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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 LESLIE JACK, et al.,

11 Plaintiffs,

12 v.

13 DCO, LLC, et al.,

14 Defendants.

CASE NO. C17-0537JLR

ORDER GRANTING  
DEFENDANTS' MOTIONS FOR  
JUDGMENT AS A MATTER OF  
LAW

15 **I. INTRODUCTION**

16 Before the court are two post-trial motions: (1) Defendant DCo, LLC's (f/k/a  
17 Dana Companies, LLC) ("DCo") motion for judgment as a matter of law (DCo Mot.  
18 (Dkt. # 816)); and (2) Defendant Ford Motor Company's ("Ford") motion for judgment  
19 as a matter of law (Ford Mot. (Dkt. # 817)). Plaintiffs Leslie Jack and David Jack  
20 (collectively, "Plaintiffs") oppose both motions. (*See* Resp. DCo (Dkt. # 822); Resp.  
21 Ford (Dkt. # 824).) DCo and Ford (collectively, "Defendants") filed replies. (DCo Reply  
22 (Dkt. # 826); Ford Reply (Dkt. # 828).) The court has considered the motions, the

1 parties' submissions concerning the motions, the relevant portions of the record, and the  
2 applicable law. Being fully advised,<sup>1</sup> the court GRANTS DCo's and Ford's motions for  
3 judgment as a matter of law for the reasons discussed below.

## 4 **II. BACKGROUND**

5 The court detailed the factual background of this case in its summary judgment  
6 order. (*See* 9/17/18 Order (Dkt. # 706) at 3-19.) Here, the court recounts only those facts  
7 relevant to the present motions, including the procedural history, the evidence presented  
8 at trial, and the jury verdict.

### 9 **A. Procedural History**

10 This case arises from decedent Patrick Jack's exposure to asbestos-containing  
11 products through his work as an automotive mechanic, a machinist in the Navy, and a  
12 machinist and nuclear inspector at the Puget Sound Naval Shipyard ("the Shipyard").  
13 (*See, e.g.*, 10/1/18 Trial Tr. (Dkt. # 806) at 168:8-171:20.) After he developed  
14 mesothelioma, Mr. Jack sued multiple companies that allegedly supplied, manufactured,  
15 or sold asbestos-containing materials and equipment to which he was exposed over the  
16 course of several decades. (*See* 2d Am. Compl. (Dkt. # 253) ¶¶ 3-40.) In October 2017,  
17 Mr. Jack died of mesothelioma. (Pl. Trial Br. (Dkt. # 726) at 1.) Mr. Jack's wife, Ms.  
18 Jack, and Mr. Jack's son, David Jack, proceeded as Plaintiffs. (*See* 2d Am. Compl. at 1.)

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21 <sup>1</sup> Ford requests oral argument on its motion (*see* Ford Mot. at Title Page), but the court  
22 finds that oral argument is unnecessary to its disposition of the motions, *see* Local Rules W.D.  
Wash. LCR 7(b)(4).

1 From October 1, 2018, to October 12, 2018, Plaintiffs tried their claims against  
2 DCo and Ford before a jury.<sup>2</sup> (See Trial Min. Entries (Dkt. ## 753, 757, 763, 764, 770,  
3 774, 781, 784, 789); *see also* 10/1/18 Trial Tr.; 10/2/18 Trial Tr. (Dkt. # 807); 10/3/18  
4 Trial Tr. (Dkt. # 808); 10/4/18 Trial Tr. (Dkt. # 809); 10/5/18 Trial Tr. (Dkt. # 810);  
5 10/9/18 Trial Tr. (Dkt. # 811); 10/10/18 Trial Tr. (Dkt. # 812); 10/11/18 Trial Tr. (Dkt.  
6 # 813).) Plaintiffs asserted three theories of liability against each Defendant:  
7 (1) negligence; (2) strict liability for failure to design reasonably safe products (“strict  
8 liability design defect claims”); and (3) strict liability for failure to warn of unsafe  
9 conditions in their products (“strict liability failure-to-warn claims”). (See Pl. Trial Br. at  
10 6-12.) After Plaintiffs rested their case, DCo and Ford made oral motions for judgment  
11 as a matter of law. (See 10/10/18 Trial Min. Entry; 10/10/18 Trial Tr. at 260:12-270:4);  
12 *see also* Fed. R. Civ. P. 50(a). DCo and Ford renewed those motions after the jury  
13 rendered its verdict. (See DCo Mot.; Ford Mot.); *see also* Fed. R. Civ. P. 50(b).

