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NO. 69364-6-I

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

THOMAS G. MONTANEY and MARJORIE E. MONTANEY, husband
and wife,

Appellants,

v.

J-M MANUFACTURING COMPANY, INC.,

Respondent.

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BRIEF OF APPELLANTS

Matthew P. Bergman, WSBA #20894
Chandler H. Udo, WSBA #40880
Kaitlin T. Cherf, WSBA #45241
BERGMAN DRAPER LANDENBURG, PLLC
614 First Avenue, Fourth Floor
Seattle, Washington 98104
Tel. (206) 957-9510

Attorneys for Appellants

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I. INTRODUCTION

In November of 2011, Thomas Montaney was diagnosed with malignant mesothelioma, an invariably fatal cancer caused by exposure to asbestos. Less than a year later, Mr. Montaney died. He and his wife, Marjorie, filed a personal injury suit against several defendants, alleging that Mr. Montaney's mesothelioma was caused by occupational exposure to the defendants' asbestos-containing products and that the defendants were liable for his injuries under theories of negligence and strict liability. J-M Manufacturing Company, Inc. (hereinafter "JMM") obtained summary judgment on the ground that the plaintiffs failed to present sufficient evidence from which a jury could find that Mr. Montaney was exposed to asbestos-containing products manufactured and sold by JMM.

As detailed herein, the trial court erred in granting summary judgment to JMM because the plaintiffs proffered ample evidence from which a reasonable jury could conclude that Mr. Montaney was exposed to asbestos-cement pipe that was manufactured after JMM assumed responsibility for the product line in January 1983. JMM sold asbestos-cement pipe to Pacific Water Works Supply ("PWW"), the only distributor from which Mr. Montaney purchased asbestos-cement pipe through the mid-1980s. This circumstantial evidence placing JMM's

asbestos-cement pipe at Mr. Montaney's jobsites—along with the evidence pertaining to his work with that pipe—is sufficient to raise an issue of material fact with respect to his exposure to an asbestos-containing product manufactured and sold by JMM. Accordingly, this Court should reverse the Superior Court's summary judgment and remand for trial.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its order dated July 20, 2012, which granted summary judgment to JMM. The Court should resolve the following issue pertaining to this error:

Did plaintiffs present evidence raising an issue of material fact as to whether Mr. Montaney was exposed to asbestos-cement pipe manufactured and sold by JMM while he was employed at the Cedar River Water and Sewer District?

III. STATEMENT OF THE CASE

A. Procedural History.

Thomas Montaney and his wife, Marjorie Montaney, filed a Complaint against JMM and eight other defendants on January 12, 2012, alleging that Mr. Montaney's mesothelioma was caused by occupational exposure to the defendants' asbestos-containing products. CP 16-20. On June 27, 2012, JMM moved for summary judgment, which was vigorously

opposed by plaintiffs. CP 1-13; CP 85-118. On July 20, 2012, after oral argument, the trial court issued an order granting JMM's motion for summary judgment and dismissed JMM from the case. CP 548-49. The case proceeded to trial against the remaining defendants and settled prior to jury selection. Plaintiffs timely appealed the grant of summary judgment to JMM. CP 550-52. Thomas Montaney died on August 28, 2012, and this appeal is being prosecuted by his Personal Representatives, Jane Martin, Jean Sloan, and Julie Pedrini.

B. Factual Background.

1. Thomas Montaney Was Exposed to Asbestos When he Worked With Asbestos-Cement Pipe at the Cedar River Water and Sewer District.

Thomas Montaney was exposed to asbestos during his employment as a municipal water worker at the Cedar River Water and Sewer District (formerly King County Water District 108), where he worked for over two decades. CP 128-132. Mr. Montaney began working at the water district in 1972 as a general laborer. CP 128. As the water district grew and Mr. Montaney's skills advanced, he was promoted to Field Superintendent, a position he held until retiring in 1995. CP 128.

