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

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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

Plaintiff-Appellant,

v.

PFIZER, INC.,

Defendant-Respondent.

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I. INTRODUCTION

Plaintiff-Appellant Margaret Rublee is the surviving spouse of Vernon Rublee and the Personal Representative of his estate. Mr. Rublee worked as a machinist at Puget Sound Naval Shipyard (PSNS) from 1965 to 2005 and was exposed to asbestos through the 1970s. He was diagnosed with mesothelioma in September 2014, and filed a personal injury suit against several defendants who supplied asbestos containing products to the shipyard. The Rublees named Pfizer, Inc. as the “apparent manufacturer” of Quigley asbestos products based on Restatement (Second) of Torts § 400 (1965). However, Pfizer obtained summary judgment on the ground that Plaintiff failed to present sufficient evidence for a jury to reasonably conclude that ordinary consumers would perceive Pfizer as a manufacturer of the asbestos products to which Mr. Rublee was exposed.

As detailed herein, the trial court erred in granting summary judgment to Pfizer because there was ample evidence from which a jury could reasonably find that Pfizer “put out” asbestos-containing products as its own under Section 400. The asbestos products at issue in this case had the Pfizer logo emblazoned on their packaging and promotional materials, and Mr. Rublee and his coworkers all testified that they worked around “Pfizer” insulation cement at PSNS. Expert testimony from a branding specialist further supports a finding that Pfizer’s renowned brand identity in

the health field served as “an indication of the quality or wholesomeness” of the asbestos products at issue in this case, and bolstered the representation in promotional materials that they were “non-injurious.” Based on this evidence, a jury could reasonably find that ordinary consumers were misled into believing that Pfizer was a manufacturer of the asbestos products to which Vernon Rublee was exposed at PSNS. Accordingly, this Court should reverse the trial court’s summary judgment and remand for trial.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its order dated March 4, 2016, which granted summary judgment to defendant Pfizer, Inc. CP 2922-24.

III. ISSUE PRESENTED

Did Plaintiff present evidence raising an issue of material fact as to whether reasonable consumers would believe that Pfizer was a manufacturer of the asbestos-containing insulation cement to which Vernon Rublee was exposed so as to impose liability under Restatement (Second) Torts § 400?

IV. STATEMENT OF THE CASE

A. Vernon Rublee Died of Mesothelioma After Being Exposed to “Pfizer” Asbestos Products.

Margaret Rublee is the surviving spouse of Vernon Rublee, who died of mesothelioma on March 14, 2015. Mesothelioma is a terminal

cancer of the lining of the lung caused by asbestos.¹ Mr. Rublee was exposed to asbestos insulation products while working as a machinist at PSNS between 1965 and 1980. CP 865-66.

Through the mid-1970s, Vernon Rublee worked on steam turbines, which were insulated with asbestos “lagging.” In order to perform work on the turbines, the existing insulation would have to be torn off and “re-lagged once the work was completed.” CP 866-67. Mr. Rublee testified that “Pfizer” was the brand of insulation cement he observed being used on the turbines. CP 869-70.

Q. What materials did the ladders use to re-lag the turbines?

A. Well, I recall seeing the bags of material that they used to put on the-- material that they were putting on the turbines, and it created a lot of dust when they were fixing it. I recall seeing the-- it was a strange name, so I remember seeing “Pfizer” on some of the bags that were piled up down in the engine room. I don’t remember anything else about it. It was in a maybe paper sack type of cement bag.

Q. What did you see the ladders do with these bags of materials?

A. They would open them up and dump them either in a trough or a bucket and mix it up.

¹ RONALD F. DODSON & SAMUEL P. HAMMAR, ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY, AND HEALTH EFFECTS 360 (2006).

Q. What were the work conditions like when the ladders poured the bags of material into the troughs?

A. It was pretty dusty at times until they got it mixed up, but the dust would stay in the area for a while.

CP 867.

Charles Edwards, a co-worker of Mr. Rublee's, testified that he observed "Pfizer Panelag" being applied to turbines on ships and submarines being repaired at the shipyard. CP 877-78. Panelag was an asbestos-containing product specifically marketed for use on turbines which was on the Navy's Qualified Products List. *See* CP 882-90; 892. Mr. Edwards described the use of Panelag as follows:

The insulation cement was poured out of paper sacks into buckets or troughs, mixed with water, and stirred with a trowel or hoe. This would make lots of dust, both when the cement was poured from the sack and when it was mixed... Pfizer Panelag is the insulation cement that I saw the ladders using on the main propulsion turbines, turbo-generators, steam powered pumps and forced draft blowers.... One reason why I'm so certain that Pfizer Panelag was used on these ships is because I would often have to remove bags of Pfizer Panelag that were in my way. The bags weighed around 50 pounds.

