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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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JAMES and KAY MORGAN, husband and wife,

Appellants/Plaintiffs,

v.

AURORA PUMP COMPANY, et al.,

Respondents/Defendants.

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**BRIEF OF RESPONDENT WARREN PUMPS LLC**

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## INTRODUCTION

Plaintiff<sup>1</sup> filed this negligence and products liability lawsuit against numerous defendants, including Warren Pumps, LLC (“Warren Pumps”), alleging that James Kenneth Morgan (“Plaintiff”) developed mesothelioma as a result of his occupational exposure to asbestos-containing products while serving as a pipefitter at Puget Sound Naval Shipyard (“PSNS”). The trial court granted Warren Pumps’ Motion for Summary Judgment (along with most other defendants) on the ground that the plaintiff’s alleged exposure to any products made and/or sold by Warren Pumps (if any such exposure occurred) was insufficient to have been a substantial factor in the cause of plaintiff’s injury.

## RESPONSES TO ASSIGNMENTS OF ERROR

1. The trial court correctly granted summary judgment in favor of Warren Pumps since there is no genuine issue of material fact that would support Plaintiff’s claims against Warren Pumps.
2. Plaintiff failed to preserve error, and seeks an improper advisory opinion, regarding his argument that the standard set forth in *Hue v. Farmboy Spray* has supplanted the substantial factor test for causation established by the Supreme Court in *Lockwood*.

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<sup>1</sup> The named plaintiffs in this case are James Kenneth Morgan and his wife, Kay Elaine Morgan. CP 1. Mr. Morgan passed away on January 27, 2008. To date, no personal representative has been substituted as the plaintiff in this case. For ease of reference, unless otherwise noted, “Plaintiff” will refer to Mr. Morgan.

## **STATEMENT OF THE CASE**

On August 29, 2007, Plaintiff filed suit against more than 50 defendants asserting claims for product liability, negligence, conspiracy, spoliation, willful or wanton misconduct, strict product liability under § 402B of the Restatement (Second) of Torts, breach of warranty, enterprise liability, and market share liability and/or market share alternate liability. CP 5-11. Plaintiff alleged that, as a result of his exposure to asbestos-containing materials made and/or sold by the defendants during his employment at PSNS in Bremerton, Washington, he developed mesothelioma. CP 9.

### **1. Pipefitters Like James Morgan Did Not Work on Internal Gaskets or Packing.**

James Morgan started at PSNS in 1952 as an apprentice pipefitter. CP 1264, 1269-70. He was promoted to journeyman pipefitter in 1957, but left PSNS shortly thereafter for other employment. CP 1264, 1269-70. He returned to PSNS in February 1959, and continued his work as a pipefitter until he moved into the engineering design shop in 1963. CP 1269-1270. Once Plaintiff started in the design shop, he stopped “working with the tools.” CP 1298-1299.

As a pipefitter, Plaintiff was required to “take and remove piping from equipment, [and] dismantle sections of piping.” CP 6264. Plaintiff’s description of that work did not involve working with internal components, such as gaskets or packing. Plaintiff stated his work,

“Largely involved knocking burrs off of welds, cleaning out old flanges of pipe, putting a length of pipe or burning a rack and getting it red, and more complicated jobs of templating piping systems to a steel floor.”

CP 1470.

Plaintiff did not know what brands of pumps he worked on or around from 1952 to 1957. CP 1473. Nor did Plaintiff ever testify that he worked on or around a Warren pump at any time during his career. Plaintiffs instead sought to rely on two co-workers, Michael Farrow and Jack Knowles, and a PSNS machine shop superintendent, Melvin Mr. Wortman, to prove their claim. These witnesses identified three types of asbestos-containing components that Plaintiff was allegedly exposed to during his work on pumps: insulation pads, flange gaskets and packing.

Plaintiffs have not offered any evidence that Warren manufactured or sold the insulation pads placed over pumps. Nor have Plaintiffs offered any evidence that Warren manufactured or sold the flange gaskets placed between a pump and the piping connected to it. Thus, Plaintiffs’ entire claim against Warren is founded on Mr. Knowles’s testimony that Plaintiff was nearby when someone else worked with brand-new packing on a Warren pump. CP 5520.

**2. Warren Did Not Manufacture Or Sell External Insulation.**

Both Mr. Farrow and Mr. Knowles discussed working with insulation that covered the pipes and flanges they worked on. CP 5518. Plaintiffs have not offered any evidence, and have not argued, that Warren

manufactured or sold that insulation.<sup>2</sup>

**3. Plaintiff Only Worked With Flange Gaskets, Which Warren Neither Manufactured, Sold, or Placed in the Chain of Distribution; Plaintiff Did Not Work With Internal Gaskets**

As a pipefitter, it was not Plaintiff's job to work on equipment such as pumps and valves. CP 5501. Machinists did that work. CP 5504. According to Plaintiff's co-workers Michael Farrow and Jack Knowles, the only gaskets Plaintiff worked on were flange gaskets, *not* internal pump gaskets.

