SUPREME COURT NO. 97629-5

COURT OF APPEALS NO. 77870-6-I

SUPREME COURT OF THE
STATE OF WASHINGTON

EDWARD P. LEREN, as Executor of the Estate of MARVIN A. LEREN,

Plaintiff-Respondent,

v.

KAISER GYPSUM COMPANY, INC., et al.,

Defendants-Appellants.

RESPONDENT EDWARD P. LEREN'S RESPONSE TO ELEMENTIS CHEMICALS INC.'S PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Washington courts have historically elevated substance over form in evaluating the legal effect of corporate acquisitions. Petitioner Elementis Chemicals, Inc. ("Elementis") is the admitted successor to Harrisons & Crosfield (Pacific), Inc. ("HCP"). In 1977, HCP acquired the stock of Benson Chemical Corporation, a raw asbestos distributor, in a transaction that was in substance an asset purchase. HCP acquired all Benson Chemical's tangible and intangible assets when it immediately dissolved Benson's corporate form while continuing to operate Benson's business by selling the same asbestos products to the same customers using the Benson trade name.

Plaintiff-Respondent Marvin Leren died from mesothelioma caused by exposure to Johns-Manville asbestos fibers sold by Benson Chemical and later HCP under Benson's name. Based upon the jury's special verdict findings, the trial court held Elementis liable under the "product line" exception to nonliability for asset purchasers. The Court of Appeals affirmed the trial court's conclusions of law, noting that "the purpose, policy, and logic of the product line doctrine applies."

Elementis does not challenge application of product line exception to product sellers, but rather asks this Court to grant discretionary review based upon the faulty premise that HCP was held liable as a shareholder.

Contrary to Elementis' claim, the Court of Appeals did not hold that "the shareholder became a successor" when it received the corporation's assets on dissolution. Rather, the Court of Appeals clearly held that it was *the totality* of HCP's conduct—both during and after the stock transaction—that permitted the court to "look past the form of the combined stock purchase and dissolution to recognize the substance of an asset acquisition."

Consistent with this Court's settled authority in *Martin v. Abbott Labs*., 102 Wn.2d 581, 689 P.2d 368 (1984), and *Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 692 P.2d 787 (1984), the Court of Appeals recognized an asset transfer masquerading behind the shield of a stock purchase and found that all of the factors underlying the "product line" exception to nonliability had been met. Petitioner has failed to demonstrate that this case meets the requirements of RAP 13.4(b). The Court should decline to accept discretionary review.

II. COUNTERSTATEMENT OF THE CASE

A. Relevant Factual Background

Marvin Leren was exposed to Johns-Manville raw asbestos fibers sold by Benson Chemical Company in the 1960s and 1970s. APP_002-003. HCP purchased 100% of the stock in Benson Chemical in January

1977. APP_010. The Court of Appeals described HCP's subsequent conduct as follows:

> Just five weeks later, HCP's board of directors voted to dissolve Benson. HCP soon began making personnel decisions, including promoting a long-time Benson employee to regional manager and retaining Benson's founder as a consultant. On June 14, 1977, HCP filed a statement of intent to dissolve Benson. On July 26, 1978, HCP filed Benson's articles of dissolution. HCP then received all of Benson's assets. HCP expressly identified Benson as a division, maintained largely the same suppliers and customers, and continued operating in the same region.

APP_010 (internal citations omitted). As a result, the Court of Appeals held that these facts " show[ed] a series of intentional steps to take control of Benson, making the company's assets part of HCP and leveraging Benson's goodwill while extinguishing Leren's ability to hold Benson liable for his injuries." APP_010-011.

Based on the jury's answers to eight special interrogatories on successorship-related issues, the Court of Appeals concluded that "there can be no question that HCP held itself out as a continuation of Benson post-dissolution." APP_011. The appellate court observed that HCP utilized Benson's distribution network in the Pacific Northwest and continued to place advertisements describing Benson as a division. APP_011-012. HCP also utilized Benson's name when distributing goods, maintained the same office in Seattle, maintained the same phone

number for the Seattle office, maintained many of the same employees, and honored Benson's outstanding contracts. APP_012. Finally, it was undisputed that "Benson distributed raw asbestos before dissolution and HCP continued to distribute raw asbestos under Benson's name after dissolution." APP_012.

B. Procedural History

On November 19, 2015, Marvin A. Leren filed a personal injury action in King County Superior Court against Elementis and other defendants as a result of his asbestos-related illness. The complaint was later amended after Mr. Leren's passing to bring claims for wrongful death and survivorship. Following a 13-day trial, the jury returned a general verdict in favor of Plaintiff. APP_032-034. In addition to finding that Benson Chemical was liable, the jury answered eight interrogatories on the special verdict form as follows:

> QUESTION 1: Did Benson Chemical's business continue to function with substantially the same personnel and maintain the same physical location after Benson Chemical was dissolved on July 26, 1978?
>
> ANSWER: YES
>
> QUESTION 2: Did Harrison & Crosfield (Pacific), Inc. retain the Benson Chemical brand name following Benson's dissolution on July 26, 1978?
>
> ANSWER: YES

QUESTION 3: Did Harrison & Crosfield (Pacific), Inc. expressly or impliedly assume Benson Chemical's obligations following its purchase of Benson's stock on January 27, 1977?

ANSWER: NO

QUESTION 4: Did Harrison & Crosfield (Pacific), Inc. acquire and benefit from the goodwill of Benson Chemical following its purchase of Benson's stock on January 27, 1977?

ANSWER:YES

QUESTION 5: Did Harrison & Crosfield (Pacific), Inc. benefit from the goodwill of Benson Chemical following its dissolution of Benson Chemical on July 26, 1978?

ANSWER: YES

QUESTION 6: Did Harrison & Crosfield (Pacific), Inc. hold itself out to the public as a continuation of Benson Chemical by selling the same products under a similar name?

ANSWER: YES

QUESTION 7: Did Harrison & Crosfield (Pacific), Inc. acquire substantially all of Benson Chemical Corporation's assets following the dissolution of Benson on July 26, 1978?

ANSWER: YES

QUESTION 8: Was one of Harrison & Crosfield (Pacific), Inc.'s intentions in dissolving Benson Chemical on July 26, 1978 avoiding liability for asbestos products sold by Benson prior to its acquisition in January 1977.

ANSWER: NO

APP_035-036.

Based on these factual findings, Plaintiff argued that HCP was liable for Benson Chemical's asbestos liabilities under the *de facto* merger, mere continuation and product line exceptions to non-successor liability. The trial court found that the jury's findings did not satisfy the elements of the *de facto* merger or mere continuation exceptions but held that Elementis had successorship liability for Benson Chemical under the product line exception. APP_028-030. In its findings of fact, the trial court detailed that there "is substantial evidence to support the application of the product line exception to Benson Chemical" and held that "HCP's acquisition of Benson Chemical and subsequent conduct satisfied the requirements of the product line exception." APP_030.

III. COUNTERSTATEMENT OF THE ISSUE

Whether review should be denied where the Petition neither raises an issue of substantial importance nor demonstrates that the Court of Appeals' decision conflicts with a decision of this Court.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals unanimously held that HCP's conduct relating to Benson Chemical satisfied every factor of the product line exception to nonliability for an asset purchaser. The Court of Appeals did not, as Elementis claims, find that *every* shareholder becomes a successor

when a dissolved corporation's assets are distributed. *See* Petition at 1 ("The trial court decided to … treat that statutory distribution to the shareholder as if it had been a sale of assets."). Rather, it was the conduct undertaken *after* the stock purchase and dissolution of assets that revealed the true nature of this transaction. The appellate court's holding does no harm to shareholder rights because HCP was not acting as a mere shareholder in its operation of Benson Chemical. Rather, HCP used the mechanisms of shareholder distribution to effectuate a total asset transfer while shedding all liabilities and leaving Benson Chemical "no more than a mere corporate shell." *Martin*, 102 Wn.2d at 614. For the following reasons, the Court of Appeals' decision below does not conflict with this Court's well-established successor liability jurisprudence, and Elementis cannot point to any genuine issues of substantial importance to justify discretionary review of the appellate court's opinion.

A. The Court of Appeals' decision does not conflict with any decision by the Supreme Court or Court of Appeals.

The general rule in Washington is that a corporation purchasing the assets of another corporation does not become liable for the debts and liabilities of the selling corporation. *Hall*, 103 Wn.2d at 261-62. Exceptions to this rule arise where: (1) the purchaser expressly or impliedly assumes liability; (2) the purchase is a *de facto* merger or

consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability. *Id.*; *Martin*, 102 Wn.2d at 609. In *Martin v. Abbott Laboratories*, this Court recognized a fifth exception in the limited context of product liability actions. *Martin*, 102 Wn.2d at 615 (citing *Ray v. Alad Corp*., 19 Cal.3d 22, 560 P.2d 3, 136 Cal.Rptr. 574 (1977)). Under this "product line" exception, a court must determine whether:

> (1) The transferee has acquired substantially all of the transferor's assets, leaving no more than a mere corporate shell;
>
> (2) The transferee is holding itself out to the general public as a continuation of the transferor by producing the same product line under a similar name; and
>
> (3) The transferee is benefiting from the goodwill of the transferor.

