

No. 69719-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

King County Superior Court Case No. 10-2-05312-3 SEA

RONALD FAGG,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT PACIFIC WATER WORKS SUPPLY
COMPANY, INC.

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ORIGINAL

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I. INTRODUCTION.

The issue here is whether the Washington Product Liability Act (“WPLA”) applies to Appellant’s claims against Pacific Water Works Supply Company, Inc. (“PWW”). Appellant has conceded that if the WPLA applies, the dismissal of PWW was appropriate. The undisputed record of admissible evidence confirms that all of Appellant’s alleged exposure to PWW’s asbestos-containing product occurred after July 26, 1981, so the WPLA applies.¹ However, even if one credits the contradictory and inadmissible evidence that Appellant relies on to suggest some exposure to PWW products came before enactment of the WPLA, the WPLA still applies.

Washington law holds that the WPLA – and not common law – applies to claims of exposure to hazardous substances unless “substantially all” of the exposure occurred before the enactment of the WPLA. *See, e.g., Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635, 965 P.2d 527 (1993). Appellant agrees this is the law. *See* Opening Brief Of Appellant (“OB”) at 3, 13-15, 23. The law is equally clear that when the alleged exposure is to products from multiple defendants over a time period before and after enactment of the WPLA, the “substantially all”

¹ The WPLA’s effective date is July 26, 1981. *See* RCW 4.22.920.

analysis is defendant specific. In other words, the WPLA applies to a particular defendant unless “substantially all” of a plaintiff’s exposure to that specific defendant’s product came before July 26, 1981. *See infra*, Section IV.B., and authorities cited therein. Appellant disagrees on this point, arguing that the court should aggregate his asbestos exposure from all defendants to determine whether “substantially all” of the exposure was before July 26, 1981. That contention is at odds with Washington law and Appellant cites no legal authority to support his argument.

The Washington Supreme Court, Washington Legislature, and public policy all favor a “defendant-specific” analysis of exposure to asbestos when a court decides if the WPLA or common law should apply. In *Macias v. Saberhagen Holdings, Inc.*, the Washington Supreme Court applied a defendant-specific exposure analysis, concluding that the WPLA independently applied to each defendant. *See* 175 Wn.2d 402, 409 n.2, 282 P.3d 1069 (2012). The *Macias* Court’s reasoning is consistent with the Washington Legislature’s intent when it enacted the WPLA. The Legislature expressly intended to insulate a seller from strict liability, and apply different liability standards to sellers than manufacturers. *See* Senate Journal, 47th Legislature V.1 Sen. 3158 (1981), at 618. Further, public policy behind Washington’s product liability law supports a defendant-specific approach.

Even if this Court declines to apply the WPLA to Appellant's action against PWW, dismissal of PWW is still appropriate because Appellant's exposure to PWW's asbestos-containing product, if any, was not a substantial factor in Appellant's alleged injury. For all of these reasons, the trial court's decision to dismiss PWW should be affirmed.

II. COUNTER-STATEMENT OF ISSUES.

1. When a Washington court determines if the WPLA applies to a plaintiff's asbestos product liability action, should the court measure the plaintiff's exposure to asbestos in the aggregate, or on a defendant-specific basis?
2. Did the trial court properly determine that the WPLA applied to Appellant's claim against PWW?
3. If the WPLA applies, should this Court affirm the trial court's dismissal of PWW?
4. Even if the WPLA does not apply to Appellant's claim against PWW, should this Court dismiss PWW because Appellant cannot show that his alleged exposure to PWW products was a substantial factor in his alleged injury?

III. STATEMENT OF THE CASE.

From 1963 until he retired in 2001, Appellant Ronald Fagg worked in construction, as a heavy equipment operator, and for municipal water

systems. *See* Clerk's Papers ("CP") at 667-73, 779, 899, 919. During parts of this employment, Appellant alleges that he was exposed to asbestos from multiple products from different manufacturers and supplied by multiple sellers. OB at 1. Among his claimed exposures, Appellant contends that he was exposed to asbestos-cement ("AC") pipe² supplied by PWW. OB at 7-9. PWW provides these facts relevant to Appellant's alleged exposure to AC pipe in general, and to PWW's product.

A. PWW'S RELEVANT CORPORATE HISTORY.

Respondent PWW was a pipe and pipe-related products supplier in Washington until 1997. *See* CP at 625 ¶ 4. The following facts are derived from depositions and declarations of former PWW employees, including PWW's former owner and President, William Davis. *See* CP at 625 ¶ 3. These facts are uncontested.

- In the 1960's, PWW had a delivery truck it used for product deliveries. PWW sold its one truck and permanently stopped delivering its products in 1967 or 1968. *See* CP at 583.
- Prior to 1981, PWW sold its products, including AC pipe, only out of its Seattle and Tacoma locations. *See* CP at 583, 626, 750.
- PWW opened its third location in Woodinville, Washington no earlier than 1981, or 1982. *See* CP at 626 ¶ 5, 750, 752-53.

² Appellant used the terms AC pipe and transite pipe interchangeably in his depositions. *See* CP at 1006.

- PWW supplied products, including AC pipe, from its Woodinville location starting at the earliest in 1981, but most likely 1982. *See* CP at 626 ¶ 5, 750, 752-53.
- In 1984, PWW stopped selling AC pipe. *See* CP at 626, 752.
- After 1984, PWW did not supply or sell any AC pipe or asbestos containing products. *See* CP at 626, 752.
- In sum, PWW sold AC pipe from its Woodinville location from 1981 or 1982 through 1984. *See* CP at 626, 750, 752-53.

B. APPELLANT’S EXPOSURE TO AC PIPE IN GENERAL.

Appellant testified that he was exposed to AC pipe during his employment from 1979 to 1992. *See* CP at 1217-18, 1232, 1253-54, 1257, 1334-35, 1409-1410. In chronological order, Appellant worked at:

- C&D Enterprises (“C&D”) for six months in 1979 to 1980. *See* CP at 1210, 1257, 1408-09;
- Lake Washington Sewer and Water (“Lake Washington”) for five or six years in the 1980’s, most likely to 1985 or 1986. *See* CP at 833-34, 1003, 1254-55, 1257;
- City of Kirkland (“Kirkland”) for five or six years in the mid-1980’s to early 1990’s. *See* CP at 852-53, 858, 1257-59, 1261; and
- City of Bothell (“Bothell”) from 1988 to 1992. *See* CP at 1006, 1253-54, 1275.

Appellant testified repeatedly that he did not work with AC pipe before C&D, or after Bothell. *See* CP at 1217-18, 1232, 1253-54, 1257, 1334-35, 1409-10.

Appellant claims he was exposed to asbestos contained in AC pipe manufactured by CertainTeed Corp. (“CertainTeed”) and Johns Manville (“JM”), and sold by PWW and H.D. Fowler Company (“HD Fowler”), when he would cut and bevel the AC pipe during pipe installations and repairs. *See* CP at 818-22, 837-58, 1217-32, 1240-41, 1257-75, 1287-93, 1307-08, 1334, 1365-73, 1395-1402.

C. APPELLANT’S ALLEGED EXPOSURE TO PWW-SUPPLIED PRODUCT.

Appellant’s Opening Brief suggests that all of his alleged AC pipe exposure was to PWW-supplied AC pipe. *See* OB at 7-9. This is incorrect. In fact, the admissible evidence³ and uncontested facts in the record show that Appellant’s total alleged exposure to PWW AC pipe was from 1982 to 1984, while he was employed at Lake Washington. *See* CP at 833-34, 843-44, 1003, 1254-55, 1257.

