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No. 65258-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARY JO WANGEN, Individually and as Personal Representative of the Estate of WILLIAM WANGEN,

Appellant,

v.

A.W. CHESTERTON COMPANY, et al.,

Respondents.

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REPLY BRIEF OF APPELLANT WANGEN

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A. INTRODUCTION

Desperately attempting to torture the facts of this case to somehow apply the Supreme Court's decision in *Braaten v. Saberhagen Holdings,* 165 Wn.2d 373, 198 P.3d 493 (2008) here, Warren Pumps LLC ("Warren") offers a highly selective recitation of the facts, neglects to acknowledge that the *Braaten* court specifically stated that its decision does not extend to situations where a product manufacturer directed in its product specifications that asbestos-containing replacement parts be used, and ignores controlling Washington law on asbestos exposure generally. This Court should not countenance such pretzel-like contortions in a party's argument. Far from a "new tort," as Warren claims, Mary Jo Wangen ("Wangen") merely asks that traditional Washington law on causation in asbestos exposure be applied.

William Wangen did not develop mesothelioma out of the blue. He contracted the invariably fatal disease after spending four years aboard the U.S.S. WILTSIE ("WILTSIE") tearing apart Warren pumps to replace asbestos gaskets and insulation, inhaling deadly dust all the while. Wangen's Navy service ultimately claimed his life. Warren glides past this unhappy fact in its response.

Warren also avoids dealing with the fact that this case was decided on summary judgment. Summary judgment is proper only if the court,

viewing all facts and reasonable inferences in the light most favorable to Wangen as the nonmoving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Here, the trial court did not view all facts and inferences in Wangen's favor but instead improperly weighed the evidence and the credibility of witnesses before it.

Warren attempts to discount Wangen's own direct testimony that he was exposed to asbestos specified and supplied by Warren, and would have this Court follow the trial court in weighing the evidence and determining the credibility of witnesses.

B. RESPONSE TO RESTATEMENT OF THE CASE

As an initial matter, Wangen must point out the obvious: Warren's response to Wangen's statement of the case represents a serious violation of RAP 10.3(a)(5) which requires a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." Warren acknowledges that it has intertwined the facts *with argument*. Br. of Resp't at 8, n. 3. It provides this mish-mash only after a six-and-a-half page introduction. Warren's exposition of the facts is hopelessly entangled with inappropriate argument, making it challenging for this Court and Warren to distinguish between them.

Failure to comply with RAP 10.3(a)(5) places an unacceptable burden on Wangen and on this Court. *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied,* 116 Wn.2d 1021 (1991); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238, *review denied,* 119 Wn.2d 1015 (1992).[1]

Because Warren's factual recitations are inextricably bound up with argument throughout its brief, Wangen will not attempt a point-by-point counter-statement, and will rely instead on the statement of the case contained in the opening brief. Several factual matters, however, bear this Court's attention.

Warren states that Wangen did not produce evidence that the late William Wangen was exposed to internal insulation to Warren pumps, or evidence that Warren sold or supplied replacement asbestos-containing components to which William was exposed. Br. of Resp't at 9. As detailed in the opening brief at 26-30, Wangen provided *abundant* evidence contrary to Warren's assertion.

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[1] If a party submits a brief which fails to comply with the requirements provided by RAP 10.3, this Court may (1) order the brief returned for correction or replacement, (2) order the brief stricken, or (3) accept the brief. RAP 10.7. A court will ordinarily impose sanctions on a party or counsel for a party who files a brief which fails to comply with these rules. *Id.* Wangen is confident this Court can weed out the improper argument and focus on the relevant facts supported by the record. Imposition of sanctions, however, would be appropriate.

Warren also states that Wangen did not show evidence that Warren specified or recommended the use of asbestos-containing components or insulation. Br. of Resp't at 9. Again, Wangen provided ample evidence to the contrary. Br. of Appellant at 27-30. Warren's own corporate representative, Roland Doktor ("Doktor"), acknowledged that Warren *specified* asbestos-containing materials for its pumps. Warren's schematic diagrams listed asbestos gaskets and packing, as well as asbestos-containing magnesia and asbestos cloth as integral components of its pumps. CP 590-94. Doktor acknowledged that the purpose of those drawings was to show the customer the exact size and locations of all pertinent parts they would need, and to serve as a guide in the proper installation, operation, and *maintenance* once the pump was delivered. CP 593. Warren provided diagrams and parts and materials lists specifying asbestos materials to be used in the pumps. CP 593-96.

