No. 43941-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY,

Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant-Respondent.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

I. INTRODUCTION

Respondent Saberhagen Holdings ("Saberhagen" or "Tacoma Asbestos") obtained summary judgment on a single ground: that the Kennedys allegedly lacked evidence that Mr. Kennedy was exposed to asbestos supplied or worked on by Tacoma Asbestos. The record demonstrates extensive circumstantial evidence that Mr. Kennedy indeed was exposed to asbestos for which Tacoma Asbestos is responsible. The Kennedys presented a convincing array of circumstantial evidence that Tacoma Asbestos was the exclusive asbestos insulation contractor and supplier to Tacoma Boat when Mr. Kennedy worked at Pier 23 from 1964-68 and suffered exposure to airborne asbestos supplied or worked on by Tacoma Boat. Under the principles enunciated in *Lockwood v. AC&S*, 109 Wn.2d 235, 744 P.2d 605 (1987), and its progeny, plaintiffs' circumstantial evidence is more than sufficient for a jury to reasonably infer that Mr. Kennedy suffered multiple exposures to airborne asbestos from Tacoma Asbestos, and all of Saberhagen's arguments here amount to a debate about disputed evidence.

Recognizing that the Kennedys have presented an exposure case that should be decided by a jury, Saberhagen seizes on two

points. First, it argues that some of the evidence framing the genuine dispute for trial is inadmissible. However, the Superior Court denied Saberhagen's motion to exclude such evidence and Saberhagen did not appeal that ruling. Thus, Saberhagen's effort to obtain additional relief in the form of an evidentiary exclusion order has no place in this appeal. In any event, Saberhagen's arguments about inadmissibility are of no consequence, as the evidence that Saberhagen concedes is admissible more than adequately joins the dispute over "exposure" for trial. Saberhagen's arguments about exclusion also are simply wrong, and the Superior Court did not abuse its discretion in rejecting them.

Second, Saberhagen raises an issue it did not raise in its summary judgment motion – that even if the jury should decide that Mr. Kennedy was exposed to asbestos for which Tacoma Asbestos is responsible, that exposure was insufficient to be a substantial factor in causing his mesothelioma. The Court should reject this new argument both as a procedural matter, because Saberhagen did not raise it in its summary judgment motion, and thus deprived the Kennedys of the opportunity to meet that challenge, and as a substantive matter, because Mr. Kennedy's multiple exposures to Tacoma Asbestos are more than sufficient under the leading cases for a jury to reasonably

infer that airborne asbestos from Tacoma Asbestos was a substantial factor in causing Mr. Kennedy's mesothelioma.

II. REPLY ARGUMENT

A. The Kennedys Are Entitled to Have a Jury Decide, Based on Circumstantial Evidence, That Mr. Kennedy Was Exposed To Asbestos For Which Tacoma Asbestos Is Responsible.

Saberhagen does not contest that Mr. Kennedy suffered exposure to airborne asbestos for a cumulative period of four months during the span of 1964-68, when he worked as a National Guardsman at Pier 23 in Tacoma. CP 206-07. Nor does Saberhagen contest that Tacoma Boat shared Pier 23 with the National Guard during that time, and that for 45-days Tacoma Boat overhauled and conducted asbestos insulation work on the FMS-789 on which Mr. Kennedy worked, and that such asbestos insulation repair (tearing out old insulation) and replacement (applying new asbestos insulation) resulted in airborne asbestos exposure on the FMS-789. CP 239-43. Saberhagen cannot contest that during the 45-day period Mr. Kennedy periodically boarded the FMS-789 and "observ[ed]" the asbestos insulation repair work. CP 408, 238-240, 407.[1] Nor can Saberhagen dispute that Mr.

[1] Saberhagen erroneously claims that Mr. Kennedy testified that he never went into the boiler room of the FMS-789 during the Tacoma Boat

Kennedy obtained from the Tacoma Boat trailer on Pier 23 asbestos bags on three separate occasions, which he personally poured, mixed and applied on vessels the National Guard was servicing at Pier 23. CP 439-44; CP 448-50. Nor does Saberhagen deny that Tacoma Boat overhauled "Victory Ships" at Pier 23 while Mr. Kennedy worked on Pier 23, and that such work involved asbestos repair and replacement. And finally, Saberhagen does not contest that Mr. Kennedy has mesothelioma, as a consequence of his exposure to airborne asbestos while working at Pier 23.

