

No. 37317-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DAVID ROY TAYLOR and ROBERTA SUE REMLICK-TAYLOR,
husband and wife,

Plaintiffs-Appellants,

v.

UNION CARBIDE CORPORATION,
Defendant-Respondent.

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I. INTRODUCTION

The only question the Court must answer in this appeal is whether Mr. Taylor has presented evidence from which a reasonable jury could find that Union Carbide asbestos fiber was in the asbestos-containing Hamilton Red Dot and Georgia-Pacific Ready Mix joint compound dust to which Mr. Taylor indisputably was exposed. He has done so and the case should be remanded for trial. Union Carbide, as one would expect, will present evidence to the jury to suggest that Mr. Taylor was not exposed to Union Carbide asbestos fiber in those two products. Union Carbide will attempt to discredit the testimony of Mr. Taylor, Mr. Hamilton and other witnesses whose testimony directly links Mr. Taylor to exposure to Union Carbide asbestos. It will try to explain away certain documents. And it will present its own competing testimony and documents in an attempt to support inferences that Union Carbide asbestos was not present in the two joint compound products at issue. That is what trials are about—juries drawing inferences and conclusions from competing evidence. But no matter how Union Carbide parses, over-argues and mischaracterizes the record, this case presents robust and genuine issues of material fact that Union Carbide asbestos was in the Hamilton Red Dot and Georgia-Pacific Ready Mix to which Mr. Taylor indisputably was exposed and which was

a substantial factor in causing his disease. The Superior Court erred as a matter of law when it prevented a jury from evaluating that competing evidence.

II. ARGUMENT

As in any case involving events that occurred almost forty years ago, records are incomplete and memories are imperfect. That is why both sides must rely on circumstantial as well as direct evidence to establish important facts. *See, e.g., Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 706, 853 P.2d 908 (1993) (“Plaintiffs in asbestos cases may rely on circumstantial evidence that the manufacturer’s products were the source of their asbestos exposure”); *see also* Opening Brief at 21, citing *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 245-48, 744 P.2d 605 (1987). Mr. Taylor testified specifically and concretely that he was exposed to the dust of two joint compound products, Hamilton Red Dot and Georgia-Pacific Ready Mix, that indisputably contained asbestos and that substantially contributed to causing his disease. The only question is whether Mr. Taylor has presented a triable question as to whether Union Carbide asbestos was in either of those two products.

Union Carbide argues weakly that Mr. Taylor has not presented “*sufficient* admissible evidence” of his exposure to its asbestos in these products (Respondent’s Brief at 11, emphasis added), as if the summary

judgment standard involved weighing competing evidence (which plainly it does not), and as if Mr. Taylor's evidence would be lacking under such a "sufficiency-of-evidence" standard. In fact, Mr. Taylor has presented overwhelming evidence establishing triable issues of fact regarding his exposure to Union Carbide asbestos in both of these products, and the Superior Court's summary judgment was error based on the documents and testimony in the record as to both products.

With respect to Hamilton Red Dot, Union Carbide does not dispute that Hamilton Red Dot contained asbestos and that Union Carbide supplied asbestos to Hamilton. Union Carbide's sole defense is that it thinks that its asbestos was not in Hamilton Red Dot in 1972-73. Mr. Hamilton – the owner of Hamilton Materials, the maker of Hamilton Red Dot – testified in great detail that Union Carbide was Hamilton's virtually exclusive supplier from the late 1960s through the 1970s. CP 2947-48, 2956 & 2968-69. That evidence is substantial proof the Mr. Taylor was exposed to Union Carbide asbestos in 1972-73 when he was exposed to Hamilton Red Dot joint compound. Everything else Union Carbide has to say on this subject is simply a preview of how it will try to undermine that testimony at trial. It does not, however, eliminate that genuine and vigorous factual dispute.

