

No. 37317-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID ROY TAYLOR and ROBERTA SUE REMLICK-TAYLOR
husband and wife,

Appellants

v.

UNION CARBIDE CORPORATION,

Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiffs/Appellants, David Roy Taylor and Roberta Taylor, allege in this case that defendant Union Carbide Corporation, supplied asbestos fiber as an ingredient used by three manufacturers of joint compound products to which Mr. Taylor claimed bystander exposure in the early 1970's: Georgia-Pacific ("GP"), Kaiser Gypsum and Hamilton Materials ("Hamilton"). Plaintiffs also sued each of these manufacturers separately. Plaintiffs' claims against Union Carbide were dismissed by the trial court on summary judgment after full briefing and oral argument. Plaintiffs do not appeal from the court's ruling as it relates to Kaiser Gypsum products.

The record presented here amply demonstrates that plaintiffs cannot establish that Mr. Taylor was exposed to a GP or Hamilton joint compound product actually containing asbestos fiber supplied by Union Carbide without engaging in impermissible speculation. The trial court therefore properly granted Union Carbide's motion for summary judgment based on the record presented for plaintiffs' failure to establish sufficient evidence from which a jury could make the necessary factual connection between Mr. Taylor's illness and asbestos fiber supplied by Union Carbide.

II. ISSUES PRESENTED

1. Did the trial court properly grant summary judgment as to claims against Union Carbide for allegedly supplying the asbestos fiber used in the GP products to which Mr. Taylor claims bystander exposure in 1972-73, where the record established that during this time frame GP did not ship its ready-mix products to the West Coast, and where the record established that the likely manufacturer of the GP products had many other suppliers of fiber during the relevant years?

Yes. Washington case law requires that plaintiffs establish a factual connection between the alleged injury, the product causing the injury and the alleged supplier of raw material to the manufacturer of that product. *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 245, 744 P.2d 605 (1987). Based on the record submitted to the trial court, plaintiffs failed to submit sufficient evidence from which a jury could make that factual connection as to GP products without engaging in speculation.

2. Did the trial court properly grant summary judgment as to claims against Union Carbide for allegedly supplying the asbestos fiber used in the Hamilton joint compound products to which Mr. Taylor claims exposure in 1972-73, where the documentary evidence shows only two sales of fiber by Union Carbide in 1970 and

no sales by Union Carbide during the years relevant to the alleged exposure?

Yes. Washington case law requires that plaintiffs establish a factual connection between the alleged injury, the product causing the injury and the alleged supplier of raw material to the manufacturer of that product. *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 245, 744 P.2d 605 (1987). Based on the record submitted to the trial court, plaintiffs failed to submit sufficient evidence from which a jury could make the factual connection between Mr. Taylor's injuries and the alleged supply of asbestos fiber by Union Carbide to any Hamilton products at issue without engaging in speculation.

III. STATEMENT OF THE CASE

Plaintiffs brought this lawsuit to recover damages from multiple defendants, including Union Carbide, based on the theory that Mr. Taylor's mesothelioma was proximately caused by the inhalation of asbestos fibers. Plaintiffs claim that Mr. Taylor was exposed to asbestos-containing products in the course of his Naval Service between 1961 and 1964, his work around boilers at Ft. Lewis in 1965-66, his work at local shipyards in the 1966-67, 1969 time frames, his work as a delivery person for an electrical contractor in 1968 and in his work as an electrician

beginning in 1969.¹ Indeed, plaintiffs asserted claims for liability against 31 separate defendants.² With regard to Union Carbide, plaintiffs specifically claimed that Mr. Taylor was exposed to certain asbestos-containing joint compound products that were used in his presence by drywall contractors at various industrial and commercial sites in the course of his work as an electrician between 1972 and 1973. Plaintiffs further alleged that certain of these joint compound products contained asbestos fiber supplied by Union Carbide.

It is undisputed that Union Carbide never manufactured any of the asbestos-containing products at issue in this case. To the contrary, Union Carbide mined pure chrysotile asbestos fiber from a mineral deposit near King City, California. This unique, short fiber asbestos was sold by Union Carbide under the trade name Calidria to a range of third-party manufacturers, who in turn used the fiber in certain products at various times.

At his perpetuation deposition, Mr. Taylor recalled generally having worked in the vicinity of others using Bondex, GP, Kaiser Gypsum, and Hamilton joint compound products during the early 1970's.³

¹ CP 205-207 (Plaintiffs' Amended Appendix A to their responses to interrogatories, attached as Ex. A to the Declaration of Elizabeth Martin in Support of Union Carbide's Motion for Summary Judgment).

² CP 45-50 (Plaintiffs' Second Amended Complaint, dated May 1, 2007).

³ CP 216-222 (Martin Decl, Ex. B, Perpetuation Deposition, March 21, 2007, pp. 109:2 to 111:12; 112: 1-7; 116:10 to 117:6). Plaintiff did not recall any other brands of joint compound products. CP 243 (Ex. B, Discovery Deposition, Vol. III, October 15, 2007 session, pp. 85: 17-25).

In his discovery deposition, however, Mr. Taylor acknowledged that he would not have personally used, mixed or applied any joint compound products and had no work-related reason to read the labels or containers of these products as it was never his job to use or work with them.⁴

Union Carbide agrees with and adopts plaintiffs' procedural history of the case. At issue in Union Carbide's motion for summary judgment were plaintiffs' claims relating to joint compound products manufactured by Hamilton, Kaiser Gypsum and GP.⁵ Plaintiffs do not pursue any assignment of error for the trial court's dismissal of claims against Union Carbide relating to Kaiser Gypsum, leaving only the claims relating to Hamilton Materials and GP at issue in this appeal. Specifically, plaintiffs argued that Union Carbide was a supplier of asbestos fiber used by Hamilton and GP in their joint compound products during the 1972-1973 time frame of Mr. Taylor's alleged exposure. Both of the manufacturers at issue here had other suppliers of fiber besides Union Carbide.⁶ Both of these manufacturers were also sued by plaintiffs for injuries arising from alleged exposure to their products.⁷

⁴ CP 230-231; 244; 256-257 (Martin Decl, Ex. B, Discovery Deposition, Vol. III, October 15, 2007 session, pp. 25:22 to 26:6; 91: 16-21; 104:13 to 105:20).

