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Court of Appeals No. 73127-1
King County Superior Court No. 14-2-21305-1 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WILLARD E. BARTEL and DAVID C. PEEBLES, Administrators for the Estate of PAUL S. MCCABE,

APPELLANTS,

v.

MATSON NAVIGATION COMPANY, INC., on its own behalf and as successor-in-interest to THE OCEANIC STEAMSHIP COMPANY, and OLYMPIC STEAMSHIP COMPANY, INC.

RESPONDENTS.

BRIEF OF RESPONDENT MATSON NAVIGATION COMPANY, INC.

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INTRODUCTION

This maritime asbestos action is barred by the three-year statute of limitations. There is no dispute that the Complaint was filed more than nine years after Decedent's mesothelioma diagnosis and more than eight years after his death. At the hearing before King County Superior Court Judge Bruce Heller on the motion that is the subject of this appeal, Plaintiffs conceded that in the absence of equitable relief the statute of limitations would bar this action.

Plaintiffs are not entitled to the extraordinary remedy of equitable tolling of the statute of limitations by reason of filing a 1998 lawsuit against Matson in federal court in Ohio – one of over 50,000 maritime asbestos suits and among more than 4,450 such suits against Matson in Ohio. As noted by Judge Heller below, that 1998 suit was filed in a forum where Plaintiffs' counsel **knew** there was no personal jurisdiction over Matson. By 1998, counsel had filed tens of thousands of suits in Ohio, against non-resident shipowners lacking jurisdictional contacts with Ohio, on a discredited "national contacts" theory of personal jurisdiction. The "national contacts" theory was rejected by the U.S. Supreme Court in 1987, and the Ohio federal court found in 1989 that Matson was not subject to personal jurisdiction in Ohio. Plaintiffs' disdain for

jurisdictional principles, their disregard of the Ohio court's explicit finding of no personal jurisdiction, and their delay in filing in a court of competent jurisdiction disqualifies them from invoking equity in their favor.

Plaintiffs rely in significant part on what amounts to a waiver argument—that by its conduct Matson waived its personal jurisdiction defense. However, that argument was decisively rejected not once, but ***three times***, by U.S. District Judge Eduardo Robreno, who presided over the federal asbestos MDL 875 in the Eastern District of Pennsylvania. "At oral argument [before Judge Heller], Plaintiffs' counsel acknowledged the preclusive effect of these decisions under collateral estoppel." CP 2069.

Plaintiffs now contend that Judge Heller confused the legal principals at issue—that he "mistakenly concluded" that the preclusion of Plaintiffs' waiver argument under collateral estoppel also precluded equitable relief. However, Plaintiffs omit material portions of his letter decision and quote selectively from the hearing transcript. The complete record establishes that Judge Heller fully considered Plaintiffs' request for equitable relief independent of the prior decisions regarding waiver, specifically Plaintiffs' argument that they held a reasonable belief that the original filing was proper despite Judge Robreno's decisions that as a matter of law that Matson never waived its jurisdictional defense:

> THE COURT: I understand your point. You're saying that whether or not it was reasonable for you to rely is different from whether or not the defendants waived.
>
> MR. HERRICK [Plaintiffs' counsel]: Correct.

RP 21:14-18.

Based on the record, Judge Heller found that the equities did not warrant tolling of the statute of limitations in this case—he found no support in the record for a finding that Plaintiffs held the requisite reasonable belief:

> [I]t is difficult to fathom how [p]laintiffs could have reasonably concluded that jurisdiction was proper in Ohio. There was no evidence that the Defendants had any contacts with Ohio, and the "national contacts" theory, which might arguably have been colorable at one time, had been unanimously rejected by the Supreme Court more than 20 years before this action was filed in Ohio.

Judge Heller decision to deny equitable relief and grant Matson's motion for summary judgment was reasonable, exercised on tenable grounds, and should be affirmed.

STATEMENT OF THE CASE

A. Statute of Limitations – The Complaint was Filed More than Three Years After Decedent's Diagnosis and Death

1. Mesothelioma Diagnosis (2005); Death (2006); This Action (2014)

Paul S. McCabe was diagnosed with mesothelioma on June 14, 2005. CP 436-40. He was a resident of Washington and died in

Washington on June 16, 2006. CP 442.

This action was filed on August 1, 2014, more than nine years after the mesothelioma diagnosis and more than eight years after Decedent's death. Plaintiffs conceded that, in the absence of equitable relief, the statute of limitations bars this action. RP 7:23-8:4.

2. Claim Accrued at Diagnosis in 2005

In 1995, the "Maritime Asbestosis Legal Clinic" Division of Jaques Admiralty Law Firm, obtained a report from a screening physician indicating results "consistent with a combined obstructive-restrictive disorder ... resulting from a parenchymal lung disease (*e.g.*, asbestosis)." CP 452.

In 1998, the Jaques firm filed an asbestos injury lawsuit for Mr. McCabe in the U.S. District Court for the Northern District of Ohio. CP 444-49.

Then, in 2005 Mr. McCabe was diagnosed with mesothelioma. CP 436-40. Mr. McCabe informed his health care provider "he is getting some money in a settlement for asbestosis [*sic*] exposure." CP 460.[1]

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[1] Matson disputes that McCabe was exposed to asbestos or asbestos-containing products aboard any of its vessels. Plaintiffs have cited no competent evidence of such exposure, merely their own Complaint. *See Appellant's Brief*, p. 3.

B. No Equitable Tolling of the Statute of Limitations – Decedent's Counsel Filed a Previous Suit in Ohio Even Though the Ohio Court Earlier Had Ruled that Matson Was Not Subject to Personal Jurisdiction There

1. The Ohio MARDOC and Federal Multidistrict Litigation (MDL)

U.S. District Judge Eduardo Robreno, the current federal asbestos MDL transferee judge, provided a concise overview of the federal maritime asbestos litigation docket (MARDOC) filed by the Jaques firm in the Northern District of Ohio:

> Beginning in the mid-1980's, the Jaques Admiralty Law Firm began filing cases in the Northern District of Ohio on behalf of merchant marines [*sic*] who were alleged to have been injured from exposure to asbestos-containing products located aboard commercial vessels. Named as defendants were manufacturers and suppliers of the accused products, and the shipowners themselves. Typically, each case named upwards of 100 defendants. Ultimately, by the year 2009, more than 50,000 cases had been filed involving millions of claims against hundreds of defendants.[2]
>
> The cases initially progressed in the Northern District of Ohio under the superintendencey of Judge Thomas Lambros. Because the claims fell within the admiralty jurisdiction of the court, they were administratively assigned to a maritime docket, titled "MARDOC." [Citation omitted.] In 1991, the cases were consolidated and transferred to the Eastern District of Pennsylvania as part of MDL 875[3] ...

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[2] According to the MDL court's Caseload Statistics, 55,989 MARDOC cases had been filed in the Northern District of Ohio by the end of 2012. *See* "MDL 875 Asbestos Products Liability Litigation Caseload Statistics, August 1, 2006 - December 31, 2012, Office of the Clerk of Court," available online at: http://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.dec2012.pdf .

[3] *See In Re Asbestos Prod. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991) (transferring all asbestos injury and death cases in federal courts nationwide for

In Re Asbestos Prod. Liab. Litig. (No. VI), 965 F. Supp. 2d 612, 614-615 (E.D. Pa. 2013) (Robreno, J.) (footnote omitted) (footnotes added).

Matson, one of more than 400 shipowner-defendants in the Ohio MARDOC litigation, was named in more than 4,450 MARDOC cases. CP 427.

2. The Rejection of Plaintiffs' "National Contacts" Theory

In June 1986, before defendants had been served with process in the more than 1,000 maritime asbestos cases filed in Ohio during the previous three months, the Jaques firm (dba "Maritime Asbestosis Legal Clinic") asserted that a "national contacts" theory of personal jurisdiction authorized their mass filings of asbestos cases in Ohio against non-resident defendants. Counsel contended that personal jurisdiction in federal question cases, such as Jones Act actions, focused only on the defendant's contacts with the United States as a whole, and that shipowners could be sued in Ohio (or any other State) even though they had no jurisdictional contacts whatsoever with the State. CP 2361-62.