With respect to Georgia-Pacific Ready Mix, Union Carbide does not dispute that every bucket of Ready Mix manufactured by Georgia-Pacific in the United States from the late 1960s through the late 1970s contained Union Carbide asbestos. Union Carbide's only defense in response to this evidence is to speculate that perhaps the Georgia-Pacific Ready Mix was not manufactured by Georgia-Pacific after all, but was manufactured by Kelly-Moore under a re-branding agreement at its San Carlos, California plant. Whether that speculative defense is credible, however, is a factual debate. Moreover, Kelly-Moore's Mr. Giffins testified that the Union Carbide California mine was the "primary" supplier of asbestos to Kelly-Moore's San Carlos, California plant. CP 3630, Giffins Dep. at 79: 1-16. Whether manufactured by Georgia-Pacific or Kelly-Moore, the Ready Mix to which Mr. Taylor was exposed probably, if not certainly, contained Union Carbide asbestos.

A. The Sole Question this Court Must Answer Is Whether Mr. Taylor Has Presented a Triable Issue That Union Carbide Asbestos Fiber Was in the Hamilton Red Dot or Georgia-Pacific Ready Mix to Which He Indisputably Was Exposed.

The sole issue before the Court is whether Mr. Taylor has presented a triable question of fact regarding whether he was exposed to Union Carbide asbestos in two products, Hamilton Red Dot and Georgia-Pacific Ready Mix. This Court should hold that he has done so. *See*

Section II.B below. Union Carbide suggests that the Court's job is more complicated—that there is no evidence that Mr. Taylor was even exposed to Hamilton Red Dot and Georgia-Pacific Ready Mix or that the asbestos in those two products was a substantial factor in causing his disease.

These arguments are just a distraction from the sole question on appeal and are designed to create a false impression of uncertainty.

Union Carbide says that Mr. Taylor's testimony is "insufficient" evidence that he was exposed to Hamilton Red Dot and Georgia-Pacific Ready Mix. The argument is wishful thinking. Mr. Taylor specifically and concretely testified that in 1972 and 1973 he was exposed to dust from those two precise product brands (*see* Opening Brief at 4-5, citing CP 564 & 566; *see also id* at 13, citing CP 565-66, 712-13 & 734), which indisputably contained asbestos. *See* Opening Brief at 23, citing CP 995-98 & 1034-35; *see also* Opening Brief at 30-31, citing CP 3027-44 & 3011-13. That Union Carbide can point to other testimony by Mr. Taylor where he was not specifically asked about those two products and his memory was less precise simply means that Union Carbide's trial lawyers will try to undermine Mr. Taylor's credibility at trial. It does not eliminate the obviously triable issue created by Mr. Taylor's concrete and specific testimony that he was exposed to Hamilton Red Dot and Georgia-Pacific Ready Mix in 1972-73.

Union Carbide also cites *Lockwood*'s¹ seven-part "causation" test in asbestos cases to suggest that the Court must also examine the supposedly complicated question of whether the asbestos dust from Hamilton Red Dot and Georgia-Pacific Ready Mix was a substantial factor in causing Mr. Taylor's disease. *See* Respondent's Brief at 10-12, citing *Lockwood*, 109 Wn.2d at 247. Union Carbide tries to create complexity where there is none. Union Carbide does not dispute (*see* Respondent's Brief at 34) that Mr. Taylor may prove Union Carbide's liability through circumstantial evidence and that Mr. Taylor, as a bystander at the work sites where Hamilton Red Dot and Georgia-Pacific Ready Mix were used, may establish the liability of Union Carbide in this case. *Lockwood*, 109 Wn.2d at 247 (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"); *id.* at 245-48 (allowing circumstantial evidence to prove asbestos liability). Nor does Union Carbide dispute that Mr. Taylor 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 logical or reasonable basis." *Lockwood*, 109 Wn.2d at 245 n.6; *Mavroudis*

¹ *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 247, 744 P.2d 605 (1987).

