

80251-3

No. 57011-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Plaintiff-Appellant

v.

BUFFALO PUMPS, INC., et al.,

Defendants-Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Sharon S. Armstrong)

RESPONDENT BUFFALO PUMPS,
INC.'S PETITION FOR REVIEW

Michael B. King
WSBA No. 14405
TALMADGE LAW GROUP PLLC
Attorneys for Respondent
Buffalo Pumps, Inc.

Barry N. Mesher
WSBA No. 07845
Brian D. Zeringer
WSBA No. 15566
Andrew G. Yates
WSBA No. 34239
LANE POWELL PC
Attorneys for Respondent
Buffalo Pumps, Inc.

Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188
Telephone: (206) 574-6661
Facsimile: (206) 575-1397

Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

FILED
JUN 20 2007
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

2007 APR 30 PM 1:26

RECEIVED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
A. Identity of Petitioner.....	1
B. Court of Appeals Decision	1
C. Statement of Issue Presented for Review	1
D. Nature of the Case and Decision Below	2
1. The Parties.....	2
a. Petitioner Buffalo Pumps	2
b. Respondent Vernon Braaten.....	2
2. The Absence of Evidence That Braaten Worked With or Around Original, Asbestos- Containing Packing or Gaskets on Equipment Manufactured by Buffalo Pumps.....	3
3. The Trial Court Granted Buffalo Pumps' Summary Judgment Motion.....	4
4. In Reversing the Trial Court, the Court of Appeals Expressly Acknowledged That This Case Presents "an Issue of First Impression in Washington"	6
E. Argument Why Review Should Be Accepted	7
1. Whether a Product Manufacturer Should Have a Duty to Warn of Dangers Posed by Products It Did Not Manufacture, but That May Be Used in Conjunction With Its Products, Is an Issue of First Impression in Washington	7

2.	The Court of Appeals Created a More Expansive Scope of a Manufacturer's Liability for Its Products Than That Contemplated by Washington's Product Liability Act	9
3.	Whether the Court of Appeals' Expanded Duty to Warn Should Remain Part of Washington's Common Law, and the Circumstances in Which It Will Apply, Are Issues of Substantial Public Importance	12
4.	Review by the Washington Supreme Court Is Also Necessary to Determine if the Court of Appeals' Novel Method of Imposing a New Postproduction Duty Was Appropriate.....	16
5.	The Court of Appeals' Decision Presumed to Resolve an Issue of First Impression, Even While the Court Gave Preclusive Effect to a Determination That an Identically Situated Defendant Had No Duty to Warn, Which Constitutes an Independent Basis for Review	17
F.	Conclusion	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Bich v. General Electric Co.</u> , 27 Wn. App. 25, 614 P.2d 1323 (1980).....	8
<u>Cena v. Department of Labor & Industries</u> , 121 Wn. App. 915, 91 P.3d 903 (2004).....	19
<u>Hanson v. City of Snohomish</u> , 121 Wn.2d 552, 852 P.2d 295 (1993).....	18
<u>Hutchins v. 1001 Fourth Avenue Associates</u> , 116 Wn.2d 217, 802 P.2d 1360 (1991).....	16
<u>Koker v. Armstrong Cork, Inc.</u> , 60 Wn. App. 466, 804 P.2d 659 (1991).....	9, 13
<u>Lockwood v. AC&S, Inc.</u> , 109 Wn.2d 235, 744 P.2d 605 (1987).....	12, 14
<u>Lunsford v. Saberhagen Holdings, Inc.</u> , 125 Wn. App. 784, 106 P.3d 808 (2005).....	7, 8
<u>Parkins v. Van Doren Sales, Inc.</u> , 45 Wn. App. 19, 724 P.2d 389 (1986).....	8, 9
<u>Schooley v. Pinch's Deli Market, Inc.</u> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	16, 17
<u>Seattle-First National Bank v. Tabert</u> , 86 Wn.2d 145, 542 P.2d 774 (1975).....	13
<u>Shepard v. Mielke</u> , 75 Wn. App. 201, 877 P.2d 220 (1994).....	16
<u>Simonetta v. Viad Corp.</u> , 151 P.3d 1019 (2007).....	15

<u>Snyder v. Medical Service Corp. of Eastern Washington</u> , 145 Wn.2d 233, 35 P.3d 1158 (2001)	16
--	----

