Supreme Court No. 94732-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET RUBLEE, Individually and as Personal Representative of the Estate of VERNON D. RUBLEE,

Plaintiff-Petitioner,

v.

PFIZER, INC.,

Defendant-Respondent.

AMICUS BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Authority

Foreign Authority

Statutes

Other Authorities

INTRODUCTION

Apparent manufacturer liability is the law in Washington, even if it was not explicitly adopted prior to the exposure that caused injury in this case. The concept was incorporated into the 1981 Washington Products Liability Act (WPLA), RCW 7.72.010(2). Even so, there should not be any doubt that apparent manufacturer liability applies to state products liability cases.

Applying the doctrine, the Court of Appeals erred in several respects. First, it failed to consider that the object of products liability law is the safety of the user, not purchaser, and employed reliance tests that are inconsistent with the state's strict liability regime. It further failed to consider the special solicitude accorded asbestos lawsuits due to the unusually long latency period following exposure before a claimant may seek compensation. Finally, the court below utilized tests for apparent manufacturer liability that adhere to an archaic approach more consistent with contract law and privity considerations that are no longer operative in products liability.

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent victims in civil

suits and personal injury actions, including asbestos-injury actions. AAJ members practice law in the state and federal courts of every state of the Union, including Washington, as well as the District of Columbia and each of the U.S. territories. AAJ has served as a leading advocate of the right to trial by jury, as well as for access to the courts for the preservation of protections enjoyed by ordinary citizens that are afforded by the common law and state tort law. AAJ regularly files amicus briefs in cases that raise issues of vital concern to its members' clients.

This case is of acute interest to AAJ and its members. The effects of asbestos exposure still plague American workers and their families, which effects generally result from exposure to asbestos-containing products over a victim's working lifetime. A fundamental principal of American tort law is that victims may recover from every defendant that victims prove substantially contributed to their illness or injury. Here, AAJ believes that liability as a manufacturer should apply to Pfizer, who held itself out as the manufacturer of the injurious product that caused the defendant's injuries and death

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case set forth in the Supplemental Brief of Plaintiff-Petitioner Margaret Rublee.

ARGUMENT

A. Apparent Manufacturer Liability Applies to this Action.

No party disputes that apparent manufacturer liability applies in Washington. The concept is a venerable one, recognized at least as early as 1912. *See Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355, 367 (Ill. App. Ct. 1912), *disapproved of on other grounds by Suvada v. White Motor Co.*, 210 N.E.2d 182 (1965).[1] Apparent manufacturer liability was incorporated into the Restatement of Torts in 1934 in language that tracks the Restatement (Second). David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 Case W. Res. L. Rev. 671, 729 n.143 (1999) (citing Restatement (First) of Torts § 400 (1934) ("One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.").

Although this Court has had no occasion to opine on its applicability as a matter of the common law, two federal decisions concluded that apparent manufacturer liability would have been adopted. *See Sprague v. Pfizer, Inc.*, No. 14-5084 RJB, 2015 WL 144330, at *3 (W.D. Wash. Jan.

[1] *Suvada* adopted strict liability in Illinois and only disapproved of *Davidson's* holding that privity of contract was still necessary to hold a manufacturer liable. 210 N.E.2d at 184.

12, 2015); *Turner v. Lockheed Shipbuilding Co.*, No. C13-1747 TSZ, 2013 WL 7144096, at *2 (W.D. Wash. Dec. 13, 2013). The court below agreed. *Rublee v. Carrier Corp.*, 199 Wash. App. 364, 371, 398 P.3d 1247, 1251 (2017). The adoption would have taken the form of the Restatement (Second), consistent with this Court's endorsement of other aspects of the same Restatement.[2] In 1981, apparent manufacturer liability was confirmed by statute in the Washington Products Liability Act (WPLA), RCW 7.72.010(2). Both formulations impose an independent duty on those putting themselves out as the apparent manufacturer of a product made by another as though they were the manufacturer of the defective product.

