

No. 80251-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

VERNON BRAATEN,

Plaintiff/Appellant,

v.

BUFFALO PUMPS, INC., et al.,

Defendants/Respondents.

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SUPPLEMENTAL BRIEF OF PETITIONER
YARWAY CORPORATION

Attorneys for Petitioner Yarway Corporation:

MORGAN, LEWIS & BOCKIUS LLP
Mortimer H. Hartwell
(admitted *pro hac vice*)
Brett M. Schuman
(admitted *pro hac vice*)
One Market
Spear Street Tower
San Francisco, CA 94105
Tel: (415) 442-1000
Fax: (415) 442-1001

STAFFORD FREY COOPER
Katherine M. Steele. WSBA #11927
601 Union Street, Suite 3100
Seattle, WA 98101-1374
Tel. (206) 623-9900
Fax (206) 624-6885

Ronald C. Gardner
Gardner Bond Trabolsi PLLC
2200 Sixth Avenue, Suite 600
Seattle, WA 98121
Tel: (206) 256-6309
Fax: (206) 256-6318
www.gardnerbond.com

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I. INTRODUCTION

Petitioner Yarway Corporation ("Yarway") manufactured and sold valves and other components to the Navy for use aboard naval warships. Yarway's products, along with other suppliers' components, were combined and incorporated by the Navy into the vessels' steam-powered propulsion systems. After installing Yarway's components on board the ships, the Navy allegedly coated the entire steam-propulsion system in asbestos insulation. The Navy also periodically replaced the packing and gaskets inside Yarway's products with asbestos-containing packing and gaskets it procured from other suppliers. "The use of asbestos in and on Navy valves, pumps, and turbines was not by chance, but by design . . . 'based on military necessity.'" Slip Op. at 3; CP 5244-5266. Yarway did not specify the use of any of this asbestos in conjunction with its products, and it had no control over the Navy's decision to use asbestos in conjunction with its products.

Plaintiff Vernon Braaten ("Mr. Braaten") claims he suffered personal injuries from exposure to asbestos. He sued Yarway (among others) claiming Yarway owed him a duty to warn regarding the hazards of working with asbestos applied in and around Yarway's products.

It is undisputed that Mr. Braaten was not exposed to any asbestos-containing product made or sold by Yarway. Under established common law principles, Mr. Braaten's claims against Yarway fail. In reversing the trial court's summary judgment for Yarway, the Court of Appeals effected

an unprecedented, unprincipled and unwarranted expansion of the duty to warn that should be repudiated by this Court for the reasons described in the pages that follow.

II. STATEMENT OF THE CASE

Mr. Braaten was a pipe fitter working at the Puget Sound Naval Shipyard from 1967 to 2000. His job duties included the maintenance of Yarway's valves. Regular maintenance of the valves required replacement of the interior asbestos gaskets and packing. To do this work, pipe fitters like Mr. Braaten also had to remove and later replace the exterior asbestos-containing insulation the Navy allegedly used to coat the entire steam-propulsion system. It is undisputed that Yarway did not make or sell the external asbestos-containing insulation to the Navy; Yarway was never in the insulation business. It is also undisputed that Yarway did not supply either the packing and gaskets removed by Mr. Braaten or the replacement packing and gaskets installed in Yarway's valves by Mr. Braaten. CP 5606-5608.¹

On January 7, 1958 – almost 10 years before Braaten began working as a pipe fitter at Puget Sound – the Navy issued a safety handbook warning pipe fitters specifically regarding the hazards of working with asbestos: “Asbestos. Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard.”

¹ In opposition to Yarway's summary judgment motion, Braaten conceded “it is impossible to determine whether or not the asbestos gaskets and packing that Mr. Braaten installed and removed from Yarway valves and sight glasses was present at the time the valves left Yarway's factory.” CP 5828.

CP 281 [Betts Decl., ¶19]. Braaten wore no breathing protection until 1980. CP 6026.

In 2003, Braaten was diagnosed with mesothelioma. He sued Yarway, among others, contending that Yarway should be held liable for failing to warn him regarding the hazards of working with asbestos.

