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No. _____

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

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

VERNON BRAATEN,
Plaintiff-Respondent,

v.

BUFFALO PUMPS, INC., et al.,
Defendants,

CRANE CO.,
Defendant-Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Sharon S. Armstrong)

CRANE CO.'S PETITION FOR REVIEW

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PETITION FOR REVIEW

In a case of acknowledged “first impression,” the Court of Appeals created an unprecedented rule allowing imposition of tort liability for hazards associated with products neither manufactured nor supplied by the defendant and, with respect to Petitioner Crane Co., not even essential to the functioning of the defendant’s products. Such an expansive rule, which finds no support in existing Washington precedent, has substantial public policy implications for defining the appropriate limits of tort liability in Washington; moreover, it invites a flood of litigation involving non-Washington plaintiffs, using the already over-taxed resources of Washington’s courts to take advantage of the Court of Appeals’ decision. Moreover, the Court of Appeals’ decision is unclear on several important points. Finally, the Court of Appeals should not even have decided the issue, as the plaintiff lost on this very point before the State Court in Texas before re-filing his action in Washington. Accordingly, this Court should grant the petition for review and reverse the Court of Appeals.

A. Identity of Petitioner

Petitioner Crane Co., a manufacturer of metal valves, asks this Court to accept review of the published decision of the Court of Appeals, Division One terminating review in this case.

B. Court of Appeals Decision

The Court of Appeals' January 29, 2007 decision, reported at 137 Wn. App. 32 and 151 P.3d 1010 (attached as A-1 to A-15), reversed a summary judgment in favor of Crane Co., and held that Crane Co. had the duty to warn of potential hazards associated with products it neither manufactured nor supplied, and that were not even essential to the valve's functioning, simply because those products would later come to be affixed – by others – to Crane Co. valves.

The Court of Appeals denied Crane Co.'s timely motion for reconsideration by order dated March 30, 2007. *See* A-16 to A-17.

This matter was linked with and decided with a case involving similar factual circumstances and reaching a similar conclusion, *Simonetta v. Viad Corp.*, 137 Wn. App. 15, 151 P.3d 1019 (the slip opinion in which is attached as A-18 to A-35).

C. Issues Presented for Review

1. Does a product liability defendant have a duty to warn of hazards associated with products it neither manufactured nor supplied, and that were not even essential to the functioning of its products, simply because those products were used in connection with its products?

2. Should the courts of Washington decline to decide an unsettled issue of tort law where the party asserting the claim already

litigated to final judgment, unsuccessfully and preclusively, the identical issue in another lawsuit in another state?.....

D. Statement of the Case

Plaintiff-Respondent Vernon Braaten worked as a pipefitter at Puget Sound Naval Shipyard from 1967 to 2002, and alleges that he was exposed to asbestos-containing products in connection with his job. Mr. Braaten contends that, as a result of these exposures, he contracted mesothelioma. *See* CP 333, 517, 527-28.

Mr. Braaten first asserted claims arising out of these injuries by filing two lawsuits, in Dallas County and Brazoria County, Texas. *See* CP 337-52, 354-65. Crane Co. was named as a defendant in the Brazoria County lawsuit. *See* CP 337. One of the other defendants, Goulds Pumps, Inc., moved for summary judgment on the very issue at bar in this appeal, seeking a ruling that a defendant has no duty to warn of dangers associated with asbestos-containing products that were applied to the defendant's products by an end user. *See* CP 375-83. After the trial court granted Goulds Pumps' motion, CP 385, Mr. Braaten dismissed both lawsuits, *see* CP 387-88, 393, and reasserted his claims in King County, *see* CP 3-6.

There is no evidence that Crane Co. ever manufactured asbestos materials. Rather, insofar as relevant here, Crane Co. manufactured metal valves, used as components of piping systems. *See, e.g.*, CP 1299.

Packing material and bonnet gaskets manufactured by others were used in, and supplied with, certain Crane Co. valves, in order to prevent leakage. *See id.* The packing is placed into the valve, around the valve stem, and the bonnet gasket provides a seal between the cover (the “bonnet”) and the body of a valve. *See id.* From time to time, a valve’s internal packing and bonnet gaskets may be removed and replaced, if necessary. *See id.* Until the mid-1980s, material used for packing and bonnet gaskets sometimes (but not always) contained varying percentages of asbestos. *See id.*

Other asbestos-containing products, supplied and installed by others, may also have been used around or in the vicinity of a Crane Co. valve. For example, a valve may be affixed to a piping system through a flange connection; in that case, a gasket manufactured by others (which may have contained asbestos) would often be used to prevent leakage from the joint. *See id.* There is no evidence that Crane Co. supplied any of the flange gaskets to which Mr. Braaten was allegedly exposed.