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 has presented extensive expert witness testimony – unchallenged on summary judgment or appeal – that his exposures to asbestos-containing joint compound 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. On summary judgment, Union Carbide placed *no* evidence in the record to contradict Mr. Taylor's experts' conclusion the asbestos in Hamilton Red Dot and Georgia-Pacific Ready Mix caused his disease.²

Thus, *Lockwood's* causation factors are largely irrelevant to the only question on appeal – whether Mr. Taylor has presented a triable question that Union Carbide's asbestos fiber was in the Hamilton Red Dot and Georgia-Pacific Ready Mix to which Mr. Taylor was exposed. Union Carbide says, to borrow a phrase from Woody Allen in *Play it Again, Sam*, “I was nowhere near Oakland!” But, as discussed in the following section,

² Indeed, the Superior Court denied Hamilton Materials' summary judgment motion (CP 3599-3601) (Georgia-Pacific was not a party and settled separately) so there is no question that the Superior Court

Mr. Taylor has presented substantial evidence that Union Carbide was indeed “in Oakland” – that Union Carbide’s asbestos fiber was in the Hamilton Red Dot and Georgia-Pacific Ready Mix to which he indisputably was exposed in 1972-73 – and that Mr. Taylor is entitled to have a jury decide Union Carbide’s responsibility for his injuries.³

B. Mr. Taylor Has Raised Triable Issues That Union Carbide Asbestos Was in the Hamilton Red Dot and Georgia-Pacific Ready Mix Dust to Which He Was Exposed.

If Mr. Taylor has presented a triable issue that Union Carbide asbestos was in *either* Hamilton Red Dot *or* Georgia-Pacific Ready Mix in 1972 and 1973, then this Court must reverse and remand for trial. He has presented triable issues that Union Carbide asbestos was in *both* products.

concluded that Mr. Taylor had presented a triable case that his disease was caused by his exposure to Hamilton Red Dot.

³ Union Carbide implicitly suggests that the Court should affirm because Georgia-Pacific and Hamilton settled with Mr. Taylor and that any claim against Union Carbide will allegedly be barred under the “one recovery rule.” Union Carbide admits that this argument is irrelevant to this appeal (Respondent’s Brief at 5-6 & n.7) – so in making this suggestion, it is apparently trying to influence the Court for improper reasons. On the merits, Union Carbide also completely misstates Washington law of joint and several liability (*see, e.g., Mavroudis*, 86 Wn. App. at 28-30), which would allow Union Carbide only the right to offset the reasonable amount of the Hamilton and Georgia-Pacific settlements from the joint and several liability judgment against it. *See* RCW 4.22.060 & 4.22.070(2).

1. Hamilton Red Dot Joint Compound Contained Union Carbide Asbestos.

Mr. Taylor specifically testified that he was exposed to Hamilton Red Dot dust (CP 566), and Hamilton Red Dot indisputably contained asbestos in 1972-73. CP 995-98 & 1034-35. What is the evidence that the asbestos was Union Carbide's?

Willis Hamilton testified in great detail that from the mid-1960's through the mid-1970's, Union Carbide was virtually the "exclusive" supplier of asbestos to Hamilton. CP 2947-48, 2956 & 2968-69; Opening Brief at 6-9. He testified that Union Carbide asbestos was the best fiber for use in joint compound products (Opening Brief at 9, citing Hamilton's testimony at CP 2971) and that except for test batches with other manufacturer's asbestos, Union Carbide was the exclusive supplier for Hamilton's joint compound products. Opening Brief at 6-9, citing CP 2947, 2956 & 2968-69. His testimony is specifically corroborated by Hamilton's sworn corporate discovery responses four years earlier. Opening Brief at 9, citing 2918.⁴ Union Carbide falsely claims that "these

⁴ Union Carbide claims these sworn discovery responses by a party opponent (Hamilton was a defendant in the case) are inadmissible. The argument is defective for a number of reasons. First, Union Carbide never moved to exclude these interrogatories before the Superior Court, and they were admitted and argued before that Court. *See, e.g.*, RP 14, 15 and 84.. This Court conducts a *de novo* review of the summary judgment ruling, but it does so on the evidentiary record presented to the Superior Court.

interrogatories do not set forth a specific **time frame** for the alleged supply of fiber by Union Carbide.” Respondent’s Brief at 19 (emphasis in original). To the contrary, the interrogatory specifically asked Hamilton to identify the suppliers of asbestos during the time frame relevant here (1960-78). *Compare* CP 2915-16 with CP 2916-19.

