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Supreme Court No. _____

No. 75009-7-I

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

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

Plaintiff-Appellant,

v.

PFIZER, INC.,

Defendant-Respondent.

PETITION FOR REVIEW OF MARGARET RUBLEE

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Plaintiff-Appellant Margaret Rublee ("Plaintiff"), the surviving spouse of Vernon Rublee and Personal Representative of his Estate, is the Petitioner.

II. COURT OF APPEALS' DECISION

The Court of Appeals issued its published opinion on June 26, 2017. *See* App. 1-23.

III. ISSUES PRESENTED FOR REVIEW

1. Whether this petition involves issues of substantial importance that should be determined by this Court and therefore warrants review under RAP 13.4(b)(4) because the Court of Appeals' published opinion misapplies the apparent manufacturer doctrine set forth in Restatement (Second) of Torts § 400 (1965)?

2. Whether the Court of Appeals' Opinion conflicts with this Court's precedent and therefore warrants review under RAP 13.4(b)(1) because it erroneously focuses on sophisticated purchasers of products rather than end users and improperly expands the learned intermediary doctrine?

IV. STATEMENT OF THE CASE

A. Relevant Factual Background

The Quigley Company was founded in 1916 and produced refractory products for the steel industry out of a manufacturing facility in Old Bridge, New Jersey. CP 915; 917; 921. Quigley's product line included two asbestos-containing insulation cements: Insulag and Panelag. *See id.* Prior to 1968, certain promotional materials included the following stylized Quigley logo with the phrase "Manufacturer [singular] of Refractory Specialties and Paints."

CP 923.

Pfizer, Inc. was founded in 1849 as the manufacturer of pharmaceutical products. Over the next century, Pfizer expanded its product line to chemicals, agricultural and industrial products. *See* "Pfizer: About Us," http://www.pfizer.com/about/history/timeline. In 1953, Pfizer registered its familiar oval logo (reproduced below) for numerous product lines including industrial chemicals, mineral additives and, most familiarly, a full line of medical and pharmaceutical products. CP 925-26.

In 1968, Pfizer, Inc. acquired the Quigley Company in order to "establish[] a position in refractory specialties." CP 950. Pfizer-Quigley continued to manufacture and sell Insulag and Panelag through mid-1974. Following the acquisition, marketing and packaging materials for Insulag and Panelag were reconfigured to include the Pfizer logo. On promotional materials, the Pfizer and Quigley logos were usually configured side-by-side, as follows:

CP 952. The logos were in equal size and indicated that the companies were both "Manufacturers [plural] of Refractories—Insulations." *Id.*

In communications with customers after 1968, Quigley used letterhead emblazoned with Pfizer's familiar oval logo. CP 963. Quigley salesmen distributed pocket calendars yearly to customers that included both the Pfizer and Quigley logos and described the companies as "Manufacturers [plural] of Refractories Insulation." CP 965-66. In addition, Pfizer's annual reports to shareholders described Quigley manufacturing facilities as "Pfizer construction sites" and identified Quigley as a "division" within the company. CP 968-70.

Pfizer took numerous affirmative steps to promote its overarching responsibility for Insulag and Panelag. This included "Technical Data Sheets" distributed to consumers, which detailed the chemical and physical properties of these products. While these data sheets reference Quigley, they only included the Pfizer logo and referenced the address of the Pfizer Headquarters in New York City. CP 975. Consumers reading the data sheets were told that:

> All information given and recommendations made herein are based on our research and are believed to be accurate but no guarantee, either expressed or implied, is made with respect thereto . . . Our products are sold on the understanding that the user is solely responsible for determining their suitability for any purpose. *This information is not to be copied, used in evidence, released for publication or public distribution without written permission from Pfizer, Inc.*

Id. (emphasis supplied). The data sheet's use of the term "our" and express reference to "Pfizer" left no room for doubt in the readers' mind that this was a Pfizer product.

No asbestos warnings were ever applied to Insulag and Panelag product packaging or promotional materials. To the contrary, in advertising materials emblazoned with the Pfizer logo, Insulag was lauded as "Non-Injurious." CP 1028.

Margaret Rublee is the surviving spouse of Vernon Rublee and the Personal Representative of his Estate. Mr. Rublee worked as a machinist

at Puget Sound Naval Shipyard (PSNS) from 1965 to 2005 and was exposed to asbestos throughout the 1970s. He was diagnosed with mesothelioma in September 2014, and filed a personal injury suit against several defendants who supplied asbestos containing products to the shipyard.

Mr. Rublee expressly testified that "Pfizer" was the brand of insulation cement he observed being used on the turbines he worked on. CP 869-70. Charles Edwards, a co-worker of Mr. Rublee's, testified that he observed "Pfizer Panelag" being applied to turbines on ships and submarines being repaired at the shipyard. CP 877-78. Mr. Edwards further testified that he believed the Panelag he was using would be safe because "[i]t was produced by a drug company." CP 878.

B. Procedural History

On September 24, 2014, Margaret and Vernon Rublee filed a personal injury action in King County Superior Court against Pfizer and other defendants on account of Mr. Rublee's asbestos-related illness.[1] After limited discovery, Pfizer moved for summary judgment based on the argument that Plaintiff could not establish liability under Restatement (Second) of Torts § 400 (1965). On March 4, 2016, the trial court issued

[1] The case converted to a wrongful death action after Vernon Rublee passed away from mesothelioma on March 14, 2015.

an order granting Pfizer's motion for summary judgment and dismissed Pfizer from the case. In doing so, the court rejected the non-binding holdings of *Turner v. Lockheed Shipbuilding Co*., No. C13-1747 TSZ, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013) and *Sprague v. Pfizer*, No. 14-5084, 2015 WL 144330 (W.D. Wash. Jan. 12, 2015) and "considered this evidence applied to Restatement 400 . . . through the prism of what would have been *apparent* to a reasonable purchaser." CP 2923 (emphasis in original).

Recognizing that the scope and application of § 400 were questions of first impression in Washington, the trial court issued the following findings pursuant to RAP 2.3(b)(4):

> The Court finds that the interpretation of Restatement (Second) of Torts § 400 under Washington law on which Pfizer's summary judgment motion is based involves a controlling question of law and that immediate review of the court's ruling will materially advance the ultimate termination of this and other litigation.

App. 25. On May 23, 2016, the Court of Appeals ruled that this appeal satisfied the requirements of RAP 2.3(b)(4) and granted discretionary review. App. 28.

On June 26, 2017, the Court of Appeals affirmed the trial court, holding in a published decision that the evidence did not create a genuine issue of material fact about Pfizer's status as an apparent manufacturer.

App. 2. The court further held that Plaintiff had not identified evidence sufficient to satisfy any of the three tests for apparent manufacturer liability that other courts have generally applied. App. 8

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In finding that Margaret Rublee did not present evidence sufficient to create an issue of fact as whether Pfizer could be held liable as the apparent manufacturer of asbestos-containing insulating cements, the Court of Appeals committed several fundamental legal errors in its published opinion that warrant this Court's review pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(4).

