

Washington State Supreme Court – March 11, 2008

- JUDGE: Good afternoon, Ladies and Gentlemen. Welcome to the Washington Supreme Court. Our first case this afternoon is Joseph A. Simonetta et al. v. The Viad Corporation f/k/a The Dial Corporation. Mr. Gardner, you've reserved 15 minutes for opening and Mr. Bergman, you'll have twenty minutes for argument. Mr. Gardner, you'll then have rebuttal. You may proceed.
- RON: Thank you, your Honor. May it please the Court. I am Ronald Gardner. I represent Viad Corp., the petitioner today. We're asking the Court respectfully to reverse the Court of Appeals decision in this case and reinstate the Trial Court's Summary Judgment in favor of the evaporator manufacturer, in this case, Viad. The Superior Court correctly applied well established precedent in this state and elsewhere across the country that the duty to warn about dangerous products rests with the entities who are in the chain of distribution of those products, the products that cause the harm. Here, the external insulation on the evaporator is the product that caused the harm to Mr. Simonetta, his asbestos-related lung cancer.
- JUDGE: This evaporator was manufactured and installed back in 1941?
- RON: Yes, your Honor. Mr. Simonetta encountered it in 1959 or 1960 in that area. But it was a World War II era vessel. The evaporator had been present for many years.
- JUDGE: I didn't know they were doing that during the war – converting sea water to fresh water. But, apparently, they were.
- RON: They were. And I don't know a great deal about it; but I know they do need that water for the boilers, for the men, the sailors on the ship. So, yes, this is a large piece of equipment on the vessel.
- JUDGE: And this man was in the navy – the worker we're talking about, Simonetta.
- RON: His exposure occurred while serving in the navy, on the vessel and he had
- JUDGE: *(Interrupting)* But it's not before ... I assume he would have some sort of a service-connected disability as a consequence of suffering this disease while he was in the service.
- RON: Presumably, your Honor, but I don't know a great deal about that either. It's really not germane to our case below.
- JUDGE: Go ahead.

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- RON: Unlike the next case that you are going to hear, this case involves only that external insulation. There's no issue here about internal gaskets, whether they were original components or replacement parts. It's purely
- JUDGE: *(Interrupting)* Let me focus you on something on the negligence argument under the Restatement Section 388. It talks about "use of the product."
- RON: Yes, your Honor
- JUDGE: To me that's a focal word and some of the cases have looked at that, either expansively or narrowly. And how would you have us define "use" in this context?
- RON: I think that's where logic and common sense come into play. I could construct an argument, I guess, that Mr. Simonetta is not technically using the evaporator when he's tearing off the insulation in order to get to it to repair it. We haven't focused on that, though. We focused on the fact that it is not the evaporator that caused the harm, it's the insulation that caused the harm. And I think if you read Section 388, that's when they talk about chattel, the use of which causes harm, that's what they're talking about. In other words, an analogy that I've played with to illustrate this point a bit is - if one drives a defective automobile down a perfectly acceptable highway and is injured. One is injured while using the highway. But nobody would think that it is the highway that caused the injury, or that the people responsible for the highway should have some duty to protect about the defective vehicle. So, in a sense, perhaps he is using it, but it's not the USE of the product – it's not THAT product that caused the harm in this case. And there are very good policy reasons for not adopting an expansive definition of that here; particularly in the strict liability realm, because there the policy of the law is to afford maximum protection to the consumer. We don't want people who are injured by dangerous products to bear the expense and burden of those injuries. We need to locate somebody who is appropriate to pay for that. This is liability without fault. And so the law has struck the proper balance at those who market and manufacture the products that are responsible for the harm are the ones who should pay to maximize the protection to the consumer. They are also in the best position to promote the safety of the products. They are familiar with the product. They manufacture it. If they just sell it, at least they have a contract with the manufacturer, some relationship where they can pass that liability back up the chain or bring pressure to bear on the manufacturer to make a safer product. So it's a good policy; because it not only is the fair place to make the burden of these injuries rest, but it also promotes consumer safety, which is an important policy in the products liability law in this state.

