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No. 684451-12-I

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE**

ROGER E. HAMMETT, JR. and ANITA M. HAMMETT,
Respondents/Cross-Appellants,

v.

RESIDUAL ENTERPRISES CORPORATION, as successor in
interest to SEA-LAND SERVICE, INC.,
Appellant/Cross-Respondent

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	ASSIGNMENT OF ERROR ON CROSS-APPEAL	2
III.	STATEMENT OF THE CASE	3
	A. Procedural History.....	3
	B. Factual Background.....	5
	1. Mr. and Mrs. Hammett and His Mesothelioma.	5
	2. Mr. Hammett’s Exposure to Asbestos on the M/V SEATTLE.	6
	3. Dr. Churg’s Expert Opinion that Mr. Hammett’s Asbestos Exposure Was 100 Times Greater than What Was Sufficient to Cause Mesothelioma.	8
	4. Sea-Land’s Failure to Take Any Precautions to Protect Mr. Hammett from the Hazards of Asbestos.....	9
IV.	ARGUMENT ON CROSS-APPEAL	10
V.	ARGUMENT ON SEA-LAND’S APPEAL	12
	A. Standards of Review.....	12
	B. The Trial Court Appropriately Permitted Dr. Churg to Testify About the Level of Asbestos Exposure to Mr. Hammett Aboard the M/V SEATTLE.	13
	C. The Trial Court Properly Excluded Evidence of Mr. Hammett’s Alleged Asbestos Exposures When He Worked for Non-Defendants.	18

1.	The Exclusion of Mr. Hammett’s Alleged Asbestos Exposure from Non-Defendant Sources Was Justified by the Legal Framework of Jones Act Claims.	19
2.	Sea-Land Has Waived Any Claim that the Evidence Was Insufficient to Support the Jury’s Finding that Sea-Land’s Negligence Caused Mr. Hammett’s Injuries.	25
3.	<i>McDermott</i> Is Irrelevant to the Exclusion of Non-Defendant Exposures.	26
D.	The Trial Court Did Not Abuse Its Discretion in Allowing Evidence of Publicly Available “State of the Art” Information to Demonstrate What Sea-Land Should Have Known in 1966.	28
1.	The Trial Court Appropriately Permitted “State of the Art” Evidence.	29
2.	The Trial Court’s Limiting Instruction Protected Sea-Land from Any Potential Prejudice.	33
E.	The Trial Court Appropriately Allowed Plaintiff’s Counsel to Argue His Case.	35
F.	The Trial Court’s Jury Instructions Were Appropriate.	38
1.	The Trial Court Properly Instructed the Jury that Sea-Land May Not Delegate its Duty.	39
2.	The Trial Court Correctly Instructed the Jury Regarding Foreseeable Injury.	43
VI.	CONCLUSION	48

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Atlantic Sounding Co., Inc. v. Townsend</i> , 557 U.S. 404, 129 S.Ct. 2561 (2009).....	11, 12
<i>Barrette v. Jubilee Fisheries, Inc.</i> , 2011 WL 3516061 (W.D. Wash. Aug. 11, 2011)	12
<i>Beggs v. Dept. of Social & Health Services</i> , 171 Wn.2d 69, 75, 247 P.3d 421 (2011).....	12
<i>Caldbick v. Marysville Water & Power Co.</i> , 114 Wash. 562, 567, 195 P. 1027 (1921).....	42, 43
<i>Carlsdotter v. The E.B. Ward, Jr.</i> , 23 F. 900, 901-02 (E.D. La. 1885)	10
<i>Caruso v. Local Union No. 690</i> , 107 Wn.2d 524, 529-30, 730 P.2d 1299	13, 41
<i>Cobb v. Snohomish County</i> , 86 Wn. App. 223, 236, 935 P.2d 1384 (1997).....	13, 41
<i>Colburn v. Bunge Towing, Inc.</i> , 883 F.2d 372, 374 (5th Cir. 1989).....	29
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 808, 828 P.2d 549 (1992).....	26
<i>CSX Transp., Inc. v. McBride</i> , ___ U.S. ___, 131 S.Ct. 2630, 2639 (2011).....	20
<i>Dale v. Baltimore & Ohio Railroad Company</i> , 552 A.2d 1037, 1041 (Pa. 1989).....	31
<i>Esparza v. Horn Machinery Co.</i> , 408 N.W.2d 404, 408 (Mich. App. 1987)	21
<i>Ferguson v. Moore-McCormack Lines, Inc.</i> , 352 U.S. 521, 523, 77 S.Ct. 457 (1957).....	20
<i>Gallick v. Baltimore & Ohio R.R.</i> , 372 U.S. 108, 120, 83 S.Ct. 659, 666-67 (1963)	44, 46

<i>Garlock Sealing Technologies, LLC v. Robertson</i> , 2011 WL 1811683 (Ky. App. March 14, 2012)	16
<i>Green v. River Terminal Ry.</i> , 763 F.2d 805, 808 (6th Cir.1985).....	44
<i>Havens v. F/T Polar Mist</i> , 996 F.2d 215, 218 (9th Cir. 1993) ...	19, 20
<i>Hoglund v. Raymark Indust.</i> , 50 Wn. App. 360, 367, 749 P.2d 164 (1988).....	30
<i>Holz v. Burlington Northern Railroad Co.</i> , 58 Wn. App. 704, 708, 794 P.2d 1304 (1990).....	13, 24, 28
<i>In re Detention of A.S.</i> , 138 Wn.2d 898, 921-22, 982 P.2d 1156 (1999).....	17
<i>Jackson v. Johns-Manville Sales Corp.</i> , 750 F.2d 1314, 1318 (5th Cir. 1985)	32
<i>John Crane, Inc. v. Linkus</i> , 988 A.2d 511, 523-24 (Md. App. 2010)	16
<i>Johnson v. Blue Marlin Services, LLC</i> , 713 F. Supp. 2d 592, 594 (E.D. La. 2010)	29
<i>King v. Armstrong World Indust., Inc.</i> , 906 F.2d 1022, 1025 n. 14 (5th Cir. 1990).....	31
<i>Kuhn v. Schnall</i> , 155 Wn. App. 560, 577, 229 P.3d 828 (2010)	34
<i>Laney v. Celotex Corp.</i> , 901 F.2d 1319, 1320 (6th Cir. 1990).....	21
<i>Lockwood v. AC &S, Inc.</i> , 109 Wn.2d 235, 245 & 268, 744 P.2d 605 (1987).....	21
<i>McDermott, Inc. v. AmClyde</i> , 511 U.S. 202, 217-21, 114 S.Ct. 146 (1994).....	20, 26, 27
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19, 32, 111 S.Ct. 317 (1990).....	10, 11
<i>Mitchell v. Steward Oldford & Sons</i> , 415 N.W.2d 224, 227 (Mich. App. 1987)	21
<i>Moreland v. Butcher</i> , 126 Wn.2d 36, 39, 891 P.2d 725 (1995)	26
<i>Mullahon v. Union Pac. R.R.</i> , 64 F.3d 1358 (9th Cir. 1995)	44

