

No. 65258-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARY JO WANGEN, Individually and as Personal Representative
of the Estate of WILLIAM WANGEN,

Appellant,

v.

A.W. CHESTERTON COMPANY, et al.,

Respondents.

BRIEF OF APPELLANT WANGEN

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A. INTRODUCTION

William Wangen (“Wangen”) served aboard the U.S.S. WILTSIE (“WILTSIE”) in the Korean War. During his time aboard the WILTSIE, Wangen was routinely exposed to large amounts of asbestos dust while performing regular maintenance on very large shipboard pumps aboard the ship. As a result of that exposure, he developed the invariably fatal asbestos-related cancer of mesothelioma. Wangen sued various manufacturers of asbestos-containing products, including Warren Pumps, LLC (“Warren”), before ultimately succumbing to the disease.

The trial court erroneously granted Warren’s motion for summary judgment, finding that Wangen had not shown he was exposed to asbestos supplied by Warren, relying on the Supreme Court’s decisions in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008) and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008). However, in light of Washington’s long-standing liberal policy on causation in asbestos cases, a policy never repudiated by *Simonetta* or *Braaten*, Wangen provided sufficient evidence to create a genuine issue of material fact regarding whether Warren was the source of the asbestos to which he was exposed. Wangen provided evidence that Warren was involved in the supply steam, that Warren sold its pumps with asbestos insulation, that it specified asbestos replacement products, and supplied

asbestos-containing replacement products. Where Wangen provided such evidence, summary judgment was not appropriate.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting Warren's motion for summary judgment.

2. The trial court erred in granting Warren's motion for reconsideration.

(2) Issue Pertaining to the Assignments of Error

Did the trial court err in granting a motion for summary judgment by the manufacturer of naval pumps that contained asbestos where evidence showed that such manufacturer sold, supplied, and specified the use of the asbestos materials for the pump on the ship on which the plaintiff was exposed during his naval service? (Assignments of Error Numbers 1 and 2)

C. STATEMENT OF THE CASE

William Wangen served honorably in the Navy from 1950 until 1954. CP 416-32. Most of his service was spent aboard the U.S.S. WILTSIE (DD-716), a destroyer which was regularly deployed for combat duty during the Korean War. *Id.*; CP 450, 455. Wangen served as a fireman and boilerman in the forward fire room of the WILTSIE where he

operated and maintained marine boilers, pumps, valves, and other fire room machinery. CP 447-50.

The fire room in destroyers like the WILTSIE contained pumps and valves supplied by various manufacturers, including fire and bilge pumps and emergency feed pumps manufactured and provided by Warren. CP 512, 565, 588, 591. Wangen worked in immediate proximity to Warren's pumps. CP 2276, 2415-20.

Warren sold a large number of fire and bilge pumps to the Navy on February 20, 1943, including pumps destined for the WILTSIE. CP 520-21. Warren's schematic drawings and "assembly list of spare and material" for the fire and bilge pumps specified the use of asbestos materials for the pumps. CP 528, 530, 581, 590-95, 2250-57, 2260-61.¹ Warren also sold numerous emergency feed pumps to the Navy, including two installed on the WILTSIE. CP 536-37, 585. Warren's schematics for the emergency feed pumps likewise showed asbestos-containing materials incorporated into the pumps. CP 543-44, 2250-53.²

Wangen serviced and maintained the Warren pumps. CP 549. Warren installed asbestos-containing gaskets and packing during the initial

¹ The diagrams on CP 2250-62 are more legible versions of the same diagrams on 528 and 530.

² As described below, the "85% magnesia" listed for both kinds of pumps is an asbestos-containing material.

construction of the pumps, which had to be removed as part of the pumps' regular maintenance. CP 592, 606. Maintaining the pumps and valves in the fire room involved taking them apart, and removing and replacing the asbestos gaskets and packing. CP 450-51, 547. The asbestos gaskets and packing were frequently baked hard by heat and had to be filed, scraped, ground, and brushed out of the valves and pumps, producing fine asbestos dust which flew everywhere. CP 452, 457, 459, 462-63, 547. It was dirty work. CP 446, 458-59, 566, 547. Even when Wangen himself was not working on the asbestos materials, others would be, exposing Wangen to asbestos fibers. CP 458-59. Typically, the WILTSIE would spend 30 days in combat and 30 days in port undergoing maintenance, at which time ten to fifteen sailors would be at work on the pumps, tearing off and replacing old gaskets. CP 451, 549-50. Wangen could not avoid inhaling the asbestos fibers. CP 95, 446, 565-66. Replacing the asbestos material in the valves and pumps was part of the ship's routine maintenance, and it was a regular and frequent requirement of Wangen's job, often taking up five hours a day. CP 451.