First, the Court of Appeals applied an incorrect legal standard. The court's novel ruling focusing on sophisticated purchasing entities rather than end users represents the third iteration of how courts think this Court might ultimately interpret and apply the apparent manufacturer doctrine. Because this legal issue will appear in every case involving ambiguous branding or trademark licensing, this Court should accept review of the Court of Appeals' published opinion under RAP 13.4(b)(4) and provide needed guidance on if and how the apparent manufacturer doctrine applies under Washington law.

Indeed, to date, four courts have issued rulings speculating that this Court would adopt § 400. Although all of them have agreed that this Court

would adopt the provision, their rulings have been significantly divergent, often taking positions that are at greatly at odds with critical aspects of this Court's products liability jurisprudence. The issue as to whether a party can be held liable as an apparent manufacturer under § 400 frequently arises and will reoccur with regularity, necessitating resolution by this Court in accordance with RAP 13.4(b)(4).

Second, to hold, as the Court of Appeals did, that liability under the apparent manufacturer doctrine in Washington turns on an intermediary purchaser's purported understanding of a product's provenance contravenes this Court's product liability jurisprudence which has consistently focused on end users. Barring this Court's review, the Court of Appeals' ruling would expand the learned intermediary defense well-outside of the highly-limited confines first articulated in *Terhune v. A. H. Robins Co.*, 90 Wn.2d 9, 14, 577 P.2d 975 (1978). This and other significant conflicts between the decision of the Court of Appeals and the decisions of this Court warrant review under RAP 13.4(b)(1).

A. The Proper Scope and Application of Restatement (Second) of Torts § 400 (1965) are Issues of Substantial Public Interest That Should Be Determined by This Court. (RAP 13.4(b)(4))

The "apparent manufacturer" doctrine set forth in Restatement (Second) of Torts § 400 (1965) provides that "[o]ne who puts out as his

own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Comment a to the provision clarifies that "'one who puts out a chattel' include[s] anyone who supplies it to others for their own use or for the use of third persons, either by sale or lease or by gift or loan." *Id.*

Comment d to § 400 further delineates what constitutes putting out a chattel:

> [O]ne puts out a chattel as his own product when he puts it out under his name or *affixes to it his trade name or trademark*. When such identification is referred to on the label as *an indication of the quality or wholesomeness of the chattel*, there is an added emphasis that the user can rely upon the reputation of the person so identified. The mere fact that the goods are marked with such additional words as "made for" the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. *The casual reader of a label is likely to rely upon the featured name*, trade name, or trademark, and *overlook the qualification of the description of source.* So too, the fact that the seller is known to carry on only a retail business does not prevent him from putting out as his own product a chattel which is marked in such a way as to indicate clearly it is put out as his product. However, *where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own*. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

(emphasis supplied).

Most state courts that have considered the apparent manufacturer doctrine have adopted it in some form.[2] Courts adopting § 400 have explained that "[j]ustice would be offended if a corporation, which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability." *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 427, 244 N.W.2d 873, 882 (1976). Thus, if the labeling or presentation of the injurious product is "likely to cause a consumer to rely on the retailer's reputation as an assurance of the product's quality," liability may attach under § 400. *Mello v. K-Mart Corp.*, 604 F. Supp. 769, 773 (D. Mass. 1985). The plain language of § 400 and its related

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[2] *See, e.g., Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 304 (4th Cir. 1962) (*citing Highland Pharmacy, Inc. v. White*, 144 Va. 106, 131 S.E. 198 (Va. 1926)); *Davis v. United States Gauge*, 844 F. Supp. 1443, 1446 (D. Kan. 1994); *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844, 846 (S.D. Ga. 1971) *superseded by statute as stated in Freeman v. United Cities Propane Gas, Inc.*, 807 F. Supp. 1533, 1539-40 (M.D. Ga. 1992); *Sears, Roebuck & Co. v. Morris*, 273 Ala. 218, 136 So.2d 883, 885 (Ala. 1961); *Cravens, Dargan & Co. v. Pacific Indem. Co.*, 29 Cal. App.3d 594, 105 Cal. Rptr. 607, 611 (Ct. App. 1972); *King v. Douglas Aircraft Co.*, 159 So.2d 108, 110 (Fla. Dist. Ct.App.1963); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266, 273 (Ind. Ct. App. 1972); *Tice v. Wilmington Chem. Corp.*, 259 Iowa 27, 141 N.W.2d 616, 628 (Iowa 1966); *Penn v. Inferno Mfg. Corp.*, 199 So.2d 210, 215 (La. Ct. App. 1967); *Coca Cola Bottling Co. v. Reeves*, 486 So.2d 374, 378 (Miss. 1986) *superseded by statute as stated in Turnage v. Ford Motor Co.,* 260 F. Supp. 2d 722, 727 (S.D. Ind. 2003); *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 A. 120, 121 (N.J. 1935) *aff'd*, 117 N.J.L. 101, 186 A. 832 (N.J. 1936)); *Andujar v. Sears Roebuck & Co.*, 193 A.D.2d 415, 597 N.Y.S.2d 78, 78 (App. Div. 1993) (citing *Commissioners of State Ins. Fund v. City Chem. Corp.*, 290 N.Y. 64, 48 N.E.2d 262, 265 (N.Y. 1943)); *Warzynski v. Empire Comfort Sys., Inc.*, 102 N.C. App. 222, 401 S.E.2d 801, 803-04 (N.C. Ct. App. 1991); *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593, 599 (Pa. 1968); *Sears, Roebuck & Co. v. Black*, 708 S.W.2d 925, 928 (Tex. App. 1986); *Wojciuk v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149, 152-53 (Wis. 1961).

comments make clear that the focus of the provision is on the perceptions of the end user.

This Court has yet to address whether Washington would adopt § 400 and, if so, how courts should interpret and apply the provision in cases governed by Washington law. Although the 1981 Washington Product Liability Act (WPLA) codified a variation of the apparent manufacturer doctrine, this Court has yet to interpret and apply this statute. *See* RCW 7.72.010(2); RCW 7.72.030(1).[3] But while this Court has not yet addressed the issue, since 2013, four courts have issued rulings holding that this Court would adopt § 400 and *speculating* as to the contours of such a ruling. In *Turner v. Lockheed Shipbuilding Co.*, Judge Zilly concluded that the Washington Supreme Court would adopt § 400 but would limit its application to those within the chain of distribution of the product. No. C13-1747 TSZ, 2013 WL 7144096, at *1-2. A year later, another federal district court followed the holding of *Turner* and concluded that § 400 mandates that the apparent manufacturer fall within the chain of distribution of the injurious product. *Sprague v. Pfizer, Inc.*, No. 14-5084 RJB, 2015 WL 144330, at *3-4 (W.D. Wash. Jan. 12, 2015).

[3] Common law governs Plaintiff's claim as it arose before the effective date of WPLA, July 26, 1981. *See Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 472, 804 P.2d 659 (1991); RCW 4.22.920. Thus, clarification on how the doctrine is interpreted will benefit both pre-and post-WPLA claimants.

