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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
DEPUTY

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MARJORIE M. ARNOLD, Individually and as  
Personal Representative of the Estate of  
REUBEN J. ARNOLD; and DANIEL J. ARNOLD, Individually,

Appellants,

v.

LOCKHEED SHIPBUILDING CORPORATION,

Respondent,

and

SABERHAGEN HOLDINGS, INC., as successor to TACOMA  
ASBESTOS COMPANY and THE BROWER COMPANY;  
AMERICAN OPTICAL CORPORATION; THE BOEING COMPANY;  
CERTAINTEED CORPORATION;  
C.H. MURPHY/CLARK-ULLMAN, INC.;  
D&G MECHANICAL INSULATION, INC.;  
HANSON PERMANENTE CEMENT, INC., f/k/a KAISER CEMENT  
CORPORATION; KAISER GYPSUM COMPANY, INC.;  
INTERNATIONAL PAPER COMPANY, individually and as successor to  
ST. REGIS PAPER COMPANY and CHAMPION INTERNATIONAL  
CORP.; KIPPER & SONS FABRICATORS, INC.;  
LOCKHEED SHIPBUILDING COMPANY; LONE STAR  
INDUSTRIES, INC., individually and as successor-in-interest to  
PIONEER SAND & GRAVEL COMPANY; MARIANA PROPERTIES,  
INC., as successor-in-interest to Hooker Chemical Company; J. M.  
MARTINAC SHIPBUILDING CORPORATION; METALCLAD  
INSULATION CORPORATION; MILLERCOORS, LLC, as successor-  
in-interest to Olympia Brewing Company; MINE SAFETY  
APPLIANCES COMPANY; NORTH SAFETY PRODUCTS USA;  
OCCIDENTAL CHEMICAL CORPORATION, as successor-in-interest to

Hooker Chemical Company; P-G INDUSTRIES, INC., as successor in interest to PRYOR GIGGEY CO., INC.; PIONEER AMERICAS, LLC, as successor-in-interest to Hooker Chemical Company; RAYONIER, INC.; RILEY POWER, INC., a/k/a RILEY STOKER CORP., f/k/a BABCOCK BORSIG POWER, INC., f/k/a D.B. RILEY, INC.; SEQUOIA VENTURES, INC., formerly known as and as successor in interest to BECHTEL CORPORATION, BECHTEL, INC. BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.; SIMPSON TIMBER COMPANY; TODD PACIFIC SHIPYARDS CORPORATION, Individually and as successor-in-interest to TODD SHIPYARDS CORPORATION; TODD SHIPYARDS CORPORATION, Individually and as successor-in-interest to TODD PACIFIC SHIPYARDS CORPORATION; TRANE U.S., INC., f/k/a AMERICAN STANDARD, INC., Individually and as parent and alter ego of AMERICAN BOILER CORP., WESTINGHOUSE AIR BRAKE COMPANY and KEWANEE BOILER COMPANY, a division of AMERICAN RADIATOR & STANDARD SANITARY COMPANY; TRICO CONTRACTING, INC.; UNION CARBIDE CORPORATION; WEYERHAEUSER COMPANY, ZURN INDUSTRIES LLC; GOULDS PUMPS (IPG), INC.; FLETCHER CONSTRUCTION COMPANY NORTH AMERICA; and PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY,

Defendants.

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-vi
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	2
(1) <u>Assignments of Error</u> .....	2
(2) <u>Issues Pertaining to Assignments of Error</u> .....	2
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT .....	22
E. ARGUMENT .....	23
(1) <u>Standard of Review on Summary Judgment</u> .....	23
(2) <u>Effect of the Testimony of Lockheed’s CR 30(b)(6) Testimony on Summary Judgment</u> .....	25
(3) <u>The Trial Court Abused Its Discretion in Striking the Evidence on Reconsideration</u> .....	28
(4) <u>The Trial Court Erred in Determining that Lockheed Owed No Duty to the Arnolds</u> .....	31
(5) <u>Lockheed Owed a Nondelegable Duty to Ensure a Safe Workplace for Reuben and Daniel</u> .....	31
(a) <u>Lockheed Was both a Premises Owner and a General Contractor with Respect to Projects on Which Reuben Arnold Worked</u> .....	32

(b)	<u>Lockheed Retained Control over the Work of Subcontractor Employees Like the Arnolds Resulting in a Duty of Care</u> .....	34
(c)	<u>Lockheed Owed a Duty of Care to the Arnolds Based on Statutes Informing Such a Duty</u> .....	37
(i)	<u>RCW 49.16</u> .....	40
(ii)	<u>WISHA</u> .....	40
(iii)	<u>Walsh-Healey Act</u> .....	42
(d)	<u>Lockheed Owed the Arnolds a Duty of Care as Business Invitees</u> .....	46
F.	CONCLUSION.....	50

Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Adkins v. Aluminum Co. of America</i> , 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988) .....	38
<i>Amend v. Bell</i> , 89 Wn.2d 124, 570 P.2d 138 (1977).....	25
<i>Applied Indus. Materials Corp. v. Melton</i> , 74 Wn. App. 73, 872 P.2d 87 (1994).....	28, 29
<i>Bayne v. Todd Shipyards Corp.</i> , 88 Wn.2d 917, 568 P.2d 771 (1977).....	40
<i>Casper v. Esteb Enters., Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004).....	26
<i>Chen v. State</i> , 86 Wn. App. 183, 937 P.2d 612, <i>review denied</i> , 133 Wn.2d 1020 (1997).....	28, 29, 30
<i>Cresap v. Pacific Inland Navigation Co.</i> , 78 Wn.2d 563, 478 P.2d 223 (1970).....	45
<i>Des Moines Marina Ass'n v. City of Des Moines</i> , 124 Wn. App. 282, 100 P.3d 310 (2004), <i>review denied</i> , 154 Wn.2d 1018 (2005).....	23
<i>Epperly v. City of Seattle</i> , 65 Wn.2d 777, 399 P.2d 591 (1965).....	47
<i>Flower v. T.R.A. Indus., Inc.</i> , 127 Wn. App. 13, 111 P.3d 1192 (2005), <i>review denied</i> , 156 Wn.2d 1030 (2006) .....	26, 27
<i>Goucher v. J.R. Simplot Co.</i> , 104 Wn.2d 662, 709 P.2d 774 (1985).....	38, 40
<i>Iwai v. State</i> , 129 Wn.2d 84, 915 P.2d 1089 (1996).....	46
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	<i>passim</i>
<i>Kelley v. Howard S. Wright Construction Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	34, 35, 37
<i>Kinney v. Space Needle Corp.</i> , 121 Wn. App. 242, 85 P.3d 918 (2004).....	35, 49
<i>Kness v. Truck Trailer Equip. Co.</i> , 81 Wn.2d 251, 501 P.2d 285 (1972).....	37
<i>Larson v. Centennial Mill Co.</i> , 40 Wash. 224, 82 P. 294 (1905).....	31

<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 125 Wn. App. 784, 106 P.3d 808 (2005).....	31
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , (Supreme Court Cause No. 80728-1, June 4, 2009) .....	31
<i>Martinez Melgoza &amp; Assocs., Inc. v. Dep't of Labor &amp; Indus.</i> , 125 Wn. App. 843, 106 P.3d 776, <i>review denied</i> , 155 Wn.2d 1015 (2005).....	41, 42
<i>Meridian Minerals Co. v. King County</i> , 61 Wn. App. 195, 810 P.2d 31, <i>review denied</i> , 117 Wn.2d 1017, 818 P.2d 1099 (1991).....	28
<i>Morton v. McFall</i> , 128 Wn. App. 245, 11 P.3d 1023 (2005) .....	23
<i>Mucsi v. Graoch Assoc. Ltd. P'ship No. 12</i> , 144 Wn.2d 847, 31 P.3d 684 (2001).....	46
<i>Netversant Wireless Systems v. Wash. State Dep't of Labor &amp; Indus.</i> , 133 Wn. App. 813, 138 P.3d 161 (2006) .....	42
<i>Payne v. Saberhagen Holdings</i> , 147 Wn. App. 17, 190 P.3d 102 (2008).....	19
<i>Phillips v. Kaiser Aluminum &amp; Chemical Corp.</i> , 74 Wn. App. 741, 875 P.2d 1228 (1994).....	40-41
<i>Powell v. Viking Ins. Co.</i> , 44 Wn. App. 495, 722 P.2d 1343 (1986).....	25
<i>Sjogren v. Properties of Pacific Northwest LLC</i> , 118 Wn. App. 144, 75 P.3d 592 (2003).....	23-24, 25
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990) .....	35, 37, 38
<i>Tincani v. Inland Empire Zoological Soc'y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	46
<i>Vogel v. Alaska S.S. Co.</i> , 69 Wn.2d 497, 419 P.2d 141 (1969).....	45

Federal Cases

<i>Amato v. U.S.</i> , 167 F. Supp. 929 (S.D.N.Y. 1958) .....	34
<i>Brazos River Authority v. GE Ionics, Inc.</i> , 469 F.3d 416 (5th Cir. 2006) .....	27
<i>Foster Wheeler Corp. v. American Surety</i> , 142 F.2d 726 (2 <sup>nd</sup> Cir. 1944).....	33
<i>In re Professional Coatings, Inc.</i> , 210 B.R. 66 (E.D. Vir. 1997).....	33
<i>Marker v. Union Fid. Life Ins. Co.</i> , 125 F.R.D. 121 (M.D.N.C. 1989).....	26

<i>Perkins v. Lukens Steel Co.</i> , 310 U.S. 113, 60 S. Ct. 869, 84 L.Ed. 1108 (1940) .....	43
<i>Resolution Trust Corp. v. S. Union</i> , 985 F.2d 196 (5th Cir. 1993) .....	27