<u>Teagle v. Fischer & Porter Co.</u> , 89 Wn.2d 149, 570 P.2d 438 (1977).....	14
---	----

STATUTES AND COURT RULES

RCW ch. 7.72 (Washington Product Liability Act)	9, 10, 15
---	-----------

RCW 7.72.030(1)(c)	10
--------------------------	----

RAP 13.4(b)(4)	2
----------------------	---

CR 30(b)(6)	2
-------------------	---

MISCELLANEOUS

Philip A. Talmadge, <u>Product Liability Act of 1981: Ten Years Later</u> , 27 Gonz. L. Rev. 153 (1991)	9
--	---

Restatement (Second) of Torts § 402A.....	9, 12, 13
---	-----------

A. Identity of Petitioner.

Respondent Buffalo Pumps, Inc. ("Buffalo Pumps") petitions for the relief set forth below.

B. Court of Appeals Decision.

Buffalo Pumps petitions for review of the published decision terminating review entered January 29, 2007 ("the Decision"), by Division I of the Court of Appeals. A copy of the Decision is attached as Exhibit A of the Appendix to this Petition.¹ The Court of Appeals denied Buffalo Pumps' timely Motion for Reconsideration, by an order entered on March 30, 2007.

C. Statement of Issue Presented for Review.

This case involves a manufacturer's duty to warn of dangers posed by products placed by others within or around the manufacturer's product, after the manufacturer has completed the product and delivered it to the user. The Decision raises the following issue warranting Supreme Court review:

Whether, under strict liability or negligence principles, a manufacturer of one product has a duty to warn of dangers associated with another product which it did not manufacture and did not cause to be used on or around its products.

¹The Decision currently is available only at 151 P.3d 1010; the official Washington Reporter pagination has not yet been issued. This Petition therefore will cite to the Decision in the form in which it was originally issued on January 29, 2007.

This issue warrants review under RAP 13.4(b)(4), because it presents a matter of substantial public interest.

D. Nature of the Case and Decision Below.

1. The Parties.

a. Petitioner Buffalo Pumps. Buffalo Pumps manufactures centrifugal pumps. (CP 4690-91.) Pumps supplied for the Navy vessels on which plaintiff claims asbestos exposure were built in strict accordance with military specifications, and were delivered to the customer without external insulation. (CP 4732, 4735) (Excerpts of Deposition of Buffalo Pumps' CR 30(b)(6) designee, Terrence W. Kenny, at 87, ll. 7-9 and 93, ll. 22-25); (CP 783) (Deposition of Malcolm MacKinnon, 22, ll. 11-15). If those specifications required gaskets or packing materials, Buffalo Pumps supplied those materials in accordance with the specifications. (CP 4733) (Kenny Dep. at 83, ll. 15-17). Buffalo Pumps did not manufacture gaskets, packing, or any other asbestos-containing products or components. (CP 4729) (*id.* at 82, ll. 6-8). Nor is there any evidence that Buffalo Pumps supplied replacement gaskets or packing to any work site at issue.

b. Respondent Vernon Braaten. Vernon Braaten worked as a pipefitter at the Puget Sound Naval Shipyard ("PSNS"), from November 1967 to June 3, 2002. Braaten alleges he was exposed to

asbestos-containing products in connection with his work as a pipefitter, and that he contracted mesothelioma as a consequence of this and other asbestos exposure. See (CP 333, 517 & 527-28).

2. The Absence of Evidence That Braaten Worked With or Around Original, Asbestos-Containing Packing or Gaskets on Equipment Manufactured by Buffalo Pumps. Braaten seeks to impose liability on Buffalo Pumps, based on his alleged work around pumps made by Buffalo Pumps. See generally (CP 359-60) (Plaintiff's Original Petition and Jury Demand at 6-7, Count Four, in Braaten v. Buffalo Pumps, Dallas County (Texas) No. 0308127); (CP 503-04) (Plaintiff's First Amended Complaint at 2-3, § III). Among the products to which Braaten alleges exposure, and for which he seeks to impose liability on Buffalo Pumps, were external gaskets and insulating materials not manufactured or supplied by Buffalo Pumps, but selected, procured and installed by the Navy. See (CP 1247, 1257) (Plaintiff's Response in Opposition to Buffalo Pumps' Motion for Summary Judgment); (CP 774-79) (Plans).