Indisputably, tort law has long "overwhelmingly [been] court-developed common law." *Burkhart v. Harrod*, 110 Wash. 2d 381, 394, 755 P.2d 759, 765 (1988) (Utter, J., concurring). At the same time, this Court has acknowledged that "[r]etroactive application, by which a decision is applied both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule, is overwhelmingly the norm." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash. 2d 264, 270, 208 P.3d 1092, 1095 (2009) (citations and internal quotation marks omitted).

[2] The Restatement (Second) formulation of apparent manufacturer liability should govern here, as it was promulgated in 1965 and reflected the American Law Institute's consensus on the law during the most relevant period of Mr. Rublee's exposure.

Applying that principle, this Court adopted Section 402A of the Restatement (Second) of Torts and strict liability. *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969) (manufacturers); *Seattle–First National Bank v. T.E. Tabert*, 86 Wash.2d 145, 542 P.2d 774 (1975) (sellers and suppliers). The adoption applied retroactively. *Lunsford*, 166 Wash. at 284, 208 P.3d at 1102-03.

The same principles of adoption and retroactive application ought to apply with respect to Section 400.

B. The Context and Development of Asbestos Litigation Further Impels Recognition of Pfizer as the Apparent Manufacturer with Responsibility for Mr. Rublee's Injuries.

The fact that this is an asbestos claim involving a deadly disease manifesting itself decades after exposure provides additional support to apparent manufacturer status for Pfizer. Once touted as a miracle fiber for its flame-retardant and insulating properties and employed ubiquitously in a varied set of products, asbestos is now simply described by the federal government as a "health hazard," U.S. Dep't of Labor, OSHA, Safety and Health Topics: Asbestos, Overview, available at https://www.osha.gov/SLTC/asbestos/, and is largely banned. *See* U.S. Environmental Protection Agency, "U.S. Federal Bans on Asbestos," available at https://www.epa.gov/asbestos/us-federal-bans-asbestos.

Product users were long unaware of its toxic qualities, largely due to industry efforts to hide dangers known as early as the 1930s, to keep workers in the dark about the impact of exposure, to prevent distribution of scientific studies showing its effects, and to oppose regulations to reduce asbestos in the workplace. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 258 (2006).

As was the case for Mr. Rublee, asbestos exposure engenders mesothelioma, a fatal cancer that almost never occurs as a result of any other cause, *see* Anita Bernstein, *Asbestos Achievements,* 37 Sw. U. L. Rev. 691, 703 (2008), and is not dose-related or cumulative. Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine,* 122 L.Q. Rev. 189, 189-91 (2006).

Mesothelioma appears only after long latency periods have passed, sometimes as long as 40 years. *Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 168, 123 S. Ct. 1210, 155 L. Ed.2d 261 (2003) (Kennedy, J., concurring in part, dissenting in part). The "cancers inflict excruciating pain and distress - pain more severe than that associated with asbestosis, distress more harrowing than the fear of developing a future illness." *Id*.

Mr. Rublee worked as a machinist at the Puget Sound Naval Shipyard beginning in 1965 and was exposed to asbestos in that job through

the 1970s. It was not until September 2014 that he was diagnosed with mesothelioma. As this Court previously recognized, "[i]n an ordinary personal injury action, the general rule is that a cause of action 'accrues' at the time the act or omission occurs." *White v. Johns–Manville Corp.*, 103 Wash.2d 344, 348, 693 P.2d 687 (1985). An action based on product liability is barred unless brought within three years after the cause of action shall have accrued. Wash. Rev. Code § 4.16.080(2).

Under normal circumstances, exposures in the 1960s and 1970s, as here, that result in injuries that first occur in this decade, would result in a nonsuit because of the statute of limitations. *See, e.g., Hooper v. Carr Lumber Co.*, 1 S.E.2d 818, 820, 215 N.C. 208 (N.C. 1939) (stating the then-prevailing rule that the "law will not permit recovery for negligence which has become a fait accompli at a remote time not within the statutory period, although injury may result from it within the period of limitation…"). *Cf. Lindquist v. Mullen*, 45 Wash. 2d 675, 677-78, 277 P.2d 724, 725 (1954), *overruled in part by Ruth v. Dight*, 75 Wash. 2d 660, 453 P.2d 631 (1969).

