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No. 56614-8-1

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

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JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Appellants,

v.

VIAD CORP.,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

As more and more asbestos defendants are driven out of business and forced into bankruptcy by the wave of mass-tort asbestos litigation, plaintiffs have started exploring alternative peripheral sources of tort recovery. Not content with the recoveries available through the asbestos products manufacturers, their bankruptcy trusts, and state and federal worker compensation systems, plaintiffs have ventured to distort notions of duty and foreseeability in an effort to recover from second and third-tier defendants who were not directly involved in the distribution chain of the asbestos-containing product. In response to this alarming trend, courts across the country have rejected this movement and refused to expand liability to entities whose connection to the particular product does not give rise to liability under existing laws.

Simonetta's claim against Viad Corp. ["Viad"] is undoubtedly the product of this emerging wide-spread effort. This appeal may have far-reaching effects, and is likely to affect a universe of entities far beyond those directly involved in this case.

Viad is being targeted for its alleged predecessor's failure to warn of risks associated with thermal asbestos insulation attached, post-manufacture, to its evaporator. Undisputedly, the alleged predecessor,

Griscom-Russell,<sup>1</sup> never manufactured, supplied, or attached the insulation to the evaporator. The asbestos insulation Simonetta handled was supplied by third parties post-sale. This is not a claim for exposure to Griscom-Russell's own asbestos product, as Simonetta does not allege that the evaporator in and of itself was defective.

At the trial court level, Viad argued that the extension of duty advocated by Simonetta finds no sound legal, logical, or policy basis. Following the lead of other courts nationwide, King County Presiding Asbestos Judge Sharon Armstrong correctly dismissed Simonetta's claim, thereby upholding the long standing principle that a product defendant has no duty to warn of potential risks of another manufacturer's product. Viad respectfully asks this Court to affirm this ruling.

## **II. RESTATEMENT OF ISSUES PRESENTED**

1. Whether the trial court properly held that Griscom-Russell owed Simonetta no duty to warn of dangers associated with asbestos insulation where (1) Simonetta's claim is limited to exposure to asbestos insulation attached by others to Griscom-Russell's evaporators post-manufacture, (2) uncontroverted evidence showed that Griscom-Russell's evaporators were sold without asbestos insulation, and (3) Griscom-

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<sup>1</sup> Viad disputes Simonetta's claim that it has successor liability, but for the purposes of this appeal, this Court may assume that Viad is a corporate successor to Griscom-Russell.

Russell never manufactured, sold or supplied the insulation that allegedly caused Simonetta's injury.

2. Whether the trial court properly held that Griscom-Russell owed Simonetta no duty to warn of dangers associated with asbestos insulation, even assuming that Griscom-Russell should have known that asbestos insulation would be applied to its evaporators, because foreseeability alone does not create a duty, but instead serves as a limit on the scope of a duty once it is found to exist.

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

#### **A. Factual Background**

The undisputed facts pertinent to the legal question at hand can be summarized as follows.

##### **1. Viad's corporate background**

Viad was incorporated in 1926. CP 331, 14:19-25. Simonetta is suing Viad as an alleged corporate successor to Griscom-Russell. CP 133. Viad vigorously disputes Simonetta's claim that it has successor liability, but this issue is not part of this appeal. For the purposes of this proceeding only, this Court may assume that Viad is a corporate successor to Griscom-Russell.

Griscom-Russell was a business entity that procured a contract with the U.S. Navy to manufacture and sell evaporators for the military

ships. CP 345, 72:5-11. Griscom-Russell's business is believed to have ceased to exist some time in early 1960s. CP 345, 69:19-22.

## **2. Simonetta's exposure claim**

Simonetta is 68 years old. Appellant's Brief, p. 3. He served as a Senior Chief Petty Officer Mate with the United States Navy from 1954 until 1974. *Id.* Simonetta was diagnosed with lung cancer in two different lobes of his lungs in 2000 and 2002; those lobes were successfully removed. CP 12-14. His physician, Dr. Marrujo, determined that Simonetta's smoking history contributed to his lung problems. CP 183.

This appeal arises out of Simonetta's alleged exposure to Griscom-Russell's evaporator, also known as a distilling plant.<sup>2</sup> CP 177. Appellant misstates uncontroverted facts by arguing that Simonetta was exposed to more than one evaporator manufactured by Griscom-Russell.<sup>3</sup> The evidence of record shows that Simonetta worked on just one Griscom-Russell evaporator throughout his tenure with the Navy, while he served as a machinist mate aboard the USS Saufley from 1958 through 1959. CP 187-91, 143-44.

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<sup>2</sup> The terms "evaporator" and "distilling plant" are used in this brief interchangeably.

<sup>3</sup> See Appellant's Brief at p. 4, stating that Simonetta "was exposed to asbestos insulation installed on Griscom-Russell evaporators" and that he "worked on Griscom-Russell evaporators while serving as a machinist mate aboard the USS SAUFLEY in the 1958-59 time period."

Simonetta described the evaporator in question as a large cylinder, measuring 10-12 feet in diameter and approximately 15 feet in length. CP 174, 190. The evaporator was designed for the use in open sea to desalinate sea water and convert it into fresh water. *Id.*

In the course of routine maintenance of the evaporator at issue, Simonetta on one isolated occasion had to remove exterior insulation material from it, replace internal gaskets, and install new insulation. CP 203-04. The entire project took no more than six to eight hours. CP 202. Simonetta recalls that the insulation material he applied consisted of block insulation, asbestos mud, and asbestos cloth. CP 197. Simonetta does not claim that Griscom-Russell was the manufacturer or supplier of the asbestos material. CP 203.

In addition to his insulation exposure claim, Simonetta had alleged exposure to asbestos-containing gaskets purportedly located on both sides of an inner flange inside Griscom-Russell's evaporator. CP 198-99. He offered no evidence, however, showing that those gaskets were original Griscom-Russell gaskets or that they had not been replaced with gaskets by a different manufacturer before Simonetta started his service on the USS Saufley. On July 6, 2005, Simonetta voluntarily dismissed his claim against Viad for alleged exposure to internal asbestos gaskets. CP 1383-

85. His claim against Viad is limited to alleged exposure to asbestos fibers from thermal insulation covering Griscom-Russell's evaporator.

It is undisputed that Griscom-Russell sold the evaporator in question to the Navy without insulation. The insulation was applied post-manufacture by the Navy or its third-party contractors. CP 45:10-12.

