

ORIGINAL

NO. 39055-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

01/11-9  
ST. REGIS PAPER COMPANY  
BY  
COURT OF APPEALS  
DIVISION II

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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REPLY BRIEF OF APPELLANTS ARNOLD

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## A. INTRODUCTION

Lockheed Shipbuilding Corporation's ("Lockheed") brief in response to the Arnolds' opening brief acknowledges the three legal bases for a duty of care it owed to the Arnolds, but then it embarks on a description of the facts that ignores the actual record in this case.

When considered in a light most favorable to the Arnolds, as this Court must review the record, it is clear that the Arnolds both died of mesothelioma, an invariably fatal asbestos-related cancer, due to exposure while Reuben Arnold worked on Lockheed jobs. Reuben brought that asbestos home and exposed his son, Daniel, to it.<sup>1</sup>

Lockheed owed a duty to the Arnolds, even though Reuben was employed by Lockheed contractors, because Lockheed owned the premises on which the asbestos was used and it was the general contractor on the ships on which Reuben worked, retaining control over the jobsite where asbestos was used. Moreover, Lockheed had an unambiguous statutory duty to Reuben Arnold to prevent his exposure to asbestos on the

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<sup>1</sup> Daniel Arnold also worked for Lockheed in 1979-80. CP 357, 585. For purposes of the summary judgment motion and this appeal, the principal focus of Daniel Arnold's estate's claim against Lockheed for his mesothelioma is his take-home exposure. *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005). See Br. of Appellants at 31 n.17. Contrary to Lockheed's assertion, br. of resp't at 5 n.2, 16-17, that Daniel Arnold did not assign error to the dismissal of his claim against Lockheed, Arnold did, in fact, assign error to the dismissal of his claims. Br. of Appellants at 2 (assigning error to trial court's 2/9/09 summary judgment order dismissed all Daniel Arnold claims against Lockheed). Lockheed does not dispute Daniel's take home exposure anywhere in its brief.

job. Moreover, as a premises owner, Lockheed owed a duty of care to business invitees like Reuben Arnold.

Nothing in Lockheed's brief should dissuade this Court from reversing the trial court's summary judgment in Lockheed's favor. The trial court's concept of duty in this case was far too restrictive. The Arnolds are entitled to a trial on the merits for Reuben's and Daniel's asbestos-caused death.

B. RESPONSE TO LOCKHEED'S STATEMENT OF THE CASE

(1) Lockheed's Statement of the Case Violates RAP 10.3(a)(5), 10.3(b)

Initially, it is difficult to respond to Lockheed's so-called statement of the case because it is *replete* with argumentative statements and long statements of alleged fact for which there is no citation to the record. RAP 10.3(a)(5) and RAP 10.3(b) require a respondent's statement of the case to be a "fair statement of the facts and procedure relevant to the issues presented for review, without argument."<sup>2</sup>

Lockheed's statement of the case bears little resemblance to a proper statement of the case. For example, Lockheed asserts, without citation to the record, that specialty insulation contractors were experts in

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<sup>2</sup> Lockheed asserts in its brief at 11 n.3 that the Arnolds somehow miscited the Clerk's Papers as to the Nickell, Curtis, or Ingwersen depositions. The Arnolds have reviewed their CP references in their opening brief and believe they are accurate.

the safe handling of asbestos, and it relied on them. Br. of Resp't at 6. Again, without a record reference, it further asserts Reuben Arnold was trained and knowledgeable about asbestos hazards. Br. of Resp't at 6. It makes a long conclusory statement regarding insulation contractors in its brief at 7, again without a record cite. Lockheed makes further conclusory statements regarding the testimony of Reuben's co-workers in its brief at 9, 10, and 11 that are not only unsupported by the record, but, as will be shown *infra*, are *flatly wrong*.

At a minimum, this Court should disregard statements that are unsupported by citations to the record. Where, as here, the statements are flagrant and increase the difficulty for the Court and opposing counsel to address them, such statements are sanctionable. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (Division I imposed sanctions against counsel who filed brief that miscited cases and failed to properly cite to the record in statement of the case).

(2) Response to Lockheed's Factual Contentions

The two principal factual points in Lockheed's statement of the case are that employees of insulation contractors were "knowledgeable" regarding the hazards of asbestos exposure in 1962-63 and 1967-69 when Reuben Arnold worked on ships at Lockheed, br. of resp't at 6-7, and that

Lockheed's activities in connection with the work of insulation contractors constituted mere "oversight." *Id.* at 7-11. Neither statement is true, and the Arnolds offered ample evidence below to document the fact that Reuben Arnold's knowledge of his risk from asbestos exposure at Lockheed was minimal and Lockheed's was far greater, and that Lockheed's actual role in connection with Reuben Arnold's work far exceeded mere contract oversight. Questions of fact are plainly present on these issues.<sup>3</sup>

First, Lockheed attempts to characterize its control over Reuben Arnold as "narrow," or merely "overseeing the timing of projects and inspecting the quality of the final product," or "coordinating the work of trades working side-by-side." Br. of Resp't at 9.

