IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Cox, J. — It is well settled that asbestos plaintiffs in Washington may establish exposure to a defendant's product through direct or circumstantial evidence.[1] It is equally well settled that the plaintiff in a product liability or negligence action bears the burden to establish a causal connection between the injury, the product, and the product's manufacturer.[2] A manufacturer is not liable for failure to warn of the danger of exposure to asbestos in products it did not manufacture or supply.[3] Whether the evidence of causation is sufficient to survive summary judgment ultimately depends upon a number of factors and the unique circumstances of each case.[4]

Here, Mary Jo Wangen, individually and as personal representative of William Wangen's estate (collectively "Wangen"), fails to show that the deceased was exposed to asbestos products manufactured or supplied by Warren Pumps, Inc., that caused his death due to mesothelioma. Moreover, she fails to show that Warren had any duty to warn of the danger of exposure to asbestos replacement products used in its pumps. Accordingly, the trial court

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[1] Morgan v. Aurora Pump Co., 159 Wn. App. 724, 729, 248 P.3d 1052 (2011) (citing Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 571, 157 P.3d 406 (2007)).

[2] Id.

[3] Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 385, 198 P.3d 493 (2008) (citing Simonetta v. Viad Corp., 165 Wn.2d 341, 358, 197 P.3d 127 (2008)).

[4] Lockwood v. A C & S, Inc., 109 Wn.2d 235, 249, 744 P.2d 605 (1987).

properly granted Warren's motion for summary judgment. We affirm.

William Wangen served in the Navy onboard the destroyer USS WILTSIE for three and a half years, beginning in 1950. He worked in the ship's forward fire room. He was later diagnosed with mesothelioma and eventually succumbed to the disease.

Before his death, he commenced a lawsuit against numerous parties other than Warren in California. The suit was later moved to Washington and Warren was added as a defendant. Warren moved for summary judgment on all claims. The trial court granted partial summary judgment to Warren, leaving other matters for trial. Following Warren's motion for reconsideration, the trial court granted Warren summary judgment on the remaining matters.

Wangen appeals.

A moving defendant meets its initial burden by pointing out that there is an absence of evidence to support the plaintiff's case.[5] Then, the inquiry shifts to the plaintiff to set forth specific facts demonstrating a genuine issue for trial.[6] Summary judgment should be granted if the nonmoving party fails to establish the existence of an element essential to its case.[7]

We review de novo a summary judgment order, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving

[5] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

[6] Id. at 225.

[7] Id.

party.[8] Likewise, we examine de novo "***all*** the evidence presented to the trial court, including evidence that had been redacted."[9] In doing so, we decide whether we agree with the trial court's ruling to either admit or exclude expert or lay evidence submitted in connection with the motion.[10]

Evidentiary Rulings

We first address a threshold issue: What admissible evidence was before the trial court when it ruled on summary judgment? Only admissible evidence may be used to decide a motion for summary judgment.[11]

Here, the trial court granted in part and denied in part Warren's motion to strike certain evidence submitted in opposition to its motion for summary judgment. Specifically, the court granted the motion to strike, for lack of foundation, Mr. Wangen's deposition testimony that assumed Warren was the source of replacement gaskets for its pumps in the destroyer's forward fire room.

On appeal, Wangen neither assigned error to nor argued in the opening brief that the trial court improperly struck this portion of Mr. Wangen's deposition testimony. Rather, the evidentiary argument in the opening brief is limited to the claim that the trial court improperly weighed conflicting evidence in two

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[8] Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

[9] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

[10] Id. at 663-64.

[11] CR 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence . . . .").

[12] Brief of Appellant Wangen at 12-17.

respects.[12]

For the first time in the reply brief, Wangen argues that there was a proper foundation for the deposition testimony struck by the trial court.[13] Because this challenge to the court's evidentiary ruling was not raised in the opening brief, we do not consider it.[14]

Wangen also argues that we must consider all documents presented to the trial court on summary judgment, whether stricken or not. This is true, to the extent that we review de novo the trial court's evidentiary decisions on summary judgment.[15] But this does not permit us to allow inadmissible evidence to affect our de novo review of the trial court's summary judgment ruling.

