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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Case No. 80251-3

VERNON BRAATEN,

Respondent,

v.

BUFFALO PUMPS, INC., ET AL,

Petitioners.

MEMORANDUM OF *AMICI CURIAE* INGERSOLL-RAND COMPANY AND LESLIE CONTROLS, INC. IN SUPPORT OF PETITIONERS-DEFENDANTS BUFFALO PUMPS, INC., CRANE CO., IMO INDUSTRIES, INC. AND YARWAY CORPORATION

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ORIGINAL

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Amici Curiae Ingersoll Rand Company ("Ingersoll Rand") and Leslie Controls, Inc. ("Leslie") submit this Memorandum in support of Petitioners-Defendants Buffalo Pumps, Inc., Crane Co., IMO Industries, Inc. and Yarway Corporation (collectively, "Petitioners").

STATEMENT OF INTEREST OF *AMICI CURIAE*

Like Petitioners, Ingersoll Rand and Leslie manufactured and sold industrial equipment to the United States Navy. Respondent-Plaintiff Vernon Braaten ("Respondent") seeks to impose liability on Petitioners for failing to investigate and warn of the hazards of asbestos-containing insulation, even though it is undisputed that Petitioners did not manufacture or distribute any such insulation and that Petitioners' own products did not cause or contribute to Respondent's injuries.[1] Specifically, Respondent argues that Petitioners and other manufacturers had a duty to investigate and warn of the hazards of asbestos-containing thermal insulation that the Navy or its agents chose to attach to the exterior of their equipment after it had been delivered to the Navy. This issue is likely to recur in many cases before the Washington courts, including cases in which Ingersoll Rand or Leslie is a defendant.

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[1] Although this *amici* brief focuses on asbestos-containing insulation that the Navy attached to the exterior of Petitioners' equipment, Respondent also seek to hold Petitioners liable for asbestos-containing pipe flange gaskets that attached to points at which Petitioners' equipment was connected to pipes or other equipment. Like the external asbestos insulation, the external pipe flange gaskets were not manufactured, supplied, or installed by Petitioners, but instead were purchased and installed by the Navy after Petitioners' equipment had been delivered. The reasoning set forth in this brief therefore applies equally to such external pipe flange gaskets.

PRELIMINARY STATEMENT

Had a responsible equipment manufacturer in the 1940s, 1950s, or 1960s asked any knowledgeable lawyer at that time whether it had a duty under Washington common law to investigate and warn of the potential hazards of insulation manufactured by another company and applied by the Navy to equipment on board naval vessels, the lawyer would doubtless have responded that no such duty existed because the equipment manufacturer was not in the chain of distribution of the asbestos insulation. Yet the Court of Appeals has taken the extraordinary leap of imposing that duty retroactively, notwithstanding that neither Petitioners nor any other equipment manufacturer at the time could reasonably have anticipated that they had such a duty. Indeed, even today, the law in Washington and other states does not support that duty.

In imposing this newly-created duty to have investigated and warned of the latent hazards of other companies' products, the Court of Appeals has created new rules in 2007 to govern primary conduct that occurred half a century ago under a legal regime that since has been superseded by the Washington Products Liability Act.[2] The parties who actually did have a duty to warn and failed to do so – the companies that manufactured and sold the asbestos insulation, and the Navy that selected,

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[2] The Court of Appeals purports not to decide "whether any temporal limitations may apply to a retroactive application of the duty to warn." *Simonetta v. Viad Corp*, 137 Wn. App. 15, 32 n. 3, 151 P.3d 1019 (2007). But its decision below necessarily and indisputably establishes new rules for conduct that took place long ago: according to the Court of Appeals, Petitioners should have warned of the hazards of asbestos insulation in the 1940s, 1950s, and 1960s, and could now be liable for not having done so.

purchased and installed the asbestos insulation (rather than choosing non-asbestos insulation) – are unavailable, the insulation manufacturers long since having been driven into bankruptcy by the asbestos litigation, and the Navy being shielded from suit by sovereign immunity.[3] Respondent's lack of a tort remedy against the culpable parties does not justify rewriting the law to effectively place the full liability on equipment manufacturers for failing to issue warnings that were the responsibility of the Navy and insulation manufacturers. This far-reaching and fundamentally unfair expansion of Washington law should be reversed by this Court.

STATEMENT OF THE CASE

Ingersoll Rand and Leslie hereby adopt by reference Petitioners' Statement of the Case.