#### 14 **B. Evidence Presented at Trial**

15 At trial, Plaintiffs introduced evidence that Mr. Jack used gaskets manufactured or  
16 sold by DCo and automotive brakes and clutches sold by Ford. (See, e.g., 10/4/18 Trial  
17 Tr. at 101:11-14, 168:10-13, 193:22-194:3, 201:10-25; *see also* 10/11/18 Trial Tr. at  
18 48:3-65:11.) Mr. Jack worked as a professional mechanic from approximately 1962 to  
19 1967. (10/4/18 Trial Tr. at 192:16-193:8, 200:17-201:5, 202:10-12.) He also performed  
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21 <sup>2</sup> Plaintiffs settled with several other Defendants before trial. (See *generally* Dkt.) At the  
22 beginning of trial, Borg-Warner Morse Tec, LLC (“Borg-Warner”) also remained as a  
Defendant. Plaintiffs and Borg-Warner settled during trial. (See Not. of Settlement (Dkt. # 800)  
at 1.)

1 automotive work on multiple personal vehicles from 1955 until a few years before his  
2 death. (*Id.* at 99:1-5, 100:6-7.) Plaintiffs attempted to establish that the DCo and Ford  
3 products Mr. Jack used contained asbestos, and that neither Defendant warned  
4 consumers—either at the time of sale or later—about dangers related to their  
5 asbestos-containing products. (*See, e.g.*, 10/2/18 Trial Tr. 150:24-151:2, 164:18-165:1;  
6 10/5/18 Trial Tr. at 197:7-13.)

7 Dr. Carl Brodtkin, Plaintiffs’ expert, offered testimony on the causal significance  
8 of Mr. Jack’s exposure to Defendants’ products. In Dr. Brodtkin’s view, mesothelioma  
9 results from “identified exposure[s],” which require “a well-characterized source of  
10 asbestos” and “an activity that disrupts the source.” (10/9/18 Trial Tr. at 31:18-22.) Dr.  
11 Brodtkin opined that “Mr. Jack’s work with [DCo-attributable] gaskets [was] an identified  
12 exposure” and “was a cause of his mesothelioma.” (*Id.* at 59:12-17.) Dr. Brodtkin also  
13 opined that Mr. Jack’s work with asbestos-containing Ford clutches and brakes were  
14 identified exposures. (*Id.* at 61:3-4, 11-16; *see also id.* at 67:25-68:4.) In addition, Dr.  
15 Brodtkin acknowledged that Mr. Jack sustained causally significant asbestos exposure in  
16 the Navy, from 1961 to 1962, and at the Shipyard, from 1967 to 1980. (*Id.* at 33:19-34:3,  
17 96:7-99:21, 105:14-108:9.)

18 After the presentation of evidence, the court instructed the jury on the applicable  
19 law. (10/11/18 Trial Tr. at 24:17-46:16.) The court explained that, with respect to both  
20 negligence and strict liability, Plaintiffs were required to prove that Defendants’ conduct  
21 or products proximately caused Mr. Jack’s mesothelioma. (Final Jury Instr. (Dkt. # 786)  
22 No. 19.) Relying on Washington law, the court defined proximate cause as “a cause that

1 was a substantial factor in bringing about the injury, even if the result would have  
2 occurred without it.” (*Id.*); see *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684,  
3 688-89 (Wash. Ct. App. 1997). The court also instructed the jury that, with respect to  
4 Plaintiffs’ negligence claims, “[a] manufacturer of products is under a duty to use  
5 ordinary care to test, analyze, and inspect the products it manufactures.” (Final Jury  
6 Instr. No. 20.) In addition, over Defendants’ objections, the court allowed the jury to  
7 consider whether either Defendant was negligent in failing to uphold a duty to issue  
8 post-sale warnings about dangers related to its products. (*Id.* No. 21; see also 10/10/19  
9 Trial Tr. at 223:22-224:25, 234:22-235:21.)