**B. Procedural Background**

Simonetta filed his personal injury action on January 22, 2004. CP 3-6. On March 15, 2004, Simonetta amended his complaint adding Viad as a defendant. CP 24-28. The Amended Complaint named seventeen defendants allegedly responsible for Simonetta's asbestos exposure. *Id.*

On January 5, 2005, Viad filed a Motion for Summary Judgment. CP 42-60. By that time, the only two defendants remaining in the case were Viad and Saberhagen Holdings. The rest of the defendants settled or were dismissed at earlier stages of the litigation.

Viad's argument for summary judgment dismissal was two-fold. First, Viad was not the corporate successor to Griscom-Russell. CP 47-48. Second, Griscom-Russell owed no duty to warn of dangers associated with asbestos insulation manufactured, sold, and supplied by others. CP 49-60.

On January 25, 2005, Simonetta filed a Cross-Motion for Partial Summary Judgment on Corporate Successorship and an opposition to

Viad's summary judgment motion. CP 970-996. Both parties filed replies. CP 1011-30, 1177-89.

On February 21, 2005, the parties argued their respective summary judgment motions before King County Presiding Asbestos Judge, The Honorable Sharon Armstrong. Judge Armstrong denied the cross-motions as to successor liability, but granted Viad's motion on the duty to warn.

The court's order read:

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.

Viad moved for reconsideration on the issue of successor liability. CP 1206-12. Simonetta, in turn, moved for reconsideration on the duty to warn. CP 1249-54. The court denied both motions. CP 1297-98, 1321-22.

Simonetta subsequently moved for discretionary review, but the motion was denied. To expedite appellate review as a matter of right, Simonetta dismissed its remaining claims against Viad and the only other remaining defendant, Saberhagen Holdings, Inc., on July 6, 2005, CP

1374-75. Simonetta expressly withdrew all claims relating to exposure to asbestos-containing gaskets allegedly incorporated into Griscom-Russell's evaporator. CP 1383-85.

On July 22, 2005, Simonetta filed its Notice of Appeal seeking review of the order granting summary judgment for Viad on the duty to warn. Simonetta also appealed the trial court's denial of his summary judgment motion on successor liability. CP 1388-89. On July 26, 2005, Viad filed a Notice of Cross-Appeal, seeking review of the trial court's denial of Viad's motion for summary judgment on successor liability. CP 1398-99.

In October 2005, Simonetta and Viad mutually dismissed their respective appeals on successor liability. The sole issue before this Court is Judge Armstrong's order of February 21, 2005 granting Viad's Motion for Summary Judgment on the duty to warn.

#### **IV. ARGUMENT**

##### **A. Summary of Argument**

Judge Armstrong's grant of summary judgment was proper under the law of Washington and elsewhere because a product manufacturer bears no legal duty to warn of dangers associated with products supplied by others to an end-user, regardless of whether the claim sounds in

common law negligence or strict liability. The manufacturer's duty to warn is limited to dangerous features inherent in its own product.

Judge Armstrong also properly held that foreseeability, in and of itself, does not create a duty, where such duty did not exist in the first place. Instead, foreseeability serves as a limit on the scope of a duty once such duty is found to exist.

**B. Standard of Review**

In reviewing summary judgment orders, “[t]he appellate court engages in the same inquiry as the trial court, with questions of law reviewed *de novo* and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004) (citation omitted). Summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). A material fact is one upon which the outcome of the litigation depends. *Id.* Failure of proof as to any essential element of a plaintiff's claim requires entry of summary judgment for the defendant. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 23, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993).

The trial court's dismissal of Viad was proper. In granting summary judgment, Judge Armstrong held that Griscom-Russell owed no duty to warn because "the product itself did not produce the injury." CP 1194-96; *see also* CP 1228-30. The existence of a duty is a matter of law and can be properly resolved on summary judgment. *See Briggs v. Pacificorp.*, 120 Wn. App. 319, 322, 85 P.3d 369 (2003), *review denied*, 152 Wn.2d 1018 (2004). Because the law does not impose upon Griscom-Russell the duty to warn, no triable issues of fact remained for a jury to decide.

**C. Griscom-Russell owed Simonetta no duty to warn because its product did not produce any injury**

Simonetta does not claim that Griscom-Russell's evaporators were defective as designed or manufactured. As he is unable to prove any manufacturing or design defect, Simonetta resorts to the argument that the evaporator was unreasonably dangerous by virtue of asbestos insulation applied to the evaporator by a third party post-manufacture. As a matter of law and fairness, Simonetta's claim should have been asserted against the manufacturer of the asbestos insulation that allegedly caused his injury. Yet, Simonetta apparently chose not to try to identify and pursue claims against the entity responsible for putting those insulation products on the market and instead sued Griscom-Russell for its alleged failure to

warn of potential health hazards inherent in the asbestos insulation supplied by other entities.

Simonetta's claim is fatally flawed. Griscom-Russell owed no legal duty to provide such warning because Griscom-Russell never designed, manufactured, or sold the asbestos insulation in question. This is true regardless of whether the claim is analyzed under a negligence or strict liability standard.

**1. Duty of care under negligence product liability theory**

It is hornbook law that to prove actionable negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. *Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992). The existence of a duty is a threshold question decided by the court as a matter of law. *Briggs*, 120 Wn. App. at 322.

Under traditional negligence product liability theory, a manufacturer is not responsible for a product it never manufactured or supplied. In *Nigro v. Coca-Cola Bottling, Inc.*, 49 Wn.2d 625, 305 P.2d 426 (1957), the Washington Supreme Court found for the defendant where the plaintiff offered no evidence showing that the defendant "supplied" a Coca-Cola bottle that allegedly contained foreign matter and caused the plaintiff's injury. *Id.* The proof that the defendant supplied the product causing the

injury was, in the court's opinion, "the essential element of [the plaintiff's] case." *Nigro*, 49 Wn.2d at 426.

In asbestos product liability cases, Washington courts have held that plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product.

*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.*

Here, the product causing the injury is asbestos insulation, and Griscom-Russell was neither the manufacturer nor supplier of this product. Because the evaporator left Griscom-Russell's plant free of insulation, it was not, as a matter of law, a defective product. It was the insulation, not the evaporator, that allegedly caused Simonetta's injury. Simonetta's failure to establish the requisite reasonable connection between his injury and Griscom-Russell's product is fatal to his case. Under these facts, the Washington case law provides Simonetta with no cause of action against Viad.

## **2. Duty of care under strict liability theory**

The law of strict products liability in Washington had its genesis in the case of *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969). In *Ulmer*, the Washington Supreme Court adopted RESTATEMENT (SECOND)

OF TORTS §402A as the basis for Washington products liability law. Under *Ulmer*, strict liability in tort was restricted to product manufacturers. In a broad interpretation of section 402A, our Supreme Court later extended strict liability beyond manufacturers to all others in the chain of distribution. *Sea-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975). A year later, strict liability under a failure to warn theory was adopted in *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wn. App. 379, 388, 550 P.2d 71 (1976).