Mr. Montaney's primary responsibility at the water district was ensuring the maintenance of the district's water and sewer system. CP 128-29. His job duties included performing repairs to the existing pipe

comprising the district's system, tapping mains for new service, and supervising the installation of new pipe. CP 128-31.

When Mr. Montaney started at the water district in 1972, "most all" of the water and sewer system lines consisted of asbestos-cement pipe ("A-C pipe"). CP 129. Throughout the 1970s and into the 1980s, the water district added many new water and sewer lines. CP 128-29; CP 131. The material most commonly used for these water and sewer lines continued to be A-C pipe. CP 129.

2. Mr. Montaney Purchased JMM Transite A-C Pipe from Pacific Water Works Supply Throughout the 1980s and Continued to Use New A-C Replacement Pipe Until the 1990s.

Mr. Montaney and his co-workers were responsible for performing repairs to A-C pipe that was fractured or leaking. CP 129. The repair process involved removal of damaged sections of A-C pipe and replacement of those sections with new A-C pipe. CP 27; CP 129; CP 189-92. Until the 1990s, the Cedar River Water and Sewer District continued to use new sections of A-C pipe for replacement purposes. CP 129-32; CP 264. Mr. Montaney testified that he personally purchased new A-C pipe from Pacific Water Works Supply, which sold JMM A-C pipe through at least 1984. CP 264-65; CP 402-03; CP 427. The district maintained an inventory of new A-C pipe, from which Mr. Montaney and

his crew selected replacement pipe to install when conducting repairs through the 1990s. CP 58; 129-32; CP 264.

Because he had exclusive responsibility for selecting and purchasing replacement pipe for the water district, Mr. Montaney had firsthand knowledge of the distributor from which he purchased A-C pipe. CP 130; CP 375. Mr. Montaney testified that there were only two sources of A-C pipe used at the water district: leftovers from contractors and Pacific Water Works Supply. CP 130; CP 377.

Up until the 1990s, when the Cedar River Water and Sewer District stopped buying new A-C pipe, Mr. Montaney testified that he personally purchased new A-C pipe from Pacific Water Works Supply for repairs:

Q: Did there come a time that you stopped using new asbestos cement pipe for repairs and used a different material?

A: Yes.

Q: Can you estimate when that time was for me, sir?

A: Oh, probably in the early '90s.

Q: All right. And so prior to that, did you continue to purchase new asbestos cement pipe as necessary?
...

A: Yes.

CP 264. Mr. Montaney stopped ordering A-C pipe after he attended a workshop on A-C pipe work practice procedure in 1990, around the time when he started to become aware of the hazards of asbestos exposure generated by cutting A-C pipe. CP 132.

3. Mr. Montaney Breathed Asbestos When He Personally Cut New A-C Pipe For Repairs.

Mr. Montaney and his co-workers were responsible for repairing A-C pipe that was damaged or defective. CP 129. The majority of repairs to the district's water mains were performed on A-C pipe, as Mr. Montaney's nephew and former water district co-worker, James ("Jim") Montaney explained:

Q: Do you recall what kind of material those water mains that you repaired leaks on were made out of?

A: A lot of them were asbestos cement. It was the most problematic of the products in the District at the time.

Q: And what do you mean by "most problematic"?

A: We—if we had 50 miles of pipe, and 25 miles of it was A-C and 25 was other, 90 percent of the breaks would be in the A-C. And I don't know what the ratios are, but I just know we repaired A-C all the time. We didn't repair ductile iron ever and plastic a few times.

...

Q: So, with regard to the—to the repairs that you did on water mains while you were at the—at the Water

District, the vast majority of those would have been on A-C pipe rather than other sorts of pipe?

A: Right.

CP 228.

Repairing the pipe required two stages of cutting: first, cutting sections of the old, damaged pipe still located in the ground to facilitate its removal; second, cutting and beveling new pipe to size for use as a replacement. CP 129; CP 191-92. David Thompson, a co-worker of Mr. Montaney who was employed at the water district from 1974 to 2002, described the A-C pipe repair process at the water district during the 1970s and 1980s:

Q: [I]f you were replacing a piece of asbestos cement pipe in the ground, how many times do you have to cut pipe in order to make that repair?

