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NO. _____

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 57011-1-I)

VERNON BRAATEN,

Plaintiff/Appellant/Respondent on Review,

v.

BUFFALO PUMPS, INC., INC. (sued individually and as successor-in-interest to BUFFALO FORGE COMPANY); CRANE CO.; IMO INDUSTRIES, INC. (sued individually and as successor-in-interest to DE LAVAL TURBINE, INC. and WARREN PUMPS); and YARWAY CORPORATION,

Defendants/Respondents/Petitioners on Review,

and

GENERAL ELECTRIC COMPANY,

Defendant/Respondent.

and

SABERHAGEN HOLDINGS, a Washington corporation; BARTELLS ASBESTOS SETTLEMENT TRUST, a Washington corporation; GEORGIA PACIFIC CORPORATION (sued individually and as successor-in-interest to BESTWALL GYPSUM COMPANY); GOULDS PUMPS, INCORPORATED; GUARD-LINE, INC.; INGERSOLL-RAND COMPANY; JOHN CRANE, INC.; KAISER GYPSUM COMPANY; SEPCO CORPORATION; TUTHILL CORPORATION (sued individually and as successor-in-interest to CORPUS ENGINEERING CORP.); and UNION CARBIDE CORPORATION,

Defendants.

GENERAL ELECTRIC COMPANY'S ANSWER TO PETITIONS FOR REVIEW

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I. INTRODUCTION

General Electric Company (GE), defendant/respondent at the Court of Appeals, submits this answer to the petitions for review filed by the defendants/petitioners on review. Although the Court of Appeals affirmed the summary judgment dismissal of GE on collateral estoppel grounds, its decision on the merits has a far-reaching impact on GE, and indeed on all who make and sell products that may be used “in conjunction” with other manufacturers’ products. The merits decision should be reversed as an unwise extension of the common law without precedent in Washington.

II. RELEVANT BACKGROUND

A. Factual Background.

Plaintiff Vernon Braaten, a marine pipefitter, worked at Puget Sound Naval Shipyard (PSNS) from 1967 to 2002. CP 292. He was diagnosed with mesothelioma in 2003. CP 8. He testified that he was exposed to asbestos-containing insulation found on the outside of various manufacturers’ main propulsion turbines, including GE turbines, on ships where he worked, in the course of removing insulation from the turbines so that machinists could do inside maintenance.¹ CP 293-94 (pp. 39-42).

GE manufactured marine turbines for U.S. Navy ships, and performed all aspects of its turbine work related to U.S. Navy vessels

¹ Insulating the turbines kept the engine rooms quiet and kept the heat in the turbine rather than on engine room workers. CP 293(40).

under the immediate supervision of the Navy through NAVSEA officers. CP 5302-03. GE manufactured and shipped the turbines to the Navy without any thermal insulation materials (asbestos-containing or otherwise) on them. CP 5302. GE did not manufacture or supply any thermal insulation that the Navy may have later placed on the turbines. Id.; CP 2123. Only after a turbine arrived at a shipyard, and was installed and tested,² would thermal insulation materials be applied. Id.

The insulation applied after the turbines left GE's control would be whatever the U.S. Navy selected, specified and installed in accordance with the Navy's Manual of Thermal Insulation, and would have been supplied and installed by entities other than GE. Id. The Navy's use of asbestos aboard ships and on turbines was based upon what the Navy determined was military necessity. CP 5244-46. The Navy had extensive knowledge about asbestos and took a variety of precautions through the years with respect to it.³ CP 5244-58; Resp. Brief of GE, pp. 5-8.

B. Procedural Background.

Plaintiff sued, *inter alia*, various manufacturers who supplied equipment to the Navy, CP 7-10, for injuries caused by asbestos exposure.

² The turbines were tested both at the dock and at sea trials. CP 5306.

³ Although Mr. Braaten denied being warned by the Navy, the Navy's Safety Handbook for Pipefitters, issued in 1958, provided in part: "Asbestos. Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard." CP 5255.

He alleged that he was exposed to asbestos when he worked around defendants' equipment because such equipment was "used in conjunction" with asbestos-containing products. CP 8. As to GE, he claimed that he was exposed to asbestos when he removed or replaced asbestos-containing insulation products that the Navy bought from third parties and applied to the outside of GE's turbines after delivery. See App. Br. at 32-34.