Braaten testified he repacked, removed and replaced pumps made by Buffalo Pumps and other manufacturers aboard Navy vessels during his work as a pipefitter at PSNS. See (CP 537-39) (09/05/03 Braaten Dep. at 234, l. 16-243, l. 15). Braaten could not establish that he worked with any original, asbestos-containing gaskets or packing on any Buffalo

Pumps equipment. See (CP 537) (09/05/03 Braaten Dep. at 237, ll. 21-23); (CP 539) (09/05/03 Braaten Dep. at 246, l. 24-247, l. 1). He admitted he never installed a brand new pump on a ship. (CP 539) (09/05/03 Braaten Dep. at 246, l. 24-247, l. 1). In fact, Braaten testified he never even saw a new pump being installed on a vessel. (CP 537) (09/05/03 Braaten Dep. at 237, ll. 21-23). As to all pumps with which he worked at PSNS, Braaten testified that his work involved only changing the packing on a pump or removing the entire pump from the ship. (CP 539) (09/05/03 Braaten Dep. at 248, ll. 5-8). Braaten acknowledged it was impossible to know how many times the materials had been replaced prior to the occasion when he did so. (CP 537) (09/05/03 Braaten Dep. at 235, l. 25, 236, ll. 1-23).

Braaten recalled changing gaskets used by the shipyard to join pumps and other equipment to the piping systems of the ships; those gaskets were external to, and were not supplied with, the pumps. See CP 538-39 (09/05/03 Braaten Dep. at 245, ll. 21-25, 246, ll. 1-8). He admitted he never removed gaskets internal to the pumps. (CP 538-39) (09/05/03 Braaten Dep. at 245, ll. 21-25, 246, ll. 1-8).

3. The Trial Court Granted Buffalo Pumps' Summary Judgment Motion. Buffalo Pumps moved for summary judgment based on lack of evidence regarding exposure to original, asbestos-containing

gaskets or packing. (CP 487-90) (Buffalo Pumps' Motion for Summary Judgment at 7-10, § B). As to Braaten's duty to warn theory of recovery, Buffalo Pumps argued it owed no duty to Braaten to warn him of the dangers of asbestos-containing products manufactured, sold, or distributed by other companies. (CP 481-98) (Buffalo Pumps' Motion for Summary Judgment). Braaten opposed by focusing on foreseeability, arguing that Buffalo Pumps should have foreseen that the Navy might install asbestos-containing products (gaskets, insulation), and that Buffalo Pumps should have warned of the dangers associated with asbestos, based on evidence purporting to show that Buffalo Pumps was aware of those dangers. See (CP 1246-65) (Braaten's Opposition to Buffalo Pumps' Summary Judgment Motion).

The trial court granted Buffalo Pumps' motion for summary judgment. (CP 5562-64) (September 6, 2005 Order Granting Defendant Buffalo Pumps' Motion for Summary Judgment). In its order, the trial court concluded there is no evidence that plaintiff was exposed to any asbestos-containing product manufactured, sold, or delivered by Buffalo Pumps, and that Buffalo Pumps owed no duty to plaintiff to warn of the dangers of products it did not manufacture or otherwise place into the stream of commerce. Id. at 2. Based on those conclusions, the trial court dismissed all of plaintiff's claims against Buffalo Pumps. Id.

4. In Reversing the Trial Court, the Court of Appeals Expressly Acknowledged That This Case Presents "an Issue of First Impression in Washington." Braaten appealed the trial court's dismissal of his claims, arguing that under both strict liability and negligence principles, Buffalo Pumps had a duty to warn of dangers posed by the asbestos that others applied on or around Buffalo Pumps' pumps after the pumps left its control. Br. of Appellant at 22-54.

The Court of Appeals reversed, finding a manufacturer has a duty to warn regarding the hazards of asbestos-containing products used in association with their products. The Court of Appeals did not, however, apply that duty to every defendant in Braaten. Before bringing suit in Washington, Braaten had sued several of the same manufacturers in Texas. After one of the defendants, Goulds Pumps, obtained summary judgment dismissal of Braaten's duty to warn claim, Braaten took a nonsuit against the remaining defendants, including Buffalo Pumps, and filed anew in King County Superior Court. General Electric, one of the defendants in the King County action, argued on appeal that the Texas court's order dismissing Goulds on summary judgment collaterally estopped Braaten from pursuing another subsequent duty to warn claim. The Court of Appeals agreed, holding:

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. It is immaterial that GE is a different defendant.

