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STATE OF WASHINGTON

No. _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Court of Appeals No. 56614-8-I )

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JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Appellants,

v.

VIAD CORP,

Respondent.

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# PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW..... 1

D. STATEMENT OF THE CASE..... 2

1. Nature of the Case..... 2

2. Factual Background..... 2

3. Procedural Background..... 4

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 5

1. Division I's Decision Conflicts with Supreme Court and Court of Appeals Case Law Holding that Strict Liability under the Restatement (Second) of Torts §402A Applies Only to One in the Business of Selling the Unsafe Product that Caused the Harm..... 6

2. Division I's Reasoning Conflicts with Supreme Court and Court of Appeals Cases Holding that Strict Liability Applies Only if the Product is Expected to and Does Reach the User Without Substantial Change..... 12

3. Division I's Decision Also Conflicts with Supreme Court and Court of Appeals Case Law Holding that Product Manufacturers are Subject to Liability for Negligence When a Product They Sell is Not Reasonably Safe..... 13

4. This Petition Involves Issues of Substantial Public Interest That Should be Determined by this Court..... 14

F. CONCLUSION..... 20

Appendix A:

Slip Opinion in *Simonetta v. Viad Corp*, 137 Wn. App. 15, 151 P.3d 1019 (2007).....Pages A1 – A21

Court of Appeals Order Denying Viad's Motion for Reconsideration and/or Clarification No. 56614-8-I (Linked with No. 57011-1-1)....Pages A22 – A23

Slip Opinion in *Braaten v. Saberhagen Holdings*, 137Wn. App. 32, 151 P.3d 1010 (2007).....Pages A24 – A38

TABLE OF AUTHORITIES

**Washington Cases**

*Bich v. General Elec. Co., supra* 27 Wash.App. at 29, 614 P.2d 1323..... *12*

*Braaten v. Saberhagen Holdings*, ___ Wn. App. ___, 151 P.3d 1010, (2007).....15

*Central Washington Refrigertation, Inc.* 133 Wn.2d 509, 946 P.2d 760 (1997).....18

*DiPangrazio v. Salamonsen* 64 Wn.2d 720, 723-724, 393 P.2d 936, (1964).....17

*Flessher v. Carstens Packing Co.* 93 Wash. 48, 55, 160 P. 14, 17 (1916).....10

*Geisness v. Scow Bay Packing Co.*, 16 Wash.2d 1, 14, 132 P.2d 740, 746 (1942).....12

*Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wash.2d 708, 658 P.2d 1230 (1983).....18

*Haugen v. Minnesota Mining & Mfg. Co.,* 15 Wn. App. 379, 387, 550 P.2d 71 1976).....8, 9

*Haysom v. Coleman Lantern Co., Inc.* 89 Wash.2d 474, 573 P.2d 785 (1978).....9

*Koker v. Armstrong Cork, Inc.,* 60 Wn. App. 466, 804 P.2d 659, *review denied,* 117 Wn.2d 1006, 815 P.2d 265 (1991).....14

*Little v. PPG Industries, Inc.,* 19 Wn. App. 812, 579 P.2d 940 (1978).....9, 16

*Little v. PPG Industries, Inc.*, 92 Wn. 2d 118,
594 P.2d 911 (1979).....9, 16

*Lockwood v. AC & S, Inc.* 109 Wn.2d 235, 744 P.2d 605, 612
(1987).....6, 11

*Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 105 P.2d 76,
130 A.L.R. 606 (1940).....10

*Nigro v. Coca-Cola Bottling, Inc.*, 49 Wn.2d 625,
305 P.2d 426 (1957).....7

*Padron v. Goodyear Tire & Rubber Co.*,
34 Wn. App. 473, 476-477, 662 P.2d 67, 69 - 70 (1983).....12, 13

*Rufener v. Scott,* 46 Wash.2d 240, 242, 280 P.2d 253
(1955).....18

Sahlie v. Johns-Manville Sales Corp., 9 Wn.2d 550, 552,
663 P.2d 473, 474 (1983).....13

*Seattle First Nat. Bank v. Tabert,*
86 Wn.2d 145, 542 P.2d 774 (197.....8, 10, 12, 18

*Stocker v. Shell Oil Co.,* 105 Wash.2d 546, 547, 716 P.2d 306
(1986).....18

*Ulmer v. Ford Motor Co.* 75 Wash.2d 522, 531-532,
452 P.2d 729, 734 (1969).....7, 10, 11, 12, 13

*Young for Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 175,
922 P.2d 59,67 (1996).....14, 17

**Cases from Other Jurisdictions**

*Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57, 63,
377 P.2d 897, 901-901, 27 Cal.Rptr. 697, 701 (1963.....10

*Koonce v. Quaker Safety Products & Mfg. Co.* 798 F.2d 700, 715 (5th Cir.1986).....19

*Lindstrom v. A-C Product Liability Trust,* 424 F.3d 488 (6th Cir. 2005).....19

**Codes and Statutes**

RAP 13.4(b)(1), (2) and (4).....6

**Other Authorities**

Restatement (Second) of Torts § 402A.....6, 7

Restatement (Second) of Torts § 402A, comment c.....10

Restatement (Second) of Torts § 402A(1)(b), comment *p,* at 357 (1965).....12

## A. IDENTITY OF PETITIONER

Viad Corp[1] ["Viad"] asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

## B. COURT OF APPEALS DECISION

The Court of Appeals decision, 137 Wn. App. 15, 151 P.3d 1019 (2007), A-1 through A-21, reversed a summary judgment ruling that the manufacturer of an un-insulated evaporator used on U.S. Naval ships had no duty to warn about the dangers of asbestos in products placed on the evaporator by others after its delivery to the Navy.

Viad's Motion for Reconsideration and/or Clarification of this decision was denied on March 23, 2007. A-22 through A-23.

## C. ISSUES PRESENTED FOR REVIEW

Does a manufacturer of a Naval marine evaporator (also known as a distilling plant or sea water distiller) have, under common law negligence or strict product liability, a duty to warn potential users regarding the dangers of respirable asbestos released from insulation placed on the evaporator by the Navy or others where (1) the manufacturer sold the evaporator without insulation; and (2) the manufacturer did not manufacture, sell, or supply the insulation installed by the Navy or others?

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[1] Viad is being sued in this action for the failure of its alleged predecessor Griscom-Russell to warn of risks associated with thermal asbestos insulation attached, post-manufacture and sale, to Griscom-Russell's evaporator. Viad disputes the claim that it has successor liability, but for the purposes of this Petition, the Court may assume that Viad is a corporate successor to Griscom-Russell.

## D. STATEMENT OF THE CASE

### 1. Nature of the Case

In this asbestos personal injury case Simonetta sued Viad and other companies claiming he developed lung cancer as a result of working around asbestos products. Simonetta's theory of Viad's liability is based on Griscom-Russell's (Viad's alleged predecessor) failure to warn about the dangers of asbestos insulation the U. S. Navy put on evaporators manufactured by Griscom-Russell. The claims against Viad sound in negligence and strict products liability under the common law, not the Washington Product Liability Act.[2]

### 2. Factual Background

Simonetta served in the Navy on the USS Saufley. The Saufley was commissioned in 1942. CP 137. Griscom-Russell manufactured its evaporator in the early 1940's. CP 201. It was a large cylinder, 10-12 feet in diameter and approximately 15 feet in length, and desalinated sea water converting it into fresh water. CP 174, 190.

Sometime in 1959 to 1960, seventeen years after the manufacture of the Saufley's evaporator, Simonetta, a Third Class Machinists Mate, on one occasion, removed, repaired and cleaned its internal tube bundle. CP

[2] This case is not governed by the Washington Product Liability Act, as noted by Division I, (A-4) because Simonetta's exposure occurred before the effective date of the Act.

173-179, 189-198. In order to access the tube bundle inside of the evaporator, Simonetta removed exterior insulation material made with asbestos. CP 187,189, 195-197, 201-203. The process of removing the old insulation and replacing gaskets took no more than six to eight hours. CP 202. Simonetta used a hammer to remove external asbestos block insulation covered with asbestos mud and asbestos cloth. CP 196-197. He does not claim Griscom-Russell manufactured, sold, or supplied the asbestos material he removed or installed. CP 203. He did not know who originally put the insulation materials on the evaporator. CP 203. Forty years later, he developed lung cancer and claims it was caused in part by asbestos exposure from the one occasion he removed insulation on the Saufley's evaporator. CP 7-9.

It is undisputed that Griscom-Russell sold the evaporator to the Navy without insulation and that the Navy or its third-party contractors applied insulation after delivery. CP 993. There is no evidence that Griscom-Russell recommended or specified the use of asbestos insulation. Simonetta submitted evidence that the evaporator had to be insulated in order to operate properly and safely. CP 744. He also submitted evidence that Griscom-Russell would know the Navy used asbestos-containing insulation on "high temperature applications" but no evidence that only

asbestos containing insulation could be used. CP 744.[3] He also submitted a Griscom-Russell operations and maintenance manual describing how to remove, repair and clean the tube bundles inside the evaporator. CP 773-782. The manual does not state whether the evaporator should be insulated, what type of insulation should be used, or how to remove and replace insulation to access internal parts. Id.