With asbestos exposure, "[i]njury, in the sense of tissue damage, occurs shortly after the initial inhalation of asbestos fibers" yet "long before the effects of the contact become apparent" or constitute a cognizable injury. Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule*

in Latent Injury Claims: An Exception or the Law?, 43 U. Pitt. L. Rev. 501, 503 (1982).

The solution to this dilemma came through reconfiguration of the discovery rule, which holds that "a statute of limitation does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action." *U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wash.2d 85, 92, 633 P.2d 1329 (1981).

In its normal rendition, the discovery rule still insists that a plaintiff take steps at the first hint of injury to discover its cause and not sit on his or her rights. First recognized by this Court in *Ruth v. Dight*, 75 Wash.2d 660, 453 P.2d 631 (1969), a case involving a surgical sponge left inside a patient that went undiscovered for 23 years, the discovery rule enunciated retained a requirement of diligence on the part of the would-be plaintiff and held the limitations period to commence when, "in the exercise of reasonable care [the plaintiff] should have discovered the presence of the foreign substance or article in [the plaintiff's] body." *Id.* at 667-68, 453 P.2d at 636.

Yet, asbestos plaintiffs know of their exposure long before mesothelioma takes root.[3] Nonetheless, Washington, like most states, has

[3] Courts across the country, as here, have held that knowledge about asbestos exposure does not constitute discovery for purposes of a mesothelioma claim, and that the judicially recognized extension of a limitation period based on time of discovery is a benefit that often flows only to asbestos plaintiffs due to the unusually lengthy latency period before the disease manifests. *See, e.g., Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 112,

modified the usual discovery rule to allow mesothelioma cases to be filed years after asbestos exposure.[4] In *Sahlie v. Johns-Manville Sales Corp.*, 99 Wash.2d 550, 663 P.2d 473 (1983), this Court held that "the statute of limitation does not begin to run until the plaintiff has discovered or should reasonably have discovered *all the essential elements* of the action." *Id.* at 553, 663 P.2d at 474 (emphasis added). Relying upon the Restatement, the *Sahlie* Court described the three elements as consisting of an unreasonably dangerous product, a seller in the business of selling the product, and a lack of substantial change in the condition of the product before the limitations period begins to run. *Id.*

Subsequently, this Court held the discovery rule applies in asbestos cases more than three years after death in favor of decedent's personal representative and statutory beneficiaries even though the wrongful death cause of action normally accrues upon death. *White v. Johns-Manville*

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116 (D.C. Cir. 1982) (holding that development of asbestosis much earlier did not trigger the running of the statute of limitations for later claims based on mesothelioma engendered by the same asbestos exposure due to latency, and stating "[w]e hold that time to commence litigation does not begin to run on a separate and distinct disease until that disease becomes manifest"); *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 635-36 (Wis. 1999) (same holding for second lawsuit based on mesothelioma after earlier lawsuit over pleural thickening but no malignant disease was dismissed).

[4] Originally, in many jurisdictions, the statute of limitations barred lawsuits filed years after first exposure. Hensler, *supra* at 260. The Fifth Circuit pioneered the change that adapted the discovery rule for asbestos cases. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *Borel* heralded a series of novel applications and extensions of existing doctrines to enable asbestos plaintiffs to seek compensation for their latent injuries. *See* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. Rev. 796, 819-20 (1983).

Corp., 103 Wash. 2d 344, 352-53, 693 P.2d 687, 693 (1985). To effectuate justice, this Court adopted a rule, largely applied in asbestos actions, that a wrongful death action accrues when the decedent's personal representative discovered, or should have discovered, *the cause of action*. *Id*. The Court explained that its approach "reflect[ed] the latent nature of occupational diseases." *Id*. at 354, 693 P.2d at 694.

The same solicitude for the nature of the claim is reflected in the application of strict liability retroactively in asbestos litigation. State courts have applied strict product liability in cases where the asbestos exposure predated adoption of Section 402A, Restatement (Second) of Torts. *See Lunsford*, 166 Wash. 2d at 284 n.20, 208 P.3d at 1103 n.20 (collecting cases).

