

No. 62996-4-I
(Consolidated)

IN THE COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION 1

MICHAL FARROW and LIDIA FARROW
Appellants/Plaintiffs,

v.

LESLIE CONTROLS, INC., et al.,

And

ALFA LAVAL, INC.,

Respondents/Defendants.

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Consolidated Appeal from the Superior Court of Washington
For King County
(Cause No. 08-2-07177-4 SEA)

RESPONSE BRIEF OF RESPONDENT SEPCO CORPORATION

Thomas A. Heller, WSBA #14867
HELLER WIEGENSTEIN PLLC
Attorneys for Respondent Sepco Corp.
144 Railroad Avenue, Suite 210
Edmonds, WA 09020
Tel: 425 778-2525
Fax: 425 778-2566

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I. INTRODUCTION

Sepeco Corporation [“hereinafter “Sepco”] was one of numerous defendants that the Farrowes sued in this matter. Along with most of the other defendants, Sepco filed a separate joinder in the summary judgment motion filed by defendant IMO Industries, Inc., which sought the dismissal of all claims arising from Mr. Farrow’s alleged asbestos exposure occurring in a federal enclave. L-CP 51-73; A-CP 348-350.¹ On October 22, 2008, Judge Lum granted IMO’s Motion for Summary Judgment, entered partial summary judgments in favor of multiple defendants, and dismissed all of the Farrowes’ claims arising from alleged exposure to asbestos in the federal enclave of PSNS. L-CP 1498. On October 25, 2008, Judge Lum signed an Order granting Sepco’s joinder in IMO’s Motion for Summary Judgment, and dismissing all of the Farrowes’ claims against Sepco. L-CP 1553-1555.

¹ Appellants initially noticed two appeals – *Farrow v. Leslie Controls*, No. 62996-4-I (involving just Leslie Controls, Inc. and ITT Corporation) and *Farrow v. Alfa-Laval*, No. 63554-9-I (involving the rest of the defendants/respondents) – which were subsequently consolidated by court order. Appellants prepared two separate sets of Clerk’s Papers, and cited to both in her opening brief. Sepco will use the same designations as Appellants to avoid duplication and additional confusion. Thus, citations to “L-CP” will be to the Clerk’s Papers for No. 62996-4-L, and citations to “A-CP” will be to the Clerk’s papers for No. 63554-9-I.

II. JOINDER IN OTHER RESPONDENTS' BRIEFS

Respondents Crane Co., Garlock Sealing Technologies, Inc., Fairbanks Morse Pump Corporation, Coltec Industries, McWane, Inc., Leslie Controls, Inc., and ITT Industries, Inc., and perhaps some other respondents, are expected to file responsive briefs that directly address the central issue on this appeal, namely the legal impact of the language the Farrows chose to use in their complaint disclaiming causes of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, namely the Puget Sound Naval Shipyard [hereinafter "PSNS"]. Inasmuch as Sepco has every reason to believe that those other respondents will comprehensively brief those issues for this Court, and in order to promote notions of judicial economy, Sepco will not address those issues here, but rather pursuant to RAP 10.1(g) joins in those other respondents' briefs on those issues. Sepco does submit this additional briefing on issues pertaining specifically to it, and which may not be covered in briefing submitted by the other respondents.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Farrows have waived any alleged error pertaining to the trial court's dismissal of all claims against Sepco, and therefore the trial court should be affirmed.

2. The trial court correctly found, based on the entirety of the record before it, that the Farrow's had not presented sufficient evidence of any alleged exposure to a Sepco product outside the PSNS federal enclave, and hence the trial court's dismissal of all claims against Sepco should be affirmed.

IV. COUNTER STATEMENT OF THE CASE

As indicated in Section II, *supra*, Sepco joins in the responsive briefing to be filed by other respondents, and those briefs will set forth counter statements of the case at least as they relate to the federal enclave issues. Sepco offers the following additional counter statement of facts.

Sepco was one of some fifty defendants that the Farrow's chose to sue in this matter. As the record before this Court reflects, there was very considerable discovery undertaken in the trial court, before the time that Judge Lum entered the Order on October 22, 2008, granting IMO's Motion for Summary Judgment, and before Judge Lum signed the order on October 25, 2008 dismissing all claims against Sepco. For example, Mr. Farrow gave extensive deposition testimony that spanned many, many days. See, A-CP 481-488, A-CP 508-513. Mr. Farrow also responded under oath to respondents' standard "style" interrogatories and requests for production of documents. A-CP 408-435. He also responded to defendant-specific written discovery issued by various defendants. It is apparent

from both Mr. Farrow's written discovery responses and his deposition testimony that the sole basis for his claims against defendants, including Sepco, relate to his alleged exposure at PSNS.