Moreover, exterior insulation was sometimes applied to valves and associated piping systems, at the discretion of the purchaser. *See id.* In some cases, this insulation contained asbestos. *See id.* There was no evidence that this insulation is needed for valves to function properly.

The Crane Co. valves out of which Mr. Braaten’s claim arose were sold to the United States Navy, for use on warships. Mr. Braaten has

testified that he removed insulation from the exterior of the valves, removed and replaced valve packing and gaskets, and then reapplied insulation. *See* CP 2036-40, 1323-24, 1335-36. The replacement bonnet gasket and packing material Mr. Braaten worked with were neither manufactured nor supplied by Crane Co. *See* CP 5684, 5778. Mr. Braaten could not say whether any bonnet gaskets and packing he removed were the ones originally supplied in a Crane Co. valve. *See* CP 5684, 6391-92. Indeed, it was not even clear that the gaskets and packing on which Mr. Braaten worked actually contained asbestos. *See, e.g.*, CP 6409-10, 6417-18. Further, there is no evidence that Crane Co. supplied any of the insulation materials that Mr. Braaten handled.

Accordingly, Crane Co. filed two motions for summary judgment. The first sought a ruling that Crane Co. had no duty to warn of dangers of asbestos-containing products that were manufactured, sold or distributed by others. *See* CP 459-80. By order dated September 6, 2005, the Superior Court granted this motion. *See* CP 5565-57. Thereafter, Crane Co. sought summary judgment dismissing Mr. Braaten's remaining claims because he had not shown exposure to any asbestos-containing components actually supplied by Crane Co. *See* CP 5743-48. The Superior Court also granted this motion. *See* CP 7271-72.

The Superior Court also granted similar motions filed on behalf of other defendants. For example:

- General Electric, a manufacturer of turbines, obtained a summary judgment holding that it was not liable for external insulation on its turbines. *See* CP 7303. In so ruling, the trial court was not swayed by evidence that (i) General Electric turbines required insulation to function properly, *see* CP 2149-55, 4029, and (ii) the turbines were specially manufactured with hangers used to affix insulation, *see* CP 2145, 4035.
- Buffalo Pumps, Inc. obtained a similar ruling, *see* CP 7307, in the face of evidence that (i) it submitted plans specifying that its pumps be insulated with asbestos-containing materials, *see* CP 776, 1251, and (ii) the pumps had to be insulated to function properly, *see* CP 781-86, 1257-58.
- Summary judgment was also granted to IMO Industries, Inc., as alleged successor to DeLaval, a manufacturer of pumps, *see* CP 7318-21, despite Mr. Braaten's contention that DeLaval in fact sold asbestos insulation materials for use with its turbine-driven pumps, *see* CP 6434-66.

Mr. Braaten appealed, and the Court of Appeals reversed, *see* A-1 to A-15.¹ The Court of Appeals' ruling is sweeping:

- The Court ruled that a product can be actionably “defective,” under Section 402A of the RESTATEMENT (SECOND) OF TORTS (1965), if it is not accompanied by warnings about the hazards associated with *other* products, manufactured and distributed *by others*, wherever those other products may come to be utilized with the product. *See* A-6 to A-13.
- The Court held that a product’s manufacturer or distributor can be negligent if it should have known of the risk posed by components supplied by others that foreseeably would have been used with its products. *See* A-13 to A-15.
- The Court suggested that the existence of a duty to warn was to be determined by the jury, based on whether or not the risk was foreseeable. *See* A-14.
- The Court made no clear distinctions between a defendant’s duties with respect to (i) components supplied with a

¹ The Court also reversed the companion *Simonetta* case, in which the Court entered summary judgment in favor of an evaporator manufacturer, holding that it was not liable for external insulation supplied by others, *see* A-19, A-21, in the face of evidence that the evaporator required insulation to operate properly, *see* A-23 to A-24.

product but manufactured by others (such as bonnet gaskets or packing); (ii) components not supplied with a product, but whose use is integral to the proper function of a product (such as turbine insulation); or (iii) components affixed to a product at the purchaser's discretion, that are not essential for the proper function of the product itself (such as external insulation affixed to valves).

Mr. Braaten's victory was not total, however: the Court of Appeals correctly affirmed judgment in favor of General Electric, on the ground that Mr. Braaten's claims against it were precluded by the judgment entered in Brazoria County, Texas. *See* A-4 to A-5. Even so, on reconsideration, the Court of Appeals declined to apply the same ruling to Crane Co., *see* A-16 to A-17, or to any other defendant, even though Superior Court would be obligated, on remand, to enter judgment in these entities' favor in accordance with the Court of Appeals' mandate.

