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No. 62996-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

LESLIE CONTROLS, INC.,

And

ALFA LAVAL, INC.,

Respondents/Defendants.

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**BRIEF OF RESPONDENTS WEIR VALVES & CONTROLS USA,  
INC. AND HOKE, INC.**

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## **I. Preliminary Statement**

Farrow claims that he was exposed to asbestos-containing products of numerous defendants inside Puget Sound Naval Shipyard, and may claim exposure outside PSNS. Farrow challenges the trial court's grant of summary judgment to all defendants for PSNS-related exposure. By mentioning all summary-judgment orders in his Notice of Appeal, he appears to also challenge the trial court's orders granting summary judgment to the defendants for his non-PSNS-related exposure.

The response to the PSNS-exposure challenge is addressed in the Briefs of Respondents Leslie Controls, Inc., ITT Industries, Inc., Crane Co., Garlock Sealing Technologies, Inc., Fairbanks Morse Pump Corporation, Coltec Industries, and McWane, Inc. (collectively, "Primary Respondents"). As to the non-PSNS exposure, Farrow's challenge fails because he has made no argument either here or in the trial court against the relief granted. As to defendant Hoke, Inc. Farrow does not seek review.

## **II. Statement of Facts**

Michael Farrow<sup>1</sup> served in the Navy from 1950 to 1953 and worked as a pipefitter in the Puget Sound Naval Shipyard from about 1953

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<sup>1</sup> For simplicity we refer to Mr. Farrow as the sole plaintiff.

to 1974.<sup>2</sup> In 2007, he developed mesothelioma from which he died in May 2008.<sup>3</sup> His mesothelioma was, he claimed, caused by asbestos exposure.<sup>4</sup> He claimed to have been exposed to numerous defendants' asbestos-containing products during his employment at PSNS.<sup>5</sup>

Farrow sued over 50 defendants, including Weir Valves & Controls USA, Inc. and Hoke, Inc. to whose products he claimed asbestos exposure.<sup>6</sup> But in his complaint he expressly disclaimed any claims based on "any exposure to asbestos dust that occurred in a federal enclave."<sup>7</sup> Based on Farrow's disclaimer, defendant IMO moved for summary judgment, seeking dismissal of Farrow's PSNS-related claims.<sup>8</sup> All defendants at one time or another sought the same relief either by joining

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<sup>2</sup> L-CP 8; A-CP 2033, 2035, 2036.

<sup>3</sup> L-CP 8;

<sup>4</sup> L-CP 8.

<sup>5</sup> L-CP 5-1-; A-CP 2036.

<sup>6</sup> L-CP 5-10.

<sup>7</sup> L-CP 9.

<sup>8</sup> L-CP 51-70.

or by later motions.<sup>9</sup> The trial court granted the motion and dismissed all PSNS-related claims against all defendants.<sup>10</sup>

Several defendants, including Weir Valves, then moved for summary judgment seeking dismissal of any remaining claims.<sup>11</sup> Weir Valves sought dismissal of all non-PSNS related claims on several bases. First, it asserted that Farrow had no evidence that he was ever exposed to any Weir Valves asbestos-containing product outside of PSNS. Second, it asserted that Farrow lacked evidence that any exposure to a Weir Valves product was a substantial factor leading to his disease. Third, Weir Valves argued that it owed no duty for products it neither manufactured nor sold, and that Farrow lacked evidence to support many of his alternative theories of liability.<sup>12</sup>

Hoke's motion was different. It sought summary judgment because (1) Farrow lacked evidence that he was exposed to an asbestos-containing Hoke product either inside or outside PSNS, (2) Farrow lacked evidence that any exposure to Hoke products was a substantial factor in

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<sup>9</sup> E.g. L-CP 142-143, 161-162, 229 n.1; A-CP 355-356, 357-358.

<sup>10</sup> E.g. L-CP 1498-1501, 1503-1506; A-CP 835-865, 874-75, 918-921, 928-930, 942-944.

<sup>11</sup> A-CP 1984-1994.

<sup>12</sup> A-CP 1984-1994.

his disease, (3) Hoke had no liability for products it neither manufactured nor sold, and (4) Farrow had no evidence to support certain of his alternative liability theories.<sup>13</sup>

Farrow did not oppose either motion.<sup>14</sup> Consequently, the trial court granted both motions.<sup>15</sup> Weir Valves was granted summary judgment as to all remaining claims against it.<sup>16</sup> Hoke was granted summary judgment as to all of Farrow's claims against Hoke; Farrow has, however, not made the Hoke order part of the appellate record.

Farrow appealed the Weir Valves orders but not the Hoke orders.<sup>17</sup> But in his brief Farrow mentions the Hoke orders.<sup>18</sup>

### **III. Questions Presented**

A. Appellate jurisdiction: The trial court granted Hoke summary judgment both on the federal-enclave issue and the wholly independent lack-of-exposure issue. Plaintiff's Notice of Appeal refers

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<sup>13</sup> A-CP 1973-1983.

<sup>14</sup> A-CP 2189-2190, 2256-2257.

