NO. 43941-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

JACK DON KENNEDY AND SANDRA KENNEDY

Plaintiffs-Appellants

v.

SABERHAGEN HOLDINGS, INC.

Defendant-Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. John R. Hickman)

RESPONDENT'S BRIEF

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I. INTRODUCTION

In January 2012, Plaintiffs/Appellants Jack and Sandra Kennedy sued defendant Saberhagen Holdings ("Saberhagen") claiming that, while serving in the Washington Army National Guard from 1964 to 1979, Mr. Kennedy was exposed to asbestos-containing insulation products supplied by Saberhagen's alleged predecessor, Tacoma Asbestos Co., and that such exposure caused him to develop mesothelioma. Saberhagen was the sole defendant and has vigorously denied the Kennedys' claims

Initially, the Kennedys claimed that this exposure lasted 15 years, spanned three different National Guard sites in Western Washington, and included no less than 24 different asbestos containing products. However, by the time of the hearing on Saberhagen's summary judgment motion in August 2012, the Kennedys' claims had shrunk to: (1) just a *single* site, the National Guard's post at Pier 23 in the Port of Tacoma; (2) perhaps a *few weeks* of alleged intermittent exposures sometime in 1965 or 1966, in connection with repairs performed by a company named "Tacoma Boat[1]" on four vessels stationed there; (3) and *only one* identifiable insulation product: *a sack and a half* or less of "Johns Manville" cement that Mr. Kennedy said he obtained from Tacoma Boat.

Saberhagen's summary judgment motion challenged the Kennedys to produce sufficient admissible evidence of the fundamental element of *proximate cause*: *i.e.*, evidence demonstrating that Mr. Kennedy's alleged illness and damages were somehow caused by the products of Tacoma

[1] Tacoma Boatbuilding Co., a Tacoma Shipyard.

Asbestos. The requirements for demonstrating proximate cause in asbestos cases are by now well-established in Washington case law and indeed the parties agreed that the controlling criteria are those announced in *Lockwood v. A.C. & S.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987), which have been repeatedly confirmed and applied in subsequent cases. Those criteria require admissible, non-speculative evidence of the nature of the defendant's products, how they were used, plaintiff's proximity to the products, the duration of his exposures, the expanse of the worksite, and medical causation evidence connecting those exposures to the plaintiff's disease.

The Kennedys failed to present sufficient admissible evidence of these factors in opposition to Saberhagen's summary judgment motion. While the Kennedys offered evidence that *Tacoma Boat* workers occasionally performed work, including insulation work, on or around the National Guard vessels at Pier 23, and that Mr. Kennedy had obtained a sack and a half of Johns-Manville cement from *Tacoma Boat*, they offered no such testimony implicating Saberhagen's predecessor, *Tacoma Asbestos*. They presented no evidence that *Tacoma Asbestos* workers had ever set foot on Pier 23 or that *Tacoma Asbestos* had ever supplied any insulation materials to Pier 23 or to the National Guard. Instead, they relied upon an illogical and provably false theory that Tacoma Boat obtained *all* of its insulation from Tacoma Asbestos and, hence, any insulation materials used by Tacoma Boat on or around the Pier 23 vessels must have originated from Tacoma Asbestos. Moreover, whatever the merits of their convoluted

theories of exposure to Tacoma Asbestos products, the Kennedys nonetheless failed to offer *any* medical testimony or other causation evidence, as required by *Lockwood*, showing that the claimed exposure to Tacoma Asbestos products was *causally significant*, *i.e.*, that it caused or contributed to the development of Mr. Kennedy's mesothelioma. Simply put, the Kennedys offered no evidence demonstrating that defendant's product proximately caused the plaintiff's injury.

Given the clear proximate cause requirements of *Lockwood*, and the Kennedys' failure to produce admissible evidence satisfying those requirements, the trial court properly granted summary judgment. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

Should this Court affirm the trial court's grant of summary judgment, where the Kennedys failed to submit sufficient admissible evidence of the *Lockwood* criteria demonstrating that Mr. Kennedy's claimed injuries were proximately caused by exposure to the products of Saberhagen's alleged predecessor, Tacoma Asbestos?

III. RESTATEMENT OF THE CASE

A. The Kennedys' Shrinking Case and Saberhagen's Summary Judgment Motion.

The Kennedys claims changed dramatically over the course of this suit as they were forced to substantiate their original sweeping claims. The Kennedys had claimed at the outset of the case that Mr. Kennedy had experienced some 15 years of exposure to 24 different asbestos-containing

products supplied by Tacoma Asbestos at three different job sites: Fort Lewis, Camp Murray, and Pier 23. CP 1-5, 34-35, 49-50.

The Fort Lewis claim was the first to go, when Mr. Kennedy was deposed in May 2012 and conceded that he had not in fact been exposed to asbestos at Fort Lewis as claimed. CP 71 (emphasis added).

The Camp Murray claim was abandoned next in response to Saberhagen's summary judgment (filed on July 6, 2012), which sought dismissal on the grounds of lack of evidence of proximate cause, *i.e.*, that plaintiffs had failed to satisfy the proximate cause standards established in *Lockwood* and had "[in]sufficient admissible evidence showing that that [Mr. Kennedy] was ever actually exposed to or harmed by asbestos-containing products" supplied by Saberhagen's predecessors. *See* CP 17. In opposition, the Kennedys presented no argument supporting the claims against Saberhagen of exposure at Fort Lewis or Camp Murray. CP 137. Importantly, the Kennedys still maintained that Mr. Kennedy had in fact been *exposed* to asbestos at Camp Murray; but they conceded that *this exposure* was only intermittent, of short duration, and therefore not significant. CP 137 n.2. Similarly, they also acknowledged that Mr. Kennedy may have been exposed to asbestos while performing brake jobs, though this exposure, too, the Kennedys did not consider to be "significant." CP 137 n.2.[2]

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[2] The Kennedys appear also to have dismissed as "insignificant" Mr. Kennedy's other likely exposures to asbestos at Pier 23, namely, the Zidell Company, which operated a filthy ship salvage and dismantling operation on the landward half of Pier 23, right next to the National Guard's post. CP 240, 290, 405, 837. Among the big ships Zidell dismantled between 1964 and 1968 were two aircraft carriers and a "lot of [L]iberty ships."

In the end, the Kennedys stated that "Mr. Kennedy's only *significant* exposure to asbestos" was his claimed exposure at Pier 23. CP 137 (emphasis added). Narrower still, the Kennedys were obliged to rest their *entire* opposition to summary judgment on claims of intermittent exposure on just *four* National Guard vessels at Pier 23: the FMS-789, the FMS-6, a small tug, and the FS-313, and just *one* named asbestos product (Johns Manville cement). CP 138-45. And the Kennedys have since narrowed their claims even further, abandoning any challenge relating to the FS-313, acknowledging that the claim as to that ship had been based on a mistake by Mr. Kennedy. *See* Brief of Appellants, at 15 n.7 and CP 226.

B. The Kennedys' Opposition to Summary Judgment.

Despite nearly six months of discovery—and even the running of *newspaper ads* by the Kennedys' counsel at the close of discovery soliciting *anyone* who had *ever* worked at Tacoma Boat, Tacoma Asbestos or Pier 23 to please call them[3]—plaintiffs' summary judgment opposition reflected that what remained of their case was based solely upon (1) provably mistaken recollections of Mr. Kennedy as to the FS-313 (mistakes subsequently admitted in this appeal), (2) inadmissible hearsay

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CP 290,-405. Another National Guardsman remembered two Victory ships being at Zidell's. CP 839. There was a "lot of dust flying over there all the time." CP 839. The Guardsmen had to pass by Zidell's dismantling operation every day. CP 839. Mr. Kennedy remembered the operation as being filthy. CP 405. He also went on-board vessels being dismantled at Zidell on a couple occasions to salvage parts. CP 405. Notably, there is no evidence to implicate Tacoma Asbestos in any of the work performed by Zidell at Pier 23.

[3] *See* CP 135.

from depositions taken decades ago, (3) illogical conjecture about Tacoma Boat's suppliers, and (4) empty claims of proximate cause, unsupported by any scientific, medical or other expert testimony.

