NO. 90282-8

SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 69917-2-I]

MICHAEL FARROW and LIDIA FARROW,

Respondents,

v.

FLOWSERVE US INC.,
solely as successor to EDWARD VALVES, INC.,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Flowserve US Inc., solely as successor to Edward Valves, Inc., ("Edward") asks the Supreme Court to accept review of the decision of the Court of Appeals designated in Part II.

II. COURT OF APPEALS DECISION

Farrow v. Alfa Laval, Inc., et al., __ Wn. App. __, 2014 Wash. App. LEXIS ____ (No. 69917-2-I), filed on March 3, 2014. A copy of the Slip Opinion is Part A to the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals conflict with the Supreme Court's holdings in *Braaten v. Saberhagen Holdings Inc.*, 165 Wn.2d 37 (2008), and *Simonetta v. Viad Corp.*, 165 Wn.2d 341 (2008), because it allows plaintiffs to avoid summary judgment without offering admissible evidence that the defendant placed the injury-causing product into the stream of commerce?

2. Under ER 602, is a witness who admitted that he has never heard of a company competent to testify about whether it sold asbestos-containing replacement parts to the Navy?

3. Under ER 602, is a witness who had no involvement with the Navy's acquisition of replacement parts and who never demonstrated that he had personal knowledge of the Navy's acquisition procedures

competent to testify about the Navy's "standard operating procedure" for acquiring replacement parts?

4. Under ER 804(b)(1), is deposition testimony from a now-deceased witness admissible to show that a defendant supplied asbestos-containing replacement parts to the Navy where the defendant was not a party to the prior lawsuit, did not know about or attend the prior deposition, and where no party at the deposition shared the defendant's motive of showing that the defendant did not supply asbestos-containing replacement parts to the Navy?

IV. STATEMENT OF THE CASE

This is an asbestos-related products liability action brought by Michael and Lidia Farrow against Edward, a manufacturer of metal valves, and approximately fifty other defendants. The claims arise from Mr. Farrow's alleged exposure to asbestos from a wide variety of products incurred during his service in the U.S. Navy and his subsequent employment at the Puget Sound National Shipyard ("PSNS").

The plaintiffs' claims against Edward do not arise from Edward's metal valves. They arise solely from Mr. Farrow's alleged exposure to other manufacturers' asbestos-containing products attached to or installed in those metal valves. The plaintiffs claim that Mr. Farrow was exposed to asbestos from external insulation sometimes attached to Edward's metal

valves, from flange gaskets installed between Edward's metal valves and pipes or other equipment aboard Navy ships, and from stem packing installed inside some of the valves to prevent steam or fluids from leaking. CP 108-111.

Edward never manufactured any of these products. It only manufactured valves. CP 150-151. Edward's corporate representative, James Tucker, also testified that Edward never distributed or sold any external insulation or flange gaskets. CP 76. While stem packing manufactured by others was installed in some Edward valves when they first left Edward's factory, the stem packing was a consumable product that was repeatedly replaced. CP 55. There is no evidence that Mr. Farrow was exposed to original stem packing in any Edward valve. Mr. Farrow testified that he did not know the maintenance history of any of the valves and there was no way for him to know whether any stem packing was original. CP 60, 61.

There is likewise no evidence that Edward supplied any replacement stem packing that the Navy used in valves, pumps, or other pieces of equipment onboard its ships. While Edward offered for sale other manufacturers' replacement stem packing, there is no evidence that the Navy or PSNS ever purchased any from Edward. Mr. Tucker, who has worked at Edward for over forty years, testified that Edward rarely sold

replacement packing because consumers could more cheaply purchase the same stem packing directly from stem packing manufacturers rather than indirectly from Edward. CP 192. He also testified that he was unaware of any replacement packing sales to the Navy or PSNS, CP 193, 197, 198, and that Edward has no records showing any sales to the Navy. CP 76.

Because there was no evidence that Mr. Farrow was exposed to asbestos from an Edward product, Edward moved for summary judgment arguing that under *Braaten v. Saberhagen Holdings Inc.*, 165 Wn.2d 37 (2008) and *Simonetta v. Viad Corp.*, 165 Wn.2d 341 (2008), the plaintiffs could not support a necessary element of their claim. CP 11. The plaintiffs responded with the deposition testimony of a deceased witness, Melvin Wortman, given in a lawsuit that did not involve Edward and that Edward did not know about or attend. CP 86. They argued that his testimony created a triable issue of fact as to whether Edward supplied replacement stem packing to the Navy because he believed that the Navy sometimes purchased replacement parts indirectly from some equipment manufacturers. CP 92. Mr. Wortman said nothing, however, about whether Edward was one of those equipment manufacturers. In fact, Mr. Wortman had never heard of Edward:

> Q: Let me ask you the names of some valves and see if they sound familiar to you okay?
> A: Yes.

* * *

Q: Edward Valves?
A: No.

CP 205.

While Mr. Wortman "believed" it was the Navy's "standard operating procedure" to purchase replacement parts from some equipment manufacturers, CP 483-84, he had no basis for that belief. He had no involvement with the Navy's procurement practices and no way of knowing what the Navy's "standard operating procedure" was for acquiring replacement stem packing. He had no role with the Navy's acquisition of any replacement parts. CP 409. He never ordered any replacement parts, including stem packing. CP 408. And he never saw any purchase orders, invoices, or other documents showing who supplied these parts to the Navy. CP 414.

Mr. Wortman guessed that during the latter part of his career, the Navy purchased "approximately fifty percent of the replacement parts" used at PSNS from various equipment manufacturers. CP 411. He never said whether Edward supplied anything to the Navy, and he admitted that his estimate came only from the "top of his head." CP 411. Mr. Wortman based his belief on his observations at PSNS of stem packing in packaging that he associated with various equipment manufacturers. CP 222. His testimony adds no support to the plaintiff's claims against Edward,

however, because he had not heard of Edward and therefore could not associate any packaging with it. CP 205.

Even though Mr. Wortman did not say a single word about Edward and his testimony revealed that he knew nothing about the Navy's acquisition protocols, the plaintiffs argued that a jury could "infer" that Mr. Farrow was exposed to asbestos supplied by Edward. Edward objected to the admission of Mr. Wortman's testimony on numerous grounds. He lacked personal knowledge to support his testimony as required by ER 602. His testimony was inadmissible hearsay because it was given in a different case where Edward was not even a party. Edward also argued that if it was admitted, Mr. Wortman's testimony did not show that Mr. Farrow was exposed to asbestos from Edward. CP 226-37.

The trial court initially overruled Edward's objections and denied its motion for summary judgment. CP 363-364.

A few months later, several other defendants filed their own motions for summary judgment making nearly identical arguments to those previously made by Edward. CP 365, 900, 987. Each argued that it was entitled to summary judgment because there was no evidence that Mr. Farrow was exposed to asbestos from their products. The plaintiffs responded to all these motions in exactly the same way, citing to Mr. Wortman's testimony and arguing that it allowed a jury to infer that Mr.

Farrow may have been exposed to asbestos-containing replacement parts supplied by any of them. CP 561-64.

Confronted with these additional motions, the trial court revisited whether Mr. Wortman's testimony should be admitted. Just as Edward had argued months before, the moving defendants all argued both that Mr. Wortman lacked personal knowledge of whether the Navy obtained replacement parts from them and that his testimony was inadmissible hearsay. CP 1979-1998. Some defendants also argued that his testimony should be barred because the plaintiffs did not comply with the King County Consolidated Pretrial Style Order's requirements for notifying other litigants of a deposition that may be used in future asbestos-related lawsuits. CP 1907. After considering the question again, the trial court changed its ruling and held that Mr. Wortman's testimony could not be offered against any party who did not attend his deposition. CP 592-93.

Because the trial court changed its ruling regarding the admissibility of Mr. Wortman's testimony, Edward renewed its motion for summary judgment asking for the same relief given to the other defendants. CP 569. The court granted Edward's renewed motion. CP 641-642.

The plaintiffs appealed. The Court of Appeals held that Mr. Wortman's testimony could be admitted as an exception to the hearsay

rule under ER 804(b)(1) and reversed the trial court's order. That rule allows prior testimony to be admitted against a party if it or its predecessors in interest had a prior opportunity and motive to fully examine the witness. Even though Edward had no notice of the deposition, the Court of Appeals found that other defendants qualified as Edward's predecessors in interest because they shared Edward's interest of discrediting any testimony that the Navy purchased replacement parts from any equipment manufacturers. Appendix at 14-15. The decision did not address whether those defendants shared Edward's more specific motive of showing that even if some equipment manufacturers supplied replacement stem packing to the Navy, Edward did not.

Edward moved for reconsideration because the Court of Appeals failed to address Edward's separate arguments that Mr. Wortman lacked personal knowledge about Edward and could not know whether Edward sold anything to the Navy as required by ER 602. Appendix at 21-33. After ordering the plaintiffs to answer, the Court of Appeals denied Edward's motion to reconsider on April 15, 2014. Appendix at 43. Edward now petitions this Court for review of the Court of Appeals' opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In 2008, the Washington Supreme Court examined whether proof that *the defendant placed the alleged injury–producing product into the*

stream of commerce is an essential element of an asbestos-related products liability claim. In the companion cases of *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 198 P.3d 493 (2008) (en banc) and *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008) (en banc), this Court answered that question in the affirmative, holding that manufacturers of metal valves and equipment have no duty to warn of hazards arising from asbestos-containing products that they did not manufacture or sell and were attached to their equipment post-sale (i.e., insulation and flange gaskets), *Simonetta*, 165 Wn.2d at 350-63, or installed as replacement parts (i.e., replacement stem packing). *Braaten*, 165 Wn.2d at 383-98.

