No. 80251-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals 57011-1-I)

VERNON BRAATEN

Plaintiff/Appellant

v.

BUFFALO PUMPS, INC., et. al.,

Defendants/Respondents.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANTS/RESPONDENTS

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The Coalition for Litigation Justice, Inc., National Association of Manufacturers, Chamber of Commerce of the United States of America, National Federation of Independent Business Legal Foundation, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, American Insurance Association, and American

Chemistry Council – collectively "*amici*" – hereby move for leave to file the accompanying brief in support of Defendants/Respondents.

Amici are organizations that represent companies doing business in Washington and their insurers. Accordingly, *amici* have a substantial interest in ensuring that Washington's tort system is fair, follows traditional tort law rules, and reflects sound public policy. The decision below violates these core principles.

The appellate court held that valve and pump manufacturers have a duty to warn about hazards in a component part (asbestos) sold by others and incorporated into a finished product (naval propulsion system) by a third party (the Navy). Under common law, however, manufacturers of component parts are liable only for defects or hazards in their *own* products, or in the use of their *own* products – not those of others.

To reach its decision, the appellate court blurred important differences between Defendants/Respondents' nonhazardous pumps and valves, the asbestos sold by others, and the Navy's finished product. Plaintiff/Appellant does not allege an injury from a defect in the nonhazardous components or from the use of those components in the form they were supplied by Defendants/Respondents. Rather, Plaintiff/Appellant alleges harm from asbestos fibers (sold by others) that were released during the maintenance of the finished product made by the

Navy. The finished product with asbestos was not Defendants/Respondents' "product." They should not be held liable for harms resulting from it.

Furthermore, the new duty created by the appellate court runs contrary to Washington law. The existence of a duty "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159, 1162 (2004) (citations omitted). The appellate court, however, relied upon foreseeability as the trigger for the legal duty (rather than to limit its scope). Review is necessary to address this dramatic change in Washington tort law.

The appellate court's holding also represents unsound public policy. The decision would worsen what the United States Supreme Court has described as an "asbestos-litigation "crisis," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997), and invite a flood of new cases into Washington. Civil defendants in other types of cases will be adversely impacted too. For example, if a manufacturer must warn of risks in others' products, syringe manufacturers could be held liable for failing to warn of risks in pharmaceuticals made by others; match or lighter makers could be held liable for failing to warn of cigarette-related risks; even sellers of bread or jelly could be held liable for failing to warn of the foreseeable risk of peanut allergies in peanut butter and jelly sandwiches.

Consumer safety could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

For all these reasons, this case of first impression raises an "issue of substantial public importance that should be determined by the Supreme Court." RAP 13(b)(4).

* * *

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.[1] The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large

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[1] The Coalition for Litigation Justice includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a

wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include

all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Washington, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

For these reasons, *amici* request that the Court grant their Motion for Leave to file a brief in this case.

Respectfully submitted,

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STATEMENT OF THE QUESTION PRESENTED

Whether, under the law in effect prior to the Washington Products Liability Act of 1981 (WPLA), a component manufacturer owes a duty to warn end users of dangers associated with components or finished products made by others.

STATEMENT OF INTEREST

As organizations that represent companies doing business in Washington and their insurers, *amici* have a substantial interest in ensuring that Washington's tort system is fair, follows traditional tort law rules, and reflects sound public policy. As described below, the appellate court's decision below violates these core principles; it should be reversed.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of the Defendants/Respondents.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under common law, manufacturers of component parts are liable only for defects or hazards in their *own* products, or in the use of their *own* products – not those of others. Nevertheless, the appellate court chose to impose a broad new duty requiring nonhazardous component makers (here, valve and pump manufacturers) to warn about hazards in a different component (asbestos) sold by others and incorporated into a finished product (naval propulsion system) by a third party (the Navy). The lower court based its duty determination on the foreseeability of harm – a

dramatic change in Washington tort law. The appellate court's holding also represents unsound public policy. It will worsen asbestos litigation and invite a flood of new cases into Washington courts. Civil defendants in other types of cases will be adversely impacted; consumer safety could be undermined. For all these reasons, this case of first impression raises an "issue of substantial public importance that should be determined by the Supreme Court." RAP 13(b)(4).

