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NO. 62996-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

MICHAEL FARROW and LIDIA FARROW,
husband and wife,

Appellants,

v.

LESLIE CONTROLES, INC., et al.

Respondents.

RESPONSE BRIEF OF RESPONDENT WM. POWELL COMPANY

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ORIGINAL

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I. RESPONDENT'S STATEMENT OF THE ISSUES

Appellants' opposition to the federal enclave motion and following proceedings are set forth in the brief of Respondents Leslie Controls, Inc.; Crane Co.; Garlock Sealing Technologies, Inc.; Fairbanks Morse Pump Corporation; Coltec Industries; and McWane Inc (collectively "Primary Respondents"). Respondent Wm. Powell Company joins in the Primary Respondents' briefing on the federal enclave and language of the disclaimer set forth within Appellants' Complaint. *See* Brief of Primary Respondents.

Additional issues include:

- A. The Trial Court Properly Dismissed Appellants' Claims Against Wm. Powell Company on the Grounds that they Arose within a Federal Enclave and Appellants had Expressly Disclaimed Said Claims.
- B. Alternatively, this Court may Affirm the Trial Court's Dismissal of Claims against Wm. Powell Company on the Grounds that Appellants had Insufficient Product Identification and Lack of Causation.

II. RESPONDENT'S STATEMENT OF THE CASE

Appellants Michael and Lydia Farrow (hereinafter "Appellants") sued Wm. Powell Company and other defendants claiming that Mr. Farrow had developed mesothelioma as a result of occupational exposure to asbestos while working as a pipefitter at Puget Sound Naval Shipyard

(“PSNS”) from 1954-1962 and as an engineering technician at PSNS working in the design shop from 1962-1974. L-CP 5-10.¹

As against Wm. Powell Company, Appellants claimed that Mr. Farrow was exposed to asbestos from the external insulation on Wm. Powell valves and from internal replacement gaskets and packing materials within Wm. Powell valves. A-CP 1459-1463, A-CP 1484-1497, A-CP 1502, A-CP 1508-1509.

Procedural History

Wm. Powell moved for summary judgment on two occasions and on three grounds: federal enclave, lack of product identification and insufficient proximate cause.

In its joinder to Defendant IMO’s “federal enclave” motion, Wm. Powell joined in defense arguments that Appellants had expressly disclaimed all claims against Wm. Powell as they had: (1) expressly disclaimed all claims for asbestos exposure within a federal enclave; (2) PSNS was at all relevant times a federal enclave; and (3) Appellant’s alleged no exposure to Wm. Powell Company products other than at PSNS. A-CP 476-480, A-CP 497-507.

¹ The Appellants’ appeals in Farrow v. Leslie Controls, et al. (No. 62996-4-I) and Farrow v. Alfa-Laval, Inc. et al. (No. 63554-9-I) were consolidated by the court. Citations A-CP will be to the Clerk’s Papers for No. 62996-4-L and citations to A-CP for No. 63554-9-I.

The trial court granted the federal enclave motion and dismissed all of Appellants' claims arising from PSNS exposure pursuant to Appellants' disclaimer, concluding that Appellants had offered insufficient evidence to create a triable issue with respect to the enclave status of PSNS or of naval vessels being worked on there, or with respect to Appellants' disclaimer of claims caused by exposure in a federal enclave. A-CP 610-612, L-CP 5-10, A-CP 772-775.

The trial court granted Wm Powell's joinder and dismissed all of Appellants' PSNS related claims with prejudice. A-CP 610-612. The trial court denied Appellants' motion to reconsider its federal enclave ruling on two separate occasions and this appeal followed. L-CP 1643-1649, A-CP 823-846.

In its proximate cause and lack of product identification motion, Wm. Powell Company argued that even if Appellants had not waived their claims, they nonetheless had no admissible evidence showing that Mr. Farrow had ever been exposed to an asbestos-containing product manufactured by Wm. Powell outside of PSNS. Thus, Appellants could not demonstrate the essential element of proximate cause. A-CP 1459-1466, A-CP 847-848.

Appellants' **did not oppose** Wm. Powell's proximate cause motion. A-CP 847-848. Additionally, Appellants have not filed an appeal

of the court's granting of Defendant Wm. Powell Company's Motion for Summary Judgment for Lack of Product Identification and Lack of Causation. A-CP 847-848, A-CP 823-846.

A. The Trial Court Properly Dismissed Appellants' Claims Against Wm. Powell on the Grounds that They Arose Within a Federal Enclave and Appellants Had Expressly Disclaimed All Such Claims.

After extensive briefing and argument, the trial court concluded that: (1) Appellants' waiver was not ambiguous and did not exclude ship-based claims from its scope but instead applied to all enclave-related claims; and (2) determined that PSNS was a federal enclave. RT 41-46.

The Primary Respondents have explained why these determinations by the trial court were correct and why the Appellants' assignments of error are without merit. The Wm. Powell Company joins in and adopts those arguments and authorities. Accordingly, the Court should affirm the trial court's October 22, 2008 entry of summary judgment for Wm. Powell. A-CP 610-612.