<sup>15</sup> A-CP 2595-2596.

<sup>16</sup> A-CP 2595-2596.

<sup>17</sup> A-CP 2610-2621, 2729-2933.

<sup>18</sup> Brief of Appellants at 6, 12.

neither to the Hoke orders nor to Hoke as a respondent. Does this court have jurisdiction to review the Hoke orders?

B. Non-opposition issue: Hoke moved for summary judgment on the independent basis that plaintiff had no evidence of exposure to a Hoke asbestos product, and Weir Valves moved for summary judgment as to all claims arising outside of the federal enclave. Plaintiff opposed neither motion. May plaintiff assign error to trial-court actions he did not oppose?

#### IV. Argument

**A. The PSNS-related orders should be affirmed for the reasons identified in the Briefs of Primary Respondents.**

As authorized by RAP 10.1(g), Weir Valves adopts the federal-enclave arguments in the Briefs of Primary Respondents as its own.

**B. The Hoke orders are not subject to review because (1) plaintiff has not appealed the Hoke orders, and (2) plaintiff did not oppose Hoke's motion seeking summary judgment on a basis independent of the federal-enclave issue.**

*1. Hoke is not properly before this court because Farrow has not appealed as against Hoke.*

The trial court granted summary judgment to Hoke both on the federal-enclave issue and on wholly independent grounds (failure to identify any Hoke-related exposure).<sup>19</sup> Plaintiffs' Notice of Appeal omits

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<sup>19</sup> A-CP 1973-1983.

any reference to the Hoke orders, does not identify Hoke as one of the defendants against whom he is appealing and does not include the Hoke orders in the record on appeal.<sup>20</sup> Therefore, the Hoke orders are final and this court has no jurisdiction over Hoke.

2. *Plaintiff cannot assign error to an order that he did not oppose.*

Hoke sought summary judgment on all claims against it on bases independent of the federal-enclave issue.<sup>21</sup> Farrow did not oppose that motion.<sup>22</sup> Even if the failure to identify Hoke in the Notice of Appeal was an oversight, Farrow's claims against Hoke must still fail.

Farrow's brief assigns error to defendants' motions for summary judgment without specification.<sup>23</sup> Assuming that Farrow has adequately assigned error to, among others, the Hoke orders, this court cannot consider those claimed errors for two reasons. First, Farrow cannot assign error to a trial-court action that he did not oppose.<sup>24</sup> Second, even though

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<sup>20</sup> A-CP 2610-2621.

<sup>21</sup> A-CP 1973-1983.

<sup>22</sup> A-CP 2189-2190, 2256-2257.

<sup>23</sup> Brief of Appellant at 1.

<sup>24</sup> *Bellevue School Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967) ("In a plethora of decisions, involving many varying situations, this court has steadfastly adhered to the rule that a litigant cannot remain silent

Farrow makes passing references to Hoke in his brief in this court, he presents no argument about the independent bases on which Hoke was granted summary judgment.<sup>25</sup> An assignment of error unaccompanied by any argument does not warrant review.<sup>26</sup>

**C. Regardless of the outcome of the federal-enclave issue, Farrow may not obtain review of the non-PSNS-related Weir Valve order because he presents no argument for reversal of that order.**

Weir Valves sought summary judgment as to all claims arising outside of PSNS.<sup>27</sup> Farrow did not oppose that relief.<sup>28</sup> He may not assign error to a matter he never gave the trial court an opportunity to address.<sup>29</sup>

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as to claimed error during trial and later, for the first time, urge objections thereto on appeal. The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before this court can consider it on appeal.") *See also Leen v. Demopolis*, 62 Wn. App. 473, 479, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022 (1992) (litigant may not remain silent regarding a claimed error and later raise the issue on appeal).

<sup>25</sup> Brief of Appellant at 6, 12 (references to Hoke); 12-15 (summary of argument).

<sup>26</sup> *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 80, 808-809, 828 P.2d 549 (1992) (appellants waived assignment of error when they presented no argument on that error); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005) (without argument or authority to support it, an appellant waives an assignment of error).

<sup>27</sup> A-CP 1984-1994.

<sup>28</sup> A-CP 2189-2190, 2256-2257.

<sup>29</sup> *Bellevue School Dist. No. 405 v. Lee*, 70 Wn.2d at 950.

Nor may he obtain this court's review of that order when he presents the court with no argument on the point.<sup>30</sup> The order granting Weir Valves summary judgment as to any non-PSNS related claims must be affirmed regardless of this court's decision on the federal-enclave issue.

#### V. Conclusion

Despite plaintiffs' indiscriminating assignment of error, the only question properly before this court is the federal-enclave issue. Neither the orders granting Weir Valves relief as to non-PSNS claims, nor the order granting Hoke relief on all of Farrow's claims for reasons independent of the federal-enclave issue are subject to this court's review. Both types of orders must be affirmed and these respondents should be awarded their costs.

Dated: 8 September, 2009.



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<sup>30</sup> *Cowiche Canyon Conservancy*, 118 Wn.2d at 808-809.