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No. _____

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals 57011-1-I)

VERNON BRAATEN,

Plaintiff/Appellant,

v.

BUFFALO PUMPS, INC., et al.,

Defendants/Respondents.

**PETITION FOR REVIEW
BY YARWAY CORPORATION**

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I. PETITIONER

Petitioner Yarway Corporation (“Yarway”) seeks review of the Court of Appeals decision terminating review designated in Section II of this petition.

II. COURT OF APPEALS DECISION

Yarway seeks review of the Court of Appeals decision in *Braaten v. Saberhagen Holdings et al.*, Nos. 57011-1-I, 56614-8-I. The Court of Appeals filed its decision on January 29, 2007 (hereafter “Slip Op., at __”). Yarway’s motion for reconsideration was denied on March 30, 2007.¹

III. ISSUE PRESENTED FOR REVIEW

The Court of Appeals decided “an issue of first impression in Washington.” Slip Op., at 7. It is an issue of substantial public interest that should be resolved by the Supreme Court. *See* RAP 13.4(b).

Yarway manufactured and sold valves and other component products that were installed on Navy vessels. The Navy specified that those components be used in conjunction with asbestos: internal gaskets and packing had to be made of asbestos, and the components were also coated in asbestos mud. In order to maintain the components, workers like Braaten necessarily came into contact with the asbestos. The Court of Appeals held that Yarway had a duty to warn Braaten of the hazards of working with asbestos.

Thus, the following issue is presented for review:

¹ A copy of the decision and order are attached as Appendix A and B.

Does the manufacturer of an inherently non-hazardous component product owe a duty to warn regarding hazardous products used by others in conjunction with the manufacturer's component product? If so, what is the scope of that obligation?²

IV. STATEMENT OF THE CASE

The basic underlying facts are undisputed.

A. Yarway's Products.

Yarway manufactured and sold valves and other components to the United States Navy for installation and use aboard Navy vessels. Slip Op., at 2-3. During the relevant period, most Naval vessels were propelled by superheated, high-pressure steam, and Yarway's valves were components of the vessels' steam propulsion systems. After installing these valves on the vessels, the Navy insulated them (and other components of the propulsion systems) with asbestos-containing insulation products. Yarway did not manufacture or sell that insulation to the Navy. "The use of asbestos in and on Navy valves, pumps, and turbines was not by chance, but by design . . . 'based on military necessity.'" *Id.* at 3; CP 5244-5266. Asbestos insulation products were used by the Navy "because it was lighter and withstood higher temperatures than other products." Slip Op., at 2-3.

Although Yarway's valves could function safely uninsulated, or if insulated with products that did not contain asbestos, it was "highly likely

² The Washington Products Liability Act ("WPLA") does not apply. *See* Slip Op., at 6 ("Braaten was exposed to asbestos before its adoption, so WPLA does not apply").

that a valve . . . sold to the Navy would contain or be used in conjunction with asbestos.” Slip Op., at 3. Similarly, Yarway’s valves could function properly with gaskets and packing that did not contain asbestos. *Id.*

Regular maintenance of the valves (and other components installed on Naval vessels) required the removal of the exterior asbestos mud insulation that had been applied by the Navy to these components. *Id.* at 2. “Regular maintenance of the valves . . . also required replacement of interior asbestos gaskets and packing.” *Id.* The Navy – not Yarway – specified the type of replacement packing material to be used in connection with Yarway’s valves: “It had to be specific packing called out by the Navy spec number.” CP 5612-13. Similarly, the replacement gaskets were fabricated by the Navy from asbestos products procured by the Navy. CP 5603-4; CP 5616-7.

B. Braaten’s Job Responsibilities.

Braaten was a pipe fitter. He worked at the Puget Sound Naval Shipyard from November 1967, to June 2002. *Id.* at 2. His job duties included the maintenance and servicing of the many components constituting the ships’ steam propulsion systems, including valves supplied by Yarway. *Id.* According to the Court of Appeals, “Braaten could not service the valves, pumps, and turbines without disturbing the asbestos.” *Id.* “During the maintenance process, asbestos dust was released into the air, and Braaten breathed it in.” *Id.* at 3. He did not wear any protection from the dust until 1980. *Id.*³

³ There is no evidence that Braaten was exposed to any asbestos-

C. **Braaten's Lawsuits and the Trial Court's Ruling In Favor of Yarway.**

In 2003, Braaten was diagnosed with mesothelioma. *Id.* Braaten initially sued thirty manufacturers, including Yarway, in two different Texas courts. One manufacturer filed a no-evidence motion maintaining that there was no evidence it owed a legal duty to Braaten. The Texas court agreed, and so, just weeks before trial, Braaten dismissed those lawsuits. *See Slip Op.*, at 3-4.

On January 24, 2005, Braaten commenced this action against many of the same defendants he sued in Texas claiming, among other things, that Yarway is liable for failing to warn him regarding the hazards of asbestos. CP 1-6. Yarway moved for summary judgment. On September 23, 2005, the trial court granted Yarway's motion, ruling that Yarway had no duty to warn about the hazards of asbestos in third-party products used by the Navy in conjunction with Yarway's products:

- (1) Defendant Yarway Corporation's Motion for Summary Judgment shall be GRANTED.
- (2) There is no evidence that plaintiff was exposed to any asbestos-containing product that was manufactured, sold or distributed by Yarway Corporation.
- (3) Yarway Corporation has no duty to warn of potential dangers associated with the use of asbestos-containing products manufactured, sold, distributed, supplied or

containing gaskets or packing supplied by Yarway. For this reason, Yarway is not liable as a seller or distributor of asbestos-containing products. *See Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 148, 542 P.2d 774 (1975) (extending strict liability to "those in the chain of distribution" of unreasonably unsafe products). The Court of Appeals did not impose liability on this basis.

installed by another, including, without limitation, insulation, gaskets and packing that may have been applied by the end user in, on or around valves or sight glasses alleged manufactured sold and/or distributed by Yarway Corporation.

CP 7284-86.⁴ Braaten appealed.

D. The Court of Appeals Opinion.

The Court of Appeals reversed. The Court characterized Braaten's claim this way:

Braaten argues that the valves and pumps were defective because there were no warnings about how to safely avoid asbestos exposure during their maintenance.