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- JUDGE: Would we be here, Counsel, if the manufacturer in this case had pre-insulated the equipment before delivery?
- RON: Absolutely not, your Honor.
- JUDGE: What do you make of the – the reason I ask – what do you make of the finding that the manufacturer or your client knew or should have known that the insulation would have been installed as part of the operation of the equipment?
- RON: That, and you know ..., that is the only fact that Simonetta has brought forward and put forward as a reason why there should be a trial in this case. And what I make of that, your Honor, is that goes only to the question of foreseeability. So, yes, we can say that, if you accept that evidence – which you have to today – (this is a summary judgment review – de novo of the Trial Court) that Griscom Russell knew that asbestos insulation was hazardous. What you establish is foreseeability. But the law is clear in this jurisdiction – that foreseeability alone is not enough to establish a duty.
- JUDGE: *(Female voice)* Counsel, do we really, I mean, I can see “foreseeability” if it’s this product might be used in this way or that way. But, as I understand the record below, isn’t it that this product is incomplete until it is insulated? So it’s not simply that that’s a foreseeable use of the product, but that’s integral to the use of the product. Is that really “foreseeability?”
- RON: Oh, I think it is. I think it is foreseeability.
- JUDGE: *(Interrupting)* And you use this product without insulation?
- RON: I’ll refer you to Clerk’s Paper 744 and Clerk’s Paper 867. Those are the two places in the record where you’ll find the answer to this. And I think the evidence is that (let me just look what it is) “insulation was necessary” is what Cushing said and that Griscom Russell knew asbestos insulation would be necessary. But what is NOT established in this record is that any particular form of insulation was necessary – asbestos or otherwise. Some form of insulation was necessary, but it did not have to be asbestos. Although there is evidence that Griscom Russell knew the Navy was using asbestos, there’s no evidence that they knew the details of that: what form was the asbestos in? How was it affixed to the evaporator? And this is all information that the manufacturer would have to know if it’s going to formulate an effective, reasonable warning. And I submit it places too great of a burden ...

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- JUDGE: *(Interrupting)* Could the produce be ... could the evaporator be operated without – safely operated without insulation?
- RON: I don't think we have any evidence in the record to say that it could. What we have is one question and answer by an expert that said insulation was necessary.
- JUDGE: And if insulation was necessary, does it follow that if the evaporator functioned without insulation that it would be unsafe?
- RON: Not in any way that's relevant to this case. I mean without insulation – I don't know the answer. There's nothing in the record to help us with that. I can surmise that it might create too much heat for the sailor.
- JUDGE: Let me ask another question. Would applying insulation be a misuse of the product?
- RON: No, I don't think it would be a misuse of the product. No. Certainly not.
- JUDGE: Does anybody argue that at some point the manufacturer became aware that there were hazards associated with asbestos being used as an insulation?
- RON: There is evidence in the record that Simonetta submitted a very general statement from Lauderdale, the industrial hygienist, that the hazards of asbestos were known, or should have been known, by somebody like Griscom Russell.
- JUDGE: Does the record reflect whether or not the manufacturer notified the Navy that there might be a hazard with respect to using asbestos insulation.
- RON: The record is silent on that, either way. And to go back to your original question, there are many parts of this ship that – these ships are made up of many components, and so they are all in a sense incomplete until finally hooked up into a working vessel. So, even an insulated evaporator is not yet complete. It needs piping, and pumps, and the other pieces of equipment that function with it on the ship.
- JUDGE: I'm smiling because I fly on an airplane that was manufactured in 1941. And it works very well. *(General laughter)*
- RON: Well, they built them very well back then.
- JUDGE: *(Female voice)* Can I ask you question? Because you mentioned about "components." I mean your argument about – and the one that Judge Armstrong focused on – about the

chain of distribution does not – maybe I’m misunderstanding it. But does it rely on looking at the valves or the pumps as “components” of a different product?

RON: No. We really have not focused on trying to create an argument that the evaporator is a component. We focused on the chain of distribution. She didn’t look it at that way. Judge Armstrong applied the law that it is the people in the chain of distribution of the product that caused the harm that have the duty to warn and; even if Griscom Russell knew the insulation would cause harm, that’s irrelevant. It is the insulation that caused the harm. The manufacturers and sellers of that product have the duty to warn.

JUDGE: Would their argument be that the insulation is a component of this product?