### 3. Procedural Background

Simonetta sued 17 defendants alleging asbestos exposure caused his lung cancer and asserting liability based primarily on negligence and strict products liability. CP 24-28. Viad moved for summary judgment. CP 42-60. Viad argued Griscom-Russell owed no duty to warn of dangers associated with asbestos products manufactured, sold, and supplied by others. CP 49-60. King County Presiding Asbestos Judge, The Honorable Sharon Armstrong, granted Viad's motion on the duty to warn with respect to asbestos insulation products. The Court's order reads:

> IT IS ORDERED that Viad Corp.'s Motion for Summary Judgment is GRANTED on the issue of duty to warn. Although the product manufacturer knew or should have known that its product would be insulated with asbestos containing material, the product itself did not produce the injury. *Teagle* is distinguishable. The motion is denied as to corporate successor liability and exposure to asbestos containing gaskets due to genuine issues of material fact. (CP 1194-96; *see also* CP 1228-30).

[3] Based on this evidence Simonetta argued Griscom-Russell would have known the Navy would use asbestos containing insulation on the exterior of its evaporator. Viad did not contest this assertion because that arguably would create an issue of fact. Instead, Viad argued the fact was not material. But at trial Viad will have evidence that non-asbestos insulation was also used by the Navy on evaporators because evaporators were not "high temperature" equipment.

Simonetta voluntarily dismissed all remaining claims and appealed. CP 1374-75, 1383-85, 1388 – 1397.

Division I reversed. With respect to the common law negligence claim, Division I held there were questions of fact as to whether Griscom-Russell had a duty to warn of the risk of asbestos exposure during service of its evaporator in light of evidence that the evaporators would need to be insulated to operate properly, that the Navy used asbestos insulation and that workers would have to disturb the asbestos insulation to perform maintenance. A-12. With respect to the strict liability claim, Division I held there were questions of fact as to whether Griscom-Russell had a duty to warn about the insulation to be placed on its evaporators in light of the evidence that its evaporators required the use of insulation which would release a hazardous substance upon proper use of the evaporator. A-20.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Division I acknowledged that its decision extends the manufacturer's duty in negligence beyond traditional bounds.

> While this duty has not traditionally applied to products manufactured by another, this present case represents a set of facts that compels another logical extension of the common law.

A-12. It characterized the strict liability issue as one of first impression. A-18. Relying on one distinguishable case,[4] not cited by any party, Division I

[4] *Stapleton v. Kawasaki Heavy Indus.*, 608 F.2d 571 (1979) is inapposite because the motorcycle failed to perform its intended function of containing gasoline in its tank.

drastically broadened the liability of product manufacturers by making them responsible for dangers in products they do not sell and that involve technical arts outside their field of expertise. This will have a significant impact on businesses, their insurers, and ultimately consumers who will bear the cost of such additional liability.

Viad seeks review under RAP 13.4(b)(1), (2), and (4) because Division I's decision conflicts with decisions of this Court and the Court of Appeals, and involves issues of substantial public interest that should be determined by this Court. Viad asks this Court to reverse Division I.

**1. Division I's Decision Conflicts with Supreme Court and Court of Appeals Case Law Holding that Strict Liability under the Restatement (Second) of Torts §402A Applies Only to One in the Business of Selling the Unsafe Product that Caused the Harm.**

An essential element of a products liability case is proof that the defendant supplied an unsafe product that caused harm. In asbestos cases, the plaintiff must identify the asbestos product that caused the harm to have a cause of action. *Lockwood v. AC & S, Inc.,* 109 Wn.2d 235, 245, 744 P.2d 605 (1987). "In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury." *Id.* This essential element dates back to the implied warranty cases decided well before the adoption of strict liability under §402A.

In *Nigro v. Coca-Cola Bottling, Inc.,* 49 Wn.2d 625, 305 P.2d 426 (1957), the Washington Supreme Court reversed a judgment for the plaintiff because he failed to establish that the defendant, Coca-Cola Bottling, Inc., "supplied" the bottle of Coca-Cola that contained foreign matter making the plaintiff ill. *Id.* Proof that the defendant supplied the unwholesome product causing the injury was, in the court's opinion, "the essential element of [the plaintiff's] case." *Nigro,* 49 Wn.2d at 426. *Nigro* was an implied warranty case but the essential element of defendant's sale of the dangerous product that caused the harm remains in the modern law of strict liability.

Implied warranty was the forerunner to strict products liability under the Restatement (Second) of Torts §402A.

> Section 402A, insofar as it pertains to manufacturers (and we are concerned in this case with a manufacturer only), is in accord with the import of our cases which have been decided upon a theory of breach of implied warranty and we hereby adopt it as the law of this jurisdiction.

*Ulmer v. Ford Motor Co.* 75 Wash.2d 522, 531-532, 452 P.2d 729, 734 (1969). Section 402A provides:

> (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.

In every strict product liability case decided under Washington law, liability has been restricted to **entities in the chain of distribution** of the defective product.

> According to the Restatement, strict liability is applicable if 'the seller is engaged in the business of selling such a product' even though 'the user or consumer has not bought the product from or entered into any contractual relation with the seller.' (Italics ours.) Restatement (Second) of Torts s 402A(1)(a) and (2)(b). Comment f states that the rule is intended to apply to any manufacturer, wholesale or retail dealer or distributor. Thus, <u>such liability is extended to those in the chain of distribution</u>.

(Underlining added.). *Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 148, 542 P.2d 774, 776 (1975). Comment f to the Restatement (Second) of Torts §402A states in pertinent part:

> *f. Business of selling. ...*
> ...The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

Washington first applied strict liability in tort for failure to warn of the manner in which to safely use an otherwise faultlessly manufactured product in the case of *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wn.

App. 379, 387, 550 P.2d 71, 76 (1976). *Haugen* was an action against a grinding disc manufacturer for failing to warn the user to wear special impact resistant goggles when grinding. Subsequently, in *Haysom v. Coleman Lantern Co., Inc.*, 89 Wash.2d 474, 573 P.2d 785 (1978) (alleged failure to warn adequately about dangerous propensities of a Coleman stove) this Court described the rule in the following terms:

> It provides that a product may be deemed "defective" and a manufacturer incur liability for failure to adequately warn of dangerous propensities of a product which it places in the stream of commerce.

Id. at 478-479. In *Little v. PPG Industries, Inc.,* 19 Wn. App. 812, 579 P.2d 940 (1978), *affirmed,* 92 Wn.2d 118, 594 P.2d 911 (1979), (an action against a solvent manufacturer for failing to warn about breathing solvent fumes), the Court of Appeals and this Court approved the following jury instructions:

> A manufacturer of a product must give warning of any **dangerous propensities of a product manufactured or sold by him**, which are inherent in the product or its use which the user of the product would not ordinarily discover.

*Id* at 92 Wn.2d 124 (emphasis added).

> The plaintiff has the burden of [proving] that the defendant failed sufficiently to warn of **the dangers inherent in its product** and that thereby the product was rendered unreasonably dangerous.

*Id.* at 92 Wn.2d 124-125 (emphasis added).

The rationale behind strict liability for manufacturers is that they

rather than consumers rightfully ought to absorb the costs of injuries caused by their products.

> The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

*Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57, 63, 377 P.2d 897, 901-901, 27 Cal.Rptr. 697, 701 (1963). When this Court extended strict liability to sellers other than manufacturers it recognized that the arguments in favor of strict liability had no less force in the case of dealers. *Tabert*, at 148-149. As early as 1916 this Court noted that the rule of implied warranty "has its ethical basis in the reasonable presumption that the vendor, if a regular retail dealer, and especially if he be also the manufacturer, has the better means of knowledge of the character of the food which he offers for sale." *Flessher v. Carstens Packing Co.* 93 Wash. 48, 55, 160 P. 14, 17 (1916) cited by *Nelson v. West Coast Dairy Co.,* 5 Wn.2d 284, 105 P.2d 76, 130 A.L.R. 606 (1940) in turn cited by *Ulmer v. Ford Motor Co.* 75 Wn.2d 522, 531-532, 452 P.2d 729, 734 (1969).

§402A comment c describes the justification for strict liability as follows:

> On whatever theory, the justification for the 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; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

The notion that strict liability is limited to those in the business of selling the product that created the danger is firmly rooted in the Court of Appeals and Supreme Court decisions that have adopted and applied §402A.

Based on those precedents, Viad argued Griscom-Russell had no duty to warn about the hazardous propensities of asbestos insulation because Griscom-Russell was not in the chain of distribution of the insulation.

Division 1 however has now rejected the argument and held that §402A applied even though Griscom-Russell was not in the business of selling asbestos insulation and did not sell the asbestos that injured plaintiff. This result reached by Division I conflicts with *Lockwood*, *Ulmer*, and is not supported by the rationale behind product liability.

**2. Division I's Reasoning Conflicts with Supreme Court and Court of Appeals Cases Holding that Strict Liability Applies Only if the Product Is Expected to and Does Reach the User Without Substantial Change.**

Division I constructed the artifice that the evaporator itself was dangerous and caused the harm. Semantics cannot place Griscom-Russell in

the chain of distribution of the "relevant product."

§402A applies only if the "defective" product is expected to and does reach the consumer without substantial change. The condition of the product at the time of sale is what is relevant. See §402A(1)(b), comment p to 402A, *Ulmer* and *Tabert*, which state the rule, and *Padron v. Goodyear Tire & Rubber Co.*, 34 Wn. App. 473, 476-477, 662 P.2d 67, 69 - 70 (1983), which applied the rule to dismissal of a manufacturer. Griscom-Russell delivered a safe evaporator containing no insulation. The Navy applied asbestos insulation. If that made the evaporator unsafe, as Division I incorrectly postulated, then the evaporator underwent a significant change and 402A does not apply. This limitation is firmly rooted in the case law dating back to *Ulmer* and before. See *Geisness v. Scow Bay Packing Co.*, 16 Wn.2d 1, 14, 132 P.2d 740, 746 (1942).

