

No. 39055-8-II

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

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY [Signature] DEPUTY CLERK

MARJORIE M. ARNOLD, Individually and as Personal  
Representative of the Estate of REUBEN J. ARNOLD; and  
DANIEL J. ARNOLD, Individually,

Appellants,

v.

LOCKHEED SHIPBUILDING COMPANY,

Respondent.

and

SABERHAGEN HOLDINGS, INC., as successor to TACOMA  
ASBESTOS COMPANY and THE BROWER COMPANY; AMERICAN  
OPTICAL CORPORATION; THE BOEING COMPANY;  
CERTAINTEED CORPORATION; C.H. MURPHY/CLARK-ULLMAN,  
INC.; D&G MECHANICAL INSULATION, INC.; HANSON  
PERMANENTE CEMENT, INC., f/k/a KAISER CEMENT  
CORPORATION; KAISER GYPSUM COMPANY, INC.;  
INTERNATIONAL PAPER COMPANY, individually and as successor to  
ST. REGIS PAPER COMPANY and CHAMPION INTERNATIONAL  
CORP.; KIPPER & SONS FABRICATORS, INC.; LOCKHEED  
SHIPBUILDING COMPANY; LONE STAR INDUSTRIES, INC.,  
individually and as successor-in-interest to PIONEER SAND & GRAVEL  
COMPANY; MARIANA PROPERTIES, INC., as successor-in-interest to  
Hooker Chemical Company; J.M. MARTINAC SHIPBUILDING  
CORPORATION; METALCLAD INSULATION CORPORATION;  
MILLERCOORS, LLC, as successor-in-interest to Olympia Brewing  
Company; MINE SAFETY APPLIANCES COMPANY; NORTH  
SAFETY PRODUCTS USA; OCCIDENTAL CHEMICAL  
CORPORATION, as successor-in-interest to Hooker Chemical Company;

ORIGINAL

P-G INDUSTRIES, INC., as successor-in-interest to PRYOR GIGGEY CO., INC.; PIONEER AMERICAS, LLC, as successor-in-interest to Hooker Chemical Company; RAYONIER, INC.; RILEY POWER, INC., a/k/a RILEY STOKER CORP., f/k/a BABCOCK BORSIG POWER, INC., f/k/a D.B. RILEY, INC.; SEQUOIA VENTURES, INC., formerly known as and as successor-in-interest to BECHTEL CORPORATION, BECHTEL, INC., BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.; SIMPSON TIMBER COMPANY; TODD PACIFIC SHIPYARDS CORPORATION, individually and as successor-in-interest to TODD SHIPYARDS CORPORATION; TODD SHIPYARDS CORPORATION, individually and as successor-in-interest to TODD PACIFIC SHIPYARDS CORPORATION; TRANE U.S., INC., f/k/a AMERICAN STANDARD, INC., individually and as parent and alter ego of AMERICAN BOILER CORP., WESTINGHOUSE AIR BRAKE COMPANY and KEWANEE BOILER COMPANY, a division of AMERICAN RADIATOR & STANDARD SANITARY COMPANY; TRICO CONTRACTING, INC.; UNION CARBIDE CORPORATION; WEYERHAEUSER COMPANY; ZURN INDUSTRIES LLC; GOULDS PUMPS (IPG), INC.; FLETCHER CONSTRUCTION COMPANY NORTH AMERICA; and PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY,

Defendants.

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BRIEF OF RESPONDENT  
LOCKHEED SHIPBUILDING COMPANY

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**A. INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiffs' lawsuit fails for one simple reason – absent duty, there is no breach. The trial court correctly granted summary judgment to Lockheed Shipbuilding Company (“Lockheed Shipbuilding”) on the ground that Lockheed Shipbuilding owed no duty to the employees of insulation contractors. Nothing in Plaintiffs’ appeal alters that conclusion.

Throughout the 1960’s, Lockheed Shipbuilding contracted with various companies, including decedent’s employers: E.J. Bartells, Owens-Corning, and Unicor, to provide Lockheed Shipbuilding with specialty insulation services. Not being in the insulation business, Lockheed Shipbuilding deferred to its insulation contractors to ply their trade safely, properly, and in compliance with any duties the contractors owed to their own employees to minimize any potential safety hazards.

Virtually ignoring the fact that Lockheed Shipbuilding never employed Reuben Arnold, Plaintiffs Marjorie and Daniel Arnold (“Plaintiffs”) now conjure a parade of horrors, itemizing a litany of ways that Lockheed Shipbuilding supposedly “failed” to protect Reuben Arnold from the alleged hazards of his own insulation trade.

Premises owners who hire independent contractors generally owe no duty of care to the independent contractor’s employees. *See Larson v.*

*Centennial Mill Co.*, 40 Wash. 224, 228, 81 P. 294 (1905). Plaintiffs' efforts to avoid this general rule fail.

First, Plaintiffs contend that Lockheed Shipbuilding owed a nondelegable duty to third-party employees because Lockheed Shipbuilding supposedly acted as a "general contractor" as to Reuben Arnold's insulation work. A premises owner, however, is only deemed a "general contractor" when it so involves itself in the means and manner of an independent contractor's work as to undertake responsibility for the safety of the independent contractor's employees. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114,120-21 (2002). The trial court properly ruled that Plaintiffs presented no evidence that Lockheed Shipbuilding retained, let alone exercised, such pervasive control.

Second, Plaintiffs argue that Lockheed Shipbuilding supposedly did not comply with various statutory mandates. Plaintiffs, however, fail to present any evidence or authority that Lockheed Shipbuilding owed, let alone breached, a statutory duty to independent contractor employees. Nor could they. Following the Washington Legislature's abolition of the negligence per se doctrine in 1986, a statutory duty cannot substitute for the threshold requirement of a common law duty. *See Estate of Templeton v. Daffern*, 98 Wn. App. 677, 683, 990 P.2d 968 (2000). Given that

Lockheed Shipbuilding owed no common law duty, Plaintiffs' discussion of alleged statutory duties is irrelevant.