Id. at 614.

Significantly, Elementis does not dispute the factual conclusions by the jury, the trial court, and the Court of Appeals that all the factors for the product line exception had been met. Elementis also did not challenge application of the product line exception to product sellers such as Benson Chemical before the trial court or Court of Appeals. RAP 13.7(b). Instead, the gravamen of Elementis' argument appears to be that none of the exceptions to nonliability articulated in *Martin* or *Hall* can ever apply to a transaction formally characterized as a stock purchase. Petition at 9

("No Washington case has previously equated a stock purchase to an asset purchase.").

However, Washington courts have long looked to the substance of a transaction over its form to determine whether successorship liability should attach. *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Club*, 135 Wn.2d 894, 901, 959 P.2d 1052 (1998) ("Liability may be imposed regardless of the exact form of [the] transfer of assets between corporations."); *Payne v. Saberhagen Holdings, Inc*., 147 Wn. App. 17, 25-26, 190 P.3d 102 (2008); *see also Hall*, 103 Wn.2d at 264 ("The policy justifications for our adoption of the product line [doctrine] require a transfer of substantially all of the predecessor's assets … ."). *Martin*, which laid out the critical elements of the product line exception, required only the *acquisition* of the transferor's assets; the test does not articulate any exclusions based upon the form of the acquisition. 102 Wn.2d at 614.

In *Hall*, this Court explained that an "essential purpose of the product line exception is to afford a products liability claimant an opportunity to bring an action against the successor corporation when his or her rights against the predecessor corporation have been essentially extinguished," either by dissolution of the predecessor or transfer of substantially all of its assets to the successor. 103 Wn.2d at 264. Moreover, the Court held that "elemental fairness demands that there be a

causal connection between the successor's acquisition and the unavailability of the predecessor." *Id.*

In this case, every factfinder recognized a pervasive intent by HCP to enjoy the benefits of Benson's product lines and goodwill of the Benson name while depriving products liability claimants of any recourse. Application of liability rests not upon HCP's status as a shareholder but upon its status as a successor through its conduct post-dissolution. *See Martin*, 102 Wn.2d at 617 (finding questions of fact as to defendant's sale of similar product lines and assumption of predecessor corporation's goodwill); *Hall*, 103 Wn.2d at 267 (declining to extend the product line exception where the transaction of assets contemplated that the predecessor would continue in existence while maintaining its separate goodwill and the resources to compensate products liability claimants).

The case of *Potlatch Corp. v. Superior Court*, which Elementis cites in its Petition, provides a notable contrast to the facts of this case. 154 Cal.App.3d 1144, 201 Cal.Rptr. 750 (1984). In *Potlatch*, a wholly-owned subsidiary company was dissolved in compliance with California law. *Id.* at 1147. However, unlike the case at bar, the parent company in *Potlatch* did not continue to operate the dissolved business and benefit from its product lines and goodwill. Instead, the subsidiary's "business was discontinued and its plant and equipment were liquidated by an

auction sale." *Id.* Indeed, the parent company "did not take over the business of [the subsidiary] nor absorb its plant and equipment." *Id.* at 1148.

The court in *Potlatch* agreed that, "[o]f course, substance should prevail over form." *Id.* at 1150. However, the wholesome substance of the transaction in *Potlatch* was demonstrated by the fact that the parent company "did not acquire the physical assets of [the subsidiary] … and continue the business of [the subsidiary] as part of its own business." *Id.* In stark contrast to the facts of *Potlatch*, HCP clearly took over the business of Benson and absorbed its products, employees, customer base, trade name, and goodwill.

Elementis also insists that HCP sold only Union Carbide Calidria raw asbestos while Benson sold Johns-Manville raw asbestos. *See* Petition at 3, 6, 12-13. This claim is belied by the testimony at trial. William Clary, a lifelong Benson employee, stated that the company continued to supply Johns-Manville raw asbestos products to Mr. Leren's employer, Z-Brick, even after Benson had been acquired and dissolved by HCP. APP_040. The jury was free to credit Mr. Clary's testimony and reject the testimony of Elementis' corporate representative, Robert Mann, as it did when it found that HCP held itself out as a continuation of Benson by selling "*the same products* under a similar name." APP_036

(emphasis added). In fact, Mr. Mann admitted that the stock sale was indistinguishable from an asset sale, rendering the entire transaction "in effect … a merger." APP_044.

Elementis' final argument is that the Court of Appeals misconstrued *Hall* by finding that the goodwill requirement of the product line exception must be associated to individual products rather than the goodwill of the predecessor business entity. Petition at 14. This is incorrect. In *Hall*, the Court expressly held that the product line exception did not apply because the transaction "contemplated that UNARCO [the predecessor corporation] would continue in existence, hence maintaining *its separate goodwill* … ." 103 Wn.2d at 267. In *Martin*, the Court found genuine issues of material fact where the evidence demonstrated the successor corporation's "assumption of Stanley Drug Products, Inc.'s goodwill," not the goodwill associated with the specific product. 102 Wn.2d at 617.

This Court's subsequent decision in *George v. Parke-Davis*, 107 Wn.2d 584, 733 P.2d 507 (1987) does not alter the holdings in *Hall* or *Martin*. The Court reaffirmed that a successor corporation must benefit from "the assumption of *the old corporation's goodwill* and therefore should shoulder the burdens associated with those products." *Id.* at 589-90. Thus, the Court held that the fact that "a company manufactures

additional products should have no effect on this goodwill, and recovery on the basis of other products should be denied." *Id.* at 590.

In this case, the Court of Appeals noted that "[t]he goodwill for a distributor of raw materials is associated with the distributor's customer relationships and reputation for quality service, quality materials, reliability, and competitive pricing." APP_007. HCP was not found to benefit from the goodwill of Benson's sale of other products; rather, it benefited from the goodwill of Benson's sale of raw asbestos products, which HCP continued by selling the same raw asbestos products to the same customers under the Benson trade name. For all these reasons, Elementis has failed to demonstrate that the Court of Appeals decision conflicts with any decision by the Supreme Court or Court of Appeals. RAP 13.4(b)(1), (2).

B. The Court of Appeals' refusal to limit successorship claims under RCW 23B.14.340 does not raise an issue of substantial public interest.

"Painting a pumpkin green and calling it a watermelon will not render its contents sweet and juicy." *Arruda v. Sears, Roebuck & Co*., 310 F.3d 13, 24 (1st Cir.2002). Elementis' argument regarding the application of Washington's corporate survivorship statute, RCW 23B.14.340, is entirely misplaced. Neither the Washington Legislature, nor any decision by any court in this state, has suggested that RCW 23B.14.340 was

designed to supersede Washington's lengthy corporate successorship and liability jurisprudence. The Court of Appeals noted as much, APP_014, and the instant Petition makes no effort to provide any such authority. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

RCW 23B.14.340 provides that dissolution of a company "shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing … unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution." As the Court of Appeals observed, Mr. Leren did not attempt to resurrect Benson Chemical and sue it directly, nor was liability ever imposed upon Elementis as the successor to a former shareholder. APP_014. Under either theory of liability, the statute may well have applied to bar Mr. Leren's claims.

Instead, Mr. Leren alleged liability consistent with the exceptions to non-liability for asset transfers under well-established Washington law. The jury expressly found evidence that would support application of the "product line" exception, and the jury's special verdict findings supported the trial court's Findings of Fact and Conclusions of Law. HCP's prior

status as a shareholder was entirely irrelevant to the legal theories and factual determinations at issue in this case.

Moreover, Elementis' argument would lead to an absurd cycle of corporate immunity. If Elementis' reading of the statute were correct, it would mean that a Washington corporation could transfer the entirety of its assets to a new corporate entity every two years, dissolve the prior iteration, and forever insulate itself from all liabilities with a discovery latency greater than two years. Elementis would have this Court hold that every successor liability claim that has been litigated in our courts over the past 30 years has been contrary to Washington law. And while the statute has been revised three times since its passage, not once has our Legislature looked upon our successorship jurisprudence and revised the law to explain that successor corporations are liable for a period of only two years. The reason for this is simple: Elementis' reading of the statute is completely unsupported, and the Court of Appeals' refusal to adopt such reading does not raise an issue of substantial public interest. RAP 13.4(b)(4).

V. CONCLUSION

For the foregoing reasons, Plaintiff-Respondent requests that the Court deny discretionary review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 27th day of September, 2019.

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CERTIFICATE OF SERVICE

I certify that on September 27, 2019, I caused to be served a true and correct copy of the foregoing document upon:

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SUPREME COURT NO. 97629-5

COURT OF APPEALS NO. 77870-6-I

SUPREME COURT OF THE
STATE OF WASHINGTON

EDWARD P. LEREN, as Executor of the Estate of MARVIN A. LEREN,

Plaintiff-Respondent,

v.

