

No. 69719-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

RONALD FAGG,

Appellant,

v.

CSK Auto, Inc. and Pacific Water Works Supply Co, Inc.,

Respondents.

OPENING BRIEF OF APPELLANT

Meredith Boyden Good, Esq.
Attorney for Ronald Fagg, Appellant

BRAYTON PURCELL, LLP
621 SW Broadway, Suite 200
Portland, OR 97205
503-295-4931
WSBA # 39890

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I.
INTRODUCTION

Ronald Fagg has been denied the right to pursue his injury claims against the defendants in the matter because of a misinterpretation of fact and law. The trial court paid lip service to the holdings of the Washington appellate courts concerning applicability of the Washington Product Liability Act (WPLA) in latent disease cases, but then ignored those holding in granting summary judgment and dismissing Fagg's claims.

Fagg was exposed to asbestos from multiple products produced and marketed by multiple entities from the 1950s through the early 1980's. Each of these exposures contributed to cause one single injury, asbestos-related disease. When Fagg filed his action, the defendants here, CSK Auto, Inc. and Pacific Water Works Supply, moved for summary judgment and dismissal of the complaint on the ground that they were immune from liability under the WPLA. The court below granted the motions after finding that the act applied to confer immunity. In so doing, it ignored precedent

concerning exposure in asbestos cases, failed to consider exposures extending over decades prior to the effective date of the act, and failed to properly place the burden on the moving parties to demonstrate an entitlement to summary judgment. Fagg, accordingly asks this court to reverse the ruling and reinstate his right to pursue relief for his injury.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted summary judgment in favor of defendant CSK Auto and dismissed plaintiff's claims against it after incorrectly deciding that the defendant was entitled to immunity under the terms of RCW 7.72.040.

2. The trial court erred when it granted summary judgment in favor of defendant Pacific Water Works Supply, Inc. and dismissed plaintiff's claims against it after incorrectly deciding that the case was governed by the WPLA because "substantially all" of plaintiff's exposure to asbestos-containing pipe supplied by PWWS did not occur prior to July 1981.

The common issue in both assignments of error is application of the WPLA in cases involving injury caused by asbestos-containing products. Under Washington case law, the Act does not apply to cases in which the asbestos caused injury is diagnosed after the effective date of the Act if “substantially all” of the injurious exposure to asbestos occurred prior to the effective date of the act. In this case, in which a single injury is caused by exposure to multiple products over an extended period of time, each being a substantial factor in causing the injury, did the court err in failing to consider **all** the exposures in the case, focusing only on the individual defendants’ dates of exposure, when determining whether substantially all the exposure took place before the effective date of the act?

III. STATEMENT OF THE CASE

Ronald Fagg had an approximate 40 year work history during which he was employed as a construction worker, naval machinist mate, heavy equipment operator, and superintendent of a municipal water system. Throughout this time he also performed maintenance

on his personal vehicles. (Clerk's Papers ("CP") 23-27) In October of 2009, he was diagnosed with asbestosis and asbestos related pleural disease by Dr. Brad Black. (CP 28)¹ On January 29, 2010 he initiated this action alleging causes of action for negligence and strict liability against a number of defendants responsible for his exposure to asbestos, including one of the respondents here, CSK Auto.

On September 20, 2010, Fagg filed a first amendment to his complaint naming defendant Pacific Water Works Supply, Inc. for the previously named Doe 1. (CP 34) A second amendment named H.D. Fowler Co. as Doe 2. (CP 42) Additional defendants CNH America LLC, Caterpillar Inc., and ExxonMobil Oil Corporation were named as Doe 3, 4, and 5 respectively in a third amended complaint. (CP 48)

Defendant CSK Auto, Inc. filed its answer denying all claims and asserting affirmative defenses. As its fourteenth affirmative defense CSK stated: Plaintiff's claims should be dismissed because

¹Asbestosis: A condition featuring scarring of the lungs caused by inhaled asbestos fibers. Asbestosis is irreversible. It tends to lead to COPD (chronic obstructive pulmonary disease), a progressive disorder that can be disabling or fatal.

<http://www.medterms.com/script/main/art.asp?articlekey=10945>

CSK is immune from liability under RCW 7.72.040. (CP 29-33)

Pacific Water Works Supply, Inc. (PWWS) also answered with denials and asserted defenses but did not assert the statutory defense of the WPLA. (CP 54-62)²

A. Fagg's Exposures to Asbestos

1. Fagg's Exposure to CSK Products³

CSK admits that it operates retail stores where the public can purchase automotive repair parts. The business operates under various trade names, including Al's and Schuck's. (CP 64) Fagg testified in his deposition that he purchased brakes and gaskets at Al's and Schuck's when he did repair work on his own or his family's vehicles from the 1950s through the 1970s. (CP 119) His list of repairs included: a brake job in the 50s on his mother's '49 Ford; a brake job on a 53 Ford in the late 50s; brake and two exhaust

²Only the answers of CSK and PWWS are addressed here as they are the respondents in this appeal.