Finally, Plaintiffs argue that Lockheed Shipbuilding had a duty to warn Reuben Arnold of the supposedly hazardous nature of his insulation trade. This argument fails on several fronts. Most importantly, construction work, and particularly a contractor's *own* construction work, is not the type of "hazardous condition" about which a premises owner owes a duty to warn or protect. *See Morris v. Vaagen Brothers Lumber, Inc.*, 130 Wn. App. 243, 250, 125 P.3d 141 (2005). Moreover, Plaintiffs have not shown that Lockheed Shipbuilding had knowledge superior to Reuben Arnold, an expert asbestos insulation worker, regarding the potential hazards of performing his trade. Indeed, the reason Lockheed Shipbuilding hired insulation contractors was that the insulation contractors, not Lockheed Shipbuilding, possessed the necessary expertise regarding the means and manner of safely performing such work.

The trial court's judgment should be affirmed.

**B. COUNTER-STATEMENT OF THE ISSUES**

1. Did the trial court correctly rule that a premises owner owed no legal duty of care to an independent contractor's employee when the independent contractor's employee failed to present evidence that the

premises owner retained control over the means and manner by which the independent contractor performed its work?

2. Did the trial court correctly rule that a premises owner owed no statutory duty to an independent contractor's employee when the independent contractor's employee failed to present evidence that the premises owner owed a common law duty of care and otherwise failed to present evidence or authority for imposing a statutory duty on the premises owner?

3. Did the trial court correctly rule that a premises owner had no duty to warn an independent contractor's employee of hazards associated with the contractor's own construction work when the contractor's employee admitted that he knew of the alleged hazard and otherwise failed to present evidence that the premises owner had superior knowledge of the alleged hazard?

4. Did the trial court act within its discretion by striking evidence submitted after entry of its order granting summary judgment and by denying a motion for reconsideration when the moving party failed to articulate any basis for reconsideration under Civil Rule 59(a) and otherwise presented no "newly-discovered" evidence?

**C. STATEMENT OF THE CASE**

**1. Relevant Background Facts**

Plaintiffs Reuben, Marjorie, and Daniel Arnold (collectively “Plaintiffs”) sued approximately thirty defendants alleging that Reuben and Daniel Arnold contracted mesothelioma as a result of their exposure to asbestos. CP 35-37. Plaintiffs alleged that Reuben Arnold was exposed during his service in the Navy between 1955 and 1957, and in his thirty-three year career as an insulator spanning from 1954 to 1987. CP 34-35. Plaintiffs’ claims against Lockheed Shipbuilding, however, are limited in scope and time. The only years potentially relevant to Lockheed Shipbuilding, and thus this appeal, are 1962-63 and 1967-1969, when Reuben Arnold allegedly performed work on a handful of occasions as the employee of an insulation contractor at Lockheed Shipbuilding.<sup>1</sup> For purposes of this appeal, the only alleged exposure relevant to Daniel Arnold was through his secondary, or “take home,” exposure to asbestos dust from his father Reuben’s clothing. CP 33, 35-36.<sup>2</sup>

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<sup>1</sup> Specifically, Reuben Arnold testified that he performed work at Lockheed Shipbuilding in the years 1962-63 and 1969. CP 3658, 3660. Plaintiffs’ counsel has also alleged that Reuben performed work at Lockheed Shipbuilding from 1967 to 1968. CP 360.

<sup>2</sup> In their suit below, the Arnolds also alleged that Daniel Arnold may have incurred primary exposure to asbestos dust when he worked briefly at Lockheed Shipbuilding as a certified asbestos abatement worker in 1979. CP 357. Plaintiffs did not address the

In connection with its shipbuilding and ship repair operations, Lockheed Shipbuilding contracted with companies specializing in providing insulation materials and related services, including Reuben Arnold's employers: E.J. Bartells, Owens-Corning and Unicor. See CP 720-21. These specialty insulation contractors were experts in the safe handling of asbestos. Lockheed Shipbuilding properly relied upon that expertise and expected these contractors to know and understand any potential asbestos hazards and to know and follow the necessary procedures to minimize these hazards.

As a "career insulator" and employee of these companies, Reuben Arnold was trained and experienced in asbestos work and knowledgeable about any associated hazards during the limited periods of work he performed at Lockheed Shipbuilding. He began working with asbestos in 1954 and joined the asbestos insulators' union in 1959. CP 3655-57. The union sent him a publication called *The Asbestos Worker*. CP 3832-33. He admitted knowledge of potential asbestos hazards as early as the 1950s, long before he ever worked at Lockheed Shipbuilding. CP 3811.

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dismissal of this claim in their opening brief and have thus abandoned it. See pp. 16-17, *infra*.

Given the expertise and knowledge of the specialty insulation contractors and their respective employees, the very reason for which they were hired, it naturally followed that Lockheed Shipbuilding played no more than a basic oversight role with respect to any work performed by these companies. Each insulation contractor maintained control of how work was performed, how materials were handled, and how employees were instructed to perform their duties. It is in this context that Reuben Arnold, as an employee of E.J. Bartells, Owens-Corning and Unicor, visited Lockheed Shipbuilding to provide insulation services. He brought his own tools to the job; his foreman checked his work and answered any questions; and he attended safety meetings conducted by his union. Indeed, he had no interaction at all with Lockheed Shipbuilding personnel. CP 3665-66. As confirmed by his own testimony:

Q. Okay. If you had any problem on applying the insulation or taking it off or helping around the other insulators, who did you go to with your problem?

A. Foreman.

Q. Foreman. And he was employed by Bartells or somebody else?

A. Yes.

Q. Okay. Did any Lockheed person on any of the jobs you had at Lockheed come up to you and try to correct

or improve the way you were applying or taking off insulation?

