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No. 70309-9-I

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

RALMA EHLERT, Individually and as Personal Representative of the
Estate of ROBERT S. EHLERT; and TAMARA JONES, as Personal
Representative of the Estate of JAMES A. JONES,

Appellants,

v.

BRAND INSULATIONS, INC., et al.,

Respondents.

REPLY/CROSS-RESPONSE BRIEF OF APPELLANTS
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A. INTRODUCTION

There is nothing wrong with profiting from the distribution of inherently dangerous products, provided those who reap the benefits of such commerce are held liable for the injury it inflicts.

Brand Insulations, Inc. (“Brand”) argues that this Court, as a matter of first impression, should adopt a blanket exemption from strict liability for those whose business model involves both selling dangerous products and also installing them. Brand claims that its business is primarily a service, and that despite evidence it sold asbestos-containing materials that injured Robert Ehlert and James Jones, it should be exempted from strict liability.

Washington courts and our Legislature have a long tradition of supporting and advancing policies that protect consumers, workers, and other injured parties from the unavoidable negative consequences of the quest for profit. Rather than creating a blanket exemption for businesses such as Brand, this Court should adopt a rule that holds liable those whose business model depends on participation of the chain of distribution of dangerous products, even if they also provide services.

B. REPLY ON STATEMENT OF THE CASE

Ehlert and Jones’ statement of the case is recited in their opening brief, and need not be repeated here. With respect to this Court’s review

of Ehlert and Jones' summary judgment motion and Brand's CR 50 motion for judgment as a matter of law, Brand's statement of the case is largely irrelevant. However, a few of Brand's factual contentions must be addressed specifically.

Whether Brand installed the asbestos insulation it purchased, or resold that insulation to others to install, Brand was in the business of buying, reselling, and then installing insulation. Brand did not give its customers insulation for free. It billed the customer for both the resale of the insulation and the labor to install it. Ex. 38. The very nature of its contract with Parsons required Brand to buy the insulation and other materials and resell it to the customer as part of its contract to supply and install insulation. *Id.* This was Brand's business model, and central to its operations. RP 642, 649.

Brand states that there was "no evidence" upon which Dr. Hammar could have based his expert opinion regarding causation, because Ehlert and Jones did not hire an industrial hygienist to conduct a retrospective dose reconstruction analysis to determine precisely how many fibers of Brand's asbestos Ehlert and Jones were exposed to 40 years ago. Br. of Resp'ts at 7-8.

In a footnote, Brand concedes that Dr. Hammar based his causation opinion on other evidence approved of by the Supreme Court. Br. of

Resp'ts at 7 n.2. Also, Dr. Longo, Ehlert and Jones' expert on exposure was an expert in materials science, specifically asbestos testing and analysis. RP 123-24, 130. Dr. Longo stated that, based on the testimony of workers that they could actually see visible material release from Brand's products in the air, the exposure would "far and exceed five million particles per cubic foot." RP 150. After specialized laboratory testing, Longo was able to opine that workers like Ehlert and Jones, working in proximity to insulators at Cherry Point, would have suffered "significant exposure" of between 3.5 to 4 fibers per cc. RP 176, 191, 196.

Regardless of Brand's opinion of the evidence underlying Dr. Hammar's expert opinion, Hammar testified at trial that, to a reasonable degree of medical certainty, Ehlert and Jones were exposed to enough asbestos at Cherry Point to cause their illnesses:

Q: Dr. Hammar, based upon your review of Mr. Ehlert's sworn statement, your review of Rodney Steinmetzer's deposition, your review of Mr. Ehlert's social security records, your review of Leslie Pugh's deposition, your review of Nils Johnson's deposition, and your knowledge, experience and expertise as a mesothelioma diagnostician over the last 30 years, do you have an opinion to a reasonable degree of medical certainty whether the exposure that Robert Ehlert sustained to asbestos at ARCO Ferndale standing alone would have been

sufficient to cause his mesothelioma if he had never been exposed at any other place at any other time in his life?

MR. SHAW: Object, lacks foundation, incomplete hypothetical.

THE COURT: Overruled.

THE WITNESS: Yes.

Q: What is that opinion, Doctor?

A: That he would have.

MR. SHAW: I object to that question as well, Your Honor, on the same grounds.

THE COURT: Understood. Overruled.

RP 360-61.

