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No. 80076-6

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 56614-8-I)

JOSEPH A. SIMONETTA AND JANET E. SIMONETTA,
Plaintiffs-Respondents,

v.

VIAD CORPORATION,

Defendant-Petitioner.

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I. ISSUE PRESENTED

Whether the Court of Appeals correctly held that an equipment manufacturer has a duty to warn of foreseeable exposure to the release of hazardous substances from another product that is used as part of the manufacturer's intended use of its equipment.

II. STATEMENT OF THE CASE

A. Factual Background.

In the late 1950s, Joseph Simonetta served in the Navy as a Senior Chief Petty Officer and Machinist Mate aboard the USS SAUFLEY. CP 187-91. In that capacity, he performed routine maintenance on the ship's Griscom Russell evaporator, which was insulated with asbestos. The evaporator was a large cylinder, approximately 10-12 feet in diameter and 15 feet long, that evaporated sea water and converted it into fresh water. CP 174, 190. Although Griscom Russell did not sell the product with the insulation already attached, insulation was necessary for the evaporator to operate properly, CP 744, and Griscom Russell "knew or reasonably should have known that its product would be insulated with asbestos-containing material." CP 1229 (Superior Court order).¹ Yet despite its

¹ See also CP 744 (testimony by *defendant's* expert stating that "everyone involved with the sale of distilling units would know that asbestos-containing insulation would be used by the United States Navy on the exterior of a distilling plant" such as the Griscom Russell evaporator; *id.* (testimony by *defendant's* same expert that Griscom Russell "would have known" that the gasketing material used on the product contained asbestos and that the asbestos-containing gaskets "would have to be replaced from time to time"); CP 745, 748 & 778 (Griscom Russell's 1945 product manual for the product at issue stating that the pumps and packing material should be "completely dismantled" and "completely repacked" at least once every six months and preferably every three

knowledge that use of the product would expose workers to a hazardous substance, Griscom Russell provided no warnings about the risk of asbestos exposure on the evaporator or in its product manual. CP 178-179; *see also* CP 745-798 (product manual, containing no such warnings).

Mr. Simonetta was exposed to respirable asbestos as a result of his work on this Griscom Russell evaporator, which required him to remove the insulation surrounding it in order to access the equipment. CP 195-204. He also was exposed to asbestos dust as a result of replacing gaskets on the evaporator that were packed with asbestos. CP 174-176, 196-198 & 200. In 2000 and again in 2002, Mr. Simonetta was diagnosed with cancer in two different lobes of his lungs, both of which were removed. He likely suffered from “asbestos-related pleural disease” underlying his cancer diagnosis. CP 8, 12-14. His work experience was sufficient “to show a causal relationship between his lung cancer and his asbestos exposure.” CP 8 (testimony of Dr. Samuel Hammer).

B. Procedural Background.

Mr. Simonetta filed a personal injury action in King County Superior Court on January 24, 2004, CP 3-6, and amended his complaint to add Viad Corporation (“Viad”), Griscom Russell’s successor for the purpose of this appeal,² on March 15, 2004. CP 24-28. Viad moved for

months).

² *See Simonetta v. Viad Corp.*, 137 Wn. App. 15, 19 n.1, 151 P.3d 1019 (2007) (assuming successor liability for purposes of appeal).

summary judgment that it had no duty to warn Mr. Simonetta of the dangers during maintenance of removing the asbestos insulation on the exterior surfaces of the evaporator and in the packing material in the product's pumps and gaskets. CP 42-60. Superior Court Judge Armstrong granted summary judgment, despite finding that "the product manufacturer knew or reasonably should have known that its product would be insulated with asbestos containing material," because "the product itself did not produce the injury." CP 1229.

Following denial of his motions for reconsideration, CP 1249-54, and discretionary review, CP 1301-02, Mr. Simonetta dismissed his remaining claims and filed a timely Notice of Appeal. CP 1388-89. The only issue before the Court of Appeals was whether Griscom Russell had a duty to warn Mr. Simonetta about the risk of asbestos exposure resulting from the anticipated and necessary maintenance of its product required by Griscom Russell in its product manual. *See* CP 778.

The Court of Appeals reversed Judge Armstrong and held that Viad had a duty to warn Mr. Simonetta of the dangers of the asbestos used to insulate the components of the Griscom Russell evaporator. *See Simonetta*, 137 Wn. App. at 21-32.

III. ARGUMENT

The Court of Appeals correctly held that under Washington's negligence and strict liability law, the duty to warn is defined by the need

to make products safe when put to their intended use.³ The duty to warn of risks from the intended use of a product is most often associated with risks that are intrinsic to the product itself, but that does not define the limit of the duty to warn. Under both Section 388 (negligence) and Section 402A (strict liability) of the *Restatement (Second) of Torts*, and this Court's decisional law adopting and applying those principles, the risk about which product users must be warned are those arising from "the use of the product," not solely from risks inherent in the product itself. This Court should affirm the Court of Appeals' holding that Mr. Simonetta may prove at trial that Viad breached its duty by failing to warn him of risks from the intended use of the Griscom Russell evaporator, which caused him harm.

A. Standard of Review.

This Court reviews *de novo* the Court of Appeals' reversal of the Superior Court's summary judgment ruling. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). All facts must be viewed in the light most favorable to the Mr. Simonetta, and the Superior Court's grant of summary judgment may be affirmed only if, based on all of the evidence, reasonable persons could reach but one conclusion. *Id.*, 154 Wn.2d at 26. Viad, as the moving party, has the burden to show that there is no genuine issue as to any material fact. *Id.*

³ Plaintiffs addressed Viad's and *amici's* other disagreements with the Court of Appeals' decision in their Opposition to Viad Corp.'s Petition to Review, dated May 23, 2007, and their Answer to Memorandum of *Amicus Curiae* Ingersoll-Rand Company, dated July 30, 2007. We do not repeat those arguments here, but incorporate them by reference.

B. Under Washington’s Negligence and Strict Liability Law, the Superior Court Erred in Holding as a Matter of Law that Griscom Russell Had No Duty to Warn of the Risks of Using Its Product.

The Court of Appeals noted that the facts of this case are new to this jurisdiction, *see Simonetta*, 137 Wn. App. at 29. The law that the Court of Appeals followed, however, is not new at all.⁴ Rather, as discussed below, the Court of Appeals’ holding – that a manufacturer has a duty to warn about the dangers of the use of its product – is black letter Washington law.

1. Risks Arising from the Foreseeable Use of a Product Give Rise to a Duty to Warn Under Section 388 and Washington Case Law.

This Court has adopted the *Restatement (Second) of Torts* § 388 (1965) (“Section 388”) to define, with respect to negligence, the scope of the duty to warn owed by a product supplier. *Mele v. Turner*, 106 Wn.2d 73, 78, 720 P.2d 787 (1986). Section 388 imposes liability on product manufacturers who fail to warn foreseeable users about latent dangers arising from a product’s intended use:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm *caused by the use of the chattel in the manner for which and by a person for whose use it is supplied*, if the supplier

⁴ That this case presents a situation not often confronted is unsurprising both because it involves a product that left the manufacturer incomplete in that it required installation of an insulating product to its exterior surfaces and its internal pumps and gaskets and because the risks posed were so hidden from the user.

- (a) knows or has reason to know that the chattel is or is likely to be dangerous *for the use* for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Mele, 106 Wn.2d at 78 (quoting Section 388; emphasis added).

Plaintiff introduced evidence on every element of Viad's liability for failure to warn under Section 388. Indisputably, Griscom Russell supplied the evaporator and Mr. Simonetta was an intended – and indeed, necessary – user of the evaporator. Mr. Simonetta suffered physical harm from using the evaporator in the manner intended by the manufacturer. CP 8, 12-14. Defendant's own expert witness testified that the Griscom Russell evaporator required insulation to function properly, that such insulation contained asbestos, and that the company knew or should have known both of this use and that the insulation would be disturbed during normal maintenance. CP 744. Plaintiff's expert offered the opinion that a manufacturer of evaporators for the U.S. Navy, such as Griscom Russell, knew or should have known that the asbestos-containing insulation required to operate the evaporator safely was dangerous to workers such as Mr. Simonetta. CP 867. He also testified that the gaskets probably contained asbestos. CP 866-867. Viad offered no evidence Mr. Simonetta knew that working on the evaporator would result in exposure to a deadly substance. Indeed, Mr. Simonetta testified that no warnings were visible on the evaporator, nor did he recall any warnings in any of the technical

manuals. CP 178-179. Finally, it is undisputed that Griscom Russell provided no warnings about asbestos exposure on the equipment, in its manual or elsewhere. *See, e.g.*, CP 745-798 (Griscom Russell's product manual, containing no such warnings).

The Superior Court agreed that Griscom Russell "knew or reasonably should have known that its product would be insulated with asbestos containing material." The Superior Court held that Griscom Russell owed no duty to warn about the risks of using the evaporator because the evaporator *did not itself* injure Mr. Simonetta. CP 1229. This holding was, as the Court of Appeals held, legal error. Neither Section 388 nor any Washington decision requires that physical harm be inflicted by the product itself in order for a duty to warn to arise. Rather, the legal standard is that the physical harm be "caused by the *use of the* chattel in the manner for which and by a person for whose use it is supplied." Section 388 (emphasis added).

