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NO. 56614-8-I

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

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Appellants,

v.

VIAD CORP.,

Respondent.

REPLY BRIEF OF APPELLANTS

Matthew P. Bergman
David S. Frockt
Ari Y. Brown
BERGMAN & FROCKT
705 Second Avenue, Suite 1601
Seattle, Washington 98104
Tel. (206) 957-9510
Counsel for Appellants

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Reply	3
A. Plaintiffs Argument is Consistent with Established Tort Principals	3
B. Medical Causation Is Not Before This Court	5
C. Reversal of the Trial Court Will Not Divest	8
Defendants of Meritorious Defenses	
D. A Jury Could Reasonably Conclude That The	9
Evaporator Was Unreasonably Dangerous Because No Warnings Were Provided	
E. Griscom Russell Owed Simonetta A Duty Of	14
Reasonable Care	
F. Griscom Russell Authorities Are Distinguishable	17
III. Conclusion	24

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Anderson v. Nissei ASB Mach. Co., Ltd.</u> 197 Ariz. 168, 173, 3 P.3d 1088, 1093 (Ariz.App. Div. 1,1999)	20
<u>Barrett v. Waco Internatl., Inc.</u> 123 Ohio App.3d 1, 8, 702 N.E.2d 1216, 1220 (Ohio App. 8 Dist.,1997)	21
<u>Bich v. General Electric</u> , 27 Wash.App. at 31-32	19, 20, 24
<u>Bourgeois v. Garrard Chevrolet, Inc.</u> 811 So.2d 962, 965, (La.App. 4 Cir.,2002)	20, 21
<u>Brown v. U.S. Stove Co.</u> 98 N.J. 155, 165-166, 484 A.2d 1234, 1239 (N.J.,1984)	21
<u>Cacciola v. Selco Balers, Inc.</u> 127 F.Supp.2d 175, 187 (E.D.N.Y.,2001)	21
<u>Codd v. Stevens Pass, Inc.</u> , 45 Wash.App. 393, 725 P.2d 1008 (1986)	16
<u>Davis v. Pak-Mor Mfg. Co.</u> 284 Ill.App.3d 214,220, 672 N.E.2d 771,775, 219 Ill.Dec.918, 922 (Ill.App. 1 Dist., 1996)	20
<u>Gibson v. Chicago, Milwaukee & Puget Sound Ry, Co</u> , 61, Wash 639, 112 P. 919 (1911)	15
<u>Hannah v. Gregg, Bland & Berry, Inc.</u> 840 So.2d 839, 855 (Ala., 2002)	20
<u>Haugen v. Minn.Mining & Manufacturing Co.</u> , 15 Wash.App. 379, 550 P.2d 771 (1976)	10
<u>Howard v. TMW Enterprises, Inc.</u> 32 F.Supp.2d 1244, 1252 (D.Kan.,1998)	20
<u>Leaf v. Goodyear Tire & Rubber Co.</u> 590 N.W.2d 525,	20

TABLE OF AUTHORITIES

	<u>Page</u>
529 - 530 (Iowa,1999)	
<u>Lindstrom v. A-C Product Liability Trust</u> , 424 F.3d 488 (6 th Cir. 2005)	21, 22, 23, 24
<u>Maltese v. Westinghouse Electric Corp.</u> , 678 N.E.2d 467, 89 N.Y.2d 955 (NY Ct.App. 1997)	5
<u>Maussner v. Atlantic City Country Club</u> , 691 A 2d 826 (N.J. Super 1997)	16
<u>Minert v. Harsco Corp.</u> , 26 Wash.App. 867,874-75, 614 P.2d 686 (1980)	24
<u>Mohr v. St. Paul Fire & Marine Ins. Co</u> , 674 NW 2d 673 (Wis.App. 2003)	11
<u>Molino v. B.F. Goodrich</u> , 617 A.2d 1235, 1238 (NJ Sup.Ct.App. 1992) <i>cert.denied</i> 634 A.2d 528 (N.J. 1993)	11, 12, 13
<u>Nigro v. Coca Cola Bottling, Inc</u> , 49 Wash.2d 625, 305 P.2d 426 (1957).	14
<u>Novak v. Piggly Wiggly Puget Sound Co.</u> , 22 Wash.App. 407, 412, 591 P.2d 791 (1979)	10
<u>Owen v. Burlington Northern Santa Fe Railroad</u> , 114 Wash.App. 227, 56 P.3d. 1006 (2002)	15, 16
<u>Potter v. Chicago Pneumatic Tool Co.</u> 241 Conn. 199, 236, 694 A.2d 1319, 1341 (Conn.,1997)	20
<u>Powell v. Standard Brands Paint Co.</u> , 166 Cal.App.3d 357 (Cal.App. 1985)	18
<u>Raybell v. State</u> , 6 Wa App 795, 496 P.2d 559 (1972)	15
<u>Rindlisbaker v. Wilson</u> , 519 P.2d 421, 428 (Idaho 1974)	11
<u>Sepulveda-Esquivel v. Central Machine Works, Inc.</u> , 120	17, 18

