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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

*Appellant,*

v.

BUFFALO PUMPS, INC., et al.,

*Respondents.*

**CORRECTED REPLY BRIEF OF APPELLANTS**

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**ORAL ARGUMENT REQUESTED**

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## ARGUMENT

### **A. Plaintiff Vernon Braaten Was Exposed to Asbestos Emanating from the Products of Defendant Equipment Manufacturers**

Several defendants<sup>1</sup> argue that plaintiff cannot prove causation under Lockwood v. A.C.& S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987), because he has not produced evidence that he was exposed to asbestos-containing products manufactured by defendants. This argument ignores the facts presented in the record. Those facts show that Mr. Braaten was exposed to asbestos from defendants' products. Even though those products were not manufactured with asbestos, the evidence in the record reveals that those products required asbestos-containing insulation, gaskets, and packing to operate in high temperature applications. See CP 2149-55; CP 781-86; CP 794-99; CP 6216-17; CP 6229; CP 6159-60. In these applications, the product must therefore be considered the entire "unit" of the equipment and its necessary components. The record evidence establishes that Mr. Braaten's work on these units exposed him to asbestos dust. CP 4032-34; CP 2157-66; CP 2347-48; CP 582-671; CP 2036-40; CP 1323-24, 1335-36. Asbestos-containing insulation, packing, and gaskets do not function alone, but are meant to be applied to the

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<sup>1</sup>Respondents General Electric Company ("GE"), Buffalo Pumps, Inc. ("Buffalo Pumps") IMO Industries, Inc.. ("IMO" or "DeLaval"), Yarway Corporation ("Yarway"), and Crane Co. ("Crane") will be referred to collectively in this Reply as "defendants" and "equipment manufacturers."

equipment at issue in this case. Moreover, the record shows that it is the application, removal and replacement of these products on the equipment that created the release of asbestos dust to which Mr. Braaten was exposed. See, e.g., CP 593-594 (Mr. Braaten testifying that asbestos dust would “fly through the air” when he removed insulation from pumps in order to repair them, and that when he removed packing from a pump, particles would “fly[] all over”). Thus, it was Mr. Braaten’s work on GE, Buffalo Pumps, IMO, Yarway and Crane’s equipment that exposed him to asbestos.

**B. Under the Circumstances Presented in this Case, Imposition of a Duty on the Equipment Manufacturers Is Justified on the Grounds of Foreseeability and Public Policy**

Defendants argue that foreseeability has nothing to do with the duty analysis. In support of this argument, defendants have cited to a litany of cases—none of which deals with determining whether there is a duty under principles of common law. “In a negligence action, a defendant’s duty may be predicated on violation of statute or of common law principles of negligence.” Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 804, 43 P.3d 526 (2002). All of the cases cited by defendants to encourage the Court to ignore the foreseeability aspect of the duty analysis focus on the former—whether duty can be predicated on the violation of a statute.

In Burg, 110 Wn. App. at 804, for example, 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, defendants' duty here arises from common law principles of negligence.<sup>2</sup>

Similarly, in Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998), the court's inquiry was to "determine whether a duty of care exists based upon a statutory violation," not based on the common law. In engaging in this analysis, the court emphasized that the determination of whether a class of persons is within the class protected by the statute is not made based on foreseeability. But the question of whether a plaintiff falls within a protected class for the purposes of determining statutory negligence is different from the question of whether a defendant has a duty based in common law.

Zabka v. Bank of America Corp., 131 Wash. App. 167, 127 P.3d 722 (2006), is also inapposite because, like Schooley, it deals with whether a bank had a statutory duty to plaintiffs. Moreover, dispositive in

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<sup>2</sup> Further, as plaintiff pointed out in his Opening Brief, in Burg defendant discharged any duty it had by warning an intermediary—the City—of the defect in the land. See 110 Wn. App. 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.

Zabka was the court's public policy determination that "the bank was not in the best position to protect the Zabkas—the Zabkas were." Had they investigated the wrongdoer entities, they could have avoided their injury. 127 P.3d at 725. In the instant case, by contrast, the equipment manufacturers were better placed to investigate the harms caused by asbestos than Mr. Braaten, especially since many of these manufacturers actually sold and marketed asbestos products.

In Halleran v. Nu West, Inc., 123 Wash. App. 701, 98 P.3d 52 (2004), the court had to decide whether the Securities Division of the Washington State Department of Financial Institutions had a duty to protect individual investors from investment losses under any of the exceptions to the "public duty doctrine." Id. at 704. Of course, the "public duty doctrine" analysis does not apply here. The reasoning in Halleran is therefore also inapplicable in this case.

The law is clear: "The existence of a duty is a question of law which is determined by foreseeability and policy considerations." Shepard v. Mielke, 75 Wash. App. 201, 205, 877 P.2d 220, 222 (1994). Although much paper and ink has been spent in the course of this appeal on how Washington courts determine duty, it is clear that both factors must be analyzed. Public policy favors placing liability on the equipment defendants here because the evidence in the record establishes that during

the relevant time period, their equipment, when used in certain applications, required asbestos-containing components to function properly. Thus, it was entirely foreseeable to these defendants that a laborer like Mr. Braaten, who performed maintenance on their equipment, would be exposed to asbestos when conducting such regular and necessary repairs.

Defendants repeatedly contend that they had no duty to warn in the circumstances presented by this case because they only have a duty to warn about “their own equipment” and not about “the products of another.” They stress that none of the cases relied upon by plaintiff is apposite because in each case the duty to warn was placed on the manufacturer of the equipment. Thus, they point out, in Bich v. General Electric, 27 Wash. App. 25 (1980), the court found that General Electric had a duty to warn about its transformer, but not about the Westinghouse fuse. But what type of warning did the Bich court suggest would have been appropriate? The Bich court noted that “[i]t would have been a simple and inexpensive matter for GE to have included on its fuses a warning not to substitute fuses.” Id. at 33. Thus, in Bich, the court found that GE had a duty to warn about the use of another manufacturer’s product in conjunction with its own. In other words, the court found that GE would have had to warn that use of another manufacturer’s

transformer with its product could cause injury. This mirrors plaintiff's claim here—that the equipment manufacturers simply should have provided a warning in the vein of: “the use of asbestos-containing insulation, gaskets, and packing with this equipment may cause injury.” As in Bich, the equipment manufacturers here had a duty to warn about the hazardous nature of using specific products in conjunction with their own.

Moreover, as in Bich, “it would have been a simple and inexpensive matter” for the equipment manufacturers to have provided such a warning. Indeed, the United States government required the manufacturers to warn. Military Specifications Manuals in the record provided: “A WARNING statement shall be used to call particular attention to a step of a procedure which, if not strictly followed, could result in serious injury or death of personnel.” CP 2192. Moreover, the equipment manufacturers were in a unique position to warn. First, the evidence shows that a number of these manufacturers—such as General Electric (CP 2178), Yarway (CP 6110-6145), and Crane Co. (CP 1273-1290)—published catalogues of their equipment, where they advertised and sold asbestos-containing components to be used with their equipment. Warnings could easily have been provided in these catalogues. Moreover, many of these equipment manufacturers helped produce specifications

(Buffalo Pumps – CP 776) or provided manuals (DeLaval – CP 7141-78; Yarway - CP 6152) to be used by workers like Mr. Braaten. Again, it would have been simple and inexpensive for these manufacturers to have provided warnings in these materials.

The Restatement (Second) of Torts § 402A, comment c, emphasizes that “the burden of accidental injuries caused by products [should] be placed upon those who market them.” Several of these defendants—namely, GE, DeLaval, Yarway, and Crane Co.—marketed and sold asbestos-containing components to be used in conjunction with their equipment. Moreover, all the equipment at issue in this case was marketed for naval uses, including uses in hot or steam applications, where the equipment required asbestos-containing insulation, gaskets, and packing to operate properly and efficiently. Given that (1) these manufacturers marketed their products for use by the Navy; (2) it was entirely foreseeable to the manufacturers here that their products would be used with asbestos-containing component parts; (3) the manufacturers knew or should have known of the dangers of asbestos; (4) the Navy required these manufacturers to warn about procedures (like the application or removal of asbestos-containing components) that would result in serious injury; and (5) it would have been a simple matter for

these manufacturers to have provided warnings, public policy clearly favors an imposition of duty under these circumstances.

