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NO. ~~69917-2-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)

REPLY BRIEF OF APPELLANTS

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I. SUMMARY OF ARGUMENT

A key question in this appeal relates to the admissibility of the deposition of Melvin Wortman which was taken in a different asbestos case (*Nelson v. Buffalo Pumps, et. al.*, King County Cause No. 08-2-17324-I SEA) which was attended by five defendants who were all manufacturers of pumps or valves used at Puget Sound Naval Shipyard ("PSNS"). Mr. Wortman's deposition in the *Nelson* case was noted by those defendants, was taken over three days, was transcribed, and resulted in approximately 340 transcript pages. The *Nelson* defendants' interest and motive in depositing Mr. Wortman came from the fact that he had done a declaration, excepts of which are contained at CP 599-602, which recounted naval policies and/or policies at PSNS in which approximately 50 percent of the replacement parts for equipment such as pumps, compressors, and valves came from the original manufacturers of those products. He further explained 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." CP 600.

Mr. Wortman was uniquely qualified to talk about these matters since he had worked at PSNS for 35 years starting as an apprentice during WWII and retiring in 1976 as head of all of the machinists at PSNS, a trade very much involved in installing and repairing equipment such as valves and pumps both aboard ship and in the PSNS shops. *See e.g.* CP 395-396. The bulk of his questioning during the depositions was by the

defendants and much of the questions related to discussing the above matters as well as challenging his statements and his foundation for making such statements. In the *Nelson* case, the defendants present asked some questions about other equipment manufacturers besides the ones at the deposition and established through their questioning that Mr. Wortman was not familiar with Edward valves. CP 205. Defendant Flowserve, which is responsible for Edward valves, thus has that evidence and any inferences flowing from that evidence. At the same time, plaintiffs have evidence from Mr. Wortman's testimony as to general Navy policies to acquire replacement parts including gaskets and packing generally from the original manufacturers of the pumps and valves.

The trial court originally admitted the Wortman deposition when Flowserve moved for summary judgment and denied Flowserve's motion for summary judgment. Flowserve moved a second time for summary judgment and the trial court changed its ruling, struck the Wortman evidence, and granted summary judgment. Plaintiffs' opening brief agreed with the first decision, disagreed with the second decision, and discussed these matters at some length. Defendant's responsive brief ignored much of plaintiffs' authority and attempts to justify the trial court's second decision. This reply brief explains why defendant's efforts are not persuasive and why this case should be reversed and remanded for trial.

II. ARGUMENT

A. The Record Contains Substantial Evidence That Michael Farrow ("Plaintiff") Was Exposed To Asbestos Dust From Replacing New Packing Inside Of Edward Valves And That Edward Sold Asbestos-Containing Replacement Packing.

Mr. Farrow testified about his work with respect to packing on Edward valves including the dust produced by that work. At CP 142, he testified:

> Q. What type of work did you perform with packing on Edward valves?
> A. Packing valves. Packing. We would -- Same as I described before. We would remove the packing nut or packing gland. If we had to replace it, we would take the old packing out, make -- cut new packing, and, same as I mentioned before, put it down into the valve cavity, and put the packing gland, packing nut back on.
> Q. What were the conditions in the air like when you would remove old packing from the Edward valve?
> A. Very often it would be dusty.
> Q. Did you breathe that dust?
> A. Yes.
> Q. What were the conditions in the air like when you would replace new packing in Edward valves?
> A. It would be dusty --
> MR. SHAW: Objection; form.
> A. -- not as dusty, possibly, but there would still be some dust in the air. (Emphasis added)

James Tucker was Edward's managing agent and defendant supplied his declaration as part of its motion for summary judgment. In his declaration at CP 76, he admitted that the packing material in Edward's valves was "inside the valves":

> 5. Some Edward valves left EVI's manufacturing facilities with "bonnet" gaskets and/or stem-packing material that contained asbestos. "Bonnet" gaskets and stem-packing material were inside the valves. (Emphasis added.)

