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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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GEORGE ABBAY and LYNN ABBAY,

*Appellants,*

v.

LESLIE CONTROLS, INC., et al.,

*Respondents.*

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APPEAL FROM THE KING COUNTY  
SUPERIOR COURT

Cause Nos. 07-2-36540-1SEA and 07-2-36537-1SEA

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CORRECTED BRIEF OF RESPONDENT  
SABERHAGEN HOLDINGS, INC.

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## **I. RESPONDENT'S STATEMENT OF THE ISSUES**

Respondent Saberhagen Holdings, Inc. (hereinafter "Saberhagen") hereby joins in Respondent Leslie Controls, Inc.'s statement of Issues 1-4. *See* Brief of Respondent Leslie Controls, Inc. at 2-3. Saberhagen states the following additional issues:

1. Should this Court affirm the trial court's summary judgment dismissal of plaintiffs' claims against Saberhagen on the grounds that plaintiffs had expressly disclaimed all claims based on exposures in a federal enclave, and no exposure to Brower products was alleged other than in a federal enclave, i.e., Puget Sound Naval Shipyard (PSNS)?

2. Alternatively, should this Court affirm the trial court's grant of summary judgment for Saberhagen on the grounds that plaintiffs did not produce sufficient admissible evidence to raise a genuine issue of material fact as to the element of *proximate cause*, i.e., that Mr. Abbay had been exposed to and harmed by Brower-installed products?

## **II. RESPONDENT'S STATEMENT OF THE CASE**

### **A. Factual Background.**

Appellants George and Lynn Abbay (hereinafter "plaintiffs") sued Saberhagen and 63 other defendants claiming that Mr. Abbay had developed an asbestos-related disease, i.e., mesothelioma, as a result of occupational exposure to asbestos while serving in the U.S. Navy from 1962-66 and while working as a rigger at PSNS from 1966-93. CP 6-10, 376-78. Specifically as against Saberhagen, plaintiffs claimed that during his work on ships at PSNS, Mr. Abbay had been exposed to asbestos-

containing insulation products that were installed by Saberhagen's alleged predecessor, the Brower Company (hereinafter "Brower"). CP 3859.

**B. Procedural Background.**

Saberhagen moved for summary judgment on two grounds: federal enclave and proximate cause. First, in its "federal enclave" motion, Saberhagen joined in defense arguments that plaintiffs had expressly disclaimed all claims against Saberhagen, since (1) they had expressly disclaimed all claims for asbestos exposure within a federal enclave, (2) PSNS was at all relevant times a federal enclave, and (3) plaintiffs alleged no exposure to Brower products *other than* at PSNS. *See* CP 7808-09. Second, in its "proximate cause" motion, Saberhagen argued that even if plaintiffs had not waived their claims against it, they nonetheless had no admissible evidence showing that Mr. Abbay had ever been exposed, at PSNS or anywhere else, to asbestos-containing products supplied or installed by Brower, and thus could not demonstrate the essential element of proximate cause. *See* CP 1422-39.

Plaintiffs' opposition to the "federal enclave" motion and the proceedings relating thereto are set forth in the Brief of Respondent Leslie Controls, Inc. at 8-10. 13-33. *See also* CP 3863-66. In opposition to Saberhagen's "proximate cause" motion, plaintiffs relied primarily upon

(1) Mr. Abbay's testimony that, as a PSNS rigger, he handled many types of equipment on naval vessels,<sup>1</sup> (2) prior testimony from two, now-deceased Brower employees, Richard Mills and Robert Kinsman, who stated that they had worked for Brower at PSNS on one or more isolated, unspecified occasions sometime in the 1960s or (in the case of Mr. Kinsman) the early 1970s,<sup>2</sup> (3) a purported 1967 PSNS report indicating that PSNS had tested product samples obtained from Brower;<sup>3</sup> and (4) a declaration from plaintiffs' industrial hygiene expert, Steven Paskal, opining that Mr. Abbay's exposure to the "tear-out" of insulation at PSNS would have resulted in "significant asbestos exposures."<sup>4</sup> *See* CP 3858-62. Saberhagen moved to strike much of this evidence as inadmissible and untimely. *See* CP 7831-40, 7849-81, 7900-03.

