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NO. 69917-2-1

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

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

FLOWSERVE US INC.,
solely as successor to EDWARD VALVES, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 08-2-0717704 SEA)

BRIEF OF RESPONDENT

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1. Did the trial court correctly grant summary judgment for Flowserve US Inc., solely as successor to Edward Valves, Inc. ("EVI" or "Edward Valves") because the plaintiff failed to produce evidence showing that Mr. Farrow was exposed to asbestos material that EVI placed in the stream of commerce?

2. Can the plaintiff create an issue of material fact with out-of-court statements made by Melvin Wortman in prior litigation not involving EVI where EVI was not present and never had an opportunity to challenge Mr. Wortman's testimony?

3. Even if admitted, can Mr. Wortman's testimony establish a genuine issue of fact that Mr. Farrow was exposed to EVI replacement parts at the Puget Sound National Shipyard ("PSNS") when Mr. Wortman testified that he had never heard of EVI or Mr. Farrow?

II. COUNTERSTATEMENT OF THE CASE

The plaintiff appeals from the trial court's order granting summary judgment in favor of EVI. The trial court granted EVI's motion for summary judgment after finding that the plaintiff could not produce evidence supporting an essential element of her claim, namely, that the plaintiff's decedent, Mr. Michael Farrow, was exposed to asbestos from a product EVI placed in the stream of commerce. 1/7/2013 RP 30-31.

A. Mr. Farrow testified that he was exposed to asbestos from external insulation, flange gaskets, and stem packing in and around EVI's metal valves.

Mr. Farrow was deposed three times about his work at PSNS. Besides his own case, he testified in lawsuits brought by two other PSNS workers, James Morgan and James Justice (Case No. 07-2-28464-8 SEA and Case No. 07-2-30057-1 SEA). CP 98. Mr. Farrow sat for a discovery deposition in his own case and a trial preservation deposition applicable to all three cases. CP 809, 1669.

Mr. Farrow worked at PSNS as a pipefitter from 1953 to 1962 and in the design shop from 1963 to 1974. He "worked on" Edward valves, along with several other brands. CP 111. He installed and replaced valves, replaced packing material around the valves' stems, and replaced the flange gaskets inserted between the valves and pipes. CP 45, 47. He also worked around others, like Messrs. Morgan and Justice, doing the same type of work. CP 142-143. The only asbestos-containing products on Edward valves to which Mr. Farrow claims exposure are insulation pads, flange gaskets, and stem packing. CP 108-111. Despite the plaintiff's claims to the contrary, Mr. Farrow never worked on internal "bonnet" gaskets, saying his only work on the inside of valves was changing the packing and adjusting a single check valve. CP 64.

B. EVI never manufactured, distributed, or sold external insulation or flange gaskets.

Edward never manufactured, distributed, or sold any of the external products such as flange gaskets or insulation, which led to Mr. Farrow's asbestos exposure. EVI's corporate representative, James Tucker, testified that EVI never manufactured, distributed, or sold any external insulation or flange gaskets. CP 76. And Mr. Farrow's testimony did not suggest otherwise. He had no reason to believe that the valve manufacturers supplied flange gaskets. CP 73. Likewise, he did not know whether Edward supplied insulation for any valves at the shipyard. CP 67.

C. There is no evidence that Mr. Farrow was exposed to the original packing in an Edward valve.

There is no testimony that Mr. Farrow or anyone else replaced original packing. Mr. Farrow could not testify about the maintenance history for the valves. He stated that many of the valves were refurbished and it was difficult to tell which ones were actually new. CP 66. He conceded that there was no way to tell whether the packing he or anyone else removed was the original packing placed in the stream of commerce by the valve manufacturer or whether it was replacement packing manufactured and supplied by someone else. CP 60, 61.

D. There is no evidence that EVI ever sold any replacement packing to the Navy or PSNS.

Although Edward occasionally responded to a customer request for replacement packing and bonnet gaskets, there is no evidence that it ever sold replacement parts, including packing, to the Navy. Mr. Farrow could not identify EVI as a seller or supplier of packing.

