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No. 63923-4-I

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

JAMES MORGAN and KAY MORGAN, husband and wife,

Appellants,

v.

AURORA PUMP COMPANY, et al.,

Respondents.

**APPEAL FROM THE KING COUNTY SUPERIOR COURT
Cause No. 07-2-28464-8**

BRIEF OF RESPONDENT IMO INDUSTRIES, INC.

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I. INTRODUCTION, SUMMARY, AND JOINDER

This Brief is submitted on behalf of Respondent IMO Industries, Inc., individually and as successor in interest to DeLaval Turbine, Inc., hereinafter collectively referred to as “IMO” or to “IMO/DeLaval.” Pursuant to RAP 10.1(g), IMO joins in the briefs submitted by its co-respondents, including, particularly, the legal arguments set forth in Sections IV (a),(b),(c), and (e) of the Brief of Respondent Leslie Controls, Inc., and in Section V of the Brief of Respondent Buffalo Pumps, Inc.

IMO sought summary judgment below following the then-recent decisions of the Washington Supreme Court in *Simonetta v. Viad Corp*, 165 Wn.2d 341, 197 P.3d 127 (2008) (“*Simonetta*”), and *Braaten v. Saberhagen Holdings, et al.*, 165 Wn.2d 373, 198 P.3d 493 (2008) (“*Braaten*”). Those cases make clear that an asbestos plaintiff’s claims against an equipment manufacturer like IMO cannot survive in cases like this. They eliminate, in this case, the possibility that equipment manufacturers such as IMO are responsible for asbestos insulation later applied to their products, or for asbestos in gaskets and packing that the manufacturer did not supply but which instead were replacement materials obtained from others. *Braaten*, 165 Wn.2d at 398.

In response to IMO's original motion before the trial court, Appellant¹ shifted her focus from a "failure to warn" to a "design defect" theory, arguing that *Braaten* and *Simonetta* did not bar such claims and as a consequence, claims for exposure to asbestos from after-applied insulation and replacement gaskets and packing remained viable. CP 2901-2916. IMO pointed out that this was a distinction without a difference, insofar as the applicable law was concerned. CP 4424-4434. The trial court agreed, and granted summary judgment. This appeal followed.

Now, on appeal, Appellant once again switches arguments, to in effect abandon the "substantial factor" jurisprudence upon which her claims before the trial court were premised and presented, and instead argues that any evidence that Mr. Morgan was exposed to any asbestos from IMO's products, no matter how slight, means that IMO has contributed to the cause of Mr. Morgan's asbestos disease and can be held legally responsible. As explained herein, Appellant's arguments are doubly incorrect. First, Appellant simply has failed to sustain her evidentiary burden of showing that IMO so contributed to any asbestos exposure. The snippets of testimony she has marshaled do not reasonably

¹ Plaintiff James Morgan died in January, 2008, not long after this action was originally filed. No motion was ever made before the trial court or this Court to formally substitute

allow one to conclude that Mr. Morgan was exposed to any asbestos for which IMO is legally responsible. Second, if there were any such exposure, there is no basis for concluding that it was a substantial factor contributing to cause his asbestos disease. In apparent recognition of these problems, Appellant seeks to again shift the legal underpinnings of her claim to avoid, rather than meet, the burden of showing IMO to have substantially contributed to the cause of Mr. Morgan's disease. While paying lip service to established case law on that issue, Appellant seeks to substitute legal theories that in effect would relieve her from having to make any such showing, and that she instead need only show that a defendant *may be* responsible for some – any – exposure to asbestos. Appellant's new legal thesis is unpersuasive (and ultimately irrelevant). The trial court properly granted summary judgment, and should be affirmed.

II. COUNTERSTATEMENT OF THE CASE

Appellant claims that James Morgan was exposed to asbestos during his career at Puget Sound Naval Shipyard ("PSNS") in Bremerton. She attributes at least some of this exposure to asbestos for which Respondent IMO is allegedly responsible. IMO is the successor to

a personal representative for Mr. Morgan. Nonetheless, IMO here will refer to Mrs. Morgan as the Appellant.

DeLaval, a manufacturer of precision equipment such as pumps and turbines and a supplier of such equipment to the United States Navy. Appellant claims that Mr. Morgan was exposed to asbestos because he was working near DeLaval pumps when asbestos was released from gaskets or packing used with those pumps.

Pumps that IMO or DeLaval supplied to the U.S. Navy were designed and constructed to exacting specifications for uniquely harsh service aboard warships. CP 4469-4472; 5945-5946. These Navy specifications were not mere minimum requirements, but were “an exacting set of requirements that must be met.” CP 6023. Equipment had to conform to those specifications, down to and including such details as gaskets and packing. CP 4470-4473.

In the words of Retired Admiral David P. Sargent, Jr., the exacting nature of these specifications was at least in part the result of the U.S. Navy having “one of the most robust engineering organizations in the world.” CP 6031-6032. Navy requirements for pumps were truly “leading edge,” and could not be met by simply supplying equipment that had been designed for commercial use. CP 6032.

Plaintiff initially identified and relied upon PSNS co-worker Michael Farrow as its lone product identification witness, to support a claim that Mr. Morgan was exposed to asbestos from a DeLaval product.

CP 823. Mr. Farrow described work PSNS pipefitters might do around pumps. They did not work on pumps themselves, but disconnected piping so pumps could be removed from a ship, and reconnected them during reinstallation. CP 829. Thus, Mr. Farrow never saw Mr. Morgan work on the internal components of any pump. CP 842. Nor did Mr. Farrow see Mr. Morgan install a brand new pump. CP 837. He did see Mr. Morgan reinstall a pump that had been worked on in a machine shop and was being replaced aboard a ship. CP 839.

As for DeLaval pumps, Mr. Farrow knew of an “IMO” pump he associated with DeLaval, and believed them to be the same thing. CP 850-851. Mr. Farrow could recall Mr. Morgan performing work at PSNS on IMO lube oil pumps, and could identify one instance in which he observed Mr. Morgan reconnected piping to an IMO pump. He knew of no other equipment that Mr. Morgan worked on, other than lube or fuel oil pumps, which he associated with IMO or DeLaval. CP 854-857.

In her brief, Appellant refers to testimony from Mr. Jack Knowles, another pipefitter who worked on occasion with Mr. Morgan. Mr. Knowles is said to have seen Mr. Morgan “in the presence of other people who were making new gaskets for use on both new and existing

DeLaval pumps . . .” Appellant’s Brief at 9-10; 21.² However, there is no evidence that DeLaval would have supplied or in any other manner been responsible for material from which such new gaskets were being “made.” Mr. Knowles apparently was discussing the fabrication of flange gaskets from bulk material available to pipefitters such as Mr. Morgan. Mr. Knowles, like Mr. Farrow, recalls DeLaval pumps as being lube and fuel oil pumps. CP 5904-5906.

Appellant also refers to a declaration, and deposition testimony in another case, from Melvin Wortman, a supervisor of the machine shops at PSNS. Appellant’s Brief at 4-7. Mr. Wortman apparently did not know and makes no specific references to Mr. Morgan (which is not surprising, given that Mr. Morgan was a pipefitter, while Mr. Wortman supervised machinists). Mr. Wortman’s declaration includes the following claims:

- From 1967 to 1971, almost all the pumps used on board navy ships contained asbestos gaskets and packing. CP 5191.
- Due to quality control issues, the Planning and Estimating division (which was separate from the machine shop) liked to obtain replacement parts from original manufacturers, although that did not always happen. CP 5192
- Between 1967 and 1971, approximately 50% of the replacement parts obtained by PSNS for equipment, including pumps, came from the manufacturer. CP 5192

² The testimony cited by Appellant at CP 4854, 4855 also was objectionable (and objected to) as leading.

