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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEO MACIAS and PATRICIA MACIAS,

Plaintiffs/Petitioners,

vs.

SABERHAGEN HOLDINGS, et al.,

Defendants/Respondents.

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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

George M. Ahrend
WSBA No. ~~25106~~ 25160
100 E. Broadway Avenue
Moses Lake, WA 98837
(509) 764-9000

On Behalf of
Washington State Association for Justice Foundation

ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper interpretation and application of Washington common law strict products liability and the Washington Product Liability Act, Ch. 7.72 RCW (WPLA).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case principally involves the nature and extent of a manufacturer's duty to warn, under Washington common law strict products liability and the WPLA, about dangers associated with servicing contaminated reusable respirators. The action was brought by Leo Macias (Macias) and his wife Patricia Macias against a number of defendants, including respirator manufacturers American Optical Corporation, Mine Safety Appliances Company, and North Safety Products USA (Respirator Manufacturers). The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Macias v. Safety

Appliances Co., 158 Wn.App. 931, 244 P.3d 978 (2010), *review granted*, 171 Wn.2d 1012 (2011); Macias Supp. Br. at 4-5; Macias Pet. for Rev. at 3-7; Respirator Manufacturers Ans. to Pet. for Rev. at 2-4; Respirator Manufacturers Br. at 3-5; Macias Br. at 5-9.

For purposes of this amicus curiae brief, the following facts are relevant: Macias worked as a tool keeper at Todd Shipyards in Seattle from 1978 to 2004, and his duties included cleaning and servicing reusable respirators manufactured by the Respirator Manufacturers. These respirators served as safety equipment, protecting workers from a variety of contaminants, including asbestos particles. See Macias, 158 Wn.App. at 936. As a tool keeper, Macias was responsible for cleaning and servicing the respirators in preparation for reuse by workers in the shipyards, although he did not wear one himself. See Respirator Manufacturers Supp. Br. at 17.

Macias brought this action against the Respirator Manufacturers for common law negligence, common law strict products liability, and liability under the WPLA, based upon the Respirator Manufacturer's failure to properly warn users on how to clean and service the respirators to prepare them for reuse. See Macias Supp. Br. at 4-6; Macias Br. at 5-7.¹ The superior court denied Respirator Manufacturers' motion for summary judgment seeking dismissal of all failure to warn claims based on their argument that they owed no duty to warn Macias of the hazards

¹ The WPLA applies to product liability claims "arising on or after July 26, 1981." RCW 4.22.920(1); Laws of 1981, ch. 27; Macias, 158 Wn.App. at 949 & n.8.

associated with other asbestos products containing the asbestos particles that allegedly caused Macias to contract mesothelioma.² The parties agreed the summary judgment motion posed a pure question of law, and that there were no disputed issues of fact for purposes of the motion. See Respirator Manufacturers Br. at 2. The summary judgment proceeding was limited to the question of duty.

In particular, Respirator Manufacturers argued that under this Court's decisions in Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008), and Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493 (2008), they owed no duty to warn Macias of the dangers associated with asbestos particles in other manufacturers' products because the Respirator Manufacturers were outside the "chain of distribution" of those products. The superior court denied the motion for summary judgment.

The Court of Appeals granted discretionary review and reversed. In so doing, it concluded Simonetta and Braaten were controlling, and remanded for entry of an order granting summary judgment to the Respirator Manufacturers on all failure to warn claims. See Macias, 158 Wn.App. at 942-51. Chief Judge Penoyar concurred specially, noting:

For the respirators to function properly, as intended by the user and the manufacturer, the user or a co-worker needed to clean the respirators' surfaces and the filters containing concentrated hazardous products. Under these facts, Macias strongly argues that the respirator manufacturers owed a justiciable duty to the person cleaning the respirators under both common law negligence and strict liability, as well as

² Macias died in June 2010, after this action was initiated. See Macias Pet. for Rev. at 4.

under chapter 7.72 RCW. However, under the broad language of *Simonetta* and *Braaten*, Macias's claims must fail. Whether the Supreme Court may choose in the future to paint with a narrower brush in cases such as this remains to be seen.

