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No. 684451-12-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I  
SEATTLE

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RESIDUAL ENTERPRISES CORPORATION,  
as successor in interest to SEA-LAND SERVICE, INC.,  
Appellant/Cross-Respondent,

v.

ROGER E. HAMMETT, JR. and ANITA M. HAMMETT,  
Respondents/Cross-Appellants

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Appeal from King County Superior Court  
No. 11-2-12255-7-SEA

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**BRIEF OF APPELLANT/CROSS-RESPONDENT RESIDUAL  
ENTERPRISES CORPORATION, INC.**

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## I. INTRODUCTION

Respondent Roger Hammett (“Hammett”) brought the maritime asbestos lawsuit from which this appeal arises against Appellant Residual Enterprises Corporation, as successor in interest to Sea-Land Service, Inc. (“Sea-Land”) in King County Superior Court on April 20, 2011. Hammett alleged that he developed mesothelioma as a result of his employment in 1964 as a messman on Sea-Land’s vessel, the M/V SEATTLE, where he served a total of 67 days out of his 30-year career as a merchant seaman. Hammett brought claims for negligence under the Jones Act and unseaworthiness under general maritime law against Sea-Land and the State of Washington. Hammett settled his claims against The State of Washington prior to trial. Hammett also dismissed his claim of unseaworthiness prior to trial and proceeded only on his claim of Jones Act negligence.

Trial of this matter began December 6, 2011 and concluded December 15, 2011 with a special jury verdict in favor of Hammett in the amount of \$1.45MM, with 70% of that amount allocated to Sea-Land. On January 17, 2012, Sea-Land filed a Motion for a New Trial, which was denied by the trial court on February 10, 2012. Timely appeal from that denial was taken in this Court on March 7, 2012.

## II. ASSIGNMENTS OF ERROR

(1) Did the trial court err in permitting Hammett's expert pathologist to testify outside his area of qualification and expertise, offering opinions on matters of industrial hygiene, and then using those unqualified opinions as the basis for his opinions on medical causation? Yes.

(2) Did the trial court err in prohibiting Sea-Land from introducing evidence of Hammett's exposure to asbestos prior to his employment aboard the SEATTLE and in limiting the scope of Sea-Land's cross examination of Hammett with respect to conditions aboard other vessels? Yes

(3) Did the trial court err in allowing Hammett to argue, and to publish to the jury during opening statement and closing argument, inapplicable statutes, regulations and publications? Yes.

(4) Did the trial court err in permitting Hammett to argue an incorrect negligence standard to the jury in his closing argument? Yes.

(5) Did the trial court err in providing to the jury an instruction regarding the delegation of duty by Sea-Land? Yes.

(6) Did the trial court err in improperly instructing the jury that Hammett was merely required to demonstrate that Sea-Land knew, or reasonably should have known, that Hammett's presence aboard the SEATTLE entailed a significant risk of "injury," as opposed to a

significant risk of “mesothelioma”? Yes.

### III. STATEMENT OF THE CASE

#### A. Background And Proceedings Below

##### 1. Legal Background

In this maritime case, Hammett asserted a negligence claim against Sea-Land under the Jones Act. The Jones Act provides a seaman with a cause of action against his employer for personal injuries sustained in the course of employment as a result of the employer's negligence. 46 U.S.C. § 30104 (formerly 46 U.S.C. App. § 688). To establish a *prima facie* case under the Jones Act, a seaman must prove: "(1) that a dangerous condition actually existed on the ship; (2) that the defendant shipowner had notice of the dangerous condition and should have reasonably anticipated the plaintiff might be injured by it; and (3) that if the shipowner was negligent, such negligence proximately caused the plaintiff's injuries." *Bailey v. Seaboard Barge Corp.*, 385 F. Supp. 2d 310, 315 (S.D.N.Y. 2005) (quoting *Diebold v. Moore McCormack Bulk Transp. Lines, Inc.*, 805 F.2d 55, 58 (2nd Cir. 1986)); *see also Hiltbruner v. Crowley Marine Servs.*, 2007 Wash. App. LEXIS 2602, ¶ 8 (Wash. App. September 10, 2007) (“The elements of a Jones Act negligence claim are: duty, breach, notice, and causation”).

In order to make a successful Jones Act claim against a shipowner in asbestos litigation, plaintiff must first establish that plaintiff was exposed to harmful levels of friable asbestos aboard the shipowner's vessel. "Exposure cannot be presumed merely because [plaintiff seaman] worked on board a vessel where asbestos materials were located." *Jackson v. A-C Prod. Liab. Trust*, 622 F.Supp.2d 641, 644 (N.D. Ohio 2009)(citing *Stark v. Armstrong World Indus.*, 21 Fed. Appx. 371, 376 (6th Cir. 2001)).

## **2. Proceedings Below**

Hammett filed his initial complaint in this action in King County Superior Court on April 1, 2011, and amended his complaint to add Sea-Land as a defendant on April 20, 2011. Hammett sought a priority trial setting. Hammett was deposed by a number of defendants on July 7, 2011. Following Hammett's deposition, Sea-Land filed a motion for summary judgment, which was denied, in part, on October 21, 2011, specifically as to Sea-Land's argument that Hammett failed to identify any source of asbestos exposure aboard the SEATTLE. Between April 2011 and November 2011, a number of shipping company defendants were dismissed for financial insolvency, and Hammett settled his claims against the State of Washington. The case proceeded to trial on December 6, 2011 and concluded December 15, 2011 with a special jury verdict in favor of Hammett in the amount of \$1.45MM, with 70% of that amount

allocated to Sea-Land. On January 17, 2012, Sea-Land filed a Motion for a New Trial, which was denied by the trial court on February 10, 2012. Timely appeal from that denial was taken in this Court on March 7, 2012.