EVI's corporate representative testified that he was unaware of any sales of replacement packing to the Navy, CP 193, 197, 198, and EVI found no documentation showing any such sales. CP 76. Nor has the plaintiff produced such documents. Throughout Mr. Farrow's lengthy depositions, he never suggested that EVI sold or supplied packing or any other replacement component to the Navy.

E. EVI filed its original motion for summary judgment because there was no evidence that Mr. Farrow was exposed to asbestos from an EVI product.

Because there is no evidence that Mr. Farrow was exposed to asbestos from an EVI product, EVI filed its motion for summary judgment on June 28, 2012. CP 11.

F. The trial court denied EVI's original motion for summary judgment based on its initial finding that the deposition testimony of Melvin Wortman could be used against EVI.

In her response to EVI's motion for summary judgment, the plaintiff argued that Melvin Wortman's deposition testimony created a genuine issue of fact whether EVI supplied replacement packing to the Navy and whether Mr. Farrow was exposed to asbestos from such replacement packing. CP 94.

Mr. Wortman, now deceased, was deposed in *Nelson v. Buffalo Pumps*, Case No. 08-2-17324-1 SEA, in April, 2009. EVI was not a party to that case and did not know about or attend the deposition. CP 201-202. Mr. Wortman testified that he worked at PSNS from 1940 to 1976, serving as a machinists' superintendent from about 1967 to 1976. CP 1210. While he estimated that "approximately 50 percent of the replacement parts" used at the shipyard came from the original manufacturer, he did not know whether any of those replacement parts came from EVI. CP 1213. He never testified that the Navy bought replacement packing from EVI. In fact, he had never even heard of EVI. CP 205.

Q: Let me ask you the names of some valves and see if they sound familiar to you okay?

A: Yes.

* * *

Q: Edward Valves?

A: No.

CP 205.

Over EVI's objection, the trial court initially allowed Mr. Wortman's testimony and denied EVI's motion for summary judgment. CP 363-364.

G. The trial court granted EVI's renewed motion for summary judgment after granting other defendants' motions to strike Mr. Wortman's testimony.

The trial court revisited the admissibility of Mr. Wortman's testimony when it considered motions to strike filed by other defendants in support of their motions for summary judgment. As with EVI, those defendants argued that Mr. Wortman's deposition testimony was hearsay and could not be offered against parties who had never examined him. CP 1979-1998. The court agreed that Mr. Wortman's testimony was inadmissible hearsay. It therefore granted their motions to strike as well as the related motions for summary judgment because the plaintiff could not prove that Mr. Farrow was exposed to asbestos from their products. CP 2027-35.

EVI renewed its motion for summary judgment asking the trial court to reconsider its ruling that Mr. Wortman's testimony could be used against EVI and that genuine issues of fact precluded summary judgment.

CP 569. The court reversed its prior order and granted the motion holding that Mr. Wortman's testimony could not be used against EVI and that the plaintiff had failed to produce any evidence of asbestos exposure from an EVI product:

> 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.

1/7/2013 RP 30-31; CP 641-642.

This appeal followed.

III. SUMMARY OF ARGUMENT

As explained below, to overcome a motion for summary judgment, the plaintiff must come forward with admissible evidence to support each element of her claim. An essential element of the plaintiff's claim against EVI is that Mr. Farrow was exposed to asbestos from a product that EVI placed in the stream of commerce. Because there is no admissible evidence to support this element, the trial court properly granted EVI's renewed motion for summary judgment. CP 641-642. The plaintiff nevertheless argues that the trial court's ruling should be reversed because the testimony of Mervin Wortman creates a triable issue of fact whether

EVI supplied asbestos-containing replacement parts to the Navy and whether Mr. Farrow was exposed to asbestos from such parts.

Mr. Wortman's testimony is inadmissible hearsay that cannot be offered against EVI. The testimony was taken at a deposition that EVI did not know about or attend, in a case that did not involve EVI. CP 201. No party at the deposition had any interest in securing testimony to counter the allegation that EVI supplied asbestos-containing replacement parts to the Navy. And Mr. Wortman never suggested that EVI supplied asbestos-containing material to the Navy or that Mr. Farrow was exposed to asbestos supplied by EVI. In fact, Mr. Wortman testified that he had never even heard of EVI. CP 205. It is difficult to understand how Mr. Wortman's ignorance of EVI can be used to contest EVI's motion for summary judgment.

