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No. 57011-1-I

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

VERNON BRAATEN,

Plaintiff-Appellant,

v.

BUFFALO PUMPS, INC., *et al.*,

Defendants-Respondents.

RESPONDENT YARWAY CORPORATION'S BRIEF

ORIGINAL

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I. STATEMENT OF ISSUES

1. Plaintiff Vernon Braaten failed to establish that he was exposed to any asbestos-containing material manufactured, sold or distributed by respondent Yarway Corporation. Did the trial court err in ruling that summary judgment must be entered in favor of Yarway on Braaten's claims for negligence and strict products liability? (Braaten's Assignment of Error No. 4).

2. Washington negligence law does not require a product manufacturer to warn about asbestos-containing products that it did not manufacture and which may have been applied by the end user on or around its product. Did the trial court err in ruling that Yarway had no duty to warn Braaten of potential dangers associated with the use of asbestos-containing products manufactured sold, distributed, supplied, or installed by another, including, without limitation, insulation, gaskets and packing that may have been applied by the end user in, on or around valves or sight glasses allegedly manufactured, sold and/or distributed by Yarway? (Braaten's Assignment of Error No. 4).

3. Washington's strict products liability law does not require a product manufacturer to warn about asbestos-containing products that it did not manufacture and which may have been applied by the end user on or around its product. Did the trial court err in ruling that Yarway had no

duty to warn Braaten of potential dangers associated with the use of asbestos-containing products manufactured sold, distributed, supplied, or installed by another, including, without limitation, insulation, gaskets and packing that may have been applied by the end user in, on or around valves or sight glasses allegedly manufactured, sold and/or distributed by Yarway? (Braaten's Assignment of Error No. 4).

II. STATEMENT OF THE CASE

The plaintiff-appellant in this lawsuit, Vernon Braaten, sued several defendants, including Yarway, seeking damages for injuries he attributed to his alleged exposure to asbestos. CP 3. Braaten asserted liability under various theories, including negligence, warranty, conspiracy, spoliation, willful or wanton misconduct, enterprise liability, market share liability, products liability under RCW 7.72. *et seq.*, and under Section 402B of the Restatement (Second) of Torts. CP 5. Braaten alleged that he was exposed to asbestos-containing products manufactured, sold or distributed by the defendants, including Yarway, or that he was exposed to asbestos through the use of products manufactured by defendants, including Yarway. This latter contention arose from Braaten's claim that liability may be imposed under negligence or strict liability theories for the failure to warn of the dangerous propensities of asbestos-

containing products applied to equipment (such as valves) manufactured by Yarway.

Braaten's specific claims as to Yarway relate to his work as a pipefitter at the Puget Sound Naval Shipyard from November, 1967 to June, 2002. *Plaintiff's Responses to Style Interrogatories*, Appendix A, CP 5599. Braaten's discovery responses indicate that plaintiff alleges exposure to asbestos as a consequence of his alleged work with valves manufactured and sold by Yarway Corporation and installed aboard U.S. Navy vessels. *Id.* Braaten alleged that he contracted mesothelioma as a consequence of that and other asbestos exposure.

This lawsuit is the third asbestos related action Braaten has filed against Yarway and other defendants seeking damages for mesothelioma. The prior two lawsuits were filed in Texas – one in Brazoria County and a separate lawsuit in Dallas County. Just weeks before trial, Braaten dismissed the lawsuits and thereafter filed this action in Washington. Two depositions were taken of Braaten in the Texas cases. CP 5610, 5615. His deposition in the present suit, limited in scope by protective order of the trial court, was taken on August 1, 2005. CP 5601.

Braaten's deposition testimony in both the Texas and Washington cases showed that his claims against Yarway were based on his work with and around both valves and sight glasses allegedly made by Yarway.

Q. You testified previously regarding valves that you worked on With Yarway and you also mentioned that you worked on Yarway sight glasses?

A. Yes.

Excerpts of Braaten Deposition taken August 1, 2005, pp. 117:8-11,

CP 5602.

Q. Other than valves and site gaskets [sic], are there any other products that you associate with Yarway?

A. None that I can recollect.

Id., pp. 120:13-15, CP 5605.

Q. In your previous depositions, you testified that you had worked on Yarway valves, and the ones that you specifically mentioned were angle valves, sto[p]-check valves and throttle valves; is that correct?

A. Yes.

Id., at , pp. 120:16-20. Braaten admitted that Yarway was not the only known manufacturer of the valves and sight glasses that he worked with.

Q. Did you work on sight glasses just made by Yarway or were there other manufacturers of sight glasses?

A. I can't recall.

Q. So you don't know whether or not Yarway is the only manufacturer –

A. That's correct.

Q. Of this?

A. [No audible response]

Q. And what type of work did you do on sight glasses?

A. Mainly changed the gaskets in 'em.

Id., pp. 117:20-118:6, CP 5602-03.