³The facts concerning Fagg's exposure to asbestos from the defendants' products are presented here, as required, in the light most favorable to Fagg, the non moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 345, 350, 588 P.2d 1346 (1979)

manifold gasket replacements on a 55 Ford pickup in the early 60s; brake replacement on a 56 Ford pickup in the early to mid 60s; brake job on a second 56 Ford pickup; brakes on a 65 Ford Mustang in the 70s; brakes and two exhaust manifold gaskets on a 57 Ford Ranchero in the early 60s; brakes on a 57 Ford station wagon in the late 60s; brakes on a second 57 Ford in the 60s; brakes on a 65 Volkswagen Super Beetle in the late 70s; exhaust manifold gaskets on a 64 Mustang in the early 80s; and a brake job on a friend's 61 Ford in the early 80s. (CP 130-135)

Fagg testified that he always bought the brakes at either Al's or Schuck's, (CP 135) and that he always bought Bendix brakes because the employees of Al's and Schuck's told him they were the best. (CP 136) When necessary, he smoothed the uneven surfaces of the replacement brakes by sanding them. (CP 85) Fagg also testified that the brand name of the gaskets he purchased at Al's and Schuck's was Victor. He identified the gaskets as metal on one side and dark grey with a "rough" texture and fibers protruding on the other. (CP 132-34)

Fagg produced evidence that Bendix brakes contained chrysotile asbestos until at least 1985. (CP 153-54)⁴ and that Victor gaskets contained asbestos until 1988. (CP 211) Fagg also produced the declaration of his expert asbestos consultant who stated that the brakes and gaskets used by Fagg more likely than not contained asbestos and that the use of those products in the manner described by Fagg would have caused the release of respirable asbestos fibers into the air, injuriously exposing him. (CP 364-374)

2. Fagg's Exposure to PWWS Products

Fagg testified that he worked for C&D Enterprises for a period of six months in the 70s. (CP 315) C&D was in the business of installing water lines. (*Id.*) Fagg testified that during his employment, he installed transite water mains and hydrants. He identified "transite" as a pipe made of concrete and asbestos. (*Id.*) He identified the pipe as being made by Johns-Mansville because of the lettering

⁴Verified interrogatory responses of Allied Signal, the successor to Bendix indicate that Bendix brake linings contained asbestos from 1939-1985. That is also the year Bendix was merged into Allied Corporation and ceased to exist. (CP 140)

“J-M” which was on the pipe. (*Id.*)

The transite pipe came in 20 foot lengths and sometimes had to be cut to fit. This was done with a power saw which created large quantities of dust. (CP 315-16) When the pipe was cut it also needed to be beveled so it could be connected to other pieces of pipe. This was also done with a power saw and also created large quantities of dust.(CP 316) Fagg testified to personally making forty to fifty cuts of transite pipe during his employment with C&D. Each of those cuts involved a similar number of bevels. (*Id.*)

The transite pipe that Fagg worked with came from two different suppliers - Pacific Water Works and Fowler's. (*Id.*) Fagg testified that he personally picked up some of the transite from PWWS himself. Pipe he did not personally pick up was delivered to C&D's storage yard from which he would later obtain pipe for his jobs. (CP 316-17) Fagg estimated that he personally cut the transite he obtained from PWWS about 20 times and beveled it 10 times during his employ with C&D. (CP 317))

After his employment with C&D, Fagg went to work for Lake

Washington Sewer and Water as a backhoe operator in the late 70s and worked there for approximately 5 years. (CP 319) During that time he was involved in repairing leaking pipes and estimated that he made about 50 cuts and 25 bevels of the asbestos containing transite pipe.⁵ Between 1985 and 1990 he worked for the City of Kirkland and made approximately 15 cuts and 10 bevels in transite pipe. (CP 324)

3. Fagg's Other Asbestos Exposures

Fagg had extensive exposure to asbestos far pre-dating his exposure to asbestos-containing products for which CSK and PWWS were responsible. He served in the navy from 1965 -1968 as a machinist mate. He was exposed to asbestos from the gaskets and packing in pumps and valves that he repaired. He had to cut away asbestos-containing insulation on steam lines and cut and install new asbestos-containing insulation. He was present when boiler tenders

