

NO. 74458-5-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

YEANNA WOO, personal representative for the estate of  
YUEN WING WOO and his Surviving Spouse, JEAN OI  
WOO,

Plaintiffs and Appellants,

v.

GENERAL ELECTRIC COMPANY, ET AL.,  
Defendant and Respondent.

**RESPONDENT'S BRIEF OF DEFENDANT  
GENERAL ELECTRIC COMPANY**

On Appeal from the Superior Court  
for the State of Washington,  
County of King, Case No. 12-2-07945-5 SEA,  
Hon. Jean Rietschel, Presiding

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## I. INTRODUCTION

Plaintiffs' decedent Yuen Wing Woo ("Woo") died in 2009 of mesothelioma. Plaintiffs allege that Woo was exposed to asbestos-containing insulation, packing and/or gaskets used in conjunction with marine turbines installed by defendant General Electric Company ("GE") on three ships where Woo briefly served in the 1940s and 1950s.

The Superior Court held that GE had no duty to warn Woo of purported defects in asbestos-containing materials which GE neither manufactured, sold or distributed, citing two landmark decisions of the Washington Supreme Court: *Simonetta v. Viad Corp.*, 165 Wn.2d 341 (2008) and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373 (2008). Since the plaintiffs were unable to prove an essential element of their claim, the Superior Court entered summary judgment. That judgment was correct and should be affirmed.

Plaintiffs argue that *Simonetta* and *Braaten* were virtually gutted by the Supreme Court only four years after they were issued in *Macias v. Saberhagen Holdings*, 175 Wn.2d 402 (2012), and that most courts around the country have agreed with their position. Plaintiffs are mistaken. *Macias* described a limited exception to the *Simonetta-Braaten* rule for products which inevitably bring users into contact with asbestos every time they are used as intended by the manufacturer. *Macias* has no

application to the undisputed facts here. The great weight of authority around the country supports *Simonetta* and *Braaten*'s bright-line rule, and the few outlier cases which do not are inconsistent with Washington law.

Even if GE had owed a duty to Woo in connection with the insulation, packing and/or gaskets purportedly added to its turbines, summary judgment should be affirmed on the alternative grounds that plaintiffs cannot show a triable dispute of fact regarding the essential element of causation. Woo's testimony was not preserved before his death. No coworkers of Woo during the relevant periods have ever been found, and each of the plaintiffs' witnesses concedes that he has no knowledge of where Woo was or what he was working on during so much as a single day of his career. Woo cannot possibly show that he worked in proximity with sufficient frequency and regularity to any asbestos for which GE was responsible, and his claim must therefore fail.

The judgment was correct and should be affirmed.

## **II. STATEMENT OF ISSUES**

1. Did the Superior Court correctly hold, consistent with both Washington law and the clear majority of authorities from around the country, that GE cannot be liable for injuries purportedly caused by asbestos insulation GE did not manufacture, sell or distribute?
2. May the judgment be affirmed on the alternative grounds

that plaintiffs failed to offer evidence that decedent worked in proximity with sufficient frequency and regularity to any asbestos for which GE was responsible to support liability against GE under *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235 (1987)?

### **III. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

##### **1. Decedent Yuen Wing Woo's Service in the Navy and Military Sea Transportation Service**

Woo served in the U.S. Navy between September 24, 1943 and May 14, 1946 as a machinist. CP 2, 114. Following his discharge from the Navy, he joined the Military Sea Transportation Service (which was known after 1970 as the Military Sealift Command), serving aboard numerous vessels over the course of a thirty-two year career, ultimately rising to the position of Chief Engineer. CP 2.

Woo was diagnosed with mesothelioma in April 2009. CP 2, 65-66, 68-72. Woo died, allegedly from mesothelioma, on July 27, 2009. CP 2, 63.

##### **2. GE Provided Turbines for Three Ships on Which Woo Served, But Did Not Require, Manufacture, Sell or Distribute Insulation for the Turbines**

GE manufactured and shipped marine steam turbines to three vessels on which Woo briefly served during his long career: the *USS George K. MacKenzie*, the *USAT John R. Towle* and the *USNS James*

*O'Hara*. CP 239. Woo served aboard the *George K. MacKenzie* while with the Navy, from July 13, 1945 (the day the *MacKenzie* was commissioned) to July 6, 1946. CP 52, 114. He served as a Third Assistant Engineer aboard the *John R. Towle* for thirteen months - from December 16, 1949 to January 24, 1951 - and aboard the *James O'Hara* for ten months, from March 1, 1951 to January 16, 1952. CP 52, 92-100.

GE's marine turbines were shipped to the shipyard "bare metal" – meaning without insulation. CP 282. GE's corporate representative, David R. Skinner, found no evidence in the relevant engineering drawings that GE had any role in procuring, designing or installing any thermal insulation for any of the three ships. CP 27. Skinner testified that the standard practice for marine turbines was for the ship owner to choose and install all thermal insulation.<sup>1</sup> *Id.*

With respect to the *George K. MacKenzie*, Navy regulations dictated the type of insulation that had to be used in a particular location. CP 23 ("[T]he Navy specifications will say in these locations you must use asbestos material, and these locations you should not use asbestos-

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<sup>1</sup> In their Opening Brief, the plaintiffs cite Skinner's testimony that he was first told about the health risks of asbestos exposure around 2005, suggesting that this somehow indicates that GE was hiding information from its employees. (AOB, pp. 7-8.) Plaintiffs fail to note, however, that Skinner's entire career until 2005 had been spent in office work – he was never exposed to asbestos. CP 27.

containing material”). Navy regulations also required that insulation be of a material and thickness which would not deteriorate under operational conditions. CP 24; *Hagen v. Benjamin Foster Co.*, 739 F.Supp.2d 770 (E.D. Pa. 2010)(“[m]ilitary specifications governed every significant characteristic of the equipment used on the U.S. Navy ships, including the instructions and warnings . . . . This control included the decision of which warnings should or should not be included.”). As for the *John R. Towle* and *James O’Hara*, the Maritime Commission had regulations which “parallel(ed) the Navy requirements . . . identifies the materials and the methodology for putting the insulation on.” CP 25. During the 1940s, the Navy required the use of asbestos in many applications due to its weight and efficiency. CP 287; *Hagen*, 739 F.Supp.2d at 775 (Navy had “recognized that inhaling asbestos fibers in significant doses could result in pulmonary disease” since the early 1920s, but “continued to use asbestos aboard ships due to military necessity”). Both the Navy and the Maritime Commission required the use of “lagging” – a hard metal or concrete covering over insulation – to keep the insulation from deteriorating. CP 24-25. Most of the maintenance work necessary for GE’s marine turbines could be accomplished without disturbing whatever insulation the Navy and/or the Maritime Commission had chosen to use. CP 22.

**3. Plaintiffs Were Unable to Produce a Single Witness with Any Knowledge of Woo's Work Responsibilities or the Repair History of Any of the Relevant GE Turbines**

Plaintiffs were unable to produce *any* evidence that Woo worked with or in proximity to asbestos-containing materials for which GE was responsible for so much as a single day during his service aboard the relevant ships. Woo's testimony was not preserved before his death in 2009, nor have any of Woo's coworkers from the *George K. MacKenzie*, the *John R. Towle* or the *James O'Hara* ever been found. Nor have plaintiffs produced any evidence regarding the repair history of any of the GE turbines aboard the three ships.

