

No. 43941-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY,

Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant-Respondent.

BRIEF OF APPELLANTS

Matthew P. Bergman, WSBA #20894
Vanessa J. Firnhaber Oslund, WSBA #38252
Bergman Draper Ladenburg, PLLC
614 First Avenue, Fourth Floor
Seattle, WA 98104
(206) 957-9510

John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544
Phillips Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
(206) 382-6163

Counsel for Plaintiffs-Appellants

FILED
COURT OF APPEALS
DIVISION II
2013 FEB 22 PM 1:24
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 22 PM 4:30

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR.....2

III. STATEMENT OF THE CASE2

 A. Procedural History.....2

 B. Factual Background.....4

 1. Mr. Kennedy Was Exposed to Asbestos on the
 FMS-789 During a Major Overhaul
 Conducted by Tacoma Boat.7

 2. Mr. Kennedy Was Exposed to Asbestos
 Material Obtained from Tacoma Boat When
 He Worked on a Boiler Insulation Project on
 the FMS-6.....9

 3. Mr. Kennedy Was Exposed to Asbestos
 Material Obtained From Tacoma Boat When
 He Repaired Insulation on the ST-2104.....13

 4. Tacoma Boat Had a Smaller Operation on
 Pier 23 Where It Was Overhauling Two Old
 Victory Ships in the Mid-1960s.14

 5. The Asbestos Material that Mr. Kennedy
 Obtained from Tacoma Boat and the Asbestos
 Material Used by Tacoma Boat in Its
 Overhaul Operations at Pier 23 Was All
 Supplied by Tacoma Asbestos.15

IV. ARGUMENT22

 A. Standard of Review and Summary Judgment
 Standards.22

B. A Jury Can and Should Reasonably Find that Mr. Kennedy Was Injured by Exposure to Asbestos Supplied and/or Applied by Tacoma Asbestos.23

1. Circumstantial Evidence that Mr. Kennedy Was Exposed to Tacoma Asbestos' Asbestos-Containing Products Is Sufficient to Prove His Exposure.....23

2. It Is Reasonable to Infer that the Asbestos Products at Issue Were Supplied and/or Applied by Tacoma Asbestos.....25

3. Applying the *Lockwood* Factors and Based on the Record, the Summary Judgment Should Be Reversed and the Case Should Be Remanded for Trial.29

V. CONCLUSION33

TABLE OF AUTHORITIES

Washington Cases

<i>Allen v. Asbestos Corp., Ltd.</i> , 138 Wn. App. 564, 157 P.3d 406 (2007).....	passim
<i>Berry v. Crown Cork & Seal Co., Inc.</i> , 103 Wn. App. 312, 14 P.3d 789 (2000).....	passim
<i>Lockwood v. AC&S</i> , 109 Wn.2d 235, 744 P.2d 605 (1987).....	passim
<i>Morgan v. Aurora Pump Co.</i> , 159 Wn. App. 724, 248 P.3d 1052 (2011).....	24
<i>Sedwick v. Gwinn</i> , 73 Wn. App. 879, 873 P.2d 528 (1994).....	22
<i>Soproni v. Polygon Apartment Partners</i> , 137 Wn.2d 319, 971 P.2d 500 (1999).....	22
<i>White v. Kent Medical Center, Inc.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	31

Non-Washington Cases

<i>Petrina v. Allied Glove Corp.</i> , 46 A.3d 795 (Pa. 2012)	29
---	----

Other Authorities

Ronald F. Dodson & Samuel P. Hammar, ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY AND HEALTH EFFECTS 360 (2006)...	4
--	---

Court Rules

CR 56(c).....	22
CR 56(h)	3
CR 7(b)(1).....	31

I. INTRODUCTION

Jack Don Kennedy is dying from mesothelioma, a fatal cancer to the lining of the lung that is caused by asbestos exposure. He and his wife sued Saberhagen Holdings, Inc. (“Saberhagen”) claiming that his exposure to asbestos that Saberhagen supplied and used on ships where he worked at Pier 23 on the Tacoma waterfront as a full-time employee of the National Guard between 1964 and 1968 caused his illness. Saberhagen obtained summary judgment on the ground that Mr. Kennedy failed to present sufficient evidence from which a jury could reasonably find that he was exposed to asbestos supplied and used by Saberhagen’s predecessors in interest which operated under the name Tacoma Asbestos Company (“Tacoma Asbestos”). As detailed below, because Mr. Kennedy has presented extensive and uncontradicted evidence from which a jury could reasonably find that Tacoma Asbestos supplied the asbestos to which he was exposed during his work at Pier 23, the Superior Court erred by granting summary judgment. Accordingly, this Court should reverse the Superior Court’s summary judgment and remand for trial.

II. ASSIGNMENT OF ERROR

The Superior Court erred in entering its order dated August 3, 2012, CP 950-951, as amended on August 31, 2012, which granted summary judgment to Saberhagen. The Court should answer two questions relating to this error:

1. Did Mr. Kennedy present evidence from which a jury could reasonably find that he was exposed to asbestos during his work as a full-time employee of the National Guard at Pier 23 at the Port of Tacoma from 1964 to 1968?

2. Did Mr. Kennedy present evidence from which a jury could reasonably find that the source of the asbestos he describes to which he was exposed when he worked at Pier 23 from 1964 to 1968 was asbestos supplied and/or applied by Saberhagen's predecessors in interest which operated as Tacoma Asbestos Company?