Crane Co. seeks review, so that this Court can re-impose appropriate boundaries on what is now an unfairly broad, unworkably amorphous, and indeed virtually limitless standard for tort liability.

E. Argument Why Review Should Be Accepted

1. This Matter Presents an Issue of Substantial Public Importance: Whether Defendants Are Liable In Tort for Products They Neither Manufactured Nor Distributed.

a. The Court of Appeals' Expansion of Product Liability Is Unprecedented.

Under the rubric of implementing a “logical extension of the common law,” *Simonetta*, A-27, on an “issue of first impression,” A-7; *Simonetta*, A-32, the Court of Appeals has created an unprecedented expansion of the scope of tort liability, potentially holding a defendant liable for hazards associated with products that it neither manufactured nor distributed, whenever these products might be used in connection with, or might come to be affixed to, its own product. The ruling extends even where the hazardous product is not essential to the function of the defendant’s product.

As the Court of Appeals necessarily observed, *see* A-7 to A-12 to A-17; *see also Simonetta*, A-29 to A-34, this is not a result commanded or even contemplated by existing Washington precedent. Until the Court of Appeals decisions in *Braaten* and *Simonetta*, the duty to warn of potential hazards was limited to injuries directly resulting from, and inhering in, products the defendant itself manufactured or supplied, either in isolation,²

² *See, e.g., Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d (footnote continued)

or when used in conjunction with other products that necessarily work together inseparably.³

Indeed, had the Court of Appeals properly applied the wisdom of its most closely apposite recent precedent, *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 84 P.3d 895 (2004), it should have reached a contrary result as to Crane Co. There, the plaintiff was injured due to the failure of a crane hook assembly, which in turn was caused by the failure of a “mouse” used to close the open end of the hook; the hook itself (manufactured by the defendants) did not fail. 120 Wn. App. at 15-16, 84 P.3d at 896-97. Because the “mouse” failed, rather than the hook itself, the Court held that the hook manufacturer bore no liability. In so doing, the Court made an observation which should have been applied here: “Under the common law, component sellers are not liable

(footnote continued)

1337 (1991) (risk from inhalation of defendant’s baby oil); *Little v. PPG Indus., Inc.*, 92 Wn.2d 118, 594 P.2d 911 (1979) (risk from exposure to defendant’s solvent); *Parkins v. Van Doren Sales, Inc.*, 45 Wn.App. 19, 724 P.2d 389 (1986) (risk of injury from defendant’s conveyor components, when incorporated into conveyor system without substantial modification).

³ See, e.g., *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977) (risk of injury from breakage of defendant’s “flowrater,” when used in combination with unsuitable O-ring seals); *Bich v. General Elec. Co.*, 27 Wn.App. 25, 614 P.2d 1323 (1980) (risk of catastrophic failure of defendant’s transformer, when used in combination with an incompatible replacement fuse).

when the component itself is not defective.” 120 Wn. App. at 19, 84 P.3d at 899.⁴

Plaintiff’s attempt to hold Crane Co. liable for an external component such as insulation presents a perfectly analogous situation. Here, any defect associated with such a product, as incorporated into an integrated piping system, should not be imputed to Crane Co., the manufacturer of only one component of the system.

Instead of relying on Washington authority, however, the Court of Appeals justified its steps into new territory principally by citing *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979), a decision not relied on by any of the parties to either the *Braaten* or *Simonetta* appeals. Not only is that case not binding, it is not even apposite: there, the plaintiff alleged and the court held that Kawasaki was liable for failing to warn of the risk that gasoline would leak from its motorcycle when the fuel switch was left in the “on” position. *Id.* at 572. Plainly, the failure to warn there was the failure to warn about an inherent

⁴ The Court in *Sepulveda-Esquivel* was applying the Washington Product Liability Act, RCW 7.72.010 *et seq.*, which does not apply here, given that Mr. Braaten’s exposures took place before 1981, *see* A-6. As a result, the Court of Appeals’ statement is *dictum*. Had *Sepulveda-Esquivel* involved a common law claim, its holding would have been inconsistent with the ruling in this case, and would have resulted in a conflict justifying review under RAP 13.4(b)(2).

characteristic of Kawasaki's motorcycle, *not* about any characteristic of the gasoline itself (since its flammability is obvious to all).

In sum, the Court of Appeals' rulings in this case, and in *Simonetta*, overreach this Court's precedents in a way that cannot be justified by existing precedent or logic.

b. The Court of Appeals' Expansion of Product Liability Is Unworkable.

Not only is the Court of Appeals' new theory of tort liability unsupported; it also is almost impossible to apply in practice, given the Court of Appeals' failure to articulate principled distinctions between the very different positions in which the parties arrived at the Court.