Union Carbide attempts to undermine this evidence by claiming that Mr. Hamilton’s testimony cannot be trusted because he had a litigation motivation to blame Union Carbide and he had testified earlier that he could not cite a specific percentage of Union Carbide asbestos supplied to Hamilton. Respondent’s Brief at 18-19. The argument at best goes to Union Carbide’s “impeachment” plan for trial, but it does not eliminate the vigorous factual dispute on this subject.⁵

Because Union Carbide did not move to strike the interrogatories on summary judgment, it has waived the right to do so here. *See Washington Appellate Practice Handbook*, §17.7(1)(a)(iv) (3d ed. 2005); *In re Marriage of Monaghan*, 78 Wn. App. 918, 930, 899 P.2d 841 (1995). In any event, the sworn interrogatory response of a party opponent (Hamilton) is cumulative, as Mr. Hamilton repeatedly testified to the same point as detailed in text above.

⁵ There is nothing contradictory about a witness on one occasion not having a specific percentage in mind, and on another occasion testifying concretely about a specific percentage by a specific manufacturer during a specific time when specifically asked and when it is made clear to the witness that the percentage is material to the litigation, particularly if the witness has educated himself on the subject in the interim.

Moreover, Union Carbide's evidence that Union Carbide asbestos may not have been in Hamilton Red Dot in 1972 and 1973 is itself circumstantial and subject to vigorous challenge. For example:

- Union Carbide cites Mr. Myers' litigation affidavit and deposition, but ignores that Mr. Myers specifically testified that Mr. Hamilton would be more knowledgeable concerning when and how much Union Carbide asbestos went into Hamilton's joint compound products. *See* CP 1664 & 1665.
- Union Carbide says that the invoice trail is inconsistent with Mr. Hamilton's testimony and suggests that Union Carbide did not begin supplying asbestos to Hamilton until 1974. Respondent's Brief at 16-17. But there are a host of problems with this attempt to contradict Mr. Hamilton's concrete and very specific testimony. First, Mr. Myers never testified that the invoices he reviewed from 1970 forward were a *complete* set of invoices. They were simply what was available for him to review.⁶ Second, those invoices

⁶ Union Carbide's assertion that "Myers testified *unequivocally* that a search of all *existing* Calidria sales invoices from the 1970s" showed "no sales of SG-210 Calidria fiber to Hamilton before 1974" is both false and misleading. Respondent's Brief at 20 (emphasis added; citing CP 382-85 & CP 1670). It is false because Mr. Myers did not "unequivocally" state that there were no such records, but simply that there were none "to [his] knowledge." CP 1670. It is also misleading, because there is no evidence that Union Carbide's "existing" invoice records for Calidria are complete

specifically showed one shipment of asbestos to Hamilton in 1970, and the asbestos was a kind that Union Carbide specifically advertised as suitable for joint compound applications. CP 1820, 1987-88, CP 2848-58. Third, Mr. Myers testified that he believed that all sales of Union Carbide asbestos to Hamilton were actually sold through a distributor, Harrison & Crossfields (CP 383, ¶ 7), which means that shipments of Union Carbide asbestos could easily have been sent to the distributor's warehouse (*e.g.*, CP 2052) and then shipped to Hamilton. And fourth, Mr. Myers admitted that all invoices from 1967-69 were lost. To borrow an argument from Union Carbide (*see* Respondent's Brief at 29), shipments of Union Carbide asbestos during those years could easily have been present in products sold for use in 1972-73 in Washington. Thus, the documentary record is incomplete and at best only suggestive.