Both of Saberhagen's summary judgment motions (and 13 summary judgment motions of other defendants) and its motions to strike and to shorten time, were set for hearing on June 27, 2008. *See* CP 1423, 7808-09, 7816, 7820. However, the trial court indicated that it would only hear oral argument on the "federal enclave" motion, because that motion was common to many defendants, including Saberhagen. RP 4-5. The

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<sup>1</sup> *See* CP 2474-75, 2485-86, 2620-21.

<sup>2</sup> CP 3443-45 (Mills); CP 3950-51, citing CP 3960, 3962 (Kinsman).

<sup>3</sup> CP 3951, 3964-70.

trial court directed that the parties' other summary judgment motions, including Saberhagen's "proximate cause" motion, would be decided on the briefs, unless it found particular issues on which it desired oral argument. RP 5-6, 34-36.

The trial court eventually granted the "federal enclave" motion and dismissed all of plaintiffs' claims arising from PSNS exposure pursuant to plaintiffs' disclaimer, concluding that plaintiffs had offered insufficient evidence to create a triable issue with respect to the enclave status of PSNS or of naval vessels being worked on there, or with respect to plaintiffs' disclaimer of claims caused by exposure in a federal enclave. *See* CP 6635-38, 6639-45. Given the dismissal of plaintiffs' claims arising from PSNS exposure, the trial court concluded that the remaining summary judgment motions based on alleged PSNS exposure, including Saberhagen's "proximate cause" motion, were moot and would not be considered. CP 6638, 6645. Since no claims of exposure other than at PSNS were asserted against Saberhagen, the trial court dismissed all claims against Saberhagen. CP 950-51, 3859. The trial court denied plaintiffs' motion to reconsider its "federal enclave" ruling and this appeal followed. CP 782-84, 802-08.

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<sup>4</sup> CP 3930, 3935.

### III. ARGUMENT

A. **The Trial Court Properly Dismissed Plaintiffs' Claims Against Saberhagen on the Grounds that They Arose Within a Federal Enclave and Plaintiffs Had Expressly Disclaimed All Such Claims.**

After extensive briefing and argument, the trial court concluded that (1) the plaintiffs had expressly disclaimed all claims of exposure arising in a federal enclave, (2) PSNS was at all times a federal enclave, and (3) all the vessels upon which Mr. Abbay worked and claims to have been exposed at PSNS were within a federal enclave; and therefore (4) all of plaintiffs' claims based on PSNS work and exposure should be dismissed. Respondent Leslie Controls has explained why these determinations by the trial court were correct and why the Abbays' assignments of error with respect thereto are without merit. *See* Brief of Respondent Leslie Controls, Inc. at 13-33. Saberhagen joins in and adopts those arguments and authorities. Since Saberhagen's summary judgment motion challenged *all* of plaintiffs' claims against Saberhagen,<sup>5</sup> and since plaintiffs had not in response asserted any claims other than those arising from exposure at PSNS,<sup>6</sup> the trial court correctly dismissed all of

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<sup>5</sup> CP 1427, 1432, 1441.

<sup>6</sup> CP 3859.

plaintiffs' claims against Saberhagen. CP 951. Accordingly, this Court should affirm the trial court's entry of summary judgment for Saberhagen.

**B. Alternatively, This Court May Affirm the Trial Court's Dismissal of Claims Against Saberhagen on the Grounds that Plaintiffs Had Insufficient Admissible Evidence of Proximate Cause.**

- 1. This Court may properly affirm the trial court's dismissal on the alternate grounds presented in Saberhagen's "proximate cause" summary judgment motion.**

As explained above, Saberhagen presented two separate grounds for summary judgment in the trial court: (1) plaintiffs' disclaimer of federal enclave exposures; and (2) lack of evidence of proximate cause (i.e., no exposure to Brower products). As the record reflects, both grounds were properly presented and fully briefed in the trial court. *See* discussion *supra* at 2-5.

The trial court granted summary judgment for Saberhagen only on first ground (federal enclave) and concluded that it was therefore unnecessary to reach the second (proximate cause). CP 6638, 6645. However, in the event that this Court decides not to affirm on the federal enclave ground, it nonetheless can and, as set forth below, should affirm on the proximate cause ground. This Court may affirm a trial court's grant of summary judgment on any grounds established by the pleadings

and supported by the record. *See Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002); *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). *Cf.* RAP 2.5(a) (permitting party to assert a ground for affirming trial court's decision that was not presented below, if the record is sufficiently developed to fairly consider the ground).

