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COURT OF APPEALS
DIVISION ONE
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NO. 57011-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Appellant,

v.

BUFFALO PUMPS, INC., et al.,

Respondents.

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY

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I. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the trial court properly dismissed, on summary judgment, plaintiff Vernon Braaten's claims against General Electric Company (GE), which manufactured marine turbines according to United States Navy specifications, on the ground that a product manufacturer does not have a legal duty to warn a plaintiff of dangers potentially associated with a product that it did not manufacture, sell, or supply, where it was uncontroverted that (1) GE supplied the turbines to the Navy without thermal insulation, asbestos-containing or otherwise, and (2) GE did not manufacture, sell, or supply the thermal insulation to which plaintiff claims he was exposed, and which the Navy acquired from third parties and arranged to have placed around the outside of the turbines.

B. Whether the trial court's summary judgment dismissal of plaintiff's claims may be affirmed on the alternate ground that plaintiff's claims were barred by collateral estoppel.

II. RESTATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff Vernon Braaten has sued various manufacturers who supplied equipment to the Navy, CP 7-10,¹ for injuries caused by asbestos

¹ Plaintiff previously filed two lawsuits in Texas in August 2003, CP 5360-61: one in Dallas County, Texas, against a number of defendants, including GE, which he nonsuited by stipulation in June 2004, CP 2088, and another in Brazoria County, Texas, CP 31-33,

exposure. He asserts that he was exposed to asbestos when he worked around defendants' products because defendants' products "were used in conjunction" with asbestos-containing products. CP 8.

As to GE, he claims that he was exposed to asbestos when he removed or replaced asbestos-containing exterior thermal insulation products that the Navy bought from third parties and applied to the outside of GE's turbines after GE delivered them to the Navy. App. Br. at 32-34. He claims that GE had a duty to warn him, under negligence and Restatement (Second) of Torts § 402A principles, of the dangerous propensities, not of its own product, but of the asbestos-containing insulation of another, even though GE did not make, sell, or supply it in connection with the turbines it supplied to the Navy.

GE and the other defendants moved for summary judgment, *inter alia*, on the ground that they did not have a duty to warn of someone else's product, the same basis on which the trial court had granted summary judgment in Simonetta v. Viad Corp., No. 56614-8-I.² The trial court

against other defendants, which he nonsuited in December 2004, CP 5394-95, after the trial court, in November 2004, granted summary judgment to defendant Goulds Pumps on the ground that it did not have a duty to warn of other entities' products. CP 310, 560. He filed the instant action in King County in January 2005. CP 1-6.

² Mr. Braaten's attorneys also represent the Simonettas in Simonetta v. Viad Corp., No. 56614-8-I, decided on the same basis, *i.e.*, that a manufacturer that does not make or sell the asbestos-containing product to which a plaintiff was exposed does not have a duty to warn of the dangers of asbestos. Commissioner Neel granted respondents' motion to link this appeal administratively with Simonetta for argument and consideration.

granted the motions, determining as to GE that “GE had no duty to warn of potential dangers associated with the use of asbestos containing products manufactured, sold, or installed by third parties, unless contained in the turbine when delivered.” CP 5560. Plaintiff has appealed the trial court’s dismissal of his claims against the defendants. CP 7297-7325.

B. Factual Background.

1. Plaintiff’s work as a pipefitter at Puget Sound Naval Shipyard (“PSNS”).

Plaintiff, a marine pipefitter, worked at PSNS from November 1967 to June 2002. CP 292. He was diagnosed with mesothelioma in July 2003. CP 8. He testified that he was exposed to asbestos-containing insulation found on the outside of various manufacturers’ main propulsion turbines, including GE turbines, on ships where he worked. CP 293-94(pp. 39-42). The insulation covered flanges and valves, which the pipefitters would remove from the turbines so that machinists could do inside maintenance.³ CP 293(41). Around the flanges and valves an asbestos pad was wired on so that it could be easily taken on or off.⁴ CP 293(39,

³ Thus, contrary to the assertion that plaintiff was assigned to do maintenance on the turbines, App. Br. at 51, that was the machinists’ job. Plaintiff never saw a GE turbine with the casing open during the time he worked at PSNS. See CP 5319.

⁴ For normal maintenance, the GE turbines had an access type panel. CP 2146 (119-20). GE was required by Navy specifications to manufacture the turbines with hangers so that an insulating “pillow” or “pad” could be wired on and easily lifted on or off of the panel. CP 2146 (119-20). Such pads were covered with lagging (cloth such as muslin or fiberglass). Id. (120-21).

41). There was also asbestos-containing mud insulation and block insulation around the turbines, which he removed and applied. CP 293(41). Insulating the turbines kept the engine rooms quiet and kept the heat in the turbine rather than on engine room workers. CP 293(40).

2. It was undisputed that GE's turbines were supplied to the Navy without thermal insulation, and that GE did not manufacture, supply or sell that thermal insulation to the Navy.

GE manufactured marine turbines for U.S. Navy ships under contract between GE and the shipyards and/or the United States, specifically the Navy Department, CP 5302, which administered the contract through Navy Sea Systems Command ("NAVSEA"), acting under authority of the Secretary of the Navy. CP 5302. During all aspects of its turbine work related to U.S. Navy vessels, GE performed its work under the immediate supervision of the Navy through NAVSEA officers.⁵ CP 5302-03. NAVSEA personnel exclusively developed ship designs and plans, as well as comprehensive and detailed guidelines and specifications for all ship equipment, and NAVSEA officers supervised, enforced, and approved the supplier's compliance with the plans and specifications. CP 5302. The turbines GE manufactured for any Navy vessel had to meet

⁵ The Inspector of Machinery (INM), a Naval officer, supervised GE's production of turbines for Navy vessels, CP 5301-02, worked onsite at GE's plants in Massachusetts, exercised direct control over all aspects of GE's production of turbines for Navy vessels, and enforced compliance with design specifications. CP 5302.

detailed and precise Navy specifications. CP 5302-03. Each turbine was specifically designed for a particular vessel or class of vessels. CP 5303.

As manufactured and shipped to the Navy by GE, the turbines did not have any thermal insulation materials (asbestos-containing or otherwise) on them. CP 5302. GE did not manufacture or supply any thermal insulation that the Navy may have later placed on the steam turbines. Id.; CP 2123. Only after a turbine arrived at a shipyard, was installed and tested,⁶ would thermal insulation materials be applied. Id. The thermal insulation applied after the turbines left GE's control would be whatever the U.S. Navy selected, specified and installed in accordance with the Navy's Manual of Thermal Insulation, and would have been supplied and installed by entities other than GE.⁷ Id.

3. The U.S. Navy's knowledge about asbestos hazards.

The Navy's use of asbestos aboard ships and on turbines was not based on any requirements of GE, but instead upon what the Navy determined was military necessity. CP 5244-46. The Navy had recognized since the 1920s that inhalation of asbestos fibers in sufficient amounts

⁶ The turbines were tested both at the dock and at sea trials. CP 5306.

⁷ Plaintiff refers to a letter sent to commercial customers in 1990 alerting them to the possibility of asbestos containing materials in land-based turbine-generators sold to utilities and industrial powerhouses, App. Br. at 7, 33, which plaintiff says suggests that GE specified the use of asbestos-containing external insulation and allowed customers to order it. On its face, this document is not applicable to Naval turbines as the first sentence makes clear that it is directed at "turbine-generators manufactured for Utility and Industrial applications." CP 2177.

could result in pulmonary disease. CP 5246. By 1939, the Navy had set up an organization to protect its military and civilian personnel, which included a safety engineer to supervise the safety precautions taken to protect employees in Navy yards and other locales, assisted by a Navy medical officer and staff.⁸ CP 5247. When counting of asbestos particles in air became available, the Navy followed the recommendations of the U.S. Public Health Service to set permissible exposure levels.⁹ CP 5250.

In 1943, the U.S. Maritime Commission and the Navy approved Minimum Requirements for Safety and Health in Contract Shipyards. CP 5251-52. These standards required segregation of dusty work and special ventilation or special respirators, and periodic medical examinations, in any job where asbestos dust was breathed. CP 5252. The Navy's occupational health team was responsible for assisting in interpreting the standards for implementation at Navy and contract yards. CP 5252-53.