The trial court's summary judgment ruling in *Sprague* is currently being appealed to the Ninth Circuit. *See Sprague v. Pfizer*, No. 15-35051 (9th Cir. Jun, 26, 2015). On July 14, 2016, the Ninth Circuit granted Plaintiff's motion to stay the federal appeal pending resolution of this appeal. The Ninth Circuit concluded the scope and requirements of § 400 under Washington was an issue of first impression that should be considered in the first instance by Washington appellate courts. The Ninth Circuit lifted the stay of proceedings in the *Sprague* appeal on July 14, 2017 but emphasized that the appellant could renew the motion to stay upon showing that this Court has granted review of the *Rublee* case. App. 29. Thus, there is at this time at least one other court that would immediately and directly benefit from the Court's review and clarification regarding how this Court interprets and applies § 400.

The Court of Appeals failed to provide this needed guidance. Instead, it expressly declined to adopt any specific test for apparent manufacturer liability. App. 8. While it noted that courts generally applied one of three tests—objective reliance, actual reliance, and enterprise liability—it did not expressly adopt one of those tests. *Id*. That approach fails to provide critical guidance needed by both litigants and other courts (including the Ninth Circuit in *Sprague*). This is plainly an issue of substantial public interest and should be determined by the Supreme Court

under RAP 13.4(b)(4). The Court of Appeals also contradicted this Court's precedent in numerous respects, which likewise warrant review under RAP 13.4(b)(1) as set forth below.

B. This Court Should Grant Review to Correct the Court of Appeals' Improper Expansion of the Learned Intermediary Doctrine. (RAP 13.4(b)(1) and (4))

In its published opinion, the Court of Appeals assumed that this Court would adopt § 400 but concluded that the focus should be on the *sophisticated purchasers* of products, not end users. *See* App. 3. The Court of Appeals held that the record was insufficient under the objective reliance test to create a fact issue over whether a *sophisticated* industrial purchaser would believe Pfizer manufactured the injurious products at issue by placing its logo their packaging and promotional material. *Id.* at 5-6.

While the Court of Appeals' ruling embraced much of the language and reasoning of *Stein v. Pfizer Inc*., 228 Md. App. 72, 137 A.3d 279, 290-91 (2016), it did so uncritically. Maryland has expressly adopted the sophisticated user/learned intermediary doctrine in products liability cases—including asbestos cases. *See generally Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 218, 604 A.2d 445, 464 (1992). In contrast, Washington courts have consistently rejected the sophisticated user defense and refused to expand the learned intermediary doctrine outside of

the narrow confines of the relationship between a drug manufacturer, a prescribing physician, and a patient. *See Headley v. Ferro*, 630 F. Supp.2d 1261, 1273 n. 10 (W.D. Wash. 2008). The Court of Appeals' published opinion improperly expands the learned intermediary defense well-outside of the limitations articulated in *Terhune v. A. H. Robins Co.*, 90 Wn.2d 9, 14, 577 975 (1978).

This Court has repeatedly emphasized that the focus in almost every product liability action is on the product when it is placed in the hands of the ultimate user. *See, e.g., Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 155, 570 P.2d 438 (1977). Likewise, in cases considering whether a product is reasonably safe, this Court has stressed that summary judgment is inappropriate in cases where "[t]he emphasis is upon the consumer's reasonable expectation…." *Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 154, 542 P.2d 774 (1975). This is because "the question of whether a product is or is not reasonably safe within the reasonable expectations of the ordinary consumer would be a material issue of fact...." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 351, 588 P.2d 1346 (1979); *see also Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 411, 553 P.2d 107 (1976) (reversing summary judgment and noting "the concept of 'reasonably safe' is to be measured in terms of the reasonable expectations of the ordinary consumer—a relative rather than

absolute concept."). As these cases make clear, matters which turn on consumer perceptions must—in all but the rarest of circumstances—be resolved by the jury. The Court of Appeals' analysis contradicts this precedent, thus warranting review under RAP 13.4(b)(1).

The Court of Appeals erred in other significant respects as well. The court, for example, determined that the Plaintiff's apparent manufacturer claims could not survive a motion for summary judgment under the so-called "enterprise liability" test articulated in comment d of Restatement (Third) of Torts § 14 (1998)—the revised and somewhat controversial version of § 400. *See* App. 8; 20. While the court conceded that the Plaintiff had presented substantial evidence of active corporate involvement, it ruled that the evidence was insufficient to create an issue of fact as to whether Pfizer participated substantially in the design, manufacture, or distribution of Quigley's products. App. 20. The implicit adoption of the Third Restatement's recodification of § 400 is both striking and problematic as scholars have critiqued this provision, emphasizing that it is "questionable as a matter of social and economic policy" and "[i]t is doubtful whether [it] accurately restates existing law..." D. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 CASE W. RES. L. REV. 671 (1999).

The Court of Appeals further erred when it rejected Plaintiff's argument that Pfizer could held liable as the apparent manufacturer under comment d to § 400. App. 20-21. This comment expressly contemplates situations, and imposes liability, where the apparent and actual manufacturer are both identified in a manner but "the casual reader...overlook[s] the qualification of the description of source." Nevertheless, the court disregarded this and imposed the novel limitation articulated in comment d to Restatement (Third) of Torts § 14 that requires the apparent manufacturer to sell or distribute the product at issue. To reach this conclusion, the court yet again focused its attention on the purchasing relationship and disregarded the uncontroverted evidence of consumer confusion.

The trial court, in contrast, correctly held that § 400 focuses on the reasonable expectations of ordinary consumers, not sophisticated purchasers. The sole focus of § 400 is whether an apparent manufacturer's purported role reasonably impacts consumer perceptions of the product in dispute. There is no requirement that the apparent manufacturer be in the chain of distribution of the product or that individual reliance by the end user or purchaser is necessary. Put simply, once there is some prima facie showing that a reasonable consumer's perception is impacted under the standards in § 400, the matter becomes a fact question for the jury to

decide. The central flaw with the Court of Appeals' opinion is its belief that Restatement (Second) of Torts § 400 necessitates a purchasing relationship or something more before apparent manufacturer liability can attach. The Court of Appeals' interpretation of § 400 is inconsistent with the plain language of the provision, its commentary, and beneficial purpose, and this Court's precedent regarding products liability claims. The Court of Appeals' published opinion thus warrants review under RAP 13.4(b)(1) as well as (b)(4).

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 26th day of July 2017.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARGARET RUBLEE, individually and as personal representative of the Estate of VERNON D. RUBLEE, Petitioner, v. CARRIER CORPORATION; AIR & LIQUID SYSTEMS CORPORATION, as successor by merger to BUFFALO PUMPS, INC.; CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; ELLIOTT COMPANY; GENERAL ELECTRIC COMPANY; IMO INDUSTRIES, INC., individually and as successor in interest to DE LAVAL TURBINE, INC.; INGERSOLL-RAND COMPANY; LONE STAR INDUSTRIES, INC., individually and as successor in interest to PIONEER SAND & GRAVEL COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; SABERHAGEN HOLDINGS, INC.; UNION CARBIDE CORPORATION; and WARREN PUMPS, LLC, individually and as successor in interest to QUIMBY PUMP COMPANY, Defendants, PFIZER, INC., Respondent.	No. 75009-7-I DIVISION ONE PUBLISHED OPINION FILED: June 26, 2017

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LEACH, J. — Margaret Rublee appeals the summary judgment dismissal of her wrongful death action against Pfizer Inc. She seeks to impose liability on Pfizer as an "apparent manufacturer" under Restatement (Second) of Torts § 400 (Am. Law Inst. 1965), claiming that Pfizer represented itself as a manufacturer of products that caused her husband's mesothelioma. Because Rublee's evidence does not create a genuine issue of material fact about Pfizer's status as an apparent manufacturer, we affirm.