On July 22, 1986, before U.S. District Judge Thomas Lambros, Leonard Jaques (plaintiffs' counsel) expounded his "national contacts" theory, admitting with regard to non-Great Lakes shipowners, "We are

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multidistrict, coordinated pretrial proceedings in the Eastern District of Pennsylvania, including later-filed cases).

assuming they don't do any business in the State of Ohio whatsoever." CP 2393. Even as to shipowners without Ohio contacts, Mr. Jaques – citing a hypothetical defendant that operated tugs only around Morgan City, Louisiana – stated, "[T]here is not going to be any question in my opinion as to jurisdiction," only questions as to venue. CP 2391.

On August 15, 1986, the Jaques Firm reiterated its theory that shipowners could be sued in Ohio for the seamen's cases even though the shipowners had no jurisdictional contacts with Ohio. CP 2457-78.

In 1987, a unanimous U.S. Supreme Court agreed with the 1986 *en banc* Fifth Circuit Court of Appeals that, in the absence of a statute authorizing nationwide service of process, federal courts cannot assert personal jurisdiction in federal question cases over a defendant who cannot be reached by the state's long-arm statute. *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), *aff'g Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986). *Omni Capital* directly rejected the "national contacts" theory on which the Jaques Firm relied for filing suit in Ohio against non-resident shipowners.

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3. In 1989, the Ohio Federal Court Held There is No Personal Jurisdiction In Ohio Over More than 100 Shipowner Defendants, Including Matson; on April 14, 2014, the MDL Court Dismissed Plaintiffs' Suit

From 1988 through 1989, more than 100 shipowner defendants filed personal jurisdiction motions in their MARDOC cases. Matson, a non-resident of Ohio, filed a personal jurisdiction motion on May 30, 1989. CP 2751-60.

Plaintiffs' counsel filed a single opposition on or about June 19, 1989. CP 2480-97. Plaintiffs' counsel again relied on the discredited "national contacts" theory without acknowledging that the Supreme Court had rejected that theory in *Omni Capital*. CP 2482-89.

On October 31, 1989, the judge presiding over the Ohio MARDOC litigation addressed Plaintiffs' "national contacts" theory and the shipowners' numerous personal jurisdiction motions. CP 2499-2620. In the presence of Leonard Jaques of the Jaques firm (CP 2554, 2566-69, and 2572) Judge Lambros summarily rejected Mr. Jaques' "national contacts" theory and found that personal jurisdiction was lacking over Matson and more than 100 additional shipowner defendants. CP 2554-58; 2556. Instead of dismissing the defendants for lack of personal jurisdiction, Judge Lambros said he was going to transfer cases to other districts – but never did so.

On November 21, 1989, Judge Lambros re-iterated his ruling that there was no personal jurisdiction, and sought from Plaintiffs' counsel a list of jurisdictions **with** personal jurisdiction. CP 882. The next day, he issued an order charging Plaintiffs' counsel with providing a factual basis to support personal jurisdiction in the transferee courts. CP 896. On December 29, 1989, Judge Lambros, by order, identified those defendants over whom the Court did not have jurisdiction. This included Matson, CP 901 and 905, and the Order even identifies Washington as a proper jurisdiction. CP 907. Yet, Plaintiffs did nothing but persist in filing lawsuits in a court known to lack jurisdiction.

Even after Judge Lambros found on October 31, 1989, that Matson was not subject to personal jurisdiction in Ohio, the Jaques firm continued to file 4,148 additional cases against Matson in Ohio. CP 428. Further, despite the judicial finding of no personal jurisdiction over large numbers of shipowners, the Jaques firm filed as many as 50,000 additional maritime asbestos cases against shipowners in Ohio after Oct. 31, 1989. *In Re Asbestos Prod. Liab. Litig. (No. VI), supra*, 965 F. Supp. 2d at 615.

With the creation of the federal asbestos MDL 875 in July 1991, all pending MARDOC cases not already in trial were transferred to the Eastern District of Pennsylvania; all later-filed cases also were ordered to be transferred as "tag-along" cases. *In Re Asbestos Prod. Liab. Litig. (No.*

VI), *supra*, 771 F. Supp. at 424.

In a February 8, 1995, then MDL Judge Charles Weiner summarily denied all pending motions to dismiss "without prejudice and with leave to renew at the time of trial" and prohibited the filing of additional such motions. CP 2622.

In 1996, after repeatedly expressing dissatisfaction with Plaintiffs' counsel's refusal to comply with its orders and produce medical information to defendants, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 239863, *2 (E.D. Pa. May 2, 1996) at *1-2 and 4, the Court announced it was creating an "administrative device" which "created administrative vehicles to hold in abeyance these **asymptomatic cases** until counsel finds that the plaintiff is actually suffering from an impairment. Before an action is activated, certain criteria must be met", *id.* at *4 (emphasis added).

Any inference that Judge Weiner's 1996 order somehow tolled the statute of limitations is incorrect.[4] The court's reference to tolling flows from its recognition that "many plaintiffs initiated litigation **without injury, but rather with knowledge of exposure**. The reasoning supporting this litigation has been the concern for the running of tolling

[4] No federal judge has such authority. *See e.g. Lee v. Cook County, Ill.*, 635 F.3d 969, 972 (7th Cir. 2011).

statutes which may begin when the party becomes aware of an injury." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 239863, *2 (E.D. Pa. May 2, 1996) (emphasis added). Thus, the "tolling of the statute of limitations" referenced pertained to cases filed for **asymptomatic** plaintiffs who had not yet developed any impairment; it was not a wholesale judicial suspension of Congressional statutes of limitations for Jones Act and general maritime law asbestos claims.

In 1998, the Jaques firm filed an asbestos case on behalf of Mr. McCabe in the N.D. of Ohio against Matson, among other defendants. CP 444-49. This filing occurred roughly nine years after Judge Lambros had informed the Jaques firm in 1989 that Matson and many other shipowners were not subject to personal jurisdiction in Ohio and 11 years after the U.S. Supreme Court's rejection in 1987 of the "national contacts" theory in *Omni Capital, supra*. Plaintiffs do not dispute that they have known since October 31, 1989, that personal jurisdiction did not exist in Ohio. *Appellant's Brief*, p. 5. Nor did the Jaques Firm (Mr. McCabe's attorneys) file a timely new suit in a forum where Matson would have been subject to personal jurisdiction after he was diagnosed with mesothelioma in 2005 and died in 2006.

In 2011, John Herrick of the Motley Rice firm – counsel for plaintiffs in this action – formally entered an appearance as co-counsel,

with the Jaques firm, for the plaintiffs in the federal MARDOC cases. CP 2625.

Most recently, by way of three Orders issued in 2013 and 2014, the MDL court granted over 10,000 personal jurisdiction dismissals of hundreds of shipowners, including Matson, in cases filed by the Jaques firm in Ohio. *In Re Asbestos Prod. Liab. Litig. (No. VI)*, 965 F. Supp. 2d 612 (E.D. Pa. 2013); *In Re Asbestos Prod. Liab. Litig. (No. VI)*, MDL Docket No. 875, 02-md-875, 2014 WL 944227 (E.D. Pa. March 11, 2014); CP 2627-2745 (*In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL Docket No. 875, 02-md-875, 02-md-875, doc. No. 4286 (E.D. Pa. April 14, 2014))

Matson was dismissed for lack of personal jurisdiction from Mr. McCabe's Ohio case on April 14, 2014. CP 2656.

C. MDL Judge Robreno Ruled that Matson and the Other Shipowner Defendants had not Waived or Forfeited their Personal Jurisdiction Defenses.

Plaintiffs contend that Matson (among other shipowners) waived its affirmative defenses to personal jurisdiction by means of its conduct during the course of Ohio asbestos litigation. CP 4-5; *Appellant's Brief*, pp. 7-10. That argument was decisively rejected not just once, but ***three times***, by U.S. District Judge Eduardo Robreno, who presided over the federal asbestos MDL 875 in the Eastern District of Pennsylvania.