**Michael Farrow**

Mr. Farrow testified that Plaintiff's pump work was limited to the flange and did not include work on the pump itself.

“Q. Well, let me -- for all of these pumps, it was never your job to do any work inside the pumps; is that right?”

A. No, we didn't work on the pump itself. We would disconnect the flanged connections to the pump. And a lot of times the riggers would lift up the pump if it needed to be sent off to a shop to be worked on and -- but I didn't work on the pump itself.”

CP 5501. Mr. Farrow recalled that those flange gaskets were spiral wound

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<sup>2</sup> The Supreme Court has held that equipment manufacturers such as Warren Pumps cannot be held liable for insulation materials made and sold by third parties that were applied to their equipment. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008). Because Plaintiff has not argued to either the trial court or this Court that Warren Pumps could be held liable for these insulation materials, no further discussion of these products is necessary.

gaskets made by Flexitallic. CP 1489. The replacement gaskets Mr. Farrow and Plaintiff installed were made by Flexitallic as well. CP 1490. Plaintiff has not offered any evidence that Warren ever manufactured or sold Flexitallic gaskets.

Mr. Farrow never saw Plaintiff work on the internal components of a Warren pump. CP 5507-08. Nor did Mr. Farrow ever see Plaintiff install a brand new pump. CP 1482. Any work on the internal components of a pump would be done in a machine shop, not onboard ship. CP 1483.

Mr. Farrow also agreed that there would be no way to tell whether the flange gaskets were original gasket installed during the vessel's construction or a replacement gasket:

“Q. Okay. Now, when the pipefitter separates the flange so that the pump can be lifted out, is -- and let's refer to the time when you recall Mr. Morgan doing it. Is there any way you could tell whether or not the gasket between that flange was original or a replacement?”

A. There's no way you could tell if it was the original or replacement gaskets, I don't think.”

CP 1484.

The only specific ship Mr. Farrow could recall that Plaintiff worked on the USS Coral Sea. CP 1486. According to the Dictionary of Naval Fighting Ships, the USS Coral Sea was launched on April 2, 1946. CP 1491-92. She was overhauled between 1948 and 1949, between 1950

and 1951, and again in October 1952. *Id.* There is nothing in the record to establish that any original flange gaskets or packing used in connection with a Warren pump remained by 1954 when Mr. Farrow met Plaintiff.

In summary, Mr. Farrow's only memory was that plaintiff installed and removed flange gaskets, which Warren did not make, sell, or specify.

**Jack Knowles**

Jack Knowles and Plaintiff worked together as pipefitter apprentices from 1954 to 1957. CP 5512-15. Mr. Knowles recalls Warren as one of the brands of pumps that he saw at PSNS. CP 5516.

Under leading questions from Plaintiffs' attorney, Mr. Knowles testified that Plaintiff was present when he, or others around him, worked on insulation, gaskets, and packing on "existing" and "brand new" Warren pumps. CP 5516-21. But Mr. Knowles clarified this testimony during questioning by Warren's counsel. Mr. Knowles clarified that the only work he actually saw Plaintiff do on a Warren pump was connect it to the piping system. CP 5537-39. Mr. Knowles denied seeing Plaintiff—or anyone else in Plaintiff's presence—work with internal gaskets or packing in a Warren pump:

“Q. Okay. So the only thing you saw done with these pumps is that they were connected into a system by Mr. Morgan; is that what you're saying?”

A. That's what I'm saying basically.

Q. There's nothing else that you remember being done on these pumps?

A. No.”

CP 5537.

But before Warren questioned him, Mr. Knowles responded to leading questions from Plaintiffs’ counsel about his observations of Plaintiff working near a Warren pump. He testified that he saw Plaintiff present when flange gaskets were installed and removed from the flanges of Warren pumps on a few occasions. CP 4855-56. Moreover, he answered some leading questions from Plaintiff’s counsel with respect to packing:

“Q. Did you ever have occasion to see Mr. Morgan in the presence of other people who were working with packing on brand-new Warren Pumps?

DEFENSE COUNSEL: Object to form.

