

No. 65258-3-1

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

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

Appellants/Plaintiffs,

v.

A.W. CHESTERTON, et al.,

Respondents/Defendants.

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**BRIEF OF RESPONDENT WARREN PUMPS LLC**

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## I. INTRODUCTION

This is an asbestos wrongful death and survivorship case. According to the Opening Brief, this case tests the reach of the Supreme Court's decision in *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008). That is not necessarily true; this Court can and should affirm summary judgment based on the evidentiary record alone.

But if the Court decides it must determine the legal viability of the new tort theory Plaintiff proposes, it should reject that theory. The proposed new tort appears to be a transitive type of product liability, in which the defendant manufacturer "specified" the use of replacement parts made and sold by others, which in turn allegedly caused the plaintiff's harm. No Washington court or Restatement has sanctioned it thus far, and this Court should not do so here.

Plaintiff Mary Jo Wangen alleged that William Wangen died of mesothelioma caused by his use of asbestos-containing products over a span of thirty years. CP 32. She claimed that various defendants contributed to causing Mr. Wangen's death because they "manufactured, sold or distributed asbestos-containing products or

products that were used in conjunction with asbestos.” CP 31-32 (emphasis added). For Warren Pumps, LLC (“Warren”), the products at issue were two pumps that it sold to the United States Navy during World War II, for use on the destroyer USS Wiltsie. CP 2276, ¶¶13-14 (Plaintiff’s expert declaration); Opening Brief at 3 (pumps sold in 1943).

The USS Wiltsie (hull number DD-716) was a Gearing-class destroyer built in 1945. CP 1239. The Wiltsie was overhauled at Puget Sound Naval Shipyard in 1948, and again at Mare Island Naval Shipyard (California) from December 1949 through April 1950. CP 1239. “Plaintiff does not dispute that the U.S.S. Wiltsie was overhauled twice before Mr. Wangen served on it.” CP 1271 (Plaintiff briefing below). There is also evidence that gaskets and packing in pumps would be replaced periodically. *See, e.g.*, CP 549-51.

In the underlying briefing, Plaintiff conceded that “whether or not the Warren pumps still had their original asbestos-containing internal parts when Mr. Wangen worked along side them is *simply unknown*,” and that “neither [fact] witness in this case affirmatively

testified that the original asbestos-containing gaskets, packing and [internal] insulation were still on the Warren pumps in 1950.” CP 1271. The Court requested supplemental briefing on who had the burden of proof on this issue, which the parties provided. The court ultimately held under *Braaten* that the Plaintiff bore that burden, a ruling she does not challenge on this appeal.

Moreover, the Opening Brief does not dispute that Warren carried its initial summary judgment burden, and that the burden thus shifted to Plaintiff to come forward with evidence of exposure to asbestos from an original Warren product. *See generally, passim* (arguing only about the sufficiency of *her own* showing below) and specifically pages 1-2 and 12<sup>1</sup>; *see Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 394-396, 198 P.3d 493 (2008); *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 752 n. 1, 162 P.3d 1153 (2007) (“*Jacob’s Meadow*”).

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<sup>1</sup> In a vague passage late in her brief, Mrs. Wangen does suggest otherwise. (See unsupported assertions at pages 25-26.) But that very section begins with an accurate concession that the burden shifted to her: “In order to survive Warren’s motion for summary judgment, Wangen had to demonstrate by ‘some evidence’ that Warren was in the chain of supply for the asbestos in its pumps.” (page 25)

Warren contends, therefore, and the trial court agreed, that Mrs. Wangen did not carry her shifted burden to produce evidence from which a reasonable person could infer that any of the parts that Mr. Wangen may have come into contact with were *original*.

*Braaten* teaches that where the plaintiff cannot produce evidence showing exposure to the defendant manufacturer's original asbestos-containing parts, summary judgment is proper. 165 Wn.2d at 396 ("The plaintiff has not established a connection between the injury and the manufacturers' products themselves, as is required"). Mrs. Wangen did not produce such evidence here. As in *Braaten*, "there was no way to tell whether and how many times gaskets and packing had been replaced in pumps ... [Mr. Wangen] worked on" – which meant that neither plaintiff could carry the shifted summary judgment burden to "show that asbestos in [parts] originally supplied with [defendants'] products was asbestos to which [the sailor] was exposed." *Id.* at 394. One wrinkle here is Mrs. Wangen's unsupported claim that Warren *did supply* some of the replacement parts that Mr. Wangen used. But the trial court correctly struck Mr. Wangen's testimony on that point for lack of foundation (CP 1714-

15; 2067; RP 3/9/10 at 5, 9) – an order the Opening Brief ignores. Plaintiff offered no other evidence to support the inference that Warren supplied any replacement parts.

The trial court initially granted Warren’s motion for summary judgment in part, determining that: (a) there was no evidence of exposure to asbestos-containing gaskets or packing that Warren manufactured, sold or supplied, and (b) no evidence that Warren “specified” the use of asbestos-containing replacement parts (whether or not such evidence would be material).

The court denied Warren’s motion in part, however, finding that there was a question of fact about an issue Plaintiff focused on late in the process: whether Mr. Wangen would have had to access *internal insulation* in the Warren pumps – enclosed in metal covering or “lagging” (Opening Brief at 6; CP 1646, 1649-50, 1667 ¶9) – in order to change the gaskets or packing. Warren moved for reconsideration of that ruling. After argument, the court determined that any packing or gasket work Mr. Wangen performed on the pumps would not have exposed him to the internal insulation. More importantly, the Court determined that even if Mr. Wangen was

around any work with involving internal asbestos insulation on Warren pumps, Plaintiff had offered no evidence establishing that such insulation was original (and indeed, some evidence to the contrary). The court therefore granted Warren's motion for reconsideration and entered summary judgment in full.

This brings us to the new tort theory proposed by Mrs. Wangen. In her brief opposing summary judgment, she had sought a way around her inability to prove exposure to any original asbestos-containing components from a Warren product: her "specification" theory. She argued that drawings and parts lists that Warren delivered with its pumps "specified" asbestos-containing replacement parts in some way that now makes Warren liable for harm those parts allegedly caused, *no matter who manufactured or sold the replacement parts*. The trial court never assessed the legal basis for this claim, because it correctly saw no reasonable inference that these drawings and parts lists "specified" what replacement parts the Navy should use in the future. Those exhibits merely

described the structure of Warren’s original product. (RP 3/9/10 at 5).<sup>2</sup> This Court can and should affirm on the same ground.

