

No. 94732-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET RUBLEE, individually and as Personal Representative of
the Estate of VERNON D. RUBLEE,

Petitioner,

v.

PFIZER, INC.,

Respondent,

and

CARRIER CORPORATION; AIR & LIQUID SYSTEMS
CORPORATION, as successor by merger to BUFFALO PUMPS, INC.;
CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., as
successor by merger to CBS CORPORATION, a Pennsylvania
corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION;
ELLIOTT COMPANY; GENERAL ELECTRIC COMPANY; IMO
INDUSTRIES, INC., individually and as successor in interest to DE
LAVAL TURBINE, INC.; INGERSOLL-RAND COMPANY; LONE
STAR INDUSTRIES, INC.; individually and as successor in interest to
PIONEER SAND & GRAVEL COMPANY; METROPOLITAN LIFE
INSURANCE COMPANY; SABERHAGEN HOLDINGS, INC.; UNION
CARBIDE CORPORATION; WARREN PUMPS, LLC, QUIMBY
PUMP COMPANY,

Defendants.

MEMORANDUM OF AMICUS CURIAE
WASHINGTON STATE LABOR COUNCIL
AFL-CIO

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

The interest of amicus Washington State Labor Council, AFL-CIO (“WSLC”) is articulated in detail in the motion for leave to submit this memorandum in support of the petition for review by Margaret Rublee, personal representative of the Estate of Vernon Rublee (“Rublee”).

B. INTRODUCTION

The trial court here concluded that Rublee failed to create a question of fact as to Pfizer, Inc.’s (“Pfizer”) status as an apparent manufacturer under § 400 of the *Restatement (Second) of Torts*. In a published opinion, Division I of the Court of Appeals agreed. However, in so doing in this case of first impression, that court applied the incorrect standard for determining if Pfizer was an apparent manufacturer of the product-containing the asbestos that caused Vernon Rublee’s mesothelioma that killed him.

This Court should grant review in this case of first impression and establish the correct standard for claims arising under common law principles set forth in *Restatement* § 400 or the provision in Washington’s 1981 Product Liability and Tort Reform Act (“WPLA”), RCW 7.72.010(2) that adopted a similar apparent manufacturer theory of liability. RAP 13.4(b)(1), (4). When it does, this Court should reverse the trial court, affording Rublee its day in court on Vernon’s wrongful death.

C. STATEMENT OF THE CASE

WSLC adopts the recitation of the facts in the Court of Appeals' opinion, op. at 2-5, as supplemented by the facts in Rublee's petition for review. Pet. at 2-7.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

- (1) The Court of Appeals Failed to Apply the Ordinary Consumer Expectations Test Mandated by This Court's Decisions to Determine if Pfizer Was an Apparent Manufacturer – RAP 13.4(b)(1)

The Court of Appeals decision merits review under RAP 13.4(b)(1) because it contradicts the decisions of this Court on the fundamental interpretive principle for addressing product liability issues in Washington – the expectations of the ordinary product consumer.

(a) Apparent Manufacturer Liability

Division I correctly concluded that the *Restatement (Second) of Torts* § 400 applied to the facts in Rublee's case because the liability-creating events pre-dated the enactment in 1981 of Washington's Product Liability and Tort Reform Act ("1981 Act"). Op. at 7-8. The *Restatement* provides:¹

¹ It would not have made a difference if the product liability components of the 1981 Act, RCW 7.72 ("the WPLA") applied here. RCW 7.72.010(2) provided for apparent manufacturer liability when it defined a manufacturer as "a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer."

One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

Comment c to § 400 discusses the rationale for such liability, stating:

One who puts out his own produce chattels made by others is under a duty to exercise care, proportionate to the danger involved in the use of chattels if improperly made, to secure the adoption of a proper formula or plan and the use of safe materials and to inspect the chattel when made. But he does not escape liability by so doing. He is liable, if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerously defective condition which the seller could not discover after it was delivered to him.

Prior to Division I's opinion, no Washington state court had explicitly adopted § 400 or applied the WPLA's analogous principle in RCW 7.72.010(2). However, as the Court of Appeals noted, *op. at 7-8*, two federal court decisions, *Turner v. Lockheed Shipbuilding Co.*, 2013 WL 7144096 (W.D. Wash. 2013) and *Sprague v. Pfizer, Inc.*, 2015 WL 144330 (W.D. Wash. 2015) both predicted that Washington courts would adopt § 400. Both courts noted that Washington courts have adopted numerous sections of the *Restatement* including § 402A. Section 400 is mentioned in a Court of Appeals decision, and many other jurisdictions have also adopted it. *Turner at *2; Sprague at *3.*²

² Neither district court mentioned the WPLA, RCW 7.72.010(2), an additional reason for believing Washington courts would adopt § 400.

The Court of Appeals was correct in its determination that § 400 applies in Washington.

Division I, however, went astray in its analysis when it relied on foreign authority to determine when, and from whose perspective, a defendant constitutes an apparent manufacturer. Op. at 8-22. The court examined three tests – objective reliance, actual reliance, and “enterprise liability. *Id.* Ultimately, Division recognized that a majority of American courts employ the objective reliance test, looking to whether a reasonable consumer would have relied on advertising materials or labels in making a purchase of the product or utilizing it. *Id.* at 8. That test, resembling Washington’s own consumer expectations test, that will be discussed *infra*, is fact-intensive. *E.g., Swift & Co. v. Blackwell*, 84 F.2d 130, 132 (4th Cir. 1936) (looking to how average reader of can of evaporated milk would understand who manufactured the product). Instead, Division I adopted the defendant manufacturer’s contention that courts must look to the more sophisticated perspective of the product purchasing agents. Op. at 9-11. This was error. Washington law required application of Washington’s longstanding ordinary consumer expectations test for this analysis, an intensively factual analysis that is for the trier of fact, and not a question of law.