From 1979 to 1992, Appellant worked with three categories of AC

³ One type of AC pipe that Appellant claims he worked with is pipe he took from his employer’s inventory, or pipe yard. *See* CP at 1365. But Appellant testified that he had no personal knowledge of where his employers obtained the AC pipe for their respective pipe yards. *See* CP at 825, 845-46, 1225, 1384, 1394-95, 1398. Appellant testified that at each of those employers he did not personally purchase AC pipe for the pipe yard, and that he was rarely present when his employers’ trucks returned with AC pipe deliveries. *See* CP at 825, 1349-50, 1354-55, 1357-58. Of the few deliveries at which Appellant was present, the only reason he believed the AC pipe came from PWW was because “the truck driver told [him] so.” CP 1384; *see also* CP at 1225, 1394-95, 1398. This is inadmissible hearsay, and cannot be offered to prove that AC pipe in an employer’s yard came from PWW. *See* Wash. R. Evid. 801, 802.

pipe: (1) AC pipe already in the ground; (2) AC pipe from his employer's pipe yard; and (3) AC pipe that he personally obtained from a pipe supplier in the area. *See* CP at 1365. Appellant testified that none of the AC pipe already in the ground came from PWW. *See* CP at 1260, 1274. And Appellant provided no admissible evidence to show where his employers obtained the AC pipe for their respective pipe yards.⁴ *See* CP at 825, 845-46, 1225, 1384, 1394-95, 1398.

As to AC pipe that he personally obtained from PWW, Appellant alleges he worked with such pipe at only two employers: Lake Washington and C&D.⁵ *See* CP at 823-24, 843-44, 855. However, it is undisputed that when he personally obtained AC Pipe from PWW, he did so from *only* one of PWW's locations – *only* from PWW's Woodinville location. *See* CP at 1372-73. He repeatedly testified that he never obtained AC pipe from PWW's other locations. *See id.* In fact, Appellant stressed that he never even visited PWW's other locations. *See id.* Accordingly, the only evidence in the record of Appellant's exposure to PWW AC pipe is from AC pipe that he personally obtained from PWW's Woodinville location. *See id.*

⁴ *See supra*, note 3.

⁵ Appellant does not claim that he worked with AC pipe that he personally obtained from PWW while employed at Kirkland or Bothell. *See* OB at 7-9. Appellant has never contested this undisputed fact, not before the trial court, nor in his Opening Brief. *See* OB at 7-9; CP at 823-24, 843-44, 855.

It is undisputed that PWW opened its Woodinville location at the earliest in 1981, or 1982. *See* CP at 626 ¶ 5, 750, 752-53. And it is uncontested that PWW stopped selling AC pipe in 1984. *See* CP at 626, 752. Therefore, for a defendant-specific analysis, his total alleged exposure to PWW AC pipe is from 1982 to 1984; and only his employment at Lake Washington is during this time frame. *See* CP at 833-34, 843-44, 1003, 1254-55, 1257.

D. PROCEDURAL POSTURE.

In 2009, Appellant filed suit alleging *only* Washington common law product liability claims. *See* CP 13-28. To prove his claims, Appellant relied almost exclusively upon his own deposition testimony. *See generally* Clerk's Papers. Appellant did not depose any former co-workers, and his documentary evidence was scant. *See id.*

On December 12, 2011, PWW moved for summary judgment, in pertinent part, because: (1) the WPLA preempted Appellant's common law claims; (2) PWW was immune from liability under the WPLA;⁶ and (3) Appellant's exposure, if any, to PWW's AC pipe was not a substantial factor in his injury.⁷ *See* CP at 96-109, 394-96, 607-613, 693-97. In

⁶ PWW formally joined in Respondent CSK Auto, Inc. ("CSK Auto")'s motion for summary judgment on this ground, properly preserving this ground for dismissal before the trial court and this Court. *See* CP at 394-96, 693-97.

⁷ PWW also moved for dismissal on an independent ground for lack of causation. *See* CP at 103-05. That issue is not presented on appeal.

opposing PWW's motion for summary judgment, Appellant contested application of the WPLA, but conceded that if the WPLA applied, dismissal for PWW was appropriate. *See* CP at 529-39.

The trial court heard argument on PWW's motion on March 16, 2012,⁸ and granted PWW's motion that same day. In its Order dismissing PWW, the trial court concluded that "the only admissible evidence of [Plaintiff's] exposure to A/C pipe distributed by Pacific Water Works was from its Woodinville store, which opened in 1981 or 1982." CP at 617. As a result, the WPLA applied, and PWW was not liable under the WPLA as a matter of law. The trial court also concluded that "[e]ven if [P]laintiff could show he was exposed to pipe from Pacific Water Works as early as the late 1970's, this would not satisfy the "substantially all" requirement, the WPLA still applied, and dismissal of PWW was proper. CP at 617. Appellant now appeals this ruling. *See* CP at 7-10, 616-17.

IV. ARGUMENT.

A. STANDARD OF REVIEW.

The Superior Court concluded that the WPLA applied to Appellant's claim against PWW. *See* CP at 617. Appellant's Opening

⁸ Appellant claims that the trial court asked "the parties" to provide supplemental briefing on the question now before this Court. OB at 23. That is incorrect. The trial court requested such briefing only from Appellant and CSK Auto. The trial court never requested such briefing from PWW.

Brief argues that application of the WPLA is an “affirmative defense,” and that Respondents have the burden to prove both that the WPLA applies, and Respondents are “immune” from liability under it. *See* OB 28-31. Appellant is incorrect.

Application of the WPLA to this case is an issue of law, which this Court reviews *de novo*. *See Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 583, 915 P.2d 581 (1996). Appellant agrees. *See* OB at 31 (“[T]he application of the [WPLA] is a question of law . . .”). Respondents, therefore, do not have the burden of proving it applies.

This Court reviews summary judgment orders *de novo* and engages in “the same inquiry as the trial court.” *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). If this Court determines that PWW has made an initial showing of the absence of a material fact, Appellant must offer prima facie evidence to support each essential element of its claim. *See Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 208, 890 P.2d 469 (1995). The facts Appellant sets forth must be specific, detailed, and not speculative or conclusory. *See Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). Appellant “cannot rest on mere allegations.” *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

Appellant’s claim against PWW is a product liability action. It is well-established that Appellant has the burden of proof to show that PWW

is liable under the WPLA's section applicable to sellers, RCW 7.72.040.⁹ *See Buttelo v. S.A. Woods-Yates Am. Mach. Co.*, 72 Wn. App. 397, 401, 864 P.2d 948 (1993) (stressing that it is the plaintiff's burden to prove a defendant's liability under § 7.72.040(1)); *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 729, 248 P.3d 1052 (2011) (affirming a plaintiff has the burden of proving a product liability claim under WPLA).

B. WASHINGTON COURTS, LEGISLATIVE INTENT, AND PUBLIC POLICY COMPEL A DEFENDANT-SPECIFIC ANALYSIS.

The primary issue in this appeal is: when deciding if the WPLA applies in an asbestos exposure suit, should the Court evaluate the plaintiff's asbestos exposure in the aggregate, or on a "defendant-specific" basis; i.e., limited to each defendant's product. *See* OB at 3; Response Brief, *supra*, at 1-2. Appellant argues for aggregation of all exposures. *See* OB at 20-28. In his brief, however, Appellant provides no authority – primary or secondary, Washington law or foreign – to justify his position. *Id.* That is because Washington law, legislative intent, and public policy all compel a defendant-specific approach in deciding this issue.

1. The Washington Supreme Court's Opinion in *Macias v. Saberhagen Holdings* has Already Decided the Issue.

A defendant-specific approach is the law in Washington after

⁹ It is undisputed that PWW is alleged to have been a seller, not a manufacturer, under both common law and the WPLA, RCW 7.72.010(1).

Macias v. Saberhagen Holdings. In *Macias*, the Washington Supreme Court applied a defendant-specific analysis of the plaintiff's asbestos exposure to determine if the WPLA applied. 175 Wn.2d at 409 n.2.