ARGUMENT

I. The Law At The Time Of Respondent's Purported Exposure Did Not Require Companies To Warn Of The Hazards Of Products They Did Not Manufacture Or Distribute, And No Such Duty Could Reasonably Have Been Foreseen

In the decisions below, the Court of Appeals created a duty that neither existed nor could reasonably have been foreseen at the time Petitioners manufactured and sold the equipment with which Mr. Braaten allegedly worked. As discussed in Ingersoll Rand's *amicus* brief in support of Petitioners' Petitions for Review, by the time the Petitioners manufactured and sold the equipment – the 1940s, 1950s, and 1960s –

[3] Of course, most companies that have entered bankruptcy as a result of asbestos litigation have established trusts to pay claimants, such as Respondent, on a no-fault basis. A claimant may receive a substantial aggregate payment from such trusts.

there had been only a handful of Washington cases that involved product liability claims alleging a negligent failure to warn. And in each of those cases, the hazard at issue was inherent to the product manufactured or sold by the defendant. Indeed, Washington was reluctant to extend the duty to warn even to the entire supply chain of a product, and certainly gave no hint that a manufacturer would have the duty to warn of the dangers of other manufacturers' products.[4] It was not until 1967 that this Court recognized that a *manufacturer's* failure to warn about its *own* products, by itself, could give rise to tort liability for negligence.[5]

As explained in Ingersoll Rand's *amicus* brief in support of Petitioners' Petitions for Review, beginning with the 1934 publication of

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[4] *See, e.g., Foster v. Ford Motor Co.,* 139 Wn. 341, 246 P. 945 (1926) (reversing plaintiff's jury verdict for injuries caused by tractor purchased by plaintiff's employers, reasoning that "the manufacturer who puts out an article with notice to the purchaser of its limitations, restrictions or defects is not liable to third persons"). Prior to 1970, this Court cited Section 388 of the Restatement on only three occasions: *Belcher v. Lentz Hardware Co.*, 13 Wn.2d 523, 532, 125 P.2d 648 (1942) (declining to apply Section 388 given lack of evidence proving defects in weed burner purchased from defendant retailer); *Bock v. Truck & Tractor, Inc.*, 18 Wn.2d 458, 475, 469, 139 P.2d 706 (1943) (citing Section 388 in holding that seller of secondhand automobile could be held liable for automobile's harm to both immediate purchaser as well as "those whom the dealer should expect would use it or would be in the vicinity of its probable use"); *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467-68, 423 P.2d 926 (1967) (holding individual seller who modified transmission safety switch on pickup truck could be liable for failure to warn buyer of potential hazard, notwithstanding fact that he traded truck on "as is" basis).

[5] *See Callahan v. Keystone Fireworks Manuf. Co.*, 72 Wn.2d 823, 827, 435 P.2d 626 (1967) (affirming jury verdict against defendant fireworks manufacturer for plaintiff's negligence claims based on, *inter alia*, failure to warn, citing rule set out in 76 A.L.R.2d that a manufacturer will be liable for failure to warn as to "a product which, to his actual or constructive knowledge, involves danger to users"). Research has revealed not a single case from other jurisdictions during the 1940s, 1950s, or 1960s holding that a company outside a product's supply chain would have a duty to warn of the hazards of that product.

the First Restatement of Torts, the Restatement also consistently limited the duty to warn of a product's potentially dangerous conditions to parties in that product's chain of distribution.[6]

Moreover, the Court of Appeals' effort to rewrite the well-established law of the 1940s, 1950s, and 1960s did not end with its creation and retroactive application of a previously unknown and unforeseen duty to warn of the dangers of other companies' products. Because that newly created duty applies even to latent product defects, the duty necessarily carries with it an obligation to investigate other manufacturers' products to uncover possible risks. However, the duty to investigate and test products, like the duty to warn of hazards, has long been limited to manufacturers' own products. Indeed, absent circumstances suggesting that such testing was needed, the law absolved even retail sellers from this duty. For example, in *Ringstad v. I. Magnin,* the plaintiff argued that had the defendant retailer tested the product at issue (a cocktail robe), "it would have discovered the inherent danger of explosive ignition." 39 Wn.2d 923, 926, 239 P.2d 848 (1952). In rejecting this proposition, the Court stated "the general rule [] that there is no obligation on the retailer to make such a test in the absence of some circumstance suggesting the necessity therefore." *Id.* This holding was

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[6] Indeed, a review of the citations in the appendix to Section 388 in the Restatement (Second), published in 1966, reveals no case even suggesting that liability for negligent failure to warn would extend beyond the parties in a product's supply chain to the manufacturer of an entirely separate product. *See* Rest. (Second) of Torts § 388 app. (1966).

consistent with the Restatement, which likewise absolved sellers of the affirmative duty to inspect the goods they sold for hidden defects.[7] The reasoning for this policy was both simple and sound: "[t]he burden on the vendor of requiring him to inspect chattels he reasonably believes to be free from hidden danger outweighs the magnitude of the risk that a particular chattel may be dangerously defective."[8] That burden is even greater, and the principle applies even more forcefully, in the present circumstance: a product, asbestos-containing insulation, manufactured and sold by a different company in a different chain of distribution in an entirely different industry.

Respondent presents his theory of liability as less drastic than it actually is, focusing in hindsight on a single hazard, the now well-known dangers of asbestos insulation. But Respondent ignores the much broader ramifications of the theory he espouses: the duty to investigate cannot be limited with the benefit of hindsight to the one product that turned out actually to be dangerous, but must logically extend to any other products that were used with the Petitioners' equipment at the time and that might upon investigation have been revealed to pose health risks. That category would include numerous products made by companies in other industries

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[7] The 1934 edition of the Restatement imposed liability on retailers if, even though ignorant of their goods' "dangerous character or condition," the retailer "could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have." Rest. of Torts § 402 (1934). However, that provision was amended in the 1948 supplement to absolve retailers of that responsibility. Rest. of Torts § 402 (1948 Supp.).

