IN THE

SUPREME COURT OF FLORIDA

No. 69,319

JOSEPHINE DORSE,

Plaintiff-Appellee,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.,

Defendants,

EAGLE-PICHER INDUSTRIES, INC.,

Defendant-Appellant.

On Certification from the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF APPELLANT EAGLE-PICHER INDUSTRIES, INC.

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REPLY BRIEF OF APPELLANT
EAGLE-PICHER INDUSTRIES, INC.

I. PRELIMINARY STATEMENT

Because fully one-third of appellant's brief to this Court is devoted to an inaccurate and unfounded presentation of extra-record "factual" contentions,[1] it is appropriate to reiterate that this Court has been asked here to resolve a single, clearly stated, and purely legal question of Florida law -- to wit:

> May the defendant in a strict products liability case avoid liability by alleging and showing that (1) it manufactured and supplied its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware.[2]

The factual predicate upon which this Court is asked to decide that legal question is necessarily limited to those facts alleged by Eagle-Picher in the district court, as accurately restated by the court of appeals in its formulation of the certified question.[3]

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[1] See Answer Brief of Appellee Josephine Dorse, at 1, 2-3, 3-13, 31 n.4, 37 n.7 (filed Nov. 21, 1986) (hereinafter cited as "Dorse Answer Brief").

[2] Initial Brief of Appellant Eagle-Picher Industries, Inc., at 7 (filed Sept. 29, 1986) (hereinafter cited as "Eagle-Picher Initial Brief"), quoting Dorse v. Armstrong World Industries, Inc., 798 F.2d 1372, 1377 (11th Cir. 1986) (certifying the issue to this Court for disposition in accordance with Florida law).

[3] As explained previously, the district court summarily ordered Eagle-Picher's assertion of the government contract specification defense stricken from its answer, thereby

(Footnote Continued)

In her brief to this Court, appellee does not deny that the overwhelming majority of courts presented with the issue have expressly recognized and adopted the government contract specification defense;[4] nor does she contend seriously that the defense has not already been effectively recognized as a matter of Florida law.[5] She argues, rather -- on the basis of "facts" which are false,[6] unsupported,[7] and/or simply

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denying Eagle-Picher any opportunity to present evidence which would prove its entitlement to the protection of that defense. See Eagle-Picher Initial Brief, at 5-6 & nn.3-5. See also Dorse v. Armstrong World Industries, Inc., supra, 798 F.2d at 1373-74, 1377.

It is, of course, by now axiomatic that, in its consideration of a motion to strike a defense as a matter of law pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a court must accept as true all allegations in the answer and draw all reasonable inferences in favor of the party opposing the motion. See C. Wright & A. Miller, Federal Practice and Procedure § 1381, at 800-02 (1969); 2A Moore's Federal Practice ¶ 12.21[3], at 12-184 (1986). See also In re All Maine Asbestos Litigation, 575 F. Supp. 1375, 1377 (D. Me. 1983) (Gignoux, J.) (denying motion to strike government contract specification defense in circumstances precisely identical to those presented here); In re All Massachusetts Asbestos Cases, M.B.L. No. 1 (D. Mass. July 11, 1984) (DeGiacomo, U.S.M.), recommendation accepted, motion to strike denied, (July 31, 1984) (Zobel, J.) (copy attached as Exhibit hereto).

[4]See Dorse Answer Brief, at 18-25 (defense recognized as a matter of federal common law); id at 25-32 (defense recognized as a matter of state law).

[5]Dorse Answer Brief, at 13 ("Florida law already supplies the necessary doctrinal basis for exonerating a defendant in those few cases truly warranting the defense's application."); see id. at 14-18.