If the Court instead moves on to assess whether Mrs. Wangen’s “specification” theory is viable as a matter of law – i.e. whether any fact dispute she even arguably raised on this point was *material* – it will find no Washington authority for this novel form of product liability, and serious discouragement in *Braaten*. This Court should not approve such a theory here.

## II. RESPONSES TO ASSIGNMENTS OF ERROR

1. Summary judgment was correct because Plaintiff Mary Jo Wangen did not carry her shifted burden under *Braaten* to produce evidence that Warren Pumps manufactured, sold or supplied any asbestos-containing parts to which Mr. Wangen was exposed.

2. The trial court was correct to grant Warren’s motion for reconsideration (which effectively completed the summary judgment), resolving the one remaining evidentiary concern it had from the summary judgment hearing.

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<sup>2</sup> Indeed, the evidence in this case is to the contrary. *See* pages 45-47, *infra*, describing evidence that it was the Navy that specified the use of asbestos-containing parts, to the extent they were present in the equipment at issue.

**III. THERE IS NO EVIDENCE THAT MR. WANGEN WAS  
EXPOSED TO ASBESTOS FROM PRODUCTS THAT  
WARREN MANUFACTURED OR SOLD<sup>3</sup>**

The USS Wiltsie (hull number DD-716) was a Gearing-class destroyer built in 1945. CP 1239. The ship had two boiler rooms (also known as “fire rooms”) and two engine rooms. CP 2276. Mr. Wangen began serving onboard the USS Wiltsie in October of 1950. CP 132. He remained for approximately three-and-one-half years, stationed in the forward fire room. CP 138, 385.

As relevant to this case, Warren manufactured two different types of pumps for installation aboard the USS Wiltsie: (A) emergency feed pumps; and (B) fire and bilge pumps. CP 2276. Warren sold two emergency feed pumps for the USS Wiltsie (CP 387, 536-37), one of which was in the forward fire room where Mr. Wangen worked (CP 2276, ¶14, CP 2418). Warren also sold four fire and bilge pumps for installation on the Wiltsie. CP 512. Only one of the fire and bilge pumps was in the forward fire room where

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<sup>3</sup> Because the legal and factual issues are intertwined, and to reduce redundancy, Warren has incorporated its response to Plaintiff’s Statement of the Case in its argument.

Mr. Wangen worked. CP 512, 2276, 2418. Thus, *two* Warren pumps were present in Mr. Wangen's work area – one of each type. See Opening Brief at 3; CP 386, 388 (Plaintiff's summary judgment response).

Plaintiff's attempts to distinguish the circumstances of Mr. Wangen's alleged exposure to asbestos from the holdings in *Braaten* and *Simonetta* fail for several reasons. First, Plaintiff has failed to adduce evidence that Mr. Wangen ever worked with gaskets or packing original to either of the Warren pumps, a point Plaintiff essentially concedes here. Second, Plaintiff has failed to adduce evidence that Mr. Wangen was ever exposed to any internal insulation in either of the Warren pumps in the forward fire room, and has certainly produced no evidence of exposure to any *original* insulation. Third, Plaintiff has failed to adduce evidence that Warren sold or supplied any replacement asbestos-containing components to which Mr. Wangen would have been exposed.

Finally, Plaintiff has failed to adduce evidence that Warren specified or recommended the use of asbestos-containing components or insulation for either of the pumps on board the

Wiltsie – and even if she did, such “specification” does not and should not support product liability claims against Warren, which did not make or sell the products causing harm.

Summary judgment in favor of Warren was proper because Mrs. Wangen could not make a prima facie case concerning an essential element of all her claims (*Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)), namely Mr. Wangen’s exposure to asbestos from products manufactured or sold by Warren. This Court should affirm.

**A. Mrs. Wangen conceded that this record does not show evidence of exposure to originally supplied gaskets or packing in either of the pumps.**

The evidence in this case is insufficient to establish exposure to originally supplied gaskets or packing.<sup>4</sup> As explained above, “Plaintiff does not dispute that the U.S.S. Wiltsie was overhauled

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<sup>4</sup> While these facts were not material to the grant of summary judgment, they are true:

-- There is no evidence that *any of the packing* in either of the pumps at issue contained asbestos. See CP 2259-2262 (fire and bilge pump drawing); CP 2345 (emergency feed pump drawing); CP 601-02 (PMK testimony re emergency feed).

-- The emergency feed pump had no asbestos-containing *gaskets*, either; all were made of metal. CP 2345; 601-02. The fire and bilge pump had both asbestos- and non-asbestos-containing gaskets. CP 2259-62.

twice before Mr. Wangen served on it.” CP 1271 (Plaintiff briefing below); *see also* CP 1239. Further, Mr. Wangen testified that he had no knowledge regarding the maintenance history of any of the equipment onboard the USS Wiltsie before he boarded the vessel. CP 1258, 2092; *see also* CP 1254 (same for shipmate). Plaintiff also conceded below that the record does not show how often asbestos-containing parts on Warren pumps were changed in the years before Mr. Wangen boarded (RP 3/8/10 at 7), and that “*whether or not the Warren pumps still had their original asbestos-containing internal parts when Mr. Wangen worked along side them is simply unknown.*” CP 1271.

Warren moved for summary judgment (“MSJ”) based on Plaintiff’s lack of admissible evidence to establish that Mr. Wangen was ever exposed to asbestos fibers from an original part on a Warren pump. CP 43-56. Plaintiff’s MSJ Response argued only that Mr. Wangen worked with gaskets and packing on Warren pumps. CP 393-98. As set forth above, she could not show those parts were original. But to be certain that summary judgment was appropriate, the trial court questioned counsel about, and requested

supplemental briefing, on whether Mrs. Wangen indeed bore the burden on that issue (RP 2/19/10 at 13-16, 23, 34-35, 39) which the parties supplied. CP 1224-30, 1263-72. As explained in the Introduction, the Court ultimately held that she did, and the Opening Brief does not challenge that ruling. RP 3/9/10 at 6.

At a follow-up hearing on the burden of proof, Plaintiff essentially abandoned her claim for exposure to original asbestos-containing gaskets and packing, and argued for the first time that Mr. Wangen was exposed to internal insulation when he replaced gaskets and packing in the two Warren pumps. RP 3/8/10 at 5-8; *see infra*, at pages 13-22.