Other Cases

<i>Goede v. Aerojet General Corp.</i> , 143 S.W.3d 14 (Mo. App. 2004) .....	45
<i>Poole v. Quality Shipyards, Inc.</i> , 668 So.2d 411 (La. App. 1996), writ denied, 669 So.2d 1215 (La. 1996) .....	34
<i>Zimko v. American Cyanamid</i> , 905 So.2d 465 (La. App. 2005), writ denied, 925 So.2d 538 (La. 2006) .....	45

Statutes

41 U.S.C. § 35 .....	42
<i>Restatement (Second) of Torts</i> § 286 .....	37
<i>Restatement (Second) of Torts</i> § 343 .....	46, 47, 48, 50
<i>Restatement (Second) of Torts</i> § 343A .....	24, 47, 49, 50
<i>Restatement (Second) of Torts</i> § 343A(1) .....	47
RCW 5.40.050 .....	37
RCW 18.27.010 .....	32
RCW 18.27.020 .....	32
RCW 18.27.030 .....	33
RCW 18.27.030(1)(c) .....	33
RCW 18.27.030(1)(f) .....	33
RCW 18.27.040 .....	33
RCW 18.27.060(1) .....	33
RCW 18.27.070 .....	33
RCW 49.16.030 .....	37, 40
RCW 49.17.060 .....	38
RCW 49.17.060(2) .....	38

Rules and Regulations

41 C.F.R. § 50-204.50 .....	43, 44
Fed. R. Civ. P. 30(b)(6) .....	26

CR 30(b)(6).....	<i>passim</i>
CR 43(f)(3).....	25
CR 56(c).....	24
CR 59 .....	28, 29
CR 59(a)(4).....	22
WAC 296-155-040.....	38
WAC 296-800-11005.....	41
WAC 296-800-11010.....	41
WAC 296-800-11015.....	41
WAC 296-800-11020.....	41
WAC 296-800-11040.....	41

Other Authorities

Charles A. Wright, Arthur R. Miller & Richard L. Marcus, <i>Federal Practice and Procedure</i> § 2103 (2d ed. 1994).....	26
John T. Hodgson and Andrew Darnton, <i>The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure</i> , 44 Ann. Occup. Hygiene 565 (2000).....	21

## A. INTRODUCTION

The trial court here prematurely dismissed the Arnolds' case, ruling that Lockheed Shipbuilding Company ("Lockheed"),<sup>1</sup> a general contractor/premises owner, did not owe the Arnolds, employees of subcontractors on Lockheed's jobsite, a duty of care.

Reuben and Daniel Arnold contracted the invariably fatal asbestos-related cancer, mesothelioma, from Reuben's exposure to asbestos while he worked on Lockheed jobsites. In Daniel's case, he was exposed to asbestos that his father Reuben brought home from work on his clothing. The trial court erred in dismissing the Arnolds' case because Lockheed owed them a duty as a general contractor/premises owner. It retained control over the jobsite where asbestos was used and it had a statutory duty to prevent their exposure to asbestos on the job.

The trial court also erred in dismissing the Arnolds' complaint because Reuben Arnold was a business invitee of Lockheed to whom Lockheed owed a duty under traditional premises liability principles.

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<sup>1</sup> Lockheed Aircraft Corporation acquired Puget Sound Bridge & Dredging Company in early 1959. CP 717. In 1965 the company became Lockheed Shipbuilding and Construction Company. CP 475-76. Ms. Ildiko Songrady, the Lockheed corporate representative, acknowledged that Lockheed Shipbuilding is the corporate successor to Puget Sound Bridge & Dredging Company. CP 476. Ms. Songrady assumed that Lockheed probably took over the leases of the Puget Sound Bridge & Dredging Company when it acquired the shipyard in 1959. CP 477. Lockheed Shipbuilding Company and its predecessors will be referenced herein as "Lockheed."

The trial court's conception of the duty owed by Lockheed to the Arnolds was too narrow and it acted contrary to law in dismissing the Arnolds' complaint.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its order on summary judgment on February 9, 2009.

2. The trial court erred in entering the order granting Lockheed's motion to strike and denying plaintiff's motion for reconsideration on March 5, 2009.

(2) Issues Pertaining to Assignments of Error

1. Where a shipbuilding corporation owns the premises, acts as a general contractor, and retains control over the jobsite where asbestos was routinely used, does the corporation owe a duty to the employees of a subcontractor on the jobsite or their family members who contract mesothelioma, a deadly asbestos-related cancer, to prevent asbestos exposure? (Assignments of Error Numbers 1-2)

2. Where a shipbuilding corporation owns the premises and acts as a general contractor for work on a jobsite where asbestos was used, does the corporation have a nondelegable statutory duty of care to the

employees of a subcontractor on the jobsite or their family to prevent asbestos exposure? (Assignments of Error Numbers 1-2)

3. Where a shipbuilding corporation invites the employees of an insulation subcontractor onto its jobsite where asbestos was routinely used, does the corporation owe a duty as the premises owner to warn the employees and their family members with respect to the dangers associated with asbestos exposure or to discover and take reasonable care to protect them against the dangers of asbestos exposure? (Assignments of Error Numbers 1-2)

#### C. STATEMENT OF THE CASE

Reuben Arnold worked as a career insulator from 1954 until 1987. CP 146, 3163-64, 3186. From 1964 until his death, he lived at the same residence on East B Street in Parkland, Washington. CP 146, 3175.

Reuben worked at Lockheed in the early 1960s and again in the late 1960s. He first worked at Lockheed in 1962-1963 for approximately a year straight, insulating piping and exhaust stacks on three different ferries being built for the State of Alaska. CP 3172-74. Reuben also worked at Lockheed in 1967-1968 for Owens Corning, and in 1969 for Unicolor, a contractor that obtained some Lockheed work during an interval of time when the union was on strike against other insulation contractors. CP 3179. Ron Nickell worked with Reuben at Lockheed on this job which

involved insulating steam pipe and a host of machinery on two vessels being built for the Navy – the LPD 11 and the LPD 13. CP 521.

Reuben testified that he was exposed to asbestos dust on the Lockheed jobs in the 1960s and brought the dust home on his clothes. CP 3173. Lockheed did not provide him a respirator, *id.*,<sup>2</sup> or warn him of the hazards of asbestos exposure, CP 3173, 3174, discuss the hazard of wearing asbestos-laden clothing home from the job, CP 3202, or provide him disposable clothing. CP 3202.<sup>3</sup> He was not aware of the hazard of asbestos until the 1970s. CP 3201.

Daniel Arnold was born in 1960 and followed in his father's shoes, working in insulation. CP 345. Daniel lived with his parents throughout his entire life, with only brief interludes during which he resided outside the family home. *Id.*

Daniel Arnold worked at Lockheed aboard the USS ROARK in 1979-80 as a helper. CP 357, 585. His job as a helper was to assist the journeyman insulators by cleaning up insulation after it had been removed and by bringing materials to the journeyman insulators so that they could

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<sup>2</sup> Reuben testified that masks were not provided until the 1980s. CP 3202.

<sup>3</sup> Reuben recalled that Lockheed provided showers, CP 3208, but his testimony was contradicted by other witnesses who were Lockheed co-workers.

do their work. CP 357. Daniel testified, however, that he wore a respirator, protective coveralls, and gloves during this job. *Id.*

Lockheed was the owner of the shipyard premises at which Reuben Arnold worked in the 1960s and Daniel Arnold worked in 1979-80 and acted as the general contractor for the work on specific vessels. It used asbestos in its shipyards prior to 1972, CP 473, and long after that date.

Although it claimed to first be aware of the hazards of asbestos in the early 1970s, CP 480, Lockheed was aware as early as 1945 of the hazards of asbestos exposure to workers performing insulation work on vessels from the report of a Pacific Coast Shipyard Safety Conference that year. CP 624-72.<sup>4</sup> The Selikoff-Churg report on asbestos exposure for insulation workers, prepared in 1964-65, was also known to Lockheed. CP 739-60.<sup>5</sup> It adopted a policy in 1980 to control asbestos exposure. CP 482, 723-32. It had no written asbestos policy prior to that date. CP 483.

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<sup>4</sup> The 1946 Fleischer Drinker study indicated that asbestos diseases were a health hazard for workers in the construction of naval vessels. CP 1085-92.

<sup>5</sup> Lockheed's CR 30(b)(6) witness, Ildiko Songrady, acknowledged that the report was referenced in a 1969 Lockheed memorandum, indicating that Lockheed had knowledge of the document at least as early as 1969, and perhaps earlier. CP 493-94.

Lockheed's former president, Marty Ingwerson, confirmed that Lockheed maintained huge warehouses of all the materials required to outfit the ships under construction, including materials such as insulation. CP 607-08. Lockheed stored insulation materials on its premises and had control of those materials that insulation contractors were to use. CP 608-09.

Lockheed required insulation subcontractors to adhere to the provisions of its safety booklet as a condition of entering into a contract with Lockheed:

Notes

1. THE SAFETY REGULATIONS AND GENERAL SAFETY RULES CONTAINED IN THE BOOKLET, "SAFETY AT LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY" WILL BE STRICTLY ADHERED TO BY EMPLOYEES OF THE SELLER WHILE IN OR ON THE CONFINES OF LSCC FACILITIES. A COPY OF THIS BOOKLET IS FORWARDED WITH THE PURCHASE ORDER. ACKNOWLEDGMENT OF RECEIPT OF BOOKLET WILL BE RETURNED TO THE BUYER PRIOR TO SELLER'S EMPLOYEES ADMISSION TO LSCC FACILITIES.

CP 613, 614. Ingwerson confirmed that it was Lockheed's practice to forward this booklet to the various subcontractors because Lockheed wanted its subcontractors to adhere to its safety practices. CP 606.