Finally, and most critically, Warren points to various documents detailing Navy specifications governing insulation and protective lagging on Warren's pumps. Br. of Appellant at 15. One of the documents Warren cites is a military specification for pumps used in Naval ships. *Id.*; CP 2594-2611. That document shows that Warren was required to provide packing and mechanical seals (i.e. gaskets) for 100 percent complete replacement for all pumps installed aboard the WILTSIE. CP

2605. *See* Appendix. Warren knew that such replacement parts, like the original packing and gaskets, contained asbestos because the Navy specified the use of asbestos. CP 481-82, 583-84, 1648.

C. ARGUMENT

(1) Warren Misstates the Supreme Court Decision in *Braaten* and Largely Ignores that Court's Lockwood Decision

In lieu of any real analysis of *Braaten* or the Supreme Court's decision in *Lockwood v. AC&S, Inc.,* 109 Wn.2d 235, 744 P.2d 605 (1987), which clearly announced Washington's liberal rule for proving a worker's exposure to asbestos at a work site, Warren repeats a claim that Wangen seeks the creation of a "new tort," br. of resp't at 1, 41, or a parade of horribles, culminating in Warren's hyperbolic assertion in its brief at 35-36 that holding it responsible for *requiring* asbestos-containing replacement parts for its product will drive it into bankruptcy.[2] Hyperbole is no substitute for sound legal reasoning.

The core reasoning of the *Braaten* court regarding a manufacturer's duty to warn was that it was not responsible for what might happen in the replacement of components in its products; it would be speculative to assume that manufacturers of such replacement products would employ asbestos-containing products. 165 Wn.2d at 390-92. The

[2] Warren's assertion in its brief at 36 that "virtually all" manufacturers of gaskets, packing and internal insulation "are gone" is without foundation in the record in this case and should be disregarded.

issue, however, was different in situations where that manufacturer *specified* asbestos-containing replacement parts, and, for that reason, our Supreme Court left open the issue of whether liability could be imposed on such a manufacturer. 165 Wn.2d at 396-97. Liability should clearly follow where asbestos-containing replacement parts are specified. The manufacturer has, in effect, built in asbestos exposure to persons like William Wangen working with its product and replacement parts for it when it commands that the product's replacement *must* contain asbestos. It is no longer a matter of speculation.

At this point, Washington's liberal rule regarding proof of asbestos exposure articulated in *Lockwood* must come into play. As articulated in the Brief of Appellant at 21-24, this rule permits proof of exposure by circumstantial evidence. Far from a mere rule of causation, *Lockwood* and the attendant cases make clear that the burden rests *on Warren* to demonstrate that a plaintiff like William Wangen was not exposed to its asbestos-containing product. Ultimately, Warren has no answer to *Lockwood* and its progeny. Wangen bore his initial burden of proving his exposure to asbestos from Warren's product or replacement parts to that product that contained asbestos per Warren's specifications. Warren did not sustain its burden of proving otherwise. The issues here were for the trier of fact.

(2) On Summary Judgment, All Facts and Reasonable Inferences Must Be Construed in Favor of Wangen

Glaringly absent in Warren's brief is any acknowledgment that, on summary judgment, all reasonable inferences are construed *in favor of Wangen* as the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). This studious refusal to acknowledge the proper burden and standard of review on summary judgment taints Warren's argument. This Court essentially stands in the shoes of the trial court in reviewing the summary judgment de novo; summary judgment is proper only if this Court, viewing all facts and reasonable inferences in the light most favorable to Wangen, finds no genuine issue as to any material fact and Warren is entitled to judgment as a matter of law. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence or resolve any existing factual issues, *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964), nor may a court weigh credibility in deciding a motion for summary judgment. *In re Welfare of Sego,* 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973); *Jones v. State, Dep't of Health*, ___ Wn.2d ___, 242 P.3d 825, 834 (2010); *see also,* 14A Karl B. Tegland, Washington Practice: Civil Procedure § 25:16 (2009).