This appeal asks the Court to examine, for the first time, the corollary question of what minimum evidence a plaintiff must present to establish this element. Specifically, can a plaintiff avoid summary judgment by offering hearsay and speculation from a now-deceased witness who the defendant never had an opportunity to examine and who admitted he had no knowledge of the defendant or its products? If such testimony can defeat a motion for summary judgment, then this Court's holdings in *Braaten* and *Simonetta* are meaningless and afford no protection at all to manufacturers facing serious claims arising from products they did not manufacture or sell.

A. Preserving the protections that *Braaten* and *Simonetta* provide to product manufacturers from liability for products they did not sell and determining what minimum evidence must be presented to show that the defendant sold the alleged injury-producing product are issues of substantial public interest and first impression that should be determined by the Supreme Court.

Before this Court's landmark rulings in *Braaten* and *Simonetta,* and motivated by increased bankruptcy filings by traditional asbestos defendants, the plaintiffs' asbestos bar attempted to dramatically expand well-settled principles of products liability law by asking courts to hold manufacturers liable not only for their own products but also for other products attached to their products post-sale.

This Court was the first high court of any state to consider the issue in the context of asbestos litigation, and it squarely rejected the plaintiffs' proposed expansion of well-established law. In *Braaten* and *Simonetta*, the Court held that manufacturers of valves and other equipment have no duty to warn about the hazards of asbestos-containing insulation, flange gaskets, or replacement stem packing that were attached to their equipment post-sale. *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d at 383-398, 198 P.3d 493 (2008) (en banc) and *Simonetta v. Viad Corp.*, 165 Wn.2d at 350-63, 197 P.3d 127 (2008) (en banc). Courts across the country soon followed Washington's lead and likewise held that manufacturers of bare metal equipment have no duty to warn about

products they did not place in the stream of commerce. *See, e.g., Rumery v. Garlock Sealing Techs.*, 2009 Me. Super. LEXIS 73 (Me. Super. Ct. Apr. 24, 2009); *Dombrowski v. Alfa Laval, Inc.*, 2010 WL 4168848 (Mass. Super. Ct. July 1, 2010); *Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797, 801 (S.D.N.Y.2011); *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012); *Cabasug v. Crane Company,* 2013 WL 6212151 (D. Hawaii Nov. 26, 2013); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 2014 WL 1093678 (E.D. La. Mar. 14, 2014). These courts recognized that imposing liability upon a product manufacture for somebody else's product would force that manufacturer to become the involuntary insurer of another's product. As explained in *Braaten* and *Simonetta*, the public policies underlying product liability law do not justify shifting the costs of accidental injury onto these parties. A seller

> by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidentally injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Simonetta, 165 Wn.2d 341, 363 n. 8 (citing *Restatement (Second) of Torts § 401A* cmt. c). These policies do not justify forcing manufacturers to become experts about or insurers of others' products. *Id.; Braaten*, 165 Wn.2d at 385-86. While consumers are entitled to protection from unsafe products, they have no right to demand that the cost of that protection be shifted to anyone other than those who placed the products into commerce.

B. The decision of the Court of Appeals is in conflict with this Court's holdings in *Braaten* and *Simonetta* because it allows plaintiffs to avoid summary judgment without evidence that the defendant placed the injury-causing product into the stream of commerce.

While their efforts to change the law failed, the plaintiffs' bar remained highly motivated to find new ways to extend liability for injuries caused by gaskets and stem packing to companies that never manufactured those products. This became especially true after several of the companies that manufactured those parts and supplied them to the Navy filed for bankruptcy. *See, e.g., In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bank. W.D.N.C. 2014). Therefore, they changed their story and began arguing that it was actually the metal equipment manufacturers—and not the stem packing manufacturers—who supplied asbestos-containing replacement parts to the Navy. The problem with their new argument is that it has never been supported by evidence.

Instead, plaintiffs offer the testimony of a deceased witness, Melvin Wortman, as a magic bullet to oppose any equipment manufacturer's motion for summary judgment motion. *See, e.g.*, *Farrow v. Alfa Laval, Inc., et al.*, __ Wn. App. __, 2014 Wash. App. LEXIS ____ (No. 69917-2-I), Appendix at 15; *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052 (2011); *Cabasug v. Crane Co.*, No. 12-313, 2013 WL 62151, *16 (D. Hawai'i Nov. 26, 2013). They rely on Mr. Wortman's testimony to oppose not only those motions brought by equipment manufacturers that he remembered but also those he did not know. They rely on this same testimony to oppose motions in cases in Washington and elsewhere. *Id.* While courts outside of Washington have recognized that Mr. Wortman's testimony cannot defeat a motion for summary judgment, *Cabasug v. Crane Co.*, No. 12-313, 2013 WL 62151, *16 (D. Hawaii Nov. 26, 2013), the Washington Court of Appeals has twice relied on his testimony to reverse trial courts' orders granting summary judgment to equipment manufacturers under *Braaten* and *Simonetta*'s holdings. *Farrow v. Alfa Laval, Inc., et al.*, __ Wn. App. __, 2014 Wash. App. LEXIS ____ (No. 69917-2-I), Appendix at 15; *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052 (2011).

If *Braaten* and *Simonetta*'s holdings are to have any meaning, Mr. Wortman's testimony cannot serve as a permanent and universal bar to

any equipment manufacturer's motion for summary judgment. His testimony should not be admissible in any case unless it is based on his personal knowledge as required by ER 602 and qualifies for admission under ER 804(b)(1). Even it were admitted, it does not support the plaintiffs' contention that Edward supplied replacement parts to the Navy.

1. Mr. Wortman's testimony is inadmissible under ER 602 because he has no personal knowledge of Edward or the Navy's acquisition methods.

Under ER 602, a necessary prerequisite to the introduction of any lay witness testimony is evidence establishing that the witness has personal knowledge of the matter in question. ER 602; *Carlton v. Black*, 153 Wn.2d 152, 166, 102 P.3d 796 (2004). ("A witness may testify only to events within his or her personal knowledge, and affidavits submitted during summary judgment proceedings must be based on the affiant's personal knowledge.") It is the burden of the party offering the testimony to make this showing. *State v. Le Fever*, 102 Wn.2d 777, 690 P.2d 574 (1973) ("The burden of laying a foundation that a witness had an adequate opportunity to observe the facts with which he testifies is on the proponent.")

The plaintiffs cannot show that Mr. Wortman knew who supplied the Navy with any replacement stem packing or, critically, whether Edward did so. While Mr. Wortman said that "it was the Navy's standard

operating procedure to procure the gaskets and packing from the equipment manufacturers via the Navy supply system," CP 600-601, the record shows that Mr. Wortman had no personal knowledge of that system. *See Baldwin v. Silver*, 165 Wn. App. 463, 471, 269 P.3d 284 (2011) (holding that trial court may not consider conclusory statements of fact not shown to be based on the witness's personal knowledge).

Mr. Wortman testified that whenever replacement parts were needed in the Navy and at PSNS, they were ordered from the Navy Supply Department. CP 417. That department, in turn, was responsible for buying the parts in the marketplace. CP 408. The responsibility lay with persons who worked on the "business side" of the Navy Supply Department. CP 408. Mr. Wortman never worked on the "business side" of the Navy Supply Department and never had any responsibility for the acquisition of materials. CP 408, 453. He never ordered replacement parts from vendors, and he had nothing to do with the purchases of these parts. CP 222. He never reviewed any invoices or purchase orders that identified the supplier of any gaskets or packing sold to the Navy. CP 414. The only time he worked in the Navy Supply Department was during World War II when he sorted valves. Even then, he was not involved at all with ordering or purchasing any materials, which he described as a responsibility of the "business side" of the department. CP 214. In fact, he was never involved

with the "business side" of any shipyard work, and worked exclusively on what he called the "production side." CP 214-215. His estimate that 50 percent of replacement parts came from equipment manufacturers was based on his "experience," CP 411-414, and "the upper part of his head," CP 411, but he could not offer any facts about how the Navy bought replacement packing. Nor could he identify anybody else who knew about these supposed Navy policies. CP 411-415.

Saying testimony is based on experience without describing that experience or showing how the witness gained personal knowledge of the subject matter does not satisfy ER 602's requirements. ER 602. Because Mr. Wortman's own testimony establishes that he had no way of knowing who supplied replacement packing to the Navy or PSNS, his testimony cannot be admitted under ER 602.

Even if the plaintiffs could show that Mr. Wortman had firsthand knowledge of the Navy buying some replacement packing from some equipment manufacturers, this would not be enough to overcome Edward's motion for summary judgment under *Braaten* and *Simonetta.* They must show that Edward, specifically, supplied asbestos-containing replacement parts to the Navy and Mr. Farrow was exposed to those parts. *Braaten*, 165 Wn.2d at 396, 198 P.3d 493 ("the plaintiff must identify the particular manufacturer of the product that caused the injury"). Mr.

Wortman admitted that had never heard of Edward. CP 205. It follows that he cannot possibly know whether Edward sold gaskets, packing, or anything else to the Navy. *See e.g., Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (holding that where witness could not recall meeting with Environmental Protection Agency, he was incompetent under ER 602 to testify as to whether the agency notified him of presence of PCB during that meeting).

