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No. 56614-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Appellants,

v.

VIAD CORP;

Respondent.

BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiff-Appellant Joseph Simonetta was exposed to asbestos while performing regular maintenance on Griscom Russell evaporators. The evaporators required insulation to operate properly and the trial Court explicitly found that Griscom Russell knew or reasonably should have known that its products would be insulated with asbestos. Nevertheless, the trial court granted summary judgment to the manufacturer, holding that Griscom Russell had no legal duty to warn of hazards arising from asbestos insulation that it did not manufacture or install. Plaintiffs respectfully submit that this ruling was based on an erroneous interpretation of Washington negligence and strict liability law.

A manufacturer has a duty to warn of hazards arising from the foreseeable uses of its product, even if the hazard arises from an instrumentality manufactured by another entity, that is used in the normal and expected operation of the manufacturer's own product. Respondent Viad's ("Viad") own expert testified that it was foreseeable that asbestos insulation would be used in the normal operation and maintenance of Griscom Russell evaporators and that manufacturers like Griscom Russell would reasonably have been expected to know of this fact. Based on this record, Griscom Russell owed plaintiff a duty of reasonable care which

included a duty to warn of asbestos hazards arising out of the foreseeable use and alteration of Griscom Russell products.¹

ASSIGNMENT OF ERROR

Error arises from the holding in Paragraph 2 of the trial Court's March 7, 2005 order granting Viad partial summary judgment. CP1228-1230. Plaintiff contends that the trial court erred in holding as a matter of law that Griscom Russell had no duty to warn of asbestos hazards arising out of the regular and anticipated maintenance of its evaporators where (1) it is undisputed that Griscom Russell evaporators required insulation to operate properly; and (2) it is foreseeable that asbestos insulation would be used on Griscom Russell products.

STATEMENT OF THE CASE

A. Background

Appellant Joseph Simonetta, age 68, served as a Senior Chief Petty Officer and Machinist Mate with the United States Navy from 1954 until 1974. He worked on a wide variety of equipment in the engineering

¹ Viad is alleged by the Appellant to be the successor in interest to Griscom Russell. The trial court denied cross motions for summary judgment by Appellant and Respondent on the successorship issue and both sides have agreed to withdraw their appeals of the respective denial of summary judgments on that issue. Accordingly, this Court should assume for appellate purposes only that Viad is the successor in interest to Griscom Russell.

spaces of his numerous Naval vessels during his military career. CP 139.

In 2000 and then in 2002, Appellant was diagnosed with lung cancer in two different lobes of his lungs, both of which were ultimately removed. His diagnosing physicians noted that Appellant likely suffered from “asbestos related pleural disease” underlying his cancer diagnoses. CP 12-14. Appellant’s expert, Dr. Samuel Hammar, opined that Appellant’s “exposure demonstrates both a sufficient latency period and exposure to asbestos products to show a causal relationship between his lung cancer diagnosis and his asbestos exposure.” CP 8.²

B. Appellant Was Exposed to Asbestos Insulation Installed On Griscom Russell Evaporators

Appellant testified that he worked on Griscom Russell evaporators while serving as a machinist mate aboard the USS SAUFLEY in the 1958-59 time period. CP 187-191.³ During cross-examination by Viad’s counsel, Appellant Simonetta described how he dismantled the Griscom Russell evaporator while performing regular maintenance on the product:

Q: As I understand it, you actually did some work on that evaporator in terms of a repair or opening it up in some way?

² Dr. Hammar’s testimony has been cited numerous times in asbestos related cases in reported decisions in Washington.

³ An evaporator’s function on a navy ship is to take sea water and turn it into fresh water.

A: We were getting too much salt. We had to find out why. We pulled it out and found that some of the tubes in the bundle were ruptured.

* * *

Q: So take me through the process of what you had to do to open this thing up.

A: Take the gaskets or the insulation off the front of it.

* * *

Q: So you take the insulation off?

A: Take the insulation off. Take the bolts off. Jacking bolts. Jacket it out. Hook it up to a chain to it takes the weight off and pull it out.

* * *

Q: How would you do it? How would you take it off?

A: It was the block insulation covered with asbestos mud. And then the asbestos cloth on top of that.

Q: So how would you take it off?

A: With a hammer.

CP 195-197..

Mr. Simonetta testified that after removing the asbestos insulation from the Griscom Russell evaporator, he removed gaskets from the flanges and cleaned up the mess with a foxtail broom. *CP 198-199; 202..* Once the repairs were completed, Mr. Simonetta described re-insulating the Griscom Russell product:

Q: [Y]ou don't know whether that evaporator came from Griscom Russell with insulation on it or no insulation and was put on by somebody else?

A: No, I know I put some of it on.

Q: [W]hen you put it back together, you had to reinsulated that?

A: That's right.

Q: Did you use block insulation?

A: Uh-huh

Q: And mud?

A: Yeah.

* * *

Q: And you did all that work?

A: Yeah.

CP 203-204.

