69917-2

69917-2

69917-2

NO. ~~6~~6917-2-I

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

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

FLOWSERVE USA, Inc.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 08-2-07177-4 SEA)

OPENING BRIEF OF APPELLANTS

WILLIAM RUTZICK, WSBA #11533
KRISTIN HOUSER, WSBA #7286
THOMAS J. BREEN, WSBA #34574

SCHROETER, GOLDMARK & BENDER
500 Central Building
810 Third Avenue
Seattle, Washington 98104
(206) 622-8000

TABLE OF CONTENTS

Table of Contents, continued

TABLE OF AUTHORITIES

Page

Cases

Table of Authorities, continued

Table of Authorities, continued

Table of Authorities, continued

I. ASSIGNMENTS OF ERROR

1. The King County Superior Court ("trial court") erred in granting respondent Flowserve USA Inc. ("Flowserve" or "defendant" or "Edward") motion for summary judgment against appellants Michael and Lydia Farrow ("plaintiffs").

2. The trial court erred in concluding that there were no material disputed issues of fact in connection with defendant's second motion for summary judgment.

3. The trial court erred in excluding the deposition of Melvin Wortman.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does the record, including but not limited to, the evidence submitted by plaintiffs in opposition to summary judgment, contain material disputed issues of fact as to whether Michael Farrow was exposed to asbestos-containing products distributed by Flowserve?

2. Did plaintiffs or their counsel violate the King County Asbestos Style Order?

3. Is the Wortman deposition admissible pursuant to ER 804(b)(1)?

III. STATEMENT OF THE CASE

A. Mr. Farrow Worked On and Around Edward Valves While Employed at Puget Sound Naval Shipyard ("PSNS") From 1953 Through 1974.

Defendant admitted in its original motion (CP 14) that Mr. Farrow worked at PSNS between 1953 and 1974 first as a pipefitter (1953-1962), and then in the design shop (1963-1974) and that he worked aboard ships in both of those positions:

> Mr. Farrow testified in his deposition that he went to work at PSNS in December of 1953, that he worked as a rigger for a month and then as an apprentice pipefitter on Navy ships until becoming a journeyman pipefitter in late 1957, then transferred in the early 1960s to the PSNS design shop helping design piping systems and making occasional visits to ships where pipefitters worked on the systems, remaining at the design shop until 1974. (Dep. 58-65). (Emphasis added.)

At CP 49, Mr. Farrow testified that while working for the design shop:

> We would go down on board ship, and we had to route a certain run of piping a certain way and put a valve in a certain way, and we would put dimensions – take dimensions on the ship. (Emphasis added.)

He also testified that while he was in the design section at PSNS, he "fairly often" worked aboard ships with Mr. Justice, a co-worker. CP 50. He worked aboard ships both at repairing valves and putting on new and different valves. CP 106, 45.

During his tenure at PSNS, plaintiff worked extensively with and around Edward valves.[1] He worked on Edward valves "many times" and was also in proximity when others worked on such valves. CP 141. Farrow worked with a number of different types of Edward valves. CP 66. Mr. Farrow knew he worked on Edward valves because he saw the company name "on the valve body, not the face, but on the valve body." *Id.*

Mr. Farrow worked on the internal components of Edward valves, including the removal and replacement of packing and gaskets. CP 108, 111, 142. Conditions in the air "very often" would "be dusty" when Mr. Farrow removed packing from Edward valves. He breathed that dust. *Id.* After removing the old packing, Mr. Farrow replaced it with new packing. When repacking an Edward valve with new packing, Mr. Farrow noted that conditions in the air "would be dusty." He breathed that dust. *Id.* Both installing and replacing asbestos-containing gaskets and packing released asbestos dust. CP 320-327. Mr. Farrow never saw a warning concerning the hazards of asbestos on Edward valves. CP 142.

---

[1] Flowserve acknowledged in its original motion for summary judgment that it was sued "as successor to Edward Valves, Inc. ("EVI")" (CP 11) and refers to EVI's valves as "Edward Valve." Plaintiffs will refer to this defendant as "Edward" or ""Flowserve" or "defendant".

B. Flowserve's Admissions and Other Evidence Establish That Edward Supplied Asbestos Gaskets and Packing for Use In Its Valves, Which Were Installed Aboard Ships Docked At PSNS While Mr. Farrow Worked There.

Defendant's Motion at page 3 (CP 13) admitted:

> For purposes of this motion only, the Court may assume (1) that EVI supplied *some* valves that were installed on *some* ships that docked at PSNS before or while Mr. Farrow worked there, and (2) that *some* of those Edward valves came new from EVI's factory with "bonnet" gaskets and/or stem-packing material that contained asbestos. (Italic emphasis in original; underlined emphasis added.)

This admission is consistent with testimony from Flowserve's CR 30(b)(6) witness James Tucker. Mr. Tucker testified that Edward started manufacturing asbestos-containing valves in the 1930s, Edward manufactured valves that contained asbestos at the time the valves left the factory, the asbestos contained in Edward valves at the time they left the factory for installation included both packing and gaskets, and Edward valves were designed to contain asbestos until 1985. CP 151-152.[2]

Edward supplied replacement asbestos gaskets with new valves that already incorporated an original asbestos gasket. Edward also separately sold replacement asbestos gaskets, including sheet gasket material. Edward sold replacement asbestos packing separately as well.

---

[2] Edward sold asbestos-containing valves for use on Navy vessels, as well as commercial vessels. CP 152-153. Edward knew that the original asbestos gaskets and packing supplied with its valves would need to be replaced. CP 153.

Q. Has Edward Valves sold replacement asbestos gaskets with a valve that already incorporated an original asbestos gasket?
A. Yes.
Q. Edward Valves knew when it sold valves that there would be occasions where an original asbestos gasket that it had put into the valve would need to be replaced over time?
A. That is correct.

....

Q. All right. Did you sell replacement asbestos gaskets separately –
A. Yes.
Q. -- for use in Edward Valves?
A. Yes.
Q. Did you sell replacement asbestos packing separately for use in Edward Valves?
A. Yes.

CP 153-154.

In fact, Edward recommended and sold replacement asbestos-containing packing called "EValpak" that was marketed exclusively for its own valves. CP 154. According to Edwards, EValpak was "[i]deal for high-temperature, high pressure service. Treated to prevent stem pitting." CP 154-155); *see also* CP 157, 158-162, 185. All Edward valves up until 1985 contained EValpak asbestos packing. CP 195-196.[3]

---

[3] Defendant does not have any sales records demonstrating to whom it sold its replacement valves or its asbestos-containing packing:

Q. Edward Valves does not still have any sales records that document when or specifically to whom it sold its valves?
A. I know of none.

CP 152.

C. By The Mid- to Late-1960s, PSNS Increased Quality Control By Returning To The Equipment Manufacturers Like Edward To Purchase Repair Parts, Including Asbestos-Containing Gaskets And Packing.

Melvin Wortman was a former superintendent of machinists at PSNS from approximately 1968 until 1976. CP 395-396. By the time Mr. Wortman became a superintendent, the Navy and PSNS "were deeply involved in increasing our quality control." CP 221. According to Mr. Wortman, "the increased quality control measures required the Navy to be more careful in purchasing the repair parts, and that at that time there was a great increase in going to the original vendor for repair parts." CP 222 (emphasis added). [4] He further testified that in "later years"

---

[4] Q. So by the time you became a superintendent, where was the Navy in that process of revamping quality control as a result of the loss of the submarines?
[Objections]
A. The Navy and we at Puget were by the time I became superintendent were deeply involved in increasing our quality control.
....
Q. Okay. And did that -- did that have any effect on the ordering of replacement parts?
A. As I believe I stated before, the increased quality control measures required the Navy to be more careful in purchasing the repair parts, and that at that time there was a great increase in going to the original vendor for repair parts.

