

62996-4

62996-4

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 SEP -8 PM 3:02

No. 62996-4-I  
(Consolidated)

---

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

MICHAEL FARROW and LIDIA FARROW,

*Appellants,*

v.

LESLIE CONTROLS, INC.,

And

ALFA LAVAL, INC., et al.,

*Respondents.*

---

Consolidated Appeal from the Superior Court of Washington  
For King County

Cause No. 08-2-07177-4SEA

---

BRIEF OF RESPONDENT CLEAVER-BROOKS, INC.

---

Timothy K. Thorson, WSBA No. 12860  
CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-5017  
Telephone: (206) 622-8020  
Of Attorneys for Respondent  
Cleaver-Brooks, Inc.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b><u>TABLE OF AUTHORITIES</u></b> .....	ii
I. <b><u>RESPONDENT’S STATEMENT OF THE ISSUES</u></b> .....	1
II. <b><u>RESPONDENT’S STATEMENT OF THE CASE</u></b> .....	2
III. <b><u>ARGUMENT</u></b> .....	4
A. <b><u>This Court Should Affirm the Trial Court’s Dismissal of Plaintiffs’ PSNS-based Claims Against Cleaver-Brooks Because Those Claims Arose Within a Federal Enclave and Plaintiffs Had Expressly Disclaimed All Such Claims</u></b> .....	4
B. <b><u>This Court Should Affirm the Trial Court’s Dismissal of Plaintiffs’ non-PSNS-based Claims Because Plaintiffs Did Not Oppose Dismissal in the Trial Court and Have Not Challenged It on Appeal</u></b> .....	5
IV. <b><u>CONCLUSION</u></b> .....	6

**TABLE OF AUTHORITIES**

**CASELAW**

**Federal**

*Celotex Corp. v. Catrett*,  
477 U.S. 317 (1986).....5

**Washington State**

*In re Marriage of Lutz*,  
74 Wn. App. 356, 873 P.2d 566 (1994).....6

*State v. Olsen*,  
126 Wn.2d 315, 893 P.2d 629 (1995).....6

*Tinder v. Nordstrom*,  
84 Wn. App. 787, 929 P.2d 1209 (1997).....5

*Viereck v. Fiberboard Corp.*,  
81 Wn. App. 579, 915 P.2d 581 (1996).....6

*Young v. Key Pharmaceuticals, Inc.*,  
112 Wn.2d 216, 770 P.2d 182 (1989).....5

**STATUTES, RULES AND LEGISLATIVE MATERIALS**

**State**

CR 56(e).....5  
RAP 10.1(g) .....1, 2, 5  
RAP 10.3(a)(3).....6  
RAP 10.3(a)(6).....6

## **I. RESPONDENT'S STATEMENT OF THE ISSUES**

Respondent Cleaver-Brooks, Inc. ("Cleaver-Brooks") hereby joins in the Statements of Issues set forth in the briefs of respondents Leslie Controls, Inc. and ITT Corp.<sup>1</sup> and of respondents Crane Co., Garlock Sealing Technologies, Inc, Fairbanks Morse Pump Corp., Coltec Industries, and McWane, Inc.<sup>2</sup> *See* RAP 10.1(g). Cleaver-Brooks states the following additional issues:

1. Should this Court affirm the trial court's dismissal of plaintiffs' claims against Cleaver-Brooks based upon Mr. Farrow's alleged exposures while employed at Puget Sound Naval Shipyard ("PSNS"), where plaintiffs had expressly disclaimed all claims based on exposures in a federal enclave, PSNS was a federal enclave, and the ships on which Mr. Farrow worked at PSNS were within that federal enclave?

2. Regardless of whether this Court affirms the trial court's dismissal of plaintiffs' *PSNS-based* claims against Cleaver-Brooks, should this Court affirm the trial court's dismissal of plaintiffs' *non-PSNS-based* claims, i.e., claims based upon Mr. Farrow's alleged exposure to Cleaver-

---

<sup>1</sup> Brief of Respondents Leslie Controls, Inc. and ITT Corp. (hereinafter "Brief of Respondent Leslie Controls") at 3-4.

