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I. INTRODUCTION

David Roy Taylor is dying from mesothelioma, a fatal form of lung cancer caused by asbestos exposure. He and his wife sued Union Carbide Corporation (“Union Carbide”) claiming that his exposure to joint compound products containing Union Carbide asbestos was a cause of his illness. Union Carbide obtained summary judgment on the ground that Mr. Taylor failed to present evidence from which a jury could reasonably find that he was exposed to Union Carbide’s asbestos fiber. Because Mr. Taylor, in fact, presented abundant evidence from which a jury could reasonably so find, summary judgment was inappropriate. Accordingly, the Superior Court’s order of summary judgment, and its denial of reconsideration of that order, violated bedrock summary judgment principles and should be reversed.

II. ASSIGNMENT OF ERROR

The Superior Court erred in entering its order dated December 14, 2007, CP 3486-88, granting summary judgment to Union Carbide, and in entering its order dated January 14, 2008, CP 3581-82, denying reconsideration of the summary judgment order. The Court should address two questions with respect to this error:

1. Did Mr. Taylor present evidence from which a jury could reasonably find that Union Carbide asbestos was in Hamilton Red Dot

joint compound to which Mr. Taylor was exposed in 1972-1973?

2. Did Mr. Taylor present evidence from which a jury could reasonably find that Union Carbide asbestos was in Georgia-Pacific Ready Mix joint compound to which Mr. Taylor was exposed in 1972-1973?

III. STATEMENT OF THE CASE

A. Procedural History.

Mr. Taylor and his wife filed their Complaint against multiple defendants on January 19, 2007, claiming that his mesothelioma was caused by workplace exposure to defendants' asbestos products and that defendants were liable on negligence and strict products liability grounds. CP 4-9. On April 3, 2007, the Taylors amended their complaint to add Union Carbide as a defendant. CP 36-41. On November 15, 2007, Union Carbide moved for summary judgment. CP 160-67. On December 4, 2007, the Taylors opposed Union Carbide's motion as part of an Omnibus Opposition to the multiple motions for summary judgment filed by Union Carbide and other defendants. CP 439-527. On December 11, 2007, Union Carbide filed a reply brief in support of summary judgment. CP 3397-3419.

On December 14, 2007, after oral argument, the Superior Court denied all of the defendants' summary judgment motions except Union Carbide's, which it granted. CP 3486-88 (order of summary judgment to

Union Carbide). The other defendants settled with the Taylors thereafter. On December 21, 2007, the Taylors moved for reconsideration of the Union Carbide summary judgment. CP 3489-97. The Superior Court denied their motion for reconsideration on January 14, 2008, CP 3581-82, and the Taylors timely appealed on February 6, 2008. CP 3583-84.

B. Factual Background.

Mr. Taylor is a 66-year-old Tacoma resident who is dying from mesothelioma, CP 542-44, 685-86, which is a lung cancer caused by asbestos exposure. CP 574-75, 632. Mr. Taylor was exposed to a number of asbestos products during his career as an electrician over many years, including joint compound products. *E.g.*, CP 563-66, 712-13, 734 (evidence of his work near drywall contractors who applied and sanded joint compounds to seal nail holes and cracks between sheets of drywall in housing projects, apartments and commercial buildings); CP 731-52 (Social Security earnings statement listing employers from 1953 through 2005). The record is replete with evidence that his exposure to asbestos-containing products was a substantial cause of his mesothelioma. *E.g.*, CP 574-75, 589-98, 632, 637-39, 660-96.

1. Mr. Taylor Was Exposed to Hamilton Red Dot Joint Compound Containing Union Carbide Asbestos.

a. Mr. Taylor Was Exposed to Hamilton Red Dot Joint Compound.

Mr. Taylor specifically identified Hamilton Red Dot as one of the joint compounds to which he was exposed during his work in the Tacoma area in 1972-1973. Mr. Taylor testified:

Q: Mr. Taylor, you had indicated that one of the products you worked around when doing commercial work in greater Tacoma over a two-year period [referring to 1972 and 1973, *see* CP 564] was Hamilton Red Dot. Can you . . . describe for me how the Hamilton Red Dot came packaged?

A: In a bag. . . . A 25-pound bag.

Q: *And did you ever observe the Hamilton Red Dot joint compound being mixed for application?*

A: *Yes.*

Q: And what did you see?

A: The same half-inch drill motor and, oh, a big auger . . .

Q: And what, if anything, would occur when the Hamilton product was mixed?

A: Dust.

Q: After the Hamilton product was applied to the walls, do you recall seeing what the next step was?

A: Dust from the sanding.

Q: And did you breathe that dust, sir?

A: Yes.

CP 566 (emphasis added).

b. The Hamilton Red Dot Joint Compound to Which He Was Exposed Contained Union Carbide Asbestos.

There is ample evidence in the record demonstrating that the Hamilton Red Dot compound to which Mr. Taylor was exposed to in 1972-1973 contained Union Carbide asbestos.

Between 1959 and 1977, Hamilton Materials produced a number of asbestos-containing joint compounds, including Red Dot, that were manufactured in Southern California and distributed in Washington. CP 995-98, 1034-35. Hamilton manufactured and sold its All Purpose Joint System, which included Red Dot, *e.g.*, CP 1034, 1212-13, beginning in 1959, and according to Hamilton, it “no longer contained asbestos *after approximately 1977.*” CP 998 (emphasis added).

Darold Hefely, Hamilton’s sales representative in Oregon and Washington, further testified that between 1973 and 1977, Hamilton sold several asbestos-containing joint compound products in Washington, including the All Purpose Joint System, which included Red Dot. CP 1034-35. For at least two years prior to 1973, these asbestos-containing products made by Hamilton were delivered to the customers in the Northwest, including Washington. CP 1027, 1073-77, 1194-96. Based on

this and other evidence, the Superior Court denied Hamilton's motion for summary judgment on Mr. Taylor's negligence and product liability claims against Hamilton. CP 3604-06.