A. I’m sure, yes. I’m sure that I did.”

CP 5520. This leading testimony mentions unidentified “work” on packing within “brand-new” Warren pumps. *Id.* If the pumps are “brand-new,” the only “work” Mr. Knowles could be referring to must be installation of the new packing that he claims was supplied with the “brand-new” pump. *Id.* Indeed, he confirmed this fact upon later inquiry when he testified that he saw Plaintiff in the presence of others when new packing was installed in new Warren pumps. CP 4856. He explained that this work occurred when pump manufacturers supplied packing rings alongside the pumps, not installed. CP 4858. As discussed below, even

Plaintiffs' industrial hygiene expert agrees that new, unused, original packing does not release asbestos fibers.

**4. Dr. Millette Testified That Brand-New Packing is Not Friable**

Dr. Millette is Plaintiffs' material scientist expert. His lengthy, 25-page Declaration largely concerns other defendants, and exposures to products—such as insulation—that Warren is not responsible for. CP 4583-4607. Dr. Millette testified that new packing is not friable, meaning it does not release asbestos fibers. CP 4590. Dr. Millette referred to one of his studies that concluded,

“Asbestos packing, *although not friable in original, unused condition*, can become friable after use in valves and can release asbestos fibers into the air during valve packing removal operations.”

CP 4590 (emphasis added). Dr. Millette's opinions about packing are based on Mr. Knowles's testimony (the only one to testify that Plaintiff observed work on internal pump components). CP 4605. The only packing work Mr. Knowles discussed involves new packing used with “brand-new” pumps. CP 5520. Thus, according to Dr. Millette's sworn declaration quoted above, Plaintiff would not have been exposed to respirable asbestos fibers from watching others work with new packing.<sup>3</sup>

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<sup>3</sup> Although Dr. Millette also cites Knowles' testimony that the air was “dusty and dirty,” CP 4604, Dr. Millette's own testimony confirms that the non-friable packing did not contribute to that “dusty and dirty” condition. CP 4590. Indeed, Mr. Knowles never testified that any “dust” or “dirt” that might have been present during the installation of new packing material into pumps actually came from the packing itself. Rather, Mr. Knowles was merely asked, and he merely described, the general conditions in the air at that time. *See* CP 5521.

Dr. Millette further offered opinions regarding Warren Pumps specifically. CP 4604-06. His opinions primarily concerned Plaintiff's exposures to asbestos fibers released from flange gaskets (which, as discussed elsewhere, Warren neither made or sold) used in connection with Warren pumps. CP 4604-05. With respect to packing, Dr. Millette does not distinguish between Plaintiff's presence when new, original, unused packing (which Mr. Knowles claimed Warren supplied) was installed, and the removal of used packing material made and sold by unknown manufacturers and suppliers. CP 4605-06. As already discussed, Dr. Millette's opinion was that the new, original, unused packing material that Warren allegedly supplied was not friable and, therefore, did not release respirable asbestos fibers in Plaintiff's presence. CP 4590.

**5. Dr. Mark Bases His Causation Testimony on Dr. Millette's Opinions About What Products Release Asbestos Fibers.**

Dr. Mark is Plaintiffs' expert pathologist, and has opined that all of Plaintiff's asbestos exposures contributed to his disease. CP 4568-4575, 4555-4561. Dr. Mark relies on Dr. Millette to determine Plaintiff's sources of asbestos exposures. CP 4558. Because the only alleged exposure to asbestos from a Warren product (brand-new packing) is not friable according to Dr. Millette, Dr. Mark could not have considered that exposure when reaching his opinion.

**6. Melvin Wortman's Testimony Only Relates to a Time When Plaintiff Worked in the Design Shop, and Is Speculative As to Warren.**

Plaintiff submitted the declaration of Melvin Wortman given in another asbestos case in opposition to defendants' motion for summary judgment. CP 6448-53. Mr. Wortman began working as a machinist at PSNS in 1940, and eventually was promoted to inside machine shop superintendent. CP 6448. Mr. Wortman's declaration is limited to 1967 and 1971, when the plaintiff in the other action, Douglas Nelson, worked as a machinist in the inside machine shop at PSNS known as Shop 31. *Id.* In that declaration, Mr. Wortman states that he knew that PSNS bought 50% of the replacement parts from the equipment manufacturers because of "experience." CP 6707.

From 1967 to 1971, Plaintiff worked in the engineering design shop. CP 1269-1270. Plaintiff did not work in Shop 31 where Mr. Wortman was the supervisor. As a design engineer, Plaintiff was not "working with the tools." CP 1298-1299.

Mr. Wortman never saw Plaintiff work on or around a Warren pump.<sup>4</sup> CP 6716-17. In fact, Mr. Wortman could not recall a single, specific instance in which he saw *anyone* work on a Warren pump:

"Q. And just to be clear, sitting here today, you do not have a specific recollection of seeing a Warren pump being worked on; is that correct?"

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<sup>4</sup> Indeed, there is no evidence that Plaintiff ever set foot inside the PSNS machine shop building where Wortman worked.