- Most of the gaskets and packing in valves, pumps and compressors when they came into the shop for overhaul were probably provided by the original manufacturer. Some of it was from new equipment being worked on for the first time. Other equipment may have been overhauled on other occasions, but it was standard operating procedure to procure gaskets and packing from equipment manufacturers through the Navy supply system. CP 5192-5193)
- Machinists, as well as pipefitters, routinely removed and inserted both packing and gaskets on equipment such as pumps, valves and compressors. CP 5193

As will be explained below, Mr. Wortman's statements are made without evident personal knowledge or factual basis, and constitute only surmise and conjecture on his part. While the trial court did not strike them, they should not be considered when reviewing the propriety of the summary judgment entered by the trial court.

Moreover, if one were to consider Mr. Wortman's statements, the following must then also be borne in mind: Mr. Wortman refers to activities in the machine shops of PSNS, where he was supervisor. Mr. Morgan never served in that capacity, but worked aboard ships as an apprentice or journeyman pipefitter from 1952 until 1957 and from 1959 until 1963. He thereafter worked out of the design department. CP 1024-1025. When Mr. Farrow and Mr. Knowles discussed working with Mr. Morgan around pumps, it was when they all were pipefitters. CP 837; CP 4847-4848. However, when Mr. Wortman testified about the use of replacement parts obtained from manufacturers, and regarding the

asbestos content of replacement gaskets and packing, he was quite specific about the time frame being 1967 to 1971. CP 5190-5192.

Appellant cites Mr. Wortman as saying that equipment manufacturers such as IMO/DeLaval supplied gaskets. At the same time, however, the only evidence Appellant can point to suggesting that Mr. Morgan was around when gaskets associated with IMO or DeLaval were being worked on is from Mr. Knowles, who says he saw Mr. Morgan around people who were “making gaskets” for DeLaval pumps. Compare Appellant’s Brief at 5 with 9-10, 21. Either the gaskets were obtained from the manufacturer or they were fabricated in the field. And, gaskets Mr. Wortman described as being installed in pumps being refurbished in the machine shop are entirely different than flange gaskets being used to connect pumps to pipes aboard ship, which is what Mr. Knowles was describing. Thus, this evidence, even when summed (or perhaps especially when summed), reveals that Appellant cannot muster evidence of exposure to asbestos for which IMO could be responsible.

Thus, on appeal, Appellant continues to gloss over the fundamental shortcoming of whether there is any admissible, reliable evidence that Mr. Morgan was exposed to any respirable asbestos for which IMO is *legally responsible*. Absent evidence of such exposure, Appellant cannot establish proximate causation against IMO. The cumulative testimony

establishes *only* that Mr. Morgan might have worked with asbestos-containing exterior flange gaskets that were not supplied by IM/DeLaval but merely connected piping to IMO/DeLaval fuel oil and lube oil pumps on certain unidentified Navy ships. Such evidence is insufficient under Washington law to reverse the summary judgment granted by the trial court.

III. LEGAL ARGUMENTS

A. **The Supposed Evidence Regarding Gaskets and Packet Provided by “Original Manufacturers” in the Declaration of Melvin Wortman Should Not Be Considered**

Appellant relies on a declaration from Melvin Wortman to support her claim that James Morgan was exposed to asbestos for which IMO is responsible, claiming that a pump manufacturer such as IMO would have supplied replacement gaskets and packing for use during overhaul of pumps (in contrast to such materials being supplied by their actual manufacturer). Appellant’s Brief at 4-7; 17.

Declarations and other submissions that take the place of live testimony are subject to essentially the same requirements that would apply if the declarant were present and testifying personally. CR 56(e) specifies that declarations must be based upon personal knowledge. *See, e.g., Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002) (affidavit properly disregarded for lack of personal knowledge).

Most of the statements Appellant relies upon are not based upon Mr. Wortman's "personal knowledge" or "facts as would be admissible in evidence," but lack foundation and are conclusory.

The trial court did not find it necessary to strike Mr. Wortman's declaration while ruling that IMO's summary judgment motion should be granted, and IMO has not cross-appealed that ruling. However, the trial court can be affirmed on any appropriate basis evident from the record. *E.g., Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978); *Wendle v. Farrow*, 102 Wn.2d 380, 686 P.2d 480 (1984). If this evidence should not be considered, and that requires affirmance, this Court should so rule.

The standard of review of an order granting summary judgment, including evidentiary rulings therein, is *de novo*:

Normally, an appellate court uses a *de novo* standard of review when considering a trial court's evidentiary rulings made in conjunction with a summary judgment motion. This is appropriate here, where the trial court never held an evidentiary hearing, but instead based its decision on documentary evidence. When ruling on a summary judgment motion, a court cannot consider inadmissible evidence.

Warner v. Regent Assisted Living, 132 Wn. App. 126, 132, 130 P.3d 865 (2006)(citations and footnotes omitted); *see also Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wash. App. 292, 297, 186 P.3d 1089

(2008) (“[A] court’s ruling on a motion to strike is reviewed for abuse of discretion. However, when a motion to strike is made in conjunction with a motion for summary judgment, we review de novo”); *Seybold v. Neu*, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001) (“we review the trial court’s evidentiary rulings made for summary judgments de novo”).³

Appellant relies on Mr. Wortman for the proposition that gaskets and packing in place in various pieces of Navy equipment (such as pumps) 1) were supplied by IMO, and 2) contained asbestos. Mr. Wortman’s Declaration states the following:

Due to quality control issues, the Planning and Estimating division preferred to obtain replacement parts from the original manufacturer. . . . I believe, based on my observations of the replacement parts we received when we were doing work on equipment as part of an overhaul, conversion, or modernization of a ship, approximately 50% of the replacement parts obtained by PSNS between the 1967 to 1971 time period that PSNS obtained replacement parts for equipment, including pumps, compressors and valves came from the manufacturer.

However, in a deposition, Mr. Wortman was asked about the basis of his statements:

³ *Am. States Ins. Co. v. Rancho San Marcos Props., LLC*, 123 Wn. App. 205, 214, 97 P.3d 775 (2004) and *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774, 780 (2004), *review denied*, 153 Wn.2d 1016, 101 P.3d 109 (2005) employed, or at least recited, an abuse of discretion standard. Such an abuse of discretion standard was also referenced in *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008), although the material there at issue was a lawyer’s declaration containing unpublished case law authority. Even applying such a standard, however, testimony that is admitted without an adequate foundation is an abuse of discretion. *State v. Phillips*, 123 Wn. App. 761, 764, 98 P.3d 838 (2004).

Q. "Due to quality control issues, the planning and estimate division preferred to obtain replacement parts from the original manufacturer." What quality control issues are you referring to?

A. Experience had proved that obtaining the parts from the original manufacturer had the best chance of good quality and timeliness in providing the parts.

Q. *How do you know that the purchasing department – where the purchasing department went to obtain replacement parts?*

A. *We didn't.*

CP 5957-5958 (emphasis added).

Mr. Wortman, in fact, was never in a position at PSNS to obtain personal knowledge about how replacement parts were ordered:

Q. So would you go to the supply department to get the packing when you wanted to replace packing in a 600-pound angle valve, such as in Exhibit 11?