The record also indicates that Union Carbide was Hamilton's exclusive supplier of asbestos fiber for joint compound products, except for test batches, starting in the late 1960s. As Hamilton's president, Willis Hamilton, testified:

Q: Do you recall if for any time period, between 1959 and the mid-to-late '70s, the chrysotile fiber from a particular source was the predominant fiber used in any specific Hamilton product or category of products.

A: Yes.

Q: What do you recall?

A: From '57 until – what was the other year?

Q: '59 until early January of 1978.

A: '59 . . . We used a variety of fibers and until approximately, well, the end of this – 1960s, *and then we went to predominantly the Union Carbide fiber in the joint cements.*

Q: *In the joint compound products?*

A: *Yes.*

CP 2947 (emphasis added). Mr. Hamilton reaffirmed this testimony on cross-examination:

Q: Mr. Hamilton, if I understood your testimony earlier today, it was that the predominant provider of Union Carbide fiber, excuse me, *predominant provider of asbestos fiber for use in Hamilton Materials joint cements was Union Carbide*; is that correct?

A: *That's correct. From the late '60s on.*

Q: From the late '60s on?

A: Yes.

CP 2956 (emphasis added).

In further examination, Mr. Hamilton clarified the very limited circumstances in which Hamilton used fibers other than Union Carbide asbestos fiber in its joint compounds:

Q: [Y]ou did say in the late '60s that Union Carbide was the predominant supplier of asbestos fibers for use in joint compound produced by Hamilton; is that correct?

A: Yes.

Q: By "predominant" – what do you mean by "predominant" exactly?

A: We used the Union Carbide asbestos in the joint cements that – not exclusively but basically all of the way through. The only time we didn't use it is when we were trying to run some kind of test for some other fiber, which would just be a very small batch, but other than that, Union Carbide was the supplier of asbestos for joint cements.

Q: So in the late '60s . . . Hamilton utilized Union Carbide asbestos fibers predominantly, meaning

when you said all through – all throughout the late '60s, in making joint compounds, is that correct?

A: I think that's what I gave testimony to.

Q: And by "predominant" would you say that is 80 percent or more of Union Carbide asbestos fibers were utilized in making joint compounds in the late 1960s?

A: It was – it was far and above the majority of asbestos used in the joint cements.

Q: By "majority," you mean 51 percent or more?

A: No, it was . . . I was going to say exclusive, but occasionally something – some new fiber come in and we would try that in a small batch. Other than that, it was exclusively used in the joint cements.

Q: . . . I just want to clarify for the record, if I may, so then *in the late 1960s, Union Carbide asbestos fibers were exclusively – unless utilized for some testing mechanism – utilized in making joint compounds for Hamilton? . . . Is that a correct clarification of your testimony?*

A: *Yes*

* * *

Q: During the 1970s, is it safe to say that Union Carbide was the exclusive supplier of asbestos fibers used by Hamilton in manufacturing joint compounds?

A: Near exclusive, yes.

Q: And when you say "near exclusive," what do you mean by that exactly?

A: Well, we were always trying to upgrade the material so if something else came down the pike, we would give it a shot and do a comparison. So it would be we would make a batch, but we wouldn't put it in production, we'd make a batch, so it's hard to say it's exclusive from that.

Q: When you say you would make a batch but wouldn't put it in production, does that mean that it wouldn't be sold outside—

A: It would be a test batch.

Q: A test batch. And would that be tested by Hamilton themselves or would you give that out to different users of the product?

A: Basically tested by Hamilton.

CP 2968-69 (emphasis added). Hamilton used Union Carbide asbestos fiber in Hamilton joint compounds because it “worked better than any other asbestos in the joint compounds.” CP 2971.

Mr. Hamilton's testimony that Union Carbide was the virtually exclusive supplier of asbestos used by Hamilton in its joint compound products during 1972-1973 is corroborated by Hamilton's sworn written discovery responses from 1998, stating that “Hamilton believes most of the chrysotile [asbestos] was purchased from Union Carbide Company.” CP 2918.

Mr. Hamilton's testimony is also corroborated by documentation. While John Myers, Union Carbide's corporate designee, testified that

many of Union Carbide's invoices no longer exist (CP 1656, 1663-64, 1806-07), Union Carbide produced invoices that Union Carbide sent to Hamilton for the sale of asbestos fiber dating as early as 1970. CP 1987-88; *see also* CP 1661-63 (testimony by Mr. Myers regarding these records showing sales of asbestos fibers to Hamilton from 1970 forward). And Union Carbide was contemporaneously promoting the specific grade of asbestos fiber identified in the invoices from 1970, SG-130, for use in joint compounds. CP 2848-58. Further corroborating this evidence, Hamilton produced accounts payable records reflecting payments to Union Carbide for "raw materials" as early as 1970. *E.g.*, CP 2079, 2081, 2083-88, 2091.

Union Carbide's witness, Mr. Myers, testified that he could not contradict Mr. Hamilton's testimony that Union Carbide was Hamilton's virtually exclusive asbestos supplier. Mr. Myers conceded that Mr. Hamilton (whose testimony is quoted above) would have superior knowledge on that subject:

Q: Now, again, with respect to Hamilton Materials, is Union Carbide aware of what percentage of Calidria [asbestos] fiber Hamilton Materials used in the manufacture of its tape joint compounds?

A: No.

* * *

Q: *And if . . . an official from Hamilton Materials testified that he believed the Calidria was the predominant fiber supply, the fiber that was used in their tape joint cements, say, after 1970, based on what you just told me, Union Carbide doesn't have anything within its knowledge to contradict that?*

A: *Other than just our thinking that we didn't – that we weren't an exclusive supplier, but we don't have anything in our records to [support] that.*

Q: You're thinking is based on conjecture based on information about how they formulated their product?