Slip Op., at 7. After noting "[t]his is an issue of first impression in Washington," the Court of Appeals explained why none of the cases cited by the parties (including many from outside Washington) were on point. *Id.* Relying primarily on a Fifth Circuit case, *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979), the Court of Appeals concluded that Yarway had an independent duty to warn foreseeable users of its products regarding the hazards of asbestos:

But the Stapleton case does demonstrate that there is an independent duty to warn when a manufacturer's product design utilizes a hazardous substance that can be released during normal use Here, the pumps and valves as designed contained asbestos during normal use. Also, the hazardous substance was released into the air as part of the regular operation and maintenance of pumps and valves, rather than by accident as in Stapleton. This distinction strengthens the argument for a duty to warn in the present case.

⁴ The trial court granted summary judgment in favor of the other defendants on similar grounds. Yarway also moved for summary judgment on collateral estoppel grounds, but the trial court denied summary judgment on this basis.

Id. at 11.⁵ The Court of Appeals also claimed its decision to impose a duty to warn on companies like Yarway was supported by “public policy” because “[i]n modern asbestos litigation, the manufacturers of the hazardous substances are, for the most part, no longer amenable to judgment.” *Id.* at 10-11.

The Court of Appeals held further that summary judgment was improper on Braaten’s negligence claim. *Id.* at 13-15. The Court held there was sufficient evidence to defeat summary judgment on the issue of whether manufacturers like Yarway knew or should have known of the dangers of the asbestos used in conjunction with their products.⁶ Again, the Court of Appeals invoked public policy to support its newly imposed duty: “it is logical and sensible to place some duty to warn on the manufacturer who is in the best position to foresee the specific danger involved in the use of a product.” *Id.* at 14. Of course, the manufacturers and distributors of the asbestos - and the Navy itself – were in the best position to foresee and warn regarding the dangers of asbestos but, according to the Court of Appeals, “the manufacturers of the pumps, turbines, and valves *also* had a duty to warn about maintenance procedures

⁵ The Court of Appeals also found this Court’s decision in *Teagle v. Fisher & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977) to be “of some aid to our duty analysis.” Slip Op., at 8. As we discuss below, neither *Teagle* nor *Stapleton* support imposing a duty to warn on companies like Yarway under the circumstances presented by this case.

⁶ The Court of Appeals did not elaborate or cite any specific record evidence supporting its view that there is a triable issue of fact on this point.

for their products that would release those dangerous [asbestos] fibers into the air.” *Id.* (emphasis added).

On March 30, 2007 the Court of Appeals denied Yarway’s motion for reconsideration. This timely petition follows.⁷

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Current Washington law does not support the Court of Appeals’ extension of the duty to warn in this case. Even if this Court ultimately were to disagree, the Court of Appeals opinion raises an important issue with substantial implications for the law of Washington and beyond. Review by the Supreme Court is warranted.

A. Yarway’s Valves Are Components; Component Manufacturers Generally Have No Duty to Warn Regarding the Potential Hazards of Their Products as Part of an Integrated Whole.

In imposing a duty to warn on Yarway, the Court of Appeals failed to account for existing Washington law regarding the limited duty to warn traditionally imposed on manufacturers of component parts.

Under Washington law, “component sellers are not liable when the component itself is not defective.” *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wash.App. 12, 19, 84 P.3d 895 (2004). If the

⁷ On the same day it decided *Braaten*, the Court of Appeals also decided *Simonetta v. Viad Corp.*, Nos. 56614-8-I, 57011-1-I. In *Simonetta*, the Court of Appeals held that the manufacturer of an evaporator sold to the Navy and insulated by the Navy with asbestos-containing insulation owed both a strict liability- and negligence-based duty to warn a Navy machinist who maintained and serviced the evaporator regarding the hazards of asbestos. The Court’s reasoning in *Simonetta* is similar to its reasoning in *Braaten*. Viad Corporation filed a petition for review in *Simonetta* on April 23, 2007. If review is accept in *Simonetta*, it should be accepted in this case, too.

law were otherwise, a component seller would be required “to review the decisions of the business entity that is already charged with responsibility for the integrated product.” *Id.* Here, that entity was the Navy.

Washington law in this regard is consistent with the general rule: “As a general rule, component sellers should not be liable [for failure to warn] when the component itself is not defective as defined in this Chapter.” Restatement (Third) Torts § 5, cmt. a.⁸ Under the Restatement, a component is “defective in itself” when the component itself causes the harm. *Id.*, cmt. b. A valve is an archetype component product: “Product components include raw materials, bulk products, and other constituent products sold for integration into other products. Some components, such as raw materials, *valves*, or switches, have no functional capabilities unless integrated into other products.” Restatement (Third) Torts § 5, cmt. a (emphasis added).

The Yarway valves at issue in this case were integrated by others into Navy ships. Moreover, the valves were not “defective in [themselves]” in the sense that the valves themselves caused Braaten’s mesothelioma. That harm was caused by the asbestos products procured and applied by the Navy to and inside Yarway’s valves. The integrated product here is the Navy vessel – or the engine room, or the boiler room,

⁸ This Court has cited § 2 of the Restatement (Third) of Torts as “persuasive authority” but apparently has not yet considered § 5. *See Ruiz-Guzman v. Amvac Chemical Corp.*, 141 Wn.2d 493, 504, 7 P.3d 795 (2000). In the Restatement (Second) of Torts, the American Law Institute “expresse[d] no opinion on the matter.” *See* Restatement (Second) Torts § 402A, cmt. q.

of that vessel. Yarway, as a supplier of component valves, had no duty “to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.” *Sepulveda-Esquivel*, 120 Wash.App. at 19 (quoting the Restatement).

That Yarway may have foreseen that the Navy would use asbestos insulation in or around its products does not change the analysis. *See, e.g., In re Silicone Gel Breast Implants Products Liability Litigation*, 996 F.Supp. 1110, 1117 (N.D.Ala. 1997) (holding that manufacturer of silicone gel had no duty to warn recipients of silicone breast implants of dangers of silicone gel even though it knew the manufacturer of the implants intended to incorporate its gel: “[t]he issue is not whether GE was aware of the use to be put by implant manufacturers of its materials – clearly it knew this – . . . such awareness by itself is irrelevant to the imposition of liability”); *Kealoha v. E.I. Du Pont de Nemours & Co.*, 844 F.Supp. 590, 595 (D.Haw. 1994) (“The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer’s line of business and second-guess the finished product manufacturer . . .). Yarway’s purported awareness of the Navy’s application of asbestos in and around Yarway’s products did not obligate Yarway to become expert in the hazards of asbestos, including the way in which the Navy applied it,

removed it, and the conditions under which Navy employees were handling it.⁹

The duty to warn imposed by the Court of Appeals in this case is inconsistent with the limited duty to warn traditionally imposed on manufacturers of components such as valves. In order to warn users how to maintain their products safely after asbestos-containing products have been applied to and in them by others, manufacturers such as Yarway necessarily would have had to investigate the hazards of asbestos-containing products, including how those products could be safely handled by Navy pipe fitters such as Braaten under the conditions prevailing on Navy ships. The Court should consider the utility, cost and practicality of imposing such a duty. The Navy surely had an obligation to warn workers such as Braaten how to handle the asbestos products it procured.¹⁰ As the Court of Appeals notes, the asbestos manufacturers and distributors also had a duty to warn regarding the hazards of asbestos. *See Slip Op.*, at 11. Imposing an additional duty to warn on component manufacturers like Yarway would increase the cost of inherently safe components in exchange for little – if any – benefit.