RON: Uh (*sighing*) I guess if you were to define the product as the “insulated evaporator” then you’ve got two components. You’ve got a bare evaporator and you’ve got the insulation. When you put them together, you’ve got an insulated evaporator. But the component law – if the component you sell doesn’t cause the harm - the law is pretty clear - when other components are added to it that in fact caused the harm, the entity that sold the entire product has the duty as well as those who sold the particular components that were dangerous and caused the harm in the case. I’m not sure how long my amber light has been on, but I want to talk a little bit about the precedent behind the Court of Appeal’s decision because I think it is entirely lacking in precedent. There is only one case in the entire United States as far as anybody here has been able to cite that would agree with the decision of the Court of Appeals – that’s the Berkowitz case – which appears to be inconsistent with other New York authority. It provides absolutely no analysis for the result that it reached. It’s an appellate term – an appellant division decision – and it is an appeal, an interlocutory appeal from a denial of a summary judgment motion. It’s very, very weak authority. We’ve cited lots of other cases on point for this proposition that if you didn’t sell the product that caused the harm, you have not duty to warn – and the Court of Appeals attempt to distinguish a case that has run all four points: The Lindstrom Sixth Circuit Decision. The Court of Appeals attempted to characterize it as a causation case. That is an error of law by the Court of Appeals. Read that case carefully. Yes, the language does talk about causation, but they also go on to note that although the plaintiff failed to prove that the components that you sold had asbestos caused any harm to him (because he wasn’t exposed to them) they also note “and you have no liability for products that were sold by others.”

JUDGE: What if you sold the evaporator in 1941 coated with asbestos, but the asbestos was made by some other company? But...

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- RON: I think the law is clear. Under the Common Law there would be a strict liability duty to warn. Absolutely.
- JUDGE: Because you've assembled, or you've put it out that way where the asbestos is, correct?
- RON: We are in the chain of distribution, that's correct, of that product and at least we can pass it back to the manufacturer and we've reaped a profit from the sale of the insulation, so we're the appropriate place to put the economic consequences of harm or danger that is caused by that insulation product. We can, by insurance,
- JUDGE: The insulation was put on afterward by
- RON: *(Interrupting)* ... in this case.
- JUDGE ... by the Navy or...
- RON: By the Navy. Correct. And there is absolutely no evidence that Griscom Russell did anything to cause the Navy to use asbestos, or select asbestos as the type of insulation to put on this evaporator.
- JUDGE: I've gotten the impression over the years that they put asbestos on everything on ships in those days – just about. Was there anything else in use at that time?
- RON Well the record There were other things in use; and if you look carefully at the Lauderdale declaration in this case, he says almost all the insulation was asbestos, but not all of it because there were other materials that were used.
- JUDGE: They must be using something else today.
- RON: Oh yeah. There are And there are other things that could be used back then and at times they had to use because asbestos was a rare commodity and they didn't have enough of it at times and had to use other things in place of it when they ran out. One point I want to make clear to the Court here is that the rule that the Court of Appeals announced here puts Griscom Russell, the manufacturer of this evaporator, in a worse position than a seller of asbestos insulation who did not manufacture it because Mr. Russell is outside the chain of distribution. We don't have a contract with the manufacturer of the asbestos insulation. We don't have any warranty rights – any way to pass this liability back up the chain to the appropriate place where it should reside, which is the manufacturer of the dangerous product. So the rule that the Court of Appeals has really got an anomaly here – it stands product liability on its head in terms of public policy; it is placing the cost of these injuries on the wrong place where it will do

little good. The duty to warn rests with other manufacturers. The increased expense that the evaporator manufacturer would be put to to study all the various forms of insulation that could have been used on this evaporator to determine whether they are dangerous and how to use them would have to be passed onto the consumer and it's just ...

JUDGE *(Interrupting)* I have a little question about the “duty to warn” discussion generally. I note in your footnote in your brief – I think it's page 14 – it talks about ... since 1958 the Navy knew this stuff was dangerous and, in fact, you cite there “Evidence of record in the Bratton case shows the Navy was well aware of the health hazards associated with asbestos” and in 1958 published their warning to people like the plaintiffs here. “Asbestos dust is injurious if inhaled. Wear improved dust respirator.” Citing CP 281. So, the Navy is controlling this, knows that, tells the plaintiffs they've got to go and put in ... they could have chosen another ... something other than asbestos, it seems to me like ...

RON And it was the Navy's choice.

JUDGE: The primary responsibility here is then in the Navy and perhaps that was your answer to the threshold question by the Chief. Well, isn't the Navy responsible this time? The answer is somewhere, but that's not part of this case. Is that ... I'm answering my own question.

RON: Yes.