CP 221-222 (emphasis added). Mr. Wortman also testified that the replacement parts for shipboard equipment were ordered from the original manufacturer because "[e]xperience had proved that obtaining the parts from the original manufacturer had the best chance of good quality and timeliness in providing the parts." CP 215-216. Mr. Wortman also stressed that when ordering replacement and repair parts from the original manufacturers, "the delivery schedule from the original manufacturers was much more dependable than it was from other contractors." CP 222. In short, once the demands on quality control increased in the 1960s, "there was an effort to try to procure the parts from the original vendor." CP 224. See also CP 213 [replacement packing for a 600-pound globe valve would have been obtained "through the supply department, from the original vendor").

"approximately 50 percent" of the replacement parts obtained for PSNS were obtained from manufacturers. CP 411.

He testified about this matter further throughout his deposition in *Nelson.*[5] For example at CP 206, he testified that "the gasket manufacturers I would not know because generally speaking, it was normal practice to buy them through the supply system from the original vender." (Emphasis added.) At CP 222, he testified that he saw packaging of gaskets or packing while walking around the shop. He testified at CP 217:

> Q. You don't limit your belief that most of the gaskets and packing in the equipment that come to the machine shop for use, you don't limit that only to valves, pumps, and compressors but all the rotary equipment,. It's your belief that all the rotary equipment that was sent to the inside machine shop for overhaul probably were provided by the original manufacturer, and that's the gaskets and packing correct?
>
> MS. HOUSER: Object to the form.
>
> A. It is my belief that the greater percentage, or predominance, would be that case, yes. (Emphasis added.)

Mr. Wortman's most complete discussion of this matter appears at CP 221-224.

---

[5] Mr. Wortman's deposition appears in several places in the Clerk's Papers. Excerpts appear at CP 201-225 and 440-477. The complete text also appears at CP 1217-1305.

In his declaration in *Nelson v. Buffalo Pumps, et. al.*, King County Cause No. 08-2-17324-1 SEA (CP 600-601), Mr. Wortman also stated:

> Because of time constraints and sometime budget reasons, Shop 31 did not always get the parts from the original manufacturer, but I believe, based on my observations of the replacement parts we received when we were doing work on equipment as part of an overhaul, conversion, or modernization of a ship, approximately 50% of the replacement parts obtained by PSNS between the 1967 to 1971 time period that PSNS obtained replacement parts for equipment, including pumps, compressors and valves came from the manufacturer.
>
> 11. I believe that most of the gaskets and packing that were in valves, pumps and compressors when they came to the shop for overhaul were probably provided by the original manufacturer. Some of it was new equipment, being worked on for the first time. Even though other equipment may have been overhauled on other occasions, it was the standard operating procedure to procure the gaskets and packing from the equipment manufacturers via the Navy supply system. (Emphasis added.)

In the *Nelson* deposition, Mr. Wortman incorporated that declaration into his testimony. *See* CP 595, 1296.

Mr. Wortman's deposition in *Nelson* was taken over a three-day period. CP 202, 210, 219. The initial questions were by the attorney for Crane Co., whose questioning covers 200 pages. *See* CP 202 and 219. Defendants Buffalo Pumps, Ingersol Rand, and Warren Pumps also asked questions as did the plaintiffs in *Nelson*. *See* CP 219. Some of those defendants manufactured pumps, *e.g.,* Buffalo Pumps, and some manufactured valves, *e.g.,* Crane Co., and both of those defendants'

products were on ships repaired at PSNS. *See, e.g., Braaten v. Saberhagen Holdings,* 137 Wn. App. 32, 37, 151 P.3d 1010 (2007), *rev'd,* 165 Wn.2d 373, 394-95, 198 P.3d 493 (2008). As part of his initial questions, counsel for Crane Co elicited testimony from Mr. Wortman that Mr. Wortman was not familiar with Edward valves. CP 442.

C. Procedural History Of This Appeal.

1. Flowserve's Original Summary Judgment Motion Was Denied On July 27, 2012.

Flowserve moved for summary judgment in the summer of 2012, which was heard on oral argument on July 27, 2012. Flowserve was not present at the Wortman deposition. However, at oral argument on July 27th, Flowserve's counsel admitted that he would not have asked additional questions had it been at Mr. Wortman's deposition. This is set forth in the colloquy set forth in the margin where Flowserve's counsel agreed that he would "just be quiet" at the deposition.[6]

---

[6] THE COURT: -- now, one of your objections is that counsel representing Edwards Valves was not present and did not have an opportunity to ask questions.

My question to you is, after you received testimony that Edwards Valves, the company, was not familiar to Mr. Wortman, if you -- if you had been present, would you have asked anything else? I mean, in other words --

MR. ALIMENT: No, your Honor. We were not -- we also -- we were not simply -- we weren't present, but we also were not a party to that case.

The trial court understood and relied on those representations from Flowserve when it found Mr. Wortman's deposition admissible under ER 804 and denied summary judgment. The trial court also explained its reasoning. That reasoning included both (a) the court's understanding from counsel that had he been at the Wortman deposition, he "would not have asked any other questions," and (b) the court's conclusion that the other defendants who did ask questions "had similar interests, not identical interests, but similar interests to EVI's counsel":

> So the legal question then is is his prior testimony admissible as an exception to the rule against hearsay under Evidence Rule 804, and the Court will find that it is, indeed, admissible.
>
> It is telling, indeed, that had Mr. Aliment been there or a representative from EVI, that they would not have asked any other questions because, let's face it, once you have testimony that, "No, Edwards Valve is not familiar with me, to me," I don't know any attorney who would ask any further questions at that point. In fact, it would probably be malpractice to ask any further questions at that point.

> THE COURT: Understood. Understood. Right. But had you been there, I mean, would you have gilded the lily once you had received that --
>
> MR. ALIMENT: Typically in the asbestos litigation, which I have been a part of from the very beginning, you -- when your product is not named at a deposition, what's the point?
>
> THE COURT: Right. You would just be quiet, right?
>
> MR. ALIMENT: That's the practice in this state and I'm sure in most states.

Summary Judgment Hearing Transcript before the Honorable Dean Lum dated July 27, 2012, pp. 5-6 (emphasis added).

> Mr. Aliment has conceded that it's the standard of practice in -- in the asbestos community for -- for folks not to gild the lily at that particular point, and that's not surprising that that would -- that would occur. I mean, why would anybody ask any further questions?
>
> So if someone had been there, they would not have asked any other questions other than those questions which were asked by other counsel, and those other counsel had similar interests, not identical interests, but similar interests to EVI's counsel. And -- and to the extent their interests were identical, those questions were asked. I can't imagine any additional benefit to EVI had counsel been present than existed -- than occurred during the deposition.

Summary Judgment Hearing Transcript before the Honorable Dean Lum dated July 27, 2012, pp. 45-46 (emphasis added).[7]

---

[7] The trial court further explained why Edward's other objections to Mr. Wortman's deposition did not go to admissibility and why the summary judgment motion should be denied:

> Now, the defense has a number of other objections to the Wortman testimony, but all of those objections go to weight, not admissibility. It is for the jury to decide whether -- the reliability of that particular testimony and what weight to give to it. I cannot find as a matter of law that it's -- that the relevance of the Wortman testimony is so tangential that -- so as to -- not to be admissible.
>
> So, if the Wortman testimony is admissible and if we have to take the Plaintiff's testimony for the purposes of this motion as true -- in other words, that he specifically did work on Edwards valves in a -- in a variety of applications, including taking them apart, installing, reinstalling, that there was a dusty environment, that -- that there's testimony from -- I -- I don't think he's quite a hy -- well, it's a -- it's a scientist. I don't think he's a hygienist. I think he's -- well -- but there's testimony that friable asbestos fibers can travel over the entire ship. I have to take that as testimony as true for the purposes of this particular motion.
>
> The Court will find that there are genuine issues of material fact which preclude summary judgment on the product liability claim, and therefore, that portion of the summary judgment motion is denied.

July 27, 2012 Summary Judgment Tr., pp. 46-47 (emphasis added).

2. Other Defendants Subsequently Raised The Admissibility Of The Wortman Deposition In Connection With Their Motions For Summary Judgment.