2. Mr. Wortman's testimony is inadmissible under ER 804(b)(1) because it is hearsay and no one at his deposition shared Edward's motive of showing that Mr. Farrow was not exposed to asbestos from an Edward product.

There is no dispute that Mr. Wortman's testimony is hearsay. It was taken in another lawsuit in which Edward was not a party and Edward did not know about or attend. Because Mr. Wortman is now deceased, Edward will never have the opportunity to find out what, if anything, he knows about whether Edward supplied replacement parts to the Navy.

The Court of Appeals found that Mr. Wortman's testimony was nevertheless admissible under ER 804(b)(1), which allows prior testimony to be admitted as an exception to the hearsay rule if the party against whom it is offered or its predecessors in interest had an opportunity and motive to fully develop the witness's testimony. *See Acord v. Pettit*, 174 Wn. App. 95, __ P.3d __, 2013 WL 992126, at *4 (2013) (finding that

predecessor in interest must have had the opportunity and like motive to develop the testimony of the witness as to same material facts as present party). The Court of Appeals found that other equipment manufacturers at the deposition qualified as Edward's predecessors in interest because they shared its motive of discrediting Mr. Wortman's testimony that the Navy purchased replacement parts from some equipment manufacturers. The Court of Appeals failed to recognize, however, that the critical question at Mr. Wortman's deposition was not whether the Navy purchased asbestos-containing replacement parts from any equipment manufacturer, but whether it purchased such parts from Edward.

Nobody who attended Mr. Wortman's deposition was motivated to show that Edward did not supply replacement parts to the Navy. In fact, the other defendants, each hoping to spread liability to as many parties as possible, had a motive to show that Edward did, in fact, sell replacement parts to the Navy. Counsel for one of those defendants, Crane Co., even asked Mr. Wortman whether he was familiar with Edward in order to implicate Edward in the case. CP 205. This motive is directly the opposite of Edward's desire to exculpate itself. For this reason, Mr. Wortman's testimony cannot qualify for admission under ER 804(b)(1). *See New England Mut. Life Ins. v. Anderson*, 888 F.2d 646, 652 (10th Cir. 1989) (test not met where prior defendant's counsel "was simply not

disposed to protect [the current party's] interests in his examination of the witness as he sought to protect his client); *Rich v. Kaiser Gypsum Co., Inc.*, 103 So. 3d 903, 910 (Fl. Dist. Ct. App. 2012) ("an entirely different product in a products liability case is the type of distinction that would preclude similar motive of witness examination").

3. Mr. Wortman's testimony does not support an inference that Mr. Farrow was exposed to asbestos that Edward placed in the stream of commerce.

Even if Mr. Wortman's testimony were admissible, it does not show that Mr. Farrow was exposed to asbestos from any product that Edward placed in the stream of commerce. Mr. Wortman does not know Edward. CP 205. At best, his testimony stands for no more than the proposition that the Navy purchased some replacement parts from some equipment manufacturers. CP 1213. It says absolutely nothing about whether the Navy purchased any from Edward or whether Mr. Farrow was exposed to asbestos from Edward's parts. The plaintiffs cannot avoid summary judgment by inviting the jury to guess about an essential element of their claim. *See White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (en banc) ("[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved fact issues remain.")

C. Unless the Court of Appeals' decision is reversed, the speculative testimony of a now-deceased witness will serve as a universal and permanent bar to any equipment manufacturer's motion for summary judgment.

The plaintiffs' asbestos bar is trying to use Mr. Wortman's testimony as a universal and permanent bar against any manufacturer's motion for summary judgment in any asbestos-related lawsuit with Navy exposure. Indeed, they have already offered Mr. Wortman's testimony for precisely that purpose in several cases in Washington and elsewhere. *See, e.g.*, *Farrow v. Alfa Laval, Inc., et al.*, __ Wn. App. __, 2014 Wash. App. LEXIS ____ (No. 69917-2-I), Appendix at 4; *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052 (2011); *Cabasug v. Crane Co.*, No. 12-313, 2013 WL 62151, *16 (D. Hawaii Nov. 26, 2013). To preserve the protections guaranteed by *Braaten* and *Simonetta*, the Court of Appeals' decision must be reversed.

VI. CONCLUSION

For the foregoing reasons, this Court should grant review, reverse the Court of Appeals, and affirm the trial court's order granting summary judgment in favor of Edward.

RESPECTFULLY SUBMITTED this 14th day of May, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Randy Aliment, WSBA #11440, Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 14th day of May, 2014, I caused a true and correct copy of the foregoing document, Petition for Review, to be delivered in the manner indicated below to the following counsel of record:

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☐ Express Mail
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☑ E-mail

DATED this 14th day of May, 2014, at Seattle, Washington.

Dena S. Levitin, Legal Assistant

NO. _____
SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 69917-2-I]

MICHAEL FARROW and LIDIA FARROW,

Respondents,

v.

FLOWSERVE US INC.,
solely as successor to EDWARD VALVES, INC.,

Petitioner.

APPENDIX TO PETITION FOR REVIEW

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 14th day of May, 2014, I caused a true and correct copy of the "Appendix to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 14th day of May, 2014, at Seattle, Washington.

Dena S. Levitin, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL FARROW and LIDIA FARROW, Appellants, v. ALFA LAVAL, INC. (sued individually and as successor-in-interest to THE DELAVAL SEPARATOR COMPANY and SHARPLES CORPORATION); ANCHOR/DARLING VALVE COMPANY; AURORA PUMP COMPANY; BEAIRD COMPANY; BUFFALO PUMPS, INC. (sued individually and as successor-in-interest to BUFFALO FORGE COMPANY); BW/IP INTERNATIONAL, INC. (sued individually and as successor-in-interest to BYRON JACKSON PUMP COMPANY); CAMERON INTERNATIONAL CORPORATION f/k/a COOPER CAMERON CORPORATION (sued individually and as successor-in-interest to COOPER-BESSEMER CORPORATION); CARRIER CORPORATION; CLA-VAL CO.; CLEAVER-BROOKS, INC. f/k/a AQUA-CHEM, INC. d/b/a CLEAVER-BROOKS DIVISION (sued individually and as successor-in-interest to DAVIS ENGINEERING COMPANY); COLTEC INDUSTRIES, INC. (sued individually and as successor-in-interest to	)	No. 69917-2-I DIVISION ONE PUBLISHED IN PART OPINION

FAIRBANKS MORSE ENGINE);)
CRANE CO. (sued individually and as)
successor-in-interest to COCHRANE)
CORPORATION and CHAPMAN)
VALVE CO.); CRANE)
ENVIRONMENTAL, INC. (sued)
individually and as successor-in-interest)
to COCHRANE CORPORATION);)
CROSBY VALVE, INC.; EATON)
HYDRAULICS, INC. (sued individually)
and as successor-in-interest to)
VICKERS INC.); ELLIOTT)
TURBOMACHINERY COMPANY a/k/a)
ELLIOTT COMPANY; E.J. BARTELLS)
SETTLEMENT TRUST; FAIRBANKS)
MORSE PUMP CORPORATION; FMC)
CORPORATION (sued individually and)
as successor-in-interest to PEERLESS)
PUMP COMPANY); FRYER-)
KNOWLES, INC.; FRYER-KNOWLES,)
INC., a Washington corporation;)
GARLOCK SEALING)
TECHNOLOGIES, L.L.C. (sued)
individually and as successor-in-)
interest to GARLOCK, INC.); GENERAL)
MOTORS CORPORATION (sued)
individually and as successor-in-interest)
to HARRISON THERMAL SYSTEM and)
HARRISON RADIATOR); GOULDS)
PUMPS, INC.; HARDIE-TYNES, L.L.C.)
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MANUFACTURING COMPANY);)
HARDIE-TYNES MANUFACTURING)
COMPANY; HOKE INCORPORATED;)
HOPEMAN BROTHERS, INC.;)
HOPEMAN BROTHERS MARINE)
INTERIORS, L.L.C. a/k/a HOPEMAN)
BROTHERS, INC.; IMO INDUSTRIES,)
INC. (sued individually and as)
successor-in-interest to DELAVAL)
TURBINE, INC. and C.H. WHEELER);)
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interest to BELL & GOSSETT,)
KENNEDY VALVE MANUFACTURING)

CO., KENNEDY VALVE, INC. and KENNEDY VALVE CO); INVENSYS SYSTEMS, INC. (sued individually and as successor-in-interest to EDWARD VALVE & MANUFACTURING); J.T. THORPE & SON, INC.; JOHN CRANE, INC.; LESLIE CONTROLS, INC.; M. SLAYEN AND ASSOCIATES, INC.; MCWANE INC. (sued individually and as successor-in-interest to KENNEDY VALVE MANUFACTURING COMPANY, KENNEDY VALVE INC. and KENNEDY VALVE COMPANY); METALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PLANT INSULATION COMPANY; RAPID-AMERICAN CORPORATION (sued as successor-in-interest to PHILIP CAREY MANUFACTURING CORPORATION); SB DECKING, INC. f/k/a SELBY BATTERSBY & CO.; SEPCO CORPORATION; STERLING FLUID SYSTEMS, INC. f/k/a PEERLESS PUMPS CO; SYD CARPENTER, MARINE CONTRACTOR, INC.; THOMAS DEE ENGINEERING CO., INC.; TRIPLE A MACHINE SHOP, INC.; TYCO FLOW CONTROL, INC. (sued individually and as successor-in-interest to THE LUNKENHEIMER COMPANY, and HANCOCK VALVES); WARREN PUMPS, L.L.C. (sued individually and successor-in-interest to QUIMBY PUMP COMPANY); WEIR VALVES & CONTROLS USA, INC. f/k/a ATWOOD & MORRILL; THE WILLIAM POWELL COMPANY; YARWAY CORPORATION; and DOES 1-450 INCLUSIVE,

Defendants,

FLOWSERVE US INC. (sued individually and as successor-in-interest to DURCO INTERNATIONAL,

BYRON JACKSON PUMP COMPANY, ALDRICH and EDWARD VALVE & MANUFACTURING),

Respondents.