<i>New York & Long Branch Steamboat Co. v. Johnson</i> , 195 F. 740, 741-42 (3d Cir. 1912)	10
<i>Nolan v. Weil-McLain</i> , 910 N.E.2d 549, 555 (Ill. 2009).....	21
<i>Norfolk & Western Railway Co. v. Ayers</i> , 538 U.S. 135, 165-66, 123 S.Ct. 1210 (2003).....	23, 31
<i>Norfolk Shipbuilding & Drydock Corp. v. Garris</i> , 532 U.S. 811, 818, 121 S.Ct. 1927 (2001).....	11
<i>Oliver v. Pacific Northwest Bell Tel. Co.</i> , 106 Wn.2d 675, 683, 724 P.2d 1003 (1986).....	15
<i>Page v. St. Louis Southwestern Railway Co.</i> , 349 F.2d 820, 826- 827 (5th Cir. 1965).....	24
<i>Palmer v. Union Pacific Railroad Co.</i> , 311 S.W.3d 843 (Mo. App. 2010)	22, 23
<i>Perry v. Morgan Guar. Trust Co.</i> , 528 F.2d 1378, 1380 (5th Cir.1976).....	29
<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 393, 88 P.3d 939 (2004).....	13, 17
<i>Rogers v. Missouri Pacific Railroad Co.</i> , 352 U.S. 500, 507-08, 77, S.Ct. 443 (1957).....	19
<i>Sanford v. Caswell</i> , 200 F.2d 830, 832 (5th Cir. 1953).....	28, 39
<i>Smith v. Trinidad Corp.</i> , 992 F.2d 996 (9th Cir. 1993).....	10
<i>State v. Braham</i> , 67 Wn. App. 930, 939, 841 P.2d 785 (1992).....	41
<i>State v. Brown</i> , 132 Wn.2d 529, 618, 940 P.2d 546 (1997).....	33, 35, 38
<i>State v. C.J.</i> , 148 Wn.2d 672, 686, 63 P.3d 765 (2003)	13
<i>State v. Castle</i> , 86 Wn. App. 48, 51, 935 P.2d 656 (1997).....	38
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003).....	37
<i>State v. Griffin</i> , 173 Wn.2d 467, 268 P.3d 924 (2012).....	28
<i>State v. Kennard</i> , 101 Wn. App. 533, 537, 6 P.3d 38 (2000).....	38
<i>Torrejon v. Mobil Oil Co.</i> , 876 So.2d 877, 887-88, 892-893 (La. App. 2004)	23

Urie v. Thompson, 337 U.S. 163, 178, 69 S.Ct. 1018, 1028
(1949).....29

Wooden v. Mo. Pac. R.R. Co., 862 F.2d 560 (5th Cir. 1989).....47, 48

Other Authorities

“The Sole Proximate Cause ‘Defense’: a Misfit in the World of
Contribution and Comparative Negligence,” 22 S. ILL. LAW
J. 1, 2 (1997)24

*Foreseeability as an Element of Negligence and Proximate
Cause*, 155 A.L.R. 157, supplemented at 100 A.L.R. 2d 942
(1965).....46

I. INTRODUCTION AND SUMMARY

Respondents/Cross-Appellants Roger E. Hammett, Jr. and Anita M. Hammett (“Mr. Hammett” and “Mrs. Hammett,” and collectively “Plaintiff”) file this cross-appeal and response to the appeal filed by Appellant/Cross-Respondent Residual Enterprises Corporation, as the successor in interest to Sea-Land Service, Inc. (“Sea-Land”) in this matter.

Plaintiff presents a purely legal issue on cross-appeal and asks this Court to reinstate Mrs. Hammett’s loss of consortium claim under general maritime law. The Jones Act expanded the remedies previously available under general maritime law, and the trial court committed legal error in holding that the Jones Act abrogated Mrs. Hammett’s loss of consortium claim.

Sea-Land’s appeal, by contrast, repeatedly attacks the discretionary decisions of a trial judge whose practical judgments are entitled to great deference here. Sea-Land claims that only industrial hygienists may testify about asbestos exposure, but that is not the law, and Plaintiff’s expert, Dr. Churg, was eminently qualified to testify on that subject given his expertise in occupational medicine

and pathology.

Sea-Land claims it was prevented from presenting a “sole cause” defense, but that fictional defense is foreclosed by the “featherweight” causation standard applicable to Jones Act claims, the Jones Act rule that non-parties cannot be assessed comparative fault, and the denial of Sea-Land’s summary judgment motion on causation — which Sea-Land did not appeal. The trial court acted well within its discretion to exclude evidence of Mr. Hammett’s alleged exposure to asbestos from non-defendant sources, and Sea-Land has no “sole cause” defense in light of its failure to appeal the trial court ruling that sufficient evidence supported a jury finding that Sea-Land’s negligence caused Mr. Hammett’s injuries.

Finally, Sea-Land takes issue with several of the trial court’s evidentiary rulings and two jury instructions. But all of them were appropriate exercises of the trial court’s discretion and they caused no prejudice to Sea-Land.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

Did the trial court commit legal error in ruling that Mrs. Hammett’s loss of consortium claim under general maritime law was

barred by the Jones Act, where loss of consortium has long been a cognizable claim under general maritime law, and the purpose of the Jones Act was to enlarge the protection available to seamen, not to narrow it? Yes.

III. STATEMENT OF THE CASE

A. Procedural History.

Plaintiff sued Sea-Land and the Washington State Ferries, asserting claims under the Jones Act and general maritime law and claiming that defendants negligently exposed Mr. Hammett to asbestos during his time aboard their vessels. CP 1-6 (Third Amended Complaint).

After Mr. Hammett's deposition, Sea-Land moved for summary judgment. CP 73-143 (Sea-Land's 10/17/11 SJ reply pleadings); Supp. CP 667-714 (Sea-Land's 9/22/11 SJ motion pleadings); Supp. CP 715-962 (Plaintiff's 10/10/11 SJ opposition pleadings). In ruling on the summary judgment motion, the trial court specifically rejected Sea-Land's argument that the evidence was insufficient for a reasonable jury to find that Mr. Hammett was exposed to hazardous levels of asbestos aboard Sea-Land's vessel, the M/V SEATTLE. CP 144-146. The trial court granted, however,

Sea-Land's motion that Mrs. Hammett's general maritime claim for loss of consortium was barred under the Jones Act. *Id.*

Mr. Hammett settled his claims against the Washington State Ferries, CP 218-220, leaving Sea-Land as the sole non-settling defendant. Plaintiff filed a motion *in limine* requesting the trial court to exclude evidence of possible asbestos exposures from sources other than the M/V SEATTLE because such exposure evidence was irrelevant under the Jones Act's "featherweight" causation standard and would cause unfair prejudice and juror confusion under ER 403. Supp. CP 963-1153 (Plaintiff's 11/14/11 motion *in limine*). The trial court ruled that Sea-Land could introduce evidence of exposures attributable to the settling defendant Washington State Ferries on which Mr. Hammett served, but could not offer evidence of possible exposures on ships or jobsites of non-defendants. RP 12/7/11 (16:14-20:13).

Trial commenced on December 6, 2011, and concluded on December 15, 2011, with a special jury verdict returned in favor of Mr. Hammett. CP 524-525. The jury found that Mr. Hammett was exposed to asbestos during his employment on the M/V SEATTLE,

that this exposure was the result of Sea-Land's negligence, and that this negligent exposure was a cause of his mesothelioma. *Id.* The jury awarded Mr. Hammett damages in the amount of \$1.45 million. *Id.* It found Sea-Land 70% at fault, and found the settling defendant, Washington State Ferries, 30% at fault. *Id.* The trial court entered judgment for Mr. Hammett. CP 537-554.

Sea-Land moved for a new trial, making the same arguments it now makes on appeal. CP 555-579. The trial court denied Sea-Land's motion. CP 663-664. Sea-Land timely appealed. CP 612-614. Plaintiff timely cross-appealed the trial court's dismissal of Mrs. Hammett's general maritime loss of consortium claim. Supp. CP 1192-1200 (Plaintiff's 3/19/12 notice of cross-appeal).

B. Factual Background.

1. Mr. and Mrs. Hammett and His Mesothelioma.

Roger Hammett was diagnosed with mesothelioma in 2010. RP 12/8/11 (Hammett at 15:3-19). Mesothelioma is a terminal cancer of the lining of the lung and is a signature disease of asbestos exposure. *Id.* (Churg at 25:13-18; 51:10-15; 66:1-7). For men in North America, 90% of all cases of mesothelioma are caused by

asbestos exposure. *Id.* at 51:10-11. Until his death, Mr. Hammett lived with his wife of 37 years, Anita Hammett, on Vashon Island. *Id.* (Hammett at 3:16-4:12; 13:13-14). Mr. Hammett died from mesothelioma on July 19, 2012.