C. Viad Moves For Summary Judgment

On January, 5, 2005 Viad moved for summary judgment on the ground that (1) there is no evidence that Plaintiff inhaled asbestos fibers from a product manufactured or sold by Griscom Russell; and (2) Griscom Russell owed no duty to warn about asbestos products it did not sell or manufacture. *CP 43.*⁴

⁴ Viad also sought summary judgment on the ground that it was not the corporate successor to Griscom Russell corporation and plaintiffs filed a cross-motion for summary judgment on the same issue. This corporate successor issues are not before this Court on appeal. See Fn. 1

In support of its motion, Viad presented no expert or factual declarations. Instead, Viad relied exclusively on Plaintiff's Amended Complaint; Plaintiff's interrogatory responses; excerpts from the perpetuation and discovery depositions of Joseph Simonetta; and excerpts from the CR 30(b)(6) deposition of their own corporate representative. *CP* 46. The excerpts from their 30(b)(6) representative, however, related exclusively to the corporate successor issue not on appeal.

Appellant opposed Viad's summary judgment motion with testimony from Viad's own marine engineering expert, Charles Cushing, who confirmed the use of asbestos insulation on Griscom Russell evaporators. Mr. Cushing testified as follows:

Q: [Y]ou would agree that [it] certainly is anticipated and is necessary for the plant the unit to be insulated to operate properly and safely?

A: Yes sir.

Q: And certainly everyone involved with the sale of distilling units would know that asbestos-containing insulation would be used by the United States Navy on the exterior of a distilling plant?

A: I believe they would.

Q: And what is the basis of your opinion that they would?

A: I don't know what anybody at Griscom Russell would be thinking or not thinking, or have no personal knowledge of what they know or don't know. . . . *But I do believe that somebody who designs a piece of equipment for shipboard use that involves the use of steam and that is hot would understand that the unit is going to be insulated.*

Q: And it is your understanding that in the 1945 time frame, 1950s, even the 1960s, that high temperature thermal insulation used by the United States Navy was asbestos containing-

A. *Material-yes.*

CP 744.⁵

In addition to the testimony of Charles Cushing, Appellants submitted an expert declaration from Jerry Lauderdale⁶ which provided in pertinent part as follows:

3. I have been retained as a testifying expert in this case and have reviewed the deposition transcript of Joseph Simonetta. Mr. Simonetta testified about the work he did on board several Navy ships from 1954 to 1974 during his tenure with the Navy. Specifically, Mr. Simonetta testified that as a machinist mate and Chief Petty Officer, he worked in and around the engine rooms of vessels and on various

⁵ During Mr. Cushing's deposition, Plaintiffs presented him with a Griscom Russell operations and maintenance manual that accompanied its evaporators. The manual provided detailed instructions on cleaning and maintenance of Griscom Russell evaporators, on a monthly basis, including the type of work that Joseph Simonetta described in his deposition. Petitioners argued below that the work practices described in Mr. Simonetta's deposition were foreseeable to Griscom Russell in light of Mr. Cushing's testimony and Griscom Russell's own technical manuals circulated with its equipment. CP 743; 745-798.

⁶ Mr. Lauderdale is a Certified Industrial Hygienist with over a decade of experience with the Texas State Department of Health, Occupational Health Division. CP 865-866; 869-870.. Viad did not move to strike Mr. Lauderdale's declaration in its response to Plaintiff's motion for summary judgment.

pieces of equipment such as turbines, pumps, valves, piping and Griscom Russell evaporators. Mr. Simonetta testified that he scraped old gasket material off of the Griscom Russell evaporators using a wire brush or pneumatic tool. Mr. Simonetta also testified that he had to remove old insulation from the evaporators, sometimes using a hammer to beat off portions of the old insulating material. Further, Mr. Simonetta was involved in re-insulating the Griscom Russell evaporators once maintenance and repairs had been affected. He was also exposed as a bystander while others removed insulation, cleaned scrap after removal, and re-insulated Griscom Russell evaporators and other equipment on ships.

4. Prior to and during Mr. Simonetta's tenure in the U.S. Navy, almost all of the high temperature thermal insulation and gaskets that he would have come into contact with contained asbestos. In the process of him working on the Griscom-Russell evaporators, the asbestos-containing insulation and gaskets would have been disturbed. Removing debris from such removal would have resulted in exposure. These disturbances would have released respirable asbestos into the air and would have exposed the men and women working on or even around the evaporators to respirable asbestos. Generally speaking, these exposures would be at levels sufficient to cause or contribute to the potential for developing asbestos-related diseases, such as the disease from which Mr. Simonetta suffers.

5. Prior to and throughout Mr. Simonetta's service in the U.S. Navy, it was generally known throughout the United States in the medical and industrial hygiene fields, and in the industrial sectors that excessive exposures to asbestos was harmful to human health. Therefore, it is my opinion that any manufacturer of evaporators for the U.S. Navy, such as Griscom Russell, knew, or at a minimum, should have known, that the asbestos containing insulation, gaskets and packing materials in their equipment, or that were needed to operate their evaporators safely and

efficiently would have posed harm to workmen such as Mr. Simonetta.

6. ...[E]quipment manufactures such as Griscom-Russell should have included warnings on their evaporators and in their manuals that the asbestos-containing gaskets in the evaporators and the asbestos-containing insulation applied to the exterior of the evaporators posed a hazard to human health. These warnings could and should have been provided to the US Navy and to Navy personnel in order to warn shipboard personnel like Joe Simonetta to take precautions to avoid creating dust and to wear respiratory protection when working with their equipment in situations where asbestos containing materials could be disturbed....