⁸ The safety engineer in naval yards was to be sufficiently familiar with Navy yard trades, machinery, and safety devices and appliances to be able to make inspections and recommend protective measures to promote healthy working conditions. CP 5247-48. The medical officer was to be thoroughly versed in industrial diseases, and was to instruct employees in safety measures and encourage cooperation in the use of protective measures. CP 5248. Hospital corpsmen were informed of asbestos hazards, instructed to locate asbestos hazards and to afford protection, including masks for asbestos workers and special physical examinations. CP 5248-49.

⁹ Based upon the findings of Dreessen and coworkers' 1938 study of asbestosis in the textile industry prepared by direction of the United States Surgeon General, the Navy accepted an exposure level of 5 million particles per cubic foot (MPPCF) as the time-weighted average (TWA) for occupational exposure. CP 5250.

Based on a 1945 study to evaluate asbestos exposure and disease among workers performed by Harvard and the Navy at four shipyards (the Fleischer-Drinker study¹⁰), CP 5253-54, the Navy adopted a recommended maximum allowable concentration (MAC) value for asbestos of 5 MPPCF, the same value recommended by the National Conference of Governmental Industrial Hygienists in 1942, and adopted in 1946 by the American Conference of Governmental Industrial Hygienists (ACGIH).¹¹. CP 5254. At that time, there were no federal, state, or local occupational exposure standards, so the Navy used the occupational exposure level that the scientific and medical evidence supported. CP 5254-55.

In 1955, the Navy adopted the “Threshold limit values for toxic materials” set by the ACGIH. CP 5255. In 1958, the Navy issued its Safety Handbook for Pipefitters, which provided in part: “Asbestos. Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard.” Id.

In 1960, the Department of Labor recommended an occupational exposure level of 5 MPPCF for asbestos, CP 281, the same exposure level

¹⁰ Phillip Drinker was Chief Health Consultant for the U.S. Maritime Commission, and Professor in the Harvard School of Public Health program that was training the Navy physicians, scientists, and engineers. CP 5253.

¹¹ The ACGIH was a private organization that did not offer membership to individuals affiliated with industry. In 1946, its members included three representatives of the Navy Department and 42 representatives from the U. S. Public Health Service. CP 5254.

the Navy had been using for some 20 years. CP 5250, 5255. That value continued to be generally accepted by occupational health professionals in the United States, and by the Navy until the late 1960s when the scientific and medical communities and Navy had evidence that it was not sufficient to adequately control the health effects of asbestos exposure. CP 5256.

In the early 1970s, the Occupational Safety and Health Act (PL 91-596) established national permissible exposure levels (PELs). As the OSHA prescribed PELs changed, the Navy followed them. CP 5257-58.

C. Procedural Background.

1. Plaintiff's Brazoria County, Texas action.

One of the defendants in plaintiff's Brazoria County action was Goulds Pumps, Inc., a manufacturer that supplied pumps for use on U.S. Navy vessels while plaintiff was employed at PSNS. The pumps were delivered without thermal insulation. Plaintiff claimed that he inhaled asbestos fibers released from thermal insulation that shipyard workers had applied to the pumps. As he does here against GE, plaintiff alleged that Goulds had a duty to warn him of the danger posed by that thermal insulation. E.g., CP 5381, 5383. Goulds moved for summary judgment, on the ground that it had no duty to warn of dangers posed by thermal insulation products manufactured, supplied, and installed by others. CP

306. The Brazoria County court dismissed plaintiff's failure to warn claims against Goulds. CP 310, 560.

2. The King County action.

Plaintiff nonsuited the Brazoria County case and refiled his case in King County. CP 1-6, 2088-89, 5394-95. His allegations against GE in this action are essentially the same as the dismissed claims he asserted against Goulds in the Brazoria County, Texas case.¹² Trial was set for September 2005. GE moved for summary judgment, *inter alia*, on the duty to warn and collateral estoppel. CP 283-314, 5243-61, 5300-07, see CP 261. Plaintiff opposed the motion, CP 2084-3227, 4019-48, and GE replied, CP 5313-36. The trial court granted GE's motion on the duty to warn, CP 5559-61, and similar motions of other defendants, and plaintiff appealed. CP 7297-7325.

III. STANDARD OF REVIEW FOR SUMMARY JUDGMENTS

An order granting summary judgment is reviewed *de novo* and the appellate court engages in the same inquiry as the trial court, considering the facts in the light most favorable to the nonmoving party. Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 305, 96 P.3d 957 (2004) (citation omitted). Summary judgment is properly granted where

¹² In both cases, plaintiff attempted to avoid possible removal to federal court by disclaiming any federal question. See CP 8-10, 5391.

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Questions of law presented on summary judgment are reviewed *de novo*. Coppernoll v. Reed, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). An order granting summary judgment may be affirmed on any basis supported by the record. Id.

A defendant may move for summary judgment either by setting out its version of the facts and asserting that there is no genuine issue as to the facts as set out, or by pointing out that the plaintiff lacks sufficient evidence to support his case. Young v. Key Pharms., 112 Wn.2d 216, 225, 770 P.2d 182 (1989); Guile v. Ballard Community Hosp., 70 Wn. App. 18, 25, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993). To defeat a defendant's motion for summary judgment, the plaintiff must come forward with sufficient competent evidence of specific facts on which a jury could reasonably find for plaintiff on the essential elements of his or her claims. Young, 112 Wn.2d at 225; Guile, 70 Wn. App. at 21. Failure of proof on any essential element of a plaintiff's claim necessarily renders all other facts immaterial and requires entry of summary judgment for defendant. Robinson v. Avis Rent A Car Sys., 106 Wn. App. 104, 110-11, 22 P.3d 818, rev. denied, 145 Wn.2d 1004 (2001).

IV. ARGUMENT

A. Summary of Argument.

Plaintiff bases his claims against GE on his alleged exposure to asbestos-containing thermal insulation that others manufactured, sold and applied to the exterior of GE's turbines, after GE delivered them to the Navy. GE was not in the chain of distribution of the asbestos materials alleged to have caused plaintiff's injury. Nor, contrary to plaintiff's assertions, did GE have a duty to warn of potential hazards of asbestos in thermal insulation products that GE did not manufacture, sell or supply and the court should not hold, decades after the fact, that it did.

In addition, the issue of an equipment manufacturer's duty to warn of the hazards of asbestos in thermal insulation that the equipment manufacturer did not make, sell or apply, was decided adversely to plaintiff in Texas after a fair hearing on the merits and he should be bound by that adverse determination.

B. Summary Judgment for GE May Be Affirmed on the Ground That Collateral Estoppel Bars Plaintiff's claims against GE.

Although Judge Armstrong denied GE's motion on collateral estoppel, CP 5560, the court may affirm a summary judgment on any basis supported by the record. Coppernoll, 155 Wn.2d at 296.

Plaintiff's Texas lawsuits were based on the same set of operative facts as the current action. In the Brazoria County action, one of the

equipment manufacturer defendants, Goulds Pumps, moved for summary judgment in October 2004 on the ground that it did not owe a legal duty to plaintiff. CP 306. The trial court there granted the motion:

On November 19, 2004, the Court considered the Amended No-Evidence Motion for Summary Judgment filed by Goulds Pumps, Inc. After reviewing the Motion and hearing arguments of counsel, it was decided that:

The Motion is GRANTED as to any alleged duty of Goulds Pumps, Inc. to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by Goulds Pumps. [Judge Robert May Order Dated November 19, 2004, CP 310, 560.]

The doctrine of collateral estoppel prevents relitigation of an issue by a party against whom an adverse ruling has been made after full and fair opportunity to present its claim, and applies not only to issues of fact, but also to issues of law if both causes of action arose out of the same subject matter or transaction. Franklin v. Klundt, 50 Wn. App. 10, 13-14, 746 P.2d 1228 (1987), overruled on other grounds, Thompson v. Dep't of Licensing, 138 Wn.2d 783, 789, 982 P.2d 601 (1999).

The public policy underpinning the doctrine of collateral estoppel is the avoidance of duplicative proceedings and it serves as a “means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal.” United States v. Deaconess Med. Ctr., 140 Wn.2d 104, 110, 994 P.2d 830 (2000). As the

court observed in Lee v. Ferryman, 88 Wn. App. 613, 621, 945 P.2d 1159

(1997), rev. denied, 135 Wn.2d 1006 (1998) (citations omitted):

Collateral estoppel, referred to as issue preclusion, “prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. The purpose of the doctrine is to promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants.”