2. Mr. Hammett's Exposure to Asbestos on the M/V SEATTLE.

Prior to his retirement in 2000, Mr. Hammett worked as an able-bodied seaman on the Washington State Ferries and several merchant ships, including Sea-Land's vessel, the M/V SEATTLE, on which he worked for over two months as a messman during 1966. RP 12/8/11 (Hammett at 17:23-32:10; 32:11-33:20; 38:16-18).

During his time on the M/V SEATTLE, Mr. Hammett was exposed to significant levels of asbestos exposure that originated from damaged and deteriorating, asbestos-containing insulation on steam pipes on the ship. RP 12/8/11 (Hammett at 20:10-20; 23:21-24:15; 27:19-29:17; Churg at 38:8-18). The entire time he was aboard, Sea-Land conducted an extensive maintenance and repair operation in which damaged asbestos insulation throughout the ship was ripped out and repaired or replaced. *Id.* (Hammett at 24:13-

27:18). This operation produced visible clouds and accumulations of asbestos dust. As he testified:

Q. Sir, can you tell us what would happen when the asbestos would be ripped off, or ripped out?

A. Well, when you hit it with a hammer, all this dust falls down. And then when it's leaking the dust falls down everywhere . . .

Q. And could you see visible dust in the air?

A. Yes, I could.

Q. And you talked about this work going on in the passageway. Can you tell me what kind of work, if any, was going on in the steam heating system overhead in the mess hall?

A. There would be dust on the floor, and, of course, I had to clean up – see, I was waiting on the tables and taking orders for food. I had to clean up the mess hall and the dust.

Id. (Hammett at 25:4-24). This rip-out and repair also occurred in the living quarters, and sometimes when Mr. Hammett awoke, he found asbestos dust on his pillow that had fallen during the night.

Id. (Hammett at 24:2-25:3; 26:11-18; 26:23-27:18).

3. Dr. Churg's Expert Opinion that Mr. Hammett's Asbestos Exposure Was 100 Times Greater than What Was Sufficient to Cause Mesothelioma.

Mr. Hammett's significant asbestos exposures aboard the M/V SEATTLE were far above the levels of exposure required to cause or contribute to causing mesothelioma. As Mr. Hammett's expert, Dr. Churg, testified, "it doesn't take a very big burden . . . to get a mesothelioma." RP 12/8/11 (Churg at 38:20-22). Dr. Churg further testified, "[Y]ou've got insulation that is coming off that pipe. And it is friable meaning that it crumbles. It produces fibers that get released. Or if you get fibers that get on the ground and then they get stirred up." *Id.* at 39:3-7.

Dr. Churg has expertise in both pathology and occupational medicine. *See, e.g.*, RP 12/8/11 (Churg at 3:22-11:4; 14:14-20; 20:23-21:16); Supp. CP 1154-1184 (1/31/12 Vanessa Firnhaber Oslund declaration attaching Dr. Churg's *curriculum vitae*). Based on his review of Mr. Hammett's testimony, combined with his expertise as an occupational medicine pathologist, his research, training and experience involving occupational asbestos exposures, and the academic literature evaluating asbestos levels created by

repair and replacement of asbestos insulation on ships, Dr. Churg calculated that Mr. Hammett's total asbestos exposure aboard the M/V SEATTLE was 18.3 fiber cc years. RP 12/8/11 (Churg at 40:16-43:15; 72:15-73:11). He testified that this was "certainly a number that's within the range" of asbestos exposures that could cause mesothelioma. *Id.* at 43:16-18. He further testified that even if Mr. Hammett's exposure had been 100 times lower (.183 fiber cc years), it would still have been within the range of exposures that cause mesothelioma. *Id.* at 44:13-15.

4. Sea-Land's Failure to Take Any Precautions to Protect Mr. Hammett from the Hazards of Asbestos.

Sea-Land took no precautions to protect Mr. Hammett from the hazards of the airborne and accumulated asbestos dust that it exposed him to on the M/V SEATTLE. RP 12/8/11 (Hammett at 30:10-32:4). Sea-Land provided no protective clothing; it provided no respirators; it did nothing to segregate or isolate the areas where the insulation rip-out and repair operations occurred; it took no measurements to determine the levels of asbestos dust; and it never warned Mr. Hammett of the hazard he faced — about which he was

completely unaware. *Id.*

IV. ARGUMENT ON CROSS-APPEAL

The trial court committed legal error in dismissing Mrs. Hammett's claim for loss of consortium under general maritime law. Under general maritime law pre-dating the Jones Act, a claim for loss of consortium indisputably was authorized.¹ In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317 (1990), the Court held that a loss of consortium claim is not authorized under the Jones Act. Some courts extended that holding to mean that the Jones Act also barred claims under general maritime law. *See, e.g., Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (per curiam). The United States Supreme Court has now clarified that such an interpretation is wrong, and this Court should therefore reinstate Mrs. Hammett's loss of consortium claim under general maritime law.

¹ *See, e.g., New York & Long Branch Steamboat Co. v. Johnson*, 195 F. 740, 741-42 (3d Cir. 1912) (allowing husband to recover for loss of consortium for injury to his wife, stating that “[w]e are clear that Johnson’s claim was recoverable in admiralty”); *Carlsdotter v. The E.B. Ward, Jr.*, 23 F. 900, 901-02 (E.D. La. 1885) (upholding claim in favor of widow, parents, and mother and sister of diseased, for loss of “services, society, comfort, and support”).

In *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 129 S.Ct. 2561 (2009), the Court clarified the reach of its decision in *Miles*. In *Townsend*, a seaman sought punitive damages under general maritime law. The Court addressed whether *Miles* meant that seamen could seek only damages recoverable under the Jones Act, thus barring a punitive damages claim under general maritime law. *Id.* at 418-19. It held that such a reading of *Miles* was “far too broad.” *Id.* at 419. The Court “directly rejected” the notion “that *Miles* precludes *any* action for personal injury beyond that made available under the Jones Act.” *Id.* at 421 (emphasis original; citing *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818, 121 S.Ct. 1927 (2001)). It explained that the Jones Act “was remedial, for the benefit of seamen” and that “[i]ts purpose was *to enlarge that protection, not to narrow it.*” *Id.* at 417 (emphasis added). It thus held that because punitive damages were a common law remedy under general maritime law at the time the Jones Act was enacted, such recovery was possible under a general maritime claim without contravening the Jones Act. *Id.* at 421-22.

Applying *Townsend*'s lessons, the court in *Barrette v. Jubilee Fisheries, Inc.*, 2011 WL 3516061 (W.D. Wash. Aug. 11, 2011), held that the Jones Act does not preclude recovery for a general maritime loss of consortium claim. *Id.* at *6-8. The court explained:

Because unseaworthiness was a well-established cause of action prior to the enactment of the Jones Act, nothing in the Jones Act displaces such a claim . . . As such, the Court finds that the Jones Act does not preclude recovery for Mrs. Barrette's loss of consortium claim. Applying the *Townsend* analytical framework, it is clear that loss of consortium damages were available in the general maritime law before the enactment of the Jones Act.

Id. at *7. Following *Townsend* and *Barrette*, and applying *de novo* review to this purely legal issue, *Beggs v. Dept. of Social & Health Services*, 171 Wn.2d 69, 75, 247 P.3d 421 (2011), this Court should reverse the trial court's denial of Mrs. Hammett's loss of consortium claim as legal error.

V. ARGUMENT ON SEA-LAND'S APPEAL

A. Standards of Review.

A trial court's evidentiary rulings and other rulings that depend on an understanding of the specific context and facts of the case are reviewed for abuse of discretion. *See, e.g., State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003) (admission of evidence);

Cobb v. Snohomish County, 86 Wn. App. 223, 236, 935 P.2d 1384 (1997), *rev. denied*, 134 Wn.2d 1003, 953 P.2d 96 (1998) (same); *Holz v. Burlington Northern Railroad Co.*, 58 Wn. App. 704, 708, 794 P.2d 1304 (1990) (same re ER 403 determination); *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (same re determination that expert is qualified and testimony will assist the jury under ER 702). Error is harmless if it would not affect the outcome. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 529-30, 730 P.2d 1299, *cert. denied*, 484 U.S. 815 (1987). Plaintiff will further address these standards of review in responding below to Sea-Land's specific arguments.

