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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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RALMA EHLERT, individually and as Personal Representative of the  
Estate of ROBERT S. EHLERT; and TAMARA JONES, as Personal  
Representative of the Estate of JAMES A. JONES,

Appellants/Cross-Respondents,

v.

BRAND INSULATIONS, INC., et al.,

Respondent/Cross-Appellant.

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. SUMMARY.....1

    A. Reply to Ehlert and Jones’ Appeal.....1

    B. Brand’s Cross Appeal .....2

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANTS’ ASSIGNMENT OF ERROR.....3

III. CROSS-APPELLANT’S ASSIGNMENTS OF ERROR.....3

IV. ISSUES PERTAINING TO CROSS-APPELLANT’S ASSIGNMENTS OF ERROR.....4

V. RESPONDENTS/CROSS-APPELLANT’S STATEMENT OF THE CASE .....5

    A. Nature of the Case.....5

    B. Factual Background. ....5

    C. Proceedings Below.....8

        1. Brand Insulations Motion for Summary Judgment.....8

        2. Trial.....9

VI. ARGUMENT IN RESPONSE TO APPELLANT’S BRIEF .....15

    A. The trial court correctly dismissed the strict liability claims asserted by plaintiffs and limited plaintiffs to their negligence claims.....15

        1. Standard of review. ....15

        2. No competent and substantial evidence existed to support plaintiffs’ strict liability claims.....15

B.	The trial court correctly instructed the jury on negligence. ....	26
1.	Standard of review. ....	26
2.	Appellants failed to take exception to the trial court’s negligence instruction, thus failing to preserve the negligence instruction issue for review. ....	27
3.	The trial court’s negligence instruction was a correct statement of the law, allowed all parties to argue their theories of the case, and was not prejudicial. ....	29
C.	The trial court did not abuse its discretion in excluding irrelevant newspaper articles regarding asbestos. ....	31
1.	Standard of review. ....	31
2.	The trial court properly excluded plaintiffs’ newspaper articles as they were without foundation and irrelevant. ....	31
VII.	ARGUMENT IN SUPPORT OF CROSS-APPEAL .....	32
A.	The Trial Court Had Been Apprised Before Trial that Brand Was Challenging the Sufficiency of Plaintiffs’ Expert Testimony to Establish the Causation Element of a Product Liability Claim. ....	32
B.	Plaintiffs’ Causation Evidence Remained Insufficient Through Trial. ....	35
VIII.	CONCLUSION .....	40
A.	Plaintiffs’ Appeal .....	40
B.	Brand’s Cross Appeal .....	40

TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>Adcox v. Children's Orthop. Hosp.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	29
<i>Anderson Hay &amp; Grain Co. v. United Dominion Indus.</i> , 119 Wn. App. 249, 76 P.3d 1205 (2003), <i>rev. denied</i> , 151 Wn.2d 1016 (2004).....	20, 21
<i>Anfinson v. Fedex Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	27
<i>Barham v. Turner Constr. Co.</i> , 803 S.W.2d 731 (Tex. Ct. App. 1990).....	23
<i>Blaney v. International Ass'n of Machinists &amp; Aerospace Workers</i> , 114 Wn. App. 80, 55 P.3d 1208 (2002), <i>aff'd</i> , 151 Wn.2d 203 (2004).....	28
<i>Brown v. Spokane Cty. Fire Prot. Dist. No. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983).....	29, 30
<i>Caruso v. Local Union No. 690</i> , 107 Wn.2d 524, 730 P.2d 1299, <i>cert. denied</i> , 484 U.S. 815 (1987).....	29, 30
<i>Delta Refining Co. v Procon, Inc.</i> , 552 S.W.2d 387 (Tenn. Ct. App. 1976).....	25
<i>Fabrique v. Choice Hotels Int'l, Inc.</i> , 144 Wn. App. 675, 183 P.3d 1118 (2008).....	36, 40
<i>Faust v. Albertson</i> , 167 Wn.2d 531, 222 P.3d 1208 (2009).....	15
<i>Fenimore v. Donald M. Drake Constr. Co.</i> , 87 Wn.2d 85, 549 P.2d 483 (1976).....	31

<i>Gammon v. Clark Equip. Co.</i> , 104 Wn.2d 613, 707 P.2d 685 (1985).....	30
<i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 877 P.2d 703 (1994), <i>aff'd</i> , 127 Wn.2d 401 (1995).....	26
<i>Griffin v. West RS, Inc.</i> , 143 Wn.2d 81, 18 P.3d 558 (2001).....	30
<i>Howell v. Spokane &amp; Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991).....	27
<i>Hunt v. Guarantee Elec. Co. of St. Louis</i> , 667 S.W.2d 9 (Mo. 1984) .....	24
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003).....	33
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	30
<i>Koker v. Armstrong Cork, Inc.</i> , 60 Wn. App. 466, 804 P.2d 659, <i>rev. denied</i> 117 Wn.2d 1006 (1991).....	15
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	34
<i>Lockwood v. AC&amp;S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987).....	7, 35, 40
<i>McGowan v. State</i> , 148 Wn.2d 278, 60 P.3d 67 (2002).....	34
<i>McKenna v. Harrison Mem'l Hosp.</i> , 92 Wn. App. 119, 960 P.2d 486 (1998).....	20, 21
<i>Micro Enhancement Intern'l, Inc. v. Coopers &amp; Lybrand, L.L.P.</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002).....	26
<i>Miller v. Yates</i> , 67 Wn. App. 120, 834 P.2d 36 (1992).....	30

<i>Monte Vista Development Corp. v. Superior Court</i> , 226 Cal. App. 3d 1681 (Cal. Ct. App. 1991) .....	22
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983).....	26
<i>Seattle-First National Bank v. Tabert</i> , 86 Wn.2d 145, 542 P.2d 774 (1975).....	17
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	26, 31
<i>State Ex. Rel. Pierce County v. King County</i> , 29 Wn.2d 37, 185 P.2d 134 (1974).....	31
<i>State ex rel. Risk Management Div. of Dep't of Fin. and Admin. v. Gathman-Matotan Architects &amp; Planners, Inc.</i> , 653 P.2d 166 (N.M. Ct. App. 1982) .....	24
<i>Thomas v. Wilfac, Inc.</i> , 65 Wn. App. 255, 828 P.2d 597, <i>rev. denied</i> , 119 Wn.2d 1020 (1992).....	26
<i>Ulmer v. Ford Motor Co.</i> , 75 Wn.2d 522, 452 P.2d 729 (1969).....	16
<i>Van Hout v. Celotex Corp.</i> , 121 Wn.2d 697, 853 P.2d 908 (1993).....	27, 28
<b>STATE STATUTES</b>	
RCW 7.72.010(1).....	19
RCW 7.72.010(1)(b).....	20
Washington Products Liability Act, RCW 7.72 et. seq. (“WPLA”).....	15
WPLA .....	4, 15, 19, 20
<b>RULES</b>	
CR 30(b)(6).....	18, 32

CR 50 .....	2, 5, 9
CR 50(a).....	passim
CR 51(f) .....	28
ER 401 .....	31
ER 402 .....	31
RAP 2.5(a) .....	33

**OTHER AUTHORITIES**

<i>Restatement (Second) of Torts</i> § 402A .....	passim
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## I. SUMMARY

### A. Reply to Ehlert and Jones' Appeal

Appellants Ehlert's and Jones' complaints about the trial are without merit. The jury was entitled to find that defendant Brand Insulations, Inc. ("Brand") had exercised ordinary care in the installation of insulation at the ARCO Cherry Point Refinery and, therefore, was neither negligent nor liable to Appellants for their alleged asbestos related injuries.