The party seeking application of collateral estoppel must establish that:

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d at 307. All

four elements were shown here. First, plaintiff’s claims against the equipment manufacturers in the Texas and Washington cases are identical.

He seeks recovery for the manufacturer defendants’ alleged failure to warn of the hazards of asbestos manufactured, sold, supplied and installed by others, and the dispositive issue is whether a product manufacturer has a legal duty to warn of dangers of a product it did not make or sell.¹³

Second, Judge May’s November 19, 2004 order is a judgment on the

¹³ Plaintiff argued that the issue of whether Goulds had a duty to warn of hazards of asbestos insulation applied to the exterior of its pumps was different from the issue of whether a turbine manufacturer was liable for failing to warn of asbestos “on and around” its turbines. CP 4023-24. That is a distinction without a difference.

merits against plaintiff.¹⁴ Third, he is the party against whom collateral estoppel is being asserted and was a party to Brazoria County action. Finally, there is no injustice in requiring a party to abide by an adverse ruling from another jurisdiction. Plaintiff had ample incentive and an opportunity to litigate the issue in question in the prior proceeding. Thompson v. Dep't of Licensing, 138 Wn.2d 783, 799, 982 P.2d 601 (1999) (the “no injustice” prong calls for an examination of procedural regularity; there is no injustice where a party had a full and fair hearing of the issues and did not seek to overturn an adverse outcome).

Disappointed litigants may not relitigate an issue resolved adversely in another jurisdiction. As noted in Civil Serv. Comm'n v. City of Kelso, 137 Wn.2d 166, 178 n.5, 969 P.2d 474 (1999) (Talmadge, J., concurring):

The record suggests forum shopping may have been undertaken . . . We should not condone parties' seeking out the most favorable forum and then, if they lose, seeking another forum for a second bite at the apple.

Plaintiff should be bound by the adverse ruling entered by Judge May that an equipment supplier to the U.S. Navy does not have a legal

¹⁴ As plaintiff noted in opposing summary judgment on this issue, under Texas law the taking of a nonsuit does not vitiate earlier orders on the merits. CP 4022 (citing Tex. R. Civ. P. 162 and Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 855 (Tex. 1995)). A nonsuit sought after partial summary judgment on the merits “results in a dismissal with prejudice as to the issues pronounced in favor of the defendant,” id., and makes the partial summary judgment a final, appealable order. McClure v. J.P. Morgan Chase Bank, 147 S.W.3d 648, 652 (Tex. App. 2004), rev. denied (2005).

duty to warn of dangers allegedly associated with asbestos-containing thermal insulation ultimately applied to that equipment by others, when the equipment manufacturer did not make, sell, or supply such thermal installation. Therefore, GE asks the court to affirm the dismissal of plaintiff's claims under the doctrine of collateral estoppel.

C. An Essential Element of a Plaintiff's Claim Is the Identification of the Product that Caused the Injury and Its Manufacturer.

Whether proceeding on a negligence or strict liability theory for a product defect, the plaintiff must identify the manufacturer of the product that caused the injuries. Lockwood v. A C & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987) (to have a cause of action in a product liability case, a plaintiff "must identify the particular manufacturer of the product that caused the injury"); Nigro v. Coca Cola Bottling, Inc., 49 Wn.2d 625, 626, 305 P.2d 426 (1957) (proof that defendant supplied the product causing the injury is an essential element of a breach of implied warranty claim).

The product that caused plaintiff's injury in this case is the external asbestos insulation that GE did not make, sell, or supply. The proper defendants in this case are the asbestos manufacturers or sellers. Although plaintiff attempts to circumvent this essential element of his claim -- that he identify the maker of the product that caused his injuries -- by alleging that GE had a duty of warn of someone else's product, the law is clear that the

duty to warn pertains to the propensities of one's own product, not those of someone else's product. See May v. Dafoe, 25 Wn. App. 575, 577-78, 611 P.2d 1275, rev. denied, 93 Wn.2d 1030 (1980), where this Court noted:

[A] manufacturer may be held strictly liable for injury sustained by use of a product which is free from defect in either design or manufacture if adequate warning concerning its potentially dangerous propensities is not given a user.

* * *

But the injury received must be the result of a functioning of the product itself. . . .¹⁵

Identifying the manufacturer of the product that caused the harm is an essential element both in considering causation and in considering whether there is any case for a manufacturer to answer. It is as relevant to the issue of duty as it is to causation and is an essential element of any claim asserted with respect injuries allegedly caused by a product.

D. Product Manufacturers Do Not Have a Duty Under Negligence Principles to Warn of Dangers Inherent in Products They Do Not Make or Sell.

To establish a claim for negligence, a plaintiff must show: "(1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury." Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798,

¹⁵ In May, the plaintiff was injured because the Isolette incubator the defendant manufactured permitted him to be exposed to excessive oxygen, but that was not due to a dangerous propensity of the incubator itself, but was rather the result of a medical decision to administer oxygen. 25 Wn. App. at 578.

804, 43 P.3d 526 (2002); Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). If there is no duty, a plaintiff's negligence claim necessarily fails. Burg, 110 Wn. App. at 804.

1. A manufacturer has a duty to warn of the dangerous propensities of its own product, but it does not have a duty to warn of the dangerous propensities of products of others that it did not make, sell or supply.

Plaintiff claims that the equipment manufacturers could foresee that their products would eventually be insulated by the Navy with asbestos-containing products. GE notes that, in his brief, App. Br. at 7, plaintiff erroneously claims that an Admiral MacKinnon, whom he identifies as a GE expert, "admitted that GE's turbines would be insulated with asbestos-containing materials." Not only is Admiral MacKinnon not a GE expert, but plaintiff also misrepresents the testimony MacKinnon gave. Plaintiff cites his summary judgment response, CP 4036, purporting to quote from MacKinnon's deposition. Although plaintiff inserted "GE" in his purported quote from the deposition, in fact the question and actual testimony was not about GE at all, but a different entity. CP 2170 (19-20).

At any rate, even if GE could foresee that the Navy would add external insulation around the turbine, with or without asbestos, that does not give rise to a duty to communicate to naval and shipyard personnel

about dangers inherent in a product GE did not make, sell or supply to the Navy, and that the Navy had applied to the turbine after delivery.

Foreseeability does not create a duty. Instead, “whether a particular class of defendants owes a duty to a particular class of plaintiffs is a question of law and depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’” Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (citations omitted).¹⁶

Although acknowledging this correct statement of the law, plaintiff argues that “the existence of a duty turns upon the foreseeability of the risk of harm.” App. Br. at 21. He is incorrect, and his reliance upon Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), is misplaced. The fact that, as the Palsgraf court noted, no duty is owed where conduct does not involve a foreseeable risk of harm, does not establish the converse proposition--that a foreseeable risk of harm creates a duty. New York’s highest court has rejected such an interpretation of Palsgraf:

Foreseeability should not be confused with duty. The principle expressed in Palsgraf v. Long Is. R.R. Co. [...] is applicable to determine the scope of duty – only after it has been determined that there is a duty.

Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019, 1022 (1976); see also

Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 750 N.E.2d 1055, 1060

¹⁶ See also Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982) (the court evaluates public policy considerations in determining whether a duty exists).

(2001) (citations omitted):

The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff? Courts traditionally “fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.” Thus, in determining whether a duty exists, “courts must be mindful of the precedential, and consequential, future effects of their rulings, and ‘limit the legal consequences of wrongs to a controllable degree.’”

Where there is no duty, foreseeability principles are inapplicable. Pulka, 385 N.E.2d at 1022. This is likewise the law in Washington. As this Court recently observed:

. . . [Plaintiff’s] contentions that the harm suffered by the investors was reasonably foreseeable and that the Securities Division had a duty to prevent the harm conflate the concepts of duty and foreseeability. Foreseeability limits the scope of a duty, but it does not independently create a duty.

Halleran v. Nu West, Inc., 123 Wn. App. 701, 717, 98 P.3d 52 (2004).

Instead, “[t]he existence of a duty is a threshold question,” Burg, supra, 110 Wn. App. at 804.