Instead, Saberhagen says that while asbestos supplied and worked on by ***Tacoma Boat*** may have caused Mr. Kennedy's mesothelioma, the Kennedys allegedly have no evidence that ***Tacoma Asbestos*** and asbestos it supplied ever was present on Pier 23, where Mr. Kennedy worked. Saberhagen's assertion ignores the convincing circumstantial case to the contrary that requires a jury to decide that question.

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overhaul of that vessel. Resp. Br. at 19, citing CP 408. When Saberhagen's counsel asked the basis for Mr. Kennedy's knowledge regarding the asbestos repair on the FMS-789 by Tacoma Boat, he responded by testifying "by observing." CP 408 at 116: 17.

1. Mr. Kennedy Was Exposed to Airborne Asbestos From Tacoma Asbestos' Insulation Repair and Replacement Work at Pier 23.

The Kennedys presented extensive uncontradicted testimony that Tacoma Boat refurbished and insulated the FMS-789 at Pier 23 and that it refurbished two Victory Ships at Pier 23, all while Mr. Kennedy worked at Pier 23. CP 239-44, 610-11. The Kennedys also presented circumstantial evidence that Tacoma Asbestos was the exclusive asbestos insulation contractor for Tacoma Boat in the 1960's. Former Tacoma Boat employee Mr. Legas testified that based on his experience, Tacoma Asbestos was the only asbestos insulation contractor that Tacoma Boat used in the 1960's, and he was unaware of Tacoma Boat employees themselves doing any such insulation work during that time. CP 637. Mr. Hansen also testified that in his 37 years as a Tacoma Boat employee Tacoma Asbestos was the only insulation contractor he recalled doing work at Tacoma Boat sites. CP 668. Former Tacoma Asbestos employees corroborated that testimony. Mr. Brands, a former Tacoma Asbestos insulator, testified that Tacoma Asbestos had the exclusive insulation contract for Tacoma Boat in the 1960's. CP 677-678 (emphasis added). And Mr. Anderson, a former Tacoma Asbestos employee, testified that Tacoma

Asbestos was so entrenched with Tacoma Boat that Ted Boscovich, a Tacoma Asbestos employee and the brother of an owner of Tacoma Asbestos, "worked at Tacoma Boat roughly 20 or 25 years" as the on-site Tacoma Asbestos representative. CP 691-92. There is also no question that Tacoma Asbestos used asbestos products for its insulation work until at least 1971. CP 594-95.

All Saberhagen can argue in the face of this evidence is that none of this evidence provides 100% proof that Tacoma Asbestos was the exclusive asbestos insulation contractor for Tacoma Boat in the 1960's. That, of course, is not the standard for circumstantial evidence, and Saberhagen offers *no* evidence to contradict any of these witnesses' testimony. Saberhagen, after all, *is* Tacoma Asbestos. Yet it offers no evidence that it was *not* the exclusive asbestos insulation contractor for Tacoma Boat during the 1960's. Plainly, a jury could reasonably infer from the uncontradicted testimony that Tacoma Asbestos was the exclusive asbestos insulation contractor for Tacoma Boat in the 1960's when Tacoma Boat conducted asbestos insulation repair and replacement at Pier 23.

Saberhagen persists by arguing that the Kennedys "presented no evidence that *Tacoma Asbestos* workers had ever set foot on Pier

23." Resp. Br. at 2. This argument misrepresents the record, erroneously assumes that workers who arrived at Pier 23 on a "Tacoma Boat" bus all were Tacoma Boat employees, and is wrong. The workers who arrived on the Tacoma Boat bus each morning surely were working on a Tacoma Boat job (refurbishing, repairing and replacing insulation on the FMS-789), but they were employed by a host of different Tacoma Boat subcontractors, and the witnesses who testified about the workers who arrived on the bus explained that they did not differentiate between Tacoma Boat employees and subcontractors. For example, Mr. Elmore testified:

> Q: Okay. And how did you know they were Tacoma Boat personnel?
>
> A: Basically they had -- answer it this way: They had a truck that brought them back and forth that had Tacoma Boat on the side of the truck.
>
> . . .
>
> Q: Do you have any recollection whatsoever of personnel other than Tacoma Boat personnel coming and going off that ship during that work?
>
> A: I could not because everybody was a contractor. I don't know where they come from other than Tacoma Boat. That's all I can answer that.

