

X

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 JUL 30 P 4:40

BY ROUTING SLIP SENT

No. 80076-6

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

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

JOSEPH A. SIMONETTA AND JANET E. SIMONETTA,

Plaintiffs-Respondents,

v.

VIAD CORP.,

Defendant-Petitioner.

FILED
JUL 31 2007
APPELLATE DEPARTMENT
STATE OF WASHINGTON
a
ap

**PLAINTIFFS-RESPONDENTS' ANSWER TO MEMORANDUM
OF *AMICUS CURIAE* INGERSOLL RAND COMPANY IN
SUPPORT OF DEFENDANT-PETITIONER**

Matthew P. Bergman
David S. Frockt
Brian F. Ladenburg
Bergman & Frockt
614 First Avenue, Fourth Floor
Seattle, WA 98104
Telephone (206) 957-9510

John W. Phillips
Matthew Geyman
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
Telephone (206) 382-6163

Counsel for Plaintiffs-Respondents

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
A. The Court Should Disregard Ingersoll Rand’s Brief Because Its Argument Was Not Raised in the Trial Court, the Court of Appeals, or Defendant’s Petition for Review. 1	
B. The Court of Appeals Properly Applied Existing Law, and its Decision Applies to the Parties in this Case.....	4
III. CONCLUSION.....	9

TABLE OF AUTHORITIES

Washington Cases

	<u>Page</u>
Belcher v. Lentz Hardware Co., 13 Wn.2d 523, 125 P.2d 648 (1942).....	4
Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 151 P.3d 1010 (2007)	8
Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 94 P.3d 961 (2004) 8	8
Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984)	4
Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006).....	3
Falk v. Keene Corp., 113 Wn.2d 645, 782 P.2d 974 (1989).....	6
Firth v. Lu, 103 Wn. App. 267, 12 P.3d 618 (2000).....	8
Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 865 P.2d 527 (1993).....	6
Lockwood v. AC & S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987).....	6
Long v. Odell, 60 Wn.2d 151, 372 P.2d 548 (1962).....	3
Lunsford v. Saberhagen Holdings, Inc., ___ Wn. App. ___, 160 P.3d 1089 (2007).....	3, 5, 6, 8
Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 106 P.3d 808 (2005).....	5
Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 591 P.2d 791 (1979).....	9
Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1987)	6, 7
Simonetta v. Viad Corp., 137 Wn. App. 15, 51 P.3d 1019 (2007).....	2
Van Hout v. Celotex Corp., 121 Wn.2d 697, 853 P.2d 908 (1993).....	6
Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 586 P.2d 870 (1978).....	4

Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 50 P.3d 256
(2002)..... 2

State Rules

RAP 2.5(a) 2

Other Authorities

Restatement (Second) of Torts § 402A (1965)..... 4

Restatement of Torts § 388 (1934) 4

I. INTRODUCTION

Ingersoll Rand says this Court should accept review because the Court of Appeals' decision allegedly creates an unknown and unforeseen duty to warn that it applies retroactively for half a century. Ingersoll Rand's argument is a fiction. The decision applies established law to a new set of facts. The Court of Appeals' holding is a proper application of Washington law. The decision does not seek to discern the law in effect a half century ago. It simply applies Washington law to new facts. The decision does not even address retroactivity, and the retroactivity of the *Simonetta* holding was not argued in the trial court, the Court of Appeals, or defendant Viad Corp.'s Petition for Review. Indeed, under Washington law, once the court applied Washington law to the facts of this case, the court had no choice but to apply its decision to the parties in this case. Thus, Ingersoll Rand's argument for this Court to accept review is an improper argument raised for the first time in an *amicus* brief, is based on a fiction concerning what the Court of Appeals did and the issues it addressed, and has no merit.

II. ARGUMENT

A. **The Court Should Disregard Ingersoll Rand's Brief Because Its Argument Was Not Raised in the Trial Court, the Court of Appeals, or Defendant's Petition for Review.**

Ingersoll Rand argues that Supreme Court review is warranted because the Court of Appeals' decision creates a new rule and erroneously

applies it retroactively. Yet the retroactive application of the *Simonetta* holding is not an issue that the parties raised either in the trial court or the Court of Appeals, and defendant Viad Corp. did not even attempt to raise a retroactivity question in its Petition for Review.¹ Accordingly, Ingersoll Rand's argument for granting review is out of order and this Court should disregard it.