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In the published opinion in *In re Asbestos Products Liability Litigation (No. VI)*, 965 F. Supp. 2d 612 (E.D. Pa. 2013), Judge Robreno undertook to "disentangle the parties from a web of procedural knots that have thwarted the progress of this litigation." *Id.* at 615. The opinion addressed 418 motions filed by shipowner defendants to dismiss for lack of personal jurisdiction, which called on Judge Robreno to adjudicate what he identified as "important threshold issues. One, does the Court have personal jurisdiction over the defendants?"

After reciting the tangled procedural history of the previous Ohio federal asbestos litigation, Judge Robreno summarized plaintiffs' main argument in opposition to defendants' motions to dismiss – namely that "these defendants waived or forfeited their personal jurisdiction defenses when they filed answers based on Judge Lambros' Orders" in the Ohio cases. *Id.* at 618. In addressing plaintiffs' argument, Judge Robreno first analyzed Ohio's long-arm jurisprudence and concluded that personal jurisdiction over the movants was lacking. *Id.* at 616-20. Then, he decisively rejected plaintiffs' waiver arguments holding the defendants at all relevant times preserved their defense of lack of personal jurisdiction because (a) they did not fail to timely raise the defense in the Ohio litigation; and (b) their participation in the Ohio litigation was not of "their own volition," but at order of the Ohio district court, even after they raised

their jurisdictional defense. *Id.* at 621.[5] Accordingly, after a thorough analysis, Judge Robreno granted the motions to dismiss, "given that there is no personal jurisdiction over the defendants." *Id.* at 623. The Order and published decision resulted in the dismissal of hundreds of cases classified as "Group 1" on the court's massive asbestos docket. 965 F. Supp. 2d at 615 n.2.

In connection with nearly 6,000 additional personal jurisdiction motions in Groups 4, 5, 6 and 7 cases, plaintiffs claimed they had supplemental "'new' evidence that allegedly show[ed] that defendants waived the defense of lack of personal jurisdiction either explicitly, or through their conduct throughout the litigation." *In re Asbestos Prods. Liab. Litig. (No. VI) (Jacobs v. A-C Prod. Liab. Trust)*, 2014 WL 944227, *2 (E.D. Pa. March 11, 2014). Those motions were again fully briefed, and were argued at an oral hearing. *Id.* at *1 n.2. After considering the "new" evidence as to the shipowner defendants' purported waiver or forfeiture of their defense of lack of personal jurisdiction, the court again found no waiver: "Viewed together, the Court is not persuaded that

[5] Judge Robreno ruled that "[e]ssentially, defendants are now, for the first time since 1989, being given the chance to argue the issue of personal jurisdiction before the Court." 965 F. Supp. 2d at 621. And it was "apparent from the record that despite filing answers [in the Ohio asbestos litigation], defendants did not intend to waive the defense," because they filed answers "under protest" that identified the personal jurisdiction defense in multiple locations, pending interlocutory review of Judge Lambros' order. *Id.* at 622. Under these circumstances, "defendants preserved and did not waive the [personal jurisdiction] defense." *Id.*

[plaintiffs'] exhibits show by a preponderance of the evidence a universal waiver [of personal jurisdiction] by all defendants, in all cases, in perpetuity." *Id.* at *5. The court again held that it lacked personal jurisdiction, this time granting nearly 6,000 additional personal jurisdiction dismissals. *See id.* at Exhibit A (listing dismissals).

Finally, Judge Robreno issued a third Order on April 14, 2014, granting an additional 4,400 motions to dismiss on the same bases as his previous two orders (again rejecting plaintiffs' "new" evidence as to purported waiver of the personal jurisdiction defense). CP 2627-2745 (*In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL Docket No. 875, 02-md-875, 02-md-875, doc. No. 4286 (E.D. Pa. April 14, 2014)), at 2629. That Order had the effect of dismissing the claims of Plaintiffs claims against Matson with respect to Decedent here. CP 2656.

Nevertheless, Plaintiffs continue to recycle the arguments and evidence already rejected by Judge Robreno **three times**. In *In re Asbestos Prods. Liab. Litig. (No. VI) (Jacobs v. A-C Prod. Liab. Trust)*, 2014 WL 944227 (E.D. Pa. March 11, 2014), Plaintiffs submitted as "new" evidence answers filed by defendants purportedly waiving personal jurisdiction, which evidence and argument had previously been rejected by that court. *Id.* at *2. They introduced the same rejected evidence and argument before the trial court below, CP 556, and recycle it here. *See*

Appellant's Brief, pp. 6-7. In fact, the answer submitted by Plaintiffs proves that Matson did **not** waive its personal jurisdiction defense. CP 983 (asserting defense of lack of personal jurisdiction). Plaintiffs cite statements by Thompson Hine in opposition to Plaintiffs' Motion to Transfer in Toto, and in opposition to a transfer to Michigan. *See Appellant's Brief*, pp. 7-9. The identical statements were rejected by Judge Robreno. *In re Asbestos Prods. Liab. Litig. (No. VI)*, *supra.*, 2014 WL 944227, *3 and *5. Plaintiffs again try to introduce the inadmissible October 22, 2013 declaration of Hartley Martyn. *Appellant's Brief*, pp. 10-11.[6] Not only did Judge Robreno reject this declaration, he was troubled by the ethical implications of a Special Master advocating for one of the parties. *In re Asbestos Prods. Liab. Litig. (No. VI)*, *supra.*, 2014 WL 944227, *4 and 6 fn. 14. Plaintiffs cited then as now the opposition to MDL consolidation. *Id.* at *3-4; *Appellant's Brief*, pp. 11-12. Lastly, Plaintiffs cited then as now the purported failure to seek dismissal upon remand to Ohio and actual litigation in Ohio. *In re Asbestos Prods. Liab. Litig. (No. VI)*, *supra.*, 2014 WL 944227, *4; *Appellant's Brief*, pp. 12-13. As Judge Robreno noted, the "new" evidence at most showed waiver in only 16 cases, long pre-dating the instant case, and could not be imputed

[6] Matson objects (again) to the declaration of Hartley Martyn as inadmissible hearsay, lacking foundation, so vague as to be meaningless, and contrary to the record. CP 1494-95.

to "other plaintiffs' cases." *Id.* at *5.[7]

1. The Facts Fully Support the MDL Court's Conclusion that Matson Consistently Asserted its Defense Based on Lack of Personal Jurisdiction

The MDL court's findings that Matson consistently asserted its jurisdictional defense at every permitted juncture, during almost 25 years of litigation, are fully supported by the following timeline:

5/30/1989	Matson filed its personal jurisdiction motion in the Ohio federal district court MARDOC litigation as soon as that court permitted such motions. CP 2751-60
10/31/1989	Judge Lambros found that personal jurisdiction was lacking over Matson and more than 100 other shipowners in Ohio MARDOC litigation. CP 2499-2620
1/5/1990	Matson (among many other defendants) filed Master Answer No. 1, asserting a defense of lack of personal jurisdiction. CP 2764; 2762-2901
9/22/2011 and 9/26/2011	In the federal MDL, counsel for Shipowner Defendants (including Matson) notified Magistrate Judge and all counsel (including Plaintiffs' counsel here) that Shipowner Defendants want to file personal jurisdiction motions as "preliminary motions" before fact discovery is undertaken. (Filed as Doc. No. 570, 10/11/2011, on the main MDL MARDOC docket.) CP 46 - 399
11/15/2012	Matson filed its personal jurisdiction motion at the first opportunity permitted by the Court, in all cases against it. (Filed as Doc. No.1909, 11/15/2012, on the main MDL MARDOC docket.) CP 2159-2352

[7] No litigation choice by a defendant regarding defenses in one case binds that same defendant in other cases. *See Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835, 836 (9th Cir. 2005) ("we hold that defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties"; held, defendants "did not consent to jurisdiction in this action by waiving their personal jurisdiction objection in" a different prior action).