[8] Rest. (Second) of Torts § 402 (comment d).

as to which Petitioners have no expertise whatsoever but which could foreseeably be used in conjunction with Petitioners' equipment: for example, other components of asbestos-containing insulation such as magnesium or calcium silicate, other types of insulation used by the Navy such as fiberglass and rock wool, and various types of paints, lacquers, solvents and cleansers. Under Respondent's theory, Petitioners had a duty to investigate and warn of the potential hazards of all such products, even though Petitioners did not manufacture or sell those products and had no expertise regarding their potential dangers. This seems a far cry from traditional Washington duty-to-warn principles, which the Court of Appeals accurately described in *Simonetta* as requiring "the use of ordinary care to test, analyze and inspect products and keep abreast of scientific knowledge *in its product field*." 137 Wn. App. at 21 (emphasis added).

II. Even Today, The Law Does Not Require Companies To Warn Of The Hazards Of Products They Did Not Manufacture Or Distribute

Even today, decades after Mr. Braaten was exposed to asbestos, the law does not require a company to investigate and warn of the latent, hidden hazards of another company's product. It is a bedrock principle of law, in Washington as in other states, that liability for injuries allegedly caused by a product does not extend to a defendant that was not part of the chain of distribution of that product.

The Washington Products Liability Act (WPLA), enacted in 1981, expressly limits liability to those in the chain of distribution of the "relevant product" – "that product or its component part or parts which gives rise to the product liability claim." RCW 7.72.010(3). With the exception of the instant decisions of the Court of Appeals, Washington common law has followed and reaffirmed this principle. *See Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 18-19, 84 P.3d 895 (2004) (manufacturers of hook not liable for harm caused by a latching "mouse" that they did not manufacture and that was subsequently added to the hook by the plaintiff's employer); *Seattle First National Bank v. Tabert*, 86 Wn.2d 145, 148-149, 542 P.2d 774 (1975) (recognizing liability of those in the chain of distribution); *Peterick v. State,* 22 Wn. App. 163, 192, 589 P.2d 250 (1977) ("The initial limitation of all [duty to warn] actions requires the common denominator of a manufacturer or seller. . . . The plaintiffs did not produce evidence to rebut [the defendant's] denial of control in the manufacturing process or its denial of any duty to warn plaintiff's decedents."), *overruled on other grounds, Stenberg v. Pacific Power & Light Co.,* 104 Wn.2d 710, 719, 709 P.3d 793 (1985); *Falk v. Keene Corp.*, 113 Wn.2d 645, 651, 782 P.2d 974 (1989) (*Tabert* approach favored when Legislature enacted WPLA); *Bombardi v. Pochel's Appliance & TV Co.,* 9 Wn. App. 797, 806, 515 P.2d 540, *modified*, 10 Wn. App. 23, 516 P.2d 517 (1973) ("purpose of [product] liability is to ensure that the costs of injury resulting from defective

products are borne by the makers of the products who put them in the channels of trade[.]").

Furthermore, Washington's limitation of "failure-to-warn" liability to the chain of distribution is consistent with numerous decisions from other jurisdictions that, like Washington, have refused to impose any duty to warn upon a defendant that did not design, manufacture, or distribute the product that allegedly caused injury. For example:

California: In a recent case in which the plaintiffs advanced essentially the same theory of liability advocated by Respondent, the United States District Court for the Northern District of California, applying California law, held that Boeing was not liable for injuries allegedly caused by airplane seats that it "did not design, manufacture, install or replace...." *In re Deep Vein Thrombosis*, 356 F.Supp.2d 1055, 1063 (N.D. Cal. 2005). The plaintiffs in that case contended that it was foreseeable to Boeing, as a manufacturer of commercial aircraft, that its airline customers would add seats to the aircraft, and that Boeing therefore also should have been aware of and warned of the risk that if those seats were placed too close together or if passengers remained seated too long, the passengers could develop deep vein thrombosis.

The court rejected that line of reasoning, holding that "Boeing is not responsible for the action or inactions of the seat manufacturers," and reasoning that "[t]he seat manufacturers did not act pursuant to Boeing's specifications, instructions, directions or procedure; the seat manufacturers were not Boeing's authorized representatives or agents. Accordingly

Boeing did not design, manufacture, install or replace the allegedly defective seating.... Boeing sold its 'completed product' (an aircraft with no seats) to the airlines with no defective condition. In such a situation, Boeing cannot be liable (based upon either strict liability or negligence) under the tort laws of any state...." *Id.* The court then went on to reject the plaintiffs' efforts to hold Boeing liable for failing to warn of hazards associated with airplane seating:

> Did Boeing have a duty to warn the airlines about [deep vein thrombosis] and defective seating conditions? The answer is no. ... [T]he court can find no case law that supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer.

Id. at 1068.