⁵Fagg estimated he made about 100 cuts and half that number of bevels. (CP 321) He later clarified that half of those cuts were of pipe that was already in the ground so only 50 percent would have been in new pipe supplied by either Fowler or PWWS. (CP 323-324)

opened boilers and disturbed asbestos-containing refractory and insulation. While the ship was in dry dock, holes were cut in its sides to remove the generators, disturbing in place asbestos insulation on steam lines. (CP 524-525)

Fagg also testified that he worked for Sunshine Construction for two years from 1963 -1965 before he entered the Navy and again from 1968 - 1972 or 73. (CP 305-306)) During those years he used asbestos-containing drywall compound manufactured by Kaiser Gypsum and sold to him by Defendant Dunn Lumber. (CP 308-309)⁶

Fagg then worked as an equipment operator for the King County Road Department until the late 1970s. (CP 311) In that job he took equipment, Case backhoes and Caterpillar graders, to the repair facility at least once a week. (CP 312) There he was in close proximity to mechanics as they serviced the asbestos-containing brakes on the equipment, grinding and sanding the brakes to fit, and using compressed air to blow out the brake dust. (CP 312-313)

⁶Fagg estimated that he worked on over 100 projects during his time at Sunshine Construction and that he utilized approximately 400 buckets of joint compound, each containing five gallons. (CP 309)

B. Defendants' Motions for Summary Judgment

Both CSK and PWWS filed motions for summary judgment. CSK sought to have Fagg's claims dismissed because, as a "mere retail product seller" it was immune from product liability suits. It also claimed that Fagg could not establish that any product he had obtained from CSK proximately caused any disease or harm. (CP 63) PWWS similarly argued that Fagg's claims against it were preempted by the WPLA. It also claimed Fagg had never been exposed to any product supplied by PWWS that contained asbestos, and even if he had been so exposed, the exposure was not a substantial factor in causing his asbestosis. (CP 96)

CSK filed a joinder to part V.A. of PWWS' motion. (CP 112) That section addressed the applicability of the WPLA to this matter. PWWS in turn filed a joinder to CSK's reply to plaintiffs Opposition to its motion. (CP 394)

C. Fagg's Opposition to the Defendants' Motions

In opposition to the claim that he could not show exposure to any asbestos-containing product for which PWWS was responsible,

Fagg presented the deposition testimony of George Vandersanden, a former salesman for PWWS who testified that PWWS sold asbestos containing transite pipe beginning in 1957 or 58. (CP 341) One of the brands of transite they sold was Johns-Mansville. (CP 343) Fagg also submitted his own declaration that he had obtained asbestos-containing pipe from PWWS which he had cut and beveled prior to 1981. (CP 385-86)

Fagg presented declarations from two expert witnesses. His asbestos consultant, Charles Ay, explained how the handling of cementitious asbestos-containing pipe (transite) caused release of respirable quantities of asbestos. (CP 375-384) Dr. Herman Bruch declared he had examined Mr. Fagg, diagnosed him with asbestosis, and determined that the exposures identified by Mr. Fagg and Mr. Ay would have been a substantial factor in causing his disease. (CP 346-348)

In opposition to the CSK motion Fagg presented the interrogatory responses of Allied Signal, Inc., the successor to Bendix, admitting that Bendix Brakes contained asbestos from 1935

to 1985 and that the asbestos comprised 50 percent of the brake product by weight. (CP 153-154) He also presented the interrogatory responses of Dana Corporation for its Victor Products division. Dana admitted that between 1967 and 1988 Victor marketed gaskets containing asbestos. (CP 195)

Fagg submitted the declaration of Mr. Ay who explained why the gaskets used by Fagg would, more likely than not, have contained asbestos, and how the asbestos-containing gaskets and brakes released asbestos into the air in respirable quantities. (CP 364-374) Fagg also submitted the declaration of Dr. Bruch who had examined Mr. Fagg and diagnosed him as having asbestosis. Bruch explained how people who develop asbestosis are exposed to asbestos over a long period of time, and that the exposures identified from the Victor Gaskets and Bendix Brakes would have been a substantial factor in contributing to Fagg's development of the disease. (CP 258-260)

In response to both motions, and the applicability of the WPLA, Fagg relied on Washington case law which holds that even when an asbestos related disease is diagnosed *after* the applicable

date of the Act, where “substantially all” of the exposures occurred *prior* to the effective date, the Act does not apply. He pointed out that Fagg’s disease is a cumulative dose disease caused by all of his lifetime exposures to asbestos. Those exposures began in the 1950s and occurred repeatedly up to the effective date of the act and only occasionally thereafter. Therefore, he explained that the act did not apply. (CP 120-122)

D. CSK’s Reply to Fagg’s Opposition

CSK’s reply reiterated its position that the WPLA applied in this case . It pointed out that plaintiff’s evidence showed CSK products contained asbestos until 1988 and there is no evidence that the automotive work was any different in the 80s than in earlier years. It also argued that Fagg had not presented any evidence that his work with new parts had released any respirable fibers. Finally it argued that plaintiff’s exposures to brakes and gaskets were not a substantial factor in causing his disease.

