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No. 63923-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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JAMES and KAY MORGAN, husband and wife,  
Appellant/Plaintiffs,

v.

AURORA PUMP COMPANY, et al.,  
Respondents/Defendants.

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**BRIEF OF RESPONDENT**  
**WEIR VALVES & CONTROLS USA, INC.**

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## I. Preliminary Statement

In this asbestos personal-injury case plaintiff<sup>1</sup> fails to present evidence he was ever exposed to an asbestos-containing product for which Weir Valves (formerly known as Atwood & Morrill Co.) was responsible. He speculated that he might have been exposed to a Weir product – a valve with original asbestos-containing gaskets or packing – but he failed to present evidence from which a rational jury could find that such an exposure occurred.

Unhappy with our Supreme Court's decisions in *Braaten* and *Simonetta*, plaintiff claims that his product-design claims survive. But the legal underpinnings of *Braaten* and *Simonetta* dispose of his design-defect claims just as they dispose of his failure-to-warn claims. He failed to present evidence sufficient to present a triable case on Weir's government-contractor defense and failed to show that any exposure to a Weir product was a substantial factor in generating his disease.

This case calls upon this court to decide these questions:

Product Identification: To establish a manufacturer's liability, an asbestos personal-injury plaintiff must show that he was exposed to an asbestos-containing product of that manufacturer. Plaintiff's evidence

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<sup>1</sup> For simplicity and clarity this brief refers to the Morgan plaintiffs in the singular as if James Morgan were the sole plaintiff.

showed that he worked on some Atwood & Morrill valves but failed to show that those valves contained original asbestos components and failed to show that any asbestos components came from Atwood & Morrill. Did that evidentiary failing require dismissal of plaintiff's claims against Weir?

Failure to Warn: Under controlling law a manufacturer of a product with asbestos components may be liable only if the plaintiff proves exposure to original asbestos components supplied by that manufacturer. Plaintiff could not show that he was exposed to original asbestos packing or gaskets on an Atwood & Morrill valve or that any packing or gaskets to which he was allegedly exposed originated with Atwood & Morrill. Does his claim fail?

Design Defect: To prevail, a product-liability plaintiff must show that the injury-producing product was defectively designed and caused his injury. Plaintiff showed only that Atwood & Morrill's valves could be used with asbestos, which under controlling authority does not establish a defect. Did the trial court properly dismiss plaintiff's design-defect claim?

Government-Contractor Defense: The government-contractor product-liability defense applies if (1) the government approved reasonably precise specifications for the product, (2) the equipment conformed to those specifications, and (3) the supplier warned the

government of dangers in the use of the equipment known to the supplier but not the government. Weir showed each of those elements. Was Weir entitled to dismissal of plaintiff's claims on that basis?

Substantial Factor: An asbestos plaintiff must show that his exposure to the defendant's asbestos-containing product was a substantial factor in causing his disease. Plaintiff failed to show any exposure to an asbestos-containing Atwood & Morrill product and failed to show that any such exposure caused his disease. Was any exposure to an Atwood & Morrill product a substantial factor in generating his disease?

## **II. Statement of Facts**

### **A. Overview.**

From June 1952 until 1989, James Morgan worked in various positions at the Puget Sound Naval Shipyard (PSNS) in Bremerton. He was a pipefitter/steamfitter from 1952 to 1963 (with the exception of a short period of employment elsewhere), a mechanical engineering technician from 1963 to 1975, and a technical assistant for testing from 1975<sup>2</sup> to 1989. In 2006 or 2007, he was diagnosed with mesothelioma.<sup>3</sup> Morgan sued over 50 defendants, including Weir, claiming that he was exposed to their asbestos-containing products during his PSNS

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<sup>2</sup> CP 926-927.

<sup>3</sup> CP 10, 904, 932.

employment and that his mesothelioma was caused by that exposure.<sup>4</sup> After discovery, Weir, along with many other similarly-situated defendants, moved for summary judgment on four separate grounds: 1) lack of evidence of exposure to a Weir product, 2) lack of evidence to support the plaintiff's design-defect theory, 3) Weir's government-contractor defense, and 4) lack of evidence that Morgan's exposure to a Weir product was a substantial factor in causing his disease.<sup>5</sup> The court granted the motion on the first ground, dismissing Morgan's claims with prejudice.<sup>6</sup>

As far as it relates to Weir's motion, the evidence, viewed in the light most favorable to Morgan, showed this.

**B. Weir manufactured Atwood & Morrill valves.**

Weir, formerly Atwood & Morrill Company, Inc., manufactured valves referred to as Atwood & Morrill valves.<sup>7</sup> Weir makes valves to fit its customers' specifications.<sup>8</sup> From time to time, ending in 1985, Weir has sometimes incorporated other companies' asbestos-containing

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<sup>4</sup> CP 6-11.

<sup>5</sup> CP 880-892; 3386-3392; 5691-5702.

<sup>6</sup> CP 6747-6767.

<sup>7</sup> CP 894.

<sup>8</sup> CP 894; 6191

materials into the interior of the valves, depending on its customers' specifications for the valves.<sup>9</sup> Prior to 1986, Weir made some valves that used asbestos-containing gaskets or asbestos-containing internal packing, and some valves that did not use or contain any asbestos.<sup>10</sup> Weir has never recommended the use of any external flange gaskets or external insulation covering in conjunction with its Atwood & Morrill valves.<sup>11</sup> Whether to use such external items – and their composition – has always been the choice of the purchaser.<sup>12</sup>

If an Atwood & Morrill valve contained asbestos-containing gaskets or packing, this was always on the inside of the valve, not on the outside. That is, any asbestos-containing product was only an internal component part of the valve.<sup>13</sup> Not all Atwood & Morrill valves contained internal packing, and of those that did, not all contained asbestos-containing packing.<sup>14</sup> Not all Atwood & Morrill valves contained internal

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<sup>9</sup> CP 894.

<sup>10</sup> CP 894; 6180.

<sup>11</sup> CP 895.

<sup>12</sup> CP 895.

<sup>13</sup> CP 894.

<sup>14</sup> CP 894.

gaskets, and of those that did, not all contained asbestos-containing gaskets.<sup>15</sup>

Weir cannot identify if a particular Atwood & Morrill valve contained internal asbestos-containing gaskets or packing without either (1) having possession of the valve so its component parts can be examined and tested, or (2) knowing the specific identification of the valves by sales order number, valve identification number, serial number, model number or bill of materials number, so that Weir could search its records for information on that particular valve and its component parts.<sup>16</sup>

**C. Farrow identified Morgan as having worked with one Atwood & Morrill valve, but knew little about it.**

In his discovery answers Morgan claimed exposure to Atwood & Morrill valves allegedly containing asbestos. The answers, however, failed to specify valve type, date, or amount of alleged exposure.<sup>17</sup>

Morgan's employment at PSNS breaks down into two distinct periods. During the first period, from 1952 to 1963 (with the exception of a short period of employment elsewhere) he performed "hands on" work as a pipefitter/steamfitter. During the second period from 1963 to 1989 he

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<sup>15</sup> CP 895.

