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No. ~~68445-12-I~~

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I  
SEATTLE

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RESIDUAL ENTERPRISES CORPORATION,  
as successor in interest to SEA-LAND SERVICE, INC.,  
Appellant/Cross-Respondent,

v.

ROGER E. HAMMETT, JR. and ANITA M. HAMMETT,  
Respondents/Cross-Appellants

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Appeal from King County Superior Court  
No. 11-2-12255-7-SEA

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**REPLY IN SUPPORT OF BRIEF OF  
APPELLANT/CROSS-RESPONDENT RESIDUAL  
ENTERPRISES CORPORATION, INC.**

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Marc E. Warner, WSBA # 5937  
Carey Gephart, WSBA #37106  
LeGros Buchanan & Paul, P.S.  
701 Fifth Avenue, Suite 2500  
Seattle, WA 98104  
Phone: (206) 623-4990  
Fax: (206) 467-4828  
*Attorneys for Appellant /  
Cross-Respondent*

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## I. INTRODUCTION AND SUMMARY OF THE ARGUMENTS

Respondents/Cross-Appellants (“Hammett”)’s Brief obfuscates the numerous errors at trial, but fails to meaningfully rebut Appellant Sea-Land Service, Inc. (“Sea-Land”)’s appeal. First, Hammett appeals the trial court’s dismissal of Mrs. Hammett’s claim for loss of consortium without any legal basis, having dismissed his general maritime claim (for unseaworthiness) at the outset of trial. Second, Hammett asks the Court to suspend the evidentiary rules for expert testimony, which require that opinion testimony be based on otherwise admissible evidence. Next, Hammett incorrectly refers to the causation standard as it relates to Sea-Land’s “sole cause” defense. And lastly, Hammett misrepresents both the applicable law and the record below as they relate to his counsel’s improper references to prohibited evidence, misstatements of applicable legal standards, and fabrication of a “delegation of duty” argument. Hammett’s arguments fail to negate the numerous errors that led to significant prejudice to Sea-Land at the trial below. As such, Sea-Land respectfully renews its request for an Order entering judgment in favor of Sea-Land on the basis of lack of admissible testimony regarding medical causation. In the alternative, Sea-Land requests an order vacating the special jury verdict, and ordering a new trial of this matter.

## II. LAW AND ARGUMENT

### A. Mrs. Hammett's Claim for Loss of Consortium Was Properly Dismissed by the Trial Court.

Sea-Land denies that Mrs. Hammett would have been entitled to a loss of consortium claim even if Mr. Hammett had advanced a general maritime law claim at trial, which he did not; but, Mrs. Hammett is clearly not entitled to a loss of consortium claim in connection with Mr. Hammett's Jones Act claim.

In 1990, the U.S. Supreme Court held in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), that loss of society, which was not recoverable under the Jones Act, could not be recovered in a seaman's wrongful death action under general maritime law. Instead, the Court "restore[d] a uniform rule [of damages] applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act or general maritime law." *Id.* at 33. The basis for this uniform rule is the Jones Act, described as "Congress' ordered system of recovery for seamen's injury and death." *Id.* at 36. Where Congress has spoken directly to a question, such as the damages recoverable, courts are not free to supplement Congress' answer so as to make the Act meaningless. *Id.*, at 31, 36. After the *Miles* decision, the federal circuit courts uniformly have held that there can be no recovery under either the Jones Act or general maritime law for loss of consortium in an action for injury of a Jones Act seaman. *See e.g.*,

*Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Lollie v. Brown Marine*, 995 F.2d 1565 (11th Cir. 1993); *Smith v. Trinidad Corp.*, 992 F.3d 996 (9th Cir. 1993); *Murray v. Anthony J. Bertucci Constr. Co., Inc.*, 958 F.2d 127 (5th Cir. 1992); *Michel v. Total Transportation, Inc.*, 957 F.2d 186, 191 (5th Cir. 1992); *but see Barrette v. Jubilee Fisheries, Inc.*, 2011 U.S. Dist. LEXIS 89514 (W.D. Wash. August 11, 2011). Mrs. Hammett's claim for loss of consortium, therefore, is without redress under the general maritime law.