Washington courts following Section 388 have never wavered from the focus on intended "use" in defining the scope of the duty to warn: "The manufacturer's knowledge of its product and the foreseeability of the dangers latent in that product *or in its intended and potential uses* is the relevant inquiry in order to determine the reasonableness of the manufacturer's conduct in failing to give, or in giving, the warning that it did." *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 339, 772 P.2d 826 (1986), *aff'd*, 109 Wn.2d 235, 744 P.2d 605 (1987); *see also Haysom v.*

Coleman Lantern Co., Inc., 89 Wn.2d 474, 476-81, 573 P.2d 785 (1978) (“Washington has for many years recognized the common law negligence principle that a manufacturer is under a duty to warn consumers of hazards associated with the use of potentially dangerous products”)⁵; *Novak v. Piggly Wiggly Puget Sound Co., Inc.*, 22 Wn. App. 407, 412, 591 P.2d 791 (1979) (where injury was caused by a BB that was fired from manufacturer’s product, the BB gun, court held that the “manufacturer [could] also be found negligent for failure to give adequate warning of the hazards involved in the use of the product [the BB gun] which [were] known, or in the exercise of reasonable care should have been known, to the manufacturer”) (emphasis added; citing Section 388).⁶

Duvon v. Rockwell International, 116 Wn.2d 749, 807 P.2d 876 (1991), is another case in point. In *Duvon*, this Court reiterated that Washington “adheres to Restatement (Second) of Torts § 388,” and it quoted Section 388 in its entirety. *Id.* at 758-59. The Court held that a

⁵ In *Haysom*, the defendant was the manufacturer of a stove that “burn[ed] a petroleum product commonly referred to as ‘white gas.’” *Haysom*, 89 Wn.2d at 476. “The record [did] not establish whether the fuel used by Mrs. Haysom on the day of the accident was stored in a can manufactured by [defendant].” *Id.* However, even though the plaintiff’s injuries were caused by the *stove fuel* during the *use* of defendant’s stove, the Supreme Court held that whether the defendant was liable under the circumstances was a jury question. *Id.* at 788-90. Although the jury ruled in favor of the defendant, the plaintiff was allowed to submit this issue to the jury, just as the Court of Appeals ruled should happen here.

⁶ In *Novak*, the Court of Appeals held that the defendant was not liable, but its reason was that defendant’s warnings were sufficient to discharge defendant’s duty to warn of the risk involved in the use of the product, and *not* that that were was no duty to warn under the circumstances under Section 388). *Novak*, 22 Wn. App. at 414-15.

defendant manufacturer could be liable to the plaintiff for injuries that plaintiff suffered when exposed to ammonia gas (another manufacturer's product) that plaintiff used to determine why defendant's product (a portable exhauster) had failed. *Id.* at 750-51. Plaintiff alleged that defendant was negligent in failing to warn of the need to shut off an inlet valve when the filtering system on its product was down. *Id.* at 751. Although plaintiff was injured by ammonia gas, which was not defendant's product, the Court held defendant owed a duty to warn of the risk involved in the *use* of its product under Section 388. *Id.* at 758-59.

The "use of" the Griscom Russell evaporator in the manner for which it was supplied included its routine and necessary maintenance by Mr. Simonetta. He had no choice but to chip off asbestos insulation surrounding the evaporator and packed against its gaskets and pumps in order to work on them. Plainly, Mr. Simonetta presented evidence demonstrating that his exposure to asbestos was "caused by the use of the" evaporator in the manner intended by Griscom Russell. The Superior Court's grant of summary judgment is thus inconsistent with Section 388 and the Washington decisions applying it. By artificially circumscribing the duty to warn to harms caused by the product and excluding foreseeable harms from the product's *use*, the Superior Court's decision conflicted with the longstanding rule that a manufacturer has a duty to warn users of its product about foreseeable risks from intended "use" of the product, and it signaled to manufacturers that *know* their products will be used in

conjunction with toxic, explosive or flammable substances that they have no duty to warn consumers about how to use the products so as to avoid latent risks. That is not and should not be the law.

2. Under Section 402A and Washington Case Law, Strict Liability May Attach If a Faultless Product Is Sold Without Adequate Warnings Regarding How to Use the Product Safely.

In *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), this Court adopted the doctrine of strict products liability set forth in the *Restatement (Second) of Torts* § 402A (“Section 402A”).⁷ Washington thus adopted the position that “a product may be deemed ‘defective’ and a manufacturer incur liability for failure to adequately warn of dangerous propensities of a product that it places in the stream of commerce.” *Haysom*, 89 Wn.2d at 478-79. This Court has repeatedly made clear that manufacturers have a duty to inform consumers how to use the product safely, not just how to avoid being injured by the product itself:

Strict liability may be established if 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 use it safely*.

Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 137, 727 P.2d 655 (1986); *Terhune v. A. H. Robins Co.*, 90 Wn.2d 9, 12, 577 P.2d 975 (1978)

⁷ Because Mr. Simonetta’s exposure to asbestos occurred prior to enactment of WPLA in 1981, his claims are governed by Washington common law negligence and strict product liability law in effect prior to WPLA. See *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 23, 33-34, 935 P.2d 684 (1997).

(same); *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 155, 570 P.2d 438 (1977) (same); *Haysom*, 89 Wn.2d at 479 (same).

Viad wrongly assumes that the only defective or unreasonably dangerous product in this case is asbestos, which Griscom Russell did not manufacture. The law, however, says that a product with no physical defect – such as the Griscom Russell evaporator – may be “unreasonably dangerous” if it bears an inadequate warning concerning its use. *Little v. PPG Industries, Inc.*, 92 Wn.2d 118, 121, 594 P.2d 911 (1979). Thus in *Lockwood*, this Court approved this jury instruction in an asbestos case:

The words “not reasonably safe” refer not only to the condition of the product itself, but a product may also be “not reasonably safe” because of failure to give sufficient directions to the ultimate users as to how to use the product in order to make the product safe and/or the failure to give adequate warnings as to the specific dangers or risks associated with the product.

Lockwood v. AC & S, Inc., 109 Wn. 2d 235, 268 (1987); *id.* at 256 (stating that “the trial court thoroughly and accurately instructed the jury on . . . strict liability”). In light of this long-established Washington law, Viad’s plea that it cannot be required to warn about *other* manufacturers’ products rings false. There is no requirement under Washington law that the manufacturer’s own product itself be toxic (or flammable, explosive or bone-crushing) in order for the manufacturer to be required to warn of the risks of its product’s intended use. If the intended and foreseeable use⁸ of

⁸ As this Court has held, foreseeability of the *use* of the product is an element of strict liability under Washington law. See, e.g., *Galvan v. Prosser Packers, Inc.*, 83 Wn.2d

a product exposes the user to latent hazards, then the product is unreasonably dangerous in the absence of an adequate warning by the manufacturer.

Because the Griscom Russell evaporator had to be encapsulated in insulation for use, *Simonetta*, 137 Wn. App. at 26, and this insulation harbored a latent danger, a jury could find directions and warnings about the use of the evaporator inadequate if they fail to inform the user that maintenance of the machinery will cause the release of a hazardous substance.

Viad's related argument that Section 402A does not require it to warn of the risks of another manufacturer's product has been squarely rejected by this Court in *Teagle*. Applying a strict liability analysis under Section 402A, this Court recognized a defendant manufacturer's duty to warn of the dangers of using, in conjunction with its product, *another* product that the defendant did not even sell, supply or recommend:

[A]ppellant knew that Viton O-rings were incompatible with ammonia, yet it did nothing more than recommend the use of Buna O-rings. It 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.

Teagle, 89 Wn.2d at 156 (emphasis added).⁹ The defendant in *Teagle* did

690, 693-94, 521 P.2d 929 (1974); *Baughn*, 107 Wn.2d at 137 (citing *Galvan* and holding that strict liability requires a product be safe for its *intended* use).

⁹ The agent of injury in *Teagle* was anhydrous ammonia, which like the asbestos in this case, was not manufactured or supplied by defendant. *Teagle*, 89 Wn.2d at 151. As in this case, use of the product at issue in *Teagle* could result in exposure to a hazardous substance in the absence of safety warnings.

not manufacture the Viton O-rings; it did not sell or supply the Viton O-rings; it even recommended use of a different brand of O-rings. *Id.* at 155-56. Yet this Court held that the defendant's failure to warn of the risk of using *another manufacturer's* O-rings rendered the *defendant's* product unsafe. *Id.* at 156; *see also Bich v. General Electric Co.*, 27 Wn. App. 25, 33, 614 P.2d 1323 (1980) (holding that where plaintiff was injured because another manufacturer's fuse was used in GE's transformer, plaintiff could present to jury claim that GE transformer was unreasonably dangerous because GE failed to warn about using a non-GE fuse).

3. The Court of Appeals' Holding Is Supported by Case Authority From Other Jurisdictions.

A number of courts in asbestos-related cases in other jurisdictions have likewise held that a duty to warn exists in circumstances virtually identical to those here, where the asbestos causing the injury was not made by the manufacturer but was used in conjunction with the manufacturer's equipment. For example, in *Chicano v. General Electric Co.*, 2004 WL 2250990 (E.D. Pa. 2004) (attached), General Electric argued, like Viad here, that it had a duty to warn only of the dangers of the product it supplied—marine steam turbines—even though it “knew that its turbines would be covered with asbestos maintaining material.” *Id.* at *7. The *Chicano* court distinguished cases involving non-defective, generic component parts that the manufacturer cannot reasonably foresee will be put to a dangerous use, and, because GE could reasonably foresee the need

to disturb asbestos insulation during routine maintenance of its product, it denied GE's motion for summary judgment claiming that it did not have a duty to warn regarding products it did not produce. *Id.* at *3.