Q. And going back to your prior deposition, you indicated that you had worked with Yarway valves and Crane valves. Is that correct sir?

A. That's correct.

Excerpts of Braaten Deposition taken November 22, 2003, p. 22:9-12, CP 5611. Review of Braaten's testimony clarifies that it is not the Yarway valves or sight glasses that he alleged contained asbestos, but rather the gaskets and/or packing material associated with the repair or installation of the valves and sight glasses. Importantly, Braaten admitted that the gaskets and packing material were all manufactured by entities other than Yarway.

Q. And so what type of gasket is there on a sight glass?
Can you describe the gasket?

A. They were asbestos gaskets.

Q. And how do you know that? What is your basis?

A. We made them out of asbestos sheets, mainly.

Q. That was really my question. So you cut them actually out of a sheet of asbestos?

A. Yes.

Q. Do you recall who the manufacturer of the sheet of asbestos was?

A. I would have stated it in my previous, the asbestos gaskets that we worked with in my previous testimony or deposition.

Excerpts of Braaten Deposition taken August 1, 2005, pp. 118:23-119:10,¹ CP 5603-4.

Q. Do you recall – you’ve testified to three gasket manufacturers today, and I’m just curious if you are aware of working with other asbestos-containing gaskets that were manufactured by anyone other than those three that you testified to earlier today?

A. No I don’t.

(Excerpts of Braaten Deposition taken September 5, 2005, pp. 180:20-181:1, CP 5617.

Q. Did you use the same packing material for whatever valve you were working on, or were specific valves required to use specific types of packing material?

A. It had to be specific packing called out by the Navy spec number.

Q. Do you remember which type of packing was specified for Yarway valves?

[objection]

A. I would not know the brand name, no[.]

Excerpts of Braaten Deposition taken November 11, 2003, pp. 34:24-35:9, CP 5612-13. Significantly, Braaten admitted that he had no knowledge of whether the gaskets or packing he encountered on Yarway valves or sight

¹ In the prior deposition referenced by Braaten he testified as follows:

Q. Sir, what kind of gasketing material did you use when you were at the shipyard?

A. Garlock was a big one. Sepco. And John Crane.

Excerpts of Braaten Deposition taken September 5, 2003, p. 25:9-12, CP 5616.

glasses were the original gaskets or packing material, or whether they had been replaced with other materials prior to Braaten's work.

Q. Describe for me that packing that was used on these valves.

A. The packing would consist of rings of asbestos material that you would remove the gland nut, install the rings around the stem and then put the packing gland back on to compress the material so the valve would seal, so the steam wouldn't come back or the hot water or steam wouldn't come back out through the stem.

Q. And when you took apart a valve and removed a gasket, is there any way of knowing whether or not that gasket that you are removing was the original gasket?

A. No way of knowing.

Q. And do you recall who any of the manufacturers were of the gaskets that you used on valves?

[objection]

A. I stated them in my previous deposition.

Excerpts of Braaten Deposition taken August 1, 2005, 123:7-24,² CP 5606.

Q. Do you know the manufacturers of any of the packing material?

A. None other than what I stated. I can't recall.³

...

² See fn. 2.

³ As follow up to this answer, which referred to prior deposition testimony, the following exchange occurred, consistent with the prior referenced deposition testimony:

Q. I'm not sure whether or not that specific question was asked. So unless we want to take a break and look back at deposition testimony, could you try to answer that question?

A. It would be Garlock, Sepco, or John Crane or one of those.
CP 5607.

Q. Is it your opinion that that packing material contained asbestos?

A. Yes.

Q. And what is the basis for that opinion?

A. It usually said on the packing material that it contained asbestos.

Q. And is there any way of knowing when you removed packing from a valve whether or not that was the original packing installed on the new valve?

A. No.

Excerpts of Braaten Deposition taken August 1, 2005, 124:14-125:7, CP 5607-08.

Based on the above deposition testimony and existing Washington law, Yarway moved for summary judgment on the basis that (1) Braaten could not demonstrate that he was exposed to asbestos-containing products manufactured or distributed by Yarway and (2) Braaten's duty-to-warn claim failed as a matter of law since there is no duty to warn of dangers associated with other manufacturer's products. CP 5638-56. On September 23, 2005, Judge Sharon Armstrong granted Yarway's motion for summary judgment, holding as follows:

(1) Defendant Yarway Corporation's Motion for Summary Judgment shall be GRANTED.

(2) There is no evidence that plaintiff was exposed to any asbestos-containing product that was manufactured, sold or distributed by Yarway Corporation.

(3) Yarway Corporation had no duty to warn of potential dangers associated with the use of asbestos-

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

(4) All claims against Yarway Corporation shall be DISMISSED WITH PREJUDICE.

CP 7284-86.⁴ This appeal followed.