A. Well, as we've established before, we didn't obtain the parts. We told our shop planner that we needed the part, and he generated paperwork to planning and estimating, then planning and estimating would generate paperwork to the supply department.

Q. You never worked in the supply department, correct?

A. I worked there temporarily after World War II, sorting materials that came in from the war.

Q. That's right. But you never had responsibilities for the acquisition of materials, correct?

A. No
[Objection]

A. No, I did not.

* * *

Q. Sir, I'm trying to figure out how you knew what the production department was doing with regard to purchasing spare parts.

A. Understand, now, the production department did not do that. The planner and estimators, that's a separate department of the shipyard, the planning.

Q. Did you ever work in that department?

A. No.

Q. Was that ever under your supervision?

A. No.

Q. Did you ever read any manuals or documents as to how the planning and estimate department operated?

A. No.

Q. Were you ever physically inside that department?

A. Casual visits.

Q. Do you know who worked in that department?

A. I can't recollect.

CP 5846, 5847.

Q: Okay. Did you ever work in planning and estimating?

A: No.

Q: Now, with shop planning and planning and estimating, are we still on the production side as opposed to the business side at PSNS?

A: Yes.

Q: And then from planning and estimating, where does the request go?

A: *Never having worked there, I couldn't say.*

CP 6693 (emphasis added).

The lack of any basis for Mr. Wortman's conclusion that fifty percent (50%) of the replacement parts obtained by PSNS between 1967 and 1971 came from original equipment manufacturers is further borne out in this additional exchange from his deposition:

Q. Is that your understanding, that approximately 50 percent of the replacement parts obtained from PSNS were obtained from manufacturers?

MS. HOUSER: Object; vague as to time.

A. You didn't put the time.

Q. (By Mr. Mesher) At any time.

A. In later years when quality control became more to the forefront, that was generally a good statement.

Q. How did you come up with the figure of 50 percent?

A. Again, from observation and experience. And as we got into nuclear work, it reflected into the whole Navy that the quality control became more important and that's when I came to the conclusion in reviewing that 50 percent would be a pretty good average.

Q. What did you review to come up with that number of 50 percent?

A. The upper part of my head.

Q. You didn't review any documents, correct?

A. No.

Q. Is that correct?

A. No, I did not.

Q. You didn't speak with anybody who was involved with purchasing?

A. No.

Q. Okay. You never talked to anybody in the business side at PSNS to make a determination as to whether or not the business side that did the purchasing purchased 50 percent of the replacement parts for equipment from 1967 to 1971 from manufacturers, correct?

A. No, I did not.

CP 5851-5852.⁴

The deposition testimony of Melvin Wortman demonstrates that his declaration does not meet the requirements of CR 56(e), that such a declaration in opposition to a motion for summary judgment: (1) be made on personal knowledge, (2) set forth admissible evidentiary facts, and (3)

⁴ Appellant also cites Mr. Wortman's declaration to characterize the sort of work done by a pipefitter such as Mr. Morgan. Appellant's Brief at 6. However, Mr. Wortman worked as a machinist, supervised machinists, and was a superintendent of the inside and outside machine shops. CP 5189-5190. Mr. Wortman was not, and does not claim to be, a pipefitter at PSNS. Any statement he makes as to what jobs were routinely performed by machinists within the shop he supervised is within his experience and training. However, there is no basis for his statements about what jobs were routinely performed by pipefitters aboard ships.

affirmatively show that the affiant or declarant is competent to testify to the matters stated therein. Mr. Wortman did not have knowledge about (nor speak with anyone about) how the purchasing department obtained replacement parts, nor have or review any documents that contained such information. He only “believed” that fifty percent (50%) of all replacement parts came from original manufacturers, a conclusion he could only articulate as coming from “the upper part of [his] head.”

Moreover, this conclusion is apparently based on the following reasoning set forth by Mr. Wortman in his declaration: That for quality control purposes, the Navy’s Planning and Estimating division preferred that replacement parts be obtained from the original manufacturer, and this thus was done through the Naval Supply System. (As explained above, Mr. Wortman was not working within or privy to the activities of either of these separate departments.) But pump manufacturers such as DeLaval did not manufacture the gaskets and packing used in their pumps. They in turn obtained them from manufacturers, who in turn were required to comply with Navy standards and specifications. CP 6632-6633. IMO was required to identify such materials in their drawings and specifications by reference to Navy standards so that the Navy itself could obtain replacement materials directly from the source – the original manufacturers of the gaskets and packing. CP 6634; 6636-6637.

Mr. Wortman's declaration lays out his thought processes and his conclusions about "original manufacturers," but he does not explain – because he has no actual knowledge – whether this means the original manufacturer *of gaskets and packing*, or the original manufacturer *of a pump* into which those materials were fitted. To the extent he draws a conclusion on that point, he offers only surmise rather than anything properly considered when reviewing this summary judgment.

This problem is confirmed in the following passage from Mr. Wortman's deposition:

- Q. What is your basis for believing that Ingersoll-Rand⁵ supplied replacement gaskets and packing to Puget Sound Naval Shipyard?
- A. At one time my shop, machine shop, was a designated repair facility for all the Navy for Ingersoll-Rand high pressure compressors. And at that time, we had a large quantity of them flowing through our shop, and at that time, I am confident that gaskets and packing were provided by the manufacturer.
- Q. Why are you confident that Ingersoll-Rand provided gaskets and packing to the Puget Sound Naval Shipyard?

⁵ The particular equipment manufacturers discussed at Mr. Wortman's deposition do not coincide with the respondents to this appeal because the deposition was taken in a different proceeding to which IMO, for instance, was not even a party. Still, the problems with his testimony regarding particular manufacturers are also evident in his more general testimony regarding the supposed source of replacement gaskets and packing used at PSNS's machine shops.

A. Because we were working on units with a lot of commonality, and it would make sense to purchase those components rather than try to make them.

Q. So your basis is that it would make sense to you for the Navy – for Puget Sound Naval Shipyard to procure replacement gaskets and packing from Ingersoll-Rand, right?

A. It would make economic sense.

Q. But you don't know how much Ingersoll-Rand would charge for replacement gaskets or packing, correct?

A. No.

Q. And you don't know how manufacturers – manufacturers of gaskets and packing charged for their products, do you, sir?

A. No.

Q. So you don't know for certain whether it did make economic sense to obtain gaskets and packing from Ingersoll-Rand?

[Objection]

The Witness: Based on my own knowledge, if you made a quantity of packing or gaskets, it would be more economical than if you just made one at a time.

Q. Sir, you do not have any personal knowledge that Ingersoll-Rand ever made gaskets or packing, do you?

[Objection]

The Witness: I have no personal knowledge of that.

Q. So it would be speculation on your part that Ingersoll-Rand manufactured gaskets and packing.

[Objection]

The Witness: My perception would be that Ingersoll-Rand provided them to the naval supply system.

Q. But you never saw any documents that went through the naval supply system regarding Ingersoll-Rand equipment, correct?

[Objection]

The Witness: I didn't see the forms come up because that wasn't under my responsibility.

Q. So then it follows that you wouldn't know whether or not the Naval Supply Center at PSNS obtained replacement gaskets and packing from Ingersoll-Rand?

[Objection]

The Witness: I don't know.

Q. You don't know whether Ingersoll-Rand provided replacement gaskets or packing to the Naval Supply Center at Puget Sound Naval Shipyard; is that correct?

A. No.

[Objection]

Q. I'm sorry. What was your answer?

A. No.

Q. You don't know whether they did?

[Objection]

The Witness: No, because, again, it was not under my responsibility to determine that.