or anything close to it. *See* CP 382-85; CP 1670 (Myers deposition and affidavit cited by Union Carbide, neither of which claims that the records were complete). Mr. Myers admitted that the Union Carbide records were simply "all the records that we've been able to find." CP 1638. Thus, the lack of existing records, to the best of his knowledge, thirty years after the fact, does not establish that Union Carbide fiber was not used by Hamilton before 1974, and it certainly cannot establish that point as an undisputed fact negating Mr. Hamilton's concrete testimony and Hamilton's concrete interrogatory responses showing that Union Carbide was virtually the

- Finally, Union Carbide claims that “[n]either Union Carbide nor Hamilton records show any ongoing sales relationship prior to 1973.” Respondent’s Brief at 20. Hamilton’s records do in fact demonstrate an “ongoing sales relationship” with Union Carbide prior to 1973. Mr. Taylor produced Hamilton’s accounts payable records that showed Hamilton’s regular payments to Union Carbide for “raw materials” as early as 1970. CP 2079, 2081, 2083-88, 2091.

Thus, the record shows that Mr. Hamilton’s comprehensive testimony as President of Hamilton Materials is powerful evidence that Union Carbide asbestos was in the Hamilton Red Dot to which Mr. Taylor was exposed, and while both sides may argue inferences from the fragmentary documentary record, an obvious and genuine factual dispute concerning whether Union Carbide asbestos was in Hamilton Red Dot in 1972 and 1973 must be decided by the jury.

Finally, Union Carbide’s attempt to distinguish *Covalt v. Carey Canada, Inc.*, 950 F.2d 481 (7th Cir. 1991), is also unavailing. Compare Opening Brief at 27-28 with Respondent’s Brief at 21. The factual differences that Union Carbide identifies are inconsequential to *Covalt’s*

exclusive supplier of asbestos fiber to Hamilton for its Red Dot product from the mid-1960s.

holding that using the *absence* of records to show that a manufacturer did not supply asbestos to a particular company during a particular time period does not prove that the sales did not occur, particularly where, as here, there is no evidence that the records were complete, and where, as here, there is concrete testimony that Union Carbide was the virtually exclusive supplier of asbestos fiber during the relevant time period. *See Covalt*, 950 F.2d at 484-85 (finding a disputed issue of fact that precluded summary judgment, holding that the absence of records showing that Union Carbide supplied its asbestos to the company did not prove that it didn't do so, particularly in light of contrary evidence – as in this case – that Union Carbide did supply asbestos to the company).

2. Georgia-Pacific Ready Mix Contained Union Carbide Asbestos.

Union Carbide has abandoned a number of arguments regarding Georgia-Pacific that it had floated to the Superior Court. Because Mr. Taylor specifically testified that he was exposed to Georgia-Pacific Ready Mix, Union Carbide's argument that Georgia-Pacific manufactured other joint compound products that did not contain asbestos (CP 167, citing CP 313-15) is irrelevant. Similarly, because Mr. Taylor has demonstrated that *every* bucket of Georgia-Pacific Ready Mix manufactured by Georgia-Pacific at any of its four plants around the country contained Union

Carbide asbestos (*see* CP 2991-92, CP 3011-13, CP 3027-44 & CP 3188-91), Union Carbide has abandoned its smokescreen about being only one of three suppliers of asbestos to Georgia-Pacific (CP 168, citing CP 265).⁷

Thus, the record establishes that every bucket of Georgia-Pacific Ready Mix manufactured by Georgia-Pacific at one of its plants in the early 1970's contained Union Carbide asbestos. Three Georgia-Pacific witnesses testified that the Acme, Texas plant was the plant that manufactured joint compounds shipped to the west coast. *See* CP 3346; CP 3233-34 & CP 3521. Indeed, when it brought its summary judgment motion, Union Carbide relied on its own understanding that the Georgia-Pacific Ready Mix to which Mr. Taylor was exposed came from Georgia-Pacific's Acme, Texas plant. *See* CP 167, Defendant Union Carbide's Motion and Memorandum for Summary Judgment at 8, n. 22.