B. The Trial Court Appropriately Permitted Dr. Churg to Testify About the Level of Asbestos Exposure to Mr. Hammett Aboard the M/V SEATTLE.

The Court should reject Sea-Land's baseless claim that in opining on Mr. Hammett's asbestos exposure in excess of ambient or background levels aboard the M/V SEATTLE, Plaintiff's expert, Andrew Churg, M.D., Ph.D., testified outside his area of expertise. App. Br. at 16-18. Dr. Churg is a world-renowned occupational pathologist who specializes in the study of occupational lung

disease, including mesothelioma caused by workplace asbestos exposure. RP 12/8/11 (Churg at 3:22-11:4; 14:14-20; 20:23-21:16).² His background, training and experience as a leading researcher and clinician in occupational medicine make him eminently qualified to evaluate and opine on the levels of asbestos exposure Mr. Hammett encountered on the M/V SEATTLE and the effects of that exposure.³

Dr. Churg has published dozens of peer-reviewed articles that review and estimate past asbestos exposures.⁴ In providing foundation for his expert opinions, Dr. Churg testified as follows:

Q: So have you, Doctor, undertaken an effort to quantify the amount of asbestos exposure that Roger Hammett sustained during his service on the SS Seattle?

² See also Supp. CP 1154-1184 (Dr. Churg's *curriculum vitae*, attached to 1/31/12 Vanessa Firnhaber Oslund declaration, listing over 300 books, articles, and other publications written, co-written, or edited by him, including dozens relating to levels of occupational asbestos exposure, and describing his experience and role as a peer reviewer for *Annals of Occupational Hygiene*, *Journal of Toxicology and Environmental Health*, *American Journal of Industrial Medicine*, among many other journals in the fields of occupational hygiene, industrial medicine and environmental health).

³ See ER 702 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

⁴ See fn. 2, above (Dr. Churg's *curriculum vitae*).

MR. BURGER: Objection. This is industrial hygiene, your Honor.

THE COURT: Overruled . . .

Q: Is this the type of quantification that you do in the course of your research and training and experience as a pathologist with specialty in occupational lung diseases?

A: Yes, I do that – do do that.

Q: And have you published on these types of issues?

A: Yes, I have.

Q: Okay. And have those been peer-reviewed articles?

A: That's right.

RP 12/8/11 (Churg at 40:16-41:11). Surely, if Dr. Churg's peers believe him qualified to publish in some of the most prestigious medical and scientific journals in the world on this subject, he was qualified to testify as an expert on this subject in Mr. Hammett's case. Dr. Churg's testimony was helpful to the trier of fact and was properly admitted. ER 702; *see Oliver v. Pacific Northwest Bell Tel. Co.*, 106 Wn.2d 675, 683, 724 P.2d 1003 (1986) ("Qualifications of expert witnesses are to be determined by the trial court within its

sound discretion, and rulings on such matters will not be disturbed unless there is a manifest abuse of discretion”).

Sea-Land suggests, without any supporting authority, that only an industrial hygienist may offer expert testimony about the level of asbestos exposure to which Mr. Hammett was exposed. App. Br. at 17. Sea-Land cites no authority because none exists, and the law is to the contrary. In *Garlock Sealing Technologies, LLC v. Robertson*, 2011 WL 1811683 (Ky. App. March 14, 2012), for example, the court rejected the defense assertion that only an industrial hygienist could give expert testimony concerning levels and effects of asbestos exposure. The court noted that the jury “could weigh the credibility of all the testimony in light of the experts’ respective areas of expertise.” *Id.* at *5.⁵ Sea-Land was

⁵ Indeed, courts have held that even lay testimony may be sufficient to establish the presence of significant levels of asbestos above background, and industrial hygienist testimony is not necessary to provide such testimony. See *John Crane, Inc. v. Linkus*, 988 A.2d 511, 523-24 (Md. App. 2010) (court rejected contention “that expert testimony was required to establish that the number of asbestos fibers released exceeded ambient air levels,” and held that “lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose-response relationship and the lack of a safe

free to and did cross-examine Dr. Churg regarding his credentials and present evidence contradicting his exposure calculations, leaving it to the jury to weigh the testimony and determine who was right.

This Court should hold that the trial court did not abuse its discretion in allowing Dr. Churg, a world-renowned expert on occupational lung disease, including mesothelioma, caused by workplace asbestos exposure, to give expert testimony on these topics based on Mr. Hammett's testimony and Dr. Churg's expert knowledge and experience, including his review of relevant scholarly literature. *See In re Detention of A.S.*, 138 Wn.2d 898, 921-22, 982 P.2d 1156 (1999) (holding that trial court did not abuse its discretion in allowing a social worker to offer expert testimony on the presence of mental disorders in individuals who were subjects of confinement petitions); *see also Philippides*, 151 Wn.2d at 393 (trial court has "broad discretion" in determining admissibility of expert testimony and its decision "should not be disturbed absent an abuse of discretion").

threshold of exposure (above ambient levels) was sufficient to create a jury question").

C. The Trial Court Properly Excluded Evidence of Mr. Hammett's Alleged Asbestos Exposures When He Worked for Non-Defendants.

Sea-Land claims it should have been allowed to present evidence that Mr. Hammett's exposures to asbestos when working for non-defendants were the "sole cause" of his mesothelioma. App. Br. at 18-23. Sea-Land's argument fails to take account of the unique legal framework of the Jones Act, which requires a plaintiff to prove only that defendant's negligence was a "featherweight" cause of his injury, and which precludes assigning comparative fault to non-defendants. In light of that legal framework, any "sole cause" defense in this case was both irrelevant and logically precluded by the trial court's summary judgment ruling that Plaintiff presented sufficient evidence that Mr. Hammett's asbestos exposure aboard the M/V SEATTLE was a cause of his injuries. CP 144-146.

Sea-Land did not appeal that ruling or the sufficiency of the evidence supporting the jury's verdict finding that Sea-Land's negligence caused his injuries. Thus, the factual foundation for Sea-Land's "sole cause" defense simply does not exist, and the trial court

exercised appropriate discretion in excluding such irrelevant and confusing evidence.

1. The Exclusion of Mr. Hammett's Alleged Asbestos Exposure from Non-Defendant Sources Was Justified by the Legal Framework of Jones Act Claims.

Under the Jones Act, “[t]he employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question of whether the negligence of the employer played any part, *however small*, in the injury or death which is the subject of the suit.” *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507-08, 77, S.Ct. 443 (1957) (emphasis added).⁶ *Accord, Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993) (it is sufficient for a Jones Act plaintiff to show that “the negligence was a cause, *however slight*, of his injuries”) (emphasis added).

A seaman does not need to prove traditional proximate cause, but need only demonstrate that the employer’s negligence was a

⁶ Although *Rogers* involved a claim under the Federal Employers’ Liability Act (“FELA”), the Jones Act explicitly incorporates FELA standards and decisions applicable to FELA’s causation and liability

slight or “featherweight” cause of his injury. *Id.*⁷ As the United States Supreme Court recently held, the “featherweight” causation standard is “incompatible with ‘dialectical subtleties’ that common-law courts employed to determine whether a particular cause was sufficiently ‘substantial’ to constitute proximate cause.” *CSX Transp., Inc. v. McBride*, ___ U.S. ___, 131 S.Ct. 2630, 2639 (2011); *see also Rogers*, 352 U.S. at 508 (for practical purposes, only issue is “*whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit*”) (emphasis added).

Moreover, under the Jones Act, only other trial defendants or defendants who have settled can be considered comparatively at fault. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 217-21, 114 S.Ct. 146 (1994). None of the cases cited by Sea-Land (App. Br. at 19-

standards. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457 (1957).

⁷ *See* CP 514 (Jury Instr. No. 11, to which Sea-Land did not object, instructing that “If you find that Sea-Land’s negligence played any part, *no matter how slight*, in bringing about Roger Hammett’s mesothelioma, you must find for the plaintiff even if Sea-Land’s negligence operated in combination with the acts of another, or in combination with some other cause”) (emphasis added).