From 1978 to 2004, Macias was a “tool keeper,” cleaning respirators designed to filter out hazardous substances, including asbestos, and replacing the filter cartridges. *Id.* at 405-06. Macias worked with several different brands of respirators, each made by different manufacturers. *Id.* at 405. Macias sued the respirator manufacturers claiming injury from asbestos exposure while using their products. *Id.*

The *Macias* court addressed the issue of which law – the WPLA or common law – applied to Macias's suit. *Id.* at 408. After affirming the “substantially all” standard formulated by this Court, the Court evaluated Macias's exposure to each defendant's product to determine if the WPLA applied. *See id.* at 408-09. The Court reasoned:

The record indicates that Macias maintained and cleaned respirators manufactured by the [Defendants] Mine Safety Appliances Company and North America Safety Products USA only after July 1981. The WPLA clearly governs the claims against **these defendants. With respect to [Defendant] American Optical Corporation**, the WPLA applies, as explained, because substantially all of Mr. Macias's exposure to asbestos occurred after the effective date of the Act.

Id. at 409 & n.2 (emphasis added). Macias claimed exposure to asbestos

from 1978 to 2004, which on its face supports application of the WPLA – substantially all of the asbestos exposure did not occur before July 1981. *See id.* at 409. Rather than perform an aggregate analysis, or declare a blanket conclusion that the WPLA applied, the Court applied the substantially all standard to each defendant, ensuring that the proper law, and liability standard, applied to each claim. *See id.* at 409 n.2; *see also Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 617, 624, 146 P.3d 444 (2006) (applying a defendant-specific analysis to determine if the pre- or post-1973 comparative negligence statute governed; only considering the years Coulter was exposed to Asten’s product, ignoring Coulter’s full asbestos exposure); *cf. Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 388-89, 198 P.3d 493 (2008) (applying a defendant-specific approach to liability and duty to warn in an asbestos-exposure product liability claim).

Macias controls here. As in *Macias*, Appellant claims exposure “to asbestos from multiple products produced and marketed by multiple entities.” OB at 1. And just as *Macias* claimed he used different brands of respirators at different times, here too, Appellant claims he worked around different asbestos-containing products at different times. *See* OB at 5-10. *Macias* dictates application of a defendant-specific approach, and affirmation of the ruling below.

2. Washington Law that Defendants are not Strictly Liable for Products Outside their Chain of Distribution Also Compels a Defendant-Specific Approach.

The *Macias* Court also reaffirmed the long-standing principle that to apply “strict liability in a product liability case, the [defendant] must be in the chain of distribution.” 175 Wn.2d at 410. That is because “the policy underpinnings for strict liability . . . do not apply when a [defendant] has not placed the product in [the] stream of commerce.” *Braaten*, 165 Wn.2d at 386; *see also Simonetta v. Viad Corp.*, 165 Wn.2d 341, 363 & n.8, 197 P.3d 127 (2008) (same).

If a court aggregated a plaintiff’s asbestos exposure to determine if the WPLA applied, it would combine exposure to multiple products outside each respective defendant’s chain of distribution. Combining exposure in this way could apply strict liability to defendants for exposure outside the stream of commerce of their products, a result that contradicts the law set forth in *Macias*, *Braaten*, and *Simonetta*.

This case presents the dangers of aggregation recognized in *Macias*, *Braaten*, and *Simonetta*: the Court would combine alleged asbestos exposure in brakes and gaskets manufactured by Bendix and Victor, and sold by CSK Auto, asbestos from AC pipe manufactured by JM and sold by PWW, asbestos from AC pipe manufactured by CertainTeed and sold by HD Fowler, and asbestos from vermiculite mined

by W.R. Grace. None of these products is in the other's chain of distribution. Yet, if this court applied the common law from aggregation, and exposure to a specific defendant's product was not substantially all before 1981, it would be imposing strict liability on a defendant due to exposure to products outside that defendant's chain of distribution. A defendant-specific approach applies strict liability only to a product within that defendant's chain of distribution. Only this approach is consistent with the Supreme Court's holdings in *Macias*, *Braaten*, and *Simonetta*.

3. Only a Defendant-Specific Analysis Upholds the Legislative Intent Behind the WPLA.

a. In enacting the WPLA, the Washington Legislature rejected the common law strict liability standard for Washington's sellers, and intended to immunize sellers from product liability except in limited circumstances.

The Washington Legislature enacted the WPLA in 1981, after five years of intense debate, and after the Legislature had rejected six previous product liability reform bills. *See* Senate Journal, 47th Legislature (1981), at 618. Prior to its enactment, in 1979, due to the legislative stalemate surrounding the "product liability controversy," the Senate convened the Select Committee on Tort and Product Liability Reform ("Senate Committee") to examine potential solutions and propose a comprehensive product liability bill. *Id.* The Senate Committee spent a year and a half

studying the issues surrounding product liability reform, holding nine public hearings to solicit experts' input and proposals.¹⁰ *See id.* at 618-21.

A principal problem the Senate Committee intended the WPLA to resolve was the exposure of sellers to the same strict liability under the common law as a manufacturer. *See Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 149, 542 P.2d 774 (1975). The Senate Committee stressed this was a fundamental problem: “[t]here has been general agreement before the Committee that the current liability exposure of the ‘passive’ retailer under current rules of joint and several liability throughout the distribution chain is not justified.” Senate Journal, 47th Legislature (1981), at 625.

To correct the unjustified application of strict liability to Washington's sellers, the Senate Committee, and the Washington Legislature, split the liability standard for sellers from manufacturers. *See id.* at 631-32; Laws of 1981, ch. 27, §§ 4, 5, at 114-116. In RCW 7.72.030, the WPLA retained the strict liability standard for manufacturers. Laws of 1981, ch. 27, § 4, at 114-115. RCW 7.72.040, the provision applicable to sellers, however, rejected the common law

¹⁰ The Senate Committee's final report, with a section-by-section analysis of the WPLA, was incorporated in the Senate Journal of the 47th Legislature. *See* Senate Journal, 47th Legislature (1981), at 617-37.

strict liability standard for sellers. *See* Laws of 1981, ch. 27, § 5, at 115-16. Instead, § 7.72.040 immunized Washington’s sellers from product liability claims, except in the limited circumstances enumerated therein. *Id.* The Senate Committee explained that “it is the intent of the Select Committee that liability will be imputed to the non-manufacturing product seller only if the claimant is unable to reach each manufacturer which otherwise might be liable in the particular circumstances addressed in the relevant subparagraph.” Senate Journal, 47th Legislature (1981), at 632.

The WPLA plainly reflects the Senate Committee’s intent to immunize Washington’s sellers from strict liability. In the Preamble to the WPLA, the Legislature stated: “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.” Laws of 1981, ch. 27, § 1, at 112. Washington courts have affirmed this intent. *See, e.g., Buttelo*, 72 Wn. App. at 404-05 (affirming the intent of the Washington Legislature to apply different liability standards to manufacturers and sellers, generally immunizing sellers from liability).

In sum, the Washington Legislature intended the WPLA to affect three purposes: (1) apply different liability standards to manufacturers and sellers; (2) reject a strict liability standard for sellers; and (3) generally

immunize sellers from liability. *See generally*, Senate Journal, 47th Legislature (1981).

b. Only a defendant-specific analysis for the WPLA's application is consistent with the Legislature's intent in passing the WPLA.

In addressing the aggregation/defendant-specific issue, it is a court's duty to "give effect to the intent and purpose of the Legislature." *Grant v. Spellman*, 99 Wn.2d 815, 818, 664 P.2d 1227 (1983). The overriding rule of statutory construction is "the rule of reason upholding the obvious purpose that the legislature was attempting to achieve." *State v. Coffey*, 77 Wn.2d 630, 637, 465 P.2d 665 (1970). "[N]o construction should be given to a statute which leads to gross injustice or absurdity." *In re Horse Heaven Irr. Dist.*, 11 Wn.2d 218, 226, 118 P.2d 972 (1941).

