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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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GEORGE ABBAY and LYNN ABBAY,

Appellants,

v.

LESLIE CONTROLS, INC., et al.,

Respondents.

APPEAL FROM THE KING COUNTY
SUPERIOR COURT

Cause Nos. 07-2-36540-1SEA and 07-2-36537-1SEA

CORRECTED BRIEF OF RESPONDENT CLEAVER-BROOKS, INC.

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I. RESPONDENT'S STATEMENT OF THE ISSUES

Respondent Cleaver-Brooks, Inc. hereby joins in Respondent Leslie Controls, Inc.'s statement of Issues 1-4. *See* Brief of Respondent Leslie Controls, Inc. at 2-3. Cleaver-Brooks states the following additional issues:

1. Should this Court affirm the trial court's summary judgment dismissal of plaintiffs' claims against Cleaver-Brooks on the grounds that plaintiffs had expressly disclaimed all claims based on exposures in a federal enclave, and no exposures to Cleaver-Brooks products were alleged other than in a federal enclave, i.e., Puget Sound Naval Shipyard?

2. Alternatively, should this Court affirm the trial court's grant of summary judgment for Cleaver-Brooks on the grounds that plaintiffs did not produce sufficient admissible evidence to raise a genuine issue of material fact as to the element of *proximate cause*, i.e., evidence showing that Mr. Abbay had been exposed to and harmed by a product manufactured, distributed or supplied by Cleaver-Brooks?

II. RESPONDENT'S STATEMENT OF THE CASE

A. Factual Background.

Appellants George and Lynn Abbay (hereinafter "plaintiffs") sued Cleaver-Brooks and 63 other defendants claiming that Mr. Abbay had developed an asbestos-related disease, i.e., mesothelioma, as a result of occupational exposure to asbestos while serving in the U.S. Navy from 1962-66 and while working as a rigger at Puget Sound Naval Shipyard ("PSNS") from 1966-93. *See* CP 6-10, 376-78. Specifically as against Cleaver-Brooks, plaintiffs claimed that Mr. Abbay had worked on or

around Cleaver-Brooks distillers (also known as “evaporators”¹) aboard the USS CONSTELLATION during repairs being undertaken at PSNS, and that in the course of that work he was exposed to asbestos from the distillers’ gaskets and insulation. CP 3869.

B. Procedural Background.

Cleaver-Brooks moved for summary judgment on two grounds: federal enclave and proximate cause. First, in its “federal enclave” motion, Cleaver-Brooks joined in defense arguments that plaintiffs had expressly disclaimed all claims against Cleaver-Brooks, since (1) they had expressly disclaimed all claims for asbestos exposure within a federal enclave, (2) PSNS was at all relevant times a federal enclave, and (3) plaintiffs alleged no exposure to Cleaver-Brooks distillers or other products other than at PSNS. *See* CP 7707-08.

Second, in its “proximate cause” motion, Cleaver-Brooks argued that even if plaintiffs had not waived their claims against it, they nonetheless had no admissible evidence showing that Mr. Abbay had ever been exposed, at PSNS or anywhere else, to asbestos-containing products manufactured or supplied by Cleaver-Brooks, and thus could not

¹ Mr. Abbay called the device by either name. CP 2682. Accordingly, the terms were used interchangeably in Mr. Abbay’s deposition and are so used in this Brief.

demonstrate the essential element of proximate cause. *See* CP 1775-85, 1465-85.

Plaintiffs' opposition to the "federal enclave" motion and the proceedings relating thereto are set forth in the Brief of Respondent Leslie Controls, Inc. at 8-10, 13-33. *See also* CP 3872-75. In opposition to Cleaver-Brooks' "proximate cause" motion, plaintiffs relied primarily upon (1) an excerpt of Mr. Abbay's testimony in which he says that he worked on the distillers on the CONSTELLATION;² (2) a purported, but unauthenticated shipyard memorandum indicating that the CONSTELLATION was originally outfitted with Cleaver-Brooks distillers;³ and (3) a declaration from their industrial hygiene expert, Steven Paskal, opining that Mr. Abbay's work with gaskets and insulation on particular types of shipboard equipment⁴ would have resulted in significant asbestos exposures.⁵ *See* CP 3858-62. Cleaver-Brooks moved to strike much of this evidence as inadmissible or otherwise improper under CR 56. *See* CP 7720-71, 7793-97.