III. ARGUMENT AND AUTHORITY

A. The Standard of Review Is the Same as the Summary Judgment Standard Correctly Applied by the Trial Court.

Appellate courts review decisions granting summary judgment under the *de novo* standard. *Coulson v. Huntsman Packaging Prods., Inc.*, 121 Wn. App. 941, 943, 92 P.3d 278 (2004). Appellate courts are to engage in the same inquiry as the trial court when reviewing orders granting summary judgment. *Travis v. Bohannon*, 128 Wn. App. 231, 115 P.2d 342 (2005).

Civil Rule 56(e) authorizes the entry of summary judgment where the affidavits, discovery materials and pleadings on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, such as where there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v.*

⁴ Judge Armstrong entered orders granting summary judgment on similar grounds in favor of the other respondents in this appeal, General Electric Company, Buffalo Pumps, Inc., Crane Co. and IMO Industries, Inc. CP 5559-61, 5562-64, 5565-67, 7267-70.

Catrett, 477 U.S. 317 (1986); *Farley v. Henderson*, 883 F.2d 709, 711 (9th Cir. 1989). See also, *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (adopting *Celotex* articulation of summary judgment standards.

A defendant moving for summary judgment meets its burden by showing that there is an absence of evidence supporting the plaintiff's case. See *Tinder v. Nordstrom*, 84 Wn. App. 787, 790-91, 929 P.2d 11209 (1997); *Young v. Key Pharmaceuticals*, 112 Wn.2d at 225, n.1, citing *Celotex*, 477 U.S. at 325. The burden then shifts to the plaintiff to demonstrate the existence of such evidence, thereby establishing a genuine issue of material fact. In discharging that burden, the plaintiff may not rest on mere argument or denials; rather the plaintiff must come forward with substantial admissible evidence:

The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [that party].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (construing Fed. R. Civ. P. 56).

Although the trial court must make all reasonable inferences in the light most favorable to the plaintiff, an inference is not reasonable unless it is deduced "as a logical consequence" of proven or admitted facts.

Fairbanks v. J.B. McLoughlin, 131 Wn.2d 96, 101-02, 929 P.2d 433 (1997). Accordingly, the plaintiff may not rely upon mere speculation or possibility:

[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. After the moving party submits adequate affidavits, *the nonmoving party must set forth specific facts* which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (emphasis added).

B. Braaten Failed To Establish that He Was Exposed to Any Asbestos-Containing Material Manufactured, Sold or Distributed by Yarway.

As an initial matter, Braaten's claim in his opening brief that "causation is not an issue in this appeal" ignores the first of the bases on which the trial court granted summary judgment in favor of Yarway. Yarway moved for summary judgment on the basis that (1) Braaten could not demonstrate that he was exposed to asbestos-containing products manufactured or distributed by Yarway, and (2) that Braaten's duty-to-warn claim failed as a matter of law since there is no duty to warn of dangers associated with other manufacturer's products.

To the extent Braaten based his claims against Yarway on grounds that he was exposed to an asbestos-containing product manufactured,

produced or placed into the stream of commerce by Yarway, he failed to furnish evidence sufficient to raise a genuine issue of material fact of such exposure.

Whether he based his claims upon negligence or product liability principles, to survive this motion for summary judgment, Braaten had to produce some evidence that (1) Yarway manufactured, sold or distributed an asbestos-containing product, (2) plaintiff was exposed to that product, and (3) that exposure caused the injuries alleged. *See Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 246-47, 744 P.2d 605 (1987). In determining whether sufficient evidence of causation exists, a court should consider the following factors: (1) plaintiff's proximity to the 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 asbestos products to which plaintiff was exposed and the ways in which the products were handled and used. *Id.* at 248. Traditional products liability theory has always required a reasonable connection between the injured plaintiff, the injury-causing product, and the manufacturer of the injury-causing product. *Martin v. Abbott Laboratories*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). Specifically, the plaintiff must offer some admissible evidence that he was exposed to respirable [asbestos-containing] dust from a product manufactured, sold or

distributed by Yarway. See *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 707, 853 P.2d 908 (1993).

Braaten failed to meet the essential causation element standard laid out in *Lockwood*, *Martin*, and *Van Hout*. While Braaten testified that he worked on valves and sight glasses allegedly manufactured by Yarway, Braaten failed to establish that he was ever exposed to any asbestos-containing gasket or packing material manufactured, sold or distributed by Yarway. First, Braaten repeatedly testified that all valve and sight glass-related gaskets and packing material that he worked with at Puget Sound Naval Shipyard were manufactured by entities other than Yarway. *Excerpts of Braaten Deposition taken August 1, 2005*, pp. 118:23-119:10, 123:7-24, 124:14-125:7; CP 5603-04, 5606, 5607-08; *Excerpts of Braaten Deposition taken November 22, 2003*, pp. 34:24-35:, CP 5612-13; *Excerpts of Braaten Deposition taken September 15, 2003*, pp. 25:9-12, 180:20-181:1, CP 5616-17. Braaten also testified that he had no way of knowing whether any gasket or packing material that he encountered while working on a Yarway product was the original gasket or packing material distributed with or in that Yarway product. *Excerpts of Braaten Deposition taken August 1, 2005*, 123:7-24; 124:14-125:7, CP 5606-08.

