

**SUPREME COURT OF THE
STATE OF WASHINGTON**

Case No. 80251-3

(Court of Appeals No. 57011-1-I)

VERNON BRAATEN,

Respondent,

v.

BUFFALO PUMPS, INC., et al.,

Petitioners.

**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS
FILED IN SUPPORT OF PETITIONERS**

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INTRODUCTION

Several amicus curiae briefs have been filed in support of petitioners. The Coalition for Litigation Justice and other defense interests previously filed a brief in support of the petitioner for review, as did Ingersoll-Rand Co. Respondent filed briefs in response to both of those briefs.

The Coalition, et al. were granted amicus status again upon this Court's acceptance of the case. Respondent filed a short further response to the Coalition's brief on February 21, 2008. Ingersoll-Rand has filed another brief, now joined by Leslie Controls, Inc. Respondent relies on the previous response to Ingersoll-Rand's contentions.

Three other briefs have now been filed on behalf of petitioners. The amici are Pacific Legal Foundation, Washington Defense Trial Lawyers and Flowserve Corporation. Most of their arguments are duplicative and respondent sees no need to answer them further. Respondent respectfully files this answer, however, to address one theme that recurs throughout the amicus briefs, to rebut a specific contention by the Washington defense Trial Lawyers and to correct certain misstatements by Pacific Legal Foundation.

ARGUMENT

I. THE COURT OF APPEALS DID NOT RADICALLY EXPAND TORT LIABILITY

Running through all of the amicus briefs is the theme that the Court of Appeals' holding was some kind of unprecedented, outlandish expansion of tort liability. Respondent has previously briefed this contention and that discussion will not be repeated here. Respondent respectfully takes the opportunity, however, to look at the issue through the words of one of the authorities cited by petitioners' friends Ingersoll-Rand and Leslie Controls.

At p. 21 of their brief, these amici quote this Court's decision in Taylor v. Stevens County, 111 Wn. 2d 159, 168 (1988), which in turn quotes the 1984 version of Prosser & Keeton on Torts, §53, p. 357, to the effect that "duty" is simply the sum of those policy considerations that lead to the conclusion that a "plaintiff's interests are entitled to legal protection against the defendant's conduct." One of the authors of this version of the classic treatise is the eminent tort scholar Professor David Owen, now of the University of South Carolina Law School. Much more recently, Professor Owen has co-authored a treatise on products liability.

This treatise makes clear that the Court of Appeals' holding is hardly "novel" or "radical" at all. As if anticipating the present case, Professor Owen and his co-authors write:

A manufacturer has a duty to provide warnings concerning particular risks that will foreseeably arise in the environment in which the product may be expected to be used.... When the character, ingenuity, or both of a post-sale product modification is not reasonably foreseeable to the manufacturer, as an expert in the uses and misuses to which its product may be put, no design or warning liability should attach. Some post-sale modifications, however, are of a nature that the manufacturer has actual or constructive notice of their practice or their potential. In these settings, a manufacturer may be liable for failure to warn of the risks inhering in such product damages.

David Owen, M. Stuart Madden & Mary Davis, Madden & Owen on Products Liability §9.5 at 552, 557 (3d ed. 2000) (footnotes omitted).

It is also worth noting that claims against equipment manufacturers, as distinct from insulation manufacturers, are hardly new in asbestos litigation either. Manufacturers of equipment insulated with asbestos have been sued for damages attendant to the foreseeable uses of the equipment for many years. Ironically, only in the last few years have such defendants even thought to contend that they owed persons who work with their equipment no duty; there are numerous reported cases involving such claims against equipment manufacturers from earlier years