Here, there is no reason to overturn the trial court's decision to strike, for lack of foundation, Mr. Wangen's deposition testimony that assumed that Warren was the source of replacement gaskets for its pumps. Wangen cites no persuasive authority for the proposition that an appellate court should permit an evidentiary ruling that is not timely challenged on appeal to affect review of a summary judgment ruling. Therefore, this argument is not persuasive.[16]

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[13] Reply Brief of Appellant Wangen at 8-9.

[14] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(c).

[15] See Folsom, 135 Wn.2d at 663-64 (agreeing with trial court's decision to exclude portions of expert testimony submitted in connection with a summary judgment motion).

[16] See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after search).

Wangen also argues that it was not required to assign error to the trial court's order striking the testimony because "the gravamen of Wangen's appeal from the summary judgment order plainly encompassed the trial court's evidentiary rulings . . . ."[17] Wangen's reliance upon Johnson v. Kittitas County[18] and All Star Gas, Inc., of Washington v. Bechard[19] for this principle of law is misplaced. In both cases, the appealing party failed to assign error to findings of fact and conclusions of law, but the failure did not bar appellate review because the briefing articulated the challenges to the court's decisions.[20] As we have already stated, Wangen's opening brief includes no argument that Mr. Wangen's testimony was improperly stricken. So it was not clear that the trial court's evidentiary ruling was challenged on the basis now claimed.[21]

In sum, the portion of Mr. Wangen's deposition testimony that the trial court struck cannot be used to show the existence of any genuine issue of material fact.

Exposure to Asbestos-Containing Materials

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[17] Reply Brief of Appellant Wangen at 13.

[18] 103 Wn. App. 212, 11 P.3d 862 (2000).

[19] 100 Wn. App. 732, 998 P.2d 367 (2000).

[20] Johnson, 103 Wn. App. at 216; All Star Gas, 100 Wn. App. at 740 n.3.

[21] See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (failure to assign error in an opening brief does not preclude review of an issue where "the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced . . . .").

Wangen argues that there are genuine issues of material fact whether Mr. Wangen was exposed to asbestos-containing materials in the pumps that Warren originally sold to the Navy to outfit the destroyer. We disagree.

Warren moved for summary judgment, arguing that there was no evidence that Mr. Wangen was exposed to any original asbestos-containing Warren products. It supported its motion with Mr. Wangen's deposition testimony and responses to interrogatories.

In response, Wangen argued that there were genuine issues of material fact for trial. Wangen claimed that Warren sold its pumps with asbestos-containing materials to the Navy for original installation in the destroyer's forward fire room. Wangen also argued that Warren supplied asbestos-containing replacement gaskets and specified asbestos-containing gaskets and insulation for its pumps. It supported these arguments by relying on the deposition testimony of two fact witnesses: Mr. Wangen and Elbert Gassaway, a co-worker who served on the destroyer at the same time as Mr. Wangen.

In reply, Warren did not dispute that it sold pumps that contained asbestos-containing gaskets and packing to the Navy in 1943. But it claimed that Wangen failed to show that Mr. Wangen was exposed to either original Warren gaskets or packing or replacement gaskets manufactured by Warren. Warren also claimed that there was no showing that it specified asbestos-containing material for replacement gaskets.

Lockwood v. A C & S, Inc.,[22] on which Wangen relied below and

[22] 109 Wn.2d 235, 744 P.2d 605 (1987).

continues to rely on appeal, holds that an asbestos plaintiff may establish causation for a claim by satisfying several factors outlined by the supreme court in that case. The factors are: (1) the plaintiff's proximity to the asbestos product during exposure, the size of the work site where asbestos fibers were released, and the timeline of exposure; (2) the types of asbestos products to which the plaintiff was exposed and how they were handled and used; and (3) medical causation evidence of the plaintiff's disease.[23]

Here, there is no evidence of the first and second factors insofar as exposure to original material in Warren pumps is concerned. It is undisputed that Warren sold pumps that contained asbestos materials to the Navy in 1943 for installation on the destroyer. But Mr. Wangen did not begin his service on the destroyer until 1950, some seven years after the pumps' installation. The undisputed evidence in the record also shows that the destroyer was overhauled twice—in 1948 and 1949—before Mr. Wangen began his service on that vessel. Significantly, Wangen admitted in the supplemental briefing to the trial court that "whether or not the Warren pumps still had their original, asbestos-containing internal parts when Mr. Wangen worked along side them is simply unknown."[24] In sum, Wangen fails to meet the burden of showing the existence of any genuine issue of material fact that Mr. Wangen was exposed to asbestos-containing materials in the Warren pumps installed in 1943.