(b) Ordinary Consumer Expectations

In applying strict product liability under § 402A of the *Restatement*, Washington law has long applied the expectations of the ordinary consumer to determine if a product is not reasonably safe and liability should attach for the manufacturer. *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 154, 542 P.2d 774 (1975).³ It is a cardinal principle of Washington product liability law, so firmly entrenched that the Legislature explicitly made it a part of the WPLA:

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.

RCW 7.72.030(3).⁴ Indeed, in retaining the consumer expectations principle, the 1981 Legislature did so expressly. It had relied substantially on the United States Department of Commerce's Model Uniform Product Liability Act, 44 Fed. Register 62714, *et seq.* (1979) ("MUPLA"). *See* 1981 *Senate Journal* at 629. The MUPLA, in its discussion of liability principles, was critical of the consumer expectations test as too highly subjective a basis for manufacturer liability. 44 Fed. Register at 62724. Nevertheless,

³ In determining the reasonable expectations of the ordinary consumer, a number of factors may 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." In other instances, the nature of the product or the nature of the claimed defect may make other factors relevant to the issue. *Talbert*, 85 Wn.2d at 154.

⁴ The Legislature's enactment of the WPLA modified the common law of product liability "only to the extent set forth in [RCW 7.72]." RCW 7.72.020(1).

the 1981 Legislature, recognizing that the consumer expectation test was “currently utilized by the Washington court,” expressly chose to retain it as a basis for manufacturer liability along with the risk-burden balancing test.

Thus, Washington courts since 1981 have recognized that a WPLA claimant can establish a product liability claim either by asking the trier of fact to assess the risk-benefit of the product or looking to the expectations of the ordinary product consumer as to its safety. *Falk v. Keene Corp.*, 113 Wn.2d 645, 654, 782 P.2d 974 (1989) (design defect); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 765-66, 818 P.2d 1337 (1992) (warning case); *Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 326-27, 971 P.2d 500 (1999).

The Court of Appeals here disregarded this long history in Washington law looking to the expectations of the ordinary consumer regarding a product’s safety. In failing to apply that overarching standard to the apparent manufacturer question, the Court of Appeals’ decision is contrary to decisions of this Court, meriting review. RAP 13.4(b)(1).

(2) The Adoption of Apparent Manufacturer Liability Is a Significant Issue of Public Importance This Court Should Decide – RAP 13.4(b)(4)

The present case also merits review under RAP 13.4(b)(4) because it is an issue of substantial public importance that should be ultimately decided by this Court for two clear reasons. First, the issue of apparent

manufacturer liability – whether under the common law or under the WPLA – is a question of first impression. Second, this issue is generally of importance to manufacturers and others in Washington and should be resolved by this Court. Both reasons require this Court to grant review. RAP 13.4(b)(4).

(a) Whether Pfizer Is an Apparent Manufacturer under Washington Law Is One of First Impression

Division I acknowledged that the liability of apparent manufacturers is one of first impression in Washington law. Op. at 8. As such, this Court should grant review and address the issue.

This Court has frequently concluded that issues of first impression qualify for direct review under RAP 4.2(a) or review under RAP 13.4(b)(4).⁵ In particular, this Court customarily grants such review in cases

⁵ See, e.g., *Birrueta v. Dep't of Labor & Indus., State of Wash.*, 186 Wn.2d 537, 379 P.3d 120 (2016) (repayment of worker compensation benefits); *In re Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011) (use of guardianship fees for advocacy activities); *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011) (public private defender staff entitlement to public pension); *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (prejudgment interest in legal malpractice action); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city's reply letter to a public records request was a proper claim of exception); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (constitutionality of random drug testing of student athletes); *King Cty. v. Central Puget Sound Growth Mgmt. Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000) (recreational use of land in areas designated under GMA for agricultural purposes); *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 899 P.2d 787 (1995) (interpretation of insurance policy exclusion for government-owned vehicles); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968 (1988) (validity of exculpatory clause required of student athletes); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (admissibility of evidence obtained from pen register).

involving the need for a definitive statutory interpretation. Specifically, this Court has provided for review in cases involving the need for a definitive interpretation of the 1981 Act and other associated tort law changes. *E.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (interpreting contribution provisions of 1981 Act); *Scott v. Cascade Structures*, 100 Wn.2d 537, 673 P.2d 179 (1983) (contribution and constitutionality of 1981 Act); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989) (constitutionality of noneconomic damages caps enacted in 1986 amendments to 1981 Act).

Demonstrating the importance of this novel issue, the Ninth Circuit Court of Appeals in *Sprague v. Pfizer, Inc.* (Cause No. 15-35051) has acknowledged the present case in an order entered on July 14, 2017 allowing the parties to renew a motion for stay should this Court grant review.

In sum, as an issue of first impression regarding an important principle of Washington product liability, this Court, not Division I, should address it and its appropriate contours for manufacturer liability.