FILED: March 3, 2014

DWYER, J. — Michael Farrow died in 2008 as a result of contracting mesothelioma. Prior to his death, he and his wife, Lidia Farrow, filed a lawsuit against a number of defendants, including Flowserve US Inc., who they sued individually and as successor-in-interest to Edward Valves, Inc. (EVI). The Farrows alleged that Michael had contracted mesothelioma as a result of being exposed to asbestos-containing products while working at the Puget Sound Naval Shipyard (PSNS) over the span of two decades. Melvin Wortman, a superintendent at the PSNS during part of Farrow's tenure, was deposed in a different lawsuit, and subsequently died before Farrow's case could be heard. Initially, the trial court allowed Farrow to offer Wortman's testimony, over EVI's hearsay objection, pursuant to the "predecessor in interest" exception of ER 804(b)(1).[1] However, after excluding Wortman's testimony as to several other defendants, the trial court reversed course and excluded his testimony in this case, leading to its grant of Flowserve's motion for summary judgment. The trial court erred in making the latter rulings. Accordingly, we reverse and remand for further proceedings.

[1] **(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804.

I

Farrow worked at the PSNS as a pipefitter from 1953 to 1962 and in the design shop from 1963 to 1974. As part of his work in both positions, he spent a significant amount of time aboard ships installing and repairing valves, removing and replacing packing material around the valves' stems, and removing and replacing flange gaskets. One brand of valve that Farrow worked on and around "many times" was the Edward valve. Farrow removed insulation pads from Edward valves, removed flange gaskets from and fabricated flange gaskets on Edward valves, and removed packing from Edward valves and replaced the old packing with new packing. When Farrow or others nearby removed insulation from Edward valves, the air would be dusty and Farrow would breathe that dust. When Farrow or others nearby would remove gaskets from Edward valves, the air would be dusty and Farrow would breathe that dust. When Farrow or others nearby would fabricate gaskets on Edward valves, the air would be dusty and Farrow would breathe that dust. When Farrow or others nearby would remove old packing from Edward valves, it would very often be dusty and Farrow would breathe that dust. When Farrow or others nearby would replace old packing with new packing, it would be dusty and Farrow would breathe that dust.

Melvin Wortman was a superintendent of machinists at the PSNS from approximately 1968 until 1976. Although Wortman is now deceased, he is significant in this case because of deposition testimony he gave in a previous King County Superior Court case: Nelson v. Buffalo Pumps, Inc., No. 08-2-17324-1 SEA. Wortman testified that because the Navy and the PSNS were

focused on increasing their quality control during the time when he was superintendent, "there was a great increase in going to the original vendor for repair parts." He testified that in later years approximately 50 percent of the replacement parts obtained for the PSNS were procured from original manufacturers.[2] Wortman's deposition in the Nelson case was taken over a three-day period, during which time questions were asked by attorneys for defendants Crane Co., Buffalo Pumps, Ingersol Rand, and Warren Pumps, and by attorneys for the plaintiffs. Buffalo Pumps manufactured pumps, whereas Crane Co., manufactured valves, and both of these defendants' products were on ships repaired at the PSNS. See Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 37, 151 P.3d 1010 (2007), rev'd 165 Wn.2d 373, 394-95, 198 P.3d 493 (2008).

Flowserve's CR 30(b)(6)[3] witness in this case, James Tucker, testified that EVI began manufacturing valves containing asbestos in the 1930s; that EVI manufactured valves that contained asbestos at the time the valves left the factory; that the asbestos contained in Edward valves at the time they left the factory for installation included both packing and gaskets; and, that Edward valves were designed to contain asbestos until 1985. He also testified that EVI supplied replacement asbestos gaskets with new valves that already incorporated an original asbestos gasket; that EVI also separately sold replacement asbestos gaskets, including sheet gasket material; and, that EVI sold replacement asbestos packing separately as well. Although Tucker

[2] However, Wortman testified that he was not familiar with Edward valves.
[3] This rule allows a corporation to designate a witness to testify on its behalf.

admitted that EVI sold original and replacement packing, he testified that EVI never manufactured, distributed, or sold any external insulation or flange gaskets. Additionally, Tucker testified that he was unaware of any sales of replacement packing to the Navy and that, in preparing to testify as a CR 30(b)(6) witness, he had found no company records indicating otherwise.

Flowserve moved for summary judgment on June 28, 2012. During oral argument, and in connection with the issue of the admissibility of Wortman's testimony, Flowserve's counsel, Randy Aliment—who was not present at Wortman's deposition[4]—admitted that he would not have asked Wortman additional questions had he been present. The trial court, relying in part on attorney Aliment's assertion that he would not have asked Wortman additional questions had he been present, ruled that Wortman's deposition testimony was admissible pursuant to ER 804(b)(1) and denied Flowserve's motion for summary judgment. The court explained its ruling on the admissibility of Wortman's testimony, in pertinent part, as follows:

> It is telling, indeed, that had Mr. Aliment been there or a representative from EVI, that they would not have asked any other questions because, let's face it, once you have testimony that, "No, Edwards Valve is not familiar with me, to me," I don't know any attorney who would ask any further questions at that point. In fact, it would probably be malpractice to ask any further questions at that point.
>
> . . .
>
> So if someone had been there, they would not have asked any other questions other than those questions which were asked by other counsel, and those other counsel had similar interests, not identical interests, but similar interests to EVI's counsel. And – and to the extent their interests were identical, those questions were asked. I can't imagine any additional benefit to EVI had counsel been present than existed – than occurred during the deposition.

[4] Neither Flowserve nor EVI was a party to the case in which Wortman was deposed.

Several months later, in support of their separate motions for summary judgment against Farrow, a number of other defendants filed motions to exclude or strike Wortman's testimony. Several defendants, including Alfa Laval, opposed the admission of Wortman's deposition based upon ER 804(b)(1) and the King County Asbestos Order (KCAO), an order applying to all asbestos cases filed in the King County Superior Court. With respect to ER 804(b)(1), Alfa Laval contended that the deposition could be admitted only "when a party or its predecessor [in] interest has had an opportunity to cross-examine the witness, at the original deposition or subsequently." With respect to the KCAO, Alfa Laval contended that because the plaintiffs failed to follow the procedure dictated by the KCAO—requiring parties to give notice to parties against whom the deposition may subsequently be used—the plaintiffs were precluded from seeking admission of the deposition testimony, notwithstanding the provisions of ER 804(b)(1). The KCAO states, in pertinent part:

> 5.6 Depositions, generally
>
> . . .
>
> d. Pre-Deposition Statement In order to minimize time, travel expenses, and surprise to counsel or parties who may not desire to attend all depositions, there shall be attached to each notice of deposition a statement containing the following information (except depositions of individual plaintiffs).
>
> . . .
>
> (7) That any party intending to use a deposition as a "Style" deposition, or to use it in certain other trials, shall serve the pre-deposition statement described in this Section (d) as well as a notice of "Style" deposition and/or a notice of deposition for said other trials, upon counsel for all parties who are intended to be bound thereby.

On December 13, 2012, the trial court issued a written order granting Alfa Laval's

motion to strike Wortman's deposition testimony "as to those moving/joining defendants who were not notified of and who did [not] have counsel at the Wortman . . . deposition."

On December 26, 2012, Flowserve filed a second summary judgment motion, asserting that the "law of the case" doctrine and judicial economy compelled a grant of summary judgment in its favor. During the second summary judgment hearing, attorney Aliment stated that although—as he indicated during the first summary judgment hearing—he would not have asked additional product identification questions of Wortman, "there were a number of questions that could have/should have been asked by competent counsel about the replacement part issue, which became central to his testimony." The trial court then reversed its prior ruling, excluded Wortman's deposition testimony, and granted Flowserve's motion for summary judgment. The court provided the following explanation for its rulings:

> Now, Mr. Aliment I think was a little bit caught off guard I think when the Court last July asked him some questions relating to questions he would have asked at the Wortman deposition, and – but I do take his statements at face value, and he was really addressing whether – as we have discussed it, whether the – whether he would have gilded the lily in terms of the Wortman deposition had he been present or had been given notice. And I think that's absolutely true.
>
> . . .
>
> But Mr. Aliment's renewed motion for summary judgment is not only as he's renewed it, but he's basically saying, "Give me summary judgment for the same reason you gave Ms. Dinsdale,"[5] and the basis for Ms. Dinsdale's motion was, number one, defects in the case law and, number two, defects in the style order local rules.
>
> So, long story short, the motion to strike the Wortman

[5] Counsel for a different defendant.