*Padron* was a tire explosion case. The Court of Appeals wrote:

> Also, the plaintiff may be barred from recovery if the product underwent a substantial change in its condition after leaving the manufacturer. *Bich v. General Elec. Co., supra* 27 Wash.App. at 29, 614 P.2d 1323; Restatement (Second) of Torts § 402A(1)(b), comment *p,* at 357 (1965).
>
> The record shows the tractor was assembled at the factory with Firestone tires. The tire that exploded was a Goodyear tire. Mr. McConkie testified he had the front wheels and tires changed on the tractor about a year after it was purchased. Obviously, the tractor underwent a substantial change in condition after leaving the manufacturer, John Deere. Therefore, the court did not err in dismissing John Deere.

*Padron* 34 Wn. App. at 476-477.

Finally, this Court held, for statute of limitations purposes, that lack of substantial change is an essential element of a strict liability claim. *Sahlie v. Johns-Manville Sales Corp.*, 9 Wn.2d 550, 552, 663 P.2d 473, 474 (1983).

Here, the danger arose exclusively from asbestos insulation and was not enhanced by the evaporator. Division I's decision conflicts with §402A(1)(b) as adopted in *Ulmer* and *Tabert* and with the holding and rationale of *Padron*.

**3. Division I's Decision Also Conflicts with Supreme Court and Court of Appeals Case Law Holding that Product Manufacturers are Subject to Liability for Negligence When a Product They Sell is Not Reasonably Safe.**

This Court approved the following instruction on negligent failure to warn in a pharmaceutical manufacturer case.

> A pharmaceutical manufacturer is under a duty to use ordinary care to test, analyze and inspect the drug products it sells, and is charged with knowing what such tests should have revealed.
>
> The pharmaceutical manufacturer has a duty to use ordinary care to keep abreast of scientific knowledge, discoveries, advances and research in the field, and is presumed to know what is imparted thereby.
>
> When a pharmaceutical manufacturer becomes aware or should have become aware of dangerous aspects of one of its drug products, it has a continuing duty to warn of such dangerous aspects. In such a case, the pharmaceutical manufacturer is under a duty to act with regard to issuing warnings or instructions concerning any such danger in the manner that a reasonably prudent pharmaceutical

> manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform the ordinary physician who prescribes that drug product.

*Young for Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 175, 922 P.2d 59, 67 (1996). In a case against an asbestos product manufacturer, the Court of Appeals approved an instruction that was essentially identical to the first three sentences of the above instruction. *Koker v. Armstrong Cork, Inc.,* 60 Wn. App. 466, 804 P.2d 659, *review denied,* 117 Wn.2d 1006, 815 P.2d 265 (1991). Both *Young* and *Koker* relate the manufacturer's duty to dangerous aspects of its product. Division I's decision conflicts with *Young* and *Koker* because it imposes a duty to discover and warn about dangerous aspects of products other than those of the manufacturer.

**4. This Petition Involves Issues of Substantial Public Interest That Should be Determined by this Court.**

The issues presented in this petition are of substantial public interest for several reasons. First, Viad is currently defending four other cases in Superior Court and an additional case is pending in the Superior Court but is on the inactive docket. Four more cases originating in Washington are pending in Federal Court Multi-District Litigation proceedings. Viad expects more cases in Washington.

Second, there are a significant number of asbestos personal injury

actions pending in the Washington trial courts court against other equipment manufacturers based on exposure to external asbestos insulation products they did not supply. E.g., *Braaten v. Saberhagen Holdings*, 137 Wn. App. 32, 151 P.3d 1010 (2007), A-24 – A-41, administratively linked with the instant case in the Court of Appeals. Guidance from the Supreme Court would be valuable to the Superior Court. Division I's unprecedented decision now makes Washington a destination forum for similar asbestos cases in other states.

Third, apart from the numerous parties to the asbestos litigation who are interested in these issues, Division I's decision will impact many future lawsuits outside of the asbestos litigation. The decision creates new theories of liability that will apply to manufacturers of a wide variety of products. Any time a purchaser is required to combine a product with another product in order to use the first product, the manufacturer of the first product may now be subject to liability if the second product possesses dangerous characteristics. This is true even if the manufacturer's product was otherwise safe. Examples include manufacturers of wood products that require paint for proper use. Are they now subject to liability for harm caused through the past use of lead paint? Is the manufacturer of a steam pipe now subject to liability for the asbestos insulation it knew would be used to insulate the pipe so that it could properly and safely transport steam?

Would the manufacturer of the tank in the *Little v. PPG* case be subject to liability for failing to warn about the toxic solvents used to clean the tank if it knew those solvents would be used?

Strict liability in these circumstances imposes an untoward burden on manufacturers doing business in the state of Washington. A manufacturer should not be expected to be an expert on the safety of products it does not sell and otherwise has no reason to inspect, test and evaluate. The cost of developing such expertise is wasteful, duplicative of costs incurred by the manufacturers of the dangerous product and provides little to no additional margin of safety.

Finally, there are several subsidiary issues pertaining to the scope of liability under the rule adopted by Division 1 that warrant consideration by this Court. Under strict liability, the focus is on the product, not the manufacturer's conduct, and the manufacturer's knowledge of the danger is assumed. *Little,* 19 Wn. App. at 821-822. Should Griscom-Russell be deemed to know all of the hazards of asbestos such that its duty to warn will be determined by the reasonable expectations of the user without reference to whether Griscom-Russell could or should have discovered those dangers in 1942?

Under negligence theory, the manufacturer has a duty to use ordinary care to test, analyze and inspect its products and is charged with knowing

what such tests should have revealed? *Young*, 130 Wn.2d at 175. Do all manufacturers have a duty to use ordinary care to test, analyze and inspect products they don't sell because they may be used with other products?

Under negligence theory, the manufacturer has a duty to use ordinary care to keep abreast of scientific knowledge, discoveries, advances and research in the field. *Id.* Should Griscom-Russell have a duty to use ordinary care to keep abreast of scientific knowledge, discoveries, advances and research in the field of insulation or asbestos it does not sell?

In negligence law there is a general rule that there is no obligation on a retailer of a chattel to test the product in the absence of some circumstance suggesting the necessity therefore. *DiPangrazio v. Salamonsen* 64 Wn.2d 720, 723-724, 393 P.2d 936, (1964). Will that rule apply to a manufacturer who is not in the business of selling the product that created the danger? Will it apply to the negligence claim, the strict liability claim, or both?

Is it unjust and inefficient to impose liability on Griscom-Russell for the decision by the Navy to use asbestos insulation instead of other forms of insulation where Griscom-Russell had no input or control over the Navy's decision? Is the imposition of liability too great a burden and unfair because Griscom-Russell has no contractual relation with the insulation manufacturer and no legal basis to seek indemnity for damages cause by defective insulation products? When this Court extended strict liability to product sellers it noted:

> All of the valid arguments supporting the strict liability would appear to have no less force in the case of the dealers . . . to justify giving the consumer the maximum of protection, and requiring the dealer to argue out with the manufacturer any questions as to their respective liability.
> (Footnotes omitted.) W. Prosser, Torts s 100, at 665 (4th ed. 1971).

*Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 149, 542 P.2d 774, 776 (1975). A manufacturer in the position of Griscom-Russell has no basis on which to "argue it out with the (insulation) manufacturers". It has no contractual relationship with the manufacturers and cannot protect itself with an express indemnity provision or an implied warranty claim such as that enforced in *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997). There are no remedies available to a manufacturer in the position of Griscom-Russell.

> Indemnity may arise by express contract to indemnify when one party expressly contracts to reimburse the other party for any damages the other party may incur. *Stocker v. Shell Oil Co.,* 105 Wn.2d 546, 547, 716 P.2d 306 (1986). In tort, indemnity arises when a passive tort-feasor discharges a liability that an active tort-feasor should have paid; in such case the passive tort-feasor has an indemnity right against the active tort-feasor. *Rufener v. Scott,* 46 Wn.2d 240, 242, 280 P.2d 253 (1955). The Tort Reform Act expressly abolished tort indemnity in Washington between active and passive tort-feasors. RCW 4.22.040(3) (subject to narrow limitations not relevant here "indemnity between active and passive tort-feasors is abolished.."). *See also Glover for Cobb v. Tacoma Gen. Hosp.,* 98 Wn.2d 708, 658 P.2d 1230 (1983).

*Id.* 133 Wn.2d at 514, fn 3. The imposition of liability on Griscom-Russell in these circumstances leaves it in a worse position than an entity

that sells but does not manufacture asbestos insulation. The fairness of that outcome is something this Court needs to assess.

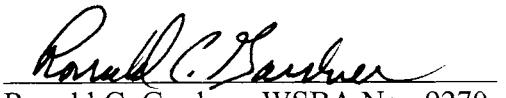
The Sixth Circuit specifically held in an asbestos personal injury case brought against ship equipment manufacturers that they cannot be held responsible for asbestos containing material incorporated into products post-manufacture. *Lindstrom v. A-C Product Liability Trust,* 424 F.3d 488 (6th Cir. 2005). *Lindstrom* appropriately analogized to the component part rule:If the component part manufacturer does not take part in the design or assembly of the final system or product, he is not liable for defects in the final product if the component part itself is not defective. *Koonce v. Quaker Safety Products & Mfg. Co.* 798 F.2d 700, 715 (5th Cir.1986). The evaporator itself was not defective and did not cause the harm. The asbestos supplied by someone else did. The rationale and policies behind product liability do not support subjecting Griscom-Russell to a duty to warn here.