- (b) Whether Apparent Manufacturers Should Have the Liability of Product Manufacturers under Washington Law Is an Issue of Significant Public Importance

A second reason that justifies review under RAP 13.4(b)(4) is the significance of the manufacturing sector in Washington's economy. That vital component of Washington's economy should have a definitive ruling by the State's highest court if, and if to what extent, businesses are liable if they engage in conduct suggesting that they have manufactured an unsafe product.

According to the National Association of Manufactures, manufacturers in Washington account for 13.12% of the total economic output in the state, employing 8.8% of the workforce. Total output from manufacturing was \$58.22 billion in 2015. There were 286,300 manufacturing employees in Washington in 2016, with an average annual compensation of \$86,991 in 2015. Manufacturers provided \$66.22 billion in manufactured goods exports in 2016. This helps create jobs in the state, and 38.80% of its employment stemmed from exports in 2011. Small businesses comprised 90.00% of all exporters in Washington. <http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/April2017/Washington>.

Washington businesses should know the circumstances under which they assume the status of a manufacturer by their conduct. Given the critical nature of the manufacturing sector to Washington's economy, review in this case is merited. RAP 13.4(b)(4).

E. CONCLUSION

This case is a Supreme Court case. This Court should address the concept of apparent manufacturer liability and should apply this Court's overarching principle of the expectations of the ordinary product consumer to the establishment of such liability.

DATED this 14th day of September, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARGARET RUBLEE, individually)
and as personal representative of)
the Estate of VERNON D. RUBLEE,)

Petitioner,)

v.)

CARRIER CORPORATION; AIR &)
LIQUID SYSTEMS CORPORATION,)
as successor by merger to)
BUFFALO PUMPS, INC.; CBS)
CORPORATION, a Delaware)
corporation, f/k/a VIACOM, INC.,)
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CORPORATION, a Pennsylvania)
corporation, f/k/a WESTINGHOUSE)
ELECTRIC CORPORATION;)
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INDUSTRIES, INC., individually and)
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SABERHAGEN HOLDINGS, INC.;)
UNION CARBIDE CORPORATION;)
and WARREN PUMPS, LLC,)
individually and as successor in)
interest to QUIMBY PUMP COMPANY,)

Defendants,)

PFIZER, INC.,)

Respondent.)

No. 75009-7-1

DIVISION ONE

PUBLISHED OPINION

FILED: June 26, 2017

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LEACH, J. — Margaret Rublee appeals the summary judgment dismissal of her wrongful death action against Pfizer Inc. She seeks to impose liability on Pfizer as an “apparent manufacturer” under Restatement (Second) of Torts § 400 (Am. Law Inst. 1965), claiming that Pfizer represented itself as a manufacturer of products that caused her husband’s mesothelioma. Because Rublee’s evidence does not create a genuine issue of material fact about Pfizer’s status as an apparent manufacturer, we affirm.

FACTS

Vernon Rublee died of mesothelioma in 2015. His wife, appellant Margaret Rublee, survives him.

Vernon¹ was a machinist at Puget Sound Naval Shipyard (PSNS) from 1965 to 1980. He worked on steam turbines that were insulated with asbestos “lagging.” Other workers periodically replaced this lagging. To do this, they tore off the existing insulation and then “re-lagged” the turbine. To prepare the lagging, they poured bags of insulation cement, or refractories, “in a trough or a bucket and mix[ed] it up.”² This created dust that would linger at the worksite, exposing those working there to asbestos.

¹ We refer to Vernon by his first name to distinguish him from his wife.

² Pfizer describes “refractories” as “cement-like powders designed to be mixed with water and applied to the surface of areas exposed to extreme heat.”

The workers at PSNS used two refractory products, Insulag and Panelag. Vernon and other PSNS workers testified to seeing "Pfizer" on the product bags.

Quigley Company Inc. actually manufactured Panelag and Insulag. Quigley trademarked Insulag in 1936 and Panelag in 1945. Both contained asbestos until the early 1970s when, faced with growing health concerns, Quigley replaced them with asbestos-free versions.

Pfizer acquired Quigley as a wholly owned subsidiary in 1968. According to Pfizer officers, Quigley continued to operate as a separate corporation, continued to manufacture both products, continued to own the plant where it made them, and continued to buy the raw materials used in them. Pfizer also submitted evidence that Quigley continued to handle sales and distribution of these products by maintaining its own sales employees and receiving and filling customers' orders. Quigley sales employees continued to communicate with purchasers and distributors on Quigley stationery and sign letters on behalf of Quigley. The stationery stated that Quigley was a "Subsidiary of PFIZER, INC." and included a Pfizer logo in the upper-left corner. Quigley invoices included the same information. Purchasers and distributors continued to send orders and letters to "Quigley Company, Inc." And the product distributors advertised themselves as distributors for "Quigley Co." The labels on bags of Insulag and Panelag identified Quigley as the product manufacturer and stated that it was a

subsidiary of Pfizer. Quigley continued to submit forms and distribute safety and promotional materials that identified Insulag and Panelag as Quigley products.

Quigley filed for bankruptcy in 2004.³ By then, over 160,000 workers had sued the company for injuries caused by asbestos.⁴ In 2013, the United States District Court for the Southern District of New York approved a reorganization plan that created an asbestos injury trust to compensate claimants.⁵ The court enjoined all parties from suing Quigley for asbestos-related injuries. This “channeling injunction” also prevents asbestos-related injury claims against Pfizer based on its ownership, management, or control of Quigley, including claims based on “piercing the corporate veil” or successor liability theories.⁶ But the channeling injunction does not bar claimants from alleging that Pfizer is liable as an apparent manufacturer.⁷

Rublee sued Pfizer and several other companies for damages.⁸ The trial court dismissed the claims against Pfizer by summary judgment. This court

³ In re Quigley Co., No. 04-15739(SMB), 2008 WL 2097016, at *1 (Bankr. S.D.N.Y. May 15, 2008), rev'd, 449 B.R. 196 (S.D.N.Y. 2011), aff'd, 676 F.3d 45 (2d Cir. 2012).