Decision at 5.

Braaten has asserted the same duty to warn claim against Buffalo Pumps that he asserted against Goulds and GE. Buffalo Pumps moved for reconsideration, arguing that collateral estoppel also should bar Braaten's claim against it. The Court of Appeals denied reconsideration.

E. Argument Why Review Should Be Accepted.

1. Whether a Product Manufacturer Should Have a Duty to Warn of Dangers Posed by Products It Did Not Manufacture, but That May Be Used in Conjunction With Its Products, Is an Issue of First Impression in Washington. The Court of Appeals recognized that Braaten's claim, that "pumps were defective because there were no warnings about how to safely avoid asbestos exposure during their maintenance," presented an "issue of first impression in Washington." Decision at 7. Although the Court of Appeals referred to several Washington precedents, in fact no Washington appellate court had passed on the issue prior to the Decision of the Court of Appeals in this case:

- In Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 106 P.3d 808 (2005), the existence of a duty was not at issue. Rather, the issue was the scope of an established duty "whether a bystander or a

person in Lunsford's position is a user for the purposes of section 402A[,]" and that issue was resolved on the premise that a duty was owed to users by the manufacturer of the product that had caused injury to the bystander plaintiff. See Lunsford, 125 Wn. App. at 786 & 789-90.

- In Bich v. General Electric Co., 27 Wn. App. 25, 28, 614 P.2d 1323 (1980), the plaintiff replaced a fuse in a General Electric ("GE") transformer with a fuse manufactured by Westinghouse. The transformer exploded, injuring plaintiff. Bich, 27 Wn. App. at 28. The plaintiff asserted claims based on a defective product theory (the transformer was defective) and on failure to warn of fuse substitution in the transformer. Regarding the failure to warn claim, the court found there was a question of fact whether "the transformer was unreasonably dangerous," because GE did not issue a warning not to substitute fuses. Id. at 33. The injury in Bich was the result of the combination of a GE transformer and a Westinghouse fuse, which caused the transformer to fail and injure the plaintiff. Here, the conjunction of an asbestos-containing product with a steel valve did not cause the valve to fail and thereby injure Braaten, nor has Braaten ever claimed to have been injured in such a fashion.

- In Parkins v. Van Doren Sales, Inc., 45 Wn. App. 19, 724 P.2d 389 (1986), plaintiff was injured by a nip point on a conveyor system and sued Van Doren Sales, Inc. Van Doren designed and manufactured

conveyor systems component parts. Id. at 22. Van Doren argued it had no knowledge about how its parts would be used, e.g., as replacement parts or as new assembly, but the Court of Appeals stated that Van Doren "design[ed] and manufacture[d] the component parts used and installed without substantial modification in assembling the conveyor[,]" and it was "the design, and subsequent injury because of that design, which form the basis of Ms. Parkins' claim." Id. at 25. Parkins involves an injury actually caused by the defendant's product. Here, the pumps that Buffalo Pumps manufactured were not the mechanism of injury; it was the asbestos products that others manufactured and the Navy placed on and around the pumps.

2. The Court of Appeals Created a More Expansive Scope of a Manufacturer's Liability for Its Products Than That Contemplated by Washington's Product Liability Act. Because Braaten's employment as a pipefitter exposed him to asbestos before 1981, the Restatement (Second) of Torts § 402A, as construed and applied by Washington appellate courts, rather than the Washington Product Liability Act ("WPLA"), controls resolution of Braaten's claims. See Koker v. Armstrong, 60 Wn. App. 466, 472, 804 P.2d 908 (1993). Under the WPLA, a product manufacturer's duty to warn extends to problems encountered with the product after manufacture. See Philip A. Talmadge, Product Liability Act

of 1981: Ten Years Later, 27 Gonz. L. Rev. 153, 160-61 (1991). The postproduction duty the Act imposes on product manufacturers is set forth in RCW 7.72.030(1)(c), and requires a manufacturer to take reasonable steps to warn users about a danger connected with its product after the product was manufactured.