1. Mr. Kennedy's Alleged Exposure on the FMS-789.

In 1964, Mr. Kennedy was working as an assistant electrical repair supervisor on-board the FMS-789. CP 216-17. "FMS" stands for "floating machine shop." CP 234. The floating machine shops have their own machine shops, electrical repair shops, carpenter shops, welding shops, engine rebuild shops, and supply rooms with an inventory of parts and supplies necessary for the repairs. CP 221, 408. The FMS-789 was about 210 feet long and served as a floating marine repair shop to handle repairs arising from the National Guard vessels based on Piers 17 and 23. CP 217, 221, 836.[4] Mr. Kennedy repaired radios and other electrical equipment from those vessels. CP 217. Between 1964 and 1968, he worked on the floating machine shops most of the time, working in or near the electrical shops. CP 218.

In 1966, the U.S. Army activated the FMS-789 for service in Vietnam and awarded a contract to a Tacoma shipyard, Tacoma Boatbuilding Company (Tacoma Boat), to prepare the vessel for active duty. CP 238-39. The National Guard personnel at Pier 23 offloaded their equipment shortly after being notified of the Army's need for the FMS-789. CP 238. Preparing the ship for the Army was not the National

[4] The National Guard site was on Pier 17 from February to June of 1964 and moved to Pier 23 somewhere between June and August 1964. CP 215.

Guard's duty; for that, Tacoma Boat workers were dispatched to Pier 23. CP 239. Their work included preparing and applying insulation, removing equipment, and fixing up a couple areas. CP 239, 407. Tacoma Boat worked on FMS-789 for somewhere in the neighborhood of three to six weeks. CP 325, 407. The FMS-789 left Pier 23 in the spring of 1966. CP 220.

Mr. Kennedy did not have any personal involvement with the work on the FMS-789. CP 407. On a "few occasions" during the period when "the Tacoma Boat people" were working, Mr. Kennedy went on board to grab things he might need. CP 407-08. He never went into the boiler room, the location where Mr. Kennedy testified that asbestos repair took place. CP 408. Richard Elmore, a National Guardsman at Pier 23, testified about Mr. Kennedy and the FMS-789, although he did not work with Mr. Kennedy most of the time. CP 187, 231.[5] Mr. Elmore testified that Mr. Kennedy and other National Guardsmen boarded the FMS-789 periodically when Tacoma Boat was working to salvage equipment the Army did not want. CP 239-40, 321-22.

There is no evidence about the identity of the original supplier of the insulation Tacoma Boat workers *removed* from the FMS-789. As for the insulation *applied* by the Tacoma Boat workers during the overhaul, no witnesses testified that it came from Tacoma Asbestos. No sale

[5] Two weeks before Mr. Elmore's deposition, Mr. Kennedy provided him with the dates he worked on Pier 23, the vessels he worked on, and his exposure claimed related to those vessels. CP 186.

receipts or contracts or purchase orders shed light on the identity on the supplier of the insulation used by the Tacoma Boat workers.

2. Mr. Kennedy's Alleged Exposure on the FMS-6 and the Small Tug.

The FMS-6, an inland cargo barge converted into a floating machine shop, replaced the FMS-789 on Pier 23 as the floating machine shop for National Guard use after the Army took the FMS-789 to Vietnam. CP 220, 241. The FMS-6 arrived in the summer of 1966. CP 220. Mr. Elmore and other guardsmen removed and replaced boiler insulation on that vessel. CP 241. Mr. Kennedy worked on removing the old asbestos from the boiler, a job he characterized as "real dusty." CP 447. There is no evidence about the source or original installation of the insulation that was removed.

Mr. Kennedy helped apply the new insulation over a period of several weeks. CP 446. The supplies for maintaining and repairing the National Guard's vessels at Pier 23 came from the vessel under repair or from the National Guard's main supply shop on the FMS vessels. CP 286. This included the insulation materials. CP 130-31. The supplies stocked aboard the FMS vessels were typically ordered from Camp Murray and delivered to Pier 23. CP 130-31. The main supply shop on the FMS was called the organizational maintenance shop. CP 286. Abe Coleman was the guardsmen in charge of ordering and maintaining supplies. CP 400. If Mr. Kennedy or Mr. Elmore needed supplies, the normal procedure was to fill out a form and submit it to Mr. Coleman. CP 286, 288. There is no

evidence that any of the asbestos containing material supplied through Camp Murray or dispensed by Mr. Coleman came from Tacoma Asbestos.

Mr. Elmore testified that Tacoma Boat was overhauling Victory ships on the other side of Pier 23 around the same time the National Guard was working on FMS-6. CP 242.[6] During that time period, Tacoma Boat did some dock-side work away from its main shipyard. CP 610-11. Mr. Kennedy testified that Tacoma Boat had a temporary office on land at the base of Pier 23. CP 402. Mr. Elmore testified that Tacoma Boat's trailer and lean-to set-up on the base of Pier 23 related to Tacoma Boat's work on the Victory ships. CP 288.

On one occasion when the National Guardsmen who were performing repairs on the FMS-6 ran out of insulation from the ships own supplies, Mr. Kennedy's supervisor had him go to the Tacoma Boat temporary office to get some. CP 443. Mr. Kennedy got one sack of asbestos, marked "Johns Manville," from that office for the FMS-6 project. CP 402-03. He could not say how much of the insulation work was done with the bag of Johns Manville insulation and how much was done with the asbestos from the ship's supply. CP 444.

On another occasions, Mr. Kennedy also did a "patch job" on a small tug at Pier 23 in the mid-1960's. CP 444. He got an open, partial sack of asbestos cement from Tacoma Boat for this job. CP 449. That was more than enough to seal the joints on a one-foot piece of pipe

[6] "Victory ships" were cargo ships produced during WWII to replace ships lost to German submarines. They were based on an earlier design, called "Liberty ships." 531 were produced. CP 21, citing http://en.wikipedia.org/wiki/Victory_ship (accessed 8/1/2013).

insulation; the rest of the bag was returned to the storage area. CP 449-50. He did not know what happened to the rest of the bag. CP 450.

In short, no witnesses placed Tacoma Asbestos workers on the FMS-789, the FMS-6, the small tug or on any other Pier 23 vessel, or even at Pier 23—ever. To the contrary, the only insulation workers identified at Pier 23 were, according to Mr. Kennedy himself and his coworker Richard Elmore, *Tacoma Boat* employees. CP 239, 324, 407-08. Likewise, there were no sales invoices, transactional records or testimony from witnesses reflecting any sales of any products by Tacoma Asbestos to the National Guard, to Tacoma Boat, or to Pier 23—ever. To the contrary, the only evidence in the record showing *actual sales* of insulation to Tacoma Boat during the 1960s was evidence showing sales by the *E.J. Bartells Co.*, a Tacoma Asbestos *competitor* (and a distributor of Johns Manville products) with a sales office very near to Tacoma Boat. *See* CP 687, 861, 888, 897.

3. The Kennedys' "Exclusive Supplier" Theory.

Lacking any evidence of *actual* sales of asbestos insulation by Tacoma Asbestos to Tacoma Boat for subsequent use on the four referenced Pier 23 vessels, the Kennedys could only argue *possible* sales of such products by Tacoma Asbestos and possible resulting exposure and harm to Mr. Kennedy. The Kennedys argued that whenever Tacoma Boat chose to subcontract its insulation work to outside contractors, it would typically subcontract that work to Tacoma Asbestos. Accordingly, the Kennedys reasoned that since Tacoma Boat used Tacoma Asbestos as its *sole insulation* ***subcontractor***, it must therefore also have used Tacoma

Asbestos as *its sole insulation* ***supplier***. Thus, the Kennedys concluded, it follows that any insulation work that Mr. Kennedy witnessed being performed by *Tacoma Boat* workers must necessarily have involved insulation that had been supplied to Tacoma Boat by Tacoma Asbestos; and likewise, any insulation obtained from Tacoma Boat, must in turn have been obtained from Tacoma Asbestos.