Washington courts have held that if the plaintiff, as a nonmoving party, can offer only a “scintilla” of evidence, evidence that is “merely

colorable” or evidence that is “not significantly probative,” the plaintiff will not defeat the motion. *Herron v. Tribute Publishing Co.*, 108 Wn. 2d 162, 170, 736 P.2d 249 (1987) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). On this topic, the *Liberty Lobby* court stated as follows:

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Liberty Lobby, Inc., *supra* (emphasis added).

Braaten testified that he had “no way of knowing” whether he worked on original gaskets or packing material distributed by Yarway. Allowing a jury to speculate to the contrary — without any admissible testimony that the original gaskets and/or packing materials were still in the Yarway products when Braaten worked on them — would result in a wholly unreasonable and improper inference. *See Boeing*, 108 Wn.2d at 61. The possibility that Yarway may have distributed such products,

without more, does not establish any connection between Braaten and any “injury-causing” Yarway product, and was therefore not sufficient to support a verdict against Yarway. The trial court properly dismissed Braaten’s claims for lack of proof of proximate cause. *See Lockwood, supra; Martin, supra; Van Hout, supra.*

In his opening brief, Braaten makes no legal argument addressing his failure to establish any exposure to asbestos-containing products manufactured or distributed by Yarway. Braaten does outline his factual assertions against Yarway at pages 13-15. But his factual evidence amounts at most to the following insufficient argument: Braaten worked on valves, including Yarway valves. (For purposes of this appeal, this is not disputed.) Braaten removed and installed exterior insulation, and removed and replaced packing on boiler trim valves and steam control valves. Therefore, he must have been exposed to asbestos. Further, even this insufficient argument is undermined by Braaten’s admission below in his opposition to Yarway’s motion for summary judgment below, where he admitted that it was “impossible to determine whether or not the asbestos gaskets and packing that Mr. Braaten installed and removed from Yarway valves and sight glasses was present at the time the valves left Yarway’s factory.” CP 5828. As the trial court correctly decided, this evidence is insufficient to establish any exposure to asbestos-containing

products manufactured by Yarway and therefore the trial court's first basis for granting summary judgment in favor of Yarway should be affirmed.

C. **Yarway Has No Duty to Warn of Dangers of Asbestos-Containing Products Applied On or Around Its Products.**

As an initial matter, Braaten's contention that mere foreseeability determines the issue of legal duty is not supported by Washington law. Rather, the existence of a legal duty is determined as a matter of law *before* the issue of foreseeability is visited as to the scope of that duty.

"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). "The existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted). "The existence of a duty is a question of law which is determined by foreseeability and policy considerations." *Shepard v. Mielke*, 75 Wn. App. 201, 205, 877 P.2d.220 (1994). Indeed, Washington courts recognize that "actions predicated on products liability or medical malpractice, must be subject to limitations imposed by the courts." *Snyder*, 145 Wash.2d at 245, 35 P.3d 1158.

Once a duty is established, a jury may be called on to determine the reach of that duty or how well the defendant preformed its duty. *Id.* In such cases, foreseeability (whether the harm was reasonably perceived) may be part of the jury's analysis. *See Shepard v. Mielke*, 75 Wn. App. 201, 206, 877 P.2d 220 (1994). *See also Youngblood v. Schireman*, 53 Wn. App. 95, 99, 765 P.2d 1312 (1988) (parents of resident son owed no duty to son's girlfriend to protect her from assault on premises).

This requirement is consistent with general negligence principles from which Washington courts have refused to impose liability on a defendant for harm caused by a dangerous condition that it did not create, even if the defendant was aware of the dangerous condition. For example, in *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 43 P.3d 526 (2002), the plaintiff sued an engineering firm for damage to the plaintiffs home from a mudslide, caused by a defect in land above the plaintiff's property. It was undisputed that the engineering firm was aware of the dangerous condition of the land that led to the mudslide, and even informed the city of it. Nonetheless, the court upheld the grant of summary judgment in favor of the engineering firm based on its conclusion that the firm owed no duty to the plaintiff. Similarly, in *Halleran v. Nu West. Inc.*, 123 Wn. App. 701, 98 P.3d 52 (2004), the

court refused to impose a duty to warn of another's conduct simply because the defendant should foresee harm caused by the third person:

[Plaintiff's] contentions that the harm suffered . . . was reasonably foreseeable and that the [defendant] 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.