The trial court ruled the next day, splitting its decision on the basis of some technical confusion that Warren would later clarify in a motion for reconsideration. The court reviewed key facts that it deemed to be without material dispute: that the USS Wiltsie had been overhauled twice before Mr. Wangen boarded; and that no one knew what maintenance or repair had been performed on Warren's reciprocating pumps – but deposition testimony showed that gaskets

and packing on pumps were replaced periodically. RP 3/9/10 at 4-5; CP 1738-39.

Finding that under *Braaten* the Plaintiff had the burden of proving exposure to Warren's original asbestos-containing parts, the court correctly held that Warren was entitled to summary judgment with respect to gaskets and packing, since Plaintiff had provided no evidence to establish that Mr. Wangen was ever exposed to original gaskets or packing in a Warren pump. CP 1740. Plaintiff does not contest the trial court's ruling that the burden of proof was on her, and she essentially leaves the entire ruling with respect to original asbestos-containing components unchallenged.

**B. Mr. Wangen was either not exposed to any, or not exposed to any original, internal insulation on a Warren pump; either way, summary judgment was appropriate.**

The trial court denied Warren's MSJ in part, "based on an issue that did not receive much focus in oral argument" – the internal insulation on the steam end of the two Warren pumps at issue. CP 1740. The trial court first laid out its impression that there was no evidence that either the insulation or its metal covering had been replaced before Mr. Wangen served on the Wiltsie. *Id.* Then, the

trial court broadly construed Mr. Wangen's testimony that he needed to "take the pump apart" to replace packing. CP 1741. The court acknowledged (correctly) that it may have construed Mr. Wangen's testimony too broadly, but noted that any inferences had to be drawn in Plaintiff's favor. CP 1742.

The inference of exposure to internal insulation was *not reasonable*, however, as Warren showed on its Motion for Reconsideration of the trial court's partial denial of its MSJ. CP 1582. Warren supported its motion with deposition testimony and a declaration from its Navy expert, Commander Delaney. CP 1644-53, 1666-68. Warren's evidence clarified the following for the court:

The two pumps at issue, the emergency feed pump and the fire and bilge pump, were both steam-powered "vertical reciprocating" pumps. CP 1667, ¶9. These pumps each had two sections that served different purposes: (1) the pump end, and (2) the steam end. CP 1667, 2476. The "pump end" is where the fluid (*i.e.*, water) was pumped, and the "steam end" was where the pump

was powered. CP 589 (at 83:10-15); CP 597 (at 115:10-116:7); CP 2476-77 (at 143:6-144:3).

The *steam end* of each pump included asbestos-containing insulation material (called “85% magnesia”) that was completely encased in galvanized sheet metal “lagging.” CP 1646, 1649-50, 1667 ¶9. As described by Plaintiffs’ expert Captain Lowell, the sheet metal covering the insulation was already in place, affixed by metal bands, when the pumps arrived at the shipyard for installation. CP 2478. Both the lagging and insulation underneath it were specified and required by the U.S. Navy. CP 481-82, 1648, 1667; see also CP 2605-06.

To the extent Plaintiff contends that Mr. Wangen was exposed to any of the internal insulation on either of the reciprocating pumps, the record does not support such an inference and actually points to the opposite conclusion. The only work Mr. Wangen testified to performing on any pump was replacement of gaskets and packing. CP 547. Commander Delaney explained that neither the sheet metal lagging nor the internal insulation on the steam end of a reciprocating pump needed to be removed or

disturbed when changing gaskets or packing on the pump. CP 1667; *see also* CP 1656-57, CP 2479-80 (Plaintiff's expert Captain Lowell). Moreover, neither Mr. Wangen nor his shipmate Elbert Gasaway, the only fact witnesses in this case, ever testified that they or anyone else ever removed either the sheet metal lagging or internal insulation from a Warren reciprocating pump. CP 565-66, 1667.

Additionally, as described previously, the trial judge correctly concluded that the gasket and packing work Mr. Wangen would have performed was on the "pump end," which is not the end of the pump where the internal insulation was located. CP 1722. Plaintiff's own expert, Captain William Lowell, admitted that he had never seen insulation on the "pump end" of a reciprocating pump. CP 2476. There simply is no reasonable inference that Mr. Wangen was exposed to asbestos from internal insulation on a Warren reciprocating pump.

But even assuming for the sake of argument that Mr. Wangen *could* have been exposed to that internal insulation, Plaintiff's own concessions in her papers, at argument, and her own expert

testimony, preclude any reasonable inference that such internal insulation was *original* to those pumps. Plaintiff conceded in supplemental briefing below (CP 1271) that “whether or not the Warren pumps still had their original asbestos-containing internal parts when Mr. Wangen worked on them is *simply unknown*,” and also that “neither witness in this case affirmatively testified that the original asbestos-containing gaskets, packing and insulation [necessarily meaning *internal* insulation, since there was no original external insulation<sup>5</sup>] were still on the Warren pumps in 1950.”

What is more, the evidence Plaintiff submitted with her Response to Warren’s Motion for Reconsideration included a declaration from her expert Captain Lowell, who opined that, before Mr. Wangen ever boarded the USS Wiltsie, it was likely that the sheet metal lagging was removed, and not reinstalled. CP 2278 at 7:3-8. Although left unstated by Captain Lowell, the only reason to do that would be to perform work on the steam cylinder – requiring

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<sup>5</sup> See, also, pages 17-18 of the Opening Brief, distinguishing *Simonetta* on its facts because “asbestos insulation *external* to the equipment being maintained ... is not at issue in the present case.” (emphasis in original) This further confirms that the insulation Plaintiff’s *does* argue about here was *internal* – the 85% magnesia originally supplied under metal “lagging” on the pumps’ steam end.

removal and replacement of the internal insulation under the lagging as well. Captain Lowell himself strongly implied as much, opining that when boiler tenders performed work on Warren's reciprocating pumps in the forward fire room of the Wiltsie, they likely would have *removed the insulation from the steam cylinder*. CP 2277.

Setting aside Warren's objection that Captain Lowell's "opinions" could not serve as a substitute for admissible evidence regarding the actual repair and maintenance history of these pumps (CP 2450-51), his opinion ultimately *defeated* Plaintiff's case. For even assuming Captain Lowell's testimony was admissible and correct, it left Plaintiff unable to establish that any internal insulation Mr. Wangen even possibly encountered was *original* in October 1950 – especially since the USS Wiltsie had already undergone two overhauls.

