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COURT OF APPEALS
DIVISION ONE

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No. 57011-1-I

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

VERNON BRAATEN,

Plaintiff-Appellant,

v.

BUFFALO PUMPS, INC., et al.,

Defendants-Respondents.

AMICI CURIAE BRIEF OF INGERSOLL-RAND COMPANY
AND LESLIE CONTROLS

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici Ingersoll-Rand Company (“Ingersoll-Rand”) and Leslie Controls (“Leslie”) submit this brief to assist the Court in determining the application of Washington law to equipment manufacturers and distributors to whose products – subsequent to their sale and distribution – asbestos-containing products manufactured, distributed, or otherwise placed in the stream of commerce by others are attached or installed.

Amici have a strong interest in this issue. For over one hundred and twenty-five years, Ingersoll-Rand has manufactured and/or marketed numerous types of multi-use products, including pumps and compressors; its customers have included the United States Navy and industrial facilities around the country and the world, including sites in the State of Washington. Leslie has manufactured and provided control valves and other equipment to naval and commercial vessels for decades. Both have become more frequent defendants in litigation in Washington and other states brought by plaintiffs alleging injury from exposure to asbestos-containing products affixed to or installed in their equipment subsequent to its sale and distribution. The decision in this case will have a significant effect on *Amici’s* liability under Washington law not for their own products, but for failing to warn about products manufactured and distributed by others.

II. STATEMENT OF THE CASE

Ingersoll-Rand and Leslie adopt the statements of the various respondents with respect to their respective issues.

III. ARGUMENT

A. Washington Law Limits Liability for Injury To Those Proximately Caused by a Manufacturer's Own Product.

Courts in Washington, and elsewhere, have rejected as a matter of law Appellant's novel theory of liability that respondents somehow had a duty to warn for another manufacturer's (a) insulation supplied and installed by third parties on the exterior of their equipment, (b) pipe flange connection gaskets, and/or (c) replacement internal gaskets/packing, despite the fact that respondents neither placed them in the stream of commerce nor earned a profit from their sale. Dismissal of Appellant's claims they were exposed to asbestos-containing products affixed to or installed in respondents' equipment is consistent with Washington law and the law of other jurisdictions around the country, and should be affirmed.

It is a bedrock principle of law, in Washington as in other states, that liability for injuries allegedly caused by a product does not extend to a defendant that was not part of the chain of distribution of that product. The Washington Supreme Court held in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987) that in order for there to be a triable issue of fact regarding proximate causation in an asbestos case, the

plaintiff must offer evidence supporting a reasonable inference that he or she was exposed to a particular defendant's asbestos-containing product that caused injury. In rejecting a "market share" theory of liability, the *Lockwood* court recognized:

Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between injury, the product causing the injury, and the manufacturer of a product. In order to have a cause of action the plaintiff must identify the particular manufacturer of the product that caused the injury.

Id. (emphasis added). Such evidence of proximate causation is required whether recovery is sought based on negligence, strict liability, or the failure to warn. *Kuster v. Gould Nat. Batteries*, 71 Wn.2d 474, 485, 429 P.2d 220 (1967); *see also* W. Prosser, *The Law of Torts*, § 241 (4th ed. 1971) (plaintiff must "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.").

1. Appellant Fails to Establish a Legal Duty to Warn of Hazards Presented by Products Manufactured or Distributed by Others.

Appellant acknowledges his burden to demonstrate the existence of an actionable duty breached by respondent equipment manufacturers, but set out to craft a duty to warn myopically based on the foreseeability of hazards created by another's products and ignore the requisite "mixed considerations of logic, common sense, justice, policy, and precedent"

necessary under Washington law. See, e.g., *Snyder v. Med. Serv. Co. of E. Wash.*, 145 Wn.2d 233, 35 P.3d 1158 (1958). For support, Appellant cites the New York Court of Appeals opinion in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928). However, that Court has expressly rejected the same *Palsgraf*-based foreseeability argument raised here by Appellant:

Foreseeability should not be confused with duty. The principle expressed in [*Palsgraf*] is applicable to determine the scope of duty – only after it has been determined that there is a duty. Since there is no duty here, that principle is inapplicable. . . . When a duty exists, nonliability in a particular case may be justified on the basis that an injury is not foreseeable. In such a case, it can thus be said that foreseeability is a limitation on duty. In the instant matter, however, we are concerned with whether foreseeability should be employed as the sole means to create duty where none existed before. If a rule of law were established so that liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow. The liability potential would be all but limitless and outside boundaries of that liability, both in respect to space and the extent of care to be exercised, particularly in the absence of control, would be difficult of definition.

Pulka v. Edelman, 40 N.Y.2d 781, 785-786 (1976) (internal citations omitted); see also *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) (“Foreseeability, alone, does not define duty – it merely determines the scope of the duty once it is determined to exist.”) (citations omitted). Plaintiff’s citation to *King v. Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974), is similarly misplaced – *King* discusses only the lack of duty based on lack of foreseeability, not vice versa, and the authorities it cites clearly

treat foreseeability as a limitation on a duty's scope, not its basis.¹

Appellant also cites for support cases which require manufacturers and suppliers to warn of foreseeable hazard created by their *own* products which caused injury. None, however, support Appellant's novel theory that a product manufacturer must warn of hazards from products *other* than its own, and several expressly rejected the existence of such a proposed duty.² In fact, Appellant completely ignores such important alternative considerations as the placement of liability on those who produce and profit from the sale of the injury-causing product or substance or who make the decision to use it, or that deterrence of harmful conduct

¹ See, e.g., *Wells v. Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970) ("Generally, the duty to use ordinary care is *bounded* by the foreseeable range of danger.") (emphasis added).

² See, e.g., *Koker v. Armstrong Cork*, 60 Wn.App. 466, 476-477, 804 P.2d 659 (1991) (duty to warn arises when product manufacturer "becomes aware or should be aware of dangerous aspect of *its* product...") (emphasis added); *Freeman v. I.B. Navarre*, 47 Wn.2d 760, 772-73, 289 P.2d 1015 (1955) ("duty of care on the part of the manufacturer does not arise out of contract, but out of the fact of *offering goods on the market...*") (emphasis added); *Bich v. General Electric Co.*, 27 Wn. App. 25, 32-33, 614 P.2d 1323 (1980) (rejecting existence of any duty by a transformer manufacturer to warn about a defective fuse installed in its product, and holding manufacturer liable because its own transformer exploded and caused injury); *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 25, 724 P.2d 389 (1986) (plaintiff injured by the "relevant" assembly line part purchased from Van Doren); *Wright v. Stang Mfg. Co.*, 54 Cal.App.4th 1218 (1997) (basing liability on deck gun's propensity to generate water pressure which caused the mounting system to fail – not for any failure to warn about the mounting system itself). The conclusory decision in *Berkowitz v. A.C.&S.*, 733 N.Y.S.2d 410 (App. Div. 2001), lacks cogent analysis, completely fails to address contrary authorities, and is inconsistent with higher court decisions in *Rastelli v. Goodyear*, 79 N.Y.2d 289, 297 (1992) (rejecting "that one manufacturer has a duty to warn about another manufacturer's products"), *Pulka*, and *Hamilton*. The unpublished decision of the federal district court in *Chicano v. General Electric*, 2004 WL 2250990 (E.D.Pa. 2004), completely ignores Pennsylvania court decisions in *Toth v. Economy Forms Corp.*, 391 Pa.Super. 383 (1990), and *Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. August 2, 2004), and has not been followed.

is best enhanced when liability is squarely placed on those in the best position to avoid injury rather than diffusing it among multiple parties with little connection to the injury-causing product, special expertise in its hazards, or ability to develop alternative lower risk products.

In short, Appellant fails to demonstrate existence of an actionable duty to warn of hazards created by another's asbestos-containing products. All claims against respondent equipment manufacturers based on such a duty to warn were properly dismissed as a matter of law.