<sup>16</sup> CP 695.

<sup>17</sup> CP 927-931.

was involved in desk jobs.<sup>18</sup> Under plaintiff's theory he was exposed to levels of asbestos exceeding background levels only during the first period. The testimony focused on that period.

Morgan's evidence of his claimed exposure to asbestos came from three sources: co-workers Michael Farrow, Jack Knowles and Melvin Wortman. The evidence from these sources relevant to Atwood & Morrill follows.

Morgan's sometime co-worker Michael Farrow, who did not work on the same crew as Morgan,<sup>19</sup> claimed that he saw Morgan working with Atwood & Morrill valves "many times."<sup>20</sup> When pressed for specifics, however, he could specifically recall Morgan removing only one Atwood & Morrill valve from the machinery space in the engine room aboard the *USS Princeton* in March 1954.<sup>21</sup> He estimated that this work would have taken under four hours from beginning to end.<sup>22</sup> Farrow did not know the model or serial number of this valve nor did he know whether it was an

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<sup>18</sup> CP 911-912.

<sup>19</sup> CP 1737.

<sup>20</sup> CP 2698.

<sup>21</sup> CP 946-950.

<sup>22</sup> CP 949.

original valve.<sup>23</sup> Indeed, he admitted the valve could have been replaced several times before Morgan worked on it.<sup>24</sup> He never saw Morgan working on the internal components of this one Atwood & Morrill valve, did not know if the valve contained internal packing, did not know if Morgan removed packing from the valve, and did not know what type of liquid the valve controlled.<sup>25</sup>

**D. Jack Knowles provided no evidence of Morgan's work on new Atwood & Morrill valves.**

Plaintiff's additional fact witness, Jack Knowles, did not add anything. While Knowles claimed to have seen Morgan working with Atwood & Morrill valves "numerous times",<sup>26</sup> he stated those valves were not brand-new and that Morgan did not work on any internal components associated with those valves:

Q: Do you know if any of the Atwood valves that you worked with in Mr. Morgan's presence or you witnessed Mr. Morgan work with were brand new Atwood valves?

A: I don't. I do not believe that they were new. Since we were in a removal stage primarily.

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<sup>23</sup> CP 947-949.

<sup>24</sup> CP 948.

<sup>25</sup> CP 947-950.

<sup>26</sup> CP 4702-4704.

Q: Okay. Okay. And to follow up on that. So then I would be correct in saying that the Atwood valves that you and Mr. Morgan worked with would have been removed and replaced many times before you encountered them? Could have been removed and replaced?

A: It could have. They could have.

. . .

Q: Am I correct that you have no way of knowing whether the valves that you witnessed Mr. Morgan working with were original valves or they could have been removed and replaced many times previously?

A: True.

Q: Okay. Did you ever witness Mr. Morgan performing any repairs to the internal components of an Atwood valve?

A: No.<sup>27</sup>

Knowles did not know whether Morgan ever removed any original gaskets from an Atwood valve and did not have any specific recollection of the Atwood valves containing packing.<sup>28</sup>

**E. Wortman knew nothing about Atwood & Morrill valves.**

Plaintiff's witness Melvin Wortman knew even less. He knew nothing about Atwood & Morrill valves. The name was not familiar to him.<sup>29</sup>

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<sup>27</sup> CP 4715.

<sup>28</sup> CP 4716.

**F. Weir presented evidence in support of its government-contractor defense.**

Weir presented evidence in support of its government-contractor defense both from its own representative, Samuel Shields, and from its naval expert, Rear Admiral Roger Horne.

Shields testified that the valves sold to the Navy before and during the period when Morgan was allegedly exposed had to comply with detailed Navy design requirements, including materials of construction. Atwood & Morrill had to completely comply with those specifications, without deviation, and in fact did so. If it had not complied with those requirements, their valves would have been rejected.<sup>30</sup>

Rear Admiral Horne's testimony was similar. Horne explained that equipment sold by Weir during the 1940s, 1950s, and 1960s to the United States Navy for use on US Navy ships was always required to comply with the detailed specifications proposed, written, approved and issued by the Navy.<sup>31</sup> The military specifications for valves and other equipment intended for use aboard Navy ships were drafted, approved and maintained by the Navy, specifically NAVSEA, to address all aspects of

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<sup>29</sup> CP 6227 - 6229.

<sup>30</sup> CP 6189-6192, 2043, 2045.

<sup>31</sup> CP 6114; 6116.

shipboard equipment and materials requirements, including the materials to be used.<sup>32</sup> Any changes to those specifications were made by the Navy. Only valves especially designed and built for US Navy combat ships, including Atwood & Morrill valves, could be installed on those ships. The Navy assured that contractors such as Weir followed the required contract specifications.<sup>33</sup> It was common for the Navy's directors of the machinery and propulsion equipment groups to inspect the manufacturing process at vendors plants.<sup>34</sup> If Atwood & Morrill valves had failed to conform to the Navy's specifications, they would not have been installed on a Navy vessel.<sup>35</sup>

**G. Expert testimony from other defense naval experts confirmed that compliance with governmental specifications was mandatory.**

Horne was not alone. Other defendants' naval experts confirmed that equipment supplied to the Navy had to meet the Navy's rigorous requirements. For example, Captain Charles Wasson testified that the *USS Princeton*, a ship on which Morgan had allegedly worked in 1954, had undergone five repair periods before 1954, including an inactivation and

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<sup>32</sup> CP 6114; 6116.

<sup>33</sup> CP 6114-6115.

<sup>34</sup> CP 6115.

<sup>35</sup> CP 6116.

reactivation period during which most all piping and systems, joints and valves containing gasket or packing materials would have been renewed or replaced.<sup>36</sup> Wasson rejected the view that the Navy was not the designer of valves because the Navy was “in the business of designing it and determining what would work.”<sup>37</sup>

Rear Admiral Benjamin Lehman, a naval engineering expert, concurred. Lehman explained that any deviation from military specifications of equipment, including valves, to be installed on Navy ships would have resulted in significant problems and rejection of the equipment. According to Lehman,

The Navy could not, and did not, permit its contractors to implement changes because every aspect of every item had to be:

- a. functionally compatible with every other piece of equipment and with available materials from the Navy supply system.
- b. compatible with the shipyard practices, training, tools and capabilities.
- c. consistent with the ability of the crew to maintain the ship during its service when shipyard help was unavailable using materials carried onboard.<sup>38</sup>

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<sup>36</sup> CP 3271.