⁹ For example, the manufacturer of a knife handle knows that a sharp blade will be attached to its component and that the finished assembly could cause injury if not handled properly. Nevertheless, the manufacturer of the handle cannot reasonably be required to warn regarding proper handling of the knife.

¹⁰ In fact, on January 7, 1958 – almost *ten years before* Braaten began working as a pipe fitter – the Navy issued a “Safety Handbook for Pipefitters.” The Handbook warns pipe fitters: “Asbestos. Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard.” CP 281 [Betts Decl., ¶19].

The Court of Appeals gave short shrift to these principles of component manufacturer liability. The Court did not expressly consider *Sepulveda-Esquivel* at all. It distinguished another case cited by Yarway, *Chicano v. General Electric Co.*, 2004 WL 2250990 (Oct. 5, 2004 E.D. Pa.), on the ground that it “applies Pennsylvania’s component manufacturer liability test, which is not applicable in Washington.” Slip Op., at 8 fn. 25. But the principles discussed in *Chicano* are consistent with *Sepulveda-Esquivel*: manufacturers of components that are not defective in themselves, such as Yarway’s valves, have no duty to warn regarding the hazards of other products that are used in combination with the component as part of the assembled whole.

B. The Court of Appeals Improperly Extended This Court’s Duty-To-Warn Jurisprudence.

None of this Court’s product liability opinions have extended the duty to warn (whether based in negligence or strict liability) as far as the Court of Appeals has done here.

1. The Duty-To-Warn Principles Established by This Court for Purposes of Product Manufacturers Cannot Be Applied to Component Manufacturers such as Yarway.

In *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337 (9th Cir. 1986), the Ninth Circuit held that Washington law did not permit a so-called “manufacturer’s knowledge” defense in a strict liability-based duty-to-warn case. Plaintiff’s decedent was an asbestos worker who died of mesothelioma. His widow sued numerous asbestos manufacturers,

claiming they were strictly liable for failing to warn about the dangers of asbestos. The court held that, under Washington law, a manufacturer's ignorance of the danger of its own product was no defense in a case claiming strict liability-based failure to warn. *Id.* at 1338.¹¹

A few years before *Kisor*'s rejection of the "manufacturer's knowledge" defense, the New Jersey Supreme Court rendered its influential decision rejecting the related "state of the art" defense. *See Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). In that case, the asbestos manufacturers contended that "no one knew or could have known that asbestos was dangerous when it was marketed." *Id.* at 197. Accepting that contention for purposes of analysis, the court rejected the state of the art defense on policy grounds:

Defendants have treated the level of technological knowledge at a given time as an independent variable not affected by defendants' conduct. But this view ignores the important role of industry in product safety research. The "state of the art" at a given time is partly determined by how much industry invests in safety research. By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research.

Id. at 207.

¹¹ In *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987), the Court confirmed that Washington law did not permit a "manufacturer's knowledge" defense. The Court held that evidence regarding an asbestos manufacturer's early knowledge of the hazards of asbestos was inadmissible in respect of plaintiff's strict liability duty to warn claim because, as the Ninth Circuit held in *Kisor*, "lack of knowledge of the danger of [a manufacturer's] products was not a defense to a strict liability claim." *Id.* at 255.

This Court rejected the state-of-the-art defense in *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996):

Under strict liability, the reason why the warning was not issued is irrelevant, and the manufacturer is liable even if it neither knew or could have known of the defect about which the warning was required.

Id. at 169 (quoting *Brown v. Superior Court*, 245 Cal.Rptr. 412, 417 n.4, 751 P.2d 470, 476 (1988) (emphasis added)).

According to the Supreme Court of California, “[e]xclusion of state-of-the-art evidence, when the basis of liability is a failure to warn, would make a manufacturer the *virtual insurer* of its product’s safe use, a result that is not consonant with established principles underlying strict liability.” *Anderson*, 53 Cal.3d at 991 (emphasis added). In other words, in rejecting the manufacturer’s knowledge (*Kisor, Lockwood*) and state-of-the-art (*Young*) defenses, Washington law treats product manufacturers as virtual insurers of their consumers’ safety.¹² Although reasonable minds (and courts) may differ, there may be good reasons to treat product manufacturers as virtual insurers of their *own* products. *See, e.g., Beshada*, 90 N.J. at 207. But there is *no* good reason to treat a manufacturer of non-hazardous product – such as Yarway’s valves – as insurer of *another’s* hazardous asbestos. Yet, in extending the duty to warn to Yarway, the Court of Appeals has done just that.

¹² Over 30 years ago, the Court said that “[t]he doctrine of strict liability does not impose legal responsibility simply because a product causes harm. Such a result would embody absolute liability, which is not the import of strict liability.” *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 150, 542 P.2d 774 (1975). However, Washington law plainly has evolved since *Tabert* was decided.

The Court of Appeals suggested, incorrectly, that its holding was supported by public policy. *See* Slip Op., at 10-11. Under the circumstances of this case, public policy counsels *against* imposing on Yarway any obligation to warn regarding the hazards of asbestos.

Public policy does not support requiring companies to conduct safety research regarding the hazards of another company's products – even if those products may be used in conjunction with the defendant's product. *See, e.g.*, Restatement (Third) Torts §5, cmt. a. Yarway's products were capable of operating with non-asbestos insulation or, in some cases, no insulation at all. *See* Slip Op., at 3. That they were used in conjunction with asbestos was the Navy's decision. Yarway was not required to conduct research regarding asbestos specified and applied by the Navy to its valves, any more than it was required to study other products or substances purchasers of its valves might foreseeably use with them, *i.e.*, other insulation products, solvents, lubricants, etc. Further safety research by Yarway regarding its *own* products would not have led to any warning from Yarway regarding the hazards of asbestos unless Yarway also conducted additional research regarding safe handling of the asbestos itself.