In response to this overwhelming evidence, Union Carbide makes two arguments. First, it says that a "thorough review of all GP witness transcripts" demonstrates that the Ready Mix made by Georgia-Pacific's Acme, Texas plant was not sent to the west coast during the 1972-73 time period. Respondent's Brief at 24-25. Second, it argues that Kelly-Moore

⁷ Union Carbide admits that Georgia-Pacific Ready Mix "did *at times* contain UC fiber," Respondent's Brief at 23 (emphasis added), but it offers no evidence to contradict the evidence presented by Mr. Taylor that

manufactured a Georgia-Pacific labeled Ready Mix “for distribution on the West Coast during the relevant timer period” and that Union Carbide supplied only 8% of the asbestos fiber to Kelly-Moore. *Id.* at 31-32. In making these arguments, Union Carbide engages in pure speculation, its arguments overreach the actual record, and it certainly does nothing to eliminate the vigorous factual dispute that the Georgia-Pacific Ready Mix to which Mr. Taylor was exposed contained Union Carbide asbestos. For example:

- Georgia-Pacific’s Mr. Schutte specifically testified in a 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, Schutte Decl., ¶ 7. Union Carbide says in a footnote (Respondent’s Brief at 24, n. 27) that Mr. Schutte’s reference to “joint system products” should be construed to mean only Georgia-Pacific “dry” products, but his testimony is unequivocal and is unlimited in its reference to “joint system products,” which included “Ready Mix.” While Georgia-Pacific’s Mr. Lehnert and Mr. Burch testified that Georgia-Pacific was at an economic

Union Carbide asbestos was in *every* bucket of Ready Mix manufactured by Georgia-Pacific.

disadvantage shipping Ready Mix from its Acme, Texas plant to the State of Washington, Mr. Lehnert specifically testified that he had no personal knowledge that the Acme plant did not ship Ready Mix to the west coast. *See* CP 3454, Lehnert Dep. at 86:22-87:2; CP 3452, Lehnert Dep. at 71:14-20. And Mr. Burch testified that Georgia-Pacific sold its products in the Pacific Northwest, and that the Acme Plant was the Georgia-Pacific plant that shipped to the Pacific Northwest. *See* CP 3462-63, Burch Dep. at 201:20-202:9 (testimony that Acme was the plant that supplied the west coast market before the re-branding agreement); CP 3688, Burch Dep. at 224:11-225:21 (testimony regarding shipping joint compound products from Acme, Texas to the Georgia-Pacific Seattle branch); CP 3686, Burch Dep. at 65:9-66:4 (testimony regarding competing in the Northwest for sales of joint compound manufactured in Acme despite shipping cost disadvantage). Thus, the record shows that Mr. Taylor was exposed to Georgia-Pacific Ready Mix in Washington, that every Georgia-Pacific plant in the country put Union Carbide asbestos in its Ready Mix and that the Acme, Texas plant shipped joint system products such as Ready Mix to Washington where Mr. Taylor was exposed.

- Union Carbide cannot cite a single witness who testified or will testify that the Georgia-Pacific Ready Mix to which Mr. Taylor was exposed was manufactured by Kelly-Moore's San Carlos, plant under a re-branding agreement with Georgia-Pacific. That would be difficult to do given that the witnesses with knowledge of the agreement testified it was for the "California market" and ended in 1971, before Mr. Taylor's exposure in 1972 and 1973. Mr. Merrill testified that Kelly-Moore shipped Ready Mix to Georgia-Pacific at Georgia-Pacific warehouses in California and Denver. CP 3701, 3703-4, Merrill Dep. at 163:12-20 and Ex. E. And while Union Carbide correctly observes that Mr. Merrill did not know where the Ready Mix was shipped after delivery to Georgia-Pacific warehouses in California and Denver, even Georgia-Pacific's Mr. Burch described the product manufactured under the re-branding agreement as "[m]ainly in the California market." CP 3526, Burch Dep. at 206:7. A number of witnesses testified that the re-branding agreement terminated in 1971. CP 3573-74, Merrill Dep. at 141:8-142:14; CP 3697, *id.* at 142:11-14; CP 3463-65, Burch Dep. at 202-204; CP 3461, *id.* at 199:9-13.
- Union Carbide argues that Mr. Burch testified that Georgia-Pacific "continued to purchase joint treatment products from Kelly-Moore

for distribution on the West Coast after the agreement ended.”

