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No. 80251-3

SUPREME COURT
OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Plaintiff-Respondent

v.

BUFFALO PUMPS, INC., et al.,

Defendants-Petitioners

ON PETITION FOR REVIEW FROM COURT OF APPEALS,
DIVISION I

SUPPLEMENTAL BRIEF OF PETITIONER BUFFALO PUMPS, INC.

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I.

INTRODUCTION

Pursuant to RAP 13.7(e), Petitioner Buffalo Pumps, Inc. ("Buffalo Pumps"), hereby submits its supplemental brief, in which Buffalo Pumps offers a brief statement of the key undisputed facts and then argument on why the Court of Appeals decision in Braaten should be reversed. These arguments are briefly summarized here for the Court's reference.

- The inapplicable decisions on which the Court of Appeals relied to create its new and novel duty to warn do not support such an extension of Washington law. Decisions which are more analogous to this case than the decisions relied on by the Court of Appeals establish that requiring a manufacturer to warn of the dangers of another manufacturer's product is legally unsound.
- Only manufacturers in the chain of distribution of the harm-causing product should have a duty to warn of the dangers associated with the use of that product.
- The duty to warn created by the Braaten decision is inconsistent with and contrary to the historical bases of Restatement (Second) of Torts § 402A and the true relationship between duty and foreseeability.
- Public policy considerations militate in favor of reversal or modification of the Court of Appeals' decision.
- Principles of judicial restraint provide this Court with an opportunity to undo the pronouncements by the Court of Appeals on the substantive duty to warn issues.

II.

KEY UNDISPUTED FACTS

A. The Only Asbestos Braaten Would Have Encountered in Connection With His Work on Buffalo Pumps Equipment Was Installed by Third Parties.

1. Buffalo Pumps Has Never Manufactured Asbestos Insulation or Components. Buffalo Pumps manufactures pumps according to the customer's specifications and delivers them without any external insulation at all, asbestos-containing or otherwise. (CP 4690-91); See (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, 21, ll. 11-15). If a manufacturer's specifications called for it, the Buffalo Pumps pump would include asbestos gaskets or packing manufactured by third parties. (CP 4733) (Kenny Dep. at 88, ll. 15-17). Buffalo Pumps itself "never manufactured any component parts that contained asbestos fibers." (CP 4729) (id. at 82, ll. 6-8). Nor did Buffalo Pumps manufacture, supply, or sell replacement asbestos gaskets. (CP 4730) (id. at 83, ll. 12-15). Buffalo Pumps' pumps were delivered without any external insulation and were subsequently covered with asbestos insulation manufactured by others that the Navy had specified. (CP 783) (MacKinnon Dep. at 21, ll. 5-20). Once delivered, Buffalo Pumps were installed to Navy vessels as one component of a vast system of pipes which moves various

liquids and gases throughout the ship. See (CP 783) (MacKinnon Dep. at 21, ll. 5-20); (CP 4757-59) (Bath Iron Works Specifications for DD 927 Class Vessels); (CP 791-92) (Excerpt from Machinists' Mate 2c, Navy Training Courses, at 121 (1931)).¹

2. There Is No Evidence That Braaten Ever Encountered Asbestos From Original Packing or Gaskets in Buffalo Pumps' Pumps.

Vernon Braaten 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). He only changed the packing on a pump or removed the entire pump from the ship. (CP 539) (09/05/03 Braaten Dep. at 248, ll. 5-8). Braaten changed gaskets to flanges exterior to the pump, but never removed gaskets internal to a Buffalo Pumps pump. (CP 538-39) (09/05/03 Braaten Dep. at 245, ll. 21-25, 246, ll. 1-8). It is impossible to know how many times these

¹ Notably, under Washington law:

[I]t is ordinarily not reasonably to be expected that one who knows that a chattel is dangerous will pass it on to another without a warning. Where the [employer] is notified of the danger, or discovers it for himself, and delivers the product without warning, it usually has been held that the responsibility is shifted to him, and that his negligence supersedes the liability of the [manufacturer].