III. STATEMENT OF THE CASE

A. Procedural History.

Jack Don Kennedy and his wife, Sandra Kennedy, filed their Complaint against Saberhagen on January 11, 2012, claiming that his mesothelioma was caused by workplace exposure to Tacoma Asbestos Company's asbestos products when he was employed by the National

Guard from 1964 to 1968, working on the Tacoma waterfront, and that Saberhagen is liable for his injuries based on negligence, strict products liability, and other grounds. CP 1-5. On July 6, 2012, Saberhagen moved for summary judgment. CP 17-135. On July 23, 2012, the Kennedys opposed Saberhagen's motion. CP 136-730. On July 30, 2012, Saberhagen filed a reply in support of summary judgment. CP 918-933.

On August 3, 2012, after oral argument, the Superior Court issued an order that denied Saberhagen's motion to strike documents submitted by the Kennedys in opposition to summary judgment, and granted Saberhagen's motion for summary judgment. CP 950-951. The Superior Court's order failed to identify documents or evidence it relied on in reaching its decision, contrary to CR 56(h)'s requirement that any order of summary judgment "*shall* designate the documents and other evidence called to the attention of the trial court before the order was entered." CR 56(h) (emphasis added).

On August 10, 2012, Saberhagen filed a written request with the Superior Court asking it to amend the summary judgment order by identifying the documents and evidence on which it relied, as required by CR 56(h). CP 1082. On August 31, 2012, the Superior

Court issued an amended judgment that identified the documents and evidence relied upon. CP 1083-1086. On September 13, 2012, less than two weeks later, Plaintiffs timely appealed.¹ Saberhagen has not cross-appealed the Superior Court's denial of its motion to strike documents submitted by the Kennedys in opposition to summary judgment.

B. Factual Background.

Mr. Kennedy is a 76-year-old Puyallup resident who is dying from mesothelioma, a terminal cancer caused by asbestos exposure. CP 2; CP 1095-1096. Mesothelioma is a signature disease for asbestos exposure; the very diagnosis indicates that the victim has been exposed to respirable asbestos.² He was exposed to asbestos during his work on ships at Pier 23 at the Port of Tacoma from 1964 to 1968 where he was as a full-time employee of the National Guard at its marine operation there. CP 206-207; CP 215.

¹ Saberhagen's challenge to the timeliness of this appeal was denied by the Commissioner on November 6, 2012. That ruling was affirmed by this Court on February 6, 2013.

² Ronald F. Dodson & Samuel P. Hammar, ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY AND HEALTH EFFECTS 360 (2006).

Mr. Kennedy's only significant exposure to asbestos occurred during his work in the National Guard at Pier 23.³ After starting his service for the Guard in 1954 as a reservist, CP 199, he switched to full-time employment in 1958. CP 205. In 1964, he was assigned to the Guard's operation at Pier 23 at the Port of Tacoma. CP 215. He worked at Pier 23 until 1968, when he was reassigned to Camp Murray near Fort Lewis. CP 207-208.

At Pier 23, the Guard maintained an inventory of ships and barges, and Mr. Kennedy's unit was tasked with maintaining these vessels. While Mr. Kennedy's specialty was electrical work, he and his co-workers "crossed over" trade lines and did "whatever was necessary" to keep the vessels running. CP 233. Thus, Mr. Kennedy did not just do electrical work; he performed any needed maintenance on the vessels, including the maintenance and repair of asbestos-containing insulation.

The asbestos to which Mr. Kennedy was exposed during his work at Pier 23 included asbestos he personally handled in the course

³ Mr. Kennedy may have been exposed to small amounts of asbestos when he served at Camp Murray in the early 1970s, but the exposure, if any, was relatively minimal and very brief and does not compare to his substantial exposure at Pier 23. CP 431-432.

of his work. *See, e.g.*, CP 208, 236-238, 241-242, 288-289, 315-317, 401, 439-442, 443-444, 445-448. It also included asbestos in areas where Tacoma Boatbuilding Company (“Tacoma Boat”) and other workers were installing or maintaining asbestos-containing insulation and other asbestos products, or had recently done so. *See, e.g.*, CP 239-243, 246, 321-323, 334-335, 344-345, 407-408.

Mr. Kennedy presented extensive evidence demonstrating that a substantial portion of the asbestos to which he was exposed at Pier 23 came from asbestos material that he obtained directly from Tacoma Boat and personally handled, and from asbestos dust to which he was exposed as a bystander during Tacoma Boat’s operations on a vessel at Pier 23. *See, e.g.*, CP 236-237, 239-240, 242, 288, 317, 321-322, 334-335, 400-404, 407-408, 443-444. Mr. Kennedy also presented evidence that Saberhagen’s predecessors in interest, operating under the name Tacoma Asbestos, were the *exclusive supplier* of asbestos products to Tacoma Boat in the 1960s and the *exclusive asbestos insulator* used by Tacoma Boat during those years.⁴ Mr. Kennedy

⁴ *See, e.g.*, CP 684 & 691-692 (trial testimony by a 30-year Tacoma Asbestos employee stating that Ted Boscovich “worked at Tacoma Boat roughly 20 or 25 years” and obtained insulation for Tacoma Boat, that Ted Boscovich was the brother of George Boscovich, and

thus presented evidence of his extensive exposure to asbestos from Tacoma Boat, whose exclusive supplier and asbestos insulator was Tacoma Asbestos, Saberhagen's predecessor.