CP 6720-6721

His statement that “most of the gaskets and packing in valves, pumps and compressors when they came into the shop for overhaul were probably provided by the original equipment manufacturer,” likewise is a conclusion for which he can offer no foundation.

Q. Okay. “I believe that most of the gaskets and packing that were in valves, pumps and compressors when they came to the shop for overhaul were probably provided by the original manufacturer.”

Do you have any personal knowledge as to the useful life of the casing gasket in a – in a pump, how long it will last?

A. No. No. No idea. And it’s too general to – to make an intelligent answer because, again, a wide range of pumps and their uses.

* * *

Q. After 1967 when you became a – 1966, when you became the superintendent, did you have any firsthand knowledge to determine the extent of the rotary equipment that was coming to the inside machine shop to determine whether or not it actually contained original gaskets and packing or not or gaskets and packing supplied by that manufacturer?

A. *I have no basis for that.*

CP 5853-5854 (Emphasis added)

On appeal, Appellant attempts to remedy obvious deficiencies by claiming another basis for Mr. Wortman’s testimony: That he “frequently” was able to personally observe replacement parts that came in

packaging “from the manufacturers.” Appellant’s Brief at 36. Mr. Wortman never made such a claim, however. As seen above, he instead explained that it simply “made sense” to him that the Navy would have gotten replacement gaskets and packing from equipment manufacturers. When challenged, he did not claim to have personally observed the packaging such materials came in, but in effect conceded he was only drawing conclusions about that point. His actual testimony about what he could observe is a far cry from what Appellant claims in her brief:

Q. Okay. Did you – you talked a little bit in earlier testimony about replacement parts coming in to the machine shop. Do you remember that?

A. Yes.

Q. Okay. Did you have an opportunity to observe the packaging that the machine - that the replacement parts came in?

[Objection]

THE WITNESS: Only in passing.

Q. What do you mean by "passing"?

A. Well, as I walked around the shop, *I might see a package that had been opened.* And obviously it had come from the supply department and had been opened, and *I would only see it in passing.*

CP 6732 (emphasis added).

Moreover, Mr. Wortman does not here refer to packaging *containing gaskets and packing* rather than other types of replacement parts. To the contrary, when specifically asked about that, he denied having any such knowledge:

Q. Sir, did you ever see any packaging associated with replacement gaskets and packing that were used with Ingersoll-Rand equipment at the Puget Sound Naval Shipyard?

A. I can't recall specifically any.

CP 6721.

Q. Do you have any – do you have a specific recollection of seeing any Warren Pump packaging?

A. Not Specifically.

CP 6740.⁶

There is no basis to contend that Mr. Wortman personally observed replacement gaskets and packing obtained from particular defendants being utilized at PSNS.

Where a declaration sets forth nothing more than unsupported conclusory opinions, it does not constitute “evidence” or “specific facts” within the meaning of CR 56(e). It should be disregarded by the trial court when ruling on the motion for summary judgment. *John Doe v.*

⁶ As earlier noted, while Mr. Wortman may have been asked at his deposition about certain, different equipment manufacturers, IMO was not even a party to that proceeding.

Puget Sound Blood Center, 117 Wn.2d 772, 787, 819 P.2d 370 (1991); *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180, *rev. denied*, 118 Wn.2d 1001, 822 P.2d 287 (1991).

Appellant anticipates these arguments, and in her brief states that testimonial knowledge need not be strictly first-hand, but can include information acquired from subordinates. Appellant's Brief at 35-38, citing, *inter alia*, *Herring v. DSHS*, 81 Wash. App. 1, 21-22, 914 P.2d 67 (1996) (co-workers allowed to testify regarding the quality of plaintiff's work, which they relied upon to perform their own jobs). Appellant also cites cases involving lay opinion, or examples of upper level executives and managers relying upon their interactions with subordinates. Thus, Appellant claims, because *shop planners within the machine shop* preferred replacement parts from original manufacturers, machine shop supervisor Wortman can so testify. Appellant's Brief at 38. But Mr. Wortman was quite specific when he stated in his declaration that, "Due to quality control issues, the *Planning and Estimating division* preferred to obtain replacements parts from the original manufacturer." CP 5192 (emphasis added). He also consistently distinguished between the production department containing his machine shop and the separate

The testimony, nonetheless, reveals problems that generally pervade his claims about the source of gaskets and packing used at PSNS.

planning and estimating department, which he did not work in nor have much familiarity with. CP 5846, 5847.

Mr. Wortman demonstrated during his deposition that his statements regarding the source of gaskets and packing used when overhauling and repairing equipment at PSNS were not based on personal knowledge or other valid foundation. Instead, while those statements may seem logical to him, they are only assumptions that do not survive scrutiny as evidence and which should not be considered upon *de novo* review of the trial court's grant of summary judgment.

B. No Competent Evidence Shows That Gaskets or Packing in IMO/DeLaval Pumps James Morgan Worked On or Around Were Supplied by IMO or DeLaval, or That They Contained Asbestos

Mr. Wortman's opinions and conclusions are also overbroad as to whether replacement gaskets and packing used with IMO or DeLaval pumps Mr. Morgan may have been around contained asbestos. Mr. Wortman lists various pump manufacturers, and various types of pumps. CP 5190. Some were motor driven, others steam driven. *Id.* However, pumps are not simply pumps. For instance, when Mr. Wortman was asked how long a gasket in a pump would last before machinists in his shop would have to replace it, he explained that he could not answer without knowing what type of pump was involved. CP 5853. Asked if all pumps

contained asbestos gaskets and packing, he similarly replied that a “galaxy” of different pumps came through PSNS’s machine shops. CP 6704. Product identification witnesses Michael Farrow and Jack Knowles, discussed above, only observed Mr. Morgan around particular types of IMO or DeLaval pumps: Fuel oil and lube oil pumps. CP 854-857; CP 5904-5906. Asked about gaskets and packing in lube oil pumps DeLaval supplied the Navy, IMO’s Richard Salzman testified that the “vast majority” were non-asbestos materials, CP 5940, including metallic packing, CP 5937 and plant fiber or manila paper gaskets. CP 5937-5941.

Mr. Wortman demonstrated during his deposition that it is impossible to generalize about the characteristics of different types of pumps or other equipment provided by different manufacturers, which other evidence in the record only confirms. This includes whether they are fitted with asbestos-containing gaskets or packing.

“Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” *Guile v. Ballard Community Hosp.*, 70 Wash. App. 18, 25, 851 P.2d 659 (1993). “[T]he party opposing summary judgment . . . must submit competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact. . . . Broad generalizations and vague conclusions are insufficient to resist a motion

for summary judgment.” *Thompson v. Everett Clinic*, 71 Wash. App. 548, 555, 860 P.2d 1054, 1059 (1993).

The unsupported, overbroad, and conclusory opinions in Mr. Wortman’s declaration about asbestos content of replacement gaskets and packing do not constitute “evidence” or “specific facts” within the meaning of CR 56(e), and should be disregarded when reviewing the trial court’s awarding summary judgment.⁷

Even if Mr. Wortman’s statements are taken into account, the fact remains that they ultimately do not advance Appellant’s cause. Nothing connects Mr. Morgan with any of the materials discussed by Mr. Wortman. Mr. Wortman’s testimony relates to a very specific time frame, of 1967 through 1971, and to work inside the machine shops at PSNS. He nowhere describes Mr. Morgan, or indicates familiarity with any particular circumstances in which Mr. Morgan might come into contact with the machine shop work he describes.

