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No. 57011-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Plaintiff-Appellant

v.

BUFFALO PUMPS, INC., et al.,

Defendants-Respondents

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

RESPONDENT BUFFALO PUMPS, INC.'S ANSWERING BRIEF

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CR 30(b)(6) 4, 9, 10

MISCELLANEOUS

United States Navy Department, Bureau of Navigation, Instructions for Use in Preparation for the Rating of Machinists Mate 2c (1930) 9, 13

I.

SUMMARY INTRODUCTION

This appeal involves the assertion by Plaintiff and Respondent Vernon Braaten ("Braaten") of a novel theory of liability, which would hold a pump manufacturer responsible for failing to warn about asbestos-containing products that the pump manufacturer neither manufactured, sold, or distributed, and which others applied to or installed within the pump after it had left the control of the pump manufacturer.

Braaten alleges injuries stemming from his inhalation of asbestos fibers from asbestos-containing products used at his workplace. Defendant and Respondent Buffalo Pumps, Inc. ("Buffalo Pumps") manufactures pumps. Certain of these pumps are alleged to have been installed aboard Navy vessels on which Braaten worked at the Puget Sound Naval Shipyard. The pumps contain internal packing and gaskets. Braaten could furnish no proof that he worked with or around any internal packing or gasket material that was originally delivered with a pump made by Buffalo Pumps. Thus, Braaten sought to hold Buffalo Pumps liable for asbestos-containing insulation that was sometimes applied to its pumps after they were delivered and installed aboard the vessel. This insulation was manufactured by others, sold by others, and applied by others after the pumps had left the control of Buffalo Pumps.

Buffalo Pumps moved for summary judgment on the basis that there was no proof that Braaten was exposed to any asbestos-containing material, including gaskets or packing, that was incorporated within and delivered with its pumps. In addition, as to any asbestos-containing insulation that was applied to the exterior of its pumps after their delivery to the customer, Buffalo Pumps argued it did not owe Braaten a duty to warn about the dangers of such products, which it neither manufactured, nor sold, nor distributed, nor applied to its equipment. The trial court agreed with Buffalo Pumps, and granted summary judgment on both grounds.

As he did with the trial court below, Braaten belabors the concept of foreseeability, and thereby misses the true issue of this appeal. Before foreseeability becomes pertinent to the analysis, Braaten must establish that Buffalo Pumps owed him a legal duty. Whether Buffalo Pumps owed such a duty is for the court, not the jury, to decide.

While the factual record differs with respect to each of the respondents to this appeal, the legal analysis is the same. For this reason, Buffalo Pumps sets forth its counterstatement of the issues and its counterstatement of the case specific to Defendant-Respondent Buffalo Pumps, and it joins and incorporates by reference the legal analysis and policy considerations as set forth in Crane Co.'s answering brief regarding both negligence and strict liability. There is no evidence that Braaten was

exposed to any asbestos-containing packing or gasket attributable to Buffalo Pumps, and there is no legal basis or policy justification to impose upon Buffalo Pumps a duty to warn of the dangers posed by products it did not manufacture, sell, or distribute. Accordingly, the ruling of the trial court granting Buffalo Pumps' motion for summary judgment should be affirmed.

II.

COUNTERSTATEMENT OF THE ISSUES

Braaten's assignment of error presents two issues pertaining to Buffalo Pumps.

1. Failure to Warn. Whether the trial court erred in dismissing Appellant's failure to warn claim against Buffalo Pumps when, under Washington law, there is no duty to warn of dangers associated with asbestos-containing products manufactured, sold, or distributed by others, and that may have been installed on or around pumps manufactured by Buffalo Pumps. (Assignment of Error No. 2.)

2. Evidence of Exposure to Original Parts. Whether the trial court erred in dismissing Appellant's claims against Buffalo Pumps when there is no evidence that Braaten was exposed to original, asbestos-containing gaskets or original packing incorporated within the pumps that were delivered by Buffalo Pumps. (Assignment of Error No. 2.)

III.