<sup>37</sup> CP 5748.

<sup>38</sup> CP 741.

Lehman was emphatic that long before the 1940s and thereafter “the Navy had complete control over every aspect of each piece of equipment.”<sup>39</sup> Lehman further explained that the Navy retained the “final say” over the design of any piece of equipment and “made the ultimate decisions, whether engineering or contractual.” The Navy made the ultimate decision on what equipment or machinery would be insulated and what type of insulation would be used. Indeed, the Navy “dictated every aspect of the design, manufacture, installation, overhaul, written documentation and warnings associated with its ships and did not permit deviations from any of its contractors.”<sup>40</sup> Lehman further explained that all equipment, including valves, was delivered to ships for installation without exterior insulation. Valves were frequently installed aboard Navy vessels without exterior insulation covering.<sup>41</sup>

Admiral David Sargent’s testimony was similar. In a detailed declaration he emphasized the unique and complex character of Navy warships for which the Navy developed detailed specifications. “Specifications for any equipment intended for use aboard Navy ships

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<sup>39</sup> CP 741.

<sup>40</sup> CP 742.

<sup>41</sup> CP 742.

were drafted, approved and maintained by the Navy.”<sup>42</sup> Because of the complexities of the ship design construction process, component manufacturers were not consulted by the Navy with respect to insulation of their equipment.<sup>43</sup> Likewise the Navy would not have permitted equipment manufacturers to place asbestos-related warnings in technical manuals during the 1940s, 1950s and 1960s.<sup>44</sup>

Sargent was emphatic that the Navy required asbestos-containing thermal insulation without any input or say from the manufacturers of the equipment.<sup>45</sup>

Plaintiff’s expert, William Lowell, did not take issue with these points. In fact, he found nothing that he disagreed with in Wasson’s testimony.<sup>46</sup> Lowell claimed, however, that the valves sold to the Navy were “very similar” to those sold by the same manufacturers for use on commercial vessels. According to Lowell, the valves sold to the Navy were “not functionally different” from the valves sold for use on

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<sup>42</sup> CP 3437.

<sup>43</sup> CP 3445.

<sup>44</sup> CP 3446-3447.

<sup>45</sup> CP6033.

<sup>46</sup> CP 5821.

commercial ships.<sup>47</sup> Yet, he undertook no detailed review of specifics before making that statement.<sup>48</sup> But he agreed with the defense experts that the Navy set the requirements in terms of the composition of asbestos gaskets and packing.<sup>49</sup>

Plaintiff's witness Jack Knowles also acknowledged that the Navy set the requirements for the manufacturers to meet.<sup>50</sup>

**H. The defendants presented uncontroverted evidence that the Navy knew of the dangers of asbestos as early as the 1920s.**

The defendants showed that the Navy knew of the dangers of asbestos as early as the 1920s. In a lengthy and detailed affidavit supported by exhibits,<sup>51</sup> Samuel A. Forman, M.D., board certified in occupational medicine and a visiting scientist at the Harvard University School of Public Health, testified that while serving with the Navy in occupational medicine in the early 1980s he was directed to locate, digest and organize governmental documents for production in asbestos

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<sup>47</sup> CP 4544-4545.

<sup>48</sup> CP 5824.

<sup>49</sup> CP 5690.

<sup>50</sup> CP 6573.

<sup>51</sup> CP 3876-4148.

litigation.<sup>52</sup> For a year and a half he “investigated the Navy’s historical handling and knowledge of various industrial hygiene issues, including asbestos disease.”<sup>53</sup> His research took him to the National Archives and other storage facilities for records of the Navy’s Bureau of Medicine and Surgery and to Harvard University’s Library of Medicine. Based upon the extensive research, which led to the publication of a January 1988 article in the *Journal of Occupational Medicine*, he determined that the Navy had always placed a high priority on industrial hygiene in general and asbestos health issues in particular.<sup>54</sup>

His research showed that “[a]s early as 1922 the Navy recognized, as exemplified by its instructions to officers published in the *Navy Medical Bulletin*, the health hazards associated with airborne asbestos dust and the appropriate protective measures to prevent asbestos exposure.”<sup>55</sup> The Navy’s knowledge of those dangers and of the means to control against them increased over the following decades.<sup>56</sup> In 1939 the Navy directed its medical officers at all Navy yards to advise safety engineers

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<sup>52</sup> CP 3876-3878.

<sup>53</sup> CP 3877.

<sup>54</sup> CP 3877-3879.

<sup>55</sup> CP 3879.

<sup>56</sup> CP 3879.

and to instruct employees in safety and protective measures including the use of masks for asbestos workers. In that same year the Surgeon General of the Navy specifically addressed the hazards of asbestos in his Annual Report. At the same time, however, the Navy rejected offers of assistance from other leaders in the field of industrial hygiene, including the Department of Labor – a decision that originated at the highest levels of the government.<sup>57</sup>

Over the years the Navy continued to maintain “complete control over existing military specifications, policies and procedures with respect to asbestos-containing materials and worker practices with those materials.”<sup>58</sup> As a result, in his research Forman had “not located a single instance in which the Navy, at any time during the 1930s through the 1960s, instructed or permitted a supplier of pumps to a vessel or facility to affix or provide any asbestos related warning with its equipment.”<sup>59</sup>

“While rejecting the participation from manufacturers in the Navy’s efforts to alert Navy personnel to potential asbestos hazards in Navy operations,” over the 1940s, 50s and 60s, the Navy continued to

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<sup>57</sup> CP 3880-3882.

<sup>58</sup> CP 3885.

<sup>59</sup> CP 3885.

pursue the issue in its own manner and continued to advise its personnel of the dangers of asbestos dust exposure.<sup>60</sup> Forman concluded:

...the Navy's handling of and programs regarding workplace safety and hazard communication, as they related to asbestos and other issues, reflected the Navy's balance of various considerations, including combat readiness, maintenance of the necessary command structure, the needs of discipline and the hierarchy of risks presented by life and work aboard a combat vessel. In general, the Navy chose to address long-term workplace health issues in the course of training for various trades and jobs, rather than using labeling or other written materials to accompany products into the workplace.

44. During the time periods in question, the Navy's occupational health program in no way depended upon, required or sought advice from equipment manufacturers regarding long-term occupational health issues, including those posed by exposure to asbestos dust. I have not uncovered – nor would I have expected to based on my research and experience and the extent of the Navy's knowledge in these areas, situations in which the Navy solicited from suppliers of shipboard equipment any information or guidance regarding the appropriate methods for the prevention of exposure to asbestos. Given the Navy's state-of-the-art knowledge concerning asbestos related hazards and its robust safety and health program, it would be unreasonable to assume that the Navy would have accepted any advice pertaining to asbestos related safety precautions from a manufacturer of equipment.<sup>61</sup>

**I. Weir had no knowledge of asbestos dangers until the 1980s.**

In contrast to the Navy's extensive knowledge of asbestos hazards beginning in the 1920s, Weir first learned of those dangers in the 1980s.

