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No. ~~62323-4-I~~

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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JAMES and KAY MORGAN,

Appellants,

v.

AURORA PUMP COMPANY, et al.,

Respondents.

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BRIEF OF RESPONDENT  
AURORA PUMP COMPANY

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## I. INTRODUCTION

Appellants, James and Kay Morgan (collectively “Morgan”), seek damages resulting from James Morgan’s alleged exposure to asbestos. Morgan claims he was exposed to asbestos from a number of sources, including pumps manufactured by respondent Aurora Pump Company (“Aurora”). Morgan’s primary exposure (and the only exposure associated with Aurora pumps) occurred during his employment at the Puget Sound Naval Shipyard (“PSNS”).

The trial court entered summary judgment in favor of Aurora because Morgan failed to offer sufficient evidence that he was exposed to asbestos-containing materials that Aurora had manufactured, supplied or distributed, and the court concluded that such evidence was necessary under the Washington Supreme Court’s recent decisions in *Simonetta v. Viad Corp.*<sup>1</sup> and *Braaten v. Saberhagen Holdings*.<sup>2</sup> Morgan now appeals this determination.

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<sup>1</sup> *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.2d 127 (2008).

<sup>2</sup> *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

The trial court's dismissal of Morgan's claims against Aurora must be affirmed. The evidence presented to the trial court established that, as a matter of law, Morgan was not exposed to asbestos from Aurora products, thereby entitling Aurora to judgment in its favor as a matter of law.<sup>3</sup>

## **II. ASSIGNMENTS OF ERROR**

Morgan assigns error to the trial court's dismissal of his claims on summary judgment.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should the trial court's entry of summary judgment in favor of Aurora be affirmed because Morgan failed to prove that Aurora manufactured, supplied or distributed asbestos-containing products to which he was exposed?

2. Should the trial court's entry of summary judgment in favor of Aurora be affirmed because Morgan

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<sup>3</sup> Aurora also joins in the briefing submitted by the other respondents and hereby adopts the arguments and authorities contained in those briefs including, particularly, the arguments regarding the substantial factor test and the government contractor defense.

failed to prove that any asbestos-containing products manufactured, supplied, or distributed were a substantial factor in causing his disease?

**A. Factual Background**

Morgan alleges he came into contact with asbestos-containing products while he worked at PSNS in the 1950s, 1960s and 1970s. (CP 4285) Morgan was initially employed as a pipefitter at PSNS from 1952 to approximately 1962. (CP 6263-64) In approximately 1962, Morgan began working in the pipefitter design shop. (*Id.*)

**1. Morgan's Work at PSNS**

As a pipefitter apprentice, Morgan was required to "take and remove piping from equipment, [and] dismantle sections of piping." (CP 6264) During this work, Morgan encountered products that contained asbestos from three primary sources: (1) insulation (or "lagging") (CP 6264, 6266); (2) "flange" gaskets between piping and equipment (CP 6264); and (3) packing material placed in equipment to prevent leaking (CP 4199, 6266).

After Morgan finished his pipefitter apprenticeship, he transferred to the design shop. (CP 6263-64) The design shop was responsible for developing blueprints for piping systems on the Navy ships. This work would periodically require visits to the ships to ensure the blueprints were appropriately drawn and sufficient to meet the ship needs. (CP 4204, 6263)

## **2. Identification of Aurora Pumps**

Morgan himself was unable to identify *any* Aurora pumps that he worked with or around. Instead, his claims against Aurora are based upon the testimony of four individuals: Jack Knowles, a co-worker of Morgan's at PSNS (CP 6260-6324); Melvin Wortman, a machinist at PSNS (CP 6448-53); Michael Farrow, a co-worker of Morgan's at PSNS (CP 4189-4278); and Leroy Franklin, an Aurora representative (CP 4361-4407, CP 6326-64).