2. Liability For External Insulation and Pipe Flange Connection Gaskets Rests With the Companies That Manufactured and Distributed Those Products, Not With Manufacturers of Equipment on Which They Were Installed.

Further contrary to Appellant's attempt to expand the scope of the duty to warn, Washington law limits tort liability to those defendants who manufacture or otherwise place in the stream of commerce a particular product that causes injury. The Washington Products Liability Act (WPLA) expressly limits liability to those in the chain of distribution of the "relevant product" – "that product or its component part or parts which gives rise to the product liability claim." RCW 7.72.010(3) (emphasis added). Washington common law has reaffirmed this principle. *See Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 18-19, 84 P.3d 895 (2004) (manufacturers of hook not liable for harm caused

by latching “mouse” that they did not manufacture and that was added to the hook at a later point in time by the plaintiff’s employer); *Seattle First National Bank v. Tabert*, 86 Wn.2d 145, 148-149, 542 P.2d 774 (1975) (recognizing liability of those in the chain of distribution); *Falk v. Keene Corp.*, 113 Wn.2d 645, 651, 782 P.2d 974 (1989) (*Tabert* approach favored when Legislature enacted WPLA); *Bombardi v. Pochel’s Appliance & TV Co.*, 9 Wn. App. 797, 806, 515 P.2d 540, *modified*, 10 Wn. App. 23 (1973) (“purpose of [products] liability is to ensure that the costs of injury resulting from defective products are borne by the makers of the products who put them in the channels of trade[.]”).³

³ Washington has adopted Restatement (Second) of Torts § 402A (“Section 402A”) with respect to the assignment of legal responsibility for products liability claims, including asbestos-related claims. *See, e.g., Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 532 (1969) (applying Section 402A to manufacturers of unreasonably dangerous products); *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 792 (2005) (applying Section 402A to claim against asbestos distributor). Section 402A(a)(1) provides in pertinent part:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Under this rule, costs associated with a defective product are appropriately “placed upon those who market them, and [] treated as a cost of production.” Section 402A, comment c; *see also Bombardi*, 9 Wn. App. at 806 (imposition of liability on those in the chain of distribution justified policy “to ensure that the costs of injuries resulting from defective products are borne by the makers of products who put them in the channels of trade” and benefit financially from them); *Tabert*, 86 Wn.2d at 147 (“[a] manufacturer is strictly liable in tort when an article he places on the market . . .”) (emphasis added); *Falk*, 113 Wn.2d at 651 (WPLA incorporates *Tabert* approach), *Lockwood*, 109 Wn.2d at 245

Peterick v. State, 22 Wn. App. 163, 589 P.2d 250 (1977), overruled on other grounds, *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 719 (1985), is instructive. In exchange for stock, Rocket Research (“Rocket”) assigned to its subsidiary EXCOA the patent for a liquid explosive Rocket had developed. Plaintiffs’ decedents were EXCOA employees killed in an explosion at a test facility designed, owned, and operated by EXCOA, and their estates sued Rocket, claiming it was strictly liable under a products liability theory because it had failed to give adequate warnings concerning the explosive. The trial court dismissed plaintiffs’ claims against Rocket and the Court of Appeals affirmed, explaining that because Rocket had not manufactured the explosive or had knowledge unknown to others, it had no duty to warn:

The initial limitation of all such actions requires the common denominator of a manufacturer or seller. *See Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 45, 148-149, 542 P.2d 774 (1975). . . . The facts alleged by plaintiffs fail to establish either that Rocket was the manufacturer or that Rocket had any duty to warn plaintiffs’ decedents of dangers that officials in EXCOA were aware of. The plaintiffs have failed to show any causal link between the explosion and any acts or omissions of Rocket. The plaintiffs did not produce evidence to rebut the defendant Rocket’s denial of control in the manufacturing process or its denial of any duty to warn plaintiff’s decedents, and that claim properly was dismissed.