IV. ARGUMENT

A. Standard of Review

Orders granting summary judgment are reviewed *de novo*; the test is whether there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Annechino v. Worthy*, 175 Wn.2d 630, 635, 290 P.3d 126 (2012). An order granting summary judgment can be affirmed for any reason supported by the record. *See*

Davies v. Holy Family Hosp., 144 Wn. App. 483, 491, 183 P.3d 283 (2008).

B. The trial court properly granted EVI's renewed motion for summary judgment because there is no evidence that Mr. Farrow was exposed to asbestos from an EVI product.

The Washington Supreme Court recently held in two cases with facts nearly identical to this one that a plaintiff asserting an asbestos-related product liability claim can only overcome a motion for summary judgment by producing evidence of exposure to asbestos material that the defendant placed in the stream of commerce. *See Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 383-398, 198 P.3d 493 (2008); *Simonetta v. Viad Corp.*, 165 Wn. 2d 341, 350-63, 197 P.3d 127 (2008). Liability cannot be based on exposure to a different manufacturer's product used with the defendant's product. *Id.* Nor can it be based on exposure to replacement parts manufactured and sold by somebody else. *Id.* The plaintiff must prove actual exposure to asbestos that the defendant placed in the stream of commerce. Because the plaintiff cannot do so here, summary judgment was proper.

1. Summary judgment is proper when the plaintiff fails to produce admissible evidence to support an essential element of her claim.

Civil Rule 56(c) dictates that summary judgment should be granted when the pleadings and other evidence show that there is no genuine issue

of material fact and the moving party is entitled to judgment as a matter of law. While the moving party bears the initial burden of showing the absence of a material fact, it can meet this burden by showing that there is an absence of evidence to support an essential element of the plaintiff's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the plaintiff who "must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627, 818 P.2d 1056 (1991) (citation omitted).

A plaintiff may not rely on mere speculation or empty allegations to carry her burden. *See White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) ("[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved fact issues remain.") While a plaintiff can use circumstantial evidence, "the facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them." *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610-11, 224 P.3d 795 (2009) (citation omitted). And although the trial court must view all reasonable inferences in the light most favorable to the plaintiff, an inference is not reasonable unless it is

deduced "as a *logical consequence* from other facts, or a state of facts, already proved or admitted." *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 101, 929 P.2d 433 (1997) (citation omitted) (emphasis in original). If the plaintiff's response to a defendant's motion for summary judgment "fails to make a showing sufficient to establish the existence of an element essential to his case," then there is no genuine issue of material fact and summary judgment should be granted. *See Athiston Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young*, 112 Wn.2d at 225 (citing C*elotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 916 L. Ed. 2d 265 (1986)).

2. Exposure to an asbestos-containing product that the defendant placed in the stream of commerce is an essential element of the plaintiff's claim.

One of the essential elements of the plaintiff's claims against EVI is that Mr. Farrow was exposed to asbestos that EVI placed in the stream of commerce. The Washington Supreme Court's companion decisions in the *Braaten* and *Simonetta* cases hold that an equipment manufacturer like EVI cannot be liable for asbestos exposures unless the plaintiff can demonstrate that the asbestos to which he was exposed was manufactured, sold, or supplied by the equipment manufacturer. *See Braaten*, 165 Wn.2d at 383-398; *Simonetta*, 165 Wn. 2d at 350-63. The Supreme Court clarified that a defendant is not liable for harm caused by asbestos-

containing materials used in or on the defendant's products (*i.e.*, replacement gaskets, packing or external insulation), regardless of whether the use of such products was foreseeable, if the asbestos-containing materials were not manufactured, sold or distributed by the defendant. *See Braaten*, 165 Wn.2d at 391-98 (plaintiff must show exposure to asbestos-containing materials which themselves were manufactured, sold or distributed by the defendant). For the plaintiff's claims to survive summary judgment, she must come forward with admissible evidence that Mr. Farrow was exposed to asbestos that EVI placed in the stream of commerce.