Evidence that packing used inside Edward's valves during the relevant time period contained asbestos is contained at CP 262-263. That is also consistent with Mr. Tucker's agreement at CP 151 that "[a]nother type of asbestos that were in Edward valves when they left Edward's factory were packing that contained asbestos."[1] Mr. Tucker also provided evidence that Edward Valves sold "replacement asbestos packing separately for use in Edward valves" and that it sold replacement asbestos-containing packing "EValpak" marketed exclusively for its valves. CP 153-154.

Defendant (also sometimes referred to as "Flowserve") argues in its responsive brief at page 14, n. 1, that plaintiffs' statements about replacement packing sold are misleading because "there is no evidence that EVI ever sold replacement packing to the Navy or to PSNS. Mr. Tucker testified that he was not aware of any sales of replacement packing to the Navy. CP 76." What Mr. Tucker actually testified to at CP 197 is

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[1] Moreover, defendant's Motion at CP 13 admitted 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. (Italic emphasis in original; underlined emphasis added.)

Defendant's newly articulated claim at pages 15-16 of its brief regarding its subjective intent, does not take away from the plain meaning of its statement, which is discussed at pages 41-42 of plaintiffs' Opening Brief.

that he did not know "one way or the other" as to whether EValpak was sold to the Navy:

> Q. I did understand you to say you didn't think EValpak was sold to the navy. What did you mean by that?
> A. I don't know of any cases we have sold the packing to the navy. I don't know that we've sold it to the navy.
> Q. You – you don't know one way or the other?
> A. I don't know one way or the other.

Mr. Tucker, therefore, does not know whether defendant sold a lot of asbestos packing to the Navy or none at all. That is because Edward Valves does not still have any sales records that demonstrate when or specifically to whom it sold its valves. CP 152. Moreover, as discussed in more detail, *infra*, plaintiffs do have substantial evidence that defendant sold asbestos packing to the Navy or to PSNS. *See* discussion regarding Melvin Wortman.

B. Mr. Workman Testified Extensively About His 35 Years At PSNS And His Experience And Observations Concerning How The Navy And PSNS By The Mid- To Late-1960s Generally Obtained Replacement Parts For Valves And Other Equipment, Including Asbestos-Containing Gaskets And Packing.

At CP 600-601 Mr. Wortman 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.)

Not only was this declaration incorporated into Mr. Wortman's deposition in *Nelson*, but he talked about these matters in his three-day deposition in the *Nelson* case at which time he was extensively questioned by defendants over hundreds of pages of transcript.

He testified, for example, that in "later years", "approximately 50 percent" of the replacement parts obtained for PSNS were obtained from manufacturers. CP 411. In that regard, at CP 222, he testified that he saw packaging of gaskets or packing while walking around the shop. He also testified as follows 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 discussion of this matter also appears at CP 221-224. Mr. Wortman explained that the replacement parts for shipboard equipment were ordered from the original manufacturer based on his own experience at PSNS, *i.e.*, "[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.

C. None Of Defendant's Arguments Discredit Plaintiffs' Position That The Trial Court Was Correct In Admitting Mr. Wortman's Evidence In July 2012, But Violated ER 804(b)(1) In Striking His Evidence In Connection With Flowserve's Second Motion For Summary Judgment.

1. The Great Weight Of Authority Supports Plaintiffs' Interpretation Of ER 804(b)(1) And Argues Against That Such Interpretation Violates Due Process.