Mrs. Hammett's claim is even more explicitly barred under the Jones Act, which is the only claim Hammett pursued at trial, having dismissed his general maritime claim. The Jones Act proscribes recovery to anyone but the seaman advancing a claim under the Act. *Miller v. Foster Wheeler Co.*, 98 Wash. App. 712, 714-715, 993 P.2d 917, 919 (1999). (In a Jones Act seaman's action, the Washington Court of Appeals observed that the trial court had granted partial summary judgment for defendants with respect to elements of damages not recoverable as a matter of law, including loss of consortium. Since the Jones Act/FELA do not authorize such recovery, the deference accorded to the statute exemplified in *Miles* precludes such recovery under general maritime law. *Horsley, supra*; *Michel, supra*.) *See also, Chan v. Society Expeditions*, 39 F.3d 1398, 1407 (9th Cir. 1994) ("Loss of society damages are also not

recoverable under the Jones Act, or under the general maritime law, for the wrongful death of a seaman.) *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 325 (1990). They are likewise unavailable in connection with the injury of a Jones Act seaman. *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993).”).

Thus, under both the general maritime law, and unquestionably under the Jones Act, Mrs. Hammett lacked standing to bring a loss of consortium claim. In granting Sea-Land’s Motion for Summary judgment on Mrs. Hammett’s loss of consortium claim, the trial court correctly applied the law, both under the Jones Act and under general maritime law. As such, no error was committed and Mrs. Hammett’s appeal on her loss of consortium claim should be denied.

**B. Dr. Churg’s Testimony Regarding Matters of Industrial Hygiene Was Given Outside His Area of Expertise, Rendering Improper the Verdict Premised on that Testimony.**

As Sea-Land detailed in its appellate brief, the trial court abused its discretion and improperly permitted Hammett’s expert pathologist, Dr. Andrew Churg, to testify to matters admittedly outside his area of qualification and expertise. Dr. Churg is qualified to offer expert testimony on matters of pathology, however, matters of industrial hygiene lie outside his area of expertise. On cross-examination, Dr. Churg readily admitted that he is not an industrial hygienist and has no training or

experience in industrial hygiene. [RP 12/8/2011 Vol., Churg Testimony, 72:6-14; 75:25-76:13; 85:10-15] Dr. Churg also admitted that he ordinarily relies on industrial hygienists to calculate exposure levels. [RP 12/8/2011 Vol., Churg Testimony, 42:4-9; 42:21-43:15; 73:12-24] Nonetheless, Hammett elicited calculations of exposure levels from Dr. Churg at trial [RP 12/8/2011 Vol., Churg Testimony, 38:8-44:15] Then, Hammett asked Dr. Churg to base his ultimate medical causation opinion on his own admittedly unqualified exposure level testimony. [RP 12/8/2011 Vol., Churg Testimony, 73:17-24]

Washington Court Rule, Rule of Evidence 702 requires that an expert be qualified in the area for which testimony is offered by “knowledge, skill, experience, training, or education.” Dr. Churg, by his own admission, is a pathologist; not an industrial hygienist.

Washington law is clear. An expert may not testify about information outside his area of expertise. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703, 891 P.2d 718 (1994). Further, expert opinions lacking an adequate foundation should be excluded. *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993). Dr. Churg admitted that he has no training or qualification in industrial hygiene, which is the area of science uniquely charged with analysis related to occupational exposure levels. Moreover, Dr. Churg did not base

his opinion on any case-specific data regarding Hammett's alleged exposure level to asbestos aboard the M/V SEATTLE because none was ever provided by Hammett in this case. As such, Dr. Churg's opinion regarding exposure levels constitutes conjecture, at best.