*CP 867-868.*⁷ In contrast to the testimony of Mr. Simonetta, Mr. Cushing and Mr. Lauderdale, Viad's own corporate representative, Peter Novak, testified that the company had no knowledge of whether Griscom Russell products ever incorporated, used or required asbestos materials at any point in time, including during the relevant time period in this case. *CP 359-360.*⁸

After extensive briefing and oral argument, the trial court granted partial summary judgment to Viad. Specifically, the Court's order provided as follows:

Viad Corp.'s Motion for Summary Judgment is GRANTED on the issue of duty to warn. *Although the product*

⁷ Appellants' summary judgment opposition was also supported by a general state of the art/history of knowledge of asbestos disease declaration from Dr. Barry Castleman, a well known author on this subject whose testimony has been cited and admitted in reported asbestos decisions around the country on several occasions. *CP 873-879.* Viad did not move to strike this declaration.

⁸ Mr. Novak's only investigation on these issues apparently occurred back in 1970-71. *CP 359.*

manufacturer knew or reasonably should have known that its product would be insulated with asbestos containing material, the product itself did not produce the injury.

CP 1229 (emphasis supplied).⁹ Plaintiff voluntarily dismissed his remaining claims against Viad on July 14, 2005. CP 1383-1385.

This appeal was timely filed on July 22, 2005. CP 1388-1397.

ARGUMENT

A. Standard of Review

Decisions granting summary judgment in whole or in part are evaluated by appellate courts under the *de novo* standard. Coulson v. Huntsman Packaging Prods., Inc. 121 Wash.App.941, 943, 92 P.3d 278 (2004) *review denied* 153 Wash.2d 1019 (2005). In reviewing an order of summary judgment, appellate courts are to engage in the same inquiry as the trial court. Travis v. Bohannan, 128 Wash.App. 231, 115 P.2d 342 (2005) (*citing* Rhea v. Grandview Sch. Dist. No. JT 116-200, 39 Wash.App. 557, 559, 694 P.2d 666 (1985)). Therefore, the facts and all reasonable inferences to be drawn from them must be construed in favor of the non-moving party. Id. citing Rojas v. Grant County Pub. Utility Dist., 117 Wash.App. 694, 697, 72 P.3d 1093 (2003).

⁹ The trial court denied Viad's motion for summary judgment as it pertained to asbestos gaskets that were contained within Griscom Russell evaporators. This issue is not before this Court on appeal.

The standard of review for summary judgment motions is well settled. The moving party bears the initial burden of showing the absence of an issue of material fact and an entitlement to judgment as a matter of law. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182, 187-188 (1989). If the moving party does not sustain the burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials. Hash v. Children's Orthopedic Hospital and Medical Center, 110 Wash.2d. 912, 915-916, 737 P.2d 507 (1988). A material fact is one upon which the outcome of the litigation relies in whole or in part. Hope v. Larry's Markets, 108 Wn.App.185, 29 P.3d 1268 (2001).

As the non moving party, Appellant Simonetta was entitled to all reasonable inferences from the factual record to be drawn in his favor. It was Viad's burden to either produce affirmative evidence in support of its motion for summary judgment, or to point out the absence of evidence in support of Appellant's claims. In its motion on the duty to warn issue, Viad provided no expert declaration or factual testimony to refute the testimony of Appellant, Appellant's experts or even their own expert. This Court must therefore consider the evidence submitted by the Appellant in refutation of Viad's arguments regarding the duty to warn on both the strict liability and negligence claims, as undisputed facts.

B. Duty to Warn Under Common Law Negligence

1) The Scope of Duty Rests on the Foreseeability of Injury

On any negligence claim involving a product manufacturer, the focus is on the manufacturer's conduct in contrast to a strict liability action where the focus is on the product and the consumer's expectation. Young v. Key Pharmaceuticals, 130 Wash.2d 160, 178, 922 P.2d 59 (1996) (citing Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wash.2d 747, 762, 818 P.2d 1337 (1991); Davis v. Globe Mach. Mfg. Co., Inc. 102 Wash.2d 68, 684 P.2d 692 (1984)).

For conduct to be negligent, it must be unreasonable in light of a recognizable danger. Bodin v. City of Stanwood, 130 Wash.2d 726, 733, 927 P.2d 240 (1996) (citing W. Page Keeton et al., *Prosser and Keeton on Torts* § 31, at 170 (5th ed. 1984)). As a general proposition, issues of negligence are not susceptible to summary judgment. Grimsrud v. State, 63 Wash.App. 546, 548, 821 P.2d 513 (1991). Summary judgment is particularly inappropriate "if the record shows any reasonable hypothesis which entitles the nonmoving party to relief." Id. (citing Selberg v. United Pac. Ins. Co., 45 Wash.App. 469, 474, 726 P.2d 468 (1986)).

To prove actionable negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the

proximate cause of the injury. Hansen v. Friend, 118 Wash.2d 476, 824 P.2d 483 (1992). The issues of breach of a duty and of proximate cause are generally questions of fact for the jury. Briggs v. Pacificorp, 120 Wash.App. 319, 322, 85 P.3d 369 (2003), review denied, 152 Wash.2d 1018 (2004); Hertog v. City of Seattle, 138 Wash.2d. 265, 275, 979 P.2d 400 (1999).¹⁰

The existence of a duty, therefore, is a threshold question decided by the Court as a matter of law. Briggs v. Pacificorp, 120 Wash.App. at 322; Rasmussen v. Bendotti, 107 Wash.App. 947, 955, 29 P.3d 56 (2001). The plaintiff has the burden of establishing the existence of a duty. Lake Washington School District No. 414 v. Schuck's Auto Supply, Inc., 26 Wash.App. 618, 613 P.2d 561 (1980). On any negligence claim, the existence of a defendant's threshold duty may be predicated on a violation of statute or of common law principles of negligence. Bernethy v. Walt Failor's, Inc., 92 Wash.App. 919, 653 P.2d 280 (1982).