On January 13, 2012 the court heard oral argument on the CSK Motion. After extended argument the court took the matter under

submission and asked the parties to submit additional briefing on the question of application of the WPLA. More specifically, the court sought input on how to apply the standard set forth in *Koker v. Armstrong Cork, Inc., et al*, 60 Wn. App. 466, 804 P.2d 659 (1991) – that the WPLA does not apply where “substantially all” the exposures occurred prior to the effective date of the act. (01-13-12 RP 33)⁷

CSK’s supplemental briefing noted that some of Fagg’s exposure occurred before 1981 and some occurred after the effective date of the act. Accordingly, CSK argued, the Act must apply. The brief then addressed the court’s question of whether the issue to be determined was “whether all of plaintiff’s claimed exposures, automotive and otherwise should be considered in determining whether ‘substantially all’ of his exposures occurred prior to July 1981.” (CP 499)

In response to that question, CSK opined that it was consistent with the definition of a “product liability claim” in RCW 7.72.010(4),

⁷Because the Record of Proceedings includes hearings on three separate dates, citation is to the date of the hearing and then the page of the RP for that hearing.

and with the case law, to include **all exposures**. (CP 499-500) It further pointed out that the court in *Koker* evaluated “all the events which ‘can be termed injury producing’” when determining whether “substantially all” of plaintiff’s exposures took place prior to the enactment of the act. From there, CSK concluded that since Fagg also claimed exposure to PWWS products in 1981, and later, the proper conclusion would be that the Act did apply. CSK’s evaluation of “all the events which can be termed ‘injury producing’” did not include any of Fagg’s exposure to asbestos-containing construction products in the 60s and 70s, or his exposure to asbestos-containing products during his service in the Navy in the 60s, or the exposures to equipment provided by Caterpillar and CNH America in the 1970's.

In his supplemental briefing, Fagg pointed out that the exposure to asbestos-containing products from the other remaining defendants all pre-dated the act. His exposures to the backhoes and graders made by CNH America and Caterpillar all occurred between 1970 and 1976, and transite pipe sellers HP Fowler and PWWS both denied selling transite to plaintiff after 1981. (CP 402)

Fagg further pointed out that the Washington Courts have consistently applied substantial factor causation in asbestos cases. In that analysis, where injury causation is attributable to multiple exposures over an extended period of time, and it is scientifically impossible to identify an individual exposure or exposures as the “but for” cause, the test is whether the exposure was a substantial factor in causing the disease. Here, the exposures to CSK’s products, in conjunction with **all other exposures**, contributed to Fagg’s disease. The question therefore was whether substantially **all** of his exposures occurred prior to the adoption of the act. (CP 403-405) Fagg noted that the facts here are consistent with the facts in *Koker*. Fagg’s exposures occurred in the 50s, 60s, 70s and into the 80s. Therefore, he pointed out, substantially all of his exposures occurred prior to the effective date of the Act. (CP 407)

On February 17, 2012, in a telephone conference, the court announced its decision to grant CSK’s Motion and dismiss plaintiff’s claim against it based on the immunity provisions of the Act. (02-17-12 RP 10-11)

E. PWWS' Reply to Fagg's Opposition

PWWS replied that the WPLA applies because all of Fagg's exposure to PWWS-supplied products occurred after 1981. PWWS also claimed its dismissal was required by "issue preclusion." In support of that claim PWWS argued that the court's dismissal of CSK based on application of the PLA meant that PWWS should also be dismissed. It claimed the two motions had identical issues, the dismissal of CSK was a final judgment, Plaintiff had been a party to the prior determination, and there would be no injustice to plaintiff because dismissal of PWWS would be consistent with the legislature's intent in passing the act. (CP 608-610)

On the other issues PWWS repeated its assertion that Fagg could not have been exposed to asbestos from pipe sold by PWWS because its Woodinville store did not open until after 1980 and Fagg testified that the only place he purchased pipe from PWWS was at the Woodinville location. As to the question of substantial factor causation, PWWS argued that the declarations of Fagg's expert asbestos consultant and medical expert were conclusory. It also relied

on the analysis by its own industrial hygiene expert who speculated that Fagg's exposure from 20 cuts of asbestos-containing pipe would have been substantially less than the amount necessary to cause asbestosis. (CP 610-11)

The motion was heard on March 16, 2012. The court indicated its inclination to side with the defendant on the question of the applicability of the PLA. (03-16-12 RP 23) The court subsequently issued its order granting the motion for summary judgment and dismissing Fagg's claims with prejudice. The court found that the WPLA applied, that there was no admissible evidence of exposure before 1981 or 1982 and even if there were evidence of exposure in the late 70s it would not satisfy the "substantially all" requirement. (CP 616-617)

The court entered its final order dismissing both CSK and PWWS on December 18, 2012. (CP 618-619) This appeal followed.