Plaintiff claims that Halleran and Burg are inapposite as not involving a duty to warn of a defective product. App. Br. at 32, n. 10. Both cases correctly state the law. The principles that guide a court in determining whether a duty exists in the first place do not change, as

plaintiff tacitly acknowledges by citing numerous nonproduct cases in setting forth his views of the duty question.

While, as plaintiff notes, foreseeability of the risk of harm has sometimes been characterized as “an element” of the duty question,¹⁷ he cites no Washington authority to the effect that mere foreseeability of a risk of harm “independently” creates a duty. Rather, the court first determines whether a duty exists; only then does it become a jury’s function to determine the foreseeable range of danger that serves as a limitation on the scope of the duty. Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982); Hansen v. Friend, 118 Wn.2d 476, 487, 824 P.2d 483 (1992).

To prove existence of a duty, the plaintiff must establish “a statutory or common-law rule that imposes a *duty* upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type.” Bernethy, 97 Wn.2d at 932.

¹⁷ Plaintiff cites King v. Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974), where plaintiffs sued the City alleging that it arbitrarily and capriciously denied them street use and building permits. The court there, however, determined first that the City “had a duty to act fairly and reasonably in its dealings with the plaintiffs,” and that findings in a previous action that the City had acted arbitrarily and capriciously toward plaintiffs established a breach of duty. 84 Wn.2d at 247-48. Thus, the court had found a duty and breach thereof. It made the statement that plaintiff cites in the course of rejecting the City’s argument that it could not have a duty because it could not foresee the risk of harm. Id. at 248.

In an attempt to establish the existence of the duty he urges, plaintiff cites several Washington cases, App. Br. at 22-26, but all apply to a manufacturer's duty to warn of dangers inherent in *its own product*.¹⁸ In Dalton v. Pioneer Sand & Gravel Co., 37 Wn.2d 946, 227 P.2d 173 (1951), for example, the plaintiff asserted that he sustained chemical burns from defendant's cement product and that defendants were negligent in failing to warn him that the cement material would burn his skin. Id. at 948. Dalton merely confirms that it is the maker/seller of the inherently dangerous product who has a duty to warn. Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 469, 804 P.2d 659, rev. denied, 117 Wn.2d 1006 (1991), was an action against asbestos product manufacturers for injuries caused by their asbestos products, and Young v. Key Pharms., 130 Wn.2d 160, 922 P.2d 59 (1996), concerned a defendant's alleged failure to warn of the dangers of its theophylline product. Both concern a manufacturer's duty to warn of dangerous aspects of its own product, Young, 130 Wn.2d at 178; Koker, 60 Wn. App. at 469, 477, and neither supports plaintiff's contention.

Plaintiff cites no Washington statutory or common rule imposing a duty upon a product manufacturer to warn of dangers inherent in another

¹⁸ Plaintiff also cites Snyder v. Philadelphia, 129 Pa. Commw. 89, 564 A.2d 1036, 1039 (1989), for the proposition that, under negligence principles, a manufacturer has a duty to warn of a product's dangerous propensity. App. Br. at 22. That case concerned handgun manufacturers' duty to warn that gunfire noise could cause hearing loss. It does not stand for the proposition that a manufacturer has a duty to warn of dangerous propensities of a product it did not make or sell.

manufacturer's product that it did not make or sell merely because its product may be used in conjunction with the latter manufacturer's product. Plaintiff cites Freeman v. Navarre, 47 Wn.2d 760, 772-73, 289 P.2d 1015 (1955), App. Br. at 25-26, to the effect that the duty of care arises not from contract, but from offering goods on the market. In Freeman, the court reversed the trial court's dismissal, based on lack of privity, of the manufacturer of the defective pipes that caused property damage to the shopping center owned by plaintiff. 47 Wn.2d at 764, 773-74. Freeman provides no support for the proposition that a manufacturer has a duty to warn of goods it did not offer on the market.

Immediately after discussing the duty to warn of the dangerous aspects of a manufacturer's own product referred to in Koker and Young, plaintiff asserts that "[n]otably, then, in Washington, a manufacturer's duty to warn is not limited to danger arising from original equipment," App. Br. at 24, without citation to any case so holding. Rather, extrapolating from the duty to warn of inherently dangerous propensities of one's own product, he employs the artifice of characterizing as an "aspect" of one product the fact that it might be used with another. If a car requires gasoline to run, plaintiff's theory goes, the car manufacturer must warn of dangers of whatever gasoline product the car buyer uses, even though the car manufacturer does not make or sell the gasoline. That is

not the law, nor do Koker and Young support the extension of a manufacturer's duty to require it to warn of dangers inherent in other entities' products.

Plaintiff's hypothetical that, if respondents are correct as to Washington law, a manufacturer could escape liability by assembling its product from outsourced components, App. Br. at 24, is faulty. The manufacturer that incorporates defective component parts into its own product and then sells the product as an assembled whole is subject to liability caused by those component parts whether it outsourced the making of components or not. See Lenhardt v. Ford Motor Co., 102 Wn.2d 208, 683 P.2d 1097 (1984); see RCW 7.72.010. The converse, however, is not true. A component manufacturer may not be held liable unless the component part it provided was the cause of the injury. See, e.g., Sepulveda-Esquivel v. Cent. Mach. Works, Inc., 120 Wn. App. 12, 18, 84 P.3d 895 (2004). Thus, a tire manufacturer whose tire is purchased by Ford and sold on a new Ford automobile does not have a duty to warn of dangerous propensities of the car's air bag system.

Plaintiff's contention that a duty to warn would be extinguished after major maintenance, such as "the overhaul of a turbine," makes no sense. App. Br. at 25. If plaintiff is claiming that the removal and replacement of external insulation would be required to perform such

maintenance, the fact is that GE did not make or sell the external insulation to the Navy in the first place and did not have a duty that could be extinguished. If his argument is that a product initially had some asbestos-containing part that was replaced by a different asbestos product made and sold by someone other than the original manufacturer, to which the plaintiff was exposed, there is no unfairness in requiring the duty to warn to be placed on the asbestos supplier who made and marketed the substituted asbestos containing product that caused the injury.¹⁹

2. Wright v. Stang does not stand for the proposition that a manufacturer has a duty to warn of the hazards of a product it did not make, sell or supply.

Finding no support in Washington law, plaintiff turns to Wright v. Stang Manufacturing Co., 54 Cal. App. 4th 1218, 63 Cal. Rptr. 2d 422 (Cal. Ct. App.2d Dist.), rev. denied (1997). Stang manufactured a deck gun that was attached to a fire engine. While plaintiff was using the deck gun, a sudden change in water pressure created what is known as a “water hammer.” The force of the “water hammer” was such that it caused the deck gun to come loose, throwing the plaintiff into the air and injuring him. The manufacturer claimed that its product did not fail, which the appellate court interpreted to mean that the deck gun did not break or

¹⁹ Plaintiff does not contend that he was exposed to any asbestos-containing product in GE turbines. App. Br. at 34-35.

sustain any damage. Id. at 1229. The court determined that the defendant had not negated the plaintiff's claim, under California summary judgment law principles, and found issues of fact on plaintiff's design defect and warning claims and negligent warning claim, based in large part on the fact that an expert testified that the product was defective in that it was manufactured without a flange mounting system, and lacked warnings that the product was dangerous absent such a system, as well as how the product would react in the event of the nozzle reaction that caused the accident. See 54 Cal. App. 4th at 1222-24, 1229-31. The court held that the manufacturers had failed to counter the expert's declaration or negate

allegations that the manufacturer of the deck gun did not provide an adequate, or any, warning against the potential dangerous and foreseeable "mismatch" of the deck gun and riser pipe attachments [used instead of a flange mounting system] which did not have adequate strength or design to withstand the water pressures generated with the use of the deck gun, and the alleged foreseeable danger that the deck gun or its attachments may become separated from the fire truck under such pressures.

Id. at 1236. Thus, the absence of the flange mounting system made the functioning of the deck gun dangerous in the event of a water hammer. Here, the asbestos materials were hazardous no matter where plaintiff encountered them if he was sufficiently exposed. To impose a duty to warn on the makers of whatever surface asbestos was ultimately placed, on the ground that the two "combined" to make a defective product,

strains concepts of fairness and logic. Nor did the Wright court hold that one manufacturer has a duty to warn of dangers inherent in different manufacturers' products that caused a plaintiff's injuries, even if plaintiff so reads it.