The Warren pumps in the fire room contained various types of gaskets and packing. CP 2261. The gaskets were designed to create a seal around the pump components. CP 591. The packing would be stuffed in and around the valves and pumps. CP 547, 673. For some equipment,

Wangen would cut gaskets out of large flat sheets of asbestos material. CP 452, 460-62, 605. When the Warren pumps were originally manufactured, assemblers at the Warren plant cut the asbestos sheets to match whatever part of the pump they were intended to fit. CP 605. Once the pumps were aboard the ship, Wangen prepared simple gaskets for them by cutting the flat sheets by hand, using a knife. CP 466. The asbestos sheets came on a roll and had the manufacturers' names stamped on them. CP 452, 461, 566. When Wangen removed old gaskets from pumps, the manufacturer's name would always still be visibly imprinted on the asbestos material. CP 464. That way, he could always tell which company manufactured the gasket material. CP 465.

All the pumps had internal gaskets supplied by the manufacturers. CP 556. Wangen had to use specific pre-cut asbestos gaskets provided by the pump manufacturers on the internal portions of the pumps. CP 461. Those gaskets were specially made and provided by the manufacturers. CP 461, 548. Wangen could not make those pieces himself, but had to request them from a supply officer. CP 460, 549.

Wangen also had to remove and replace asbestos packing on the pumps. CP 547, 674. The inner packing for the pumps were pre-made and had to be specially ordered for each pump brand. CP 674. The packing, which came on spools, had the manufacturer's name on it, and

Wangen was always aware of what brand he needed to install in a particular pump. CP 457, 674-75. Gaskets and packing for each brand of pump were supplied by the same manufacturers. CP 456-57, 460, 674.

Warren pumps had a metal plate affixed to them identifying Warren as the manufacturer, identifying the type of pump, and providing the catalog numbers for replacement parts - including the asbestos gaskets. CP 548, 565. When Wangen requested replacement gaskets for Warren pumps, a supply officer would provide them to him in a marked package with the name of the pump on it. CP 548-49. Wangen could verify he had the correct gasket by comparing the part number and pump name printed on the box and the part number and pump name on the pump itself. CP 549.

In addition to internal gaskets and packing, the Warren pumps contained a three-inch deep layer of asbestos-containing insulating material known as "85% magnesia" contained inside a thin sheet metal cover known as "lagging" which covered the upper end of the pumps. CP 593-95, 603, 2250-57. The lagging also covered an "asbestos material cloth ring." CP 593, 2253. Warren installed these insulating materials as component parts of the pumps at the time of their manufacture. CP 595-97. Warren's own instructions for maintaining the pumps required

removal of the sheet metal lagging surrounding the steam cylinder head. CP 2237.

Wangen's work on the WILTSIE put him in proximity to Warren pumps during his service in her forward fire room. CP 450-51, 547, 549. Warren pumps were used in that forward fire room. CP 512, 565, 588, 591. Wangen serviced and maintained Warren pumps, including handling asbestos-containing gaskets and lagging material. CP 594-95, 603, 2250-57, 2261. Others around him in the forward fire room handled asbestos-containing components of Warren pumps, per the pumps' specifications, exposing him to asbestos. CP 451, 458, 549-50.

Warren left the Navy in 1954. CP 416. As a result of his constant exposure to asbestos aboard the WILTSIE, including exposure to asbestos contained in pumps and replacement materials supplied by Warren, Wangen was diagnosed with malignant mesothelioma, a an invariably fatal disease caused only by exposure to asbestos. CP 626-32. The disease ultimately killed him. CP 434.

After he was diagnosed with mesothelioma, Wangen filed suit in the King County Superior Court against numerous manufacturers of asbestos-containing products to which he had been exposed over the years, bringing claims for strict product liability, negligence, duty to warn, and

duty to test.³ CP 1-10, 1705-10. Warren was one of the manufacturers Wangen sued. *Id.* The case was assigned to the Honorable Bruce Heller.

Warren moved for summary judgment, arguing that Wangen had failed to show that he had been exposed to asbestos from an original Warren product. CP 43-53. Citing *Braaten*, the trial court granted Warren's motion for summary judgment in part, finding that there was "no evidence that the replacement gaskets or packing were provided by Warren." CP 1732-34, 1739-40. The court weighed the testimony determining that, while Wangen had testified that the replacement parts were made by Warren, Wangen was merely making an assumption in that regard. CP 1739. The court found no evidence that Warren specified that the packing and gaskets had to be replaced with asbestos components. *Id.* It also found that two diagrams of the pumps - including lists of parts and materials - produced by Warren were descriptions of original components, rather than specifications for parts to be used by customers. *Id.*⁴

At the same time, the court denied summary judgment on the issue of whether Wangen had been exposed to the asbestos-containing magnesia

³ The suit was originally brought in California, but was moved to Washington State on the basis of forum non conveniens. CP 984. After Wangen's death, the case was amended as a wrongful death and survivorship action by his widow. CP 26-27.