20) are Jones Act or FELA cases. Rather, they are conventional proximate cause cases applying traditional standards.⁸ Those authorities have no application to Jones Act cases.

Under the applicable “featherweight” causation standard, evidence that Mr. Hammett’s mesothelioma was caused by other exposures, other than his work on the M/V SEATTLE and the Washington State Ferries, was simply irrelevant. Unlike the “substantial factor” causation standard used in traditional asbestos personal injury cases,⁹ under which evidence of other exposures arguably has some bearing on whether an exposure attributed to the defendant was or was not “substantial” compared to other exposures, the “featherweight” causation standard is *not* a comparative standard, and in evaluating whether Sea-Land’s negligence played a part in

⁸ See *Nolan v. Weil-McLain*, 910 N.E.2d 549, 555 (Ill. 2009) (proximate cause); *Laney v. Celotex Corp.*, 901 F.2d 1319, 1320 (6th Cir. 1990) (same); *Mitchell v. Steward Oldford & Sons*, 415 N.W.2d 224, 227 (Mich. App. 1987) (same); *Esparza v. Horn Machinery Co.*, 408 N.W.2d 404, 408 (Mich. App. 1987) (same).

⁹ See, e.g., *Lockwood v. AC &S, Inc.*, 109 Wn.2d 235, 245 & 268, 744 P.2d 605 (1987) (“substantial factor” causation standard used in asbestos personal injury cases). The *Nolan* and *Laney* cases (App. Br. at 19) are distinguished on this basis as well. *Nolan*, 910 N.E.2d at 551-559 (“substantial factor” causation standard); *Laney*, 901 F.2d at 1320 (same).

causing Mr. Hammett's asbestos disease under the "featherweight" standard it is irrelevant whether he was exposed to asbestos from non-defendant sources. Accordingly, the trial court properly exercised its discretion in excluding this irrelevant evidence.

Even if such evidence were nominally relevant, it lost relevance when the trial court denied summary judgment to Sea-Land and found that Plaintiff had presented sufficient evidence that the jury could find that Sea-Land's negligence on the M/V SEATTLE was a "featherweight" cause of his injury. *Palmer v. Union Pacific Railroad Co.*, 311 S.W.3d 843 (Mo. App. 2010), is directly on point. Palmer was a railway employee who claimed under FELA that Union Pacific's negligence was a "featherweight" cause of his injuries. Before trial, the trial court ruled *in limine* that Union Pacific could not offer evidence that a non-party, Warren, was the cause of Palmer's injuries. *Id.* at 847. On appeal, after a jury verdict for Palmer, Union Pacific argued, just as Sea-Land does here, that the trial court abused its discretion in preventing Union Pacific from arguing "that Warren's negligence was the *sole cause* of the accident." *Id.* at 853 (emphasis added).

The Missouri Court of Appeals noted that under FELA (as under the Jones Act), an employee “can recover all of his damages from his employer if the employer’s negligence caused any part of the employee’s injury, regardless of whether the injury was also caused ‘in part’ by the actions of a third party.” *Id.* at 853 (citing *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 165-66, 123 S.Ct. 1210 (2003)). The court found that so long as there was evidence that Union Pacific’s negligence played a part, no matter how slight, in Palmer’s injury, it did “not matter that, from the evidence, the jury could reasonably attribute the result to negligence on behalf of Warren also.” *Id.* Based on its prior determination that “the jury could reasonably conclude that Union Pacific’s negligence played a part,” the court held that Union Pacific’s “sole cause” defense was unfounded, and it affirmed the exclusion of the proposed other causation evidence. *Id.*¹⁰

¹⁰ *Accord, Torrejon v. Mobil Oil Co.*, 876 So.2d 877, 887-88, 892-893 (La. App. 2004) (holding that under Jones Act’s “featherweight” causation standard, exposure to asbestos from non-party sources was irrelevant because it had no bearing on whether plaintiff’s exposure on defendant’s ships was “a cause, however slight” of plaintiff’s mesothelioma).

Finally, any probative value of non-defendant exposures was clearly outweighed by the danger of unfair prejudice and confusion to the jury under ER 403. Such evidence would almost certainly have misled the jury about “featherweight” causation and assessing fault under the standards of the Jones Act, as derived from FELA. *See Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 826-827 (5th Cir. 1965) (court held that allowing the jury to consider non-party causes of plaintiff’s injury in a FELA case would produce “confusion and contradiction”). As one commentator has observed:

When courts instruct jurors to determine if something or someone was the sole cause of an injury, there is an inherent danger that their attention will shift from deciding whether the defendant’s conduct contributed to the injury to a non-issue. The defense tends to lead jurors into a proverbial “snipe hunt” for the one person or thing that is the “sole cause” of the injury, when such a creature simply does not exist.

J.G. Phillips, “The Sole Proximate Cause ‘Defense’: a Misfit in the World of Contribution and Comparative Negligence,” 22 S. ILL. LAW J. 1, 2 (1997). Thus, any nominal relevance of non-defendant exposures was outweighed by the danger of unfair prejudice and juror confusion, and the trial court properly excluded it in exercising its discretion under ER 403. *See Holz*, 58 Wn. App. at 708 (rulings

under ER 403 “are within the sound discretion of the trial court”).

2. Sea-Land Has Waived Any Claim that the Evidence Was Insufficient to Support the Jury’s Finding that Sea-Land’s Negligence Caused Mr. Hammett’s Injuries.

The premise of Sea-Land’s “sole cause” argument is that there is no evidence that Mr. Hammett’s exposure aboard the M/V Seattle caused his injuries. Yet Sea-Land made that precise claim before trial in its motion for summary judgment and lost it. *See* Supp. CP 667-714 (Sea-Land’s 9/22/11 SJ motion pleadings). In denying Sea-Land’s motion on causation, the trial court determined that Plaintiff’s evidence was sufficient for a reasonable jury to find, as it eventually did find, that Mr. Hammett’s exposure to asbestos on the M/V SEATTLE was at least a “featherweight” cause of his disease. CP 144-146; CP 524 (Special Jury Verdict Question No. 2).

Sea-Land did not appeal that summary judgment order, and it has not challenged the jury’s finding that Sea-Land’s negligence caused Mr. Hammett’s injuries. Because Sea-Land failed to appeal the rulings and findings that foreclosed its alleged “sole cause” defense, for purposes of appeal, this Court should conclude that the “sole cause” defense is a fiction. *See, e.g., Moreland v. Butcher*, 126

Wn.2d 36, 39, 891 P.2d 725 (1995) (unchallenged trial court finding is a verity on appeal); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) (same); *see also* RAP 10.3(g) (appellate court will only review claims of error that are identified in assignments of error). Sea-Land plainly was not prejudiced by the trial court's exclusion of evidence of alleged exposures from non-defendants as to a defense it has not preserved.¹¹

3. *McDermott* Is Irrelevant to the Exclusion of Non-Defendant Exposures.

Sea-Land claims that the trial court's exclusion of non-defendant exposures constitutes a misapplication of the United States Supreme Court's decision in *McDermott*. *See* App. Br. at 22-23. But *McDermott* has nothing to do with such exclusion. As discussed above, *McDermott* instructs trial courts that comparative fault principles apply only to trial and settling defendants. Under *McDermott*, the trial defendant is entitled to a reduction in the total

¹¹ In regard to the lack of prejudice to Sea-Land, the Court should also note that the trial court's *in limine* ruling did not prevent Sea-Land from eliciting testimony and offering evidence of the condition of other ships on which Mr. Hammett worked to try to establish its contention that Mr. Hammett's testimony conflated his memories of

compensation that it must pay based on a proportionate share of fault attributed to the settling defendant. *McDermott*, 511 U.S. at 217.

McDermott has no bearing on a trial court's discretionary determination to exclude evidence of non-defendant exposures when the plaintiff has presented a *prima facie* case that the defendant's negligence was a featherweight cause of his injury, which precludes a sole cause defense, and introduction of such evidence could confuse the jury. The trial court did not in any way misinterpret or misapply *McDermott*.

work on the M/V SEATTLE with his memories of work on other ships. RP 12/7/11 (17:17-20:12).