The trial court was correct in finding that strict liability standards do not apply to Brand as Brand was not a seller of asbestos containing products, and thus not subject to strict liability. Likewise, the trial court did not commit reversible error by providing the Washington Pattern Jury Instruction on negligence to the jury as Appellants' counsel did not take exception to the instruction, the given instruction was a correct statement of the law, Appellants were free to argue their theory of negligence during closing argument, and the jury was entitled to a neutral instruction that was not peppered with either party's theory of the case. Finally, the trial court's refusal to enter irrelevant newspaper articles into evidence was within its discretion and did not constitute reversible error.

B. Brand's Cross Appeal

This case arises out of claims of asbestos exposure asserted by the personal representatives of two tradesmen, Robert Ehlert and James Jones. Both men were employed by Ralph Parsons, Inc., the general contractor for the initial construction of the ARCO Cherry Point Refinery in Ferndale, Washington. Mr. Ehlert and Mr. Jones were pipefitters and both died from mesothelioma. Brand was the primary insulation contractor for the ARCO Cherry Point project. Brand filed a summary judgment motion in this matter which was denied. That motion was based on the plaintiff personal representatives' lack of evidence that claimed exposures to asbestos attributable to the conduct of Brand were a substantial factor in causing plaintiffs' diseases. Following presentation of the plaintiffs' case, Brand, essentially renewing its summary judgment motion as a CR 50 motion, moved to dismiss on the grounds that plaintiffs had failed to prove that any claimed exposure to asbestos containing insulation was a substantial factor in causing their mesothelioma. The trial court again ruled against Brand. At the completion of the presentation of evidence, Brand renewed its CR 50 motion for "directed verdict." At that point in the trial, not only had plaintiffs failed to produce evidence of substantial factor causation, but there was uncontroverted evidence that alleged

asbestos exposure at ARCO Cherry Point was not a substantial factor in the development of either man's disease.

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANTS' ASSIGNMENT OF ERROR

1. Because Brand was a contractor, and not in the chain of distribution of an inherently dangerous product, did the trial court properly determine that Brand was not subject to strict liability under *Restatement (Second) of Torts* § 402A (Appellants' Assignments of Error Nos. 1 and 2)?

2. Did the trial court properly instruct the jury on negligence by giving the neutral Washington Pattern Jury Instruction on negligence without exception by Appellants' counsel (Appellants' Assignment of Error No. 3)?

3. Did the trial court act within its discretion in excluding from evidence irrelevant newspaper articles regarding asbestos (Appellants' Assignment of Error No. 4)?

III. CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying Brand's CR 50(a) motion for judgment as a matter of law at the close of plaintiffs' case in chief as plaintiffs failed to produce evidence that the substantial factor causation standard established by their causation expert had been satisfied.

2. The trial court erred in denying Brand's renewed CR 50(a) motion for judgment as a matter of law following completion of the presentation of evidence. Not only had plaintiff's failed to produce evidence that the substantial factor causation standard established by their causation expert had been satisfied, the uncontroverted evidence presented at trial established that the standard had not been met.

#### IV. ISSUES PERTAINING TO CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

1. In a case subject to common law that applied prior to enactment of the Washington Product Liability Act (WPLA) in 1981, when a plaintiff's sole causation expert acknowledges that there is a specific threshold level of exposure to asbestos necessary for that expert to testify to a reasonable degree of medical certainty that the exposure constitutes a substantial factor in causing a decedent individual's mesothelioma, must the plaintiff present competent evidence that the decedent's exposure to asbestos attributable to a particular defendant's product met or exceeded that threshold level?

2. When, at trial of such a case, the causation expert witnesses for both the plaintiff and the defendant agree that exposures occurring more than 20 years after a decedent was initially exposed to asbestos do not contribute to the risk of developing mesothelioma, is the defendant

entitled to judgment of dismissal as a matter of law pursuant to CR 50 when the uncontroverted evidence establishes that exposures for which the defendant is claimed to be liable occurred more than 20 years after the date the decedent was first exposed to asbestos from a source unrelated to the defendant?

V. RESPONDENTS/CROSS-APPELLANT'S STATEMENT OF THE CASE

A. Nature of the Case.

Ralma Ehlert, individually and as personal representative of the estate of Robert S. Ehlert, and Tamara Jones, as personal representative of the estate of James A. Jones (hereinafter plaintiffs), sued Brand for injuries Mr. Jones and Mr. Ehlert allegedly sustained from exposure to insulation, which allegedly contained asbestos, installed by Brand at the ARCO Cherry Point Refinery. CP 252-57.

B. Factual Background.

Robert Ehlert and James Jones were pipefitters. RP 349, 458-60, 474-77. One of the many locations at which they both claimed to have worked during their lengthy careers was the ARCO Cherry Point Refinery during its initial construction in the early 1970s. RP 353-4, 474-77. Brand entered into a subcontract with Ralph Parsons, Inc. ("Parsons"), ARCO's general contractor, to install insulation on vessels, piping and related equipment at ARCO's Cherry Point facility. RP 641-42, 645-46,

Exs. 1 and 2. The insulation products to be used at the site were specified by Parsons. Exs. 1 and 2. The majority of the insulation on the project was installed by Brand.<sup>1</sup> RP 663.

The facts critical to Brand's cross appeal are, for the most part, identical to the facts before the court on Brand's motion for summary judgment. Those critical facts are:

1. Plaintiffs retained two expert witnesses to testify in support of their claims. The first was Dr. William Longo, a materials scientist. RP 106-107. Dr. Longo is not an industrial hygienist and does not consider himself to be one. RP 122-23. Dr. Longo was not asked by plaintiffs' counsel to conduct a retrospective exposure assessment for either Mr. Ehlert's or Mr. Jones' claimed asbestos exposure at ARCO Cherry Point. RP 76, 234. Plaintiff counsel admitted that Dr. Longo was not qualified to testify as to causation and was not being presented to express opinions on causation. RP 193.

2. The second expert retained by plaintiffs was Sam Hammar, MD, a pathologist. Dr. Hammar was the plaintiffs' causation expert. Dr. Hammar has testified historically that, in order for him to testify to a reasonable degree of medical certainty that a particular exposure

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<sup>1</sup> There was a dispute at trial as to whether or not the majority of the insulation installed at the Cherry Point Refinery by Brand contained asbestos. That dispute is not germane to this appeal. Each of the bases for Brand's Cross Appeal assumes insulation to which Ehlert and Jones claimed exposure contained asbestos.

constitutes a substantial contributing factor to the development of a patient's mesothelioma, that exposure must exceed .1 f/cc-year.<sup>2</sup> CP 436, 615-20, 627-29. In this trial, he testified that an exposure had to be at least .15 f/cc years before he could opine, to a reasonable degree of medical certainty, that the exposure was a substantial contributing factor for the development of mesothelioma at issue in this case. RP 443-44.

3. No evidence was presented by plaintiffs at Brand's summary judgment motion or in their case in chief that the claimed exposure of either Mr. Ehlert or Mr. Jones exceeded Dr. Hammar's .15 f/cc-year threshold for concluding whether or not a particular exposure constitutes a substantial factor in the development of a patient's mesothelioma. At trial, when asked about what exposure dose information he was provided, Dr. Hammar admitted that "The only thing I was told is what Mr. Bergman said about the exposure."<sup>3</sup> RP 444. In his deposition, Dr. Hammar testified that he had been provided no information on exposure dose and simply assumed that the exposures exceeded his threshold. CP 882-83.

4. Brand presented an industrial hygienist who had conducted a retrospective exposure assessment for Mr. Ehlert and Mr. Jones. He

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<sup>2</sup> Dr. Hammar's opinion on this point is nothing more than his synthesis of the proximity, intensity, frequency criteria identified by the *Lockwood* court as considerations in determining substantial factor. *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 248-9, 744 P.2d 605 (1987). .1 f/cc-year is the equivalent of an exposure of one year duration at the current OSHA PEL of .1 f/cc as a time weighted average.