CP 321. Mr. Kennedy testified similarly:

Q: Okay. Did you ever see any workers working on that – on the 789 work that you're talking about by Tacoma Boat, that you understood to be employed by someone other than Tacoma Boat?

A: As far as myself or anybody could recall, there was no distinction between the different workers. I mean, we just assumed it was Tacoma Boat.

CP 408. *See also* CP 361 (Mr. Elmore responded to Saberhagen's counsel who asked him to confirm that the workers insulating at Pier 23 were "Tacoma Boat employees" by correcting with the following statement: "Tacoma Boat people, yes.")

Moreover, Saberhagen's speculation (Resp. Br. at 30-31) unsupported by any record evidence, that perhaps Tacoma Boat, not Tacoma Asbestos, employees conducted the asbestos insulation work on the FMS-789, is contradicted by Mr. Legas' testimony that no Tacoma Boat employees did asbestos insulation work during the time that Tacoma Asbestos was its exclusive subcontractor for asbestos insulation. CP 637. Thus, a jury could reasonably infer that Tacoma Asbestos workers, who had the exclusive contract for insulation work with Tacoma Boat in the 1960's, conducted the asbestos insulation work aboard the FMS-789 on Pier 23 where Mr. Kennedy worked.

2. Mr. Kennedy Was Exposed to Asbestos From Tacoma Asbestos When He Applied Asbestos On Insulation Projects Aboard the FMS-6 and ST-2104.

Saberhagen does not dispute that Mr. Kennedy obtained from Tacoma Boat 3 to 4 bags of asbestos which he then applied by hand in conducting insulation repairs on two National Guard vessels, the FMS-6 and ST-2104. CP 241-42, 288-89, 439-44,446-47.444, 448-50. The Kennedys presented circumstantial evidence that Tacoma Asbestos was the source of those asbestos bags, because it was the sole supplier of asbestos to Tacoma Boat during the time it was Tacoma Boat's exclusive contractor for asbestos insulation work. Mr. Legas testified that the only deliveries of asbestos supplies he ever witnessed at Tacoma Boat sites were by trucks emblazoned with a Tacoma Asbestos nameplate. CP 639. He also testified that Tacoma Asbestos – and not Tacoma Boat employees – did all the asbestos insulation work at Tacoma Boat. CP 637. And Tacoma Asbestos unquestionably was both a supplier and contractor for asbestos insulation. CP 560.

Saberhagen lectures that it is a "non-sequitor" to infer that Tacoma Asbestos, as sole asbestos insulation contractor to Tacoma Boat, also would be the sole asbestos supplier to Tacoma Boat. Not

only did Mr. Legas testify that in his decades of experience Tacoma Asbestos was the only supplier of asbestos to Tacoma Boat, but it also would be eminently rational for a company that had the exclusive contract to conduct asbestos insulation work for Tacoma Boat to supply the asbestos with which it would conduct the work, especially when the company's business includes supplying asbestos.

Undeterred, Saberhagen announces that it is "provably false" that Tacoma Asbestos was the exclusive supplier of asbestos to Tacoma Boat during the 1964-68 time period when Mr. Kennedy worked at Pier 23. Resp. Br. at 23. In support of its bold assertion of provable falsehood, Saberhagen offers just four citations to the record – CP 687, 861, 888 and 897 – each of which is worth examining briefly. CP 687 is testimony by Mr. Anderson, the former Tacoma Asbestos employee, to the effect that Tacoma Asbestos used Johns-Manville asbestos on its jobs – the same brand as one of the bags Mr. Kennedy retrieved from the Tacoma Boat trailer. *See* CP 402. That testimony contributes nothing to disproving that Tacoma Asbestos was the exclusive supplier of asbestos to Tacoma Boat. CP 861 and CP 888 are pages from a phone book that identify the addresses of Tacoma Boat and E. J. Bartells, which obviously does nothing to

