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*In the*  
**Supreme Court**  
*of the*  
**State of Washington**

94732-5

Margaret RUBLEE, Individually and as Personal Representative of  
the Estate of Vernon D. Rublee,

*Plaintiff-Petitioner,*

v.

PFIZER INC.,

*Defendant-Respondent.*

On review of the decision in Court of Appeals No. 75009-7-I.

**AMICUS CURIAE BRIEF OF ASBESTOS DISEASE  
AWARENESS ORGANIZATION**

Brian D. Weinstein, WSBA No. 24497  
WEINSTEIN COUTURE PLLC  
601 Union Street, Suite 2420  
Seattle, Washington 98101  
Phone: (206) 508-7070  
Fax: (206) 237-8650

Ted W. Pelletier (California S.B. #172938)  
Michael T. Stewart (California S.B. #253851)  
KAZAN, McCLAIN, SATTERLEY &  
GREENWOOD  
A Professional Law Corporation  
55 Harrison Street, Suite 400  
Oakland, California 94607  
Phone: (510) 302-1000  
Fax: (510) 835-4913

Counsel for Amicus Curiae  
Asbestos Disease Awareness Organization

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## **ABOUT THE ASBESTOS DISEASE AWARENESS ORGANIZATION**

ADAO, an international nonprofit organization, is comprised of asbestos victims, workers, and professionals dedicated to preventing asbestos-caused diseases through national and international education, advocacy, and community initiatives. ([asbestosdiseaseawareness.org](http://asbestosdiseaseawareness.org)) In 2004, Linda Reinstein and Doug Larkin founded ADAO after their lives were forever changed when their loved ones were diagnosed with mesothelioma. ADAO has since become a network of more than 50,000 people and organizations dedicated to protecting public health from the known dangers of asbestos. Beginning in 2005, ADAO has organized annual international conferences bringing together leading experts to discuss advancements in early disease detection and new treatments, prevention, and global advocacy. ADAO also serves as a Congressional witness and stakeholder in legislative discussions. As an independent section 501(c)(3) organization, ADAO does not refer victims of asbestos disease to legal counsel.

## **INTRODUCTION**

Amicus curiae Asbestos Disease Awareness Organization (ADAO) respectfully files this brief in support of plaintiff and petitioner Margaret Rublee. ADAO submits that this Court should (1) adopt the multi-factor balancing test for an “apparent manufacturer” as articulated by the Eastern District of Washington in *Cadwell Industries, Inc. v. Chenbro America, Inc.*, 119 F.Supp.2d 1110 (E.D. Wa.

2000), and (2) remand for a trial in which the jury can apply those factors to determine whether defendant Pfizer, Inc. was an apparent manufacturer – as the evidence strongly suggests it was.

Under Washington law, any “entity” – not just a manufacturer, distributor, or seller – that “holds itself out as a manufacturer” may be found liable as an apparent manufacturer of a defective product. RCW 7.72.010(2). But the Washington statutes and cases have not articulated a test for whether or not a defendant “[held] itself out” as a manufacturer.

In Part I below, we explain that *Cadwell* articulates the proper balancing test. Washington policy favors treating plaintiffs and defendants in a “balanced fashion.” *Falk v. Keene Corp.*, 113 Wn.2d 645, 650 (1989). And the perceptions of the “ordinary consumer” always inform whether a product had design or failure-to-warn defects. RCW 7.72.030(1)-(3). Those background principles of Washington law, combined with persuasive non-Washington authorities on the apparent-manufacturer doctrine, support this Court’s adoption of *Cadwell*’s objective multi-factor test.

In Part II below, we explain that, under the *Cadwell* test, the evidence here will support a jury finding that Pfizer was an apparent manufacturer, making remand appropriate.

## DISCUSSION

### **I. This Court should adopt the *Cadwell* multi-factor balancing test for finding an “apparent manufacturer.”**

This Court should adopt the *Cadwell* test, which provides an objective test of factors to be balanced to determine whether a defendant “held itself out” as a manufacturer. This test is consistent with existing principles of Washington product-liability law.

#### **A. Washington law currently treats the injured “consuming public” in a “balanced fashion” with respect to manufacturers of defective products.**

The preamble to the Washington product liability statutes dictates a “balanced” approach to product-liability law: “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 . . .” *Falk*, 113 Wn.2d at 650 (quoting Laws of 1981, ch. 27, § 1.). Within this balance, the “right of the consumer to recover for injuries sustained as a result of an unsafe product [should] not be unduly impaired.” *Id.*

#### **B. Washington law defines defective products with reference to the safety expectations of an “ordinary consumer.”**

A balancing test that focuses on the perceptions of the product’s ordinary consumer would comport with Washington law.

Indeed, the Washington product liability statutes provide multiple alternative tests for finding that a product is defective. *O'Connell v. MacNeil Wash Systems Limited*, 409 P.3d 1107, 1114-1115 (Wn. App. 2017). Each is tied to the consumer:

1. Design defect: Under the test for a design defect, “the plaintiff must show the product was more dangerous than the ordinary consumer would expect.” *O'Connell*, 409 P.3d at 1115 (test applied to car-wash machine that lacked safety bollards); *see* RCW 7.72.030(1)(a), (3).