And that is how the matter played out in the live hearings below. The trial court heard oral argument on the reconsideration motion on March 22, 2010. CP 1716. Plaintiff admitted that since the USS Wiltsie had undergone two overhauls before Mr. Wangen came onboard, "that certainly increase[d] the likelihood that these

pumps would have been fully overhauled. Fully, including the lagging.” RP 3/22/10 at 25-26. The following exchange then occurred:

**“THE COURT: But if you are dealing in ... probabilities, then, isn’t there also a probability that if and when the lagging was removed, the original asbestos insulation would have been replaced and then don’t we have the same problem with respect to insulation that we had with respect to gaskets and packing?”**

**MS. KNUDSON: Absolutely, we do.**

THE COURT: But if I’m going to be consistent with my ruling on the gaskets and packing, wouldn’t that require you to come forward with some evidence that, in fact, the asbestos insulation that your client might have been exposed to came from Warren as opposed to have the Navy, or some other manufacturer?

**MS. KNUDSON: Well, I think that the gap that we are talking about, and the area of uncertainty with just she[e]r lack of evidence, does removal of lagging necessitate the placement of the 85% magnesia insulation that we know Warren supplied originally with its pumps? Again, we don’t know.”**

RP 3/22/10, at 26-27, emphasis added.

Thus, just as in *Braaten*, Plaintiff could not carry her burden of putting forth evidence of exposure to an internal asbestos-containing component that Warren sold, supplied or placed into the

chain of distribution. Summary judgment was therefore appropriate, and the next day the court granted Warren's Motion for Reconsideration. CP 1716-29.

The court first explained that its former technical confusion about direct exposure to internal insulation while performing gasket work had been corrected:

. . . Based on counsels' explanation of the diagrams of the fire and bilge and the emergency feed pump, the Court concludes that the following facts are undisputed: First, both pumps have two ends, there is a steam end and a pump end. . . . Three, the internal packing and gaskets that were the subject of the Court's previous rulings are located in the pump end. Four, the asbestos containing insulation that is the subject of defendant's motion for reconsideration is located on the steam end.

**Thus, the Court's premise in denying summary judgment that Mr. Wangen may have been exposed to the insulation while replacing the internal packing and gaskets appears to be incorrect. . . .**

**So the issue before the Court is no longer whether Mr. Wangen may have been exposed to the insulation while replacing internal packing and gaskets.**

RP 3/23/10, at 2-4, emphasis added; CP 1721-23.

Instead, the court explained, Plaintiff's main issue in opposition to summary judgment had evolved to: "whether [Mr. Wangen] may have been exposed to such insulation simply by virtue of working around the pumps . . . ." RP 3/23/10, at 4, emphasis added; CP 1723. On that issue, the trial court did note that "[t]he parties' experts g[a]ve conflicting opinions as to the likelihood of the lagging being removed, thereby exposing the insulation." RP 3/23/10, at 5, CP 1724; *see* Opening Brief at 9, 14-17.

But that did not matter in the end, and does not matter here, because the trial court correctly crystallized the issue even further: even assuming Mr. Wangen was exposed to internal insulation on a Warren pump, was the insulation at that time "insulation originally installed by Warren in or on its pumps, or was this insulation installed by others?" RP 3/23/10, at 4; CP 1723. Plaintiff's expert himself provided the only reasonable inference on that:

**Even if the Court were to assume, ... based on Captain Lowell's testimony, that the lagging had been removed and not re-installed, Mr. Wangen would have a significant problem under *Braaten* and *Simonetta*. ... During that process, the original insulation would have to be removed to get to the inside of the pump and then likely replaced with new insulation.**

**There is no evidence that such new insulation would have been supplied by Warren, as opposed to the Navy or another supplier.**

RP 3/23/10, at 5, emphasis added; CP 1725.

Consequently – and largely based on Plaintiff’s written and oral concessions – the trial court held that Plaintiff failed to meet her burden under *Braaten* to establish exposure to *any* original asbestos-containing components supplied by the equipment manufacturer. CP 1726-27.

**C. Mr. Wangen’s testimony that Warren would have supplied the replacement gaskets and packing was properly stricken, as it lacked foundation.**

Lacking evidence of exposure to original asbestos-containing parts in any Warren pump, Plaintiff relies instead on evidence supposedly suggesting that Warren itself supplied replacement gaskets for its pumps onboard the *Wiltsie*. The Opening Brief repeatedly claims that Warren Pumps “supplied asbestos-containing replacement products.” Opening Brief at 1-2; *see also* pp. 7, 29. But the evidence it relies on is stricken – not part of the summary judgment record – and inadequate anyway.

**1. The Wangen testimony on which Plaintiff relies was stricken, and is therefore not part of the record on review.**

This Court “review[s] a ruling on a motion for summary judgment based on the precise record considered by the trial court.” *Jacob’s Meadow*, 139 Wn. App. at 754-755, citing *Wash. Fed’n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). As explained below, that record *excluded* Mr. Wangen’s speculation about the source of the replacement parts he used in his work on Warren pumps, because the trial court struck that testimony as lacking foundation. The Opening Brief ignores this fact, relying on the excluded evidence to establish a fact dispute (at 25, 28-30), and claiming that the trial court “weighed the testimony” based on Mr. Wangen’s “credibility” (at 8, 30). That is wrong.

Mr. Wangen gave a deposition in a previously filed California case, where he suggested that the replacement gaskets and packing that he used would come directly from the equipment manufacturers. Warren moved to strike Mr. Wangen’s California deposition testimony on two grounds: (1) in its entirety, because Warren was

not named in the California case and did not appear at the deposition, and (2) for lack of foundation, insofar as Mr. Wangen purported to say where the replacement parts that petty officers gave him came from. CP 896-902.

The trial court rejected the first ground because Warren *was* named in Mrs. Wangen's subsequent Washington lawsuit (this case), giving Warren the opportunity to cross-examine Mr. Wangen at his *Washington* deposition. CP 1714-15; RP 3/9/10 at 2-4. While Warren believes the ruling on ground (1) was wrong and unfair, it does not challenge that ruling here.