A. No.

Q. Okay. If -- did your foreman make any corrections or tell you how your job should be done?

A. No.

Q. Okay. Who -- who checked the quality of your work at Lockheed?

A. I'm --

MR. BURNS: If you know?

Q. If you know.

A. I imagine that they had a man there to check.

\* \* \*

Q. Who had a man to check the work?

A. Well, imagine every craft had someone check; the electricians, and someone probably checked ours to make sure it was done.

Q. So basically somebody from the insulation unit checked the work you were doing?

A. Yes.

\* \* \*

Q. If there was any problem with the ventilation system, would you go to your foreman?

\* \* \*

A. Well, if there was a complaint, yes, I would go to the foreman.

\* \* \*

Q. Did they have safety meetings at the union where you would sit around and talk about your job and type of hazards on your job?

A. They -- not generally at the meetings. They had safety meetings on the job.

Q. Do you remember any safety meetings that you went to while you were at Lockheed doing any jobs there?

A. I don't recall.

CP 3665-68.

Testimony from former Lockheed Shipbuilding employees and Reuben Arnold's former co-workers confirms the narrow scope of Lockheed Shipbuilding's involvement with any work performed by insulation contractors. Lockheed Shipbuilding primarily performed basic functions such as overseeing the timing of projects and inspecting the quality of the final product.

For example, Bruce Curtis, one of Reuben Arnold's co-workers, testified that Lockheed Shipbuilding coordinated the work of trades working side-by-side, to ensure they "didn't bump into each other." CP 669. According to Curtis, the only other alleged Lockheed Shipbuilding

involvement with his work was to show identification to a Lockheed Shipbuilding employee before gaining access to the property. *See* CP 669.

John Tanner, a union pipe-fitter during Reuben Arnold's time at Lockheed Shipbuilding, testified that Lockheed Shipbuilding personnel would "sign off" on work "to make sure that you'd put it in according to the prints and all that stuff." CP 415. When asked about control over safety, however, he was unable to provide any concrete testimony. He surmised that Lockheed Shipbuilding personnel "might tag something and say this was unsafe or something like that...." CP 416. He was unable to recall a single example of a situation where such interaction occurred; testifying merely that he "would think that that was their role they played...." CP 416.

Michael Harris, a former Lockheed Shipbuilding employee, likewise testified that Lockheed Shipbuilding's influence over independent contractors was limited to scheduling and inspection of the final product. For example, he stated that, as a lead man, he had "hands-on responsibility for crews." CP 442. But the crew was limited to a single trade. CP 442. There is no evidence that Lockheed Shipbuilding ever had mixed crews consisting of both Lockheed Shipbuilding employees and independent contractors within the same trade. Thus, the lead man's

“hands-on responsibility” would have been over Lockheed Shipbuilding employees only, not independent contractors. Harris also testified that a Lockheed Shipbuilding production manager coordinated scheduling of the work done by various trades. CP 446.

Even the testimony cited in Plaintiffs’ opening brief reveals Lockheed Shipbuilding’s limited role. Ron Nickell offered only two examples of alleged instances where a Lockheed Shipbuilding supervisor had “responsibility for the insulators”: (1) the supervisor would issue a “release” when other trades had finished an area and it was ready for insulation; and (2) insulators would notify him if the pipefitters had installed pipes in a way that made it impossible to insulate them properly, so he could address this issue with the pipefitters. *See* CP 643.<sup>3</sup>

In short, there is no evidence of Lockheed Shipbuilding maintaining control over the means and manner of insulation work performed by E.J. Bartells, Owens-Corning or Unicor at the Lockheed Shipbuilding facility.

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<sup>3</sup> The page numbers in Appellants’ citation to the Clerk’s Papers for the testimony of Ron Nickell, Bruce Curtis, and Martin Ingwersen do not match Lockheed Shipbuilding’s copy of the Clerk’s Papers. Apparently, one of the parties may have received a copy with some documents in a different order.

## 2. Procedural History

Lockheed Shipbuilding moved for summary judgment on December 26, 2008, demonstrating that Plaintiffs could not meet their burden of satisfying the necessary elements of their claims against Lockheed Shipbuilding. Specifically, Plaintiffs could not show that Lockheed Shipbuilding owed Plaintiffs any duty as a premises owner because Lockheed Shipbuilding did not retain control over the means and manner of insulation work performed by Reuben Arnold. CP 161. After ample time and opportunity for Plaintiffs to respond, the motion was heard on February 9, 2009, just two days before the scheduled commencement of trial.<sup>4</sup> CP 3290, 69. In an oral ruling granting Lockheed Shipbuilding's motion, the trial court dismissed all claims against Lockheed Shipbuilding. For the claims arising from Reuben Arnold's alleged work at Lockheed Shipbuilding, including Daniel Arnold's secondary exposure claim, the trial court found that Plaintiffs had failed to show a legal duty. CP 3298. The trial court also dismissed Daniel Arnold's claim for alleged primary exposure in 1979 due to lack of exposure evidence. CP 3298.

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<sup>4</sup> The Motion was scheduled for hearing on January 23, 2009, making Plaintiffs' response due on January 12, 2009. *See* CR 56(c). Plaintiffs received an extension of time and filed their response on January 27, 2009. CP 343. The response was 59 pages long and accompanied by several hundred pages of documents. *See* CP 343-1727.

Plaintiffs moved for reconsideration on February 19, 2009, although they failed to explain on what grounds they were seeking reconsideration or even mention Civil Rule 59. CP 2809-27. Plaintiffs did not challenge the dismissal of Daniel Arnold's 1979 primary exposure claim. *See* CP 2809-27. With their motion for reconsideration, the Arnolds submitted the Declaration of Brian F. Ladenburg in Support of Plaintiffs' Motion for Reconsideration. CP 2830. Attached thereto were over 600 pages of additional documents, the vast majority of which predated the present litigation by many years. *See* CP 2833-3435. On February 24, 2009, five days after the deadline for motions for reconsideration, Plaintiffs submitted the Declaration of William Longo in Support of Plaintiffs' Motion for Reconsideration, premised on materials available prior to the summary judgment hearing. CP 3159, 3439-42, 3448, 3465.