See id. at 952 (Penoyar, C.J., concurring).

This Court granted Macias' petition for review.

III. ISSUE PRESENTED

Under common law strict products liability and the WPLA, whether the manufacturers of reusable respirators owe Macias and other users a duty to warn of the dangers of contaminant exposure while cleaning and servicing the respirators, despite the fact they did not manufacture the asbestos product that injured Macias?

See Macias Pet. for Rev. at 2-3.³

IV. SUMMARY OF ARGUMENT

Under Washington common law strict products liability and the WPLA, products are principally evaluated by the trier of fact in terms of the reasonable expectations of the ordinary consumer or user. The focus is on the intrinsic nature of the particular product, and its safety. This is a relative, not absolute, concept that dictates a product-specific analysis.

This same consumer expectations focus must also inform a court's threshold duty analysis. Under Washington common law and the WPLA, manufacturers have a duty to make products that are reasonably safe. This duty includes the obligation to provide warnings, when necessary to render the product safe.

³ Macias challenges on review the Court of Appeals' application of *Simonetta* and *Braaten* as the basis for dismissing claims based on negligence, common law strict liability, and strict liability under the WPLA. This brief focuses on the strict liability claims, and does not discuss liability based on negligence.

Here, given the intrinsic nature of the safety equipment – a reusable respirator – and its function to protect against harmful contaminants, manufacturers must necessarily be deemed familiar with the contaminants their products are specifically designed to protect against, the limits of that protection, and the manner of cleaning and servicing their products. With these obligations in mind, the manufacturers must provide those warnings necessary to render their products reasonably safe for consumers and users. (If reasonable minds could differ on whether the duty to warn has been breached, the issue is for the trier of fact.)

Under this analysis, the focus in this case is on the safety equipment, not the product that contains the harmful contaminant that injured the consumer or user. Because the focus is on each safety equipment manufacturer's *own product*, the “chain of distribution” principle applied in Simonetta and Braaten is satisfied.

V. ARGUMENT

Introduction

The narrow issue before the Court is whether in a strict liability context the Respirator Manufacturers had a duty to warn Macias of dangers associated with servicing their products. The nature of these warnings and how they would be dispensed are not at issue at this stage of proceedings.⁴

⁴ Amicus Curiae Pacific Legal Foundation (PLF) appears to raise an issue beyond the duty question presented here in suggesting the Respirator Manufacturers' duty to warn is fulfilled by warnings directed to employers, as required by federal regulation. See PLF Am. Br. at 7-8, 13; see also RCW 7.70.050(1) (allowing trier of fact to consider a

The parties disagree whether Macias, as tool keeper, is a “user” of the Respirator Manufacturers’ products. See Macias Supp. Br. at 14; Macias Pet. for Rev. at 2; Respirator Manufacturers Ans. to Pet. for Rev. at 10-11; Respirator Manufacturers’ Br. at 19. This brief assumes for purposes of argument that because Macias cleaned and serviced the respirators he was a user under the common law and the WPLA.⁵

A. Overview of Strict Product Liability Under Washington Common Law And The WPLA, And The Focus On The Intrinsic Nature Of The Particular Product When Analyzing A Manufacturer’s Duty And Breach Of Duty.

In order to answer the duty to warn issue presented in this case, it is necessary to revisit key concepts guiding the development of strict liability in Washington, and the resulting focus on the intrinsic nature of the product in determining whether it is unreasonably dangerous, or reasonably safe.

In 1969, this Court adopted strict product liability (strict liability) in Washington in Ulmer v. Ford Motor Co., 75 Wn.2d 522, 525-32, 452 P.2d 729 (1969) (involving manufacturing defect). In Ulmer, the Court

manufacturer’s compliance with legislative and administrative regulatory standards). This issue is not briefed by the parties, and should not be reached by the Court. If the Court is inclined to address the issue, it should call for supplemental briefing. See RAP 12.1(b).