KAISER GYPSUM COMPANY, INC., et al.,

Defendants-Appellants.

APPENDIX TO RESPONDENT EDWARD P. LEREN'S RESPONSE TO ELEMENTIS CHEMICALS INC.'S PETITION FOR DISCRETIONARY REVIEW

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Appendix

Bates No.	**Description**
APP_001-023	Published Opinion
APP_024-031	Findings of Fact and Conclusion of Law
APP_032-034	General Verdict Form
APP_035-036	Special Verdict Form
APP_037-040	Verbatim Transcript of Proceedings (morning)
APP_041-044	Verbatim Report of Proceedings (afternoon)

FILED
5/28/2019
Court of Appeals
Division I
State of Washington

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

EDWARD P. LEREN, as Executor of the Estate of Marvin A. Leren, Respondent, v. KAISER GYPSUM COMPANY, INC., et al, Defendants. ELEMENTIS CHEMICALS, INC., Appellant.	)	No. 77870-6-I PUBLISHED OPINION FILED: May 28, 2019

VERELLEN, J. — We are asked to resolve whether the product line doctrine of successor liability applies to a distributor of raw asbestos where the acquired distributor faces strict liability under section 402A of the Restatement (Second) of Torts. We conclude the product line doctrine applies.

The purpose of the product line doctrine is to afford a product liability victim with a meaningful remedy when a successor business entity acquires the assets of a predecessor, leaving a mere corporate shell. Although stock purchasers are generally not responsible for the conduct of the companies in which they invest, if a business entity buys 100 percent of a corporation's stock in a single transaction and promptly begins the process of dissolving the corporation, thereby acquiring

the predecessor's assets, then a court may look past the form of the combined stock purchase and dissolution to recognize the substance of an asset acquisition. And if, after acquiring the assets, the purchaser avails itself of the goodwill associated with the distributor's sales of unreasonably dangerous materials by holding itself out as a continuation of the acquired distributor, then the purpose, policy, and logic of the product line doctrine applies.

Additionally, the limitations period in RCW 23B.14.340 regarding claims against dissolved corporations and their shareholders does not apply to defeat the product line doctrine of successor liability.

A jury award of noneconomic damages is sustainable under the wrongful death and survivor statutes where the required beneficiary under RCW 4.20.020 is an adult child with compelling bonds of affinity that survived the stepparent's divorce.

Finally, the court properly declined to give a superseding cause instruction because the requesting party failed to show the decedent's employer had actual, specific knowledge of the harm from prolonged asbestos exposure.

Therefore, we affirm.

FACTS

Marvin Leren graduated from Ballard High School in 1961 and went to work for the Z-Brick Company the following year. Leren worked at Z-Brick until 1981. Z-Brick made thin, decorative bricks. Benson Chemical Corporation supplied Z-Brick with raw asbestos used to make the bricks. Leren poured 100-pound

sacks of raw asbestos into large hoppers used to mix ingredients for the bricks. Pouring asbestos produced huge clouds of asbestos dust. After the bricks hardened, Leren cut them with a power saw, producing more dust. Generally, Z-Brick was "a mess" with "powder on the floor" and "particles floating in the air."[1] Leren never wore a mask or any other protective gear.

In 1969, Leren met and began dating fellow Z-Brick employee Gretha Zylstra. He soon met Zylstra's three-year-old daughter Jo because she accompanied Zylstra and Leren on their first date. Leren and Zylstra married in 1974. They divorced amicably in 1985.

During the springtime of 2015, Leren felt short of breath and began losing energy. In late September or early October of that year, he had a lung biopsy and began feeling "immense pain."[2] Soon after, he was diagnosed with the rare myloxoid variant of mesothelioma and began chemotherapy. Leren was admitted to the hospital after having a bad reaction to his first round of chemotherapy. He never left. Doctors placed him on palliative care. Leren made out a will on November 10, naming his brother Edward as administrator of his estate (the Estate), providing a monetary bequest to Jo. He filed a complaint seeking damages for negligence and product liability on November 19. He died on November 24, 2015.

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[1] Report of Proceedings (RP) (Oct. 24, 2017) at 611.

[2] RP (Oct. 19, 2017) at 302-03.

The Estate maintained the lawsuit. Over the next 10 months, the Estate added a claim for wrongful death and added Elementis as a defendant. In the late 1970s, Harrisons & Crosfield (Pacific), Inc. (HCP) acquired 100 percent of Benson's stock and dissolved Benson as an independent company. Elementis is the undisputed successor to HCP.

Elementis was the sole defendant at trial. Based on the jury's special verdict and its own findings of fact, the court relied on the product line doctrine and entered judgment in favor of the Estate.

Elementis appeals.

ANALYSIS

I. Corporate Successor Liability

Leren alleged personal injuries from mesothelioma caused by frequent asbestos exposure. Because these exposures occurred prior to enactment of the Washington Product Liability Act,[3] we evaluate potential liability using common law principles embodied in the Restatement (Second) of Torts.[4] Under section 402A of the Restatement, strict liability may be imposed on any party involved in distributing an unreasonably dangerous product.[5] It is undisputed that asbestos is unreasonably dangerous and that Benson distributed the raw asbestos that

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[3] Ch. 7.72 RCW.

[4] Simonetta v. Viad Corp., 165 Wn.2d 341, 348, 354, 197 P.3d 127 (2008).

[5] Id. at 354-55 (citing Seattle-First Nat. Bank v. Tabert, 86 Wn.2d 145, 148-49, 542 P.2d 774 (1975); Restatement (Second) of Torts § 402A cmt. f (1965)).

caused Leren's mesothelioma. The question is whether Elementis is liable for those sales based upon HCP's acquisition of Benson's assets.

Elementis argues it cannot be liable for Leren's injuries because HCP was a mere investor who acquired Benson's assets by automatic transfer upon dissolution rather than by purchase. The trial court disagreed. We review conclusions of law de novo.[6]

Generally, a successor corporation is not responsible for its predecessor's liabilities simply because it acquired the predecessor's assets.[7] But case law provides well-established exceptions.[8] In product liability cases, successor liability arises where one corporation benefits from another's goodwill after acquiring its product line.[9] Washington adopted the product line doctrine of corporate successor liability for the "essential purpose" of

> afford[ing] a products liability claimant an opportunity to bring an action against the successor corporation when his or her rights against the predecessor corporation have been essentially extinguished either de jure, through dissolution of the predecessor,

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[6] Blackburn v. State, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016).

[7] Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 481-82, 209 P.3d 863 (2009) (citing Hall v. Armstrong Cork, Inc., 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984)).

[8] Exceptions include where "(1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability." Martin v. Abbott Labs., 102 Wn.2d 581, 609, 689 P.2d 368 (1984). These four exceptions are not at issue here.

[9] Hall, 103 Wn.2d at 261-63; Martin, 102 Wn.2d at 609.

> or de facto, through sale of all or substantially all of the assets of the predecessor.[10]

We consider the following questions to decide whether the product line doctrine applies: (1) did the successor acquire substantially all the predecessor's assets, leaving no more than a mere corporate shell, (2) did the successor hold itself out to the general public as a continuation of the predecessor by producing the same product line under a similar name, (3) did the successor benefit from the goodwill of the predecessor?[11]

Product line successor liability requires an asset transfer from predecessor to successor, though the transfer need not be a direct sale.[12] Our Supreme Court adopted the product line doctrine to protect "otherwise defenseless victims" by ensuring they can seek "meaningful remed[ies]" while simultaneously protecting corporations from unexpected liability by requiring "a causal connection between the successor's acquisition and the unavailability of the predecessor."[13] Reflecting this balance, a court should consider two issues when determining if these policy

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[10] Hall, 103 Wn.2d at 264.

[11] Id. at 262-63 (quoting Martin, 102 Wn.2d at 614); Fox v. Sunmaster Prods., Inc., 63 Wn. App. 561, 570-71, 821 P.2d 502 (1991).

[12] See Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 135 Wn.2d 894, 901, 959 P.2d 1052 (1998) (Successor "[l]iability may be imposed regardless of the exact form of [the] transfer of assets between the corporations.") (citing Stoumbos v. Kilimnik, 988 F.2d 949, 961 (9th Cir. 1993) (citing Martin, 102 Wn.2d at 609)); see also Hall, 103 Wn.2d at 264 ("The policy justifications for our adoption of the product line [doctrine] require the transfer of substantially all of the predecessor's assets to the successor corporation as a prerequisite to imposing liability on the successor.") (emphasis added).

[13] Hall, 103 Wn.2d at 264-65.

concerns are present: first, whether an asset transfer of any kind occurred between an alleged predecessor and its alleged successor, and second, whether the successor corporation by its acquisition actually "played some role in curtailing or destroying the claimants' remedies."[14] These questions turn on the substance of an asset transfer rather than its form.