The equipment manufacturers also argue that they had no duty to warn because the danger here arose from the asbestos-containing components, not from their equipment. But the asbestos-containing components did not function separate and apart from the equipment. The asbestos-containing gaskets, packing and insulation were meant to be added to equipment, and the equipment would not function without it. As such, just as in Molino v. B.F. Goodrich Co., 617 A.2d 1235 (N.J. Super. 1992), cert denied 634 A.2d 528 (N.J. 1993), where the danger evolved from the “entire . . . assembly,” in the instant case, the danger evolves from the unit that encompasses the equipment and the asbestos-containing components that allow that equipment to function in high temperature applications. Or, as the court put it in Chicano v. General Elec. Co., No. Civ. A. 03-5126, 2004 WL 2250990, at \*3 (E.D. Pa. Oct. 5, 2004), “the products from which [plaintiff] inhaled asbestos fibers are properly understood to be the turbines covered with asbestos-containing insulation, as fully functional units.”<sup>3</sup>

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<sup>3</sup> GE and IMO complain that plaintiff’s reliance on Chicano is misplaced because the Chicano court misconstrued Pennsylvania law. First, contrary to GE’s contentions, the Chicano opinion is not at odds with Wenrick v. Schloemann-Siemag, A.G., 523 Pa.1, 564 A.2d 1244, 1247 (Pa. 1989). The Chicano court considered Wenrick in great detail, regarding it as the “paramount Pennsylvania

In a similar vein, several defendants also suggest that all the cases upon which plaintiff has relied impose a duty on the manufacturer of the defective product, and since their products were not dangerous—the asbestos was—they had no duty to warn. There are two points to be made about this specious argument. First, the defendants' equipment was defective and dangerous because it required asbestos-containing insulation, packing, and gaskets to operate properly in high temperature applications. In Bich, as Yarway puts it, “the use of the Westinghouse fuse made the GE transformer dangerous.” The same can be said of all of the equipment at issue here: while not dangerous alone, the use of asbestos-containing insulation, gaskets, and packing that the equipment required in high temperature and steam applications made the equipment dangerous. The equipment was also defective because although it was reasonably foreseeable to the equipment manufacturers that their equipment would be used with these asbestos-containing products, they did not warn of the dangers of asbestos. Second, the asbestos-containing products at issue

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case” on duty to warn, but found it distinguishable because in Chicano the equipment manufacturer knew asbestos insulation would be used with its product, while in Wenrick, the component manufacturer could not reasonably foresee the relevant danger. 2004 WL 2250990, at \*7. Similarly, the circumstances presented by Chicano and the instant case are distinguishable from those in Toth v. Economy Forms Corp., 391 Pa. Super. 383, 571 A.2d 420 (Pa. 1990) because, as in Wenrick, the court in Toth held that the circumstances causing injury—that faulty planks would be used—were not foreseeable to the scaffolding manufacturer. Id. at 388.

here—insulation, packing, and gaskets—are made dangerous by application to and removal from the equipment. In other words, as evidenced by the record here, asbestos dust is liberated from these products when they are applied to or removed from the defendants' equipment. The equipment manufacturers were aware that these asbestos-components would be used with their equipment and that regular and necessary maintenance to their equipment would require removal and replacement of the asbestos-components, which in turn would create dust to which a worker would be exposed. Again, under these circumstances, it is entirely just to impose a duty on these equipment manufacturers to warn.

Although the equipment manufacturers seek to characterize the imposition of duty in these circumstances as extreme—"subject[ing] defendants to indeterminate and overwhelming liability," General Electric Response at 46, it is defendants' position that is the extreme one. Defendants essentially contend that under no circumstances should the manufacturer of a product have a duty to warn with respect to a product manufactured by another. Even the district court that granted the summary judgment motions at issue here has recognized that this extreme position is without merit. In Jensen v. Saberhagen, No. 04-2-20249-3 SEA, Judge Armstrong denied a summary judgment motion on the basis

of duty to warn, finding that because Warren Pumps, an equipment manufacturer, specified that replacement products used with its pumps contain asbestos, it had a duty to warn about the dangers inherent in its product. Jensen v. Saberhagen, No. 04-2-20249-3 SEA, Motion Hearing, Feb. 17, 2006, at 22-23.<sup>4</sup> The trial court also found that although the specifications were directed by the Navy, they were issued by Warren Pumps. Further, “the defendant had an opportunity to warn as it created its operations manual, and didn’t warn.” Id. In other words, even the court that granted the equipment manufacturers’ motions here recognizes that equipment manufacturers may have a duty to warn about asbestos-containing products used in conjunction with their equipment.

As set forth herein and in his Opening Brief, plaintiff believes that the facts in this case also justify imposition of a duty on the equipment manufacturer defendants here, and that the trial court erred in refusing to do so, since all of them either provided equipment with asbestos-containing components or sold or marketed asbestos-containing components as replacement parts for their equipment. General Electric specified the use of asbestos-containing insulation on its turbines prior to the 1970s. See CP 2177; 2179. Moreover, customers of General Electric

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<sup>4</sup> The argument in Jensen took place on February 17, 2006, long after the trial court decided the motions for summary judgment here, and after plaintiff submitted his Opening Brief in this appeal. Plaintiff has attached a transcript of the argument to this Reply as Appendix A.

could order asbestos-containing products associated with GE turbines from General Electric, by catalogue, non-catalogue, or pursuant to drawings provided by General Electric. CP 2178. Buffalo Pumps provided reference materials for blueprints specifying the use of asbestos-containing insulation for use with its equipment. CP 776.<sup>5</sup> DeLaval used asbestos sheet gaskets, spiral wound gaskets, asbestos rope packing on its equipment, CP 7190-91, and provided kits of spares and tools for its pumps that included packing rings. CP 7069-73. DeLaval's Pump Engineering Division was also using asbestos-containing insulation with its equipment. CP 7218, 7235-37. Yarway manufactured a multitude of products that had asbestos-containing parts in them. CP 6204. And Crane actually marketed and sold asbestos-containing products, such as gaskets, packing, and insulation, in its catalogues, encouraging its customers to buy these products from Crane. CP 1276-89. For these manufacturers to claim that they were "in no position to evaluate any hazards associated with" these asbestos-containing products, see Yarway's Response at 28, is

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<sup>5</sup> Buffalo Pumps argues that with respect to these specifications, "Plaintiff cannot dispute that the Navy developed and furnished the specifications for the pumps supplied by Buffalo Pumps and these plans do not prove otherwise." Buffalo Pumps Response at 12. To the contrary, as in Jensen, although the specifications may have been directed by the Navy, they were provided by Buffalo Pumps. This is why the "References" refers to Buffalo Pumps with respect to instructions on the Main Feed and Booster Pumps. CP 776. These specifications required that "Main Feed and Booster . . . Pump shall be insulated" and that "Wires shall be fastened to steel hooks welded to pump where required." Id. The specifications further require that "the insulation shall then be covered with asbestos cloth type 'A'" and that "asbestos cloth lagging shall be painted with a coat of fire retardant paint." Id.

absurd. Not only were they in a position to evaluate the hazards associated with the asbestos-containing products they specified, required, marketed, and sold to be used with their own products, as set forth above, they were in a unique position to warn about the hazards of those products, given the catalogues and manuals they published.

Finally, defendants' contentions that extension of liability here would lead to a parade of horrors in which car manufacturers would be held responsible for injuries caused by gasoline and doll manufacturers for injuries caused by leaking batteries are without merit. Garman v. Magic Chef, Inc., 117 Cal. App.3d 634 (1981), cited by defendants in their responses, is instructive on this issue. In Garman, the plaintiffs' mobile home was ignited when the plaintiff wife lit a stove, and gas that had leaked from a faulty propane tank was ignited. The plaintiffs sued the stove manufacturer. The California Court of Appeals declined to impose a duty on the stove manufacturer because "it was not any unreasonably dangerous condition or feature" of the stove "which caused the injury." Id. at 638. In the instant case, of course, it is a feature of defendants' products—that they required asbestos-containing components to function properly in high temperature applications—that caused injury to Mr. Braaten. Moreover, the Garman court refused to find a duty to warn because the stove did not become "so dangerous or unsafe simply because

it is used with natural gas.” Id. In contrast, in the instant case, the equipment at issue here became dangerous or unsafe because it had to be used with asbestos-containing components in high temperature applications. To put it differently, a stove can be used safely with natural gas; the equipment in this case was inherently dangerous by virtue of the fact that it required the use of asbestos-components in high temperature applications.

More important, for the purposes of addressing defendants’ argument that imposition of a duty here would lead to unlimited liability for product manufacturers, the Garman court found that it would be unjust to impose liability in that case because the use of natural gas is known to be dangerous to a substantial number of people. Id. Likewise, the dangers of gasoline and batteries—which have been used daily by consumers for generations—are well known. In contrast, when Mr. Braaten was exposed to asbestos from his work at the Puget Sound Naval Shipyard, while the hazards of asbestos were well-known to industrial manufacturers, the dangers of asbestos were not well-known to workers such as Mr. Braaten. See CP 2557-59; CP 4038-39; CP 2719-2917; CP 6291-6307; CP 6291-6307. In these circumstances, it is just to place a duty to warn on the equipment manufacturers.