Similarly, in *Lindquist v. Buffalo Pumps*, PC 06-2416, 2006 WL 3456346 (R.I. Super. Nov. 28, 2006) (attached), plaintiff alleged that the defendant pump manufacturer "had a duty to warn of the reasonably foreseeable dangers related to the use and maintenance of its pumps (including dangers posed by asbestos-containing materials used in conjunction with the pump)." *Id.*, 2006 WL at *1. Buffalo Pumps moved for summary judgment arguing that plaintiff had failed to offer evidence that he was exposed to asbestos-containing products manufactured by Buffalo Pumps and that it could not "be held responsible for injury caused by products manufactured by another company." *Id.* Plaintiff there showed that the pumps could not operate without asbestos products and that Buffalo Pumps knew that asbestos components would need to be replaced over time, which would release asbestos fibers. *Id.* at 2. The Rhode Island court, applying the same rule that exists in Washington, held that plaintiff's evidence raised "triable issue of fact as to whether Buffalo Pumps knew or should have known of the dangers posed by its pumps when serviced in the manner intended, and whether it breached a duty when it did not warn of those dangers." *Id.*

In *Berkowitz v. A.C. and S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (N.Y. App. Div. 2001), the court rejected the defendant pump

manufacturer's argument that it had no duty to warn about the dangers of asbestos it neither installed nor manufactured where it was "at least questionable" whether pumps could be operated safely without insulation that defendant knew would be made of asbestos. 288 A.D.2d at 149. A Delaware court reached the same conclusion with respect to a defendant boiler manufacturer in *Dawson v. Weil-McLain*, No. 00C-32-117, at 136-38 (Del. Super. July 20, 2005), where the court allowed a jury to consider whether a boiler manufacturer had a duty to warn of possible exposure to asbestos installed or manufactured by others. *Wilkerson v. American Honda Motor Co.*, No. 04C-08-268, 2008 WL 162522, *1 (Del. Super. Jan. 17, 2008) (citing and discussing the holding in *Dawson v. Weil-McLain* as set forth above) (attached). The Delaware court held that the provisions of Section 388 "trigger the duty to warn based on the foreseeable harm that might be caused by the *use or probable use of the product*" and held that a duty to warn would lie if defendant "knew or should have known that in the installation of its boilers, there was a need to be exposed to a toxic dangerous substance." *Id.*, 2008 WL 162522 at *2 (citing *Dawson v. Weil-McLain*; emphasis added); *see also Maltese v. Westinghouse Elec. Corp.*, 89 N.Y.2d 955, 956, 678 N.E.2d 467, 468 (1997) (refusing to reverse jury finding of liability where plaintiffs contracted mesothelioma from dust generated by maintenance of defendant's turbines, which were insulated with asbestos).

Many non-asbestos cases also demonstrate that a duty to warn is defined by intended use and not the product itself. In *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.*, 129 Cal. App. 4th 577, 28 Cal. Rptr. 3d 744 (2004), plaintiff developed pulmonary fibrosis in the course of his work as a lamp maker. He alleged that the manufacturers of grinding machines were liable for failure to warn of dangers of exposure to respirable metallic dust that was released from abrasive wheels and discs that defendants did not manufacture. Plaintiff relied on “standard products liability law,” contending that the machine manufacturers “had a duty to warn of the known or knowable health hazards resulting from the intended use of their products.” 28 Cal. Rptr. 3d at 756. Defendants argued “they were not liable because the harm (if any) was caused by the wheels, discs and belts, and not by their tools” and that “a manufacturer’s duty to warn is restricted to its own products.” *Id.* at 746.

The *Tellez-Cordova* court reversed the trial court’s dismissal, found that the component-parts doctrine did not apply, and held the plaintiff stated a cause of action because he alleged (as here) that the hazard was not obvious and (as here) that the grinders were designed to be used as a “finished product,” that is, in combination with the abrasive wheels and discs that were the source of release of toxic substances. *Id.* at 748-49. The *Tellez-Cordova* court held that the argument that a manufacturer need not warn of defects in another’s product misses the point that manufacturers must warn of risks associated with the intended

use of their products: “[A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.” *Id.* at 750 (quoting *Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357, 362, 212 Cal. Rptr. 395, 397 (1985)).

In *Brantley v. General Motors*, 573 So.2d 1288, 1290 (La. App. 1991), plaintiff was injured by an exploding 16-inch tire that plaintiff tried to mount on a 16.5-inch rim manufactured for GM to its specifications. Based on its findings that GM should have anticipated plaintiff’s mistake, the court held that GM had a duty to properly label the rim as to size, and its failure to do so was a legal cause of the accident. *Id.* at 1290. Another manufacturer’s tire exploded and injured plaintiff, and there was no allegation that GM’s rim was defective, save for the absence of a warning, yet liability attached—GM had a duty to warn of the latent risks¹⁰ from use of its product. *Cf. Cooley v. Quick Supply Co.*, 221 N.W.2d 763, 770-71 (Iowa 1974) (producer of dynamite fuse strictly liable for defect and failure to warn even though it did not produce the dynamite that injured plaintiff); *Dunson v. S.A. Allen, Inc.*, 355 So.2d 77, 79 (Miss. 1978) (holding that where “product is manufactured for the purpose of being used in conjunction with another product, which when combined proves to be unsafe for the purpose for which it was intended, the manufacturer of the first product can be found liable”).

¹⁰ The risks were latent because the 16.5-inch and 16-inch wheels looked the same, and a 16-inch tire fit easily on a 16.5-inch rim. *Brantley*, 573 So. 2d at 1290.

In *Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (2000), the court held that a barbecue manufacturer had a duty to warn of the danger of propane (it presumably did not provide) leaking out of another manufacturer's tank. This case arose from an explosion and fire that occurred when the user attempted to replace an empty propane tank on a barbecue stored on a partly-enclosed porch. Defendant Sears sold the barbecue to the decedent, and the issue was whether its warning to store the grill only outdoors in a well-ventilated area was adequate to warn of the dangers of storing and using the grill on a partly enclosed porch. *Id.*, 268 A.D. at 245. The hazard in question was "the propensity of propane, a gas heavier than air, to accumulate from ground level upward in a partially screened area," knowledge of which, the court held, could not be assumed. *Id.* at 245-46. The court held that even if the accident was caused by a defective valve on the propane tank, which Sears did not manufacture or supply, Sears had a duty to warn about leaking propane because "the grill could *not be used without the tank* and its own warning recognized that gas emissions were a danger inherent *in the use* of the grill; *see also Simonetta*, 137 Wn. App. at 30-31 (discussing *Stapleton v. Kawasaki Heavy Industries*, 608 F.2d 571, 572 (5th Cir. 1979), which held that manufacturer of non-defective motorcycle could be found liable for failure to warn of risk posed by another product, leaking gasoline, which ignited and caused fire).

In short, the Court of Appeals in this case simply applied existing Washington law to novel facts, and other courts around the country have reached similar conclusions when confronted with similar circumstances. This Court should affirm the Court of Appeals.

4. The Court of Appeals' Holding Is Supported by Sound Tort Policy.

The paramount policy goals of products liability law—protecting defenseless victims from their use of products that present dangers and spreading the cost of compensation throughout society¹¹—are clearly served by requiring manufacturers to warn of latent risks inherent in the use of their products, whether or not the injury has another source. Who, after all, is in the best position to warn about the risks of servicing an evaporator than the evaporator's manufacturer? Who provides manuals and instructions for use in maintaining the equipment that will be read by workers such as Mr. Simonetta? *See* CP 745-798 (Griscom Russell's product manual for the product at issue).

Viad contends that if it were required to warn of the hazards of asbestos insulation, there will be no end to manufacturers' liability to warn about a myriad of products that might conceivably be used in conjunction with their products. This concern is hyperbole. The duty to warn is limited to reasonably foreseeable uses of a product and, more importantly, there is no duty to warn of obvious risks. *Baughn*, 107 Wn.2d at 139.

¹¹ *See Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 265, 692 P.2d 787 (1984).

Where the risk posed by a product is patent, either because it is common knowledge or because it comes with its own safety warnings, the manufacturer of products used in conjunction such a product does not have a duty to warn.

IV. CONCLUSION

This Court should affirm the Court of Appeals' reversal of the Superior Court's summary judgment, and remand for further proceedings to determine if Griscom Russell satisfied its duty to warn Mr. Simonetta.

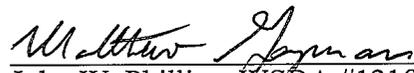
DATED this 8th day of February, 2008.

Respectfully submitted,

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Chicano v. General Elec. Co.
 E.D.Pa.,2004.

Only the Westlaw citation is currently available.
 United States District Court,E.D. Pennsylvania.
 Raymond CHICANO and Linda Chicano
 v.
 GENERAL ELECTRIC COMPANY, et al.
 No. Civ.A. 03-5126.

Oct. 5, 2004.

Lee B. Balesky, Kline & Specter, Philadelphia, PA, for Plaintiffs.

Nancy D. Green, Hollstein Keating Cattell Johnson & Goldstein PC, Barbara J. Buba, Wilbraham Lawler & Buba, Stewart R. Singer, Salmon Ricchezza Singer & Turchi, Philadelphia, PA, for Defendants.

James Alex Traficante, Dickie McCamey & Chicote PC, Pittsburgh, PA, for Movant.

MEMORANDUM

ONEILL, J.

*1 Plaintiff, Raymond Chicano, filed a complaint on June 9, 2003 against defendant General Electric Company alleging that he sustained personal injuries as a result of exposure to asbestos-containing materials, which insulated marine steam turbines manufactured and supplied by GE, and that GE failed to warn of the dangers posed by such exposure. The case was removed to this Court on September 10, 2003 pursuant to 28 U.S.C. § 1442(a)(1). Before me now is defendant's motion for summary judgment, plaintiff's response, and defendant's reply thereto. Also before me is plaintiff's motion for substitution of parties and amendment of complaint.^{FN1}

FN1. Linda Chicano asserts a cause of action in her own right and, as of the date of this opinion, will be substituted as personal representative of Raymond Chicano's estate. However, for the sake of simplicity, I will consider the plaintiff to be Raymond

Chicano.

