

No. 69719-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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

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RONALD FAGG,

Appellant,

v.

CSK Auto, Inc. and Pacific Water Works Supply Co, Inc.,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Pacific Water Works Supply and CSK Auto both ignore the principal question at issue in this case. That question is not: During what years did Mr. Fagg suffer some exposure to asbestos products? Rather, it is: When did the greatest quantity of that exposure occur?

The respondents look at the years in which exposure occurred, but do not consider the magnitude of the exposure in each of those years. Much like the trial court, which incorrectly concluded that the WPLA applied because “some” exposure occurred after July of 1981, the defendants claim Substantially all fo his exposure did not occur before 1981 because some occurred in 1984. That is not the test, or the law.

In addition to confusing the test, they have adopted a position directly opposite to that which they espoused in the trial court. In its Supplemental brief on its motion for summary judgment CSK took the position that the proper analysis for the court was to look at the claimant’s “total” exposure to asbestos, from all sources, when trying

to determine whether the act applied. Now they take the position that one must look only to the exposure to an individual defendant's product. This court should find defendant's judicially estopped from taking a different position here than in the trial court.

Finally, neither CSK or PWWS has met its burden to prove by *uncontradicted* facts that there is no genuine issue of material fact. *Rathvon v. Columbia Pacific Airlines*, 30 Wn.App. 193, 201, 633 P.2d 122 (1981) (emphasis added) Examining the evidence in the light most favorable to the non-moving party here, there are disputed issues of fact which require that summary judgment be denied and the case be allowed to go to trial.

## II ARGUMENT

### A. **The Respondents Misstate the Proper Test for Determining Application of the WPLA**

#### 1. **The Proper Determination Is the Quantity of the Exposure Pre and Post the Effective Date of the Act**

The case law applying the immunity provision of the WPLA

in product liability actions against sellers of injurious products in cumulative injury cases makes application of the statute dependant on whether “substantially all” of the exposure occurred prior to the implementation date of the act. Making that determination requires an analysis not just of the time when exposure occurred, but the magnitude of the exposure before and after the effective date of the act.

PWWS and CSK Auto both ignore the proper test and look only to the years in which some exposure is claimed. The PWWS argument is essentially this:

1. Fagg was exposed to asbestos containing products from 1963 through 1980 - before the effective date.<sup>1</sup>
2. Fagg was exposed to asbestos containing products from 1981 through 1995 - after the effective date of the act.
3. Because that is virtually the same number of years before and after the effective date, the act doesn't apply. (PWWS RB

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<sup>1</sup>Interestingly, although PWWS claims exposure only from 1963, CSK admits to exposure beginning in the 1950s.

34-35)

But neither of the defendants looks at the magnitude of the exposure. Fagg was exposed to asbestos-containing automotive parts beginning in the 1950s. He was exposed to drywall compound from 1963 - 1965 and again from 1968 - 1972 while employed in construction. He testified to using 400 buckets of this compound, each five gallons in size, during that time. He was also exposed to asbestos-containing insulation aboard ship on a daily basis during the time he was in the Navy from 1965 - 1968. Yet, defendants don't look at this significant exposure as substantially greater than the exposure incurred from his periodic exposure to brakes or gaskets after the act became effective.

The factor that needs to be evaluated is the **quantity** of exposure that occurred pre and post the effective date of the act.<sup>2</sup>

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<sup>2</sup>See, *Koker v Armstrong Corp., Inc.*, 60 Wn.App. 466 (1991) in which the court recognized that "The degree of exposure was less in the later years." at 472, note 2. The parties had stipulated to the lesser exposure in later years, a stipulation which does not exist here, but the court's focus is important here - it is the "degree of exposure," its magnitude, which is the critical element of the analysis.

Using the arguments put forth by PWWS, exposure to one cut of asbestos containing pipe a year, or one every three years, or even one every five years for 15 years after 1980 would be the same as daily exposure to gallons of asbestos-containing joint compound for 15 years prior to the implementation of the act. But the standard to be applied by the court is the degree or magnitude of the exposure - not the passage of time, but the measure of exposure.

**2. Total Exposure Pre and Post the Effective Date Is The Determining Factor**

Nothing in Washington law restricts the exposure analysis on a “per defendant” basis as claimed by PWWS. Rather, as the defendants themselves argued in the trial court, it is “consistent with the definition of a ‘product liability claim’ in RCW 7.72.010(4), and with the case law, to include all exposures.” (CP 499-500) As noted in the opening brief this is because the injury is indivisible. It is caused by total exposure. Unlike unique injuries incurred from individual events, toxic exposures to multiple injurious products over time require an analysis of all exposures. This analysis properly

looks at the causation of the injury, which is cumulative, while considering the individual defendant's contribution to it. PWWS argues this would pervert the legislative intent to immunize sellers from liability. But that is not the case. The legislature has recognized that these types of cumulative injuries resulting from exposure to asbestos are "different" than other types of cases. As PWWS points out in its response brief, the legislature retained joint and several liability in asbestos cases even though it was eliminated in other types of cases. (PWWS RB at 19, fn 12) Analyzing exposure in terms of all products rather than in individual terms of single defendants is consistent with this approach. It recognizes the cumulative nature of the disease and the significant contribution to creation of the disease caused by all the exposures together.

This is consistent with the legislative intent and, as pointed out in Fagg's opening brief, consistent with the substantial factor causation standard applied to asbestos cases. When causation and liability are determined cumulatively, the exposure necessary to determine applicability of the WPLA must also be determined

cumulatively. For that reason, the analysis of pre and post enactment exposure must include all exposures.