(“plaintiff must identify the particular manufacturer of the product that caused the injury.”) (emphasis added). This rule and its underlying rationale effectively preclude respondents’ liability for asbestos-containing products of others such as flange gaskets and exterior insulation in which it has no financial stake or return.

Id. at 192-193 (citations omitted). Appellant similarly failed to offer evidence that respondents manufactured the injury-causing asbestos-containing product or possessed knowledge of dangers unknown to others.

Washington's limitation of product liability to the chain of distribution is consistent with a legion of decisions from other jurisdictions that, like Washington, have adopted the precepts of Section 402A and refused to impose any duty to warn upon a defendant who did not design, manufacture, or distribute the product that caused injury. For example:

California: In *Powell v. Standard Brands Paint*, 166 Cal.App.3d 357, 212 Cal.Rptr.2d 395 (1985), plaintiff sued Standard Brands because a lacquer thinner manufactured by Grove Chemical exploded the day after he had used a Standard Brands lacquer thinner sold without any warnings, claiming he would not have used any thinners if Standard Brands had warned him of the dangers of their use. The California Court of Appeals affirmed summary judgment in favor of Standard Brands:

[I]t is clear the manufacturer's duty is restricted to warnings based on the characteristics of the *manufacturer's own product*. Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of the risks of these products. A manufacturer's decision to supply warnings, and the nature of any warnings, are therefore necessarily based upon and tailored to the risks of use of the manufacturer's own product. Thus, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are

the only risks he is required to know.

166 Cal.App.3d at 364 (citations omitted) (emphasis in original).

The same rule applies where a manufacturer's safe product is used in conjunction with another manufacturer's defective component part. In *Garman v. Magic Chef, Inc.*, 117 Cal.App.3d 634, 173 Cal.Rptr. 20 (1981), the Court of Appeals affirmed summary judgment to stove manufacturer Magic Chef where the plaintiff sought to impose liability for failing to warn about risks from another manufacturer's adjacent pipe and t-joint which leaked propane that was ignited by the stove's nearby flame:

[T]he makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe manner or in conjunction with another product which because of a defect or improper use is itself unsafe.

117 Cal.App.3d at 638 (emphasis added). As the Court explained, "[t]o say that the absence of a warning to check for gas leaks in other products makes the stove unsafe is semantic nonsense." *Id.* Similarly in *Blackwell v. Phelps Dodge Corp.*, 157 Cal.App.3d 372, 203 Cal.Rptr. 706 (1984), the court specifically distinguished between the defendant supplier's acid and the defective tank manufactured and supplied by a third party which was used to transport the acid with respect to the duty to warn:

While failure to warn may create liability for harm caused by use of an unreasonably dangerous product, that rule does not apply where it was not any unreasonably dangerous condition or feature of defendant's product which caused the injury.

157 Cal.App.3d at 377 (emphasis added). As in these cases, Appellant offered no evidence that respondents had any role in the manufacture or distribution of the relevant products.

New York:⁴ In *Rastelli v. Goodyear Tire & Rubber*, 79 N.Y.2d 289, 591 N.E.2d 222 (1992), plaintiff alleged that tire manufacturer Goodyear negligently failed to warn of the danger of using the tire on a multi-piece rim which exploded when inflating a Goodyear tire. While a product manufacturer could indeed be held liable in strict liability or negligence under New York law for failure to provide adequate warnings regarding its own products, the New York Court of Appeals expressly:

decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. Goodyear had no control over the production of the subject multi-rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode.

79 N.Y.2d at 297-298. As in *Rastelli*, there is no evidence that respondents had any role in placing asbestos-containing products in the stream of commerce or benefited from their sale – a test expressly recognized in Washington and under Section 402A as a basis for product

⁴ See *Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 49 N.Y.2d 471, 479, 403 N.E.2d 440 (1980), regarding application Section 402A in New York State.

liability. See *Bombardi*, 9 Wn. App. at 806; Section 402A, comment c.