⁵ Union Carbide was never a supplier of fiber to Bondex; therefore there was never an issue as to Bondex joint compound products. This was not challenged by plaintiffs in their response to Union Carbide's Motion for Summary Judgment.

⁶ See CP 264-267 as to Georgia-Pacific and CP 382-438 as to Hamilton.

⁷ CP 45-50 (Plaintiffs' Second Amended Complaint, filed May 1, 2007). Plaintiffs asserted claims against Hamilton and Georgia-Pacific for injuries arising from exposure to their joint compound products. Plaintiff is also seeking damages from Union Carbide for its alleged supply of raw materials (asbestos fiber) used in those same products. A

After full briefing by both parties and oral argument, the trial court agreed that plaintiffs had not submitted sufficient evidence from which a jury could conclude that Mr. Taylor was exposed to a product actually containing Union Carbide asbestos as opposed to fiber supplied by one of the respective manufacturers' other suppliers, and therefore had not established the requisite causal connection between his injuries and Union Carbide's Calidria fiber. RP 29:14 to 30:11; CP 3486-3488. Plaintiffs filed a motion for reconsideration relating solely to the trial court's ruling as to GP products. CP 3489-3497. The plaintiffs' motion was denied by the trial court on January 14, 2008. CP 3581-3582.⁸

settlement or recovery from any of these manufacturers would discharge any liability against Union Carbide for alleged fiber supply for that manufacturer's product as the asbestos fiber is fully integrated into the manufactured product. Thus, it can only be one injury and therefore one recovery. See *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (the law does not sanction double recovery); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000) (basic principle of damages is that there shall be no double recovery for the same injury); *Barney v. Safeco Ins. Co. of Am.*, 73 Wn. App. 426, 428, 869 P.2d 1093 (1994) (applicable measure of damages is public policy with respect to recovery; double recovery violates public policy), overruled on other grounds by *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 946 P.2d 388 (1997); *Wilson v. Brand S Corp.*, 27 Wn. App. 743, 747, 621 P.2d 748 (1980) (double recovery is contrary to the principle of compensatory damages). Plaintiffs acknowledged in their brief that they have settled with all other defendants in Taylor. App. Brief, p. 3, line 1. Union Carbide notes that if this court reverses the trial court and remands the case for trial, the doctrine of double recovery may preclude any further action against Union Carbide in this matter.

⁸ Plaintiffs apparently did not designate as Clerk's Papers Union Carbide's Response in Opposition to Plaintiffs' Motion for Reconsideration of the Order Granting Summary Judgment or the Supporting Declaration of Elizabeth Martin with exhibits. Respondents have now designated these documents and assume the Clerk's Papers for these documents will have the next consecutive numbers, 3666 to 3712. This brief is filed before final designation by the Clerk; however, Union Carbide has used these numbers to refer to the relevant pages of these documents.

IV. ARGUMENT

A. **The Summary Judgment Standard Places a Burden on Plaintiffs to Come Forward With Admissible Evidence Supporting Their Claims.**

A defendant may support a summary judgment motion by “merely challenging the sufficiency of the plaintiff’s evidence as to any material issue.” *Las v. Yellow Front Stores*, 66 Wn.App. 196, 198, 839 P.2d 744 (1992); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). The burden then shifts to the non-moving party to prove the existence of a genuine issue of material fact. If the non-moving party fails to make a sufficient showing to establish the existence of an essential element of his case (e.g., product identification), then there is no genuine issue of material fact for a jury to determine and summary judgment, as a matter of law, is appropriate. *Young*, 112 Wn.2d at 226; *Vallandingham v. Clover Park School District No. 400*, 154 Wn.2d 16, 26, 109 P.3d 850 (2005). To make this showing, the party opposing summary judgment must submit “competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issue remain, but instead “must set forth specific facts that sufficiently rebut the moving party’s contentions.”

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

This court reviews summary judgment orders *de novo*. RAP 9.12. When reviewing an order of dismissal on summary judgment, an appellate court engages in the same inquiry as the trial court. The reviewing court considers the facts and all reasonable inferences from the facts in the light most favorable to the non-moving party. *Right-Price Recreation, L.L.C. v. Connells Prairie Community Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002); *Hadley v. Maxwell*, 144 Wn.2d 306, 310, 27 P.3d 600 (2001); *Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005).

Although plaintiffs attempt here to create factual issues, a careful review of the record shows that plaintiffs would have to ask a jury to speculate to reach the conclusion that Mr. Taylor was ever exposed to a product containing asbestos fiber supplied by Union Carbide. In the absence of sufficient admissible evidence to establish the first factual step of showing exposure to fiber supplied by Union Carbide, plaintiffs' claims necessarily fail.

B. To Bring a Viable Claim against Union Carbide, Plaintiffs Must Establish That Mr. Taylor Was Exposed To Asbestos Fiber Actually Supplied by Union Carbide.

A plaintiff in an asbestos case must establish that he or she was injured by a particular product for which the defendant is responsible. In the context of the claims against Union Carbide in this matter, plaintiffs

must establish that Mr. Taylor was injured by a particular asbestos-containing product containing asbestos supplied by Union Carbide, as opposed to another supplier of asbestos fiber to the relevant third-party manufacturers at issue.