3. The plaintiff did not produce evidence that Mr. Farrow was exposed to asbestos from an EVI product.

The plaintiff failed to meet her burden of producing admissible evidence to show that Mr. Farrow was exposed to asbestos that *EVI placed in the stream of commerce*. She still fails on appeal to point to any admissible evidence of such exposure. She shows only that Mr. Farrow was exposed to a variety of asbestos-containing products used in conjunction with Edward valves without showing that any of those products were manufactured, distributed, or sold by EVI.

For example, she cites to Mr. Farrow's deposition testimony as evidence that he was exposed to asbestos from external insulation and

flange gaskets. CP 108-111, 142. This testimony is entirely irrelevant to any claim against EVI, however, because it never manufactured, distributed or sold insulation or flange gaskets. EVI's corporate representative, Jim Tucker, testified that EVI never manufactured, distributed or sold flange gaskets or insulation, and the plaintiff has never offered any contradictory evidence. CP 76. Under *Braaten*, the plaintiff cannot maintain her claim against Edward by offering evidence of exposure to these products because EVI did not place them in the stream of commerce.

The plaintiff also cites to testimony that Mr. Farrow or others removed asbestos-containing stem packing from Edward valves without proving that the packing was manufactured, distributed, or sold by EVI. CP 108, 111, 142. Stem packing is a rope-like product used in valves, pumps, and turbines to prevent gas or liquids from leaking around moveable parts. Much like oil in a car, packing must be replaced over time. Because the plaintiff admits, as she must, that EVI never manufactured any packing, she claims that Mr. Farrow was exposed to the original stem packing inside some EVI valves or he was exposed to replacement packing EVI sold to the Navy. The problem with the plaintiff's argument is that there is no evidence for either assertion.

No testimony, document, or other evidence suggests that Mr. Farrow or others in his presence removed original packing material. Mr. Farrow could not testify about the maintenance history of the valves he worked on. Many of the valves were refurbished and it was difficult to tell which ones were actually new. CP 66. He conceded that it was impossible to tell whether the packing was original to the equipment or a replacement that was manufactured and supplied by someone else. CP 60.

There is likewise no evidence or inference that EVI supplied any replacement packing. Neither Mr. Farrow nor any witness testified that he was exposed to replacements supplied by EVI. EVI never admitted to selling replacements to the Navy generally or PSNS specifically. EVI's corporate representative testified that EVI was not aware of any sales of replacement packing to the Navy and had located no documents of any sales.[1] CP 76. No witness testified to seeing or even being familiar with EVI replacement packing. In short, there is simply no support for the plaintiff's assertion that Mr. Farrow was exposed to asbestos from packing or any product that EVI placed in the stream of commerce.

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[1] In the plaintiff's opening brief, at page 5, she misleadingly states that EVI, through its corporate representative, Jim Tucker, admitted that it sold replacement packing. She failed to mention, however, that 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.. While EVI occasionally offered replacement packing for sale to customers who requested it, there is no evidence that the Navy ever bought replacement packing from EVI or that Mr. Farrow was exposed to any EVI replacement packing.

Instead of pointing to admissible evidence that Mr. Farrow was exposed to asbestos from an EVI product, the plaintiff distorts the record by suggesting that EVI admitted these propositions in its original motion for summary judgment. This is not true. In its motion for summary judgment EVI said that the trial court could assume for purposes of considering the motion two non-controversial propositions: "(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." CP 13. The purpose of identifying these assumptions was to focus the court on the critical evidence missing from the plaintiff's case—namely, whether any of the original asbestos-containing materials still remained in the valves when Mr. Farrow worked on them.

Because there is no evidence for this fundamental part of the plaintiff's claim, she rewrites the propositions in EVI's motion and insists that Mr. Farrow worked with so many Edward valves that it is fair to guess that some of them must have included original asbestos materials. Citing a dictionary she says that the word "some" as used in EVI's motion for summary judgment means "a certain unspecified (but often considerable) number" (underlining added by the Plaintiffs). (App. Br. at

41). She then argues that EVI admitted it "supplied an 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." (*Id.*).