Several months later, a number of defendants other than Flowserve moved for summary judgment and plaintiffs responded by offering portions of the Wortman deposition. CP 440-477. Several defendants including Alfa Laval and BW/IP, through their attorney Christine Dinsdale, opposed the admission of the Wortman deposition based upon ER 804 and the King County Asbestos Style Order.

Both in briefing (CP 1984-1986) and at oral argument on November 2, 2012, those defendants argued that ER 804(b)(1)'s "predecessor-in-interest" language[8] only applies to entities that were the defendant's "corporate predecessor" and does not include entities which had similar motives and opportunities to develop the testimony. *See* November 2, 2012 Hearing Transcript, p. 43. At CP 1985-1986, those

---

[8] ER 804(b)(1) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

defendants discounted the numerous federal cases interpreting Fed. R. Evid. 804(b)(1) and instead argued that:

> On its face, ER 804(b)(1) prohibits use of Wortman's deposition testimony against Alfa Laval because neither Alfa Laval nor a predecessor in interest had an opportunity to examine Wortman. Washington appellate courts have applied the 804(b)(1) hearsay exception only when a party or its predecessor interest has had an opportunity to cross-examine the witness, at the original deposition or subsequently. *See Young v. Key Pharmaceuticals, Inc.*, 63 Wn. App. 427, 819 P.2d 814 (1991); *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 57 P.3d 406 (2007) (refusing to apply exception where no evidence that party in prior deposition was in fact the current party's predecessor in interest).

Those defendants also argued that the King County Asbestos Order required that judges in King County must interpret ER 804(b)(1) in that fashion. *Braaten,* 137 Wn. App. at 93-94. The Style Order set forth at CP 2059-2131, sets forth a number of procedures that concern asbestos litigation in King County Superior Court.

In response to those arguments, plaintiffs, at oral argument and in supplemental authority (CP 2021-2022), cited appellate cases approving a broader definition of "predecessor-in-interest" under ER 804(b)(1). [9]

---

[9] Those cases included *Dykes v. Raymark Indus., Inc.*, 801 F.2d 810 (6th Cir.1986); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983); *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276 (4th Cir. 1993); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, (1992), and *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978).

See November 2, 2012 Hearing Transcript, pp. 68-69. Plaintiffs' also argued that there was not a basis for finding that plaintiffs violated the King County Asbestos Order, *inter alia*, because plaintiffs did not notice the deposition and because the King County Style Order could not "trump the evidence rules":

> Mr. Morgan's deposition was noticed and taken by the defendants. It wasn't noticed by plaintiff. It was taken by -- a Mr. Mesher did – did the primary examination.
>
> So the fact that plaintiffs are being alleged or accused of not designating it in the style rules is sort of -- we didn't notice the dep -- plaintiffs didn't notice the deposition in the first place. It was noticed by the defense. So I'm not sure why the argument is coming up and why fingers are being pointed at plaintiffs' counsel.
>
> More importantly, or just as importantly, the -- the style rules -- there's no authority cited here today that -- that the style rules would take precedent or somehow trump the -- the -- the evidence rules.

November 2, 2012 Hearing Transcript, pp. 70-71 (emphasis added). Plaintiffs also argued that by the time Mr. Wortman was deposed in April 2009, this case had already been dismissed by Judge Lum and was on appeal before this Court so the trial court no longer had jurisdiction. *Id.*, at pp. 89-90.

The trial court on December 13, 2012 issued a written order concerning those defendants (which did not include Flowserve). That order did not explain the basis for the court's ruling or which arguments of

the various defendants it accepted. Rather, after reciting generally that it reviewed the pleadings and memoranda and heard oral argument, the trial court ruled:

> [N]ow therefore, the Court hereby GRANTS the motion to strike as to those moving/joining defendants who were not notified of and who did [not] have counsel at the Wortman and Fryer depositions (BW/IP, Inc.), and hereby DENIES the motion to strike as to those moving/joining defendants who did receive notice of and who did have counsel at those depositions (Crane Co., FMC/Crosby and Warren Pumps).

CP 592-93.

3. Flowserve Subsequently Made A Second Motion For Summary Judgment On Shortened Time And Its Motion For Shortened Time And Motion For Summary Judgment Were Granted.

On December 14, 2012 (the day after the trial court's December 13th Order referred to immediately above), Flowserve filed a motion to dismiss and accompanying declaration. CP 553-560. Plaintiffs objected on procedural and substantive grounds (CP 561-564), and defendant filed a reply. CP 565-568. That motion was never ruled on by the Court.

On December 26, 2012, defendant filed a second summary judgment motion, requested a hearing on that motion on December 31, 2012, only five days later, and filed a motion to shorten time. That second motion did not incorporate any pleadings or argument by other defendants.

CP 569-575. Rather, it argued that summary judgment should be granted because of the "law of the case" and "judicial economy." Moreover, neither Flowserve nor plaintiffs could have known what arguments the trial court found persuasive in entering its December 13, 2012 Order, since the Order quoted above did not reveal that information.[10]

Plaintiffs again objected, arguing that defendant's second motion for summary judgment "lacks merit" and did "not provide plaintiffs with adequate time to respond." Plaintiffs also incorporated by reference evidence and argument supplied in prior motions, including plaintiffs' response to motions to strike the Wortman testimony made by other defendants referred to above. CP 594-95.[11]

---

[10] That second motion for summary judgment also implicitly admitted that the Wortman testimony provided evidence of Mr. Farrow's exposure to original asbestos-containing material supplied by defendant:

> Other than the Wortman testimony, there is no evidence or admission that Mr. Farrow was exposed to any original asbestos-containing component inside an Edward valve, which is the only place EVI put any asbestos.

CP 570 (emphasis added).

[11] Plaintiffs also explained that:

> Flowserve has claimed in its most recent brief, at pages 2-3, that when Mr. Wortman testified that the Navy preferred to obtain replacement gaskets and packing from the "original manufacturer," he could have been referring to the manufacturers of generic gasket and packing material, rather than to manufacturers of the equipment used on the ships, such as pumps and valves. This is patently incorrect: taken in context, Mr. Wortman was clearly referring to equipment manufacturers like Flowserve. For example, at page 305 of his deposition, he adopted as his testimony the statements made in his declaration in the same case. In his declaration, he stated that " it was the standard operating procedure to procure the gaskets and packing *from the equipment manufacturers* via the Navy supply system." (Emphasis added.) Ex. A to the Declaration of Rhonda Jones.

CP 595.

Because the second summary judgment motion was noted for December 31st, plaintiffs had to file their response on December 28th, less than two days after the motion was filed. The court later stated that it denied that motion to shorten time because "there wasn't enough time to allow plaintiffs' counsel a fair chance to respond to it." Jan. 7, 2013 Hearing, p. 29. On January 2, 2013, defendant filed another motion to shorten time for hearing to January 7, 2013. CP 622-24. The trial court granted that motion the next day without giving plaintiffs an opportunity to object or respond. CP 637-38. The hearing was held on January 7, 2013.

At the January 7th hearing, Flowserve's counsel did not offer a transcript of what he actually said at the July 27, 2012 hearing. Instead, he characterized his statements in a fashion contrary to the trial court's characterization of his statements quoted, *supra*, at page 10-11 of this brief:

> And what I told the Court was that typically in the asbestos litigation you would not ask questions about product identification testimony because, as you put it, that would simply be gilding the lily, but that does not mean necessarily that you would not ask questions with respect to other issues in the case.

January 7, 2013 Hearing Transcript, p. 4:17-22 (emphasis added). Flowserve's counsel did not explain how its motives differed from that of the defendants at the *Nelson* deposition, but instead argued that:

> [T]here were a number of questions that could have/should have been asked by competent counsel about the replacement part issue, which became central to his testimony.

Id., p. 6:18-21 (emphasis added).[12] Plaintiffs' attorney at the hearing disagreed with Flowserve's counsel's characterization of his prior remarks to the court. *Id.*, at 13:17-14:11.

