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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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NO. 62996-4-I
(Consolidated)

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

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

LESLIE CONTROLS, INC.,

And

ALFA LAVAL, INC.,

Respondents/Defendants.

Consolidated Appeal from the Superior Court of Washington
for King County
(Cause No. 08-2-07177-4 SEA)

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The King County Superior Court erred in granting respondents' (defendants) motions for summary judgment against appellants Michael and Lidia Farrow ("plaintiffs").

2. The trial court erred in concluding that there were no material disputed issues of fact in connection with defendants' motions for summary judgment.

3. The trial court erred in considering new evidence submitted by defendants in reply that was not proper rebuttal and by taking judicial notice without affording plaintiffs an opportunity to respond pursuant to ER 201.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does the evidence, including, but not limited to, the evidence submitted by plaintiffs in opposition to the motions for summary judgment create material disputed issues of fact as to whether plaintiffs disclaimed all claims of asbestos exposure aboard ships docked at Puget Sound Naval Shipyard?

2. Is a plaintiff entitled to clarify an ambiguous statement in a complaint when responding to summary judgment?

3. Should the term “federal enclave” in plaintiffs’ complaint be interpreted as it is in BLACK’S LAW DICTIONARY and numerous federal cases?

4. Does federal jurisdiction based on the federal enclave clause of the United States Constitution apply when the law at issue in the case is state law?

5. Do cases such as White v. Kent Medical Center, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991) permit the trial court to consider, for purposes of summary judgment, new non-rebuttal evidence submitted by the moving party at a time when the non-moving party may not respond?

III. STATEMENT OF THE CASE

A. Plaintiffs’ Complaint.

Michael Farrow was exposed to asbestos largely while working aboard ships which were being repaired while docked at Puget Sound Naval Shipyard (“PSNS”). He was diagnosed with mesothelioma. Plaintiffs¹ filed two complaints against various defendants. One case was entitled Farrow v. Alfa Laval, King County Cause No. 08-2-07177-

¹ Michael Farrow passed away on May 30, 2008. The caption has not been amended to reflect this change. As such, “plaintiffs” will be used rather than “plaintiff”.

4SEA.² The first sentence of paragraph 6 of that complaint reads as follows:

Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.

CP 9 from Farrow v. Leslie Controls. Prior to reviewing and signing the complaint, plaintiffs' counsel and thus plaintiffs were aware that there was a split of authority, in the asbestos context, as to whether naval vessels being repaired in a federal enclave were part of a federal enclave.³ Plaintiffs understood that much, but not all, of Mr. Farrow's asbestos exposure was aboard ships being repaired at PSNS, and believed a court might conclude that PSNS was a federal enclave. L-CP 179.

Plaintiffs were hopeful, but not certain, that a court would conclude that naval ships docked at a federal enclave were not part of a federal enclave. Plaintiffs' intent in including the first sentence in paragraph 6 to the Farrow complaint was to disclaim all causes of action for injuries caused by asbestos exposure occurring in a federal enclave

² Both of those consolidated appeals only involve defendants from that case. Prior to the consolidation of Farrow v. Leslie Controls, 62996-4-I and Farrow v. Alfa Laval, 63554-9-I, plaintiffs filed designation of Clerk's Papers in both appeals. She did not duplicate designations that were previously filed in Leslie in the hopes that Leslie and Alfa Laval would be consolidated, which has happened. Appellant will hereafter refer to Clerk's Papers from Leslie as L-CP and designations from the Clerk's Papers in Alfa Laval as A-CP.

³ Compare Anderson v. Crown Cork & Seal, 93 F. Supp.2d 697 (E.D. Va. 2000) with Fung v. Abex Corp., 816 F.Supp. 569 (N.D. Cal. 1992).

except those causes of action for injuries caused by asbestos exposure that occurred onboard naval vessels docked or moored at a federal enclave. L-CP 179-180.

Successful removal to federal court would have substantially delayed plaintiffs' claim, but would not have been fatal to the claim. That is because the claim would still exist in federal court. The likelihood of successful removal was reduced but not eliminated by this limited disclaimer. If the defendants removed the case to federal court, based upon federal enclave related jurisdiction, and if the federal court ruled that federal enclave jurisdiction did not apply to shipboard asbestos exposure within a federal enclave, then, based on plaintiffs' limited disclaimer, the case would have been remanded back to state court. On the other hand, if, after removal, the federal court ruled that PSNS was a federal enclave and that shipboard asbestos exposure was part of the federal enclave, remand likely would have been denied. The case would then have proceeded in federal court based upon shipboard exposure to asbestos on ships moored or docked within a federal enclave. By making such a limited disclaimer, plaintiffs were thus intending (a) to reduce (although not eliminate) the likelihood of a successful removal to federal court, while (b) guarding against the possibility that the disclaimer would swallow all of their claims if a court determined both that PSNS was a federal enclave and that naval

vessels docked in a federal enclave were part of the federal enclave. L-CP 180.

B. Defendants' Summary Judgment Motions And Joinders.

On or about May 23, 2008, defendant IMO filed a motion for summary judgment noted for June 20, 2008.⁴ L-CP 51. IMO's motion raised four issues.⁵ IMO's issues two and three only related to Mr. Farrow's exposure to asbestos aboard one particular ship before he worked at PSNS. L-CP 54.

Many defendants joined or partially joined in IMO's motion limited to the effect of the first sentence of paragraph 6 of the complaint. Turning first to the "partial joinders", defendants Buffalo Pumps, Crane Co., and Anchor Darling Valve Co.'s partial joinder was:

... limited to IMO's motion to dismiss all claims by plaintiffs Michael Farrow and Lidia Farrow ("Plaintiffs") that arose during Mr. Farrow's employment at the Puget Sound Naval Shipyard between 1953 and 1974. As set forth in IMO's motion plaintiffs' complaint expressly disclaims all causes of action for injuries that arose in a federal enclave. Accordingly, the Court should dismiss all of plaintiffs' claims against [those three defendants] arising out of Mr. Farrow's employment at Puget Sound Naval Shipyard, which is a federal enclave.

⁴ It was subsequently noted for September 5, 2008.

⁵ Issue 1 (which is the issue primarily relevant to this appeal) was:

1. Whether Plaintiffs' Claims Against Defendant IMO Industries, Inc. Should Be Dismissed Because Plaintiffs' Express Disclaimer Effectively Surrendered Any Right To Maintain Causes of Action Arising From Exposure to Asbestos That Occurred at PSNS or Any Other Federal Enclave Where Plaintiffs Allege Mr. Farrow Was Injured?

A-CP 320, 311, and 329. Defendants Garlock Sealing Technologies LLC, McWane Inc., Fairbank Morse Pump Companies, Cleaver-Brooks, Inc., and Sepco Industries used the same language. A-CP 284, 286, 290, 303, and 348.

Defendants Yarway Corp. and Tyco Flow Control, Inc., made essentially the same limited partial joinder. A-CP 353 and 341. Defendants Crosby Valve Inc., Sterling Fluid, and FMC Corp.'s partial joinders were similarly limited and simply argued that:

Plaintiff expressly disclaims all claims arising in a federal enclave, and the Court should therefore dismiss all claims arising out of Mr. Farrow's employment at Puget Sound Naval Shipyard, which is a federal enclave.

A-CP 359, 367, and 375. Flowserve US Inc. ("Edwards Valves") partial joinder was also substantially identical. A-CP 461.

The "joinders" in IMO's motion were also almost identical and similarly limited to the PSNS "disclaimer." Defendants Hoke Incorporated and Weir Valves & Controls USA, Inc. joined in IMO's motion, e.g.:

As set forth by IMO's motion, Plaintiff's Complaint expressly disclaims "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave. . . ." All of Plaintiffs' claims against Weir Valves arise from Mr. Farrow's alleged exposure to asbestos during his work at the Puget Sound Naval Shipyard. Accordingly, the Court should dismiss all of Plaintiffs' claims against Weir Valves arising out of Mr.

Farrow's employment at the Puget Sound Naval Shipyard, which is a federal enclave.

Given that the federal enclave issue presented by IMO is no different than that presented by Weir Valves, additional briefing on this issue is unnecessary and duplicative.

A-CP 355, 357-58. Warren Pumps joinder was substantially the same. A-CP 338.⁶ The same is true of the joinders of Alfa Laval, Inc.⁷, Darinon (A-CP 276), BW/IP International, Inc. (A-CP 404), and Wm. Powell (A-CP 476). Defendants Leslie Controls, Inc. and ITT Corporation also both joined but limited their joinder to the issue of federal enclave waiver. L-CP 143, 162.

C. Facts Relating To Whether PSNS Is A Federal Enclave For Federal Jurisdictional Purposes.

IMO's motion for summary judgment, joined or partially joined in by numerous other defendants argued that the fundamental basis for federal enclave jurisdiction was Article I, Section 8, Clause 17 of the United States Constitution,

... which 'grants Congress the power to exercise exclusive jurisdiction over enclaves acquired by the United States with the state's consent for various military purposes.' *Celli v. Shoell*, 995 F. Supp. 1337, 1941 (D. Utah 1998).
[Footnote omitted]

⁶ See also, the joinders of Metalclad Insulation Corporation, J.T. Thorpe & Son, Inc., Goulds Pumps, and Motion of Summary Judgment of Fryer-Knowles, Inc., a Washington Corp. A-CP 489, 481, 465, and 613.

⁷ This joinder was inadvertently not designated. Appellant is supplementing her Clerk's Papers to include this joinder.

L-CP 56 (emphasis added). Defendants' motion also acknowledged that PSNS had more than doubled in size between 1891 and 1985. In 1891, approximately 190 acres had been acquired. By 1985, PSNS consisted of:

344 acres of hard land and 338 acres of submerged land, has six dry docks, nine piers with 12,300 lineal feet of deep-water pier space, four mooring sites, and 382 buildings with more than six million square feet of floor space."

L-CP 58 (footnote omitted). Moreover, dry dock No. 6, the largest of the dry docks, was not dedicated until 1962. *Id.* at footnote 6.