Both of Cleaver-Brooks' summary judgment motions (and 13 other summary judgment motions of other defendants) and its motions to strike

² CP 2536.

³ CP 3484-85.

⁴ The only specific shipboard equipment referenced in Mr. Paskal's declaration is "pumps, valves, engines, boilers, and turbines." CP 3932, 3934. The declaration contained no reference to distillers or evaporators.

⁵ CP 3930, 3933-35.

and to shorten time, were set for hearing on June 27, 2008. *See* CP 7703-04, 7715-16, 7720-21. However, the trial court indicated that it would only hear oral argument on the “federal enclave” motion, because that motion was common to many defendants, including Cleaver-Brooks. RP 4-5. The trial court directed that the parties’ other summary judgment motions, including Cleaver-Brooks’ “proximate cause” motion, would be decided on the briefs, unless it found particular issues on which it desired oral argument. RP 5-6, 34-36.

The trial court eventually granted the “federal enclave” motion and dismissed all of plaintiffs’ claims arising from PSNS exposure pursuant to plaintiffs’ disclaimer, concluding that plaintiffs had offered insufficient evidence to create a triable issue with respect to the enclave status of PSNS or of naval vessels being worked on there, or with respect to plaintiffs’ disclaimer of claims caused by exposure in a federal enclave. *See* CP 6635-38, 6639-45. Given the dismissal of plaintiffs’ claims arising from PSNS exposure, the trial court concluded that the remaining summary judgment motions based on such exposure, including Cleaver-Brooks’ “proximate cause” motion, were moot and would not be considered. CP 6638, 6645. Since no claims of exposure other than at

PSNS were asserted against Cleaver-Brooks,⁶ the trial court dismissed all claims against Cleaver-Brooks. CP 952. The trial court denied plaintiffs' motion to reconsider its "federal enclave" ruling and this appeal followed. CP 782-84, 802-8.

III. ARGUMENT

A. **The Trial Court Properly Dismissed Plaintiffs' Claims Against Cleaver-Brooks on the Grounds that They Arose Within a Federal Enclave and Plaintiffs Had Expressly Disclaimed All Such Claims.**

After extensive briefing and argument, the trial court concluded that (1) the plaintiffs had expressly disclaimed all claims of exposure arising in a federal enclave, (2) PSNS was at all times a federal enclave, and (3) all the vessels upon which Mr. Abbay worked and claims to have been exposed at PSNS were within a federal enclave; and therefore (4) all of plaintiffs' claims based on PSNS work and exposure should be dismissed. Respondent Leslie Controls has explained why these determinations by the trial court were correct and why the Abbays' assignments of error with respect thereto are without merit. *See* Brief of Respondent Leslie Controls, Inc. at 13-33. Cleaver-Brooks joins in and adopts those arguments and authorities. Since Cleaver-Brooks' summary judgment motion challenged *all* of plaintiffs' claims again Cleaver-

⁶ *See, e.g.*, CP 7760-61.

Brooks,⁷ and since plaintiffs had not in response asserted any claims other than those arising from exposure at PSNS,⁸ the trial court correctly dismissed all of plaintiffs' claims against Cleaver-Brooks. CP 952-53. Accordingly, this Court should affirm the trial court's entry of summary judgment for Cleaver-Brooks.

B. Alternatively, This Court May Affirm the Trial Court's Dismissal of Claims Against Cleaver-Brooks on the Grounds that Plaintiffs Had Insufficient Admissible Evidence of Proximate Cause.

1. This Court may properly affirm the trial court's decision on the alternate grounds presented in Cleaver-Brooks' "proximate cause" summary judgment motion.

As explained above, Cleaver-Brooks presented two separate grounds for summary judgment in the trial court: (1) plaintiffs' disclaimer of federal enclave exposures; and (2) lack of evidence of proximate cause (i.e., no exposure to asbestos products manufactured or supplied by Cleaver-Brooks). As the record reflects, both grounds were properly presented and fully briefed in the trial court. *See* discussion *supra* at 2-5.

The trial court granted summary judgment for Cleaver-Brooks only on the first ground (federal enclave) and concluded that it was therefore unnecessary to reach the second (proximate cause). CP 952, 6638, 6645. However, in the event that this Court decides not to affirm on the federal

⁷ CP 1776, 1782, 1485.