TABLE OF AUTHORITIES

	<u>Page</u>
Wash.App. 12, 84 P.3d 895 (2004)	
<u>Shouey ex rel. Litz v. Duck Head Apparel Co., Inc.</u> 49 F.Supp.2d 413, 422 (M.D.Pa.,1999)	21
<u>Small v. Pioneer Machinery, Inc.</u> 329 S.C. 448, 466, 494 S.E.2d 835, 844 (S.C.App.,1997)	21
<u>Smith v. Lead Indus. Assn., No. 2368.</u> (Md.Ct.Spec.App. Sept.Term)	2
<u>Smock Materials Handling Co., Inc. v. Kerr</u> 719 N.E.2d 396, 404 (Ind.App., 1999)	20
<u>Tanguma v. Yakima County</u> , 18 Wash.App. 555, 569 P.2d 1255 (1977)	15
<u>Theer v. Phillip Carey Co.</u> , 628 A.2d 724 (NJ 1993)	8, 9
<u>Tuttle v. Sudenga Industries, Inc.</u> 125 Idaho 145, 148-149, 868 P.2d 473, 476 - 477 (1994)	20
<u>Vanskike v. ACF Industries, Inc.</u> 665 F.2d 188, 195 (8 th Cir. 1981)	21
<u>Weakley v. Burnham Corporation et. al.</u> , 871 A.2d 1167, 1178 (D.C. Ct.App. 2005)	5
<u>Webb v. Rodgers Machinery Mfg. Co.</u> 750 F.2d 368, 372 (C.A.Tex.,1985)	21
<u>Welch Sand & Gravel, Inc. v. O & K Trojan, Inc.</u> (1995), 107 Ohio App.3d 218, 224, 668 N.E.2d 529, 533.	21

INTRODUCTION

Griscom Russell urges this Court to hold as *matter of law* that a product manufacturer whose product requires a component in order to function as intended can never have a duty to warn of dangers involved in using the product with the necessary component. Griscom Russell claims that such a manufacturer is always entitled to dismissal under either negligence or strict liability principles because there is no legal duty of reasonable care encompassing a duty to warn. This is an extreme position that warps common law tort principles.

While it is true that Washington courts have never addressed a case with the precise facts in the case at bar,¹ Washington Courts have consistently emphasized that under common law negligence, the issue is the *conduct* of a party against whom the claim is asserted and not merely the *status* of the party. Similarly, Washington law is clear that a foreseeable modification triggers a duty to warn under strict liability. Moreover, the numerous out of state cases that Griscom Russell cites are distinguishable because they primarily address the question of proximate

¹ Griscom Russell repeatedly conceded in the arguments below that this was a question of first impression for the Courts in this state. *See e.g.* CP 49.

cause, not the threshold question of legal duty on which Judge Armstrong based her decision.²

Joseph Simonetta was exposed to asbestos while performing regular and anticipated maintenance on a Griscom Russell evaporator. Appellant submitted undisputed expert testimony that this exposure was at levels sufficient to cause or contribute to the potential for developing asbestos related diseases. Respondent's own expert admitted that Griscom Russell evaporators, due to their high temperature and steam power, required asbestos insulation to operate as intended and that it was foreseeable to Griscom Russell that its products would be insulated with asbestos. Finally, Mr. Simonetta's testimony reveals that it was not possible to maintain the Griscom Russell products properly without tearing off asbestos insulation.

Despite these undisputed facts, Griscom Russell argues that it owed no legal duty to the intended users of its products to warn of

² Viad denigrates Appellants for several pages in its brief for referring in a short footnote to the analysis of a federal district judge in Chicano, a well reasoned federal court decision (*Brief of Respondent at pp. 32-33*). However, in an astounding display of chutzpah, Griscom Russell cites, just a few pages later, its own unpublished case, Smith v. Lead Indus. Assn., No. 2368. (Md.Ct.Spec.App.Sept.Term) because the extended quote from the case is merely "humorous" and is only being cited in order to "identify the source of the quote." Leaving aside the question of whether the quote is in fact, funny, the citation is clearly designed to lay out another precedent, albeit an unpublished one, upon which Griscom Russell seeks to rely. If the parties are allowed to go down this road then Appellant would be happy to provide the Court of Appeals copies of the numerous trial court decisions from around the country that have decided the duty to warn issue directly opposite to the conclusion reached by the trial court in this case.

foreseeable dangers arising out of the anticipated use of its products. Griscom Russell is asking this Court to lay down an extreme rule of law holding that under no circumstances could a product manufacturer owe a duty of reasonable care to users of its products where the specific harmful agent is manufactured a third party. Under Griscom Russell's interpretation, a manufacturer could deliberately design and manufacture a product that requires hazardous material to operate properly without incurring any legal obligation to warn intended users of foreseeable hazards arising from the anticipated use of that product. So long as the actual instrument of harm is manufactured by someone else, Griscom Russell contends that no legal duty is owed. That is the extreme position and it should not be accepted by this Court.

REPLY

A. Appellant's Argument is Consistent with Established Tort Principles

Griscom Russell initially charges that Appellant's case is merely an attempt by the Plaintiff's bar to find another pocket to recover from for asbestos injuries since other sources of recovery have filed for bankruptcy. Not only is this pejorative attack on motivation beneath the

dignity with which this Court should be deciding this very important question of law, it is irrelevant and, most importantly, inaccurate.³

Equipment manufacturers of all types have been sued in asbestos injury cases for many years. For example, there have been thousands of cases filed against boiler manufacturers by former boiler tenders and other workers who have developed asbestos related cancers after working with and around boilers that insulated internally and externally with asbestos containing products.