Similarly, in *Garman* v. *Magic Chef, Inc.*, 117 Cal.App.3d 634 (1981), the plaintiff sued the manufacturer of a non-defective cooking stove that ignited gas leaking from the propane system of plaintiff's motor home. The Court of Appeal affirmed summary judgment for the defendant stove manufacturer "because it was not any unreasonably dangerous condition or feature of [defendant's] product which caused the injury. To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense." *Id.* at 638. *Garman* further held that the manufacturers of a product do not bear liability "for merely failing to warn of injury which may befall a person

who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe." *Id.*

Numerous other California cases are to the same effect: that a manufacturer cannot be held liable in either negligence or strict liability for injuries caused by a product that it neither manufactured nor distributed. *See, e.g., Cadlo v. Owens-Illinois, Inc.*, 125 Cal.App.4th 513, 524 (2004) (no liability where there was no evidence that Owens-Illinois "played any role in the design, manufacture, distribution, or marketing" of the products that allegedly caused injury); *Peterson* v. *Superior Court*, 10 Cal.4th 1185, 1197-2000 (1995) (hotel not liable for defective bed; strict liability does not extend beyond chain of distribution of defective product); *Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357, 362-63 (1985) ("To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else. . . . The evidence is undisputed that the immediate efficient cause of plaintiffs' injuries was the explosion of a product manufactured not by [defendant] but rather by [another company]."); *Blackwell* v. *Phelps Dodge Corp.*, 157 Cal.App.3d 372, 378 (1984) ("[I]t was not the product (acid) supplied by defendant, but the container (tank car) in which that product was shipped, which was allegedly defective for lack of warnings or instructions. Under these circumstances, defendant incurred no liability to plaintiffs for its failure to

warn them of danger from formation of pressure in the acid allegedly caused by defective design of the tank car.").

New York: In *Rastelli v. Goodyear Tire & Rubber,* 79 N.Y.2d 289, 591 N.E.2d 222 (1992), the plaintiff alleged that tire manufacturer Goodyear negligently failed to warn of the danger of using the tire on a multi-piece rim which exploded when inflating a Goodyear tire. While a product manufacturer could indeed be held liable in strict liability or negligence under New York law for failure to provide adequate warnings regarding its own products, the New York Court of Appeals expressly:

> decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. Goodyear had no control over the production of the subject multi-rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode.

79 N.Y.2d at 297-298.[9]

Pennsylvania: *Chicano v. General Electric,* 2004 WL 2250990 (E.D.Pa. 2004) – cited by Respondent below for support – lacks cogent analysis and foundation in Pennsylvania law. For example, in *Toth v.*

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[9] Thus, even the court that decided *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), is not willing to extend "duty to warn" liability based on the concept of foreseeability as far as Respondent seek. *See also, e.g., Pulka v. Edelman,* 40 N.Y.S.2d 781, 785-786 (1976) (Foreseeability should not be confused with duty. The principle expressed in [*Palsgraf*] is applicable to determine the scope of duty – only after it has been determined that there is a duty.); *Hamilton v. Beretta U.S.A. Corp.,* 96 N.Y.S.2d 222, 232 (2001) ("Foreseeability, alone, does not define duty – it merely determines the scope of the duty once it is determined to exist.") (citations omitted); *Holdampf v. A.C.&S., et al.,* 806 N.Y.S.2d 146 (2005).

Economy Forms Corp., 391 Pa. Super. 383, 571 A.2d 420 (1990), the plaintiff's decedent was killed when a wooden plank broke on a construction scaffold. The plaintiff alleged that the scaffold manufacturer had a duty to warn about the inherent dangers of using wooden planks on its metal product. The court rejected this argument: "[Plaintiff's] theory would have us impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking it did not supply. Pennsylvania law does not permit such a result." *Id.* at 388-389.[10]

Texas: In *Walton v. Harnischfeger,* 796 S.W.2d 225 (Tex. App. – San Antonio 1990), the plaintiff alleged that a crane manufacturer failed to warn about or provide instructions for rigging a nylon strap that broke and caused a load of tin to fall and injure him. The Texas Court of Appeals held that an equipment manufacturer had no duty to warn of potential dangers associated with another manufacturer's products:

> Appellee did not manufacture, distribute, sell, or otherwise place the nylon straps or any other rigging material into the stream of commerce; appellee is not in the business of manufacturing or selling any rigging material; and rigging

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10 Further, though the decision is non-precedential, the Pennsylvania Superior Court also addressed in *Korin v. Owens Illinois, Inc.,* No. 3323 EDA 2003 (Pa. Super. Ct., Aug. 2, 2004) (copy attached as Appendix A), a situation analogous to that here in which there was no evidence the cross-claim defendant, General Electric, manufactured, supplied, or installed the asbestos insulation that was attached to the outside of its generators and turbines and that allegedly caused harm to the plaintiff:

> [T]here is no evidence that General Electric made any of the asbestos insulation on the General Electric products with which Korin came in contact. General Electric is not liable if it made a product that was later insulated with someone else's asbestos. The insulation here was all on the outside of the General Electric components.

Id. at 6.