Lockheed Shipbuilding opposed the motion for reconsideration and moved to strike the entire Longo declaration and Exhibits 1-12 and 14-16<sup>5</sup> of the Ladenburg declaration. CP 3482-94. Lockheed Shipbuilding argued that Plaintiffs provided no justification for submitting

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<sup>5</sup> Exhibit 13 was the transcript of the summary judgment hearing. *See* CP 3289-90.

these documents after the discovery cutoff, after the summary judgment motion, and after the scheduled trial date. CP 3486-89. In addition, Plaintiffs' untimely submissions were riddled with inadmissible hearsay and other evidentiary flaws. CP 3487-93. Plaintiffs' response to the motion to strike ignored Lockheed Shipbuilding's evidentiary objections. CP 3515. The trial court granted Lockheed Shipbuilding's motion to strike, and denied Plaintiffs' motion for reconsideration. *See* CP 3555. Plaintiffs now appeal the trial court's orders granting summary judgment for claims related to Reuben Arnold's alleged exposure (including Daniel Arnold's alleged secondary exposure), striking certain exhibits to the Ladenburg declaration and denying the motion for reconsideration. CP 3556.<sup>6</sup>

**D. ARGUMENT**

**1. Plaintiffs Improperly Rely On Evidence Stricken From The Record**

As a threshold matter, Plaintiffs' appellate brief is replete with improper references to documents stricken from the Record by the trial

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<sup>6</sup> Plaintiffs do not challenge the trial court's order with respect to the dismissal of Daniel Arnold's 1979 primary exposure claim or the order striking the Longo Declaration. Nor do they challenge the striking of the vast majority of the exhibits to the Ladenburg Declaration in support of Plaintiffs' motion for reconsideration.

court. In the proceedings below, the trial court ordered stricken all documents belatedly submitted with Plaintiff's motion for reconsideration, specifically the material contained at CP 2833-3288 and 3300-3478. *See* CP 3555. Nonetheless, Plaintiffs blatantly disregard the trial court's order by repeatedly citing the stricken material as "fact." *See, e.g.,* Appellants' Brief at pp. 20-22 and p. 32 n.18.

Moreover, Plaintiffs failed to appeal the order striking evidence, except as to three exhibits. *See* Appellants' Brief at p. 28 (appealing only the trial court's decision to strike exhibits 8, 9, and 11 to the Ladenburg Declaration). Yet, they cite to other stricken evidence throughout their brief. *See, e.g.,* Appellants' Brief at 32-33 n. 18 (citing to stricken exhibit 1 to the Ladenburg Declaration).<sup>7</sup> At a minimum, to ensure that the Court has an accurate understanding of the Record below, Lockheed Shipbuilding requests that this Court disregard the following exhibits to the Declaration of Brian F. Ladenburg in Support of Plaintiffs' Motion for Reconsideration:

- Ex. 1, Department of Labor & Industries fax, CP 2833-35;
- Ex. 2, printout from Labor & Industries website, "Construction Contractors: Get the Facts, Get Registered," CP 2836-51;

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<sup>7</sup> *See* discussion at pp. 44-47, *infra*.

- Ex. 3, article by PEG. Harries, CP 2852-66;
- Ex. 4, “Interim Report,” CP 2867-83;
- Ex. 5, “Second Interim Report,” CP 2884-90;
- Ex. 6, “Fourth Interim Report,” CP 2891-96;
- Ex. 7, Deposition of Elizabeth Sutton, CP 2897-2924;
- Ex. 8, Deposition of William Northup, CP 2925-72;
- Ex. 9, Deposition of Andrew Pashkowski, CP 2973-3157;
- Ex. 10, Deposition of Reuben Arnold, CP 3158-3234;
- Ex. 11, Deposition of Samuel Hammar, CP 3235-61;
- Ex. 12, Deposition of Dorsett Smith, CP 3262-88;
- Ex. 14, article by Hodgson and Darnton, CP 3300-37;
- Ex. 15, report of proceedings from *Missler v. E.J. Bartells*, CP 3338-60; and
- Ex. 16, interrogatory responses of TEN PLC, CP 3361-3438.

The Court must also disregard the entire Declaration of William Longo in Support of Plaintiffs’ Motion for Reconsideration, located at CP 3439-78.

**2. Plaintiffs Do Not Challenge The Trial Court’s Dismissal Of Daniel Arnold’s Claim Of Primary Exposure While Working At Lockheed Shipbuilding In 1979**

Plaintiffs do not assign error to the trial court’s dismissal of Daniel Arnold’s claim of primary exposure to asbestos when he allegedly was present at Lockheed Shipbuilding in 1979, and do not discuss this portion of the court’s ruling in their brief. Accordingly, this aspect of their claim is deemed abandoned. *See Smith v. King*, 106 Wn.2d 443, 451-52, 722

P.2d 796 (1986) (citing *Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 142, 542 P.2d 756 (1975)).

As such, the only time-period relevant to this appeal is 1962-1969, when Reuben Arnold's employer allegedly assigned him to provide insulation services at Lockheed Shipbuilding. See CP 360, 3658, 3660. To the extent Plaintiffs rely on post-1969 documentation to mischaracterize Lockheed Shipbuilding's alleged knowledge or control in the 1960's (see, e.g., CP 619 (Lockheed General Procedure effective November 26, 1980)), Lockheed Shipbuilding respectfully requests that the Court disregard such irrelevant evidence.

3. **The Trial Court Correctly Ruled That Lockheed Shipbuilding Owed No Duty To Protect Independent Contractor Employees From Job-Related Injuries**

The crux of Plaintiffs' argument is that Lockheed Shipbuilding somehow breached a duty of care allegedly owed to independent contractors' employees on Lockheed Shipbuilding's premises. The trial court properly ruled that Plaintiffs failed to establish any such duty to third-party employees.