Defendants subsequently filed more than 200 documents attached to the second Horne declaration (L-CP 257, *et seq.*), in connection with the motion for summary judgment. Those documents included:

(a) Numerous documents such as Exhibits 199-211 showing acquisition of property after 1940 and before 1945, much of which was by condemnation; L-CP 1072-1124.

(b) A letter dated July 31 1945 from the Secretary of War to the Governor of Washington, L-CP 1140 which referred to 40 U.S.C. §255, and which stated:

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083, 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1,

1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts concurrent jurisdiction over all lands title of record to which has been acquired by it for military purposes within the State of Washington and over which Federal jurisdiction has not heretofore been obtained, excepting, however, from this acceptance all lands comprising the Hanford engineer works, which is located in the Counties of Benton, Grant, Franklin and Yakima. L-CP 1140.

(Emphasis added.)

(c) A largely illegible document of more than 40 pages (Exh. 130), which defendants' counsel identified as a "Judgment Determining Final Compensation For Certain Land In Kitsap County, Washington and Mason County, Washington dated 3/22/1948"; L-CP 693, *et seq.*

(d) A letter dated March 27, 1951 (Exh. 212) L-CP 1136 and a Judgment (L-CP 354) apparently relating to the condemnation of approximately 440 acres of land vesting in the United States "the right to use the above-described land for naval and other military purposes" (emphasis added); and

(e) A declaration from a paralegal attaching documents (all of which are hearsay and were objected to on that basis (L-CP1447)), and giving expert opinion, objected to on hearsay and lack of foundation grounds (L-CP 1173), relating to property at Puget Sound Naval Shipyard ("PSNS"). L-CP 1213.

The record contains no evidence that the United States accepted jurisdiction for land acquired after July 31, 1945, including land, or right to use, if any, acquired by or referenced in Exhs. 15, 130, 212, or 217. L-CP 354, L-CP 693, L-CP 1136, and L-CP 1173. Defendants also submitted additional evidence relating to whether PSNS was a federal enclave. L-CP 257, L-CP 1457. Plaintiff objected to that evidence. L-CP 1445, L-CP 1447, L-CP 1448. However, the trial court considered that evidence and granted summary judgment in favor of the moving defendant and all defendants who joined. L-CP 1498.⁸

D. Subsequent Proceedings In The Trial Court.

Following the trial court's granting of IMO's motion for summary judgment together with the joinders described above, some defendants who had joined the IMO motion filed subsequent motions for summary judgment relating to exposures to their products other than at Puget Sound Naval Shipyard. For example, defendants Buffalo Pumps, Crane Co., Anchor Darling Valve, filed subsequent motions which sought only to dismiss claims for exposure outside of PSNS. L-CP 1219, 1234, and 1249 (emphasis added). Both Yarway Corp. and Tyco Flow Control Inc., also moved for summary judgment on the same basis, i.e.:

⁸ Plaintiffs also filed several motions for reconsideration. L-CP 1507, 1704. These were granted in part with respect to the form of the judgments, but otherwise denied. L-CP 1515, 1928.

The Court has dismissed plaintiffs' claims against Defendant [Yarway and Tyco], that arose during Michael Farrow's employment at Puget Sound Naval Shipyard ("PSNS").¹ [Yarway and Tyco] now asks that all remaining claims against it be dismissed because there is no evidence that Mr. Farrow was exposed to or harmed by asbestos associated with [defendant's products] outside of his employment at PSNS.

L-CP 818 and 1215 (emphasis added; footnote omitted).⁹ The subsequent summary judgment motions of Garlock, Coltec, Fairbanks Morse, and Mcwane Inc. were to the same effect and also dealt only with asbestos exposure outside of PSNS. A-CP 1550, 1556, 1537 and 1524. The Cleaver-Brooks' motion for summary judgment (A-CP 1448) provided:

IV. ISSUE PRESENTED

Where the Court has dismissed plaintiffs' PSNS-based claims against Cleaver-Brooks, and where plaintiffs have not alleged or identified evidence of exposure to Cleaver-Brooks' products anywhere else, should any and all remaining claims against Cleaver-Brooks be dismissed?

Plaintiffs continued to disagree with the trial court's ruling regarding the disclaimer of exposure aboard ships docked at PSNS. However, plaintiffs did not disagree with various motions that sought dismissal based on non-PSNS exposure aboard the USS PRINCETON while

⁹ WM. Powell Co. filed a similar motion in which the sole issue raised was:

Should the Court dismiss plaintiffs' claims against Wm. Powell as there is no evidence that Mr. Farrow was exposed to asbestos with any Wm. Powell product anywhere other than Puget Sound Naval Shipyard ("PSNS")?

CP A-1459. Flowserve US, Inc., as successor to Edwards Valves, Inc., also moved for summary judgment only on the remaining claims. A-CP 1441.

Mr. Farrow was in the Navy and before he started working at PSNS.

Plaintiffs communicated this position expressly to the trial court. For example, at A-CP 1793, plaintiffs stated:

Please take notice that plaintiffs Michael Farrow and Lidia Farrow do not oppose the following defendants' motions for summary judgment relating to Mr. Farrow's work in the U.S. Navy aboard USS PRINCETON CV-37: Anchor Darling Valve Company, Buffalo Pump Inc., Crane Co., Tyco Flow Control, Inc., and Yarway Corporation. Importantly, Plaintiffs have previously opposed and continue to oppose the prior ruling of the Court on defendant IMO's motion for summary judgment (and all joinders) regarding Mr. Farrow's exposure while at the Puget Sound Naval Shipyard.

(Emphasis added.) At A-CP 2104, 2181 and 2257, plaintiffs stated the same position with respect to motions of defendants Cleaver-Brooks, Inc., Coltec Industries Inc., Fairbanks Morse Pump Company, Flowserve US, Inc., Garlock Sealing Technologies, Mcwane Inc., WM. Powell Company's, Weir Valves & Controls USA, Inc., and Hoke, Inc.¹⁰

V. SUMMARY OF ARGUMENT

A basic issue in this case is whether plaintiffs expressed in their complaint an intent to disclaim causes of action in federal enclaves except those arising from asbestos exposure on U.S. Navy vessels, or to disclaim all causes of action from work at PSNS and on board U.S. Navy vessels.

¹⁰ On October 27, 2008, defendant Fryer-Knowles, a Washington corporation, filed a separate motion for summary judgment. A-CP 613. That motion was based on the same "disclaimer" issue as was the IMO motion and also raised additional issues. See RP 17-19 ((Dec. 5, 2008). However, summary judgment was only granted by the court "on Federal Enclave Grounds alone." A-CP 2572 (Jan. 5, 2009 Order). Thus, the same analysis set forth in this Brief applies to Fryer-Knowles, as well.

The first sentence of paragraph 6 of plaintiffs' complaint ends with the language, "which expressly excludes U.S. Navy vessels". Plaintiffs argued and presented evidence that the language following ", which" unambiguously referred to and qualifies the entire phrase "any cause of action for any injuries caused by exposure to asbestos that occurred in a federal enclave." Defendants argued that the language following ", which" referred to and qualified only "federal enclave." The trial court concluded that language was unambiguous, agreed with defendants, and granted summary judgment in defendants' favor.

The trial court was wrong because the sentence was ambiguous in exactly the same way that the sentence "[i]t emerged that Edna made the complaint, which surprised everybody" is ambiguous. The AMERICAN HERITAGE DICTIONARY (L-CP 228) explained that sentence "may mean either that the complaint was surprising [", which surprised everybody" refers only to "complaint" the immediately antecedent noun] or that it was surprising that Edna made it [", which surprised everybody" refers to "Edna made the complaint"]". Moreover, Washington statutes suffer from a similar ambiguity, e.g., former RCW 26.50.110 construed in State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008) and State v. Wofford, 148 Wn. App. 870, 201 P.3d 389 (2009).

When language in a complaint is unclear, as it was in this case, the plaintiffs have the right to clarify the language in plaintiffs' opposition to a summary judgment. State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987) and Adams v. King County, 164 Wn.2d 640, 656-657, 192 P.3d 891 (2008). Plaintiffs did exactly that and clarified that the phrase “, which expressly excludes U.S. Navy vessels” qualifies the entire disclaimer. Given that clarification, the disclaimer does not apply to asbestos exposure aboard Navy vessels even if docked in a federal enclave. L-CP 179-228. This Court should interpret plaintiffs' complaint in accordance with that clarification. Id. Furthermore, application of the “last antecedent rule” discussed in State v. Bunker, supra, also supports plaintiffs' interpretation that the language “, which expressly excludes U.S. Navy vessels” qualifies the entire disclaimer. Id.

Even if the Court does not accept the argument summarized above, a second independent basis for reversing summary judgment is that the record here shows that the federal government does not have exclusive jurisdiction over much of PSNS. Both BLACK'S LAW DICTIONARY and numerous federal cases define “federal enclave” as land over which the government has exclusive jurisdiction. As such, PSNS is not a federal enclave as that term was used in plaintiffs' complaint.

Exclusive federal jurisdiction is not present throughout PSNS for several reasons. First, since 1939 Washington law (RCW 37.04.020, .030), only ceded concurrent rather than exclusive jurisdiction for property acquired by the federal government at PSNS after 1939 and substantial parties of PSNS were acquired after 1939. Second, the record contains no proof that the federal government has accepted jurisdiction for the land at PSNS acquired after July 31, 1945, although such an acceptance is required by 40 U.S.C. §3112. Third, there is no basis for ousting state court jurisdiction in favoring of federal court jurisdiction over torts such as the one at issue in this case simply because the torts occurred at PSNS. Indeed, there have been hundreds of such asbestos-related torts litigated in Washington state courts over the past 30 years.

VI. ARGUMENT

A. Standard Of Review.

In reviewing a summary judgment order *de novo*, appellate courts should:

Examine the pleadings, affidavits, and depositions before the trial court and “take the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Owen is the nonmoving party. Thus, all facts and reasonable inferences must be viewed in the light most favorable to her.

Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (emphasis added). See also Ross v. Kirner, 162 Wn.2d 493, 500, 172 P.3d 701 (2007).

B. Plaintiffs Did Not Disclaim Causes Of Action Relating To Asbestos Exposure Upon Ships Docked Or Moored At A Federal Enclave.