A: Usually twice. The full circumference of the pipe in two places.

Q: So you—you would cut the pipe in the ground?

A: Right.

Q: And then you'd cut the new pipe to—to fit?

A: That's true.

CP 191.

The process of cutting both the new and the old pipe released visible asbestos dust. CP 131; CP 192. Until 1990, water district

employees typically used a gasoline powered “cutoff saw” to cut the A-C pipe. CP 129; CP 229. When Mr. Montaney was cutting or beveling the A-C pipe himself—or when he was nearby a co-worker engaged in cutting A-C pipe—respirable asbestos fibers were released into Mr. Montaney’s breathing zone. CP 131; CP 146; CP 152. Jim Montaney, described the dusty conditions created by cutting A-C Pipe with a cutoff saw:

Q: And what sort of environmental conditions were created, if any, when you used the cut off saw to—cut off pieces of the pipe?

A: Well, anytime you engage, essentially, a big grinder to a concrete pipe you have an instant cloud. And that was the standard. Your pant leg would be white with the stuff that blew back on it, and fine dust was on everything nearby.

CP 229. Even when Mr. Montaney did not personally cut the A-C pipe, he would still be in the vicinity of his co-workers while they were performing the cutting.¹ CP 130.

Furthermore, Mr. Montaney and his co-workers agree with respect to the frequency with which he conducted such A-C pipe repairs. Mr. Montaney reported that he performed repair work about ten times per

¹ The concentration of asbestos fibers during the exposure sustained by Mr. Montaney throughout the A-C pipe repair process was estimated by plaintiffs’ Material Science Expert, Dr. William Longo. CP 146-47; CP 150; CP 154. Dr. Longo testified that cutting A-C pipe while performing repairs in the manner described by Mr. Montaney and his co-workers would cause exposures to asbestos in excess of 50 to 60 fibers per cubic centimeter. CP 154.

month. CP 130. Jim Montaney testified that he personally performed A-C pipe repairs about one to ten times each month, but that Mr. Montaney likely did even more repairs because Mr. Montaney was also on call after hours, while Jim was not. CP 228.

4. Mr. Montaney Was Exposed to Transite A-C Pipe Manufactured and Sold by JMM.

On January 1, 1983, defendant JMM began manufacturing A-C pipe under the trade name “J-M Transite.” CP 497-98; CP 514-15. JMM had purchased all of the assets necessary to manufacture and market this product from Johns-Manville in late 1982.² CP 497-98; CP 505. JMM’s corporate representative testified in prior litigation regarding the asset sale pursuant to which JMM acquired Johns-Manville’s A-C pipe business:

Q: And when J-M Manufacturing took possession of the [Johns-Manville Stockton plant] on January 1st, 1983...they probably began working the first day after the new year; is that correct?

A: That’s correct.

Q: All right. And they continued making in that building asbestos cement pipe . . . just as has been done by Johns-Manville the day before, correct?

A: That’s correct.

...

² Facing an onslaught of asbestos lawsuits, Johns-Manville opted to apply for bankruptcy protection in 1982. See CP 512.

Q: Transite Pipe is a trade name that Johns Manville began using for their asbestos cement pipe; is that correct?

A: That's correct.

Q: And when J-M Manufacturing took over the business J-M Manufacturing sold Transite Pipe made in Stockton; is that correct?

A: That's correct.

CP 498; CP 504.

JMM's corporate representative testified that the A-C pipe sold by JMM was identical to Johns-Manville Transite A-C pipe. CP 508. The A-C pipe remained the same through the asset sale in all respects except trade dress. CP 507-08; CP 514. Pursuant to the asset purchase deal, JMM purchased use of the "Transite" trade name, but not the "Johns Manville" trade name. CP 506-08. As a result, the Transite A-C pipe sold by JMM was labeled "J-M" instead of "Johns-Manville," as it had been previously. CP 506-08.

