

No. 80076-6

SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH A. SIMONETTA and JANET E. SIMONETTA

Plaintiffs and Respondents,

v.

VIAD CORPORATION,

Defendant and Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2008 FEB 19 P 4: 18
BY RONALD R. DARR
CLERK

BRIEF OF AMICUS CURIAE CATERPILLAR INC.

69430
80380

Frederick D. Baker (CA Bar No. 111277)
Brian R. Thompson (CA Bar No. 252589)
**SEDGWICK, DETERT, MORAN & ARNOLD
LLP**
One Market Plaza, Steuart Tower, 8th Floor
San Francisco, California 94105
Telephone: (415) 781-7900
Facsimile: (415) 781-2635

John A. Knox (WA Bar No. 12707)
WILLIAMS, KASTNER & GIBBS, PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
Telephone: (206) 628-6600

Attorneys for Amicus Curiae Caterpillar Inc.

Attorneys for Amicus Curiae Caterpillar
Inc.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	2
A. Facts	2
B. The Court of Appeals' Decision	3
III. ARGUMENT.....	5
A. A Product Manufacturer Cannot Logically Be Charged with a Duty to Warn of Dangers Associated with the Products of Others	5
B. It Is Unjust to Charge a Product Manufacturer with a Duty to Warn of Dangers Associated with the Products of Others.....	13
C. The Mischief Created by the Court of Appeals' Decision Is Illustrated in a Case Now Pending in the Court of Appeals	18
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Baughman v. General Motors Corp.</i> , 780 F.2d 1131 (4th Cir. 1986)	10
<i>Cipollone v. Yale Industrial Products</i> , 202 F.3d 376 (1st Cir. 2000)	10
<i>Reynolds v. Bridgestone/Firestone, Inc.</i> , 989 F.2d 465 (11th Cir. 1993)	10
<i>Stapleton v. Kawasaki Heavy Industries, Inc.</i> , 608 F.2d 571 (5th Cir. 1979)	11

STATE CASES

<i>Acoba v. General Tire, Inc.</i> , 986 P.2d 288 (Hawaii 1999)	11
<i>Braaten v. Saberhagen Holdings</i> , 137 Wn. App. 32 (2007)	19
<i>Dep't of Labor & Indus. v Kaiser Aluminum & Chem. Co.</i> , 111 Wn. App. 771 (2002)	6
<i>Escola v. Coca Cola Bottling Co.</i> , 224 Cal. 2d 453, 150 P.2d 436 (1944)	14
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645 (1989)	5
<i>Ford Motor Co. v. Wood</i> , 119 A.2d 1315 (Md.App. 1998)	11
<i>Garman v. Magic Chef, Inc.</i> , 117 Cal. App. 3d 634 (1981)	11
<i>Lockwood v. AC&S, Inc.</i> , 109 Wn.2d 235 (1987)	10
<i>Mitchell v. Sky Climber, Inc.</i> , 396 Mass. 629 (1986)	10
<i>Nigro v. Coca-Cola Bottling, Inc.</i> , 49 Wn.2d 625 (1957)	10

TABLE OF AUTHORITIES
(cont.)

	<u>Page</u>
<i>Novak v. Piggly Wiggly Puget Sound Co.</i> , 22 Wn. App. 407 (1979)	4
<i>Powell v. Standard Brands Paint Co.</i> , 166 Cal. App. 3d 357 (1985)	11
<i>Rastelli v. Goodyear Tire & Rubber Co.</i> , 79 N.Y.2d 289 (1992)	11
<i>Reichelt v. Johns-Manville Corp.</i> , 107 Wn.2d 761 (1987)	5
<i>Sea-First Nat. Bank v. Tabert</i> , 86 Wn. 2d 145 (1975)	10, 12
<i>Sepulveda-Esquivel v. Central Machine Works, Inc.</i> , 120 Wn.App. 12 (2004)	10
<i>Spencer v. Ford Motor Co.</i> , 141 Mich. App. 356 (1985)	11
<i>Teagle v. Fischer & Porter, Inc.</i> , 89 Wn.2d 149 (1977)	11
<i>Thing v. LaChusa</i> , 48 Cal. 3d 644 (1989)	8
<i>Toth v. Economy Forms Corp.</i> , 391 Pa. Super. 383 (1990)	11
<i>Walton v. Harnischfeger dba P&H Crane</i> , 796 S.W.2d 225 (1990)	11
<i>Washington Cedar & Supply Company, Inc. v. Dep't of Labor & Indus.</i> , 137 Wn. App. 592 (2007)	6