The first sentence of paragraph 6 in plaintiffs' complaint (L-CP 5) did not disclaim causes of action for injuries that occurred onboard U.S. Naval vessels docked or moored in a federal enclave. The clause in that sentence beginning with "which" should be construed as modifying the entire object of that sentence, i.e., the phrase "any cause of action or recovery for any injuries caused by an exposure to asbestos dust that occurred in a federal enclave." Thus, there was no good basis for granting summary judgment with regard to Mr. Farrow's asbestos exposure that occurred aboard ships docked at PSNS even assuming PSNS was a federal enclave. There are at least three separate reasons for that conclusion, which are discussed below.

1. Dictionary Definitions And Common Usage.

a. Dictionary Definitions.

Plaintiffs' construction of the words in paragraph 6 beginning with "which" is supported by standard dictionaries submitted by both sides. For example, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY,

Unabridged, Second Edition, p. 2083, defines “which”, among other things, as a word used in either a restrictive or non-restrictive clause and referring to the thing specified in an antecedent word, phrase, or clause:

* * * *

3. who, whom or that: used as a relative in a restrictive or nonrestrictive clause referring to the thing or event (or, archaically, person) specified in the antecedent word, phrase, or clause; as, my hat, *which* is on the table; the war *which* had just ended.

(Italic emphasis in original, underlining added.) L-CP 224.

“Which”, according to WEBSTER’S, thus, may properly be used in a “restrictive” [i.e., defining] clause” referring to the thing specified in the antecedent “phrase or clause” not simply the antecedent “word.” For example, “which” could properly be used in the following sentence: “I support all major United States wars in the past 200 years, which excludes police actions.” It would make little sense to say that “which excludes police actions” only refers to “years”, the nearest antecedent noun. Rather, the language beginning with “which” refers to and restricts the phrase “all major United States wars in the past 200 years”. Similarly, the language beginning with “ which” in the first sentence of paragraph 6 in the Farrow complaint refers not simply to “federal enclave”, the nearest antecedent noun, but instead refers to and restricts the entire phrase “any cause of action for any injuries caused by exposure to asbestos that

occurred in a federal enclave”. WEBSTER’s thus rejects defendants’ position (and Judge Heller’s position on reconsideration in Abbey) that there is a “general precept of grammar that one looks to that immediate antecedent, rather than to a remote word or phrase.” L-CP 245, 1628.¹¹

Excerpts of THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Third Edition) were submitted by both sides. L-CP 228, 1163. Its definition of “which” not only agrees that the antecedent of “which” may be a sentence or clause, but also points out that such usage may lead to exactly the kind of ambiguity that exists in this case:

USAGE NOTE: The antecedent of which can sometimes be a sentence or clause, as opposed to a noun phrase, as in She ignored him, which proved to be unwise. They swept the council elections, which could never have happened under the old rules. Such examples are unexceptionable, but care should be taken that this usage does not cause ambiguities. The sentence It emerged that Edna made the complaint, which surprised everybody may mean either that the complaint was surprising or that it was surprising that Edna made it.

¹¹ See also the definition of “which” in Merriam Webster Online Dictionary at www.meriam-webster.com/dictionary/which:

3 — used as a function word to introduce a relative clause; used in any grammatical relation except that of a possessive;

... used by speakers on all educational levels and by many reputable writers, though disapproved by some grammarians, in reference to an idea expressed by a word or group of words that is not necessarily a noun or a noun phrase <he resigned that post, after *which* he engaged in ranching — *Current Biography*> (Emphasis added)

(Emphasis added.) It is that same ambiguity which affects the first sentence of paragraph 6. Plaintiffs' intended the clause beginning with "which" to modify the entire phrase "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, . . ." However, it is unclear whether "which" modifies only "federal enclave" or the entire phrase quoted above. That is the same ambiguity described in the usage note as whether "which surprised everybody" refers only to the last noun, i.e., "complaint" or the entire phrase "Edna made the complaint."

Judge Heller, in a footnote to his initial ruling on summary judgment in Abbey, recognized this ambiguity in an identical sentence in the Abbey complaint:

¹ The wording of plaintiffs' disclaimer is ambiguous. Did plaintiffs intend to disclaim all causes of action that arose in a federal enclave and then to assert that federal enclaves *always exclude* navy vessels? Alternatively, did plaintiffs intend to disclaim all causes of action that arose in a federal enclave *except* those that arose onboard a docked ship?

(Italic emphasis in original) L-CP 1620. Plaintiffs' counsel in this case, to use Judge Heller's words, intended "to disclaim all causes of action that arose in a federal enclave *except* those that arose onboard a docked ship."

Judge Heller in his Order on Reconsideration in Abbey (L-CP 1627) apparently changed his mind and stated that "applying basic

rules of grammar”, the court concluded that the term “which” modifies the immediately antecedent noun “federal enclave” as opposed to the distant verb “disclaim”. L-CP 1628. Respectfully, plaintiffs believe that Judge Heller got this issue right the first time, but was wrong on reconsideration. Under grammatical rules, the language beginning with “, which” may properly refer to and qualify the object in the sentence, i.e., the entire phrase beginning with “any cause of action” and continuing through “federal enclave”. WEBSTER’S, THE AMERICAN HERITAGE DICTIONARY and MERRIAM WEBSTER’S ONLINE DICTIONARY demonstrate that, under “basic rules of grammar”, a clause or phrase beginning with “which” need not relate to the immediately antecedent noun, but also may properly relate to the antecedent “phrase or clause.”

b. Plaintiffs’ Position Is Also Supported By Language Beginning With “Which” Contained In The Revised Code Of Washington, Including Some Such Language That Was Ambiguous.

The Revised Code of Washington contains a number of examples of statutory language beginning with “which” referring to an antecedent phrase or clause, rather than to the last antecedent noun. For example, RCW 9A.72.010(1) provides that:

(1) “materially false statement” means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the

course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law;

(Emphasis added.) In that statute, the language beginning with “which” does not simply modify “evidence”, the nearest antecedent noun. Rather, the meaning and structure of RCW 9A.72.010(1) is similar to the structure of the first sentence of paragraph 6 of the Farrow complaint, i.e., the clause beginning with “which” modifies the entire phrase “any false statement, oral or written, regardless of its admissibility under the rules of evidence”.¹²

Similarly, RCW 74.04.005, defines income as follows:

(11) “Income” – (a) All appreciable gains in real or personal property (cash or kind) or other assets, which are received by or become available for use and enjoyment by an applicant or recipient during the month of application or after applying for or receiving public assistance.

(Emphasis added.) Does the language beginning with “, which” (a) refer to “all appreciable gains in real or personal property (cash or kind) or to other assets”, or (b) refer to the immediately preceding noun “other assets”? Plaintiffs suggest that, while ambiguous, the language likely refers to (a). See also RCW 46.04.035.

¹² For the convenience of the Court, the language of the disclaimer is set forth again:

Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.

L-CP 9 from Farrow v. Leslie Controls.

Former RCW 26.50.110 provides a good example of a statute whose language beginning with “for which” created an ambiguity similar to the ambiguity at issue in this case. That statute provided with respect to certain protection orders that:

. . . a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b) is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

(Emphasis added.)

In State v. Bunker, supra, 144 Wn. App. at 415, this Court construed that statute and rejected the contention that the phrase “, for which an arrest is required under RCW 10.31.100(2)(a) or (b)” was unambiguous:

At the outset, Bunker's and Williams's contention that former RCW 26.50.110(1) unambiguously means what they say it means is without merit; it is not obvious from the structure of the section what the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” is intended to modify. It may be that it only applies to the clause “a provision of a foreign protection order specifically indicating that a violation will be a crime.” Perhaps, instead, it modifies that clause and the clause “a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a

location.” Or perhaps it modifies both of those clauses as well as the phrase “a violation of the restraint provisions.” The plain text of the statute does not indicate which construction is most plausible, and each construction gives the statute a different meaning.

(Emphasis added.)

The ambiguity created by the language beginning with “for which” in former RCW 26.50.110 is very similar to the ambiguity created in this case by the language beginning with “which”. Bunker thus directly supports plaintiffs’ position that the sentence in the complaint was ambiguous. See also State v. Wofford, supra.¹³

2. Washington Law Calls For Pleadings To Be Liberally Construed And Permits The Complaint To Be Clarified In Opposition To Summary Judgment.

“Pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process.” State v. Adams,

¹³ In Wofford, supra, 148 Wn. App. at 878, Division II agreed with Bunker, supra, and held:

We find former RCW 26.50.110(1) susceptible to more than one reasonable interpretation and, therefore, ambiguous. We recognize that different panels of our court have held that former RCW 26.50.110(1) is unambiguous. *See State v. Madrid*, 145 Wn. App. 106, 108, 192 P.3d 909 (2008); *Hogan*, 145 Wn. App. at 212. But we agree with Division One that former RCW 26.50.110(1) is unclear as to whether the final clause ““for which an arrest is required under RCW 10.31.100(2)(a) or (b)”” is intended to modify all the preceding phrases or only the immediately preceding phrase dealing with foreign orders. *Bunker*, 144 Wn. App. at 415. (quoting former RCW 26.50.110(1)).

(Emphasis added.)

supra, 107 Wn.2d at 620. (Emphasis added.) “‘Liberal construction’ is a command that the coverage of an act’s provisions in fact be liberally construed and that its exceptions be narrowly confined.” Vogt v. Seattle-First Nat’l Bank, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (footnote omitted). See also Simpson v. State, 26 Wn. App. 687, 691, 615 P.2d 1297 (1980). Those cases and principles call for paragraph 6 of plaintiffs’ complaint to be construed so as to permit decision on the merits. That is contrary to defendants’ position that there should be no decision on the merits.

The first sentence of paragraph 6 to the complaint is ambiguous, as discussed above. Washington law provides that such ambiguity should be resolved for summary judgment purposes consistently with plaintiffs’ clarification in response to the summary judgment motion, including the accompanying declaration that clarified what the language of the disclaimer meant. L-CP 179.

State v. Adams, supra, held that:

... initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings. See Schoening v. Grays Harbor Comm’ty Hosp., 40 Wn. App. 331, 336-37, 698 P.2d 593, *review denied*, 104 Wn.2d 1008 (1985).

