

NO. 74458-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

YEANNA WOO, Personal Representative for the Estate of YUEN
WING WOO and his Surviving Spouse, JEAN OI WOO,

Appellants,

v.

ASBESTOS CORP. LTD.; et al.,

Defendants,

GENERAL ELECTRIC COMPANY,

Respondent.

Appeal from the Superior Court of Washington
for King County
(Cause No. 12-2-07945-5 SEA)

REPLY BRIEF OF APPELLANT

WILLIAM RUTZICK, WSBA #11533
KRISTIN HOUSER, WSBA #7286
THOMAS J. BREEN, WSBA #34574

SCHROETER, GOLDMARK & BENDER
500 Central Building
810 Third Avenue
Seattle, Washington 98104
(206) 622-8000

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

In *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008) and *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), the Supreme Court set out a general rule, with certain exceptions; the exceptions were discussed in *Braaten*, at 385, n. 7, and clarified in *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012) In *Macias*, the Court applied one of the exceptions, imposing on the manufacturer a duty to warn of the dangers of asbestos that was required to be used with their products *Id.* at 413-414 Appellants' ("Plaintiffs") position is that one of the exceptions also applies in this case, specifically, that GE turbines required the use of asbestos insulation, gaskets and packing in order to function properly, and that, as a result, GE had a duty to warn of its dangers.

GE argues that applying an exception "guts" the general rule and attacks plaintiffs' failure to explain what is left of the general rule if the exception is applied. What is left includes precisely the situation that GE describes in its brief at p. 23: a situation in which the products "only happened to be insulated by asbestos products because the Navy chose to insulate the equipment on its ships with asbestos products." *Id.* at 414 (emphasis added) That was the situation in *Braaten* and *Simonetta*, but is not the situation here In this case, Plaintiffs have submitted evidence that

insulation, gaskets and packing were required for GE turbines to function. GE documents show that, during the period Mr. Woo was on ships, only asbestos-containing insulation, gaskets and packing were available for use on its turbines. They further show that GE typically installed insulation products on its new turbines and thus was necessarily aware that only asbestos products were used for those purposes. Thus, a reasonable interpretation of the evidence is that asbestos-containing products were required to be used on GE turbines.

In its effort to avoid the application of the exception imposing a duty when asbestos is required for use with a product, GE misrepresents the facts and misstates the exception. To take the latter first, to fall under the exception, it is not necessary to prove that GE expressly required asbestos-containing materials to be used with the products. Rather, the evidence must show that asbestos-containing materials were required for its product to work properly – a critical difference. *Macias*, at 414-415; 416, n. 4. And its attempt to dismiss GE's pre-litigation admission in its "Technical Information Letter" as irrelevant because it was written after Mr. Woo's exposure makes no sense, given that the document sets out GE's account of the past history of the use of asbestos with its products. In fact, its statements that, prior to the 1970's or 1980's, asbestos-containing insulation, gaskets and packing were used on or in its turbines because no

alternatives to asbestos were available is highly relevant. After all, who would know better than the manufacturer what its turbines needed and what products were typically used? Finally, GE makes much of the fact that the TIL was discussing land-based turbines in industrial settings, yet can point to no evidence that the turbines on ships were somehow different in their need for and use of asbestos insulation for heat retention, or asbestos gaskets and packing as sealants. Plaintiffs' evidence is that asbestos insulation was used extensively on turbines on ships; it is certainly a reasonable inference from the TIL that this was because no alternatives to asbestos products were available for the insulation necessary for the turbines to operate properly, when the turbine is on a ship or when it is on land.

GE also questions Plaintiffs' reliance on circumstantial evidence, yet fails to recognize that Washington courts have taken a common sense, flexible approach to circumstantial evidence, including in situations where, as here, a person's injury manifests itself decades after the injury-causing events. *See, e.g., Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987). Plaintiffs are not asking the Court to give its blessing to speculation leading to absurd results; rather, the inferences Plaintiffs are drawing from the evidence are actually quite straightforward. For example, as to Mr. Woo's work in the vicinity of GE turbines, the chain of

evidence is as follows: a) Government records show that Mr. Woo was a third assistant engineer on MSTS ships, including the TOWLE, MACKENZIE, and O'HARA; b) Everett Cooper, a marine engineer who served on MSTS ships in the 1950's and 1960's, states that "across the board" it was the job of third assistant engineers on MSTS ships to work in the engineering spaces, or engine rooms, of those ships, standing watch and taking care of specific equipment in those spaces; c) Not surprisingly, main steam turbines are located in the engineering spaces of ships; d) Ship records and GE interrogatory answers document that the main steam turbines on the MACKENZIE, TOWLE, and O'HARA were made by GE. It is not a great leap to conclude that Mr. Woo regularly worked in the vicinity of GE turbines on those ships.