Statutory law also recognizes the unique nature of asbestos injury and litigation. For example, in 1986 the Legislature abolished joint and several liability for most causes of action in favor of proportionate liability. *Kottler v. State*, 136 Wash. 2d 437, 446, 963 P.2d 834, 839 (1998) (citing RCW 4.22.070). However, among the exceptions it created to its new rule were cases involving hazardous waste and unmarked fungible goods such as asbestos. RCW 4.22.070(3)(a), (c).[5]

[5] Asbestos has become a recognized exception in the jurisprudence of many states. *See Pustejovsky v. Rapid-American Corp.*, 35 S.W. 3d 643, 653, 44 Tex. Sup. Ct. J. 89 (Tex. 2000) (recognizing an exception to the single-injury rule due to the latency period in

Asbestos cases also need a different rule from those generated by the tests employed by the Court of Appeals. In its analysis, all tests hinged on the sophistication of the buyer, not the holding out of the defendant as though it were the manufacturer from the viewpoint of the user. These tests misapprehend the plain import of the apparent manufacturer rule, the demise of immunity due to privity of contract, the modern approach to liability in tort law generally, and the application of modern liability rules to asbestos litigation.

C. The Court of Appeals Erred in Focusing on the Purchaser's Sophistication and Experience with the Seller.

1. *Apparent manufacturer liability does not depend on the sophistication of the purchaser.*

Whether viewed through the lens provided by the Restatement (Second) or the WPLA, apparent manufacturer liability depends on a company purposefully holding itself out to be the manufacturer of a product by adorning it with its label or logo. The Restatement plainly states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Restatement (Second) of Torts § 400). The comments accompanying this statement

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mesothelioma cases). *See also* Bruce J. McKee, *Alabama: A Jurisdiction Out of Control?*, 41 N.Y.L. Sch. L. Rev. 637, 641 (1997) (stating that Alabama statutory law prohibits recognition of the discovery rule outside of claims for fraud and asbestos-related injury).

emphasize that even the exercise of due care through inspection of the item for its suitability of use does not absolve a party of responsibility because liability is premised on "some negligence in its fabrication or through lack of proper inspection during the process of manufacture," so as to render the article "dangerously defective." *Id*. at Comment c. It further emphasizes that "one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark." *Id*. at Comment d. Moreover, rather than consider that labeling from the perspective of the sophisticated user or even the purchaser, the Restatement examines that label from the perspective of the "casual reader of a label [who] is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source." *Id*.

As with most Restatement provisions, an illustration is provided to demonstrate the proper use of the rule:

> A, a wholesale distributor, sells canned corned beef labeled with A's widely known trademark and also labeled "Packed for A" and "A, distributor". The beef was negligently packed by B and is unwholesome. C buys a can of it from D, a retail grocer, and serves it to her guest, E, who is made ill. A is liable to E.

Id., Illustration 2.[6]

[6] The illustration was based on *Burkhardt v. Armour & Co*., 161 A. 385, 115 Conn. 249 (Conn. 1932).

Significantly, in the illustration the purchaser could see that the label indicates that A is not the manufacturer but put a private label on canned food from a wholly separate party who packed it for A. The user, E, was not a purchaser and had no access to the label. Nonetheless, apparent manufacturer A is liable to E – just as Pfizer should be deemed liable to Plaintiff here.

The text of the WPLA suggests that the same result should obtain. It does not treat apparent manufacturers differently than factual manufacturers, as it joins the two within a single definition of "manufacturer." RCW § 7.72.010 (manufacturer "includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer."). If the Legislature sought to depart from the approach adopted in the Restatement, it had ample ability to do so. It did not.

Unlike the test employed below, courts have imposed apparent manufacturer liability with respect to users of products. For example, a defective ladder used by a farmhand, even though purchased by the farm owner and sold under the Sears "Craftsman" brand, though manufactured by another company, resulted in liability to the injured farmhand in *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844, 845-46 (S.D. Ga. 1971). Similarly, another court-imposed liability on Sears for a hammer manufactured by another company and purchased by the employer when an

employee was injured by a shattering of the hammer adorned with "Craftsman." C*happuis v. Sears Roebuck & Co.*, 358 So. 2d 926, 930 (La. 1978).