On ground (2), the trial court *granted* Warren's motion to strike Mr. Wangen's testimony about replacement parts. CP 1714-15; 2067; RP 3/9/10 at 5 ("Mr. Wangen claims, in his deposition, that the replacement gaskets [in] pumps were manufactured by Warren, but I have concluded that there is no foundation upon which he could make that conclusion. ... I conclude that he was making an assumption that because he did not make the gaskets, Warren must have made the gaskets. But we all know they could have been manufactured by somebody else, as well."). *See also id.* at 9:11-23

(confirming the court was striking this testimony); RP 3/8/10 at 3 (“there is simply not a sufficient foundation that has been laid ...”); CP 991, 997-1000, 1004 (admissions by Mr. Wangen that he lacked personal knowledge of whether the pump manufacturers had supplied replacement gaskets).

Mrs. Wangen did not move this Court under RAP 9.13 for relief from the striking order, nor does her Opening Brief assign error to that order.<sup>6</sup> The order was, in all events, correct. Accordingly, this Court reviews the summary judgment record without Mr. Wangen’s testimony suggesting (never actually saying) that Warren made the replacement parts he used aboard the Wiltsie. *See, e.g., Jacob’s Meadow*, 139 Wn. App. at 754-756; *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 221, 936 P.2d 1163

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<sup>6</sup> The Opening Brief never acknowledges the striking order at all, much less does it challenge that order as error. The closest the Brief comes is to complain about the trial court’s “willingness to dismiss Wangen’s testimony ... because the court did not believe Wangen had any foundation for that conclusion” (at 30) – but the Brief never argues that Mr. Wangen *had* foundation to give the stricken testimony. Appellate courts do not “review issues where inadequate argument has been briefed ‘or only passing treatment has been made.’” *Mossman v. Rowley*, 154 Wn. App. 735, 744-745, 229 P.3d 812 (Div. 3 2009) (rejecting contention of error in striking declaration), quoting *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

(1997) (court will not consider argument based on excluded evidence, where party did not assign error to the exclusion).

There is no other evidence in the record that Warren sold the replacement asbestos-containing parts that Mr. Wangen used aboard the Wiltsie. *See* RP 3/9/10 at 5, lines 15-18. Thus Mrs. Wangen did not “set forth specific facts showing the existence of a genuine issue for trial.” CR 56(e); *McBride v. Walla Walla County*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999). She was in the same position as the plaintiff in *Braaten*, who could not carry her shifted burden of establishing an issue for trial concerning exposure to asbestos from replacement parts sold or supplied by the defendant.

**2. The Wangen testimony would not establish a fact issue even if considered.**

Even if this Court were to consider Mr. Wangen’s unfounded testimony about the source of replacement parts handed to him by the Wiltsie’s supply officers, it would not raise a triable issue under *Braaten*. This is because Mr. Wangen never actually testified that *Warren supplied replacement parts for these pumps*. The testimony on which the Opening Brief relies is either too general to implicate

Warren as a supplier, or very specific in stating that *a different company* supplied the replacement parts:

- Pages 674-675 of the Clerk's Papers are part of a different defendant's motion, which should not appear in this record.
- Pages 456-457 and 460 of the Clerks Papers contain testimony from Mr. Wangen about replacement packing – but all of it affirmatively *undermines* Plaintiff's assertion that “[g]askets and packing for each brand of pump were supplied by the same manufacturers.” Opening Brief at 6. The cited testimony talks about only one maker of such parts: a company called Garlock that did not make pumps.
- The final evidence cited for the source of the replacement asbestos-containing parts that Mr. Wangen used is at pages 548-549 of the Clerk's Papers. It is his California deposition testimony, where he said he understood that replacement gaskets used in pumps onboard the USS Wiltsie were supplied by the pump manufacturer. He

concluded this because he did not make them himself, and because petty officers handed him some gaskets in boxes with the pump names on them. This testimony – even if considered despite its having been stricken – does not say or imply that Warren manufactured the replacement parts. The very most it says or implies is that the packages bore *the name of the pump that the part would fit, and the part number it was intended to replace.* That is true of most aftermarket parts ever made by any manufacturer, and says nothing about the actual source of the replacement<sup>7</sup> – points that Warren counsel had no chance to explore with Mr. Wangen when he gave the cited testimony in California, because Warren was not then a party. Moreover, later in the same deposition, it became clear

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<sup>7</sup> At pages 481-482 of the Clerk’s Papers, Warren’s interrogatory answer states affirmatively that: (a) Warren “manufactured pumps only,” and (b) “Warren did not manufacture such component parts [asbestos gaskets and packing], and the U.S. Navy required that Warren purchase such components from certain manufacturers that the U.S. Navy had approved through a stringent qualification process.”

that the “numbers” Mr. Wangen referred to were actually Navy part numbers. CP 1175-76 (at 361:13-362:4).

In sum, there is no evidence that Mr. Wangen ever encountered asbestos-containing packing, gaskets or internal insulation supplied by Warren Pumps. Summary judgment, therefore, was appropriate.

**IV. PLAINTIFF’S “SPECIFICATION” THEORY CANNOT REVIVE HER CASE, WHETHER ON THIS RECORD OR AS A MATTER OF WASHINGTON LAW**

Mrs. Wangen advanced a secondary theory in opposition to summary judgment, without explaining its legal basis: that Warren Pumps “specified” the use of the asbestos-containing replacement parts Mr. Wangen used, even if Warren did not manufacture or sell such parts. *See* single paragraphs at CP 387 and 401. This argument fails on the record, and independently, it fails as a matter of law.

If this Court agrees that this record does not raise a fact dispute about whether Warren issued any such “specifications” (point A below), it need not even consider Mrs. Wangen’s invitation

to recognize this new theory of asbestos product liability. Even if some other commercial context might conceivably give rise to tort liability on a “specification” theory – which is the most one can ever infer from *dicta* in *Braaten* – this record does not require the Court to determine whether such a theory might apply here. But if the Court has any uncertainty about point A, it should decline to adopt Mrs. Wangen’s new theory of liability, as explained in point B.

**A. There Is No Evidence Warren Specified The Use of Asbestos-Containing Gaskets, Packing or Internal Insulation**

Again, the burden shifted to Mrs. Wangen to show a triable issue of fact connecting Warren Pumps to Mr. Wangen’s disease. As set forth above, she did not carry that burden with respect to any exposure to asbestos from a product manufactured, sold or supplied by Warren.

Likewise with respect to her secondary argument about “specification,” Mrs. Wangen pointed to no evidence that Warren endorsed or recommended the use of any such parts, as it was her burden to do. These concepts are central to any meaningful use of the word “specified,” yet the Opening Brief never brings itself to

claim that Warren endorsed or recommended the Navy's use of any replacement part. Mrs. Wangen never pointed to any language in any Warren document saying that the Navy should or must use any particular kind of replacement part, or that a pump would not work properly unless the replacement parts contained asbestos. There is none.