> is a complex art that requires different loads to be rigged in a multitude of different ways. We hold that, under the facts of this case, appellee had no duty to warn or instruct users of its crane about rigging it did not manufacture, incorporate into its cranes, or place into the stream of commerce.

796 S.W.2d at 227-228. *See also Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 613-16 (1996) (manufacturer has no duty to warn about another company's products, even though those products may be used in connection with manufacturer's own products); *Braaten v. Certainteed Corp.*, No. 25489 (Tex. Dist. Brazoria County – November 19, 2004) (pump manufacturer not required "to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by [defendant]") (prior case brought by Respondent Braaten) (unpublished) (copy attached as Appendix B).[11]

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[11] Additional cases from other jurisdictions that have refused to impose liability on one company for the hazards of another company's products include:

- Louisiana: *Fricke v. Owens-Corning Fiberglass Corp.,* 618 So.2d 473, 475 (La. Ct. App. 1993) (manufacturer had no duty to warn about asbestos product that it neither manufactured nor sold).
- Maryland: *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1331-32 (Md. Ct. Spec. App. 1997) (expressly refusing to hold that a manufacturer "has a duty to warn of the dangers of a product that it did not manufacture, market, sell, or otherwise place into the stream of commerce").
- Michigan: *Brown v. Drake-Willock Int'l*, 530 N.W.2d 510 (Mich. App. 1995) (manufacturer of dialysis machine that recommended cleaning with formaldehyde under no duty to warn of dangers of formaldehyde; "foreseeability" not a dispositive factor).
- Ohio: *Lindstrom v. AC Product Liability Trust*, 424 F.3d 488, 496 (6th Cir 2005) (applying Ohio law) (affirming summary judgment for pump manufacturers, including Coffin Turbo Pump where asbestos-containing insulation manufactured by other companies was attached to the pumps; holding that although the plaintiff was exposed to asbestos containing products "from

On the rare occasion when a court has found that a manufacturer of one product could be held liable for harm caused by another company's product, the issue generally has been one of synergistic harm, in which each product contributed to a hazard resulting from the combination of the products. *See, e.g., Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977) (hazard resulted from combination of flowrater and O-rings in presence of ammonia); *Tellez-Cordova* v. *Campbell-Hausfeld/ Scott Fetzger Co.*, 129 Cal.App.4th 577 (2004) (combination of grinding tools and disks); *Wright* v. *Stang Mfg. Co.*, 54 Cal.App.4th 1218 (1997) (interaction of deck gun and riser pipe). *Cf. Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979) (affirming jury verdict against motorcycle manufacturer on theory that defendant should have warned of danger that fuel could leak and ignite when motorcycle's fuel switch was left on; hazard arose either from defect of motorcycle itself or, at most, from interaction of motorcycle and gasoline).

Here, the hazards at issue here did not arise from the combination of Petitioners' equipment and asbestos-containing insulation applied by the Navy to the exterior of that equipment – in other words, there was no synergistic hazard that arose from the attachment of one product to the other. Rather, any dangers of the asbestos-containing insulation inhered

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another company that were attached to a Coffin product," "Coffin Turbo cannot be held responsible for the asbestos contained in another product.").

- Massachusetts: *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (Mass. 1985) (refusing to hold manufacturer liable "for failure to warn of risks created solely in the use or misuse of the product of another manufacturer").

solely in the insulation itself. Those hazards were present whether the insulation was applied to a pump, to other equipment in a mechanical system on board a naval vessel, to pipes linking the pump and the other equipment, or remained unattached to any other product. It was the insulation itself – not the attachment of the insulation to any particular piece of equipment – that created the hazard. The equipment served merely as a passive platform for the hazard-creating insulation.

Perhaps recognizing this reality, Respondent and the Court of Appeals have attempted to re-characterize the issue as if the design of Petitioners' equipment encompassed and required the use of asbestos insulation. Indeed, the Court of Appeals summarized its holding as: "when a product's design utilizes a hazardous substance, and there is a danger of that substance being released from the product during normal use, the seller of the product containing the substance has an independent duty to warn." *Braaten v. Saberhagen Holdings*, 137 Wn. App. 32, 46, 151 P.3d 1010 (2007). But this is a gross mischaracterization. In no sense did the design of the pumps or evaporators in question "utilize" asbestos-containing insulation. The pumps and evaporators were delivered to the Navy un-insulated. It was up to the Navy to decide whether to insulate the equipment, and, if so, what type of insulation to use. It also is incorrect to suggest that asbestos was released from Petitioners' equipment during normal use: the asbestos was released from the insulation, not the equipment, and the hazard created by release of asbestos fibers was the

same whether the insulation was applied to Petitioners' equipment or to any other equipment or surface.