¹⁰ Proximate cause consists of two elements: cause in fact and legal causation. Taggart v. State of Washington, 118 Wash. 2d 195, 226, 822 P.2d 243 (1992) Cause in fact concerns the "but for" consequences of an act: those events the act produced in a direct unbroken sequence, and which would not have resulted had the act no occurred. Id.

Legal causation, by contrast, rests on considerations of policy and common sense as to how far a defendant's responsibility should extend. Id. The question of legal causation can be so intertwined with the question of duty that the former (legal cause) is answered by addressing the later. Id. Viad's summary judgment motion only addressed the threshold question of duty and did not address issues of proximate cause.

Viad argued below and will undoubtedly argue here that even on a negligence theory, the threshold legal duty owed by it to Appellant can only exist if the evaporator itself was the injuring product and not the insulation it knew or had reason to know (as is undisputed on this record) would be applied to the evaporator. However, because of the factual record that existed at the time Viad filed its motion for summary judgment, Viad could not dispute that numerous witnesses including their own expert had opined that it was foreseeable that its product would be insulated with asbestos materials. Its only recourse is to argue that *despite* this fact, there is still no threshold legal duty of reasonable care owed by it to Appellant. This argument is untenable because it artificially limits the question of duty to the product and not the conduct of Griscom Russell which is the fundamental consideration in determining whether a duty is owed.

Duty is “an obligation, to which the law will give recognition and effect, to conform to a *particular standard of conduct* toward another.” Transamerica Title Ins. Co. v. Johnson, 103 Wash.2d 409, 413, 693 P.2d 697 (1985) (quoting Prosser on Torts § 53 (3d Ed. 1964) (emphasis supplied)). It is a necessarily flexible concept and can exist in a variety of forms, depending upon the facts of a particular case. Indeed, Washington appellate courts have repeatedly advised whether a duty exists in the first

place is generally a question that depends on “mixed considerations of logic, common sense, justice, policy and precedent.” Snyder v. Medical Service Company of Eastern Washington, 145 Wash.2d 233, 35 P.3d 1158 (2001); Caulfield v. Kitsap County, 108 Wash.App. 242, 29 P3d 738 (2001).

Ultimately, the existence of a duty turns upon the foreseeability of the risk of harm. Washington has long relied on the seminal opinion of Justice Cardozo in Palsgraf v. Long Island Railroad Co., 162 NE 99 (N.Y. 1928), that if the conduct of the actor does not involve a foreseeable risk of harm to the person injured, he owes no duty to that person. King v. Seattle, 84 Wash.2d 239, 248, 525 P.2d 228 (1974). Conversely, if the risk of harm which befell the plaintiff was reasonably foreseeable then, as to that plaintiff, a duty was owed and legal liability may attach:

We have earlier held that foreseeability of the risk of harm to the plaintiff is *an element of the duty question*.

...Liability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained.

Id. (emphasis supplied).

In short, the foreseeability of harm to a person as the result of another's act is material to the question of whether the actor owes a duty, and whether there was a breach of that duty. That the particular mode,

method, or cause of harm was not foreseeable is not significant so long as the general nature of the harm was foreseeable.

2) *A Manufacturer Has a Duty to Warn Consumers of Foreseeable Dangers*

Washington has long recognized that a product manufacturer's failure to warn of foreseeable hazards may constitute common law negligence. In Dalton v. Pioneer Sand & Gravel Company, the Supreme Court laid out the type of evidence that would be required to impose a duty to warn, on a negligence theory, on a product manufacturer:

The duty appellant seeks to invoke does not arise *unless* there is a showing of inherent danger in the material, known only to experts, which the *seller knows or ought to know* would likely produce injury to a handler of ordinary knowledge and prudence.

Dalton v. Pioneer Sand & Gravel Company, 37 Wash.2d 246, 227

P.2d 173 (1951) (emphasis supplied).¹¹

Over the years, Washington Courts have repeatedly affirmed that product manufacturers sued on theories of negligence do have a duty to warn of hazards associated with their products. In each instance, the Courts have made clear that the focus must be on the defendant manufacturer's *conduct*. For example, in Koker v. Armstrong Cork, this

¹¹ Other courts have put it succinctly: "In negligence, the duty to warn is but another aspect of the manufacturer's duty to exercise due care and a manufacturer must warn of a product's dangerous propensity of which it has knowledge." Snyder v. City of Philadelphia, 564 A.2d 1036, 1039 (Pa. Ct. of App.1989).

Court held that on common law negligence claims, asbestos manufacturers have a non-delegable duty of reasonable care that incorporated a duty to warn:

When a product manufacturer becomes aware or should have become aware of dangerous aspects of its product, it has a continuing duty to warn of such dangerous aspects even though the dangerous aspects are discovered after the product has left its hands. The duty to warn potential users exists even though such dangerous aspect was not known or foreseeable when the product was initially marketed.

The duty to warn attaches, not when scientific certainty of harm is established, but whenever a reasonable person using the product would want to be informed of the risk of harm in order to decide whether to expose himself to it.