⁸ CP 3868-69.

enclave ground, it nonetheless can and, as set forth below, should affirm on the proximate cause ground. This Court may affirm a trial court's grant of summary judgment on any grounds established by the pleadings and supported by the record. *See Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002); *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). *Cf.* RAP 2.5(a) (permitting party to assert a ground for affirming trial court's decision that was not presented below, if the record is sufficiently developed to fairly consider the ground).

2. Dismissal was proper because plaintiffs offered no admissible evidence of the essential element of proximate cause, i.e., evidence that Mr. Abbay had been exposed to an asbestos-containing product manufactured or supplied by Cleaver-Brooks.

a. Summary judgment is appropriate where plaintiffs cannot produce evidence of an essential element of their claims.

Civil Rule 56(c) authorizes the entry of summary judgment where the affidavits, discovery materials, and pleadings on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (adopting *Celotex's* articulation of summary judgment standards). A defendant moving for summary

judgment meets its burden by showing that there is an absence of evidence supporting the plaintiff's case. *See Young*, 112 Wn.2d at 225 n.1, *citing Celotex*, 477 U.S. at 325; *Tinder v. Nordstrom*, 84 Wn. App. 787, 790-91, 929 P.2d 1209 (1997). The burden then shifts to the plaintiff to demonstrate the existence of such evidence, thereby establishing a genuine issue of material fact.

In discharging that burden, the plaintiff may not rest on mere argument or speculation; rather, he must come forward with substantial, admissible evidence:

The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [that party].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (construing Fed. R. Civ. P. 56). *See also White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (non-moving party must set forth *specific facts* which rebut the moving party's contentions and disclose existence of a genuine issue of material fact). Although the court must make all reasonable inferences in the light most favorable to the plaintiff, 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).

b. Proximate cause requires evidence of actual exposure to the defendant's product.

Basic product liability theory requires a plaintiff to establish the element of proximate cause, *i.e.*, a reasonable connection between the injury, the product causing the injury, and the manufacturer of the product. *See Martin v. Abbott Labs*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). There is no product liability claim against a defendant unless the plaintiff can show that the defendant was the particular manufacturer or supplier of the asbestos-containing product that caused the injury. *See Lockwood v. A.C. & S.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987). *Accord Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 396, 198 P.3d 493 (2008). *See generally*, Keeton, W., PROSSER AND KEETON ON THE LAW OF TORTS § 103 at 713 (5th ed. 1984).

Washington law allows asbestos plaintiffs to establish exposure to a defendant's products through circumstantial evidence. *See Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706-07, 853 P.2d 908 (1993). However, that evidence must rise above mere speculation, or the case will not be allowed to go to the jury. *See Dumin v. Owens-Corning Fiberglas Corp.*, 33 Cal. Rptr.2d 702, 28 Cal. App. 4th 650 (1994); *Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn. App. 610, 622, 789 P.2d 792, *review denied*, 115 Wn.2d 1025 (1990); *Young v. Group Health*

Cooperative, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975). It is the duty of the court to withdraw the case from the jury when the necessary inference of exposure to a particular defendant's asbestos product is so tenuous that it rests merely upon conjecture and speculation. See *Claytor v. Owens-Corning Fiberglass Corp.*, 662 A.2d 13744 (D.C. Ct. App. 1995).

The *Lockwood* directed trial courts to scrutinize plaintiff's proof of causation to see if there is sufficient evidence of *actual exposure* and it identified several pertinent factors to be considered:

- (1) plaintiff's proximity to the asbestos product when the exposure occurred;
- (2) the expanse of the worksite where asbestos fibers were released;
- (3) the extent of time that the plaintiff was exposed to the product;
- (4) the types of asbestos products to which plaintiff was exposed; and
- (5) the ways in which such products are handled and used.

Lockwood, 109 Wn.2d at 248. "Ultimately," the court held, "the sufficiency of the evidence of causation will depend on the unique circumstances of each case." *Id.* at 249.

c. Plaintiffs failed to produce any admissible evidence that Mr. Abbay was actually exposed to asbestos from a Cleaver-Brooks distiller or other product.

