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(No. 45381-9 Consolidated)

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY,

Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant-Respondent.

SUPPLEMENTAL REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The recently discovered Yost Journals supply a missing link, which, when coupled to the extensive evidence assembled prior to summary judgment, establish a triable question whether defendant Saberhagen Holdings, Inc. (“Saberhagen” or “Tacoma Asbestos”) “set foot on Pier 23,” Case No. 43941-7-II, Respondent’s Br. at 2, and both worked on asbestos pipe insulation repairs and supplied asbestos to which Jack Kennedy (“Kennedy”) was exposed at Pier 23.

When the superior court granted summary judgment to Saberhagen, it observed that the “primary issue” was whether Tacoma Asbestos was responsible for “the asbestos products used at the Port of Tacoma [Pier 23]” where Mr. Kennedy inhaled asbestos that caused his mesothelioma. CP 1150-51. The court held that the Kennedys had presented insufficient evidence that Tacoma Asbestos conducted asbestos work or supplied asbestos at Pier 23 to which Mr. Kennedy was exposed. CP 1151. Consistent with the superior court’s ruling, on appeal, Saberhagen’s central criticism of the Kennedys’ circumstantial evidence that Tacoma Asbestos was responsible for some of Mr. Kennedy’s asbestos exposures at Pier 23 was that the Kennedys lacked specific evidence that Tacoma Asbestos “ever set

foot on Pier 23” when Mr. Kennedy suffered his asbestos exposures. Case No. 43941-7-II, Respondent’s Br. at 2, 10. The Yost Journals fill that gap and provide a strong and reasonable inference that Tacoma Asbestos was indeed the asbestos contractor and supplier on Tacoma Boat’s projects at Pier 23 in 1965 and 1966 when Mr. Kennedy was exposed to asbestos.

Saberhagen has two responses to this crucial new evidence, neither of which has any force here. Indeed, each of Saberhagen’s arguments simply reinforces that the Kennedys have presented a triable case against Saberhagen. First, Saberhagen says that the Yost Journals are not proof-positive that Tacoma Asbestos was the contractor that conducted asbestos pipe insulation repairs on the FMS-789 or that Tacoma Asbestos was the supplier of asbestos bags retrieved by Mr. Kennedy from the Tacoma Boat “Victory Ship” trailer on Pier 23, which he used on asbestos pipe repairs aboard the FMS-6 and ST-2104. But the test for circumstantial evidence is not that it must establish a fact with irrefutable certainty. Rather, circumstantial evidence must create a reasonable inference that a fact exists, which the defendant is free to attempt to rebut. The Yost Journals create a strong and reasonable inference that Tacoma

Asbestos worked on the asbestos projects that Tacoma Boat managed at Pier 23 when and where Mr. Kennedy was exposed to asbestos. And Saberhagen's attempts to cast doubt on that reasonable inference simply reinforce the strength of the inference.

Second, Saberhagen re-hashes arguments it made in the underlying appeal, but repeating them here does not make them any better. As set forth in the Kennedys' briefing in the underlying appeal (Case No. 43941-7-II), all of Saberhagen's arguments are either an argument with the evidence or about the weight the trier of fact should give to the evidence. They are not a basis for summary judgment, but the reason we have trials.

The Court should reverse the superior court's denial of the CR 60 motion and remand to the superior court for trial.

II. ARGUMENT

A. Standard of Review

The parties agree that the Court reviews summary judgment *de novo*. Saberhagen does not respond to the practical reality that – since there is no challenge to the fact that the Yost Journals could not have been discovered before summary judgment – the appropriate course for the Court in this consolidated appeal is to conduct a *de novo*

review of summary judgment in light of all the evidence implicating Tacoma Asbestos.

B. The Yost Journals Create the Reasonable Inference that Tacoma Asbestos Conducted Asbestos Repairs on the FMS-789 and Supplied the Asbestos that Mr. Kennedy Retrieved from the Tacoma Boat “Victory Ship” Trailer.