The trial court's refusal to limit Dr. Churg's testimony to his proffered areas of expertise was error, and prejudicial to Sea-Land because unreliable, unsubstantiated testimony regarding Hammett's alleged asbestos exposure was presented to the jury. Its prejudicial effect was magnified when Dr. Churg based his medical causation opinion on that unreliable, unsubstantiated opinion testimony about exposure levels. Therefore, Dr. Churg's medical causation opinion should have been precluded to the extent that it was not based on admissible industrial hygiene testimony.

**C. Hammett Seeks to Mislead the Court With His Irrelevant Discussion of the “Featherweight” Standard<sup>1</sup>.**

**1. Sea-Land Did Not Waive Its Sole Cause Defense.**

As an initial matter, Hammett seeks to convince the Court that somehow Sea-Land had an obligation to seek an interlocutory appeal from the denial of its Motion for Summary Judgment on the issue of Hammett’s lack of evidence of exposure to asbestos aboard the M/V SEATTLE, or waive the issue of Hammett’s burden of proof thereafter. Clearly this is an incorrect statement of the law. “When a trial court denies summary judgment due to factual disputes, as here, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment.” *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, 123 Wn.2d 15, 35, 864 P.2d 921 (1993) (citing *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988)).

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<sup>1</sup> Hammett claims erroneously that a Jones Act employer can be found liable if there is even “slight negligence” or “featherweight negligence” on its part. This argument is based upon a line of Fifth Circuit decisions that were declared erroneous and expressly overruled in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.2d 331 (5th Cir. 1997) (en banc). Instead, the employer’s obligation is only to exercise reasonable care under the circumstances, not some heightened standard of care. *E.g.*, *Gautreaux*, *supra*; *Green v. River Terminal Ry. Co.*, 763 F.2d 805 (6th Cir. 1985); *Cherry v. United States*, 2007 U.S. Dist. LEXIS 81792, \*14 (W.D. Wash. Oct. 25, 2007) (“[P]laintiff must meet the standard for proving negligence required of all tort plaintiffs, not some mythical featherweight burden, a term which has been loosely and improperly employed in the past.”).

**2. Hammett Misrepresents the Basis Upon Which “Other Source” Evidence Was Excluded by the Trial Court.**

Hammett distorts the effect of the trial court’s denial of Sea-Land’s motion for summary judgment. As this Court is well-aware, denial of a motion to establish a total lack of evidence does not thereby make the converse true. In other words, the trial court’s denial of Sea-Land’s motion did not establish that Hammett had carried his burden of proof of exposure caused by Sea-Land; it merely allowed Hammett to attempt to make his case at trial. Nor did the trial court’s decision create an evidentiary vacuum, precluding evidence of other sources of asbestos exposure. Indeed, no mention of the exclusion of “other source” evidence was even made until the trial court considered competing motions in limine related to the *McDermott* doctrine, and was solely based on the trial court’s (mis)interpretation of the *McDermott* doctrine that Sea-Land was precluded from introducing evidence of the actual sources of Hammett’s asbestos exposure. [CP 423-426; RP 12/7/2012 Vol. 16:14-17:9]

Hammett’s novel appellate theory that pre-trial motion practice and “featherweight” causation determined the admissibility of other source evidence is plainly wrong on the record before this Court. *Id.*

**3. The Trial Court’s Misapplication of *McDermott* and Resultant Exclusion of “Other Source” Evidence Precluded Sea-Land From Presenting Its Sole Cause Defense.**

As explained in Sea-Land’s appellate brief, a central tenet of the “sole cause” defense holds that the defendant is entitled to present evidence of exposure to other products to prove that the cause of the disease was exposure to other products. *Nolan v. Weil-McLain*, 901 N.E.2d 549 (Ill. 2009).<sup>2</sup> By extending the *McDermott* damages doctrine to Sea-Land’s defense, and precluding evidence of Hammett’s actual sources of exposure, Hammett was relieved of his evidentiary burden. Further, the Jones Act negligence causation standard does not entitle Hammett to a *res ipsa loquitur* presumption through the exclusion of all other potential sources of exposure evidence. On the contrary, Hammett retains the