In every case decided under Washington law, strict product liability has been restricted to **entities in the chain of distribution** of the defective product. *See e.g. Tabert*, 86 Wn.2d at 148. Comment “f” to RESTATEMENT (SECOND) OF TORTS §402A makes clear that the doctrine of strict liability is limited to entities in the chain of distribution of the product causing the injury:

The rule stated in this Section applies to **any person engaged in the business of selling products** for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor [...].

RESTATEMENT (SECOND) OF TORTS §402A cmt. f (emphasis supplied).

In *Little v. PPG Industries, Inc.*, 19 Wn. App. 812, 579 P.2d 940 (1978), *affirmed*, 92 Wn.2d 118, 124, n. 4, 594 P.2d 911 (1979), the court upheld the following jury instruction on plaintiff’s burden in a strict liability failure to warn claim:

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.

*Little*, 19 Wn. App. at 818, n. 3 (emphasis supplied). Thus, Simonetta was required to show that the danger was inherent in Griscom-Russell's own product, not the product of others.

It is undisputed that Griscom-Russell was not in the chain of distribution of the asbestos insulation at issue. Imposing a duty to warn upon an entity that was outside of the chain of distribution of the injury-producing product would violate the long-standing principles of products liability established in Washington.

**3. Griscom-Russell owed Simonetta no duty to warn either under a negligence or strict liability theory**

Simonetta's claims against Viad sound in negligence and strict liability. While the distinction drawn between a negligent failure to warn and the warning requirements for strict tort purposes might seem elusive, there are different bases for the two theories. As noted in *Haugen*,

Under the strict tort doctrine the emphasis is on the product and the danger it poses to the public, while under the negligence concept the emphasis is on the reasonableness of the conduct of the manufacturer.

*Haugen*, 15 Wn. App. at 387, *adopting* L. FRUMER & M. FRIEDMAN, 2 PRODUCTS LIABILITY § 16A(4), \*\*77 P. 3--336.3 (1960).

It is helpful to recognize the theoretical distinctions between negligent and strict liability failure to warn claims, but in this case the distinctions are purely academic. Simonetta's claims fail under either theory because the alleged injury was not caused by Griscom-Russell's product. As one Washington court noted, the burden is upon plaintiff under either a negligence or strict liability theory to prove that there was a defect in the defendant's product that proximately caused the resulting injury. *Ewer v. Goodyear Tire & Rubber Co.*, 4 Wn. App. 152, 157, 480 P.2d 260 (1971). Failure to satisfy this burden warrants dismissal.

It is axiomatic that before being allowed recovery, "plaintiff must establish a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained of conduct and that is designed to protect the plaintiff against harm of the general type." *Bernethy v. Walt Faylor's, Inc.*, 92 Wn.2d 929, 932, 653 P.2d 280 (1982). "The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 750 N.E.2d 1055 (N.Y. 2001) (internal citations omitted). The fundamental principle of products liability law is that the manufacturer has a duty to provide adequate warnings with respect

to its own product. *See Little*, 92 Wn.2d at 124; *see also* WPI 110.03.

Washington law does not charge the manufacturer with the duty to warn of dangers associated with a product it never sold and had no control over.

Numerous Washington decisions impose liability upon product manufacturers for the failure to warn of dangers inherent in the products they make and market. *See e.g., Little*, 92 Wn. 2d 118 (action against cleaning solvent manufacturer for alleged defects in the solvent); *see also Lamon v. McDonnell Douglas Corp.*, 19 Wn. App. 515, 576 P.2d 426 (1978) (action against aircraft manufacturer for the design of the airplane's open emergency hatch); *Haugen*, 15 Wn. App. 379 (action against manufacturer of an abrasive grinding disk for injury caused by such disk); *Ewer*, 4 Wn. App. 152 (action against tire manufacturer for injuries caused by exploded tire); *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 804 P.2d 659 (1991) (action against asbestos product manufacturers for injuries caused by such asbestos product). Yet, there is not a single precedent in this jurisdiction holding a defendant in *Griscom-Russell's* position liable for injuries caused by the product supplied by third parties. Not surprisingly, *Simonetta* cites no Washington authorities justifying the limitless expansion of the duty to warn to parties not involved in the manufacture or distribution of the injury-producing product.

Regardless of whether Simonetta proceeds under a strict liability or negligence theory, his arguments are untenable. As there was no duty to warn in the first place, the application of strict liability versus negligence makes no practical difference, and both causes of action fail.

**D. The trial court's dismissal of Simonetta's claims is in accord with Washington authorities**

The issue of a manufacturer's duty to warn of dangers associated with the products of others is not new to Washington courts. The recent appellate decision in *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 84 P.3d 895 (2004), is instructive and confirms that Washington law does not impose on Griscom-Russell a duty to warn about asbestos insulation it never sold or installed.

*Sepulveda-Esquivel* sued the seller and manufacturer of an industrial hook for damages sustained at his place of employment when he was injured by a load that fell from the hook. His employer had attached a "mouse" to the hook, the purpose of which was to close the opening of the hook when moving the load. The court concluded that the seller and manufacturer of the hook had no duty with respect to the finished hook assembly with the mouse. They did not manufacture, supply or sell the finished assembly. They made and sold the hook component of the assembly, but that component did not fail. The relevant product was the completed assembly, and the hook seller

and manufacturer had no liability because the hook component of the finished product did not produce the injury.

Simonetta invites this Court to impose liability based upon the reasoning expressly rejected in *Sepulveda*. The situation in the instant case is analogous in that the evaporator itself did not produce the injury, just as the industrial hook in *Sepulveda* did not fail when the incident occurred. In both cases, the inherent danger was in the finished assembly, and arose from the product provided by others.

Although *Sepulveda* was resolved under the statutory provisions of the Washington Products Liability Act [“WPLA”], the court’s analysis indicates that the same outcome would be warranted under pre-WPLA product liability law.

Under the common law, component sellers are not liable when the component itself is not defective. As [one of the defendants] points out: “This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.”

*Sepulveda-Esquivel*, 120 Wn. App. at 19 (internal citations omitted).

Unable to explain away this well-settled rule of product liability law, Simonetta cites easily distinguishable cases such as *Bich v. General Elect. Co.*, 27 Wn. App. 25, 33 614 P2d 1323 (1980), and *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 724 P.2d 389 (1986).