Lockheed appears to be oblivious to the record. It has *no answer* to a variety of facts demonstrating that it had very substantial control over the insulation contractors. Lockheed had warehouses and sheds on site where it maintained insulation materials, meting asbestos-laden materials out to contractors. CP 552, 553, 607-09. Lockheed controlled access to the shipyard. CP 447, 552. Lockheed staff told insulators to step up production. CP 524, 531, 532. Its specially attired supervisors and quality

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<sup>3</sup> The right to control is a question of fact. *Morris v. Vaagen Bros. Lumber*, 130 Wn. App. 243, 252, 125 P.3d 141 (2005) (recognizing control as fact question); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247-48, 85 P.3d 918 (2004) (same).

control managers signed off on all work, making sure it was acceptable. CP 415. Before insulators could move to another task, Lockheed managers had to provide a release to the insulators. CP 526, 532. Insulator employees answered to Lockheed managers. CP 446-50.

On safety issues, Lockheed required insulators by contract to adhere to its safety booklet. CP 606, 613, 614. John Tanner, a Lockheed employee in 1962-63, testified that Lockheed retained control over all safety issues in its shipyard. CP 416. Michael Harris, a Lockheed manager, specifically testified that when he was a superintendent, he retained the authority and ultimate control over work safety practices of Lockheed *and* contractor employees. CP 461. Lockheed's CR 30(b)(6) witness Ildiko Songrady could not dispute Harris' testimony. CP 505-06.

All of these activities raise a question of fact as to Lockheed's control over the work of Reuben Arnold.

Second, Lockheed constructs an elaborate argument that Reuben Arnold knew more than it did about the hazards of asbestos exposure based on the alleged knowledge of insulation contractors and Arnold's union. Br. of Resp't at 6-7. However, there apparently is no evidence in

the record to support this argument because *Lockheed fails to cite to the record for the overwhelming bulk of this argument/factual contention.*<sup>4</sup>

Reuben Arnold testified that he was not aware of the hazard of asbestos until the 1970's. CP 3201. This testimony was consistent with the testimony of numerous other witnesses who worked with Arnold at Lockheed.<sup>5</sup> For example, John Tanner testified that safety protection was not common until the later 70's or early 1980's. CP 421. He never even heard of *Asbestos Worker* magazine. CP 422. Michael Harris testified that he was not aware asbestos was harmful until the late 70's or early 80's. CP 450, 458. Ron Nickell testified that he started to take precautions such as using a dust mask or respirator in 1970 or 1971, CP 529, and he saw warnings on asbestos boxes at about that time. CP 530. While he received *Asbestos Worker* magazines, he did not recall seeing a "green sheet" insert. CP 532. Bruce Curtis testified that in the 1966-69 period, no one from the union advised him about the hazard of asbestos exposure or the need for safety precautions associated with his clothing

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<sup>4</sup> Lockheed contends in its brief at 6 that Reuben Arnold knew of the hazard of asbestos from reading his union magazine, *Asbestos Worker*. In its reply on summary judgment, Lockheed offered excerpts from very general health-related articles in that magazine gleaned over many years, CP 3821-34, but offered no testimony that Reuben actually read such articles or that union members were specifically advised of the connection between asbestos exposure and lung diseases like asbestosis or mesothelioma. CP 3833-34.

<sup>5</sup> This is also consistent with Lockheed's initial claim that it was not aware of the hazard of asbestos until the early 1970's. CP 480.

worn while working with asbestos. CP 559-60. Curtis did not remember the green sheets either, CP 567, and did not recall warnings in union magazines about the health risk of asbestos until 1972-73. CP 567, 576.

In sum, contrary to Lockheed's argument, any awareness of the health hazard of asbestos on the part of any union to which Reuben Arnold belonged long *post-dated* his asbestos exposure at Lockheed in the 1960's.

As for the insulation contractors, Lockheed adduced *no testimony* that any insulation contractor had knowledge of the health hazard of asbestos exposure by shipyard workers like Reuben Arnold in the 1960's. Additionally, Lockheed offered *no evidence* that any insulation contractor ever told its employees anything about the hazard of asbestos. This fact is consistent with Reuben Arnold's argument that Lockheed had safety responsibility on the site.

Thus, for *all* of the time Reuben Arnold worked at Lockheed in the 1960's there is, at a minimum, a question of fact as to whether he was aware of the hazard of asbestos exposure, and certainly the record here offers no support for Lockheed's contention that Reuben Arnold had "superior knowledge" to Lockheed about the hazard of asbestos in the 1960's.

(3) Evidence Presented in the Arnolds' Motion for Reconsideration

Lockheed contends that the Arnolds relied in their opening brief on evidence that was excluded by the trial court when presented by the Arnolds in connection with their motion for reconsideration below. Br. of Resp't at 13-16. Lockheed further contends that the Arnolds did not assign error to the trial court's order granting its motion to strike such evidence. *Id.* at 15.