Little v. PPG Indus., Inc., 19 Wn. App. 812, 824, 579 P.2d 940 (1978) (quoting W. Prosser, Law of Torts § 102, at 667-68 (4th ed. 1971)), aff'd as modified by 92 Wn.2d 118, 594 P.2d 911 (1979).

materials had been replaced prior to the time when Braaten worked on the pump for the first time. (CP 537) (09/05/03 Braaten Dep. at 235, l. 25-236, 11. 1-23). Braaten was never exposed to asbestos packing or gaskets shipped by Buffalo Pumps because he never performed the first repacking or gasket replacement on any Buffalo Pumps pump.

B. Buffalo Pumps and Other Equipment Manufacturers Will Raise a Collateral Estoppel Defense if The Case Is Remanded.

Before bringing suit in Washington, Braaten had sued Buffalo Pumps and other equipment manufacturers in Texas. After one of the defendants, Goulds Pumps, obtained summary judgment dismissal, Braaten took a nonsuit against the remaining defendants, including Buffalo Pumps, and filed in King County Superior Court. One of these defendants, General Electric, argued on appeal that Texas Court's order dismissing Goulds on summary judgment collaterally estopped Braaten from asserting that it had a duty to warn. The Court of Appeals recognized that Braaten did not dispute that he had the opportunity to challenge the order but did not do so and affirmed the summary judgment dismissal as to General Electric. Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 39-40, 151 P.3d 1010 (2007).

III.

SUPPLEMENTAL ARGUMENT

A. The Post-Production Duty to Warn Created by the BRAATEN Decision Does Not Rest on Sound Legal Analysis.

1. The Court of Appeals Did Not Rely on Apposite Legal Authority to Extend a Manufacturer's Duty to Warn. The Court of Appeals expressly acknowledged that Braaten's argument, that Buffalo Pumps had a duty to warn of dangers posed by products placed by others within or around its product, after the manufacturer has completed the product and delivered it to the user, presented an issue of first impression. Although the Court of Appeals ultimately determined to embrace Braaten's argument and recognize this new duty to warn, the court held that none of the asbestos cases cited by the parties were dispositive. Braaten, 137 Wn. App. at 42. And the court candidly acknowledged that Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977), and Stapleton v. Kawasaki Heavy Industries, Ltd., 608 F.2d 571 (5th Cir. 1979), the cases on which it did rely, were only of "some aid" and provided "an interesting comparison," respectively. Braaten, 137 Wn. App. at 43-44.

In fact, these decisions do not support the new duty to warn the Court of Appeals created. As the Court of Appeals recognized, the Teagle decision is factually distinguishable because it involved an actual failure of the defendant manufacturer's product whereas in this case there is no

allegation that the pumps or valves failed. See Braaten, 137 Wn. App. at 44. To overcome this key distinction, the Court of Appeals turned to Stapleton, a Fifth Circuit decision in which the plaintiff's house had been damaged by a fire caused when a motorcycle tipped over and the fuel it contained was ignited by the pilot light in a nearby heater. Stapleton, 608 F.2d at 572. The fuel had spilled because the motorcycle's fuel switch was in the "on" position. Stapleton, 608 F.2d at 572-73. Thus, the duty to warn issue was whether the motorcycle manufacturer had fulfilled its duty to warn a user about *a feature of its own product* – a fuel switch that allowed gas to spill when the motorcycle was tilted – by placing the warning in regular type on page 13 of the owner's manual. Stapleton, 608 F.2d at 572. There is nothing about the design or operation of a Buffalo Pumps pump that causes it to release a dangerous substance and the Court of Appeals' conclusion that Stapleton demonstrates 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" (see Braaten, 137 Wn. App. at 45) is an unsupported extension of the actual holding of that case.