Even if plaintiff's reading of Wright were correct, the weight of authority in California is to the contrary. See e.g., Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634, 173 Cal. Rptr. 20 (Cal. App. 2d Dist. 1981). The plaintiffs in Garman sued the manufacturer of a cooking stove that operated on propane, after an explosion caused by leaks in the plaintiffs' propane system, for failing to warn consumers that the stove's flame could ignite gas leaking from another source. Id. at 637. The court determined that there was no causation and that the stove manufacturer had no duty to warn of the possible defect in the product of another. Id. at 638-39. The court emphasized that a manufacturer of a nondefective product is not liable for failing to warn of the dangers of another's product:

A failure to warn may create liability for harm caused by use of an unreasonably dangerous product. That rule, however, does not apply to the facts in this case because it was not any unreasonably dangerous condition or feature of [Magic Chef's] product which caused the injury. To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense.

Id. at 638. The Garman court also explained that the stove did not cause or create the risk of harm, and was not unreasonably dangerous or unsafe

“simply because it is used with natural gas.” The court stated:

Even if its use required the use of natural gas, that fact does not require a special warning. . . . The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe. . . .

Id. (citations omitted); see also Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372, 377-78, 203 Cal. Rptr. 706 (Cal. App. 2d Dist. 1984) (failure to warn rule “does not apply where it was not any unreasonably dangerous condition or feature of *defendant’s* product which caused the injury”) (citations omitted); Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 362, 364, 212 Cal. Rptr. 395 (Cal. App. 3d Dist. 1985) (“the manufacturer’s duty is restricted to warnings based on the characteristics of the *manufacturer’s own product*”) (emphasis in original).²⁰

The same is true in other jurisdictions, as discussed more fully in Section E. below. By way of example, in Lindstrom v. A-C Prod. Liab.

²⁰ Plaintiff cites and attaches to his brief, App. Br. at 27-28, n. 8 & Appendix A, several trial court rulings, which are neither precedential nor persuasive, even if such citation were permitted. See RAP 10.4(h). GE notes that plaintiff’s reliance on the Broadnax ruling, citing Wright for the proposition that a defendant has a duty to warn of foreseeable uses of its product, including uses incorporating the products of others, is misplaced, and the Broadnax statement (even if it were correct) is inapposite here. The asbestos to which plaintiff alleges exposure was neither a component of (included in) or “incorporated” in GE’s turbine. Instead, it was purchased from and applied by others after GE delivered the turbine.

Trust, 424 F.3d 488 (6th Cir. 2005), a case directly on point, the plaintiff merchant seaman, alleged that certain defendants were liable, under negligence and strict liability theories, for his asbestos exposure. Id. at 491-92, 495. Equipment manufacturing defendants whose equipment was supplied without asbestos moved for summary judgment. The court held that the defendants whose equipment was supplied without asbestos could not be liable to the plaintiff for injuries allegedly caused by asbestos products added later to the equipment by others. Id. at 496-97.

Plaintiff attempts to distinguish Lindstrom on the ground that it involves causation and not duty, and on the ground that its standards for establishing actionable asbestos exposure differ from those in Washington, citing the Lindstrom court's statement that the mere presence of a defendant's product at the worksite is not enough to support liability. Id. at 492; see App. Br. at 52 n. 15. The mere presence of a product on a job site would not support liability in Washington either. Instead, to determine if sufficient evidence of causation exists, the trial court must consider several factors, Lockwood, 109 Wn.2d at 248, which generally relate to the frequency, regularity and proximity of a plaintiff's exposure to a particular defendant's asbestos product while he is working.²¹

²¹ The factors are: (1) plaintiff's proximity to the defendant's asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product; and (3) the types of

Lacking Washington authority that would justify imposing a duty on a manufacturer, such as GE, to warn of dangers associated with a product it did not make, sell or supply, plaintiff characterizes the application of external insulation as a foreseeable alteration or modification of a defendant's product. Despite plaintiff's assertion, App. Br. at 28, that courts have often recognized the duty to warn of hazards posed by instrumentalities manufactured by others, he cites not a single case in support. Instead, citing Am. Jur. 2d § 1449 (2005), he asserts that GE had a duty to warn on the ground that the Navy's application of external asbestos insulation was a foreseeable "alteration" or "modification" of GE's turbine, App. Br. at 28, a theory he first raises on appeal. See RAP 9.12.

Plaintiff's foreseeable alteration/modification theory, App. Br. at 29-32, is inapplicable. First, nothing in GE's turbine was altered or modified, and it is mere semantics to contend otherwise. Second, in those cases where the manufacturer remains liable for a foreseeably altered

asbestos products to which plaintiff was exposed and the ways the products were handled and used. Lockwood, 109 Wn.2d at 248. The court must also consider the medical evidence of causation. Id. That Washington allows circumstantial evidence to be used to identify the manufacturer of the injury causing asbestos product, that does not mean that the showing need not be made. See Van Hout v. Celotex Corp., 121 Wn.2d 697, 707, 853 P.2d 908 (1993); Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 26-27, 935 P.2d 684 (1997); Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 315-18, 324, 14 P.3d 789 (2000), rev. denied, 143 Wn.2d 1015 (2001). In these cases, plaintiffs presented testimony establishing that they worked with or in sufficient proximity to respirable asbestos dust from an asbestos product manufactured by the particular defendant and a causal relationship between the exposure and harm.

product, it is the foreseeably altered product that caused the injury. Here, the turbine was not altered and it did not cause plaintiff's asbestos-related injury. The cases plaintiff cites in his accompanying footnote 9 establish only that a manufacturer who has a duty cannot escape liability if, despite alterations or modifications to the safety features of its own products, such are reasonably foreseeable. See, e.g., Brown v. U.S. Stove Co., 98 N.J. 155, 167, 484 A.2d 1234, 1239 (1984):

Consequently, a design defect inherent in a safety feature of a product that foreseeably leads to a substantial alteration and an increased risk of danger can be a basis for strict products liability.

The other cases cited by plaintiff are to the same effect or do not involve alterations or modifications.²²

²² See Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839 (Ala. 2002) (plaintiff's injuries caused by defendant's failure to include appropriate safety devices); Anderson v. Nissei ASB Mach. Co., 197 Ariz. 168, 3 P.3d 1088 (Ariz. App. 1999) (purge guards had been removed from bottle-making machine thereby causing plaintiff's injuries), rev. denied (2000); Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199, 694 A.2d 1319 (1997) (safety features had been removed increasing the vibration from the tools thereby heightening plaintiff's injuries); Tuttle v. Sudenga Indus., 125 Idaho 145, 868 P.2d 473 (1994) (auger covers had been shortened and flattened; plaintiff fell into consequently uncovered auger); Davis v. Pak-Mor Mfg. Co., 284 Ill. App. 3d 214, 672 N.E.2d 771 (1996) (defendants' neutral safety switch had been circumvented allowing truck to operate while running thereby causing plaintiff's injuries); Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396 (Ind. App. 1999) (sensor on lift had been adjusted such that safety feature could not prevent plaintiff's injuries); Howard v. TMW Enters., Inc., 32 F. Supp. 2d 1244 (D. Kan. 1998) (employees taped a coin over safety sensor that may otherwise have prevented plaintiff's injuries); Vanskike v. ACF Industries, Inc., 665 F.2d 188 (8th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) (applying Missouri law) (retaining rings were removed contributing to collapse of hitch and plaintiff's consequential injuries); Cacciola v. Selco Balers, Inc., 127 F. Supp. 2d 175, 187 (E.D.N.Y. 2001) (safety interlock switch had been disabled allowing access to baler's compaction chamber while in operation; plaintiff was injured when his was caught inside); Barrett v. Waco Int'l, 123 Ohio App. 3d 1, 702 N.E.2d 1216 (1997) (plywood was no longer nailed to

E. Product Manufacturers Do Not Have a Duty Under Strict Liability Principles to Warn of Dangers Inherent in Products They Do Not Make or Sell.

1. Washington limits strict products liability to entities within the chain of distribution of the injury causing product.