Koker v. Armstrong Cork, 60 Wash.App. 466, 476-77, 804 P.2d 659 (Wash.App. 1991). This jury instruction linked the duty to warn to the expectations of a reasonable person using the product.

In 1996, the Washington Supreme Court modified this rule, moving away from the reasonable consumer test and instead linked the duty to warn to “the actions of a reasonably prudent manufacturer. In a negligence action the focus is on the conduct of the manufacturer.” Young v Key Pharmaceuticals, 130 Wash.2d at 178. Accordingly, it held that in a negligence case “the duty to warn arises when a manufacturer

becomes aware or should have become aware of dangerous aspects of one of its products.” Id.

Viad will undoubtedly argue that Koker and Young are inapposite because no threshold duty can attach when “its product” is not the instrumentality that causes the injury. However, this argument would allow any manufacturer to negate responsibility for its own actions and conduct regardless of the facts that may have been developed. The assertion of common law negligence is quintessentially about a *defendant’s conduct* in relation to a product that it offers on to the market. The duty to test, inspect, analyze, keep abreast of scientific knowledge and indeed to warn, focus upon the conduct of the manufacturer in relation to a product that it puts on the market. “The duty of care on the part of the manufacturer does not arise out of contract, but out of the fact of offering goods on the market to remote users, as to whom there is a foreseeable risk of harm, if due care is not used.” Freeman v. I.G. Navarre et. al., 47 Wash.2d 760, 772-773, 289 P.2d 1015 (1955).

For this reason, if a manufacturer knows or has reason to know that its product will be operated with another hazardous product that it did not manufacture, a duty of reasonable care to warn of those foreseeable hazards exists. This is particularly the case under a summary judgment standard when there is undisputed evidence that the manufacturer knew or

had reason to know that the hazardous material would be used in conjunction with the product it did manufacture. The Koker Court therefore correctly described the following as an “accurate reflection of the law” on the threshold legal question of whether a defendant owes a duty to a Plaintiff:

A manufacturer’s duty to use ordinary care is bounded by the foreseeable range of the danger. In order to recover on the theory of negligence, plaintiff must prove that the defendant should have anticipated an unreasonable risk of danger to a plaintiff or to other workers of plaintiff’s class.

Koker v. Armstrong Cork, 60 Wash.App. at 480. Appellant has met this burden based upon the undisputed evidence in this record.

The foreseeability rationale supported liability in Wright v. Stang Manufacturing Co., 54 Cal.App.4th 1218, 63 Cal.Rptr.2d 422 (Cal.App.2.Dist., 1997). The defendant in Wright manufactured a piece of equipment used on a fire truck, a deck gun. The deck gun was mounted to the fire truck by a piece of equipment manufactured by another entity, a three inch riser pipe. The deck gun itself never failed, but the riser pipe did fail, causing the entire apparatus to break loose and injure the plaintiff firefighter. The deck gun manufacturer claimed it could not be liable for a failure to warn because *its* product was not defective. Id., at 1224. However, the California Court held summary judgment could not be

entered because the plaintiff introduced evidence that it was “foreseeable to anyone familiar with fire apparatus” that pressure from the deck gun would be too great for the steel riser, and that the combination of the deck gun and riser could result in the failure that injured plaintiff. Id. at 1225-1226. The deck gun manufacturer had not negated that it “knew that the fire department intended to attach the deck gun to a threaded riser pipe.” Id. at 1234-1235. Simply stated, the deck gun manufacturer had a duty to warn of the foreseeable dangers posed by the combination of a product, manufactured by another, with its own product.

3) *Duty to Warn of Foreseeable Risks Arising from Products Manufactured by Third Parties*

What Appellants are seeking in the context of this summary judgment record, is neither new nor novel. Courts have often recognized the duty to warn arising from the foreseeable uses of a manufacturer’s product even if the hazard arises from an instrumentality, which although manufactured by another is used in the normal operation of the Defendant’s product. A duty to warn is particularly appropriate where the modification or alteration is necessary to the product’s intended use. A leading treatise explains:

Foreseeability is the critical factor in determining whether a subsequent substantial alteration may be attributed to the manufacturer as a proximate result of an original design

defect; a design defect inherent in a safety feature of a product that foreseeably leads to a substantial alteration and an increased risk of danger may be a basis for strict products liability. A modification or alteration of a product which is essential to the product's intended use does not insulate the manufacturer from liability.

American Jurisprudence, Second Edition, § 1449 *Alteration Necessary to Correct Design Defect or Essential to Intended Use* (2005). This rationale applies with full force here because there is substantial evidence in the record that the modification of the evaporator through the application of asbestos insulation was, on an objective basis, reasonably foreseeable.¹²

In short, negligence law in a failure to warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk that a reasonably prudent manufacturer would and should have known and warned about.

¹² See also, American Jurisprudence, Second Edition § 1446, *Applicability of Concept of Foreseeability* (2005):

Generally, only alterations or modifications *that were not reasonably foreseeable* by the manufacturer or seller are sufficient to preclude imposition of liability....

Further on in the comment to this section, it is stated that:

... The plaintiff bears the burden of proving that it was foreseeable that an alteration would be made, and that the alteration itself did not unforeseeably render the product unsafe. The plaintiff must establish that *it was objectively foreseeable that a subsequent alteration of the product would create a risk of injury; subsequent alterations are objectively foreseeable where in light of the general experience within the industry at the time the product was manufactured, they could reasonably have been anticipated by the manufacturer.*

Id. citing Brown v. United States Stove, 484 A.2d 1234 (N.J. 1984) (emphasis supplied).