In *Bich*, the plaintiff was injured in an explosion while changing a fuse in a transformer manufactured by General Electric [“GE”]. *Bich*, 27 Wn. App. at 27. Bich replaced the GE fuses with Westinghouse fuses. Although the Westinghouse and GE fuses were similar in appearance and labeling, the Westinghouse fuses had a longer time-delay curve. After replacing the fuse, Bich closed the drawer where the transformer was housed and waited to see if the new fuses would hold. As he reopened the drawer, electric current arced from the opening and was followed immediately by an explosion and fire. Bich was severely burned in the explosion. *Bich*, 27 Wn. App. at 28.

Bich sued GE on the theory of strict liability, asserting, *inter alia*, that GE’s transformer was unreasonably dangerous due to GE’s failure to adequately warn of fuse substitution. *Bich*, 27 Wn. App. at 32. The court held GE strictly liable and said that GE had the duty to warn of its own fuses:

It would have been a simple and inexpensive matter for GE to have included **on its fuses** a warning not to substitute fuses or to have given information regarding the time-delay characteristics **of its fuses**.

*Bich*, 27 Wn. App. at 33 (emphasis supplied). However, the *Bich* court expressly refused to charge GE with the duty to provide any warnings as to fuses manufactured by Westinghouse: “We agree that GE had no duty

to warn in 1969 of a fuse Westinghouse manufactured in 1973.” *Bich*, 27 Wn. App. at 33. This was so even though both GE and Westinghouse manufactured time-delay fuses as far back as 1967, and GE knew that its high voltage equipment required time-delay fuses. *Id.* In other words, GE arguably could foresee that its fuses may be replaced with Westinghouse fuses.

Simonetta’s reliance on *Bich* is misplaced. In fact, the *Bich* court’s refusal to impose upon GE the duty to warn of Westinghouse’s fuses provides a vivid illustration of why Simonetta’s claims against Viad are contrary to Washington law. Under the *Bich* court’s reasoning, Griscom-Russell would only have had a duty to warn of asbestos insulation if Griscom-Russell had manufactured such insulation and supplied it as a component part for its evaporators. Such a duty to warn would be akin to GE’s duty to place warnings on its own fuses. Under *Bich*, however, Griscom-Russell’s duty to warn is limited to its own product. Just as GE was not responsible for providing any warnings for Westinghouse’s fuses, Griscom-Russell had no duty to warn of asbestos insulation manufactured and supplied by a different entity.

Simonetta’s reliance on *Parkins* is also misplaced. In *Parkins*, the court found the supplier of conveyor components, defendant Van Doren, liable for plaintiff’s injuries. *Parkins*, 45 Wn. App. 19. *Parkins* was

injured when her right arm was caught in a nip point of the conveyor. Van Doren sold the unassembled conveyor components to the plaintiff's employer. The parts supplied by Van Doren were accompanied by no warnings or safety guards for the nip points created when the components were assembled.

*Parkins* does not establish a duty to warn on the part of a manufacturer in Griscom-Russell's position. In *Parkins*, the plaintiff was injured by unreasonably dangerous component parts, namely unguarded nip points of the conveyor itself. Even though the parts sold by Van Doren were not dangerous when sold separately, they presented a potential hazard after being assembled together into a single conveyor unit. There was only one way in which the conveyor could be assembled. In ruling in the plaintiff's favor, the court specifically noted that, "**the machinery causing the plaintiff's injury was sold by Van Doren**, as opposed to other equipment which made up the conveyor." *Parkins*, 45 Wn. App. at 25 (emphasis supplied).

The reasoning behind *Parkins* is easy to understand. Since Van Doren was the supplier of the instrumentality causing the plaintiff's injury, it was properly situated to bear responsibility for dangerous features of its product. If a component part has a danger or defect associated with it, Washington law rightfully requires the manufacturer to warn about such

inherent danger. But requiring a supplier of a non-defective product to issue end-use specific warnings about risks that arise only in other companies' particular end uses would constitute a substantial departure from this principle.

In canvassing the case law in Washington, this Court will find ample well-reasoned authority imposing liability on the parties that either made a product that was defective in design, failed to warn of the product's inherent dangers, manufactured it improperly or were in the direct distributive chain of those who placed the defective product into the stream of commerce. Yet, there is no viable case law to support the contention that a party who played no role in the design, manufacture and marketing of a defective product can be held responsible in a product liability action.

**E. The trial court's dismissal of Simonetta's claims is in accord with the decisions from other states arising under analogous operative facts**

Not only does Simonetta's novel liability theory find no support in Washington law, it is contrary to law in other jurisdictions. Recently, the Sixth Circuit squarely addressed the issue at hand in *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6<sup>th</sup> Cir. Sept. 28, 2005). *Lindstrom* holds that a manufacturer can be liable for his own product, but not for asbestos-containing products that may be attached or connected to his product by others.

The 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, citing *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 517 (5<sup>th</sup> Cir. 1986).

The plaintiff in *Lindstrom* alleged asbestos exposure during his career as a merchant seaman. *Lindstrom*, 424 F.3d at 491. His claims were based on both negligence and strict liability theories. *Lindstrom*, 424 F.3d at 492. Among other defendants, he sued Coffin Turbo Pump, Inc. [“Coffin Turbo”], which manufactured feed pumps installed on vessels he worked upon. The plaintiff’s claims included exposure to asbestos insulation from the Coffin Turbo pumps. These pumps undisputedly came without asbestos insulation; any insulation put on them was the product of another manufacturer. *Lindstrom*, 424 F.3d at 496. The court held that Coffin Turbo was not liable to the plaintiff for exposure to asbestos insulation. Simply put, “Coffin Turbo [could not] be held responsible for the asbestos contained in another product.” *Id.*

In the same action, the plaintiff sued defendant Ingersoll-Rand, a manufacturer of air compressors. The alleged source of the plaintiff’s exposure was sheet packing he handled in connection with working on Ingersoll-Rand’s air compressors. Since Ingersoll-Rand was not the

manufacturer of the asbestos sheet packing, the court dismissed plaintiff's claim, noting:

Ingersoll Rand cannot be held responsible for asbestos containing material that [...] was incorporated into its product post-manufacture.

*Lindstrom*, 424 F.3d at 497 (citing *Stark v. Armstrong World Indus., Inc.*, 21 Fed.Appx. 371, 381 (6<sup>th</sup> Cir. 2001), and *Koonce*, 798 F.2d at 715). The *Lindstrom* Court applied the same rationale in dismissing the claims against defendant Henry Vogt Machine Co. ["Henry Vogt"]. The plaintiff alleged exposure to asbestos from Henry Vogt's valves. The evidence showed that the original valves had contained asbestos packing and gaskets. The plaintiff, however, could not have handled Henry Vogt's original packing or gasket material because his employment did not start until several years after the new valves were installed. Any asbestos the plaintiff may have been exposed to in connection with a Henry Vogt product would be attributable to replacement packing and gaskets subsequently installed on Henry Vogt's units by others. The court found Henry Vogt could not be held responsible for asbestos material it did not supply. *Lindstrom*, 424 F.3d at 495.