⁴ Quigley, 2008 WL 2097016, at *1.

⁵ See 11 U.S.C. § 524(g) (Bankruptcy Code). Pfizer states that it has funded approximately \$965 million of the trust.

⁶ Quigley, 676 F.3d at 60 & n.18.

⁷ Quigley, 676 F.3d at 60-61 (holding that injunction does not prohibit apparent manufacturer claim because such a claim is not “a legal consequence of” Pfizer’s ownership of Quigley).

⁸ Rublee converted this suit to a wrongful death action after Vernon died.

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granted discretionary review on the issue of Pfizer's alleged apparent manufacturer liability.⁹

At least two plaintiffs have brought apparent manufacturer claims against Pfizer in the United States District Court for the Western District of Washington. In Turner v. Lockheed Shipbuilding Co.¹⁰ and Sprague v. Pfizer, Inc.,¹¹ that court dismissed the claims at summary judgment. The Ninth Circuit stayed an appeal in Sprague pending this appeal.

STANDARD OF REVIEW

We review an order granting summary judgment de novo, making the same inquiry as the trial court.¹² We affirm summary judgment when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law.¹³ We view the facts and all reasonable inferences from them in the light most favorable to the nonmoving party.¹⁴ A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the

⁹ See RAP 2.3(b)(4).

¹⁰ No. C13-1747 TSZ, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013) (court order).

¹¹ No. 14-5084 RJB, 2015 WL 144330 (W.D. Wash. Jan. 12, 2015) (court order).

¹² Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

¹³ Owen, 153 Wn.2d at 787.

¹⁴ Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

outcome of the lawsuit.¹⁵ The nonmoving party “must set forth specific facts showing a genuine issue” and “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.”¹⁶

ANALYSIS

Rublee relies on section 400 of Restatement (Second) to establish Pfizer's liability. Section 400 states that “[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.” The legal community commonly calls this “apparent manufacturer liability.”

Apparent manufacturer liability predates the doctrine of strict liability for harms caused by unreasonably dangerous goods.¹⁷ Some courts have concluded that since both doctrines aim to remedy the same harms, strict product liability has in effect “absorbed” the apparent manufacturer doctrine.¹⁸ Others have expanded the apparent manufacturer doctrine to include actors that

¹⁵ Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

¹⁶ Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989); Leahy v. Quality Loan Serv. Corp. of Wash., 190 Wn. App. 1, 4-5, 359 P.3d 805 (2015) (citing Wash. Fed. Sav. v. Klein, 177 Wn. App. 22, 311 P.3d 53 (2013)), review denied, 185 Wn.2d 1011 (2016).

¹⁷ Hebel v. Sherman Equip., 92 Ill. 2d 368, 442 N.E.2d 199, 201, 65 Ill. Dec. 888 (1982).

¹⁸ Hebel, 442 N.E. 2d at 202.

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would not be strictly liable because they are outside the good's chain of distribution, such as trademark licensors.¹⁹ The Washington legislature incorporated both the apparent manufacturer doctrine and strict product liability in the 1981 Washington product liability act (WPLA), chapter 7.72 RCW.²⁰ Preexisting law governs claims that, like Rublee's, arose before the effective date of this act, July 26, 1981.²¹

First, we must decide whether § 400 applies to claims that arose before the WPLA took effect. No Washington appellate court has adopted § 400. Our Supreme Court has adopted similar sections of Restatement (Second).²² This court cited § 400 in a 1975 decision but did not adopt it.²³ And the majority of jurisdictions to consider § 400 have adopted it.²⁴ From this history, the United

¹⁹ Stein v. Pfizer Inc., 228 Md. App. 72, 137 A.3d 279, 290-91 (2016) (citing Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103, 1107 (E.D. Pa. 1973); Connelly v. Uniroyal, Inc., 75 Ill.2d 393, 389 N.E.2d 155, 161, 163, 27 Ill. Dec. 343, (1979); Brandimarti v. Caterpillar Tractor Co., 364 Pa. Super. 26, 527 A.2d 134 (1987)), cert. denied, 146 A.3d 476 (2016).

²⁰ RCW 7.72.010(2) (defining "manufacturer" to "include[] a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer"); RCW 7.72.030(1).

²¹ Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 472, 804 P.2d 659 (1991); RCW 4.22.920.

²² Ulmer v. Ford Motor Co., 75 Wn.2d 522, 452 P.2d 729 (1969) (applying § 402A strict product liability to manufacturers); Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 542 P.2d 774 (1975) (applying § 402A to sellers and suppliers); Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (applying § 46 and comments).

²³ Martin v. Schoonover, 13 Wn. App. 48, 54-55, 533 P.2d 438 (1975).

²⁴ See Long v. U.S. Brass Corp., 333 F. Supp. 2d 999, 1003 (D. Colo. 2004) (collecting cases).

States District Court for the Western District of Washington has twice concluded that the Washington Supreme Court would adopt § 400.²⁵ We agree. For purposes of this appeal, we assume that the Washington Supreme Court would apply § 400 when presented with the appropriate case.