A. Specifically, no.”

*Id.* Because Plaintiff was not working with Mr. Wortman in Shop 31, and was not working on any equipment during the relevant time period (1967-1971), Mr. Wortman’s testimony about the use of replacement components inside the machine shop is not relevant to plaintiff’s claims.

Even if considered, Mr. Wortman does not have a basis for his opinion against Warren. The planning and estimating department was responsible for ordering replacement parts. CP 6692, 6694. Mr. Wortman never worked in the planning and estimating department, never supervised that department, never read any manuals or documents that discussed how the planning and estimate department operated, never set foot inside the planning and estimate building for a business reason, and could not recall anyone who worked there. *Id.* Mr. Wortman simply did not know where the purchasing department obtained replacement parts, unless he saw the packaging for those replacement parts:

“Q. How do you know that the purchasing department – where the purchasing department went to obtain replacement parts?

A. We didn’t.

Q. Okay. Now –

A. We didn’t, unless it came from a manufacturer and the packaging contained where it came from, because, remember, it came from the supply department.”

CP 6705-06. However, Mr. Wortman never saw any packaging from Warren:

“Q. Do you have any -- do you have a specific recollection of seeing any Warren pump packaging?”

A. Not specifically.”

CP 6740.

Mr. Wortman maintained that he knew that PSNS bought 50% of the replacement parts from the equipment manufacturers because of “experience.” CP 6707. But aside from seeing packaging from other manufacturers, Mr. Wortman never articulated what that “experience” was. In fact, Mr. Wortman admitted that he never talked with anyone on the business, or purchasing, side of PSNS to find out whether replacement gaskets and packing came from the equipment manufacturers:

“Q. Okay. You never talked to anybody in the business side at PSNS to make a determination as to whether or not the business side that did the purchasing purchased 50 percent of the replacement parts for equipment from 1967 to 1971 from manufacturers, correct?”

A. No, I did not.”

CP 6707. Thus, the sole basis for Mr. Wortman’s opinion comes from his role as inside machine shop supervisor. But his role as a supervisor did not give him any “experience” in the procurement of replacement gaskets or packing:

- Mr. Wortman never spoke with anyone who was in charge with ordering replacement gaskets or packing; *Id.*
- He never ordered replacement gaskets or packing from Warren or any other equipment manufacturer. *Id.*
- He has no firsthand knowledge about whether an equipment manufacturer ever supplied the gaskets or packing in any particular pump. CP 6708.
- He never saw any invoices, purchase orders, or other documentation from the Navy discussing replacement gaskets or packing. *Id.*
- He never received any information from plaintiff's counsel, or written statements from other PSNS workers, to support his opinion that replacement gaskets and packing were provided by the original manufacturer; *Id.*, and
- He had never heard the term "qualified products list" before his deposition. CP 6691, 6708.

Any possible relevance these opinions is undermined by Mr. Wortman's lack of experience regarding the procurement of replacement parts.

#### **7. Motion for Summary Judgment**

On January 12, 2009, Warren Pumps filed a motion for summary judgment on the ground that there was no evidence that Plaintiff had been exposed to asbestos from products made, distributed, or sold by Warren. CP 1452-1460. Plaintiff responded to that motion three months later on

April 14, 2009.<sup>5</sup> Plaintiff's response included an argument that he had sufficient evidence to proceed under a "design defect" theory. That issue was not raised in Plaintiff's Opening Brief, and no further discussion of that issue is required. Warren Pumps served its Reply on May 1, 2009.

The trial court considered Warren's motion together with summary judgment motions filed by several other defendants. In an order dated July 2, 2009, the trial court granted defendants' motions. CP 6747-67. The court determined that, based on *Simonetta* and *Braaten*, "there is insufficient evidence that the new material internal to the product here would be a substantial factor in the tragic mesothelioma that Mr. Morgan suffered." CP 6767.

Plaintiff filed a Notice of Appeal on July 22, 2009. CP 6768.

## ARGUMENTS

### I

#### **Warren Pumps Joins in Other Defendants' Arguments Pursuant to RAP 10.1(g).**

Pursuant to RAP 10.1(g), Warren Pumps joins in the arguments made by any other defendant in response to the legal arguments made by Plaintiffs in their Opening Brief to the extent applicable. In addition, Warren Pumps sets forth the following response to plaintiff's Opening Brief as it relates to Warren Pumps.

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<sup>5</sup> It appears that Plaintiff's Response to Warren Pumps' Motion for Summary Judgment is not included among the Clerk's Papers.