Rueben's co-workers at the Lockheed site testified to the asbestos exposure there in the 1960s, Lockheed's limited safety practices, and its control over the asbestos work. John Tanner first worked at Lockheed in 1962-63, contemporaneous to the time that Reuben Arnold first worked at Lockheed, and later between 1967 and 1969. CP 412. While he worked as a union pipe fitter and a Lockheed employee at the shipyard in 1962-63, Lockheed supervisors and quality control managers maintained oversight over all crafts working aboard ships, wearing white coveralls and blue hats to distinguish them from the other crafts engaged in work on the site. CP 415. Lockheed quality control people reviewed and signed off on the work that Lockheed craftsmen and outside craftsmen were conducting in particular areas of the ships. *Id.* Tanner believed that Lockheed personnel retained control over the work of all craftsmen to insure that the work was done correctly. *Id.*

With respect to safety, Tanner testified that Lockheed personnel advised the foremen overseeing the craft workers as to safety procedures for the workers and that Lockheed retained overall control over safety measures taken on the work site. CP 416.

Tanner testified that he never received any information from Lockheed about asbestos hazards at any time that he was working there in the 1960s. *Id.* He received no information from Lockheed advising him

to avoid getting asbestos dust on his work clothes that might be brought home to expose a family member. *Id.* He was never advised by Lockheed to wear a respirator when working around asbestos materials. *Id.* Even in the later years that he worked at Lockheed, from 1967-1969, he believed that Lockheed put little to no emphasis on the safety of craftsmen who were working in the yard. CP 417, 419. He never recalled seeing an industrial hygienist on site at Lockheed in the 1960s, nor did he ever recall Lockheed providing workers with devices to sample the air for dust and other toxins while working. CP 424.

Ron Nickell testified that he worked with Reuben Arnold beginning in the summer of 1969 at Lockheed. CP 520-21. Nickell served as the general foreman for Unicor, an insulation contractor for Lockheed. CP 521. Unicor had nearly 100 insulators on the job, with a foreman assigned to every 10 insulators, CP 526, but it operated under a system of releases issued by Lockheed managers;<sup>6</sup> Nickell stated that a Lockheed manager “was responsible for the insulators, everything we did.” CP 526, 532.

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<sup>6</sup> A Lockheed supervisor had to give the insulators written approval or “release” to insulate in a particular area. CP 526.

Nickell indicated that Unicor used an asbestos-containing calcium silicate insulation on the steam lines and boilers. CP 521-22. The dust from the application of that product was thick and ventilation was poor. CP 524. Nickell testified that “it could get to the point where, you know, visually there would be so much dust you couldn’t hardly see in a compartment depending on what size the compartment was and if there was any ventilation at all.” CP 525.

Nickell noted that Lockheed “had ventilation, but it wasn’t always working ventilation. So there was a lot of times that crafts were working in very hazardous situations,” including but not limited to asbestos. CP 532. Lockheed was not advising insulators to control dust at this time. *Id.* Instead, according to Nickell, Lockheed told the insulators to step up the work:

They were telling us that we were making too much of a mess, but don’t let it slow your production down to correct it. That’s exactly what they were telling us.

*Id.* Production, not safety, was the first priority. CP 524, 531.

In 1969, Unicor provided paper masks. CP 525. But the masks were uncomfortable and workers did not use them. *Id.* Neither Lockheed, nor Unicor, offered the insulation workers work clothing to wear, a laundry service, nor did they offer changing rooms or an isolated area for the workers to take off their dusty clothes. *Id.*

Bruce Curtis was also an insulator and co-worker of Reuben Arnold who worked with Reuben in 1968 and 1969 at Lockheed insulating pressure vessels and pipes. CP 543-44. He and Reuben would cut insulation and mix insulating mud creating dust that would adhere to both his and Reuben's work clothes. CP 551-52.

Lockheed controlled the access of contractor employees to its shipyard and the materials that those employees used during this period. CP 552. Lockheed coordinated the work of the crafts on site. *Id.* Lockheed maintained a shack on its property where insulation material was stored and material was distributed from this shack to insulators. CP 552, 553. Curtis' recollection of the insulation shack is corroborated by Lockheed's own internal documents which refer to the stocking of insulation material at LSCC Yard 1, albeit in later years. CP 737.

According to Curtis, Lockheed never informed the workers about asbestos hazards or that they should wear respiratory protection and not take dusty work clothes home to their families. CP 552. Lockheed also did not offer change or locker facilities to these insulation workers where they could change their clothes before taking them home, nor were these offered to Lockheed employees. CP 553. Lockheed did not provide shower facilities or disposable work clothes. *Id.*

Michael Ray Harris, a former Lockheed employee and supervisor, testified concerning Lockheed's retained control over safety measures applicable to both Lockheed employees and insulation contractors like Reuben Arnold. Harris was a pipefitter who went to work in 1966 as a Lockheed employee shortly after graduating from high school. CP 442. He moved through the ranks at Lockheed from a journeyman pipefitter to lead man, foreman, and then to superintendent. CP 442-43. Lead men had "hands on" responsibility for 7 to 15 craftsmen; foreman would supervise 5 to 8 lead men, and "would be responsible not only for the crew but for direction of the lead men down the line to the men themselves." CP 442. Superintendents had responsibility for the entire crew aboard a ship and sometimes as many as two ships, and were considered part of Lockheed management. CP 443.

Harris confirmed that as a pipefitter he worked constantly in the same compartment aboard ship right next to the insulation contractors. CP 444.

On a given ship, a Lockheed production manager had the responsibility for all of the work done on that particular ship; he would have an office on the ship and would administer the master schedule that "coordinated . . . all crafts in given areas of a ship." CP 446. This Lockheed production manager was:

. . . responsible to all crafts aboard ship

Q. Whether they were Lockheed employees or not?

A. Right, anyone working on that ship.

*Id.* Lockheed's superintendents and the project manager resolved all inter-craft disputes. *Id.*

In addition to this control over the activities of all personnel aboard ship including outside contractors, Lockheed management personnel (superintendents and production managers) regularly held meetings of the various trade crafts aboard ships that included insulators who were integral to the schedule of the ship and treated as any other trade. *Id.* The insulation contractors responded to instructions from the production manager. CP 447.

Lockheed always had quality assurance personnel on board ships to insure that work was being done up to their workmanship standards and contract specifications. CP 447-48. These quality assurance managers reviewed not only the work of the pipefitters, but of all crafts, whether they were Lockheed employees or not. CP 448. Indeed, in the early years of OSHA when OSHA inspectors came onto the worksite, Harris testified that Lockheed management told not just to its own employees, but all trade crafts (including insulators) to clean up the worksite. CP 449-50.

Harris also testified that Lockheed did not require dust masks or respirators for insulators. CP 448. Lockheed controlled temporary ventilators that were provided to limit the amount of dust on the jobsite. *Id.* But Lockheed did not provide showers or laundries for employees of Lockheed contractors. CP 449. Lockheed offered no training on asbestos hazards in the 1960s and 1970s. CP 450, 458. Harris recalled workers actually playing with asbestos, making it into “snowballs.” CP 450. In that period, Harris never encountered a Lockheed industrial hygienist. CP 457.

On the specific question of Lockheed’s retention of control over safety of their outside contractors, Harris, as both a Lockheed foreman and particularly as a superintendent, stated he retained the authority and ultimate control over the safety work practices of Lockheed employees and specifically outside contractors. CP 461.<sup>7</sup>

Lockheed’s representative, Ildiko Songrady, a corporate paralegal with no training, no knowledge, and no experience, undertook little review of critical documents at issue in this case in response to the Arnolds’ CR

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<sup>7</sup> Lockheed’s Ildiko Songrady did not dispute Harris’ testimony on his safety authority. CP 505-06.

30(b)(6) notice of deposition. CP 468-70. She testified that Lockheed had no evidence to refute the Arnolds' evidence on Lockheed's retained control over the safety of insulation contractors like Reuben Arnold:

Q All right. Now, was Lockheed responsible for the safety of the workers of the insulation subcontractors?

...

A I don't know.

Q Okay. Did Lockheed feel it was important that any individuals who worked on their premises in the 1960's, whether they were employees or employees of their subcontractors, did Lockheed believe it was important to try to have a safe workplace for those individuals?

...

A I don't know.

Q Did Lockheed retain ultimate control of the safety of subcontractor employees when it came to any work that they would have done involving asbestos-containing insulation?

...

Q In the 1960's?

...

A I don't know.

...

Q Let me ask you as a – it Lockheed's position in the litigation that's before us today.

A Right.

Q -- that the insulation subcontractors had all control over the insulation work that their workers were doing at Lockheed Shipbuilding Company in the 1960's?

A I don't know.

CP 504-06.

Songrady testified that Lockheed did not know that asbestos was a hazard to human health until the “early 1970’s.” CP 480. Nevertheless, Lockheed officials attended a shipyard safety conference as early as 1945 (approximately 17 years before Reuben Arnold went to work at Lockheed) where medical and industrial hygiene presentations on the hazards of asbestos in shipyards were discussed in detail, including the occupational disease asbestosis. CP 498-500. The then-existing threshold limit value for asbestos was presented to attendees, which included three Lockheed safety managers. CP 500.<sup>8</sup>

In the spring of 1969, the Navy asked Lockheed to survey its asbestos use and control operations in its shipyard activities. CP 764. In correspondence to the Navy in May 1969, A.J. Miller, Lockheed’s director of contract administration, advised the Navy that Lockheed utilized asbestos insulation in a number of different capacities in its shipbuilding activities including on steam piping, boilers, and diesel exhaust piping and that written instructions, prepared by Lockheed’s Engineering Branch,<sup>9</sup> were routinely provided by Lockheed to the insulation contractor

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<sup>8</sup> The safety director of Todd Pacific Shipyards led the conference discussion on occupational diseases, which included information on asbestosis and asbestos hazards. CP 498, 501. Three individuals from Puget Sound Bridge & Dredging were registrants at this conference including the shipyard’s safety director and a safety engineer. CP 503.