FACTS

Vernon Rublee died of mesothelioma in 2015. His wife, appellant Margaret Rublee, survives him.

Vernon[1] was a machinist at Puget Sound Naval Shipyard (PSNS) from 1965 to 1980. He worked on steam turbines that were insulated with asbestos "lagging." Other workers periodically replaced this lagging. To do this, they tore off the existing insulation and then "re-lagged" the turbine. To prepare the lagging, they poured bags of insulation cement, or refractories, "in a trough or a bucket and mix[ed] it up."[2] This created dust that would linger at the worksite, exposing those working there to asbestos.

[1] We refer to Vernon by his first name to distinguish him from his wife.

[2] Pfizer describes "refractories" as "cement-like powders designed to be mixed with water and applied to the surface of areas exposed to extreme heat."

The workers at PSNS used two refractory products, Insulag and Panelag. Vernon and other PSNS workers testified to seeing "Pfizer" on the product bags.

Quigley Company Inc. actually manufactured Panelag and Insulag. Quigley trademarked Insulag in 1936 and Panelag in 1945. Both contained asbestos until the early 1970s when, faced with growing health concerns, Quigley replaced them with asbestos-free versions.

Pfizer acquired Quigley as a wholly owned subsidiary in 1968. According to Pfizer officers, Quigley continued to operate as a separate corporation, continued to manufacture both products, continued to own the plant where it made them, and continued to buy the raw materials used in them. Pfizer also submitted evidence that Quigley continued to handle sales and distribution of these products by maintaining its own sales employees and receiving and filling customers' orders. Quigley sales employees continued to communicate with purchasers and distributors on Quigley stationery and sign letters on behalf of Quigley. The stationery stated that Quigley was a "Subsidiary of PFIZER, INC." and included a Pfizer logo in the upper-left corner. Quigley invoices included the same information. Purchasers and distributors continued to send orders and letters to "Quigley Company, Inc." And the product distributors advertised themselves as distributors for "Quigley Co." The labels on bags of Insulag and Panelag identified Quigley as the product manufacturer and stated that it was a

subsidiary of Pfizer. Quigley continued to submit forms and distribute safety and promotional materials that identified Insulag and Panelag as Quigley products.

Quigley filed for bankruptcy in 2004.[3] By then, over 160,000 workers had sued the company for injuries caused by asbestos.[4] In 2013, the United States District Court for the Southern District of New York approved a reorganization plan that created an asbestos injury trust to compensate claimants.[5] The court enjoined all parties from suing Quigley for asbestos-related injuries. This "channeling injunction" also prevents asbestos-related injury claims against Pfizer based on its ownership, management, or control of Quigley, including claims based on "piercing the corporate veil" or successor liability theories.[6] But the channeling injunction does not bar claimants from alleging that Pfizer is liable as an apparent manufacturer.[7]

Rublee sued Pfizer and several other companies for damages.[8] The trial court dismissed the claims against Pfizer by summary judgment. This court

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[3] In re Quigley Co., No. 04-15739(SMB), 2008 WL 2097016, at *1 (Bankr. S.D.N.Y. May 15, 2008), rev'd, 449 B.R. 196 (S.D.N.Y. 2011), aff'd, 676 F.3d 45 (2d Cir. 2012).

[4] Quigley, 2008 WL 2097016, at *1.

[5] See 11 U.S.C. § 524(g) (Bankruptcy Code). Pfizer states that it has funded approximately $965 million of the trust.

[6] Quigley, 676 F.3d at 60 & n.18.

[7] Quigley, 676 F.3d at 60-61 (holding that injunction does not prohibit apparent manufacturer claim because such a claim is not "a legal consequence of" Pfizer's ownership of Quigley).

[8] Rublee converted this suit to a wrongful death action after Vernon died.

granted discretionary review on the issue of Pfizer's alleged apparent manufacturer liability.[9]

At least two plaintiffs have brought apparent manufacturer claims against Pfizer in the United States District Court for the Western District of Washington. In Turner v. Lockheed Shipbuilding Co.[10] and Sprague v. Pfizer, Inc.,[11] that court dismissed the claims at summary judgment. The Ninth Circuit stayed an appeal in Sprague pending this appeal.

STANDARD OF REVIEW

We review an order granting summary judgment de novo, making the same inquiry as the trial court.[12] We affirm summary judgment when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law.[13] We view the facts and all reasonable inferences from them in the light most favorable to the nonmoving party.[14] A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the

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[9] See RAP 2.3(b)(4).

[10] No. C13-1747 TSZ, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013) (court order).

[11] No. 14-5084 RJB, 2015 WL 144330 (W.D. Wash. Jan. 12, 2015) (court order).

[12] Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

[13] Owen, 153 Wn.2d at 787.

[14] Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

outcome of the lawsuit.[15] The nonmoving party "must set forth specific facts showing a genuine issue" and "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value."[16]

ANALYSIS

Rublee relies on section 400 of Restatement (Second) to establish Pfizer's liability. Section 400 states that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." The legal community commonly calls this "apparent manufacturer liability."

Apparent manufacturer liability predates the doctrine of strict liability for harms caused by unreasonably dangerous goods.[17] Some courts have concluded that since both doctrines aim to remedy the same harms, strict product liability has in effect "absorbed" the apparent manufacturer doctrine.[18] Others have expanded the apparent manufacturer doctrine to include actors that

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[15] Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

[16] Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989); Leahy v. Quality Loan Serv. Corp. of Wash., 190 Wn. App. 1, 4-5, 359 P.3d 805 (2015) (citing Wash. Fed. Sav. v. Klein, 177 Wn. App. 22, 311 P.3d 53 (2013)), review denied, 185 Wn.2d 1011 (2016).

[17] Hebel v. Sherman Equip., 92 Ill. 2d 368, 442 N.E.2d 199, 201, 65 Ill. Dec. 888 (1982).

[18] Hebel, 442 N.E. 2d at 202.

would not be strictly liable because they are outside the good's chain of distribution, such as trademark licensors.[19] The Washington legislature incorporated both the apparent manufacturer doctrine and strict product liability in the 1981 Washington product liability act (WPLA), chapter 7.72 RCW.[20] Preexisting law governs claims that, like Rublee's, arose before the effective date of this act, July 26, 1981.[21]

First, we must decide whether § 400 applies to claims that arose before the WPLA took effect. No Washington appellate court has adopted § 400. Our Supreme Court has adopted similar sections of Restatement (Second).[22] This court cited § 400 in a 1975 decision but did not adopt it.[23] And the majority of jurisdictions to consider § 400 have adopted it.[24] From this history, the United

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[19] Stein v. Pfizer Inc., 228 Md. App. 72, 137 A.3d 279, 290-91 (2016) (citing Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103, 1107 (E.D. Pa. 1973); Connelly v. Uniroyal, Inc., 75 Ill.2d 393, 389 N.E.2d 155, 161, 163, 27 Ill. Dec. 343, (1979); Brandimarti v. Caterpillar Tractor Co., 364 Pa. Super. 26, 527 A.2d 134 (1987)), cert. denied, 146 A.3d 476 (2016).