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<sup>60</sup> CP 3885-3890.

<sup>61</sup> CP 3890-3891.

As Weir's corporate representative testified, that knowledge first came when Weir's asbestos-containing-component-parts suppliers (for those instances when Weir required those parts to meet customer specifications,) notified Weir that they would no longer be able to supply asbestos-containing products because of the safety concerns.<sup>62</sup>

**J. Plaintiff presented expert testimony on substantial factor.**

Plaintiff presented expert testimony from James Millette, a materials scientist, and Dr. Eugene Mark, a pathologist.

In his original declaration Millette, who had been "involved in environmental/toxicology/particle and materials studies since 1972 primarily using electron microscopy techniques",<sup>63</sup> opined based on a review of Farrow's testimony that "the gasket and packing materials that James Morgan encountered while working as a pipefitter (apprentice and journeyman) at Puget Sound Naval Shipyard contained asbestos."<sup>64</sup> He recited at some length Farrow's testimony concerning Atwood & Morrill valves<sup>65</sup> and offered his "professional opinion" that Morgan's work with

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<sup>62</sup> CP 2019; 2030.

<sup>63</sup> CP 1980.

<sup>64</sup> CP 1982.

<sup>65</sup> CP 1983-1984.

Atwood & Morrill valves exposed him to respirable asbestos fibers and that Morgan's work removing "asbestos-containing gaskets and packing from the above equipment, [equipment from Buffalo Pumps, Leslie Valves and Elliott, in addition to Atwood & Morrill] as well as fabricating new gaskets, resulted in exposures to asbestos that were substantially above ambient levels."<sup>66</sup>

Dr. Mark, the pathologist, offered his opinion based on his review of Farrow's testimony that "the gasket and packing materials and insulation that James Morgan encountered while working as a pipefitter" contained asbestos.<sup>67</sup> He relied on Millette's declaration about gaskets, packing and insulation materials to conclude that Morgan was exposed to "dust-containing asbestos fibers in amount that substantially exceeded levels of asbestos to which he would have been exposed to without these exposures [sic]."<sup>68</sup> He stated that there is no known safe level of asbestos and that Morgan's exposure to "dust that arose while he worked with Buffalo, Atwood & Morrill valves, Leslie valves and Elliott de-aerating feed system were exposures to asbestos that significantly exceeded other

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<sup>66</sup> CP 1986.

<sup>67</sup> CP 1990.

<sup>68</sup> CP 1993-1994.

exposures to asbestos known in his life.”<sup>69</sup> Accordingly, each of these exposures was a substantial factor in causing Morgan’s disease.<sup>70</sup>

When defendants challenged these experts’ declarations on motions to strike,<sup>71</sup> they revised their testimony. Millette stated his opinion, based on his review of the testimony of Farrow, Knowles and Wortman, now was that “most of the gasket and packing materials used with defendants’ products to which Mr. Morgan was exposed contained asbestos.” Millette added that the quantity of asbestos fibers to which Morgan was exposed was “excessive” and that “visible dust” reflects exposure to levels above background levels.<sup>72</sup> But at his deposition Millette conceded that he (1) had done no studies on Atwood & Morrill valves, (2) had no personal knowledge (beyond the deposition testimony provided him) about whether the Atwood & Morrill valves contained asbestos, (3) could not quantify Morgan’s exposure other than to say that it was greater than ambient, and (4) had not performed a dose

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<sup>69</sup> CP 1995.

<sup>70</sup> CP 1995.

<sup>71</sup> CP 3160 - 3167, 3392.

<sup>72</sup> CP 4591.

reconstruction analysis concerning Morgan's work with Atwood & Morrill valves.<sup>73</sup>

Mark supplemented his declaration to state that each of Morgan's exposures that attributed to the total cumulative exposure (including his exposure to Atwood & Morrill valves) was a significant contributing cause of his disease.<sup>74</sup> And he concluded that Morgan's exposure to Atwood & Morrill valves "significantly exceeded the levels of asbestos to which he would have been exposed without those exposures."<sup>75</sup> But at his deposition Mark conceded that he never performed or reviewed studies on Atwood & Morrill valves or component parts, had no personal knowledge about whether the Atwood & Morrill valves Morgan worked around contained asbestos, agreed that not all valves used in the Navy contained asbestos gaskets and packing, and was not aware of any dose reconstruction analysis specific to Morgan's exposure.<sup>76</sup>

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<sup>73</sup> CP 6234-6235.

<sup>74</sup> CP 4560.

<sup>75</sup> CP 4561.

<sup>76</sup> CP 6142.

**K. The court granted Weir's motion after an extended briefing process.**

Weir and other defendants separately moved for summary judgment. The trial court extended the briefing process by several months, permitting plaintiff to submit evidence from new witnesses, Knowles and Wortman, and revised declarations from his experts Millette and Mark.<sup>77</sup> Both sides submitted supplemental briefs.<sup>78</sup> After lengthy oral argument, the court granted Weir's motion on the basis that the plaintiff lacked sufficient evidence that he was exposed to an asbestos-containing product from Weir and that any exposure was a substantial factor in causing his disease.<sup>79</sup>

**L. Plaintiff appeals.**

This appeal followed.<sup>80</sup>

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<sup>77</sup> CP 4555-4582; 4583-4673; 4690-4734; 4820-4825.

<sup>78</sup> CP 4674, 4826, 4968, 5090, 5210, 5691-5702; 6220, 6237.

<sup>79</sup> CP 6747-6767.

<sup>80</sup> CP 6768-6792.

### III. Argument

**A. The trial court properly granted summary judgment to Weir because plaintiff has no evidence that he was exposed to an asbestos-containing product from Weir.**

***1. Plaintiff must show exposure to a Weir asbestos-containing product.***

In his brief, plaintiff asks that this court reverse and remand this case for trial against Weir. But plaintiffs give only the most superficial treatment to the most basic element of their case: Was Morgan ever exposed to an asbestos-containing product from Weir? He wasn't. And for that reason the trial court's grant of summary judgment to Weir must be affirmed.

To show a triable fact issue on causation in an asbestos case plaintiff must offer evidence capable of supporting a reasonable inference that respirable dust containing asbestos from the defendant's product was in fact present at the plaintiff's work site while the plaintiff was present.<sup>81</sup> Speculation and conjecture does not support a reasonable inference.<sup>82</sup> Yet that is all plaintiff offers here.