1. Mr. Kennedy Was Exposed to Asbestos on the FMS-789 During a Major Overhaul Conducted by Tacoma Boat.

One of the vessels in the National Guard's inventory at Pier 23 when Mr. Kennedy began there in 1964 was a floating machine shop ("FMS"), the FMS-789. Mr. Kennedy was exposed to asbestos on this vessel as a bystander in 1966 during a major overhaul performed by insulators and other personnel working for Tacoma Boat. Workers dispatched by Tacoma Boat did their work on the vessel at Pier 23. CP 238-240, 321-322. The project included extensive repair and installation of pipe insulation and took about 45 days. CP 239-240, 325. Mr. Kennedy and his fellow guardsmen were on and off the FMS-789 during that time to remove equipment from the vessel and obtain materials they needed. CP 239-240; CP 407-408.

that Ted Boscovich "g[ot] the insulating materials for use at Tacoma Boat" from "Tacoma Asbestos Company"); CP 469-470 (testimony by George Boscovich stating that he, Ed Saberhagen, and Charles Brower were the partners and co-owner of Tacoma Asbestos); CP 677-678 (testimony by another Tacoma Asbestos employee stating that in the 1960s, Tacoma Asbestos "did all the work for Tacoma Boat").

Mr. Kennedy's co-worker, Richard Elmore explained the work done by Tacoma Boat personnel on the FMS-789:

Q: So did you have an opportunity to observe the Tacoma Boat personnel working below deck, sir?

A: Yes, I did.

Q: What kinds of things did you see them doing, sir?

A: They were preparing any of the insulation that had been broken in the engine room or the working areas. They were in there doing the same thing we had done only they were in there taking, you know, removing the loose stuff and retighten in the same way we had done it.

Q: Did you see them applying new insulation materials?...

A: Yes, I did....

Q: Did you observe Mr. Kennedy onboard the vessel while the Tacoma Boat personnel were working on it?...

A: Yes, he was because he had – was in charge of the electrical, so they had an electrical department down there.

CP 239-240.

Mr. Kennedy had similar recollections regarding the asbestos work that Tacoma Boat performed on the FMS-789:

Q: Is there any other aspect of their work that you can recall being done by Tacoma Boat on the FMS-789, at this time other than the removing of the carpenters' shop because it wasn't needed?

A: Well, they had to do some asbestos repair on the boiler pipes. I'm not sure what all they had to do or something, but they did quite a bit.

CP 408.

2. Mr. Kennedy Was Exposed to Asbestos Material Obtained from Tacoma Boat When He Worked on a Boiler Insulation Project on the FMS-6.

Mr. Kennedy was also exposed to asbestos during a boiler insulation project on the FMS-6, which was the floating marine shop that replaced the FMS-789. When the FMS-6 arrived in the mid-1960s, it was in poor condition. CP 241. In particular, the insulation on the boiler needed to be completely replaced. *Id.* While it was their normal practice to obtain supplies through National Guard supply channels, on this particular boiler job, the Guard personnel sought the material from Tacoma Boat which had available asbestos product in a temporary building nearby. CP 241-242, 288-289, 439-444, 446-447. Tacoma Boat was in the area because at the time of the FMS-6 boiler project, Tacoma Boat was overhauling World War II Victory ships on the other side of Pier 23. CP 242; *see also* CP 610-611 (testimony by

Tacoma Boat employee confirming that during that period, Tacoma Boat overhauled Victory ships at piers away from its main shipyard).

Mr. Kennedy testified that he and his supervisor walked over to the Tacoma Boat building and obtained asbestos-containing material for the boiler work. CP 401-402. This asbestos product from Tacoma Boat was in a bag labeled "Johns Manville." CP 402. Mr. Kennedy testified:

Q: Did you personally . . . ever get an asbestos-containing product from some source other than through Mr. Coleman?

A: Yes.

Q: When did you personally do that?

A: That's – the first time, we was on the – working on the boiler on the FMS-6, and we ran out and didn't have enough to finish the job.

Q: Now, again, you said – sorry to interrupt, but you mentioned "we" and so forth, we did this. I'm just focusing now on you, your knowledge and what you were doing.

A: That's right, that's what I was doing. So then I went to the supervisor, so he went down to Tacoma Boat and talked to them. . . . After he got – made the arrangements, then he took me down there and introduced me to – I can't remember the names or anything, but anyway, a Tacoma Boat representative about acquiring some asbestos.

Q: So. Mr. Coombs told you that he was going to try and get some materials from Tacoma Boat, correct?

A: Yes.

Q: And then after what you understand him having some contact with Tacoma Boat, then the two of you went at picked up some material, some asbestos from Tacoma Boat?

A: Yes, One bag of asbestos. . . .

Q: And that was on the FMS-6?

A: Yes.

CP 401. Mr. Elmore's recollection is quite similar:

Q: Where did the insulation that you installed on or near the boiler [on the FMS-6] come from, sir?...

A: It came from Tacoma Boat. They were across the pier working on those victory ships at that time...And so in this particular case there was a fellow by the name of John Coombs who was one of the supervisors there had made the decision and he had gone over and probably traded something – some of our work. Like, we would do a lot crane work from them... It was trading back and forth, so he probably went over – I know that they went over, and I know that Jack went over and got the insulation and brought it back, and that's what we used down at – to insulate this boiler once again.⁵

⁵ CP 242.