Although Everett Cooper claimed that "much" of Woo's work "would have been in the various ships' engine spaces where the turbines were located," CP 146, he conceded that he had never worked with Woo, and indeed had never even set foot on any of the three ships where Woo had once served. CP 614. Nor had Cooper reviewed any testimony of anyone who had ever worked with Woo. *Id.* He had no knowledge of what Woo was doing on any particular day, or of any instance in which Woo worked with or in proximity to asbestos-containing packing, insulation or gaskets. CP 154-55, 502-503, 505-506. He had no knowledge of the repair history of the GE turbines aboard any of the relevant ships. CP 503. Cooper was unable to testify that any GE

personnel had been aboard any of the three ships at any time while Woo was serving on board. CP 160. Cooper agreed that asbestos-containing insulation was common in a wide variety of locations in all of the ships where Woo served, and conceded that he had no information who had installed any of it. CP 503. Cooper testified that he had never seen any GE personnel aboard any ship installing insulation, CR 154, and conceded that GE personnel had no authority to direct Navy personnel to do anything. CP 157.

Plaintiffs' expert Nicholas Heyer testified that regardless of Woo's title, his job responsibilities might have changed over time. CP 494. He agreed that he knew nothing of what Woo did on any given day during the relevant periods, or even of what his job responsibilities were. CP 497-98. Heyer testified that he had seen no testimony from Woo's coworkers. CP 495. He agreed that he had no knowledge that Woo had ever worked with or in proximity to the GE turbines. CP 496, 498. Nor did Heyer have any information regarding the repair history of any of the turbines in any of the relevant ships, or who performed any particular repair or provided any materials used. CP 495-96, 503. He had no information that GE had supplied any asbestos-containing insulation for any of the relevant ships. CP 498, 605. Like Cooper, Heyer agreed that thermal insulation was everywhere in the ships where Woo served, and he had no knowledge that

GE had supplied any of it. CP 496, 498, 503, 605.

Plaintiffs' witness Wayne Nettekoven agreed that he did not know Woo either. CP 174, 511-13. Indeed, Nettekoven had "never heard of [Woo]" until receiving his deposition notice. CP 177.

Plaintiffs assert in their Opening Brief that Everett Cooper testified that "asbestos-containing insulation and other asbestos-containing products were necessary for GE ship turbines to operate properly." AOB, p. 3. In fact, Cooper merely testified that turbines "require insulation . . . to function properly" – he said nothing about GE requiring a particular material.<sup>2</sup> CP 142. He testified that external insulation "typically" (not inevitably) contained asbestos "[d]uring the 1950s and 1960s" – after the relevant time periods. CP 143. Cooper testified that turbines required maintenance necessitating the removal of insulation from the top half of

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<sup>2</sup> Later in their Opening Brief, plaintiffs claim that "GE stated [that] only asbestos-containing insulation could be used to insulate the GE turbines [and] such asbestos-containing products were needed for the GE turbines to function properly." (AOB, p. 14.) There is not a scintilla of support in the record for plaintiffs' assertion, and indeed, they offer no record cite for their claim. Plaintiffs also claim that GE required the use of asbestos-containing gaskets for its marine turbines (AOB, p. 14, n.8), but the only support they cite for this claim is a Technical Information Letter regarding a different product and dated decades after Woo left the *James O'Hara*. CP 23, 342, 412; *see discussion infra* at 10-11.

the turbine every five years. CP 142.<sup>3</sup>

Cooper's testimony was repeatedly contradicted by Paul Banaszewski, who testified about GE land-based turbines at a Southern California Edison plant. CP 253. Banaszewski testified that one could run a turbine without insulation, although it would be relatively inefficient and might be subject to premature failures. CP 250. According to Banaszewski, GE merely identified the expected operating temperature of various parts of a turbine, and never specified a particular insulation material. CP 246, 251. "There are all kinds of different thermal insulations," he testified, "and people who provide different types of thermal insulation." CP 248. As long as the material withstood the necessary temperatures, GE would have viewed the material the insulation was made of as being none of its concern. CP 248.

Plaintiffs argue in their Opening Brief that GE provided one set of precut gaskets for use with its new turbines. (AOB, p. 5.) Plaintiffs' witness Everett Cooper conceded that the extra set of gaskets was required by regulations of the American Bureau of Shipping. CP 144; *see* CP 24, 421. Further, it cannot be reasonably inferred that the replacement gaskets

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<sup>3</sup> As noted above, Woo served on the *George K. MacKenzie* for the first year after it was commissioned – long before such service would have been necessary, even if Cooper's testimony is credited. CP 52, 114.

were ever used; Cooper admitted that if the replacement set could not be located when a gasket needed to be replaced, Navy personnel cut a new one from whatever material was handy and made the repair anyway. CP 164, 508.

**4. Plaintiffs Relied on an Assortment of Documents Which Post-Date the Relevant Period by Decades and Relate to Entirely Different Products**

Unable to point to even a scintilla of testimony supporting a reasonable inference that Woo was ever in proximity to asbestos for which GE was arguably responsible, the plaintiffs resort to pointing to documents and testimony relating to entirely different products and dating from decades after Woo's service on the *James O'Hara* ended in 1952.

Just as they did before the trial court, the plaintiffs rely heavily on a Technical Information Letter ("TIL") sent by GE in 1989 – thirty-seven years after Woo's service on the *James O'Hara* ended, and eleven years after Woo retired. Plaintiffs insist that the TIL raises a material dispute of fact – notwithstanding all the testimony described above – that GE chose and/or procured insulation for its marine turbines itself, and that asbestos was the only insulation available during the relevant period. (AOB, pp. 2-3.) However, as plaintiffs well know, the TIL relates to land-based steam turbines, not marine turbines built for the Navy and the Military Sea Transportation Service in the 1940s. CP 23, 342, 412. Further, the TIL

was merely an information sheet listing conceivable places where asbestos might have been used. It says nothing about asbestos being "necessary" in any particular product, nor is that a permissible inference from the document. Furthermore, any suggestion that anything said in the TIL about land-based turbines is applicable to the military applications of decades earlier would be the rankest speculation.

Similarly, plaintiffs cite to a letter from GE's Components and Materials Group referring to the potential of "very small" asbestos exposures to have serious health effects. (AOB, p. 6.) First, the letter has nothing to do with the issue of whether asbestos was necessary for the marine turbines to function. Second, the article merely summarizes a *New York Times* article. Third, the letter plaintiffs cite is dated 1973 – twenty-one years after Woo left the *James O'Hara*. CP 372.

Finally, plaintiffs point to testimony from Wayne Nettekoven and Everett Cooper, which they say shows "GE's routine presence at and role in connection with shipyard repairs of GE turbines." (AOB, p. 7.) Plaintiffs argue that this supports the notion that GE could have monitored the activities of the Navy and the Maritime Commission and intervened to give military personnel additional warnings. Plaintiffs fail to note that Nettekoven's testimony relates to his experiences working at Todd Shipyards between 1959 and 1971 – well after the relevant period. CP

190. Nettekoven conceded that he had no knowledge of anything that happened at the shipyards before his arrival in 1959. CP 513. The Cooper testimony plaintiffs cite relates to an even later time – Cooper claims that GE personnel were involved in turbine repairs and maintenance while Cooper was working for SeaLand between 1966 and 1988. CP 144.

**B. Procedural History**

Plaintiff Yeanna Woo, the adult daughter and personal representative of Woo’s estate, and Woo’s surviving spouse Jean Oi Woo, filed suit against GE and various other defendants, alleging that Woo’s mesothelioma had been caused by exposure to asbestos for which each defendant was responsible. CP 1.

GE sought summary judgment on the grounds that the plaintiffs had no evidence sufficient to raise a triable dispute of fact that Woo had been exposed to any asbestos for which GE was responsible. Opposing the motion, plaintiffs filed nearly all of the materials which they subsequently refiled in relation to GE’s second motion for summary judgment and now urge on appeal, excluding only partial transcripts from three depositions taken after the first motion for summary judgment (Everett Cooper, CP 149-167, Wayne Nettekoven, CP 200-209, and David Skinner, CP 402-457); a 2014 declaration from Yeanne Woo, CP 471-72, a 2014 order of the Washington Supreme Court denying Todd Shipyards’

motion for interlocutory review, CP 461-467; a photo of Woo and a brief deposition excerpt from 2007. CP 468, 310-317.