⁵ This assumption seems intuitively and legally correct. The nature of reusable respirators would seem to contemplate servicing by the person wearing the respirator or someone acting on their behalf. These circumstances do not seem much different than the situation where a worker contracts mesothelioma because over the years he or she cleaned and serviced their own mask without proper safeguards due to lack of sufficient warnings. See Restatement (Second) of Torts, §402A, Comment *i* (1965) (providing “‘User’ includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased”); RCW 7.72.010(5) (defining “claimant”); RCW 7.72.020(1) (carrying forward generally common law strict liability).

abandoned the fiction of warranty liability in favor of strict liability based upon Restatement (Second) of Torts, §402A (1965). See 75 Wn.2d at 532.⁶

Washington strict liability law was next refined in Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 147-49, 542 P.2d 774 (1975), which extended strict liability for unreasonably dangerous products to other actors in the chain of distribution, including suppliers or sellers of the product. More relevant here, Tabert clarified two additional points. First, strict liability was extended to claims based on defective design. See id., 86 Wn.2d at 149-50. Second, citing §402A(c) & Comment *i*, see id. at 152-53, Washington's conceptual approach to strict liability was settled as focusing on "the consumer's expectation of buying a product which is reasonably safe." Id. at 154. The Court later characterized this standard as "a buyer-oriented standard based on the reasonable expectations of an ordinary user." Ryder v. Kelly-Springfield Tire, 91 Wn.2d 111, 117, 587 P.2d 160 (1978).⁷

In a frequently referenced passage from Tabert, the Court explained the focus of Washington common law strict liability as follows:

This evaluation of the product in terms of the reasonable expectations of the ordinary consumer allows the trier of the fact to take into account the *intrinsic nature of the product*. The purchaser of a Volkswagen cannot reasonably expect the same degree of safety as would the buyer of the much more expensive Cadillac. *It must be*

⁶ Section 402A allows for strict liability based upon manufacturing defect, defect in design, and failure to warn. See Simonetta, 165 Wn.2d at 355 & n.7.

⁷ In choosing this conceptual path the Court rejected a seller-oriented standard favored elsewhere. See Ryder, 91 Wn.2d at 117-18.

borne in mind that we are dealing with a relative, not an absolute concept.

In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the *nature of the product* or the nature of the claimed defect may make other factors relevant to the issue.

Id. at 154 (emphasis added).⁸

In Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 155, 570 P.2d 438 (1977), and Ryder, 91 Wn.2d at 117-18, the Court extended the principles announced in Tabert to the duty to warn context. In so doing, it noted “[w]hile *Tabert* discussed the test in a defective design case, the standard would be the same where the product is claimed to be defective because of a failure to warn.” Ryder at 117 (citation omitted).

This common law buyer-oriented standard, with focus on the product itself, was generally referred to as a “consumer expectations” test. See Baughn v. Honda Motor Co., 107 Wn.2d 127, 134, 727 P.2d 655 (1986). However, as Baughn explains:

the *Tabert* rule actually combines the consideration of consumer expectations with an analysis of the risk and utility inherent in a product’s use. Thus, some commentators find it more accurate to call the *Tabert* test “a consumer expectations test with a risk-utility base.”

Id. (footnote citing quoted commentator and other commentary omitted).

With the adoption of the WPLA, the Washington Legislature carried forward Washington’s common law strict liability, with only a few

⁸ The last two sentences of the Tabert quote set forth the risk-utility factors.

modifications, none of which are relevant here. See RCW 7.72.020(1). RCW 7.72.030 codified the three basic theories of strict product liability – manufacturing defect, design defect, and failure to warn.⁹ In interpreting RCW 7.72.030 this Court has held: 1) the buyer-oriented risk-utility/consumer expectations framework developed at common law is carried forward in this statute, see Falk v. Keene Corp., 113 Wn.2d 645, 651-54, 782 P.2d 974 (1989); and 2) the conceptual underpinnings for design defect liability and failure to warn liability remain substantially the same, see Ayers v. Johnson & Johnson, 117 Wn.2d 747, 762-64, 818 P.2d 1337 (1991).¹⁰

Where the WPLA differs from the common law, as developed up to the time the act was adopted, is that the WPLA interprets RCW 7.72.030(1) and (3) as establishing two independent bases for strict liability, based on either a risk-utility or a consumer expectation analysis. See Falk, 113 Wn.2d at 654.