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

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

Plaintiffs can establish exposure to a defendant's asbestos products through circumstantial evidence. *See Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706-707, 853 P.2d 908 (1993). However, as in all product liability cases, the evidence must rise above mere speculation or conjecture. *See Young v. Group Health Cooperative*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); *Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn. App. 610, 622, 789 P.2d 792, *rev. denied*, 115 Wn.2d 1025 (1990). *See also Dumin v. Owens-Corning Fiberglass Corp.*, 28 Cal. App. 4th 650, 33 Cal. Rptr. 2d 702 (1994). It is the duty of the court to withdraw a case from the jury when the necessary inferences of exposure to a particular defendant's asbestos product are so tenuous that it rests upon

mere speculation and conjecture. *Claytor v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1384 (D.C. App. 1995).

If a case is based on circumstantial evidence, such as the fact that a defendant's product was on board a ship, it is not enough to merely speculate that the product was the source of the plaintiff's asbestos disease. Sufficient evidence must be provided to conclude that there was a causal link between that product and the injured party's asbestos exposure. *Van Hout*, 121 Wn.2d at 706. The plaintiff must produce evidence showing or at least supporting the conclusion that there was actual exposure to asbestos fibers from a particular fiber supplier.

In *Lockwood*, 109 Wn.2d 235, 744 P.2d 605 (1987), the Supreme Court instructed trial courts to consider a number of factors when determining if there is sufficient evidence for a jury to find that causation has been established in an asbestos case: (1) plaintiff's **proximity** to an asbestos product when the exposure to it occurred; (2) the **expanse** of the work site where asbestos fibers were released; (3) the extent of **time** the plaintiff was exposed to the product; (4) the **types of asbestos products** to which the plaintiff was exposed; (5) the **ways** in which such products were **handled and used**; (6) the tendency of such products to **release** asbestos fibers into the air depending on their form and the methods in which they are handled; and (7) **other potential sources** of the plaintiff's injury. *Id.* at 248-249 (emphasis added). In this case the trial court properly found

that plaintiffs had produced insufficient evidence of these factors to allow the case to proceed to a jury. RP 29:14 to 30:11.

Nothing in *Allen v. Asbestos Corp. Ltd.*, 138 Wn. App. 564, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022, 178 P.3d 1033 (2008) or *Berry v. Crown Cork & Seal Co. Inc.*, 103 Wn. App. 312, 14 P.3d 789 (2000) *rev. denied*, 143 Wn. 2d 1015, 22 P.3d 803 (2001) - cases cited by plaintiffs - changes the *Lockwood* requirement or the factors a plaintiff needs to show to establish causation. Both cases, along with *Lockwood*, stand for the proposition that it is the plaintiff's burden to establish that a particular defendant's asbestos-containing product was present at the plaintiff's workplace during a time in which the plaintiff was present. In this case, without sufficient evidence even placing Union Carbide's asbestos fiber at Mr. Taylor's worksite during the limited 1972-1973 time frame at issue here - let alone sufficient evidence to meet the *Lockwood* factors of proximity, time and frequency of exposure - plaintiffs' claims fail.

C. Plaintiffs Did Not Sufficiently Demonstrate Exposure By David Taylor To Asbestos Products Containing Union Carbide Fiber.

In the present case, plaintiffs did not provide sufficient admissible evidence from which a jury could conclude that asbestos fiber supplied by Union Carbide substantially contributed to Mr. Taylor's asbestos exposure and consequent disease under the factors of proximity and time set forth in

Lockwood. The issue on summary judgment was not whether Union Carbide ever supplied any asbestos fiber to GP or Hamilton, but whether plaintiffs established that Mr. Taylor worked around an asbestos-containing product *containing fiber actually supplied by Union Carbide*. In other words, the plaintiffs had to produce sufficient evidence of exposure to a product containing Union Carbide fiber that could satisfy the “substantial factor” test as required under *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997).

The evidence produced by Union Carbide established that each of the manufacturers had other suppliers of fiber during the relevant time frame. The trial court properly concluded “You would be asking the jury to speculate regarding whether or not the Plaintiff was even exposed to any amount of UCC’s product, let alone an amount that would have been a substantial factor in causing his condition.” RP 30: 7-11. A closer look at the complete record relating to each of these two manufacturers demonstrates the wisdom of the trial court’s ruling.

- 1. Plaintiffs failed to produce sufficient documentary evidence from which a jury could conclude that Union Carbide supplied asbestos fiber used in the Hamilton products to which Mr. Taylor claimed exposure.**

Plaintiffs set forth in their brief excerpts from Mr. Taylor’s perpetuation deposition (direct examination) testimony with regard to Hamilton products. The omissions of certain discovery deposition (cross-

examination) testimony relating to Hamilton is telling. Testimony provided by Mr. Taylor in response to the examination by Hamilton counsel establishes that aside from recalling seeing the name Hamilton, Mr. Taylor had no specific recollection of Hamilton products, could not describe the products with any detail nor describe the quantity used:

Q: ... Do you have a specific recollection of moving bags of Hamilton product?

A: No.

...

Q: Do you recall any of the lettering on the outside of the box?

A: Just Hamilton.

Q: Is it your recollection that the name Hamilton was on the box?

A: Yes.

Q: Any other writing that you recall on the box as you sit here today?

A: No.

Q: Any logos or pictures or diagrams on the box that you recall?

A: No.

Q: Any specific colors or coloring of letters or anything like that on the box?

A: No, I would just be guessing on colors.

...

Q: Do you have any knowledge as to how many different types of drywall mud Hamilton produces?

A: No.

Q: Do you know whether Hamilton makes a drywall mudding -- mudding compound that does not contain asbestos?

A: No.

Q: Do you have any knowledge as to whether the Hamilton product you saw at the Royal Oaks contained asbestos?

A: No.

Q: The same question for the Hamilton product at the Cheney ski lodge, do you know whether that product you saw contained asbestos?

A: No.

Q: Let me just on that move on to the third one, which I think is the Foss school. Do you know if the Hamilton product you saw at the Foss school project contained asbestos?

A: No.

...

Q: ... At any time when you saw Hamilton product, do you remember the writing on the bucket?