Wangen offers this authority, not as a stock recitation of the standard of review, but because the treatment of summary judgment here is critical to the resolution of the issues. Wangen and Warren presented testimony on a key issue from experts who arrived at differing opinions. The trial court invaded the province of the jury when it weighed the evidence and determined the credibility of those experts, choosing to agree with one over the other. The trial court ruled that where the parties' experts had submitted conflicting opinions as to whether the metal lagging had been removed from the pumps, thereby exposing asbestos-containing insulation, Wangen's expert had no personal knowledge of the circumstances aboard the WILTSIE and therefore his expert opinion could not be substituted for the testimony of individuals with personal knowledge. CP 1755-56. The trial court's assessment of the experts' testimony, like its weighing of Wangen's own testimony, constituted an improper evaluation of the evidence, and its rulings were in direct conflict with its obligation to view all facts and inferences in a light most favorable to Wangen.

The trial court also ruled that William Wangen had no foundation to testify in his deposition that the replacement gaskets and packing were manufactured by Warren. CP 1739. That is simply not the case. Navy specifications unequivocally required Warren to provide replacement

gaskets and mechanical seals[3] for its pumps installed aboard the WILTSIE. CP 2605. At trial, and now on review, Warren has argued strenuously that there is no evidence that it supplied asbestos-containing replacement parts, and that a different company may have done so. Br. of Resp't at 26-31. The Navy specifications are a stark refutation of Warren's insistence that it did not provide such replacement parts because it provided replacement parts – the Navy *required* it to do so. *See* Appendix. The trial court improperly weighed the evidence and the credibility of Wangen's testimony and concluded that Wangen had no foundation to testify that the replacement gaskets and packing were manufactured by Warren is directly contrary to the record.

The trial court ruled that two diagrams of the pumps - including lists of parts and materials - produced by Warren were descriptions of original components, rather than specifications for parts to be used by customers. CP 1739. This, too, constituted an improper weighing of the evidence. The court failed to view the facts and inferences about the diagrams in a light most favorable to Wangen.

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[3] A mechanical seal is a gasket. A seal is "a tight and perfect closure (as against the passage of gas or water), or a device to prevent the passage or return of gas or air into a pipe or container." Webster's Collegiate Dictionary 1119 (11th ed. 2004); "A mechanical seal is a device which helps join systems or mechanisms together by preventing leakage (e.g., in a plumbing system), containing pressure, or excluding contamination. A seal may also be referred to as 'packing.'" Wikipedia, http://en.wikipedia.org/wiki/Seal_%28mechanical%29

Warren would have this Court follow the trial court in weighing evidence and determining the credibility of witnesses. This is entirely inappropriate. Whether Warren provided replacement parts is a question of material fact which cannot be resolved on summary judgment.

(3) Evidence Of Wangen's Exposure Is Properly Before This Court

Hoping yet again to avoid the plain factual issues that abound in this case, Warren raises a procedural argument to try to keep the evidence favorable to Wangen from this Court. It argues that portions of William Wangen's deposition testimony were stricken and therefore such testimony is not part of the record on review. Br. of Resp't at 23. This argument is of a piece with Warren's misapprehension about the restrictions on summary judgment. Just as all facts and reasonable inferences are construed in favor of the nonmoving party on summary judgment, so this Court must consider *all* documents presented to the trial court on review.

An appellate court would not be properly accomplishing its charge if it did not examine all the evidence presented to the trial court, *including evidence that had been redacted. Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Because this Court applies the de novo standard of review when reviewing all trial court rulings made in

conjunction with a summary judgment motion, evidence and inferences are viewed in favor of the nonmoving party. Materials submitted to the trial court in connection with a motion for summary judgment cannot be stricken from consideration; they remain in the record to be considered on appeal. *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009), *review denied*, 168 Wn.2d 1018 (2010). An appeal from an order granting summary judgment may be sufficient to encompass all the grounds relied on by the trial court, and an appellant does not waive any ground by failing to specifically assign error to a portion of the summary judgment order. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 323-28, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008 (2006).