Misconstruing the record does not create the missing evidence that plaintiff needs to support her claims. Nor does it give her license to fill in the gaps with guesswork. There is still no evidence that Mr. Farrow was ever exposed to any original asbestos-containing components in Edward valves. Her claims therefore fail as a matter of law.

4. The *Hash* decision does not relieve the plaintiff of her burden of producing evidence supporting each element of her claim.

Perhaps recognizing that there is no evidence that Mr. Farrow was exposed to asbestos from an EVI product, the plaintiff compounds her error by misreading the Washington Supreme Court's decision in *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 100 Wn.2d 912, 757 P.2d 507 (1998). According to the plaintiff, *Hash* allows a plaintiff to avoid summary judgment, without ever producing evidence to support her claim, if the defendant cannot disprove the plaintiff's case and leaves open the

possibility that the defendant's conduct could have caused the plaintiff's injury. (App. Br. at 42-44). Nothing in *Hash* supports this contention.

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. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21-23, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993) (explaining that *Young* by adopting the U.S. Supreme Court's decision in *Celotex* provided an alternative method for summary judgment because a "complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"). The defendant in *Hash* moved for summary judgment under the first method. 100 Wn.2d at 913-14; *see also Guile*, 70 Wn. App. at 21-23. While the court ultimately found that its evidence was insufficient to disprove an essential element of the plaintiff's claim, it never said that a plaintiff confronted with a motion based on the second method could avoid summary judgment without coming forward with evidence. *Hash*, 100 Wn.2d at 916.

In *Hash* a child who broke his leg during physical therapy in a hospital sued the hospital. *Id.* at 913. The hospital moved for summary judgment on the issue of causation. The supporting affidavits, however, failed because they said little more than that the plaintiff's injuries could

have occurred even in the absence of negligence. *Id.* at 913-14. Because the affidavits left open the possibility that the injuries were in fact caused by the hospital, the court found that summary judgment was improper. *Id.* at 916. As the court explained, "We find it impossible to uphold a ruling that there is no genuine issue as to any material fact when the record contains all questions and no facts." *Id.*

Hash's logic does not apply, however, where a defendant's motion for summary judgment is based on a failure in the plaintiff's proof. When a plaintiff is confronted with such a motion, she must come forward with evidence for her claim in order to show that a fact question exists. In the absence of such evidence, the defendant is entitled to summary judgment because no issues of fact remain. *See Guile*, 70 Wn. App. at 23, 27. Nothing in *Hash*, or any other case, permits a case to go to the jury on a whim and a prayer. *Boguch*, 153 Wn. App. at 610-11; *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962) ("[A] jury will not be allowed to resort to conjecture to determine the facts").

C. Melvin Wortman's deposition testimony, given in another case in which EVI had no involvement, is hearsay, lacks foundation, and cannot defeat EVI's motion for summary judgment.

Throughout the course of this litigation the plaintiff has never pointed to any admissible evidence that Mr. Farrow was exposed to asbestos from an EVI product. Instead, she tries to create a fact question

out of whole cloth by using a deposition from a different case, that EVI did not know about, and that EVI did not attend, in which the deponent, Mr. Wortman, testified that he had never heard of EVI or Mr. Farrow. CP 205. How this testimony permits the inference that Mr. Farrow was exposed to asbestos from an EVI product is anybody's guess. Yet the plaintiff would have this court hold that Mr. Wortman's testimony is admissible in perpetuity against all defendants, regardless of whether they had ever heard of him or his deposition. There is no justification for such a sweeping denial of the absent defendants' due process rights and the plaintiff offers none.

Mr. Wortman was deposed in an asbestos products liability case captioned *Nelson v. Buffalo Pumps, Inc.* in April 2009. CP 201. EVI was never a party to this case, never given notice of the deposition, and never had the opportunity to cross-examine Mr. Wortman. Because Mr. Wortman is now deceased, EVI will never have the opportunity to cross-examine him.