The Garman court's reasoning is also illuminating as to defendants' other bugaboo that if liability were imposed here, matchmakers would be responsible for injuries caused by cigarette smoking. The court pointed out in Garman that, "[o]nce the gas leaked and gathered in the motor home, the explosion was bound to occur as soon as someone lit a match for a cigarette, a cigar, a pipe or for any other reason. The fact that the stove was lit to prepare food simply was a fortuitous circumstance." Id. at 639. Similarly, while a cigarette requires lighting in order for it to be smoked, it is fortuitous whether a match or lighter or some other means will be used to light it. Here, the use of asbestos-containing components with defendants' equipment was not fortuitous. It was necessary, and was foreseen, anticipated and contemplated by equipment manufacturer defendants.

**C. The Use of Asbestos with the Defendants' Products Constituted a Foreseeable Alteration of those Products**

The Restatement (Second) of Torts, § 402A(1)(b) is clear that a product manufacturer will not have a duty to warn if the product underwent substantial change in its condition after leaving the manufacturer. See Bich, 27 Wash. App. at 29. Conversely, a product manufacturer continues to have a duty to warn if the alteration is not substantial—meaning that it was reasonably foreseeable. In Neimann v.

McDonnell Douglas Corp., 721 F. Supp. 1019 (N.D. Ill. 1989), relied upon by defendants, the court held that an airplane manufacturer could not be liable for plaintiff's asbestos exposure because by the time plaintiff was exposed to the asbestos strips in the plane, "the product supplied by McDonnell Douglas was not in the same form." Id. at 1029-30. Because the product "did not reach Mr. Niemann without substantial change," no liability could be imposed. Id. at 1030. Unlike the record in the instant case, the record in Neimann did not establish that the airplane manufacturer could foresee that the asbestos strips would be replaced with other asbestos-containing products.

Implicitly acknowledging that they can be held liable for foreseeable alterations to their products, several defendants have tried to escape this liability by arguing that their products were not "altered" by the application of asbestos-containing insulation or by the use and replacement of other asbestos-containing components with their equipment. "Alteration" means "an altering or being altered." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (2d ed. 1970). "Alter" in turn is defined as "to make different in details but not in substance" or to "modify." Id. "Modify" is defined as "to change or alter; especially, to change slightly or partially in character, form, etc." Id. A "modification" is a "partial or slight change in form." Id. The

foreseeable addition of asbestos to the manufacturers' equipment is therefore an "alteration" or "modification" because it changed the form of the equipment. If a discussion of semantics is wanted, see GE's Response at 29, semantics makes clear that the use of asbestos-containing components under the circumstances presented by this case constitutes "alteration" or "modification" of the defendant manufacturers' equipment.

Plaintiff provided in his Opening Brief an extensive overview of case law throughout the country that establishes that a manufacturer or seller of a product remains liable for alterations or modifications to its product that are reasonably foreseeable. Plaintiff would like to highlight one case in particular here to illustrate how the principle applies in the instant case. In Eck v. Powermatic Houdaille, 527 A.2d 1012 (Pa. 1987), the plaintiff suffered injuries to his left hand when his hand came in contact with the rotating blade of an electrically-powered arbor saw manufactured by Powermatic Houdaille. Id. at 1014. The saw had originally contained a safety guard, but the guard had been removed and another component part—a "shim"—had been added to the saw. The allegation was that the addition of the shim made the product defective. Id. The Pennsylvania Superior Court ruled that the trial court erred in refusing to instruct the jury that the defendant could be liable for the injuries caused by the later modification of the saw if the changes made to

the saw were reasonably foreseeable. Id. at 1021. The Superior Court determined that even in a strict products liability action, where there is a question of substantial change, “the concept of ‘foreseeability’ is a significant factor in determining whether a manufacturer or seller will be held responsible for injuries resulting after post-sale modifications of a product have been made.” Id. at 1018-19.

Just as in Eck, where there was evidence that the modifications to the saw were foreseeable, in the present case, the record in this case shows that the addition of asbestos-containing external insulation to the equipment in this case and the removal and replacement of asbestos-containing gaskets and packing in that equipment was completely foreseeable to the equipment manufacturers. Moreover, just as in Eck, it was the addition of these asbestos-containing components that caused the injury. Again, it was neither those components alone nor the equipment alone that caused the injury here. It was the addition, removal, and replacement of asbestos-containing components to the equipment in this case that liberated asbestos-dust and substantially contributed to Mr. Braaten’s exposure. Thus, it was the foreseeable alteration or modification of the equipment itself that contributed to the injuries here. As such, the equipment manufacturers should be held liable for these foreseeable uses of and modifications to their equipment.

**D. The Authorities Relied Upon By Defendants Are Distinguishable**

Plaintiff has already distinguished in his Opening Brief most of the cases cited by defendants in their responses. However, plaintiff will address the cases defendants cite for the extreme proposition that a manufacturer can never be held liable for injuries caused by the products of another. Of course, a review of these cases reveals that none is so broad in its holding.

In fact, Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357 (1985), actually supports plaintiff's position. In Powell, the plaintiffs spent a day using a lacquer thinner supplied by Standard Brands. Id. at 361. They eventually ran out of that lacquer thinner, and on the next day, commenced using a lacquer thinner manufactured by Grow Chemical Coatings Company. Id. While using the Grow lacquer thinner and buffing with an electric buffer, an explosion occurred, injuring both plaintiffs. Id. The plaintiffs sued Standard Brands arguing that if that product had had a warning on it, they never would have used the Grow Chemical product. The California Court of Appeals held that, because the plaintiffs had not pleaded that Standard Brands' product had the "same generic description and identical risks of use" as Grow Chemical's product, there could be no duty to warn. Id. at 365. Notably, and

importantly, the California court did not hold that a manufacturer's duty to warn is limited to its own products. In fact, the California court assumed that, under certain circumstances a manufacturer could be held liable for another's product, stating:

[I]t follows that if plaintiff's theory of liability . . . has any validity, it would be limited to situations where the risks of use of the product immediately causing injury are identical to the risks of use of the product previously used with inadequate warnings. *No other risks are reasonably foreseeable.*

Id. at 364 (emphasis added). In other words, the court held that if such risks were reasonably foreseeable, a manufacturer could be held liable for failure to warn even where another manufacturer's product caused the injury. Moreover, the Powell court emphasized that "a manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product." Id. at 362. Here, where removing and replacing asbestos-components was a risk of using the equipment at issue here, and such risks were reasonably foreseeable to the equipment manufacturers, under Powell the manufacturers would have a duty to warn.

The Washington cases cited by defendants also provide no basis for refusing to impose a duty in the circumstances here. In Peterick v. State, 22 Wn. App. 163, 589 P.2d 250 (1977), the issue was not whether one product manufacturer could be held liable for injuries caused by

another, but whether a parent corporation could be held liable for injuries caused by a product manufactured by its subsidiary. Since the court refused to pierce the corporate veil, and found there was no evidence that the parent had any controlling role in the manufacture of the subsidiary's dangerous product, it refused to impose liability on the parent. Id. at 192-93. Of course, there is no parent-subsiary relationship alleged here.

Sepulveda-Esquivel v. Central Machine Works, 120 Wn. App. 12, 84 P.2d 985 (2004), a case decided under the Washington Products Liability Act, dealt with whether a hook manufacturer could be held liable for injuries caused when a "mouse" used with the hook assembly failed, causing injury to the plaintiff. The court found that the hook manufacturer and the hook supplier would not have a duty to warn in these circumstances because neither knew how the hook was to be used, except for the load it would bear. Id. at 16. In this case, of course, the equipment defendants knew exactly how their products would be used, and knew that at least in high temperature applications, their products would be used with asbestos-containing insulation, gaskets, and packing. Thus, the holding in Sepulveda-Esquivel is inapposite here.