The Yost Journals prove that Tacoma Asbestos performed substantial work on Tacoma Boat projects in the mid-1960’s (CP 1234-1434), and they create a strong and reasonable inference that Tacoma Asbestos performed the asbestos insulation repairs (1) aboard the FMS-789 at Pier 23 to which Mr. Kennedy was exposed, and (2) aboard the Victory Ships at Pier 23, from which Mr. Kennedy obtained asbestos to apply on pipe insulation repairs aboard the FMS-6 and ST-2104. *See* CP 408; CP 239-240. As detailed below, this new evidence provides the specific linkage between Tacoma Asbestos and Mr. Kennedy’s asbestos exposures at Pier 23 that the Kennedys did not have at the time of summary judgment.

The FMS-789. The circumstantial case implicating Tacoma Asbestos with respect to the 1965 asbestos pipe insulation repairs on the FMS-789 not only is reasonable, but it is also quite strong, and includes the following:

- In 1965, Mr. Kennedy and the National Guard conducted repairs of Army vessels at Pier 23, which it leased from the Port of Tacoma (CP 289-90)¹;
- The FMS-789 was an “Army Repair Ship” on which Mr. Kennedy worked to conduct Army vessel repairs, which was moored at the Port of Tacoma Pier 23 in July 1965 (CP 238-240; CP 408);
- Tacoma Boat conducted repairs on the FMS-789 in 1965, including asbestos pipe insulation repairs (CP 239; CP 407-408)²;
- Four witnesses testified generally that Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat in the mid-1960s (CP 637; CP 668; 677-678 and CP 691-692);

¹ Saberhagen notes that the record citation to CP 237-38 in the Kennedys’ Supplemental Brief does not stand for the proposition that the Army National Guard leased Pier 23. The correct citation is CP 289-90, which includes pages 237-38 of the deposition cited.

² Mr. Kennedy, limited by a 50-year old memory and with no documents to refresh his memory, testified that he thought the asbestos repairs on the FMS-789 occurred in the spring of 1965 and lasted 45 days. CP 239-240; CP 407. That testimony does not conflict with but coincides with Mr. Yost’s Journal entry of July 1965 for the work on the “Army Repair Ship, Port of Tacoma Pier.”

- Mr. Yost worked for Tacoma Asbestos, and his journals demonstrate that he frequently worked for Tacoma Asbestos on Tacoma Boat projects throughout the 1960's (CP 1234-1434);
- Mr. Yost worked for Tacoma Asbestos on an "Army Repair Ship, Port of Tacoma Pier" in July 1965 (CP 1375-1376; CP 1406-1408);
- The record is devoid of any evidence of an "Army Repair Ship, Port of Tacoma Pier" that had asbestos insulation repairs performed on it in July 1965 to which Mr. Yost's work can be attributed other than the FMS-789.³

This body of circumstantial evidence creates a compelling inference that Tacoma Asbestos conducted the asbestos repairs on the FMS-789 to which Mr. Kennedy was exposed in 1965.

Saberhagen protests and says that the Kennedys have not shown that "the FMS-789 was *the only* Army Repair Ship" on which Tacoma Asbestos could have been working in July 1965."

³ Saberhagen also suggests that the FMS-789 may not have been the only Army Repair Ship at Pier 23 in 1965, but it cites nothing in the record, and Mr. Kennedy testified about all the vessels located at Pier 23 when he arrived, and the only Army Repair Ship was the FMS-789. See CP 215. He testified that the FMS-789 was eventually replaced by the FMS-6, but that occurred in 1966. CP 220.

Respondent's Supp. Br. at 14. The Kennedys submit that such an assertion is not the test of circumstantial evidence,⁴ and it is also simply wrong. To suggest other possible Army Repair Ship candidates in July 1965, Saberhagen says that Mr. Kennedy testified that the Army had "at least ten new or converted FMS-type ships," citing CP 220. *Id.* Saberhagen's citation to the record is both irresponsible and misleading. Mr. Kennedy testified that the only "floating machine shop" (i.e., Army Repair Ship) at the Port of Tacoma in 1965 was the FMS-789 (CP 215), which was thereafter replaced by the FMS-6 in 1966. CP 220. He testified the Army built other "floating machine shops" to serve the Army globally, but there is no evidence in the record that there was any other floating machine shop or "Army Repair Ship" moored at the Port of Tacoma in 1965 other than the FMS-789.