A: Correct.

Q: And it's not specifically related to Hamilton?

A: No.

* * *

Q: *You agree with me, if Hamilton has proffered evidence that would tend to show that the Calidria was the exclusive fiber that was used in certain products – namely tape joint cements, as you sit here today, there's no information that Union Carbide has to discredit that specifically, correct?*

A: You say there's evidence or just statements?

Q: If that's a statement that they've [Hamilton] made, you would agree with me –

A: I don't have any way to disagree with that.

Q: Okay.

A: Any records or anything.

Q: *At least it's a dispute in this case, a genuine dispute; is that correct?*

A: *Yes.*

CP 1663-65 (emphasis added).

Union Carbide, for its part, submitted an affidavit by Mr. Myers made in 2005, two years before his deposition testimony quoted above, stating that Union Carbide began supplying SG-210 grade asbestos to Hamilton in 1974. CP 384. Mr. Myers also stated in the affidavit that he believed the amounts of SG-130 grade asbestos that Hamilton purchased from Union Carbide before 1974 were “not consistent with amounts that would be needed in an exclusive supplier relationship.” *Id.* He added that, “to the best of my recollection,” the SG-130 grade asbestos that Union Carbide supplied to Hamilton before 1974 was “not generally used in the manufacture of tape joint compounds.” *Id.* Mr. Myers admitted, however, that there was “very little difference” between the SG-130 and SG-210 grades of asbestos. CP 1640. Further, the Taylors presented evidence contradicting Mr. Myers’ assertion that SG-130 grade asbestos was not used in joint compounds. This included the Union Carbide promotional materials noted above that were then promoting SG-130 for use in joint compounds, CP 2848-58, as well as an internal Union Carbide memo specifically describing SG-130 grade fiber as a fiber to be used in

the manufacture of joint compounds. CP 1820; *see also* CP 1636-42
(testimony of Mr. Myers discussing this memo).

2. Mr. Taylor Was Exposed to Georgia-Pacific Ready Mix Joint Compound Containing Union Carbide Asbestos.

a. Mr. Taylor Was Exposed to Georgia-Pacific Ready Mix Joint Compound.

The record establishes that Mr. Taylor was exposed to Georgia-Pacific Ready Mix joint compound in 1972-1973. Mr. Taylor specifically identified Georgia-Pacific Ready Mix as a product to which he was exposed in the course of his work on a construction job at Foss High School in Tacoma in 1972-1973. CP 565-66, 712-13, 734. He testified that the Ready Mix typically came in five-gallon buckets and that it was sanded in his presence, creating respirable dust. CP 566.

b. The Georgia-Pacific Ready Mix Joint Compound to Which He Was Exposed Contained Union Carbide Asbestos.

The record demonstrates that the Georgia-Pacific Ready Mix to which Mr. Taylor was exposed in 1972-1973 – and indeed, *all* Georgia-Pacific Ready Mix made during that time period – contained Union Carbide asbestos. First, William Lehnert, former manager for research and development at Georgia-Pacific, identified himself as the person most qualified to testify about Georgia-Pacific's formulations of asbestos containing joint compounds. CP 2991-92. Mr. Lehnert testified that all

Georgia-Pacific Ready Mix contained asbestos until 1977, CP 3027-44, and in particular, that all Ready Mix sold in five-gallon buckets contained asbestos until that time. CP 3011-12. He also testified that Ready Mix sold in five-gallon buckets was the last Georgia-Pacific product to go completely asbestos-free (primarily due to technical formulation issues to meet contractor standards), CP 3188-91, and that the Ready Mix sold in five-gallon buckets was marketed primarily to those contractors for professional and commercial use. CP 3013.

Mr. Lehnert further testified that the Georgia-Pacific Ready Mix sold in five-gallon buckets typically contained 4.6% asbestos. CP 3009-12. He agreed that with the exception of certain texture products and laminating compound and spackling compound, “[a]nyone exposed to the Georgia-Pacific Joint System Products listed in Exhibit 1 through 1972 [which included Ready Mix, *see* CP 3245] . . . was using products containing asbestos because all G-P Joint System Products listed in Exhibit 1 contained asbestos until 1972.” CP 3096; *see also* CP 3245 (stating that Ready Mix was first “asbestos free” in 1976).

All Ready Mix joint compound manufactured by Georgia-Pacific in 1972-1973 contained Union Carbide asbestos. While Georgia-Pacific had three asbestos suppliers, every formulation of Georgia-Pacific Ready Mix contained SG-210 grade Union Carbide asbestos fiber. Georgia-

Pacific's Mr. Lehnert hand-wrote a chart showing the percentage of "Union Carbide SG-210 Asbestos in Georgia-Pacific Joint System Products" at all five Georgia-Pacific manufacturing facilities in the United States that made Ready Mix. CP 3262-64. The chart shows that for all five Georgia-Pacific U.S. plants that manufactured Ready Mix – including its largest plant in Acme, Texas – Ready Mix contained a percentage of Union Carbide SG-210 asbestos fiber during the two-year period spanning 1972-1973 when Mr. Taylor was exposed to Ready Mix. *Id.*

When Mr. Lehnert was questioned in his deposition about this handwritten chart and asked whether Georgia-Pacific used SG-210 "in combination with somebody else's asbestos," he testified that "[i]n many instances we did. In some instances we used it [SG-210] alone." CP 3223. Thus, irrespective of whether Georgia-Pacific had other asbestos suppliers, in 1972-1973, its Ready Mix product always included a percentage of SG-210 that was used either alone or in combination with other suppliers' asbestos in every five gallon bucket of Ready Mix.¹