In addition, Morgan included in the summary judgment record below several documentary exhibits, including a variety of sales documents that relate to Aurora

pumps purchased by the U.S. Navy for use on the *U.S.S.*

*Julius A. Furer.*<sup>4</sup> (CP 6404-46)

Based on these materials, the record before this Court establishes the following uncontroverted facts.

**a. *Jack Knowles' Testimony***

Knowles remembered working with Morgan as a pipefitter apprentice at PSNS. (CP 6263-64) Knowles testified that Morgan's work would require him to "take and remove piping from equipment, [and] dismantle sections of piping." (CP 6264) Knowles confirmed that a pipefitter's only involvement with pumps would be to disconnect the pumps from the pipe at a "flange" connection. (CP 6302) Machinists would then be responsible for removing the pumps from the ship, refurbishing them, and reinstalling them on board the ship. (CP 6302)

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<sup>4</sup> Morgan's opening brief also identifies expert testimony from James Millette, Ph.D. and Dr. Eugene Mark regarding the effects of his exposure to asbestos. Brief of Appellants at 10-13. Drs. Millette and Mark do not offer any first-hand testimony regarding Morgan's exposure to Aurora products. Instead, their opinions are based upon the information contained in the testimony of Knowles, Wortman, Farrow, and Franklin.

Knowles remembered seeing Morgan work around Aurora pumps. (CP 6275) He remembered seeing Morgan “break the flanges [between the pipe and pump], remov[e] the insulation pads off the flanges, [and] remov[e] the gaskets.” (CP 6275) Morgan was exposed to insulation and flange gaskets when he uncoupled the pump from the flange connections. (CP 6275) Knowles also testified that he saw Morgan in the presence of individuals who were working with packing in connection with “brand-new” and “existing” Aurora pumps. (CP 6276) Knowles did not testify as to where any of these materials—insulation, flange gaskets, or packing material—came from or who manufactured or supplied them to PSNS.

***b. Declaration of Melvin Wortman***

Morgan also submitted the declaration of Melvin Wortman in opposition to Aurora’s motion for summary judgment. (CP 6448-53) The declaration was prepared for another lawsuit—*Penny Nelson, individually and as Personal Representative of the Estate of Douglas Nelson*, King County Superior Court, Cause No. 08-2-17324-1 SEA.

Wortman began working as a machinist at PSNS in 1940. (CP 6448) He generally remembered working with pumps and valves manufactured by a variety of equipment manufacturers but did not claim to remember any equipment manufactured by Aurora. (CP 6449-50) He also stated that “most of the gaskets and packing that were in valves, pumps and compressors when they came to the shop for overhaul were probably provided by the original manufacturer.” (CP 6451) Like Knowles, Wortman did not claim to know whether PSNS ever procured asbestos-containing replacement gaskets or packing from Aurora. (See CP 6448-53)

*c. Michael Farrow's Testimony*

Michael Farrow worked with Morgan as an apprentice and journeyman pipefitter at PSNS from 1954 to 1962. (CP 4197-98, 4202-03) Their work was limited to removing insulation from pipes and breaking the flange connections between the pipes and the equipment to which they were connected. (CP 4224) Farrow never saw Morgan work on

the internal components of a pump, which would have been performed by a machinist in the machine shop. (CP 1428)

With respect to the replacement flange gaskets that were used at PSNS, Farrow testified those gaskets were not made by the equipment supplier. (CP 4200) Further, Farrow admitted that there was “no way you could tell if it was the original or replacement gaskets” when a pump was removed from a flange connection. (CP 1430)

*d. Leroy Franklin's Testimony*

Aurora's corporate representative, Leroy Franklin, testified regarding Aurora's manufacture and sale of pumps. He explained that Aurora both manufactures and designs pumps. (CP 4310, 6336) Franklin testified that Aurora did not have anything to do with insulation that the Navy applied to piping systems aboard its ships and that Aurora's pumps would run fine without that insulation. (CP 6340) Further, Franklin testified that Aurora did not supply any of the gaskets that were used at the flange connections between the piping and pumps. (CP 4375, CP 4390-4391)