<sup>3</sup> Mr. Bergman is one of plaintiffs' counsel.

concluded that, with respect to Mr. Ehlert, there was not sufficient information available to make a determination that Dr. Hammar's threshold for attributing causation had been exceeded. RP 716-18. He concluded that, with respect to Mr. Jones, the exposure as described by his coworker Pugh would have been far less than Dr. Hammar's threshold for attribution. RP 718-725, CP 915-20.

5. Mr. Ehlert was first exposed to asbestos in 1944. Ex. 42. Mr. Jones was first exposed to asbestos in 1947. Ex. 43. Both plaintiffs' causation expert Dr. Hammar and defense causation expert Dr. Weir testified that exposures to asbestos that occur more than 20 years after an individual is first exposed to asbestos do not contribute to the risk of developing mesothelioma. RP 439-41, 843-48. Both Mr. Ehlert's and Mr. Jones' claimed exposures at the ARCO Cherry Point facility occurred in 1971-1972, in each case more than 20 years after their initial asbestos exposures. Exs. 42 and 43.

C. Proceedings Below.

1. Brand Insulations Motion for Summary Judgment.

Following completion of expert discovery, Brand filed a motion for summary judgment on the ground that plaintiffs had not produced evidence that the threshold exposure established by their causation expert Dr. Hammar had been exceeded by the exposures claimed to be

attributable to Brand. CP 427-629. Dr. Hammar had testified that an exposure must exceed a specific cumulative amount before he could testify to a reasonable degree of medical and scientific certainty that it was a substantial factor in causing a patient's mesothelioma. CP 436, 615-20, 627-29, 882-83. Neither at the time of the summary judgment motion nor at trial did plaintiffs present any evidence that Dr. Hammar's threshold for attributing causation had been exceeded by exposures claimed to be the responsibility of Brand. In addition, Brand presented evidence through its industrial hygienist that the threshold had not been exceeded by claimed exposures attributable to Brand. CP 915-20. Brand's motion was denied. 926-27.

2. Trial.

Trial to a jury began on November 21, 2012. RP 2. Evidence was presented to the jury on November 27, 28, and 29 and December 3, 4, and 5, 2012.

a. Brand Insulations' Motion for Directed Verdict at close of Plaintiffs/Appellants' case.

Following presentation of the plaintiffs' case, Brand made a CR 50 motion for directed verdict/judgment as a matter of law. RP 623-635. The basis for the motion was identical to that which formed the basis of its summary judgment motion: (1) Dr. Hammar had testified that there was a

specific threshold exposure which he required before he could testify to a reasonable degree of medical and scientific certainty that a specific exposure constituted a substantial factor in causing a patient's mesothelioma, and (2) Plaintiffs had presented no evidence that Dr. Hammar's threshold had been exceeded by exposures claimed to have been Brand's responsibility. That motion was denied. RP 635.

b. Trial court's exclusion of newspaper articles.

Following the close of plaintiffs' case in chief, counsel for plaintiffs sought to admit into evidence various exhibits including three newspaper articles from the Seattle Times related to asbestos (Exs. 30, 31, and 32) and two articles regarding the same from the Chicago Tribune (Exs. 33 and 34). RP 611-20. Brand objected to the articles, noting that plaintiffs had failed to lay any foundation that Brand was aware of the articles and that the articles constituted inadmissible hearsay. RP 611, 614. The trial court refused to admit the exhibits based on relevance, noting:

“[Y]ou could pull out an article from any newspaper in the United States and say so and so thought something, it was a problem and therefore these people should have known. ... It's just too speculative where you're asking the jury to say that the defendant should have been searching newspaper articles about anything they were using on the work site to see if somebody thought there were problems with it.”

RP 615-16.

c. Brand Insulations Renewed Motion for “Directed Verdict”.

At the close of evidence, Brand renewed its CR 50(a) motion for “directed verdict.” RP 887. Plaintiffs still had presented no evidence that Dr. Hammar’s threshold exposure level for attributing substantial factor causation had been exceeded, and Brand had presented an industrial hygienist, Dr. Holtshouser, who testified that Dr. Hammar’s threshold would not have been exceeded by plaintiffs’ claimed exposures at ARCO Cherry Point. In addition, Brand pointed out both Dr. Hammar and Dr. Weir had agreed that exposures occurring more than 20 years after an individual is first exposed to asbestos do not increase the risk of developing mesothelioma. RP 439-41, 843-48. The uncontroverted evidence before the court established that both plaintiffs’ initial exposures to asbestos occurred more than 20 years prior to the date they commenced work at ARCO Cherry Point. RP 887. Brand’s motion was denied. RP 888-89.

d. Trial court’s findings regarding strict liability.

On December 5, 2013, after the close of evidence, Brand moved to limit plaintiffs’ claims to simple negligence and dismiss plaintiffs’ strict liability claims. RP 893. Plaintiffs opposed the motion. RP 894-907.

In considering Brand's motion, the trial court reasoned that strict liability claims were not applicable to Brand, noting that: "[t]he doctrine of strict liability is premised on a policy decision that the manufacturers of products are able to bear the cost associated with injuries from their products." RP 894. The trial court further explained that the comment to *Restatement (Second) of Torts* § 402A relates to entities in the business of selling and the business of selling only "applies to any person engaged in the business [of] selling products or their delivery applies to any manufacturer of such a product to any wholesale or retail dealer or distributor," RP 896, and that the record was void of sufficient evidence that Brand was in the business of selling insulation products. RP 896-7. Moreover, the trial court pointed out that the jury instruction submitted by plaintiffs on strict liability (CP 311) could not apply to Brand because as an installer/contractor, the allegedly hazardous product had not left Brand's control until it had been fully installed and encapsulated:

"Here's what you're asking that I instruct the jury. A seller has a duty to supply products that are reasonably safe for use at the time they leave the seller's control. Now, in this case...the product did not leave the seller's control, if Brand is the seller, until it was installed, and clad, and banded. And an invoice was given to Parsons saying we get paid for this. So that product had not yet, if they are the seller, had never left their control when the alleged injury is suppose (sic.) to have occurred."

RP 897-98. Finally, the trial court noted that:

“[t]he Restatement [Second of Torts] does say that that rule does not apply to the occasional seller of the products who’s not engaged in that activity as part of his business. ... [W]hen a general contractor says we want you to install insulation and you’ve got to buy this type of insulation and you’ve got to put this in our facility, I don’t see that as a sale.”

RP 900-901.

Ultimately, the trial court granted Brand’s motion, dismissing plaintiffs’ strict liability claims, and submitted the case to the jury on plaintiffs’ negligence claims. RP 907.

e. Jury Instruction on Negligence.

The trial court gave as its Instruction No. 10, without exception and agreed to by plaintiffs (RP 918-19) WPI 10.01, which stated:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

CP 388. The trial court explained its decision to give the WPI negligence instruction as follows:

THE COURT: I think the best way to handle this is to maybe just give a general negligence instruction and counsel can argue and you can write however you want to do it the acts that you maintain and allege were negligent in argument, rather than specifying. So I will go ahead and pull number 2 and use the defendant’s proposed general WPIC negligence instruction.

RP 918. The trial court also noted that the WPI instruction would allow both parties to argue their theories of the case:

THE COURT: The plaintiff, even if I give the generic one, plaintiff is going to be able to argue whatever theories of negligence they have.

