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63923-4

No. 63923-4-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES and KAY MORGAN, husband and wife,

Appellants,

v.

AURORA PUMP COMPANY, *et al.*,

Respondents.

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**BRIEF OF RESPONDENT  
ELLIOTT COMPANY**

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Walter E. Barton, WSBA # 26408  
E. Pennock Gheen, WSBA #14969  
KARR TUTTLE CAMPBELL, P.S.C.  
Suite 2900, Washington Mutual Tower  
1201 Third Avenue  
Seattle, WA 98101-3028  
(206) 223-1313

Attorneys for Respondent  
Elliott Company

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## **I. Identity of Respondent**

Respondent Elliott Company (“Elliott”) submits this brief pursuant to RAP 10.1.

## **II. Assignments of Error**

Elliott makes no assignments of error as it has not filed a cross appeal.

## **III. Statement of the Case**

Appellants James and Kay Morgan (“Morgans”) bring their appeal against Elliott and the other Respondents on grounds that the trial court erred in granting Respondents’ respective motions for summary judgment. The court found that Morgans’ claims relating to Mr. Morgan’s alleged exposure to after-market application of asbestos-containing products to Respondents’ equipment or to adjunct parts to such equipment (“after-added products”) — *i.e.*, products that were not manufactured by or placed into the stream of commerce by Respondents — were barred by the Washington Supreme Court’s rulings in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008). CP 6763–66.

With respect to evidence of Mr. Morgan’s alleged exposure to asbestos-containing products that were “internal” to Respondents’

equipment, the trial court found that such exposures were insufficient “to be a substantial factor” in causing Mr. Morgan’s disease. CP 6767 (lines 3–8). Morgans appeal this ruling, urging this Court to find that there was “sufficient evidence that defendants’ products could be a proximate cause of Mr. Morgan’s mesothelioma.” Brief of Appellants at 16–17.<sup>1</sup> Morgans also contend, *to the express exclusion of Elliott*, that the other Respondents also supplied after-added products external to their equipment and to which Mr. Morgan allegedly was exposed, and that the trial court should not have granted summary judgment in favor of these Respondents given such evidence. Brief of Appellants at 18–21.

Morgans otherwise have abandoned any assertion that *Simonetta* and *Braaten* do not bar their claims with respect to after-added products not manufactured or supplied by Respondents. Morgans stated, “The trial court concluded that Braaten and Simonetta did apply to [bar] plaintiffs’ design defect [claims], as well as their failure to warn claims.” Brief of Appellants at 16. But Morgans do not challenge this ruling. *See id.* and Assignments of Error at 1. Given Morgans’ express exclusion of Elliott from their argument that Respondents supplied after-

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<sup>1</sup> With respect to the “substantial factor” aspect of Morgans’ appeal and their arguments regarding *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995), and *Mavroudis v. Pittsburg Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997), Elliott joins in the briefs filed by the other Respondents.

added products, Morgans' failure to present any evidence on this issue with respect to Elliott, and the uncontested application of *Braaten* and *Simonetta* to any evidence that Mr. Morgan was exposed to after-added products with respect to Elliott equipment, this Court should affirm summary judgment on behalf of Elliott.

In addition to moving for summary judgment with respect to Morgan's principal argument re: causation (*see* Brief of Appellants, Assignment of Error No. 1 at 1), Elliott also moved separately for summary judgment on grounds that Morgans failed to establish a question of fact, beyond the application of *Simonetta* and *Braaten*, regarding whether Mr. Morgan was exposed to asbestos-containing products internal to Elliott equipment. CP 6098-6111, 6855-6877. Such evidence is a necessary predicate to asserting that work around Elliott equipment *was* a substantial factor in causing Mr. Morgan's disease. In short, absent evidence that Mr. Morgan was exposed to asbestos-containing products internal to equipment manufactured by Elliott, Morgans have no claim that Elliott equipment played any factor — substantial or otherwise — in causing Mr. Morgan's disease.

In this respect, Morgans failed to show that Mr. Morgan was exposed to asbestos-containing products internal to Elliott equipment. Although this issue did not form the basis for the trial court's oral ruling

and Order Granting Motions for Summary Judgment, etc., (CP 6747–6767), the issue was fully briefed by the parties and appears as a matter of record before this Court.<sup>2</sup>

In Morgans’ arguments regarding the *factual* questions of product exposure and proximate cause, Morgans make no reference whatsoever to evidence — or even allegations — that Mr. Morgan was exposed to any asbestos-containing products internal to Elliott equipment or external products allegedly supplied by Elliott. Brief of Appellants at 18–21, 33–35. Thus, Morgans have waived any assertion here on appeal that Elliott is liable to them for any alleged exposure to asbestos-containing products related to Elliott equipment — internal or external. *See Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002) (“A party waives an assignment of error not adequately argued in its brief.”) (citing *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990), and RAP 10.3(a)(5)).