Plaintiffs' opposition to Cleaver-Brooks' "proximate cause" summary judgment consisted largely of inadmissible evidence, which showed at most only that Mr. Abbay recalled having *once* worked at PSNS on a piece of equipment that he called a "distiller", and that it *may* have been on the CONSTELLATION (which had Cleaver-Brooks distillers), *or* on the KITTY HAWK, *or* on some other ship among the "many, many, many ships" that he worked on at PSNS; he just couldn't pinpoint *which one*. See CP 2535-36, 2826-27, 3484-85. Moreover, plaintiffs offered no evidence whatsoever that the Cleaver-Brooks distillers on the CONSTELLATION contained asbestos or that they were covered with asbestos-containing external insulation. Even if plaintiffs' evidence is considered, it gives rise only to *speculation*; it is plainly insufficient to raise a reasonable inference that Mr. Abbay was exposed to an asbestos-containing product manufactured or supplied by Cleaver-Brooks. Absent such a link, there is no proximate cause and no viable claim against Cleaver-Brooks.

(1). Mr. Abbay's testimony about "distillers" lacked foundation and in any event did not reasonably suggest that he had ever worked on Cleaver-Brooks distillers on the CONSTELLATION.

Plaintiffs offered an excerpt of Mr. Abbay's perpetuation deposition in which he testified, without foundation and in response to leading questions from his attorney, that he had "probably" worked on what he was calling the "distillers" on the CONSTELLATION. *See* CP 3869, 2536. Cleaver-Brooks moved to strike Mr. Abbay's testimony about distillers on the grounds that it lacked a foundation demonstrating that Mr. Abbay knew what a "distiller" was and could reliably distinguish it from other equipment on the CONSTELLATION. CP 7724-74. *See* CR 56(e) (evidence submitted in opposition to summary judgment motion must be admissible and based on personal knowledge); ER 602 (testimony not admissible without evidence to show personal knowledge).

Indeed, Mr. Abbay's own testimony reflected that he lacked personal knowledge about distillers. Ironically, while plaintiffs offered documents in the summary judgment proceedings to show that the distillers on the CONSTELLATION were manufactured by *Cleaver-Brooks*,⁹ Mr. Abbay himself testified that the pieces of equipment that *he* was calling the "distillers" were manufactured by *De Laval* and/or *Foster-*

⁹ *See* CP 3484-85.

Wheeler. CP 2536, 2683, 2721. Moreover, he testified that the equipment on the CONSTELLATION that he was calling a “distiller” was located in either the Engine Room or the Boiler Room, was “round with flat ends”, “like a cylinder” lying on its side, “with a bunch of tubes in it.” CP 2721, 2825-26. But while Mr. Abbay’s description may have accurately described *other* equipment that *was* in the CONSTELLATION’s Boiler Room, it did not describe the ship’s *distillers*, and the evidence is indisputable that the distillers were actually located in an entirely different machinery space, not the Boiler or Engine Rooms.

In support of its motion to strike, Cleaver-Brooks submitted the declaration of Captain Charles Wasson, formerly the Chief Engineer of the CONSTELLATION, whose responsibilities included maintenance of the ship’s boilers, distillers and other equipment located in the Boiler Rooms, Engine Rooms and other machinery spaces. *See* CP 7740-44. Capt. Wasson testified that Mr. Abbay’s description of the “distillers” on the CONSTELLATION was simply wrong in virtually every respect, e.g.,

location, shape, and internal components.¹⁰ Thus, while it is possible that Mr. Abbay is correctly describing the features and location of a certain piece of equipment that he recalls on the CONSTELLATION, that piece of equipment is certainly *not* a distiller. Accordingly, Mr. Abbay's testimony about having worked on the "distillers" on the CONSTELLATION lacked foundation, was not admissible, and could not defeat summary judgment.¹¹ CR 56(e).

Furthermore, plaintiffs' reliance on a single passage of Mr. Abbay's testimony, in which he testified that he worked on the CONSTELLATION's "distiller", ignores and conflicts with his other testimony that he really couldn't say *which* ship he had done this work

¹⁰ Captain Wasson stated that (1) the CONSTELLATION's distillers were *not* located in the ship's Boiler or Engine Rooms as Mr. Abbay had testified, but rather in the ship's forward and aft Auxiliary Machinery Spaces; (2) they were not "round cylinders" with flat ends, but rather were large rectangular boxes; and (3) they did not have "a bunch of metal tubes" inside them, rather, someone opening these distillers would see a large open space void of such tubes. *Id.* According to Capt. Wasson, Mr. Abbay's description of a round, cylindrical piece of equipment with metal tubes inside and located in the CONSTELLATION's Boiler Room closely matches a piece of equipment known as an turbo-generator condenser. *See* CP 7743-44.