Lockheed's motion to strike related to all but one of the exhibits attached to the declaration of Brian Ladenburg submitted in connection with the Arnolds' motion for reconsideration. CP 2830-3435, 3482-95.<sup>6</sup> The justification for the motion was that the evidence was not "newly discovered" within the meaning of CR 59(a)(4). The trial court granted the motion to strike without any explanation for its ruling. CP 3555.

Contrary to Lockheed's assertion in its brief at 15, the Arnolds assigned error to the trial court's entire order granting Lockheed's motion to strike. Br. of Appellants at 2. ("The trial court erred in entering the order granting Lockheed's motion to strike and denying plaintiffs' motion for reconsideration on March 5, 2009.").

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<sup>6</sup> Lockheed moved to strike Ladenburg's earlier declaration of January 27, 2009 (CP 402-1727), submitted on summary judgment, CP 1747-55, but the motion was denied. CP 2772. Ladenburg submitted three further declarations (CP 1764-1811, 2719-57, 3549-54) which were not the subject of a motion to strike.

Finally, the Arnolds opposed the motion to strike below, CP 3509-16, and specifically argued the trial court's error in striking the evidence on reconsideration. Br. of Appellants at 28-30. Emblematic of the trial court's error were the trial court's exclusion of the Pashkowski, Northrup, and Hammar declarations. By focusing on those depositions, the Arnolds did not intend to waive any other evidence that was the subject of the trial court motion to strike. The other materials and depositions annexed to the Ladenburg declaration should not have been excluded.

For example, it seems disingenuous that Lockheed should contend that the deposition testimony of Dr. Samuel Hammar should not have been made a part of the record when Lockheed submitted *a portion* of that deposition to the trial court on summary judgment. CP 3718-22.

Similarly, as will be noted *infra* in greater detail, some of the exhibits to the Ladenburg declaration were offered to directly rebut arguments advanced by Lockheed in its *reply* on summary judgment, a pleading to which the Arnolds could not reply.

Finally, the evidence submitted by the Arnolds relating to the use of Limpet was "newly discovered" within the meaning of CR 59(a)(4). In general, "newly discovered evidence" requires a party to demonstrate that the evidence was essentially unavailable at the time of the initial hearing, due diligence was employed to discover and present the evidence, the

evidence is material to the case's resolution, the evidence is plainly described to the court, and the evidence might change the result in the case. Karl B. Tegland, 4 *Wash. Practice Rules Practice* (5<sup>th</sup> ed.) at 480-81. The Pashkowski, Sutton, and Northrup deposition testimony here fits that rule because the evidence regarding Reuben Arnold's exposure to Limpet was disclosed by defendant Lone Star Industries after the Arnolds' response to Lockheed's motion for summary judgment was filed. The Longo declaration, CP 3439-78, was submitted after Mr. Longo, the Arnolds' expert, had a chance to consider the Limpet issue. This evidence confirmed that Arnold was exposed to a form of asbestos that placed fibers more aggressively into the workplace environment at Lockheed.

The trial court abused its discretion in striking the evidence on reconsideration. The Arnolds were entitled to refer such evidence in their brief.

C. ARGUMENT<sup>7</sup>

(1) Effect of the "Testimony" of Lockheed's CR 30(b)(6) Witness

Lockheed does not deny that the deposition testimony of Ildiko Songrady, the witness *it designated* in response to the Arnolds' CR

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<sup>7</sup> Lockheed neglects to discuss the standard of review anywhere in its brief, apparently *conceding* that the standard of review as articulated in the Brief of Appellant at 23-24 is correct.

30(b)(6) notice, was evasive or lacking in rudimentary knowledge with respect to the questions posed in the Arnolds' notice. Br. of Resp't at 42-44.<sup>8</sup> Instead, Lockheed attempts to argue that Songrady was asked "legal questions" and even asserts, without authority of any sort, that the Arnolds were somehow at fault for not seeking unspecified "relief" from the trial court. *Id.* at 43.

A review of the Songrady deposition transcript reveals that far from having no answer to alleged "legal questions," Songrady had no knowledge of basic information about Lockheed. Her consistent refrain in response to questions from the Arnolds' counsel was: "I don't know." *See, e.g.*, CP 504-07. Songrady was identified in response to the Arnolds' notice which required Lockheed to produce a corporate witness cognizant of critical issues pertaining to the corporation.<sup>9</sup> Songrady acknowledged the notice in her deposition. CP 474, 478.

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<sup>8</sup> The Arnolds invite the Court to review the Songrady deposition transcript, CP 465-516, or the video deposition, to appreciate the full effect of Ms. Songrady's evasions and inability to answer simple questions about Lockheed. Songrady's answers were entirely consistent with Lockheed's unwillingness to provide candid responses to simple discovery requests. CP 674-713.