[20] RCW 7.72.010(2) (defining "manufacturer" to "include[ ] a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer"); RCW 7.72.030(1).

[21] Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 472, 804 P.2d 659 (1991); RCW 4.22.920.

[22] Ulmer v. Ford Motor Co., 75 Wn.2d 522, 452 P.2d 729 (1969) (applying § 402A strict product liability to manufacturers); Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 542 P.2d 774 (1975) (applying § 402A to sellers and suppliers); Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (applying § 46 and comments).

[23] Martin v. Schoonover, 13 Wn. App. 48, 54-55, 533 P.2d 438 (1975).

[24] See Long v. U.S. Brass Corp., 333 F. Supp. 2d 999, 1003 (D. Colo. 2004) (collecting cases).

States District Court for the Western District of Washington has twice concluded that the Washington Supreme Court would adopt § 400.[25] We agree. For purposes of this appeal, we assume that the Washington Supreme Court would apply § 400 when presented with the appropriate case.

Because no Washington court has addressed apparent manufacturer liability under § 400, this case presents an issue of first impression. For persuasive authority, we look to other courts' applications of § 400.

Courts generally have applied one of three tests for apparent manufacturer liability: objective reliance, actual reliance, and "enterprise liability."[26] We do not need to decide which of these tests, if any, our Supreme Court would adopt because Rublee has not identified evidence sufficient to satisfy any of them.

The majority of courts to adopt apparent manufacturer liability have applied the objective reliance test.[27] This test asks "whether a reasonable consumer would have relied upon a label or advertising materials of a product in purchasing it."[28] A court can answer this question "from the vantage point of an ordinary, reasonable consumer or from the perspective of a reasonable

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[25] Turner, 2013 WL 7144096, at *2.
[26] Stein, 137 A.3d at 294.
[27] Stein, 137 A.3d at 290.
[28] Stein, 137 A.3d at 294-95; see, e.g., Hebel, 442 N.E.2d at 203; Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385, 391 (1932).

purchaser, in the position of the actual purchaser."[29] Pfizer contends that we should apply the test from the viewpoint of the agents who actually purchased Insulag and Panelag for steel mills, power plants, and shipyards like PSNS. Rublee asserts that we should instead ask whether an ordinary user of Insulag and Panelag would think Pfizer manufactured them.

We agree with Pfizer. Courts applying the objective reliance test appear to have done so uniformly from the viewpoint of the "purchasing public." In the classic apparent manufacturer case, where a consumer sues the retailer or distributor that sold a harmful good to the consumer, the purchaser would also be an "ordinary user."[30] But in cases where a sophisticated industrial entity purchased the product, courts have applied the test from the viewpoint of a "reasonable purchaser" in that position.[31]

For example, in Hebel v. Sherman Equipment,[32] the Supreme Court of Illinois rejected as irrelevant a car wash employee's argument that a reasonable person in his position would think the defendant manufactured the conveyor belt that injured him. Sherman manufactured most of the other pieces of equipment

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[29] Stein, 137 A.3d at 295.

[30] See Hebel, 442 N.E.2d at 202; RESTATEMENT (SECOND) OF TORTS § 400 cmt. d, illus. 1-2; see, e.g., Burckhardt, 161 A. at 391 (holding that distributor put out corned beef can as its own where it placed trademark on label and label did not identify actual packer).

[31] Stein, 137 A.3d at 296-97.

[32] 92 Ill. 2d 368, 442 N.E.2d 199, 202-03, 65 Ill. Dec. 888 (1982).

at the car wash, each of which were sold and operated separately from the hazardous conveyor.[33] The court observed that the "primary rationale" of the apparent manufacturer doctrine is that the defendant "has induced the purchasing public to believe that it is the actual manufacturer, and to act on this belief—that is, to purchase the product in reliance on the apparent manufacturer's reputation and skill in making it."[34] The court held that a reasonable purchaser of car wash equipment would not rely on the possible impression a "casual observer" like the plaintiff might have that the defendant manufactured the machine.[35]

The Maryland Court of Special Appeals adopted this reasoning in Stein v. Pfizer, Inc.[36] In applying the objective reliance test to a claim very similar to Rublee's, the court required the plaintiffs to "show that a reasonable purchaser of refractory materials, that is, Bethlehem Steel, . . . would have relied upon Pfizer's reputation and assurances of quality in purchasing . . . Insulag."[37]

Rublee cites no case asking whether an ordinary user who was not a purchaser would rely on a defendant's representation. Instead Rublee relies on cases that either apply the test from a "purchasing public" viewpoint or address

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[33] Hebel, 442 N.E. 2d at 203.
[34] Hebel, 442 N.E. 2d at 203.
[35] Hebel, 442 N.E. 2d at 203.
[36] 228 Md. App. 72, 137 A.3d 279, 296, cert. denied, 146 A.3d 476 (2016).
[37] Stein, 137 A.3d at 296.

what parties can recover for injuries from defective products.[38] As discussed above, courts applying an objective test have done so from the perspective of a "reasonable purchaser in the position of the actual purchaser."[39]

Rublee contends that her evidence creates a fact question even under this test. We disagree.[40]

The record contains several marketing items and pieces of correspondence that include Pfizer's logo. Advertising fliers show the logo alongside Quigley's, with "Manufacturers of Refractories" printed beneath.[41] Quigley salespeople distributed pocket calendars also bearing Pfizer's logo. In a Pfizer shareholder report, photographs of Quigley plant construction sites call them "Pfizer construction sites." Another report refers to "the Quigley Magnesite Division of Pfizer Chemical Corporation." Invoices for Insulag and Panelag include the Pfizer logo in the corner. And a letter from Quigley's vice president

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[38] See, e.g., Heinrich v. Master Craft Eng'g, Inc., 131 F. Supp. 3d 1137, 1160 (D. Colo. 2015) ("reasonable member of the buying public").

[39] Stein, 137 A.3d at 295; see Hebel, 442 N.E. 2d at 203; Kennedy v. Guess, Inc., 806 N.E.2d 776, 784 (Ind. 2004) ("purchasing public").

[40] See Robinson v. City of Seattle, 119 Wn.2d 34, 57, 830 P.2d 318 (1992); CR 56(c).

[41] Both offer pre-1968 Quigley logos that, they assert, support their side. Rublee points to an information sheet from before the acquisition, which reads "Manufacturer of Refractories" under the Quigley logo. Pfizer counters with materials from before the acquisition that read "Manufacturers of Refractories" under Quigley's name. Neither argument is determinative because at the time Pfizer owned Quigley, a reasonable consumer would not necessarily know how Quigley advertised itself in the past.

regarding discontinuing Insulag and Panelag again includes Pfizer's logo in the top-left corner.