¹¹ Nor could plaintiffs respond that their failure to demonstrate Mr. Abbay's personal knowledge simply goes to the weight, rather than the admissibility, of his testimony about so-called "distillers." It is clear under ER 602 that a witness's lack of personal knowledge goes to the *admissibility* of the testimony, not simply its weight.

on.¹² It also ignores and conflicts with plaintiffs' sworn answers to interrogatories stating that plaintiffs have no knowledge of exposure to Cleaver-Brooks equipment on any particular ship. Plaintiffs offered no explanation for this self-contradictory testimony and cannot rely upon it to create an issue of fact to defeat summary judgment. *See Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)(party cannot create issue with an affidavit that contradicts, without explanation, previously given clear testimony).

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Q. I take it that you don't recall specifically what your work on the evaporator on either of those two ships [the CONSTELLATION or KITTY HAWK] consisted of?

A. *To be honest about it, no, I couldn't tell you. I remember pulling the ends off of one of them once and all these valves and stuff, but to be exact I couldn't tell you.*

Q. Okay. And you said you remember pulling the ends off. You remember on some ship sometime pulling the ends off an evaporator?

A. Right. Yeah.

Q. *Do you recall what ship that was on?*

A. *Huh-uh.*

Q. *You're shaking your head no?*

A. Yes, *it's no.* I worked many, many, many ships - -

Q. I understand that, sir, I do appreciate that.

A. - - on many jobs, you know, and so to pinpoint which ship was which, an evaporator to me in my head right now is just an evaporator.

CP 2827 (emphasis added). *See also* CP 2838.

(2). Plaintiffs offered no admissible evidence that Cleaver-Brooks distillers were on the CONSTELLATION.

Plaintiffs offered contradictory evidence to identify the manufacturer of the “distillers” that Mr. Abbay worked on at PSNS: (1) Mr. Abbay’s own testimony that the manufacturers were *De Laval* and/or *Foster-Wheeler*;¹³ and (2) a purported shipyard memorandum identifying Cleaver-Brooks distillers on the CONSTELLATION.¹⁴ Plaintiffs’ claims against Cleaver-Brooks would thus require the court to disregard Mr. Abbay’s own testimony, in favor of the purported shipyard memorandum.

In any event, that memorandum was never properly authenticated and, accordingly, Cleaver-Brooks moved to strike it. *See* CP 7730-32. Plaintiffs’ only showing that this document was in fact an authentic “Navy record” was the declaration of plaintiffs’ lawyer, stating that it was “a true and correct copy of a memorandum from the Commander of the New York Naval Shipyard to the Chief, Bureau of Ships, regarding the Constellation and Cleaver-Brooks.” CP 2465. This is insufficient.

Evidence that is not properly authenticated is inadmissible for summary judgment purposes. *See Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004), *review*

¹³ CP 2536, 2683, 2721.

¹⁴ CP 3484-85.

denied, 153 Wn.2d 1016 (2004) (footnotes omitted). An attorney generally cannot authenticate an exhibit by merely stating that the exhibit is a “true and correct copy” of an original. Without personal knowledge of the document, the attorney cannot vouch for its authenticity and must instead supply additional facts to properly authenticate the document. *See Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 367, 966 P.2d 921 (1998). Plaintiffs’ attorney’s claim that an attachment to his declaration is a “true and correct copy” of a shipyard memorandum is precisely the same showing that was held to be insufficient in *Burmeister*.¹⁵ Because plaintiffs failed to provide any information establishing that the purported shipyard memorandum is what it purports to be, that exhibit is

¹⁵ In *Burmeister*, the Court of Appeals reversed the trial court where the trial court, in denying the defendant’s summary judgment motion, considered a police report that was not properly authenticated. The plaintiff’s attorney had submitted the police report and attempted to authenticate it by simply stating that it was a true and correct copy of the original. The court held that because the plaintiff did not submit an authenticating affidavit from the police officer, the police report was inadmissible and it was error for the trial court to have considered it. 92 Wn. App. at 367-68.

inadmissible and cannot defeat summary judgment.¹⁶ CR 56(e).

(3). Plaintiffs offered no admissible evidence that the Cleaver-Brooks distillers to which they claim Mr. Abbay was exposed contained asbestos.

