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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON BY RONALD R. CARPENTER

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

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VERNON BRAATEN,
Plaintiff-Respondent,

v.

BUFFALO PUMPS, INC., *et al.*,

Defendants-Petitioners.

ANSWER TO PETITION FOR REVIEW

Matthew P. Bergman, WSBA #20894
David S. Frockt, WSBA #28568
Brian F. Ladenburg, WSBA #2953
Bergman & Frockt
614 First Avenue, Fourth Floor
Seattle, WA 98104
Telephone (206) 957-9510

John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544
Phillips Law Group, PLLC
315 Fifth Avenue S. Suite 1000
Seattle, WA 98104
Telephone (206) 382-6163

Charles S. Siegel (*pro hac vice*) 80240
Loren Jacobson (*pro hac vice*) - 80323
Walters & Krauss LLP
3219 McKinney Avenue
Dallas, Texas 75204
(214) 357-6244

Counsel for Plaintiff-Respondent
Vernon Braaten

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A. IDENTITY OF RESPONDENT

Respondent Vernon Braaten (“plaintiff” or “Mr. Braaten”) requests that this Court deny review of the Court of Appeals’ decision terminating review in this case.

B. COURT OF APPEALS’ DECISION

The Court of Appeals issued its decision on January 29, 2007. *Braaten v. Saberhagen Holdings*, 137 Wn. App. 32, 151 P.3d 1010 (2007). The Court of Appeals applied established principles of Washington law existing prior to the enactment of the Washington Product Liability Act, RCW 7.72 (“WPLA”), to hold that where a product’s design utilized a hazardous substance—respirable asbestos—and there was a danger of that substance being released from the product during normal use, the seller of the product had an independent strict liability duty to warn of the hazard, even though it did not manufacture the hazardous substance. 137 Wn. App. at 46. The court further held that under negligence principles, manufacturers who knew or should have known that exposure to the release of the hazardous substance was a risk of using its product, have “a duty to warn about maintenance procedures for their products that would release those dangerous fibers into the air.” *Id.* at 49.

C. ISSUE PRESENTED

Should this Court deny the Petitions for Review of the Court of Appeals’ holding that manufacturers that incorporated asbestos into the designs of their products had a duty to warn Mr. Braaten of the dangers of breathing asbestos fibers where release of respirable asbestos occurred

during routine maintenance of their products, where Petitioners knew or should have known that exposure to the asbestos was a hazard involved in the use of their products, and using their products as intended would very likely result in exposure to the asbestos, and where the Court of Appeals' decision does not conflict with any prior Washington appellate decision and raises no issue of substantial public interest?

D. STATEMENT OF THE CASE

1. Factual Background.

For thirty-five years—from 1967 until 2002—Vernon Braaten worked as a pipefitter at Puget Sound Navel Shipyard. CP 9-10. In that capacity, he performed regular maintenance and repair on naval equipment, including pumps manufactured by Petitioners IMO Industries, Inc. (“IMO”)¹ and Buffalo Pumps, Inc. (“Buffalo Pumps”), and valves manufactured by Petitioners Yarway Corporation (“Yarway”) and Crane Co. (“Crane”).

All of the Petitioners “either sold products containing asbestos gaskets and packing or were aware that asbestos insulation was regularly used in and around their machines.” *Braaten*, 137 Wn. App. at 38. Indeed, Mr. Braaten presented evidence that all Petitioners produced products that contained or used asbestos, *id.*; *see also* CP 7190-91 (IMO); CP 768-69 & 1250 (Buffalo Pumps); CP 6114 (Yarway); and CP 2035-36 & 1298-1300 (Crane), yet none provided any form of warning about the

¹ IMO is successor in interest to DeLaval Turbine, Inc. *Braaten*, 137 Wn. App. at 37 n.1.

risk of asbestos exposure. CP 7202 (IMO); CP 1263 (Buffalo Pumps); CP 6280 (Yarway); CP 1309-10 (Crane – warning only in mid-1980s).