involving such claims against equipment manufacturers from earlier years in which no such contentions are even mentioned. See e.g., Abadie v. Metropolitan Life Ins. Co., 804 So.2d 11, 16 (upholding jury verdict in favor of heirs of shipyard worker who died of mesothelioma against several defendants including Westinghouse, which manufactured turbine “wrapped in asbestos blankets” which plaintiff “worked around”); Feidt v. Owens-Corning Fiberglas Corp., 153 F.3d. 124, 126 (dismissing appeal by Westinghouse from order remanding to state court mesothelioma case in which worker claimed that “he was exposed to asbestos products including insulation on turbines manufactured by Westinghouse”); Pack v. ACandS, Inc., 838 F.Supp. 1099, 1103 (D. Md. 1993) (denying remand in case removed by Westinghouse because of government involvement in decisions concerning “the type of asbestos cloth to be used when insulating valves and flanges”); Vaughn v. Farrell Lines, 937 F.2d 953, 955 (4th Cir. 1991) (claim by shipowners for indemnity against “the manufacturers of the asbestos products involved and the boilers (containing asbestos insulation) that had been used on their ships”). The Court of Appeals’ decision in this case broke no new ground.

II. THE NAVY'S ROLE

The Washington Defense Trial Lawyers argue at length that the alleged actions or inactions of the Navy in the setting of this case should somehow exonerate defendants entirely. See e.g., their brief at 6-7: “Only the employer... can train workers, provide safety equipment, and enforce safe practices.... Also, in the context of the Navy or a naval shipyard, the high level of sophistication of the employer should weigh against holding a related component manufacturer [*sic*] for not specifying highly specialized procedures for protecting against inhaling asbestos.” (footnote omitted). But the role of the Navy in this or similar cases – whether framed in terms of a “sophisticated employer,” or a superceding cause, or some other defensive formulation – is not an issue in this appeal and never has been an issue. The Court is respectfully referred to pp. 2-4 of respondent’s previous answer to the amicus brief of Ingersoll-Rand, filed on July 30, 2007, for a discussion of why this argument should therefore not be considered.

To whatever extent the Court wishes to indulge this argument, it provides no basis for absolving petitioners of the duty the Court of Appeals described. The contention that the Navy is responsible for

asbestos injuries to naval shipyard workers like respondent here is not new.

Over 20 years ago, in another asbestos case also arising out of exposure at Puget Sound Naval Shipyard, the Court of Appeals held that the Navy's role could not plausibly be seen as a superseding cause, but rather at most as a concurring cause:

Section 452 which states the general rule that a third party's failure to prevent harm is not a superseding cause, also supports the district judge's instruction here. See § 452(1) Restatement (Second) of Torts (1965). The only exception to the general rule is where the duty to prevent harm has shifted to the third party. Restatement (Second) of torts, § 452(2) (1965). But in the strict liability context, "the duty to provide a non-defective product is non-delegable." Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 193, 337 A.2d 893, 903 (1975). If the duty is non-delegable, it cannot be shifted. Therefore, Berkebile strongly suggests that in a strict liability situation, a third party's failure to warn will not constitute a superseding cause. . . . Van Buskirk, at 497.

Washington law supports the same conclusion. To remove liability from the original tortfeasor, the intervening negligence of another must be so extraordinary or unexpected that it falls outside the realm of reasonably foreseeable events; unless this threshold is met, there is not superseding cause. Smith v. Acme Paving Co., 16 Wash.App. 389, 558 P.2d 811 (1976). The actions of the government through its management of PSNS were not unexpected or extraordinary, since the procedures for using asbestos products at PSNS were similar or identical to those followed elsewhere. . . .

At most, the failure of the government to warn Hoglund of the danger of asbestos exposure was a concurring cause of his injury and, as such, did not remove Raymark from liability of the injury. . . .

An instruction regarding the duty of PSNS to provide a safe workplace for its employees would have been misleading to the jury, since it would imply that a breach of this duty would relieve the manufacturers of liability for injuries which might have been prevented by PSNS. The trial judge properly refused to give the instruction.