Typically, when a plaintiff seeks to hold a successor strictly liable through the product line doctrine, a successor holds itself out as a continuation of the predecessor by continuing to manufacture and sell the predecessor's product line.[15] A manufacturer's goodwill is often associated with its specifically branded product lines. But section 402A allows strict liability for all sellers of unreasonably dangerous products, including distributors.[16] The goodwill for a distributor of raw materials is associated with the distributor's customer relationships and reputation for quality service, quality materials, reliability, and competitive pricing.[17] Thus, the goodwill transfer contemplated in the product line doctrine is "not that associated with individual products," but rather "that associated with the predecessor business entity."[18] Where a successor distributor acquires a predecessor's goodwill, holds itself out as akin to the predecessor by continuing to distribute similar

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[14] Hall, 103 Wn.2d at 264, 265-66.

[15] See, e.g., Martin, 102 Wn.2d at 609-12.

[16] Simonetta, 165 Wn.2d at 354-55.

[17] RP (Oct. 24, 2017) at 696-98, 739.

[18] Hall, 103 Wn.2d at 267.

unreasonably dangerous products, and realizes benefits from those distributions, then the product line doctrine applies.

Elementis argues, though, that the product line doctrine is limited to manufacturers who produce unreasonably dangerous products because they can spread the cost of those products across their customer base. We disagree.

Consistent with the principles discussed above, California has held for over 30 years that a distributor of unreasonably dangerous goods may be strictly liable under the product line doctrine for its predecessor's conduct. In Kaminski v. Western MacArthur Company,[19] a former welder's assistant suffering from mesothelioma sued the successor of the distributor that sold asbestos products to his employer.

In 1967, the predecessor asbestos distributor, Western Asbestos Company, was struggling. It made an agreement with the MacArthur Company to turn over all operational control in exchange for a large loan of operating capital.[20] Western viewed the investment as a prelude to a purchase.[21] It notified customers and suppliers of the potential change but emphasized that longtime corporate officers would remain to share their expertise.[22] Seventeen months later, it was running out of money.[23] MacArthur announced Western would dissolve and would let

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[19] 175 Cal. App. 3d 445, 450-51, 220 Cal. Rptr. 895 (Cal. Ct. App. 1985).

[20] Id. at 451.

[21] Id. at 452.

[22] Id.

[23] Id.

MacArthur purchase inventory and other assets equal to its debt, take over all outstanding contracts, and buy Western's records and customer lists.[24] MacArthur then created a new company, Western MacArthur Company, to do this work. The new company retained 90 percent of Western's employees, kept similar board members, kept similar customers, supplied the same products, referred to itself as "Western," and honored work orders made out to the dissolved Western.[25]

Under these facts, the court concluded the product line doctrine applied. It explained why the policy concerns underlying the doctrine were present:

> When a distributor or retailer acquires a corporation and takes advantage of its goodwill and other corporate assets and facilities to inject the predecessor's product line into the stream of commerce, it continues "the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[26]

The analysis in Kaminski is compelling. First, the court relied on our Supreme Court's reasoning in Hall v. Armstrong Cork, Inc.[27] and explained MacArthur used its financial leverage and operational control to "engineer a takeover."[28] Second, the "essence of the takeover" resulted in an asset transfer from Western to the new company that left the plaintiff without a meaningful remedy.[29] Third, the new company was better positioned than the plaintiff to guard

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[24] Id. at 452-53.

[25] Id. at 453.

[26] Id. at 456 (quoting Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964)).

[27] 103 Wn.2d 258, 265-66, 692 P.2d 787 (1984).

[28] Kaminski, 175 Cal. App. at 458.

[29] Id.

against the risks of injury and to spread the costs of injury around by seeking indemnification from the product's manufacturer.[30] Thus, the court held the successor distributor was properly held liable because "[n]othing in [the product line doctrine] conceptually limits its reasoning to manufacturers."[31]

Similarly, the product line doctrine applies to HCP's acquisition of Benson. On January 10, 1977, HCP purchased 100 percent of Benson's stock from its founder and his wife.[32] Just five weeks later, HCP's board of directors voted to dissolve Benson.[33] HCP soon began making personnel decisions, including promoting a long-time Benson sales employee to regional manager and retaining Benson's founder as a consultant.[34] On June 14, 1977, HCP filed a statement of intent to dissolve Benson. On July 26, 1978, HCP filed Benson's articles of dissolution.[35] HCP then received all of Benson's assets.[36] HCP expressly identified Benson as a division, maintained largely the same suppliers and customers, and continued operating in the same region.[37] These details show a series of intentional steps to take control of Benson, making the company's assets

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[30] Id. at 456-57.

[31] Id. at 456.

[32] RP (Oct. 24, 2017) at 587, 700.

[33] CP at 985.

[34] RP (Oct. 24, 2017) at 594-95, 701.

[35] CP at 107.

[36] RP (Oct. 24, 2017) at 736.

[37] Id. at 595-98, 712-13, 714-16; Ex. 90.

part of HCP and leveraging Benson's goodwill while extinguishing Leren's ability to hold Benson liable for his injuries. We agree with the Kaminski court that the rationale behind the product line doctrine applies to a distributor in these circumstances.[38]

As discussed, HCP acquired all of Benson's assets and left it "no more than a mere corporate shell."[39] And there can be no question that HCP held itself out as a continuation of Benson post-dissolution. Substantial evidence supports findings of fact 6, 11, 12, and 13, which, in turn, support the court's conclusions "that Benson Chemical's goodwill was transferred to HCP and that HCP benefited from Benson's goodwill in its sale of asbestos products to consumers."[40] For example, HCP, which did not operate in Washington or Oregon, acquired Benson's Pacific Northwest distribution network upon dissolution.[41] And long after Benson's dissolution, HCP continued to place ads describing Benson as a

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[38] Elementis relies on another California case, Potlatch Corporation v. Superior Court of Riverside County, 154 Cal. App. 3d 1144, 1146, 201 Cal. Rptr. 750 (Cal. Ct. App. 1984), to argue a stock purchaser cannot be liable as a result of the purchase. But Potlatch is factually distinguishable, predates Kaminski, and, most importantly, the logic of Kaminski is apt and compelling.

[39] Martin, 102 Wn.2d at 614.

[40] CP at 989 (finding of fact 7). Findings of fact are supported by substantial evidence where there is sufficient evidence "'to persuade a rational, fair-minded person of the truth of the finding.'" Blackburn, 186 Wn.2d at 256 (quoting Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 353, 172 P.3d 688 (2007)). When reviewing a jury verdict, we make all inferences in its favor. Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013). Unchallenged findings of fact are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

[41] RP (Oct. 24, 2017) at 621-22, 677, 680.

division.[42] HCP also continued to use Benson's name when distributing goods, maintained the same office in Seattle, maintained the same phone number for the Seattle office, maintained many of the same employees, and honored Benson's outstanding contracts.[43] Further, it is undisputed Benson distributed raw asbestos before dissolution and HCP continued to distribute raw asbestos under Benson's name after dissolution.[44]

Elementis contends, though, sufficient evidence does not support the court's conclusion that it sold similar products as Benson because HCP sold only Union Carbide's brand of raw asbestos, whereas Benson sold only Johns-Manville's brand of raw asbestos before its dissolution.[45] Elementis is correct that the product line doctrine applies to a successor manufacturer where it continues producing the same product under a similar name,[46] but the doctrine does not limit liability to only those particular circumstances. The product line doctrine requires continued sales of "the same type of product" for a successor distributor to be held liable; the products do not need to be identical.[47] A

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[42] Id. at 714-16; Ex. 90.

[43] Id. at 595-96, 701-02, 712-13, 717, 737.

[44] Id. at 718; see Exs. 270, 281 (Benson-branded invoices showing post-dissolution sales of raw asbestos in Washington and Oregon).

[45] Elementis does not argue that the raw asbestos distributed before and after the dissolution were different types or grades of asbestos.

[46] E.g., Martin, 102 Wn.2d at 614.

[47] See George v. Parke-Davis, 107 Wn.2d 584, 588, 590, 733 P.2d 507 (1987) ("The product line [doctrine] requires the corporation to manufacture the same type of product, and not merely stay in the same type of manufacturing business.") (emphasis added).

distributor's goodwill is necessarily associated with the grade, quality, and price of the raw materials it provides, regardless of the materials' brands. On this record, the Johns-Manville and Union Carbide brands of asbestos were the same type of product: raw white asbestos.

Benson's goodwill was associated with its ability to deliver raw asbestos generally, and HCP leveraged that goodwill to continue selling raw asbestos after it dissolved Benson. HCP benefitted from those sales. Accordingly, the policies, essential purpose, and requirements of the product line doctrine support holding Elementis strictly liable.[48]

Elementis argues Leren's recovery should be limited to the value of the corporate assets HCP received from Benson. Elementis relies on Lonsdale v. Chesterfield[49] and Smith v. Sea Ventures, Inc.[50] for this proposition. Neither case is compelling because, unlike the instant case, both involve lawsuits against a dissolved corporation. In absence of any persuasive authority, we decline Elementis's invitation to impose a cap on awards in successor liability cases.