### **3. Hammett's Evolving Allegations of Exposure**

Hammett alleged that he contracted mesothelioma as a result of his exposure to asbestos while working aboard the M/V SEATTLE for a total of 67 days in 1964. Hammett's allegations regarding the purported source of his exposure, however, changed throughout the pendency of this action.

Prior to trial at deposition, Hammett did not identify any source of alleged exposure to asbestos aboard the SEATTLE, testifying that he did not work around asbestos-containing products on the SEATTLE and, in fact, could not recall ever entering the engine room on board. Several months later, in his opposition to a motion for summary judgment filed by Sea-Land, however, Hammett filed an affidavit, at that time claiming that he was exposed to: (1) dust accumulation on his clothes when he hung his laundry to dry in the fidley of the engine room and (2) incidental contact with asbestos as a result of bumping in to insulated pipes and due to ship vibration. At trial, Hammett presented yet another version of his supposed exposure, alleging for the first time that during the entire 67 days he was at sea aboard the SEATTLE, a previously undisclosed major insulation

rip-out project took place. Hammett's inconsistent exposure allegations formed the foundation for numerous errors at trial.

**B. Facts Relevant To The Claims On Appeal**

**1. Hammett's Expert Pathologist was Permitted to Improperly Offer, and then Rely on, Industrial Hygiene Opinions, Which Were Outside His Expertise.**

At trial, Hammett called Dr. Andrew Churg to provide medical causation opinion testimony as a clinical pathologist. In addition to his testimony on pathology, however, Dr. Churg, was also permitted to render opinions regarding asbestos exposure levels, an area of expertise that is ordinarily reserved for an industrial hygienist, and then rely on those unqualified opinions to draw conclusions about medical causation. [RP 12/8/2011 Vol., Churg Testimony, 73:17-24] Notably, Hammett did not offer an expert qualified in industrial hygiene. Further, even though Dr. Churg admitted during trial that he was not an industrial hygienist, [RP 12/8/2011 Vol., Churg Testimony, 72:6-14; 75:25-76:13; 85:10-15], and that he would typically rely on an industrial hygienist to calculate levels of exposure, [RP 12/8/2011 Vol., Churg Testimony, 42:4-9; 42:21-43:15; 73:12-24], the trial court, over Sea-Land's objections, permitted him to offer unqualified industrial hygiene opinions and then rely on those opinions to conclude that Hammett's exposure to asbestos aboard the

SEATTLE was a cause of his mesothelioma. [RP 12/8/2011 Vol., Churg Testimony, 73:17-24].

To the extent that Dr. Churg relied on his own unqualified exposure calculations to determine medical causation, Dr. Churg's medical causation opinion was also unqualified. As a result, Hammett was left without any admissible evidence of medical causation, thereby failing to prove his claims at trial.

**2. Sea-Land was Prevented from Offering Evidence Pertaining to Hammett's Prior Asbestos Exposure History.**

Prior to working for Sea-Land for 67 days in 1964, Hammett worked at Todd Shipyard, breaking apart a World War II battleship. At deposition, Hammett testified regarding his extensive exposure to asbestos during his work in the shipyard. This exposure is also documented throughout Hammett's medical records, which were entered into evidence as Exhibits 1-4. [CP 527]. Hammett also swore out a declaration prior to trial attesting to his asbestos exposure during his work at Todd Shipyards. [CP 69]. Noticeably absent from Hammett's exposure declaration is any mention of Sea-Land or the SEATTLE. At trial, however, Sea-Land was precluded from eliciting testimony about Hammett's shipyard work, which formed the basis for Sea-Land's medical causation defense. Moreover, any and all references to Hammett's shipyard work were redacted from

Hammett's medical record exhibits, despite the fact that Hammett's shipyard work was identified in those records as the cause of Hammett's mesothelioma. [Trial Exs. 1, 3] Further, neither Sea-Land nor the merchant marines were mentioned anywhere in Hammett's medical records; not even as a potential or contributing cause of Hammett's illness. [Trial Exs. 1, 3]

Hammett also worked on a number of merchant ships following his brief time on the SEATTLE. Unlike the SEATTLE, however, each of the other ships on which Hammett sailed came straight from "mothballs," or long-term storage, following their use during World War II. [RP 12/8/2012, Hammett's Testimony, 65:1-14] As such, those ships were in substantially the same condition as they were when they were being operated at the end of the War, twenty years earlier. The SEATTLE, on the other hand, had been extensively renovated just two years prior to Hammett's tenure, and converted to a container ship, which was illustrated in detail through the testimony of Dr. Cushing and Everett Cooper at trial, as well as through the photographs entered into evidence as Exhibit 163.

