

NO. 80251-3

SUPREME COURT OF THE STATE OF WASHINGTON

LYNN MUSSER, Personal Representative of the Estate of Vernon
Braaten,

Respondent,

v.

SABERHAGEN HOLDINGS, INC., et al.

Defendants,

and

BUFFALO PUMPS, INC., et al.,

Petitioners.

EQUIPMENT MANUFACTURERS' JOINT ANSWER TO AMICUS
CURIAE BRIEFS OF O-I, INC. AND SCHROETER, GOLDMARK &
BENDER

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I. ARGUMENT

Petitioners Crane Co., Yarway Corp., IMO Industries, Inc. and Buffalo Pumps, Inc. and Respondent General Electric Company, jointly submit this answer to the amicus briefs filed in support of respondent Braaten by Schroeter Goldmark & Bender (SGB) and O-I, Inc.

Both SGB and O-I misapprehend the law governing the existence of a duty, as opposed to the law governing the scope of a duty once one has been found to exist. O-I's brief is particularly disingenuous. As O-I acknowledges, it was an asbestos manufacturer. Its interest is not in the proper determination of legal issues. Rather, O-I seeks to shift to equipment manufacturers, who did not make or sell the injury-causing asbestos, O-I's own responsibility for warning about asbestos products that O-I did make and sell.

A. Both SBG and O-I Erroneously Analyze the Law Pertaining to the Determination of Whether a Duty Exists. The Court Should Make Clear that Foreseeability Considerations Pertain to the Issue of the Scope of a Duty, But Not to the Determination of Whether a Duty Exists in the First Place.

To establish a claim for negligence, a plaintiff must show: "(1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury." Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 804, 43 P.3d 526 (2002); Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d

77 (1985). “The existence of a duty is a threshold question.” Burg, at 804. “If there is no duty, appellants have no claim.” Id. (citing Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1998)).

To establish the first element, the plaintiff must show “a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type.” Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982) (emphasis in original).

Despite the absence of a statutory or common law rule in Washington, the Court of Appeals in Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 151 P.3d 1010 (2007), and Simonetta v. Viad Corp., 137 Wn. App. 15, 151 P.3d 1019 (2007), fashioned one out of whole cloth, under the guise of implementing “a logical extension of the common law,” Simonetta, id. at 25, to impose a duty on manufacturers of one product to warn of dangers inherent solely in a different product that the defendant manufacturers did not make or sell.

SGB and O-I applaud the Court of Appeals’ imposition of such an unprecedented duty on the basis that the defendant manufacturers could foresee that their equipment would be used “in conjunction with” another manufacturer’s asbestos product and that such foreseeability alone gave rise to a duty to warn of dangers inherent in asbestos. This is not the law.

Foreseeability does not independently create a duty. Rather, once a duty is found to exist, the foreseeable range of danger serves as a limitation on the scope of the duty. Hansen v. Friend, 118 Wn.2d 476, 483, 824 P.2d 483 (1992); Bernethy, 97 Wn.2d at 933; Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 475, 951 P.2d 749 (1998) (“When a duty is found to exist from the defendant to the plaintiff then foreseeability concepts serve to define the scope of the duty owed.”) Division One previously and correctly acknowledged these principles:

... [Plaintiff's] contentions that the harm suffered by the investors was reasonably foreseeable and that the Securities Division had a duty to prevent the harm conflate the concepts of duty and foreseeability. Foreseeability limits the scope of a duty, but it does not independently create a duty.

Halleran v. Nu West, Inc., 123 Wn. App. 701, 717, 98 P.3d 52 (2004), rev. denied, 154 Wn.2d 1005 (2005) (citing Hansen, 118 Wn.2d at 483). SGB's and O-I's arguments cannot obscure the Court of Appeals' failure to follow these principles in Braaten and Simonetta.

SGB itself acknowledges that whether a defendant owes a duty of reasonable care is a question of law answered generally “without reference to the facts or parties in a particular case.” SGB Br. at 3 (citing Estate of Templeton v. Daffern, 98 Wn. App. 677, 687, 990 P.2d 968, rev. denied, 141 Wn.2d 1008 (2000)). It also acknowledges that whether a duty exists

is a question of law, the resolution of which depends “on mixed considerations of logic, common sense, justice, policy and precedent.” SGB Br. at 3 (citing Snyder v. Medical Service Corp., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001)). Thus, O-I’s contention, O-I Br. at 4-5, that “the determination of whether a defendant owes a tort duty turns on whether the injury was foreseeable,” is incorrect.