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<sup>2</sup> CP 6855–6877 (Defendant Elliott Company’s Motion for Summary Judgment); CP 6880–6928 (Declaration of E. Pennock Gheen in Support of Defendant Elliott Company’s Motion for Summary Judgment); CP 2883–2990 (Plaintiffs’ Response to Motion for Summary Judgment of Defendant Elliott Company); CP 1511–2802 (Declaration of Brian Barrow); CP 2917–2921 (Reply in Support of Defendant Elliott Company’s Motion for Summary Judgment); CP 4968–5089 (Plaintiffs’ Supplemental Response to Motion for Summary Judgment of Defendant Elliott Company); CP 6098–6111 (Defendant Elliott Company’s Supplemental Brief in Support of Motion for Summary Judgment). The Second Amended Declaration of Charles Wasson in Support of Defendant Elliott Company’s Motion for Summary Judgment (April 26, 2009) is also part of the record below and should be included as an exhibit to the Court’s files; it is not part of the Clerk’s Papers. *See* note 11, *infra*.

Morgans failed to present any evidence below that would circumvent *Simonetta* and *Braaten* with respect to Elliott and have effectively waived on appeal any claims that Elliott is liable for after-added products or internal products. Elliott therefore was — and is — entitled to summary judgment dismissal as a matter of law on grounds separate and apart from the “substantial factor” issue now raised by Morgans for the first time on appeal. On this further ground, this Court should affirm the trial court’s order dismissing Morgans’ claims against Elliott.

#### IV. Statement of Facts

The Morgans brought suit against Elliott Company and many other defendants alleging that Mr. Morgan was exposed to asbestos from various products at the Puget Sound Naval Shipyard (“PSNS”), causing him to develop fatal mesothelioma

Mr. Morgan was deposed prior to his death.<sup>3</sup> He explained in his deposition that he started as a pipefitter / copper fitter / steam fitter apprentice at PSNS in 1952. His job was to “assemble/disassemble piping systems and any other instructions given to me by authority figure

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<sup>3</sup> Mr. Morgan was deposed by defendants’ counsel for only one day before it was determined that he could no longer continue. He passed away shortly thereafter with no further testimony being taken. Therefore, Morgans were unable to present any substantive testimony from Mr. Morgan.

— an authority figure at the shipyard.”<sup>4</sup> His work involved “[l]argely knocking burrs off welds, cleaning out old flanges of pipe, putting a length of pipe or burning a rack and getting it red, and more complicated jobs of templating piping systems to a steel floor.”<sup>5</sup>

After his four-year apprenticeship, Mr. Morgan became a pipefitter journeyman. He explained a typical work day as follows:

Well, brought my lunch bucket aboard, stashed it, went over drawings with various — with other pipefitters on the work we were doing that day, sent somebody off to — to the materials lockers to gather materials for that day and then we would find the job site and make a final copy, and then we would proceed with the day of doing the job assigned with the materials gathered and have a lunch break and play (pinochle), work the afternoon, go home — and go home.<sup>6</sup>

“Materials” were the bits and pieces of a piping system, including fittings, valves, flanges, gaskets and bolts.<sup>7</sup>

During his apprenticeship, Mr. Morgan also worked in Shop 56 at PSNS where he spent half of each day.<sup>8</sup> Of his work aboard ships at PSNS, Mr. Morgan was unable to recall any particular type of work he

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<sup>4</sup> CP 6906 at 24:18–25:11.

<sup>5</sup> CP 6907 at 32:10–14.

<sup>6</sup> CP 6909 at 53:6–18.

<sup>7</sup> CP 6909 at 53:19–23.

<sup>8</sup> CP 6907 at 30:2–7.

performed on any specific ship.<sup>9</sup> It cannot be disputed that Mr. Morgan did not identify Elliott during his deposition.<sup>10</sup>

Other than Mr. Morgan, the only product identification witness whose testimony is excerpted and cited here by Morgans — Jack Knowles — did not testify that Mr. Morgan was exposed to asbestos-containing products internal to Elliott equipment, principally deaerator feed tanks.<sup>11</sup> Morgans' references to Mr. Knowles' testimony (Brief of Appellants at 7-10) make no mention of Elliott products. In fact, Mr. Knowles, who could not associate a name with "deaerators" he said he worked on,<sup>12</sup> testified that he never saw Mr. Morgan working on the inside of a deaerating feed tank; rather, he only saw Mr. Morgan breaking exterior flanges.<sup>13</sup>

Q. Okay, or do you have any recollection that he ever, that you ever saw him disturbing the tank insulation itself?

A. The tank insulation, no.

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<sup>9</sup> CP 6908 at 47:2-17.

<sup>10</sup> See CP 6880 at ¶ 2.

<sup>11</sup> See Exhibit 688C, Second Amended Declaration of Charles Wasson in Support of Defendant Elliott Company's Motion for Summary Judgment (April 26, 2009) at 5-6, ¶¶ 12-13, discussing Elliott's equipment. As Capt. Wasson further attested, Elliott manufactured only the upper portion of the deaerating feed tank, known as a vent condenser/deaerating unit. The lower portion of a deaerating feed tank was manufactured by the ship builder. *Id.*

<sup>12</sup> CP 5735, lines 22-24.

<sup>13</sup> CP 5737, lines 17-20.