The Kennedys constructed this "exclusive supplier" theory from the proffered testimony of various witnesses, much of which was challenged by Saberhagen as inadmissible.

a. Dennis Legas

Dennis Legas was a Tacoma Boat boilermaker who worked on tuna fishing boats at another temporary Tacoma Boat facility located elsewhere in the Port of Tacoma industrial yard from 1966 to 1973. CP 605-06, 633. He did not work on Pier 23 while he was with Tacoma Boat and did not set foot on that pier during the 1960s. CP 628. As the Kennedys admitted in discovery, Mr. Legas has "no knowledge regarding the particular circumstances of Mr. Kennedy's exposure[.]" CP 50.

Mr. Legas characterized Tacoma Asbestos as an insulator that provided workers to perform the insulation work on those tuna boats. CP 624-25. He testified that Tacoma Asbestos trucked its materials to the Tacoma Boat site in the Port Industrial Yard where the tuna boats were built. CP 606-10, 620-21, 640. Tacoma Boat did not have anywhere to store materials at the site. CP 614. While Mr. Legas had seen the Tacoma

Asbestos trucks, he did not know what was on them. CP 621[7] He had no personal involvement in Tacoma Boat's material purchasing. CP 620-21. He did not testify that no other companies made deliveries—he just did not know of any others:

> Q: You're not saying that there weren't lots of other deliveries made by other companies; you just didn't know about it?
>
> A: Correct.

CP 639.

b. Dave Hansen

Dave Hansen worked for Tacoma Boat at its main shipyard in the 1960s. CP 651-52. As with Mr. Legas, the Kennedys stipulated that Mr. Hansen had "no knowledge regarding the particular circumstances of Mr. Kennedy's exposure[.]" CP 50. He testified that he had seen Tacoma Asbestos workers at the main Tacoma Boat facility, although he did not remember when or in which decade. CP 662-63. Tacoma Asbestos was the only company he could recall doing insulation work at the Tacoma Boat main facility. CP 668. He also remembered a man named "Boscovich" who ran the Tacoma Asbestos insulation crew. CP 667-68.

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[7] Q: . . . And those were the occasions when you saw the trucks—you saw the Tacoma Asbestos trucks in the yard we talked about.
A: Correct.
Q: Right. ***But you don't know what was in the trucks?***
A: ***Correct.***

CP 621 (emphasis added).

Mr. Legas saw the trucks, and saw them unloaded: "***What the product was, [he] couldn't answer that.***" CP 638 (emphasis added).

c. Charles Brands

Charles Brands, a witness deposed in another lawsuit in 1990, stated that "[Tacoma Asbestos] did all the work for Tacoma Boat, all the insulating." CP 677-78.[8] As with Messrs. Legas and Hanson, Mr. Brands' testimony relates only to Tacoma Asbestos' role as a *subcontractor performing work* for Tacoma Boat; he had nothing to say about its supposed additional role as an *insulation supplier* to Tacoma Boat. Nothing in his testimony suggests that he would have known anything about the Tacoma Boat's purchasing or sources of supply.

d. George Boscovich

George Boscovich, a former manager of Tacoma Asbestos, testified that Tacoma Asbestos did "industrial work" in the Tacoma Boat shipyard. CP 492.[9] Mr. Boscovich did not say anything suggesting that, aside from performing *work* as a subcontractor for Tacoma Boat, Tacoma Asbestos also served as a product *seller* or *supplier* of insulation products to Tacoma Boat for Tacoma Boat's own insulation work. To the contrary, he testified that Tacoma Asbestos' sales of insulation products were "insignificant." CP 559.

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[8] *See* discussion *infra* at Section V.B.3.c concerning the admissibility of Mr. Brands testimony.

[9] *See* discussion *infra* at Section V.B.3.c concerning the admissibility of Mr. Boscovich's testimony.

e. John Anderson

The Kennedys also offered excerpts from an incomplete transcript of testimony of John Anderson taken in a 1990 trial. [10] From that excerpt it appears that Mr. Anderson had been an insulator for Tacoma Asbestos. He testified that he and Ted Boscovich (George Boscovich's brother and a fellow insulator) had performed work at Tacoma Boat and used one of three brands of insulation: "Philip Carey or Johns Manville or Pabco." Tacoma Asbestos mostly used "Pabco" materials. CP 689-90. Tacoma Asbestos was the agency for Pabco. CP 697. E.J. Bartells used Johns Manville products only. CP 687, 897.

C. The Trial Court's Grant of Summary Judgment and Subsequent Proceedings.

In response to the Kennedys' opposition, Saberhagen moved to strike the testimony of Messrs. Brands, Anderson, and Boscovich. CP 908-15. But Saberhagen argued that even if those materials were considered, the Kennedys had still failed to come forward with sufficient admissible, non-speculative evidence satisfying the proximate cause criteria of *Lockwood, Allen v. Asbestos Corp.*, 138 Wn. App. 564, 157 P.3d 406 (2007), and *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 14 P.3d 789 (2000), and demonstrating that Mr. Kennedy had in fact been exposed to and harmed by asbestos-containing products supplied or installed by Tacoma Asbestos. Indeed, in stark contrast to each of those

[10] *See* discussion *infra* at Section V.B.3.c concerning the admissibility of Mr. Anderson's testimony.

cases, the Kennedys had failed to offer *any evidence whatsoever* causally connecting the claimed exposure to Mr. Kennedy's mesothelioma.

The trial court denied Saberhagen's motion to strike, but granted summary judgment. CP 950-51. The court agreed that the Kennedys' evidence failed to satisfy the *Lockwood* criteria for proximate cause, and likewise concluded that their "exclusive supplier" theory was insufficient. CP 950-51. The trial court denied the Kennedys' motion for reconsideration (CP 1088-89), and this appeal followed.[11] More recently, the Kennedys have sought to vacate the order granting summary judgment under CR 60(b)(3) on the grounds of newly discovered evidence. That motion has been fully briefed and argued in the trial court, and the parties are awaiting the trial court's decision.

IV. STANDARD OF REVIEW

In reviewing a summary judgment, this Court engages in the same inquiry as the trial court. *Allen*, 138 Wn. App. at 569. This Court "will affirm an order granting summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (quotation omitted).

In reviewing summary judgment orders, appellate courts "consider supporting affidavits and other admissible evidence that is based on the affiant's personal knowledge." *Id.* (quotation omitted). The party moving for summary judgment has the initial burden of establishing the absence of

[11] In separate proceedings before this Court, Saberhagen challenged the timeliness of the Kennedys' appeal, but this Court denied that challenge and the Supreme Court denied Saberhagen's request for discretionary review.

an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets that burden, in order to withstand summary judgment, the nonmoving party must set forth specific facts establishing a genuine issue for trial. *Id.*, at 225-26. "The evidence and all reasonable inferences therefrom must still be examined in the light most favorable to the nonmoving party to determine if there are genuine issues of material fact for trial." *Weatherbee v. Gustafson*, 64 Wn. App. 128, 132, 822 P.2d 1257 (1992). An inference is not reasonable unless it is deduced "as a logical consequence" of admitted or proven facts. *Fairbanks v. J.B. McLoughlin*, 131 Wn.2d 96, 101-02, 929 P.2d 433 (1997) (quotation omitted).

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Allen*, 138 Wn. App. at 570. "Although the trial court has discretion to rule on a motion to strike, a 'court may not consider inadmissible evidence when ruling on a motion for summary judgment.'" *Id.*, at 570, quoting *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

V. ARGUMENT

A. Summary Judgment Standards for Proximate Cause in Asbestos Cases.

An asbestos plaintiff "must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product." *See Lockwood*, 109 Wn.2d at 245. "In order to have a cause of action, the plaintiff must identify the particular manufacturer of the

product that caused the injury." *Id.*, citing *Martin v. Abbot Labs.*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). A plaintiff may satisfy that requirement through circumstantial evidence. *Berry*, 103 Wn. App. at 323, citing *Lockwood*, 109 Wn.2d at 247 (allowing a plaintiff to rely on the "testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace."). However, there must be sufficient evidence to allow a reasonable fact finder to infer the plaintiff was exposed to the defendant's product. *Lockwood*, 109 Wn.2d at 247.