The nature of the duty owed by manufacturers under the common law and WPLA is substantially the same. Common law strict liability under §402A, as interpreted by Tabert and its progeny, requires

⁹ The current versions of RCW 7.72.010, 7.72.020 and 7.72.030 are reproduced in the Appendix. Post-manufacture failure to warn is treated differently under the WPLA, imposing a negligence standard on manufacturers in this instance, as opposed to the strict liability standard that governs the product at the time it leaves the manufacturer's control. See RCW 7.72.030(1)(c). WSAJ Foundation assumes postmanufacture warnings are not at issue in this case. See Macias, 158 Wn.App. at 931 (suggesting the record is unclear on this point).

¹⁰ Strict liability based upon a claim that the product is not reasonably safe in construction is governed by RCW 7.72.030(2). See generally Washington Pattern Instructions (WPI), WPI 110.01 & Comment (defect in construction); WPI 110.02 & Comment (design defect); WPI 110.03 & Comment (failure to warn).

manufacturers to produce products that are not “unreasonably dangerous” or, stated another way, that are “reasonably safe.” See Tabert at 154. RCW 7.72.030 repeatedly frames the manufacturer’s duty in terms of the obligation to provide a “reasonably safe” product. At common law a manufacturer breaches its duty if plaintiff establishes the product is unsafe under the combined risk-utility consumer expectations test. See Baughn, 107 Wn.2d at 134.¹¹ Under the WPLA, a manufacturer breaches its duty if its product is unsafe under either the risk-utility or consumer expectations test. RCW 7.72.030(1), (3); Falk at 654.¹²

In determining breach under the common law strict liability test, the inquiry focuses on the intrinsic nature of the product, and the analysis is product-specific. This same analysis applies under the WPLA consumer expectations test in RCW 7.72.030(3).¹³

The above overview demonstrates that under both common law strict liability and the WPLA the principal focus of the inquiry is on the intrinsic nature of the product and the reasonable expectations of the ordinary consumer or user. It is with this lens in mind that Macias’ strict liability failure to warn claims must be examined.

¹¹ Under the common law, the consumer expectations standard considers “the reasonable expectations of the ordinary consumer.” Ryder, 91 Wn.2d at 117; see also Teagle, 89 Wn.2d at 155.

¹² In Soproni v. Polygon Apt. Partners, 137 Wn.2d 319, 327, 971 P.2d 500 (1999), this Court held that under the WPLA consumer expectations “are judged against the reasonable expectations of the ordinary consumer.”

¹³ For that matter, the WPLA risk-utility balancing test is also product-specific, although the focus may be more on the manufacturer than the consumer or user. See Baughn, 107 Wn.2d at 134 (recognizing that common law strict liability involves assessing risk-utility “inherent in a product’s use”); WPI 110.03 (setting forth separate considerations for risk-utility and consumer expectations tests based on failure to warn).

B. Given The Intrinsic Nature Of Safety Equipment Such As A Reusable Respirator, Under Common Law Strict Liability And The WPLA The Manufacturer Of This Type Of Product Has A Duty To Warn Of Dangers In Servicing The Product To Render It Reasonably Safe.