COUNTERSTATEMENT OF THE CASE

A. The Parties.

1. The Respondent Buffalo Pumps. As the name denotes, Buffalo Pumps manufactures pumps. CP 4690-91 (Buffalo Pumps' Reply in Support of Motion for Summary Judgment at 7-8); Appellant's Brief at 9. The pumps are built according to the customer's specifications and are delivered to the customer without external insulation. CP 4732, 4735 (Excerpts of Deposition of Buffalo Pumps' CR 30(b)(6) designee Terrence W. Kenny at 87, ll. 7-9 and 93, ll. 22-25); CP 783 (Deposition of Malcolm MacKinnon, 22, ll. 11-15). If those specifications included the requirement for a gasket or packing ". . . it was included with the pump." CP 4733 (Kenny Dep. at 83, ll. 15-17). Buffalo Pumps "never manufactured any component parts that contained asbestos fibers." CP 4729 (id. at 82, ll. 6-8). Nor did Buffalo Pumps manufacture, supply, or sell replacement gaskets. CP 4730 (id. at 83, ll. 12-15).

2. Plaintiff Vernon Braaten. Vernon Braaten worked as a pipefitter at the Puget Sound Naval Shipyard ("PSNS") from November 1967 to June 3, 2002. Braaten alleges he was exposed to asbestos-containing products in connection with his work as a pipefitter, and that he contracted mesothelioma as a consequence of this and other asbestos exposure. See CP 333 (Plaintiff's First Amended Complaint at 2, § III);

CP 517 & 527-28 (Plaintiff's Responses to Style Interrogatory No. 11 & Appendix A).

B. Braaten's Concedes That There Is No Evidence He Worked With or Around Original, Asbestos-Containing Packing or Gaskets on Equipment Manufactured by Buffalo Pumps.

Braaten seeks to impose liability on Buffalo Pumps based on his alleged work with pumps made by Buffalo Pumps. See generally CP 359-60 (Plaintiff's Original Petition and Jury Demand at 6-7, Count Four, in Braaten v. Buffalo Pumps, Dallas County No. 0308127); CP 503-04 (Plaintiff's First Amended Complaint at 2-3, § III). At his depositions, Braaten testified he repacked, removed and replaced pumps made by Buffalo Pumps and other manufacturers aboard Navy vessels during his work as a pipefitter at PSNS. See CP 537-39 (09/05/03 Braaten Dep. at 234, l. 16-243, l. 15).

In clear terms, however, Braaten testified he was unable to establish he worked with any original, asbestos-containing gaskets or packing on any Buffalo Pumps equipment. Braaten acknowledges he never installed a brand new pump on a ship:

> Q. . . . Did you ever install a new pump on a ship, a brand new pump?
>
> A. No. Most of them were repaired pumps.

CP 539 (09/05/03 Braaten Dep. at 246, l. 24-247, l. 1). In fact, Braaten testified he never even saw a new pump being installed on a vessel:

Q. Okay. Did you ever see a new pump that was being installed on a vessel?

A. No, I didn't.

CP 537 (09/05/03 Braaten Dep. at 237, ll. 21-23). As to Buffalo Pumps' pumps, and indeed all pumps with which he worked at PSNS, Braaten testified that his work involved only changing the packing on a pump or removing the entire pump from the ship:

Q. You never performed any work on the pumps yourselves, did you, other than removing them and the packing material that we talked about earlier?

A. Just the packing and removing them.

CP 539 (09/05/03 Braaten Dep. at 248, ll. 5-8). In addition, Braaten recalled changing gaskets to flanges exterior to the pump. The flange gaskets that Braaten sometimes changed are distinguished from gaskets internal to the pump, which, according to plaintiff's testimony, he never removed:

Q. Now you talked about gaskets, and I believe you talked about exterior gaskets. What did you mean by that?

A. Well . . .

Q. Maybe I can help you. By exterior gaskets, did you mean the gaskets on the flanges?

A. Right. The flange gaskets. Not between the pump and the -- or the pump and the motor, the body itself.

Q. Okay. Did you ever remove that gasket between the pump and the motor itself on a Buffalo Pumps' product?

A. No, I did not.

CP 538-39 (09/05/03 Braaten Dep. at 245, ll. 21-25, 246, ll. 1-8).[1] As to the gaskets and packing that Braaten removed or replaced from pumps, he acknowledged it was impossible to know how many times the materials had been replaced prior to the occasion when he did so:

> Q. I take it when you were working on this packing material, these weren't new pumps. Is that correct?
>
> A. No. These were all used pumps.
>
> Q. Do you know how many times before you got to work on the packing that you testified to, that someone else had already removed the packing and reinstalled other packing?
>
> A. No idea.
>
> Q. There's no way to tell, either, is there?
>
> A. There's no way of telling.
>
> Q. Same with the gaskets that you testified to earlier. You would have worked on used pumps, pumps that had already been in service, as opposed to new pumps, when you talked about changing the gaskets, correct?
>
> A. That's correct.
>
> Q. Is there any way that you can tell how many times a gasket on the pump had been changed before you got there to do the work on it?
>
> A. No.
>
> Q. But you didn't work on the new pumps, correct?