This evidence does not create a fact question about objective reliance. Rublee overstates the prominence of the Pfizer logo in the pocket calendar and correspondence. While these materials include Pfizer's logo, both feature Quigley's name more prominently, with "subsidiary of Pfizer" under it.[42] The product invoices feature Quigley's logo and address in the top center. A reasonable reader would not infer from these items that Pfizer manufactured the products.

Likewise, a caption in a shareholder report that refers to a Quigley plant in Ireland as a "Pfizer construction site[ ]" does not, in context, give the impression Rublee attributes to it. While those words appear in small font above the photos, the text of the report makes clear that the plants belonged to Quigley and that Quigley was Pfizer's subsidiary.[43] And a single reference to "the Quigley Magnesite Division of Pfizer Chemical Corporation" in another report does not create a fact question, particularly in light of that passage's opening sentence: "Nineteen-seventy sales of refractory specialties manufactured and marketed by

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[42] Also, a "technical data" sheet on Insulag includes the Pfizer logo but reads "a subsidiary of Pfizer Inc." under the Quigley name.

[43] The report states, "Construction work continued throughout 1969 on Quigley's dolomite stone processing plant . . . and on the sea-water magnesite plant at Dungarvan . . . .They will provide high-purity, low-cost magnesite grain for use in many of Quigley's specialty refractory formulations."

Quigley Company, Inc., a Pfizer subsidiary . . . . " Thus, while this evidence shows that Pfizer and Quigley had a corporate relationship, no reasonable industrial purchaser could infer from it that Pfizer actually manufactured the refractories.

The record also contains deposition testimony from several workers who said that they noticed the Pfizer name on bags of refractory materials at PSNS. But this testimony has little relevance to a reasonable purchaser's understanding of the products' manufacturer because Rublee has not shown that any of the workers had any role in any purchasing decision. And even if this court applied the objective reliance test from a reasonable user's viewpoint, none of the workers stated that they took any action based on seeing Pfizer's name on the products.[44]

Finally, Rublee contends that her expert's affidavit created an issue as to a reasonable consumer's understanding that Pfizer manufactured the products. Rublee submitted an affidavit from a "branding specialist," Steff Geissbuhler, opining that Pfizer logos on the documents Geissbuhler reviewed would confuse consumers as to who manufactured the product. "In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to

[44] Rublee contends the trial court ignored the workers' impressions of Pfizer's role and her expert's testimony on consumer perceptions. But how the trial court reached its decision does not affect this court's de novo review. See Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

create a genuine issue as to that fact, precluding summary judgment."[45] But Geissbuhler's testimony does not preclude summary judgment here because it does not address the relevant issue of fact.

Geissbuhler opined that "Pfizer's logo on various Quigley communications strongly suggested to the average consumer that Pfizer played a supervising role in the manufacture of the product at issue" and that "the invocation of its brand identity could impact consumer perception of Insulag and Panelag and effect [sic] their purchasing decisions." As discussed above, the objective reliance test depends on the perception of a reasonable purchaser in the actual purchaser's position. Whether Geissbuhler's declaration created a fact issue on that point thus depends on what he meant by "average consumer."

Geissbuhler's deposition testimony shows that he meant an ordinary member of the public. Geissbuhler conceded that he did not know who was buying Insulag and Panelag. He did not know, for instance, whether the products were available at the hardware store or bought by sophisticated industrial purchasing departments.[46] His testimony thus does not help Rublee show what

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[45] J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

[46] Geissbuhler's deposition transcript reads in part: "Q. Do you have an opinion . . . on whether or not purchasers of, say, Insulag would be more knowledgeable than the average consumer? A. I don't. I mean, I really don't." The testimony from Geissbuhler that Rublee relies on to show "that sophisticated industrial purchasers could reach similar conclusions" to Vernon's coworkers does not support such a conclusion. Geissbuhler did not directly answer the

a reasonable purchaser in the position of PSNS purchasers would have understood.

None of the evidence relevant to the understanding of industrial purchasers suggests they would think Pfizer manufactured the products. For instance, Lone Star Industries and Pioneer Sand & Gravel—distributors that sold the products to PSNS—continued to send purchase orders and questions to Quigley and to advertise Quigley as the products' manufacturer.[47]

Because the record does not create a genuine issue of material fact as to whether a reasonable purchaser of Insulag and Panelag would think Pfizer manufactured them, Rublee's argument fails under the objective reliance test.[48]

Likewise, Rublee's claim would not succeed under any of the alternative tests the parties advance.

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attorney's questions on whether "the average purchasing agent of a fireproofing insulation company would be confused as to who the manufacturer of the Insulag product is"; he appeared to answer instead from either an ordinary person's viewpoint or his own.

[47] A former Lone Star employee confirmed that he understood his company to be a distributor for Quigley and Insulag and Panelag to be "Quigley refractory products."

[48] Rublee asserts that the trial court impermissibly weighed evidence in considering the summary judgment motion. But the trial court did not decide what a reasonable purchaser would understand. Rather, it necessarily determined that a reasonable person could not find from the evidence presented that a reasonable purchaser would think Pfizer manufactured the products. As long as a trial court faithfully applies the CR 56 standard, this is an appropriate question to answer.

First, Rublee's claim would fail under an "actual reliance" test. This test asks whether the plaintiff showed "that he or she actually and reasonably relied upon the reputed 'apparent manufacturer's' trademark, reputation, or assurances of product quality, in purchasing the defective product at issue."[49] A court can again apply this test from either of two viewpoints: the actual user's or the actual purchaser's.[50]

While Pfizer asks this court to require actual reliance, few courts have done so. The Stein court cited just one case where the court did this, a 1962 opinion from the Fourth Circuit.[51] And the Stein court held that the plaintiffs had not satisfied the test from either perspective, as they had not shown evidence that the decedent was even aware of the product, let alone relied on Pfizer's apparent manufacture of it.[52] The court also found that the record showed that the purchaser, Bethlehem Steel, had purchased the products from Quigley for

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[49] Stein, 137 A.3d at 297.

[50] Stein, 137 A.3d at 297.

[51] See Stein, 137 A.3d at 297; Carney v. Sears, Roebuck & Co., 309 F.2d 300, 304 (4th Cir. 1962) ("[T]he basic test is whether or not the vendee reasonably believed in and relied upon the vendor's apparent manufacture of the product."). Pfizer cites several other cases; these do not articulate an actual reliance test but simply list lack of reliance evidence as a factor in granting or affirming summary judgment. See Yoder v. Honeywell, Inc., 900 F. Supp. 240, 245 (D. Colo. 1995), aff'd, 104 F.3d 1215 (10th Cir. 1997); Bernier v. One World Techs., Inc., 746 F. Supp. 2d 240, 243 (D. Mass. 2010); Stones v. Sears, Roebuck & Co., 251 Neb. 560, 558 N.W.2d 540, 545 (1997); Sherman v. Sunsong Am., Inc., 485 F. Supp. 2d 1070, 1080 (D. Neb. 2007).