## II

### **Plaintiff Has Not Set Forth Admissible Evidence to Establish that He Was Exposed to Respirable Asbestos Fibers From Replacement Gaskets or Packing Made and/or Sold by Warren Pumps.**

As this Court well knows, an appellate court may affirm a trial court's ruling on any correct ground, even though that ground was not considered by the trial court. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *Gontmakher v. The City of Bellevue*, 120 Wn.App. 365, 370, 85 P.3d 926 (2004). Thus, in addition to affirming the trial court's dismissal of Warren Pumps on the ground that any exposure to new gaskets and/or packing (if any) sold by Warren Pumps was not a substantial factor in the cause of plaintiff's injury, this Court may also affirm on the ground that Plaintiff failed to set forth admissible facts sufficient to establish that he ever encountered respirable asbestos fibers from replacement components made and/or sold by Warren Pumps.

Contrary to the Plaintiff's Opening Brief, there is no evidence whatsoever in the record to establish that Plaintiff was ever exposed to respirable asbestos fibers released from gasket or packing material sold by Warren Pumps. As mentioned, it is undisputed that Warren did not manufacture, sell, or supply flange gaskets, and the only possible connection to packing is new, original, unused packing that Plaintiff's expert concedes is not friable and, therefore, does not release respirable asbestos fibers. Rather, the record establishes that, at most, plaintiff's

arguments are based wholly on speculation that is insufficient to avoid summary judgment.

The Supreme Court has held that an equipment manufacturer such as Warren Pumps does not have a duty, under strict liability or negligence, to warn of defects or dangers posed by products that it did not make or sell. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 354, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 398, 198 P.3d 493 (2008). Thus, absent any evidence that Warren Pumps made or sold any asbestos-containing replacement gaskets and/or packing materials that were used in connection with the metal pumps that it manufactured, plaintiff's claim against Warren Pumps fails.<sup>6</sup>

In *Braaten*, the Supreme Court summarized its rulings in that case and *Simonetta* as follows:

“These holdings . . . foreclose the plaintiff's products liability and negligence claims based on failure to warn of the danger of exposure to asbestos (1) in insulation applied to pumps and valves the defendant-manufacturers sold to the Navy, where the manufacturers did not manufacture or sell the insulation and were not in the chain of distribution of it, and (2) in replacement packing and gaskets installed or connected to the pumps and valves after they were installed aboard ships, where the manufacturers did not manufacture or sell the

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<sup>6</sup> As discussed above, Plaintiff has not argued on appeal that the trial court erred in granted summary judgment in favor of Warren Pumps to the extent that his claims are for “design defect.” Thus, no further discussion of this issue is necessary. *See, Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 397, 858 P.2d 245 (1993) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”), *quoting Cowiche Canyon Conser. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

replacement packing and gaskets and were not in the chain of distribution of these products.”

*Id.* at 398.

Plaintiff relies on the declaration of Mr. Wortman and the deposition of testimony of Mr. Knowles to support his argument. However, these witnesses’ testimony only establishes that Plaintiff encountered flange gaskets that Warren Pumps neither made nor sold, and new, original, unused packing material that, according to Plaintiff’s own industrial hygiene expert, was not friable.

Mr. Wortman’s declaration states that between 1967 and 1971, equipment manufacturers generally supplied approximately 50% of all replacement components, including replacement gaskets and/or packing. (CP 5192) There is no evidence in the record that Plaintiff ever worked with or around a Warren pump between the years of 1967 and 1971. Thus, Mr. Wortman’s declaration concerns a period of time that is not at issue in this case.

Mr. Wortman’s only statement regarding Warren is that it was one of at least six manufacturers of pumps used onboard Navy vessels. CP 5190. He does not state that Warren actually sold any replacement gaskets and/or packing for use at PSNS. Rather, his assertion regarding replacement gaskets and/or packing was a general statement and did not specify any particular equipment manufacturer.<sup>7</sup> Mr. Wortman explained

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<sup>7</sup> Even if Wortman’s declaration were given an undue inference that Warren supplied some replacement gaskets, that fact still would not assist Plaintiff. As both Mr. Knowles and Mr. Farrow testified, Plaintiff was not present when any internal gaskets were replaced in a Warren pump. CP 4855-56, 5501, 5537.

in his deposition that the only way he would know whether an equipment manufacturer such as Warren had supplied replacement gaskets and/or packing is if it included some packaging with these components. CP 6706. He had no memory, however, of ever seeing any such packaging from Warren on any replacement gaskets or packing materials. CP 6740. In fact, Mr. Wortman could not even recall ever seeing anybody perform maintenance or repair work on a Warren pump.<sup>8</sup> CP 6716-17.

Mr. Knowles' testimony also fails to establish that Plaintiff was exposed to respirable asbestos fibers released from replacement gaskets and/or packing that Warren sold. Mr. Knowles recalled seeing Plaintiff present when flange gaskets were installed and removed from the flanges of Warren pumps on a few occasions. CP 4855-56. However, there is no evidence in the record that Warren made, sold, or specified any flange gaskets that the Navy used in connection with its pumps.