The style written discovery that Mr. Farrow responded to had very precise questions that asked Mr. Farrow to identify each location – work or otherwise – where he alleged asbestos exposure. In response to Interrogatories Nos. 11 and 12 Mr. Farrow responded that, “I contend that I was exposed to the asbestos products of defendants during my employment at Puget Sound Naval Shipyard in Bremerton, Washington.” Mr. Farrow also responded that, “I contend that I was exposed to the asbestos-containing products manufactured, sold, and/or supplied by defendants during my employment at Puget Sound Naval Shipyard from 1953 through 1974.” Mr. Farrow failed to identify any other locations where he allegedly was exposed to asbestos. A-CP, 613, 639.

During the course of Mr. Farrow's depositions, he conceded that he only was claiming alleged asbestos exposure at PSNS. A-CP 1395-1396. Furthermore, during the course of Mr. Farrow's depositions, his own counsel represented on the record that Mr. Farrow was not claiming asbestos exposure outside of PSNS. A-CP, 1444-1445; A-CP, 1524-1536; A-CP 1579-1624; A-CP, 1625-1687. It follows, therefore, that there is ample evidence in the trial court record that Mr. Farrow and his attorneys

expressly limited his claimed exposure to asbestos to any he may have had while working at PSNS. Correlatively, any exposure that Mr. Farrow may have had to a Sepco asbestos-containing product must also have occurred when Mr. Farrow worked at PSNS.

Sepco asked Judge Lum to dismiss all claims against it arising out of Mr. Farrow's alleged exposure at PSNS. A-CP 348-350. On October 25, 2008, Judge Lum signed an Order granting Sepco's Joinder in IMO's motion and dismissing all claims against Sepco with prejudice. A-CP, 928-930. In granting Sepco's motion, and dismissing all claims against it, Judge Lum relied on a long list of items including all of the Court's [at that time lengthy] files and records. *Id.*

V. ARGUMENT

A. **The Farrow's Have Waived Any Alleged Error in the Trial Court's Dismissal of All Claims Against Sepco and Therefore the Trial Court's Order Granting Sepco Dismissal Should be Affirmed.**

The Farrow's have not raised any specific issues, nor have they made any specific arguments in their opening brief regarding Sepco. Indeed, Sepco is mentioned only one time in the Farrow's forty-seven page brief. See, appellants' brief at page 6. The brief is completely devoid of any arguments or explanation of why the Farrow's have sought review of the trial court's decision to dismiss all claims against Sepco, aside from the

general arguments advanced as to all defendants, that Judge Lum erred on the federal enclave issues. Moreover, the Farrowes have not cited to a single case with respect to its appeal against Sepco.

RAP 10.3(a)(6) requires an appellant to include argument in his brief that supports the issues presented for review, together with citations to legal authority. State v. Olson, 126 Wn.2d 315, 320, 893 P.2d 629 (1995). It is well-settled that when an appellant fails to raise an issue in the assignments of error or fails to present supporting argument or legal citations, the appellate courts of this state will not consider the merits of that issue. Viereck v. Fibreboard Corp., 81 Wn. App. 579, 582, 915 P.2d 581 (1996)(citing Olson, 126 Wn.2d at 321), review denied, 130 Wn.2d 1009 (1996). Thus, even an appellant who assigns error to a trial court ruling, but fails to provide supporting argument, “is deemed to have abandoned it.” In re Marriage of Lutz, 74 Wn.App. 356, 372, 873 P.2d 566 (1994). See also, Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987); Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978).

Here, it is clear that the Farrowes have failed to raise any issue concerning Sepco in their assignments of error [that is, beyond the more general federal enclave issue, that pertains to all defendants], have failed to make any arguments, and have failed to provide the Court with citations of

authority. Accordingly, under well-settled principles of appellate procedure, this Court should conclude that the Farrows have abandoned any such contentions as to Sepco, and should dismiss the appeal and affirm the order of dismissal as to Sepco, assuming of course that this Court affirms Judge Lum's rulings concerning his interpretations of the Farrows' disclaimer language in their complaint, and his rulings concerning PSNS as constituting a federal enclave.