The trial court granted summary judgment for Yarway and other defendants. The Court of Appeals reversed, holding that Yarway had both a strict liability and negligence-based duty to warn naval pipe fitters such as Mr. Braaten of the hazards of working with asbestos. The Court reached this result primarily by characterizing the metal valves themselves as the injury-causing products – even though Mr. Braaten’s mesothelioma was caused solely by his exposure to asbestos. The Court reasoned that the valves were the injury-producing products because regular maintenance of the valves required pipe fitters like Mr. Braaten to come into contact with a hazardous substance, *i.e.*, asbestos. Slip Op., at 11.

The Court of Appeals’ judgment should be reversed. As the Court readily acknowledged, it extended the duty to warn beyond existing Washington law. The Court recited the several public policies undergirding the duty to warn, but its holding is driven by only one: the creation of a source of compensation for injured plaintiffs like Mr. Braaten under circumstances where “the manufacturers of the hazardous substance [*i.e.*, the asbestos] are, for the most part, no longer amenable to judgment.” Slip Op., 10-11. However, this rationale proves too much and would justify imposition of liability on virtually any solvent defendant with any

conceivable connection to the injury-causing hazardous product. And “we do not premise liability on manufacturers solely because of their ability to pay tort judgments.” *George v. Parke-Davis*, 107 Wn.2d 584, 590, 733 P.2d 507 (1987).

Other important principles and cases, discussed below, should lead this Court to reject the duty to warn imposed by the Court of Appeals.

III. ARGUMENT

Whether or not Yarway owed any duty to warn pipe fitters like Mr. Braaten regarding the hazards of working with asbestos-containing products is a question of law dependent on mixed considerations of logic, common sense, justice, policy and precedent. *E.g.*, *Snyder v. Medical Service Corp. of E. Wash*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).²

The Court of Appeals did not analyze separately (1) whether Yarway had a duty to warn Mr. Braaten regarding the *external* asbestos-containing insulation the Navy applied to valves and other components it purchased from Yarway; and (2) whether Yarway had a duty to warn Mr. Braaten regarding *internal* asbestos-containing replacement gaskets and packing material procured by the Navy and placed in Yarway’s products. Although Yarway believes it owed no duty to warn regarding either external or internal asbestos-containing products that it did not manufacture or sell to the Navy, it nonetheless believes that the external

² The Washington Products Liability Act (“WPLA”) does not apply. *See* Slip Op., at 6 (“Braaten was exposed to asbestos before its adoption, so WPLA does not apply”).

and internal asbestos-containing products raise potentially different issues and, therefore, should be analyzed separately.

The Court of Appeals also failed to distinguish between different types of product liability cases, as evidenced in part by its heavy reliance on *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979). *Stapleton* involved a consumer product – a motorcycle – and the issue was whether the manufacturer adequately warned the consumer regarding the use of the motorcycle’s fuel switch. *Id.* at 572-73. Product liability actions are highly contextual. This case involves industrial components for military use on naval warships: valves, pumps, and other components to be assembled, coated in asbestos insulation by the Navy, and serviced by pipe fitters in some cases many years after the equipment was sold to the Navy. This context is important, as we demonstrate below.

A. Yarway Had No Duty To Warn Regarding The Hazards Of Working With External Asbestos-Containing Insulation Procured By The Navy From Other Suppliers And Applied To Yarway’s Products.

Yarway “has never manufactured or sold any insulation, asbestos-containing or otherwise, for use with any of its products.” CP 6364. Yarway did not recommend, specify or require asbestos-containing insulation be applied to its products. As the Court of Appeals recognized, the Navy chose to apply asbestos-containing insulation to Yarway’s products, procured that insulation from other suppliers, and applied that insulation without any involvement by Yarway. Slip Op., 3. On these

undisputed facts, Yarway had no duty to warn anyone regarding the hazards of working with exterior asbestos-containing insulation.

First, it is by now well-established that component part sellers are not liable for failing to warn of hazards associated with other products used in conjunction with their components. *See* Restatement (Third) Torts § 5. It is beyond dispute that the valves and other products supplied by Yarway to the Navy are components within the meaning of this rule. *See* Restatement (Third) Torts § 5, cmt. a.