The Superior Court found that there was a reasonable inference that Woo was present on ships with GE's turbines on them, and that there was asbestos on those ships. CP 574. However, the Court declined to hold that the plaintiffs had established a triable dispute of fact with respect to duty and causation. *Id.* Rather than granting GE's motion outright, the Superior Court granted the plaintiffs' request for a Rule 56(f) continuance to give plaintiffs time to obtain additional documents and take a CR 30(b)(6) deposition from GE. CP 481-82.

GE produced David R. Skinner in response to that order, and then renewed its motion for summary judgment. In opposition to GE's second motion, the plaintiffs chose not to file so much as a page of GE's CR 56(f) document production, or a word of testimony from Skinner. Rather, they merely refiled much the same materials they had relied upon in unsuccessfully opposing GE's original motion.

The Court granted GE's motion for summary judgment on April 24, 2015. CP 576-77. The Court explained its rationale at the close of the hearing:

There is not any specific evidence linking GE personnel to any specific repairs where Mr. Woo is present on any particular ship. There is no evidence of any product, of any

material specifically linking GE in terms of supplying, installing, or specifying asbestos in the facts of this case. There is some brochures, some information from other dates. There is some information from land turbines. There's not any specific evidence supplied that specifies the kind of evidence the Court needs to link GE to supplying, installing, requiring asbestos.

This Court would find that the case is governed by *Simonetta* and *Braaten* and not *Macias*. Those cases hold when the defendant's products are installed or encased in insulation. There has to be a tie that is shown when routine maintenance or replacement is done and the insulation is removed. There is not that tie shown here. And I would grant the motion of summary judgment as to GE. I don't find that there's a specific tie shown to GE as to the insulation. And I think *Simonetta* and *Braaten* do control, and not *Macias* in this case.

Verbatim Transcript of Proceedings (Apr. 24, 2015) 29-30.

Plaintiffs filed their Notice of Appeal on December 23, 2015. CP 5789-81.

#### IV. SUMMARY OF ARGUMENT

According to plaintiffs, the Superior Court erred by finding that this case was governed by *Simonetta* and *Braaten*, where the Washington Supreme Court held that a manufacturer has no duty to warn with respect to asbestos insulation, packing and/or gaskets it did not manufacture, sell or distribute. Instead, they claim, the case was governed by *Macias*, which established a limited exception to *Simonetta* and *Braaten*.

Plaintiffs are mistaken. The *Macias* court held that *Simonetta* and *Braaten* do not apply to a product which was specifically designed to be

used with asbestos and which necessarily exposed users to asbestos every single time it is used as directed by the manufacturer. The *Macias* exception has no possible application here, since there is no evidence that GE's turbines were specially designed to be used with asbestos, or that the turbines exposed users to asbestos every time they were used.

The bright-line rule adopted in *Simonetta* and *Braaten* is consistent with the great weight of authority around the country. Decisions of the California Supreme Court, the Sixth Circuit, and the federal asbestos MDL court have all thoroughly analyzed the issues and endorsed the same rule found in *Simonetta* and *Braaten*. These cases have been followed dozens of times in state and federal courts, including in a number of cases involving negligence and products liability claims involving GE's marine turbines. The Superior Court properly declined to disregard this wealth of persuasive authority.

The plaintiffs urge the Court to disregard *Simonetta* and *Braaten* and instead follow a limited line of outlier cases from other jurisdictions. But each of the cases cited by plaintiffs is inconsistent with the undisputed facts, Washington law, or both. Several imposed a duty of care based solely on the court's view that the use of third-party asbestos-containing insulation post-sale was foreseeable. Others involved products which, unlike GE's turbines, contained asbestos-containing insulation, packing

and/or gaskets when they were delivered by their original manufacturers. Still others involved evidence that a defendant had specifically mandated the use of asbestos-containing insulation. Another denied summary judgment on the grounds that the relevant state does not recognize the rule adopted by the Supreme Court in *Simonetta* and *Braaten*.

Even if GE could somehow be said to have had a duty of care in relation to asbestos-containing insulation, packing and/or gaskets, it neither manufactured, sold or distributed, summary judgment should be affirmed on the alternative grounds that plaintiffs cannot raise a triable dispute of fact regarding the element of causation. Woo's testimony was not preserved before his death in 2009, none of his coworkers have ever been located, and each of the plaintiffs' witnesses has admitted under oath that he knows absolutely nothing of where Woo was or what he was working on for so much as a single day of his career. Nor do any of the plaintiffs' witnesses have any knowledge of the maintenance or repair history of any of the GE turbines on the three ships at issue.

Finally, plaintiffs argue that GE's motion for summary judgment should have been denied out of hand on the grounds that GE never shifted the burden of production to plaintiffs. The plaintiffs are mistaken. GE described the grounds for its motion in detail – plaintiffs' inability to prove duty or causation – and pointed to the relevant aspects of the record

showing that plaintiffs could prove neither. Nothing more was required.

The judgment was correct and should be affirmed.

## V. ARGUMENT

### A. The Court Reviews the Superior Court's Judgment *De Novo*

The Court reviews the judgment *de novo*. *Bowers v. Marzano*, 170 Wn. App. 498, 505 (2012). Summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*; *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243 (2008). The court considers all facts in the light most favorable to the nonmoving party. *Vallandigham v. Claver Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26 (2005).

The nonmoving party must make a showing sufficient to establish each element on which that party will bear the burden of proof at trial. *Miller v. Likins*, 109 Wn. App. 140, 145 (2001). If the nonmoving party fails to make a showing sufficient to establish the existence of an essential element, summary judgment is proper, since a complete failure of proof with respect to an essential element renders all other facts immaterial. *Young v. Key Pharm., Inc.*, 112 Wn. 2d 216, 225 (1989). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits taken at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13

(1986). An affidavit expressing an expert's opinion does not create a genuine dispute of fact when the affidavit amounts to mere speculation or conclusory statements. *Bowers*, 170 Wn.App. at 505; see *Guile v. Ballard Cmt. Hosp.*, 70 Wn. App. 18, 25 (1993).

A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to those facts. Alternatively, the party may meet its burden by "pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Guile*, 70 Wn. App. at 21; *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 171 (1991). For the second option, "the requirement of setting forth specific facts does not apply." *Guile*, 70 Wn. App. at 23. Instead, the moving party must identify those portions of the record which demonstrate the failure of proof. *Id.* at 22. "It is difficult to prove a negative, and in some circumstances the only way that the moving party will be able to show that there is no material issue of fact is by way of reply to the responding party's citations to the record." *Id.*

**B. The Supreme Court’s *Simonetta-Braaten* Rule Bars Plaintiffs’ Claim against GE**

**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**

The essential elements of a cause of action for negligence under Washington law are duty, breach, injury and causation. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661 (2010). Whether or not the defendant owed the plaintiff a duty of care is a threshold question of law for the court, not for the jury. *Folsom v. Burger King*, 135 Wn. 2d 658, 671 (1998); *Stenger v. State*, 104 Wn. App. 393, 399 (2001).

The trial court properly found that GE owed Woo no duty pursuant to two landmark cases decided on the same day by the Washington Supreme Court: *Simonetta v. Viad Corp.*, *supra*, 165 Wn.2d 341 and *Braaten v. Saberhagen Holdings*, *supra*, 165 Wn.2d 373.

The plaintiff in *Simonetta* worked as a machinist aboard a Navy ship (the same rank held by Woo when he served aboard the *George R. MacKenzie*). As part of his job responsibilities, he performed maintenance on an evaporator which had been sold as “bare metal” by the defendant and later insulated by Navy personnel with asbestos products manufactured by a third party. *Simonetta*, 165 Wn.2d at 346. Like Woo, the plaintiff argued that the evaporator required insulation to function

properly, that the defendant knew that the Navy would use asbestos-containing insulation, and that necessary maintenance would involve disturbing the insulation. On appeal, the Court of Appeals agreed with the plaintiff, finding that the defendant was not entitled to summary judgment. *Id.* at 349-50.