As a general rule, premises owners such as Lockheed Shipbuilding are not liable for injuries to employees of independent contractors hired to perform work on their property. *Kamla v. Space Needle Corp.*, 147

Wn.2d 114, 119 (2002). As explained in the Supreme Court's seminal *Kamla* decision, premises owners generally do not owe a duty because they "*do not control the manner in which the independent contractor works*. Conversely, employers *are* liable for injuries incurred by [their own] employees precisely because the employer retains control over the manner in which the employee works." *Id.* (emphasis added).

Under *Kamla*, Lockheed Shipbuilding owed no duty to protect independent contractor employees such as Reuben Arnold because Lockheed Shipbuilding did not control the manner and means by which Reuben Arnold's employers performed insulation work on Lockheed Shipbuilding's premises. When Reuben Arnold worked on Lockheed Shipbuilding's premises, he did so as the employee of independent contractors hired by Lockheed Shipbuilding to perform the very work for which Plaintiffs claim injury – installation and removal of insulation. As the trial court correctly ruled, *Kamla* permits only one conclusion – Lockheed Shipbuilding did not owe Reuben Arnold a duty of care. Rather, the duty of care rests with Reuben Arnold's own employers. Although Washington has recognized a handful of narrow exceptions to the *Kamla* rule, none of them apply here.

- a. Plaintiffs failed to show that Lockheed Shipbuilding was a general contractor as to Reuben Arnold's insulation work

Plaintiffs seek to avoid the general prohibition on landowner liability with the conclusory allegation that “Lockheed was the general contractor for the projects on which the Arnolds worked . . . .” Appellants’ Brief at p. 32. Plaintiffs rely solely on RCW 18.27.010’s definition of “general contractor” for this conclusory assertion. By its own terms, however, RCW 18.27 *does not apply to shipyards*. Rather, RCW 18.27 applies only to persons performing work on “any building, highway, road, railroad, excavation or other structure, project, development, or improvement *attached to real estate . . . .*” RCW 18.27.010(1) (emphasis added). Nothing in the plain language of this definition applies to the building of ships, and no case has so extended RCW 18.27.

The original version of RCW 18.27, as enacted in 1963, contained the following statement: “The terms ‘general contractor’ and ‘builder’ are synonymous.” WASHINGTON SESSION LAWS, Ch. 77, § 1 (1963). This statement, reflecting the common understanding of a general contractor as

a person engaged in the construction of buildings,<sup>8</sup> remained in the statute throughout the relevant time-frame and was not removed until 2007. *See* WASHINGTON SESSION LAWS, Ch. 436, § 1 (2007).

Plaintiffs further contend that Lockheed Shipbuilding acted as a “general contractor” with respect to Reuben Arnold’s insulation work because Lockheed Shipbuilding supposedly held a contractor’s license from 1963 to 1987. This argument relies entirely on documents stricken from the Record. *See* CP 2833-35, 3482, 3555. On that basis alone, Plaintiffs’ argument should be disregarded.

In any event, the registration documents improperly cited by Plaintiffs are irrelevant and immaterial. Those records say nothing about whether Lockheed Shipbuilding acted as a general contractor *as to the shipbuilding work for which Lockheed Shipbuilding hired Reuben Arnold’s employers*. The reason is simple – Lockheed Shipbuilding’s *shipbuilding* activity did not fall within RCW 18.27.010’s definition of “contracting.” Again, RCW 18.27 applies only to one “who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck or

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<sup>8</sup> A common definition of the term “builder,” from a source published close to the pertinent time, was “a person in the business of constructing buildings.” WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE at 185 (2nd College Ed. 1976).

demolish, *for another*, any building, highway, road, railroad, excavation or other structure, project, development, or improvement *attached to real estate.*” *Coronado v. Orono*, 137 Wn. App. 308, 314, 153 P.3d 217 (2007) (citing RCW 18.27.010(1)) (emphasis added). Similarly, the contractor registration requirements *do not apply* to “the sale of any finished products, materials, or articles of merchandise that are not fabricated into and do not become a part of a structure under the common law of fixtures.” RCW 18.27.090(5). Ships are not “fixtures,” are not “attached to real estate,” and shipbuilding otherwise is not real estate development. As such, even assuming Lockheed Shipbuilding filed registration documents regarding business operations other than shipbuilding, this fact is utterly immaterial to Lockheed Shipbuilding’s entitlement to summary judgment because the contractor registration statute did not apply to Lockheed Shipbuilding’s *shipbuilding* activities.

Finally, Plaintiffs cite four cases from foreign jurisdictions and claim that those courts generically referred to shipyards as “general contractors.” Two of the cited cases do not even refer to shipyards as general contractors. *See Foster Wheeler Corp. v. American Surety*, 142 F.2d 726 (2nd Cir. 1944); *In re Professional Coatings, Inc.*, 210 B.R. 66 (E.D. Vir. 1997). The other two cases assumed, without analyzing, that

the shipyards in question were undefined “general contractors.” *See Poole v. Quality Shipyards, Inc.*, 668 So.2d 411, 412 (La. App. 1996); *Amato v. United States*, 167 F. Supp. 929, 933 (S.D. N.Y. 1958). Most importantly, none of the cited cases analyze a Washington landowner’s legal duty to independent contractor employees.

- b. Plaintiffs failed to show that Lockheed Shipbuilding owed them a duty under the retained control exception to the general rule of premises owners’ nonliability

“Generally, an employer is not liable for injuries to the employees of an independent contractor unless the employer retains the right to ***control and direct*** the manner in which the independent contractor’s employees perform their work.” *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247, 85 P.3d 918 (2004) (citing *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-22, 52 P.3d 472 (2002)) (emphasis added). The retained control exception derives from the distinction between independent contractors and employees. *See Kamla*, 147 Wn.2d at 119. “The difference between an independent contractor and an employee is whether the employer can tell the worker how to do his or her job.” *Id.*

It is undisputed that, when Reuben Arnold performed work at Lockheed Shipbuilding, he did so as the employee of an independent

contractor. Plaintiffs bear the burden of showing that Lockheed Shipbuilding so involved itself in the performance of Reuben Arnold's work as to undertake responsibility for his safety (rather than requiring Lockheed Shipbuilding to somehow disprove speculation to the contrary). *See Kinney*, 121 Wn. App. at 247 (quoting *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991)). Plaintiffs make no such showing.