Instead, Mrs. Wangen relied – and continues to rely here – on certain schematic drawings and parts lists that Warren supplied to the Navy when it originally sold the pumps at issue. *See* CP 528 and 530 [fire & bilge pump], CP 543-544 [emergency feed pump]; CP 2250-57, 2260-61 [enlarged sections of the same materials].<sup>8</sup> (To assist the Court's review of the record, Warren offers in an Appendix to this brief a table showing which pages duplicate others or enlarge others. Large-format copies used at the March 22, 2010

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<sup>8</sup> Mrs. Wangen also cites testimony by Warren Pumps' corporate representative Roland Doktor in another case, where plaintiff's counsel tried to get Mr. Doktor to characterize these exhibits as Warren's specifications. (Opening Brief at 27-28, citing CP 573-574, 590-597) Mr. Doktor never said that, and in fact, in response to a question regarding asbestos-containing internal insulation, he testified that the Navy specified that material. CP 594. In all events, these drawings and parts lists speak for themselves.

hearing have been delivered to the Court as a file exhibit in the appellate record).

The Opening Brief asserts that “Warren’s schematic drawings and ‘assembly list of spare and material’ for the fire and bilge pumps specified the use of asbestos for the pumps.” Opening Brief at 3. More generally, the Opening Brief says that “Warren specified asbestos material as replacement parts when the pumps were maintained” (at 10; similar at 11, 28), and that “[t]he diagrams at issue here ... articulated precisely what Warren intended for the replacement gasket for its pump” (at 14).

But the trial court was correct that the cited evidence actually just “describe[d] the components that were contained in the original equipment.” RP 3/9/10 at 5; *see, also*, RP 3/8/10 at 3. Each drawing mapped the parts of the pump when sold, and the parts lists set forth what Warren provided to the Navy at the time of sale. Indeed, the pump drawings have a block identifying the military specification to which the respective parts conformed. CP 2247-48, 2259, 2345. They further note that the materials provided are in accordance with Navy specifications. *See, e.g.*, CP 522, and 409 ¶11. A reasonable

person could not view this evidence as a recommendation or requirement set forth by the Warren Steam Pump Company for the United States Navy to follow, aboard warships the early 1940s.

Contrary to the Opening Brief's claim (at 13 and 8 n. 4), this determination by the trial court did not usurp the fact-finder's role. As this Court has explained, not all inferences are reasonable, and unreasonable inferences do not defeat summary judgment. *See, e.g., Snohomish County v. Rugg*, 115 Wn. App. 218, 226-229, 61 P.3d 1184 (2002) (in zoning-violation case, extensive heavy-equipment activity on defendant's property, documented by neighbors, was not subject to inference of mere home improvement); *Lange v. Nature Conservancy, Inc.*, 24 Wn. App. 416, 419-420, 601 P.2d 963 (1979) (reasonable persons could not conclude from plaintiffs' evidence that respondents entered plaintiffs' property); *Scott v. Blanchet High School*, 50 Wn. App. 37, 40-42, 747 P.2d 1124 (1987) (unreasonable to infer from supposed admissions by a teacher and student that inappropriate relationship, if it occurred, took place in context of counseling authorized by school). *See also* the Division 2 decision in *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 309-311 and n. 14,

151 P.3d 201 (2006) (unreasonable to infer from array of evidence that murder victim first met perpetrator at worksite where defendant placed him).

Plaintiff cannot create an issue of fact by making argumentative assertions that Warren's pump diagrams were actually "specifications." The nature of the documents does not support the inference that Warren specified or recommended that the United States Navy use asbestos-containing replacement parts at any point in the future. They say only what Warren originally supplied with its pumps.

**B. Any Fact Dispute About "Specification" Is Not Material, Because Washington Law Does Not And Should Not Recognize Liability On That Basis**

Even if the Warren documents that Mrs. Wangen cites could be viewed as creating a fact question about whether Warren "specified" asbestos-containing replacement parts, summary judgment was proper as a matter of law, because Washington has never recognized such a theory. We begin with *Braaten*, and move on from there to show why no Washington authority supports Plaintiff's new form of product liability.

**1. *Braaten's* guiding principles counsel rejection of Plaintiff's "specification" theory.**

As the Opening Brief acknowledges (at 20), *Braaten* does not expressly permit or expressly preclude liability on a "specification" theory. The Supreme Court did not decide that issue because the issue was not presented:

In light of the facts here, we need not and do not reach the issue of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design. 165 Wn.2d at 397.

In other words, the Court expected to analyze another day whether manufacturers who *do* recommend or require the use of others' products with their own could be liable on any theory.

While the opinion does not answer that question directly, *Braaten's* essential message counsels against recognition of the theory Mrs. Wangen offers. That message – also plain in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 345-347 and n. 2, 197 P.3d 127 (2008) – is that "there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos *in other manufacturers' products.*" Opening Brief at 24,

emphasis in original.<sup>9</sup> The specification theory Plaintiff proposes calls for just such liability. It disregards the entity or entities that actually put the allegedly dangerous replacement part in the stream of commerce, and seeks to impose strict liability for that harm on a different manufacturer.

It is worth noting what drives this untraditional approach: bankruptcy, pure and simple. Virtually all manufacturers of asbestos-containing gaskets, packing and internal insulation are gone, which brings creative counsel to push the legal envelope in search of new payors for those companies' liabilities. Charles E. Bates, et al., *The Naming Game*, 24:15 Mealey's Litigation Report: Asbestos 1 (Sept. 2, 2009). Such ends-driven litigation is a dubious basis for generating new tort theories in Washington law.

This brings us to the *accepted* principles that justify imposition of strict product liability, according to *Braaten*. None

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<sup>9</sup> The parties agree that *Simonetta* is less relevant on its facts (though of course its general principles matter), because "asbestos insulation *external* to the equipment being maintained ... is not at issue in the present case." (Opening Brief at 17-18, emphasis in original) *Simonetta* concerned only claims related to external insulation that the Navy wrapped around the defendant's equipment. 165 Wn.2d at 345-347 and n. 2.

supports Plaintiff's "specification" theory. We quote them below, from page 397 of *Braaten*, with line breaks added for clarity:

[T]he theory underlying strict liability under § 402A is that,

the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it;

that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods;

that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained;

and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. Cmt. c (emphasis added).