Indeed, the Court of Appeals has stated that “component 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). If the law were 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.*³

The Court of Appeals emphasized that Yarway and other component part suppliers “were aware that asbestos insulation was regularly used in and around their machines when they were installed on a Navy ship.” Slip Op., 3. Even so, awareness does not give rise to a duty to warn:

³ Mr. Braaten may argue that Yarway’s components were themselves “defective,” and therefore outside the scope of the component parts rule, because they contained internal asbestos-containing packing and gaskets. However, the packing and gaskets are irrelevant for purposes of assessing whether Yarway and other component parts suppliers had a duty to warn regarding external asbestos-containing insulation applied by the Navy to its products. Conceptually, Mr. Braaten is asserting two distinct claims: one based on the internal packing and gaskets, and another based on the external insulation. Even if the component parts rule does not apply to the former claim it governs the latter one.

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, 901 (9th Cir. 1996)).⁴

Second, the component parts rule is but a specific application of the general principle that “[t]he manufacturer’s duty to warn is restricted to warnings based on the characteristics of the manufacturer’s own products . . . [t]he manufacturer is not required to warn of dangers posed by use of another manufacturer’s product in the same vicinity as its product was used.” 63A Am.Jur.2d Products Liability, § 1127. Washington law subscribes to this well-established rule. *See Lockwood v. AC&S, Inc.*, 109 Wash.2d 235, 245, 744 P.2d 605, 612 (Wash. 1987) (“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”). And there is a wealth

⁴ *See also Artiglio v. General Electric Co.*, 61 Cal.App.4th 830, 838 (1998) (“The TMJ cases are significant because they have made it clear that knowledge of how a raw material will be used does not, by itself, create a duty to investigate the risks posed by the final product’): *In re Silicone Gel Breast Implants Products Liability Litigation*, 996 F.Supp. 1110, 1117 (N.D.Ala. 1997) (“[t]he issue is not whether GE was aware of the use to be put by implant manufacturers of its materials – clearly it knew this – . . . such awareness by itself is irrelevant to the imposition of liability”).

of out-of-state case law applying this rule under circumstances analogous to those of the present case. In a widely-cited case, New York's highest court held that a tire manufacturer had no duty to warn regarding the foreseeable hazards of using its non-defective tires with another manufacturer's unreasonably dangerous rim assembly:

We 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. Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale.

Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 591 N.E.2d 222 (1992) (emphasis added).⁵

The rule stated in these cases applies here. Yarway and other component suppliers sold products to the Navy that were, at most, compatible for use with the asbestos-containing exterior insulation procured and allegedly applied to the products by the Navy. Yarway had no involvement or control over the Navy's decision to use asbestos-containing insulation. Yarway did not sell the injury-causing insulation to the Navy. To the extent external insulation needed to be disturbed by pipe fitters like Mr. Braaten to maintain Yarway's products, the duty to warn

⁵ See also, e.g., *Brown v. Drake-Willock International, Ltd.*, 209 Mich.App. 136, 530 N.W.2d 510 (Mich.Ct.App. 1995) (affirming summary judgment for manufacturer of dialysis machine on claim that manufacturer failed to warn regarding hazards of using formaldehyde to clean the machine: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else"); 63A Am.Jur.2d Products Liability, §1127 (collecting cases).

regarding the hazards of that work should be placed on those entities with some control over the manufacture, sale or application of the injury-causing insulation.

The Court of Appeals suggested this rule did not apply because, according to the Court, “the pumps and valves *as designed* contained asbestos during normal use.” Slip Op., 11. But Yarway’s components “as designed” did *not* require exterior asbestos-containing insulation. Slip Op., at 3. Yarway’s products may have been compatible for use with the type of insulation chosen by the Navy,⁶ but Yarway did not supply or specify that insulation to the Navy. With respect to exterior insulation, at least, Yarway’s valves were merely passive recipients of the insulation the Navy allegedly applied to them, much like a mannequin that could be dressed with any clothes (or none at all), a canvass that could be painted with any type of paint (or none at all), or a salad that could be dressed with any dressing (or none at all).

Teagle v. Fischer & Porter Co., 89 Wash.2d 149, 570 P.2d 438 (1977), did not prescribe a different rule for Washington, and the Court of Appeals’ heavy reliance on the case was misplaced. In *Teagle*, the Court held that the manufacturer of the exploding flowrater had a duty to warn regarding known hazards of using its *own* product with another manufacturer’s replacement component: a Viton O-ring. *Id.* at 156.

⁶ At the time the Navy was specifying the use of asbestos insulation, other types of insulation products were available, *e.g.* cork, fiberglass, etc. The Navy chose asbestos-containing insulation for its own reasons and without any input from Yarway.