[6]Throughout her brief, for example, appellee contends that Eagle-Picher's (or other manufacturers') asbestos-containing products were produced prior to and/or without regard to pre-existing mandatory government contract
(Footnote Continued)

inapplicable to Eagle Picher[8] -- that Eagle-Picher should not be afforded the protection of the defense in the

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specifications. See, e.g., Dorse Answer Brief, at 1, 2, 4, 5, 9-10, 16, 33, 35. The fact of the matter is that Eagle-Picher had no input whatsoever into the development of the federal government's earliest military specifications for high-temperature thermal insulation cements. To the contrary, Eagle-Picher's original Eagle-66 thermal insulation cement was specifically developed and tailored to satisfy the mandatory content requirements of pre-existing Navy contract specifications. See Supp. R. at 24, 25, 257-59. See generally Supp. R. at 22-23, 88-89, 290-93, 427-32. All successor Navy and military specifications similarly expressly mandated the use of asbestos in that product. See Supp. R. at 23, 434-67.

Appellee's quotations from the February 1, 1983 deposition testimony of Glen J. Christner for the proposition that the Navy never suggested that Eagle-Picher add more asbestos to its original insulation cement (Dorse Answer Brief, at 6-8) is particularly duplicitous. In a videotaped deposition of February 3, 1983, Mr. Christner carefully corrected his earlier statement, expressly emphasizing the fact that the Navy did indeed suggest that Eagle-Picher add more and longer asbestos fibers to its product if it hoped to have that product approved by the Navy. See Supp. R. at 290-93.

[7]As noted above (see note 3 supra), none of the contentious and self-serving "factual" allegations and characterizations which permeate appellee's brief were properly before the district court on the Rule 12(f) motion below. As the court of appeals recognized, this Court should determine the availability of the asserted defense on the basis of Eagle-Picher's allegations -- and its proffer of evidence to prove -- "that (i) it manufactured and supplied its product in accordance with mandatory specifications set forth in government contracts, and (ii) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware." 798 F.2d at 1377 (emphasis added).

[8]Significant portions of appellee's "factual" contentions are comprised of citations to documents and testimony -- not properly in any "record" in this case -- which were prepared by or which relate to other manufacturers, and which have absolutely nothing whatsoever to do with Eagle-Picher. See Dorse Answer Brief, at 5-6, 9, 10-11.
(Footnote Continued)

circumstances, as she describes them.[9]

The more important point here is this: Appellee's "factual" contentions notwithstanding, even she is constrained to acknowledge that "Florida law already supplies the doctrinal basis for exonerating a defendant in those few cases truly warranting the defense's application." Dorse Answer Brief, at 13. That, of course, is precisely Eagle-Picher's position here: The government contract specification defense "is not only consistent with, but effectively

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Equally pointless and wasteful of this Court's time are (i) appellee's citation to the minutes of meetings of the Asbestos Textile Institute (id. at 8-9), an organization of which Eagle-Picher was never a member, and (ii) her citation to the testimony of Mr. John Haas (id. at 9-10), who was not employed by the Navy's Specifications Branch until 1966 -- some 34 years after Eagle-Picher first submitted its product to the Navy for testing and some 25 years after the decedent, Mr. Dorse, was exposed to asbestos by the United States Navy. Similarly, appellee's extensive quotation from the "declaration" of Joseph H. Chilote (id. at 5-6) contains absolutely no reference to Eagle-Picher.

[9]This Court, of course, is not called upon to determine -- nor, indeed, is it in a position to determine -- whether Eagle-Picher, in the precise circumstances actually presented here, is entitled to the protection of the government contract specification defense. It is asked, rather, whether the government contract specification defense is recognizable in Florida.

Resolution of factual issues in this case -- and the application of any facts thus found -- is a task for the trial court where, Eagle-Picher submits, it should be permitted to prove the facts that it has alleged and to argue the applicability of the defense (if it exists at all) in the context of those facts.

Particularly inappropriate is appellee's attempt to introduce "evidence" in this Court. See Dorse Answer Brief, at 37 n.7 & Exhibit A thereto (extra-record documents which appellee asks the Court to consider in support of her "factual" contentions.)

already incorporated into, the law and the public policy of the State of Florida." Eagle-Picher Initial Brief, at 28.