The Honorable Sharon Armstrong granted summary judgment to GE and other equipment manufacturer defendants on the ground that they did not have a duty to warn of dangers of someone else's product. See CP 5560 ("GE had no duty to warn of potential dangers associated with the use of asbestos-containing products manufactured, sold, or installed by third parties, unless contained in the turbine when delivered"). This was the same basis on which Judge Armstrong had granted summary judgment in another King County case, Simonetta v. Viad Corp., Court of Appeals No. 56614-8-I.⁴ The Court of Appeals in this case and in Simonetta reversed on the duty to warn,⁵ holding that the equipment manufacturers had a duty to warn, under both negligence and strict liability principles, of the dangers of asbestos products that they did not make or sell. See Crane

⁴ Viad Corporation has filed a petition for review of the Court of Appeals decision in Simonetta, Supreme Court No. 80076-6.

⁵ As noted, the Court of Appeals affirmed summary judgment for GE on the alternate ground of collateral estoppel.

Co's petition, Appendix, A-1 to A-35.⁶ The equipment manufacturers seek review. GE agrees that the Court should accept review and reverse the Court of Appeals' decision imposing on equipment manufacturers a strict liability and negligence duty to warn as to the dangers of asbestos products they did not make or sell.

III. THE PETITIONS SHOW THAT THE CRITERIA FOR
DISCRETIONARY REVIEW BY THIS COURT HAVE BEEN MET

GE agrees with petitioners that the Court of Appeals opinion is in conflict with decisions of this Court and other decisions of the Court of Appeals, RAP 13.4(b)(1) and (2), and that the duty to warn imposed by the Court of Appeals constitutes an issue of substantial public interest that should be determined by this Court, RAP 13.4(b)(4). Without repeating the briefing already done by the petitioners in this Court, or the briefing done by defendants in the Court of Appeals, GE wishes to make some observations about the Court of Appeals decision and its implications.

A. The Court of Appeals' Departure from Settled Law Is Unwarranted.

Until the Court of Appeals decisions in this case and in Simonetta, the common law placed the responsibility for an injury-causing product upon the manufacturer of that product and others in its chain of

⁶ The decisions have now been officially reported. See Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 151 P.3d 1010 (2007); Simonetta v. Viad Corp., 137 Wn. App. 15, 151 P.3d 1019 (2007).

distribution. In extending that responsibility to manufacturers who did not make or sell the injury-causing product, the Court of Appeals correctly acknowledged that it was faced with an issue of first impression, 137 Wn. App. at 42, as no Washington case has held that a manufacturer of a product that did not injure the plaintiff had a duty to warn, whether in negligence or strict liability, of the dangerous propensities of a product, which it did not make or sell, that did injure the plaintiff.

Neither plaintiff nor the Court of Appeals cited any Washington statutory or common law rule⁷ to support the Court of Appeals' imposition of a duty upon one product manufacturer to warn of dangers inherent in another manufacturer's product, which the first manufacturer did not make or sell, merely because its product might be used "in conjunction" with the other manufacturer's product.⁸

The Court of Appeals decision undermines the longstanding requirement that the plaintiff alleging an asbestos-caused injury must

⁷ To prove existence of a duty, the plaintiff must establish "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).

⁸ Instead, the Court of Appeals relied upon Stapleton v. Kawasaki Heavy Industries, Ltd., 608 F.2d 571 (5th Cir. 1979), modified, 612 F.2d 905 (5th Cir. 1980), a case not cited by any party, where a motorcycle's design permitted gasoline to leak from the motorcycle's gasoline tank (which was supposed to contain the gasoline) when the motorcycle was laid on its side. The petitioners have explained in detail why the Stapleton case is distinguishable and inapposite. Crane Co.'s petition at 11-12; Yarway Corporation's petition at 19; IMO Industries, Inc.'s petition at 15-16.

identify the manufacturer of the asbestos product that caused the injuries. Lockwood v. A C & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987) (to have a cause of action in a product liability case, a plaintiff “must identify the particular manufacturer of the product that caused the injury”). This is a threshold requirement, not solely a causation one. Identifying the manufacturer of the product that caused the harm is an essential element both in considering causation and in considering whether there is any case for a manufacturer to answer.