Strict liability furthers public policy by forcing product manufacturers to internalize the external costs their products impose on society. *See generally*, Dan B. Dobbs, et al., *Prosser and Keeton Torts* § 98, p. 692-94 (5th ed. 1984); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 462, 150 P.2d 436 (1944) (Traynor, J.) ("It is in

the public interest to discourage the marketing of products having defects that are a menace to the public”). Here, forcing the producers of valves and other inherently safe components to internalize the societal costs of asbestos does not further that objective. Instead, it punishes manufacturers who sold those products to the Navy, giving a competitive advantage to valve manufacturers who did not, either because they were not chosen or were not yet in existence. Yarway should not be forced to “internalize” the societal costs of asbestos made by others and specified by the Navy for use in conjunction with its products.

This Court also has invoked the maximization of consumer protection as a justification for imposition of strict liability. *See Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 265, 692 P.2d 787 (1984). The Court of Appeals apparently relied on this rationale in extending liability. *See Slip Op.*, at 10-11 (noting that “the manufacturers of the hazardous substance are, for the most part, no longer amenable to judgment”). But that does not mean that any other company whose products may be associated with asbestos should be held liable in stead of the asbestos manufacturers and distributors. “[W]e do not premise liability on manufacturers solely because of their ability to pay tort judgments.” *George v. Parke-Davis*, 107 Wn.2d 584, 590, 733 P.2d 507 (1987). This Court has declined to extend strict liability when the consumer protection rationale would have been furthered and other, countervailing considerations dictate a contrary outcome. *E.g., Rogers v. Miles Laboratories*, 116 Wn.2d 195, 802 P.2d 1346 (1991) (holding that a

manufacturer could not be held strictly liable for failing to warn regarding allegedly contaminated blood products); *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996) (asthma medication). The consumer protection rationale proves too much, and must be subject to limiting principles. Otherwise, it always justifies imposition of liability on any manufacturer with some connection to a hazardous product, however tenuous, if there is a risk that an injured plaintiff will go uncompensated.¹³

2. *Teagle v. Fisher & Porter* Is Readily Distinguishable.

The Court of Appeals improperly found *Teagle v. Fisher & Porter Co.*, 89 Wn.2d 149, 570 P.2d 438 (1977) to be “of some aid to [its] duty analysis.” Slip Op., at 8-9. In *Teagle*, the defendant manufactured a flowrater used to measure liquids in the production of liquid chemical fertilizer. *Id.* at 150. “Although appellant knew that Viton O-rings were not compatible with ammonia, it did not warn its customers of the dangers of using Viton O-rings when using a flowrater to measure liquid ammonia. The only thing appellant did was to recommend to its distributors that Buna O-rings should be used when measuring ammonia.” *Id.* at 154. Plaintiff was injured when he attempted to use a flowrater fitted with Viton O-rings while measuring ammonia. *Id.* at 152. The Court affirmed the trial court’s liability ruling in favor of the plaintiff: “appellant knew

¹³ The principles discussed in this section apply to both Braaten’s strict liability and negligence claims. For purposes of Braaten’s negligence claim, the Court of Appeals improperly assumed Yarway owed a “general duty to warn” regarding the hazards of asbestos and focused solely on the foreseeability limitation. But, for the reasons given, Yarway owed Braaten no duty at all regarding products that the Navy chose to use in conjunction with its own.

that Viton O-rings were incompatible with ammonia, yet it did nothing more than recommend the use of Buna O-rings. It did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, by itself, would render the flowrater unsafe.” *Id.* at 156.

Teagle does not support imposing a duty to warn regarding the hazards of asbestos products manufactured and sold by others on Yarway. *See Slip Op.*, at 8. The defect in *Teagle* was in the flowrater itself, which the manufacturer knew would fail if used with ammonia and Viton O-rings. The Court held only that the manufacturer had a duty to warn of this *known* risk of failure of its *own* product. The Court did not hold the manufacturer had a duty to warn of the hazards of ammonia or of Viton O-rings manufactured by another company.

C. **The Court Of Appeals’ Extension of the Duty To Warn Begets Legal and Public Policy Problems that Should Be Considered By This Court.**

The Court of Appeals’ decision opens the door to a new wave of asbestos litigation against companies that manufactured or sold products that were later covered in asbestos by others. Manufacturers and distributors of the pipes could be sued; indeed, manufacturers of the rivets, screws, bolts and other components used to assemble the components incorporated into a ship’s boiler room could be sued. As the Court of Appeals noted, many manufacturers and distributors of the harmful product itself are no longer amenable to judgment. *Slip Op.*, at 11.

Moreover, the theory of liability adopted by the Court of Appeals is not limited to the context of asbestos litigation:

[T]here is an independent duty to warn when a manufacturer's product design utilizes a hazardous substance that can be released during normal use

[T]he hazardous substance was released into the air as part of the regular operation and maintenance of pumps and valves, rather than by accident . . . strengthen[ing] the argument for a duty to warn in the present case.

Slip Op., at 11. This rationale exposes:

- wallboard manufacturers to liability for failure to warn regarding the potential hazards of lead paint;
- bottle and can manufacturers to liability for failing to warn about the health risks associated with consuming too much of the Coke or Pepsi inside;
- manufacturers of household appliances to liability for failure to warn regarding the potential hazards of cleaning products, such as oven cleaner, laundry detergent, Draino®, etc.
- manufacturers of medical products like syringes to liability for failing to warn regarding the drugs or medicines that are administered using those products; and
- seed producers to liability for failing to warn of hazards associated with the many fertilizers and pesticides that will be used to grow the seeds into plants and maintain those plants.

Manufacturers of stemware are not liable for failing to warn purchasers of the potentially harmful effects of the wine they know people will use with their products. For the same reason, Yarway is not liable for failing to warn regarding the hazards of the insulation material used in and

on its products by the Navy. As the Court of Appeals noted, Yarway's valves could have functioned without asbestos insulation. *See Slip Op.*, at 3.

