

No. 80251-3

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

**SUPREME COURT OF THE STATE OF WASHINGTON**

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**VERNON BRAATEN,**

**Plaintiff /Appellant,**

**v.**

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

**Defendants/Respondents.**

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**SUPPLEMENTAL BRIEF OF PETITIONER  
IMO INDUSTRIES, INC.**

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## I. INTRODUCTION AND SUMMARY

Comes now Petitioner IMO Industries, Inc., (“IMO”) for itself and as successor to DeLaval Turbine Company (“DeLaval”), and respectfully submits this Supplemental Brief pursuant to RAP 13.7(d).

Plaintiff Vernon Braaten claims DeLaval is responsible for his asbestos exposure. He does not allege DeLaval supplied this asbestos, but that DeLaval had a duty to warn about the dangers of asbestos that was in thermal insulation manufactured and supplied by others and applied to DeLaval pumps after their installation aboard U. S. Navy vessels. He also claims that DeLaval had a duty to warn him about asbestos in replacement packing manufactured and supplied by others and fitted into DeLaval pumps by other parties when the pumps were being overhauled.

In a companion case, the Court of Appeals acknowledged that a manufacturer’s duty to warn regarding its products “has not traditionally applied to products manufactured by another.” *Simonetta v. Viad Corp*, 137 Wash. App. 15, 25, 151 P.3d 1019 (2007). It nonetheless found in that case “a set of facts that compels another logical extension of the common law,” and reversed summary judgment that had been granted defendant Viad Corp. Here, the Court of Appeals similarly found that DeLaval and other equipment manufacturers had a duty to warn of the hazards of asbestos thermal insulation and replacement gaskets and

packing that were manufactured and supplied by other entities. The Court of Appeals determined that when these asbestos-containing components were added to the equipment manufacturers' products by other parties, their equipment "by design" contained asbestos which was released during normal "use." 137 Wash. App. at 45.

However, these decisions conflict with various case precedents from Washington and elsewhere. More fundamental, the decision below is wrong. It cannot be reconciled with the general and basic proposition that a product manufacturer is not under a duty to warn of dangers posed by products it did not manufacture. It likewise cannot be reconciled with the principles underlying that proposition: manufacturers should be liable for hazards of the products they introduce into the stream of commerce because they exercise design and manufacturing control over such products, can include product liability insurance in the cost of production, and can seek indemnity from the suppliers of materials and components that created such hazards. Those rationales fail when the hazard was not the defendants' products but asbestos materials later applied by others.

The Court of Appeals fell into error in several respects:

- Nothing in the record indicates Braaten was exposed to a DeLaval product that used or contained asbestos-containing components.

The Court of Appeals was wrong to conclude that DeLaval had a

duty to warn Braaten about asbestos regardless of whether he was actually exposed to asbestos in connection with a DeLaval product.

- The Court of Appeals adopted an over-expansive theory of what constitutes “use” of a product and whether injury arises from such “use,” and created a duty to warn of dangers presented not by a product such as the bare metal pumps manufactured by DeLaval, but by other products such as, here, after-added external thermal insulation and replacement packing.
- The Court of Appeals purported to reject foreseeability of harm as the basis of a duty to warn, maintaining that a duty instead arose because the equipment by design contained a hazardous substance. However, it nonetheless reasoned that DeLaval had a duty to warn about asbestos thermal insulation manufactured by others because of the foreseeability of the U.S. Navy’s use of asbestos on equipment obtained from DeLaval. The Court of Appeals erroneously assumed that the defendant equipment manufacturers designed their products to use asbestos insulation, when in fact it was the U.S. Navy who chose to add such asbestos.

The Court of Appeals’ unique approach in this case, and its “extension” of products liability law in conflict with prior case law, should be reversed and the summary judgment granted by the trial court affirmed.

## II. ADOPTION OF ARGUMENTS IN OTHER BRIEFS

Pursuant to RAP 10.1(g), IMO adopts by reference the arguments set forth in the separate Supplemental Briefs filed by Petitioners Buffalo Pumps, Inc., Crane Co., General Electric Co., and Yarway Corporation.