Because no Washington court has addressed apparent manufacturer liability under § 400, this case presents an issue of first impression. For persuasive authority, we look to other courts' applications of § 400.

Courts generally have applied one of three tests for apparent manufacturer liability: objective reliance, actual reliance, and "enterprise liability."²⁶ We do not need to decide which of these tests, if any, our Supreme Court would adopt because Rublee has not identified evidence sufficient to satisfy any of them.

The majority of courts to adopt apparent manufacturer liability have applied the objective reliance test.²⁷ This test asks "whether a reasonable consumer would have relied upon a label or advertising materials of a product in purchasing it."²⁸ A court can answer this question "from the vantage point of an ordinary, reasonable consumer or from the perspective of a reasonable

²⁵ Turner, 2013 WL 7144096, at *2.

²⁶ Stein, 137 A.3d at 294.

²⁷ Stein, 137 A.3d at 290.

²⁸ Stein, 137 A.3d at 294-95; see, e.g., Hebel, 442 N.E.2d at 203; Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385, 391 (1932).

purchaser, in the position of the actual purchaser.”²⁹ Pfizer contends that we should apply the test from the viewpoint of the agents who actually purchased Insulag and Panelag for steel mills, power plants, and shipyards like PSNS. Rublee asserts that we should instead ask whether an ordinary user of Insulag and Panelag would think Pfizer manufactured them.

We agree with Pfizer. Courts applying the objective reliance test appear to have done so uniformly from the viewpoint of the “purchasing public.” In the classic apparent manufacturer case, where a consumer sues the retailer or distributor that sold a harmful good to the consumer, the purchaser would also be an “ordinary user.”³⁰ But in cases where a sophisticated industrial entity purchased the product, courts have applied the test from the viewpoint of a “reasonable purchaser” in that position.³¹

For example, in Hebel v. Sherman Equipment,³² the Supreme Court of Illinois rejected as irrelevant a car wash employee’s argument that a reasonable person in his position would think the defendant manufactured the conveyor belt that injured him. Sherman manufactured most of the other pieces of equipment

²⁹ Stein, 137 A.3d at 295.

³⁰ See Hebel, 442 N.E.2d at 202; RESTATEMENT (SECOND) OF TORTS § 400 cmt. d, illus. 1-2; see, e.g., Burckhardt, 161 A. at 391 (holding that distributor put out corned beef can as its own where it placed trademark on label and label did not identify actual packer).

³¹ Stein, 137 A.3d at 296-97.

³² 92 Ill. 2d 368, 442 N.E.2d 199, 202-03, 65 Ill. Dec. 888 (1982).

at the car wash, each of which were sold and operated separately from the hazardous conveyor.³³ The court observed that the “primary rationale” of the apparent manufacturer doctrine is that the defendant “has induced the purchasing public to believe that it is the actual manufacturer, and to act on this belief—that is, to purchase the product in reliance on the apparent manufacturer’s reputation and skill in making it.”³⁴ The court held that a reasonable purchaser of car wash equipment would not rely on the possible impression a “casual observer” like the plaintiff might have that the defendant manufactured the machine.³⁵

The Maryland Court of Special Appeals adopted this reasoning in Stein v. Pfizer, Inc.³⁶ In applying the objective reliance test to a claim very similar to Rublee’s, the court required the plaintiffs to “show that a reasonable purchaser of refractory materials, that is, Bethlehem Steel, . . . would have relied upon Pfizer’s reputation and assurances of quality in purchasing . . . Insulag.”³⁷

Rublee cites no case asking whether an ordinary user who was not a purchaser would rely on a defendant’s representation. Instead Rublee relies on cases that either apply the test from a “purchasing public” viewpoint or address

³³ Hebel, 442 N.E. 2d at 203.

³⁴ Hebel, 442 N.E. 2d at 203.

³⁵ Hebel, 442 N.E. 2d at 203.

³⁶ 228 Md. App. 72, 137 A.3d 279, 296, cert. denied, 146 A.3d 476 (2016).

³⁷ Stein, 137 A.3d at 296.

what parties can recover for injuries from defective products.³⁸ As discussed above, courts applying an objective test have done so from the perspective of a “reasonable purchaser in the position of the actual purchaser.”³⁹

Rublee contends that her evidence creates a fact question even under this test. We disagree.⁴⁰

The record contains several marketing items and pieces of correspondence that include Pfizer’s logo. Advertising fliers show the logo alongside Quigley’s, with “Manufacturers of Refractories” printed beneath.⁴¹ Quigley salespeople distributed pocket calendars also bearing Pfizer’s logo. In a Pfizer shareholder report, photographs of Quigley plant construction sites call them “Pfizer construction sites.” Another report refers to “the Quigley Magnesite Division of Pfizer Chemical Corporation.” Invoices for Insulag and Panelag include the Pfizer logo in the corner. And a letter from Quigley’s vice president

³⁸ See, e.g., Heinrich v. Master Craft Eng'g, Inc., 131 F. Supp. 3d 1137, 1160 (D. Colo. 2015) (“reasonable member of the buying public”).

³⁹ Stein, 137 A.3d at 295; see Hebel, 442 N.E. 2d at 203; Kennedy v. Guess, Inc., 806 N.E.2d 776, 784 (Ind. 2004) (“purchasing public”).

⁴⁰ See Robinson v. City of Seattle, 119 Wn.2d 34, 57, 830 P.2d 318 (1992); CR 56(c).