It is plain that resolution of the aggregation/defendant-specific analysis must consider the Legislature's intent to immunize sellers from liability, and must ensure that it does not lead to the "gross injustice or absurdity" of imposing strict liability on a seller when unwarranted. *In re Horse Heaven*, 11 Wn.2d at 226.

If aggregation were the rule, it would contravene the intent of the Legislature by unjustifiably imposing strict liability on a seller. For instance, if a plaintiff was exposed to asbestos from a manufacturer's product from 1950 through 1982, but a seller's product only in 1982, an

aggregate approach would hold that the common law applied because substantially all of the asbestos exposure occurred before 1981.¹¹ The seller would be subject to strict liability.

But the plaintiff's exposure to the seller's product occurred only after 1981, and neither the common law, nor a strict liability standard should apply to that seller. A defendant-specific approach, however, would apply the WPLA to the seller, and the plaintiff would need to satisfy the requirements of § 7.72.040 to hold the seller liable.

c. The application of joint and several liability to hazardous substance exposure cases requires a defendant-specific approach.

Because joint and several liability applies in asbestos cases,¹² a court must be particularly mindful to adhere to the Legislature's intent to insulate sellers from strict liability. Aggregation does not accomplish this. If a plaintiff alleged exposure to a manufacturer's product from 1950 to

¹¹ Aggregation would lead to the same result if the manufacturer settled with the plaintiff, and trial proceeded only against the seller. Applying an aggregate approach, the court would apply the common law, and strict liability to the seller, based on exposure to products from a defendant-manufacturer absent from the courtroom.

¹² Washington's common law imposed joint and several liability on both manufacturers and sellers in a product liability claim. *See Kottler v. State*, 136 Wn.2d 437, 442, 963 P.2d 834 (1998). The Tort Reform Act of 1986 rejected this approach, save in certain exceptions, such as product liability claims based on asbestos exposure. *See* Laws of 1986, ch. 305, § 401; *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 668-69, 771 P.2d 711 (1989) (holding joint and several liability applicable to asbestos product liability claims).

1982, and a seller's only in 1982, aggregation would apply the common law, and strict liability, to that seller. The seller could be held jointly and severally liable to a plaintiff's adjudged damages where the manufacturer was primarily at fault.

This situation offends the Legislature's intent not because the seller is jointly and severally liable, but rather because the seller is jointly and severally liable under a strict liability standard, instead of the limited standard in § 7.72.040. *See id.* The Legislature declared such a result was "not justified." Senate Journal, 47th Legislature (1981), at 625. Aggregation magnifies that injustice by punishing a defendant for tortious conduct of others. A defendant-specific approach, however, upholds the legislature's intent, by applying the correct liability standard to the seller based only on its conduct. If based on that conduct, and the appropriate liability standard, a seller is liable, the Legislature deemed joint and several liability justified.

4. Public Policy Only Supports a Defendant-Specific Analysis to Determine if the WPLA Applies.

It is generally recognized that application of product liability principles should apply "only when the policies underlying the duty to guard against injuries caused by products will be advanced." *Buttelo*, 72 Wn. App. at 404. The policy arguments advanced in favor of applying

strict liability to sellers in products liability claims are not at issue here.¹³ The Washington Legislature has already rejected these arguments when it enacted the WPLA with the primary objective of removing Washington sellers from the exposure to strict liability.¹⁴ *See generally* Senate Journal, 47th Legislature (1981); *see also* Laws of 1981, ch. 27, § 1, at 112.

Instead, the primary policy concern present here is the principle affirmed by the Washington Supreme Court that defendants should not be strictly liable for products outside their chain of distribution. *See Macias*, 175 Wn.2d at 410. Holding sellers strictly liable for actions of manufacturers unrelated to the seller, or the seller's product, does not advance the policy of protecting the public from unsafe products. *Buttelo*, 72 Wn. App. at 404.

For instance, a seller of one product cannot influence a manufacturer of a different product to make its product safer. Nor is it just

¹³ *See, e.g., Vandemark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964) (advancing policy arguments).

¹⁴ Courts, in addition to Washington's Legislature, have long recognized that the arguments in favor of imposing a strict liability standard on manufacturers do not justify doing so for sellers. *See* John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 95 Dick. L. Rev. 287, 289-97 (1991). Indeed, even Justice Traynor, recognized as the catalyst for the movement to impose strict liability on sellers, acknowledged that liability on manufacturers is more justified than on sellers. *See Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 468, 150 P.2d 436, 443 (1944) ("[T]here is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.") (Traynor, J., concurring).

to ask a seller to absorb the costs of a faulty product it had no part in distributing. Holding a seller accountable for a duty it never had in the first place does not advance the public policies governing product liability law in Washington. As shown, aggregation violates these principles, whereas a defendant-specific approach upholds them.¹⁵

C. UNDER EITHER A DEFENDANT-SPECIFIC APPROACH OR AGGREGATION, THE RECORD SHOWS THAT THE WPLA APPLIES.

1. The “Substantially All” Standard Requires Appellant to Show That “Essentially All” of his Asbestos Exposure Occurred Before 1981.

Unless substantially all of a plaintiff’s exposure to a hazardous substance occurred prior to July 26, 1981, the WPLA applies. *See, Viereck*, 81 Wn. App. at 584; *Krivanek*, 72 Wn. App. at 635.

“Substantially all” has been interpreted to mean: all except a “negligible

¹⁵ A defendant-specific approach may lead to application of both the common law and WPLA in the same lawsuit. But this is neither unreasonable nor unusual, because this is already the norm in product liability actions. The WPLA applies the strict liability standard from common law against a manufacturer under § 7.72.030, and insulates a seller from liability except as listed in § 7.72.040. *See, e.g., Macias*, 175 Wn.2d at 409 (“[W]ith respect to failure to warn claims in particular, we have concluded that the legislature intended that [WPLA § 7.72.030] carr[ies] forward principles that we previously recognized under the common law Strict liability principles apply to both defective design and failure to warn cases.” (internal citation omitted)). And by exempting claims based on fraud, intentional harms and the Consumer Protection Act, the WPLA intends a court to apply common law and the WPLA under the same cause of action. *See* RCW 7.72.010(4); *see, e.g., Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1584 (9th Cir. 1994) (applying WPLA to nuisance claim, but common law to intentional nuisance claim). Applying varying legal standards is not unusual in Washington tort practice.

minority”; “essentially all”; and all except a “practically negligible” amount. *See Ice Serv. Co. v. Comm’r of Internal Revenue*, 30 F.2d 230, 230 (2d Cir. 1929) (holding that substantially all, in the context of when two corporations are affiliated for tax purposes, means all except “a negligible minority” or when a “practically negligible” amount remains); *Hook v. Astrue*, No. 1:09-cv-1982, 2010 WL 2929562, at *4 (N.D. Ohio July 9, 2010) (holding, in the context of social security disability analysis, that “substantially all means ‘essentially all’ as opposed to ‘in the main’ or ‘for the most part’”). Accordingly, for the common law to apply, Appellant must show that essentially all of his exposure occurred prior to 1981, or that only a negligible amount of exposure occurred after 1981.¹⁶

2. Washington Courts Have Applied the “Substantially All” Standard to Mean “Essentially All.”

Washington courts have consistently applied the WPIA unless substantially, or essentially, all of a plaintiff’s asbestos exposure occurred prior to 1981.¹⁷ No court holds otherwise. In fact, Washington courts

¹⁶ Because the WPIA’s effective date is July 26, 1981, absent precise facts, 1981 should not be included in the calculation, as 1981 is virtually an even split of exposure before and after the effective date.