⁴ These diagrams are found at CP 528, 530, 543-44, 581, 590-95, 2250-53, 2256-57, 2260-61. The trial court's assessment of what these diagrams meant was a weighing of the evidence that must be performed by the trier of fact. *See infra*.

and the asbestos cloth under the lagging cover of the pumps, because there was a question of fact about whether Wangen had need to open the lagging case so as to be exposed to the magnesia and asbestos cloth. CP 1740-42.

Warren moved for reconsideration. CP 1570-82. After argument by counsel based on the parties' expert witness testimony of how the pumps were insulated and maintained, (*see* RP 3/22/10: 3-27)⁵ the trial court reversed its decision about the lagging and granted summary judgment. CP 1747-48. The court noted that the parties' experts had submitted conflicting opinions as to the possibility that the lagging had been removed from the pumps, thereby exposing the asbestos-containing insulation, but the court nevertheless concluded that Wangen's expert, Captain William Lowell, had no personal knowledge of the circumstances aboard the WILTSIE, and therefore his expert opinion could not be substituted for the testimony of individuals with personal knowledge. CP 1755-56.⁶ The court determined that Wangen could not show that he was exposed to asbestos in packing and gaskets originally supplied by Warren, and that there was no way to determine whether and how many times

⁵ The trial transcripts will be referred to by their date.

⁶ The trial court's assessment of the experts' testimony constituted a weighing of the evidence that must be performed by the trier of fact. *See infra*.

gaskets and packing had been replaced in pumps and valves he worked on. CP 1757. This appeal followed. CP 1730.

D. SUMMARY OF ARGUMENT

For three and a half years, William Wangen inhaled asbestos dust while maintaining Warren pumps in the forward fire room of the WILTSIE. Warren placed the asbestos material in the pumps at the time of their manufacture. Warren specified asbestos material as replacement parts when the pumps were maintained. Warren provided replacement asbestos gaskets and gasket material for use during routine maintenance. Nevertheless, the trial court erroneously held as a matter of law that Wangen had presented no evidence of Warren's part in the supply chain of the asbestos-containing parts.

The trial court invaded the province of the trier of fact when it decided how to characterize the diagrams Warren provided for the replacement of the gaskets and insulation in the pumps. Taken in a light most favorable to Wangen, those diagrams were specifications.

Similarly, the trial court usurped the role of the trier of fact by weighing the evidence of experts presented by both parties, determining that the testimony of the defense expert was entitled to greater weight.

The trial court misapprehended the Supreme Court's *Simonetta* and *Braaten* decisions as to the duty Warren owed to William Wangen to warn

him of the hazards of asbestos in its pumps from the time of their manufacture and when the asbestos-containing parts were replaced. The facts here are different than those in *Braaten*, particularly where Warren specified that replacement parts in its pumps needed to contain asbestos and it provided those parts. The trial court was unaware of Washington's liberal approach to asbestos exposure, an approach that required the exposure issue here to be resolved by the trier of fact.

E. ARGUMENT

(1) Standard of Review

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Summary judgment is proper if the court, viewing all facts and reasonable inferences in the light most favorable to the non-moving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ellis*, 142 Wn.2d at 458. A material fact is one upon which the outcome of the litigation depends. *Kim v. O'Sullivan*, 133 Wn. App. 557, 559, 137 P.3d 61 (2006), *review denied*, 159 Wn.2d 1018 (2007). When determining whether an issue of material fact exists, all reasonable inferences are construed in favor of the nonmoving party like Wangen.

Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).⁷

Where a defendant moves for summary judgment claiming that a plaintiff has not proved an essential element of the prima facie claim, then the burden shifts to the plaintiff to show the existence of evidence to support that element of the prima facie claim. At that point, all the usual rules set forth above pertaining to evidence on summary judgment apply. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Here, Warren essentially claimed that Wangen failed to establish a necessary element of her claim.

(2) The Trial Court Improperly Weighed Conflicting Evidence

In two significant respects, the trial court weighed the evidence in arriving at its summary judgment decision, something it was forbidden to do under the standards articulated in Washington case law for considering motions for summary judgment. The very nature of the case law stating that all reasonable inferences from the facts on summary judgment makes clear that a court is not permitted to weigh the evidence. *See Snohomish*

⁷ Even when evidentiary facts are not disputed, a motion for summary judgment will be defeated if different inferences may be drawn from the evidence in the record as to ultimate facts. Philip A. Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash.L.Rev. 1, 4 (1970). Similarly, a motion must be denied if reasonable minds might draw different conclusions from the undisputed evidentiary facts. *Id.*

County v. Rugg, 115 Wn. App. 218, 228-29, 61 P.3d 1184 (2002) (weighing evidence and credibility are for trier of fact). Here, the trial court decided that two Warren diagrams offered below by Wangen did not constitute “specifications” and that an expert’s testimony offered by Warren was more credible than the testimony of Wangen’s expert. The trial court erred in each instance.