In a related argument, Elementis contends Leren's claims are time-barred under the limitations period in RCW 23B.14.340 for a dissolved corporation or its shareholders. The court denied Elementis's motion for summary judgment

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[48] Leren argued additional theories of successor liability. Due to our reasoning, there is no need to address those theories unsuccessfully advocated at trial.

[49] 99 Wn.2d 353, 662 P.2d 385 (1983).

[50] 93 Wn. App. 613, 969 P.2d 1090 (1999).

seeking to dismiss this suit as untimely. We review summary judgment orders de novo.[51]

The general rule at common law held that dissolved corporations ceased to exist and could not be sued, but the enactment of chapter 23B.14 RCW "showed the legislature's intent to cut any remaining ties" to that rule.[52] RCW 23B.14.340 governs the survival of remedies against a dissolved corporation, its directors, its officers, or its shareholders. Dissolution does not strip a claimant of the ability to file a lawsuit.[53] For a dissolution with an effective date prior to June 7, 2006, claims are timely when filed within two years of the date of dissolution.[54]

Benson was dissolved in 1978, and Leren filed suit in 2015. But Elementis provides no authority for the proposition that the legislature intended to bar successor liability claims when it enacted the dissolution statute. Notably, Benson, the dissolved corporation, is not party to this lawsuit. Nor is Elementis a defendant in its capacity as successor to a former Benson shareholder. Rather, Elementis is a defendant because the Estate alleges it is liable as HCP's successor when HCP is in turn a successor to Benson. Therefore, RCW 23B.14.340 does not apply. The court did not err by denying Elementis's motion for summary judgment.

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[51] Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co., 158 Wn.2d 603, 608, 146 P.3d 914 (2006).

[52] Id. at 609, 611.

[53] RCW 23B.14.050(2)(e)-(f).

[54] Ballard Square, 158 Wn.2d at 616. For dissolutions effective after June 7, 2006, claims are timely when filed within three years of the effective date of dissolution. RCW 23B.14.340.

II. Wrongful Death and Survivor Actions

Elementis argues the court erred by denying its motion for judgment as a matter of law that the Estate lacked the statutory beneficiary required to maintain a wrongful death claim or receive an award of noneconomic damages under the survivor statute.

"We review judgments as a matter of law de novo."[55] A motion for judgment as a matter of law admits the truth of the evidence and reasonable inferences favoring the nonmoving party.[56] Statutory interpretation is also a matter of law reviewed de novo.[57]

In its damages instructions, the court told the jury to consider economic damages, such as medical costs, and noneconomic damages, such as "pain, suffering, anxiety, emotional distress, and loss of enjoyment of life experienced," when calculating the extent of Leren's injury.[58] The court also told the jury to "consider what Marvin Leren reasonably would have been expected to contribute to [stepdaughter] Jo Lefebvre in the way of love, care, companionship, and guidance."[59] The jury awarded the Estate, on Leren's behalf, $294,000 in

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[55] Paetsch v. Spokane Dermatology Clinic, P.S., 182 Wn.2d 842, 848, 348 P.3d 389 (2015).

[56] Tapio Inv. Co. I v. State ex rel. the Dep't of Transp., 196 Wn. App. 528, 538, 384 P.3d 600 (2016).

[57] In re Est. of Blessing, 174 Wn.2d 228, 231, 273 P.3d 975 (2012).

[58] CP at 1933.

[59] CP at 1934.

economic damages and $681,000 in noneconomic damages.[60] The jury awarded Lefebvre "$0."[61]

At issue here is the interplay between the general survival statute, RCW 4.20.046, and the wrongful death statute, RCW 4.20.020. The survival statute allows "[a]ll causes of action by a person" to "survive to the personal representatives of the [person] . . . whether such actions arise on contract or otherwise."[62] But the survival statute has an exception "[t]hat the personal representative shall only be entitled to recover damages for pain and suffering . . . personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020."[63] That statute allows wrongful death actions only "for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused."[64]

Elementis argues the Estate was not entitled to noneconomic damages under the survival statute because Lefebvre is not a statutory stepchild. Any legal relationship between Lefebvre and Leren was severed, Elementis contends, when Leren and Lefebvre's mother divorced in 1985.

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[60] CP at 916.

[61] Id.

[62] RCW 4.20.046(1).

[63] Id.

[64] RCW 4.20.020 (emphasis added).

A statutory stepchild under RCW 4.20.020 is "'a child of one's [spouse] by a former marriage.'"[65] The definition does not require "that stepchildren are necessarily the children of a present spouse by a previous marriage or a former partner."[66] This is because "'the relationship by affinity is in fact . . . continued beyond the death of one of the parties to the marriage which created the relationship, and where the parties continue to maintain the same family ties and relationships, considering themselves morally bound to care for each other.'"[67] Relationships by "affinity" are formed by marriage rather than blood.[68]

The Estate relies on In re Estate of Blessing to argue Lefebvre is a statutory beneficiary.[69] In Blessing, our Supreme Court held that the death and remarriage of a nonbiological parent did not sever the bond between a stepparent and her stepchildren.[70] A woman married her first husband, and they had three children together.[71] After their divorce, she married her second husband, who had four children from a previous marriage.[72] They raised all seven children together,

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[65] Blessing, 174 Wn.2d at 232 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 2237 (2002)).

[66] Id.

[67] Id. at 234 (quoting In re Estate of Bordeaux, 37 Wn.2d 561, 579-80, 225 P.2d 433 (1950)).

[68] Id. at 233 n.3.

[69] 174 Wn.2d 228, 273 P.3d 975 (2012).

[70] Id. at 235.

[71] Id. at 230.

[72] Id.

although she never adopted her second husband's children.[73] He died after almost 30 years of marriage.[74] The woman married for a third time, and her third husband died a few years later.[75] After the woman died in a car accident, her estate brought wrongful death claims on behalf of her three biological children and four stepchildren.[76] The court reasoned that the stepchildren "[i]ndisputably . . . at least during the marriage, had legal status as 'stepchildren.'"[77] And the "step relationship" continued even after they had become adults and the marriage terminated upon their father's death.[78] The court rejected the argument "that once a marriage ends, the step relationship ends," so the fact of the woman's remarriage was not germane.[79] Accordingly, the stepchildren "retained" their status under RCW 4.20.020.[80]

Similarly, here, Lefebvre indisputably became Leren's stepdaughter from age seven through to adulthood. Lefebvre's mother testified that people regarded Leren as Lefebvre's biological father.[81] As a child, Lefebvre did not have a relationship with her biological father, and she has always regarded Leren as her

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[73] Id.

[74] Id.

[75] Id.

[76] Id.

[77] Id. at 231.

[78] Id. at 235.

[79] Id.

[80] Id.

[81] RP (Oct. 25, 2017) at 757.

father.[82] Leren taught Lefebvre how to tie her shoes, ride a bike, and catch a fish.[83]

Further, Lefebvre and Leren "'continue[d] to maintain the same family ties and relationships, considering themselves morally bound to care for each other'"[84] even after the divorce. Leren, Lefebvre, and her mother regularly celebrated Lefebvre's birthdays together.[85] For the five years Lefebvre lived overseas, she and Leren spoke by phone every week.[86] Leren and Lefebvre regularly went camping together until she married.[87] At Lefebvre's wedding, Leren walked her down the aisle and danced with her for the traditional father/daughter dance.[88] Leren attended funerals for Lefebvre's maternal grandmother and uncle.[89] Leren was present when Lefebvre's son was born, and Leren "was a strong figure" in her son's life.[90] After learning of his diagnosis, Lefebvre spent every night at the hospital with Leren until he died.[91] She informed her mother of his death.[92] Leren left a bequest for Lefebvre in his will, which he made in the weeks before his

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[82] Id. at 757-59, 762.

[83] Id. at 814.

[84] Blessing, 174 Wn.2d at 234 (quoting Bordeaux, 37 Wn.2d at 579-80).

[85] RP (Oct. 25, 2017) at 773.

[86] Id. at 835.

[87] Id. at 772-73.

[88] Id. at 774.

[89] Id.

[90] Id. at 822.

[91] Id. at 803.

[92] Id. at 776.

death.[93] Although Elementis distinguishes Blessing because that marriage terminated by death rather than divorce, the bonds of affinity between Leren and Lefebvre indisputably lasted until the end of Leren's life. The logic of Blessing controls here and requires a similar result.

Elementis warns that absurd results will flow from ruling in the Estate's favor. Specifically, Elementis fears that former spouses will be able to maintain wrongful death claims. But spouses are not stepchildren. The bonds of affinity formed by marriage have ceased to exist between spouses who choose to divorce—hence, the divorce. Divorces do not, in theory, sever the bonds of affinity between a stepparent and a stepchild any more than between a parent and a biological child. "Any concerns over the result or regarding which stepchildren should be entitled to recover in a wrongful death suit are far more appropriately factored into any damages determination."[94] Lefebvre was a statutory beneficiary under RCW 4.20.020, and the Estate was properly allowed to collect noneconomic damages under RCW 4.20.046. The court did not err by denying Elementis's motion for judgment as a matter of law.[95]

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[93] Id. at 835-36.