The duty established by the Decision of the Court of Appeals is more expansive. It requires a manufacturer to warn not only of dangers connected with its own product, but also of dangers associated with a product manufactured by someone else, and applied to or incorporated within the manufacturer's product, even though the only danger is entirely attributable to the other manufacturer's product. Under the duty imposed by the Court of Appeals, the maker of orange juice would be required to warn against the hazards of alcohol consumption, knowing orange juice will be used as a mixer in a variety of alcoholic drinks. Similarly, a toy manufacturer would be required to place a warning on battery-operated toys, about the dangers of mercury or other hazardous materials found in some alkaline batteries. The possibilities are virtually endless; yet, these are precisely the implications of the Court of Appeals' new postproduction duty to warn.

Review by the Washington Supreme Court is appropriate and necessary to address the propriety of this wholesale expansion of the

postproduction duty to warn. The state's highest court should examine whether the policy considerations identified by the Court of Appeals actually outweigh the policy considerations in favor of affirming the trial court's grant of summary judgment, which was based on more traditional and generally accepted principles of tort liability. Adhering to these traditional principles would place responsibility for harm caused by asbestos-containing products where it belongs and where it traditionally has rested -- with the parties who participated in the manufacture and design of those products and with the employer who selected, purchased, specified and installed the products. Under the Court of Appeals' new duty, manufacturers of a product are now responsible for dangerous characteristics of other products that are not part of their industries, and outside their fields of technical expertise. The Court of Appeals' approach thus imposes a responsibility on the part of manufacturers for policing the conduct of third parties beyond their control, and simultaneously risks diluting the responsibilities under the law of those third parties, and reducing their incentive to manufacture and distribute safe products and to provide safe workplaces.

Moreover, reversing the Court of Appeals' extension of the duty to warn avoids the legal and business disruption that may very likely ensue under the Court of Appeals' approach. Every equipment manufacturer

would be obligated to anticipate the potential dangers posed by a myriad of other products that might be used in conjunction with or around its product, and vice versa. The proliferation of warnings that would necessarily accompany each product would be confusing, and would render warnings virtually meaningless, if not unintelligible. The policy underlying Section 402A is to free a plaintiff from the burden of establishing fault on the part of the manufacturer or seller of a product that is defective at the time the product leaves that manufacturer's possession or control. That policy would not be furthered, but instead unreasonably stretched beyond recognition, by imposing strict liability on a manufacturer or seller of a product that is not defective when it leaves the manufacturer's control -- particularly where, as here, the product is sold to a sophisticated user who creates a hazard affixing a product, that by itself is dangerous, to the original manufacturer's product.

3. Whether the Court of Appeals' Expanded Duty to Warn Should Remain Part of Washington's Common Law, and the Circumstances in Which It Will Apply, Are Issues of Substantial Public Importance. In keeping with traditional product liability principles, Washington law requires plaintiffs exposed to asbestos to identify the products that harmed them. Lockwood v. AC&S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987). A logical corollary to this requirement is that a

manufacturer must make a product that causes harm to be liable. Indeed, this had been the law in Washington under both strict liability and negligence theories until the Court of Appeals' decision. See, e.g., Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 148, 542 P.2d 774 (1975) (recognizing that under the strict liability of Restatement (Second) of Torts § 402A, "liability is extended to those in the chain of distribution"); Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 804 P.2d 659 (1991) (holding manufacturers of asbestos-containing products liable under a negligent failure to warn theory). Pumps are the only product that Buffalo Pumps manufactured, and Braaten was not harmed by them. He was harmed by asbestos that others manufactured and placed within or around pumps made by Buffalo Pumps. The Washington Supreme Court should decide whether the Court of Appeals' new and expanded postproduction duty to warn is an appropriate extension of the state's common law with respect to products liability.