The Supreme Court reversed, holding that defendants have a duty to warn sufficient to support a negligence claim only with respect to products that the defendant manufactured, sold or supplied. *Id.* at 353-54. The Court also held that since it was undisputed that the defendant had sold the evaporator to the Navy without insulation, the relevant product for purposes of a strict liability claim was the uninsulated evaporator. Since the uninsulated evaporator was not defective, the plaintiff's strict liability claim failed. *Id.* at 362-63.

The plaintiff's decedent in *Braaten* had been a pipefitter aboard various Navy ships. As part of his job, he removed and reapplied asbestos-containing gaskets, insulation and packing to defendants' pumps and valves. *Braaten*, 165 Wn.2d at 382. The decedent testified that he never worked on pumps and valves when they were new, and that it was impossible to tell how many times the original gaskets, insulation and packing had been removed and replaced by the time he began working on any particular piece of machinery. *Id.* The trial court granted defendants'

motion for summary judgment, but the Court of Appeals reversed on the grounds that the defendants knew that their products would be insulated with asbestos and that maintenance of their equipment would result in exposure to asbestos. *Id.* at 382-83.

The Supreme Court reversed the Court of Appeals. The holding in *Simonetta* finding no duty to warn with respect to products manufactured and sold by third parties, was “in accord with the majority rule nationwide,” the Court wrote. *Id.* at 385. Since the defendants in *Braaten* did not manufacture, sell or distribute the asbestos-containing insulation, packing and gaskets applied to their products, the Court held that the defendants had no duty to warn as a matter of law. *Id.* at 389-90.

The Supreme Court further held that the defendants had no duty to warn with respect to replacement packing and gaskets manufactured by third parties:

[T]hese manufacturers should not be held liable for harm caused by asbestos-containing material included in their products postmanufacture. It does not comport with principles of strict liability to impose on manufacturers the responsibility and costs of becoming experts in other manufacturers’ products. Here, for example there is evidence that more than 60 types of packing have been approved for naval use.

*Id.* at 394.

Here the Superior Court held that GE owed Woo no duty of care

pursuant to *Simonetta* and *Braaten* because plaintiffs had no admissible evidence that Woo had been exposed to asbestos-containing insulation, packing or gaskets which GE manufactured, sold or distributed. That holding was plainly correct and should be affirmed.

The plaintiffs respond that the *Simonetta-Braaten* rule is inapplicable because GE's turbines allegedly needed asbestos-containing insulation in order to function properly,<sup>4</sup> or because GE purportedly knew or should have known that the Navy and Maritime Commission would use asbestos-containing insulation in connection with the turbines. (AOB at 13-15.) But plaintiffs are arguing exactly what the Court of Appeals held in *Simonetta* and *Braaten*. *Simonetta*, 165 Wn.2d at 349-50; *Braaten*, 165 Wn.2d at 382-83. In each case, the Supreme Court considered the argument plaintiffs are making herein and squarely rejected it. *Simonetta*, 165 Wn.2d at 353-54; *Braaten*, 165 Wn.2d at 385, 389-90.

**2. *Macias* Distinguished *Simonetta* and *Braaten* on Limited Grounds with No Application Here**

Plaintiffs' principal argument on appeal is that the Supreme Court gutted the *Simonetta-Braaten* rule in *Macias v. Saberhagen Holdings, Inc.*,

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<sup>4</sup> No evidence in the record supports the plaintiffs' argument. *Supra* at 4-5, 8-9. But even if plaintiffs had pointed to evidence creating a triable dispute of fact on the issue, the plaintiff's assertion is irrelevant under *Simonetta* and *Braaten*.

*supra*, 175 Wn.2d 402. Plaintiffs are mistaken. The *Macias* Court did not purport to overrule *Simonetta* or *Braaten*. Rather, the Court distinguished its two earlier decisions on highly unusual facts with no possible application here.

Plaintiff in *Macias* was a tool keeper in a shipyard. One of his responsibilities was to collect respirators used by workers to filter out dangerous substances such as asbestos, welding and paint fumes and dust, remove and dispose of used and dirty filters and thoroughly clean the respirators for their next use. *Id.* at 406. When the plaintiff contracted mesothelioma, he sued, among others, the manufacturers of the respirators, alleging that the respirators were defective because of their lack of warnings relating to asbestos. *Id.* at 406-07.

The *Simonetta-Braaten* rule did not bar the plaintiffs' suit, the Supreme Court held:

Critically . . . 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.

*Id.* at 414.

The valves, pumps and evaporator in *Simonetta* and *Braaten* “only happened to be insulated by asbestos products because the Navy chose to insulate the equipment on its ships with asbestos products.” *Id.* But the

whole purpose of the respirators at issue in *Macias* was to collect and trap asbestos fibers before workers breathed them in. *Id.* at 415. They were designed to be reused, and for that to be possible the dirty filters had to be removed and the respirators cleaned. *Id.* In other words, in an environment which contained any asbestos at all, every single use of the respirators was going to wind up exposing someone to asbestos. *Id.* (“[T]he very purpose of the respirators would, of necessity, lead to high concentrations of asbestos . . . and in order to reuse them as they were intended . . . this asbestos had to be removed”).

*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. GE’s turbines were not; even assuming that the turbines at issue here were in fact insulated with asbestos – which plaintiffs have not shown - the turbines “only happened to be insulated by asbestos products because the Navy chose to insulate the equipment on its ships with asbestos products.” *Id.* When used in exactly the manner and for the purpose intended, the respirators allegedly exposed the plaintiff to asbestos fibers, *id.* at 414-15; it is hardly a stretch to suggest that an asbestos protective device which exposes people to asbestos is defective. GE’s turbines, of course, were not built to collect asbestos fibers from the air, and they could be used as intended for years without running any risk

of exposure to asbestos from any insulation or gaskets which the Navy or Maritime Commission might have chosen to use with them.<sup>5</sup>

Plaintiffs herein are not seeking to have this Court apply *Macias* as written. They are asking the Court to treat *Macias* as having overruled *Simonetta* and *Braaten sub silentio* (although they fail to cite a single authority which has read the three cases in the way they do). Nowhere in their brief do they explain what is left of the *Simonetta-Braaten* rule if *Macias* is broadly interpreted in the way they suggest. This is because their central argument – that GE owed Woo a duty merely because it allegedly knew or should have known that asbestos would inevitably be used to insulate its turbines – was considered and squarely rejected in both *Simonetta* and *Braaten*. Plaintiffs’ argument cannot be accepted without rendering *Simonetta* and *Braaten* dead letters. This Court should decline the plaintiffs’ invitation to simply disregard *Simonetta* and *Braaten*, two quite recent decisions of the Supreme Court, when the *Macias* majority explained quite clearly how all three decisions could be read together.

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<sup>5</sup> Plaintiffs concede as much, claiming that the *Macias* exception to *Simonetta-Braaten* should apply because “the insulation [on the turbines] deteriorated and gave off asbestos *over time* while being used.” (AOB, p. 14)(emphasis added). Even if that were true – which it is not – some risk of eventual release of asbestos does not trigger the *Macias* exception. The respirators in *Macias* released asbestos fibers every single time they were used and cleaned in precisely the manner the manufacturer intended.

Because nothing in the record supports the application of the limited *Macias* exception, the Superior Court properly held that *Simonetta-Braaten* applied, mandating a finding that GE owed no duty of care to Woo.