ARGUMENT

I. COMPONENT MANUFACTURERS GENERALLY OWE NO DUTY TO WARN OF HAZARDS IN COMPONENTS OR FINISHED PRODUCTS MADE BY OTHERS

"The existence of a duty is a question of law," *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360, 1362 (1991), that "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159, 1162 (2004) (citations omitted); *Snyder v. Medical Serv. Corp. of E. Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158, 1164 (2001). Here, these considerations do not support a duty on the part of nonhazardous and nondefective component manufacturers to warn of hazards in components or finished products made by others.

"Under common law, component sellers are not liable when the component itself is not defective." *Sepulveda-Esquivel v. Central Mach.*

Works, Inc., 120 Wn. App. 12, 19, 84 P.3d 895, 899 (2004). Washington law is consistent with the "black letter" rule in the Restatement Third, Torts: Products Liability § 5 (1997) [hereinafter Restatement, Third]; *see also id.* at Cmt. *a* ("As a general rule, component sellers should not be liable when the component itself is not defective."). The Restatement specifically identifies "*valves*" as a component for which liability should not attach unless the product itself is defective. *Id.*

Numerous decisions from around the country support the position of Defendants/Respondents that no duty is owed here.[1] For instance, in

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[1] *See Kaloz v. Risco,* 466 N.Y.S. 2d 218, 221 (N.Y. Sup. Ct. 1983) (pool manufacturer not liable for fall from defective ladder manufactured by another); *Blackwell v. Phelps Dodge Corp.*, 157 Cal. App. 3d 372, 378 (1984) (failure to warn may not attach where harm not caused by a hazardous feature in defendant's product); *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986) ("we have never held a manufacturer liable. . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer."); *Shaw v. General Motors Corp.*, 727 P.2d 387, 390 (Colo. App. 1986) ("The burden of guarding against the injury suffered here should appropriately be placed upon the entity that designed the final product, arranged for the acquisition of all the component parts, and directed their assembly."); *Niemann v McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1030 (S.D. Ill. 1989) (Ill. law) (airplane manufacturer had no duty to warn about replacement asbestos chafing strips it did not manufacture); *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990) (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the steam of commerce); *Sperry v. Bauermeister, Inc.*, 804 F. Supp. 1134, 1140 (E.D. Mo. 1992), *aff'd*, 4 F.3d 596 (8th Cir. 1993) (Mo. law) (nondefective component seller not liable for incorporation of its parts into system designed by another); *Fricke v. Owens-Corning Fiberglas Corp.*, 618 So. 2d 473, 475 (La. App. 1993) (manufacturer not liable for inadequate warning on product it neither made nor sold); *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 615-616 (Tex. 1996) (manufacturer not liable for tire made by licensee); *Ford Motor Co. v.*
(Footnote continued on next page)

Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222 (N.Y. 1992), Goodyear's tire was used in conjunction with a defective rim made by another company. The court "decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of another manufacturer." *Id.* at 376-77.[2]

The rule limiting component supplier liability has been found to apply even where the supplier knew its product may be integrated into a finished product that may cause harm. *See* Restatement Third, § 5 Cmt. *a* Illus. 1. For instance, in *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510 (Mich. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997), the

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Wood, 703 A.2d 1315, 1330 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998) (no duty to warn for replacement asbestos brake and clutch parts that defendant did not make); *Lindstrom v. A-C Prods. Liab. Trust*, 264 F. Supp. 2d 583, 591, 595 (N.D. Ohio 2003), *aff'd*, 424 F.3d 488 (6th Cir. 2005) (Ohio law) ("a manufacturer is responsible only for its own products and 'not for products that may be attached or connected' to the manufacturer's product."); *Powell v. Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395, 398 (1985) ("the manufacturer's duty is restricted to warnings based on the characteristics of its own product . . . the law does not require a manufacturer to study and analyze the products of others and to warn users of risks in those products.").

2 *See also Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993) (Ala. law); *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal. App. 3d 621, 629-30 (1979); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393, 396 (Mich. App. 1985); *Baughman v. General Motors Corp.*, 780

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court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company - even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean the machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515.