Id. at 620 (emphasis added). State v. Adams was relied upon by the Washington Supreme Court in Adams v. King County, 164 Wn.2d at 656-

657. In the present case, while the initial pleading may have been unclear, it was clarified during the course of summary judgment proceedings by the Declaration of William Rutzick (L-CP 179) referred to above. Thus, under State v. Adams, supra and Adams v. King County, supra, summary judgment should not have been granted in the face of this clarification.¹⁴

Defendants argued that Adams, supra, and Schoening v. Grays Harbor Community Hosp., 40 Wn. App. 331, 698 P.2d 593 (1985), are not applicable because:

. . . In those cases, the issue was whether the opposing party and/or the trial court had adequate notice of the nature and theory of plaintiffs' claims in order to be able to address them during summary judgment proceedings. Here, the admitted purpose of the federal enclave disclaimer clause is to affect whether or not the case can be removed to federal court. That determination generally must be made from the face of plaintiffs pleadings; a clause specifically aimed at federal removal jurisdiction should be interpreted as it is written, despite Plaintiffs' argument that they now are "clarifying" the scope of the claims they are making (or disclaiming from) their complaint. (Emphasis added)

L-CP 247 (emphasis added).

¹⁴ The Rutzick Declaration (L-CP 179) also rebuts the argument that plaintiffs' position was a "last minute" change of position made in light of decisions in the Abbey v. Cla-Val Co., et al., KC No. 07-2-36540-1SEA and Smith v. AGCO Corp., et al., KC No. 07-2-27653-0SEA cases, since it shows that plaintiffs' position predated those decisions. The Abbey decision has been appealed to this Court (No. 62399-1-I).

Defendants' analysis is flawed for three independent reasons. First, the holding in State v. Adams applies equally to this case because the issue of the meaning of the complaint in State v. Adams and in this case was first raised during summary judgment. Secondly, determinations of removability do not have to be made from the "face of" pleadings if the pleadings are unclear. If a complaint does not provide a basis for removal, removal can take place after discovery provides such a basis. See Peters v. Lincoln Electric, 285 F.3d 456, 465-66 (6th Cir. 2002). Defendants were free to do discovery on this issue in the months following the complaint being filed, but chose not to. Indeed, defendants could have removed the case when they received plaintiffs' opposition in August 2008, clarifying plaintiffs' complaint, because one year had not elapsed since the case was filed. 28 USC §1446; Caterpillar Inc v. Lewis, 519 U.S. 617 (1996).¹⁵ Thirdly, the argument that this clause "should be interpreted as it is written" begs the question since, "as it is written," the clause is ambiguous.

¹⁵ Removal of this case at any time would have required the consent of all defendants. That can be difficult to achieve in the context of asbestos litigation. Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006).

3. Defendants' And The Trial Court's Interpretation Of The First Sentence To Paragraph 6 Of The Complaint Are Contrary to Standard Rules Of Construction.

a. The "Last Antecedent Rule".

Bunker, *supra*, 144 Wn. App. at 418 also analyzed the applicability of the "last antecedent rule" to the language in the former RCW 26.50.110 beginning with "for which". This Court explained the significance of a comma before the qualifying language¹⁶:

The last antecedent rule states that "unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. . . . Yet the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one." *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006) (internal citations and quotation marks omitted) (*quoting Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005)). Thus, as applied to former RCW 26.50.110, this rule would appear to support Bunker's and Williams's contention that the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" modifies every preceding clause, up to and including the phrase "violation of the restraint provisions."

(Emphasis added.) See also In Re Sehome Park Care Center v. State, 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995).¹⁷ The last antecedent rule is not

¹⁶ Wofford refers to the language beginning with "for which" as a "clause". 148 Wn. App. at 184, while Bunker refers to the same language as a "phrase". 144 Wn.2d at 418.

¹⁷ Sehome, *supra* at 781-82, held that:

The last antecedent rule provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. . . . However, the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. . . . Here a comma introduced the "but only if" qualifier. While not conclusive, the presence and location of this comma supports the Department's position that the "but only if" language applies to all of the institutions listed in the statute.

See also RP 20-26 (Dec. 5, 2008).

limited to statutes, but also applies to documents drafted by private parties. Witherspoon v. St. Paul Fire Ins, 86 Wn.2d 641, 648, 548 P.2d 302 (1976).

The last antecedent rule provides additional support for plaintiffs' position here because the qualifying phrase "which . . ." in the first sentence of paragraph 6 of the complaint was preceded by a comma. Thus, the qualifying phrase was intended "to apply to all antecedents instead of only the immediately preceding one." That was plaintiffs' position in the trial court and continues to be plaintiffs' position.

b. Pleadings Should Not Be Interpreted To Be Superfluous Or Insignificant.

The trial court interpreted the language beginning with ", which" as simply stating a legal belief that federal enclaves can never include Navy vessels, even though the sentence was ambiguous, and even though plaintiffs clarified their meaning in opposition to summary judgment. RP 41-42. There are at least two additional reasons beyond those set forth above why the trial court should not have so interpreted those words. First, plaintiffs explained that they knew there was some contrary authority, so they were not certain that such a belief was correct. L-CP 231. The complaint should not be interpreted to state a legal

proposition that plaintiffs explain that they knew may be incorrect and thus would not have stated.

Secondly, in construing legally significant writings, the writings should be construed wherever possible so that no clause or word would be superfluous or insignificant. See UPS v. Department of Revenue, 102 Wn.2d 355, 687 P.2d 186 (1984). That is equally true of complaints. If one construes the clause beginning with “, which” in the first sentence of paragraph 6 of the complaint as nothing more than an assertion that “federal enclaves always exclude navy vessels,”¹⁸ that clause would be superfluous or insignificant since a plaintiff cannot make a legal assertion more true simply by stating it in a complaint. For example, the statement in a complaint that “comparative negligence never applies in automobile accidents” would be superfluous to what the law really was.

4. Defendants’ And The Trial Court’s Other Arguments Concerning The First Sentence Of Paragraph 6 To The Complaint Are Incorrect.

a. The Phrase “, Which Expressly Excludes U.S. Navy Vessels” Is Ambiguous Even Though The Trial Court Ruled That It Could Only Have One Meaning.

The trial court ruled that the “disclaimer” language was not ambiguous:

¹⁸ See Judge Heller’s memorandum opinion in Abbey, n. 1. L-CP 1620.

I do not believe, and I will so find, that the disclaimer is not ambiguous. I read the disclaimer language about 20 times, and then I typed it out and put it on a piece of paper. And I couldn't construe that language in any way Mr. Rutsick (sic) wished to have me construe it. That is contrary to how I speak English and read English. I can't come to that interpretation.

RP 41-42. Since this was a summary judgment, this Court should review *de novo* what the disclaimer language means. Moreover, the record demonstrates that plaintiffs' counsel and Judge Heller, in his initial ruling granting summary judgment in Abbey, agreed that there were two reasonable interpretations of the language. Furthermore, both sides in this case put into the record a usage note from the AMERICAN HERITAGE DICTIONARY of the English language which directly supports the position that the language following “, which” was “ambiguous.” See L-CP 228, 1163.

BLACK'S LAW DICTIONARY (7th Ed.), page 79, defines “ambiguity” as “[a]n uncertainty of meaning or intention, as in a contractual term or statutory provision.” The Washington Supreme Court has explained that if there is more than one “possible” reasonable interpretation of language, the language is ambiguous. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992). See also Cockle v. Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001). Given the ambiguity inherent in the language beginning with “, which” acknowledged by the

dictionary, by Judge Heller's initial ruling, by the declaration of plaintiffs' counsel, and by cases such as Bunker, supra, there is more than one reasonable interpretation of that language.¹⁹

b. When Language Is Ambiguous, The Fact That It Has Been Interpreted By Others In One Way Does Not Demonstrate That Another Interpretation Is Unreasonable.

Defendants also challenged plaintiffs' interpretation in this case because other attorneys and judges in other cases have interpreted the language beginning with “, which” differently than do the plaintiffs in this case. L-CP 246 to 249. (Smith case, Abbay case.) The argument appeared to be that, because other plaintiffs (represented by one of the same law firms as represent the plaintiffs in this case) have interpreted the language differently than do plaintiffs in this case, the interpretation by plaintiffs in this case must be wrong. Legally, as discussed above, that argument fails. Since the language is subject to more than one reasonable

¹⁹ Defendants may argue that plaintiffs' interpretation of the first sentence of paragraph 6 to the complaint in this case should be disregarded because, in other cases, the parties or the court interpreted that language differently than do plaintiffs in this case. The argument may be that the “law of the case” doctrine prohibits plaintiffs from taking a different position. The “law of the case” doctrine is defined in BLACK'S DICTIONARY as:

1. The doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal.
2. an earlier decision giving rise to the application of this doctrine.

However, at the time of the summary judgment in this case, there had been no appeal and no decision on appeal in this case, so the “law of the case” doctrine did not apply. What did apply was CR 54(b). As explained in Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 301, 840 P.2d 860 (1992), under CR 54(b), at any “time before entry of final

interpretation, it is necessarily true that the fact that some lawyers or judges interpret it one way does not make an alternative interpretation unreasonable. Factually, that argument is not warranted because the Rutzick Declaration (L-CP 179) provided substantial evidence that the attorney for plaintiffs in this case (who was not the same attorney as in the other cases) interpreted the clause in the way described above from the time he first signed the complaint in this case. L-CP 179-180. That interpretation was well supported by the dictionaries and other authorities discussed above.

C. Defendants Never Proved that PSNS, as it Existed during Mr. Farrow's Tenure, was a Federal Enclave Subject to the Federal Government's Exclusive Jurisdiction.²⁰

1. A Federal Enclave As That Term Was Used In Plaintiffs' Complaint Exists Only When The Federal Government Has Exclusive Jurisdiction.

Defendants' argued in their motion that the federal government had exclusive jurisdiction over PSNS, and that is what made it a federal enclave. Notably, defendants acknowledged that a shipyard does not constitute a federal enclave "when a state fails to cede exclusive jurisdiction to the federal government":

judgment trial court has plenary authority to afford such relief as justice requires." That trial court thus was not limited by the law of the case.