Q: Dr. Hammar, based upon your review of Mr. Jones' social security records, your review of his medical records, your review of the deposition of Rodney Steinmetzer, of Leslie Pugh, and based upon your knowledge and experience and expertise that you have described regarding mesothelioma in refinery workers, do you have an opinion to a reasonable degree of medical certainty whether, if the only exposure that James Jones ever sustained to asbestos in the course of his life was during the period that he worked at the ARCO Refinery between 1971 and 1972, would that exposure standing alone be sufficient to cause his mesothelioma?

MR. SHAW: Objection, Your Honor, lacks foundation, incomplete hypothetical.

THE COURT: Overruled.

THE WITNESS: Yes.

Q: What is that opinion, sir?

A: That it would have been.

Q: Is the opinion that you have expressed today to a reasonable degree of scientific certainty?

A: Yes.

RP 391.

Brand misleadingly characterizes both a 1985 study and the expert testimony at trial relating to that testimony. Br. of Resp'ts at 8. Brand suggests that the study, and the medical experts at trial, agreed that “exposures to asbestos that occur more than 20 years after an individual is first exposed to asbestos do not contribute to the risk of developing mesothelioma.” *Id.*

Brand’s contention is simply wrong. The study in question merely concludes that, if a person is *continuously exposed to asbestos* for 20 years, stopping or continuing the constant exposure beyond 20 years does not significantly alter the risk for developing mesothelioma:

The predicted risk increases in approximate proportion to *duration* for exposures of up to about 10 years, but more slowly thereafter and there is very little difference between

the predicated effects of *stopping or continuing* exposure after 20 years.

Br. of Resp'ts, Appendix A at 2. Dr. Hammar, Ehlert and Jones' causation expert, did not testify to the contrary. He simply agreed that risk of developing mesothelioma increases over time. RP 440-41.

Brand adduced no evidence at trial that Ehlert or Jones experienced "constant" exposure to asbestos for 20 years before being exposed to it at Cherry Point. Brand's statement they were first exposed in the 1940's is inconsequential.

C. SUMMARY OF ARGUMENT

This Court should reject a blanket exemption from strict liability under Washington law applying the *Restatement (Second) of Torts* § 402. Those whose business model involves participation in the chain of distribution of inherently dangerous products are liable, even if they also provide the service of installing that product. Only those whose sole business involves a service, and not a service combined with the sale, distribution, or supply of the dangerous product, should be exempted.

Washington has established a specific and detailed jury instruction that outlines the specific knowledge and duties expected of those who participate in profiting from inherently dangerous products. That instruction was rejected, and replaced with a general negligence

instruction. The problem with the general negligence instruction is that it does not take into account the particularized standards of conduct Washington law imposes on those in the chain of distribution. Brand was not simply under a duty to do what a “reasonably prudent person” would do. The jury should have been instructed about other “pertinent” factors in determining duty, such as the duty to discover the potential harms stemming from the products Brand profited from.

Despite a record replete ample expert testimony regarding causation and exposure, Brand argues that the trial court should have ruled the evidence insufficient as a matter of law. When explored, Brand’s arguments really disagreements with the evidence, rather than any lack of evidence. Brand should not obtain CR 50 judgment as a matter of law because Brand thinks its evidence is better, or Ehlert and Jones’ evidence is inferior. That is not the standard. Ehlert and Jones adduced sufficient evidence to convince a fair minded person of the merits of their claims.

D. ARGUMENT

- (1) This Court Should Adopt a Rule that Those Whose Business Involves Both the Sale and Installation of Inherently Dangerous Products Are Not Entitled to Blanket Exemption from Strict Liability

In their opening brief, Ehlert and Jones argued that Brand was in the chain of distribution of asbestos insulation, an inherently dangerous

product. Br. of Appellants at 8. Under the common law as expressed in § 402, Brand was a seller, supplier, or distributor of the product, and thus strictly liable for the harms caused by the asbestos fibers that injured Ehlert and Jones. Br. of Appellants at 9-14.

Brand argues that this Court should apply the Washington Products Liability Act, RCW 7.72 et seq. (“WPLA”) to this case. Br. of Resp’ts at 19. Brand cites to two cases interpreting WPLA. *Id.* Although Brand admits that WPLA “does not govern” this case, it contends this Court should apply it because it “mimics” the language of § 402. *Id.* Brand would like to take advantage of WPLA’s specific exclusion of “provider[s] of professional services” from the definition of those in the chain of distribution. *Id.* Unfortunately for Brand, that exemption appears nowhere in the language of § 402.