"*Lockwood* identified several factors a court must consider when evaluating whether sufficient evidence of causation exists: (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." *Berry*, 103 Wn. App. at 323-24, citing *Lockwood*, 109 Wn.2d at 248. "In addition, trial courts must consider the evidence presented as to medical causation of the plaintiff's particular disease." *Lockwood*, 109 Wn.2d at 248 (emphasis added). Ultimately, "the sufficiency of the evidence of causation will depend on the unique circumstances of each case." *Id.*, at 249.

B. The Kennedys Failed to Satisfy the *Lockwood* Criteria for Demonstrating Proximate Causation.

1. FMS-789: Mr. Kennedy Failed To Offer Sufficient *Lockwood* Evidence of Exposure To and Harm Resulting From Tacoma Asbestos Products During the Overhaul of the FMS-789.

The Kennedys claimed that Mr. Kennedy had been exposed to asbestos from Tacoma Asbestos products as a bystander to the overhaul work performed on the FMS-789 by Tacoma Boat. Summary judgment on this claim was required because the Kennedys presented insufficient admissible evidence of *any* exposure to Tacoma Asbestos's products on this ship, much less one that was causally "significant"—the *Kennedys'* term[12]—*i.e.*, an exposure that satisfies the *Lockwood* criteria of proximate cause, tying an asbestos product to a plaintiff's injury.

First, as the trial court found, Mr. Kennedy failed to offer sufficient evidence of his exposure to asbestos in relation to the FMS-789 and thus did not meet the exposure factor of the *Lockwood* test. CP 951. That was because of "a lack of evidence to confirm if and how often Plaintiff went to the boiler room, or any other part of the vessel, where he might have been exposed." CP 951.

The trial court was correct. Mr. Kennedy admitted that he had no personal involvement with this overhaul work. CP 407. In fact, during the 3 to 6 week overhaul, Mr. Kennedy only went on board on a "few occasions" to grab things he might need or to salvage equipment. CP 239-40, 321-22, 407-08. Both Mr. Kennedy and his key witness, Mr. Elmore,

[12] CP 137.

testified that this work, including the insulation work, was performed by *Tacoma Boat* workers. CP 239, 324, 394, 407.[13] While Mr. Kennedy recalled that those Tacoma Boat workers "did some asbestos repair on the boiler pipes[,]" he *never* went in the boiler room during the "few occasions" when he went aboard. CP 407-08. There is no evidence that Tacoma Asbestos products were involved in any way in this work by Tacoma Boat. No witness testified that the Tacoma Boat workers used insulation supplied by Tacoma Asbestos. There are no receipts, invoices, purchase orders, bid requests, or any other documentary evidence of even a single sale from Tacoma Asbestos to Tacoma Boat.

The Kennedys' "exclusive supplier" theory cannot salvage this claim. Even assuming that the Tacoma Boat insulation workers were using *asbestos*-containing products (the Kennedys never identified these supposed products or provided any basis for concluding that they were asbestos-containing rather than, say, fiberglass); and even assuming that Mr. Kennedy's few, brief forays onto the ship during the overhaul happened to coincide with the use of those products, there is still no evidence in the record to show that this resulted in any "*significant*"—the Kennedys' term—exposure to asbestos, or one that otherwise satisfies the *Lockwood* criteria for demonstrating a sufficient causal connection

[13] Mr. Elmore knew that the workers applying insulation on the FMS-789 were *Tacoma Boat* workers because "they had Tacoma Boat signs on their trucks[.]" CP 239. Further, he testified he was sure that the workers removing insulation from the FMS-789 were Tacoma Boat personnel. CP 324.

between a defendant's product and a plaintiff's injury.[14] In sharp contrast to the evidence in the *Lockwood*, *Berry*, and *Allen* cases, Mr. Kennedy offered no medical, scientific or other expert testimony to show that his intermittent and short exposure on the FMS-789 was somehow different, or causally more important, than his comparably "intermittent" and "short" exposures at Camp Murray and/or while performing brake jobs—*exposures that the Kennedys themselves characterized as "insignificant" for the purposes of attributing causation of mesothelioma. See* CP 137.

2. FMS-6: Mr. Kennedy Failed to Offer Sufficient *Lockwood* Evidence of Exposure to and Harm Resulting from Tacoma Asbestos Products on the FMS-6 and the Small Tug.

The Kennedys argued that Mr. Kennedy was exposed to asbestos during a boiler insulation project on the FMS-6, the floating machine shop that replaced the FMS-789. However, as with their FMS-789 claim, no jury could reasonably infer that the asbestos insulation products that were allegedly used had come from Tacoma Asbestos.

National Guard personnel, including Mr. Kennedy, performed the insulation work. CP 221, 446-47. Tacoma Asbestos was not involved as an insulation contractor. Mr. Kennedy's removal of old asbestos-containing insulation would likely have resulted in exposure, but there is no evidence or claim that the old insulation being removed had come from Tacoma Asbestos. As for the *replacement* insulation used in the repairs, Mr.

[14] Mr. Kennedy even conceded that the FMS-789 was not one of the vessels on which he believes he had the most exposure to asbestos. CP 391-92.

Kennedy stated that he used insulation materials that came from the ship's supply section (which in turn would have come from the National Guard supply channels[15]), but after some period of time those supplies ran out and he was told to get additional supplies from a nearby Tacoma Boat office. He picked up *one sack* of Johns Manville insulation cement from Tacoma Boat. *See* CP 402-03. His repair work consisted of perhaps a "few hours" and he was unable to say how much of that work was performed with materials from the FMS's supply shop, and how much was performed with this one sack from Tacoma Boat. *See* CP 444.

As with the FMS-789 claim, the Kennedys have no admissible, non-speculative testimony, sales documents or other evidence tying this one sack of cement—obtained by Mr. Kennedy from a *Tacoma Boat* office—to Tacoma Asbestos. Instead, the Kennedys again rely on their "exclusive supplier" theory to contend that this one sack of Johns Manville insulation must have been supplied by Tacoma Asbestos to Tacoma Boat because Tacoma Boat supposedly obtained *all* of its insulation products from Tacoma Asbestos and no one else. As demonstrated in Section V.B.3, no jury could reasonably conclude that Tacoma Asbestos was the sole supplier of insulation to Tacoma Boat. Indeed, the record in this case contains *undisputed* testimony and evidence that there was a *Johns Manville* insulation distributor, E.J. Bartells, very nearby to Tacoma Boat's shipyard, and in fact that *Bartells had sold*

[15] *See* CP 130-31, 286, 288.

insulation products to Tacoma Boat throughout the 1960s. See CP 687, 861, 888, 897.

The Kennedys' evidence relating to the small tug is even weaker—there consisting of even *less* than one sack of insulation supposedly obtained by Mr. Kennedy from the Tacoma Boat temporary office at the foot of Pier 23, for use in repairing a *one foot* piece of pipe. *See* CP 449-50. The Kennedys again relies on their "exclusive supplier" theory, but here too there is no evidence from which it can be reasonably inferred that Tacoma Boat had obtained that partial sack from Tacoma Asbestos.

Yet even if the evidence *was* sufficient to show that the insulation cement obtained by Mr. Kennedy from Tacoma Boat and used on the FMS-6 and the small tugs—a scant one and one-half sacks or less, in all—*had* been supplied to Tacoma Boat by Tacoma Asbestos, the claims would still fail, for the same fundamental reason as stated above: in contrast to the evidence in the *Lockwood*, *Berry*, and *Allen* cases, Mr. Kennedy offered no medical, scientific or other expert testimony to satisfy the proximate cause criteria of those cases or to show that his handling of just one and one-half sacks of insulation cement for a period of perhaps several hours on the FMS-6 and the small tug was somehow different, or causally more important, than his "intermittent" and "short" exposures at Camp Murray and/or while performing brake jobs—exposures *that the Kennedys themselves* characterized as "insignificant" for the purposes of attributing causation of mesothelioma. *See* CP 137.

3. The Kennedys' "Exclusive Supplier" Theory Is a Speculative Non-Sequitur That Is Provably False.

From the evidence offered by the Kennedys' to support their "exclusive supplier" theory, no reasonable jury could reasonably infer that Tacoma Boat purchased *any* insulation materials from Tacoma Asbestos, much less that it purchased *all* of its insulation materials from Tacoma Asbestos.