> deposition is granted. That – that the motion being granted, there are no genuine issues of material fact remaining. It is the Plaintiff's burden to prove – demonstrate some admissible evidence establishing causation. Even though all inferences are in favor of the non-moving party, the – the Plaintiff must still come forward with some admissible evidence establishing the elements of their cause of action, and they have failed to do so in this particular case now that the Wortman deposition has been stricken. Therefore, I will grant both motions by Mr. Aliment.

Farrow appeals from the trial court's grant of Flowserve's motion to strike Wortman's deposition testimony and from its grant of summary judgment in favor of Flowserve.

II

Farrow contends that the trial court erred by excluding Wortman's deposition testimony as inadmissible hearsay. This is so, Farrow asserts, because certain defendants in the case in which Wortman was deposed were predecessors in interest to Flowserve within the meaning ascribed by ER 804(b)(1). We agree.

"We review de novo a trial court ruling on a motion to strike evidence made in conjunction with a summary judgment motion." Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 85, 272 P.3d 865, review denied, 174 Wn.2d 1016 (2012); accord Parks v. Fink, 173 Wn. App. 366, 375, 293 P.3d 1275 ("We review the admissibility of evidence in summary judgment proceedings de novo." (citing Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998))), review denied, 177 Wn.2d 1025 (2013).

Division Three recently examined how the "predecessor in interest" exception of ER 804(b)(1)[6] has been interpreted by federal courts and by Washington state courts, concluding that both have interpreted the exception broadly, focusing on opportunity and similar motive.

> Indeed, the courts have dispensed with any technical and narrow definition of the term and instead examine whether the party against whom the evidence was previously offered had an opportunity and similar motive to develop and challenge the testimony by cross-examination. *So a previous party having like motive to develop the testimony by cross-examination about the same matter is a predecessor in interest to the present party for purposes of this rule.*

Acord v. Pettit, 174 Wn. App. 95, 105, 302 P.3d 1265 (emphasis added), review denied, 178 Wn.2d 1005 (2013). Although the Acord court's assessment of federal court interpretations was accurate, its review of Washington court interpretations was not: specifically, it was mistaken that Washington courts had earlier held that a previous party with a like motive to develop testimony by cross-examination about the same matter was considered a predecessor in interest to the present party. In support of its erroneous conclusion, the Acord court cited two Washington cases, neither of which supported the proposition for which it was cited. The first of these cases did not explain who may constitute a predecessor in interest. Instead, it merely reiterated that which ER 804(b)(1) already states: "the predecessor in interest exception requires the predecessor to have the opportunity to examine the witness." Allen v. Asbestos Corp., 138 Wn. App. 564, 578-79, 157 P.3d 406 (2007). The second decision also did not determine who it was that might constitute a predecessor in interest. Instead, it

[6] ER 804(b)(1) is identical to Fed. R. Evid. 804(b)(1). State v. DeSantiago, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003).

addressed whether, assuming that the testimony at issue was already admissible pursuant to ER 804(b)(1), the rule allowed only the proponent of the testimony at the former proceeding to introduce the testimony at the subsequent proceeding. State v. Whisler, 61 Wn. App 126, 135, 810 P.2d 540 (1991).

Nevertheless, the Acord court correctly concluded that federal courts have held that a previous party with a like motive and an opportunity to develop testimony by cross-examination about the same matter is a predecessor in interest to the current party. Indeed, the Third, Fourth, Sixth, Eighth, and Tenth circuits all look to whether the former party had a similar motive and an opportunity to develop testimony through cross-examination in determining whether the former party is a predecessor in interest to the latter within the meaning of the rule. See Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276, 282 (4th Cir. 1993); O'Banion v. Owens-Corning Fiberglas Corp., 968 F.2d 1011, 1015 (10th Cir. 1992); Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455, 1461 (8th Cir. 1986); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1294-95 (6th Cir. 1983); Lloyd v. Am. Exp. Lines, Inc., 580 F.2d 1179, 1187 (3d Cir. 1978).[7]

"Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules." Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989); accord State v. DeSantiago, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003). Moreover, our Supreme

[7] Many of the federal cases interpreting the language of ER 804(b)(1) are asbestos cases. Although it is not surprising that the admissibility of deposition testimony from since-deceased witnesses is a recurring issue in asbestos cases, given that asbestos-related diseases have a long latency period between exposure and manifestation of the disease, it does underscore the critical nature of the evidentiary question presented in this appeal.

Court, in the absence of prior state interpretation, has been willing to adopt federal interpretations of evidentiary rules where the rules are identical. State v. Land, 121 Wn.2d 494, 498-500, 851 P.2d 678 (1993); State v. Terrovona, 105 Wn.2d 632, 639-41, 716 P.2d 295 (1986); accord Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 748, 87 P.3d 774 (2004). Extensive, uniform federal authority interpreting ER 804(b)(1) exists without conflicting precedent in any federal or Washington appellate court. Recognizing that this persuasive authority is extensive and uniform and exists without conflicting precedent in Washington, we adhere to the federal court interpretation of the predecessor in interest language of ER 804(b)(1).

When opposing admission of evidence pursuant to ER 804(b)(1), counsel must "explain as clearly as possible . . . why the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness." Dykes v. Raymark Indus., Inc., 801 F.2d 810, 817 (6th Cir. 1986); O'Banion, 968 F.2d at 1015 n.4. In United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993), the court was not persuaded "by the Government's contention that the absence of similar motive is conclusively demonstrated by the availability at the grand jury of some cross-examination opportunities that were forgone." DiNapoli, 8 F.3d at 914. In explaining why it was not persuaded, the court noted that, "[i]n virtually all subsequent proceedings, examiners will be able to suggest lines of questioning that were not pursued at a prior proceeding." DiNapoli, 8 F.3d at 914; cf. Dykes, 801 F.2d at 817 ("[W]e would have been much more impressed with the

defense's objections had they articulated before the trial court in the first instance, and later before us, precisely what lines of questioning they would have pursued.").

During the second summary judgment hearing, attorney Aliment asserted that he would not have asked additional product identification questions, but that competent counsel should have asked additional questions about Wortman's testimony related to obtaining replacement parts from the original manufacturers. On appeal, Flowserve asserts that the defendants in Nelson did not have a similar motive to Flowserve because (1) none of the other equipment manufacturers had a motive to discredit Wortman as a witness whose testimony might show that EVI in particular supplied replacement parts to the Navy and, (2) in fact, each manufacturer hoped to spread liability to as many parties as possible. These assertions are unavailing.

All of the manufacturers were interested in discrediting Wortman's testimony, which supported Farrow's position that if he worked with or around valves at PSNS that were being repaired or replaced during a period of years in the 1960s and 1970s, he would likely have been exposed to new and replacement asbestos-containing insulation, gaskets, and packing supplied to the PSNS by the manufacturers during that time period. Furthermore, although each manufacturer may have hoped to spread liability to as many parties as possible if their respective defenses failed, that fact would not extinguish the shared motive of discrediting Wortman's testimony so that no manufacturer would be held liable. Accordingly, we conclude that certain defendants present at Wortman's

deposition had an opportunity and a similar motive to Flowserve to develop Wortman's deposition testimony. Therefore, Wortman's deposition testimony does not constitute hearsay pursuant to the predecessor in interest exception of ER 804(b)(1). To the extent that it was excluded as hearsay, the trial court erred.[8]

The remainder of this opinion has no precedential value. It will, therefore, be filed for public record in accordance with the rules governing unpublished opinions.

III

Farrow next contends that the trial court erred by granting summary judgment in favor of Flowserve. This is so, Farrow asserts, because Wortman's deposition testimony, considered along with Tucker's and Farrow's testimony, creates genuine issues of material fact. We agree.

"This court's review of orders granting or denying summary judgment is de novo, and we engage in the same inquiry as the trial court." Rafel Law Grp. PLLC v. Defoor, 176 Wn. App. 210, 218, 308 P.3d 767 (2013), review denied,

[8] During oral argument, Flowserve's counsel stated that Farrow's purported failure to comply with the KCAO did not present an independent ground for affirmance and that Flowserve was not asserting that it did. To the extent that Flowserve's briefing could be construed to contradict counsel's statement, we rely on counsel's concession that Flowserve does not view the question of Farrow's compliance with the KCAO as an independent ground for affirmance. However, even absent counsel's concession, it is clear that a violation of the KCAO would not present an independent ground for affirmance. This is so because the trial court failed to consider the factors required by Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997), on the record before excluding Wortman's testimony, as is mandated by Jones v. City of Seattle, __ Wn.2d __, 314 P.3d 380, 391 (2013).

Moreover, even if the trial court had considered the Burnet factors, there is no evidence in the record that Farrow *willfully* violated the KCAO. Thus, the trial court could not have properly excluded the testimony. Jones disavowed the usual presumption that violating a rule constitutes a willful act, holding instead that willfulness must be demonstrated. Jones, 314 P.3d at 391. In holding that merely violating a rule does not equate to a willful violation, Jones was unequivocal: "Something more [than a violation of a discovery order] is needed." Jones, 314 P.3d at 391.