## F. CONCLUSION

Viad respectfully requests that this Court accept review and reverse the Court of Appeals by affirming the trial court's summary judgment order dismissing Simonetta's failure to warn claims.

RESPECTFULLY SUBMITTED this 23rd day of April, 2007.

GARDNER BOND TRABOLSI PLLC



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Attorneys for Respondent Viad Corp

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

Appendix

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|---|---|
| JOSEPH A. SIMONETTA and JANET E. SIMONETTA, a married couple,<br><br>Appellants,<br><br>v.<br><br>VIAD CORPORATION f/k/a The Dial Corporation individually and as successor to Griscom Russell Company<br><br>Respondents,<br><br>and<br><br>SABERHAGEN HOLDINGS, INC., as successor to TACOMA ASBESTOS COMPANY and THE BROWER COMPANY; BARTELLS ASBESTOS SETTLEMENT TRUST; AQUA-CHEM, INC., individually and as successor to Cleaver-Brooks Company; FOSTER WHEELER ENERGY CORPORATION; GENERAL ELECTRIC COMPANY; GENERAL REFRACTORIES COMPANY; IMO INDUSTRIES, INC., individually and as successor-in-intrest to De Laval Turbine, Inc.; INGERSOLL-RAND COMPANY; VIACOM INC., individually and as successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation; WARREN PUMPS, INC.; DIAL CORPORATION, Individually and as successor to Griscom Rusell Company; ELLIOTT COMPANY, a/k/a ELLIOTT TURBOMACHINERY CO., INC.; CARRIER CORPORATION, Individually and as successor-in-interest to Bryant Heating & Manufacturing Co.; J.T. THORPE & SON, INC. a/k/a J.T. THORPE COMPANY; ALLIS-CHALMERS CORPORATION, Individually and as successor to The Buda Company; and QUIMBY EQUIPMENT CO., INC.,<br><br>Defendants. | No. 56614-8-I<br>(Linked with<br>No. 57011-1-I)<br><br>**DIVISION ONE**<br><br>PUBLISHED OPINION<br><br>FILED: January 29, 2007 |

**APPELWICK, C.J.** – Joseph Simonetta (Simonetta) brought a product liability law suit against Viad Corp. (Viad) sounding in both negligence and strict liability based on exposure to asbestos causing subsequent lung cancer. The exposure was to insulation manufactured by another corporation, but necessarily used to encapsulate a Viad[1] evaporator installed aboard a Navy ship. The trial court granted summary judgment for Viad on the basis that the corporation owed no duty to warn Simonetta of the potential hazards of asbestos, because the exposure did not stem from the evaporator itself. We hold that Viad did have a duty to warn once it knew that the asbestos necessarily used with its product posed a health risk to those servicing its equipment. We reverse and remand for further proceedings.

[1] The evaporator was manufactured by Griscom Russell. Viad is the alleged successor to Griscom Russell. The issue of Viad's corporate successor liability for Griscom Russell's products was a contentious issue at the trial court and was not granted summary judgment. Successor liability is not before the court and will be assumed for purposes of this appeal.

## FACTS

Joseph Simonetta was diagnosed with lung cancer and underlying "asbestos related pleural disease" in 2000 and 2002. Appellant's expert testified as to a causal link between the lung cancer and asbestos exposure. Simonetta's exposure to asbestos appears to stem from his tenure as a Navy machinist mate.

Simonetta worked for the Navy between 1954 and 1974. He served as machinist mate from 1958-59, during which time his duties included maintaining and servicing a Griscom Russell evaporator (also called a distiller) which converted sea water into fresh water for use aboard the USS Saufley. At one point during his tenure, Simonetta had to open the evaporator in order to examine and repair some of the internal tubing of the equipment. To open the evaporator, Simonetta removed block insulation, asbestos mud and asbestos cloth using a hammer. After completing the repairs, he had to reinsulate the unit with the same materials.

The evaporator was shipped from Griscom Russell without asbestos insulation. The asbestos exposure came from a product that was not manufactured, provided or installed by the respondent. Simonetta was not aware of the company who manufactured or installed the insulation.

Simonetta brought both negligence and strict liability claims against Viad for failure to warn of the danger posed by asbestos insulation. The asbestos exposure at issue occurred in 1958-59, and therefore is governed by pre-Washington Product Liability Act (WPLA) product liability law. Mavroudis v.

Pittsburgh-Corning Corp., 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997). The issue at the heart of the summary judgment is whether Viad had a duty under either theory to warn of dangers resulting from exposure to asbestos from another manufacturer's insulation used with the Griscom Russell evaporator. The trial court granted summary judgment for defendant on both the negligence and strict liability claims based on the lack of any duty owed to the plaintiff. The trial court judge determined that no duty existed because "[a]lthough the product 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."

## ANALYSIS

On review of summary judgment courts engage in the same inquiry as the trial court. Highline Sch. Dist. v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is appropriate if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Seattle Police Officers Guild v. City of Seattle, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). The moving party bears this burden of proof. Young v. Key Pharm. Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A material fact is one upon which the outcome of the litigation depends. Seattle Police, 151 Wn.2d at 830. Facts and all reasonable inferences must be construed in favor of the non-moving party. Id. Based on this standard, facts and inferences should be viewed in the light most favorable to appellant Simonetta.

**1. Negligence**

Plaintiff alleges negligence for Viad's failure to warn of the potential for asbestos exposure from use of its evaporator. A product liability negligence claim focuses on the manufacturer's conduct. Young, 130 Wn.2d 160, 178, 922 P.2d 59 (1996). As an element of a negligence claim under products liability, as in any negligence case, the plaintiff must demonstrate a duty owed by the defendant. Hansen v. Friend, 118 Wn.2d 479, 485, 824 P.2d 483 (1992). The existence of a duty is a threshold question determined as a matter of law. Briggs v. Pacificorp, 120 Wn. App. 319, 322, 85 P.3d 369 (2003). Once a duty is found, the jury determines the scope of that duty based on the foreseeable range of danger. Bernethy v. Walt Failor's Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982). Under negligence law, a defendant has a duty to exercise ordinary care, and "[a] manufacturer's duty of ordinary care is a duty to warn of hazards involved in the use of a product which are or should be known to the manufacturer." Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 772, 733 P.2d 530 (1987). This manufacturer's duty to warn attaches when a reasonable person using the product would want to be informed of the risk and requires the use of ordinary care to test, analyze and inspect products and keep abreast of scientific knowledge in its product field. Koker v. Armstrong Cork Inc., 60 Wn. App. 466, 477-79, 804 P.2d 659 (1991).

Viad contends no duty was owed to Simonetta because the Griscom Russell evaporator itself was not hazardous. However, "[a] manufacturer can

also be found negligent for failure to give adequate warning of the hazards involved in the use of the product which are known, or in the exercise of reasonable care should have been known, to the manufacturer." Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 412, 591 P.2d 791 (1979), see also Restatement (Second) of Torts § 388 (1965); Callahan v. Keystone Fireworks Mfg. Co., 72 Wn.2d 823, 435 P.2d 626 (1967); Little v. PPG Indus., Inc., 92 Wn.2d 118, 594 P.2d 911 (1979). A duty to warn exists toward users of the product who may encounter a known hazard. Accordingly, because Simonetta was a repairman engaged in the operation and maintenance of an evaporator, Griscom Russell owed him a duty of reasonable care to warn of the known hazards involved in the use of the product.

Viad contends that it is not liable because it must only warn of the dangers "inherent in its product." Asbestos was not a Griscom Russell product. But, the danger of asbestos exposure is "inherent" in the use of its product, because the evaporators were built with the knowledge that insulation would be needed for the units to operate properly and that workers would need to invade the insulation to service the units. Griscom Russell also knew that the Navy used asbestos for thermal insulation. A product designed so that use requires the invasion of asbestos insulation has a known inherent danger because the particles become respirable which exposes people nearby to their toxic nature.

The undisputed evidence presented by Simonetta demonstrates Griscom Russell's (Viad's) awareness of the necessary requirements for the use of the

evaporator, both operations and maintenance. Marine engineering expert Charles Cushing testified 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." He also agreed that during the time frame of Simonetta's employment the high temperature thermal insulation use by the Navy contained asbestos. Although asbestos was not the required material, Griscom Russell knew it was used by the navy for thermal insulation. Jerry Lauderdale, Certified Industrial Hygienist confirmed with his testimony, "any manufacturer of evaporators for the U.S. Navy . . . knew, or at a minimum, should have known, that the asbestos containing insulation . . . needed to operate their evaporators safely and efficiently would have posed harm to workmen such as Mr. Simonetta." This ample evidence of Griscom Russell's knowledge led the trial court to conclude that the manufacturer "knew or reasonably should have known that its product would be insulated with asbestos-containing material."

