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No. 94732-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff-Petitioner,

v.

PFIZER, INC.,

Defendant-Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

The purpose of this supplemental memorandum is to set forth *all* of the pertinent facts and case law necessary to decide the narrow issues before this Court. Those issues are: (1) whether the “apparent manufacturer doctrine” articulated in Restatement (Second) of Torts § 400 and codified in RCW 7.72.010(2) focuses on the reasonable expectations of consumers who sustain injury from hazardous products or on the expectation of sophisticated purchasers who acquire injurious products for large industrial entities; and (2) whether a jury could reasonably find that Pfizer held itself out as a manufacturer of asbestos-containing products so as to impose liability under Restatement (Second) of Torts § 400.

In a published opinion, the Court of Appeals speculated that this Court would adopt § 400. But the Court of Appeals misconstrued the purpose and function of the apparent manufacturer doctrine by disregarding the perceptions of end users who sustain injury from the product in favor of a test that looks only to the perspective of the product purchaser—in this case, a sophisticated purchaser—at no risk of injury. The Court of Appeals based its analysis on a Maryland opinion that is both factually inapposite and contrary to Washington’s lengthy jurisprudence that it is the injured end users who must receive the benefit of products liability protection. Washington has adopted only a very limited

application of the sophisticated user/purchaser doctrine and the majority of jurisdictions to have adopted the apparent manufacturer doctrine have done so with a test focusing on the reasonable expectations of the end user consuming the product.

Where the purchaser and consumer are not one and the same, the Court must decide whose perceptions are determinative to trigger liability under § 400. Washington law makes clear that the focus of products liability should be and has always been on the user. Here, there are numerous fact issues regarding whether Pfizer held itself out as a manufacturer of asbestos products to ordinary users as well as to sophisticated purchasers. Therefore, for reasons set forth more fully below, the trial court's ruling granting summary judgment in Pfizer's favor should be vacated and the matter should be remanded for trial.

II. PERTINENT FACTS

A. Pfizer Used its Logo to Promote the Sale of Quigley Products.

In 1968, Pfizer acquired the Quigley Company in order to “establish[] a position in refractory specialties.” CP 950. Quigley's product line included two asbestos-containing insulation cements: Insulag and Panelag. *Id.* Prior to Pfizer's acquisition of Quigley, promotional materials for Insulag identified Quigley as a “Manufacturer [singular] of

Refractory Specialties and Paints.” CP 923. Following the acquisition, that presentation *markedly* changed as follows:



Pfizer now represented that *both companies* were “Manufacturers [plural] of Refractories—Insulations.” CP 952. Pfizer-Quigley continued to manufacture and sell Insulag and Panelag through 1974.

Shortly after the acquisition, Quigley’s headquarters moved to the Pfizer World Headquarters at 235 East 42nd Street in Manhattan. CP 923, 975. From 1968 to 1972, sales of Insulag and Panelag were directed out of the Pfizer Headquarters, and invoices directed that payments be remitted to that location. Invoices to customers included both the Pfizer and Quigley logos—equally sized—and identified the companies as “Manufacturers [plural] of Refractory Specialties & Insulations.” CP 977. These invoices included a phone number which connects to Pfizer operators. CP 935-36.

After 1968, all communications with customers involving Insulag and Panelag used letterhead with Pfizer’s familiar oval logo. *See, e.g.*, CP 963. Pfizer took numerous affirmative steps to promote its overarching responsibility for Insulag and Panelag. This included “Technical Data

Sheets,” which detailed the chemical and physical properties of these products. These data sheets included the Pfizer logo and referenced the address of the Pfizer headquarters in New York City. CP 975. Consumers reading the data sheets were admonished that: “This information is not to be copied, used in evidence, released for publication or public distribution without written permission from Pfizer, Inc.” CP 975.

Quigley’s corporate representative acknowledged that inclusion of the Pfizer and Quigley logos on advertising and packaging had the potential to confuse the average consumer. When asked if the general public seeing the Quigley and Pfizer logos side-by-side identified as “manufacturers” would conclude that both Pfizer and Quigley were the manufacturers of Insulag, Pfizer’s representative admitted: “It could.” CP 919-20.

Plaintiff presented expert opinions by a branding specialist, Steff Geissbuhler, which the trial court explicitly held were admissible. CP 2924. Mr. Geissbuhler was shown a letter to customers of Insulag and Panelag emblazoned with the Pfizer logo and asked to explain the significance in terms of consumer perceptions:

Q. [B]ased upon your knowledge, experience and expertise, sir, do you have an opinion as to whether or not [the letter] would communicate to the average consumer of Insulag and Panelag, who did not have 50 years of prior knowledge of the

product, that Pfizer was the master brand of those two products?