B. Alternatively, This Court May Affirm the Trial Court's Dismissal of Claims Against Wm. Powell on the Grounds that Appellants had Insufficient Evidence of Proximate Cause.

Wm. Powell presented a second motion for summary judgment comprising of two issues: (1) lack of causation; and (2) lack of asbestos-containing product identification. Wm. Powell set forth the argument that Appellants' had no evidence that Mr. Farrow was exposed to an asbestos-

containing Wm. Powell product at any location other than PSNS. All grounds were briefed and properly presented to the trial court. A-CP 476-480, A-CP 497-507, A-CP 610-612, A-CP 1459-1523, A-CP 847-848.

The trial court granted Wm. Powell's Motion for Lack of Product Identification and Causation and ordered a full dismissal with prejudice. A-CP 847-848. The Order stated **"Defendant Wm. Powell Company's Motion for Summary Judgment for Lack of Product Identification and Lack of Causation be GRANTED, plaintiffs' claims are DISMISSED with prejudice and this is a final order per CR 56."** A-CP 847-848.

Appellants have not appealed Wm. Powell's Motion for Summary Judgment for Lack of Product Identification and Lack of Causation. A-CP 823-846. Rather, Appellants have only appealed the federal enclave motion. Id. Additionally, Appellants did not file a Motion for Reconsideration requesting that the trial court reconsider the granting of Wm. Powell's Lack of Product Identification and Lack of Causation Motion.

Appellants' brief makes no assignment of error on the issue of causation, identifies no issue pertaining to causation and makes no argument on the issue of causation. In fact, appellants filed a "non-opposition" motion to Wm. Powell's summary judgment motion and

failed to rebut Wm. Powell's position that there was no evidence of causation on which Appellants could proceed to trial. A-CP 847-848.

Appellants failed to offer any testimony that Mr. Farrow was exposed to Wm. Powell products that contained original gaskets and/or packing either at PSNS or outside of PSNS. Under Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493 (2008), and Simonetta v. Viad Corp., 165 Wn.2d 341, 197 Wn.3d 127 (2008), the Appellants had the burden of proof of connecting Mr. Farrow's asbestos-related disease to a defendant-manufacturer's original asbestos-containing product. Braaten, 165 Wash.2d at 396 (holding the "Appellant has not established a connection between the injury and the manufacturers' products themselves, as required.").

Appellants have failed to set forth any evidence that asbestos supplied by Wm. Powell in any way contributed to Mr. Farrow's asbestos-related disease. Because the Appellants failed to raise the issue of causation on appeal, the trial court's judgment should be affirmed, irrespective of this Court's determination of the federal enclave waiver issue.

The trial court properly concluded that all of Appellants' claims arising from exposure to PSNS were claimed based on exposure in a federal enclave and Appellants had expressly disclaimed those claims. As

the claims against Wm. Powell were based only upon alleged exposure at PSNS, the trial court properly granted Wm. Powell's federal enclave summary judgment motion joinder.

The trial court also properly concluded that Appellants' claims against Wm. Powell lacked causation and correctly granted Wm. Powell's Lack of Product Identification and Lack of Causation Motion for Summary Judgment.

III. CONCLUSION

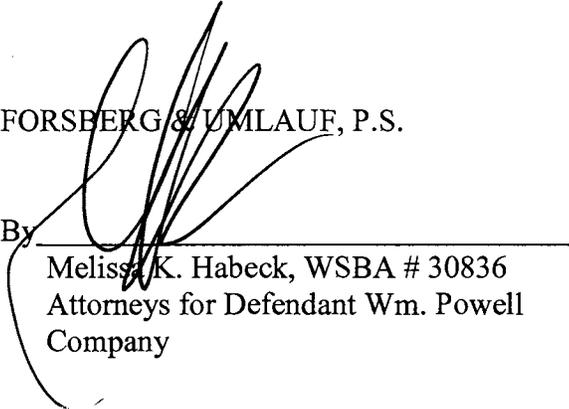
For the reasons set forth above and in the Primary Respondents' brief, the trial court properly concluded that all of Appellants' claims arising from exposure at PSNS were claims based on exposure in a federal enclave and that Appellants had expressly disclaimed those claims. Because the claims against Wm. Powell were based only upon alleged exposure at PSNS, the trial court properly granted Wm. Powell's "federal enclave" joinder summary judgment motion. This Court should affirm that ruling; if it does so, the Court need not reach the merits of Wm. Powell's proximate cause summary judgment motion.

However, if the Court does not affirm the granting of summary judgment for Wm. Powell on the federal enclave grounds, it should nonetheless affirm the summary judgment on the alternate grounds

presented in Wm. Powell's "proximate cause" summary judgment as explained above.

RESPECTFULLY SUBMITTED this 4 day of September, 2009.

FORSBERG & UMLAUF, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

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