The trial court then reversed its prior ruling of July 27th, excluded the Wortman evidence, and granted Flowserve's summary judgment. The trial court accepted counsel's statements on January 7th "at face value", discounted his statements on July 27th, and, for the first time, explained the bases for its December 13th order:

> Now, Mr. Aliment I think was a little bit caught off guard I think when the Court last July asked him some questions relating to questions he would have asked at the Wortman deposition, and – but I do take his statements at face value, and he was really addressing whether -- as we have discussed it, whether the -- whether he would have gilded the lily in terms of the Wortman deposition had he been

[12] Flowserve's counsel went on to argue that the time frame described by Mr. Wortman may have been off by a year or so compared with "contemporary reports" and that "competent counsel with this type of testimony and the import of – of what it could mean to the asbestos litigation would focus on his personal knowledge relating to the timing of each of those critical events, which are not clear from the testimony." January 7, 2012 Hearing Transcript, p. 8.

present or had been given notice. And I think that's absolutely true.

....

But Mr. Aliment's renewed motion for summary judgment is not only as he's renewed it, but he's basically saying, "Give me summary judgment for the same reason you gave Ms. Dinsdale," and the basis for Ms. Dinsdale's motion was, number one, defects in the case law and, number two, defects in the style order local rules.

So, long story short, the motion to strike the Wortman deposition is granted. That the motion being granted, there are no genuine issues of material fact remaining. It is the Plaintiff's burden to prove – demonstrate some admissible evidence establishing causation. Even though all inferences are in favor of the non-moving party, the – the Plaintiff must still come forward with some admissible evidence establishing the elements of their cause of action, and they have failed to do so in this particular case now that the Wortman deposition has been stricken. Therefore, I will grant both motions by Mr. Aliment.

Id., pp. 29-31 (emphasis added). *See also* CP 645-46.

IV. ARGUMENT

A. The Trial Court Correctly Ruled On July 27, 2012 That The Wortman Deposition Was Admissible, But Erred In Excluding The Same Wortman Deposition on January 7, 2013.

1. Standard of Review.

The Washington Supreme Court has several times held that trial rulings made in conjunction with summary judgment motions should be reviewed *de novo*. For example, in *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007), the Supreme Court stated:

> Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).[13]

Such rulings include trial court rulings on motions to strike in connection with summary judgment motions. As this Court held in *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 85, 272 P.3d 865 (2012):

> We review de novo a trial court ruling on a motion to strike evidence made in conjunction with a summary judgment motion. *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (" 'The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.' ") (alteration in original) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)) (emphasis added).

See also Parks v. Fink, 173 Wn. App. 366, 375, 293 P.3d 1275 (2013)

In the federal courts, a somewhat different standard applies but even there, the *de novo* rule standard of review applies to the trial court's determination of the appropriate legal standard. For example, the Fourth Circuit in *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 126-27 (4th Cir. 1995), held:

> The legal standards the district court applies in making its evidentiary rulings, however, are reviewed de novo. *See United States v. Ellis*, 951 F.2d 580, 582 (4th Cir.1991), *cert. denied,* 505 U.S. 1220, 112 S.Ct. 3030, 120 L.Ed.2d 901 (1992). Because we believe the district court applied an erroneous legal standard and therefore incorrectly

---

[13] *Cf. King County Fire Protection Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County,* 123 Wn.2d 819, 826, 872 P.2d 516 (1994), (trial court had discretion to admit a declaration in a summary judgment motion for limited purposes).

determined that French's testimony was inadmissible under Rule 804(b)(1), we need not address Marlinton's arguments as to the other two hearsay exceptions. (Emphasis added.)

2. The Later Exclusion Of The Wortman Deposition Was Inconsistent With ER 804(b)(1).

a. The Wortman Deposition Is Admissible Under The Consistent Federal Interpretation Of Fed. R. Evid. 804(b)(1).

Most cases interpreting 804(b)(1) come from federal courts interpreting Fed. R. Evid. 804(b)(1), which is identical to ER 804(b)(1). The trial court's January 7th ruling, excluding the Wortman deposition, was not only contrary to its previous ruling denying Flowserve's motion to strike Wortman's testimony, but was also inconsistent with the interpretation of Fed. R. Evid. 804(b)(1) by federal appellate courts from the Third, Fourth, Sixth, Eighth and Tenth Circuits.[14] All of those circuits interpret "predecessor-in-interest" as that term is used in 804(b)(1) not to require privity between the entities. Rather, all of those courts hold that a predecessor-in-interest includes a party not present at the deposition

[14] *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir. 1978); *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d at 283; *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d at 126-27; *Clay v. Johns-Manville Sales Corp.*, 722 F.2d at 1294-95; *Dykes v. Raymark Industries, Inc.*, 801 F.2d at 817; *Azalea Fleet, Inc. v. Dreyfus Supply & Machinery Corp.*, 782 F.2d 1455, 1461 (8th Cir. 1986); *O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1015 (10th Cir. 1992). In the criminal context, the issue of "similar motive" under Fed. R. Evid. 804(b)(1) has been discussed by the D.C. Circuit as well as the Second and Ninth Circuits. *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), *United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990), and *United States v. McFall*, 558 F.3d 951, 962-63 (9th Cir. 2009).

having a like motive to develop the testimony about the same material facts, *e.g.*:

> "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.

Clay, 722 F.2d at 1294-95 *quoting Lloyd,* 580 F.2d at 1185.

The Wortman deposition is admissible under Fed. R. Evid. 804(b)(1) for four separate reasons:

(1) These federal cases from the Fourth, Sixth, and Tenth Circuits, require that a party such as Flowserve must "explain as clearly as possible" why "the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness." *Dykes*, 801 F.2d at 817. The Fourth Circuit in *Meadow Gold Dairies*, 71 F.3d at 128, agreed and held that:

> We explained in *Horne*, "privity is not the gravamen of the [Rule 804(b)(1)] analysis. Instead, the party against whom the [testimony] is offered must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination." *Horne*, 4 F.3d at 283. Like the party opposing admission of the evidence in

> *Horne*, the dairies offer no sufficient distinction here. (Emphasis added.)

In *O'Banion*, 968 F.2d at 1015, n. 4, the Tenth Circuit also quoted and agreed with the excerpts of *Dykes* quoted above.[15]

Flowserve's argument in connection with the January 7, 2013 hearing did not meet the requirements set out by those federal circuits. Flowserve never explained at all, let alone "explained as clearly as possible," why the motive and opportunity of the *Nelson* defendants "was not adequate to develop the cross-examination" which Flowserve would have presented to Mr. Wortman. Flowserve, therefore, did not comply with *Dykes*, *Horne*, *Meadow Gold Dairies,* or *O'Banion*.

(2) Flowserve's argument on January 7th was that "competent" counsel "would have/should have" asked some additional questions. The trial court's oral decision (which was based on taking counsel's remarks "at face value"), was also contrary to the interpretation of "similar motive" by other federal circuits interpreting Fed. R. Evid. 804(b)(1) in the criminal context. In criminal cases, the "predecessor-in-interest" language does not apply, but the "similar motive" language does apply. For example, in *United States v. DiNapoli,* 8 F.3d 909, 914 (2d Cir. 1993) (en banc), the Second Circuit analyzed the issue of "similar motive" and

rejected the position that a party opposing admission of prior testimony can defeat admissibility simply by asserting that it would have asked additional questions:

> Nor are we persuaded by the Government's contention that the absence of similar motive is conclusively demonstrated by the availability at the grand jury of some cross-examination opportunities that were forgone. In virtually all subsequent proceedings, examiners will be able to suggest lines of questioning that were not pursued at a prior proceeding. In almost every criminal case, for example, the Government could probably point to some aspect of cross-examination of an exonerating witness that could have been employed at a prior trial and surely at a prior grand jury proceeding. (Emphasis added.)