<sup>9</sup> The instructions are detailed in Lockheed’s Engineering Standards, LSCC 5-054, entitled “Insulation and Lagging for Piping and Machinery,” effective on 9/21/67 and revised on 12/18/68. CP 768-89.

providing the insulation work on the ships Lockheed was building. CP 759-60. Lockheed's own document specifically identified and called for the use of asbestos lagging, providing detailed instructions on how Lockheed wanted its contract insulators to install asbestos insulation on the various hot systems on vessels under construction, and conferring control over the use and application of insulation materials on Lockheed's Engineering Branch. CP 492, 768-89. That document made clear that its terms governed insulators at Lockheed's site; no deviation from its terms was permitted without Lockheed's approval, Lockheed controlled quality assurance, and the Engineering Branch had final say over the document's interpretation. CP 768.

Songrady confirmed that the Engineering Standard was a Lockheed document and that it was likely provided to the insulation contractors referenced in Miller's correspondence with the Navy. CP 491-92. She also acknowledged that the engineering standard was something given to insulation subcontractors prior to their beginning work at Lockheed to inform these contractors on how Lockheed wanted the insulation work accomplished. CP 492.<sup>10</sup> Lockheed saw no alternative to the use of asbestos. CP 760.

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<sup>10</sup> Lockheed's 1969 letter responding to the Navy's inquiry on asbestos hazards indicated that Lockheed was using asbestos products in 1969 and was aware of their

The May 1969 correspondence with the Navy also made reference to, and enclosed, the Selikoff-Churg study of 1964-65, CP 493-94, a critical study on asbestos hazards among insulators, including discussions of mesothelioma, the disease at issue in this case. CP 739-55, 759.

Although it had actual knowledge of asbestosis by 1945 and mesothelioma by the mid to late 1960s, CP 624-72, 739-60, Lockheed did not have a written asbestos control procedure until 1980. CP 483, 723-32. Lockheed's Songrady conceded the 1980 policy gave Lockheed the right to review the contractors' removal of insulation to ensure such activities complied with its policy. CP 489.

The 1980 Lockheed asbestos control policy also contained warnings about asbestos hazards that Lockheed directed its personnel to post in areas where asbestos materials were located. CP 483. Songrady conceded that had the warning been posted in those areas where asbestos was being used on ships, it could have informed contractors of asbestos hazards because both employees and contractors were working in the same areas. CP 484-85. Nevertheless, no such warnings were ever posted between 1960 and 1980, according to her testimony. CP 484. Moreover,

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hazard, CP 490, 759-60, contradicting Songrady's earlier testimony that Lockheed first learned of the hazards in the early 1970s. CP 493, 495.

Lockheed offered no evidence that it tested for airborne concentrations of asbestos fiber at any time between 1960 and 1980. CP 487, 496.

Lockheed's 1980 policy provided for changing rooms. CP 485. While Lockheed may have provided some locker rooms for their own employees to change clothes prior to 1980, there is no evidence that they ever made those available to insulation contractors,<sup>11</sup> nor did they inform workers of the need to change asbestos contaminated clothing so as not to expose family members. CP 485-86.

Songrady represented that Lockheed was concerned for the welfare of its own employees as to asbestos hazards, even as early as the 1960s, CP 487, 488, but to control the exposure to its own employees, Lockheed would have taken precautions not only for their own employees but for the contractors as well. CP 487.

Reuben Arnold was diagnosed with mesothelioma in March 2008 and died of the disease in April 2008. CP 147, 3183-84. Dr. Dorsett Smith, Lockheed's expert, testified that Reuben's asbestos exposure resulted in his mesothelioma. CP 3275-76, 3281. Daniel was diagnosed with mesothelioma in January 2008. CP 147. He recently died of the disease. Asbestos exposure is the only known cause of mesothelioma, and

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<sup>11</sup> Harris' testimony creates the opposite inference.

it is invariably fatal. *Payne v. Saberhagen Holdings*, 147 Wn. App. 17, 22, 190 P.3d 102 (2008).

Marjorie Arnold, the widow of Reuben Arnold and the mother of Daniel Arnold, was appointed the personal representative of the estate of her late husband, and filed this action in Pierce County Superior Court on her behalf and on behalf of Daniel as a statutory beneficiary under Washington law against various defendants. CP 1-13. Daniel Arnold brought his own personal injury claims arising from his mesothelioma. *Id.* The case was assigned to the Honorable Kitty Van Doornink. All of the defendants, except Lockheed, have settled with the Arnolds.

Lockheed filed a motion for summary judgment, claiming that it owed no duty to Reuben or Daniel as they were employees of independent contractors. CP 161-82.<sup>12</sup> The trial court granted the motion. CP 2771-72. The trial court's oral ruling focused only on the retained control issue and did not address either the statutory-based duty of Lockheed or its responsibility under premises liability principles:

I am going to grant summary judgment in regards to Daniel and the primary exposure. I just don't think there's any evidence that he was exposed in 1979. That has to be speculation.

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<sup>12</sup> Lockheed filed a motion to strike portions of the declaration of Brian Ladenburg submitted in opposition to its motion for summary judgment, CP 1747-63, but the trial court denied that motion. CP 2772.

I think it's a really close question in regards to what Lockheed's responsibility obligation was to Reuben Arnold. And I did look at the Kamla and the Kinney cases very closely, and I think that the evidence that is before the Court is that Lockheed didn't have control over the means and manner of the work. Certainly, they had the obligation to coordinate with the subcontractors, and make sure that the timing was right and those kinds of things, but in everything that I looked at, I did not see that they had control of the means and manner of how the work was done, and how the asbestos-related insulation was being installed, and how that worked.

So it is, I think, a pretty close call, but I am going to grant summary judgment in regards to that as well. I don't think Lockheed was the general contractor, and I don't think the statutory duty applies, either. So I'm granting summary judgment.

RP 31-32.

The Arnolds moved for reconsideration, providing the trial court additional critical evidence of Reuben's exposure to asbestos in a sprayed form. CP 2809-3435.

While Reuben was working on pipe insulation and on insulating the stacks of vessels, Lockheed hired American Fireproofing and Spraying Company ("AFSC") to apply a sprayed-on acoustical and thermal insulation product, "Limpet," to the beams, ceilings, decks and walls of the Alaska ferries on which Reuben Arnold worked. CP 3031, 3172-73. Limpet contains 60% asbestos fiber (including crocidolite or amosite

asbestos, depending on the grade) and the remainder of the product was 38% Portland cement and 2% mineral oil. CP 2814, 3007, 3395.<sup>13</sup>

Andrew Pashkowski, the president of a local company Lockheed hired to do the work of spraying the Limpet fireproofing aboard the three Alaska ferries on which Reuben Arnold also worked, confirmed that Limpet was the product used on all three Alaska state ferries. CP 3019-22, 3100, 3102. He confirmed that other trades complained to his crew when he was working in their vicinity because of the dust and mess created by the spraying of the Limpet product. CP 3022.

William Northup, a member of Pashkowski's Limpet crew, confirmed that Limpet was sprayed on the three Alaska ferries at Lockheed. CP 2935. His crew sprayed Limpet on the main car deck and then on the upper decks above the car deck. CP 2936-37. Because of the tight spaces and the necessity of working near one another, he sprayed in the vicinity of other trades during this work. CP 2942-43.

Dr. Samuel Hammar testified that the Limpet exposure was alone sufficient to cause Reuben Arnold's mesothelioma. CP 3246. Lockheed's

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<sup>13</sup> Crocidolite and amosite asbestos fibers have been found in peer-reviewed literature to be as much as 500 to 100 times as potent for causing mesotheliomas as chrysotile asbestos. Chrysotile asbestos, mined primarily at the time in California, Vermont and Canada, constituted approximately 95% of all the asbestos sold in the United States. *See, e.g.,* John T. Hodgson and Andrew Darnton, *The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure*, 44 *Ann. Occup. Hygiene* 565 (2000) (discussing relative risks for development of mesothelioma by asbestos fiber types). CP 3301-37.

expert, Dr. Smith, agreed and testified that the Limpet exposure would be sufficient to have caused Reuben Arnold's mesothelioma. CP 3281.

Lockheed moved to strike portions of the declaration of Brian Ladenburg in support of the Arnold's motion for reconsideration. CP 3482-98.<sup>14</sup> Notwithstanding the evidence adduced by the Arnolds, without any analysis, the trial court granted Lockheed's motion to strike the testimony and denied the Arnolds' motion for reconsideration. CP 3555. This timely appeal followed. CP 3556-62.

#### D. SUMMARY OF ARGUMENT

The trial court here precipitously dismissed the claims of Reuben and Daniel Arnold against Lockheed for the mesothelioma they contracted as a result of Reuben's exposure to asbestos while working for contractors on Lockheed's worksites, or, in Daniel's case, for his exposure to asbestos brought home from Lockheed worksites by his father.

Washington law imposes a duty upon a premises owner/general contractor like Lockheed that retains control over the workplace to provide a safe workplace for the employees of contractors on that jobsite.

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<sup>14</sup> This evidence was newly discovered within the meaning of CR 59(a)(4) as the key depositions that were the subject of the motion were provided to the Arnolds' trial counsel by defendants in another case after the Arnolds submitted their opposition to Lockheed's motion for summary judgment.

Washington law also imposes a nondelegable duty upon a premises owner/general contractor like Lockheed to provide a safe workplace for the employees of contractors on that worksite.

Washington law provides for liability on the part of a premises owner who allows business invitees onto its premises where such invitees encounter hazards that harm them.