Citing a grand total of zero cases, defendant argues that allowing the use of Mr. Wortman's deposition in *Nelson* against it (when it did not know about or attend that deposition) is a "sweeping denial of the absent defendant's due process rights'" (Def. Brief., p. 19), and that "Allowing the plaintiff to offer testimony of a deceased witness against a party who never had an opportunity to cross-examine him is fundamentally unfair and would create dangerous future precedent." *Id.* at 25. Those arguments are inconsistent with ER 804(b)(1) and are incorrect for several reasons. First, defendant's brief ignores all but one of the 14 cases cited by

plaintiffs that interpret the "predecessor in interest" language in 804(b)(1) to permit just such a result when a party present at a deposition had a motive and opportunity to develop the witness's testimony, which was "similar" to that of the defendant.[2] *See Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir. 1978); *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 283 (4th Cir. 1993); *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 126-27 (4th Cir. 1995); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1294-95 (6th Cir. 1983); *Dykes v. Raymark Industries, Inc.*, 801 F.2d 810, 817 (6th Cir. 1986); *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); *Rich v. Kaiser Gypsum Co., Inc.*, 103 So. 3d 903 (Fl. Dist. Ct. App. 2012);[3] *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993);*United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990);*United States v. McFall*, 558 F.3d 951, 962-63 (9th Cir. 2009);*Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 440-441 (1992); *Culver v. Asbestos Defendants (BP)*, 2010 WL 5094698 (N.D. Cal. Dec. 8, 2010); and *Temple v. Raymark Industries, Inc.*, 551 A.2d 67 (Del. Super. 1988). All of those cases permit a deposition to be used against a party who did not know of the deposition and was not present at the deposition

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[2] While these cases generally do not discuss due process, it is exceedingly unlikely that those courts would consistently adopt an interpretation of the rules of evidence that they believed violated due process.

[3] *Rich* is the one of the 14 case cited by defendant in its brief.

when someone at the deposition had a similar motive and opportunity to develop the testimony. None of those cases even suggested that their inpterpretation of 804(b)(1) violated due process. Nor does defendant respond to or even acknowledge the discussion in Tegland on Evidence quoted at page 33 of plaintiffs' Opening Brief or the Washington authority holding that ordinarily Washington courts follow the intepretation of identidcal federal rules, *e.g., State v. Land*, 121 Wn.2d 494, 498-500, 851 P.2d 678 (1993).

A second important reason for rejecting defendant's argument is that two new cases it cites interpreting 804(b)(1) employ the same interpretation of that section as do plaintiffs and the 14 cases cited above. The new cases cited by defendant in its brief are *Acord v. Pettit*, 174 Wn. App. 95, 104-107, 302 P.3d 1265 (2013), and *New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646 (10th Cir. 1989). Of these two cases, *Acord* is by far the more important because it is a Washington Court of Appeals decision that is factually and legally very much on point. Significantly, the Court of Appeals in *Acord* relies on a number of the cases cited by plaintiffs in holding that "a previous party having like motive to develop the testimony by cross-examination about the same matter is a predecessor in interest to the present party for purposes of this rule."[4] Similarly, in *New England Mut. Life Ins. Co. v. Anderson*, 888

[4] The entire discussion in *Acord* on the meaning of predecessor in interest is quoted below:

F.2d 646 (10th Cir. 1989) the Court adopted the same "predecessor in interest" interpretation advocated by plaintiffs stating:

> *Lloyd v. American Export Lines*, 580 F.2d 1179 (3d Cir.), is a leading case to construe Rule 804(b)(1). *See also Clay v. Johns–Manville Sales Corp.*, 722 F.2d 1289, 1293–95 (6th Cir.); McCormick on Evidence § 256. The court in *Lloyd* adopted an interpretation of "predecessor in interest" that it considered "realistically generous" rather than "formalistically grudging." 580 F.2d at 1187. The court there decided that a "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" for the purposes of the rule. *Id.* [5]