Q. Did you ever see one of those tanks opened up?

A. Never.

Q. Do you know whether they could be opened up?

A. No, I'm not familiar with that tank.

Q. All right, you wouldn't know what the inside of the tank looked like?

A. No.

Q. And you didn't see any maintenance being performed on the inside of the tank at any time?

A. Never.

Q. And you're not aware of Mr. Morgan ever being around when any maintenance was performed on the inside of the tank?

A. I never saw it when he was around it or heard of them talking about it.<sup>14</sup>

Morgans have submitted no contrary testimony. *See* Brief of Appellants at 7-10, 20-21 (no testimony from Mr. Knowles re: Elliott); at 19 (Wortman and Knowles testimony limited to Buffalo, Aurora, Warren, IMO (Laval), Leslie, Powell and Weir); at 20 ("Jack Knowles provided additional evidence with respect to *most* defendants.") (emphasis added); at 21 (Knowles testimony limited to Aurora, DeLaval, Buffalo, Warren Pumps, Powell and Weir).<sup>15</sup>

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<sup>14</sup> CP 5740, lines 16-19; CP 5742, lines 4-19.

<sup>15</sup> Morgans also rely on the declaration and deposition testimony of Melvin Wortman. Brief of Appellants at 3-6, 13, 19-20. However, Mr. Wortman did not

As noted above, Mr. Knowles testified that the only portion of a deaerating feed tank that he ever saw Mr. Morgan work on was the flange connection running to the lower tank portion of the deaerating feed tank,<sup>16</sup> *i.e.*, the lower portion that was not manufactured by Elliott (*see* note 11, *supra*), and which he could not identify by manufacturer.

Mr. Knowles had no involvement with a deaerator vent condenser, let alone one he could identify as having been manufactured by Elliott.

Q. Do you know what a vent condenser is?

A. No.

Q. If I was to tell you that a vent condenser is part of a deaerating feed tank, would you know if that is correct or not?

A. I would not know.

Q. Okay. If it was part of a deaerating tank, would you know where on the deaerating tank the vent condenser is located?

A. No.<sup>17</sup>

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provide any testimony with respect to Elliott nor have Morgans submitted any such testimony here. *See id.*; CP 5189–94 (Mr. Wortman’s declaration), CP 6657–6746 (Mr. Wortman’s deposition). In fact, Mr. Wortman confirmed that, as an inside machinist, he would have had no contact with deaerators, which were not removed from the ships. CP 5729–31 (Gheen Declaration, Exhibit C, Wortman Deposition, Vol. 1, 28:1–5; 29:21–30:5). Also, the “Admissions From Defendants” referenced by Morgans are limited to Aurora Pumps, Buffalo Pumps, Leslie Controls, IMO (DeLaval Pumps), Weir Valves and Controls (Atwood & Morrill), and William Powell. Brief of Appellants at 13–16.

<sup>16</sup> CP 5738, line 9 to 5739, line 11.

<sup>17</sup> CP 5744, lines 12–21.

Otherwise, Morgans mention Elliott *three times* in their brief. The first is a general reference to all Respondents by name. Brief of Appellants at 2. The second is a reference to the declaration of James Millette, Ph.D., in which — according to Morgans — Dr. Millette “discussed equipment manufactured by” Elliott and the other Respondents. *Id.* at 11. The reference to Elliott appears at CP 4589:

[I]t is my expert opinion to a reasonable degree of scientific probability that James Morgan’s work with and around asbestos gaskets and packing associated with ... Elliott deaerating systems ... exposed him to respirable asbestos fibers.

However, Dr. Millette’s declaration contains no corroborating evidence that Mr. Morgan worked on “Elliott deaerating feed systems,” let alone that Mr. Morgan’s alleged “work with and around asbestos gaskets and packing associated with ... Elliott deaerating systems” involving asbestos-containing products internal to such systems. *See* CP 4583–4607. In fact, Dr. Millette later conceded that there was no evidence that Mr. Morgan ever worked on a vent condenser on a deaerating feed tank, let alone one manufactured by Elliott.<sup>18</sup>

The third reference to Elliott in Appellants’ brief is to the declaration of Dr. Eugene Mark. Brief of Appellants at 12–13; CP

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<sup>18</sup> CP 5774, lines 21–25.

4561. That reference makes further reference to an earlier declaration by Dr. Mark. CP 4568–75. Therein, Dr. Mark relies upon the deposition testimony of Michael Farrow for his conclusion that Mr. Morgan’s “inhalation of the dust that arose while he worked with ... Elliott deaerating feed system [sic] were exposures to asbestos that significantly exceeded other exposures to asbestos known in his life.” CP 4573, 4575. However, Dr. Mark’s description of Mr. Farrow’s testimony is limited to the following:

Mr. Morgan removed insulation from the flanged connections with the feed tank and also removed gaskets. Mr. Morgan also worked a lot of [sic] the Elliott deaerating system in general. There were no warnings on the Elliott deaerating feed tanks.<sup>19</sup>

Dr. Mark’s citations are to pages 165–67 of Mr. Farrow’s February 22, 2008 deposition testimony, which appear at CP 1567–68. Therein, Mr. Farrow, while being improperly led by Morgans’ counsel — over the objection of Elliott’s counsel — associated the name Elliott with deaerating feed tanks,<sup>20</sup> but testified only to working on and seeing Mr. Morgan only working on *exterior* systems:

Q. Was it the pipefitter’s responsibility to do any work on the deaerating feed tanks?

A. Yes.

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<sup>19</sup> CP 4573.