JUDGE: But it seems like everyone knew and the “everyone” was the Navy in this case that made him use this product, use it presumably with an aspirator or, if not,

RON: *(Interrupting)* There is lots of evidence in the Bratton record to that effect, your Honor. That wasn't a theory that we raised in the Simonetta case, but in the Bratton

JUDGE: *(Interrupting)* From the brief. I was reading from that brief.

RON: I know it is. I know. We cited to the evidence in this companion case, Bratton, that ... for background information to the Court.

JUDGE: I asked the wrong guy the question. Perhaps I should “Warning! Warning!”

RON: *(Laughing)* OK. I think I'm out of my time. I've reserved five minutes.

JUDGE: Thank you, Mr. Gardner. Mr. Bergman?

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BERGMAN: May it please the Court. I'm Matthew Bergman. I represent Joe and Jean Simonetta. The rule of law articulated by Counsel would be a rule under which a manufacturer could knowingly produce a product that was dangerous when used as intended and avoid any responsibility to the public or the users of that product simply by outsourcing the dangerous component of that product to somebody else. Your Honor, the issue in this case is whether or not Mr. Bratton was injured as a result of the use of the evaporators. In this Court, both applying strict liability and negligence law, has adopted a

JUDGE: (Interrupting) There was nothing defective about the evaporator, was there?

BERGMAN: There was nothing defective about the evaporator, but this Court has held in "Little" that a non-defective product can be deemed effective for failure to provide warnings of dangers arising out of the use of the product.

JUDGE: But, I'm reading from Judge Applework(sp?) said, and I quote, "Asbestos was not the required material." Even by the Court of Appeals' analysis, they didn't even have to use asbestos.

BERGMAN: They didn't have to use asbestos

JUDGE: something later could have been used.

BERGMAN: Yes, that is correct. But the record in this case – the record in this case is that Griscom Russell knew, or should have known, that asbestos was going to be used on its product, that Griscom Russell knew that asbestos was dangerous, that the product required insulation in order to function as intended and, most importantly on this record, the product could not undergo regular and intended maintenance without disturbing the insulation. I would direct the Court's attention to Excerpt of Record 745 which are the instructions that Griscom Russell provided for people like Joe Simonetta on how to use their product. And on pages 781-784 the exact work that Mr. Simonetta performed on the evaporator, - the work that caused him to break into the asbestos, to be exposed to asbestos, to inhale the asbestos - was work that was circumscribed in the manual that Griscom Russell put forward.

JUDGE: But I warned you about that.

BERGMAN: OK.

JUDGE: Cutting off that causal chain, it seems to me, is the fact the Navy knew what we know now that asbestos was bad and in order to cut off that exposure part, required these

respirators. I presume that if they did it today, they'd have a whole suit. There would be no exposure to asbestos if they did it the right way.

BERGMAN: We would hope so, your Honor, but I think your question portends to my answer, which is you used the term "the causal chain." The duty to warn under Washington law is a non-delegable duty that a manufacturer owes to the users of the product. Now, as we're well aware, simply establishing a duty does not get us to home plate. We nevertheless have to show a breach of duty and causation; and in the case of *Hoagland v. Raymark*, Division I held that the issue of Navy negligence or employer negligence does not have any portend in the context of duty, but may

JUDGE: Are you saying there will be a double duty to warn? You're not disputing that the plaintiff got this notice from the Navy. The Navy told him this was a

BERGMAN: In this case the Navy did not tell him that. And the record before this case is silent on the issue of Navy. But the issue of Navy negligence or negligence of other parties ... - *(whispered voice – "this exposure") (Bergman laughing) "I hope not. I think they cleaned it out of this building."*) that goes to the issue of cause. And it is argued in many of these that the issue of Navy negligence or third party negligence may go into the issue of superseding intervening cause. But under Washington law, it is clear that there is a non-delegable duty to warn. And what's clear is that the exposure that Mr. Simonetta sustained was not only anticipated or foreseeable, but was inherent to and necessary to the regular maintenance of the product. There was no

JUDGE *(Female voice)* Counsel, how do you distinguish the situation here from, say, the tire cases – where the manufacturer, for example, the Goodyear case, knew that the tires would be dangerous when in conjunction with certain types of rims knew that was likely – that it's tires would be used with those rims – and yet courts have found no responsibility on the part of the tire manufacturer, simply because their product can be used with rims that were perhaps dangerous and their product was compatible with that. We know that you can't drive a car without tires.