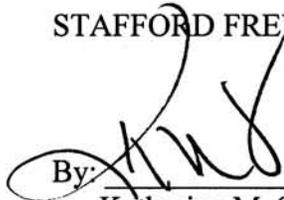
The Court of Appeals relied heavily on *Stapleton v. Kawasaki Heavy Indus., Ltd.*, 608 F.2d 571 (5th Cir. 1979). *See Slip Op.*, at 9-11.¹⁴ *Stapleton* has no bearing on this case at all. There, the plaintiff's son accidentally tipped over a motorcycle while cleaning it. Because the fuel switch was left in the "on" position, gasoline leaked from the motorcycle and was ignited by the pilot on a nearby heating unit, causing personal injuries. In ordinary type on page 13 of the owner's manual, Kawasaki warned users regarding the possibility that gas could leak from the motorcycle if the fuel switch was in the "on" position and the motorcycle was tilted. *Id.* at 573. The issue in the case was "whether putting the warning on p. 13 in ordinary type was an *adequate effort* and whether the warning so located was sufficient to warn [the] user of the danger" of titling the motorcycle with the fuel switch in the "on" position. *Id.* at 572-73 (emphasis added). The essential point of *Stapleton* is that the gas was not supposed to leak out of the motorcycle, and liability was imposed for Kawasaki's failure to warn adequately regarding how to keep the gas inside. In the present case, Yarway does not stand in the shoes of Kawasaki. Rather, Yarway's position is more analogous to that of the gasoline dealer whose product was used in conjunction with the defective product sold by Kawasaki.

¹⁴ *Stapleton* was not cited in any of the briefs filed in the Court of Appeals.

Petitioners have been unable to locate any case from any other jurisdiction holding component manufacturers liable for failing to warn of the hazards of asbestos applied in and on its products by others. There are cases refusing to impose such liability. See *Lindstrom v. AC Products Liability Trust*, 264 F.Supp.2d 583 (N.D. Ohio 2003), *aff'd* 424 F.3d 488 (6th Cir. 2005) (granting summary judgment in favor of manufacturers of valves, pumps, and other components supplied to the Navy where the plaintiff claimed he was exposed to asbestos while servicing the equipment).

DATED this 30th day of April, 2007.

STAFFORD FREY COOPER

By: 

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Attorneys for Petitioner
YARWAY CORPORATION

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

VERNON BRAATEN,)	
)	DIVISION ONE
Appellant,)	
)	No. 57011-1-I
vs.)	(Linked with
)	No. 56614-8-I)
SABERHAGEN HOLDINGS, a)	
Washington Corporation, BARTELLS)	
ASBESTOS SETTLEMENT TRUST, a)	
Washington Corporation; BUFFALO)	
PUMPS, INC. (sued individually and as)	
successor-in-interest to BUFFALO)	
FORGE COMPANY); CRANE CO;)	
GENERAL ELECTRIC COMPANY;)	
GEORGIA-PACIFIC CORPORATION)	
(sued individually and as successor-in-)	ORDER DENYING MOTION
interest to BESTWALL GYPSUM)	FOR RECONSIDERATION
COMPANY); GOULDS PUMPS,)	
INCORPORATED; GUARD-LINE, INC.;)	
IMO INDUSTRIES, INC. (sued)	
individually and as successor-in-interest))	
to DE LAVAL TURBINE, INC. and)	
WARREN PUMPS, INC.); INGERSOLL-)	
RAND COMPANY; JOHN CRANE,)	
INC.; KAISER GYPSUM COMPANY,)	
INC.; SEPCO CORPORATION;)	
TUTHILL CORPORATION (sued)	
individually and as successor-in-interest))	
to CORPUS ENGINEERING CORP.);)	
UNION CARBIDE CORPORATION; and))	
YARWAY CORPORATION,)	
)	
Respondents.)	
)	

The respondent, Buffalo Pumps, Inc., having filed a motion for reconsideration

WARREN PUMPS, INC.); INGERSOLL-)
 RAND COMPANY; JOHN CRANE,)
 INC.; KAISER GYPSUM COMPANY,)
 INC.; SEPCO CORPORATION;)
 TUTHILL CORPORATION (sued)
 individually and as successor-in-interest)
 to CORPUS ENGINEERING CORP.);)
 UNION CARBIDE CORPORATION; and)
 YARWAY CORPORATION,)
)
 Respondents.)

FILED: January 29, 2007

BAKER, J. — Vernon Braaten spent his career as a pipe fitter at the Puget Sound Naval Shipyard, where he was often exposed to asbestos. His job involved tearing into, removing and replacing asbestos insulation used in and on the pumps, valves, and turbines he maintained. He sued the machine manufacturers, claiming that they should have warned about the danger of asbestos inhalation involved with using their products. Braaten first sued in Texas state court where, two weeks before trial, the court entered summary judgment in favor of one of the defendants. Braaten took a nonsuit against the remaining defendants and sued in Washington.

The Washington case raised the same issue with respect to all five manufacturers, and all five won their summary judgment motions. Braaten appealed. General Electric (GE) argued on appeal that collateral estoppel precludes Braaten's claim; the other manufacturers responded only on the merits. We affirm summary judgment for GE on the alternate ground of collateral estoppel. We hold that the other four manufacturers did have a duty to warn, and reverse and remand for further proceedings.

I.

Vernon Braaten worked for 35 years as a pipe fitter at the Puget Sound Naval Shipyard (PSNS). His job was to maintain ship valves, pumps, and turbines, some of which were manufactured by Crane Co. (valves), General Electric (turbines), IMO Industries, Inc. (pumps),¹ Yarway Corp. (valves) and Buffalo Pumps (pumps). Regular maintenance of all these machines required the removal of exterior asbestos mud insulation that had to be sawn or hammered off. Regular maintenance of the valves and pumps also required replacement of interior asbestos gaskets and packing, which usually had to be ground, scraped, or chipped off. Braaten could not service the valves, pumps, and turbines without disturbing the asbestos.

The use of asbestos in and on Navy valves, pumps, and turbines was not by chance, but by design. GE's medical and Navy expert Lawrence Betts declared that the use of asbestos was "based on military necessity." Asbestos insulated the valves, turbines, fittings, and flanges on almost all combat vessels built between World War I and the mid-1980s, because it was lighter and withstood higher temperatures than other products.

All five manufacturers either sold products containing asbestos gaskets and packing, or were aware that asbestos insulation was regularly used in and around their machines when they were installed on a Navy ship. Buffalo Pumps sold pumps with asbestos packing and gaskets for use in Navy ships from 1943 to 1989. Crane's bronze, iron, and steel valves all included asbestos packing and gaskets; asbestos sheet packing was described in the Crane catalog as "superior." Yarway

¹ IMO is the successor in interest to DeLaval Turbine, Inc.

acknowledged that asbestos was the “only insulation product available to withstand temperature” on Navy ships. Although some of their machines could operate using no insulation or non-asbestos insulation, it was highly likely that a valve, pump, or turbine sold to the Navy would contain or be used in conjunction with asbestos.