Pennsylvania:⁵ In *Toth v. Economy Forms Corp.*, 391 Pa. Super. 383, 571 A.2d 420 (1990), plaintiff's decedent was killed when a wooden plank broke on a construction scaffold. Plaintiff alleged that the scaffold manufacturer had a duty to warn about the inherent dangers of using wooden planks on its metal product. The court rejected this argument:

[Plaintiff's] theory would have us impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking it did not supply. Pennsylvania law does not permit such a result.

391 Pa. Super. at 388-389, 571 A.2d at 423. In *Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. August 2, 2004), the court faced circumstances where, as here, there was no evidence of asbestos manufactured or supplied by the defendant:

[T]here is no evidence that General Electric made any of the asbestos insulation on the General Electric products with which Korin came in contact. General Electric is not liable if it made a product that was later insulated with someone else's asbestos. The insulation here was all on the outside of the General Electric components.

Id. at 6. As in *Toth* and *Korin*, respondent equipment manufacturers owe no duty to warn about defective component parts they did not supply, even if they reasonably knew or should have known the defective component would likely be used with its own product.

⁵ Pennsylvania courts have formally adopted Section 402A. See, e.g., *Phillips v. A-Best Prods. Co.*, 665 A.2d 1167, 1170 (1995).

Texas: In *Walton v. Harnischfeger*, 796 S.W.2d 225 (Tex. App. – San Antonio 1990), plaintiff alleged crane manufacturer Harnischfeger failed to warn about or provide instructions for rigging a nylon strap which broke and caused a load of tin to fall and injure him. The Texas Court of Appeals held that an equipment manufacturer had no duty to warn of potential dangers associated with another manufacturer’s products:

Appellee did not manufacture, distribute, sell, or otherwise place the nylon straps or any other rigging material into the stream of commerce; appellee is not in the business of manufacturing or selling any rigging material; and rigging is a complex art that requires different loads to be rigged in a multitude of different ways. We hold that, under the facts of this case, appellee had no duty to warn or instruct users of its crane about rigging it did not manufacture, incorporate into its cranes, or place into the stream of commerce.

796 S.W.2d at 227-228. See also *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 613-16 (1996) (manufacturer has no duty to warn about another company’s products, even though those products may be used in connection with manufacturer’s own products); *Braaten v. Certainteed Corp.*, No. 25489 (Tex. Dist. Brazoria County – November 19, 2004) (pump manufacturer not required “to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by [defendant]”) (prior case brought by Appellant Braaten).⁶

⁶ Cases from other jurisdictions that have refused to impose liability on one company for the hazards of another company’s products include:

3. Respondent Equipment Manufacturers Are Not Legally Responsible for Replacement Gaskets or Packing They Did Not Manufacture or Distribute.

Washington law is also clear that a manufacturer is not responsible for component or replacement parts installed or affixed later that it did not manufacture or distribute. *Sepulveda-Esquivel*, 120 Wn. App. at 18-19.

This result is consistent with decisions in products liability cases – including asbestos-related cases – brought in other jurisdictions with products liability standards analogous to those adopted in Washington. In *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the Sixth Circuit Court of Appeals affirmed summary judgment under federal maritime law, ruling that a merchant seaman could not hold equipment manufacturers liable for his asbestos-related injury because he lacked evidence that he had worked with original gasket and packing material

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- **Louisiana:** *Fricke v. Owens-Corning Fiberglass Corp.*, 618 So.2d 473, 475 (La. Ct. App. 1993) (manufacturer had no duty to warn about asbestos product that it neither manufactured nor sold). Louisiana follows the rule in Section 402A. See *Weber v. Fidelity & Casualty Ins. Co.*, 250 So.2d 754, 755 (1971); *Chauvin v. Sisters of Mercy Health Sys.*, 818 So.2d 833, 841 (2002).
 - **Maryland:** *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1331-32 (Md. Ct. Spec. App. 1997) (expressly refusing to hold that a 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”).
 - **Massachusetts:** *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (Mass. 1985) (refusing to hold manufacturer liable “for failure to warn of risks created solely in the use or misuse of the product of another manufacturer”). While Massachusetts had not formally adopted Section 402A, but its courts have reached essentially the same result using a U.C.C. breach of warranty analysis. See *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1313 (1988); *Mason v. General Motors Corp.*, 490 N.E.2d 437, 441 (1986); *Hayes v. Ariens Co.*, 462 N.E.2d 273, 277 (1984).