By way of a second example, the same is true as to the evidence that Mr. Woo was exposed to asbestos-containing insulation used on GE turbines. Plaintiff's evidence is that: a) GE Turbines required insulation for heat-retention purposes; b) during the years Mr. Woo was working, only asbestos insulation, per GE, was available; c) when the ships were at sea, the normal vibration of the equipment on the ships caused asbestos to erode and produce dust in the air; d) in the expert opinion of industrial hygienist Nicholas Heyer, studies show that such vibration on ships produced dangerous amounts of asbestos to those working in engine

rooms; e) when ships were in port for repairs, turbines were regularly maintained, which required removal of asbestos insulation (CP 142); f) as Mr. Cooper explained, to get to the internal workings of a turbine, first the insulation had to be removed to be able to lift the casing on the turbine. *id.*; g) removing asbestos insulation released dust into the air, exposing those working in the engine rooms to dangerous levels of asbestos fibers, according to industrial hygienist Dr. Heyer. Again, it is not a stretch to infer from this evidence that Mr. Woo, an engineering assistant, had significant exposure to insulation on GE products both while he was on these ships at sea and when the ships were in port for repairs. In any event, such circumstantial evidence certainly is sufficient for a jury as fact-finder to make the decision whether the conclusions urged by Plaintiff can be drawn.¹

II. ARGUMENT

A. **GE's Admissions Provide Crucial Evidence In This Case Not Present In Cases Such As *Braaten* and *Simonetta***

Since much of GE's opposition presents a truncated and distorted view of GE's 1989 Technical Information Letter ("TIL"), plaintiffs reiterate the essential admissions. Plaintiffs' Opening Brief at pp. 2-3 discussed several GE admissions contained in the TIL relating to GE's

¹ Similarly, relating to plaintiff's negligence claims, the jury can decide the inferences to be drawn from evidence of GE's knowledge in the past about the dangers of asbestos. *See* CP 313-314, 385-386.

Industrial Steam Turbine Generators. *See* CP 342-350. GE, for example, admitted at CP 346 that as of 1989 (a) flat sheet gaskets were “used extensively” in those GE turbines; (b) that “asbestos-containing materials have been used exclusively in such gaskets”; and (c) that “the industry has only recently developed suitable non-asbestos replacements.” As to insulation, GE also admitted in that same TIL at CP 345:

1. Heat retention material used for thermal insulation has been typically² purchased to functional specifications from insulation vendors and field installed. In the early 1970's non-asbestos equivalent materials became available and the GE specifications were subsequently revised to prohibit the use of asbestos. The bulk of asbestos applied in turbine generators was used for heat retention application. (Emphasis added.)³

1. Admissions Relating To Necessity For Asbestos-Containing Insulation Of GE Turbines

GE’s admission that heat retention material for new installations is usually purchased and field installed by GE to functional factory specification leads to a reasonable inference that since GE “usually” purchased and installed heat retention materials, GE was familiar with types of heat retention materials and when non-asbestos heat retention materials first became available.

GE’s admission at CP 345 that “in the early 1970’s non-asbestos

² WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED (2d Ed.), p. 1979 defines “typical” as “having or showing the characteristics, qualities, etc. of a kind, class, or group so fully as to be a representative example.” (Emphasis added).

³ The TIL also admitted that insulation for such GE turbines was “usually purchased and field installed by GE to functional factory specification” (emphasis added) CP 343.

equivalent [heat retention] materials became available” (emphasis added) for use on Utility and Industrial steam turbine generators fairly can be interpreted to mean that prior to “the early 1970’s,” non-asbestos equivalent heat retention materials were not “available” for such purposes. Given that evidence, as well as evidence that “all vessels delivered before 1975 had extensive asbestos insulating material aboard” (CP 216), it is a reasonable inference that non-asbestos equivalent heat retention materials were also not available for use in insulating GE marine steam turbines “prior to the early 1970s.” Given Mr. Cooper’s evidence that steam turbines on Navy and MSTS ships “require insulation on the exterior in order to function properly” (TR 142) and that such turbines “cannot function without insulation” (CP 645), that means that, prior to the early 1970’s, asbestos was required to be used to insulate GE marine turbines regardless of whether or not Navy specifications required asbestos, and that GE knew asbestos was required for that purpose.