During the maintenance process, asbestos dust was released into the air, and Braaten breathed it in. Until 1980 he wore no breathing protection. Then, he was told to wear a paper dust mask. No one in his division wore respirators until the mid-1980s. In 2003, Braaten was diagnosed with mesothelioma, a disease caused by his inhalation of asbestos dust.

Braaten sued 30 machine manufacturers in Texas, alleging strict liability and negligence for failure to warn of the dangers of exposure to asbestos. One manufacturer, Goulds Pumps,² filed a no evidence motion. The motion maintained there was no evidence that Goulds had a legal duty to Braaten. The Texas court agreed. Braaten quickly took a nonsuit against the remaining parties, and filed a new suit here in Washington State. He did not appeal the Texas order.

The court below granted summary judgment to all defendants, ruling that these manufacturers had no duty to warn about asbestos products manufactured and installed by others. GE argued that the Texas summary judgment order collaterally estopped Braaten’s Washington claims, but the trial court concluded that it did not. Braaten appealed.

II.

² Goulds is not a party to this appeal.

When reviewing a summary judgment motion and order, we engage in the same inquiry as the trial court.³ We consider the facts in the light most favorable to the nonmoving party. Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.⁴

Collateral Estoppel

GE argues that collateral estoppel bars relitigation of the duty to warn issue. The doctrine of collateral estoppel promotes finality and judicial economy by preventing parties from raising identical issues after they receive a full and fair opportunity to present their claims.⁵ The doctrine applies if: (1) the issue raised is identical to the issue previously ruled upon; (2) the prior adjudication ended in a final judgment on the merits of the issue; (3) the party against whom collateral estoppel is asserted was a party, or was in privity with a party, in the prior adjudication; and (4) application of the doctrine does not work an injustice.⁶ Injustice in the collateral estoppel context does not refer to a substantive injustice, but to whether the party was afforded a full and fair hearing.⁷ Even if the prior legal conclusion was erroneous, collateral estoppel does not work an injustice if the party had the opportunity to attack the error directly.⁸

³ Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

⁴ CR 56(c).

⁵ Hanson v. Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

⁶ Hanson, 121 Wn.2d at 562.

⁷ Lee v. Ferryman, 88 Wn. App. 613, 625, 945 P.2d 1159 (1997).

⁸ Thompson v. Dep't of Licensing, 138 Wn.2d 783, 799-800, 982 P.2d 601 (1999).

Collateral estoppel precludes relitigation of the duty to warn issue against GE. The legal issue is identical between Goulds and GE; it is irrelevant that the two manufacturers produced different products, because both products were to be installed on Navy ships and used with asbestos. The Texas summary judgment was a final adjudication on the merits with the same preclusive effect as a full trial.⁹ It is immaterial that GE is a different defendant. Finally, Braaten does not dispute GE's contention that, procedurally, he had an opportunity to challenge the Texas ruling but declined to do so.

Although the trial court concluded that collateral estoppel did not bar the claims, this court can affirm on alternate grounds, as long as those grounds were properly presented and developed below.¹⁰ They were, and summary judgment in favor of GE is affirmed.

Strict Liability – Duty to Warn

Although this claim would normally be governed by the Washington Products Liability Act (WPLA),¹¹ Braaten was exposed to asbestos before its adoption, so WPLA does not apply.¹² Therefore, the common law as articulated in Restatement (Second) of Torts section 402A controls:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability

⁹ DeYoung v. Cenex Ltd., 100 Wn. App. 885, 892, 1 P.3d 587 (2000).

¹⁰ State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997).

¹¹ Ch. 7.72 RCW. WPLA was adopted in 1981 as part of the Tort Reform Act. Brewer v. Fibreboard Corp., 127 Wn.2d 512, 520, 901 P.2d 297 (1995).

¹² Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 472, 804 P.2d 659 (1991).

for physical harm thereby caused to the ultimate user or consumer, or to his property, if

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

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.^[13]

Under section 402A, manufacturers are strictly liable for failing to give adequate warnings.¹⁴ The duty extends to foreseeable users of the manufacturer's product.¹⁵ Braaten was a foreseeable user of the products sold by the manufacturers because he performed maintenance work on the products.¹⁶ As a user of the manufacturers' products, Braaten must make a prima facie showing of the following elements to sustain his strict liability claim:

(1) that there was a defect in the product which existed when it left the manufacturer's hands; (2) that the defect was not known to the user; (3) that the defect rendered the product unreasonably dangerous; and (4) that the defect was the proximate cause of the injury.^[17]

A faultless product may be nonetheless "defective" if it is unreasonably dangerous

¹³ Restatement (Second) Torts § 402A (1965).

¹⁴ Van Hout v. Celotex Corp., 121 Wn.2d 697, 704, 853 P.2d 908 (1993).

¹⁵ Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 793, 106 P.3d 808 (2005). It is important to distinguish foreseeability of who will use the product from foreseeability of the harm. Foreseeability of the harm is not an element of a strict liability failure to warn claim. Ayers v. Johnson & Johnson Baby Products Co., 117 Wn.2d 747, 762-63, 818 P.2d 1337 (1991). Foreseeability of the harm is relevant to Braaten's negligence claim, but not to his strict liability claim.

¹⁶ See Restatement (Second) Torts § 402A cmt. I.

¹⁷ Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 410, 591 P.2d 791 (1979).

when placed in the hands of the end user “without giving adequate warnings concerning the manner in which to safely use it.”¹⁸ Unlike in a negligence claim, the focus here is on the product and its dangers, not on what the manufacturer knew or should have known.

Braaten argues that the valves and pumps were defective because there were no warnings about how to safely avoid asbestos exposure during their maintenance. This is an issue of first impression in Washington. The parties cite extensively to other asbestos cases, but none is dispositive. Lindstrom v. A-C Product Liability Trust,¹⁹ cited by the manufacturers, has facts identical to this case.²⁰ However the issue in Lindstrom was causation, not duty.²¹ Olivo v. Owens-Illinois, Inc.,²² cited by Braaten, also has similar facts, but the defendant was a landowner, not a machine manufacturer.²³ Chicano v. General Electric Co.²⁴ is almost identical to this case and denies summary judgment, but it is an unpublished decision, and it applies a different test.²⁵ Berkowitz v. A.C. & S., Inc.²⁶ also favors Braaten’s argument, but simply affirms denial of a summary judgment motion with almost no analysis.²⁷

¹⁸ Novak, 22 Wn. App. at 412.

¹⁹ 424 F.3d 488 (6th Cir. 2005).

