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

VERNON BRAATEN,

Appellant,

v.

BUFFALO PUMPS, INC., et al.,

Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

The issue in this case is a simple one: whether a products manufacturer has a duty to warn of hazards arising out of the foreseeable use and alteration of its products. Plaintiff-Appellant Vernon Braaten¹ contends that Washington law is clear that such a duty exists under both negligence and strict liability causes of action.

Vernon Braaten was exposed to asbestos while performing regular maintenance on naval equipment, including turbines, pumps, and valves. All of this equipment required insulation to operate properly, and the pumps and valves required packing. During the relevant time period, the insulation and packing would have contained asbestos. Thus, the manufacturers of this equipment knew or reasonably should have known that their products would be insulated and/or packed with asbestos. Indeed, the evidence in the record indicated that several of these manufacturers specified the use of asbestos materials with their products, incorporated these materials themselves into their products and then put them into the stream of commerce, and sold insulation and/or packing to their customers for use with their equipment. Nevertheless, the trial court granted summary judgment to these manufacturers, holding that they had

¹ The terms “appellant” and “plaintiff” will be used interchangeably throughout this brief. Plaintiff-appellant will also be referred to as “Mr. Braaten.”

no legal duty to warn of hazards arising from products they did not manufacture. Plaintiffs respectfully submit that this ruling was in error.

ASSIGNMENT OF ERROR

In this case, plaintiff Vernon Braaten appeals from six different orders granting summary judgment to the following defendants in the case: General Electric Company; Buffalo Pumps, Inc.; IMO Industries, Inc.; Yarway Corporation; and Crane Co. CP 7297-7325. Error arises from:

- (1) The holding in paragraph 2, point 1, of the Order Granting Defendant General Electric Company's Motion for Summary Judgment of Dismissal, filed Sept. 6, 2005. CP 5559-5561.
- (2) The holding in paragraph 2 of the Order Re: Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment, filed Sept. 7, 2005. CP 5562-5564.
- (3) The holding in paragraph 2, points 1 and 2, of the order granting Defendant IMO Industries, Inc.'s Motion for Summary Judgment, filed Sept. 23, 2005. CP 7267-69.
- (4) The holding in paragraph 2, points 2 and 3, of the Order Granting Defendant Yarway Corporation's Motion for Summary Judgment and Dismissing All Claims Against Yarway with Prejudice, filed Sept. 26, 2005. CP 7284-86.
- (5) The holding in paragraph 2 of the Order Granting Defendant Crane Co.'s Motion for Partial Summary Judgment, filed Sept. 7, 2005, CP 5565-67, as well as the holding in paragraph 3 of the Order Granting Defendant Crane Co.'s Motion for Summary Judgment Re Original Bonnet Gaskets and Packing on Crane Co. Equipment, filed Sept. 23, 2005, CP 7271-73.

Plaintiff contends that the trial court erred in holding as a matter of law that none of these defendants had a duty to warn of asbestos hazards arising out of the regular and anticipated maintenance of their equipment where (1) it is undisputed that the equipment required external asbestos-containing insulation to function properly, and in some cases, was supplied with internal asbestos-containing parts, such as packing; and (2) it is foreseeable that insulation would be used on these products and it was equally foreseeable that the packing would have to be removed and replaced.

STATEMENT OF THE CASE

A. Background

Appellant Vernon Braaten was a pipefitter at Puget Sound Naval Shipyard from 1967 until 2002. CP 9-10. As part of his duties, Mr. Braaten performed regular maintenance and repair on naval equipment, including turbines, pumps, and valves. During the course of this work, Mr. Braaten was exposed to asbestos from equipment manufactured by, among others, General Electric Company (“General Electric” or “GE”), Buffalo Pumps, Inc. (“Buffalo Pumps”), IMO Industries, Inc. (“IMO”),² Yarway Corporation (“Yarway”), and Crane Co. (“Crane”).³

² IMO Industries, Inc. is the successor-in-interest to DeLaval. Plaintiff testified that he worked on and around DeLaval pumps. Since IMO Industries, Inc. is the successor to DeLaval, plaintiff sued IMO Industries, Inc. in the instant action and IMO appears as a

In 2003, Mr. Braaten was diagnosed with mesothelioma, a cancer of the lung pleura that is almost always caused by exposure to asbestos. In fact, Dr. Samuel Hammar, plaintiff's expert, provided his opinion that Mr. Braaten's mesothelioma was caused by his inhalation of asbestos dust. CP 1839. Moreover, Dr. Hammar stated that "Mr. Braaten's exposure to asbestos dust through his work as a pipefitter played a contributing role to cause his mesothelioma." Id. During his deposition, Dr. Hammar further clarified that all of the exposures to asbestos products that Mr. Braaten had up to 10 to 15 years prior to his diagnosis would have contributed to cause his mesothelioma. CP 5219-21.⁴

In January 2005, Mr. Braaten brought the instant lawsuit in the Superior Court of Washington for King County. CP 1-8.⁵ Thereafter,

defendant/respondent. "DeLaval" and "IMO" will be used interchangeably throughout this brief.

³ When referred to collectively, these defendants shall hereinafter be called "equipment defendants."

⁴ Appellant notes that causation is not at issue in this appeal. The orders granting defendants' motions for summary judgment in this case were based solely on the issue of whether there was a duty to warn.

⁵ Mr. Braaten originally brought suit in Texas. CP 337-65. During the course of the proceedings in Brazoria County, Texas, one of the defendants to the suit, Goulds Pumps, was granted summary judgment. CP 385. Thereafter, on December 13, 2004, plaintiff nonsuited his case in Brazoria County and brought the instant suit. Several defendants in the instant case, in addition to moving for summary judgment on the issue of duty to warn, also argued that the Goulds Pumps Order from the Brazoria County court was preclusive. The trial court rejected this argument, holding that the Order was not preclusive and that Mr. Braaten's claims were not barred by collateral estoppel. CP 5560; CP 5566. Thus, whether Mr. Braaten's claims are barred by collateral estoppel or are otherwise precluded is not at issue in this appeal. Moreover, the "sophisticated user" defense, raised by General Electric, was not ruled upon by the trial court, CP 5560, and therefore is also not at issue here.

several of the defendants, all of whom manufactured equipment, moved for summary judgment, contending that they had no duty to warn of dangers associated with thermal insulation products, gaskets, and packing used on, in, and with their equipment. CP 264-66; CP 459-80; CP 481-98; CP 5424-43; 5452-67. The trial court granted the motions. With respect to General Electric, the court held that “GE had no duty to warn of potential dangers associated with the use of asbestos contained products manufactured, sold, or installed by third parties, unless contained in the turbine when delivered.” CP 7303. Similarly, the court ruled that “Buffalo Pumps, Inc. owed no duty to plaintiff to warn of the dangers of products that it did not manufacture or otherwise place into the stream of commerce.” CP 7307. The court made similar rulings with respect to IMO Industries, Inc., CP 7318-21, and Yarway Corporation. CP 7323-25. The court made the same ruling with respect to Crane Co., who manufactured valves, but indicated that the order did “not effect [*sic*] plaintiff’s remaining claims against Crane Co. for original bonnett [*sic*] gaskets and packing on Crane Co. products.” CP 7311. Nevertheless, the court thereafter granted summary judgment to Crane Co. on this issue as well. CP 7314-16. Appellant timely appealed on October 4, 2005.

B. Evidence Proffered to the Trial Court

As already discussed, plaintiff appeals from orders granting summary judgment to General Electric Company, Buffalo Pumps, Inc., IMO Industries, Inc., Yarway Corporation, and Crane Co. In response to the motions for summary judgment filed by these defendants, plaintiff provided evidence that he worked with turbines, pumps and valves, all of which required asbestos-containing external insulation to function, and some of which also were manufactured and shipped with asbestos-containing packing. Plaintiff offered evidence that he was exposed to these asbestos-containing products during the course of his career as a pipefitter. In addition, evidence was presented to the trial court establishing that all of these defendants knew that their equipment required asbestos-containing materials in order to function properly, knew that those materials would be disturbed or replaced, but did not provide any warnings with respect to the hazards associated with asbestos exposure.

1. Turbines – General Electric

Mr. Braaten testified that he was exposed to asbestos-containing insulation on General Electric turbines. He removed this insulation—including block insulation, mud insulation and asbestos pads—from

General Electric turbines and applied it to the turbines as well. CP 4032-34; CP 2157-66.

The evidence presented in response to General Electric's motion for summary judgment established that General Electric knew that its turbines required such external asbestos insulation in order to function properly. CP 4029. Specifically, plaintiff's expert, Captain Francis Burger, testified by affidavit that GE's turbines would not function properly without external insulation. Id.; CP 2149-55. Both of GE's experts, Dr. Lawrence Betts and Admiral MacKinnon, admitted that GE's turbines would be insulated with asbestos-containing materials and that General Electric knew that its turbines had to be insulated in order to work properly. Id., CP 4035, 4036.

General Electric specifically manufactured its turbines with hangers, which were used to affix the asbestos insulation to the equipment. CP 4035; CP 2145. Moreover, General Electric sent out a letter to its customers in 1989 to "inform our customers of the possible locations of asbestos-containing materials in General Electric steam turbine-generators manufactured for Utility and Industrial applications," given "regulatory trends." CP 4037; CP 2176-77. The letter suggests that General Electric specified the use of asbestos-containing insulation on its turbines prior to the 1970s. CP 2177; 2179 ("Asbestos eliminated from GE specifications

early 1970's.”). Moreover, the letter indicates that prior to GE instituting a policy of replacing asbestos-containing products with non-asbestos products, customers of General Electric could order asbestos-containing products associated with GE turbines from General Electric, whether by catalogue, non-catalogue, or pursuant to drawings provided by General Electric. CP 2178. Finally, GE’s expert testified that GE knew that the insulation placed on the exterior of its turbines would have to be disturbed in order to perform regular and required maintenance, service, and repair on those turbines. CP 4035; 2145-46.

GE not only knew that its turbines would require exterior insulation and that the insulation would necessarily be disturbed during maintenance of the turbines, but it also knew, as early as the 1930s, that exposure to asbestos dust was harmful. General Electric was a member of the National Safety Council (“NSC”). CP 2314 (showing 1934 membership in the NSC by G.E. Sanford, representing the General Electric Company). In 1934, at the Twenty-Third Annual Safety Congress of the NSC, the members were told that dust from asbestos causes formation of scar tissue in the human lung. CP 2316. By 1951, the NSC informed its members that “[a]t the present time, it is generally agreed that the most important sources of Industrial Diseases of the lungs are free or uncombined silica and asbestos.” CP 2557-59.

In 1947, GE also became a member of the Industrial Hygiene Foundation, which published several articles that discussed the link between asbestos exposure and diseases such as asbestosis, lung cancer, and mesothelioma. CP 4038-39; CP 2719-2917. Thus, GE knew that exposure to asbestos was hazardous, yet it failed to warn of the hazards associated with the foreseeable uses and alterations of its equipment that it knew or had reason to know would liberate asbestos dust. CP 2121-28.

2. Pumps – DeLaval and Buffalo Pumps

Mr. Braaten testified that he worked with heat application pumps, including Buffalo Pumps and DeLaval pumps. CP 1247; CP 582-671; CP 6665-66, 6668-69. Mr. Braaten indicated that DeLaval pumps were on almost every ship he worked on. CP 6689. Mr. Braaten regularly repacked pumps, which required removing the exterior insulation on the pump, removing the old packing, replacing the packing, and then reapplying asbestos insulation to the exterior of the pump. CP 2347-48; CP 582-671. Thus, Mr. Braaten was exposed to asbestos-containing exterior insulation and packing from his work with pumps manufactured by Buffalo Pumps and DeLaval.

Buffalo Forge, the predecessor in interest to Buffalo Pumps, manufactured its pumps and placed them in the stream of commerce with asbestos-containing packing and gaskets. CP 1250; CP 768-69. Further,

certified copies of Buffalo Pumps' plans from the National Archive and Records Administration indicate that these pumps required insulation with asbestos felt, asbestos cloth and asbestos cement. CP 1251; CP 776. Although these documents were created by Gibbs & Cox, Inc., they reference Buffalo Pumps' plans as their source. CP 776. Additionally, Buffalo Pumps' expert witness, Admiral Malcolm MacKinnon III, testified that during the relevant time period, Buffalo pumps used for heat applications would have required asbestos-containing insulation to properly function. CP 1257-59; CP 781-86. Plaintiff's industrial hygienist, Jerry Lauderdale, concurred that pumps used in hot applications would have required thermal insulation and that the thermal insulation used during the time period relevant to this case would have contained asbestos. CP 1260; CP 794-99. He also testified that this insulation would have frequently been disturbed. Id. Similarly, plaintiff's expert Everett Cooper testified in an affidavit that "[I]n order to operate properly, steam powered marine pumps need to be insulated with asbestos on the exterior." CP ____.⁶ He further explained that pumps required asbestos packing in the valves and on the pump shafts to keep steam and hot water

⁶Everett Cooper's declaration was submitted to the trial court as part of the record in this case, and the trial court considered it. CP 7272. Although defendant Crane moved to strike the declaration, the trial court denied the motion. Id. Nevertheless, the declaration did not get filed with the clerk under the correct cause number until after the record was designated in this case. Appellant filed a supplemental designation of the declaration on January 20, 2006.

from leaking. Id. His testimony concurs with that of Admiral MacKinnon and Jerry Lauderdale that regular and necessary maintenance of steam powered pumps cannot be done without removal of exterior asbestos insulation and replacement of gaskets and packing. Id.

The evidence presented in response to Buffalo Pumps' motion for summary judgment therefore established that Buffalo Pumps placed pumps with asbestos-containing gaskets and packing into the stream of commerce, and knew that its pumps required external insulation to function properly and that this insulation would be disturbed. The evidence also showed that Buffalo Pumps failed to provide warnings regarding the presence, danger, or handling of asbestos on its pumps. CP 1263.

The evidence submitted to the trial court established that DeLaval manufactured its pumps to use asbestos-containing packing and gaskets. Further, DeLaval knew that its turbine-driven pumps would have to be used with insulation, and actually provided insulation to its customers for use with its turbine-driven pumps.

Plaintiff submitted as evidence the interrogatory responses of IMO in a similar case, which admit that DeLaval used "asbestos sheet gaskets, spiral wound gaskets, asbestos rope packing" on its equipment. CP 7190-91. DeLaval knew that these parts would have to be replaced, and it

provided kits of spares and tools for its pumps that included packing rings. CP 7069-73.

Richard Salzmann, corporate representative for IMO, has also testified that DeLaval sold asbestos insulation materials for use with its turbine-driven equipment. CP 6434-6466. An internal DeLaval letter from 1973 with the heading "Pump Engineering" indicates that the Turbine Division was using several asbestos materials, including Cerafelt, asbestos cloth, Thermobestos Block, and Nbr. 352 cement. CP 7218. During the same time period, there were memos between the DeLaval Pump Sales Department and Pump Engineering questioning what non-asbestos substitutes DeLaval was going to use on its pumps in order to comply with OSHA. CP 7235-37. This evidence suggests that DeLaval was using asbestos-containing insulation and supplying such insulation for use with its pumps.

Thus, the evidence presented to the trial court established that DeLaval manufactured its pumps with asbestos-containing packing, and placed the asbestos-containing pumps in the stream of commerce. Moreover, DeLaval sold asbestos-containing exterior insulation to be used with its turbine-driven pumps. Nevertheless, DeLaval did not provide any warnings with respect to the asbestos-containing component parts it integrated into its pumps. CP 7202.

3. Valves – Yarway and Crane Co.

Mr. Braaten testified that he worked with valves on a daily basis, including Crane and Yarway valves. CP 2036; CP 1323-24, 1335-36. Mr. Braaten testified that he removed asbestos-containing exterior insulation from the valves, removed the asbestos-containing packing from the valves, repacked the valves, and then reapplied insulation to the valves. CP 2036-40; CP 1323-24, 1335-36. Mr. Braaten testified that Yarway valves were placed on the front of all the boilers. CP 6036. He also testified that he used Yarway angle valves and stock check valves. Id. Additionally, he testified that Crane valves, which were steam-drain valves, were “used . . . for everything.” Id.

Plaintiff submitted, in response to Yarway’s motion for summary judgment, evidence that Yarway manufactured products that contained asbestos components and then placed these products in the stream-of-commerce. Further, the evidence before the trial court demonstrated that Yarway knew these asbestos components would have to be replaced, and actually specified the use of asbestos-containing gaskets and packing for use in its valves.

First, plaintiff submitted the deposition of Yarway’s expert, Horace Maxwell. Mr. Maxwell testified that between 1908 and 1982, Yarway manufactured “a multitude of products that had asbestos-containing parts

in them.” CP 6204. Yarway’s interrogatory responses in similar cases confirm that the steam valves and traps manufactured by Yarway employed asbestos as gaskets and packing. CP 5868. Mr. Maxwell also confirmed that boiler trim valves—the ones Mr. Braaten specifically testified about—contained and utilized asbestos-containing packing and gaskets. CP 6219-20.

Mr. Maxwell also testified that the accepted practice was to insulate steam control valves on ships, CP 6229, and that one would expect boiler trim valves also to be insulated. CP 6216. Mr. Maxwell stated that exterior insulation was required for the purposes of efficiency, and that he had never seen a boiler, including the valves associated with the boiler, on a ship that was not insulated. CP 6216-17. Testimony submitted from plaintiff’s expert, Jerry Lauderdale, likewise confirmed that all hot equipment, such as valves associated with boilers used in heat applications, would have had thermal insulation on them, and that during this time frame, that insulation would have contained asbestos. CP 6159-60. Mr. Lauderdale also testified that this insulation would frequently have been disturbed during the course of maintenance and repair work. Id. Similarly, Everett Cooper testified by affidavit that Yarway (and Crane) valves needed to be insulated with asbestos in order to function properly

and that the valves had to be packed with asbestos packing in order to keep from leaking. CP _____.

In a Yarway sales manual of 1963, Yarway advertises that “[s]elected materials, coupled with Yarway workmanship in machining and assembly, guarantee long, satisfactory service.” CP 6114. The manual indicates that the packing used in Yarway products was “jacketed type asbestos.” Id. Yarway knew that this packing would have to be removed and replaced. Instructions on the use of Yarway Blow-Down valves, provided by the Yarway company as part of a larger brochure on steam generating equipment, includes a section on installing new packing rings. CP 6152.

The evidence submitted to the trial court revealed that Yarway would have known that the asbestos used in its products was hazardous, as it advertised in the November 1946 issue of Southern Power and Industry magazine, which reported that “there are certain dust exposures which may result in acute health hazards. This is especially true of dust containing . . . asbestos.” CP 6291-6307. Nevertheless, as Mr. Maxwell testified, even as late as the mid-1980s, when the last asbestos-containing Yarway products were being produced, Yarway did not issue warnings about the asbestos-containing components of its products. CP6280.

Similarly, Crane manufactured valves and then sold them with asbestos-containing gaskets and packing. CP 2035-36; CP 1298-1300. Indeed, Crane admitted (one could say bragged) in its advertising materials that it carefully selected the packing that came with its valves. CP 2041; CP 1276. Evidence submitted in response to Crane's motion for summary judgment therefore shows that Crane manufactured its own asbestos-containing packing. CP 1276. Crane also sold asbestos insulating materials manufactured by Johns-Manville. CP 1273-1290.

A Crane catalogue advertises woven asbestos and core packing with an asbestos jacket for use with Crane bronze and iron body valves. CP 1276. The catalogue also advertises Johns-Manville pre-shrunk asbestocel, zero pipe insulation, magnesia-asbestos insulation, asbestos sheet millboard, asbestocel blocks, magnesia-asbestos blocks, and asbestos cements. CP 1288-89. The evidence therefore demonstrates that Crane's valves contained asbestos; further, Crane placed these asbestos-containing valves in the stream of commerce. Crane also knew that its valves would be repacked with asbestos-containing materials, and that they would be insulated with asbestos-containing thermal insulation. Crane not only specified the use of these materials, but provided them for sale to its customers. Moreover, just like Yarway, Crane advertised in the 1946 issues of Southern Power magazine, which reported that exposure to

asbestos dust could cause acute health hazards. CP 6291-6307. Nevertheless, although Crane knew or had reason to know of the health hazards associated with asbestos at least as early as 1946, prior to the 1980s, Crane failed to warn of these health hazards associated with the use of the products it manufactured and sold. CP 1309-10.

ARGUMENT

I. STANDARD OF REVIEW

Appellate courts review decisions granting summary judgment in whole or in part under the *de novo* standard. Coulson v. Huntsman Packaging Prods., Inc., 121 Wash.App. 941, 943, 92 P.3d 278 (2004) *review denied* 153 Wash.2d 1019 (2005). In reviewing an order of summary judgment, appellate courts are to engage in the same inquiry as the trial court. Travis v. Bohannan, 128 Wash.App. 231, 115 P.2d 342 (2005) (citing Rhea v. Grandview Sch. Dist. No. JT 116-200, 39 Wash.App. 557, 559, 694 P.2d 666 (1985)).

The standard of review for summary judgment motions is well settled. The moving party bears the initial burden of showing the absence of an issue of material fact and an entitlement to judgment as a matter of law. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182, 187-188 (1989). If the moving party does not sustain the burden, summary judgment should not be entered, irrespective of whether the

nonmoving party has submitted affidavits or other materials. Hash v. Children's Orthopedic Hospital and Medical Center, 110 Wash.2d 912, 915-916, 737 P.2d 507 (1988). A material fact is one upon which the outcome of the litigation relies in whole or in part. Hope v. Larry's Markets, 108 Wn.App.185, 29 P.3d 1268 (2001).

In reviewing the evidence, the appellate court must consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wash.2d 17, 21, 896 P.2d 665 (1995); Rojas v. Grant Cty. Pub. Utility Dist., 117 Wash.App. 694, 697, 72 P.3d 1093 (2003). It is appropriate to confirm a grant of summary judgment only when, after reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, it is clear to the appellate court there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Viking Properties, Inc. v. Holm, 155 Wash.2d 112, 119, 118 P.3d 322 (2005).

II. THE EQUIPMENT DEFENDANTS ARE LIABLE UNDER WASHINGTON LAW FOR FAILURE TO WARN UNDER NEGLIGENCE PRINCIPLES

A. The Scope of Duty Rests on the Foreseeability of Injury

In contrast to a strict liability action, where the focus is on the product and the consumer's expectation, in a negligence claim involving a product manufacturer, the focus is on the manufacturer's conduct. Young

v. Key Pharm., 130 Wash. 2d. 160, 178, 922 P.2d 59 (1996) (citing Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wash.2d 747, 762, 818 P.2d 1337 (1991); Davis v. Globe Mach. Mfg. Co., 102 Wash.2d 68, 684 P.2d 692 (1984)).

For conduct to be negligent, it must be unreasonable in light of a recognizable danger. Bodin v. City of Stanwood, 130 Wash.2d 726, 733, 927 P.2d 240 (1996) (citing W. Page Keeton et al., Prosser and Keeton on Torts § 31, at 170 (5th ed. 1984)). As a general proposition, issues of negligence are not susceptible to summary judgment. Grismrud v. State, 63 Wash. App. 546, 548, 821 P.2d 513 (1991). Summary judgment is particularly inappropriate “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” Id. (citing Selberg v. United Pac. Ins. Co., 45 Wash.App. 469, 474, 726 P.2d 468 (1986)).

To prove actionable negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. Hansen v. Friend, 118 Wash. 2d 476, 824 P.2d 483 (1992). The issues of breach of a duty and of proximate cause are generally questions of fact for the jury. Briggs v. Pacificorp, 120 Wash.App. 319, 322, 85 P.3d 369 (2003), *review denied*, 152 Wash.2d

1018 (2004); Hertog v. City of Seattle, 138 Wash.2d 265, 275, 979 P.2d 400 (1999).⁷

The existence of a duty, therefore, is a threshold question decided by the court as a matter of law. Briggs, 120 Wash.App. at 322; Rasmussen v. Bendotti, 107 Wash.App. 947, 955, 29 P.3d56 (2001). The plaintiff has the burden of establishing the existence of a duty. Lake Wash. Sch. Dist. No. 414 v. Shuck's Auto Supply, Inc., 26 Wash. App. 618, 613 P.2d 561 (1980). On any negligence claim, the existence of a defendant's threshold duty may be predicated on a violation of statute or of common law principles of negligence. Bernethy v. Walt Failor's Inc., 92 Wash.App. 919, 653 P.2d 280 (1982).

Duty is "an obligation, to which the law will give recognition and effect, to conform to a *particular standard of conduct* toward another." Transamerica Title Ins. Co. v Johnson, 103 Wash.2d 409, 413, 693 P.2d 697 (1985) (quoting *Prosser on Torts* § 53 (3d ed. 1964) (emphasis added)). It is a necessarily flexible concept and can exist in a variety of forms, depending upon the facts of a particular case. Indeed, Washington appellate courts have repeatedly advised whether a duty exists in the first place is generally a question that depends on "mixed considerations of

⁷ Proximate cause consists of two elements: cause in fact and legal causation. Taggart v. State of Washington, 118 Wash. 2d 195, 226, 822 P.2d 243 (1992). As already discussed, since the orders appealed from in this case were based solely on the issue of duty to warn, that is the only issue raised here on appeal.

logic, common sense, justice, policy, and precedent.” Snyder v. Med. Serv. Co. of E. Wash., 145 Wash.2d 233, 35 P.3d 1158 (2001); Caulfield v. Kitsap Cty., 108 Wash. App. 242, 29 P.3d 738 (2001).

Ultimately, the existence of a duty turns upon the foreseeability of the risk of harm. Washington has long relied on the seminal opinion of Justice Cardozo in Palsgraf v. Long Island Railroad Co., 162 NE 99 (N.Y. 1928), that if the conduct of the actor does not involve a foreseeable risk of harm to the person injured, he owes no duty to that person. King v. Seattle, 84 Wash.2d 239, 248, 525 P.2d 228 (1974). Conversely, if the risk of harm which befell the plaintiff was reasonably foreseeable then, as to that plaintiff, a duty was owed and legal liability may attach. Or, as the King court has put it: “We have earlier held that foreseeability of the risk of harm to the plaintiff *is an element of the duty question.*” Id. (emphasis added).

In short, foreseeability of harm to a person as the result of another’s act is material to the question of whether the actor owes a duty, and whether there was a breach of that duty. That the particular mode, method, or cause of harm was not foreseeable is not significant so long as the general nature of the harm was foreseeable. See id. (“Liability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained.”); McLeod v. Grant Cty. Sch. Dist. 128, 42 Wash.2d

316, 321, 255 P.2d 360 (1953) (“Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.”).

B. A Manufacturer Has a Duty to Warn Consumers of Foreseeable Dangers

Washington has long recognized that a product manufacturer’s failure to warn of foreseeable hazards may constitute common law negligence. In Dalton v. Pioneer Sand & Gravel Co., 37 Wash.2d 946, 227 P.2d 173 (1951), the Supreme Court laid out the type of evidence that would be required to impose a duty to warn, on a negligence theory, on a product manufacturer:

The duty appellant seeks to invoke does not arise unless there is a showing of inherent danger in the material, known only to experts, which the seller knows or ought to know would likely produce injury to a handler of ordinary knowledge and prudence.

Id. at 948 (emphasis supplied); see also Snyder v. City of Philadelphia, 546 A.2d 1036, 1039 (Pa. Ct. of App. 1989) (“In negligence, the duty to warn is but another aspect of the manufacturer’s duty to exercise due care and a manufacturer must warn of a product’s dangerous propensity of which it has knowledge.”).

Over the years, Washington courts have repeatedly affirmed that product manufacturers sued on theories of negligence do have a duty to warn of hazards associated with their products. In each instance, the courts have made clear that the focus must be on the defendant manufacturer's *conduct*. For example, in Koker v. Armstrong Cork, 60 Wash. App. 466, 804 P.2d 659 (Wash. App. 1991), the Court of Appeals held that on common law negligence claims, asbestos manufacturers have a non-delegable duty of reasonable care that incorporated a duty to warn:

When a product manufacturer becomes aware or should have become aware of dangerous aspects of its product, *it has a continuing duty to warn of such dangerous aspects even though the dangerous aspects are discovered after the product has left its hands*. The duty to warn potential users exists even though such dangerous aspect was not known or foreseeable when the product was initially marketed.

This duty to warn attaches, not when scientific certainty of harm is established, but whenever a reasonable person using the product would want to be informed of the risk of harm in order to decide whether to expose himself to it.

Id. at 476-77 (emphasis supplied). This jury instruction linked the duty to warn to the expectations of a reasonable person using the product.

In 1996, the Washington Supreme Court modified this rule, moving away from the reasonable consumer test and instead linked the duty to warn to “the actions of a reasonably prudent manufacturer. In a negligence action the focus is on the conduct of the manufacturer.” Young v. Key Pharma., 130 Wash.2d at 178. Accordingly, it held that in a

negligence case “the duty to warn arises when a manufacturer becomes aware or should have become aware of dangerous aspects of one of its products.” Id.

Notably, then, in Washington, a manufacturer’s duty to warn is not limited to danger arising from original equipment. Rather, the manufacturer’s duty to warn also encompasses the “dangerous aspects” of the equipment. Thus, if an “aspect” of the equipment is that it requires insulation and/or packing to operate properly, the duty to warn attaches regardless of whether the equipment manufacturer also made the insulation.

The equipment defendants argued before the trial court, and are likely to argue here, that they had no duty to warn with respect to asbestos-containing products that they did not manufacture and that their products were not the instrumentality that caused the injury. However, this argument allows any manufacturer to negate responsibility for its own actions and conduct—here manufacturing products that incorporated asbestos packing, gaskets, and insulation and required such packing, gaskets, and insulation to function properly—regardless of the facts that may have been developed. Indeed, it would allow an equipment defendant to escape liability completely by outsourcing the manufacture of all of the components of its equipment to others, and then assembling those

components to make the equipment. If the equipment then caused injury, the manufacturer could parse out exactly which “piece” was involved in causing the injury and argue that it did not make that piece.

Moreover, under the theory proposed by defendants below (and accepted by the trial court), a manufacturer’s duty to warn would be extinguished after any major maintenance to its equipment (including, for example, the overhaul of a turbine), even if the manufacturer knew that the equipment needed regular maintenance (or such overhauls) to function. This position is not only without merit, but ignores the clear language of Koker and Young.

In sum, then, the assertion of common law negligence is quintessentially about a *defendant’s conduct* in relation to a product that it offers on the market. The duty to test, inspect, analyze, keep abreast of scientific knowledge and indeed to warn, focuses upon the conduct of the manufacturer in relation to a product that it puts on the market, not on the product itself. “The 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 to remote users, as to whom there is a foreseeable risk of harm, if due care is not used.” Freeman v. I.G. Navarre, 47 Wash.2d 760, 772-73, 289 P.2d 1015 (1955). For this reason, if a manufacturer knows or has reason to know that its product will be operated with another hazardous product that

it did not manufacture, a duty of reasonable care to warn of those foreseeable hazards exists. This is particularly the case under a summary judgment standard when there is evidence that the manufacturer (1) incorporated the hazardous products of another into its own products; (2) specified the use of hazardous products with its products; or (3) knew or had reason to know that hazardous material was necessary for the proper functioning of the product it did manufacture. The Koker court therefore correctly described the following as an “accurate reflection of the law” on the threshold legal question of whether a defendant owes a duty to a plaintiff:

A manufacturer’s duty to use ordinary care is bounded by the foreseeable range of the danger. In order to recover on the theory of negligence, plaintiff must prove that the defendant should have anticipated an unreasonable risk of danger to a plaintiff or to other workers of plaintiff’s class.

60 Wash.App. at 480. Appellant has met this burden based upon the evidence in this record.

Several courts have similarly applied this foreseeability rationale in determining the issue of duty. For example, in Wright v. Stang Manufacturing Co., 54 Cal.App.4th 1218, 63 Cal.Rptr.2d 422 (Cal. App 2. Dist., 1997), the defendant manufactured a piece of equipment used on a fire truck, a deck gun. The deck gun was mounted to the fire truck by a piece of equipment, a three inch riser pipe, manufactured by another

entity. The deck gun itself never failed, but the riser pipe did fail, causing the entire apparatus to break loose and injure the plaintiff firefighter. The deck gun manufacturer claimed it could not be liable for failure to warn because *its* product was not defective. Id. at 1224. However, the California court held summary judgment could not be entered because the plaintiff introduced evidence that it was “foreseeable to anyone familiar with the apparatus” that pressure from the deck gun would be too great for the steel riser, and that the combination of the deck gun and riser could result in the failure that injured the plaintiff. Id. at 1225-26. The deck gun manufacturer had not negated that it “knew that the fire department intended to attach the deck gun to a threaded riser pipe.” Id. at 1234-35. Simply stated, the deck gun manufacturer had a duty to warn of the foreseeable dangers posed by the combination of a product—manufactured by another—with its own product.

Relying on Stang, the Superior Court of California, County of Los Angeles, recently denied a summary judgment motion brought by Yarway identical to the ones challenged here. See Brodnax v. Agco Corp., No. BC327773 (Oct. 6, 2005), attached hereto as “Appendix A.” The court

ruled that “the defendant . . . had a duty to warn of foreseeable uses of its product, including those uses incorporating the products of others.” Id.⁸

C. A Manufacturer Has a Duty to Warn of Foreseeable Risks Arising from Products Manufactured by Third Parties That Are Used in Conjunction with Its Product

What plaintiffs seek here is neither new nor novel. Courts have often recognized the duty to warn arising from the foreseeable uses of a manufacturer’s product even if the hazard arises from an instrumentality, which although manufactured by another, is used in the normal operation of defendant’s product. A duty to warn is particularly appropriate where

⁸ The California Superior Court has ruled in plaintiffs’ favor on this issue at least three times. In addition to the ruling in Brodnax, in Williams v. Carver Pump, the California Superior Court for Los Angeles County similarly held that because the equipment at issue required asbestos-containing insulation, “[t]his gave rise to a duty imposed on the manufacturer to warn of the hazard created by the insulation.” *Notice of Ruling Denying Foster Wheeler, LLC’s Motion for Summary Judgment, Williams v. Carver Pump Co.*, No. BC 309034 (Sup. Ct. of Ca., Los Angeles Cty., December 16, 2004). Similarly, in Landingin v. A.W. Chesterton, the Superior Court for San Francisco County denied an equipment manufacturer’s motion for summary judgment on the same grounds. *Order Denying Ingersoll-Rand’s Motion for Summary Judgment, Landingin v. A.W. Chesterton Co.*, No. 437009 (Sup. Ct. of Ca., San Francisco Cty., Nov. 1, 2005).

In Walraven v. A.W. Chesterton Co., No. 04-3940 (Suffolk County, Jan. 27, 2005), the trial court similarly ruled that “[t]here may be a duty to warn of a possible risk arising out of a foreseeable use by a third party or a foreseeable alteration.” The court further noted that “the alteration is simply adding an asbestos product as I understand it as an insulator rather than modifying the product, whether it’s a pump or valve or steam trap, to be a component part of something larger. And as I understand it, any addition of asbestos as an insulating system or feature was to facilitate a known or intended use of that product.”

Finally, several Texas trial courts have ruled against the equipment defendants, finding there is a duty to warn under the circumstances raised by this appeal. *Motion and Order denying defendant Yarway’s Motion for Summary Judgment, Simkins v. General Motors Corp.*, No. CC-03-02935-B (Dallas County Court at Law No. 2, May 25, 2005); *Order Denying Buffalo Pumps, Inc.’s Motion for Partial Summary Judgment, Hassall v. Alfa Laval, Inc.*, No. 24366*BH03 (District Court of Brazoria County, 23rd Judicial District, Jan. 26, 2004). These unpublished decisions have been collected at “Appendix A,” attached hereto.

the modification or alteration is necessary to the product's intended use.

A leading treatise explains:

Foreseeability is the critical factor in determining whether a subsequent substantial alteration may be attributed to the manufacturer as a proximate result of an original design defect; a design defect inherent in a safety feature of a product that foreseeably leads to a substantial alteration and an increased risk of danger may be a basis for strict products liability. A modification or alteration of a product which is essential to the product's intended use does not insulate the manufacturer from liability.

American Jurisprudence at § 1449 (2d ed. 2005).⁹ This rationale applies

⁹Courts throughout the country have likewise held that a manufacturer or seller of a product remains liable for alterations or modifications to its product that are reasonably foreseeable. **Alabama:** Hannah v. Gregg, Bland & Berry, Inc., 840 So.2d 839, 855 - 855 (Ala. 2002) (“A manufacturer or seller remains liable if the alteration or modification did not in fact cause the injury, or if the alteration or modification was reasonably foreseeable to the manufacturer or seller”); **Arizona:** Anderson v. Nissei ASB Mach. Co., Ltd., 197 Ariz. 168, 173, 3 P.3d 1088, 1093 (Ariz.App. Div. 1 1999) (“In Arizona, only an unforeseeable modification of a product bars recovery from the manufacturer.”); **Connecticut:** Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199, 236, 694 A.2d 1319, 1341 (Conn. 1997) (“In order to rebut the defendant's allegations of substantial change, the plaintiff must prove.... [a]lternatively, ... that the alteration or modification: (1) was in accordance with the manufacturer's instructions or specifications; (2) was made with the manufacturer's consent; or (3) was the result of conduct that the manufacturer reasonably should have anticipated.”) **Idaho:** Tuttle v. Sudenga Indus., Inc., 125 Idaho 145, 148-149, 868 P.2d 473, 476-77 (1994) (defense of substantial alteration or modification of product not available if “[t]he alteration or modification was reasonably anticipated conduct, and the product was defective because of the product seller's failure to provide adequate warnings or instructions with respect to the alteration or modification”) **Illinois:** Davis v. Pak-Mor Mfg. Co., 284 Ill.App.3d 214,220, 672 N.E.2d 771,775, 219 Ill.Dec.918,922 (Ill.App. 1 Dist. 1996) (“Where an unreasonably dangerous condition is caused by a modification to the product after it leaves the manufacturer's control, the manufacturer is not liable unless the modification was reasonably foreseeable. [Citations.] Foreseeability means “that which it is *objectively reasonable* to expect, not merely what might conceivably occur.”) **Indiana:** Smock Materials Handling Co., Inc. v. Kerr, 719 N.E.2d 396, 404 (Ind.App. 1999) (“The modification or alteration defense is only applicable ...where such modification or alteration is not reasonably expectable to the seller.”) **Iowa:** Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 529 -530 (Iowa 1999) (“a manufacturer will remain liable for an altered product if it is reasonably foreseeable that the alteration would be made”) **Kansas:** Howard v. TMW Enterprises, Inc., 32 F.Supp.2d 1244, 1252 (D.Kan. 1998) (“Under Kansas law, if a product is modified after delivery to the purchaser, the manufacturer may not be liable for defective design. [Citation.] The manufacturer must show, however, that the product modification was not foreseeable.”) **Louisiana:** Bourgeois v. Garrard Chevrolet, Inc., 811 So.2d 962, 965, (La.App. 4 Cir. 2002) (“The product's characteristic that renders it unreasonably dangerous under La. R.S. 9:2800.55 must exist at the time that the product left the control of its manufacturer, or result from a reasonably anticipated alteration or modification of the product.”) **Missouri:** Vanskike v. ACF Industries, Inc., 665 F.2d 188, 195 (8th Cir. 1981)(applying Missouri law) (“...subsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable....”) **New Jersey:** Brown v. U.S. Stove Co., 98 N.J. 155, 165-166, 484 A.2d 1234, 1239 (N.J. 1984) (“...a manufacturer can also be held liable under strict liability principles for design defects if it is objectively foreseeable that a substantial change in the product will cause injury”) **New York:** Cacciola v. Selco Balers, Inc., 127 F.Supp.2d 175, 187 (E.D.N.Y. 2001) “[A]lthough it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some

with full force in the instant case because there is substantial evidence in the record that the modification of the equipment at issue here through application of asbestos insulation was, on an objective basis, reasonably foreseeable. Further, there is substantial evidence that several of the equipment manufacturers actually supplied their products with asbestos-

cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.”) **Ohio** Barrett v. Waco Int’l, Inc., 123 Ohio App.3d 1, 8, 702 N.E.2d 1216, 1220 (Ohio App. 8 Dist.1997) (“Ohio courts have held that design defect claims may include the failure to design a product to prevent foreseeable misuse, including modifications. Welch Sand & Gravel, Inc. v. O & K Trojan, Inc. 107 Ohio App.3d 218, 224, 668 N.E.2d 529, 533 (1995). Although manufacturers need not guarantee that a product is incapable of causing injury, they must consider, *inter alia*, “the likelihood that the design would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.”) **Pennsylvania**: Shouey ex rel. Litz v. Duck Head Apparel Co., 49 F. Supp. 2d 413, 422 (M.D. Pa. 1999) (“A manufacturer or seller will not be liable if the product is made unsafe by subsequent changes unless the manufacturer or seller reasonably could have foreseen the alteration.”); Eck v. Powermatic Houdaille, 527 A.2d 1012, 1018 (1987) (“If the manufacturer is to effectively act as the guarantor of his product’s safety, then he should be held responsible for all dangers which result from foreseeable modifications of that product.”) **South Carolina**: Small v. Pioneer Machinery, Inc., 329 S.C. 448, 466, 494 S.E.2d 835, 844 (S.C.App. 1997) (“An essential element of any products liability claim is proof that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant. However, ...liability may be imposed upon a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller....”) **Texas**: Webb v. Rodgers Machinery Mfg. Co., 750 F.2d 368, 372 (5th Cir. 1985) (“[I]t is widely accepted that, for a manufacturer to be held liable under a strict liability theory, the product must ‘reach the user ... without substantial change in the condition in which it is sold.’ Restatement (Second) of Torts § 402A(1)(b). Texas courts likewise have noted that a manufacturer may be held liable where the subsequent alteration leading to the accident was foreseeable by the manufacturer.”); USX Corp. v. Salinas, 818 S.W.2d 473, 488 n.16 (Tex. App. – San Antonio 1991, writ denied) (“If the subsequent alteration is substantial, the burden is on the plaintiff to establish that it was objectively foreseeable that the alteration of the product would create a risk of injury; subsequent alterations are objectively foreseeable where in light of the general experience within the industry at the time the product was manufactured, they could have been reasonably anticipated by the manufacturer. If a manufacturer or assembler surrenders possession and control of a product in which change will occur, or in which change can be anticipated to occur so as to cause a product failure, the existence of a defect at the time the product left the manufacturer or seller is established.” (internal citation omitted)).

containing packing, and that it was, on an objective basis, reasonably foreseeable that the equipment would have to be re-packed.

In short, negligence law in a failure to warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk that a reasonably prudent manufacturer would and should have known and warned about.¹⁰

D. The Equipment Defendants Had a Duty to Warn of Asbestos Hazards Arising from the Foreseeable Use of Their Products

1. Exterior Insulation

In the instant case, the evidence submitted by plaintiff in opposition to summary judgment established that:

¹⁰In the briefing submitted to the trial court, some of the defendants sought to rely on two cases—Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 43 P.3d 526 (2002), and Halleran v. Nu West, Inc., 123 Wn. App. 701, 98 P.3d 52 (2004)—to support their position that they had no duty to warn. Both of these cases are inapposite because neither addresses the issue of a manufacturer’s duty to warn with respect to a hazardous product. The Halleran case narrowly dealt with whether the Securities Division of the Washington State Department of Financial Institutions had a duty under the “public duty doctrine” to warn the public of fraudulent acts by an investment company. See 123 Wn. App. at 704. The “public duty doctrine” is not at issue in this case, and Halleran is therefore inapplicable. In Burg, the issue was whether there was a statutory duty or duty arising out of contract that required the defendant to warn of defects it discovered in an area of land. In the instant case, there are no such questions with respect to statutory duty or contract. Rather, as set forth above, duty here arises out of common law principles of negligence. See Burg, 110 Wn. App. at 804 (“In a negligence action, a defendant’s duty may be predicated on violation of statute or of common law principles of negligence.”). Further, in Burg defendant discharged any duty it had by warning an intermediary—the City—of the defect in the land. See id. at 801-02. In the instant case, there is no evidence in the record indicating that any of the equipment defendants warned Mr. Braaten’s employer about the hazards of the asbestos products that equipment defendants knew or had reason to know were used inside and in conjunction with their equipment.

- (1) All of the equipment relevant here—turbines, pumps, and valves—had to be insulated in order to operate properly;
- (2) The insulation applied to all of this equipment during the relevant time period contained asbestos;
- (3) The equipment defendants knew or should have known that their equipment required external insulation to function properly and knew or should have known that this insulation was likely to be disturbed in the course of normal and anticipated maintenance.

Specifically:

- General Electric specified the use of external insulation on its turbines and allowed its clients to order insulation directly from GE. CP 2176-79.
 - Buffalo Pumps specified the use of asbestos felt, asbestos cloth, and asbestos cement with its pumps. CP 776.
 - DeLaval sold asbestos insulation materials for use with its turbine-driven pumps. CP 6434066; CP 7218; CP 7235-37.
 - Crane sold asbestos insulating materials manufactured by Johns-Manville specifically to be used in conjunction with its valves. CP1273-90.
- (4) Plaintiff Vernon Braaten was exposed to asbestos insulation while performing regular and foreseeable maintenance to turbines, pumps, and valves.

Under these circumstances, it is clear that the addition of asbestos-containing insulation to this equipment was not only reasonably foreseeable, but was actually required by the manufacturers themselves. These manufacturers were not innocent to the application of hazardous materials to their products. On the contrary, the evidence suggests that they were fully informed that their products would in fact be insulated with asbestos material and that asbestos material would be used inside their equipment. In fact, several of them actually placed their equipment into the stream of commerce containing asbestos materials and supplied these materials to their customers. The equipment defendants therefore had a duty to warn about the hazards associated with the necessary modification of their equipment.

2. Internal Components

Further, the evidence in the record establishes that Buffalo Pumps, IMO, Yarway, and Crane integrated asbestos-containing packing into their products and placed them into the stream of commerce with asbestos. The evidence also establishes:

- (1) Buffalo Pumps, IMO, Yarway, and Crane knew or should have known that in the course of normal and anticipated maintenance,

the packing would have to be removed and replaced with asbestos-containing packing;

Specifically:

- Everett Cooper testified that regular and necessary maintenance of steam powered pumps and valves cannot be done without removal and replacement of packing.
 - DeLaval provided kits of spares and tools for its pumps that included asbestos-containing packing rings. CP 7069-73.
 - Yarway advertised its use of asbestos-containing packing and provided instructions on how to repack its valves. CP 6114; CP 6152.
 - Crane advertised and sold woven asbestos and core packing with an asbestos jacket for use with its valves. CP 1276.
- (2) Mr. Braaten was exposed to asbestos while removing and replacing packing as part of the regular and foreseeable maintenance of the relevant equipment.

In light of this evidence, these manufacturers owed Mr. Braaten a duty of reasonable care that included a duty to warn him of asbestos hazards. Mr. Braaten presented sufficient evidence to raise a triable issue on his claims of common law negligence. The trial court therefore erred in granting summary judgment to the equipment defendants on this issue.

III. The Equipment Defendants Are Strictly Liable for Their Failure to Warn

In addition to his common law negligence claims, Mr. Braaten also asserted against the equipment defendants a claim of strict liability based

upon their failure to provide adequate warnings of asbestos related hazards. CP 5. The asbestos exposures in this case occurred prior to passage of the Tort Reform Act of 1981. Accordingly, product liability claims in this case are to be adjudicated under product liability law that was in place prior to 1981. Mavroudis v. Pittsburgh Corning Corp., 86 Wash.App. 23, 34, 935 P.2d684 (1997).

A. Elements of a Strict Liability Claim

Washington has adopted the Restatement (Second) of Torts Section 402A with regard to strict liability claims against product manufacturers and product sellers. See Ulmer v. Ford Motor Co., 7 Wash.2d 522, 452 P.2d 729 (1969). The essence of strict liability is:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being....

... To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.

Lunsford v. Saberhagen Holdings, Inc., 125 Wash.App. 784, 788, 106 P.3d 808 (2005), quoting Seattle-First Nat'l Bank v. Tabert, 86 Wash.2d 145, 542 P.2d 774 (1975).

In order to prove strict liability, a plaintiff must establish (1) a defect, either in design or in manufacturing, (2) which existed at the time the product left the hands of the manufacturer, (3) and not contemplated by the user, (4) which renders the product unreasonably dangerous or not reasonably safe, and (5) which was the proximate cause of plaintiff's injury. Bich v. General Electric, 27 Wash.App. 25, 28-29 (1980), citing Lamon v. McDonnell Douglas Corp., 19 Wash.App. 515, 521, 576 P.2d 426 (1978) aff'd 91 Wash.2d 3435, 588 P.2d 1346 (1979). The terms "defective" and "unreasonably dangerous" are synonymous in a strict tort liability action. Lamon v. McDonnell Douglas Corp., 19 Wash.App. at 521. Further, "a manufacturer may be held strictly liable even though his product was faultlessly manufactured if the product is unreasonably dangerous because the manufacturer failed to give adequate warnings." Bich, 27 Wash.App. at 32; Little v. PPG Indus., Inc., 92 Wash.2d 118, 594 P.2d 911 (1979); Novak v. Piggly Wiggly Puget Sound Co., 22 Wash.App. 407, 412, 591 P.2d 791 (1979).

In contrast to negligence claims, strict liability for unreasonably dangerous products under 402(A) "focuses attention on the product rather than upon the conduct of the supplier of the product." Little v. PPG Indus., Inc., 92 Wash.2d at 120. The benefits of strict liability extend to all individuals whom a manufacturer should reasonably expect to use its

product, which includes employees and repairmen, such as Mr. Braaten. Bich v. General Electric, 27 Wash.App. at 28-29; see also Lunsford v. Saberhagen Holdings, Inc., 125 Wash.App. 784, 792-93, 106 P.3d 808 (2005) (holding that “policy rationales support application of strict liability to a household family member of a user of an asbestos containing product, if it is reasonably foreseeable that household members would be exposed in this manner. Thus, the question for the jury would be whether it was reasonable for the manufacturer to foresee that [plaintiff] would be exposed to its product”)

In Washington, appellate courts have repeatedly confirmed that the jury is entitled to consider all evidence that bears on whether a product is unreasonably dangerous as designed, including if that danger arises from failure to warn:

As strict products liability in tort was originally conceived, the manufacturer’s ability to know of the danger of its product at the time of sale was immaterial. Under pure strict liability theory, the product is on trial, not the knowledge or conduct of the manufacturer. Subsequently, additional products liability theories developed which permit the plaintiff to recover when the manufacturer fails to give adequate warning or adopt an alternate design to make the product safer.

. . . Under Washington’s approach *all evidence* of the nature of the product and its dangers which assists the trier of fact to determine whether the product was unreasonably dangerous is relevant.

Lockwood v. AC & S, Inc., 44 Wash.App. 330, 348-49, 722 P.2d 826 (1986) (emphasis supplied, citations omitted) aff'd 109 Wash.2d 235, 744 P.2d 605 (1987).

B. Manufacturer's Strict Liability for Alteration of Its Product

Washington courts have consistently held a manufacturer strictly liable for failing to warn about alteration of its own product by the addition or substitution of other components used in conjunction with the product. For example, in Bich v. General Electric, 27 Wash.App. 25, 27-28, 614 P.2d 1323 (1980), an electrician (Bich) was seriously injured when a transformer he was working on exploded. General Electric was the manufacturer of the transformer. The cause of the explosion was traced to a Westinghouse fuse which Bich had installed in the transformer. Bich sued General Electric for personal injuries on a theory of strict liability related to the transformer. Among its defenses, GE asserted that it was not liable for Bich's injuries because Bich's substitution of Westinghouse fuses for GE fuses constituted a substantial change or modification. The Court of Appeals disagreed holding that "whether the substitution was a substantial change was a question of fact" because "the parties introduced conflicting evidence on this point." Id. at 29.

Bich also argued, among other things, that GE's transformer was unreasonably dangerous due to GE's failure to adequately warn of fuse substitution. Id. at 31-32. While acknowledging that GE had no duty to warn specifically about a fuse Westinghouse manufactured in 1973, the Court of Appeals held that "the jury could have found GE had a duty to warn of the time-delay characteristics of its own fuse." This was precisely because "the evidence indicated all such high voltage equipment [the transformer] requires time delay fuses." Id. at 33.

Similarly, in Parkins v. Van Doren Sales, Inc., 45 Wash.App. 19, 724 P.2d 389 (1986), the plaintiff was injured when her right arm was caught in a nip point of a conveyor belt. The conveyor had been assembled as one part of a newly installed processing line designed, constructed, and installed by the plaintiff's employer, not the manufacturer of the nip point. Like the equipment defendants in this case, the defendant in Parkins moved for summary judgment contending it merely sold parts which were individually non-defective when manufactured; it had no knowledge as to whether the parts would merely be used for replacement purposes or to construct a new conveyor; and it consequently had no duty to warn or provide safety devices. Id. at 22-23. Although the trial court granted summary judgment on this basis, the Court of Appeals reversed. That court, applying the concept of foreseeability, noted that there was

evidence that the defendant knew unguarded nip points made conveyors “not reasonably safe.” Id. at 26. It also held that there was evidence that the defendant knew that the plaintiff’s employer was installing a new processing line and required conveyors. Id.

The Court specifically rejected the defendant’s argument that even if it possessed such knowledge, it was not reasonable for it to provide guards for the components it did supply since the defendant had no control over the assembly of the conveyor and processing line. Id. at 27. The Court held that a nip point is always created when a conveyor such as this is fully assembled. Accordingly, the defendant’s failure to provide warnings on component parts near the nip point made the failure to warn of a dangerous defect actionable. Id.

The Court of Appeals also rejected the defendant’s affirmative defense of substantial change. Although the employer added important parts of the conveyor—parts without which the conveyor would not work—the Court held that there was evidence that these parts “had to be added to construct any conveyor.” Id.

Following Bich and Parkins, in the instant case it is clear that the equipment defendants are liable because they failed to provide adequate warnings. First, under Bich, it is clear that there is at least a jury question as to whether the pump and valve manufacturers had a duty to warn about

the packing that was integrated into their equipment. Like the transformer in Bich, which came with a fuse that would eventually require replacement, the pumps and valves all came with a component—packing—that the equipment defendants knew or had reason to know would be replaced. Further, just as replacement of the fuse could prove dangerous, the evidence in the record established that the removal of packing could liberate asbestos dust, making the packing unreasonably dangerous. Thus, a jury could find that the equipment defendants failed to warn as to the dangers of the packing. As the court in Bich pointed out, “[I]t 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.” Bich, 27 Wash.App. at 33. Similarly, the pump and valve manufacturers could have provided warnings about the dangers inherent in removing and replacing asbestos-containing packing that had been integrated into their equipment. Notably, the court in Bich found that there could have been a duty to warn even though Mr. Bich did not actually work with a GE fuse. Thus, even if there is no evidence in this case that Mr. Braaten worked with original packing in the pumps and valves, this does not relieve the manufacturers of their duty to warn about the asbestos-materials that came

with their equipment or the hazards inherent in removing and replacing those materials.

Moreover, the addition of the asbestos insulation to the equipment defendants' products was not a substantial change under Bich. First, in Bich, the Court of Appeals specifically noted that "Bich's alternative theory of the case was that GE's transformer [not the fuse alone, but rather the integrated product] was unreasonably dangerous due to GE's failure to adequately warn of fuse substitution." Bich, 27 Wash.App. at 31-32. The Court therefore looked at the entire unit—the transformer that integrated the fuse—in considering the duty to warn. The critical fact in the Court's rationale was that, like high temperature equipment that requires asbestos insulation to operate properly, the evidence in the case was that all such transformers required time-delay fuses to operate properly. Id. at 33.

Moreover, in Bich, there was evidence that it was acceptable practice to interchange GE and Westinghouse fuses. Id. at 29. The court therefore found that whether the substitution was a substantial change is a question of fact. Id. Here, there is even stronger evidence in the record that the addition of asbestos insulation to the equipment did not constitute a substantial change because it was not only acceptable to add such insulation, it was *necessary*. Thus, as in Parkins, where the addition of other components to the nip point was normal and necessary, and therefore

was not considered a substantial change, 45 Wash.App. at 26-27, here, the addition of asbestos insulation likewise should not be considered a substantial change. As in Parkins, the equipment defendants had a duty to warn, even though other components were added to their equipment, since they knew or had reason to know that these components would be added, and in fact were necessary for the proper functioning of their products.¹¹

¹¹ Equipment defendants often rely on three cases to argue they have no duty to warn under strict liability principles. These cases are distinguishable. In Peterick v. State, 22 Wn. App. 163, 589 P.2d 250 (1977), the putative defendant did not manufacture the explosive material that caused injury to the plaintiff. Here, the equipment defendants actually manufactured the products that caused Mr. Braaten harm.

Sepulveda-Esquivel v. Central Machine Works, 120 Wn. App. 12, 84 P.2d 985 (2004) is limited to interpretation of the Washington Products Liability Act and is also distinguishable from this case. In Sepulveda-Esquivel, plaintiff was injured by a load that fell off a hook modified by one defendant (Vanalco), forged by another (Ulven), and supplied to Vanalco by a third defendant (Central Machine Works); plaintiff also alleged that defendants were liable for the assembly of a “mouse” to the hook that controlled the device. Id. at 898-99. The evidence showed neither Ulven nor Central made, supplied, or sold the finished hook assembly with the mouse, and that only Vanalco designed and manufactured the “mouse” and assembled it to the hook in question. Id. As there was no defect with the hook itself, neither Ulven or Central could be held liable as they had no control or influence in how Vanalco used their hooks (i.e., with or without a mouse assembly). Notably, there was no evidence in Sepulveda-Esquivel that the hook manufacturers intended for the hook to be used with a mouse assembly or that the design specified or required other products for intended its use. In contrast, the evidence in this case shows that the equipment manufacturers reasonably foresaw that their products would integrate and require asbestos-containing materials, including packing, gaskets, and insulation.

Powell v. Standard Brands Paint Co., 166 Cal.App.3d 357 (Cal.App. 1985), similarly adds little to the legal analysis at issue in this case. In Powell, plaintiffs used one defendant’s lacquer thinner on the first day of a project and were injured in an explosion on the second day while using a lacquer thinner manufactured and sold by a second defendant. The court rejected plaintiffs’ attempt to hold liable the manufacturer of the first day’s product as there was no evidence that product caused plaintiffs’ injury and, in doing so, rejected plaintiffs’ argument that they would not have bought either defendant’s product had it seen a warning on the first defendant’s product. Id. at 364-65. Unlike Powell, however, in this case the equipment defendants are sued for asbestos packing and insulation they foresaw on *their own products*, not the products of other defendants. Thus, Crane Co. is sued for its failure to warn with respect to its own valves,

C. Appellate Courts Agree that Failure to Warn of Hazards Arising Out of Foreseeable Use of a Product Renders the Product Unreasonably Dangerous

Appellate courts in other jurisdictions are in accord with the reasoning that supports Bich and Parkins. In Liriano v. Hobart Corp., 700 N.E.2d 303 (N.Y. Ct. App. 1998), the New York Court of Appeals (New York's highest court), was called upon to answer the question, "Can manufacturer liability exist under a failure to warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory?" Id. at 305. New York's strict liability law is substantially the same as that in Washington. As in Washington, in New York, a manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries. Also as in Washington, in New York, a product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product. A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known, and a manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable. Id. (internal citations omitted).

not Yarway's. Likewise, Buffalo Pumps has been sued for failure to warn about asbestos products integrated into its own pumps, not DeLaval pumps. Thus, Powell is inapposite.

Considering this law, the New York Court of Appeals held that the existence of a substantial modification defense does not preclude a *failure to warn claim*. The court ruled that, as opposed to cases where a court sought to impose upon a manufacturer a duty to design against post sale modification of a given product, the policy considerations are less cogent with respect to the *duty to warn* about hazards associated with such modifications. Id at 306-09. The Liriano Court stated:

Unlike design decisions that involve the consideration of many interdependent factors, the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning. The burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product. Thus, although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.

Id. at 308.

Thus, the New York court has held, in circumstances similar to the instant one and under law that is virtually identical to the law in Washington, that the public policy favors imposing a duty to warn on defendants such as General Electric, Buffalo Pumps, IMO, Yarway, and Crane. Indeed, in the instant case, where the evidence establishes:

- (1) the equipment defendants knew that their products required asbestos insulation and/or packing, often specified the use of these materials in conjunction with their products, and even, in some cases, provided their products with asbestos-containing materials already integrated into them and sold replacement parts that contained asbestos;
- (2) the equipment defendants knew or had reason to know that the asbestos-containing materials integrated into their equipment was necessary for the proper functioning of their equipment; and
- (3) the equipment defendants knew or had reason to know that the asbestos-containing materials integrated into their equipment would be disturbed during necessary and foreseeable maintenance,

appellant has raised a genuine issue of material fact with respect to the equipment defendants' duty to warn. Given these facts, it certainly cannot be said, as a matter of law, that it was unforeseeable to the equipment defendants that Mr. Braaten would inhale asbestos fibers while maintaining the equipment or that this danger was "so obvious or known that no warning was required." See Bich v. Gen. Elec., 27 Wash. App. at 33.

In a nearly identical case to the instant one, a New York appellate court, adopting a similar analysis of Section 402A as this Court applied in Bich and Parkins, unanimously ruled that a pump manufacturer had a duty to warn of hazards arising from asbestos gaskets and insulation, despite the fact that the pump manufacturer neither manufactured nor installed the asbestos products. Berkowitz v. A.C. and S., Inc., 733 N.Y.S.2d 410 (N.Y. App. 2001). The court, affirming a denial of summary judgment to the pump manufacturer, Worthington, explained:

Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos.

Id. at 412 (internal citations omitted).¹²

Also consistent with Bich and Parkins and the cases discussed above, in Molino v. B.F. Goodrich Co., 617 A.2d 1235 (N.J. Super. 1992), cert denied 634 A.2d 528 (N.J. 1993), the New Jersey appellate court ruled that a tire manufacturer had a duty to warn of the dangers of a rim

¹² In coming to this decision, the Appellate Division found Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289 (1992), relied upon by at least some of the equipment defendants below, distinguishable. See Berkowitz, 733 N.Y.S.2d at 410.

assembly unit of which the tire was only one component. Specifically, the plaintiff in this case was injured when a tire and rim assembly exploded while he was handling an inflated Goodrich tire that was mounted on a multi-piece rim manufactured by Firestone Tire & Rubber Company. The case ultimately went to trial against the manufacturer of the tire, Uniroyal, on a strict products liability failure to warn claim. In granting a directed verdict in favor Uniroyal, the trial judge stated: "I don't find that there is a need to have the defendant tire company Goodrich warn about a possible defect in the rim furnished by firestone." Id. At 1239. In other words, like the trial court in this case, the trial judge in Molino held that Uniroyal simply had no duty to warn about a rim assembly unit that it did not manufacture.

The New Jersey Court of Appeals reversed. Its reasoning is directly applicable in the instant case:

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

Here, even though the tire was separate from the rim assembly, the pieces were by design required to be used together. The evidence appears to support plaintiffs' contention that the tire manufactured by Uniroyal was part of the system involved with the multi-piece rim assembly unit. The issue should not have been decided as a matter of law as the court was required to consider the evidence and

all legitimate inferences in plaintiffs' favor. . . . The jury should have been given the opportunity to consider whether it would accept [Plaintiff Expert] Forney's testimony as credible and reasonable.¹³ If convinced that Uniroyal should have foreseen or actually knew of the dangers involved with the rim assemblies used with its product, the jury would then consider Uniroyal's duty to provide an adequate warning of hidden dangers to reasonably foreseeable users, unless the danger was so obvious that such users would know of it.

Id. at 1239-40.

Similar to Molino, in the instant case the defective products are not the asbestos-containing insulation and packing. Rather, the defective products are the "fully functional units" of (1) turbines covered in insulation; (2) pumps containing packing and covered in insulation; and (3) valves containing packing and covered in insulation. See Chicano v. General Elec. Co., No. Civ. A. 03-5126, 2004 WL 2250990, at * (E.D. Pa. Oct. 5, 2004) (explaining that because a turbine cannot function properly or safely without thermal insulation, "the products from which [plaintiff] inhaled asbestos fibers are properly understood to be the turbines covered with asbestos-containing insulation, as fully functional units").¹⁴ In other

¹³ Forney testified that when the tire was manufacture, the industry knew there were problems with multi-piece rims. Forney also testified that all of the parts of the assembly were necessarily involved with the explosion even though the tire itself was not physically defective. Forney further testified that warnings should have been on all parts of the assembly, including the tire. Molino, 617 A.2d 1238-39.

¹⁴ Although Chicano is an unpublished decision, in the Third Circuit, where the Eastern District of Pennsylvania is located, citation to unpublished opinions is not prohibited, and therefore, such opinions may serve as persuasive authority. U.S. v. Torres, 268 F.Supp.2d 455, 461 n.9 (E.D. Pa. 2003); see L.A.R. 28.3(a) (3d Cir.2003); I.O.P. 5.3 (3d

words, there is evidence in the record that asbestos packing and insulation was anticipated and necessary for this equipment to be fully functional. Thus, just as the tire in Molino had to be considered part of the entire system comprising the rim assembly unit, the equipment here must be considered part of an entire unit that includes the asbestos-containing components, since all “the pieces [the equipment, packing, and insulation] were by design required to be used together.” Molino, 671 A.2d at 1240.

Further, Mr. Braaten was not assigned to perform maintenance on the insulation; he was assigned to perform maintenance on the equipment—the turbines, pumps, and valves. But the only way to perform maintenance on this equipment required disturbing the insulation and packing, which, the undisputed evidence establishes, was necessary for the equipment to function as intended. As such, the equipment was inherently dangerous because the asbestos insulation and packing (in the case of pumps and valves) was integral to the equipment’s proper functioning. The equipment was not accompanied by any warning to take precautions when performing maintenance that would inevitably cause exposure to asbestos.

Cir.2003); see also City of Newark v. U.S. Dep’t of Labor, 2 F.3d 31, 33 n.3 (3d Cir.1993) (“Although we recognize that this unpublished opinion lacks precedential authority, we nonetheless consider persuasive its evaluation of a factual scenario identical to the one before us in this case.”).

Had the trial court allowed Mr. Braaten's strict liability claims to proceed to trial, a jury could have reasonably concluded, based on the evidence set forth above, that the equipment at issue here was defectively designed because none of the products were accompanied by a warning about an eminently foreseeable use and the hazards associated with that use. It is for this reason that a jury should have been allowed to evaluate whether warnings should have been provided by General Electric, Buffalo Pumps, IMO, Yarway, and Crane to direct workers in Mr. Braaten's position to take precautions when performing routine maintenance on the asbestos-containing equipment. Appellant respectfully submits that the trial court erred when it took this issue away from the jury.¹⁵

¹⁵The reasoning in Lindstrom v. A-C Product Liability Trust, 424 F.3d 488 (6th Cir. 2005), which appellant believes equipment defendants will seek to rely upon, is completely inapplicable in Washington cases. In Lindstrom, the Sixth Circuit examined whether there was sufficient evidence of exposure to asbestos on equipment to defeat summary judgment or directed verdict. The Lindstrom court ultimately held that there was insufficient evidence linking the plaintiff's exposure to the products at issue with his disease. Notably, the exposure requirements in the Sixth Circuit differ from those in Washington. In the Sixth Circuit, a plaintiff must show "substantial exposure for a substantial period of time" in order to prove that the product was a substantial factor in causing injury. Id. at 492. Moreover, "a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. These standards, of course, conflict with the exposure standards in Washington asbestos cases. In Washington, "[p]laintiffs in asbestos cases may rely on circumstantial evidence that the manufacturer's products were the source of their asbestos exposure." Van Hout v. Celotex Corp., 121 Wash.2d 697, 706, 853 P.2d 908 (1993). Indeed, the Washington Supreme Court has ruled, in direct contrast to the Sixth Circuit, that "instead of personally identifying the manufacturers of asbestos products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present in the workplace." Lockwood v. AC and S, Inc., 100 Wash.2d 235, 247, 744 P.2d 605 (1987). Because the standard for proving exposure is different in Washington than in the Sixth Circuit, the reasoning in Lindstrom is unavailing in any Washington case, and should not be considered here. Further, the issue

D. Public Policy Considerations Favor Imposing a Duty to Warn in these Circumstances

This Court has often turned to public policy considerations in deciding whether to impose a duty to warn. In Lunsford v. Saberhagen Holdings, Inc., 125 Wash.App.784, this Court was called upon to decide whether a manufacturer of an asbestos product had a duty to household family members of users of its product. The Court noted that in such circumstances “policy considerations are key.” Id. at 792. The policy considerations the Court referred to are those discussed in comment c of the Restatement (Second) of Torts § 402A, namely:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the products.

Restatement (Second) of Torts § 402A cmt. c (1965); Lunsford, at 792-93.

The Lunsford court ruled that “[t]hese policy rationales support

of duty was never analyzed in Lindstrom. Thus, any language finding a lack of duty is mere dictum.

application of strict liability to a household family member of a user of an asbestos-containing product, if it was reasonably foreseeable that household members would be exposed in this manner.” Id. at 793.

Similarly, in the instant case, the policy considerations set forth above weigh in favor of placing a duty in the instant circumstances on the equipment defendants. The record evidence establishes that it was reasonably foreseeable to these defendants that their equipment would be used in conjunction with asbestos-containing products and that these products would be disturbed in the course of necessary maintenance of the equipment. In fact, as stated several times in this brief, the evidence shows that the equipment required the asbestos-products to function efficiently and safely. Thus, General Electric, Buffalo Pumps, IMO, Yarway and Crane were more than adequately positioned to evaluate the hazards associated with their products due to their eminently foreseeable uses. Requiring them to do so, and to provide warnings, does not place on such manufacturers an unlimited responsibility to inquire into every possible product that could be used in conjunction with their equipment. Instead, placing a duty to warn on the equipment defendants in this case simply requires them to warn of a use of their equipment that was necessary, foreseen, anticipated and indeed contemplated by these defendants.

Moreover, as the New York court in Liriano pointed out, requiring the placement of a warning in such circumstances does not impose “an untoward duty.” Rather, in the instant case, where the equipment could not properly function without asbestos-containing components, it is “neither infeasible nor onerous” to warn of the dangers of these foreseeable modifications that pose the risk of injury. Liriano, 700 N.E.2d at 308.

Under these circumstances, public policy favors imposing a duty on the equipment defendants to warn of hazards they knew were inherent in maintaining their equipment.

CONCLUSION

As set forth above, under Washington law, the equipment defendants had a duty to warn of the asbestos hazards that arose from the foreseeable uses of and alterations to their equipment. Moreover, the pump and valve manufacturers were also under a duty to warn about the hazards associated with the asbestos-containing packing they integrated into their equipment and placed in the stream of commerce. The trial court committed reversible error in determining otherwise. Appellant therefore respectfully submits that the trial court’s orders granting General Electric, Buffalo Pumps, IMO, Yarway, and Crane summary judgment should be reversed and the case remanded back to the lower court for trial.

RESPECTFULLY SUBMITTED this 23rd Day of January 2006.

BERGMAN & FROCKT

A handwritten signature in black ink, appearing to be 'D. Frockt', written over a horizontal line.

David S. Frockt, WSBA 28568
Matthew P. Bergman, WSBA 20894

WATERS & KRAUS LLP

Charles S. Siegel, TX Bar No. 18341875
Admitted *pro hac vice*

Counsel for Petitioner

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Appellant,

v.

BUFFALO PUMPS, INC.; CRANE CO.;
GENERAL ELECTRIC COMPANY; IMO
INDUSTRIES, INC.; and YARWAY
CORPORATION,

Respondents.

No. 57011-1

BRIEF OF APPELLANT
APPENDIX A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/06/05

DEPT. 72

HONORABLE Jon M. Mayeda

JUDGE L. RIVAS

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

S. VALENTE, CA

Deputy Sheriff

T. FONG

Reporter

9:00 am

BC327773

Plaintiff

Counsel PAUL C. COOK (X)

ELMER "LEE" BRODNAX

VS

Defendant

AGCO CORP ET AL

Counsel BRUCE C. CHUSID (X)

170.6 JUDGE RODNEY E. NELSON

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT YARWAY CORPORATION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION;

The Motion is called for hearing and argued.

The Motion is DENIED.

The plaintiff testified with certainty that he worked on Yarway valves and steam traps while working as a pipe fitter, and that he removed gaskets and insulation from these products. The defendant also had a duty to warn of foreseeable uses of its product, including those uses incorporating the products of others, Wright v. Stang Mfg. Co. (1974) 54 Cal.App4th 1218; DeLeon v. Commercial Manufacturing and Supply Co. (1983) 148 Cal.App.3d 336.

Notice to be given by plaintiff.

201

CAUSE NO. CC-03-02935-B

JANET SIMKINS, Individually and as Personal
Representative of the Estate of HARRY RON
SIMKINS, Deceased, and as Representative of Heirs
LESLEE S. KOMOSLY and SCOTT R. SIMKINS,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, et al,

Defendants.

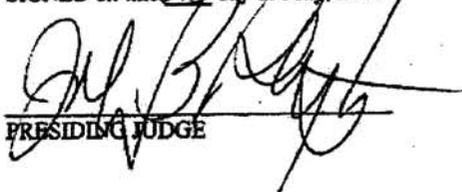
§ IN THE COUNTY COURT
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§ AT LAW NO. 2
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§
§ DALLAS COUNTY, TEXAS

**ORDER DENYING DEFENDANT YARWAY CORPORATION'S
NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT**

On the 25 of May, 2005, the Court considered Yarway Corporation's No-Evidence Motion for Summary Judgment. After considering the pleadings, the motion, the response, affidavits, and other evidence on file, the court:

DENIES Defendant Yarway Corporation's No-Evidence Motion for Summary Judgment on the issues of duty, exposure and causation.

SIGNED on this 25 day of May, 2005


PRESIDING JUDGE



FILED

at _____ o'clock _____ M.

JAN 26 2004

CAUSE NO. 24366*BH03

JERRY DEERE
Clerk of District Court Brazoria Co., Texas

ALBERT HASSALL AND
SANDRA HASSALL

§
§
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§
§
§
§

IN THE DISTRICT COURT OF
Brazoria County, Texas

VS.

BRAZORIA COUNTY, TEXAS

ALFA LAVAL, INC., ET AL

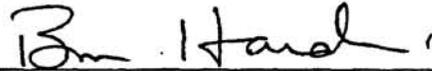
23RD JUDICIAL DISTRICT

ORDER DENYING BUFFALO PUMPS, INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court has received and considered Buffalo Pumps, Inc.'s Motion For Partial Summary Judgment (the "Motion"). After considering the summary judgment evidence, the Court has determined that the Motion should be denied.

It is, therefore, ORDERED that the Motion is hereby DENIED.

SIGNED this the 26th day of January, 2004.



BEN HARDIN
District Judge, 23rd District Court



1 C. ANDREW WATERS, ESQ. CA Bar No. 147259
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9 Attorneys for Plaintiff

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

11 TOMMIE L. WILLIAMS and IMOGENE
12 WILLIAMS,
13 Plaintiffs,
14 vs.
15 CARVER PUMP COMPANY, et al.,
16 Defendants.

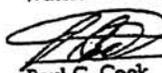
Case No. BC 309034

NOTICE OF RULING DENYING
FOSTER WHEELER, LLC'S MOTION
FOR SUMMARY JUDGMENT

18 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

19 PLEASE TAKE NOTICE that on December 15, 2004 at 8:30 a.m. in Dept. 15 of the
20 above entitled court, Foster Wheeler LLC's Motion for Summary Judgment came on for hearing.
21 Appearing on behalf of Plaintiffs was Paul C. Cook of Waters & Kraus LLP; appearing on behalf of
22 Foster Wheeler was James G. Scadden of Carroll, Burdick & McDonough. After oral argument the
23 Court took the matter under submission, and subsequently issued an Order that the motion be
24 DENIED. The final ruling of the Court is attached hereto as Exhibit A.

25 Dated: Dec. 16, 2004

Waters & Kraus, LLP

Paul C. Cook
Attorneys for Plaintiffs



6 RULING ON SUBMITTED MATTER

WILLIAMS v. CARVER PUMP COMPANY, et al, Case No. BC 309034

FILED
LOS ANGELES SUPERIOR COURT
DEC 15 2004

The court confirms as it final orders its Tentative Rulings on the motion argued on Wednesday, December 15, 2004

JOHN A. CLARKE, CLERK
BY R. GONZALEZ, DEPUTY

A. RULING ON MOTION BY DEFENDANT VIKING PUMP, INC. FOR SUMMARY JUDGMENT:

This motion for summary judgment is granted. Plaintiff filed a notice of non-opposition. Viking's separate statement sets forth material facts supporting the motion for summary judgment. MP is to serve notice of ruling.

B. RULING ON MOTION BY DEFENDANT FOSTER WHEELER LLC FOR SUMMARY JUDGMENT:

Foster Wheeler's motion for summary judgment is DENIED. The dispositive issues are:

- (1) Was plaintiff Tommie Williams exposed to asbestos from any Foster Wheeler product? and
- (2) Did Foster Wheeler have a duty to warn about the dangers of its boilers as a result of the asbestos-containing insulation that was added to the boilers as recommended by Foster Wheeler.

To prevail on a motion for summary judgment/adjudication, MP must control a dispositive issue. "To control" means that the opposing party cannot present contrary admissible evidence to raise a triable factual dispute on that issue. Said another way, a MP must produce evidence to establish a prima facie case; if successful, the burden shifts to opposing party to produce evidence to show a triable issue of material fact. "A prima facie showing is one that is sufficient to support the position of the party...." Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 851; see CCP section 437c, subdivisions (o) and (p). MP has not met its burden as it has failed to control the dispositive issues.

Plaintiffs dispute MP's assertion of Undisputed Facts ## 6 and 7. Fact # 6 asserts: "During his deposition, Mr. Williams could not identify the manufacturer of the boiler he came into contact with on the USS Ashtabula." The Burger declaration, based on a U.S. Navy report, testifies that the USS Ashtabula and the USS Decatur (both vessels plaintiff

EXHIBIT "A"

Mr. Williams worked on) were equipped with boilers manufactured by Foster Wheeler.

Fact # 7 asserts in essence that Mr. Williams could not identify the specific brand of the boilers he encountered. This fact is disputed through the Burger declaration, paras. 6-8, Exhs. B-D to the Burger declaration and the Williams depo. At 498:21-499:6.

Furthermore, MP fails to address the failure to warn and design defect issues. Foster Wheeler manufactures boilers, which are not inherently dangerous, but the addition of asbestos-containing insulation, as recommended by Foster Wheeler, makes the boilers hazardous. See Burger decl., para. 12. The particular type of boilers required asbestos-containing insulation. This gave rise to a duty imposed on the manufacturer to warn of the hazard created by the insulation. *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336, 344.

Plaintiff is to serve notice of ruling. This TR shall be attached to the minute order, and incorporated therein, to state the court's ruling and reasons.

At the hearing various issues presented by Foster Wheeler's motion were discussed at length. The court is not persuaded to change its Tentative Ruling (to deny Foster Wheeler's motion) but adds these additional comments.

1. Foster Wheeler brought the motion on the assertion that plaintiff could not raise a triable issue that he was exposed to asbestos arising from the use of its product. Plaintiff raised a triable issue by submitting the declaration of an expert witness. MP then countered the Burger declaration with a counter-declaration from its expert Silloway. The motion thus illustrates the phenomena of an evolving summary judgment motion.

2. Plaintiff did raise a triable issue by submitting the Burger declaration. Silloway may impeach the Burger declaration but Silloway does not eliminate the triable issue that Burger raised. A battle between the experts must be decided by a trial. Allowing MP to take Burger's deposition is not going to eliminate the expert conflict, absent Burger admitting that his opinion that plaintiff was exposed to asbestos through the use of MP's product is wrong.

3. MP raises the argument that plaintiff was required to reveal the facts on which its expert relied in response to discovery requests. If Burger was recently retained, that is, after plaintiff provided the discovery responses, plaintiff had no obligation to update its factual disclosure, unless asked or required by a CCP 2034 demand.

MP's argument is that plaintiff's law firm has been litigating asbestos cases for decades and therefore was aware of the factual basis on which plaintiff would attempt to prove liability against Foster Wheeler, even if it did not have an expert ready to provide an opinion. While that could be true, Foster Wheeler also has been litigating asbestos cases for decades. It could be expected to have surmised the basis on which plaintiff would attempt to connect Foster Wheeler to plaintiff's exposure, namely that he was exposed when he worked on naval ships in proximity to cutting work on insulation predictably used with Foster Wheeler boilers. Foster Wheeler, however, did not choose to base its summary judgment motion on an assertion that its product could not have caused injury to plaintiff even if he were exposed to it in the workplace. Foster Wheeler, in the court's view, is defeated because it chose a too narrow ground on which to seek summary judgment. Once plaintiff countered with a facially sufficient expert declaration that plaintiff was exposed to asbestos, MP cannot introduce a new theory to buttress its motion, namely that Foster Wheeler cannot be liable for failing to provide a warning on products sold the Navy "before plaintiff was born." MP is then shifting ground to broaden its grounds for summary judgment.

With respect to plaintiff's possibly "lying in the weeds" in not disclosing facts on which it arguably knew its expert would rely, the court does not have adequate information that plaintiff had the information plaintiff failed to disclose or that MP was prejudiced by such failure to disclose.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am over eighteen years of age and not a party to the within action; my business address is 200 Oceangate, Suite 520, Long Beach, California 90802; I am employed in Los Angeles County, California.

On December 16, 2004, I served a copy of the following documents:

NOTICE OF RULING DENYING FOSTER WHEELER, LLC'S MOTION FOR SUMMARY JUDGMENT, on the interested parties in this action by placing the true and correct copies thereof enclosed in sealed envelopes addressed as stated as follows:

(By Mail) I caused each envelope with postage fully prepaid, to be placed in the United States Mail at Long Beach, California to:

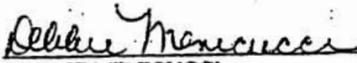
See Attached Mailing List

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

Executed on December 16, 2004, at Long Beach, California.


DEBBIE MENICUCCI

WILLIAMS V. CARVER PUMP COMPANY, et al.
LASC Case No. BC 309 034, W&K File No. 03-0955
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FILED
San Francisco County Superior Court

NOV - 1 2005

GORDON PARK-LI, Clerk
BY: West
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 301

ALBERT LANDINGIN and EPIFANIA
LANDINGIN,

Plaintiffs,

vs.

A.W. CHESTERTON COMPANY, et al.,

Defendants.

437009

**ORDER DENYING INGERSOLL-
RAND'S MOTION FOR SUMMARY
JUDGMENT**

Defendant Ingersoll-Rand's ("Ingersoll") Motion for Summary Judgment came on regularly for hearing before the Honorable James L. Warren on October 27, 2005, in Department 301. Paul Cook appeared on behalf of Plaintiff Landingin and Timothy Killelea appeared on behalf of Ingersoll. Following the hearing, the Court took the matter under submission. Having considered the filed papers and the oral arguments presented, the Court rules as follows:

Plaintiff Landingin served in the US Navy from 1956 to 1965 as an engineman. One of the ships on which Landingin worked was the USS Toledo. It is undisputed that seven

ORDER DENYING INGERSOLL-RAND'S MOTION FOR SUMMARY JUDGMENT



1 Ingersoll compressors were aboard the USS Toledo. Landingin testified that he and others in
2 his vicinity inspected, repaired, aligned and tested various types of ship machinery, including
3 pumps, valves, compressors, and generators. Landingin also testified that he insulated steam
4 pumps and steam lines. Through the deposition testimony of Captain William Lowell, a
5 naval marine engineering expert, Landingin presented circumstantial evidence that he would
6 have worked in the same room as Ingersoll compressors, and that Landingin would have
7 been working with asbestos containing products. (The Court acknowledges Ingersoll's
8 objections to Captain Lowell's opinion, asserted without foundation, that asbestos was
9 contained in the products with which Plaintiff worked. Because the Court finds that Ingersoll
10 failed to shift the burden, it does not rule on the admissibility of any evidence submitted by
11 Plaintiff in opposition to the motion.) Finally, it is undisputed that Landingin testified that he
12 worked on and around asbestos-containing insulation materials affixed to turbines and the
13 associated piping that was hooked to the compressors aboard the Toledo.
14

15
16 Ingersoll moved for summary judgment on two grounds: first, that Landingin did not
17 work on any internal component parts of Ingersoll's compressors, and second, that Ingersoll
18 cannot be held liable for the work that Landingin performed on third party equipment
19 affixed, and external, to Ingersoll's compressors.
20

21 The court agrees that no triable issue of fact exists regarding Landingin's work on
22 internal components of Ingersoll's compressors. However, the court finds that Ingersoll
23 failed to shift the burden regarding its potential liability for Landingin's work on parts
24 affixed to Ingersoll's compressors.

25 Captain Lowell testified at deposition that there were high, medium, and low pressure
26 Ingersoll compressors aboard the Toledo. Based on his study and personal knowledge of
27 WWII ships and the compressors on those ships, Lowell stated his opinion that the high
28

1 pressure compressors in every case would have been turbine (steam) driven and insulated. A
2 turbine driven air compressor would have insulation on the turbine, but not on the
3 compressor. According to Lowell, the turbine and compressor would be "a package,"
4 coming as a whole to the shipbuilder, regardless of who manufactured the parts (here, the
5 turbine). Lowell testified that he had never seen any high pressure compressors without a
6 turbine attached.
7

8 The court finds that Ingersoll never addressed Lowell's testimony that Ingersoll sold
9 its compressors and the turbines as a package. Although counsel confirmed that Lowell
10 would not be rendering an opinion "that Ingersoll played any role with respect to the
11 insulation of the turbines associated with its compressors," this statement does not adequately
12 address or provide any evidence that Ingersoll did not sell its compressors with turbines. If,
13 as Lowell's testimony posits, Ingersoll sold the compressor and the turbine as "a package,"
14 even if Ingersoll did not manufacture the turbine itself, then Ingersoll has not shown that
15 Plaintiff does not have and cannot adduce evidence that Ingersoll placed an asbestos
16 containing product (the "packaged" turbine and compressor) into the market. This failure to
17 shift renders it unnecessary for the Court to address Ingersoll's many objections to Plaintiff's
18 evidence tendered in opposition to this motion.
19

20 For the foregoing reason, Ingersoll's Motion for Summary Judgment or, in the
21 alternative, for Summary Adjudication, is DENIED.
22

23 IT IS SO ORDERED.

24 Dated: 10/31/05

25 By: 

26 James L. Warren
27 Judge of the Superior Court
28

California Superior Court
County of San Francisco
Law & Motion Department • Room 301

ALBERT LANDINGIN and EPIFANIA
LANDINGIN,

Plaintiffs,

vs.

A.W. CHESTERSON, et al.,

Defendants.

No. 437009

Certificate of Service by Mail
(CCP § 1013a(4))

I, Gordon Park-Li, Clerk of the Superior Court of the City and County of San Francisco, certify that:

1) I am not a party to the within action;

2) On NOV - 1 2005, I served the attached:

ORDER DENYING INGERSOLL-RAND'S MOTION FOR SUMMARY JUDGMENT
by placing a copy thereof in a sealed envelope, addressed to the following:

Paul Cook
Waters & Kraus
300 N. Continental Blvd., Suite 500
El Segundo, CA 90245

Timothy Killelea
Gordon & Rees
275 Battery Street, 20th Floor
San Francisco, CA 94111

and,

3) I then placed the sealed envelope in the outgoing mail at 400 McAllister St., San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practice.

Dated: NOV - 1 2005

GORDON PARK-LI, Clerk
By: *C. Herbert*
deputy
CYNTHIA S. HERBERT

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PAGES 1-9

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPERIOR COURT
MICV 04-3940
BEFORE: Locke, J.

Day 3 Rulings on Motions in Limine

WALRAVEN *

VS *

A. W. CHESTERTON COMPANY, ET AL. *

Thursday, January 27, 2005

Boston, Massachusetts

Warren A. Greenlaw

OFFICIAL COURT REPORTER

SUFFOLK SUPERIOR COURT, BOSTON, MA 02109

(617) 788-7314

*****COMPUTER AIDED TRANSCRIPTION*****



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24

PROCEEDINGS

EXCERPT TRANSCRIPTION JUDGE'S RULINGS

MOTIONS IN LIMINE

1
2
3
4 THE COURT: One of the matters
5 that we heard argument on yesterday and took
6 under advisement related to the defendants',
7 various defendants' motions in limine to
8 exclude a claim of duty to warn as it related
9 to the application of asbestos materials by
10 third parties, and by that I mean other
11 manufacturers or users.

12 And after consideration I'm denying
13 those motions in limine.

14 In making that ruling, I am not ruling
15 at this point as a matter of law that these
16 particularly defendants had a duty to warn
17 others including end users or consumers of a
18 danger regarding the external application of
19 asbestos.

20 But it does seem to me that the proper
21 application of law depends at least in part
22 on the use for which the pumps or valves or
23 steam traps at issue were designed and
24 intended and as well the use to which third

1 parties may have put those products.

2 All parties have brought my attention
3 what is considered the seminal Massachusetts
4 case, that of Mitchell v. Skyclimber,
5 Incorporated, dealing with a manufacturer's
6 duty to warn where the product at issue was
7 merely a component part of larger system and
8 where the hazardous condition was created by
9 the construction or design of the larger
10 system.

11 And although the defendant accurately
12 quoted portions of the Skyclimber decision,
13 it seems to me they overlook other language
14 that could be read as making the general
15 proposition that is that, generally, there's
16 no duty to warn of risks created by the use
17 to which a product is put by another
18 manufacturer as a conditional proposition of
19 law.

20 In reading Skyclimber or Mitchell or
21 whatever it's referenced as with some care it
22 seemed to me at page 632 that general
23 proposition may have been modified where the
24 court said and I paraphrase, that we

1 recognize that there's no duty to set forth a
2 warning of a possible risk created solely by
3 the act of another, but would not be
4 associated with a foreseeable use or misuse
5 of the manufacturer's own product.

6 It seems to me the converse of that
7 statement is that there may be a duty to warn
8 of a possible risk arising out of a
9 foreseeable use by a third party or
10 foreseeable alteration. And I note here the
11 alteration is simply adding an asbestos
12 product as I understand it as an insulator
13 rather than modifying the product, whether
14 it's pump or valve or steam trap, to be a
15 component part of something larger.

16 And as I understand it, any addition of
17 asbestos as an insulating system or feature
18 was to facilitate a known or intended use of
19 that product.

20 Accordingly, I'm denying the motion at
21 this time and I'll entertain further argument
22 on the issue prior to formulating final
23 instructions for the jury at the close of the
24 evidence, that is, in the final jury

1 instructions, I'll then determine whether or
2 not on the evidence, as I've heard it, it's
3 appropriate to instruct the jury as a matter
4 of law regarding the extent of a duty to
5 warn.

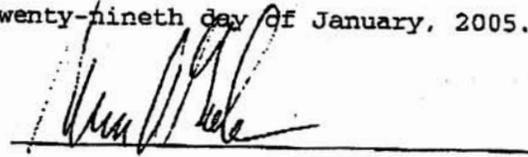
6 (End excerpt transcription)

C E R T I F I C A T E

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I, Warren A Greenlaw, a Notary Public in
and for the Commonwealth of Massachusetts, do
hereby certify that the foregoing Record, Pages 1
to 8, inclusive, is a true and accurate transcript
of my System Tapes, to the best of my knowledge,
skill and ability.

In Witness Whereof, I have hereunto set
my hand this Twenty-ninth day of January, 2005.



WARREN A. GREENLAW, Notary Public

My Commission expires March 25, 2005.

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Petitioner,

V.

BUFFALO PUMPS, INC., et. Al.,

Respondents.

No: 57011-1

DECLARATION OF SERVICE

I, Wil John Cabatic, declare and state as follows:

1. I am at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.
2. On the 23rd day of January, 2006, I caused to be served true and correct copies of:
 - (1) Appellant's Motion Pursuant to RAP 10.4(b) to File Overlength Brief;
 - (2) Brief of Appellant
 - (3) Brief of Appellant – Appendix A
 - (4) Declaration of Service, on the following:

Via ABC Legal Messenger:

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2006 JAN 23 PM 4:49

WIL JOHN CABATIC
VERNON BRAATEN V. BUFFALO PUMPS, INC., ET AL.
DECLARATION OF SERVICE
K

DECLARATION OF SERVICE - 1

\\SBSEVER\ClientData\Clients\Clients_B\BRAATEN, Vernon\BraatenV_APEALS\BraatenV_Appeals_Pleadings\BraatenV_Appeals_PLD_wjc_DecOfService.doc

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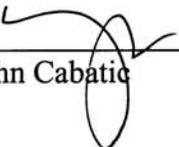
LOCAL COUNSEL FOR GENERAL ELECTRIC COMPANY:

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

DATED at Seattle, Washington this 23rd day of January, 2006.

BERGMAN & FROCKT



Wil John Cabatic