There is no reason in law or logic why the analytical framework of *Lindstrom* should not apply with full force to the instant case. *Lindstrom* offers at least three distinct factual scenarios where a product manufacturer is sued under claims virtually identical to the claims asserted against Viad in

this action. The common thread is that Coffin Turbo, Ingersoll-Rand, and Henry Vogt's products were not the products that caused the plaintiff's injury. The same is true of Griscom-Russell's product. Under *Lindstrom*, Judge Armstrong properly dismissed Simonetta's claims against Viad on summary Judgment.

Similarly, in *Cipollone v. Yale Industrial Products, Inc.*, 202 F.3d 376 (1<sup>st</sup> Cir. 2000), the first Circuit Court of Appeals refused to impose liability upon a manufacturer for injuries caused by an integrated product. The plaintiff in *Cipollone* sued Yale, which manufactured a customized dock lift for his employer FedEx. The lift was integrated into FedEx's overall material-handling system. *Cipollone*, 202 F.3d at 378. The plaintiff injured his hand while using the lift to unload his truck. Liability theories against Yale included negligent design and manufacture of the dock lift, as well as "failure to warn of the shearing hazard." *Cipollone*, 202 F.3d at 379.

The court noted that Yale's lift itself was not defective when delivered to FedEx. Because the product was merely a component of FedEx's larger package-handling system, summary judgment for Yale was proper. *Cipollone*, 202 F.3d at 379. The court framed the applicable rule as follows:

A supplier of a component part containing no latent defect has no duty to warn the subsequent assembler or its

customers of any danger that may arise after the components are assembled.

*Cipollone*, 202 F.3d at 379, citing *Freitas v. Emhart Corp.*, 715 F.Supp. 1149, 1152 (D.Mass. 1989); see also *Newman v. General Motors Corp.*, 524 So. 2d 207 (4<sup>th</sup> Cir. 1988) (holding that a manufacturer of a specialized trailer is not liable for defects caused by a defective ratchet assembly attached to the manufacturer's product by a third-party post-sale).

The Fourth Circuit has adopted the same rule in *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4<sup>th</sup> Cir. 1986). The plaintiff in *Baughman* was a tire mechanic injured while changing a tire on a GMC truck. The tire was mounted on a "CR-2" multi-piece wheel. After the plaintiff replaced the tire, inflated it, and began to remount the wheel, it exploded, causing him injuries. *Baughman*, 780 F.2d at 1131.

The plaintiff sued General Motors ["GM"] alleging, *inter alia*, that GM was liable for its failure to warn potential users that the wheel could explode after the tire was fully inflated. *Baughman*, 780 F.2d at 1132. The *Baughman* court affirmed the district court's summary dismissal of GM because the wheel that injured the plaintiff was not designed, manufactured, or placed into the stream of commerce by GM. *Id.* The court wrote:

Where, as here, the defendant manufacturer did not incorporate the defective component into its finished product and did not place the defective component part into its finished product and did not place the defective component

into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part was its own.

*Baughman*, 780 F.2d at 1132-33; *see also Firestone Steel Prod. Co. v.*

*Barajas*, 927 S.W.2d 608 (Tex. 1996) (holding under similar facts that a manufacturer of a wheel does not have a duty to warn about another manufacturer's products, though those products might be used in connection with such wheel).

The same is true of Griscom-Russell, which had no opportunity to test asbestos products applied to the evaporator post-sale, never derived any benefit from the sales of asbestos insulation, and has never claimed that the insulation in question was in any way associated with Griscom-Russell. Under the rationale formulated in *Baughman*, Griscom-Russell is not a proper party to bear liability for Simonetta's injury.

Simonetta relies on *Wright v. Stang Mfg. Co.*, 54 Cal.App.4<sup>th</sup> 1218, 63 Cal.Rptr.2d 422 (Cal.App.2.Dist., 1997), but the weight of authority in California is to the contrary. California courts have repeatedly refused to impose liability on the basis urged by Simonetta. *See e.g., Garman v. Magic Chef, Inc.* 117 Cal. App.3d 634, 173 Cal.Rptr. 20 (1981).

The defendant in *Garman* was the manufacturer of a cooking stove. *Garman*, 117 Cal. App.3d at 636. The plaintiff's wife used the defendant's

stove inside a motor home. An explosion occurred, injuring the plaintiff and his wife. It was undisputed that the explosion was caused by leaks in the motor home's propane system, not by any defect in the stove. *Garman*, 117 Cal. App.3d at 637. The plaintiff sought recovery against Magic Chef on the theory that the instructions accompanying its stove were defective in failing to warn consumers that the stove's flame could ignite gas leaking from another source. *Id.*

Affirming the trial court's summary judgment in favor of Magic Chef, the California Court of Appeals emphasized that a manufacturer cannot be liable for failing to warn about the dangers of another manufacturer's product:

A failure to warn may create liability for harm caused by use of an unreasonably dangerous product. That rule, however, does not apply to the facts in this case because it was not any unreasonably dangerous condition or feature of [Magic Chef's] product which caused the injury. To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense.

*Garman*, 117 Cal. App.3d at 638-39 (internal citations omitted).

*Garman* was followed in *Blackwell v. Phelps Dodge Corp.*, 157 Cal.App.3d 372, 203 Cal.Rptr. 706 (1984). There, a defendant sold sulfuric acid to McKesson, which shipped the acid to its plant in a special tank car designed and owned by Union Tank. *Blackwell*, 157 Cal. App.3d at 375. As a result of pressure that built up in the car, the acid spilled out on the

plaintiffs when they attempted to unload it. The plaintiffs sued the defendant on the theory that the defendant had a duty to warn them of the possible accumulation of pressure in the tank and to provide instructions on how to safely unload it. *Blackwell*, 157 Cal. App.3d at 377. The Court of Appeals rejected this theory, applying the same rationale as in *Garman*:

While failure to warn may create liability for harm caused by use of an unreasonably dangerous product, that rule does not apply where it was not any unreasonably dangerous condition or feature of *defendant's* product which caused the injury. It was not the product (acid) supplied by defendant, but the container (tank car) in which that product was shipped, which was allegedly defective for lack of warnings or instructions. Under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them ...

*Blackwell*, 157 Cal. App.3d at 377-78 (internal citations omitted).