A: No.

Q: Do you remember any of the colors on the buckets?

A: No.

Q: Do you remember any logos or drawings or representations on the buckets?

A: No.

...

Q: Do you recall cleaning up buckets and/or boxes that were left on the site by the drywallers?

A: No.

...

Q: Do you have any recollection as you sit here today of seeing anyone mix a Hamilton product in a bucket with a drill bit and auger?

A: No.

...

Q: And as we talked previously, can you describe the boxes in any greater detail than you have already today?

A: No. The names of them, I'm lucky to remember them.⁹

It is against this backdrop of testimony that the claims against Union Carbide relating to Hamilton products were evaluated by the trial

⁹ CP 244-246; 248-250; 254 (Martin Decl., Ex. B, Vol. III, pp. 91:19-21; 92:23 to 93:12; 95:22 to 96:14; 97:4-12; 20-22; 98:7-10, 101:6-9).

court. To make a claim against Union Carbide based on exposure to Hamilton products under the *Lockwood* factors, plaintiffs would have to establish that Mr. Taylor worked in the vicinity of a Hamilton asbestos-containing product **and** that the product contained fiber supplied by Union Carbide. However, Mr. Taylor could not identify anything other than the name Hamilton appearing on containers of material used by others at various job sites. He could not identify what the product was, how much of it was used, whether it contained asbestos, or what the product container looked like. He did not mix the material or apply it. In short, his memory regarding Hamilton products was vague, at best. Thus, before even addressing the issue of whether plaintiff was exposed to Union Carbide fiber in an amount sufficient to constitute a substantial factor in the causation of disease through exposure to a Hamilton product, the court was faced in the first instance with extremely weak evidence of exposure to a Hamilton asbestos-containing product.

Significantly, Mr. Taylor's deposition testimony did not include any work sites where he claims to have seen Hamilton products after 1973.¹⁰ This is a critical fact, and one which plaintiffs do not dispute in their opening brief, as they concede Mr. Taylor's exposure to Hamilton was limited to the 1972-73 time frame. Appellants' Brief, pp. 4, 5. The

¹⁰ See CP 205-207 (Martin Decl. Ex. A, attaching Plaintiff's Amended Appendix A, which limits joint compound exposure to the time frame 1970-1973). See also CP 230-261 (Martin Decl. Ex. B, Vol. III, pp. 25 to 119, generally).

affidavit of Union Carbide corporate witness John Myers and the exhibits attached thereto¹¹, along with the documentary evidence based on contemporaneous records and invoices, all established that Union Carbide did not begin regularly supplying Hamilton with asbestos fiber for use in the manufacture of its joint compound products until 1974 - after the time frame at issue in the Taylor case. Indeed, in response to Union Carbide's summary judgment motion, plaintiffs submitted nearly 100 invoices showing sales of Calidria fiber to Hamilton. Every single invoice was dated 1974 or after, with the sole exception of **two** 1970 invoices showing isolated sales of a different type of fiber, not typically used in joint compounds and which pre-date the 1972-73 time frame of exposure asserted here.¹²

Even as to these two isolated sales, however, the mere presence of invoices does not create a causal connection between the plaintiff here and Union Carbide. There is no indication from these invoices into what product the SG-130 fiber was incorporated, or if it was even incorporated into a product sold to the public as opposed to being used for experimental purposes. The invoices also do not tell us where the finished product was sold, let alone whether the finished product ever ended up at one of Mr. Taylor's work sites in Pierce County in 1972 or 1973. The trial court was

¹¹ CP 378-438.

¹² CP 1967-2053; 2056-2064; 2071-2072.

well within its province to rule that a jury would have to speculate to draw any conclusion from these invoices.

In short, plaintiffs submitted no documentary evidence in support of the existence of an ongoing exclusive or primary fiber supply relationship between Union Carbide and Hamilton prior to 1974. Nevertheless, in an effort to manufacture a question of fact on this issue, plaintiffs have continued to rely in their appellate brief on the December 2003 testimony of Willis Hamilton. This court should note, as was pointed out to the trial court, that Mr. Hamilton's testimony is inconsistent with his own prior sworn testimony on the very same subjects. In 1996, Mr. Hamilton testified that he had no idea Hamilton had other suppliers of fiber, had no idea how much asbestos Hamilton had purchased from Union Carbide, or what percentage of overall supply Union Carbide represented.¹³

Moreover, Mr. Hamilton had no knowledge as to how much fiber any of its suppliers provided.¹⁴ In 2000, Mr. Hamilton again testified that he could not recall whether *any* supplier was an exclusive or majority supplier.¹⁵ Even in his 2003 deposition, Mr. Hamilton could not state

¹³ CP 3422-3432 (Supplemental Declaration of Elizabeth Martin, Ex. A, excerpts from deposition of Willis Hamilton, December 4, 1996).

¹⁴ *Id.* at pp. 645:6 to 646:9, 667:4-19.

¹⁵ CP3437-3438 (Supp'l Decl. Martin, Ex. B, pp. 28:25 to 29:13).

percentages of supply and acknowledged that Union Carbide was not the sole fiber supplier to Hamilton Materials.¹⁶

Plaintiffs also rely on Hamilton's responses to California interrogatories from 1998.¹⁷ As a preliminary matter, the out-of-state interrogatories of another party cannot be used against Union Carbide as they are inadmissible hearsay under ER 801 and not subject to any exception under 802. The statements set forth therein cannot be considered a statement against interest as to Union Carbide as they are not Union Carbide's statements and Union Carbide had no role in making the statements. ER 801(d)(2). Therefore, this court should not consider them in its *de novo* review of the trial court. Plaintiffs must come forward with admissible evidence to defeat summary judgment. *Jones v. Dept. of Health*, 140 Wn. App. 476, 494-95, 166 P.2d 1219 (2007) ("a party cannot rely on inadmissible evidence to establish the existence of material facts").