Particularly, where Lockheed's CR 30(b)(6) witness failed to deny the key aspects of Lockheed's duty to the Arnolds referenced above, the trial court erred in finding that Lockheed owed no duty to the Arnolds, dismissing their complaint.

E. ARGUMENT

(1) Standard of Review on Summary Judgment

Appellate court review of a summary judgment order is *de novo*. *Morton v. McFall*, 128 Wn. App. 245, 252, 11 P.3d 1023 (2005). When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291, 100 P.3d 310 (2004), *review denied*, 154 Wn.2d 1018 (2005). Although the existence of a duty of care is usually a question of law, where, as here, the existence of a duty depends on proof of certain facts, summary judgment is inappropriate. *Sjogren v. Properties*

*of Pacific Northwest LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003) (premises liability case under *Restatement (Second) of Torts* § 343A).

This Court must consider all facts and reasonable inferences in a light most favorable to the Arnolds, as the nonmoving party. *Id.* Summary judgment is properly granted only where the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Taken in a light most favorable to the Arnolds as the nonmoving parties, the evidence provided to the trial court demonstrated that

- Lockheed owned the shipyards where Reuben Arnold worked in 1962-63 and again in 1967-68 and 1969 and where Daniel worked in 1979-80;
- Lockheed was the general contractor for the ships on which Reuben and Daniel worked;
- Lockheed was aware of the hazards of asbestos for shipyard workers as early as 1945;
- Lockheed required contractors to adhere to its safety standards in the 1960s;
- Lockheed had safety, production, and quality assurance staff who controlled the work of craftsmen on the ships;
- Lockheed controlled contractor employee access to its site;
- Lockheed even provided asbestos materials to contractor employees from a shack on its premises;

- Lockheed did not advise personnel like Reuben Arnold about asbestos hazards nor did it advise them to avoid bringing asbestos dust home on their clothes;
- Despite significant asbestos dust on the job, Lockheed did not sample the air for dust, require respirators, provide ventilators or shower or changing rooms, or disposable work clothes.

(2) Effect of the Testimony of Lockheed's CR 30(b)(6) Testimony on Summary Judgment

In response to a CR 30(b)(6) deposition notice, Lockheed made Ildiko Songrady available for testimony. CP 478. Ms. Songrady was repeatedly unable to answer simple questions regarding the extent of Lockheed's control over employees like the Arnolds who worked on Lockheed sites. *See generally*, CP 465-516. The inability of Ms. Songrady to answer such questions bore on material facts associated with Lockheed's duty to the employees of its contractors, foreclosing summary judgment under *Sjogren*. Her inability, or refusal, to answer created credibility questions on those issues for the trier of fact. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 502-03, 722 P.2d 1343 (1986) (witness credibility issues preclude summary judgment).<sup>15</sup>

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<sup>15</sup> This relief is consistent with CR 43(f)(3) which provides that if a CR 30(b)(6) witness refuses to appear for a deposition, the party's pleadings may be stricken and judgment may be taken against that party. Alternatively, the witness may be cited for contempt.

A notice of deposition issued to a party under CR 30(b)(6) requires the corporation to produce one or more officers to testify with respect to matters set out in the deposition notice. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005), *review denied*, 156 Wn.2d 1030 (2006). Because CR 30(b)(6) and Fed. R. Civ. P. 30(b)(6) are nearly identical, “federal cases interpreting the federal rule are highly persuasive.” *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). The party seeking discovery need only “designate with reasonable particularity the matters on which examination is requested.” CR 30(b)(6). The corporation “must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.” *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989).

Rule 30(b)(6) is designed "to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself." 8A CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *Federal Practice and Procedure* § 2103 at 33 (2d ed. 1994). Therefore, the corporation must make a “conscientious good-faith endeavor to designate the persons

having knowledge of the matters sought...and to *prepare* those persons in order that they can answer fully, completely, unequivocally, the questions posed...as to the relevant subject matters." *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 432-33 (5th Cir. 2006). The duty to present and prepare a Rule 30(b)(6) designee goes beyond simply matters personally known to that designee, or matters in which the designee was personally involved. *Id.* The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources. *Id.*

The CR 30(b)(6) deponent must testify to "the knowledge of the corporation and the corporation's subjective beliefs and opinions and interpretation of documents." *Flower*, 127 Wn. App. at 40. If the designated agent "is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all." *Resolution Trust Corp. v. S. Union*, 985 F.2d 196, 197 (5th Cir. 1993). If it becomes obvious that a representative sent to speak on behalf of a corporation in a 30(b)(6) deposition is not sufficiently knowledgeable about the subject matter, the corporation is obligated to provide a substitute. *Brazos*, 469 F.3d at 433.

By offering Ms. Songrady as a CR 30(b)(6) witness, Lockheed provided a person who could not answer simple questions regarding factual issues relevant to the Arnolds' liability theories. Lockheed created a question of fact regarding Songrady's credibility (and its own) on vital issues pertaining to its duty to the Arnolds, and its breach, that should be submitted to the trier of fact.

(3) The Trial Court Abused Its Discretion in Striking the Evidence on Reconsideration

The trial court abused its discretion in granting the motion to strike the deposition testimony of Andrew Pashkowski, William Northup, and Samuel Hammar annexed to the declaration of Brian Ladenburg. The trial court, however, never stated in its order the precise grounds for striking the declarations. CP 3555.

Motions for reconsideration are governed by CR 59, but that rule does not prohibit the submission of new or additional materials on reconsideration: “[I]n the context of summary judgment, unlike a trial, there is no prejudice to any findings if additional facts are considered. *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994) (citing *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31, *review denied*, 117 Wn.2d 1017, 818 P.2d 1099 (1991)). This Court stated in *Chen v. State*, 86 Wn. App. 183, 192, 937

P.2d 612, *review denied*, 133 Wn.2d 1020 (1997) “[N]othing in CR 59 prohibits the submission of new or additional materials on reconsideration.”

For example, in *Applied Industrial Materials*, the trial court accepted and considered a supplemental declaration submitted by the defendants on reconsideration after the trial court granted the plaintiff’s motion for summary judgment. Based on the supplemental declaration, the trial court determined on reconsideration genuine issues of material facts existed and denied the plaintiff’s motion for summary judgment. On appeal, the plaintiff argued the trial court erred by considering the supplemental declaration. Noting the rule allowing a party to submit additional evidence on reconsideration because there is no prejudice if additional facts are considered, this Court held it was permissible for the trial court to consider the supplemental declaration on reconsideration. *Applied Indus. Materials*, 74 Wn. App. at 77.

By contrast, in *Chen*, the court concluded the trial court did not abuse its discretion by declining to consider an affidavit and a declaration Chen submitted on reconsideration after the trial court granted the State’s motion for summary judgment. *Chen* was an action for age, race, and national origin discrimination filed by a psychiatrist who was dismissed from his employment at Western State Hospital. The trial court granted

the State's motion for summary judgment on the ground Chen failed to establish the State's reason for terminating him was a pretext or unworthy of belief. With his motion for reconsideration, Chen submitted an affidavit and a declaration of former colleagues at Western State. The trial court ordered the affidavit and declaration stricken and denied Chen's motion for reconsideration. On appeal, Chen argued it was error to strike these documents. This Court concluded the trial court did not abuse its discretion by striking the affidavit and declaration because they contained no new material, only a repetition of information already presented, and accordingly did not create any issues of material fact concerning Chen's dismissal from employment. *Chen*, 86 Wn. App. at 912.

Here, the declarations contained critical new evidence on the use of Limpet on Lockheed's jobsite, a toxic form of asbestos to which Reuben Arnold was exposed in 1962-63, 1967-68, and 1969. The trial court abused its discretion in excluding such vital evidence, particularly where it failed to articulate any grounds for its decision. The admission of such evidence rendered the trial court's decision to grant Lockheed's motion for summary judgment and to deny the Arnolds' motion for reconsideration clear error.<sup>16</sup>

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<sup>16</sup> While the Arnolds believe that the trial court abused its discretion in excluding the evidence on reconsideration, the evidence they provided the Court on

(4) The Trial Court Erred in Determining that Lockheed Owed No Duty to the Arnolds

The trial court here concluded that Lockheed owed no duty to the Arnolds, and granted Lockheed's motion for summary judgment. CP 2771-72. The trial court's decision was erroneous because Lockheed owed a duty to the Arnolds as a premises owner/general contractor that retained control over the worksite at which the Arnolds worked,<sup>17</sup> and it owed them a duty based on its statutory obligation to provide them safety equipment while working with a toxic substance like asbestos. Finally, as a premises owner, Lockheed owed a duty to the Arnolds as invitees.

(5) Lockheed Owed a Nondelegable Duty to Ensure a Safe Workplace for Reuben and Daniel

Washington law generally provides that a person does not owe a duty of care to the employees of independent contractors working for that person. *Larson v. Centennial Mill Co.*, 40 Wash. 224, 228, 81 P. 294 (1905). However, that general rule has three significant exceptions: (1)

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summary judgment even without the additional evidence on reconsideration, was ample to forestall summary judgment.

<sup>17</sup> Daniel Arnold was exposed to asbestos both because his father brought asbestos home on his clothing. A person exposed to asbestos from a family member's clothing is owed a duty. *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005). This rule must be applied retroactively. *Lunsford v. Saberhagen Holdings, Inc.* (Supreme Court Cause No. 80728-1, June 4, 2009). The experts for the Arnolds and Lockheed both testified that Daniel's exposure to Reuben's "take home" asbestos from his Lockheed work was sufficient to result in his mesothelioma. CP 3259, 3276, 3281-82.

where the owner of premises or a general contractor on a jobsite retain control over the jobsite and the work performed on it by the contractor; (2) where the owner or general contractor has a statutory obligation with respect to safety on the jobsite; or (3) where the owner has a duty with respect to hazards on the premises.