Moreover, *Teagle* is in an altogether different category of products liability cases governed by the rule that “where the combination of one sound product with another sound product creates a dangerous condition . . . the manufacturer of each product has a duty to warn.” 63A Am.Jur. Products Liability § 1127.

Third, extension of the duty to warn under these circumstances does not further the overall objectives of products liability law. The Court of Appeals fixated on one salutary public policy objective – compensating an injured plaintiff – but, as noted above, that rationale standing alone would support imposition of liability on almost any defendant. *See George*, 107 Wn.2d at 590.⁷ There are other considerations that, when properly weighed, defeat imposition of a duty to warn on Yarway.

Imposing a duty to warn on Yarway under these circumstances would obliterate the component parts rule and the public policies furthered by it. By definition, a component part manufacturer always knows that its products are going to be used in conjunction with other products.

⁷ The Court of Appeals reasoned that imposition of a duty to warn on companies like Yarway was required in part because “[i]n modern asbestos litigation, the manufacturers of the hazardous substances are, for the most part, no longer amenable to judgment.” Slip Op., 10-11. But just because some of the companies whose products actually harmed pipe fitters like Mr. Braaten may “no longer amenable to judgment” does not mean they are not a source of potentially substantial compensation. Many of the companies the Court of Appeals was advertent to have established trusts under Bankruptcy Code §524(g) for purposes of compensating victims of their harmful products. *See* Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of The Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Vol. 6, No. 7 Mealey’s Asbestos Bankr. Rep. 20 at 5, 7 (LexisNexis Feb. 2007); Charles Bates and Charles Mullin, *Having Your Tort And Eating It Too?* Vol. 6, No. 4 Mealey’s Asbestos Bankr. Rep. 21 at 1, 3, 4 (LexisNexis Nov. 2006).

“Imposing liability would require the component seller to scrutinize another’s product which the component seller had 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) Torts § 5 cmt. a. As applied here, the duty would have required Yarway to develop expertise regarding the proper handling of any of a number of potentially harmful products that could be used in conjunction with its valves, either by the Navy or other customers. As the Restatement comment suggests, from a public policy perspective it is inefficient and improper to require this sort of redundant effort from multiple parties. *i.e.*, the supplier of the hazardous product, and the supplier(s) of other product(s) that may be used in combination with the hazardous product. This case involves liability for conduct that occurred many years ago. But prospectively, imposition of a duty to warn under these circumstances will increase the cost of products subject to the rule, thereby making them less competitive with products that are not subject to the rule.

The progression down the proverbial slippery slope is inevitable. Wallboard manufacturers and plywood wood suppliers will be required to warn regarding the hazards of paint, wallpaper and other products that will be applied to the walls and ceilings made out of their products. Other illustrations of the problem populate the several petitions for review that were filed in this case.

Washington law has never before imposed a duty to warn on those outside the chain of distribution of the injury causing product. The rationale for the chain of distribution requirement is fully applicable here. When it supplied valves and other components to the Navy, Yarway plainly did not assume any "special responsibility" toward any member of the consuming public regarding exterior asbestos insulation; Yarway is not failing to "stand behind" its products by disclaiming responsibility for *other* products the Navy chose to use in conjunction with its valves and sight glasses. *See Slip Op.*, 11. Yarway was not in the insulation business; it did not profit at all from the Navy's purchase of asbestos-containing insulation from other manufacturers. In the parlance of strict liability theory, the rule adopted by the Court of Appeals will force one manufacturer (Yarway) to internalize the externalities associated with another manufacturer's products, thereby distorting the true societal costs of *both* manufacturers' products. *See Doe v. Miles Labs., Inc.*, 675 F. Supp. 1466, 1471 (D.Md. 1987).