Since its enactment, WPLA has been the exclusive remedy for product liability claims in Washington. *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853, 774 P.2d 1199 (1989). WPLA supplants previously existing common law remedies, including common law actions for negligence. *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). The purpose of the statute is to provide a single cause of action for product-

related harm with specified statutory requirements for proof. *Id.* at 854; *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 71, 866 P.2d 15 (1993).

Our Supreme Court has acknowledged that it is “readily apparent” that WPLA is more favorable to product liability defendants than to injured plaintiffs. *Graybar*, 112 Wn.2d at 855-52. “[U]nder the WPLA, several significant obstacles to recovery may arise.” *Id.*

Thus, to borrow the language of the Supreme Court in *Graybar*, it is “readily apparent” why Brand would like this Court to import the WPLA exclusion of professional service providers into its analysis of § 402. It allows them to take advantage of a defendant-friendly law that was not in effect at the time they participated in the distribution of a dangerous product.

However, it is improper to apply WPLA to a pre-WPLA claim, particularly when that statute was specifically written to preempt and supplant the common law. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 348, 197 P.3d 127, 131 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383 n.4, 198 P.3d 493, 497 (2008) (explaining that the common law, not WPLA, applies to claims arising before July 26, 1981).

§ 402, unlike WPLA uses general language regarding “sellers” and does not have any exclusion for “providers of professional services.” *Restatement (Second) of Torts* § 402(1). Our Supreme Court has

expanded the § 402 language of “sellers” to include the entire chain of distribution, including manufacturers, distributors, and sellers. *Reichelt v. Johns-Manville Corp.*, 42 Wn. App. 620, 625, 712 P.2d 881 (1986), *reversed on other grounds*, 107 Wn.2d 761, 733 P.2d 530 (1987); *Kisor v. Johns Manville Corp.*, 783 F.2d 1337 (9th Cir. 1986).

Brand argues that in interpreting § 402 here, this Court should look to three foreign cases interpreting § 402 in the context of construction contractors. Br. of Resp'ts at 22, citing *Monte Vista Dev. Corp. v. Superior Court*, 226 Cal. App. 3d 1681, 277 Cal. Rptr. 608 (Ct. App. 1991), *Barham v. Turner Const. Co. of Texas*, 803 S.W.2d 731 (Tex. App. 1990), and *Hunt v. Guarantee Elec. Co. of St. Louis*, 667 S.W.2d 9 (Mo. Ct. App. 1984). Brand suggests that this Court should adopt the reasoning of these cases and conclude that if the sale of insulation part of Brand’s “service” of installing that insulation, then it is not in the chain of distribution and cannot be held strictly liable as a matter of law. *Id.*

Hunt is inapposite and should be disregarded. In *Hunt*, an electrical contractor installed a timer in an electrical control panel, which later malfunctioned. *Hunt*, 667 S.W.2d at 10. However, there was absolutely no evidence that the contractor designed, selected or sold the timer or the electrical control panel as part of its service. *Id.* at 11-12. The only evidence regarding the contractor’s involvement was that it

prepared the wiring diagrams that would enable the timer's installation. *Id.* Thus, there was no evidence that the electrician participated at all in the chain of commerce of the product deemed defective. *Id.*

The rationale of the other two foreign cases Brand cites is that subcontractors who are hired to perform a service are not "in the business" of selling the various products that they install. *Barham*, 803 S.W.2d at 738; *Monte Vista*, 226 Cal. App. 3d at 1686. Thus, these courts reasoned, there should be a blanket exception for subcontractors who install defective products, even if they supplied the defective product to the end user.

However, there was considerable disagreement among the various California courts, acknowledged in *Monte Vista*, regarding whether there should be a blanket exclusion for all subcontractors, or whether the court should look at the specific product alleged to be defective and whether the subcontractor could reasonably be considered a "supplier" under § 402. *See, e.g., Casey v. Overhead Door Corp.*, 74 Cal. App. 4th 112, 120, 87 Cal. Rptr. 2d 603, 608 (1999).