8/26/2013	Judge Robreno, presiding over the federal MDL, issued his first personal jurisdiction memorandum and order, finding no waiver by shipowners of personal jurisdiction and granting 418 motions to dismiss for lack of personal jurisdiction. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 965 F. Supp. 2d 612 (E.D. Pa. 2013).
3/11/2014	Judge Robreno issued his second personal jurisdiction memorandum and order, rejecting alleged "new evidence" that shipowner defendants waived their defense of lack of personal jurisdiction, and granting an additional 5,974 motions to dismiss. *In re Asbestos Prods. Liab. Litig. (No. VI) (Jacobs v. A-C Prod. Liab. Trust)*, 2014 WL 944227, *5 (E.D. Pa. March 11, 2014).
4/14/2014	Judge Robreno issued his third personal jurisdiction order on the same basis as his 2013 order and *Jacobs*, above, again rejecting the "new evidence" of waiver and granting an additional 4,400 motions to dismiss for lack of personal jurisdiction, including as to these Plaintiffs' claims on behalf of decedent against Matson. CP 2627-2745; 2656 (*In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL Docket No. 875, 02-md-875, 02-md-875, doc. No. 4286 (E.D. Pa. April 14, 2014)).

Thus, the waiver issue has already been expressly and vigorously litigated in the Eastern District of Pennsylvania and decided adversely to Plaintiffs.

D. Judge Heller Did Not Abuse His Discretion; Judge Heller Correctly Concluded, Based on the Record, that the Equities Did Not Warrant Tolling of the Statute of Limitations in this Case

Plaintiffs initiated this action in King County Superior Court on August 1, 2014. CP 1-16. On November 14, 2014, Matson moved for summary judgment, contending that Plaintiffs' action was barred by the

three-year statute of limitations, that they were not entitled to the extraordinary remedy of equitable tolling because they knowingly filed in a court lacking jurisdiction, and that they were collaterally estopped from arguing that Matson had waived its jurisdictional defense. CP 400-423. King County Superior Court Judge Bruce Heller heard argument on Matson's motion on January 9, 2015. RP 1-32.

At oral argument, Plaintiffs promptly conceded that, in the absence of equitable tolling, the statute of limitations would bar this action:

> THE COURT: That's conceded, isn't it, counsel --
>
> . . .
>
> THE COURT: -- that the statute of limitations would bar this action unless equitable estoppel [tolling] applies?
>
> MR. HERRICK: Correct, Your Honor.

RP 7:23-8:4.

Plaintiffs also conceded that defendants did not waive personal jurisdiction, that Judge Robreno's decision on personal jurisdiction was correct, and that Plaintiffs were precluded under the doctrine of collateral estoppel from re-litigating the issue of waiver. "At oral argument, Plaintiffs' counsel acknowledged the preclusive effect of these decisions under collateral estoppel." CP 2069; RP 19:9-16; 25:15-16 ("I'm not arguing that Judge Robreno made the wrong ruling on personal jurisdiction.").

Instead, Plaintiffs attempted to persuade Judge Heller they were entitled to equitable relief because they reasonably believed filing in Ohio was proper, despite the evidence they knew there were no jurisdictional contacts in Ohio, that their national contacts theory had been rejected, that Judge Robreno had **three times** ruled Matson never waived its jurisdictional defense, and that Plaintiffs had taken no action to preserve their right of action. When Judge Heller disagreed, Plaintiffs appealed.

Plaintiffs contend on appeal that Judge Heller never properly considered equitable tolling because he "found the issue was precluded by Judge Robreno's ruling on waiver..." *Appellant's Brief*, p. 16. This contention finds no support in the record.

Plaintiffs omit the material portion of the decision below and selectively quote certain portions thus giving a false impression. The full record establishes that Judge Heller concluded the **evidence**, **not** Judge Robreno's decisions, precluded a finding that Plaintiffs held a reasonable belief jurisdiction was proper Ohio when they originally filed there in 1998, and consequently they could not support their request for equitable relief:

> Suffice it to say, by the time Mr. McCabe filed his action in 1998, it was clear that neither of the defendants had any contacts with the Northern District of Ohio and that there was no jurisdictional basis for filing there.

CP 2068

> ...it is difficult to fathom how [p]laintiffs could have reasonably concluded that jurisdiction was proper in Ohio. **There was no evidence that the Defendants had any contacts with Ohio, and the "national contacts" theory, which might arguably have been colorable at one time, had been unanimously rejected by the Supreme Court more than 20 years before this action was filed in Ohio.**

CP 2069-70 (Emphasis added).

Plaintiffs omitted from their Appellant's Brief the section in bold above, in which Judge Heller cites Plaintiffs' knowledge that Matson did not have any jurisdictional contacts with Ohio and the rejection of their national contacts theory before Decedent's first action as the bases for his decision. *See Appellant's Brief*, p. 16.

The record establishes that Judge Heller fully considered Plaintiffs' request for equitable relief independent of the prior decisions regarding waiver, specifically Plaintiffs' argument that they held a reasonable belief that the original filing was proper despite Judge Robreno's decisions that as a matter of law that Matson never waived its jurisdictional defense:

> THE COURT: I understand your point. You're saying that whether or not it was reasonable for you to rely is different from whether or not the defendants waived.
>
> MR. HERRICK [counsel for Bartel and Peebles]: Correct.

RP 21:14-18.

ARGUMENT

A. Standard of Review

The applicable standard of review is not a straight forward *de novo* review as Plaintiffs suggest. At issue here is the trial court's exercise of its equitable powers. Washington appellate courts have historically reviewed a lower court's conclusions concerning the equities for abuse of discretion. *E.g.*, *Sac Downtown Ltd. Partn. v. Kahn*, 123 Wn.2d 197, 205-6, 867 P.2d 605 (1994) (*en banc*) ("On equitable matters, a court has broad discretion, which will be disturbed on appeal only if the trial court abused its discretion.") More recent decisions have muddled the standard somewhat, but it remains clear that appellate courts defer to the trial court's factual findings. *E.g., Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 375, 113 P.3d 463 (2005) ("Applying these principles here, we give deference to the trial court's factual determinations but review the trial courts grant of equitable relief de novo.")

Here, Judge Heller's findings and decision to deny equitable relief were reasonable, exercised on tenable grounds, and based on the record: "... by the time Mr. McCabe filed his action in 1998, it was clear that neither of the defendants had any contacts with the Northern District of Ohio and that there was no jurisdictional basis for filing there." CP 2068. There was no mistake. Plaintiffs **intentionally** filed in a court they knew

had no personal jurisdiction over Matson, and took no action whatsoever to preserve their right of action by timely filing in a court of competent jurisdiction in 1998 or after Decedent's mesothelioma diagnosis in 2005 and death in 2006. Judge Heller's decision should be affirmed.

B. Plaintiffs' Claims are Barred by the 3-Year Statute of Limitations

Plaintiffs assert federal claims under the Jones Act and general maritime law doctrine of unseaworthiness. Although state courts have concurrent jurisdiction with federal courts to try actions under the Jones Act, the governing law is federal, not state law. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942).

1. The Federal Three-Year Statute of Limitations

The Jones Act (46 U.S.C. § 30104(a)) incorporates and makes applicable to seamen the substantive recovery provisions of the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.*). *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 33 (1990). Actions under the Jones Act are subject to the FELA three-year statute of limitations, 45 U.S.C. § 56.[8] Actions for maritime torts, including plaintiffs' unseaworthiness claim, are subject to a substantially identical three-year statute of limitations,

[8] In pertinent part, 45 U.S.C. § 56 states, "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

46 U.S.C. § 30106.[9]

2. Accrual of Occupational Disease Claims

The federal MDL judge currently handling the many thousands of MARDOC cases explained that, for Jones Act/FELA occupational disease cases:

> The statute of limitations begins to run when "a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." *Tolston* [*v. National R.R. Passenger Corp.*], 102 F.3d [863] at 865 [7th Cir. 1996] (citing *Fries* [*v. Chicago & Northwestern Transp. Co.*], 909 F.2d [1092] at 1095 [7th Cir. 1990]). This is an objective inquiry and imposes an affirmative duty on the plaintiff to investigate what caused his or her injury.