CP 877-78.

Mr. Edwards recalled working with or around Vernon Rublee on numerous occasions between 1969 and 1975 when Pfizer Panelag was being mixed and applied to turbines. CP 877-78.

Testimony from other shipyard employees confirms that Panelag—and a related product Insulag—were routinely used at PSNS in the 1960s and 1970s. CP 901-02; 1282-83. Co-defendant Pioneer Sand & Gravel Company was a distributor of both Panelag and Insulag in the Pacific Northwest and, according to eyewitness accounts, made numerous deliveries to the shipyard during that timeframe. CP 906-08; 1282.

B. Plaintiff Sued Pfizer as the “Apparent Manufacturer” of Insulag and Panelag but the Trial Court Dismissed Those Claims on Summary Judgment.

Vernon and Margaret Rublee filed a Complaint against Pfizer and several other defendants on September 14, 2014, alleging that Mr. Rublee’s mesothelioma was caused by occupational exposure to the defendants’ asbestos-containing products. CP 1-4. Plaintiffs asserted common law negligence and strict liability claims against all defendants except Pfizer, who they alleged was liable as an “apparent manufacturer” of asbestos products under Restatement (Second) Torts § 400. *Id.* Mr. Rublee died on March 14, 2015, and the case was converted to a wrongful death action.

Pfizer moved for summary judgment on the ground that Plaintiff could not establish liability under Section 400. On March 4, 2016, the trial court issued an order granting Pfizer’s motion for summary judgment and dismissed Pfizer from the case. However, recognizing that the scope and application of Section 400 were questions of first impression in

Washington, the trial court issued the following findings pursuant to RAP

2.3(b)(4):

The Court finds that the interpretation of Restatement (Second) of Torts § 400 under Washington law on which Pfizer's summary judgment motion is based involves a controlling question of law and that immediate review of the court's ruling will materially advance the ultimate termination of this and other litigation.²

Based on this finding, Plaintiffs moved for discretionary review without objection from any party. On May 23, 2016, this Court found that this appeal satisfied the requirements of RAP 2.3(b)(4) and granted discretionary review.

V. ARGUMENT

A. Standard of Review and Summary Judgment Standard.

When reviewing summary judgment, this Court engages in the same inquiry as the trial court. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 324-25, 971 P.2d 500, 504 (1999). The Court considers all facts and reasonable inferences from those facts in the light most favorable to the non-moving party, the Rublee family. *Id.* at 325. Summary judgment must be reversed if the evidence in the record could lead reasonable persons to reach more than one conclusion. *Id.* If, after drawing all reasonable inferences in Ms. Rublee's favor, this Court concludes that there is any issue

² See Appellant's Motion for Discretionary Review at App. 005-06.

as to a material fact, the trial court's order of summary judgment should be reversed. *See* CR 56(c).

B. The Trial Court Correctly Held that Section 400 is Focused on Consumer Expectations.

1. Background on Section 400.

The “apparent manufacturer” doctrine set forth in Restatement (Second) of Torts § 400 (1965) provides that “[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.” While the parties agreed that Section 400 applies in Washington, no appellate court has considered its scope and application.³ However, the Washington Products Liability Act incorporates the apparent manufacturer doctrine, providing that “a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer” can be liable as a manufacturer. RCW 7.72.010(2). Although the Act is not directly controlling on the present case because Mr. Rublee’s asbestos exposure occurred prior to its enactment in 1981, *see Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 33, 935 P.2d 684, 690 (1997), the statutory language is instructive because it is based on common law

³ The single reference to Section 400 in *Martin v. Schoonover*, 13 Wn. App. 48, 54, 533 P.2d 438 (1975), is mere dicta, noting in passing that Section 400 is a general area where liability has been found.

product liability principles. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 410, 282 P.3d 1069, 1074 (2012).

The majority of state courts that have considered the apparent manufacturer doctrine have adopted it in some form.⁴ Courts adopting Section 400 have explained that “[j]ustice would be offended if a corporation, which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability.” *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 427, 244 N.W.2d 873, 882 (1976). Under this rationale, a defendant that advertises itself as the maker of a product may be liable as the manufacturer if the advertising was such as to lead a reasonable

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

consumer to believe that the defendant was the actual manufacturer. *See Hebel v. Sherman Equip.*, 92 Ill.2d 368, 377, 442 N.E.2d 199, 204 (1982). Thus, if the labeling or presentation of the injurious product is “likely to cause a consumer to rely on the retailer’s reputation as an assurance of the product’s quality,” liability may attach under Section 400. *Mello v. K-Mart Corp.*, 604 F. Supp. 769, 773 (D. Mass. 1985). Accordingly, courts have held that “[w]hether a ‘holding out’ has occurred should be judged from the viewpoint of the purchasing public.” *Kennedy v. Guess*, 806 N.E.2d 776, 784 (Ind. 2004).