BACKGROUND

Raymond Chicano worked as a sheet metal mechanic at the New York Shipyard in Camden, NJ from 1959 to 1962. At the Shipyard, Chicano worked aboard the United States Navy aircraft carrier, USS Kitty Hawk, installing ventilation duct work in various quarters of the ship, including its boiler rooms, where Chicano spent about 40% of his work time. In addition to the duct work, the ship's boiler rooms housed giant turbines, generators, and pumps, all of which were installed prior to Chicano's employment at the Shipyard. The turbines aboard the Kitty Hawk were manufactured by GE. At the time of Chicano's employment, the turbines were already insulated or were in the process of being insulated with an asbestos-containing material bearing the name Johns-Manville. Although Chicano did not work on the turbines, generators, or pumps, he worked in and around them in a dusty and dirty environment. There was visible dust and white flakes from the insulation material on the floor, equipment, and in the air where he was working. The dust gathered on his face and clothes; he breathed in the dust. Chicano was diagnosed on October 9, 2002 with mesothelioma and died on June 17, 2004 at the age of 64.

GE manufactured and supplied marine steam turbines for the USS Kitty Hawk under contract with the Department of the Navy. The contract was administered by the Navy Sea Systems Command ("NAVSEA") under the authority of the Secretary of the Navy. NAVSEA personnel exclusively developed the ship designs and plans for the USS Kitty Hawk, as well as the comprehensive and detailed guidelines and specifications for all of the ship's equipment, including the marine steam turbines. NAVSEA personnel also supervised and approved the plans of the various suppliers of the ship's component parts, including GE, and enforced their compliance with Navy specifications.

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The marine steam turbines at issue were specifically designed for a particular vessel or class of vessels. The turbines for each vessel or class were not interchangeable; they were custom built under the direction and control of the Navy. Prior to the construction of the ship, there was an extensive set of specifications, known as Mil-Specs, which comprised thousands of pages and governed all aspects of the ship's design and construction. These Mil-Specs specified that certain materials were to be used, including asbestos-containing thermal insulation. The specifications for GE's marine steam turbines included further specifications for certain components and materials to be used for and with the turbines, e.g. specific metals, bearings, and gaskets. These specifications also called for: (1) notes, cautions, and warnings to be used to emphasize important and critical instructions as were necessary; (2) safety notices where the high voltages or special hazards were involved; and (3) routine and emergency procedures, and safety precautions.

*2 The turbines required thermal insulation to operate properly and safely. However, GE did not include any insulation materials, asbestos or otherwise, with its turbines when they were shipped to the Navy. Nor did GE supply the Navy with any separate thermal insulation. GE did not specify any insulation material to be used to insulate its turbines. The Navy's specifications called for asbestos insulation to be used on the turbines. Nevertheless, GE knew that its turbines would be insulated with asbestos-containing materials and knew that they were, in fact, insulated with asbestos-containing materials. Before the Kitty Hawk was built and before Chicano worked on the ship, both the Navy and GE knew that asbestos posed certain health risks. GE was required to give warnings regarding its turbines and to provide detailed manuals regarding proper safety, installation, and operation. GE supplied warnings regarding its turbines, but did not supply warnings of the dangers of asbestos. Chicano was never warned about the dangers of asbestos and had no knowledge regarding the safety, installation, or operation of the turbines. After they were installed, GE had a continuing obligation to service and/or inspect the turbines.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions ... which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." *Id.* In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. *Id.* However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. *See Celotex*, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir.1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50 (citations omitted).

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DISCUSSION

*3 After consideration of all of the issues, viewing the facts in the light most favorable to plaintiff, and applying governing law, I conclude that a fact finder could reasonably return a verdict in favor of plaintiff. Accordingly, defendant's motion for summary judgment will be denied.

Asbestos litigation claims are governed by substantive state tort law. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366 (3d Cir.1990). Plaintiff has asserted a Pennsylvania strict products liability claim alleging that GE's turbines aboard the Kitty Hawk constituted defective products under a failure to warn theory. I apply substantive Pennsylvania tort law to plaintiff's claims.

Plaintiff argues that the turbines were defective because, although GE only supplied the turbines and not the asbestos-containing products that insulated them, GE failed to warn Chicano, in the turbine safety manual or otherwise, of the dangers of the asbestos-containing products that would be used to insulate its turbines aboard the Kitty Hawk. Plaintiff asserts that GE had a duty to warn of the dangers of asbestos because: (1) the turbines required thermal insulation to operate safely; (2) GE knew that the Navy would insulate them with an asbestos-containing product; and (3) GE knew that asbestos-containing products posed significant health risks, including the possibility of mesothelioma. In response, GE asserts that it does not have a duty to warn regarding products it did not produce and that its products were neither the cause-in-fact nor the proximate cause of plaintiff's injuries.

I. Chicano's Exposure to Asbestos

As a preliminary matter, plaintiff must establish that his injuries were caused by a product of the particular manufacturer or supplier. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (Pa.1975). In the asbestos context, plaintiff must "present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product." *Eckenrod v. GAF Corp.*, 375

Pa.Super. 187, 544 A.2d 50, 52 (Pa.Super.Ct.1988); see also *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 376 (3d Cir.1990) (rejecting the "fiber drift theory"). GE argues that it did not manufacture its marine steam turbines with any asbestos materials and, therefore, Chicano could not have inhaled asbestos fibers from its turbines. However, GE's argument overlooks the fact that its products are component parts of finished products, because the turbines cannot function properly or safely without thermal insulation. The products from which Chicano inhaled asbestos fibers are properly understood to be the turbines covered with asbestos-containing insulation, as fully functional units. Chicano inhaled dust and white flakes shed by the insulation material covering GE's marine steam turbines. Thus, there is at least a genuine issue of material fact as to whether Chicano inhaled asbestos fibers from the integrated products.

GE further argues that plaintiff has failed to present evidence that he was sufficiently exposed to the asbestos-containing material to meet the "frequency, regularity, and proximity test" of *Eckenrod v. GAF Corp.*, 375 Pa.Super. 187, 544 A.2d 50 (Pa.Super.Ct.1988). Although the Pennsylvania Supreme Court has yet to establish a standard for exposure to asbestos, the Court of Appeals has predicted that the Pennsylvania Supreme Court would adopt *Eckenrod's* frequency, regularity, and proximity test. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 (3d Cir.1990); see also *Lilley v. Johns-Manville Corp.*, 408 Pa.Super. 83, 596 A.2d 203, 209-10 (Pa.Super.Ct.1991); *Godlewski v. Pars Mfg. Co.*, 408 Pa.Super. 425, 597 A.2d 106, 110 (Pa.Super.Ct.1991); *Samarin v. GAF Corp.*, 391 Pa.Super. 340, 571 A.2d 398, 404 (Pa.Super.Ct.1989).

*4 In *Eckenrod*, the Pennsylvania Superior Court held that "a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use." *Eckenrod*, 544 A.2d at 52. Moreover, to withstand summary judgment under the *Eckenrod* standard, plaintiff must present evidence to show: (1) that defendant's product was frequently used; (2)

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that plaintiff regularly worked in proximity to the product; and (3) that plaintiff's contact with the product was of such a nature as to raise a reasonable inference that he inhaled asbestos fibers emanating from it. *See, e.g., Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 622 (Pa.Super.Ct.1999) ("The evidence must demonstrate that plaintiff worked, on a regular basis, in physical proximity with the product, and that his contact was of such a nature as to raise a reasonable inference that he inhaled asbestos fibers that emanated from it.").

GE's turbines, with the asbestos-containing insulation, were an integral part of the ship's source of propulsion power and were frequently used by the Navy on board the USS Kitty Hawk. GE argues that Chicano did not work sufficiently frequently or regularly in the vicinity of the insulated boilers to meet the *Eckenrod* test. This argument is unavailing. Chicano worked every day for three years in and around the insulated turbines in a dirty environment where dust and white flakes from the insulation material covered his clothes and his face. Chicano could not help but breathe the dust as he worked on the ventilation ducts. Although not conclusive, this exposure is sufficient to raise a reasonable inference that he inhaled asbestos fibers emanating from the insulation surrounding the turbines.

This case is analogous to *Lilley v. Johns-Manville Corp.*, 408 Pa.Super. 83, 596 A.2d 203 (Pa.Super.Ct.1991). In *Lilley*, the Pennsylvania Superior Court upheld the trial court's denial of defendant asbestos manufacturer's motion for judgment non obstante veredicto because plaintiff, who contracted asbestosis, presented sufficient evidence of exposure to asbestos to meet the *Eckenrod* test. *Id.* The Court held that the evidence adduced at trial was sufficient to meet the *Eckenrod* test because plaintiff presented evidence: (1) that he had worked in close quarters with asbestos products; (2) that asbestos dust was omnipresent in the area; and (3) that a number of his asbestos products were used at plaintiff's company during the pertinent time frame. *Id.* As in *Lilley*, Chicano presented evidence that he worked in and around the insulated turbines in a

dirty and dusty environment where white flakes from the insulation material filled the air and coated the floor, equipment, and his clothes.

The present case is distinguishable from *Eckenrod*. In *Eckenrod*, the Court affirmed a grant of summary judgment in favor of defendant asbestos manufacturers because plaintiff failed to provide sufficient evidence of decedent's exposure to defendants' products. 375 Pa.Super. 187, 544 A.2d 50. Although plaintiff presented evidence that defendant's asbestos-containing products were sent to the furnace area of plaintiff's employer and that plaintiff worked somewhere in the vicinity of those products, the Court concluded that the evidence "did not elaborate on the nature or length of the exposure or the brand of products available." *Id.* at 52. In contrast to *Eckenrod*, Chicano did elaborate on the nature and length of his exposure as he presented evidence that he spent 40% of his time working in and around the insulated turbines in cramped boiler rooms. Thus, there is at least a genuine issue of material fact as to whether plaintiff has met the *Eckenrod* standard, and therefore whether the insulation around the turbines was the cause of Chicano's mesothelioma.