Further, imposing on Yarway a duty to warn pipe fitters like Mr. Braaten regarding the hazards of working with asbestos-containing insulation would lead to a proliferation of warnings that other courts have argued would be self-defeating. *See, e.g., Finn v. G.D. Searle & Co.*, 35 Cal.3d 691, 701 (1984) ("If we overuse warnings, we invite mass consumer disregard and ultimate contempt for the warning process"). It is well-established that the asbestos manufacturers and suppliers had a duty to warn regarding the hazards of working with their products. *E.g.*,

Lockwood, 109 Wash.2d at 251-253. The Navy also had a duty to provide a safe working environment for pipe fitters like Mr. Braaten. See *Bartlett v. Hantover*, 9 Wash.App. 614, 620-21. 513 P.2d 844, 849 (1973), *rev'd on other grounds*, 84 Wash.2d 426, 526 P.2d 1217 (1974). Here, the record establishes that the Navy knew of and warned pipe fitters about the hazards of working with asbestos: "Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard." CP 281.⁸ Requiring additional, potentially inconsistent but in any event redundant warnings from other companies like Yarway would not advance the goals of the law.

In sum, the Court should hold that Yarway had no duty to warn pipe fitters such as Mr. Braaten regarding the hazards of working with exterior asbestos-containing insulation that the Navy procured and applied to Yarway's products without any involvement by Yarway.

⁸ That Mr. Braaten may claim he did not receive the Navy's warning is legally irrelevant. See, e.g., *Bowersfield v. Suzuki Motor Corp.*, 111 F.Supp.2d 612, 622 (E.D.Pa. 2000). Since the Navy actually warned pipe fitters regarding the hazards of working with asbestos-containing products, this case actually seeks to impose an even greater duty on suppliers such as Yarway to provide redundant warnings and essentially to police the naval work space. Nothing in products liability law supports that purported duty.

B. Under The Circumstances Presented By This Record, Yarway Had No Duty To Warn Regarding Hazards Allegedly Associated With Replacing Internal Packing And Gaskets In Yarway's Products.

Yarway acknowledges that it had a duty to warn regarding hazards of its *own* products, including any asbestos-containing packing or gaskets that Yarway may have integrated into those products.⁹

However, Mr. Braaten conceded below that he could not identify having replaced any original packing or gaskets. CP 5606; 5828. Mr. Braaten did not identify the replacement materials as having been supplied by Yarway, either. CP 5606-5607. Under traditional principles, therefore, Yarway was entitled to summary judgment with respect to Mr. Braaten's claims based on exposure to asbestos in packing and gaskets. *See Lockwood*, 109 Wash.2d at 245 ("In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury"). Several courts outside of Washington have rejected claims based on exposure to replacement parts virtually identical to the one asserted here by Mr. Braaten.¹⁰

⁹ Yarway did not actually supply valves to the Navy with asbestos-containing gaskets, and there is no record evidence disputing that point.

¹⁰ *See, e.g., Baughman v. General Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986) (holding that GM had no duty to warn regarding the hazards of a replacement wheel assembly that was not on the truck at the time of sale: "While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any of a number of manufacturers"); *Lindstrom v. AC Products Liability Trust*, 424 F.3d 488 (6th Cir. 2005); *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019 (S.D.Ill. 1989) ("Although McDonnell Douglas does not dispute that it originally installed asbestos rub strips, the plaintiff fails to show that the rub strips supplied by McDonnell Douglas in fact caused the injury . . ."); *Ford Motor Co. v. Wood*, 119 Md.App.1,

The Court of Appeals accepted Mr. Braaten's novel argument that the injury-causing products were the metal valves themselves, thereby side-stepping the traditional requirement that an asbestos personal injury plaintiff identify the manufacturer of the asbestos-containing product that injured him. The argument is a sophism, as demonstrated by a consideration of the policies underlying strict products liability. *See, e.g., Zamora v. Mobil Corp.*, 104 Wash.2d 199, 206, 704 P.2d 584, 589 (1985) (considering policies underlying strict products liability for purposes of deciding whether to impose a duty to warn).

Yarway's duty to warn regarding the *original* packing and gaskets is based on the rule requiring a manufacturer to warn regarding unreasonably dangerous components incorporated into the manufacturer's finished product. In addition to the fact that the finished product manufacturer is in the "chain of distribution" and profits from the sale of the unreasonably dangerous component, the manufacturer of the finished product is deemed to be "in the best position to evaluate the safety of the use of the component part in its final product and can exert power over component manufacturers to insure the safety of parts." 63 Am.Jur.2d § 140; *see also Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) ("... the manufacturer is best situated to afford such protection").