316 P.3d 495 (2014). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

> Asbestos plaintiffs in Washington may establish exposure to a defendant's product through direct or circumstantial evidence. [Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 571, 157 P.3d 406 (2007).] A plaintiff need not offer a detailed recollection of facts surrounding the exposure to the asbestos-containing product. [Morgan v. Aurora Pump Co., 159 Wn. App. 724, 729, 248 P.3d 1052 (2011).] "'[I]nstead of personally identifying the manufacturers of asbestos products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace.'" [Morgan, 159 Wn. App. at 729 (alteration in original) (quoting Lockwood v. AC & S, Inc., 109 Wn.2d 235, 246-47, 744 P.2d 605 (1987))].

Montaney v. J-M Mfg. Co., __ Wn. App. __, 314 P.3d 1144, 1145-46 (2013). However, the plaintiff must produce evidence that he or she was harmed by exposure to asbestos material that the defendant placed in the stream of commerce. Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 383-93, 198 P.3d 493 (2008); Simonetta v. Viad Corp., 165 Wn.2d 341, 350-63, 197 P.3d 127 (2008). Thus, summary judgment is not appropriate where evidence demonstrates "that [the plaintiff] worked around materials that created asbestos dust aboard ships, that certain brands of asbestos-containing products were commonly used on ships repaired at [the plaintiff's] workplace, and the defendant distributed those specific brands of products to the plaintiff's employer." Montaney, 314 P.3d at 1146 (citing Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 315-18, 14 P.3d 789 (2000)). We review asbestos cases with an awareness of the proof problems inherent in cases of this type.

> "Because of the long latency period of asbestosis, the plaintiff's ability to recall specific brands by the time he brings an action will be seriously impaired. A plaintiff who did not work directly with the asbestos products would have further difficulties in personally identifying the manufacturers of such products. The problems of identification are even greater when the plaintiff has been exposed at more than one job site and to more than one manufacturer's product."

Montaney, 314 P.3d at 1146 (quoting Lockwood, 109 Wn.2d at 246-47).

As in Montaney, Farrow presented evidence that (1) he worked on and around Edward valves that created asbestos dust, which he breathed during the several decades in which he worked as a pipefitter and in the design shop at the PSNS; (2) he worked on or around Edward valves many times; and (3) EVI placed into the stream of commerce asbestos-containing products used at the PSNS. Although Tucker, EVI's CR 30(b)(6) witness, testified that EVI never manufactured, distributed, or sold any external insulation or flange gaskets, he admitted that EVI sold original and replacement packing. This evidence that EVI sold original and replacement packing—coupled with Farrow's testimony that he removed and replaced packing from Edward valves, and Wortman's testimony that the majority of replacement parts at the PSNS in later years were procured from the original manufacturer—could allow a trier of fact to reasonably infer that EVI placed asbestos-containing materials into the stream of commerce, which resulted in Farrow working on or around those products. This evidence is sufficient to survive summary judgment. Accordingly, the trial court erred by ruling to the contrary.

Reversed and remanded.

We concur:

NO. 66917-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

FLOWSERVE US INC.,
solely as successor to EDWARD VALVES, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 08-2-0717704 SEA)

RESPONDENT'S MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTY

The Respondent, Flowserve US Inc., solely as successor to Edward Valves, Inc. ("Edward") is the moving party.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4, Edward moves the Court to reconsider its opinion issued on March 3, 2014 (the "Opinion").

III. GROUNDS FOR RELIEF SOUGHT

Edward seeks reconsideration of the Opinion because the Opinion overlooks and misapprehends several important matters of fact and points of law. RAP 12.4(c). The Opinion fails to address whether the plaintiffs established that Mr. Melvin Wortman had personal knowledge of the Navy's practices for acquiring replacement gaskets and packing as required by ER 602 and ER 701 before finding that his testimony could be admitted against Edward. The Opinion also fails to properly apply the Washington Supreme Court's holdings in *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 198 P.3d 493 (2008), *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008).

A. The Opinion does not address whether Mr. Wortman had personal knowledge of the Navy's practices for acquiring replacement packing.

The plaintiffs allege that Michael Farrow developed mesothelioma caused by exposure to asbestos fibers from a wide variety of products used at the Puget Sound National Shipyard ("PSNS"). They argue that Mr. Farrow worked around Edward's metal valves and was exposed to asbestos-containing stem packing material used inside some of those valves. Edward, however, never manufactured stem packing, and the plaintiffs presented no evidence to support their argument that Edward distributed or sold packing to the Navy or PSNS. Edward therefore moved for summary judgment on grounds that the plaintiffs lacked evidence to support a necessary element of their claim—namely, that Mr. Farrow was exposed to asbestos-containing material Edward placed in the stream of commerce. *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 198 P.3d 493 (2008), *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008).

In opposition to Edward's motion, the plaintiffs offered the deposition testimony of a now-deceased witness, Melvin Wortman, given in a different case that Edward did not know about or attend. Mr. Wortman testified that he believed that the Navy sometimes purchased

gaskets and stem packing from equipment manufacturers rather than directly from the gasket and stem packing manufacturers. CP 411. He also testified that he had never heard of Edward Valves. CP 205. Edward objected to the admission of Mr. Wortman's testimony because (1) the testimony was inadmissible hearsay given in a prior lawsuit that did not involve Edward and Edward was given no opportunity to examine Mr. Wortman before his death; and (2) the plaintiffs failed to establish that Mr. Wortman had personal knowledge to support his assertions. CP 231-233. The trial court excluded Mr. Wortman's testimony and granted Edward's motion for summary judgment. The plaintiffs then appealed.

A central issue on appeal is whether the trial court's decision to exclude Mr. Wortman's testimony was correct. In the Opinion, this Court found that Mr. Wortman's testimony qualified for admission as an exception to the hearsay rule under ER 804(b)(1). The Opinion does not address, however, Edward's separate argument that Mr. Wortman lacked personal knowledge to support his testimony as required by ER 602. Brief of Respondent, p. 22. Because the record shows that Mr. Wortman did not know how the Navy acquired the gaskets and stem packing used at PSNS and had never heard of Edward, Edward requests that this Court reconsider the original Opinion.

Under ER 602, a necessary prerequisite to the introduction of any lay witness testimony is evidence establishing that the witness has personal knowledge of the matter in question. ER 602; *Carlton v. Black*, 153 Wn.2d 152, 166, 102 P.3d 796 (2004) ("A witness may testify only to events within his or her personal knowledge, and affidavits submitted during summary judgment proceedings must be based on the affiant's personal knowledge.") It is the burden of the party offering the testimony to make this showing. *State v. Le Fever*, 102 Wn.2d 777, 690 P.2d 574 (1973) ("The burden of laying a foundation that a witness had an adequate opportunity to observe the facts with which he testifies is on the proponent.").

> RULE ER 602: LACK OF PERSONAL KNOWLEDGE
>
> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 602.

Mr. Wortman was never qualified as an expert witness under ER 702 and was never qualified to provide opinion testimony. Therefore, under ER 602, his testimony must be limited to his personal knowledge. ER 602; ER 702. *See In re Asbestos Prods. Liab. Litig. No.*, MDL Docket

No. 875, 2014 U.S. Dist. LEXIS 32516, *12-13 (E.D. Pa. March 13, 2014) (holding that testimony of naval expert witness, Captain William Lowell, that original equipment manufacturer more likely than not supplied asbestos containing replacement packing and gaskets was impermissively speculative under federal law).

ER 602's personal knowledge requirement is separate and distinct from the rules governing hearsay and must be satisfied no matter whether a hearsay objection is upheld or overruled. *See Farmer v. Davis*, 161 Wn. App. 420, 431-32, 250 P.3d 138 (2011) (holding that witness testimony could be excluded on alternative grounds as hearsay, improper opinion testimony, or speculation); *State v. Karpenski*, 94 Wn. App. 80, 110, 971 P.2d 553 (1999) ("Even though a hearsay statement satisfies the criteria set forth on the face of a hearsay exemption or exception, it cannot be reliable if, at the time it was made, the declarant spoke or wrote without personal knowledge.") Indeed, none of the authorities cited in the original Opinion or the parties' appellate briefs suggests that testimony is exempt from ER 602's personal knowledge requirement just because the Court found that the testimony is not barred as hearsay.

The plaintiffs presented no evidence that Mr. Wortman knew how the Navy acquired gaskets and stem packing or, critically, whether it purchased any of them from Edward. While Mr. Wortman said that "it was

the Navy's standard operating procedure to procure the gaskets and packing from the equipment manufacturers via the Navy supply system," CP 600-601, the plaintiffs provided no evidence to explain how Mr. Wortman acquired personal knowledge to support this assertion. *See Baldwin v. Silver*, 165 Wn. App. 463, 471, 269 P.3d 284 (2011) (holding that trial court may not consider conclusory statements of fact that are not shown to be based on the witness's personal knowledge). At best, the record shows only that Mr. Wortman knows he obtained gaskets and packing from the Navy Supply Department. There is no evidence, however, that Mr. Wortman knows how the Navy Supply Department acquired these products from the marketplace. His testimony as to the source of replacement parts from the marketplace is therefore incompetent on its face. And, of course, Mr. Wortman offered no opinion on this subject with respect to Edward.