The "authority to merely inspect the work and demand contract compliance" is "not 'retained control' sufficient to strip away the common law liability insulation." *Kamla*, 147 Wn.2d at 120.

"It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor's employees. 'The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.'"

*Id.* at 120-21 (quoting *Hennig*, 116 Wn.2d at 134).

Controlling the timing of construction does not amount to controlling the performance of the work. *Id.* at 121 (citing *Straw v. Esteem Constr. Co.*, 45 Wn. App. 869, 874, 728 P.2d 1052 (1996)). Such "general contractual rights as the right to order the work stopped or to control the order of the work or the right to inspect the progress of the

work do not mean that the general contractor controls the method of the contractor's work." *Id.* (quoting *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 445-56, 711 P.2d 1090 (1985)).

**“[T]he employer must have retained at least some degree of control over the manner in which the work [sic] is done. *It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.* Such a general right is usually reserved to employers, but *it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.*”**

*Id.* (emphasis added).

*Kamla* and *Kinney*, two cases arising from the same location, illustrate why the trial court correctly ruled that Plaintiffs did not establish the “retained control” exception to landowner nonliability. In *Kamla*, the plaintiff was an employee of Pyro-Spectaculars (“Pyro”), the independent contractor hired to install a New Year’s Eve fireworks display on the Space Needle. *Id.* at 118. The *Kamla* plaintiff was injured during this work and sued the Space Needle Corporation (“SNC”). *Id.* SNC had agreed to provide a display site, access to the site, crowd control, firefighters, permit fees, technical assistance and support, security, and

fencing. *Id.* at 122. The Supreme Court nonetheless affirmed summary judgment for SNC, holding that SNC's interactions with the independent contractor did not constitute "retained control" over the manner and means of work performed by the plaintiff's employer. *Id.* at 117-18.

*Kinney*, on the other hand, illustrates the intimate level of landowner involvement necessary to show "retained control." As in *Kamla*, the accident at issue in *Kinney* occurred while the plaintiff was working for Pyro to install a fireworks display at the Space Needle. *Kinney*, 121 Wn. App. at 244. Although Pyro previously had installed displays at the Space Needle, it had not done so at the height level at issue in *Kinney*. *Id.* "Pyro did not have all the necessary safety equipment to work at [the required] heights," so SNC provided "safety equipment including safety lanyards, harnesses, hoists, couplings, and safety lines with stops...." *Id.* at 244-45. SNC's facilities manager instructed Pyro's employees regarding safety procedures and controlled how Pyro's employees moved around the structure. *Id.* at 245. The facilities manager further testified:

It was part of my job to continue to check and regulate the safety practices of the Pyro Spectacular employees and it was our job *to control all safety issues* and to make certain that all the Pyro Spectacular employees were working safely on the Space Needle, particularly on the roof.

*Id* (emphasis added).

The *Kinney* plaintiff's employer assigned him to work on the Space Needle's roof. *Id.* She was not familiar with the roof or with the ladders and hatches involved in accessing it. *Id.* SNC's facilities manager provided the safety equipment, checked the plaintiff's harness, attached her safety lanyard, transported her tools to the roof, assisted the plaintiff in accessing the roof, and attached her safety lanyard to the roof railing. *Id.* at 246. The plaintiff subsequently was injured because the lanyard was too long. *Id.* at 246. Under these facts, the Court of Appeals held that the plaintiff presented sufficient evidence of SNC's control over the plaintiff's work so as to raise a triable issue as to the applicability of the "retained control" exception to landowner nonliability. *Id.* at 247-48.

Here, Plaintiffs' evidence falls far short of the landowner control facts in *Kinney*. Plaintiffs contend that Lockheed Shipbuilding supposedly retained control over the means and manner of Reuben Arnold's work because: (1) Lockheed Shipbuilding controlled access to its premises; (2) Lockheed Shipbuilding scheduled the timing of work performed by independent contractors; (3) Lockheed Shipbuilding inspected the work performed by independent contractors; and (4) some witnesses made vague references to safety procedures. As discussed below, Plaintiffs'

purported evidence on each of these points falls far short of the control necessary to raise a triable issue regarding the “retained control” exception.

First, the fact that Lockheed Shipbuilding controlled public access to its property is utterly unremarkable, and no different from *Kamla*, in which SNC controlled access to the Space Needle. Checking identification at the shipyard’s front gate is a far cry from SNC’s control over the *Kinney* plaintiff’s movements, including direct assistance in allowing her access to the rooftop on which she was injured.

Similarly immaterial is Plaintiffs’ claim that Lockheed Shipbuilding occasionally allowed insulation materials to be stored in a shack on Lockheed Shipbuilding’s premises. Not only did the independent contractor (not Lockheed Shipbuilding) own these construction materials, but independent contractors (not Lockheed Shipbuilding) transported the materials to the independent contractors’ work locations. *See* CP 678, 670. Thus, there is no evidence whatsoever to support Plaintiffs’ assertion that Lockheed Shipbuilding “provided asbestos.” Appellant’s Brief at p. 36.

Second, Lockheed Shipbuilding’s coordination of contractor scheduling, timing, and order of work is irrelevant to the “retained

control” analysis. *See Kamla*, 147 Wn.2d at 120-21. While Plaintiffs mischaracterize Lockheed Shipbuilding’s action as “coordination” of the independent contractor’s actual work, Plaintiffs’ evidence establishes only that Lockheed Shipbuilding controlled scheduling of the work performed by the various trades. *See, e.g.*, CP 446, 669. As *Kamla* explained, “controlling the timing of construction [does] not amount to controlling the performance of the work.” *Kamla*, 147 Wn.2d at 121.