2. Failure-to-warn defect: Under the test for a failure-to-warn defect, the plaintiff likewise must show that, without an adequate warning, “the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” RCW 7.72.030(1)(b)-(c), (3).

**C. The “balanced” Washington approach would be advanced by the *Cadwell* test for an “apparent” manufacturer.**

This Court, consistent with Washington’s policy of treating plaintiffs and defendants in a “balanced fashion” (*Falk*, 113 Wn.2d at 650), should adopt an objective multi-factor balancing test that omits any bright-line rules for liability or non-liability.

We first trace the origins of such a test in the Restatement (Second) of Torts, then show that the proper test is found in *Cadwell*.

**1. Section 400 of the Restatement (Second) of Torts provides the broad outline of the test.**

The apparent-manufacturer doctrine is reflected in section 400 of the Restatement (Second) of Torts: “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.” (Emphasis added.)

Comment *d* elaborates:<sup>1</sup>

The actor puts out a chattel as his own product . . . where the actor *appears* to be the manufacturer of the chattel. . . . [Here] the actor frequently causes the chattel to be *used* in reliance upon his care in [apparently] making it . . . Thus, one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark. When such identification is referred to on the *label* 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 person so identified. . . . The *casual reader* of a *label* is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source.

(Emphasis added.)

Courts in other jurisdictions have applied section 400 to support apparent-manufacturer liability:

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<sup>1</sup> The Restatement (Third) of Torts, Products Liability, section 14 (1998) is similar: “One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product’s manufacturer.”

Fifth Circuit: In *E. I. du Pont de Nemours & Co. v. McCain*, 414 F.2d 369 (5th Cir. 1969), a can of water-repellant compound caused an explosion. *Id.* at 371. The defendant (du Pont) did not manufacture or supply the flammable ingredient, nor the final product. Instead, du Pont: (1) manufactured and supplied only the safe water-repellant ingredient; (2) recommended that the final product should consist of 98 percent (flammable) solvent; and (3) allowed the “du Pont” name to be prominently displayed on the final product, such that “the word ‘CHEMICAL’ lies directly below the word ‘DU PONT.’” *Id.* at 371-372.

The Fifth Circuit held that sufficient evidence supported the jury’s finding that du Pont was an apparent manufacturer of the final product because “duPont assumed to itself a role much more active than it would now have this Court believe. It counseled and advised Klehman concerning the proper formula to be used in its compound; it contacted Shell, which recommended to Klehman the use of the highly flammable Shell Sol B. It conducted quality control tests on the X-33. It retained the right to make the ultimate decision as to the label on the product. DuPont dictated the appropriate advertising methods. It acknowledged that its name on the label was permitted in the fashion it was so as to advance the sale of X-33.” *Id.* at 373.

Pennsylvania: In *Brandimarti v. Caterpillar Tractor Co.*, 364 Pa.Super. 26 (Pa. App. 1987), a forklift overturned and injured the driver. *Id.* at 28, 35. The

defendant (Caterpillar) did not manufacture or supply the forklift – its wholly owned subsidiary Towmotor did. *Id.* “*The Caterpillar trade name was, however, conspicuously displayed on the forklift.*” *Id.* at 35 (emphasis in original.)

The Pennsylvania appellate court held that Caterpillar could be found to have been an apparent manufacturer of the dangerous forklift: “although Caterpillar did not manufacture the product at issue and was not a supplier of the product participating in the chain of distribution, it did permit its name to appear on the equipment. Under such circumstances Caterpillar could expect others to purchase the product in reliance on the skill and reputation associated with the Caterpillar name.” *Id.* at 36-37.

Eastern District of Virginia: In *Bilenky v. Ryobi Technologies, Inc.*, 115 F.Supp.3d 661 (E.D. Va. 2015), a riding lawn mower exploded and killed the driver. *Id.* at 664-665. The defendant (Ryobi Technologies) did not manufacture or supply the lawn mower – non-party Husqvarna did. *Id.* at 669-670. But the mower “was printed with the ‘Ryobi’ name and [the] owner’s manual was printed with the name ‘Ryobi’ at the top.” *Id.* at 670.

The district court ruled that sufficient evidence supported the jury’s finding that Ryobi was an apparent manufacturer: “This jury was presented with evidence that Mr. Wright purchased a tractor with the word ‘Ryobi’ printed on its side, that he possessed an owner’s manual with the name ‘Ryobi’ printed on the top, and that

his receipt was indeed for a Ryobi lawn tractor.” *Id.* at 671-672. Although “Husqvarna was a manufacturer of the lawn tractor,” and it was purchased at Home Depot, there was “sufficient evidence in the record to support the jury’s finding that Ryobi Technologies, Inc., put the Ryobi tractor out as its own, and is therefore subject to liability under Virginia law.” *Id.* at 672.