While courts from time to time may have referred to foreseeability in discussing “the duty question” as it relates to a given defendant under the particular circumstances of a case, that is a shorthand way of asking, once a duty has been found to exist, whether such duty extends as far as the plaintiffs claimed – in essence, the scope of the duty and whether it was breached. For example, both SGB and O-I rely upon Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002), and King v. Seattle, 84 Wn.2d 239, 248, 525 P.2d 228 (1974). A careful reading of those cases shows that the court’s references to foreseeability concerned the scope of a duty, not its existence. In Keller, the Court was required to decide whether a municipality’s duty to maintain the public ways (the existence of which duty is clear) was limited to fault-free plaintiffs or extended to plaintiffs who were not fault free. As the Keller court observed, the court had to determine “the proper scope of a municipality’s duty in building and maintaining its roadways,” 146 Wn.2d at 244 (emphasis added).

In King v. Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974), the plaintiffs sued the City alleging that it arbitrarily and capriciously denied them street use and building permits. The King court determined that the City "had a duty to act fairly and reasonably in its dealings with the plaintiffs," and also observed that findings in a previous action -- that the City had acted arbitrarily and capriciously toward plaintiffs -- established a breach of duty. 84 Wn.2d at 247-48. The court then rejected the City's argument that it could not have foreseen the risk of harm that befell the plaintiffs. In rejecting that argument, 84 Wn.2d at 248, the court stated:

We have earlier held that foreseeability of the risk of harm is an element of the duty question. If the risk of harm which befell the plaintiff as a result of the defendant's act was not reasonably foreseeable, our cases have held, then, as to that plaintiff, no duty respecting that act was owed. Thus, no duty was breached and no legal liability attached to the defendant for that plaintiffs' loss. [Citations omitted.]

Tellingly, SGB and O-I cite only the first sentence of this discussion, ignoring its context. The King court merely recognized that even where a general duty exists, that duty does not extend to require the defendant to protect against unforeseeable injuries. Id. (citing inter alia Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928)). Neither King nor Palsgraf stand for the proposition that a foreseeable risk of harm creates a duty. New York's highest court indeed has rejected such an

interpretation of Palsgraf, holding that foreseeability principles apply to determine the scope of a duty only after a duty has been found to exist. Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019, 1022 (1976). The same is true in Washington. Schooley, supra, 134 Wn.2d at 475; Hansen v. Friend, supra, 118 Wn.2d at 483; Knott v. Liberty Jewelry & Loan, Inc., 50 Wn. App. 267, 271, 748 P.2d 661, rev. denied, 110 Wn.2d 1024 (1988) (“Foreseeability determines the extent and scope of a duty. The threshold determination of whether a defendant owes a duty to the plaintiff is a question of law.”). (Citations omitted.)

The cases cited by SGB demonstrate these principles. In some cases, the court has applied the factors reiterated in Snyder (logic, common sense, justice, policy and precedent) to determine whether to recognize a new duty, including consideration of the state of the law across the country on the issue as well as pertinent Restatement provisions and treatises if applicable. See, e.g., Hunsley v. Giard, 87 Wn.2d 424, 553 P.2d 1096 (1976) (determining that a defendant has a duty to avoid the infliction of mental distress); Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 472, 476, 480-81, 656 P.2d 483 (1983) (recognizing causes of action for “wrongful birth” and “wrongful life,” after determining that a physician has a duty to protect parents’ right to prevent the birth or

conception of defective children);¹ and Petersen v. State, 100 Wn.2d 421, 427-28, 671 P.2d 230 (1983) (citing Restatement (Second) of Torts § 315 and holding that State had a duty to take reasonable precautions to protect third persons against dangerous propensities of a state hospital patient).