Maintenance of Petitioners' pumps and valves "required replacement of interior asbestos gaskets and packing, which usually had to be ground, scraped, or chipped off." *Braaten*, 137 Wn. App. at 37. Thus, routine maintenance of Petitioners' products caused the release of respirable asbestos. *Id.* at 38. Mr. Braaten labored unprotected for many years and so inhaled asbestos as he worked. *Id.* In 2003, Mr. Braaten was diagnosed with mesothelioma caused by inhalation of asbestos dust. *Id.*

2. Procedural Background.

Mr. Braaten filed a personal injury action in King County Superior Court in January of 2005. CP 1-8. Petitioners' moved for summary judgment contending that they had no duty to warn Mr. Braaten of the dangers of asbestos products manufactured by others. Judge Armstrong granted their motions, CP 5562-64, 7267-79, 7284-86, 7271-73 & 7314-16, and Mr. Braaten timely appealed.

In a unanimous decision, the Court of Appeals reversed the trial court, holding that where a product was designed to use a hazardous substance that could be released during the normal use of the product resulting in exposure to the hazardous substance, the manufacturer had a duty to warn of the danger of using the product, even though it did not manufacture the hazardous substance. *Braaten*, 137 Wn. App. at 46 & 49. Defendants filed their Petitions for Review on April 30 and May 1, 2007.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. Standard for Discretionary Review.

Petitioner IMO seeks review under RAP 13.4(b)(2) and 13(b)(4)²

which provide:

A petition for review will be accepted by the Supreme Court only: . . . (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; . . . or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In contrast, Petitioners Crane, Buffalo Pumps and Yarway, recognizing that the Court of Appeals' decision does not conflict with any prior Washington appellate decision, seek review only under RAP 13.4 (b)(4).³ Accordingly discretionary review is appropriate only if the decision below conflicts with another decision of the Court of Appeals or if it raises an "issue of substantial public interest" that warrants review. Petitioners meet neither standard.

² IMO Petition at 10-20.

³ See Crane Petition at 9 (contending that review should be accepted because matter presents issue of substantial public importance); Buffalo Pumps Petition at 2 ("This issue warrants review under RAP 13.4(b)(4), because it presents a matter of substantial public interest"); Yarway Petition at 1 ("It is an issue of substantial public interest that should be resolved by the Supreme Court"); cf. Crane Petition at 11 n. 4 ("Had *Sepulveda-Esquivel* [*v. Central Machine Works, Inc.*, 120 Wn. App. 12, 84 P.3d 895 (2004)] involved a common law claim [which it did not], its holding would have been inconsistent with the ruling in this case and would have resulted in a conflict justifying review under RAP 13.4(b)(2)").

2. The Petitions Do Not Present an Issue of “Substantial Public Interest” that Warrants Review.

All of the Petitioners argue that the Court of Appeals’ decision involves an issue of “substantial public interest” under RAP 13.4(b)(4). Crane describes the issue as “whether defendants are liable in tort for products they neither manufactured nor distributed” and argues that the court’s decision represents an expansion of product liability law that is “unprecedented,” unworkable” and “unfair” and that will “flood the courts of Washington with non-citizens’ claims.” Crane Petition at 9-16. Stating the issue so abstractly, stripped of its factual context, entirely ignores the circumstances of this case which render the Court of Appeals’ decision a logical and well-reasoned result based on existing, pre-WPLA Washington law. When the issue is stated and considered in its factual context, as it must be, it becomes clear that the Court of Appeals’ holding is a natural application of existing Washington tort law principles that does not raise an issue of “substantial public interest” warranting review under RAP 13.4(b)(4). *See infra* at 7-10.