II. Strict Liability

*5 Under principles of strict liability, a seller is strictly liable for injury caused by a defective condition in his product, even if he exercised all reasonable care in its design, manufacture, and distribution. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (Pa.1975); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853, 854 (Pa.1966), adopting § 402A Restatement (Second) of Torts (1965).^{FN2} The Pennsylvania Supreme Court has held that in a strict product liability action, plaintiff bears the burden of demonstrating: (A) that defendant had a duty to warn of the dangers inherent in his product; (B) that the product was defective or in a defective condition; (C) that the defect causing the injury existed at the time the product left the seller's hands; and (D) that the defective product was the cause of plaintiff's injuries. *See, e.g., Pavlik v. Lane Limited/*

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Tobacco Exporters Int'l, 135 F.2d 876, 881 (3d Cir.1998); *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 575 A.2d 100, 102 (Pa.1990); *Schriner v. Pa. Power & Light Co.*, 348 Pa.Super. 177, 501 A.2d 1128, 1132 (Pa.1985); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (Pa.1978); *Berkebile*, 337 A.2d at 898; § 402A Restatement (Second) of Torts. These elements will be addressed in turn.

FN2. 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.

A. Duty to Warn

A manufacturer of a product has a duty to provide those warnings or instructions that are necessary to make its product safe for its intended use. *See, e.g., Mackowick*, 575 A.2d at 102; *Azzarello*, 480 Pa. 547, 391 A.2d 1020; *Berkebile*, 337 A.2d at 903 ("Where warnings or instructions are required to make a product nondefective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risks and inherent limits of the product."); *see also* Restatement (Second) of Torts § 402A, comment h ("Where ... [the seller of a product] has reason to anticipate that danger may result from a particular use ... he may be required to give adequate warning of the danger, and a product sold without such warning is in a defective condi-

tion."). The duty to provide a nondefective product is not delegable. *Berkebile*, 337 A.2d at 903.

GE argues that it has a duty to warn only of the dangers inherent in the product it supplied, i.e. marine steam turbines. Plaintiff argues that "GE, as the manufacturer of the turbines, had a duty to distribute the product with sufficient warnings to notify the ultimate user of the dangers inherent in the product[,] including inevitable insulation with an asbestos-containing product.

In support of this argument, plaintiff asks me to follow the New York Supreme Court's holding in *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (N.Y.App.Div.2001). In *Berkowitz*, the Court affirmed the denial of defendant pump manufacturer's motion for summary judgment and held that there were genuine issues of material fact because defendant may have had a duty to warn concerning the dangers of asbestos, which it had neither manufactured nor installed on its pumps. *Id.* at 148, 733 N.Y.S.2d 410. Although the pumps could function without insulation, the governmental purchaser of the pumps had provided certain specifications involving insulation of the pumps, and the Court found it questionable whether the pumps-transporting steam and hot liquids on board Navy ships-could be operated safely without insulation, which defendant knew would be made out of asbestos. *Id.*

*6 Citing *Berkowitz*, plaintiff argues that GE as a manufacturer of component parts-the turbines-had a duty to warn of the dangers associated with the use of the finished products-the insulated turbines-which it knew to have a defective condition-asbestos insulation. I need not decide whether to follow *Berkowitz* because there is ample Pennsylvania law on this subject.

Generally, under Pennsylvania law, a manufacturer's duty to warn may be limited where it supplies a component of a product that is assembled by another party and the dangers are associated with the use of the finished product. *See, e.g., Jacobini v. V. & O. Press Co.*, 527 Pa. 32, 588 A.2d 476, 478

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(Pa.1991). A review of Pennsylvania law and its federal interpretations suggests that a component part manufacturer does not have a duty to warn of dangers inherent in the ultimate product where: (1) the component itself is not dangerous; (2) the manufacturer does not have control over the use of its component after sale; (3) the component is a generic component part, not designed for a particular type of finished product; and (4) the manufacturer could not reasonably foresee that its component would be put to a dangerous use. *See, e.g., Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1309 (3d Cir.1995); *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 112 (3d Cir.1992); *J. Meade Williamson and F.D.I.B., Inc. v. Piper Aircraft Corp.*, 968 F.2d 380, 385 (3d Cir.1992); *Jacobini*, 588 A.2d at 479; *Wenrick v. Schloemann-Siemag, A.G.*, 523 Pa. 1, 564 A.2d 1244, 1247 (Pa.1989). Particular emphasis has been placed on the foreseeability inquiry. *See Colegrove v. Cameron Mach. Co.*, 172 F.Supp.2d 611, 629 (W.D.Pa.2001) ("Only if the component's use was foreseeable does the manufacturer of that component have a duty to warn of dangers associated with the component.").

In the case at bar, there is at least a genuine issue of material fact as to whether GE had a duty to warn of the dangers of the asbestos-containing material that was used to insulate its turbines. GE's marine steam turbines by themselves were not dangerous products. Although the turbines could not be operated properly or safely without thermal insulation and they were shipped to the Navy without thermal insulation, the turbines were not dangerous because GE supplied ample warnings of the hazards involved with installing and operating the turbines. GE did not have control over the use of its turbines after they were sold to the Navy. Although GE had a continuing obligation to service and/or inspect the turbines, GE did not control what form of insulation would cover its turbines. However, there is at least a genuine issue of material fact as to whether the turbines were generic components or designed for a particular type of finished product and whether GE could reasonably foresee that its turbines would be combined with asbestos-containing insulation, which together constituted a defective product, ab-

sent appropriate warnings of the dangers of asbestos.

*7 A review of the case law in this area is instructive. The paramount Pennsylvania case is *Wenrick v. Schloemann-Siemag, A.G.*, 523 Pa. 1, 564 A.2d 1244 (Pa.1989). In *Wenrick*, the Supreme Court of Pennsylvania upheld the lower court's decision to grant judgment non obstante verdicto in favor of defendant switch manufacturer because it did not have a duty to warn regarding the placement of its switch, which activated a hydraulic loader that crushed plaintiff's husband. *Id.* Plaintiff settled with the manufacturer of the hydraulic loader and asserted negligence and strict liability claims against the manufacturer of the switch alleging: (1) that the switch activating the loader was defective because the switch was unguarded and placed near the steps; and (2) that the switch manufacturer should have warned the hydraulic loader manufacturer of the danger of locating the switch near the steps. *Id.* at 1246. The Supreme Court concluded that the switch manufacturer did not have a duty to warn because it had not placed the switch there, it had no control over the placement of the switch, and it had no knowledge as to the placement of the switch. *Id.* at 1247. This case has come to be cited for the basic proposition that a component part manufacturer has no duty to warn of dangers associated with the finished products into which its component was incorporated; however, as discussed below, this proposition has been qualified by later cases. *See, e.g., Colegrove v. Cameron Mach. Co.*, 172 F.Supp.2d 611, 629 (W.D.Pa.2001) (discussing the development of the *Wenrick* principle). The present case is distinguishable from *Wenrick* because although GE did not produce the insulation that covered its turbines or control what form of thermal insulation covered them GE knew that its turbines would be covered with an asbestos-containing material.

Most analogous to the case at bar is *Fleck v. KDI Sylvan Pools*, 981 F.2d 107 (3d Cir.1992). In *Fleck*, the Court of Appeals affirmed a jury verdict against defendant manufacturer of a swimming pool replacement liner that lacked warnings of the pool's

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depth. *Id.* Plaintiff dove head first into a three foot deep pool, broke his neck, and was rendered a quadriplegic. *Id.* He sued the replacement liner manufacturer claiming that the replacement liner was defective because it lacked depth warnings. *Id.* The replacement liner manufacturer argued that it had no duty to warn because its replacement liner was a component part incorporated into a final product. *Id.* Rejecting this argument, the Court held that the replacement liner manufacturer had a duty to warn because the danger from the replacement liner lacking depth warnings was foreseeable to the manufacturer of that component. *Id.* at 118. The dangers associated with a replacement liner that lacked depth warnings were reasonably foreseeable because the replacement liner had but one use-to be incorporated into a completed swimming pool. *Id.* The *Fleck* court also distinguished "generic component parts," where the *Wenrick* principle does apply, from "separate products with a specific purpose and use," where the *Wenrick* principle is inapplicable. *Id.* Thus, with generic component parts, "it would be unreasonable and unwarranted to recognize liability in such a tenuous chain of responsibility[.]" but with single purpose parts, a duty to warn may arise. *Id.* Like the replacement liner that lacked depth warnings, the marine steam turbines that required thermal insulation were specifically designed for a particular purpose-to be insulated with an asbestos-containing material and propel a particular aircraft carrier, the USS Kitty Hawk. Thus, there appears to be a genuine issue of material fact as to whether GE had a duty warn of the asbestos insulation used to insulate its turbines, which were designed for a particular purpose.