Robinson v. Illinois Central R.R. Co., No. 2:08-89339, 2011 WL 4907401, n.1 (E.D. Pa., Feb. 14, 2011) (Robreno, J.).

It makes no difference if the plaintiff did not ask anyone about the cause of the injury, and therefore, did not learn until years later that it might be work-related, because the plaintiff has a duty to investigate the source of a known injury. *Id.*

3. When an Action is Filed More than Three Years After Death, Both the Survival and Wrongful Death Claims are Barred by the Statute of Limitations

FELA creates two separate causes of action for an injury resulting

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[9] "Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose." (46 U.S.C. § 30106)

in the death of a railroad worker (or seaman), generally referred to as "wrongful death" (45 U.S.C. § 51) and "survival" (45 U.S.C. § 59). The two claims are "quite distinct, no part of either being embraced in the other." *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347 (1937) (Jones Act case). The survival action compensates for the personal injuries and losses sustained by the employee before his death,[10] while the wrongful death action compensates the statutory beneficiaries for their own pecuniary losses sustained as a result of the death. *Id.*

When there is no question that the decedent's claim accrued prior to his death, the court need not engage in a lengthy analysis of proper accrual date for the survival claim; if the complaint is filed more than three years after decedent's death, both the survival claim and the wrongful death claim are barred by the statute of limitations. Memorandum Opinion and Order in *Bartel*. CP 2747-49 *(Estate of Charles Welch v. Foster Wheeler Co.*, No. 1:94cv11801 (N.D. Ohio July 16, 2009) (Adams, J.) at 2749.)

4. This Action was Filed More than Three Years After Decedent's Claims Accrued and After His Death

In this case, the attached medical records demonstrate beyond

[10] A survival action preserves the causes of action that a person could have maintained if he or she had not died. *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984).

dispute that Decedent was aware of the diagnosis in 2005 and that he had a past history of exposure to asbestos. CP 436-40; CP 451-63. He had been represented by the Maritime Asbestosis Legal Clinic since at least 1995, filed an asbestos personal injury action in 1998, was diagnosed with Mesothelioma in June 2005, and then informed his provider he was expecting a settlement for asbestosis exposure. Thus, the survival claim accrued prior to his death, and since the complaint in this case was filed more than three years after Decedent's death in 2006, both the survival and the wrongful death claims are barred by the statute of limitations. *Bartel (Estate of Charles Welch), supra.* Indeed, Plaintiffs conceded that, in the absence of equitable relief, the statute of limitations would bar this action. RP 7:23-8:4.

C. PLAINTIFFS ARE NOT ENTITLED TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS

1. Requirements for Equitable Tolling

Equitable tolling of a federal statute of limitations is governed by federal law, *Chico-Velez v. Roche Products, Inc.*, 139 F.3d 56, 58 n.3 (1st Cir. 1998), and equitable tolling of a federal statute of limitations is ***extraordinary*** relief that is to be applied only sparingly, as reflected by the "extraordinary circumstances" requirement. *Waldon-Ramsey v. Pacholke*,

556 F.3d 1008, 1011 (9th Cir. 2009).[11] Equitable tolling is unavailable in most cases. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (stating "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule."). An "external force must cause the untimeliness, rather than ... merely 'oversight, miscalculation or negligence on [the petitioner's] part.'" *Waldon-Ramsey*, 556 F.3d at 1011 (*quoting Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008)). "Equitable tolling 'focuses on whether there was excusable delay by the plaintiff' and 'may be applied if, *despite all due diligence*, a plaintiff is unable to obtain vital information bearing on the existence of his claim.'" *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1120 (9th Cir. 2006) (holding that absolute lack of effort by seaman defeated his equitable tolling claim) (*quoting Santa Maria v. Pac. Bell*,

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[11] Although federal law applies to equitable tolling of a federal statute of limitations, Washington law is in accord with federal law. *See, e.g., Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791, 797 (1998) ("the predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff") (*citing Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 739–40, 888 P.2d 161 (1995)); *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761, 183 P.3d 1127, 1130 (2008) ("Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect.") (*review denied* 165 Wn.2d 1020, 203 P.3d 378 (2009)); *In re Carter*, 172 Wn.2d 917, 929, 263 P.3d 1241, 1247-48 (2011) ("[A]ny application of equitable tolling ... must only be done in the narrowest of circumstances and where justice requires."); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362, 1364 (1991) (holding equitable tolling was unavailable in the absence of bad faith, deception or false assurance and where the plaintiff unreasonably failed to act for more than three years); *Finkelstein*, 76 Wn. App. at 739–40 (indicating equitable tolling unavailable where plaintiff was lawyer and delayed taking action for five years).

202 F.3d 1170, 1178 (9th Cir. 2000)). The Supreme Court has recognized that courts are generally "much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96 (1990) (holding equitable tolling unavailable for "a garden variety claim of excusable neglect").

Generally, equitable tolling of a federal statute of limitations has been recognized in only three limited circumstances: (1) where the defendant actively misleads the plaintiffs regarding the cause of action, or (2) where extraordinary circumstances beyond the plaintiff's control prevents him from timely filing the action, *Seattle Audubon Soc. v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991); or (3) where the plaintiff has raised the precise claim at issue ***in a court of competent jurisdiction*** but ***mistakenly*** has done so in a court without proper venue, *Burnett v. New York Cent. R. Co.*, 380 U.S. 424 (1965). Even then a plaintiff must still prove that he exercised diligence in pursuing his rights. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way"); *see also Huseman*, 471 F.3d at 1120 (holding that absolute lack of effort by Jones Act seaman defeated his

equitable tolling claim).

2. Plaintiffs Are Not Entitled to Equitable Tolling of the Statute of Limitations

Here, Plaintiffs do not satisfy any of the three circumstances for which equitable tolling is recognized, and Plaintiffs have not diligently pursued their rights.

First, Matson never actively misled Plaintiffs. In 1989 – ***nine years before*** the Complaint was filed in Ohio – Matson filed a motion to dismiss for lack of personal jurisdiction in Ohio. CP 2751-60. *See also In Re Asbestos Prod. Liab. Litig. (No. VI), supra*, 965 F. Supp. 2d at 616 (noting that early in the MARDOC litigation and while the cases were pending in the Northern District of Ohio, the defendants raised the issue of lack of personal jurisdiction). At all times, Matson maintained its position that the Ohio court lacked personal jurisdiction. *Id.,* 965 F. Supp. 2d at 621-622; *see Matson's 1989 personal jurisdiction motion* (CP 2751-60); *see also In Re Asbestos Prod. Liab. Litig. (No. VI)*, No. MDL Docket No. 875, 02-md-875, 2014 WL 944227, *2 and *5 (E.D. Pa. Mar. 11, 2014) (noting that the shipowner defendants consistently raised the defense of lack of personal jurisdiction throughout the litigation).

Second, no extraordinary circumstances beyond Plaintiffs' control prevented them from timely filing their action in a forum with personal

jurisdiction over Matson. In fact, the 1989 rulings by Judge Lambros suggested a transfer to Washington State. Certainly the courts are not responsible for any alleged "delay" in Plaintiffs' failing to timely pursue their action in Washington State. Instead, Plaintiffs **chose** to sue where there was no personal jurisdiction. Plaintiffs can make no legitimate claim that they reasonably believed the Ohio court had personal jurisdiction over Matson. In 1987 – ***11 years before*** Plaintiffs filed their Ohio Complaint– the U.S. Supreme Court decided *Omni Capital*, rejecting the "national contacts" theory of personal jurisdiction. And in 1989 – ***nine years before*** Plaintiffs filed their Ohio Complaint – Judge Lambros held that the Ohio court had no personal jurisdiction over Matson in the Jaques firm cases. CP 2554-58. Indeed, in dismissing hundreds of complaints in the federal MDL for lack of personal jurisdiction, Judge Robreno noted that "Plaintiffs never could present support for [their national contacts] theory in case law, statutes or otherwise." *In Re Asbestos Prod. Liab. Litig. (No. VI)*, 965 F. Supp. 2d at 617 n.6. Therefore, there could have been no belief – let alone a reasonable one – that the Ohio court had personal jurisdiction over Matson in 1998 when the Complaint was filed in Ohio. Moreover, since courts universally hold that even a reasonable mistake in interpreting the law is not an extraordinary circumstance warranting

equitable tolling,[12] an *intentional* disregard for the law most assuredly is not. Nor did Plaintiffs timely file a new action in a court having personal jurisdiction over Matson after Decedent's mesothelioma diagnosis in 2005 and death in 2006.