Also the "predecessor-in-interest" language of ER 804(b)(1) has been interpreted broadly by federal courts and Washington state courts. Indeed, the courts have dispensed with any technical and narrow definition of the term and instead examine whether the party against whom the evidence was previously offered had an opportunity and similar motive to develop and challenge the testimony by cross-examination. So a previous party having like motive to develop the testimony by cross-examination about the same matter is a predecessor in interest to the present party for purposes of this rule. *See State v. Whisler*, 61 Wn. App. 126, 135, 810 P.2d 540 (1991) ("no legitimate rationale" to disallow former testimony "so long as the 'opportunity and similar motive' requirements of ER 804(b)(1) are met"); *Allen v. Asbestos Corp.*, 138 Wn.App. 564, 579, 157 P.3d 406 (2007) ("the predecessor in interest exception requires the predecessor to have the opportunity to examine the witness"); *Lloyd v. Am. Export Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir. 1978) ("'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' " (quoting CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 256, at 619–20 (2d ed. 1972))); *Clay v. Johns–Manville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir.1983) (" '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' " (quoting *Lloyd*, 580 F.2d at 1187)). In *Clay*, the court refused to endorse " 'an extravagant interpretation of who or what constitutes a "predecessor in interest," it preferred one "that is realistically generous over one that is formalistically grudging." ' " *Clay*, 722 F.2d at 1295 (quoting *Lloyd*, 580 F.2d at 1187). This common sense practical application of this rule can easily be applied by trial judges exercising their discretion in these matters.

[5] Unlike most of the cases cited above, the Court in *New England Mut. Life* found that there was no predecessor in interest relationship between anybody at the deposition and the party challenging the use of the deposition so it rejected the admissibility of the deposition. Its facts, however, were significantly different from the facts in this case regarding the similarity of motive.

2. The Defendant's Motives In Examining Mr. Wortman In *Nelson* Were Similar To Edward's Motives In This Case And Edward Never Properly Laid Out Any Difference In Motive.

a. Defendant Never Properly Explained To The Trial Court Why Its Motives To Examine Mr. Wortman Were Different Than Those Of Crane Co. And The Other Defendants Present At The Wortman Deposition In Nelson.

Plaintiffs' Opening Brief explained that numerous cases from the Fourth, Sixth and Tenth Circuits interpreting 804(b)(1) held that a party such as defendant 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 819 (asbestos case), *Horne*, 4 F.3d at 283 (asbestos case), *Meadow Gold Dairies*, 71 F.3d at 128, *O'Banion,* 968 F.2d at 1015 n. 4 (asbestos case). *See* Opening Brief at pp. 22-23. Flowserve does not dispute that plaintiffs correctly stated the law. Plaintiffs pointed out in its opening brief that Flowserve never gave such an explanation to the trial court. Rather, in the first hearing in July 2012, Flowserve agreed with the trial court that it would not have asked any additional questions and in the January 2013 hearing, it argued that competent counsel "could have/should have" asked a number of questions about the replacement parts, but never explained why Flowserve's motives differed from those other defendants for purposes of the Wortman examination. January 7, 2013 Hearing Transcript, p. 6. Flowserve does not explain why the above holdings should not be applied in this case.

b. Defendant Also Never Distinguished the Line Of Cases From The Sixth, Ninth and D.C. Circuits Dealing With Motive.

Plaintiffs' original brief also pointed out that ample precedent from the Sixth, Ninth and D.C. Circuits upheld plaintiffs' position that a motive to discredit a witness testifying about a crucial part of the witness's testimony properly serves as a similar motive. *See* Opening Brief, pp. 24-25 arguing that both Flowserve's goals and the defendants in *Nelson* goals would have been the same – to discredit Mr. Wortman's testimony regarding obtaining replacement parts from the original manufacturers. Flowserve does not dispute this argument nor ever try to distinguish those cases.[6]

Acord directly supports plaintiffs' position because the Washington Court of Appeals rejected a similar argument by the defendants there who argued that:

> [T]hey had no predecessors in interest because the southern boundary of the Acords' property was not an issue in the former case and therefore there was no motive for thorough cross-examination of Fred Chandler relating to evidence about the southern line. (Emphasis added.)

The Court of Appeals at page 106 rejected that argument noting that the trial court "found that '[t]he motive was to call into question how the fence was constructed, what the purpose of the fence was, where it was put down.' RP at 302." The Court of Appeals then held at pages 106-107:

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[6] Plaintiffs also pointed out in their opening brief at pages 23-24, citing *United States v. DiNapoli*, that the fact that a party may have asked additional questions at the deposition is not a sound basis for determining no similar motive.