⁴ The Washington Supreme Court has firmly established that "circumstantial evidence" must play a critical role in proving that a plaintiff was exposed decades earlier to asbestos for which a defendant is responsible. *Lockwood v. AC&S*, 109 Wn.2d 235, 246, 744 P.2d 605 (1987). The test for such "circumstantial evidence" is whether, "based on [the jury's] common sense and experience, [it] may reasonably infer something that is at issue in this case." Washington Pattern Instruction 1.03

Next, Saberhagen says that there were Port of Tacoma Piers other than Pier 23 where Army ships were repaired (Respondent's Supp. Br. at 6). That is certainly true, but none of them was in use for repair of Army ships in July 1965, the date Mr. Yost's worked on an "Army Repair Ship, Port of Tacoma Pier." Saberhagen cites CP 1510 and 1567 for the proposition that Army ship repairs occurred at Pier 17 and Pier 22 (*id.*), but Mr. Kennedy testified Piers 17 and 22 were used by the National Guard to service Army vessels *before* the National Guard operation moved to Pier 23, where the National Guard was operating in July 1965. CP 1510, CP 1567. And Saberhagen cites CP 1524 because it mentions Piers 24 and 25, but the testimony at that page discusses the operation of Zidell Dismantling, and has nothing to do with repair of Army ships.

Saberhagen also regurgitates its argument from the underlying appeal that the workers conducting repairs on the FMS-789 were Tacoma Boat, not Tacoma Asbestos employees (Respondent's Supp. Br. at 2-4), but the Kennedys have already shown that Saberhagen is wrong on that score. *See* Case No. 43941-7-II, Appellant's Reply Br. at 6-9. Mr. Kennedy's and Mr. Elmore's testimony that workers arrived from Tacoma Boat but that they did not know who Tacoma

Boat's specific sub-contractors were is perfectly consistent with the four witnesses who testified that Tacoma Boat used Tacoma Asbestos for asbestos work and the Yost Journal itself. To the extent that Saberhagen suggests that Tacoma Asbestos workers would not arrive at Pier 23 in a Tacoma Boat truck, Saberhagen forgets that the brother of the owner of Tacoma Asbestos (Ted Boscovich) was permanently stationed at Tacoma Boat in order to coordinate Tacoma Asbestos' work for Tacoma Boat. *See* Case No. 43941-7-II, Brief of Appellants at 19-20.

Finally, Saberhagen says that the Kennedys have not even shown that Mr. Yost worked on asbestos in July 1965 when he worked on the "Army Repair Ship, Port of Tacoma Pier." But it is plainly reasonable to infer that Mr. Yost, who himself died of mesothelioma, was working with *asbestos* when he was working for Tacoma *Asbestos*, and Mr. Kennedy and Mr. Elmore both testified that the repairs on the FMS-789 were repairs of asbestos pipe insulation. CP 239; CP 407-408.

Tacoma Boat "Victory Ship" Trailer at Pier 23. The circumstantial case linking Tacoma Asbestos to the asbestos bags Mr. Kennedy retrieved from the Tacoma Boat trailer that was set up at Pier

23 to service Victory Ships that Tacoma Boat was servicing in 1966 is equally strong:

- In 1966, Mr. Kennedy and the National Guard conducted repairs of Army vessels at Pier 23, which it leased from the Port of Tacoma (CP 289-90);
- The Victory Ships docked at Pier 23 were Army ships (CP 240);
- Tacoma Boat overhauled the Victory Ships at Pier 23, which included asbestos pipe insulation work, and placed a trailer at Pier 23 that served as a staging area for Tacoma Boat's work on the Victory Ships (CP 240-244 and CP 610-611);
- Four witnesses testified that Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat during the mid-1960's (CP 637; CP 668; 677-678 and CP 691-692);
- Mr. Yost worked for Tacoma Asbestos, and his journals demonstrate that he frequently worked for Tacoma Asbestos on Tacoma Boat projects throughout the 1960's (CP 1234-1434);