The only testimony regarding work by Mr. Morgan comes from separate witnesses, Michael Farrow and Jack Knowles. Neither could identify any specific vessel on which Mr. Morgan encountered an IMO or DeLaval pump. CP 856-857; CP 5894-5895. Both generally identified

only lube oil pumps and fuel oil pumps (and purifiers⁸) as types of DeLaval equipment on which Mr. Morgan worked. CP 854-855; CP 5904-5906.

Appellant claims that Mr. Knowles saw people making new gaskets for use on new and existing DeLaval pumps. Appellant's Brief at 9-10. Mr. Knowles was describing Mr. Morgan's work as a pipefitter, connecting piping systems to pumps via flange connections. CP 4848-4855.⁹ However, there is no issue but that IMO/DeLaval never supplied the flange gaskets used to couple its pumps to piping. CP 4430; CP 4456. Thus, references to this sort of testimony from Mr. Knowles (or from Mr. Farrow, who also testified regarding flange gasket removal and installation) simply are irrelevant to Appellant's claims.

With respect to packing, there likewise is no evidence that Mr. Morgan ever worked with or in the vicinity of such material originally supplied by IMO/DeLaval, or that such material contained asbestos. It would be difficult to tell whether any packing removed during the

⁷ The same holds true for the declaration of plaintiff's industrial hygiene expert, James Millette, to the extent he relies upon Mr. Wortman as a basis for his opinions. CP 4588-4589.

⁸ DeLaval purifiers were made by a separate and unrelated corporate entity, CP 4434. Although some of the witnesses refer to DeLaval purifiers, Appellant makes no issue about them, presumably for this reason.

⁹ Plaintiff's expert, James Millette, also clarified that all references to gaskets in his several declarations are to external flange gaskets, not gaskets internal to any pump or other piece of equipment. CP 6011-6012.

servicing of an existing pump came with the pump originally or had been installed in prior servicing. Mr. Knowles, for instance, did not know the maintenance history of any of the DeLaval pumps he saw, CP 5917-5918, and would not know if an existing pump had been overhauled one or ten prior times. CP 5891-5892.

Appellant might argue that the declaration of Mr. Wortman shows that it was likely that any packing within an existing DeLaval pump was provided by IMO. As discussed earlier, his declaration does not address packing, per se, and in any event discusses a different time frame than when Messrs. Knowles, Farrow, or Morgan worked as pipefitters at PSNS. In addition, Mr. Knowles's own testimony is inconsistent with the notion that machinists he was working around were using packing supplied specifically for DeLaval pumps. To the contrary, he describes machinists using bulk packing that came in rolls, which they cut to fit whatever equipment they were working on. CP 5887-5889.

Even if one could conclude that Mr. Knowles observed Mr. Morgan working around DeLaval pumps in which new packing supplied by DeLaval was being installed, there is no basis to also conclude that the packing contained asbestos. Appellant can rely only on blanket, conclusory assumptions that that would be the case. However, the evidence regarding the particular types of pumps described by Mr. Farrow

and Mr. Knowles is that the “vast majority” did not have asbestos-containing packing (or gaskets). CP 5935-5941.

Finally, but certainly not least, even if one assumes (contrary to the evidence) that Mr. Morgan worked around DeLaval pumps in which asbestos-containing packing supplied by DeLaval was being installed, that *still* doesn’t mean Mr. Morgan was exposed to asbestos from it. Appellant’s expert opines only that removal of old gaskets, fabrication of new gaskets, or removal of old packing released asbestos fibers. CP 5975, 5983-84. Installation of new packing, as supposedly seen by Mr. Knowles is not a source of asbestos exposure *because new packing is not friable, i.e., does not release asbestos fibers when handled.* CP 5984.

Appellant attempts to rely upon “admissions” from IMO to bolster her claims that Mr. Morgan would have been exposed to asbestos for which IMO is responsible. However, there is no basis for even contending that any of the circumstances she cites are relevant to Mr. Morgan’s claims of exposure. The fact that IMO may have sold pumps that contained asbestos-containing gaskets and packing says nothing about whether any particular pumps did so, CP 4884, nor how likely that would be. The “vast majority” of IMO lube and fuel oil pumps contained non-asbestos manila paper gaskets and metallic packing. CP 5935-5941. IMO “on occasion” may have sold replacement gaskets or packing, and on

“relatively infrequent occasions” sold thermal insulation for a piece of equipment. CP 3083. But, again, nothing connects those situations with Mr. Morgan. See, e.g., *Braaten v. Saberhagen Holdings, et al.*, 165 Wn.2d 373, 388-389, 395, 198 P.3d 493 (2008) (no evidence that defendant supplied insulation or replacement gaskets/packing for the particular equipment plaintiff worked with).

C. Appellant’s Claims Were Properly Dismissed Because There Is No Reasonable Basis to Conclude that an IMO/DeLaval Product Exposed James Morgan to Asbestos

A plaintiff in an asbestos case must establish that he was injured by the particular product for which the defendant is responsible.

Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product. In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury.

Lockwood v. AC&S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987).

Plaintiffs can establish exposure to a defendant’s asbestos products through circumstantial evidence. See *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706-707, 853 P.2d 908 (1993). However, as in all product liability law, the evidence must rise above mere speculation or conjecture. See *Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn. App. 610, 622,

789 P.2d 792, *rev. denied*, 115 Wn.2d 1025 (1990); *Young v. Group Health Coop.*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975). *See also Dumin v. Owens-Corning Fiberglass Corp.*, 33 Cal. Rptr. 2d 702, 28 Cal. App. 4th 650 (1994). It is the duty of the court to withdraw a case from the jury when the necessary inferences of exposure to a particular defendant's asbestos product are so tenuous that it rests upon mere speculation and conjecture. *Id.*

Thus, it is not enough to merely speculate that the product was the source of plaintiff's asbestos disease; sufficient evidence must be provided to conclude that there was a causal link between that product and the injured party's asbestos exposure. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706, 850 P.2d 908 (1993). Plaintiff must produce evidence showing or at least supporting the conclusion that there was actual exposure to asbestos fibers from DeLaval products.

In *Lockwood v. AC&S, Inc.*, *supra*, 109 Wn.2d 235, 744 P.2d 605 (1987), our Supreme Court instructed trial courts to consider a number of factors when determining if there is sufficient evidence for a jury to find that causation has been established in an asbestos case: Plaintiff's proximity to an asbestos product when the exposure to it occurred; the expanse of the work site where asbestos fibers were released; the extent of time the plaintiff was exposed to the product; the types of asbestos

products to which the plaintiff was exposed; the ways in which such products were handled and used; the tendency of such products to release asbestos fibers into the air depending on their form and the methods in which they are handled; and other potential sources of the plaintiff's injury. *Id.*, 109 Wn.2d at 248-249.

D. Appellant's Claims Likewise Were Properly Dismissed for Failure to Show that Exposure to Asbestos from an IMO/DeLaval Product Was a Substantial Factor in Causing James Morgan's Asbestos Disease

Even if Appellant demonstrated the bare possibility that James Morgan at some point encountered asbestos as a result of a product manufactured by IMO/DeLaval, she also had the burden of showing some basis for further concluding that this was a proximate cause of harm. Here, as always, Appellant cannot rely upon speculation, but must provide sufficient evidence to enable a reasonable jury to conclude that there was a causal link between a product and the injured party's asbestos disease.