> The Thomsens, who were defending an adverse possession claim to the Acords' east line had a similar opportunity and motive to challenge Fred Chandler's statements pertaining to how he established his east and south lines based upon the construction of fences along the east and south lines of the Chandler (now Acord) property.
>
> The same fence was implicated in both cases and questions as to its location, when it was built, and how often it was maintained was then relevant in both trials. The attorney for the defendants in the earlier adverse possession suit cross examined Mr. Chandler about the relevant details of the fence. He questioned about when it was built and how often it was maintained. Ex. 16, at 32–44. (Emphasis added.)

The Ohio Court of Appeals in an asbestos case recently came to a similar conclusion. In *Burkhart v. H.J. Heinz Co.*, 989 N.E.2d 128, 131 (2013):

> *Lloyd* is well reasoned and in conformity with Ohio cases concerning the definition of "predecessor in interest" as used in Evid. R. 804(b)(1). There is also merit in applying the rule in conformity with the federal courts of this circuit. Accordingly, we adopt the *Lloyd* holding.
>
> Applying this to the facts before us, we conclude that the defendants in the Cuyahoga County asbestos cases and appellee share the same position with respect to appellant: all would benefit if it was disproven that Donald Burkhart had been exposed to asbestos. In that regard, the Cuyahoga County asbestos defendants had the same motive to develop testimony through direct and cross-examination as appellee. As to appellee's argument that the questioners at the Burkhart video deposition did not ask the exact same questions as appellee might have, this is not required. See *Whitaker*, 12th Dist. No. CA 86–12–179, 1987 WL 28437.
>
> The Cuyahoga County asbestos defendants were predecessors in interest and shared the same motive to develop testimony as appellee. As a result, Donald Burkhart's video deposition testimony in the prior proceeding was admissible pursuant to

> Evid. R. 804(b)(1) and the trial court acted unreasonably in refusing to consider such testimony on summary judgment. Accordingly, appellant's fourth assignment of error is well-taken. (Emphasis added.)

It also is not coincidental that so many of the cases dealing with 804(b)(1) cited in the parties' briefs are asbestos cases e.g. *Burkhart*, *Clay*, *Culver*, *Dykes*, *Horne*, *O'Banion*, *Rich*, *Temple*, and *Zenobia*. As recognized by the Washington Supreme Court in *Lockwood v. AC&S*, 109 Wn.2d. 235, 270, n. 2, 744 P.2d 605 (1987), asbestos diseases have a very long latency period so thirty or more years may elapse between asbestos exposure and manifestation of an asbestos-related disease. It is hardly surprising, therefore, that there is a particular need in such cases for evidence from currently unavailable witnesses, which is the purpose of 804(b)(1).

3. Plaintiffs Did Not Violate The King County Style Order.

Plaintiffs' Opening Brief at pages 35-38 goes into considerable detail as to why it had not violated the King County Style Order, e.g.,

> 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.

....

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.

....

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

Defendant had no response to any of those arguments. Instead, without even suggesting that any Order required plaintiffs to do so, it instead argues that plaintiffs could have issued its own notices to depose Mr. Wortman:

> The plaintiff's attorneys cannot excuse their own lack of foresight by suggesting that because a defendant noticed Mr. Wortman's deposition in the Nelson case, they had no opportunity to issue their own style notice for the deposition. If they wanted to give EVI and other potential defendants an opportunity to fully and fairly examine Mr. Wortman, then they could have issued a cross-notice for his deposition that complied with King County style notice procedures. Or, they could have issued a separate style notice for Mr. Wortman's deposition and served it on EVI and all other potential defendants at any time before his death.). (Emphasis added.)