To justify the result it reached, the Court of Appeals characterized the equipment as the “relevant product,” even though Mr. Braaten’s mesothelioma was caused by asbestos, not by the turbines, valves or pumps.⁹ 137 Wn. App. at 47 n. 47, 49. Based on its erroneous definition of the “relevant product,” the Court of Appeals held that one manufacturer’s product is unreasonably dangerous for failing to contain warnings that a different manufacturer’s product is unreasonably dangerous. This is not good law, nor is it consistent with the rationale behind “chain of distribution” liability or strict liability.

⁹ The Court of Appeals also incorrectly referred to asbestos as being “contained in” the equipment or as “being released” by the equipment. 137 Wn. App. at 45-46. Neither characterization is correct as to exterior insulation applied by others to equipment after the equipment was sold and delivered to the Navy.

The equipment manufacturers may have profited from selling their own equipment, but they did not make, sell or profit from the injury-causing asbestos, which was applied to their products after they delivered their products to the Navy. The Court of Appeals did not discuss the “chain of distribution” arguments of defendants, but the rationale behind “chain of distribution” liability is that relationships exist as among manufacturers, distributors and retailers that put them in a position to “argue out” any questions as to their respective liabilities. Seattle-First Nat’l Bank v. Tabert, 86 Wn.2d 145, 149, 542 P.2d 774 (1975). No such relationships exist here.

Another rationale for strict liability is that “the burden of accidental injuries caused by products intended for consumption [should] be placed upon those who market them,” and “be treated as a cost of production against which liability insurance can be obtained” See Restatement (Second of Torts) § 402A, comment c. The defendants in this case could not have anticipated that, in their costs of production, they would need to provide for the prospect of injuries caused by asbestos products they did not make or sell, nor could they or their insurers have anticipated that liability insurance would be necessary to protect against injuries caused not by their own products, but by products made and sold by others.

B. The Court of Appeals Decision Is Not Supported by Public Policy.

“[W]hether a particular class of defendants owes a duty to a particular class of plaintiffs is a question of law and depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’” Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (citations omitted); see also Bernethy v. Walt Faylor’s, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982) (the court evaluates public policy considerations in determining whether a duty exists).

The Court of Appeals decision focuses only on the aspect of public policy that seeks to compensate the plaintiff and fails to give balanced consideration to the impact of its decision on civil defendants and the legal system. Mr. Braaten is not without remedy. Some asbestos manufacturers are still solvent, and most in bankruptcy have trust claim procedures. Mr. Braaten also has the equivalent of workers’ compensation protection from the Navy. A desire to expand the sources of possible recovery for asbestos plaintiffs may be understandable, but the duty imposed by the Court of Appeals here is not supported by considerations of “logic, common sense, justice, policy and precedent.” Stalter, 151 Wn.2d at 155.

The opinion creates great uncertainty and will have significant adverse economic impacts on the new class of “asbestos” defendants, who are now deemed subject to liability for injuries caused by asbestos

insulation, because many decades ago they made a product that could or probably would be insulated, even though the injury-causing asbestos insulation was made, sold, and applied by others to the outside of defendants' equipment after delivery. Such adverse economic impacts include a significant increase in already enormous costs of litigation, and future costs to research other products that might be used "in conjunction" with their own, even though the other product may be the sole cause of injury. The costs to purchasers of equipment must necessarily increase if a company is to stay in business. Efficacious new products may not be developed or marketed at all due to the risks inherent in someone else's products that might be used in conjunction with such new products.

The decision will also have an adverse impact on Washington courts. With only rare exceptions, courts across the country have held that one manufacturer does not have a duty to warn of risks of another manufacturer's product that the first manufacturer did not make or sell.¹⁰

¹⁰ E.g., Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 582 N.Y.S.2d 373, 377, 591 N.E.2d 222, 225-26 (1992) (manufacturer of nondefective truck tire had no duty to warn about the use of its nondefective product with a defective multipiece tire rim product produced by another, noting that the tire manufacturer "had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale"); Baughman v. General Motors Corp., 780 F.2d 1131, 1132-33 (4th Cir. 1986) (truck manufacturer had no duty to warn against replacement multi-piece wheel rim assembly supplied by another manufacturer because such a rule would impose an excessive burden on a manufacturer to test and warn against a myriad of products made by any number of manufacturers, and because the rationale for imposing liability did not exist where the defendant had not placed the defective product into the stream of commerce); Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d

As a result of the Braaten and Simonetta opinions, Washington will become a destination forum for numerous non-resident asbestos and other plaintiffs whose own states have rejected the imposition of liability on one defendant for someone else's product.