The trial court ruled that the Warren schematics showing asbestos-containing material were not specifications for what had to be used by the customer, but instead described the components that were contained in the original equipment. CP 528, 530. But whether the schematics and parts lists were engineering documents and or were intended to guide customers in the proper use of replacement parts was for a finder of fact to determine. *See, e.g., Snohomish County v. Postema*, 95 Wn. App. 817, 820, 978 P.2d 1101, *review denied*, 139 Wn.2d 1011 (1998) (characterization of water as natural watercourse or surface water is for trier of fact).

A specification has a well-understood meaning, as described in Bryan A. Garner, *Black’s Legal Dictionary* (8th ed.) at 1434, it is the “act of making a detailed statement, esp. of the measurements, quality, materials, or other items to be provided under a contract.” Similarly, *Merriam-Webster’s Collegiate Dictionary* (11th ed.) provides at 1198 that

a specification is a “detailed precise presentation of something or of a plan or proposal for something.”

The diagrams at issue here were prepared by Warren. They articulated precisely what Warren intended for the replacement gasket for its pump. They constituted a specification, contrary to the trial court’s analysis that simply adopted Warren’s characterization of the diagrams.

The trial court here also invaded the province of the trier of fact by weighing the credibility of the parties’ respective expert witnesses. The parties provided expert testimony regarding the “lagging” and the asbestos-containing magnesia and cloth which Warren applied underneath it. The contention between Wangen and Warren was whether that material was “internal” or “external” insulation, and whether the lagging would have been removed for maintenance. RP 3/22/10: 3. Warren provided expert testimony by James Delaney, a retired naval officer. CP 1662. Delaney testified there was never any reason to remove the lagging, thus exposing the magnesia. CP 1651-52. Wangen provided expert testimony by William Lowell, a retired captain in the Naval Reserve. CP 2281-82. In direct contrast to Delaney, Lowell testified that he had seldom seen the sheet metal lagging on Warren pumps in place on naval ships. CP 2277-78. He generally found the lagging had been removed, leaving the

asbestos insulation in place and plainly visible. CP 2278. Both experts' opinions were admitted into evidence.⁸

The court admitted that it found Wangen's deposition testimony regarding removal of insulation on the pumps "difficult to understand." RP 3/22/10: 13. The expert testimony was introduced in an attempt to resolve the factual ambiguity regarding Wangen's possible exposure to asbestos under the lagging. *Id.* at 3. Even where the two experts provided conflicting testimony, Roland Doktor, the Warren spokesman, acknowledged that maintaining the pumps did "not necessarily" involve removing the lagging. CP 596. Given that Warren's own representative could not provide a definitive answer about removing the lagging for maintenance purposes, it was essential that the factual dispute between the experts be resolved by a finder of fact.

On Warren's motion for reconsideration, the trial court weighed the conflicting opinions provided by the two experts. CP 1755. The court devalued Lowell's testimony because Lowell had "no personal knowledge

⁸ ER 702 permits admission of qualified expert testimony when scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue. *State v. Phillips*, 123 Wn. App. 761, 765, 98 P.3d 838 (2004), *review denied*, 154 Wn.2d 1014 (2005). Expert testimony is admissible if the witness's expertise is supported by the evidence, his opinion is based on material reasonably relied on in his professional community, and his testimony is helpful to the trier of fact. *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995); ER 702, 703. An expert witness need not have direct personal knowledge of the matter at hand. *Phillips*, 123 Wn. App. at 765.

of the circumstances on the WILTSIE,” and was basing his opinion on “his experience in other vessels.” *Id.* As a result, the court ruled that Lowell’s opinion could not be substituted for the testimony of individuals with personal knowledge. *Id.* at 1755-56.

A disagreement between experts creates an issue of material fact sufficient to defeat a motion for summary judgment. *Texaco Refining and Marketing, Inc. v. Department of Revenue*, 131 Wn. App. 385, 404, 127 P.3d 771, *review denied*, 158 Wn.2d 1012 (2006).⁹ Assessing the credibility of competing experts is for the trier of fact. *Larson v. Nelson*, 118 Wn. App. 797, 810, 77 P.3d 671 (2003), *review denied*, 144 Wn.2d 1014 (2001). This rule has its root in the fact that where experts’ opinions are admissible, disagreement between expert witnesses as to their opinions goes to the weight of the evidence for the trier of fact. *In re Thorell*, 149 Wn.2d 724, 756, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004).

It is important to recognize that the testimony of both experts had been admitted, ER 702, 703, which the court did in acknowledging the conflict between their testimony. When the court discounted Lowell’s testimony it improperly made a determination on the weight of his

⁹ Our Supreme Court recently determined in *Fitzpatrick v. Okanogan County*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3432591 (2010) that the presentation of two expert opinions on the characterization of certain Methow Valley watercourses, precluded summary judgment where the County offered *no evidence* to refute those opinions.

testimony. The court erred in discounting Lowell's testimony on the ground that he lacked personal experience, because, again, Lowell's opinion was *admitted*. Because it is for the trier of fact to determine what weight, if any, will be given to expert testimony, *State v. Mitchell*, 102 Wn. App. 21, 27-28, 997 P.2d 373 (2000), it was error for the trial court to weigh Lowell's testimony, and to discount it in favor of "individuals with personal knowledge."