¹⁷ Washington courts did not apply the WPIA in the following cases because the plaintiff alleged asbestos exposure entirely before 1981. *See Simonetta*, 165 Wn.2d at 345 (asbestos exposure “in 1958 or 1959”); *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 699, 853 P.2d 908 (1993) (asbestos exposure from 1946 to 1980); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 27, 34, 935 P.2d 684 (1997) (asbestos exposure from 1957 to 1963); *Viereck*, 81 Wn. App. at 581 (asbestos exposure from 1956 to 1960); *Krivanek*, 72 Wn. App. at 635 (asbestos exposure “in the 1950s and 1960s”).

have applied the WPLA in asbestos cases, even if all, or essentially all, of the exposure occurred *before* 1981.¹⁸

Seven Washington cases present facts where a plaintiff's asbestos exposure occurred both before and after 1981. In all of these cases, the Court applied the WPLA unless essentially all of the asbestos exposure occurred before 1981.

In 1991, the Washington Court of Appeals addressed application of the WPLA in *Koker v. Armstrong Cork*, 60 Wn. App. 466, 804 P.2d 659 (1991). Koker alleged asbestos exposure from 1969 to 1971, and again from 1974 through 1986. *Id.* at 469. The “parties agree[d] that the degree of exposure was less in the later years with the advent of preventative and precautionary measures.” *Id.* at 472 n.4. Because Koker's post-1981 exposure was minimal by admission of the parties, the *Koker* court held that substantially all of Koker's asbestos exposure occurred prior to 1981. *Id.* at 472; *see also Braaten*, 165 Wn.2d at 381 & n.1, 383 n.4 (holding,

¹⁸ *See Falk v. Keene Corp.*, 113 Wn.2d 645, 646, 648-650, 782 P.2d 974 (1989) (applying WPLA despite asbestos exposure “from 1947 to 1953”); *Stark v. Celotex Corp.*, 58 Wn. App. 940, 942, 795 P.2d 1165 (1990) (applying WPLA's statute of limitations, without discussion, with asbestos exposure from 1950 to 1982); *Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 651, 656-57, 794 P.2d 554 (1990) (applying WPLA, without discussion, with asbestos exposure that occurred no later than September 1982); *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 182-83, 782 P.2d 1107 (1989) (applying WPLA's statute of limitations despite asbestos exposure “in the early 1950's”); *In re Estate of Foster*, 55 Wn. App. 545, 546-47, 550-51, 779 P.2d 272 (1989) (applying WPLA despite asbestos exposure in 1944 and 1945).

without analysis, that substantially all of Braaten’s exposure “from 1967 until the early 1980s” occurred before 1981).

In *Macias v. Saberhagen Holdings*, the Washington Supreme Court addressed asbestos exposure that occurred continuously from 1978 to 2004. 175 Wn.2d at 405. Applying a defendant-specific approach to the three defendants in the case, the *Macias* Court noted that exposure to two defendants occurred only after 1981, and thus, the WPLA applied. *Id.* at 409 n.2. As to the remaining defendant, the Court concluded that the exposure was not substantially all before 1981 and the WPLA applied. *Id.*

The *Macias* Court’s conclusion is the same one reached by the Supreme Court in *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 901 P.2d 927 (1995). In *Brewer*, the plaintiff alleged uninterrupted asbestos exposure at two different workplaces from 1966 to 1988. *Id.* at 515. The Court applied the WPLA to Brewer’s claim. *Id.* at 520-21; *see also Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 610, 614-15, 762 P.2d 1156 (1988) (this Court applied the WPLA to a claim in which the plaintiff alleged exposure from an unknown start to “the time of trial” in 1986).¹⁹

And in two instances, the Washington Court of Appeals applied

¹⁹ The trial court docket in *Sturgeon v. Celotex Corp.*, listed the trial date as September 15, 1986. *See* King County Superior Court Case Summary, No. 82-2-04402-4, Dkt. No. 1345, Non-Jury Trial JDG0008, *available at* http://dw.courts.wa.gov/index.cfm?fa=home.superiorSearch&terms=accept&flas_hform=0.

the WPLA in cases where the alleged asbestos exposure was almost entirely *before* 1981. In *Stark v. Celotex Corp.*, the plaintiff alleged asbestos exposure from several manufacturers' products while employed at the Puget Sound Naval Shipyard from 1950 to 1982. 58 Wn. App. 940, 942, 795 P.2d 1165 (1990). At issue was a jury instruction for the statute of limitations. *Id.* The *Stark* Court, applied, without discussion, the WPLA's statute of limitations provision, RCW 7.72.060, even though essentially all of Stark's asbestos exposure occurred pre-1981. *Id.* at 942 n.2; *see also Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 651, 656-57 & n.9, 794 P.2d 554 (1990) (this Court applied the WPLA to asbestos exposure that occurred no later than September 1982).

The review of Washington case law reveals that the cases most analogous to Appellant's facts have held that the WPLA applied. *See Macias*, 175 Wn.2d at 405, 409 n.2; *Brewer*, 127 Wn.2d at 515, 520-21; *Stark*, 58 Wn. App. at 942.

3. Under a Defendant-Specific Approach the WPLA Applies to Appellant's Claim Against PWW.

The undisputed facts show that Appellant's only claimed exposure to PWW AC pipe occurred after 1981. As a result, the WPLA applies to Appellant's claim against PWW.

Appellant's alleged exposure to PWW AC pipe is from his

testimony that he personally obtained, and used, PWW AC pipe while employed at Lake Washington in the 1980's. *See* CP at 823-25, 843-46, 855, 1225, 1260, 1274, 1384, 1394-95, 1398. It is undisputed that Appellant picked up AC pipe *only* from PWW's Woodinville location. *See* CP at 1372-73. It is also undisputed that PWW did not open its Woodinville location until 1981 at the earliest. *See* CP at 626 ¶ 5, 750, 752-53. Mr. Davis, a disinterested non-party witness, testified that he *personally* opened PWW's Woodinville location, and did so no earlier than 1981. *See* CP at 626, 750-51, 753. Mr. Davis also testified that PWW stopped selling AC pipe in 1984. *See* CP at 626, 752.

Combining the above uncontested facts, the record shows that Appellant's total alleged exposure to PWW AC pipe was from 1982 to 1984. Thus, his exposure to PWW's AC pipe occurred, if at all, after 1981. This Court does not need to engage in a "substantially all" analysis, because *all* of Appellant's alleged exposure to PWW's AC pipe occurred after 1981. The WPLA applies to Appellant's claim against PWW.

Even if this Court considered Appellant's alleged exposure to PWW AC pipe in 1979 and 1980,²⁰ the WPLA still applies. Appellant

²⁰ Appellant will likely point to his declaration submitted in opposition to PWW's summary judgment motion as "evidence" that Appellant was exposed to PWW AC pipe before 1981. *See* CP at 588-89. He declared that he "cut and beveled" AC pipe "which was delivered by" PWW. CP 588 ¶ 4. This directly contradicts his prior testimony that his employers delivered AC pipe for their

testified that he worked with AC pipe that he personally obtained from PWV's Woodinville location while employed at C&D "for six months" in 1979 to 1980. See CP at 823, 1210, 1257, 1408-09. Assuming, *arguendo*, this is true, Appellant's pre-1981 exposure to PWV AC pipe is two years. His post-1981 exposure is three years, from 1982 to 1984. Therefore, not substantially all of Appellant's exposure to PWV's products occurred before 1981, and the WPLA applies here. See *Macias*, 175 Wn.2d at 409; *Brewer*, 127 Wn.2d at 520-21; *Koker*, 60 Wn. App. at 472.

pipe yard in his employers' trucks. See CP at 825, 845-46, 1384, 1394-95, 1398. And this directly contradicts his prior testimony that the only reason he thought the AC pipe in his employers' yards came from PWV was because his employers' truck drivers told him so. See CP at 825, 845-46, 1225, 1384, 1394-95, 1398. Appellant's claim is also factually impossible because after 1967 or 1968, long before Appellant worked at C&D in 1979, PWV sold its one truck, and permanently stopped delivering piping and pipe supplies. See CP at 583.