Def. Brief, p. 24. The fact that plaintiffs could have noted a deposition of Mr. Wortman (or indeed of all witnesses whose depositions are noted by defendants in asbestos litigation) and that plaintiffs could have sent out deposition notices to scores of non-defendants forcing them to attend a deposition in a case they are not part of or seek relief (and possibly terms) from the court is no basis to argue that plaintiffs were required to do that. Defendant also never responds to plaintiffs' argument that the ER 804(b)(1) and the other rules of evidence apply generally in Washington and do not permit a trial court generally to add additional requirements for the admission of evidence that would be admissible under the rules of evidence.

D. Mr. Wortman Had A More Than Adequate Personal Knowledge And Foundation For His Declaration And Deposition.

Defendant argues with respect to Mr. Wortman that the record shows he lacked personal knowledge to support his testimony that "'[a]pproximately 50 percent of the replacement parts obtained by PSNS between the 1967 to 1971 time period' came from the original manufacturer." Def. Brief pp. 19-20. *See also id.* at 22. Defendant is mistaken.

Under ER 602, "'testimony should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge.' *State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984), citing 5 Karl Tegland, Wash. Prac. § 219 (2d ed. 1982)." (Emphasis added.) Here, Mr. Wortman's declaration and deposition demonstrate facts from which a trier of fact could reasonably find that Mr. Wortman had firsthand knowledge for this evidence. In his declaration, Mr. Wortman explained that his testimony was "based on my observations of the replacement parts we received when we were doing work on equipment as part of an overhaul, conversion or a modernization of a ship." CP 600. Similarly, in deposition, Mr. Wortman testified that he toured the machine shop every day and that he frequently observed replacement packaging from the original manufacturers. CP 222. Mr. Wortman's testimony is also based on his experience – experience that spanned more than 35 years of employment at PSNS. Mr. Wortman

utilized his experience as part of his foundation for testifying, *e.g.,* Mr. Wortman 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. Indeed, Wortman not only worked with, but also supervised, various types of workers at PSNS. He testified that he worked closely with the supervisor of the pipefitter shop (Shop 56) that Mr. Farrow and his co-workers were employed. CP 450.

A witness such as Mr. Wortman may properly testify pursuant to ER 602 and 701 and/or ER 703 to inferences and opinion rationally based on perception and helpful to a determination of a fact in dispute. Numerous federal circuits hold similarly construing the identical provisions of the Federal Rules of Evidence.[7] Defendants' argument

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[7] In *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518 (7th Cir. 1989) the Court of Appeals explained that:

> Business executives do not make assessments of a product's quality and marketability by inspecting the product at first hand. Their assessments are inferential, and as long as they are the sorts of inference that businessmen customarily draw they count as personal knowledge, not hearsay. See *Navel Orange Administrative Comm. v. Exeter Orange Co.*, 722 F.2d 449, 453 (9th Cir.1983); *Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 739 (1st Cir.1982) ("most knowledge has its roots in hearsay"); *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055, 1060 (7th Cir.1987) (dictum). All perception is inferential, and most knowledge social; since Kant we have known that there is no unmediated contact between nature and thought. Knowledge acquired through others may still be personal knowledge within the meaning of Fed.R.Evid. 602, rather than hearsay, which is the repetition of a statement made by someone else—a statement offered on the authority of the out-of-court declarant and not vouched for as to truth by the actual witness. (Emphasis added.)

regarding the timeframe of Mr. Wortman's testimony and its purported inapplicability to this action is also incorrect. On appeal, this Court in *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052 (2011), confirmed that "[t]he deposition and declaration of Melvin Wortman were taken in another case and related to the period from 1967 to 1971, when he was the superintendent of machinists at PSNS." (*Id.*, at p. 733.) This timeframe is directly applicable here. Mr. Farrow worked in the pipefitting era at PSNS from 1954 to 1974. From 1954 to 1962, Farrow was a pipefitter apprentice and then journeyman. In 1962, Farrow started working in the pipefitter design department and remained there until 1974. CP 501, 507, 508, 511. Mr. Farrow testified that throughout his 20-year tenure as a pipefitter, he worked with the equipment, including his years in the design department. Specifically, Farrow testified that in the design division, he "did work on board ship to measure pipe and relocate different piping systems. Install modifications to piping. In some cases, put new valves in or show the location to put the valves in." Farrow spent