At the outset of trial, Hammett's counsel filed a motion in limine to preclude Sea-Land from providing evidence regarding these other asbestos exposures. The motion was heard by the trial court on the first day of trial, and based on a misapplication of the *McDermott* line of cases

pertaining to the allocation of damages, the trial court granted Hammett's motion. [CP 423-426; RP 12/7/2012 Vol. 16:14-17:9] As a result of this ruling, Sea-Land was prevented from cross-examining Hammett about the relative condition of the various other merchant vessels in which Hammett had worked, even though Hammett had testified at deposition that all of the merchant vessels in which he had sailed had just come "out of mothballs," and whereas Sea-Land's expert naval architect, Dr. Cushing, testified that the SEATTLE had been refurbished just two years before Hammett was aboard. [RP 12/13/2011 Vol., Cushing Testimony, 113:3-20; 130:14-131:16] This erroneous limitation impaired Sea-Land's impeachment of Hammett, based on his prior testimony, and also precluded the development of testimony as to exposures on other merchant vessels. In short, the trial court's preclusive ruling prevented Sea-Land's from arguing that other exposures caused Hammett's injury, in whole, and thus Hammett's alleged exposure aboard the SEATTLE did not cause his injury, even in part.

**3. Hammett's Counsel Improperly Introduced, and Mised the Jury with, Irrelevant Statutes, Regulations and Publications.**

Prior to the commencement of trial, in his Trial Brief, Hammett announced his intent to introduce evidence pertaining to the Walsh-Healey Public Contracts Act ("Walsh-Healey Act"), the 1958 State of

Washington, Department of Labor and Industries, Safety Standards for Protection Against Occupationally Acquired Diseases (“1958 WSHA regulations”), and numerous articles and publications concerning the asbestos industry. [CP 382-391] Sea-Land opposed Hammett’s attempt to introduce improper evidence in a Bench Brief provided to the trial court prior to the commencement of the trial. [CP 427-434] On the first full day of trial, the trial court heard argument on the issue, and ruled that Hammett could generally reference the statute, regulations, and articles in opening statement, while deferring the trial court’s decision as to whether the statutes, regulations and articles would be published to the jury and whether they were admissible as evidence of Sea-Land’s negligence. [RP 12/7/2011 Vol., 178:2-180:15]

Moments after the trial court’s ruling, Hammett’s counsel flagrantly violated the trial court’s ruling, publishing images of the statute, regulations and numerous articles to the jury, and informing the jury that the evidence would show, in light of those documents, that Sea-Land had knowledge of the dangers of asbestos and knowingly subjected Hammett to those dangers. Sea-Land properly objected to Hammett’s counsel’s misconduct, but the objection was overruled and Hammett’s counsel continued to make improper references to the proscribed evidence, even telling the jury that Hammett would introduce evidence that Sea-Land was

a government contractor (which Sea-Land was not), and, therefore, was subject to both the Walsh-Healey Act and the 1958 WSHA regulations. [RP 12/7/2011 Vol., 204:5-211:5] Notably, Hammett offered no admissible evidence that Sea-Land was a government contractor.

Throughout the trial, Hammett continued to make improper references to the Walsh-Healey Act and the 1958 WSHA regulations, attempting to utilize Hammett's vague and unsubstantiated testimony that Sea-Land discharged cargo at a military base as establishing Sea-Land as a government contractor. These attempts drew a defense objection, which was sustained. [RP 12/8/2011 Vol., Hammett's Testimony, 20:21-22:19] The damage was done, however, erroneously and baselessly leading the jury to the conclusion that Sea-Land was a government contractor, which Sea-Land was not. More significantly, this foundationless testimony was intended to improperly lead the jury to consider whether Sea-Land had violated statutes and regulations applicable only to government contractors.

Similarly, Hammett continually discussed irrelevant articles from medical journals and other publications concerning the effects of asbestos on asbestos miners and shipyard workers; while none of the articles concerned the commercial shipping industry. Further, most of the articles concerned asbestosis (a non-malignant disease caused by massive

exposure to asbestos); not mesothelioma. Despite the clear irrelevance of these articles, Hammett continually argued to the jury that somehow the articles imposed a duty on Sea-Land to warn Hammett of the risk of mesothelioma to merchant seaman, based solely on emerging science in the medical community regarding the potential dangers of asbestos to miners and shipyard workers. Sea-Land objected to the improper introduction of these materials throughout the duration of the trial.

Not until the end of trial did the trial court attempt to limit the effect of Hammett's misuse of the statutes, regulations and articles, through a jury instruction that read:

You have received evidence in this case pertaining to federal and state statutes and regulations only for the limited purpose of demonstrating knowledge. You are instructed, as a matter of law, Defendant was not legally bound by these statutes and regulations and did not violate these statutes and regulations. You may only consider these statutes and regulations evidence of knowledge.

[CP 517]. This instruction came far too late, and indeed, fell far short of curing the prejudice caused by Hammett's violation of the trial court's pre-trial ruling, and his improper and repeated utilization of irrelevant and inapplicable statutes, regulations, and articles to attempt to impose a non-existent duty of knowledge upon Sea-Land.

**4. Hammett was Erroneously Permitted to Argue an Incorrect Negligence Standard to the Jury.**

Beginning in opening statement and continuing through closing argument, Hammett's counsel repeatedly told the jury that Sea-Land was a cause of Hammett's injury because Sea-Land was bound to know about the hazards of asbestos if the hazards were merely "knowable," as opposed to "reasonably should have [been] known" through the exercise of reasonable care. [RP 12/7/2011 Vol. 204:5-18; 12/14/2011 Vol. 65:12; 66:10; 73:6-12; 156:1] Sea-Land objected to this mischaracterization of the applicable legal standard, both in Hammett's opening statement and in his closing argument. Once again, however, Hammett's counsel's conduct had already poisoned the jury, misleading the jurors into an analysis whereby Hammett's burden of proof was improperly lightened and confusing the proper standard.