BERGMAN; Of course, your Honor, and the way I would distinguish those cases is to say foreseeability is a necessary element of the duty analysis, but certainly not the threshold analysis. The way I would distinguish those cases is to say that based on the record before this court, in this case, it is evident that the company – not only did they know, but, more importantly, there was no way that the Griscom Russell evaporator could operate as intended without insulation, (No. 1) and (No. 2) there was no way that that evaporator could undergo regular and anticipated and scheduled maintenance without disturbing the insulation. So, therefore, unlike the tire case where it was more of a

fortuity, in this case, the necessary and anticipated use of that product involved tearing into insulation.

JUDGE: I don't understand the difference. I mean, if you can't drive a car without tires and Goodyear knows that there are certain rims that are dangerous and yet their tires they know they are going to be used on those cars, and they're going to be replaced when they, you know, wear out – I guess I'm not

BERGMAN: Well, I believe, you know, this Court has consistently followed Restatement 388 in the Little case and in the Bame case. In those cases, this Court has held repeatedly that a manufacturer has a duty to warn of dangers arising out of the use of the product. And the difference, I think, you know, and what's urged upon you, your Honor, is a very restrictive, and I would submit respectfully, artificial definition on what causes the injury. In your Teagle case, this Court was very clear that the Vitron O-rings which were one of the causes of the injury – those Vitron O-rings were not supplied by the manufacturer of the flow meter; they were supplied by a third party.

JUDGE: But didn't, in that case, the rings actually rendered the product itself dangerous. It was the rings that made it wasn't just the rings that were defective, it was the use of the rings and the rings then rendered the main product defective.

BERGMAN: And, your Honor

JUDGE: But we don't have that here, do we? That the pipes and so on, the gadgets that are involved here didn't become dangerous as a result of the asbestos. I mean, it's never a dangerous product. The asbestos remains the danger. Is that ...?

BERGMAN: Well, but, there's It's like a horse and carriage. You can't have one without the other. So I believe this is very similar to the Teagle case.

JUDGE: Except that in Teagle, again, the product that was produced in Teagle became dangerous itself. When did these pipes and various gadgets become dangerous?

BERGMAN: Because there was no way you could use the evaporator. And if you look at the manual, there's no way you could perform the work that Griscom Russell itself mandated. You couldn't use the product without tearing into the asbestos. Just like you could not use the evaporator – excuse me – use the flow meter in Teagle without the O-rings. They are bound together because you could not

JUDGE: But the flow meter becomes dangerous. And that's where I'm having a little glitch in my

BERGMAN: I understand. But if you look at the cases that this Court has held on duty to warn. This Court has not applied this restrictive and I believe artificial idea of what caused the injury. And in the Bane v. Honda case, you know, the injury was caused by an automobile; and in the Teagle case, what actually caused the injury? Was it the ammonia? Was it the broken glass? Was it the O-ring? No. What this Court held in Teagle, is what rendered the product dangerous was its use, which is an encompassing and, I believe, an exercise in legal realism that you look at how the product is used in the real world. You don't

JUDGE: Counsel, back to the question I asked your opponent as to expansiveness of the term "use." This example just sort of popped into my head and it's probably a silly example. But if you contracted to supply the nuts and bolts that connected the pipes knowing, or perhaps should have known, that the nuts and bolts were going to be covered with asbestos, would the nuts and bolts be under the broad characterization of "use" then – to hold the nut and bolt manufacturer subject to liability?

BERGMAN: I would say, absolutely not, for two reasons: One, there's nothing about a nut and bolt that requires insulation to work as intended. Yes, it's foreseeable. I concede to you it's foreseeable. But this Court has been very clear that foreseeability is not the threshold issue on duty. So, in answer to your question, your Honor, the first reason is that nuts and bolts can be used around insulation; some aren't. But there's nothing inherent about a nut and bolt, or for that matter a pipe, which would be kind of carrying your analogy on a little bit, - there's nothing inherent about a nut and bolt or a pipe that requires insulation to operate as intended. Secondly, nuts and bolts and pipes are inert objects; they don't require regular maintenance. They don't require that you tear into asbestos insulation or insulation in order to do this work. So I think that that is a clear and bright line distinction that this Court can draw and essentially that the Court of Appeals drew.

JUDGE: *(Female voice)* But you don't have to have the asbestos insulation, do you? I mean, at this time, they didn't have to.