Moreover, Mr. Knowles answered several leading questions from Plaintiff's counsel that he saw Plaintiff in the presence of others when packing was installed in new Warren pumps. CP 4856. In response to these leading questions, he testified that this work occurred when pump

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<sup>8</sup> Wortman's statements regarding replacement gaskets are also irrelevant for purposes of this case. As discussed above, there is no evidence that Plaintiff was ever present when an internal gasket was either installed or removed from a Warren pump. Indeed, Mr. Farrow, who was a product identification witness on behalf of Plaintiff, testified that any work on the internal components of pumps would have been performed in the PSNS machine shop, not onboard the Navy vessels. CP 1483. Likewise, Mr. Knowles also testified that any gasket work that he observed in connection with Warren pumps involved only flange gaskets. CP 4855-56, 5537. Moreover, Plaintiff does not argue, nor is there any evidence, that he ever worked in or around the PSNS machine shop where such replacement gaskets would have been installed.

manufacturers supplied packing rings alongside the pumps, not installed. CP 4858. These leading questions and the responses thereto are inadmissible and should be disregarded for purposes of summary judgment. *State v. Scott*, 20 Wn.2d 696, 699, 149 P.2d 152 (1944) (holding that leading testimony is not admissible). Upon further inquiry from Warren Pumps, Mr. Knowles recanted this leading testimony, admitting that the only work he saw performed on a Warren pump in Plaintiff's presence was connection of the pump to the system in which it was installed. CP 5537.

Moreover, even if Mr. Knowles' testimony in response to leading questions is considered, Plaintiff's own industrial hygiene expert, James Dr. Millette, explained that the new, original, unused packing material he described is not friable. CP 4590. Thus, there is no evidence in the record that new, original, unused packing material used in connection with a Warren pump would have released asbestos fibers.

Based on the record before the trial court, the only evidence regarding a product sold by Warren Pumps for which it might potentially be liable is new packing installed in new Warren pumps, as described by Mr. Knowles. However, since Dr. Millette's opinion was that new, unused packing material is not friable, there is no evidence that it contributed to plaintiff's cumulative dose of exposure to asbestos. Accordingly, the trial court's grant of summary judgment in favor of Warren Pumps should be affirmed.

### III

#### **The Trial Court's Ruling Should be Affirmed Because Plaintiff's Evidence is Insufficient as a Matter of Law to Establish that Warren Pumps' Products Were a Substantial Factor in the Cause of His Injury.**

In addition to the Plaintiff's lack of evidence of exposure to respirable fibers released from a product that Warren Pumps made and/or sold, the record establishes that the trial court correctly ruled that Plaintiff's evidence is insufficient to establish that any alleged exposure to a Warren Pumps product could be a substantial factor in the cause of his injury. Under the well-established criteria set forth by the Washington Supreme Court, summary judgment was appropriate.

#### **A. Washington Courts Adhere to the *Lockwood* Factors to Determine Whether a Plaintiff Has Offered Sufficient Evidence to Create a Question of Fact.**

To establish that a Warren Pumps product caused plaintiff's injury, plaintiffs had to establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of the product, Warren Pumps. *Lockwood v. AC & S, et al.*, 109 Wn.2d 235, 245, 744 P.2d 605, 612 (1987) (*en banc*) (citing *Martin v. Abbott Laboratories*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984)). A plaintiff is not required to personally identify the asbestos products to which he was exposed in order to recover, but may alternatively submit direct or circumstantial evidence to identify the manufacturer of an asbestos product. *Id.* at 247.

If circumstantial evidence is offered, such as the fact that a defendant's product was on board a ship, it is not enough to merely speculate that the product was the source of plaintiff's injury. Instead, sufficient evidence must be offered to conclude that there was a causal link between the injured party's asbestos exposure and the injury. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706, 850 P.2d 908 (1993). Plaintiffs must produce evidence showing or at least supporting the conclusion that there was actual exposure to asbestos fibers from Warren Pumps products.

To meet the burden of proof on causation, plaintiff must establish both cause-in-fact and legal cause. In some situations "but for" causation must be shown, e.g., that a defendant's conduct produced plaintiff's injury and but for that conduct, the injury would not have happened. *Eckerson v. Ford's Prairie Sch. Dist. No. 11*, 3 Wn.2d 475, 482, 101 P.2d 345 (1940). However, in the asbestos context, Washington courts have substituted "but for" causation with the "substantial factor test." *Mavroudis v. Pittsburg-Corning Corp.*, 86 Wn. App. 22, 32, 935 P.2d 684 (1997). To avoid summary judgment in a "substantial factor" case a plaintiff must offer:

Evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. The mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Prosser, *The Law of Torts*, § 41 (5th Ed. 1984).