Mr. Montaney and his co-workers, Mr. Thompson and Kurt Hunkeler, each testified that they cut new "J-M" and "Johns Manville" A-C pipe during their employment at the Cedar River Water and Sewer District. CP 28; CP 53; CP 55; CP 130. Mr. Hunkeler, who started at the water district after the J-M asset purchase outlined above, unequivocally identified J-M A-C pipe with its distinct trade dress:

Q: Now, did the Cedar River [water district] keep an inventory of AC pipe?

A: Yes.

Q: At least from 1984 to 1990?

A: Yes.

Q: And do you recall the brands of the AC pipe that Cedar River kept in their inventory in that '84 to '90 time period?

...

A: Yes. Again, I believe it was the Johns-Manville and CertainTeed.

Q: And can you tell me the basis for your belief that the brands were Johns-Manville and CertainTeed?

A: I recall seeing the name or the symbol for the Johns-Manville pipe.

Q: And what was the symbol for the Johns-Manville pipe that you recall?

A: It was a J-dash-M.

Q: And can you describe the lettering of that J-dash-M?

A: All caps.

CP 28.

5. JMM Sold Transite A-C Pipe to Pacific Water Works Supply between 1983 and 1984.

Pacific Water Works Supply was a distributor of water pipe and accessories to governmental entities and private contractors in the Pacific

Northwest. CP 425-26; CP 433; CP 438-39. Pacific Water Works Supply was a distributor of Johns-Manville A-C pipe until the product line was sold to JMM in December 1982; thereafter, Pacific Water Works Supply sold JMM A-C pipe through the mid-1980s. CP 402-04; CP 427-28; CP 438-39.

William Davis, Pacific Water Works' Vice President of Operations during the 1980s, testified in prior litigation that his company sold A-C pipe through at least 1984:

Q: How long did PWW continue to market asbestos-containing pipe from Johns-Manville after it started?

...

A: We stopped selling AC pipe in the mid '80s, prior to the mid 80's, because the market had just disappeared for AC pipe.

Q: When you say mid '80s or just before the mid '80s, would you be comfortable saying 1984?

A: Yes, I would.

CP 427. *See also* CP 402-04; CP 427-29; CP 438-39. Similarly, Pacific Water Works' corporate representative offered the following testimony confirming Pacific Water Works Supply's relationship with JMM:

Q: And, based on these two documents, would you agree with me that between 1973 and 1979, Pacific Water Works transacted business with J-M?

A: That's what it appears to show.

Q: Okay. And, would you also agree with me that from 1981 to 1984, Pacific Water Works also transacted business with a—with an entity that it referred to as J-M?

A: That's what they apparently show.

CP 413. Pacific Water Works Supply's distribution of J-M pipe continued through 1984, according to the testimony of its corporate representative:

Q: There seems to be no question that between 1980 and 1984 Pacific Water Works was a distributor for J-M; is that right?

A: I believe that's true.

CP 438-39.

IV. ARGUMENT

A. Standard of Review and Summary Judgment Standard.

When reviewing summary judgment, this Court engages in the same inquiry as the trial court. *Soproni v. Polygon Apartment Partners*, 137 Wn. 2d 319, 324-25, 971 P. 2d 500 (1999). The Court considers all facts and reasonable inferences from those facts in the light most favorable to the non-moving party, the Montaneys. *Id.* at 325. Summary judgment must be reversed if the evidence in the record could lead reasonable persons to reach more than one conclusion. *Id.* If, after drawing all reasonable inferences in the Montaneys' favor, this Court concludes that

there is any issue as to a material fact, the trial court's order of summary judgment should be reversed. CR 56(c).

B. A Reasonable Jury Could Find that Mr. Montaney Was Exposed to Asbestos-Cement Pipe Supplied by JMM.

The record contains sufficient evidence from which a jury could reasonably find that Mr. Montaney was exposed to A-C pipe manufactured and sold by JMM after December of 1982. Accordingly, this Court should reverse the trial court's summary judgment order, and remand this case for trial.

1. Circumstantial Evidence that Mr. Montaney Was Exposed to JMM's Asbestos-Containing Product is Sufficient to Raise a Factual Dispute as to His Asbestos Exposure.