In these instances, the status of the plaintiff as a user but not purchaser did not enter into the equation. That status should not change this Court's approach to who the manufacturer is.

2. *The tests utilized by the Court of Appeals erroneously depend on privity of contract and antiquated legal concepts.*

The Court of Appeals did not choose a single test for application of apparent manufacturer liability, but analyzed three different ones found in an intermediate appellate decision from Maryland decision. *Rublee*, 199 Wash. App. at 371, 398 P.3d at 1251 (citing *Stein v. Pfizer, Inc.*, 137 A.3d 279, 294 (Md. App. 2016), *cert. denied*, 450 Md. 129, 146 A.3d 476 (2016)). The court held that Mr. Rublee could not meet the requirements of any of the three tests. *Id.* at 371, 398 P.3d at 1252. Yet, none of the tests employed were appropriate because they depended on concepts more aligned with the long-abandoned privity of contract concept rather than concepts of modern tort law.

The objective reliance test, which can apply either the perspective of the "ordinary, reasonable consumer" or that of the agents who purchased the product, asks whether that reasonable person would have relied upon

the affixed label. *Id*. at 371-72, 398 P.3d at 1252. The court chose the agents' perspective because the product was purchased by a sophisticated industrial entity. The extensive evidence that showed the Pfizer logo was part of the marketing and packaging of the purchased products counted for naught because other evidence showed purchase orders and questions were still directed to the true manufacturer, a Pfizer subsidiary. *Id*. at 374-77, 398 P.3d 1253-54.[7] In other words, to that court, as sophisticated purchasers, the company agents understood who manufactured and bore responsibility for product regardless of how the products were labeled.

The court below also found the evidence insufficient for the actual reliance test, which similarly can be viewed from "the actual user's or the actual purchaser's" viewpoints. *Id*. at 377, 398 P.3d at 1255. The court found no evidence that "a worker relied on Pfizer's name in deciding to use or work near the products" or that the "actual purchasers relied on Pfizer's apparent role when they purchased the products." *Id*. at 378, 398 P.3d at 1255. The test, though, inappropriately assumes that workers have much

[7] *Amicus curiae* agrees with Plaintiff-Petitioner that, even under this test, a factual dispute was created that precluded summary judgment. After all, the nonmoving party is given the benefit of any doubt on a summary judgment motion, the causal linkage between the evidence and the reasonableness of any assumptions about who manufactured the product is a factual, rather than legal, question for the jury's determination, and this Court has long recognized that summary judgment "is seldom granted on the basis of the unreasonableness of alleged facts." *Hartley v. State*, 103 Wash. 2d 768, 777, 698 P.2d 77, 82 (1985). In fact, even when the assertions "may strain credulity," as long as "reasonable minds *arguably* could disagree," reasonableness becomes "a proper question for jury determination." *Id*.

choice in the equipment and products purchased by an employer and focuses too heavily on the employer because it is the party contracting for the product.

Finally, the court rejected an enterprise liability theory that no party raised. *Id*. at 381, 398 P.3d at 1256.

The Court of Appeals engaged in an anachronistic inquiry by examining the contractual and business relationships between Mr. Rublee's employer and the manufacturer. While in the early days of apparent manufacturer liability, "product defect claims were squarely within the province of contract law–one could only recover if in privity of contract with the product seller, and only in accordance with the specific provisions and limitations of contract." Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 Minn. L. Rev. 1845, 1845 (2016) (footnote omitted). When "products liability had emerged as a vibrant branch of tort law," however, it was principally because of "the fall of the 'citadel' of privity—'the cluster of rules precluding liability for certain kinds of wrongs unless the victim and injurer were in privity of contract.'" *Id*.