For example, in *Simonetta*, the Court suggests that a duty to warn arises only "when a product *requires* the use of another product and the two together cause a release of a hazardous substance." A-35 (emphasis added). There also are suggestions in the *Braaten* opinion that a duty to warn exists only "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[.]" A-12 (emphasis added). These statements suggest that a duty to warn arises only with respect to a product's internal components, or only with respect to external components whose use is essential for proper function. At the same time, plaintiffs (in these cases

and those to come) undoubtedly will point to the fact that the summary judgments were reversed *in toto*, including as to Crane Co., without such distinctions. In consequence, litigants and trial courts are left without guidance as to how far the Court of Appeals' "expansion" of the common law goes, or how its standards are to be applied in individual cases.

Nor do these decisions provide any principled basis for trial courts to limit the bounds of the duty to warn through summary judgment. The Court of Appeals' opinion holds – contrary to this Court's decisions – that the existence of a duty to warn in negligence cases is only "bounded by . . . foreseeability," that this is "generally a question of fact for the jury, not a question of law for the court," and thus that the existence of the duty "should be considered by the trier of fact." A-14.⁵

By broadening the boundary of the duty to warn to the limits of foreseeability, as determined by a jury with the benefit of hindsight, there is a very real risk that strict liability would transform itself into potentially-absolute liability for any injuries caused by hazards in proximity to a product, however tangential the association. This would

⁵ Contrary to the Court of Appeals' suggestion, this Court has made clear that "[t]he existence of duty is a question of law," *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360, 1362 (1991), that depends not only on foreseeability, but rather on "mixed considerations of logic, common sense, justice, policy and precedent," *Snyder v. Medical Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158, 1164 (2001). While "[f]oreseeability limits the scope of a duty, . . . it does not independently create a duty." *Halleran v. Nu West, Inc.*, 123 Wn.App. 701, 717, 98 P.3d 52, 59-60 (2004).

contravene the well-recognized principle of Washington law that “[t]he doctrine of strict liability does not impose legal responsibility simply because a product causes harm,” because “[s]uch a result would embody absolute liability which is not the import of strict liability.” *Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 145, 150, 542 P.2d 774, 777 (1975).

c. The Court of Appeals’ Expansion of Product Liability Is Unfair.

The Court of Appeals’ decision is also inimical to sound public policy. In this respect, the Third Restatement speaks with particular resonance, in the analogous context of component parts:

As a general rule, component sellers should not be liable when the component itself is not defective Imposing liability would require the component seller to scrutinize another’s product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998), § 5, comm. a. *See also Sepulveda-Esquivel*, 120 Wn. App. at 19, 84 P.3d at 899 (citing Section 5 of the Third Restatement).

Put otherwise, a fundamental goal of tort law is to compel manufacturers and suppliers of goods to internalize the true cost of their activities (including the cost of injury or damage resulting from the use of their products). *See, e.g., Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn.

App. 784, 792-93, 106 P.3d 808, 812 (2005) (“public policy demands that the burden of accidental injuries caused by products intended for consumption . . . be treated as a cost of production” (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comm. c (1965))). That end is not served, however, by imposing liability on those who had no role in making design or manufacturing decisions for the allegedly hazardous product.

Such an expansion is especially unjustifiable in the context of the duty to warn, an area of the law that already is difficult to confine in a principled fashion, and that already presents considerable analytical challenges, as respected commentators have observed. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. REV. 121 (1992); Howard Latin, “Good” Warnings, *Bad Products & Cognitive Limitations*, 41 U.C.L.A. L. REV. 1193 (1994).

An influential critique of “failure to warn” jurisprudence summarized the analytical and practical problems that bedevil this area of jurisprudence, and that cry out for clarification, not unguided expansion:

Product manufacturers have become increasingly vulnerable to assertions of tort liability based on the absence or inadequacy of warnings (warnings liability). . . . The desire to compensate victims of product-related accidents has led some courts to impose on manufacturers a broad duty to warn all foreseeable users of virtually all possible hazards inherent in the use or misuse of a product. . . .

The increased impact of warnings liability in product liability litigation is troublesome. The expansion of warnings liability has occurred with little consideration of what is known about the communication and dissemination of information. The legal rules regarding warnings presently are being formulated and applied on a case-by-case basis in the emotional context of personal injury litigation. The complex and difficult issues relating to the adequacy of warnings generally have been decided by lay juries without . . . the benefit of . . . reasonable judicial guidelines. . . .

The extension of workplace warnings liability unguided by practical consideration has the unreasonable potential to impose absolute liability

Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law & Communication Theory*, 52 U. CIN. L. REV.

