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No. 80076-6

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 56614-8-1)

JOSEPH A. SIMONETTA AND JANET E. SIMONETTA,
Plaintiffs-Respondents,

v.

VIAD CORP.,

Defendant-Petitioner.

OPPOSITION TO VIAD CORP.'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENTS

Respondents Joseph A. Simonetta (“plaintiff” or “Mr. Simonetta”) and Janet E. Simonetta request that this Court deny review of the Court of Appeals’ decision terminating review in this case.

B. COURT OF APPEALS’ DECISION

The Court of Appeals issued its decision on January 29, 2007. *See Simonetta v. Viad Corp.*, 137 Wn. App. 15, 151 P.3d 1019 (2007). The Court of Appeals held that under established principles of Washington law as it existed prior to the enactment of the Washington Product Liability Act (“WPLA”) in 1981, petitioner Viad Corp. (“Viad”) had a duty to warn Mr. Simonetta of the dangers of asbestos used to insulate its product, which in this case was a naval marine evaporator.¹

C. ISSUE PRESENTED

Should this Court deny Viad’s Petition for Review of the Court of Appeals’ holding that it had a duty to warn Mr. Simonetta of the dangers of asbestos used to insulate its product where that decision does not conflict with any decision of this Court or the Court of Appeals and does not present a question of substantial public interest?

¹ For purposes of this Petition for Review, the Court may assume that Viad is the successor in interest to the product manufacturer, Griscom Russell. *See Simonetta*, 137 Wn.2d at 19 n.1 (assuming successor liability for purposes of appeal); Petition at 1 n.1 (same).

D. STATEMENT OF THE CASE

1. Factual Background.

In the late 1950s, Joseph Simonetta served in the Navy as a Senior Chief Petty Officer and Machinist Mate aboard the USS SAUFLEY. CP 187-91. In that capacity, he performed routine maintenance on the ship's Griscom Russell evaporator, which was insulated with asbestos. The evaporator was a large cylinder, approximately 10-12 feet in diameter and 15 feet long, that desalinated sea water and converted it into fresh water. CP 174, 190. Although Griscom Russell did not sell the product with the insulation already attached, insulation was necessary for the evaporator to operate properly, CP 744, and Griscom Russell "knew or reasonably should have known that its product would be insulated with asbestos-containing material." CP 1229 (trial court's order). Yet despite its knowledge that use of the product would expose workers to a hazardous substance, Griscom Russell provided no warnings about the risk of asbestos exposure either on the evaporator or in the accompanying product manual. CP 178-79. Mr. Simonetta was exposed to respirable asbestos as a result of his work on this Griscom Russell evaporator. CP 195-204.

In 2000 and again in 2002, Mr. Simonetta was diagnosed with cancer in two different lobes of his lungs, both of which were removed. He likely suffered from "asbestos-related pleural disease" underlying his cancer diagnosis. CP 12-14, 8. Mr. Simonetta's work experience was sufficient "to show a causal relationship between his lung cancer and his asbestos exposure." CP 8 (testimony of Dr. Samuel Hammer).

2. Procedural Background.

Mr. Simonetta filed a personal injury action in King County Superior Court on January 24, 2004, CP 3-6, and amended his complaint to add Viad on March 15, 2004. CP 24-28. On January 25, 2005, Viad moved for summary judgment that it had no duty to warn Mr. Simonetta of the dangers of the asbestos used to insulate the evaporator. CP 42-60. Judge Armstrong granted summary judgment, despite finding that “the product manufacturer knew or reasonably should have known that its product would be insulated with asbestos containing material.” CP 1229.

Following denial of his motions for reconsideration, CP 1249-54, and discretionary review, CP 1301-02, Mr. Simonetta dismissed his remaining claims and, on July 22, 2005, filed his Notice of Appeal. CP 1388-89. The only issue before the Court of Appeals was whether Griscom Russell had a duty to warn plaintiff about the risk of asbestos exposure resulting from the anticipated and necessary use of its product.

The Court of Appeals, Division I, reversed Judge Armstrong, holding that “Viad did have a duty to warn once it knew that the asbestos necessarily used with its product posed a health risk to those servicing its equipment.” *Simonetta*, 137 Wn. App. at 19. Viad filed this Petition for Review on April 23, 2007.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. Standard for Discretionary Review.