III ARGUMENT

A. The Court's Decision is Not Entitled to Deference, But Should be Reviewed De Novo

An appellate court reviews summary judgment orders *de novo* and performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The court examines the pleadings, affidavits, and depositions before the trial court and “take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)); *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220, 1223 (2005). In this case Fagg is the nonmoving party. Thus, all facts and reasonable inferences must be viewed in the light most favorable to him.

B. The Court’s Decision Incorrectly Applies the Case Law Regarding Application of the WPLA in Asbestos Cases

When the legislature passed the Products Liability Act, it made it effective in cases arising after the implementation date of the statute. The Act, by its terms, applies “to all claims arising on or after July 26, 1981.” *See* RCW 4.22.920. In 1991 this court was

challenged to apply that provision to a case of asbestos exposure which took place over a period of years in the late 1960's, the 1970's, and 1980's. *Koker v. Armstrong Cork, Inc., et al*, 60 Wn. App. 466, 472, 804 P.2d 659 (1991). Relying on the legislature's intentional change of language to make the act effective based on the date the cause of action *arose* rather than *accrued*, the court ruled that the applicability of the act depended on the dates of exposure to the injury-causing asbestos rather than on the date the disease was diagnosed. *Id.* Since the exposures had extended over three decades, the court held that the Act did not apply because "substantially all of the events which can be termed 'injury producing' occurred prior to the adoption of the Act." *Id.*

That holding has been approved by the Supreme Court, as have other decisions which applied the same rule:

The WPLA governs all product liability claims arising on or after July 26, 1981. RCW 4.22.920(1). In a case where "substantially all" of the injury-producing events exposing a shipyard worker to asbestos occurred prior to the WPLA's effective date, the Court of Appeals held that the product liability claim did not "arise" after the effective date. *Koker v. Armstrong Cork, Inc.*, 60 Wn.

App. 466, 472, 804 P.2d 659 (1991). The same rule was applied in *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993), where substantially all of plaintiff's exposure to asbestos occurred prior to the WPLA's adoption, but he was diagnosed with the injury—mesothelioma—after its adoption. The court held that the WPLA did not apply because the harm resulted from exposure and substantially all of the injury-producing events occurred before the effective date of the Act. *Id.* at 635; *see also Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 584-85, 915 P.2d 581 (1996) (because “substantially all the events producing” mesothelioma from asbestos exposure occurred before 1981, the WPLA was not applicable). Likewise, in *Braaten*, we noted that the exposure to asbestos products “substantially occurred before the enactment” of the WPLA. *Braaten*, 165 Wn.2d at 383 n.4. We therefore decided the case under common law product liability and negligence law.⁸

Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 408, 282 P.3d 1069 (2012)

⁸Ben Krivanek was exposed to asbestos in the 1950's and 1960's and was diagnosed in 1987. *Krivanek, supra*, 72 Wn App at 635.

Viereck worked as a laborer and operator at the Shell Oil Refinery in Anacortes from about 1956 to 1960. During that time, he was exposed to asbestos and asbestos-containing products manufactured by OCF. In 1992, he was diagnosed with mesothelioma, a malignancy in the lining of the lungs. *Viereck, supra*, 81 Wn App at 580.

Evidence showed that Braaten was allegedly exposed to asbestos from 1967 until the early 1980s. *Braaten, supra*, 165 Wn 2d at 383 n.1.

In *Macias*, the contrary was true. Macias was allegedly exposed to asbestos from 1978 to 2004. In accord with *Koker*, *Viereck*, and *Braaten*, the court held that when substantially all of the exposure to injury-causing asbestos occurs *on and after* July 26, 1981, the WPLA applies. *Macias, supra*, 175 Wn 2d 402, 408-409.

The trial court here erred by failing to follow the law in applying the WPLA. The evidence showed Fagg was exposed to asbestos beginning in the 1950's, through the 1960's, 1970's, and into the 80's. (*Infra* at 5-10) Because “substantially all” of Mr. Fagg’s exposure to asbestos occurred before the effective date of the Act, the court should have ruled that the defendants were not immunized by the act. Instead, the court found the Act applicable and dismissed Mr. Fagg’s claims.