The California Supreme Court clarified the issue and held that the strict liability exemption for subcontractors only applies when the subcontractor provides *services only*. *Jimenez v. Superior Court*, 29 Cal. 4th 473, 453, 58 P.3d 450 (2002). Thus, when a subcontractor both sells

or supplies the defective product *and* installs it, strict liability may still apply. *Id.*

Other courts, including California courts, have concluded that when a defendant installs a defective product in a sales-service context, strict liability applies. In *Barth v. B. F. Goodrich Tire Co.*, 265 Cal. App.2d 228, 71 Cal. Rptr. 306, 320 (1968), an installer of defective tires argued that it could not be held strictly liable to injured persons because the tires were sold to the customer by another retailer. *Barth*, 265 Cal. App.2d at 251. The Court reasoned that the installer fell into the category of “distributor and supplier,” and was therefore strictly liable despite having made no profit on the transaction. *Id.*

In the early case of *Newmark v. Gimbel's Incorporated*, 54 N.J. 585, 258 A.2d 697 (1969), the New Jersey Supreme Court held a beauty shop strictly liable under an implied warranty of fitness when defective permanent wave lotion was applied to a patron's hair. *Newmark*, 54 N.J. at 599-600. Applying § 402A, the court reasoned that if the lotion had been sold over the counter there would have been strict liability. *Id.* It concluded that was no logical reason to hold otherwise merely because the defective lotion was applied in a service context, especially when the cost of the service included the price of the lotion. *Id.*

Courts, including this Court, examining these sales-service hybrid cases have concluded that applying strict liability is appropriate when the product supplied, as opposed to the service rendered, is defective. These courts adopted the same reasoning as the early *Newmark* case in the context of implied warranty of merchantability¹ and in ordinary tort cases. *Carpenter v. Best's Apparel, Inc.*, 4 Wn. App. 439, 443, 481 P.2d 924 (1971) (merchantability case, salon sold and applied defective hair product); *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918) (merchantability case, restaurant supplied tainted food); *State Stove Manufacturing Company v. Hodges*, 189 So.2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912, 87 S. Ct. 860, 17 L.Ed.2d 784 (1967) (ordinary tort case, contractor supplied defective hot water heater).

This Court should adopt the reasoning of these courts that have rejected a blanket exclusion from strict liability for those in the chain of commerce who install products as part of their business model. Nothing in the language of § 402 or the Washington cases interpreting it require that the seller be engaged *exclusively* in the business of selling the dangerous product at issue in order to be held liable. A blanket exclusion would exempt many entities that clearly qualify as being in the chain of

¹ Although *Newmark* and similar cases analyze the definition of “seller” under statutes imposing the doctrines of implied warranty of merchantability and fitness for use, the analysis is similar to that under § 402. The *Newmark* court drew this precise connection in its analysis.

distribution. For example, many sellers of carpets also offer installation services, that fact should not entitled them to a blanket exemption from products liability if their carpets are dangerously flammable. *See d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 889 (9th Cir. 1977).² Sellers of blinds or flooring, who also often install the products they sell as part of their business, should not be given blanket exemption. Restaurants that both sell food and also prepare and serve it should not be exempted.

A sound rule to adopt would be this: if the subcontractor both sold and installed a defective product as part of its business, as opposed to simply providing the service of installing a product sold or distributed to the end user by someone else, then they are not exempted from strict liability for providing dangerous products to the consumer. If the end user purchased the product from a third party, and then supplied that product to the subcontractor for installation, then § 402 liability should not apply. But sellers of products who clearly participate in – and profit from – movement of a defective product through the stream of commerce to the end user are not exempt from strict liability under § 402.

² This case does not specifically address the strict liability of a carpet seller and installer, but it cited to draw the court's attention to the potential consequences of adopting Brand's interpretation of § 402.

There is competent evidence here that shows Brand *Insulations, Inc.*³ was in the business of selling insulation. Nothing in § 402 exempts Brand from strict liability simply because Brand also installed the insulation it sold. The question of Brand's strict liability under § 402 should go to the factfinder.

In response to Ehlert and Jones' assertion that Brand was in the business of selling, as well as installing, insulation, Brand argues that Ehlert and Jones failed to produced "any evidence" that Brand was in the business of selling insulation. Br. of Resp'ts at 17-18. Brand admits that Ehlert and Jones provided invoices showing that Brand sold asbestos-containing insulation to another contractor for installation, but claims that they do not qualify as evidence because they reflect "one-off occurrences." *Id.* Brand then points to the weight of its own evidence on summary judgment and concludes that its evidence was superior. *Id.*

There are two flaws in Brand's analysis of the parties' offers of proof on summary judgment: (1) it ignores that not only evidence, but "reasonable inferences therefrom" are considered, and (2) it ignores that the trial court may not weigh evidence at summary judgment. Applying Brand's logic, it was entitled to summary judgment unless Ehlert and Jones produced every invoice Brand issued for insulation, and those

³ As opposed to "Brand *Insulators, Inc.*"

invoices outweighed Brand's evidence that it also installed insulation as part of its business model. This is not how summary judgment works.