There is undisputed evidence that *directly contradicts* the Kennedys' "exclusive supplier" theory and proves not only that Tacoma Boat *could have* purchased insulation products from a source other than Tacoma Asbestos, but that it actually *did so*. For example, a known supplier of Johns Manville insulation, E.J. Bartells, was located very close to Tacoma Boat. *See* CP 687, 861, 888, 897. Ralph Woolstenhulme, a Bartells employee, specifically testified that *he took orders from, and sold products to Tacoma Boat throughout the 1960s*. CP 687, 897.[16] Indeed, this evidence was the *only* evidence offered by either party of *any* actual sales of insulation by anyone to Tacoma Boat in the 1960s.

The Kennedys did not challenge Mr. Woolstenhulme's testimony in any way, nor did they offer any response, objection, or rebuttal to it in their motion for reconsideration. They likewise failed to offer any comparable sales evidence of their own supporting *their* theory—*i.e.*, no sale receipts, purchase orders, invoices, contracts, or testimony from sales

[16] Mr. Woolstenhume was in a position to know about sales to Tacoma Boat because he was the person called by the Tacoma Boat purchasing agents when they needed to order materials. CP 898.

agents or purchasers—to support their claim that Tacoma Asbestos had made even a single sale *of anything* to Tacoma Boat in the 1960s, much less that it was Tacoma Boat's *exclusive* supplier.

Moreover, the Kennedys' "exclusive supplier" theory has at its core a logical fallacy with no support in the record but which the Kennedys have nonetheless continued to assert freely and often throughout their briefing: namely, that "contractors" are necessarily also retail "suppliers" of the materials that they use in their contracting work. Of course, logic and experience teach the absurdity of that proposition: it certainly does not follow, for example, that a home remodeling contractor is also a retail supplier of nails and 2x4 lumber, or that an electrical contractor also is a retail supplier of copper wire. Yet the Kennedys' "exclusive supplier" theory rests entirely on that fallacy, which despite their blind repetition, cannot withstand scrutiny. *Even if* the Kennedys had shown that Tacoma Asbestos was Tacoma Boat's exclusive insulation *subcontractor*, *i.e.*, that it was the only company to whom Tacoma Boat ever subcontracted its insulation work, that would certainly *not* entail that Tacoma Asbestos was also a retail *seller* or *supplier* of insulation, or that it had ever *supplied* any insulation to Tacoma Boat. The Kennedys cannot satisfy the *Lockwood* proximate cause criteria by reliance on such faulty logic.

The Kennedys offered no evidence—admissible or otherwise—from which it could reasonably be inferred that Tacoma Asbestos was

Tacoma Boat's "exclusive supplier" of asbestos-containing insulation. Saberhagen will start by examining the *admissible* testimony:

a. No *admissible* testimony supports the claim that Tacoma Asbestos was Tacoma Boat's "exclusive supplier."

Dennis Legas: In the 1960s, Mr. Legas worked for Tacoma Boat at its temporary Port Industrial Yard facility building tuna boats (not the temporary facility at Pier 23). CP 605-06, 628, 633. He was familiar with Tacoma Asbestos as an insulation subcontractor performing the insulation work on the tuna boats under construction. CP 624-25. It would be unreasonable to infer from the testimony of Mr. Legas that Tacoma Asbestos was the only insulation *contractor* doing work for Tacoma Boat—he just did not know of any others. CP 624-25, 637, 639.

More importantly, it would be unreasonable to infer from his testimony that Tacoma Asbestos was the exclusive *supplier* of insulation to Tacoma Boat. Mr. Legas had nothing to do with Tacoma Boat's purchasing of materials at the time. CP 620-21. He had no role at all in ordering or receiving deliveries of insulation supplies. CP 639. He could not answer what was unloaded from the Tacoma Asbestos trucks that made deliveries to the worksite. CP 620-21, 637-38. Far from supporting any inference of "sales" of insulation by Tacoma Asbestos to Tacoma Boat, Mr. Legas' testimony only supports the inference that the Tacoma Asbestos trucks were delivering materials to the Tacoma Asbestos workers who were performing the insulation contacting work on the tuna boats. Mr. Legas' testimony is thus insufficient to establish that Tacoma

Asbestos was a "supplier" of any insulation materials to Tacoma Boat or a supplier of insulation materials to a Tacoma Boat temporary repair facility site where Mr. Legas did not work (Pier 23), much less its exclusive supplier to all of its facilities.

David Hansen: Mr. Hansen was a Tacoma Boat worker who testified that Tacoma Asbestos was frequently present at Tacoma Boat and that Tacoma Asbestos was the only company he could recall *performing insulation work* at the Tacoma Boat main facility. CP 668. That testimony—again, about *insulation subcontracting*—does not shed light on the sources from which Tacoma Boat *purchased* insulation for its own use, nor for that matter does it suggest that Tacoma Asbestos ever sold or supplied insulation to Tacoma Boat or anyone else. Further, his testimony is not relevant to the temporary Tacoma Boat facility at Pier 23 since Mr. Hansen could not recall ever working at Pier 23. CP 650.

Saberhagen's 30(b)(6) testimony: Saberhagen's 30(b)(6) representative, Joseph Campos, testified that there was no way of knowing from the company's few remaining records whether Tacoma Asbestos had ever supplied asbestos products to Tacoma Boat during the 1964-68 timeframe. CP 724. Since the Kennedys offered no evidence establishing that Tacoma Boat obtained all of its asbestos from Tacoma Asbestos from 1964-68, there was no evidence for Saberhagen's 30(b)(6) representative to controvert.

Because the Kennedys did not offer sufficient admissible evidence to support an inference that Tacoma Asbestos was the exclusive supplier

to Tacoma Boat, there is no basis for a jury to reasonably conclude that Mr. Kennedy was exposed to any asbestos products for which Tacoma Asbestos is responsible. Nor is there any medical, scientific or other evidence, as explained above, showing that any such exposure was "significant"—the *Kennedy's* term—in causing Mr. Kennedy's mesothelioma, or that these alleged exposures were somehow *different*, or causally *more important*, than his exposures at Camp Murray and/or while performing brake jobs—exposures that the *Kennedys themselves have dismissed* as "insignificant" for the purposes of attributing causation of mesothelioma. *See* CP 137. Thus the trial court did not err in concluding that the Kennedys' "exclusive supplier" theory was insufficient to satisfy the *Lockwood* criteria for proximate cause.

b. Even the *inadmissible* testimony, if considered, does not support the Kennedys' "exclusive supplier" theory.

Inadmissible George Boscovich testimony:[17] The Kennedys offered the 1981 testimony of Mr. Boscovich for the proposition that Tacoma Asbestos *supplied* asbestos-containing insulation *and* insulation contractors to Tacoma Boat. Brief of Appellants, at 16, citing CP 492. However, Mr. Boscovich's *actual* testimony was that Tacoma Asbestos had ***done work*** in at Tacoma Boat shipyards. CP 492. He did not say or

[17] The Kennedys also offered the 1999 deposition of George Boscovich from the *Lind* case in opposition to summary judgment, but they do not rely on any of that testimony in their appellate brief. As Saberhagen argued below, the 1999 testimony is inadmissible under ER 804(b)(1). CP 912-13. In any event, the 1999 testimony does not advance Mr. Kennedy's exclusive supplier theory. *See* CP 526-89

suggest that Tacoma Boat had ever ***sold*** or ***supplied*** any insulation materials to Tacoma Boat. Moreover, his testimony about Tacoma Asbestos having done work at "Tacoma Boat" does state any time period, nor does it necessarily or reasonably extend to remote or temporary Tacoma Boat offices at Pier 23 or in the Port Industrial Yard.

At most, Mr. Boscovich's testimony supports the assertion that Tacoma Asbestos performed *some* work at *some* Tacoma Boat facility during *some* time period. That testimony does not suggest that Tacoma Asbestos ever sold or supplied insulation products to Tacoma Boat during the 1964-84 period, much less that it was the *only* supplier of asbestos to Tacoma Boat for any of its activities at Pier 23.