<sup>20</sup> CP 1567 (163:24–164:8).

Q. What work?

A. They worked on the air ejectors, on the flanged connections, you know, to and from the deaerating feed tank, the piping connections for the water and the feed and condensate. All those connections were — was the pipefitter's responsibility.

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Q. What work did you do on Elliott deaerating feed tanks?

DEFENSE COUNSEL: Object to the form.

THE WITNESS: The same with the — the flanged connections and sometimes removing the air ejectors and these — that were attached to the — to the deaerating feed tank.

BY MR. JONES:

Q. Did your work on Elliott deaerating feed tanks involve insulation?

DEFENSE COUNSEL: Object to the form.

THE WITNESS: Yes. It's an insulated system.

BY MR. JONES:

Q. And did you remove that insulation?

DEFENSE COUNSEL: Object to the form.

THE WITNESS: Generally not. Generally it would — unless there was some problem, you generally didn't have to remove the insulation of it.

BY MR. JONES:

Q. What about — and so you're saying you didn't have to remove the insulation on the deaerating feed tank itself?

DEFENSE COUNSEL: Object to the form.

WITNESS: Not on the feed tank itself.

BY MR. JONES:

Q. Okay. Did you have to remove insulation from any of the flanged connections with the feed tank?

A. On some of the flanged connections, yes.

Q. Okay. And did you personally do that work?

A. Yes.

Q. Did Mr. Morgan do that work?

A. Yes.

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Q. Did that work involve removing gaskets?

A. Yes.

Q. And did you do that the same way we talked about before?

DEFENSE COUNSEL: Objection to form, foundation.

THE WITNESS: Yes, yes.<sup>21</sup>

BY MR. JONES: Did Mr. Morgan remove gaskets from Elliott deaerating feed tanks?

DEFENSE COUNSEL: Objection to form, foundation.

THE WITNESS: Yes, he did. ... Yes, from all that — from the feed and condensate and

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<sup>21</sup> Mr. Farrow's prior testimony regarding gasket work varied; thus, the objection. As far as "removing gaskets," Mr. Farrow generally testified that this work only involved external systems, *i.e.*, breaking or undoing flanged connections to various types of equipment and removing the gasket inside the flange. It did not involve work on internal systems. CP 1550 (95:14-23), CP 1552 (105:23-106:5), CP 1556-57 (121:25-122:13), CP 1561 (139:5-12; 139:18-140:21), CP 1562 (142:3-10), CP 1563 (147:3-8), CP 1564 (151:11-21), CP 1565 (155:15-156:11), CP 1566 (158:19-159:8).

booster pumps, on all that feed and condensate pumps, we all worked on those systems.<sup>22</sup>

Notably, however, Morgans have not cited any of Mr. Farrow's testimony in their brief, most likely because his testimony was limited to work performed on external components, *i.e.*, "flanged connections," to what he believed to be deaerating feed tanks with which he associated the name Elliott.

Q. And tell me, as a pipefitter, what involvement you had with deaerating feed tanks.

A. It would only be incident work with — if there were inlets and outlets and if there were air ejectors up on top of the unit — I'm not sure if there were or not, but we would just be breaking the flanges and reinstalling equipment.<sup>23</sup>

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Q. And what specifically were you doing with regard to the deaerating feed tank?

A. There was something on top that we were taking apart. We were taking some of the air ejectors — and I'm not sure if the air ejectors were on part of that tank or in the area but there was — I remember taking some of these things off the top of this tank. And I — I don't know exactly what — what we were taking apart.

Q. Okay. Now was the stuff on the top of the tank — was that insulated at all?

A. I don't recall it being insulated.

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<sup>22</sup> CP 1567-68 (163:15-23; 164:9-165:15; 166:2-24).

<sup>23</sup> CP 6914 (613:21-614:2).

Q. The tank itself, did that have insulation?

A. I don't recall it having insulation.

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Q. Okay. And do you know if the work you did on the top of the tank involved contact with any asbestos-containing material?

A. There were — there were — I believe there were gaskets there, but I'm not sure what they contained.

Q. Okay. What were the gaskets associated with?

A. I think they were associated with a number of air ejectors that were attached to the top of the tank, if I — I may have the wrong tank, but I remember air ejectors on a tank, and I think it was a deaerating feed tank.

Q. And how would a gasket be incorporated into an air ejector?

A. They were flanged and sitting on top of the tank.

Q. Okay. The ejector was attached via a flange; is that what you're saying?

A. Yes.

Q. And the gaskets that you'd be talking about were between the two flanges that connected the air ejector?

A. Yes.

Q. Okay. And do you recall what kind of gaskets those were?

A. I think they were Flexitallic.<sup>24</sup>

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<sup>24</sup> CP 6916 (620:9-622:2)

Q. And the flange connections that you're talking about are the connections between the air ejectors and the tank?

A. Yes.

Q. Okay. You didn't have any reason to be working on any flange connections to the tank itself, correct?

A. Like an inlet or outlet?

Q. Right.

A. No. I don't think so.<sup>25</sup>

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Q. Okay. And as we sit here today, you're not sure whether Elliott had anything to do with those air ejectors, correct?