**3. Creating a Post-Sale Duty to Warn Extending to Maritime Personnel is Incompatible with Washington’s Adoption of Section 402A of the Restatement**

The Washington Supreme Court has adopted Section 402A of the Restatement (Second) of Torts as the law of Washington regarding strict liability. *Simonetta*, 165 Wn.2d at 354-55. Under Section 402A, a product is either defective or not “at the time it was manufactured and sold.” *Romero v. Intl. Harvester Co.*, 979 F.2d 1444, 1450 (10<sup>th</sup> Cir. 1992); *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4<sup>th</sup> Cir. 1991) (product defect is measured against a standard existing at the time of sale). The plaintiffs’ theory that a duty to warn can arise post-sale based upon what insulation, packing and gaskets the purchaser of GE’s turbines decides to use in conjunction with the turbines cannot be reconciled with that standard.

**4. A Clear Majority of Federal and State Courts Are in Agreement With the *Simonetta-Braaten* Rule**

According to plaintiffs, “[m]ost of the appellate decisions and a large number of trial court decisions favor” their invitation to this Court to broadly interpret the *Macias* exception to entirely swallow up the

*Simonetta-Braaten* rule. (AOB, p. 17.)

Nonsense. The rule that “a manufacturer has no duty to warn about hazards associated with a product it did not manufacture or distribute” – usually known in cases around the country as the “bare metal defense”<sup>6</sup> – “reflects the clear majority view.” *O’Neil v. Alfa Laval, Inc.*, 2014 WL 5341878, \*5 (2014).

The California Supreme Court squarely endorsed the bright-line rule adopted in *Simonetta* and *Braaten* in *O’Neil v. Crane Co.*, 53 Cal.4<sup>th</sup> 335 (2012). Plaintiff was a naval officer who supervised enlisted men repairing equipment in the engine and boiler rooms of his ship. Defendants manufactured valves and pumps used in the ship. *Id.* at 342-43. Although defendants’ products contained asbestos packing and gaskets when they were sold to the Navy, it was undisputed that the original packing and gaskets had been replaced by the time of the plaintiffs’ exposure to products made by third parties. *Id.* at 347-50. “Accordingly, even assuming the inclusion of asbestos makes a product defective, no defect inherent in defendants’ pump and valve products caused O’Neil’s disease.” *Id.* at 350. Nor were the defendants’ products

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<sup>6</sup> Although this term is commonly used in the cases, several courts have pointed out that it is something of a misnomer, since the “bare metal defense” simply involves a defendant pointing out that the plaintiff cannot, as a matter of law, establish the essential element of duty.

defective, the Court found, because they were designed to be used with asbestos-containing components. “The products were designed to meet the Navy’s specifications.” *Id.* Nor was there any evidence that the products specifically *required* asbestos-containing insulation, packing and gaskets, as opposed to insulation, packing and gaskets made of some other material – as demonstrated by the fact that the defendants made valves and gaskets with no asbestos-containing parts. “As alternative insulating materials became available, the Navy could have chosen to replace worn gaskets and seals in defendants’ products with parts that did not contain asbestos.” *Id.*

“No case law . . . supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer,” the Court noted. *Id.* at 352, *quoting In re Deep Vein Thrombosis*, 356 F.Supp.2d 1055, 1068 (N.D. Cal. 2005).

The Court distinguished an earlier decision of the California Court of Appeal, *Tellez-Cordova v. Campbell-Haufeld/Scott Fetzger Co.*, 129 Cal.App.4<sup>th</sup> 577 (2004) in a way which supports GE’s analysis of *Simonetta*, *Braaten* and *Macias* above. *Tellez-Cordova* involved power tools designed to be used with abrasive discs for grinding and sanding

metals. The Supreme Court pointed out that the tools in *Tellez-Cordova* “could *only* be used in a potentially injury-producing manner. Their sole purpose was to grind metals in a process that inevitably produced harmful dust.” *Id.* at 361 (emphasis in original). Furthermore, “it was the action of the power tools in *Tellez-Cordova* that *caused* the release of harmful dust, even though the dust itself emanated from another substance.” *Id.* (emphasis in original). “Recognizing a duty to warn was appropriate in *Tellez-Cordova* because there the defendant’s product was intended to be used with another product *for the very activity that created a hazardous situation.*” *Id.* at 361 (emphasis in original). But this was not true of defendants’ pumps and valves; they were routinely used in a non-injury producing manner, and nothing about the action of the pumps and valves directly and inevitably caused the release of harmful fumes. *Id.* The same is true of GE’s turbines here.

Nor was the plaintiffs’ allegation that the manufacturer should have foreseen that its product would be used with the injury-producing product of a third party sufficient grounds for imposing a duty, according to the Supreme Court. Such a rule could “easily lead to absurd results,” the Court found. “It would require match manufacturers to warn about the dangers of igniting dynamite, for example . . . [and] manufacturers of the saws used to cut insulation would become the next targets of asbestos

lawsuits.” *Id.* at 361.

*O’Neil* was consistent with earlier California authorities. For example, the plaintiff in *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal.App.4<sup>th</sup> 564 (2009) was exposed to asbestos in conjunction with the ship’s propulsion system. It was undisputed that all asbestos-containing materials originally supplied by the defendants with their products had been removed from the ship by the time of plaintiff’s exposure; the asbestos-containing materials at issue were manufactured by third parties. The Court of Appeal held that defendants had no duty to plaintiff because they had not manufactured, sold or distributed the asbestos-containing materials to which the plaintiff had been exposed. *Id.* at 579-80; *accord*, *Garman v. Magic Chef, Inc.*, 117 Cal.App.3d 634, 639 (1981) (stove manufacturer had no liability in connection with explosion caused by leak in copper tubing manufactured by third party); *In re Deep Vein Thrombosis*, 356 F.Supp.2d at 1068 (manufacturer of airliner under no continuing duty to warn of risk of deep vein thrombosis from sitting for long periods in airline seats).

The federal asbestos MDL court addressed the bare metal defense in detail in *Conner v. Alfa Laval, Inc.*, 842 F.Supp.2d 791 (E.D. Pa. 2012). The lead plaintiff alleged that he had been exposed to asbestos products used with GE marine turbines aboard his Navy ship. The facts in *Conner*

were indistinguishable from plaintiffs' allegations here: "GE manufactured marine turbines that required exterior insulation, which likely would have contained asbestos, and that required asbestos-containing gaskets to seal the turbines to adjoining equipment and piping. In some instances, GE originally supplied gaskets to the Navy along with its turbines." *Id.* at 795. After reviewing in detail the Federal and state court authorities, and relying in part upon the Washington Supreme Court's decisions in *Simonetta* and *Braaten*, the court held that "under maritime law, a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute." *Id.* at 801.

Like the plaintiffs here, the plaintiffs in *Conner* claimed that the defendants' products "required" asbestos insulation, gaskets and packing, that defendants sometimes supplied asbestos-containing replacement parts, and that routine maintenance might expose the sailors to asbestos-containing products manufactured by third parties. *Id.* at 803. But none of that mattered, the Court held:

Plaintiffs have not pointed to evidence of record to create a genuine issue of material fact as to whether Defendants manufactured or distributed the asbestos products to which Decedents were allegedly exposed. Therefore, Defendants are entitled to summary judgment on Plaintiffs' products-liability claims based on strict liability and negligence.

*Id.* at 803.

The Washington Supreme Court in *Simonetta* and *Braaten*, the California Supreme Court in *O'Neil* and the MDL court in *Conner* all discussed at length and relied upon the Sixth Circuit's opinion in *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6<sup>th</sup> Cir. 2005). There, the plaintiff was employed for thirty years as a merchant seaman, working as an engineer aboard numerous vessels. Although the valves manufactured by defendant originally contained asbestos packing and gaskets, it was clear that any asbestos plaintiff might have been exposed to from the valves came from replacement gaskets and packing manufactured by third parties. The court held that a defendant had no duty to warn of defects in material manufactured by a third party and "'attached or connected'" to its product post-sale. *Id.* at 495, quoting *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 375 (6<sup>th</sup> Cir. 2001). Summary judgment for various additional defendants was affirmed on similar grounds. *Lindstrom*, 424 F.3d at 495-97.