Id. at 60. Similarly here, a duty is not mandated or created based on notions of foreseeability.

Explaining the process of first determining whether a duty is owed before addressing issues of foreseeability, the court in *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 951 P.2d 749 (1998), stated as follows:

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, 951 P.2d 749.⁵ Thus, the existence of a duty is the initial determination that must be made by the court, not by a jury.

⁵ In the *Shepard* case, *supra*, a nursing home was sued by a patient for a sexual assault committed by a visitor. The plaintiff argued that a heightened duty of care was owed by the nursing home, whereas, the defendant that argued foreseeability precluded liability,

Yarway maintains that such a duty to warn of another's products has never been established by Washington law.

It is fundamental that the plaintiff must prove that a defendant manufactured or distributed the product or products alleged to have caused the injury. In *Kuster v. Gould Nat'I Batteries, Inc.*, 71 Wn.2d 474, 485, 429 P.2d 220 (1967), the court explained:

It is the law that the plaintiff must establish with reasonable certainty a manufacturing defect as a cause of the accident in order for him to recover damages from the defendant.

Id. at 485.

Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product. In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury. *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987).

Although no appellate court in Washington has yet decided the precise argument advanced by Braaten (*i.e.*, that a manufacturer has a duty

i.e., whether the nursing home adequately protected the patient. The court correctly noted that plaintiffs argument touched on the "legal issue of [the nursing home's] duty of care." Once the duty was determined to exist, factual issues of foreseeability were germane to determining breach of duty. Accordingly, after finding that a duty of care of ordinary care existed, the court then addressed the nursing home's arguments: "How well [the nursing home] performed this duty is another question. [The nursing home's] argument, focusing on the foreseeability of the assault by [the assailant], raises a factual question: Whether [the nursing home] adequately protected [plaintiff] from a foreseeable risk. And, as the court noted foreseeability is a question of fact for a jury.

to warn about the dangers of another's product), Washington decisions explaining and defining the scope of liability provide guidance and show that Yarway is not liable for failing to warn about injuries caused by another's product.

In *Seattle First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), the court discussed how far to extend strict products liability beyond the manufacturer of the product in question. The court held liability would be imposed on any manufacturer, dealer or distributor engaged in the business of selling the defective product, extending liability to those in the chain of distribution. *Id.* at 148-49. See also *Falk v. Keene Corp.*, 113 Wn.2d 645, 651, 782 P.2d 974 (1989) (explaining that the *Tabert* approach was favored when the Legislature enacted, the Washington Products Liability Act). The Washington Court of Appeals has similarly stated that “the purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the makers of the products who put them in the channels of trade[.]” *Bombardi v. Pochel's Appliance & TV Co.*, 9 Wn. App. 797, 806, 515 P.2d 540, modified, 10 Wn. App. 243 (1973), review denied, 83 Wn.2d 1009 (1974).

In the same vein is *Peterick v. State*, 22 Wn. App. 163, 589 P.2d 250 (1977), overruled on other grounds by *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 719 (1985). There, plaintiffs were employees

of the EXCOA company, whose parent company was Rocket Research (“Rocket”). Plaintiffs were killed in an explosion caused by a liquid explosive at a test facility, and their estates sued. Rocket had developed the liquid explosive but had assigned the patent to EXCOA in exchange for stock. EXCOA designed, built and operated the test facility where the explosion occurred. Plaintiffs’ estate claimed that Rocket was strictly liable under a product liability theory because it had failed to give adequate warnings regarding the explosive. *Id.* at 192. The Court of Appeals rejected this claim, affirming the trial court’s dismissal. *Citing Tabert*, the appellate court reasoned that plaintiff had failed to show that Rocket had manufactured the explosive and therefore that Rocket had any duty to warn:

The initial limitation of all such actions requires the common denominator of a manufacturer or seller. *See Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 145, 148-49, 542 P.2d 774 (1975) The facts alleged by plaintiffs fail to establish either that Rocket was the manufacturer, or that Rocket had any duty. to warn plaintiffs’ decedents of dangers that officials in EXCOA were aware of. The plaintiffs have failed to show any causal link between the explosion and acts or omissions of Rocket. The plaintiffs did not produce evidence to rebut the defendant Rocket’s denial of control in the manufacturing process or its denial of any duty to warn plaintiffs’ decedents, and the claim properly was dismissed.

Id. at 192-193 (citation omitted.)

In the present case, it is undisputed that Yarway is not in the chain of distribution of any asbestos-containing products that may have been applied to its products by the end user, and that Yarway is not the manufacturer, distributor, seller or installer of such asbestos-containing products.