The Ninth and the D.C. Circuits have also interpreted the "similar motive" language of 804(b)(1) in the criminal context. In *McFall,* 558 F.3d at 962, the Ninth Circuit agreed with the D.C. Circuit (which analyzed the issue of motive under 804(b)(1) "at a high level of generality"). Furthermore, *McFall* held:

> In *United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir.1990), the D.C. Circuit compared the government's respective motives at a high level of generality. The *Miller* Court concluded that "[b]efore the grand jury and at trial" the testimony of an unavailable co-conspirator "was to be directed to the same issue-the guilt or innocence" of the defendants, and thus, the government's motives were sufficiently similar. *Id.; accord United States v. Foster*, 128 F.3d 949, 957 (6th Cir. 1997) (*citing Miller* with approval). McFall's trial counsel made a similar argument before the district court, contending that the government's primary goal in questioning Sawyer before the grand jury was to incriminate McFall. At trial, the government's motivation would, of course, have been the same. (Emphasis added.)

---

[15] The *O'Banion* court also examined the examination done by the claimed predecessor-in-interest and found it "thorough".

While the D.C. and Ninth Circuit's analysis differs to some extent from that of the Second Circuit, all three Circuits look to the "similarity of motive," not simply to whether the party opposing admission of the prior testimony could come up with additional questions that were not asked in the offered testimony. Thus, three additional Circuits also reject the approach taken by Flowserve and by the trial court here.

Similarly, the fact that on January 7th, Flowserve came up with some new questions it may have asked Mr. Wortman in the deposition does not show lack of similar motive because, as explained in *DiNapoli* "in virtually all subsequent proceedings, examiners will be able to suggest lines of questioning that were not pursued at a prior proceeding." Moreover, as held in *McFall, Miller*, and *United States v. Foster*, 128 F.3d 949, 957 (6th Cir. 1997), both Flowserve's and the defendants in *Nelson* goals would have been the same -- to discredit Wortman's testimony regarding obtaining replacement parts from the original manufacturer.

(3) Flowserve's motives were in fact similar to defendants such as Crane Co., which were present at Mr. Wortman's deposition. All of those defendants in *Nelson*, manufactured equipment (either valves or pumps) which were used and repaired at PSNS. That was equally true of Flowserve, which admitted that at CP 3. The motive of the defendants in *Nelson* to challenge Mr. Wortman on his recollection (that PSNS

beginning in the mid- to late 1960s obtained replacement pump and valve parts including gaskets and/or packing from the pump and valve manufacturers) relates to the holding in *Braaten*. *Braaton* held that for purposes of both product liability and negligence against a defendant manufacturer of asbestos-containing pumps or valves which used asbestos-containing gaskets or packing, plaintiffs must provide evidence that the defendant was in the chain of distribution of the particular asbestos-containing products, *e.g.*, gaskets or packing, to which the plaintiff was exposed. *See* 165 Wn.2d at 394 (product liability) and 397 (negligence).

Mr. Wortman's testimony provided such evidence for the period at least between approximately 1968, when he became superintendent, and 1976, when he retired. That is so because as discussed, *supra*, he testified that "there was a great increase in going to the original vender for repair parts", including gaskets and packing, which typically contain asbestos. *See* CP 221-22, 411, 600-601. His testimony was equally relevant to Flowserve, which supplied valves used and repaired on ships at PSNS and also sold asbestos-containing replacement or packing, as it was to equipment manufacturers such as Crane Co. or Buffalo, which were present at the deposition.

Were Mr. Wortman's testimony to be believed, it would apply equally to Flowserve as to Crane Co. or Buffalo. Flowserve thus had the same motive as did those defendants, *e.g.,* to discredit Mr. Wortman's memory, his opportunity to perceive, and the plausibility of his testimony.[16]

(4) A further problem with Flowserve's new position – and the trial court's adoption of it – was that Flowserve's position at the January 7th hearing was quite different from its position on July 27th. On July 27th, when the court, discussing a situation in which a defendant's product was not named by the deponent, asked Mr. Aliment "you would just be quiet, right?"; Mr. Aliment agreed, stating "that's the practice in this state and I'm sure in most states." On July 27th, Flowserve's counsel nowhere even hinted that he would have asked any question on any topic and the trial court's comments at the end of the hearing clearly indicated that was also the trial court's understanding of his statements.

Three things then happened. First, Flowserve's summary judgment was denied based in part on counsel's statements. However, Flowserve did not move for reconsideration based on a claim that the court

---

[16] Flowserve has consistently agreed that it would not have asked Flowserve specific questions about its product since Mr. Wortman had admitted that he did not recall Edward valves. Thus, its motives regarding those questions were no different than Crane Co., which asked Mr. Wortman the question about whether he remembered Edward valves.

misunderstood Flowserve's position or that Flowserve's counsel had misspoken. Secondly, mothers later, other defendants moved for summary judgment and claimed they would have asked questions at the *Nelson* deposition. Third, their summary judgments were granted. By that time Flowserve's counsel necessarily would have known that it would help Flowserve's position if he argued that "competent counsel" "could have/should have" asked additional questions. And he did so. Given all of this, plaintiffs suggest that it is not reasonable to take counsel's January 7th statements at "face value" rather than to consider both statements.

b. Other States Interpretation Of ER 804(b)(1) Follow The Federal Interpretation.

Other states which, like Washington, have adopted the substance of Fed. R. Evid. 804(b)(1), have also adopted the federal courts' interpretation of that section. For example, in *Owens-Illinois, Inc. v. Zenobia*, 325 Md. At 440-441, Maryland's highest court held that:

> [A] "predecessor in interest" for the purposes of this rule is interpreted to include any party with a similar motive to develop the testimony. Privity between the two parties is no longer required. Deposition testimony is admissible if some other party, present at the deposition, had the same opportunity and similar motive to develop the testimony as the party against whom the deposition is offered. *Clay v. Johns-Manville Sales Corp., supra,* 722 F.2d at 1294-1295; *Hendrix v. Raybestos-Manhattan, Inc.,* 776 F.2d 1492, 1505 (11th Cir.1985); *Dartez v. Fibreboard Corp.,* 765

> F.2d 456, 462-463 (5th Cir.1985). As we have expressly adopted the substance of Federal Rule of Evidence 804(b)(1), we agree that "[m]otive to develop the testimony, [rather than privity between the parties], is the key factor" in assessing whether the parties present at the deposition are predecessors in interest for purposes of Maryland Rule 2-419(c). (Emphasis added.)

Similarly, in *Rich v. Kaiser Gypsum Co., Inc.*, 103 So.3d 903 (Fla. Dist. Ct. App. 2012), the Florida Court of Appeals relied upon federal cases, including *Horne* and *Lloyd*, when it held that the party such as Flowserve "must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination. The court added that "[n]o circuit has 'expressly disavowed this interpretation of Rule 804.' *Culver v. Asbestos Defendants (BP),* 2010 WL 5094698 (N.D. Cal. Dec. 08, 2010)."[17]

c. Washington Should Adopt The Above Analysis Adopted By Virtually Every Appellate Court Which Has Interpreted "Predecessor In interest" Under Evidence Rule 804(b)(1).

ER 804(b)(1) "is the same as Fed. R. Evid. 804, except that a minor editorial change is made in subsection (b)(2), and subsection (b)(5) is omitted." *See* comments to Evidence Rule reprinted at 91 Wn 2d at 1117, 1173. As held by the Washington Supreme Court in *Young v. Key*

[17] The court in *Temple v. Raymark Industries, Inc.*, 551 A.2d 67 (Del. Super. 1988), similarly held that "[s]ince Delaware adopted Rule 804(b)(1) from the Federal Rule of the same designation, this Court will apply the interpretation which has been given to the Federal Rule."

Pharmaceuticals, Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989), "Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules." *See also Harding v. Will*, 81 Wn.2d 132, 135 n.2, 500 P.2d 91 (1972) ("CR 13, 14, and 15 are taken from their like numbers in the Federal Rules of Civil Procedure and are substantially the same. Where a federal rule is adopted as the state rule, the construction of the former should be applied to the latter.").