Even if plaintiffs' evidence showed that was a Cleaver-Brooks distiller on the CONSTELLATION and that Mr. Abbay worked on it, they have offered no admissible evidence to show that this led to *any* asbestos exposure, much less a "substantial" exposure. Plaintiffs offered no evidence showing that Cleaver-Brooks distillers on the CONSTELLATION contained asbestos and, likewise, they offered no testimony from anyone knowledgeable about Navy distillers, their

¹⁶ Authenticity issues aside, the exhibit should still be stricken because plaintiffs did not disclose it to Cleaver-Brooks in their responses to interrogatories and document requests specifically asking them to identify the ship(s) on which they claimed Mr. Abbay was exposed to Cleaver-Brooks distillers and to identify and produce any supporting documents. See CP 7760-61. Indeed, plaintiffs stated that they did not know any particular ships on which such exposure occurred and they produced no documents whatsoever. *Id.* Those answers were never amended or supplemented and no documents were ever produced. CP 7736-38. Plaintiffs also failed to list the document on their mandatory Disclosure of Trial Exhibits. *Id.* Exclusion of evidence is proper where a party has engaged in willful or tactical nondisclosure. *Hampson v. Ramer*, 47 Wn. App. 806, 812, 737 P.2d 298 (1987); *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). Plaintiffs' failure to identify or produce the purported shipyard memorandum constitutes a willful violation of CR 33 and 34. See *Hampson*, 47 Wn. App. at 812 ("A violation of the discovery rules is willful if done without a reasonable excuse"). Under the circumstances, striking the exhibit is an appropriate remedy under CR 37. *Id.* at 811-12.

components or operations.¹⁷

(4). Plaintiffs offered no admissible evidence that Mr. Abbay was exposed to an asbestos-containing product manufactured or supplied by Cleaver-Brooks.

As explained above, plaintiffs responded to Cleaver-Brooks' "proximate cause" summary judgment motion with evidence which they claimed showed that Mr. Abbay was exposed to gaskets and insulation on a Cleaver-Brooks distiller on the CONSTELLATION. However, they offered no admissible evidence that these materials contained asbestos, that they were part of the distiller at the time of its manufacture by Cleaver-Brooks (as opposed to having later been applied by the Navy and/or installed as replacement parts in maintenance, repairs or overhauls in the years following the ship's construction in the late 1950s¹⁸), or that they had been manufactured, distributed or supplied by Cleaver-Brooks.

¹⁷ The purported shipyard memorandum concerning Cleaver-Brooks distillers on the CONSTELLATION does not mention asbestos. CP 3484-85. Similarly, while plaintiffs also offered the prior testimony of Carl Mangold concerning gaskets used by the Navy (CP 2900, 2912), that testimony does not mention distillers or suggest that distillers used asbestos-containing gaskets. *Cf.* CP 7750-53 (Navy's use of *non*-asbestos-containing gaskets). Moreover, plaintiffs did not dispute that Mr. Mangold was an unavailable and previously undisclosed witness, that Cleaver-Brooks' interests were not represented at his prior deposition, or that his testimony was therefore inadmissible hearsay under ER 804(b)(1). CP 7737, 7748-53, 7796. Finally, distillers were not mentioned anywhere in the declarations of plaintiffs' experts Stevan Paskal or Dr. Samuel Hammar, and nothing in them tends to show that distillers require asbestos-containing gaskets or that Mr. Abbay's removal on one occasion of a cover on a CONSTELLATION distiller would create any substantial asbestos exposure. CP 3930-42, 5428-33.

¹⁸ The CONSTELLATION (CVA-64) was laid down in 1957 and launched in 1960. *See* DICT. OF AM. NAVAL FIGHTING SHIPS, <http://www.history.navy.mil/danfs/c13/constellation-iii.htm>.

Without evidence that the specific asbestos-containing products that allegedly caused Mr. Abbay's injury, i.e., the insulation and the gaskets, were Cleaver-Brooks products, there is no connection of proximate cause between Mr. Abbay's injury and Cleaver-Brooks' products and, consequently, no liability. *See Lockwood*, 109 Wn.2d at 248 (noting traditional requirement that plaintiffs must establish a reasonable connection between injury, the product causing the injury, and the manufacturer of the product). *Accord Braaten*, 165 Wn.2d at 396.