---

[1]Plaintiff has provided no evidence that Buffalo Pumps furnished flange gaskets with its pumps. Nor did Plaintiff dispute the assertion made by counsel for Buffalo Pumps, at oral argument, that no such evidence existed. VRP (Sept. 2, 2005) (Transcript of Oral Argument) 6.

A. No, I did not.

CP 537 (09/05/03 Braaten Dep. at 235, l. 25, 236, 11. 1-23).

C. The Trial Court Grants Buffalo Pumps' Motion for Summary Judgment in Its Entirety.

1. Motion for Summary Judgment. On July 27, 2005, Buffalo Pumps moved for summary judgment based on lack of evidence regarding exposure to original, asbestos-containing gaskets or packing. CP 487-90, (Buffalo Pumps' Motion for Summary Judgment at 7-10, § B). Relying on Plaintiff's deposition testimony, Buffalo Pumps established that, although Plaintiff may have worked on pumps made by Buffalo Pumps, he offered no basis to conclude that he worked with any gaskets or packing that was original to a pump manufactured by Buffalo Pumps. CP 489-90 (id. at 9-10). In his opposition to Buffalo Pumps' motion for summary judgment, Braaten offered no proof that he worked with or was exposed to gasket or packing material that was original to a Buffalo Pumps' pump.[2]

[2]At oral argument, counsel for Buffalo Pumps, again asserted its contention that there existed no evidence that Braaten was exposed to asbestos-containing gasket or packing material original to a pump manufactured by Buffalo Pumps. Plaintiff's counsel did not dispute this assertion at oral argument. Moreover, although Braaten nominally raises an assignment of error based on the trial court's finding that no proof of exposure to original gaskets or packing had been furnished, he does not address this issue in his Brief. Thus, Appellant has waived this issue on appeal. Indeed, if there was any doubt as to his waiver, Braaten asserts at footnote 7 of his Brief, that "the orders appealed from in this case were based solely on the issue of duty to warn, that is the only issue raised here on appeal." See Brief of Appellant at 20.

As to Braaten's duty to warn theory of recovery, Buffalo Pumps argued that it owed no duty to Braaten to warn him of the dangers of asbestos-containing products that were manufactured, sold, or distributed by other companies. CP 481-98 (Buffalo Pumps' Motion for Summary Judgment). Braaten opposed this portion of Buffalo Pumps' motion by focusing on foreseeability and discussing evidence purporting to show that Buffalo Pumps was aware of the dangers associated with asbestos. Plaintiff relied on the following in opposition to motion for summary judgment: (1) the deposition testimony of Braaten, CP 582-671; (2) the deposition testimony of former PSNS coworker Cyrus Jones, CP 673-755; (3) the deposition of Terrence William Kenny, Buffalo Pumps' CR 30(b)(6) designee, CP 757-72; (4) purported Buffalo Pumps' plans, CP 774-79; (5) the depositions of retired Rear Admiral Malcolm MacKinnon, III, CP 781-87, and Jerry Lauderdale, CP 794-99; (6) the Machinist's Mate, Navy Training Manual, CP 791-92; (7) various and sundry scientific and medical articles regarding the growing body of knowledge pertaining to asbestos-related health hazards, CP 801-1049; and (8) a military specifications manual, CP 1054-1175.

a. Deposition of Vernon Braaten. As shown above, Braaten admitted that he did not work on new pumps, he never saw a new pump being installed, he never worked with interior pump gaskets, and

that although he removed packing, he did not know if it was original packing or how many times the packing had previously been replaced.

b. Deposition of Cyrus Jones. The testimony of Cyrus Jones does nothing more than place pumps made by Buffalo Pumps at "the Puget Sound Naval Shipyard . . . during the same time period that Mr. Braaten worked there." CP 1247 (Plaintiff's Response in Opposition to Buffalo Pumps' Motion for Summary Judgment at 2). His testimony does not establish that Braaten worked with new pumps or was exposed to gaskets or packing original to a pump manufactured by Buffalo Pumps.