Before addressing Petitioners’ specific arguments, their common mischaracterization of the *Braaten* holding must be corrected.⁴ The Court

⁴ For example, Buffalo Pumps claims that under the Court of Appeals’ decision, a manufacturer is required to warn of “dangers associated with a product manufactured by someone else . . . even though the only danger is entirely attributable to the other manufacturer’s product.” Buffalo Pumps Petition at 10. In fact, the releases of asbestos in this case resulted from use of the *petitioners’* products and the dangers were attributable both to the fact that respirable asbestos is a hazardous substance and that defendants failed to provide warnings on the safe use of their products. *See Braaten*, 137 Wn. App. at 46-49. Thus, unhinged from this case, Buffalo Pumps goes on to assert that the Court of Appeals’ decision could require a juice manufacturer to warn of the dangers of alcohol consumption and a toy manufacturer to warn of the dangers of batteries.

of Appeals made it clear that Petitioners' have a duty to warn of the dangers arising from the design and use of Petitioners' *own* products. Thus, with respect to Mr. Braaten's claim that Petitioners had a duty to warn under common law negligence, the court held:

Contrary to the manufacturer's framing of the issue, their duty was not to warn of dangers associated with a third party's product, but of the dangerous aspects of *their own product*: namely that using their product as intended would very likely result in asbestos exposure.

Braaten, 137 Wn. App. at 49 (emphasis added). Similarly, with respect to Petitioners' strict liability duty to warn, the Court of Appeals held:

[W]hen a product's design [*i.e.*, the design of Petitioners' *own* products] utilizes a hazardous substance, and there is a danger of that substance being released from the product during normal use, the seller of the product containing the substance has an independent duty to warn.

Id. at 46. Thus, by omitting the essential links to their *own* products and ignoring the facts on which the Court of Appeals based its decision, Petitioners have asserted a supposed substantial public interest that does not exist.⁵

Buffalo Pumps Petition at 10. The Court of Appeals' holding requires not simply that the two products be used together but also that defendant's design incorporates the hazardous substance, the dangers of which are not obvious to the user. *Braaten*, 137 Wn. App. at 46 & 49. Minute Maid and Mattel have nothing to worry about.

⁵ See Crane Petition at 2; Buffalo Pumps Petition at 1; Yarway Petition at 2; IMO Petition at 4-5.

a. The Court of Appeals' Decision Applied Existing Principles of Washington Law.

The Court of Appeals applied existing principles of Washington law to hold that, prior to the enactment of WPLA,⁶ the seller of a product containing, by design, a hazardous substance—respirable asbestos—that could be released as a result of the product's use had an independent duty to warn users about the risk of exposure. *Braaten*, 137 Wn. App. at 46. As shown below, *see infra* at 17-20,⁷ the Court of Appeals' decision conflicts with no Washington appellate case. Rather, it is consistent with and flows naturally from the long line of pre-WPLA Washington cases holding that “where a product is faultlessly designed, it may be considered unreasonably unsafe if it is placed in the hands of the ultimate consumer unaccompanied by adequate warning of dangers necessarily involved *in its use*.” *Terhune v. A. H. Robins Co.*, 90 Wn.2d 9, 12, 577 P.2d 975 (1978) (emphasis added). *Accord, Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 478-79, 573 P.2d 785 (1978); *Teagle v. Fischer & Porter Co.*, 89

⁶ Because Mr. Braaten's exposure to the asbestos occurred prior to enactment of WPLA in 1981, his claims are governed by Washington common law negligence and strict product liability law in effect prior to WPLA. *See Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997).

⁷ Crane argues that had the Court of Appeals “applied the wisdom of its most closely apposite recent precedent, *Sepulveda-Esquivel*, 120 Wn. App. 12, 84 P.3d 895 (2004), it should have reached a contrary result . . .” Crane Petition at 10. As discussed more fully below, *see infra* at 18-19, *Sepulveda-Esquivel* is consistent with *Braaten* in holding that the manufacturer of a component part has no duty to warn of the risks of an assembled product where it manufactured the component based on a design supplied by the purchaser, did not know how its component would be used, and did not know that the purchaser would add a latch that resulted in the injury-causing failure. *Sepulveda-Esquivel* might have been relevant if it had been decided prior to WPLA and if the manufacturer there had designed its product—the hook—to incorporate the injury-causing latch, and had known that use of the hook and latch together would create a risk of injury during normal use—but none of these conditions applied in that case.