With respect to the evidence rules in particular, Washington has adopted the federal interpretation in situations in which there is substantial federal or federal and other state authority for such an interpretation. *See State v. Land*, 121 Wn.2d 494, 498-500, 851 P.2d 678 (1993). The only occasions in which a federal interpretation of a rule has not been adopted by the Washington Supreme Court is in a case such as *State v. Copeland*, 130 Wn.2d 244, 255-261, 922 P.2d 1304 (1996), where there was both conflicting Washington authority and conflicting authority from other states. The status of the law with respect to 804(b)(1) is very different than the status with regard to the issue of the *Frye* Rule and ER 702 discussed in *Copeland.* In the present case, there is no conflicting Washington authority concerning 804(b)(1) and little, if any, conflicting law from any jurisdiction that has adopted 804(b)(1).

According to his oral comments, the trial court apparently granted Flowserve's motion because he accepted Ms. Dinsdales" argument about the "case law" interpreting 804(b)(1). As quoted above, that argument relied on *Young v. Key Pharmaceuticals, Inc.*, 63 Wn. App. 427, 819 P.2d 814 (1991) and *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 57 P.3d 406 (2007). Defendants also cited *American Nat. Fire, supra.* Those cases, however, never dealt with the merits of the issue here: whether a predecessor-in-interest under ER 804(b)(1) includes a party who was present at the deposition (*e.g.*, Crane Co.), had a motive and opportunity to further the witness's testimony similar to that of the entity against whom the deposition is now being offered (*e.g.*, Flowserve).

Young, supra, for example differs from the present case. In *Young*, 63 Wn. App. at 430, the defendant challenging the admissibility of the deposition was present at the deposition, so the issue did not come up. In *American Nat. Fire*, 82 Wn. App. at 668, the entity challenging the admission of the deposition had been present at a deposition that had incorporated the deposition the party was now challenging. Thus, the issue did not come up.[18] In *Allen*, 138 Wn. App. at 578, this Court held

[18] The Court of Appeals in *American Nat. Fire* cited *Dykes* approvingly, but for a somewhat different reason than the interpretation of "predecessor in interest."

that since the plaintiff "did not raise the predecessor in interest exception before the trial court, we need not consider this argument on appeal."

Contrary to the implication of defendant's argument, there is thus no Washington appellate law rejecting the *Lloyd, Horne*, *Clay, Dykes*, *O'Banion*; *Azalea Fleet*, *Meadow Gold Dairies, Zenobia, Kaiser Gypsum,* and *Temple* cases. Plaintiffs believe the issue on this appeal is precisely the kind of situation where this Court should both consider and approve that line of cases. This Court's confirmation of the federal court's approach would be consistent with Tegland, WASH. PRAC. § 804.17, page 187, which agrees with the Federal Court's approach for purposes of Washington law. Relying, *inter alia*, on *Lloyd*, Tegland's Treatise explained:

> Most postrule [804(b)(1)] decisions have interpreted the provision liberally, to the point of dispensing with any need for technical privity. The courts have, instead, focused on the question of whether the predecessor in interest was a party whose interests and motives in examining the witness were the same as those of the party against whom the witness's testimony is later offered. (Emphasis added.)

Washington should adopt the interpretation of "predecessor in interest" in 804(b)(1) held by the courts in *Lloyd, Horne*, *Clay, Dykes*, *O'Banion*; *Azalea Fleet*, *Meadow Gold Dairies, Zenobia, Kaiser Gypsum,* and *Temple*, and discussed favorably in Tegland. As explained above, Crane Co., a defendant in *Nelson* made valves used aboard Naval vessels

at PSNS and also utilized asbestos-containing gaskets and packing which were periodically removed and replaced. That situation was thus similar to Flowserve's situation because Flowserve's predecessor also made valves used at PSNS, which also contained asbestos packing and gaskets which also were periodically removed and replaced.

Mr. Wortman's testimony supported plaintiffs' position that if he or she worked with or around valves at PSNS being repaired or replaced during the mid- to late-1960s through the mid-1970s he or she would likely have been exposed to new asbestos-containing gaskets and packing supplied to PSNS during that time period by the valve manufacturers. That is just what plaintiffs are claiming with regard to Flowserve. The *Nelson* defendants' motive to challenge Mr. Wortman's testimony was thus similar to Flowserve. Moreover, the defendants in the Wortman deposition in *Nelson* also obviously had the opportunity to examine Mr. Wortman because they did so for more than 200 pages. *See* CP 441-477.

B. The Provisions Of The King County Asbestos Order Provide No Proper Basis For Excluding The Wortman Testimony.

The trial court stated at page 19 of the January 7th hearing transcript:

> [T]here's some local rules, local King County rules, which required that there was a specific procedure if you intend to rely on this type of prede -- this type of evidence for predecessor in interest, there's -- there's argument that, well,

> that -- that counsel did not note it properly under the King County local rules and that defense counsel could reasonably rely on the local rules if they were noted one way, and if they were not noted in style, they could reasonably rely on the fact that – that nobody could use that against them and -- and raise the predecessor in interest argument, and that was one of the bas -- several bases on which the Court granted Ms. Dinsdale's motion.
>
> Mr. Aliment didn't raise that last July.
>
> MR. BREEN: Yeah.
>
> THE COURT: This was a new argument, but the Court found it at least partially persuasive, in addition to some other arguments. (Emphasis added.)

Alfa Laval was one of the defendants that took the lead in arguing against the admissibility of the Wortman deposition. It argued as follows in its Reply in support of its Motion For Summary Judgment And Objection To Admission Of Certain Evidence (CP 1984-1986):

> Admission of Wortman's prior deposition testimony would be directly contrary to the express dictates of the King County asbestos Pre-trial Style Order in effect in 2008 when Nelson was deposed, which were reiterated in the current Revised Consolidated Pretrial Style Order (effective August 1,2011) [referred to jointly as "KC Asbestos Rules"]. Style Order Rule 5.6(d)(7) provided:
>
> > [A]ny party intending to use a deposition as a "Style" deposition, or to use it in certain other trials, shall serve the pre-deposition statement described in the Section (d) as well as a notice of "Style" deposition and/or a notice of deposition for said other trials, upon counsel for all parties who are intended to be bound thereby.
>
> Plaintiff's counsel in this case, Schroeter Goldmark & Bender, also represented Mr. Nelson, and when Wortman

> was deposed in Nelson in 2009, he was asked whether he knew Mr. Farrow. (Vol. 1, 14:19-20). If plaintiff intended to bind Alfa Laval by Wortman's testimony, her counsel was required to have served Alfa Laval with a notice of Wortman's deposition "in style" or in this case, so that Alfa Laval would be allowed an opportunity to cross-examine him. It is fundamentally unfair to Alfa Laval, who was not present at Wortman's deposition in Nelson, to now have that testimony admitted against it when a mandatory procedure was in place requiring notice to Alfa Laval and an opportunity to cross-examine, and plaintiff's counsel failed to comply. Moreover, the King County Rules expressly note that they are "mandatory," and that failure to comply may result in exclusion of the witness's testimony. (Rule 10.1.)

It is that section that defendants Alfa Laval and others relied on in asserting that plaintiff's counsel in *Nelson* violated the King County Asbestos Order ("Asbestos Order") and arguing that use of that deposition in the present case is barred by the Asbestos Order. However, that argument is inconsistent with both the plain meaning and the intent of the Asbestos Order under the undisputed facts of this appeal.

Several facts in the record call for rejecting the argument that the plaintiffs in *Nelson* or the present case violated § 5.6(d)(7) of the Asbestos Order. First, it was defendant Crane Co., rather than the plaintiff who noted Mr. Wortman's deposition in *Nelson*. Section 5.6(d)(7) requires a "pre-deposition statement" when a "party intends" to use the deposition in other cases. Not only were the Farrows not "parties" in *Nelson*, there is no evidence that they were intending at the time of Mr. Wortman's deposition

to introduce that deposition into evidence in Mr. Farrow's trial. Indeed, Mr. Wortman lived in Kitsap County and could have been subpoenaed to King County. Consequently, at the time of his deposition, he was "available" so his deposition could not have been used in Farrow at all pursuant to ER 804. Moreover, plaintiffs did not know before the deposition noted by Crane Co. what questions Mr. Wortman would be asked, so could not reasonably have been expected to give a pre-deposition statement.