c. Deposition of Terrence William Kenny. Plaintiff submitted the deposition testimony of Buffalo Pumps' CR 30(b)(6) designee Terrence William Kenny to establish that Buffalo Pumps manufactured, produced, designed, specified, and/or placed asbestos-containing products and machinery into the stream of commerce. CP 1251 (Plaintiff's Response in Opposition to Buffalo Pumps' Motion for Summary Judgment at 5-6). However, Kenny testified that Buffalo Pumps "never manufactured any component parts that contained asbestos fibers." CP 765 (07/05/02 Terrence W. Kenny Dep. at 82, ll. 5-8). He also testified that Buffalo Pumps did not manufacture, supply, or sell replacement gaskets. CP 766 (Kenny Dep. at 83, ll. 12-14). When Buffalo Pumps sold equipment, it did so "in accordance with the specifications that their orders included." CP 768 (Kenny Dep. at 87,

ll. 7-9). "If those specifications included the requirement for a gasket and packing . . . it was included with the pump." CP 769 (Kenny Dep. at 88, ll. 14-17). Kenny's testimony does not address the application of exterior insulation to the pumps manufactured by Buffalo Pumps. See CP 757-72.

d. Purported Buffalo Pumps' Plans. Braaten submitted what he characterized as a copy of Buffalo Pumps' plans from the National Archive and Records Administration. CP 774-79 (Plans). In response to Buffalo Pumps' summary judgment motion, Plaintiff argued that these documents "indicate that pumps manufactured by Buffalo Pumps, to which Mr. Braaten was exposed, were to be insulated with asbestos cloth and coated with asbestos cement." CP 1251 (Plaintiff's Response in Opposition to Buffalo Pumps' Motion for Summary Judgment at 6). Similarly, in his Brief, Plaintiff contends that Buffalo Pumps required that such material be used to insulate it pumps. A simple review of the documents, shows that Plaintiff mischaracterizes the contents of these documents.

On their face, the referenced plans reveal that they are from Bath Iron Works, a manufacturer of naval vessels. CP 774; see also CP 4695 (Buffalo Pump's Reply in Support of Motion for Summary Judgment at 12 (discussing Bath Iron Works' homepage at http://www.gdbiw.com)). The box in the lower right-hand corner specifically identifies Bath Iron Works. CP 774. The box also states that the specifications thereon were approved

by the U.S. Navy. Id. The only reference to Buffalo Pumps is in a small box entitled "References" and that box only refers to a certain pump. CP 776. (Plans at 2.) Plaintiff cannot dispute that the Navy developed and furnished the specifications for the pumps supplied by Buffalo Pumps and these plans do not prove otherwise. Furthermore, nowhere in these plans does it state that Buffalo Pumps required that its pumps be insulated with asbestos-containing products. CP 774-79 (Plans).

e. Deposition of Rear Admiral MacKinnon and Jerry Lauderdale. In his opposition to Buffalo Pumps' motion for summary judgment, Plaintiff also relied on the deposition testimony of Rear Admiral MacKinnon and Jerry Lauderdale regarding pumps and thermal insulation. See CP 1257-61 (Plaintiff's Response in Opposition to Buffalo Pumps' Motion for Summary Judgment at 12-16). The deposition of Rear Admiral MacKinnon merely affirms that pumps arrived without insulation; that it was the Navy that specified the use of insulation to meet its needs; and that it was the Navy that determined whether a pump ultimately received exterior insulation. CP 783 (MacKinnon Dep. at 21, ll. 11-20). The evidence before the Court shows that the customer, depending on the intended use of the pump, may or may not affix insulation to the pump. See id.

The testimony of these witnesses, explains why insulation was applied to the exterior certain pumps, such as those manufactured by

Buffalo Pumps. Their testimony does not support the contention that Buffalo Pumps required that asbestos-containing insulation (or any other type of insulation) be applied to the exterior of its pumps after they were sold to the Navy. See CP 781-87 and CP 794-99.

f. Machinist's Mate, Navy Training Manual. This manual simply says that steam pipes are "lagged and clothed" and covered with "asbestos and canvas, and painted" to reduce "heat loss." CP 792 (Machinists Mate 2c, Navy Training Courses at 121). There is nothing in the manual that sets forth any requirement from Buffalo Pumps that its pumps be insulated, or even discusses pumps. See id.

g. Scientific and Medical Literature. Plaintiff presented the trial court with 374 pages of various articles regarding the growing body of scientific knowledge of asbestos-related diseases. See CP 801-1175. This represents Plaintiff's apparent attempt to support his argument that Buffalo Pumps foresaw the dangers associated with asbestos-containing products manufactured by others.