Even if Hamilton's out-of-state interrogatory responses were admissible against Union Carbide, the fact remains that these interrogatories do not set forth a specific **time frame** for the alleged supply of fiber by Union Carbide and do not answer the question of whether Union Carbide sold **any** fiber to Hamilton (aside from the two isolated 1970 sales) prior to 1974. Union Carbide does not and did not

¹⁶ CP 2972-2973 (Plaintiff's Ex. U-5, p. 120:15 to 121:3).

¹⁷ App. Brief at p. 9, citing CP 2918.

dispute that it sold Calidria asbestos fiber to Hamilton Materials between 1974 and 1977, but that time frame is not relevant to plaintiffs' claims here.

Neither Union Carbide nor Hamilton records show any ongoing sales relationship prior to 1973 and no invoices of SG-210 sales (the fiber universally used by UCC's tape joint compound customers in the manufacture joint compound products), prior to 1974.¹⁸ Indeed, plaintiffs produced no such records before the trial court. Rather, plaintiffs suggest that the lack of records regarding Hamilton sales was due to a general lack of Union Carbide records for that time period acknowledged by Mr. Myers in his deposition in this case. App. Brief at pp. 9-10. Plaintiffs misrepresent Mr. Myers testimony.

A clear reading of Mr. Myers' testimony shows that he was referring to a lack of complete sales record data from the 1967 to 1969 time frame—a time period not relevant to this case.¹⁹ Myers testified unequivocally that a search of all existing Calidria sales invoices from the 1970's shows only the two isolated sales to Hamilton in 1970 and no sales of SG-210 Calidria fiber to Hamilton before 1974.²⁰ Plaintiffs produced no evidence to the contrary.

¹⁸ CP 378-438 (Affidavit of John Myers in Support of UCC's Motion for Summary Judgment and exhibits thereto). *See also* CP 1892-1910 (Plaintiffs' Ex. U-1, Ex. 4 to the Deposition of John Myers).

¹⁹ CP 1663, lines 11-13.

²⁰ CP 382-385; *See also* CP 1670, lines 1-5.

Plaintiffs refer to the Seventh Circuit decision in *Covalt v. Carey Canada*, 950 F. 2d 481 (7th Cir. 1991) for the proposition that summary judgment based on missing records is reversible error. Plaintiffs overlook key factual differences between the *Covalt* case and the issues presented here. In the *Covalt* case, the plaintiff was an employee of a manufacturing facility to which Union Carbide was alleged to have supplied fiber directly. Moreover, in *Covalt*, at least some records existed showing sales of fiber directly by Union Carbide to Mr. Covalt's employer and shipments of fiber to his workplace. The issue was whether the plaintiff could show such sales during the time he was at the manufacturing facility.

Here, the fiber sales are one step removed. Mr. Taylor was not an employee of either Hamilton or GP and never worked at the manufacturing plants that made their joint compound products. There is no issue, therefore, of plaintiffs possibly showing sales to the workplace—the issue raised in the *Covalt* case. Once again, it is critical for this court to note that under *Lockwood*, *Berry* and *Allen* it is plaintiffs' burden to place Calidria fiber at Mr. Taylor's workplace at a time when he was present.

Based on this record, the trial court properly concluded that plaintiffs had not established that any bucket Mr. Taylor may have seen in 1972 or 1973 with the word Hamilton on it contained Union Carbide fiber,

based on (1) the complete lack of any documentary evidence supporting ongoing sale of asbestos fiber from Union Carbide to Hamilton during the 1972-1973 time frame at issue, (2) the admission by Willis Hamilton that Hamilton had other suppliers, and (3) the sworn testimony of Union Carbide's corporate witness with knowledge that Hamilton was not a customer of Union Carbide for sales of its SG-210 fiber used in joint compound products until June 1974, which was clearly after the limited 1972-1973 time frame at issue here.

2. Plaintiffs failed to show that Mr. Taylor was exposed to Union Carbide Calidria fiber through his alleged bystander exposure to GP ready-mix products.

Mr. Taylor placed GP products at only one work site – Foss High School – sometime between 1972 and 1973.²¹ He described the product at issue as “ready-mix.”²² At all times, it was plaintiffs’ burden on summary judgment to show that Mr. Taylor worked with or around a GP product containing fiber supplied by Union Carbide. There is no evidence that there was any GP ready-mix joint compound actually manufactured by GP sold in the state of Washington at the time of Mr. Taylor’s alleged exposure, aside from Mr. Taylor’s limited testimony that he saw a container of premix joint compound with the name GP at one job site in

²¹ CP 240-242 (Martin Decl., Ex. B, Vol. III, pp. 54:3-20; 58:6-14).

²² *Id.*

the 1972-73 time frame. That testimony is insufficient by itself to make the causal connection to Union Carbide.

Plaintiffs, in fact, produced no documentary evidence showing any sales of GP ready-mix products to the Tacoma market during the relevant time frame. They further ignore or try to escape the testimony of GP corporate witnesses Oliver Eugene Burch and Charles William Lehnert, which makes clear that although ready-mix products made at GP's Acme, Texas plant did at times contain Union Carbide fiber, those products were not shipped to the West Coast²³ as well as the fact that GP relied on a re-branding agreement with Kelly-Moore (the "Re-branding Agreement") to supply GP labeled ready-mix in West Coast markets.²⁴ Finally, the testimony of Herbert Giffins, Kelly-Moore's corporate witness, confirms that UCC supplied only 8% of all fiber used by Kelly-Moore in the manufacture of joint compound products.²⁵ Conversely stated, 92% of Kelly-Moore's asbestos fiber came from sources other than Union Carbide.

A thorough review of all GP witness transcripts submitted by both parties, including the testimony relied upon by plaintiffs in their brief,

²³ CP 3451 to 3466, generally.

²⁴ CP 3458 to 3466.