¹ Union Carbide's witness, Mr. Myers, testified that he did not know how Georgia-Pacific formulated its joint compound products. CP 1674. He also acknowledged that Union Carbide's records through 1974 reflected an understanding that Georgia-Pacific used a combination of Canadian asbestos fiber and United Carbide's Calidria asbestos fiber mixed into the same product. CP 1659-60, 1696-1702; *see also* CP 2777-80 (1973 Union Carbide memorandum stating that Georgia-Pacific's joint

Three Georgia-Pacific witnesses testified that Georgia-Pacific's joint compound products sold on the west coast were manufactured at Georgia-Pacific's plant in Acme, Texas. Howard Schutte, Georgia-Pacific's Vice-President for Strategy and New Product Development, testified in his declaration that "the Acme, Texas plant is the Georgia-Pacific gypsum facility which would have manufactured and supplied joint system products to the states of Washington and Oregon." CP 3346. Georgia Pacific's Mr. Lehnert also testified that the Acme, Texas plant supplied products to the west coast. CP 3233-34. And Mr. Burch, Georgia-Pacific's head of marketing, discussing the "joint cement business," testified that "[a]nything that we sold on the west coast had to be shipped from Acme, Texas." CP 3521 (emphasis added).

Finally, Union Carbide presented evidence to suggest that the "Georgia Pacific Ready Mix" to which Mr. Taylor was exposed in the workplace in 1972-1973 was not made at one of the five Georgia-Pacific plants, but was "likely a product manufactured and relabeled by Kelly-Moore" at a plant in San Carlos, California, where Union Carbide was a minor supplier of asbestos "and then sold as a GP product." See CP 3409-

compounds used combination of 1/3 Union Carbide asbestos fiber and 2/3 Canadian asbestos fiber).

10 (Union Carbide's reply brief in support of summary judgment, citing CP 3458-60 and 3479-81).

That evidence is contradicted, however, by the testimony of the three Georgia-Pacific witnesses quoted above indicating that any joint compound products sold by Georgia-Pacific on the west coast came from its Acme, Texas plant. *See* CP 3346, 3233-34, 3521. In addition, the Taylors submitted evidence that the Kelly-Moore re-branding agreement governed mainly *California*, with a few Colorado sales, but no record of Washington sales, CP 3525-26, 3579, and that the re-branding agreement expired in 1971, a year before the period of Mr. Taylor's exposure (1972-1973). CP 3524, 3573-74.

Finally, Mr. Taylor presented evidence that Union Carbide was also *Kelly-Moore's* primary supplier of asbestos in the late 1960s, when Kelly-Moore produced Georgia-Pacific Ready Mix under the re-branding agreement. *See* CP 3628 & 3630 (testimony by Mr. Giffins, President of Kelly-Moore, that Kelly-Moore's San Carlos, California facility produced joint compound "for a few years in the late 1960s" but no later than June 1970 and that Union Carbide was "the prime source" of asbestos fiber used by Kelly-Moore's San Carlos, California plant).

IV. ARGUMENT

A. Standard of Review and Summary Judgment Standards.

In reviewing the order of summary judgment, this Court applies the same standard as the Superior Court. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 324-25, 971 P.2d 500 (1999). Under that standard, this Court must consider the facts and all reasonable inferences in the light most favorable to the non-moving party, the Taylors. *Id.* at 325. The summary judgment may be affirmed only if, drawing all reasonable inferences in the Taylors' favor, the Court concludes that there are no genuine issues of material fact and that the moving party, Union Carbide, is entitled to judgment as a matter of law. CR 56(c). Thus, the Court "must reverse [the] summary judgment if the evidence could lead reasonable persons to reach more than one conclusion." *Soproni*, 137 Wn.2d at 325.

B. The Disputed Facts Concerning Mr. Taylor's Exposure to Union Carbide Asbestos Require this Court to Reverse the Summary Judgment and Remand for Trial.

If Mr. Taylor created a genuine dispute that he was exposed to Union Carbide asbestos in either of these products, then this Court must reverse the Superior Court's summary judgment order. As demonstrated in the above summary of the facts, and as further demonstrated below, a reasonable jury could and should conclude that the Hamilton Red Dot and

Georgia-Pacific Ready Mix joint compounds to which Mr. Taylor was exposed contained Union Carbide asbestos. Accordingly, based on the evidence and governing law, this Court should reverse the summary judgment for Union Carbide and remand for trial.

1. Mr. Taylor Is Not Required to Show that He Directly Handled the Asbestos-Containing Joint Compounds or that Union Carbide Asbestos Was the Only Asbestos to Which He Was Exposed, and His Exposure May Be Shown Circumstantially.

Union Carbide sought summary judgment based solely on its claim that there is no evidence that the Hamilton Red Dot and Georgia-Pacific Ready Mix joint compounds to which Mr. Taylor was exposed in the workplace in 1972-1973 contained Union Carbide asbestos. *See* CP 164, 3397-3419. For purposes of summary judgment, it also did not dispute that he was exposed to those joint compounds. *See* CP 3407-10, 3411-15. Accordingly, the sole issue on appeal is whether Mr. Taylor has created a genuine factual issue regarding whether the Hamilton Red Dot and/or Georgia-Pacific Ready Mix joint compounds to which he was exposed contained Union Carbide asbestos.

Under Washington law, Mr. Taylor need not show that he worked *directly* with the Hamilton Red Dot and Georgia-Pacific Ready Mix joint compounds in order to prove that he suffered exposure to Union Carbide asbestos contained in those products. *See Lockwood v. A C & S, Inc.*, 109

Wn.2d 235, 247, 744 P.2d 605 (1987) (evidence of exposure sufficient where dust from asbestos product “was released [and] drifted in the air and could be inhaled by bystanders who did not work directly with [the] asbestos”). Rather, Washington courts allow juries to determine that a plaintiff was exposed to asbestos even though the plaintiff did not work with the asbestos product directly, based on evidence that, as here, plaintiff worked in the vicinity of the asbestos or asbestos-containing product. *Lockwood*, 109 Wn.2d at 247.² In this case, Mr. Taylor testified directly about his exposure to dust from those products. *See* CP 565-66, 712-13, 734.