²⁰ This argument need only be reached if the Court rejects plaintiffs' primary argument that the disclaimer did not disclaim asbestos exposure aboard Naval ships docked at a federal enclave.

While as a general rule, a government-owned shipyard constitutes a federal enclave, there may be exceptions such as when a state fails to cede exclusive jurisdiction to the federal government or where there is some dispute about whether exposure to asbestos actually occurred in the federal enclave, at sea in naval service, or both. . . . None of those issues pertain to the present case.

L-CP 57-58 (emphasis added). The United States Supreme Court held in United States v. Mississippi Tax Com., 412 U.S. 363 (1973), that the existence of concurrent as opposed to exclusive federal jurisdiction made it inappropriate to rely on the federal enclave clause.²¹ Many recent cases take the position that exclusive jurisdiction is the hallmark of a “federal enclave.” For example, in Osburn v. Morrison Knudsen Corp., 962 F. Supp. 1206, 1208 (E.D. Mo. 1997), the court stated:

A federal enclave is territory which has been transferred by a state through cession or consent to the United States and over which the federal government has acquired exclusive jurisdiction.²² (Emphasis added)

²¹ The Court first discussed two bases in which the federal government had exclusive jurisdiction and there distinguished those bases from two other bases which were subject to concurrent state and federal jurisdiction:

The two bases over which the United States claims to exercise jurisdiction concurrent with the State -- Columbus Air Force Base and Meridian Naval Air Station -- present somewhat different problems. Since the United States has not acquired exclusive jurisdiction over the land upon which these bases are located, the Government is unable to rest its claims for immunity from the markup with respect to purchases of liquor for the nonappropriated fund activities of these bases on Art. I, § 8, cl. 17. (Emphasis added.)

U.S. v. Mississippi Tax Com., *supra*, 412 U.S. at 379.

²² See also Swords v. Kemp, 423 F. Supp. 2d 1031, 1034 (N.D. Cal. 2005) (“Federal enclaves are under the exclusive jurisdiction of the United States”), Benjamin v. Brookhaven Science Assoc., LLC., 387 F. Supp.2d 146, 157 (E.D.N.Y. 2005), where the court stated “[a] federal enclave is ‘a portion of land over which the United States government exercises exclusive federal jurisdiction.’”

Significantly, under the standard legal dictionary definition of “federal enclave”, the federal government must have exclusive authority and jurisdiction. In BLACK’S LAW DICTIONARY (8th Ed), p. 626, “federal enclave” is defined as:

Territory or land that a state has ceded to the United States.
• Examples of federal enclaves are military bases, national parks, federally administered highways, and federal Indian reservations. The U.S. government has exclusive authority and jurisdiction over federal enclaves.

(Emphasis added.)²³

The term “federal enclave” in plaintiffs’ complaint is undefined. Since it is an undefined legal term, this Court should define it in accordance with BLACK’S LAW DICTIONARY. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008), Mut. Of Enumclaw v. U.S. Ins. Co., 164 Wn. 2d 411, 423, 191 P.3d 866 (2008). Therefore, in order to prove that the disclaimer in the complaint relating to “federal enclave” applies to PSNS, defendants had to establish that PSNS was a federal enclave as that term was defined in BLACK’S LAW DICTIONARY, i.e., the federal government had exclusive jurisdiction over PSNS. However, as discussed below, that position is inconsistent both with the factual record before this Court and with applicable law.

²³ Similarly, 16 U.S.C. §457 dealing with what law applies to federal enclaves only come into effect when the property is subject to the “exclusive jurisdiction of the United States.”

2. Land Acquired For PSNS After 1939 Was Not Under The Federal Government's Exclusive Authority And Jurisdiction.

Defendants' primary argument regarding enclave jurisdiction was that the Washington and United States Supreme Courts characterized PSNS as a federal enclave subject to the federal government's exclusive jurisdiction in Murray v. Joe Gerrick & Co., 172 Wash. 365, 20 P.2d 591 (1933), *aff'd* 291 U.S. 315 (1934). L-CP 59. If PSNS, as it existed when Mr. Farrow had worked there, were the same size and dimensions as it was in 1934 when Murray was decided, that argument would have some force. However, the record establishes that PSNS had considerably bigger and different dimensions in the 1950s, 1960s and 1970s than it did in the 1930s when Murray was decided. See, L-CP 354, 693, 1136, 1173. Defendants never proved (and the record does not show) whether Mr. Farrow's asbestos exposure occurred in the portion of PSNS that existed in the 1930's or in the portion of PSNS that was acquired after the 1930's. State and federal law also changed in significant ways after 1934 when Murray was decided. See, e.g., 40 U.S.C. §255 and RCW 37.04.020,²⁴ 030²⁵ (adopted in 1939).²⁶ Prior to 1939, applicable Washington law

²⁴ RCW 37.04.020 is titled, "Concurrent jurisdiction ceded – Reverter."

²⁵ 37.04.030 is titled, "Reserved jurisdiction of state."

²⁶ Plaintiffs also pointed out to the trial court at oral argument that, contrary to defendants' argument, Washington Const. Act 25, Sec. 1, only applied to land owned by the federal government as of the date of the adoption of the Washington constitution, i.e.,

relating to federal enclaves typically ceded exclusive jurisdiction to the United States, see, e.g., the discussion of Washington law in Murray v. Joe Gerrick & Co., supra, 172 Wash. at 367.²⁷ In 1939, however, Washington law was changed by RCW §§ 37.04.010-050. Under that 1939 statute, while Washington consented to acquisition of property by the United States, the jurisdiction of Washington and the United States for such property was specifically characterized as “concurrent”. RCW 37.04.020. Moreover, in RCW 37.04.030, Washington expressly reserved:

... such jurisdiction and authority over land acquired or to be acquired by the United States as aforesaid as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition.

These Washington statutory provisions adopted in 1939 are almost identical to the provisions of the West Virginia statute that were upheld by the United States Supreme Court in James v. Dravo Contracting Co., 302 U.S. 134, 142 (1937). Moreover, as quoted in Pratt v. Kelly, 585 F.2d 692, 696 (4th Cir. 1978), the United States Supreme Court in James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940), held that:

It is now settled that the jurisdiction acquired from a State by the United States, whether by consent to the purchase or

land “now held or reserved by the government of the United States ...” RP 30. It thus does not apply to any part of PSNS, which was all acquired after Washington became a state in 1888.

²⁷ The only exception related to service of civil or criminal process. That exception was not viewed as taking away from the federal government’s exclusive jurisdiction. Lord v. Local Union 2088, etc., 646 F.2d 1057, 1061 n. 6 (5th Cir. 1981).

by cession, may be qualified in accordance with agreements reached by the respective governments. . . .

Thus, none of PSNS acquired after 1939 is subject to the federal government's exclusive jurisdiction.²⁸

3. Given That Federal Jurisdiction For Much Of PSNS Was Concurrent And that Washington Reserved Such Jurisdiction As Was Not Inconsistent With The Purposes Of The Cession, There Is No Federal Jurisdiction For The State Law Torts At Issue In This Case Simply Because They Occurred At PSNS.

Defendants refer to the Memorandum Opinion of Judge Heller in Abbay v. Cla-Val Co., et al., which relied on Mater v. Holley, 200 F.2d 123 (5th Cir. 1952) as explaining the basis of "federal enclave" jurisdiction. L-CP 1620-1621. Mater held that when the federal government had exclusive jurisdiction over an enclave (which were the facts in Mater), federal question jurisdiction pursuant to 28 U.S.C.A. § 1331 applies because the state law that existed previously ceases to exist and becomes "federal law":

It seems indubitable that any law existing in territory over which the United States has 'exclusive' sovereignty must

²⁸ Defendants also cited United States v. Kiliz, 694 F.2d 628 (9th Cir. 1982), and Brem-Air Disposal v. Cohen, 156 F.3d 1002, 1003 (9th Cir. 1998). L-CP 252. However, the Court in Kiliz never says why it believed the PSNS was "an arguably restricted federal enclave". *Id.* at 629. Nor was a finding that PSNS was a federal enclave necessary to the opinion in Kiliz, given that the Court relied upon the Assimilative Crimes Act., 18 USC (§§ 7 and 13). *Id.* Brem-Air merely found that the Navy "operates the Puget Sound Naval Shipyard in the City of Bremerton", not that it was a federal enclave. Neither case ever discussed the facts and state law set forth above. Moreover, the record here provides evidence not present in Kiliz, and Brem-Air, as to the actual status of land acquired as part of PSNS since 1939.

derive its authority and force from the United States and is for that reason federal law, even though having its origin in the law of the state within the exterior boundaries of which the federal area is situate. When, therefore, this area was ceded by Georgia to the United States, Georgia law as such, and by virtue of Georgia sovereignty ceased to exist, but remained operative as federal law by virtue of the sovereignty of the United States. (emphasis added)

Id. at 124. That was also the reasoning in Stokes v. Adair, 265 F.2d 661, 665-66 (4th Cir. 1958). See also McComber v. Bose, 401 F.2d 545 (9th Cir. 1968).

The rationale of those cases does not apply to torts on land acquired by PSNS after 1939. That is because, by operation of state law, jurisdiction on such land was “concurrent rather than exclusive” and Washington “reserved” jurisdiction to the extent compatible with the federal acquisition of PSNS. RCW 37.04.020, 030. Since there was no exclusive federal jurisdiction on those portions of PSNS, Washington law does not become federal law. Therefore, there is no federal jurisdiction pursuant to § 1331 for such torts. This analysis is also supported by Pratt v. Kelly, supra, 585 F.2d at 696, where the Court canvassed both United States Supreme Court cases and a case from the Virginia Supreme Court.

The Pratt court explained:

Both before and after the enactment of the quoted eighth paragraph of 40 U.S.C. § 255 it has been held that a State may limit its cession of jurisdiction to the United States. *Paul v. United States*, 371 U.S. 245, 83 S. Ct. 426, 9 L. Ed.

2d 292 (1963), *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 60 S. Ct. 431, 84 L. Ed. 596 (1940), *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937), *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937), *Fort Leavenworth RR v. Lowe*, 114 U.S. 525, 5 S. Ct. 995, 29 L. Ed. 264 (1885), *Waltrip v. Commonwealth*, 189 Va. 365, 53 S.E.2d 14 (1949).