Third, Plaintiffs' Ohio action was not filed in a court of competent jurisdiction but rather filed **intentionally** in a court known to have no personal jurisdiction over Matson. Notably, neither the U.S. Supreme Court nor any U.S. Court of Appeals has held that a federal statute of limitations can be equitably tolled by the filing of a complaint in a court that lacked personal jurisdiction over the defendant.[13] But numerous federal appellate and district courts *have held* that where, as here, a Jones Act plaintiff files an action in a court without any reasonable expectation

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[12] *Irwin,* 498 U.S. at 96 (rejecting equitable tolling where attorney failed to timely act to preserve remedy); *Gayle v. UPS, Inc.,* 401 F.3d 222, 227 (4th Cir. 2005) ("To accept [attorney] mistakes as a ground for equitable tolling, however, would over time consign filing deadlines and limitations periods to advisory status."); *Miranda*, 292 F.3d at 1068 (lawyer's miscalculation of limitations period not an extraordinary circumstance warranting equitable tolling); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (same); *Dominguez v. Hatch*, 440 Fed. Appx. 624, 625-26 (10th Cir. 2011) (same); *Merritt v. Blaine*, 326 F.3d 157, 170 (3d Cir. 2003) (same).

[13] U.S. Courts of Appeals confronted with the issue so far have declined to hold that equitable tolling can be applied where a previous action was filed in a court that lacked personal jurisdiction. *See Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 267 (5th Cir. 1991) ("This Circuit has addressed, but not yet resolved, the issue of whether the Jones Act statute of limitations may be tolled by pursuit of a Jones Act claim that was denied on jurisdictional grounds."); *Covey v. Arkansas River Co.*, 865 F.2d 660 (5th Cir. 1989) ("This Court has not yet decided the applicability of equitable tolling to Jones Act cases which are dismissed for want of jurisdiction and refiled subsequent to the limitations period."); *Weathers v. Bean Dredging Corp.*, 26 F.3d 70 (8th Cir. 1994) ("We also decline to decide the question of whether or not equitable tolling should be allowed where the prior dismissal was on jurisdictional grounds.").

of personal jurisdiction over the defendant, equitable tolling is *unavailable* due to the plaintiff's failure to diligently pursue his rights. *See e.g., Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) (Jones Act statute of limitations not equitably tolled by filing complaints in courts lacking personal jurisdiction; "equity is not intended for those who sleep on their rights", and "failure to determine which court had proper jurisdiction . . . negates any serious diligent intention on her part to pursue available legal remedies"); *Weathers v. Bean Dredging Corp.,* 26 F.3d 70, 73 (8th Cir. 1994) (Jones Act statute of limitations not equitably tolled during pendency in court with no personal jurisdiction over defendant); *Valentin v. Ocean Ships, Inc.*, 38 F. Supp. 2d 511, 514 (S.D. Tex. 1999) (same); *Tobey v. Atwood Oceanics, Inc.*, No. H-10-0154, 2010 WL 3447639, *3 (S.D. Tex. Aug. 30, 2010) (same); *Reichert v. Mon River Towing, Inc.*, No. 2:09-cv-1493, 2010 WL 419435, *3 (W.D. Pa. Jan. 29, 2010) (same).

Valentin v. Ocean Ships, Inc., supra, is particularly instructive. The defendant asserted lack of personal jurisdiction as an affirmative defense, and after three years, moved to dismiss for lack of personal jurisdiction, which the court granted. *Id.* at 512. The plaintiff re-filed in the U.S. District Court for the Southern District of Texas. The defendant moved for summary judgment on the ground that the lawsuit was barred by the statute of limitations. *Id.* at 512-513. The Court granted the

motion, rejecting the plaintiff's argument that the statute of limitations was equitably tolled by his prior timely filing in New York. *Id.* at 514. The Court noted it has not been decided whether equitable tolling applies to Jones Act cases dismissed for lack of personal jurisdiction. *Id.* at 513. However, "in an abundance of caution," the Court considered and then rejected the plaintiff's argument for tolling, finding he could not establish due diligence in pursuing his rights. *Id.* The Court reasoned:

> This case offers numerous examples of Plaintiff's lack of diligence in prosecuting his action. First, Plaintiff failed to act on the possibility that jurisdiction in New York was improper during the first three years of that lawsuit. That omission is particularly vexing as Defendant raised lack of personal jurisdiction in its Answer, putting Plaintiff on notice that jurisdiction might not be proper. ***More troubling is the fact that in a similar, earlier case filed in New York by Plaintiff's counsel against this Defendant, the court there held that Defendant was not subject to personal jurisdiction.***

Id. (emphasis added). *See also Reichert,* 2010 WL 419435 (no equitable tolling of Jones Act statute of limitations; prior filing in Ohio not reasonable when no connection to parties or accident); *accord Pecoraro v. Diocese of Rapid City*, 435 F.3d 870, 875 (8th Cir. 2006) (applying South Dakota law) (equitable tolling not available where prior suit brought in a state clearly lacking minimum contacts with defendant and plaintiff unreasonably failed to heed numerous warnings regarding the lack of personal jurisdiction over the defendant).

As in *Valentin* and *Reichert*, it was not reasonable for Plaintiffs to file suit in Ohio in 1998 knowing Matson was not subject to personal jurisdiction in Ohio. When the U.S. Supreme Court rejected their "national contacts" theory in 1987 in *Omni Capital,* and when Judge Lambros summarily rejected in 1989 the "national contacts" theory and found no personal jurisdiction over Matson and more than 100 other shipowners, the Jaques firm knew there was no personal jurisdiction over Matson in Ohio. Nonetheless, with ***actual knowledge*** that there was no personal jurisdiction over Matson, the Jaques firm proceeded to file ***4,148 additional cases*** against Matson in Ohio ***after*** 1989.

Plaintiffs' actual knowledge there was no jurisdiction in Ohio precludes any reasonable belief to the contrary. As Judge Heller concluded:

> [I]t is difficult to fathom how [p]laintiffs could have reasonably concluded that jurisdiction was proper in Ohio. There was no evidence that the Defendants had any contacts with Ohio, and the "national contacts" theory, which might arguably have been colorable at one time, had been unanimously rejected by the Supreme Court more than 20 years before this action was filed in Ohio.

CP 2069-70.

Fundamental to the cases cited by Plaintiffs is a finding that the plaintiff **reasonably and in good faith proceeded in the wrong venue and then exercised diligence in filing the second action**. *E.g. Flores v.*

Predco Servs. Corp., 2011 WL 883640, *2, 3, and 6 (D. N.J., Mar. 11, 2011) (citing the third circumstance in which equitable tolling may be warranted as based on a timely ***but mistaken*** initial filing; noting the court initially held it had personal jurisdiction; and plaintiff refiled 31 days after dismissal and before the Appeals Court denied rehearing). In fact, the *Flores* Court distinguished its case from *Reichert v. Mon River Towing*, *supra*, on the basis that the *Flores* trial court's initial finding it had personal jurisdiction rendered plaintiff's belief that the court had jurisdiction reasonable, whereas it was unreasonable for the *Reichert* plaintiff to proceed in Ohio against a defendant lacking minimum contacts. *Flores*, 2011 WL 883640, *6. As in *Reichert*, there is no rational basis for concluding that Plaintiffs in 1998 held a reasonable belief that the Ohio court had personal jurisdiction over Matson.

As the case law makes clear, equitable tolling is the narrow exception to the rule, to be applied sparingly and only in extraordinary circumstances. Even then it is clear that, as stated in *Flores*, *supra*, 2011 WL 883640, *4,[14] equity cannot favor tolling where a plaintiff knowingly filed in the wrong forum. Prior notice of a personal jurisdiction problem renders filing in wrong forum unreasonable and precludes equitable relief.