Under both the combined risk-utility/consumer expectations test of the common law and the consumer expectations test of the WPLA, manufacturers of safety equipment are responsible for warnings necessary to assure safe use of the product, based on the intrinsic nature of the product. See Teagle, 89 Wn.2d at 156 (under common law, holding consumer expectations violated as a matter of law in absence of warnings regarding pressure limits of “flowrater” that exposed user to ammonia); Ayers, 117 Wn.2d at 757 (distinguishing consumer expectations regarding baby oil from those regarding other products not intended for use with babies; WPLA failure to warn claim); see also Macias Br. at 15-17; Macias Pet. for Rev. at 19-20; Macias Supp. Br. at 3, 11.¹⁴

The products involved in this case are reusable respirators, which are designed to be used, and re-used, in contaminated environmental conditions. They must be cleaned and serviced so that they can be re-used safely in such conditions, yet the cleaning and servicing process itself is alleged to entail exposure to the same contaminants from which the respirators are supposed to protect users. The gravamen of Macias’ claim

¹⁴ Respirator Manufacturers point to a rubber gloves hypothetical and other tools that may have been exposed to asbestos particles in the shipyards as justification for not imposing warnings regarding their own products. See Respirator Manufacturers Supp. Br. at 9; Respirator Manufacturers Ans. to Pet. for Rev. at 3, 11. These are different products with different natures and purposes. Whether a strict liability duty to warn claim would fail as a matter of law or present an issue for trial in those contexts is not relevant to the inquiry here, focusing on the intrinsic nature of the respirators. See Haysom v. Coleman Lantern, 89 Wn.2d 474, 479-80, 573 P.2d 785 (1978).

is that the Respirator Manufacturers failed to warn users how to clean and service their products without exposing them to these contaminants, essentially re-creating the environmental conditions that caused them to wear a respirator in the first place. See Macias Supp. Br. at 6. Given the intrinsic nature of the respirator, it is reasonable for users to expect the Respirator Manufacturers to troubleshoot those dangers in their products that are not open and obvious.¹⁵

Under both the common law and WPLA, strict liability for failure to warn is on an equal footing with design defect liability. See Ayers, 117 Wn.2d at 762-64. No one would reasonably question that if a respirator were improperly designed so that it did not filter targeted contaminants such as asbestos from the air breathed by the user, and an injury from the contaminant followed, that the respirator manufacturer would be liable, regardless of the fact that another product was the agent of injury. There should be no different result in a failure to warn context. This is simply a separate and distinct ground for finding the safety equipment is not reasonably safe. The Respirator Manufacturers should be deemed to have

¹⁵ The failure to warn encompasses all dangers that are not open and obvious. Under strict liability, this Court has stated that a manufacturer is not liable for failure to warn if the danger is open and obvious. See Haysom, 89 Wn.2d at 479-80 (providing that whether danger is open and obvious may be for the trier of fact); see also Teagle, 89 Wn.2d at 158 (recognizing under comparative fault that voluntarily encountering a known danger may be a damage-reducing factor). This issue may have to be resolved by the trier of fact, depending upon the particular circumstances. Presumably, these statements are also relevant in interpreting the WPLA. See RCW 7.72.020(1). In any event, Respirator Manufacturers' mainly seem to reference the open and obvious danger concept with regard to whether they have a duty to warn of dangers in *other* products containing asbestos. See Respirator Manufacturers Supp. Br. at 13-14. However, the duty to warn discussed here relates to Respirator Manufacturers' *own products*.

a duty to warn of dangers associated with cleaning and servicing their products under both common law strict liability and the WPLA.¹⁶

C. The Fact That Another Manufactured Product Contains The Contaminant (Asbestos) That Injures The Safety Product User Is Not Determinative Of Whether The Safety Product Manufacturer Fulfilled Its Duty To Warn Of Dangers In Servicing Its Product, As The Other Product Only Bears On The Nature And Extent Of The Injury Resulting From The Failure To Warn.

This case does not involve a failure to warn about asbestos products because the gravamen of the claim would be the same regardless of the contaminant involved, and regardless of whether it occurs naturally or is a man-made product. Instead, this case involves a failure to warn about the limits of protection against contaminants offered by reusable respirators, and the dangers involved in cleaning and servicing such respirators so that they can be reused. The focus of the liability inquiry is on the intrinsic nature of the respirator itself.