III. The Court Of Appeals' Decision To Create in 2007 A New Duty Governing Conduct That Occurred In The 1940s, 1950s, And 1960s Is Fundamentally Unfair

In support of their position, Respondent relies heavily on the alleged foreseeability that the Navy would decide to insulate Petitioners' equipment with asbestos-containing materials. But foreseeability is simply one factor among several to be considered in determining whether to impose a duty to warn. This Court has defined duty broadly as "a reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Taylor v. Stevens County*, 111 Wn.2d 159, 168 (1988) (quoting from W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER AND KEETON ON TORTS § 53, at 357 (5th ed. 1984)). Although foreseeability may play a role in determining a duty's scope, other policy factors also are properly taken into account in determining its existence. *See Wells v. Vancouver,* 77 Wn.2d 800, 803, 467 P.2d 292 (1970) ("Generally, the duty to use ordinary care is *bounded* by the foreseeable range of danger.") (emphasis added); *Bailey v. Town of Forks*, 108 Wn.2d 262, 266 (1987) ("The concept of duty turns on foreseeability *and* pertinent policy considerations" (emphasis added)); Indeed, this Court recently reemphasized that duty "depends on mixed considerations of logic, common sense, justice, policy and precedent." *Christensen v. Royal School Dist. No. 160,* 156 Wn.2d 62, 67 (2005) (en banc).

In applying these principles, the Court of Appeals overreached in imposing on Petitioners and other equipment manufacturers a duty that did not exist and could not reasonably have been anticipated at the time of their underlying conduct, that even today has been largely rejected by courts, and that runs counter to public policy and fundamental fairness. The equipment manufactured by Petitioners was simply a passive platform for the insulation: the equipment itself did not cause or contribute to Respondent' injuries. The absence of the truly culpable parties in these lawsuits – the insulation manufacturers and the Navy – due to bankruptcy and sovereign immunity is not a legitimate reason to extend the duty to warn far beyond its well-established limits.

Moreover, as pre-WPLA case law cited by Respondent makes clear, a product manufacturer has a duty to warn "of dangers necessarily involved in its use."[12] The only pertinent danger necessarily involved in the use of the pumps, valves, and other equipment manufactured by Petitioners and similarly-placed manufacturers was that they could become hot under operating conditions. But that heat was an open and obvious danger, not only to the Navy but also to any seamen or shipyard workers trained in the maintenance of the equipment. Under Washington common law, there is no duty to warn of open and obvious dangers such

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12 *Terhune v. A.H. Robins Co.*, 90 Wn. 2d 9, 12, 577 P.2d 975 (1978).

as the heat generated by Petitioners' products.[13] How that obvious danger was to be addressed was the responsibility not of the equipment manufacturer, but of the Navy which controlled the sites where the equipment was located and which necessarily would have to customize its means of addressing the heat to the circumstances of each workplace under its control. To the extent that the Navy made use of insulation to contain the heat generated by particular equipment, the responsibility for warning of any hazards of the insulation rested with the insulation industry that developed in response to the need for heat containment and that manufactured and sold the insulation to the Navy. The hazards of the insulation were not "necessarily involved in [the] use" of the equipment manufactured and sold by Petitioners.[14] The dangers of asbestos insulation arise entirely and solely from the insulation itself, not as a result of any interaction between the insulation and Petitioners' equipment. Asbestos insulation presents the same hazards wherever it happens to be – and it was everywhere on the naval vessels aboard which Mr. Braaten worked.

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13 *See, e.g., Kimble v. Waste Sys.Intern'l, Inc.,* 23 Wn. App. 331, 337, 595 P.2d 569 (1979); *Ewer v. Goodyear Tire & Rubber Co.,* 4 Wn. App. 152, 162, 480 P.2d 260 (1971).

14 Indeed, even if one assumes that the equipment in question called for the use of some type of insulation, it would have been reasonable for Petitioners to presume that the insulation industry would act responsibly in investigating and warning of the health hazards posed by its products and that the Navy would appropriately investigate worker safety issues in deciding which types of insulation to use on its vessels.

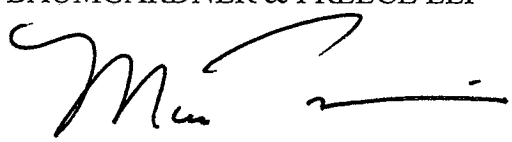
The decisions of the Court of Appeals also threaten to have devastating practical implications. Under the theory adopted by the Court of Appeals and apparently applied retroactively, equipment manufacturers should, in the 1940s, 1950s, and 1960s, have affirmatively investigated the hazards of asbestos insulation and any other product used in conjunction with their equipment, and sought to warn workers on board naval vessels of all of those hazards. This standard, applied to govern primary conduct that occurred several decades ago, at a time when the law gave the equipment manufacturers no reason to believe they had any such obligation, comes close to creating absolute liability for equipment manufacturers. This Court should reverse the decisions of the Court of Appeals to impose retroactively such a sweeping and unforeseen duty.

CONCLUSION

For the foregoing reasons, Ingersoll Rand and Leslie respectfully request that this Court reverse the decisions of the Court of Appeals and reinstate the summary judgments granted to Petitioners by the trial court.

RESPECTFULLY SUBMITTED this 8th day of February, 2008.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



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LESLIE CONTROLS, INC.