Griscom Russell knew, or should have known, that the use of asbestos to insulate the evaporators would result in exposure to respirable asbestos during maintenance. This risk of exposure is a known danger. Griscom Russell understood with certainty that the evaporator would need insulation to work properly, that the Navy used asbestos insulation, asbestos insulation would be applied to the unit, and that the unit would need to be invaded for routine service. Griscom Russell had a duty to warn workmen like Simonetta of the

known

danger, even though it did not produce or supply the asbestos.[2]

Viad argues that Washington precedent does not hold defendants liable for injuries resulting from products manufactured by third parties. Viad primarily relies upon Sepulveda-Esquivel v. Central Machine Works Inc., 120 Wn. App. 12, 84 P.3d 895 (2004), in which a manufacturer of an industrial hook was held to have no duty for injuries resulting from the failure of an add-on component to the hook. "Under the common law, component sellers are not liable when the component itself is not defective." Sepulveda 120 Wn. App at 19. Viad states that "[i]n both cases, the inherent danger was in the finished assembly, and arose from the product provided by others." Unlike the case at bar, Sepulveda applies the WPLA and also derives its claim from failure of the product. The cases are distinguishable because Simonetta does not claim the product failed, but that the lack of warning was an actual defect of the evaporator. As seen above, product failure is not necessary since a manufacturer can be found negligent for failure to warn of known hazards from use of its product even in the absence of a defect or failure. Novak, 22 Wn. App. at 412. Additionally, the Sepulveda manufacturers had no knowledge of the future use or modifications of the product. Sepulveda, 120 Wn. App. at 13. This differs from Griscom Russell's undisputed knowledge that the evaporators necessarily would be used

[2] Simonetta argues that foreseeability of the injury created the duty to warn. Foreseeability does not create a duty but sets limits once a duty is established. "A manufacturer's duty to use ordinary care is bounded by the foreseeable range of danger." Koker v. Armstrong Cork Inc., 60 Wn. App. at 480. 107 Wn.2d 772. Once a duty is found to exist, the jury decides foreseeability by determining whether the harm was within the foreseeable scope of risk. Rikstad v. Holmberg, 76 Wn.2d 265, 270, 456 P.2d 355 (1969). The duty to warn workers like Simonetta arises from the requirement of ordinary care to warn users of a known danger.

with asbestos insulation for proper and safe use. The precedent relied upon is distinguishable.

Implicitly Viad argues current common law does not require this result. "Common law is not static. It is consistent with reason and common sense. The common law 'owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems.'" (citations omitted) Senear v. Daily Journal-American, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982). At times, this dynamic nature of the common law requires the courts to make logical extensions of principles announced in earlier decisions in order to meet evolving standards of justice. Dickinson v. Edwards, 105 Wn.2d 457, 480-81, 716 P.2d 814 (1986). Several of these expansions have occurred in the realm of product liability. The Washington courts adopted strict liability as defined in Restatement (Second) of Torts § 402A. Ulmer v. Ford Motor Co., 75 Wn.2d 522, 452 P.2d 729 (1969). We have moved away from the "reasonable consumer test" for the duty to warn and moved to a focus on when a manufacturer becomes aware, or should have become aware, of the dangers of a product. Young, 130 Wn.2d at 178. Most recently, this Court expanded the definition of a "user" of an asbestos product to include a family member exposed to fibers on a worker's clothing. Lunsford v. Saberhagen Holdings Inc., 125 Wn. App. 784, 106 P.3d 808 (2005).

If the asbestos insulation was placed inside the evaporators or outside the evaporators by Griscom Russell, the law has long held that a duty to warn

would exist as to one who would necessarily have to disturb the asbestos to service the evaporator. Given the certainty that the evaporators would need to be insulated to operate properly, that the Navy used asbestos insulation and that workers would have to disturb the asbestos insulation to perform maintenance on the units, Griscom Russell was aware that exposure would occur during the use and maintenance of the product. The duty of ordinary care requires a duty to warn when a manufacturer knew, or should have known, of a hazard produced by reasonable use. While this duty has not traditionally applied to products manufactured by another, this present case represents a set of facts that compels another logical extension of the common law. We hold that Grissom Russell had a duty to warn of the risk of asbestos exposure with respect to servicing the evaporator units. Summary judgment on the issue of duty to warn under the negligence theory was improper.

**2. Strict Liability**

Under common law, strict liability applies when

> (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. Restat 2d of Torts, § 402A (1965).

Ulmer, 75 Wn.2d at 530-32.

To establish a claim for strict liability under §402A, the plaintiff must show (1) a defect, (2) in existence when the product left the hands of the manufacturer, (3) which was not contemplated by the user, (4) which renders the product unreasonably dangerous and (5) proximately caused the injury. Lamon v. McDonnell Douglas Corp., 19 Wn. App. 515, 521, 576 P.2d 426 (1978). Viad claims that "[b]ecause the evaporator left Griscom Russell's plant free of insulation, it was not, as a matter of law, a defective product." However, Viad may still face strict liability since "a product, though faultlessly manufactured, is unreasonably dangerous when placed in the hands of the ultimate user by a manufacturer without giving adequate warnings concerning the manner in which to safely use it." Novak, 22 Wn. App. at 412. A physical defect is unnecessary because, "in the failure-to-warn case, the defect which makes the product 'unreasonably dangerous' . . . is in the absence of adequate warnings concerning the product[]s use, rather than any physical defect in the product itself." Little v. PPG Indus. Inc., 19 Wn. App. 812, 822, 579 P.2d 940 (1978). If a product has dangerous propensities, the manufacturer is strictly liable for inadequate warnings about inherent dangers in the use of the product unless those dangers are obvious or known to the user. Little, 19 Wn. App. at 822. It is undisputed that asbestos has dangerous propensities when invaded. Even though the evaporator left the factory without insulation, it was defective. It had to be encapsulated in insulation for use, yet included no warning about the risk

of exposure to a known danger, which would result from disturbing the insulation during ordinary use and necessary maintenance on the units.

Viad claims that Griscom Russell cannot be sued under strict liability because Washington case law restricts liability under § 402A to "entities in the chain of distribution of the defective product." Griscom Russell was not in the chain of distribution of the asbestos. The asbestos was applied after the evaporators were delivered and installed. However, strict liability applies to "any person engaged in the business of selling products for use or consumption." Restatement (Second) of Torts, § 402A cmt. f. Because of its engagment in the business of selling evaporators for use by the Navy, Griscom Russell can be held strictly liable for the harms originating from use of the evaporator. The required maintenance on the evaporator encapsulated in asbestos resulted in harmful asbestos exposure.

Viad misconstrues the source of Simonetta's harm by focusing blame for his exposure to the asbestos insulation on the manufacturers of the asbestos alone. "Here, the product causing the injury is asbestos insulation, and Griscom Russell was neither the manufacturer nor supplier of this product." According to Viad, this limits the manufacturer's liability because "the plaintiff must identify the particular manufacturer of the product that caused the injury." Lockwood v. AC & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987). However, Lockwood differs because the issue was the identity of the asbestos manufacturer. Id. There is no question about the identity of the manufacturer of the product involved in this

case.

Viad also relies on another asbestos case where the plaintiff sued a manufacturer whose product was insulated with third-party applied asbestos insulation. Lindstrom v. A-C Product Liability Trust, 424 F.3d 488, 495 (6th Cir. 2005). While the facts are similar to the case at bar, the issue was causation not the existence of a duty. In Lindstrom, the court granted summary judgment for the defendant because of the plaintiff's inability to prove the defendant's product caused his illness. Id. at 495. Plaintiff could not establish causation because "[t]he component part manufacturer is protected from liability when the defective condition results from the integration of the part into another product and the component part is free from defect." Lindstrom, 424 F.3d at 495. Additionally, Simonetta's case is distinguishable because the evaporator and insulation do not fit the description of "component parts" given in Lindstrom. The defective condition did not result from the integration of the evaporator into another product. Instead, the evaporator was the main unit; the insulation is the "component part" incorporated into the final assembly. If the insulation was a component, Griscom Russell clearly would have the duty to warn of potential defects in the final product.

A California case with closely related facts provides a strong counterargument to Viad's "component manufacturer" defense. A firefighter was injured when the "deck gun" or water cannon broke loose from the firetruck's mounting assembly which had been manufactured by another party. Wright v.

Stang Manufacturing Co., 54 Cal. App. 4th 1218, 1222 (1997). The "gun," itself, did not fail but separated from the mounting because the riser was not designed to have the strength to withstand the water pressure of the deck gun. Id. at 1224-26. Like Viad, the defendant provided a finished product it knew would be used with another product in a way that could result in harm without a warning as to the proper and safe use. Id. at 1226. The defendant attempted to defend itself from a duty to warn by claiming it was merely a component manufacturer of a final product. The court "fail[ed] to see how the deck gun was 'packaged, labeled and marketed,' by the Glendale Fire Department; rather, the fire department apparently installed it on their firetruck without making any changes to the deck gun or firetruck. It is also not negated . . . that the manufacturer knew that the fire department intended to attach the deck gun to a threaded riser pipe." Id. at 1234-35. As a result, the court found the trial courts' grant of summary judgment in favor of the manufacturer of the deck gun was improper even though the gun itself did not fail and the manufacturer did not provide the riser apparatus because there were triable issues in regard to defects in the warnings. Id. at 1236. Like the fire department, the Navy did not modify the evaporator except to insulate it as expected by Griscom Russell. Like the firefighter, Simonetta was injured. Like Stang, Viad may have liability and is not entitled to summary judgment on the strict liability claim.

The "raw material supplier defense" does not insulate Viad. Kealoha v. E.I. DuPont DeNemours & Co., 82 F.3d 894, 895 (9th Cir. 1996) (Teflon was

incorporated into TMJ implants which later failed). Unlike Kealoha, the evaporator was not a "raw material" used in a defective end product. Id. at 899. The evaporator was an end product.