These landmark cases have been cited and followed again and again by federal and state courts across the country. For example, only last month, the court granted summary judgment in *Moss v. Trane U.S., Inc.*, 2016 WL 916435 (W.D. Wis. 2016). There, plaintiff's decedent had been exposed to asbestos used to line industrial boilers. It was undisputed

that the decision of how to insulate boilers, including what material to use, was the responsibility of the person purchasing, installing and maintaining the boilers. The plaintiff argued that the defendant should have foreseen the use of asbestos-containing insulation, but the court held that it did not matter: “imposing a duty to warn based on foreseeability alone is inconsistent with the well-recognized tort principle that there is no general ‘duty to rescue’ absent a judicially-recognized special relationship.” *Id.* at \*4. The court found that public policy counseled strongly against plaintiffs’ theory (which is also the plaintiffs’ theory in this case):

Of particular importance in this case is the sixth factor: whether ‘allowing recovery would have no sensible or just stopping point.’ (Citation omitted). For example, if plaintiff were to hold American Standard liable for failing to warn about the risks of asbestos based on nothing other than the fact that it was ‘foreseeable’ that asbestos insulation might be used, nothing would stop plaintiff from next filing suit against the steel mill that supplied the steel used to construct the Kewanee boilers. (Certainly the steel mill could foresee that American Standard would use the steel to make boilers, and that those boilers might be insulated with dangerous asbestos.) Plaintiff’s expansive failure to warn theory would soon find its way into other industries as well: paint brush manufacturers will be sued for failing to warn individuals about the risks associated with lead paint; companies that make cigarette lighters will face suit for failing to warn people about the dangers of smoking; and orange juice distributors will be expected to warn consumers of alcohol-related dangers because it is foreseeable that someone might mix orange juice with vodka.

*Id.* at \*7.

The court found that an additional factor – “whether allowing recovery would place too unreasonable a burden upon the tortfeasor” – also counseled against imposing a duty to warn about products based simply upon foreseeability:

It is simply too much to demand that a product manufacturer anticipate which third-party products will be used in connection with its own, determine how frequently all of those products will be used, investigate the risks associated with all of those products and then craft warnings or product use instructions for both the sale use of the manufacturers’ products *and* the safe use of the third-party’s components.

*Id.* at \*7; *O’Neil v. Crane*, 53 Cal.4<sup>th</sup> at 363.

In the additional cases cited below, the court granted summary judgment on the grounds that the plaintiff was unable to demonstrate exposure to any asbestos-containing product manufactured, sold or distributed by the defendant.<sup>7</sup> Courts have applied *Conner* and the other

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<sup>7</sup> *Presley v. Bill Vann Co.*, 2015 WL 4641538, \*2-3 (S.D. Ala. 2015); *Hammell v. Air & Liquid Systems Corp.*, 2015 WL 4158766, \*7 (D.N.J. 2015); *Henry v. American Honda Motor Co., Inc.*, 2014 WL 6910490, \*7 (D.R.I. 2014); *Thurmon v. A.W. Chesterton*, 61 F.Supp.3d 1280, 1285-86 (N.D. Ga. 2014); *O’Neal*, 2014 WL 5341878, \*5-6; *Festa v. Worthington Pumps, Inc.*, 2014 WL 6746840, \*1, n.1 (E.D. Pa. 2014); *Carper v. General Electric Co., Inc.*, 2014 WL 6736227 (E.D. Pa. 2014); *Robbins v. Air & Liquid System Corp.*, 2014 WL 6746796, \*1, n.1 (E.D. Pa. 2014); *Duenas v. General Electric Co.*, 2014 WL 6747102, \*1, n.1 (E.D. Pa. 2014); *Kelly v. CBS Corp.*, 2014 WL 6735121, \*1, n.1 (E.D. Pa. 2014); *Crews v. Air & Liquid Systems Corp.*, 2014 WL 639685, \*3-5 (N.D.N.Y. 2014); *Cabasug v. Crane Co.*, 989 F.Supp.2d 1027, 1039, 1041, 1043 (D. Haw. 2013); *Sheppard v. CBS Corp.*, 2013 WL 9796598, \*1, n.1 (E.D. Pa.

authorities a number of times to grant summary judgment to GE on negligence and products liability claims arising from its marine turbines.

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2013); *Marshall v. 3M Co.*, 2013 WL 9796591, \*1, n.1 (E.D. Pa. 2013); *Dalton v. 3M Co.*, 2013 WL 4886658, \*7, 10 (D. Del. 2013); *Morgan v. Bill Vann Co., Inc.*, 969 F.Supp.2d 1358, 1367-71 (S.D. Ala. 2013); *Case v. America Standard, Inc.*, 2013 WL 5548803, \*1, n.1 (E.D. Pa. 2013); *Doucet v. Asbestos Corp.*, 2013 WL 5548678, \*1, n.1 (E.D. Pa. 2013); *Donn v. A.W. Chesterton Co., Inc.*, 2014 WL 2477049, \*1, n.1 (E.D. Pa. 2013); *Hall v. A.W. Chesterton Co., Inc.*, 2013 WL 2477053 (E.D. Pa. 2013); *Pace v. 3M Co.*, 2013 WL 1890385, \*1, n.1 (E.D. Pa. 2013); *Payne v. A.W. Chesterton Co.*, 2013 WL 1880796, \*1, n.1 (E.D. Pa. 2013); *Mattox v. American Standard, Inc.*, 2012 WL 7760060, \*1, n.1 (E.D. Pa. 2012); *Nelson v. A.W. Chesterton Co., Inc.*, 2012 WL 7761235, \*1, n.1 (E.D. Pa. 2012); *Grammer v. Advocate Mines, Ltd.*, 2012 WL 7760442, \*1, n.1 (E.D. Pa. 2012); *Wannall v. Alfa-Laval, Inc.*, 2012 WL 5389824, \*1, n.1 (E.D. Pa. 2012); *Campbell v. A.W. Chesterton Co.*, 2012 WL 5392779, \*1, n.1 (E.D. Pa. 2012); *McNaughton v. General Electric Co.*, 2012 WL 5395008, \*1, n.1 (E.D. Pa. 2012); *Cardarg v. Aerojet General Corp.*, 2012 WL 3536243, \*1, n.1 (E.D. Pa. 2012); *Faddish v. Buffalo Pumps*, 881 F.Supp.2d 1361, 1365, 1368 (S.D. Fla. 2012); *Crater v. 3M Co.*, 2012 WL 2989146, \*1, n.1 (E.D. Pa. 2012); *Robertson v. Carrier Corp.*, 2012 WL 2989171, \*1, n.1 (E.D. Pa. 2012); *Hays v. A.W. Chesterton Co.*, 2012 WL 3096621, \*1, n.1 (E.D. Pa. 2012); *Hughes v. Foster Wheeler LLC*, 2012 WL 2914276, \*1, n.1 (E.D. Pa. 2012); *Serini v. A.W. Chesterton Co.*, 2012 WL 2914188, \*1, n.1 (E.D. Pa. 2012); *Miller v. A.W. Chesterton Co.*, 2012 WL 2914180, \*1, n.1 (E.D. Pa. 2012); *Lyautey v. Alfa Laval, Inc.*, 2012 WL 2877389, \*1, n.1 (E.D. Pa. 2012); *Floyd v. Air & Liquid Systems Corp.*, 2012 WL 975665, \*1, n.1 (E.D. Pa. 2012); *Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797, 801-02 (S.D.N.Y. 2011); *Ferguson v. Lorillard Tobacco Co., Inc.*, 2011 WL 4910416, \*1, n.1 (E.D. Pa. 2011); *In re Asbestos Products Liability Litigation (Sweeney)* 2011 WL 346822, \*6-7 (E.D. Pa. 2011); *Reed v. American Steel & Wire Corp.*, 2014 WL 3674678, \*2-3 (Ga. Super. 2014); *In re Asbestos Litigation (Milstead)*, 2012 WL 1996799, \*2-3 (Del. Super. 2012); *In re Asbestos Litigation (Wolfe)*, 2012 WL 1415706, \*4 (Del. Super. 2012); *In re Asbestos Litigation (Howton)*, 2012 WL 1409011, \*5 (Del. Super. 2012).