**B. Defendants Did Not Meet Their Burden to Demonstrate an Entitlement to Summary Judgment**

The law is clear that the party moving for summary judgment has the burden to demonstrate that it is entitled to summary judgment. In this case, the defendants faced two burdens. First, because they asserted the defense of immunity under the WPLA, they had the burden to show that the law applied to this matter. CSK at least, recognized that burden in its answer to the complaint when it asserted the affirmative defense. In its response brief PWWS tries to skirt that burden by pointing to the standard of review. PWWS claims that, because the application of the statute is a question of law reviewed “de novo” it does not have any burden to show applicability of the act. (PWWS RB at 10) This is akin to claiming that it has no burden to show entitlement to summary judgment because summary judgment is reviewed “de novo.”

The application of the WPLA in this case is a mixed question

of law and fact. The defendants claim they are immune from liability under the act. To support that claim they must demonstrate that substantially all of Mr. Fagg's exposure did not occur prior to the implementation date of the act. That is their burden. The fact that the appellate court will review the trial court's determination on a "de novo" review standard does not change the initial burden.

As seen above, the defendants failed to meet this burden. They argue that the exposure was not substantially all before July 1981, but they present no evidence of that. They totally ignore years of heavy exposure involving anything other than their own products. This failure to demonstrate their claimed immunity is a failure to meet their burden.

Having failed to meet that burden, the defendants then failed to meet their second burden - to demonstrate by *uncontradicted* facts that there is no genuine issue of material fact. In fact, there are genuine issues of material fact that prohibit the granting of summary judgment.

PWWS claims Fagg's declaration, that he purchased asbestos-

containing pipe from PWWS before 1981, is inadmissible because it contradicts his deposition testimony that he only bought from the Woodinville store. (PWWS RB at 27-28, fn 20) It bases that conclusion on the testimony of its witness that the Woodinville store did not open until at least 1981.” (PWWS RB at 27) But that is not a conflict in Fagg’s testimony. That is a conflict in the testimony of two witnesses - a material issue of fact which is inappropriate for resolution on summary judgment.

The same is true with PWWS’ claim that even if it is not immune, it still is entitled to summary judgment because exposure to its products was not a substantial factor in Fagg’s injury. PWWS relies on *Morgan v Aurora Pump Co.*, 159 Wn.App. 724 (2011) for the proposition that the plaintiff must establish that the frequency of exposure to the defendant’s product was “medically sufficient.” (PWWS RB 39) Analyzing the evidence again in a light most favorable to itself, PWWS claims that the declaration of its expert witness showed the exposure was insufficient to have caused Fagg’s asbestosis, and the counter testimony of plaintiff’s experts was

insufficient create a triable issue of fact.

This position ignores the very holding of the *Morgan* case on which PWWS relies. In that case the court, faced with an identical argument from respondents, ruled:

While we do not decide the frequency of asbestos exposure a plaintiff must demonstrate to survive summary judgment, we note that this case involves allegations of more than a single instance of exposure to asbestos from each Respondent's products. [A witness] testified that Morgan worked with new and existing pumps or valves—plural—from each Respondent, which means that Morgan could have been exposed to asbestos in each Respondent's products numerous times during the years he worked at PSNS, particularly in his capacity as a pipefitter/steamfitter. For purposes of summary judgment, this showing is sufficient.

*Morgan, supra*, 159 Wn. App. at 740.

That is exactly the situation here. Fagg testified that he was exposed to asbestos-containing pipe from PWWS and asbestos-containing automotive parts from CSK Auto “numerous times during the years he worked.” That evidence is sufficient to show the frequency. In addition, the testimony of the expert on whom PWWS relied does not negate the likelihood that Fagg’s exposure to asbestos

from PWWS products was a “substantial factor” in causing his disease. That expert concludes that the exposure was significantly less than “the lowest exposure level recorded to cause asbestosis.” (PWWS RB 39) That is not the standard of causation applicable here. Fagg does not have to show that the asbestos from PWWS’ products alone caused his asbestosis. He must show that it was a “substantial factor” in causing his disease. That position is supported by the declarations of his expert witnesses. To the extent they conflict with the testimony of the defense expert, they create an issue of material fact and prevent the defendants from meeting their burden to demonstrate by “uncontradicted” evidence that there is no genuine issue of material fact.

### **III.**

#### **CONCLUSION**

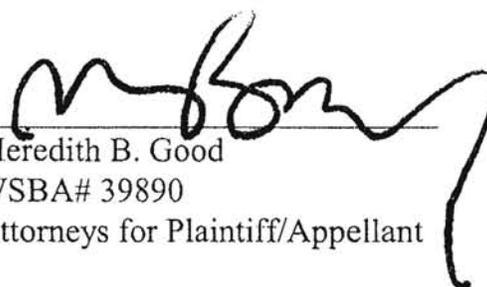
The trial court’s grant of summary judgment in this case was improper. The court applied the wrong standard to determine the applicability of the WPLA and incorrectly determined the defendants were immune. There are substantial issues of material fact which

are inappropriate for determination on summary judgment. This court should reverse the judgment of the trial court and remand the matter for trial so that a jury can determine those disputed facts.

Respectfully submitted this 16<sup>th</sup> day of December, 2013

BRAYTON PURCELL, LLP

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**CERTIFICATE OF SERVICE**

*Ronald Fagg, Appellant v. CSK Auto, Inc., et al., Respondents*  
Appellate Court No. 69719-6  
KCSC Cause # 10-2-05312-3 SEA

I hereby certify that on the below date, I served a true and correct copy of **REPLY BRIEF OF APPELLANT**

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Dated this 16th day of December, 2013.

  
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