C. Defendants Acknowledged That All Exposures Should Be Considered When Determining Applicability of the Act.

The court specifically asked the parties to present a supplemental briefing on the question of whether the total of all exposures should be considered in determining the applicability of the

act, or only the exposures to a specific defendant's product. Quite accurately, CSK replied that the law applied to "claims" and that Fagg's claim was a single claim for asbestos related disease, so that all exposures contributing to the disease should be considered.⁹ (CP 499-500)

Ironically, despite its position that all exposures apply, CSK asked the court to consider only the exposures to products sold by it and PWWS. All of the other exposures to which Fagg testified were ignored. (*Id.*)

At the hearing on the supplemental briefing, the court restated the question it had previously posed: "[W]hether the products liability act pertained to the claims against the specific defendant, in this case CSK Auto, or whether it - - it pertained to the claim of asbestos exposure that has been raised in this case." (02-17-12 RP 3 - 4) The court went on to explain that the question was important

⁹Although PWWS did not participate in the supplemental briefing, it did join in CSK's motion pertaining to the applicability of the Act and its counsel appeared at the hearing on the question. (CP 394; 02-117-12 RP 1)

because “the statute applies if substantially all of the exposure occurred before [*sic*] July 1981.¹⁰ And conversely, if a portion of the exposure occurred after that, then the act would apply” (*Id.*)

The court then admitted it was uncertain whether the question to be addressed was whether you look at the claim as a whole or the claim against the individual party. (*Id.*) Despite CSK’S position set forth in its brief, the court declared that it didn’t have to reach that question “because the evidence is clear that some of the alleged exposure to CSK Auto’s products occurred after July of 1981.” (02-17-12 RP 4-5) Ultimately the court concluded that “based on the application of the products liability act, there’s no liability on behalf of the distributor, like CSK Auto. So I am going to grant the summary judgment on those grounds.” (*Id.* at 7)

The following exchange then took place:

MS. GOOD:¹¹ Just to be clear, you’re granting summary

¹⁰The court obviously misspoke about the application of the act. It applies only if substantially all of the exposure occurred *after* July 1981.

¹¹Ms. Good is Plaintiff’s Counsel. (02-17-12 RP 1)

judgment because there was exposure after 1981, correct?

THE COURT: Correct.

MS GOOD: And are you making a ruling whether that was substantial exposure or you're just saying because there was some exposure, the act applies?

THE COURT: Well, I'm finding that substantially all of Mr. Fagg's exposure did not take place prior to July of 1981 based on the exposures that he had throughout the '80s.

MS. GOOD: As it relates solely to CSK Auto, correct?

THE COURT: Correct.

(Id. 7-8)

This colloquy reveals the uncertain nature of the court's ruling. At first, it was an important question whether to consider **all** of Fagg's exposures when determining if the Act applied, or only those to CSK's products. Then, the court very incorrectly declared that it didn't matter because there was exposure after July 1, 1981.¹² Having

¹²Were this assertion correct, there would be no need for a determination whether "substantially all of the harmful exposures" occurred before the effective date of the Act. The court's interpretation

seemingly relied on that basis, the court retrenched and said it found that “substantially all” of the exposures had **not** occurred prior to the effective date based on Fagg’s exposure into the 80’s. But the analysis was limited only to the exposure to CSK’s products. This result totally ignored the case law and even the position taken by CSK itself that **all** exposures had to be considered.

And the court further demonstrated its incorrect approach to the question when it addressed CSK’s argument that any exposure to asbestos in its brakes and gaskets was “de minimis.” As the court phrased it, the question “had to do with whether or not there was evidence of exposure to any asbestos from CSK Auto’s products based on the fact that he shaved some bumps off of the brakes and perhaps the gaskets once every blue moon.” (*Id.* 7) The court found it did not have to address that issue because “based on the application of the products liability act, there’s no liability on behalf of the distributor, like CSK Auto. So I am going to grant the summary

would reduce the test to a question of whether “any” exposure occurred after the effective date. That is not the standard set forth in *Koker* and subsequent case law.

judgment on those grounds.”(*Id.*)

The court’s response reflects the error of the decision. The question to be answered was whether “substantially all” of Fagg’s exposure to injurious asbestos occurred prior to the effective date of the act. The answer to the question is determined by the magnitude or degree of the exposure both before and after the effective date. *See, Koker, supra*, 60 WN app 466, 472 note 4. The question is not how long after the effective date of the act **some** exposure occurred, but rather how much exposure occurred both before and after that date. In assessing that magnitude or degree of exposure, the amount of exposure from CSK products was a key question. Yet, the court decided it did not need to be addressed. Instead, it granted summary judgment simply because *some* exposure, an amount that CSK itself claimed was either non-existent or “de minimis,” occurred after the effective date.