[94] Blessing, 174 Wn.2d at 238.

[95] We note that the legislature recently enacted amendments to the wrongful death and survival statutes. LAWS OF 2019, ch. 159, §§ 1-4. Significantly, the amendments remove the requirement that a decedent's second tier beneficiaries, which include siblings, must have been dependent on the decedent to be a statutory beneficiary for a wrongful death action or for receipt of noneconomic damages in a survivor action. Id. at §§ 2-3. These amendments apply retroactively to any case pending in any court as of the law's effective date. Id. at § 6. This could provide an alternative legal theory that retroactively supports

III. Superseding Cause of Injury

Elementis argues the court erred by denying its request for a jury instruction that Z-Brick's conduct was a superseding cause of Leren's injuries.[96]

We review jury instructions de novo for legal errors.[97] But the decision to provide a jury instruction depends on the facts of the case and is reviewed for abuse of discretion.[98] A court abuses its discretion where its ruling is based on untenable grounds.[99] Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theories of the case, and, read together, properly inform the jury of the applicable law.[100]

As a general matter, the superseding cause theory applies to product liability actions.[101] If an employer's conduct is at issue, failure to protect an employee from a product that is unreasonably unsafe can be a superseding cause

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an award of noneconomic damages regardless of Lefebvre's status as a statutory beneficiary because Leren's brother is the Estate's personal representative.

[96] Although the court granted a partial motion for summary judgment on this issue in the Estate's favor, Elementis does not appeal that order and instead argues the court should have modified its order during trial and allowed the instruction.

[97] Paetsch, 182 Wn.2d at 849.

[98] Fergen v. Sestero, 182 Wn.2d 794, 802-03, 346 P.3d 708 (2015).

[99] Hizey v. Carpenter, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

[100] Fergen, 182 Wn.2d at 803.

[101] Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 767-68, 389 P.3d 517 (2017).

where "the employer had actual, specific knowledge that the product was unreasonably unsafe and failed to warn or protect."[102]

An industrial hygienist testified that it was widely known by 1964 that direct and indirect asbestos exposure could cause mesothelioma and that major studies were published as early as 1949 linking asbestos exposure to lung cancer.[103] Additional testimony stated that all asbestos would have come with a warning printed on it beginning in 1972.[104] But no one testified about Z-Brick's actual, specific knowledge during the years Leren worked with asbestos.

Elementis relies heavily on testimony from a former employee that beginning around 1963, workers would say, "Put on your mask. I'm going to add the asbestos now," before pouring it into a hopper.[105] This, according to Elementis, "shows an awareness of a hazard."[106] But that same employee explained the masks were just basic dust masks costing around 10 cents apiece.[107] Another Z-Brick employee testified the masks were for "nuisance dust" only.[108] Elementis's

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[102] Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 817, 733 P.2d 969 (1987) (emphasis added). An employer's conduct also may constitute a superseding cause where "(1) the employer's intervening negligence created a different type of harm; or (2) the employer's intervening negligence operated independently of the danger created by the manufacturer." Id. Elementis does not argue either of these applies.

[103] RP (Oct. 23, 2017) at 437-38, 450.

[104] RP (Oct. 26, 2017) at 924-25.

[105] Appellant's Br. at 15, 37.

[106] Id. at 37.

[107] Ex. 328 at 16:00-16:30.

[108] RP (Oct. 25, 2017) at 769.

evidence merely proves some workers were generally aware of the hazards from dust. It is not the same as an employer's knowledge of risks from repeated exposure to asbestos dust. Given the lack of testimony about Z-Brick's actual, specific knowledge, the court did not abuse its discretion.

Therefore, we affirm.

WE CONCUR:

HONORABLE JAMES ROGERS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

EDWARD P. LEREN, as Executor of the Estate of MARVIN A. LEREN,

Plaintiff,

v.

KAISER GYPSUM COMPANY, INC., et al,

Defendants.

NO. 15-2-28006-6 SEA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND

Plaintiff filed this wrongful death and survivorship action against Elementis Chemical Inc. on September 14, 2016, alleging that Elementis was the legal successor to Benson Chemical Company. On July 7, 2017, Judge Mariane Spearman denied Elementis' motion for summary judgment, finding that the Court's legal determination on corporate successorship rested on disputed issue of fact. This matter was tried before a jury between October 16, 2017, and November 1, 2017. In addition to determining Benson Chemical's liability and ascertaining Plaintiff's damages, the jury was presented with eight factual interrogatories to guide the Court's legal determination of whether or not Elementis is the legal successor to Benson Chemical.

On November 1, 2017, the jury found that Benson Chemical was strictly liable for the damages to Marvin Leren and awarded his estate $975,000 in damages. On the same date, the

jury formalized a series of factual findings to assist the Court in its resolution of the contested successorship issue. Based on jury's factual findings, the Court issued an oral ruling on November 7, 2017 holding that Elementis Chemical, Inc. was the legal successor to Benson Chemical. This ruling is memorialized in the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Plaintiff Edward Leren is the Personal Representative of the Estate of Marvin Leren who died of mesothelioma on November 24, 2015 at the age of 72.

2. Defendant Elementis Chemical, Inc. is a Delaware Corporation licensed to conduct business in the State of Delaware.

3. It is undisputed that Elementis Chemical, Inc. is the successor-in-interest to Harrisons & Crosfield (Pacific), Inc. ("HCP").

4. Plaintiff alleges that defendant Elementis is the corporate successor to Benson Chemical Corporation and that Elementis is legally responsible for any asbestos-related liabilities arising out of Plaintiff's work with products distributed by Benson Chemical.

5. W. Ronald Benson, Inc., was originally incorporated in 1950. The Company amended its articles of incorporation to change the name to Benson Chemical Corporation in 1966. Benson Chemical Corporation distributed Johns-Manville asbestos fiber in Washington and Oregon from the mid-1960s through the late 1970s.

6. HCP purchased Benson Chemical Corporation on January 10, 1977, by acquiring all fifteen shares of the issued and outstanding capital stock of the Company. At the time, Benson Chemical Corporation was a closed, privately held company. While the transaction was structured as a stock sale agreement, it was intended to acquire all the assets of Benson Chemical

Corporation. After acquisition of the stock, HCP took over the operations of Benson Chemical and operated it as a division.

7. On January 10, 1977—the date of the sale—W. Ronald Benson, the president and founder of Benson Chemical Corporation—entered into a two-year employment agreement with HCP for the period covering December 1, 1976 to December 1, 1978.

8. On January 30, 1977, the stock sale was announced in the *Seattle Times* on page A 20. The article emphasized that Benson Chemical would continue to trade under the Benson name, and Ronald Benson, president and founder, would continue with the company as a consultant.

9. On February 15, 1977, a Special Meeting of the Board of Directors of HCP took place. The board members, on behalf of the stockholder HCP, voted to dissolve Benson Chemical and adopted and approved the Plan of Liquidation of the business as necessary to effectuate the dissolution. As of February 28, 1977, the officers of HCP were: Murray P. Wilson (President), Wharton Jackson (Vice President), and Ila A. Fitzgerald (Secretary-Treasurer). The directors of the Company were: Murray P. Wilson, Wharton Jackson, Tom Prentice, John McLeod, R.J. Davidson, and R.A. Goddard.

10. HCP filed a Statement of Intent to Dissolve Corporation on Consent of Shareholders Pursuant to RCW 23A.28.020 of Benson Chemical Corporation with the Secretary of State on June 14, 1977. The filing identified Benson Chemical's officers as follows: Murray P. Wilson (President), Wharton Jackson (Vice President), and Ila A. Fitzgerald (Secretary-Treasurer). The directors of Benson Chemical at the time of the filing were: Murray P. Wilson, Wharton Jackson, and R.A. Goddard.

11. Between HCP's acquisition of Benson Chemical in January 1977 and the dissolution of Benson in July 1978, the companies operated as a single entity.

12. On July 26, 1978, Benson Chemical Corporation's articles of dissolution were filed with the Washington Secretary of State. After Benson Chemical ceased to exist as an independent corporate entity, HCP continued to transact business under the Benson trade name and sold Johns-Manville asbestos fiber under the Benson name for some period following the July 1978 dissolution.