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<sup>2</sup> A substantial body of authority supports the applicability of the “sole cause” defense to this case: *Mitchell v. Steward Oldford & Sons*, 163 Mich. App. 622, 415 N.W.2d 224 (1987) (“Defendant may introduce evidence that the injury is attributable to another’s negligence.”) As the Sixth Circuit held in *Laney v. Celotex Corp.*, 901 F.2d 1319, 1320-1321 (6th Cir. 1990), “this is true even if the alleged negligent actor is not a party to the action, *Kujawski v. Cohen*, 83 Mich. App. 239, 268 N.W.2d 358 (1978); or is immune from suit as the Plaintiff’s employer. *Esparza v. Horn Machinery Co.*, 160 Mich. App. 630, 408 N.W.2d 404 (1987) (Jury instructions pertaining to the negligence of plaintiff’s employer, who was immune from suit and therefore not a party to the lawsuit, were not improper: “It is perfectly proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty. *Love v. Brumley*, 30 Mich. App. 61, 63, 186 N.W.2d 19 (1971). See also *Kujawski v. Cohen*, 83 Mich. App. 239, 242-243; 268 N.W.2d 358 (1978) (Plaintiffs have conceded the employer’s negligence and that it was a proximate cause. It was not unfair for defendant to seek to blame someone else for the accident when plaintiffs sued defendant.”); *Love v. Brumley*, 30 Mich. App. 61, 186 N.W.2d 19 (1971) (“Plaintiffs also argued that it was error to permit evidence that plaintiff [ ]’s employer, a non-assessable party, was guilty of negligence. Reason and logic dictate that a defendant should not be precluded from placing the liability for an accident elsewhere. See *DePriest v. Kooiman*, 2 Mich. App. 431(1966), aff’d (1967), 379 Mich. 44. It was proper for the trial court to admit such evidence.”); see also, *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 325 (3d Cir. 2003) (Jury’s consideration of evidence of proportional fault of non-parties in a negligence action was not improper; comparative negligence doctrine properly applied.)

burden to demonstrate negligence: duty, breach, causation, and damages; which necessarily requires Hammett to prove that his exposure aboard the M/V SEATTLE actually caused his mesothelioma. *See Cherry v. United States*, 2007 U.S. Dist. LEXIS 81792, \*14 (W.D. Wash. Oct. 25, 2007) (holding “Plaintiff is required to prove her employer was negligent and that this negligence was a cause of her injuries. *Matter of Hechinger*, 890 F.2d 202 (9th Cir. 1989), cert. den., 498 U.S. 848, 111 S. Ct. 136, 112 L. Ed. 2d 103 (1990). In this regard, a plaintiff must meet the standard for proving negligence required of all tort plaintiffs, ***not some mythical featherweight burden, a term which has been loosely and improperly employed in the past.*** *See, e.g., Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).) (emphasis added).

The trial court’s preclusion of other source evidence essentially eviscerated that burden of proof requirement, creating a presumption that Sea-Land was the only possible source of exposure. This impermissible burden shifting – forcing Sea-Land to prove it was not responsible, rather than requiring Hammett to prove Sea-Land was – resulted in a verdict contrary to the law. Indeed, “evidence of Plaintiff’s exposure to other asbestos products goes to the fundamental question of cause. A jury may consider all evidence of contributing factors to determine which, if any, . .

. caus[ed] Plaintiff's injury. *Th[is]* . . . *analysis cannot be made in a vacuum.*" *Laney, supra*, 901 F.2d at 1321 (emphasis added).

Due to the lowered burden of proof and exclusion of other source evidence, Sea-Land was prevented from presenting its sole cause defense and suffered significant prejudice as a result.