- A. That's not a question to me, it's a clear hierarchy and totally understood that Pfizer is the author of this. And it is about Quigley Company and their products, but it's definitely, if not master branded, it is definitely endorsed by Pfizer.

CP 1272. Mr. Geissbuhler was shown the "Technical Data Sheet" for Insulag described above on which the Pfizer logo is singularly displayed. He testified that Pfizer's presentation "implies to me that Pfizer is taking complete responsibility for this data on this sheet." CP 1271-72. Mr. Geissbuhler reviewed the same Insulag and Panelag promotional documents as relied upon by the trial court and testified that "it is my opinion that the presentation of the Pfizer and Quigley logos on Insulag and Panelag promotional materials would have confused consumers as to who the products' manufacturer was." CP 801-02.

B. Pfizer Used its Logo and Brand Identity to Vouch for the Safety of Asbestos Products.

At the time Pfizer acquired Quigley in 1968, concern for asbestos hazards was reaching a crescendo within regulatory agencies and the general public. CP 724. The New York Academy of Sciences conference on asbestos disease in 1964 was widely publicized in the national press, and by the late-1960s regional newspapers such as *The Seattle Times* began to report on asbestos disease as an occupational hazard. CP 723-24.

Public awareness was further spurred by the ban on sprayed asbestos in New York City and promulgation emergency asbestos regulations by the federal government in 1971. CP 724.

Johns-Manville manufactured an asbestos cement product virtually identical to Insulag and Panelag that was also used at PSNS. CP 1012-13. In 1964, Johns-Manville began affixing caution labels to its asbestos cement products warning end users to wear respiratory protection whenever dust was created. CP 1019-20. In marked contrast, Panelag and Insulag *never* had asbestos warnings on product packaging or in promotional materials distributed to consumers. To the contrary, advertising materials emblazoned with the Pfizer logo proclaimed that Insulag was “non-injurious.” CP 1028. Additionally, a manual entitled “How to Use Insulag”—emblazoned with the Pfizer logo and bereft of warnings—instructed workers to pour powdered Insulag into a mortar box and then “[m]ix the batch thoroughly and quickly with a hoe and shovel.” CP 1026. As explained below, this is the precise work practice that the decedent, Vernon Rublee, described observing at PSNS, which caused asbestos dust to permeate his work area. CP 870-71.

C. Vernon Rublee Died as a Result of Exposure to Pfizer Asbestos Products.

Mr. Rublee was exposed to asbestos while working as a machinist at Puget Sound Naval Shipyard (“PSNS”) between 1965 and 1980. CP 865-66. Through the mid-1970s, Mr. Rublee worked on steam turbines, which were insulated with asbestos “lagging.” Mr. Rublee testified that he frequently observed “lagers” opening bags of “Pfizer” insulation cement and pouring the material into troughs. CP 867. Mr. Rublee developed mesothelioma as a result of this exposure and died on March 14, 2015 while this action was pending. Margaret Rublee is Mr. Rublee’s surviving spouse and Personal Representative of his estate.

III. ARGUMENT

A. The Apparent Manufacturer Doctrine Exists to Protect End Users Who Rely on the Apparent Manufacturer’s Brand Identity for Assurance that the Product is Safe for Use.

The “apparent manufacturer” doctrine set forth in Restatement (Second) of Torts § 400 (1965) provides 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.” In 1981, the Washington Legislature enacted the Washington Product Liability Act (“WPLA”), which codified the apparent manufacturer doctrine by defining “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 reasoned 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 the WPLA’s statutory framework, the Legislature further 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 (2012) (WPLA intended to “carry forward principles that we previously recognized under the common law”).

The majority of state courts that have considered the apparent manufacturer doctrine have adopted it in some form.¹ Courts adopting