Viad seeks review under Rules 13.4(b)(1), (b)(2) and (b)(4) of the Washington Rules of Appellate Procedure which provide:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; . . . or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Under this Court's rule, review is appropriate *only* if the Court of Appeals' decision conflicts with a prior decision of this Court or of the Court of Appeals, or if it raises an issue of substantial public interest warranting review by this Court. Viad does not meet either standard.

2. The Court of Appeals' Decision Does Not Conflict With Prior Washington Authority.

a. The Court of Appeals Applied Existing Principles of Washington Law.

The Court of Appeals applied existing principles of Washington law to hold that, prior to enactment of the WPLA,² a product manufacturer had a duty to warn of hazards inherent in the use of its product where it did not supply the injury-causing product used in conjunction with its own product, but knew that it would be used. As shown below, not only does the Court of Appeals' decision not conflict with any Washington appellate case, but it is a "logical extension" of the controlling Washington cases.

² Because Mr. Simonetta's exposure to the asbestos insulating Viad's product occurred prior to enactment of WPLA in 1981, his claims are governed by Washington common law negligence and strict product liability law in effect prior to WPLA. *See Simonetta*, 137 Wn. App. at 20; Petition at 2 n. 2. Thus, the Court of Appeals' decision does not and cannot conflict with the large body of post-WPLA case law that now governs all non-asbestos product liability claims in Washington on these issues.

As the Court of Appeals stated, “[w]hile this duty has not traditionally applied to products manufactured by another, this present case represents a set of facts that compels another *logical extension* of the common law.” *Simonetta*, 137 Wn. App. at 25 (emphasis added).

The Court of Appeals’ decision is consistent with and flows naturally from the long line of Washington cases holding that “where a product is faultlessly designed, it may be considered unreasonably unsafe if it is placed in the hands of the ultimate consumer unaccompanied by adequate warning of dangers necessarily involved *in its use*.” *Terhune v. A. H. Robins Co.*, 90 Wn.2d 9, 12, 577 P.2d 975 (1978) (emphasis added). *Accord, Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 478-79, 573 P.2d 785 (1978); *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 155, 570 P.2d 438 (1977); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wn. App. 379, 550 P.2d 71 (1976).

In *Teagle*, applying a strict liability analysis under § 402A of the Restatement (Second) of Torts (“Restatement”), this Court recognized a defendant manufacturer’s duty to warn of the dangers of using, in conjunction with the defendant’s product, *another* product that the defendant did not sell, supply or recommend:

[A]ppellant knew that Viton O-rings were incompatible with ammonia, yet it did nothing more than recommend the use of Buna O-rings. It did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, *by itself*, would render the flowrator unsafe.

Teagle, 89 Wn.2d at 156 (emphasis added).³ The defendant in *Teagle* did not manufacture the Viton O-rings; it did not sell or supply the Viton O-rings; it even recommended use of a different brand of O-rings, yet this Court held that the defendant's failure to warn of the risk of using another manufacturer's O-rings rendered the defendant's product unsafe. The Court of Appeals simply applied the principles set forth in *Teagle* to the facts of this case.

The Court of Appeals' decision is thus a consistent application of existing, pre-WPLA Washington law holding a manufacturer strictly liable for a faultlessly manufactured product "when placed in the hands of a user without giving adequate warnings or instructions concerning the safe manner in which to use it." *Haysom*, 89 Wn.2d at 479 (quoting *Haugen*, 15 Wn. App. at 388). See *Simonetta*, 137 Wn. App. at 25-31 (discussing *Teagle* and § 402A and finding duty to warn under existing Washington strict liability law).⁴

³ The agent of injury in *Teagle* was anhydrous ammonia, which like the asbestos in this case, was not manufactured or supplied by defendant. 89 Wn.2d at 151. As in this case, use of the product at issue in *Teagle* could result in exposure to a hazardous substance in the absence of safety warnings.