In this case, Lockheed owed a duty to the Arnolds under any of these well-established grounds.

(a) Lockheed Was Both a Premises Owner and a General Contractor with Respect to Projects on Which Reuben Arnold Worked

Before undertaking a detailed analysis of each of these grounds for a Lockheed duty of care to the Arnolds, it is first important to note that Lockheed was both a premises owner and a general contractor here when the facts are considered, as they must be, in light most favorable to the Arnolds as the nonmoving party. *See* section (1) *supra*.

There is little question that Lockheed owned the shipyards at which the Arnolds worked. Additionally, Lockheed was the general contractor for the projects on which the Arnolds worked because (1) the shipyards' business activities fit within the accepted definitions and usage of the term "general contractor" by the public and the courts;<sup>18</sup> and (2) the

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<sup>18</sup> Since 1963, Washington law has required all contractors to register as such with the Department of Labor and Industries ("DOLI"). RCW 18.27.020. DOLI refers to contractors required to register as "construction contractors." When applying for

shipyards were in the business of building and maintaining ships and the insulation services provided by the Arnolds were integral to that building and maintaining. Moreover, Lockheed referred to itself as a contractor on ship projects. CP 513-14, 734.

A general contractor is an entity in the business of constructing a structure for a third party and whose business operations require the use of more than one tradesperson on the site of the project. See RCW 18.27.010 (defining “contractor” as anyone who “in the pursuit of an independent business undertakes to . . . construct, alter, repair . . . or demolish any building, highway . . . or other structure . . .” and “general contractor” as a contractor whose business requires it use more than one building trade or craft upon a single project). Lockheed was a general contractor because it contracted with third parties, including the U.S. Navy and State of Alaska, to construct and maintain ships, and it employed various subcontractors, including insulators, to complete those contracts. See *Foster Wheeler Corp. v. American Surety*, 142 F.2d 726 (2<sup>nd</sup> Cir. 1944); *In re Professional Coatings, Inc.*, 210 B.R. 66 (E.D. Vir. 1997);

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registration, the contractor must specify whether she or he is applying as a general contractor or a specialty contractor. RCW 18.27.030(1)(f). To become registered, a general contractor must also provide proof of workers’ compensation insurance, file a twelve thousand dollar surety bond with DOLI and pay a fee. RCW 18.27.030(1)(c), .040, .070. These contractor registration applications must be signed under oath by the contractor’s owner or corporate officer. RCW 18.27.030. Registrations must be renewed every two years. RCW 18.27.060(1). Lockheed registered as a contractor with DOLI every year from 1963 through at least 1987. CP 2834-35.

*Poole v. Quality Shipyards, Inc.*, 668 So.2d 411 (La. App. 1996), *writ denied*, 669 So.2d 1215 (La. 1996); *Amato v. U.S.*, 167 F. Supp. 929 (S.D.N.Y. 1958) (in all of these cases, the court refers to the shipyard as a “general contractor”).

As a premises owner/general contractor, Lockheed owed a duty of care to the Arnolds to prevent their exposure to asbestos on its jobsite.

(b) Lockheed Retained Control over the Work of Subcontractor Employees Like the Arnolds Resulting in a Duty of Care

Washington law has long recognized that a general contractor, by virtue of its retained general supervisory control over a jobsite, has a duty to provide a safe workplace for employees of subcontractors working at its jobsite. *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 330-32, 582 P.2d 500 (1978). Where the general contractor retains the right to control over some part of the subcontractor’s work, even if control is not actually exercised, the general contractor owes a duty of care to the subcontractor’s employees. *Id.* at 330-31.

A premises owner/general contractor meets the requirements of the retained control doctrine when it either (1) retains the right to direct the manner in which a contractor does its work; *or* (2) affirmatively assumes responsibility for worker safety. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121-22, 52 P.3d 472 (2002). The proper inquiry is not

whether there is an *actual* exercise of control over the manner the work is performed, only that the retention of the *right* to control is required. *Id.* at 121. In fact, merely retaining general supervisory and coordinating responsibility over the worksite is enough to establish the requisite control for purposes of this rule. *Kelley*, 90 Wn.2d at 331. As our Supreme Court stated in *Stute*:

A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor's responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.

114 Wn.2d at 464.

While in *Kamla*, the Supreme Court determined the Space Needle Corporation did not retain control over a pyrotechnical contractor's work in preparing a fireworks display, in *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (2004), the court found that the retained control rule applied. The court there found that the right of control is a question of fact. *Id.* at 247-48. While *Kinney* and *Kamla* both arose from workplace injuries sustained at the Space Needle in Seattle, *Kinney* presented evidence from a Space Needle employee that detailed factually the extent to which the Space Needle retained control over the worksite – particularly those remote areas where *Kinney* was injured just below the

Needle's antenna. The Space Needle provided instruction to Kinney on how to gain access to the area, on how to use safety equipment, and on how to descend the area where Kinney was ultimately injured. No such evidence was offered by the plaintiffs in the *Kamla* case where the Space Needle provided no equipment and no instructions, and where plaintiff's employer was in full control of the work area for a fireworks display. All the Space Needle did in the *Kamla* case was hire the vendor to come to the premises and provide its staff with a platform to set up their fireworks display.

In this case, as previously noted, Lockheed had guarded access to its properties and only allowed Reuben Arnold to gain access through use of an ID badge, it provided asbestos out of a central building for insulators' use. CP 552, 553. Lockheed required contractors to adhere to its safety policy, and it had staff on site who retained the power not only to correct workplace safety violations, but to review insulation work and safety procedures associated with it. CP 488, 506-08. As Harris explicitly testified, Lockheed not only controlled safety on its site, it coordinated the work of craftsmen on its ship projects and it had quality control staff pushing production. CP 447-48.

Lockheed's retention of control over the work of people like Reuben Arnold only confirmed that Lockheed owed him a duty of care; the trial court erred in granting summary judgment to Lockheed.

(c) Lockheed Owed a Duty of Care to the Arnolds Based on Statutes Informing Such a Duty

Under Washington's workplace safety laws, a general contractor has a nondelegable duty to provide a safe workplace for employees of subcontractors on the jobsite. *Kelley*, 90 Wn.2d at 332-34.<sup>19</sup> As noted by the *Kelley* court, this duty arises out of principles of negligence per se. *Id.* at 332-33.<sup>20</sup> Similarly, in *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, '461,

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<sup>19</sup> *Kelley* was decided under RCW 49.16.030 which stated:

... it shall be the duty of every employer to furnish a place of work which shall be as safe for workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions, and to furnish and use such safety devices and safeguards and to adopt and use such practices, means, methods, operations and processes as under the circumstances, surroundings and conditions are reasonable and practical in order to render the work and place of work safe, and to comply with such standards of safety of place of work and such safety devices and safeguards and such standards and systems of education for safety as shall be from time to time prescribed for such employer by the director of labor and industries through the division of safety, or by statute, or by the state mining board.

RCW 49.16.030 derived from Laws of 1919, ch. 130 § 4. The Washington Industrial Safety and Health Act, RCW 49.17 ("WISHA") repealed RCW 49.16.030 in 1973.

<sup>20</sup> Although Washington law now provides that a violation of a statute is evidence of negligence, RCW 5.40.050, the statutory obligation still informs the duty owed by a defendant. Under the *Restatement (Second) of Torts* § 286, a duty arises out of a statutory violation where the statute is designed to protect the class of persons that includes the plaintiff whose interest is affected, to protect the interest affected, to protect against the kind of harm experienced by the plaintiff, and to protect against the particular hazard from which the harm resulted. *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 257-58, 501 P.2d 285 (1972) (Washington has adopted § 286).

788 P.2d 545 (1990), a case decided under WISHA,<sup>21</sup> our Supreme Court held: “[i]t is the general contractor’s responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.” *Id.* at 461. The *Stute* court noted that a general contractor is in the best position, financially and structurally, to ensure WISHA compliance or provide safety equipment to workers, we place “the prime responsibility for safety of all workers ... on the general contractor.” *Id.* at 463.

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<sup>21</sup> RCW 49.17.060 states:

Each employer:

(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees ... and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

WAC 296-155-040 provides in part:

(1) Each employer shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.

(2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

RCW 49.17.060(2) provides a specific duty on all employers to comply with WISHA standards for all employees on a jobsite. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988); *Goucher v. J.R. Simplot*, 104 Wn.2d 662, 672, 709 P.2d 774 (1985).

In *Kamla*, our Supreme Court reaffirmed the principles of *Stute* and extended them to a premises owner that exercises a degree of control over the work of contractors on its premises comparable to that of a general contractor. There, the Court analyzed both the nondelegable duty under WISHA, as well as the retained control concept previously discussed, and held that the Space Needle Corporation did not have a nondelegable duty under WISHA to the employees of contractors on its site because it did not retain control over the manner in which a subcontractor completed its work. *Id.* at 124-25. The Court rejected a per se rule regarding the application of WISHA to premises owners. *Id.* at 123. It recognized that under the appropriate facts, a premises owner could owe a duty analogous to that of a general contractor to comply with WISHA mandates of workplace safety for all employees on a jobsite. *Id.* at 122-25.

Washington law clearly provides that a premises owner or general contractor owes a statutory duty to provide a safe workplace to its own employees and the employees of a subcontractor on its site where workplace safety statutes direct the general contractor or premises owner to make its premises safe for the workers working there. This duty has been in place in Washington under workplace safety laws since 1919 and independently under federal workplace safety statutes.