These boiler manufacturers have availed themselves of many of the defenses claimed by Griscom Russell in this case i.e. the instrumentality of injury was not the boiler itself but an associated product, such as insulation or refractory cement, to which the individual was actually exposed. However, Plaintiffs have located no authority which holds that boiler manufacturers are relieved of a legal duty to warn workers who might encounter dangerous asbestos materials that they did not manufacture but which were regularly incorporated into and onto the

³ In all of the arguments before Judge Armstrong on this and similar cases, the trial Court has never castigated any party for bringing these arguments before her. Instead the arguments have been hotly contested and argued with a high degree of intellectual discourse and reasoned debate. Judge Armstrong has repeatedly expressed the need for appellate guidance in this area as evidenced, most notably, by her appellate certification of this issue at an earlier stage of this case.

boilers as an integral component and without which these boilers would not operate properly.⁴

B. Medical Causation Is Not Before This Court

Griscom Russell highlights several facts in a not so subtle effort to raise questions with this Court about the overall legitimacy of Appellant's claim. First, Griscom Russell points out that one of Simonetta's doctors concluded that smoking contributed to Simonetta's lung "problems" in an effort imply that the true cause of his lung cancer is not related to asbestos. Medical causation was never challenged by Griscom Russell in the proceedings below. Furthermore, Griscom Russell chooses to ignore the fact that Simonetta was diagnosed by his *own* physicians, prior to initiating this lawsuit, as having "bibasilar pleural plaques...consistent with asbestos related pleural disease". CP 15. These plaques are

⁴See e.g. Weakley v. Burnham Corporation et. al., 871 A.2d 1167 (D.C. Ct.App. 2005), where boiler manufacturer Oakfabco argued "that it could not be held liable to Weakley for exposure to its boilers unless Oakfabco manufactured the asbestos product (rather than the boiler)" to which Weakley had been exposed. 871 A.2d at 1178. The Court rejected this argument holding that Oakfabco misinterpreted one of its prior precedents, and further that it did not agree with trial court decisions, cited by Oakfabco, which had apparently granted boiler manufacturers summary judgment based on the very argument that Griscom Russell makes here. *Id.* at 1178 at Fn. 11.; *See also Maltese v. Westinghouse Electric Corp.*, 678 N.E.2d 467, 89 N.Y.2d 955 (NY Ct.App. 1997) which established that two men suffering from mesothelioma (a rare form of asbestos related cancer) could maintain a cause of action against Westinghouse as a "result of their exposure to...the dust generated by maintenance and repair of asbestos insulated turbines" manufactured by Westinghouse. While this appellate decision found that the evidence in the case did not support a finding of punitive damages against the turbine manufacturer, it did not dismiss the case outright as would occur under Griscom Russell's proposed rule where the instrumentality of harm would have had to be the turbine itself and not the insulation on the turbine.

biological markers for asbestos exposure and are often the basis for medical experts to reach a conclusion that asbestos exposure was a substantial factor in the development of an individual's lung cancer. It was on this basis of these markers that Dr. Hammar concluded that Simonetta's asbestos exposure was a cause of his lung cancer that resulted in the loss of two lobes of his lungs. CP 8.⁵

Griscom Russell also declines to discuss the fact that Appellant submitted an extensive, detailed declaration from Mr. Jerry Lauderdale, an expert industrial hygienist, who reviewed Simonetta's entire deposition testimony, including the parts relating to the Griscom Russell exposure on the *USS Saufley*. He determined that Simonetta's asbestos exposure from work on various pieces of equipment, including specifically Griscom Russell equipment, "would be at levels sufficient to cause or contribute to the potential for developing asbestos related diseases..." CP 867-868. Griscom Russell did not move to strike this declaration, nor did it offer a competing expert declaration.⁶

⁵ Similarly, Appellant did not intentionally imply, anywhere in the record below, or here that Appellant worked on any evaporator other than the one on the *USS Saufley*. However it is also a fact that Simonetta testified that he was responsible for operating this evaporator for about a year while on this particular ship. CP 191.

⁶ Griscom Russell characterizes Simonetta's work on the evaporator as "one isolated occasion". However it offered no expert testimony from which it could be concluded that Simonetta's work on that evaporator did not contribute to the development of his disease nor any evidence that the asbestos exposure from that work was de minimis. The *only* evidence in the record on the significance of this work is that of Mr. Lauderdale's. His

For some inexplicable reason, Griscom Russell also highlights Simonetta's testimony with respect to an asbestos containing gasket that was on the inner flange of the evaporator, noting that Simonetta offered no evidence that the gasket was the original gasket supplied with the evaporator by Griscom Russell or that it had not been replaced by gaskets from another manufacturer during the course of routine maintenance over the years. *Brief Of Respondent at p.5*. Since Griscom Russell raised the gasket exposure in their response, Appellant will reply even though it is not directly at issue in this appeal. The salient point is that Judge Armstrong *denied* Griscom Russell summary judgment on the gasket exposure obviously concluding that there was a legal duty of some sort owed with respect to gaskets, *even if Griscom Russell was likely not the manufacturer of the gasket disturbed by Simonetta* – a point argued vigorously by Griscom Russell below. Even the trial court did not fully accept the extreme position set forth by Griscom Russell in this appeal, namely that there can be no situations where one manufacturer owes a legal duty with respect to the dangerous features of another manufacturer's product.

testimony is undisputed in the record before this Court. The inferences contained within it are entitled to be construed in Appellants favor.

C. Reversal of the Trial Court Will Not Divest Defendants of Meritorious Defenses

Griscom Russell describes Appellant's position in this case as seeking to "impose a limitless duty to warn" on product manufacturers (*Brief of Respondent at p. 16*). This slippery slope argument is often made and seldom accurate. It is not accurate here.

Liability would not be limitless precisely because a trier of fact could always find that the conduct of the manufacturer (by failing to issue a warning) was not a proximate or legal cause of the Plaintiff's injury or that the *conduct* of the manufacturer was otherwise reasonable. Indeed, a Court could still find grounds for dismissing a case on summary judgment if the Plaintiff could not raise an issue of fact any of the other elements of his negligence claim: breach, proximate cause and injury. For example a defendant such as Griscom Russell might still be entitled to summary judgment if it could show that the Simonetta would not have heeded warnings even if they had been given.⁷

⁷ In asbestos failure-to-warn cases, it is presumed that plaintiff would have heeded warning if given, and thus that failure to warn was proximate cause of plaintiff's injuries. However, such presumption is rebuttable by evidence. *Theer v. Phillip Carey Co.*, 628 A.2d 724 (NJ 1993). The Theer Court emphasized that this was not an insurmountable threshold for a defendant to reach.