## III. LEGAL ARGUMENT

### A. **Plaintiff's Breach of Duty Theory Is Based on the Unsupported Claim that Plaintiff Was in Proximity to Equipment that DeLaval Specified or Designed to Contain Asbestos**

The Court of Appeals reversed the several summary judgments dismissing Braaten's claims, finding a record "sufficient to survive summary judgment" and that a trier of fact "could conclude" that the defendant manufacturers knew or should have known that asbestos exposure was a hazard they were obligated to provide warnings for. 137 Wash. App. at 49. It did so after first stating that "[a]ll 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." *Id.* at 38. Yet none of the circumstances cited by the Court of Appeals in support of this proposition demonstrated a connection with any equipment Braaten might have encountered.<sup>1</sup> Moreover, the Court of Appeals did not even mention

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<sup>1</sup> The Court of Appeals observed only that Buffalo Pumps sold pumps with asbestos

IMO or DeLaval in this context. This is not surprising, as the record is devoid of any such connection. Typical of the evidence submitted by Braaten to support his claims are a memo stating that DeLaval had "used" asbestos items, without further specificity, CP 7190-7191, 7218, and a list of spare parts sent by DeLaval to the Naval Supply Depot in Mechanicsburg, Pennsylvania in August of 1947, that lists some packing rings, with no reference to asbestos. CP 7069.

Braaten testified that while he worked around pumps during his career at Puget Sound Naval Shipyard ("PSNS"), CP 5498, he did not work with any new DeLaval pumps, but only removed and replaced pumps that had been in service for some time. CP 5499. Nor did he perform any work on the pumps themselves. CP 5501. Braaten thus never was exposed to the internal components of any DeLaval pump.

As for external thermal insulation or flange gaskets, nothing indicates DeLaval supplied them for any equipment relevant to Braaten's claims. The record instead establishes just the opposite, that in no instance did DeLaval provide any asbestos-containing thermal insulation or any flange gaskets with or for use on any relevant equipment. CP 5768. Thus,

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packing and gaskets for use in Navy ships from 1943 to 1989, that various Crane valves included asbestos packing and gaskets and that a Crane catalog described asbestos sheet packing as "superior," and that Yarway acknowledged that asbestos was the only insulation product available to withstand temperature on Navy ships. *Id.*

while the Court of Appeals broadly concluded that the defendants' equipment "by design" contained asbestos, there is no evidence that DeLaval, recommended, or otherwise told the U. S. Navy (or anyone else) that insulation – much less *asbestos* insulation – should be applied to any of the equipment in question.

To the extent the evidence supposedly supports the proposition that the application of asbestos was by *DeLaval's* design, Braaten's submissions for the record prove too much: that asbestos was used ubiquitously aboard steam powered vessels – piping, valves, turbines, pumps of all kinds, boilers, and other components all would be insulated with asbestos. CP 7329-7330. For the ships Braaten worked on at PSNS, this indisputably was at the direction or specification of the Navy.

That DeLaval may have sent kits of spare parts to the Navy Depot in Mechanicsburg, Pennsylvania in August of 1947, or that it may have generically indicated in 1972 that it had used asbestos materials in some fashion at some time does not establish a duty on the part of DeLaval to warn Braaten of the presence of asbestos used by the Navy at PSNS.

**B. The Court of Appeals Wrongly Reasoned  
that Braaten Was Exposed to Asbestos from  
"Use" of a DeLaval Pump**

The Court of Appeals ostensibly did not agree with Braaten's argument that foreseeability of harm could be the basis of a duty to warn,

but nonetheless concluded that such a duty to warn could be imposed upon IMO and the other Petitioners because Braaten “was a user of their valves and pumps.”<sup>2</sup> 137 Wash. App. at 48. Yet the fact remains that the bare metal valves and pumps supplied by the Petitioners were not the source of Braaten’s injury. The hazard here was the danger of breathing asbestos dust emanating from exterior thermal insulation, or from replacement packing. DeLaval pumps did not create or contribute to that danger, which was solely a characteristic of the insulation and packing themselves – regardless of the type (or manufacturer) of the equipment they were used with. Nothing about the pumps supplied by DeLaval contributed to or increased the danger of these asbestos materials.