²⁰ Lindstrom, 424 F.3d at 491.

²¹ Lindstrom, 424 F.3d at 492-93. It is worth noting that although duty is not mentioned, as a matter of law the Lindstrom case would not have reached the causation issue without a presumption of duty.

²² 895 A.2d 1143 (N.J. 2006).

²³ Olivo, 895 A.2d at 1146.

²⁴ 2004 U.S. Dist. LEXIS 20330 (E.D. Pa. 2004).

²⁵ 2004 U.S. Dist. LEXIS 20330 at 40. Chicano’s in-depth analysis of the duty to warn issue applies Pennsylvania’s component manufacturer liability test, which is not applicable in Washington.

²⁶ 288 A.D.2d 148 (N.Y. App. 2001).

²⁷ Berkowitz, 288 A.D.2d at 149.

The case of Teagle v. Fischer & Porter Co.²⁸ is of some aid to our duty analysis. In Teagle, a manufacturer sold a device called a “flowrater” to Teagle’s employer.²⁹ The flowrater measured liquid chemicals, including ammonia, and was designed to hold chemicals pressurized up to 440 pounds per square inch (p.s.i.).³⁰ The ammonia would enter the flowrater from one end, Teagle would check a glass tube on the flowrater to see how much ammonia was inside, and then release it from the other end of the flowrater.³¹ To seal the ends of the glass tube, Teagle’s employer used rings manufactured by a third party and made of a material called Viton. The defendant manufacturer knew that Viton was not compatible with ammonia and might disintegrate, causing the glass tube to break.³² It also knew that if the flowrater broke while holding chemicals pressurized above 50 p.s.i., the operator could be harmed.³³ Teagle was measuring ammonia pressurized at 175 p.s.i. when the rings failed, the glass tube broke, and ammonia sprayed in his eyes.³⁴ Despite the fact that the use of Viton rings and ammonia in the flowrater was entirely the choice of Teagle’s employer, the court held the flowrater manufacturer liable for not warning that the use of those products in conjunction with the flowrater made it dangerous.³⁵ Without proper warnings, the product was defective when used as intended, regardless of the fact that a third-party’s product used in conjunction with the flowrater was the precipitating cause of the

²⁸ 89 Wn.2d 149, 570 P.2d 438 (1977).

²⁹ Teagle, 89 Wn.2d at 150-51.

³⁰ Teagle, 89 Wn.2d at 151-52.

³¹ Teagle, 89 Wn.2d at 150-51.

³² Teagle, 89 Wn.2d at 153-54.

³³ Teagle, 89 Wn.2d at 151-52.

³⁴ Teagle, 89 Wn.2d at 151-52.

³⁵ Teagle, 89 Wn.2d at 156-57.

malfunction and resulting injury.³⁶

However, there is an important factual distinction between Teagle and the present case. In Teagle, there was an actual failure of the manufacturer's product: the flowrater exploded. Here, there is no allegation that the pumps or valves failed. For that matter, there is no allegation that the asbestos "failed." Products containing hazardous, injury-causing substances that can be released during normal use are unlike traditional defective products. There is nothing "wrong" with such products; they do not "malfunction." They are simply dangerous in ordinary use. This case involves the release of a hazardous substance from a product. In that way, it is more analogous to products liability cases involving gasoline or other hazardous substances.

One such case from the Fifth Circuit provides an interesting comparison. In Stapleton v. Kawasaki Heavy Industries, Ltd.,³⁷ a motorcycle was tipped over when its fuel switch was in the "on" position. Gasoline leaked out, and was ignited by a nearby pilot light. Stapleton sued Kawasaki alleging negligence, strict liability, and breach of duty to warn about the fuel switch.³⁸ Although the jurors found that there was no design defect, they did find that Kawasaki breached its duty to warn about the specific danger of gasoline leaking from the motorcycle when the fuel switch was in the "on" position.³⁹ Kawasaki appealed, raising the issue that the jurors' conclusions were inconsistent with each other.⁴⁰ But the Fifth Circuit affirmed, finding no contradiction in the jury's

³⁶ Teagle, 89 Wn.2d at 155.

³⁷ 608 F.2d 571 (5th Cir. 1979).

³⁸ Stapleton, 608 F.2d at 572.

³⁹ Stapleton, 608 F.2d at 572.

⁴⁰ Stapleton, 608 F.2d at 572.

conclusions:

The jury . . . could have meant that the motorcycle was not defective in the sense that there was something wrong with it that caused it to be unfit or unsuited for the purpose intended, but that the defendants should have made greater efforts to warn users of the potential danger in failing to turn the fuel switch to the off position. This failure to warn is sufficient to hold Kawasaki liable under both negligence and strict liability theories.^[41]

There is an important parallel with this case: the product at issue was dangerous not because it failed or malfunctioned, but because: (1) by design it contained a hazardous substance; (2) that hazardous substance was released from the product during normal use;⁴² and (3) the manufacturers did not warn users about that danger.

From a public policy standpoint, asbestos cases are different from gasoline or other hazardous substance cases because asbestos injuries are latent. If there is a gasoline explosion, the injuries are immediately actionable. If there are additional tortfeasors to be impleaded, or against whom indemnity can be sought, they can be ascertained and held liable. In modern asbestos litigation, the manufacturers of the hazardous substance are, for the most part, no longer amenable to judgment.⁴³ And there is no doubt that asbestos manufacturers are culpable for the injuries to Braaten.

But the Stapleton case does demonstrate that there is an independent duty to warn when a manufacturer's product design utilizes a hazardous substance that can be

⁴¹ Stapleton, 608 F.2d at 572.

⁴² The Stapleton decision does not explain why a fuel switch allows gas leakage when open, but it appears from the jury's findings that the feature was not considered a defect.

⁴³ Katherine M. Anand, Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms that Effectively Discharge Asbestos Claims in Chapter 11 Reorganization, 80 Notre Dame L. Rev. 1187, 1190 (2005) ("[M]ost of the asbestos manufacturers responsible are already bankrupt.").

released during normal use. Few would argue that Kawasaki had no duty to warn about gasoline leaking from its motorcycles simply because someone else manufactured the gasoline. Its product contained gasoline during normal use. Here, the pumps and valves as designed contained asbestos during normal use. Also, the hazardous substance was released into the air as part of the regular operation and maintenance of pumps and valves, rather than by accident as in Stapleton. This distinction strengthens the argument for a duty to warn in the present case.