"We repeat that the burden of proof in that regard is not insurmountable. Evidence needed to effectively overcome the heeding presumption with respect to employers would relate to the adequacy of the warnings that were given, whether they were directed to employers, whether they were calculated to reach and inform employees who would foreseeably be exposed to those products in the workplace, and

Instead, what the lower Court did in this case was inoculate a manufacturer like Griscom Russell, indeed all manufacturers, from liability no matter what the evidence showed due to the overly simple explanation that a product manufacturer never has a duty of reasonable care that encompasses a duty to warn of hazardous materials which it knows or should know will be used in conjunction with its product.

D. A Jury Could Reasonably Conclude That The Evaporator Was Unreasonably Dangerous Because No Warnings Were Provided

Griscom Russell erroneously interprets Appellant's position on how Griscom Russell evaporators were unreasonably dangerous. *See Brief of Respondent at p. 10.* Had the lower court let the case proceed to trial on strict liability, a jury could have found the evaporator unreasonably dangerous for two reasons: (1) due to the extremely high temperature at which it operated, it required, as an integral component or appendage, asbestos insulation; and (2) Griscom Russell failed to provide a warning about that asbestos insulation which, according to their own

whether the employer would have required or allowed employees to take precautionary measures to overcome the risks of exposure to asbestos.”

Id. at 730-731. In plaintiff depositions, asbestos defendants regularly explore the issue of what a Plaintiff would have done with a warning had it been provided. This goes directly to the issue of proximate cause on a duty to warn theory. A defendant could also challenge medical causation.

expert, it knew or had reason to know would be applied to its evaporator when installed on Naval vessels.

Washington Courts have long held that failure to give an adequate warning about the dangerous features of a product can render that product “unreasonably dangerous” under Restatement § 402(a). To this end, Washington courts have indicated that the failure to warn *constitutes a design defect in and of itself*:

Strict liability may be established if a product, though faultlessly manufactured, is unreasonably dangerous when placed in the hands of the ultimate user by a manufacturer *without giving adequate warnings concerning the manner in which to safely use it*. ... In such a case, the *defect in the product is in the inadequacy, or total absence, of the warnings*.

Novak v. Piggly Wiggly Puget Sound Co., 22 Wash.App. 407, 412, 591 P.2d 791 (1979).

In Washington, the failure to warn theory of strict liability was first announced in Haugen v. Minn.Mining & Manufacturing Co., 15 Wash.App. 379, 550 P.2d 771 (1976) which held that a manufacturer may be held strictly liable if a plaintiff establishes that a product is unreasonably dangerous, though faultlessly manufactured, when placed in the hands of a user without giving suitable and adequate warnings or instructions *concerning the safe manner in which to use it*.” Haugen, 15 Wash.App. at 388. (emphasis supplied). Haugen relied on the leading

Idaho case on duty to warn at the time which interpreted the comments to

§ 402A in the following way:

It is clear that a failure to warn may be used as a basis for a strict liability case... Comment H, Restatement Torts 2d, § 402(a), provides that where the defendant *has 'reason to anticipate that danger may result from a particular use' of his product and he fails to give adequate warnings of such a danger, 'a product sold without such warning is in a defective condition...* This rule, however, is limited to situations wherein the danger is not obvious...

Rindlisbaker v. Wilson, 519 P.2d 421, 428 (Idaho 1974) (emphasis supplied).⁸

In Molino v. B.F. Goodrich, 617 A.2d 1235 (NJ Sup.Ct.App. 1992) *cert.denied* 634 A.2d 528 (N.J. 1993), Molino was injured when a tire and rim assembly exploded while he was handling an inflated Goodrich tire that was mounted on a multi-piece rim manufactured by Firestone Tire & Rubber Company (Firestone). Plaintiff sued among others, the manufacturer of the tire (Uniroyal Goodrich Tire Company) and the rim assembly (Firestone).

After Firestone settled, the case went to trial against Uniroyal on a strict products liability failure to warn claim. In granting a directed

⁸ See also Mohr v. St. Paul Fire & Marine Ins. Co., 674 NW 2d 673 (Wis.App. 2003) ("A manufacturer must anticipate the environment that is normal for the use of the product. In other words, the manufacturer has the duty to foresee all reasonable uses and misuses and the resulting foreseeable dangers. The duty to warn arises when the manufacturer has, or should have, knowledge of a dangerous use. An inadequate warning

verdict in favor of Uniroyal, the trial judge stated “*I don't find that there is a need to have the defendant tire company Goodrich warn about a possible defect in the rim furnished by Firestone*”. *Id.* at 1239. Like the trial court in this case, the trial judge in Molino held that Uniroyal simply had no duty to warn about a rim assembly unit which it did not manufacture.

The New Jersey Court of Appeals reversed. Its reasoning translates directly to the analogous facts in this case.

Here, the tire manufactured by Uniroyal contained no warning. Although the rim assembly to which the tire attached was not itself the product of Uniroyal and was never in its possession or control, this particular tire was made to be used with a multi-piece rim assembly...