RP 914. Although initially taking exception to the use of the WPI instruction, RP 918, plaintiffs' counsel revised his position and agreed with the trial court's decision to use the WPI negligence instruction:

MR. BERGMAN: If the court's concern was characterizing the parties' negligence, the allegation on either side, and ours was too broad and theirs too narrow, let's just go with the negligence instruction. It's not appropriate to say theirs suffers from the same deficiency that the court concluded ours does.

RP 918-19.

f. Jury's Finding of No Negligence.

The trial court gave the jury a verdict form that asked, with respect to each plaintiff, whether Brand had been negligent and then, if the answer was yes, whether its negligence had proximately caused Mr. Ehlert's and/or Mr. Jones' death. CP 408-10. The jury found that, with respect to each plaintiff, Brand had not been negligent, CP 408-9, and thus answered no further questions. The trial court entered judgment on the defense verdict. CP 411-13.

## VI. ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

### A. The trial court correctly dismissed the strict liability claims asserted by plaintiffs and limited plaintiffs to their negligence claims.

#### 1. Standard of review.

An order granting a defendant's CR 50(a) motion for judgment as a matter of law is subject to *de novo* review; the test is whether no competent and substantial evidence existed to support a verdict for the plaintiff. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009).

#### 2. No competent and substantial evidence existed to support plaintiffs' strict liability claims.

Appellants argue that Brand is subject to strict liability as it was a seller or in the "chain of distribution" of an allegedly hazardous product. App. Br. at 8-11.<sup>4</sup> However, neither the *Restatement (Second) of Torts* § 402A nor case law cited by Appellants sets forth nor implies that under 402A a contractor or installer is in the business of selling. Plaintiffs presented no competent evidence at trial to support their theory that Brand, an insulation contractor, was in the business of selling an allegedly hazardous product.

#### a. Brand Insulations is not subject to strict liability as it was not in the business of selling insulation, nor in

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<sup>4</sup> The applicable legal standard in this matter is the *Restatement (Second) of Torts* § 402A. Washington adopted the Washington Products Liability Act, RCW 7.72 et. seq. ("WPLA") in the 1980's, however, the WPLA applies only to claims after its effective date. *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 470-72, 804 P.2d 659, rev. denied 117 Wn.2d 1006 (1991).

the “chain of distribution,” but was instead a contractor/service provider.

Under section 402A, one who is a seller of a defective product that is unreasonably dangerous to a consumer is subject to strict liability *only if* the seller is engaged in the business of selling the product. *Restatement (Second) of Torts* § 402A (1965). Section 402A was adopted in Washington in *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 531-32, 452 P.2d 729 (1969). Comment *f* to Section 402A elaborates on the “business of selling” requirement and states that the rule is intended to apply to any manufacturer, wholesale or retail dealer, or distributor. Comment *f* further explains that “[t]he basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into *the business of supplying human beings with products* which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.” (emphasis added). Despite Appellants’ citations to the contrary, not a single case in Washington has expanded the “business of selling” requirement beyond what is set forth in section 402A, and comment *f* thereto. The “chain of distribution” Appellants rely on is no more than a general expression for any manufacturer, wholesale or retail dealer, or

distributor. *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 148, 542 P.2d 774 (1975).

Plaintiffs failed to present any competent evidence or testimony that Brand was a manufacturer, wholesale or retail dealer, or distributor of insulation. Plaintiffs based their contention that Brand was in the business of selling insulation entirely on three invoices (Exs. 22, 24 and 25) that showed that Brand charged the general contractor, Parsons, for insulation it had used from Brand's onsite stockpiled supply. RP 697. These invoices were all from February 1972, near the end of Brand's contract with Parsons and represented less than 0.6% of the total contract price. RP 696. Exhibit 25 showed that Brand had invoiced Parsons \$11,362.56 for insulation material "[t]o bill [Parsons] for materials which [Parsons] have used in Unit 14". RP 668, Ex. 25. Exhibit 24 was an invoice from Brand to Parsons totaling \$1,435.69 "to bill [Parsons] for materials which were turned over to [Parsons] for use in Unit 11 and Unit 17" (RP 670), and Exhibit 22 was an invoice for \$4,901.51 in insulation "for materials which [Parsons'] field forces picked up to utilize in unit 12." RP 670, Exs. 24 and 22. These invoices made no indication that Brand was in the business of selling insulation, nor indicated that these "sales" were more than one off occurrences.

In contrast, Brand presented substantial evidence that it installed insulation as a subcontractor pursuant to a service contract with the general contractor, Ralph M. Parsons Company, at ARCO Cherry Point Refinery – i.e., Brand was a service provider and itself a consumer of a product manufactured and sold by another. Among this evidence was testimony from Brand’s CR 30(b)(6) witness and project coordinator of the at issue site, Michael McGinnis. Mr. McGinnis testified that Brand was not a distributor of insulation products, but instead “bought materials for [its] own use,” purchasing these materials from a distributor or a manufacturer. RP 644, 667. Mr. McGinnis explained that unlike other insulation companies that, at the time, had both a contracting arm and a sales arm, Brand was solely in the contracting business. RP 644. This distinction was illuminated by Mr. McGinnis’ testimony that the insulation supplier, Pabco, often had a representative on site and when Brand encountered problems with the insulation product it contacted the Pabco representative, as any consumer of a product would. RP 651-53.

Additionally, Brand’s subcontract with Parsons was admitted into evidence (Ex. 1 and 2) and demonstrated that the contract contained “hot insulation specifications” that specified certain brands and types of insulation materials Brand (or any other subcontractor that successfully bid the job) would be required to use. RP 646, Ex. 2. Brand used the

specified material and Mr. McGinnis estimated that the labor costs for the project represented 70% of the bid, whereas the material costs only represented 30%. RP 647. The work performed by Brand was billed to Parsons in “a lump sum price which was labor, material and equipment” via progress payments. RP 666. As Mr. McGinnis explained, the invoices relied upon by Plaintiffs represented nothing more than a handful of occasions where the general contractor, Parsons, had come to Brand and requested the use of excess insulation products to finalize the work on the site. RP 697-98.

- b. The WPLA is instructive as it was based largely on the *Restatement (Second) of Torts* § 402A.

Although the Washington Product Liability Act (WPLA) does not govern this case because the exposure at issue occurred prior to 1981, the WPLA’s language is instructive. This is particularly the case where, as here, no Washington cases interpreting *Restatement (Second) of Torts* § 402A determine whether a contractor or service provider is engaged in the business of selling for purposes of strict liability. RCW 7.72.010(1), which mimics the language from section 402A, defines a “product seller” as an entity that is engaged in the business of selling products, and includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. Specifically excluded from this definition is “[a] provider of

professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider.” RCW 7.72.010(1)(b). Thus, it is informative that the Washington legislature never intended the definition of “product seller” to include service providers like Brand.

Courts interpreting the WPLA have come to the same conclusion. In *Anderson Hay & Grain Co. v. United Dominion Indus.*, 119 Wn. App. 249, 260, 76 P.3d 1205 (2003), *rev. denied*, 151 Wn.2d 1016 (2004), the court held that a contractor was not a seller under the WPLA because the contract was primarily for construction services and the prefabricated products at issue were incidental to the contractual obligations. The court relied on the WPLA’s exclusion of providers of professional services to support its holding. *Id.* at 260 (citing RCW 7.72.010(1)(b)). The court explained that Washington courts “have distinguished between product sellers and providers of professional services by looking at the contract to determine if its primary purpose was to provide a service or a product. Contractors who provide architectural, engineering, and inspection services are not product sellers.” *Id.* at 260 (citing *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822 n.1, 881 P.2d 986 (1994)). The *Anderson* court also relied on *McKenna v. Harrison Mem’l Hosp.*, 92 Wn. App. 119, 121, 960 P.2d 486 (1998), in which “a

patient sued the hospital for products liability related to a screw and rod device surgically inserted into her spine. The *McKenna* court held the hospital was a provider of professional services and not a product seller because the primary purpose of a hospital was to provide medical services, and the use or sale of any products was merely incidental to the primary purpose.” 119 Wn. App. at 260. Finally, the *Anderson* court was persuaded by the lack of evidence that the contractor sold the prefabricated product outside of its contractor role. *Id.* at 260-61.