Nor is Mr. Taylor required to show that Union Carbide was the *only* asbestos to which he was exposed. He may prove that Union Carbide asbestos was a “substantial cause” of his disease if the jury finds that such exposure along with his other exposures to asbestos from different sources “combine[d] to produce a single result, incapable of division on any

² *See also Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 573, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022, 178 P.3d 1033 (2008) (evidence that asbestos product was used at shipyard supported finding that plaintiff’s father was exposed to the asbestos, without evidence of direct asbestos exposure); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000), *rev. denied*, 143 Wn.2d 1015, 22 P.3d 803 (2001) (evidence that plaintiff, a machinist, worked around other workers who used asbestos material, was sufficient to establish exposure, even though plaintiff did not handle asbestos directly).

logical or reasonable basis.” *Lockwood*, 109 Wn.2d at 245 n.6; *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 29 & n.3, 935 P.2d 684 (1997) (holding that substantial factor test applied to plaintiff’s claims against many defendants based on exposure to different sources of asbestos over time). Mr. Taylor presented extensive expert witness testimony and other evidence that his exposures to asbestos-containing products, including Hamilton Red Dot and Georgia-Pacific Ready Mix were substantial causes of his disease. *E.g.*, CP 574-75, 589-98, 632, 637-39, 660-96.

Finally, Mr. Taylor may prove that he was exposed to Union Carbide asbestos in Hamilton Red Dot and Georgia-Pacific Ready Mix through *circumstantial* evidence. *Lockwood*, 109 Wn.2d at 245-48 (holding that plaintiff may establish exposure to defendant’s asbestos product through circumstantial evidence); *Allen*, 138 Wn. App. at 570-73 (same); *Berry*, 103 Wn. App. at 323-25 (same). Here, the evidence that Mr. Taylor has presented demonstrating that he was exposed to Union Carbide asbestos in Hamilton Red Dot and Georgia-Pacific Ready Mix joint compounds is considerably stronger than the circumstantial evidence that was presented in other cases in which Washington appellate courts held that the exposure evidence raised material issues of fact for the jury.

See *Lockwood*, 109 Wn.2d at 245-48³; *Allen*, 138 Wn. App. at 570-73⁴;

Berry, 103 Wn. App. at 323-25.⁵

³ Unlike Mr. Taylor, the plaintiff in *Lockwood* was unable to identify any Raymark asbestos cloth products to which he was exposed during his long career. *Lockwood*, 109 Wn.2d at 245. The Washington Supreme Court nonetheless held that the plaintiff did not have to “personally identify the manufacturers of asbestos products to which he was exposed in order to recover from those manufacturers,” but could instead prove their identity through circumstantial evidence that their products were present in the workplace. *Id.* at 246.

⁴ In *Allen*, the plaintiff presented no direct evidence that his father worked with or around the Uniroyal asbestos product in question. *Allen*, 138 Wn. App. at 572-73. Instead, the Court of Appeals concluded that Allen’s case was triable based on (1) sales records indicating that large volumes of “Asbeston” asbestos cloth manufactured by Uniroyal’s predecessor were shipped to the shipyard, and (2) expert testimony from an industrial hygienist who concluded that the plaintiff could have been exposed to Uniroyal asbestos fiber carried home on his father’s clothing. *Id.* at 573-75 & nn. 2-3.

⁵ In *Berry*, the Court of Appeals held that the plaintiff raised a genuine issue of fact regarding his exposure to asbestos-containing products supplied by the Brower Company through (1) an affidavit by a witness that Brower supplied some of the insulation products used at the shipyard during the relevant period; (2) evidence from a second witness that he regularly saw the “Carey” and “Plant” brands of insulation at the shipyard during the relevant period; (3) testimony from a third witness that Brower was a distributor of Carey and Plant brands, and that local distributors such as Brower were the first source of supplies for immediately-needed products at the shipyard; and (4) expert testimony that asbestos fibers used in one area of a shipyard dispersed throughout the shipyard. *Berry*, 103 Wn. App. at 315-16 & 324-25. The plaintiff offered no direct evidence that he had worked in the vicinity of Carey or Plant insulation products at the shipyard or that Brower had supplied Carey or Plant insulation products to the particular areas of the shipyard where plaintiff worked.

2. This Court Should Reverse the Summary Judgment Because Mr. Taylor Has Raised a Genuine Issue of Fact Concerning His Exposure to Union Carbide Asbestos in the Hamilton Red Dot Joint Compound.

With respect to Hamilton joint compounds, Union Carbide claimed that it would be speculative to conclude that Union Carbide asbestos was in the Hamilton product to which Mr. Taylor was exposed, because (1) the majority of Hamilton's drywall finishing products did not contain asbestos in 1972-1973 (CP 163, citing CP 376), and (2) Union Carbide was not the exclusive supplier of asbestos to Hamilton and did not begin supplying asbestos to Hamilton until 1974, after Mr. Taylor's exposure to Hamilton joint compound products in 1972-73 (CP 163 & 170-71, citing CP 384 & 396-400).