²⁵ CP 3477 to 3482 (Supplemental Declaration of Elizabeth Martin, Ex. G, Excerpt from testimony of Kelly-Moore corporate witness Herbert Giffins, pp. 79:9 to 80:12; 169:5-11).

affirmatively supports the arguments put forth by Union Carbide, namely: (1) that GP's Acme Texas plant did not manufacture any *ready-mix* joint compound supplied to the West Coast during the time frame at issue, and (2) Kelly-Moore, which manufactured a GP labeled ready-mix product for distribution on the West Coast during the relevant time period, purchased the vast majority of its asbestos requirements from suppliers other than Union Carbide.

a. Plaintiffs offer no evidence that any GP branded ready-mix joint compound products sold in Washington during the time frame at issue were manufactured at GP's Acme, Texas plant.

Plaintiffs have offered no proof that any GP ready-mix joint compound products allegedly sold in Washington during the relevant time period, were manufactured at GP's Acme, Texas plant. To the contrary, the testimony of Mr. Burch and Mr. Lehnert clearly shows that the Acme, Texas plant did not supply ready-mix joint compound products to the West Coast at that time.²⁶ Plaintiffs cite to testimony provided by Mr. Burch which states that to the extent GP itself manufactured and distributed tape joint compound products on the West Coast, they would have been manufactured at Acme.²⁷ However, this cited testimony fails to

²⁶ CP 3453 to 3454; 3458 to 3466.

²⁷ Plaintiffs also rely on the Declaration of Howard Schutte for the same proposition that the Acme Texas plant is the GP facility which would have manufactured and supplied joint system products to the States of Washington and Oregon. App. Brief at p. 16, citing CP 3345-3346. Mr. Schutte's testimony, however, relates to GP *dry mix* product, not *ready-mix*. CP 3346, ¶ 5. GP dry mix joint compound products manufactured at the

address both the Re-branding Agreement and the distinction between dry mix and ready-mix products.

With regard to the Re-branding Agreement, Mr. Burch's testimony establishes that during the time frame at issue, products sold on the West Coast under the GP label would have been manufactured by Kelly-Moore.²⁸ Therefore, Mr. Burch's testimony that *if* GP products sold on the West Coast were manufactured by GP they would have been manufactured at Acme²⁹ is entirely irrelevant to this case.

Plaintiffs failed to produce any evidence of any sales of GP manufactured tape joint compounds in Washington during the time period at issue. Moreover, plaintiffs ignore Mr. Lehnert's testimony which draws a distinction between the types of joint compound products GP may have manufactured and sold on the West Coast. According to Mr. Lehnert, it would have been economically infeasible for GP to ship ready-mix joint compound products to the West Coast due to the high costs of shipping a product with such a high water content.³⁰ Plaintiffs failed to provide any evidence to refute this point.

Acme, Texas facility did not contain any Calidria fiber. CP 318 (Martin Decl., Ex. E, p. 156:12-25).

²⁸ CP 3671-3673 (Martin Decl., Ex. A, attaching deposition testimony of Oliver Eugene Burch, taken on July 24, 2002, at pp. 202:18 to 203:2; 203:23 to 204:14).

²⁹ CP 3686 (Martin Decl., Ex. B, attaching deposition of Oliver Eugene Burch, taken on November 17, 2005, at p. 65:9-20).

³⁰ CP 3691 (Martin Decl., Ex. C, attaching deposition testimony of Charles W. Lehnert, taken on November 12, 2002, at pp. 83:25 to 84:3; 85: 22 to 86:12).

b. Plaintiffs' representations regarding the geographic scope of the GP/Kelly-Moore Re-branding Agreement are incorrect.

Plaintiffs argue that the Re-branding Agreement between GP and Kelly-Moore only applied to California, and further stretch their argument to state that no products manufactured under the Re-branding Agreement were sold in the Pacific Northwest. Yet plaintiffs have absolutely no evidence to support this contention. Plaintiffs relied in their motion for reconsideration in large part upon a deposition of a Kelly-Moore employee – Douglas Merrill – to support their argument that the Re-branding Agreement was limited to products sold in California. Appellant's Brief at p. 17. However, a close examination of Mr. Merrill's transcript reveals that Mr. Merrill's testimony does not support this argument, and further, that no one at Kelly-Moore would have any knowledge about where GP distributed the products produced under the Re-branding Agreement.

Initially, Mr. Merrill's testimony regarding the alleged delivery locations of re-branded products is based upon a document that the plaintiffs did not provide for the court's review, but which Union Carbide provided in response to plaintiff's motion for reconsideration.³¹ This document, a memorandum written in 1983 that summarizes Kelly-Moore's sales records regarding the Re-branding Agreement, acknowledges that

³¹ CP 3701 (Martin Decl., Ex. D, attaching deposition testimony of Douglas Merrill, March 14, 2002 at pp. 163:12-25; 150:4-22).

Kelly-Moore does not have any sales records regarding products manufactured and sold under the Re-Branding Agreement after 1969.³² Therefore, the testimony to which plaintiffs cite regarding the locations to which Kelly-Moore delivered re-branded products would only reflect sales that occurred in 1969, a time frame not even at issue here. Given the lack of records for later years, it would be highly speculative to assume that the locations reflected in this document necessarily apply to any year other than 1969. Mr. Merrill testified that he could not recall what records were used in drafting the summary or how Kelly-Moore was able to determine where the re-branded products were shipped.³³ Further, the document only refers to products that Kelly-Moore delivered to GP, and does not encompass products that GP picked up themselves.

It is also important to note that Kelly-Moore was not in charge of distributing the products manufactured according to the terms of the Re-branding Agreement.³⁴ Mr. Merrill never personally delivered any of the re-branded products and cannot say exactly what type of facility ordered the products.³⁵ Kelly-Moore had no reason to know what happened to the re-branded products once GP took possession of them. The terms of the Re-branding Agreement called for GP to pick up the re-branded products

³² CP 3703-3704 (Martin Decl., Ex. E, Kelly-Moore Memorandum, 1/7/83).