***2. Plaintiff's lay witnesses failed to show his exposure to a Weir asbestos-containing product.***

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<sup>81</sup> *Lockwood v. AC&S*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987).

<sup>82</sup> *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wn.App. 227, 235, 103 P.3d 1256 (2005).

Michael Farrow, a sometime co-worker of Morgan who never worked in the same crew with Morgan, claimed to have seen Morgan around Atwood & Morrill valves, but failed to show that those valves contained asbestos components originating from Weir. Under leading questions from plaintiff's counsel – objected to at the time – Farrow claimed to have seen Morgan working around Atwood & Morrill valves “many times.”<sup>83</sup> Under cross-examination, however, Farrow conceded that he could specifically recall only one occasion when Morgan was around an Atwood & Morrill valve.<sup>84</sup> And with respect to that one instance Farrow conceded that he did not know whether the Atwood & Morrill valve was new and thus whether any packing and gaskets associated with the valve were original or replacement parts.<sup>85</sup>

Later-disclosed witness Jack Knowles also failed to provide evidence that Morgan was ever exposed to a new Atwood & Morrill valve with original packing or gaskets. He, like Farrow, claimed to have seen Morgan working with Atwood & Morrill valves many times.<sup>86</sup> But he

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<sup>83</sup> CP 2698.

<sup>84</sup> CP 946; 950.

<sup>85</sup> CP 947-950.

<sup>86</sup> CP 4702-4704.

stated those valves were not brand-new and had most likely been removed and replaced many times before Morgan encountered them. In addition, he never saw Morgan performing any repairs to the internal components (i.e., the internal gaskets and packing) of any Atwood & Morrill valve.<sup>87</sup>

And Melvin Wortman offered even less: the name Atwood & Morrill was not even familiar to him<sup>88</sup> and his declaration fails to even mention Atwood & Morrill.<sup>89</sup>

The evidence from Atwood & Morrill showed that some but not all of the valves supplied by Atwood & Morrill to the Navy contained asbestos packing in accordance with the Navy's design requirements.<sup>90</sup> Plaintiff's naval expert, Captain Lowell, conceded this was true.<sup>91</sup> In addition, Atwood & Morrill had no records showing deliveries to PSNS before the 1990s and no historical records showing deliveries by ship name.<sup>92</sup>

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<sup>87</sup> CP 4715.

<sup>88</sup> CP 6227-6229.

<sup>89</sup> CP 4820-4825.

<sup>90</sup> CP 894.

<sup>91</sup> CP 6168-6169.

<sup>92</sup> CP 2024, 2132-2133.

Thus, taken together, Farrow's, Knowles', and Wortman's testimony provided no evidence by which a reasonable jury could conclude that any Atwood & Morrill valve allegedly present at Morgan's worksite (1) contained any asbestos-containing components either originally (when sent by Atwood & Morrill to the Navy) or at the time of Morgan's claimed exposure, or (2) that the packing or gaskets associated with the Atwood & Morrill valve were the original packing gaskets supplied by Atwood & Morrill rather than replacement materials supplied by others.

***3. Plaintiff's experts – who relied on the lay witnesses – did not establish exposure to a Weir product.***

The testimony of plaintiff's experts Millette (industrial hygiene) and Mark (pathology) does not fill that evidentiary gap. Their testimony relied on Farrow's and Knowles' testimony to support their statements about Atwood & Morrill valves.<sup>93</sup> Millette and Mark were not at PSNS in the 1950s and thus have no personal knowledge about what was or was not there at the time.<sup>94</sup> They may not offer opinions about facts that require personal knowledge. Nothing about their areas of expertise

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<sup>93</sup> CP 6234-6235; 6142.

<sup>94</sup> CP 6142-6143.

qualifies them to determine that an asbestos-containing Atwood & Morrill valve was or was not present at Morgan's jobsite.<sup>95</sup>

It follows then that since plaintiff failed to present evidence of his exposure to an Atwood & Morrill asbestos-containing product, his claims against Weir were properly dismissed.

**B. This court should affirm the grant of summary judgment to Weir because under *Simonetta* Weir's product was not defective.**

A product-liability claimant may proceed under three possible theories: 1) a flaw in the manufacturing process, 2) design defect, or 3) a failure to warn. Here, plaintiff does not assert a manufacturing flaw. He does, however, maintain that Atwood & Morrill valves were defectively designed and that Atwood & Morrill's valves contained no warning of the dangers of asbestos. Neither theory can survive on this record.

***1. Plaintiff's failure-to-warn claim is foreclosed by Braaten and Simonetta and his failure to present evidence of his exposure to Weir replacement products.***

Plaintiff's failure-to-warn claim proceeds from the assumption that a valve manufacturer such as Weir should have warned him about the dangers of asbestos insulation that the Navy would foreseeably apply to

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<sup>95</sup> See *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 579-82, 157 P.3d 406 (2007) (industrial hygienist could not offer substantive testimony concerning presence of asbestos at workplace, when not based on personal knowledge).

the valves and that it should have warned him about gaskets and packing containing asbestos manufactured by others and installed in their valves. But our Supreme Court has rejected those theories in two recently decided cases.

In *Simonetta v. Viad Corporation*<sup>96</sup> the plaintiff contracted lung cancer allegedly as a result of exposure to asbestos insulation applied to an evaporator aboard a Navy ship. The plaintiff claimed that his exposure occurred when he performed maintenance on the evaporator, a process that required him to remove and replace the asbestos insulation installed not by the evaporator manufacturer but rather by others. He claimed that the evaporator manufacturer failed to warn him of the danger of exposure to the asbestos affixed to its equipment.

The Supreme Court rejected the claim. The duty to warn was limited to those in the chain of distribution of the offending product; the duty did not extend to warning about another manufacturer's product. This was true both under negligence and under strict-liability theories. Because the offending product was the asbestos insulation, the plaintiff's claim against the evaporator manufacturer failed.

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<sup>96</sup> 165 Wn.2d 341, 197 P.3d 127 (2008).

The Supreme Court reached a similar result in a companion case, *Braaten*.<sup>97</sup> There the asbestos-exposed plaintiff, a pipefitter like Morgan, sought to impose liability on the manufacturers of valves and pumps to which asbestos insulation had been applied. Some of the valves and pumps contained asbestos-containing replacement packing and gaskets not manufactured by the pump and valve manufacturers. As in *Simonetta*, the court held that the plaintiff could not survive summary judgment because the manufacturers could not be liable because they had not placed the offending product in the stream of commerce. A manufacturer, said the court, “has no obligation to become expert in another manufacturer’s product and . . . the policy underpinnings for strict liability . . . do not apply when a manufacturer has not placed the product in the stream of commerce.”<sup>98</sup> Consequently, the manufacturers did not have a duty to warn of the dangers of replacement parts they did not manufacture, even though their valves and pumps may have originally contained asbestos-containing parts. This followed because they “did not market the product causing the harm.”<sup>99</sup>

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<sup>97</sup> *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

<sup>98</sup> *Braaten*, 165 Wn.2d at 385-86.