2. The Court of Appeals' Decision Departs From Established Washington Law, Which Has Limited a Manufacturer's Duty to Warn to Those Entities in the Chain of Distribution of the Relevant Product and to Harms Arising Out of a Defect or Failure In the Manufacturer's Own

Product. This Court first adopted Restatement (Second) of Torts § 402A in Ulmer v. Ford Motor Co., 75 Wn.2d 522, 531-532, 452 P.2d 729 (1969), which was concerned solely with the liability of a manufacturer of the product at issue. In the seminal case of Seattle First Nat'l Bank v. Tabert, 86 Wn.2d 145, 542 P.2d 774 (1975), this Court delineated the outer limits of strict products liability under § 402A, holding after a careful examination of the comments and history of the Restatement that liability would be imposed only on a manufacturer, dealer or distributor engaged in the business of selling the defective product, i.e., those in the chain of distribution. Tabert, 86 Wn.2d at 148-49.

The principle that a plaintiff must prove that the defendant manufactured or distributed the product at issue was re-affirmed in Sepulveda-Esquivel v. Central Machine Works, Inc., 120 Wn. App. 12, 84 P.3d 895 (2004). In that case 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. Sepulveda-Esquivel, 120 Wn. App. at 19. Rather, they

made and sold the hook, a component of the assembly, and this component was not defective. Sepulveda-Esquivel, 120 Wn. App. at 19.

This Court's decision in Teagle is entirely consistent with this approach. In Teagle, the defendant manufacturer made a device called a "flowrater," which measured levels of liquid chemicals including ammonia during the course of producing liquid chemical fertilizer for agricultural use. 89 Wn.2d at 150-151. "O-rings" (manufactured by parties other than the defendant) were used to seal the open ends of the flowrater's tubes, and the defendant knew – but failed to warn – that "Viton" O-rings should not be used because they could harden and disintegrate after coming in contact with ammonia, which in turn could cause a failure of the flowrater's tubes. Id. at 153-54. In affirming a judgment for the plaintiff (who sustained injuries to his eye when the use of Viton O-rings caused a failure of the flowrater's glass tubes), this Court held that the lack of a warning concerning Viton O-rings "render[ed] the flowrater unsafe." Id. at 156.

In other words: The manufacturer of the flowrater knew that the use of another manufacturer's product (Viton O-rings) in conjunction with the flowrater would render the flowrater itself a hazard (because of the risk that the flowrater's glass tubes would fail and cause injury). Accordingly, under § 402A as interpreted by this Court in Tabert, the flowrater was a defective product and its manufacturer had a duty to warn against the condition (its

use in tandem with Viton O-rings) that could give rise to the hazard that made the flowrater a defective product. But in the present case, the application of external asbestos insulation does not give rise to any risk that Buffalo Pumps's product will fail and injure anyone. Thus, the decision of the Court of Appeals requires that Washington law depart from the chain of distribution approach laid down in Tabert and applied in subsequent decisions such as Sepulveda-Esquivel and Teagle, in order to impose a duty to warn on manufacturers in the position of Buffalo Pumps.²

3. The Most Analogous Decisions From Other Jurisdictions Do Not Impose a Duty to Warn of Potential Dangers of Another Manufacturer's Product. Although this Court is faced with an issue of first impression, there are numerous decisions from other jurisdictions which are more analogous than those relied on by the Court of Appeals. Tellingly, these cases do not impose a duty to warn on manufacturers whose products are subsequently used or combined with the product of another after the manufacturer has sold and delivered its completed product.

² Buffalo Pumps recognizes that this distinction does not resolve the issue of any duty to warn for the original asbestos-containing packing put inside the pump during its assembly. Although Buffalo Pumps would agree that it had a duty to warn of this original asbestos-containing packing, it is undisputed that there was no evidence that Braaten was exposed to asbestos from original packing in Buffalo Pumps' pumps. See (CP 539) (09/05/03 Braaten Dep. at 246, l. 24-247, l. 1);(CP 537) (09/05/03 Braaten Dep. at 235, l. 25-236, 11. 1-23). Moreover, this distinction cannot save the Court of Appeals' decision, which sweeps broadly and imposes a duty to warn for any use of asbestos-containing products in association with Buffalo Pumps' products.