Mr. Wortman was not designated as an expert. CP 1244-45. He worked at PSNS for 35 years, and acted as a machinists' superintendent from approximately 1966 until 1976. CP 1210. While he estimated that "[a]pproximately 50 percent of the replacement parts obtained by PSNS between the 1967 to 1971 time period" came from the original

manufacturer, CP 1213, the record shows that he lacked personal knowledge to support that assertion. Mr. Wortman testified that he had never heard of EVI or Mr. Farrow. CP 205. He never worked in PSNS's supply department and never had any responsibilities for the acquisition of materials. CP 213. He had nothing to do with purchases at or for PSNS. CP 222. He has never reviewed any invoices or purchase orders of any government documentation to any manufacturer of any equipment requesting replacement gaskets or packing. CP 217.

Mr. Wortman's testimony was taken in another lawsuit in which EVI was not a party, the plaintiff claims that it is admissible under ER 804(b)(1), which excludes from the hearsay rule the deposition testimony of an unavailable witness if the party against whom it is offered or its predecessor in interest had the opportunity and motive to develop the witness's testimony. *See Acord v. Pettit*, 174 Wn. App. 95, __ P.3d __ (2013) (finding that predecessor in interest must have had the opportunity and like motive to develop the testimony of the witness as to same material facts as present party). Because none of the equipment manufacturers at Mr. Wortman's deposition shared EVI's motive to discredit Mr. Wortman as a witness whose testimony might show that EVI supplied replacement parts to the Navy, none qualified as EVI's predecessor in interest under the rule. In fact, the other equipment

manufacturers, each hoping to spread liability to as many parties as possible, had a motive to show that EVI sold replacement parts to the Navy. This motive is directly the opposite of EVI's desire to exonerate itself. For this reason, Mr. Wortman's testimony cannot qualify for admission under ER 804(b)(1). *See New England Mut. Life Ins. v. Anderson*, 888 F.2d 646, 652 (10th Cir. 1989) (test not met where prior defendant's counsel "was simply not disposed to protect [the current party's] interests in his examination of the witness as he sought to protect his client); *Rich v. Kaiser Gypsum Co., Inc.*, 103 So. 3d 903, 910 (Fl. Dist. Ct. App. 2012) ("an entirely different product in a products liability case is the type of distinction that would preclude similar motive of witness examination"); *see also Acord*, 174 Wn. App. at 101 (test met where prior defendant had developed testimony as to boundary at issue in current lawsuit in course of examining witness about same fence at center of both adverse possession lawsuits).

The plaintiff nevertheless argues that Mr. Wortman's testimony should be admissible against EVI because other parties who attended Mr. Wortman's deposition adequately questioned him about the Navy's acquisition of replacement parts. To support this argument, the plaintiff makes much of the fact that EVI's counsel stated that if he had attended the deposition he likely would not have asked Mr. Wortman further

questions after Mr. Wortman admitted that he did not know EVI. The plaintiff misconstrues this statement as proof that EVI's interests were fully protected by those present at the deposition when it actually proves only that Mr. Wortman knew nothing about EVI. Plaintiff's argument that Mr. Wortman's ignorance of EVI somehow supports the admission of his testimony makes no sense at all. His testimony is hearsay that does not qualify for admission under 804(b)(1).

Even if it were not hearsay, Mr. Wortman's testimony would still be inadmissible because the plaintiff cannot show that he had personal knowledge to support his assertions. ER 602 requires that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Here, the plaintiff has not, and cannot, make such a showing. While Mr. Wortman claimed that the Navy purchased 50 percent of its replacement parts from the original vendor, there is nothing in the record to show that he had personal knowledge to support his claim. He never had any responsibilities for the acquisition of materials. CP 213. He had nothing to do with purchases. CP 222. He never reviewed any invoices or purchase orders. CP 217. And he had never even heard of EVI. CP 205.

The trial court's holding that Mr. Wortman's testimony could not be offered against EVI should therefore be affirmed.

D. The plaintiff's attorneys never issued a style notice that would have given EVI an opportunity to examine Mr. Wortman before his testimony was offered against it.