By the mere expedient of characterizing Braaten as “using” a DeLaval pump when external thermal insulation was being removed from it, the Court of Appeals was able to find a duty to warn because it was known or foreseeable that such “use” of the pump would expose shipyard workers to asbestos hazards – hazards created solely by the product of another manufacturer later applied to the pump by another party. While the Court of Appeals considered this “an issue of first impression in

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<sup>2</sup> The companion case likewise rejected foreseeability as the source of a duty to warn. “Foreseeability does not create a duty but sets limits once a duty is established.” *Simonetta v. Viad Corp*, 137 Wash. App. at 23, fn 2. However, as explained in Section C, *infra*, foreseeability remains problematic in the Court of Appeals’ analysis.

Washington” and said other cases were not dispositive, a plethora of courts have rejected this very proposition. “Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between *the injury, the product causing the injury, and the manufacturer of that product.*” *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605, 612 (1987) (emphasis added); *see also, e.g., Powell v. Standard Brands Paint Co.*, 166 Cal. App.3d 357, 364, 212 Cal. Rptr. 395 (1985) (“it is clear that a manufacturer’s duty is restricted to warnings based on the *characteristics of the manufacturer’s own product*”); *Blackwell v. Phelps Dodge Corp.*, 157 Cal. App.3d 372, 377, 203 Cal. Rptr. 706 (1984) (no duty to warn “where it was not any unreasonably dangerous condition or feature of a defendant’s product *which caused the injury*”); *Garman v. Magic Chef, Inc.*, 117 Cal. App.3d 634, 639, 173 Cal. Rptr. 20 (1981) (“respondent was under no duty to warn *of the possible defect in the product of another* and is not liable for failure to do so”) (all emphasis added).

The several cases involving tire manufacturers are analogous, and their reasoning is universally adverse to Plaintiff’s position and contrary to the result of the Court of Appeals. For instance, in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297, 591 N.E. 2d 222, 225-226 (1992), plaintiff’s decedent was killed when, while inflating a tire

manufactured by the defendant, the multi-piece rim on which the tire was being mounted flew apart. The plaintiff argued that:

the subject Goodyear tire was made for installation on a multi-piece rim, that Goodyear was aware of the inherent dangers of using its tires in conjunction with such rims, and, thus, that Goodyear had a duty to warn of the dangers resulting from such an intended use of its tires.

591 N.E. 2d at 225. Surely the tire in *Rastelli* was being “used” as much or more at the time of the accident than a DeLaval pump was being “used” when shipyard workers removed external thermal insulation from it. Nonetheless, the New York Court of Appeals, while acknowledging that “[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products” nonetheless reversed an intermediate appellate court and dismissed all claims against Goodyear:

[W]e decline to hold that one manufacturer has a duty to warn about another manufacturer’s product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer.

*Id.* at 225-226.

Examples of other cases with similar facts, and similar holdings, include *Acoba v. General Tire, Inc.*, 986 P.2d 288, 304-305 (Haw. 1999); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 467, 472 (11<sup>th</sup> Cir.

1993) (where plaintiff alleged the tire at issue was designed *exclusively* for use with an inherently dangerous type of rim); and *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996).<sup>3</sup>

Cases from other context yield a similar result. In *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510, 514-515 (Mich. App. 1995), a technician required to clean dialysis machines with formaldehyde sued the their manufacturers for injuries from formaldehyde exposure, alleging they “had a duty to warn of the dangers associated with formaldehyde use because [they] recommended formaldehyde to clean their machines [or] anticipated its use.” This case, too, cannot be differentiated by reasoning the plaintiff was “using” the dialysis machines to a lesser degree than Braaten was “using” a DeLaval pump. The proper inquiry is not into what products the plaintiff can be said to have been “using,” but what products the plaintiff was using *that caused injury*, and whether they were manufactured by the defendant in question. *Brown* thus concluded: “The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else.” *Id.*

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<sup>3</sup> In *Molino v. B. F. Goodrich Co.*, 716 A.2d 1235, 1239 (N.J. App. 1992), summary judgment dismissing a plaintiff’s claims against a tire manufacturer was reversed on the logic that the danger of explosion of a tire and rim assembly “evolves from the ‘entire pressured assembly and not in the individual parts,’” readily distinguishing its rationale from the present case, where the danger of asbestos indisputably stems from such “individual parts” as asbestos thermal insulation or packing.