DOCKETED CASES

<i>Anderson v. Caterpillar, Inc., et al.</i> , Court of Appeals of the State of Washington, Division 1, Case No. 06271-3	18, 19
---	--------

TABLE OF AUTHORITIES
(cont.)

Page

OTHER AUTHORITIES

J.E. Stingletz, et al., <i>The Impact of Asbestos Liabilities in Bankrupt Firms</i> , 12 J. Bankr. L. & Prac. 51 (2003)	16
M. Neil, <i>Backing Away from the Abyss</i> , ABA J., Sept. 2006	16

I. INTRODUCTION

It has long been settled law that a manufacturer owes a duty to warn of risks associated with the use of the products it produces, but owes no duty to warn of the risks of products made by others. A tort plaintiff has no claim against the manufacturer of a product that did not cause his or her injury.

The Court of Appeals' decision radically departs from these fundamental principles. If a manufacturer has reason to know that the purchaser of its product may independently decide to use the product in conjunction with a product produced by a third party, the Court held, the manufacturer owes a duty to inform itself of risks associated with the stranger's product and to warn foreseeable users of those dangers.

Perhaps because, had the Court of Appeals followed existing law, the asbestos plaintiff here may not have located a solvent defendant capable of satisfying a tort money judgment, the Court concluded that this newly-minted duty is logical and just. It is neither.

II. STATEMENT OF THE CASE

A. Facts

The relevant facts, as drawn from the Court of Appeals' decision and the briefs of the parties below, are not in dispute. In the early 1940's, defendant sold an evaporator to the Navy. The equipment was installed on the U.S.S. Saufley, which was commissioned in 1942. The Navy, or someone hired by the Navy, then installed insulation on the exterior of the evaporator.

Seventeen years later, plaintiff repaired the evaporator. This required removing insulation to access the malfunctioning components and replacing it when the repair was completed. Plaintiff contends that the insulation contained asbestos, that its removal and replacement exposed him to respirable asbestos fibers, and that this exposure contributed to his development of lung cancer forty years later.

We assume for the purpose of analysis that defendant knew purchasers of its evaporators, including the Navy, would install insulation. It appears undisputed, however, that:

- defendant did not specify that asbestos

insulation, or any other particular sort of insulation, was recommended for use with its evaporators;

- defendant did not manufacture, supply, or install the insulation used with the U.S.S. Saufley's evaporator;
- the Navy selected and purchased the insulation from a third-party supplier who had no connection with the defendant; and
- the Navy either installed the insulation itself, or hired a third-party contractor to do the work.

Indeed, it does not appear to have been established that the asbestos disturbed by plaintiff nearly two decades after the evaporator was installed was the original insulation.

B. The Court of Appeals' Decision

Based upon the opinions of a marine engineer and an industrial hygienist submitted by plaintiff, the Court of Appeals – without any direct evidence on the question – charged defendant with at least constructive knowledge that (1) the Navy would install asbestos insulation on the evaporator, (2) the evaporator would require maintenance that would disturb the insulation, and (3) this created a risk of harm to those working on the evaporator. (137 Wn. App. at 22-23.)