<sup>9</sup> The amended CR 30(b)(6) notice to Lockheed required the production of the person or persons "having the greatest knowledge concerning the following matters:"

1. All information responsive to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to defendant Lockheed Shipbuilding;

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2. The investigation conducted by Lockheed Shipbuilding in forming their answers to interrogatories and responses to requests for production;
  3. Lockheed Shipbuilding's membership in health and trade organizations;
  4. Lockheed Shipbuilding's knowledge of the dangers associated with asbestos including how Lockheed Shipbuilding obtained such knowledge and the dates upon which such knowledge was acquired;
  5. Lockheed Shipbuilding's knowledge of the dangers to its employees' families associated with asbestos, including specifically Lockheed Shipbuilding's knowledge that asbestos fibers could be brought into an employee's home on the employee's person and clothing, and how Lockheed Shipbuilding obtained any such knowledge and the dates upon which such knowledge was acquired;
  6. Lockheed Shipbuilding's policies regarding protecting its employees and their families from asbestos hazards;
  7. Current or former Lockheed Shipbuilding employees who were involved in safety and health-related matters pertaining to asbestos hazards, including the date that these individuals worked for Lockheed Shipbuilding;
  8. Lockheed Shipbuilding's document retention policies;
  9. Lockheed Shipbuilding's implementation of OSHA regulations;
  10. Lockheed Shipbuilding's industrial hygiene practices for asbestos pre OSHA;
  11. Lockheed Shipbuilding's practices with respect to providing shower areas, changing areas, uniforms and laundry services for its employees;
  12. Lockheed Shipbuilding's use of asbestos products at Seattle location(s), including the types of products used, the specific brands employed and the fiber type of said products;
  13. Lockheed Shipbuilding's employment of subcontractors to apply asbestos thermal insulation and do other work involving the release of asbestos fibers;

Lockheed has *no answer* for the authorities on CR 30(b)(6) set forth in the Arnolds' opening brief. Br. of Appellants at 25-28. A CR 30(b)(6) witness must testify to the corporation's knowledge and *its opinions*. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 40, 111 P.3d 1192 (2005), *review denied*, 156 Wn.2d 1030 (2006). *None* of those authorities indicate that a plaintiff aggrieved by evasive answers or lack of knowledge on the part of a CR 30(b)(6) witness must apply to the trial court for some sort of unspecified relief. The more appropriate "relief" is that where a defendant has violated CR 30(b)(6), but moved for summary judgment, any evasive answers or non-answers may raise genuine issues of material fact. CR 56(e).

Under CR 30(b)(6), the burden was initially on the Arnolds to "designate with reasonable particularity the matters on which examination is requested." They did so. The burden then shifted to Lockheed to "designate one or more officers, directors, or managing agents or other person who consent to testify on its behalf." The corporation may even identify the "matters known on which [the witness] will testify." Lockheed failed to produce a witness response to the rule.

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14. Any industrial hygiene surveys and dust counts at Lockheed Shipbuilding;
  15. Lockheed Shipbuilding's corporate history and organization.

Lockheed's failure to produce a proper CR 30(b)(6) witness should create questions regarding the corporation's credibility as to each answer on which Songrady was evasive or lacked knowledge, thereby creating a question of fact.

(2) Lockheed Owed a Duty to the Arnolds

Lockheed makes an elaborate legal argument that it owed no duty of care to the Arnolds with respect to their exposure to asbestos from its shipyard, br. of resp't at 17-42, an argument that conveniently avoids the facts adverse to its position and mischaracterizes the Arnolds' legal arguments. As this Court is well aware, for purposes of review of an order on summary judgment, all facts and reasonable inferences from those facts must be construed in a light most favorable to the Arnolds as the nonmoving party. *Sjogren v. Properties of Pacific Northwest LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003). Moreover, although duty is often a question of law, where the existence of a duty depends on disputed facts, summary judgment is "inappropriate." *Id.*

Lockheed owed a duty to the Arnolds because as a premises owner/general contractor, it retained control over the work performed by Reuben Arnold, as a premises owner/general contractor, it had a nondelegable duty by statute with respect to the safety of workers like

Reuben Arnold, or it had a duty as a premises owner to business invitees like Reuben Arnold to deal with an warn about hazards on its premises.

(a) Lockheed Had a Duty to Reuben Arnold Because It Retained Control over His Work<sup>10</sup>

Generally, Lockheed does not dispute the fact that it owned the premises on which Reuben Arnold was exposed to asbestos. Br. of Resp't at 17. (" . . . premises owners such as Lockheed Shipbuilding . . . "). It does, however, contest that it was a general contractor for the projects on which Reuben Arnold worked. *Id.* at 19-22.

Lockheed's assertion that it was not the general contractor on those projects is contrary to the record and defies common sense. Lockheed essentially argues that it was not subject to the Contractor Registration Act, RCW 18.27, ergo, it was not a general contractor.<sup>11</sup> Lockheed

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<sup>10</sup> While Lockheed complains about the Arnolds' characterization of it as a premises owner or general contractor, for this duty owed by Lockheed, its status makes little practical difference as the duty is owed by a premises owner *or* a general contractor. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121-22, 52 P.3d 472 (2002).