Although *Anderson* and *McKenna*'s post-WPLA holdings are not binding on this case, they are persuasive as to who should be considered to be “in the business of selling.” Here, Brand's contract was primarily for installation services. RP 647. Importantly, Brand's contract with Parsons specified the insulation material Brand was to install and Brand purchased the specified insulation material for a lump sum price from manufacturers and distributors so that it could perform its service contract. RP 646-48. Thus, the insulation material was incidental to Brand's contractual obligation to provide installation services. Moreover, as in *Anderson*, plaintiffs presented no evidence that Brand sold the insulation materials outside of its contractor role. Indeed, the invoices upon which plaintiffs rely show that the minimal amount of insulation materials sold were to Parsons and within Brand's role as Parsons' subcontractor. RP 697-98.

- c. Interpretations of the *Restatement (Second) of Torts* § 402A from other jurisdictions support the conclusion that Brand Insulations is not subject to strict liability.

Case law from other jurisdictions interpreting section 402A is also persuasive given the lack of Washington cases interpreting 402A with regards to service providers and/or contractors. In *Monte Vista Development Corp. v. Superior Court*, 226 Cal. App. 3d 1681 (Cal. Ct. App. 1991), the court held that Willey Tile, a subcontractor that installed a defective soap dish, was not a “seller” under section 402A. The court explained:

The focus of our analysis is not on whether Willey Tile was a subcontractor but whether the tile company came within the chain of commerce as a supplier of the soap dish to the extent that it became strictly liable if the item was defective. We conclude liability should not be extended under these circumstances... Willey Tile was not in the business of selling soap dishes or any other fixtures. It purchased the soap dish that injured plaintiff, as well as other fixtures, in order to complete its subcontract with Monte Vista. Obviously, it mattered not to Willey Tile whether Monte Vista or someone else supplied the tile fixtures. Willey Tile’s job was to do the tile work.

*Id.* at 1687. As in *Monte Vista Development Corp.*, Brand was not in the business of selling insulation. It purchased the insulation in order to complete its contract with Parsons. As part of that contract, Brand was limited in the types of insulation it could purchase given the narrow specifications provided by the general contractor. Brand simply selected

the most cost efficient supplier that met the contract specifications, as its job was to install the insulation, no matter where it came from.

Similarly, in *Barham v. Turner Constr. Co.*, 803 S.W.2d 731, 738 (Tex. Ct. App. 1990), SISCO sold steel columns used in a construction project for which Turner Construction was the general contractor. Plaintiff argued that Turner should be subject to strict liability under section 402A for the steel columns it purchased from SISCO and installed. The court held that although Turner was in the business of selling its services as a general contractor, there was no evidence that Turner was in the business of selling the steel columns and erection plates which caused plaintiff's alleged injury. *Id.* Rather, any alleged "sale" of the steel columns by Turner was incidental to its contract to provide the services necessary to the construction project. *Id.* "[I]t was not engaged in the sale of steel columns as part of its business." *Id.* (citing *Restatement (Second) of Torts* § 402A, comment *f* (1965)). The court then held that "the underlying consumer protection principles of strict liability do not apply in this case" because Turner "did not introduce the steel columns manufactured by SISCO into channels of commerce by releasing them to the consuming public" and Turner "was not in the business of selling such steel columns." *Id.*

Finally, in *Hunt v. Guarantee Elec. Co. of St. Louis*, 667 S.W.2d 9, 11 (Mo. 1984), the court declined to impose strict liability against an installer of a timer in an industrial machine because an installer is not a “seller,” “engaged in the business of selling,” as required by section 402A. After Mr. Hunt was killed at work, his family brought a wrongful death action against Guarantee Electrical Company, alleging negligence and strict liability. Plaintiffs claimed that Guarantee Electric “sold, furnished, designed, supplied and assembled the electrical system that” caused the alleged injury. *Id.* at 10. Because plaintiffs presented no evidence that Guarantee Electric designed, assembled, or sold the component parts of the timer its employees installed, plaintiffs were unable to show that it was engaged in the business of selling electrical timing systems. The court held:

[a]bsent proof defendant designed, assembled, and sold the system to [the employer] in the course of its business, plaintiffs’ proof goes only to showing defendant installed an automatic timer pursuant to its contract to provide the services of electricians. The policy reasons justifying imposition of strict tort liability are not present in this case where defendant rendered professional services in installing a timer.

*Id.* at 12. As in *Hunt*, Brand installed the insulation as a service, and was not in the business of designing, assembling, or selling insulation.<sup>5</sup>

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<sup>5</sup> See also *In State ex rel. Risk Management Div. of Dep’t of Fin. and Admin. v. Gathman-Matotan Architects & Planners, Inc.*, 653 P.2d 166, 170 (N.M. Ct. App. 1982)

- d. Appellants' argument regarding control is nothing more than a red herring.

Appellants' make much ado about the trial court's commentary on when Brand relinquished control of the at issue insulation materials. This argument is a red herring. As can be gleaned from the record, the trial court clearly found that strict liability did not apply because Brand did not meet the definition of a seller in the business of selling under *Restatement (Second) of Torts* § 402A. The trial court's commentary regarding control was simply to point out that plaintiffs' proposed jury instruction No. 15 (CP 311) was not feasible regardless of the definition of seller as it required the product to leave defendant's control for strict liability to be applicable.

Here's what you're asking that I instruct the jury. A seller has a duty to supply products that are reasonably safe for use at the time they leave the seller's control. Now, in this case...the product did not leave the seller's control, if Brand is the seller, until it was installed, and clad, and banded. And an invoice was given to Parsons saying we get paid for this. So that product had not yet, if they are the

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(architect not held to higher standard than that imposed by traditional negligence principles because "reasons for the development of...strict liability in tort...are the lack of privity between the manufacturer and the buyer, the difficulty of proving negligence against a distant manufacturer using mass production techniques, and the better ability of the mass manufacturer to spread the economic risks among its consumers [which] are not applicable in a contract for professional services."); *Delta Refining Co. v Procon, Inc.*, 552 S.W.2d 387 (Tenn. Ct. App. 1976) (general contractor not strictly liable as seller of pump because contractor was not in business of selling such pumps within meaning of section 402A where pump was built according to plans and specifications provided by refining company and contractor entered into agreement with company to purchase assembled pump and install it).

seller, had never left their control when the alleged injury is suppose (sic.) to have occurred.

RP 897-98. Indeed, plaintiffs' proposed jury instruction regarding failure to warn was a separate instruction that the court did not address (CP 312) but was removed as part and parcel of the trial court's finding that strict liability did not apply as Brand was not a seller.<sup>6</sup>

B. The trial court correctly instructed the jury on negligence.

1. Standard of review.

On review of challenges to jury instructions, the Appellate Court's inquiry "is whether the trial court abused its discretion by giving or refusing to give certain instructions." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401 (1995). When a jury instruction correctly states the law, a trial court's decision to give it will not be disturbed absent an abuse of discretion. *Micro Enhancement Intern'l, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002); *see also Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992); *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). The trial court's decision constitutes an abuse of discretion only if it is "manifestly unreasonable" or was based on "untenable grounds" or "untenable reasons," *State ex rel.*

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<sup>6</sup> It should also be noted that plaintiffs' did not provide any evidence that warnings would have changed the conduct of any of the parties.

*Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), or if no reasonable person would have decided the way the judge did, *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 629, 818 P.2d 1056 (1991).

With respect to challenges to jury instructions for errors of law:

Jury instructions are reviewed de novo for errors of law. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). If any of these elements are absent, the instruction is erroneous. See *Joyce*, 155 Wn.2d at 323-25. An erroneous instruction is reversible error only if it prejudices a party. *Id.* at 323. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

*Anfinson v. Fedex Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

2. Appellants failed to take exception to the trial court's negligence instruction, thus failing to preserve the negligence instruction issue for review.

"An appellate court may consider a claimed error in a jury instruction only if the appellant raised the specific issue by exception at trial." *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993). "The trial court must have been sufficiently apprised of any

alleged error to have been afforded an opportunity to correct the matter if that was necessary.” *Id.* at 703. Under CR 51(f), the party objecting to the giving of a jury instruction or to the refusal to give a proposed jury instruction “shall state distinctly the matter to which he [or she] objects and the grounds of his [or her] objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which the object is made.” The “inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Blaney v. International Ass’n of Machinists & Aerospace Workers*, 114 Wn. App. 80, 85-86, 55 P.3d 1208 (2002), *aff’d*, 151 Wn.2d 203 (2004).

Here, plaintiffs initially took exception to the trial court’s negligence instruction, but then rescinded this exception and, moreover, agreed with the trial court that a general negligence instruction would be appropriate. To wit, plaintiffs’ counsel stated:

If the court’s concern was characterizing the parties’ negligence, the allegation on either side, and ours was too broad and theirs too narrow, let’s just go with the negligence instruction. It’s not appropriate to say theirs suffers from the same deficiency that the court concluded ours does.

RP 918-19. Given this retraction of plaintiffs’ initial exception, the trial court was not on notice that plaintiffs continued to except to the general

negligence instruction. Thus, plaintiffs' did not preserve a challenge to the given negligence instruction for appeal.

3. The trial court's negligence instruction was a correct statement of the law, allowed all parties to argue their theories of the case, and was not prejudicial.

Jury instructions challenged on appeal are reviewed to determine whether they permit the parties to argue their theories of the case, whether they are misleading, and whether when read as a whole they accurately inform the jury of the applicable law.

*Adcox v. Children's Orthop. Hosp.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). Jury instructions which permit the parties to argue their theories of the case, are not misleading, and, when read as a whole, accurately inform the jury of the applicable law are sufficient and not erroneous. *Brown v. Spokane Cty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 194, 668 P.2d 571 (1983); *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 529, 730 P.2d 1299, *cert. denied*, 484 U.S. 815 (1987).

The court's instructions on plaintiffs' negligence claim meet that test. The trial court gave WPI 10.01 as Instruction No. 10. CP 388, RP 918. That pattern instruction sets forth the general negligence standard, which does not include any specific acts, such as the "failure to warn" cited by Appellants. Instead the pattern instruction provides for the "failure to do some act that a reasonably careful person would have done under the same or similar circumstances." WPI 10.01. "Failure to do

some act” encompasses the “failure to warn” asserted by Appellants if a reasonably careful person would have warned in the same or similar circumstances. As such, plaintiffs’ “negligent failure to warn” instruction fell within the general negligence instruction given by the trial court.

Trial courts have “considerable discretion in deciding how [jury] instructions will be worded.” *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985). Even if an instruction is misleading or erroneous, it will not require reversal unless prejudice is shown. *Brown*, 100 Wn.2d at 196; *Caruso*, 107 Wn.2d at 530. The party challenging an instruction bears the burden of establishing prejudice.<sup>7</sup> *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001); *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992). Here, the trial court explained that the general negligence instruction would allow counsel to “argue...however you want to do it the acts that you maintain and allege were negligent, rather than specifying.” RP 917. The trial court additionally noted that “if I give the generic [instruction], plaintiff is going to be able to argue whatever theories of negligence they have.” RP 913. In short, the trial court, in its discretion, chose the general and all-encompassing negligence instruction. Appellants have failed to demonstrate how this instruction did

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<sup>7</sup> Prejudice is presumed if an instruction contains a clear misstatement of law; prejudice must be demonstrated if an instruction is merely misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

not encompass negligent failure to warn, nor have they demonstrated that even if erroneous how they were prejudiced by the trial court's instruction.

C. The trial court did not abuse its discretion in excluding irrelevant newspaper articles regarding asbestos.

1. Standard of review.

The granting or denial of a motion to exclude certain evidence is addressed to the discretion of the trial court and should be reversed only in the event of abuse of discretion. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. The trial court properly excluded plaintiffs' newspaper articles as they were without foundation and irrelevant.

Evidence is relevant only if it has "a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is inadmissible. ER 402.

Here, Brand agrees with Appellants that newspaper articles can be admissible under limited circumstances. However, as noted in *State Ex. Rel. Pierce County v. King County*, 29 Wn.2d 37, 45, 185 P.2d 134 (1974), relied upon by Appellants, a newspaper article would only be

competent evidence of notice “if the witness admitted having read or authorized the article” – i.e., if foundation had been established. As the trial court noted, no testimony was elicited from any witness that Brand or its agents had read the articles proffered by plaintiffs. RP 616. Moreover, following the rejection of the articles by the trial court, plaintiffs failed to solicit any testimony from Brand’s CR 30(b)(6) witness that would have indicated that Brand was aware of the articles. Lacking testimony that Brand was aware of the articles in question, the trial court was within its discretion to rule that no foundation had been laid for the articles and they were therefore irrelevant and inadmissible.

## VII. ARGUMENT IN SUPPORT OF CROSS-APPEAL

### A. The Trial Court Had Been Apprised Before Trial that Brand Was Challenging the Sufficiency of Plaintiffs’ Expert Testimony to Establish the Causation Element of a Product Liability Claim.

In denying Brand’s initial and renewed CR 50(a) motions at trial, the trial court denied relief to which Brand had been entitled at the time it moved for summary judgment. Brand’s summary judgment motion had assumed that Mr. Ehlert and Mr. Jones were exposed to asbestos at the ARCO Cherry Point Refinery and that the exposure could be attributed to asbestos in insulation Brand installed there. The issue, though, was never whether some such exposure occurred, but rather, whether the plaintiffs had evidence that whatever exposure occurred exceeded the threshold for

attribution of causation to which *plaintiffs' own sole causation expert*, Dr. Hammar, subscribed and which he conceded. That was the issue before trial, during trial, and after all the trial evidence was in. The trial court erred three times in denying Brand the relief to which Brand was entitled, because at all three junctures plaintiff failed to cite or offer competent evidence that Mr. Ehlert and/or Mr. Jones were exposed to asbestos attributable to Brand's work at the refinery at levels that met or exceeded Dr. Hammer's admittedly necessary threshold level.<sup>8</sup>

Even if this Court were to agree with Appellants' instructional-error argument, the proper ruling would be to affirm because plaintiffs' proof of causation failed at trial, because Brand pointed out the insufficiency of the plaintiffs' causation case before, during, and at the conclusion of trial, and because an appellate court may affirm on any ground supported by the record, even if the ground was not a basis for the trial court's ruling (here, dismissal of the complaint, with prejudice). RAP 2.5(a); *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174

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<sup>8</sup> Plaintiff had argued at the summary judgment stage that no Washington appellate decision has required that plaintiff prove a threshold quantum of exposure before a case could be submitted to the jury.<sup>8</sup> CP 647-49. That argument was nonresponsive to Brand's argument, however, because Brand's argument was not a case law-based argument; Brand's points were that plaintiffs' *own causation expert* had conceded, for purposes of *this case* and as a matter of fact, that causation is not probable at exposures below a threshold level, and that plaintiffs lacked, before and then during trial, evidence of exposures at or above that threshold level. That no published decision refers to or establishes some minimum asbestos exposure level was never a reason for the trial court to ignore the concession made by plaintiffs' own, and only, causation expert.