Brand's version of summary judgment would turn the procedure into a *de facto* bench trial, which is prohibited. "Credibility determinations, the weighing of the evidence, *and the drawing of legitimate inferences from the facts* are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (emphasis added). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.*; *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989). Trial courts must act with caution in granting summary judgment. *Id.*; *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

Plaintiffs sustain their burden of production on summary judgment if they adduce evidence from which a jury could reasonably conclude that they are entitled to recovery. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7, 10 (1974). Unless a jury could reach "but one conclusion," summary judgment should be denied. *Id.*

Ehlert and Jones produced sufficient evidence from which as jury could reasonably conclude that Brand was in the business of selling *and* installing asbestos insulation. Whether the fact that Brand also installed

the insulation made the sales “incidental” is a question of the weight of the evidence, not its sufficiency. Summary judgment is not a contest whereby the trial court weighs the evidence and concludes which is mightier or more persuasive. Brand cannot and does not deny that Ehlert and Jones adduced competent evidence, it simply argues that its evidence is better. That is for a jury to decide.

The trial court erred in granting Brand summary judgment on Ehlert and Jones’ common law strict liability claims. Brand was both a seller and installer of asbestos-containing insulation, and participated in the stream of commerce that brought the dangerous insulation to the end consumer. This Court should reverse the order of summary judgment.

(2) The Trial Court Unequivocally and Erroneously Rested Its Strict Liability Dismissal on the Grounds that the Asbestos Insulation Was Not an Inherently Dangerous Product

Ehlert and Jones maintain that the trial court erred in concluding that asbestos insulation was not an inherently dangerous product. Br. of Appellants at 14. They argue that the trial court entered summary judgment on two alternate grounds: that Brand was not a manufacturer or seller, and that the asbestos was not inherently dangerous. *Id.*

Brand maintains that this argument is merely a “red herring” and this Court should ignore it. Br. of Resp’ts at 25-26. Brand claims that the trial court’s incorrect legal analysis of “inherently dangerous” was merely

a disagreement over the wording of jury instructions, and immaterial to its summary judgment ruling on Ehlert and Jones' strict liability claim. *Id.* By arguing that the ruling was immaterial to the trial court's analysis but not disputing that analysis on the merits, Brand apparently concedes that the trial court erred.

Brand's suggestion that the trial court's erroneous ruling regarding the dangerous nature of asbestos was not grounds for its summary judgment ruling is disingenuous. Although the trial court mentioned jury instructions in the portion of the transcript Brand quotes, the notion that the discussion was limited to the wording of jury instructions, and not to the summary judgment ruling, is *flatly contradicted* by the trial court's oral ruling, which Brand does not quote:

From my understanding of the law of product liability, pre-tort reform liability, or tort reform for that matter, this court believes that there is insufficient evidence in the record to establish that Brand was either a seller *or that the product was unreasonably hazardous at the time it left its control*, and the defendant's motion to dismiss the cause of action for product liability has to be granted.

RP 908 (emphasis added). Thus, the trial court's dismissal of the strict liability claim had two grounds: Brand was not a seller, nor was the insulation unreasonably hazardous.

The trial court erred. Asbestos insulation is a hazardous product, as Washington courts have ruled definitively. *Macias v. Saberhagen*

Holdings, Inc., 175 Wn.2d 402, 418, 282 P.3d 1069, 1078 (2012).

Summary judgment should be reversed.

- (3) The Jury Instructions Omitted a Specific Duty Test that Focuses on Those In the Chain of Distribution, and Replaced It With a General Instruction Inviting Jurors to Contemplate What a Reasonable Person Would Do

In their opening brief, Ehlert and Jones argued that the trial court offered an improper jury instruction that eliminated their claim for negligent failure to warn. Br. of Appellants at 19-20. The trial court erroneously concluded that its ruling on strict liability for failure to warn also eliminated any claim for negligent failure to warn, and instead offered only a general negligence instruction. *Id.*

Brand first responds by claiming that Ehlert and Jones did not object to the erroneous instruction, and thus did not preserve the argument for appeal. Br. of Resp'ts at 27-29. Brand claims that because Ehlert and Jones obeyed the trial court's ruling rejecting their instruction, and agreed that a negligence instruction was the only reasonable option left, they "rescinded" their exception. *Id.*

Brand's argument is, again, disingenuous and misrepresents the record. Ehlert and Jones offered the negligent failure-to-warn instruction,

which was Instruction No. 12. RP 913; CP 388.⁴ When Brand objected to that instruction and instead asked to substitute a general negligence instruction, counsel for Ehlert and Jones clearly stated the basis for rejecting the more specific instruction and substituting the general one:

Well, Your Honor, the jury instruction as written coincides almost exactly with the one that the Washington State Supreme Court approved for asbestos cases in *Lockwood*,⁵ including that particular line that you just mentioned. So we think it is a correct statement of the law and it behooves us to follow the jury instructions that have been approved by the Washington State Supreme Court for asbestos cases.