703 A.2d 1315 (Md.Ct.Spec.App. 1998), *abrogated in part on other grounds in John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

But the same cannot be said for the replacements for those components where, as here, the replacements are manufactured and sold by *different* manufacturers. CP 5607 (identifying manufacturers of replacement packing). Yarway was not in the chain of distribution of the replacement packing and gaskets: it did not profit from other manufacturers' sales of the replacement components; and it did not "stand behind" any other manufacturers' replacement products.

Strict liability is imposed on anyone in the "chain of distribution" of a product in part because after the injured plaintiff is compensated by someone in the chain "[t]he sellers are then required to argue among themselves any questions as to their respective liability." *Zamora*, 104 Wash.2d at 206, 704 P.2d at 589. Those in the chain of distribution can expressly or impliedly allocate responsibility among themselves. However, when strict liability for a product is imposed on someone outside the chain of distribution, there is no comparable mechanism for re-allocating the responsibility to others in the chain of distribution.

In sum, virtually all of the usual justifications for imposing strict liability are absent when strict liability is imposed on a product manufacturer for replacement components manufactured by others.

If the Court is at all inclined to depart from the traditional rule of nonliability, it could consider imposing a duty to warn on original equipment manufacturers that specify or require certain replacements made by other manufacturers for use with their products. Manufacturers who specify or require replacements for use with their product are situated

similarly to those manufacturers who incorporate others' components into their finished products. By specifying replacements, the original equipment manufacturer is in a position to evaluate the replacements and exert at least some measure of control over the manufacturer of the replacements. The original equipment manufacturer may fairly be said to be "standing behind" the replacement components it is requiring for its products and in some sense adopting those replacements as its own.

However, this case lies at the *opposite* end of the spectrum. The Navy specified the replacement packing and gaskets for Yarway's products. CP 5612-13 ("It had to be specific packing called out by the Navy spec number"). Yarway had no say regarding the replacement packing and gaskets specified for use with Yarway's components.

Mr. Braaten may argue that Yarway had a duty to warn regarding the replacement packing and gaskets because those replacements presumably were identical to the original packing and gaskets that Yarway supplied with its products. But that is only because the Navy specified the packing and gaskets for the products. The Navy could have easily changed the specification to non-asbestos materials after Yarway supplied the original products, and then any Yarway-provided warning regarding how to safely handle asbestos-containing packing and gaskets would have been superfluous, confusing and perhaps even conflicting with the instructions for handling properly the newly specified material.

C. Yarway Owed Mr. Braaten No Negligence-Based Duty To Warn.

As the Court of Appeals noted, “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.” Slip Op. 13. Thus, much of the discussion above, concerning whether Yarway owed Mr. Braaten a strict liability-based duty to warn, is applicable to Mr. Braaten’s negligence-based claim. However, there are additional reasons by Mr. Braaten’s negligence claim fails.

First, Mr. Braaten adduced no evidence in response to Yarway’s summary judgment motion raising a triable issue on the issue of whether Yarway knew or should have known about the hazards of working with asbestos-containing insulation. Yarway never made or sold insulation. CP 6364. At least with respect to his claim based on external insulation, Mr. Braaten failed to adduce any evidence sufficient to defeat summary judgment for Yarway. *See Christen v. Lee*, 113 Wash.2d 479, 492, 780 P.2d 1307, 1313 (1989) (“Foreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ”). And as to the internal packing and gaskets, Yarway should not be held to answer in tort for the Navy’s decision to procure and use replacement packing and gaskets that contained asbestos with Yarway’s products.

Second, the Court of Appeals expressly ruled that “foreseeability alone” is sufficient to impose a negligence-based duty to warn on Yarway regarding the safe handling of other manufacturers’ asbestos-containing products. *See* Slip Op. 13. As noted above, it is always foreseeable that a component will be used with other components and it is virtually always foreseeable that a component like a valve will require maintenance over the course of its useful life. It would be impossible for a component manufacturer to test and warn regarding the myriad other products that could foreseeably be used with its products, and it makes no sense to require component manufacturers to do so.

Third, the Court of Appeals’ negligence analysis fails entirely to account for the context of the case:

The duty to warn described in § 388 of the Restatement of Torts 2d makes superior knowledge an important element in the application of the duty. Generally, a duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant possessed of such knowledge, knows or should know that harm might occur if no warning is given.