APPENDIX A

J. A19027/04

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GERALD S. KORIN AND ELAINE KORIN, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
OWENS ILLINOIS, INC., ALLIED CORP., UNIROYAL, INC., AW CHESTERTON, INC., GREENE TWEED & CO., INC., QUIGLEY CO., INC., PFIZER, INC., HOPEMAN BROTHERS, INC., FLINTKOTE CO., FOSTER WHEELER CORP, INC., PARS MANUFACTURING CO., JH FRANCE REFRACTORIES CO., AC&S CORP., GENERAL MOTORS CORP, BRAND INSULATIONS, INC., SELAS CORP. OF AMERICA, BICKLEY FURNACES, WESTINGHOUSE ELECTRIC CORP., DREVER FURNACES, KEELER DORR-OLIVER BOILER CO., CLEAVER BROOKS, BEVCO INDUSTRIES, CRANE PACKING, BORG-WARNER CORP., RAPID AMERICAN CORP., SQUARE D CO., CHRYSLER CORP., CUTLER-HAMMER CO., CLARK CONTROLLER CO., SHEPARD NILES, KAISER GYPSUM CO., PLIBRICO SALES & SERVICE, AO SMITH CORP., AMPCO PITTSBURGH CORP., PEP BOYS, FORD MOTOR CO., GEORGIA PACIFIC CORP., CERTAIN-TEED CORP., INC., DANA CORP., UNION CARBIDE, NORTH AMERICAN REFRACTORIES, BENJAMIN FOSTER CO., HB SMITH, WEIL MCCLAIN CO., DURABLA MANUFACTURING CO., KAISER ALUMINUM & CHEMICAL CORP., ROCK BESTOS, CO., EATON CORP., AND JOHN CRANE, INC.	:	5 of 9 Partners
APPEAL OF JOHN CRANE, INC.	:	No. 3323 EDA 2003

Appeal from the Judgment entered October 2, 2003
In the Court of Common Pleas of Philadelphia County,
Civil No. 3942 December Term, 2001

FILED AUGUST 2, 2004

BEFORE: MUSMANNO, KLEIN, JJ. and McEWEN, P.J.E.

MEMORANDUM: **FILED AUGUST 2, 2004**

Gerald Korin (Korin) and his wife Elaine were awarded a total of $1,500,000 against various asbestos manufacturers including John Crane, Inc. for mesothelioma, which he contracted through exposure to asbestos, and which ultimately killed him. Crane raises two issues on appeal: (1) whether comparing Korin's "death sentence" from mesothelioma to a death penalty murder case going on at the same time was prejudicial, and (2) whether the court erred in ruling there was insufficient evidence to allow the jury to consider cross-claims against General Electric and Pep Boys. We affirm.

The issues are well covered in Judge Paul P. Panepinto's opinion and we rely on that in part and attach it in the event there are further proceedings in this matter.

1. The closing statement in Phase I referring to a "death sentence" was not so highly prejudicial as to mandate a new trial.

> Trial counsel must be expected to advance a spirited argument to support his client's cause and promote the interest of justice. As long as no liberties are taken with the evidence or prejudices aroused by exaggerated accusations, a lawyer may appeal to a jury in colorful language with the strongest aspect of his case.

Easter v. Hancock, 346 A.2d 323 (Pa. Super. 1975).

In the closing argument in the medical causation phase of the case, plaintiff mentioned a highly publicized murder case which was proceeding at the time of this trial. Plaintiff's counsel said, "There's a similarity here in terms

of the importance. Jerry Korin has been given a death penalty." Counsel went on to say that Korin lived a wonderful life and had a good family and did nothing to bring the "death penalty" on himself.

There is no question that Korin was terminally ill at that time. Mesothelioma is invariably fatal. Such a fate is often, even outside the courtroom, referred to as a "death sentence" or "death penalty." There is no liberty taken with the evidence to refer to inevitable death as a death penalty. The question, therefore, is whether this particular comparison so inflamed the jury so as to render the verdict improper.

In ***Harvey v. Hassinger***, 461 A.2d 814, (Pa. Super. 1983), the trial court declined to grant a new trial after the plaintiff stated in closing argument that the defendant had "murdered" the decedent. Even acknowledging that it "was improper for appellant's counsel to refer to Appellee as having "murdered" the decedent we cannot say that in the context of this trial that the remark was so prejudicial as to require a new trial." ***Id.*** at 818. Our court found that in the context of that particular trial, the reference to "murder" was not in the technical criminal sense, but in the broader sense of outrageous conduct.

We agree with Judge Panepinto that this comment, while "stretching into the grey area of permissible comments, certainly was not so highly prejudicial as to cause a mistrial." Opinion at 4. One might also say that although counsel came close to the line, he did not cross it.

As noted by Judge Panepinto, this argument was made in the medical causation and damages phase of the case, not the product identification phase. Counsel did say he was bringing this up only to highlight the importance of this case, because Korin was almost certainly going to die from the disease. There was no reference to any actions on the part of the defendants to analogize them to murders. The verdict for this kind of case was not outside the expected range, so it appears there was no actual prejudice. Although defendants asked for a mistrial, there was no request for a curative instruction which could have solved any problem. The trial judge is in the best position to determine whether such a remark is so prejudicial to cause a mistrial, and we do not believe Judge Panepinto abused his discretion at all in denying the motion for mistrial.