Likewise, the Court of Appeals in *Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357, 212 Cal.Rptr. 395 (1985), held that strict product liability for failure to warn extends only to the manufacturer of the defective product:

No reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else [...] [I]t is clear the manufacturer's duty is restricted to warnings based on the characteristics of the **manufacturer's own product.**"

*Powell*, 166 Cal.App.3d at 362, 364 (emphasis original).

Simonetta also relies on a New York case, *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (2001). As discussed below, *Berkowitz* fails to follow controlling New York authority. Moreover, Simonetta mischaracterizes the holding of *Berkowitz*. The *Berkowitz* court never held that the defendant Worthington Pump had a duty to warn of hazards arising from asbestos insulation, as Simonetta represents to this Court at page 32 of his brief. Rather, *Berkowitz* stated that, “[it did not] necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps.” *Berkowitz*, 288 A.D. 2d at 148. Clearly, there is a big difference between saying that one “had a duty” and saying that “it does not necessarily appear that one does not have a duty.”

The reasoning of the *Berkowitz* court is also flawed. A review of New York law reveals that there is no substantive legal basis for the court’s finding that the defendant Worthington Pump might have had a duty to warn of dangers associated with thermal insulation applied to its products by others. The very fact that the court punted the duty issue to the jury demonstrates the court’s lack of understanding that the existence of duty is a question of law. It is not for the jury to determine whether or not a duty exists; rather, it is the jury’s function to resolve whether a defendant who has an existing duty has violated it. *See Bernethy*, 97 Wn.2d at 933, *see also*

*Holdampf v. A.C. & S., Inc.*, \_\_\_ N.E.2d \_\_\_, 2005 WL 2777559 (N.Y. Oct. 27, 2005).

Moreover, the holding of *Berkowitz* is contrary to the weight of authority in New York. See *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S. 2d 373 (N.Y. 1992). *Rastelli* involved the death of a car mechanic when a rim on which he was mounting a Goodyear tire exploded. The plaintiff alleged that Goodyear had a duty to warn of dangers associated with the rim on which its tires were mounted. Goodyear moved for summary judgment asserting that it had no duty to warn about inherent dangers of a separate product manufactured by another company. The court agreed that no such duty existed. *Rastelli*, 79 N.Y.2d at 297-98. The *Rastelli* court articulated its rationale as follows:

we conclude that Goodyear had no duty to warn about the use of its tire with potentially dangerous multipiece rim produced by another where Goodyear did not contribute to the alleged defect in a product, had no control over it, and did not produce it.

*Id.*

Following the same rationale, the New York's highest court recently affirmed an appellate decision refusing to impose liability upon a manufacturer of a water heater for failure to warn of dangers associated with a device supplied and installed by others. See *Marie Cleary v. Reliance Fuel Oil Assocs.*, 17 A.D.3d 503, 793 N.Y.S.2d 468 (N.Y. App. Div. 2d Dep't,

2005), *affirmed*, 2005 N.Y. LEXIS 3215 (N.Y. Nov. 17, 2005). The infant plaintiff in *Marie Cleary* was scalded by hot tap water. The hot water was produced by a water heater manufactured by the defendant Bock Water Heaters, Inc. [“Bock”]. The temperature of the water within the heater was controlled by a device known as an aquastat, which was neither manufactured nor sold by Bock. *Marie Cleary*, 17 A.D.3d at 505-06. The court affirmed the trial court’s dismissal of summary judgment on the basis that Bock owed the plaintiff no duty to provide warnings as to potential defects caused by improper installation of the aquastat in its product. *Id.*

The lesson to be drawn from these cases is that courts should not impose liability on a manufacturer in Griscom-Russell’s position. The trial court’s dismissal of Simonetta’s claim is consistent with Washington law and with the vast majority of decisions nationwide.

At the trial court level and in his Motion for Discretionary Review, Simonetta heavily relied on *Chicano v. General Elec. Co.*, 2004 WL 2250990 (E.D.Pa., 2004). Acknowledging that *Chicano* was and remains an unpublished opinion, Simonetta still cites to it in his brief. *See* Appellant’s Brief, p. 32 at n. 16. This attempt to weave an unpublished authority into the

legal argument is procedurally inappropriate and directly violates RAP 10.4(h).<sup>4</sup>

An unpublished decision may not be cited as precedential authority on a point of law. *State v. Acrey*, 97 Wn. App. 784, 988 P.2d 17 (1999). It can be only used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *Id.* See also RAP 10.4(h). Use of out-of-state unpublished opinions is similarly inappropriate. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 450, 45 P.3d 594 (2002). Therefore, Viad asks this Court to disregard Simonetta's references to *Chicano* and its holding.

**F. The trial court properly ruled that foreseeability does not create a duty where such duty did not exist in the first place**

Simonetta further contends that the trial court erred in granting Viad's motion for summary judgment where the evidence may have suggested that Griscom-Russell knew or should have known that asbestos insulation would be applied to its product. Without conceding that the use of asbestos insulation was foreseeable, Viad submits to this Court that the issue of foreseeability has no bearing on the outcome of the instant case.

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<sup>4</sup> Moreover, the *Chicano* reasoning is flawed. Similarly to the *Berkowitz* court, the *Chicano* court improperly blurred and misapplied the notions of duty and foreseeability, as Viad pointed out to the trial court. See CP 52-59.

Simonetta mistakenly argues that foreseeability of injury creates a duty, even if the duty never existed in the first place. This erroneous approach mischaracterizes the role of foreseeability; it is akin to putting the proverbial cart before the horse.

Under our tort law, the proper function of foreseeability is the reverse of what Simonetta suggests. First, the court must determine whether a duty exists. *Bernethy*, 97 Wn.2d at 933. Only after this initial determination of legal duty is made, is it the jury's function to decide the foreseeable range of danger thus limiting the scope of that duty. *Id.* As Judge Schindler of this Court recently wrote, “[f]oreseeability limits the scope of a duty, but it does not independently create a duty.” *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 717, 98 P.3d 52 (2004). Simonetta's foreseeability argument is based upon the analysis previously considered and rejected by this Court. *See id.*; *see also Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998)(stating that concept of foreseeability serves to define the scope of the duty after a duty is found to exist); *Hansen*, 118 Wn.2d at 483.

Appellant cites to Justice Cordozo's opinion in *Palsgraf v. Long Island Railroad Co.*, 162 NE 99, 162 N.E. 99 (N.Y. 1928). Simonetta properly reasons that *Palsgraf* stands for the proposition that if the conduct of the actor does not involve a foreseeable risk of harm to the person injured,

he owes no duty to that person. Appellant's Brief at p. 16. Nowhere, however, does the *Palsgraf* decision say that the converse is true.