- In In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055 (N.D. Cal. 2005), plaintiff airline passengers who developed deep vein thrombosis ("DVT") as a result of cramped and prolonged seating sued the aircraft manufacturer and various airlines, alleging, *inter alia*, that Boeing, the manufacturer, had a duty to warn of the risks of DVT and potentially preventative steps even though Boeing had delivered its aircraft to the airlines without seats, which were subsequently manufactured and installed by third parties at the airlines' direction. In re Deep Vein Thrombosis, 356 F. Supp. 2d at 1058-59.³ The court expressly rejected this theory, finding an absence of any case law supporting the creation of such a duty to warn. Moreover, the court recognized that:

[T]he proposition that a manufacturer, after its product is sold to a purchaser, is under a duty to warn a third party (with whom the manufacturer has never had contact) that the purchaser may or may not have supplemented the manufacturer's completed product with an allegedly defective piece of equipment. This convoluted theory of liability stretches a manufacturer's tort liability too far.

In re Deep Vein Thrombosis, 356 F. Supp. 2d at 1068.

In In re Deep Vein Thrombosis, Boeing clearly knew that the passenger airlines purchasing its planes would install seats, but as the court correctly noted, imposing a duty to warn would require Boeing to, after it

³ In another set of claims, Boeing had installed the seats pursuant to manufacturer instructions and specifications. In re Deep Vein Thrombosis, 356 F. Supp. 2d at 1058-59.

had manufactured and delivered a plane, determine which seating manufacturer had installed the seats and whether the seats had been installed correctly. In re Deep Vein Thrombosis, 356 F. Supp. 2d at 1068. If Boeing determined that the seats were defective or installed improperly, it would then have to take affirmative steps to warn passengers about a product it no longer owned or controlled. In re Deep Vein Thrombosis, 356 F. Supp. 2d at 1068-69. The court rejected such a duty as unsound, yet under the duty established by the Court of Appeals, manufacturers sued in Washington courts or under Washington law are now faced with this same burden.

- In Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634, 173 Cal. Rptr. 20 (1981), plaintiff sued the manufacturer of a non-defective cooking stove after propane gas that had leaked from a defective copper pipe attached to a water heater ignited when the stove was lit. As these facts were not in dispute, "the question remaining before the court was whether as a matter of law the stove manufacturer had a duty to warn that a lighted but properly operating stove might ignite gas leaking from some other place." Magic Chef, 173 Cal. Rptr. at 22. The court unequivocally refused to impose liability on the stove manufacturer, holding that:

[M]akers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe.

Magic Chef, 173 Cal. Rptr. at 23.

This case calls for application of the same rule. It has never been disputed that the pumps manufactured by Buffalo Pumps (and the pumps and valves of the other manufacturers) were faultlessly manufactured and that plaintiff seeks to impose liability solely on the basis that these parties had a duty to warn of the dangers of a completely different product. Just as the stove manufacturer in Magic Chef had no duty to warn of the danger that propane from another manufacturer's defective product might explode if ignited, the equipment manufacturers here should not have a duty to warn of the dangers of respirable asbestos manufactured and installed by others.

- In Wiler v. Firestone Tire & Rubber Co., 95 Cal. App. 3d 621, 157 Cal. Rptr. 248 (1979), plaintiffs attempted to hold Firestone, the tire manufacturer, liable for damages caused by a faulty tire valve stem manufactured and attached to the tire by Ford Motor Company. Relying on a numerous and well-established line of cases, as well as Professor Prosser's article, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 22-23 (1966), the court held that because "plaintiffs' evidence shows no defect in the component part, the tire, which was manufactured by Firestone, it may not be held liable." Wiler, 157 Cal. Rptr. at 252.