By repeatedly telling the jury that the dangers of asbestos merely had to be "knowable" in order to find Sea-Land liable, Hammett gave the jury permission to find Sea-Land liable based on an incorrect, improperly lowered standard of proof. Hammett's improper statement of the applicable negligence standard, coupled with Hammett's introduction of inapplicable statutes, regulations and articles, likely led the jury to an incorrect legal conclusion regarding Sea-Land's liability based on what

was “knowable,” and not what “should reasonably have been known” about the hazards of asbestos to seamen in 1964.

**5. The Trial Court Improperly Instructed The Jury Regarding Delegation of Duty.**

Despite offering no evidence at trial pertaining to Sea-Land’s delegation of its duty to a third party, in arguing jury instructions, Hammett introduced his intent to instruct the jury that Sea-Land sought to delegate its duty to provide a reasonably safe place to work to the U.S. Coast Guard. Of particular significance is the complete lack of any evidence introduced at trial to support Hammett’s eleventh hour position. Despite this incurable deficiency, and over Sea-Land’s objection, the trial court instructed the jury:

Negligence is the failure to use reasonable care. Reasonable care is the degree of care that reasonable prudent persons or corporations would use under like circumstances to avoid injury to themselves or others. Negligence is the doing of something that a reasonably prudent person or corporation would not do, or the failure to do something a reasonably prudent person would do, under the circumstances.

SeaLand/Residual is not relieved of its duty of ordinary care owed to Mr. Hammett by delegating or seeking to delegate that duty to another person or entity.

[CP 512] Hammett presented no evidence at trial that Sea-Land sought to delegate its duty to any other entity. In closing argument, however, and for the first time, Hammett argued to the jury that Sea-Land sought to shift its responsibility to the U.S. Coast Guard. [RP 12/14/2012 Vol. 154:17-155:20] On the contrary, the only evidence produced on the issue demonstrated that Sea-Land acted proactively, and in advance of any Coast Guard directives, to study the potential effects of asbestos exposure on merchant seaman, by conducting the first ambient air sampling study of asbestos exposure aboard operating merchant ships. [Trial Ex. 147]

**6. The Jury was Instructed Regarding the Wrong Standard of Proof for Injury.**

The trial court provided an erroneous instruction regarding Hammett's burden of proof with respect to the injury at issue in this litigation. Rather than requiring Hammett to prove that "Sea-Land knew, or reasonably should have known, that the particular concentrations of asbestos fibers, if any, likely to be encountered by crewmembers aboard operating vessels entailed a significant risk of *mesothelioma*," the trial court merely required that Hammett show a significant risk of *injury*. [CP 513] Sea-Land objected to this mischaracterization of Hammett's burden, and argued that Hammett was required to demonstrate the specific risk of mesothelioma based on the threshold of alleged asbestos exposure from

Sea-Land's purported negligence, [CP 455] but the trial court rejected Sea-Land's position and erroneously instructed the jury on the lesser standard.

\* \* \*

As a consequence of these numerous errors, Sea-Land was incurably prejudiced. The result of this prejudice was an unsupported jury verdict in favor of Hammett. Due to the highly prejudicial nature of these errors, to the extent all of Dr. Churg's medical causation testimony is determined to be inadmissible, Sea-Land respectfully requests that this Court enter an order overturning the special jury verdict entered in the trial court against Sea-Land and entering judgment in favor of Sea-Land on the basis of lack of medical causation. In the alternative, Sea-Land respectfully requests entry of an order for a new trial of this matter.

#### IV. ARGUMENT

A. **The Trial Court Erred in Permitting Hammett's Expert Pathologist to Testify Outside His Area of Knowledge and Experience, and then Base His Determination of Medical Causation on that Unqualified Opinion.**

The trial court abused its discretion and improperly permitted Hammett's expert pathologist, Dr. Andrew Churg, to testify to matters admittedly outside his area of qualification and expertise. At trial, Hammett presented evidence of Dr. Churg's education, experience and knowledge with respect to matters of *pathology*. But, Hammett also

attempted to utilize Dr. Churg to elicit testimony regarding matters reserved to the field of *industrial hygiene*, including the calculation of asbestos exposure levels and opinion testimony regarding the threshold levels of asbestos fibers to which Hammett sought to convince the jury he was exposed. [RP 12/8/2011 Vol., Churg Testimony, 38:8-44:15] Sea-Land timely objected to this testimony as improper and in violation of Washington Rules of Evidence 702 and 703, but was overruled by the Court. [RP 12/8/2011 Vol., Churg Testimony, 39:8-10; 39:17-18; 40:19-21] Further, on cross-examination, Dr. Churg readily admitted that he is not an industrial hygienist and has no training or experience in industrial hygiene. [RP 12/8/2011 Vol., Churg Testimony, 72:6-14; 75:25-76:13; 85:10-15] Dr. Churg also admitted that he ordinarily relies on industrial hygienists to calculate exposure levels. [RP 12/8/2011 Vol., Churg Testimony, 42:4-9; 42:21-43:15; 73:12-24] Nevertheless, at trial, Dr. Churg performed his own calculation of Hammett's supposed exposure level aboard the SEATTLE and then based his ultimate opinion regarding medical causation on that unqualified exposure calculation. [RP 12/8/2011 Vol., Churg Testimony, 73:17-24]

The trial court's refusal to limit Dr. Churg's testimony to his proffered areas of expertise was error, and prejudicial to Sea-Land because unreliable, unsubstantiated testimony regarding Hammett's alleged

asbestos exposure was presented to the jury. Moreover, Dr. Churg based his ultimate medical causation opinion on his own, improper industrial hygiene opinion. Therefore, Dr. Churg's medical causation opinion also should have been precluded to the extent that it was not based on admissible industrial hygiene testimony.