Thus, the threshold question on the issue of causation is whether plaintiffs have offered evidence capable of supporting a reasonable inference that the plaintiff was exposed to respirable asbestos from a Warren Pumps product. Because the mere presence of a product on a job site creates nothing more than the mere possibility of causation, the *Lockwood* court held that there must be sufficient evidence of the circumstances of the products usage in proximity to the plaintiff to support an inference that the product was a substantial factor in causing the plaintiff's injury.

In deciding whether sufficient evidence of substantial factor causation exists, a court must consider several factors. *Lockwood*, 109 Wn.2d at 248; *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn.App. 312, 323-324, 14 P.2d 789 (2000). These factors include: 1) plaintiff's proximity to an asbestos product when the exposure occurred; 2) the expanse of the work site where asbestos fibers were released; 3) the extent of time the plaintiff was exposed to the product; 4) the types of asbestos products to which the plaintiff was exposed; 5) the ways in which such products were handled and used; 6) the tendency of such products to release asbestos fibers into the air depending on their form and the methods in which they were handled; and 7) other sources of the plaintiff's injury. *Lockwood*, 109 Wn.2d at 248-249.

In *Lockwood*, the court found that the evidence of causation was sufficient to support an inference that the plaintiff had been exposed to

respirable fibers from an asbestos insulation product. The proof that the *Lockwood* plaintiff offered included testimony from a co-worker that the defendant Raymark's product had been used aboard the ships which Lockwood worked onboard, and Lockwood's own testimony that he had worked aboard the ships in the timeframe that the products were used. Further, experts testified that the asbestos used in the insulation could travel throughout the ships, and workers could breathe it in anywhere on the ships.

In *Berry*, the plaintiff offered the testimony of a past worker at PSNS who had purchased the asbestos-containing insulation product from the defendant supplier. Other former employees had also testified that the defendant supplier had supplied asbestos-containing insulation products. Further, the plaintiff Berry testified that he worked with insulation workers and around insulation which contained asbestos.

**B. Plaintiff's Evidence Fails to Satisfy the *Lockwood* Factors.**

In this case, Plaintiff's evidence establishes, at most, the following: (1) that he encountered flange gaskets that were used in connection with Warren Pumps' equipment; and (2) that he encountered new, original, unused packing material in connection with a Warren pump. CP 4856, 4858. However, Plaintiff offered no evidence that Warren Pumps made, sold, or specified the use of any particular type of flange gasket in connection with any of its pumps. *Id.* Moreover, as already discussed, Dr. Millette opined that any new, original, unused packing material supplied

by Warren in connection with Warren pumps would not have been friable and, therefore, would not have released any respirable asbestos fibers in Plaintiff's presence.

As discussed above, the Supreme Court has held that equipment manufacturers do not have any duty, under strict liability or negligence, to warn of defects or dangers posed by products the manufacturer did not make or sell. *Simonetta*, 165 Wn.2d at 354. Rather, strict products liability may be imposed only upon parties in the product's "chain of distribution." *Id.* at 355. Plaintiff has offered no evidence that Warren Pumps was in the "chain of distribution" of any flange gaskets used by the Navy in connection with its pumps. CP 3897-3900, 4026-27. Moreover, there is no admissible evidence that Warren supplied any replacement packing material that was used in connection with its pumps in the 1950's.<sup>9</sup> Thus, the only potential asbestos-containing products that plaintiff associates with Warren Pumps – flange gaskets and new, original, unused packing material that Dr. Millette concedes is not friable – are not products for which it can be held liable. Accordingly, Plaintiff cannot supply any evidence to satisfy any of the *Lockwood* factors. The trial court correctly ruled that Warren's products were not a substantial factor in the cause of Plaintiff's injury.

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<sup>9</sup> As discussed above, Mr. Wortman's declaration only concerns the time period 1967-71, which is many years after Plaintiff's alleged exposure to Warren pumps occurred. CP 6448.

#### IV

##### **Plaintiff Failed to Preserve Error Regarding the Application of Hue v. Farmboy Spray.**

The centerpiece of plaintiff's argument before this Court concerns the proper application of the "substantial factor" test under Washington law. Plaintiff argues that this case should be decided on appeal based on a substantial factor "instruction" that was set forth *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995). Warren Pumps agrees that the "substantial factor" test for causation, as set forth by the Supreme Court in *Lockwood, infra*, is the appropriate standard for causation in asbestos claims in Washington. To the extent that plaintiff claims on appeal that summary judgment motions should be decided on the basis of an "instruction" based on plaintiff's interpretation of *Hue*, that argument was not preserved in the trial court below and should not be considered on appeal.