4) *Griscom Russell had a Duty to Warn Plaintiff of Asbestos Hazards Arising from the Foreseeable Use of its Products*

In the instant case, the evidence submitted by Plaintiff in opposition to summary judgment established that: (1) Griscom Russell evaporators had to be insulated in order to operate properly; (2) the insulation on Griscom Russell products contained asbestos; (3) Griscom Russell's personnel knew or should have known that asbestos insulation was likely to be disturbed in the course of normal and anticipated maintenance; and (4) Plaintiff Joseph Simonetta was exposed to asbestos insulation while performing regular and foreseeable maintenance on Griscom Russell evaporators. Moreover, this case presents a unique appellate record because the trial court explicitly found that "the product manufacturer knew or reasonably should have known that its product would be insulated with asbestos containing material." *CP 1229*.

In light of this evidence, Griscom Russell owed Appellant Simonetta a duty of reasonable care that included a duty to warn him of asbestos hazards. Appellant presented sufficient evidence to raise a triable issue on his claims of common law negligence and the trial court therefore erred in granting summary judgment to Viad on this issue.

C. Duty to Warn Under Strict Products Liability

Appellant also asserted a claim of strict liability based upon Viad's failure to provide adequate warnings of asbestos related hazards. *CP* 26. The asbestos exposures in this case occurred prior to passage of the Tort Reform Act of 1981. Accordingly, product liability claims in this case are to be adjudicated under product liability law that was in place prior to 1981. Mavroudis v. Pittsburgh Corning Corporation, et. al., 86 Wash.App. 22, 34, 935 P.2d 684 (1997).

1) Elements of a Strict Liability Claim

Strict liability in tort is based upon the Restatement (Second) of Torts s 402(A) (1965)¹³ and was adopted in Washington in Ulmer v. Ford Motor Co., 75 Wash.2d 522, 452 P.2d 729 (1969). In order to prove strict liability, a plaintiff must establish (1) a defect, either in design or in manufacturing, (2) which existed at the time the product left the hands of the manufacturer, (3) and not contemplated by the user, (4) which renders the product unreasonably dangerous or not reasonably safe, and (5) which

¹³ (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

was the proximate cause of plaintiff's injury. Bich v. General Electric, 27 Wash.App. 25, 28-29, 614 P.2d 1323 (1980) *citing* Lamon v. McDonnell Douglas Corp., 19 Wash. App. 515, 521, 576 P.2d 426 (1978) *aff'd* 91 Wash.2d 345, 588 P.2d 1346 (1979); Potter v. Van Waters & Rogers, Inc., 19 Wash.App. 746, 578 P.2d 859 (1978). The terms "defective" and "unreasonably dangerous" are synonymous in a strict tort liability action. Lamon v. McDonnell Douglas Corp., 19 Wash.App. at 521 (1978).

In contrast to negligence, strict liability for unreasonably dangerous products under 402(A) "focuses attention on the product rather than upon the conduct of the supplier of the product." Little v. PPG Industries, 92 Wash.2d 118, 594 P.2d 911 (1979). The benefits of strict liability extend to all individuals whom a manufacturer should reasonably expect to use its product, which includes employees and repairmen. Bich v. General Electric, 27 Wash.App. 25, 28-29 (1980). Appellant falls within this definition because his job duties in the Navy were to maintain and repair equipment such as Griscom Russell evaporators. A manufacturer may be held strictly liable even though his product was faultlessly manufactured if the product is unreasonably dangerous because the manufacturer failed to give adequate warnings. Id.

In Washington, Appellate Courts have repeatedly confirmed that the jury is entitled to consider all evidence that bear on whether a product

is unreasonably dangerous as designed including if that danger arises from failure to warn:

As strict products liability in tort was originally conceived, the manufacturer's ability to know of the danger of its product at the time of sale was immaterial. Under pure strict liability theory, the product is on trial, not the knowledge or conduct of the manufacturer. Subsequently, additional products liability theories developed which permit the plaintiff to recover when the manufacturer fails to give adequate warning or adopt an alternate design to make the product safer [citation omitted] ...

Under Washington's approach *all evidence* of the nature of the product and its dangers which assists the trier of fact to determine whether the product was unreasonably dangerous is relevant.

Lockwood v. AC & S, Inc., 44 Wash.App. 330, 348-49, 722 P.2d 826 (1986) (emphasis supplied, citations omitted) *aff'd* 109 Wash.2d 235, 744 P.2d 605 (1987).

In Lunsford v. Saberhagen Holdings, Inc., 125 Wash.App. 784, 788, 106 P.3d 808 (2005), this Court recently considered whether an asbestos plaintiff can bring a strict liability claim against an asbestos supplier based upon Plaintiff's household exposures to asbestos dust brought home on his father's work clothes. The trial court granted summary judgment to the supplier, holding as a matter of law that the plaintiff was not a product "user" under Section 402A. However, this Court reversed holding

that the foreseeability of Plaintiff's household exposure to the defendant's products was a question of fact to be decided by the jury. Id. at 792-793. The Court explained its holding as follows.

“[T]he justification for . . . strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it. . . . “ These policy rationales support application of strict liability to a household family member of a user of an asbestos containing product, if it is reasonably foreseeable that household members would be exposed in this manner. Thus, the question for the jury would be whether it was reasonable for the manufacturer to foresee that [plaintiff] would be exposed to its product through his father.