**B. The Trial Court Erred in its Misapplication of the *McDermott* Line of Caselaw, Precluding Sea-Land From Presenting a Complete Defense.**

Sea-Land was prejudiced by the trial court's exclusion of relevant, probative evidence, based on a misapplication of admiralty law, which resulted in an erroneous verdict. Because the trial court's exclusion of relevant evidence was premised upon its erroneous interpretation of the applicable law of the case, this error is reviewable *de novo*, as opposed to the traditional abuse of discretion standard applied to evidentiary exclusion rulings. "Interpretation of an evidentiary rule is a question of law, which we review *de novo*." *State v. Griffin*, 173 Wn.2d 467 (2012) (citing *State v. Foxhoven*, 161 Wn.2d 168 (2007) ("Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003))). Here, the trial court imposed evidentiary limitations as a result of its misinterpretation of the *McDermott* doctrine, an error that is reviewed *de novo*. Even under an abuse of discretion

standard, however, this constitutes reversible error.

**1. The Trial Court Improperly Precluded Sea-Land From Presenting Its “Sole Cause” Defense.**

From the outset of this case, Sea-Land’s position was, and always remained, that Hammett’s mesothelioma was caused solely by asbestos exposure from a source other than Sea-Land. A central tenet of the “sole cause” defense holds that the defendant is entitled to present evidence of exposure to other products to prove that the cause of the disease was other products. *Nolan v. Weil-McLain*, 901 N.E.2d 549 (Ill. 2009). *See also, Mitchell v. Steward Oldford & Sons*, 163 Mich. App. 622, 415 N.W.2d 224 (1987) (“Defendant may introduce evidence that the injury is attributable to another's negligence.”) As the Sixth Circuit held in *Laney v. Celotex Corp.*, 901 F.2d 1319, 1320-1321 (6th Cir. 1990), “this is true even if the alleged negligent actor is not a party to the action, *Kujawski v. Cohen*, 83 Mich. App. 239, 268 N.W.2d 358 (1978); or is immune from suit as the Plaintiff’s employer. *Esparza v. Horn Machinery Co.*, 160 Mich. App. 630, 408 N.W.2d 404 (1987) (Jury instructions pertaining to the negligence of plaintiff’s employer, who was immune from suit and therefore not a party to the lawsuit, were not improper: “It is perfectly proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty. *Love v*

*Brumley*, 30 Mich. App. 61, 63, 186 N.W.2d 19 (1971). *See also* *Kujawski v Cohen*, 83 Mich. App. 239, 242-243; 268 N.W.2d 358 (1978). Plaintiffs have conceded the employer's negligence and that it was a proximate cause. It was not unfair for defendant to seek to blame someone else for the accident when plaintiffs sued defendant.”); *Love v. Brumley*, 30 Mich. App. 61, 186 N.W.2d 19 (1971)(“Plaintiffs also argued that it was error to permit evidence that plaintiff [ ]’s employer, a non-assessable party, was guilty of negligence. Reason and logic dictate that a defendant should not be precluded from placing the liability for an accident elsewhere. *See DePriest v. Kooiman* , 2 Mich. App. 431(1966), *aff’d* (1967), 379 Mich 44. It was proper for the trial court to admit such evidence.”); *see also, Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 325 (3d Cir. 2003) (Jury’s consideration of evidence of proportional fault of non-parties in a negligence action was not improper; comparative negligence doctrine properly applied.)

Given that the undisputed primary source of Hammett’s exposure to asbestos occurred during his work at Todd Shipyards [CP 69, 527], an entity immune from suit in this case, Sea-Land was uniquely prejudiced by the trial court’s refusal to permit evidence of Hammett’s other sources of exposure. The effect of the trial court’s ruling was to put Sea-Land in the impossible position of having to prove a negative. In other words, the trial

court precluded Sea-Land from introducing any evidence of other documented and admitted exposures despite the existence of clear, admissible evidence of Hammett's extensive exposure to asbestos at Todd Shipyard, which was recognized in Hammett's medical records as the cause of his illness, and his extensive history sailing on a number of "mothballed" World War II-era ships, [CP 527]. Sea-Land's sole recourse was thus to prove that Hammett's novel "rip out project" theory of exposure aboard the SEATTLE was false. The trial court's granting of Hammett's motion in limine to preclude Sea-Land from referencing Hammett's other sources of exposure to asbestos was in direct contravention to the sole cause defense authority and deprived Sea-Land of critical evidence that disproved an essential element of Hammett's case, namely, that Sea-Land's negligence was a cause of Hammett's injury.

This impermissible burden shifting – forcing Sea-Land to prove it was not responsible, rather than requiring Hammett to prove Sea-Land was – resulted in a verdict contrary to the law. Indeed, "evidence of Plaintiff's exposure to other asbestos products goes to the fundamental question of cause. A jury may consider all evidence of contributing factors to determine which, if any, . . . caus[ed] Plaintiff's injury. *Th[is]* . . . ***analysis cannot be made in a vacuum.***" *Laney, supra*, 901 F.2d at 1321 (emphasis added).