Third, Lockheed Shipbuilding’s purported retention of the right to inspect the insulators’ work does not vitiate the independent contractor relationship or otherwise create a duty to ensure the safety of independent contractor employees. The Supreme Court expressly rejected the notion that a landowner’s authority to inspect work, demand contract compliance, or monitor progress amounts to retained control. *See Kamla*, 147 Wn.2d at 120-21 (“it is not enough that [the landowner] has merely a general right . . . to inspect [the independent contractor’s] progress . . . or to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.”). Indeed, Plaintiffs’ purported “inspection” evidence establishes, at most, that Lockheed Shipbuilding occasionally raised concerns over the quality of insulation work. *See* CP 447. Plaintiffs present no evidence, however, that Lockheed Shipbuilding

retained any control over the means or manner by which insulation contractors actually performed their insulation work.

Fourth, Plaintiffs' anecdotal references to "safety procedures" is so vague as to be meaningless. For example, one non-party witness speculated about what Lockheed Shipbuilding personnel "might" have done regarding safety and said that he "would think that that was their role they played...." CP 416. Similarly, Plaintiffs cryptically refer to a "safety booklet" supposedly provided to independent contractors, but provide no evidence of this booklet's contents or whether the safety booklet had anything to do with third-party insulation work. *See* CP 722.

Finally, Plaintiffs' reliance on testimony of a Lockheed Shipbuilding former employee named Michael Harris is irrelevant. The cited testimony concerned Harris's work as a Lockheed Shipbuilding superintendent in 1973 – four years *after* Reuben Arnold worked at Lockheed Shipbuilding – and thus is immaterial to the interaction between Lockheed Shipbuilding and its independent contractors during the relevant time-period of 1962 to 1969. *See* CP 443, 461.<sup>9</sup> Moreover, at most,

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<sup>9</sup> By 1973, much had changed in the dynamics of workplace safety in the four years since Reuben Arnold had last worked at Lockheed Shipbuilding's premises. For example, Congress passed the Occupational Safety and Health Act in 1970, and the Legislature enacted WISHA in 1973. *See* 29 U.S.C. § 654; RCW 49.17.010. It is, at

Harris's testimony merely shows that Lockheed Shipbuilding occasionally coordinated work performed by various contractors at its premises, as any premises owner would be expected to do.

In sum, Plaintiffs' vague, anecdotal allegations regarding Lockheed Shipbuilding's interaction with independent contractors falls well short of the evidence in *Kinney*, which contained specific testimony that the defendant's personnel provided, installed, and inspected the plaintiff's safety equipment and controlled nearly every move of the plaintiff while on the premises. *See Kinney*, 121 Wn. App. at 245-46. In addition, the *Kinney* evidence established that the landowner exercised intimate control over the operative details of the plaintiff's work. *See id.* at 244-45. She had not previously worked on the Space Needle roof, was not familiar with the access points, and her employer had explained to the property owner that its employees were not accustomed to working at heights. *Id.* For that reason, the *Kinney* defendant's facilities manager admitted that he controlled "all safety issues" and made certain that the independent contractors worked safely. *Id.* at 245.

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best, unhelpful, and at worst, affirmatively misleading, to present evidence of one person's impressions regarding the safety hierarchy at the jobsite in 1973.

Here, by contrast, there is no evidence that Lockheed Shipbuilding injected itself into the “operative details” of Reuben Arnold’s work, no evidence that Lockheed Shipbuilding regulated the means and methods of his work, and no evidence that Lockheed Shipbuilding assumed responsibility for Reuben Arnold’s safe performance of his work. Accordingly, the trial court correctly ruled that Plaintiffs failed to create a triable issue regarding the “retained control” exception.

- c. Plaintiffs failed to show that Lockheed Shipbuilding owed them a legal duty under RCW 49.17, RCW 49.16, or the federal Walsh-Healey Act

In addition to their quixotic effort to impose upon Lockheed Shipbuilding a non-existent common law duty, Plaintiffs similarly seek to impose a statutory duty under three separate provisions: (1) RCW 49.17 (the Washington Industrial Safety and Health Act (“WISHA”)); (2) RCW 49.16 (WISHA’s predecessor statute); and (3) the federal Walsh-Healey Act. Plaintiffs contend that these statutory duties “arise[] out of principles of negligence per se.” Appellants’ Brief at p. 37. The Washington Legislature, however, abolished the doctrine of negligence per se in 1986. RCW 5.40.050. Thus, even assuming Lockheed Shipbuilding owed and breached a statutory duty to Plaintiffs (which it did not), such a breach “cannot be evidence of negligence . . . unless the

defendant owes a common law duty of reasonable care.” *Estate of Bruce Templeton*, 98 Wn. App. 677, 685 (2000) (holding that defendant was entitled to summary judgment, despite breach of statutory duty, when defendant owed no common law duty of care).

As discussed *supra*, the Washington Supreme Court explicitly held in *Kamla* that a premises owner owes no common law (or statutory) duty of care to independent contractor employees absent evidence of retained control over the contractor’s work. As such, Plaintiffs’ discussion of inapplicable statutory requirements is wholly irrelevant. Nonetheless, even assuming Washington still recognized independent statutory duties of care, none of the three statutes relied upon by Plaintiffs impose upon Lockheed Shipbuilding any such duty as to Reuben Arnold.

*i. RCW 49.17 (“WISHA”)*

Plaintiffs contend that WISHA imposes upon Lockheed Shipbuilding a statutory duty to independent contractor employees because “under WISHA, general contractors have an absolute, nondelegable duty to . . . ensure a safe work environment for the employees of the subcontractors hired by the general.” *See* Appellants’ Brief at p. 40. Plaintiffs’ argument fails for two separate and independent reasons.