Respondent’s Brief at 30. He so testified, but Georgia-Pacific misses that point that such later-purchased joint compound products did not bear the “Georgia-Pacific Ready Mix” name.

They bore Kelly-Moore’s name. CP 3524, Burch Dep. at 204:18-25. While it is theoretically possible that Georgia-Pacific Ready Mix sold and used in Washington in 1972-73 could have been manufactured in the Kelly-Moore San Carlos facility, Union Carbide’s position is little more than a speculative alternative (on which it will bear the burden at trial) to the more obvious conclusion that the Ready Mix product at Mr. Taylor’s work site bearing Georgia-Pacific’s name was manufactured by Georgia-Pacific at its Acme, Texas plant and sent to its Seattle branch.⁸

- In any event, even if it is possible that the Georgia-Pacific Ready Mix sold and used in Washington in 1972-73 was manufactured at the Kelly-Moore San Carlos plant, it is likely that the product contained Union Carbide asbestos because Union Carbide was the

⁸ Union Carbide says that Mr. Burch “suggests that re-branded products were shipped to Seattle (Respondent’s Brief at 29), but the cited testimony is about a memo (not written by Mr. Burch) concerning the need to get more raw material to Acme, Texas in order to supply the Seattle branch. CP 3688, Burch Dep. at 225:11-22.

“primary” supplier of asbestos to the San Carlos plant. While Union Carbide urges the Court to read the deposition transcripts carefully, it is Union Carbide that has misused those transcripts by claiming that Union Carbide supplied only 8% of the asbestos to the Kelly-Moore San Carlos plant. The testimony that Union Carbide cites (CP 3477-84, and in particular CP 3479-80, Giffins Dep. at 79:9-80:12, and CP 3481, *id.* at 169:5-11) is not even evidence, but constitutes questions by a Union Carbide lawyer about a letter – which Union Carbide did not make part of the record – that apparently addressed the percentage of Union Carbide asbestos supplied to Kelly-Moore *nationally* (and not to the San Carlos plant). The witness (Kelly-Moore’s Mr. Giffins) did not write the letter, had no personal knowledge of it (*see* CP 3479, Giffins Dep. at 79:3 (“I can only tell you what the letter says”)), and based on his own personal knowledge, disagreed with its conclusions. CP 3712, Giffins Dep. at 116:18-20 (“My personal feeling based on what I’ve seen and some that I’ve read, I would have thought that it would have been higher than that”). Mr. Taylor, by contrast, cited the testimony of Mr. Giffins that *is* relevant here – where he testified *with* personal knowledge that the “majority” of Union Carbide asbestos went to the San Carlos

facility, and that Union Carbide was the “prime source” (CP 3630, Giffins Dep. at 79:1-16) of asbestos to Kelly-Moore’s nearby San Carlos, California plant, the only plant involved in the Georgia-Pacific re-branding agreement.

Thus, whether the Georgia-Pacific Ready Mix to which Mr. Taylor was exposed was manufactured by Georgia-Pacific or Kelly-Moore, it either certainly or probably contained Union Carbide asbestos, and in all events, it is a question of fact for the jury as to both products.

III. CONCLUSION

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

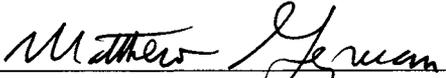
DATED this 11th day of July, 2008.

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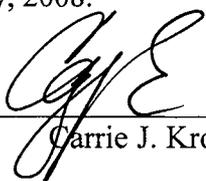
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