**2. The Trial Court Erroneously Applied the *McDermott* Damages Doctrine to the Admissibility of Evidence on Causation.**

In granting Hammett’s motion in limine, which precluded Sea-Land from referencing Hammett’s other sources of asbestos exposure, the trial court based its analysis entirely on a misunderstanding of the damages allocation doctrine set forth in *McDermott, Inc. v. Amclyde and River Don Castings Ltd.*, 511 U.S. 202, 207 (1994). *McDermott* was concerned solely with the proper means by which to allocate fault in an admiralty action, where some defendants had settled with the plaintiff prior to trial. *McDermott* held that the allocation of damages should be proportionate to fault, as opposed to *pro tanto*. *McDermott* has no bearing, however, and indeed is wholly silent, on the admissibility of evidence at trial to establish causation and the liability of parties and non-parties.

Given that *McDermott* has no relevance to the admissibility of evidence of causation, the trial court should have been guided by the “sole cause” defense case law discussed above. Instead, by erroneously extending *McDermott* well beyond its intended scope, the trial court effectively created a *res ipsa loquitur* scenario for the jury. By preventing Sea-Land from introducing any evidence of Hammett’s other asbestos exposures, which were well-documented in Hammett’s medical records

and relied upon by Hammett’s experts, the trial court effectively created a presumption for the jury that since Hammett was ill with mesothelioma, and given that the jury heard no evidence regarding other (actual) exposures to asbestos, the jury could come to no other conclusion than that Sea-Land was the cause. In other words, Sea-Land was the only logical “bad actor” for the jury to blame, since the jurors never got to hear the extensive evidence of Hammett’s actual exposure to asbestos at Todd Shipyard and aboard non-refurbished World War II-era commercial ships. In so doing, the trial court turned *McDermott* into an exclusionary rule of evidence instead of its observing its intent as a damages allocation doctrine. This improper extension of *McDermott*, and rejection of Sea-Land’s sole cause defense incurably hamstrung Sea-Land’s ability to present a complete defense and resulted in a legally erroneous verdict against Sea-Land.

C. **The Trial Court Erred in Permitting Hammett’s Counsel to Improperly Mislead the Jury with Irrelevant Statutes, Regulations and Publications.**

There were several instances, beginning in opening statement and continuing through trial, where the jury was improperly shown and told that irrelevant statutes and regulations applied to Sea-Land. This error was magnified when the trial court subsequently admitted evidence based on that misinterpretation of the law. “Interpretation of an evidentiary rule is a

question of law, which [is] review[ed] de novo.” *State v. Griffin*, 173 Wn.2d 467 (2012)(emphasis added). Even under an abuse of discretion standard, however, this constitutes reversible error.

Hammett introduced the Walsh-Healey Public Contracts Act (“Walsh-Healey Act”) and the 1958 State of Washington, Department of Labor and Industries, Safety Standards for Protection Against Occupationally Acquired Diseases (“1958 WSHA regulations”), arguing initially to the jury that Sea-Land was bound by both. Contrary to Hammett’s contention, for several reasons the 1958 WSHA regulations pertaining to dust in the workplace did not apply to the SEATTLE in 1966. First, the Preface of the 1958 WSHA regulations specifies that those regulations were promulgated “[p]ursuant to the passage of the Amendment to the Workers’ Compensation Act”. However, the U.S. Supreme Court long ago established that state workers’ compensation laws do not apply to seamen engaged in maritime employment, *London Guarantee & Accident Co. Ltd. v. Industrial Accident Comm. of California*, 279 U.S. 109 (1929). Second, State laws such as these regulations are preempted by maritime law when they “work material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law”, *Strain v. West Travel, Inc.*, 117 Wn. App. 251, 70 P.3d 158 (2003) (Washington

wage and hour laws cannot be applied to seamen engaged in interstate voyages because the “potential disruption of the uniformity and harmony of the maritime law is clear”). Third, a State cannot apply its laws extraterritorially to employment occurring primarily on the high seas and on the territorial waters of foreign nations and other States. *See e.g., Oil, Chemical & Atomic Workers Int’l Union, AFL-CIO, v. Mobil Oil Corp.*, 426 U.S. 407 (1976) (Powell, J. concurring) (state employment laws cannot be applied to seamen whose job situs is the high seas); *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (discussing cases regarding the “‘due process principle that a state is without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries.’”)<sup>1</sup>

Similarly, Hammett misrepresented the applicability of the Walsh-Healey Act to the SEATTLE. The title of the Walsh-Healey Act itself reveals that it applies only to “Contractors Performing Federal Supply

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<sup>1</sup> *Inlandboatmen’s Union of the Pacific v. Dept. of Transp.*, 119 Wn.2d 697, 836 P.2d 823 (1992), is not to the contrary and distinguishable. In that case, the Court held that the Washington Industrial Safety and Health Act (WISHA) could be applied to the Washington State Ferry System, where state law provided that the State of Washington is an employer which must comply with WISHA, the workers were State employees, and the ferries were “state owned vessels operating almost exclusively in Washington territorial waters”. Here, by contrast, the plaintiff was privately employed by a non-resident on a privately owned vessel that operated primarily on the high seas and the territorial waters of foreign nations and other States.

statute and regulations to Sea-Land, claiming that Sea-Land was bound by and in violation of both. [RP 12/7/2012 Vol., 164:17-166:17]. He did not.

Similarly, Hammett sought to introduce numerous articles relating to the potential hazards of lung disease posed by asbestos to workers in the asbestos mining, construction, and shipyard industries. None of the articles pertained to the commercial shipping industry, and most related to forms of lung cancer and asbestos-related diseases other than mesothelioma. [Trial Exs. 43-46; 59-60; 69] Nor did Hammett introduce any evidence that Sea-Land knew of the existence of these articles and publications, much less demonstrate their relevance to Sea-Land's operation of a commercial ship in 1964.