Here, even though the tire was separate from the rim assembly, the pieces were by design required to be used together. The evidence appears to support plaintiffs' contention that the tire manufactured by Uniroyal was part of the system involved with the multi-piece rim assembly unit. The issue should not have been decided as a matter of law as the court was required to consider the evidence and all legitimate inferences in plaintiffs' favor. ...The jury should have been given the opportunity to consider whether it would accept [Plaintiff Expert]Forney's testimony as credible and reasonable.⁹ If convinced that Uniroyal should

on a product can, by itself, render the design defective. Whether a warning is adequate is generally an issue of fact to be determined by the jury.” (citation omitted)).

⁹ Forney testified that a warning should have been on all parts of the assembly, including the tire. The warning should have, according to Forney's testimony, contained language that the tire be secured or fastened to the truck before inflation, that persons should stand some distance away, that the tire should not be replaced if the rim assembly was broken or corroded, and that only specially-trained persons should mount these tires. Molino, 617 A.2d at 1238.

have foreseen or actually knew of the dangers involved with the rim assemblies used with its product, the jury would then consider Uniroyal's duty to provide an adequate warning of hidden dangers to reasonably foreseeable users, unless the danger was so obvious that such users would know of it.

Id. at 1239-40.

In the instant case, Griscom Russell argues that the defective product is, exclusively, the insulation. However, like the rim assembly in Molino, the defective product in the instant case is not solely the insulation. It is also the evaporator precisely because there was evidence in the record that asbestos insulation was anticipated and necessary for the evaporator to be functional on Navy ships.

Simonetta was not assigned to perform maintenance on the insulation. He was assigned to perform maintenance on the evaporator. But the only way to perform maintenance on the evaporator was to disturb insulation which, the undisputed evidence establishes, was necessary for the evaporator to function as intended. Griscom Russell argues repeatedly that, *as a matter of law*, there was no inherent danger in the evaporator. On the contrary, the danger is inherent in the evaporator precisely because the insulation was integral to the evaporator's proper functioning. The evaporator was not accompanied by any warning to take precautions when

performing maintenance that would inevitably cause exposure to asbestos insulation that was integral to its very operation.

Had the trial court allowed the strict liability claim to proceed to trial, a jury could have reasonably concluded, based on the testimony of Mr. Lauderdale, Mr. Simonetta, and Griscom Russell expert Cushing, that the evaporator was defectively designed because it was not accompanied with a warning about an eminently foreseeable use and the hazards associated with that use. It is for this reason that a jury should have been allowed to evaluate whether a warning should have been provided by Griscom Russell to direct Navy personnel in Simonetta's position to take precautions when performing routine maintenance on asbestos insulated Griscom Russell evaporators. Appellant respectfully submits that the trial court erred when it took this issue away from the jury.

E. Griscom Russell Owed Simonetta A Duty Of Reasonable Care

Respondent argues that because the asbestos that Mr. Simonetta's inhaled was manufactured by a third-party, imposing liability upon Griscom Russell constitutes a radical expansion of tort law.¹⁰ In actuality, Washington law has long recognized that a defendant's duty of reasonable

¹⁰ Griscom Russell cites Nigro v. Coca Cola Bottling, Inc., 49 Wash.2d 625, 305 P.2d 426 (1957) for the proposition that a manufacturer is not responsible for a product it never manufactured or supplied. Nigro is a two paragraph decision reversing a \$500 judgment. The decision contains no analysis whatsoever is relevant to the issues and evidence before the Court in the case at bar.

care may encompass a duty to warn, even where the instrument that causes the injury is out of the defendant's direct control. For example, 90 years ago in Gibson v. Chicago, Milwaukee & Puget Sound Ry, Co, 61 Wash. 639, 112 P. 919 (1911), the Washington Supreme Court held an employer liable for failing to provide adequate warnings to a worker injured by a falling rock. More recently, in Raybell v. State, 6 Wash.App 795, 496 P.2d 559 (1972), the Court of Appeals held the State liable for failing to provide adequate warnings in a case where an automobile drove off a cliff to avoid a rock slide. In Tanguma v. Yakima County, 18 Wash.App. 555, 569 P.2d 1255 (1977), the trial court granted summary judgment to the County where a motorist was injured in a head on collision with pickup truck while crossing a narrow bridge. Although the instrument that caused the injury was the pickup truck, the Court of Appeals reversed, holding that a question of fact existed as to whether the County should have erected a warning sign in the exercise of reasonable care. *Id.* at 565-566.

This Court applied a similar analysis in Owen v. Burlington Northern Santa Fe Railroad, 114 Wash.App. 227, 56 P.3d.1006 (2002), a wrongful death case arising out of a collision between a train and an automobile. Although the cause of injury was the train, this court held that a question of fact existed regarding whether the City had fulfilled its duty to post adequate and appropriate warning signs on the railway

crossing. *Id.* at 238. Finally, in Codd v. Stevens Pass, Inc., 45 Wash. App. 393, 725 P.2d 1008 (1986), a skier was killed when he fell and struck his head on a fallen rock. Although the instrument of injury was beyond the defendant's control, this Court held that the ski resort had a common law duty to warn plaintiff of latent hazards of fallen rocks. *Id.* at 1012.

While no Washington court has considered the duty to warn in the context of lightening strikes, the issue was addressed by the New Jersey Court of Appeals in Maussner v. Atlantic City Country Club, 691 A 2d 826 (N.J. Super 1997). In that case, a golfer was struck by lightening and sought damages against the golf club for failing to warn of a foreseeable risk. The Court found that the golf course had the ability to monitor weather channels and order the evacuation of the course during lightening conditions. *Id.* at 829-30. While finding that lightening was foreseeable, the Court held that foreseeability alone was not sufficient to establish a duty. *Id.* at 832. Rather, the Court looked to the relationship between the parties concluding that "golf course [had] a duty to post a sign that details what, if any, safety procedures are being utilized by the golf course to protect its patrons from lightning." *Id.* at 835.