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See also Burlington N R. Co. v. Nebraska, 802 F.2d 994, 1005 (8th Cir. 1986). *See United States v. Cantu*, 167 F.3d 198, 204 (5th Cir. 1999) ["personal knowledge can include inferences and opinions, so long as they are grounded in personal observation and experience"); *United States v. Neal*, 36 F.3d 1190, 1206 (1st Cir. 1994) [same]; *Farner v. Paccar, Inc.*, 562 F.2d 518,520 (8th Cir. 1977) [allowing lay opinion testimony of truck operator with extensive experience in the industry regarding the proper use of safety chains]; *Gravely v. Providence Partnership*, 549 F.2d 958, 961 (4th Cir. 1977) [allowing lay opinion testimony of company's president regarding relative safety of conventional versus spiral staircase]. As noted at his deposition, Mr. Wortman is a lay expert on certain matters and may give opinion evidence pursuant to ER 701. (Wortman Dep., at 260.) If found to be an expert pursuant to ER 702 or 703, he could properly give opinion s as well.

considerable time working directly with the pipefitters - "I made drawings and I went down to check on their work and spent a lot of time on board ship with the pipefitters who were actually doing work." CP 522.

E. Summary Judgment Should Be Reversed Based Upon The Wortman Evidence.

Plaintiffs' Opening Brief at page 40 incorrectly predicted that "there is little, if any dispute that summary judgment should be denied in this case if the Wortman deposition is considered." Defendant in fact disputes it at page 26-27 of its brief. However, defendant's arguments are wrong.

Plaintiffs first relied upon statements from both the trial court and Flowserve. Flowserve does not even attempt to explain any flaws in the trial court's analysis contained at pages 46-47 of the July 27, 2012 Summary Judgment transcript. Defendant presumably would have done so if it could think of any. Defendant does, however, dispute the inference plaintiffs drew from defendant's statement that "other than the Wortman testimony, there is no evidence or admission [of exposure attributable to EVI]." *See* Def. Brief, p. 26 n. 2 (emphasis added). Whatever defendant now claims was "intended" by the statement, plaintiffs' inference was reasonable, particularly for summary judgments whose inferences are interpreted favorably for the non-moving party. For example, the statement "other than the incorrect cite at page 3 of your brief, your brief

seems correct," reasonably implies that the writer believes there is an incorrect cite at page 3.

Defendant also tries to distinguish *Morgan*, where this Court utilized the Wortman deposition to prove exposure to asbestos products sold by the defendants in that case for use in their valves and other equipmentused at PSNS. In *Morgan,* 159 Wn. App. at 733 this Court explained:

> The deposition and declaration of Melvin Wortman were taken in another case and related to the period from 1967 to 1971, when he was the superintendent of machinists at PSNS. Wortman stated that during that period, almost all of the pumps used onboard Navy ships contained asbestos gaskets and packing. He estimated that 50 percent of the replacement parts obtained by PSNS, including replacement parts for pumps, compressors, valves, and other equipment, came from the original manufacturer. Wortman also stated that most of the gaskets and packing that were in valves, pumps, and compressors when they came into the shop for overhaul were probably provided by the original manufacturer.[12] (Emphasis added)

This Court later held at 736-737 that:

> Morgan has presented evidence that he was exposed to asbestos contained in products manufactured, sold, or supplied by Respondents. This evidence is found in the combined testimony of various witnesses. Knowles testified that he saw Morgan, or other workers in Morgan's presence, work on the internal parts of all of the Respondents' pumps and valves. And all of the Respondents except Warren, acknowledge supplying replacement parts to PSNS on occasion. In addition, Wortman testified that approximately 50 percent of replacement parts he saw came from the original manufacturers.
>
> The Respondents vigorously contest this evidence, but the majority of their arguments go to the weight and credibility of

> Morgan's evidence or attempt to contradict his evidence with their own evidence.[13]
>
> ....
>
> 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] (Emphasis added)