* * *

Q: How do you know that Mr. Kennedy went to Tacoma Boat and picked up some insulation and brought it aboard?

A: Because I remember him stepping off the boat in his blue coveralls and walking up the pier and getting the items accompanied by Mr. Coombs ...

Q: So you recall Mr. Kennedy coming off a boat with the –

A: Off the FMS, going down the pier and actually picking up one bale of the insulation and bringing it back aboard.

CP 288. Both men recall that this insulation product came in forty to fifty pound paper bags that had the word “asbestos” on them. CP 242, 402, 442. Mr. Kennedy also remembered that the bag said “Johns Manville.” CP 402.

The job reinsulating the boiler on the FMS-6 was the biggest job involving asbestos in which Mr. Kennedy was ever personally involved. CP 445. After removing the old damaged insulation, the men poured the powdered asbestos cement from the bags that they obtained from Tacoma Boat into buckets and added water to make insulating asbestos cement. CP 242. They then applied the asbestos cement to the boiler with their bare hands. CP 447.

**3. Mr. Kennedy Was Exposed to Asbestos Material
Obtained From Tacoma Boat When He Repaired
Insulation on the ST-2104.**

Mr. Kennedy was also exposed to asbestos from Tacoma Boat when he repaired insulation on a small tug boat, the ST-2104, at Pier 23 in the mid-1960s. Again, he obtained the asbestos cement material from Tacoma Boat. CP 444, 448-450. He testified:

Q: [Y]ou've mentioned that one of these three occasions when you went and you got some insulation material from this [Tacoma Boat] building – did I understand you to say that one of those occasions had to do with doing some work on one of the tugs?

A: Yes.

Q: Okay. And what work was being done on the tugs that required you to go and get this material?

A: Well, right underneath the pilot house was the crews' quarters, and all they had down there was a head and two – I think they had two double bunks down there for the crews' quarters, and the heating unit down there, you know, was just a thin heating unit, and where the pipe was next to the deck, it had been kicked a few times or something bumped against it and knocked the insulation loose, so I had to cut off a section of half round and patch that up and mix up some it – the paste and slap it back on and wrap cheesecloth around it to seal the joints.

* * *

Q: So you mentioned that you had to go get some material from this TB [Tacoma Boat] building?

A: Yeah...Like I said I just went down there and I asked them – And they said, “What are you doing now,” or whatever, you know, and I told them, I says, “Well, you don’t need a full bag,” or something to that effect or something anyway, and so he gave me – an open bag...

CP 449. Mr. Elmore reinforced Mr. Kennedy on this point as well, testifying that “Mr. Kennedy worked on [the ST-2104]” and that the small tug had piping that “had to be insulated.” CP 245-246.⁶

4. Tacoma Boat Had a Smaller Operation on Pier 23 Where It Was Overhauling Two Old Victory Ships in the Mid-1960s.

Although Tacoma Boat’s main shipyard was located some distance away, Tacoma Boat had a smaller operation on Pier 23 during the relevant time period where it was overhauling two WWII-era Victory ships in the mid-1960s. CP 240. Mr. Elmore recalled that Tacoma Boat had a trailer and lean-to set up on the Pier relating to its work on the Victory ships. CP 288. Mr. Kennedy similarly testified that Tacoma Boat had a temporary office or portable unit at the base

⁶ Mr. Kennedy also recalled obtaining a third bag of asbestos cement from Tacoma Boat on another occasion, but he did not remember what use he made of that asbestos material. CP 450.

of the Pier from which he obtained the asbestos cement material from Tacoma Boat. CP 402. Thus, during the relevant period, the National Guard and Tacoma Boat were located on the west and east sides of Pier 23, respectively, working on their respective vessels.⁷

5. The Asbestos Material that Mr. Kennedy Obtained from Tacoma Boat and the Asbestos Material Used by Tacoma Boat in Its Overhaul Operations at Pier 23 Was All Supplied by Tacoma Asbestos.

The record demonstrates that Tacoma Asbestos was the *exclusive supplier* of asbestos products and asbestos insulation contractors to Tacoma Boat in the 1960s. Thus, the asbestos that Mr. Kennedy obtained from Tacoma Boat and handled during his work on the FMS-6 and ST-2104, *see* Sections III. B. 2 & 3, above, and the asbestos materials and insulation contractors used by Tacoma Boat in

⁷ Much of the debate below concerned whether Mr. Kennedy's exposure to asbestos dust he encountered on another vessel, the FS-313, was attributable to work done by Tacoma Boat using asbestos materials supplied by Tacoma Asbestos. In light of Mr. Kennedy's testimony on the second day of his deposition that he was mistaken in his original belief that the insulation work on that vessel occurred at Tacoma Boat's shipyard, *see* CP 226, he does not allege that exposure as a basis for this appeal. The law is clear, however, that when there are multiple exposures, a plaintiff is entitled to recover from each defendant whose asbestos was a substantial factor in causing his disease. *See* Sections IV. B. 1 & 3, below.

its overhaul of the FMS-789 where Mr. Kennedy worked, *see* Section III. B. 1, above, were all supplied by Tacoma Asbestos.