A. No. I don't know that Elliott made the tank and someone else made the air ejectors and put them on. I'm not sure of the Elliott involvement in the air ejectors.<sup>26</sup>

Morgans' own expert, Captain William Lowell (whose testimony also has not been offered by Morgans), also conceded that there is no evidence that Mr. Morgan ever worked on the internal parts of deaerating feed tanks — Elliott or otherwise — or was around when they were worked on.<sup>27</sup>

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<sup>25</sup> CP 6916 (622:9-17).

<sup>26</sup> CP 6917 (627:8-14).

<sup>27</sup> CP 5762, line 6 to 5763, line 20.

## V. Argument

### A. Summary Judgment Standard

This Court may affirm the trial court's summary judgment ruling on any grounds supported by the record. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). The Court's review is *de novo* and it conducts the same inquiry as would have been conducted by the trial court. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995). A defendant may support a summary judgment motion by presenting its own evidence and challenging the sufficiency of the plaintiff's evidence, which shifts the burden to the plaintiff to establish the existence of a genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

In responding to a summary judgment motion, the non-moving plaintiff, "by affidavits or as otherwise provided in this rule [CR 56], must set forth specific facts showing that there is a genuine issue for trial." *Id.* To defeat summary judgment, a plaintiff must establish

specific and material facts to support each element of his or her case. *Marquis v. City of Spokane*, 130 Wn.2d 97, 104, 922 P.2d 43 (1996). If the plaintiff will bear the burden of proof at trial as to an element essential to his case, as Morgans do here with respect to the allegation that Mr. Morgan was exposed to asbestos supplied by Elliott, and that party fails to make a showing sufficient to establish a genuine dispute of material fact as to that element, then summary judgment is appropriate. *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1406 (W.D. Wash. 1990).

“A party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings, he must affirmatively present the factual evidence upon which he relies.” *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 557–58, 739 P.2d 1188 (1987). “A nonmoving party ... may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value.” *Meyer v. University of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). *See also Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 358–61, 753 P.2d 517 (1988).

B. There Is No Evidence that Mr. Morgan Was Ever Exposed to Asbestos from Products “Internal” to Elliott Equipment.

*Simonetta* and *Braaten* bar Morgans’ claims related to exposure to “after-added products,” *i.e.*, asbestos-containing materials external to Elliott equipment, and Morgans have abandoned all such claims here on appeal — both as to failure to warn and design defect. Morgans also have not presented any evidence or made any argument that Elliott supplied any external asbestos-containing products associated with its equipment.

Therefore, to establish any claim against Elliott, Morgans must produce evidence that Mr. Morgan was exposed to asbestos-containing products contained *within* equipment manufactured by Elliott. They have conspicuously produced no such evidence; in fact, the evidence is to the contrary. There is no evidence whatsoever that Mr. Morgan was ever around any of the internal gaskets associated with Elliott equipment. Mr. Knowles flatly denied any such exposure.

With three exceptions (noted above and which will be discussed below), Morgans’ brief makes no mention of Elliott or of Mr. Morgan’s alleged exposure to Elliott products, nor does the brief cite to any evidence in the record indicating that Mr. Morgan was so exposed. Having failed to raise any substantive argument against Elliott in their

opening brief, Morgans have waived any claim that the trial court's dismissal of their claims against Elliott was in error. *See Milligan*, 110 Wn. App. at 635 (“A party waives an assignment of error not adequately argued in its brief.”).

Even absent a finding of waiver, there is no evidence in the record that Mr. Morgan was exposed to the internal parts of any piece of Elliott equipment or that Mr. Morgan was exposed to external, asbestos-containing products that were supplied by Elliott. Given the lack of such evidence, Morgans cannot establish that Mr. Morgan was exposed to asbestos-containing materials that were supplied by Elliott under the standard set forth in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987). Moreover, even if there were evidence of asbestos exposure from the internal components of Elliott equipment, Morgans have failed to meet their burden under *Braaten*, 165 Wn.2d at 394–96, to establish that Mr. Morgan was exposed to asbestos-containing products originally supplied with Elliott equipment.

Morgans make two “factual” assertions regarding Elliott (Brief of Appellants at 11, 12–13), neither of which presents an issue of fact. Otherwise, Morgans focus their legal and factual arguments on the other Respondents. *See, e.g.*, Brief of Appellants at 13–16 (addressing “admissions” by Aurora Pumps, Buffalo Pumps, Leslie Controls, IMO

(DeLaval Pumps), Weir Valves and Controls (Atwood & Morrill), and William Powell, to the express exclusion of Elliott); at 16–17 (“[Morgans] adduced substantial evidence that *these* defendants sold to PSNS substantial amounts of replacement asbestos-containing gaskets and packing to which Mr. Morgan was exposed.”).<sup>28</sup>

To establish a genuine issue of material fact, Morgans are required to set forth specific *facts* showing that Mr. Morgan was exposed to asbestos and that Elliott is responsible for that exposure. Intrinsic in this consideration is that Morgans must produce some evidence that Mr. Morgan worked with or around asbestos-containing internal components of a piece of Elliott equipment — or asbestos-containing materials external to Elliott equipment and which Elliott supplied — and that this work released a quantity of asbestos sufficient to expose him to asbestos and to cause his mesothelioma. Morgans did not meet this burden in the trial court and cannot — and have not even attempted to — meet it here.