In other cases, the court has applied foreseeability principles to determine the scope or bounds of an existing general duty -- which already had a source in a common law or statutory rule -- in a given case. In Shepard v. Mielke, 75 Wn. App. 201, 205-06, 877 P.2d 220 (1994), for example, it was undisputed that the nursing home defendant owed the plaintiff a duty of ordinary care. The appellate court disagreed with the trial court, however, as to what the exercise of ordinary care required, holding on appeal that the nursing home's duty of ordinary care included the duty of taking reasonable precautions to protect its residents who were unable to protect themselves against reasonably foreseeable risks of harm.² The question was again one of scope, i.e., what risks should the nursing home have foreseen in the exercise of its existing duty.

¹ The same duty extended to persons not yet conceived, but is "limited, like any other duty, by the element of foreseeability." 98 Wn.2d at 480.

² Although the Court of Appeals in Shepard stated that "[t]he existence of a duty is a question of law which is determined by foreseeability and policy questions," 75 Wn. App. at 205, it proceeded to note that foreseeability is a question of fact for the jury. Id. at 206.

SGB erroneously cites Kaiser v. Suburban Transp. System, 65 Wn.2d 461, 398 P.2d 14 (1965), as finding that a doctor had a duty based in part on foreseeability. In Kaiser, a bus driver fell asleep at the wheel, and a passenger injured in the resulting accident sued the bus driver, the bus company and the bus driver's doctor who had prescribed for him a medication that caused drowsiness. The trial court granted a directed verdict on the basis that the evidence did not establish a standard of care and that, even if the doctor was negligent, the bus driver's negligence was an intervening cause relieving the doctor of liability. Those were the issues decided on appeal. The Kaiser court did not create a new duty on the part of the physician; the doctor already had a duty to exercise reasonable care in treating the bus driver. Rather, the court held that (1) there was evidence of a standard of care requiring the doctor to inform his patient of side effects, including drowsiness, of the prescribed drug, and (2) a violation of that standard of care foreseeably endangered the bus passenger, such that the driver's falling asleep was not an intervening cause relieving the doctor from liability. 65 Wn.2d at 464-65.

Both the Shepard court and SGB cite the plurality's statement in Bailey v. Forks,³ 108 Wn.2d 262, 266, 737 P.2d 1257 (1987): "The

³ In Bailey, the court held that the Forks police officer had a duty to enforce a statute but failed to do so, and that plaintiff had established a duty running to her under the "failure to enforce" exception to the public duty doctrine. 108 Wn.2d at 269-70.

concept of duty turns on foreseeability and pertinent policy considerations.” There is a difference, however, between the existence of a duty and its scope, both of which are part of the “concept of duty.”

Unfortunately, certain decisions have either confused these two aspects of duty, or discussed them in one breath. For example, O-I quotes Yong Tao v. Heng Bin Li, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007), O-I Br. at 5 n.1, for its statement that “the conclusion that a given defendant owes a duty of care turns on whether injury or damage is foreseeable.” Such a statement would be correct only after the court has identified the applicable source for a duty, as is demonstrated by the decision Yong cites -- Seeberger v. Burlington Northern. R. Co., 138 Wn.2d 815, 982 P.2d 1149 (1999). In Seeberger, the court first observed that defendant BN had a duty under FELA to provide the plaintiff with a safe workplace, before discussing the scope of the duty owed, an issue to which foreseeability principles were relevant. 138 Wn.2d at 822-23.

Another case O-I cites, Parrilla v. King County, 138 Wn. App. 427, 432, 157 P.3d 979 (2007), notes that the existence of a duty is a question of law to be determined by reference to considerations of public policy. Later, however, it states that the existence of a duty turns on the foreseeability of the risk created, citing inter alia, Restatement (Second) of Torts § 321 (which imposes a duty upon one whose affirmative acts create

unreasonable risks of harm to others to use reasonable care to prevent the risk from taking effect, such as abandoning one's automobile in the middle of a road without warning anyone). 138 Wn. App. at 436.

To the extent that such statements may be read to govern the determination of whether a duty exists in the first place, the Yong and Parrilla decisions demonstrate that this Court needs to reiterate (1) the considerations that govern the legal question of whether a duty exists generally (logic, common sense, justice, policy and precedent), (2) the need to identify the source of a claimed duty if it already has a common law or statutory source, and (3) if a duty is found to exist, the role that foreseeability principles play in the determination of the scope and extent of a duty in a given situation.

