

THIS AMENDED REPLY BRIEF REPLACES
THE REPLY BRIEF THAT WAS FILED ON
12-22-2016

No. 94732-5

No. 75009-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Plaintiff-Appellant,

v.

PFIZER, INC.,

Defendant-Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 DEC 28 PM 4:09

**AMENDED
REPLY BRIEF OF APPELLANT**

Matthew P. Bergman
Chandler H. Udo
Colin B. Mieling
BERGMAN DRAPER
LADENBURG
821 Second Avenue, Suite 2100
Seattle, WA 98104
(T) 206-957-9510

Leonard J. Feldman
PETERSON WAMPOLD
ROSATO LUNA KNOPP
1501 Fourth Avenue, Suite 2800
Seattle, WA 98101
(T) 206-624-6800

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION | 1 |
| II. ARGUMENT | 2 |
| A. The Quigley Bankruptcy is Irrelevant to the Present Appeal. | 2 |
| B. The Apparent Manufacturer Doctrine Remains a Viable Product Liability Theory. | 3 |
| C. Section 400 Focuses on Expectations of Ordinary Users, Not Sophisticated Purchasers. | 5 |
| D. Individual Reliance is Not a Separate Element of Section 400. | 8 |
| E. Plaintiff’s Evidence Was Sufficient to Create a Fact Question Over Whether Consumers Could Have Perceived Pfizer as a Manufacturer of Asbestos Products..... | 10 |
| 1. <i>Placement of Pfizer’s Logo on Invoices, Promotional Materials, and Data Sheets Was Potentially Misleading.</i> | 11 |
| 2. <i>All Eyewitness Testimony Identifies Pfizer, Not Quigley, as the Manufacturer of the Asbestos Products.</i> | 13 |
| 3. <i>Expert Testimony on Consumer Perceptions Established a Fact Issue on Which Summary Judgment Should Have Been Denied.</i> .. | 14 |
| F. Pfizer’s Legal Authority is Unavailing. | 15 |
| G. Pfizer’s Alternative Argument—That Pfizer Did Not Fall Within the Chain of Distribution of Asbestos Products—Also Fails. | 20 |
| 1. <i>Section 400 Does Not Include a Chain of Distribution Requirement.</i> | 20 |
| 2. <i>A Fact Question Exists Over Whether Pfizer Fell Within the Chain of Distribution of Insulag and Panelag.</i> | 21 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)..... | 11 |
| <i>Bich v. Gen. Elec. Co.</i> , 27 Wn. App. 25, 614 P.2d 1323 (1980)..... | 6 |
| <i>Davies v. Holy Family Hosp.</i> , 144 Wn. App. 483, 183 P.3d 283 (2008)..... | 15 |
| <i>Kroshus v. Koury</i> , 30 Wn. App. 258, 633 P.2d 909 (1981)..... | 11 |
| <i>Lockwood v. A C & S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987)..... | 6, 16 |
| <i>Lunsford v. Saberhagen Holdings, Inc.</i> , 125 Wn. App. 784, 106 P.3d 808 (2005)..... | 6 |
| <i>Macias v. Saberhagen Holdings, Inc.</i> , 175 Wn.2d 402, 282 P.3d 1069 (2012)..... | 4 |
| <i>Schnall v. AT & T Wireless Servs., Inc.</i> , 171 Wn.2d 260, 259 P.3d 129 (2011)..... | 8 |
| <i>Simonetta v. Viad Corp.</i> , 165 Wn.2d 341, 197 P.3d 127 (2008)..... | 25 |
| <i>Sprague v. Pfizer</i> , 2015 WL 144330 (W.D. Wash. 2015)..... | 18 |
| <i>Tallmadge v. Aurora Chrysler Plymouth, Inc.</i> , 25 Wn. App. 90, 605 P.2d 1275 (1979)..... | 9 |
| <i>Turner v. Lockheed Shipbuilding Co.</i> , 2013 WL 7144096 (W.D. Wash. 2013)..... | 18 |
| <i>Zamora v. Mobil Corp.</i> , 104 Wn.2d 199, 704 P.2d 584 (1985)..... | 21, 25 |

Federal Authority

Carney v. Sears, Roebuck & Co.,
309 F.2d 300 (4th Cir. 1962) 19

Clicks Billiards, Inc. v. Sixshooters, Inc.,
251 F.3d 1252 (9th Cir. 2001) 11

Davis v. U.S. Gauge,
844 F. Supp. 1443 (D. Kan. 1994)..... 6

Fletcher v. Atex, Inc.,
68 F.3d 1451 (2d Cir. 1995) 20

Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.,
826 F.2d 837 (9th Cir. 1987) 11

Headley v. Ferro,
630 F. Supp. 2d 1261 (W.D. Wash. 2008) 5

Heinrich v. Master Craft Eng’g, Inc.,
131 F. Supp.3d 1137 (D. Colo. 2015)..... 6, 9