38 (1983). The Court of Appeals' decision exacerbates these problems.

d. The Court of Appeals' Ruling, If Permitted to Stand, Would Flood the Courts of Washington with Non-Citizens' Claims.

Finally, there is a very practical reason for this Court to limit the reach of the Court of Appeals' rulings: the risk that the courts of

Washington would be overwhelmed by non-Washington plaintiffs, seeking the application of favorable law.

This is hardly a speculative concern. It is well-recognized that asbestos caseloads ebb and flow with changing perceptions, on the part of the plaintiffs' bar, as to the relative friendliness of different venues. *See, e.g., Owens-Corning v. Carter*, 997 S.W.2d 560, 566 (Tex. 1999) (observing that Texas had become "an especially popular forum for a huge number of out-of-state asbestos claims"); *'21' Int'l Holdings, Inc. v. Price Waterhouse*, 856 S.W.2d 479, 486 (Tex. Ct. App. 1993) (Peebles, J., concurring) (stating that Texas had become "the courthouse for the world"). Indeed, this matter is a case in point: Mr. Braaten originally brought his case in the courts of Texas, and invoked the assistance of Washington's courts only when it became apparent that Texas was not as hospitable a forum as he had hoped.

Of particular concern, a significant and increasing volume of claims are brought by former U.S. Navy sailors, who allegedly were exposed to asbestos during their naval service; in the past several years, thousands of these claims have been brought. A significant number of those plaintiffs served in the Navy's Pacific fleet, and spent time in the coastal waters, ports of call and shipyards of Washington. Should this State become a haven for asbestos claims, with an easy path to recovery

against solvent equipment manufacturers,⁶ such cases will invariably migrate to Washington's courts.

Indeed, Crane Co. has already observed increased activity in Washington courts in the aftermath of the *Braaten* and *Simonetta* decisions. If this Court does not take action to stem that influx, it will only increase crowding in Washington's courts, and thereby threaten Washington citizens' timely access to civil justice. This is yet another justification for this Court's attention to the contours of asbestos litigation.

2. The Court Should Accept Review to Safeguard Principles of Judicial Restraint, and to Prevent the Issuance of *De Facto* Advisory Opinions.

Additionally or alternatively, there remains a substantial public interest in ensuring that Washington's courts exercise restraint, and avoid the needless resolution of unnecessary issues. As this Court has explained, "[p]rinciples of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented." *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167, 1173 (2000) (internal quotations omitted).

⁶ Most asbestos manufacturers are no longer viable, forcing plaintiffs into an ever-more-elusive search for solvent target defendants. *See, e.g.*, A-11 n.43 (citing Katherine M. Anand, *Demanding Due Process: The Constitutionality of the Section 524 Channeling Injunction and Trust Mechanisms that Effectively Discharge Asbestos Claims in Chapter 11 Reorganizations*, 80 NOTRE DAME L. REV. 1187, 1190 (2005)).

Here, the Court of Appeals was presented with a ground that would enable it to avoid addressing unsettled principles of tort law: the collateral estoppel effect of the judgment rendered in Brazoria County, Texas. It is well-established in Washington, as the Court of Appeals observed correctly with respect to General Electric, that collateral estoppel:

applies if: (1) the issue raised is identical to the issue previously ruled upon; (2) the prior adjudication ended in a final judgment on the merits of the issue; (3) the party against whom collateral estoppel is asserted was a party, or was in privity with a party, in the prior adjudication; and (4) application of the doctrine does not work an injustice. Injustice in the collateral estoppel context does not refer to a substantive injustice, but to whether the party was afforded a full and fair hearing. . . .

A-5 (footnotes omitted).

As the Court of Appeals observed, an application of these rules was fatal to Mr. Braaten's claims against General Electric:

Collateral estoppel precludes relitigation of the duty to warn issue against GE. The legal issue is identical between Goulds and GE; it is irrelevant that the two manufacturers produced two different products, because both products were to be installed on Navy ships and used with asbestos. The Texas summary judgment was a final adjudication on the merits with the same preclusive effect as a full trial. It is immaterial that GE is a different defendant

A-5. This same rationale also supports judgment as a matter of law in favor of *any* party whose "products were to be installed on Navy ships and used with asbestos," *id.*, including Crane Co., as Crane Co. argued in the

Superior Court, and in the Court of Appeals through its motion for reconsideration. On remand, then, the Superior Court has no alternative – in light of the Court of Appeals’ decision – other than the entry of summary judgment in favor of Crane Co. and the other defendants.

In consequence, the Court of Appeals did not even need to reach the more difficult tort law questions whose evaluation comprised the bulk of the Court of Appeals’ decision. The Court of Appeals’ ruling thus is in effect only an advisory opinion, on an issue better left for later resolution.