Inadmissible purported Tacoma Asbestos correspondence: This correspondence does not say anything about Tacoma Asbestos supplying Tacoma Boat with asbestos and does not support Mr. Kennedy's theory that Tacoma Asbestos was the exclusive supplier of Tacoma Boat. *See* CP 594-95.

Inadmissible John Anderson testimony: This testimony would not permit a jury to reasonably infer that Tacoma Asbestos was the "exclusive supplier" to Tacoma Boat. Mr. Anderson was an insulator for Tacoma Asbestos. He testified that he and Ted Boscovich (the brother of George Boscovich) had worked as insulators at Tacoma Boat and, unsurprisingly, that Ted got the insulating materials he used for that work

from Tacoma Asbestos. CP 691-92.[18] Mr. Anderson's testimony thus stands only for the unsurprising proposition that Tacoma Asbestos insulation workers working at Tacoma Boat got their insulation materials from Tacoma Asbestos.

None of Mr. Anderson's testimony speaks to Tacoma Boat's insulation supply practices or sources. Nothing from the excerpt offered by Mr. Kennedy gives any indication that Mr. Anderson had any first-hand knowledge of Tacoma Boat's procurement practices. Finally, Mr. Anderson did not testify that Ted Boscovich worked at Pier 23 on the FMS-789 overhaul, leaving the source of any asbestos material used there as an open question.

Inadmissible Charles Brands testimony: This testimony does not support Mr. Kennedy's "exclusive supplier" theory. Mr. Brands testified that "Tacoma Asbestos . . .did all the ***work*** for Tacoma Boat, all the ***insulating***." CP 677-78 (emphasis added). Mr. Brands did not have anything to say about insulation supply (as opposed to performing the insulation work, or doing "the insulating" through a contract with Tacoma Boat). That is not surprising since Mr. Brands' testimony does not show any personal knowledge with Tacoma Asbestos insulation sales or the sources from which Tacoma Boat procured insulation.

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[18] Contrary to Mr. Kennedy's claims, the record does not specify who employed Ted Boscovich, only that he worked "at" Tacoma Boat. CP 691. Mr. Anderson was a Tacoma Asbestos employee who worked at Tacoma Boat. CP 691. He testified that Ted Boscovich was an "asbestos worker like myself[,]" leading to the reasonable conclusion that Ted Boscovich worked for Tacoma Asbestos, like Mr. Anderson, while working at Tacoma Boat.

Nothing on CP 677-78 supports Mr. Kennedy's claim that Tacoma Asbestos had the "***exclusive*** contract for providing insulation to Tacoma Boat[.]" *See* Brief of Appellants, at 18 (emphasis in original), quoting CP 677-78.[19] Nothing on those pages or in Mr. Brand's testimony (or in anywhere else on this record) would allow a reasonable fact-finder to infer that Tacoma Asbestos was the exclusive *supplier* of asbestos to Tacoma Boat.

Nor do those pages support a finding that Tacoma Asbestos was the exclusive insulation *contractor* used by Tacoma Boat during the 1960s. *See* Brief of Appellants, at 6 & fn.4, citing Mr. Brands' testimony at CP 677-78. There is nothing from the short excerpt of Mr. Brands' deposition offered by the Kennedys to indicate whether Mr. Brands knew anything about the contractual relationships between Tacoma Boat and Tacoma Asbestos or anything about Tacoma Boat's practices outside of its main shipyard. Regardless, allowing an inference that Tacoma Asbestos was the exclusive insulation subcontractor used by Tacoma Boat does not in turn support the Kennedys' claim that Tacoma Asbestos insulators worked on the FMS-789. *See* Brief of Appellants, at 31.[20] That is because the

[19] The 1999 deposition of George Boscovich, conducted by Mr. Kennedy's trial counsel in this case, shows that counsel for Mr. Kennedy appreciates the difference between selling insulation and supplying insulation on work being performed by Tacoma Asbestos. CP 558-59.

[20] The Kennedys' claim in the argument section of their Appellants' Brief that Tacoma Asbestos insulators overhauled the FMS-789 cannot be reconciled with their admissions in the fact section of his brief that "Tacoma Boat personnel" worked on the FMS-789 and that "Tacoma Boat performed" the asbestos work on the FMS-789. Brief of Appellants, at 8. This Court need not chose which version set forth the Kennedys' brief is correct, however, because the evidence from Mr. Elmore and Mr. Kennedy points in only one direction: that *Tacoma Boat* did the work on the FMS-789. *See* CP 239-40, 407.

evidence does not show that Tacoma Boat used *any* insulation contractors when overhauling the FMS-789; in fact, the evidence shows *it did not*. *See* CP 239-40 (Mr. Elmore testifying that Tacoma Boat workers arrived in Tacoma Boat trucks to work on the FMS-789) and CP 407 (Mr. Kennedy testifying that Tacoma Boat people worked on the renovation of the FMS-789).

c. This Court should not consider the inadmissible Boscovich, Anderson, or Brands testimony, or the purported Tacoma Asbestos correspondence.

The Kennedys' claims fail even if this Court considers *all* of the evidence they submitted to the trial court. However, this Court should refuse to consider the *inadmissible* evidence. *See* CR 56(e) (facts offered in opposition to summary judgment must be admissible in evidence); *Allen*, 138 Wn. App. at 409 (A "court may not consider inadmissible evidence when ruling on a motion for summary judgment.") (quotations omitted). Indeed, the record reflects that, with the single exception of the Charles Brands testimony, the Kennedys did not oppose Saberhagen's motion to strike *all* of this inadmissible material. *See* CP 955 n.2, 1043-62; RP (8/3/2012) at 2-10.[21]

George Boscovich: Mr. Boscovich's deposition testimony from the *Schnelle* case in 1981 may not be considered because it is hearsay and

[21] Saberhagen is entitled to raise the question of whether the trial court erred in denying its motion to strike, without having taken a cross-appeal. A "successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court, but no additional relief will be granted on appeal in the absence of a cross-appeal." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000).

inadmissible under ER 804(b)(1). *See* CR 56(e); *Allen*, 138 Wn. App. at 409. Saberhagen moved to strike it on this basis, and the Kennedys offered no opposition. CP 909-13. George Boscovich is not available as a witness because he is deceased. *See* CP 935. The former testimony of an unavailable witness is not admissible under ER 804(b)(1) unless the party against whom the testimony is offered—here, Saberhagen or its predecessor in interest—had an opportunity and similar motive to develop the testimony. ER 804(b)(1). The proponent of the former testimony bears the burden of satisfying ER 804(b)(1)'s requirements for admissibility. *See United States v. Salerno*, 505 U.S. 317, 322, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992);[22] *State v. Whisler*, 61 Wn. App. 126, 137, 810 P.2d 540 (1991).

The Kennedys failed to show that Saberhagen or a predecessor in interest was present during the deposition of George Boscovich in the *Schnelle* case. *See* CP 466-67; 935-36.[23] They also failed to show that Saberhagen or a predecessor had a motive to develop the former testimony of George Boscovich. Since Saberhagen had no opportunity or motive to

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[22] Because the federal rule is identical to ER 804(b)(1), this Court can look to federal law when interpreting that rule. *State v. DeSantiago*, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003).

[23] Mr. Kennedy argued that he was not given enough time to support the admissibility of this evidence following Saberhagen's motion to strike, but CR 56(e) requires that the facts offered in opposition to summary judgment be admissible. And Mr. Kennedy bore the burden of satisfying ER 804(b)(1)'s requirements for admissibility. *See Salerno*, 505 U.S. at 322. Thus, he should have been prepared to establish the admissibility of the evidence he offered in opposition to summary judgment. Tellingly, Mr. Kennedy did not move for more time under CR 56(f) to engage in discovery to uncover additional facts related to admissibility. Instead, Mr. Kennedy identified case files that he could have, but apparently failed to, search before opposing summary judgment. *See* CP 934-37, 941-45.

develop the former testimony of George Boscovich, his testimony is not admissible under ER 804(b)(1) and may not be considering when ruling on summary judgment.

Purported Tacoma Asbestos correspondence: This document[24] may not be considered because it was not authenticated and is therefore inadmissible under ER 901. *See* CR 56(e); *Allen*, 138 Wn. App. at 409. Saberhagen moved to strike it on this basis, and the Kennedys offered no opposition. *See* CP 914-15.