Regarding internal gaskets and packing material, Franklin testified that some of the pumps utilized asbestos-containing gaskets and packing, but that some pumps did not. (CP 4371) In particular, some Aurora pumps utilized a “mechanical seal” and an “O-ring,” which eliminated the need for gaskets and packing material. (CP 4371)

Franklin also testified regarding Aurora’s sales of pumps to the Navy. During Morgan’s work as an apprentice pipefitter between 1952 and 1962, he worked primarily on three aircraft carriers—the *U.S.S. Roosevelt*, *U.S.S. Midway*, and *U.S.S. Coral Sea*. (CP 6264) Aurora’s sales records for those ships disclose that during that time period Aurora shipped only one pump to PSNS. (CP 6328-29 (identifying 80 pages of sales records), CP 6341-42, 6350 (identifying one pump)) That pump—a GNC-17 End Suction Navy Pump used to pump aviation fuel—was delivered to PSNS in 1960 for use on the *U.S.S. Coral Sea*. (CP 6341-42) It was designed with mechanical seals. (CP 6350) A mechanical seal is a design feature that prevents leaks with a physical seal and O-rings, which eliminates the

need for asbestos-containing gaskets and packing. (CP 6374, 6380)

Aurora's sales records further disclose that all of the other pumps manufactured for use on the ships on which Morgan worked were delivered to either the San Francisco Bay Naval Shipyard, in San Francisco, California, or to the Norfolk Naval Shipyard, in Portsmouth, Virginia. (CP 6349-50)

*e. Documentary Exhibits*

Morgan submitted a number of documentary exhibits into the summary judgment record below, including a variety of sales orders and one Aurora "Bulletin" for centrifugal pumps. (CP 6404-46) He did not lay any foundation for these records; however, they appear to have been produced in another case and relate to the *U.S.S. Julius A. Furer*. (CP 6404) There is no evidence in the record that Morgan ever came into contact with the *U.S.S. Julius A. Furer* or that that ship ever docked at PSNS.

Morgan's only reference to these materials in his briefing is to page 3 of a "Bulletin" for "Centrifugal

Pumps”. (CP 6440) That page describes packing material that contains “long fibre asbestos” for use with “cold water” applications. (CP 6440) Morgan offered no evidence that this pump was used or refurbished on any of the ships he worked, or that this type of pump was ever sent to PSNS.

Further, Franklin testified that these bulletins were very general documents and not customer specific; they would be shipped to the customer whether the pump it received utilized packing or a mechanical seal. (CP 6380) If the particular pump used by the customer had a mechanical seal and did not need packing, the customer would obviously ignore provisions regarding packing in the actual operation of the pump. (CP 6380)

**B. Procedural Background**

On August 29, 2007, Morgan filed suit against more than 50 defendants asserting claims for product liability, negligence, conspiracy, spoliation, willful or wanton misconduct, strict product liability under § 402B of the Restatement (Second) of Torts, breach of warranty,

enterprise liability, and market share liability and/or market share alternate liability. (CP 4281-91)

Thereafter, Aurora filed a motion for summary judgment on the ground that there was no evidence that Morgan had been exposed to asbestos from products made, distributed, or sold by Aurora. The trial court denied Aurora's motion. Aurora renewed its motion following the issuance of the *Simonetta* and *Braaten* decisions. (CP 1438-49)

The trial court considered Aurora's motion together with summary judgment motions filed by several other defendants.<sup>5</sup> In an order dated July 2, 2009, the trial court granted defendants' motions. (CP 6747-58) The court determined that, based on *Simonetta* and *Braaten*, "there is insufficient evidence that the new material internal to the product here would be a substantial factor in the tragic mesothelioma that Mr. Morgan suffered." (CP 6767)

Morgan filed a Notice of Appeal on July 22, 2009. (CP 6768-92)

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<sup>5</sup> Aurora also joined in the replies submitted by the other defendants. (CP 4168-69)

#### IV. ARGUMENT

A. Morgan did not present evidence to show he was exposed to asbestos from products manufactured, distributed, or sold by Aurora.