Union Carbide's first point, that a majority of Hamilton's drywall finishing products did not contain asbestos in 1972-1973, may be true. It is irrelevant, however, because Mr. Taylor testified about his exposure to a *specific* Hamilton joint compound product – "Hamilton Red Dot," CP 566 – which indisputably contained asbestos in 1972-1973. As explained above, between 1959 and 1977, Hamilton produced a number of asbestos-containing joint compounds, including Red Dot, that were manufactured in Southern California and distributed in Washington. CP 995-98, 1034-35. Hamilton manufactured its All Purpose Joint System, which included

Red Dot, *e.g.*, CP 1034, 1212-13, beginning in 1959, and according to Hamilton, it “no longer contained asbestos *after approximately 1977.*” CP 998 (emphasis added); *see also* CP 1027, 1034-35, 1073-77, 1194-96 (additional evidence discussed above showing that Hamilton’s All Purpose Joint System, including Red Dot, was sold in Washington prior to 1973 and contained asbestos during that period). The fact that Hamilton may have manufactured other drywall finishing products in 1972-1973 that did not contain asbestos is irrelevant, because the specific joint compound product that Mr. Taylor saw and was exposed to – Hamilton Red Dot – contained asbestos.

Union Carbide’s second claim, that it was not the exclusive supplier and did not begin supplying asbestos to Hamilton until 1974, is contradicted by abundant evidence in the record. Hamilton’s president, Willis Hamilton, testified that Union Carbide was Hamilton’s exclusive supplier of asbestos for joint compound products, except for test batches, starting in the late 1960s. CP 2947-48, 2956, 2968-69.⁶ His testimony is

⁶ Union Carbide’s witness, Mr. Myers, conceded that Hamilton would have superior knowledge regarding whether Union Carbide was the predominant or exclusive supplier of asbestos fiber used by Hamilton in the early 1970s, and that if Hamilton had evidence that Union Carbide’s asbestos was used in Hamilton’s products during that time, he would have no basis to disagree with that, and at minimum it would create a genuine dispute. CP 1663-65.

corroborated by the Hamilton company's written discovery responses stating that "Hamilton believes most of the chrysotile [used in Hamilton's joint compounds] was purchased from Union Carbide Company." CP 2918-19. Mr. Hamilton's testimony is also corroborated by the invoices that Union Carbide sent to Hamilton for sales of SG-130 grade asbestos fiber dating as early as 1970, CP 1987-88,⁷ which Union Carbide was then promoting for joint compound applications, CP 2848-58, by the Union Carbide memo specifically describing SG-130 grade fiber as a fiber to be used in the manufacture of joint compounds, CP 1820, and by the accounts payable records Hamilton produced reflecting payments to Union Carbide for "raw materials" as early as 1970. *E.g.*, CP 2079, 2081, 2083-88, 2091.

Union Carbide's Mr. Myers submitted the affidavit stating that he had reviewed assorted invoice records showing that Hamilton had purchased asbestos fiber from Union Carbide in 1975, and that these invoices were "*consistent with [his] recollection* that up until this point [1975], Hamilton had not been purchasing *significant* amounts of Calidria asbestos" made by Union Carbide. CP 384 (emphasis added). However, Mr. Myers did not state that the invoice records that he reviewed were

⁷ *See also* CP 1661-63 (testimony by Union Carbide witness Mr. Myers, discussing these invoices showing sales of Union Carbide asbestos to Hamilton from 1970 forward).

complete, and he did not rule out the possibility that there were other invoices reflecting the sale of Union Carbide asbestos to Hamilton for use in the Hamilton Red Dot joint compound to which Mr. Taylor was exposed. *See* CP 382-85 (Myers affidavit).⁸

Based on this evidence, a jury reasonably could and likely would conclude that the Hamilton Red Dot joint compound to which Mr. Taylor was exposed in 1972-1973 contained Union Carbide asbestos. Union Carbide's witness, Mr. Myers, specifically deferred to Mr. Hamilton as having superior knowledge on that subject, *see* CP 1663-65, and Mr. Hamilton testified that Union Carbide was Hamilton's exclusive supplier of asbestos for joint compound products, except for test batches, starting from the late 1960s. CP 2947, 2956, 2968-69. Mr. Hamilton's testimony is further supported by the discovery responses of the Hamilton company and the other documentary evidence discussed above. *E.g.*, CP 1820, 1987-88, 2079, 2081, 2083-88, 2091.⁹ What evidentiary weight, if any,

⁸ Indeed, given Mr. Myers' concession that if Hamilton had evidence that Union Carbide's asbestos was used in Hamilton's products during 1972-1973, he (Mr. Myers) would have no basis to disagree with that evidence, *see* CP 1663-65, Mr. Myers could not have inferred such a conclusion from the partial invoice records that he referenced in his affidavit.

⁹ The Court should also recall, as noted above, that the Superior Court denied the motion for summary judgment filed by *Hamilton*, which was

should be given to Mr. Myers' conflicting affidavit based on his general "recollection" and assorted invoices from a later time period (1975 and later) must be decided by a jury at trial, and the Superior Court thus plainly erred in granting Union Carbide summary judgment.

In light of these facts, the Seventh Circuit's decision reversing summary judgment in *Covalt v. Carey Canada, Inc.*, 950 F.2d 481 (7th Cir. 1991), is squarely on point. The plaintiff in *Covalt* was diagnosed with asbestosis after working with asbestos products at the Cambridge City, Indiana, plant of Proko Industries from 1963 through 1971. *Id.* at 482. Based on that asbestos exposure, the plaintiff filed suit against Union Carbide, alleging that it had supplied the asbestos to which he was exposed while working at the plant. In support of his claim, plaintiff submitted an affidavit from the plant's purchasing director, Mr. Wright, stating that the plant started purchasing Union Carbide asbestos in 1970, before plaintiff left at the end of 1971. *Id.* at 484. In an attempt to rebut that evidence, Union Carbide relied on sales records suggesting that the first sales of Union Carbide asbestos to the plant began in 1973, after the plaintiff had departed. *Id.* Based on those sales records, and despite the

briefed and heard at the same time as Union Carbide's motion, finding that there were genuine factual issues concerning Mr. Taylor's exposure to asbestos in *Hamilton's* products. CP 3604-06.

testimony of the purchasing director, the trial court entered summary judgment in favor of Union Carbide. *Id.* at 481 & 484.