Tacoma Asbestos was an insulation supplier and contractor in the Tacoma area from the 1940s until approximately 1976. CP 469-470. Its former president, George Boscovich, testified that Tacoma Asbestos supplied asbestos-containing insulation products and insulation contractors to Tacoma Boat. CP 492. Correspondence between Tacoma Asbestos and the Occupational Safety and Health Administration indicates that Tacoma Asbestos used asbestos-containing cements and other insulation until at least 1971. CP 594-595.

The record demonstrates that Tacoma Boat obtained from Tacoma Asbestos *all* of its asbestos-containing insulation products and insulation contractors in the relevant time period. Former Tacoma Boat employee, Dennis Legas, who worked at Tacoma Boat from 1966 to 1973, CP 605, testified that Tacoma Asbestos was the *only* insulation contractor he recalls ever working for Tacoma Boat:

Q: In the 1960s are you aware of any other insulation subcontractor besides Tacoma Asbestos doing insulation work at Tacoma Boat?

A: Was there other insulators in the yard? Not to my knowledge.

Q: Okay. And are you aware of any instances in the 1960s where Tacoma Boat hired insulators directly from the union as opposed to working through a subcontractor? . . .

A: No.

CP 637.

Likewise, Mr. Legas believed that Tacoma Asbestos was the only company that delivered insulation products to Tacoma Boat in the 1960s. CP 637. He especially recalled Tacoma Asbestos trucks delivering insulation products to Tacoma Boat near Pier 23, because his brother-in-law drove the Tacoma Asbestos truck. CP 621. Indeed, Mr. Legas recalled that there were three different types of trucks that made deliveries of asbestos materials to Tacoma Boat, and that *all* of them said "Tacoma Asbestos" on the side. CP 639.

David Hansen worked for Tacoma Boat throughout the 1960s, CP 651-652, and also remembered Tacoma Asbestos. He testified that Tacoma Asbestos was present at Tacoma Boat "definitely frequently," CP 668, and that during his entire 37 years at Tacoma Boat, Tacoma

Asbestos was the only insulation contractor he recalled doing work at Tacoma Boat sites. CP 668. Mr. Hansen also specifically recalled that a man named “Boscovich” ran the Tacoma Asbestos insulation crew. CP 667-668.

A former Tacoma Asbestos insulator, Charles Brands, testified that Tacoma Asbestos had the *exclusive* contract for providing insulation to Tacoma Boat:

Q: Did you work at Tacoma Boat during the decade of the 1960’s at all?

A: Yeah, I worked at Tacoma Boat quite a few times in and out. My boss – Tacoma Asbestos – See that’s all – *Until in fact last year, they did all the work for Tacoma Boat, all the insulating.*

Q: Do you remember specifically when during the 1960s you were at Tacoma Boat?

A: Oh, I was just in and out of there all the time. Whenever we ran out of the work, I’d go down there to fill in.

Q: How many times do you think you worked at Tacoma Boat during the 1960s, ballpark? ...

A: Oh, 50 times. I don’t know. It’s hard to say.

CP 677-678 (deposition of Charles Brands, taken on February 28, 1990, in *Brady v. Fibreboard Corp.*, Washington Superior

Court in and for Kitsap County, No. 89-2-01870-7) (emphasis added).

John Anderson, a 30-year employee of Tacoma Asbestos, CP 684, similarly testified that Ted Boscovich, a *Tacoma Boat* employee and the brother of the co-owner and partner of *Tacoma Asbestos*, George Boscovich, was always on site for Tacoma Boat, and that he, Ted Boscovich, always obtained Tacoma Boat's insulation products from his brother's company, Tacoma Asbestos:

Q: You mentioned Tacoma Boat. Can you tell us when you worked at Tacoma Boat Shipyard?

A: I can't give you a specific date. I worked for 30 years. Maybe they would call me down there for a month. Maybe they would call me down there for a week. I just – I just can't answer that. There was a person, an employer down there working steady. Whenever he needed extra help, he would call us. Can you get away from your job and go down and help Ted for a while? We would go down there. So we, its – after this many years, it's hard for me to remember exact dates at that plant.

Q: Who was Ted? Who was Ted that you mentioned?

A: *Ted Boscovich. He was an asbestos worker like myself and he worked at Tacoma Boat roughly 20 or 25 years.*

Q: *And what relation, if any, was he to George Boscovich?*

A: *He was his brother. They were brothers.*

Q: *And where did Ted Boscovich get the insulating materials for use at Tacoma Boat?*

A: *Tacoma Asbestos Company.*⁸

Q: Do you know whether that would have been true in the year 1967?

A: Oh, I'm sure, yes....

Q: Can you tell us what type of products, or what manufacturers of products would have been used in 1967 at Tacoma Boat?

A: I would say one of the three that we discussed, Philip Carey or *Johns Manville*⁹ or Pabco.

Q: And why do you say that sir?

A: Well, because I seen it – I seen it being used. I used it myself.

⁸ As noted, Ted Boscovich's brother, George Boscovich was also the President and co-owner of Tacoma Asbestos. CP 470-471. The other partners and co-owners of Tacoma Asbestos were Ed Saberhagen and Charles Brower. CP 469-470.