The recent decision of *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 84 P.3d 895 (2004), reinforces the conclusion that Washington law does not impose a duty on Yarway to warn of a product it did not manufacture. In *Sepulveda-Esquivel*, the plaintiff sued the seller and manufacturer of an industrial hook for injuries sustained when he was injured by a load that fell from the hook. Plaintiff's employer attached a "mouse" to the hook, the purpose of which was to close the opening of the hook when moving the load. The court concluded that the seller and manufacturer of the hook had no duty with respect to the finished hook assembly with the mouse. This was because they did not manufacture, supply or sell the finished assembly. *Id.* at 19. Rather, they made and sold the hook, a component of the assembly, and this component did not fail. Further, even if the relevant product for the purpose of analysis was the completed hook assembly with the mouse, the hook seller and manufacturer had no liability because the hook component of the finished product did not produce the injury. *Id.* at 19.

The present case is analogous to *Sepulveda-Esquivel*. Even assuming that the valve was a “component,” and the valve and the asbestos-containing product (someone else’s “component”) collectively constitute the relevant “product,” Yarway still has no liability because its “component” did not cause the injury; rather, the other manufacturer’s component did. As in *Sepulveda-Esquivel*, Yarway did not make the “component” that is alleged to have injured plaintiff, did not place it in the stream of commerce and did not profit from its sale. For this reason, Yarway is not subject to liability for the injury under the failure to warn theory.

The conclusion that Yarway has no duty to warn is confirmed by decisions from other jurisdictions that have rejected the argument advanced by Braaten. In *Powell v. Standard Brands Paint Company*, 166 Cal. App. 3d 357, 212 Cal. Rptr. 395 (1985), the plaintiff was injured when lacquer thinner manufactured by Grow Chemical exploded. The day before, he had used lacquer thinner made by Standard Brands. He sued Standard Brands because their lacquer thinner contained no warnings, asserting he would not have used any lacquer thinner had Standard Brands warned him. The California Court of Appeals held that a manufacturer has no duty to warn of another’s product. The court reasoned that the duty to warn is restricted to the characteristics of the manufacturer’s own

product, and that the law does not require a manufacturer to study and analyze the products of others:

[I]t is clear the manufacturer's duty is restricted to warnings based on the characteristics of the manufacturer's own product. Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products.

Powell, 166 Cal. App. 3d at 364 (emphasis in original; citations omitted). See also *Carman v. Magic Chef, Inc.*, 117 Cal. App. 3d 634, 173 Cal. Rptr. 20 (1981) (stove manufacturer had no duty to warn about a defective T-joint in a propane supply system for the stove that was manufactured by someone else).

In *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), an employee was killed while inflating a Goodyear tire when the multi-piece rim, which was not manufactured by Goodyear, exploded. The employee's estate filed suit, alleging that Goodyear negligently failed to warn the employee of the inherent dangers of using its tire with multi-piece rims. In dismissing the claim, the New York Court of Appeals reasoned that Goodyear had no duty to warn regarding another's product:

[W]e 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 multi-piece 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 225-226.

Similarly, the Texas case of *Walton v. Harnischfeger*, 796 S.W.2d 225 (Tex. App. 1990), holds that an equipment manufacturer has no duty to warn of potential dangers associated with products made by another manufacturer. In *Walton*, the court held that a crane manufacturer had no duty to warn a plaintiff about the potential dangers associated with defective rigging straps manufactured by another for use on its crane. The court reasoned:

[A]ppellee did not manufacture, distribute, sell, or otherwise place the nylon straps or any other rigging material into the stream of commerce; appellee is not in the business of manufacturing or selling any rigging material; and rigging is a complex art that requires different loads to be rigged in a multitude of different ways. We hold that, under the facts of this case, appellee had no duty to warn or instruct users of its crane about rigging it did not manufacture, incorporate into its crane, or place into the stream of commerce.

Id. at 227-228.

Illinois courts have reaffirmed the fundamental principle that a defendant may not be held responsible for injuries caused by others' products. This is true even where those products are used with the defendant's products. For example, *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989), involved a claim against a

military aircraft manufacturer for alleged design defects and inadequate warning regarding the asbestos chafing strips used inside of the aircraft's engine cowling. These strips were replaced before plaintiffs worked on the aircraft. The court granted summary judgment in favor of defendant because it did not manufacture, design or supply the replacement strips. *See also Harding v. Amsted Indus.*, 276 Ill. App. 3d 483, 658 N.E.2d 1208 (1st Dist. 1995), *app. denied*, 164 Ill. 2d 563, 660 N.E.2d 1269 (1995) (manufacturer of friction casting for rail car wheel assembly not responsible for failure to warn of risks of using machine used to install casting). Significantly, the foreseeability of the use of the allegedly defective product in conjunction with defendant's product is irrelevant to the question of whether a duty exists. Indeed, the manufacturer of the aircraft cowling in *Niemann* was aware that asbestos chafing strips might be used with its products, and had supplied the original straps at the time it delivered the product.