Viad cites to decisions from other jurisdictions to suggest that the trend of decisions favors a finding that manufacturer's in Griscom Russell's position did not have a duty to warn. However, these cases are neither dispositive nor persuasive. See, Cipollone v. Yale Indus. Prods., 202 F.3d 376 (1st cir. 2000) (component part manufacturer had no duty to warn when product becomes dangerous due to integration into larger, allegedly defective system); Baughman v. General Motors Corp., 780 F.2d 1131 (4th Cir. 1986) (no duty to warn of dangers from a non-standard replacement part); Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634 (1981) (no duty to warn when stove caused gas explosion due to a propane leak from a wholly unrelated product in the vicinity); Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372-73 (1984) (defendant did not own or lease a tanker car so had no authority to add warnings so could not be held liable for failure to warn); Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289 (1992) (no duty of manufacturer of a sound tire to warn of dangers of using it with another manufacturer's defective rim assembly where the rim was one of many that could have been used and tire manufacturer had no knowledge of user's choice of rim); Cleary v. Reliance Fuel Oil Assocs., 17 A.D.3d 503, affirmed 840 N.E.2d 1024 (2005) (hot water heater manufacturer not liable for failure to warn of danger caused by aquastat manufactured by another

corporation and provided by a third corporation with another component).

The cases cited by Simonetta are equally unhelpful in the determination of this issue of first impression. Lunsford, 125 Wn. App. at 793 (duty to warn applies to child exposed to asbestos dust from father's clothing); Parkins v. Van Doren Sales Inc., 45 Wn. App. 19, 724 P.2d 389 (1986) (defendant had duty to warn of dangers created when components were assembled), Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148 (2001) (denial of summary judgment on similar case but with little analysis); Chicano v. General Electric Co., 2004 U.S. Dist. LEXIS 20330 (2004) (denial of summary judgment on factually similar situation but unpublished and based on Pennsylvania's component manufacturer liability test); Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006) (factually similar but defendant is landowner not product manufacturer).

Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977), provides insight into Washington's previous analysis of third party product liability. Teagle involved a strict liability suit for failure to warn of potential hazards resulting from the use of a metal and glass flowrater to measure ammonia. The flowrater required the use of third party manufactured O-rings to seal the open ends of the glass tube component. The manufacturer knew that Viton O-rings would harden and disintegrate when used with ammonia. Despite this knowledge, Fischer & Porter did not warn purchasers of the potential danger in using Viton O-rings but did recommend the use of Buna O-rings. Teagle, 89 Wn.2d at 153-54. The Supreme Court of Washington found this solution

inadequate. "It [Fisher & Porter] did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, by itself, would render the flowrator unsafe." Id. at 156. The Court further stated that appellant was not absolved of its duty to warn customers who measure ammonia that Viton O-rings should not be used with the flowrater. Id.

The factual differences between Teagle and the present case render the precedent merely persuasive because the harm from the flowrater stemmed from the failure that occurred when the product exploded. In contrast, the evaporator functioned as designed yet caused harm through the release of hazardous particles. The Fifth Circuit encountered a similar scenario in Stapleton v. Kawasaki Heavy Indus., 608 F.2d 571 (1979). A motorcycle was tipped over while its fuel switch was in the "on" position allowing gasoline to leak and ignite on a nearby pilot light. Id. The jurors found no design defect but that Kawasaki breached its duty to warn about the danger of gasoline leakage when the fuel switch was in the "on" position. Id. at 572. The court found these two determinations consistent because

> [t]he jury. . . could have meant that the motorcycle was not defective in the sense that there was something wrong with it that caused it to be unfit or unsuited for the purpose intended, but that defendants should have made greater efforts to warn users of the potential danger from failing to turn the fuel switch to the off position. This failure to warn is sufficient to hold Kawasaki liable under both negligence and strict liability theories.

Id. Like the present case, the motorcycle was not dangerous because of product failure but because its design required the use of a hazardous substance that

was released during normal use. The gasoline fumes, not the motorcycle, actually caused the explosion which led to the harm. Kawasaki was required to warn about the hazards of gasoline leakage despite the fact that the company did not manufacture or supply the gasoline. Id. at 572-73. As in most vehicles, gasoline was an integral addition that rendered the product dangerous without an adequate warning about the hazards that can result from its use in the motorcycle as designed. Id. Similarly, the design of the evaporator required the use of insulation which would release a hazardous substance upon proper use.

We hold that when a product requires the use of another product and the two together cause a release of a hazardous substance, the manufacturer has a duty to warn about the inherent dangers. Griscom Russell had a duty to warn about the dangers of respirable asbestos released during the reasonable use of its product.[3] As a result, we reverse the summary judgment and remand the case for further proceedings.

Finally, we note that we are not finding that Viad was liable for negligence or strict liability as this is for the trial court to decide upon remand. We merely determine that based on the record presented there was a duty to warn under both theories.

Appelwick, C.J.

WE CONCUR:

[3] The parties have not asked us to address whether any temporal limitations may apply to a retroactive application of the duty to warn.

Baker, J. Coleman, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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|---|---|---|
| JOSEPH A. SIMONETTA and JANET E. SIMONETTA, a married couple,<br><br>Appellants,<br><br>v.<br><br>VIAD CORPORATION f/k/a The Dial Corporation individually and as successor to Griscom Russell Company<br><br>Respondents,<br><br>and<br><br>SABERHAGEN HOLDINGS, INC., as successor to TACOMA ASBESTOS COMPANY and THE BROWER COMPANY; BARTELLS ASBESTOS SETTLEMENT TRUST; AQUA-CHEM, INC., individually and as successor to Cleaver-Brooks Company; FOSTER WHEELER ENERGY CORPORATION; GENERAL ELECTRIC COMPANY; GENERAL REFRACTORIES COMPANY; IMO INDUSTRIES, INC., individually and as successor-in-intrest to De Laval Turbine, Inc.; INGERSOLL-RAND COMPANY; VIACOM INC., individually and as successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation; WARREN PUMPS, INC.; DIAL CORPORATION, Individually and as successor to Griscom Rusell Company; ELLIOTT COMPANY, a/k/a ELLIOTT | ) | No. 56614-8-I<br>(Linked with<br>No. 57011-1-I)<br><br>ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION |

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| TURBOMACHINERY CO., INC.; CARRIER CORPORATION, Individually and as successor-in-interest to Bryant Heating & Manufacturing Co.; J.T. THORPE & SON, INC. a/k/a J.T. THORPE COMPANY; ALLIS-CHALMERS CORPORATION, Individually and as successor to The Buda Company; and QUIMBY EQUIPMENT CO., INC., | ) |
| Defendants. | ) |

The respondent, VIAD Corporation, having filed a motion for reconsideration and/or clarification herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration and/or clarification is denied.

DATED this 23rd day of March, 2007.

FOR THE COURT:

Appelwick, CJ
Judge

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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| VERNON BRAATEN,<br><br>Appellant,<br><br>vs.<br><br>SABERHAGEN HOLDINGS, a Washington Corporation, BARTELLS ASBESTOS SETTLEMENT TRUST, a Washington Corporation; BUFFALO PUMPS, INC. (sued individually and as successor-in-interest to BUFFALO FORGE COMPANY); CRANE CO; GENERAL ELECTRIC COMPANY; GEORGIA-PACIFIC CORPORATION (sued individually and as successor-in-interest to BESTWALL GYMPSUM COMPANY); GOULDS PUMPS, INCORPORATED; GUARD-LINE, INC.; IMO INDUSTRIES, INC. (sued individually and as successor-in-interest to DE LAVAL-TURBINE, INC. and WARREN PUMPS, INC.); INGERSOLL-RAND COMPANY; JOHN CRANE, INC.; KAISER GYPSUM COMPANY, INC.; SEPCO CORPORATION; TUTHILL CORPORATION (sued individually and as successor-in-interest to CORPUS ENGINEERING CORP.); UNION CARBIDE CORPORATION; and YARWAY CORPORATION,<br><br>Respondents. | DIVISION ONE<br><br>No. 57011-1-I<br>(Linked with<br>No. 56614-8-I)<br><br>**PUBLISHED OPINION**<br><br>FILED: January 29, 2007 |

**BAKER, J.** — Vernon Braaten spent his career as a pipe fitter at the Puget Sound Naval Shipyard, where he was often exposed to asbestos. His job involved tearing into, removing and replacing asbestos insulation used in and on the pumps,

valves, and turbines he maintained. He sued the machine manufacturers, claiming that they should have warned about the danger of asbestos inhalation involved with using their products. Braaten first sued in Texas state court where, two weeks before trial, the court entered summary judgment in favor of one of the defendants. Braaten took a nonsuit against the remaining defendants and sued in Washington.

The Washington case raised the same issue with respect to all five manufacturers, and all five won their summary judgment motions. Braaten appealed. General Electric (GE) argued on appeal that collateral estoppel precludes Braaten's claim; the other manufacturers responded only on the merits. We affirm summary judgment for GE on the alternate ground of collateral estoppel. We hold that the other four manufacturers did have a duty to warn, and reverse and remand for further proceedings.

## I.

Vernon Braaten worked for 35 years as a pipe fitter at the Puget Sound Naval Shipyard (PSNS). His job was to maintain ship valves, pumps, and turbines, some of which were manufactured by Crane Co. (valves), General Electric (turbines), IMO Industries, Inc. (pumps),[1] Yarway Corp. (valves) and Buffalo Pumps (pumps). Regular maintenance of all these machines required the removal of exterior asbestos mud insulation that had to be sawn or hammered off. Regular maintenance of the valves and pumps also required replacement of interior asbestos gaskets and packing, which usually had to be ground, scraped, or chipped off. Braaten could not service the valves, pumps, and turbines without disturbing the asbestos.

[1] IMO is the successor in interest to DeLaval Turbine, Inc.

The use of asbestos in and on Navy valves, pumps, and turbines was not by chance, but by design. GE's medical and Navy expert Lawrence Betts declared that the use of asbestos was "based on military necessity." Asbestos insulated the valves, turbines, fittings, and flanges on almost all combat vessels built between World War I and the mid-1980s, because it was lighter and withstood higher temperatures than other products.