A defendant that specifies use of a particular replacement part that it does not make or sell is not "marketing [its] product for use and consumption." Further, even in a commercial-sales context – a far cry from this case – specified replacement parts are not "products

... for which [the public] is forced to rely upon the seller”; they are products the public can choose to buy anywhere no matter whose goods the manufacturer may “specify.” Third, to the extent “the public has the right to and does expect ... that reputable sellers will stand behind their goods” – a concept fitting the case of a Navy sailor awkwardly if at all – the plaintiff’s remedy has always been, and should remain, with the seller of the good itself.

The remaining public policies espoused above weigh strongly *against* recognition of Plaintiff’s new “specification” tort. “[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained.” That category plainly does not include a manufacturer that merely recommends or specifies another’s product (or type of product) for use with the manufacturer’s own. Indeed, spreading strict liability in the way Plaintiff advocates would *dilute* the deterrent effect and safety-incentive that strict liability is meant to provide to the actual seller of injury-causing products.

Furthermore, *Braaten* holds that where the defendant did not place the asbestos-containing replacement part in the stream of commerce, it makes no difference “whether the [defendant] manufacturers knew replacement parts would or might contain asbestos”; such knowledge “does not matter.” *Braaten*, 165 Wn.2d at 391, 198 P.3d 493 (citing *Simonetta*, 165 Wn.2d at 358, 197 P.3d 127). If *knowing* a buyer will use such parts cannot support liability, then merely “specifying” the use of such parts cannot support liability either. A manufacturer “specifying” the use of asbestos-containing replacement parts does not know or control what the buyer will do – and like the defendants in *Braaten*, has played no role in bringing the allegedly harmful part to market. The responsibility for the alleged asbestos exposure lies with the manufacturer supplying the replacement insulation, gasket, or packing.

No Washington case has ever approved the concept of one manufacturer assuming liability for another manufacturer's product, except in the context of corporate succession. That is the essence of

what Mrs. Wangen proposes here, but there is simply no authority for it in Washington.

Instead the Opening Brief spends several pages (at 21-24) reviewing asbestos *product identification* and *causation* cases. But nothing in *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 157 P.3d 406 (2007), or *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987), is at all relevant to support her proposed “specification” theory. Her only *claim* of relevance is the vague suggestion (at 21) that “Washington courts have employed a liberal test in asbestos cases where exposure occurs at a work site or multiple work sites.” Such loose language does not do. Apart from courting “liberal” treatment overall (*see also* at 1), the Opening Brief never explains how *Allen* or *Lockwood* supports Plaintiff’s “specification” theory – much less, why either case justifies reversal here.

On the contrary, the key lesson of *Lockwood* – as the Supreme Court observed in *Braaten* – is that “traditional product liability theory” demands a direct connection between the defendant and the product causing the injury:

[T]he plaintiff must establish a reasonable connection between the injury, the product causing the injury,

and the manufacturer of *that product*. In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury.

*Braaten*, 165 Wn.2d at 396, emphasis added (quoting *Lockwood*, 109 Wn.2d at 245).

2. **While common law governs Plaintiff's traditional product liability claims, the WPLA also counsels against approving her *new* theory of product liability.**

The asbestos product liability claims in *Braaten* were governed by common law, rather than by Washington's Product Liability Act, chapter 7.72 RCW ("WPLA"), because Mr. Braaten's exposure to asbestos occurred before that Act took effect. *Braaten*, 165 Wn.2d at 383 n. 4 (citing RCW 4.22.920(1): "the tort reform act of 1981, which includes the WPLA, applies to claims 'arising on or after July 26, 1981'"). Mrs. Wangen's traditional product liability claims are of course also governed by common law, for the same reason: the exposure allegedly involving Warren products occurred in the 1950s.

But nothing in *Braaten* suggests that courts are free, simply on account of the vintage of a plaintiff's claim, to approve a theory

of product liability that (A) has never before been recognized at common law; *and* (B) is not recognized under the WPLA. This Court should not do so in litigation that post-dates the WPLA by two decades.

The WPLA does not countenance the idea of liability for harm caused by a product that the defendant did not have any role in bringing to market. Under the Act, a “Product seller” includes “a manufacturer, wholesaler, distributor, or retailer *of the relevant product*” (RCW 7.72.010(1), emphasis added) – which in turn is the product that “gave rise to the product liability claim” (RCW 7.72.010(3)) – here, the replacement parts.

Furthermore: “The substantive liabilities of product manufacturers and sellers towards individuals or entities asserting product liability claims are *specifically delineated* in the statute.” *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 850, 774 P.2d 1199 (1989) (“*Graybar*”), emphasis added. The Supreme Court held in *Graybar* that “the WPLA creates a single cause of action for product-related harms that supplants previously existing common law remedies.” *Id.* at 860.

That single cause of action, called the “product liability claim,” includes “any product-related claim ‘previously based on ... any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.’” *Graybar*, 112 Wn.2d at 850 (quoting RCW 7.72.010(4)). The WPLA’s very broad definition of “product liability claim” does not enumerate any liability-producing act akin to “specifying” *another entity’s product*.<sup>10</sup> It is thus consonant with the definition of “Product Seller,” which also precludes that notion.

The high court in *Graybar* determined that the absence of an express preemption clause “does not defeat the case for preemption” of pre-existing common law claims not enumerated in the Act – in

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<sup>10</sup> The full definition in RCW 7.72.010(4) is: “any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.”

that case, for “economic loss” suffered by a plaintiff not in privity with the product seller. 112 Wn.2d at 851-856. Instead, the court held, “[c]lear statutory language and corroborative legislative history leave no doubt about the WPLA’s preemptive purpose.” *Id.* at 853.

While the *Graybar* court was not called upon to decide whether the WPLA’s comprehensive approach to product liability should likewise be read to preempt *new* product liability theories like “specification,” the Supreme Court’s reasoning suggests that it should. *See* 112 Wn.2d at 851-856. “The WPLA would accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure.” *Id.* at 855. Moreover, “the WPLA [was] designed to address a liability insurance crisis which could threaten the availability of socially beneficial products and services.” *Id.* at 850. Approval of a “specification” theory would undermine that purpose even more than approval of the economic loss claim in *Graybar* would have. Here, the products allegedly causing harm are not even Warren Pumps’ own – threatening an expansion of the traditional scope of liability that the Legislature sought to contain.