³³ CP 3701-3702 (Martin Decl., Ex. D, at pp. 164:12-24; 165:6-11).

³⁴ CP 3700 (Martin Decl., Ex. D, pp. 160:24 to 161:18).

³⁵ CP 3699 (Martin Decl., Ex. D, p. 156:10-23).

and distribute them, themselves.³⁶ Moreover, although GP could have used Kelly-Moore's common carrier truck line to deliver some re-branded products to its various distribution facilities, since Kelly-Moore's common carrier was only licensed in California, Kelly-Moore could not have delivered re-branded product outside of California.³⁷ And finally, since Kelly-Moore was not in charge of distributing the re-branded products, its records do not reflect the ultimate destination of any product manufactured pursuant to the Re-branding Agreement.³⁸ As established by these excerpts, no one at Kelly-Moore has any personal knowledge about where the re-branded materials were distributed and sold.

Instead, in order to determine where GP sold the re-branded products it received from Kelly-Moore, the court must look to the testimony of GP witness, Eugene Burch. Although plaintiffs attempt to characterize Mr. Burch's testimony as specifically limiting the Re-branding Agreement to California, his testimony does no such thing. While it is true that Mr. Burch stated that the Re-branding Agreement applied "mainly" to California, he also acknowledged sales to Colorado and Arizona.³⁹ He never said that the re-branded products were not distributed elsewhere – he simply could not recall whether other states

³⁶ CP 3700 (Martin Decl., Ex. D, pp. 160:12-23; 164:12-24; 165:4-7).

³⁷ CP 3701 (Martin Decl., Ex. D, pp. 165:24 to 166:9).

³⁸ CP 3702 (Martin Decl., Ex. D, at pp. 167:18 to 168:5).

³⁹ CP 3687 (Martin Decl., Ex. B, at pp. 205:21 to 206:5).

were involved. In fact, later in this same transcript, Mr. Burch suggests that re-branded products were shipped to Seattle.⁴⁰ Additionally, the deposition to which plaintiffs cite is the first volume of a three volume deposition. In volume three of this deposition, Mr. Burch adds Utah to the list of states that could have received products produced under the Re-branding Agreement, and refers to the agreement as covering the "West Coast" of the United States – not "California."⁴¹ It is clear from Mr. Burch's testimony that the Re-branding Agreement was *not* limited to California, as represented by plaintiffs.

c. Plaintiffs' representations regarding the time frame of the GP/Kelly-Moore Re-branding Agreement are misleading

Plaintiffs claim that Mr. Taylor would not have been exposed to a re-branded Kelly-Moore product because he claims to have seen a GP product container in 1972-73. This argument is baseless. First, a joint compound product used on a job site during that time frame was not necessarily manufactured in those years. Depending on when in that time frame the product was actually used, it is entirely possible that the joint compound was manufactured and packaged while Kelly-Moore and GP still had a formal re-branding agreement. Moreover, the testimony

⁴⁰ CP 3688 (Martin Decl., Ex. B at pp. 225:11 to 226:8).

⁴¹ CP 3706 (Martin Decl., Ex. F, attaching deposition testimony of Oliver Eugene Burch, July 20, 2006, at p. 234:11-21).

provided by witnesses with actual personal knowledge of the Re-branding Agreement does not support the idea that Kelly-Moore completely ceased re-branding its products with GP packaging in 1971.

Although plaintiffs have no problem relying on Mr. Burch's testimony regarding the geographic scope of the Re-branding Agreement, they conveniently ignore his testimony regarding the relevant time frame for this agreement. Instead, they rely upon the testimony of Douglas Merrill – a Kelly-Moore employee who admitted that he has no personal knowledge of the agreement, including how it started and why it ended.⁴² He can only testify regarding the dates of the actual formal agreement.⁴³ However, GP's witness Oliver Burch testified that while the Re-branding Agreement officially ended in 1971, GP continued to purchase joint treatment products from Kelly-Moore for distribution on the West Coast after the agreement ended.⁴⁴ Additionally, Kelly-Moore continued to re-brand Kelly-Moore joint compound in GP packaging, even after the Re-branding Agreement officially ended.⁴⁵ And finally, Mr. Burch testified that GP continued to buy Kelly-Moore joint compound for distribution in its West Coast markets – including Seattle – until at least 1976.⁴⁶

⁴² CP 3697 (Martin Decl., Ex. D, at pp. 142:18 to 143:13).

⁴³ *Id.*

⁴⁴ CP 3682-3683 (Martin Decl., Ex. A, at pp. 203:23 to 204:14).

⁴⁵ CP 3683-3684 (Martin Decl., Ex. A, pp. 204:18 to 205:4).

⁴⁶ CP 3688 (Martin Decl., Ex. B, at pp. 225:11 to 226:8).

Therefore, even crediting Mr. Taylor's testimony that he observed GP ready-mix joint compound on a job site in 1972-73, and assuming it was actually manufactured during this time period, there is still insufficient evidence for a jury to conclude that whatever plaintiff saw at his worksite was a product actually manufactured by GP, let alone that it contained fiber supplied by Union Carbide.

d. Plaintiffs offer no evidence to refute that Kelly-Moore purchased 92% of its asbestos requirements from sources other than Union Carbide.

Plaintiffs claim that Kelly-Moore witness Herbert Giffins testified that Kelly-Moore's San Carlos plant received the bulk of its asbestos requirements from Union Carbide. Appellants Brief at p. 34, citing CP 3628 and 3630. However, when read in context, it is clear that Mr. Giffins did not make that representation. Rather, he testified that Union Carbide primarily supplied to the Kelly-Moore San Carlos plant, *in comparison to the other Kelly-Moore plants to which Union Carbide supplied fiber.*⁴⁷ Further, there is no evidence regarding the time frame of Union Carbide's sales to the San Carlos plant in relation to the manufacture of the product at issue in this case, nor is there any evidence that this plant would have manufactured the products supplied to Foss High School in Tacoma, Washington between 1972 and 1973.