⁴ The Court of Appeals' decision is also consistent with decisions in other jurisdictions that have dealt with the same factual situation. See, e.g., *Berkowitz v. A.C. and S., Inc.*, 288 A.D.2d 148, 149, 733 N.Y.S.2d 410 (N.Y. App. 2001) (holding that where it was "at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [defendant] knew would be made out of asbestos" that it did not "necessarily appear that [defendant] had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps"); *Chicano v. General Elec. Co.*, 2004 WL 2250990, *7-*8 (E.D. Pa. 2004) (holding that there was "at least a genuine issue of material fact as to whether GE had a duty to warn of the dangers of the asbestos-containing material that was used to insulate its turbines" even though plaintiff's cancer "allegedly was caused by the asbestos-

Similarly, under common law negligence, the Court of Appeals' decision is consistent with the long line of Washington cases decided prior to the enactment of WPLA holding that "[a] manufacturer can also be found negligent for failure to give adequate warning of the hazards *involved in the use* of the product which are known, or in the exercise of reasonable care should have been known, to the manufacturer." *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn. App. 407, 412, 591 P.2d 791 (1979) (emphasis added; citing Restatement § 388). *Accord, Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 827, 435 P.2d 626 (1967) ("[A] manufacturer or seller of a product which, to his actual or constructive knowledge, *involves* danger to users has a duty to give warning of such danger") (emphasis added). Indeed, there is a continuing duty to warn of a product's "*dangerous aspects*" of which the manufacturer later becomes (or should have become) aware: "The duty to warn potential users exists even though such *dangerous aspect* was not known or foreseeable when the product was initially marketed after the product. *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 477, 804 P.2d 659 (emphasis added), *rev. denied*, 117 Wn.2d 1006, 815 P.2d 265 (1991). Thus, the Court of Appeals' decision is also consistent with the existing, pre-WPLA Washington law following Restatement § 388 and requiring a manufacturer to warn users of dangers involved in the use of the product

containing insulation, which was manufactured by an entirely different company and assembled into completed products by the Navy").

that are known or reasonably should have been known to the manufacturer. *See Simonetta*, 137 Wn. App. at 21-25 (discussing *Novak, Callahan* and § 388 and finding duty to warn under existing Washington negligence law).

As such, the Court of Appeals' decision is fully consistent with, and not contrary to, the existing, pre-WPLA Washington law as set forth in prior Washington appellate decisions. As discussed below, Viad simply disagrees with the Court of Appeals' conclusion that its holding is a "logical extension" of existing Washington law, but that disagreement does not create the conflict in Washington appellate decisions necessary for this Court to accept review.

b. No Washington Case Conflicts with the Court of Appeals' Holding that Where Use of the Product Entailed Exposure to a Hazardous Substance, the Manufacturer Had a Strict Liability Duty to Warn About the Risks of Such Exposure.

Viad argues that under prior Washington law, it cannot be strictly liable under Restatement § 402A for failing to warn of the hazards of exposure to the asbestos insulating its evaporator because it did not supply the asbestos that caused Mr. Simonetta's lung cancer. As discussed below, none of the cases it cites even address the duty to warn question answered by the Court of Appeals in this case.

Viad cites *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987), for the proposition that, in asbestos cases, a plaintiff must identify the particular manufacturer of the product that caused his injury.

Petition at 6. *Lockwood*, however, simply states the *general* rule in product liability actions and notes that asbestos cases are an *exception* to that rule because a plaintiff need not “personally identify the manufacturer of the asbestos products to which he was exposed” but instead may rely on evidence identifying “manufacturers of asbestos products which were present at his workplace.” *Lockwood*, 109 Wn.2d at 246-47.

More importantly, as the Court of Appeals observed, the issue in *Lockwood* was plaintiff’s ability to establish *causation* by identifying the manufacturer of the allegedly defective product.⁵ *Simonetta*, 137 Wn. App. at 27. Here, in contrast, the identity of the manufacturer is known, and the only question is whether the manufacturer had a *duty to warn*, which, in turn, depends on whether there were “any dangerous propensities . . . inherent in the [Griscom Russell evaporator] *or its use*.” *Little v. PPG Industries, Inc.*, 92 Wn.2d 118, 124 n.2, 594 P.2d 911 (1979) (emphasis added). Because proper use of defendant’s evaporator necessarily involved use of asbestos insulation and resulted in defendant’s

⁵ Viad similarly cites *Nigro v. Coca-Cola Bottling, Inc.*, 49 Wn.2d 625, 305 P.2d 426 (1957), as standing for the proposition that a plaintiff must establish that defendant sold the product alleged to be dangerous. Petition at 7. In *Nigro*, there was no dispute that plaintiff had been injured by consuming the contents of a particular bottle of Coke; the problem there was that plaintiff “offered no evidence that the bottle of Coca-Cola was supplied by the defendant” rather than by another Coca-Cola bottling company. *Nigro*, 49 Wn.2d at 626. The Court of Appeals’ decision does not conflict with *Nigro* because it is not disputed that Griscom Russell sold the evaporator. *Nigro* did not address the issue here—whether a product seller may have a duty to warn of hazards inherent in the use of what is indisputably its product where it does not supply a dangerous substance used in conjunction with the product.

exposure to respirable asbestos, the evaporator itself was unreasonably dangerous in the absence of adequate warnings.