It is well established that arguments not made in the trial court are generally not to be considered on appeal. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853-54, 50 P.3d 256 (2002) (refusing to consider federal preemption argument not raised below); RAP 2.5(a). Specified errors may be raised for the first time on appeal by *a party*, including (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) obvious error affecting a constitutional right. *Id.* In addition, *a party* may present a new ground for affirming the trial court if the record has been sufficiently developed, and *a party* may raise a claim of error raised in the trial court by another party on the same side of the case. *Id.* But none of these exceptions in RAP 2.5(a) permits *an amicus* to raise the issue of retroactivity for the first time in support of a party's Petition for Review. Indeed, even where a party (as opposed to an *amicus*) attempted to raise a retroactivity issue after failing to raise it in the trial court, the Court of Appeals recently rejected such a belated

¹ See *Simonetta v. Viad Corp.*, 137 Wn. App. 15, 29 n. 3, 151 P.3d 1019 (2007) (“The parties have not asked us to address whether any temporal limitations may apply to a retroactive application of the duty to warn.”).

attempt. See *Lunsford v. Saberhagen Holdings, Inc.*, ___ Wn. App. ___, ___, 160 P.3d 1089, 1090 (2007) (*Lunsford II*) (noting that “because Saberhagen had not presented its retroactivity argument to the trial court below, this court declined to address the issue, leaving it to Saberhagen to raise on remand”).

Here, not only was the issue of retroactivity not raised in the Court of Appeals or the trial court, it was not even raised in defendant’s Petition for Review. For this reason as well, Ingersoll Rand’s retroactivity arguments should not be considered. As this Court observed many years ago, “[i]t is . . . well established that appellate courts will not enter into the discussions of points raised only by *amici curiae*.” *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). The rationale for this established policy is that “the case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by ‘friends of the court.’” *Id.* (citing *Lorentzen v. Deere Mfg. Co.*, 66 N.W.2d 499, 503 (Iowa 1954)); see also *Cummins v. Lewis County*, 156 Wn.2d 844, 851, 133 P.3d 458 (2006) (“[*Amicus*] is not a party to this case, and its interest in the outcome of it is merely tangential. Under case law from this court, we address only claims made by a petitioner, and not those made solely by *amici*.”); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984) (“This argument is raised only by *amici*, therefore we need not consider it.”); *Washington State Bar Ass’n v. Great W. Union Fed. Sav. & Loan Ass’n*, 91 Wn.2d 48, 60, 586 P.2d 870 (1978) (holding that “we ordinarily do not consider arguments raised only by *amicus curiae*”).

In short, Ingersoll Rand's retroactivity argument has no place here and provides no basis for granting the Petition for Review.

B. The Court of Appeals Properly Applied Existing Law, and its Decision Applies to the Parties in this Case.

In their Answer to Defendant's Petition for Review, plaintiffs demonstrated that the Court of Appeals' decision merely applies long-established Washington law to a new set of facts. See Opposition to Viad Corp.'s Petition for Review at 4-16. With respect to plaintiffs' negligence claim, the liability of the manufacturer of a product who "fails to exercise reasonable care to inform [foreseeable users] of its dangerous conditions or of the facts which make it likely to be so" was derived from then-existing case law in 1934, Restatement of Torts § 388 (1934), and first cited by the Washington Supreme Court no later than 1942. *Belcher v. Lentz Hardware Co.*, 13 Wn.2d 523, 532, 125 P.2d 648 (1942). Strict liability for failure to warn under Section 402A of the Restatement (Second) of Torts is more recent (1965), but, as described below, it has consistently been applied by Washington courts to cases involving asbestos exposures in the 1940s and 1950s.

Not only is a manufacturer's duty to warn about risks inhering in the use of its product long-standing, but the recent *Lunsford* decisions and prior Washington law make clear that retroactivity concerns are irrelevant to this case. In *Lunsford I*, the Court of Appeals held, for the first time, that asbestos product manufacturers may be held strictly liable for injuries caused to a child exposed to asbestos brought home from work by a

parent. *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 793, 106 P.3d 808 (2005) (*Lunsford I*). In *Lunsford II*, the Court of Appeals held that the *Lunsford I* holding applied “retroactively” to an exposure that occurred in 1958. *Lunsford II*, 160 P.3d at 1095-96. The *Lunsford II* court noted that although strict liability under Section 402A was not adopted in Washington until 1969, *Lunsford II*, 160 P.3d at 1092 (citing *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 531-32, 452 P.2d 729 (1969)), it was applied to the defendants in that seminal case and thereafter has been applied consistently in asbestos cases in which the exposure occurred in the 1940s and 1950s. See *Lunsford II*, 160 P.3d at 1094 (citing *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997); *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 853 P.2d 908 (1993); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993); *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989); *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987)).

Once a decision has been applied by a Washington appellate court to the parties in that case, the rule announced by that decision applies “retroactively” to all civil causes of action, including those in which the events at issue occurred prior to the new decision. *Lunsford II*, 160 P.3d at 1094 (citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 80, 830 P.2d 318 (1992)). Thus, the *Lunsford II* court held that Section 402A of the Restatement, as adopted in 1969, applied to determine whether defendants were liable to plaintiffs for events occurring in 1958. And the “new rule” derived in *Lunsford I*—that a household member of a worker who carries

asbestos home from his job may be a “user or consumer” of asbestos for strict product liability purposes—will apply not only in *Lunsford* but in all cases brought henceforth, regardless of when the exposure occurred. *Id.*

Ingersoll Rand’s complaint that defendant will be unfairly held to standards it did not foresee has no legal merit. Standards set by courts in civil suits apply to future litigants as a matter of course and without regard to defendants’ particular circumstances:

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.