Plaintiff argues that GE is strictly liable under the Restatement (Second) of Torts § 402A. App. Br. At 35-55. Despite plaintiff's claims to the contrary, e.g., App. Br. at 44 n. 11, GE did not sell the injury-causing product in this case, nor is GE in the chain of distribution of any asbestos-containing products that injured plaintiff.

Under § 402A, to hold a defendant liable, a plaintiff must demonstrate that (1) the seller is engaged in the business of selling the product and (2) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Ulmer v. Ford Motor Co., 75 Wn.2d 522, 530, 452 P.2d 729 (1969) (citing

scaffolding allowing plaintiff to fall); Welch Sand & Gravel v. O & K Trojan Inc., 107 Ohio App. 3d 218, 668 N.E.2d 529 (1995) (wiring harness implemented to prevent short-circuits was altered producing the fire that caused plaintiff's injuries); Eck v. Powermatic Houdaille, 364 Pa. Super. 178, 527 A.2d 1012 (1987) (plaintiff's arm was injured after contacting saw blade for which the safety guard had been removed); Small v. Pioneer Mach., 329 S.C. 448, 494 S.E.2d 835 (S.C. App. 1997) (lumberjack injured while operating saw that had its driver's side door removed and inoperable brakes); Webb v. Rodgers Machinery Mfg. Co., 750 F.2d 368 (5th Cir. 1985) (applying Texas law) (plaintiff's injuries could have been prevented by safety features adequate to address modification). The four remaining cases cited by plaintiff do not rule on the scope of the alteration/modification inquiry. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525 (Iowa 1999) (product misuse and normal wear and tear); Bourgeois v. Garrard Chevrolet, Inc., 811 So. 2d 962 (La. App.), writ denied (2002) (no discussion of alteration/modification); Shouey v. Duck Head Apparel Co., 49 F. Supp. 2d 413 (M.D. Pa. 1999) (no discussion of alteration/modification); USX Corp. v. Salinas, 818 S.W.2d 473 (Tex. App. 1991), writ denied (1992)(defectively manufactured replacement part).

§ 402A). As originally defined under Ulmer, only product manufacturers were subject to strict liability in tort. The concept of strict liability was later expanded to include all entities in the “chain of distribution” for the injury-causing product. Seattle-First Nat’l Bank v. Tabert, 86 Wn.2d 145, 148, 542 P.2d 774 (1975) (emphasis in original):

According to the Restatement, strict liability is applicable if ‘the seller is engaged in the business of selling such a product’ even though ‘the user or consumer has not bought the product from or entered into any contractual relation with the seller.’ Restatement (Second) of Torts s 402A(1)(a) and (2)(b). Comment f states that the rule is intended to apply to any manufacturer, wholesale or retail dealer or distributor. Thus, such liability is extended to those in the chain of distribution.

In so holding, the Tabert court reasoned that manufacturers and retailers in the chain of distribution are in a position to “argue out” any questions with respect to their respective liabilities.²³ Id. at 149.

Strict liability also applies to failure to warn claims, Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 155, 570 P.2d 438 (1977); Haugen v. Minnesota Mining & Mfg. Co., 15 Wn. App. 379, 388, 550 P.2d 71 (1976), but the requirement that the defendant be a seller in the business of selling of

²³ Thus, in Zamora v. Mobil Oil Corp., 104 Wn.2d 199, 704 P.2d 584 (1985), a distributor who sold propane to a retailer was strictly liable for injuries caused by a propane explosion that occurred because the gas had been inadequately odorized, even though the distributor never physically handled, modified, altered, transported, or refined the propane, and could not be liable in negligence, because it was in the chain of distribution of a defective product. Id. at 208. Moreover, the gas was marketed exactly as the distributor sold it, and the distributor had agreed to hold the retailer harmless in the event of liability resulting from improper odorization. Id. at 207.

the injury causing product has not changed. The policy behind chain of distribution liability reflects principles underlying strict liability, including the principle “that the burden of accidental injuries caused by products . . . be placed upon those who market them.” Restatement (Second) of Torts, § 402A, Comment c.

Washington law does not recognize strict liability claims with respect to entities such as equipment manufacturers, like GE, that are outside the chain of distribution of the injury-causing product (here thermal insulation). Nor should this Court do so.

2. Under Washington law, a manufacturer’s duty to warn is limited to the dangerous aspects of its own products.

In urging strict liability, plaintiff again argues generic principles without regard to the actual injury-causing product.²⁴ Thus, he asks the court to hold that a product is unreasonably dangerous for not having a warning that another product (that the defendant manufacturer did not make or sell) is unreasonably dangerous. That is not, and should not be, the law. Under strict liability principles, a manufacturer is held liable only where it “failed sufficiently to warn of the dangers inherent in its product,”

²⁴ Although he asserts that defendants actually manufactured the products that caused him harm, *see* App. Br. at 44 n. 11, his injury is asbestos related. GE did not make, sell or supply the asbestos-containing thermal insulation to which he claims exposure.

thereby rendering the product unreasonably dangerous. Little v. PPG Indus., Inc., 92 Wn.2d 118, 124-25 & n. 4, 594 P.2d 911 (1979).

3. Plaintiff's reliance on *Bich v. General Electric Co. and Parkins v. Van Doren Sales, Inc.* is misplaced.

Relying on Bich v. General Elec. Co., 27 Wn. App. 25, 614 P.2d 1323 (1980), and Parkins v. Van Doren Sales, Inc., 45 Wn. App. 19, 724 P.2d 389 (1986), plaintiff asserts that GE had a duty to warn about the “addition” of “other components” used in conjunction with the product.²⁵ App. Br. at 39, 43-45. Plaintiff's reliance on both cases is misplaced because the injuries in each case resulted from a design defect or failure to warn of dangers inherent in the manufacturer's own product, and the manufacturer's own product caused the injury.

In Parkins, defendant Van Doren manufactured and sold conveyor system component parts to the plaintiff's employer, who then assembled the system. There was allegedly only one possible way to assemble the conveyor system and the resulting assembly created dangerous nip points. 45 Wn. App. at 22. Van Doren failed to provide guards for these nip points even though it did so when it supplied an assembled conveyor. Id. The court rejected Van Doren's argument that it could not be liable under the WPLA because it did not sell an assembled conveyor, stating:

²⁵ Plaintiff's contentions, App. Br. at 41-43, as to valve and pump manufacturers do not relate to GE.

Because Ms. Parkins was injured by machinery purchased from Van Doren, as opposed to other equipment which made up the pear processing unit, those parts constitute “relevant” products for the purposes of the act.

45 Wn. App. at 25 (emphasis added). Parkins does not establish a duty to warn on the part of a manufacturer in GE’s position. To the contrary, Parkins merely illustrates that the defendant who sells and supplies the injury-causing products is the defendant that has the duty to warn. Under plaintiff’s theory, however, the supplier of the other equipment that made up the unit would have a duty to warn of the dangers of Van Doren’s products, even though it did not sell or supply them.

Plaintiff’s reliance on Bich v. General Elec. Co. is likewise misplaced. There, General Electric manufactured a transformer using General Electric fuses. In changing a fuse, the plaintiff inserted a Westinghouse fuse into the General Electric transformer. 27 Wn. App. at 27. Although the Westinghouse and General Electric fuses appeared similar, the Westinghouse fuses had a longer time-delay curve. Due to the time-delay differences, current issued when plaintiff opened the fuse drawer, producing an explosion and fire, and injuring him. Id. at 28. He sued General Electric alleging that it should be held strictly liable for failing to adequately warn of the dangers of fuse substitution in its own product. Id. at 32. As in Parkins, Bich involved injury from a product

(the transformer) actually manufactured and sold by the defendant, unlike here where GE's turbine did not cause plaintiff's asbestos-related injury. Moreover, in imposing strict liability on General Electric, the Bich court expressly limited General Electric's duty to warn only to those dangers relating to its own fuses, and agreed that it had no duty to provide warnings concerning fuses manufactured by Westinghouse, id. at 33, even though it could arguably foresee that another manufacturer's time delay fuse could be used.