While all of these cases contain different fact patterns, they all belie Griscom Russell's contention that a defendant's duty to warn is governed exclusively by the defendant's status, rather than its conduct.

None of the defendants in these cases caused the plaintiffs injury. Indeed, the instrumentality that caused the plaintiffs injury was beyond the defendant's control.¹¹ Nevertheless, in each of the aforementioned cases the Courts examined the relationship between the parties and determined that the defendant's duty of reasonable care encompassed a duty to warn.

Here, it is undisputed that Griscom Russell manufactured a product that it knew or should have known would be insulated with asbestos and that workers in Mr. Simonetta's position would have to tear off that asbestos while performing regular and anticipated maintenance on Griscom Russell's products. By failing to consider the dynamic of this relationship and dismissing plaintiffs claims on the sole ground that Griscom Russell did not manufacture the asbestos, the trial court erred as a matter of law.

F. Griscom Russell Authorities Are Distinguishable

Griscom Russell's reliance on Sepulveda-Esquivel v. Central Machine Works, Inc., 120 Wash.App. 12, 84 P.3d 895 (2004) is misplaced. *See Appellant's Brief at p. 31, fn. 15.* The facts of that case are entirely different from the case at bar. In Sepulveda-Esquivel, plaintiff

¹¹ By that standard, the insulation that Griscom Russell knew or had reason to know would be applied to its evaporators presents a far *easier* case than the fact patterns above because Griscom Russell and similar situated defendants could have affirmatively specified for the use of a non-hazardous substitute. Again the issue is the conduct and not merely the status.

was injured by a load that fell off a hook modified by one defendant (Vanalco), forged by another (Uleven) and supplied to Vanalco by a third defendant (Central Machine Works); plaintiff also alleged that defendants were liable for the assembly of a “mouse” to the hook that controlled the device. *Id.* at 898-99. As there was no defect with the hook itself, neither Ulven nor Central was held liable as they had no control or influence in how Valanco used their hooks (i.e. with or without the mouse assembly). The most important contrast between Sepulveda-Esquivel and this case is that there was absolutely no evidence presented to the trial court – none at all – that the hook manufacturers either foresaw or intended that the hook be used with a mouse assembly. Nor was there evidence that the design of the hook necessitated the use of other products for its intended use and proper operation. In contrast, Appellant provided *undisputed* evidence supporting these very inferences to the trial court below.¹²

¹² Powell v. Standard Brands Paint Co., 166 Cal.App.3d 357 (Cal.App. 1985), is also distinguishable. In *Powell*, plaintiffs used one defendant’s lacquer thinner on the first day of a project and were injured in an explosion on the second day while using a lacquer thinner manufactured and sold by a second defendant. The court rejected plaintiffs’ attempt to hold liable the manufacturer of the first day’s product as there was no evidence that product caused plaintiffs’ injury and, in doing so, rejected plaintiffs’ argument that they would not have bought either defendant’s product had it seen a warning on the first defendant’s product. *Id.* at 364-65. Unlike *Powell*, however, Griscom Russell in this case is sued for asbestos insulation that it had reason to know was integral to the proper operation of its product. It reasonably foresaw the use of this material, the undisputed evidence demonstrates. If plaintiff were attempting to hold Griscom Russell liable for its failure to warn when the only exposure was due to other defendants’ evaporators, then *Powell* would be persuasive. The facts in this case clearly show that the issue is what warning was required, if any, on Griscom Russell’s own products.

Griscom Russell’s distinguishing of Bich v. General Electric is equally unavailing. It was entirely expected that Respondent would seize on the insulated statement in Bich that GE had no duty to warn in 1969, *specifically*, about a Westinghouse fuse manufactured in 1973.¹³ However, a close reading of the case indicates that Respondent is taking that statement out of context. The Court of Appeals noted specifically that “Bich’s alternative theory of the case was that GE’s transformer [not the fuse alone, but rather the integrated product] was unreasonably dangerous due to GE’s failure to adequately warn of fuse substitution.” Bich, 27 Wash.App. at 31-32. The critical fact in the Court’s rationale was that, like a high temperature steam evaporator that requires asbestos insulation to operate properly, the evidence in the case was that all such transformers required time-delay fuses to operate properly. Id. at 33.

Griscom Russell seems to imply that the only reason that the duty to warn question went to the jury was because GE manufactured the original fuse. This is not correct. If Westinghouse had manufactured the original fuse that was required for the transformer to work, the outcome of the case would not have changed. The Court concluded correctly that the question for the jury was “whether *the transformer* was unreasonably

¹³ Appellant acknowledged this statement from Bich in the opening brief. *See Brief of Appellant at p. 28.*

dangerous because of GE's inadequate warnings." Id. Just as the question for the jury was whether the transformer required GE to provide a warning related to fuse substitution, the question for the jury in this case should have been whether the use of the evaporator required Griscom Russell to provide a warning due to its foreseeable and *required* modification through the use of another product that contained a cancer causing agent.¹⁴