<sup>11</sup> Lockheed also complains about the Arnolds' citation to Lockheed's registration under RCW 18.27 with the Department of Labor & Industries from 1963 to 1987 as a contractor. CP 2834-35. The record at issue should not have been excluded by the trial court as it clearly was a business record and admissible as such. RCW 5.45.020; ER 803(a)(6); *Zink v. City of Mesa*, 140 Wn. App. 328, 346, 166 P.3d 738 (2007) (city clerk's summary of City's contacts with plaintiff held admissible as business record).

More importantly, the Arnolds had no legitimate opportunity to rebut Lockheed's amazing contention that it was not a general contractor, despite overwhelming evidence to the contrary. Lockheed *never argued* in its motion for summary judgment that it was not a general contractor. CP 161-82. It was not until Lockheed's reply on summary judgment, CP 3805-06, a *pleading to which the Arnolds could not respond*, that Lockheed asserted it was not a general contractor. Thus, it was

misunderstands the Arnolds' citation to RCW 18.27.010. They cited RCW 18.27.010 as an effective operating definition of a contractor. The Arnolds could just as well have cited various case authorities or a dictionary definition of a contractor. *Black's*, for example, defines a contractor as "one who contracts to do work or provide supplies for another," and a general contractor as one "who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work." Bryan A. Garner, *Black's Law Dictionary* (8<sup>th</sup> ed.) at 350-51.<sup>12</sup>

In addition, Lockheed's argument here is utterly contrary to the facts. Lockheed owned the shipyards where Reuben Arnold worked, as Lockheed concedes. Lockheed does not deny that it had contracts with the United States Navy and the State of Alaska for the ship projects on which Arnold worked. Br. of Appellants at 3-4; CP 357. Lockheed does not

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only on reconsideration that the Arnolds could respond to the new Lockheed contention that it was not a general contractor. The trial court abused its discretion by refusing to allow the admission of Lockheed's registration records with the Department of Labor & Industries.

<sup>12</sup> The broad statutory duty of a general contractor in cases like *Stute* actually arises out of statutory language that imposes the duty upon an *employer*. RCW 49.17.060; WAC 296-155-040; *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990). The term "employer" under WISHA is broadly defined as any entity which "employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons. . ." RCW 49.17.020(3). Like the general contractor in *Stute*, Lockheed is within the definition of an employer under WISHA and had a nondelegable duty to care to Reuben Arnold. *Stute*, 114 Wn.2d at 463. In fact, as the *Kamla* court noted, the nondelegable duty is owed by a general contractor or an entity that had the characteristics of a general contractor. 147 Wn.2d at 123-25.

dispute that it employed, supervised and even “coordinated” contractors, working on such projects. Br. of Resp’t at 9-11. Plainly, there is at least a question of fact as to whether Lockheed was the general contractor for such projects. It cannot point to anyone else who would be the general contractor.

(b) Lockheed Owed a Statutory Duty of Care to the Arnolds

Lockheed contends in its brief at 31-36 that it had no statutory duty to the Arnolds. It argues that the Arnolds are making a negligence per se argument when that is plainly untrue.<sup>13</sup> Washington law clearly provides that a general contractor has a statutory duty to employees like Reuben Arnold *regardless of whether that contractor retained a right of control over the work of the subcontractors’ employees.*

Lockheed’s attempt to avoid this rule from the case law imposing a statutory duty upon it as a general contractor is based principally on its misreading of *Kamla*. It cannot. Lockheed tortures the holding in *Kamla* to assert that the statutory duty found in the cases cited in the Arnolds’ opening brief at 37-46 are inapplicable unless the Arnolds also prove that

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<sup>13</sup> The Arnolds’ passing reference to negligence per se in their brief was only to note the Supreme Court’s decision in *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 332-33, 582 P.2d 500 (1978). The duty is measured by the terms of the statutes at issue here. RCW 5.40.050 (violation of statute is evidence of negligence).

Lockheed retained a right of control. Br. of Resp't at 32. Its argument is disingenuous at best. *Kamla* held that a *premises owner* did not have a nondelegable duty to the employees of contractors on its premises. 147 Wn.2d at 123-24, but the *Kamla* court recognized that the nondelegable statutory duty was owed by general contractors or jobsite owners playing a role sufficiently analogous to general contractors to justify imposing that same nondelegable duty to ensure WISHA compliance in the absence of a general contractor. *Id.* In fact, our Supreme Court *rejected* the notion that the right to control had to be present before a general contractor or one similarly situated owed a worker the nondelegable statutory duty. *Stute*, 114 Wn.2d at 464. *See also, Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (1990) (recognizing *Stute's* rejection of need to prove right of control). A general contractor's supervisory authority is per se control over the workplace. *Kamla*, 147 Wn.2d at 122; *Stute*, 114 Wn.2d at 464.

Here, Lockheed was a general contractor, or acted so analogously to a general contractor, that *Stute's* rule applied: it owed a nondelegable statutory duty to Reuben Arnold without proof it controlled the employees of its contractors.