The fact that the contaminant that injured Macias, i.e., asbestos particles, stems from an asbestos product really bears on the nature of the injury sustained by Macias. The focus of the liability inquiry is on the intrinsic nature of the safety equipment; the consequence of the unsafe nature of the safety equipment is mesothelioma caused by the asbestos particles. Any failing in the asbestos product is not the gravamen of

¹⁶ Regarding the separate basis for liability under the WPLA based upon the risk-utility test, this test also involves a product-specific inquiry, requiring balancing a number of factors in determining whether the product is reasonably safe. See WPI 110.03 & Comment. The briefing in this case does not suggest a sufficient record exists from which a court could determine whether the risk-utility test is met as a matter of law. The seriousness of the injury is evident, but not much else.

Macias' liability claim. If Macias had suffered injury from a natural contaminant instead of a man-made contaminant due to the Respirator Manufacturers' failure to warn about how to clean and service their products, would anyone reasonably question their potential liability for the resulting injury? It should make no difference from a liability standpoint that another product was the agent of injury.

While Respirator Manufacturers may not have a duty to warn of the dangers of another manufacturer's product, they have a distinct duty to warn of dangers grounded in the intrinsic nature of their own products. They appear to acknowledge this point in their briefing, but then contend this duty is somehow eclipsed by this Court's holdings in Simonetta and Braaten:

A manufacturer may have a duty to warn about a danger inherent in its own product to which the plaintiff is exposed during "use," whether that use is operating, cleaning or maintaining that product. However, as the Court held in *Simonetta* and *Braaten*, a manufacturer does not have a duty to warn about hazards of another manufacturer's products which arise from the use, maintenance or cleaning of the non-asbestos containing product. *Simonetta*, 165 Wn.2d at 354, 363; *Braaten*, 165 Wn.2d at 389-90, 398.

Respirator Manufacturers Reply Br. at 9; see also PLF Am. Br. at 3 (similar argument). As discussed below, Simonetta and Braaten involved products different in nature from the safety equipment at issue here, and are distinguishable.¹⁷

¹⁷ As previously noted, Respirator Manufacturers also argue that their own duty to warn is not triggered here because Macias was not "using" their products during the course of cleaning and servicing them for others. See Respirator Manufacturers Reply Br. at 8-9; Respirator Manufacturers Ans. to Pet. for Rev. at 10-11. As previously discussed,

D. Under The Above Analysis, Imposing A Duty To Warn On The Respirator Manufacturers Does Not Abridge The Teachings Of *Simonetta* And *Braaten*, Because The Duty To Warn Relates To Each Respirator Manufacturer's *Own Product*, And Thus Meets The "Chain Of Distribution" Principle Applied In These Cases.

Allowing Macias to pursue a failure to warn claim against Respirator Manufacturers under common law strict liability and the WPLA is not inconsistent with this Court's decisions in Simonetta and Braaten, because the focus of the claim here is on the respirators, their own products, and thus satisfies the chain of distribution principle.

In Simonetta and Braaten, this Court held manufacturers of certain machines did not have a duty to warn of dangers of asbestos products manufactured by others because the machine manufacturers were outside of the chain of distribution of the asbestos products. See Simonetta, 165 Wn.2d at 360; Braaten, 165 Wn.2d at 389-90.¹⁸ Although these holdings involved common law strict liability claims, it is assumed they would also carry forward under the WPLA. See §A, supra.

The chain of distribution principle applied in Simonetta and Braaten, traceable to Tabert, 86 Wn.2d at 148, is satisfied here. The focus of the failure to warn claim is the reusable respirator, and the failure to warn of proper cleaning and servicing to avoid exposure to contaminants. The intrinsic nature of the product is to prevent harmful exposure.

cleaning and servicing the reusable respirators should qualify as use. See supra at 6 & n.5.