The King County Asbestos "Style" Order rules create a simple procedure for asbestos litigants who want to use a deposition from one case in other cases against absent parties. To ensure fairness to all parties "who are intended to be bound" by the deposition, the rule says that the party must serve a "style notice" and pre-deposition statement describing the subject matter and substance of the anticipated testimony to those parties whom the proponent intends to bind with the testimony. CP 1907, 1931 (¶5.6(d)(7)); 1/7/2013 RP 19. If a party follows this mechanism, and the style notice is properly served, then the deposition may be used in other cases. Style Order rules apply to cases filed by named law firms, including the firm representing the Farrows. *See* CP 1928.

In her brief the plaintiff argues that Mr. Wortman's testimony should be admissible against EVI notwithstanding that her counsel did not follow the style notice procedure. She argues that the rule should be disregarded because it somehow conflicts with ER 804(b)(1). She also argues that the rule should not apply because Mr. Wortman's deposition in the Nelson case was noticed by a defendant rather than her attorneys. These arguments miss the point.

The style notice procedure does not conflict with ER 804(b)(1). Rather, it works in tandem with ER 804(b)(1) by providing a mechanism through which a deposition can be used in multiple cases while simultaneously ensuring that litigants have a full and fair opportunity to examine a witness before his testimony can be offered against them. If the plaintiff's counsel had served EVI with a style notice before Mr. Wortman's deposition, EVI could have cross-examined Mr. Wortman and the admissibility of his deposition might have been mooted. Their failure to do so however, hardly means that the King County rule conflicts with 804(b)(1) or that Mr. Wortman's testimony can now be offered against EVI.

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.). The court should reject the plaintiff's attempt to use testimony against those who

never had an opportunity to examine Mr. Wortman due to the plaintiff's omission.

E. 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.

If the plaintiff's position is accepted and Mr. Wortman's testimony is allowed against EVI, it would set new and dangerous precedent for asbestos litigation in this state. Such a holding would allow future plaintiffs to admit Mr. Wortman's testimony against essentially anyone for any purpose for all time. Mr. Wortman testified that he never heard of EVI. He is now deceased, and EVI never had an opportunity to question him. If his testimony can be offered against EVI to somehow show that EVI supplied replacement parts to the Navy or PSNS, it follows that there are essentially no limits on the admissibility of his testimony so that it can be offered against anyone (regardless of whether they ever had a chance to question him) for any purpose (regardless of whether he knows anything about them) for all time (and he can never be cross examined). The hearsay rule safeguards minimum due process rights for litigants. Adopting the plaintiff's position in this case would eliminate those safeguards for EVI and countless future litigants.

F. Even if admitted, Mr. Wortman's testimony fails to create an inference that Mr. Farrow was exposed to a replacement part from EVI, and therefore summary judgment should be affirmed.

Even if Mr. Wortman's testimony is deemed admissible under ER 804(b)(1), it is still insufficient to show that Mr. Farrow was exposed to asbestos from a product that EVI placed in the stream of commerce.[2] At best, his testimony stands for no more than the proposition that the Navy started buying 50 percent of some replacement parts from some original equipment manufacturers at PSNS in 1967. CP 1213. There is nothing to show that Navy purchased any replacement parts form EVI. Indeed, Mr. Wortman admitted that he never heard of EVI.

> Q: Let me ask you the names of some valves and see if they sound familiar to you okay?
>
> A: Yes.
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> * * *
>
> Q: Edward Valves?
>
> A: No.

[2] The plaintiff's suggestion that EVI has conceded that Mr. Wortman's testimony would create a fact issue is false and misleading. (App. Br. at 16 n.10, 40). EVI has consistently maintained that Mr. Wortman's testimony does not prove Mr. Farrow was exposed to an asbestos-containing part from EVI. CP 603. EVI's assertion, "other than the Wortman testimony, there is no evidence or admission [of exposure attributable to EVI]," was intended to highlight that the Wortman testimony was the only evidence the plaintiff offered to support her case and that no further evidence had been presented to defeat summary judgment.

