

No. 69719-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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RONALD FAGG,

Appellant,

v.

CSK AUTO, INC. AND PACIFIC WATER WORKS SUPPLY CO, INC.,

Respondents.

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BRIEF OF RESPONDENT CSK AUTO, INC.

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FILED  
APR 15 2015  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA  
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## **I. INTRODUCTION**

It has been the public policy of the State of Washington since July 1981 that retail sellers are immune from products liability claims as long as the seller was not negligent, did not breach an express warranty, and made no intentional misrepresentations. *See* RCW 7.72.040.

In this case, the question before both the trial court and this court is whether plaintiff's claim against CSK Auto, Inc. ("CSK Auto") arose on or after July 26, 1981, such that RCW 7.72.040 applies to his claim. Given that plaintiff claims exposure to asbestos-containing products up to 1990, including products he says were sold to him by CSK Auto as well as other products he encountered in the workplace, a correct application of Washington case law compels the conclusion that the statute does apply to plaintiff's claim against CSK Auto. The trial court therefore properly granted CSK Auto's motion for summary judgment of dismissal, and its ruling should be affirmed on appeal.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO**

A. The trial court correctly applied Washington precedent in granting CSK Auto's Motion for Summary Judgment pursuant to RCW 7.72.040, in conformity with the public policy of the State of Washington.

1. Whether the Court analyzes all of plaintiff's claimed exposures to asbestos-containing products or only his claimed exposure to products he purchased from CSK Auto, the conclusion remains that not substantially all of plaintiff's claimed exposure took place prior to the effective date of the Tort Reform Act, including RCW 7.72.040. Thus, plaintiff's claim "arose" after July 26, 1981.

### **III. COUNTER-STATEMENT OF THE CASE**

In Exhibit A to his complaint, plaintiff alleged that he was exposed to asbestos-containing products, occupationally and nonoccupationally, from 1961 to 1995, a period of approximately 35 years. CP 25-29. The alleged exposures occurred while plaintiff worked in the construction trade, during his service in the United States Navy, while working for Lake Washington Sewer & Water, during work with the City of Kirkland Water Department, and in the course of performing personal automotive repair. *Id.* The dates of the automotive repair work were not alleged.

In connection with his automotive repair work, plaintiff alleged that he obtained replacement parts from Al's Auto Supply and Schuck's Auto Supply, both of which were CSK Auto companies. CP 28-29. Plaintiff testified that he purchased parts from Schuck's and Al's from the 1950's into the 1980's. CP 879-884.

Plaintiff later testified in some detail regarding the timing of his work on 15 different vehicles:

1. He worked on a 1949 Ford in the 1950's. CP 859-860.<sup>1</sup>
2. He worked on a 1949 Ford pickup in the 1950's. CP 876-877.
3. He worked on a 1953 Ford in the late 1950's. CP 862-863.
4. He worked on a 1955 Ford pickup in the early to mid-1960's. CP 863-864.
5. He worked on a 1956 Ford pickup in the 1960's. CP 865-866.
6. He worked on another 1956 Ford pickup at an unstated time. CP 867-868. This work took place some time between 1982 and 1985, when plaintiff was living in Monroe, Washington. CP 1033-1034.
7. He worked on a 1958 Ford in the 1960's. CP 877.
8. He worked on a 1957 Ford in the 1960's. CP 877-878.
9. He worked on a 1957 Ford Ranchero in the 1960's. CP 871-872.
10. He worked on a 1957 Ford station wagon at some point after 1968. CP 875-876.

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<sup>1</sup> On most all of these vehicles, plaintiff testified that he performed brake work, clutch work, and/or work with gaskets, using parts that he obtained from a CSK Auto store.