**2. Dismissal was proper because plaintiffs offered no admissible evidence of the essential element of proximate cause, i.e., evidence that Mr. Abbay had been exposed to Brower-installed products.**

**a. Summary judgment is appropriate where plaintiffs cannot produce evidence of an essential element of their claims.**

Civil Rule 56(c) authorizes the entry of summary judgment where the affidavits, discovery materials, and pleadings on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (adopting *Celotex's* articulation of summary judgment standards). A defendant moving for summary judgment meets its burden by showing that there is an absence of evidence supporting the plaintiff's case. *See Young*, 112 Wn.2d at 225 n.1, *citing Celotex*, 477 U.S. at 325; *Tinder v. Nordstrom*, 84 Wn. App. 787, 790-91,

929 P.2d 1209 (1997). The burden then shifts to the plaintiff to demonstrate the existence of such evidence, thereby establishing a genuine issue of material fact.

In discharging that burden, the plaintiff may not rest on mere argument or speculation; rather, he must come forward with substantial, admissible evidence:

The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [that party].

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (construing Fed. R. Civ. P. 56). *See also White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (non-moving party must set forth *specific facts* which rebut the moving party's contentions and disclose existence of a genuine issue of material fact). Although the court must make all reasonable inferences in the light most favorable to the plaintiff, an inference is not *reasonable* unless it is deduced "as a logical consequence" of admitted or proven facts. *Fairbanks v. J.B. McLoughlin*, 131 Wn.2d 96, 101-02, 929 P.2d 433 (1997).

**b. Proximate cause requires evidence of actual exposure to the defendant's product.**

Basic product liability theory requires a plaintiff to establish the element of proximate cause, *i.e.*, a reasonable connection between the injury, the product causing the injury, and the manufacturer of the product. *See Martin v. Abbott Labs*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). There is no product liability claim against a defendant unless the plaintiff can show that the defendant was the particular manufacturer or supplier of the product that caused the injury. *See Lockwood v. A.C. & S.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987). *Accord Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 396, 198 P.3d 493 (2008). *See generally*, Keeton, W., PROSSER AND KEETON ON THE LAW OF TORTS § 103 at 713 (5<sup>th</sup> ed. 1984).

Washington law allows asbestos plaintiffs to establish exposure to a defendant's products through circumstantial evidence. *See Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706-07, 853 P.2d 908 (1993). However, that evidence must rise above mere speculation, or the case will not be allowed to go to the jury. *See Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn. App. 610, 622, 789 P.2d 792, *review denied*, 115 Wn.2d 1025 (1990); *Young v. Group Health Cooperative*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); *Dumin v. Owens-Corning Fiberglas Corp.*, 33 Cal. Rptr.2d 702, 28 Cal. App. 4<sup>th</sup> 650 (1994). It is the duty of the court to withdraw

the case from the jury when the necessary inference of exposure to a particular defendant's asbestos product is so tenuous that it rests merely upon conjecture and speculation. *See Claytor v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1384 (D.C. Ct. App. 1995).

The *Lockwood* directed trial courts to scrutinize plaintiff's proof of causation to see if there is sufficient evidence of *actual exposure* and it identified several pertinent factors to be considered:

- (1) plaintiff's proximity to the asbestos product when the exposure occurred;
- (2) the expanse of the worksite where asbestos fibers were released;
- (3) the extent of time that the plaintiff was exposed to the product;
- (4) the types of asbestos products to which plaintiff was exposed; and
- (5) the ways in which such products are handled and used.

*Lockwood*, 109 Wn.2d at 248. "Ultimately," the court held, "the sufficiency of the evidence of causation will depend on the unique circumstances of each case." *Id.* at 249.

**c. Plaintiffs failed to produce any admissible evidence that Mr. Abbay was actually exposed to Brower-installed products.**

Plaintiffs' response to Saberhagen's "proximate cause" summary judgment consisted largely of inadmissible evidence, which showed at most that Brower *may* have had workers at PSNS or *may* have supplied products to PSNS on some isolated and unspecified occasions in the 1960s or 1970s. However, they failed to link *any* of those supposed occasions or products with Mr. Abbay. Absent such a link, there is no proximate cause and no viable claim against Saberhagen.