10 During closing argument, Plaintiffs’ counsel argued, among other theories, that  
11 Defendants were negligent because they breached their post-sale duties to warn of  
12 dangers associated with their asbestos-containing products. Specifically, counsel argued  
13 that Defendants failed to issue post-sale warnings once they became aware of the dangers  
14 of asbestos exposure and that their failure to issue such warnings was a substantial factor  
15 in bringing about Mr. Jack’s asbestos exposure at the Shipyard. (10/11/18 Trial Tr. at  
16 62:5-63:18.) Specifically, counsel asserted:

17 Even if . . . you believe that it was 100 percent the shipyard . . . the timeline  
18 before that happened is so important. . . . [F]or seven years before [Mr. Jack]  
19 ever set foot as an employee on Puget Sound Naval Shipyard, he was working  
20 with these companies’ products day in and day out.

21 And if they had put a warning on the box, if they had put a skull and  
22 crossbones, if they had said, “This can kill you. This can cause cancer. This  
can give you mesothelioma. This can kill your family,” during those seven  
years before he ever went to the Puget Sound Naval Shipyard, if they just  
told him once, maybe he would have put on a mask at Puget Sound Naval  
Shipyard. Maybe he would have avoided the dust. Maybe he would have

1 protected himself. Maybe he would have gone and worked somewhere else.  
2 But he could have minimized his exposure that they all say killed him,  
3 because they had seven years to warn him before he ever got to the  
4 shipyard. . . . They never did anything.

5 And so the answer to question No. 1, for negligence, should be “yes” for both  
6 companies.

7 (*Id.*)

### 8 **C. The Jury’s Verdict**

9 The court provided the jury a general verdict form on which the jury was asked  
10 whether Plaintiffs proved their strict liability design defect, strict liability failure-to-warn,  
11 and negligence claims. (*See* Verdict Form (Dkt. # 791) at 2.) Following deliberations,  
12 the jury found that Plaintiffs did not prove their strict liability design defect and strict  
13 liability failure-to-warn claims against DCo or Ford. (*Id.*) The jury did not reach a  
14 verdict on Plaintiffs’ negligence claims with respect to either Defendant. (*See id.*; *see*  
15 *also* 10/12/18 Trial Tr. at 7:16-21, 8:1-4.) The court therefore declared a mistrial on  
16 Plaintiffs’ negligence claims. (10/25/18 Min. Order (Dkt. # 804) at 1-2.) Defendants  
17 timely renewed their motions for judgment as a matter of law. (*See* DCo Mot.; Ford  
18 Mot.)

## 19 **III. ANALYSIS**

### 20 **A. Legal Standard**

21 The court may grant a motion for judgment as a matter of law if it “finds that a  
22 reasonable jury would not have a legally sufficient evidentiary basis” to find for the  
nonmoving party. *See* Fed. R. Civ. P. 50(a), (b). Judgment as a matter of law is  
warranted when “the evidence, construed in the light most favorable to the nonmoving

1 party, permits only one reasonable conclusion.” *Theme Promotions, Inc. v. News Am.*  
2 *Marketing FSI*, 546 F.3d 991, 999 (9th Cir. 2008). To avoid judgment as a matter of law,  
3 the nonmoving party must demonstrate that “there is substantial evidence supporting a  
4 verdict in favor of the nonmoving party.” *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th  
5 Cir. 1992); *see also Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014).  
6 “Substantial evidence is such relevant evidence as reasonable minds might accept as  
7 adequate to support a conclusion even if it is possible to draw two inconsistent  
8 conclusions from the evidence.” *Weaving*, 763 F.3d at 1111 (quoting *Landes Constr. Co.*  
9 *v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987) (internal quotation marks  
10 omitted)). In deciding a motion for judgment as a matter of law, the court may not  
11 consider the credibility of witnesses, resolve conflicts in testimony, or weigh the  
12 evidence. *Gibson v. City of Cranston*, 37 F.3d 731, 735 (9th Cir. 1994). Moreover, the  
13 court “must disregard all evidence favorable to the moving party that the jury is not  
14 required to believe.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151  
15 (2000).<sup>3</sup>