BERGMAN: You didn't have to. But the record in this case is first of all that they did have insulation and that Griscom Russell knew that they had asbestos insulation and No. 3, the record on this case – and Judge Armstrong specifically found they know or should have known that it would have been insulated with asbestos – and the Lauderdale submission in the case further establishes that they knew that asbestos was hazardous. So, yes, you are absolutely correct, your Honor. You did not need to have it. But they knew that they would have it. Remember, the alternative is a rule of law – kind of a bright conference of judicial immunity on a company under which they can know that their product is

dangerous and when used as intended – when used as intended – and nevertheless have no responsibility to warn of uses arising out of that. And so, I would respectfully that the duty to warn arises out of the duty of ordinary care. This Court has held that ordinary care requires a manufacturer to warn of duties arising out of the use of its product; and based on this record, and concededly, there are many other records that could be presented to this Court under which summary judgment would be appropriate; but based on this record, it is very clear that the use of the product involved exposure to insulation. And if we allow the Court of Appeals decision to be overturned, we are essentially saying that a manufacturer who is in the best position to ensure the safety of the individuals using the product, that manufacturer has no liability. When Joe Simonetta wanted to know “How do I safely use this evaporator?” – what did he reach for? Did he reach for an insulations manual? Or did he reach for the Griscom Russell manual? And so he is within the scope of individuals that are entitled to protection under 388 and 402A. He is an intended user. And there may very well be cases brought before you, your Honor, and subsequent cases where somebody was a captain up in the wheelhouse, or was playing cards in the boiler room. And in those cases it may very well be that it is not foreseeable and that he is not an intended user and he’s not entitled to protection. But in this case ...

JUDGE: *(Female voice)* Counsel?

BERGMAN: Yes.

JUDGE: Counsel, when does the duty to warn arise?

BERGMAN: The duty to warn arises when a – well – under a strict liability theory, under 402A, the duty to warn arises based on a danger associated with the product. That’s what 402A says and under 388, the duty to warn arises when a manufacturer knows, or should know, of a danger arising out of the use of the product.

JUDGE: So, in this case, when would it arise – since there was the option for insulation that did not have asbestos? At what point would the manufacturer know, or have reason to know, that the Navy was going to use asbestos insulation and then how would they go about warning?

BERGMAN: Well, OK, based on this record, we know that there’s been a finding that they knew or should have known that asbestos would be warned. And the best place to put a warning is right here in the manual when they say when you open the machine up, wear a mask, wet the asbestos down, take some reasonable precautions. I think that that, you know, which would cost a tenth of a cent in ink, would have provided people like

Joe Simonetta with a fair chance to avoid the risk that they undertook. The duty to warn arises when a manufacturer knew or should have known of a hazard arising out of the use of its product. In this case, I think, based on the record we have before us, it is eminently clear that they knew or should have known that asbestos would be used on the product and that there was no way that you could follow their own manual. You couldn't do this! It would be impossibility. It would be like, you know, erasing a blackboard without creating dust, or something like that. There's no way you could follow their manual whatsoever if you didn't break into the insulation that they knew would be on the product. And so, in that situation, I think the duty is triggered. There may

JUDGE: *(Female voice)* Is that part of the instruction, that you have to cut through the insulation?

BERGMAN: No. No, what the instructions says – and I direct the Court's attention to pages 780- 784 of the Excerpt of Record on Appeal. And what that record does is talk about the exact – you could take that directions and you could take Mr. Simonetta's deposition side-by-side and it's the exact work that Joe Simonetta did. And there was absolutely no way, you know, it's like opening up a Christmas present without taking the wrapping off. There was no way that you could open up the evaporator to do the work that Griscom Russell foresaw, that Griscom Russell instructed people to do, without tearing out that insulation. Now that, in and of itself, might not be enough. The first element has to be present as well, that insulation was required for it work as intended (not just a fortuity that it was put on) and also, in the record that we have here, they knew that it would be asbestos and they knew that it was hazardous. So, you are correct, they don't specifically say ..

JUDGE: Is it part of the record that that Griscom Russell knew in 1941 that asbestos was dangerous?

BERGMAN: The statement by ... in 1941? No. The statement that Mr. Lauderdale indicated in his declaration was that at the time that Mr. Simonetta did his work. In the late fifties, it was knowable. But there is, under Washington law in the Lockwood case, a manufacturer has a continuing duty to warn when it knows or should know that its product is dangerous.

JUDGE: And Simonetta was doing the work in

BERGMAN: 1958, aboard the U.S.S. Shaflee.