All five manufacturers either sold products containing asbestos gaskets and packing, or were aware that asbestos insulation was regularly used in and around their machines when they were installed on a Navy ship. Buffalo Pumps sold pumps with asbestos packing and gaskets for use in Navy ships from 1943 to 1989. Crane's bronze, iron, and steel valves all included asbestos packing and gaskets; asbestos sheet packing was described in the Crane catalog as "superior." Yarway acknowledged that asbestos was the "only insulation product available to withstand temperature" on Navy ships. Although some of their machines could operate using no insulation or non-asbestos insulation, it was highly likely that a valve, pump, or turbine sold to the Navy would contain or be used in conjunction with asbestos.

During the maintenance process, asbestos dust was released into the air, and Braaten breathed it in. Until 1980 he wore no breathing protection. Then, he was told to wear a paper dust mask. No one in his division wore respirators until the mid-1980s. In 2003, Braaten was diagnosed with mesothelioma, a disease caused by his inhalation of asbestos dust.

Braaten sued 30 machine manufacturers in Texas, alleging strict liability and negligence for failure to warn of the dangers of exposure to asbestos. One

manufacturer, Goulds Pumps,[2] filed a no evidence motion. The motion maintained there was no evidence that Goulds had a legal duty to Braaten. The Texas court agreed. Braaten quickly took a nonsuit against the remaining parties, and filed a new suit here in Washington State. He did not appeal the Texas order.

The court below granted summary judgment to all defendants, ruling that these manufacturers had no duty to warn about asbestos products manufactured and installed by others. GE argued that the Texas summary judgment order collaterally estopped Braaten's Washington claims, but the trial court concluded that it did not. Braaten appealed.

II.

When reviewing a summary judgment motion and order, we engage in the same inquiry as the trial court.[3] We consider the facts in the light most favorable to the nonmoving party. Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.[4]

**Collateral Estoppel**

GE argues that collateral estoppel bars relitigation of the duty to warn issue. The doctrine of collateral estoppel promotes finality and judicial economy by preventing parties from raising identical issues after they receive a full and fair opportunity to

[2] Goulds is not a party to this appeal.
[3] Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).
[4] CR 56(c).

present their claims.[5] The doctrine applies if: (1) the issue raised is identical to the issue previously ruled upon; (2) the prior adjudication ended in a final judgment on the merits of the issue; (3) the party against whom collateral estoppel is asserted was a party, or was in privity with a party, in the prior adjudication; and (4) application of the doctrine does not work an injustice.[6] Injustice in the collateral estoppel context does not refer to a substantive injustice, but to whether the party was afforded a full and fair hearing.[7] Even if the prior legal conclusion was erroneous, collateral estoppel does not work an injustice if the party had the opportunity to attack the error directly.[8]

Collateral estoppel precludes relitigation of the duty to warn issue against GE. The legal issue is identical between Goulds and GE; it is irrelevant that the two manufacturers produced different products, because both products were to be installed on Navy ships and used with asbestos. The Texas summary judgment was a final adjudication on the merits with the same preclusive effect as a full trial.[9] It is immaterial that GE is a different defendant. Finally, Braaten does not dispute GE's contention that, procedurally, he had an opportunity to challenge the Texas ruling but declined to do so.

Although the trial court concluded that collateral estoppel did not bar the claims, this court can affirm on alternate grounds, as long as those grounds were properly presented and developed below.[10] They were, and summary judgment in favor of GE is affirmed.

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[5] Hanson v. Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).
[6] Hanson, 121 Wn.2d at 562.
[7] Lee v. Ferryman, 88 Wn. App. 613, 625, 945 P.2d 1159 (1997).
[8] Thompson v. Dep't of Licensing., 138 Wn.2d 783, 799-800, 982 P.2d 601 (1999).
[9] DeYoung v. Cenex Ltd., 100 Wn. App. 885, 892, 1 P.3d 587 (2000).
[10] State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997).

**Strict Liability – Duty to Warn**

Although this claim would normally be governed by the Washington Products Liability Act (WPLA),[11] Braaten was exposed to asbestos before its adoption, so WPLA does not apply.[12] Therefore, the common law as articulated in Restatement (Second) of Torts section 402A controls:

> **Special Liability of Seller of Product for Physical Harm to User or Consumer**
>
> (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
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> (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.[13]

Under section 402A, manufacturers are strictly liable for failing to give adequate warnings.[14] The duty extends to foreseeable users of the manufacturer's product.[15] Braaten was a foreseeable user of the products sold by the manufacturers because he

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[11] Ch. 7.72 RCW. WPLA was adopted in 1981 as part of the Tort Reform Act. Brewer v. Fibreboard Corp., 127 Wn.2d 512, 520, 901 P.2d 297 (1995).

[12] Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 472, 804 P.2d 659 (1991).

[13] RESTATEMENT (SECOND) TORTS § 402A (1965).

[14] Van Hout v. Celotex Corp., 121 Wn.2d 697, 704, 853 P.2d 908 (1993).

[15] Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 793, 106 P.3d 808 (2005). It is important to distinguish foreseeability of who will use the product from foreseeability of the harm. Foreseeability of the harm is not an element of a strict liability failure to warn claim. Ayers v. Johnson & Johnson Baby Products Co., 117 Wn.2d 747, 762-63, 818 P.2d 1337 (1991). Foreseeability of the harm is relevant to Braaten's negligence claim, but not to his strict liability claim.

performed maintenance work on the products.[16] As a user of the manufacturers' products, Braaten must make a prima facie showing of the following elements to sustain his strict liability claim:

> (1) that there was a defect in the product which existed when it left the manufacturer's hands; (2) that the defect was not known to the user; (3) that the defect rendered the product unreasonably dangerous; and (4) that the defect was the proximate cause of the injury.[17]

A faultless product may be nonetheless "defective" if it is unreasonably dangerous when placed in the hands of the end user "without giving adequate warnings concerning the manner in which to safely use it."[18] Unlike in a negligence claim, the focus here is on the product and its dangers, not on what the manufacturer knew or should have known.

Braaten argues that the valves and pumps were defective because there were no warnings about how to safely avoid asbestos exposure during their maintenance. This is an issue of first impression in Washington. The parties cite extensively to other asbestos cases, but none is dispositive. Lindstrom v. A-C Product Liability Trust,[19] cited by the manufacturers, has facts identical to this case.[20] However the issue in Lindstrom was causation, not duty.[21] Olivo v. Owens-Illinois, Inc.,[22] cited by Braaten, also has similar facts, but the defendant was a landowner, not a machine manufacturer.[23]

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[16] See RESTATEMENT (SECOND) TORTS § 402A cmt. *l*.

[17] Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 410, 591 P.2d 791 (1979).

[18] Novak, 22 Wn. App. at 412.

[19] 424 F.3d 488 (6th Cir. 2005).

[20] Lindstrom, 424 F.3d at 491.

[21] Lindstrom, 424 F.3d at 492-93. It is worth noting that although duty is not mentioned, as a matter of law the Lindstrom case would not have reached the causation issue without a presumption of duty.

[22] 895 A.2d 1143 (N.J. 2006).

[23] Olivo, 895 A.2d at 1146.

Chicano v. General Electric Co.[24] is almost identical to this case and denies summary judgment, but it is an unpublished decision, and it applies a different test.[25] Berkowitz v. A.C. & S., Inc.[26] also favors Braaten's argument, but simply affirms denial of a summary judgment motion with almost no analysis.[27]

The case of Teagle v. Fischer & Porter Co.[28] is of some aid to our duty analysis. In Teagle, a manufacturer sold a device called a "flowrater" to Teagle's employer.[29] The flowrater measured liquid chemicals, including ammonia, and was designed to hold chemicals pressurized up to 440 pounds per square inch (p.s.i.).[30] The ammonia would enter the flowrater from one end, Teagle would check a glass tube on the flowrater to see how much ammonia was inside, and then release it from the other end of the flowrater.[31] To seal the ends of the glass tube, Teagle's employer used rings manufactured by a third party and made of a material called Viton. The defendant manufacturer knew that Viton was not compatible with ammonia and might disintegrate, causing the glass tube to break.[32] It also knew that if the flowrater broke while holding chemicals pressurized above 50 p.s.i., the operator could be harmed.[33] Teagle was measuring ammonia pressurized at 175 p.s.i. when the rings failed, the glass tube

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[24] 2004 U.S. Dist. LEXIS 20330 (E.D. Pa. 2004).

[25] 2004 U.S. Dist. LEXIS 20330 at 40. Chicano's in-depth analysis of the duty to warn issue applies Pennsylvania's component manufacturer liability test, which is not applicable in Washington.

[26] 288 A.D.2d 148 (N.Y. App. 2001).

[27] Berkowitz, 288 A.D.2d at 149.

[28] 89 Wn.2d 149, 570 P.2d 438 (1977).

[29] Teagle, 89 Wn.2d at 150-51.

[30] Teagle, 89 Wn.2d at 151-52.

[31] Teagle, 89 Wn.2d at 150-51.

[32] Teagle, 89 Wn.2d at 153-54.