(Emphasis added.) The Pratt Court found no federal jurisdiction in a tort occurring in the Blue Ridge Parkway because “exclusive jurisdiction over the Blue Ridge Parkway was not transferred to the United States.” Id. See also Sylvane v. Whelan, 506 F. Supp. 1355, 1361 (E.D. N.Y. 1981), where the Court found no case in which the doctrine set forth in Mater was applied when the State reserved concurrent jurisdiction:

. . . the state may qualify its cession of land to the federal government by the reservation of concurrent jurisdiction. See *James v. Dravo Construction Co.*, 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937). Once the state cedes concurrent jurisdiction (in this case, indeed, reserving unto itself exclusive civil jurisdiction) the rationale for applying "federalized" state law as the basis for § 1331 jurisdiction disappears. . . . The Fourth Circuit adopted this rationale in Pratt v. Kelly, 585 F.2d 692 (4th Cir. 1978), in holding that federalized state law does not apply in a negligence suit arising from an automobile accident on federal land over which the state had concurrent jurisdiction. Indeed we have been unable to discover any instance in which the doctrine was invoked in a federal enclave over which the state has reserved concurrent jurisdiction. (emphasis added)

The inapplicability of federal jurisdiction in this case is particularly appropriate in this case because there is nothing inconsistent with the

acquisition of land by the United States for a naval base at PSNS while Washington retained jurisdiction over claims of asbestos causing injury occurring 30 years after the injured person was exposed at PSNS. To the contrary, the State has been utilizing such jurisdiction for many years for cases involving such injuries occurring at PSNS. See, e.g., Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997); Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 865 P.2d 527 (1993); Hoglund v. Raymark Indus., 50 Wn. App. 360, 749 P.2d 164 (1987); and Berry v. Crown Cork & Seal, 103 Wn. App. 312, 14 P.3d 789 (2000). Defendants presented no evidence that this case or the hundreds of other asbestos personal injury cases filed in King County under Washington law has in any way interfered with the Navy's purpose of acquiring land to repair ships at PSNS. As such, Washington state law did not become federal law and under Mater, Stokes and Pratt, there is no basis for federal question jurisdiction pursuant to 28 U.S.C.A. 1331.

4. The Trial Court's Decision is Inconsistent with State v. Williams and Willis v. Craig.

The above discussion, standing alone, calls for rejection of the trial court's ruling. However, an additional reason for rejecting the trial court's decision is that it is contrary to this Court's reasoning in State v. Williams, 23 Wn. App. 694, 696-97, 598 P.2d 731 (1979). Williams held that the

extent of federal jurisdiction under the federal enclave provision varies depending on the manner of acquisition.

Thus, the method of acquisition of state land by the United States determines the extent of federal jurisdiction over such land. Since Indian Island was acquired by condemnation rather than by purchase, federal jurisdiction over the island is exclusive only for the stated federal purpose of “establishing additional ammunition storage facilities,” and not for purposes of managing shellfish.

(Emphasis added.) 23 Wn. App. at 697. Defendants’ response in the trial court to this Court’s ruling in Williams was simply to assert that Williams was “correctly decided, but erroneously reasoned”. L-CP 1476. Willis v. Craig, 555 F.2d 724, 726 (9th Cir. 1977), similarly focused on the significance to the jurisdictional issue of whether the land in question was “purchased” or acquired through condemnation:

The evidence submitted in this case showed that much of PSNS was not “purchased”, but was acquired by condemnation. See, e.g., L-CP 354, 1072-1124. There also is no evidence that the purposes for which PSNS was acquired by the federal government are inconsistent with state law responsibility for injuries caused by asbestos-containing products. For example, there is no inconsistency between the United States interest in repairing ships at PSNS (which is presumably why they acquired whatever land they did acquire) and Washington retaining jurisdiction for asbestos injury claims against non-governmental

manufacturers. See Mendoza v. Neudorfer Engineers, Inc., 145 Wn. App. 146, 185 P.3d 1204 (2008) (reversing dismissal of tort action occurring in a federal enclave based on lack of jurisdiction).²⁹

5. A Separate Reason For Finding No “Federal Enclave” Jurisdiction Is That Defendants Also Did Not Establish That Acquisition of Land for PSNS by the United States After July 1945 Complied With Federal Statutory Criteria For Acceptance of Jurisdiction.

As set forth above, Congress in 1940 enacted 40 U.S.C. § 255 (now codified as 40 U.S.C. § 3112) which imposes requirements on the federal government for accepting jurisdiction. As explained in Hankins v. Delo, 977 F.2d 396, 397 (8th Cir. 1992):

“Even when the state purports to cede land to the federal government, the United States does not have jurisdiction unless it accepts it in the way the statute requires. *Adams v. United States*, 319 U.S. 312, 315, 87 L.Ed.1421, 63 S. Ct. 1122 (1943).”

²⁹ Plaintiffs objected to Exhibit 217. L-CP 1448, 1449, 1453-1456. The trial court also erred in relying on Exhibit 217, the Declaration of Karen Booth, and attachments (L-CP 1457) because the documents are hearsay and the opinion lacks foundation. That decision should not be construed by the Court. Furthermore, there are a number of substantive problems with that exhibit. For example, page 1 of Exhibit E appears to label lots including B-94 through B-101. L-CP 1208. Pages 3 and 4 of Exhibit E appear to label lots B-79 through B-90 (B-91 is missing) and B-92 through B-101. L-CP 1210-1211. There should be significant similarity, since a number of the lots are duplicated between those exhibits. However, the lots on pages 3 and 4 with the same numbered labels are not the same shape or size as the lots so marked on Page 1, and there is no indication on the Exhibit as to why there is such a difference.

As another example, Exhibit F to the Declaration is stated to be a map obtained from the Office of the Kitsap County Auditor, and to show Parcel 84, consisting of approximately 440 acres of submerged lands. L-CP 1213. An examination of Exhibit F does not show the location of the parcel identified as number 84. L-CP 1213. In addition, it is clear that the scale of Exhibit F is not as stated therein, because an attempt to trace the legal description of the parcel on Exhibit F runs beyond the boundaries of the paper. Parcel 84 cannot be identified from the map provided in Exhibit F.

Defendants provided no evidence that the United States complied with 40 U.S.C. § 3112 by accepting jurisdiction for any land acquired after July 31, 1945, the date referred to in L-CP 1140. Under such cases as Adams v. United States, 319 U.S. 312, 63 S. Ct. 1122 (1943); Hankins, supra; De Kalb County v. Henry C. Beck Co., 382 F.2d 992, 995-996 (5th Cir. 1967), and United States v. Grant, 318 F. Supp. 1042, 1045-46 (D. Mont. 2004), the record in this appeal does not demonstrate acceptance of federal jurisdiction over land acquired after July 31, 1945, including the 440 acres of submerged land referred to in Exhibits 15, 212 and 217. L-CP 354, L-CP 1136, L-CP 1173.

Defendants may rely upon Torrens v. Lockheed Martin Services Group, Inc., 396 F.3d 468 (1st Cir. 2005), for the proposition that the 1945 letter of acceptance contained at L-CP 1140 covered all lands subsequently acquired for piers and dry docks jutting into Sinclair Inlet. Torrens, however, is not applicable. In Torrens, the First Circuit was considering facilities extending into submerged land which were being built by the government at the time of the acceptance of the conveyance. Thus, the court concluded that the Secretary of the Navy:

. . . cannot have intended to exclude from the letter the very facilities being built then and there for fleet operations, Congressional authority for which was cited in the letter itself. (emphasis added)

Id. at 473. That was not true in the present case. At least some of the dry docks at PSNS had not been constructed by July 1945. For example, Dry Dock 6 was not dedicated until 1962. CP 58. See also photographs and other materials attached as Appendix A which show that construction of that dry dock did not begin until the last 1950's.³⁰

More relevant than Torrens to this Washington case is the March 13, 1962 opinion of the Attorney General of Washington is attached as Appendix B. That opinion explained that the acceptance of jurisdiction by the federal government in July, 1945, does not mean that the federal government has accepted federal jurisdiction of land subsequently acquired:

You have advised us that the Air Force has not accepted concurrent jurisdiction, in so far as you have been able to determine, pursuant to the federal statute mentioned above. Please be advised that your information is correct. We have been informed by the governor's office that no acceptances have been filed by the federal government involving land in the Grant county area since July of 1945.

* * *

Based upon the holding of the Adams case, *supra*, and the statutes involved it is our opinion that the federal government has not acquired exclusive or partial criminal jurisdiction over the lands we are here concerned with for two reasons: First, because under the present statute the

³⁰ Had the trial court honored plaintiffs' request for a hearing on defendant's request for judicial notice discussed, supra, plaintiffs would have provided this to the trial court. Since plaintiffs did not receive a hearing, plaintiffs believe it is appropriate to attach this material to this brief.

Washington legislature has tendered concurrent jurisdiction only; second, because the federal government has not purported to accept any legislative jurisdiction whatsoever by filing an acceptance of jurisdiction with the governor in accordance with 40 USC, § 255 (1958). (emphasis added)

D. Arguments Relating To Evidence That The Trial Court Improperly Considered.

Defendant IMO submitted additional materials attached to the second declaration of another defendant's paralegal (and the plaintiffs objected, relying, inter alia, on CR 56(c) and See, e.g., White, supra). L-CP 257. The trial court nevertheless utilized these affidavits. L-CP 1499. In doing so, the trial court erred.

The trial court erred when defendants attempted to remedy this hole in their motion by submitting evidence in reply after plaintiffs pointed out the hole in the evidence and at a time when plaintiffs could not respond either by argument or responsive evidence to this new evidence. Several cases from this Court hold that IMO could not properly add new evidence at that time under those circumstances. White v. Kent Medical Ctr., 61 Wn. App. at 168-169.