disprove that Tacoma Asbestos was the exclusive supplier of asbestos to Tacoma Boat. That leaves only CP 897, one page from the deposition of Ralph Woolstenhulme who testified that "I sold *material* to Tacoma Boat" (emphasis added). The entire four-page transcript excerpt from Mr. Woolstenhulme's deposition placed in the record by Saberhagen contains no identification of Mr. Woolstenhulme's employer – Saberhagen tells us he was an ex-employee of E. J. Bartells, but the transcript provides no such confirmation. The transcript also provides no description of the "material" to which Mr. Woolstenhulme refers, how Tacoma Boat allegedly used it (the witness did not know, see CP 898), when the "material" was sold other than to say sometime between 1948 and 1979, and the witness testified that he had no recollection of materials sold to Tacoma Boat during the time period at issue here – 1964 through 1968 (CP 898). This flimsy record does nothing to undermine, let alone disprove, the strong circumstantial evidence that Tacoma Asbestos was the exclusive contractor *and* supplier of *asbestos* (as opposed to "material") to Tacoma Boat on Pier 23 between 1964 and 1968.

At best, Saberhagen has done no better than join the debate over circumstantial evidence concerning whether Tacoma Asbestos

was the exclusive asbestos supplier to Tacoma Boat from 1964-68. Saberhagen takes umbrage at the fact that the Kennedys have not presented Tacoma Asbestos invoices and receipts for the asbestos it sold to Tacoma Boat. Resp. Br. at 10, 19, 23. But Saberhagen forgets that it is the successor to Tacoma Asbestos and thus was responsible for maintaining Tacoma Asbestos' invoices and receipts. That Tacoma Asbestos long ago destroyed such records, if anything, is a mark against Saberhagen[2], not the Kennedys, and is one of the reasons why the *Lockwood* court embraced circumstantial evidence as a means to prove exposure in asbestos disease cases. The Kennedys have presented a strong circumstantial case that Tacoma Asbestos was the exclusive asbestos insulation contractor and supplier to Tacoma Boat and that Mr. Kennedy suffered multiple exposures to airborne asbestos at Pier 23 for which Tacoma Asbestos bears responsibility.

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[2] Indeed, when a party fails to preserve material evidence it is required to maintain courts often make an "adverse inference" that the evidence would have shown the connection that can't be proven because documents have been destroyed, leaving it to the party that destroyed the documents to rebut the adverse inference. *See, e.g., Byrnie v. Town of Cromwell*, 243 F.3d 93, 100-11 (2d Cir. 2001) (reversing summary judgment and holding that "[w]hether a reasonable trier of fact actually will draw such an [adverse] inference is a matter left to trial").

3. Under the *Lockwood* Test for Exposure, the Kennedys Are Entitled to Have a Jury Decide That Mr. Kennedy Suffered Multiple Exposures to Asbestos For Which Tacoma Asbestos is Responsible.

This case is indistinguishable in any meaningful way from the leading cases, and if anything, Mr. Kennedy has presented stronger evidence that Tacoma Asbestos was a source of his asbestos exposure at Pier 23 than did the plaintiffs in those cases in which the courts held a jury should decide the case. In *Lockwood*, the Court held that Mr. Lockwood had presented sufficient evidence that he was exposed to defendant Raymark's asbestos, because another worker testified that Raymark asbestos was used on a "liner" at a shipyard at the time Lockwood worked at the shipyard, and Lockwood testified that he worked on the *George Washington*, a liner, in that time frame, where asbestos was used. Even though there was no evidence that Lockwood worked in and around workers applying Raymark asbestos cloth, the Court held that the fact that asbestos fibers remain in the air for a long period of time after such work was sufficient for a jury to infer that Lockwood was exposed to Raymark asbestos while working on the *George Washington*. 109 Wn.2d at 238, 243, 246-48.[3]

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[3] *See Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 740-41, 248 P.3d 1052 (2011) (court rejected valve manufacturer's argument that Morgan had

The obvious lesson from the leading cases is that – given the difficulties of proof regarding asbestos exposure 50 years after-the-fact – the test for circumstantial evidence sufficient to join the question of exposure to a defendant's asbestos-related products or activities is quite liberal. Here, the Kennedys have presented substantial circumstantial evidence from numerous corroborating sources that Mr. Kennedy was exposed to asbestos-containing products and asbestos insulation work at Pier 23 for which Tacoma Asbestos bears responsibility. Indeed, the Kennedys have produced a richer quantum of evidence of his multiple exposures to asbestos from Tacoma Asbestos than did the plaintiffs in *Lockwood, Allen,* and

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no evidence that the new valves around which he worked contained asbestos, finding circumstantial evidence that such valves may have contained asbestos and that he did work around them); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 572-73, 157 P.3d 406 (2007) (court reversed summary judgment and held that circumstantial evidence of three sales of defendant's product to shipyard where plaintiff worked was sufficient to establish prima facie case of exposure); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000) (court reversed summary judgment because evidence that plaintiff, a machinist, worked in vicinity of other workers who had handled asbestos sold by defendant distributor to shipyard where plaintiff worked was sufficient to establish prima facie case of exposure, even though there was no evidence that plaintiff handled distributor's asbestos).