2. Admissions Relating To Need For Asbestos-Containing Gaskets in GE Turbines

GE’s admission in 1989 that “asbestos-containing materials have been used exclusively [for sheet gaskets] and the industry has only recently developed⁴ suitable non-asbestos replacements” means that prior

⁴ Given that such evidence should be viewed favorably to plaintiffs as the non-moving party, “only recently” in a 1989 document could fairly be understood to be after 1980.

to “only recently,” i.e., prior to 1980, industry had not “developed suitable non-asbestos replacements” for sheet gaskets used in GE Industrial Steam turbines. CP 346. Since, prior to that time, industry had not developed suitable non-asbestos replacements for use in GE Industrial Steam turbines, it is a reasonable inference that industry also had not developed suitable non-asbestos sheet gasket replacements for use in GE marine turbines. That is also confirmed by Mr. Cooper’s evidence that, in the same time period, marine “steam turbines require asbestos gaskets to seal piping flange connections and asbestos packing on the nozzle valves.” CP 142.

3. GE’s Effort To Blunt The Impact Of These Admissions Fail

None of GE’s arguments at p. 8, n. 2 and pp. 10-11 as to why GE’s admissions are irrelevant or otherwise do not support the inferences suggested by plaintiffs are persuasive. The fact that the admissions in the TIL were “dated decades after Woo left the James O’Hara” (Def. Opp., p. 8, n. 2) and “11 years after Woo was retired” (*id.* at 10) does not affect either the admissions or relevancy. That is because ER 801(d)(2) does not distinguish between admissions about events depending on how long ago the event occurred. For example, a confession in 1989 to a murder committed in 1950 would not be rejected in a criminal prosecution simply because the murder occurred 39 years before. *Lockwood*, 109 Wn.2d. at

258 is on point. In *Lockwood*, the Supreme Court found relevant a “post-1974 review of literature on asbestos health from 1906 to 1974, which was prepared by Raymark officials.” *Id.* at 258. The Court thus found admissions relating to matters more than 60 years in the past to be admissible and relevant.

B. Plaintiff’s Interpretation, Rather Than GE’s Interpretation, Of *Simonetta*, *Braaten* and *Macias* More Accurately Reflect Those Decisions

The parties posit different interpretations of *Braaten*, *Simonetta*, and *Macias* According to respondent (hereinafter “GE” of “defendant”):

1. *Simonetta* and *Braaten* Establish a Bright-Line Rule That Manufacturers Have No Duty to Warn of Purported Defects in Products Which They Did Not Manufacture, Sell or Distribute” (Def. Brief, p. 19).

GE’s interpretation of *Simonetta* and *Braaten* is inconsistent with the opinions themselves as well as how they have been interpreted by the Washington Supreme Court and other courts. The *Braaten* court at p. 397 explicitly rejected defendant’s position quoted immediately above, where the court discussed three factual situations not resolved in *Braaten*:

In light of the facts here, we need not and do not reach the issue of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be applied to, in, or connected to their products, or required because of a

peculiar, unusual, or unique design.⁵ (Emphasis added.)

GE similarly misreads *Macias v. Saberhagen Holdings, Inc.*, when it states:

“2. Macias distinguished *Simonetta* and *Braaten* on Limited Grounds with No Application Here.” *Id.* at 22.

The majority opinion in *Macias* discussed several “exceptions” to the general rule in *Simonetta* and *Braaten*, stating:

[I]t must be remembered that the general rule stated in *Simonetta* and *Braaten* is just this, a general rule to which there are exceptions. Further, *Simonetta* and *Braaten* did not establish new law narrowing the class of manufacturers who may have a duty to warn of inherent dangers in products. Both cases rest on settled principles. They do not establish any new, absolute rule limiting liability.

The court went on to say:

Critically, for present purposes, the products involved in the *Simonetta* and *Braaten* cases did not require that asbestos be used in conjunction with their products, nor were they specifically designed to be used with asbestos. Nor were those products designed as equipment that by its very nature would necessarily involve exposure to asbestos.

175 Wn.2d at 413-14 (emphasis added).

A favorable but fair reading of the evidence submitted by plaintiff

⁵ That was also the understanding of the Third Circuit in its January 29, 2016 Order in *In Re Asbestos Products Liability Litigation* attached to Plaintiff’s Opening Brief. The Order which identified “*Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008)” as one of the cases supporting the relevance of the circumstance that “the defendant affirmatively specifics that asbestos component and replacement parts be used.” Defendant’s Brief ignores both the above language in *Braaten* and the Third Circuit’s Order. The portion of *Braaten* quoted by GE at p. 21 was discussing the applicability to *Braaten* of *Lindstrom v. A–C Product Liability Trust*, 424 F.3d 488 (6th Cir.2005), under the facts of *Braaten*, which, as described above, did not contain evidence described in [2] or [3] of the above quote.

in this case, is that prior to the early 1970s, GE marine turbines required asbestos-containing gaskets, packing and insulation to be used in conjunction with those turbines in order for them to function properly. And, because there was no available alternative to asbestos-containing gaskets, packing and insulation for use within (or in conjunction with) GE marine turbines, they necessarily were designed to be used with asbestos. Finally, the evidence would permit the inference that turbines designed as products to be insulated with asbestos would necessarily involve exposure to asbestos, given such evidence as that contained in CP 138, para. 11.