1. *Simonetta and Braaten*

In *Simonetta*, the Washington Supreme Court ruled that a manufacturer cannot be held liable, either on negligence or strict liability grounds, for failure to warn of the hazards of another manufacturer's product.<sup>6</sup> In that case, the plaintiff alleged he contracted lung cancer as a result of his exposure to asbestos while employed by the United States Navy. While working for the Navy, the plaintiff performed maintenance on an evaporator manufactured by the defendant's predecessor corporation. After it was shipped, the evaporator was insulated with asbestos products manufactured by another entity and installed by the Navy or another entity.<sup>7</sup>

The plaintiff argued the defendant should be liable under negligence and strict liability theories for failing to warn of the dangers of asbestos. The trial court granted

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<sup>6</sup> *Simonetta*, 165 Wn.2d at 345-46.

<sup>7</sup> *Id.* at 345.

summary judgment in favor of the defendant, and the plaintiff appealed. The Court of Appeals reversed, concluding the defendant was aware that (1) the evaporator needed insulation, (2) the Navy used asbestos insulation, and (3) workers would have to disturb the insulation when performing required maintenance.<sup>8</sup>

The Supreme Court reversed the decision of the Court of Appeals, concluding that, as a matter of law, the defendant owed no duty to warn because it did not manufacture, sell, or supply the asbestos insulation on the evaporator.<sup>9</sup> The court also ruled that, as a matter of law, the defendant could not be strictly liable for failure to warn because it was not in the chain of distribution of the asbestos.<sup>10</sup>

In a companion case, *Braaten*, the Supreme Court extended its holding in *Simonetta* regarding external insulation to replacement packing and gaskets contained inside the defendants' products. The court explained:

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<sup>8</sup> *Id.* at 347.

<sup>9</sup> *Id.* at 354.

<sup>10</sup> *Id.* at 363.

We hold that the general rule that there is no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in other manufacturers' products applies with regard to replacement packing and gaskets. The defendants did not sell or supply the replacement packing or gaskets or otherwise place them in the stream of commerce, did not specify asbestos-containing packing and gaskets for use with their valves and pumps, and other types of materials could have been used.<sup>11</sup>

## **2. Morgan's Failure to Warn Claims**

Morgan presented no evidence to show that any of the insulation, flange gaskets, or internal packing that he came into contact with at PSNS had been manufactured, supplied or distributed by Aurora. The only evidence in the record regarding insulation and flange gaskets is that Aurora did *not* manufacture, supply or distribute those materials. (CP 6340 (insulation), CP 4390-91 (flange gaskets)) Accordingly, as in *Simonetta* and *Braaten*, Aurora did not have a duty to warn of dangers associated with those products.

Nor can there be any dispute with regard to internal packing. Knowles testified that he remembered

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<sup>11</sup> *Braaten*, 165 Wn.2d at 380.

“individuals who were working with packing in connection with brand-new Aurora Pumps” and that the conditions in the air were “[d]usty and dirty.” (CP 6276) However, Knowles was not asked and did not address the key inquiry required by *Simonetta* and *Braaten*—i.e., *who* manufactured, supplied or distributed the packing material? Morgan submitted no direct evidence regarding that issue.

Morgan may attempt to distinguish *Braaten* because in that case, the plaintiff did not work with new pumps, so there was no way to determine “whether and how many times gaskets and packing had been replaced in pumps and valves he worked on.”<sup>12</sup> Here, in contrast, Morgan allegedly worked around “brand-new” Aurora pumps, leading to the potential inference that he was exposed to packing material that was originally supplied from Aurora’s manufacturing facility.

However, a review of the evidence refutes this assertion. First, as discussed above, the only evidence regarding a brand-new Aurora pump that was sent to PSNS

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<sup>12</sup> *Braaten*, 165 Wn.2d at 394.

concerns a GNC-17 End Suction Navy Pump that was shipped in 1960 and that was used to pump aviation fuel on the *U.S.S. Coral Sea*. That pump utilized mechanical seals that eliminated the need for packing and internal gaskets. Thus, a jury could not reasonably infer that Morgan was exposed to packing that would have originally been shipped from Aurora's factory, because the one "brand-new" pump at issue did not require such packing.