Wn.2d 149, 155, 570 P.2d 438 (1977); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wn. App. 379, 550 P.2d 71 (1976).

In *Teagle*, applying a strict liability analysis under § 402A of the Restatement (Second) of Torts (“Restatement”), this Court recognized a defendant manufacturer’s duty to warn of the dangers of using, in conjunction with the defendant’s product, *another* product that the defendant did not sell, supply or recommend:

[A]ppellant knew that Viton O-rings were incompatible with ammonia, yet it did nothing more than recommend the use of Buna O-rings. It did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, *by itself*, would render the flowrator unsafe.

Teagle, 89 Wn.2d at 156 (emphasis added).⁸ The defendant in *Teagle* did not manufacture the Viton O-rings; it did not sell or supply the Viton O-rings; it even recommended use of a different brand of O-rings, yet this Court held that the defendant’s failure to warn of the risk of using another manufacturer’s O-rings rendered the defendant’s product unsafe. Here, where Petitioners actually specified and/or incorporated asbestos into their product designs, the case for a duty to warn is even more compelling.⁹

⁸ The agent of injury in *Teagle* was anhydrous ammonia, which like the asbestos in this case, was not manufactured or supplied by defendant. 89 Wn.2d at 151. As in this case, use of the product at issue in *Teagle* could result in exposure to a hazardous substance in the absence of safety warnings.

⁹ The Court of Appeals’ decision noted that, in *Teagle*, the manufacturer’s product itself failed (exploded) because of the incompatible O-rings, while in this case neither the pumps and valves nor the asbestos “failed”; rather they were “simply dangerous in ordinary use.” *Braaten*, 137 Wn. App. at 44. Despite this distinction, *Teagle* supports

The Court of Appeals' decision is thus a consistent application of existing, pre-WPLA Washington law holding a manufacturer strictly liable for a faultlessly manufactured product "when placed in the hands of a user without giving adequate warnings or instructions concerning the safe manner in which to use it." *Haysom*, 89 Wn.2d at 479 (quoting *Haugen*, 15 Wn. App. at 388).¹⁰

Similarly, under common law negligence, the Court of Appeals' decision is consistent with the long line of Washington cases decided prior to the enactment of WPLA holding that "[a] manufacturer can also be found negligent for failure to give adequate warning of the hazards *involved in the use* of the product which are known, or in the exercise of reasonable care should have been known, to the manufacturer." *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn. App. 407, 412, 591 P.2d 791 (1979) (emphasis added; citing Restatement § 388). *Accord*, *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 827, 435 P.2d 626 (1967)

the ultimate conclusion that a manufacturer can have a duty to warn about products manufactured by others that are used in conjunction with the manufacturer's product.

¹⁰ The Court of Appeals' decision is also consistent with decisions in other jurisdictions that have dealt with the same or similar factual situations. *See, e.g., Berkowitz v. A.C. and S., Inc.*, 288 A.D.2d 148, 149, 733 N.Y.S.2d 410 (N.Y. App. 2001) (holding that where it was "at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [defendant] knew would be made out of asbestos," it did not "necessarily appear that [defendant] had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps"); *Chicano v. General Elec. Co.*, 2004 WL 2250990, *7-*8 (E.D. Pa. 2004) (holding that there was "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" even though plaintiff's cancer "allegedly was caused by the asbestos-containing insulation, which was manufactured by an entirely different company and assembled into completed products by the Navy").

(“[A] manufacturer or seller of a product which, to his actual or constructive knowledge, *involves* danger to users has a duty to give warning of such danger”) (emphasis added). Indeed, there is a continuing duty to warn of a product’s “*dangerous aspects*” of which the manufacturer later becomes (or should have become) aware: “The duty to warn potential users exists even though such *dangerous aspect* was not known or foreseeable when the product was initially marketed.” *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 477, 804 P.2d 659 (emphasis added), *rev. denied*, 117 Wn.2d 1006, 815 P.2d 265 (1991). Thus, the Court of Appeals’ decision is also consistent with the existing, pre-WPLA Washington law that followed Restatement § 388 and required a manufacturer to warn users of dangers involved in the use of the product that are known or reasonably should have been known to the manufacturer.