**D. Hammett's Counsel Improperly Misled the Jury with Irrelevant Statutes, Regulations and Publications.**

Hammett's brief attempts to lead this Court down the same erroneous path it first pitched to the trial court, that is, that Sea-Land, an end-user of asbestos products should have been aware of, and acted upon, emerging science related to potential hazards from asbestos exposure to asbestos workers in industries unrelated to the maritime shipping business. By the end of trial, the trial court came to the correct conclusion that Hammett's introduction of irrelevant statutes and regulations was prejudicial to Sea-Land, resulting in a limiting instruction to the jury. Unfortunately, however, by that point the prejudice to Sea-Land from Hammett's repeated, and improper, references to the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") and the 1958 State of Washington, Department of Labor and Industries, Safety Standards for Protection Against Occupationally Acquired Diseases ("1958 WSHA regulations"), along with numerous irrelevant articles and journals, was incurable.

As explained in Sea-Land's Brief, Hammett introduced the Walsh-Healey Act and the 1958 WSHA regulations to the jury in opening statement, arguing initially that Sea-Land was bound by both. [RP 12/7/2012 Vol., 164:17-166:17]. Hammett failed to produce any evidence of their applicability at trial, however, and now concedes that neither actually applied to Sea-Land, instead claiming the statute and regulations were introduced to demonstrate hazards known to other industries. The record belies this claim, revealing Hammett's intent to lead the jury to the conclusion that Sea-Land violated a law or regulation. Only when Hammett was finally precluded by the trial court from making this unsupported argument to the jury did Hammett's purported basis for introducing the Walsh-Healey Act and the 1958 WSHA regulations change.

Similarly, Hammett sought to introduce numerous articles relating to the potential hazards of lung disease posed by asbestos to workers in the asbestos mining, construction, and shipyard industries. None of the articles pertained to the commercial shipping industry, and most related to forms of lung cancer and asbestos-related diseases other than mesothelioma. [Trial Exs. 43-46; 59-60; 69] Nor did Hammett introduce any evidence that Sea-Land knew of the existence of these articles and publications, much less demonstrate their relevance to Sea-Land's

operation of a commercial ship in 1964. Although the trial court issued a limiting instruction,<sup>3</sup> contrary to Hammett's assertion that this was a singular, inadvertent oversight, Hammett's counsel repeatedly violated that instruction, publishing a number of articles and journals to the jury, in contravention of the trial court's limitation. [RP 12/7/2011 Vol., 178:2-180:15] Sea-Land's objection to these flagrant violations were overruled by the trial court. [RP 12/7/2011 Vol., 204:19-21; 208:6-8]

Hammett's Brief attempts to gloss over the significant distinction between Sea-Land, a shipowner, and employers in the asbestos industry. Sea-Land was not a manufacturer of asbestos products; it was an end-user. The standard of care imposed upon a product manufacturer is indisputably much higher than that for product end-users. Hammett, however, would have this Court impose the same standard on all employers, regardless of their proximity to the asbestos-manufacturing process.

Hammett attempts to discredit Sea-Land's exposition of the weaknesses in Hammett's reliance on *Hoglund v. Raymark Indus.*, 50 Wn. App. 360, 365 (1987) in support of its relevance claims. Hammett's attempts fall flat, however, given that Hammett altogether fails to address

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<sup>3</sup> The text of the trial court's limiting instruction was as follows:  
"And I'm going to require that you *not show these documents in your opening statement*, but you can obliquely reference or you can --more generally reference what kind of evidence you expect to show in which -- and it's an opening statement anyway, so you're just going to --tell them what you think the evidence will show."

the fact that *Hoglund* concerned an employee of asbestos-product manufacturers – i.e., those directly involved in the handling of raw asbestos – whereas Hammett was a messman aboard a commercial vessel end-user of finished asbestos products, with which Hammett himself never worked or otherwise used.