The question posed by the Court of Appeals for the Eleventh Circuit should, Eagle-Picher submits, be answered by this Court in the affirmative: A defendant in a strict liability case should be exonerated of liability where it alleges and proves that

> (1) it manufactured and supplied its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware[.]

798 F.2d at 1377. In other words, as so many courts have already expressly held, "cases truly warranting the defense's application" (Dorse Answer Brief, at 13) are those in which the defendant can prove:

1. That the Government established and contractually enforced specifications pursuant to which the allegedly injurious product was manufactured and procured;

2. That the product complied with the Government's specifications in all material respects; and

3. That the Government possessed knowledge concerning hazards associated with the use of the product which was greater than or equal to that of the manufacturer.

See Eagle-Picher Initial Brief, at 3, 7, 11, 20-21, 27-28.

Eagle-Picher has alleged that each of those elements is present in the instant case. It asks this Court now expressly to rule that -- if Eagle-Picher can prove those allegations

to a jury's satisfaction -- it should, under the law of the State of Florida, be relieved of liability in the instant case.

II. THOSE ARGUMENTS THAT ARE ADVANCED BY APPELLEE IN SUPPORT OF HER POSITION HERE ARE ENTIRELY WITHOUT MERIT.

Apart from her distorted "factual" presentation (Dorse Answer Brief, at 1-13) and her extended efforts "factually" to distinguish the numerous cases cited by Eagle-Picher in its opening brief to this Court (id. at 14-32), appellee's brief contains very little by way of affirmative argument in support of her position here. Two such arguments can be discerned, however, and each will be addressed below.

First, appellee contends that the government contract specification defense should not, as a matter of law, be permitted in the context of a strict-liability failure-to-warn case. See Dorse Answer Brief, at 2-3, 16, 18, 26-28, 36-39. Second, she contends that the government contract specification defense should be recognized only in a "weapons-in-wartime" context -- i.e., in "[t]he paradigm case . . . where the defendant manufactures a military product, to be used only by the armed forces and for sale only to the military." Id. at 11; see id. at 18-25, 29-30. Neither of those arguments finds support in legal authority or in public policy.

A. The Inclusion of a Failure-to-Warn Allegation in a Products-Liability Complaint does Not Eo Instante Render the Government Contract Specification Defense Inapplicable as a Matter of Law.

Appellee's principal argument -- that the government contract specification defense is, as a matter of law, unavailable in any case where a plaintiff alleges that he or she was not warned of a product's potential hazards -- has already been addressed to some extent in Eagle-Picher's opening brief to this Court. See Eagle-Picher Initial Brief, at 22-28 (Application of the defense is entirely consistent with Florida strict products liability law.) Appellee's focus here upon an alleged failure to warn adds little to that discussion. The fact of the matter is that every strict products liability case is a "failure-to-warn" case -- for, if the defendant in any such a case had warned the ultimate user of the allegedly dangerous aspect of the product, he could not be held strictly liable, since the giving of an adequate warning renders the product not unreasonably dangerous for purposes of strict product liability law. See Restatement (Second) of Torts § 402A, comments j, k (1965); cf. West v. Caterpillar Tractor Co., 336 So.2d 80, 86-87, 90 (Fla. 1976); Buckner v. Allergan Pharmaceuticals, Inc., 400 So.2d 820, 823 & n.4 (Fla. 5th DCA 1981).

Not surprisingly, appellee has essentially ignored the fact that courts throughout the country have upheld the government contract specification defense in a wide range of cases -- including "failure-to-warn" cases -- irrespective

of the theories invoked by the products-liability plaintiffs. See e.g., Burgess v. Colorado Serum Co., 772 F.2d 844, 845, 847 (11th Cir. 1985) Bynum v. FMC Corp., 770 F.2d 556, 574 n.4 (5th Cir. 1985) Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 252-53 (3rd Cir. 1982);[10] In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 850 (E.D.N.Y. 1984) (Weinstein, C.J.) ("Agent Orange III").[11]