⁴¹ Both offer pre-1968 Quigley logos that, they assert, support their side. Rublee points to an information sheet from before the acquisition, which reads “Manufacturer of Refractories” under the Quigley logo. Pfizer counters with materials from before the acquisition that read “Manufacturers of Refractories” under Quigley’s name. Neither argument is determinative because at the time Pfizer owned Quigley, a reasonable consumer would not necessarily know how Quigley advertised itself in the past.

regarding discontinuing Insulag and Panelag again includes Pfizer's logo in the top-left corner.

This evidence does not create a fact question about objective reliance. Rublee overstates the prominence of the Pfizer logo in the pocket calendar and correspondence. While these materials include Pfizer's logo, both feature Quigley's name more prominently, with "subsidiary of Pfizer" under it.⁴² The product invoices feature Quigley's logo and address in the top center. A reasonable reader would not infer from these items that Pfizer manufactured the products.

Likewise, a caption in a shareholder report that refers to a Quigley plant in Ireland as a "Pfizer construction site[]" does not, in context, give the impression Rublee attributes to it. While those words appear in small font above the photos, the text of the report makes clear that the plants belonged to Quigley and that Quigley was Pfizer's subsidiary.⁴³ And a single reference to "the Quigley Magnesite Division of Pfizer Chemical Corporation" in another report does not create a fact question, particularly in light of that passage's opening sentence: "Nineteen-seventy sales of refractory specialties manufactured and marketed by

⁴² Also, a "technical data" sheet on Insulag includes the Pfizer logo but reads "a subsidiary of Pfizer Inc." under the Quigley name.

⁴³ The report states, "Construction work continued throughout 1969 on Quigley's dolomite stone processing plant . . . and on the sea-water magnesite plant at Dungarvan . . . They will provide high-purity, low-cost magnesite grain for use in many of Quigley's specialty refractory formulations."

Quigley Company, Inc., a Pfizer subsidiary” Thus, while this evidence shows that Pfizer and Quigley had a corporate relationship, no reasonable industrial purchaser could infer from it that Pfizer actually manufactured the refractories.

The record also contains deposition testimony from several workers who said that they noticed the Pfizer name on bags of refractory materials at PSNS. But this testimony has little relevance to a reasonable purchaser’s understanding of the products’ manufacturer because Rublee has not shown that any of the workers had any role in any purchasing decision. And even if this court applied the objective reliance test from a reasonable user’s viewpoint, none of the workers stated that they took any action based on seeing Pfizer’s name on the products.⁴⁴

Finally, Rublee contends that her expert’s affidavit created an issue as to a reasonable consumer’s understanding that Pfizer manufactured the products. Rublee submitted an affidavit from a “branding specialist,” Steff Geissbuhler, opining that Pfizer logos on the documents Geissbuhler reviewed would confuse consumers as to who manufactured the product. “In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to

⁴⁴ Rublee contends the trial court ignored the workers’ impressions of Pfizer’s role and her expert’s testimony on consumer perceptions. But how the trial court reached its decision does not affect this court’s de novo review. See Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

create a genuine issue as to that fact, precluding summary judgment."⁴⁵ But Geissbuhler's testimony does not preclude summary judgment here because it does not address the relevant issue of fact.

Geissbuhler opined that "Pfizer's logo on various Quigley communications strongly suggested to the average consumer that Pfizer played a supervising role in the manufacture of the product at issue" and that "the invocation of its brand identity could impact consumer perception of Insulag and Panelag and effect [sic] their purchasing decisions." As discussed above, the objective reliance test depends on the perception of a reasonable purchaser in the actual purchaser's position. Whether Geissbuhler's declaration created a fact issue on that point thus depends on what he meant by "average consumer."

Geissbuhler's deposition testimony shows that he meant an ordinary member of the public. Geissbuhler conceded that he did not know who was buying Insulag and Panelag. He did not know, for instance, whether the products were available at the hardware store or bought by sophisticated industrial purchasing departments.⁴⁶ His testimony thus does not help Rublee show what

⁴⁵ J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

⁴⁶ Geissbuhler's deposition transcript reads in part: "Q. Do you have an opinion . . . on whether or not purchasers of, say, Insulag would be more knowledgeable than the average consumer? A. I don't. I mean, I really don't." The testimony from Geissbuhler that Rublee relies on to show "that sophisticated industrial purchasers could reach similar conclusions" to Vernon's coworkers does not support such a conclusion. Geissbuhler did not directly answer the

a reasonable purchaser in the position of PSNS purchasers would have understood.

None of the evidence relevant to the understanding of industrial purchasers suggests they would think Pfizer manufactured the products. For instance, Lone Star Industries and Pioneer Sand & Gravel—distributors that sold the products to PSNS—continued to send purchase orders and questions to Quigley and to advertise Quigley as the products' manufacturer.⁴⁷

Because the record does not create a genuine issue of material fact as to whether a reasonable purchaser of Insulag and Panelag would think Pfizer manufactured them, Rublee's argument fails under the objective reliance test.⁴⁸

Likewise, Rublee's claim would not succeed under any of the alternative tests the parties advance.

attorney's questions on whether "the average purchasing agent of a fireproofing insulation company would be confused as to who the manufacturer of the Insulag product is"; he appeared to answer instead from either an ordinary person's viewpoint or his own.

⁴⁷ A former Lone Star employee confirmed that he understood his company to be a distributor for Quigley and Insulag and Panelag to be "Quigley refractory products."