The cases cited in Hammett’s brief reinforce the impropriety of Hammett’s attempts to distort *Hoglund*’s holding. Hammett cites *Dale v. Baltimore & Ohio Railroad Co.*, 552 A.2d 1037 (Pa. 1989), *King v. Armstrong World Indust., Inc.*, 906 F.2d 1022 (5th Cir. 1990), and *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1318 (5th Cir. 1985), but glosses over the central “fit” problem with each. *Dale* involved a railroad worker whose pipefitter job required him to remove asbestos material from pipes, and who contracted asbestosis (not mesothelioma). Further, the employer in *Dale* was a railroad operator that belonged to a trade organization where the hazards of asbestos to its workers were discussed and recorded in meeting minutes. *King* and *Jackson* are equally inapplicable to Sea-Land. Both concerned claims against asbestos product manufacturers and the admissibility of the Sumner-Simpson papers as evidence of knowledge of the hazards of asbestos in the asbestos product manufacturing industry. Moreover, *Jackson* involved the authors of the Sumner-Simpson papers themselves.

Once again, Sea-Land was a shipowner; not an asbestos product manufacturer. Further, Hammett allegedly contracted mesothelioma; not asbestosis. Moreover, no evidence was produced at trial demonstrating that Sea-Land had knowledge of any of the articles and journals in question. Thus, Hammett's attempts to distort *Hoglund* and thereby bind Sea-Land to the knowledge of an asbestos product manufacturer are improper, and resulted in prejudice to Sea-Land at trial.

**E. Hammett's Counsel's Arguments Improperly Permitted the Jury to Apply a Reduced Negligence Standard.**

Whether intentional or merely instances of "straying into the colloquial," Hammett's counsel's repeated references to an improperly reduced negligence standard were improper and prejudicial.

As explained in Sea-Land's Brief, the proper standard for Hammett to establish Sea-Land's negligence was "known, or reasonably should have known." *Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560 (5th Cir. 1989) (The defendant's duty to use reasonable care requires that the defendant knew, or should have known, of a particular risk under the circumstances.).

Hammett's counsel's improper representations of the law began in voir dire, which contrary to Hammett's apparent contention [Hammett Brief. p. 36, n. 14], is highly prejudicial in that it intones a false standard

to the jury before the evidence has even begun, which was subsequently continued by Hammett's counsel throughout the trial and during his closing argument [RP 12/7/2011 Vol. 204:5-18; 12/14/2011 Vol. 65:12; 66:10; 73:6-12; 155:25-156:4; 156:1] The record speaks for itself regarding the number of occasions upon which Hammett's counsel improperly reduced Hammett's burden of proof. [RP 12/7/2011 Vol., 132:1; 204:9; 208:16; 208:21, RP 12/14/2011 Vol., 65:12; 66:10; 156:1].

Whether deliberate or inadvertent, repeated improper statements of the law and, in particular, misrepresentations of Hammett's burden of proof, constitute misconduct that resulted in prejudicial error to Sea-Land.

**F. Hammett, not Sea-Land, Introduced the Concept of Delegation of Duty in His Closing Argument.**

Sea-Land did not produce any evidence at trial, nor did Sea-Land argue at any point, that it had delegated its duty as Hammett's employer to any other entity. On the contrary, it was Hammett's own counsel who attempted to introduce this claim, for the first time, in his closing argument, claiming Sea-Land had tried to delegate its duty to the U.S. Coast Guard. [RP 12/14/2012 Vol. 154:17-155:20] The record demonstrates otherwise, however. Sea-Land's references to the Coast Guard were made only for the purpose of demonstrating the proactive measures, such as an ambient air sampling study, performed by Sea-Land

to protect its employees, in advance of any directives issued by the Coast Guard, and in fact, during a time when the Coast Guard was requiring vessels such as the M/V SEATTLE to be insulated with asbestos material. [Trial Ex. 147]