This includes the issue of medical causation. Appellant had the burden of demonstrating a genuine issue of material fact in support of her claims that (1) the presence of a DeLaval product, that (2) contained or was used in conjunction with asbestos, that (3) released fibers (4) that were breathed by Mr. Morgan. And, Appellant also had to demonstrate some basis for concluding that this encounter (5) was *sufficient to be a*

substantial factor in causing Mr. Morgan's asbestos disease. Lockwood v. AC& S, Inc., supra; Mavroudis v. Pittsburgh-Corning Corp., 86 Wash. App. 22, 32, 935 P.2d 684 (1997);

As pointed out in IMO's Counterstatement of Facts and the preceding sections of this brief, Appellant can muster little, if any, evidence of potential exposure to asbestos-containing gaskets or packing for which IMO can be held legally responsible under *Braaten* or *Simonetta*.¹⁰ Notwithstanding this paucity of this evidence, Appellant offered the declaration of two experts, James Millette, Ph.D. and Eugene Mark, M.D., in support of her claim that Mr. Morgan's occupational exposures contributed to the cause of his mesothelioma. However, both Drs. Millette and Mark purport to base their causation opinions on the testimony of Messrs. Farrow and Knowles (and Mr. Wortman) regarding the type of work Mr. Morgan performed, the kind of products with which he worked, the manner in which he was exposed to asbestos, and the frequency and duration of his exposures. CP 4558; CP 4587; CP 4600-01. As a consequence, Drs. Millette and Mark include and rely upon exposures of Mr. Morgan to asbestos-containing insulation, flange

¹⁰ Under the holdings of *Braaten* and *Simonetta*, a plaintiff must prove that a defendant manufactured or marketed the hazardous product, *i.e.*, asbestos-containing insulation, gaskets, or packing, in order to be held responsible for such equipment—manufacturers are not responsible for replacement gaskets or packing supplied by others, *Braaten*, 165 Wn.2d at 385, nor are they responsible for insulations supplied or installed by third parties. *Simonetta*, 165 Wn.2d at 348-63.

gaskets, gaskets from manufactured sheet material — all of which are indisputably not the responsibility of IMO — to draw their conclusions regarding IMO's contribution to Mr. Morgan's development of asbestos-related disease. In fact, there is no basis for concluding that any of the supposed exposures cited by Drs. Millette or Mark emanate from asbestos materials for which IMO is responsible under *Braaten* and *Simonetta*. The trial court reviewed and considered such expert declarations and concluded there still was insufficient evidence of proximate causation to submit this case to the jury. Likewise, this Court should not and cannot give credence to these opinions, or rely upon them to determine whether or not the trial court's grant of summary judgment should be affirmed.

Absent some specific information showing the physical nexus between Mr. Morgan and asbestos fibers released from DeLaval/IMO equipment — something upon which a jury reasonably could determine proximity, duration, and intensity of exposure to asbestos — Appellant's theory of liability was just that, a theory that Mr. Morgan *might* have been exposed to asbestos from products manufactured by DeLaval/IMO which *might* have resulted in injury. Such claims are insufficient to submit to a jury and were properly dismissed on summary judgment.¹¹

¹¹ As stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986):

As Appellant readily admits,¹² the Washington Supreme Court case of *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987), is the “leading Washington case” on the issue of the standard for proving exposure to an asbestos-containing product. Appellant’s Brief at 17-18. *Lockwood* is the seminal case for setting forth the factors a trial court must consider before determining whether sufficient evidence exists to submit an asbestos case to the jury for its determination of whether proximate causation has been established.

Lockwood involved a shipyard worker with asbestosis who brought negligence and strict liability claims against the manufacturers of asbestos-containing insulation products to which he was exposed. The case went to trial against Raymark Industries, Inc., the successor-in-interest to a manufacturer of asbestos textiles, including asbestos cloth. Over Raymark’s objections that plaintiff failed to meet his burden of proving sufficient evidence of exposure to its asbestos-containing products, the trial court gave the following jury instructions:

No longer are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. . . . [T]here is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

¹² See, e.g., Appellant’s Brief at 31.

If you find two or more causes combine to produce a single result, incapable of division on any logical or reasonable basis, and *each is a substantial factor*¹³ in bringing about harm, each is charged with responsibility for the harm.

Instruction 5.

. . . When the concurring negligence and/or product liability of two or more defendants are each proximate cause of an injury, each is liable regardless of the relative degree in which each contributed to the injury.

Instruction 6.

Lockwood, 109 Wn.2d at 245 n. 6 (emphasis added). In approving the trial court's "substantial factor" jury instruction, the *Lockwood* court noted that "[i]t is extremely difficult to determine if exposure to a particular defendant's asbestos product actually caused the plaintiff's injury." *Id.* at 248.¹⁴

Lockwood identified several factors, discussed in detail above, for determining whether sufficient evidence exists to submit a case to the jury

¹³ *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 28, 935 P.2d 684 (1997), approved a jury instruction defining "substantial factor" as follows: "A substantial factor is an important or material factor and not one that is insignificant."

¹⁴ Interestingly, at oral argument before the Washington Supreme Court, the manufacturer of the asbestos cloth at issue, Raymark Industries, Inc., urged the *Lockwood* Court to adopt a market-share alternate liability theory. The Court declined the invitation indicating the applicability of market-share alternate liability to asbestos cases is a "substantial and complex issue" it would not address, both because the underlying case had not been tried on that theory and because plaintiff presented sufficient evidence of asbestos exposure to satisfy the traditional proximate cause requirements. Further, the *Lockwood* court noted "the use of market-share alternate liability theory in the asbestos products context is not without difficulties. See Note, *The Causation Problem in Asbestos Litigation: Is there an Alternative Theory of Liability?*, 15 Ind. L. Rev. 679, 691-711 (1982); see also *Celotex Corp. v. Copeland*, 471 So.2d 533, 536-39 (Fla. 1985)." *Lockwood*, 109 Wn.2d at 245 n. 6.

for its determination of whether causation has been established. The *Lockwood* court further noted:

Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case. Nevertheless, the factors listed above are matters *which trial courts should consider* when deciding if the evidence is sufficient to take such cases to the jury.

Id. at 249 (emphasis added).

Lockwood establishes the threshold for product identification and the factors trial courts are to consider in determining whether exposure is sufficient to tender the causation question to a jury. The *Lockwood* factors form the basis for the trial court's "gatekeeper function" in determining whether, based upon the evidence presented, a plaintiff can establish that a defendant's negligence or product was a "substantial factor" in bringing about the injury, even though the injury would have occurred without it.

As noted above, Appellant purports to embrace *Lockwood* and, in doing so, implicitly admit the proper factors to be considered in a proximate causation determination are to be determined in accordance with the *Lockwood* factors. To the extent Appellant argues for a different standard by way of *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995), for example, her arguments are simply contradictory.