<sup>99</sup> 165 Wn.2d at 392.

Here, however, plaintiff maintains that he can survive summary judgment because he provided evidence that Weir supplied replacement gaskets. He bases his claim on the testimony of his witnesses, Farrow, Knowles and Wortman. He is mistaken.

Wortman knew nothing about Atwood & Morrill valves. It was a name not even familiar to him.<sup>100</sup>

Farrow and Knowles also failed to advance plaintiff's claim. Farrow, who claimed to have seen Morgan working on one Atwood & Morrill valve on one occasion in 1954, did not know whether that valve was an original valve, and admitted its parts could have been replaced several times before Morgan worked on it.<sup>101</sup> And Knowles, who claimed to have seen Morgan working on Atwood & Morrill valves "many times," was clear that those valves were not brand new and that Morgan did not work on any internal components associated with those valves.<sup>102</sup>

Knowles had no knowledge whether Morgan ever removed any original gaskets from an Atwood & Morrill valve.<sup>103</sup> And, because the Atwood & Morrill valves he recalled Morgan working with and around

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<sup>100</sup> CP 6227-6229.

<sup>101</sup> CP 946-950

<sup>102</sup> CP 4702-4704, 4715.

<sup>103</sup> CP 4716.

did not utilize packing material,<sup>104</sup> his knowledge about the source of such materials is irrelevant.

Moreover, while there is evidence that Atwood & Morrill may have sold some replacement parts to the Navy,<sup>105</sup> plaintiff offered no evidence to prove that any asbestos-containing replacement parts supplied by Atwood & Morrill were actually present at PSNS, or were ever used on any ship in Mr. Morgan's presence. Knowles had no knowledge who supplied or manufactured any of the flange gaskets he or Morgan worked with or whether they were supplied by the manufacturers of the specific valves that they were associated with.<sup>106</sup> He also had no knowledge whether any of those flange gaskets were specified by any of the valve manufacturers.<sup>107</sup> Likewise, with respect to packing, Knowles had no knowledge as to the source of the packing or whether it was made, sold or distributed by the manufacturer of the specific valves it was associated with.<sup>108</sup> Weir cannot be liable for a replacement part without proof that it

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<sup>104</sup> CP 4716.

<sup>105</sup> CP 5693.

<sup>106</sup> CP 6211-6213.

<sup>107</sup> CP 6213.

<sup>108</sup> CP 6214.

was in the chain of distribution for the part actually worked on.<sup>109</sup> Here, the absence of that evidence is fatal to plaintiff's claim.

**2. Plaintiff's design-defect claim, if not abandoned, fails because asbestos rather than the valve was the cause of plaintiff's injury.**

Plaintiff appears to have abandoned his claim that the Atwood & Morrill valves were defectively designed. His brief makes no identifiable argument about design defect. Rather he claims only that defendants are liable for replacement gaskets and packing and seeks to distinguish this case from *Braaten*, a failure-to-warn case.<sup>110</sup>

If he has not abandoned his design-defect claim, it nevertheless fails. Plaintiff fails to identify a design defect other than that Atwood & Morrill valves can be used with asbestos. But *Braaten* and *Simonetta* reject that theory, holding that the products involved there – an evaporator, and pumps and valves – were not the products that caused the asbestos-related injury; the asbestos insulation was.<sup>111</sup> Here the Atwood & Morrill valves were designed for uses that could require insulating and that may or

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<sup>109</sup> *Braaten*, 165 Wn.2d at 394-95.

<sup>110</sup> Brief of Appellant at 18-21.

<sup>111</sup> *Braaten*, 165 Wn.2d at 390-91; *Simonetta*, 165 Wn.2d at 358.

may not have been used with asbestos.<sup>112</sup> As in *Simonetta*, the unreasonably dangerous product and proximate cause of the injury was the asbestos, not the metal valve. Plaintiff's theory that a product that can use asbestos components is thereby defective contradicts the *Simonetta* holding that the non-asbestos product was not the cause of the harm. The trial court properly dismissed plaintiff's defective-design claim.

**C. In the alternative this court may affirm the grant of summary judgment to Weir because Weir manufactured its products in accordance with precise governmental guidelines.**

***1. Federal law displaces state product-liability law when the government-contractor defense applies.***

Weir moved for summary judgment on the basis of the government-contractor defense recognized by the U.S. Supreme Court in *Boyle v. United Technologies Corporation*.<sup>113</sup> The trial court, claiming that the defense was fact-intensive, denied summary judgment on that basis. But because all of the elements were established without material factual dispute, this court may affirm summary judgment for Weir on this alternate basis.<sup>114</sup>

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<sup>112</sup> CP 894, 6188-89.

<sup>113</sup> 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed. 2d 442 (1988).

<sup>114</sup> *Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (appellate court may affirm on any basis established by the record).

*Boyle*, like this case, presented the question of whether a contractor providing military equipment to the federal government could be held liable under state law for injury caused by a product-design defect. There the claimant, the representative of the estate of a Marine helicopter pilot, sought recovery from the manufacturer of the helicopter that had crashed. He claimed that the helicopter incorporated a defectively designed escape hatch. When the helicopter crashed at sea, the pilot survived the crash but drowned because the hatch opened out instead of in and could not open because of external water pressure. The claimant prevailed at trial, but the Fourth Circuit reversed and directed judgment for the defendant manufacturer.<sup>115</sup> The Supreme Court affirmed in part and remanded the case to the Fourth Circuit for clarification. The Supreme Court's opinion identified the elements of the government-contractor defense and its basis.

The court first recognized that the obligations to and rights of the federal government under its contracts are governed exclusively by federal law and involved "uniquely federal interests." Those "uniquely federal interests" applied equally to the civil liabilities arising out of the performance of federal procurement contracts. Even though the dispute involved private parties, the government's interests were directly affected because imposing design liability on a government contractor would cause

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<sup>115</sup> 487 U.S. at 502-03, 108 S.Ct. at 2513-14.

it to either refuse to manufacture the government's specified design or raise its price. The conflict between the federal interests and state law imposing design liability on federal contractors required that state law be displaced.<sup>116</sup> Therefore, the court held that design-defect liability could not be imposed under state law when:

(1) the United States approved reasonably precise specifications;

(2) the equipment conformed to those specifications; and

(3) the supplier warned the United States that the dangers in the use of the equipment that were known to the supplier but not to the United States.<sup>117</sup>

Because the Fourth Circuit's opinion was unclear on the limited question of whether that court had determined independently that the defense had been established or whether it had decided that no reasonable jury could find for the plaintiff on the defense, the Supreme Court remanded to the Fourth Circuit for clarification.<sup>118</sup> On remand, the Fourth

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<sup>116</sup> 487 U.S. at 503-12, 108 S.Ct. at 2514-2518.