The Seventh Circuit reversed, holding that the conflict between the testimony that Union Carbide asbestos was present at the plant in the early 1970s and Union Carbide's sales records suggesting that it was not sold to the plant until after the plaintiff stopped working there created a material issue of fact regarding whether Union Carbide's asbestos was present at the plant in 1970 and 1971, before the plaintiff left. *Id.* at 485-86. With respect to the sales records on which Union Carbide relied so heavily, the Seventh Circuit observed:

Union Carbide contends that they provided direct evidence that [their] asbestos was not present at Mr. Covalt's workplace. *They did nothing of the kind. They showed only that they had no record of shipments to that plant before 1973, not that the asbestos was not present.* Computer records are not perfect; they reflect only the input of fallible human beings. Even if the records are perfect, they do not account for the possibilities of shipments to Proko's Cambridge City plant from distributors or from other Proko plants. The district court put great weight on the amount of detail in Union Carbide's description of shipments to Proko's Indiana plant, and contrasted that with the Wright affidavit supplied by the plaintiff. However, *Mr. Covalt does not need such detail to make out his claim . . .*

Covalt, 950 F.2d at 484-85 (emphasis added). The court further noted that "even if a jury would be more convinced by Union Carbide's evidence because of the wealth of detail, we may not take that into consideration when deciding on summary judgment." *Id.* at 485.

Here, just as the plaintiff did in *Covalt*, the Taylors presented a genuine issue of fact regarding whether the Hamilton Red Dot joint compound to which Mr. Taylor was exposed in the early 1970s contained Union Carbide asbestos, and he is entitled to have a jury resolve that issue at trial. Indeed, Mr. Myers' "recollection" in this case is substantially weaker than the sales records Union Carbide produced in *Covalt* in an unsuccessful attempt to avoid trial. *See Covalt*, 950 F.2d at 485-86; *see also Allen*, 138 Wn. App. at 582 (reversing summary judgment because plaintiff presented sufficient evidence to raise issue of fact regarding exposure to defendant's asbestos product); *Berry*, 103 Wn. App. at 325 (same).

3. This Court Should Reverse the Summary Judgment Because Mr. Taylor Has Raised a Genuine Issue of Fact Concerning His Exposure to Union Carbide Asbestos in the Georgia-Pacific Ready Mix Joint Compound.

With respect to the Georgia-Pacific joint compound products, Union Carbide postulated (1) that Georgia-Pacific manufactured a range of joint compound products that contained no asbestos (CP 167, citing CP 313-15); (2) that Union Carbide was one of three suppliers of asbestos to Georgia-Pacific (CP 168, citing CP 265); and, (3) in its reply in support of summary judgment, that the Georgia-Pacific joint compound to which Mr. Taylor was exposed was not manufactured at Georgia-Pacific's Acme,

Texas plant where Union Carbide supplied asbestos, but was allegedly manufactured by Kelly-Moore in San Carlos, California, under a re-branding agreement under which Kelly-Moore manufactured the product and then sold it as a Georgia-Pacific product (CP 3409, citing CP 3457-60).

Union Carbide's first point, that Georgia-Pacific manufactured a range of joint compound products that contained no asbestos, may be true, but it is irrelevant. Mr. Taylor testified the he was exposed in 1972-1973 to a specific Georgia-Pacific joint compound product, Georgia-Pacific Ready Mix in five-gallon buckets, and Georgia-Pacific Ready Mix indisputably contained asbestos at that time. As noted above, William Lehnert, the former manager for research and development at Georgia-Pacific, who identified himself as the person most qualified to testify about Georgia-Pacific's formulations of asbestos containing joint compounds, CP 2991-92, testified that all Georgia-Pacific Ready Mix contained asbestos until 1977, CP 3027-44, and in particular, that all Ready Mix sold in five-gallon buckets contained asbestos until that time. CP 3011-12. Mr. Lehnert also testified that Ready Mix sold in five-gallon buckets was the last Georgia-Pacific product to go completely asbestos-free, CP 3188-91, and that the Ready Mix sold in five-gallon buckets was marketed primarily to contractors for use in workplaces such as the

workplaces where Mr. Taylor worked as a professional electrician. CP 3013.¹⁰

Mr. Lehnert further testified that the Georgia-Pacific Ready Mix sold in five gallon buckets typically contained 4.6% asbestos, CP 3009-12, and that with the exception of certain texture products and laminating compound and spackling compound not applicable here, “[a]nyone exposed to the Georgia-Pacific Joint System Products listed in Exhibit 1 through 1972 [including Ready Mix, *see* CP 3245] . . . was using products containing asbestos because all G-P Joint System Products listed in Exhibit 1 contained asbestos until 1972.” CP 3096; *see also* CP 3245 (stating that Ready Mix was first “asbestos free” in 1976).

Thus, the jury would not have needed to speculate that the Georgia-Pacific Ready Mix sold in five-gallon buckets that was used where Mr. Taylor worked and to which Mr. Taylor was exposed contained Union Carbide asbestos. The jury could have reasonably reached that conclusion based on the abundant evidence in the record.

¹⁰ *See also McConnell v. Union Carbide Corp.*, 937 So.2d 148, 149 (Fla. App. 2006) (finding, without any exception or qualification, that Georgia-Pacific Ready Mix joint compound manufactured in the 1970s contained Union Carbide asbestos).