Berry.[4]

B. The Court Should Reject Saberhagen's Admissibility Arguments.

1. Saberhagen's Request to Exclude Evidence is Not Before this Court.

Saberhagen devotes an entire section of its Response Brief to attempting to exclude evidence that the Superior Court considered. The Superior Court, "in its discretion," denied Saberhagen's separate motion to exclude that evidence (CP 950), and Saberhagen did not cross-appeal that ruling. Therefore, Saberhagen's arguments about the admissibility of evidence are not before this Court. Saberhagen cites *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000), for the proposition that a "successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment." Resp. Br. at 31, n.21. *Amalgamated Transit*, however, makes clear that the rule is that "failure to cross-appeal an issue

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[4] Saberhagen conceded that "Mr. Kennedy certainly had significant exposure to asbestos at Pier 23" by virtue of the activities of another company, Zidell Dismantling," which also had operations at Pier 23. CP 919. Yet it is not possible to concede the valid circumstantial evidence of exposure regarding Zidell without conceding the valid circumstantial evidence of exposure from asbestos for which Tacoma Asbestos is responsible, given that Tacoma Boat, like Zidell, had operations on Pier 23, had the contract to overhaul the FMS-789, and Mr. Kennedy personally applied asbestos he obtained from Tacoma Boat.

generally precludes its review on appeal," *id.*, and that the sole exception to that rule is where the respondent offers alternative reasons to affirm the Superior Court without asking for "additional relief." *Id.* Washington courts treat this rule and its exception as permitting a respondent to offer alternative legal grounds for affirming the result reached by the Superior Court as long as the respondent does not seek additional relief in doing so. *See Amalgamated Transit Union*, 142 Wn.2d at 202 (court permitted respondent to argue narrow basis for striking statute even though trial court struck it down on broad grounds, because respondent did not seek additional relief); *Morello v. Vonda*, 167 Wn. App. 843, 277 P.3d 693 (2012) (court permitted respondent to argue that superior court should be affirmed because it substantially complied even if it did not actually comply with rule, but did not seek additional relief); *Peterson v. Hagen*, 56 Wn.2d 48, 351 P.2d 127, 129 (1960) (respondent did not need to cross-appeal where it argued only an alternative legal ground for affirming trial court's ruling striking statute and did not seek additional relief).

Here, Saberhagen is not raising alternative legal bases for why summary judgment was properly granted. Rather, Saberhagen asks

this Court of Appeals for the additional relief of excluding evidence that was considered by the trial court in adjudicating its motion. If Saberhagen wanted such additional relief, it was incumbent on Saberhagen to cross-appeal, which it did not. This Court accordingly should reject all of Saberhagen's evidentiary exclusion arguments (See Resp. Br. at 31-38) as not properly before it.

2. Saberhagen's Evidentiary Exclusion Arguments Are Immaterial and Wrong.

Even if the Court were to reach Saberhagen's request to exclude evidence, it would not affect the outcome of this appeal. Saberhagen seeks to exclude 1973 correspondence from Tacoma Asbestos (CP 594-95), 1981 testimony of George Boscovich (CP 466-524), 1989 testimony of Mr. Anderson (CP 681-703), and the 1990 testimony of Mr. Brands (CP 671-79). Notably, Saberhagen does not seek to exclude the testimony of Mr. Kennedy, Mr. Elmore, Mr. Legas or Mr. Hanson, which body of evidence is more than sufficient to establish the circumstantial case that Tacoma Asbestos was the exclusive asbestos supplier and asbestos insulation contractor for Tacoma Boat from 1964-68 when Mr. Kennedy was exposed to its asbestos and asbestos-related activities at Pier 23. The testimony of Boscovich, Anderson and Brands simply adds further weight to the

circumstantial case supplied by Messrs. Kennedy, Elmore, Legas and Hanson.