<sup>117</sup> 487 U.S. at 512, 108 S.Ct. at 2518.

<sup>118</sup> 487 U.S. at 514, 108 S.Ct. 2519-20.

Circuit clarified that it had determined that no reasonable jury could find for the claimant under the properly formulated defense.<sup>119</sup>

**2. *Weir established as a matter of law each of the required elements of the government-contractor defense.***

Before the trial court Weir established each of the required elements of the defense as a matter of law.

*a. Reasonably precise specifications.*

Weir manufactures valves and control devices to customer specifications.<sup>120</sup> It does not supply customers with products from a catalog.<sup>121</sup> Valves supplied to the Navy conformed to that model. Weir's corporate representative testified that its valves conformed to precise specifications, both as to design and materials, dictated by the Navy.<sup>122</sup> If they had not conformed to those specifications, the Navy would have rejected them.<sup>123</sup>

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<sup>119</sup> 857 F.2d 1468 (4<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 994, 109 S.Ct. 959, 102 L.Ed.2d 585 (1988), *re-hearing denied*, 489 U.S. 1047, 109 S.Ct. 1182, 103 L.Ed.2d 248 (1989).

<sup>120</sup> CP 894; 6191.

<sup>121</sup> CP 6191.

<sup>122</sup> CP 6189-6190; 6192.

<sup>123</sup> CP 6192. *See Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 420 (5<sup>th</sup> Cir. 2001) (showing that government accepted the product establishes conformity to specifications).

Weir's naval expert, Rear Admiral Horne, confirmed that the equipment was required to comply with detailed government specifications and deviations were not tolerated.<sup>124</sup>

And Admiral Horne was not alone. Other naval experts – Admirals Lehman, Sargent, and Captain Wasson – were equally adamant that the suppliers had to comply with precise Navy specifications.<sup>125</sup>

Plaintiff presented no contrary evidence. Rather, he claimed through his expert, Captain Lowell, that the valves were “functionally similar” to commercially-used valves and thus were not “military equipment.”<sup>126</sup> Weir does not dispute that its valves “function” as valves in either setting. But the Weir valves built for Navy ships were manufactured according to detailed specifications written, approved and issued exclusively by the Navy. That is what is required for the defense to apply.<sup>127</sup>

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<sup>124</sup> CP 6114-6116.

<sup>125</sup> CP 3271 - 3272; 5748, 741-742, 3437-3447; 6033.

<sup>126</sup> CP 4544-4545.

<sup>127</sup> See *Boyle*, 487 U.S. at 512 (sufficient that government approved the specifications); *Russek v. Unisys Corp.*, 921 F.Supp. 1277, 1287 (D.N.J. 1996) (“it is necessary only that the government approve, rather than create, the specifications . . .”).

The federal courts have rejected plaintiff's "function" and "no military equipment" arguments both implicitly and explicitly. In *Boyle*, for example, the claimant could have argued that the military helicopter at issue "functioned" like civilian helicopters and had an escape hatch that "functioned" like escape hatches on civilian helicopters. If the government-contractor defense could be so easily avoided, surely the Supreme Court would have said so.

If the Supreme Court has only been implicit in its rejection of the "functionality" argument, the Ninth Circuit has been explicit. In *Butler v. Ingalls Shipbuilding, Inc.*<sup>128</sup> the court rejected the plaintiff's argument that an accommodation ladder built for a Navy ship was not "military equipment" for purposes of the government-contractor defense. While fungible commodities or consumer goods readily available to private industry (such as a can of beans or paint) would not qualify as "military equipment," products designed specifically for the military under precise specifications – like the Atwood & Morrill valves here – would.

*b. Conformity to specifications.*

Weir's testimony likewise showed that its valves conformed to the Navy's prescribed specifications. If Weir had not met the specifications,

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<sup>128</sup> 89 F.3d 582 (9<sup>th</sup> Cir. 1996).

the Navy would have rejected them.<sup>129</sup> Admiral Horne concurred.<sup>130</sup> And other Navy experts likewise maintained that any non-compliance would have led to product rejection.<sup>131</sup>

*c. Warning known to Atwood & Morrill but not to the United States.*

The third requirement – that the supplier warned the United States about dangers known to the supplier, but not to the United States – exists to protect the governmental discretionary-decision-making function. But if the government is aware of the danger, then it is able to evaluate it in its risk-benefit analysis.

Here plaintiff claims that Weir should have warned the Navy about the dangers of asbestos. But Weir knew nothing of those dangers in the 1940s and 1950s when its valves were allegedly sold to the Navy. Indeed, it first learned of those dangers in the mid-1980s when those entities supplying asbestos-containing components informed it.<sup>132</sup> By contrast, the evidence in this record shows that the Navy was well aware of the dangers

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<sup>129</sup> CP 6192.

<sup>130</sup> CP 6115-6118.

<sup>131</sup> CP 3272, 742, 3438-3439.

<sup>132</sup> CP 2019; 2030.

of asbestos as early as the 1920s.<sup>133</sup> Plaintiffs presented no contrary testimony.

On this record, each of the elements of the government-contractor defense is established as a matter of law. This court can therefore affirm on that independent basis.

**D. The court may affirm summary judgment for Weir because plaintiff failed to present sufficient evidence that his exposure to a Weir product was a substantial factor in generating his disease.**

To survive summary judgment, plaintiff must present sufficient evidence to raise a genuine issue of material fact about whether a Weir product was a substantial factor in causing his asbestos-related disease.<sup>134</sup> Plaintiff, citing *Hue*,<sup>135</sup> contends that he can satisfy the substantial-factor requirement with respect to Weir by showing that asbestos fibers from an Atwood & Morrill valve were “part of a cloud” of fibers that proximately caused Morgan’s disease. On that basis, plaintiff claims he need not show individual causation for a particular supplier. He contends that the

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<sup>133</sup> CP 3879.

<sup>134</sup> *Lockwood v. AC&S*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987); *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn.App. 22, 935 P.2d 684 (1997).