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[23] Id. at 248.

[24] Clerk's Papers at 1271.

Braaten v. Saberhagen Holdings[25] supports this conclusion. Under that case, Wangen has the burden to show that the asbestos to which Mr. Wangen was exposed was manufactured by Warren.[26] Wangen presents no such evidence of exposure to asbestos replacement products manufactured by Warren during Mr. Wangen's service on the destroyer. The trial court properly granted partial summary judgment on the original equipment exposure claim.

The trial court originally denied summary judgment regarding exposure to the Warren pumps' internal insulation during Mr. Wangen's service. Specifically, Wangen argued there was exposure to internal insulation:

> [T]here was also lots of testimony that in order to access the internal parts of the pump they would often, you know, the—the pumps would have to be torn apart. So the inference is that would also result in the asbestos insulation being disturbed.[27]

The trial court decided that, based on deposition testimony from Gassaway and Mr. Wangen, there was a factual dispute whether he ever cracked the lagging and was exposed to the asbestos insulation. The court conceded that it was unclear about "what exactly we are talking about here[,]"[28] but concluded that there was a genuine issue of material fact.

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[25] 165 Wn.2d 373, 198 P.3d 493 (2008).

[26] Id. at 389 ("The plaintiff has not presented sufficient evidence to withstand summary judgment as to whether the defendants manufactured, sold, or were otherwise in the chain of distribution of the asbestos-containing insulation applied to their products.").

[27] Report of Proceedings (Feb. 19, 2010) at 29.

[28] Report of Proceedings (March 9, 2010) at 7.

Warren moved for reconsideration. In its motion, it relied on expert testimony from Commander James Delaney, a retired naval officer. He explained that only the pump's steam end was insulated, that the gaskets and packing Mr. Wangen replaced were located outside of the pump's lagging, and that changing those gaskets would not disturb the internal insulation.

Warren also argued that Mr. Wangen testified that he never worked on insulation internal to the pump based on the following deposition testimony:

> Q. Besides the area around the flange and steam pipes did you personally remove insulation from any other equipment or surface on the Wiltsie?
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> A. From pumps. That would be the only other one that I can recall.
>
> Q. And from what part of the pump would you have to remove insulation?
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> [Objection.]
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> [A.] If we had it removed, the pump from the steam lines, and if we just put packing in it on the top valve then we wouldn't have to remove it. But if we had to do the inner ones we would have to take—we could do it on a steam line actually. It comes apart.
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> . . . .
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> Q. So I am a little unclear. Did you have to remove any insulation from a pump itself or just from the steam line that ran to it?
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> A. No. Pump is totally covered. It's steam line.[29]

In response, Wangen argued that this testimony was evidence that Mr. Wangen did remove the internal insulation. Alternatively, Wangen argued that

[29] Clerk's Papers at 1638-39.

such removal was necessary for maintenance that required over-hauling the pump's steam end.

Wangen also cited testimony by an expert witness, Captain William Lowell, a retired naval engineer. Captain Lowell testified that the sheet metal lagging was likely removed, leaving the insulation exposed, before Mr. Wangen served on the destroyer. He confirmed that a pump has a steam end, which is insulated, and a pump end, which is not insulated. He also confirmed that changing the packing did not require removing insulation from inside the steam cylinder.

Both experts testified that there was no internal insulation in the end of the pump that Mr. Wangen was responsible for maintaining. There is no testimony by either Mr. Wangen or Gassaway that they ever were exposed to the internal insulation by removing the lagging. The only evidence that Mr. Wangen was exposed to the internal insulation is the testimony quoted above.