RP 914. As the colloquy continued and Brand reiterated its desire for only a general negligent installation instruction, Ehlert and Jones' counsel again stated the specific objection: "I have a problem with limiting our claims to the negligent installation. There's a duty to warn that's also under the negligence." RP 918. When Brand again disagreed, Ehlert and Jones acknowledged that if the trial court refused to offer their proposed instruction, then a general negligence instruction was the only reasonable remaining option. RP 919. Thus, far from "retracting" their objection, Ehlert and Jones simply acknowledged that the trial court was overruling it, and moved on.

⁴ The report of proceedings refers to plaintiffs' instruction no. "2," however, it is clear from the context that instruction 2 was not at issue. Instruction 2 was a general statement describing the parties, and acknowledging that each lawsuit was separate.

⁵ *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605, 615 (1987).

This precise issue was decided by our Supreme Court in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275, 1282 (2013). In *Washburn*, both parties engaged in “extensive discussions” over an instruction regarding duty. *Washburn*, 178 Wn.2d at 744. After it became clear to one party that its objection to the proposed instructions would not be sustained, that party “admitted that under the trial court’s understanding, the trial court’s proposed wording was appropriate, but again objected that the instruction should not be given at all.” *Id.* On appeal, the Supreme Court concluded that as long as the trial court was aware of the “substance” of the objection, the issue was preserved. *Id.* at 746.

There is no question that Ehlert and Jones offered a negligent failure-to-warn instruction, explained the grounds for why it thought that instruction was appropriate, and why the general negligence instruction was inappropriate. The trial court was well aware, after extensive discussions with counsel, of the nature of Ehlert and Jones’ objection. Under *Washburn*, the objection is preserved.

Brand next argues that offering a general negligence instruction was adequate, correctly stated the law, and that it in no way prejudiced the resolution of Ehlert and Jones’ claims. Br. of Resp’ts at 29-31.

As Ehlert and Jones’ trial counsel pointed out in their objections below, Washington courts have set out the legal test for negligent failure-to-warn. *Lockwood*, 109 Wn.2d at 251; *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 34, 935 P.2d 684, 690 (1997). Even in the context of negligent failure-to-warn, when a dangerous product is involved the manufacturer, seller, distributor, or supplier has a higher duty to consumers than would an ordinary member of the general public.⁶ The focus of the inquiry into alleged negligence is on the reasonableness of the manufacturer, seller, supplier, or distributor’s conduct. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 72, 684 P.2d 692 (1984). Those in the chain of distribution can be found negligent for failing to give an adequate warning of the hazards involved in using its product which are known, or in the exercise of reasonable care should have been known. *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 827, 435 P.2d 626 (1967); *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn. App. 407, 412, 591 P.2d 791 (1979). “Hence, the manufacturer’s knowledge of the product, its dangerousness, and the hazards involved in reasonably foreseeable uses of the product, are pertinent in determining the reasonableness of the

⁶ Although the categorization is not legally binding, it is interesting to note that the authors of the Washington Pattern Jury Instructions (“WPI”) have separated the instructions for product liability – including the negligence instructions – from the general negligence instructions in Part II. Part IX of the WPI indicates that product liability negligence duties are “Particularized Standards of Conduct.”

manufacturer's conduct in failing to warn users." *Lockwood*, 109 Wn.2d at 235.⁷

This heightened duty and assumption of knowledge is set forth in the specific WPI regarding the duty to warn:

A manufacturer has a duty to supply products that are reasonably safe.

A product may be not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured.

A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured if:

- 1 A manufacturer learned, or if a reasonably prudent manufacturer should have learned, about a danger connected with the product after it was manufactured;
- 2 Without adequate warnings or instructions, the product was unsafe to an extent beyond that which would be contemplated by an ordinary user; and
- 3 The manufacturer failed to issue warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances.

The duty to issue warnings or instructions is satisfied if the manufacturer exercises reasonable care to inform product users.