A California court has held that, while a broom is commonly used to sweep up dust that might contain silica, the broom manufacturer is not required to warn of the hazards of silica exposure. *See* Thomas W. Tardy, III & Laura A. Frase, *Liabliity of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin Columns: Asbestos, May 2007, at 6 [hereinafter Tardy & Frase]. Other decisions are in accord.[3]

F.2d 1131, 1133 (4th Cir. 1986) (S.C. law); *Acoba v. General Tire, Inc.*, 986 P.2d 288, 305 (Haw. 1999).

[3] *See, e.g., Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989) (Mich. law) (component maker's knowledge of the design of the final product was insufficient to impose liability); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 996 F. Supp. 1110, 1117 (N.D. Ala. 1997) ("[t]he issue is not whether GE was aware of the use to be put by [breast] implant manufacturers of its [silicone gel] – clearly it knew this - . . . such awareness is irrelevant to the imposition of liability."); *Kealoha v. E.I. Du Pont de Nemours & Co.*, 844 F. Supp. 590, 595 (D. Haw. 1994) ("The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer. . . .").

Here, no defect is alleged in the valves sold by Defendants/Respondents. Any harm which occurred arose from hazards in a component part (asbestos) made by others and through work to service the finished product (naval ship propulsion system) assembled by another (the Navy). No liability should attach to Defendants/Respondents.

II. A DUTY REQUIREMENT HERE WOULD REPRESENT UNSOUND PUBLIC POLICY

Public policy dictates that manufacturers be held liable for defects in their *own* products, or in the use of their *own* products – not those of others. To place a duty to warn on a defendant for harms caused by others' products, or the use of others' products, is contrary to long-standing tort law principles: (1) that economic loss should ultimately be borne by the one who caused it, and (2) that the manufacturer of a particular product is in the best position to warn about risks associated with it. As the Restatement, Third explains: "If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective." Restatement, Third § 5 Cmt. *a.*

"Furthermore, an expansion of the liability for failure to warn under these circumstances becomes untenable and unmanageable." Tardy & Frase, *supra*, at 6. Such a duty rule would lead to "legal and business

chaos – every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts & Env'tl L. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005) [hereinafter Petereit].

"For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Tardy & Frase, *supra*, at 6. "Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" Petereit, *supra*, at 7. Packaging companies might be held liable for hazards regarding contents made by others. The Court no doubt appreciates there are many other examples.

Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products. *See* Restatement, Third § 5 Cmt. *a.;* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension

of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

III. A DUTY REQUIREMENT HERE WOULD WORSEN THE ASBESTOS LITIGATION

The United States Supreme Court has described asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits."). The litigation has forced an estimated eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy.[4] By 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/ publications/MG/MG162 [hereinafter RAND].

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[4] *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002), *available at* http://www.nlcpi.org; Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Joseph E. Stiglitz *et al., The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin Columns: Asbestos, Aug. 2004, at 5, as "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314. One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs); *see also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND, *supra*, at 94.

The broad new duty rule created by the appellate court would worsen the litigation and fuel claims against peripheral defendants, such as Defendants/Respondents. The fact that the holding purports to apply only to cases governed by the law in effect prior to the enactment of the WPLA in 1981 is really no limit at all. "Asbestos consumption peaked in 1973, RAND, *supra*, at 11, and the "latency period may be as last as long as 40 years for some asbestos related diseases." Judicial Conf. Ad Hoc Comm.

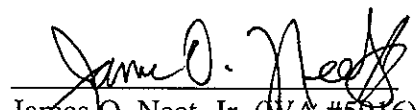
on Asbestos Litig., *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 2-3 (Mar. 1991), *reprinted at* 6:4 Mealey's Litig. Rep.: Asbestos 2 (Mar. 15, 1991).

Finally, the appellate court's reasoning is based on a false premise. The overriding factor apparently driving the court was the desire to compensate plaintiffs where many at-fault companies have declared bankruptcy. Trusts, however, have been created to pay these claims. In fact, one recent study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." *See* Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006).

CONCLUSION

For these reasons, *amici curiae* ask this Court to reverse the decision of the court below.

Respectfully submitted,



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Dated: June 28, 2007

PROOF OF SERVICE

I certify that on June 28, 2007, an original and one copy of the foregoing Motion and Brief were served on the Court via overnight mail, postage prepaid, addressed as follows:

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