All of the jurisdictions in which the government contract specification defense has been expressly recognized are, like Florida, firmly committed to a strong public policy in favor of (i) safe products and (ii) the provision of warnings with respect to any potentially hazardous aspects of products. They also recognize, however, that manufacturers which serve the procurement needs of the Government (i) are bound to comply with the precise

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[10]The court's observation in Brown that, "as a practical matter, most products liability suits are brought on multiple theories" (696 F.2d at 353) -- invariably including "failure-to-warn" allegations -- highlights the appropriateness of the weight of authority which holds that the government contract specification defense is available "regardless of the plaintiff's theory of recovery" (id.).

[11]See also Garrison v. Rohm & Haas Co., 492 F.2d 346, 351-53 (6th Cir. 1974); Spangler v. Kranco, Inc., 481 F.2d 373, 375 (4th Cir. 1973); In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 777 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2d Cir. 1980) (Pratt, C.J.) ("Agent Orange I"); Orion Insurance Co. v. United Technologies Corp., 502 F. Supp. 173, 176 (E.D. Pa. 1980); Littlehale v. E.I. du Pont de Numours & Co., 268 F. Supp. 791, 803-04 & n.17 (S.D.N.Y. 1966), aff'd, 380 F.2d 274 (2d Cir. 1967); Davis v. Henderlong Lumber Co., 221 F. Supp. 129, 134 (N.D. Ind. 1963); McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592, 595 (Ky. 1980).

specification requirements set forth in their government contracts and (ii) are not the party best suited (or able) to protect (or to provide effective warnings to) the products' ultimate users.[12] The government contract specification defense itself represents a studied and effective judicial conciliation of these diverse factors.

The first two elements of the defense -- together requiring the non-negligent manufacture of the product in strict compliance with mandatory and contractually enforced government specifications -- limit the availability of the defense to situations in which the Government effectively controls the product's design, content and manufacture, and the manufacturer fully and faithfully conforms to the

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[12] Eagle-Picher has alleged, and is prepared to prove (i) that it had no knowledge of any health hazards associated with the use of asbestos until 1964, when it immediately began placing warning labels on its product's packages; (ii) that it had neither access to the nation's naval shipyards nor any knowledge of the negligent manner in which asbestos-containing products were used at those shipyards; and (iii) that the Government possessed (and withheld from Eagle-Picher) a significant body of information concerning hazards associated with occupational exposure to airborne asbestos dust, concerning the manner in which asbestos-containing products were misused at its shipyards, and concerning its own creation and maintenance of deplorable and unsafe working conditions at those shipyards, including the Brooklyn shipyard at which Mr. Dorse was employed. See Supp. R. at 31-52, 539-818. In such circumstances,

> tort liability principles property seek to impose liability on the wrong-doer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the Government.

"Agent Orange I," supra, 506 F. Supp. at 793-94.

Government's directives. The third element of the defense -- i.e., that the Government's knowledge of any potential hazards associated with the product must be equal to or greater than that of the manufacturer -- assures (i) that the Government is fully informed and thereby in a position intelligently to evaluate all known risks and (ii) that the manufacturer not withhold any pertinent information which might affect the Government's decision-making process. In such circumstances, the courts have held, a government-contract manufacturer should not be held liable if the Government's conscious and informed procurement decision ultimately causes injury to a third party.

The public policy underpinnings of the government contract specification defense have been discussed in Eagle-Picher's principal brief here. See Eagle-Picher's Initial Brief, at 15-22, 23-27. The defense, however, is also rooted in traditional tort principles -- principles which, even the appellee must admit, are firmly embodied in the law of the State of Florida. In "Agent Orange III," for example, Chief Judge Weinstein expressly rejected precisely the same "failure-to-warn" argument now advanced by the appellee here. His analysis -- remarkably similar, incidentally, to the teaching of this Court's decision in Edward M. Chadbourne, Inc. v. Vaughan, 491 So.2d 551 (Fla. 1986) (see note 13 infra) -- was founded in basic tort principles of causation:

> [I]f the government was aware of the hazard, no harm results from the lack of warning [by the defendant], and the element of proximate cause is, therefore, missing.