In sum, the Court of Appeals’ decision is fully consistent with the existing, pre-WPLA Washington case law as set forth in prior Washington appellate decisions.

b. The Court of Appeals’ Decision is Not Unworkable.

Next, Crane asserts that the Court of Appeals’ decision raises a matter of substantial public interest because the decision addressed a slightly different issue (duty to warn when a product’s *design* uses a hazardous substance) than was addressed in the companion decision by the Court of Appeals, *Simonetta v. Viad Corp.*, 137 Wn. App. 15, 151 P.3d

1019 (2007) (duty to warn when a product requires use of a hazardous substance). Crane Petition at 12-13. *Braaten* and *Simonetta* involved different products and different uses of asbestos. However, the court applied the same consistent pre-existing Washington law to the specific facts involved. The decisions in the two cases are consistent—*Simonetta* simply covers a potentially larger set of products: namely, those products in which the manufacturer knew or should have known that asbestos would be used, even though it was not necessarily incorporated as part of the manufacturer’s design.¹¹ Here, asbestos was, by design, part of the internal workings of Petitioners’ products. That the *Braaten* decision may be narrower than *Simonetta* results from the Court of Appeals’ properly basing its decisions on the facts before it in each case; that liability attaches in both cases is neither confusing nor unprincipled.

Petitioners also complain that the Court of Appeals’ decision, in holding that the jury should determine whether the harm to Mr. Braaten was foreseeable, leaves the question of duty to the trier of fact. Crane Petition at 13; Buffalo Pumps Petition at 16-17. That is simply untrue. The court held that the manufacturers have “a duty to warn about maintenance procedures for their products that would release . . . dangerous fibers into the air,” but that liability would also require the

¹¹ Although in *Simonetta* there was nothing in that record to indicate that asbestos was called for in the product’s design, the product nevertheless required insulation to work properly and the defendant knew or should have known that the insulation would contain asbestos which, in turn, would be released during normal use of the product. 137 Wn. App. at 32-33.

factual determination that the “manufacturers [knew], or should have known, about the hazards of asbestos involved in the use of their products at the time they were being sold and used.” *Braaten*, 137 Wn. App. at 48. The Court of Appeals did not, as Crane argues, broaden the boundary of the duty to warn to the limits of foreseeability, but rather properly held that defendants’ duty to warn “is *bounded* by the foreseeability of harm.” *Id.* (emphasis added). Washington law is clear that foreseeability is ordinarily a question of fact for the jury that serves to limit the scope of the duty owed, *Seeberger v. Burlington Northern R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999), and the Court of Appeals held just that and nothing more.¹²

c. The Court of Appeals’ Decision Is Fair and Consistent with Sound Public Policy.

Petitioners next argue that the Court of Appeals’ decision is “inimical to sound public policy” because the goal of compelling manufacturers to internalize the cost of their activities is not served “by imposing liability on those who had no role in making design or manufacturing decisions for the allegedly hazardous product.” Crane Petition at 14-15; *see also* Buffalo Pumps Petition at 12-14. To the contrary, as noted above, what the Court of Appeals held is that, in the absence of adequate warnings, a product that uses a hazardous substance

¹² Crane’s assertion that under the Court of Appeals’ decision, foreseeability will be “determined by a jury with the benefit of hindsight,” Crane Petition at 13, is particularly surprising given the court’s clear statement that “foreseeability of harm examines foresight, not hindsight.” *Braaten*, 137 Wn. App. at 48.

by design—*i.e.*, each of the Petitioner’s *own* products—is *itself* hazardous and gives rise to a duty to warn if exposure to the hazardous substance is known or reasonably likely to occur during the normal use or maintenance of the product.