Washington appellate courts have developed a unique body of case law clarifying the manner in which a plaintiff may establish injurious exposure to asbestos. In the seminal decision of *Lockwood v. A. C. & S., Inc.*, 109 Wn. 2d 235, 744 P. 2d 605 (1987), the Washington Supreme Court announced that evidence establishing that a defendant's asbestos product was present at the plaintiff's jobsite enables a finder of fact to draw the inference of asbestos exposure. *Id.* at 246-48.

Thus, under *Lockwood*, circumstantial evidence placing a defendant's asbestos-containing product at the relevant jobsite is sufficient to create an issue of fact with respect to exposure. *See, e.g., Allen v.*

Asbestos Corp., Ltd., 138 Wn. App. 564, 573, 157 P. 3d 406 (2007) (evidence that the asbestos product was used at the shipyard where plaintiff's father worked supported finding of exposure to asbestos, without further evidence of direct exposure); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 324-25, 14 P. 3d 789 (2000) (evidence that plaintiff, a machinist, worked in the vicinity of other workers who handled asbestos material was sufficient to establish exposure, even though the plaintiff did not handle asbestos directly).³ Therefore, following *Lockwood*, *Berry*, and *Allen*, it is sufficient for the plaintiffs to show that Mr. Montaney was exposed to JMM's A-C Pipe through reasonable inferences.

2. A Jury Could Reasonably Infer that Transite A-C Pipe Manufactured by JMM Was Present at the Cedar River Water and Sewer District After 1982.

In the present case, JMM argued that the plaintiffs were bereft of *any* evidence placing JMM Transite pipe at Mr. Montaney's jobsites while he worked at the Cedar River Water and Sewer District, thereby deliberately ignoring Mr. Montaney's own testimony regarding his purchases of A-C Pipe from Pacific Water Works Supply *after* 1982. *See* CP 130-32; CP 264; CP 375-78. Just like the plaintiffs in *Lockwood*,

³ *See also Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 740-41, 248 P. 3d 1052 (2011) (holding that plaintiff's evidence of "more than a single instance of exposure" raised an issue of fact as to whether the exposure was a substantial factor in causing his mesothelioma, and reversing trial court's order of summary judgment).

Berry, and *Allen*, the Montaneys presented more than sufficient evidence to raise a reasonable inference that Mr. Montaney was exposed to an asbestos-containing product manufactured and sold by the defendant. In fact, the Montaneys have presented even stronger evidence regarding the source and nature of Mr. Montaney's exposure to asbestos than the evidence of exposure presented by the plaintiffs in *Lockwood*, *Berry*, or *Allen*.

In *Lockwood*, *Berry*, and *Allen*, the plaintiffs alleged exposure to asbestos-containing products at Puget Sound area shipyards. See *Lockwood*, 109 Wn. 2d at 238-39; *Allen*, 138 Wn. App. at 569; *Berry*, 103 Wn. App. at 314. In each case, the plaintiff could not personally identify the defendant's asbestos product and could not say that they had personally worked with or even seen the product. *Lockwood*, 109 Wn. 2d at 243-45; *Allen*, 138 Wn. App. at 572-73; *Berry*, 103 Wn. App. at 323-24. In addition, the evidence in each of those cases showed that the defendant's asbestos-containing product was not the sole asbestos product in use at each respective shipyard, but merely one of many asbestos-containing products used. *Id.* The plaintiffs in those cases relied on circumstantial evidence alone to prove that the defendants' asbestos-containing products were present at their jobsites to make a *prima facie* case of exposure. *Id.*

In *Allen*, the only evidence of exposure was three sales records placing the defendant's asbestos-containing products at the shipyard. 138 Wn. App. at 568-69. Similarly, in *Berry*, the Court denied summary judgment where the plaintiff presented evidence that the defendant's asbestos-containing product was one of several at plaintiff's immense jobsite. 103 Wn. App. at 323-25. The evidence in *Berry* consisted of testimony by a shipyard purchaser who recalled that the defendant supplied some products to the shipyard when plaintiff worked there. *Id.* In *Lockwood*, the only evidence connecting the defendant's product to the plaintiff was testimony from other shipyard workers that the defendant had supplied some of its asbestos-containing cloth for a ship overhaul, and that the plaintiff had worked on a similar overhaul. 109 Wn.2d at 247.