Lockheed also claims that neither RCW 49.16, RCW 49.17, nor the federal Walsh-Healey Act applied to it. Again, Lockheed flagrantly

misreads the statutes and mischaracterizes the Arnolds' arguments. The Arnolds argued in their opening brief at 37-42 that whether RCW 49.16 or 49.17 applied here, it has long been the rule in Washington that a general contractor, or an entity similar to it, has a nondelegable duty to its employees and the employees of subcontractors to ensure a safe work environment. Lockheed has *no answer* for the unambiguous holdings on this point in *Kelley*, *Stute*, and *Kamla*. As a general contractor, or an entity largely behaving like one, it owed Reuben Arnold this duty of care.

Additionally, Lockheed owed Reuben Arnold a duty of care based on the Walsh-Healey Act, 41 U.S.C. § 35. The trial court apparently concluded the Act did not apply to Lockheed.<sup>14</sup> Lockheed asserts that the Act provides no private right of action, but does not deny that, by its terms, the Act applied to its work on vessels for the United States Navy, nor is it able to deny the extensive worker testimony presented below by the Arnolds that Lockheed did not implement asbestos controls during the period Reuben Arnold worked at its shipyard. Songrady acknowledged Lockheed had no evidence the company tested for the 5 million particles per cubic foot standard required by the Act. CP 496-98.

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<sup>14</sup> Lockheed's Songrady *conceded* that Lockheed was likely subject to the Act. CP 497-98. The Arnolds have filed a CR 60 motion in the trial court shortly to present CR 30(b)(6) deposition testimony from Lockheed representatives admitting the Walsh-Healey Act applied to 1960's-era contracts the company had with the Navy.

However, a private right of action under the Act is not the basis for the Arnolds' present action. As noted in the Arnolds' opening brief at 45, and as this Court has determined, a statute can articulate the tort duty owed by a defendant like Lockheed to persons like Reuben Arnold. *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 684, 990 P.2d 968, review denied, 141 Wn.2d 1008 (2000); *Restatement (Second) of Torts* § 286. Reuben Arnold was clearly within the class of persons to be protected by the statutory provisions at issue here. Lockheed's duty is consistent with the policy of RCW 5.40.050 that violation of a statute is evidence of negligence.<sup>15</sup>

In sum, a statute may inform the common law duty of care owed by a defendant to a person like Reuben Arnold. In Washington, under RCW 49.16 or RCW 49.17, a general contractor owes a nondelegable duty to the employees of its subcontractors to provide a safe workplace regardless of whether it retained the right to control the means and manner of the work of the subcontractors' employees because its supervisory authority is *per se* control over the workplace. Similarly, under Walsh-Healey, a federal contractor owes such a non-delegable duty to provide a

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<sup>15</sup> Ironically, if Lockheed is insistent upon the argument it advances in its brief at 32-33 about when the Arnolds' causes of action arose, then the violation of the Walsh-Healey Act by Lockheed was negligence *per se* because that doctrine was the law in Washington in the 1960's when Reuben Arnold was exposed to asbestos while working at Lockheed.

safe workplace. The trial court here erred in finding Lockheed owed no duty to Reuben Arnold.

(c) As a Premises Owner, Lockheed Owed a Duty of Care to Reuben Arnold as a Business Invitee

Lockheed contends that it owed no duty as a premises owner to Reuben Arnold as a business invitee. Br. of Resp't at 36-42. Nowhere does Lockheed deny that it was a premises owner or that Reuben Arnold was a business invitee. Instead, it argues that "construction work" is not a condition on the land and that Reuben Arnold had "superior knowledge" to Lockheed on the risks of asbestos exposure.

(i) Asbestos Was a Condition of the Land

Lockheed cites several cases for the proposition that "insulation work" is not a condition on the land. *Id.* at 37-38. Those cases are readily distinguishable. Lockheed seeks to avoid liability by a hypertechnical interpretation of Washington premises liability law.

In *Mauch v. Kissling*, 56 Wn. App. 312, 783 P.2d 601 (1989), for example, Division III of this Court held that the Boys Scouts of America, as the owner of a camp, had no duty to the estate of a Boy Scout killed when the airplane operated by his scoutmaster in which he was a passenger crashed while it was making a low altitude overflight of the camp. Obviously, negligence in performing such an *overflight* had

nothing to do with a hazard *on the premises*. Similarly, in *Morris*, a premises owner was not liable when the building housing a sawmill collapsed, during the building's disassembly, killing a worker. The building collapsed because the equipment in the building that was being dismantled helped to anchor the building's walls.<sup>16</sup>

By contrast, decisions like *Kinney* make clear that a premises owner can be liable under the *Restatement (Second) of Torts* §§ 343, 343A formulation for specific physical conditions on the land such as ladders and platforms on the Space Needle. 121 Wn. App. at 250. In fact, under § 343A, a premises owner can even be liable if the invitee was aware of the hazard or the hazard was obvious if the owner “should anticipate the harm despite such knowledge or obviousness.”