[33] Teagle, 89 Wn.2d at 151-52.

broke, and ammonia sprayed in his eyes.[34] Despite the fact that the use of Viton rings and ammonia in the flowrater was entirely the choice of Teagle's employer, the court held the flowrater manufacturer liable for not warning that the use of those products in conjunction with the flowrater made it dangerous.[35] Without proper warnings, the product was defective when used as intended, regardless of the fact that a third-party's product used in conjunction with the flowrater was the precipitating cause of the malfunction and resulting injury.[36]

However, there is an important factual distinction between Teagle and the present case. In Teagle, there was an actual failure of the manufacturer's product: the flowrater exploded. Here, there is no allegation that the pumps or valves failed. For that matter, there is no allegation that the asbestos "failed." Products containing hazardous, injury-causing substances that can be released during normal use are unlike traditional defective products. There is nothing "wrong" with such products; they do not "malfunction." They are simply dangerous in ordinary use. This case involves the release of a hazardous substance from a product. In that way, it is more analogous to products liability cases involving gasoline or other hazardous substances.

One such case from the Fifth Circuit provides an interesting comparison. In Stapleton v. Kawasaki Heavy Industries, Ltd.,[37] a motorcycle was tipped over when its fuel switch was in the "on" position. Gasoline leaked out, and was ignited by a nearby pilot light. Stapleton sued Kawasaki alleging negligence, strict liability, and breach of

[34] Teagle, 89 Wn.2d at 151-52.
[35] Teagle, 89 Wn.2d at 156-57.
[36] Teagle, 89 Wn.2d at 155.
[37] 608 F.2d 571 (5th Cir. 1979).

duty to warn about the fuel switch.[38] Although the jurors found that there was no design defect, they did find that Kawasaki breached its duty to warn about the specific danger of gasoline leaking from the motorcycle when the fuel switch was in the "on" position.[39] Kawasaki appealed, raising the issue that the jurors' conclusions were inconsistent with each other.[40] But the Fifth Circuit affirmed, finding no contradiction in the jury's conclusions:

> The jury . . . could have meant that the motorcycle was not defective in the sense that there was something wrong with it that caused it to be unfit or unsuited for the purpose intended, but that the defendants should have made greater efforts to warn users of the potential danger in failing to turn the fuel switch to the off position. This failure to warn is sufficient to hold Kawasaki liable under both negligence and strict liability theories.[41]

There is an important parallel with this case: the product at issue was dangerous not because it failed or malfunctioned, but because: (1) by design it contained a hazardous substance; (2) that hazardous substance was released from the product during normal use;[42] and (3) the manufacturers did not warn users about that danger.

From a public policy standpoint, asbestos cases are different from gasoline or other hazardous substance cases because asbestos injuries are latent. If there is a gasoline explosion, the injuries are immediately actionable. If there are additional tortfeasors to be impleaded, or against whom indemnity can be sought, they can be ascertained and held liable. In modern asbestos litigation, the manufacturers of the

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[38] Stapleton, 608 F.2d at 572.
[39] Stapleton, 608 F.2d at 572.
[40] Stapleton, 608 F.2d at 572.
[41] Stapleton, 608 F.2d at 572.
[42] The Stapleton decision does not explain why a fuel switch allows gas leakage when open, but it appears from the jury's findings that the feature was not considered a defect.

hazardous substance are, for the most part, no longer amenable to judgment.[43] And there is no doubt that asbestos manufacturers are culpable for the injuries to Braaten.

But the Stapleton case does demonstrate that there is an independent duty to warn when a manufacturer's product design utilizes a hazardous substance that can be released during normal use. Few would argue that Kawasaki had no duty to warn about gasoline leaking from its motorcycles simply because someone else manufactured the gasoline. Its product contained gasoline during normal use. Here, the pumps and valves as designed contained asbestos during normal use. Also, the hazardous substance was released into the air as part of the regular operation and maintenance of pumps and valves, rather than by accident as in Stapleton. This distinction strengthens the argument for a duty to warn in the present case.

Public policy also supports a finding of duty. In Lunsford v. Saberhagen Holdings, Inc.,[44] we recently expanded the definition of "user" of an asbestos product to include the family member of a worker who was exposed to the fibers on that worker's clothing. In doing so, we acknowledged the public policy purpose behind strict liability:

> "On whatever theory, the justification for the 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; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the

[43] Katherine M. Anand, Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms that Effectively Discharge Asbestos Claims in Chapter 11 Reorganization, 80 Notre Dame L. Rev. 1187, 1190 (2005) ("[M]ost of the asbestos manufacturers responsible are already bankrupt.").

[44] 125 Wn. App. 784, 106 P.3d 808 (2005).

> consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the products."[45]

These manufacturers did profit from the Navy's purchase of their products. They argue that they did not sell the specific asbestos that injured Braaten, but that is akin to saying that Kawasaki was not the relevant product seller because it did not sell the gasoline that leaked and ultimately injured Stapleton. Again, when a product's design utilizes a hazardous substance, and there is a danger of that substance being released from the product during normal use, the seller of the product containing the substance has an independent duty to warn.

A jury could determine that the pumps and valves were unreasonably dangerous when used as intended, without warnings about how to safely avoid asbestos exposure. Whether the product is unreasonably dangerous is based on the reasonable expectations of the ordinary consumer. Factors to be considered include the relative cost of the product, the gravity of the potential harm, and the cost and feasibility of eliminating or minimizing the risk.[46] Given the high cost of this complex machinery, the deadly medical consequences of prolonged asbestos exposure and the relatively low cost of adding warnings to a technician's manual or to the exterior of the machinery itself, it appears that a jury could find that the products in this case were unreasonably dangerous.[47]

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[45] Lunsford, 125 Wn. App. at 792-93 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. c. (1965)).

[46] Bich v. General Electric Co., 27 Wn. App. 25, 32, 614 P.2d 1323 (1980) (citing Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 154, 542 P.2d 774 (1975)).

[47] Although the issue of unreasonable danger is not discussed in the briefs, the manufacturers would no doubt argue that the asbestos, not their products, posed the

If the pumps and valves were found to be unreasonably dangerous without warnings, they would be defective under products liability law: "If a product is unreasonably dangerous, it is necessarily defective."[48] The manufacturers had a duty to warn regarding the safe use of their products, and the trial court erred in concluding otherwise.

**Negligence – Duty to Warn**

Braaten also argues that the failure to warn was negligent. The elements of negligence are duty, breach, causation, and damages.[49] In this appeal, duty is the only element at issue. Braaten must show that the manufacturers had a duty to warn of "the hazards involved in the use of the product which are known, or in the exercise of reasonable care should have been known, to the manufacturer."[50] The duty to warn in the context of negligence is similar to the duty to warn in a strict liability claim, but the focus is on the conduct and knowledge of the manufacturer instead of the dangerous propensities of the product itself.[51]

The manufacturers had a general duty to warn Braaten, because he was a user of their valves and pumps.[52] The manufacturers argue that foreseeability is the only possible source of any duty to Braaten, and that foreseeability alone is not enough reason to hold them responsible. We disagree. A worker required to frequently service these products as a regular part of his job was a user of their products.

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danger. However, as discussed below, the pumps and valves are the correct products for this analysis.

[48] Seattle First Nat'l Bank v. Tabert, 86 Wn.2d 145, 154, 542 P.2d 774 (1975).

[49] Koker v. Armstrong Cork, 60 Wn. App. 466, 473, 804 P.2d 659 (1991).

[50] Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 412, 591 P.2d 791 (1979).

[51] Little v. PPG Indus., Inc., 92 Wn.2d 118, 120, 594 P.2d 911 (1979).

[52] RESTATEMENT (SECOND) TORTS § 402A cmt. *l.* (1965).

But as all parties and amici agree, this general duty is bounded by the foreseeability of the harm.[53] The test of foreseeability is "'whether the actual harm fell within a general field of danger which should have been anticipated.'"[54] In hindsight, asbestos exposure was undoubtedly a hazard involved in the use of the manufacturers' products. But foreseeability of harm examines foresight, not hindsight: did the manufacturers know, or should they have known, about the hazards of asbestos involved in the use of their products at the time they were being sold and used? This question is not an appropriate one for summary judgment. Foreseeability of harm is generally a question of fact for the jury, not a question of law for the court, unless the circumstances of the injury "'are so highly extraordinary or improbable as to be wholly beyond the range of expectability.'"[55] That is not the situation here. Foreseeability of the harm should be considered by the trier of fact.

As a matter of policy, it is logical and sensible to place some duty to warn on the manufacturer who is in the best position to foresee the specific danger involved in the use of a product. Here, the asbestos manufacturers had a duty to warn about the general dangers of inhaling asbestos fibers, but the manufacturers of the pumps, turbines, and valves also had a duty to warn about maintenance procedures for their products that would release those dangerous fibers into the air.

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[53] See Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 793, 106 P.3d 808 (2005).

[54] Koker, 60 Wn. App. at 480 (quoting McLeod v. Grant Cy. Sch. Dist. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953)).

[55] Seeberger v. Burlington N. R.R. Co., 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting McLeod v. Grant Cy. Sch. Dist. 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)).

The record supports a duty to warn sufficient to survive summary judgment. A trier of fact could conclude that the manufacturers knew or should have known that exposure to released asbestos fibers was a hazard involved in the use of their products. Contrary to the manufacturers' framing of the issue, their duty was not to warn of dangers associated with a third party's product, but of dangerous aspects of their own product: namely, that using their products as intended would very likely result in asbestos exposure. The trial court erred in granting summary judgment for the manufacturers on the duty to warn element of the negligence claim.

III.

GE prevails in its collateral estoppel argument, and summary judgment is affirmed on that alternate basis. The trial court erred when it concluded that the other manufacturers had no duty to warn in strict liability and in negligence. The remaining summary judgment orders are reversed and remanded for further proceedings.

AFFIRMED IN PART AND REVERSED IN PART.

Baker, J.

WE CONCUR:

Appelwick, C.J.

Coleman, J.