The Court of Appeals, implicitly conceding that existing Washington authority and common law did not support the imposition of liability on the defendant for harm caused by a hazardous product manufactured by another, said that the “dynamic nature of the common law requires the courts,” at times, “to make logical extensions of principles announced in earlier decisions in order to meet evolving standards of justice.” (*Id.* at 24.) A logical and just extension of the principle that a manufacturer must warn of risks associated with the use of a product it produces (*Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn. App. 407, 412 (1979)), the Court of Appeal concluded, was to impose a duty upon a manufacturer to warn of risks associated with a product produced by *someone else* that that manufacturer knows (or should know) would be used in conjunction with its own product. (*Simonetta* at 31-32.)

Amicus curiae believes the Court of Appeals’ newly-created duty is neither logical nor just.

III. ARGUMENT

A. A Product Manufacturer Cannot Logically Be Charged with a Duty to Warn of Dangers Associated with the Products of Others

A manufacturer may be liable for injury caused by a defect in its product if the defect was present when the product left the manufacturer's control. (*Falk v. Keene Corp.*, 113 Wn.2d 645, 647 (1989).) The evaporator here left defendant's control in or before 1942. Assuming there was then knowledge in the public domain of the hazards of asbestos exposure, who may logically be charged with a duty to warn of the danger and to prevent harm to those potentially at risk?

First, of course, is the manufacturer of the asbestos products to which plaintiff was exposed. A manufacturer has a duty to know of the risks associated with the use of its products, and to warn foreseeable users of those dangers. (*Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772 (1987).) If the manufacturer of the asbestos products disturbed by plaintiff failed to provide an adequate warning, it is indisputable that the manufacturer of the injury-causing product may be liable.

Second is the Navy. The plaintiff's employer bears the principal and nondelegable duty to inform itself of the hazards of the workplace, to provide adequate training and safety equipment, and to otherwise ensure that its workers are not exposed to, or are protected to the extent possible from, known or knowable dangers. (See *Washington Cedar & Supply Company, Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 602 (2007); *Dep't of Labor & Indus. v. Kaiser Aluminum & Chem. Co.*, 111 Wn. App. 771, 780 (2002).) Here, if there was sufficient information publicly available in 1942 to charge makers of equipment that did not even contain asbestos (like the defendant) with knowledge of the risks associated with asbestos exposure, the Navy plainly is charged with this knowledge. It was the Navy's duty to purchase nonhazardous insulation, or if it purchased asbestos insulation to (1) warn employees of the hazard, (2) ensure that it was installed in a manner that did not cause the release of respirable fibers, (3) ensure that the insulated equipment could be repaired and maintained without causing the release of respirable fibers, and (4) if the release of respirable fibers was unavoidable, to provide adequate ventilation, respirators, and other

safety equipment to prevent the inhalation of dangerous levels of respirable fibers.

If the manufacturer of the asbestos-containing products to which plaintiff was exposed failed to discharge its duties, and if the Navy failed to fulfill its obligations to plaintiff, and if neither is available to satisfy a tort judgment, that is tragically unfortunate for the injured worker. But the worker's misfortune does not logically lead to the imposition of a duty, created by the Court of Appeals here, on a manufacturer of *nonhazardous* equipment to warn of defects in products made by others which *may* be used in conjunction with its product.

A manufacturer of nondefective equipment cannot be presumed to know how downstream purchasers will elect to perform after-market alterations of, or additions to, its product. Even assuming defendant knew that its evaporator would be insulated, it cannot logically be charged with knowing the type of insulation to be used, whether the insulation was or could be made safe, how the purchaser would allow for maintenance or repair, or whether the employer would provide adequate safety precautions. How, exactly,

could the manufacturer here discharge the duty created by the Court of Appeals? Should it have affixed a metal plate to the evaporator which reads: "WARNING: This evaporator is probably insulated. If it is, the insulation may contain asbestos. If it does, you should not disturb it without wearing a respirator"? (Such a warning likely would have been rendered useless by a covering of insulation.) There is no logical basis upon which to impose a duty on a manufacturer to engage in such speculation. The theoretical ways in which a product may be altered in a manner that might create risks is limitless. "[F]oreseeability' 'is endless because [it], like light, travels indefinitely in a vacuum.'" (*Thing v. LaChusa*, 48 Cal.3d 644, 659 (1989).) Logic requires no more than that a manufacturer be required to provide warnings of risks, about which it either knew or should have known, associated with the use of *its own* products. To warn of every imaginable risk is to warn of nothing; warnings of true risks are lost in a blizzard of warnings of remote and highly unlikely dangers.