Nevertheless, construing Mr. Wangen's confusing testimony in the light most favorable to him, summary judgment was still proper because the testimony does not show that any genuine issue of material fact exists. This is because there is no showing that the insulation was manufactured by Warren or original to the materials provided when it sold the pumps to the Navy in 1943. Without such a showing, summary judgment was proper.

Wangen argues that the trial court improperly weighed the credibility of Commander Delaney and Captain Lowell regarding whether the lagging was

actually removed. This claim is irrelevant. As we have explained, assuming the lagging was removed, Wangen provided no evidence that the internal insulation in place during Mr. Wangen's service was originally manufactured by Warren and not replaced with insulation from another manufacturer.

Duty to Warn

Wangen argues that there are genuine issues of material fact whether Warren supplied and specified the use of replacement asbestos-containing gaskets and packing installed by Mr. Wangen. We disagree.

Under product liability theory, the plaintiff must establish a reasonable connection between his injury, the product causing his injury, and the manufacturer of that product.[30] But, "there is no duty under common law products liability . . . to warn of the dangers of exposure to asbestos in other manufacturers' products . . . with regard to replacement packing and gaskets."[31] Therefore, the plaintiff must prove that the defendant manufactured or supplied the replacement parts.[32] A plaintiff may rely on circumstantial evidence to identify manufacturers, which were then present at his workplace.[33]

Here, Wangen claims that the replacement asbestos gaskets he serviced on the Warren pumps were manufactured and supplied by Warren. The only

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[30] Lockwood, 109 Wn.2d at 245 (citing Martin v. Abbott Laboratories, 102 Wn.2d 581, 590, 689 P.2d 368 (1984)).

[31] Braaten, 165 Wn.2d at 380.

[32] Id. at 389-90.

[33] Lockwood, 109 Wn.2d at 246-47.

evidence that Warren supplied the replacement gaskets came from Mr. Wangen's own deposition testimony, which the trial court struck.

Wangen argues that there is additional evidence in the record that Warren supplied the replacement gaskets.[34] Gassaway testified by deposition that the replacement gasket material was supplied by the pump manufacturer and had the manufacturer's name on it.[35] But it is unclear from this testimony whether Warren was among those manufacturers whose names were on replacements.

In response to Warren's motion for summary judgment, Wangen did not rely on this deposition testimony. Rather, Wangen only relied on testimony from Gassaway to show that he and Mr. Wangen worked on Warren pumps and that Gassaway saw Mr. Wangen replacing and packing the pumps.[36] Because Wangen did not rely on Gassaway's testimony for this purpose below, we do not consider it any further.

Wangen argues that Berry v. Crown Cork & Seal Co., Inc.,[37] Allen v. Asbestos Corp., Ltd.,[38] and Morgan v. Aurora Pump Co.[39] support the argument that the evidence presented here is sufficient to show a genuine issue of

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[34] Brief of Appellant Wangen at 29.

[35] Clerk's Papers at 566.

[36] Id. at 396-98.

[37] 103 Wn. App. 312, 14 P.3d 789 (2000).

[38] 138 Wn. App. 564, 157 P.3d 406 (2007).

[39] 159 Wn. App. 724, 248 P.3d 1052 (2011).

material fact of exposure to asbestos gaskets and packing manufactured by Warren. We disagree because those cases are distinguishable.

In Berry, the plaintiff presented witnesses that saw the defendant's products at the plaintiff's workplace almost every day.[40] In Allen, the plaintiff provided sales orders of asbestos material from the defendant, implying that the products were used at the plaintiff's workplace.[41] Finally, in Morgan, the plaintiff provided deposition testimony and a declaration from the superintendant of machinists at his workplace.[42] The superintendant testified that almost all of the pumps used asbestos gaskets and packing and that 50 percent of the replacement parts obtained came from the original manufacturer.[43]

Here, Wangen's only evidence that Warren supplied the replacement gaskets was from Mr. Wangen's stricken deposition testimony. Because there was no other evidence, Berry, Allen, and Morgan are not persuasive.

Wangen argues that it presented evidence creating a genuine issue of material fact that Warren specified the use of replacement asbestos gaskets and gasket material for its pumps. We disagree.

