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No. 62996-4-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MICHAEL FARROW and LIDIA FARROW,
husband and wife,

Appellants,

v.

LESLIE CONTROLS, INC., et al.,

Respondents.

Consolidated Appeal from King County Superior Court
(Hon. Dean S. Lum)
Cause No. 08-2-0717-4 SEA

BRIEF OF RESPONDENT BUFFALO PUMPS, INC.

Barry N. Mesher, WSBA No. 07845
Brian D. Zeringer, WSBA No. 15566
Jeffrey M. Odom, WSBA No. 36168
LANE POWELL PC
Attorneys for Respondent,
Buffalo Pumps, Inc.

Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

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I. INTRODUCTION

In this action Plaintiffs/Appellants, Michael and Lidia Farrow, sued more than 50 defendants for damages relating to Michael Farrow's diagnosis of mesothelioma, which condition Appellants contend was caused by exposure to asbestos. In their Complaint, Appellants alleged that Mr. Farrow was exposed to asbestos at various places during the 1950's, 1960's, and through the late 1970's. Among the places where Mr. Farrow was allegedly exposed to asbestos was the Puget Sound Naval Shipyard ("PSNS"), where he worked as a pipefitter and engineering technician from 1953 to 1974. Notwithstanding their claims as to Mr. Farrow's overall asbestos exposure, Appellants expressly disclaimed "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels."

IMO Industries, Inc. ("IMO") moved for summary judgment dismissal of all of the claims Appellants had asserted against it. IMO's motion was in part based on the disclaimer contained within Appellants' Complaint. Buffalo Pumps, Inc. ("Buffalo Pumps"), together with several other defendants, joined IMO's summary judgment motion to the extent it sought dismissal of the claims Appellants had asserted against it arising out of Mr. Farrow's employment at PSNS.

The trial court granted IMO's summary judgment motion, and it also granted Buffalo Pumps' motion for partial summary judgment thereby dismissing all claims asserted against Buffalo Pumps for the injuries Mr. Farrow had allegedly sustained as a result of asbestos exposure at PSNS. The trial court's ruling was based on its finding that PSNS was a federal enclave and that, by virtue of their disclaimer, Appellants had excluded from this action all claims based on exposure at PSNS. In granting summary judgment dismissal of Appellants' PSNS based claims, the trial court also rejected Appellants' efforts to limit the scope of their disclaimer to "land based" exposures and to reserve for themselves the ability to pursue in this action claims based on exposures aboard the Navy vessels that were drydocked or moored at PSNS during their construction or repair.

After the trial court dismissed the claims that were based on exposure at PSNS, Buffalo Pumps moved to dismiss Appellants' claims to the extent they were based on exposure to asbestos outside of PSNS. In its follow-up motion Buffalo Pumps showed that there was no evidence that Mr. Farrow had any exposure outside of PSNS to an asbestos-containing product for which Buffalo Pumps was responsible. Appellants did not oppose this motion and, accordingly, the trial court further ordered the

dismissal of all claims asserted against Buffalo Pumps that related to Mr. Farrow's alleged exposure to asbestos outside of PSNS.

Appellants apparently do not seek to reverse the trial court's dismissal of their claims against Buffalo Pumps relating to exposures outside of PSNS. Rather, it is the trial court's finding as to the federal enclave status of PSNS and its finding as to the scope of the disclaimer contained within Appellants' Complaint that form the crux of their appeal. This Court should affirm the trial court's findings as to both issues. The trial court's determination that PSNS is a federal enclave is supported by historical documentation evidencing the federal government's acquisition of ownership and jurisdiction over the property comprising PSNS, and is consistent with prior rulings by the U.S. Supreme Court, the Washington Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit, all of which also determined PSNS to be a federal enclave. This Court should also affirm the trial court's decision not to limit the scope of Appellants' disclaimer. Contrary to the Appellants' assertions, the language of their disclaimer is not ambiguous, and the limiting interpretation they ask this Court to accept is unsupported and unreasonable.

II. JOINDER IN CO-RESPONDENTS' BRIEFS

Pursuant to RAP 10.1(g), Buffalo Pumps joins in the Brief of Respondents Crane Co., Garlock Sealing Technologies, Inc., Fairbanks

Morse Pump Corporation, Coltec Industries, and McWane Inc. and in the Brief of Respondents Leslie Controls, Inc. and ITT Corporation (“Co-Respondents’ Briefs.”) Buffalo Pumps joins in and adopts by specific reference, but without limitation, the Statement of Issues Pertaining to Assignments of Error, the Statement of the Case, and the Argument sections of the Co-Respondents’ briefs and the authorities presented therein. In addition, Buffalo Pumps sets forth herein certain issues, facts, and arguments particularly pertinent to Appellants’ appeal of the orders dismissing their claims as to Buffalo Pumps.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court correctly determined that PSNS is a federal enclave based on historical documentation furnished by Respondents establishing the federal government’s acquisition of ownership and jurisdiction over the property comprising PSNS and based on prior case law determining it to be a federal enclave.