Macias went on to distinguish the products in *Braaten* and *Simonetta v. Viad Corp.*, from the product in *Macias* as follows:

[T]he products in *Simonetta* and *Braaten* were not designed for or intended for use with asbestos, but only came into contact with asbestos because that was the purchaser-Navy's choice to use as shipwide insulation. The respirators in the present case, in contrast, are products specifically designed and intended to filter asbestos and other contaminants. When used exactly as designed and intended, the respirators invariably and necessarily involve exposure to the specific contaminants for which the respirator filters are designed. The products themselves involve risk of asbestos exposure when they are used exactly for the purpose for which they were manufactured and sold. There is no such inherent, necessarily existent risk of exposure in use of products that, at the ultimate choice of the purchaser, are coated with asbestos-containing insulation (Emphasis added.)

Macias, 175 Wn.2d at 416. The evidence here is that since asbestos was a

necessary part of the insulation, packing, and gaskets used in or covering the GE turbines in the relevant time, the use of asbestos was not because the Navy's chose asbestos among various alternatives; the Navy chose it because it was the only alternative, as GE knew.

C. GE Never Adequately Analyzed These Washington Cases

GE never cites this language in its Opposition. GE also never explains why, given the admissions in the TIL, a jury would not have been able to conclude prior to the early 1970s that asbestos had to be used in and in conjunction with the GE marine turbines in order for them to operate properly. GE instead overstates the inevitability of asbestos exposure in *Macias* and understates it in this case when, in reality, the likelihood of asbestos exposure in the two situations is actually quite similar. For example, at p. 24, GE states:

Macias does nothing to assist Woo in avoiding *Simonetta-Braaten*. The respirators in *Macias* were "specifically designed to be used with asbestos." *Id.* at 414.

Macias at 414 actually said that the respirators were specifically designed "... to filter contaminants from the air breathed by the wearer, including asbestos, welding fumes, paint fumes and dust." (Emphasis added.) They were designed to be used with or without asbestos.

GE goes on to argue:

[T]he turbines "only happened to be insulated by asbestos products because the Navy chose to insulate the equipment

on its ships with asbestos products." *Id.*

That understates the inherent nature of asbestos exposure in this case. The turbines were insulated by asbestos products because the evidence supports an inference that GE's turbines in the 1950s and 1960s were always insulated with asbestos because no other satisfactory insulation was available, whether the turbines were on ships or in factories.

GE also wildly exaggerates plaintiffs' position regarding the impact of *Macias* on *Braaten* and *Simonetta*, arguing that plaintiffs' position is that *Macias* "gutted" the two cases, or "overruled" them *sub silentio*, or treated them as "dead letters."⁶ None of those statements are true.⁷ *Braaten* and *Simonetta* apply in those many circumstances where, unlike here, there is no evidence that a given defendant either specified that asbestos-containing products be used in conjunction with its products or knew its products required asbestos-containing products in order to

⁶ E.g., "Plaintiff's principal argument on appeal is that the Supreme Court gutted the *Braaten-Simonetta* rule in *Macias* ..." Def. Opp., p. 22; plaintiffs are asking the Court to treat *Macias* as having overruled *Braaten* and *Simonetta sub silentio* although they fail to cite a single authority which has read the three cases the way they do. Def. Opp., 25 "Plaintiff's arguments cannot be accepted without rendering *Braaten* and *Simonetta* dead letters." *Id.* "This court should decline the plaintiff's invitation to simply disregard *Braaten* and *Simonetta*" *Id.* Plaintiffs are inviting this Court "to broadly interpret the *Macias* exception to entirely swallow up the *Simonetta-Braaten* rule." *Id.* at 26-27.