In determining whether a product was unsafe to an extent beyond that which would be contemplated by an ordinary user, you should consider the following:

- a the relative cost of the product;
- b the seriousness of the potential harm from the claimed defect;
- c the cost and feasibility of eliminating or minimizing the risk; and
- d such [other] factors as the nature of the product and the claimed defect indicate are appropriate.

⁷ Although both *Lockwood* and the WPI refer to "manufacturers," that same duty has been extended to all those in the chain of distribution.

If you find the product was not reasonably safe because the manufacturer did not provide adequate warnings or instructions after the product was manufactured and this was a proximate cause of the plaintiff's [injury] [and] [or] [damage], then the manufacturer is [subject to liability] [at fault].

WPI 11.03.01. According to the WPI and *Lockwood*, these instructions, not general negligence instructions, are a correct statement of the law in asbestos cases.

The problem with the general negligence instruction is that it does not take into account the particularized standards of conduct Washington law imposes on those in the chain of distribution. It invites the jury to ask, “What would I [a reasonably prudent person] do?” The correct question is, “What would those *who are under a duty to provide safe products to the public* do, and what should they be charged with knowing?”

Brand was not simply under a duty to do what a “reasonably prudent person” would do. The jury should have been instructed about other “pertinent” factors in determining duty, such as the duty to discover the potential harms stemming from the products Brand profited from.

Here, the more specific *Lockwood* instruction for negligent failure to warn as applied to a seller, supplier, or distributor of asbestos-containing products, was warranted by the facts and should have been given to the jury. The general negligence instruction did not adequately

apprise the jury of the specific superior knowledge that informs the duty to warn held by those in the chain of distribution. The instruction was prejudicial, and the *Lockwood* instruction should have been offered. Reversal and remand for a new trial is warranted

(4) The Trial Court Did Not Err In Allowing the Jury to Consider Ehlert and Jones' Claims, the Record Reflects Sufficient Evidence of Causation

Brand argues that the trial court should have granted its summary judgment motion and dismissed Ehlert and Jones's claims before trial. Br. of Resp'ts at 32-39. Brand contends that insufficient evidence of causation existed before trial. *Id.* Brand also argues that the trial court erred in denying its CR 50 motion for judgment as a matter of law, claiming that no substantial evidence of causation was adduced at trial. *Id.*

As a threshold matter, Brand's challenge to the trial court's denial of summary judgment is procedurally barred. *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471, 472 (1988). This Court has held that "denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact." *Id.* This Court recently reaffirmed this rule in *Hanks v. Grace*, 167 Wn. App. 542, 551, 273 P.3d 1029, 1034 *review denied*, 175 Wn.2d 1017, 290 P.3d 133 (2012). "The primary purpose of a summary judgment procedure is to avoid a useless trial."

Once a court holds a trial on the merits, reviewing the decision to deny a party's motion for summary judgment would do nothing to further this purpose. *Hanks*, 167 Wn. App. at 551-52. Thus, the only issue before this Court is the CR 50 motion and the evidence adduced at trial.

This Court reviews the trial court's denial of a motion for judgment as a matter of law de novo, applying the same standard as the trial court. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 322, 189 P.3d 178, 190 published with modifications at 144 Wn. App. 1028 (2008), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530–31, 70 P.3d 126 (2003). “Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997); see also, CR 50(a)(1). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Most critically to Brand's contentions here, the nonmoving party in a CR 50 proceeding is “not bound by the unfavorable portion of [the] evidence, but is entitled to have [the] case submitted to the jury on the basis of the evidence ... most favorable to [her] contention.” *Venezelos v.*

Dep't of Labor & Indus., 67 Wn.2d 71, 72, 406 P.2d 603 (1965) (internal quotation marks omitted) (quoting *Dayton v. Dep't of Labor & Indus.*, 45 Wn.2d 797, 798–99, 278 P.2d 319 (1954)).

Brand's CR 50 challenge, like its unsuccessful summary judgment challenge, is based on insufficiency of the evidence. Br. of Respondent at 32-39. Brand argues that the evidence adduced at trial was insufficient as a matter of law to prove that the Cherry Point exposure was a substantial factor in causing Ehlert and Jones' mesothelioma. *Id.*

The legal test and evidentiary basis for proving causation in asbestos cases is well known to this Court.