Warren moved to strike William Wangen's California deposition on the grounds that Warren was not present for the deposition and Wangen's deposition testimony lacked foundation. CP 896-903. The trial court considered Warren's motion for summary judgment and its motion to strike at the same hearing, and issued a single order on the motions, incorporating its March 9, 2010 oral ruling and listing the motion to strike as one of the documents it considered. CP 1732-34. The trial court ruled that the California deposition was admissible because Warren's counsel had the opportunity to take Wangen's deposition in Washington and cross examined him regarding the California deposition. CP 1736-38.

The court then ruled as a matter of law that there was no foundation upon which Wangen could conclude that replacement parts were made by Warren and granted Warren's motion to strike on that basis. CP 1739.

But in ruling on Warren's motion to strike and its motion for summary judgment at the same time, the trial court cross-pollinated the facts and the issues, and conflated the two motions.

Indeed, in ruling the California deposition was admissible under ER 804, the court stated, "[F]or purposes of my factual analysis, I am taking the deposition testimony from California into consideration, as well." CP 1738. The trial court also stated, "It is true that in the second deposition, Mr. Wangen could not recall working around Warren pumps, but in the first deposition he did. I think, at least with respect to that issue, there is a conflict and therefore an issue of fact." CP 1738. In other words, even as it granted the motion to strike for lack of foundation, the trial court relied on the very deposition it was striking to weigh the facts on Warren's motion for summary judgment.

Because the trial court conflated Warren's motion to strike and its motion for summary judgment, Wangen did not separately assign error to the court's grant of the motion to strike. Contrary to Warren's argument in its brief at 25, Wangen was not obliged to do so in order for this Court

to consider the deposition on review. The California deposition was before the trial court when it entered its summary judgment order, and it relied on the contents of that deposition in weighing the facts of the case. As noted above, this Court examines all the evidence presented to the trial court, including evidence that had been redacted. *Folsom*, 135 Wn.2d at 663. Thus, it may properly consider the California deposition.

In any event, a specific assignment of error to the trial court's decision to strike evidence is unnecessary because the gravamen of Wangen's appeal from the summary judgment order plainly encompassed the trial court's evidentiary rulings, and this Court reviews such orders de novo. *See Johnson v. County of Kittitas*, 103 Wn. App. 212, 11 P.3d 862 (2000), *review denied*, 144 Wn.2d 1002 (2001) (failure to assign error to certain conclusions of law not fatal where appellant assigned error and argued trial court's ultimate conclusion of law on statute); *All Star Gas, Inc., of Washington v. Bechard*, 100 Wn. App. 732, 998 P.2d 367 (2000) *citing State v. Olson,* 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (failure to assign error to findings and conclusions not fatal as it was clear from the party's brief what legal conclusions it contends are error).

The trial court mingled Warren's motions and improperly weighed the evidence and the credibility of witnesses in doing so. There can be no disputing Wangen's assignment of error to the trial court's order of

summary judgment. The evidence Wangen cites is properly before this Court.

(4) Wangen Met the Burden of Showing William Wangen Was Exposed to Asbestos Sold, Supplied, and Specified by Warren

Warren asserts that Wangen has presented no evidence he was exposed to insulation from Warren pumps. Br. of Resp't at 9. The record is replete with evidence to the contrary.

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989). To successfully move for summary judgment, a party must demonstrate a *complete lack* of evidence or a material fact which cannot be rebutted. *Id.* at 225, *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Again, the evidence and all reasonable inferences must still be examined in the light most favorable to the nonmoving party to determine if there are genuine issues of material fact to be resolved at trial. *Id.* at 226.

Warren did not meet its initial burden of showing a complete lack of evidence supporting Wangen's case. In attempting to discount Wangen's evidence, Warren would have this Court ignore Wangen's California deposition. As argued above, its effort is groundless. It also

attempts to deflect Wangen's evidence by focusing almost exclusively on what it describes as "internal" insulation on its pumps.[4] Br. of Resp't at 13, 16. This focus on "internal" insulation is a red herring to steer the Court's attention away from all the evidence Wangen presented that he had been exposed to asbestos in the pump gaskets and packing as well as the asbestos-containing material originally encased under metal lagging on the ends of the pumps. Warren dismisses what it calls "the inference of exposure to internal insulation" as "not reasonable," but cites no authority to support why that inference should not be construed in Wangen's favor. Br. of Resp't at 14. Warren is attempting to coax this Court into accepting inferences in *its* favor rather than Wangen's - the complete opposite of what the law requires. Warren merely insists there is no evidence Wangen was exposed to asbestos from its products. Such sweeping assertions are not sufficient to shift its burden of proof.