⁹ Mr. Anderson's testimony that Tacoma Asbestos supplied Tacoma Boat with Johns Manville asbestos products in 1967 is consistent with Mr. Kennedy's testimony that the sacks of asbestos cement material that he personally obtained from Tacoma Boat were "Johns Manville" asbestos, CP 402, and is also reinforced by a 1973 letter from Tacoma Asbestos to OSHA stating that by 1971, Tacoma Asbestos had started to phase out its use of "Johns Manville" asbestos products. CP 594.

CP 691-692 (trial testimony of John Anderson on February 21, 1989, in *Ness v. Celotex Corp.*, U.S. District Court for Western District of Washington at Tacoma, No. C87-404TB) (emphasis added).

Finally, Saberhagen admits it cannot controvert this evidence establishing that Tacoma Boat obtained *all* of its asbestos products and insulation contractors from Tacoma Asbestos during the period from 1964 to 1968 when Mr. Kennedy worked at Pier 23. As Saberhagen's CR 30(b)(6) representative conceded:

Q: So Saberhagen cannot say one way or the other whether Tacoma Asbestos or Brower supplied asbestos-containing products to Tacoma Boat in the 1964 to 1968 time period; is that correct?

A: I have seen nothing in the records I have reviewed to support or not support that.

Q: Okay. You just don't know?

A: I just don't know. . .

Q: Did Tacoma Asbestos contractors install asbestos-containing materials at Tacoma Boat between February 1964 and July 1968?

A: I don't know.

CP 724.

IV. ARGUMENT

A. Standard of Review and Summary Judgment Standards.

In reviewing summary judgment, this Court applies the same standard used in the Superior Court. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 324-25, 971 P.2d 500 (1999). Thus, the Court considers the record and all reasonable inferences therefrom in the light most favorable to the non-moving party, the Kennedys. *Id.* at 325. The summary judgment should be affirmed only if, drawing all reasonable inferences in the Kennedys' favor, the Court concludes that there are no genuine issues of material fact and that the moving party, Saberhagen, is entitled to judgment as a matter of law. CR 56(c); *see Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994) (reversing summary judgment, holding that circumstantial evidence and reasonable inferences therefrom created material issue of fact). The Court must reverse the Superior Court's summary judgment "if the evidence could lead reasonable persons to reach more than one conclusion." *Soproni*, 137 Wn.2d at 325.

B. A Jury Can and Should Reasonably Find that Mr. Kennedy Was Injured by Exposure to Asbestos Supplied and/or Applied by Tacoma Asbestos.

The record in this case is replete with evidence from which a jury can and should reasonably find that Mr. Kennedy, during his service with the National Guard at Pier 23 from 1964 to 1968, was exposed to asbestos that was supplied and/or applied by Tacoma Asbestos. Accordingly, this Court should reverse the Superior Court's summary judgment order, and remand this case for trial.

1. Circumstantial Evidence that Mr. Kennedy Was Exposed to Tacoma Asbestos' Asbestos-Containing Products Is Sufficient to Prove His Exposure.

As this Court is no doubt well aware, Washington courts have developed a distinct body of case law for establishing injurious exposure in asbestos cases, and these cases should guide the Court's decision in this case. In the landmark case, *Lockwood v. AC&S*, 109 Wn.2d 235, 744 P.2d 605 (1987), the Supreme Court held that direct evidence of exposure to a particular defendant's asbestos product is unnecessary, and that it is a permissible inference that a plaintiff was exposed to the defendant's product if there is evidence that the product was present at the jobsite. *Id.* at 246-48.

Following *Lockwood*, Washington courts have been consistent in holding that circumstantial evidence placing a defendant's asbestos-containing products on the relevant jobsite is sufficient to create an issue of fact with regard to exposure. See, e.g., *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 573, 157 P.3d 406 (2007) (evidence that asbestos product was used at shipyard supported finding that plaintiff's father was exposed to the asbestos, without evidence of direct asbestos exposure); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000) (evidence that plaintiff, a machinist, worked in vicinity of other workers who had handled asbestos material was sufficient to establish exposure, even though plaintiff did not handle asbestos directly).¹⁰

Applying these leading cases – *Lockwood*, *Allen* and *Berry* – here, it is sufficient for the Kennedys to demonstrate that Mr. Kennedy was exposed to Tacoma Asbestos' asbestos-containing products when he worked at Pier 23 through circumstantial evidence and reasonable

¹⁰ See also *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 740-41, 248 P.3d 1052 (2011) (following *Lockwood*, *Allen*, and *Berry*, holding that plaintiff's evidence of "more than a single instance of exposure" raised an issue of fact as to whether the exposure was a substantial factor in causing his mesothelioma, and reversing trial court's order of summary judgment).

inferences from that evidence. He has more than fulfilled that responsibility.

2. It Is Reasonable to Infer that the Asbestos Products at Issue Were Supplied and/or Applied by Tacoma Asbestos.

Like the defendants in *Lockwood, Allen, and Berry*, Saberhagen argued that the evidence that Mr. Kennedy was exposed to asbestos supplied and/or applied by Tacoma Asbestos was too tenuous and would invite the jury to speculate. However, also like the plaintiffs in *Lockwood, Allen, and Berry*, the Kennedys have presented more than sufficient evidence to raise a reasonable inference that Mr. Kennedy was exposed to the asbestos-containing products distributed and/or applied by Saberhagen's predecessor, Tacoma Asbestos. Indeed, this case is indistinguishable in any meaningful way from the leading cases, and if anything, Mr. Kennedy has presented stronger evidence of the source of his exposure to asbestos than did the plaintiffs in those cases who were entitled to have a jury decide their cases.