Insulation is frequently employed on equipment with very hot metal surfaces or steam. If the equipment manufacturer has a duty to

warn of the dangers of insulation, does the insulation manufacturer have a duty to warn of the risks of burns if adequate precautions are not taken? If the manufacturer of a steam generator, and the manufacturer of the insulation the purchaser chooses to install on the generator, know that it will provide power for a punch press, must each warn of known or knowable risks associated with operating a punch press? Or must the punch press manufacturer, knowing that it will be powered by a steam generator, warn of the risks of working near hot equipment and insulating material which may contain asbestos?

It is simply a fact that industrial workplaces are dangerous environments. Interconnected components of industrial equipment bristle with potential injury-causing hazards. The most we can fairly ask is that manufacturers provide clear warnings of known or knowable risks associated with the use of their own products; it is neither logical nor workable to require them to warn of risks which may be associated with other products which the purchaser may or may not employ in the workplace in conjunction with the purchased equipment. It is the duty of the employer and third-party

manufacturers to control risks associated with the add-on products, not that of the producer of the original nonhazardous equipment.

Presumably this is why neither the great weight of decisional authority that has addressed the question, nor the Restatement, recognizes the duty created by the Court of Appeals. Not only do other Washington cases hold that a manufacturer is liable *only* for risks associated with the use of products *it* placed in the stream of commerce (*Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12 (2004); *Nigro v. Coca-Cola Bottling, Inc.*, 49 Wn.2d 625 (1957); *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245 (1987) [“in order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury.”]; *Sea-First Nat. Bank v. Tabert*, 86 Wn.2d 145 (1975)), this is the principle adopted by the vast majority of courts in other jurisdictions.¹

¹ The parties will detail the holdings of courts in foreign jurisdictions. Briefly, the Court of Appeals’ conclusion is inconsistent with the law of the following jurisdictions, among others: Massachusetts (*Cipollone v. Yale Industrial Products*, 202 F.3d 376 (1st Cir. 2000)); *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629,631 (1986)); South Carolina (*Baughman v. General Motors Corp.* 780 F.2d 1131 (4th Cir. 1986)); Alabama (*Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465 (11th Cir. 1993));

The duty announced by the Court of Appeals is also inconsistent with the Restatement (Second) of Torts (§ 402A, cmt. *f*, states that strict products liability attaches only to one who is in the chain of distribution for the injury-causing product), and the Restatement (Third) of Torts (§ 5, cmt. *a*, states that a component manufacturer is liable only for defects in its own product).²

Indeed, the duty created here by the Court of Appeals is flatly

(FOOTNOTE CONTINUED):

California (*Garman v. Magic Chef, Inc.*, 117 Cal.App.3d 634 (1981)); *Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357 (1985)); Hawaii (*Acoba v. General Tire, Inc.*, 986 P.2d 288 (Hawaii 1999)); Maryland (*Ford Motor Co. v. Wood*, 119 A.2d 1315 (Md.App. 1998)); Michigan (*Spencer v. Ford Motor Co.*, 141 Mich.App. 356 (1985)); New York (*Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289 (1992)); Pennsylvania (*Toth v. Economy Forms Corp.*, 391 Pa.Super. 383 (1990)); and Texas (*Walton v. Harnischfeger dba P&H Crane*, 796 S.W.2d 225 (1990)).