⁷ Plaintiff's actual argument at p. 17 states:

Most of the appellate decisions and a large number of trial court decisions favor plaintiffs' position, as discussed in more detail below. That is particularly true of those decisions where the courts considered situations where the use of asbestos in replacement components or in insulation covering the products was required because of the unavailability of non-asbestos substitutes or because of the defendant's specifications.

function properly. For example, if the evidence in this record showed that non-asbestos gaskets existed and could have been used by the Navy in the 1950s in GE turbines, then *Braaten* and *Simonetta* would apply regarding gaskets. What is different about this case from *Braaten* and *Simonetta* is that, unlike those cases, there is evidence from GE in 1989 with respect to sheet gaskets in GE turbines showing both that asbestos-containing materials had been used “exclusively” in those GE turbines and that the “industry” only recently developed suitable non-asbestos replacements.” CP 346. There was no such evidence in *Braaten* or *Simonetta* regarding the defendants involved in that appeal.

D. GE Has A Post Sale Duty To Warn Relating to Plaintiffs’ Negligence Claims

GE obviously was aware that plaintiffs’ claims included negligence as well as strict liability, since at p. 19, GE cites *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 240 P.3d 162 (2010) on the elements of a negligence cause of action. GE argues at p. 26 that a post-sale duty to warn is “incompatible with Washington’s Adoption of Section 402A of the Restatement,” which applies to strict liability claims governed by the common law. GE, however, fails to point out that *Lockwood*, 109 Wn.2d. at 101, n.2, holds that a post-sale duty to warn exists in an asbestos plaintiff’s negligence claim such as plaintiffs also

have here.⁸ Contrary to GE’s argument, plaintiffs’ negligence claim of a “duty to warn post-sale” fits squarely with *Lockwood* and Washington’s common law.

E. GE Fails In Its Effort To Distinguish Cases Relied Upon By Plaintiffs

1. Defendant’s Efforts To Distinguish Plaintiff’s Cases Based On Foreseeability Is Inconsistent With *Macias*

Defendant at page 37 argues that “The Cases Relied Upon By Plaintiff Are Inconsistent with *Simonetta Braaten* And The Weight Of Authority Across The Country Applying The Bare Metal Defense.” As discussed herein, the reason GE omits *Macias* from that argument is because *Macias* contradicts GE’s argument Defendant attempts to distinguish 8 cases relied upon by plaintiffs⁹ on the grounds that (a) they each imposed “a duty of care based upon the court’s view that the post-sale use of third-party asbestos-containing insulation by the purchaser in conjunction with the defendant’s product was foreseeable to the defendant”, and that (b) under *Simonetta*, “foreseeability has ‘no bearing’

⁸ Lockwood found “highly persuasive” defendant’s claim – repeated here – that the post-exposure duty did not apply to a strict liability case. Plaintiffs here are only asserting the post-sale warning with respect to negligence.

⁹ *In re New York City Asbestos Litigation (Konstantin)*, 121 A.D. 3d 230, 250-51, 990 N.Y.S. 2d 174 (2014), *Berkowitz v. AC&S, Inc.*, 288 A.D. 2d 148, 149, 733 N.Y.S.2d 410 (2001), *May v. Air & Liquid Systems Corp.*, 446 Md.1, 14-15 (2015), *Kochera v. Foster Wheeler LLC*, 2015 WL 5584749, *4 (S.D. Ill. 2015), *Schwartz v. Abex Corp.*, 106 F.Supp.3d 626, 663 (E.D. 2015), *Chicano v. General Electric Co.*, 2004 WL 2250990, *9 (E.D. Pa. 2004), *Sether v. Agco Corp.*, 2008 WL 1701172, *3 (S.D. Ill. 2008) and *Gitto v. A.W. Chesterton*, 2010 WL 8752912, *2 (S.D. N.Y. 2010).2

on the adequacy of a manufacturer's warnings when injury arises from a separate product manufactured and sold by a third party. *Simonetta*, 165 Wn.2d at 358. ”

Macias, however, undercuts GE's argument about the inapplicability of foreseeability in the context of this case. *Macias* at p. 417 distinguished *Simonetta* on this issue by explaining while foreseeability is itself irrelevant to the creation of a duty, foreseeability is relevant to deciding whether a product is unsafe without a warning. *Macias* explained that:

[C]onsidering foreseeability in the context of determining whether the product is unsafe without adequate warnings and instructions is a different matter from considering foreseeability of injury to establish that a duty is owed.” (Emphasis added.)

Macias then held at 419:

That these products are likely to be used in the future and the predictability of the future hazards posed during actual use does not involve forbidden considerations of foreseeability of harm as defining duty. Rather, future use and predictability of hazards when the product is used as intended involve considerations of whether the product itself is unreasonably unsafe ...
...it is a matter of considering whether the product might be unreasonably unsafe in the absence of adequate warnings and, as is always true in product liability cases, the use to which the product will be put is always a part of this determination. (Emphasis added.)