D. The Trial Court Did Not Abuse Its Discretion in Allowing Evidence of Publicly Available “State of the Art” Information to Demonstrate What Sea-Land Should Have Known in 1966.

Sea-Land complains that the trial court erred in permitting evidence of publicly available information to demonstrate what Sea-Land should have known in 1966, when Mr. Hammett was exposed to asbestos aboard the M/V SEATTLE. App. Br. at 23-29. Because it was not bound by the laws or regulations that reflected such publicly available information about the risk of asbestos exposure, Sea-Land argues that such evidence was confusing and misled the jury. This Court reviews for abuse of discretion the trial court’s decision to permit the introduction of such plainly relevant evidence. *State v. C.J.*, 148 Wn.2d at 686 (admission of evidence reviewed for abuse of discretion); *Holz v. Burlington Northern*, 58 Wn. App. at 708 (same re ER 403 determination).¹² The Court should conclude that the trial court did not abuse its discretion.

¹² Sea-Land wrongly claims that the trial court’s decision is subject to *de novo* review, see App. Br. at 23-24 (citing *State v. Griffin*, 173 Wn.2d 467, 268 P.3d 924 (2012)), but that case involved judicial interpretation of an *evidence rule*, not judicial review of an *evidence ruling*. As the Court observed in *Griffin*, “Once the rule is correctly interpreted, the trial court’s decision to admit or exclude evidence is

**1. The Trial Court Appropriately Permitted
“State of the Art” Evidence.**

Under the Jones Act, an employer/ship owner owes an absolute and non-delegable duty to furnish its employees with a safe workplace. *See Sanford v. Caswell*, 200 F.2d 830, 832 (5th Cir. 1953). To find that an employer was negligent under the Jones Act, the employer must have had notice and opportunity to correct the dangerous condition and prevent the plaintiff’s injury. *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 374 (5th Cir. 1989). Knowledge is determined by “what the employer . . . objectively knew or *should have known*.” *Johnson v. Blue Marlin Services, LLC*, 713 F. Supp. 2d 592, 594 (E.D. La. 2010) (emphasis added; quoted in *Perry v. Morgan Guar. Trust Co.*, 528 F.2d 1378, 1380 (5th Cir.1976)). Thus, Plaintiff was obliged to show the jury that Sea-Land knew, or in the exercise of reasonable care should have known, of the dangers of the asbestos to which Mr. Hammett was exposed on the M/V SEATTLE in 1966. *See id.*; *Urie v. Thompson*, 337 U.S. 163, 178,

reviewed for an abuse of discretion.” 173 Wn.2d at 473 (quoting *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)).

69 S.Ct. 1018, 1028 (1949) (adopting same rule of negligence in FELA cases).

Indisputably, the Walsh-Healy regulations and Washington State Labor and Industry standards as of 1966 recognized the hazards of asbestos and required the implementation of industrial hygiene practices to combat those hazards. *See* RP 12/13/11 (Cohen at 68:19-70:5; 72:19-73:21; 78:17-79:6). Indisputably, newspaper articles and medical and industrial safety and hygiene literature discussed at trial documented the well-known hazards of asbestos prior to 1966. *See, e.g.*, RP 12/12/11 (Cohen at 140:13-23; 53:25-55:9); RP 12/13/11 (Cohen at 77:5-77:12; 82:17-83:5); RP 12/8/11 (Churg at 11:12-13:9; 81:2-18). Sea-Land offers no authority for the proposition that publicly available, “state of the art” information about the dangers of asbestos is not relevant to proving what Sea-Land should have known in 1966.

Without any authority of its own, Sea-Land attempts to distinguish the controlling authority of *Hoglund v. Raymark Indust.*, 50 Wn. App. 360, 367, 749 P.2d 164 (1988), but its effort is grounded in trivial factual differences that don’t affect admissibility.

In *Hoglund*, the court affirmed admission of articles and letters addressing asbestos hazards in mines and factories as relevant to proof of defendant's actual or constructive knowledge of asbestos hazards in shipyards. Sea-Land says *Hoglund* is inapposite because Sea-Land is not an asbestos manufacturer, and that the information in *Hoglund* more closely paralleled the defendant manufacturer's circumstances. *See* App. Br. at 28. But these arguments go entirely to the weight to be given the evidence, not its admissibility. They do not make irrelevant this evidence of what Sea-Land should have known about asbestos risks in 1966, as many other courts have held in similar circumstances.

In *Dale v. Baltimore & Ohio Railroad Company*, 552 A.2d 1037, 1041 (Pa. 1989), *overruled on other grounds*, *Norfolk & Western Rail. Co. v. Ayers*, 538 U.S. 135, 123 S.Ct. 1210 (2003), for example, the Pennsylvania Supreme Court, interpreting FELA, found that studies regarding asbestos-related disease in laborers working directly with raw asbestos fibers and in shipyards were relevant to whether the defendant railroad had notice of asbestos hazards to its employees. *Dale*, 552 A.2d at 1039-40. The *Dale*

court noted that the evidence could cut both ways. A jury could find that the evidence demonstrated the railroad's constructive knowledge of asbestos hazards or the jury could find that the railroad acted reasonably because the studies did not involve railroad workers. *Id.* at 1040-41. *Accord, King v. Armstrong World Indust., Inc.*, 906 F.2d 1022, 1025 n. 14 (5th Cir. 1990) (holding that "state of the art" evidence regarding hazards of raw asbestos was relevant to asbestos product manufacturer's actual or constructive knowledge regarding dangers of asbestos, and concluding that distinction between raw asbestos and finished products went only to weight to be given evidence), *cert. denied*, 500 U.S. 942 (1991); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1318 (5th Cir. 1985) (*en banc*) (holding that "[a] study indicating that exposure to asbestos fibers is likely to cause harm to one group of workers is at least suggestive of the facts that other groups of workers who are also exposed to asbestos fibers face similar damages").

Under these authorities, the trial court plainly did not abuse its discretion in permitting "state of the art" evidence to show what Sea-Land should have known about asbestos risks.

2. The Trial Court's Limiting Instruction Protected Sea-Land from Any Potential Prejudice.

Sea-Land devotes extensive argument to asserting that evidence of “state of the art” regulations should have been excluded because Sea-Land was not subject to the laws and regulations that publicly described the asbestos risk to which Mr. Hammett was exposed aboard the M/V SEATTLE in 1966. App. Br. at 24-26. Of course, the trial court did not admit this information for that purpose, and it specifically instructed the jury that Sea-Land was not bound by and did not violate those laws, and that the evidence was to be considered solely in determining what Sea-Land knew or should have known about the risks of asbestos exposure. Here is the trial court's instruction:

You have received evidence in this case pertaining to federal and state statutes and regulations only for the limited purpose of demonstrating knowledge. You are instructed, as a matter of law, Defendant was not legally bound by these statutes and regulations and did not violate these statutes and regulations. You may only consider these statutes and regulations as evidence of knowledge.

CP 517 (Jury Inst. No. 14.) Thus, the jury was explicitly instructed about the limited relevance of the regulations, and it was explicitly admonished that Sea-Land was not bound by and did not violate

these regulations. Sea-Land points to no evidence that the jury did not follow the trial court's instruction. "A jury is presumed to follow instructions given." *State v. Brown*, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). Clearly the trial court protected Sea-Land against any prejudicial misuse of "state of the art" evidence and did not abuse its discretion.

Sea-Land also makes much of Mr. Hammett's counsel's inadvertent display – for a few seconds – of a regulation during opening statement. App. Br. at 27-28. Moments before opening statements, the trial court instructed Plaintiff's counsel that he could discuss "state of the art" regulations but should not show them to the jury. RP 12/7/11 (178:4-6). In opening statement, Plaintiff's counsel inadvertently left one slide in his PowerPoint that displayed a regulation. Supp. CP 1190-1191 (1/31/12 Declaration of Matthew P. Bergman, ¶ 2). As soon as he realized his mistake, he quickly took down the slide before the jury even had time to read its print, and, as discussed, the trial court gave a curative instruction to the jury. This minor miscue does not come close to rising to the level of attorney misconduct, and was not treated as such by the trial court.