In *Weatherbee v. Gustafson,* 64 Wn. App. 128, 132, 822 P.2d 1257 (1992), a plaintiff brought action against the manufacturer of a defective smoke detector and the builder who installed it after she was injured in a fire at her home. The trial court granted the defendant's motions for

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[4] Warren attempts to confine the discussion to the "internal" asbestos-containing magnesia under the lagging. Br. of Resp't at 17. However, as described in Wangen's opening brief, the gaskets and packing were likewise "internal" to the pumps.

summary judgment in which they argued that the defective smoke detector could not be considered the proximate cause of the homeowner's injuries. This Court reversed and remanded for trial, holding that the claims of the moving parties did not eliminate competent evidence from which a fact finder could draw reasonable inferences supporting the essential elements of the homeowner's claim. *Id.* at 132. This Court held that the defendants' sweeping conclusion that there was a lack of evidence showing prima facia proximate cause was insufficient, thus the burden of proof never shifted to the homeowner, making summary judgment inappropriate. *Id.* at 132-33. A party cannot simply make bald assertions unsupported by factual evidence and thereby shift the burden of proof when there is evidence giving rise to questions of material fact. *Id.* at 134.

In this case, Warren argues that the original asbestos-containing materials would have been replaced during regular overhauls of the WILTSIE. Br. of Resp't at 17-22. But it offers no evidence that whenever the WILTSIE was overhauled all asbestos components in its pumps were automatically replaced. Indeed, Warren's own witness, Roland Doktor testified to the contrary, stating that maintenance would "not necessarily" require removal of the lagging. CP 596. Where Wangen has offered substantial evidence that Warren's pumps were installed aboard the WILTSIE, and that he worked on those pumps aboard the

vessel only four years after the ship was commissioned, Warren cannot shift the burden of proof to Wangen. Rather than showing an absence of material facts, Warren ignores Wangen's evidence.

Even if Warren had met its burden of proof, Wangen offered specific, detailed facts showing that Warren sold, supplied, and specified the use of the asbestos materials for the pumps on the ship aboard which William Wangen was exposed during his naval service. Critically, Warren ignores the fact that Navy specifications *required Warren* to provide replacement gaskets and packing. CP 2605. *See* Appendix. That document alone would be sufficient to create an issue of material fact rendering summary judgment inappropriate because it made clear that Warren itself directed the replacement of gaskets and packing with asbestos-containing products.

But there was far more evidence introduced than the Navy specifications:

- Wangen serviced and maintained Warren pumps the entire time he was aboard the WILTSIE. CP 549.
- Warren's schematic drawings and "assembly list of spare and material" for the fire and bilge pumps specified the use of asbestos materials for the pumps. CP 528, 530, 581, 590-95, 2250-57, 2260-61.
- Warren installed asbestos-containing gaskets and packing during the initial construction of the pumps, pursuant to Navy specifications, which had to be removed as part of the pumps' regular maintenance. CP 481-82, 583-84, 592, 606, 1648.