[52] Stein, 137 A.3d at 297.

years before Pfizer acquired Quigley and continued to do so after, apparently without relying on Pfizer's role.[53]

Here, Rublee presented evidence that former workers noticed Pfizer's name on bags of Insulag and Panelag. At least one worker suggested that the Pfizer name made him think the products were safe. But no worker testimony shows that a worker relied on Pfizer's name in deciding to use or work near the products. Nor did Rublee present evidence that actual purchasers relied on Pfizer's apparent role when they purchased the products. Instead, as in Stein, the record shows that the industrial purchasers bought the products from Quigley without interruption before and after the Pfizer acquisition.

The evidence thus fails to create an issue of fact about either the purchasers' or the product users' actual reliance.

Second, Rublee's claim would fail under an "enterprise theory" of liability.

The enterprise liability test does not focus on consumer reliance but instead asks "whether the defendant 'participate[d] substantially in the design, manufacture, or distribution' of the defective product."[54] It also requires that the defendant's trademark appear on the product.[55]

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[53] Stein, 137 A.3d at 299.

[54] Stein, 137 A.3d at 297 & n.25 (alteration in original) (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 14 cmt. d (AM. LAW INST. 1998)). The Stein court noted that while reliance is a rationale for this test, it does not appear to be a requirement. According to Restatement (Third), "Trademark licensors are liable for harm caused by defective products distributed

Only a few courts have applied this test.[56] In Lou v. Otis Elevator Co.,[57] the court held that a trademark licensor was liable as an apparent manufacturer because the plaintiff had shown that it "participated substantially in the design or manufacture of" a defective escalator. An escalator "prominently bore the Otis trademark" and "no other trade name or mark."[58] The court distinguished cases where plaintiffs failed to submit evidence, apart from the placement of the trademark on the product, that the defendant "'was engaged in the actual manufacture, distribution, or marketing.'"[59] Similarly, in Connelly v. Uniroyal, Inc.,[60] the court held that issues of fact precluded summary judgment on a claim that the defendant was liable as an apparent manufacturer for injuries caused by a tire bearing its trademark. The defendant provided the tire's actual manufacturer—a licensee and subsidiary—with plans, specifications, and technical knowledge for the tire's production, authorized the manufacturer's use of its trademark, and received quarterly payments in return.[61]

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under the licensor's trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee's products. In these circumstances they are treated as sellers of the products bearing their trademarks." RESTATEMENT (THIRD) § 14, cmt. d.

[55] Stein, 137 A.3d at 297.

[56] See Stein, 137 A.3d at 297-98.

[57] 77 Mass. App. Ct. 571, 933 N.E.2d 140, 150 (2010).

[58] Lou, 933 N.E.2d at 143.

[59] Lou, 933 N.E.2d at 149-50.

[60] 75 Ill. 2d 393, 389 N.E.2d 155, 163, 27 Ill. Dec. 343 (1979).

[61] Connelly, 389 N.E.2d at 161. The same court later distinguished this decision, observing in Hebel that it based liability in Connelly on "the defendant's

The Stein court noted that Pfizer and Quigley did not have a trademark licensing agreement.[62] It concluded that even if the companies' arrangement was analogous to such an agreement, the plaintiff had presented no evidence that Pfizer "participated 'substantially' in the design, manufacture, or distribution of Insulag."[63]

Although Rublee does not explicitly assert this theory of liability, she contends that she presented evidence that Pfizer participated substantially in bringing Insulag and Panelag to market. We disagree.

Rublee's evidence of Pfizer's active involvement includes corporate annual reports referring to the Ireland construction site, purchase orders on Pfizer forms for the raw asbestos used to make the products, budget sheets that include research for different refractory methods, the invoices bearing the Pfizer logo, a Quigley sales manager's testimony that he was paid by Pfizer and known as a Pfizer employee, Pfizer's accounting for the products' costs and sales, evidence that Quigley and Pfizer shared insurance and that Pfizer provided safety guidance to Quigley, and a Quigley officer's statement, in response to a

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integral involvement in the overall producing and marketing enterprise that placed the dangerous product in the stream of commerce, and its participation in the profits from the distribution of the product," and that such factors were absent in the case before it. Hebel, 442 N.E. 2d at 204.

[62] Stein, 137 A.3d at 298.

[63] Stein, 137 A.3d at 298.

question about "the leasing of [refractory] guns," that "[e]verything is handled in New York."

But Rublee does not dispute that Quigley made and sold Insulag and Panelag for decades before Pfizer acquired the company. She does not contend that Pfizer made any changes to the products' design. The references to a "Pfizer construction site" and Quigley being a "division of Pfizer" do not support an inference that Pfizer was involved in manufacturing. Nor does Pfizer's logo on Quigley invoices help show that Pfizer itself distributed the products. And while the asbestos order forms bear the Pfizer logo, a Quigley employee signed all of them. As in Stein, this evidence does not create an issue of fact as to whether Pfizer "'participate[d] substantially in the design, manufacture, or distribution'" of Quigley's products.[64]

Finally, Rublee's theory of liability based on comment d to § 400 also fails. Comment d indicates that a company can be liable as an apparent manufacturer if it "affixes to [the product its] trade name or trademark."[65] The comment explains that when a label identifies the company "as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the [company]."[66] But the comment also specifies that

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[64] Stein, 137 A.3d at 298 (quoting RESTATEMENT (THIRD) § 14 cmt. d).
[65] RESTATEMENT (SECOND) § 400 cmt. d.
[66] RESTATEMENT (SECOND) § 400 cmt. d.

a trademark "licensor, who does not sell or otherwise distribute products, is not liable under this Section of this Restatement."[67]

Rublee contends that Pfizer vouched for the asbestos products' safety by allowing Quigley to use its well-known logo as an assurance of quality. While no evidence indicates the companies had a trademark licensing agreement, this court could view this situation as analogous.[68] Still, Pfizer did not "sell" or "distribute" the products as a more recent version of the Restatement requires for trademark license liability.[69] Moreover, the record shows that Quigley was clearly identified to purchasers as the manufacturer of Insulag and Panelag. Pfizer and Quigley employees testified that Quigley continued to manufacture the products and sell them using the same sales personnel. Quigley's sales force continued to correspond on Quigley letterhead, signing as Quigley. Invoices came from Quigley. Purchase orders went to Quigley. And numerous materials, including product labels, marketing materials, federal Occupational Safety & Health Administration (OSHA) data sheets, and a report to purchasers, identified Quigley to purchasers as the products' manufacturer. When those materials mentioned Pfizer, it was either as a parent company or in a small logo in the corner. And, as noted above, the record shows that actual purchasers like Lone

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[67] RESTATEMENT (THIRD) § 14 cmt. d.
[68] See Stein, 137 A.3d at 298.
[69] RESTATEMENT (THIRD) § 14 cmt. d.

Star knew Quigley was still the manufacturer. Comment d thus does not provide a basis for liability.

A company that, like Pfizer, placed its logo on a product but did not sell it or "'participate substantially in [its] design, manufacture, or distribution'" should not expect to be held liable for harms the product caused.[70] On this record, any liability Pfizer incurred would stem not from representing itself as the dangerous products' manufacturer but from owning the company that did manufacture and sell the products.