**3. The truncated nature of the record on this issue also weighs against recognizing the proposed new tort.**

Even if the Court were to believe that Mrs. Wangen's proposed "specification" liability might apply in some context, this is not the case in which to sanction it. Mrs. Wangen raised her "specification" argument for the first time in her brief opposing summary judgment (CP 387 and 401), where she devoted a total of one page to the contention. Warren had no reasonable opportunity to develop evidence showing where these "specifications" actually came from – *i.e.* whether Warren itself even undertook to "specify" these parts, or was instead merely responding to directives of the Navy.

Having said that, Plaintiff herself submitted evidence of the reality that common sense suggests: the Navy's wartime need for standardized supply worldwide required that the Navy itself specify parts and materials to its vendors, rather than allow a free-for-all in which individual equipment vendors "specified" the kinds of parts the Navy had to stock on its ships. She offered all of the following with her summary judgment opposition or other papers below:

- Warren’s interrogatory answer explaining that the inclusion of asbestos-containing parts in pumps on the

Wiltsie was compelled by *Navy* specification:

Warren manufactured these pumps pursuant to strict, military specifications that called for these pumps to withstand the most severe combat conditions imaginable. Warren manufactured these pumps in accordance with government contracts, utilizing materials tested and strictly specified by the Navy for utilization aboard this warships. ... *[T]he U.S. Navy required the use of specific internal component parts, some of which may have contained asbestos such as gaskets and packing. ... Warren did not manufacture such component parts and the U.S. Navy required that Warren purchase such components from certain manufacturers that the U.S. Navy had approved through a stringent qualification process. In addition, for a particular type of pump manufactured for use aboard the [Wiltsie], the U.S. Navy specified the use of internal insulation, which also may have contained asbestos. However, Warren did not manufacture such insulation, instead receiving it from a manufacturer approved by the U.S. Navy. (CP 482-483, and 409 ¶7, emphasis added.)*

- Testimony from Warren’s corporate representative that a “Naval specification” number for internal asbestos-containing insulation appeared right alongside Warren’s own part number on its pump drawing (CP 594), and drawings showing the same (CP 2247-48, 2259, 2345).

- “General Note 1” on Warren Pumps’ *Lagging Outline – 6x9x12 Vert. Single Fire and Bilge Pump*, WA-WW-00045, stating: “All material to be in accordance with specifications for the inspection of material under Bu. of Ships, Navy Dept.” (CP 522, and 409 ¶11)
- Warren’s sales order for the Wiltsie, noting that: “The above pumps shall meet the requirements of Bureau of Engineering, General Specifications for Machinery ...” and must pass “Full Navy inspection.” (CP 522, and 409 ¶9)

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In sum: Even assuming for the sake of argument that Mrs. Wangen presented evidence from which a jury could infer that Warren Pumps told the United States Navy what kind of replacement gaskets and insulation to use, that would not support reversal because Washington law has never recognized liability on that basis, and should not start with this kind of case.

## V. CONCLUSION

This Court should affirm Warren's summary judgment because Mrs. Wangen failed to meet her shifted burden to establish any material fact dispute about whether Warren manufactured or sold any asbestos-containing product to which Mr. Wangen was exposed. Furthermore, the trial court was right that Mrs. Wangen's evidence did not raise a fact issue about "specification" regardless of whether that dispute would matter in the law – which in all events, it does not and should not.

DATED this 8<sup>th</sup> day of November, 2010.

Respectfully submitted,

RIZZO MATTINGLY BOSWORTH PC



J. Michael Mattingly, WSBA #33452

Allen E. Eraut, WSBA #30940

Attorneys for Defendant-Respondent

Warren Pumps, LLC

# APPENDIX

**TABLE OF CORRESPONDING RECORD PAGES  
FOR DRAWINGS AND PARTS LISTS  
CITED IN THE OPENING BRIEF**

<b>The Drawing/List At CP Page:</b>	<b>Is the Same As CP Page:</b>	<b><i>Enlarged Sections of It Appear At CP Pages:</i></b>	<b>This Is the Exhibit Discussed In the 3/22/10 Transcript At:</b>
<b>528</b> – Fire & Bilge Pump drawing and parts list	2259	2260-2262	7:11- 10:8; 18:22 – 20:7.  Warren has delivered a large-format copy to this Court as a file Exhibit. The file exhibit is entitled, “Supplemental Declaration of Allen Eraut in Support of Warren Pumps, LLC’s Motion for Reconsideration.” The large format copy can be found under <i>Exhibit C</i> to that declaration.
<b>530</b> – Fire & Bilge Pump “lagging outline”	2247	2254-2257	11:11 – 18:9; 20:7 – 23:13.  Warren has delivered a large-format copy to this Court as a file Exhibit. The file exhibit is entitled, “Supplemental Declaration of Allen Eraut in Support of Warren Pumps, LLC’s Motion for Reconsideration.” The large format copy can be found under <i>Exhibit D</i> to that declaration.
<b>543</b> – Emergency Feed Pump “lagging outline”	2248	2250-2253	Warren has delivered a large-format copy to this Court as a file Exhibit. The file exhibit is entitled, “Supplemental Declaration of Allen Eraut in Support of Warren Pumps, LLC’s Motion for Reconsideration.” The large format copy can be found under <i>Exhibit B</i> to that declaration.

<b>544</b> – Emergency Feed Pump drawing and parts list	2345	None – see footnote 4 of Respondent’s Brief noting no asbestos-containing gaskets or packing.	10:8 – 11:10.

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2 CERTIFICATE OF SERVICE  
(Mary Jo Wangen v. A.W. Chesterton, et al.)

3 I HEREBY CERTIFY that a true and correct copy of the foregoing **Response Brief** was  
4 served upon the following parties in the manner indicated:

5 I am employed by the law firm of Rizzo Mattingly Bosworth PC in Portland, Oregon. I  
6 am over the age of eighteen years and not a party to the subject cause. My business address is  
411 S.W. Second Avenue, Suite 200, Portland, OR 97204.

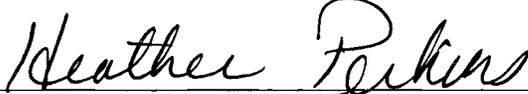
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14 I declare under penalty of perjury and under the laws of the State of Washington (RCW  
15 9A.72.085) that the foregoing is true and correct.

16 Executed at Portland, Oregon, this 8<sup>th</sup> day of November, 2010

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18 Heather Perkins, Paralegal

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