(3) The Trial Court Misapprehended the Scope of *Braaten* and *Simonetta*

It is important to understand in this case precisely what is at issue, and, in order to do so, it is necessary to precisely identify the holdings in *Simonetta* and *Braaten* and to place them appropriately in the context of Washington law on asbestos exposure.

Simonetta is a duty case. There, the defendant manufactured evaporators, devices used to desalinate water aboard Navy ships. The evaporators *Simonetta* serviced were encased in asbestos insulation and he had to remove the insulation in order to maintain the equipment and then re-insulate it when he was finished. *Id.* The insulation was manufactured, not by the company which made the evaporators, but by a separate company, and was installed by the Navy itself, or by yet another entity. Thus, the case dealt with asbestos insulation *external* to the equipment

being maintained, which is not at issue in the present case. That the case involved duty was squarely articulated by the Court when it stated that the “only issue pertaining to negligence raised on appeal is whether Viad owed a duty of care to Simonetta.” *Id.* at 348-49. The Court similarly addressed duty under the WPLA. *Id.* at 354-55. In each instance, the Court held that a manufacturer did not owe a duty where the manufacturer was not in the “chain of distribution” for the asbestos-containing product. Because the defendant there sold the evaporator without insulation and another manufacturer made, sold, and selected the asbestos insulation, no duty was owed by the evaporator manufacturer. *Id.* at 362-63.

Braaten is also a duty case with elements of breach and causation considered as well. That case addressed whether a manufacturer could be liable for asbestos in *internal* asbestos-containing materials supplied by third parties. 165 Wn.2d at 391. In so doing, the Court addressed the asbestos contained in the pumps’ gaskets and packing materials. *Id.* Thus, the Court noted: “The manufacturers do not dispute that they would be liable for failure to warn of the danger of exposure to asbestos in packing and gaskets originally contained in their products.” *Id.* In *Braaten*, the defendants manufactured pumps and valves used on naval ships. Some of the manufacturers' products originally contained packing and gaskets with asbestos in them, but the packing and gaskets were

manufactured by third parties and then installed in the defendants' products.¹⁰ Braaten worked aboard Navy ships maintaining pumps and valves, which required him to remove and replace asbestos-containing packing and gaskets, and he had to grind, scrape or chip the gaskets and packing off, resulting in the release of respirable asbestos. Unlike William Wangen's situation however, there was no evidence that Braaten ever removed gaskets internal to the defendants' pumps. *Id.* at 395. Also, documents provided by the defendants either made no reference to asbestos or listed both asbestos and non-asbestos-containing materials.¹¹

Reiterating the *Simonetta* holding that a manufacturer has no obligation to warn of the dangers of another manufacturer's product, the *Braaten* Court held there was no duty to warn about replacement materials. *Id.* at 394. Critically, the Court found that there was *no evidence* that the pump manufacturers manufactured the gaskets and packing included in its pumps; *no evidence* that they furnished a particular type of gasket with the pumps, and *no evidence* that they manufactured, sold, or supplied replacement gaskets, or were in the chain of distribution

¹⁰ The Navy also applied asbestos-containing insulation to the valves and pumps after they were installed on the ships. *Id.* at 379.

¹¹ Braaten worked aboard ships at a considerably later date than Wangen did. He worked as a pipefitter from 1967 until 2002. *Id.* at 381. By that time, it is entirely reasonable that manufacturers were listing non-asbestos materials as alternatives to traditional asbestos materials.

of replacement packing or gaskets. *Id.* at 393-94. The Court therefore held that where the evidence was *undisputed* that a defendant did not manufacture the gaskets and packing included in its pumps, and was not in the chain of distribution of replacement packing or gaskets, no liability could attach. *Id.* at 394.

A critical facet of the Supreme Court's opinion is what the opinion does not address. The Court did not say that an asbestos plaintiff could *never* establish a duty to warn based in negligence or the WPLA for exposure to asbestos from gaskets or packing. Rather, the Court held there was insufficient proof in Mr. Braaten's particular case of his exposure to such asbestos. Moreover, the Court did not reach the issue of asbestos in gaskets or insulation specified by the product manufacturer:

In light of the facts here, we need not and do not reach the issue of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design.

Id. at 397.

This case presents the very facts not addressed in *Braaten*, given Warren's use of asbestos in its pumps from the time of their manufacture and the presence of asbestos in any replacement gaskets or packing in the pumps specified by Warren.