¹⁴ The position that a manufacturer or seller of a product remains liable for alterations or modifications that are reasonably foreseeable is not novel in any way. Courts throughout the country have so held. **Alabama:** Hannah v. Gregg, Bland & Berry, Inc. 840 So.2d 839, 855 (Ala., 2002) ["A manufacturer or seller remains liable if the alteration or modification did not in fact cause the injury, *or* if the alteration or modification was reasonably foreseeable to the manufacturer or seller"]; **Arizona:** Anderson v. Nissei ASB Mach. Co., Ltd. 197 Ariz. 168, 173, 3 P.3d 1088, 1093 (Ariz.App. Div. 1,1999) ["In Arizona, only an unforeseeable modification of a product bars recovery from the manufacturer."]; **Connecticut:** Potter v. Chicago Pneumatic Tool Co. 241 Conn. 199, 236, 694 A.2d 1319, 1341 (Conn.,1997) ["In order to rebut the defendant's allegations of substantial change, the plaintiff must prove.... [a]lternatively, ... that the alteration or modification: (1) was in accordance with the manufacturer's instructions or specifications; (2) was made with the manufacturer's consent; or (3) was the result of conduct that the manufacturer reasonably should have anticipated."]; **Idaho:** Tuttle v. Sudenga Industries, Inc. 125 Idaho 145, 148-149, 868 P.2d 473, 476 - 477 (1994) [defense of substantial alteration or modification of product not available if "The alteration or modification was reasonably anticipated conduct, and the product was defective because of the product seller's failure to provide adequate warnings or instructions with respect to the alteration or modification."]; **Illinois:** Davis v. Pak-Mor Mfg. Co. 284 Ill.App.3d 214,220, 672 N.E.2d 771,775, 219 Ill.Dec.918, 922 (Ill.App. 1 Dist., 1996): ["Where an unreasonably dangerous condition is caused by a modification to the product after it leaves the manufacturer's control, the manufacturer is not liable unless the modification was reasonably foreseeable. [Citations.] Foreseeability means "that which it is *objectively reasonable* to expect, not merely what might conceivably occur."]; **Indiana:** Smock Materials Handling Co., Inc. v. Kerr 719 N.E.2d 396, 404 (Ind.App., 1999) ["The modification or alteration defense is only applicable ... where such modification or alteration is not reasonably expectable to the seller."]; **Iowa:** Leaf v. Goodyear Tire & Rubber Co. 590 N.W.2d 525, 529 -530 (Iowa,1999) ["...a manufacturer will remain liable for an altered product if it is reasonably foreseeable that the alteration would be made...."]; **Kansas:** . Howard v. TMW Enterprises, Inc. 32 F.Supp.2d 1244, 1252 (D.Kan.,1998) ["Under Kansas law, if a product is modified after delivery to the purchaser, the manufacturer may not be liable for defective design. [Citation.] The manufacturer must show, however, that the product modification was not foreseeable."]; **Louisiana:** Bourgeois v. Garrard Chevrolet, Inc. 811 So.2d 962, 965,

Griscom Russell also places primary reliance on Lindstrom v. A-C Product Liability Trust, 424 F.3d 488 (6th Cir. 2005) stating that there is no reason “why the analytical framework of Lindstrom should not apply with full force to the instant case.” On the contrary, the analytical framework of Lindstrom is quite different than the case at bar. Lindstrom

(La.App. 4 Cir.,2002)[“The product's characteristic that renders it unreasonably dangerous under La. R.S. 9:2800.55 must exist at the time that the product left the control of its manufacturer, or result from a reasonably anticipated alteration or modification of the product.”] **Missouri:** Vanskike v. ACF Industries, Inc. 665 F.2d 188, 195 (8th Cir. 1981)(applying Missouri law) [“...subsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable....”] **New Jersey:** Brown v. U.S. Stove Co. 98 N.J. 155, 165-166, 484 A.2d 1234, 1239 (N.J.,1984) [“...a manufacturer can also be held liable under strict liability principles for design defects if it is objectively foreseeable that a substantial change in the product will cause injury.”] **New York:** Cacciola v. Selco Balers, Inc. 127 F.Supp.2d 175, 187 (E.D.N.Y.,2001) [[A]lthough it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.”] **Ohio** Barrett v. Waco Internatl., Inc. 123 Ohio App.3d 1, 8, 702 N.E.2d 1216, 1220 (Ohio App. 8 Dist.,1997) [“Ohio courts have held that design defect claims may include the failure to design a product to prevent foreseeable misuse, including modifications. Welch Sand & Gravel, Inc. v. O & K Trojan, Inc. (1995), 107 Ohio App.3d 218, 224, 668 N.E.2d 529, 533. Although manufacturers need not guarantee that a product is incapable of causing injury, they must consider, *inter alia*, "the likelihood that the design would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.”] **Pennsylvania:** Shouey ex rel. Litz v. Duck Head Apparel Co., Inc. 49 F.Supp.2d 413, 422 (M.D.Pa.,1999) [“A manufacturer or seller will not be liable if the product is made unsafe by subsequent changes unless the manufacturer or seller reasonably could have foreseen the alteration.”] **South Carolina:** Small v. Pioneer Machinery, Inc. 329 S.C. 448, 466, 494 S.E.2d 835, 844 (S.C.App.,1997) [“An essential element of any products liability claim is proof that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant. However, ...liability may be imposed upon a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller....”] **Texas:** Webb v. Rodgers Machinery Mfg. Co. 750 F.2d 368, 372 (C.A.Tex.,1985) [“...it is widely accepted that, for a manufacturer to be held liable under a strict liability theory, the product must "reach the user ... without substantial change in the condition in which it is sold." Restatement (Second) of Torts § 402A(1)(b). ... Texas courts likewise have noted that a manufacturer may be held liable where the subsequent alteration leading to the accident was foreseeable by the manufacturer.”]

was decided almost entirely on the basis of causation. Id. at 492. In the instant case, the trial court never even reached any significant causation analysis because the holding was limited solely to whether Griscom Russell had a legal duty of reasonable care to warn of insulation hazards. As Griscom Russell notes throughout its brief, the question of duty is a question of law decided before the other elements of a negligence or strict liability claim are addressed: “In the absence of duty, there is no breach, and without a breach there is no liability.” *Brief of Respondent at pp. 43.*¹⁵

In Lindstrom, the plaintiff supported his case with an affidavit from medical expert, Dr. Corson, who did not refer specifically to any particular product. His affidavit was limited solely the conclusion that every exposure to asbestos was a “substantial factor” in Lindstrom’s illness. Id. at 493. The 6th Circuit correctly concluded that this expert testimony, indeed the only expert testimony in the record, was insufficient to “to make a showing with respect to each defendant that the defendant’s product was a substantial factor in plaintiff’s injury... As a matter of law, Corson’s affidavit [did] not provide a basis for a causation finding as to any particular defendant.” Id.