While the court recognized the duty of asbestos manufacturers to warn of the general dangers of inhaling asbestos fibers, it found that the Petitioners “also had a duty to warn about maintenance procedures for their products that would release those dangerous fibers into the air.” *Braaten*, 137 Wn. App. at 49. Thus the court correctly found that “[a]s a matter of policy, it is logical and sensible to place some duty to warn on the manufacturer who is in the best position to foresee the specific danger involved in the use of a product.” *Id.* at 49. If Petitioners are liable for Mr. Braaten’s injuries, it is as a result of their *own* products being unsafe. Their complaints of unfairness are self-serving and wrong. Indeed if Petitioners’ rule were adopted, manufacturers could simply shift the legal duty to warn to third party manufacturers of integral, yet harmful, components necessary to the proper functioning of their own product, all the while being relieved of the duty to warn of this “dangerous aspect” of their product in direct contravention of Washington law. *See Koker*, 60 Wn. App. at 477.

d. The Court of Appeals’ Decision Will Not Flood the Courts of Washington with Non-Citizens’ Claims.

Without citation, Crane asserts that it “has already observed an increase in activity in Washington courts in the aftermath of this case,

Crane Petition at 18, and that there is a “risk that the courts of Washington [will] be overwhelmed by non-Washington plaintiffs seeking the application of favorable law.” There is no basis for this argument. There is no substantial public interest supporting review of the Court of Appeals’ decision because its application is strictly limited to cases governed by the law in effect prior to the enactment of WPLA in 1981. *Braaten*, 137 Wn. App. at 40-41 & 40 n. 11; *Mavroudis*, 86 Wn. App. at 33-34. In order for the decision to apply to another case, the injurious exposure at issue must have occurred over 25 years ago, *id.*, and yet the case must also have been capable of being brought (or be capable of being brought in the future) years later under the applicable statute of limitations. Thus, the Court of Appeals’ decision applies to a very limited and ever-diminishing subset of product liability cases involving primarily, if not exclusively, asbestos exposure, and is unlikely to result in a flood of foreign litigants descending upon the courts of Washington.¹³

e. The Collateral Estoppel Effect of the Texas Judgment Was Not Before the Court with Respect to Petitioners.

Petitioners unsuccessfully argued in the trial court that Mr. Braaten’s claims should be dismissed based on the collateral estoppel

¹³ Nor is Washington the only forum recognizing a duty to warn in these circumstances. Courts in both New York (in 2001) and Pennsylvania (in 2004) have adopted similar rules. *Berkowitz*, 288 A.D.2d at 149 (New York); *Chicano*, 2004 WL 2250990 at *7-*8 (Pennsylvania). Petitioners present no evidence, and plaintiff is aware of none, that the courts of New York or Pennsylvania have suffered from an unmanageable onslaught of, or even any increase in, asbestos litigation attributable to the decisions in those cases. In addition, forum non conveniens and choice of law rules would limit non-residents’ access to Washington courts and to the application of Washington law.

effect of summary judgment granted to one defendant in prior Texas litigation. *Braaten*, 147 Wn. App. at 40. General Electric (but none of the Petitioners) appealed the denial of summary judgment on that basis, and the Court of Appeals affirmed the grant of summary judgment as to GE on this alternate ground. *Id.* at 39-40. Yet despite not having appealed the trial court's collateral estoppel rulings, Crane and Buffalo Pumps now argue that the Supreme Court should accept discretionary review on substantial public interest grounds in order to find that the Court of Appeals erred in failing to reach an issue that they never raised on appeal below. Crane Petition at 18-20; Buffalo Pumps Petition at 19. Again, the argument is unfounded and not a basis for granting review. *See* RAP 2.4 (precluding review of issues not raised in the Court of Appeals).

f. Petitioners Cannot Meet the Criteria for a Finding of Substantial Public Interest.

None of the Petitioners has identified criteria for determining whether an issue qualifies as one of "substantial public interest." While such criteria are difficult to discern from decisions granting review under RAP 13.4(b)(4), they have been enumerated by this Court in a context raising similar concerns (determining whether a moot case should be decided):

We may decide to review a case, even though moot, *if it involves a matter of "substantial public interest"* . . . This analysis comprises three factors: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur."