Strict liability under § 402A prior to WPLA required proof that the defendant supplied a defective product. In a failure-to-warn case, a product need not have a physical defect to be defective “because in the failure-to-warn case, the defect which makes the product ‘unreasonably dangerous’ . . . is in the absence of adequate warnings concerning the product's use, rather than any physical defect in the product itself.” *Little v. PPG Industries, Inc.*, 19 Wn. App. 812, 822, 579 P.2d 940 (1978), *modified on other grounds*, 92 Wn.2d 118, 594 P.2d 911 (1979). The allegedly dangerous product in this case is the evaporator sold without adequate warnings. There is no question that Griscom Russell supplied this product. Viad’s cases are thus inapposite and do not conflict with the Court of Appeals’ decision.

In sum, the Court of Appeals found that because defendant’s evaporator “had to be encapsulated in insulation for use,” *Simonetta*, 137 Wn. App. at 26, and because the asbestos insulation would necessarily be disturbed “during ordinary use and necessary maintenance on the units,” *id.*, exposing plaintiff to a known danger, defendant had a duty to warn about the danger of asbestos exposure inherent in the use of its product. This decision is an application of existing Washington law and does not conflict with it.

c. **No Washington Case Holds that the “Substantial Change” Defense Applies to an Associated Product that Was Essential to Proper Operation of a Defendant’s Product.**

Viad next argues that the Court of Appeals’ decision conflicts with Washington appellate decisions recognizing a “substantial change” defense to strict liability because Griscom Russell “delivered a safe evaporator containing no insulation.” Petition at 12. Under § 402A(b), however, strict liability extends to a product that “*is expected to* and does reach the *user* or consumer without substantial change in the condition in which it is sold.” *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 530, 452 P.2d 729 (1969) (quoting § 402A(1)(b); emphasis added). The “substantial change” defense is unavailable here, because Viad’s evaporator *was not* expected to reach the user without the addition of asbestos insulation. To the contrary, it is undisputed for purposes of this appeal that insulation was necessary for the proper operation of the evaporator and that defendant knew that its evaporator *would* be insulated with asbestos. *Simonetta*, 137 Wn. App. at 28 (“[T]he Navy did not modify the evaporator except to insulate it as expected by Griscom Russell.”); *see also* CP 1229 (trial court’s finding that defendant “knew or reasonably should have known that its product would be insulated with asbestos containing material”). Where an alteration is foreseeable to the manufacturer, it is not a “substantial change” under the plain language of § 402A(b). As one commentator explained:

A duty to warn may arise if the manufacturer or product supplier can reasonably anticipate that a product will change and become unreasonably dangerous through regular use This relates to the obligation of the product supplier to know and to reasonably anticipate the use and environment of use of a product. A kindred concept concerns the supplier's duty to warn of dangers resulting from the removal and replacement of a component part during maintenance or servicing of the product.

Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521, 584 (1982).

Thus, in *Bich v. General Electric Co.*, 27 Wn. App. 25, 29, 614 P.2d 1323 (1980), the defendant claimed that substitution of Westinghouse fuses for its own fuses amounted to a substantial change under § 402A(b). The *Bich* court approved jury instructions stating that “a manufacturer is not liable if the product is *mishandled* in a manner *unforeseeable* to the manufacturer” and that “a seller is not liable if the product is delivered in a safe condition but undergoes subsequent changes *not reasonably foreseeable* by the manufacturer.” *Id.* at 30. Because the application of asbestos insulation to Viad's evaporator was not simply foreseeable but, as Judge Armstrong found, expected, the “substantial change” defense is clearly inapplicable here. *See* CP 1229 (finding that defendant “knew or reasonably should have known that its product would be insulated with asbestos-containing material”); *see also Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 28, 724 P.2d 839 (1986) (no substantial modification where plaintiff “added the conveyor belt, motor and supporting braces” because there was “evidence these parts had to be added to construct any