Under ER 901, authentication is a condition of admissibility. The Kennedys offered no evidence to support a finding that the matter in question is what he claims it to be. *See* ER 901 (requiring "evidence sufficient to support a finding that the matter is what its proponent claims it to be."). For example, there was no testimony or declaration from any person with personal knowledge of the letter stating that the letter is what Mr. Kennedy claims it to be. *See* ER 901(b)(1)(providing that authentication may be accomplished by the testimony of a witness with knowledge).[25] Having presented neither any authenticating evidence nor

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[24] CP 594-95.

[25] While a copy of the letter was ostensibly identified as a true and correct copy by Mr. Kennedy's lawyer, that does not authenticate the document itself. *See* CP 171; ER 602 ("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."); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins.*, 122 Wn. App. 736, 750, 87 P.3d 774 (2004) (declaration by lawyer without personal knowledge of the document cannot satisfy the showing of authenticity required for admissibility). Since Mr. Kennedy's lawyer does not have personal knowledge of the authenticity of the letter, it may not be considered in opposition to summary judgment.

any argument for admissibility to the trial court, the exhibit is inadmissible and may not be considered on summary judgment.

John Anderson: The transcript of Mr. Anderson's testimony during the 1989 *Ness* trial may not be considered in ruling on summary judgment because it is incomplete and therefore inadmissible under ER 106 and CR 32(a)(4). *See* CR 56(e); *Allen*, 138 Wn. App. at 409. Saberhagen moved to strike it on this basis and the Kennedys offered no opposition. ER 106 states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

Similarly, CR 32(a)(4) provides:

> If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Here, the transcribed trial testimony of John Anderson ends abruptly with a note from the court reporter that the order for the remainder of the transcript had been cancelled. CP 698. The transcribed portion offered by the Kennedys contained only the *direct* examination of Mr. Anderson, no cross-examination. Saberhagen requested that the Kennedys produce a complete transcript of that testimony, but it was never provided. CP 913. Thus, the cross-examination remains an unknown, and

there is simply no way of determining whether the testimony relied upon by the Kennedys stood up during cross-examination or was significantly changed, clarified or retracted. Without such evidence, the partial testimony offered by the Kennedys is inherently untrustworthy and has no proper place in summary judgment proceedings.

Charles Brands: This testimony may not be considered because it is hearsay and not admissible under ER 804(b)(1). *See* CR 56(e); *Allen*, 138 Wn. App. at 409. Charles Brands is deceased and is therefore unavailable as a witness. *See* CP 935. Thus, the Kennedys had the burden of showing that his former testimony meets the ER 804(b)(1) requirement that Saberhagen or its predecessor in interest (*i.e.*, Brower) had an opportunity and similar motive to develop the testimony. *See Salerno*, 505 U.S. at 322. Saberhagen moved to strike this testimony on this basis, *i.e.*, that its motives to question Mr. Brands at his deposition in the 1990 *Schnelle* case were dramatically different than its motives and interests in the present case, and thus the prior testimony did not pass the "similar motive and opportunity" test of ER 804(b)(1).

The Kennedys did not dispute Saberhagen's contention, arguing only that they needed more time to support their offer of this evidence, because of the "complexity and gravity" of Saberhagen's motion. *See* CP 936. At the time of the summary judgment hearing, the Kennedys had offered no evidence or substantive argument disputing Saberhagen's contention that it lacked "similar motive and opportunity" and accordingly the testimony was inadmissible. *See* RP (8/3/2012) at 2-12. Their only evidence on the issue

was presented for the first time on August 16, 2012, when they filed an untimely motion for reconsideration. *See* CP 953 n.2 and 1088-89.

The Brands testimony is plainly inadmissible under ER 804(b)(1) and cannot defeat summary judgment. *State v. DeSantiago*, 149 Wn.2d 402, 413-14, 68 P.3d 1065 (2003). The Kennedys failed to make any showing that Saberhagen or Brower had similar motive to develop Mr. Brands' former testimony in the 1990 deposition. In moving to strike, Saberhagen put in evidence showing the *opposite*: that counsel for Brower had no motive to develop the testimony of Mr. Brands because Brower was a defendant in the case only for jurisdictional purposes (to preclude removal to federal court) and the plaintiff had no interest in pursuing liability claims against Brower. CP 799-800 (letter from Brower counsel to plaintiff's counsel in the *Brady* case agreeing to "continue to quietly remain on the sidelines during the course of the litigation[.]"). Since Brower did not have the same motive to develop the testimony of Mr. Brands in the former case (where it was a passive jurisdictional defendant) as Saberhagen does in the present case (where it is a significant, if not a targeted defendant), the previous testimony is inadmissible under ER 804(b)(1).

In moving for reconsideration of the trial court's order granting summary judgment, the Kennedys, for the first time, attempted to show that Saberhagen did in fact have a similar motive to develop Mr. Brands' former testimony through submission of a deposition transcript from the *Brady* case in which counsel for Brower cross-examined the plaintiff (Peter Brady). CP 955 n.2, 1043-62. This Court may not consider that

evidence since (1) the Kennedys' motion for reconsideration *itself* was found to be untimely, CP 1088-89, and (2) in any event the Kennedys' had offered no basis for their untimely submission of additional evidence.

Civil Rule 59(a)(4) provides the ostensible basis for Mr. Kennedy's submission of additional evidence. However, that provision requires that the evidence be "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have [timely discovered and produced]." *See Adams v. W. Host., Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (denying reconsideration because evidence had been available to submit before the summary judgment hearing). Evidence presented to the trial court for the first time in a motion for reconsideration—much less an *untimely* motion for reconsideration—does not qualify as "newly discovered evidence" without a showing that the party was unable to obtain the evidence earlier. *Go2Net, Inc. v. C.I. Host*, 115 Wn. App. 73, 90-91, 60 P.3d 1245 (2003).

Here, the Kennedys made no showing in their untimely motion for reconsideration why the transcript from Mr. Brady's 1989 deposition was not available to submit before the hearing. CP 952-56, 985-86. They argued that they had no opportunity to respond to Saberhagen's motion to strike. *See* 934-38. But of course, but it was *their burden in the first place* under CR 56(e) to "set forth such facts as would be admissible in evidence[]" in opposition to Saberhagen's summary judgment motion and, as the offering party, they bore the burden of demonstrating admissibility at the time they chose to offer the Brands testimony. If the transcript from

Mr. Brady's 1989 deposition was necessary to establish an exception to the hearsay rule, the Kennedys should have submitted it with their summary judgment opposition. They can hardly cry "foul" or claim surprise when Saberhagen properly challenged them to demonstrate the admissibility of their own proffered evidence. That the Kennedys were simply unprepared to do so at the time of summary judgment is no excuse.

4. Applying the *Lockwood* Test to These Facts Establishes that Summary Judgment Was Appropriate.

Lockwood requires that an asbestos plaintiff "must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product." *See Lockwood*, 109 Wn.2d at 245. Mr. Kennedy did not meet that burden here. The proximate cause evidence offered in this case was wholly insufficient under the leading cases—*Lockwood*, *Allen*, and *Berry*—cited by both parties.

In *Lockwood*, the plaintiff had eyewitness testimony that the defendant's asbestos products (asbestos cloth) were in the shipyard where he was working and even on the same ships. *Lockwood*, 109 Wn.2d at 247. Here, there is no eyewitness testimony nor *any* other evidence that Tacoma Asbestos supplied *any* asbestos containing materials to Pier 23, distinguishing this case from *Lockwood.*

In *Allen*, there was documentary proof—sales invoices—demonstrating the defendant had sold nearly *19,271 pounds* of its asbestos containing products to the plaintiffs' shipyard during the general time period that plaintiff worked there. 138 Wn. App. 572-74. Notably, there

is no comparable proof in this case of *any* sales by Tacoma Asbestos to Tacoma Boat, to the National Guard or to Pier 23. To the contrary, the *only* such proof of *any* sales of insulation to Tacoma Boat is the testimony of Ralph Woolstenhulme, *i.e.*, that *E. J. Bartells* (a nearby distributor of the *very brand* of insulation cement identified by Mr. Kennedy at Pier 23, Johns Manville) sold products to Tacoma Boat throughout the 1960s. *See* CP 687, 861, 888, 897.