Because of the peculiar nature of asbestos products and the development of disease due to exposure to such products, it is extremely difficult to determine if exposure to a particular defendant's asbestos product actually caused the plaintiff's injury. Trial courts should consider...evidence of plaintiff's proximity to the asbestos product...the extent of time that the plaintiff was exposed to the product...the types of asbestos products to which the plaintiff was exposed and the ways in which such products were handled and used...the evidence presented as to medical causation of the plaintiffs particular disease...evidence of any other substances that could have contributed to the plaintiff's disease, and expert testimony as to the combined effects of exposure to all possible sources of the disease. ...Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case. Nevertheless, the factors listed above are matters which trial courts should consider when deciding if the evidence is sufficient to take such cases to the jury.

Lockwood, 109 Wn.2d at 248-49.

In seeking judgment as a matter of law on causation, Brand claims that Dr. Hammar, a medical expert who testified as to causation, could not possibly have reached the conclusion that, to a reasonable degree of medical certainty, exposure to Brand's products caused Ehlert and Jones' mesothelioma. *Id.*

However, Dr. Hammar did just that, concluding in his testimony at trial that, based on all of the evidence and documents he reviewed, Ehlert and Jones' Cherry Point exposure was, to a reasonable degree of medical certainty, enough *on its own* to have caused their diseases. RP 360-61; RP 391.

Brand does not, and cannot, deny that Dr. Hammar testified, to a reasonable degree of medical certainty, that Ehlert and Jones' exposure at Cherry Point was sufficient to cause their diseases. This testimony should end this Court's CR 50 inquiry. CR 50 permits a court to enter judgment as a matter of law only if "during a trial by jury, a party has been fully heard with respect to an issue and there is *no legally sufficient evidentiary basis* for a reasonable jury to find or have found for that party with respect to that issue." CR 50(1)(a).

Yet Brand insists Dr. Hammar's testimony is inadequate. Brand's first dispute with Dr. Hammar's testimony is that he was precluded from

testifying as to causation without specific industrial hygiene evidence as to the precise ratio of fibers to air that Ehlert and Jones were exposed to during their time at Cherry Point. Br. of Resp'ts at 35, 38.

However, Dr. Hammar stated that he relied on numerous other records and sources of evidence to reach his conclusion about causation. RP 361-62, 391. Dr. Hammar *never* testified, as Brand would like to suggest, that such a conclusion can *only* be reached when the medical expert has industrial hygiene evidence, or that other evidence of exposure is insufficient.

Brand's challenge is to the quality and weight of Dr. Hammar's expert opinion, not to the sufficiency of his testimony. If Brand feels that Dr. Hammar's expert opinion is faulty, then the proper challenge would be to his admission as an expert witness. Brand has not appealed from the trial court's decision to admit Dr. Hammar. Thus, it cannot complain that his opinion was not properly before the jury.

Brand's second dispute with Dr. Hammar's testimony stems from its characterization of a single statement of a 1985 study regarding cumulative exposures over time. Br. of Resp'ts at 38-39, Appendix A thereto. Brand claims that the study states that "asbestos exposures occurring more than 20 years after an individual's first exposure to asbestos do not contribute to the risk of developing mesothelioma." *Id.*

Brand's characterization of the 1985 study is misleading, and it does not prove what Brand claims it does. The study states that risk of contracting mesothelioma increases during *constant* exposures up to 20 years, but after 20 years of *constant* exposure, the risk is not altered by continuing or discontinuing exposure. Br. of Resp'ts, Appendix A. The study does *not* say, as Brand suggests, that if a person is who first exposed to asbestos 20 years ago, but was not constantly exposed to asbestos in the intervening 20 years, any additional exposure does not increase the risk.

Even assuming the 1985 study says what Brand claims it says, in a CR 50 proceeding any unfavorable evidence must be ignored. *Venezelos v. Dep't of Labor & Indus.*, 67 Wn.2d at 72.

Put simply, Brand's CR 50 challenge was not well taken. Ample evidence on causation was adduced at trial, and the trial court did not err in refusing to enter judgment as a matter of law.

E. CONCLUSION

Businesses are within their rights to sell inherently dangerous products, provided they take reasonable steps to warn those who might be injured of the dangers. Under § 402, those in the chain of distribution – including businesses who both sold and installed asbestos-containing insulation – are strictly liable for the resulting illness and death.

Errors in the jury instructions regarding the description of Brand's duty likely prejudiced the result at trial. Not only did Ehlert produce sufficient evidence to overcome Brand's CR 50 motion, but to prevail at trial to a properly instructed jury. Reversal and remand for a new trial is warranted.

DATED this 11th day of March, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Reply/Cross-Response Brief of Appellants Ralma Ehlert and Tamara Jones in Court of Appeals Cause No. 70309-9-1 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: March 17th, 2014 at Tukwila, Washington.



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