In *Lockwood, Berry, and Allen*, the plaintiffs alleged exposure to asbestos-containing products at Puget Sound area shipyards. See *Lockwood*, 109 Wn.2d at 238-39; *Allen*, 138 Wn. App. at 569; *Berry*, 103 Wn. App at 314. In each case, the plaintiff could not personally

identify the defendant's asbestos product and could not say that they had personally worked with *or even seen the product*. *Lockwood*, 109 Wn.2d at 243-45; *Allen*, 138 Wn. App. at 572-73; *Berry*, 103 Wn. App. at 323-24. In addition, the evidence in each of those cases was that the defendant's asbestos-containing product was not the sole or exclusive asbestos product at the shipyard, but merely one of many asbestos-containing products used there. *Id.* The plaintiffs relied solely on circumstantial evidence that the defendants' asbestos-containing products were present on the jobsite to make a *prima facie* case of exposure to that product. *Id.*

In *Allen*, the only evidence of exposure to the defendant's product was proof of three sales of the defendant's product to the shipyard. *Allen*, 138 Wn. App. at 572-73. In *Lockwood*, plaintiff's sole evidence tying the defendant's product to plaintiff was testimony by other shipyard workers stating that the defendant had supplied some of its asbestos-containing cloth for another large ship overhaul, and that the plaintiff had worked on a similar large overhaul in the same area at about the same period. *Lockwood*, 109 Wn.2d at 247. Similarly, in *Berry*, the proof that plaintiff was exposed to asbestos-containing products distributed by the defendant consisted solely of

testimony by a purchaser for the shipyard that the defendant “supplied *some* of the insulation products” used at the shipyard when plaintiff worked there. *Berry*, 103 Wn. App at 323-24 (emphasis added).¹¹

Here, as in *Lockwood*, *Berry*, and *Allen*, plaintiff has presented substantial circumstantial evidence from numerous corroborating sources that Tacoma Asbestos supplied and/or applied the asbestos-containing products that were used at Mr. Kennedy’s jobsite, Pier 23, and to which he was exposed. Specifically, Mr. Kennedy and Mr. Elmore testified that at least some of the asbestos-containing products used at Pier 23 came from Tacoma Boat. *See* Sections III. B. 1-3, above (citing CP 239-242, 288-289, 401-402, 408, 446-450, and other record evidence). This testimony is buttressed by the testimony of Mr. Brands and Mr. Anderson who testified that Tacoma Asbestos was the *exclusive* supplier of insulation to Tacoma Boat during the 1960s, CP 677-678, and by Mr. Legas’ testimony that Tacoma Asbestos delivered its asbestos products to Tacoma Boat during that same time

¹¹ Saberhagen was also the defendant in *Berry*. In *Berry*, however, Saberhagen’s predecessor, Brower, was only one of many suppliers of asbestos products to PSNS, *Berry*, 103 Wn. App at 315-18, whereas here it is uncontroverted that Tacoma Asbestos was the exclusive supplier to Tacoma Boat. *See* Section III. B. 5, above.

period, CP 637. This corroborating testimony is further reinforced by uncontradicted evidence that Tacoma Asbestos had the exclusive contract to provide insulators to Tacoma Boat in that period. CP 677, 637. These multiple sources of evidence create a reasonable inference that the insulation work done on the FMS-789 was carried out by insulators from Tacoma Asbestos.

Mr. Kennedy has produced a richer and larger quantum of evidence of his exposure to asbestos from Tacoma Asbestos than the plaintiffs did in *Lockwood, Allen, and Berry*. Unlike in those cases, Mr. Kennedy and his co-worker, Mr. Elmore, have both testified that Mr. Kennedy personally handled and worked with the asbestos-containing products from Tacoma Boat supplied by Tacoma Asbestos. See Sections III. B. 2 & 3, above (citing CP 242, 288, 401-402, 442, 445-450). Compare *Lockwood*, 109 Wn.2d at 244-45 (holding that there was sufficient evidence to create a jury question on the issue of exposure to defendant's asbestos product, even though plaintiff did not personally handle the asbestos product and could not identify it); *Berry*, 103 Wn. App. at 323-24 (reversing summary judgment for asbestos product supplier where plaintiff provided no testimony about exposures to the product in question); *Allen*, 138 Wn. App. at 574-75

(reversing summary judgment even though plaintiff could not provide any evidence as to the manner or quantity of his exposure to the product).

In short, a reasonable jury could and likely will find, based on all the evidence and reasonable inferences therefrom, that the asbestos products to which Mr. Kennedy was exposed during his work at Pier 23 were supplied and/or applied by Tacoma Asbestos. *Id.*; *see also Petrina v. Allied Glove Corp.*, 46 A.3d 795, 797-801 (Pa. 2012) (in case involving plaintiff's exposure to asbestos-containing product called "Gold Bond," where defendant Union Carbide argued it was merely one of several suppliers of asbestos used in the product and plaintiff claimed that Union Carbide was the exclusive supplier, *held*, that plaintiff's evidence presented an issue of fact "from which a jury might infer that Union Carbide was the exclusive supplier," and that summary judgment in favor of Union Carbide was in error).

3. Applying the *Lockwood* Factors and Based on the Record, the Summary Judgment Should Be Reversed and the Case Should Be Remanded for Trial.