Defendants also rely on a New York case, Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289 (1992), to support their position that a product manufacturer can never be held responsible for injuries caused by

another entity's products. In Rastelli, the New York Court of Appeals held that a tire manufacturer did not have a duty to warn about a defect in the multi-rim piece used in conjunction with the tire. 79 N.Y.2d at 297. Of course, a New Jersey court, reviewing the same issue, came to the opposite conclusion in Molino v. B.F. Goodrich Co., 617 A.2d 1235 (N.J. Super. 1992). As IMO has pointed out in its response, the difference in Molino was that the danger in that case evolved from the "entire pressured assembly and not in the individual parts." Id. at 1239. Of course, IMO insists that the danger here comes only from the asbestos-containing components, just as the danger in Rastelli came only from the rim. But, as argued above, the asbestos-containing components did not function separate and apart from the equipment. The asbestos-containing gaskets, packing and insulation were meant to be added to equipment, and the equipment would not function without it. Moreover, it was the removal of those components from the equipment and their replacement on and in the equipment that caused the hazard in this case—release of asbestos dust into the air. As such, the equipment and the asbestos-containing insulation, gaskets, and packing must be considered a unit, and it was exposure to this unit that substantially contributed to causing Mr. Braaten's mesothelioma.<sup>6</sup>

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<sup>6</sup> To the extent that Crane and Buffalo Pumps have sought to rely on another New York

Moreover, despite defendants' attempts to malign it, the decision by the New York Appellate Division in Berkowitz v. A.C. and S., Inc., 733 N.Y.S.2d 410 (N.Y. App. 2001), finding an equipment manufacturer had a duty to warn in circumstances similar to the ones presented here, is good law and has precedential authority, as a decision of the New York appeals court. The New York court of appeals court took Rastelli into consideration in deciding Berkowitz and found it distinguishable. Id. at 410. Whether the trial court that originally decided Berkowitz later came to another conclusion in the context of a brake case is irrelevant. See Crane's Response, at 27 n.12. Its decision with respect to equipment manufacturers was affirmed by the New York court of appeals. Finally, the ruling in Holdampf v. A.C. & S., Inc., 5 N.Y.3d 486, 806 N.Y.S.2d 146, 840 N.E.2d 115 (2005), a premises liability case, does not render Berkowitz, a product liability case, bad law.

Defendants IMO and Yarway have also cited to several Texas cases in support of their argument that a manufacturer can never be held liable for injuries caused by a component manufactured by another. In Walton v. Harnischfeger, 796 S.W.2d 225, 226 (Tex. App.—San Antonion

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case, Holdampf v. AC&S, Inc., 5 N.Y.3d 486, 806 N.Y.S.2d 146, 840 N.E.2d 115 (2005), this reliance is completely misplaced. The New York court's ruling in Holdampf refusing to find an employer had a duty towards household members of its employee who was exposed to asbestos on the work site and foreseeable brought it home on his clothes, is in direct conflict with the holding in Lunsford v. Saberhagen Holdings, Inc., 125 Wash.App. 784, 788, 106 P.3d 808 (2005).

1990, writ denied), the plaintiff was injured when a nylon strap rigged to a load of tin and attached to a crane broke and caused the load of tin to drop on the plaintiff. Id. at 226. The plaintiff brought suit against his employer; the crane manufacturer, who also designed, distributed, and marketed the crane; the manufacturer and seller of the nylon strap used to rig the load of tin; and the party that provided the nylon strap. Id. The plaintiff's claims, based on negligence and strict liability, included failure to warn or to provide instructions regarding rigging the crane. Id. Defendant, the crane manufacturer, filed a motion for summary judgment arguing (1) that it had no duty to warn or instruct users of the crane in question with regard to rigging of the load in question, and (2) that the crane in question operated properly and in no way contributed to or caused the incident in question. Id.

In Walton, the following summary judgment evidence established by the defendant was uncontroverted: (1) defendant did not manufacture, distribute, sell or otherwise place the nylon straps or any other rigging material into the stream of commerce; (2) defendant was not in the business of manufacturing or selling any rigging material; and (3) rigging is a complex art that requires different loads to be rigged in a multitude of different ways. Id. at 227-28. The trial court found that the crane manufacturer had no duty to warn or instruct in regards to the nylon strap

because it was not a product made or supplied by the crane manufacturer. Id. at 226. More important, the court further noted that (like the manufacturer in Sepulveda-Esquivel), the crane manufacturer was not even aware of the use of the nylon strap in the rigging process, and that the nylon strap was not a component part of the crane. Id. at 227. Plaintiff appealed and the appellate court affirmed, however, the appellate court specifically limited its ruling to the facts of that case. Id. at 227-28.

Walton presents a significantly different factual situation from the case presently before the Court. Unlike the facts of Walton where there was no record that the crane manufacturer was aware of the use of the nylon strap in the rigging process, the equipment manufacturers here knew that their products would require the use of asbestos-containing component parts such as insulation, gaskets, and packing in high temperature applications.

Firestone Steel Prods. Co. v. Barajas, 927 S.W2d 608 (Tex. 1996), relied upon by IMO, is also inapposite. In fact, the Barajas case is similar to Powell, in that it deals with a case in which plaintiffs seek to hold a manufacturer liable for another product where there is no proof that the products are the same. In Barajas, Firestone had introduced a new design for a type of truck wheel. Another company, Kelsey-Hayes, subsequently marketed its own wheel, with a design based on, but modified from,

Firestone's original design. Firestone did not design or sell the wheel that fatally injured the decedent. Under such facts, Firestone was not liable because although it was the original designer, the product had been substantially altered.

Contrary to IMO's assertion, Barajas does not establish an absolute rule that a defendant can never be liable, regardless of the facts, for injuries sustained in connection with the use of a product manufactured and supplied by another entity. In Alm v. Aluminum Co. of America, 717 S.W.2d 588, 591 (Tex. 1986), the Texas Supreme court held that "a designer who is not also the manufacturer should share the same duty [as a manufacturer] to develop a safe design . . . . [and] to exercise ordinary case in the design of its . . . system. . . ." See also Easter v. Aventis Pasteur, Inc., No. 5:03-CV-141, 2004 WL 3104610, \*9 (E.D. Tex. Feb. 11, 2004) (applying Texas law to hold that the original designer of a vaccine preservative, thimerosal, could be liable to a plaintiff injured by that preservative even though it had not manufactured or sold the thimerosal in the vaccines given to plaintiff). In Easter, Judge Ward held that where there is no substantial change to a product, a defendant who did not design the product nevertheless had a duty to warn potential users of the harms associated with the product. Judge Ward ruled:

Alm is analogous to this case. Lilly developed the design for thimerosal, used thimerosal in vaccines, licensed thimerosal to other manufactures, and after its patent expired, knew that other manufacturers had copied its thimerosal design for use in vaccines. Lilly was in the best position to know about the potentially harmful effects of thimerosal, to warn others about them, and even, as plaintiffs allege, to conceal them as well . . . . Under the holding in Alm, Lilly, as a designer, has a duty to develop a safe design for thimerosal. Also, Lilly's design of and intimate knowledge about thimerosal also gives use to a duty to inform users of hazards associated with the sue of thimerosal . . . .

Id. at \*9. In other words, Texas courts—including the Texas Supreme Court—have been willing to hold an entity other than the product manufacturer liable for injuries caused by the product.

Finally, defendants try mightily to get this court to follow the Sixth Circuit's ruling in Lindstrom v. A-C Product Liability Trust, 424 F.3d 488 (6<sup>th</sup> Cir. 2005). But, as plaintiff set forth in his Opening Brief, the reasoning of Lindstrom 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. Id. at 492. 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, are not the same as 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, 100 Wash.2d at 247. 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, and perhaps more important, the issue of duty was never analyzed in Lindstrom. Thus, any language finding a lack of duty is mere dictum. To the extent that Lindstrom makes tangential reference to the fact that a defendant “cannot be held responsible for material ‘attached or connected’ to its product on a claim of a manufacturing defect,” its

reliance on Stark v. Armstrong World Industries, Inc., 21 Fed. Appx. 371 (6<sup>th</sup> Cir. 2001), an unpublished decision, is revealing. In Stark, the Sixth Circuit found that while under a manufacturing defect claim a manufacturer could not be held liable for injuries caused by a product manufactured by another entity, a design defect claim could exist if “defective attachments manufactured by others” were part of the product’s design. Id. at 381. Relying on Stark, then, the Lindstrom court found no liability because the plaintiffs had only alleged a manufacturing defect. By contrast, in the instant case, the plaintiff has alleged, among other things, “negligent and unsafe design.” CP 5. Thus, since the brief Lindstrom discussion of “responsibility” is predicated on a case based solely on manufacturing defect, it is not applicable here. Moreover, since the equipment in this case was designed in such a way as to require asbestos-containing components to function properly and efficiently in high temperature applications, under the reasoning in Stark, the manufacturers here would have a duty to warn.

In sum, none of the cases cited by defendants stands for the proposition that a product manufacturer can never have a duty with respect to products manufactured by another. In fact, most of these cases actually suggest that where the risks are foreseeable, because, for example, the

design of the product may require the use of another entity's product as a component, a duty may exist.

**E. Collateral Estoppel Does Not Bar Plaintiff's Claims Against General Electric**

General Electric has asserted in its response that an alternative ground for affirming the grant of summary judgment is that plaintiff's claims are barred by collateral estoppel. In the first instance, this case was consolidated with the appeal in Simonetta v. Viad Corp., No. 56614-8-I, based on the representation by all defendants, including General Electric, that "[t]he appeals arise out of the same determination by the same trial court of the same legal issue, i.e., whether a defendant owes a duty to warn of the dangers associated with asbestos-containing products that the defendant neither manufactured, distributed, nor otherwise placed into the stream of commerce." Joint Motion to Administratively Link Appeal to Simonetta v. Viad Corp., at 5-6. The collateral estoppel issue is a separate legal issue not raised by the Simonetta appeal. General Electric's argument on the issue not only betrays the representations made in the motion to administratively link, but defies the purposes of efficiency served by linking the cases. As such, this Court should not entertain it.