Although most were cited to it, the Court of Appeals did not differentiate or otherwise attempt to deal with these authorities, other than to either ignore them, or in *Simonetta* to conclusorily label them “neither dispositive nor persuasive.” 137 Wash. App at 29. Instead, it heavily relied upon a federal case, *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979), which was said to address whether “there is an independent duty to warn when a manufacturer’s product design utilizes a hazardous substance that can be released during normal use.” 137 Wash. App at 45. In *Stapleton*, a motorcycle tipped over while its ignition switch was still on. Gasoline leaked from the motorcycle’s fuel tank, causing a fire. A jury found no product defect in the motorcycle but did find that the manufacturer had negligently failed to warn of the danger of leaving the ignition switch on. Our Court of Appeals found this significant and interpreted *Stapleton* as holding that a duty to warn existed for dangers outside the motorcycle itself, because it had been found to be without defect. 137 Wash. App. at 44-45. However, this misstates the issue presented in, and the holding of, *Stapleton*. There, the parties did not contend and the Fifth Circuit did not analyze whether the defendant had a duty to warn about the dangers of gasoline. To the contrary, the opinion characterized the plaintiff’s claim as alleging a “breach of duty to warn about the *dangerous nature of the fuel switch* on the motorcycle.” 608

F.2d at 572 (emphasis added). The issue on appeal was whether the jury's finding of a breach of such a duty was inconsistent with its separate finding that the motorcycle was not defective. The case does not present the parallel the Court of Appeals hoped to find, of a duty to warn about the dangers of a hazardous substance used in conjunction with but separate from a product, *i.e.*, gasoline in *Stapleton* and asbestos here. The failure of the attempted analogy to *Stapleton* only highlights the lack of case law support for the result reached below, and that it contradicts the other cases cited herein and in the briefs submitted to the Court of Appeals.

The muddling of any distinction between products a plaintiff might in some sense be "using" and those *that injured him* runs afoul of fundamental underpinnings of our tort law, including the doctrine of strict liability for defective products. "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.*" *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wash. App 784, 792, 106 P.3d 808 (2005), *quoting* Restatement (Second) of Torts § 402A, comment c (1965).

The Court of Appeals would eliminate the requirement that legal duty be imposed upon – and thus limited to – the manufacturers of the

product *that injured someone*, in favor of the more amorphous concept found in its decision below: Imposing liability on the manufacturer of any product a plaintiff necessarily was “using” at the time of his injury, even if the injury itself was caused by a different product made by a different manufacturer. This dangerously ignores the requisite legal relationship – product manufacturer, product user, and injury by that product – required by product liability and tort law. *Newton v. Kaiser Foundation Hospitals*, 184 Cal. App.3d 386, 228 Cal. Rptr. 890, 893 (1986) emphasized the need for such a legal relationship in a slightly different context:

If not thus concretely linked to a legal relationship the quest for foreseeability is endless because foreseeability, like light, travels indefinitely in a vacuum. Instead, by linking foreseeability with that relationship, the degree to which an existing duty is to be extended could be rationally analyzed.

The Court of Appeals found public policy for its holding in a quote from *Lunsford, supra*, which in closing noted that “the 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.” 125 Wash. App. at 793. “Someone,” however, cannot mean “anyone.” While *Lunsford* expanded the concept of “use,” this was in the context of family members of workers exposed to asbestos, which family members were injured by (and for that reason considered to be “users” of) asbestos

products. *Lunsford* reinforces, rather than detracts from, the connection between “use” of a product and injury caused by that product.

To impose a duty upon DeLaval, Braaten should be required to show more than that he was in some sense “using” a DeLaval pump when he exposed to asbestos. There must be a legal relationship between DeLaval and that asbestos – that DeLaval manufactured, sold, supplied, or otherwise is legally responsible for it – that is entirely lacking in the test provided by the Court of Appeals.