13. On November 1, 2017, the jury found by a preponderance of the evidence the following:

i. Benson Chemical's business continued to function with substantially the same personnel and maintained the same physical location after Benson Chemical was dissolved on July 26, 1978.

ii. Harrison & Crosfield (Pacific), Inc. retained the Benson Chemical brand name following Benson's dissolution on July 26, 1978.

iii. Harrison & Crosfield (Pacific), Inc. acquired and benefited from the goodwill of Benson Chemical following its purchase of Benson's stock on January 27, 1977.

iv. Harrison & Crosfield (Pacific), Inc. benefited from the goodwill of Benson Chemical following its dissolution of Benson Chemical on July 26, 1978.

v. Harrison & Crosfield (Pacific), Inc. held itself out to the public as a continuation of Benson Chemical by selling the same products under a similar name.

vi. Harrison & Crosfield (Pacific), Inc. acquired substantially all of Benson Chemical Corporation's assets following the dissolution of Benson on July 26, 1978.

These findings are controlling on the Court's legal determination of the corporate successorship of HCP to Benson Chemical's asbestos liabilities.

II. CONCLUSIONS OF LAW

1. The general rule is that there is no corporate successor liability. Thus, where a company sells its assets to another company, the purchaser is not liable for the debts and liabilities of the selling company, including those arising out of the seller's tortious conduct. Washington recognizes the following five exceptions to this general rule: (1) *de facto* merger; (2) mere continuation; (3) product line; (4) an express or implied agreement for the purchaser to assume the liabilities of the seller; and (5) fraudulent transfer of liability. Based on the jury's response to the Special Interrogatories, the Court limits its consideration to the first three exceptions. In considering these three exceptions, the Court looks to the substance of the transaction under which HCP acquired Benson Chemical over its form. Therefore, the fact that the January 20, 1977 transaction was characterized as a stock sale rather than an asset purchase does not preclude the Court from analyzing the transaction under these three exceptions.

2. *De Facto* Merger. Plaintiff argues that the 1977 acquisition of Benson Chemical by HCP amounted to a *de facto* merger of the two companies. The pertinent factors to this inquiry are: (1) continuity of the business (including personnel and management, physical location, operating, use of brand names); (2) continuity of ownership; (3) seller's existence ceasing as soon as legally and practically possibly; and (4) if the purchaser expressly or impliedly assumes the seller's obligations. Not all four elements must be present to find an asset purchase constitutes a de facto merger. Nonetheless, continuity of ownership has repeatedly been held essential.

3. The Court finds that the Plaintiff has established many of the elements of this exception. More specifically, the Court finds that HCP: (1) maintained the physical location of Benson Chemical; (2) maintained Benson Chemical's operations and goodwill; (3) utilized the

Benson Chemical trade name; (4) maintained—in many ways—a continuity of ownership between Benson Chemical and HCP; and (5) extinguished Benson Chemical's existence as soon as legally and practically possible. However, because the jury declined to find that HCP acquired Benson's liabilities and because Ronald and Helen Benson received cash for their sale of Benson Chemical stock the *de facto* merger exception does not apply in this situation.

4. Mere Continuation. Plaintiff argues that the 1977 acquisition of Benson Chemical by HCP and its rapid dissolution support a finding of the "mere continuation" exception to successor liability. As with the *de facto* merger doctrine, the "mere continuation" exception is not a bright line test. The factors to support a finding that the "mere continuation" exception applies include: (1) a common identity of the officers, directors, and stockholders in the selling and purchasing companies; (2) the retention of a trade name; (3) the purchase of goodwill; and (4) the sufficiency of consideration running to the seller.

5. The Court finds that Plaintiff has established many of the factors for application of the "mere continuation" exception. However, there was insufficient evidence to support a finding that HCP furnished insufficient consideration for its purchase of Benson Chemical's stock to support the application of the "mere continuation" exception. The Court holds that insufficiently of consideration is a critical factor in determining the applicability of the mere continuation exception and should be weighed more heavily than the other factors.

6. Product Line. Plaintiff argues that the product line exception applies to HCP's acquisition of Benson Chemical and subsequent dissolution. Under *Martin v. Abbott Labs.*, 102 Wn.2d 581, 609, 689 P.2d 368 (1984), this exception imposes successor liability where: (1) the acquiring corporation acquires substantially all the transferor's assets, leaving no more than a mere corporate shell; (2) the acquiring corporation holds itself out to the public as a continuation

of the transferor by selling the same product line under a similar name; and (3) the acquiring corporation continues to benefit from the goodwill of the acquired corporation.

7. The Court finds that there is substantial evidence to support the application of the product line exception to HCP's acquisition of Benson Chemical including the jury's answers to questions 1, 2, 4, 5, and 6 on the special verdict form. First, there was clear evidence that HCP acquired Benson Chemical and dissolved Benson Chemical shortly thereafter, leaving no remedy whatsoever for the Estate of Marvin Leren or similarly situated plaintiffs injured by Benson's products. Second, there was ample evidence in this case that Benson Chemical knew about the risks or would have known about the risks of asbestos and raw asbestos based on what was publicly available in the literature and the fact that Ronald Benson was a chemical engineer. Third, the record was clear that Benson Chemical's goodwill was transferred to HCP and that HCP benefited from Benson's goodwill in its sale of asbestos products to consumers. Finally, there was a causal connection between HCP's acquisition and dissolution of Benson Chemical, leaving no remedy whatsoever for the Estate of Marvin Leren or similarly situated plaintiffs injured by Benson's products except the statutory remedy provided under Washington law with regard to claims against dissolved corporations.

8. Although Elementis argues that the product line exception applies only to manufacturers, the Court finds that where a plaintiff's claim arises prior to enactment of the Washington Product Liability Act in 1981, the product line exception applies to sellers as well. The paramount policy to be promoted by the rules of strict liability is the protection of otherwise defenseless victims from unreasonable dangerous products and the spreading throughout society of the cost of compensating them. This policy is served by imposing liability upon a successor under the circumstances where, as here, (1) Marvin Leren's remedy against Benson Chemical

was virtually destroyed by HCP's acquisition and subsequent dissolution of the business; (2) HCP had virtually the same capacity as Benson to estimate the risks of product defects and to spread the costs of insuring against those risks to the product's consumers; and (3) the Court finds it essentially fair to require HCP to bear the burden of Benson's strict liability because such liability was necessarily attached to the benefits of Benson's goodwill and trade name.

9. The Court holds that HCP's acquisition of Benson Chemical and subsequent conduct satisfied the requirements of the product line exception as enunciated in *Martin v. Abbott Labs*. As the corporate successor to Benson Chemical, Elementis is therefore liable for asbestos-related liabilities of Benson Chemical incurred by Benson Chemical in connection with the products at issue in this case.

DATED this 6 day of December, 2017.

HONORABLE JIM ROGERS
KING COUNTY SUPERIOR COURT

Presented by:

BERGMAN DRAPER OSLUND, PLLC

/s/ Matthew P. Bergman

Matthew P. Bergman, WSBA #20894
Colin B. Mieling, WSBA #46328

Approved as to form:

SOHA & LANG, PS

/s/ Kyle M. Butler
Kyle M. Butler, WSBA # 44290

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

EDWARD P. LEREN, as Executor of the Estate of MARVIN A. LEREN, Plaintiff, v. ELEMENTIS CHEMICAL INC., et al, Defendants.	NO. 15-2-28006-6 SEA GENERAL VERDICT FORM

We, the jury, answer the following questions submitted by the Court:

Liability

QUESTION 1: Did Benson Chemical Corporation sell or supply a product that was not reasonably safe?

ANSWER: Yes

(INSTRUCTION: If you answered "yes" to Question 1, proceed to Question 2. If you answered "no," proceed to Question 3.)

QUESTION 2: Was the unsafe condition of any of the products sold or supplied by Benson Chemical Corporation a substantial factor in causing Marvin Leren's mesothelioma?

ANSWER: Yes

QUESTION 3: Was Benson Chemical Corporation negligent?

ANSWER: No

ORIGINAL

(INSTRUCTION: If you answered "yes" to Question 3 proceed to Question 4. If you answered "no" to Question 3 and "yes" to Question 2, proceed to Question 5. If you answered "no" to Question 3 and Question 2, sign the verdict form and notify the bailiff.)

QUESTION 4: Was Benson Chemical Corporation's negligence a substantial factor in causing Marvin Leren's mesothelioma?

ANSWER: _____

(INSTRUCTION: If you answered "yes" to either Question 2 or Question 4, proceed to Questions 5. If you answered "no" to both Question 2 and Question 4 sign this verdict form and notify the bailiff.)

Damages

QUESTION 5: What do you find to be the amount of Plaintiff's damages arising out of Marvin Leren's injury?

Damages to Marvin Leren:

Economic Damages $294,000

Non-economic Damages $681,000

Damages to Jo LeFebvre: $0

QUESTION 6: Was there negligence by Marvin Leren that was a proximate cause of the injury or damage to the Plaintiff?

ANSWER: No

(INSTRUCTION: If you answered "no" to Question 6, sign this verdict form. If you answered "yes" to Question 6, answer Question 7.)

QUESTION 7: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of the negligence of the defendant and Marvin Leren is attributable to Marvin Leren?

ANSWER: _____

(INSTRUCTION: Sign this verdict form and proceed to answer the questions on the Special Verdict Form.)