2. The trial court correctly determined that Appellants’ disclaimer of any cause of action relating to injuries caused by asbestos exposure occurring within a federal enclave was not ambiguous, and it correctly rejected Appellants’ efforts to limit the scope of their disclaimer to exclude asbestos exposures that occurred aboard U.S. Navy ships that

were moored alongside piers or drydocked within PSNS during their construction or repair.

3. Insofar as Appellants' Complaint disclaimed any cause of action relating to injuries sustained as a result of asbestos exposures Mr. Farrow may have sustained within a federal enclave, the trial court correctly dismissed on summary judgment Appellants' claims to the extent they were based on Mr. Farrow's asbestos exposure while he worked as a pipe fitter and engineering technician at PSNS.

4. The Court correctly dismissed on summary judgment Appellants' claims as to Buffalo Pumps that were based on asbestos exposures he may have sustained outside of PSNS as Appellants presented no evidence in opposition to Buffalo Pumps' summary judgment motion that Mr. Farrow was exposed outside of PSNS to asbestos for which Buffalo Pumps may be deemed responsible.

IV. STATEMENT OF THE CASE

A. Factual Background.

In their Complaint, Appellants sought damages from the defendants for the injuries they suffered relating to Michael Farrow's diagnosis of mesothelioma, which condition they allege was caused by

exposure to asbestos. (L-CP 5-10)¹ Appellants alleged in their Complaint that Mr. Farrow was exposed to asbestos at various places, including Bremerton, Washington; San Diego, California; Groton, Connecticut; Washington D.C., Pearl Harbor, Hawaii; and Maine during the 1950's, 1960's, and through the late 1970's. (*Id.*) In written responses to style discovery requests and to discovery requests specifically propounded by Buffalo Pumps, Appellants stated that the basis for their claims specifically as to Buffalo Pumps related to Mr. Farrow's work with Buffalo Pumps' products at PSNS. (A-CP 1146-48, 1158) At his deposition, Mr. Farrow confirmed that his alleged exposure to Buffalo Pumps' products was restricted to his work at PSNS. (A-CP 1170)

Although, Appellants alleged that Mr. Farrow was exposed to asbestos at several locations, they expressly disclaimed any cause of action that was based on Mr. Farrow's asbestos exposure within a federal enclave. Appellants' disclaimer was expressly set out in Paragraph 6 of their Complaint, the first sentence of which reads as follows:

Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that

¹ Appellants filed two appeals. Their first appeal in Farrow v. Leslie Controls, 62996-4-I was consolidated with their appeal in Farrow v. Alfa Laval, 63554-9-I. Consistent with the manner in which Appellants referred to the clerk's papers in the consolidated appeals, Buffalo Pumps refers to the clerk's papers designated in Leslie as L-CP and the clerk's papers designated in Alfa Laval as A-CP.

occurred in a federal enclave, which expressly excludes U.S. Navy vessels.

(L-CP 9)

B. Procedural Background.

Based in part on the disclaimer contained within the Complaint, IMO moved for summary judgment dismissal of Appellants' claims. (L-CP 51-73) Buffalo Pumps partially joined in IMO's motion contending that PSNS was a federal enclave and that insofar as Appellants had disclaimed all causes of action based on asbestos exposure that occurred within a federal enclave, their PSNS based claims should be dismissed. (A-CP 320-21) The trial court agreed, and on October 25, 2009 it granted Buffalo Pumps' Motion for Partial Summary Judgment and ordered the dismissal of all claims asserted against Buffalo Pumps that were based on injuries Mr. Farrow sustained during his employment at PSNS. (A-CP 715-16)

Thereafter, Buffalo Pumps moved for the summary judgment dismissal of all remaining claims that Appellants had asserted against it. (A-CP 1219-28) In its follow-up motion for summary judgment, Buffalo Pumps showed that aside from Mr. Farrow's alleged work with or around Buffalo Pumps' products at PSNS, Appellants had no evidence that he had been exposed to asbestos from a Buffalo Pumps product at any other location. (A-CP 1220-23) Accordingly, Buffalo Pumps sought dismissal

of all claims relating to Mr. Farrow's alleged exposures outside of PSNS. Appellants filed a Notice of Non-Opposition to Buffalo Pumps' follow-up summary judgment motion (A-CP 1792-93), and they did not otherwise oppose the relief that Buffalo Pumps sought except to note their continuing opposition to the Court's prior determination (made in the context of IMO's summary judgment motion) as to the nature and scope of the Appellants' disclaimer. On December 5, 2008, the trial court granted Buffalo Pumps' follow-up motion for summary judgment and ordered that all of Appellants' claims against Buffalo Pumps based on Mr. Farrow's asbestos exposure outside of PSNS be dismissed with prejudice. (A-CP 2174-75)

V. ARGUMENT

A. The Trial Court Correctly Dismissed All Claims against Buffalo Pumps That Are Based on Mr. Farrow's Alleged Exposure to Asbestos at PSNS.