*E.g., Shearer v. A.W. Chesterton Co.*, 2015 WL 3889366, \*5-6 (D.N.J. 2015); *Kilgore v. Allen-Bradley Co.*, 2014 WL 7648956, \*1, n.1 (E.D.Pa. 2014); *Radzwilowicz v. General Electric Co.*, 2015 WL 6736336, \*1, n.1 (E.D. Pa. 2014); *Barnes v. Foster Wheeler Corp.*, 2014 WL 2965699, \*4-5 (D.N.J. 2014); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 2014 WL 1093678, \*2-3 (E.D. La. 2014); *Trujillo v. CBS Corp.*, 2013 WL 9796586, \*1, n.1 (E.D. Pa. 2013); *Wingfield v. Georgia Pacific Corp.*, 2012 WL 7760174, \*1, n.1. (E.D. Pa. 2012); *Deuber v. Asbestos Corp. Limited*, 2012 WL 7761244, \*1, n.1 (E.D. Pa. 2012). These additional cases further support GE’s position, holding that the “bare metal defense” did not justify summary judgment on the grounds that the plaintiffs there *did* produce evidence of exposure to asbestos-containing materials manufactured, sold or distributed by the defendant.<sup>8</sup>

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<sup>8</sup> *Nelson v. Air & Liquid Systems Corp.*, 2014 WL 6982476, \*13-14 (W.D. Wash. 2014); *Sellers v. Air & Liquid Systems Corp.*, 2014 WL 6736347, \*1, n.1 (E.D. Pa. 2014); *Kite v. Bill Vann Co., Inc.*, 2014 WL 6735191, \*1, n.1 (E.D. Pa. 2014); *Bell v. Arvin Meritor, Inc.*, 2013 WL 5548481, \*1, n.1 (E.D. Pa. 2013); *Bolton v. Air & Liquid Systems, Inc.*, 2013 WL 2477239, \*1, n.1 (E.D. Pa. 2013); *Lowe v. General Electric Co.*, 2012 WL 2989163, \*1, n.1 (E.D. Pa. 2012); *Rabovsky v. Foster Wheeler, LLC*, 2012 WL 2913799, \*1, n.1 (E.D. Pa. 2012); *Various Plaintiffs v. Various Defendants*, 856 F.Supp.2d 703, 712 (E.D. Pa. 2012); *Abbey v. Armstrong Intl., Inc.*, 2012 WL 975829, \*1, n.1 (E.D. Pa. 2012).

**5. The Cases Relied Upon by Plaintiffs Are Inconsistent with *Simonetta, Braaten* and the Weight of Authority Across the Country Applying the Bare Metal Defense**

The plaintiffs urge the Court to disregard *Simonetta, Braaten* and the weight of authority discussed above, and instead follow a limited line of outlier cases imposing a duty of care on grounds inconsistent with Washington law. All of the cases cited by the plaintiffs are distinguishable for a variety of fundamental reasons.

*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. Pa. 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) each imposes 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. The Washington Supreme Court squarely held in *Simonetta* that foreseeability has "no bearing" 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.

The pumps, valves, machine parts and ships involved in *May*, 446 Md. at 5-6, *Hughes v. A.W. Chesterton Co.*, 435 N.J. Super. 326, 341 (App. Div. 2014), *Quirin v. Lorillard Tobacco Co.*, 17 F.Supp.3d 760, 769-70 (N.D. Ill. 2014), *Spychalla v. Boeing Aerospace Operations, Inc.*, 2015 3504927, \*3 (E.D. Wis. 2015) and *Salisbury v. Asbestos Corp. Ltd.*, 2014 WL 345214 \*1, n.1 (E.D. Pa. 2014)<sup>9</sup> contained asbestos insulation, packing and/or gaskets when they were delivered by the manufacturer to the buyer. The *May* and *Quirin* courts emphasized that a manufacturer could have a duty to warn only where, *inter alia*, “asbestos is a critical part of the pump sold by the manufacturer.” *May*, 446 Md. at 25; *Quirin*, 17 F.Supp.3d at 769-70. It is undisputed that GE’s turbines contained no asbestos at all when they were delivered to the buyers. CP 282.

The Kentucky Court of Appeals found a potential duty of care in *Branon v. General Electric Co.*, 2005 WL 1792122, \*2, n.6 (Ky. 2005)

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<sup>9</sup> *Salisbury* is distinguishable on the additional grounds that it involved the duty of care owed under maritime law by a shipbuilder. Shipbuilders are not subject to strict products liability under maritime law because a Navy ship is not a “product,” but have a duty to warn sounding in common law negligence whenever a failure to warn would not be reasonable under the circumstances. *Salisbury*, 2014 WL 345214, \*1, n.1. Plaintiffs cite no law establishing that such a standard applies to negligence claims against entities like GE under Washington law, and none exists.

based upon its (incorrect) conclusion that GE had specified the use of asbestos-containing insulation with its turbines. As discussed above, there is no evidence here that GE specified the use of any particular type of insulation with respect to the three ships at issue. CP 27. The court in *Abate v. Advanced Auto Parts, Inc.*, 2014 WL 683843, \*3 (Ct. Super. 2014) denied summary judgment on the grounds that defendants' lathes and grinders always released harmful dust when used exactly as intended. As noted above in connection with *Macias*, GE's turbines can be used as intended for years without exposing anyone to asbestos. *Supra* at 23-25. Finally, the court in *Sparkman v. Goulds Pumps, Inc.*, 2015 WL 727937, \*1, n.1 (D.S.C. 2015), denied summary judgment based on its view that South Carolina does not recognize the bare metal defense. But the Supreme Court made it clear in *Simonetta* and *Braaten* that Washington does.

Nothing about the limited authorities cited by plaintiffs offers any reason to stray from the clear rule set forth by the Supreme Court only eight years ago in *Simonetta* and *Braaten*. Plaintiffs have failed to show that Woo was harmed by any asbestos-containing product manufactured, sold or distributed by GE. GE can have no duty to warn as a matter of law with respect to any such third-party product. The limited exception to this rule established in *Macias* for products which must necessarily release

asbestos every time they are used as intended cannot apply to the undisputed facts here. Since plaintiffs cannot establish an essential element of their claims, summary judgment must be affirmed.

**C. Even If Washington Law Permitted Imposition of a Duty of Care With Respect to Asbestos-Containing Materials the Defendant Neither Manufactured, Sold or Distributed (Which It Does Not), Summary Judgment Can Be Affirmed on the Alternative Grounds That Plaintiffs Have No Admissible Evidence of Causation**

If the court holds that *Simonetta* and *Braaten* apply here, then GE owed Woo no duty, and the court need never reach the additional element of causation. But even if GE had owed a duty here, summary judgment should be affirmed for the additional reason that Woo was unable to produce evidence sufficient to create a triable dispute of fact showing that he was exposed to any asbestos used in conjunction with GE's turbines.