Even if the Court should consider this issue, it is clear that plaintiff's claims are not barred by collateral estoppel. In order for the

doctrine of collateral estoppel to apply, several requirements must all be met:

- (1) The issue decided in the earlier proceeding must be identical to the issue presented in the later proceeding;
- (2) The earlier proceeding must end in a judgment on the merits;
- (3) The party against whom collateral estoppel is asserted must be a party to, or in privity with a party to, the earlier proceeding; and
- (4) Application of collateral estoppel must not work an injustice on the party against whom it is applied.

Christensen v. Grant Cty. Hosp., Dist. No. 1., 152 Wn.2d 299, 307 (2004).

General Electric has not—and cannot—show that all four requirements for the application of collateral estoppel have been met. First, plaintiff is not relitigating the identical issue decided in the earlier proceeding. As noted above, the issue decided in the Texas action was whether or not Gould Pumps – *a pump manufacturer*—had a duty to warn of the hazards associated with the use of asbestos on the exterior of its pumps. The issue in this case—plaintiff’s claims against General Electric—*a turbine manufacturer*—are wholly different. Plaintiff’s claims against General Electric stem from General Electric’s liability for its failure to warn of the hazards associated with the use of asbestos insulation on and around its turbines. This issue—General Electric’s liability for its turbines—was not litigated in the Texas proceedings. No order was ever issued exonerating General Electric from liability for asbestos insulation used in conjunction

with its turbines. Moreover, as is clear from the extensive briefing on the issue of duty to warn, the analysis is inherently a fact intensive one that includes an inquiry into foreseeability and public policy concerns. This inquiry will be different depending on the unique circumstances of the defendant in the case. Thus, even if the facts surrounding the use of asbestos with Goulds Pumps may have led the Texas court to conclude that no duty to warn should be imposed, this does not mean that the very different facts having to do with the use of asbestos with GE's turbines would not lead to the opposite conclusion.

Second, no judgment on the merits was entered in the Texas litigation as to General Electric. The only defendant sued in the Texas litigation for whom judgment was entered was Goulds Pumps. This ruling was clearly interlocutory in nature; no final judgment resolving all issues against all parties on the merits was ever entered in the case. To the extent that General Electric's asserts that a judgment against Goulds Pumps is somehow a judgment on the merits against General Electric, such an argument is preposterous. The evidence used in establishing a duty to warn claim against Goulds Pumps was and is entirely distinct from the evidence used in establishing liability against General Electric for its turbines. And, again as already stated, that evidence and that issue was never litigated in the Texas action.

Finally, although the Plaintiff in the present action—Vernon Braaten—is the same as in the Texas litigation, the application of the doctrine of collateral estoppel would work a severe injustice to Mr. Braaten in this case. As noted above, whether or not a defendant has a duty to warn is a fact-specific inquiry. As between Goulds Pumps and General Electric, there are no evidence facts that are exactly the same. Gould Pumps, for instance, is a manufacturer of pumps. General Electric manufactured turbines. General Electric not only manufactured turbines but it also designed its turbines in such a way that made the use of asbestos-containing insulation materials a necessity. Before the trial court, there was no such identical “evidence presented as to Gould pumps.” Indeed, the way Gould Pumps may have manufactured and marketed their equipment and the facts surrounding their knowledge of asbestos hazards are not exactly the same as the facts in this record with respect to GE. If General Electric’s theory that plaintiff is barred by the doctrine of collateral estoppel were the case, then the doctrine of collateral estoppel would preclude plaintiff from ever litigating this issue against General Electric. It is clearly too great an injustice to plaintiff here to stick him with a judgment for parties against whom the issues relevant to this case and this appeal were not litigated. See Thompson v. Dep’t of Licensing, 138 Wash.2d 783, 982 P.2d 601 (1999). Thus, the trial court’s decision

denying General Electric's motion for summary judgment on the ground of collateral estoppel was correct and should not be overruled.

**CONCLUSION**

As set forth in plaintiff's Opening Brief and in this Reply, 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. The trial court committed reversible error in determining otherwise. Plaintiff Vernon Braaten 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 17<sup>th</sup> day of April, 2006.

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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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|------------------------------|---|---------------|
| VERNON BRAATEN               | § |               |
|                              | § |               |
| Petitioner,                  | § |               |
|                              | § |               |
| v.                           | § | No: 56614-8-I |
|                              | § |               |
|                              | § |               |
| BUFFALO PUMPS, INC., ET AL., | § |               |
|                              | § |               |
| Respondents.                 | § |               |

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**DECLARATION OF SERVICE**

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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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VERNON BRAATEN,

*Appellant,*

v.

BUFFALO PUMPS, INC., et al.,

*Respondents.*

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**APPENDIX**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

PAULINE JENSEN, individually and as)  
 Personal Representative of the )  
 Estate of ALVIN JENSEN, )  
 )  
 Plaintiff, ) No. 04-2-20249-3 SEA  
 )  
 vs. )  
 )  
 SABERHAGEN HOLDINGS, INC. et al., )  
 )  
 Defendants. )

RANA FRENCH, as Personal )  
 Representative of the estate of )  
 RALPH DALE, )  
 )  
 Plaintiff, ) No. 05-2-09268-8 SEA  
 )  
 vs. )  
 )  
 SABERHAGEN HOLDINGS, INC. et al., )  
 )  
 Defendants. )

MOTION HEARING

February 17, 2006

DATE TRANSCRIBED: March 8, 2006  
 TRANSCRIBED BY: Marjorie Jackson  
 Court-Certified Transcriptionist  
 Notary Public



Page 2

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Page 3

1 February 17, 2006  
 2 -o0o-  
 3  
 4 THE COURT: Okay. Could you give your  
 5 appearances for the record, please.  
 6 MR. BERGMAN: Matthew Bergman for the  
 7 plaintiff, Your Honor.  
 8 MR. MATTINGLY: Michael Mattingly for Warren  
 9 Pumps, Your Honor.  
 10 THE COURT: Okay.  
 11 MR. BERGMAN: Your Honor, it's Warren Pumps  
 12 motion. I -- accordingly, the first to hear from  
 13 (inaudible).  
 14 THE COURT: Yes.  
 15 MR. MATTINGLY: I just want to first say that I  
 16 saw your motion for summary judgment calendar today. I  
 17 have great sympathy for everything you have gone  
 18 through, I'm sure. And we're in the home stretch,  
 19 hopefully, and I'm going to accordingly try to keep my  
 20 comments as brief as I possibly can today.  
 21 THE COURT: You know, you already scheduled --  
 22 not you individually -- but I think it was 141 motions  
 23 for summary judgment in a -- was it a four-week or  
 24 five-week period?  
 25 THE CLERK: It was four.

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1 THE COURT: Four weeks, maybe five weeks.  
 2 MR. MATTINGLY: I think people took heart from  
 3 your e-mail, though, Judge.  
 4 THE COURT: Well, I was really glad, yes.  
 5 MR. MATTINGLY: We're in the home stretch here,  
 6 and like I say, I'm going to try to keep my comments  
 7 fairly brief because I don't think that the issues  
 8 legally are issues that are unfamiliar to the court. In  
 9 fact, we heard them just addressed just a moment ago  
 10 very eloquently by Mr. Zeringer and really any of the  
 11 issues -- those legal issues are going to be pretty much  
 12 the same here, and they have been addressed many times  
 13 in the past by the court concerning whether or not a  
 14 manufacturer can be responsible for products that were  
 15 made or sold by other entities over which it had no  
 16 control.  
 17 There are really two key issues, as I see it,  
 18 and I'm just cutting through here, cutting through to  
 19 the bone as closely as I can, two issues that appear to  
 20 be the key issues in this case that need to be addressed  
 21 in this motion.  
 22 One is the motion to strike Mr. Jensen's  
 23 deposition, his perpetuation and discovery deposition  
 24 testimony.  
 25 And the other is whether Mr. Jensen was

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1 actually exposed to any original asbestos-containing  
 2 components that might have been included with any of the  
 3 pumps, Warren pumps sold pursuant to military  
 4 specifications in the Navy. And I think, as you will  
 5 see, that those two issues really do tie in together  
 6 here, Your Honor.  
 7 Looking to the motion to strike, the key facts  
 8 are this:  
 9 As the Court is aware, this case -- Mr. Jensen  
 10 originally had filed this case in Los Angeles in early  
 11 2004. A six-day discovery occurred, a discovery  
 12 deposition and perpetuation deposition as well. Warren  
 13 Pumps was not a party to the case at that time and they  
 14 were not represented in that case. They did not attend  
 15 that deposition. They did not have an opportunity to  
 16 ask any questions.  
 17 There was one pump defendant at that deposition  
 18 out of about 15 to 20 or so other parties. That one  
 19 pump defendant was Ingersoll Rand. And from what I  
 20 could gather in deposition, they were the one company  
 21 naturally that focused on pumps.  
 22 THE COURT: You know, Mr. Mattingly, you're  
 23 going to run out of time, and I'm just trying to alert  
 24 you to that.  
 25 MR. MATTINGLY: I will cut it even a little