When considering issues pertaining to asbestos exposure, a key issue here, it is well to recall that Washington courts have employed a liberal test in asbestos cases where exposure occurs at a work site or multiple work sites. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987). In order to have a cause of action, a plaintiff must identify the particular manufacturer of the product that caused the injury, *id.*, but asbestos plaintiffs in Washington may establish exposure to a defendant's product through circumstantial evidence. *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 571, 157 P.3d 406 (2007), *review denied*, 162 Wn.2d 1022 (2008). A plaintiff need not personally identify the manufacturers of asbestos products to which he was exposed in order to recover from those manufacturers. *Lockwood*, 109 Wn.2d at 246. Because of the long latency period of asbestosis, the plaintiff's ability to recall specific brands by the time he brings an action will be seriously impaired. *Id.* The problems of identification are even greater when the plaintiff has been exposed to more than one manufacturer's product. *Id.* A plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace. *Id.* at 247.

Lockwood identified several factors a court must consider when evaluating whether sufficient evidence of causation exists: (1) plaintiff's

proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product; and (3) the types of asbestos products to which plaintiff was exposed and the ways in which the products were handled and used. *Id.* at 248; *see also, Berry v. Crown Cork & Seal Co. Inc.*, 103 Wn. App. 312, 14 P.3d 789, *review denied*, 143 Wn.2d 1015 (2001).

The *Berry* court applied the liberal standard adopted in *Lockwood* to overturn a summary judgment in favor of an asbestos manufacturer. Like Wangen, Berry died of mesothelioma after being exposed to asbestos at a Navy shipyard. *Id.* at 314-15. The trial court dismissed Berry's claims on summary judgment, concluding that there was insufficient evidence to raise a genuine issue of material fact that Berry had ever been exposed to asbestos-containing products supplied by the defendant. *Id.* at 315. On appeal, this Court held that Berry had satisfied the *Lockwood* proximity and time factors, having worked at the Navy yard during the time the defendant's asbestos products were used, and that the asbestos fibers had dispersed throughout the entire shipyard so that it could be inferred that Berry had breathed them. *Id.* at 324.

The critical issue for summary judgment was whether Berry raised an issue of material fact as to whether he was exposed to the defendant's

products at the Navy yard. *Id.* The Court held that evidence that the defendant supplied asbestos products to the Navy yard and that its products were seen there by one witness almost every day was sufficient to raise a genuine issue of material fact as to whether Berry was exposed to the defendant's product. *Id.* at 324-25. Notably, the Court held that the extent to which the defendant supplied asbestos-containing products as compared with other distributors was irrelevant for purposes of summary judgment. *Id.* at 325.

Likewise, in *Allen*, this Court applied the *Lockwood* factors to reverse summary judgment in favor of the defendants.¹² *Allen* sued the defendant, claiming he was exposed to asbestos dust his father brought home from work on his clothing. *Id.* at 568. The defendant moved for summary judgment, arguing that *Allen* had offered insufficient evidence he had been exposed to its products. *Id.* at 570. As in *Berry*, the central issue on appeal was whether *Allen* raised an issue of material fact as to whether he had been exposed to the defendant's asbestos products. *Id.* at

¹² The *Allen* court amplified upon the *Lockwood* exposure elements indicating that a court should consider: (1) plaintiff's proximity to the asbestos product when the exposure occurred; (2) the expanse of the work site where asbestos fibers were released; (3) the extent of time plaintiff was exposed to the product; (4) what types of asbestos products the plaintiff was exposed to; (5) how the plaintiff handled and used those products; (6) expert testimony on the effects of inhalation of asbestos on human health in general and the plaintiff in particular; and (7) evidence of any other substances that could have contributed to the plaintiff's disease (and expert testimony as to the combined effect of exposure to all possible sources of the disease). *Allen*, 138 Wn. App. at 571.

572. Allen presented expert testimony that if asbestos had been used anywhere at Allen's father's workplace, Allen's father would have been exposed to it because the asbestos dust would have drifted throughout the workplace. *Id.* at 572. He also adduced evidence of three sales orders of asbestos material which the Court held permitted the reasonable inference that the defendant's asbestos products were used at the shipyard. *Id.* at 572-74. Because it was reasonable to infer that the defendant's product was used at the shipyard and there was opinion testimony in the record that if the product was used Allen's father would have been exposed, the Court held Allen had established the existence of an issue of material fact, and that summary judgment was inappropriate. *Id.* at 574-75.

In short, under *Simonetta* and *Braaten*, there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos *in other manufacturers' products*. But this does not alter the conclusion derived from *Lockwood* and similar cases that a product manufacturer *is* liable if its product contains asbestos products to which a plaintiff is exposed or if the plaintiff is exposed to asbestos from asbestos-containing replacement parts the manufacturer provided for the product or specified must be in the product. Warren met that test here.