Given the obvious relevance and admissibility problems attendant to Hammett's attempts to introduce these documents, the trial court explicitly limited Hammett's use of the documents in opening statement, ruling:

And I'm going to require that you *not show these documents in your opening statement*, but you can obliquely reference or you can --more generally reference what kind of evidence you expect to show in which -- and it's an opening statement anyway, so you're just going to --tell them what you think the evidence will show.

Despite this clear and explicit instruction, moments later in his opening statement, Hammett's counsel proceeded to publish images of inapplicable statutes and regulations, along with numerous irrelevant articles, to the jury on a 54-inch flat screen television. [RP 12/7/2011 Vol., 178:2-180:15] Sea-Land's objection to this flagrant violation was overruled by the trial court. [RP 12/7/2011 Vol., 204:19-21; 208:6-8]

Hammett's arguments regarding the alleged relevance of these documents were premised upon *Hoglund v. Raymark Indus.*, 50 Wn. App. 360, 365 (1987), wherein the so-called Sumner Simpson papers were admitted as relevant to an asbestos product manufacturer's alleged negligence. Here, however, Sea-Land was not a manufacturer of asbestos products; it was an end-user. The standard of care imposed upon a product manufacturer is indisputably much higher than that for product end-users. Further, in *Hoglund*, the manufacturer defendant had actual awareness of the Sumner Simpson papers, and knowledge of their contents. Moreover, the Sumner Simpson papers concerned workers who directly handled asbestos or asbestos-containing products. By contrast here, Hammett introduced no evidence that Sea-Land had actual knowledge of the existence of any of the articles he sought to introduce. Nor did any of the articles introduced by Hammett align with the facts at issue here: a merchant mariner messman who admittedly did not work

with or handle a single asbestos-containing product aboard the SEATTLE. Thus, *Hoglund* has no binding, or even persuasive, effect on the record before this Court. The articles cited by Hammett were simply irrelevant to the facts of this case, and their introduction was prejudicial error.

Although the trial court attempted to mitigate the prejudice caused by Hammett's improper introduction of this evidence through an after the fact jury instruction, the harm was, by then, incurable. The jury was improperly led by Hammett's counsel to consider inapplicable statutes and regulations, pertaining to other entities that were actually subject to the regulations, as though they were binding upon Sea-Land. The jury was also improperly permitted to consider irrelevant evidence pertaining to the state of the art in other industries, concerning other diseases, and considering other work conditions as probative of Sea-Land's alleged negligence. This was prejudicial and reversible error.

**D. The Trial Court Erroneously Permitted Hammett's Counsel to Argue an Incorrect Negligence Standard to the Jury.**

The jury was also during Hammett's opening statement and closing argument, wherein Hammett's counsel argued an incorrect legal standard to the jury. Once again, the trial court's permission of the presentation of an incorrect legal standard, and evidence reliant thereon, to the jury resulted in prejudicial error. "Interpretation of an evidentiary rule

is a question of law, which [is] review[ed] de novo.” *State v. Griffin*, 173 Wn.2d 467 (2012)(emphasis added). Even under an abuse of discretion standard, however, this constitutes reversible error.

It was undisputed at the time of trial that the proper standard for Hammett to establish Sea-Land’s negligence was “known, or reasonably should have known.” *Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560 (5th Cir. 1989) (The defendant's duty to use reasonable care requires that the defendant knew, or should have known, of a particular risk under the circumstances.). Nonetheless, Hammett’s counsel repeatedly and knowingly stated an incorrect, lower standard to the jury, deliberately leading to confusion regarding Hammett’s burden of proof. [RP 12/7/2011 Vol. 204:5-18; 12/14/2011 Vol. 65:12; 66:10; 73:6-12; 156:1] The Court failed to cure this prejudice, despite Sea-Land’s repeated objections. In opening statement, for example, Hammett’s counsel argued to the jury:

MR. BERGMAN: So we have to decide, if we find causation, was Sea-Land negligent? And there's kind of three things we have to ask ourselves, and you could kind of tell in voir dire where we were going when we were asking you questions about what ***was known or knowable***. What knowledge was available to Sea-Land on how to protect its crew from asbestos? What was out there that Sea-Land ***could have learned***? What regulations would Sea-Land

-- should have followed or been aware of regarding asbestos and what, if anything, did Sea-Land do to protect its workers from asbestos hazards? *So what was out there? What knowledge was available?* Well, one of the most important sources of knowledge is what -- you know, and one of the foremost bases is what were other companies doing at the time?

MR. BURGER: Objection, Your Honor.

MR. BERGMAN: Was asbestos hazards in the --

THE COURT: Overruled. Go ahead.

Hammett's counsel continued these improper efforts in his closing argument. [RP 12/14/2011 Vol., 65:1-66:11; 155:25-156:4] Indeed, Plaintiff's counsel improperly represented to the jury that "knowable" was the correct standard no less than seven times during the course of trial. [RP 12/7/2011 Vol., 132:1; 204:9; 208:16; 208:21, RP 12/14/2011 Vol., 65:12; 66:10; 156:1]. Repeated improper statements of the law and, in particular, misrepresentations of Hammett's burden of proof, constitute misconduct that resulted in prejudicial error to Sea-Land. The trial court's permission of Hammett's counsel's repeated improper argument to the jury that Hammett's burden of proof was to show that information regarding the hazards of asbestos were merely "knowable," and not "known, or reasonably should have known" was in error.