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18 <sup>3</sup> The same standard applies to renewed motions for judgment as a matter of law  
19 following a mistrial. *See Headwaters Forest Def. v. Cty. of Humboldt*, 240 F.3d 1185, 1197 (9th  
20 Cir. 2000), *vacated on other grounds*, 534 U.S. 801 (2001) (“A jury’s inability to reach a verdict  
21 does not necessarily preclude a judgment as a matter of law.”); *Elliott v. Versa CIC, L.P.*, No.  
22 16-cv-0288-BAS-AGS, 2019 WL 414499, at \*6 (S.D. Cal. Feb. 1, 2019) (“Notwithstanding the  
jury’s failure to reach a verdict, if the standard for granting a motion for judgment as a matter of  
law is met, a renewed motion for judgment as a matter of law under Rule 50(b) is appropriate  
and may be granted.”) (quoting *Wright & Miller*, 9B Fed. Prac. & Proc. Civ. § 2537 (3d ed.  
2018)); *Rodriguez v. Cty. of Stanislaus*, 799 F. Supp. 2d 1131, 1139 (E.D. Cal. 2011) (“The same  
standard applies to a motion for judgment as a matter of law made after a mistrial because of jury  
deadlock.”).

1           Because a Rule 50(b) motion is a renewed motion, a proper post-verdict motion  
2 for judgment as a matter of law is limited to the grounds asserted in the movant’s  
3 pre-deliberation Rule 50(a) motion. *EEOC v. GoDaddy Software, Inc.*, 581 F.3d 951,  
4 961-62 (9th Cir. 2009) (citing *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.  
5 2003)). Consequently, a party cannot properly “raise arguments in its post-trial motion or  
6 judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule  
7 50(a) motion.” *Freund*, 347 F.3d at 761. Nonetheless, Rule 50(b) “may be satisfied by  
8 an ambiguous or inartfully made motion [under Rule 50(a)] or by an objection to an  
9 instruction for insufficient evidence to submit an issue to the jury.” *Reeves v. Teuscher*,  
10 881 F.2d 1495, 1498 (9th Cir. 1989). Otherwise, the rule is an overly harsh one. *See*  
11 *GoDaddy Software*, 581 F.3d at 961 (internal quotation marks omitted) (quoting *Nat’l*  
12 *Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir. 1986)).

13 **B. Defendants’ Motions**

14           Defendants move for judgment as a matter of law on parallel grounds. To begin,  
15 Defendants contend that Plaintiffs failed to present evidence sufficient for a reasonable  
16 jury to find that Mr. Jack was exposed to asbestos when working with their products and  
17 that any such asbestos exposure was a substantial factor in causing his mesothelioma.  
18 (DCo Mot. at 4-11; Ford Mot. at 3-7.) Defendants also assert that Plaintiffs’ post-sale  
19 failure-to-warn theory of negligence—that is, that Defendants breached their duty to alert  
20 Mr. Jack of their products’ hazards after the point of sale—is neither legally cognizable  
21 nor supported by substantial evidence. (*See* DCo Reply at 7-10; Ford Mot. at 9-12.)

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1 As a threshold matter, the court considers whether Plaintiffs’ negligence claims  
2 survive the jury’s verdict of no liability on the strict liability counts. Under Washington  
3 law, a jury may consistently find that a defendant is not strictly liable under a design  
4 defect or failure-to-warn theory but is liable in negligence. (Pl. Resp. Ford at 9); *see also*  
5 *Davis v. Globe Mach. Mfg. Co.*, 684 P.2d 692, 696 (Wash. 1984); *Brown for Hejna v.*  
6 *Yamaha Motor Corp.*, 691 P.2d 577, 579-80 (Wash. Ct. App. 1984). As the Washington  
7 Supreme Court has explained, “negligence and strict liability are not mutually exclusive  
8 because they differ in focus: negligence focuses on the conduct of the manufacturer  
9 while strict liability focuses upon the product and the consumer’s expectation.” *Davis*,  
10 684 P.2d at 696. Indeed, as the jury instructions in this case indicated, a manufacturer’s  
11 duty of care is not precisely commensurate with its duties in strict liability. (*See* Final  
12 Jury Instr. No. 20 (noting that a manufacturer’s duty of ordinary care encompasses a duty  
13 to test its products and keep abreast of scientific research in the field); *id.* No. 21  
14 (describing the factual circumstances that trigger a manufacturer’s post-sale duty to  
15 warn).)