11. He worked on a 1965 Mustang that he purchased in the 1970's. CP 868. He owned that vehicle for six or seven years, likely indicating that some of his automotive work on that vehicle took place in the 1980's. *Id.*

12. He worked on a 1964 Mustang in the 1980's. CP 869-870.

13. He worked on a 1961 Ford for a friend in the 1980's. CP 870-871.

14. He purchased a 1965 Volkswagen in the late 1970's or early 1980's, and owned it for five years. CP 873-874.

15. He worked on a 1976 Ford pickup that he purchased in the early 1980's and owned for four years. CP 874-875.

In addition to this automotive repair work, plaintiff alleged that he worked with asbestos-containing cement transite pipe during his employment with the Lake Washington Sewer & Water District from 1979 to 1986. CP 27. Plaintiff testified that he personally cut this asbestos-containing pipe over 100 times. CP 636-637. Plaintiff also testified that he continued to work with asbestos-containing cement transite pipe when he worked for the City of Kirkland from 1985 or 1986 to 1995, with his exposure occurring from 1985 to 1990. CP 640-642.

#### IV. STANDARD OF REVIEW

CSK Auto agrees that the Court is to review summary judgment orders *de novo*, performing the same inquiry as did the trial court. *See, e.g., Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860 (2004).

#### V. ARGUMENT

**A. Washington’s Tort Reform Act Applies to This Case Unless “Substantially All” of Plaintiff’s Asbestos Exposure Occurred Before July 1981.**

The Tort Reform Act, including RCW 7.72.040 (the “product seller statute”), is applicable to “all claims arising on or after July 26, 1981.” RCW 4.22.920.

RCW 7.72.040 provides that a mere product seller is generally immune from product liability claims. RCW 7.72.040(1) provides:

Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

- (a) the negligence of such product seller; or
- (b) breach of an express warranty made by such product seller; or
- (c) the intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

It is undisputed that CSK Auto is a “product seller” under RCW 7.72.010(1):

“Product seller” means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

As such, CSK Auto’s potential liability to a purchaser such as plaintiff is extremely limited in a product liability action such as this.<sup>2</sup> This was the intent of the Legislature when it passed the Tort Reform Act in 1981. *See* Preamble, Laws of 1981, Ch. 27, § 1:

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. **It is further the intent of the legislature that retail businesses located primarily in the State of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.** (Emphasis added.)

The Legislature’s intent is also confirmed by the report of the Senate Select Committee on Tort and Product Liability Reform:

One of the complaints most frequently expressed before the Legislature during the whole course of the product liability discussion over the past few years has been the alleged inequity of holding the non-manufacturing product seller liable for product defects over which it had no control by application of the concept of joint and several liability throughout the chain of distribution. **This section addresses that concern and relieves a non-manufacturing product seller of such liability except in certain limited situations.** (Emphasis added.)

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<sup>2</sup> Plaintiffs’ claims undoubtedly constitute a “product liability claim,” as defined in RCW 7.72.010(4).

Senate Journal, 47<sup>th</sup> Legislature (1981), at 632. Thus, with RCW 7.72.040(1), the Legislature eliminated product liability claims as to product sellers except in three limited circumstances: (1) where the seller was negligent, (2) where the seller breached an express warranty, and (3) where the seller intentionally misrepresented or concealed facts about the product. Here, plaintiff has not alleged, and has no evidence, that CSK Auto was negligent, breached an express warranty, or intentionally misrepresented or concealed facts from him, let alone that any such conduct proximately caused his alleged damages. Rather, the contention is merely that CSK Auto sold him products at retail.

Under circumstances such as this, it is the public policy of the State of Washington that retailers such as CSK Auto have no liability to purchasers such as plaintiff. Under Washington's Product Liability Act, liability for defective design is placed on a product's manufacturer, not its seller. Accordingly, CSK Auto's motion for summary judgment was properly granted.

The trial court's ruling was consistent with prior case law determining when the Tort Reform Act is applicable to cases arising from exposure to asbestos-containing products. RCW 7.72.040 provides CSK Auto with a complete defense to plaintiff's claims, and the trial court properly so ruled, finding that the statute is applicable to this lawsuit.

Since 1991, it has been the law of the State of Washington that the Tort Reform Act applies to cases involving asbestos exposure unless “substantially all” of the claimed exposures occurred prior to the adoption of the Act. *See Koker v. Armstrong Corp., Inc.*, 60 Wn. App. 466, 472 (1991). Thus, where a plaintiff’s claimed asbestos exposure took place entirely in the 1950’s and 1960’s, the Tort Reform Act does not apply. *See Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22 (1997); *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579 (1996). *See also Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635 (1993) (although plaintiff worked at Puget Sound Naval Shipyard from 1953 into the 1980’s, the evidence was that he “was exposed to asbestos in the 1950’s and 1960’s”.)

Where the alleged exposure brackets the effective date of the Tort Reform Act, the court must determine whether “substantially all” of the exposure took place prior to the adoption of the Act. In *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373 (2008), while the plaintiff worked as a pipefitter on board Navy ships from 1967 to 2002, the evidence showed that his exposure to asbestos products occurred only from 1967 “until the early 1980’s.” *Id.* at 381, n. 1. Thus, the court concluded that his exposure “substantially occurred” prior to the adoption of the Tort Reform Act. *Id.* at 383, n. 4.

In *Koker, supra*, the plaintiff worked as a pipefitter in the shipyards from 1969 to 1971, and again from 1974 to 1986. *Id.* at 469. The evidence demonstrated that his exposure took place “in the late 1960’s, the 1970’s, and 1980’s.” *Id.* at 472. Significantly, however, the parties agreed “that the degree of exposure was less in the later years...” *Id.* at n. 4. In light of that agreement, the court found that the Tort Reform Act did not apply because substantially all of the events which could be termed “injury producing” occurred prior to the adoption of the Act. *Id.* at 472.

Then, in 2012, the Washington Supreme Court handed down a significant decision in *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402 (2012). There, the plaintiff worked in the shipyards from 1978 to 2004. *Id.* at 405. The court therefore found that plaintiff’s exposure “substantially occurred after the effective date” of the Act, and thus the Act applied to his claim. *Id.* at 408-09. Accordingly, the court applied the Product Liability Act to plaintiff’s claim even though he was exposed to asbestos-containing products for several years prior to the adoption of the Act.

Of particular importance to this appeal is the Court’s footnote 2, where it addressed defendants whose products plaintiff worked with only after the adoption of the Act. *Id.* at 409, n. 2:

The record indicates that Macias maintained and cleaned respirators manufactured by the Mine Safety Appliances Company and North America Safety Products USA only after June 1981. **The WPLA clearly governs the claims against these defendants.** (Emphasis added.)

This comment indicates that, in determining whether the Act applies in a given case, the courts should look both to the plaintiff's exposure to the particular defendant's product and to the entirety of his exposure as well.

In this case, under either evaluation of the facts, "substantially all" of plaintiff's exposure to CSK Auto's products and to all other asbestos-containing products did not occur prior to the adoption of the Act. As a result, the trial court ruled correctly when it granted CSK Auto's motion for summary judgment.

**B. Not "Substantially All" of Plaintiff's Work with Products from CSK Auto Took Place Prior to July 1981.**

Plaintiff testified that he obtained brakes, gaskets, and other automotive repair parts from Schuck's and Al's from the 1950's into the 1980's. CP at 79-81. More particularly, plaintiff testified to repair work performed on 10 different vehicles in the 1950's through the 1970's, *supra*. He also testified to repair work he performed on 5 different vehicles in the 1980's, *supra*. Thus, a full one-third of plaintiff's work with products from CSK Auto took place after the effective date of the

Act. Two-thirds of plaintiff's work with CSK Auto products is hardly the equivalent of "substantially all."

Plaintiff's own experts, including Dr. Bruch, submitted sworn testimony that plaintiff's work with Victor gaskets and Bendix brakes were a substantial factor in contributing to plaintiff's alleged disease. CP 258-260. These products included asbestos as a component well into the 1980's. CP 153-154, 195.<sup>3</sup> Plaintiff testified that he purchased Victor gaskets and Bendix brakes from CSK stores whenever he did automotive repair work. CP 135-136. Thus, one-third of plaintiff's claimed work with asbestos-containing products he claims to have obtained from CSK took place after the effective date of the Act.

This means that only two-thirds of plaintiff's claimed exposure to products he says he obtained from CSK occurred prior to the effective date of the Act. Two-thirds of his claimed exposure is not "substantially all" of his exposure. "Substantially all" has been interpreted to mean "all but an insignificant amount." *IPI, Inc. v. Burton*, 617 S.E.2d 531, 536 (W. Va. 2005). *See also Atmel Corp. v. Information Storage Devices, Inc.*, 997 F. Supp. 1210, 1229 (N.D. Cal. 1998).

Other courts have interpreted "substantially all" to mean 85 percent or more. *See, e.g., Continental Can v. Chicago Truck Drivers*,

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<sup>3</sup> While plaintiff now attempts to minimize his exposure to automotive parts after July 1981, that was certainly not the position he or his experts took before the trial court.

916 F.2d 1154, 1158 (7<sup>th</sup> Cir. 1990); *Central States Pension Fund v. Belmont*, 610 F. Supp. 1505, 1511 (N.D. Ind. 1985), *aff'd*, 788 F.2d 428 (7<sup>th</sup> Cir. 1986).

Similarly, 75 percent and 65 percent have been found not to be the equivalent of “substantially all.” See *Theurer v. Bd. of Review Indus. Com’n*, 725 P.2d 1338 (Utah 1986); *James v. McCoy Mfg. Co.*, 431 So.2d 1147, 1149 (Ala. 1983).

Under the Model Business Corporation Act, “substantially all” was intended to mean “nearly all.” See Comment 1, ¶ 12.01, Model Business Corporation Act (1984).

However this Court chooses to define “substantially all,” it is clear that 67% is not close to substantially all of plaintiff’s claimed exposure to CSK parts.

While it is somewhat unclear under the case law as to whether all of plaintiff’s claimed exposures, to CSK parts and otherwise, should be considered in determining whether “substantially all” of his exposures occurred prior to 1981, in *Macias, supra*, the court gave a strong clue when it held that the Act did apply to those defendants whose products the plaintiff worked with only after the adoption of the Act. Thus, as to those defendants, the *Macias* court focused solely on the alleged exposures to those particular defendants’ own products.

A similar analysis would be appropriate here. As to CSK Auto, plaintiff obtained 33% of the CSK Auto products that he worked with after the adoption of RCW 7.72.040. Only 67% of his work with CSK Auto products took place prior to the effective date of the Act, a quantity which is not “substantially all” of plaintiff’s claimed exposure to CSK Auto products.

Under this analysis, the trial court properly granted CSK Auto’s motion for summary judgment, and that ruling should be affirmed.

**C. Plaintiff’s Claimed Work With All Asbestos-Containing Products Continued Long Past July 1981.**

If the entirety of plaintiff’s work with asbestos-containing products is evaluated, it becomes even clearer that not “substantially all” of his work with such products occurred before July 1981. For example, plaintiff testified to his extensive work with asbestos-containing pipe from 1985 to 1990. CP 74; CP 640-642. He also testified to additional substantial work with transite pipe earlier in the 1980’s. CP 636-638.

Thus, plaintiff testified to a full 10 years of exposure to asbestos-containing transite pipe in the 1980’s and up to 1990. This exposure continued for eight or nine years following the passage of the Tort Reform Act. Factoring this work into the analysis makes it abundantly clear that plaintiff’s work with asbestos-containing products did not end by July

1981. Indeed, his exposure continued on a significant basis. Thus, “substantially all” of his exposure did not take place prior to July 1981.

Again, under this analysis the trial court properly granted CSK Auto’s motion for summary judgment. The court’s ruling should be affirmed.

## VI. CONCLUSION

For the foregoing reasons, respondent CSK Auto, Inc. respectfully asks that the judgment below be affirmed.

RESPECTFULLY SUBMITTED this 12 day of November, 2013.

HEURLIN, POTTER, JAHN, LEATHAM,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I caused the foregoing  
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