In the present case, as in White, the evidence submitted by IMO in reply was not proper rebuttal because the new evidence did not explain, disprove or contradict the adverse party's evidence on this issue. That is necessarily true because the plaintiff did not present any evidence on that issue but pointed out the lack of any evidence or reference thereto in

IMO's moving papers. The court, therefore, should not have properly considered this new reply evidence. White has subsequently been followed in the Court of Appeal's opinion in Owen v. Burlington N. Santa Fe R.R., supra, which is reported at 114 Wn. App. 227, 239, 56 P.3d 1006 (2002) and Seybold v. Neu, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001).

Defendants also argued that the court should take judicial notice of these facts pursuant to ER 201. L-CP 1481-1482. ER 201 does not justify taking judicial notice of these facts. Plaintiffs specifically requested timely notice for "an opportunity to be heard as to the propriety of taking judicial notice, and the tenor of the matter noticed. L-CP 1496. Under ER 201(e): "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." However, the trial court did not provide plaintiffs with the requested opportunity. As such, judicial notice was not properly taken.

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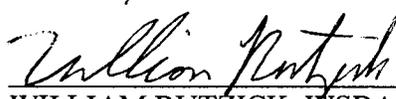
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VII. CONCLUSION

For the foregoing reasons, this Court should reverse the judgments and orders granting defendants' Motions For Summary Judgment and remand the claims against defendants for trial.

RESPECTFULLY SUBMITTED this 10th day of July, 2009.

SCHROETER, GOLDMARK & BENDER

A handwritten signature in cursive script, appearing to read "William Rutzick", is written over a horizontal line.

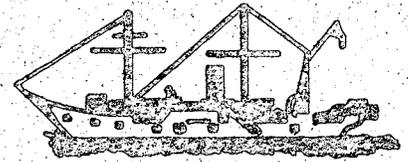
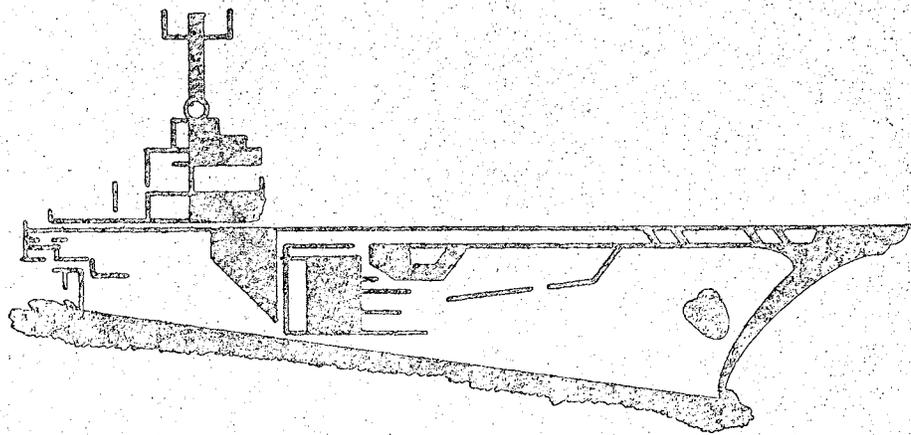
WILLIAM RUTZICK, WSBA #11533
Attorney for Appellants

INDEX OF ATTACHMENTS

Appendix A – NIPSIC to NIMITZ – A Centennial History of Puget Sound
Naval Shipyard

Appendix B – State of Washington March 13, 1962 Opinion of the
Attorney General, AGO 61-62 No. 101

APPENDIX A



NIPSYIC to NIMITZ

A Centennial History of Puget
Sound Naval Shipyard

By Louise M. Reh and Helen Lou Ross

DEDICATED
TO
THE MEN AND WOMEN
OF
THE PUGET SOUND NAVAL SHIPYARD

INTRODUCTION

NIPSIC TO NIMITZ is an exciting story of the United States Navy in the Pacific Northwest. From the pioneering days of the initial survey party and the establishment of the Puget Sound Naval Station in 1891, the hundred year history of what is now the Puget Sound Naval Shipyard is a tribute to the men and women, both civilian and military, who had the foresight and vision to plan for the future and the skill and determination to ensure that the Shipyard was fully capable of fulfilling its role in time of war and in insuring the peace.

The story begins with the singular determination of Lieutenant Ambrose Wyckoff, but its strength is the unfolding of the contribution of command leadership and the documentation of the accomplishments of each succeeding generation of the civilian workforce. It is the story of sails and coal to nuclear power, dry docks and shop facilities, ships overhauled and repaired. It is the history of the growth of the Shipyard's industrial strength in support of the needs of the United States Fleet.

Truly the Shipyard of today is far beyond what Lieutenant Wyckoff ever envisioned and provides a lesson for the next century, that the world of human accomplishment holds no bounds. The Shipyard is poised to continue improving its capabilities through innovation and hard work.

Arthur Clark
Captain, United States Navy

Captain Clark is Commander of the Puget Sound Naval Shipyard and has been selected for the rank of Rear Admiral.

NIPSIC TO NIMITZ

A Centennial History of Puget Sound Naval Shipyard

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Inside front cover U.S.S. NIPSIC

Larry Jacobson

Inside back cover U.S.S. NIMITZ

Steve Zugschwerdt, SUN



Walter Bruns, Master of the Riggers and Laborers Shop, reviews the apprentice training program in June 1960 while Fred Timmerman, Bruns' successor as Shop Master looks on. Bruns is seated in the chair used by his predecessor, George Trahey. The chair shows the repair of a hole where a .32 caliber bullet passed through to pierce Trahey's shoulder when, in 1912, a crazed employee tried to kill him.

Puget Sound Naval Shipyard

The first PSNS employee awarded the Distinguished Civilian Service Award²¹ was Foreman Machinist Carl Forsmark²² for his mastery of technical machinery problems. The second was William O. Wessler²³ in 1955 for his work on cable-banding and shop planning. Captain David R. Saveker, who was Acting Repair and New Construction Superintendent in the late 1950s, described Wessler thus:

He was an innovative, hard charging and decisive leader in the electrical/electronics area. He had a keen analytical bent and saw that X51 kept accurate and detailed production records of the shop's activities. As a result PSNS led the naval shipyards in electrical work planning, and initiated electrical planning standards that set the pace for ship construction, conversion and repair.

Walt Bruns²⁴ received the award in 1956 for advancing the state of the art of rigging. At the outbreak of World War II, Bruns, then a Foreman Rigger, began a program to train

helpers and laborers in proper rigging procedures, previously jealously guarded, in order to increase the number of qualified journeymen riggers.

He was appointed Master of Shop 72 in 1944. Protective of the rights and well-being of his work force, Bruns succeeded in establishing the rating of apprentice rigger. By proving the skill necessary to handle complicated and dangerous work assignments, he was instrumental in raising riggers' pay to the level of the "bench mark" trades.²⁵

Fred Timmerman, who became Master of Shop 72 when Bruns retired in July 1960, considered Bruns:

... one of a kind, one of the last of the old time master mechanics who exercised almost total control of their domain. They were the major source of trade knowledge and know-how — they were the backbone of the Naval Shipyards.

Many men, who started work in the Puget Sound Naval Station/Navy Yard during its earliest years, retired with 40 or more years' service. However, the increased employment during World War I was reflected in the larger number of



Breaking ground for the construction of Dry Dock 6, Rear Admiral Frank T. Watkins drops a wrecking ball to begin crushing the pavement at the dock site. Photographer Stan Cleary records the start of this three-year project.

Grosso Collection/Kitsap County Historical Society



In 1959, the Building Ways at the west end of the yard next to Building 480, were razed in connection with the construction of Dry Dock 6. The Woodworking Shop, (Bldg. 851) is now located in this area.

Grosso Collection/Kitsap County Historical Society

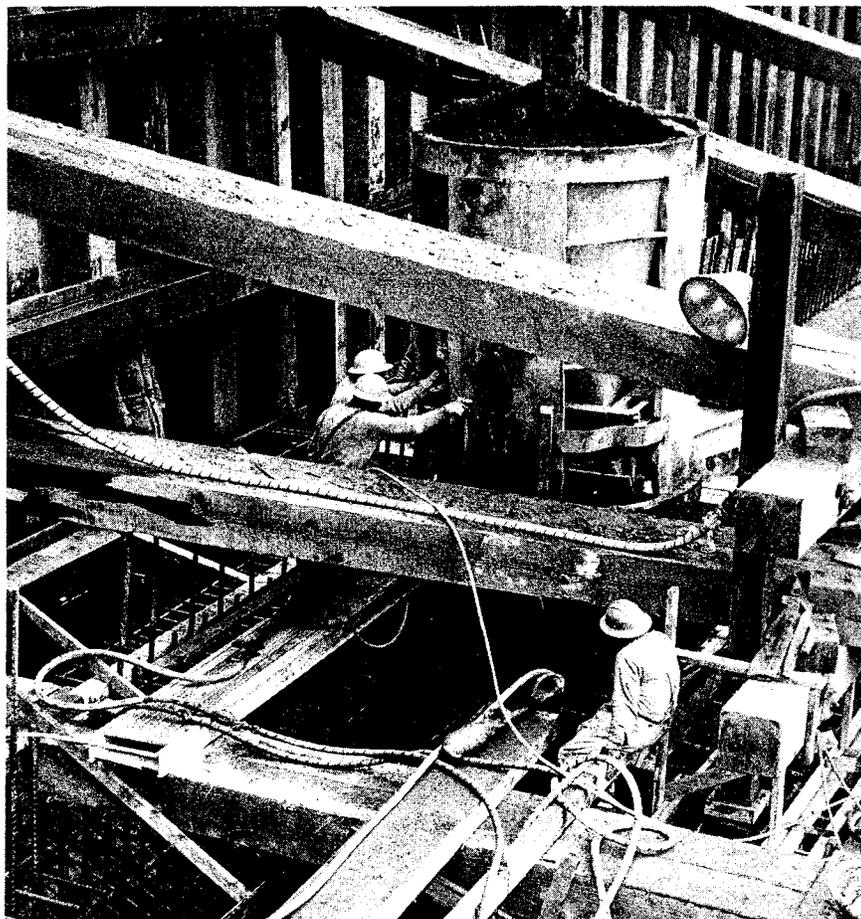


Rear Admiral Eugene J. Peltier, Chief of the Bureau of Yards and Docks, and a team of engineers look over the excavation for Dry Dock 6. Vehicular traffic in and out of the pit traveled over the ramp at the left of the photo.