16 In opposing Defendants’ motions, Plaintiffs articulate just one surviving theory of  
17 negligence liability: Defendants failed to issue consumers like Mr. Jack post-sale  
18 warnings about the dangers related to their asbestos-containing products after they  
19 discovered, or should have discovered, the hazards of asbestos exposure. (*See* Resp. DCo  
20 at 9-11; Resp. Ford at 8-12.) Plaintiffs do not argue that Defendants negligently failed to  
21 test or analyze their products at the time of sale, or that Defendants failed to keep abreast  
22 of relevant research, much less cite any evidence to support those propositions. (*See*

1 *generally* Resp. DCo; Resp. Ford.) Nor do Plaintiffs even attempt to explain how a jury  
2 could reasonably find that Defendants’ “acts or omissions” in designing their products  
3 constituted negligence, even as it rejected Plaintiffs’ strict liability design defect and  
4 failure-to-warn claims. *See Brown*, 691 P.2d at 579-80; (*see generally* Resp. DCo; Resp.  
5 Ford.) The court thus declines to assess whether substantial evidence supports those  
6 theories of liability, and proceeds to consider Defendants’ motions in view of the sole  
7 theory of negligence Plaintiffs have advanced: post-sale failure-to-warn liability.

8 In arguing that the jury could have reasonably found that Defendants breached  
9 their post-sale duties to warn, Plaintiffs analogize Mr. Jack’s injuries to those of the  
10 plaintiff in *Lockwood v. AC & S, Inc.*, 744 P.2d 605, 619 (Wash. 1987). The *Lockwood*  
11 plaintiff argued that, if the defendants in that case had informed him of the dangers of  
12 asbestos after his exposure to their asbestos-containing products ceased, he could have  
13 reduced his risk of developing mesothelioma by stopping smoking—a practice known to  
14 elevate one’s risk of asbestos-related disease. *Id.* Here, Plaintiffs emphasize Dr.  
15 Brodkin’s testimony that mesothelioma is a dose-responsive disease. (10/9/18 Trial Tr. at  
16 70:22-23 (noting that “[m]esothelioma risk increases with the cumulative dose of  
17 exposure”).) Plaintiffs contend that, once Mr. Jack was exposed to asbestos from  
18 Defendants’ products, Defendants were subject to “an ongoing duty to warn” so that Mr.  
19 Jack would refrain from future asbestos exposures that would further increase his risk of  
20 developing mesothelioma. (Resp. DCo at 10-11; Resp. Ford at 11.) According to  
21 Plaintiffs, “[Defendants’] *breach of that duty* can appropriately be considered a legal  
22 cause of Mr. Jack’s failure to take measures to prevent or lessen the harm, that is, to

1 avoid additional asbestos exposure *from other sources.*” (Resp. DCo at 10; Resp. Ford at  
2 11.)

3 Defendants argue that Plaintiffs’ post-sale failure-to-warn theory of negligence  
4 fails as matter of law for two reasons.<sup>4</sup> First, Defendants contend that the court  
5 erroneously allowed the jury to consider whether Defendants were subject to an ongoing  
6 duty to warn. (Ford Mot. at 9-11; DCo Reply at 8-10.) Second, Defendants assert that  
7 Plaintiffs failed to introduce evidence sufficient for a reasonable jury to conclude that  
8 Defendants breached a post-sale duty to warn and thereby proximately caused Mr. Jack’s  
9 injury. (Ford Mot. at 11; DCo Reply at 9-10.) The court addresses these arguments in  
10 turn.