In an apparent effort to avoid the removal of their action to federal court, Appellants disclaimed any cause of action that was based on Mr. Farrow's exposure to asbestos within a federal enclave. Based on prior court rulings and historical documentation evidencing the acquisition of ownership and jurisdiction over the property comprising PSNS, the trial court determined that PSNS was a federal enclave. Accordingly, based on Appellants' disclaimer of all claims relating to exposure within a federal

enclave, the Court correctly ruled that Appellants' PSNS related claims were disclaimed by virtue of their Complaint.

The trial court also found that Appellants' efforts to limit the scope of their disclaimer such that it would not serve to disclaim actions based on exposure to the Navy ships that were being built or repaired at PSNS was an unsupported and unreasonable interpretation of their Complaint, which on its face was unambiguous. Thus, the trial court correctly ruled that Appellants' disclaimer also served to disclaim actions based on Mr. Farrow's asbestos exposure while working aboard Navy ships that were moored or drydocked at PSNS during their construction or repair.

A more thorough and detailed analysis of why the trial court's determination as to the scope of Appellants' disclaimer and its finding that PSNS is a federal enclave should be upheld, and why the dismissal from this action of all claims relating to Mr. Farrow's exposure to asbestos at PSNS should be affirmed is set forth within the Co-Respondents' Briefs, which Buffalo Pumps has joined and adopted.

B. The Trial Court Correctly Dismissed All Claims against Buffalo Pumps That Are Based on Mr. Farrow's Alleged Exposure to Asbestos Outside of PSNS.

Following the trial court's determination that Appellants had disclaimed all of their PSNS related claims, Buffalo Pumps moved to dismiss all other claims asserted by Appellants, specifically all claims

based on Mr. Farrow's alleged asbestos exposure outside of PSNS. According to Appellants, all of Mr. Farrow's work with Buffalo Pumps' products allegedly took place at PSNS. There was no evidence that he worked with any Buffalo Pumps product anywhere else.

In Washington, in order for there to be a triable issue of fact regarding causation in an asbestos case, a plaintiff must offer evidence supporting a reasonable inference that there was exposure to respirable asbestos fibers from a defendant's product. Lockwood v. AC&S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987). As to Mr. Farrow's alleged exposure outside of PSNS to asbestos from a Buffalo Pumps product, Appellants could not meet their burden under Lockwood, and indeed they did not dispute Buffalo Pumps' contention that no evidence of such exposure had been provided. Although Appellants have generally appealed the trial court's order dismissing all claims against Buffalo Pumps based on exposures outside of PSNS, they have pointed to no evidence and have made no argument that the trial court was in error in dismissing such claims or that the trial court's dismissal should be reversed. Accordingly, this Court should affirm the trial court's December 5, 2008 order dismissing all of Appellants' claims against Buffalo Pumps to the extent they relate to Mr. Farrow's asbestos exposure outside of PSNS.

VI. CONCLUSION

For the reasons set forth above and for the reasons set forth in Co-Respondents' Briefs, Buffalo Pumps respectfully requests that this Court affirm (1) the trial court's October 25, 2008 Order Granting Defendant Buffalo Pumps, Inc.'s Motion for Partial Summary Judgment, and (2) the trial court's December 5, 2008 Order Granting Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment

RESPECTFULLY SUBMITTED this 8TH day of September, 2009.

LANE POWELL PC

By Brian D. Zeringer
Barry N. Mesher, WSBA No. 07845
Brian D. Zeringer, WSBA No. 15566
Jeffrey M. Odom, WSBA No. 36168
Attorneys for Respondent Buffalo Pumps,
Inc.

CERTIFICATE OF SERVICE

I, Kree Arvanitas, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On September 8, 2009, I caused to be served a true and correct copy of the foregoing **BRIEF OF RESPONDENT BUFFALO PUMPS, INC.** on the following parties as indicated below:

Attorney for Appellant:

William Rutzick
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Alfa Laval, Inc.