Cases interpreting what is required to “put out” a product under Section 400 have focused on the association of the defendant’s trademark with the injurious product. Comment d to Section 400 provides as follows:

[O]ne puts out a chattel as his own product when he puts it out under his name or *affixes to it his trade name or trademark*. When such identification is referred to on the label as *an indication of the quality or wholesomeness of the chattel*, there is an added emphasis that the user can rely upon the reputation of the person so identified. The mere fact that the goods are marked with such additional words as “made for” the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. *The casual reader of a label is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source.*

(emphasis supplied).

2. Section 400 is Focused on Consumer Expectations.

In seeking summary judgment, Pfizer acknowledged that Section 400 was governing law in Washington, but argued that the Section only applied to entities who fall within the “chain of distribution” of the injurious product. In advancing this argument, Pfizer focused on two federal trial court decisions finding that the Washington Supreme Court would adopt Section 400, but granting summary judgment to Pfizer on the ground that it fell outside the chain of distribution of the asbestos products at issue. *See Turner v. Lockheed Shipbuilding Co.*, No. C13-1747 TSZ, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013); *Sprague v. Pfizer*, No. 14-5084, 2015 WL 144330 (W.D. Wash. Jan. 12, 2015).⁵ Plaintiff argued in response that the “put out” inquiry under Section 400 is focused on consumer expectations, and does not turn on the determination of whether the defendant is within the chain of distribution. The trial court rejected the non-binding holdings of the federal courts in *Turner* and *Sprague* and “considered this evidence applied to Restatement 400 . . . through the prism

⁵ The trial court’s summary judgment ruling in *Sprague* is currently being appealed to the Ninth Circuit. *See Sprague v. Pfizer*, No. 15-35051 (9th Cir. Jun. 26, 2015). On July 14, 2016, the Ninth Circuit granted Plaintiff’s motion to say the federal appeal pending resolution of this appeal. The Ninth Circuit concluded the scope and requirements of Section 400 under Washington was an issue of first impression that should be considered in the first instance by Washington appellate courts.

of what would have been *apparent* to a reasonable purchaser.” CP 2923 (emphasis in original).

The trial court’s focus on consumer expectations was manifestly correct. Requiring a showing of active participation in the chain of distribution before liability can attach under Section 400 effectively converts an “apparent manufacturer” claim to a product defect claim under Section 402A. *See Simonetta v. Viad Corp.*, 165 Wn.2d 341, 355, 197 P.3d 127, 134 (2008) (Section 402A liability “imposed on parties in the chain of distribution...”). This is anomalous as the two sections serve fundamentally different purposes. Section 402A is designed to protect consumers from those parties who play a role in bringing a defective product to market. *See, e.g., Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 149, 542 P.2d 774, 776 (1975) (extending liability to parties within the chain of distribution). In contrast, Section 400 protects the reasonable expectations of a consumer who relies on the identity of a party that allegedly manufactured the product in making a decision to purchase or use a product. As the trial court correctly held, the role of the apparent manufacturer in the chain of distribution is entirely irrelevant if the apparent manufacturer’s purported role reasonably impacts consumer perceptions.

3. There is Overwhelming Evidence – All of Which Must Be Viewed in the Light Most Favorable to Plaintiff – that Reasonable Consumers Would Perceive that Pfizer Put Out Insulag and Panelag as its Own Products.

a. Pfizer Used its Logo to Promote Insulag and Panelag.

The Quigley Company was founded in 1916 and produced refractory products for the steel industry out of a manufacturing facility in Old Bridge, New Jersey. CP 915; 917; 921. Quigley’s product line included two asbestos-containing insulation cements: Insulag and Panelag. *Id.* Prior to 1968, certain promotional materials included the following stylized Quigley logo with the phrase “Manufacturer [singular] of Refractory Specialties and Paints.” CP 923.

QUIGLEY COMPANY INC.
Manufacturer of Refractory Specialties and Paints

Pfizer, Inc. was founded in 1849 as a manufacturer of pharmaceutical products.⁶ Over the next century, Pfizer expanded its product line to chemicals and agricultural and industrial products.⁷ In 1953, Pfizer started using its familiar oval logo (reproduced below) for numerous product lines including industrial chemicals, mineral additives and—most familiarly—a full line of medical and pharmaceutical products. CP 925-26.

⁶ “Pfizer: About Us,” <http://www.pfizer.com/about/history/timeline>.