Dated this 1st day of ~~October~~ November, 2017. PCG 11/1/17 11:11am

Presiding Juror

HONORABLE JIM ROGERS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

EDWARD P. LEREN, as Executor of the Estate of MARVIN A. LEREN,

Plaintiff,

v.

ELEMENTIS CHEMICAL INC., et al,

Defendants.

NO. 15-2-28006-6 SEA

SPECIAL VERDICT FORM

We, the jury, answer the following questions submitted by the Court:

(Please answer all eight questions before signing this special verdict form and notifying the bailiff.)

QUESTION 1: Did Benson Chemical's business continue to function with substantially the same personnel and maintain the same physical location after Benson Chemical was dissolved on July 26, 1978?

ANSWER: Yes

QUESTION 2: Did Harrison & Crosfield (Pacific), Inc. retain the Benson Chemical brand name following Benson's dissolution on July 26, 1978?

ANSWER: Yes

QUESTION 3: Did Harrison & Crosfield (Pacific), Inc. expressly or impliedly assume Benson Chemical's obligations following its purchase of Benson's stock on January 27, 1977?

ANSWER: No

ORIGINAL

QUESTION 4: Did Harrison & Crosfield (Pacific), Inc. acquire and benefit from the goodwill of Benson Chemical following its purchase of Benson's stock on January 27, 1977?

ANSWER: Y

QUESTION 5: Did Harrison & Crosfield (Pacific), Inc. benefit from the goodwill of Benson Chemical following its dissolution of Benson Chemical on July 26, 1978?

ANSWER: Y

QUESTION 6: Did Harrison & Crosfield (Pacific), Inc. hold itself out to the public as a continuation of Benson Chemical by selling the same products under a similar name?

ANSWER: Y

QUESTION 7: Did Harrison & Crosfield (Pacific), Inc. acquire substantially all of Benson Chemical Corporation's assets following the dissolution of Benson on July 26, 1978?

ANSWER: Y

QUESTION 8: Was one of Harrison & Crosfield (Pacific), Inc.'s intentions in dissolving Benson Chemical on July 26, 1978 avoiding liability for asbestos products sold by Benson prior to its acquisition in January 1977.

ANSWER: N

(INSTRUCTION: Sign this verdict and notify the Judicial Assistant.)

Dated this 1 day of ~~October~~ November, 2017. PCG 2:21pm

Presiding Juror

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

EDWARD P. LEREN, as Executor of the Estate of MARVIN A. LEREN,

Plaintiff,

vs.

KAISER GYPSUM COMPANY, INC., et al.,

Defendants.

No. 15-2-28006-6 SEA

10-24-17

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Jim Rogers, at King County Courthouse, 516 Third Avenue, Room E-733, Seattle, Washington.

APPEARANCES:

MATTHEW P. BERGMAN, CRAIG SIMS, COLIN B. MIELING, JUSTIN OLSON, representing the Plaintiff;

WILLIAM ARMSTRONG, KYLE BUTLER, representing the Defendant.

REPORTED BY: KEVIN MOLL, RMR, CRR, CCP

INDEX

EXHIBITS

Seattle, Washington; Monday, October 24, 2017

MORNING SESSION

--oOo--

THE COURT: Please be seated. So we left off talking about some exhibits, and I think, you know, rereading again your different frameworks and analyses on successorship or however you want to phrase this, I don't think I'm really in a different place than I was before, and that is where we're currently at is that Judge Spearman considered these arguments, I recognized she didn't address your framework of analysis, but she clearly wanted the jury to decide certain factual issues, and then all of it gets to be argued in front of me, and I think that's kind of where we're at.

So I think these issues regarding that -- for example, on plaintiff's proposed jury instructions, they've proposed interrogatories like did Harrisons & Crosfield Pacific hold itself out to the public as a continuation of Benson Chemical by selling the same products under a similar name, under Elementis's theory or analysis that would not really be relevant, but Judge Spearman clearly ruled that it should go to the jury to be -- these issues should go to the jury to be decided.

So I think that that's what I'm going to do, is we're going to continue discussing these exhibits and their

King City manufacturers, as well as Johns-Manville, at the same time?
A. Yes.
Q. How do you know that?
A. Well, I know we were selling asbestos when Harrisons & Crosfield Pacific bought us, and I can't tell you specifically how I know that, but I know it.
Q. Specifically after the purchase of Benson Chemical by HCP, after the purchase did now HCP continue to distribute Johns-Manville asbestos to the Z-Brick facility?
A. Harrisons & Crosfield Pacific would have invoiced the asbestos through Z-Brick after the purchase of Benson Chemical Company, but I don't recall how much was involved, as far as quantity is concerned.

I know that quantity declined over the years because their business declined over the years, because it was just a hard product to handle for their customers.
Q. So, I guess, let me ask just a very pointed question.
A. Uh-huh.
Q. After the sale -- after the purchase of Benson Chemical by HCP, was Johns-Manville asbestos still being distributed to the Z-Brick facility?
A. I think the answer to that is yes, but I don't know a specific instance.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EDWARD LEREN, the ESTATE OF)
MARVIN LEREN, et. al.,)
Plaintiffs,)
vs.) No. 15-2-28006-6 SEA
KAISER GYPSUM COMPANY,)
Defendants.)

VERBATIM REPORT OF PROCEEDINGS

Heard before: The Honorable Jim Rogers
Date: October 24th, 2017
Time: 1:00 p.m.

APPEARANCES:

Matthew Bergman, Craig Sims and Colin Meiling, Attorneys at Law, on behalf of the Plaintiffs;

William Armstrong and Kyle Butler, Attorneys at Law, on behalf of the Defendants.

Reported and Transcribed by:
Michael P. Townsend, Official Court Reporter

P R O C E E D I N G S

(The following occurred in the absence of the jury:)

THE COURT: Do you have your witness to bring back in?

MR. SIMS: Yes.

(The following occurred in the presence of the jury:)

THE COURT: You may all be seated. All right. Mr. Sims?

CONTINUED DIRECT EXAMINATION

BY MR. SIMS:

Q. Mr. Clary, I would like to continue our conversation where we left off, and that is with a discussion of Exhibit No. 252. And those are -- as you look in there, off to your left, they have numbers in the top right of the document. So 252, which are a sampling of the invoices we received from Johns-Manville Corporation.

A. Yes.

Q. And what I would now like to do is talk about a different document within this packet of 252, so start at the front, first page.

A. Yep.

Q. Turn. Second page.

MS. BERGMAN: May it please the Court, plaintiffs call Robert Mann to the stand.

THE COURT: Mr. Mann would you raise your right hand.

(Witness sworn.)

THE COURT: Please be seated.

Whereupon,

ROBERT MANN,

Having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BERGMAN:

Q. Good afternoon, Mr. Mann.

A. Good afternoon.

Q. We have met twice before, I believe?

A. Yes, we have.

Q. We met when you were in Seattle and you furnished a deposition face to face, do you recall that?

A. Yes.

Q. That was on May 10th?

A. That's right.

Q. And we met again on video on August 15th?

A. Yes, sir.

Q. You understood that when you had your deposition taken on May 10th, you were designated as the

operate as Benson Chemical with little or no change in policy or products." You recall being asked about this letter in your deposition; correct, Mr. Mann?

A. Frankly, I don't recall that.

Q. Okay. I asked you about this deposition, I asked you about the -- I asked you about the transaction and the reference to the term "merger," did I not?

A. It could be, but I don't remember the specifics.

Q. Okay. Well, I'll put it up here what you said. This is 78 of your deposition. And you were asked, "Mr. Benson refers to the term 'merger.' Is that your understanding as to what occurred, recognizing that I'm not asking for your legal opinion?"

A. Yeah.

Q. You state, you testified under oath, "Well, again, it depends on your definition of a merger. But they can take different forms, bases, asset purchases versus stock purchases, I mean, there is different ways to acquire a company, but in effect it's a merger." That was your testimony under oath, was it not, sir?

A. Yes.

Q. And then, in January 10th, 1977, there was a stock purchase, was there not?

A. Yes.

Q. And that was on the transaction under which HCP

CERTIFICATE OF SERVICE

I certify that on September 27, 2019, I caused to be served a true and correct copy of the foregoing document upon:

Elementis, Inc.

Megan E. Graves, WSBA #7637
Kyle M. Butler, WSBA #44290
SOHA & LANG, P.S.
1325 Fourth Avenue, Suite 2000
Seattle, WA 98101
Phone (206) 624-1800
Fax (206) 624-3585
Email graves@sohalang.com;
Butler@sohalang.com;
asbestos@sohalang.com;
kuchno@sohalang.com

Dated at Seattle, Washington this 27th day of September 2019.

BERGMAN DRAPER OSLUND, PLLC

/s/ Shane A. Ishii-Huffer
Shane A. Ishii-Huffer

BERGMAN DRAPER OSLUND UDO

September 27, 2019 - 1:38 PM

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