Robinson, 119 Wn.2d at 80 (quoting *James B. Beam Distilling v. Georgia*, 501 U.S. 529, 543 (1991)). That Washington had not recognized a cause of action for strict product liability in the 1940s does not prevent such a cause of action in a case brought today based on events occurring sixty years ago. *Robinson*, 119 Wn.2d at 77 (holding that “once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements”). Thus, there can be no doubt that the Court of Appeals here was correct to apply current Washington common law strict liability and negligence principles to this product liability case.

Once it is clear that courts do not search out and apply 1940s law

to cases brought today, the question is whether there is some other basis for not applying the rule of this case to the parties in this case. The answer is clearly no:

[I]t is unusual for a court to announce a decisional rule for future transactions without applying it in the case at hand. The rare instances of announcing a new rule prospectively occur when a court is overruling a prior decision, and then only where it is likely that particular persons had settled their affairs in justifiable reliance upon the overruled decision. The case at hand is not such a case. We are not overruling a prior decision; and our decision, while it resolves an issue of first impression in Washington, is predictably consistent with decisions in other jurisdictions.

Firth v. Lu, 103 Wn. App. 267, 275-76, 12 P.3d 618 (2000); *see also*, *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 613, 94 P.3d 961 (2004) (noting that “an opinion announcing a new rule follows the normal rule of retroactive application—it applies to the litigants before the court”). Far from overruling a prior decision, the Court of Appeals in this case simply applied existing law to new facts and produced a result consistent with prior law. Because the Court of Appeals applied existing rules to new facts, applying its holding solely prospectively was not even pertinent and thus was not addressed by the parties. *Lunsford II*, 160 P.3d at 1094.

A persistent mischaracterization among defendants and *amici* in this case and its companion case, *Braaten v. Saberhagen Holdings*, 137 Wn. App. 32, 151 P.3d 1010 (2007), is the claim that the Court of Appeals required manufacturers to “warn of the dangers of other manufacturers’ products.” Ingersoll Rand Brief at 4. In fact, the Court of Appeals held

first that defendant had a duty of reasonable care to warn of known hazards involved in the use of its own product, and second, that the danger of asbestos exposure was “inherent” in the use of defendant’s evaporators because they were “designed so that use require[d] the invasion of asbestos insulation.” *Simonetta*, 137 Wn. App. at 22. There are clearly *two* defective products in this case—asbestos, because it is inherently dangerous when airborne, and defendant’s evaporator, because, by design and with defendant’s knowledge, the use of that product resulted in the known or foreseeable release of airborne asbestos and defendant failed to warn users of this risk.

Ingersoll Rand’s insistence that defendant’s products were not defective in any way because the Navy installed the asbestos insulation, Ingersoll Rand Brief at 8, ignores the manufacturer’s duty to warn of dangers inhering *in the normal use* of its products.² *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn. App. 407, 412, 591 P.2d 791 (1979) (holding that faultless product may be defective if it lacks adequate warnings regarding manner in which to safely use it).

Similarly, Ingersoll Rand’s contention that “asbestos insulation presents the same hazards wherever it happens to be,” Ingersoll Rand Brief at 9, is plainly false. It is only airborne asbestos that presents a

² Ingersoll Rand asserts without explanation that the only “pertinent danger necessarily involved in the user of the...equipment ... was that [it] could become hot...” Ingersoll Rand Brief at 8. This might be true if the equipment never required removal of the asbestos insulation in order to be serviced. However, use of the equipment generally requires maintenance and repair, and defendant has not asserted otherwise in this case, nor could it given the context in which plaintiff’s exposure occurred.

threat, and it was impossible to service defendant's evaporator without releasing asbestos into the air. *Simonetta*, 137 Wn. App. at 23 ("use of asbestos to insulate the evaporators would result in exposure to respirable asbestos during maintenance").

III. CONCLUSION

Ingersoll Rand's *amicus* brief improperly raises an issue—retroactivity—that is not properly before this Court and provides no basis for review. Moreover, as a substantive matter, there is no merit to Ingersoll Rand's argument that this case should not be decided under current law or should not be binding on the parties. Thus, Ingersoll Rand's brief provides no basis for this Court to grant review and should be disregarded.

DATED this 30th day of July, 2007.

Respectfully submitted,

BERGMAN & FROCKT

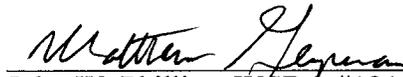


Matthew P. Bergman, WSBA #20894

David S. Frockt, WSBA #28568

Brian F. Ladenburg, WSBA #29539

PHILLIPS LAW GROUP, PLLC



John W. Phillips, WSBA #12185

Matthew Geyman, WSBA #17544

Counsel for Plaintiffs-Respondents