Union Carbide's second point is equally misleading. While Georgia-Pacific had more than one supplier of asbestos, Georgia-Pacific witnesses testified that the product formulation for Georgia-Pacific Ready Mix *always* included a percentage of Union Carbide asbestos. *See* CP 3262-64 (handwritten chart prepared by Georgia-Pacific's Mr. Lehnert showing that for all five Georgia-Pacific U.S. plants that made Ready Mix, including its largest plant in Acme, Texas, the Georgia-Pacific Ready Mix contained a percentage of Union Carbide SG-210 asbestos fiber during the two-year period spanning 1972-1973 when Mr. Taylor was exposed to Ready Mix). As Mr. Lehnert testified, in 1972-1973, Georgia-Pacific's Ready Mix product always had a percentage of SG-210 that was used either alone or in combination with other suppliers' asbestos). CP 3223; *see also* CP 3027-44, 3011-12, 3188-91, 3096, 3245 (additional evidence discussed above showing that all Georgia-Pacific Ready Mix, and in particular, all Georgia-Pacific Ready Mix sold in five-gallon buckets, contained asbestos in 1972-1973 when Mr. Taylor was exposed to the product).

In short, while there may have been more than one source of asbestos in Ready Mix, every Georgia-Pacific Ready Mix five-gallon bucket in 1972-1973 contained a percentage of Union Carbide asbestos fiber, and Mr. Taylor thus demonstrated that the Georgia-Pacific Ready

Mix to which he was exposed in 1972-1973 contained Union Carbide asbestos.

In an attempt to avoid this triable issue, Union Carbide contrived a third argument for the first time in its reply brief in support of summary judgment – that the Georgia-Pacific Ready Mix to which Mr. Taylor was exposed probably was manufactured by Kelly-Moore in California under a re-branding agreement with Georgia-Pacific, instead of by Georgia-Pacific at its Acme, Texas plant, and thus might not contain Union Carbide asbestos. *See* CP 3409-10 (Union Carbide’s reply brief, citing CP 3458-60 and 3479-81).

This argument is contradicted, however, by the testimony of three Georgia-Pacific witnesses who all testified that Georgia-Pacific joint compound products sold on the west coast were manufactured in Acme, Texas. *See* CP 3346; CP 3233-34; CP 3521. Union Carbide’s suggestion that the five-gallon buckets of Georgia-Pacific Ready Mix that Mr. Taylor identified and was exposed to in 1972-1973 might have been manufactured by Kelly-Moore under a re-branding agreement is also undercut by evidence that Mr. Taylor submitted showing that the Kelly-Moore re-branding agreement did not cover *Washington* sales. CP 3525-26, 3579. It is further contradicted by the fact that the Kelly Moore re-branding agreement expired in 1971, a year *before* the period of Mr.

Taylor's exposure (1972-1973). CP 3525-26, 3573-74. Finally, Mr. Taylor presented evidence that Union Carbide was also *Kelly-Moore's* prime supplier of asbestos in the late 1960s, when Kelly-Moore produced Georgia-Pacific Ready Mix under the re-branding agreement *See* CP 3628 & 3630.

Thus, even if the Kelly-Moore re-branding agreement had covered the right time period and the right geographic area (which it did not), and even if the Georgia-Pacific Ready Mix that Mr. Taylor identified at his workplace in 1972-1973 had been manufactured by Kelly-Moore (which is speculation on Union Carbide's part, and contrary to the other evidence discussed above), there would still be a triable issue of fact concerning the presence of Union Carbide asbestos in the Georgia-Pacific Ready Mix joint compound to which Mr. Taylor was exposed. Thus, the Superior Court also erred in granting Union Carbide summary judgment with respect to Mr. Taylor's exposure to asbestos in Georgia-Pacific Ready Mix.

The Superior Court's error in this regard becomes especially clear when one compares the facts of this case to the facts in *Berry* which the Court of Appeals, Division One, held were sufficient to create a triable issue as to whether the plaintiff there was exposed to asbestos products supplied by the Brower Company. The Court of Appeals held in *Berry*

that a witness's testimony "that he saw Plant and Carey products 'almost every day' during the seven years (1941-48) in which he worked at [the shipyard]," combined with another witness's testimony "that Brower was 'a distributor' [as opposed to the sole distributor] for Plant and Carey products," was sufficient to create "an issue of fact as to whether [plaintiff] was exposed to Brower-supplied products during the time frames in question." *Berry*, 103 Wn. App. at 324 (emphasis added). The *Berry* court specifically *rejected* the argument by defendant Saberhagen that because plaintiff had not established that Brower was ever the sole source for the Plant and Carey products, plaintiff failed to present facts from which a jury could reasonably find that plaintiff was exposed to Brower products during the period in question. *Id.* at 325.

Here, the evidence that Mr. Taylor presented showing that the Georgia-Pacific Ready Mix to which he was exposed contained Union Carbide asbestos is even more compelling, and creates an even more substantial and triable issue for the jury to decide. Mr. Taylor demonstrated that *all* known sources of Georgia-Pacific Ready Mix in 1972-1973 contained Union Carbide asbestos. Union Carbide's suggestion that the Georgia-Pacific Ready Mix to which he was exposed in that period might have come from an alternative source that did not contain Union Carbide asbestos fiber was little more than wishful

thinking. Mr. Taylor is entitled to have a jury resolve whether the Georgia-Pacific Ready Mix to which he was indisputably exposed contained Union Carbide asbestos, and the Superior Court's summary judgment order improperly deprived him of that right.

V. CONCLUSION

For all these reasons, this Court should reverse the summary judgment in favor of Union Carbide and remand for trial of the Taylors' claims.

DATED this 28th day of April, 2008.

Respectfully submitted,

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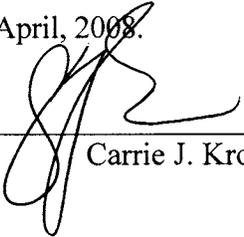
CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy of
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