**(1). The deposition testimony of Mr. Abbay did not mention or implicate Brower or Brower-installed products.**

Plaintiffs offered just eleven pages of Mr. Abbay's deposition testimony in opposing Saberhagen's proximate cause summary judgment motion. CP 3859, citing CP 2474-75, 2485-86, 2620-21. But that testimony did not mention or implicate Brower or Brower products or otherwise suggest that Mr. Abbay had been exposed to such products. *Id.*

**(2). The deposition testimony of Richard Mills and Robert Kinsman is inadmissible hearsay under ER 804(b)(1) and in any event provide no connection between Brower products and Mr. Abbay.**

Over Saberhagen's objections and motion to strike,<sup>7</sup> plaintiffs offered the prior testimony of two former Brower employees, Richard Mills and Robert Kinsman, to suggest that Brower employees had performed insulation work at PSNS. *See* CP 3859, citing CP 3443-45 (Mills); CP 3950-51, citing CP 3960, 3962 (Kinsman). However, as explained below, that testimony is inadmissible and, in any event, fails to support a reasonable inference that Mr. Abbay was ever exposed to Brower-installed products.

Mr. Mills and Mr. Kinsman are deceased. *See* CP 7834. Their testimony was taken in their own asbestos lawsuits in 1996 and 2001, respectively. *Id.*; CP 3438, 3956. Saberhagen was a defendant in both of the cases and attended the depositions. CP 7834. However, in both cases Saberhagen was *immune* under the workers compensation laws, RCW 51.32, for any injuries resulting from asbestos exposure those men had while employed by Brower. *See* CP 7834-38, 7850. Plaintiffs (the Abbays) did not dispute that immunity. *See* CP 7888-90. Thus, it was

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<sup>7</sup> *See* CP 7834-38, 7850, 7901-03.

undisputed that Saberhagen had *no interest* in those prior cases in cross-examining Mr. Mills or Mr. Kinsman regarding their work with asbestos—at PSNS or anywhere else—while employed by Brower. *Id.*; CP 7875. Accordingly, under ER 804(b)(1), such testimony is inadmissible in this case and Saberhagen moved to strike it. CP 7834-38.

ER 804(b)(1) permits the use of former testimony from unavailable witnesses only under limited circumstances:

- (1) Former testimony: Testimony given as a witness at another hearing of the same or a different proceeding, or any deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity ***and similar motive*** to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1) (emphasis added). The plain language of the rule thus establishes that the ER 804(b)(1) analysis does not end merely because a party has participated in a prior proceeding and had the *opportunity* to question the witness. The controlling question is whether that party's interests and motivation in the prior case were similar enough to those in the present case to warrant admission of the testimony in the present case. *See State v. Mohamed*, 132 Wn. App. 58, 67, 130 P.3d 401 (2006); *State v. Henry*, 36 Wn. App. 530, 535, 676 P.2d 521 (1984). Where the party's

interests and motivation for cross-examination in the two cases are substantially different, admission under ER 804(b)(1) should be denied.

In *United States v. Salerno*, the United States Supreme Court addressed the issue of the type of interest a party must hold where the party was present at two different proceedings, and an opposing party attempts to use testimony from the prior proceeding during the subsequent proceeding. 505 U.S. 317, 321 (1992). The Court held that the proponent of former testimony has the burden of showing that the opposing party had a “similar motive” to develop the testimony by direct, cross, or redirect examination. *Id.* The Court then remanded to the United States Court of Appeals to determine whether the opposing party had such an interest. *Id.* at 324-25.

On remand, the Second Circuit rejected the argument by the defendants that “the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue”. Rather, the parties must share the same side of the issue and *the same intensity of interest in prevailing* on that issue:

If a fact is critical to a cause of action at a second proceeding but the same fact was only peripherally related to a different cause of action at a first proceeding, no one would claim that the questioner had a similar motive at both proceedings to show that the fact had been established (or disproved). This is the same principle that holds collateral estoppel inapplicable when a small amount is at stake in a first proceeding and a large amount is at stake in a second proceeding, even though a party took the same side of the same issue at both proceedings. . . (Citations omitted.) *This suggests that the questioner must not only be on the same side of the same issue at both proceedings but must also have a substantially similar degree of interest in prevailing on that issue.*

...

The proper approach . . . in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a preceding proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue.

*United States v. DiNapoli*, 8 F.3d 909, 912-14 (2d Cir. 1993) (emphasis added), *as adopted by Mohamed*, 132 Wn. App. at 67.