Absent such a relation, the rationale of products liability, and the mechanisms that enable it to function – the ability to control design and production of potentially injury-causing features of a product and best be in a position to warn about them, and to spread costs by purchasing insurance (making the cost thereof a product production cost) and seeking indemnity from suppliers of defective and injury-causing components – are either very compromised or disappear altogether.

**C. While Outwardly Rejecting Foreseeability as the Source of a Duty to Warn, the Court of Appeals in Effect Based Its Decision on That Factor**

Before the Court of Appeals, Braaten contended that foreseeability alone could justify imposition of a duty. Appellant’s Opening Brief at 21.

As noted above, the Court of Appeals seemingly disagreed, and purported to base its holding not on foreseeability of injury, but because it

considered Braaten to have been a user of defendants' valves and pumps. 137 Wash. App. at 48. The Court of Appeals nonetheless slipped back into relying upon foreseeability, not as a limit on the scope of such a duty, but to justify creating one in the first place: "*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." *Id.* at 49 (emphasis added). The Court of Appeals earlier had observed that some of the defendants' equipment could operate without insulation or with non-asbestos insulation, but that "it was *highly likely* that a valve, pump, or turbine sold to the navy would contain or be used in conjunction with asbestos." *Id.* at 38 (emphasis added). Here again, while outwardly eschewing foreseeability as a sufficient basis for imposing a duty to warn, the Court of Appeals nonetheless decided that foreseeability justified imposing such a legal duty.

This is an insufficient, improper, and dangerous basis upon which to impose a tort duty. "[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing v. La Chusa*, 48 Cal.3d 644, 771 P.2d 814, 830, 257 Cal. Rptr. 865 (1989).

The existence of a duty is a question of law for the court, *Hutchins*

*v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991), and depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). A court exercises a gatekeeping role when it considers legal duty, placing, in the words of the California Court of Appeals in *Thang, supra*, a “socially and judicially acceptable limit” on tort claims. Here, the Court of Appeals concluded it was logical and sensible to place “some” duty on the defendant equipment manufacturers in this matter, and that the record supported a duty “sufficient to survive summary judgment.” 137 Wash. App. at 49. However, a court fails in its role as gatekeeper role if it leaves the gate neither open nor closed, but simply ajar. The Court of Appeals’ implicit reliance upon foreseeability as an appropriate factor for deciding to impose a tort duty (rather than limit the scope of one) detracts from the other considerations inherent in this determination, and from the purpose of requiring that legal duty be established in the first place before further countenancing a claim.

In drawing an analogy to *Stapleton v. Kawasaki, supra*, the Court of Appeals emphasized that “the product at issue was dangerous . . . because . . . *by design* it contained a hazardous substance.” 137 Wash. App. at 45 (emphasis in original). As discussed in Section A, above, there is no basis for claiming that external thermal insulation on any DeLaval

pump encountered by Braaten was originally supplied by DeLaval, or that it in any fashion was designed or specified by DeLaval for use on those pumps.<sup>4</sup> The record establishes, at most, that the Navy considered the use of asbestos aboard its vessels to be a matter of “military necessity,” and that an equipment provider such as DeLaval therefore might have reason to know that such asbestos insulation likely would be used with products it supplied. The knowledge that the Navy would use such a product does create a duty to warn on the part of DeLaval, however.

DeLaval made bare metal equipment. It did not manufacture, sell, distribute or otherwise supply the asbestos insulation products to the Navy which Braaten claims are the source of his injury. Nor did DeLaval recommend, specify, or require that asbestos-containing insulation be applied to its products. As noted by the Court of Appeals, the defendants’ equipment could function without asbestos insulation. 137 Wash. App. at 38. The Navy chose to apply asbestos insulation, which it procured from other suppliers, to such equipment.