- Mr. Yost worked on a Victory Ship for Tacoma Asbestos in February 1966, eight months after working on the “Army Repair Ship, Port of Tacoma Pier” (CP 1406-1408);
- The time interval between when Mr. Yost’s worked on the “Army Repair Ship, Port of Tacoma Pier” and the Victory Ship corresponds with Mr. Kennedy’s memory of the time interval between when the FMS-789 had asbestos pipe insulation repairs and when he retrieved asbestos from the Tacoma Boat trailer at Pier 23 so that he could conduct asbestos repairs on the FMS-6, the replacement for the FMS-789 (CP 401-402, CP 1375-1376; CP 1406-1408; CP 220);
- When Mr. Yost worked at a shipyard he identified the shipyard in his journal, but in the case of the “Victory Ship” journal entry he did not, thus further supporting the inference that the Victory Ship he worked on was at Pier 23 and not at a shipyard (CP 1234-1434); and
- The record is devoid of any evidence of a Victory Ship in Commencement Bay in February 1966 other than the

Victory Ships at Pier 23, which had asbestos pipe insulation work performed at that time.

Saberhagen's response is as ineffectual as its attempt to cast doubt on the linkage between Tacoma Asbestos and the FMS-789 repairs. First, Saberhagen says that the Kennedys have not proven that the "only Victory Ship in Commencement Bay in 1966 was at Pier 23." Respondent's Supp. Br. at 8. That is certainly true, but the evidence establishes that Tacoma Boat was working on two Victory Ships for the National Guard at Pier 23 in 1966, and the only evidence in the record of where Army Ship repairs occurred in Commencement Bay in 1966 was at Pier 23 where the National Guard was running its operation. Without evidence, Saberhagen asserts that "an entire fleet of such ships was stationed in *Olympia*" in the mid-60's. Respondent's Supp. Br. at 8, n.4 (emphasis added). Even if true and admissible, such a suggestion would not undermine the evidence that the only place where Victory Ships were being repaired in Commencement Bay in 1966 was at Pier 23.

Saberhagen then says that even if Mr. Yost and Tacoma Asbestos were working on the Victory Ships at Pier 23 when Mr. Kennedy retrieved bags of asbestos from the Tacoma Boat trailer

serving those Victory Ships, that does not prove the asbestos bags originated with Tacoma Asbestos. As the Kennedys established in the underlying appeal, 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 repairs for Tacoma Boat also to supply the asbestos with which it would conduct the work. And Saberhagen's claim that it is "provably false" that Tacoma Asbestos was the exclusive supplier of asbestos to Tacoma Boat in 1966 is "provably unsupported" by Saberhagen's record citations. *See* Case No. 43941-7-II, Appellants' Reply Br. at 9-11.

Even if Saberhagen could join the debate with evidence that Tacoma Boat occasionally obtained asbestos supplies from someone other than Tacoma Asbestos, the Yost Journals provide the direct link between the 1966 asbestos work on the Victory Ships at Pier 23 and Tacoma Asbestos, and create the reasonable inference that in the specific instance at issue – Mr. Kennedy's retrieval in 1966 of bags of asbestos from the Victory Ship trailer, Tacoma Asbestos was the source of the asbestos Mr. Kennedy retrieved.

The circumstantial case assembled by the Kennedys clearly establishes a triable question concerning Tacoma Asbestos' responsibility for some of Mr. Kennedy's asbestos exposures in 1965 and 1966 at Pier 23.

C. Saberhagen's Re-Hash of Arguments in the Underlying Appeal Is Unconvincing.

The rest of Saberhagen's Supplemental Brief is a re-hash of its arguments in the underlying appeal, and they are no better when delivered the second time around.