2. There was insufficient evidence to allow the claims against General Electric and Pep Boys to go to the jury.

The evidence against Pep Boys came primarily from Korin's testimony. He said that he did remember one purchase of brakes from Pep Boys, and also that he changed brakes more than once on several vehicles. He said that dust was given off when old brakes were removed, but not when new ones were installed. This is insufficient to show that any of the brakes he *removed* were purchased from Pep Boys.

With respect to General Electric, we first note that any issues involving General Electric are waived, as no appeal was filed regarding G.E. Korin filed a

lawsuit against a large number of defendants in December 2001. The lower court term and number for that lawsuit is December Term, 2001, Number 3942 (0112-3942). In February 2002, Korin filed a second lawsuit against General Electric and Garlock Industries. That case was issued a distinct court term and number: February Term, 2002, Number 2036. While the two cases were tried at the same time, there is no indication in the docket for either case that the two were ever formally consolidated. No motion for consolidation appears on the docket for either case. In the official record before us, post-trial motions, necessary to preserve issues before this court, were filed only under the December court term and number. No appeal was ever filed regarding the February case. Because General Electric was a defendant only in the February case and not in the original December case, no appellate issues were ever preserved regarding General Electric.

In an abundance of caution, however, because the trial court may have consolidated the two cases, *sua sponte* and/or orally, without that order ever being formally docketed, we will comment on the issue raised.[1]

Korin did testify he worked with General Electric panels and generators and was exposed to asbestos. While the products were insulated with

[1] The fact that we *comment* on the issues is not intended to absolve Crane from failing to either provide us with a record that indicates the two cases had actually been consolidated, or from filing a separate appeal regarding the February case. From what we can tell in the record before us, the proper method of appeal here would have been to file separate appeals under both lower court numbers and then indicate to Our court that the two appeals should be heard together.

asbestos, Korin did not know whether or not the asbestos insulation was manufactured by General Electric. Likewise, although there was asbestos insulation on turbines on ships that were made by General Electric, he did not know whether or not General Electric supplied the insulation.

Therefore, there is no evidence that General Electric made any of the asbestos insulation on the General Electric products with which Korin came in contact. General Electric is not liable if it made a product that was later insulated with someone else's asbestos. The insulation here was all on the outside of the General Electric components.

Crane is correct in the assertion that a jury may draw reasonable inferences, without direct proof, of the condition of the product that allegedly caused the injury. ***See Cornell Drilling Co. v. Ford Motor Co.***, 359 A.2d 822 (Pa. 1976), *reversed on other grounds*. However, the circumstances where such inferences may be drawn do not exist here.

In ***Cornell***, a Ford pick-up truck spontaneously burst into flame. Our Supreme Court held that in that situation, where all other explanations for combustion had been ruled out, the jury would be allowed to infer that the pick-up truck was defective under Restatement of Torts, § 402A. Our Supreme Court went on to say:

> Accordingly, a plaintiff may often rely on circumstantial evidence, and the inferences that may be reasonably drawn therefrom, to prove his case. Although the mere happening of an accident does not establish liability, Dean Prosser has observed that 'the addition of other facts tending to show that the defect existed before the accident, such as its occurrence within a short time after sale, or

> *proof of the malfunction of a part for which the manufacturer alone could be responsible*, may make out a sufficient case.

Id. at 826 (emphasis added).

Here, the "defect" of the G.E. product in question was the existence of asbestos insulation on the outside of the product. Crane, however, produced no evidence that the asbestos insulation was a part for which the manufacturer (G.E.) alone could be responsible. Therefore, we agree with Judge Panepinto that there was insufficient evidence for a jury to conclude that Korin came in contact with General Electric asbestos. Thus, even were we to assume that the issue had been properly preserved and raised before this court, Crane would be entitled to no relief regarding General Electric.

Judgment affirmed.

Judgment Entered:

Prothonotary

AUG 2 2004

Date:

APPENDIX B

ORD

FILED
AT 4:03 O'CLOCK P M.
11-19-04
JERRY DEERE
Clerk of District Court Brazoria Co., Texas
BY MHC DEPUTY

NO. 25489

VERNON BRAATEN **Plaintiffs**	§	**IN THE DISTRICT COURT OF**
V.	§	**BRAZORIA COUNTY, TEXAS**
CERTAINTEED CORPORATION, et al	§	**149th JUDICIAL DISTRICT**

ORDER

On November 19, 2004, the Court considered the Amended No-Evidence Motion for Summary Judgment filed by Goulds Pumps, Inc. After reviewing the Motion and hearing arguments of counsel, it was decided that:

The Motion is GRANTED as to any alleged duty of Goulds Pumps, Inc. to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by Goulds Pumps, Inc.

Signed this 19th day of November, 2004.

Judge Robert May

{00024008.DOC /}

IMAGE 2

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Dated this 8TH day of February, 2008, at Seattle, Washington.

Loida Gallegos

Loida Cifra Gallegos

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2008, a true and correct copy of the foregoing document was served on the following:

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