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JUDGE: Seventeen years after they sold this product, they should have

BERGMAN: We see this all the time. We see recalls all the time. You know, a “Notice to User.” And, again, your Honor, this may have to do with the adequacy of the warning and a jury may very well determine that if they make some efforts, that that’s something. But in this case they did nothing. They didn’t try, they didn’t send a notice to the Navy, they didn’t update their manuals. Nothing was done; and under Washington law, there’s a continuing duty to warn.

JUDGE: *(Female voice)* The continuing duty is because the manufacturer presumably continues to manufacture and would be in a position to be doing experiments and be doing the reading that’s necessary to know how its product is going to affect commerce. I guess I’m a little hard pressed to understand why somebody who doesn’t produce this insulation has a duty to keep on top of whatever insulation manufacturers have to stay on top of in order to protect the public with their products.

BERGMAN: Well, under Lockwood, this Court has said that a manufacturer is held to the knowledge and duty of an expert. And if I

JUDGE: *(Female voice)* A manufacturer who manufactures the product. But here the product that caused the injury was the asbestos, right?

BERGMAN: I disagree with you, your Honor. The product that caused the injury was the evaporator because Mr. Simonetta got cancer by working with an evaporator doing work that Griscom Russell said – told him to do on the evaporator – and there was no way he could do that without working on the evaporator. So what caused the injury was that Mr. Simonetta was not provided with a warning to use that product safely. And Mr. Gardner even conceded that Mr. Simonetta was a user of the product. So, this is an artificial distinction that is drawn only in this context. In the Hassan v. Coleman-Lannard case, this Court didn’t say, “well it was the gas that caused the injury, not the Coleman stove.” It allowed the case – or it approved of the fact that the case went to the jury. Similarly, in the Teagle case, it was the ammonia that caused the injury – the actual instrument of harm was the ammonia. Or, in the Bame, it’s an automobile.

JUDGE: *(Female voice)* Or wasn’t it in the Teagle case – it was the fact that the ammonia disrupted the ability of the flow meter to act in the way it was designed to act. So, actually the flow meter caused the accident.

BERGMAN: Except that the reason that it failed was because the Vitron O-rings that the manufacturer knew were going to be used and failed to warn, broke down under the

ammonia. So the same way that Griscom Russell knew or should have known that asbestos would be used in association with its product. My point to you, your Honor, is that this Court has never applied this formal list and I think untenable idea that in order to confer a duty to warn, the actual instrument of harm needs to be produced by the manufacturer. Because, if the Court were to adopt that rule of law, I could make a product and it could be dangerous when used as intended. I could say that in order to be used as intended, my product needs a widget. But I'm not going to manufacture the widget. I'm just going to manufacture the product and I'm going to put it into commerce, and I'm going to know that the inclusion of the widget renders it dangerous, but I have no liability and I have no duty to warn because I'm going to outsource that to some other entity. And as we look to products around, you know, that are being imported into this country without any adequacy of safety, I think that this would be a very disturbing rule of law and would create a situation where products would not be safe for users as intended.

JUDGE: If the manufacturer knew that there widgets and there were widgets; some widgets that were safe and some that weren't – would the manufacturer have the responsibility to give a warning then?

BERGMAN: I think it would depend, your Honor.

JUDGE: What if the widget was up to the buyer of the product?

BERGMAN: I think it would depend. I think in some cases the manufacturer might not. In some cases the manufacturer would. Let me just answer your question a little bit more concretely. If the manufacturer knows that the dangerous widget is required in order for the product to work as intended (which is our record here) I think liability attaches no matter what. I think that in terms of how likely it would be that, you know, on a scale that the dangerous widget or the safe widget would be used, I think that would have to be ultimately a question of fact as to what the likelihood would or foreseeability that the dangerous product would be used.

JUDGE: Thank you, Mr. Bergman.

BERGMAN: Thank you, your Honor.

JUDGE: Mr. Gardner, you have four minutes remaining.

RON: Thank you, your Honor. I want to re-emphasize my earlier argument that in this case, the record does not support the contention that was just made that the dangerous

widget was required. The record shows that there was knowledge that it could be used, that the Navy was using such a widget, but ...

JUDGE: *(Female voice)* But Counselor, wasn't that Teagle? Wasn't the record in Teagle that they knew and recommended these Viewna rings, and not the Vitron rings, but that wasn't sufficient?