h. Certain Military Specifications. Plaintiff refers to certain military specifications to argue that Buffalo Pumps was "instructed" to furnish "warnings on its machinery." See CP 1263 (Plaintiff's Response at 18 (citing Military Specifications Manual)). The document, which was created in 1978, is but a compilation of Navy rules and guidelines for the creation of manuals to be used by the Navy, which

manuals covered, among other things, hulls, mechanics, electronics, and systems, etc. See CP 1138 (Military Specification at 1). The manual sets forth how warnings are to be presented, not what warnings were to be issued or the content thereof. CP 1141 (Id., Section 3.3.3.1 Warnings, Cautions, and Notes).[3]

2. Hearing and Trial Court's Ruling. Oral argument on Buffalo Pumps' motion for summary judgment was held on September 2, 2005. After oral argument, the trial court entered an order granting Buffalo Pumps' motion for summary judgment, in its entirety. CP 5562-64 (September 6, 2005 Order Granting Defendant Buffalo Pumps' Motion for Summary Judgment). In its order, the trial court concluded there is no evidence that Plaintiff was exposed to any asbestos-containing product manufactured, sold, or delivered by Buffalo Pumps, and that Buffalo Pumps owed no duty to Plaintiff to warn of the dangers of products it did not manufacture or otherwise place into the stream of

[3]Braaten also discusses the testimony of Everett Cooper regarding marine steam pumps. See Brief of Appellant at 10. In footnote 6 of his Brief, Braaten states that "Everett Cooper's declaration was submitted to the trial court as part of the record in this case . . . and the trial court considered it[,]" citing CP 7272. See Brief of Appellant at 10. In fact, the Cooper declaration was not furnished to the trial court in opposition to Buffalo Pumps' motion for summary judgment, and was not listed amongst the evidence considered by the trial court in ruling on Buffalo Pumps' motion. See CP 5562-63 (Sept. 6, 2005 order, listing evidence considered).

commerce. Id. at 2. Based on the foregoing conclusions, the trial court dismissed all of plaintiff's claims against Buffalo Pumps. Id.

IV.

STANDARD OF REVIEW

Buffalo Pumps incorporates by reference the Standard of Review as set forth in Defendant-Respondent Crane Co.'s answering brief.

V.

ARGUMENT

A. Incorporation of Legal Analysis Set Forth in Crane Co.'s Brief.

Buffalo Pumps joins in the argument and legal analysis as set forth by Defendant-Respondent Crane Co. and incorporates by reference the Argument section of Crane Co.'s answering brief.

B. Discussion of Relevant Factual Matters Pertaining Directly to Buffalo Pumps.

As shown in Crane Co.'s Brief, the substantial weight of authority recognizes that there is no duty to warn of another manufacturer's products under common law negligence or strict products liability. Braaten's case authorities do not persuasively support his attempt to conflate the distinct issues of duty and foreseeability. Braaten's factual submissions, moreover, also cannot transform his fatally flawed claim into one that he should be allowed to take to a jury.

It is undisputed that Buffalo Pumps did not manufacture the packing and gaskets incorporated into certain pumps, as specified by the

Navy. See CP 765-66 (Kenny Dep. at 82, ll. 5-8, 83, ll. 12-14); CP 768 (Kenny Dep. at 87:7-9); CP 783 (MacKinnon Deposition at 21, ll. 11-20). It is also undisputed that the pumps arrived bare naked. CP 783 (MacKinnon Dep. at 21, ll. 11-20).

As to exterior insulation, none of the materials submitted with Plaintiff's opposition to Buffalo Pumps' motion for summary judgment established that Buffalo Pumps manufactured, sold, or delivered, or applied such insulation. Such insulation was manufactured by, sold by, and applied by others. At most, Braaten's evidence would support a finding that Buffalo Pumps knew, constructively or actually, that the end user might use asbestos-containing insulation or products with its pumps. As set forth in Crane Co.'s Answering Brief, such knowledge does not, in and of itself, support the imposition of a duty upon Buffalo Pumps to warn of the dangers associated with products it did not manufacture, sell, or install.

VI.

CONCLUSION

The trial court properly determined that there is no evidence of exposure to original gaskets or packing attributable to Buffalo Pumps. The trial court also properly determined that there is no duty to warn of the

dangers of products manufactured, sold, or delivered by another entity. The order dismissing Plaintiff's claims with prejudice should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of February, 2006.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria, 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-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On February 22, 2006, I caused to be served a true and correct copy of the following document:

RESPONDENT BUFFALO PUMP'S ANSWERING BRIEF

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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 22nd day of February, 2006.

Kathryn Savaria

Kathryn Savaria