Thus, under ER 804(b)(1) the pertinent questions are (1) whether Saberhagen's interests in *this* case coincide with those it had during the 1996 and 2001 depositions at which Mr. Mills and Mr. Kinsman testified, (2) whether the issues for which that testimony is now offered in *this* case were of the same importance in the 1996 and 2001 proceedings, and (3) whether Saberhagen shared "a substantially similar degree of interest in prevailing" on those issues in the prior proceedings as it does now.

Plaintiffs failed to make this showing below. As Mr. Mills' and Mr. Kinsman's former employer, Saberhagen's predecessor, Brower, could not be held liable for injury to them arising from their work for Brower. Thus, even though Saberhagen was a party in the *Mills* and *Kinsman* cases and attended the plaintiffs' depositions, it had no interest in cross-examining them regarding any work they may have done for Brower at PSNS (or any other sites). Obviously, Saberhagen would have fundamentally different motivation to cross-examine Mr. Mills and Mr. Kinsman in a case involving someone else's claims, such as Mr. Abbay's. Accordingly, their prior testimony is inadmissible under ER 804(b)(1) and cannot defeat summary judgment. *See* CR 56(e).

Yet even if it were admissible, the Mills and Kinsman testimony creates no link between Brower products, PSNS and Mr. Abbay. Mr. Mills testified only that he worked for Brower at PSNS on isolated occasions *sometime* in the decade of the *1960s*. *See* CP 3443-45 (Mills testimony that he worked at PSNS in the 1960s for a total of "four or five months, a month at a time"). It would be pure speculation to infer that any of those occasions occurred *after*, rather than before, Mr. Abbay began working at PSNS in *1967*,<sup>8</sup> or that any such occasion involved work *on*

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<sup>8</sup> CP 2474.

*ships*, rather than *on land* (Mills' brief stints at PSNS in the 1960s apparently included both types of work, *id.*).<sup>9</sup> Even if plaintiffs were to prevail in their efforts to limit the scope of their federal enclave disclaimer to claims arising from exposure *on land* (not ships) at PSNS, in order to avoid summary judgment plaintiffs would still have to show, without resorting to speculation, that Brower's products were *on ships* at PSNS while Mr. Abbay was also there, and that Mr. Abbay was *actually exposed* to them. *See Lockwood*, 109 Wn.2d at 245, 248-49.

Similarly, Mr. Kinsman testified that he worked for Brower *just once* at PSNS, on the powerhouse, sometime between 1970 and 1972.<sup>10</sup> CP 3962. He did not say how long the job lasted—whether for an hour or a year—or what that work consisted of, what products were used, how they were used, who supplied them or what precautions were taken. More importantly, the powerhouse is obviously a building on the *land* of PSNS, and plaintiffs have consistently stated that “none of Mr. Abbay's exposures occurred *on land* at the PSNS” and that, in any event, plaintiffs intended to disclaim any such exposures. Appellants' Opening Brief at 1 (emphasis in original). Thus,

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<sup>9</sup> While plaintiffs have argued (in connection with the federal enclave motions) that they never intended to disclaim Mr. Abbay's exposure *on ships* at PSNS, they have consistently acknowledged that they *did* intend to disclaim any exposures *on land* at PSNS. *See* Appellants' Opening Brief at 1, 9.

<sup>10</sup> In fact, the entirety of Mr. Kinsman's testimony about PSNS consists of the single sentence, “Oh, I worked at the powerhouse at Puget Sound Naval Shipyard.” CP 3962.

Mr. Kinsman's testimony about Brower's work on the powerhouse is *irrelevant*, since Mr. Abbay was admittedly not exposed to asbestos from that work and, even if he was, plaintiffs specifically intended to *disclaim* Mr. Abbay's claims for such exposure. *See id.* at 9 ("The Abbays' complaint disclaimed recovery for any exposures to asbestos that occurred on land that was a federal enclave") and 18 (confirming that "the Abbays' disclaimer applied to anything on a federal enclave *on land*" (emphasis in original)).