(2003); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). In fact, Brand probably did not need to cross-appeal to make the following arguments because it prevailed at trial. *See, e.g. McGowan v. State*, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002). Brand nonetheless cross-appealed out of an abundance of caution, and asks this Court to issue a published opinion confirming the merits of its arguments.

Plaintiffs argued in opposing summary judgment that Dr. Hammar testified in his deposition that Mr. Ehlert's and Mr. Jones' alleged ARCO Cherry Point exposures were substantial factors in the development of their disease. CP 644. Conceivably, the trial court's reason for denying Brand's subsequent CR 50(a) motions reflected its earlier mis-analysis of the deposition testimony. Aside from the fact that it is Dr. Hammar's trial testimony that matters at this juncture, plaintiffs' reliance on the deposition at the summary judgment stage ignored the re-cross examination of Dr. Hammar by Brand counsel.

Q: Doctor, with respect to your -- looking at Mr. Ehlert, how are you able to draw a conclusion that an exposure is a substantial contributing factor without knowing what that exposure was? I understood what you told me is that even if we used the Rolland abstract at .07, that was your -- that is your criteria for substantiality, correct?

A: Yes.

Q: Are you making assumptions that the described exposures exceed that amount?

A: Yes.

Q: Okay. And if you look at Mr. Jones' appendix and -- well, strike that. In Mr. Ehlert's -- in your report in Mr. Ehlert's case, you describe -- I have to find where it is. (Peruses documents.) Under No. 21, you state that all occupational, para occupational and significant bystander exposure to asbestos, and am I correct in understanding that a significant bystander exposure in your opinion would have to exceed .07 fibers per cc --

A: Yes.

Q: --year?

A: Yes.

CP 882-83; 922-23. Dr. Hammar thus admitted that he required evidence that he was not provided. He was not provided that evidence because, if the analysis was properly conducted, the exposure level would have been *below* his threshold for attributing causation as was demonstrated by Mr. Holtshouser's analysis. CP 920.

B. Plaintiffs' Causation Evidence Remained Insufficient Through Trial.

The standard for granting motions at the end of a plaintiff's case or at the conclusion of the presentation of evidence was identified in *Lockwood*, 109 Wn.2d at 248-9.

In ruling on a motion for a directed verdict or judgment notwithstanding the verdict, the court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. *Levy v. North*

*Am. Co. for Life & Health Ins.*, 90 Wn.2d 846, 851, 586 P.2d 845 (1978). The evidence must be viewed in the light most favorable to the nonmoving party. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 73, 684 P.2d 692 (1984). The court may grant the motion only where there is no competent evidence or reasonable inference which would sustain a verdict in favor of the nonmoving party. "If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury." *Levy*, at 851.

Following the presentation of plaintiffs' evidence at trial, Brand made a CR 50(a) motion for judgment as a matter of law for failure by plaintiffs' to satisfy their obligation to prove substantial factor causation. CP 623-35. The basis for the motion was identical to the basis for its previous motion for summary judgment, i.e., a complete failure of proof on substantial factor causation. In a case where the nature of injury involves "obscure medical facts which are beyond an ordinary lay person's knowledge," expert medical testimony is necessary to establish causation. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008) (quoting *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986)). Dr. Hammar was plaintiffs' sole causation expert. Thus, their ability to present sufficient evidence of causation to get their case to a jury depended on his testimony.

At trial, Dr. Hammar testified to the following propositions:

- a. He had testified in the past that, in order for him to testify to a reasonable degree of medical certainty that a particular exposure is a substantial contributing factor for the development of mesothelioma, that exposure has to be at least .15 f/cc years. CP 443-44.
- b. That was his opinion at the time of this trial. CP 443-44.
- c. He had not been provided a dose reconstruction calculating the exposures of either Mr. Ehlert or Mr. Jones. CP 444.
- d. The only thing he knew about the claimed exposures is what Mr. Bergman had told him. CP 444.

Dr. Hammar opined that, for an exposure to be a substantial contributing factor to the development of a patient's mesothelioma, that exposure must be at least .15 f/cc years. He admittedly had been provided no industrial hygiene evidence as to the claimed exposures encountered by either Mr. Ehlert or Mr. Jones at the ARCO Cherry Point facility. There was, consequently no basis for him to draw a conclusion as to whether or not those exposures constituted a substantial factor in the development of plaintiffs' diseases. Brand's motions should have been granted for that reason alone.

By the end of trial, there were to additional reasons for granting Brand's motions to dismiss for failure by plaintiffs to prove causation. First, Brand's industrial hygienist, Mr. Holtshouser, had testified without

rebuttal that there was insufficient evidence in the record from which to calculate an exposure dose for Mr. Ehlert. CP 716-725, 771-74, 778-780. Mr. Holtshouser also testified that there was, likewise, insufficient evidence in the record to calculate an exposure dose for Mr. Jones, save for a short period of time in which he worked alongside Mr. Pugh. CP 718-725. During that time period, according to Mr. Holtshouser's un rebutted expert testimony, Mr. Jones' exposures would not have exceeded between two and four per cent of an insulator exposure. Mr. Holtshouser further testified that NIOSH had calculated the time weighted exposure of an insulator to be approximately 2.2 f/cc.<sup>9</sup> Even assuming a worst case scenario of exposure all day, every day, the cumulative exposure would not have exceeded Dr. Hammar's threshold for the attribution of causation.

Second, Dr. Hammar had testified that any exposure to asbestos Mr. Ehlert or Mr. Jones may have experienced at the ARCO Cherry Point facility in the early 1970s would not have increased their pre-existing risk of developing mesothelioma. In fact, both Dr. Hammar and Dr. Weir, Brand's causation expert, agreed, consistent with pertinent epidemiological studies, that asbestos exposures occurring more than 20

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<sup>9</sup> Two to four per cent of 2.2 f/cc yields an exposure range of .044f/cc to .088 f/cc. Approximately one month of exposure would equal 1/12 of that amount or a range of .0036 to .0072 f/cc. All ranges are far below Dr. Hammar's threshold for attributing causation.

years after an individual's first exposure to asbestos do not contribute to the risk of developing mesothelioma. CP 844-848, 439-441, Appendix A at p. 33.<sup>10</sup>

According to Mr. Ehlert's interrogatory responses (Ex. 42, *see also* CP 34), he was first exposed to asbestos in 1944. According to Mr. Jones' interrogatory responses, (Ex. 43, *see also* CP 38), he was first exposed to asbestos in 1947. Consequently, consistent with the Doll/Peto model risk assessment model, which both Dr. Weir and Dr. Hammar agreed was correct, any asbestos exposures encountered by Mr. Ehlert and Mr. Jones at the ARCO Cherry Point facility in 1972 – in both cases more than 20 years after each was first exposed to asbestos – would not result in a detectable increased risk of developing mesothelioma. If there is no increased risk of mesothelioma associated with these exposures occurring more than 20 year after the men's first exposures to asbestos, it follows that such exposures cannot be a substantial contributing factor in the development of either man's mesothelioma. Brand's motion for dismissal should have been granted based on plaintiffs' failure to present a *prima facie* case on causation.

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<sup>10</sup> Appendix A is the 1985 Doll/Peto paper that sets forth the risk assessment model that was the subject of the referenced examinations of Dr. Hammar and Dr. Weir.