Christine E. Dinsdale
Catherine E. Jeannotte
Soha & Lang, P.S.
701 Fifth Avenue, Suite 2400
Seattle WA 98104
asbestos@sohalang.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for BW/IP, Inc.:

Christine E. Dinsdale
David J. Fisher
Soha & Lang, P.S.
701 Fifth Avenue, Suite 2400
Seattle WA 98104
asbestos@sohalang.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for The William Powell Company:

Carl E. Forsberg
Melissa K. Habeck
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1700
Seattle, WA 98164-1039
asbestos3@forsberg-umlau.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Cleaver-Brooks, Inc.:

Timothy K. Thorson
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
berman@carneylaw.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Coltec Industries, Inc.;
Garlock Sealing Technologies, LLC;
Fairbanks Morse Pump Corporation;
McWane, Inc.:

G. William Shaw
Michael K. Ryan
K&L Gates, LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
asbestosdefense@klgates.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Crane Co.:

Michael K. Ryan
Paul J. Lawrence
K&L Gates, LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
asbestosdefense@klgates.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Crosby Valve, Inc.;
J.T. Thorpe & Son, Inc.; Metalclad
Insulation Corporation; FMC
Corporation; Sterling Fluid Systems
(USA), LLC:

Katherine M. Steele
Stafford Frey Cooper
601 Union Street, Suite 3100
Seattle, WA 98101
asbestos@staffordfrey.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

**Attorneys for Flowserve US, Inc.
as Successor to Edward Valves:**

Randy J. Aliment
Manish Borde
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
asbestos@wkg.com
raliment@williamskastner.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

**Attorneys for Foster Wheeler Energy
Corporation:**

Dirk Bernhardt
Murray, Dunham & Murray
200 W. Thomas Street, Suite 350
P.O. Box 9844
Seattle, WA 98109
asbestos@murraydunham.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for IMO Industries, Inc.

Michael E. Ricketts
James E. Horne
Gordon Thomas Honeywell Malanca
Peterson & Daheim, LLP
600 University, Suite 2100
Seattle, WA 98101
IMOService@gth-law.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Invensys Systems, Inc:

Randy J. Aliment
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
asbestos@wkg.com
raliment@williamskastner.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Leslie Controls, Inc.;
ITT Industries, Inc.;

Mark B. Tuvim
Kevin J. Craig
Gordon & Rees, LLP
701 Fifth Avenue, Suite 2130
Seattle, WA 98104
mtuvim@gordonrees.com
kcraig@gordonrees.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Metropolitan Life
Insurance Company:

John D. Wilson, Jr.
Richard G. Gawlowski
Wilson, Smith, Cochran & Dickerson
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1007
MetLifeAsbestos@wscd.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Sepco Corporation:

Thomas A. Heller
Heller Wiegenstein PLLC
144 Railroad Avenue, Suite 210
Edmonds, WA 98020
tomh@hellerwiegenstein.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Thomas Dee Engineering
Company:

Douglas K. Yoshida
Ogden, Murphy & Wallace, PLLC
1601 Fifth Avenue, Suite 2100
Seattle, WA 98101
asbestos@omwlaw.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

Attorneys for Warren Pumps, LLC:

J. Michael Mattingly
Rizzo Mattingly Bosworth PC
411 SW Second Avenue, Suite 200
Portland, OR 98204
Washington.asbestos@rizzopc.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

**Attorneys for Weir Valves & Controls
USA, Inc.; Hoke, Inc.:**

Dana C. Hoerschelmann
Thorsrud Cane & Paulich
1325 Fourth Avenue, Suite 1300
Seattle, WA 98101
dhoerschelmann@tcplaw.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

**Attorneys for Fryer-Knowles, Inc.,
A Washington Corporation:**

Stephanie Andersen
T. Arlen Rumsey
Gordon & Polscer
1000 Second Avenue, Suite 1500
Seattle, WA 98104
asbestos-seattle@gordon-polscer.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

**Attorneys for Yarway Corporation;
Tyco Flow Control, Inc.:**

Ronald C. Gardner
David D. Mordekhov
Gardner Bond Trabolsi & St. Louis PLLC
2200 Sixth Avenue, Suite 600
Seattle, WA 98121
asbestos@gardnerbond.com

- Legal Messenger
- U.S. Mail
- Facsimile
- E-mail
- FedEx

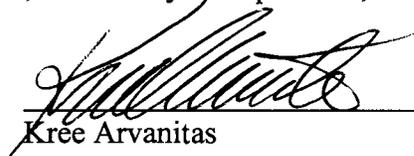
Court of Appeals Div. 1

One Union Square
600 University Street, Room 100
Seattle, Washington 98101

- Hand Delivery
- U.S. Mail
- Facsimile
- E-mail
- FedEx

The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 8th day of September, 2009.



Kree Arvanitas