In this case, Mr. Montaney has offered an even greater body of evidence placing JMM's asbestos-containing product at his jobsites. Specifically, Mr. Montaney testified that he personally ordered what he described as Johns-Manville A-C pipe from *only* Pacific Water Works Supply through the early-1990s. CP 130-32; CP 264; CP 375; CP 377-78. Likewise, up until the time he and his colleagues attended an asbestos safety class in 1990, Mr. Montaney testified that the district continued to use new A-C pipe for repairs. CP 132; CP 264; CP 375. The uncontroverted testimony in the record establishes that Pacific Water

Works continued to sell J-M A-C pipe through 1984. CP 402-03; CP 427-28. JMM's corporate representative testified that JMM sold Transite A-C Pipe beginning on January 1, 1983. CP 497-98; CP 504-05. Thus, it is reasonable to infer that at least some of the J-M A-C Pipe that Mr. Montaney personally purchased from Pacific Water Works was manufactured after December 1982 by JMM. Such circumstantial evidence is all that is required to withstand summary judgment.⁴

The Montaneys have presented more compelling evidence establishing Mr. Montaney's exposure to JMM's A-C pipe than the any of the plaintiffs in *Lockwood*, *Berry*, or *Allen*. Unlike in those cases, Mr. Montaney and his colleague, Mr. Hunkeler, both testified that Mr. Montaney worked with and around new J-M A-C Pipe during the years that product was exclusively manufactured and sold by JMM. CP 28-29; CP 130-31. *Compare Lockwood*, 109 Wn.2d at 244-45 (holding that there was sufficient evidence of exposure to the defendant's product even though the plaintiff did not personally handle the product and could not

⁴ In its Motion for Summary Judgment, JMM summarily asserted that plaintiffs had not offered sufficient evidence to raise an issue of fact regarding whether Mr. Montaney's exposure to JMM's product was a substantial factor in causing Mr. Montaney's illness. CP 6-7. However, the thrust of JMM's argument was that there is no evidence that Mr. Montaney worked "with or around a product supplied" by JMM. CP 8. Thus, based upon the trial court's dispositive ruling on that issue, Appellants confine their argument to the issue of exposure, but point out that all of the *Lockwood* factors weigh strongly in favor of submitting to a jury the question of whether asbestos from JMM's Transite A-C pipe was a proximate cause of Mr. Montaney's injury and death. *See Lockwood*, 109 Wn. 2d at 248-49.

even identify it); *Berry*, 103 Wn. App. at 323-24 (reversing grant of summary judgment in favor of defendant where plaintiff provided no testimony about exposures to defendant's product); *Allen*, 138 Wn. App. at 574-75 (reversing summary judgment even though plaintiff could not provide any evidence as to the manner or quantity of his exposure to the product in question).

V. CONCLUSION

A reasonable jury could find that JMM manufactured and sold A-C pipe to Pacific Water Works after December 31, 1982. Because Mr. Montaney testified that he continued to purchase new sections of J-M Pipe from Pacific Water Works through 1990, it is reasonable to infer that he was exposed to an asbestos product manufactured by JMM. Plaintiffs have therefore presented sufficient circumstantial evidence of Mr. Montaney's exposure to JMM's products to withstand summary judgment under firmly established Washington precedent.

DATED this 14th day of March, 2013.

Respectfully submitted,



Matthew P. Bergman, WSBA #20894
Chandler H. Udo, WSBA #40880
Kaitlin T. Cherf, WSBA #45241
BERGMAN DRAPER LANDENBURG, PLLC
614 First Avenue, Fourth Floor
Seattle, Washington 98104
Tel. (206) 957-9510
Attorneys for Appellants