At no time did Sea-Land argue that it had delegated its duty as an employer to the Coast Guard. Where no evidence of a claim has been presented at trial, it is error to instruct the jury as to that claim. See *Caldwick v. Marysville Water & Power Co.*, 114 Wash. 562, 567 (1921) (“In *Goldthorpe v. Clark-Knickerson Lumber Co.*, 31 Wash. 467, 71 P. 1091; *Cole v. Seattle, R. etc. R. Co.*, 42 Wash. 462, 85 P. 3, and *Olson v. Erickson*, 53 Wash. 458, 102 P. 400, we have held that the court was in error in having submitted to the jury instructions as to items claimed in the complaint upon which no evidence had been introduced. In *Crandall v. Puget Sound T., L. & P. Co.*, 77 Wash. 37, 137 P. 319, we held it was error for the court to instruct in regard to an item upon which no evidence had been introduced and upon another item which by stipulation had been reduced from the amount claimed in the complaint.) Thus, the presentation of this novel theory to the jury in the form of a jury instruction, despite a total dearth of evidence, was error, and prejudicial to Sea-Land.

**G. The Jury Was Instructed Regarding an Incorrect Standard of Proof for Causation of Mesothelioma.**

Sea-Land maintains that the issue for the jury was not simply whether Sea-Land should have foreseen/know in 1964 that Hammett's employment as a messman aboard a newly-renovated and refurbished container ship could lead to unspecified injury, but whether Sea-Land should have known then that the particular concentrations of asbestos fibers, if any, likely to be encountered by a messman aboard an operating vessel entailed a significant risk of mesothelioma. The law regarding foreseeability requires more than a general awareness that an unspecified injury may occur. *See Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560, 563 (5<sup>th</sup> Cir. 1989) (notice that working in "a heavy cloud of [silica] dust" was harmful does not answer the crucial question of "whether the [FELA employer] should have known that the particular concentrations of dust to which [plaintiff] was exposed entailed a significant risk of *silicosis*"). Hammett's reliance on *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 83 S.Ct. 659 (1963) is inapposite. *Gallick* did require a finding of reasonable foreseeability of a specific injury – namely that work around a fetid pool was reasonably foreseeable to lead to an insect bite; not just any injury generally. The subsequent chain of foreseeability discussed in *Gallick*, pertaining to additional injuries following on as a result of the

foreseeable insect bite, has no bearing here, where the threshold foreseeability burden has not been met.

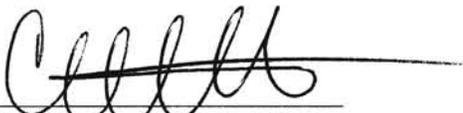
Hammett was required to show foreseeability of contracting mesothelioma as a result of his employment as a messman aboard the M/V SEATTLE. The reduced instruction given by the trial court was error.

### **III. CONCLUSION**

For the foregoing reasons, Appellant/Cross-Respondent Residual Enterprises Corporation, as successor in interest to Sea-Land Service, Inc., respectfully renews its request that, to the extent the Court finds Dr. Churg's medical causation opinion testimony to be inadmissible, this Court enter an order overturning the special jury verdict entered in the trial court against Sea-Land and entering judgment in favor of Sea-Land on the basis of lack of medical causation. In the alternative, Sea-Land renews its request for an order vacating the special jury verdict, and ordering a new trial of this matter.

RESPECTFULLY submitted this 10<sup>th</sup> day of October 2012.

LEGROS BUCHANAN & PAUL

By:   
Marc E. Warner, WSBA #5937  
Carey M.E. Gephart, WSBA #37106  
Attorneys for Appellant/Cross-  
Respondent Residual Enterprises  
Corporation, as successor in interest  
to Sea-Land Services, Inc.

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached on the Clerk of Court for Division I of the Washington State Court of Appeals and the following counsel of record:

Attorney for Respondents

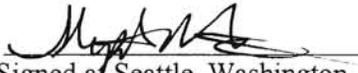
Matthew P. Bergman  
Vanessa Firnhaber Oslund  
Bergman Draper Ladenburg, PLLC  
614 First Avenue, 4th Floor  
Seattle, WA 98104

John W. Phillips  
Matthew Geyman  
Phillips Law Group, PLLC  
315 Fifth Ave. South, Ste 1000  
Seattle, WA 98104

**Via Hand Delivery**

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10<sup>th</sup> day of October 2012.

  
Signed at Seattle, Washington

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