<sup>135</sup> *Hue v. Farmboy Spray Company*, 127 Wn.2d 67, 896 P.2d 682 (1995).

testimony from his experts Millette and Mark supplies the evidence linking Weir to the “cloud” that caused Morgan’s disease.<sup>136</sup>

Weir disagrees. Weir believes that to prove substantial factor causation plaintiff must show both (1) frequent, regular, and proximate exposure to Weir’s asbestos-containing product, and (2) reasonable quantitative evidence that the exposure increased the risk of developing his asbestos-related disease. These requirements follow from our Supreme Court’s directive in *Lockwood* that in deciding whether evidence is sufficient to take the case against a particular defendant to the jury, the court must consider:

- plaintiff’s proximity to the asbestos product when the exposure occurred;
- the expanse of the worksite where the asbestos fibers were released;
- the duration of plaintiff’s exposure to the product;
- the types of asbestos products to which the plaintiff was exposed;
- the tendency of the products to release fibers and the manner in which they were handled;
- medical causation.<sup>137</sup>

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<sup>136</sup> Brief of Appellants at 23-24.

<sup>137</sup> *Lockwood*, 109 Wn.2d at 248-49.

A corollary of these requirements is that a de minimis exposure will not suffice to meet the standard.<sup>138</sup>

Under any circumstance the evidence against Weir cannot suffice to permit presentation to a jury. The fact remains that plaintiff has failed to show any exposure to an asbestos-containing product for which Weir is responsible. As Weir showed above, none of Morgan's product-identification witnesses is able to place an asbestos-containing Weir product at Morgan's workplace when he was there. And Millette and Marks base their conclusions about Atwood & Morrill on the testimony of those same witnesses. Millette conceded that he (1) had done no studies on Atwood & Morrill valves, (2) had no personal knowledge except the testimony of Farrow, Knowles and Wortman whether the Atwood & Morrill valves contained asbestos, (3) could not quantify Morgan's exposure other than to say it was greater than ambient, and (4) had not provided a dose reconstruction analysis concerning Morgan's work with Atwood & Morrill valves.<sup>139</sup> Similarly, Mark conceded that he had no personal knowledge about whether the Atwood & Morrill valves Morgan worked with contained asbestos, agreed that not all valves used in the

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<sup>138</sup> See, e.g., *Benshoof v. Nat'l Gypsum Company*, 978 F.2d 475, 477 (9<sup>th</sup> Cir. 1992) (one-week exposure to asbestos product not a substantial factor).

<sup>139</sup> CP 6234-6235.

Navy contained asbestos gaskets and packing, and was not aware of any reconstruction analysis specific to Morgan's exposure.<sup>140</sup>

In short, plaintiff presents no evidence to satisfy the proximity and duration factors. And without a showing of exposure to a Weir product, the other *Lockwood* factors become irrelevant.

In addition, and separate from those failures, plaintiff's medical-causation evidence likewise fails. Dr. Mark claims in his declaration that all "special exposures" – which he defines as "an exposure for which there is a scientific reason to conclude it created or increased the risk of developing the disease" – contribute to the development of Morgan's disease.<sup>141</sup> In plain English, Mark claims that every exposure, no matter how slight, hurts and thus is a substantial factor in creating the disease. But courts – including Washington courts – have repeatedly rejected this theory in *Frye*<sup>142</sup> hearings because it is not generally accepted in the

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<sup>140</sup> CP 6142.

<sup>141</sup> CP 4560.

<sup>142</sup> *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). See also *State v. Copeland* 130 Wn.2d 244, 255, 922 P.2d 1304 (1996) (*Frye* applies in Washington).

scientific community.<sup>143</sup> Quite simply, it is medical advocacy, not medical science, and may not be presented to a jury.

The absence of a medical-causation link to Morgan's purported exposure to a Weir product, standing alone, requires affirmance of summary judgment for Weir.

#### **IV. Conclusion**

Morgan may well have been exposed to asbestos at PSNS, but the evidence he presented failed to show any exposure to an asbestos-containing product from Weir. This court should therefore affirm the dismissal of his claims against Weir on any of these bases:

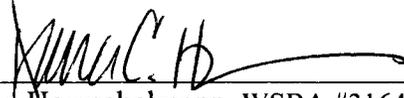
- Plaintiff failed to show that any Atwood & Morrill valves contained original asbestos-containing components to which he was exposed.
- Weir had no duty to warn Morgan of the dangers of asbestos in products not Weir's.
- As a matter of law the possibility that Weir's valves could be used with asbestos does not establish a design defect.
- Weir met all of the requirements of the federally-recognized government-contractor defense.
- Plaintiff's exposure to Weir's product was not a substantial factor in causing his disease.

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<sup>143</sup> CP 1493-1506, 3173-3180 (ruling by Judge Barnett); CP 3191-3192 (ruling by Judge Erlick); CP3194-3212 (ruling by Pa. Judge Colville); CP 1117-1170 (ruling by Pa. Judge Tereshko on Dr. Mark's testimony). *See also* Brief of Respondent Leslie Controls at 35 ff.

The court should award Weir its costs.

Dated: April 15, 2010



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No. 63923-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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JAMES and KAY MORGAN, husband and wife,  
Appellant/Plaintiffs,

v.

AURORA PUMP COMPANY, et al.,  
Respondents/Defendants.

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**DECLARATION OF SERVICE**

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Russell C. Love, WSBA #8941  
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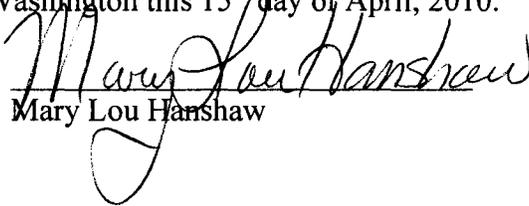
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STATE OF WASHINGTON  
2010 APR 15 PM 3:35

I declare under penalty of perjury under the laws of the United States that I caused to be served Brief of Respondent Weir Valves & Controls USA, Inc. and this Declaration of Service on the following counsel in the manner described below:

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| <p><b><u>Attorney for Plaintiffs:</u></b><br/> Janet Rice<br/> Schroeter Goldmark &amp; Bender<br/> 810 Third Avenue, Suite 500<br/> Seattle, Washington 98104</p> <p><b>VIA MESSENGER SERVICE</b></p>  | <p><b><u>Co-Counsel for Plaintiffs:</u></b><br/> Alexandra Shef<br/> Simon Eddins &amp; Greenstone<br/> 301 East Ocean Blvd., Suite 1950<br/> Long Beach, CA 90802<br/> ashef@seglaw.com</p> <p><b>VIA U.S. MAIL</b></p>   |
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| <p><b><u>Counsel for Def/ Aurora Pump</u></b><br/> <b><u>Company:</u></b><br/> Jeanne F. Loftis<br/> Bullivant Houser Bailey<br/> 888 S.W. Fifth Avenue, Suite<br/> 300<br/> Portland, OR97204-2089<br/> 503.228.6351<br/> asbestos-pdx@bullivant.com<br/> <b>VIA EMAIL</b></p>  |  |

Executed at Seattle, Washington this 15<sup>th</sup> day of April, 2010.

  
Mary Lou Hanshaw