Because Rublee's evidence does not create a genuine issue of material fact as to any theory of apparent manufacturer liability, the trial court did not err by granting summary judgment.

Pfizer separately contends that a defendant cannot be liable as an apparent manufacturer unless it was part of the "chain of distribution" that brought the harmful product to the plaintiff. But because Rublee's evidence does not satisfy any of the theories of apparent manufacturer liability, we do not decide whether the Washington Supreme Court would impose a chain of distribution requirement.

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[70] Stein, 137 A.3d at 297 (quoting RESTATEMENT (THIRD) § 14 cmt. d).

CONCLUSION

Because Rublee does not present evidence sufficient to create an issue of fact about any of the tests courts apply for apparent manufacturer liability, we affirm.

Leach, J.

WE CONCUR:

Cox, J.

Becker, J.

HONORABLE TIMOTHY A. BRADSHAW
Trial Date: March 7, 2016

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiff,

v.

CARRIER CORPORATION, et al.,

Defendants.

NO. 14-2-26353-8 SEA

STIPULATION AND ORDER RE: DISCRETIONARY REVIEW OF COURT'S RULING ON PFIZER, INC'S MOTION FOR SUMMARY JUDGMENT

CLERK'S ACTION REQUIRED

STIPULATION

On March 4, 2016, this Court granted Defendant Pfizer, Inc.'s motion for summary judgment seeking dismissal of Plaintiff's "apparent manufacturer" claim against Pfizer under Restatement (Second) of Torts § 400. All remaining parties in this case hereby stipulate that the interpretation of Restatement (Second) of Torts § 400 under Washington law involves a controlling question of law and that immediate review of the Court's summary judgment ruling will materially advance the ultimate termination of this and other litigation. The parties therefore request that the March 7, 2016 trial date be stricken and that the Court certify the case for discretionary review pursuant to RAP 2.3(b)(4).

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ORDER

This matter comes before the Court on the parties' stipulated request to certify the Court's ruling on Pfizer Inc.'s motion for summary judgment for discretionary review pursuant to RAP 2.3(b)(4). The Court finds that the interpretation of Restatement (Second) of Torts § 400 under Washington law on which Pfizer's summary judgment motion is based involves a controlling question of law and that immediate review of the court's ruling will materially advance the ultimate termination of this and other litigation.

IT IS THEREFORE ORDERED that the March 7, 2016 trial date is hereby stricken and that this matter is hereby certified for discretionary review pursuant to RAP 2.3(b)(4).

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DATED this 4th day of March 2016.

THE HONORABLE TIMOTHY A. BRADSHAW

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CASE #: 75009-7-I
Margaret Rublee, et ano., petitioner v. Carrier Corp., et al., respondents

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on May 23, 2016, regarding discretionary review:

This is a wrongful death and survivorship lawsuit involving allegations that decedent Vernon Rublee developed mesothelioma as a result of his occupational exposure to asbestos while working at Puget Sound Naval Shipyard. Plaintiff Margaret Rublee, individually and as personal representative of the estate of her husband Vernon, seeks discretionary review of a March 4, 2016 order that granted summary judgment for one of the defendants – Pfizer, Inc. As explained below, review is granted under RAP 2.3(b)(4).

The asbestos at issue allegedly came from Insulag and Panelag, manufactured by Quigley Company, Inc., a former subsidiary of Pfizer. Rublee's claim against Pfizer is based solely on the "apparent manufacturer" theory under Section 400 of Restatement (Second) of Torts, which states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." It appears that Quigley has undergone a Chapter 11 reorganization under the bankruptcy code, and the reorganization plan channels all asbestos lawsuits against Quigley and Pfizer involving a Quigley product like Insulag or Panelag to an asbestos trust under Section 524(g) of the code.

It appears that the only exception to the channeling injunction is an apparent manufacturer theory against Pfizer.

The trial court granted Pfizer's motion for summary judgment, concluding that although there is evidence to indicate "Restatement 402/successor/strict liability, Pfizer did not put out the cement as its own product pursuant [to section] 400." Order granting summary judgment at 3. All of the parties in this case stipulated, and the trial court certified, under RAP 2.3(b)(4) that interpretation of Section 400 of the Restatement under Washington law in this case involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review may materially advance the ultimate termination of the litigation.

Rublee represents that the sole remaining defendant, Lone Star Industries, is the predecessor to the company which distributed Quigley products in the Puget Sound region and that the exposure and causation issues are virtually identical for Pfizer and Lone Star. Rublee argues that immediate review will serve the interests of judicial economy because there would be one trial (not two trials) if she successfully obtains a reversal of the summary dismissal of Pfizer.

By ruling of April 12, 2016, I directed the parties to address whether CR 54(b) findings, not RAP 2.3(b)(4), are a more appropriate mechanism for interlocutory review in this case involving multiple claims against multiple defendants. Rublee argues that regardless of CR 54(b) finding, she is entitled to review under RAP 2.3(b)(4). Pfizer takes no position on the issue.

Even considering the five factors relevant to the CR 54(b) inquiry (set forth in my April 12 ruling and Fox v. Sunmaster Prods., Inc., 115 Wn.2d 498, 503, 798 P.2d 808 (1990)), immediate review appears appropriate.

Immediate review is warranted under RAP 2.3(b)(4). Therefore it is

ORDERED that discretionary review is granted. The clerk shall issue a perfection schedule.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

CMR

FILED

JUL 14 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHARLEEN SPRAGUE, Personal Representative of the estate of James Olson, Plaintiff-Appellant, v. PFIZER INCORPORATED, Defendant-Appellee.	No. 15-35051 D.C. No. 3:14-cv-05084-RJB Western District of Washington, Tacoma ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Appellee's opposed motion (Docket Entry No. 35) to lift the stay of proceedings is granted.

Appellant's motion (Docket Entry No. 36) to continue to stay appellate proceedings is denied without prejudice to a renewed motion to stay accompanied by a showing that the Washington Supreme Court has granted review in *Rublee v. Carrier Corp.*, 2017 WL 2734348 (Wash. Ct. App. June 26, 2017).

Appellee's Notice (Docket Entry Nos. 35 and 37) of Supplemental Authority under Federal Rule of Appellate Procedure 28(j) and Ninth Circuit Rule 28-6 and any related filings are referred to the panel assigned to consider the merits of the appeal.

amt/Pro Mo commish 10Jul2017

CERTIFICATE OF SERVICE

I certify that on July 26, 2017, I caused to be served a true and correct copy of the foregoing document upon:

Pfizer Inc.
Marissa Alkhazov
BETTS PATTERSON MINES
701 Pike Street, Suite 1400
Seattle, WA 98101

Lone Star Industries, Inc.
Howard (Terry) Hall
Andrew Rapp
FOLEY MANSFIELD
800 Fifth Avenue, Suite 3850
Seattle, WA 98104

Dated at Seattle, Washington this 26th day of July 2017.

BERGMAN DRAPER OSLUND, PLLC

/s/ Shane A. Ishii-Huffer

Shane A. Ishii-Huffer

BERGMAN DRAPER OSLUND

July 26, 2017 - 2:17 PM

Filing Petition for Review

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