Nor can plaintiffs circumvent this deficiency through a failure-to-warn claim, i.e., that even if Cleaver-Brooks did not manufacture or supply the insulation and gaskets to which Mr. Abbay was exposed, it nonetheless is liable for failing to warn Mr. Abbay about the anticipated use of such products with its distiller. *See CP 10*. The Washington Supreme Court has recently rejected such claims. In *Braaten* and its companion case, *Simonetta v. Viad Corp.* 165 Wn.2d 341, 197 P.3d 127 (2008), the Court confirmed that, under Washington common law of negligence and strict liability, liability for failure to warn of hazards is limited *to those in the chain of distribution of the hazardous product*. *See Simonetta*, 165 Wn.2d at 353, 363 (distiller manufacturer has no duty to warn, or strict liability for failure to warn, of hazards of asbestos insulation manufactured, distributed and applied to the distiller by third parties);

Braaten, 165 Wn.2d at 389-91 (manufacturers of valves and pumps have no liability for failure to warn of hazards of asbestos insulation applied to their products postmanufacture, or replacement packings and gaskets, absent evidence that the manufacturers were in the chain of distribution of those products).

Plaintiffs' claims in the present case closely resemble those asserted, and rejected, in *Simonetta* and *Braaten*. As in those cases, the plaintiffs here contend that Mr. Abbay was exposed to asbestos-containing insulation and gaskets on shipboard equipment (a Cleaver-Brooks distiller on the CONSTELLATION). See CP 3868-69, 3871. As in those cases, plaintiffs here offered no evidence to show that Cleaver-Brooks manufactured, supplied, distributed, installed, or was otherwise in the chain of distribution of the insulation and gaskets on the CONSTELLATION'S distiller. See *Braaten*, 165 Wn.2d at 396 (rejecting claim where the evidence failed to establish that plaintiff was exposed to asbestos-containing packing and gaskets that were in the defendant's product at the time of its manufacture, rather than replacement packing and gaskets manufactured, designed, specified or supplied by others).

Because plaintiffs failed to show that gaskets and insulation to which they claim Mr. Abbay was exposed on the CONSTELLATION'S distiller contained asbestos and were manufactured or supplied by

Cleaver-Brooks, their claims must fail. This Court may properly affirm the summary judgment dismissal below on this alternate ground. *See Vanport Homes, Inc.*, 147 Wn.2d at 766; *Mountain Park Homeowners Ass'n*, 125 Wn.2d at 344 (1994).

In sum, the evidence that plaintiffs offered in opposition to Cleaver-Brooks “proximate cause” summary judgment motion was in large part inadmissible and, in any event, could not support a reasonable inference that Mr. Abbay was actually exposed to an asbestos-containing product manufactured or supplied by Cleaver-Brooks. *See Lockwood, supra; Fairbanks*, 131 Wn.2d at 101-02 (an inference is not reasonable unless deduced “as a logical consequence” of proven or admitted facts). Without admissible evidence of such exposure, plaintiffs’ claims against Cleaver-Brooks were fatally flawed and subject to summary judgment. As demonstrated above, this Court may affirm the trial court’s dismissal of claims against Cleaver-Brooks on this alternative ground, in the event that it does not affirm on the federal enclave ground.

IV. CONCLUSION

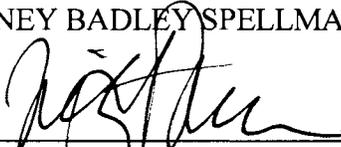
For the reasons set forth above, and in the Brief of Respondent Leslie Controls, Inc., the trial court properly concluded that all of plaintiffs’ claims arising from exposure at PSNS were claims based on exposure in a federal enclave and that plaintiffs had expressly disclaimed

those claims. Because the claims against Cleaver-Brooks were based only upon alleged exposure at PSNS, the trial court properly granted Cleaver-Brooks “federal enclave” summary judgment motion. This Court should affirm that ruling; if it does so, the Court need not reach the merits of Cleaver-Brooks’ “proximate cause” summary judgment motion.

However, if the Court does not affirm the granting of summary judgment for Cleaver-Brooks on the federal enclave grounds, it should nonetheless affirm the summary judgment on the alternate grounds presented in Cleaver-Brooks “proximate cause” summary judgment motion as explained above.

DATED this 10th day of June, 2009.

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COURT OF APPEALS
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DIVISION I

GEORGE ABBAY and LYNN
ABBAY,

Appellants,

v.

LESLIE CONTROLS, INC. et al.,

Respondents.

NO. 62399-1-I

DECLARATION OF SERVICE

I, Amy H. Berman, hereby declare that on the 11th day of June, 2009, I

caused to be served in the manner indicated below, a copy of the following pleadings:

1. Corrected Brief of Respondent Cleaver-Brooks, Inc.; and
2. Declaration of Service.

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