conveyor.”); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 530 (Iowa 1999) (holding that “a manufacturer will remain liable for an altered product if it is reasonably foreseeable that the alteration would be made and the alteration does not *unforeseeably* render the product unsafe”) (emphasis added); *Cooley v. Quick Supply Co.*, 221 N.W.2d 763, 770-71 (Iowa 1974) (rejecting defense that dynamite safety fuse was not itself dangerous; potential danger and duty to warn must be judged in context of actual use and “not as though the fuse was something to be sold and used by itself); *Dunson v. S.A. Allen, Inc.*, 355 So.2d 77, 79 (Miss. 1978) (holding that where a “product is manufactured for the purpose of being used in conjunction with another product, which when combined proves to be unsafe for the purpose for which it was intended, the manufacturer of the first product can be found liable”).

Because insulation of the evaporator was necessary and expected, the “substantial alteration” defense to strict liability, as defendants surely are aware, has no application here, and the Court of Appeals’ decision does not conflict with any Washington case on the subject.⁶

⁶ In *Chicano*, 2004 WL 2250990 at *10, the court rejected the defendant’s “substantial change” argument by concluding that the defect – the absence of an adequate warning – existed at the time the product was shipped from the manufacturer’s plant.

d. No Washington Case Holds that a Manufacturer Does Not Have a Duty Under Common Law Negligence Principles To Warn of Exposure to a Hazardous Substance that the Manufacturer Knew Would Result From the Normal Use of Its Product.

Viad also challenges the Court of Appeals' negligence ruling, arguing that because it was not a manufacturer of the asbestos that insulated its product, the Court of Appeals' decision conflicts with Washington cases that relate to the manufacturer's "duty to [warn about] dangerous aspects of its product." Petition at 14 (citing *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 175, 922 P.2d 59 (1996), and *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 804 P.2d 659, *rev. denied*, 117 Wn.2d 1006, 815 P.2d 265 (1991)). These cases hold that a manufacturer has a duty to test and inspect its products and to keep abreast of scientific knowledge and research relating to its products. But neither case addresses whether, let alone holds that, a manufacturer has no duty to warn about a dangerous product that it did not manufacture but that is necessarily and foreseeably used in conjunction with its own manufactured product.

The issue in *Young* was whether, in a negligence action, establishment of a duty depends on the conduct of the manufacturer or the expectations of the consumer. *See Young*, 130 Wn.2d at 178 (holding that under negligence law, proper focus is on the manufacturer's knowledge and conduct). In *Koker*, the issue was whether a manufacturer has a duty to test and keep up with current research. *See Koker*, 60 Wn. App. at 476-

79 (holding that a manufacturer does have such a duty). The Court of Appeals' decision does not conflict with these decisions because neither of these decisions comes close to addressing the question the Court of Appeals answered in this case.

No Washington case holds that the manufacturer of a product used in conjunction with another product is absolved of the duty to warn of the risks arising from the predictable and expected use of its product with another product. Rather, Washington applies Restatement § 388, under which “a duty to warn arises when a supplier ‘knows or has reason to know that the [product] is or is likely to be dangerous for the use for which it is supplied.’” *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 204, 704 P.2d 584 (1985) (quoting § 388(a)); *Novak*, 22 Wn. App. at 412 (holding that a manufacturer can be found negligent for failing to give adequate warnings involved in use of the product). Under § 388, “[t]he manufacturer's knowledge of its product and the foreseeability of the dangers latent in that product *or in its intended and potential uses* is the relevant inquiry in order to determine the reasonableness of the manufacturer's conduct in failing to give, or in giving, the warning that it did.” *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 339, 772 P.2d 826 (1986), *aff'd*, 109 Wn.2d 235, 744 P.2d 605 (1987). Defendant knew that its product's intended use involved the necessary use of asbestos insulation. Thus, the Court of Appeals' holding that Viad had a duty to warn of the risks inherent in the intended and foreseeable use of its

product is consistent with § 388 and Washington appellate decisions interpreting it.