Appellant also declared that he "obtained" AC pipe from PWV that he "cut and beveled prior to 1981." CP at 588 ¶ 5. This statement directly contradicts Appellant's testimony that he only obtained AC pipe from PWV's Woodinville location. See CP at 1372-73.

Appellant's self-serving declaration is inadmissible under Washington's *Marshall* rule, which holds that a party cannot create a genuine issue of material fact through a declaration that "merely contradicts" his prior testimony. See *Marshall*, 56 Wn. App. at 185. Appellant offered no explanation why he changed his testimony, and he presented no corroborating evidence to counter Mr. Davis's undisputed evidence that Appellant could have obtained AC pipe from PWV's Woodinville location only after 1981. See 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc.* § 2726 (3d ed. 2013) ("It seems quite clearly correct to conclude that an interested witness who has given clear answers to unambiguous questions cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, without providing a satisfactory explanation of why the testimony is changed.").

4. Even Under an Aggregate Approach, the WPLA Still Applies to Appellant’s Claim Against Respondents.

a. Under aggregation, the WPLA applies because not substantially all of Appellant’s admissible evidence of asbestos exposure is before 1981.

Even if this Court aggregated Appellant’s asbestos exposure, the WPLA would still apply to his claim against PWW. Appellant claimed asbestos exposure from (1) friction work –brake and gasket repair jobs on his personal cars, (2) AC pipe, and (3) while he lived and recreated in the Troy and Libby, Montana area.

Appellant also claimed he was exposed to asbestos from joint compound, while in the Navy, and when he watched mechanics perform brake jobs while employed at King County Road Department (“King County”). *See* OB at 9-10; CP at 792-94, 808, 810, 967-72, 977, 982-85, 992-93, 1114, 1165, 1189-1194. But Appellant did not present any admissible evidence to show that during these employments the products he worked with contained asbestos. Appellant had no personal knowledge these products contained asbestos; he provided no documentary evidence, and he offered no witnesses to support his claim. *See* CP at 969, 971-72, 992-93. The only evidence Appellant did provide to link these products with asbestos is inadmissible hearsay.²¹ *See* CP at 810, 816-17, 969, 983-

²¹ Appellant has no personal knowledge that the joint compound he worked around contained asbestos. He believes it today only because his wife told him so after looking on the internet. *See* CP at 983-84, 1221-22 (did not personally

84, 1174, 1193-94, 1221-22.

As to Appellant's alleged friction work, he claims asbestos exposure when he replaced brakes and gaskets supplied by CSK Auto on his personal cars. He performed a total of 13 maintenance jobs involving brakes or gaskets. *See* CP at 859-81, 1011-21, 1026, 1033-34. Of those 13 repair jobs, Appellant performed seven (7) before 1981, five (5) after 1981, and one undetermined.²² *Id.*

view internet pages). As to his naval "exposure," Appellant claimed that the only product that contained asbestos was "lagging," or insulation, and he only believed the lagging contained asbestos because his "chief" aboard the *Lloyd Thomas* told him so. *See* CP at 969, 971. As to the repair work he observed, Appellant testified that he thought the new brakes were made by Case Construction Equipment ("Case") or Caterpillar, Inc. ("Cat") only because the mechanics told him so. *See* CP at 810, 816-17, 992-93, 1174, 1193-94.

This "evidence" of what other people told Appellant is undoubtedly hearsay, and is inadmissible if offered to prove that the products he worked around contained asbestos. *See* Wash. R. Evid. 801, 802. Further, because this hearsay goes to an essential element of Appellant's product liability claim, no other purpose exists (i.e. state of mind) to offer the "evidence" than to show he worked with asbestos-containing products.

²² Appellant's testimony related to his friction work requires explanation to determine when he performed certain repair jobs. First, it is unclear from his perpetuation testimony when Appellant owned, or worked with, a 1956 Ford Pickup. *See* CP at 867-68. However, he later testified that he repaired the 1956 Ford Pickup's brakes when he lived in Monroe, Washington from 1982 to 1985. *See* CP at 1021, 1034.

Second, in his perpetuation deposition, Appellant did not specify when he worked on a 1965 VW Super Beetle. *See* CP at 873-74. He testified that he bought a 1965 VW Super Beetle in the late 1970's to early 1980's, owned it five years, and replaced the brakes. *See id.* Later, in his discovery deposition, Appellant clarified that he worked on the 1965 VW while he lived in Monroe from 1982 to 1985. *See* CP at 1034.

Third, Appellant testified that his last auto repair work occurred while he lived in Gold Bar, Washington from 1985 to 1990. *See* CP at 1021, 1034.

As to AC pipe, Appellant alleged that he was exposed to it during his employment from 1979 to 1992. *See* CP at 1217-18, 1232, 1253-54, 1257, 1334-35, 1409-1410.

And Appellant testified that he was exposed to asbestos when he would visit Libby and the surrounding area from the early 1980's until 2007. *See* CP 899-900, 919-20, 965, 1080-82. Libby and Troy, Montana, where Appellant moved in 2001, are infamous because hundreds of their residents died, and over 1,700 residents were sickened, due to asbestos contamination in the area from W.R. Grace & Co.'s vermiculite mine.²³ The Libby and Troy area was so badly contaminated with asbestos that the Environmental Protection Agency ("EPA") labeled the area a "Public Health Emergency" – the first time ever in the EPA's existence.²⁴ *See* U.S. EPA, Region 8, Libby Asbestos, Major Milestones, *available at*

Appellant performed repair work on at least one of two vehicles – the 1964 Mustang and 1961 Ford – if not both, while he lived in Gold Bar. *See id.*

Finally, as to Appellant's 1965 Ford Mustang, he said he bought it in the 1970's and owned it for six or seven years. *See* CP at 868-69. Thus, he bought the car as early as 1971 and as late as 1979, and performed repair work on it between 1971 and 1986. Without further clarification, a definitive time for this repair job is impossible.

²³ *See* Matthew Brown, *Libby, Montana: New Danger Found In Asbestos-Plagued Town*, The Huffington Post, July 5, 2011, http://www.huffingtonpost.com/2011/07/05/libby-montana-asbestos-wood-piles_n_890222.html.

²⁴ The Court may take judicial notice of the asbestos contamination in the Libby area under Wash. R. Evid. 201(b). *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008) (taking judicial notice of a public record under Wash. R. Evid. 201(b)).

<http://www2.epa.gov/region8/libby-asbestos>. In 1999, the measurable asbestos fiber level in the ambient air in Libby was 10,000 times greater than in 2009, and asbestos fibers were present in “garden soil” “driveway materials,” and playgrounds.²⁵ *Id.*; *see also id.*, Risk Assessment. “[C]hildren would write their names in the [asbestos] dust on their parent’s cars.” Andrew Schneider, *Uncivil Action: A Town Left To Die*, Seattle Post-Intelligencer, Nov. 18, 1999, at 4.

Appellant visited Libby regularly for fishing and leisure, even having picnics while lying on asbestos contaminated vermiculite. *See* CP 919-20, 965, 1080-82. And Appellant moved permanently to Troy in 2001, where he lived during the EPA’s ongoing asbestos contamination cleanup in the area. *See* CP at 774 (listing Troy, Montana address), 919 (moved to current address in 2001), 965 (retired in 2001).