E. Appellant’s Reliance on *Hue v. Farmboy* and *Allen v. Asbestos Corp.* Glosses Over the *Lockwood* Factors and Constitutes an Attempted “End Run” Around *Lockwood*’s Establishment of a Gatekeeper Function for the Trial Court to Determine the Sufficiency of Causation Evidence in Asbestos Cases

After paying lip service to *Lockwood* (and to the allegedly more restrictive jury instruction approved in *Mavroudis*), Appellant essentially argues for application of a new, more liberal formulation of the “substantial factor” test based on *Hue v. Farmboy Spray Co.*, *supra*.¹⁵ In so doing, Appellant seeks to gloss over (if not eliminate) the *Lockwood* factors, eliminate the important gatekeeper function served by the trial court, and seek by guile to substitute in place of the “substantial factor” test one in which *any* exposure, no matter how small or insignificant, is sufficient to submit the question of causation to the jury so long as there is “some evidence” that a particular defendant’s product can be shown to have been present in a work area where a plaintiff worked. Unfortunately, this standardless standard would abolish summary judgment practice in Washington asbestos cases and would increase the burden on the courts

¹⁵ While appellants argue for a “substantial factor instruction similar to the one contained at WPI 15.02 or in *Hue v. Farmboy* rather than the instruction used in *Mavroudis*,” Appellants Brief, at 22, *Hue* is neither an asbestos-related case nor a substantial factor causation case. In fact, the words “substantial factor” are never used in the Supreme Court’s opinion in *Hue*, nor is the concept of “substantial factor” causation ever discussed in the opinion.

because every case involving allegations of exposure to even miniscule amounts of asbestos would create a jury question. Fortunately, Appellant's suggested liberalization of causation is inconsistent with Washington law.

(a) Hue v. Farmboy Spray Co., et al

Hue involved claims for damage to plaintiffs' crops and ornamental plants allegedly caused by multiple aerial applications of pesticides over a several year period that drifted from the target wheat farms down into the valley occupied by plaintiffs. *Hue*, at 71-72. Plaintiffs sued DuPont as the single manufacturer of the multiple formulations of pesticides used over several aerial applications and multiple time periods; Farmboy, the company that performed each of the multiple aerial spray applications; and the 27 owners of the target wheat farms who contracted for some or all of the multiple aerial applications. *Hue*, at 70. Plaintiffs alleged that "1-3% of each application escaped and collectively contaminated the air, and then would drift into Badger Canyon due to wind patterns, and damage plaintiffs' plants." *Hue*, at 73. Plaintiffs claimed that under those circumstances, it was not possible to trace particular plant damage in the canyon to particular applications of pesticides. *Hue*, 127 Wn.2d, at 73-74.

The trial court instructed the jury that plaintiffs had to prove that a particular defendant used the pesticides, a portion thereof drifted into Badger Canyon and that “the off target drift of the pesticides was a proximate cause of damage to an individual . . . plaintiff’s property or crop.” *Hue*, at 76. The jury found for the defendants and the plaintiffs appealed.

The Washington Supreme Court affirmed the jury’s verdict and held the jury instructions permitted plaintiffs to adequately argue their theory of the case and noted that jurors were asked to determine “whether the plaintiffs had shown by competent evidence that any of the applications was a cause of harm to any of the plaintiffs,” and “did not require the jury to find that a single application drifted and caused particular damage, but allowed the jury to consider whether an application caused any part of any damage to any plaintiff’s plants.” *Hue*, at 92. As noted by the Court:

In its oral ruling, the court stated that plaintiffs only had to establish that a portion of a particular defendant’s application “*was . . . part of a cloud that then was the proximate cause of damage*,” or “that an application, either individually or in concert with others . . . was made, drifted and reached Badger Canyon,” causing injury, and that if plaintiffs made this showing, the burden of allocating responsibility would shift to the defendants. . .

127 Wash. 2d at 76 (emphasis added) (record citations omitted).

Appellant advocates the adoption of a new, more liberal causation standard that permits her to take any asbestos exposure case to a jury by demonstrating that some small amount of asbestos fibers attributable to a particular manufacturer became part of the undifferentiated “cloud of asbestos” that *may* have caused a plaintiff’s injury.¹⁶ By adopting such a theory, Appellant seeks to dispense with any need to demonstrate a particular manufacturer’s product was or could be a “substantial factor” (as opposed to an insignificant factor) in causing a plaintiff’s asbestos-related disease by simply alleging asbestos fibers attributable to that manufacturer became part of the “cloud of asbestos.”¹⁷

¹⁶ In *Hue*, the parties were unable to determine which chemical caused the damage to plaintiffs’ plants, although the damage manifested itself in fairly short order. There was a series of chemical applications, but it was not the repetition that rendered causation undifferentiated, it was the chemical composition of each cloud. By contrast to asbestos cases, damage in the form of asbestos-related disease does not manifest itself for one to five or more decades after one’s initial exposure to asbestos fibers, but the evidence seems to indicate some exposures are more causative of disease than others. There is a clear distinction between a dose-responsive type of disease (such as mesothelioma) and damage to foliage that occurs within hours or days of a particular aerial chemical spraying event in which a single manufacturer’s product is involved in various “clouds of toxic chemicals.”

¹⁷ There is no dispute in the relevant scientific communities that mesothelioma, like other asbestos-related diseases, is a dose-responsive disease. That means that the risk of developing the disease rises as an individual’s exposure to asbestos fibers increases over time and in severity. At the same time, however, there is a universal recognition that everyone has been exposed to some level of background asbestos exposure because asbestos fibers can be found in the lungs of every person, whether or not they have worked with or around asbestos. The scientific community, however, cannot agree on the threshold level, if any, of what level of exposure will result in any particular asbestos-related disease or the rate at which the risk, if any, of disease increases relative to low levels of exposure. As a result, simply indicating that some small level of exposure to asbestos fibers added to the overall “cloud of asbestos” does not answer the relevant question as to whether the additional asbestos fibers increased the risk—and thus caused or contributed—to the development of an asbestos-related disease.

The real mischief in Appellant’s argument, however, is that not only do they advocate adopting the “cloud of asbestos” theory of proximate causation from *Hue*, but seek to combine that new theory of causation with the exposure rules adopted in cases such as *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 157 P.3d 406 (2007), and *Berry v. Crown Cork & Seal Co., Inc.*, 102 Wn. App. 312, 14 P.3d 789 (2000).

(b) Allen v. Asbestos Corp., Ltd. and Berry v. Crown Cork & Seal Co., Inc.

Berry v. Crown Cork & Seal Co., Inc., *supra*, involved a lawsuit brought by the estate and surviving spouse of a shipyard worker who died of mesothelioma. Plaintiff’s decedent worked as a machinist at Puget Sound Naval Shipyard (“PSNS”) in 1942 and again from 1945-50. In response to the summary judgment motion of a distributor of asbestos insulation products to PSNS, the plaintiff offered the testimony of a witness who worked at PSNS from 1939 to 1944 and again from 1946 to 1951. *Berry*, 103 Wn. App. at 315. The witness testified “when thermal insulation products were purchased, at least 50% of the products were purchased from local sources in the Seattle area such as the Brower Company or E.J. Bartells.” *Berry*, at 315-16. Plaintiff also offered the testimony of a chemist and pulmonary physician that testified asbestos dust had the ability to drift throughout the shipyard and that workers could

be exposed to asbestos by simply working somewhere in the shipyard, an exposure theory known as “fiber drift.” *Berry*, at 318. In addition, plaintiff offered testimony from pathologists indicating all of decedent’s significant work exposures to asbestos caused or contributed to his development of mesothelioma. *Berry*, at 318.