**2. *Cadwell* articulates an appropriate test in light of the Washington statutes and the common law.**

The preceding three cases illustrate how the apparent-manufacturer doctrine can apply to specific facts. But, similar to current Washington law, those cases did not crystallize the doctrine into a set of general factors that may be readily applied to any given set of facts.

But *Cadwell* did perform that task. There, a computer part made of the wrong type of plastic melted and caused a fire. *Cadwell*, 119 F.Supp.2d at 1111.

On the issue of apparent manufacture, because “[n]o Washington case discusses” exactly how an entity “holds itself out” as a product’s manufacturer, the district court analyzed RCW 7.72.010(2), along with non-Washington cases. *Id.* at 1114-1115. Following an Illinois decision, *Cadwell* adopted the following five factors that should be weighed in any apparent-manufacturer case – and applied its facts:

1. “Labeling or Affixing Name or Trademark to the Product”: the defendant (Chenbro) “allowed its trademark to be affixed to the product”;
2. “Identifying Self as the Maker of the Product”: Chenbro “arguably identified itself as a manufacturer in its purchase orders, business cards, stationary, and parts safety list”;
3. “Participation in Manufacture, Marketing and Distribution”: Chenbro participated in marketing;
4. “Deriving Economic Benefit from Product”: as a “major stockholder of the actual manufacturer,” Chenbro “derived economic benefit from the product”; and
5. “Positioned to Eliminate the Product’s Unsafe Character”: again as the major stockholder, Chenbro “was in a position to cause the product to become safer.” *Cadwell*, 119 F.Supp.2d at 1115-1117.

Here, this Court should likewise adopt this five-factor balancing test.

**II. Under the *Cadwell* test, the jury should determine whether Pfizer was an apparent manufacturer of Quigley’s products.**

Under the *Cadwell* test, the evidence shows that a jury could reasonably find Pfizer to have been the apparent manufacturer of Quigley’s products:

1. Name or trademark on the product: Pfizer allowed its name and logo to be affixed to the packaging of Quigley's insulation cement. CP 869-70; CP 877-78. Mr. Rublee and his coworker Mr. Edwards saw "Pfizer" on the packaging. *Id.*

This fact distinguishes this case from the Maryland appellate court's decision in *Stein v. Pfizer Inc.*, 137 A.3d 279 (Md. App. 2016), on which Pfizer relies. There, the record showed that Pfizer's name and logo appeared on certain Quigley "invoices and marketing materials," but no cited evidence showed that the Pfizer name and logo was on the packaging of the final products that the end-user workers saw and handled. *Stein*, 137 A.3d at 77. Under Washington law, the "Pfizer" information that appeared on the final product packaging is important because the tests for both design and failure-to-warn defects involve the safety expectations of the "ordinary consumer[s]" who saw and handled the allegedly defective product. RCW 7.72.030(1)-(3). Washington law focuses the factfinder on the perceptions of ordinary consumers/end-users, not just any other purchasers/employers.

2. Identifying self as the maker: Pfizer identified itself as one of the manufacturers of Quigley's insulation cement. CP 952. The company names were displayed together, as "Manufacturers of Refractories – Insulations." *Id.* Letterhead, promotional materials, annual reports, and technical data sheets

likewise identified Pfizer and Quigley as part of a single manufacturing business. CP 963; CP 965-66; CP 972-73; CP 975.

3. Participation in manufacture, marketing, and distribution: Pfizer's headquarters facilitated the manufacturing, marketing, and distribution of Quigley's insulation cement. CP 975; CP 977; CP 935-36. Customers contacted Pfizer to obtain the products, and invoices reflected Pfizer as the seller. *Id.* Pfizer identified the Quigley factory as being a Pfizer facility. CP 950; CP 969; CP 973. And when the products were discontinued, Pfizer delivered that message. CP 963. Plus, as discussed above, under Washington apparent-manufacturer law there is no requirement that Pfizer needed to have been within the chain of distribution or sale.

4. Derived economic benefit: Pfizer derived an economic benefit from Quigley's products. From 1968 to 1974, Pfizer was Quigley's corporate parent when the insulation cement still contained asbestos. CP 950; CP 963.

5. Positioned to eliminate the hazard: As Quigley's parent company, Pfizer had the power to improve the safety of Quigley's products by removing the asbestos. CP 950; CP 963.

Hence, on this record, a jury could reasonably find that Pfizer was an apparent manufacturer under the *Cadwell* test.

## CONCLUSION

This Court should adopt *Cadwell*'s objective multi-factor balancing test and remand for trial on whether Pfizer was an apparent manufacturer of Quigley's products.

DATED: March 29, 2018

By

  
\_\_\_\_\_  
Brian D. Weinstein, WSBA No. 24497  
Weinstein Couture PLLC

Ted W. Pelletier, California State Bar No. 172938  
Kazan, McClain, Satterley & Greenwood PLC

Counsel for Amicus Curiae  
Asbestos Disease Awareness Organization



**KAZAN, MCCLAIN, SATTERLEY & GREENWOOD**

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Sender Name: Ted Pelletier - Email: tpelletier@kazanlaw.com  
Address:  
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Suite 400  
Oakland, CA, 94607  
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