The standard of proof in Washington in an asbestos exposure case was established in the products liability setting in *Lockwood*. In

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<sup>28</sup> There is no dispute here that Elliott did not sell replacement asbestos-containing gaskets or packing to PSNS, nor was there any evidence introduced below or submitted on appeal that even creates an inference to the contrary.

*Lockwood*, the court held that in opposing a motion for directed verdict there was sufficient evidence of exposure and causation if the plaintiff could prove through his own testimony or that of others that the defendant manufacturer's asbestos-containing product was used at his workplace when he was present. 109 Wn. 2d at 246-47.

As an initial premise, it must be understood that there was no dispute in *Lockwood* that Raymark's product contained asbestos and, when manipulated, released a quantity of asbestos fibers. Applying the *Lockwood* standard here, in order to establish Elliott's liability, Morgans must prove through Mr. Morgan's testimony or others that Mr. Morgan or someone else performed work on an asbestos-containing, internal component of a piece of Elliott equipment while Mr. Morgan was in the vicinity of that work such that he would have been exposed to asbestos and, in turn, that this exposure caused Mr. Morgan's disease. To survive summary judgment, Morgans were required to establish facts relevant to this burden of proof and at least a "reasonable inference" that Mr. Morgan was exposed to asbestos as a result of work on asbestos-containing, internal components of a piece of Elliott equipment and that this exposure caused his mesothelioma. *See Lockwood*, 109 Wn.2d at 247. Morgans produced no such evidence and have referenced no such evidence on appeal.

*Lockwood* urges that the trial court take several factors into consideration “when deciding if the evidence is sufficient to take such cases to the jury.” *Id.* at 249. This unique causation standard requires evidence of:

- Proximity to asbestos when the exposure occurred;
- The expanse of the work site where asbestos fibers were released;
- The extent of time that the plaintiff was exposed;
- The types of asbestos products to which the plaintiff was exposed;
- The ways in which such products were handled and used; and
- Medical causation.

*Id.* at 248–49. *See also Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 323–24, 14 P.3d 789 (2000) (“*Lockwood* identified several factors a court *must* consider ... .”) (emphasis added). In short, *Lockwood* requires that the plaintiff establish, among other things, the identity of the particular manufacturer of the product that caused his injury. 109 Wn.2d at 245. *See also Martin v. Abbot Labs.*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984) (holding that the law requires “a reasonable connection between the injured plaintiff, the injury-causing product, and the (source) of the injury causing product. ‘An essential element of the plaintiff’s cause of action for negligence ... is that there be some reasonable connection between the act or omission of the defendant and

the damage which the plaintiff has suffered.’”) (quoting W. Prosser, *Torts* § 41, at 236 (4<sup>th</sup> ed. 1971)); *Benshoof v. National Gypsum Co.*, 978 F.2d 475, 477–78 (9<sup>th</sup> Cir. 1992).

Morgans made no effort in the trial court to demonstrate how the facts of this case are sufficient under *Lockwood* to avoid summary judgment in favor of Elliott, and they make no such effort here. Here, Morgans provide *no* evidence of exposure to Elliott equipment; below, the only testimony adduced was to alleged exposure to *external* insulation products manufactured and applied by others. This wholly fails to satisfy the *Lockwood* criteria and to make the requisite showing with respect to the proximity, time, products, handling and medical causation.

*Proximity.* No evidence was presented that placed Mr. Morgan in the proximity of any work performed on an asbestos-containing, internal component of an Elliott deaerator feed tank in the bowels of a ship at PSNS.

*Time/Duration.* The issue is not how many years Mr. Morgan worked at PSNS. The issue is the duration of his exposure to the product at issue: asbestos fibers originating from an internal component of an Elliott deaerator feed tank. Mr. Morgan clearly was not constantly exposed to asbestos emanating from Elliott equipment during the course

of his career at PSNS nor is there any evidence that he ever sustained such an exposure. What was the duration of the exposure? It is unknown and incalculable.

*Product Type:* No evidence was presented by Morgans regarding the types of products — make, chemical composition, etc. — that *might* have been incorporated into an Elliott deaerator feed tank. More importantly, the Morgans did not identify any Elliott equipment on which work might have been performed on internal components that would have resulted in Mr. Morgan's exposure to asbestos.

In a products liability cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury. *Lockwood*, 109 Wn.2d at 245. Although an asbestos claimant can rely on circumstantial evidence, that evidence must nevertheless rise to the quantum of a preponderance of the evidence “to support an inference that the plaintiff was exposed to defendant-supplied products.” *Id.* Here, there is no evidence that the internal components of an Elliott deaerator feed tank were ever worked on at PSNS at a time when Mr. Morgan was in the vicinity of such work and at a time when that work would have widely dispersed large quantities of asbestos fibers.