(i) RCW 49.16

RCW 49.16.030, the predecessor to WISHA, made it clear that an employer owed a duty to employees to provide a safe workplace. That statute established the civil duty owed by a company to an employee of a trucking firm making deliveries to the company's premises. *Bayne v. Todd Shipyards Corp.*, 88 Wn.2d 917, 568 P.2d 771 (1977). As noted *supra*, *Kelley* held that RCW 49.16.030 established that the same duty of care was owed by a general contractor to employees of a subcontractor on a jobsite. 90 Wn.2d at 332-33. Similarly, RCW 49.16.030 informed the duty owed by Lockheed to employees of subcontractors on its site like Reuben Arnold.

(ii) WISHA

WISHA was enacted in 1973, supplanting the provisions of RCW 49.16. Under WISHA, general contractors have an absolute, nondelegable duty to take reasonable steps to ensure a safe work environment for the employees of the subcontractors hired by the general. *Stute*, 114 Wn.2d at 461. This duty requires general contractors to either furnish safety equipment or contractually require subcontractors to furnish safety equipment. *Id.* A breach of the duty may be either by omission, such as a failure to warn or provide safety equipment, or commission. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985); *Phillips v. Kaiser*

*Aluminum & Chemical Corp.*, 74 Wn. App. 741, 752, 875 P.2d 1228 (1994).

WISHA directs that Lockheed provide a workplace free from recognized hazards, WAC 296-800-11005, provide and use means to make the workplace safe, WAC 296-800-11010, prohibit employees from being in an unsafe workplace, WAC 296-800-11015, construct a safe workplace, WAC 296-800-11020, and control chemical agents. WAC 296-800-11040.

In the case of asbestos under WISHA, Lockheed's obligation is crystal clear to workers encountering that toxic substance. In *Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 850, 106 P.3d 776, *review denied*, 155 Wn.2d 1015 (2005), the court summarized the duties imposed by these regulations under Washington law:

Washington courts have assessed an employer's liability for WISHA violations by considering the employer's supervisory authority and control over the worksite and whether the employer controlled or created the worksite's dangerous condition. This is consistent with federal case law. It is also consistent with decisions made by the Occupational Safety and Health Review Commission (OSHRC), the federal agency charged with reviewing OSHA citations. The OSHRC imposed liability under the multi-employer worksite doctrine if the violating employer was a creating, correcting, or controlling employer.

*Id.*, 125 Wn. App. at 850. The *Martinez Melgoza* court held an asbestos consultant exercised sufficient control over the workplace to warrant a WISHA citation. *See also, Netversant Wireless Systems v. Wash. State Dep't of Labor & Indus.*, 133 Wn. App. 813, 138 P.3d 161 (2006) (employer properly cited for failure to inform or train employees about asbestos).

Again, Washington law holds that WISHA informs the duty owed by a general contractor or premises owner to the employees of a subcontractor working on the jobsite. Here, Lockheed owed a duty to make its premises safe from asbestos exposure for workers like Reuben Arnold and his family.

(iii) Walsh-Healey Act

Since 1936, under the Walsh-Healey Act, 41 U.S.C. § 35, federal contractors have owed a duty to their employees to provide a safe and sanitary workplace. That statute provides for federal contractors:

(d) That no part of such contract will be performed nor will any of the material, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

The purpose of the Act is to ensure that such contractors who receive the benefit of federal business do not offend fair social standards of employment. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128, 60 S. Ct. 869, 84 L.Ed. 1108 (1940).<sup>22</sup>

The United States Department of Labor promulgated regulations to protect workers and third parties from exposure to asbestos dust.<sup>23</sup> The Walsh-Healey regulations call for the use of special protective clothing,

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<sup>22</sup> Walsh-Healey's regulations were promulgated in 1952 in response to "hard, cold statistics on industrial accidents in the United States." CP 1206. Because of the "human suffering, sorrow, and misery which follow deaths and injuries into the homes of American workers," the Act established workplace safety rules and requirements that applied to companies performing government contracts in excess of \$10,000. *Id.* The regulations required control measures including personal protective equipment, air cleaning equipment, dressing rooms and other sanitation facilities. CP 1232-33.

<sup>23</sup> 41 C.F.R. § 50-204.50 states:

Gases, vapors, dusts, fumes and mists – All dust, mists, fumes, gases or other atmospheric impurities generated in connection with an operation or process, emitted into or disseminated throughout areas where persons are employed . . . should be controlled by the methods set forth under "Control Measures" below. Where there is any doubt concerning the presence of a harmful condition, the contractor should have determinations made of the kind and amount of atmospheric impurities from samples taken at a point or points in the breathing zone of workers during normal operations.

*Control Measures* – One or more of the following methods should be used to control harmful dusts, mists, fumes, gases or other atmospheric impurities:

- (1) Enclosure of such process or operation.
- (2) Isolation or rearrangement of such process or operation.
- (3) Substitution of non-toxic materials.
- (4) Wet methods.
- (5) Dilution by general ventilation.
- (6) Local exhaust ventilation.

shower facilities, and the establishment of dressing rooms for workers exposed to hazardous materials, in order to protect third parties against take-home or carry-out exposures. 41 C.F.R. § 50-204.50. These regulations on the use of protective clothing, shower facilities, and dressing rooms are all designed to protect the class of persons foreseeably endangered when employees wear work clothes home after working in an asbestos-contaminated work environment: The workers and their families. The harm to be protected against is the exact harm sustained here -- exposure to asbestos on the job and from take-home exposure. The hazard of work clothing serving as a conduit for carcinogenic material was one of the particular hazards the United States Department of Labor contemplated when it enacted these regulations:

Workers who handle or are exposed to harmful materials in such a manner that contact of work clothes with street clothes will communicate to the latter the harmful substances accumulated during working hours should be provided with facilities which will prevent this contact. . .

CP 1233.

Lockheed was subject to the requirements of the Walsh-Healey Act as it engaged in federal government contract work in excess of \$10,000; it had a duty to implement the Walsh-Healey regulations pertaining to the prevention of workplace and take-home asbestos exposure. Lockheed's Sangrady, while unaware of the Walsh-Healey Act,

agreed that Lockheed had contracts with the Navy in excess of \$10,000, thereby subjecting Lockheed to the requirements of Walsh-Healey. CP 496-97.

Walsh-Healey regulations can establish the duty of care owed by Lockheed to the Arnolds. In *Zimko v. American Cyanamid*, 905 So.2d 465 (La. App. 2005), *writ denied*, 925 So.2d 538 (La. 2006), for example, the court held that Walsh-Healey's asbestos regulations established the duty owed by an employer for the exposure of an employee's household to asbestos. Noting that the employer's general duty was to act reasonably in view of the foreseeable risks of danger to household members, the regulations confirmed foreseeability in the duty analysis. *Id.* at 482. *See also, Goede v. Aerojet General Corp.*, 143 S.W.3d 14 (Mo. App. 2004) (no prejudice to missile producer in evidence and argument on Walsh-Healey in mesothelioma case).

Washington law is no stranger to the concept that violation of federal workplace safety regulations can establish a duty of care. For example, federal regulations for stevedoring employees established the duty owed by a ship owner to stevedores to provide a seaworthy (or safe) vessel for their work. *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 501-02, 419 P.2d 141 (1969); *Cresap v. Pacific Inland Navigation Co.*, 78 Wn.2d 563, 566-67, 478 P.2d 223 (1970).

In sum, whether under RCW 49.16, WISHA, or Walsh-Healey, as a premises owner/general contractor, Lockheed owed the Arnolds a statutory duty of care. Lockheed owed Reuben Arnold a duty of care to avoid his exposure to asbestos on the job. It owed Daniel Arnold a duty to avoid having his father bring asbestos home on his clothing.

(d) Lockheed Owed the Arnolds a Duty of Care as Business Invitees

Finally, in *Kamla*, our Supreme Court applied traditional premises liability principles to workplace hazard exposures. 147 Wn.2d at 125-27. Washington law on premises liability is well-developed. Washington has adopted the standard for liability of a premises owner articulated in the *Restatement (Second) of Torts* § 343. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 138-39, 875 P.2d 621 (1994). *See also, Mucsi v. Graoch Assoc. Ltd. P’ship No. 12*, 144 Wn.2d 847, 31 P.3d 684 (2001); *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996). Under that standard, a premises owner owes a duty to an invitee if the premises owner:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

As the *Tincani* court observed, the premises owner may even owe a duty to an invitee where the risk is obvious under § 343A of the *Restatement* where the premises owner should have anticipated the harm.<sup>24</sup> 124 Wn.2d at 139-40. The *Kamla* court reiterated these clear principles, 147 Wn.2d at 123-25, recognizing that a premises owner owed a duty of care to the employees of contractors on its premises.

The starting place in the premises liability analysis is the status of the person coming on to the premises. It is well-established that employees of contractors on the premises are invitees. *Kamla*, 147 Wn.2d at 125; *Epperly v. City of Seattle*, 65 Wn.2d 777, 786, 399 P.2d 591 (1965). Thus, the duty owed by Lockheed to the Arnolds was the duty of care for invitees.

Lockheed owed a duty of care to the employees of subcontractors on its jobsite under § 343 because it was aware of the risk of harm presented by asbestos exposure. Lockheed knew of the risk of asbestos exposure since the 1940s. It was present for the 1945 conference that discussed the risks of asbestos disease, CP 498-500, a conference that took place more than 15 years before Reuben Arnold ever worked on

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<sup>24</sup> *Restatement (Second) of Torts* § 343A(1) states:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is

Lockheed's premises. Lockheed knew that if workers were using asbestos at its facilities, there was a condition on its premises that created an unreasonable risk to invitees. Indeed, one of the purposes of the 1945 conference appears to have been to address this very risk and to develop ways to address it. CP 644, 648-58, 668.