Therefore, for this further reason, this Court should step in, and confine the Court of Appeals to a more measured exercise of its authority to redefine and broaden common law principles.

F. Conclusion

For the foregoing reasons, Crane Co. asks the Court to grant review of this matter, vacate the judgment of the Court of Appeals, and reinstate the Superior Court’s judgment in Crane Co.’s favor.

Respectfully submitted this 30th day of April, 2007.

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CERTIFICATE OF SERVICE

I, Leah M. Tarabochia, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.
2. I am employed with the law firm of Kirkparick & Lockhart Preston Gates & Ellis LLP, 925 Fourth Avenue, Suite 2900, Seattle, Washington.
3. On the date indicated below I caused to be served a true and correct of the following document:

CRANE CO.'S PETITION FOR REVIEW

on the following parties as indicated below:

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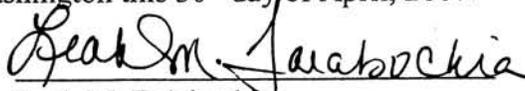
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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington this 30th day of April, 2007.


Leah M. Tarabochia

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

VERNON BRAATEN,)

Appellant,)

vs.)

SABERHAGEN HOLDINGS, a)
Washington Corporation, BARTELLS)
ASBESTOS SETTLEMENT TRUST, a)
Washington Corporation; BUFFALO)
PUMPS, INC. (sued individually and as)
successor-in-interest to BUFFALO)
FORGE COMPANY); CRANE CO;)
GENERAL ELECTRIC COMPANY;)
GEORGIA-PACIFIC CORPORATION)
(sued individually and as successor-in-)
interest to BESTWALL GYPSUM)
COMPANY); GOULDS PUMPS,)
INCORPORATED; GUARD-LINE, INC.;)
IMO INDUSTRIES, INC. (sued)
individually and as successor-in-interest)
to DE LAVAL-TURBINE, INC. and)
WARREN PUMPS, INC.); INGERSOLL-)
RAND COMPANY; JOHN CRANE,)
INC.; KAISER GYPSUM COMPANY,)
INC.; SEPCO CORPORATION;)
TUTHILL CORPORATION (sued)
individually and as successor-in-interest)
to CORPUS ENGINEERING CORP.);)
UNION CARBIDE CORPORATION; and)
YARWAY CORPORATION,)

Respondents.)

DIVISION ONE

No. 57011-1-1
(Linked with
No. 56614-8-1)

PUBLISHED OPINION

FILED: January 29, 2007

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

57011-1-1 (linked with 56614-8-1)/2

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

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

I.

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

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

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

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

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

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

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

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

II.

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

Collateral Estoppel

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

² Goulds is not a party to this appeal.

³ Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

⁴ CR 56(c).

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

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

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

⁵ Hanson v. Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

⁶ Hanson, 121 Wn.2d at 562.

⁷ Lee v. Ferryman, 88 Wn. App. 613, 625, 945 P.2d 1159 (1997).

⁸ Thompson v. Dep't of Licensing, 138 Wn.2d 783, 799-800, 982 P.2d 601 (1999).

⁹ DeYoung v. Cenex Ltd., 100 Wn. App. 885, 892, 1 P.3d 587 (2000).

¹⁰ State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997).

Strict Liability – Duty to Warn

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

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹³

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

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

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

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

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

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

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

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

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

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

¹⁶ See RESTATEMENT (SECOND) TORTS § 402A cmt. 1.

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

¹⁸ Novak, 22 Wn. App. at 412.

¹⁹ 424 F.3d 488 (6th Cir. 2005).

²⁰ Lindstrom, 424 F.3d at 491.

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

²² 895 A.2d 1143 (N.J. 2006).

²³ Olivo, 895 A.2d at 1146.

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

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

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

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

²⁶ 288 A.D.2d 148 (N.Y. App. 2001).

²⁷ Berkowitz, 288 A.D.2d at 149.

²⁸ 89 Wn.2d 149, 570 P.2d 438 (1977).

²⁹ Teagle, 89 Wn.2d at 150-51.

³⁰ Teagle, 89 Wn.2d at 151-52.

³¹ Teagle, 89 Wn.2d at 150-51.

³² Teagle, 89 Wn.2d at 153-54.

³³ Teagle, 89 Wn.2d at 151-52.

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

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

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

³⁴ Teagle, 89 Wn.2d at 151-52.

³⁵ Teagle, 89 Wn.2d at 156-57.

³⁶ Teagle, 89 Wn.2d at 155.

³⁷ 608 F.2d 571 (5th Cir. 1979).