In re Quigley Co.,
676 F.3d 45 (2d Cir. 2012) 2, 3

Watson v. Dillon Companies, Inc.,
797 F. Supp. 2d 1138 (D. Colo. 2011)..... 9

Yoder v. Honeywell Inc.,
900 F. Supp. 240 (D. Colo. 1995)..... 20

Foreign Authority

Brandimarti v. Caterpillar Tractor Co.,
527 A.2d 134 (Pa. Super. 1987) 6, 9

Burch v. Sears, Roebuck and Co.,
467 A.2d 615 (Pa. Super. 1983) 9

Connelly v. Uniroyal, Inc.,
389 N.E.2d 155 (Ill. 1979)..... 9

Hebel v. Sherman Equip.,
442 N.E.2d 199 (Ill. 1982)..... 19

Kennedy v. Guess, Inc.,
806 N.E.2d 776 (Ind. 2004) 18, 19

| | |
|---|------------|
| <i>Kennedy v. Mobay Corp.</i> , 579 A.2d 1191 (Md. App. 1990) | 15 |
| <i>Lou v. Otis Elevator Co.</i> , 933 N.E.2d 140 (Mass. App. 2010) | 6 |
| <i>Stein v. Pfizer Inc.</i> , 137 A.3d 279 (Md. App.) | 15, 16, 17 |

Statutes

| | |
|--|---|
| Conn. Gen. Stat. Ann. § 52-572m(e) | 4 |
| Md. Code Ann., Cts. & Jud. Proc. § 5-115(a)(3)(ii) | 4 |
| Kansas 60.3302(b) | 4 |
| RCW 7.72.010(2) | 4 |
| RCW 7.72.010(5) | 6 |

Other Authorities

| | |
|---|---|
| <i>The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts</i> , 49 CASE W. RES. L. REV. 671 (1999) | 5 |
|---|---|

I. INTRODUCTION

Presented with uncontroverted testimony that Vernon Rublee and his coworkers were exposed to “Pfizer” products at PSNS, Pfizer dismisses this evidence as “irrelevant” because these workers did not personally purchase insulation for the shipyard. Confronted with expert opinion from a world-renowned branding specialist that presence of Pfizer’s logo on asbestos-containing products caused both ordinary consumers *and* sophisticated purchasers to perceive it as a manufacturer of asbestos products, Pfizer argues that no reasonable jury could render such a finding. Alternatively, recognizing the inherently factual inquiry of discerning consumer expectations, Pfizer resurrects the interpretation of § 400 rejected by the trial court that the apparent manufacture doctrine only applies to entities within the chain of distribution.

Pfizer’s arguments should be rejected. The trial court correctly held that § 400 focuses on the reasonable expectations of ordinary consumers, not sophisticated purchasers. Neither Washington consumer protection law nor courts in states that have considered § 400 require that the injured plaintiff actually rely on the defendant’s misleading statement. While Pfizer may disparage eyewitness and expert testimony that placement of its logo on asbestos product advertisements and packaging was confusing, resolving conflicting interpretations and discerning

consumer perceptions is quintessentially a fact question. Finally, even if this Court adopts Pfizer's alternative theory that § 400 only applies to entities within the chain of distribution, there is ample evidence for a jury to conclude that Pfizer satisfied this requirement through its active involvement in the production, promotion, packaging, and sale of the products at issue in this case.

II. ARGUMENT

A. The Quigley Bankruptcy is Irrelevant to the Present Appeal.

It is undisputed that the sole issue in this appeal is the scope and application of § 400 under Washington law. Nevertheless, Pfizer belabors the Court with an exhaustive and one-sided narrative of the Quigley bankruptcy. The transparent motive for raising this irrelevant issue is to disparage Plaintiff's § 400 claim as a stealthy effort to resurrect a "moribund" legal theory to "exploit" an arcane exception to the bankruptcy court's injunction barring lawsuits against Quigley. Def. Br. 16; 14; 51. However, Pfizer fails to mention that it faced independent asbestos liabilities for its own conduct long before Quigley filed for bankruptcy and the Second Circuit held unremarkably that the Quigley channeling injunction could not shelter Pfizer from such independent § 400 liabilities. *See In re Quigley Co.*, 676 F.3d 45, 62 (2d Cir. 2012)

(“Pfizer’s ownership interest in Quigley is legally irrelevant to [plaintiffs’] § 400 claims.”), *cert denied*, 133 S.Ct. 2849 (2013).

Plaintiff’s liability allegations against Pfizer are neither based on its status as Quigley’s corporate parent or an esoteric exception to the Bankruptcy Code. Rather, Plaintiff’s claims arise from Pfizer’s deliberate use of its world-renowned logo and brand identity to promote the sale of unreasonably dangerous asbestos products and vouch for the fraudulent misrepresentation that these products were “non-injurious.” Plaintiff would have pursued these § 400 claims against Pfizer regardless of whether Quigley filed for bankruptcy or remained in the tort system.

B. The Apparent Manufacturer Doctrine Remains a Viable Product Liability Theory.

In a further attempt to diminish the legitimacy of Plaintiff’s § 400 claim, Pfizer argues that “[t]he apparent manufacturer doctrine is a largely moribund rule” and “a rarely used and largely obsolete aspect of product liability law.” Def. Br. 1; 3. This statement is demonstrably false. In the 50 years since § 400 was promulgated, the apparent manufacture doctrine has been applied in hundreds of cases throughout the United States and is codified in product liability statutes in Washington and elsewhere.

In 1981, the Washington Legislature enacted the Washington Product Liability Act (“WPLA”) to “create a fairer and more equitable

distribution of liability among the parties at fault...” Laws of 1981, ch. 27, § 1. Consistent with this objective, the Legislature expressly codified both the apparent manufacturer doctrine *and* strict product liability within WPLA’s statutory framework. Following product liability statutes throughout the nation,¹ WPLA defines “manufacturer” to include any “entity not otherwise a manufacturer that holds itself out as a manufacturer.” RCW 7.72.010(2). In enacting this provision, the Legislature recognized that when an entity “adopts the product as its own, [it] has, in a sense, waived [its] right to immunity and should be subject[ed] to a manufacturer's liability.” Senate Journal, 47th Leg., Reg. Sess., at 625 (Wash. 1981).