Moreover, Saberhagen's argument that such evidence should be excluded is disingenuous and simply wrong. The 1973 correspondence by Tacoma Asbestos (CP 594-95) – Saberhagen's predecessor – is self-authenticating under ER 901(b)(8) and it is admissible as an ancient document under ER 803(a)(16) (statements in ancient documents). Saberhagen does not suggest that this Tacoma Asbestos correspondence is not what it purports to be. The same is true for the transcribed testimony of Boscovich, Brands and Anderson, each of which is over 20 years old. Saberhagen does not suggest that these transcripts are fabricated or are anything other than what they purport to be. Indeed, Saberhagen itself cites the Anderson testimony to support its erroneous supposition that Tacoma Asbestos was not the exclusive supplier of asbestos to Tacoma Boat. *See* Resp. Br. at 22, 23. Accordingly, Saberhagen has waived the right to challenge the admissibility of the Anderson testimony. *E.g., Young v. Key Pharmaceuticals, Inc.*, 63 Wn. App. 427, 433-34, 819 P.2d 814 (1991).

Even when considered solely under the lense of ER 804(b)(1),

the testimony is plainly admissible. The testimony was taken "in compliance with law in the course of . . . another proceeding." ER 804(b)(1). Saberhagen admits the witnesses are no longer alive and are thus "unavailable." ER 804(b); Resp. Br. at 31-35. Brower Company was a defendant represented at the deposition of Mr. Brands (CP 671), and is a "predecessor in interest" to Saberhagen. *See* ER 804(b)(1). Therefore, Saberhagen was represented at the Brand deposition. Saberhagen fails to explain how it was not effectively represented at that deposition, what different testimony it would have elicited from Mr. Brands or what part of the omitted portions of the deposition should have been included in this record (the court should assume the Saberhagen has the full transcript, as Brower Company's counsel attended the deposition).[5] Mr. Boscovich's testimony is cited for the proposition that Tacoma Asbestos was an insulation contractor for Tacoma Boat. Saberhagen was not represented at that deposition, but it was represented at Mr. Boscovich's 1991 deposition, where it could have pursued or clarified any aspect of his 1981 deposition on

[5] It is worth noting that Saberhagen inserted into the record a grand total of four pages from the deposition of Mr. Woolstenhulme. CP 896-99.

this point. Saberhagen fails even to suggest how it would have elicited different testimony in 1981, and plainly it did not do so in 1991. And with respect to the Anderson testimony, on which Saberhagen contradictorily also relies, Saberhagen fails to suggest how parties examining Mr. Anderson in 1989 had any different motive than would Saberhagen in examining him now. The Superior Court plainly did not abuse its discretion in considering such evidence.

In short, the Court should reject Saberhagen's admissibility arguments because they are not before the Court, are immaterial, and are wrong.

C. The Court Should Reject Saberhagen's Argument That the Kennedys Have Not Presented Evidence That Mr. Kennedy's Exposure to Asbestos From Tacoma Asbestos Is A Medical Cause of His Mesothelioma.

In its summary judgment motion, Saberhagen raised solely the question of whether Mr. Kennedy had evidence that he had been exposed to asbestos that Tacoma Asbestos worked on or supplied. CP 17-32. Saberhagen framed the issue for summary judgment thus:

> **III. ISSUE PRESENTED**
>
> Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?

CP 22. Its entire motion was based on its assertion that Tacoma Asbestos was never present at Pier 23 when Mr. Kennedy worked there in the mid-1960's. Accordingly, the Kennedys responded to Saberhagen's motion by detailing all the evidence that placed Tacoma Asbestos at Pier 23, detailing the circumstantial evidence that Mr. Kennedy was exposed on multiple occasions on Pier 23 to asbestos for which Tacoma Asbestos bears responsibility.

In tacit acknowledgement that the Kennedys have presented a triable question on "exposure," Saberhagen shifts ground and says that even if Tacoma Asbestos was present at Pier 23, the Kennedys did not present "medical, scientific or other expert testimony" that the quantum of Mr. Kennedy's exposure to such asbestos was sufficient to cause his mesothelioma. Resp. Br. at 3; *see id.* at 20, 22, 40-42. Because Saberhagen did not argue medical causation as a basis for its summary judgment motion, the Court should preclude it from shifting ground here.