#### 11 1. Jury Instruction on Post-Sale Duty to Warn

12 Defendants argue that the court erred in issuing an instruction that allowed the jury  
13 to consider whether Defendants breached their duty to warn Mr. Jack of the hazards of  
14 their asbestos-containing products after the point of sale. Specifically, Defendants

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15  
16 <sup>4</sup> The court acknowledges that DCo addresses post-sale failure-to-warn liability in its  
17 reply to Plaintiffs’ opposition. (See DCo Reply at 7-10.) Because DCo makes these arguments in  
18 direct response to the negligence theory Plaintiffs advance in their opposition, the court may  
19 properly consider DCo’s arguments on the post-sale failure-to-warn theory. *See, e.g., Eberle v.*  
20 *City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (noting that a court may consider new  
21 arguments raised in a reply brief if those arguments respond to an issue raised in the opposition).  
22 Moreover, DCo preserved its arguments regarding post-sale duty to warn in its Rule 50(a)  
motion and by taking exception to the jury instruction on post-sale duty to warn. (See 10/10/18  
Trial Tr. at 234:22-235:21 (arguing that the post-sale duty to warn jury instruction was  
inappropriate because Plaintiffs failed to show “that such a warning would have done anything to  
lessen the harm” Mr. Jack suffered); *id.* at 269:19-270:4 (arguing that “[w]ith or without a  
warning, [DCo-attributable] gaskets were not a substantial factor in causing Mr. Jack’s  
mesothelioma”)); *see also Reeves*, 881 F.2d at 1498 (noting that a party may properly preserve  
an argument for Rule 50(b) purposes by objecting to a jury instruction on sufficiency-of-the-  
evidence grounds).

1 contend that Washington law imposes a post-sale duty to warn only when the evidence is  
2 sufficient to show that such a warning is practicable and could lessen the plaintiff's harm.  
3 (Ford Mot. at 10-11; DCo Reply at 8-10; *see also* 10/10/18 Trial Tr. at 264:22-266:10,  
4 269:19-270:4.) Defendants further urge the court to conclude that, as a matter of law,  
5 Defendants did not owe Mr. Jack a post-sale duty to warn because Plaintiffs did not prove  
6 these threshold requirements. (Ford Mot. at 10; DCo Reply at 10.)

7 Under Washington law, a manufacturer has a post-sale duty to warn of dangers  
8 associated with its products so long as a rational trier of fact could determine that the  
9 manufacturer learned or should have learned of those dangers after the products were  
10 manufactured. *See Esparza v. Skyreach Equip., Inc.*, 15 P.3d 188, 199 (Wash. Ct. App.  
11 2000); *see also* RCW 7.72.030(1)(c) (noting that, "where a manufacturer learned or a  
12 reasonably prudent manufacturer should have learned about a danger connected with the  
13 product after it was manufactured," the manufacturer "is under a duty to act with regard  
14 to issuing warnings or instructions"). Indeed, in the asbestos context, the Washington  
15 Supreme Court has expressly concluded that, "where a person's susceptibility to the  
16 danger of a product continues after that person's direct exposure to the product has  
17 ceased, the manufacturer still has a duty after exposure to exercise reasonable care to  
18 warn the person of known dangers, if the warning could help to prevent or lessen the  
19 harm." *Lockwood*, 744 P.2d at 619; *see also Palmer v. Fibreboard Corp.*, No. 36500-2-I,  
20 1997 WL 134543, at \*3-4 (Wash. Ct. App. Mar. 24, 1997). Put otherwise, a  
21 manufacturer or seller of asbestos-containing products has a continuing duty to warn if a  
22 jury could reasonably find that the factual circumstances that trigger that duty—that is,

1 the manufacturer knew or should have known of dangers related to its products after the  
2 date of manufacture or sale—are satisfied.