(4) Wangen Provided Evidence That Warren Sold, Supplied, and Specified Asbestos-Containing Parts For Its Pumps

In order to survive Warren's motion for summary judgment, Wangen had to demonstrate by "some evidence" that Warren was in the chain of supply for the asbestos in its pumps. Wangen provided *ample* evidence that Warren was indeed in the chain of distribution for asbestos replacement parts for its pumps aboard the WILTSIE. Wangen's evidence showed that Warren manufactured, sold, specified, and supplied asbestos-containing replacement materials, and was in the chain of distribution of replacement packing or gaskets. Wangen worked directly with such products or was in an environment where other sailors around him did so, exposing him to asbestos fibers.

In its summary judgment motion, Warren did not establish that there was "no evidence" to support the elements of Wangen's warning claims. Instead, it resorted to the flat assertion that Wangen had "absolutely no evidence that Warren ever manufactured the external insulation that might have been applied to its pumps." CP 49. It further asserted that there was no evidence Wangen worked around a Warren pump, or that the gaskets and packing inside any Warren pump that Wangen may have worked on were manufactured or sold by Warren. *Id.*

Warren did not show the absence of an issue of material fact; *it ignored the evidence Wangen had introduced*. Even if it had succeeded in showing the absence of an issue of material fact, the burden would then have shifted to Wangen. *Young*, 112 Wn.2d at 225. Only if Wangen failed to make a showing sufficient to establish the existence of an element essential to his case, and on which he would bear the burden of proof at trial, should the trial court have granted Warren's motion. *Id.* At that point, of course, the evidence and all reasonable inferences there from were to be considered in the light most favorable to Wangen as the nonmoving party. *Id.* at 226. Warren failed to show the absence of an issue of material fact. Wangen provided abundant evidence sufficient to establish the existence of an element essential to his case, and on which he would bear the burden of proof at trial. Summary judgment was not appropriate.

Here, the trial court did note that the Warren pumps were manufactured with asbestos gaskets and packing, as well as internal asbestos insulation. CP 1738. It also noted Warren sold the pumps to the Navy in 1943, and that the pumps were installed on the WILTSIE.¹³ *Id.*

¹³ The health hazards of asbestos were well known by the 1920s and 30s. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1106 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). The schematic diagrams and materials and parts lists Warren provided in the 1940s show that asbestos-containing materials were an integral

Unlike *Braaten* where the evidence was undisputed that the defendant Buffalo Pumps did not manufacture the gaskets and packing it included in its pumps, Wangen presented testimony by Doktor, Warren's corporate representative, that there was no evidence of any other companies supplying any packing and gaskets during the time period when the pumps were installed on the WILTSIE. CP 573-74, 613-14. Thus, far from evidence providing evidence of outside suppliers for the original asbestos materials, Warren's own representative acknowledged there was no evidence that any company other than Warren supplied them.

Doktor also testified that asbestos-containing gaskets, packing, magnesia, and asbestos cloth were installed during the initial construction of the pumps. CP 592, 595, 597. He described the material as a "component part" of the pump. CP 595. Unlike the defendants in *Braaten*, Warren thus supplied and installed the original asbestos-containing materials.

As Doktor further acknowledged, Warren *specified* asbestos-containing materials for its pumps. Warren's schematic diagrams listed asbestos gaskets and packing, as well as asbestos-containing magnesia and asbestos cloth as integral components of its pumps. CP 590-94. Doktor

component of the pumps and were available as replacement parts. Warren, however, provided no warning about the hazards of asbestos exposure. CP 598.

acknowledged that the purpose of those drawings was to show the customer the exact size and locations of all pertinent parts they would need, and to serve as a guide in the proper installation, operation, and *maintenance* once the pump was delivered. CP 593. Warren provided diagrams and parts and materials lists specifying asbestos materials to be used in the pumps. CP 593-96. Doktor also acknowledged that it was necessary to remove the pump gaskets in order to perform maintenance work. CP 606. By specifying that asbestos had to be installed in its pumps upon the replacement of the original gaskets and packing, Warren was just as much a part of the chain of supply as if it had installed the asbestos-containing gaskets and packing itself.

Further, Wangen's own testimony indicated that Warren replacement gaskets and packing, containing asbestos, were placed in pumps on the WILTSIE, satisfying *Lockwood's* exposure standard. Wangen testified that he served on the WILTSIE for approximately three and a half years, working with gaskets and packing, both original and replacement, for approximately five hours a day. Wangen testified that the internal gaskets he used to maintain the pumps had to be specially made to order, and were provided by the manufacturers. CP 548, 674, 679-80. Each Warren pump had a steel plate affixed to it identifying Warren as the manufacturer, and showing which gaskets to order as well

as the catalog number. CP 548, 565, 613. Wangen could confirm the correct replacement parts by comparing the number and name on the pump plaque with the number and name on the box the replacement gaskets came in. CP 549.

The flat gasket material Wangen used to make custom gaskets was supplied by the manufacturers and had the manufacturers' name stamped on it. CP 452, 460. When Wangen removed that same flat material from the pumps to replace it, he could always identify the manufacturer because the manufacturer's name could still be made out on the gasket. CP 464-65.