The *Berry* court determined plaintiff established sufficient circumstantial evidence of exposure to the asbestos insulation distributor’s products under *Lockwood* by satisfying the proximity and time factors that decedent worked at PSNS during times the asbestos insulation distributor’s products were used and, because of the propensity of asbestos fibers to drift throughout the shipyard, a reasonable inference could be drawn decedent breathed the asbestos whether he worked on ships or only worked somewhere in the shipyard. *Berry*, at 324.¹⁸

Allen v. Asbestos Corp., Ltd., supra, involved a plaintiff who suffered from lung cancer he attributed to asbestos exposure at PSNS. Mr. Allen alleged that his lung cancer was caused, at least in part, by asbestos dust from asbestos cloth (“Asbeston”) used at the shipyard. In response to the asbestos cloth manufacturer’s motion for summary judgment, plaintiff offered evidence of the purchase of large quantities of

¹⁸ In the present case, appellants offered no such expert testimony substantiating or supporting a “fiber drift” theory of exposure as to Mr. Morgan. Accordingly, although

sales to PSNS of Asbeston-brand asbestos cloth between 1958 and 1960, a time during which Mr. Allen worked at PSNS. *Allen*, 138 Wn. App. at 572-73. The Court concluded the timing and large quantities of Asbeston cloth sold to PSNS permitted the reasonable inference that the product was used at the shipyard and that plaintiff breathed asbestos from that product. *Allen*, at 574-75. Once again, the Court applied the *Lockwood* factors to determine that there was sufficient evidence to submit the case to a jury for its determination of whether causation had been established. *Allen*, at 571-75.

(c) Appellant’s Objective in Combining the “Cloud of Asbestos” Causation of *Hue* with the Fiber Drift and Circumstantial Evidence Standards of *Allen* and *Berry*

By cleverly seeking to combine the fiber drift and circumstantial evidence standards of *Allen* and *Berry* with the approach to causation from *Hue* (proof of some contribution to the “asbestos cloud”), Appellant seeks to create an automatic jury question each and every time a plaintiff can demonstrate that some quantity, however small, of a manufacturer’s asbestos-containing product may have been used in or near a worksite and thus became part of a “toxic cloud of asbestos” to which the plaintiff was were exposed. By offering this new “toxic cloud of asbestos” theory,

appellants offer such a theory in combination with the relaxed proximate causation rule of *Hue*, there is no support for such a combined theory in this case.

Appellant effectively advocates elimination of any gatekeeper function for trial courts to determine, consistent with *Lockwood*, whether any particular exposures were a “substantial exposure” because *any contribution* to the “toxic cloud of asbestos” would, by definition, constitute sufficient causation to go to the jury. Appellant’s newly-proposed, relaxed causation standard not only is inconsistent with the Washington Supreme Court’s *Lockwood* proximate causation rule, but constitutes an impractical and unwarranted extension of Washington law.

G. The Substantial Factor Causation Test Is Appropriately Applied in Situations Such as Asbestos Cases to Quickly and Easily Eliminate Insignificant Exposures That Do Not Contribute to the Disease Process

In *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997), the Court considered those situations where the substantial factor causation test should be substituted for the “but for” test of causation typically applied in tort cases. After noting the Washington Supreme Court observed in *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985), that a change from the “but for” to the substantial factor test for causation is normally justified only when a plaintiff is unable to show that one event alone was a cause of the injury, the Court went on to state:

As noted by Dean Prosser, the substantial factor test aids in the disposition of three types of cases. First, the test is used

where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the “but for” test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it. Second, the test is used where a similar, but not identical, result would have followed without the defendant’s act. ***Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.*** W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts § 41 (5th ed. 1984). . . .

Mavroudis, 86 Wn. App. at 31-32 (emphasis added).

Appellant, along with her expert medical witnesses, would contend each and every exposure to asbestos contributes to the development of asbestos-related disease because the inhalation of any particular fiber of asbestos *may* have caused or contributed to the disease process. Because, as Appellant argues, any and all exposures *may* have caused or contributed to the development of the disease, there is no justifiable reason to differentiate large, significant exposures to asbestos from small, relatively insignificant or fleeting exposures — they all contribute to the “toxic cloud of asbestos.”

The reality is that through the vehicle of a causation standard based upon a combination of *Hue, Allen and Berry*, Appellant seeks to create an air-tight jury trial issue against equipment manufacturers for miniscule

amounts of asbestos she alleges is attributable to original equipment or replacement gaskets and packing.

The substantial factor test was adopted by the Washington Supreme Court to avoid the situation, similar to that involved here, where defendants are held to answer for throwing the proverbial lighted match into the forest fire. In the case now before this Court, an experienced trial court judge heard all the evidence and concluded, after consulting the *Lockwood* proximate causation factors, that Appellant simply did not satisfy her threshold burden of proving that sufficient evidence of causation exists to submit this case to a jury. The substantial factor causation test and the trial court's application of the *Lockwood* factors should be affirmed.

H. The Mere Presence of an Equipment Manufacturer's Product at a Particular Location is Insufficient to Satisfy the Threshold Burden of Whether Exposure is Sufficient to Tender the Causation Question to a Jury.

Appellant's new argument on appeal essentially seeks to require IMO and the other product manufacturers to remain in a case through trial merely upon allegations that IMO's product or products were present in the same location as Mr. Morgan. Given the fact that IMO's products in this case are metal-cased, enclosed pumps which do not release asbestos fibers without some form of manipulation or intervention, Appellant's

argument fails to hold water.¹⁹ Moreover, the type of products potentially involved with IMO pumps is radically different from the type of products and potential levels of exposure from the products at issue in *Allen, Berry*, and *Hue***Error! Bookmark not defined.**

In *Allen v. Asbestos Corp., Ltd.*, *supra*, the product at issue was asbestos cloth; in *Berry v. Crown Cork & Seal Co., Inc.*, *supra*, asbestos-containing thermal insulation; in *Hue v. Farmboy Spray Co.*, a cloud of toxic pesticides attributable to a single manufacturer. In contrast, many of IMO's pumps, including the types of lube oil pumps Mr. Morgan was observed working upon, did not require asbestos insulation; contained manila paper gaskets; and utilized non-asbestos-containing metallic packing. Even as to those IMO pumps in which the U.S. Navy specifications called for asbestos-containing gaskets or packing material, those items were sealed within the enclosed, metal-cased pumps and would not have been accessed by a pipefitter such as Mr. Morgan, whose job was simply to disconnect and re-connect pump flanges to the piping systems aboard ship.

¹⁹ As this Court is aware, the Washington Supreme Court decisions in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008) ("*Simonetta*"), and *Braaten v. Saberhagen Holdings, et al.*, 165 Wn.2d 373, 198 P.3d 493 (2008) ("*Braaten*"), stand for the proposition that IMO cannot be held liable for exterior asbestos insulation or replacement gaskets it did not sell or provide. There is no evidence in that IMO supplied any asbestos-containing thermal insulation for any of the pumps to which Mr. Morgan may have been exposed. Under *Simonetta* and *Braaten*, liability against IMO may attach only

Even as to the replacement gaskets and packing allegedly identified as originating from IMO by inside machine shop supervisor Melvin Wortman, there is no differentiation between asbestos-containing and non-asbestos-containing gaskets and packing used in IMO pumps — an important distinction that someone in Mr. Wortman’s position surely would know, but which he could not identify in his testimony.

Simply put, there is no evidence in this case that by their mere presence aboard vessels upon which Mr. Morgan allegedly worked that IMO pumps emitted or released asbestos fibers which could have been within the breathing zone of Mr. Morgan. Once again, there is a complete failure of proof, as recognized by the trial court’s dismissal of this case for lack of sufficient proof of causation from any asbestos attributable to IMO.

upon proof that gaskets or packing material originally supplied with the pumps or later sold by IMO were asbestos-containing.

IV CONCLUSION

For the reasons set forth herein, Respondent IMO Industries, Inc., respectfully requests that summary judgment as entered by the trial court be affirmed.

DATED this 15th day of April, 2010.

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