Washington law has recognized that asbestos use in Puget Sound shipyards was so constant and ubiquitous as to be a condition of the land in shipyards. *See, e.g., Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 247-48, 749 P.2d 605 (1987); *Hoglund v. Raymark Indus., Inc.*, 50 Wn. App. 360, 362-63, 749 P.2d 164 (1987), *review denied*, 110 Wn.2d 1008 (1988). *See also, Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 457-59 (Md.

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<sup>16</sup> The foreign cases cited by Lockheed similarly involved situations that were not conditions on the land. *See, e.g., Gero v. J.W.J. Realty*, 757 A.2d 475 (Vt. 2000) (dirt mound associated with construction work); *Lombardi v. Stout*, 604 NE.2d 117 (N.Y. 1992) (fall from ladder during removal of a branch).

1992). Such asbestos use was not as episodic, transitory activity, but a fact of life in the shipyards.

The record here only confirms that asbestos was an ever-present fact of life in Lockheed's shipyard. For example, Michael Harris, who ultimately became a Lockheed superintendent, gave extensive and graphic testimony on the conditions on board the ships where work was performed at the Lockheed yard. CP 445.

For this reason, other courts have recognized asbestos as a condition of the land under § 343 or an "activity" under § 343A imposing a duty of care upon the premises owner. In *Chenot v. A.P. Green Services, Inc.*, 895 A.2d 55 (Pa. Super. Ct. 2006), the court held that an owner of a manufacturing plant where asbestos was removed from pipes and tanks, creating dust, owed a premises liability duty to the employee of a subcontractor. Similarly, in *Kinsman v. Unocal Corp.*, 37 Cal. 4<sup>th</sup> 659, 123 P.3d 931 (2005), the California Supreme Court held that an oil refinery that employed an independent contractor that in turn employed a carpenter could owe a duty to that carpenter for exposure to asbestos when the carpenter installed scaffolding for insulation workers who worked with asbestos. The court determined that asbestos was potentially a latent hazard on the refinery's premises for which it could be responsible.

(ii) Lockheed Had Superior Knowledge to Reuben Arnold of the Risk of Asbestos Exposure

The other basis upon which Lockheed seeks to escape its responsibility to Reuben Arnold, an insulation worker, is that Arnold had “superior knowledge” to Lockheed, a Fortune 500 company, of the hazards of asbestos. Br. of Resp’t at 39-42. It cites a 1970 decision that predated the adoption of *Restatement* § 343 or 343A in Washington. The passage quoted by Lockheed from *Strong v. Seattle Stevedore Co.*, 1 Wn. App. 898, 904, 466 P.2d 545, *review denied*, 77 Wn.2d 963 (1970) has *nothing* to do with premises liability law in Washington. Neither § 343 or § 343A requires such “superior knowledge” as an element of a premises liability claim. In any event, in that case, a firefighter arrived at the scene of a wharf fire, and had superior knowledge of the risk of such a fire to that of the premises owner.

The factual basis for Lockheed’s amazing argument is that Arnold had somehow gleaned deep knowledge of the epidemiological implications of asbestos exposure in 1962-63 and 1967-69 from reading his own union magazine, but Lockheed denies any responsibility for the direct asbestos exposure knowledge obtained by Puget Sound Bridge & Dredging, *its corporate predecessor*.

First, for the reasons set forth in the Arnolds' response to Lockheed's restatement of the case, there is, at a minimum, a fact question as to whether Arnold's union had knowledge of the health hazard of asbestos exposure in the shipyard in the 1960's. Moreover, Lockheed's assertion that Reuben Arnold understood the harm of asbestos exposure to him from the 1950's is based on *equivocal* quotations recited in Lockheed's reply on summary judgment. CP 3812. Arnold testified, for example, in response to the question of when union members knew of the hazard of asbestos: "It's really hard to say." CP 3812.

Lockheed had knowledge of the health hazards of asbestos exposure for shipyard workers at least as early as 1969, as Songrady acknowledged, CP 493-94, because a 1969 memo indicated Lockheed was aware of the 1964-65 Selikoff-Churg study. CP 739-60. However, Lockheed was also a participant in the 1945 Pacific Coast Shipyard Safety Conference. CP 624-72. Lockheed attempts to deny the knowledge acquired by its corporate predecessor, Puget Sound Bridge & Dredging, that attended the 1945 conference,<sup>17</sup> citing Am. Jur.2d provisions and a

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<sup>17</sup> Lockheed does not deny that Puget Sound personnel attended the conference or that the health hazard of shipyard asbestos exposure was discussed there.