Hoglund v. Raymark Ind., Inc., 50 Wa.App. 360, 371-72 (1987), rev. denied, quoting Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985). The Hoglund Court also noted that with regard to the defense of sole proximate cause, as opposed to superseding cause, defendant did not properly request such an instruction. Courts have likewise uniformly rejected the assertion of a similar “sophisticated user” defense in asbestos cases in the Navy context, In re Brooklyn Navy Yard Asbestos Litigation, 971 F.2d 831, 837-38 (2d Cir. 1992) (“We find no merit in defendants’ contention that they justifiably relied on the Navy to communicate potential hazards to those who would ultimately work with defendants’ asbestos-containing products....Given that the record supports neither a finding that defendants actually relied on the Navy to warn its workers, nor a finding that any such reliance would have been justifiable, the presence of the Navy as an alleged ‘sophisticated intermediary’ or

'knowledgeable user' does not call into question the jury's finding of defendants' duty to warn."), the private shipyard context, Oman v. H.K. Porter Inc., 764 F.2d 224 (4th Cir. 1985); Eagle-Picher, Inc. v. Balbos, 604 A.2d 445, 464 (Md. 1992), and land-based settings, Willis v. Raymark, 905 F.2d 793 (4th Cir. 1990); In re Joint Eastern & Southern District Asbestos Litig., 827 F.Supp. 1014, 1055 (S.D.N.Y. 1993).

As for the "coercion" asserted by the Defense Trial Lawyers at p. 2 of their brief ("[a]s a sailor, plaintiff did not have a choice as to whether to encounter the products"), Mr. Braaten was not a sailor; he was a civilian employee at FSNS who certainly could have chosen not to work with asbestos had he been advised it might eventually kill him.

Again, the issue of intervening causation is not before the Court and thus should not be considered. In any event, the same assertion might be made in regard to claims against the insulation manufacturers themselves, yet all amici agree that they are liable in this setting and should be held responsible for providing warnings. Indeed, just a few pages later the Defense Trial Lawyers speak of safe ways to handle asbestos: "wetting down asbestos before disturbing it; restricting access to an area; establishing ventilation; and providing disposable outer-garments, respirator and air-tight disposal containers." (p.6) Had sailors been made

aware of the lethal hazard of asbestos they doubtless could have requested or implemented these steps.

Finally, at p. 14 of its brief, Pacific Legal Foundation asserts, without support, that “the Navy as the employer had a duty to warn its employees of the hazards of asbestos, but there was no relationship between Braaten and the pump and valve manufacturers.” This is plainly wrong: the courts have consistently held that the “discretionary function” exception to the Federal Tort Claims Act vitiated any asserted duty of the government to warn of the hazards of asbestos. E.g. Sea-land Service, Inc. v. United States, 919 F.2d 888, 892-93 (3d Cir. 1990); Gordon v. Lykes Bros. Steamship Co., 835 F.2d 96, 100 (5th Cir. 1988); Shuman v. United States, 765 F.2d 283, 290 (1st Cir. 1985).

III. MISQUOTATION BY PACIFIC LEGAL FOUNDATION

At p. 11 of its brief, arguing that limits on tort liability “serve an important economic purpose,” Pacific Legal Foundation quotes Cass R. Sunstein, et al., Assessing Punitive Damages (with Notes on Cognition & Valuation in Law), 107 Yale L. J. 2071, 2077 (1998). The first sentence of the quote, as set out by the Foundation, is as follows: “If [damages] awards are unpredictable... resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely higher awards is

likely to produce excessive caution in risk-averse managers and companies.” The use of “[damages],” however, is misleading, for as the title of the article suggests, the authors were discussing only punitive damages. A look at the paragraphs in question makes this obvious:

It is not difficult to understand the widespread concern with erratic punitive damage awards. If similarly situated people—plaintiffs and defendants alike—are not treated similarly, erratic awards are unfair. As a matter of fairness, the evidence suggests that some awards are too low, while others are too high. From the standpoint of economic efficiency, unpredictable awards need not be troublesome; perhaps individual awards cannot be calculated in advance, but if people can calculate the expected value of the relevant risks, there should be no efficiency loss. If awards are unpredictable, however, resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

Id. at 2077 (footnotes omitted). Compensatory and punitive damages, needless to say, serve very different purposes. Moreover, punitive damages are not available in Washington in cases such as this one, and so the concerns raised by the Foundation are not implicated here.

Respectfully Submitted,



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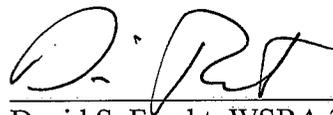
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