² The authorities principally relied upon by the Court of Appeals are inapposite. In *Stapleton v. Kawasaki Heavy Industries, Inc.*, 608 F.2d 571 (5th Cir. 1979) the alleged defect was related to a fuel switch, an integral part of the product (motorcycle) as produced by the defendant manufacturer. The court did not remotely hold that the manufacturer had a duty to warn of the dangerous properties of gasoline. In *Teagle v. Fischer & Porter, Inc.*, 89 Wn.2d 149 (1977), the defendant's product *itself* became dangerous because of its failure to warn purchasers not to use a certain component part known by the defendant to create a hazard. In neither case was liability assigned to the manufacturer of a nonhazardous product that was used in conjunction with a dangerous one.

contrary to the doctrine of strict products liability as articulated by the Restatement (Second) of Torts, because it strips the doctrine of the express limitations which are its doctrinal justifications. Section 402A applies only to a “seller” who is “engaged in the business of selling” the defective product, and only where the defective product reaches the user “without substantial change in the condition in which it is sold.” The defendant here was not a seller of asbestos-containing products, nor did the evaporator reach the “user” (plaintiff) substantially unchanged: it had been dramatically altered by the Navy, which added the very product (asbestos-containing insulation) which is alleged to have caused the plaintiff’s injury. To ignore these doctrinal limitations is to convert strict liability to absolute liability, a result this Court has condemned. (*Seattle-First National Bank v. Tabert*, 86 Wn.2nd 145, 150 (1975).)³

It is unfortunate, but true, that people are injured under

³ It is not a sufficient answer to say the doctrine applies because the “defect” is the absence of a warning. The drafters plainly were referring to the actual injury-causing product defect that was present in the defendant’s product unchanged at the time of use. If “absence of a warning” trumps these express limitations, the claim swallows the rule and its doctrinal foundations.

circumstances where there is no viable tort defendant who can respond to a money judgment. If that is the case here, this fact does not justify creating a new duty which punishes manufacturers of nonhazardous products for the actions and products of others. The principle articulated by the Court of Appeals is neither logical nor just.

B. It Is Unjust to Charge a Product Manufacturer with a Duty to Warn of Dangers Associated with the Products of Others

It may be in this case, and in other asbestos cases, that no solvent defendant who is liable under settled principles of tort law is available to satisfy a judgment. Compassion tempts us to create new principles which expand the universe of potential defendants so that injured workers receive tort damages in addition to workers' compensation benefits. While the impulse is understandable, the new duty created by the Court of Appeals does not serve the interests of justice.

If the Navy had insulated the evaporator manufactured by defendant with a nonhazardous material, the defendant could not conceivably have had a duty to warn, much less have breached such

a duty. That is, under the Court of Appeals' theory, the defendant's duty was *created* by the Navy, through its own independent choice of an insulating material, *after* the evaporator left the defendant's control. This expands the notion of what constitutes a manufacturer's duty to warn of the dangers of *its* products beyond rational understanding.

The Court of Appeals held that plaintiff may pursue a strict liability failure to warn claim against the defendant. (137 Wn. App. at 25-32.) Yet the equitable assumptions which underlie the doctrine of strict liability have no application here. Courts have justified the imposition of strict liability because (1) the manufacturer of the injury-causing product "is responsible for its reaching the market," (2) the manufacturer, who profits from the sale of the injury-causing product, is better able to afford the damages resulting from the defect than the victim, (3) the manufacturer can insure against the risk and spread the expense "among the public as a cost of doing business," and (4) the imposition of strict liability will motivate manufacturers to produce safer products. (*See, Escola v. Coca Cola Bottling Co.*, 224 Cal.2d 453, 462, 150 P.2d 436 (1944).) These

equitable considerations have no application to the producer of equipment that is indisputably nonhazardous at the time it leaves the manufacturer's control.