The duty to warn created by the Court of Appeals requires a manufacturer of specific products to warn of a generic hazard of working aboard naval vessels. The asbestos insulation, packing and gaskets Braaten encountered were ubiquitous features of the equipment he maintained. See (CP 292-96) (09/05/03 Braaten Dep. at 17, ll. 17-22; 38, ll. 11-25; 39, ll. 1-2, 14-25; 40, ll. 8-10; 41, ll. 21-25; 42, ll. 20-21; 43, ll. 10-25; 55,

ll. 4-25, 56, ll. 1-10). While working aboard vessels, Braaten encountered asbestos-containing products within and around pumps, evaporators, purifiers, condensers and turbines. See (CP 292-96) (09/05/03 Braaten Dep. at 38, ll. 12-25; 39, ll. 1-2; 22-25; 40, ll. 8-10; 41, ll. 21-25; 42, ll. 20-21; 43, ll. 10-25; 55, ll. 4-25, 56, ll. 1-10). The duty to warn of the dangers of asbestos exposure that the court imposed on Buffalo Pumps was in no way unique to the pumps it manufactured. This represents a significant departure from existing Washington case law, including the decisions on which the Court of Appeals relied, and underscores the need for Supreme Court review. See, e.g., Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977) (flowrater manufacturer had duty to warn of dangers posed by unique combination of Viton rings used to seal product and chemical being measured), cited in Decision at 8-9.

Because of considerations unique to asbestos cases, such as the long latency period for mesothelioma and other asbestos-related diseases, exposure at multiple job sites and exposure to multiple products, an asbestos plaintiff can make this identification through the testimony of witnesses who identify manufacturers of asbestos products that were then present at his workplace. Lockwood, 109 Wn.2d at 246. These considerations are important because the harm-causing products and the acts and omissions of their manufacturers typically occurred between

50 and 60 years ago. The passage of several decades is certainly an important consideration for a court deciding how a plaintiff may identify the companies whose asbestos he was exposed to. But this consideration is equally important when a court makes the more fundamental determinations of whether a duty exists and, if it does, the scope of the duty and when it applies.

The Court of Appeals did not decide whether its expanded postproduction duty to warn would apply retrospectively or prospectively, or whether it would be limited to cases where the plaintiff was exposed to the harm-causing product prior to 1981, the year the Legislature enacted the WPLA. The Court of Appeals did, however, acknowledge that the existence of its new duty could not be separated from the issues concerning its application. In Simonetta v. Viad Corp., 151 P.3d 1019 (2007), the case linked to Braaten, the court stated in a footnote that, "[t]he parties have not asked us to address whether any temporal limitations may apply to a retroactive application of the duty to warn." Simonetta, 151 P.3d at 1027, n.3. This acknowledgment underscores the significance of creating this new duty where the conduct at issue typically occurred between 50 and 60 years ago. Moreover, the paradox of a common law rule imposing broader liability for conduct preceding the adoption of the WPLA in 1981 constitutes an additional reason for Supreme Court review.

4. Review by the Washington Supreme Court Is Also Necessary to Determine if the Court of Appeals' Novel Method of Imposing a New Postproduction Duty Was Appropriate. The Court of Appeals employed a unique analysis to analyze the question of whether Buffalo Pumps had a duty to warn. "The existence of duty is a question of law," Hutchins v. 1001 Fourth Ave. Associates, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Appropriately, whether or not a duty exists as a matter of law has been identified by the Washington Supreme Court as one of the important judicial limitations on "actions predicated on products liability or medical malpractice." Snyder v. Medical Service Corp. of Eastern Washington, 145 Wn.2d 233, 245, 35 P.3d 1158 (2001) (internal quotation omitted).

The Court of Appeals, however, shifted the focus of its analysis to foreseeability, a concept better used to determine the scope or reach of an established duty, but which should not be the basis for establishing the existence of a duty. Only after a duty is established should a jury be called on to determine the reach of that duty or whether the defendant performed (or otherwise breached) its duty. See, e.g., Shepard v. Mielke, 75 Wn. App. 201, 205, 877 P.2d 220 (1994). As the Washington Supreme Court explained in Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998), courts do not reach the issue of foreseeability unless a duty has first been found owing to the plaintiff:

The Court of Appeals erroneously states that the protected class is defined by foreseeability. Noting that the question of foreseeability is a question of fact for the jury, the court left the issue of whether Schooley falls within the protected class to the jury. The problem with this analysis is that the question of whether a particular individual is part of a statute's protected class is a question of law for the court, not the jury. Thus, the court must first determine those persons protected by the statute. Only after the court defines the protected class will the jury then determine whether the injury to the plaintiff was foreseeable.

Schooley, 134 Wn.2d at 475, n.3.