The Parkins and Bich decisions confirm that a manufacturer has a duty to warn of dangers inherent in its own product, not the dangers of products that it does not make, sell or supply. Plaintiff's theory that external insulation was a "component" part of the turbine is based on a misapprehension of the law. GE did not integrate or incorporate asbestos into its product and then sell it. Rather, GE sold and delivered its turbines to the Navy without thermal insulation, and the Navy obtained from third parties the insulation it had applied to the turbine's exterior. The thermal insulation was never a component part of the turbine GE supplied. Nor does characterizing the later-added asbestos thermal insulation as a component part change the fact that it was not a "part" that GE made, sold or supplied. GE did not owe a duty to warn of the dangers inherent in asbestos insulation the Navy bought from someone else.

Sepulveda-Esquivel v. Central Mach. Works, Inc., 120 Wn. App. 12, 84 P.3d 895 (2004), is illustrative. There, the plaintiff was injured while working when a load fell from the hook supporting it. He sought to recover damages from the seller and manufacturer of the hook. His employer added a device called a “mouse” that was intended to close hook opening when a load was being moved. The mouse failed to prevent the load from falling from the hook assembly.

The court declined to impose a duty upon the seller and manufacturer of the hook with respect to the finished hook assembly:

If we consider the entire assembly as a unit and inquire whether there was liability as a component manufacturer or supplier, the “relevant product” is the component if the component gave rise to the product liability claim. Parkins v. Van Doren Sales, Inc., 45 Wn. App. 19, 24-25, 724 P.2d 389 (1986). . . .

In this case, neither Central nor Ulven made, supplied, or sold the finished, completed hook assembly with the mouse. Neither Central nor Ulven was asked to design, forge, make, or sell an interior, locking device on its hook. Because there was no defect in the hook itself, Ulven is without fault; Central is without fault because it did not design the hook and merely provided the hook according to the purchaser’s specifications, including the lack of a closing device. Like the trial court, we see no duty in either Central or Ulven to overrule [the employer’s] determination to use such hooks in multiple ways, some with and some without latching devices.

120 Wn. App. at 18-19. Plaintiff contends that Sepulveda-Esquivel is inapposite because it is a WPLA case. App. Br. at 44 n. 11. At the same

time, plaintiff relies heavily on Parkins, also a WPLA case. 45 Wn. App. at 23. Plaintiff also argues that it was not foreseeable to the defendants in Sepulveda-Esquivel how the hook would be used. If that was a factor in the court's ruling, it was not determinative. As the court noted, the manufacturer of the hook made it without a defect, and the supplier/seller of the hook supplied it according to the purchaser's specifications, including the lack of a closing device, which the purchaser then added. 120 Wn. App. at 19. Here, because GE supplied what it was asked to provide, turbines without external insulation, its position is analogous to the position of defendants Ulven and Central in Sepulveda-Esquivel.

F. The Weight of Authority From Other Jurisdictions Limits a Manufacturer's Duty to Warn to the Dangerous Aspects of Its Own Products.

Plaintiff cites two New York cases, and contends that New York law supports his contentions. The first, Liriano v. Hobart Corp., 92 N.Y.2d 232, 677 N.Y.S.2d 764, 700 N.E.2d 303 (1998), is of no assistance to plaintiff. The second, Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, 733 N.Y.S.2d 410 (N.Y. App. Div. 1st Dep't 2001), if not wrongly decided (which GE believes it was), failed to follow controlling authority from New York's highest court, which, contrary to plaintiff's contention, does not support plaintiff's arguments.

In Liriano, the plaintiff was injured by the defendant manufacturer's meat grinder after a supermarket removed a safety feature designed to prevent such injuries. 700 N.E.2d at 305. There was no warning on the meat grinder that it was dangerous to operate it without its safety guard in place. On certification from the Second Circuit, the Liriano court answered "yes" to the question of whether "manufacturer liability [may] exist under a failure-to-warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory." Id. at 309. The Liriano court did not address any alleged duty of one manufacturer to warn of dangers of a product it did not make, sell or supply.²⁶

Plaintiff relies upon Berkowitz v. A.C. and S., Inc., but that decision is not consistent with New York or Washington law. There, the court, in rather equivocal language, stated:

Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps.

288 A.D.2d at 149. The Berkowitz court failed to fulfill its responsibility to determine whether a duty existed, and delivered the issue to the jury as a question of fact. It appears to have equated duty with the foreseeability

²⁶ Contrary to plaintiff's assertions, App. Br. at 46-47, the thermal insulation the Navy put on the exterior of GE's turbines, to which plaintiff was allegedly exposed, and which he again attempts to characterize as a modification or alteration of GE's turbines, was not "integrated" into GE's turbines. Rather, it was sold and applied by others after delivery.

of injury from use of another's dangerous product with the manufacturer's own, in disregard of the settled rule applied in New York (and in Washington) that "[f]oreseeability of injury does not determine the existence of duty." Eiseman v. New York, 70 N.Y.2d 175, 187, 518 N.Y.S.2d 608, 613, 511 N.E.2d 1128, 1134 (1987).

The Berkowitz court also appears to have ignored that, like Washington, New York limits strict liability to parties within a product's manufacturing, selling, or distributing chain. Watford v. Jack LaLanne Long Island, Inc., 151 A.D.2d 742, 744, 542 N.Y.S.2d 765 (1989) ("We have recently held that, liability may not be imposed for breach of warranty or strict products liability upon a party that is outside the manufacturing, selling or distributive chain.") Finally, it failed to follow controlling New York authority with respect to the duty to warn.

Decisions of the New York Court of Appeals (New York's highest court) and elsewhere establish that a manufacturer has no duty to warn against the dangers of products that it did not sell or make, which are used in conjunction with its products, even if such use is foreseeable. In Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 582 N.Y.S.2d 373, 377, 591 N.E.2d 222, 226 (1992), the Court of Appeals held that a manufacturer had no duty to warn about the use of its nondefective product with a defective product produced by another. In Rastelli, the

plaintiff's decedent was killed when a Goodyear truck tire, mounted on an allegedly defective multipiece tire rim manufactured by Kelsey-Hayes, separated and exploded as he inflated the tire. 591 N.E.2d at 223. The plaintiff claimed that Goodyear had a duty to warn of the dangers of using its tires in conjunction with the multipiece rims. Id. at 225. The court refused to impose upon Goodyear a duty to warn about the hazards of using its tires with defective multipiece tire rims of another company:

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

Id. at 225-26. Like Goodyear in the Rastelli case, GE here did not contribute to the alleged defect in the insulation; GE had no control over the production of the insulation; GE did not make or sell the insulation; GE had no role in placing the insulation in the stream of commerce; and GE derived no benefit from the sale of the insulation.

Numerous courts in other jurisdictions have also held that a manufacturer has no duty to warn about hazards of another manufacturer's products that might be used in connection with the manufacturer's own

product. E.g., Baughman v. General Motors Corp., 780 F.2d 1131, 1133 (4th Cir. 1986) (truck manufacturer had no duty to warn against replacement multi-piece wheel rim assembly supplied by another manufacturer because such a rule would impose an excessive burden on a manufacturer to test and warn against a myriad of products made by any number of manufacturers). The Baughman court stated:

Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present.

780 F.2d at 1132-33.²⁷

²⁷ See also Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 472 (11th Cir. 1993) (applying Alabama law and holding that a tire manufacturer had no duty to warn of dangers in exploding rim assembly manufactured by another because “[t]he manufacturer of a non-defective component tire, cannot be held liable for injuries caused by a product it did not manufacture, sell, or otherwise place in the stream of commerce.”); Acoba v. General Tire, Inc., 986 P.2d 288, 305 (Haw. 1999) (same); Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 496-97 (6th Cir. 2005) (manufacturers who supplied products without the asbestos to which plaintiff was exposed could not be held liable); Walton v. Harnischfeger, 796 S.W.2d 225, 226 (Tex. App. 1990), writ denied (1991) (crane manufacturer had no duty to warn or instruct users of its crane about nylon rigging it did not manufacture, incorporate into its crane, or place into stream of commerce); Brown v. Drake-Willock Int’l, 209 Mich. App. 136, 530 N.W.2d 510, 514-15 (1995) (makers of dialysis machine did not have duty to warn hospital employee of dangers of formaldehyde she used to clean machine even though its use was recommended by some defendants and anticipated by another); Spencer v. Ford Motor Co., 141 Mich. App. 356, 367 N.W.2d 393, 396 (1985) (undesirable results would flow from finding a car manufacturer liable just because car could accommodate dangerous or defective replacement parts); Mitchell v. Sky Climber, Inc., 396 Mass. 629, 631, 487 N.E.2d 1374, 1376 (1986) (“We have never held a manufacturer liable, however, for failure to warn of risks created solely in the use or misuse of the product of another manufacturer”); Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395, 398 (1985) (“the manufacturer’s duty is restricted to warnings based on the characteristics of the manufacturer’s own product . . . the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products”); Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 615-16 (Tex. 1996) (no duty to warn in

Plaintiff also cites Molino v. B.F. Goodrich Co., 261 N.J. Super. 85, 89, 617 A.2d 1235 (App. Div. 1992), cert. denied, 634 A.2d 528 (1993), a case presenting a scenario similar to that in Rastelli, but reaching an opposite result, and holding that the jury should have been permitted to decide whether the tire manufacturer owed a duty to consumers of the tire/rim system. 617 A.2d at 1240. In Washington, however, foreseeability is not an issue for the jury unless and until the court determines that there is a duty. Bernethy, 97 Wn.2d at 933.