Id. (quoting Restatement (Second) of Torts § 402A comment c. (1965)).

2) *Manufacturer's Strict Liability for Alteration of its Product*

In Bich v. General Electric, 27 Wash.App. 25, 27-28, 614 P.2d 1323 (1980), an electrician (Bich) was seriously injured when a transformer he was working on exploded. General Electric was the manufacturer of the transformer. The cause of the explosion was traced to a Westinghouse fuse which Bich had installed in the transformer. Bich sued General Electric for personal injuries on a theory of strict liability

related to the transformer.¹⁴ Among its defenses, GE asserted that it was not liable for Bich's injuries because Bich's substitution of Westinghouse fuses for GE fuses constituted a substantial change or modification.

The Court of Appeals disagreed holding that "whether the substitution was a substantial change was a question of fact" because "the parties introduced conflicting evidence on this point." Id. at 29.

Bich also argued, *inter alia*, that GE's transformer was unreasonably dangerous due to GE's failure to adequately warn of fuse substitution. Id. at 31-32. While acknowledging that GE had no duty to warn specifically about a fuse Westinghouse manufactured in 1973, the Court of Appeals held that "the jury could have found GE had a duty to warn of the time-delay characteristics of its own fuse." This was precisely because "the evidence indicated all such high voltage equipment [the transformer] requires time delay fuses." Id. at 33.

Parkins v. Van Doren Sales, Inc., 45 Wash.App. 19, 724 P.2d 389 (1986) also refutes the substantial change defense. Parkins was injured when her right arm was caught in a nip point of a conveyer belt at a pear processing plant. The conveyor had been assembled as one part of a newly installed processing line designed, constructed and installed by Wenoka

¹⁴ Like the case at bar, Bich was adjudicated under pre-WPLA law and in particular, the Restatement (Second) of Torts S 402(A) as adopted by Washington in Ulmer v. Ford Motor Co., 75 Wash.2d. 522, 452 P.2d 729 (1969).

(Parkins' Employer) and not Van Doren. Wenoka already possessed certain parts required to construct the processing line, but it purchased additional necessary component parts from Van Doren. Of these additional parts, the Court noted that "none of the parts involved here were defectively manufactured". Id. at 21.

However, the Court also noted that "no labels, decals, directions or instructions warning of dangerous nip points created when the parts are assembled... Instead, Van Doren left it to Wenoka to install guards on the parts or warn its employees of any dangers." Id.

Like Viad in this case, Van Doren moved for summary judgment contending it merely sold Wenoka parts which were individually non-defective when manufactured; it contended it had no knowledge as to whether the parts would merely be used for replacement purposes or to construct a new conveyor. Consequently, it claimed it had no duty to warn or provide safety devices. Id. at 22-23.

The trial court granted Van Doren's summary judgment. However, the Court of Appeals reversed applying the concept of foreseeability in holding held that there was evidence that "Van Doren knew unguarded nip points made its conveyors "not reasonably safe". Id. at 26. It also held that there was evidence that Van Doren knew Wenoka was installing a new processing line and required equipment like conveyors and sizers.

The Court specifically rejected Van Doren's argument that even if it possessed such knowledge, it was not reasonable for it to provide guards for the components it did supply since Van Doren had no control over the assembly of the overall conveyor and processing line. Id. at 27. The Court held that a nip point is always created when a conveyor such as this is fully assembled. Accordingly, Van Doren's failure to provide warnings on component parts near the nip point of the fully assembled conveyor made the failure to warn of a dangerous defect actionable. Id.

The Court of Appeals also rejected Van Doren's affirmative defense of substantial change. Although Wenoka added important parts of the conveyor – parts without which the conveyor would not work (the conveyor belt, motor and supporting structures), the Court held that there was evidence that these parts “had to be added to construct any conveyor”.

Finally, the Court addressed the defense of superseding proximate cause. Van Doren argued that it was relieved of any responsibility because Wenoka knew the equipment was dangerous. Thus, Van Doren argued, Wenoka's failure to add protective guards was a superseding cause of Parkins injury. The Court expressly rejected this argument reasoning that:

The intervening negligent act of another will not supersede the original actor's negligence as a proximate cause of an injury *where the original actor should reasonably foresee*

the occurrence of such an event (citation omitted). Only when the intervening negligence is so highly extraordinary or unexpected that it falls outside of the realm of reasonable foreseeability will it be held to supersede a defendant's negligence.

Id. (emphasis supplied).¹⁵

3) *Failure to Warn of Hazards Arising out of Foreseeable Use of its Product Renders Product Unreasonably Dangerous*

Appellate courts in other jurisdictions are in accord with cases like Bich and Parkins. For example, in Liriano v. Hobart Corp., the New York Court of Appeals held that the existence of a substantial modification defense does not preclude in all cases, *a failure to warn claim*. As opposed to cases where a Court sought to impose upon a manufacturer a *duty to design* against post sale modification of a given product, the policy considerations are less cogent with respect to the *duty to warn* about hazards associated with such modifications. Liriano v. Hobart, 700 NE 2d 303, 306-309 (NY Ct. App.1998):

Unlike design decisions that involve the consideration of many interdependent factors, the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and

¹⁵ The present case is distinguishable from Sepulveda-Esquivel v. Central Machine Works, Inc., 120 Wn. App. 12, 84 P.3d 895 (2004). In that case, a third party modified the defendant manufacturer's hook. Apparently, the manufacturer had no notice, constructive or otherwise, that this modification would be made. The modification to the hook caused plaintiff's injury. However, in the present case, it was the foreseeable application of asbestos to the evaporator that gave rise to the injury. In Sepulveda-Esquivel the modification of the product was not supported by any evidence that it was foreseeable.

effectiveness of any warning. The burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product. Thus, although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.