Secondly, it was defendant Crane Co.'s counsel, not plaintiffs' counsel, who asked Mr. Wortman if he knew Mr. Farrow and Mr. Wortman testified in response to that question that he did not know Mr. Farrow. CP 442. Third, Flowserve was not a party in *Nelson* (CP 441), and at the time the *Nelson* deposition was noted, Flowserve had been dismissed in the present case. November 2, 2013 Transcript, p. 89. Since it was only defendants at the Wortman deposition in *Nelson* who asked about other companies, there is no basis to believe that plaintiffs, pre-deposition, understood that such questions would be asked about Edward or Flowserve. As such, there would be no good faith basis for plaintiffs to send out a pre-deposition statement to Flowserve.

There is thus no evidence whatsoever that, at the time Mr. Wortman's deposition was noted by defendants in *Nelson*, Mr. Farrow or

his attorneys intended to use that deposition in Mr. Farrow's case. There is, however, much contrary evidence. First, since the *Farrow* case had already been dismissed by Judge Lum more than a month before the deposition, it would have been speculative to believe that the Wortman deposition could even be used in the *Farrow* case, let alone that plaintiff, (who was not part of the *Nelson* case), was both a "party" and was "intending" to use the Wortman deposition. Secondly, plaintiffs did not know what questions would be asked by defendants at the upcoming deposition so plaintiffs could not reasonably send out a pre-deposition statement advising the universe of non-defendants, such as Flowserve, that Mr. Wortman was to be deposed by Crane Co. and other defendants, speculating about what questions those defendants would ask, and predicting what Mr. Wortman would say in response to such questions. [19]

---

[19] Crane Co., the party noting the Wortman deposition in *Nelson*, was required to file a pre-deposition statement by the King County Asbestos Order. There is no evidence it did so. The Consolidated Pre Trial Style Order at Section 5.6(d)(6)-(7) regarding depositions, states at pages 34-36 (CP 2096-2098) as follows:

> 5.6 Depositions, generally.
>
> ....
>
> d. **Pre-Deposition Statement.** In order to minimize time, travel expenses, and surprised to counsel or parties who may not desire to attend all depositions, there shall be attached to each notice of deposition a statement containing the following information (except depositions of individual plaintiffs):
>
> ....

Defendant's and the trial court's interpretation of the King County Asbestos Order is also unsupportable because it would generally require a plaintiff who did not note a deposition and did not know what questions would be asked to send out a notice to all companies who might be named in the deposition before the deposition even takes place, *i.e.*, a "pre-deposition statement." Under that analysis, plaintiffs must send out such notices to Flowserve and many other companies even though they were not even defendants in the *Nelson* case. Plaintiffs' counsel could not send out such notice without violating CR 11, particularly because it would

---

> (6) If the deponent is expected to testify regarding any defendant and/or any defendant's product(s), the party noting the deposition, or intending to use the deposition as a "Style" deposition shall set forth:
>
> (a) All such defendants the deponents shall specifically testify about; and
>
> (b) If the deponent is expected to testify concerning any of the respective defendants' asbestos products, shall set forth, with specific reference to particular work sites and years, the names of every defendant that it is anticipated the deponent will identify as having had products having asbestos:
>
> (i) That the particular witness worked with personally on a particular job in a designated year; and/or
>
> (ii) That the particular witness will state were worked with by others in his/her immediate vicinity on a particular job in a designated year; and/or
>
> (iii) That were present in any sense at any particular work site in a designated year.
>
> (7) That any party intending to use a deposition as a "Style" deposition, or to use it in certain other trials, shall serve the pre-deposition statement described in this Section (d) as well as a notice of "Style" deposition and/or a notice of deposition for said other trials, upon counsel for all parties who are intended to be bound thereby. (Emphasis added.)

require sending notices to scores of companies based on speculation as to what defendants would ask.

Defendant's and the trial court's position also rely on the unsupportable position that the King County Order both (a) intended to override the Washington Rules of Evidence particularly ER 804(b)(1), and (b) had the authority to do so. ER 804(b)(1) sets forth criteria for determining whether prior testimony may be used. With specific exceptions that do not apply here, ER 1101(a) provides that the rules of evidence apply to all actions in the courts of the State of Washington:

> (a) Courts Generally. Except as otherwise provided in Section (c), these rules apply to all actions and proceedings in the courts of the state of Washington. The terms "judge" and "court" in these rules refer to any judge of any court to which these rules apply or any other officer who is authorized by law to hold any hearing to which these rules apply.

Under defendant's and the trial court's interpretation of the King County Asbestos Order, plaintiffs in asbestos litigation in King County could comply completely with ER 804(b)(1) and still have prior testimony which complied with ER 804(b)(1) excluded because another plaintiff who did not note the deposition and did not know what questions would be asked failed to issue a pre-deposition statement to scores of non-parties. That not only is inconsistent with § 1101, but would permit a trial judge to issue orders which bar the use of ER 804(b)(1) in numerous cases even

before the judge knew any of the facts of the particular case. That is not only an unsupportable interpretation of the King County Asbestos Order, but puts the Order in conflict with the Washington Rules of Evidence adopted by the Washington Supreme Court. Simply put, defendant's argument as to the use and effect of the Style Order would create absurd and unintended results. For these reasons, defendant's arguments should have been rejected.

C. Summary Judgment Should Be Denied Considering The Wortman Evidence.

There is little, if any, dispute that summary judgment should be denied in this case if the Wortman deposition is considered. As quoted, *supra*, at pages 11, n.7 and 16, n.10 of this brief, both the trial court and Flowserve acknowledged this. Furthermore, in *Morgan v. Aurora Pump Co.,* 159 Wn. App. 724, 737, 248 P.3d 1052 (2011), this Court relied on the same Wortman testimony and held it relevant even though in *Morgan* the testimony was applied to an earlier time period, *i.e.*:

> Warren makes the point that Wortman's testimony relates to a different time period, which is a relevant consideration. But a reasonable inference can be drawn that the brands of parts used at PSNS did not change significantly within a few years.[15]
>
> [15] Warren points out that Wortman's testimony was limited to 1967 to 1971, when Morgan worked in the engineering design shop. "Because Plaintiff was not working with Mr. Wortman in Shop 31, and was not working on any equipment during the relevant time period (1967–1971), Mr. Wortman's testimony about the use of replacement components inside the machine shop is not relevant to plaintiff's claims."

D. Summary Judgment Should Be Denied Even Excluding The Wortman Deposition And Declaration.

As quoted above, Flowserve admitted in its original motion at CP 13 that:

> For purposes of this motion only, the Court may assume (1) that EVI supplied *some* valves that were installed on *some* ships that docked at PSNS before or while Mr. Farrow worked there, and (2) that *some* of those Edward valves came new from EVI's factory with "bonnet" gaskets and/or stem-packing material that contained asbestos. (Emphasis in original.)

WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (2d Ed.), p. 1729, defines "some" as "being of a certain unspecified (but often considerable) number, quantity, degree, etc.; as, *some* guests are here already, won't you have *some* butter?" (Underlining added.) Thus, for summary judgment purposes, this Court should interpret that concession to be that, for purposes of this motion, (1) defendant supplied a unspecified but considerable number of valves that were installed on an unspecified but often considerable number of ships at PSNS when Mr. Farrow worked there, and (2) that an unspecified but considerable number of those valves came new from defendant's factory with asbestos-containing gaskets and packing. *See Allen v. Asbestos Corp.*, 138 Wn. App. at 570 (evidence and reasonable inferences should be interpreted in favor of non-moving party for summary judgment purposes). Defendant's admission is also supported by Mr. Farrow's testimony that he worked on Edward valves

"many times" and was in proximity when others worked on Edward valves. "Many times" over his career could reasonably be interpreted to mean scores or hundreds of times.