B. Contrary to SGB's Contentions, the Court of Appeals Erroneously Imposed a Duty under Negligence Principles.

SGB argues that it would be unjust and against public policy to relieve a manufacturer of the duty to warn of asbestos contained in its own products. But that is not the issue. Instead, the issue concerns whether there is a duty to warn when the asbestos that caused the injury was not made or sold by the defendant.

This issue can arise because, over the long useful life of the equipment, original internal parts, such as gaskets and packing, are

replaced many times over by parts made and sold by others, which may or may not have contained asbestos. The issue also arises where the injury-causing asbestos was not internal at all, but was external insulation, made and sold by others and applied after the equipment was sold to the Navy.

SGB's contentions that other manufacturers have been held liable for dangers associated with the use of another's products in conjunction with their own products ignores the very real distinction that the Court of Appeals acknowledged between these cases and Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977). In Teagle, as a result of the manufacturer's failure to warn against using Viton O-rings in its product, the product itself exploded causing the plaintiff's injuries. Even if considered, despite RAP 9.12, RAP 10.3(a)(8) and RAP 10.3(e), the nonrecord warnings that SGB attaches to its brief demonstrate the same point. A warning is appropriately required when the use of a different product with the manufacturer's product makes the manufacturer's product itself dangerous, such as may occur through a chemical reaction or drug interaction.

C. Both SGB and O-I Ignore the Law of Strict Liability.

Under the Restatement (Second) of Torts § 402A, to hold a defendant liable for injuries caused by a product, a plaintiff must demonstrate that (1) the seller of the injury-causing product is engaged in

the business of selling the product and (2) the product 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) (citing § 402A). Strict liability applies to the entities in the “chain of distribution” for the injury-causing product. Seattle-First Nat’l Bank v. Tabert, 86 Wn.2d 145, 148, 542 P.2d 774 (1975).

SGB notes that manufacturers “in the asbestos context” are strictly liable for failing to give adequate warnings under Restatement (Second) of Torts, § 402A (citing Van Hout v. Celotex Corp., 121 Wn.2d 697, 704, 853 P.2d 908 (1993)). It is true that manufacturers of asbestos products have a duty, and have been held strictly liable for failing, to warn of the dangers inherent in their own asbestos products. Id. But that is because they made and sold the injury-causing product and were in its chain of distribution. Here, the equipment manufacturers did not make or sell the asbestos products that injured Mr. Braaten. Teagle does not provide support for the imposition of a strict liability duty to warn when Mr. Braaten’s injuries were caused by others’ asbestos and not by the manufacturers’ own equipment.

SGB quotes Restatement (Second) of Torts § 402A, comment c., which provides the policy justifications for strict liability, SGB Br. at 11, but those justifications in fact support the equipment manufacturers’

position here. Comment c. makes clear that strict liability properly applies where the manufacturer has made and sold the injury-causing product, placed it in the stream of commerce and reaped the economic benefits thereof, and is in the best position to anticipate and provide for the prospect of liability for injuries. None of those policy justifications apply to the equipment manufacturers in this case who were not in the chain of distribution of, and who did not make, control the production, or sell the injury-causing asbestos that third parties affixed to or replaced into their products.

SGB cites, without discussion, Wright v. Stang Manufacturing Co., 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422 (Cal. App. 2d Dist.), rev. denied, 1997 Cal. LEXIS 5071 (1997), as supporting liability in this case. In that case, Stang manufactured a deck gun that was attached to a fire engine. A sudden change in water pressure created a “water hammer” in the deck gun, the force of which caused the deck gun to come loose, throwing the plaintiff who was using it into the air and injuring him. Id. at 1222. The court found issues of fact on plaintiff’s design defect and warning claims and negligent warning claim, based on expert testimony that the deck gun was defective because it was manufactured without a flange mounting system, and lacked warnings that it was dangerous absent such a system. See id. at 1229-31, 1236. The Wright court did not hold

that one manufacturer has a duty to warn of dangers solely inherent in a different manufacturer's product that caused a plaintiff's injuries.