Under *Lockwood*, once a plaintiff presents sufficient evidence to allow a jury to find that a defendant's asbestos product was present at the jobsite, as Mr. Kennedy has done here, the Court must consider

several factors to determine if that exposure is sufficient to create a jury question with regard to causation. *See Lockwood*, 109 Wn.2d at 248-49. Those factors are:

(1) plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product and (3) the types of asbestos products to which plaintiff was exposed and the ways in which the products were handled and used.

Berry, 103 Wn. App. at 323-34 (citing *Lockwood*, 109 Wn.2d at 248).

Thus, Mr. Kennedy is not required to show that Tacoma Asbestos was the *only* source of the asbestos to which he was exposed. It is sufficient for him to show that such exposure along with other potential exposures "combine[d] to produce a single result, incapable of division on any logical or reasonable basis." *Lockwood*, 109 Wn.2d at 245 n.6. Under *Lockwood*, Mr. Kennedy has presented more than sufficient evidence to create a triable issue that his exposure to and handling of asbestos from Tacoma Asbestos caused his injury.¹²

¹² Saberhagen's summary judgment motion focused on the narrow issue of Mr. Kennedy's ability to produce sufficient evidence of his exposure to asbestos supplied and/or installed by Tacoma Asbestos, CP 17-27, and did not challenge the broader medical causation issue of whether his exposure as a whole, including to that asbestos, caused his mesothelioma. *Id.* Thus, any attempt by Saberhagen to enlarge

Mr. Kennedy directly worked with and handled the insulating asbestos cement that Tacoma Asbestos supplied by way of Tacoma Boat. *See* Section III. B. 2 & 3, above (citing CP 242, 288, 401-402, 442, 445-450). He personally mixed it and applied it during his work on both the FMS-789 and the ST-2104. *Id.* He was also aboard the FS-789 intermittently while Tacoma Asbestos insulators overhauled asbestos-containing insulation as contractors for Tacoma Boat. *See* Section III. B. 1, above (citing CP 238-240, 407-408). This specific evidence of exposure is more than adequate to satisfy the first two *Lockwood* factors, proximity and time. *See Berry*, 103 Wn. App. at 324 (holding that proximity and time factors were “satisfied by the fact that [plaintiff] worked at [Puget Sound Naval Shipyard] during times that asbestos products were used”); *see also Allen*, 138 Wn. App. at 572-73 (finding that the proximity and time factors were met where sales records established that the defendant’s asbestos-containing products were present at the plaintiff’s father’s jobsite, Puget Sound Naval Shipyard).

the issues beyond those limited issues as framed in its moving papers should be rejected by the Court. *See* CR 7(b)(1); *see also White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991).

Saberhagen argued that Mr. Kennedy obtained asbestos from Tacoma Boat only a few times, which it claimed was insufficient exposure to create an issue of fact with regard to exposure and/or causation. However, the court explicitly rejected that argument in *Berry*, holding that, “[t]he extent to which [defendant] supplied the products as compared with other distributors is irrelevant for purposes of summary judgment.” *Berry*, 103 Wn. App. at 325; *see also Morgan*, 159 Wn. App. at 740-41 (holding that evidence “of more than a single instance of exposure” was sufficient to raise an issue of fact as to whether the exposure was a substantial factor in causing plaintiff’s mesothelioma).

The third *Lockwood* factor, involving the type of asbestos product and manner of handling or use, also weighs strongly in favor of submitting this case to the jury. The asbestos-containing cement at issue here was a product that Mr. Kennedy and his fellow guardsmen poured and mixed, thereby creating dust. *See* Sections III. B. 2 & 3, above (citing CP 242, 288, 401-402, 442, 445-450, and other record evidence). *Compare Lockheed*, 109 Wn.2d at 245 (finding sufficient evidence of causation where defendant argued that its asbestos cloth “is cleaner than other types of asbestos products such as cement and

block product” and where “there was no direct evidence that [plaintiff] worked with or near [the] cloth.”). And Mr. Kennedy and his co-workers were also present on the FS-789 during the boiler work and insulation performed by Tacoma Boat using Tacoma Asbestos insulators and/or asbestos. *See* Section III. B. 1, above. All of these factors weigh in favor of allowing the jury to decide if asbestos from Tacoma Asbestos was a cause of Mr. Kennedy’s injury.

V. CONCLUSION

For all these reasons, this Court should reverse the summary judgment and remand this case for trial of the Kennedys’ claims.

DATED this 20th day of February, 2013.

Respectfully submitted,

BERGMAN DRAPER LADENBURG, PLLC

By: Matthew Geyman for
Matthew P. Bergman, WSBA #20894
Vanessa J. Firnhaber Oslund, WSBA #38252

PHILLIPS LAW GROUP, PLLC

By: Matthew Geyman
John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544

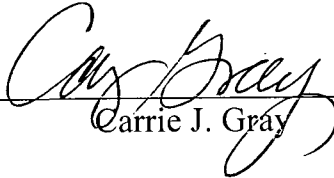
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy
of the foregoing document upon:

Timothy K. Thorson
Michael B. King
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(Via Legal Messenger)

DATED this 20th day of February, 2013.



Carrie J. Gray

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 20 PM 4:30

FILED
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
2013 FEB 22 PM 1:24
BY _____
DEPUTY