⁷ *Id.*



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



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

Pfizer’s corporate designee was unable to explain how the Pfizer logo came to be included in Quigley packaging and promotional materials. CP 941-42. However, Quigley’s former Vice President of Technical Operations testified that individuals working in the Pfizer World Headquarters developed the advertising material for products formerly manufactured by Quigley. CP 959-60. Further, there is no evidence that

Pfizer ever objected to the use of its logo or sought to remove it from advertising materials developed in the New York headquarters. CP 918.

In all communications with customers after 1968, Pfizer-Quigley used letterhead emblazoned with Pfizer's familiar oval logo in the upper left hand corner. CP 963. Pfizer-Quigley salesmen distributed pocket calendars yearly to customers that included both the Pfizer and Quigley logos and described the companies as "Manufacturers [plural] of Refractories Insulation." CP 965-66. In addition, Pfizer's annual reports to shareholders described Quigley manufacturing facilities as "Pfizer construction sites" (CP 968-70), and identified Quigley as a "division" within the company (CP 972-73).

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

All information given and recommendations made herein are based on our research and are believed to be accurate but no guarantee, either expressed or implied, is made with respect thereto . . . Our products are sold on the understanding that the user is solely responsible for determining their suitability

for any purpose. This information is not to be copied, used in evidence, released for publication or public distribution *without written permission from Pfizer, Inc.*

CP 975 (emphasis supplied). This evidence, all of which must be viewed in the light most favorable to Plaintiff, is more than sufficient to show that a reasonable consumer would conclude that Pfizer put out Panelag and Insulag as its own products and used its logo to promote those products.

b. Pfizer Also Held Itself Out as a Manufacturer of Quigley Products.

Shortly after the acquisition, Pfizer transferred Quigley's offices (CP 923) to the Pfizer World Headquarters at 235 East 42nd Street in Manhattan. CP 975. From 1968 to 1972, sales of Insulag and Panelag were directed out of the Pfizer Headquarters, and invoices directed that payments be remitted to that location. Invoices to Seattle-based Pioneer Sand & Gravel included both the Pfizer and Quigley logos—equally sized—and identified the companies as “Manufacturers [plural] of Refractory Specialties & Insulations.” CP 977. These invoices included the phone number (212) 573-3477, which even today connects to Pfizer operators! CP 935-36. Pfizer's corporate designee admitted that the telephone number connected to Pfizer and could not deny that it would have also connected directly to Pfizer operators between 1968 and 1972. *Id.*

Pfizer's 1968 Annual Report to its shareholders announced the construction of a plant in Dungarvan, Ireland designed to produce

magnesite for Quigley products. CP 950. The report contained photos of the plant and represented to Pfizer’s investors that the area was a “Pfizer construction site.” CP 969. When the plant began operations the following year, Pfizer’s Annual Report represented the plant as Pfizer’s new facility that was “[o]perated by the Quigley Magnesite *Division* of Pfizer Chemical Corporation.” CP 973 (emphasis supplied).

On January 2, 1974, Quigley’s Vice President of Sales wrote a letter on stationary emblazoned with the Pfizer logo to “our Customers” announcing the decision to discontinue the manufacture of Insulag and Panelag. CP 963. The telephone number on the letter (212) LR3-3444 also still connects to Pfizer. *See* CP 944. This evidence—which must likewise be viewed in the light most favorable to Plaintiff—not only shows that a reasonable consumer could easily conclude that Pfizer put out Panelag and Insulag as its own products, but also that Pfizer manufactured such products.

C. The Trial Court Erred in Numerous Respects.

1. The Trial Court Erroneously Weighed Evidence Regarding the Reasonableness of Consumer Perceptions.

In considering a motion for summary judgment, the trial court is not permitted to weigh evidence. *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990, 993 (1964). A trial court’s job at the summary judgment stage is “to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury’s role....” *Renz v. Spokane*

Eye Clinic, P.S., 114 Wn. App. 611, 623, 60 P.3d 106, 112 (2002). Accordingly, summary judgment is generally inappropriate in situations where a trier of fact needs to evaluate whether something was “reasonable.”⁸ In product liability cases, the Washington Supreme Court has held that summary judgment is inappropriate in cases where “[t]he emphasis is upon the consumer’s reasonable expectation....” *Tabert*, 86 Wn.2d at 153. This is because “the question of whether a product is or is not reasonably safe within the reasonable expectations of the ordinary consumer would be a material issue of fact....” *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 351, 588 P.2d 1346, 1349 (1979); *see also Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 411, 553 P.2d 107, 110 (1976) (reversing summary judgment and noting “the concept of ‘reasonably safe’ is to be measured in terms of the reasonable expectations of the ordinary consumer—a relative rather than absolute concept.”).