Aggregating Appellant’s asbestos exposure shows the following pre-1981 exposure: (a) seven (7) personal brake and gasket jobs; and (b)

²⁵ The area’s asbestos contamination came from W.R. Grace’s nearby vermiculite mine. *See id.*, Frequently Asked Questions. The vermiculite mine operated until 1990, and cleanup in the area did not begin until 1999. *Id.* As of October 2010, the EPA removed 900,000 cubic yards of asbestos-contaminated materials, and de-contaminated 1,460 residences and commercial properties, which led W.R. Grace to pay \$250 million, the largest ever Superfund settlement.. *See id.*, Cleanup Activities; *see also* Schneider, *Uncivil Action: A Town Left To Die*, Seattle Post-Intelligencer, Nov. 18, 1999, at 3-4 (reporting that by 1975, “half a million pounds of asbestos a day were processed” in the mine, leading to “5,000 pounds of asbestos” dust expelled per day).

AC pipe for six months in 1979 to 1980. *See* CP at 823, 859-81, 1011-21, 1026, 1033-34, 1210, 1257, 1408-09. His post-1981 exposure is: (a) five (5) personal brake jobs; (b) AC pipe for 11 years from 1982 to 1992, and (c) recreating and living in and around the Libby area for 26 years. *See* CP at 859-81, 919-20, 1011-21, 1026, 1033-34, 1080-82, 1217-18, 1232, 1253-54, 1257, 1334-35, 1409-1410.

On this record, substantially all of Appellant's exposure is *after* 1981. The brake and gasket repair work is practically equal (seven pre-1981, five post-1981). And Appellant's alleged asbestos exposure to AC pipe and in the Libby area occurred from 1979 to 2007. Appellant cannot meet the necessary showing that substantially all of his exposure occurred before July 1981. The WPLA applies to Appellant's claim against PWW.

b. Even if the Court views the record in the best light for Appellant, the WPLA still applies under aggregation.

The result would be the same – the WPLA applies – even if the Court considered the record in the best light possible to Appellant and included the inadmissible evidence of his asbestos exposure. Appellant's inadmissible evidence alleged asbestos exposure to joint compound, while in the Navy, and when he watched mechanics perform auto repairs.

Appellant alleged he worked with asbestos-containing joint compound while he worked with his father at Sunshine Construction

(“Sunshine”).²⁶ See CP at 792-94, 982-85. Appellant believed he worked at Sunshine for “a couple of years” before 1965 and then again from 1968 to the early 1970’s. See CP at 779-80, 792.

Appellant alleged he was exposed to asbestos while he observed co-workers perform brake jobs²⁷ on Cat and Case heavy equipment, while he worked at King County. See CP at 808, 810, 1114, 1165, 1189-1194. Appellant believes he worked for King County for seven years, most likely 1971 to 1978 or 1979. See CP at 800-01, 992.

Appellant claims he was exposed to “lagging” or insulation that contained asbestos while aboard the *U.S.S. Lloyd Thomas* when he was in the Navy from 1965 to 1968. See CP at 967-69, 971-72, 977.

Putting this testimony in the best possible light for Appellant, the Court would credit Appellant with a full year of asbestos exposure for each year he worked at these employers, even though that is not warranted (i.e., watching co-workers replace brakes on 13 to 20 wheels while

²⁶ At Sunshine, Appellant claimed he worked on 100 construction jobs, and used 400 buckets of joint compound. See CP at 792-94.

²⁷ He testified that each “brake job” was when a co-worker replaced the brakes on one wheel (i.e., replacing the brakes on a car would equal four “brake jobs”). CP at 1189-92. During his employment at King County, Appellant observed 10 brake jobs on Case backhoes, and three to 10 brake jobs on Cat road graders. See CP at 808, 810, 1114, 1165. This translates into brake replacement on 13 to 20 wheels that Appellant claims he observed. See CP at 1189-92. During his entire seven-year employment at King County, Appellant claims he witnessed brake work on Cat equipment for a “total of four hours.” CP at 1190-93.

employed at King County does not equal full years of exposure from 1971-1978). Aggregating all of Appellant's pre-1981 exposure to AC pipe and personal brake and gasket repairs, with the inadmissible evidence of his exposure while employed at King County, Sunshine, and in the Navy, Appellant would claim pre-1981 asbestos exposure from 1963 to 1980, and from seven personal brake and gasket jobs.

If the Court took Appellant's post-1981 exposure in the best possible light to him by removing any consideration of his asbestos exposure while living and recreating in Libby, the remaining post-1981 asbestos exposure would be from AC pipe while employed at Lake Washington, Kirkland, and Bothell from 1982 to 1992, and from five personal brake jobs.²⁸ In this best-case hypothetical, Appellant's alleged asbestos exposure would be from 1963 to 1992, or 18 years pre-1981 and 11 years post-1981, and seven (7) brake jobs before 1981 and five (5) brake jobs after 1981. This plainly would not satisfy the substantially all standard established by Washington courts.

Appellant cannot argue that his case is similar to *Koker v. Armstrong Cork*, because in *Koker*, the parties agreed that the degree of Koker's exposure was "less in the later years" because of "preventative

²⁸ See CP at 859-81, 1011-21, 1026, 1033-34, 1217-18, 1232, 1253-54, 1257, 1334-35, 1409-1410.

and precautionary measures.” 60 Wn. App. at 472 n.4. The *Koker* court was not attempting to establish a rule of weighing the degree of exposure before and after 1981, as Appellant suggests. See OB at 28. Rather, given the parties agreement that Koker’s use of “preventative measures” minimized his later exposure, the court held that on those specific facts, substantially all of his exposure was before 1981. 60 Wn. App. at 472. No such agreement, or evidence, exists here.

Appellant cannot deny that this case is most factually similar to the exposure claimed in *Brewer v. Fibreboard Corp.* In that case, Brewer alleged asbestos exposure from two different work places from 1966 to 1988. 127 Wn.2d at 515. And in *Brewer*, the Court applied the WPLA, without discussion. *Id.* at 520-21.

No Washington court has held the common law applies on facts remotely close to Appellant’s. The personal brake jobs are split almost evenly before and after 1981 – seven to five – and Appellant’s exposure from 1963 to 1992 is not substantially all before 1981, under any definition of “substantially all.” The WPLA applies, even under a best-case aggregation using inadmissible evidence.

Appellant conceded, before the trial court, and this Court, that if the WPLA applies, dismissal of PWW is proper. Appellant did not raise

the issue of PWW's liability under the WPLA before the trial court.²⁹ See CP at 114-25, 286-87, 529-39; 3/16/12 Report of Proceedings ("RP"), 1-28. Appellant never alleged, or provided evidence in the record, that PWW was negligent, breached an express warranty, or intentionally misrepresented or concealed facts from him, as required by RCW 7.72.040, let alone that any such conduct proximately caused his alleged damages. And Appellant conceded the issue in its Opening Brief. Thus, this Court should affirm PWW's dismissal.³⁰

D. EVEN IF THIS COURT HOLDS THAT THE WPLA DOES NOT APPLY, DISMISSAL OF PWW IS PROPER BECAUSE APPELLANT'S ALLEGED EXPOSURE TO PWW'S AC PIPE WAS NOT A SUBSTANTIAL FACTOR IN APPELLANT'S ALLEGED INJURY.

Assuming, *arguendo*, that common law applied here, to carry his burden of proof in a products liability claim, Appellant must still prove causation between his alleged injury and his exposure to PWW's AC pipe. See *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). To prove causation in an asbestos exposure claim, Appellant must show that exposure attributable to PWW was a substantial factor in causing the alleged

²⁹ Appellant may not raise an issue for the first time on appeal when he failed to do so in the lower court. See RAP 2.5(a); RAP 9.12; *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012) ("A failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived.").