3. The Petition Does Not Involve Issues of Substantial Public Interest.

Finally, Viad contends that its Petition meets the “substantial public interest” prong of RAP 13.4(b)(4) because (1) Viad has other cases pending that raise similar issues; (2) other manufacturers have decisions pending that raise similar issues; (3) the decision “creates new theories of liability” and may apply to other products; and (4) there are “several subsidiary issues pertaining to the scope of liability under the rule adopted by Division 1 that warrant consideration.”⁷ Petition at 14-16. None of these arguments demonstrates an issue of substantial public interest.

First, there is no substantial public interest supporting review of the Court of Appeals’ decision because the applicability of decision is strictly limited to cases governed by the law in effect prior to the enactment of WPLA in 1981. *See Simonetta*, 137 Wn. App. at 20 (citing *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997)). In order for the decision to apply to another case, the injurious exposure at issue must have occurred prior to 1981, *id.*, and yet the case must also have been capable of being brought (or be capable of

⁷ There may be a host of potential issues—as set forth in the Petition at 16-20—that will arise later in this case or in later cases, but they are not the subject of this Petition and thus add nothing to it. Moreover, none of those issues is a matter of substantial public interest as discussed below.

being brought in the future) years later under the applicable statute of limitations. Thus, the Court of Appeals' decision applies to a very limited and ever-diminishing subset of product liability cases involving primarily, if not exclusively, asbestos exposure, and does not involve broader issues of substantial public interest.

In addition, in a related context (determining whether a moot case should be decided), this Court has set forth the following criteria for determining whether a matter is one of "substantial public interest":

We may decide to review a case, even though moot, if it involves a matter of "substantial public interest" . . . This analysis comprises three factors: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur."

Philadelphia II v. Gregoire, 128 Wn.2d 707, 712, 911 P.2d 389 (1996) (citations omitted). Application of these factors also demonstrates that this case does not present an issue of substantial public interest. Viad obviously does not meet the first two criteria because this dispute is not public in nature (the parties are private individuals and corporations, and no rights vis-à-vis the government are alleged), and the Court of Appeals' decision provides no guidance to public officers. The issue raised in this Petition is completely unlike the issues raised in cases found to meet the substantial public interest criteria. See, e.g., *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 513, 29 P.3d 1242 (2001) (whether prosecuting attorneys may offer inducements to defense

witnesses not to testify in criminal proceedings); *Philadelphia II*, 144 Wn.2d at 712 (whether Washington Attorney General has discretion to refuse to prepare a ballot title); *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994) (whether domestic violence offenders could be detained in jail without recourse to bail pending first court appearance); *In re Marriage of T*, 68 Wn. App. 329, 336, 842 P.2d 1010 (1993) (determination of due process rights of presumptive father and his child); *State v. Kolocotronis*, 34 Wn. App. 613, 615-16, 663 P.2d 1360 (1983) (whether individual who petitions for final discharge under RCW 10.77.200(3), dealing with criminally insane, may be required to show changed condition to qualify for jury trial on merits), *rev. denied*, 100 Wn.2d 1014 (1983).

The third factor—the likelihood that the issue will recur—should not, standing alone, rise to the level of substantial public interest. Rather, it is more sensibly a disqualifier. In other words, if an issue is unlikely to recur, it makes little sense to waste judicial resources to hear an appeal of a singular case. In the context of RAP 13.4 (b), if an issue recurs it will be more properly reviewable under RAP 13.4(b)(1) or (2) once a conflict between courts has arisen. Given the temporal yardstick limiting the impact of this issue to a small and diminishing group of pre-1981 exposures to toxic substances, the likelihood is that this issue will not recur with frequency and will, in the not-too-distant future, fade away altogether.

Because this case is clearly a private dispute and will provide no guidance to public officers, it simply does not involve a substantial public interest. *Compare State v. Watson*, 155 Wn.2d 574, 577, 122 P.2d 903 (2005) (describing a holding with potential of affecting every sentencing proceeding in Pierce County after November 26, 2001 involving a DOSA sentence as “a prime example of an issue of substantial public interest” under RAP 13.4 (b)(4)). Accordingly, that Viad can point to a handful of pending cases affected by the Court of Appeals’ decision does not make this dispute a matter of substantial public interest.

F. CONCLUSION

Because Viad has failed to satisfy this Court’s criteria for review under RAP 13.4 (b)(1), (b)(2) and (b)(4), this Court should deny Viad’s Petition for Review.

DATED this 23rd day of May, 2007.

Respectfully submitted,

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