- The defendant here was not responsible for the fact that asbestos insulation reached the market.
- The defendant did not profit from the sale of asbestos insulation, and therefore is not in a superior position, as a matter of equity, vis-à-vis the plaintiff, the manufacturer of the asbestos-containing product, or the Navy to bear the burden of compensation.
- The defendant had no rational basis upon which to adjust its pricing, nor did its insurer have a basis to adjust its premiums, contingent upon speculation about how purchasers might modify its products after they left its control.
- The defendant met its societal obligation to produce a nonhazardous product; it had no obligation, and no motivation, to affect the products of other manufacturers over whom it exercised no control.

Indeed, to the extent manufacturers of nonhazardous equipment are required to pick up the tab for those who produce hazardous products, the latter's incentive to design and manufacture safe products is plainly diminished.

In stating that the question whether a manufacturer of

nonhazardous equipment owes a duty to warn of hazardous products which may be used in conjunction with its own product is one of “first impression” (137 Wn. App. at 29), and that creating such a duty requires an extension of prior law to meet “evolving standards of justice” (*id.* at 24), the Court of Appeals acknowledges that there was no basis in the law for imposing such a duty prior to the time the Court rendered its decision.

That is, at the time the defendant manufactured and sold the evaporator, in or before 1942, it owed no duty under the law to warn of risks associated with asbestos exposure from insulation manufactured and sold by others. The evaporator therefore was not defective at the time it left the defendant’s control -- *more than 65 years ago*.

The ruinous consequences of being a defendant in asbestos litigation are well documented. Dozens of companies have been forced into bankruptcy, with devastating consequences for their employees, retirees, shareholders, communities, and the economy. (See M. Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, pp. 26, 29; J.E. Stingletz, *et al.*, *The Impact of Asbestos Liabilities in*

Bankrupt Firms, 12 J. Bankr. L. & Prac. 51 (2003).) Some would argue that those who manufactured and sold asbestos-containing products without adequately testing their safety, and without adequate warnings of known or knowable risks, got what they deserved.

But who in their right mind would contend it is just and equitable to punish *today's* company defendant – and its employees, retirees, shareholders, and community – for the conduct of a predecessor company *more than half a century ago, which fully complied with then-existing law?*

The Court of Appeals' ruling may result in compensation for this plaintiff, or class of plaintiffs, but is manifestly unjust to this defendant, to those who are dependent on the company's financial viability, and to all manufacturers of nonhazardous products who may now be drawn into horrendously expensive litigation due to the acts of others over whom it exercised no control, and from whom it derived no profit.

C. The Mischief Created by the Court of Appeals' Decision Is Illustrated in a Case Now Pending in the Court of Appeals

Amicus curiae Caterpillar Inc. is a defendant and respondent in a matter pending before the court that rendered the opinion below in this case. (*Anderson v. Caterpillar, Inc., et al.*, Court of Appeals of the State of Washington, Division 1, Case No. 06271-3.) There, Caterpillar manufactured a marine engine that was installed in a boat. It is not disputed that the engine would operate as designed, and indeed did operate as designed, without insulation. The purchaser, however, attached exhaust components to the engine (which were not chosen, recommended, purchased, or manufactured by Caterpillar) and then applied insulation (which was not chosen, recommended, purchased, or manufactured by Caterpillar) to the exhaust components.

Plaintiff argued in the trial court that Caterpillar owed a duty to warn of the risks of asbestos because it was known or foreseeable to Caterpillar that the purchaser would install asbestos-containing insulation in the vicinity of the engine. The trial court rejected this theory. Plaintiff is now arguing, in the Court of Appeals, that the

decision below here, and in the companion case of *Braaten v. Saberhagen Holdings*, 137 Wn. App. 32 (2007), *review granted*, Supreme Court of Washington Case No. 80251-3, requires a holding that Caterpillar owed such a duty.