installed by the equipment manufacturers or that the equipment manufacturers themselves had supplied replacement gaskets and packing containing asbestos. As the Court explained:

Even if Lindstrom's testimony is sufficient to establish that he came into contact with sheet packing material containing asbestos in connection with an Ingersoll Rand air compressor, Ingersoll Rand cannot be held responsible for asbestos containing material that was incorporated into its product post-manufacture. Lindstrom did not allege that any Ingersoll Rand product itself contained asbestos. As a result, plaintiffs-appellants cannot show that an Ingersoll-Rand product was a substantial factor in Lindstrom's illness in Lindstrom's illness, and we therefore affirm the district court's grant of summary judgment in Ingersoll Rand's favor.

Lindstrom, 494 F.3d at 497.

In *Niemann v. McDonnell Douglas Co.*, 721 F.Supp. 1019 (S.D. Ill. 1989), the District Court held, applying Illinois law, that a military aircraft manufacturer was not responsible under claims for strict liability, negligence, or failure to warn plaintiff about asbestos chafing strips used inside the aircraft's engine cowling because the original asbestos strips installed by the aircraft manufacturer had been replaced before the plaintiff had worked on the aircraft. The Court reached this conclusion even though the original asbestos-containing strips were replaced by asbestos-containing strips from another manufacturer. *Id.* at 1029-1030.

The same result has been reached in cases involving replacement automotive parts (including asbestos-containing parts). In *Baughman v.*

General Motors Corp., 780 F.2d 1131 (4th Cir. 1986), plaintiff tire mechanic injured when a multi-rim replacement wheel exploded argued that General Motors failed to adequately warn of the dangers associated with multi-rim wheels manufactured by others it could accommodate. The Fourth Circuit rejected this reasoning in affirming summary judgment:

Since the exploding rim in question was a replacement component part and not original equipment, Baughman's position would require a manufacturer to test all possible replacement parts. If the law were to impose such a duty, the burden on a manufacturer would be excessive. While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers. The duty to warn must fairly fall upon the manufacturer of the replacement component part. Since GM may not properly be charged under the law with a duty to warn against replacement component parts, plaintiff's duty to warn theory cannot prevail.

Id. at 1132-33 (citation omitted).⁷ Similarly in *Spencer v. Ford Motor Co.*, 41 Mich.App. 356, 360, 367 N.W.2d 393 (1985), a truck mechanic injured when a multi-rim wheel exploded claimed that a Ford truck was defective because it accommodated another manufacturer's defective part installed on the truck subsequent to the truck's distribution. The Michigan Court of Appeals disagreed:

Though a vehicle manufacturer may be held liable for damages caused by a defective component parts supplied by

⁷ See S.C. Code Ann. § 15-73-10 *et seq.* (codifying Section 403A).

another, this duty has not yet been extended to component parts added to a vehicle subsequent to distribution. . . The threshold requirement of any products liability action is identification of the injury-causing product and its manufacturer. Failure of a component not supplied by the [vehicle] manufacturer does not give rise to liability on the manufacturer's part."

Id. at 360 (internal punctuation and citations omitted).⁸

The result is the same in litigation involving asbestos-containing automotive replacement parts. In *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. 1998),⁹ plaintiffs unable to prove who had manufactured brake pads instead sued Ford alleging exposure to replacement asbestos-containing brake products. Citing *Baughman* with approval, the court held that "a vehicle manufacturer [is liable only for defective component parts] incorporated...into its finished product," not those added later. *Id.* at 1331.

B. Plaintiffs' Proposed Expansion of Traditional Tort Liability Jurisprudence to Impose Liability for Exposure to or Failure to Warn About Another Manufacturer's Products Would Undermine Public Policy and Create Chaos.