¹ See, e.g., *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 304 (4th Cir. 1962) (citing *Highland Pharmacy, Inc. v. White*, 144 Va. 106, 131 S.E. 198 (Va. 1926)); *Davis v. United States Gauge*, 844 F. Supp. 1443, 1446 (D. Kan. 1994); *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844, 846 (S.D. Ga. 1971), *superseded by statute as stated in Freeman v. United Cities Propane Gas, Inc.*, 807 F. Supp. 1533, 1539–40 (M.D. Ga. 1992); *Sears, Roebuck & Co. v. Morris*, 273 Ala. 218, 136 So.2d 883, 885 (Ala. 1961); *Cravens, Dargan & Co. v. Pacific Indem. Co.*, 29 Cal. App.3d 594, 105 Cal. Rptr. 607, 611 (Ct. App. 1972); *King v. Douglas Aircraft Co.*, 159 So.2d 108, 110 (Fla. Dist. Ct. App. 1963); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266, 273 (Ind. Ct. App. 1972); *Tice v. Wilmington Chem. Corp.*, 259 Iowa 27, 141 N.W.2d 616, 628 (Iowa 1966); *Penn v. Inferno Mfg. Corp.*, 199 So.2d 210, 215 (La. Ct. App. 1967); *Coca Cola Bottling Co. v. Reeves*, 486 So.2d 374, 378 (Miss. 1986), *superseded by statute as stated in Turnage v. Ford Motor Co.*, 260 F. Supp. 2d 722, 727 (S.D. Ind. 2003); *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 A. 120, 121 (N.J. 1935), *aff’d*, 117 N.J.L. 101, 186 A. 832 (N.J. 1936); *Andujar v. Sears Roebuck & Co.*, 193 A.D.2d 415, 597 N.Y.S.2d 78, 78 (App. Div. 1993) (citing *Commissioners of State Ins. Fund v. City Chem. Corp.*, 290 N.Y. 64, 48 N.E.2d 262, 265 (N.Y. 1943)); *Warzynski v. Empire Comfort Sys., Inc.*, 102 N.C. App. 222, 401 S.E.2d 801, 803-04 (N.C. Ct. App. 1991); *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593, 599 (Pa. 1968); *Sears, Roebuck & Co. v. Black*, 708 S.W.2d 925, 928 (Tex. App. 1986); *Wojciuk v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149, 152-53 (Wis. 1961).

§ 400 have explained that “[j]ustice would be offended if a corporation, which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability.” *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 427, 244 N.W.2d 873 (1976). Under this rationale, a defendant that advertises itself as the maker of a product may be liable as the manufacturer if the advertising was such as to lead a reasonable consumer to believe that the defendant was an actual manufacturer. *See Hebel v. Sherman Equip.*, 92 Ill.2d 368, 377, 442 N.E.2d 199 (1982). Thus, if the labeling or presentation of the injurious product is “likely to cause a consumer to rely on the retailer’s reputation as an assurance of the product’s quality,” liability may attach under § 400. *Mello v. K-Mart Corp.*, 604 F. Supp. 769, 773 (D. Mass. 1985). Accordingly, courts have held that “[w]hether a ‘holding out’ has occurred should be judged from the viewpoint of the purchasing public.” *Kennedy v. Guess*, 806 N.E.2d 776, 784 (Ind. 2004).

Cases interpreting what is required to “put out” a product under § 400 have focused on the association of the defendant’s trademark with the injurious product. Comment d to § 400 provides as follows:

[O]ne 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 mere fact that the goods are marked with such additional words as “made for” the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. *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.* So too, the fact that the seller is known to carry on only a retail business does not prevent him from putting out as his own product a chattel which is marked in such a way as to indicate clearly it is put out as his product. However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

(emphasis supplied).

The Court of Appeals held that Pfizer could not be held liable under Comment d to § 400 because the Quigley logo was included with Pfizer’s in product advertising. *Rublee v. Carrier Corp.*, 199 Wn. App. 364, 381-82, 398 P.3d 1247 (2017). This is incorrect, as Comment d expressly contemplates situations, and imposes liability, where the apparent and actual manufacturer are both identified but “the casual reader ... overlook[s] the qualification of the description of source.” While Comment d recognizes that parallel labeling cannot confer liability where

it “clearly state[s] that another who is also named has nothing to do with the goods,” the record in this case indisputably shows that this did not occur. Nevertheless, the Court of Appeals imposed the novel limitation articulated in Comment d to Restatement (Third) of Torts § 14 that requires the apparent manufacturer to sell or distribute the product at issue. To reach this conclusion, the court yet again focused its attention on the purchasing relationship and disregarded the uncontroverted evidence of consumer confusion.

B. The Record Presents a Triable Claim That Pfizer Held Itself Out as a Manufacturer of Asbestos Products Both to Ordinary Users and Sophisticated Purchasers.

In response to Pfizer’s motion for summary judgment, Plaintiff presented undisputed testimony from Mr. Rublee and similarly-situated workers who all understood “Pfizer” to be the manufacturer of the asbestos products they worked around. Mr. Rublee testified:

Q. [W]hat do you understand “Pfizer” to mean, in relation to this product that you --

A. I would have to say that I just assumed it was a product that they made that they were selling in the shipyard.

Q. And when you say “they,” what do you mean by “they”?

A. Pfizer Company.

CP 871. Charles Edwards related the same understanding, stating: “I think Piefer [referring to Pfizer] was on the bag of some of them. In small letters towards the bottom.” CP 879.