*8 The distinction between this case and *Petruccelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3d Cir.1995), is particularly instructive. In *Petruccelli*, the Court of Appeals applied the *Wenrick* principle to hold that a rotor crusher manufacturer was not liable for a failure to warn of the danger of a discharge conveyer belt, which were both connected in a recycling machine, because it could not reasonably have foreseen that the conveyer belt would pull in people's body parts. *Id.* Plaintiff sued the manufacturer of the rotor crusher in strict liability

after his arm was amputated when it was pulled into a discharge conveyer belt on a recycling machine, which was designed and built by another company but incorporated defendant's rotor. *Id.* at 1309. Plaintiff was not injured by the rotor, but argued that the rotor was defective because it lacked warning systems that could alert someone standing near the discharge conveyer belt if the machine was activated. *Id.* The Court identified the issue as "whether it is reasonably foreseeable to a component manufacturer that failure to affix warning devices to its product would lead to an injury caused by another component part, manufactured by another company, and assembled into a completed product by someone other than the initial component manufacturer." *Id.* Answering in the negative, the Court concluded that defendant's duty to warn was limited because it could not be expected to foresee the danger from the discharge conveyer belt, which it neither manufactured nor assembled with its rotor, and therefore could not be liable for failing to warn of this danger. *Id.* Like the defendant rotor crusher manufacturer, GE merely created component parts-the turbines-and its component parts were not the cause of Chicano's mesothelioma. However, the rotor crusher manufacturer did not know that its component part would be connected to a defective discharge conveyer belt, whereas GE knew that the Navy would use asbestos-containing products to insulate their turbines. Although Chicano's mesothelioma allegedly was caused by the asbestos-containing insulation, which was manufactured by an entirely different company and assembled into completed products by the Navy, there is at least a genuine issue of material fact as to whether it was reasonably foreseeable to GE that a failure to include a warning regarding the use of asbestos-containing products to insulate its turbines would lead to asbestos-related illness.

This case is also distinguishable from *Jacobini v. V. & O. Press Co.*, 527 Pa. 32, 588 A.2d 476 (Pa.1991). In *Jacobini*, the Supreme Court of Pennsylvania reversed the lower court and held that defendant manufacturer of a die set was not strictly liable to plaintiff, who was injured when the power press he operated expelled a die and various materi-

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als being shaped by the die. *Id.* Evidence demonstrated that plaintiff's injuries could have been prevented by a barrier guard that had been removed. *Id.* Plaintiff sued the manufacturer of the press and the manufacturer of the die set in strict liability alleging that each manufacturer should have included a warning to use its product only with the barrier guard attached, and its failure to warn rendered the product defective. *Id.* The Supreme Court concluded that plaintiff's evidence was insufficient to support a verdict because plaintiff's expert testified that plaintiff should have been warned of the need for a separate safety device, one, which had it been installed, would not have prevented his injuries. *Id.* Nevertheless, the Court continued in dicta to opine that, even if plaintiff had produced sufficient evidence, the die set manufacturer's duty to warn was limited where "the manufacturer supplies a mere component of a final product that is assembled by another party and dangers are associated with the use of the finished product." *Id.* at 479 (citing *Wenrick*). "This is especially true where the component itself is not dangerous, and where the danger arises from the manner in which the component is utilized by the assembler of the final product, this being a manner over which the component manufacturer has no control." *Id.* at 479. The Court concluded by adding:

*9 [Defendant] cannot be expected to foresee every possible risk that might be associated with use of the completed product, the die, which is manufactured by another party, and to warn of dangers in using that completed product in yet another party's finished product, the power press. To recognize a potential for liability through such a chain of responsibility would carry the component part manufacturer's liability to an unwarranted and unreasonable extreme.

Id. at 480. Unlike the die set manufacturer, who created a generic set of dies for use on a variety of printing presses, GE specifically designed its turbines to function on a particular aircraft carrier with a view to having the turbines covered in asbestos-containing insulation. Thus, there is at least a genuine issue of material fact as to whether GE could be expected to foresee that the asbestos-containing

material would be used to insulate its turbines. Therefore, GE's duty to warn may not be limited because it knew of the danger from asbestos-containing insulation, which it neither manufactured nor assembled with its turbine.

B. Defective Condition

A product may be found defective if it "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that makes it unsafe for the intended use." *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1027 (Pa.1978). "There are three different types of defective conditions that can give rise to a strict liability claim: design defect, manufacturing defect, and failure to warn defect." *Phillips v. A-Best Prods. Co.*, 542 Pa. 124, 665 A.2d 1167, 1170 (Pa.1995). Asbestos-containing products are unavoidably unsafe products and can only be made safe through the provision of adequate warnings. *See Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 372 (E.D.Pa.1982). A product is defective due to a failure to warn where the product was "distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product." *Mackowick v. Westinghouse Elec.*, 525 Pa. 52, 575 A.2d 100, 102 (Pa.1990). In this case, plaintiff contends that GE's marine steam turbines were defective in that they were sold without adequate warnings regarding the health hazards of the asbestos-containing products used to insulate the turbines. In response, GE argues that its turbines were not defective because they included more than adequate warnings regarding proper safety, installation, and operation of the turbines themselves.

The initial determination of "whether a warning is adequate and whether a product is 'defective' due to inadequate warnings are questions of law to be answered by the trial judge." *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 575 A.2d 100, 102 (Pa.1990); *see also Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1026 (Pa.1978) ("It is a judicial function to decide whether, under the plaintiff's averment of the facts, recovery would be

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justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of complaint.”). In determining the adequacy of a warning, courts have noted that:

*10 A manufacturer may be liable for failure to adequately warn where its warning is not prominent, and not calculated to attract the user's attention to the true nature of the danger due to its position, size, or coloring of its lettering. A warning may be found to be inadequate if its size or print is too small or inappropriately located on the product. The warning must be sufficient to catch the attention of persons who could be expected to use the product, to apprise them of its dangers, and to advise them of the measures to take to avoid these dangers.

Pavlik v. Lane Ltd./Tobacco Exporters Int'l, 135 F.3d 876, 887 (3d Cir.1998) (quoting *Nowak v. Faberge USA, Inc.*, 32 F.3d 755, 759 (3d Cir.1994)).

I decline to make this determination as a matter of law because this factor hinges on GE's duty to warn regarding the asbestos-containing products used to insulate its turbines. As discussed, above, I conclude that there is at least a genuine issue of material fact regarding GE's duty to warn. To the extent that GE had a such a duty, there is at least a genuine issue of material fact as to whether GE breached this duty by failing to warn Chicano of the inherent dangers of the asbestos-containing products that insulated its turbines.

C. Defective When the Products Left the Seller's Hands

The defective condition must have existed at the time the product left the manufacturer's hands. *See, e.g., Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 901 (Pa.1975). No substantial changes were made to the turbines between the time that they were shipped by GE and when they were received by the Navy. No additional instructions or warnings were added or removed from the turbine manuals or the turbines themselves. Once they were received by the Navy, the turbines were

only changed to the extent that they were installed on the aircraft carrier and insulated with an asbestos-containing product. This factor is connected to the analysis of a component part manufacturer's duty to warn. To the extent that GE had a duty to warn regarding the asbestos-containing product used to insulate its turbines as a component manufacturer, there is at least a genuine issue of material fact as to whether the turbines were defective, due to inadequate warnings, when they were shipped to the Navy.

D. Causation

Plaintiff must establish that the lack or inadequacy of a warning was both the cause-in-fact and proximate cause of his injuries. *Pavlik v. Lane Ltd./Tobacco Exporters Int'l*, 135 F.2d 876, 881 (3d Cir.1998). Cause-in-fact, or but for cause, requires proof that the harmful result would not have occurred but for the conduct of defendant and proximate cause requires proof that defendant's conduct was a substantial contributing factor in bringing about the harm alleged. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366-67 (3d Cir.1990). The act or omission need not be the only cause of the injury, but it must be a discernible cause. *Whitner v. Von Hintz*, 437 Pa. 448, 263 A.2d 889, 893 (Pa.1970).

*11 In the failure to warn context, causation analysis focuses on the additional precautions that might have been taken by the end user had an adequate warning been given. *Pavlik*, 135 F.2d at 882. Thus, a plaintiff asserting a failure to warn theory “must demonstrate that the user of the product would have avoided the risk had he or she been warned of it by the seller.” *Phillips v. A-Best Prods. Co.*, 542 Pa. 124, 665 A.2d 1167, 1171 (Pa.1995). Although the Pennsylvania Supreme Court has yet to address this issue, the Court of Appeals has predicted that the Pennsylvania Supreme Court will adopt the “heeding presumption” to establish legal causation. *See Pavlik*, 135 F.2d at 883; *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 619-21 (Pa.Super.Ct.1999) (applying the heeding

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presumption). “[I]n cases where warnings or instructions are required to make a product non-defective and a warning has not been given, plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning.” *Coward*, 729 A.2d at 621. Thus, plaintiff is entitled to the presumption that he would have heeded GE's warning of the dangers associated with the asbestos-containing products used to insulate its turbines.

The heeding presumption is rebuttable, however. If defendant produces evidence that the injured plaintiff was either fully aware of the risk of bodily injury, the extent to which his conduct could contribute to that risk, or other similar evidence to demonstrate that an adequate warning would not have been heeded, “the presumption is rebutted and the burden of production shifts back to plaintiff to produce evidence that he would have acted to avoid the underlying hazard had defendant provided an adequate warning.” *Coward*, 729 A.2d at 621 (citing *Pavlik*, 135 F.2d at 883). GE asserts that the presumption is rebutted because Chicano could not have heeded a warning he never would have seen. GE argues that even if GE had provided a warning in its turbine manual that asbestos-containing insulation might be used to insulate its turbines Chicano never would have had the purpose or opportunity to read the manual. GE further argues: “To make plaintiff's argument work, she would need to provide evidence that a sheetmetal worker assigned to ventilation duct work would try to locate a turbine manual somewhere in a ship the size of a skyscraper, convince the chief engineer officer to let him take the manual, actually begin reading a manual that has nothing to do with his job, and then locate in a manual of hundreds of pages the part on thermal insulation.” GE's argument reveals its misunderstanding of the presumption. The key to rebutting the heeding presumption is production of evidence to show that plaintiff would not have heeded an adequate warning. See *Pavlik*, 135 F.2d at 887 (discussing factors in determining adequacy of warnings). GE has produced no such evidence. A warning hidden in an enormous expanse, guarded by a naval officer, and buried in a voluminous text

is not sufficiently adequate to warn of the dangers inherent in the insulated turbine. *See id.* Thus, there is at least a genuine issue of material fact as to whether Chicano would have heeded an adequate warning of the dangers inherent in the insulated turbines.