D. O-I's Arguments That Whether A Duty to Warn Exists Requires a Case-By-Case Resolution of Factual Issues Ignores the Threshold Issue.

As SGB notes, SGB Br. at 3 (citing Estate of Templeton, 98 Wn. App. at 687), whether a defendant owes a common law duty of reasonable care "is to be answered generally, without reference to the facts or parties in a particular case." O-I, however, goes to great lengths to argue that multiple factual scenarios it posits prevent the Court from deciding the issue of the existence of a duty at all,⁴ and to urge that whether there is a duty to warn is a fact-specific, case by case inquiry in "the context of asbestos cases against equipment manufacturers." O-I is incorrect.

⁴ Even if O-I's factual scenarios were relevant to the existence of duty, which they are not, O-I makes many assertions not found in the record or unsupported by it. It implies, for example, that the Simonetta decision concerns internal asbestos-containing parts, O-I Br. at 3, but the Court of Appeals in Simonetta was concerned only with external insulation applied by others after sale. Mr. Simonetta voluntarily dismissed his claims based on internal parts in order to appeal the summary judgment entered in favor of Viad on external insulation. See CP 1374-75 (Simonetta record). O-I also erroneously contends that equipment manufacturers "specified" asbestos insulation, O-I Br. at 11 & n.7, a contention it purports to support by its unfounded characterizations of improperly appended nonrecord documents. The only evidence in the record is that the Navy specified the asbestos-containing insulation, and the improperly attached documents do not indicate otherwise as they appear to cross-reference mandatory Navy specifications. Moreover, the attached documents are of uncertain provenance, are largely illegible, lack foundation, are unauthenticated, are taken out of context, are incomplete, for example consisting only of fragments of documents, and in some cases appear to consist of unrelated documents or fragments of documents described as one exhibit. O-I's appendices violate RAP 9.12, RAP 10.3(a)(8) and RAP 10.3(e), and the Court should disregard the documents and associated argument.

O-I argues that the Court of Appeals' imposition of a duty is supported by the record. But that is not the question: The question is whether it is supported by the law, i.e., by mixed considerations of logic, common sense, justice, policy and precedent. O-I's attempts to set forth a multitude of possible factual scenarios should not divert the court from answering the question it needs to answer, namely: Whether it is a good rule of law to impose a duty to warn on a manufacturer whose product is not defective on the ground that some other manufacturer's product used in association with the first manufacturer's product has caused injury, when the first manufacturer did not make or sell the product that caused the plaintiff's injury?

The essence of product liability law, until the Court of Appeals decided Braaten and Simonetta, whether in strict liability or in negligence, is that the one who made and sold the injury-causing product is the one that should answer for it. The Court should not depart from that settled principle. Nor should it accept O-I's invitation to abdicate its law-announcing role to determine whether a duty exists, on the basis of "factual scenarios" that O-I projects. To the extent that such "factual scenarios" would be relevant, such relevance would relate only to the scope of a duty and not to whether a duty exists in the first place.

O-I cites two cases where the courts declined to exercise their responsibility to answer a question of law and instead found issues of fact as to the existence of a duty question based on foreseeability. In Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, 733 N.Y.S.2d 410 (N.Y. App. Div. 1st Dep't 2001), an interlocutory appeal, the appellate division affirmed the denial of summary judgments for certain defendants, including Worthington. As to asbestos Worthington did not make or install, the court stated:

Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps.

288 A.D.2d at 149. The Berkowitz court thus made the existence of a duty a jury question that depended on the foreseeability of injury in disregard of the settled rule applied in New York (and in Washington) that “[f]oreseeability of injury does not determine the existence of duty.” Eiseman v. New York, 70 N.Y.2d 175, 187, 518 N.Y.S.2d 608, 613, 511 N.E.2d 1128, 1134 (1987); Pulka, supra, 358 N.E.2d at 1022 (1976). The Berkowitz court, in its abbreviated and summary ruling, also ignored the holding of New York’s highest court in Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 582 N.Y.S.2d 373, 591 N.E.2d 222, 226 (1992), that a manufacturer has no duty to warn about the use of its nondefective product with a defective product produced by another, as

well as the fact that New York, like Washington, limits strict liability to parties within a product's manufacturing, selling, or distributing chain, Watford v. Jack La Lanne Long Island, Inc., 151 A.D.2d 742, 744, 542 N.Y.S.2d 765 (1989). Even the Court of Appeals found Berkowitz unpersuasive. Braaten, 137 Wn. App. at 43 (it "simply affirms denial of a summary judgment motion with almost no analysis"); Simonetta, 137 Wn. App. at 29-30 (terming it "unhelpful").