By seeking to impose liability on respondents for products they did not place in the stream of commerce, Appellant asks this Court to engage

⁸ Michigan's doctrine of implied warranty of fitness which underlies its products liability jurisprudence "is virtually indistinguishable in concept and practical effect" from strict liability under Section 402A. *Tulku v. Mackworth Rees Division of Avis Industries, Inc.*, 101 Mich.App. 709, 722 n. 4, 301 N.W.2d 46 (1980); *see also, e.g., Dooms v. Stewart Bolling and Co.*, 68 Mich.App. 5, 10-11, 241 N.W.2d 738 (1976).

⁹ Maryland adheres to Section 402A. *See Lightolier v. Moon*, 876 A.2d 100, 108 (2005); *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 353 (1985).

in an unprecedented expansion of well-established fundamental tort law jurisprudence. A defendant that was not part of a product's chain of distribution is singularly ill-equipped to prevent or protect against any dangers associated with that product. For that reason, courts have limited such duties to those entities in the best position to know of a product's non-apparent risks – the manufacturers and distributors of such products. Yet Appellant seeks to eliminate that rational limitation and extend liability well beyond the chain of distribution.

If adopted by this Court, Appellant's theory would lead to chaos. If respondents should have warned of the hazards of asbestos-containing insulation that was affixed to the exterior of its equipment, every supplier of equipment to a facility at which such insulation was used – from the suppliers of pumps and turbines to the suppliers of steel pipes and sheet metal – could be held liable for having failed to warn of the dangers of the insulation. Moreover, the duty to warn presumably would flow in both directions: an insulation or gasket manufacturer, with reason to know that its product may have been applied to or installed in respondents' equipment, would be obligated to warn of any hazards it believed to be associated with operation of the equipment. Every product supplier, in fact, would be required to warn of the foreseeable dangers of other products used at the facility, leading to an extraordinary and confusing

proliferation of warnings, many of them issued by entities that professed no expertise in the product hazards about which they were warning.¹⁰

The law simply does not go that far. Under longstanding principles of public policy underlying Washington tort law, responsibility for a product's dangers properly rests with companies in the chain of distribution of that product, and responsibility for the safety of the workplace rests with the employer. By affirming the dismissal of Appellant's claims here, this Court will not be undermining public policy or leaving claimants without a remedy. To the contrary, such a ruling will place responsibility for gaskets and insulation where it belongs and where it traditionally has rested – with the parties who participated in the manufacture and distribution of those products, and with the employer who selected, purchased, and installed the products. To hold otherwise would dilute those parties' responsibilities under the law and reduce their incentive to manufacture and distribute safe products and to provide a safe workplace. There is, quite simply, no logical parameter for the duty to

¹⁰ A ruling in Appellants' favor would reverberate far beyond the area of asbestos litigation and turn Washington into a destination for claims barred elsewhere. For example, under a rule that those in the chain of distribution of a product must warn users of all potentially foreseeable risks of their product's interaction with unsafe products or components, department stores would have to warn that the glassware they sell could be used to drink milk (good for most, but not all) and alcohol to excess, makers of extension cords would have to warn about risks associated with power drills and all other electric tools which could be plugged into their product, and gas stations would have to warn about the dangers from chain saws and other garden tool or construction equipment.

warn beyond them. Fundamental principles of public policy require that Appellant's novel theory of liability be rejected.

IV. CONCLUSION

The grant of summary judgment and dismissal of claims against respondents arising from Appellant's exposure to asbestos-containing insulation and replacement parts is consistent with the law of Washington and other states. Appellant offered no controlling or persuasive authority to the trial court which holds otherwise, and they offer none now. To the contrary, the law recognizes that a duty is bounded by foreseeability, not created by it, and that product liability is logically limited to those in the product's chain of distribution who manufacture, distribute, or otherwise place those products in the stream of commerce rather than the boundless breadth proposed by Appellant. His novel theory of liability should be rejected and summary judgment affirmed.

RESPECTFULLY SUBMITTED this 20~~th~~ day of June, 2006.

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