*Product Handling and Use:* Morgans presented no evidence regarding the manner in which any asbestos-containing products

contained in an Elliott deaerator feed tank were used or handled on any ship berthed at PSNS when Mr. Morgan was in the vicinity of any such work. This failure renders any expert testimony regarding the dispersal of asbestos fibers from such work unreliable.

*Medical Causation.* There was absolutely no evidence presented that Mr. Morgan's mesothelioma was caused by asbestos that came from the internal components of Elliott equipment.

Mr. Morgan never testified nor did any other witness testify that Mr. Morgan was exposed to asbestos released due to work performed on an internal component of an Elliott deaerator feed tank at PSNS. He never testified nor did any other witness testify that Mr. Morgan was present during or in the proximity of *any* work — let alone asbestos-related work — that was performed on the interior of an Elliott deaerator feed tank at PSNS. There is no evidence of Mr. Morgan ever being on any ship that contained an Elliott deaerator feed tank that included internal, asbestos-containing components that were worked on when he was on board, let alone any evidence of precisely when or how long he was on a ship when such work — if any — was ever performed.

Morgans, thus, cannot rely on a *Lockwood* inference that, because an Elliott deaerator feed tank may have been on a ship at the same time Mr. Morgan was on that ship, there was exposure to asbestos from

the internal components of an Elliott deaerator feed tank. *See Allen v. Asbestos Corp.*, 138 Wn. App. 564, 573, 157 P.3d 406 (2007) (“[T]he inference that Asbeston was used at the shipyard leads *directly* to the inference that Allen’s father was exposed to Uniroyal’s product.”) (emphasis added). Rather, there must be a convergence of evidence that does not exist here.

Under the standard established in *Lockwood*, the evidence of exposure and causation is not sufficient to take the case against Elliott to the jury. Morgans have nothing to rely on but supposition and conjecture, which is not sufficient to avoid summary judgment. *See Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Attwood v. Albertson’s Food Centers, Inc.*, 92 Wn. App. 326, 331, 966 P.2d 351 (1998).

Only by placing the release of asbestos fibers — for which a particular defendant is responsible — and the plaintiff/decedent in the same place at the same time, through substantive evidence, can a reasonable inference of exposure — for which that defendant would be liable — be made. *See Lockwood*, 109 Wn. 2d at 247 (“[I]t is reasonable to infer that since that product was used on that ship when Lockwood worked there, Lockwood was exposed to it.”); *Berry*, 103 Wn. App. at 324 (“The proximity and time factors are satisfied by the fact that Berry

worked at PSNS during times that [defendants'] asbestos products were used.”); *Allen*, 138 Wn. App. at 570–75 (finding decedent’s 25-year history as an insulator at PSNS and sales records showing the use of “large quantities” of defendant’s product at PSNS precluded summary judgment for defendant). The evidence in this case falls far short of the evidence in *Lockwood*, *Berry* and *Allen*, nor do Morgans even attempt to make the connection. Given this failure, Elliott was entitled to summary judgment dismissal of Morgans’ complaint.

C. The Declarations of Dr. Millette and Dr. Mark Are Not Admissible for the Purposes of Establishing that Mr. Morgan Worked on or Around Internal Components of Elliott Equipment.

Dr. Millette and Dr. Mark have both opined that Mr. Morgan was exposed to asbestos as a result of his work on or around Elliott deaerator feed tanks. However, as has been established above, their opinions are based solely upon scant evidence that Mr. Morgan may have been exposed to asbestos-containing products associated with *external* components of Elliott deaerator feed tanks for which Elliott is not liable under *Simonetta* and *Braaten*. Neither has opined that Mr. Morgan was exposed to asbestos as a result of work on internal components of Elliott equipment. In any event, their declarations — regardless of their basis — cannot create a “genuine issue of material fact” with respect to Mr. Morgan’s alleged exposure. *See Dwinell’s*

*Central Neon*, 21 Wn. App. at 933–34; *Meyer v. University of Wash.*, 105 Wn.2d at 852.

This Court has decided this issue in *Allen*, 138 Wn. App. at 579–82, where the Court agreed that a declaration from an industrial hygienist, Nicholas Heyer, could not be offered as substantive evidence to prove the presence of a defendant’s product at PSNS, *i.e.*, the evidence that *Lockwood* requires a plaintiff to show.

In *Allen*, Dr. Heyer opined, in part:

[I]t is my opinion that asbestos was a cause of Mr. Allen’s lung cancer and that part of that asbestos exposure resulted from exposure to asbestos cloth manufactured by United States Rubber Company, including “Asbeston” cloth used at PSNS in the 1950’s and 1960’s.

138 Wn. App. at 580. The defendant below (Uniroyal) argued, as Elliott does here, that Dr. Heyer’s declaration was not based on personal knowledge and, therefore, could not be used as substantive evidence that Uniroyal’s product was present at PSNS when Mr. Allen worked there.

This Court agreed, stating:

We conclude that the trial court did not err in striking a portion of Heyer’s declaration because paragraphs 7 through 9 contain Heyer’s opinion about factual matters outside his industrial hygiene and epidemiology expertise—namely, whether Uniroyal products were present or used at PSNS. The stricken portion is admissible only for the limited purpose of explaining the basis for Heyer’s

medical opinion. Thus, we conclude that the trial court properly excluded that portion of Heyer's opinion as substantive evidence.