A federal court was recently presented with a question similar to that presented here—whether a witness's "experience" in the Navy qualifies him to testify that the Navy purchased replacement gaskets and stem packing from a certain equipment manufacturer either based on the witness's personal knowledge or as an expert witness who was qualified to

offer opinion testimony.[1] *In re Asbestos Prods. Liab. Litig. No.*, MDL Docket No. 875, 2014 U.S. Dist. LEXIS 32516, *12-13 (E.D. Pa. March 13, 2014). In that case, the plaintiff offered a declaration from her expert witness, retired Navy Captain William Lowell, saying that it was "more likely than not" that the plaintiff was exposed to asbestos from replacement gaskets and stem packing that were used in the defendant's evaporating equipment and supplied to the Navy by the defendant. *Id.* at *11-12. He based this testimony on his "experience" in the Navy. *Id.* at *13. The court found that Captain Lowell's opinion, "while based on experience, is yet impermissibly speculative." *Id.* It therefore granted the defendant's motion for summary judgment holding "even when construing the testimony in the light most favorable to Plaintiff, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from original or replacement gaskets, insulation, or packing manufactured or supplied by Defendant such that it was a 'substantial factor' in the development of his illness, because any such finding would be impermissibly conjectural." *Id.* at *13-14. This same logic applies with even greater force when applied to Mr. Wortman's testimony in this case because Mr. Wortman was never disclosed as an expert and the record

[1] While the witness in *In re Asbestos Litigation* was disclosed as an expert witness, Mr. Wortman was never disclosed as an expert witness and therefore was not qualified to offer any opinion testimony. ER 702.

demonstrates that he had no personal knowledge of the Navy's procedures for acquiring these parts.

When he worked as a machinists' superintendent at PSNS, Mr. Wortman testified that he obtained gaskets and stem packing exclusively from the Navy Supply Department. CP 397-398. Personnel in the planning and estimating group were responsible for ordering supplies from the Navy Supply Department and "having never worked there," he did not know where these requests were directed. CP 214.

Q: Sir, I'm trying to figure out how you knew what the production department was doing with regard to purchasing spare parts.

A: Understand, now, the production department did not do that. The planner and estimators, that's a separate department of the shipyard, the planning.

Q: Did you ever work in that department?

A: No.

Q: Was that ever under your supervision?

A: No.

Q: Did you ever read any manuals or documents as to how the planning and estimating department operated?

A: No.

Q: Were you ever physically inside that department at Puget Sound Naval Shipyard?

A: Casual visits.

Q: Do you know who worked in that department?

A: I can't recollect.

CP 409.

He explained that he never worked on the "business side" of Navy Supply Department and never had any responsibility for the acquisition of materials. CP 408.

Q: So you would go to the supply department to get the packing when you wanted to replace packing in a 600 pound angle valve, such as in Exhibit 11?

A: Well, as we've established before, we didn't obtain the parts. We told our shop plannerman that we needed the part, and he generated paperwork to planning and estimating; then planning and estimating would generate paperwork to the supply department.

Q: You never worked in the supply department, correct?

A: I worked there temporarily after World War II, sorting materials that came in from the war.

Q: That's right. But you never had responsibilities for the acquisitions of materials, correct?

A: No.

[Objection to form]

A: No, I did not.

CP 408.

He never ordered replacement parts from vendors, and he had nothing to do with the purchases of these parts. CP 222. He never saw and was unfamiliar with the Navy's Qualified Products List, which identified those products approved for use by the Navy.

> Q: Now, with regard to repair or replacing equipment such as valves, are you familiar at all with what a QPL is, or a qualified products list?
>
> A: No.

CP 406.

And he never reviewed any invoices or purchase orders that identified the supplier of any gaskets or packing sold to the Navy.

> Q: Have you reviewed at any time, even when you were at the Puget Sound Naval Shipyard, any invoices or any purchase orders or any documentation from the government to any manufacturer of any equipment requesting replacement gaskets and packing?
>
> A: No.

CP 414.

The only time Mr. Wortman worked in the Navy Supply Department was during World War II when he sorted valves. Even then, he was not involved at all with ordering or purchasing any materials, which he described as the "business side" of the department's activities. CP 214. In fact, he was never involved with the "business side" of any

shipyard work, and worked exclusively on what he called the "production side." CP 214-215. His beliefs about how the business side acquired gaskets and packing came from his "experience," CP 411-414, and "the upper part of his head," CP 411, but he never explained how he knew where the Navy bought its gaskets and packing. Nor did he identify anybody else who told him about these supposed Navy policies. CP 411-415.

Q: How did you come up with the figure of 50 percent?

A: Again, from observation and experience. And as we got into nuclear work, it reflected into the whole Navy that the quality control became more important, and that's when I came to the conclusion in reviewing that 50 percent would be a pretty good average.

Q: What did you review to come up with that number of 50 percent?

A: The upper part of my head.

Q: You didn't review any documents, correct?

A: No.

Q: Is that correct?

A: No, I did not.

Q: You didn't speak with anybody who was involved with purchasing?

A: No.

Q: You never talked to anybody in the business side at PSNS to make a determination as to whether or not the business side that did the purchasing purchased 50 percent of the replacement parts for equipment from 1967 to 1971 from manufacturers, correct?

A: No, I did not.

Q: Did you ever speak to anyone at the Puget Sound Naval Shipyard, at any time, in the business side of Puget Sound Naval Shipyard to determine whether or not what they were actually ordering totaled 50 percent? . . .

A: I--. . . I don't recollect specifically any such thing, no.

CP 411-412.

Simply saying testimony is based on experience without describing that experience or how the witness gained personal knowledge to support his testimony does not satisfy ER 602's requirements. And because Mr. Wortman's own testimony establishes that he had no way of knowing which manufacturers supplied replacement gaskets and packing to the Navy or PSNS, his testimony cannot be admitted under ER 602 against any company.

Nor can his testimony be recast as lay opinion testimony and admitted under ER 701. ER 701 does not allow lay witnesses to offer opinion testimony when, as here, the witness lacks personal knowledge of facts that would allow him to form such an opinion in the first place.

Ashley v. Hall, 138 Wn.2d 151, 157-59, 978 P.2d 1055 (1999) (finding that trial court abused its discretion in admitting witness's testimony under ER 701 that car accident was unavoidable where record demonstrated that the witness did not have personal knowledge of requisite facts to form such an opinion). Mr. Wortman's testimony established that he had no way of knowing how the Navy Supply Department sourced gaskets and stem packing.

Just as Mr. Wortman lacked personal knowledge of the Navy's general procedures for sourcing gaskets and packing, he also had no knowledge whether Edward, specifically, supplied any parts to the Navy. While he saw stem packing and gaskets at PSNS that he believed came from other equipment manufacturers, CP 216, he never saw any packing from Edward Valves. In fact, he admitted that had never even heard of Edward:

> Q: Let me ask you the name of some valves and see if they sound familiar to you okay?
>
> A: Yes.
>
> * * *
>
> Q: Edward Valves?
>
> A: No.

CP 205. Having never heard of Edward, it follows that Mr. Wortman cannot possibly know whether it sold gaskets, packing, or anything else to the Navy. *See e.g., Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (holding that where witness could not recall meeting with Environmental Protection Agency, he was incompetent under ER 602 to testify as to whether the agency notified him of presence of PCB during that meeting).

Because there is no evidence that Mr. Wortman had personal knowledge whether the Navy procured any gaskets or stem packing from Edward, Edward requests that this Court reconsider its original Opinion and hold that Mr. Wortman's testimony is inadmissible pursuant to ER 602.

B. The Opinion incorrectly applies the Washington Supreme Court's holdings in *Braaten v. Saberhagen Holdings, Inc., Simonetta v. Viad Corp.*

Edward also seeks reconsideration because the Opinion incorrectly applies the Washington Supreme Court's holdings in *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 493, 198 P.3d 493 (2008) and *Simonetta v. Viad Corp.*, 165 Wn.2d 373, 197 P.3d 127 (2008).

As the Court recognized in its Opinion, *Braaten* and *Simonetta* require that "the plaintiff must produce evidence that he or she was harmed by exposure to asbestos material that the defendant placed in the

stream of commerce." Opinion, p. 16 (citing *Braaten v. Saberhagen Holdings,* 165 Wn.2d at 383-93, *Simonetta v. Viad Corp.*, 165 Wn.2d at 350-63). Liability against a metal valve manufacturer cannot be premised on exposure to asbestos dust generated by other products that the valve manufacturer did not place in commerce. Liability against a valve manufacturer therefore cannot be premised on (1) asbestos dust from insulation wrapped around a valve, (2) asbestos dust from gaskets that were affixed to the valve, or (3) asbestos dust from stem packing inside of a metal valve when there is no evidence that the valve manufacturer placed that packing in the stream of commerce.

As support for its holding that the trial court erred in granting summary judgment in favor of Edward Valves, the Opinion cites numerous instances where Mr. Farrow was exposed to asbestos dust from such products with no evidence that Edward placed any of them in the stream of commerce.

On page 5 the Opinion says "[w]hen Mr. Farrow or others nearby removed insulation from Edward Valves, the air would be dusty and Farrow would breathe the dust." Opinion, p. 5. Edward, however, never manufactured, distributed, or sold any insulation. This statement therefore adds no support to any claim against Edward. *Braaten v. Saberhagen*

Holdings, 165 Wn.2d at 383-93, *Simonetta v. Viad Corp.*, 165 Wn.2d at 350-63..

The Opinion also says, "When Mr. Farrow or others nearby would fabricate gaskets on Edward valves, the air would be dusty and Farrow would breathe the dust." Opinion, p. 5. Again, Edward never manufactured, distributed, or sold any flange gaskets or other gaskets that required fabrication. This statement therefore adds no support to any claim against Edward. *Braaten v. Saberhagen Holdings,* 165 Wn.2d at 383-93, *Simonetta v. Viad Corp.*, 165 Wn.2d at 350-63.