CP 205. His testimony therefore says nothing about whether EVI supplied replacement parts to the Navy or whether Mr. Farrow was exposed to any EVI products.

Even when combined with all the other evidence in the record, and even when every inference is drawn in the plaintiff's favor, Mr. Wortman's testimony does not show that Mr. Farrow was exposed to asbestos from an EVI product. At best, the evidence shows that EVI's metal valves were at PSNS and that Mr. Farrow was exposed to asbestos-containing products attached to those valves. There is no evidence, however, to show that EVI placed any of those asbestos products in the stream of commerce. And Mr. Wortman's testimony does not change this fact.

The plaintiff cites *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052, *rev. denied*, 172 Wn.2d 1015 (2011), as purported support for her contention that Mr. Wortman's testimony establishes a fact question that precludes summary judgment. The case, however, does no such thing. In fact, contrasting the facts in *Morgan* to those here neatly demonstrates what is missing from the plaintiff's case and why the trial court properly granted EVI's motion. In *Morgan*, the court found that the plaintiff's asbestos related claims survived summary judgment because "*the combined testimony of various witnesses*" created a triable issue "that

[the plaintiff] was exposed to asbestos originally contained in products supplied by Respondents or asbestos in replacement products supplied by Respondents." *Id.* at 736-39 (emphasis added). That testimony included not just Mr. Wortman's testimony but an abundance of evidence that simply does not exist in this case.

For example, in *Morgan*, a co-worker specifically testified that he observed the plaintiff working with the internal components of *new* and old valves. *Id.* at 724, 732, 746, 738 n.16, 741.[3] Here, nobody has ever testified that Mr. Farrow or anyone in his presence worked with the internal components of new valves. In *Morgan*, all of the defendants other than Warren Pumps admitted that they supplied asbestos-containing replacement parts to the Navy or PSNS. *Id.* at 736. Here, EVI has never made such an admission. And in *Morgan*, the plaintiff offered testimony from Mr. Wortman[4] and coworker Jack Knowles specifically identifying Warren Pumps. CP 1211. Here, the plaintiff offered testimony from Mr. Wortman specifically saying that he had never heard of EVI. CP 205. In

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[3] For example, the *Morgan* court found that a material issue of fact was created for defendant DeLaval by testimony from co-worker Jack Knowles, who responded "yes" when asked "Do you recall seeing other people work with packing in Mr. Morgan's presence on brand-new DeLaval pumps." *Id.* at 738 n.16.

[4] In *Morgan*, the court never considered whether Mr. Wortman's testimony is admissible against parties who were not present at his deposition. The court expressly found that any objection to the admissibility Mr. Wortman's testimony was not preserved for appeal so it never reached the question. *Morgan*, 159 Wn. App. at 733 n.11.

other words, the plaintiff in *Morgan* survived summary judgment because he did exactly what the plaintiff in this case has failed to do, offer admissible evidence showing exposure to asbestos material that the defendants placed in the stream of commerce. *Id.* at 736.

The trial court properly granted EVI's motion for summary judgment. The motion explained that there is no admissible evidence showing that Mr. Farrow was exposed to asbestos material from an EVI product, and the plaintiff offered no evidence to rebut this fact. Instead, she asks this court to deny EVI's due process rights and hold that out-of-court testimony from a deceased witness who never heard of EVI and who EVI never had an opportunity to cross-examine can be offered against it.

Even with Mr. Wortman's testimony, though, the record in this case is devoid of evidence that Mr. Farrow was exposed to a replacement part, or any other part, from EVI. The plaintiff asks the Court to shift the burden of proof to EVI to fill the gaps in her case. But, it is not EVI's job to prove her case. Because the plaintiff cannot prove her case, the trial court's ruling in favor of EVI should be affirmed.

V. CONCLUSION

For the foregoing reasons, the trial court's judgment and order granting summary judgment in favor of respondent Flowserve US Inc., solely as successor to Edward Valves, Inc., was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of July, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 29th day of July, 2013, at Seattle, Washington.

Carrie A Custer
Carrie A. Custer, Legal Assistant