Philadelphia II v. Gregoire, 128 Wn.2d 707, 712, 911 P.2d 389 (1996) (emphasis added) (citations omitted). Whether a case involves “an important issue” or “an issue of first impression” is simply not a consideration; what matters is whether the case involves issues in the public—that is, governmental—realm. Application of these factors demonstrates that this case does not present an issue of substantial public interest. Petitioners obviously do not meet the first two criteria. First, this dispute is private, not public, in nature (the parties are private individuals and corporations, and no rights vis-à-vis the government are alleged), and, second, a decision of the Supreme Court in this case will provide no guidance to public officers. The issue raised in these Petitions is completely unlike the issues raised in cases found to meet the substantial public interest criteria. These cases involved either public officers or issues of due process. *See, e.g., In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 513, 29 P.3d 1242 (2001) (whether prosecuting attorneys may offer inducements to defense witnesses not to testify in criminal proceedings); *Philadelphia II*, 144 Wn.2d at 712 (whether Washington Attorney General has discretion to refuse to prepare a ballot title); *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994) (whether domestic violence offenders could be detained in jail without recourse to bail pending first court appearance); *In re Marriage of T*, 68 Wn. App. 329, 336, 842 P.2d 1010 (1993) (determination of due process rights of presumptive father and his child); *State v. Kolocotronis*, 34 Wn.

App. 613, 615-16, 663 P.2d 1360 (whether individual who petitions for final discharge under RCW 10.77.200(3), dealing with criminally insane, may be required to show changed condition to qualify for jury trial on merits), *rev. denied*, 100 Wn.2d 1014 (1983).

The third factor—the likelihood that the issue will recur—does not, standing alone, rise to the level of substantial public interest. Rather, it is more sensibly a disqualifier. If an issue is unlikely to recur, discretionary review is a poor use of limited judicial resources. If an issue recurs it will be more properly reviewable under RAP 13.4(b)(1) or (2) once a conflict between courts has arisen. Moreover, the temporal yardstick limiting the impact of this issue to a small and diminishing group of pre-1981 exposures to toxic substances means that that this issue will recur infrequently and, in the not-too-distant future, will fade away altogether.

Because this case is clearly a private dispute and will provide no guidance to public officers, it cannot be said to involve a substantial public interest warranting review in the Supreme Court. *Compare State v. Watson*, 155 Wn.2d 574, 577, 122 P.2d 903 (2005) (case with potential to affect every sentencing proceeding in Pierce County involving a DOSA sentence presented “a prime example of an issue of substantial public interest” under RAP 13.4 (b)(4)).

3. Petitioners Cite No Washington Case that Conflicts with the Court of Appeals’ Holding.

Finally, IMO contends that the Court of Appeals’ decision cannot be reconciled with *Sepulveda-Esquivel v. Central Machine Works, Inc.*,

120 Wn. App. 12, 19, 84 P.3d 895 (2004). As IMO's co-Petitioner Crane points out, however, *Sepulveda-Esquivel* was decided under the WPLA, which is not applicable in this case. Crane Petition at 11 n. 4. In addition, there is nothing in *Sepulveda-Esquivel* that conflicts with the Court of Appeals' decision. In *Sepulveda-Esquivel* a hook made by defendants came loose from a 2500-pound bridge, which then fell on plaintiff causing serious injuries. *Sepulveda-Esquivel*, 120 Wn. App. at 14-15. Defendants manufactured the hook based on a design supplied by plaintiff's employer. *Id.* at 16. The employer, who was not a party, manufactured and attached a metal latch or "mouse" to the hook after it was delivered by defendants. *Id.* at 16-17. Defendants did not know how the hook was to be used, except for the load it would bear. *Id.* at 16. The hook did not break, shatter or fail to bear its load. *Id.* The issue in *Sepulveda-Esquivel* was thus whether the defendants were sellers or manufacturers of the "relevant product" for purposes of WPLA, that is, the product or component part that gave rise to plaintiff's claim. *Id.* at 18. The court held that because defendants did not supply the hook and mouse assembly and did not even design the hook, they could not be liable unless they "knew of the hook's use and . . . would perform some level of engineering to examine the design that they were furnished [by the purchaser]." *Id.* at 19.