- In Kremer v. Duriron Co., Inc., 40 Ohio App. 3d 183, 532 N.E.2d 165 (1987), plaintiff sued a valve manufacturer after, unbeknownst to plaintiff, the valve, which had been incorporated into a system for holding chemicals, was

left open and plaintiff was sprayed with acid. The Court refused to find the valve manufacturer negligent under § 402A's duty to warn:

[T]he obligation that generates the duty to warn does not extend to the speculative anticipation of how components, that are not in and of themselves dangerous or defective, can become potentially dangerous as a result of their integration into a unit designed and assembled by another. The valve manufactured by Duriron was not in and of itself dangerous or defective, but functioned in the manner that the valve was designed to function. Duriron cannot be held liable for the manner in which Hilton-Davis incorporated the valve into the Hilton-Davis nitration system.

Duriron Co., 532 N.E.2d at 167.

These cases are illustrative of the overwhelming weight of authority on the question of whether to impose a duty on manufacturers to warn of dangers associated with other products. This Court should reverse the Court of Appeals' contrary holding, and align Washington with the majority rule.

4. The Duty to Warn Created by the BRAATEN Decision Is Inconsistent With the Historical Roots of § 402A's Duty to Warn. Because Braaten's asbestos exposure occurred before 1981, the Restatement (Second) of Torts § 402A, as construed and applied by Washington appellate courts, was the basis for the Court of Appeals' duty to warn under Braaten's strict liability theory. See Braaten, 137 Wn. App. at 40-41. An examination of the historical roots of the duty to warn established by § 402A is therefore highly relevant to this Court's analysis.

As Washington decisions recognize, "[a]s initially prepared by the Reporter, Dean Prosser, and as unanimously approved by the Advisors, the section applied only to foodstuffs[.]" Gates v. Standard Brands Inc. 43 Wn. App. 520, 528, 719 P.2d 130 (1986) (citing Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 830 (1973)). This initial application has been extended, moving first into the realm of products designed for intimate bodily use. See Restatement (Second) of Torts § 402A, comment b (1965). Now, a product may be found to have an unreasonably dangerous defect under § 402A because of manufacturing flaws, a defective design, or a failure to adequately warn of the product's dangers. Burton v. L. O. Smith Foundry Products Co., 529 F.2d 108, 110 (7th Cir. 1976) (citing Keeton, Products Liability, 50 F.R.D. 338 (1970)). It is this third means of establishing that a product is defective, failure to warn, that is at issue in this appeal.

Comment j to § 402A (1965), entitled, "*Directions or warning*," makes clear that the warning that may be necessary to render a product reasonably safe is a warning about the use, characteristics or properties of the product in question itself, not the use characteristics or properties of other products:

In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be

aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

Restatement (Second) of Torts § 402A, comment j (1965).

When courts have been confronted with the essential question faced by the Court of Appeals in Braaten – whether the manufacturer of a faultlessly manufactured product has duty to warn not only of dangers associated with the use of its product but also of the dangers associated with the inherently dangerous and harm-causing features of another's product – they almost uniformly conclude that such a duty would impose too great a burden on the manufacturer of the faultless product. See, e.g., Magic Chef, 173 Cal. Rptr. at 22-23; In re Deep Vein Thrombosis, 356 F. Supp. 2d at 1068. The public policy reasons supporting this result are legion, but perhaps best expressed as follows in In re Firearm Cases, 126 Cal. App. 4th 959, 24 Cal. Rptr. 3d 659 (2005):

Imposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and thus alters the cost and availability of the activity within the forum jurisdiction. In effect, it is a form of regulation administered through the courts rather than the states regulatory agencies. It is, moreover, a peculiarly blunt and capricious method of regulation, depending as it does on the vicissitudes of the legal system, which make results

highly unpredictable in probability and magnitude. Courts should therefore be chary of adopting broad new theories of liability, lest they undermine the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state[.]"

In re Firearm Cases, 24 Cal. Rptr. 3d at 682 (quoting Ileto v. Glock, Inc., 370 F.3d 860, 868 (9th Cir. 2004) (Kozinski, J., dis. from denial of reh. en banc)).

