Supreme Court No. 94732-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET RUBLEE, Individually and as Personal Representative of the Estate of VERNON D. RUBLEE,

Plaintiff-Appellant,

v.

PFIZER, INC.,

Defendant-Respondent.

PETITIONER'S ANSWER TO MEMORANDUM OF AMICUS CURIAE WASHINGTON STATE LABOR COUNCIL, AFL-CIO

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I. INTRODUCTION

Plaintiff-Appellant files this answer to the brief submitted by *amicus curiae* Washington State Labor Council, AFL-CIO ("WSLC"). As WSLC correctly points out, this Court has steadfastly applied the consumer expectation test as a bedrock principle of its products liability jurisprudence. In determining whether to impose liability for unreasonably dangerous products, the Court has consistently focused on the reasonable expectations of consumers who actually use and are injured by the product in question. Conversely, in this case the Court of Appeals applied out-of-state law to ignore undisputed testimony from workers actually exposed to asbestos from the injurious product and instead focused its legal analysis on the purportedly sophisticated users who purchased the product for their employer. Because the Court of Appeals' holding on this question of first impression contravened this Court's longstanding policy of resolving products liability questions from the perspective of the end user, review of this case is appropriate under RAP 13.4(b)(1) and RAP 13.4(b)(4).

II. ARGUMENT

This case presents a legal question of first impression within Washington State built upon a record that is not in dispute. Both Vernon Rublee and his co-worker, Charles Edwards, testified that they were

directly exposed to asbestos from "Pfizer" insulation cement used at Puget Sound Naval Shipyard. CP 869-70, 877-78. Indeed, Mr. Edwards expressly relied on the Pfizer logo testifying that "I just figured it would be safe. It was produced by a drug company." CP 878. Nevertheless, the Court of Appeals disregarded this testimony, holding instead that the apparent manufacturer doctrine should turn on the expectations of undefined "sophisticated purchasers" rather than the consumers who actually suffer injury from the defective product. As WSLC argues, this analysis conflicts with longstanding products liability jurisprudence of Washington State that consumers lured into a false sense of security should be permitted to seek compensation from companies who knowingly identify themselves with defective products and profit from such association. The Court should grant discretionary review to resolve that question of substantial importance to WSLC and its members.

A. The Ordinary Consumer Expectation Test – RAP 13.4(b)(1).

WSLC points out that the consumer expectation test has been a "cardinal principle of Washington Product liability law." Mem. of Amicus Curiae WSLC at 5. In support, WSLC cites to numerous holdings of this Court dating back to 1975. These decisions have repeatedly reaffirmed Washington's "long history [of] looking to the expectations of the ordinary consumer regarding a product's safety." *Id.* at 6. Should this

Court decide to adopt the Restatement (Second) of Torts § 400, it should apply Washington's longstanding emphasis on ordinary consumers and reject the Court of Appeals focus on sophisticated users. To hold otherwise would permit defendants to profit by associating their brand identity with an injurious product while avoiding liability by funneling their products through a sophisticated industrial purchaser. Because the Court of Appeals' decision in this case departs from the policies established by this Court's products liability jurisprudence as WSLC correctly states, review is warranted under RAP 13.4(b)(1).

WSLC cites first to *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975). In *Tabert*, the plaintiff sued a microbus importer for a defective design that caused the death of the driver and passenger. *Id.* at 146. At issue was whether the plaintiff needed to prove that the microbus was defective as well as unreasonably dangerous. *Id.* at 152. In holding that an unreasonably dangerous product is necessarily defective, the Court relied heavily on the comments to § 402A of the Restatement (Second) of Torts. *Id.* at 152-54. The Court noted that the "[e]mphasis is on consumer expectation" and recognized that "[o]ther jurisdictions follow the Restatement and focus on consumer expectations." *Id.* at 153 (citing *Lunt v. Brady Mfg. Corp.*, 13 Ariz. App. 305, 475 P.2d 964 (1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247

N.E.2d 401 (1969); *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970)).

Following adoption of Washington's Product Liability Act of 1981 (WPLA), chapter 7.72 RCW, the Court revisited the consumer expectation test in *Falk v. Keene Corporation*, 113 Wn.2d 645, 782 P.2d 974 (1989). In *Falk*, a Naval servicemember suffering from mesothelioma brought suit against asbestos manufacturers for strict products liability under RCW 7.72.030. *Id.* at 646. The asbestos manufacturers argued that the Legislature's use of the word "negligence" in the WPLA inserted common law negligence principles into the analysis of design defects. *Id.* at 652. The Court disagreed, holding that strict liability—not negligence—applied to design defects under the WPLA. *Id.* at 651. In so holding, the Court recognized 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.'" *Id.* at 650 (quoting LAWS OF 1981, ch. 27, § 1). "[B]ecause *consumer expectations* are still to be considered by the trier of fact, the Legislature has retained aspects of the buyer-oriented approach which existed before the Tort Reform Act of 1981." *Id.* at 653 (emphasis added). Thus, the Court established that "the basic nature" of strict products liability claims—both prior to and after the WPLA—includes the

consumer expectation test as one method of imposing liability. *See id.* at 654.