⁸ *See, e.g., Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002) (trial court erred in granting summary judgment in legal malpractice case when the case turned on whether the client reasonably relied upon the information in the attorney’s opinion letter); *Sec. State Bank v. Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000) (question of whether disposition of collateral was commercially reasonable presented fact issue precluding summary judgment); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 983 P.2d 1129 (1999), *aff’d*, 142 Wn.2d 784, 16 P.3d 574 (2001) (summary judgment improper in case that turned on whether an insurer acted reasonably); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 20 P.3d 447 (2001) (trial court improperly granted summary judgment in case which involved a dispute as to whether a store retained the plaintiff’s property for an unreasonable length of time).

In the present case, Pfizer’s liability hinges on whether a “casual reader” would believe that Pfizer manufactured Insulag and Panelag. *See* § 400 comment d. This determination requires the trier of fact to consider the subjective perceptions of ordinary consumers. As recognized by the Supreme Court in *Tabert* and *Lamon*, this consideration is quintessentially a fact-specific, contextual, and subjective inquiry. Nevertheless, in granting summary judgment to Pfizer, the trial court held as follows:

The Court scrutinized in particular...the evidence where both labels are displayed horizontally and equal-sized—Pfizer’s first and foremost “masterbrand”—and where the tagline “Manufacturers of Refractories-Insulations” (plural) and Pfizer’s address appear to be aligned with and integrating both Companies. Pfizer’s actual business role in this case (corporate parent) would not be apparent to the reasonable purchasing public. One *would* know that Quigley was clearly and accurately identified as a/the real manufacturer; there was no “absence of a clear and distinctive designation of the real manufacturer.” Additionally, as non-seller, Pfizer could not clearly state that it only distributed or sold the goods to others, within the meaning of Sec. 400(d). Hence, a reasonable purchaser would not have been induced to believe that the defendant was such apparent manufacturer of the injurious products, within the meaning of Restatement 400.

CP at 2924 (emphasis in original).

In reaching its holding, the trial court explicitly substituted its judgment for the jury’s in determining that reasonable consumers “would know” that Quigley was the real manufacturer and that “a reasonable consumer would not be induced to believe” that Pfizer was a manufacturer

of Insulag and Panelag. While a jury may ultimately agree with the trial court, determining the perceptions of reasonable consumers is quintessentially a fact question for the jury to decide at trial. The trial court consequently erred in granting summary judgment to Pfizer.

2. The Trial Court Erred in Holding that Because *Both* the Pfizer and Quigley Logos Appeared on Promotional Materials No Reasonable Consumer Could Ever Perceive Pfizer as a Manufacturer.

The trial court held as a matter of law that placement of the Pfizer and Quigley logos in tandem on product advertising prevented *any* reasonable consumer from *ever* being confused regarding the actual manufacturer of these products. This holding is belied by the facts of this case and by Section 400, which specifically contemplates a situation, like here, where two product names are presented in conjunction with one another:

The mere fact that the goods are marked with such additional words as “made for” the seller, or describe him as a distributor, *particularly in the absence of a clear and distinctive designation of the real manufacturer or packer*, is not sufficient to make inapplicable the rule stated in this Section. The *casual reader* of a label is likely to *rely upon the featured name*, trade name, or trademark, and *overlook the qualification of the description of source*.

§ 400 comment d (emphasis supplied).

In adjudicating Pfizer’s motion, the trial court disregarded testimony from Quigley’s corporate representative who explicitly acknowledged that

inclusion of the Pfizer and Quigley logos on advertising and packaging had the potential to confuse the average consumer:

Q. Would you agree one who looked at it in the general public and sees the name Quigley and Pfizer, manufacturers of refractories, insulations and paints, would lead to the conclusion both Pfizer and Quigley were the manufacturers of those items?

A. It could.

CP 919-20. The identification of Pfizer as a manufacturer is clearly evident in Mr. Rublee's deposition testimony:

Q. [W]hat do you understand "Pfizer" to mean, in relation to this product that you—

A. I would have to say that I just assumed it was a product that they made that they were selling in the shipyard.

Q. And when you say "they," what do you mean by "they"?

A. Pfizer Company.

CP 871. Mr. Rublee's coworker Charles Edwards related the same understanding:

Q. As you sit here today you, you don't know the company that made or manufactured panelag?

- A. I think Piefer [sic] was on the bag of some of them.
In small letters towards the bottom. . .

CP 879.⁹

Consumer identification of Insulag and Panelag as Pfizer products was not confined to PSNS. Lawrence Wedvik worked as a millwright at Bethlehem Steel in Seattle in the early-1970s and testified that he worked with and around bags of “Pfizer Insulag” while performing repair work on steel furnaces. CP 990-93. Similarly, Joseph Vrcan, an employee of Lincoln Electric in Cleveland, Ohio identified Panelag as a Pfizer product:

Q. [A]s you sit here today, you’re not able to testify that while you were employed and working, that you were ever exposed to a product that was made, manufactured, or distributed by Pfizer; correct?

A. No, I’m familiar with a product called Panelag.

Q. And do you have any reason to associate that with Pfizer?

A. Yeah, their name was on the bottom of the 50-pound bag of Panelag.

⁹ Throughout his deposition Mr. Edwards repeatedly used the malapropism “Piefer” for Pfizer. Pfizer’s counsel clarified that Mr. Edwards used this term to refer to Pfizer:

Q. You—you mentioned the name, Piefer, I think you mean Pfizer.
Was the name—that name on the bag?

A. I think if I remember right, it was—I know a couple of them had like, at the bottom, I was trying to read it. Manufactured by Piefer (sic) or somebody.

CP 880.

CP 998. When asked if he recalled who made the product Mr. Vrcan replied: “Well, the name Pfizer was on it. I presume that Pfizer manufactured it.” CP 999.

In granting summary judgment to Pfizer, the trial court focused exclusively on promotional documents for Insulag and Panelag and disregarded testimony from consumers such as Mr. Rublee who actually observed the products being used in the workplace. It is unclear from the record precisely how the Pfizer and Quigley names were displayed on the *packaging* for Insulag and Panelag. However, regardless of whether or not the Pfizer and Quigley logos on product packaging were displayed identically to the promotional materials on which the trial court relied, Vernon Rublee, Charles Edwards, Lawrence Wedvik, and Joseph Vrcan all testified that they observed “Pfizer” on the bags and understood Pfizer to be the manufacturer of these products. Thus, regardless of how the Quigley and Pfizer name were juxtaposed on product packaging, these “casual reader[s]” relied upon Pfizer’s “name, trade name, or trademark” and “overlook[ed] [any] qualification of the description of source.” *See* § 400 comment d. The trial court consequently erred in focusing exclusively on the appearance of the Pfizer and Quigley logos on promotional materials and disregarding testimony from actual consumers who were exposed to asbestos from these products in the workplace.

3. The Trial Court Erred in Disregarding Expert Testimony That Consumers Would View Pfizer as a Manufacturer of Insulag and Panelag.

Although several courts around the country have considered Pfizer's liability under Section 400, this is the first case where expert testimony was introduced on the issue. Plaintiff presented expert opinions by Steff Geissbuhler, a branding specialist with five decades of experience in graphic design and brand communications. CP 796. Mr. Geissbuhler personally designed some of the most memorable logotypes of the Twentieth Century, including the NBC peacock and Time-Warner eye-ear logo. CP 797; 799. He has designed images for several pharmaceutical companies, including a project for Merck & Co. that was used on all of Merck's visual communications. CP 798. In adjudicating Pfizer's motion, the trial court explicitly held that Mr. Geissbuhler's opinions were admissible. CP 2924.

Mr. Geissbuhler limited his review to the same eight documents used to promote the sale of Insulag and Panelag as relied upon by the trial court. Based on this review, Mr. Geissbuhler reached the following conclusion:

[I]t is my opinion that the presentation of the Pfizer and Quigley logos on Insulag and Panelag promotional materials would have confused consumers as to who the products' manufacturer was. The placement of the Pfizer logo next to the Quigley logo . . . communicates that the entities are at

least of equal importance. Placing the Pfizer logo on the left where it is read first communicates that it is the more important of the two entities. Use of the plural word “Manufacturers” communicates to consumers that the *both* entities are involved in the manufacture of Insulag and Panelag. Additionally, the address for both entities is the Pfizer World Headquarters in Manhattan . . . The use of the Pfizer logo on promotional and sales communications with Quigley’s suppliers and customers communicated ultimate responsibility, a high level of control, or management on the part of Pfizer.

CP 801-02. At his deposition, Mr. Geissbuhler was shown the “Technical Data Sheet” for Insulag described above on which Pfizer logo is singularly displayed.

Q. What impact, if any, does the placement of the Pfizer logo on the bottom quadrant of [the data sheet] have on your opinion as to whether an individual whose only contact with the Insulag product was [the data sheet] . . . have on that person’s understanding as to who the manufacturer was?

A. Its technical data on insulation done by, made by Pfizer.

Q. Is there any impact as well in terms of the, the statement . . . that “this information is not to be copied, used in evidence, released for publication or public distribution without written permission from Pfizer.”?

A. It implies to me that Pfizer is taking complete responsibility for this data on this sheet...

CP 1271-72.

Mr. Geissbuhler also explained the concept of masterbrand as it related to Pfizer:

[A] masterbrand is the overarching and most important part of a corporation. In other words, it is the parent of its divisions and subsidiaries, it's also the parent of its products, and services, and all of that. So it takes responsibility for everything associated with the brand.