By incorporating the apparent manufacturer doctrine into WPLA’s statutory framework, the Legislature recognized the doctrine as a viable cause of action at common law. *See Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 409, 282 P.3d 1069, 1074 (2012) (WPLA intended to “carry forward principles that we previously recognized under the

¹ *See, e.g.*, Conn. Gen. Stat. Ann. § 52-572m(e) (“Manufacturer” includes...a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.”); Idaho Code Ann. § 6-1402(2) (“Manufacturer” includes...a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.”); Kansas 60.3302(b) (“Manufacturer” includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer...”); Md. Code Ann., Cts. & Jud. Proc. § 5-115(a)(3)(ii) (“Manufacturer” includes an individual or entity not otherwise a manufacturer that imports a product or otherwise holds itself out as a manufacturer.”). *See also* Model Products Liability Act, § 2(E)(2) (“Manufacturer” means...any product seller...holding itself out as a manufacturer to the user of a product.”).

common law”). Moreover, WPLA’s enactment refutes Pfizer’s contention that “strict products liability and the apparent manufacturer doctrine were not designed to coexist.” Def. Br. 45.

Pfizer urges this Court to adopt the revised apparent manufacturer doctrine enunciated in Restatement (Third) Torts § 14. However, Pfizer fails to cite a single case where § 14 has been adopted. To the contrary, scholars have openly rejected the Third Restatement’s recodification of § 400 as “questionable as a matter of social and economic policy” noting that “[i]t is doubtful whether [it] accurately restates existing law...” D. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 CASE W. RES. L. REV. 671 (1999).

C. Section 400 Focuses on Expectations of Ordinary Users, Not Sophisticated Purchasers.

Pfizer urges the Court to ignore “irrelevant” testimony from Mr. Rublee and other exposed workers identifying Pfizer as the manufacturer of Insulag and Panelag because these industrial products “are purchased not by the general public but by large and sophisticated industrial entities.” Def. Br. 4. Pfizer’s focus on “sophisticated industrial entities” ignores the uniform rejection of the sophisticated user defense by Washington courts. *See Headley v. Ferro*, 630 F. Supp. 2d 1261, 1272-73 n.10 (W.D. Wash. 2008). Moreover, Pfizer’s restriction of § 400 to individuals who actually

purchase the injurious product is wholly inconsistent with Washington law, which extends product liability “to all whom a manufacturer should reasonably expect to use its product, which includes employees and repairmen.” *Bich v. Gen. Elec. Co.*, 27 Wn. App. 25, 29, 614 P.2d 1323, 1326 (1980).² In *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987), the Supreme Court recognized that a bystander who did not personally install asbestos products on a ship could be deemed a product user for strict liability purposes. Similarly, in *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005), this Court held that children who sustain “take home” exposure from asbestos products installed at their parent’s jobsite were also product users under § 402A. *Id.* at 793.

Pfizer’s argument that the apparent manufacturer doctrine only applies to plaintiffs who actually purchase injurious products has been rejected by Courts in others jurisdictions that have specifically considered § 400.³ Moreover, Pfizer ignores evidence received by the trial court that

² WPLA defines a “claimant” as “any person or entity that suffers harm” and permits product liability actions “even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.” RCW 7.72.010(5).

³ See, e.g., *Lou v. Otis Elevator Co.*, 933 N.E.2d 140 (Mass. App. 2010) (child injured on a department store escalator); *Heinrich v. Master Craft Eng’g, Inc.*, 131 F. Supp. 3d 1137 (D. Colo. 2015) (plaintiff injured while spectator at auto race by a part dislodged from race car); *Brandimarti v. Caterpillar Tractor Co.* 527 A.2d 134 (Pa. Super. 1987) (worker injured by forklift purchased by his employer); *Davis v. U.S. Gauge*, 844 F. Supp. 1443 (D. Kan. 1994) (welder injured when gauge purchased by his employer exploded). In none of these cases was the injured plaintiff involved in the purchase of the injurious

its brand identity *was* used to promote asbestos products directly to product users, not just purchasers. The Pfizer manual entitled “How to Use Insulag” instructed consumers to pour the powdered material into a mortar box and “[m]ix the batch thoroughly and quickly with a hoe and shovel,” the precise activity that Mr. Rublee observed workers performing at PSNS. CP 870, 1026 (attached hereto for the Court’s convenience). Plaintiff’s branding expert, Steff Geissbuhler, testified that the manual targeted “somebody who is new to this product” and, based on the presence of the Pfizer logo, the document “has more to do with Pfizer than with Quigley.” CP 1270.

Even if the Court accepts Pfizer’s argument that § 400 requires that confusion occur among sophisticated purchasers rather than ordinary consumers, Mr. Geissbuhler’s testimony creates a fact issue on this point:

Q. I would like you to assume that [the Insulag advertisement] was received by a purchasing agent, [of] a company that installed fireproofing cement, and that this purchasing agent went to work on the 1st of January 1969 and had no prior knowledge or experience dealing with the Quigley Company prior to its acquisition by Pfizer. Based upon that assumption, sir, do you have an opinion as to whether or not the average purchasing agent of a fireproofing insulation company would be confused as to who the manufacturer of the Insulag product is . . .

product, yet in each instance the court found the issue of whether the defendant held itself out as a manufacturer to be a question of fact.

A. I think it's very clear that Pfizer is the brand which comes first and seems to be the strongest element. At the very best it's confusing and [] at the very least it's equal to Quigley the way it's presented here.

Q. What do you mean by that, sir?

A. [T]he company name, which you would associate with this product, is Pfizer Quigley Company, Inc.

CP 1270. Accordingly, even if this Court totally disregards Mr. Rublee and his coworker's testimony that they were exposed to "Pfizer" asbestos products at PSNS, expert testimony that sophisticated industrial purchasers could reach similar conclusions raised a factual dispute on which summary judgment should have been denied.

D. Individual Reliance is Not a Separate Element of Section 400.

Pfizer argues that reliance by the injured plaintiff is an "essential element of an apparent manufacturer claim." Def. Br. 12; 19. Pfizer's reliance argument is inconsistent with Washington law involving consumer expectations. For example, Washington courts have consistently held that the claimant does *not* need to prove individual reliance on the false or deceptive trade practice to assert a claim under the Consumer Protection Act. *See, e.g., Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 277, 259 P.3d 129, 137 (2011) ("we firmly rejected the principle that reliance is necessarily an element of the plaintiff's [CPA] case."); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn.

App. 90, 93, 605 P.2d 1275, 1277 (1979) (“A claimant need not prove reliance on deceptive misrepresentation but only that the actions have a tendency or capacity to deceive a substantial portion of the public). Courts in states that have specifically addressed § 400 have likewise found that individual is not a necessary element of an apparent manufacturer claim.⁴

Even if the Court adopts Pfizer’s argument that consumer reliance is required to confer liability under § 400, Plaintiff’s evidence demonstrates that workers *did* rely on Pfizer’s brand identity in concluding that the products were safe. Lawrence Wedvik worked around “Pfizer Insulag” and testified that he associated the product with the health field: “It said ‘Pfizer’ on it. Strange name. That’s like a medical company, I always thought.” CP 992-93. Similarly, Charles Edwards, who worked alongside Mr. Rublee at PSNS, explained how he relied on Pfizer’s brand identity in concluding that the asbestos products they worked around were safe:

⁴ See, e.g., *Watson v. Dillon Companies, Inc.*, 797 F. Supp. 2d 1138, 1162 (D. Colo. 2011) (plaintiffs stated an apparent manufacturer claim without considering “whether any other elements are required, such as causation or reliance.”); *Heinrich*, 131 F. Supp. 3d at 1159-60 (plaintiff not required “to prove that a consumer was actually deceived as to the origin of a product”); *Burch v. Sears, Roebuck and Co.*, 467 A.2d 615, 624 (Pa. Super. 1983) (“the act of placing one’s name on a product is a factor in assessing responsibility because it frequently causes a product to be used in reliance upon the seller’s reputation.”); *Brandimarti*, 364 Pa. Super. 26 (injured worker did not have to prove that his employer actually relied on the defendant’s trademark in making his purchase decision); *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155 (Ill. 1979) (§ 400 permits claim by injured motorist against apparent manufacturer of tire purchased by third party).

Q. Did you have an understanding when working around Pfizer Panelag that the product was safe or not?

A. Well, the people that installed it weren't taking any precautions. They weren't wearing any asbestos respirators, or there was no signs that there was any insulation danger at all in the - I remember that Piefer [*sic*] being the drug company, I didn't think it was that dangerous.

Q. How did your understanding that Pfizer was a drug company affect your understanding as to the safety of the Panelag product that was worked around in your proximity?

A. I just figured it would be safe. It was produced by a drug company.

CP 878. Thus, even if consumer reliance is required, there are—at the very least—fact issues on that question.

E. Plaintiff's Evidence Was Sufficient to Create a Fact Question Over Whether Consumers Could Have Perceived Pfizer as a Manufacturer of Asbestos Products.

Pfizer acknowledges that application of Pfizer's logos on Insulag and Panelag may be "ambiguous," but argues that the logos "must be considered in context in light of the rest of the documents in which they appear..." Def. Br. 4. However, placing documentary evidence "in context" is a factual inquiry for the jury, and summary judgment should be denied whenever facts relevant to a critical issue of the case are susceptible to more than one interpretation. *See Berg v. Hudesman*, 115

Wn.2d 657, 671, 801 P.2d 222, 230 (1990); *Kroshus v. Koury*, 30 Wn. App. 258, 262, 633 P.2d 909, 911 (1981). As set forth below, there is ample evidence from which a jury could reasonably find that consumers *may* have been misled into believing that Pfizer was a manufacturer of Insulag and Panelag. On this basis alone, summary judgment was improper. *See generally Fuddrucker's, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 845 (9th Cir. 1987) (summary judgment should be denied “if a party produces evidence from which a reasonable jury could surmise that an “*appreciable* number” of people are confused about the source of the product); *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1264 (9th Cir. 2001) (“Evidence of actual confusion is persuasive proof that future confusion is likely”).

1. *Placement of Pfizer's Logo on Invoices, Promotional Materials, and Data Sheets Was Potentially Misleading.*

Pfizer argues that Insulag invoices sent to Seattle-based Pioneer Sand & Gravel were not misleading because they depicted both the Pfizer and Quigley logos. However, comment d to § 400 expressly contemplates situations, and imposes liability, where the apparent and actual manufacturer are both identified in a manner but “the casual reader... overlook[s] the qualification of the description of source.” While inclusion of the Quigley logo in tandem with the Pfizer logo on product invoices

may have be sufficient to alleviate consumer confusion, discernment of consumer perceptions remains a factual inquiry based on the totality of circumstances. This is particularly true where, as here, these invoices were sent from the Pfizer world headquarters in Manhattan. Moreover, Pfizer completely ignores the fact that the invoices provided a Pfizer telephone number and customers questioning their bill would be handled through a Pfizer operator. CP 963, 977. Based on this evidence, a jury could reasonably conclude that recipients of these invoices would perceive Pfizer as a manufacturer of the charged products.

In response to Plaintiff's evidence that, prior to Pfizer's 1968 acquisition, Quigley was promoted as a "manufacturer" (singular) of Insulag, Pfizer produced a single pre-1968 advertisement in which the term "manufacturers" is also used. However, it was not Plaintiff's summary judgment burden to show that all promotional materials were confusing, merely that some consumers were misled. More importantly, whether or not Quigley used singular or plural nomenclature prior to its acquisition is immaterial if the plural term "manufacturers," displayed directly beneath the Pfizer and Quigley logos, led consumers to believe that Pfizer was one of the "manufacturers" of the asbestos products at issue.

Pfizer contends that placement of the Pfizer logo on data sheets for

Insulag and Panelag was not misleading because “any purchaser that received the technical data sheets would have received Material Safety Data Sheets.” Def. Br. 26. This is pure speculation, as the evidentiary record contains absolutely no testimony from product purchasers regarding these data sheets, or any other issue. What the record *does* show is that the data sheets were emblazoned with the Pfizer logo only, referenced “our research” and “our products” and prohibited copying and distribution of the information provided “without written permission from Pfizer, Inc.” CP 975. As Mr. Geissbuhler testified, even a sophisticated purchaser with no familiarity of Quigley prior to the acquisition would read the data sheets to imply that Insulag and Panelag were Pfizer products. CP 1270.

2. *All Eyewitness Testimony Identifies Pfizer, Not Quigley, as the Manufacturer of the Asbestos Products.*

Pfizer asserts that product labeling on Insulag and Panelag bags “expressly noted that the products were manufactured by Quigley and that Quigley was a subsidiary of Pfizer.” Def. Br. 7. Pfizer’s unsubstantiated argument ignores testimony from four eyewitnesses who each identified “Pfizer,” not Quigley, products used in their proximity. Pfizer’s brief includes an undated image of a Panelag bag without any indication whether it was taken before or after asbestos was removed from the

product. *Id.* at 8. The only authentication for this photograph is Mr. Rublee’s coworker, Charles Edwards, who testified that it “sort of” resembles what he saw in the shipyard, but expressly disclaimed language identifying Quigley as a Pfizer subsidiary. CP 880. In a subsequent declaration that was received without objection by the trial court, Mr. Edward clarified that the Panelag labels he observed at PSNS were emblazoned with the Pfizer logo. CP 979-84. Mr. Edward’s sworn statement is corroborated by Mr. Rublee, who also observed the Pfizer logo on the bags of asbestos insulation used in his proximity and had no recollection of seeing the Quigley name on the product. CP 867; 870.

3. *Expert Testimony on Consumer Perceptions Established a Fact Issue on Which Summary Judgment Should Have Been Denied.*

The trial court received expert opinions that placement of Pfizer’s logo on promotional materials for Insulag and Panelag caused *both* reasonable consumers *and* sophisticated purchasers to perceive Pfizer as a manufacturer of these products. Pfizer asks the Court to ignore Mr. Geissbuhler’s “purported” expert testimony on the ground that it does “not address the understanding of a reasonable purchaser” and “lacks a sufficient factual foundation.” Def. Br. 31-32. However, the trial court explicitly held that Mr. Geissbuhler’s opinions were admissible and Pfizer has not cross-appealed this ruling. *See* CP 2924.

As a graphic designer with 50 years of experience who created some of the most iconic corporate logos of our time—including the NBC Peacock and Time-Warner Ear/Eye image—Mr. Geissbuhler is manifestly qualified to opine on how Pfizer’s logo would be perceived by consumers. *Compare Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 495, 183 P.3d 283, 289 (2008) (radiologist not qualified to render expert opinion on standard of care for hospital staff dealing with internal bleeding). While Pfizer may impugn the foundation, methodology, and substance of Mr. Geissbuhler’s opinions, such challenges are property relegated to the trier of fact.

F. Pfizer’s Legal Authority is Unavailing.

In seeking affirmance of the trial court’s summary judgment ruling, Pfizer urges this court to adopt the Maryland Court of Appeals’ recent holding in *Stein v. Pfizer Inc.*, 137 A.3d 279, 286 (Md. App.), *cert. denied*, 146 A.3d 476 (Md. 2016). *Stein* is both legally and factually distinguishable. Legally, the court applied Maryland law, which materially differs from Washington law. Unlike Washington, Maryland has expressly adopted the sophisticated user defense. *See Kennedy v. Mobay Corp.*, 579 A.2d 1191 (Md. App. 1990), *aff’d*, 601 A.2d 123 (Md. 1992). Consequently, while Washington courts focus on the expectation of ordinary consumers exposed to the injurious product, the inquiry in *Stein*

turned on whether Bethlehem Steel relied upon Pfizer's reputation and assurances of quality. Moreover, in *Stein* the court held that, even under a consumer-oriented approach, the absence of any testimony by the plaintiff that he was exposed to Insulag precluded liability, *id.* at 297, whereas under Washington law, asbestos plaintiffs need not personally identify the defendant's product to confer liability. *Lockwood*, 109 Wn.2d at 247. *Stein's* application of Restatement (Third) of Torts § 14 is also contrary to Washington law.

Factually, the record in *Stein* was also materially different than the record here. The only evidence of consumer confusion offered by the *Stein* plaintiffs was Insulag promotional materials and invoices with no evidence that the Pfizer logo appeared on the products that were actually sold to the steel mill where the plaintiff was exposed. In contrast to Mr. Rublee who testified that he personally observed bags of "Pfizer" refractory being used at PSNS, Mr. Stein had no recollection of working around Insulag, Quigley or Pfizer. *Id.* at 282. In *Stein*, Pfizer presented unrebutted testimony from plant workers that they all understood Quigley to be the manufacturer of Insulag. *Id.* at 285. Conversely, in this case all eyewitnesses' testimony was that Insulag and Panelag were "Pfizer" products. While the plaintiff's expert in *Stein* conceded that Quigley was responsible for manufacturing Insulag, here plaintiff's branding expert

testified that reasonable consumers—including sophisticated purchasers—would perceive Pfizer to be a manufacturer of this product. *Id.* Finally, while the trial court in *Stein* received “unrebutted” evidence that Pfizer played no role in the design, manufacture, and distribution of Quigley products, the Rublees submitted evidence that Pfizer actively inserted itself at all levels of distribution, from the purchase of raw materials to the sales of products to customers. *See id.* Thus, even if Maryland law and Washington law were the same (which they are not), the result in *Stein* is not controlling here.

Finally, *Stein* is also procedurally distinguishable. In *Stein*, both Pfizer and the plaintiff moved for summary judgment. *Id.* The *Stein* plaintiffs argued that the mere presence of the Pfizer logo on Insulag promotional materials and invoices established liability under § 400 *as a matter of law*, while Pfizer claimed the same evidence entitled it to summary judgment. In adjudicating the parties’ respective summary judgment motions, the court was faced with a procedural posture in which both sides conceded that no factual issues existed as to whether or not Pfizer was an apparent manufacturer of Insulag. Conversely, in this case Plaintiff has never argued that *all* the evidence establishes Pfizer as an apparent manufacturer, but simply contends that the documents and testimony are subject to two reasonable interpretations that a jury should

consider.

Pfizer's reliance on *Turner v. Lockheed Shipbuilding Co.*, 2013 WL 7144096 (W.D. Wash. 2013), and *Sprague v. Pfizer*, 2015 WL 144330 (W.D. Wash. 2015), is also misplaced. In *Turner*, the court held that the Washington Supreme Court would likely adopt § 400, but granted summary judgment to Pfizer because plaintiffs had not submitted *any* evidence that Pfizer was involved in the "chain of distribution" of the injurious products. In *Sprague*, the court adopted the holding of *Turner* and held that Plaintiff had not submitted sufficient evidence that Pfizer fell within the chain of distribution to satisfy § 400. Conversely, here the trial court declined Pfizer's invitation to apply the chain of distribution criterion enunciated in *Turner* and *Sprague* and instead focused its § 400 inquiry on consumer expectations. Moreover, the appeal in *Turner* was voluntarily dismissed, and the Ninth Circuit in *Sprague* has explicitly deferred to this Court's legal interpretation of § 400 by staying its review pending the outcome of this appeal.

Pfizer also misinterprets and misapplies *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 784 (Ind. 2004). In that case, the court analyzed the apparent manufacturer issues from the "viewpoint of the purchasing public" and examined whether the public was induced to believe that the defendant was the actual manufacturer of the product. *Id.* at 784. Contrary

to Pfizer's characterization, the *Kennedy* court did not define who could be considered a member of the purchasing public or whether said individual had to personally purchase the product in question.

The facts regarding consumer confusion in *Hebel v. Sherman Equip.*, 442 N.E.2d 199 (Ill. 1982), are also distinguishable. In *Hebel*, the injurious component of a complex car-washing system was not labeled with defendant's logo, although many other parts of the system were. *Id.* at 374. The court declined to find the defendant liable under the apparent manufacturer doctrine because the equipment was "purchased and sold as separate items" and operated independently of one another. *Id.* at 375. In contrast to *Hebel*, the insulating cements in this case were sold in individual packages with Pfizer and Quigley branding.

The other cases cited by Pfizer are likewise inapposite. In *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 305 (4th Cir. 1962), the injurious product lacked any indication who the original manufacturer was and the Court's analysis indicates that the doctrine may apply where the plaintiff "reasonably believed...the product of the defendant and reasonably relied upon its skill and judgment in manufacturing and distributing the product." In *Yoder v. Honeywell Inc.*, 900 F. Supp. 240 (D. Colo. 1995), the only evidence of the defendant's relationship to a defective keyboard was an "inconspicuous label on the bottom of the keyboard." Likewise, in

Fletcher v. Atex, Inc., 68 F.3d 1451 (2d Cir. 1995), there was no evidence that the alleged apparent manufacturer ever held itself out as the manufacturer as its logo was not featured on the product or its packaging. None of these cases assists Pfizer's argument here.

G. Pfizer's Alternative Argument—That Pfizer Did Not Fall Within the Chain of Distribution of Asbestos Products—Also Fails.

Pfizer seeks affirmance on an alternative legal theory that was neither part of the trial court's ruling nor addressed by Plaintiff in her opening brief: 1) that § 400 only applies to entities within the "chain of distribution" of the injurious product; and 2) no jury could reasonably find that Pfizer distributed the products at issue in this case. Pfizer's argument fails on both counts.

1. *Section 400 Does Not Include a Chain of Distribution Requirement.*

As the trial court correctly found, requiring active participation in the chain of distribution before liability can attach under § 400 effectively converts an apparent manufacturer claim to a product defect claim under § 402A. This is anomalous as the two sections serve fundamentally different purposes. Section 402A is designed to protect consumers from those parties who play a role in bringing a defective product to market. In contrast, § 400 protects the reasonable expectations of a consumer who relies on the identity of the apparent manufacturer in deciding to purchase

or use the product in question. The role of the apparent manufacturer in the chain of distribution is *entirely irrelevant* if the apparent manufacturer's purported role reasonably impacts consumer perceptions.

2. *A Fact Question Exists Over Whether Pfizer Fell Within the Chain of Distribution of Insulag and Panelag.*

Washington courts have consistently defined chain of distribution broadly. In *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 704 P.2d 584 (1985), the Washington Supreme Court held that strict liability applies, not just to manufacturers, but to “*all* others in the chain of distribution” because the policy objective of product liability law is “maximum of protection” for consumers. *Id.* at 206. In *Zamora*, the Supreme Court held that a seller of propane whose only connection to the product was through a paper transaction fell within the chain of distribution for purposes of strict product liability. *Id.* at 207. Applying these principles, there is ample evidence to create fact issues regarding whether Pfizer placed itself within the “chain of distribution” of asbestos-containing products.

Following its acquisition of Quigley in 1968, Pfizer transferred Quigley's offices to the Pfizer World Headquarters at 235 East 42nd Street in Manhattan. *See* CP 1030. Lewis J. Dreyling, a former Quigley Vice President, testified that after the move “[e]verything [was] handled in New York” and that all instructions came from New York. CP 957-58. Pfizer

became actively involved at all levels of distribution from procurement of raw materials to marketing finished products to customers.

Pfizer's 1968 Annual Report announced the construction of a plant in Dungarvan, Ireland designed to produce magnesite, a raw material used in Quigley products. CP 948; 950. Another annual report contained plant photos represented to Pfizer's shareholders as a "Pfizer construction site." CP 969. When the plant began operations the following year, Pfizer's Annual Report represented the plant was "[o]perated by the Quigley Magnesite *Division* of Pfizer Chemical Corporation." CP 973 (emphasis supplied).

In addition to manufacturing raw materials for Quigley products, Pfizer also purchased the ingredients used in Insulag and Panelag. Purchase orders for raw asbestos fiber for use in Insulag and Panelag were made on Pfizer order forms, originated from the Pfizer headquarters at 235 East 42nd Street and billed to "Div. Pfizer Co." CP 1042-52. Pfizer also directed and funded the research and development of Quigley products, including asbestos-free substitutes for Insulag and Panelag. CP 1054-55; 1057-60.

Pfizer was intimately involved in the production and development of Insulag and Panelag and interacted directly with customers regarding these products through "Technical Data Sheets" described above which

expressly prohibited copying and distribution of the information provided “without written permission from Pfizer, Inc.” CP 975. From 1968 to 1974, sales of Insulag and Panelag products were directed out of the Pfizer Headquarters and invoices mandated that payment be remitted to that address. *See* CP 977. Purchase invoices for Insulag sent to Seattle-based Pioneer Sand & Gravel included both the Pfizer and Quigley logos, and included the phone number (212) 573-3477 which connects to a Pfizer operator! CP 935-36; 944; 977.⁵

Pfizer’s corporate representative testified the Quigley sales force was employed and paid by Quigley. CP 939. However, Quigley’s sales manager for the Southeast Region, testified that after the 1968 acquisition he became a Pfizer employee and received his paychecks from Pfizer. CP 1076-77. The sales manager further related that customers knew he was a Pfizer employee, that he remained a Pfizer employee through the remainder of his career and that his retirement benefits are *currently* being paid by Pfizer. CP 1076-77.

In addition to directing product research and marketing, both production and sales of Quigley-manufactured products were accounted for on Pfizer’s books. CP 1079-80. Pfizer’s “Schedule of Inventory

⁵ Pfizer’s corporate designee did not dispute that these telephone numbers would have connected directly to Pfizer operators between 1968 and 1974. CP 935-36; 944.

Reserve” included both Insulag and Panelag. CP 1082-89. Expense statements detailing the costs of production and sale of these products were entered into Pfizer’s accounting system with no accounting distinction between Quigley and Pfizer. CP 1091-92.

Pfizer also assumed liability and undertook responsibility for safety issues arising from the manufacture and sale of Insulag and Panelag. Beginning in 1968, Pfizer and Quigley maintained a shared insurance portfolio to cover product liability claims arising out of their products. CP 1094-1102. Quigley personnel sought guidance from Pfizer on how to label asbestos products and were instructed that any proposed labeling had to be approved by Pfizer’s legal department. CP 1104. Pfizer’s safety director was involved in the decision to phase out asbestos products and approved a plan to deplete stockpile of raw asbestos over a five-month period. CP 1110-11; 1113. Not surprisingly, the letter to customers announcing the discontinuation of asbestos-containing Insulag and Panelag was emblazoned with a Pfizer logo and referenced a Pfizer telephone number. CP 963.

Washington law does not require that Pfizer insert itself at *every* level of the chain of distribution rather than simply assume an “identifiable role in placing a defective product on the market.” *Zamora*, 104 Wn.2d at 207. Here, Pfizer was involved in the manufacture,

marketing, and sale of Insulag and Panelag and directed Quigley to continue manufacturing these products without *any* asbestos warnings, translating its extensive knowledge of asbestos hazards “into a cost of production against which [joint] liability insurance [was] obtained.”

Simonetta v. Viad Corp., 165 Wn.2d 341, 355, 197 P.3d 127, 134 (2008).

There are, at the very least, fact issues regarding whether Pfizer fell within the “chain of distribution” of Insulag and Panelag. Accordingly, regardless of how this Court interprets § 400, it should reverse the trial court’s ruling granting Pfizer’s motion for summary judgment.

CONCLUSION

Based on the evidence discussed above, the trial court clearly erred in holding as a matter of law that “a reasonable purchaser would not have been induced to believe that the defendant was [an] apparent manufacturer of the injurious products.” CP at 2924. Discerning consumer perceptions from ambiguous documentary and testimonial evidence is a fact question properly relegated to the jury. The trial court’s judgment should therefore be reversed and this case remanded for trial.

RESPECTFULLY SUBMITTED this 27th day of December 2016.

BERGMAN DRAPER LADENBURG, PLLC

/s/ Matthew P. Bergman

By: _____

Matthew P. Bergman, WSBA # 20894
Chandler H. Udo, WSBA # 40880
Colin B. Mieling, WSBA # 46328
Attorneys for Appellant
821 Second Avenue, Suite 2100
Seattle, WA 98104
Phone: (206) 957-9510

and

Leonard J. Feldman, WSBA #20961
PETERSON WAMPOLD ROSATO
LUNA KNOPP
1501 4th Avenue, Suite 2800
Seattle, WA 98101
Phone: (206) 624-6800

Title page to Pfizer Manual entitled “How to Use Insulag”

HOW TO USE INSULAG

(Reg. U. S. Pat. Off.)

A Plastic Refractory Insulator and Sealer for Lining Interior and Exterior Surfaces of High Temperature Equipment

INSULAG when mixed with water BLOATS. In order to secure maximum insulating efficiency BLOATING MUST TAKE PLACE AFTER APPLICATION - NOT IN THE MORTAR BOX.

Use only quantity of INSULAG that can be mixed and applied within twenty minutes in a clean mortar box or wheelbarrow.

Add sufficient water to INSULAG to make a smooth easy-working mixture. Use clean fresh water at 60-65°F. An average mixture takes about ten and one half (10½) gallons of water to a one hundred pound bag. More or less water may be used for various types of work.

Mix the batch thoroughly and quickly with a hoe or shovel, turning the mixture over to be sure all of the INSULAG is saturated with water. Apply INSULAG promptly after mixing so that the BLOATING TAKES PLACE ON THE WORK INSTEAD OF IN THE MORTAR BOX. Make a fresh batch for each application. Mix only quantity required. Close bag tightly to keep the unused material in good dry condition.

All surfaces which are to be covered with INSULAG should be dry and clean - free of dust, loose scaly rust, paint and grease. When surface is painted with asphalt products, same should be entirely removed before application.

INSULAG is applied by either hand application, premixed pneumatic guns, syphon guns or gunniting. INSULAG should be applied to uniform thickness - allow bloating action to take place and INSULAG to set. Smooth hard finish is obtained by wet troweling finishing coat, which makes INSULAG water resistant.

All applications exceeding ½" should be reinforced, preferably with 2" x 2" x 14 gauge square mesh tied or affixed to the surface being insulated,

this to be on approximately 16" centers. Each additional 1" to 1½" should be similarly reinforced. The previous applied INSULAG should be scored or scratched while still moist to insure proper bonding of the additional thickness.

For hot application, a small quantity of INSULAG should be diluted into a thick paint consistency and painted on the entire surface, which will rapidly dry. Then spot-coat with regular mix INSULAG, allow the spot-coats to set up, and then fill with INSULAG. For additional thickness, use reinforcing as described above.

Where INSULAG is applied over porous surfaces the reinforcement, as described above, should be applied and securely fastened. INSULAG diluted to a stucco consistency should be painted to seal any absorption of this porous material i.e., (85% magnesia, asbestos, rockwool, fibreglass, block insulation). After this priming coat, the normal INSULAG application can be made.

INSULAG will set up hard in 8 to 24 hours depending upon temperature and atmospheric conditions.

For large valves, flanges and intricate shapes, INSULAG may be hand molded to this equipment.

INSULAG, when set, will not dissolve or collapse from contact with water, oil or creosote; is resistant to vapors of steam, acid or alkaline solutions. Should it become wet, heat will restore its original insulating value.

The above instructions cover general applications. However, for large surfaces or Gun applications, or when it is desired to use INSULAG alone or in combination with other materials to form panel construction, recommendations will be furnished upon request.

  **QUIGLEY COMPANY, INC.**

Manufacturers of Refractories - Insulations - Paints

235 E. 42nd Street

New York, N.Y. 10017

CERTIFICATE OF SERVICE

I certify that on December 27, 2016, I caused to be served a true and correct copy of the foregoing document upon:

Pfizer Inc.

Marissa Alkhazov
BETTS PATTERSON MINES
701 Pike Street, Suite 1400
Seattle, WA 98101

Lone Star Industries, Inc.

Howard (Terry) Hall
Andrew Rapp
FOLEY MANSFIELD
800 Fifth Avenue, Suite 3850
Seattle, WA 98104

Dated at Seattle, Washington this 27th day of December 2016.

BERGMAN DRAPER LADENBURG

/s/ Wil John Cabatic

Wil John Cabatic