Elbert Gassaway, who served "hand by hand" with Wangen for three years aboard the WILTSIE, testified that the gasket material would have the manufacturer's name stamped on it. CP 564, 566. Gassaway also testified that the various brands of pumps in the fire room were identified by a label attached to each pump. CP 565.

The asbestos-containing pre-cut and pre-formed gaskets had to be specially ordered from the manufacturers. CP 548-49, 674, 680, 684-85. The manufacturers' name was printed on the parts box when Wangen received them from the ship's supply officer. CP 548-49, 566. Warren himself provided spare parts for the pumps. CP 586. The procedure for ordering replacement parts was identical for all manufacturers. CP 688.

As this case was resolved on summary judgment, all inferences from the facts must be seen in Wangen's favor. Wangen's testimony, taken together with Gassaway's and Doktor's, clearly create an inference that Wangen maintained Warren pumps aboard the WILTSIE, and that he was exposed to asbestos-containing replacement parts sold, supplied, and specified by Warren, establishing Warren's presence in the chain of supply that exposed Wangen to asbestos resulting in his death by mesothelioma.

Thus, Wangen offered evidence that Warren not only specified asbestos-containing gaskets and insulation as replacement parts for its pumps, it provided the replacement gaskets and insulation for its pumps aboard the WILTSIE. The trial court's willingness to dismiss Wangen's testimony that Warren manufactured replacement gaskets and packing because the court did not believe Wangen had any foundation for that conclusion was a credibility decision for the trier of fact, not for the judge to decide in granting summary judgment to Warren.

Wangen satisfied the factors a court must consider when evaluating the evidence of causation under *Lockwood*: (1) proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product; and (3) the types of asbestos products

to which plaintiff was exposed and the ways in which the products were handled and used. *Lockwood*, 109 Wn.2d at 248.

Wangen has shown that he worked in immediate proximity to Warren's pumps. Like Mr. Berry, who worked in a ship yard and was exposed to asbestos which was widely distributed through the air, Wangen worked almost exclusively within the confines of WILTSIE's fire room. For almost four years, Wangen was regularly exposed to various kinds of asbestos material, including packing and gaskets in the forward fire room of the WILTSIE. He had to physically tear the asbestos materials apart, causing it to fly about the fire room, generally for five hours a day. Inevitably, Wangen inhaled the asbestos.

Reviewed under *Lockwood's* standard, the evidence presented was more than sufficient to allow Wangen to survive Warren's motion for summary judgment:

- Warren *sold* its pumps to the U.S. Navy with asbestos materials already incorporated in them;
- Warren *specified* asbestos gaskets and insulation for its pumps aboard the WILTSIE; and
- Warren *supplied* the replacement gaskets for the Warren pumps Wangen worked on aboard the WILTSIE.

Summary judgment was improperly granted.

F. CONCLUSION

The trial court erred in granting summary judgment to Warren. The trial court usurped the role of the trier of fact in making credibility decisions and giving weight to the opinions of experts, something it was not supposed to do on summary judgment.

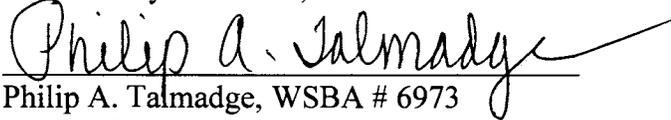
The trial court also misapplied the rule adopted in *Braaten*, particularly where the court failed to apply the liberal rule on asbestos exposure adopted by Washington courts. The trial court did not properly address the clear exception to the rule expressed in *Braaten* and *Simonetta* where a manufacturer specifies that asbestos-containing replacement parts must be used in its product. As a general rule, after *Simonetta* and *Braaten*, a plaintiff's claim may fail if there was *no evidence* that the pump manufacturers manufactured the gaskets and packing included in its pumps; *no evidence* that they furnished a particular type of gasket with the pumps, and *no evidence* that they manufactured, sold, or supplied replacement gaskets, or were in the chain of distribution of replacement packing or gaskets. However, if an asbestos plaintiff provides evidence that he was exposed to asbestos from the manufacturer's product from the time it was manufactured, or from asbestos-containing replacement parts made by the manufacturer, the case goes to the trier of fact. Similarly, the case goes to the trier of fact if the manufacturer specified that any

replacement parts for its pumps must contain asbestos. Wangen presented ample evidence here that he was exposed to asbestos-containing materials manufactured, sold, supplied, and specified by Warren.

This Court should reverse the trial court's decision on summary judgment and remand the case to the trial court to allow Wangen her day in court. Costs on appeal should be awarded to appellant Wangen.

DATED this 8th day of September, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited with the US Postal Service a true and accurate copy of the following document: Brief of Appellant Wangen in Court of Appeals Cause No. 65258-3-I to the following:

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

DATED: September 9, 2010, at Tukwila, Washington.



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