597 F. Supp. at 850 (emphasis added).[13]

The fact that appellee's complaint contains a failure-to-warn allegation should not effect this Court's decision here. If Eagle-Picher is able to prove satisfaction of all of the elements of the government contract specifications defense, it should, under Florida law, be afforded the protection of that defense in the instant case.[14]

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[13]It was on the basis of precisely the same proximate-cause analysis that this Court itself recently refused to impose liability upon the defendant in the Chadbourne case:

> It would be contrary to public policy as well as good common sense to hold a person, whether characterized as a manufacturer or a contractor, strictly liable when the defect is patent or known to the owner.

491 So.2d at 544.

[14]Appellee has cited four asbestos cases -- Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984) (applying Texas law); Cox v. Celotex Corp., No. W-82-CA-258 (W.D. Tex. June 4, 1984) (same); Chapin v. Johns-Manville Sales Corp., No. 579-0272(N) (S.D. Miss. Jan. 27, 1982) (Mississippi law); and Nobriga v. Johns-Manville Corp., 683 P.2d 389 (Hawaii 1984) -- in which courts have ruled that the government contract specification defense is unavailable to defeat a "failure-to-warn" claim. See Dorse Answer Brief, at 24, 32, 34-35. As explained above and in Eagle-Picher's principal brief herein, those anomalous rulings (i) are inconsistent with Florida tort law, (ii) involved the law of states in which the basic principles underlying the defense had never been recognized, (iii) are contrary to the great weight of authority on the issue, and (iv) failed entirely to consider the numerous public policy reasons which support the defense's applicability.

Appellee's reliance upon other asbestos cases is simply unwarranted. In Hammond v. North American Asbestos Corp., 105 Ill.App. 2d 1003, 435 N.E.2d 540 (Ill. App. Ct. 1982), aff'd, 97 Ill.2d 195, 454 N.E.2d 210 (1983), for example, the court upheld a jury verdict in favor of the plaintiff,

(Footnote Continued)

B. The Availability of the Government Contract Specification Defense Is Not Limited to Exclusively Military, "Weapons-in-Wartime" Situations.

In an effort to distinguish a handful of the cases cited by Eagle-Picher in its opening brief, appellee is reduced to arguing that the government contract specification defense is available only in situations involving "a sophisticated military product, such as a supersonic reconnaissance aircraft ejection system," or "a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver." Dorse Answer Brief, at 2, 19, 22, 23 (seeking to distinguish McKay v. Rockwell International Corp., 704 F.2d 444 (9th Cir. 1983), and Tozer v. LTV Corp., 792 F.2d 403

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and ruled that the defendant which sought to invoke the defense had relevant knowledge, apparently unknown to the Government, which it failed to disclose to the Government. In other words, the defendant failed at trial to satisfy one of the elements of the defense. In Ward v. Johns-Manville Corp., Civ. No. H-74-54 (D. Conn. June 20, 1979), the government contract specification defense was not even an issue. The issue in Ward, rather, was whether the Government's negligent handling of the asbestos-containing products was a "supervening cause" of plaintiffs' injuries within the meaning of Connecticut law.

The most useful of the asbestos decisions relating to the government contract specification defense is In re All Maine Asbestos Litigation, supra note 3, in which Judge Gignoux emphasized the inappropriateness of striking the defense (even in a state where the defense had never previously been recognized) in the absence of a full evidentiary record. His enumeration of the many factual issues inextricably involved in the assertion of the defense -- all of which are present here -- is worthy of this Court's particular attention. See 575 F. Supp. at 1378-80. See also In re: Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982); In re All Massachusetts Asbestos Cases, supra note 3.

(4th Cir. 1986)); see id. at 1, 2-3, 18-25, 29-30.[15] The argument is not a new one. Nor has it been a particularly successful one, for, as the Court of Appeals for the Eleventh Circuit recently observed:

> Both the history of the defense and its general rationale lead . . . to the conclusion that it would be illogical to limit the availability of the defense solely to "military" contractors.

Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) (involving the manufacture of a brucellosis vaccine). Accord, Tillett v. J. I. Case Co., 756 F.2d 591 (7th Cir. 1985) (front-end loader); Brown v. Caterpillar Tractor Co., supra, 696 F.2d at 254-55 (bulldozer); Meyers v. United States, 323 F.2d 580 (9th Cir. 1963) (road construction); "Agent Orange III," supra, 597 F. Supp. at 740 (commercially available chemical herbicides);[16] "Agent Orange I," supra,

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[15]At times, appellee's assertion of this argument approaches the comical, as when, presumably with a straight face, she characterizes the dough-making machine which injured the little boy in his father's pizza parlor in the Bronx (Casabianca v. Casabianca, 404 Misc. 348, 428 N.Y.S.2d 400 (Sup. Ct. Bronx Cty. 1980)) as a "uniquely military" product. See Dorse Answer Brief, at 30.

[16]The Agent Orange specification called for a simple 50/50 mixture of two herbicides -- "2,4,5-T" and "2,4-D" -- which had been commercially available and used in the United States for two decades prior to their procurement by the military. The allegedly injurious contaminant -- dioxin, or "TCDD" -- is an apparently unavoidable by-product of the manufacture of "2,4,5-T". See "Agent Orange III", supra, 597 F. Supp. at 847-48; "Agent Orange I," supra, 506 F. Supp. at 795. Unlike the instant case -- in which the Government expressly and intentionally mandated the use of asbestos in Eagle-Picher's product and Eagle-Picher modified its product accordingly for military use at the Navy's request -- the Government in "Agent Orange" neither asked

(Footnote Continued)

506 F. Supp. at 762; Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973) (operation of industrial plant pursuant to government contract and lease); Hunt v. Blasius, 55 Ill.App. 2d 14, 370 N.E.2d 617 (1977), aff'd, 74 Ill.2d 203, 284 N.E.2d 368 (1978) (highway sign posts). The fact of the matter is that the government specification defense has been widely recognized and adopted in civilian as well as military contexts.

Finally, in addition to being legally unfounded, appellee's "military product" argument ignores the fact that Eagle-Picher's asbestos-containing products were procured by the military and for military purposes. Throughout most (if not all) of the time that Mr. Dorse was exposed by the United States Navy to asbestos, asbestos was specifically and officially deemed by the United States military to be a critical strategic material -- so critical, in fact, that the federal government assumed complete control over its importation and distribution during World War II, and stockpiled huge quantities of asbestos both during and after that war. All of the public policy considerations underlying the government contract specification defense -- including those

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for nor, arguably, even knew about the presence or danger of dioxin. Nonetheless, both Chief Judge Pratt and Chief Judge Weinstein rejected arguments similar to those of the appellee here, and ruled that the Government contract specification defense was available despite the fact that the defendants themselves had developed and successfully marketed "2,4,5-T" and "2,4-D" for commercial sale.

peculiar to the military and national defense contexts[17] -- are therefore present in the instant case.

III. CONCLUSION

For all of the foregoing reasons, and for those additional reasons previously stated in its opening brief, Eagle-Picher respectfully submits that this Court should answer the question certified by the Court of Appeals for the Eleventh Circuit in the affirmative.

Respectfully submitted,

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[17] The Navy's informed decision to insist upon the inclusion of asbestos in all insulation materials used aboard its combat vessels -- a decision by which it consciously exposed thousands of civilian and military personnel to known risks in order to achieve increased vessel maneuverability, lighter vessel weight, and greater protection against shipboard fire -- is precisely the sort of military decision which should not be second-guessed in the context of litigation against non-negligent government contractors. The constitutional separation of powers is therefore an additional (albeit not a legally necessary) factor militating in favor of the defense's applicability here. See Eagle-Picher Initial Brief, at 17-18.