Almost fifty years after Justice Cordozo wrote his opinion, New York's highest court rejected an expansive interpretation of *Palsgraf* stating:

Foreseeability should not be confused with duty. The principle expressed in *Palsgraf v. Long Is. R.R. Co.* [...] is applicable to determine the scope of duty – only after it has been determined that there is a duty.

*Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019 (1976) *rearg.* denied 41 N.Y.2d 901 (1977). Simply put, *Palsgraf* does not support the proposition that a duty to warn arises from mere foreseeability.

Simonetta's reliance on *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005), is also misplaced. The primary issue in *Lunsford* was whether the defendant Saberhagen Holdings, who was undisputedly the manufacturer and supplier of asbestos insulation, could be held for a plaintiff's household exposure to asbestos from his father's working clothing. *Lunsford*, 125 Wn. App. at 787. Judge Coleman, writing on behalf of a three-judge panel, noted that a jury could find "it [was] reasonably foreseeable that household members would be exposed [to asbestos from the worker's clothing]." *Lunsford*, 125 Wn. App. at 793. Simonetta erroneously contends this is an example of the court using

foreseeability to create a duty of care. This interpretation finds no support in the court's analysis.

The main feature distinguishing *Lunsford* from this case is that Saberhagen admittedly supplied asbestos insulation to the plant where the plaintiff's father worked. Thus, Saberhagen had a duty to warn of dangers associated with its product or not to sell the dangerous product at all. As the existence of the duty had been established, this Court took the analysis one step further and applied the doctrine of foreseeability to determine the scope of the duty, *i.e.*, whether the duty extended to the worker's household. The Court concluded it was an issue of a jury to decide whether the plaintiff's injury was reasonably foreseeable. *Lunsford*, 125 Wn. App. at 793.

*Lunsford* provides an example where this Court used foreseeability as a mechanism to determine the scope of a duty that already existed. Contrary to Simonetta's argument, *Lunsford* does not stand for the proposition that foreseeability gives rise to a duty, where there is no duty to begin with.

In the instant case, the threshold inquiry is whether Griscom-Russell owed any duty to Simonetta. Only if the existence of the duty is established, does foreseeability come into play. Since Griscom-Russell, as a matter of law, bore no duty to warn Simonetta of asbestos insulation manufactured,

sold and supplied by others post-delivery, the question of whether Simonetta's exposure to such insulation was foreseeable is not relevant.

The issue of foreseeability as it pertains to component manufacturers' liability has also come up in the context of Teflon mass-tort litigation. *See e.g. Kealoha v. E.I. DuPont*, 82 F.3d 894, 901 (9<sup>th</sup> Cir. 1996) (applying Hawaii law).

By way of brief historical background, E.I. Du Pont De Nemours & Co. [ "DuPont" ] became the subject of nation-wide mass-tort litigation for its raw plastic product trademarked "Teflon." Beginning in 1969, a company called Vitek used Teflon as a component material for its Proplast TMJ Implant [ "implant" ]. Vitek invented, designed, and manufactured the implant. It was undisputed that Teflon, as sold by DuPont, was chemically inert and safe for ordinary industrial use. The ultimate implant material, however, comprised of a combination of Teflon with other products, was alleged to cause a debilitating tissue reaction to the implant recipients. *Kealoha*, 82 F.3d at 897, 899.

In the early 1990s, hundreds of lawsuits were filed against Vitek, which subsequently was rendered insolvent. Left without Vitek's deep pocket as a source for potential recovery, plaintiffs targeted DuPont as a component manufacturer. In response to this trend, more than twenty federal courts have granted summary judgment to DuPont on virtually identical

claims. *Kealoha*, 82 F.3d at 898, n. 3. See e.g., *Jacobs v. DuPont*, 67 F.3d 1219 (6<sup>th</sup> Cir. 1995); *Anguiano v. DuPont*, 44 F.3d 806 (9<sup>th</sup> Cir. 1995); *Apperson v. DuPont*, 41 F.3d 1103 (7<sup>th</sup> Cir. 1994); *LaMontagne v. DuPont*, 41 F.3d 846 (2<sup>nd</sup> Cir. 1994); and *Klem v. DuPont*, 19 F.3d 997 (5<sup>th</sup> Cir. 1994).

*Kealoha* is a representative case brought against DuPont in the Ninth Circuit by an individual who sustained injuries from Vitek's TMJ implants. In *Kealoha*, the plaintiff's liability theory was premised on the contention that DuPont had a duty to warn of known dangers posed by the use of Teflon in Vitek's implant devices. *Kealoha*, 82 F.3d at 899. Applying the "raw material supplier defense," the court found no such duty to warn because Teflon, in and of itself, was not unreasonably dangerous, and Teflon was not the product that caused the plaintiff's injury. *Id.*

Similarly to *Simonetta*, the plaintiff in *Kealoha* ventured to extend the scope of the defendant's duty to warn by applying the notion of foreseeability. The plaintiff argued that DuPont's duty to warn was predicated upon the foreseeability of the risk associated with Vitek implant material of which Teflon was a part. *Kealoha*, 82 F.3d at 900. The appellate record showed that DuPont was aware that its product was being used in the implant material. Moreover, DuPont's researchers knew that the implant material had the propensity to fragment and deteriorate. *Kealoha*, 82 F.3d at

897. Presented with evidence that the risk associated with the implants may have been foreseeable to DuPont, the *Kealoha* court reasoned that “foreseeability of the risk of the finished product was *irrelevant* to determining the liability” of the component defendant.

Where a component part became potentially dangerous in its ultimate use, the mere fact that the manufacturer of the component part had knowledge of the design of the final product was not a sufficient reason to assign responsibility to the manufacturer of the component part.

*Kealoha*, 82 F.3d at 901 (citing *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6<sup>th</sup> Cir. 1989)(applying Michigan law)).

Simonetta may argue that this case is distinguishable because Griscom-Russell’s distilling plant was a finished product, while Teflon was merely plastic raw material used in manufacturing the final product. Any such distinction, however, does not undermine the pivotal point that both products left the manufacturers’ control free of any defects, and it was the subsequent activities of third parties that made the products dangerous. In Simonetta, it was the application of asbestos insulation by the Navy; in *Kealoha*, it was the incorporation of Teflon into Vitek’s implant material.

*Kealoha* also reaffirms the principle that the mere foreseeability that a manufacturer’s product may be subsequently used with someone else’s defective product is immaterial to the issue of the manufacturer’s duty to warn. Similarly to the trial court in our case, the *Kealoha* court properly

refused to allow an undue expansion of the duty to warn on the mere basis that the injury could be foreseen. *Kealoha*, 82 F.3d at 901.