3 Here, the jury instruction correctly accounted for the factual predicate to  
4 Defendants’ continuing duty to warn. The instruction explained the general rule that a  
5 manufacturer is subject to a post-sale duty to warn only “when” the manufacturer learned  
6 or should have learned of a danger connected with its products. (Final Jury Instr. No.  
7 21.) The instruction further stated that, “[i]n such a case,” the manufacturer must act as a  
8 reasonably prudent manufacturer would under the circumstances. (*Id.*) The jury was  
9 thus free to conclude that Defendants did not know, or could not have reasonably been  
10 expected to know, of any dangers associated with their asbestos-containing products  
11 during the relevant time period. (*See id.*) In other words, the court properly permitted,  
12 but did not require, the jury to determine whether one or both Defendants breached a  
13 post-sale duty to warn Mr. Jack of any hazards related to their asbestos-containing  
14 products. *See Lockwood*, 744 P.2d at 619.

15 Additionally, the court rejects Defendants’ argument that a court may allow a jury  
16 to contemplate breach of a post-sale duty to warn only if the plaintiff has established that  
17 a post-sale warning was likely to reach the plaintiff. (*See Ford Mot.* at 10-11; DCo Reply  
18 at 8-9.) Defendants rest that argument on *Lockwood*, in which the Washington Supreme  
19 Court noted that, in the asbestos context, “a [post-sale] warning should be required to the  
20 extent practicable.” *See Lockwood*, 744 P.2d at 619. Contrary to Defendants’ assertions,  
21 however, the *Lockwood* court did not predicate the existence of a continuing duty to warn  
22 on the likelihood that the manufacturer’s warning would reach the asbestos-exposed

1 plaintiff. Rather, the court explained that the form a post-sale warning must take is  
2 highly context-dependent. *See id.* As the court acknowledged, “it will depend on the  
3 circumstances if such a warning to previous users of the product must be made by direct  
4 personal contact with such users.” *Id.* In fact, the *Lockwood* court expressly suggested  
5 that a manufacturer may satisfy a post-sale duty to warn by issuing “notices to physicians  
6 or advertisements,” rather than individual consumers. *Id.* Here, the jury instruction  
7 properly accounted for the fact-specific nature of the form of an adequate post-sale  
8 warning and allowed the jury to undertake that inquiry: the instruction noted that a  
9 continuing duty to warn “is satisfied if the manufacturer exercises reasonable care to  
10 inform product users” but did not suggest that a post-sale warning is adequate only if it  
11 reaches the intended consumer. (Final Jury Instr. No. 21.)

12 For the foregoing reasons, the court concludes that it properly instructed the jury  
13 on a post-sale duty to warn theory of negligence liability. The court now considers  
14 whether substantial evidence supports a finding that one or both Defendants failed to  
15 uphold a post-sale duty to warn Mr. Jack of the hazards related to asbestos-containing  
16 products and whether that breach was a substantial factor in increasing Mr. Jack’s risk of  
17 mesothelioma.

## 18 2. Whether Substantial Evidence Supports a Post-Sale Duty to Warn

19 Plaintiffs argue that a jury could reasonably conclude that DCo and Ford were  
20 negligent in failing to warn consumers like Mr. Jack of the dangers of their  
21 asbestos-containing products and that such negligence was a proximate cause of Mr.  
22 Jack’s mesothelioma. (Resp. DCo at 11; Resp. Ford at 12.) Plaintiffs contend that, had

1 DCo or Ford warned Mr. Jack of the hazards related to their asbestos-containing products  
2 after the time of sale, “Mr. Jack would have taken steps to avoid subsequent asbestos . . .  
3 from all sources,” including those he encountered at the Puget Sound Naval Shipyard.”  
4 (Resp. DCo at 11; Resp. Ford at 12.) In particular, Plaintiffs emphasize that Mr. Jack  
5 testified in his deposition that, while he was working at the Shipyard, “[i]f [he had] been  
6 aware of an asbestos hazard problem,” he would have taken precautions to protect  
7 himself from asbestos exposure. (10/5/18 Trial Tr. at 129:9-10; *see also id.* at  
8 129:25-130:1 (“If I had been told and warned, I would have taken precautions, yes,  
9 sir.”).)