Likewise, in *Berry*, the court found that there was testimony from a shipyard purchasing agent that the shipyard had actually *purchased* insulation materials from the defendant during the period when the plaintiff worked there. Wn. App. 323-24. Other evidence showed that the defendant was a *distributor* of a specific brand of insulation products that was frequently used on the ships at that time. No such evidence is present in this. There was no comparable evidence that Tacoma Boat ever purchased *any* insulation materials from Tacoma Asbestos, or any that such materials were used on the FMS-789, the FMS-6 or the small tug, or that products of which it was a distributor were frequently used there. Again, the only evidence of *actual sales* of insulation to Tacoma Boat was Mr. Woolstenhulme's testimony that *E.J. Bartells* sold products to Tacoma Boat throughout the 1960s.

In striking contrast to *Lockwood*, *Allen*, and *Berry*, Mr. Kennedy has *no evidence* placing Tacoma Asbestos's products at his worksites or in his vicinity. The *Lockwood* court did not condone asbestos cases based on speculation; it directed trial courts to scrutinize plaintiff's proof of

causation to see if there is sufficient evidence of actual exposure to the defendant's asbestos-containing product. Here, the trial court did just that. As demonstrated above, Mr. Kennedy produced no evidence showing he was actually ever exposed to or harmed by asbestos-containing products supplied or installed by Tacoma Asbestos.

Yet even if the Kennedys' had shown been able to show that Tacoma Asbestos' products were used on the Pier 23 vessels, that alone would satisfy the *Lockwood* criteria or demonstrate proximate cause. *Lockwood* requires a plaintiff to present evidence that his exposure to the defendant's asbestos *caused injury*. *Lockwood*, 109 Wn.2d at 248 ("In addition, trial courts must consider the evidence presented as to medical causation of the plaintiff's particular disease."). The Court explained how this showing is made:

> Such evidence would include ***expert testimony on the effects of inhalation of asbestos on human health in general and on the plaintiff in particular***. It would also include evidence of any other substances that could have contributed to the plaintiff's disease, and expert testimony as to the combined effects of exposure to all possible sources of the disease. The consideration of other potential sources of the plaintiff's injury is necessary because exposure to materials other than asbestos may also cause a number of the diseases associated with inhalation of asbestos fibers, and the risk of contracting disease may be increased by the combined effects of exposure to more than one substance, such as asbestos and cigarette smoke.

Lockwood, 109 Wn.2d at 248–49 (internal citation omitted) (emphasis added). *See also Allen*, 138 Wn. App. at 571. Indeed, in sharp contrast to the present case, the plaintiffs in *Lockwood, Allen, Berry* and *Morgan v. Aurora Pump*, 159 Wn. App. 724, 248 P.3d 1052 (2011), each presented expert medical and scientific testimony demonstrating the nature and causal

effect of the alleged exposure to the defendant's products in causing the plaintiff's disease. *See, e.g., Allen*, 138 Wn. App. at 572 (Allen presented expert testimony on the proximity factor of exposure, *i.e.*, that wherever the product was used, it would have drifted throughout the workplace), 575 n.3 (Allen's expert opined that this exposure was more likely than not a substantial factor in causing his cancer); *Morgan*, 159 Wn. App. at 740 (*Lockwood* test satisfied by expert testimony that the asbestos to which plaintiff was exposed was the cause of his disease); *Berry*, 103 Wn. App. 318, 324 (discussing evidence of effect of exposure on Berry and concluding that experts provided evidence that the cumulative effects of the asbestos exposure led to Berry's death). Here, the Kennedys presented no such expert testimony or evidence demonstrating that Mr. Kennedy had been harmed by his alleged exposure to asbestos from Tacoma Asbestos at Pier 23, *i.e.*, that that exposure proximately caused his mesothelioma.

The issue of proximate cause—whether Mr. Kennedy was *harmed* by a Tacoma Asbestos product—was, of course, squarely raised and presented in Saberhagen's summary judgment motion. Indeed, that motion stated on its first page:

> **I. RELIEF REQUESTED**
>
> Defendant Saberhagen Holdings , Inc,. ("Saberhagen") seeks summary judgment dismissal based upon plaintiffs' failure to date to identify sufficient admissible evidence that Jack Kennedy (hereinafter "Mr. Kennedy") was ever ***actually exposed to or harmed by*** asbestos-contiaining products supplied by Saberhaegn or its alleged predecessors.

CP 17 (emphasis added). *See also* CP 22 (no evidence that Mr. Kennedy "was *actually* exposed to or harmed by such exposure"), CP 22 (Mr. Kennedy is unable to offer any admissible evidence showing that exposure to Tacoma Asbestos products "*resulted in or contributed to the development of his illness.*"), CP 24 (plaintiffs "Cannot Establish the Essential Element of Proximate Cause" nor show a "reasonable connection between the injury, the product causing the injury and manufacturer of the product"), CP 26 (plaintiffs have no admissible evidence showing that "such exposure [to Saberhagen's products] was a substantial factor in causing his illness.").

Thus, the grounds for summary judgment *were* stated—clearly, repeatedly, and with particularity—throughout Saberhagen's motion, satisfying CR 7(b)(1). The Kennedys cannot now credibly pretend, though a selective parsing of Saberhagen's motion, that they somehow "missed" that the motion was a proximate cause motion challenging them to satisfy the *Lockwood* criteria. Indeed, in Saberhagen's 11 page motion, *Lockwood* is cited *7 times* and an entire section of the brief is devoted to proximate cause requirements. *See* CP 155.

This is hardly a case like *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 167-69, 810 P.2d 4 (1991). There, defendants in a medical malpractice action moved for summary judgment, but did not raise the proximate cause issue until the reply in support of summary judgment. 61 Wn. App. 168 (proximate cause issue first raised in defendant's reply memorandum), 169 n.1. *Kent Medical Center* holds that the moving party

must "raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment[]" and that the moving party is not allowed to raise new issues in its rebuttal materials because the non-moving party is not given the opportunity to respond. 61 Wn. App. 168. Here, Saberhagen squarely and repeatedly raised the issue of proximate cause in its motion for summary judgment, thus placing the Kennedys fully on notice that they needed to come forward with evidence demonstrating that element or else their claims would be dismissed. Because they did not respond with sufficient admissible evidence demonstrating that Mr. Kennedy's mesothelioma was proximately caused by exposure to a Tacoma Asbestos product as claimed, the trial court properly granted summary judgment.

VI. CONCLUSION

The trial court properly concluded that the Kennedys had failed to come forward with sufficient evidence of proximate cause satisfying the *Lockwood* and following cases, *i.e.*, evidence showing that Mr. Kennedy had been injured by exposure to asbestos products supplied by Tacoma Asbestos. Unlike *Lockwood*, *Allen* and *Berry*, the Kennedys had no direct evidence placing any Tacoma Asbestos product at Pier 23 or on the National Guard vessels. Their illogical and provably false "exclusive supplier" theory, even if it is considered, was likewise insufficient to shore up this fundamental deficiency. Moreover, unlike that plaintiffs in *Lockwood*, *Berry* and *Allen*, the Kennedys failed to demonstrate—with medical or scientific expert testimony, or any other admissible evidence—that the claimed exposure to Tacoma Asbestos products proximately

caused Mr. Kennedy's mesothelioma, *i.e.*, that such exposure satisfied the *Lockwood* criteria and was therefore "significant" to use the Kennedys' term: that it was somehow different, and causally more important than Mr. Kennedy's exposures at Camp Murray and/or while performing brake jobs, exposures that the Kennedys themselves characterized as "insignificant" for the purposes of attributing causation of mesothelioma. For all of these reasons, the trial court's grant of summary judgment was proper and this Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of September, 2013.

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and
SANDRA KENNEDY,

Appellants,

vs.

SABERHAGEN HOLDINGS, INC.,

Respondent.

DECLARATION OF SERVICE

I certify that on the date set forth below I served a copy of *Respondent's Brief* and *Declaration of Service* on the following counsel:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of September, 2013.

Michael B. King