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[14] Curiously, Plaintiffs relied on this decision before the trial court, but has elected to ignore it here. CP 544.

See Flores v. Predco Servs. Corp., 2011 WL 3273573, *5 and 7-8 (D. N.J., Jul. 29, 2011). Indeed, Plaintiffs ignore this key point in *Burnett*, *supra*, 80 U.S. at 430—that the plaintiff there ***mistakenly*** filed in Ohio state court as opposed to Ohio federal court (there was personal jurisdiction in Ohio). Here, on the other hand, Plaintiffs' conduct was unreasonable. They were undeniably on notice that Ohio was not a proper jurisdiction and filed there anyway. There was no mistake. They knew there were no jurisdictional contacts; their "national contacts" theory was rejected by the U.S. Supreme Court in 1987, twelve years earlier; and they were on notice, by way of a 1989 court decision that there was no personal jurisdiction over Matson in Ohio. This prior notice precludes a finding they acted in good faith or held a reasonable belief they were filing in the correct jurisdiction, and their filing in Ohio cannot be reasonably viewed as consistent with an exercise of due diligence under these circumstances. Under any of the cases cited Plaintiffs fail to prove they are entitled to equitable relief. [15]

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[15] *See Appellent's Brief*, p. 21. In *Island Insteel Sys. v. Waters*, the court recognized that failing to promptly seek a transfer when there was no personal jurisdiction may be unreasonable, and waiting three months to refile may preclude a finding that the plaintiff exercised diligence. *Id.*, 296 F.3d at 218. Here, Plaintiffs not only ***knowingly*** filed in a court lacking jurisdiction, but waited more than nine years after the mesothelioma diagnosis and more than eight years after Decedent's death to file in a court with jurisdiction. In *Hosogai v. Kadota*, the plaintiff was induced not to correct the alleged defect by an erroneous ruling by the trial court. *Id.*, 700 P.2d at 1334. *Mitzner v. W. Ridgelawn Cemetary*, is not applicable as it addressed only tolling in the context of an appeal period. In *Reynolds v. Logan Charter Serv., Inc.*, the plaintiff made an erroneous

Moreover, Plaintiffs waited a further eight years after Decedent's death to file this action. Plaintiffs have utterly failed to meet their burden to establish they pursued their rights diligently and extraordinary circumstances prevented a timely action. *See Podobnik v. U.S. Postal Service*, 409 F.3d 584, 591 (3d Cir. 2005) (recognizing plaintiff bears burden to prove statute of limitations should be equitably tolled). There was never any impediment to Plaintiffs timely filing suit on behalf of McCabe in a court with jurisdiction. Thus, under no reading of the law can Plaintiffs establish entitlement to the extraordinary relief of equitable tolling.

D. PLAINTIFFS ARE BARRED FROM RE-LITIGATING THE WAIVER OF PERSONAL JURISDICTION ISSUE

1. Judge Robreno's 2013 and 2014 Rulings Collaterally Estop Plaintiffs from Re-litigating the Issue Here

The issue of whether Matson (along with all other shipowner defendants in the Ohio MARDOC litigation) waived the defense of lack of personal jurisdiction has already been decided adversely to Plaintiffs – **three times** – in the MDL proceeding in the Eastern District of Pennsylvania. After two rounds of extensive briefing and hearings (in which Plaintiffs' counsel participated), the MDL court ruled in 2013, and

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choice. Here, Plaintiffs knowingly disregard the prior decisions on point, which placed them on notice Ohio was not a proper jurisdiction for their filing, and filed their anyway.

then twice again in 2014, that Matson and the other shipowner defendants had ***not*** waived their personal jurisdiction defenses: "[T]he Court is not persuaded that [plaintiffs'] exhibits show by a preponderance of the evidence a universal waiver [of personal jurisdiction] by all defendants, in all cases, in perpetuity."[16] Those rulings preclude re-litigation of the waiver issue here. As stated, although they once again attempt to re-litigate this issue, at the January 9, 2015 oral argument before Judge Heller, Plaintiffs conceded they were precluded under the doctrine of collateral estoppel from re-litigating the issue of waiver. "At oral argument, Plaintiffs' counsel acknowledged the preclusive effect of these decisions under collateral estoppel." CP 2069.

"Once a judicial system has afforded the opportunity for full and final litigation of issues between parties, ...permitting re-litigation of the same issues in another court is intolerable." *Alcantara v. Boeing Co.*, 41 Wn. App. 675, 685, 705 P.2d 1222 (1985) (*quoting Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854 (3rd Cir. 1977)). Thus, collateral estoppel (or issue preclusion) bars re-litigation of an issue actually litigated in a prior lawsuit. *Hanson v. City of Snohomish,* 121 Wn.2d 552, 561, 852 P.2d 295 (1993) (*citing Malland v. Department of Retirement Sys.*, 103 Wn.2d 484,

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[16] *In re Asbestos Prods. Liab. Litig. (No. VI) (Jacobs v. A-C Prod. Liab. Trust)*, 2014 WL 944227 at *5 (E.D. Pa. March 11, 2014).

489, 694 P.2d 16 (1985); *Beagles v. Seattle–First Nat'l Bank,* 25 Wn. App. 925, 929, 610 P.2d 962 (1980)).

State courts apply collateral estoppel to rulings rendered in federal courts. *See e.g. Alcantara*, 41 Wn. App. at 685 (holding collateral estoppel barred re-litigation of *forum non conveniens* issue previously decided by federal court and reversing and ordering dismissal of state court action); *Cunningham v. State*, 61 Wn. App. 562, 569-70, 811 P.2d 225 (1991). Here, Judge Robreno's three previous rulings in the federal MDL have precisely this effect.

Further, the doctrine of collateral estoppel precludes re-litigation of issues of fact *or* law. *Lemond v. State, Dept of Licensing*, 143 Wn. App. 797, 804, 180 P.3d 829 (2008) (*citing Restatement (Second) Judgments* § 27 (1982)). Thus, it is immaterial whether Judge Robreno's earlier rulings are viewed as having determined issues of fact or issues of law; either viewpoint yields the same issue-preclusive result here.

> The requirements which must be met when applying the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

Hanson, 121 Wn.2d at 562 (*citing Malland*, 103 Wn.2d at 489; *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)). All four requirements

are satisfied here.

a. Matson's Personal Jurisdiction Defense Was Actually Litigated and Determined in the MDL, and the Issue Was Essential to the Judgment

As stated, the parties engaged in several extensive rounds of briefing, including an oral hearing, resulting in Judge Robreno's three orders of 2013 and 2014. These orders squarely addressed the issue of waiver and directly determined adversely to Plaintiffs. That determination was essential to the judgment of dismissal, which affected thousands of cases – among them, Plaintiffs' case against Matson.

b. Judge Robreno's Orders are "Sufficiently Firm" to Satisfy the Finality Requirement and be Accorded Preclusive Effect.

"[A] grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 233, 983 P.2d 1144 (1999). Washington courts have rejected the argument that "finality for collateral estoppel purposes is the same as finality for determining appealability under CR 54." *Cunningham*, 61 Wn. App. at 566 ("such a rigorous finality requirement does not implement the purpose of collateral estoppel: to protect prevailing parties from relitigating issues already decided in their favor, and to promote

judicial economy) (*citing Chau v. Seattle*, 60 Wn. App. 115, 120-21, 802 P.2d 822 (1991)). Thus, "for purposes of issue preclusion, a final judgment "includes *any* prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Id.* at 567 (emphasis added) (*citing Restatement (Second) of Judgments* §13 (1982)).

The key factors are whether "the prior decision was adequately deliberated, whether it was firm, rather than tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or in fact was reviewed on appeal." *Id.* (*citing Restatement*, *supra.*, comment g.)