³⁰ Even if this Court addressed this issue, and held against PWW, dismissal of PWW is still proper because Appellant's Complaint only alleged common law claims, which are preempted by the WPLA. See CP at 13-28; *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853-55, 774 P.2d 1199 (1989).

injury. See 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. 15.02 (6th ed.); *Morgan*, 159 Wn. App. at 730 (analyzing “whether sufficient evidence of causation exists against a particular defendant”). Here, the record fails to create a triable issue of fact that Appellant’s alleged exposure to PWW’s AC pipe was a substantial factor in his claimed injury.³¹

Washington courts consider four factors to determine if a particular defendant’s product was a substantial factor. See *Morgan*, 159 Wn. App. at 730. At issue here is the fourth factor: “the evidence presented as to medical causation of the plaintiff[]’s particular disease.” *Id.* Under the fourth factor, a plaintiff must present expert testimony “that asbestos fibers were released in an amount sufficient to cause” the alleged injury, and thereby “separate[] the speculative from the probable.” *Borg-Warner v. Flores*, 232 S.W.3d 765, 772-73 (1ex. 2007); *Morgan*, 159 Wn. App. at

³¹ Appellant argues that tension exists between PWW’s argument that Appellant cannot satisfy the “substantially all” standard because his post-1981 exposure to PWW’s product is too much, and PWW’s argument that neither product was a substantial factor in Appellant’s alleged injury. See OB 34-35. Appellant, however, fails to point out the similar supposed tension in his own position – Appellant wants his post-1981 exposure to be de minimis during the “substantially all” analysis, but wants that same asbestos exposure to be magnified during the substantial factor discussion.

In reality, no tension exists. Appellant is merely highlighting the difference between a choice of law analysis and a causation analysis. In the choice of law analysis – should the WPLA apply – the Court is not weighing the degree of exposure, rather it is comparing when Appellant claimed asbestos exposure. In the causation analysis, the Court is examining if the degree of Appellant’s exposure is sufficient to satisfy his burden of proof for liability – is that exposure enough to be a substantial factor in his harm?

740-41 (acknowledging that a plaintiff must establish that the frequency of his exposure to each defendant's product was medically sufficient).

To satisfy its summary judgment burden, PWW presented the declaration of Dr. Coreen Robbins, a Certified Industrial Hygienist, that Appellant's alleged exposure to PWW's AC pipe was 100 times below the lowest exposure level ever recorded to cause asbestosis. *See* CP at 685 ¶ 21. The admissible evidence of Appellant's alleged exposure to PWW's AC pipe was from his employment at Lake Washington. *See* CP at 833-34, 843-44, 1003, 1254-55, 1257. While at Lake Washington, Appellant alleged he made five (5) cuts and five (5) bevels to PWW AC pipe, and watched co-workers make five (5) cuts and "a couple" of bevels to AC pipe that he personally obtained from PWW. *See* CP at 843-44.

Dr. Robbins examined this evidence in the light most favorable to Appellant by assuming that his exposure was the worst recorded in scientific literature and studies. *See* CP at 683 ¶ 17. Dr. Robbins concluded that Appellant's exposure fell 100 times short of the lowest exposure level recorded to cause asbestosis. *See* CP at 683-85 ¶¶ 19, 21. Such exposure cannot be, as a matter of law, a substantial factor.

Having met its burden and established no issue of fact as to medical causation, Appellant must offer prima facie evidence to support medical causation. *See Bruns*, 77 Wn. App. at 208. Appellant's proposed

evidence “must be specific, detailed, and not speculative or conclusory.” *Sanders*, 121 Wn. App. at 600.

Here, to satisfy the medical causation prong of the substantial factor test, Appellant relied solely on the declarations of Appellant’s experts, Charles Ay and Dr. Herman Bruch. *See* CP at 538-39, 585-87, 590-99. But Appellant’s experts’ declarations are unsubstantiated, overbroad and conclusory; they are neither specific nor detailed in their assessment of medical causation, and are inadmissible. *See, e.g., Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993) (“Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.”).

The entirety of the evidence that Mr. Ay based his conclusions on is found in paragraph 19 of his declaration: “I was provided with, and have reviewed, the deposition testimony of Ronald Fagg regarding his cutting and beveling of A/C transite pipe during his employment with C&D Enterprises, Inc. and Lake Washington Water and Sewer.” CP at 598. And Dr. Bruch declared that he reviewed Mr. Ay’s declaration, Appellant’s inadmissible declaration,³² and excerpts from Appellant’s first deposition. *See* CP at 587 ¶ 9.

³² *See supra*, note 20.

Numerous faults lie in Mr. Ay and Dr. Bruch's evidentiary review.

- Mr. Ay does not specify which of Appellant's four depositions he reviewed, or if he reviewed all of them. Dr. Bruch only reviewed excerpts of Appellant's first deposition.
- Both Mr. Ay and Dr. Bruch's review are overbroad because they considered Appellant's exposure to AC pipe generally, *not* specific to PWW, as is required by Washington law. *See Morgan*, 159 Wn. App. at 730.
- Both Mr. Ay and Dr. Bruch's review are also overbroad because they did not specify that they only considered Appellant's alleged exposure to PWW's AC pipe until 1984. It is undisputed that PWW stopped selling AC pipe after 1984. *See CP* at 626, 752.
- Mr. Ay and Dr. Bruch based their conclusions on inadmissible evidence. They failed to specify they did not consider Appellant's exposure to AC pipe from an employer's pipe yard as Appellant presented no admissible evidence that such pipe was from PWW. *See supra*, note 3.
- Mr. Ay and Dr. Bruch based their conclusions on unreasonable evidence – speculative and unreasonable testimony – that Appellant worked with AC pipe at C&D that he obtained from PWW's Woodinville location before it opened up. *See Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).
- Dr. Bruch based his conclusions on Appellant's sham affidavit that directly contradicted his testimony (in depositions Dr. Bruch never reviewed) without explanation. *See id.*; *see also supra*, note 20.

Based on his overbroad review of inadmissible evidence, Mr. Ay opined, without specificity or explanation, that Appellant's AC pipe exposure, *in general*, was a substantial factor in Appellant's alleged

injury. *See* CP at 598-99. Similarly, Dr. Bruch's opinion is medically deficient because he believed Appellant's AC pipe exposure, *in general*, while employed at C&D and Lake Washington was a cause in his alleged injury. *See* CP at 587 ¶ 8-11. This opinion is based on an overbroad review of inadmissible evidence. *See* CP at 587 ¶ 9. Both Mr. Ay and Dr. Burch failed to show that Appellant's exposure levels from AC pipe met the scientifically proven exposure levels necessary for asbestosis, as required by Washington law. *See Morgan*, 159 Wn. App. at 740-41; *Borg-Warner*, 232 S.W.3d at 772-73.

Most importantly, in stating their conclusions, neither Dr. Bruch nor Mr. Ay *ever concluded* that Appellant's exposure to PWW's AC pipe, *in particular*, was a substantial factor in his alleged injury. *See* CP at 587, 598-99. This fact alone shows that Appellant cannot satisfy the substantial factor test against PWW. Appellant's claim against PWW fails as a matter of law, and this Court should affirm PWW's dismissal.

V. CONCLUSION.

Consistent with controlling authority in *Macias*, *Braaten*, and *Simonetta*, Washington applies a defendant-specific approach to determine if the WPLA governs in an asbestos-exposure product liability action. The defendant-specific approach avoids the pitfall, present in aggregation, of holding a defendant strictly liable for products outside its chain of

distribution. And the defendant-specific approach upholds the purpose of immunizing Washington sellers from strict liability the Legislature intended when it enacted the WPLA.

Under the defendant-specific approach (and aggregation), the WPLA applies because Appellant's alleged asbestos exposure was not substantially all prior to 1981. As Appellant has conceded that if the WPLA applies, dismissal is proper for PWW, PWW respectfully requests that this Court AFFIRM the Superior Court's dismissal of PWW.

DATED this 13th day of November 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Precece LLP, attorneys for Respondent Pacific Water Works Supply Company, Inc. herein.

2. On this date, I caused a true and correct copy of the foregoing document to be served on the following counsel of record via Email and U.S. Mail:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED November 13, 2012 at Seattle, Washington.


Christy A. Nelson

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