- Wangen testified that 10-15 men worked on tearing apart dusty asbestos pump gaskets and packing five hours a day. CP 446, 450, 451, 452.
- Wangen could not avoid inhaling the asbestos fibers. CP 95, 446, 565-66.
- Wangen had to use specific pre-cut asbestos gaskets provided by the pump manufacturers on the internal portions of the pumps. CP 461.
- All pumps had internal gaskets supplied by the pump manufacturers. CP 556.
- Those gaskets were specially made and provided by the manufacturers. CP 461, 548.
- Flat gaskets were stamped with the name of the manufacturer, allowing Wangen to identify which brand was installed in each pump. CP 452, 464, 566.
- The internal gaskets were supplied by the pump manufacturer. CP 548.
- Ordering information for the asbestos gaskets was found on steel plates affixed to each pump by the manufacturer. CP 548, 565.
- Warren pumps were identified by such a metal plate which specified the catalogue numbers for internal parts, including asbestos containing parts. CP 549.
- When Wangen received replacement gaskets from the supply officer, he would know he had the correct part because the box had the name Warren on it. CP 549.
- The inner packing for the pumps were pre-made and had to be specially ordered for each pump brand. CP 674.
- The packing, which came on spools, had the manufacturer's name on it, and Wangen was always aware of what brand he needed to install in a particular pump. CP 457, 674-75.
- Gaskets and packing for each brand of pump were supplied by the same manufacturers. CP 456-57, 460, 674.
- Schematic drawings made and provided by Warren detailing asbestos components were intended to show the proper installation, operation, and maintenance of the pumps and pump components. CP 593.
- Those schematics clearly show the inclusion of asbestos containing parts. CP 590, 591, 59, 594, 603.
- Warren installed asbestos containing materials in the pumps at the time of manufacture. CP 592, 595, 597.

- Warren's own corporate representative described the asbestos containing materials as "component" parts of the pumps. CP 595.
- Maintenance of the metal lagging around asbestos-containing magnesia did not necessarily involve removal of the lagging during overhauls of the WILTSIE. CP 596.
- There was no evidence of any other supplier for packing and gaskets for Warren's pumps during the time they were installed on the WILTSIE. CP 613-614.

Thus, Warren manufactured the gaskets and packing material in its pumps with asbestos in them per Navy specifications. CP 481-82, 583-84, 1648. The Navy required Warren to have replacement gaskets and packing, presumably meeting the Navy's specifications that such replacements have asbestos in them. The question of whether the gaskets and packing were torn out in routine maintenance or refitting of the WILTSIE was a question on which experts differed. CP 1755-56.

It cannot be overemphasized that *all* evidence and the reasonable inferences drawn from it *must* be construed in Wangen's favor. *Quadrant Corp.*, 154 Wn.2d at 171. This evidence was clearly sufficient in light of *Lockwood* for Wangen to have met her burden. Wangen has presented, at the very least, a circumstantial case that William was exposed to asbestos from Warren products, and a circumstantial case is enough to survive summary judgment.

(5) <u>The Trial Court Erred in Concluding that Warren Did Not Specify Asbestos-Containing Replacement Parts</u>

In *Braaten* our Supreme Court left open the question of whether a duty to warn on the part of a product manufacturer arose when it specified asbestos-containing replacement parts for its products.[5]

The trial court here ruled that Warren schematics showing asbestos-containing material were not specifications for what had to be used by the customer, but instead merely described the components that were contained in the original equipment. CP 528, 530. But whether the schematics and parts lists were engineering documents and or were intended to guide customers in the proper use of replacement parts was for a finder of fact to determine. *See, e.g., Snohomish County v. Postema*, 95 Wn. App. 817, 820, 978 P.2d 1101, *review denied,* 139 Wn.2d 1011 (1998) (characterization of water as natural watercourse or surface water is for trier of fact).

Warren argues that it is simply unreasonable to infer that the diagrams are specifications. Br. of Resp't at 33. But it is for the trier of fact to draw reasonable inferences from the evidence. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). It is likewise for the trier of fact to determine the persuasiveness of the evidence. *State v. Camarillo,*

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[5] Division II of this Court recently held that the manufacturer of respirators owed no duty to warn of exposure to asbestos where the manufacturer did not specify that asbestos should be applied to, in, or connected to their respirators. *Macias v. Mine Safety Appliances Co.,* __ Wn. App. __, ___ P.3d ___, 2010 WL 5093188, *Macias* is thus distinguishable from the present case where Warren specified asbestos materials.

115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied,* 119 Wn.2d 1011, 833 P.2d 386 (1992).

A specification is the act of making a detailed statement, especially of the measurements, quality, materials, or other items to be provided under a contract. Bryan A. Garner, *Black's Law Dictionary* 1434 (8th ed. 2004). To specify is to name or state explicitly or in detail; to include as an item in a specification. *Webster's Collegiate Dictionary* 1198 (11th ed. 2004).