Defendant also acknowledged that it would be responsible for asbestos dust created to the extent that Mr. Farrow or someone working near him was the,

> [F]irst person to remove from a previously installed Edward valve, original gasket or stem-packing material when removing the valve for repair or replacement.

CP 21-22.

Hash v. Childrens' Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757 P.2d 507 (1988), calls for reversing summary judgment in this case given those concessions. The Supreme Court in *Hash* unanimously held that:

> In addition, reasonable inferences could be drawn from the affidavits of Dr. Wallace submitted by COH which, if resolved in favor of Hash, would raise an issue of fact. For example, one of Dr. Wallace' affidavits states that "[i]t is possible for a child to suffer a fractured bone during physical therapy when the therapist is *not* negligent." Clerk's Papers, at 21. It could be reasonably inferred from this statement that even if an appropriate program of physical therapy is prescribed and administered, and the injury could have occurred without negligence, the injury nonetheless could have been caused by negligence. Since it is this court's duty to draw all reasonable inferences in favor of the nonmoving party, we must conclude that the injury may have been caused by the negligence of COH through its physicians and physical therapists, and that therefore summary judgment was inappropriate. (Emphasis added.)

This holding makes three points. First, even though the plaintiff in *Hash* had the burden of proof, the evidence from the defendant that the injury could have occurred without negligence permitted the opposite inference that it "could" have been caused by defendant's negligence. Secondly, the court "must conclude" from the inference that the injury could have been caused by negligence and that defendant "may" have been negligent. Thirdly, the Supreme Court held that, because the defendant "may" have been negligent, "summary judgment was inappropriate."

Applying *Hash* to the facts of this case calls for reversing the summary judgment. A fair inference from the evidence and defendant's admissions is that a "considerable number" of the many Edward valves that Mr. Farrow worked on or around at PSNS came "new from EVI's factory with 'bonnet' gaskets and/or stem-packing material that contained asbestos." There also is substantial evidence that removing gaskets and packing from defendant's valves at PSNS created dust. CP 320-327.

Given that Mr. Farrow worked with Edward valves "many times", a jury could reasonably conclude that at least some of the many repairs or replacements were the original repair or replacement so that it would be reasonable that Mr. Farrow or someone around him was the first person to remove the asbestos-containing gasket or stem-packing material from

some of the Edward's valves. As quoted above, defendant admits that in such a situation, Flowserve is liable for that asbestos exposure. Yet, even without the Wortman testimony, unless the jury concluded that none of those repairs of Edward valves were the first repair, Mr. Farrow was exposed to asbestos for which Edward is responsible. Using the *Hash* terminology, "the injury may have been caused" by Edward Valves and summary judgment should be reversed.

Any reliance on this issue by defendant on *Braaten, supra,* and *Yankee v. APV N. Am., Inc.*, 164 Wn. App. 1, 262 P.3d 515 (2011) would be misplaced because the facts of those cases are materially different then the facts in this case, and include concessions not found here. In *Bratten*, 165 Wn.2d at 394, the court stated:

> Mr. Braaten's testimony establishes that he cannot show that asbestos in packing and gaskets originally supplied with their products was asbestos to which he was exposed because he testified that he did not work with new pumps and that there was no way to tell whether and how many times gaskets and packing had been replaced in pumps and valves he worked on. (Emphasis added.)

In *Yankee*, 164 Wn. App. at 8, the Court of Appeals held:

> Siemieniec and Yankee concede that they were not exposed to gaskets, packing material, or any other asbestos-containing replacement parts that were manufactured, sold, or installed by APV. (Emphasis added; footnote omitted.)

In this case, nowhere in the record does Mr. Farrow did not concede that he was not exposed to asbestos from new Edward valves. So

too with working with new valves: nowhere in the record does Mr. Farrow testify that he "did not work with" new valves. To the contrary, he testified at CP 45 that he would sometimes repair valves and sometimes put in "different valves":

> Q. What work did you do on valves?
>
> A. Well, a lot of times I – I removed valves. Sometimes I repaired the stem leaks of valves, and sometimes I would take a valve out and send it to another shop to be worked on. And I would unbolt the flanged connections and, like I said before, put the blanks to keep the foreign material exclusion there.
>
> And many times, then, over a period to time we would put the valve back together after it was repaired, or maybe they wanted to put a different type of valve in that system, and so we did that too. (Emphasis added.)

The jury could reasonably conclude that putting in a "different type of valve" involves putting in a new valve.

E. Defendant's "Law of the Case" And "Judicial Economy" Arguments Were Incorrect.

Defendant argued at CP 577:

> Washington courts recognize this [law of the case] doctrine and have codified a version of it.[4] This Court's December 13, 2012 ruling established a new law of this case, granting summary judgment for all parties not notified of and who did not have counsel at the deposition of Melvin Wortman. This new law of the case warrants summary judgment for EVI, who also was not notified of and did not have counsel at that deposition and was not a party to the case in which the deposition was taken.
>
> [4] *See Lian v. Stalick*, 115 Wn. App. 590, 598-99, 62 P.3d 933 (2003); *State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d 905 (1996); *ACLU v. City of Seattle*, 2009 Wn. App. LEXIS 1758 at *9; RAP 2.5(c).

Defendant's position is contrary to the published Washington cases it cites. For example, in *Lian v. Stalick,* 115 Wn. App. 590, 598, 62 P.3d 933 (2003), the court held that the law of the case doctrine requires that the legal issue already has been "determined as part of a previous appeal:

> Generally, the law of the case doctrine precludes this court from reconsidering the same legal issue already determined as part of a previous appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). (Emphasis added.)[20]

Defendant's position is also directly contrary to *In re Estate of Jones,* 170 Wn. App. 594, 287 P.3d 610 (2012), where the court held:

> Except in the case of jury instructions, the law of the case doctrine requires a prior appellate court decision in the same case. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). It does not apply to identical issues raised repeatedly before the trial court. *MGIC Fin. Corp. v. H.A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573 (1979). (Emphasis added; footnotes omitted.)

---

[20] In *State v. Worl,* 129 Wn.2d 416, 424, 918 P.2d 905 (1996), the court held:

> In *Greene*, this court held that the law of case doctrine is a discretionary rule that should not be applied when the result would be "manifest injustice":
>
> > Under the doctrine of "law of the case," as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled." .... (Emphasis added.)
>
> *Greene*, at 10, 414 P.2d 1013. In 1976, this court adopted RAP 2.5(c), codifying the law of the case doctrine:
>
> > Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. (Emphasis added.)

There were no appellate rulings in this case regarding the Wortman testimony. Thus, the language of the case doctrine does not apply.

The judicial economy argument was predicated on the correctness of the trial court's striking of the Wortman deposition. *See* CP 571-572. However, as discussed at length above, the trial court erred in striking the Wortman deposition and plaintiffs could prevail at trial even without the Wortman deposition. For either of these reasons, defendant's judicial economy argument is incorrect.

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court reverse the orders granting defendant's motion for summary judgment and striking the Wortman deposition, and remand this matter for trial.

DATED at Seattle, Washington, this 28th day of May, 2013.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

WILLIAM RUTZICK, WSBA #11533
KRISTIN HOUSER, WSBA #7286
THOMAS J. BREEN, WSBA #34574
Counsel for Plaintiffs

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL FARROW and LIDIA FARROW, Plaintiffs, v. ALFA LAVAL, INC., et al., Defendants.	NO. ~~66917-2-I~~ 69917-2 DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am an employee of Schroeter Goldmark & Bender, over the age of 18, not party to this action and competent to make the following statements:

2. **On May 28, 2013**, the original and one copy of Appellant's Brief was filed with the Court of Appeals of the State of Washington, Division I and copies served upon the attorney of record for the defendant/respondent

by having said copies sent via first class mail, postage prepaid to the office address below:

Counsel for Flowserve US, Inc.
Randy J. Aliment
Amanda L. Spencer
Katherine Steele
WILLIAMS KASTNER & GIBBS, PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, Washington 98101

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 28th day of May 2013.

RHONDA JONES