**E. The Trial Court Erred in Improperly Instructing the Jury Regarding Delegation of Duty.**

The trial court's instruction to the jury regarding delegation of duty, given a complete lack of evidence presented at trial on the legal doctrine of delegation of duty, was error subject to *de novo* review. *State v. Savage*, 2009 Wash. App. LEXIS 2575 (Wash. Ct. App., Sept. 21, 2009) ("Whether a jury instruction correctly states the applicable law is a question of law we review *de novo*." ) (citing *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), in turn (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995))).

Hammett's first indication that he intended to pursue a delegation of duty argument arose during the jury instruction conference, after the close of evidence. At that late hour, Hammett sought an instruction that Sea-Land had attempted to delegate its duty to provide a reasonably safe work environment to the U.S. Coast Guard. Sea-Land objected to this line of argument as wholly unsupported by the evidence at trial, and further objected to the giving of the instruction. Nonetheless, and without any evidence in the record to support the charge, the trial court instructed the jury that "SeaLand/Residual is not relieved of its duty of ordinary care owed to Mr. Hammett by delegating or seeking to delegate that duty to

another person or entity,” [CP 517] resulting in a legal error, reviewable *de novo*.

Hammett presented no evidence at trial that Sea-Land sought to delegate its duty to any other entity. Furthermore, Sea-Land never claimed and never argued that the U.S. Coast Guard, not Sea-Land, had a duty to provide Mr. Hammett with a reasonably safe place to work. Rather, Hammett apparently sought to fabricate that theory in closing argument, positing to the jury for the first time that Sea-Land’s introduction of evidence regarding Coast Guard vessel equipment requirements, which mandated the use of asbestos aboard commercial vessels in the 1960s, was an attempt to delegate Sea-Land’s duty to a third party. Hammett improperly argued that Sea-Land sought to shift its responsibility to the U.S. Coast Guard, merely by introducing evidence that Sea-Land was subject to Coast Guard regulation. The only somewhat related evidence produced on the issue demonstrated that, on the contrary, Sea-Land acted proactively with respect to the safety of its employees, and in advance of any Coast Guard directives, to study the potential effect of asbestos exposure on merchant seaman, by conducting the very first ambient air sampling study of asbestos exposure aboard merchant ships.

Where no evidence of a claim has been presented at trial, it is error to instruct the jury as to that claim. *See Caldbick v. Marysville Water &*

*Power Co.*, 114 Wash. 562, 567 (1921) (“In *Goldthorpe v. Clark-Knickerson Lumber Co.*, 31 Wash. 467, 71 P. 1091; *Cole v. Seattle, R. etc. R. Co.*, 42 Wash. 462, 85 P. 3, and *Olson v. Erickson*, 53 Wash. 458, 102 P. 400, we have held that the court was in error in having submitted to the jury instructions as to items claimed in the complaint upon which no evidence had been introduced. In *Crandall v. Puget Sound T., L. & P. Co.*, 77 Wash. 37, 137 P. 319, we held it was error for the court to instruct in regard to an item upon which no evidence had been introduced and upon another item which by stipulation had been reduced from the amount claimed in the complaint.) Thus, the presentation of this novel theory to the jury in the form of a jury instruction, despite a total dearth of evidence, was error, and prejudicial to Sea-Land in that no evidence was presented demonstrating that Sea-Land ever sought to delegate its duty to the U.S. Coast Guard, or any other entity. Where no evidence was offered at trial to support this theory, which was introduced for the first time in Hammett’s closing argument, Sea-Land was inevitably prejudiced by this jury instruction.

**F. The Trial Court Erroneously Instructed the Jury Regarding the Standard of Proof for Causation of Mesothelioma.**

The trial court’s misapplication of the law of causation, in the form of an erroneous jury instruction, led to an error of law, reviewable *de*

messman aboard an operating vessel entailed a significant risk of mesothelioma. *See Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560, 563 (5<sup>th</sup> Cir. 1989) (notice that working in “a heavy cloud of [silica] dust” was harmful does not answer the crucial question of “whether the [FELA employer] should have known that the particular concentrations of dust to which [plaintiff] was exposed entailed a significant risk of *silicosis*”). It was error for the trial court to require Hammett to demonstrate merely that Sea-Land knew that the levels of exposure to asbestos likely aboard its ships could increase the risk of an unspecified injury, generally, instead of requiring Hammett to show that Sea-Land knew that the levels of exposure to asbestos likely to be encountered aboard ship could increase the risk of mesothelioma, specifically.

## V. CONCLUSION

For the foregoing reasons, Appellant Residual Enterprises Corporation, as successor in interest to Sea-Land Service, Inc., respectfully requests that to the extent the Court finds Dr. Churg’s medical causation opinion testimony to be inadmissible, this Court enter an order overturning the special jury verdict entered in the trial court against Sea-Land and entering judgment in favor of Sea-Land on the basis of lack of medical causation. In the alternative, Sea-Land requests an order vacating the special jury verdict, and ordering a new trial of this matter.

RESPECTFULLY submitted this 20<sup>th</sup> day of July 2012.

LEGROS BUCHANAN & PAUL

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached on the Clerk of Court for Division I of the Washington State Court of Appeals and the following counsel of record:

Attorney for Respondents

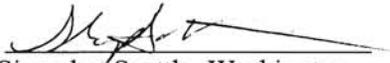
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**Via Hand Delivery**

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of July 2012.

  
Signed at Seattle, Washington