Id. at 308.

In Berkowitz v. A.C. and S., Inc. 288 A.D.2d 148, 733 N.Y.S.2d 410 (2001), a New York appellate court adopted a similar analysis of Section 402A as this Court applied in Bich, Parkins and Lundsford to a manufacturer who supplied steam pumps to the U.S. Navy. The court held that the pump manufacturer had a duty to warn of hazards arising from asbestos gaskets and insulation, despite the fact the pump manufacturer neither manufactured nor installed the asbestos products. Id., 288 A.D. 2d at 149. The Berkowitz court denied the pump manufacturer's motion for summary judgment, citing triable issues of fact regarding the manufacturer's knowledge that asbestos insulation and gaskets would be used with its equipment. Id.¹⁶

¹⁶While not published authority, the federal district court's analysis in Chicano v. General Electric Co. 2004 WL 2250990 (E.D.Pa., 2004), provides a helpful analysis. In Chicano, the trial court found that a turbine manufacturer could be liable for external insulation manufactured and applied by others to its turbines. That court noted that GE did not control what form of insulation would cover its turbines. Despite the lack of control at the point of installation, the court found triable issues of fact as to whether the turbines were "generic components or designed for a particular type of finished product and whether GE could reasonably foresee that its turbines would be combined with asbestos-

4) *Whether or Not Griscom Russell Evaporators Were Unreasonably Dangerous is a Question of Fact*

In the instant case, Viad's own expert admitted that Griscom Russell evaporators needed to be insulated in order to function properly and the trial court explicitly held that it was foreseeable to Griscom Russell that its products would be insulated with asbestos. Plaintiff's deposition testimony and Jerry Lauderdale's declaration establish a reasonable inference that it was necessary to dislodge and replace asbestos insulation when performing regular and anticipated maintenance on Griscom Russell evaporators. Although Griscom Russell did not manufacture the insulation that was used on its evaporators, it cannot be said as a matter of law that it was unforeseeable to Griscom Russell that plaintiff would inhale asbestos fibers while maintaining its evaporators or that this danger was "so obvious or known that no warning was required." See Bich v. General Electric, 27 Wash.App. at 33.

Because plaintiffs have presented evidence that (1) asbestos insulation was integral to the proper operation of Griscom Russell evaporators and (2) plaintiff's exposure to asbestos insulation from Griscom Russell products was foreseeable to the defendant, an issue of fact exists over whether Griscom Russell's failure to provide warnings of asbestos hazards rendered its products unreasonably dangerous. Accordingly, the trial court erred in granting summary judgment to Viad on plaintiffs strict liability claim.

containing insulation, which together constituted a defective product, absent appropriate warnings of the dangers of asbestos." 2004 WL 2250990, *6 (emphasis supplied).

CONCLUSION

“The adequacy of both the prominence of warnings accompanying a product is a question for the jury, and the Court need not furnish guidelines to aid the jury in its determination.” Bich v. General Electric, (citing Berry v. Coleman Systems Co., 23 Wash.App. 622, 627, 596 P.2d 1365 (1979)); accord Liriano v. Hobart Corp., 700 NE 2d at 309 (“Failure-to-warn liability is intensely fact-specific, including but not limited to such issues as feasibility and difficulty of issuing warnings in the circumstances, obviousness of the risk from actual use of the product; knowledge of the particular product user; and proximate cause.”).

At trial, Viad may be able to prove to a jury that its failure to warn of insulation hazards was not a breach of its duty of reasonable care on the claim of negligence. Similarly, it may be able to prove that its failure to warn did not make its product unreasonably dangerous and defective on the claim of strict liability. However, those are questions for the jury. The trial court committed reversible error by deciding these questions as a matter of law.

RESPECTFULLY SUBMITTED this 21st day of October, 2005.

BERGMAN & FROCKT

A handwritten signature in black ink, appearing to read "David S. Frockt". The signature is written in a cursive style with a horizontal line underneath it.

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Counsel For Petitioners

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOSEPH A. SIMONETTA and JANET E.
SIMONETTA, a married couple,

Petitioners,

V.

SABERHAGEN HOLDINGS, et. al., and VIAD
CORP.,

Respondents.

No: 56614-8-I

DECLARATION OF SERVICE

I, Wil John Cabatic, declare and state as follows:

1. I am at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.
2. On the 21st day of October, 2005, I caused to be served true and correct copies of:
(1) Brief of Appellants; and
(2) Declaration of Service, on the following:

Via ABC Legal Messenger:

Counsel for Viad Corporation

Ronald C. Gardner
GARDNER BOND TRABOLSI ST. LOUIS & CLEMENT, PLLC
2200 Sixth Avenue, Suite 600
Seattle, WA 98121

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STATE OF WASHINGTON

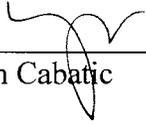
DECLARATION OF SERVICE - 1

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

DATED at Seattle, Washington this 21st day of October, 2005.

BERGMAN & FROCKT



Wil John Cabatic