Consumer identification of Insulag and Panelag as Pfizer products was not confined to PSNS. Lawrence Wedvik worked as a millwright at Bethlehem Steel in Seattle in the early-1970s and testified that he worked with and around bags of “Pfizer Insulag” while performing repair work on steel furnaces. CP 990-93. Similarly, Joseph Vrcan, an employee of Lincoln Electric in Cleveland, Ohio explained how he associated Pfizer with the Panelag product he worked around: “Well, the name Pfizer was on it. I presume that Pfizer manufactured it.” CP 999. Moreover, although advertising brochures for Insulag and Panelag included the Pfizer and Quigley logos, the undisputed evidence before the Court is that workers actually exposed to these products *only* saw the Pfizer logo on the packaging.²

² The only evidence in the record that Quigley was identified on products used at PSNS is an undated and unauthenticated image of a Panelag bag without any indication whether it was taken before or after asbestos was removed from the product in 1974. CP 567. While, Mr. Rublee’s coworker, Charles Edwards, testified that the image “sort of” resembles what he saw in the shipyard, he 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. Edwards clarified that the Panelag labels he observed at PSNS were emblazoned with the Pfizer logo. CP 979-84. Mr. Edwards’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.

In upholding the trial court’s grant of summary judgment, the Court of Appeals disregarded eyewitness testimony from Mr. Rublee and his coworkers identifying the Pfizer logo on asbestos product packaging, holding this testimony was irrelevant because none of these workers personally purchased the injurious products at issue. Rather, the Court of Appeals adopted the analysis of the Maryland Court of Appeals in *Stein v. Pfizer Inc.*, 137 A.3d 279, 286 (Md. App.), *cert. denied*, 146 A.3d 476 (Md. 2016), that § 400 is focused solely on sophisticated purchasers, not product users such as Mr. Rublee. *Rublee*, 199 Wn. App. at 372.

The Court of Appeals’ focus on “sophisticated industrial entit[ies]” 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). Rather, the Court of Appeals’ ruling expands the learned intermediary defense well-outside of the highly-limited confines first articulated in *Terhune v. A. H. Robins Co.*, 90 Wn.2d 9, 14, 577 P.2d 975 (1978). Moreover, restriction of § 400 to individuals who actually purchase the injurious product contravenes Washington product liability jurisprudence, which seeks to provide “‘maximum of protection’ to the consumer,” *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 206, 704 P.2d 584 (1985), by extending a duty “to all whom a manufacturer should reasonably expect to use its product,” *Bach v. Gen. Elec. Co.*, 27 Wn.

App. 25, 29, 614 P.2d 1323 (1980). This policy is reflected in the WPLA which 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).

Washington’s judicial and legislative focus on product users is particularly salient in asbestos cases where the product hazard permeates the entire work environment. In *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987), this Court recognized that a bystander who did not personally use asbestos products and could not identify the manufacturer of the product to which he was exposed was nevertheless a product “user” under product liability law. Under *Lockwood*, asbestos-exposed workers may assert failure to warn claims against manufacturers even though they never handled the injurious product. *Id.* at 267–68. Similarly, in *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005), the Court of Appeals 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.

The Court of Appeals’ holding that the apparent manufacturer doctrine applies only to plaintiffs who actually purchase injurious products has been rejected by courts in jurisdictions that have specifically

considered § 400.³ In none of these cases was the injured plaintiff involved in the purchase of the injurious 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.

By disregarding evidence from product users and restricting its analysis to product purchasers, the Court of Appeals also overlooked evidence that Pfizer's brand identity *was* used to promote asbestos products directly to product users such as Mr. Rublee. The Pfizer/Quigley manual entitled "How to Use Insulag" instructed consumers to "[m]ix the batch thoroughly and quickly with a hoe and shovel," the precise activity that Mr. Rublee observed at PSNS. CP 870-71, 1026. Plaintiff's branding expert opined 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. Thus, Pfizer used its brand identity not only to promote sales but also to instruct users such as Mr. Rublee how to use the product.

³ See, e.g., *Lou v. Otis Elevator Co.*, 933 N.E.2d 140 (Mass. App. 2010) (recognizing apparent manufacturer claim by child injured on a department store escalator); *Heinrich v. Master Craft Eng'g, Inc.*, 131 F. Supp. 3d 1137 (D. Colo. 2015) (spectator at auto race injured by component dislodged from race car may bring § 400 claim against auto manufacturer); *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134 (Pa. Super. 1987) (worker injured by forklift purchased by his employer); *Davis*, 844 F. Supp. at 1443 (welder injured when gauge purchased by his employer exploded).