⁴⁸ Rublee asserts that the trial court impermissibly weighed evidence in considering the summary judgment motion. But the trial court did not decide what a reasonable purchaser would understand. Rather, it necessarily determined that a reasonable person could not find from the evidence presented that a reasonable purchaser would think Pfizer manufactured the products. As long as a trial court faithfully applies the CR 56 standard, this is an appropriate question to answer.

First, Rublee's claim would fail under an "actual reliance" test. This test asks whether the plaintiff showed "that he or she actually and reasonably relied upon the reputed 'apparent manufacturer's' trademark, reputation, or assurances of product quality, in purchasing the defective product at issue."⁴⁹ A court can again apply this test from either of two viewpoints: the actual user's or the actual purchaser's.⁵⁰

While Pfizer asks this court to require actual reliance, few courts have done so. The Stein court cited just one case where the court did this, a 1962 opinion from the Fourth Circuit.⁵¹ And the Stein court held that the plaintiffs had not satisfied the test from either perspective, as they had not shown evidence that the decedent was even aware of the product, let alone relied on Pfizer's apparent manufacture of it.⁵² The court also found that the record showed that the purchaser, Bethlehem Steel, had purchased the products from Quigley for

⁴⁹ Stein, 137 A.3d at 297.

⁵⁰ Stein, 137 A.3d at 297.

⁵¹ See Stein, 137 A.3d at 297; Carney v. Sears, Roebuck & Co., 309 F.2d 300, 304 (4th Cir. 1962) ("[T]he basic test is whether or not the vendee reasonably believed in and relied upon the vendor's apparent manufacture of the product."). Pfizer cites several other cases; these do not articulate an actual reliance test but simply list lack of reliance evidence as a factor in granting or affirming summary judgment. See Yoder v. Honeywell, Inc., 900 F. Supp. 240, 245 (D. Colo. 1995), aff'd, 104 F.3d 1215 (10th Cir. 1997); Bernier v. One World Techs., Inc., 746 F. Supp. 2d 240, 243 (D. Mass. 2010); Stones v. Sears, Roebuck & Co., 251 Neb. 560, 558 N.W.2d 540, 545 (1997); Sherman v. Sunsong Am., Inc., 485 F. Supp. 2d 1070, 1080 (D. Neb. 2007).

⁵² Stein, 137 A.3d at 297.

years before Pfizer acquired Quigley and continued to do so after, apparently without relying on Pfizer's role.⁵³

Here, Rublee presented evidence that former workers noticed Pfizer's name on bags of Insulag and Panelag. At least one worker suggested that the Pfizer name made him think the products were safe. But no worker testimony shows that a worker relied on Pfizer's name in deciding to use or work near the products. Nor did Rublee present evidence that actual purchasers relied on Pfizer's apparent role when they purchased the products. Instead, as in Stein, the record shows that the industrial purchasers bought the products from Quigley without interruption before and after the Pfizer acquisition.

The evidence thus fails to create an issue of fact about either the purchasers' or the product users' actual reliance.

Second, Rublee's claim would fail under an "enterprise theory" of liability.

The enterprise liability test does not focus on consumer reliance but instead asks "whether the defendant 'participate[d] substantially in the design, manufacture, or distribution' of the defective product."⁵⁴ It also requires that the defendant's trademark appear on the product.⁵⁵

⁵³ Stein, 137 A.3d at 299.

⁵⁴ Stein, 137 A.3d at 297 & n.25 (alteration in original) (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 14 cmt. d (AM. LAW INST. 1998)). The Stein court noted that while reliance is a rationale for this test, it does not appear to be a requirement. According to Restatement (Third), "Trademark licensors are liable for harm caused by defective products distributed

Only a few courts have applied this test.⁵⁶ In Lou v. Otis Elevator Co.,⁵⁷ the court held that a trademark licensor was liable as an apparent manufacturer because the plaintiff had shown that it “participated substantially in the design or manufacture of” a defective escalator. An escalator “prominently bore the Otis trademark” and “no other trade name or mark.”⁵⁸ The court distinguished cases where plaintiffs failed to submit evidence, apart from the placement of the trademark on the product, that the defendant “was engaged in the actual manufacture, distribution, or marketing.”⁵⁹ Similarly, in Connelly v. Uniroyal, Inc.,⁶⁰ the court held that issues of fact precluded summary judgment on a claim that the defendant was liable as an apparent manufacturer for injuries caused by a tire bearing its trademark. The defendant provided the tire’s actual manufacturer—a licensee and subsidiary—with plans, specifications, and technical knowledge for the tire’s production, authorized the manufacturer’s use of its trademark, and received quarterly payments in return.⁶¹

under the licensor’s trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee’s products. In these circumstances they are treated as sellers of the products bearing their trademarks.” RESTATEMENT (THIRD) § 14, cmt. d.

⁵⁵ Stein, 137 A.3d at 297.

⁵⁶ See Stein, 137 A.3d at 297-98.

⁵⁷ 77 Mass. App. Ct. 571, 933 N.E.2d 140, 150 (2010).

⁵⁸ Lou, 933 N.E.2d at 143.

⁵⁹ Lou, 933 N.E.2d at 149-50.

⁶⁰ 75 Ill. 2d 393, 389 N.E.2d 155, 163, 27 Ill. Dec. 343 (1979).