In order to survive summary judgment, Wangen must establish a reasonable connection between Mr. Wangen's injury, the asbestos replacement

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[40] Berry, 103 Wn. App. at 324-25.

[41] Allen, 138 Wn. App. at 572-73.

[42] Morgan, 159 Wn. App. at 733.

[43] Id.

gaskets, and Warren.[44] In Braaten, the supreme court held that the plaintiff did not provide evidence creating a material fact whether he was exposed to original packing and gaskets manufactured by the defendant.[45] But the court distinguished that result from a hypothetical case where a manufacturer "specifies" the use of asbestos replacement parts:

> In light of the facts here, we need not and do not reach the issue of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products ***specified by the manufacturer*** to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design.[46]

Wangen argues this case fits within the open question of whether a manufacturer could be liable for ***specifying*** the use of asbestos-containing replacement parts. We reject this argument.

First, the supreme court gave no guidance in Braaten on what it meant by asbestos-containing products "specified by the manufacturer" in the above quotation. For example, it is unclear whether the court meant there could be liability if a manufacturer merely specified an asbestos-containing product without having manufactured that product. In the context of the holding and extensive analysis in Braaten, such a reading would be inconsistent with the principles that case discusses. Specifically, the underlying principle of both

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[44] Lockwood, 109 Wn.2d at 245 (citing Martin, 102 Wn.2d at 590).

[45] Braaten, 165 Wn.2d at 397.

[46] Id. (emphasis added).

Braaten and Simonetta v. Viad Corp.[47] is that liability for unsafe products is limited to those who manufacturer such products or are in their chain of distribution.[48]

Second, Wangen does not provide any persuasive legal analysis to address this uncertainty. Wangen argues that under the liberal rule regarding proof of asbestos exposure in Lockwood, it should prevail.[49] Wangen states that Lockwood "make[s] clear that the burden rests ***on Warren*** to demonstrate that a plaintiff like William Wangen was not exposed to its asbestos-containing product."[50]

In our view, the exposure analysis in Lockwood does nothing to assist us in understanding why liability based on specification should attach in this case. As we previously discussed in this opinion, there is no showing of exposure here. In any event, the issue in this context is not exposure, but whether Warren should be held liable for specifying asbestos-containing products where there is no evidence that it manufactured such products. Wangen has not provided any persuasive authority to show why this case fits within the undecided question mentioned in Braaten.

Here, in opposition to Warren's motion for summary judgment, Wangen

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[47] 165 Wn.2d 341, 197 P.3d 127 (2008).

[48] Id. at 358; Braaten, 165 Wn.2d at 398.

[49] Reply Brief of Appellant Wangen at 6.

[50] Id.

produced schematic drawings from Warren showing diagrams of the pumps and parts lists for the pumps. The first schematic describes the assembly list of spares and material for a fire and bilge pump. In the list of materials, it states that the pump uses asbestos gaskets.

The second and third schematics, respectively, describe the lagging outline for a fire and bilge pump and the outline lagging and stroke index for an emergency feed pump. Both drawings state that insulating material in the pump is 85 percent magnesia, an asbestos material.

During the hearing on Warren's summary judgment motion, Wangen argued that testimony from Warren's Civil Rule 30(b)(6) representative, Roland Doktor, supported the claim that the schematics are specifications. The trial court decided that the schematics showed the components that were in the original equipment, nothing more.

We assume without deciding that the schematic diagrams and the limited testimony of Doktor create a factual issue whether these diagrams show that Warren specified asbestos-containing products. Nevertheless, that factual issue is not material for summary judgment purposes. It is not material because it is not outcome-determining in this case where there is a lack of any persuasive legal authority to support this claim of liability. Accordingly, there were no genuine issues of material fact. Summary judgment was proper, even if we reach that conclusion on a different basis than the trial court.[51]

[51] See State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) ("This court may affirm a lower court's ruling on any grounds adequately supporting in the record.").

We affirm the summary judgment order and the order on reconsideration.

Cox, J.

WE CONCUR:

Leach, A.C.J.

Ellington, J.