III. Government Contractor Defense

*12 GE argues that as a government contractor it is immune under the government contractor defense recognized by the Supreme Court in *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). In *Boyle*, the Supreme Court announced a two step approach for applying the government contractor defense. *Id.* Initially, I must determine whether the state's tort law is in significant conflict with the federal interests associated with federal procurement contracts. *Id.* The imposition of liability on GE creates a significant conflict with the federal interests associated with federal procurement contracts because the liability cost of products liability suits arising out of the contract will be passed on to the government, which is the consumer. *See id.* at 507 (reasoning that the imposition of liability on a government contractor “will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.”). Where there is such a conflict, I must apply a three-prong test to determine when state tort law will be displaced by federal common law in a suit against a military contractor. *Id.*

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 507-08. If the contractor meets all three prongs, the government contractor defense is established and defendant manufacturer is immune from

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liability under state tort law. *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119 (3d Cir.1993) (extending the government contractor defense to nonmilitary contractors). Defendant bears the burden of proving each element of the defense. *Beaver Valley*, 883 F.2d at 1217 n. 7. Where defendant has moved for summary judgment, defendant must establish that there is no genuine issue of material fact as to each element of the defense. *Id.*

The first prong of the defense requires defendant to show that United States has established or approved reasonably precise specifications. *Boyle*, 487 U.S. at 507-08. The government contractor defense is available to a contractor that participates in the design of the product, so long as the government examined the design specifications and exercised ultimate responsibility for making the final decisions. *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.1985). In the case at bar, GE has demonstrated that the government established an extensive set of specifications, which governed all aspects of the aircraft carrier's design and instruction, including specifications for the components and materials to be used in the turbines. The government specifications also called for notes, cautions, and warnings, and safety notices where special hazards are involved.

*13 The second prong of the defense requires defendant to show that the products manufactured by defendant conformed to those specifications. *Boyle*, 487 U.S. at 507-08. GE has shown that its turbines conformed to all the Navy's stringent specifications regarding the turbines themselves. However, GE did not include any notes, cautions, warnings, or safety notices regarding the hazards of asbestos-containing materials. GE argues that the specifications regarding warnings and safety notices did not require it to provide warnings regarding products over which it had no control and did not supply. However, as discussed above, there is at least a genuine issue of material fact as to whether GE had a duty to supply such warnings regarding the dangers associated with the asbestos-containing products that it knew would cover its turbines. Accordingly, there is at least a genuine issue of mater-

ial fact that GE did not conform to the Navy's specifications for the turbines.

The third prong of the defense requires defendant to show that it warned the United States about the dangers in the use of the products that were known to the supplier but not to the United States. *Id.* Defendant can also satisfy this prong by showing that the government knew as much or more than defendant contractor about the hazards of the equipment. *See Beaver Valley*, 883 F.2d at 1216. GE has produced evidence that the Navy was fully aware of the dangers of asbestos and that the Navy's knowledge exceeded any knowledge that GE had at the time.

Although GE has satisfied the first and third prongs of the government contractor defense, there is at least a genuine issue of material fact as to whether GE has satisfied the second prong. Accordingly, there is at least a genuine issue of material fact as to whether GE has met the government contractor defense.

IV. Plaintiff's Motion for Substitution of Parties and Amendment of Complaint

Since Mr. Chicano's death, his wife, Linda, has been duly appointed by the Register of Wills of Delaware County, Pennsylvania as executrix of his estate. Plaintiff requests that her name, Linda R. Chicano, be substituted as Personal Representative of the Estate of Raymond A. Chicano, and thus, change the caption to Linda R. Chicano, Executrix of the Estate of Raymond A. Chicano, deceased, and Linda R. Chicano, in her own right. In addition, plaintiff requests that the complaint be amended to allege damages under the Pennsylvania Wrongful Death Act, Pa. R. Civ. P. 2202(b). Plaintiff's motion for substitution of parties and amendment of complaint will be granted.

An appropriate order follows.

ORDER

AND NOW, this 5th day of October, 2004

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upon consideration of defendant's motion for summary judgment, and plaintiff's response thereto, and plaintiff's motion for substitution of parties and amendment of complaint, and for the reasons set forth in the accompanying memorandum, IT IS HEREBY ORDERED as follows:

1. Defendant's motion for summary judgment is DENIED.

*14 2. Plaintiff's motion for substitution of parties and amendment of complaint is GRANTED. Linda R. Chicano is substituted as Personal Representative of the Estate of Raymond A. Chicano and the caption shall hereafter read "LINDA R. CHICANO, Executrix of the Estate of Raymond A. Chicano, and LINDA R. CHICANO, in her own right v. GENERAL ELECTRIC COMPANY, et al."

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Chicano v. General Elec. Co.
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 Lindquist v. Buffalo Pumps, Inc.
 R.I.Super.,2006.
 Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Rhode Island Superior Court,
 Providence County.
 Najala LINDQUIST, as Executrix of the Estate of
 George Lindquist, and Individually as Surviving
 Spouse

v.

BUFFALO PUMPS, INC., et al.
 C.A. No. PC 06-2416.

Nov. 28, 2006.

DECISION

GIBNEY, J.

*1 Before this court is defendant Buffalo Pumps, Inc.'s (Buffalo) motion for summary judgment pursuant to Super. R. Civ. P. 56. The plaintiff objects to the motion.

Facts and Travel

On May 2, 2006, George Lindquist (Mr. Lindquist) and his wife, Najala Lindquist (Mrs. Lindquist or Plaintiff), filed a lawsuit in this Court to recover damages they allege to have suffered as a result of Mr. Lindquist's exposure to asbestos at work. Mr. Lindquist died subsequent to the filing of the suit and Mrs. Lindquist was appointed the estate representative. In the complaint, the Lindquists allege, inter alia, that Mr. Lindquist was exposed to asbestos while he worked at the Norton Company (Norton) during the 1960's and 1970's. While at Norton, one of Mr. Lindquist's duties was to change the packing and the gaskets located in and connected to the pumps manufactured by Buffalo. The plaintiff alleges that Buffalo had a duty to warn of the reasonably foreseeable dangers related to the

use and maintenance of these pumps (including dangers posed by asbestos-containing materials used in conjunction with the pump) and that it failed to do so. They argue this failure contributed to Mr. Lindquist's personal injuries.

In its Motion for Summary Judgment, Buffalo argues that plaintiff has not offered any evidence that Mr. Lindquist was exposed to an asbestos-containing product manufactured by Buffalo, and that it cannot be held responsible for injury caused by products manufactured by another company. Buffalo also argues it cannot be liable for injury caused by the complex piping system when it had no involvement in designing or constructing the system. In addition, Buffalo contends that, as plaintiff's claims are derivative of Mr. Lindquist's personal injury claims, they should be barred as well.

The plaintiff agrees that a manufacturer generally does not have to warn of reasonably foreseeable dangers posed by another manufacturer's product. However, they argue that a seller's duty to warn of reasonably foreseeable dangers arising from the use of its product extends to dangers posed when the product is combined with another product. In addition, the plaintiff contends that the duty to warn includes dangers which occur when component parts of the product are replaced or removed during maintenance or service. They argue that Buffalo had a duty to warn because it intended for asbestos-containing products to be used with their pumps and it knew that the servicing and maintenance of the pumps would require exposure to asbestos-containing products.

Standard of Review

"Summary judgment is appropriate when, viewing the facts and all reasonable inferences there from in the light most favorable to the non-moving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of

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Tavares v. Barbour, 790 A.2d 1110, 1112 (R.I.2002) (quoting *Delta Airlines, Inc. v. Neary*, 785 A.2d 1123, 1126 (R.I.2001)). "Although the moving party bears the initial burden of establishing that no genuine issue of material fact exists for a finder of fact to resolve ... it can carry this burden successfully by submitting evidentiary materials, such as interrogatory answers, deposition testimony, admissions, or other specific documents, and/or pointing to the absence of such items in the evidence adduced by the parties." *Heflin v. Koszela*, 774 A.2d 25, 29 (R.I.2001) (quoting *Doe v. Gelineau*, 732 A.2d 43, 48 (R.I.1999)). "If the moving party satisfies this burden, the nonmoving party then must identify any evidentiary materials already before the court and/or present its own competent evidence demonstrating that material facts remain in genuine dispute." *Id.* The nonmoving party can meet this burden through affidavits or other evidence, but may not rely upon mere allegations or conclusions. *Bourg v. Bristol Boat Co.*, 705 A.2d 969, 971 (R.I.1998) (citing *St. Paul Fire & Marine Ins. Co. v. Russo Bros., Inc.*, 641 A.2d 1297, 1299 (R.I.1994)). If the nonmoving party can demonstrate that an issue of material fact exists, the motion will be denied. *Palmisciano v. Burrillville Racing Ass'n*, 603 A.2d 317, 320 (R.I.1992) (citing *Evans v. Liguori*, 118 R.I. 389, 394, 374 A.2d 774, 776 (1977)).

Analysis

*2 At issue is whether Buffalo's duty to warn extended to the dangers posed by asbestos fibers released during the maintenance and service of its pumps. The plaintiff has put forth evidence to suggest that Buffalo knew that the packing and gaskets needed to render its product operable contained asbestos. They have submitted the affidavit of an expert witness, Frank Parker III, a Certified Industrial Hygienist in the Comprehensive Practice of Industrial Hygiene by the American Board of Industrial Hygiene and an engineer in Texas and California. He is also a Certified Safety Professional by the Board of Certified Safety Professionals. In his affidavit, Mr. Parker has stated that during the time

period in question, the packing and gaskets used in industrial equipment generally contained asbestos, unless otherwise requested by consumer. He also stated that gaskets and packing are essential component parts of pumps, and that they are only useful for a limited period of time. Consequentially, they must be replaced often during the life of the pump.