⁴⁷ CP 3709-3710 (Martin Decl., Ex. G, attaching deposition of Herbert Giffins, taken on 1/16/03, at p. 79:1-16; *see also* pp. 66:4 to 66:20).

Moreover, a thorough examination of the Giffins transcript reveals that Mr. Giffins acknowledged that according to Kelly-Moore's records, Union Carbide only supplied Kelly-Moore with 8% of its total asbestos requirements.⁴⁸ Therefore, to the extent that Mr. Taylor was exposed to a re-branded Kelly-Moore product, plaintiffs still cannot prove that such product contained asbestos supplied by Union Carbide without asking the jury to speculate.

Plaintiffs argue that the trial court erred in granting summary judgment despite the record outlined above which established through GP's own witnesses that GP did not ship ready-mix products made at the Acme, Texas plant to the West Coast, but instead relied upon a re-branding agreement with Kelly-Moore to supply joint compound products to this market, and Kelly-Moore received only 8% of its total asbestos requirements from Union Carbide.

In arguing that the trial court erred in granting summary judgment, plaintiffs rely on *Berry v. Crown Cork & Seal Co. Inc.*, 103 Wn. App. 312, 14 P.3d 789 (2000) *rev. denied*, 143 Wn. 2d 1015, 22 P.3d 803 (2001) a decision from Division One, arguing that it is enough that Union Carbide be a supplier; it need not be the exclusive supplier. Plaintiffs misread the *Berry* case. In that case, the plaintiff had submitted evidence that

⁴⁸ CP 3711 (Martin Decl., Ex. G, at pp. 115:4 to 116:11).

Saberhagen was a supplier of Plant and Carey products **to the plaintiff's worksite (PSNS Shipyard)** during the years that plaintiff worked there. *Id.* at 324. There is no such record here through documentary evidence or otherwise.

Plaintiffs have not established that any Union Carbide fiber ever made it into the buckets Mr. Taylor allegedly saw at Foss High School in Tacoma between 1972 and 1973. Unlike the factual record in the *Berry* case, there is no evidence that directly connects asbestos fiber supplied by Union Carbide to any of Mr. Taylor's work sites. To show such a connection, plaintiffs would have to show that GP ready-mix joint compound product manufactured by GP at its Acme, Texas plant with Union Carbide fiber ended up in Tacoma, Washington when Mr. Taylor was present.

Plaintiffs' argument has too many holes, not the least of which is that GP, by its own admission, did not ship its own ready-mix joint compound product to the West Coast markets as it was cost-prohibitive. If there were any GP products at any of Mr. Taylor's worksites, they were most likely made by Kelly-Moore and sold with a GP label, according to GP witnesses. And, finally, if the GP labeled product was made by Kelly-Moore, the evidence showed that Kelly-Moore got 92% of its asbestos from sources other than Union Carbide.

The *Lockwood*, *Berry* and *Allen* cases to which plaintiffs cite all stand for the same proposition—it is the plaintiff’s burden in an asbestos case to factually connect the asbestos-containing product at issue to the plaintiff’s worksite during a time when the plaintiff was present. While that requisite factual connection may be made by circumstantial evidence, it still must be made. Even in *Allen*, the plaintiff had direct evidence of **sales to the worksite at issue** during the relevant time frame, even though plaintiff could not produce a witness who recalled seeing the product *in use* at that worksite. *Allen*, 138 Wn. App. at 570, 573. There is no such evidence here as there are no sales records or other documentary evidence establishing the requisite factual connection between Union Carbide Calidria fiber and Mr. Taylor’s work sites.

Under long-standing Washington law involving asbestos cases, summary judgment is appropriate where plaintiff cannot make the requisite factual connection between a defendant’s asbestos-containing product and the plaintiff’s injuries without engaging in impermissible speculation. Plaintiffs could not establish the requisite *Lockwood* factors to show exposure to Union Carbide fiber, let alone in an amount that could constitute a substantial factor in causing his disease.

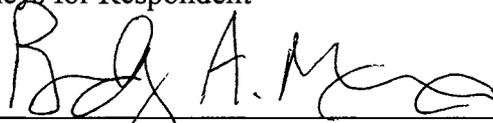
V. CONCLUSION

For all these reasons, this court should affirm the summary judgment dismissal of all claims against Union Carbide in this matter.

Dated this 11 day of June, 2008.

Respectfully submitted,

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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

COURT OF APPEALS, DIVISION II
OF STATE OF WASHINGTON

DAVID ROY TAYLOR and
ROBERTA SUE REMLICK-
TAYLOR,

Plaintiffs/Appellants,

v.

UNION CARBIDE
CORPORATION,

Defendant/Respondent.

NO. 37317-3-II

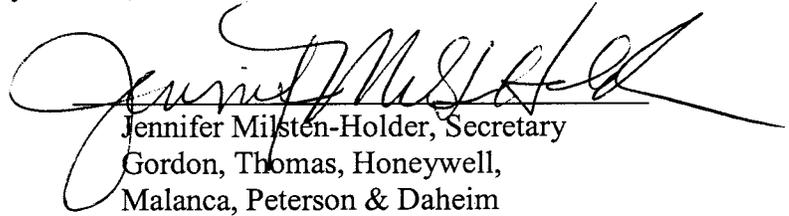
CERTIFICATE OF SERVICE

I hereby certify that on the 11TH of June, 2008, I sent out by legal messenger to be filed by June 12, 2008 the original and one copy of the Brief of Respondent in the above entitled matter with the Court of Appeals Division II and also caused to be delivered via legal messenger by June 12, 2008 a copy of the same to the following:

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Dated this 11th day of June, 2008.

A handwritten signature in black ink, appearing to read "Jennifer Milsten-Holder", written over a horizontal line.

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