## VIII. CONCLUSION

### A. Plaintiffs' Appeal

Brand respectfully submits that the trial court's rulings on evidentiary issues and jury instructions that Appellants challenge in their appeal were in all respects correct and should be affirmed. Likewise, the trial court's ruling that Brand, as a subcontractor bound to follow specifications provided by the general contractor Parsons, was not a seller of a product as that term was used under *Restatement (Second) of Torts* § 402A and the cases which have interpreted it was in all respects correct and should be affirmed.

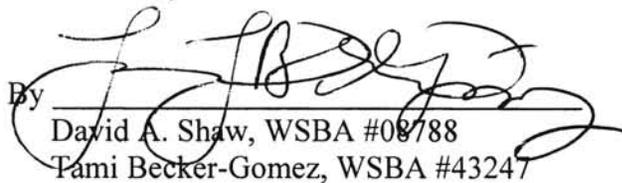
### B. Brand's Cross Appeal

Washington law on toxic torts requires medical or scientific testimony to establish causation. *Fabrique*, 144 Wn. App. at 683. Exposure to asbestos be a substantial factor in causing a plaintiff's disease before liability will attach to a defendant responsible for a particular exposure. *Lockwood*, 109 Wn.2d at 248-9. Plaintiff retained a single medical expert, Dr. Hammar, to express opinions regarding causation. Dr. Hammar identified a specific level of exposure that is necessary before he can testify to a reasonable degree of medical certainty that a particular exposure is a substantial contributing factor to the development of a plaintiff's mesothelioma. The jury was presented with no evidence that

this requisite level of exposure was met or exceeded in either Mr. Ehlert's case or Mr. Jones' case. The only exposure evidence before the court was that prepared by Brand's expert industrial hygienist, Mr. Holtshouser, who found that the claimed exposures were far below Dr. Hammar's threshold. Moreover, both plaintiff and defense experts agreed that the exposures were too remote in time from plaintiffs' initial asbestos exposures to increase their risk of developing the disease. Plaintiffs failed to produce evidence that the claimed exposures that may have occurred at ARCO's Cherry Point facility were a substantial factor in the development of Mr. Ehlert's and/or Mr. Jones' respective diseases. Washington law mandated a dismissal of the claims against Brand before the case event went to the jury. Because the judgment on the jury's "no negligence" verdict has that result, it should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of January, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 16<sup>th</sup> day of January, 2014, I caused a true and correct copy of the foregoing document, "Brief of Respondent/Cross-Appellant," to be delivered in the manner indicated below to the following counsel of record:

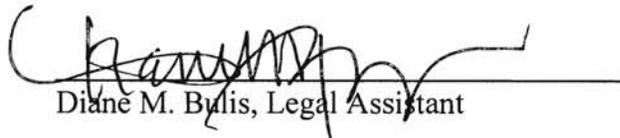
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DATED this 16<sup>th</sup> day of January, 2014, at Seattle, Washington.

  
Diane M. Bulis, Legal Assistant

# Appendix A

Page 1 and 33  
attached only.

Upon request, we can  
provide the entire paper.

FILE COPY

# Asbestos

Effects on health of exposure  
to asbestos



Richard Doll and Julian Peto

1188

(c) there are marked differences between different studies in the ratio of the number of pleural mesotheliomas to the excess of lung cancer. The highest reported ratio based on substantial numbers of cases occurred in English dockyard workers who were exposed to a mixture of types of asbestos (Rossiter and Coles, 1980) and the lowest in American textile workers who were exposed to very little other than chrysotile (McDonald *et al*, 1983a); but this cannot be attributed entirely to differences between chrysotile and other types of asbestos as the effects of chrysotile alone also appear to vary. In the American textile workers, just referred to, the ratio was zero (0/29.4), while in Canadian chrysotile miners (McDonald *et al*, 1980) it was 0.22 (10/46.0). Fibres of different dimensions are likely to reach, and perhaps also to migrate from, the upper bronchus and the pleura differentially, and such differences might therefore be expected. The site-specific effects of fibres of different sizes and types have, however, not yet been determined; and

(d) the marked difference in lung cancer risk between workers handling textiles (McDonald *et al*, 1983a) and friction products (McDonald *et al*, 1984; Berry and Newhouse, 1983) at similar nominal exposure levels and all exposed almost entirely to chrysotile are unexplained. They could be due (at least in part) to differences in the proportion of pathogenic fibres that are counted with the normal optical microscope, or to other differences in the proportion of fibres of different configurations.

These conclusions suggest that the effect of fibre size should be included in our models, and that the effects will not be the same for lung cancer as for mesothelioma. In common with previous authors, however, we do not have any useful data on the distribution of fibre sizes 30 or more years ago in the factory that we have studied, and can therefore only draw attention to this major defect in any extrapolation of dose-specific risks from one industry to another or from occupational to environmental exposure.

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## Mesothelioma

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### Factors influencing incidence

#### *Time since first exposure and age*

Observation of the incidence of mesothelioma in North American insulation workers suggest that the incidence of the disease increases approximately in proportion to a power of the time elapsed since exposure first occurred irrespective of whether the duration of exposure was short or long, and that the best fitting power for the large number of patients studied was 3.2 (SE 0.4) (Peto *et al*, 1982). This can be explained on the assumption that each brief period of exposure causes an addition to subsequent incidence that

increases approximately as the cube of time since the exposure occurred. Under this model, incidence would rise as the cube of time since first exposure following brief exposure and as the fourth power of time during continuous exposure; for exposure lasting five or 10 years the incidence would be well approximated by a power of time of between three and four (Peto, 1983).<sup>\*</sup> Unlike cancer of the lung, the risk appears to be independent of smoking habits (Hammond *et al*, 1979) and it is also independent of the age at which exposure first occurs.

If incidence is linearly proportional to dose, this model predicts that the incidence  $I(t)$  at age  $t$  caused by exposure at a constant dust level  $L$  beginning at age  $t_1$  and ending at age  $t_2$  will be given by the equation

$$I(t) = kL[t - t_1]^4 - (t - t_2)^4]$$

where  $k$  is a constant (Peto, 1983). The predicted risk increases in approximate proportion to duration for exposures of up to about 10 years, but more slowly thereafter and there is very little difference between the predicted effects of stopping or continuing exposure after 20 years.

#### *Duration of exposure*

The effect of mesothelioma incidence of different durations of exposure has not been studied extensively and it is not clear whether this model provides an accurate prediction of the relative effects of different durations of exposure. Our own data, which are reproduced from Peto *et al* (1985) in Table 5/2, are consistent in showing little difference between exposure of 10 to 20 years' duration and longer intervals, but they suggest that the risk caused by brief exposure may be rather lower than would be predicted. Stopping exposure to a carcinogen which causes cancer to an equal extent irrespective of age at exposure, as is the case with asbestos and the induction of mesothelioma, sometimes produces a marked and abrupt reduction in the subsequent rate of increase of incidence, probably because such agents sometimes affect a late as well as an early stage in carcinogenesis. Thus, for example, lung cancer incidence remains roughly constant after stopping smoking. It is, however, difficult to predict the effects of stopping exposure to asbestos, as amphibole asbestos remains in the body for many years; but if a late stage in mesothelioma induction were dependent on the residual tissue burden, a disproportionately low risk following brief exposure to chrysotile might be

<sup>\*</sup>The exponent of time may not have been estimated accurately, but for practical purposes this is not important. The incidence is estimated most precisely 30 or more years after first exposure and the subsequent incidence rates predicted by exponents of between three and five do not lead to very different estimates of life-long risk. For a given incidence 35 years after first exposure, the predicted risk of developing mesothelioma by age 80 years, for a man aged 25 years at first exposure, would be reduced by 21% if the exponent of time since first exposure was reduced from four to three and increased by 36% if the exponent was increased to five. In older recruits the variation would be less.