Grosso Collection/Kitsap County Historical Society

Pouring concrete for the floor of Dry Dock 6 required careful placement of the concrete hopper for each pour. The size and strength of the dock's structure is dramatized by the size of the supporting beams and by the diameter of the installed reinforcing bars.

Grosso Collection/Kitsap County Historical Society





To commemorate the completion of Dry Dock 6 and to signal its readiness for operations, Senator Henry M. Jackson unveils the memorial dedication plaque. Shipyard Commander William A. Dolan stands at his side.

Grosso Collection/Kitsap County Historical Society

“senior” employees during the 1950s and 1960s. Many proudly wore pins indicating 40 years’ service.²⁶

The first woman to receive a 40-year pin was Genevieve Wolfe.²⁷ In 1949 she had become the first female GS-13 in the Thirteenth Naval District. When she retired in 1957, the former Yeomanette was head of the Comptroller’s Accounting and Disbursing Division. That November, Helen V. Miller²⁸ also retired, the last of the World War I enlisted women working at PSNS.

A major organizational change took place during 1960. In the Production Department, all shops were divided into five groups according to the type of work they performed, with a Group Master at the head of each group. The new Group Masters were: Dean C. Calhoun, Structural; Edward S. Moskeland, Machinery; Eugene H. Tennyson, Outfitting; William O. Wessler, Electrical; and Fred L. Timmerman, Service. The following year Lloyd Welch became Master of the Public Works group.

Later, Outfitting was integrated into the Structural and Machinery groups. The designation “Master” was changed to “Superintendent”.

The Production Department itself was reorganized to

conform with directives from the Bureau of Ships, into the Repair Division, the Shipbuilding Division and the Production Engineering Division.

On May 27, 1960, Dolan again became Commander of the Puget Sound Naval Shipyard. In an unusual command cycle, he relieved Rear Admiral Phillip W. Snyder, who had relieved him in 1958. That July, U.S. Naval Base, Bremerton, was disestablished. The Naval Barracks came under Shipyard command; the other satellite commands reported directly to the Commandant of the Thirteenth Naval District.

On December 7, 1961, Admiral Dolan dedicated a new steel blasting and painting plant in the west end of the Yard. The new plant could process up to 40 feet of plate a minute, handling plates up to 10 feet in width, 40 feet in length and 2 inches thick. This was in keeping with the Yard’s policy of adoption of new methods of handling steel to meet the demands of the Yard’s heavy workload.

The major addition to the Yard was a new dry dock. On Christmas Eve 1958, the Navy announced a well-deserved addition to PSNS, a dry dock large enough to hold the new Forrestal class carriers.



Tugs assist KEARSARGE (CVS 33) into Dry Dock 6 on April 23, 1962 for the dock's dedication and first docking. To honor the occasion, ship's company, on the flight deck, line the rails and spell out "PSNS DD-6". Puget Sound Naval Shipyard

The following year Building 480 became the nerve center for the construction of the dock as work began on relocation or demolition of facilities and buildings in the area. Rear Admiral Frank T. Watkins, Commandant of the Thirteenth Naval District, operated the crane that dropped a 5,000-pound ball to begin crushing pavement as the symbolic start of the construction of the dock.

Manson and Osberg,²⁹ construction firm of Seattle, was the general contractor. Mechanical and electrical sub-contract was a joint venture by Lent's of Bremerton, Tide Bay of Tacoma and Holert of Seattle.³⁰

Dry Dock 6 is 1,180 feet long and 180 feet wide and 60 feet deep with a capacity of 88,000,000³¹ gallons of water. It

was dedicated April 23, 1962, when tugs maneuvered the 888-foot long USS KEARSARGE (CV 33) into the dock. The 16-year-old KEARSARGE was in the Yard for modernization under the FRAM (Fleet Repair Alteration and Modernization) program.

On June 29, 1962, Rear Admiral Floyd B. Schultz became Commander of the Shipyard, and Dolan retired. With the changes of the past decade PSNS was now prepared to handle the Navy's largest ships. However, as the 1960s began, the Yard that had been the home of the Pacific Fleet's battleships and gained added prestige for its work on aircraft carriers, was about to take on a smaller, although no less challenging, type of ship — nuclear submarines.

APPENDIX B



STATE OF WASHINGTON

JOHN J. O'CONNELL
ATTORNEY GENERAL
OLYMPIA

FEDERAL--STATE--JURISDICTION--TITAN MISSILE BASES IN GRANT COUNTY.

The federal government does not have exclusive criminal jurisdiction over the Titan missile bases in Grant county, nor does it have concurrent jurisdiction, since it has not complied with applicable federal law. However, the state of Washington, in exercising its jurisdiction, may not act in a manner which will embarrass the federal government in the exercise of the powers and functions incident to the public purpose to which the lands are devoted.

March 13, 1962

Honorable Paul Klasen
Prosecuting Attorney
Grant County
Ephrata, Washington

Cite as:
AGO 61-62 No. 101

Dear Sir:

By letter previously acknowledged you have requested the opinion of this office upon a question which we paraphrase as follows:

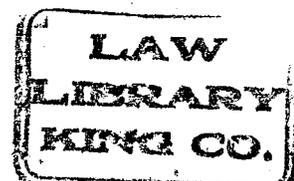
Does the federal government have exclusive criminal jurisdiction over the Titan missile bases in Grant county, title to which was acquired by the government in 1959 and 1960?

We answer your question in the negative.

ANALYSIS

The authority for the federal government to acquire exclusive criminal jurisdiction over areas within the geographical limits of an individual state arises out of Article I, § 8, Clause 17 of the United States Constitution, which provides that Congress shall have the power:

"To exercise exclusive legislation in all cases whatsoever, over . . . (the District of Columbia), and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other



Honorable Paul Klasen

-2-

needful buildings; . . ." (Emphasis supplied.)

This provision is not self-executing and Congress has passed several acts carrying it into effect. The present provision, 40 USC, § 255 (1958), was passed in 1940 and states that the United States can accept either partial or exclusive jurisdiction of land purchased, condemned or otherwise acquired by filing an acceptance of jurisdiction with the governor and that:

". . . Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

The United States Supreme Court construed this statute in Adams v. United States, 319 U.S. 312 (1943). The case held that this provision set forth the only manner in which the United States can accept jurisdiction and stated on page 314 of its opinion:

". . . The Act created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.'"

The court then stated in relation to the particular case on page 315 that, "Since the government had not given the notice required by the 1940 Act, it clearly did not have either 'exclusive or partial' jurisdiction over the camp area. . . ."

The court then concluded that the term "partial" jurisdiction as used in the federal statute included the term "concurrent" jurisdiction as used in the state statutes.

You have advised us that the Air Force has not accepted concurrent jurisdiction, in so far as you have been able to determine, pursuant to the federal statute mentioned above. Please be advised that your information is correct. We have been informed by the governor's office that no acceptances have been filed by the federal government involving land in the Grant county area since July of 1945.

In 1939 the legislature of the state of Washington enacted its present consent statute (chapter 37.04 RCW, chapter 126, Laws of 1939). Thus all land acquisitions by the federal government, pursuant to Article I, § 8, Clause 17 of the United States Constitution, supra,

which have been made since the enactment of this statute are subject to the consent given by it. RCW 37.04.020 provides in part:

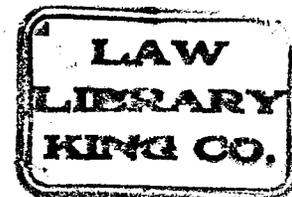
"Concurrent jurisdiction with this state in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes for which the land was acquired; . . ."

Thus, based upon the holding of the Adams case, supra, and the statutes involved it is our opinion that the federal government has not acquired exclusive or partial criminal jurisdiction over the lands we are here concerned with for two reasons: First, because under the present statute the Washington legislature has tendered concurrent jurisdiction only; second, because the federal government has not purported to accept any legislative jurisdiction whatsoever by filing an acceptance of jurisdiction with the governor in accordance with 40 USC, § 255 (1958).

It must be noted, however, that hereinbefore we have been discussing only that criminal jurisdiction which the federal government might acquire from the state of Washington and not those jurisdictional powers which the federal government already has by virtue of the United States Constitution. In other words, even though the federal government is only a proprietor of the Titan missile bases in the Grant county area, it can still exercise exclusive jurisdiction within the sphere of its constitutional powers. As Mr. Chief Justice Marshall pointed out in McCulloch v. Maryland, 4 Wheat. 316, 405, 406 (1819):

"If any one proposition could command the universal assent of mankind, we might expect it would be this--that the government of the Union, though limited in its powers, is supreme within its sphere of action. . . ."

Therefore even though the federal government has not obtained exclusive criminal jurisdiction over the lands in question, the jurisdiction of the state of Washington does not entitle it to act in a manner inconsistent with the powers delegated to the federal government by the Constitution of the United States. Thus the state of Washington can do no act which will embarrass the federal government in the exercise of the powers and functions incident to the public



AGO 61-62 No. 101

Honorable Paul Klasen

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purpose to which the lands are devoted.

We trust that the foregoing will be of assistance to you.

Very truly yours,

JOHN J. O'CONNELL
Attorney General

A handwritten signature in cursive script, reading "Bruce W. Cohoe". The signature is written in dark ink and is positioned above the typed name and title of the signatory.

BRUCE W. COHOE
Assistant Attorney General

COURT OF APPEALS
STATE OF WASHINGTON
FILED
2009 JUL 10 PM 4:09

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

MICHAEL FARROW and LYDIA
FARROW,

Appellants,

v.

LESLIE CONTROLS, INC.,

And

ALFA LAVAL, INC.,

Respondents/Defendants.

NO. 62996-4-I

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am an employee of Schroeter Goldmark & Bender, over the age of 18, not party to this action and competent to make the following statements:

2. **On July 10, 2009**, the Original and one copy of Brief of Appellant and this Declaration of Service were filed with the Appellate

Court, Division One and copies were served upon the attorneys of record for the defendant/respondents by having said copies sent via messenger, electronic mail, U.S. Mail and/or Federal Express to the office addresses below

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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 at Seattle, Washington this 10th day of July 2009.


NONA FARLEY