The "assault upon the citadel," as Professor Prosser famously labeled it,[8] was "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." William Prosser, *Handbook of the Law of Torts*, 654-55 (4th ed. 1971). It effected a legal revolution to hold manufacturers more accountable and product users more eligible for compensation. With it, for example, the first Restatement recognized a duty to warn of the hazards of disease in the instructions for a product's safe use. Restatement (First) of Torts § 388 (1934). The manufacturer thus had a duty to take steps to assure safe usage or be liable in a failure-to-warn action to the ultimate user of a product, even when that user was the employee of a product purchaser. *See id*., comment a.

This Court recognized that approach as the "general rule" in 1979. *Little v. PPG Indus., Inc.*, 19 Wash. App. 812, 822, 579 P.2d 940, 947 (1978), *modified*, 92 Wash. 2d 118, 594 P.2d 911 (1979). Even a decade earlier, this Court stated that a "manufacturer would be liable if the product carried with it an unreasonable risk of harm to *potential users*, even when carefully manufactured." *Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 526, 452 P.2d 729, 731 (1969) (emphasis added). Under the common law applicable to strict liability, lack of privity does not bar recovery.

[8] *See* William Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

Washington Water Power Co. v. Graybar Elec. Co., 112 Wash. 2d 847, 852, 774 P.2d 1199, 1203, *amended*, 779 P.2d 697 (Wash. 1989).

What Washington product liability law does do, however, is impose a duty on manufacturers "to all whom a manufacturer should reasonably expect to use its product, which includes employees and repairmen," *Bich v. Gen. Elec. Co.*, 27 Wn. App. 25, 29, 614 P.2d 1323, 1326 (1980), not just purchasers.

The critical aspect of these holdings is that users, not purchasers, are the object of the law's protection from defective products. Thus, strict liability applies when the defect that gave rise to injury and liability was "*not contemplated by the user*." *Lamon v. McDonnell Douglas Corp.*, 19 Wash. App. 515, 521, 576 P.2d 426, 430 (1978), *aff'd and remanded,* 91 Wash. 2d 345, 588 P.2d 1346 (1979) (emphasis added). A rule that emphasizes the sophistication of the purchaser has no role in products liability.

The WPLA adopts the same approach, subjecting a manufacturer (defined to include those who put their name on the packaging) "to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed." RCW 7.72.030(1). WPLA defines a "claimant" as "any person or entity that suffers harm" and permits product liability actions

"even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller." RCW 7.72.010(5). The statute makes no distinction between a purchaser or user, focusing instead on the injured party. The apparent manufacturer test should have no different focus, which is why the tests and perspective used by the Court of Appeals were wrong.

Indeed, both tests this Court utilizes for strict liability under RCW 7.72.030 are based on the ultimate user. The "risk utility test" weighs the plaintiff's harm against "manufacturer's burden to design a product that would have prevented those harms" and the feasibility of an alternative design. *Soproni v. Polygon Apartment Partners*, 137 Wash. 2d 319, 326, 971 P.2d 500, 504 (1999). The alternative "consumer expectations test" requires the plaintiff to "show that the product was 'unsafe to an extent beyond that which would be contemplated by the ordinary consumer.'" *Id.* at 326-27, 971 P.2d at 504. Neither test depends on purchaser sophistication.

No additional or different considerations are due merely because the defendant is an apparent manufacturer, rather than the in-fact manufacturer. Both the Restatement and the WPLA make clear that a nonmanufacturing seller of a defective product who puts its name on a product manufactured by another company is liable *as a manufacturer*. No assessment of a

defendant's conduct or a plaintiff's reliance is needed, for to do so reintroduces fault when strict liability eschews that inquiry.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals and hold that liability as a manufacturer applies to the defendant for holding itself out as the manufacturer of the injurious product by attaching its logo to the product that caused Mr. Rublee's injuries and death.

Date: March 30, 2018

Respectfully submitted,

/s/ Robert S. Peck

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CERTIFICATE OF SERVICE

I, Amy Brogioli, an attorney for *amicus curiae* the American Association for Justice, certify that on March 30, 2018, I electronically filed the foregoing document with the Clerk of Court for the Washington Supreme Court using the Washington Appellate Courts' Secure Portal system and caused to be served a true and correct copy of the foregoing document upon the following individuals:

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