¹⁵ See also the arguments that Griscom Russell repeatedly made below. “Before a jury is allowed to determine whether an injury is reasonably foreseeable, the Court must find a legal duty in the first place. Here, the law imposes no duty on Griscom Russell with respect to insulation products.” CP 1029.

By contrast, Appellant below submitted expert testimony from his own expert industrial hygienist that specifically referenced Simonetta's testimony and his work with the Griscom Russell evaporator. *See Appellant's Brief at pp. 6-9.* Additionally, Appellant submitted testimony from Griscom Russell's own expert establishing that it was expected and intended for the evaporators to be insulated with asbestos materials. A jury was entitled to determine based upon the inferences created by this and other evidence whether the failure to warn made the evaporator unreasonably dangerous or whether that failure to warn was a proximate cause of Simonetta's injury. Griscom Russell has simply taken the position that there is no legal duty owed in the first instance. That is a different question than what was answered in Lindstrom.¹⁶

Appellants acknowledge that the Lindstrom Court held that companies like Ingersoll Rand could not be held liable for asbestos incorporated into its pumps as an internal component part – post

¹⁶ With respect to each of the particular products in which summary judgment was upheld in Lindstrom, there was a distinct lack of evidence establishing any inference that could reasonably link the product at issue to the cause of the harm. For example, Henry Vogt was dismissed because there was insufficient information presented on whether a Henry Vogt product was a substantial factor in Lindstrom's illness. Id. at 495. Goulds Pumps and Garlock were dismissed because the Plaintiff did not even mention these products in his deposition!. Id. at 495, 498. Coffin Pumps was dismissed because there was no admissible evidence that the replacement packing to the pumps in question contained asbestos. Id. at 496-497. By contrast there is fact and expert testimony in the record supporting that very inference, with respect to the insulation, on the evaporator here.

manufacture. Appellant submits that under the precedents of Washington, including the Bich case, this would not have been the outcome were this case to have been decided in Washington. There was no evidence in Lindstrom that the Ingersoll Rand air compressors required asbestos containing components to operate properly. If there was such evidence, under Bich a foreseeable modification to those components through their regular replacement and maintenance would have triggered the duty to warn, even if the instrumentality of injury was manufactured by a party other than Ingersoll Rand.

CONCLUSION

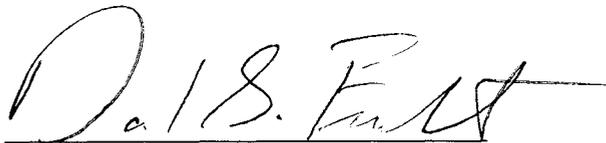
Griscom Russell was not, as Respondent contends, “poorly positioned” to evaluate the hazards of asbestos products that it had reason to know would be critical to the proper operation of its equipment. Griscom Russell, as a product manufacturer had a non-delegable duty to warn any ultimate user of any dangers in its product other than those that are open or obvious. Minert v. Harsco Corp., 26 Wash.App. 867,874-75, 614 P.2d 686 (1980).¹⁷ Griscom Russell was more than adequately positioned to evaluate the hazards associated with its own products due to their eminently foreseeable uses. A manufacturer is *required* to anticipate

¹⁷ “We agree that the manufacturer has a duty to warn the ultimate user of any dangers in its product (other than those that are open or obvious). This duty is non-delegable. If this

the foreseeable environment in which his product is intended to be used. Accordingly, there is a legal duty to warn when it is reasonably foreseeable that the use of the product has the potential to cause harm to another because the product is required to be used in concert with another hazardous product, even if the other product is the instrumentality of injury. Appellant respectfully submits that the trial court erred in holding that no such duty was triggered under the claims of negligence and strict liability in this case.

RESPECTFULLY SUBMITTED this 13th day of January, 2006.

BERGMAN & FROCKT PLLC

A handwritten signature in black ink, appearing to read "D. S. Frockt", written over a horizontal line.

David S. Frockt, WSBA 28568
Matthew P. Bergman, WSBA 20894
Ari Y. Brown, WSBA 29570
Counsel for Appellants

duty is breached, the question arises whether the breach was a proximate cause of the injury”

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOSEPH A. SIMONETTA and JANET E.
SIMONETTA, a married couple,

Appellants,

V.

VIAD CORP.,

Respondent.

No: 56614-8-I

**DECLARATION OF
SERVICE**

I, Anna K. MacInnes, declare and state as follows:

1. I am at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.
2. On the 13th day of January, 2006, I caused to be served true and correct copies of: (1) Reply Brief of Appellants; and (2) Declaration of Service, on the following:

Via ABC Legal Messenger:

Counsel for Viad Corporation

Ronald C. Gardner
GARDNER BOND TRABOLSI ST. LOUIS & CLEMENT, PLLC
2200 Sixth Avenue, Suite 600
Seattle, WA 98121

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DECLARATION OF SERVICE - 1

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 13th day of January, 2006.

BERGMAN & FROCKT



Anna K. MacInnes