Second, to the extent Knowles was referring to other, unspecified Aurora pumps that were "brand-new," his testimony is insufficient to support an inference that the packing associated with such pumps originated with Aurora. There is no evidence in the record as to how the packing that was used "in connection with" new Aurora pumps was being used. Knowles did not say whether the packing was being removed or inserted into the pump. He did not testify as to whether the packing was new or old. Critically, he was not asked and did not say whether he knew where the packing came from—i.e., if it was from the pump itself, the PSNS supply shop, or another source.

Similarly, there is no evidence in the record that Aurora ever supplied packing material to PSNS. Morgan argues that “Aurora also sold replacement gaskets and packing for its pumps.”<sup>13</sup> However, none of the evidence cited by Morgan shows that PSNS purchased replacement packing from Aurora or that Morgan ever came into contact with any such packing. Where, as here, the party opposing summary judgment relies entirely upon evidence that is “vague” and requires “leaps in logic,” such evidence is insufficient to support an inference that will allow the party offering it to avoid summary judgment.<sup>14</sup> Because Morgan has failed to present evidence establishing the requisite connection between Aurora and any asbestos-containing materials associated with the Aurora pumps he worked with, his claims must fail as a matter of law.

### **3. Morgan’s Design Claims**

In the proceedings below, Morgan attempted to avoid summary judgment by arguing that he had alleged design

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<sup>13</sup> Brief of Appellants at 14.

<sup>14</sup> *See Scott v. Blanchet High School*, 50 Wn. App 37, 42, 747 P.2d 1124 (1987) (affirming summary judgment because “inference” was “unreasonable”).

defect claims that were distinct from his failure-to-warn claims and that were not subject to *Simonetta* and *Braaten*. (CP 4180) However, none of the testimony or evidence offered by Morgan identified a specific pump that Morgan came into contact with, much less its design. The only competent evidence in the record regarding the design of any pumps that were at PSNS while Morgan was there is the testimony of Franklin, who identified the only pump sent to PSNS for the *U.S.S. Coral Sea*. That pump did not utilize asbestos-containing components. Morgan's design defect claim therefore fails as a matter of law.

**B. As a matter of law, any asbestos fibers from Aurora pumps were not a substantial factor in causing Morgan's harm.**

As explained above, there is no evidence to show that Morgan was ever exposed to asbestos from any products manufactured, distributed, or sold by Aurora. Even if any of Morgan's exposure to asbestos could be attributed to Aurora, that exposure was not a substantial factor in

causing his injury, and his claims must therefore fail, as a matter of law.<sup>15</sup>

In asbestos cases where there are multiple suppliers, the plaintiff must show that exposure to a particular defendant's product was a substantial factor in bringing about the injury.<sup>16</sup> A substantial factor is "an important or material factor and not one that is insignificant."<sup>17</sup>

In this case, Farrow identified nine different valve manufacturers and 15 different pump manufacturers during his depositions. (CP 1435, 4206-07) He also identified manufacturers of numerous other asbestos-containing products. (CP 4218-23, 4229-32) Under these circumstances, Morgan's limited exposure to pumps made by Aurora does not rise to the level of a "substantial factor."

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<sup>15</sup> See *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997) On appeal, Morgan asserts that the Court should not apply the test set forth in *Mavroudis* but should instead apply a "less rigid" standard. Brief of Appellants at 22-30.

<sup>16</sup> *Mavroudis*, 86 Wn. App. 22.

<sup>17</sup> *Id.* at 28.

**V. CONCLUSION**

For the reasons set forth above, Aurora respectfully requests that the dismissal of Morgan's claims against it be AFFIRMED.

DATED: April 15, 2010.

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**CERTIFICATE OF SERVICE**

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