**G. The trial court's dismissal of Simonetta's claims was proper in light of the compelling policy reasons**

The drastic expansion of liability urged by Simonetta could have far-reaching effects. The universe of entities that would be affected by such a decision is not limited to asbestos defendants, but encompasses legions of manufacturers and suppliers of component products in Washington and nationwide. Thus, in determining whether a duty exists, this Court should be mindful of precedential and consequential future effects of its rulings. *See Hamilton*, 96 NY2d at 232.

Our courts traditionally have used a policy-oriented approach in deciding questions of duty in product liability cases. *See e.g., Lunsford*, 125 Wn. App. at 812. When applied to the instant case, public policies warrant only one conclusion: the duty to warn properly lies with the manufacturer of asbestos insulation, and not the manufacturer of the product the insulation is applied to. The mere circumstance that Simonetta has chosen not to pursue the remedies available to him against insulation manufacturers or their bankruptcy trusts and is not content with workers' compensation benefits available from the Navy, does not warrant a shift of liability to Griscom-Russell.

“[P]ublic 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.” *See e.g., Lunsford*, 125 Wn. App. at 812, *citing* RESTATEMENT (SECOND) OF TORTS §402A cmt. c. This policy does not justify imposition of a duty upon a manufacturer in Griscom-Russell’s position.

Griscom-Russell is not and should not be made an insurer of all products that might be used with or around its evaporators. Undisputedly, Griscom-Russell did not market asbestos insulation and did not profit from it. It was the supplier of asbestos insulation, not Griscom-Russell, that was properly situated to assume liability for its products as a “cost of production against which liability insurance can be obtained.” It would be ludicrous to expect Griscom-Russell to obtain liability insurance for product it did not supply, and had no control over.

The imposition of product liability is also based on the principle that damages shall be borne by the party who is in the best position to eliminate the danger. *Blackburn v. McLaughlin*, 128 Misc. 2d 623, 625, 490 N.Y.S.2d 452 (N.Y. 1985). This policy spreads the burden equally on the entities in the direct chain of manufacture or marketing, and it serves to pressure and encourage the party responsible for the defect to develop a

safer and more attractive product. *Id.* Griscom-Russell had no control over the manufacturing process of the insulation materials, it had no control over its consistency, it had no control over its distribution, and it had no control over methods used to remove and apply asbestos insulation to the evaporator. Therefore, it was not positioned to test, evaluate, and inspect the insulation products, much less eliminate the dangers associated with such. As a New York trial court correctly reasoned,

To fabricate a duty and hold responsible a party who lacks control and discretion over production of the defective merchandise and whose role in placing the defective product in the stream of commerce is tangential to the manufacture of the product would result in unnecessary expenditure, add unnecessary cost and not serve public policy.

*Blackburn*, 128 Misc. 2d at 625.

Undisputedly, the public has the right to and does expect that reputable sellers will stand behind their goods. *Lunsford*, 125 Wn. App. at 812. Griscom-Russell would be rightfully expected by the public to “stand behind” its evaporator and accept liability for harm proximately caused by the evaporator itself. Yet, no policy reason justifies requiring Griscom-Russell to take responsibility for a product it did not produce and had no role in placing in the stream of commerce.

Failure to abide by fundamental policy considerations discussed here will lead to untenable results. Some courts have been unable to resist

identifying the ludicrous examples that extension of a duty to warn (such as the extension urged here) would yield. As one court humorously put it, this may lead to situations where,

[a] power saw maker must warn of the risks of asbestos exposure (because a power saw could foreseeably be used to cut into asbestos-containing insulation); manufacturers of paint brushes must caution against the hazards of breathing mineral spirits (because mineral spirits are commonly used to clean paint brushes); orange juice producers must warn of the dangers of alcohol intoxication (because orange juice is often mixed with vodka).<sup>5</sup>

## V. CONCLUSION

It was incumbent upon Simonetta to establish, as a matter of law that Griscom-Russell owed him the duty to warn of dangers associated with insulation material it never manufactured or supplied. Simonetta has failed to meet his burden for the simple reason that his liability theory was contrary to the settled law in Washington and elsewhere. In the absence of duty, there is no breach, and without a breach there is no liability.

Griscom-Russell was poorly positioned to evaluate the hazards of asbestos products that third parties might attach to its equipment post-manufacture, and it was not the appropriate entity to bear the costs of injuries. To impose on Griscom-Russell a duty to warn about a different

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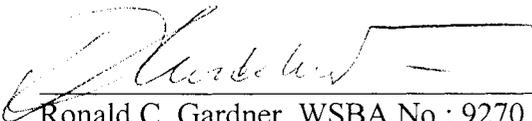
<sup>5</sup> *Smith v. Lead Indus. Ass'n, Inc.*, No. 2368, at 15 (Md. Ct. Spec. App. Sept. Term. 2002)(Unreported). *Smith* is not being cited as a precedential authority on point under RAP 10.4(h), but only to identify the source of the quote.

manufacturer's product would, in the words of one California court, "place on each manufacturer an untoward duty." *Powell*, 166 Cal. App.3d at 365.

In light of the foregoing, Viad respectfully asks this Court to affirm the trial court's order granting summary judgment to Viad.

DATED this 5<sup>th</sup> day of December, 2005.

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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

|                                 |                        |
|---------------------------------|------------------------|
| JOSEPH A. SIMONETTA and )       |                        |
| JANET E. SIMONETTA, a married ) |                        |
| couple, )                       | No. 56614-8-I          |
| )                               |                        |
| Appellants/Cross-Respondents, ) | DECLARATION OF SERVICE |
| )                               |                        |
| v. )                            |                        |
| )                               |                        |
| VIAD CORPORATION; )             |                        |
| )                               |                        |
| Respondent/Cross-Appellant. )   |                        |
| _____ )                         |                        |

I, Yvonne Younger, certify and declare as follows:

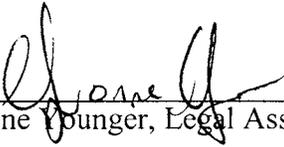
I am over the age of 18 and am otherwise competent to make this declaration. This declaration is made upon personal knowledge setting forth facts I believe to be true.

That on December 5, 2005, I caused to be served via Legal US Mail, postage prepaid, a true and correct copy of the BRIEF OF RESPONDENT on the following counsel of record:

David Frockt  
BERGMAN & FROCKT  
The Hoge Building  
705 2<sup>nd</sup> Avenue, Suite 1601  
Seattle, WA 98104

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

DATED: December 5, 2005.

By   
Yvonne Younger, Legal Assistant

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