Public policy also supports a finding of duty. In Lunsford v. Saberhagen Holdings, Inc.,⁴⁴ we recently expanded the definition of “user” of an asbestos product to include the family member of a worker who was exposed to the fibers on that worker’s clothing. In doing so, we acknowledged the public policy purpose behind strict liability:

“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.”^[45]

These manufacturers did profit from the Navy’s purchase of their products. They argue that they did not sell the specific asbestos that injured Braaten, but that is akin to

⁴⁴ 125 Wn. App. 784, 106 P.3d 808 (2005).

⁴⁵ Lunsford, 125 Wn. App. at 792-93 (quoting Restatement (Second) of Torts § 402A cmt. c. (1965)).

saying that Kawasaki was not the relevant product seller because it did not sell the gasoline that leaked and ultimately injured Stapleton. Again, when a product's design utilizes a hazardous substance, and there is a danger of that substance being released from the product during normal use, the seller of the product containing the substance has an independent duty to warn.

A jury could determine that the pumps and valves were unreasonably dangerous when used as intended, without warnings about how to safely avoid asbestos exposure. Whether the product is unreasonably dangerous is based on the reasonable expectations of the ordinary consumer. Factors to be considered include the relative cost of the product, the gravity of the potential harm, and the cost and feasibility of eliminating or minimizing the risk.⁴⁶ Given the high cost of this complex machinery, the deadly medical consequences of prolonged asbestos exposure and the relatively low cost of adding warnings to a technician's manual or to the exterior of the machinery itself, it appears that a jury could find that the products in this case were unreasonably dangerous.⁴⁷

If the pumps and valves were found to be unreasonably dangerous without warnings, they would be defective under products liability law: "If a product is unreasonably dangerous, it is necessarily defective."⁴⁸ The manufacturers had a duty

⁴⁶ Bich v. General Electric Co., 27 Wn. App. 25, 32, 614 P.2d 1323 (1980) (citing Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 154, 542 P.2d 774 (1975)).

⁴⁷ Although the issue of unreasonable danger is not discussed in the briefs, the manufacturers would no doubt argue that the asbestos, not their products, posed the danger. However, as discussed below, the pumps and valves are the correct products for this analysis.

⁴⁸ Seattle First Nat'l Bank v. Tabert, 86 Wn.2d 145, 154, 542 P.2d 774 (1975).

to warn regarding the safe use of their products, and the trial court erred in concluding otherwise.

Negligence – Duty to Warn

Braaten also argues that the failure to warn was negligent. The elements of negligence are duty, breach, causation, and damages.⁴⁹ In this appeal, duty is the only element at issue. Braaten must show that the manufacturers had a duty to warn of “the hazards involved in the use of the product which are known, or in the exercise of reasonable care should have been known, to the manufacturer.”⁵⁰ The duty to warn in the context of negligence is similar to the duty to warn in a strict liability claim, but the focus is on the conduct and knowledge of the manufacturer instead of the dangerous propensities of the product itself.⁵¹

The manufacturers had a general duty to warn Braaten, because he was a user of their valves and pumps.⁵² The manufacturers argue that foreseeability is the only possible source of any duty to Braaten, and that foreseeability alone is not enough reason to hold them responsible. We disagree. A worker required to frequently service these products as a regular part of his job was a user of their products.

But as all parties and amici agree, this general duty is bounded by the foreseeability of the harm.⁵³ The test of foreseeability is “whether the actual harm fell

⁴⁹ Koker v. Armstrong Cork, 60 Wn. App. 466, 473, 804 P.2d 659 (1991).

⁵⁰ Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. 407, 412, 591 P.2d 791 (1979).

⁵¹ Little v. PPG Indus., Inc., 92 Wn.2d 118, 120, 594 P.2d 911 (1979).

⁵² Restatement (Second) Torts § 402A cmt. 1. (1965).

⁵³ See Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 793, 106 P.3d 808 (2005).

within a general field of danger which should have been anticipated.”⁵⁴ In hindsight, asbestos exposure was undoubtedly a hazard involved in the use of the manufacturers’ products. But foreseeability of harm examines foresight, not hindsight: did the manufacturers know, or should they have known, about the hazards of asbestos involved in the use of their products at the time they were being sold and used? This question is not an appropriate one for summary judgment. Foreseeability of harm is generally a question of fact for the jury, not a question of law for the court, unless the circumstances of the injury “are so highly extraordinary or improbable as to be wholly beyond the range of expectability.”⁵⁵ That is not the situation here. Foreseeability of the harm should be considered by the trier of fact.

As a matter of policy, it is logical and sensible to place some duty to warn on the manufacturer who is in the best position to foresee the specific danger involved in the use of a product. Here, the asbestos manufacturers had a duty to warn about the general dangers of inhaling asbestos fibers, but the manufacturers of the pumps, turbines, and valves also had a duty to warn about maintenance procedures for their products that would release those dangerous fibers into the air.

The record supports a duty to warn sufficient to survive summary judgment. A trier of fact could conclude that the manufacturers knew or should have known that exposure to released asbestos fibers was a hazard involved in the use of their

⁵⁴ Koker, 60 Wn. App. at 480 (quoting McLeod v. Grant Cy. Sch. Dist. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953)).

⁵⁵ Seeberger v. Burlington N. R.R. Co., 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting McLeod v. Grant Cy. Sch. Dist. 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)).

products. Contrary to the manufacturers' framing of the issue, their duty was not to warn of dangers associated with a third party's product, but of dangerous aspects of their own product: namely, that using their products as intended would very likely result in asbestos exposure. The trial court erred in granting summary judgment for the manufacturers on the duty to warn element of the negligence claim.

III.

GE prevails in its collateral estoppel argument, and summary judgment is affirmed on that alternate basis. The trial court erred when it concluded that the other manufacturers had no duty to warn in strict liability and in negligence. The remaining summary judgment orders are reversed and remanded for further proceedings.

AFFIRMED IN PART AND REVERSED IN PART.

A handwritten signature in cursive script, appearing to read "Baker, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Appelwick, C.J.", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Coleman, J.", written over a horizontal line.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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March 30, 2007

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CASE #: 57011-1-I
Vernon Braaten, App. v. Buffalo Pumps, Inc., et al., Res.
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57011-1-I, Vernon Braaten v. Buffalo Pumps, Inc., et al.

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Counsel:

Enclosed please find a copy of the order denying respondent **Yarway Corporation's** motion for reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

For counsel's information, the Supreme Court has determined that a filing fee of \$200.00 will be required in that court.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. Sharon Armstrong
Lexis Nexis
Reporter of Decisions
West Group