D. The Defendants Failed to Sustain Their Burden

The defendants here both claimed immunity from liability under the terms of the WPLA. CSK specifically asserted it as an

affirmative defense in its answer to the complaint. Because the immunity claim is an affirmative defense to the claim of liability, the defendant asserting the defense has the burden of proof to show that the immunity applies.¹³

Neither defendant met that burden here. PWWS specifically attempted to show that there was no exposure to its products until after the effective date of the statute. But in so doing, it presented evidence that the amount of exposure, and the number of times Fagg would have been exposed to its products, all were extremely minimal. CSK ignored the decades long exposure to its products in the 50's, 60's and 70's and merely noted that *some exposures* were claimed up

¹³See, Wash. CR 8 [affirmative defenses to be pled in response include any matter constituting an avoidance or affirmative defense]; *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn. 2d 248, 251, 978 P.2d 505 (1999) [Entity liability is an affirmative defense under the WPLA]; *Cregan v. Fourth Mem'l Church*, 175 Wn.2d 279, 283, 285 P.3d 860 (2012) [Because recreational use immunity is an affirmative defense, the landowner has the burden of proving it applies.]; *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008) [The statute of limitations is an affirmative defense, and the defendant carries the burden of proof.]

until 1988.¹⁴ But neither defendant presented evidence by which the court could legitimately find that “substantially all” of Fagg’s harmful exposure to asbestos occurred after the effective date of the act.

Under Washington Superior Court Civil Rule (CR) 56, a motion for summary judgment should be granted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56c. The moving party “bears the initial burden of showing the absence of an issue of material fact.” *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn. 2d 370, 381, 46 P.3d 789, 795 (2002) (citing *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

The party moving for summary judgment has an initial burden to prove by *uncontradicted* facts that there is no genuine issue of

¹⁴Fagg’s claimed exposures to CSK products themselves all occurred in the 50’s 60’s and 70’s except for replacement of exhaust manifold gaskets on a 64 Mustang in the early 80’s and a brake job on a friend’s 61 Ford in the early 80’s. (*Infra*, 5-6)

material fact. *Rathvon v. Columbia Pacific Airlines*, 30 Wn.App. 193, 201, 633 P.2d 122 (1981) (emphasis added) Here that standard was not met and the defendants did not meet that burden. While the application of the statute is a question of law, that application here depends on the underlying facts. The burden to prove that the act applies, and that they are immune, rests with the defendants asserting that defense. As shown in the facts, *supra*, there was significant evidence of substantial exposures long pre-dating the effective date of the act. Those exposures make the applicability of the act a question of fact. To prevail, the defendants needed to demonstrate by uncontradicted evidence that “substantially all” of Fagg’s injurious exposure to asbestos did not occur prior to July 1, 1981. They failed to make that showing.

E. The Court’s Ruling Conflicts With the Standards Applied by Washington Courts for Determining Causation in a Toxic Exposure Case.

The rationale for the holding in *Koker*, and the other cases applying “substantially all” test is partially grounded in the causation standard applied in toxic exposure cases. Those cases, involving a

single injury resulting from exposure to multiple products, apply a “substantial factor” causation test. *See, Mavroudis v Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 935 P.2d 684 (1997); *Hue v. Farm Boy Spray Co., Inc.* 127 Wn.2d 67, 896 P.2d 682 (1995). Under that standard, a plaintiff does not have to prove that a particular defendant’s product was the sole cause of the injury, only that it was present in the work environment when the exposure occurred. The *Mavroudis* court relied on the Supreme Court’s holding in *Hue*.

By citing *Lockwood*¹⁵ in conjunction with *Martin v. Abbott Laboratories*,¹⁶ the case eliminating the need to show individual causal responsibility in DES cases, the *Hue* court certainly implied that asbestos-injury plaintiffs need not prove or apportion individual causal responsibility but need only show that the defendant's asbestos products were among those in the plaintiff's work environment when the injurious exposure occurred.

Mavroudis, supra, 86 Wn.App. at 30 (internal citations omitted)

¹⁵*Lockwood v. AC & S., Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987)(plaintiff need only establish that defendant's asbestos products were among those in the plaintiff's work environment)

¹⁶*Martin v. Abbott Laboratories*, 102 Wn.2d 581, 689 P.2d 368 (1984).

Noting that no previous Washington case had specifically addressed the question of the appropriateness of “substantial factor” causation the court continued:

In sum, we conclude that multi-supplier asbestos-injury cases call for the substantial-factor test of causation rather than the but-for test, in cases such as this one, wherein the expert witness testifies, as did Dr. Hammar, that all of the plaintiff's exposure probably played a role in causing the injury and that it is not possible to determine which exposures were, in fact, the cause of the condition.