RON: Well, because in Teagle the product that the manufacturer sold caused the harm. The product blew up. The flow rater blew up when these other things were used. The evaporator did not fail here. The evaporator did not cause harm to Mr. Simonetta. The evaporator did not cause harm to Mr. Simonetta. The evaporator wasn't changed in any respect

JUDGE: *(Female voice)* Doesn't that collapse the warning claim into the defective design claim? If the warning is If we've said in Little that you can have a product flawlessly designed, you don't need a defective product when we're talking about the warning, does it matter if the ultimate harm is caused by a defect in the product itself as opposed to something associated with the product from an outside source?

RON: Yes. Absolutely, it does, because the public policy – I mean the problem with putting this duty on the evaporator manufacturer is they know nothing about insulation materials. This is a choice by the Navy to use a particular type of asbestos insulation on the evaporator. The evaporator manufacturer knows nothing about that technology. It is not in the best position to warn, contrary to the argument that I heard. This is not a field in which they have any expertise. Moreover, there is no evidence in the record to show that while they knew the Navy used asbestos, that's all we know. We don't know how did they use it? How was the asbestos used to insulate the evaporator? How was it affixed to the evaporator? Does it have to be beaten off with a hammer and saw, as the way Mr. Simonetta described? Or was it going to be fastened with sheet metal screws that could be undone and taken off? We know nothing about that. But that would be very important information for the evaporator manufacturer to know if it's going to have any chance at formulating an effective, helpful warning to the user. In this case it is the Navy that selected how to insulate its evaporator that it purchased from the manufacturer; and I would submit that the Navy would not want the manufacturer telling its sailors how to take off the insulation that the Navy designed to be put on the evaporator. That's something that Navy wants to control. The argument was made that this would be a bad rule because manufacturers could outsource the dangerous component that they know needs to be used with their evaporator. Well, that is not in this case. Those are not the facts here. There could be a case where the manufacturer

of the part or the equipment would be so involved in the ultimate selection of that other part that's put on it that you might want to craft a duty, perhaps a negligence law, probably not a strict liability duty, because the policy of strict liability is to place the cost of the harm with the companies who are profiting from the products that cause the harm.

JUDGE: To use the language of your opponent, if the company knew that the bad widget would be installed on the product making it a dangerous product, would that create a duty to warn?

RON: No, because I think not in and of itself. I think that would satisfy the foreseeability element if after considering all the things you need to consider before imposing a duty – logic, common sense, policy, justice and precedent – but first you have to find some basis for a duty and then the scope of that duty is determined by foreseeability. So you certainly couldn't impose at least a negligence duty without having this element of foreseeability, but it itself is not enough.

JUDGE: What if you buy a car and there is a defect that a wheel would fall off over 50 miles an hour, but the manufacturer doesn't install a starter on the car – the purchaser of the car has to go to Shucks for the starter. How about that? Is there a duty to warn?

RON: On the part of the manufacturer of the car?

JUDGE: Yes.

RON: Because a wheel may fall off on the car, but you can't use the car until you go buy the starter?

JUDGE: Yes.

RON: Oh. Yeah. I think there you've got I'm presuming in your hypothetical the manufacturer has sold this wheel that's going to fall off the car. The problem is not the starter. The problem is the wheel that the manufacturer manufactured or sold as part of its product. So, appropriately so, the duty would rest with the manufacturer of the car. They are in the chain of distribution of a defective part.

JUDGE: If the manufacturer of the car knows that the purchaser of the car asked for the defective wheel on the car or was billed to get the defective wheel for the car, then you'd say there's no duty to warn?

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- RON: With just that fact alone, yes, I would say there is no duty. If there were more facts to show that that manufacturer played some role in causing the purchaser of the car to select that defective type of wheel, you might have a negligence duty. But we don't have any of that kind of evidence in this case.
- JUDGE: *(Female voice)* How about the manufacturer of the starter, should he or she be strictly liable?
- RON: No. I think that's the component part rule and that's a component that apparently is perfectly safe, but gets added to other components that have a defect. And so that component manufacturer would not have a duty to warn, even though, arguably, it arises out of the use of that component – because you can't drive the car without using the starter. So I think that illustrates perfectly our point that this expansive definition of "use" is inappropriate and every single case that is cited in the briefing, - the product that caused the harm was sold by the defendant who was held to have the duty to warn – in every single case!
- JUDGE: Thank you, Mr. Gardner.
- RON: Thank you.
- JUDGE: The Court will be in recess until 2:25.
- BAILIFF: All Rise!