Defendant unconvincingly attempts at page 28 of its brief to distinguish the facts here from the facts in *Morgan*. Defendant first argues that in *Morgan* there was evidence of Mr. Morgan working with "internal components of *new* and old valves", but no evidence of that in this case. However, the relevance of Mr. Wortman's testimony in this case has little to do with new valves. Rather, it has to do with the practices of PSNS of acquiring replacement parts (including packing) for valves and other equipment from the original suppliers of the equipment. Therefore, defendant's argument is a distinction without a difference. Secondly, Flowserve argues that in *Morgan* all of the defendants other than Warren Pumps admitted that they supplied asbestos-containing replacement parts to the Navy or PSNS. "Here, EVI has never made such an admission." Defendant forgets to mention that this Court in *Morgan* also applied Wortman's testimony to Warren Pumps, so Warren's failure to admit that made no difference to this Court in terms of applying the Wortman testimony to Warren. That too is a distinction without a difference. Defendant finally argues that in *Morgan*, Jack Knowles specifically identifies Mr. Morgan using Warren Pumps. In this case, Mr. Farrow

himself identifies working with the internal components of Edward valves. Thus the purported distinctions are either non-existent or irrelevant.

Defendant also argues at page 21 of its brief that because Mr. Wortman admitted that he had never heard of EVI, his testimony is not relevant to defendant. That argument is based on what might generously be characterized as a misunderstanding of Mr. Wortman's evidence. Key portions of Mr. Wortman's evidence was (a) that (at PSNS during the mid to late 1960s) it was the "standard operating procedure to procure the gaskets and packing from the equipment manufacturers via the Navy supply system," and (b) that in the "later years" "approximately 50 percent" of the replacement parts used at PSNS were obtained from manufacturers. CP 600-601, 411. Further, he testified that:

> 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). *See also* CP 217, 223-224. These and a number of similar statements in the record as to the general practice of the Navy or PSNS with respect to obtaining replacement parts from vendors and manufacturers of valves and other equipment can fairly be applied to

any such vendor or manufacturer who – like Flowserve – sold replacement parts including asbestos-containing gaskets and packing for their equipment.

F. Even Without The Wortman Evidence, *Hash* Calls For Denying Summary Judgment Given The Evidence.

Plaintiffs, in the alternative, explained in their opening brief at pages 41-44 that defendant's concession that an unspecified but quite considerable number of Edward valves on ships that docked at PSNS while Mr. Farrow "came new from EVI's factory with 'bonnet' gaskets and/or stem-packing material that contained asbestos" calls for denying defendant's motion for summary judgment in light of *Hash by Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 110 Wn.2d 912, 757 P.2d 507 (1988). Defendant makes the true statements (a) that a "defendant can obtain summary judgment in either of two ways. It can (1) provide evidence that disproves an essential element of the plaintiff's claim or (2) point to the lack of evidence supporting an essential element of her claim" (b) "[t]he defendant in *Hash* moved for summary judgment under the first method. 100 Wn.2d at 913-14", (c) that the *Hash* court found that defendant's evidence "was insufficient to disprove an essential element of the plaintiffs claim" and (d) that "Hash's logic does not apply, however, where a defendant's motion for summary judgment is based on a failure in the plaintiffs proof." Def. Brief, pp. 17-18.

The flaw in defendant's logic is that defendant did not simply point out to the court the absence of evidence on material point. Rather, defendant supplied a declaration of its corporate witnesses setting forth affirmative evidence and, even more importantly, agreed that the court could make a number of assumptions, which are discussed above. Plaintiffs were and are entitled to rely on that agreement and, because those assumptions create disputed material issues of fact, including inferences from those facts, defendant is not entitled to summary judgment, even excluding the Wortman evidence.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in plaintiffs' Opening Brief, the trial court's granting of summary judgment should be reversed.

DATED at Seattle, Washington, this 21 day of August, 2013.

Respectfully Submitted,

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