10 For purposes of its analysis, the court assumes that a reasonable jury could  
11 conclude that Plaintiffs proved the factual circumstances that trigger a manufacturer’s  
12 post-sale duty to warn—that is, that Mr. Jack purchased and used Defendants’  
13 asbestos-containing products, and, at some point thereafter, Defendants knew or should  
14 have known of the asbestos-related hazards that accompanied consumers’ use of those  
15 products. *See Esparza*, 15 P.3d at 199; (Final Jury Instr. No. 21.) The court further  
16 assumes that Defendants knew or should have known of the dangers of their  
17 asbestos-containing products, and thus assumed a post-sale duty to warn, at a point in  
18 time that preceded at least some of Mr. Jack’s medically significant exposures to asbestos  
19 at the Shipyard and in his personal automotive work. Finally, the court assumes that  
20 Defendants failed to adequately alert Mr. Jack and consumers like him of the dangers of  
21 asbestos exposure from their products. The court need not determine whether these

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1 assumptions are supported by substantial evidence, because Plaintiffs' post-sale  
2 failure-to-warn theory of negligence fails on causation grounds.

3 The court finds that Plaintiffs failed to present evidence sufficient for a reasonable  
4 jury to conclude that Defendants' breach of their post-sale duty to warn was a proximate  
5 cause of Mr. Jack's injury. Put simply, Plaintiffs' theory of post-sale failure-to-warn  
6 liability is inherently speculative. Plaintiffs point to no evidence of record that Mr. Jack  
7 was aware that he was working with asbestos-containing products at the Shipyard or his  
8 subsequent automotive work.<sup>5</sup> (*See generally* Resp. DCo; Resp. Ford.) Absent such  
9 evidence, the jury could not reasonably conclude that Mr. Jack would have attempted to  
10 protect himself from asbestos, even if Ford or DCo had issued post-sale warnings about  
11 their own products. Moreover, Plaintiffs cite no evidence of the particular protective  
12 measures Mr. Jack would have undertaken and whether those measures would have  
13 reduced his exposure at the Shipyard or elsewhere in an "important" or "material" way.  
14 (*See* Final Jury Instr. No. 19 (explaining that a "substantial factor" is a "an important or  
15 material factor"); *see generally* Resp. DCo; Resp. Ford.)

16 Accordingly, to conclude that DCo or Ford's failure to issue post-sale warnings  
17 was a substantial factor in increasing Mr. Jack's risk of mesothelioma, the jury would  
18 have had to engage in a series of speculative inferences untethered to the evidence of  
19 record: that Mr. Jack knew that he was working with asbestos at the Shipyard and in his  
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21 <sup>5</sup> In fact, shortly before stating that he would have taken precautions to protect himself  
22 from asbestos at the Shipyard had he "been aware of an asbestos hazard problem," Mr. Jack  
averred that he did not know about asbestos generally before the late 1980s. (10/5/18 Trial Tr. at  
128:18-20.)



1 personal automotive work, that he would have taken protective measures adequate to  
2 minimize his exposure to asbestos, and that those measures in fact would have reduced  
3 his exposure to asbestos in a causally significant manner. This exercise in conjecture is  
4 insufficient to withstand Defendants’ motion for judgment as a matter of law. *See*  
5 *Lakeside-Scott v. Multnomah Cty.*, 556 F.3d 797, 802-03 (9th Cir. 2009) (granting  
6 judgment as a matter of law “is appropriate when the jury could have relied only on  
7 speculation to reach its verdict”).

8 In sum, the court finds that Plaintiffs have failed to establish that a reasonable jury  
9 could find, on the basis of substantial evidence, that Defendants’ breach of their post-sale  
10 duties to warn Mr. Jack about the dangers of their asbestos-containing products  
11 proximately caused Mr. Jack’s injury. Because Plaintiffs did not advance any other  
12 theory of negligence in opposing Defendants’ motions, much less demonstrate that  
13 substantial evidence in the record supports alternative negligence theories, the court need  
14 not reach Defendants’ remaining arguments on causation and exposure. The court thus  
15 GRANTS Defendants’ motions for judgment as a matter of law.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the court GRANTS Defendants' motions for judgment  
3 as a matter of law. (Dkt. ## 816, 817.) The court DIRECTS the Clerk to enter judgment  
4 for Defendants and close this case.

5 Dated this 28th day of May, 2019.

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8 The Honorable James L. Robart  
9 U.S. District Court Judge  
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