<sup>2</sup> Response Brief of Respondents Crane Co., Garlock Sealing Technologies, Inc., Fairbanks Morse Pump Corp., Coltec Industries, and McWane, Inc. (hereinafter "Brief of Respondent Crane Co.").

Brooks products outside of his employment at PSNS, where that dismissal was unopposed in the trial court and is not challenged on appeal?

## II. RESPONDENT'S STATEMENT OF THE CASE

Cleaver-Brooks joins in the counter-statements of the case set forth in the Briefs of Respondents Leslie Controls and Crane Co. See RAP 10.1(g). Specifically as to Cleaver-Brooks, the pertinent procedural history is as follows. In *Farrow v. Alfa Laval, Inc.*, defendant IMO Industries, Inc. (“IMO”) moved for summary judgment on the ground, among others, that appellants (hereinafter “plaintiffs”) had expressly disclaimed all causes of action for injuries that arose in a federal enclave and therefore must be deemed to have disclaimed their causes of action arising from exposure during Mr. Farrow’s employment at PSNS, which is a federal enclave. L-CP 51.<sup>3</sup> Cleaver-Brooks joined that portion of IMO’s motion, seeking dismissal of all of plaintiffs’ claims against Cleaver-Brooks that arose out of Mr. Farrow’s employment at PSNS.<sup>4</sup> A-CP 303-4.

---

<sup>3</sup> Plaintiffs’ appeals in *Farrow v. Leslie Controls, Inc.*, No. 62996-4-I, and *Farrow v. Alfa-Laval, Inc.*, No.63554-9-I, have been consolidated by this Court. Citations to the designations of Clerk’s Papers in these two appeals will be abbreviated “L-CP” and “A-CP”, respectively.

<sup>4</sup> Plaintiffs had alleged that Mr. Farrow was exposed to Cleaver-Brooks “distilling plants” and “plant pumps” sometime during his employment at PSNS from 1953 to 1974. See A-CP 428-29.

The briefing, issues and argument on IMO's motion are well summarized in the Briefs of Respondents Leslie Controls and Crane Co. The trial court ultimately granted IMO's motion, and those of Cleaver-Brooks and other joining defendants, dismissing all of plaintiffs' claims arising from exposure in the federal enclave of PSNS. L-CP 1498-1501; A-CP 608-9.

With the PSNS-based claims dismissed, Cleaver-Brooks thereafter filed a second motion for summary judgment, this time seeking dismissal of any and all other claims remaining against it, i.e., claims arising from exposure to Cleaver-Brooks products *outside of* PSNS, since plaintiffs had not identified any evidence to support such claims. A-CP 1448-52, 1438-39. Plaintiffs advised the trial court that they did not oppose this motion (though they reiterated their opposition to the trial court's earlier dismissal of plaintiffs' PSNS-based claims).<sup>5</sup> A-CP 2180-81; Brief of Appellant at 11-12. The trial court thereafter granted Cleaver-Brooks' summary judgment motion, dismissing all of plaintiffs' claims against Cleaver-Brooks. A-CP 2564-65.

---

<sup>5</sup> Plaintiffs Notice of Non-Opposition referenced defense motions relating to "Mr. Farrow's work in the U.S. Navy aboard the USS PRINCETON CV-37". A-CP 2181. Cleaver-Brooks' motion was not limited to Mr. Farrow's service on the USS PRINCETON, but rather extended to *any* exposure he *ever* had to Cleaver-Brooks products outside of his employment at PSNS. A-CP 1448, 1452.

These two summary judgment orders in favor of Cleaver-Brooks, i.e., the first one dismissing plaintiffs' claims against Cleaver-Brooks arising in the federal enclave of PSNS, and the second dismissing any remaining claims against Cleaver-Brooks, are among the 42 orders of which plaintiffs now seek review. A-CP 2615.

### III. ARGUMENT

A. This Court Should Affirm the Trial Court's Dismissal of Plaintiffs' PSNS-based Claims Against Cleaver-Brooks Because Those Claims Arose Within a Federal Enclave and Plaintiffs Had Expressly Disclaimed All Such Claims.