In short, whether a duty exists is a threshold determination that must be made by the court, not by a jury. By blending the existence of a duty, a question of law, with a factual issue, foreseeability, the Court of Appeals created a new and novel method of analysis whose propriety the Washington Supreme Court should consider. The state's highest court should determine whether the answer to the legal question of the existence of a duty can be driven almost exclusively by the factual question of foreseeability.

5. The Court of Appeals' Decision Presumed to Resolve an Issue of First Impression, Even While the Court Gave Preclusive Effect to a Determination That an Identically Situated Defendant Had No Duty to Warn, Which Constitutes an Independent Basis for Review. The doctrine of collateral estoppel precludes relitigation of issues if (1) the issue decided in the prior adjudication is identical to the one presented in the second; (2) the prior adjudication ended in a final judgment on the merits; (3) the party

against whom the claim is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine does not work an injustice. Hanson v. City of Snohomish, 121 Wn.2d 552, 562, 852 P.2d 295 (1993). The purpose of the doctrine is to promote the ending of dispute and conserve judicial resources. Hanson, 121 Wn.2d at 562.

As the Court of Appeals acknowledged, it was immaterial that GE was a different defendant than Goulds Pumps. Decision at 5. It is likewise immaterial that Buffalo Pumps is a different defendant than GE. Although Buffalo Pumps did not argue collateral estoppel before its motion for reconsideration, the general rule that an issue or theory not presented below will not be considered as a basis for relief on appeal, that rule "is not inexorable and has its limitations." Hanson, 121 Wn.2d at 557 (quoting Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)). If the Texas decision did have preclusive effect against GE, it had equally preclusive effect against Buffalo Pumps. If Braaten was collaterally estopped from asserting a duty against GE, he was also collaterally estopped from asserting the existence of a duty against any of the other defendants.

Moreover, the Court of Appeals has resolved an important question of products liability law, in a case in which a narrower alternative ground argued for avoiding the issue altogether. The Court of Appeals generally

"avoids deciding issues unnecessary to the resolution of a case, and also avoids rendering advisory opinions where there is no real justiciable controversy." E.g., Cena v. Department of Labor & Industries, 121 Wn. App. 915, 924, 91 P.3d 903 (2004). Review by the Washington Supreme Court is necessary to determine if the Court of Appeals should collaterally estop a plaintiff from asserting existence of the same duty against one defendant but not other identically situated defendants, and therefore whether this case was an appropriate vehicle for announcing a new duty to warn.

F. Conclusion.

Respondent Buffalo Pumps respectfully requests that the Washington Supreme Court accept review of the Decision, for the reasons stated in this Petition for Review.

RESPECTFULLY SUBMITTED this 30th day of April, 2007.

TALMADGE LAW GROUP PLLC LANE POWELL PC

By Michael B. King
Michael B. King
WSBA No. 14405
Attorneys for Respondent
Buffalo Pumps, Inc.

By Brian D. Zeringer
Barry N. Mesher
WSBA No. 07845
Brian D. Zeringer
WSBA No. 15566
Andrew G. Yates
WSBA No. 34239
Attorneys for Respondent
Buffalo Pumps, Inc.

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

VERNON BRAATEN,)
)
 Appellant,)
)
 vs.)
)
 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-)
 interest to BESTWALL GYPSUM)
 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.)

DIVISION ONE

No. 57011-1-I
(Linked with
No. 56614-8-I)

PUBLISHED OPINION

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.

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

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 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.

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

² Goulds is not a party to this appeal.

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

⁴ CR 56(c).

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

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.

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).

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).

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 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

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).

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.

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 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

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).

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.

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

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

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.

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.

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 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

³⁴ Teagle, 89 Wn.2d at 151-52.

³⁵ Teagle, 89 Wn.2d at 156-57.

³⁶ Teagle, 89 Wn.2d at 155.

³⁷ 608 F.2d 571 (5th Cir. 1979).

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 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

³⁸ Stapleton, 608 F.2d at 572.

³⁹ Stapleton, 608 F.2d at 572.

⁴⁰ Stapleton, 608 F.2d at 572.

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.

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 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

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.").

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

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 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

⁴⁵ Lunsford, 125 Wn. App. at 792-93 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. c. (1965)).

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

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 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.

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).

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).

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 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.

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

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)).

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 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.

Baker, J.

WE CONCUR:

Appelwick, J.

Colman, J.