The analysis of foreseeability in many of the 8 cases is similar to the *Macias* analysis quoted above. This was true, for example, in *Schwartz*

v. *Abex Corp.*, 106 F. Supp. 3d 626, 663 (2015):

Because there is evidence in the record that (arguably) supports a conclusion that Defendant knew its engines would be insulated with asbestos-containing insulation, Defendant is potentially liable in negligence (if all elements of the negligent failure to warn cause of action are satisfied).

The same also was true in *May v. Air & Liquid Systems Corp.*, 446 Md.1, 14-15 (2015), where Maryland's highest court first stated:

[W]e carefully decline to extend the duty to warn to all instances when a manufacturer can foresee that a defective component may be used with its product.

May, however, went on to hold:

This Court concludes that a manufacturer will have a duty to warn under negligence and strict liability when (1) its product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packing is required; and (4) the manufacturer knows or should know the risks from exposure to asbestos.

From the evidence in the record including the TIL, GE fits all of those conditions.

2. GE Also Fails in Efforts To Distinguish Cases Based On Its Claim That Its Turbines Did Not Contain Asbestos When Delivered

Defendant also attempts to distinguish appellate cases from Maryland and New Jersey¹⁰ as well as federal trial court cases from

¹⁰ *May, supra*; *Hughes v. A. W. Chesterton Co.*, 435 N.J. Super. 326 (App. Div. 2014).

Illinois, Wisconsin, and the MDL¹¹ on the grounds that the products in which those cases “contained asbestos insulation, packing and/or gaskets,” (emphasis added) but that “it is undisputed that GE turbines contain no asbestos at all when they were delivered to the buyers. CP 282.” Def. Brief, p. 38 (CP 282) only provides evidence from Captain Burger that GE turbines were “typically” delivered “uninsulated,” but provides no evidence supporting GE’s claim that GE turbines contained no asbestos gaskets or packing. Other portions of the record are inconsistent with GE’s above quoted assertions, including the following.

a. At CP 142, Mr. Cooper stated that marine turbines on Navy and MSTC ships built in the 1940s and 1950s “require asbestos gaskets to seal piping flange connections and asbestos packing on the nozzle valves.” He also testified that GE “also provide[d] extra sets of specially precut asbestos-containing gaskets along with their new turbines.” CP 144. That evidence both states and implies that GE incorporated such asbestos gaskets in its new turbines.

b. At CP 23, GE’s 30(b)(6) witness testified that GE used asbestos-containing gaskets in its marine turbines.

c. GE’s 1989 TIL at CP 346, 349-50, provides evidence of

¹¹ *Quirin v. Lorillard Tobacco Co.*, 17 F.Supp.3d 760 (N.D. Ill. 2014); *Spychalla v. Boeing Aerospace Operations, Inc.*, 2015 WL 3504927, *3 (E.D. Wis. 2015); and *Salisbury v. Asbestos Corp. Ltd.*, 2014 WL 345214 *1 (E.D. Pa. 2014).

extensive use in GE steam turbines of gaskets and packing which contained asbestos through the 1950s and 1960s. Particularly in light of a and b above, the jury could fairly infer that both GE marine and land based steam turbines incorporated asbestos containing gaskets and packing during that same time period.¹²

F. GE Is Not Entitled To Summary Judgment Regarding Causation

Defendant at pp. 40-45 argues that “Summary Judgment Can Be Affirmed on the Alternative Grounds That Plaintiffs Have No Admissible Evidence of Causation” (Def. Opp., p. 40) and that the evidence plaintiffs supplied does not permit the necessary inferences. Defendant’s admissibility arguments are both procedurally barred and substantively invalid. The trial court considered all of the evidence plaintiff’s submitted, including, for example, the Cooper and Heyer Declarations and the Nettekoven deposition. CP 576-577. GE did not cross appeal the trial court’s decision to consider that evidence. As in *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 731, n.11 (2011), GE’s arguments that plaintiffs

¹² GE appears to believe that citing more than 35 decisions by the same judge, the Hon. Eduardo Robreno, who presided over MDL-875, is much more persuasive than citing 10 such decisions. However, citing multiple decisions by the same judge adds little to its position, especially in light of Judge Robreno’s practice of using the same language and rationale in multiple cases for the sake of uniformity, not to mention efficiency, in dealing with the many cases before him. Further, the strength of this authority has been seriously called into question by the Third Circuit’s order of remand in *Devreis* (see attachment to Appellants’ original brief), directing Judge Robreno to clarify whether he really meant to uphold the “bare metal” defense in negligent failure to warn cases. *Devreis* discussed several of those cases, including *Schwartz* (cited by plaintiffs and attempted to be distinguished by GE). That remand is currently still pending.

have no admissible evidence of causation are procedurally barred. *See also Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352 (1979). Defendant cites *Bowers v. Marzano*, 170 Wn. App. 498 (2012), but never adequately explains why this testimony is speculative or conclusory.