The Washington standard for proof of causation in asbestos cases was set by the Supreme Court in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235 (1987). The Court instructed Washington trial courts to consider seven factors in determining whether there is sufficient evidence for the question of causation to survive a summary judgment motion: (1) plaintiff's proximity to the asbestos product where the exposure occurred; (2) the expanse of the work site where asbestos fibers were released; (3) the extent of time plaintiff was exposed to the product; (4) what types of

asbestos products the plaintiff was exposed to; (5) how the plaintiff handled and used those products; (6) any expert testimony on the effects of inhalation of asbestos on human health in general and the plaintiff in particular; and (7) evidence of any other substances that could have contributed to the plaintiff's disease. *Id.* at 248-49. The proximity and time factors can be satisfied where a plaintiff shows that he worked at a job site where the product was used and there is "expert testimony that asbestos fibers have the ability to drift over an entire job site." *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 738 (2011); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 571 (2007); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn.App. 312, 324 (2000).

Plaintiffs claim to have satisfied the *Lockwood* factors with four "radial inferences" which they argue can be reasonably drawn from the evidence: (1) asbestos-containing insulation was necessary prior to 1970 to the proper functioning of GE turbines; (2) such asbestos-containing insulation deteriorates over time, releasing asbestos fibers; (3) Woo worked in engine spaces containing GE turbines for approximately three years; and (4) Woo therefore inhaled asbestos fibers from insulation, packing and gaskets on GE turbines. (AOB, pp. 10-11.) No reasonable jury could make any of these four inferences, and summary judgment was accordingly proper.

With respect to the first inference, plaintiffs cite the testimony of Everett Cooper, but Cooper said nothing about GE requiring that turbines be insulated with a particular material. CP 142. Instead, the undisputed evidence was that Navy and Maritime Commission regulations dictated what type of insulation should be used in each location aboard ship. CP 23, 25. David R. Skinner testified that GE had no role in procuring, designing or installing any thermal insulation on any of the ships at issue. CP 27. Even several years after the relevant period, Cooper merely testified that external insulation “typically” contained asbestos, not that it inevitably did. Moreover, at least with respect to land-based turbines, Cooper’s testimony was contradicted by Paul Banaszewski. CP 250. Nor does the GE TIL make plaintiffs’ proposed inference reasonable, given that it relates to an entirely different product, says nothing about asbestos being necessary to any product and is dated thirty-seven years after the relevant time. CP 23, 342, 412.

With respect to the second proposed inference, although Everett Cooper claimed that insulation around turbines tended to deteriorate over time, CP 143-44, Cooper conceded that he had never even set foot on any of the three ships on which Woo served which allegedly had GE turbines. CP 614. Therefore, the plaintiffs’ proposed inference is not supported and speculative.

Nor could a jury reasonably make plaintiffs' third proposed inference. The sole support plaintiffs cite for this inference is Everett Cooper's conclusory assertion that "much" of Woo's work "would have been in the various ships' engine spaces," and his claim that all personnel with Woo's title had the same job responsibilities. CP 614-15. But Cooper candidly admitted that he had never worked with Woo, had not reviewed any testimony from Woo's coworkers (no such testimony exists), had no knowledge of what Woo was doing on any particular day, and could not testify that Woo was ever in proximity to asbestos-containing packing, insulation or gaskets. CP 154-55, 502-03, 505-06. Nicholas Heyer similarly admitted that he had no knowledge of where Woo was or what he was working on or near on any given day, that he had seen no testimony from any coworkers of Woo, and that he had no knowledge that Woo had ever worked in proximity to the GE turbines. CP 495-498. Wayne Nettekoven admitted that he had no knowledge of Woo's activities either. CP 174, 177, 511-13.

Any inference that Woo must necessarily have worked in proximity to the GE turbines merely because of his job title, as Cooper claimed, would be too speculative and unsupported to support the inference plaintiffs seek to make, given the shortness of the periods Woo served on the three ships and the complete absence of testimony regarding

his day-to-day activities. Nicholas Heyer agreed that regardless of Woo's job title, his job responsibilities might have changed over time. CP 494. To illustrate the point, consider a hypothetical. A senior litigation attorney's job responsibilities often include conducting jury trials. But when a particular attorney joins and then departs a law firm within thirteen months' time (Woo's longest service aboard any of the relevant ships), to say that the attorney certainly conducted a jury trial during that time, based on nothing more than a broad generalization about a litigation attorney's job responsibilities, would be rank speculation. *Bowers*, 170 Wn.App. at 505 (expert opinion cannot create a genuine issue of fact when it amounts to mere speculation or conclusory statements).

Nor could a jury reasonably make the plaintiffs' fourth proposed inference, that Woo inhaled asbestos fibers from insulation, packing and/or gaskets on GE turbines. Although "radial inferences" – multiple reasonable inferences which can separately be drawn from a given set of proven facts – are permissible, plaintiffs cannot avoid summary judgment by proposing inferences which are dependent on additional inferences. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164 (1940); *Englehart v. General Electric Co.*, 11 Wn. App. 922, 927 (1974). The inference that Woo inhaled asbestos fibers while working on or near GE turbines cannot be directly drawn from any proven facts.

Rather, it is based upon two additional inferences – (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). Given that Woo is attempting to pyramid inference upon inference, his fourth proposed inference is insufficient to prevent summary judgment.

Accordingly, even if the Court finds that GE could conceivably have a duty to warn in connection with asbestos-containing insulation, packing and/or gaskets it neither manufactured, sold or distributed, the judgment should be affirmed on the grounds that the plaintiffs cannot prove the essential element of causation.

**D. GE Carried Its Initial Burden on Summary Judgment by Pointing Out That Plaintiffs Could Not Establish Essential Elements of Their Claim and Explaining in Detail Why**

The plaintiffs’ Opening Brief concludes by briefly arguing that GE’s second motion for summary judgment should have been denied without even considering plaintiffs’ opposition because GE purportedly failed to carry its initial burden under CR 56.

A moving party is permitted under Washington law to seek summary judgment in either of two ways – by setting forth its own version of the facts, or by “pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.” *Guile*, 70 Wn. App. at 21; *White*, 61 Wn.App. at 171. If the moving party chooses the latter method, “the requirement of setting forth specific facts does not apply.” *Guile*, 70 Wn.App. at 23. Instead, the moving party must identify the parts of the record which demonstrate the failure of proof.

That is precisely what GE did. GE moved for summary judgment on the grounds that plaintiff had insufficient evidence of duty and causation. GE discussed parts of the record which demonstrated the failure of proof – the testimony of David R. Skinner. CP 8-9, 15-29.

Nevertheless, the plaintiffs argue that GE had a responsibility to also thoroughly discuss the testimony and documents which the plaintiffs subsequently submitted in opposition to GE’s motion. Plaintiffs are mistaken both factually and legally. First, as plaintiffs acknowledge, GE had moved for summary judgment earlier in the case. The plaintiffs had submitted substantially all of the same material in opposition to that motion and GE responded in detail. The trial court found plaintiffs’ evidence insufficient to find a triable issue of fact regarding duty and causation. CP 574. Plaintiffs staved off summary judgment on that earlier

occasion only by insisting that they needed further documents and a deposition from GE's corporate representative David R. Skinner. CP 481-82. Naturally, once that deposition had been taken, GE focused its second summary judgment motion on demonstrating that the Skinner deposition which the plaintiffs had insisted on taking was insufficient to prove the necessary elements of plaintiff's claim. Plaintiffs cite no case holding that GE was required to go further and address the entirety of the record – including material it had addressed before – and none exists.

The plaintiffs were under no illusion as to the basis for GE's summary judgment motion. GE carried its initial burden under *Guile*, shifting the burden to plaintiffs to demonstrate a triable dispute of fact on both duty and causation. Since they failed to do so, the judgment must be affirmed.

## **VI. CONCLUSION**

The Superior Court's entry of summary judgment was compelled by binding Washington law and consistent with the great weight of authority from federal and state courts across the country. The judgment should be affirmed.

DATED: April 27, 2016

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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that on 27th day of April, 2016, I served a copy of the foregoing document on all counsel of record as indicated below:

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DATED this 27th day of April, 2016.

  
Sherry Toves

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