As an initial matter, Plaintiff's argument regarding the appropriate "instruction" is premature. This case was decided on motions for summary judgment, not by a jury after having received "instructions" from the trial court. Neither Plaintiff nor Warren Pumps has submitted proposed jury instructions, and the trial court has not ruled on jury instructions. There is no record of an "instruction" for this Court to review. Plaintiff's request that this Court decide this case based on an "instruction" based on his interpretation of *Hue* is no different than a request for an improper advisory opinion. *See Dickens v. Alliance*

*Analytical Laboratories, LLC*, 127 Wn.App. 433, 437, 111 P.3d 889 (2005) (declining to review a legal issue not yet decided by trial court on ground that Court of Appeals does not give advisory opinions).

Moreover, Plaintiff did not argue that the standard of causation set forth in *Hue* should apply to this case.<sup>10</sup> Plaintiff never cited *Hue* in his opposition to Warren Pumps' motion for summary judgment. Moreover, he did not mention *Hue* at any point during oral argument on the defendants' motions for summary judgment. The standard of causation set forth in *Hue* was simply never raised before the trial court.

It is fundamental that, with few exceptions, any assignment of error before this Court must be preserved below. RAP 2.5(a) provides:

“(a) Errors Raised for First Time on Review. *The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.* A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.”

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<sup>10</sup> As mentioned above, it is unclear whether Plaintiff's Opposition to Warren Pumps' Motion for Summary Judgment has even been included in the Clerk's Papers. However, if and when it is added to the Clerk's Papers, there is no citation to *Hue*, nor does plaintiff argue that a standard of causation other than that found in *Lockwood* should apply.

(emphasis added). Thus, there are only three assignments of error that need not be preserved below to be considered by this court: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be established; and (3) manifest error affecting a constitutional right. None of these exceptions applies in this case.

There are numerous appellate opinions in Washington that address the requirement for preservation of error. For example, in *State v. King*, 167 Wn.2d 324, 329, 219 P.3d 642 (2009), the Supreme Court held that, “[i]n general, appellate courts will not consider issues raised for the first time on appeal.” However, “a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right.” *Id.*; see also, *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (“On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error.”). The appropriate standard of causation in an asbestos injury case is not an issue that raises any constitutional issues.

Since Plaintiff failed to preserve his arguments regarding *Hue* in the trial court, that issue should not be considered on appeal.

### **CONCLUSION**

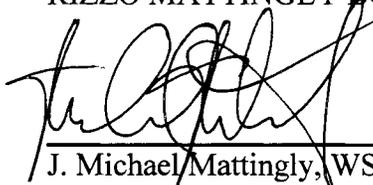
This Court should affirm the trial court’s ruling granting summary judgment to Warren Pumps. There is no evidence that Plaintiff ever encountered respirable asbestos fibers released from a product made and/or sold by Warren Pumps. Moreover, the trial court correctly ruled that, even if Plaintiff ever did encounter asbestos fibers from a Warren

Pumps product, that exposure was so de minimis that it could not be a substantial factor in the cause of Plaintiff's injury as a matter of law.

DATED this 15<sup>th</sup> day of April, 2010.

Respectfully submitted,

RIZZO MATTINGLY BOSWORTH, P.C.

A handwritten signature in black ink, appearing to read "J. Michael Mattingly", written over a horizontal line.

J. Michael Mattingly, WSBA #33452

Allen E. Eraut, WSBA #30940

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Warren Pumps, LLC

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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JAMES and KAY MORGAN, husband and wife,

Appellants,

v.

AURORA PUMP COMPANY, et al.,

Respondents/Defendants.

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**CERTIFICATE OF SERVICE**

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**COUNSEL FOR RESPONDENTS**

I am employed by the law firm of Rizzo Mattingly Bosworth, PC in Portland, Oregon. I am over the age of eighteen years and not a party to the subject cause. My business address is 411 S.W. Second Avenue, Suite 200, Portland, OR 97204.

On the date below, I caused to be served **BRIEF OF RESPONDENT WARREN PUMPS LLC** on all parties in this action by transmitting a true copy thereof in the following manner unless otherwise indicated.

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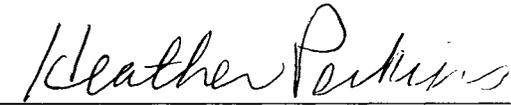
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I declare under penalty of perjury and under the laws of the State of Washington (RCW 9A.72.085) that the foregoing is true and correct.

Executed at Portland, Oregon, this 15<sup>th</sup> day of April, 2010.



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Heather Perkins  
Paralegal