After extensive briefing and argument, the trial court properly dismissed plaintiffs' claims based on PSNS work and exposure, including exposure to Cleaver-Brooks products, because (1) plaintiffs had disclaimed all claims of exposure arising in a federal enclave, (2) PSNS was a federal enclave, and (3) the ships on which Mr. Farrow worked at PSNS were within a within a federal enclave. L-CP 1498-1501; A-CP 608-9. Briefing by other respondents herein explains why these determinations by the trial court were correct and why the Farrows' assignments of error with respect thereto are without merit. *See* Briefs of Respondents Leslie Controls and Crane Co. Cleaver-Brooks joins in and adopts those arguments and authorities and, for the reasons stated therein,

urges this Court to affirm the trial court's dismissal of plaintiffs' PSNS-based claims against Cleaver-Brooks. *See* RAP 10.1(g).

**B. This Court Should Affirm the Trial Court's Dismissal of Plaintiffs' non-PSNS-based Claims Because Plaintiffs Did Not Oppose Dismissal in the Trial Court and Have Not Challenged It on Appeal.**

As set forth above, plaintiffs advised the trial court that they did not oppose Cleaver-Brooks' summary judgment motion for dismissal of plaintiffs' non-PSNS-based claims, i.e., claims arising from alleged exposure to Cleaver-Brooks products other than during Mr. Farrow's employment at PSNS. A-CP 2180-81. *See* note 5, *supra*. Given plaintiffs' non-opposition, and their failure to present any admissible evidence to support claims of non-PSNS exposure to Cleaver-Brooks products, the trial court correctly dismissed those claims.<sup>6</sup> A-CP 2564-65. *See* CR 56(e).

Plaintiffs have not argued otherwise in this Court or challenged the validity or correctness of the trial court's ruling. Rather, they have reiterated their non-opposition to Cleaver-Brooks' motion. Brief of Appellant at 11-12. This Court will not consider the merits of an issue

---

<sup>6</sup> A defendant moving for summary judgment meets its burden by showing that there is an absence of evidence supporting the plaintiff's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex*); *Tinder v. Nordstrom*, 84 Wn. App. 787, 790-91, 929 P.2d 1209 (1997). The burden then shifts to the plaintiff to demonstrate the existence of such evidence, thereby establishing a genuine issue of material fact.

that is not properly raised by a party or supported by argument and authority. *See* RAP 10.3(a)(3) (duty of appellant to state each error that was made by the trial court, together with the issues pertaining thereto), RAP 10.3(a)(6) (duty of appellant to present argument and authorities in support of issues presented for review); *Viereck v. Fiberboard Corp.*, 81 Wn. App. 579, 915 P.2d 581 (1996) (citing *State v. Olsen*, 126 Wn.2d 315, 320, 893 P.2d 629 (1995)) (where appellant fails to raise an issue, or to present argument or authority on that issue, appellate court will not consider the merits of that issue); *In re Marriage of Lutz*, 74 Wn. App. 356, 372, 873 P.2d 566 (1994) (party who fails to provide argument to support an assignment of error is deemed to have waived it).

Accordingly, this Court should affirm the trial court's summary judgment dismissal of plaintiffs' *non*-PSNS-based claims against Cleaver-Brooks, regardless of whether it affirms or reverses the trial court's dismissals of plaintiffs' PSNS-based claims against Cleaver-Brooks and other defendants.

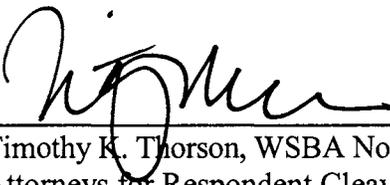
#### IV. CONCLUSION

For the reasons set forth above and in the Briefs of Respondents Leslie Controls and Crane Co., the trial court properly concluded that all of plaintiffs' claims arising from Mr. Farrow's exposure while employed at PSNS were claims based on exposure in a federal enclave and that

plaintiffs had expressly disclaimed those claims. Accordingly, this Court should affirm the trial court's dismissal of plaintiffs' PSNS-based claims against Cleaver-Brooks. In any event, however, this Court should affirm the trial court's dismissal of plaintiffs' non-PSNS-based claims against Cleaver-Brooks since that dismissal was unopposed in the trial court and is unchallenged in this appeal.