Nor can Sea-Land show unfair prejudice in the context of the entire trial record from such a momentary display, and the trial court cured the problem – to the extent it was a problem – by giving its instruction regarding the limited relevance of the regulations. *See Kuhn v. Schnall*, 155 Wn. App. 560, 577, 229 P.3d 828 (2010) (new trial requires prejudicial misconduct of counsel that is more than “mere aggressive advocacy,” and must be prejudicial “in the context of the entire record,” with no possibility of cure). Sea-Land presents no basis for the Court to conclude that the jury failed to follow the trial court’s instruction regarding the limited relevance of evidence concerning the regulations. *State v. Brown*, 132 Wn.2d at 618 (jury is presumed to follow trial court’s instructions).

E. The Trial Court Appropriately Allowed Plaintiff’s Counsel to Argue His Case.

Both parties agree that the proper standard for establishing Sea-Land’s negligence is whether Sea-Land knew or reasonably should have known about the dangers of asbestos to Mr. Hammett in 1966. App. Br. at 30. Indisputably, the Court gave the jury the

correct instructions regarding that negligence standard.¹³ Yet Sea-Land says this Court should reverse because the trial court did not prevent Plaintiff's counsel from arguing to the jury with phrases such as "was known or knowable,"¹⁴ "could have learned," and "[s]o what was out there? What knowledge was available?" App. Br. at 30-31. Each of these statements is consistent with the trial court's instructions concerning what was "known or reasonably should have been known" by Sea-Land.

¹³ See, e.g., CP 513 (Jury Instr. No. 10, stating that "[Defendant] must guard against those risks of dangers of which it knew or by the exercise of due care should have known") & CP 515 (Jury Instr. No. 12, stating: "In the exercise of reasonable care, a shipowner need not instruct or warn seamen of dangers in the use of shipboard products unless and until the state of medical, scientific, and technical knowledge and research has reached a level of development, and a level of public dissemination, that a reasonably prudent shipowner should have been aware of an unreasonable risk of harm in the use of the products aboard its vessels and aware of the necessity to instruct or warn seamen against such risks of harm.").

¹⁴ As the transcript excerpt quoted (App. Br. at 30) makes clear, counsel was actually referring to voir dire inquiries about what was known versus what was knowable. Counsel did not purport to tell the jury his voir dire questions reflected the legal standard for establishing negligence. Plainly, counsel was calling to the jury's attention that it would need to decide what Sea-Land actually and constructively knew.

While these phrases, plucked by Sea-Land from pages of argument and viewed in isolation, may not fully state the negligence standard, Plaintiff's counsel repeatedly stated the complete standard by telling the jury that the law requires the jury to determine what Sea-Land reasonably *should have known*.¹⁵

And as already has been established, the trial court correctly instructed the jury on the legal standard for negligence (*see* fn. 13, above), and it instructed the jury that arguments by counsel are just that – argument – and that it is evidence and the law, not counsel's arguments, that govern the jury's deliberations.¹⁶ *See State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (“Any allegedly improper statements [during argument] should be viewed within the

¹⁵ *See, e.g.*, RP 12/14/11 (Plaintiff's closing argument at 61:14-19, arguing that Sea-Land “must guard against those dangers which it knew – and this is key – or in the reasonable exercise of due care *should have known* would result in an injury”) (emphasis added); *id.* at 71:13-17 (“What they *should have known* is that asbestos is a dangerous dust, that there are specific levels that can't be exceeded . . . They *should have known* that. It was out there had they cared to look.”) (emphasis added).

¹⁶ CP 504 (Jury Instr. No. 1, stating: “Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, and you should disregard any remark, statement or argument that is not supported by the evidence or the law as given to you by the judge.”).

context of the . . . entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions”).

Sea-Land cites no authority for the proposition that counsel’s arguments must recite verbatim the jury instructions and never stray into the colloquial in order to avoid reversal. The trial court plainly did not abuse its discretion in overruling Sea-Land’s objections to counsel’s arguments, and Sea-Land can demonstrate no unfair prejudice, as it concedes that the jury was properly instructed on negligence. This Court should presume that the jury followed the trial court’s instructions on negligence and on the significance of counsel’s arguments. *See State v. Brown*, 132 Wn.2d at 618.

F. The Trial Court’s Jury Instructions Were Appropriate.

While Sea-Land attacks only two specific jury instructions, the Court should bear in mind the following key principles in reviewing jury instructions. First, “[t]he wording of jury instructions is left to the discretion of the trial court.” *State v. Kennard*, 101 Wn. App. 533, 537, 6 P.3d 38 (2000). Second, “Jury instructions are sufficient if they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case.” *State v.*

Brown, 132 Wn.2d at 618. And third, when examining the effect of a particular phrase in an instruction, courts must consider the instruction as a whole and in the context of all the instructions. *State v. Castle*, 86 Wn. App. 48, 51, 935 P.2d 656 (1997). This Court should sustain the instructions under these principles and for the specific reasons discussed below.

1. The Trial Court Properly Instructed the Jury that Sea-Land May Not Delegate its Duty.

Sea-Land argues that the trial court should not have instructed the jury that Sea-Land is not relieved of its duty of ordinary care by delegating or attempting to delegate its duty.¹⁷ As it does throughout its brief, Sea-Land argues that this Court should review this claimed error *de novo*, by citing plainly inapplicable case law. The cases cited by Sea-Land (App. Br. at 32) stand for the unremarkable

¹⁷ Jury Instruction No. 9 (CP 512) read in its entirety: “Negligence is the failure to use reasonable care. Reasonable care is the degree of care that reasonably prudent persons or corporations would use under like circumstances to avoid injury to themselves or others. Negligence is the doing of something that a reasonably prudent person or corporation would not do, or the failure to do something a reasonable prudent person would do, under the circumstances. SeaLand/Residual is not relieved of its duty of ordinary care owed to Mr. Hammett by delegating or seeking to delegate that duty to another person or entity.”

proposition that whether a jury instruction correctly states the law is reviewable *de novo*. But Sea-Land does not argue that this instruction incorrectly states the law. Nor could it. *See Sanford v. Caswell*, 200 F.2d 830, 832 (5th Cir. 1953) (holding that Jones Act employers' duty of providing safe workplace is non-delegable). Plainly, the instruction is a correct statement of the law and therefore *de novo* review has no application to Sea-Land's claimed error.

Rather, Sea-Land argues that the trial court's correct statement of the law was irrelevant to the case, as Sea-Land did not argue that it delegated its duty to someone else. App. Br. at 32-33. Sea-Land did, however, present evidence and argument that the Coast Guard bore some responsibility for providing a safe environment on the M/V SEATTLE and instructed shipowners to use asbestos. *See* RP 12/13/11 (Cushing at 152:20-153:20; 154:12-16; 178:17-179:25; 180:1-10; 185:19-25); *see also* RP 12/14/11 (Sea-Land's closing argument at 109:20-22; 150:3-10). That evidence was admittedly relevant to the question of Sea-Land's knowledge, but it also bore the risk of misleading the jury into thinking that part of Sea-Land's duty was fulfilled by or shared with

the Coast Guard. The trial court's instruction was thus prudent in making clear that Sea-Land was not relieved of its duty of ordinary care if it claimed a shared responsibility with the Coast Guard.

Sea-Land now says it never made such an argument and only presented evidence regarding Coast Guard regulation to show that it did not know about the risk of asbestos exposure to Mr. Hammett in 1966. Thus, at worst, the instruction was mere surplusage that did not prejudice Sea-Land in any way. The trial court's instruction regarding non-delegation correctly stated the law, and if that correct statement of the law did not bear on Sea-Land's defenses, the instruction merely told the jury that Sea-Land did not have a defense that Sea-Land concedes it did not have. The test for harmless error is whether, within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred. *See State v. Braham*, 67 Wn. App. 930, 939, 841 P.2d 785 (1992). Under this test, even assuming that the trial court should not have given the instruction, the mistake had no impact on the trial and was harmless.