B. The Trial Court Correctly Found, Based on the Entirety of the Record Before it, That the Farrows Had Not Presented Sufficient Evidence of any Alleged Exposure to a Sepco Product Outside the PSNS Federal Enclave, and Hence the Trial Court's Dismissal of All Claims Against Sepco Should be Affirmed.

If this Court is inclined to consider any arguments that the Farrows may have that are specific to Sepco, and not generic as to all of the other respondents, despite the Farrows' complete failure to identify and brief those issues for this Court, and to the extent that the Farrows are arguing that the trial court should not have dismissed all claims against Sepco, then Sepco asserts that the Farrows are wrong, and that the trial court acted correctly because the record on appeal shows that Mr. Farrow was not exposed to any Sepco product outside the PSNS federal enclave.

It is well-settled that a trial court's decision may be affirmed on any theory within the pleadings and evidence. For example, it has been

stated that the Court of Appeals may sustain a trial court result on any ground, even though that ground was not considered by the trial court. J-U-B Engineers, Inc. v. Routsen, 69 Wn.App. 148, 848 P.2d 733 (1993). See also, Hoflin v. City of Ocean Shores, 121 Wn.2d 113, 847 P.2d 428 (1993); State v. S.S., 67 Wn. App. 800, 840 P.2d 891 (1992). Stated differently, this rule of appellate procedure permits this Court to affirm a trial court's decision on any theory or alternative ground that the record adequately supports. State v. Costich, 152 n.2d 463, 477, 98 P.3d 795 (2004); Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

The trial court had the benefit of a very extensive record by the time it signed the Order dismissing all claims against Sepco, as does this Court. By that time, numerous summary judgment motions had been filed. Indeed, the record on this appeal consists of over 4,700 pages. As recited in Sepco's counter statement of the facts, the record includes Mr. Farrow's sworn written discovery responses and extensive excerpts of his depositions, which took place over a period of many days. A-CP 1287-1351. The record clearly establishes that Mr. Farrow is not claiming any asbestos exposure outside of his employment at PSNS. As indicated earlier, Mr. Farrow's responses to written interrogatories confirm this. It is also noteworthy that in response to one interrogatory asking where he had worked throughout his life, Mr. Farrow responded that he had served as a

messenger in the United States Navy from July 1950 – December 1953. [Answer to interrogatory No. 10.] Significantly, Farrow did not indicate he was alleging exposure to asbestos while serving in the Navy. To the contrary, Farrow's explicit responses to interrogatories Nos. 11 and 12 limited his alleged exposure to the times he was working at PSNS.

Farrow's written interrogatory responses, which were not amended, and which were signed and verified under penalty of perjury and dated March 5, 2008, were entirely consistent with his extensive deposition testimony that went on for over twenty days. During his depositions, Mr. Farrow admitted that he only was claiming alleged asbestos exposure at PSNS. A-CP 1395-1396. And during colloquy between counsel, Mr. Farrow's counsel stated on the record that Mr. Farrow was not claiming asbestos exposure outside of PSNS. A-CP, 1444-1445; A-CP, 1524-1536; A-CP 1579-1624; A-CP, 1625-1687. It is beyond controversy, therefore, that Mr. Farrow and his attorneys limited Mr. Farrow's claimed exposure to asbestos to any he may have had while working at PSNS. It necessarily follows, then, that any exposure that Mr. Farrow may have had to a Sepco asbestos-containing product must also have occurred when Mr. Farrow worked at PSNS.

In summary, the trial court's order dismissing all claims against Sepco must be affirmed as there is no evidence in the record that Mr.

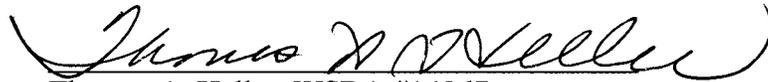
Farrow was exposed to any Sepco asbestos-containing product outside of PSNS and Mr. Farrow has waived all such claims in his complaint.

VI. CONCLUSION

For the reasons set forth above, and in the various briefs that Sepco has joined in, Sepco respectfully requests that the Court affirm the trial court's dismissal of all claims against Sepco.

RESPECTFULLY SUBMITTED this 4 day of September, 2009.

HELLER WIEGENSTEIN PLLC

A handwritten signature in cursive script, appearing to read "Thomas A. Heller", written in black ink.

Thomas A. Heller, WSBA #14867
Attorneys for Respondent Sepco Corporation