Even were they not procedurally barred, GE's objections are substantively incorrect. For example, Mr. Cooper's 40 years of experience around ship engines and turbines himself gives him foundation for his testimony at CP 614-615.¹³

Defendant's discussion of what it characterizes as four "radial inference" is also faulty.

1. Defendant first argues that no reasonable jury could infer from the record in this case that "asbestos-containing insulation was necessary prior to 1970 to the proper function of GE turbines." Def. Opp., p. 41. The four pieces of evidence GE discussed are the Cooper declaration, the Skinner testimony, the Banaszewski testimony and GE's TIL. While there are conflicts in that evidence, a jury could reasonably evaluate that evidence as follows: Mr. Cooper provided evidence that GE turbines required insulation on the outside in order to function properly and that "during the 1950s and 1960s, the insulation on the turbines ...

¹³ Varying slightly GE's hypothetical, it would be surprising if a "senior litigation attorney's job responsibilities in the 1950s did not involve litigation in the same way it would be surprising if a marine engineer's job responsibilities did not involve marine engines, which involve turbines.

typically contained asbestos.” While GE only cites CP 342, the actual TIL is set forth at CP 342-350 and identifies “Heat Retention Material” as “Thermal Insulation” at CP 347, and at CP 345 states that in “the early 1970s, non-asbestos equivalent thermal insulation materials became available.” Putting that together with Mr. Cooper’s evidence that insulation on the outside of GE turbines was necessary for it to function properly, a jury could reasonably conclude that prior to the early 1950s (when non-asbestos equivalent materials became available), GE marine turbines needed asbestos thermal insulation on the outside to function properly. The jury could believe that the TIL’s statements regarding the necessity of asbestos insulation rather than inconsistent testimony from Mr. Skinner or Mr. Banaszewski. Furthermore, since such asbestos insulation was necessary, it can reasonably be inferred that the government also required asbestos because it was the only suitable, available material.

2. Defendant next argues at p. 42 that the only evidence that supports an inference that “asbestos deteriorates over time” is from Mr. Cooper at CP 143-144. GE ignores the testimony of Dr. Heyer who, after citing a number of epidemiological and industrial hygiene articles at CP 134, directly states his opinion, at CP 138, that “the vibration aboard ships also resulted in the release of asbestos fibers from the asbestos insulation

on the turbines” as well as GE’s admission at CP 372 that the “level of exposure to asbestos would only be very small to precipitate rather disastrous results.” (Emphasis added.)

3. GE’s argument about what it refers to as “plaintiffs’ third proposed inference”¹⁴ only cites Mr. Cooper’s testimony and TR 614-615. That testimony was elicited by GE and GE made no objection to it or motion to strike after that testimony was submitted by plaintiffs. Based on his 40 years of experience, including serving as an engineer on MSTs ships in the 1950s, Mr. Cooper had substantial foundation for his testimony that an MSTs engineer would stand watch in or near the engine machinery. There also was direct documentary testimony of the ships Mr. Woo served on and the length of his service (about 3 years) on ships having GE turbines. The inference (given this evidence) that Mr. Woo, as a ship engineer on those three ships, worked around GE turbines in those three ships is perfectly reasonable.¹⁵

4. Defendant finally argues that during Mr. Woo’s three years aboard the O’HARA, TOWLE, and MCKENZIE, the “inference that Woo inhaled asbestos fibers from insulation, packing, and gaskets on GE

¹⁴ GE articulated the inference as “Woo worked in engine spaces containing GE turbines for approximately three years.” Def. Opp., p. 41.

¹⁵ Varying GE’s hypothetical at p. 44, it would be reasonable to infer that someone who worked as a senior litigation attorney for 13 months at a law firm in the 1950’s would have come into contact with law books.

turbines” depends on two additional inferences.¹⁶ Defendant is wrong for two separate reasons First, defendant ignores Dr. Heyer’s expert opinion at TR 138 which provides direct evidence of substantial asbestos exposure from “the release of asbestos fibers from the asbestos insulation on the turbines” resulting from “vibration aboard ships.” TR 138.¹⁷ As such, there is direct expert testimony on the issue characterized by GE as the fourth inference. *See Lamon*, 91 Wn.2d at 351-352 (expert testimony can raise material issues of disputed fact).