In these circumstances, DeLaval is a component part provider that is not liable for failing to warn of hazards associated with other products

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<sup>4</sup> Braaten might have worked around a pump DeLaval originally sold to the Navy with asbestos-containing packing. However, there is no evidence of that, nor of his exposure to asbestos replacement packing used in a DeLaval pump. Moreover, packing, too, would have contained asbestos only if specified by a customer such as the U.S. Navy.

used in conjunction with their components. *See* Restatement (Third) Torts § 5. “[C]omponent sellers are not liable when the component itself is not defective.” *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wash. App. 12, 19, 84 P.3d 895 (2004). Otherwise, a component seller would be required “to review the decisions of the business entity that is already charged with responsibility for the integrated product.” *Id.*

While the Court of Appeals emphasized that DeLaval and the other Respondents “were aware that asbestos insulation was regularly used in and around their machines when they were installed on a Navy ship,” 137 Wash. App. at 38, awareness does not give rise to a duty to warn:

The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer’s line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems.

*In re Temporomandibular Joint (TMJ) Implants Product Liability Litigation*, 97 F.3d 1050, 1057 (8th Cir. 1996) (quoting *Kealoha v. E.I. Du Pont de Nemours & Co.*, 844 F. Supp. 590, 594 (D. Haw. 1994), *aff’d* 82 F.3d 894 (9th Cir. 1996)). Similarly:

Speculative anticipation of how manufactured components, not in and of themselves dangerous or defective, may become potentially dangerous, depending on their integration into a unit designed and assembled by another,

does not give rise to a duty to warn . . . even if the supplier has some knowledge of the design and use of the final product”)

63A Am.Jur.2d *Products Liability* §1132.

The decision of the Court of Appeals should be reversed in light of the manner in which it erroneously ascribed to DeLaval responsibility for having required or “designed” the use of asbestos insulation with its pumps or other equipment, when it instead merely provided that equipment as components to be installed in U.S. Navy vessels that also utilized asbestos thermal insulation.

**D. The Trial Court May Be Affirmed on  
Any Basis, Including Collateral Estoppel**

Before the trial court, another defendant, General Electric (“GE”), sought summary judgment on the alternative ground of collateral estoppel.<sup>5</sup> The Court of Appeals determined that GE’s motion should have been granted, and for this reason affirmed the trial court’s dismissal of Braaten’s claims against GE. Braaten has not sought cross-petitioned for review of that ruling, which is now the law of the case.

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<sup>5</sup> Braaten brought similar claims against another equipment manufacturer, Goulds Pumps, in Brazoria County, Texas. Those claims were dismissed on the merits, the Texas court ruling that Goulds owed no duty to warn of the dangers of asbestos while working on the pumps Goulds manufactured and sold to the Navy. 137 Wash. App. at 38. IMO was a defendant in the Texas lawsuit. CP 5377-5392; CP 5360. Braaten did not appeal the adverse Texas ruling, but instead non-suited his remaining claims, CP 5394-95, and filed this Washington action against, among others, IMO and GE. CP 5575-5578.

A trial court summary judgment decision can be affirmed on any basis supported by the record. See RAP 2.5(a); *Redding v. Virginia Mason Med. Ctr.*, 75 Wash. App. 424, 426, 878 P.2d 483 (1994); *Int'l Bhd. of Elec. Workers v. TRIG Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000). *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (where, notably, the alternative ground for affirming was first raised in the Petition for Review). This Court may affirm the dismissal of IMO and the other defendant equipment manufacturers on the collateral estoppel grounds by which the Court of Appeals affirmed GE's dismissal.

#### IV. CONCLUSION

For the reasons set forth herein, Petitioner IMO Industries, Inc. respectfully requests that this Court reverse the decision of the Court of Appeals and instead affirm the trial court's dismissal of all Plaintiff's claims against it.

DATED this 8<sup>th</sup> day of February, 2008.

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By



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No. 80251-3

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

**SUPREME COURT OF THE STATE OF WASHINGTON**

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**VERNON BRAATEN,**

**Plaintiff /Appellant,**

**v.**

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

**Defendants/Respondents.**

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**CERTIFICATE OF SERVICE**

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I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 8th day of February, 2008, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondent IMO Industries, Inc.," to be delivered in the manner indicated below to the following counsel of record:

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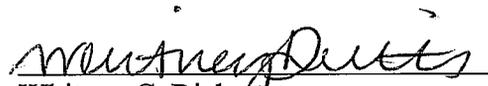
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