Here, Judge Robreno's 2013 and 2014 rulings that the defendants, including Matson, had not waived their personal jurisdiction defense are more than "sufficiently firm" to satisfy finality and preclude re-litigation here. The parties were fully heard through several rounds of briefing and at oral hearings. After the initial 2013 Order rejecting Plaintiffs' argument and "evidence" of waiver, Judge Robreno considered and addressed Plaintiffs' purportedly "new" supplemental evidence on the waiver issue. Judge Robreno supported his Orders with three extensive and reasoned opinions. And, the decision was subject to appeal – although, as detailed below, Plaintiffs never availed themselves of the opportunity for review.

c. Plaintiffs Were the Same Plaintiffs in the MDL, Thus Satisfying the Same Party/Privity Requirement.

The record indisputably establishes that the parties, the Estate of Paul S. McCabe, and Matson, were the plaintiffs in the federal MDL case action dismissed by Judge Robreno.

d. The Application of Collateral Estoppel Does Not Work an Injustice on Plaintiff

Washington courts consider the following factors in determining whether the application of collateral estoppel will work an injustice: (i) Whether the first judgment was appealable; (ii) whether there have been factual changes since the first proceeding; and (iii) whether the first determination was manifestly erroneous. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 871 (*citing Phillip A. Trautman*, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. (1985) 805, 841-42).

Here, Judge Robreno's rulings were indisputably appealable. Plaintiffs could have sought review of Judge Robreno's rulings on personal jurisdiction, including by seeking an order of "no just reason for delay" under Federal Civil Rule 54(b) or by seeking interlocutory review under 28 U.S.C. § 1292(b) – but they have not used these available mechanisms to obtain review. Furthermore, there have been no factual

changes—this remains an asbestos wrongful death action by a seaman who passed away in 2006 and the issue of personal jurisdiction has not changed since 1989. Lastly, there is no support for any contention that Judge Robreno's rulings were manifestly erroneous. Such a finding is precluded by Plaintiffs' actions in response to such rulings, namely electing against an appeal and re-filing in other jurisdictions. Plaintiffs had a more-than-full and fair opportunity to litigate the issue of waiver, and when they lost in the Eastern District of Pennsylvania MDL they were not barred as a matter of law from seeking review of Judge Robreno's orders. They chose not to utilize available methods for review and, instead, seek to re-litigate the issue here. The doctrine of issue preclusion prevents them from doing so.

Despite acknowledging the preclusive effect of these decisions under collateral estoppel at oral argument on January 9, 2015, CP 2069, Plaintiffs have the audacity to again ignore the doctrine of collateral estoppel (or issue preclusion) and waste this Court's time and resources by attempting to re-litigate the waiver issue. Plaintiffs' disregard of this bar is particularly galling because they are simply recycling arguments and evidence already rejected by Judge Robreno **three times**. In *In re Asbestos Prods. Liab. Litig. (No. VI) (Jacobs v. A-C Prod. Liab. Trust)*, 2014 WL 944227 (E.D. Pa. March 11, 2014), Plaintiffs submitted as

"new" evidence answers filed by defendants purportedly waiving personal jurisdiction, which evidence and argument had previously been rejected by that court. *Id.* at *2. They introduced the same evidence and argument before the trial court, CP 556, and recycle it here. *See Appellant's Brief*, pp. 6-7. In fact, the sample answer submitted by Plaintiffs proves that Matson did not waive its personal jurisdiction defense. CP 983 (asserting defense of lack of personal jurisdiction). Plaintiffs cite statements by Thompson Hine in opposition to Plaintiffs' Motion to Transfer in Toto, and in opposition to a transfer to Michigan. *See Appellant's Brief*, pp. 7-9. The identical statements were rejected by Judge Robreno. *In re Asbestos Prods. Liab. Litig. (No. VI)*, *supra.*, 2014 WL 944227, *3 and *5. They again try to introduce the inadmissible October 22, 2013 declaration of Hartley Martyn. *Appellant's Brief*, pp. 10-11.[17] Not only did Judge Robreno reject this declaration, he was troubled by the ethical implications of a Special Master advocating for one of the parties. *In re Asbestos Prods. Liab. Litig. (No. VI)*, *supra.*, 2014 WL 944227, *4 and 6 fn. 14. Plaintiffs cited then as now the opposition to MDL consolidation. *Id.* at *3-4; *Appellant's Brief*, pp. 11-12. Lastly, Plaintiffs cited then as now the purported failure to seek dismissal upon remand to Ohio and actual

[17] Matson objects (again) to the declaration of Hartley Martyn as inadmissible hearsay, lacking foundation, so vague as to be meaningless, and contrary to the record. CP 1494-95.

litigation in Ohio. *In re Asbestos Prods. Liab. Litig. (No. VI)*, *supra*, 2014 WL 944227, *4; *Appellant's Brief*, pp. 12-13. As Judge Robreno noted, the "new" evidence at most showed waiver in only 16 cases, long pre-dating the instant case, and could not be imputed to "other plaintiffs' cases." *Id.* at *5. No litigation choice by a defendant regarding defenses in one case binds that same defendant in other cases. *See Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835, 836 (9th Cir. 2005) ("we hold that defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties"; held, defendants "did not consent to jurisdiction in this action by waiving their personal jurisdiction objection in" a different prior action).

In sum, Plaintiffs had a full and fair opportunity in the Eastern District of Pennsylvania to litigate the issue of whether Matson (and the other shipowner defendants) waived the defense of lack of personal jurisdiction. The issue was determined adversely to Plaintiffs in rulings that were essential to the judgment and final as to that issue. Plaintiffs were not barred from seeking review of Judge Robreno's three Orders, but chose not to do so. Accordingly, the ruling that Matson did not waive its jurisdictional defense carries over to the present case, and this issue may not be re-litigated here. Plaintiff's conceded this point before Judge Heller. To the extent this Court is nevertheless inclined to permit re-

litigation of this issue, Matson incorporates by reference its prior arguments and evidence in support as set forth in CP 1466-2067.

CONCLUSION

Equity cannot favor tolling where a plaintiff knowingly filed in the wrong forum. This is the case before the Court. There was no mistake or other good faith excuse. The record establishes beyond dispute that Plaintiffs knew all along that there was no basis for filing in Ohio in 1998. They knew from the outset that jurisdictional contacts were lacking and instead advanced a "national contacts" theory of personal jurisdiction. The U.S. Supreme Court rejected this theory in 1987. In 1989, the Ohio federal court explicitly held there was no personal jurisdiction over Matson in Ohio. This was nine years ***before*** Plaintiffs filed in Ohio. This prior notice precludes a finding that Plaintiffs acted in good faith or held a reasonable belief they were filing in the correct jurisdiction. Moreover, Plaintiffs took no action whatsoever to preserve their rights, and then waited eight years after the Decedent's death to file the instant action. Plaintiffs have utterly failed to meet their burden to establish they pursued their rights diligently and extraordinary circumstances prevented a timely action. Therefore, equitable tolling is not justified, and the governing three-year statute of limitations bars Plaintiffs' long-expired claims. Judge Heller's findings and decision to deny equitable relief were reasonable,

exercised on tenable grounds, based on the record, and his grant of summary judgment should be affirmed.

DATED this 4th day of August, 2015.

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COURT OF APPEALS, DIVISON I
OF THE STATE OF WASHINGTON

WILLARD E. BARTEL and DAVID C. PEEBLES, Administrators for the Estate of PAUL S. MCCABE, Appellants, v. MATSON NAVIGATION COMPANY, INC., on its own behalf and as Successor-In-Interest to THE OCEANIC STEAMSHIP COMPANY; et al. Respondents.	No. 73127-1 DECLARATION OF SERVICE

I, Andrea Anthony, declare and state as follows:

1. I am and at all times herein a resident of King County, Washington, and am over the age of 18 years.

2. On the 5th day of August 2015, I caused to be served, via e-mail, true and correct copies of:

1. Brief of Respondent Matson Navigation Company, Inc.; and
2. Declaration of Service on the following:

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STATE OF WASHINGTON
2015 AUG -5 AM 10: 12

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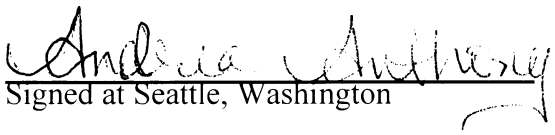
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of August, 2015.



Signed at Seattle, Washington