The second reason defendant is wrong is that the Washington Supreme Court has in recent years moved away from treating circumstantial evidence as automatically less valid than direct evidence.

¹⁶ The claimed inferences are:

(1) that despite the complete absence of direct evidence that Woo ever worked in proximity to the GE turbines, he was working on or near the turbines at one or more of the rare moments when sufficiently extensive maintenance was being done to require disturbing insulation; and (2) that Cooper's observation that turbine insulation deteriorated over time, releasing asbestos fibers, was equally applicable to the ships Woo served on (which Cooper admitted he had never been aboard).

¹⁷ Dr. Heyer’s declaration (CP 138) at ¶11 stated:

In my opinion, Mr. Woo’s work in engineering spaces around GE and Westinghouse turbines resulted in exposures to asbestos that were substantially above ambient levels. This would be true even when work was not being done to or near the turbines because, as discussed in a number of the above articles, the vibration aboard ships also resulted in the release of asbestos fibers from the asbestos insulation on the turbines. It is also my opinion that this exposure was a substantial contribution to the total asbestos exposure of Mr. Woo. By ‘substantial,’ I mean that the exposure was something that is “important” or “material” or “not insignificant.” As a consequence, it was a substantial factor in causing his mesothelioma. (emphasis added).

This calls into serious question defendant's reliance on *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164 (1940) and *Englehart v. General Electric Co.*, 11 Wn. App. 922, 927 (1974). This has been seen most strikingly in the criminal law context, where beginning with *State v. Gosby*, 85 Wn.2d 758, 764-67, 539 P.2d 680 (1975), the Supreme Court concluded that "whether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case."¹⁸ In *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999), the Supreme Court quoted approvingly from language in a treatise stating "if the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on 'pyramiding inferences.'"

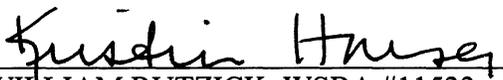
III. CONCLUSION

For the foregoing reason, as well as the reasons discussed in plaintiffs' opening brief, the order granting GE's summary judgment should be reversed and the case remanded for trial.

¹⁸ See also *State v. Hieb*, 107 Wn.2d 97, 111, 727 P.2d 239 (1986), where the court approved WPIC 5.01 which states in part "the law makes no distinction between the weight to be given to either direct or circumstantial evidence." This language is identical to WPI 1.03, so the Supreme Court's approval of WPIC 5.01 logically applies to WPI 1.03

DATED this 27th day of May, 2016.

SCHROETER, GOLDMARK & BENDER


WILLIAM RUTZICK, WSBA #11533
KRISTIN HOUSER, WSBA # 7286
Attorney for Respondents

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

YEANNA WOO, Personal
Representative for the Estate of
YUEN WING WOO and his Surviving
Spouse, JEAN OI WOO

Appellants,

ASBESTOS CORP. LTD.; et al.,

Defendants,

GENERAL ELECTRIC COMPANY,

Respondent.

NO. 74458-5-I

DECLARATION OF SERVICE

W
2016 JUN -1 AM 10:23
COURT OF APPEALS DIV I
STATE OF WASHINGTON

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

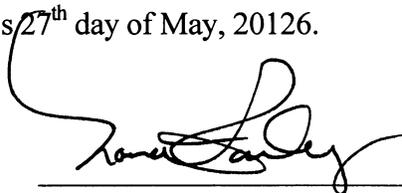
1. I am an employee of Schroeter Goldmark & Bender, over the age of 18, not a party to this action and competent to make the following statements:
2. On **May 27, 2016**, copies of the Reply Brief of Appellants and this Declaration of Service were filed with the Court of Appeals for the State of Washington, Division I, and served upon the attorneys of record for respondent by having said copies sent via legal

messenger, US Mail, facsimile, electronic mail and/or Federal Express to the addresses listed below:

<p>Counsel for: General Electric; Christopher Marks, Rebecca A. Zotti Sedgwick, LLP 520 Pike Tower, 520 Pike Street, Suite 2200 Seattle, WA 98101 855.855.8573 <i>phone</i> www.sedgwicklaw.com; Chris.Marks@sedgwicklaw.com; Maria.Tiegen@sedgwicklaw.com</p>	<p><input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Messenger <input type="checkbox"/> Via Email</p>
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 27th day of May, 20126.



NONA FARLEY
810 Third Avenue, #500
Seattle, WA 98104
(206) 622-8000
SGBasbestos@sgb-law.com