¹⁸ Braaten also involved a claim for failure to warn based upon asbestos products originally incorporated into the manufacturer's machine, an evaporator. However, this claim failed for want of proof that plaintiff was exposed to this asbestos product. See 165 Wn.2d at 391-94.

Exposure covers a variety of contaminants, including “welding fumes, paint fumes, asbestos particles, and dust.” Macias, 158 Wn.App. at 936. The focus is not on the asbestos product itself, as in Simonetta and Braaten, where the hazardous asbestos was applied after leaving each manufacturer’s control. See Simonetta at 345-46, 355; Braaten at 379-80, 385.¹⁹

Recognizing that the Respirator Manufacturers have a duty to warn of the dangers associated with cleaning and servicing their products also makes sense from a policy standpoint. These manufacturers are in the best position to guard against the harm that may follow if their products are not reasonably safe due to inadequate warnings. They manufacture and market products designed to prevent harm that would otherwise befall consumers and users exposed to contaminants. They should absorb the consequences of the failure of their products to perform. See Braaten at 382.

¹⁹ In addition to the fundamental distinction based on the intrinsic nature of reusable respirators, as opposed to the evaporators in Simonetta and the valves and pumps in Braaten, there appears to be another distinction based on the specifications of these different products. The specifications for the reusable respirators in this case included use with asbestos, among other contaminants. See Macias at 936 (stating “[t]hese respirators were manufactured to protect against a variety of contaminants. Different filter cartridges could be inserted into the respirators to protect the workers against specific contaminants, including ... asbestos particles”). In Simonetta, the manufacturer did not specify whether asbestos insulation should be used with its evaporators, even though it knew asbestos would likely be used. See 165 Wn.2d at 355 (stating “[n]or did Viad have control over the type of insulation the navy selected”); *id.* at 362 (noting Viad “did not manufacture, sell, or select the asbestos insulation”). Similarly, in Braaten the Court reviewed the factual record to confirm that none of the defendants specified asbestos-containing material for their products. See 165 Wn.2d at 380 (noting defendants “did not specify asbestos-containing packing and gaskets for use with their valves and pumps, and other types of materials could have been used”); *id.* at 396 (finding it significant that basis for claim was “replacement packing and gaskets that were not designed, manufactured, *specified*, or supplied by the [defendant-] manufacturers”; emphasis added).

Amicus Curiae Pacific Legal Foundation offers policy arguments for not “expanding” the duty to warn to cover this claim against the Respirator Manufacturers, based largely upon economic considerations. See PFL Am. Br. at 1-2, 9-19. When it adopted the WPLA, the Washington Legislature fully considered a host of policy-based arguments. See Laws of 1981, ch. 27 §1 (uncodified Preamble; reproduced in the Appendix to this brief). It chose to carry forward common law strict liability in most instances. See RCW 7.72.030 (codifying common law strict liability but providing for negligence-based postmanufacture duty to warn); RCW 7.72.010(2) (limiting design defect liability of certain product sellers). Some additional exceptions were later provided. See e.g. RCW 7.72.040 (limiting liability of product sellers other than manufacturers); RCW 7.72.070 (eliminating civil liability against food and non-alcoholic beverage manufacturers for actions based on weight gain, obesity, etc.).

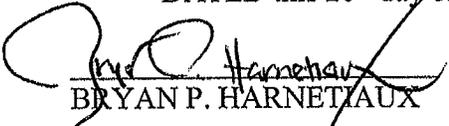
The Washington Legislature has not exempted safety product manufacturers from strict liability under the WPLA. As this act is preemptive in nature, see Washington State Phys. Ins. Exch. & Assn. v. Fisons Corp., 122 Wn.2d 299, 322-23, 850 P.2d 1054 (1993), it should be for the Legislature to provide any additional exceptions. In recognizing a valid duty to warn strict liability claim here, the Court would not “bend the rules of tort law,” PLF Am. Br. at 17, it would simply apply them.²⁰

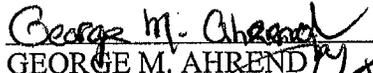
²⁰ PLF also appears to argue that imposing a duty to warn on manufacturers of safety products would discourage them from making such products. PLF Am. Br. at 1-2, 9-13.