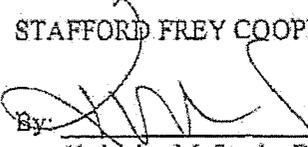
63A Am.Jr.2d Products Liability § 1139. Here, the record establishes that the Navy actually knew of the hazards of working with asbestos on warships and it actually attempted to warn pipe fitters like Mr. Braaten to “[w]ear an approved dust respirator for protection against this hazard.” CP 281; *see also* CP 283, ¶23 (quoting a 1968 Navy document stating: “The United States Navy is well aware of the hazards of asbestos to its employees engaged in ship construction and ship repair at naval

shipyards'). Under the so-called "knowledgeable user" doctrine, Yarway owed no duty to warn the Navy or pipe fitters working for the Navy of the known hazards of working with asbestos. *See Zamora*, 104 Wash.2d at 205, 704 P.2d at 588 (adopting and applying the knowledgeable user doctrine).¹¹

IV. CONCLUSION

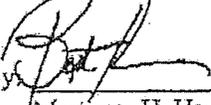
The judgment of the Court of Appeals should be reversed.

DATED February 8, 2008 STAFFORD FREY COOPER

By: 

Katherine M. Steele, WSBA #11927

DATED February 8, 2008 MORGAN, LEWIS & BOCKIUS LLP

By: 

Mortimer H. Hartwell
Brett M. Schuman
(admitted Pro Hac Vice)

Attorneys for Petitioner
YARWAY CORPORATION

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TO E-MAIL**

¹¹ *See, e.g.*, 63A Am.Jur.2d Products Liability § 1195 ("This knowledgeable user doctrine, which relieves manufacturers and suppliers of their duty to warn . . . has been extended to situations involving knowledgeable intermediaries"); *see also Smith v. Walter C. Best, Inc.*, 927 F.2d 736 (3rd Cir. 1990) (holding that sand supplier had no duty to warn foundry employee who developed silicosis of dangers of silica dust; applying knowledgeable user defense to both negligence and strict liability claims); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004) (same).

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I hereby certify that on February 8, 2007, a true and correct copy of the foregoing document was served on the following:

Matthew P. Bergman
David S. Frockt
Brian F. Ladenburg
BERGMAN and FROCKT
614 1st Avenue, 4th Floor
Seattle, WA 98104

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

John Wentworth Phillips
John Matthew Geyman
PHILLIPS LAW GROUP
315 5th Avenue S. Suite 1000
Seattle, WA 98104

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Charles S. Siegel
Loren Jacobson
WATERS and KRAUS
3219 McKinney Avenue, Suite 3000
Dallas, TX 75204

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Barry N. Mesher
Brian D. Zeringer
Andrew G. Yates
LANE POWELL
1420 5th Avenue, Suite 4100
Seattle, WA 98101

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Michael Barr King
TALMADGE LAW GROUP
18010 Southcenter Parkway
Tukwila, WA 98188

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Victor E. Schwartz
CROWEL and MORING
1100 Connecticut Avenue NW
Washington DC 20036

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Mark Behrens
SHOOK HARDY and BACON
600 14th Street NW, Suite 800
Washington DC 20005

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Paul Kalish
CROWELL and MORING
1001 Pennsylvania Avenue NW
Washington DC 20004

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Paul Lawrence
K&L GATES
925 4th Avenue, Suite 2900
Seattle, WA 98104

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Margaret A. Sundberg
Christopher Marks
WILLIAMS KASTNER and GIBBS
601 Union Street, Suite 4100
Seattle, WA 98101

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

James E. Horne
Michael Ricketts
KINGMAN RINGER and HORNE
505 Madison Street, Suite 3900
Seattle, WA 98104

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

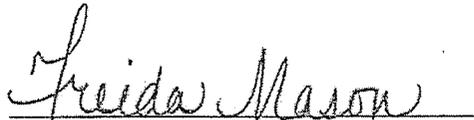
Mark Tuvim
CORR CRONIN MICHELSON
BAUMGARDNER and PREECE
1001 4th Avenue, Suite 3900
Seattle, WA 98154

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

Jeanne F. Loftis
Allen E. Eraut
BULLIVANT HOUSER BAILEY
888 SW 5th Avenue, Suite 300
Portland, OR 97204

Via U.S. Mail
 Via Facsimile
 Via Hand Delivery

DATED this 8th day of February, 2008 at Seattle, Washington.


Freida Mason

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TO E-MAIL**