The plaintiff, relying on Mr. Parker's affidavit, avers that Buffalo knew or should have known that asbestos gaskets and packing would be routinely installed in their product. In addition, they have proffered the deposition of Martin Kraft, corporate representative of Buffalo Pumps, to support their contention that, during the time period in question, Buffalo shipped its pumps completely assembled, containing either one or two asbestos gaskets and asbestos packing. The plaintiff has also submitted an instruction manual for Buffalo Pumps, which specifically states that, "unless otherwise stated, pumps are furnished with a top grade of square braided asbestos packing." The manual also contains instructions for replacing the packing and gaskets.

Under Rhode Island law, a seller must warn of reasonably foreseeable dangers posed by its products. *Thomas v. Amway Corp.*, 488 A.2d 716, 722 (R.I.1985). The question which remains before the Court, however, is whether Buffalo has a duty to warn of the danger posed by the replacement of the asbestos gaskets and packing of its pumps. In *Rogers v. Sears Roebuck & Co.*, 268 A.D.2d 245, 701 N.Y.S.2d. 359 (2000), the New York courts faced a similar situation. In that case, the court noted that the issue of failure to warn required a very fact specific inquiry, involving such issues as proximate cause and obviousness of the risk. *Id.* 268 A.D.2d at 246. In *Rogers*, the court found that a grill manufacturer had a duty to warn of proper ventilation where gas build up may occur from improper use or a defect in a valve on the tank, even though they did not manufacture the tank, noting that the grill could not be used without the tank. *Id.*

Similarly, in the instant case, the plaintiff, using Buffalo's own instruction manuals, have put forth evidence that the pumps cannot operate

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without packing and gaskets. There is evidence that Buffalo knew that the pumps it shipped included asbestos pumps and gaskets, and that it knew these components would have to be replaced over the course of the lifetime of the pump, releasing asbestos fibers. This evidence creates a triable issue of fact as to whether Buffalo knew or should have known of the dangers posed by its pumps when serviced in the manner intended, and whether it breached a duty when it did not warn of those dangers. Therefore, the Court is not persuaded by Buffalo's argument that, as a matter of law, it does not have a duty to warn of the dangers posed by its pumps when the pumps are maintained and serviced in the manner instructed by Buffalo itself.

*3 Buffalo cites the case of *Buonanno v. Colmar Belting Co., Inc.*, 733 A.2d 712 (R.I.1999) to support its claim that it did not have a duty to warn because its pump was only part of a larger, complex system it did not design or construct. However, in that case, the Rhode Island Supreme Court found that because a pulley manufacturer was not responsible "for the anticipation of every conceivable design that may be utilized by a sophisticated assembler of a conveyor belt system, it should have no duty to warn, particularly in respect to conditions that are only created after the final product is assembled." *Buonanno*, 733 A.2d at 719. However, the instant case presents a different situation. The plaintiff's evidence suggests that the manufacturer knew exactly how the pump would be used in relation to the packing and gaskets. Here, Buffalo is not being asked to "[anticipate] every conceivable design" in which its pump can be used; the alleged failure to warn results from the way the pump functioned in relation to the gasket and packing only, not the piping system as a whole. Due to the differences in the two cases, the Court is not persuaded by Buffalo's reliance on *Buonanno*.

Conclusion

The Court finds that this case contains triable issues of fact in relation to Buffalo's duty to warn of the dangers posed by the asbestos gaskets and

packing used in its pumps. Accordingly, Buffalo's Motion to Dismiss is denied.

Counsel shall prepare order for entry.

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 Not Reported in A.2d, 2008 WL 162522 (Del.Super.)
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Wilkerson v. American Honda Motor Co., Inc.
 Del.Super.,2008.
 Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Superior Court of Delaware,New Castle County.
 Carl WILKERSON and Connie Wilkerson, his
 wife, Plaintiffs,
 v.
 AMERICAN HONDA MOTOR CO., INC., et al.,
 Defendants.
 C.A. No. 04C-08-268 ASB.

Submitted: Jan. 15, 2008.
 Decided: Jan. 17, 2008.

Upon Defendants' Motion for Summary Judgment.
DENIED.

David A. Arndt, Esquire, Jacobs & Crumplar, P.A.,
 Wilmington, Delaware, Attorney for Plaintiffs.
 Robert K. Beste, Esquire, Smith, Katzenstein &
 Furlow LLP, Wilmington, Delaware, Attorney for
 Defendant.

MEMORANDUM OPINION

JOHNSTON, J.

STATEMENT OF FACTS

*1 Carl and Connie Wilkerson filed this action with the Court on August 30, 2004. Carl Wilkerson claims he developed asbestosis due to work with asbestos-containing products. Wilkerson served in the U.S. Navy, the U.S. Air Force and worked as an automotive mechanic from 1954-1982. Wilkerson routinely removed and installed gaskets from vehicles during his career. Wilkerson claims asbestos-containing gaskets manufactured and sold by defendant McCord Corporation caused him to develop asbestosis.

MOTION FOR SUMMARY JUDGEMENT

McCord Corporation filed a Rule 56 Motion for Summary Judgment on October 12, 2007. This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the non-existence of material issues of fact.^{FN1} Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.^{FN2} Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.^{FN3} If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.^{FN4}

FN1. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del.1979).

FN2. *Id.* at 681.

FN3. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

FN4. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. 322-23.

A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.^{FN5} The Court must evaluate the facts in the light most favorable to the non-moving party.^{FN6} Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.^{FN7}

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FN5.*Merrill v. Crothall-American, Inc.*,
 606 A.2d 96, 99 (Del.1992).

FN6.*Id.*

FN7.*Ebersole v. Lowengrub*, 180 A.2d
 467, 468-69 (Del.1962).

The parties do not dispute that McCord manufactured and sold asbestos-containing gaskets. Additionally, the parties agree that installing the McCord gasket did not expose Wilkerson to asbestos. The asbestos exposure could only occur in the removal and replacement of an existing asbestos-containing gasket. Thus, the issue before the Court is whether McCord had a duty to warn Wilkerson that removing and replacing a gasket, manufactured by McCord or another company, may lead to asbestos exposure.

DUTY TO WARN

In *Dawson v. Weil-McLain*, this Court allowed testimony regarding a boiler manufacturer's duty to warn of possible asbestos exposure when replacing existing boilers.^{FN8} Specifically, the Court considered whether the jury should be permitted to consider whether the defendant had a duty to warn about to products installed or manufactured by others. The Court relied on Restatement Second of Torts § 388, "Chattel Known to be Dangerous for Intended Use," which provides:

FN8.*Dawson v. Weil-McLain*, C.A. No. 00C-32-117, at 136-38 (Del.Super. July 20, 2005) (Slights, J.) (TRANSCRIPT).

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

*2 (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for

which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

The Court ruled:

[The] Restatement provisions trigger the duty to warn based on the foreseeable harm that might be caused by the use or probable use of the product.

If it can be established in the facts that the defendant knew or should have known that in the installation of its boilers, there was a need to be exposed to a toxic dangerous substance, and that falls within the foreseeable harm contemplated by these two Restatement provisions,^{FN9} and therefore, on a negligence theory, if supported by the facts, that duty will lie.

FN9.Restatement Second of Torts §§ 388, 389.

"Among the essential elements that a plaintiff must prove in a negligence-based products liability case is that the defendant had a duty to warn of dangers associates with its product."^{FN10} At issue in this case is whether, after considering all facts and reasonable inferences in the light most favorable to plaintiff, there is sufficient evidence to establish that defendant had a duty to warn of the potential dangers of exposure to an asbestos product. "The manufacturer's duty to warn is dependent on whether it had knowledge of the hazards associated with its product. [Plaintiff], however, does not need to present evidence that [defendant] had actual knowledge of those dangers. It is enough that [plaintiff] merely establish that the manufacturer should have known of them. In turn, what knowledge a defendant should have had is a function of what a reasonably prudent individual would have known under the pertinent circumstances at the time in question."^{FN11}

FN10.*In re Asbestos Litig.*, 799 A.2d 1151, 1152 (Del.2002).

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FN11.*Id.* at 1152-53.

Nevertheless, "to require each manufacturer to ascertain the risks of products manufactured by others within an industry and to warn of the highest risks a consumer might encounter ... would place on each manufacturer an untoward duty and would penalize" the manufacturer.^{FN12}The duty to warn does not "require a manufacturer to study and analyze the products of others and to warn users of risks of products."^{FN13}Any duty is "restricted to warnings based on the characteristics of the manufacturer's own product."^{FN14}Any necessary warning must be tailored to the risks associated with the reasonably-anticipated use of the manufacturer's own product.

FN12.*Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357, 364 (1985).

FN13.*Id.*

FN14.*Id.*

McCord used asbestos in manufacturing its automotive gaskets. Plaintiff has made a *prima facie* case, raising genuine issues of material fact: whether the probable use of the McCord gasket involved the removal and replacement of an asbestos-containing gasket; whether McCord knew or should have known, based on the understanding of its own product, that the installation of McCord gaskets placed plaintiff at risk of exposure to asbestos; and whether it was reasonably foreseeable that the use of a McCord gasket would lead to asbestos-related disease.

CONCLUSION

*3 Viewing the facts in the light most favorable to Wilkerson, the Court finds that a genuine issue of material fact exists as to whether McCord had a duty to warn. **THEREFORE, McCord's Motion for Summary Judgment is hereby DENIED.**

IT IS SO ORDERED.

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