Consistent with these principles, other courts have granted summary disposition in cases alleging that manufacturers of equipment for Navy vessels are responsible for injuries caused by asbestos-containing products attached by others to that equipment after its delivery to the Navy. *See Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. Aug. 2, 2004) (affirming summary judgment for turbine manufacturer

because it “is not liable if it made a product that was later insulated with someone else’s asbestos”), CP 538-555; *Braaten v. CertainTeed Corp.*, No. 25489 (Tex. Dist. Brazoria Nov. 19, 2004) (granting summary judgment as to “any alleged duty of [pump manufacturer] to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by [defendant]”), CP 556; *Nolen v. A. W. Chesterton Co.*, No. 153-200843-03 (Tex. Dist. Tarrant Cty. June 17, 2004) (granting pump manufacturer summary judgment because it is not liable for external insulation manufactured, designed, supplied and placed on pumps by third parties) CP 557; *Simkins v. Alfa Laval, Inc.*, No. CC-03-02935-B (Tex. Dist. Dallas Cty. May 5, 2004) (same holding for valve manufacturer), CP 558.

Likewise, other courts have concluded that equipment manufacturers are not liable for other types of asbestos-containing components that are added to their products by third parties. For example, in *Lindstrom v. AC Products Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the court dismissed the plaintiffs’ strict liability and negligence claims against numerous product manufacturers because plaintiffs’ exposure was limited to asbestos-containing replacement components manufactured, designed and supplied by others. *Id.* at 589, 591, 595. In addition, a pipe manufacturer has been held not liable for the use of asbestos-containing

gaskets manufactured and sold by others and used with its pipe products. *Schmidt v. A. W. Chesterton Co.*, No. 99-6020 (Mass. Super. Middlesex July 1, 2002), CP 559-561.⁶

In this case, it is undisputed that Yarway did not manufacture, distribute or sell the asbestos-containing products that plaintiff contends were applied by the end user to equipment or machinery manufactured by Yarway. In light of these undisputed facts, Yarway did not create the risk of harm to Braaten. Because Yarway had no role in manufacturing, distributing or applying the asbestos-containing product, it was in no position to evaluate any hazards associated with that product. As such, Yarway is not the appropriate entity to bear the costs of injuries arising therefrom. Accordingly, Yarway has no duty to warn about asbestos-containing products manufactured by others and, to hold otherwise would, in the words of the *Powell* court, “place on each manufacturer an untoward duty.” *Powell*, 166 Cal. App. 3d at 365.

⁶ See also, e.g., *Cullen v. Industrial Holdings Corp.*, 2002 WL 31630885 (Cal. App. Nov. 21, 2002) (manufacturer of grinding wheel not liable for injuries caused by using wheel to grind asbestos products manufactured, supplied and designed by others); *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Spec. App. 1997) (car manufacturer not liable for asbestos brakes used on car but manufactured, supplied and designed by others); *Fricke v. Owens Corning-Fiberglas Corp.*, 618 So. 2d 473 (La. App. 1993) (manufacturer has no duty to warn about product it neither manufactured nor sold); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393, 396 (Mich. App. 1985) (vehicle manufacturer not liable for defective wheel rim component added after sale); *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986) (truck manufacturer had no duty to warn of possible dangers posed by replacement parts that it did not design, manufacture or place into the stream of commerce); *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (1985) (manufacturer of an electrically-powered lift motor had no duty to give instructions regarding safe and proper rigging to use with scaffolding where manufacturer did not supply, design or assemble scaffolding).

In summary, under Washington law and compelling authority from other jurisdictions, there is no duty to warn about another manufacturer's product. Yarway's liability under this theory is limited to its own products, valves and sight glasses, and not asbestos-containing products manufactured by-another entity that may have been applied by the end user.

D. Braaten's Legal Authority Is Not Applicable To These Facts.

Perhaps recognizing that his argument is unsupported by Washington law and the vast majority of authorities in the United States, Braaten relies on legal authorities, both within and without Washington, that are simply inapplicable to the facts of this case. Braaten first cherry-picks certain language from *Koker v. Armstrong Cork*, 60 Wn. App. 466, 476, 804 P.2d 659 (1991), and *Young v. Key Pharmaceuticals*, 130 Wn.2d 160, 178, 922 P.2d 59 (1996), seizing on the word "aspects" to support his argument that a product manufacturer has a duty to warn of the dangers associated with the use of another manufacturer's products. But in both *Koker* and *Key Pharmaceuticals*, the court was referring to the "dangerous aspects" of one of the *manufacturer's own* products, not the dangerous aspects of *a different manufacturer's* product.