WSLC cites next to *Ayers v. Johnson & Johnson Baby Products Company*, 117 Wn.2d 747, 818 P.2d 1337 (1992). In *Ayers*, a 15-month-old child suffered brain damage after inhaling baby oil manufactured by the defendant. *Id.* at 750. The family of the infant child brought suit against the manufacturer, alleging that the product contained inadequate warnings as to the danger of inhalation. *Id.* The Court held that the manufacturer could be liable based on the consumer expectation test under RCW 7.72.030(3). *Id.* at 760. The Court determined that "the *ordinary consumer* is unaware of the danger presented by the inhalation of baby oil," *id.* at 765 (emphasis added), and pointed to the packaging as evidence of how the ordinary consumer might be led astray. *Id.* at 765-66 ("This misconception is encouraged by the presence of the words 'pure and gentle' on the baby oil container.").

Finally, WSLC cites to *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 971 P.2d 500 (1999). In *Soproni*, a mother sued the manufacturer of a bedroom window after her 20-month-old child fell through it from a second story apartment to the concrete patio below. *Id.* at 322. Although the window complied with applicable housing codes and standards, the Court held that such conformity did not necessarily satisfy

consumer expectations of safety. *Id.* at 328. Instead, the Court noted that a plaintiff need only show that the product was "'unsafe to an extent beyond that which would be contemplated by the *ordinary consumer*.'" *Id.* at 327 (quoting *Falk*, 113 Wn.2d at 654) (emphasis added).

The Court's unwavering commitment to protecting the end users of defective products is mirrored in the apparent manufacturer doctrine. For example, comment d to § 400 of the Restatement notes that the use of an apparent manufacturer's label on a product implies that "*the user* can rely upon the reputation of the person so identified." RESTATEMENT (SECOND) OF TORTS § 400 (1965) (emphasis added). Moreover, the same comment warns that "[t]he *casual reader* of a label is likely to rely upon the featured name[s]." *Id.* (emphasis added). Much like § 420A, the apparent manufacturer doctrine under § 400 and its related comments speak to the end user of a product: i.e., the casual reader of labels who lacks the expertise of a sophisticated buyer and may not know which of two company logos affixed to a product indicates the actual manufacturer.

The apparent manufacturer doctrine exists to provide fairness to the ultimate consumer who, using a product that the defendant holds out as its own, is most likely to suffer harm from the defective product. Although this case presented an issue of first impression, this Court has already laid the groundwork for applying the consumer expectation test to

§ 400 of the Restatement. The Court of Appeals erred in departing from this Court's prior decisions as correctly set forth in WSLC's amicus brief, and review should therefore be granted pursuant to RAP 13.4(b)(1).

B. Significant Public Importance – RAP 13.4(b)(4).

There can be no doubt that this case presents a question of first impression as to the liability of apparent manufacturers in Washington, as the Court of Appeals readily admitted. WSLC correctly points out that questions of first impression frequently involve issues of substantial public interest. Mem. of Amicus Curiae WSLC at 7. Multiple courts at both the state and federal level have now speculated as to how this Court *might* rule on whether the apparent manufacturer doctrine applies in Washington and, if so, what standard it would apply. However, the Court has never been heard on this question.

WSLC's amicus brief appropriately emphasizes the significance of this issue to Washington's manufacturing industry. A decision by this Court to adopt § 400 of the Restatement will have broad ramifications for both manufacturers and consumers alike. And as detailed above, the Washington State Legislature and this Court have repeatedly signaled the importance of functional and fair product liability law that safeguards the interests of product users.

Moreover, the particular facts of this case are well-suited to resolving the legal question involved. If this Court adopts § 400 of the Restatement and applies the consumer expectation test, there is more than sufficient evidence in the record to raise a genuine issue of material fact as to whether that test was met. *See* Pet. for Review of Margaret Rublee at 2–5. The facts of this case present the best example of both *how* the consumer expectation test should function and *why* it should be the appropriate test under Washington law for the apparent manufacturer doctrine. For the many reasons stated by WSLC, the Court should take this opportunity to resolve an issue of substantial public interest and grant review pursuant to RAP 13.4(b)(4).

III. CONCLUSION

Plaintiff-Appellant requests that the Court grant review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 12th day of October, 2017.

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