CP 1269. He was then shown a letter to customers of Insulag and Panelag and asked to explain the significance in terms of consumer perceptions resulting from the placement of the Pfizer logo in the upper left corner of Quigley's stationary.

Q. [W]hat impact, if any, of the placement of the Pfizer logo in the upper left hand quadrant of the [letterhead] has on that person's reasonable expectation as to the manufacturer of the product?

A. [T]his example that Pfizer is not directly next to Quigley, but it seems to be above and to the left. Again, this is where you start reading is the upper left hand corner, we all read from left to right except in other countries. So this is a convention, Pfizer or somebody at Pfizer authors, which is clearly understood that the masterbrand is Pfizer and that this document is, you know, is being distributed or is coming from.

Q. [B]ased upon your knowledge, experience and expertise, sir, do you have an opinion as to whether or not [the letter] would communicate to the average consumer of Insulag and Panelag, who did not have 50 years of prior knowledge of the product, that Pfizer was the masterbrand of those two products?

- A. That's not a question to me, it's a clear hierarchy and totally understood that Pfizer is the author of this. And it is about Quigley Company and their products, but it's definitely, if not masterbranded, it is definitely endorsed by Pfizer.

CP 1272.

“In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.” *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106, 1113 (1994). In this case, Mr. Geissbuhler's expert opinions go directly to the core of Section 400, which focuses on source attribution. Even where the Pfizer and Quigley logos appear in tandem, Mr. Geissbuhler opines that consumers would superordinate Pfizer's role in the manufacture of Insulag and Panelag based on their previous familiarity with the Pfizer brand. While Pfizer may disagree with Mr. Geissbuhler's opinions and challenge his testimony at trial, his opinion is sufficient to create a fact issue precluding summary judgment in this case. *See Bowers v. Marzano*, 170 Wn. App. 498, 505, 290 P.3d 134, 137 (2012) (affidavit expressing an expert's opinion sufficient to create a genuine issue of fact and thus preclude summary judgment).

4. The Trial Court Erred in Disregarding Evidence That Pfizer's Renowned Brand Identity in the Health Field Vouched for the Safety of Asbestos Products Sold Under its Logo.

The Seventh Circuit has observed that “[t]he purpose of a trademark...is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality.” *Gorenstein Enter., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989). As one trademark scholar has observed, a highly advertised trademark used on a multiplicity of products operates as “a warranty that all of the products bearing that trademark conform to a standard of quality.”¹⁰ The significant role of a well-recognized trademark to vouch for the quality of a product is reflected in Comment d to Section 400 which provides as follows:

[O]ne puts out a chattel as his own product when he puts it out under his name or *affixes to it his trade name or trademark*. When such identification is referred to on the label as *an indication of the quality or wholesomeness of the chattel*, there is an added emphasis that the user can rely upon the reputation of the person so identified....

(emphasis supplied).

Quigley's former Vice President Louis Killian recognized the benefit of Pfizer's brand identity in promoting the sales of Quigley products.

¹⁰ Margaret Goldstein, *Products Liability and the Trademark Owner: When Trademark Is a Warranty*, 67 Trademark Rep. 587, 597-98 (1977).

Q. Would you agree from the time you were there at Quigley, that Quigley wanted to benefit from the Pfizer name and reputation?

A. Well, I know in the environment when I was there Quigley was a relatively small company, and I think we took comfort in having a large parent corporation, yes.

CP 918. Pfizer's corporate designee acknowledged that in the 1968-1974 time period, Pfizer had a brand identity as a manufacturer of pharmaceuticals for use in the health field. CP 943. This identity was also shared by consumers. When asked to identify the manufacturer of the Insulag he worked with at Bethlehem Steel, Lawrence Wedvik testified: "It said 'Pfizer' on it. Strange name. That's like a medical company, I always thought." CP 990-91.

Based on the evidence presented to the trial court, a jury could conclude that Pfizer used its brand identity in the health field to assuage growing consumer concern regarding asbestos health hazards. When Pfizer acquired Quigley in 1968, asbestos product hazards were receiving increased attention by both regulatory agencies and the general public. CP 724. The New York Academy of Sciences conference on asbestos disease in 1964 was widely publicized in the national press and by the late-1960s, regional newspapers such as *The Seattle Times* began to report on asbestos

disease as an occupational hazard. CP 723-24. Public awareness was further spurred by the ban on sprayed asbestos in New York City in 1971 and promulgation of OSHA's emergency asbestos regulations in December 1971. CP 724. Pfizer was well-aware of this increased public concern over asbestos because an announcement in its 1972 Annual Report related that "[a] heavy promotional campaign was inaugurated in May for asbestos-free talc" that would "conform to standards set by OSHA." CP 1001-02.