O-I also cites Chicano v. GE, 2004 WL 2250990 *6, 2004 U.S. Dist. LEXIS 20330 (E.D. Pa. 2004), another case that even the Court of Appeals in both Braaten and Simonetta found unhelpful,⁵ where the judge likewise sent the question of the existence of a duty to the jury:

[T]here is 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.

Chicano is contrary to Pennsylvania substantive law. See Wenrick v. Schloemann-Siemag, A.G., 523 Pa. 1, 564 A.2d 1244, 1248 (1989, where the court rejected a contention that an electrical designer had a duty to warn, when the decisions and actions creating the danger were those of a different entity. Id. The court observed, 564 A.2d at 1248:

The appellant's expert's opinion as to duty, and the appellant's argument on this appeal, amount to no more

⁵ See Braaten, 137 Wn. App. at 42, and Simonetta, 137 Wn. App. at 30.

than an assertion that knowledge of a potential danger created by the acts of others gives rise to a duty to abate the danger. We are not prepared to accept such a radical restructuring of social obligations.

See also Toth v. Economy Forms Corp., 391 Pa. Super. 383, 388-89, 571 A.2d 420, 423 (Pa. Super. Ct. 1989) (“Once again, we emphasize appellee [scaffolding manufacturer] did not supply the ‘defective’ product. Appellants’ theory would have us impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking that it did not supply. Pennsylvania law does not permit such a result.”).

E. O-I and SGB Ignore the Adverse Policy Implications of the Court of Appeals’ Decisions.

SGB claims that Washington courts will not become a destination forum burdened by claims predicated on the Braaten and Simonetta holdings, asserting that it has filed only 11 asbestos injury cases against one or more of the Braaten/Simonetta defendants. SGB Br. at 12-13. SGB notes, however, that it is not the only law firm in Washington currently handling asbestos claims.

Moreover, the impact of the Braaten and Simonetta decisions is not confined to asbestos cases. Defendants have cited to the court the myriad of decisions by courts across the country rejecting the contention that the maker of one product has a duty to warn of the dangers of a different manufacturer’s product that may be used with the first manufacturer’s

product. Cases based on the same or similar contentions will no doubt be brought in Washington if it affirms the Court of Appeals' imposition of a duty on one manufacturer to warn of dangers inherent in a product made and sold by a different manufacturer.

O-I argues that it would defy products liability law, as well as "logic, common sense, justice and sound policy," for the court to grant the equipment manufacturers "immunity" from liability to Washington residents who inhaled asbestos fibers. This is an incredibly ironic argument for O-I to make. O-I as an asbestos insulation manufacturer is scarcely in the position to argue that nonmanufacturers of such products should have warned about the hazards of O-I's own products. Either O-I was warning about the hazards of its asbestos products, in which case another warning would be superfluous, or it was not warning, in which case its argument is disingenuous. It does not defy products liability law, nor is it illogical, unfair or against public policy to make the proper defendants answer the case against them.

Both SGB and O-I urge the court to focus on the claimant's interest in compensation for his injury, but the Court must also consider, unlike the Court of Appeals, the impact of any decision it makes on other litigants and on the court system; on society and on the economy, including, if the decisions of the Court of Appeals are upheld, continuing

bankruptcies by second and third tier targets of asbestos litigation; greatly increased product costs to consumers; and the deterrent effect of such a duty on new product research and development.

II. CONCLUSION

For the foregoing reasons, the Court of Appeals' decisions imposing a duty to warn should be reversed, and the summary judgment dismissals reinstated.

RESPECTFULLY SUBMITTED this 4TH day of March, 2008.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

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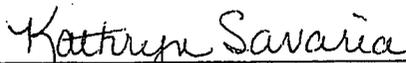
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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 4th day of March, 2008.



Kathryn Savaria