Page 6

1 closer then.  
 2 THE COURT: Yeah.  
 3 MR. MATTINGLY: The long and short of it is  
 4 that they were the only party there that could even  
 5 conceivably be related to our predecessor's interest,  
 6 but there's no evidence that they had a concern for the  
 7 type of pumps that are at issue in this case. And as we  
 8 will see in just a moment here, the type of pumps is of  
 9 critical importance to Warren Pumps and their inquiry.  
 10 And I think it's highlighted from the plaintiff's  
 11 response as well.  
 12 On the question of exposure, there are really  
 13 two pumps that the plaintiff has identified as possible  
 14 areas of exposure. One is fire pumps. With respect to  
 15 the fire pumps, Mr. Jensen was never asked about whether  
 16 he ever replaced packing on those fire pumps, so we  
 17 don't know whether that ever occurred. But even if he  
 18 did, we don't -- there is absolutely no evidence, and,  
 19 in fact, the strong suggestion is to the contrary that  
 20 that packing would have been original to the pump.  
 21 Moreover, there is no evidence in the record  
 22 that Warren Pumps specified asbestos packing. In fact,  
 23 the plaintiff does not even make that argument in the  
 24 response brief. Plaintiff did say that he replaced some  
 25 gaskets on the fire pump, but again, there is no

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1 evidence in the record that those were asbestos gaskets,  
 2 and the plaintiff doesn't contend that they were  
 3 asbestos gaskets. There was some external insulation on  
 4 the pumps. That external insulation was not supplied by  
 5 Warren Pumps. It was not specified by Warren Pumps. It  
 6 wasn't their insulation for the reasons that  
 7 Mr. Zeringer spoke of just a few moments ago and this  
 8 court has ruled on many times. I won't address that  
 9 issue unless the Court has further inquiry. We just  
 10 simply will rest on everything that has been briefed and  
 11 previously argued to the court.  
 12 With respect to the other kind of pump, bilge  
 13 pumps, there is one bilge pump at issue here.  
 14 Mr. Jensen testified that he never disturbed gaskets on  
 15 that one bilge pump. He did replace packing, but,  
 16 again, there is no evidence that it was original  
 17 packing. There is no evidence -- I don't think the  
 18 plaintiff even contends that that packing contained  
 19 asbestos, and I am not aware of any evidence in the  
 20 record that it did. And there is no evidence that  
 21 Warren Pumps specified asbestos packing. In fact, if I  
 22 recall correctly, on the drawings there is simply no  
 23 indication that the packing was to be an  
 24 asbestos-containing packing.  
 25 That brings us to the final and probably the

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1 key issue, which really I think highlights just the  
 2 deficiency of the deposition testimony as it pertains to  
 3 Warren Pumps, and that is this idea of internal  
 4 insulation covered in metal lagging that was installed  
 5 by Warren Pumps at its facility. The internal  
 6 insulation and metal lagging component was first --  
 7 remember those were Navy-specified components to these  
 8 pumps. The mill specs were cited in the record.  
 9 Document -- we pointed to a document supplied by the  
 10 plaintiff which expressly says that the Navy drawing  
 11 relating to the lagging expressly pertains to this pump,  
 12 and that it is a Navy drawing, it is required to be used  
 13 on that pump by the Navy pursuant -- it says that the  
 14 pump has to be built in strict conformance with those  
 15 specifications under the inspection of the Navy  
 16 inspector.  
 17 But more importantly, the plaintiff, Mr. Jensen  
 18 did not give any testimony that would even suggest that  
 19 he was ever exposed to that portion of the pump. What  
 20 he did say is that he removed external insulation that  
 21 is not specified or provided by Warren Pumps. It's a  
 22 third party's product.  
 23 The internal insulation, just so the Court is  
 24 aware of what that exactly entails is, it is encased  
 25 completely by metal. I was trying to think of a good

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1 analogy on the way up here, and the best I could come up  
 2 with is perhaps a can of beans or a can of Coke. It is  
 3 completely encased and until someone penetrates that  
 4 metal lagging, there is no possibilities that one could  
 5 ever be exposed.  
 6 What's more, that type -- the type of work that  
 7 would involve penetrating metal lagging and internal  
 8 insulation is not the kind of work that would occur in a  
 9 boiler room. It's the kind of work that one would  
 10 almost certainly only experience -- or observe in a  
 11 machine shop, if someone had to go in and do machining  
 12 on the interior of the pump in that particular location.  
 13 There is no evidence that that occurred here, but the  
 14 fact is that Mr. Jensen was never asked about internal  
 15 insulation.  
 16 So on the one hand, the plaintiff is claiming  
 17 in response to our motion to strike that his deposition  
 18 is complete, even though -- but then they're using this  
 19 lack of any testimony or any questioning relating to  
 20 internal insulation to try to drive that issue right  
 21 into the case.  
 22 That's not fair to us, Your Honor. At the end  
 23 of the day, there is just no evidence and there is no  
 24 suggestion in the record that Mr. Jensen was ever  
 25 exposed to internal insulation, and there is just

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1 nothing there.  
 2 Thank you.  
 3 THE COURT: Thank you.  
 4 Mr. Bergman.  
 5 MR. BERGMAN: Your Honor, let me briefly  
 6 address the Jensen deposition admissibility. In so  
 7 doing, though, regardless of how this court rules, there  
 8 is still evidence from Mr. Cooper, Dr. Brodtkin and  
 9 Mr. Heflin, who was Dana's expert, regarding  
 10 Mr. Jensen's exposure to pumps.  
 11 But basically, the rule of evidence that Warren  
 12 is putting forward is: If the evidence helps me, it's  
 13 admissible, if it hurts me, it's inadmissible.  
 14 On repeated occasions, they have brought this  
 15 evidence before this court. As a matter of fact, in two  
 16 separate summary judgment motions, the very deposition  
 17 testimony that they're now seeking to exclude, they  
 18 brought into evidence. Therefore, under the doctrine of  
 19 waiver, clearly which is very familiar to this court,  
 20 based on any evidentiary ruling, that applies.  
 21 Additionally, in their 49-day designation, they  
 22 indicated that they wanted to use these depositions on  
 23 their behalf.  
 24 In the reply to this case, they included these  
 25 depositions so, number, one, they have waived the issue.

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1 Number two, under 804(b)(1), the inquiry that  
 2 this court engages in is: Were their interests  
 3 adequately represented?  
 4 Now, what's very distinguishable between this  
 5 case and the Dale case is that there was no specific  
 6 product identification provided by Mr. Jensen. He  
 7 talked for 120 pages in his deposition -- and I read it  
 8 today -- regarding his work in the boiler room. The  
 9 testimony is what it is. We wish it were better, we  
 10 wish he could be here live to testify, but it is what it  
 11 is. And the question is: Were their interests  
 12 represented?  
 13 They were represented by O.I., they were  
 14 represented by Ingersoll Rand. It is very clear that  
 15 virtually any question that reasonably would have been  
 16 asked in a deposition had Warren Pumps been there, they  
 17 would have asked anyway.  
 18 And I think, Your Honor, the best evidence that  
 19 Warren Pumps' interests were represented is that they  
 20 affirmatively used this deposition in support of their  
 21 first two motions for summary judgment. They clearly  
 22 felt that their interests were adequately represented to  
 23 rely upon the questioning of other counsel to try to  
 24 achieve the objective.  
 25 Therefore, Your Honor -- and I think the Young

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1 case, Young vs. Key Pharmaceuticals is very clear that  
 2 the correlation of interest between Warren Pumps,  
 3 Ingersoll Rand, and Owens-Illinois in this case is far  
 4 more coherent than the correlation of interests that  
 5 existed with respect to the two different CERCLA  
 6 defendants in the Young case.  
 7 Consequently, Your Honor, what's good for the  
 8 goose is good for the gander. The rules are what they  
 9 are, and you can't have it both ways.  
 10 Let me move to the issue of insulation and  
 11 duty. I will spare you my exegesis that I gave you  
 12 earlier. Clearly, it didn't do any good anyway, so let  
 13 me focus on what Your Honor laid out in the Braaten case  
 14 is the exception. And the exception is when the  
 15 manufacturer retains control, when the manufacturer not  
 16 only specifies, and Your Honor used the term  
 17 "explicitly," or literally specifies and retains  
 18 control.  
 19 And that's what we have in this case. The  
 20 evidence is very clear, and Mr. Jensen testified that he  
 21 repaired pumps on the USS Hornet. Fire pumps, bilge  
 22 pumps and feed pumps. And Warren manufactured all of  
 23 those. We finally found out that, yes, indeed, there  
 24 were Warren Pumps on those ships. And when we asked the  
 25 discovery question just right, we got the answer we