Amidst this growing public concern over asbestos health hazards, Pfizer-Quigley circulated a promotional document entitled "How to Use Insulag" in which consumers were instructed to pour powdered Insulag into a mortar box and then "[m]ix the batch thoroughly and quickly with a hoe and shovel." CP 1026. This is the precise work practice that Mr. Rublee described observing at PSNS, which caused asbestos dust to permeate his work area! CP 870. At the same time, Johns-Manville was manufacturing asbestos cement virtually identical to Insulag and Panelag that was also used at PSNS (CP 1012-13), which contained caution labels explicitly warning users to wear respiratory protection whenever dust was created. CP 1019-1020. In stark contrast, neither Panelag nor Insulag *ever* carried asbestos warnings either on product packaging or promotional materials. To the contrary, in advertising materials emblazoned with the Pfizer logo, Insulag

was lauded as “Non-Injurious” because it contained no “particles which are irritants to the body.” CP 1028.

The testimony of Charles Edwards demonstrates how consumers relied on the Pfizer’s brand identity in concluding that the asbestos products they worked around were safe:

Q. Did you have an understanding when working around Pfizer Panelag that the product was safe or not?

A. Well, the people that installed it weren’t taking any precautions. They weren’t wearing any asbestos respirators, or there was no signs that there was any insulation danger at all in the—I remember that Piefer [sic] being the drug company, I didn’t think it was that dangerous.

Q. How did your understanding that Pfizer was a drug company affect your understanding as to the safety of the Panelag product that was worked around in your proximity?

A. I just figured it would be safe. It was produced by a drug company.

CP 878.

Mr. Edwards’ lay testimony that Pfizer vouched for the safety of Insulag and Panelag is corroborated by Plaintiff’s branding expert Steff Geissbuhler. When shown the “How to Use Insulag” brochure, Mr. Geissbuhler testified as follows:

Q. [W]hat impact would the placement of the Pfizer logo on two locations in [the brochure] have on the statement . . . that the Insulag product is “non-injurious”?

A. I would assume that this statement comes from a company called Pfizer Quigley.

Q. [D]o you have an understanding, sir, as to whether in the late 1960s, early 1970s, Pfizer had brand identity in the field of health and medicine?

A. Yes.

Q. What impact, if any, in your opinion does the placement of the Pfizer logo on [the brochure] have on the veracity that the Insulag product is “non-injurious as it contains no mineral wool or fine slag particles which are irritants to the body”?

A. Well, Pfizer being mostly connected to the health industry, I would assume that this is a safe product.

Q. Would that assumption be greater as a result of the placement of the Pfizer logo on [the brochure] than if there was no Pfizer logo on the product and it was only a Quigley logo?

A. Oh, definitely.

CP 1270.

Based on this lay and expert testimony, a jury could reasonably conclude that, by affixing its imprimatur on asbestos-containing products, Pfizer provided “an indication of the quality or wholesomeness of the chattel” as well as “added emphasis that the user can rely upon [its]

reputation....” See § 400 comment d. Given the growing public concern over asbestos hazards and the fact that other asbestos manufacturers placed explicit warnings on their products, the presence of the Pfizer logo on Insulag and Panelag served as an implicit guarantee that the products were, as advertised, “non-injurious.” Based on this evidence, a jury could reasonably find that Pfizer’s brand identity communicated an elevated level of quality and wholesomeness and gave credence to the claim that its products were safe. The trial court consequently erred in disregarding this evidence and in granting summary judgment to Pfizer.

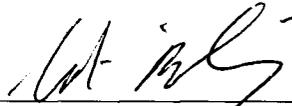
VI. CONCLUSION

In adjudicating Pfizer’s motion for summary judgment, the trial court correctly focused its Section 400 analysis on whether ordinary consumers would perceive Pfizer to be a manufacturer of Insulag and Panelag. However, the trial court erroneously substituted its judgment for the jury’s in concluding that “a reasonable purchaser would not have been induced to believe that [Pfizer] was [an] apparent manufacturer of the injurious products.” The trial court improperly disregarded expert testimony that consumers *would* perceive Pfizer as a manufacturer of Insulag and Panelag and ignored lay testimony that Mr. Rublee and his coworkers actually *did* identify Pfizer as manufacturer of these products. Based on this testimony, a jury could reasonably find that ordinary

consumers would perceive Pfizer to be a manufacturer of Insulag and Panelag. This Court should therefore reverse the trial court's grant of summary judgment to Pfizer and remand this case for trial.

RESPECTFULLY SUBMITTED this 8th day of September 2016.

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CERTIFICATE OF SERVICE

I certify that on September 8, 2016, I caused to be served a true and correct copy of the foregoing document upon:

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