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

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

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

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

³⁸ Stapleton, 608 F.2d at 572.

³⁹ Stapleton, 608 F.2d at 572.

⁴⁰ Stapleton, 608 F.2d at 572.

⁴¹ Stapleton, 608 F.2d at 572.

⁴² The Stapleton decision does not explain why a fuel switch allows gas leakage when open, but it appears from the jury's findings that the feature was not considered a defect.

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

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

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

"On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the

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

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

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

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

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

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

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

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

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

Negligence – Duty to Warn

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

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

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

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

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

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

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

⁵² RESTATEMENT (SECOND) TORTS § 402A cmt. 1. (1965).

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

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

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

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

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

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

III.

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

AFFIRMED IN PART AND REVERSED IN PART.

Baker, J.

WE CONCUR:

Cappelwick, J.

Columan, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

VERNON BRAATEN,)
)
 Appellant,)
)
 vs.)
)
 SABERHAGEN HOLDINGS, a)
 Washington Corporation, BARTELLS)
 ASBESTOS SETTLEMENT TRUST, a)
 Washington Corporation; BUFFALO)
 PUMPS, INC. (sued individually and as)
 successor-in-interest to BUFFALO)
 FORGE COMPANY; CRANE CO;)
 GENERAL ELECTRIC COMPANY;)
 GEORGIA-PACIFIC CORPORATION)
 (sued individually and as successor-in-)
 interest to BESTWALL GYPSUM)
 COMPANY; GOULDS PUMPS,)
 INCORPORATED; GUARD-LINE, INC.;)
 IMO INDUSTRIES, INC. (sued)
 individually and as successor-in-interest)
 to DE LAVAL TURBINE, INC. and)
 WARREN PUMPS, INC.); INGERSOLL-)
 RAND COMPANY; JOHN CRANE,)
 INC.; KAISER GYPSUM COMPANY,)
 INC.; SEPCO CORPORATION;)
 TUTHILL CORPORATION (sued)
 individually and as successor-in-interest)
 to CORPUS ENGINEERING CORP.);)
 UNION CARBIDE CORPORATION; and)
 YARWAY CORPORATION,)
)
 Respondents.)

DIVISION ONE

No. 57011-1-I
(Linked with
No. 56614-8-I)

**ORDER DENYING MOTION
FOR RECONSIDERATION**

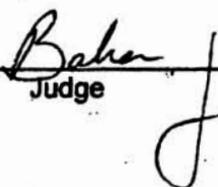
The respondent, Crane Co., having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

57011-1-I (linked with 56614-8-I)/2

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 30th day of March, 2007.

FOR THE COURT:



Judge

2007 MAR 30 PM 1:12

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOSEPH A. SIMONETTA and JANET)
E. SIMONETTA, a married couple,)

Appellants,)

v.)

VIAD CORPORATION f/k/a The Dial)
Corporation individually and as)
successor to Griscom Russell Company)

Respondents,)

and)

SABERHAGEN HOLDINGS, INC., as)
successor to TACOMA ASBESTOS)
COMPANY and THE BROWER)
COMPANY; BARTELLS ASBESTOS)
SETTLEMENT TRUST; AQUA-CHEM,)
INC., individually and as successor to)
Cleaver-Brooks Company; FOSTER)
WHEELER ENERGY CORPORATION;)
GENERAL ELECTRIC COMPANY;)
GENERAL REFRACTORIES)
COMPANY; IMO INDUSTRIES, INC.,)
individually and as successor-in-interest)
to De Laval Turbine, Inc.; INGERSOLL-)
RAND COMPANY; VIACOM INC.,)
individually and as successor by merger)
to CBS Corporation, f/k/a Westinghouse)
Electric Corporation; WARREN PUMPS,)
INC.; DIAL CORPORATION,)
Individually and as successor to)

No. 56614-8-1
(Linked with
No. 57011-1-1)

DIVISION ONE

PUBLISHED OPINION

FILED: January 29, 2007

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

Defendants.)

APPELWICK, C.J. – Joseph Simonetta (Simonetta) brought a product liability law suit against Viad Corp. (Viad) sounding in both negligence and strict liability based on exposure to asbestos causing subsequent lung cancer. The exposure was to insulation manufactured by another corporation, but necessarily used to encapsulate a Viad¹ evaporator installed aboard a Navy ship. The trial court granted summary judgment for Viad on the basis that the corporation owed no duty to warn Simonetta of the potential hazards of asbestos, because the exposure did not stem from the evaporator itself. We hold that Viad did have a duty to warn once it knew that the asbestos necessarily used with its product posed a health risk to those servicing its equipment. We reverse and remand for further proceedings.