Saberhagen says that it mentioned the word "harm" on two occasions and liberally cited *Lockwood* in its summary judgment motion, but that is a disingenuous claim. Saberhagen cited *Lockwood* with respect to the subject of circumstantial evidence and the

Lockwood factors related to "exposure," but no fair-minded reader could interpret Saberhagen's motion as addressing anything other than its alleged claim that the Kennedys lacked evidence of exposure to asbestos at Pier 23 for which Tacoma Asbestos is responsible. Saberhagen itself presented no expert testimony, because the entire burden of its argument was that Tacoma Asbestos was nowhere near Pier 23, and it cited only record evidence in support of its argument that Mr. Kennedy was not exposed to asbestos for which Tacoma Asbestos is responsible.

The Kennedys cannot now be faulted for failing to present medical testimony regarding Mr. Kennedy's asbestos exposure. In a similar procedural context, the court in *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 810 P.2d 4 (1991) rejected an attempt by the party moving for summary judgment to inject of new issues in rebuttal:

> It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.

Id. at 168-69. "Rebuttal documents are limited to documents which explain, disprove, or contradict the adverse party's evidence." *Id.* The court noted that this rule is similar to the principle that a party cannot inject new issues in its reply brief on appeal. *Id.*

Saberhagen says that *White* is different, because the defendants there moved for summary judgment on the standard of care and raised the proximate cause issue on reply. That is a distinction without a difference. The entire point of *White* and the civil rules (see CR 7(b)(1) and CR 56(c)) is that a non-moving party should have an opportunity to respond to the summary judgment argument pressed by his opponent. Here, Saberhagen argued that the Kennedys could not prove proximate cause because they had no evidence of exposure. Saberhagen did not argue that Mr. Kennedy does not have mesothelioma, that Mr. Kennedy did not get mesothelioma because of his exposure to asbestos at Pier 23, or that he had no medical evidence that such exposure was a substantial factor in causing Mr. Kennedy's disease. Yet, under Saberhagen's approach, Saberhagen could argue each of these points now and not violate the principle that the non-moving party should not be deprived of a trial based on new arguments submitted after he has opposed summary judgment. *See R.*

D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999) (Court reversed summary judgment for Merrill that was based on plaintiff's failure to present evidence of Merrill's non-use, even though plaintiff had burden of proof to show Merrill's alleged abandonment and relinquishment of water right, where Merrill did not focus on non-use in its summary judgment motion, and rejecting Merrill's argument that non-use was implicit in its request for summary judgment on plaintiff's abandonment and relinquishment claims); *compare Morgan*, 159 Wn. App. at 728 (defendant argued on summary judgment that plaintiff lacked evidence of exposure to defendants' products *and* that any such exposure was not a substantial contributing factor to his disease).

In any event, even without such medical testimony it is clear that under *Lockwood*, the circumstantial evidence presented is more than enough to create a triable issue that Mr. Kennedy's exposure to and handling of asbestos from Tacoma Asbestos was a substantial factor in causing his mesothelioma. The Kennedys have presented more than sufficient evidence on the *Lockwood* factors of proximity, time and the character of asbestos and its use. Tacoma Asbestos employees ripping, repairing and replacing asbestos insulation on the

FMS-789 is precisely the kind of conduct that sends asbestos fibers in the air for a long period of time. Pouring and mixing bags of asbestos from Tacoma Asbestos is precisely the kind of direct contact that caused Mr. Kennedy to inhale asbestos fibers. While Mr. Kennedy also suffered other exposures to asbestos, "[t]he extent to which [defendant] supplied the products as compared with other distributors is irrelevant for purposes of summary judgment." *Berry*, 103 Wn. App. at 325. It is sufficient for Mr. Kennedy to show that his exposure to asbestos from Tacoma Asbestos along with other exposures "combine[d] to produce a single result, incapable of division on any logical or reasonable basis." *Lockwood*, 109 Wn.2d at 245 n.6. Indeed, in evaluating the evidence in *Morgan*, 159 Wn. App. at 740-41, the court held that "more than a single instance of exposure" was "sufficient" to raise an issue of fact as to whether such exposure was a substantial factor in causing plaintiff's mesothelioma.

III. CONCLUSION

For all these reasons, this Court should reverse the summary judgment and remand this case for trial of the Kennedys' claims.

DATED this 9th day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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