C. The Court of Appeals Erred in Holding that Individual Reliance is a Separate Element of the Apparent Manufacturer Inquiry.

While Washington courts have not previously considered reliance in the context of § 400, this Court has consistently held that plaintiffs do *not* need to prove individual reliance to challenge deceptive claims under the Consumer Protection Act. *See, e.g., Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 277, 259 P.3d 129 (2011) (“[W]e 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 (1979) (“A claimant need not prove reliance or deceptive misrepresentation but only that the actions have a tendency or capacity to deceive a substantial portion of the public.”). Courts that have addressed § 400 have likewise found that individual reliance is not a necessary element of an apparent manufacturer claim.⁴ The Court of Appeals’ holding that reliance by the purchaser comprises an independent

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) (“[T]he 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*, 527 A.2d at 140 (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, 162-63 (Ill. 1979) (§ 400 permits claim by injured motorist against apparent manufacturer of tire purchased by third party).

element of an apparent manufacturer claim is thus inconsistent with the plain meaning of § 400, RCW 7.72.010(2), and Washington law.

However, even if the Court determines 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 their products were safe to work around. Pfizer's corporate representative admitted that the company enjoyed widespread brand identity in the health industry in the 1960s and 1970s. CP 943. Lawrence Wedvik, who worked around Insulag in the early 1970s, confirmed this brand identification testifying: "It said 'Pfizer' on it. Strange name. That's like a medical company, I always thought." CP 991-92. At the same time that Johns-Manville and other manufacturers were affixing warnings on their asbestos products, Pfizer used its logo in representing that Insulag was "non-injurious." CP 1028. Charles Edwards, who worked alongside Mr. Rublee at PSNS, relied on Pfizer's brand identity in concluding that this representation was accurate: "I just figured it would be safe. It was produced by a drug company." CP 878. Plaintiff's branding expert testified that "Pfizer being mostly connected to the health industry, I would assume that this is a safe product" and that Pfizer's logo on product advertising and packaging made the assumption stronger than if the

Quigley logo had been included alone. CP 1271. Thus, even if consumer reliance is required, there are fact issues on that question.

D. The Court of Appeals Erroneously Relied on *Stein*, Which Does Not Reflect Washington Law and is Factually Distinguishable.

The Court of Appeals substantially adopted the analysis of the Maryland Court of Appeals 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. The court in *Stein* also held that the absence of any testimony by the plaintiff that he was exposed to Insulag precluded liability, 137 A.3d 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.

Factually, the record in *Stein* was materially different. The only evidence of consumer confusion in *Stein* was Insulag promotional

materials and invoices with no evidence that the Pfizer logo actually appeared on the packaging of products that were sold to the steel mill where the plaintiff was exposed. *Stein*, 137 A.3d at 285. 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 un rebutted testimony from plant workers who all understood Quigley to be the manufacturer of Insulag. *Id.* at 285. Conversely, all eyewitness testimony in this case was that Insulag and Panelag were “Pfizer” products. While the plaintiff’s expert in *Stein* conceded that Quigley was responsible for manufacturing Insulag, the plaintiff’s branding expert here testified that reasonable consumers—including sophisticated purchasers—would perceive Pfizer to be a manufacturer of this product. *Id.* Finally, while there was “unrebutted” evidence in *Stein* 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 (they are not), the result in *Stein* is not controlling here.

Stein is also procedurally distinguishable. In *Stein*, both Pfizer and the plaintiffs 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 Maryland court was faced with a procedural posture in which both sides conceded that no factual issues existed as to whether Pfizer was an apparent manufacturer of Insulag. Conversely, Plaintiff in this case has never argued or conceded that the apparent manufacturer issue can be resolved as a matter of law. To the contrary, Plaintiff's position was and remains that the documents and testimony—viewed in the light most favorable to Plaintiff—creates triable issues on whether or not Pfizer held itself out as a manufacturer of asbestos products under §400. For that reason too, the Court of Appeals erred in relying on *Stein*.

IV. CONCLUSION

The trial court's ruling granting summary judgment to Pfizer should be vacated and the matter should be remanded for trial.

DATED this 26th day of January, 2018.

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CERTIFICATE OF SERVICE

I certify that on January 26, 2018, I caused to be served a true and correct copy of the foregoing document upon:

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Dated at Seattle, Washington this 26th day of January, 2018.

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/s/ Shane A. Ishii-Huffer

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