The *Anderson* case illustrates the absurd results that could flow from the application of the broad, uncabined, and logically insupportable decision of the Court of Appeals below. To require a product manufacturer to warn of the dangers of a product that might be attached to a third-party product that might be attached to the original manufacturer's product is to stretch the concept of a duty to warn beyond any rational or sensible understanding of the theoretical underpinnings which justify such a duty. It piles speculation upon speculation, and imposes an obligation that can never be met in any practical sense. No court (or any other authority, to Caterpillar's knowledge) has ever suggested that a manufacturer owes such a duty.

The *Anderson* case vividly demonstrates why a bright line should be drawn which limits a manufacturer's duty to warn only of risks associated with those products which it places in the stream of

commerce, and which establishes that the manufacturer owes no duty to warn with respect to those it does not. Any other result will lead to product liability chaos.

IV. CONCLUSION

Amicus curiae respectfully urges the Court to reverse the Court of Appeals' decision, and to affirm the judgment of the trial court.

Dated: February 8, 2008

Respectfully submitted

SEDGWICK, DETERT, MORAN &
ARNOLD LLP

By Frederick D. Baker by VAK

Frederick D. Baker
Brian R. Thompson
Attorneys for Amicus Curiae
CATERPILLAR INC.

WILLIAMS, KASTNER & GIBBS
PLLC

By John A. Knox

John A. Knox
Counsel for Amicus Curiae
CATERPILLAR INC.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 8th day of February, 2008, I caused a true and correct copy of the foregoing document, "BRIEF OF AMICUS CURIAE CATERPILLAR INC." to be delivered via first class mail to the following counsel of record:

David S. Frockt
Matthew P. Bergman
Brian F. Ladenburg
BERGMAN & FROCKT
614 1st Ave., Floor 4
Seattle, WA 98104
Counsel for Respondents
Simonetta

John W. Phillips
J. Matthew Geyman
PHILLIPS LAW GROUP, PLLC
315 Fifth Ave. S., Suite 1000
Seattle, WA 98104
Counsel for Respondents
Simonetta

Ronald C. Gardner
David D. Mordekhov
GARDNER BOND
TRABOLSI, PLLC
2200 - 6th Ave., Suite 600
Seattle, WA 98121
Counsel for Petitioner
Viad

Jeanne F. Loftis
Allen E. Eraut
BULLIVANT HOUSER
BAILEY PC
300 Pioneer Tower
888 SW Fifth Ave.
Portland, OR 97204
Counsel for Amicus
Curiae Flowserve Corp.

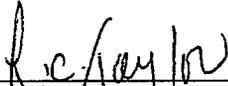
Mark B. Tuvim
CORR CRONIN MICHELSON
BAUMGARDNER & PREECE
LLP
1001 Fourth Ave., Suite 3900
Seattle, WA 98154-1051
Counsel for Amicus Curiae
Ingersoll-Rand Co. and
Leslie Controls

Deborah J. La Fetra
Timothy Sandefur
Alissa J. Strong
Elizabeth A. Yi
PACIFIC LEGAL
FOUNDATION
3900 Lennane Dr., Suite 200
Sacramento, CA 95834
Counsel for Amicus Curiae
Pacific Legal Foundation

Diana M. Kirchheim
PACIFIC LEGAL
FOUNDATION
10940 NE 33rd Place, Suite 210
Bellevue, WA 98004
Counsel for Amicus Curiae
Pacific Legal Foundation

Stewart A. Estes
KEATING, BUCKLIN &
MCCORMACK, INC., P.S.
800 Fifth Ave., Suite 4141
Seattle, WA 98104
Counsel for Amicus Curiae
WDTL

Dated this 8th day of February, 2008, at Seattle,
Washington.



Lyndsay C. Taylor

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SIMONETTA

Plaintiff/Petitioner

vs

VIAD CORPORATION

Defendant/Respondent

No. 80076-6

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 28 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 8, 2008, at Olympia, Washington.

Signature: 

Print Name: BECKY GOGAN