5. The Duty to Warn Created by the BRAATEN Decision Is Also Inconsistent With Principles of Foreseeability and Duty in a Negligence Theory. The Braaten decision also found that the defendant equipment manufacturers had a duty to warn under a negligence theory. Braaten, 137 Wn. App. at 47-49. The Court of Appeals, however, did not recognize that this Court has expressly held that "[t]he existence of duty is a question of law," Hutchins v. 1001 Fourth Ave. Associates, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991), 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 omitted).

Rather than a determining factor for establishing the existence of a duty, foreseeability is a concept better used to determine the scope or reach of an established duty. Once a duty is established, a jury may be called upon to determine the reach of that duty or whether the defendant

performed (or otherwise breached) its duty. E.g., Shepard v. Mielke, 75 Wn. App. 201, 205, 877 P.2d 220 (1994). In such cases, foreseeability (whether the harm was reasonably perceived) may be part of the analysis whether a breach of an established duty occurred. Shepard, 75 Wn. App. at 205. But as this 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 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.

B. Public Policy Considerations Weigh in Favor of Overruling or Modifying the BRAATEN Decision.

In failing to fully consider the public policies underlying strict products liability and by placing undue reliance on the concept of foreseeability, the decision of the Court of Appeals in Braaten has placed an overly expansive duty on manufacturers. It has long been established that a manufacturer should be responsible in tort and negligence for defects to its product and for the failure to warn of the hazard posed by its

product. The justification for such liability rests in the recognition that the manufacturer is positioned to know the dangers of its product, to test and retest its product to insure that product's safety, to set the price for the product to account for the risk of harm to users, and to insure itself against the risk of injury from the product.

As a consequence of the decision of the Court of Appeals, every product manufacturer is now obligated to anticipate the potential dangers posed not only of its own product but by a myriad of other products outside of their industries and beyond their fields of technical expertise that might be used in conjunction with or around his product, and to issue warnings as to the dangers posed by all such products. The proliferation of warnings that would necessarily accompany each product would not only be unduly burdensome to the manufacturer, but also confusing, rendering the 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.

The decision of the Court of Appeals not only fails to further the underlying purpose of products liability, it leads to absurd results. For instance, 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.

C. This Court Can Apply the Doctrine of Collateral Estoppel to Reverse the Court of Appeals and Undo its Pronouncement of a New and Novel Duty to Warn.

Here, the Court of Appeals affirmed summary judgment dismissal of one manufacturer defendant based on the collateral estoppel effect of the Texas Court's summary judgment order regarding a defendant identically situated to Buffalo Pumps. See Braaten, 137 Wn. App. at 39-40. Although none of the other equipment manufacturers asserted collateral estoppel at the Court of Appeals level, the general rule that an issue or theory not presented below will not be considered as a basis for relief on appeal, "is not inexorable

and has its limitations." Hanson v. City of Snohomish, 121 Wn.2d 552, 557, 852 P.2d 295 (1993) (quoting Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)). Here, application of this principle would be particularly apt. The Court of Appeals' questionable analysis of the substantive duty to warn issues could be replaced by a pronouncement from this Court that that it should not have reached those issues because it could have resolved the entire appeal on collateral estoppel grounds.

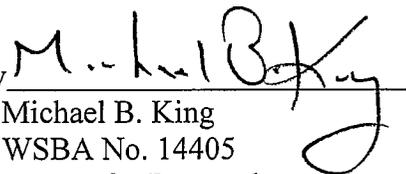
IV.

CONCLUSION

For the reasons stated above, Petitioner Buffalo Pumps, Inc. respectfully requests that this Court reverse the Court of Appeals and reinstate the summary judgment order dismissing all claims against it.

RESPECTFULLY SUBMITTED this 7th day of February, 2008.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On February 7, 2008, I caused to be served a true and correct copy of the document to which this certificate is attached on the following parties as indicated below:

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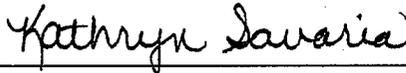
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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 7th day of February, 2008.



Kathryn Savaria