Saberhagen argues that the Yost Journals do not address "(1) plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released, (2) the extent of time the plaintiff was exposed to the product; and (3) the types of asbestos products to which the plaintiff was exposed and the ways in which the products were handled and used." Respondent's Supp. Br. at 13, citing *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 323-24, 14 P.3d 789 (2000). The Yost Journals do not address those subjects directly, but the summary judgment record clearly does do so. During the approximate 45-day period that Tacoma Boat conducted repairs aboard the FMS-789, Mr. Kennedy periodically boarded the FMS-789 and "observ[ed]" the

asbestos insulation repair work. CP 408 at 115:16-24 and 116:17; CP 407; CP 238-240. Mr. Elmore testified that he observed the Tacoma Boat contractors conducting asbestos insulation work on the FMS-789, and that he saw Mr. Kennedy aboard the vessel when Tacoma Boat and its contractors were performing their work. CP 239-40. Mr. Kennedy testified that his knowledge of the Tacoma Boat asbestos repair on the FMS-789 was based on his “observ[ation].” CP 408 at 116:17. Saberhagen does not even dispute that Mr. Kennedy obtained from the Tacoma Boat trailer 3 to 4 bags of asbestos which he then applied by hand in conducting insulation repairs on the FMS-6 and ST-2104. CP 241-42, 288-89, 439-44, 446-47, 448-50. And the kind of asbestos work being performed by Tacoma Asbestos and Mr. Kennedy – repairing asbestos pipe insulation – is notorious for release of lethal asbestos fibers, as reflected in a multitude of Washington appellate decisions.

Indeed, this record compares favorably with that in *Lockwood v. AC&S*, 109 Wn.2d 235, 244-45, 744 P.2d 605 (1987), where the plaintiff did not generally work around asbestos insulation and did not personally handle asbestos products, *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 572-73, 157 P.3d 406 (2007), where the evidence

of exposure consisted of three sales of defendant's product to a large shipyard where the plaintiff worked, and *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. at 324-25, where the Plaintiff did not handle defendant's asbestos but worked in the general vicinity of asbestos work. In each of those cases, the court held the plaintiff had presented a triable question.⁵

Finally, Saberhagen says that the Kennedys have presented no proof that Mr. Kennedy's asbestos exposures for which Tacoma Asbestos is responsible were a substantial factor in medically causing his mesothelioma. Medical causation was not, however, the basis for Saberhagen's summary judgment motion. Saberhagen told the court that its summary judgment motion was based on the Kennedys' inability to "introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its predecessors [Tacoma Asbestos]." Case No. 43941-7-II, Appellants' Reply Br. at 21, quoting from Saberhagen's Summary Judgment Motion. The Kennedys responded by presenting a convincing case linking Tacoma Asbestos to Mr. Kennedy's asbestos exposures at Pier

⁵ This Court, conducting *de novo* review, should hold that the superior court's conclusion to the contrary (CP 951) is error as a matter of law.

23 in 1965 and 1966. Nor, as a practical matter, could an expert give an opinion on medical causation until the exposures for which Tacoma Asbestos is responsible had been established. The Kennedys have retained such experts and they are prepared to testify that the asbestos exposures for which Tacoma Asbestos is responsible were a substantial contributing factor to causing Mr. Kennedy's mesothelioma. The court should remand the case. If Saberhagen wants to challenge that evidence before trial it is free to do so.

Saberhagen's argument that the Kennedys should have appended expert testimony in response to Saberhagen's opposition to their CR 60 motion is specious. Saberhagen surely would have opposed such evidence as coming too late and failing to meet the standards of CR 60. The Kennedys were entitled to rely on the basis of Saberhagen's summary judgment motion in formulating their response. And a litigant should not be trapped by arguments that first appear in reply papers and then be forced to navigate the narrow path of CR 60 in order to create a material issue of fact on a factor not squarely addressed by the underlying motion. *See R. D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 969 P.2d 458 (1999).

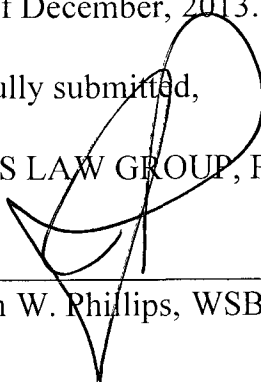
III. CONCLUSION

For the foregoing reasons, the Court should reverse denial of the CR 60 motion, reverse summary judgment and remand for trial.

DATED this 23rd day of December, 2013.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By:  _____
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy
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