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1 wanted, and that Mr. Jensen testified that he replaced  
 2 the insulation on those pumps.  
 3 And most importantly, Mr. Jensen testified that  
 4 he read and relied on the manuals.  
 5 What I would like to do, Your Honor, is show  
 6 you the some blowups of the actual documents that we  
 7 have establishing the specifications which we believe  
 8 satisfy even this court's exacting standard under the  
 9 Braaten test. So if I could, I would like to start with  
 10 the diagram for the bilge pump, and it's a little bigger  
 11 than the documents we were able to submit to this court  
 12 earlier but Roland Doktor testified on behalf of Warren  
 13 Pumps, testified that these documents, these plans were  
 14 intended to be relied upon by the customer. He  
 15 specifically said so, to show how the work was done and  
 16 how it was performed.  
 17 And explicitly they list: Insulating ring  
 18 asbestos, insulating material, 85 percent magnesia,  
 19 which Mr. Doktor testified was asbestos. And then  
 20 insulating material of 85 percent mag over the top end  
 21 of the bilge pump, which Mr. Jensen testified he worked  
 22 on.  
 23 Now, this issue about interior or exterior, I  
 24 think is kind of a red herring because what we're  
 25 talking about is a very -- we're not talking about

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|---|---|
| <p style="text-align: right;">Page 14</p> <p>1 insulation deep within the structure. We're talking<br/>                 2 about insulation, we're talking about a small tin<br/>                 3 covering around the cylinder right here. So it<br/>                 4 specifically specified and Warren has admitted, as a<br/>                 5 corporation, that those specifications were specifically<br/>                 6 intended to guide and instruct other customers on how to<br/>                 7 use that. And yeah, let's get the other -- I want to<br/>                 8 show you -- yeah.<br/>                 9 Now, the other key thing that I think Your<br/>                 10 Honor was concerned about, with respect to the Braaten<br/>                 11 case was: Does the manufacturer retain control? Does<br/>                 12 the manufacturer continue to have instruction?<br/>                 13 And first of all, we have the testimony from<br/>                 14 Mr. Jensen that he relied upon the manuals, and so what<br/>                 15 do these manuals say.<br/>                 16 Well, these are the turbine-powered pumps, and<br/>                 17 this is Warren's document, it is a Warren manual, and<br/>                 18 they say -- and this is how to do the work -- and they<br/>                 19 say: The narrow lagging strips and a small section of<br/>                 20 the lagging on either side of the upper half of the<br/>                 21 exhaust clips must be removed. So in the course of<br/>                 22 regular anticipated maintenance, they're telling people<br/>                 23 to remove lagging, which we all know is asbestos.<br/>                 24 Again, they're retaining control.<br/>                 25 They have -- and later in the manual, they have</p> | <p style="text-align: right;">Page 16</p> <p>1 circulars, continuing to send documents to and<br/>                 2 specifications to the customer explaining how the work<br/>                 3 is performed, and so they're retaining control. And<br/>                 4 once again, they say gaskets and they say sheet<br/>                 5 asbestos, as late as 1969. So this is not, you know,<br/>                 6 this is not manufacture and forget it. This is<br/>                 7 manufacture and retain control and direction.<br/>                 8 So I think that we have clearly under the<br/>                 9 standard satisfied the standard of Braaten and<br/>                 10 Simonetta. We've clearly established a situation where<br/>                 11 they have retained control.<br/>                 12 And so then the final argument that I very,<br/>                 13 very, just briefly want to address is this Navy<br/>                 14 contractor defense. It is a defense, but they're saying<br/>                 15 that as a matter of law it's a defense, and I think<br/>                 16 that's clearly disposed of by Hogeland, which said that<br/>                 17 the duty to warn cannot be delegated to another. This<br/>                 18 was something that the Court was very familiar with,<br/>                 19 either when you practicing or when you were early on the<br/>                 20 bench on the Puget Sound Naval Shipyard cases regarding<br/>                 21 blaming the Navy. And this court in Hogeland said that<br/>                 22 the duty to warn cannot be delegated to another, whether<br/>                 23 or not they were following Navy manufacturing<br/>                 24 specifications regarding asbestos.<br/>                 25 They've presented no evidence whatsoever to</p> |
| <p style="text-align: right;">Page 15</p> <p>1 a section called Safety Precautions. And they say that<br/>                 2 people should be thoroughly familiar with all parts of<br/>                 3 the turbine, and that these instructions should be<br/>                 4 carefully followed. Carefully followed. Nothing about<br/>                 5 a warning.<br/>                 6 And then they say when ordering parts for<br/>                 7 spares or replacements, the information below is<br/>                 8 required. They have retained control. They're not<br/>                 9 saying, here it is, go off and handle it yourself. They<br/>                 10 are maintaining control.<br/>                 11 What do they have in their specific -- set<br/>                 12 forth in their spare parts? They have a turbine parts<br/>                 13 list, and they say: High temperature insulation cement,<br/>                 14 insulation cement and asbestos cloth.<br/>                 15 They have retained control. They have<br/>                 16 instructed people like Mr. Jensen that in order to<br/>                 17 perform the maintenance, you have got to take the<br/>                 18 lagging off, and when you're replacing it, you've got to<br/>                 19 use our -- you've got to use these specified parts,<br/>                 20 which include asbestos. Yet nowhere in there is a duty<br/>                 21 to warn.<br/>                 22 Finally, there is a document, and the 1969<br/>                 23 document we're offering to the court not to suggest that<br/>                 24 Mr. Jensen was exposed in 1969, but simply to point out<br/>                 25 that as late as 1969, Warren is continuing to send</p>  | <p style="text-align: right;">Page 17</p> <p>1 suggest that they were forbidden to warn. Therefore,<br/>                 2 that duty still attaches. Your Honor, I believe we have<br/>                 3 gotten there, but I'm --<br/>                 4 THE COURT: Well, in looking at WPI 110.05,<br/>                 5 which is government contract specification defense, and<br/>                 6 it does say:<br/>                 7 "If you find that the injuring causing aspect<br/>                 8 of the product was at the time of manufacture in<br/>                 9 compliance with a specific mandatory government contract<br/>                 10 specification relating to design, your verdict shall be<br/>                 11 for the defendant on claims based upon design."<br/>                 12 And then it says:<br/>                 13 "If it was in compliance with a specific<br/>                 14 mandatory government contract spec relating to warning."<br/>                 15 There was no government requirement relating to<br/>                 16 warnings, but as to design, is this defense available at<br/>                 17 least as to design.<br/>                 18 MR. BERGMAN: Is this defense available? They<br/>                 19 can argue it. I mean, there was nothing in the Navy --<br/>                 20 the Navy specified insulation. The procedure was -- the<br/>                 21 Navy did not specify asbestos insulation. And the<br/>                 22 testimony at trial will be that there were other forms<br/>                 23 of insulation available besides asbestos that they could<br/>                 24 have used. The testimony at trial will also be that<br/>                 25 there was a plethora of opportunities to warn and that</p>  |

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1 the Navy even incorporated, and I don't have the  
 2 specific manu -- there is the manufacturing code and I  
 3 don't remember the name of it, but there was a specific  
 4 manufacturing code that the Navy specifications  
 5 incorporated, which in them had a duty to warn or a  
 6 requirement to warn of foreseeable hazards.  
 7 THE COURT: Okay.  
 8 MR. MATTINGLY: Your Honor, I just want to  
 9 point out a couple of things because -- since the  
 10 specifications have been raised. It's kind of hard to  
 11 see here, but if you look at the insulating ring and  
 12 insulating material, they are mil -- what is it? --  
 13 material specifications Mil-P-1233, and Mil-I-2819, I  
 14 believe, or Mil-I-2819, respectively. Those are the  
 15 military specifications. That's what Warren Pumps was  
 16 instructed was to be used on particular lagging.  
 17 That's the only issue in this case, Your Honor.  
 18 That's the only product at issue. And, again, looking  
 19 to his testimony -- I will just address very briefly, we  
 20 did rely on the testimony briefly when this was a Quimby  
 21 Pump case. For Quimby Pump purposes, the deposition was  
 22 satisfactory. For Warren Pump purposes, it is not. It  
 23 illustrates why Ingersoll --  
 24 THE COURT: But what about the 49-day  
 25 disclosure?

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1 MR. MATTINGLY: Again, that was --  
 2 THE COURT: Because Quimby would have been, I  
 3 think I issued my ruling in summary judgment, didn't I?  
 4 Before --  
 5 MR. MATTINGLY: You did.  
 6 THE COURT: -- on the 49-day disclosure.  
 7 MR. MATTINGLY: That was in August. And what  
 8 they're referring to, the 49-day disclosure, was way  
 9 back I believe in January of last year.  
 10 MR. BERGMAN: Your Honor, just for fairness,  
 11 their motion was talked about --  
 12 THE COURT: Because this was ACR 28.  
 13 MR. BERGMAN: Right. And their motion also  
 14 said exposure to Quimby and Warren. The focus was  
 15 Quimby but the motion (inaudible).  
 16 MR. MATTINGLY: Your Honor, that was simply  
 17 just to assure that for Warren's purposes all bases were  
 18 covered, but the fact is there was nothing there to  
 19 begin with about Warren in any of the plaintiff's  
 20 discovery. For Warren's purposes if it was a Quimby  
 21 case, we were satisfied with the deposition, but once it  
 22 became a Warren case, if we had known it was going to be  
 23 a Warren case, if plaintiff had disclosed that Warren  
 24 Pumps were at issue, we would have taken a much closer  
 25 look at the need to look at opening his deposition

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1 again.  
 2 These issues are critical, Your Honor. The  
 3 fact that the plaintiff is now trying to put Mr. Jensen  
 4 in a position of having penetrated the metal lagging  
 5 that encased the insulation, and the record's silence on  
 6 that issue speaks volumes to this. It's just not fair  
 7 that we didn't get a chance to ask that question at a  
 8 time when we would have known that we would want to ask  
 9 that question. And now they're trying to drive a truck  
 10 right through that door.  
 11 THE COURT: Well, it's really hard to know what  
 12 to do with a motion to strike the deposition testimony  
 13 because it didn't identify your product. So everything  
 14 that he talks about that doesn't really identify your  
 15 product shouldn't be stricken even as against you,  
 16 because others would have had the same motivation to  
 17 respond to his testimony or examine him on those issues.  
 18 I mean, I don't know what it is I'm striking.  
 19 MR. MATTINGLY: Your Honor, maybe I can make a  
 20 suggestion. Perhaps maybe the way to balance the  
 21 interests here, the way to address this would be to  
 22 simply suggest -- say that as opposed to just striking  
 23 the entire deposition, rather plaintiff cannot go try to  
 24 establish exposure beyond the scope, beyond what's  
 25 actually contained within the deposition.

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1 Mr. Jensen testified in his deposition with  
 2 respect to the bilge pump that he had talked about all  
 3 of the work that he did on the bilge pump, on all the  
 4 pumps on board the USS Hornet. None of it involved  
 5 internal insulations. Yet it's the very silence on the  
 6 record of that issue that the plaintiff is now trying to  
 7 suggest maybe, in fact, was other work that occurred.  
 8 Perhaps maybe the way to address this is to say  
 9 plaintiff is limited to what's in the record and can't  
 10 go beyond that -- what's in the deposition transcript.  
 11 THE COURT: Well, he dies, so they're limited  
 12 to the deposition transcript, but they have extrinsic  
 13 evidence.  
 14 MR. MATTINGLY: Of?  
 15 THE COURT: They have -- of the pumps on the  
 16 vessel.  
 17 MR. MATTINGLY: I agree with that, but I'm  
 18 talking about --  
 19 THE COURT: The types of pumps, manuals.  
 20 MR. MATTINGLY: I wasn't clear. I'm referring  
 21 to Mr. Jensen's activities. In other words, limit the  
 22 deposition for Warren Pumps to the activities that he  
 23 actually identified with respect to its pumps and not  
 24 allow the silence of the record of his deposition to be  
 25 used as an opportunity to start having Mr. Jensen do

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1 things that he never talked about on the types of pumps  
 2 at issue.  
 3 MR. BERGMAN: I intend to -- the evidence is  
 4 what it is, you know, we wish it were better. I would  
 5 respectfully submit -- well, with respect to this court  
 6 that this is the kind of thing that a trial court can  
 7 probably do better when the evidence is coming in. And  
 8 if there is any curative instruction or anything that,  
 9 you know, maybe they should get a chance to talk about,  
 10 we didn't get a chance to ask them. There is a plethora  
 11 of things that can be done at trial court level to  
 12 address this issue in a more surgical manner, and then I  
 13 think we certainly would be willing to work with  
 14 Mr. Mattingly.  
 15 THE COURT: Well, for purposes of this motion,  
 16 I'm not going to strike the deposition, but also the  
 17 deposition doesn't really make the plaintiff's case.  
 18 It's the other evidence that I am relying on. I am  
 19 denying the motion, and I am denying it because the  
 20 specifications, even though they were directed by the  
 21 Navy, were ones that were issued by the defendant. The  
 22 defendant had an opportunity to warn as it created its  
 23 operations manual, and it didn't warn. And yet it was  
 24 completely directed as to how the product should be  
 25 contained and what kind of replacement products should

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1 be in it, and the specified replacement products were  
 2 asbestos-containing products. So that's why I'm denying  
 3 the motion.  
 4 Is it the same issue -- no, it's not the same  
 5 issue in Dale.  
 6 MR. BERGMAN: Very similar issue in Dale.  
 7 THE COURT: Is it?  
 8 MR. BERGMAN: Yes.  
 9 THE COURT: Do we have the same --  
 10 MR. BERGMAN: Deposition issue.  
 11 THE COURT: It's a different deposition issue.  
 12 With Dale, the motion is denied, and I will tell you  
 13 why. I struck that portion of the Dale deposition  
 14 relating to G.E. and I think there was another  
 15 defendant, because G.E. had actively made an effort to  
 16 continue the deposition. And, you know, your client did  
 17 not do that. They relied on the deposition being taken  
 18 up again but didn't actively try to get it taken up.  
 19 And that's the real difference.  
 20 MR. MATTINGLY: Your Honor, I would just simply  
 21 make note for the record that at the end of the -- on  
 22 the last day of the discovery deposition that actually  
 23 occurred, Warren Pumps did specifically call into  
 24 question whether or not it would agree to the  
 25 admissibility because they had not had an opportunity to

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1 cross-examine Mr. Dale on the perpetuation deposition.  
 2 THE COURT: That's not enough.  
 3 MR. MATTINGLY: Okay.  
 4 THE COURT: Okay.  
 5 MR. MATTINGLY: I mean, G.E. really made an  
 6 active effort, and it never happened.  
 7 MR. MATTINGLY: Okay.  
 8 THE COURT: So they did everything in their  
 9 power to try to get a complete deposition and they  
 10 couldn't, and that's just the difference.  
 11 MR. MATTINGLY: Okay.  
 12 THE COURT: Okay. But, so let's talk about the  
 13 substantive issues in Dale and then we'll do Ingersoll.  
 14 MR. MATTINGLY: Your Honor, at the outset of  
 15 this motion in Dale, there were other motions to strike  
 16 as well that we can discuss if the Court is interested.  
 17 I do want to make one point and, that is, I would like  
 18 to withdraw the motion to strike, Exhibit K. That was  
 19 inadvertent. Those were Warren Pumps Interrogatory  
 20 Responses.  
 21 THE COURT: I assumed that was a typo.  
 22 MR. MATTINGLY: Consider that portion of the  
 23 motion withdrawn.  
 24 THE COURT: I think I can defer on the rest of  
 25 it. I think we have had this argument before just last

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1 week, I think.  
 2 Go ahead.  
 3 MR. MATTINGLY: Thank you, Your Honor. The  
 4 issue that remains in Dale is whether or not there is  
 5 any actual evidence of exposure to an  
 6 asbestos-containing product that was made or sold by  
 7 Warren Pumps (inaudible) if it was used in conjunction  
 8 -- that was in one of its pumps --  
 9 (End of recording)  
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|--|--|
| <p>1           C E R T I F I C A T E<br/>2<br/>3       STATE OF WASHINGTON    )<br/>4                                    )<br/>5       COUNTY OF SNOHOMISH   )<br/>6           I, the undersigned, under my commission as<br/>7       a Notary Public in and for the State of Washington, do<br/>8       hereby certify that the foregoing recorded statements,<br/>9       hearings and/or interviews were transcribed under my<br/>10      direction as a transcriptionist; and that the transcript<br/>11      is true and accurate to the best of my knowledge and<br/>12      ability; that I am not a relative or employee of any<br/>13      attorney or counsel employed by the parties hereto, nor<br/>14      financially interested in its outcome.<br/>15<br/>16           IN WITNESS WHEREOF, I have hereunto set my<br/>17      hand and seal this        day of<br/>18      2006.<br/>19<br/>20<br/>21<br/>22      NOTARY PUBLIC in and for<br/>23      the State of Washington,<br/>24      residing at Lynnwood.<br/>25      My commission expires 4-27-10.</p> |  |
|  |  |