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

FACTS

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

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

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

Simonetta brought both negligence and strict liability claims against Viad for failure to warn of the danger posed by asbestos insulation. The asbestos exposure at issue occurred in 1958-59, and therefore is governed by pre-Washington Product Liability Act (WPLA) product liability law. Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997). The

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issue at the heart of the summary judgment is whether Viad had a duty under either theory to warn of dangers resulting from exposure to asbestos from another manufacturer's insulation used with the Griscom Russell evaporator. The trial court granted summary judgment for defendant on both the negligence and strict liability claims based on the lack of any duty owed to the plaintiff. The trial court judge determined that no duty existed because "[a]lthough the product manufacturer knew or reasonably should have known that its product would be insulated with asbestos-containing material, the product itself did not produce the injury."

ANALYSIS

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

1. Negligence

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

Vlad contends no duty was owed to Simonetta because the Griscom Russell evaporator itself was not hazardous. However, "[a] manufacturer can also be found negligent for failure to give adequate warning of the hazards

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

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

The undisputed evidence presented by Simonetta demonstrates Griscom Russell's (Viad's) awareness of the necessary requirements for the use of the evaporator, both operations and maintenance. Marine engineering expert Charles Cushing testified that "somebody who designs a piece of equipment for

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

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

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

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

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

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that the evaporators necessarily would be used with asbestos insulation for proper and safe use. The precedent relied upon is distinguishable.

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

If the asbestos insulation was placed inside the evaporators or outside the evaporators by *Griscom Russell*, the law has long held that a duty to warn would exist as to one who would necessarily have to disturb the asbestos to service the

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

2. Strict Liability

Under common law, strict liability applies when

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. Restat 2d of Torts, § 402A (1965).

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

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

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

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

Viad also relies on another asbestos case where the plaintiff sued a manufacturer whose product was insulated with third-party applied asbestos

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

A California case with closely related facts provides a strong counterargument to Vlad's "component manufacturer" defense. A firefighter was injured when the "deck gun" or water cannon broke loose from the firetruck's mounting assembly which had been manufactured by another party. Wright v. Stang Manufacturing Co., 54 Cal. App. 4th 1218, 1222 (1997). The "gun," itself, did not fall but separated from the mounting because the riser was not designed to have the strength to withstand the water pressure of the deck gun. Id. at 1224-26. Like Vlad, the defendant provided a finished product it knew would be

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

The "raw material supplier defense" does not insulate Viad. Kealoha v. E.I. DuPont DeNemours & Co., 82 F.3d 894, 895 (9th Cir. 1996) (Teflon was incorporated into TMJ implants which later failed). Unlike Kealoha, the evaporator was not a "raw material" used in a defective end product. Id. at 899. The evaporator was an end product.

Viad cites to decisions from other jurisdictions to suggest that the trend of decisions favors a finding that manufacturer's in Griscom Russell's position did

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

The cases cited by Simonetta are equally unhelpful in the determination of this issue of first impression. Lunsford, 125 Wn. App. at 793 (duty to warn applies to child exposed to asbestos dust from father's clothing); Parkins v. Van Doren Sales Inc., 45 Wn. App. 19, 724 P.2d 389 (1986) (defendant had duty to warn of dangers created when components were assembled), Berkowitz v. A.C.

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& S., Inc., 288 A.D.2d 148 (2001) (denial of summary judgment on similar case but with little analysis); Chicano v. General Electric Co., 2004 U.S. Dist. LEXIS 20330 (2004) (denial of summary judgment on factually similar situation but unpublished and based on Pennsylvania's component manufacturer liability test); Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006) (factually similar but defendant is landowner not product manufacturer).

Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977), provides insight into Washington's previous analysis of third party product liability. Teagle involved a strict liability suit for failure to warn of potential hazards resulting from the use of a metal and glass flowrater to measure ammonia. The flowrater required the use of third party manufactured O-rings to seal the open ends of the glass tube component. The manufacturer knew that Viton O-rings would harden and disintegrate when used with ammonia. Despite this knowledge, Fischer & Porter did not warn purchasers of the potential danger in using Viton O-rings but did recommend the use of Buna O-rings. Teagle, 89 Wn.2d at 153-54. The Supreme Court of Washington found this solution inadequate. "It [Fisher & Porter] did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, by itself, would render the flowrator unsafe." Id. at 156. The Court further stated that appellant was not absolved of its duty to warn customers who measure ammonia that Viton O-rings should not be used with the flowrater. Id.

The factual differences between Teagle and the present case render the precedent merely persuasive because the harm from the flowrater stemmed from

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

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

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

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

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

Appelwick, J.

WE CONCUR:

Baker, J.

Columan, J.

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