Under § 343, Lockheed should have expected that its invitees did not know of the danger of asbestos exposure. Reuben Arnold was a blue collar insulator, without a college degree. His job was to insulate. The danger of asbestos was latent at all times he worked at these facilities in the 1960s. Lockheed did not warn him of the hazards associated with using asbestos on its premises. While Lockheed should have known of the hazard of asbestos exposure after 1945, invitees like Reuben Arnold did not know of the hazards associated with asbestos at that time. In fact, Bruce Curtis testified that Arnold's union did not begin advising its members of the hazards of asbestos until the early 1970s. CP 576. Similarly, John Tanner testified that the pipefitters' union did not provide education on respirators, and he did not begin wearing such protection until 1982. CP 421. Moreover, they were not aware of the risk of asbestos being brought home on Reuben's clothing.

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known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Even if Reuben was apprised by his union or his employer of the risk of asbestos, Lockheed could anticipate that workers might proceed to encounter the risk because of their need for employment. Lockheed owed the Arnolds a duty to anticipate the harm of asbestos exposure, even if the Arnolds were generally aware of that risk. Lockheed should have anticipated and addressed the risk regardless of the Arnolds' knowledge of it. *Restatement (Second) of Torts* § 343A. Whether Lockheed should have anticipated the harm under § 343A of the *Restatement* is a question of fact. *Kinney*, 121 Wn. App. at 250-51.

Finally, Lockheed failed to exercise reasonable care to protect invitees from the hazard. It did not warn workers on its premises of the hazards associated with asbestos work – despite the fact that it had knowledge of these hazards as early as 1945. As previously noted, Bruce Curtis described in detail the cutting of asbestos with saws, the mixing of asbestos “mud,” and the application of asbestos to the steam pipes, turbines, pumps, and other shipboard equipment. CP 551-52. Ron Nickell testified to the prevalence of asbestos dust on the site. CP 524-25. Lockheed did not warn the employees of subcontractors on the site of the hazards of asbestos dust or the risk of bringing dust home. It did not provide respirators to the insulators, nor did it require their use. It did not provide showers or lockers for workers like the Arnolds. Lockheed did

not require workers to change out of work clothing before leaving the shipyard at the end of the day.

In sum, the Arnolds met their burden of establishing the prima facie elements of a premises liability claim against Lockheed under § 343 or § 343A of the *Restatement*. This is particularly true as to Reuben's Limpet exposure. The trial court erred in dismissing the Arnolds' complaint.

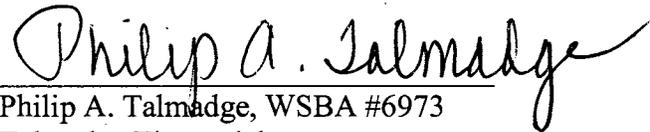
#### F. CONCLUSION

The trial court erred in granting Lockheed's motion for summary judgment, granting Lockheed's motion to strike, and denying the Arnolds' motion for reconsideration. Lockheed owed a duty of care to the Arnolds as a premises owner/general contractor based on its retained control of the premises at its shipyards where Reuben was exposed to asbestos or based on its statutory duties to people like the Arnolds. As a premises owner, Lockheed also owed a duty to Reuben Arnold as an invitee on its premises. Daniel was owed a duty of care from Reuben's take-home exposure.

This Court should reverse the summary judgment of dismissal in Lockheed's favor, and allow the Arnolds' case to proceed on the merits. Costs on appeal should be awarded to the Arnolds.

DATED this 5<sup>th</sup> day of June, 2009.

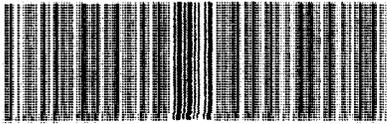
Respectfully submitted,



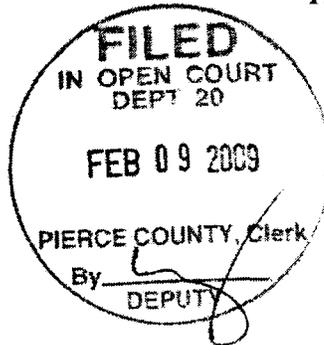
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Attorneys for Appellants Arnold

# APPENDIX



08-2-11077-5 31457597 ORGSJ 02-09-09



The Honorable K.A. van Doornick  
Room 550  
Trial Date: February 11, 2009  
Hearing Date: ~~January 23~~ February 23, 2009  
Hearing Time: 9:00 a.m.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

MARJORIE M. ARNOLD, Individually and as P  
ersonal Representative of the Estate of REUBEN J.)  
ARNOLD and DANIEL J. ARNOLD,  
Individually,  
  
Plaintiffs,  
  
v.  
  
SABERHAGEN HOLDINGS, INC., et al.,  
  
Defendants.

NO. 08-2-11077-5

~~PROPOSED~~  
ORDER GRANTING DEFENDANT  
LOCKHEED SHIPBUILDING COMPANY'S  
MOTION FOR SUMMARY JUDGMENT

CLERK'S ACTION REQUIRED

THIS MATTER, having come on regularly for hearing upon motion of defendant  
Lockheed Shipbuilding Company for Summary Judgment, and the Court having considered the  
records and files in this matter, including the following:

1. Defendant Lockheed Shipbuilding Company's Motion for Summary Judgment;
2. Declaration of Robert G. André (with its attached exhibits);
3. Plaintiffs' Omnibus Response to Motions for Summary Judgment Brought by (1) Lockheed Shipbuilding Company; (2) Todd Shipyards Corporation and Todd Pacific Shipyards Corporation; and (3) The Boeing Company;
- 4-8. Declaration of Brian F. Ladenberg in Support of Plaintiffs' Omnibus Response (and attached exhibits) (and)
5. Defendant Lockheed Shipbuilding Company's Reply: a further support of its Motion for Summary Judgment;

{JMS713305.DOC;1/12060.000013/}

~~PROPOSED~~ ORDER GRANTING DEFENDANT LOCKHEED SHIPBUILDING'S MOTION FOR SUMMARY JUDGMENT - 1

OGDEN MURPHY WALLACE, P.L.L.C.  
1601 Fifth Avenue, Suite 2100  
Seattle, Washington 98101-1686  
Tel: 206.447.7000/Fax: 206.447.0215

\*  
(p.2)

6. Declaration of Robert G Andre in Support of Lockheed's Reply to Plaintiff's Omnibus Opposition to Lockheed's Motion for Summary Judgment (and attached exhibits);

1 ORDERED ADJUDGED AND DECREED, that Lockheed Shipbuilding Company's  
2 motion is hereby GRANTED, and any and all claims against defendant Lockheed Shipbuilding  
3 Company are hereby dismissed with prejudice. *It is also ORDERED that the*

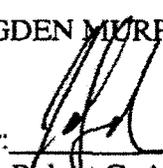
4 DONE IN OPEN COURT, this 9<sup>th</sup> day of <sup>July</sup> ~~January~~, 2009.

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7 The Honorable K.A. van Doorninick

8  
9 Presented By:

10 OGDEN MURPHY WALLACE, P.L.L.C.

11  
12 By: 

13 Robert G. Andre, WSBA #13072  
14 Attorneys for Defendant  
Lockheed Shipbuilding Company

*Motions for Shortened Time and  
the Motion to Strike ~~is denied.~~ ~~the Court has granted~~*

*Jeffrey D. Dunbar, WSBA #26379*

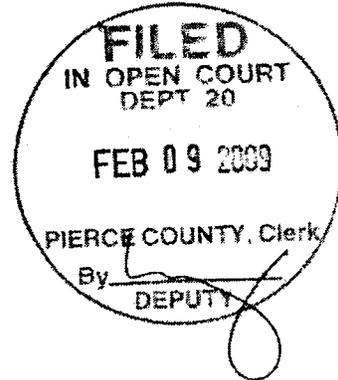
*is GRANTED*

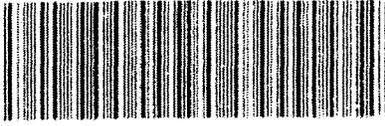
15 Approved for Entry; Notice of  
16 Presentation Waived:

17 BERGMAN & FROCKT

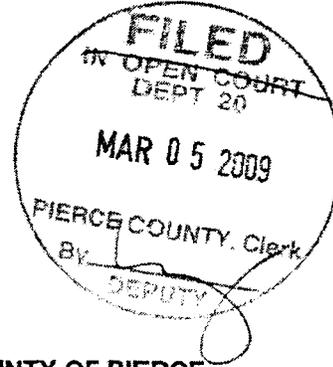
18  
19 By: 

20 Matthew Bergman, WSBA # 20874  
21 Attorneys for Plaintiffs





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**IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE**

MARJORIE M ARNOLD,

Plaintiff(s),

vs.

SABERHAGEN HOLDINGS INC,

Defendant(s).

Cause No: 08-2-11077-5

**ORDER GRANTING DEFENDANT  
LOCKHEED'S MOTION TO STRIKE  
AND DENYING PLAINTIFF'S  
MOTION FOR RECONSIDERATION  
WITHOUT ORAL ARGUMENT**

**(OR)**

THIS MATTER having been noted before the Court upon the Plaintiff's Motion for Reconsideration filed February 20, 2009 and Defendant Lockheed's Motion to Strike filed February 26, 2009, the Court having reviewed the records, files and briefing, and being fully advised, it is hereby ORDERED that Defendant Lockheed's Motion to Strike is granted and Plaintiff's Motion for Reconsideration is denied both without oral argument.

DATED this 5<sup>th</sup> day of March, 2009.

\_\_\_\_\_  
Judge Kitty-Ann van Doorninck

DECLARATION OF SERVICE

On said day below I sent by legal messenger a true and accurate copy of: Brief of Appellants Arnold in Court of Appeals Cause No. 39055-8-II to the following parties:

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Robert G. Andre  
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Seattle, WA 98101-1686

Original filed with:  
Court of Appeals, Division II  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

FILED  
COURT OF APPEALS  
DIVISION II  
09 JUN -5 PM 3:47  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

DATED: June 5, 2009, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Talmadge/Fitzpatrick