**(3). The purported 1967 PSNS Test Report does not show that Mr. Abbay was exposed to Brower-installed products.**

Plaintiffs also offered a purported PSNS record which, in their view, showed "that in 1969 Brower was a vendor of the shipyard." CP 3951, 3964-70. Saberhagen moved to strike that document as untimely submitted<sup>11</sup> and lacking proof of

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<sup>11</sup> Plaintiffs submitted the document four days late and one day before Saberhagen's summary judgment reply brief was due. *See* CR 56(c) (opposition materials must be filed eleven days before the hearing); CP 1423, 3953, 3964, 7832-33. Plaintiffs offered no good cause for this delay. *Id.*; CP 7890-91. When a party submits untimely summary judgment opposition materials, it is within the trial court's discretion to refuse to consider them. *See O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 125 P.3d 134 (2004).

authenticity.<sup>12</sup> See CP 7838-39, 7901. Yet even if the document was authentic and timely submitted, it certainly does not suggest that Brower was a “vendor of the shipyard.” At most, the document shows only that PSNS obtained product *samples* from Brower (and many other companies) for *testing* purposes, not that PSNS ever actually used Brower’s products in its shipyard operations. See *id.* (showing that PSNS *tested* three Brower samples, one of which *failed*). It would be pure speculation to infer from the supposed fact that PSNS tested a Brower product that PSNS subsequently *purchased and used* that product in shipyard operations, much less that Mr. Abbay was exposed to it.

In sum, the evidence that plaintiffs offered in opposition to Saberhagen’s “proximate cause” summary judgment motion was in large part inadmissible and, in any event, could not support a reasonable inference that Mr. Abbay was actually exposed to Brower products or that

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<sup>12</sup> Plaintiffs originally offered the document under their attorney’s declaration that it was a “true and correct copy” of an exhibit that was obtained from PSNS. CP 3954. When Saberhagen pointed out that this was insufficient authentication absent proof that plaintiff’s counsel had personal knowledge of the document, see *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 367, 966 P.2d 921 (1998), plaintiffs responded with a declaration from a previously undisclosed witness, Kirk Mortensen. CP 7838-39, 7887-88, 7901. This was improper and the Court should refuse to consider the declaration. Exclusion of evidence is proper where a party has engaged in willful or tactical nondisclosure. *Hampson v. Ramer*, 47 Wn. App. 806, 812, 737 P.2d 298 (1987); *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). Plaintiffs’ submission of evidence from a previously undisclosed witness reflects a willful violation of CR 33 and 34. See *Hampson*, 47 Wn. App. at 812 (“A violation of the discovery rules is willful if done without a reasonable excuse”).

those products contributed to his asbestos-related illness. *See Lockwood, supra; Fairbanks*, 131 Wn.2d at 101-02 (an inference is not reasonable unless deduced “as a logical consequence” of proven or admitted facts). Without evidence of proximate cause, plaintiffs’ claims against Saberhagen were fatally flawed and would necessarily have been subject to summary judgment dismissal on that ground if the trial court had not considered it moot given its federal enclave ruling.

#### IV. CONCLUSION

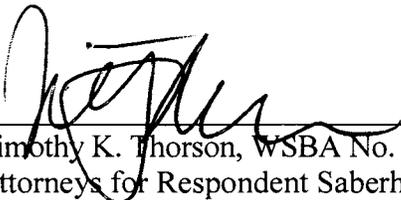
For the reasons set forth above, the trial court properly concluded that all of plaintiffs’ claims arising from exposure at PSNS were claims based on exposure in a federal enclave and that plaintiffs had expressly disclaimed those claims. As the claims against Saberhagen were based only upon alleged exposure at PSNS, the trial court properly granted Saberhagen’s “federal enclave” summary judgment motion. This Court should affirm that ruling; if it does so, the Court need not reach the merits of Saberhagen’s “proximate cause” summary judgment motion.

However, if the Court does not affirm the granting of summary judgment for Saberhagen on the federal enclave grounds, it should nonetheless affirm the summary judgment on the alternate grounds

presented in Saberhagen's "proximate cause" summary judgment motion as explained above.

DATED this 10<sup>th</sup> day of June, 2009.

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

GEORGE ABBAY and LYNN  
ABBAY,

Appellants,

v.

LESLIE CONTROLS, INC. et al.,

Respondents.

NO. 62399-1-I

**DECLARATION OF SERVICE**

I, Amy H. Berman, hereby declare that on the 11<sup>th</sup> day of June, 2009, I  
caused to be served in the manner indicated below, a copy of the following pleadings:

1. Corrected Brief of Respondent Saberhagen Holdings, Inc.; and
2. Declaration of Service.

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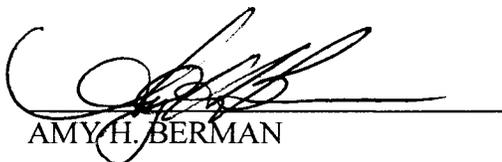
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