Id. at 32

That is the situation here. Fagg was exposed over a period of decades to multiple products from multiple manufacturers and suppliers. His expert presented a declaration that the exposures to these defendant's products would have been among those contributing to his development of asbestos-related disease. From that point the determination of substantial factor causation is one of fact for the finder of fact. As such it is not appropriate for summary judgment.

Because no single exposure or set of exposures can be parsed out, the trial court's task in determining the applicability of the

WPLA was to examine the entire extent of the injury causing exposure to asbestos. That began with automobile repairs in the 1950's, extended through Navy exposure in the 1960's, construction exposures in the 1960's and 1970's, automobile repair exposures and asbestos cement pipe exposures through the 1970's, and some less frequent exposures in the early 1980s.¹⁷ The court erred by failing to consider all the exposures which resulted in one single indivisible injury.

The extent of the court's error is magnified by the defendants' own arguments concerning their contributions to Fagg's injury. Both defendants assert that any exposure to their products would not even have been a substantial factor in causing the disease. CSK claims that the sanding of an occasional brake pad would have led to only "de minimis" exposure. PWWS presents the opinion of an industrial hygienist who attempts to calculate the amount of exposure from cutting asbestos-containing pipe and concludes it would have been

¹⁷Fagg testified to one brake job and one gasket job in the 1980's. (*Supra*, at 5.) PWWS admits selling asbestos-containing pipe before the effective date of the act, but that it sold none after 1984. (CP 97)

100 times less than the amount necessary to produce asbestosis. If these exposures were as limited as defendants claim, the court should have given them less weight than the earlier years of exposure in determining when “substantially all” of the exposure occurred. This is even more reason to have concluded that substantially all of the injury causing exposure occurred prior to the effective date of the act.

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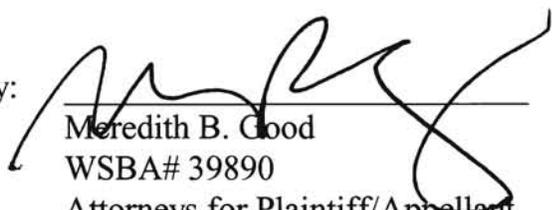
IV. CONCLUSION

The trial court failed to properly consider all of Mr. Fagg's injury-causing exposures to asbestos when it determined the applicability of the WPLA. This failure conflicts with the case law concerning applicability of the Act in these types of cases and ignores the line of cases requiring the total exposure history to be considered in determining causation. This court must reverse that judgment and remand the matter for trial on the merits.

Dated: October 14, 2013

Respectfully submitted,
BRAYTON PURCELL, LLP

By:



Meredith B. Good
WSBA# 39890
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

Ronald Fagg, Appellant v. CSK Auto, Inc., et al., Respondents
KCSC Cause # 10-2-05312-3 SEA
Appellate Court No. 69719-6

I hereby certify that on the below date, I served a true and correct copy of **Opening Brief of Appellant** on the parties below as follows:

STEPHEN G. LEATHAM, WSBA #15572 Heurlin, Potter, Jahn, Leatham & Holtman, P.S. PO Box 611 Vancouver, WA 98666 Phone: 360-750-7457 Fax: 360-750-7548 <u>sgl@hpl-law.com</u> <u>ann@hpl-law.com</u> Attorneys for CSK Auto, Inc.	Fax _____ Email <u> x </u> Regular Mail <u> x </u> Overnight _____ Hand Delivery _____
PATRICK T. JORDAN, WSBA #40292 WILLIAM H. WALSH, WSBA #21911 KELLY P. CORR, WSBA #555 HUGH HANDEYSIDE, WSBA # 39792 Corr Cronin Michelson Baumgardner & Preece, LLP 1001 Fourth Avenue, Suite 3900 Seattle, WA 98154 Phone: 206-625-8600 Fax: 206-625-0900 <u>pjordan@corrchronin.com</u> <u>wwalsh@corrchronin.com</u> <u>kcorr@corrchronin.com</u> <u>hhandeyside@corrchronin.com</u> Attorneys for Pacific Water Works Supply Co, Inc.	Fax _____ Email _____ Regular Mail <u> x </u> Overnight _____ Hand Delivery _____
The Court of Appeals of the State of Washington Division I One Union Square, 600 University Street Seattle, WA 98101	Fax _____ Email _____ Regular Mail _____ Overnight <u> x </u> Hand Delivery _____

Dated this 14 day of October, 2013.


Meredith B. Good