VI. CONCLUSION

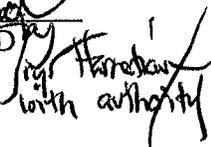
The Court should adopt the legal analysis advanced in this brief and resolve this appeal accordingly.

DATED this 20th day of September, 2011.


BRYAN P. HARNETAUX


GEORGE M. AHREND

On behalf of WSAJ Foundation


with authority

PLF's argument is premised on the assumption that safety product manufacturers would be liable for other manufacturers' products. This assumption is incorrect because Macias is seeking to hold the Respirator Manufacturers responsible for failure to warn involving the intrinsic nature of their own products. While exposure to other manufacturers' products relates to the nature and extent of injury, it does not relate to Respirator Manufacturers' duty to warn about cleaning and servicing their own products.

In any event, PLF's argument appears to be overstated. The deterrence value of product liability law -- which is recognized by PLF, see id. at 5 -- applies to safety and other products alike. Because deterrence is focused on the unreasonably dangerous aspects of products, it encourages the production of safer products of all types, not the elimination of any particular class or sub-class of products. Ultimately, PLF seems to be asking this Court to treat products that can be characterized as safety products differently than other products. The WPLA does not distinguish between the duty to warn involving safety products and other products. See RCW 7.72.030(1)(b).

Appendix

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.72. Product Liability Actions (Refs & Annos)

West's RCWA 7.72.010

7.72.010. Definitions

Currentness

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(1) Product seller. "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: PROVIDED, That when it is resold, the used product is in essentially the same condition as when it was acquired for resale;

(d) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(e) A licensed pharmacist who dispenses a prescription product manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed prescribing practitioner if the claim against the pharmacist is based upon strict liability in tort or the implied warranty provisions under the uniform commercial code, Title 62A RCW, and if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules as provided in RCW 7.72.040. Nothing in this subsection (1)(e) affects a pharmacist's liability under RCW 7.72.040(1).

(2) Manufacturer. "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller

or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.

(4) Product liability claim. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) Claimant. "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) Harm. "Harm" includes any damages recognized by the courts of this state: PROVIDED, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW.

Credits

[1991 c 189 § 3; 1981 c 27 § 2.]

Notes of Decisions (64)

Current with all 2011 Legislation

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West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.72. Product Liability Actions (Refs & Annos)

West's RCWA 7.72.020

7.72.020. Scope

Currentness

(1) The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.

(2) Nothing in this chapter shall prevent the recovery of direct or consequential economic loss under Title 62A RCW.

Credits

[1981 c 27 § 3.]

Notes of Decisions (9)

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West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.72. Product Liability Actions (Refs & Annos)

West's RCWA 7.72.030

7.72.030. Liability of manufacturer

Currentness

(1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product: PROVIDED, That a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

(c) A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design

specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW shall be determined under that title.

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

Credits

[1988 c 94 § 1; 1981 c 27 § 4.]

Notes of Decisions (182)

Current with all 2011 Legislation

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NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate March 13, 1981.

Passed the House April 9, 1981.

Approved by the Governor April 17, 1981.

Filed in Office of Secretary of State April 17, 1981.

CHAPTER 27

[Engrossed Senate Bill No. 3158]

TORT ACTIONS—PRODUCT LIABILITY—CONTRIBUTORY NEGLIGENCE—CONTRIBUTION

AN ACT Relating to tort actions; amending section 2, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.020; creating new sections; adding new sections to Title 7 RCW as a new chapter thereof; adding new sections to chapter 4.22 RCW as a part thereof; and repealing section 1, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.010.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. **PREAMBLE.** Tort reform in this state has for the most part been accomplished in the courts on a case-by-case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.