Similarly, Braaten next cites to a string of authorities which hold that a manufacturer has a duty to warn of foreseeable alterations or modifi-

cations of its product. This argument assumes that Yarway's products were somehow altered or modified by the end user's use of asbestos. However, Braaten presented no evidence to suggest that the valves or sight glasses manufactured by Yarway were altered or modified by asbestos. Indeed, Braaten could not present any such evidence since there is none. The use of asbestos in connection with Yarway products did not in any way alter, modify or change those products. Those authorities cited by Braaten in connection with this argument are simply inapplicable to the facts of this case.

Braaten next cites two Washington products liability cases in support of his argument, neither of which any guidance under the facts of this case. *Bich v. General Electric Company*, 27 Wn. App. 25, 614 P.2d 1323 (1980), preceded the passage of the Washington Products Liability Act, RCW 7.72 *et seq.*, and was thus decided under Section 402A of the Restatement (Second) of Torts. In *Bich*, the plaintiff was injured when an explosion occurred shortly after he had substituted a Westinghouse fuse for a GE fuse into a GE transformer. The plaintiff alleged that GE's transformer was unreasonably dangerous due to GE's failure to adequately warn of fuse substitution. *Id.* at 31-32. The Court of Appeals upheld the trial court's decision to allow the duty-to-warn issue to go the jury. *Id.* at 33. Significantly, however, the court specifically held that GE had *no*

duty to warn regarding the Westinghouse fuse manufactured four years after GE manufactured the transformer. *Id.* The court did say that the jury could consider whether GE had a duty to warn about the characteristics of its own fuses and how they worked with the GE transformer. *Id.*

In spite of these holdings, Braaten claims that *Bich* supports his theory that Yarway had a duty to warn him about the asbestos he used while working at a Naval shipyard. Braaten is mistaken. Braaten claims that his injuries were caused by asbestos – a product which Yarway did not manufacture. *Bich*'s holding that GE did not have a duty to warn regarding the separate Westinghouse product thus supports Yarway's position in this case. Moreover, the duty-to-warn holding in *Bich* was directed to GE's *own* products, *i.e.*, the transformer and GE fuses; it was not directed to another manufacturer's product. Finally, the plaintiff's injuries in *Bich* resulted from a malfunction of GE's product, not the product of another manufacturer. There was no evidence that the Westinghouse fuse was defective, only that the use of the Westinghouse fuse made the GE transformer dangerous. For purposes of this appeal, Braaten's injuries are alleged to be specifically caused by asbestos, a product manufactured by others. There is no evidence that Yarway's products injured Braaten.

The second case relied on by Braaten, *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 724 P.2d 389 (1986), is equally inapplicable. As an initial matter, *Parkins* was decided under the Washington Products Liability Act, RCW 7.72 *et seq.*, unlike this case which is decided under Section 402A of the Restatement (Second) of Torts. In *Parkins*, the plaintiff sued the manufacturer of certain component parts that, when assembled at a pear processing facility together with other parts, collectively formed a conveyor processing line. The plaintiff was injured when her hand was drawn into a “nip point” where the conveyor belt passed over a stationary roller. In reversing a summary judgment in favor of the manufacturer on both defective design and duty-to-warn theories, the court first emphasized that because the plaintiff 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 purposes of the act. RCW 7.72.010(3).

In this case, Braaten was not injured by equipment manufactured by Yarway. Even if Yarway valves and asbestos manufactured by others somehow forms a “unit,” it was not the Yarway valves that injured Braaten — it was the asbestos. Neither *Bich* nor *Parkins* has any application to these facts because, in both of those cases, the duty to warn imposed by the court was as to the defendant’s own product about the

potential for injury that arose from the defendant's own product. That is simply not the case here — where Braaten is asking the court to impose a duty to warn about another manufacturer's product regarding the potential for injuries that arise from that product. Washington law does not support the imposition of such a duty.

Finally, Braaten relies on a New York case, *Liriano v. Hobart Corporation*, 700 N.E.2d 303, 677 NY.S.2d 764 (1998). Braaten's reliance on *Liriano* fails for the same reasons that his long string cite to product modification cases fails. In *Liriano*, the court held that the manufacturer of a meat grinder who knew that purchasers often modified the meat grinder by removing the safety guard had a duty to warn about the dangers associated with that modification. Like the earlier "product modification" cases Braaten discusses, *Liriano* has no application here because there is no evidence that Yarway products were modified by the application of asbestos by the end user. The use of asbestos in connection with Yarway products did not in any way alter, modify or change those products.

IV. CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed in its entirety.

DATED this 22nd day of February, 2006

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No. 57011-1-I

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

VERNON BRAATEN,

Plaintiff-Appellant,

v.

BUFFALO PUMPS, INC., *et al.*,

Defendants-Respondents.

**DECLARATION OF SERVICE
OF RESPONDENT YARWAY CORPORATION'S BRIEF**

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I certify under penalty of perjury under the laws of the state of Washington that on February 22, 2006, copies of **Respondent Yarway Corporation's Brief** were served on the following parties:

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DATED this 22ND day of February, 2006



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