1971 Seventh Circuit case. *Forest Laboratories, Inc. v. Pillsbury, Co.*, 452 F.2d 621 (7<sup>th</sup> Cir. 1971) was a trade secret case. No merger was present in that case, unlike the situation here. Puget Sound merged with Lockheed Aircraft Corporation in 1959. CP 717.<sup>18</sup> Songrady assumed Lockheed took over Puget Sound's leases in 1959. CP 477. Lockheed *was* bound by the knowledge of the employees of its predecessor corporation with which it merged because it expressly or impliedly assumed Puget Sound's liabilities, or it merged with Puget Sound. *Forest Laboratories*, 452 F.2d at 625. The 1945 conference established the level of knowledge of asbestos hazard a prudent shipyard owner should have. As a premises owner, Lockheed had an affirmative duty to exercise reasonable care to discover dangerous conditions like asbestos on its premises, *Curtis v. Lein*, 150 Wn. App. 96, 103-04, 206 P.3d 1264 (2009). It had knowledge of asbestos in its predecessor's shipyards in the 1960's.

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<sup>18</sup> Lockheed Aircraft Corporation merged with Puget Sound Bridge and Dredging Company, the Seattle Shipbuilding Company located on Harbor Island in Seattle, in early 1959 for \$6,561,000 in cash and 44,290 shares of stock. CP 720. It operated under the name Puget Sound Bridge and Drydock Company until approximately 1965, at which point it became known as Lockheed Shipbuilding and Construction Company. *Id.* Songrady, the Lockheed corporate representative, acknowledged that Lockheed Shipbuilding is the corporate successor to Puget Sound Bridge & Dredging Company. CP 476. But Songrady offered no detail on the nature of the contracts or operations that Lockheed did or did not assume with the transaction in 1959, again responding "I don't know" to most questions about the corporation, but she assumed that Lockheed probably took over the leases of the Puget Sound Bridge & Dredging Company when it acquired the shipyard in 1959. CP 476-77. At a minimum, a question of fact is present as to Lockheed's relationship with its predecessor.

It could not be oblivious to that risk. It needed to act to discover such a dangerous condition and address it.

In conclusion, Lockheed was liable to Reuben Arnold as a business invitee under § 343 or § 343A of the *Restatement (Second) of Torts*.

(3) The Trial Court Abused Its Discretion in Striking the Arnolds' Evidence and Denying Reconsideration

As noted in the Arnolds' opening brief at 28-30, the trial court here abused its discretion in striking the Arnolds' additional evidence and in denying their motion for reconsideration.<sup>19</sup>

Lockheed's response to the Arnolds' argument is that the evidence provided in the declaration of Brian Ladenburg on reconsideration, CP 2830-3435, was not "newly discovered evidence" within the meaning of CR 59(a)(4).<sup>20</sup>

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<sup>19</sup> Even if the trial court were correct in excluding all or part of the evidence submitted by the Arnolds in connection with the motion for reconsideration, the trial court still erred in finding that Lockheed did not owe the Arnolds a duty of care.

<sup>20</sup> Lockheed makes the argument in its brief at 47 that the Arnolds did not cite a single case in which a trial court decision on the admission of evidence on reconsideration was reversed. This, of course, is not relevant to this Court's analysis. In *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994), the court upheld the admission of additional evidence on reconsideration. Moreover, in *Coggle v. Snow*, 56 Wn. App. 499, 508-09, 784 P.2d 554 (1990), the court found an abuse of discretion in the trial court's refusal to consider an affidavit submitted in connection with reconsideration of summary judgment.

First, it is not at all clear that CR 59 by its terms applies to motions for reconsideration of orders on summary judgment. Division I of this Court noted in *Applied Indus. Materials* that, unlike a trial, in the summary judgment context, “there is no prejudice to any findings if additional facts are considered.” 74 Wn. App. at 77.

Second, the evidence at issue regarding Reuben Arnold’s exposure to Limpet was relevant and admissible within the meaning of this Court’s decision in *Chen v. State*, 86 Wn. App. 183, 937 P.2d 612, *review denied*, 133 Wn.2d 1020 (1997) and *Wagner Development, Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 977 P.2d 639, *review denied*, 139 Wn.2d 1005 (1999). The evidence was offered on reconsideration only after Lockheed’s belated argument on summary judgment that the Walsh-Healey Act did not apply to it so that no duty was owed to persons like Reuben Arnold. CP 3511-14. The Arnolds had no opportunity to raise this issue in their response to Lockheed’s motion for summary judgment because Lockheed never made the argument in its motion. CP 161-82. It raised the issue for the first time on reply. CP 3813-14.

The trial court abused its discretion in striking the declaration of Brian Ladenburg submitted on reconsideration.

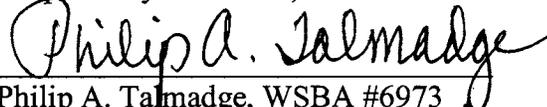
#### D. CONCLUSION

Lockheed owed Reuben and Daniel Arnold a duty of care as a premises owner/general contractor based on its retained control of its shipyard premises where Reuben was exposed to asbestos, or based on its statutory duties to workers 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 to present the merits of their claim against Lockheed to a jury. Costs on appeal should be awarded to the Arnolds.

DATED this 8th day of September, 2009.

Respectfully submitted,



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