465, 472 (11th Cir. 1993) (applying Alabama law and holding that a tire manufacturer had no duty to warn of dangers in exploding rim assembly manufactured by another because "[t]he manufacturer of a non-defective component tire, cannot be held liable for injuries caused by a product it did not manufacture, sell, or otherwise place in the stream of commerce"); Acoba v. General Tire, Inc., 986 P.2d 288, 305 (Haw. 1999) (same); Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 496-97 (6th Cir. 2005) (manufacturers who supplied products without the asbestos to which plaintiff was exposed could not be held liable); Walton v. Harnischfeger, 796 S.W.2d 225, 226 (Tex. App. 1990), writ denied (1991) (crane manufacturer had no duty to warn or instruct users of its crane about nylon rigging it did not manufacture, incorporate into its crane, or place into stream of commerce); Brown v. Drake-Willock Int'l, 209 Mich. App. 136, 530 N.W.2d 510, 514-15 (1995), appeal denied, 562 N.W.2d 198 (1997) (makers of dialysis machine did not have duty to warn hospital employee of dangers of formaldehyde she used to clean machine even though its use was recommended by some defendants and anticipated by another); Spencer v. Ford Motor Co., 141 Mich. App. 356, 367 N.W.2d 393, 396 (1985) (undesirable results would flow from finding a car manufacturer liable just because car could accommodate dangerous or defective replacement parts); Mitchell v. Sky Climber, Inc., 396 Mass. 629, 631, 487 N.E.2d 1374, 1376 (1986) ("We have never held a manufacturer liable, however, for failure to warn of risks created solely in the use or misuse of the product of another manufacturer"); Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634, 638, 173 Cal. Rptr. 20 (Cal. App. 2d Dist. 1981) (propane stove manufacturer had no duty to warn that stove's flame could ignite gas leaking from propane system, stating: "To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense," and explaining that the stove was not unreasonably dangerous or unsafe "simply because it is used with natural gas"); Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372, 377-78, 203 Cal. Rptr. 706 (Cal. App. 2d Dist. 1984) (failure to warn rule "does not apply where it was not any unreasonably dangerous condition or feature of *defendant's* product which caused the injury") (citations omitted); Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395, 398 (1985) (emphasis in original) ("the manufacturer's duty is restricted to warnings based on the characteristics of *manufacturer's own product* . . . the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products"); Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 615-16 (Tex. 1996) (no duty to warn in negligence or strict liability of another manufacturer's products even if they may be used with manufacturer's own products); Ford Motor Co. v. Wood, 119 Md. App. 1, 703 A.2d 1315, 1332, writ denied, 709 A.2d 139 (1998) (court was "unwilling to hold that a vehicle manufacturer has a duty to warn of the dangers of a product that it did not manufacture, market, sell, or otherwise place into the stream of commerce").

The practicalities of complying with the duty imposed by the Court of Appeals are questionable. A steam turbine, for example, has a potential useful life of 50-plus years. Insulation technology changes over time. Warnings that may be appropriate for a certain type of insulation at a certain time may be or become improper or ineffective for a different kind of insulation at a different time. (Plaintiff here testified that three different kinds of insulation were on the outside of the turbines. CP 293(39, 41)). A risk of confusion necessarily exists as warnings of an equipment manufacturer may be inconsistent with warnings or recommendations given by the insulation manufacturer or by the Navy.

The duty imposed by the Court of Appeals subjects manufacturers to indeterminate and overwhelming liability. A multitude of products may be used with one another. The Court of Appeals decision effectively makes the manufacturer of one product the insurer of a product that it did not make or sell.

IV. CONCLUSION

For the foregoing reasons, GE supports the petitions for review. This Court should take review and reverse the Court of Appeals decision as to its holding that subjects equipment manufacturers to negligence and strict liability for failing to warn of the dangers of the injury-causing asbestos products that the equipment manufacturers did not make or sell.

RESPECTFULLY SUBMITTED this 30th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 30th day of May, 2007, I caused a true and correct copy of the foregoing document, "General Electric Company's Answer to Petitions for Review," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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