Here in contrast, Petitioners designed and engineered their products to be used with asbestos; they supplied their products with asbestos; and they knew how their products would be used with asbestos—including the fact that the end users would necessarily be

exposed to respirable asbestos during ordinary maintenance of defendant's products. *Sepulveda-Esquivel* would be analogous to this case if the defendants there either supplied or specified use of the defective mouse and knew of the risks inherent in using the assembled product. Under such facts, the result in *Sepulveda-Esquivel* would have been different.

The only other Washington case that IMO claims conflicts with the decision below is *Bich v. General Electric Co.*, 27 Wn. App. 25, 614 P.2d 1323 (1980), and in particular its holding that "GE had no duty to warn in 1969 of a fuse Westinghouse manufactured in 1973." IMO Petition at 12 (quoting *Bich*, 27 Wn. App. at 33). In *Bich*, the plaintiff replaced GE fuses in a GE transformer with Westinghouse fuses three years after the transformer was installed, and GE argued that it could not foresee that another manufacturer's fuse made three years later might have characteristics different from its own fuses about which it should have warned its users. *Id.* There is no conflict with *Bich* because the Court of Appeals here did not hold that a manufacturer has a duty to warn about risks not yet in existence or that it could not foresee.

As it turns out, the *Bich* court held that a jury could have found that GE *did* have a duty to warn of the foreseeable dangers of substituting fuses:

GE graphically illustrated, through testimony of its witnesses, the potential harm of substituting one manufacturer's fuse with different time-delay characteristics. It would have been a simple and inexpensive matter for GE to have included on its fuses a

warning not to substitute fuses or to have given information regarding the time-delay characteristics of its fuses. We cannot say as a matter of law that the dangers here were so obvious or known that no warning was required. . . . Whether the transformer was unreasonably dangerous because of GE's inadequate warnings was a question for the jury.

Id. at 33. *Bich* thus stands for the unstartling proposition that a manufacturer may have a duty to warn of risks inherent in the use of its product, even where the injury is caused, at least in part, by a product defendant did not manufacture. Here, the argument is even more compelling because, unlike GE in *Bich*, Petitioners here supplied asbestos-containing components with their product and cannot claim that plaintiff's injury resulted from some unanticipated modification made years later by plaintiff or his employer. None of the prior Washington cases cited by IMO conflicts with the Court of Appeals' decision.¹⁴ Indeed, as discussed above, *see supra* at 7-10, the decision follows a long line of Washington appellate cases.

F. CONCLUSION

Because Petitioners have failed to satisfy this Court's criteria for review under RAP 13.4(b)(2) and 13.4(b)(4), this Court should deny their Petitions for Review.

¹⁴ IMO is the only Petitioner arguing for discretionary review based on an asserted conflict with Washington case law, and it identifies no negligence rulings as conflicting with the Court of Appeals' decision.

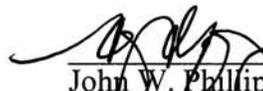
DATED this 30th day of May, 2007.

Respectfully submitted,

BERGMAN & FROCKT

 WSBA # 35521 *jm*
Matthew P. Bergman, WSBA #20894
David S. Frockt, WSBA #28568
Brian F. Ladenburg, WSBA #29539

PHILLIPS LAW GROUP, PLLC

 WSBA # 35521 *jm*
John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544

WALTERS & KRAUS LLP

 WSBA # 35521 *jm*
Charles S. Siegel, Texas Bar #18341875
(*pro hac vice*)
Loren Jacobson, Texas Bar #24050813
(*pro hac vice*)

Counsel for Plaintiffs-Respondents