Cobb v. Snohomish County is instructive. In *Cobb*, the court held it was error to allow irrelevant questions concerning a plaintiff's

involvement with the Northwest Legal Foundation, but that the error was harmless because the decision for the defendant rested on the plaintiff's failure to mitigate damages — as to which the irrelevant question had no bearing. 86 Wn. App. at 236. *Accord, Caruso v. Local Union No. 690*, 107 Wn.2d at 529-30 (holding that misleading jury instruction was harmless error because it did not affect trial outcome).

Sea-Land cites a number of cases (App. Br. 33-34) for the proposition that this Court will reverse when jury instructions are given on claims for which there is no evidence to support the claim. The key distinction between the cited cases and this case is that the jury instructions in those cases applied to an affirmative claim for monetary relief for which no evidence had been presented by the plaintiff. Thus, the prejudice to the appellant was in potential jury confusion in considering a theory of recovery that was unsupported by evidence and which should have been removed by directed verdict.¹⁸ No such risk exists with respect to the challenged

¹⁸ See, e.g., *Caldwick v. Marysville Water & Power Co.*, 114 Wash. 562, 567, 195 P. 1027 (1921) (listing cases where the court held that

instruction here. At worst, the instruction reminded the jury that Sea-Land did not have a defense that Sea-Land concedes it didn't have. The trial court did not abuse its discretion in instructing the jury about non-delegation, given that the jury could have been otherwise confused by the evidence regarding Coast Guard regulation, and any ostensible error in doing so was indisputably harmless.

2. The Trial Court Correctly Instructed the Jury Regarding Foreseeable Injury.

Sea-Land argues that the trial court erred by instructing the jury that Sea-Land could only be held liable if Sea-Land knew or should have known that the asbestos hazards its seamen faced entailed a significant risk of *injury*. App. Br. at 34-36. Sea-Land says that the trial court should have substituted the word *mesothelioma* for *injury* in its jury instruction.¹⁹ *Id.* This Court

it was error to instruct on a measure of damages for which no evidence was presented by plaintiff).

¹⁹ CP 513 (Jury Instr. No. 10: "Defendant Sea-Land/Residual was legally required to provide its employees with a reasonably safe workplace. This means that it must guard against those risks of dangers of which it knew or by the exercise of due care should have known. [¶] The question for the jury is whether Sea-Land knew, or reasonably should have known, that the particular concentrations of

should reject Sea-Land's argument and rule that the trial court's instruction is a correct statement of the law.

While there is no question that foreseeability of *some* injury is a required element of Jones Act negligence claim, the law does not require plaintiff to prove that the defendant could reasonably foresee the exact injury that the plaintiff sustained. As the court in *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358 (9th Cir. 1995), held, analyzing a FELA claim, which is analogous to a Jones Act claim (*see* fn. 6, above):

The test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that *an* injury might occur.

Id. at 1364 (citing *Green v. River Terminal Ry.*, 763 F.2d 805, 808 (6th Cir.1985); emphasis original, internal quotation marks omitted).

The *Mullahon* decision is part of a long line of cases spawned from the United States Supreme Court's decision in *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 120, 83 S.Ct. 659, 666-67 (1963). In

asbestos fibers, if any, likely to be encountered by crewmembers aboard operating vessels entailed a significant risk of injury. [¶]

Gallick, another FELA case, the Court held that it is not necessary for a plaintiff to prove that “the particular consequences of [the defendant’s] negligent acts were foreseeable.”²⁰ The plaintiff in *Gallick* suffered from a gangrenous condition, which required the amputation of both of his legs. He claimed that this condition was caused by an infection from an insect bite that he sustained while working near a fetid pool containing dead vermin and insects. He argued that the defendant employer’s failure to ameliorate this dangerous pool condition caused his insect bite, infection and consequent gangrenous condition. The railroad argued that it should not be held liable because the jury made a specific finding in its verdict that it was not reasonably foreseeable that the insect bite would cause an infection that would in turn become gangrenous. The Supreme Court rejected this argument, holding that the jury’s

However, it is not a defense that the extent of the injury or the manner in which it occurred was not probable or foreseeable.”).

²⁰ Even in negligence cases tried under the more rigorous common law formulation of causation, it is not necessary that defendant “might or should have foreseen the likelihood of the particular injury that resulted.” Annot., *Foreseeability as an Element of Negligence and Proximate Cause*, 155 A.L.R. 157, supplemented at 100 A.L.R. 2d 942 (1965).

other finding that an insect bite was reasonably foreseeable from working around the fetid pool was sufficient. In so holding, the Court explained that the proper inquiry for the jury was not whether it was foreseeable that allowing railroad workers to work in the vicinity of an insect-infested fetid pool would cause gangrene or the plaintiff-employee to lose his legs. Rather, the correct inquiry was whether it was reasonably foreseeable that working around the fetid pool would cause *some* injury to the employee:

It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable . . . And we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing which his "negligence played any part, even the slightest" such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act.

Gallick, 372 U.S. at 120-21 (citing *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443 (1957), and other cases). Like the gangrenous infection and insect bites in *Gallick*, mesothelioma is a rare disease from exposure to asbestos. As in *Gallick*, the issue is not whether Mr. Hammett's particular injury was reasonably foreseeable from exposing him to asbestos dust aboard the M/V

SEATTLE. Rather, the relevant question is whether Sea-Land's failure to employ even rudimentary industrial hygiene practices to control asbestos exposure would foreseeably result in *some* injury to its employees aboard the M/V SEATTLE. The trial court's instruction thus is entirely consistent with controlling United States Supreme Court precedent and a correct statement of the law.²¹

Sea-Land's response is to misuse *Wooden v. Mo. Pac. R.R. Co.*, 862 F.2d 560 (5th Cir. 1989), to support its false legal construct that the jury should have been instructed concerning the reasonable foreseeability of mesothelioma, specifically. Yet *Wooden* merely held that it was improper for a court to employ the extraordinary measure of taking judicial notice – thus obviating the need to introduce any evidence at trial – that it was common knowledge that silica dust caused silicosis/dust diseases in the 1950s. *Id.* at 564.

The *Wooden* court's cautious application of judicial notice has no bearing on the standard required for proof of foreseeable

²¹ Indeed, Sea-Land inadvertently concedes that the trial court's jury instruction was correct when it tells the Court that a *prima facie* Jones Act case requires the plaintiff to prove that defendant "should have reasonably anticipated the plaintiff might be *injured* by it." App. Br. at 3 (emphasis added).

injury set forth in jury instructions. To the extent that *Wooden* even touched on that subject, it supports the trial court's jury instruction here. The *Wooden* court first noted that FELA, like the Jones Act, "is protective of a plaintiff's right to a jury trial." *Id.* at 561.

Applying that principle, it then reversed a directed verdict for the railroad, holding that testimony by plaintiff's expert that "silicon dioxide, which is white sand, the kind of sand that you see at the beach . . . is very very noxious to the lung," was sufficient to allow the jury to conclude that the railroad knew or reasonably should have known that plaintiff needed protection from injury when he worked in a cloud of silicon dust. *Id.* at 562. The cited testimony focused on *injury* from silicon dust, and not silicosis in particular. *Id.*

VI. CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiff's Cross-Appeal, and deny Sea-Land's Appeal.

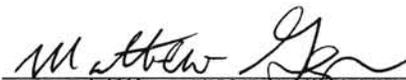
DATED this 10th day of September, 2012 [with Supp. CP
numbers as corrected on September 21, 2012].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused to be served a true and correct original and one copy of the foregoing with this Certificate of Service upon:

Court of Appeals, Division 1

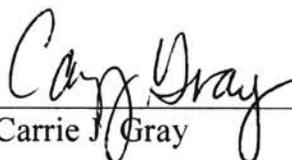
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SIGNED at Seattle, Washington, this 21st day of September, 2012.



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