Finally, the Opinion says that "[w]hen Mr. Farrow or others nearby would remove old packing from Edward valves, it would very often be dusty and Farrow would breathe that dust" and that "[w]hen Mr. Farrow or others nearby would replace old packing with new packing, it would be dusty and Farrow would breathe that dust." Opinion, p. 5. Mr. Farrow admitted, however, that he did not know whether any of the packing he encountered was supplied by the valve manufacturer:

> Q: On those occasions where you have had to remove packing from a valve, is there any way you can tell whether or not the packing that you removed was the original packing that came with the valve? Can you tell that, or is there any way for you to distinguish the packing that was original form packing that may have been replaced years before?

> A: I don't—I don't think there is any way you can tell if it was original packing or packing that had been put in at some later time by maybe ship's force or some other mechanic.

CP 60. Edward never manufactured packing and there is no evidence that Edward distributed or sold any of the packing that Mr. Farrow encountered. These statements therefore add no support to any claim against Edward. *Braaten v. Saberhagen Holdings,* 165 Wn.2d at 383-93, *Simonetta v. Viad Corp.*, 165 Wn.2d at 350-63.

None of the "dusty" activities that the Opinion ascribes to working with Edward's valves can support a liability finding against Edward. The valves are made of metal—not asbestos. They do not generate any asbestos dust. And the dust generated by other products that Mr. Farrow encountered (i.e., insulation, flange gaskets, stem packing) cannot support a claim against Edward because there is no evidence that Edward placed those products in the stream of commerce.

Because the Opinion fails to recognize the full implication of the *Braaten* and *Simonetta* holdings, the Opinion misapplies the holdings of other cases like *Montaney v. J-M Mfg. Co.*, __ Wn. App. __, 314 P.3d 1144 (2013), *Berry v. Crown Cork & Seal*, 103 Wn. App. 312, 14 P.3d 789 (2000), and *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987). Citing to those cases, the Opinion states Washington law requires

summary judgment be denied where evidence demonstrates "that [the plaintiff] worked around materials that created asbestos dust aboard ships, that certain brands of asbestos-containing products were commonly used on ships repaired at [the plaintiff's] workplace, and the defendant distributed those specific brands of products to the plaintiff's employer." Opinion, p. 16. The Opinion then finds that the plaintiffs satisfied this test by presenting "evidence that (1) [Mr. Farrow] worked on and around Edward valves that created asbestos dust . . . (2) [Mr. Farrow] worked on or around Edward valves many times; and (3) [Edward] placed in the stream of commerce asbestos-containing products used at the PSNS." Opinion, p. 17. Critically, the Opinion does not require any showing that that Mr. Farrow's work with Edward's valves caused him to be exposed to asbestos material that Edward placed into the stream of commerce. Instead, it allows the plaintiffs to avoid summary judgment by showing only that Mr. Farrow worked around Edward's metal valves.

By doing so, the Opinion fails to recognize the full ramifications of the *Braaten* and *Simonetta* decisions. They hold that metal valves themselves do not create asbestos dust and equipment manufacturers cannot be liable for injuries caused by exposure to other products without evidence that they placed those products in the stream of commerce. To overcome a motion for summary judgment after *Braaten* and *Simonetta*,

the plaintiff must affirmatively show he was exposed to asbestos-containing material that the defendant manufactured, distributed, or sold. It is no longer enough to show only that the plaintiff worked with one manufacturer's equipment used with somebody else's asbestos-containing products.

Because there is no evidence Mr. Farrow was exposed to asbestos from any product Edward placed in the stream of commerce, Edward respectfully requests that the Opinion be reconsidered.

IV. CONCLUSION

Because the current Opinion overlooks important matters of fact and points of law, it should be reconsidered.

RESPECTFULLY SUBMITTED this 20th day of March, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Randy Aliment, WSBA #11440
Attorneys for Respondent/Defendant
Flowserve US, Inc., solely as successor
to Edward Valves, Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 20th day of March, 2014, I caused a true and correct copy of the foregoing document, Motion for Reconsideration, to be delivered in the manner indicated below to the following counsel of record:

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SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-mail

DATED this 20th day of March, 2014, at Seattle, Washington.

Dena S. Levitin, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL FARROW and LIDIA FARROW, Appellants, v. ALFA LAVAL, INC. (sued individually and as successor-in-interest to THE DELAVAL SEPARATOR COMPANY and SHARPLES CORPORATION); ANCHOR/DARLING VALVE COMPANY; AURORA PUMP COMPANY; BEAIRD COMPANY; BUFFALO PUMPS, INC. (sued individually and as successor-in-interest to BUFFALO FORGE COMPANY); BW/IP INTERNATIONAL, INC. (sued individually and as successor-in-interest to BYRON JACKSON PUMP COMPANY); CAMERON INTERNATIONAL CORPORATION f/k/a COOPER CAMERON CORPORATION (sued individually and as successor-in-interest to COOPER-BESSEMER CORPORATION); CARRIER CORPORATION; CLA-VAL CO.; CLEAVER-BROOKS, INC. f/k/a AQUA-CHEM, INC. d/b/a CLEAVER-BROOKS DIVISION (sued individually and as successor-in-interest to DAVIS ENGINEERING COMPANY); COLTEC INDUSTRIES, INC. (sued individually and as successor-in-interest to FAIRBANKS MORSE ENGINE); CRANE CO. (sued individually and as	)	No. 69917-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

successor-in-interest to COCHRANE)
CORPORATION and CHAPMAN)
VALVE CO.); CRANE)
ENVIRONMENTAL, INC. (sued)
individually and as successor-in-interest)
to COCHRANE CORPORATION);)
CROSBY VALVE, INC.; EATON)
HYDRAULICS, INC. (sued individually)
and as successor-in-interest to)
VICKERS INC.); ELLIOTT)
TURBOMACHINERY COMPANY a/k/a)
ELLIOTT COMPANY; E.J. BARTELLS)
SETTLEMENT TRUST; FAIRBANKS)
MORSE PUMP CORPORATION; FMC)
CORPORATION (sued individually and)
as successor-in-interest to PEERLESS)
PUMP COMPANY); FRYER-)
KNOWLES, INC.; FRYER-KNOWLES,)
INC., a Washington corporation;)
GARLOCK SEALING)
TECHNOLOGIES, L.L.C. (sued)
individually and as successor-in-)
interest to GARLOCK, INC.); GENERAL)
MOTORS CORPORATION (sued)
individually and as successor-in-interest)
to HARRISON THERMAL SYSTEM and)
HARRISON RADIATOR); GOULDS)
PUMPS, INC.; HARDIE-TYNES, L.L.C.)
(sued individually and as successor-in-)
interest to HARDIE-TYNES)
MANUFACTURING COMPANY);)
HARDIE-TYNES MANUFACTURING)
COMPANY; HOKE INCORPORATED;)
HOPEMAN BROTHERS, INC.;)
HOPEMAN BROTHERS MARINE)
INTERIORS, L.L.C. a/k/a HOPEMAN)
BROTHERS, INC.; IMO INDUSTRIES,)
INC. (sued individually and as)
successor-in-interest to DELAVAL)
TURBINE, INC. and C.H. WHEELER);)
ITT INDUSTRIES, INC. (sued)
individually and as successor-in-)
interest to BELL & GOSSETT,)
KENNEDY VALVE MANUFACTURING)
CO., KENNEDY VALVE, INC. and)
KENNEDY VALVE CO); INVENSYS)

SYSTEMS, INC. (sued individually and as successor-in-interest to EDWARD VALVE & MANUFACTURING); J.T. THORPE & SON, INC.; JOHN CRANE, INC.; LESLIE CONTROLS, INC.; M. SLAYEN AND ASSOCIATES, INC.; MCWANE INC. (sued individually and as successor-in-interest to KENNEDY VALVE MANUFACTURING COMPANY, KENNEDY VALVE INC. and KENNEDY VALVE COMPANY); METALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PLANT INSULATION COMPANY; RAPID-AMERICAN CORPORATION (sued as successor-in-interest to PHILIP CAREY MANUFACTURING CORPORATION); SB DECKING, INC. f/k/a SELBY BATTERSBY & CO.; SEPCO CORPORATION; STERLING FLUID SYSTEMS, INC. f/k/a PEERLESS PUMPS CO; SYD CARPENTER, MARINE CONTRACTOR, INC.; THOMAS DEE ENGINEERING CO., INC.; TRIPLE A MACHINE SHOP, INC.; TYCO FLOW CONTROL, INC. (sued individually and as successor-in-interest to THE LUNKENHEIMER COMPANY, and HANCOCK VALVES); WARREN PUMPS, L.L.C. (sued individually and successor-in-interest to QUIMBY PUMP COMPANY); WEIR VALVES & CONTROLS USA, INC. f/k/a ATWOOD & MORRILL; THE WILLIAM POWELL COMPANY; YARWAY CORPORATION; and DOES 1-450 INCLUSIVE,

Defendants,

FLOWSERVE US INC. (sued individually and as successor-in-interest to DURCO INTERNATIONAL, BYRON JACKSON PUMP COMPANY, ALDRICH and EDWARD VALVE &

MANUFACTURING),)
)
Respondents.)
)

The respondents having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 15th day of April, 2014.

FOR THE COURT: