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No. 80251-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 57011-1-I)

VERNON BRAATEN,

Plaintiff-Respondent,

v.

BUFFALO PUMPS, INC., *et al.*,

Defendants-Petitioners.

**BRIEF OF AMICUS CURIAE
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I. INTRODUCTION

Washington Defense Trial Lawyers (“WDTL”) is an organization of lawyers representing defendants in civil litigation, appears on occasion as amicus curiae on a pro bono basis. It submits the following brief in support of Petitioners, and urges this Court to *reverse* the Court of Appeals.

II. ANALYSIS

A. The Duty to Warn Should Not be Expanded.

A component manufacturer cannot have liability for failing to warn of the dangers from another manufacturer’s product for three reasons. First, it subjects manufacturers to an unfair process due to the litigation’s unverifiable centerpiece. (“I would have acted differently if I had been warned.”) Second, no warning by the component manufacturer would have been effective in military and industrial settings. Third, the component manufacturer cannot be expected to have sufficient expertise to generate and communicate a warning about a related product that would have been effective. Public policy does not support extending the duty to warn in these particular cases.

1. The duty to warn generally promotes risk-reduction and informed choice, but the informed choice interest is not at issue in these cases.

Product warnings serve two policies: reducing risks by safer interaction, and informed choice. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Product Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U.L. Rev. 265, 285 (1990). First, warnings may reduce the risk of product-related injury by allowing consumers to behave more carefully than if they remained ignorant of the risks. *Id.* Second, warnings may provide consumers with informed-consent, meaning the information necessary to make an informed choice whether or not they wish to encounter certain kinds of risks on a “take it or leave it” basis. *Id.* In informed-consent cases, the function of a particular warning is to empower the consumer by allowing him or her to decide whether he wishes to expose himself to the risk at all. *Id.* As a sailor, plaintiff did not have a choice as to whether to encounter the products. As an employee sent to work on the products, there was an element of coercion in Plaintiff’s case. The policy of informed choice is not well served by imposing a duty in these contexts.

2. Risk-reduction cases should require a higher burden.

As compared to informed choice cases, the Plaintiff’s burden should be higher in risk-reduction cases. *Id.* At 288. In the context of

pure risk-reduction cases, the defendant's failure to warn constitutes less of a personal insult to the plaintiff and more of a wasteful generator of social costs. *Id.* To make a valid case, “the plaintiff arguably should be required to show that such waste has, indeed, been caused by defendant’s failure to warn—that, having received a proper warning, the plaintiff would have behaved differently and avoided injury.” *Id.* at 288-89. The plaintiff is routinely asked the self-serving question as to whether he would have heeded a warning had it been provided. The answer to this question is not verifiable. Failure to warn cases too frequently rely on unavailable data and unverifiable facts. *Id.* at 290.

3. Failure to warn cases rely on the unverifiable, which unfairly imposes liability.

Reliance on unverifiable facts raises two concerns in a fair adjudicative process. James A. Henderson, Jr., *Process Constraints in Tort*, 67 Cornell L.Rev. 901, 913 (1982). First, if litigants are to have an opportunity to present proof in support of their arguments, liability rules must refer to facts that can be verified objectively.” *Id.* While no rule can or should avoid all evidentiary gaps in all cases, the rule of law should be designed as fair in most instances and especially as to facts crucial to the outcome. *Id.*

However, in duty to warn cases, some factual circumstances, such as the subjective mental states, “are predictably non-verifiable in a high enough percentage of cases that, whenever possible, liability rules should avoid having outcomes depend on their occurrence.” *See id.* 913-14. In other words, the court should be extremely cautious when creating causes of action in areas that routinely rely on fact patterns with non-verifiable centerpieces, such as expanding the duty in failure to warn cases.

Second, “courts must try to avoid hypothetical ‘what would have happened if . . .?’ questions in the course of resolving tort disputes.” *Id.* at 914. When these kinds of hypotheticals are addressed in adjudication, “attention focuses on events that never occurred and circumstances that never existed.” *Id.* “If liability rules require answers to such questions, proof gives way to speculation.” *Id.* While these questions are unavoidable to some extent, “the verifiability constraint requires that liability rules avoid raising such questions whenever possible.” *Id.* The court should exercise caution in creating theories of liability and expanding duties that require the jury to answer hypothetical questions, such as whether a plaintiff would have changed his behavior had the information been provided. Because the hypothetical falls under the duty or cause elements, those elements traditionally decided by the court, such cases evade the ordinary screening mechanism of the court.

4. Product warnings are ineffective, especially in the industrial and military contexts.

“As a matter of public policy, it is logical and sensible to place some duty on the manufacturer who is in the best position to foresee the specific danger involved in the use of a product.” *See Braaten v. Saberhagen Holdings, Inc.*, 137 Wn. App. 32, 49 ¶26 (2007). The court should hold liable the manufacturers of the “relevant product.” *See* RCW 7.72.010(3). If asbestos caused the injury, the asbestos manufacturer should be liable. However, in asbestos injury cases, those manufacturers are bankrupt. *See Braaten*, 137 Wn. App. at 45 ¶18 fn. 43. There are two alternatives before turning to a related component manufacturer.

The court should next look to the designer of the relevant product. The product designer is in the next-best position to foresee the specific dangers involved in the use of a product. Here, the Navy apparently designed and specified the combination of various products with asbestos. The court should resist the temptation to look further than the designer, manufacturer, and supplier simply because the particular entities in this case may not be susceptible to suit. The court should not distort the entire law of products liability to fashion a remedy peculiar to one product.

The employer is in possibly the best position to minimize the dangers, especially in asbestos cases. The employer has a duty to maintain

a safe workplace, and that duty is encouraged by the cost of its workers' compensation premium, by the cost of employee productivity, by the cost of employee turnover, and by a moral obligation to its employees' health.

The safe handling of asbestos requires training and equipment. Engineering controls can minimize the dangers of inhaling asbestos, such as wetting down asbestos before disturbing it; restricting access to an area; establishing ventilation; and providing disposable outer-garments, respirators, and air-tight disposal containers. Only the employer—not the product designer, not the product manufacturer, not the product seller—can train workers, provide safety equipment, and enforce safe practices. While an employer is generally not subject to tort liability for injuries in the workplace, it is misguided to minimize the employer's interest in maintaining workplace safety. Also, in the context of the Navy or a naval shipyard, the high level of sophistication of the employer¹ should weigh

¹ The duty to warn is satisfied if the manufacturer warns a learned intermediary. See e.g., *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993); *Estate of LaMontagne v. Bristol-Meyers Squibb*, 127 Wn. App. 335, 111 P.3d 857 (2005). Causation should be absent if that learned intermediary has all the knowledge that the manufacturer would have relayed and is a large, industrial concern with its own safety programs and methods of working with the products. See *Reed v. Pennwalt Corp.*, 22 Wn. App. 718, 591 P.2d 478 (1979); RESTATEMENT (SECOND) OF TORTS §388 Cmt. n.

against holding a related component manufacturer for not specifying highly specialized procedures for protecting against inhaling asbestos.

5. Warnings are not free.

In failure to warn cases, “a tailor-made remedy seems to be automatically available, precisely limited to the category of users and consumers represented by the plaintiff.” 65 N.Y.U.L.Rev at 293. The plaintiff’s argument is that the manufacturer should share the information, however remote the risks it describes, with users and consumers. *Id.* This argument is seductively simple because the plaintiff can tailor his suggested warning (although he need not articulate one) in terms that have no obvious, negative consequences. *See id.* at 294. The court routinely assumes the cost of such warnings is negligible. *Braaten v. Saberhagen Holdings, Inc.*, 137 Wn. App. 32, 47 ¶21 (2007) (“Given... the relatively low cost of adding warnings to a technician’s manual or to the exterior of the machinery itself...”); *Simonetta v. Viad Corp.*, 137 Wn. App. 15 (2007) (implicitly assumes burden of warning was overcome). Printing one extra warning sounds inexpensive.

The court should consider the cost of developing an effective warning as a factor in the cost-benefit analysis. A warning on a pump saying, “avoid breathing asbestos,” would not be effective. It would not be seen because the insulation would cover it. If seen, it would not protect

the worker because it does not give sufficient information how to avoid the danger.² If seen and understood, it would not be heeded. Even “good” warnings as to dangerous products are ineffective. *See e.g.*, Howard Latin, “*Good*” Warnings, *Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193 (1994) (discussing inability or unwillingness of consumers to read, comprehend, and follow product instructions). A worker surrounded by asbestos, who works with asbestos daily, who is surrounded by others who work unprotected with asbestos daily, who works for an employer that provides no training or protection, would not lightly set aside his own experience to look for and heed a warning concerning asbestos buried in a technical manual about pumps or valves.

In an area as technically complex as the safe handling of asbestos, a component manufacturer cannot be held strictly liable to a future standard for another manufacturer’s product. A component manufacturer should not be expected to have sufficient expertise in another manufacturer’s components. Also, a component manufacturer in 1954 should not be liable for failing to provide warnings as to a product it neither manufactured nor sold if it fails to give information in such

² Under the RESTATEMENT (SECOND) OF TORTS §388(b), (c) and Cmt. n., there would be no liability in negligence if the component manufacturer had any reason to think that the intermediary or end user would protect themselves from the danger.

specific detail that it took the federal government decades later to develop. Assuming strict liability for the failure to warn, the component manufacturer ought to be able to explain the state of the art at the time of manufacture.

The threshold issue of whether the defendant owes a duty of care to the plaintiff is a question of law for the courts. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 561, 104 P.3d 677 (Div. II 2004). “This decision is always for the court.” Restatement (Second) of Torts § 328B, cmt. e. The burden of proving a legal duty is born by the plaintiff. *Lake Washington School Dist. No. 414 v. Schuck's Auto*, 26 Wn. App. 618, 621, 613 P.2d 561 (1980). The court should exercise restraint by not expanding liability for these failure to warn cases.

B. A Legal Duty is Constrained – Not Created – By the Concept of Foreseeability.

The Court of Appeals next addressed Plaintiff's negligence theory and held that Defendants had a duty to warn. Slip Op. at 13-15. In reaching this conclusion, the Court mistakenly placed the cart before the horse. That is, as it did with the strict liability duty to warn, the Court used the concept of foreseeability to *create* a legal duty, rather than to *define* the duty once it has been determined to exist in the first place.

A defendant is only liable for its unreasonable conduct if that defendant owed a legal duty of care in the first instance. The analysis of the issue of duty is to be answered generally, “without reference to the facts or parties in a particular case.” *Nivens v. 7-Eleven Hoagie’s Corner*, 83 Wn. App. 33, 41, 920 P.2d 241 (1996), *affirmed*, 133 Wn.2d 192 (1997). Stated otherwise “foreseeability limits the scope of a duty, but it does not independently create a duty.” *Halleran v. Nu West, Inc.* 123 Wn. App. 701, 717, 98 P.3d 52 (2004). Simply because an individual knows (or should know) that his own actions, or the actions of a third party, might lead to the harm of another, does not *in and of itself* impose a legal duty.

Foreseeability is more properly applied to the factual determinations of breach and causation, than it is to the legal determination of the existence of a duty. As the Arizona Supreme Court has noted:

[F]orseeable danger [does] not dictate the existence of duty but only the nature and extent of the conduct necessary to fulfill the duty.

Martinez v. Woodmar IV Condominium Homeowners Ass’n Inc., 189 Ariz. 206, 211, 941 P.2d 218, 223 (1997).

The Court of Appeals here began properly enough by stating “In this appeal, duty is the only element at issue.” Slip Op. at 13. The Court concluded that the defendant manufacturers “had a general duty to warn . .

. .” *Id.* at 13. The Court held that the focus of this inquiry is on “the conduct and knowledge of the manufacturer” instead of on the product (that is as it would be with strict liability). *Id.*

Unfortunately, the Court of Appeals then abruptly departed from recognized principles of tort law, and conflated the concepts of foreseeability and duty.

The manufacturers argue that foreseeability is the only possible source of any duty to Braaten and that foreseeability alone is not enough reason to hold them responsible. We disagree.

Id. (The Court did acknowledge that the general duty “is bounded by” the foreseeability of harm, but reached this conclusion anyway.) *Id.*

The opinion presents a gaping hole on the critical issue in the case – the *source* of the duty to warn. The Court provides only a single hint as to the fountainhead of the duty, citing the RESTATEMENT (SECOND) TORTS § 402A cmt. 1. (1965). *Id.* at 13, n. 52. However, as the Court of Appeals noted earlier, this section of the Restatement involves strict liability, not common law negligence. Slip Op. at 6. See also, *Lunsford v. Saberhagen Holdings, Inc.* 125 Wn. App. 784, 792, 106 P.3d 808 (2005) (discussing section 402A strict liability, and the policy considerations inherent in imposing *liability without fault on a product seller*).

Thus, the source of the duty is non-existent, except for the Court's reliance on foreseeability.

The illogic of imposing a duty to warn of the acts of another is amplified if we turn to basic tort principles. Under the common law, one has no duty in negligence to warn (or protect) another from the acts of a third person, unless a "special relationship" exists. See, RESTATEMENT (SECOND) TORTS § 315; and, *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). Here, Plaintiff seeks to impose on Defendants a duty to warn of *another manufacturer's* products. That should only be considered in extraordinary circumstances, which do not exist here. And, foreseeability should not transport us there.

Even assuming foreseeability is a proper issue to be considered, its determination favors the Defendants. The Court of Appeals seems to have concluded that because Defendant component manufacturers were aware, or should have been aware, that their products would later be insulated with asbestos and installed on naval ships, that they should have *foreseen* the risk to end users and thus warned them against the hazards of asbestos. However, there is no evidence that the manufacturers of the asbestos insulation, or the U.S. Government, was not aware of the hazards of asbestos, and would fail to warn the ultimate users.

We will assume *arguendo* that the asbestos insulation manufacturers and the installers thereof (in the 1960's) had a legal duty to warn. But we must also note that Defendants had "the right to assume that others would use ordinary care and comply with the law" WPI 12.07. That is, a person has a right to proceed on the assumption that others will use ordinary care until he or she knows, or in the exercise of ordinary care should know, that others will fail to comply with the law. *Id.* Here, there is nothing to suggest that the U.S. Navy or the asbestos insulation manufacturers would not comply with their (assumed) duty to warn. Indeed, the record in this case is to the contrary. A decade before Plaintiff's exposure to asbestos, the United States Navy issued a *Safety Handbook for Pipefitters*. On January 7, 1958, it contained the following provision:

Asbestos. Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard.

CP 281, Betts Declaration, ¶ 19 (quoted in Petition for Review of Yarway Corp., at 10, n. 10).

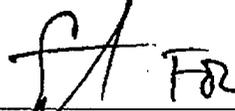
Thus, the Defendants here had the legal right to assume that the Navy would comply with its duty to warn, and additionally had a factual basis to know that this indeed had occurred. See also, discussion *infra* at

6, n.1; and 8, n. 2 (no liability if manufacturer warns learned intermediary, or has reason to believe that intermediary is aware of danger).

III. CONCLUSION

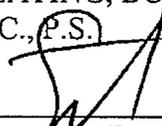
In conclusion, the Court of Appeals should be reversed. Neither legal principles nor public policy support the extension of a duty to component manufacturers under either products liability or common law negligence.

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