Plaintiff's reliance on Chicano v. General Elec. Co., 2004 WL2250990, 2004 U.S. Dist. LEXIS 20330 (E.D. Pa. 2004), as "persuasive authority" is equally misplaced.²⁸ In Chicano, the plaintiff alleged that he was exposed to asbestos while working on defendant's turbines that were covered by insulation manufactured by a different company. As in Berkowitz and Molino, the judge in Chicano court sent the question of the existence of a duty to the jury:

negligence or strict liability of another manufacturer's products even if they may be used with manufacturer's own products); Ford Motor Co. v. Wood, 119 Md. App. 1, 703 A.2d 1315, 1332, writ denied, 709 A.2d 139 (1998) (court was "unwilling to hold that a vehicle manufacturer has a duty to warn of the dangers of a product that it did not manufacture, market, sell, or otherwise place into the stream of commerce").

²⁸ Chicano is an unpublished district court decision. Whether the Third Circuit permits its citation is not the issue. Although noting that citing out-of-jurisdiction unpublished decisions was not squarely prohibited in RAP 10.4(h), the court in Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 472-73, 45 P.3d 594 (2002), observed: "Reading RAP 10.4(g) and (h) in relation to each other, it is clear citation to unpublished opinions of this court is forbidden and citation to unpublished opinions of other jurisdictions is also inappropriate."

[T]here is at least a genuine issue of material fact as to whether GE had a duty to warn of the dangers of the asbestos-containing material that was used to insulate its turbines. [2004 U.S. Dist. LEXIS 20330, *19]

Not only is this contrary to the way in which Washington courts determine the existence of a duty, but the judge's decision in Chicano is also contrary to Pennsylvania substantive law. In finding a "question of fact" as to whether General Electric had a duty to warn about the dangers of the later-added insulation it did not sell or apply, the judge acknowledged that the "paramount" Pennsylvania case on the subject of duty to warn is Wenrick v. Schloemann-Siemag, A.G., 523 Pa. 1, 564 A.2d 1244 (1989). There, the court granted JNOV to the electrical control system designer of an extrusion press, because the defects that caused the accident (the condition and location of an unguarded switch) were the decision of another defendant. The judge's decision in Chicano cannot be reconciled with the Wenrick court's discussion of the law in Pennsylvania.

The Wenrick court stated, 564 A.2d at 1248:

Before a person may be subject to liability for failing to act in a given situation, it must be established that the person has a duty to act; if no care is due, it is meaningless to assert that a person failed to act with due care. Certain relations between parties may give rise to such a duty. Although each person may be said to have a relationship with the world at large that creates a duty to act where *his own* conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation,

even by one who has the ability to intervene, is not sufficient to create a duty to act.²⁹

The Wenrick court rejected a contention that the electrical designer had a duty to warn by virtue of its substantial participation in the installation of the press, because its task did not involve the physical placement of mechanisms on the press. Id. Rather, the decisions and actions creating the danger were those of the press manufacturer. Id. The court observed:

The appellant's expert's opinion as to duty, and the appellant's argument on this appeal, amount to no more than an assertion that knowledge of a potential danger created by the acts of others gives rise to a duty to abate the danger. We are not prepared to accept such a radical restructuring of social obligations.

Id.; see also Jacobini v. V. & O. Press Co., 527 Pa. 32, 588 A.2d 476, 478 (1991) (court refused to impose duty to warn on manufacturer of nondefective component part where the component was not dangerous, and where the danger arose from the manner in which the component was used by the assembler of the final product).

The ruling in Chicano cannot be reconciled with the results or the rationale of substantive Pennsylvania law. Nor does it comport with Washington law governing the determination of the existence of a duty or

²⁹ This observation is also consistent with the law in Washington which imposes no duty to protect another from the acts or omissions of third parties in the absence of a "special relationship," between the defendant and either the third party or the foreseeable victim of the third party's conduct. Petersen v. State, 100 Wn.2d 421, 426, 671 P.2d 230 (1983); Youngblood v. Schireman, 53 Wn. App. 95, 765 P.2d 1312 (1988).

with the policies and principles underlying chain of distribution liability. Thus, even if it were proper for plaintiff to cite the case and even if it were proper for the court to consider it, the Chicano decision is neither persuasive nor well-reasoned.

G. Public Policy Considerations Weigh Against Imposing the Duty Plaintiff Urges.

While plaintiff asserts that he seeks nothing novel, he cites no Washington authority that can be reasonably read to support his contentions. Therefore, his contentions are not supported by precedent, nor are they supported by considerations of common sense, logic, justice or public policy. See Stalter v. State, 151 Wn.2d at 155.

Public policy considerations weigh in favor of adhering to well-established law and rejecting the contention that one manufacturer has a duty to warn of dangers inherent in other manufacturers' products that it did not make, sell or supply. Adopting the duty plaintiff advocates would subject defendants to indeterminate and overwhelming liability, as a multitude of products may be used with one another. Imposing such a duty is contrary to the reasonable expectations of society and would illogically and unjustly make the manufacturer of one product the insurer of another.

The better rule is to continue imposing a duty upon manufacturers to warn about the dangers inherent in their own products, but not to warn about dangers inherent in products they do not make or sell. The wisdom of this rule is apparent here. A long-term capital good like a steam turbine has a potential useful life of 50-plus years. Insulation technology changes over time. Warnings that may be appropriate for a certain type of insulation at a certain time may be improper or ineffective for a different kind of insulation (and plaintiff here testified that three different kinds of insulation were on the outside of the turbines), or may create the risk of confusion if a turbine manufacturer's warnings or recommendations were inconsistent with those given by the insulation supplier or by the Navy (which has a paramount interest in completely controlling the manner in which its personnel are instructed for the optimum performance of its warships).

It would be unjust to hold a manufacturer responsible for warning of the dangers inherent in products that it did not make, sell or install, and that were not part of its product when it was sold. The duty to warn is and should be the responsibility of the manufacturers of the products that actually cause the harm, not only because they are in the best position to discover and warn of any dangers inherent in their products, but also

because those manufacturers are the ones placing such products into the stream of commerce and reaping the economic benefits thereof.

There are competing policies of providing a remedy to an injured plaintiff, while protecting against unlimited insurer-like liability and ensuring that liability is imposed only upon the appropriate persons. As Washington recognizes, a fair balance is struck between those competing interests in product cases by imposing strict liability on those in the chain of distribution of the injury-causing product, *i.e.*, upon those who make and market the injury-causing product. See Restatement (Second of Torts) § 402A, comment c.:

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 persons to afford it are those who market the products.

The injury-causing product in this case is asbestos. Whether under strict liability or negligence principles, the proper entities to provide

warnings of the dangers inherent in the asbestos-containing thermal insulation to which plaintiff was exposed are the manufacturers and sellers of such products. GE played no role in the manufacture, sale, or installation of, and received no financial benefit from the sale of, the thermal insulation that the Navy applied to GE turbines after delivery. GE's turbines did not cause plaintiff's asbestos-related injury, and there is no legitimate basis for imposing upon it the duty plaintiff urges.

V. CONCLUSION

For the foregoing reasons, the trial court's order granting GE's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of February, 2006.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of February, 2006, I caused a true and correct copy of the foregoing document, "Brief of Respondent General Electric Company," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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