DATED this 8<sup>th</sup> day of September, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By   
\_\_\_\_\_  
Timothy K. Thorson, WSBA No. 12860  
Attorneys for Respondent Cleaver-Brooks, Inc.  
701 Fifth Avenue - Suite 3600  
Seattle, WA 98104  
(206) 622-8020

No. 62996-4-I  
(Consolidated)

---

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

MICHAEL FARROW and LIDIA FARROW,

*Appellants,*

v.

LESLIE CONTROLS, INC.,

And

ALFA LAVAL, INC., et al.,

*Respondents.*

---

Consolidated Appeal from the Superior Court of Washington  
For King County

Cause No. 08-2-07177-4SEA

---

DECLARATION OF SERVICE

---

I, Amy H. Berman, hereby declare that on the 8<sup>th</sup> day of September, 2009, I  
caused to be served in the manner indicated below, a copy of the following pleadings:

1. Brief of Respondent Cleaver-Brooks, Inc.; and
2. Declaration of Service.

on counsel for the parties herein addressed as follows:

COURT OF APPEALS  
Division I  
One Union Square  
600 University Street – Rm. 100  
Seattle, WA 98101  
*Via Legal Messenger*

William Rutzick  
SCHROETER GOLDMARK &  
BENDER  
810 Third Avenue, Suite 500  
Seattle, WA 98104  
*Via Legal Messenger*

Christine Dinsdale  
SOHA & LANG, P.S.  
701 Fifth Avenue, Suite 2400  
Seattle, WA 98104  
*Via E-mail*

Brian Zeringer  
LANE POWELL PC  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101  
*Via E-mail*

Ronald C. Gardner  
GARDNER BOND TRABOLSI  
2200 Sixth Avenue – Ste. 600  
Seattle, WA 98121  
*Via E-mail*

Christopher Marks  
WILLIAMS KASTNER & GIBBS  
601 Union Street – Ste. 4100  
Seattle, WA 98111  
*Via E-mail*

Jim Horne  
GORDON THOMAS HONEYWELL  
One Union Square  
600 University, Suite 2100  
Seattle, Washington 98101  
*Via Email*

J. Michael Mattingly  
RIZZO MATTINGLY BOSWORTH  
411 SW Second Avenue #200  
Portland, OR 97204  
*Via E-mail*

Richard G. Gawlowski  
WILSON, SMITH, COCHRAN &  
DICKERSON  
1215 Fourth Avenue – Ste. 1700  
Seattle, WA 98161-1007  
*Via Email*

Dana Hoerschelmann  
THORSRUD CANE & PAULICH  
1300 Puget Sound Plaza  
1325 Fourth Avenue  
Seattle WA 98101  
*Via Email*

Katherine M. Steele  
STAFFORD FREY COOPER  
601 Union Street – Ste. 3100  
Seattle, WA 98101  
*Via E-mail*

T. Arlen Rumsey  
GORDON & POLSCER  
1000 Second Avenue – Ste. 1500  
Seattle, WA 98104  
*Via Email*

Melissa Habeck  
FORSBERG & UMLAUF, P.S.  
900 Fourth Avenue - Ste. 1700  
Seattle, WA 98164  
*Via E-mail*

G. William Shaw  
K&L GATES  
925 Fourth Avenue – Ste. 2900  
Seattle, WA 98104-1158  
*Via E-mail*

Mark Tuvim  
GORDON & REES  
701 Fifth Avenue – Ste. 2130  
Seattle, WA 98104  
*Via Email*

Thomas Heller  
HELLER WIEGENSTEIN  
144 Railroad Avenue – Ste. 210  
Edmonds, WA 98020  
*Via Email*

Dana Hoerschelmann  
THORSRUD CANE & PAULICH  
1300 Puget Sound Plaza  
1325 Fourth Avenue  
Seattle WA 98101  
*Via Email*

DATED AT Seattle, Washington this 8<sup>th</sup> day of September, 2009.



AMY H. BERMAN