The diagrams at issue here were prepared by Warren, and articulated precisely what Warren intended for the replacement packing and gaskets for its pumps. Warren's corporate representative testified that the drawings were intended to show proper installation, operation, and maintenance of the pumps. CP 593. He also acknowledged that the materials Warren provided did not warn of the dangers of asbestos.[6] CP 598. This Court has held that interpreting the meaning and purpose of documents is for the finder of fact, and competing interpretations are not properly resolved on summary judgment. *Renner v. City of Marysville,*

[6] The hazards of working with asbestos were well known by the nineteen twenties and thirties; the United States Public Health Service documented the significant risk in asbestos factories in 1938. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1106 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

145 Wn. App. 443, 456-457, 187 P.3d 283 (2008), *aff'd*, 168 Wn.2d 540, 230 P.3d 569 (2010). Viewed in a light most favorable to Wangen, as they must be, the diagrams must be considered specifications.

D. CONCLUSION

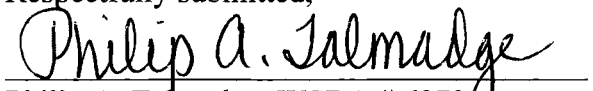
Nothing set forth in Warren's brief should dissuade this Court from reversing the summary judgment granted to Warren below. The trial court erred in granting summary judgment to Warren, usurping the role of the trier of fact in making credibility decisions and giving weight to the opinions of experts.

The trial court also misapplied the rule adopted in *Braaten*, particularly where the court failed to apply the liberal rule on asbestos exposure adopted by Washington courts. Wangen provided evidence that William was exposed to asbestos from Warren's product from the time it was manufactured, or from replacement parts, mandated by specifications from Warren, that contained asbestos. Wangen presented ample evidence here that William was exposed to asbestos-containing materials manufactured, sold, supplied, and specified by Warren.

This Court should reverse the trial court's decision on summary judgment and remand the case to the trial court to allow Wangen her day in court. Costs on appeal should be awarded to appellant Wangen.

DATED this 5th day of January, 2011.

Respectfully submitted,



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APPENDIX

3.7 Repair parts and tools. -

3.7.1. Onboard. - Onboard repair parts of the types and quantities shown in table II shall be furnished as required in the contract or order.

Table II - Onboard repair parts.

Name of part	Quantity per set
Ball or roller bearings Internal water lubricated bearings Coupling bushings, pins and other wearing parts Felt wiper rings or oil seals. Packing Mechanical seals	100 percent complete replacement for all installed units per vessel
Sleeve bearings Pivoted segmental bearings Oversize impeller wearing rings Undersize casing wearing rings Diaphragm bushings Lubricating oil pumps complete with drive shafting and gears Oil pump gears or rotors Lantern rings Stuffing box throat bushings	One to 4 units per vessel - 100 percent replacement for one pump Over 4 units per vessel - 100 percent replacement for two pumps
Rotors, completely assembled, including shaft, impellers, standard size impeller and casing wearing rings, casing diaphragms and bushings, sleeves, keys, nuts, flinger, and complete coupling Diffusion vanes	100 percent replacement for one pump

3.7.1.1 The pump rotor assembly for flexible coupled units shall be completely assembled ready for installation in the unit for which intended and shall include any nonrotating parts which can be installed only by removing some rotating part or parts of the pump rotor.

3.7.1.2 Pump rotor assemblies for motor-driven close-coupled pumps shall be furnished disassembled.

3.7.1.2.1 The quantities of individual repair parts shall not be reduced because of duplication of parts furnished to make the rotor assembly except that standard casing wearing rings shall not be required.

3.7.1.3 Impeller and casing wearing rings, (see table II) shall be machined oversize and undersize as applicable by at least 0.016 inch in order to permit finish machining as required for replacement aboard ship.

3.7.1.4 Tools. -

3.7.1.4.1 A complete set of special tools required for the maintenance and repair of the pump units shall be included in each set of onboard repair parts.

DECLARATION OF SERVICE

On said day below I emailed and deposited with the US Postal Service a true and accurate copy of the following document: Reply Brief of Appellant Wangen in Court of Appeals Cause No. 65258-3-I to the following:

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

DATED: January 5, 2010, at Tukwila, Washington.

Paula Chapler, Legal Assistant
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