*Id.* at 581–82. The same principles apply here: Dr. Millette's and Dr. Mark's opinions are not substantive evidence that Mr. Morgan was exposed to asbestos — let alone asbestos-containing, internal components of Elliott equipment — at PSNS.

Drs. Millette and Mark, of course, have no personal knowledge in this respect: They were not there. Rather, they relied wholly on the equivocal testimony of others. Expert opinions that repeat hearsay statements of third parties are inadmissible. *State v. Nation*, 110 Wn. App. 651, 661, 41 P.2d 1204 (2002). Further, based upon the materials upon which Drs. Millette and Mark said they relied, they were presented with no factual evidence that Mr. Morgan ever worked on the internal components of Elliott equipment or was in the vicinity of such work — because there is no such evidence in the record. Their opinions are just that: opinions, not fact. Such opinions cannot defeat a motion for summary judgment. “Ultimate facts, conclusions of fact, or conclusory statements are insufficient to raise a question of fact.” *Crane & Assoc. v. Felice*, 74 Wn. App. 769, 778–79, 875 P.2d 705 (1994).

As stated in *Lilly v. Lynch*:

An expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show that the affiant is competent to testify to the matters stated therein. The opinion of an expert that is only a conclusion or that is based on assumptions does not satisfy the summary judgment standard.

88 Wn. App. 306, 320, 945 P.2d 727 (1997) (citing *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991)).

Given the similarities between this case and *Allen*, the lack of factual support for the opinions of Drs. Millette and Mark, their lack of personal knowledge, and the principles underlying CR 56(e), their declarations are not substantive evidence that Mr. Morgan was exposed to asbestos during work performed on asbestos-containing, internal components of Elliott equipment. Thus, their declarations do not create a *genuine* issue of *material* fact that precluded the entry of summary judgment on Elliott's behalf.

## **VI. Conclusion**

Morgans have presented no evidence that Mr. Morgan worked on or around internal, asbestos-containing components of Elliott deaerator feed tanks or other Elliott equipment. The only evidence presented by

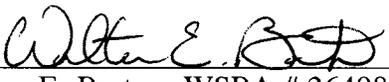
Morgans against Elliott concerned exposure to asbestos-containing products that had been placed on or in components exterior and ancillary to Elliott's equipment. *Simonetta* and *Braaten* bar claims for such alleged exposure and Morgans have abandoned such claims.

Absent evidence of asbestos exposure from internal components to Elliott equipment, Morgans have no case and cannot survive summary judgment under *Lockwood v. AC&S*. They have produced no evidence that satisfies any of the *Lockwood* criteria, let alone evidence that allows the Court even to infer exposure under *Lockwood*.

Given the lack of evidence and the lack of a legal theory that leads to a conclusion that Elliott *might* be liable if certain evidence — that was not produced — can be established, Elliott was entitled to summary judgment on grounds that Morgans could not establish exposure to asbestos-containing products manufactured or supplied by Elliott. Therefore, this Court should find for Elliott and affirm the trial court's summary judgment ruling on its behalf.

Respectfully submitted this 15th day of April, 2010.

KARR TUTTLE CAMPBELL

By:   
Walter E. Barton, WSBA # 26408  
E. Pennock Gheen, WSBA #14969

Attorneys for Elliott Co.

No. 63923-4-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES and KAY MORGAN, husband and wife,

Appellants,

v.

AURORA PUMP COMPANY, *et al.*,

Respondents.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on April 15, 2010, I cause a copy of Brief of  
Respondent to be served by Legal Messenger on the following:

Janet Rice  
William Rutzick  
Schroeter Goldmark & Bender  
810 Third Avenue, Suite 500  
Seattle, WA 98104

And by United States Mail, first-class, postage-paid on the following:

Brian Barrow  
Simon Eddins Greenstone  
301 E. Ocean Blvd., Suite 1950  
Long Beach, CA 90802

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And by electronic mail on the following:

Michael Ricketts  
James Horne  
Gordon Thomas Honeywell Malanca  
600 University St., Suite 2100  
Seattle, WA 98101

Carl Forsberg  
Melissa K. Habeck  
Catherine Jeannotte  
Forsberg Umlauf  
901 Fifth Avenue, Suite 1700  
Seattle, WA 98104

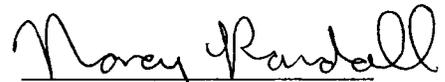
Steve Rizzo  
J. Michael Mattingly  
Rizzo Mattingly Bosworth  
411 S.W. Second Avenue, Suite 200  
Portland, OR 97204

Jeanne Loftis  
Bullivan Houser Bailey  
888 S.W. Fifth Avenue, Suite 300  
Portland, OR 97204

Mark Tuvim  
Kevin J. Craig  
Gordon & Rees  
701 Fifth Avenue, Suite 2130  
Seattle, WA 98104

Lori Nelson Adams  
Dana C. Hoerschelmann  
Thorsrud Cane & Paulich  
1325 Fourth Avenue, Suite 1300  
Seattle, WA 98101

Brian N. Mesher  
Brian D. Zeringer  
Lane Powell  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101

  
Nancy Randall  
Nancy Randall