⁶¹ Connelly, 389 N.E.2d at 161. The same court later distinguished this decision, observing in Hebel that it based liability in Connelly on “the defendant’s

The Stein court noted that Pfizer and Quigley did not have a trademark licensing agreement.⁶² It concluded that even if the companies' arrangement was analogous to such an agreement, the plaintiff had presented no evidence that Pfizer "participated 'substantially' in the design, manufacture, or distribution of Insulag."⁶³

Although Rublee does not explicitly assert this theory of liability, she contends that she presented evidence that Pfizer participated substantially in bringing Insulag and Panelag to market. We disagree.

Rublee's evidence of Pfizer's active involvement includes corporate annual reports referring to the Ireland construction site, purchase orders on Pfizer forms for the raw asbestos used to make the products, budget sheets that include research for different refractory methods, the invoices bearing the Pfizer logo, a Quigley sales manager's testimony that he was paid by Pfizer and known as a Pfizer employee, Pfizer's accounting for the products' costs and sales, evidence that Quigley and Pfizer shared insurance and that Pfizer provided safety guidance to Quigley, and a Quigley officer's statement, in response to a

integral involvement in the overall producing and marketing enterprise that placed the dangerous product in the stream of commerce, and its participation in the profits from the distribution of the product," and that such factors were absent in the case before it. Hebel, 442 N.E. 2d at 204.

⁶² Stein, 137 A.3d at 298.

⁶³ Stein, 137 A.3d at 298.

question about “the leasing of [refractory] guns,” that “[e]verything is handled in New York.”

But Rublee does not dispute that Quigley made and sold Insulag and Panelag for decades before Pfizer acquired the company. She does not contend that Pfizer made any changes to the products’ design. The references to a “Pfizer construction site” and Quigley being a “division of Pfizer” do not support an inference that Pfizer was involved in manufacturing. Nor does Pfizer’s logo on Quigley invoices help show that Pfizer itself distributed the products. And while the asbestos order forms bear the Pfizer logo, a Quigley employee signed all of them. As in Stein, this evidence does not create an issue of fact as to whether Pfizer “participate[d] substantially in the design, manufacture, or distribution” of Quigley’s products.⁶⁴

Finally, Rublee’s theory of liability based on comment d to § 400 also fails. Comment d indicates that a company can be liable as an apparent manufacturer if it “affixes to [the product its] trade name or trademark.”⁶⁵ The comment explains that when a label identifies the company “as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the [company].”⁶⁶ But the comment also specifies that

⁶⁴ Stein, 137 A.3d at 298 (quoting RESTATEMENT (THIRD) § 14 cmt. d).

⁶⁵ RESTATEMENT (SECOND) § 400 cmt. d.

⁶⁶ RESTATEMENT (SECOND) § 400 cmt. d.

a trademark “licensor, who does not sell or otherwise distribute products, is not liable under this Section of this Restatement.”⁶⁷

Rublee contends that Pfizer vouched for the asbestos products’ safety by allowing Quigley to use its well-known logo as an assurance of quality. While no evidence indicates the companies had a trademark licensing agreement, this court could view this situation as analogous.⁶⁸ Still, Pfizer did not “sell” or “distribute” the products as a more recent version of the Restatement requires for trademark license liability.⁶⁹ Moreover, the record shows that Quigley was clearly identified to purchasers as the manufacturer of Insulag and Panelag. Pfizer and Quigley employees testified that Quigley continued to manufacture the products and sell them using the same sales personnel. Quigley’s sales force continued to correspond on Quigley letterhead, signing as Quigley. Invoices came from Quigley. Purchase orders went to Quigley. And numerous materials, including product labels, marketing materials, federal Occupational Safety & Health Administration (OSHA) data sheets, and a report to purchasers, identified Quigley to purchasers as the products’ manufacturer. When those materials mentioned Pfizer, it was either as a parent company or in a small logo in the corner. And, as noted above, the record shows that actual purchasers like Lone

⁶⁷ RESTATEMENT (THIRD) § 14 cmt. d.

⁶⁸ See Stein, 137 A.3d at 298.

⁶⁹ RESTATEMENT (THIRD) § 14 cmt. d.

Star knew Quigley was still the manufacturer. Comment d thus does not provide a basis for liability.

A company that, like Pfizer, placed its logo on a product but did not sell it or “participate substantially in [its] design, manufacture, or distribution” should not expect to be held liable for harms the product caused.⁷⁰ On this record, any liability Pfizer incurred would stem not from representing itself as the dangerous products’ manufacturer but from owning the company that did manufacture and sell the products.

Because Rublee’s evidence does not create a genuine issue of material fact as to any theory of apparent manufacturer liability, the trial court did not err by granting summary judgment.

Pfizer separately contends that a defendant cannot be liable as an apparent manufacturer unless it was part of the “chain of distribution” that brought the harmful product to the plaintiff. But because Rublee’s evidence does not satisfy any of the theories of apparent manufacturer liability, we do not decide whether the Washington Supreme Court would impose a chain of distribution requirement.

⁷⁰ Stein, 137 A.3d at 297 (quoting RESTATEMENT (THIRD) § 14 cmt. d).

CONCLUSION

Because Rublee does not present evidence sufficient to create an issue of fact about any of the tests courts apply for apparent manufacturer liability, we affirm.

Leach, J.

WE CONCUR:

Cox, J.

Becker, J.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Memorandum of Amicus Curiae Washington State Labor Council AFL-CIO* in Supreme Court Cause No. 94732-5 to the following:

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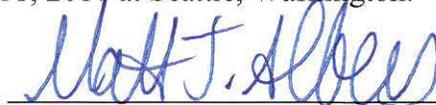
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 11, 2017 at Seattle, Washington.



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