First, WISHA, enacted in 1973, did not even exist when Reuben Arnold worked at Lockheed Shipbuilding in the 1960s. Plaintiffs cite no authority for retroactively applying WISHA to shipbuilding operations in the 1960's, and Lockheed Shipbuilding is aware of none.

Second, even assuming WISHA existed during Reuben Arnold's work on Lockheed Shipbuilding's premises, "nothing in [WISHA] specifically imposes a duty upon jobsite owners to comply with WISHA." *Kamla*, 147 Wash.2d at 123. Rather, the "duty of ensuring WISHA-compliant work conditions" attaches to premises owners *only* when they "retain control over the manner in which an independent contractor completes its work." *Id.* at 125. As discussed above, Lockheed Shipbuilding did not retain control over the manner and method by which Reuben Arnold completed his insulation work. Rather, such control remained with Reuben Arnold's employer – the specialty insulation contractor.

*ii. RCW 49.16*

Plaintiffs' contention that Lockheed Shipbuilding owed Reuben Arnold a statutory duty under WISHA's predecessor statute, RCW 49.16, is equally meritless because *a premises owner owes no statutory duty of care to employees of independent contractors* absent retained control over

the independent contractor's work. *See Kamla*, 147 Wash.2d at 122-125. Given that both WISHA and RCW 49.16 have the identical purpose of "providing safe working conditions for every Washington worker," (*J&S Services, Inc. v. Washington*, 142 Wn. App. 502, 506 (2007); *see also* RCW 49.16.030), the *Kamla* court's express limitation on WISHA's statutory mandates is applicable equally to its predecessor, RCW 49.16.

Furthermore, the two cases on which Plaintiffs rely to establish RCW 49.16's alleged statutory duty are wholly inapposite. In *Bayne v. Todd Shipyards Corp.*, 88 Wn.2d 917 (1977), a truck driver sustained injury when he fell off a loading platform on the defendant's premises. The loading platform lacked a guardrail required by a safety regulation enacted under RCW 49.16. The parties did not dispute that the premises owner retained control over the loading platform at all relevant times. Indeed, "the sole issue [before the court was] whether violation of an administrative safety regulation is negligence per se or only evidence of negligence." *Id.* at 918. Similarly, in *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323 (1978), the court considered only "the issue of the duty of a general contractor on a multi-employer job site to take safety precautions for the benefit of employees of subcontractors." *Id.* at 325.

The court held RCW 49.16 imposed such a duty on general contractors (as does WISHA). *Id.* at 333.

However, not only do both *Bayne* and *Kelley* pre-date the abolition of negligence per se, neither *Bayne* nor *Kelley* addressed whether RCW 49.16 imposed a statutory duty on premises owners, like Lockheed Shipbuilding, who did not retain control over the independent contractor's work and had no control over the injury-causing instrumentality, such as the loading platform in *Bayne*. Indeed, Plaintiffs cite no case, and Lockheed Shipbuilding is aware of none, extending RCW 49.16's statutory duty to premises owners who do not retain control over an independent contractor's work conditions. To the contrary, *Kamla* explicitly rejected such a duty. Accordingly, Plaintiffs' reliance on RCW 49.16 is misplaced for the same reasons that their reliance on WISHA is misplaced.

*iii. The Walsh-Healey Public Contracts Act*

Plaintiffs' reliance on the Walsh-Healey Act, 41 U.S.C. §§ 35-45, is even more tenuous than RCW 49.16. The Walsh-Healey Act "does not represent an exercise by Congress of regulatory power over private business or employment." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128-29, 60 S.Ct. 869 (1940). It provides no private right of action. *See Koren*

v. *Martin Marietta Service, Inc.*, 997 F. Supp. 196, 214 n. 22 (D. P.R. 1998) (“the Walsh-Healy Act provide[s] for administrative remedies and no private right of action”). Further, no Washington case has held that the Walsh-Healy Act establishes any duty of care – let alone a duty to persons other than a company’s own employees.

Plaintiffs cite two cases for the purported proposition that “federal workplace safety regulations can establish a duty of care.” Appellants’ Brief at p. 45 (citing *Cresap v. Pacific Inland Navigation Co.*, 78 Wn.2d 563, 566-67, 478 P.2d 223 (1970) and *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 501-02, 419 P.2d 141 (1969)). Both cases pre-date RCW 5.40.050’s limitation of tort liability to circumstances in which the defendant owes a common-law duty of care. See *Templeton*, 98 Wn. App. at 685-86. Furthermore, neither *Cresap* nor *Vogel* involves the Walsh-Healey Act. Accordingly, the Walsh-Healy Act, like RCW. 49.16 and WISHA, does not alter the propriety of the trial court’s entry of summary judgment in Lockheed Shipbuilding’s favor.

d. Plaintiffs failed to show that Lockheed Shipbuilding owed or breached a legal duty to Reuben Arnold as a business invitee

“Employees of independent contractors hired by landowners are invitees on the landowners’ premises.” *Kamla*, 147 Wn.2d at 125. A

premises owner owes a duty to prevent physical harm to invitees caused by a “condition on the land” *only if* the premises owner:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that [the invitees] will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

*Kamla*, 147 Wn.2d at 125-126. Here, Plaintiffs’ premises liability claim fails for the fundamental reason that construction work, including insulation installation, is *not* a “condition on the land” for which a premises owner owes a duty to warn. Moreover, even if insulation work, were a “condition on the land,” there is no admissible evidence that: (1) Lockheed Shipbuilding knew that installing insulation presented “an unreasonable risk of harm,” or (2) Lockheed Shipbuilding “should expect that [Plaintiffs would] not discover or realize the danger, or [] fail to protect themselves against it.” *Kamla*, 147 Wash.2d at 125-126.

i. *Installing Insulation is not a “condition on the land”*

Lockheed Shipbuilding is not liable as a premises owner because the alleged hazard was not a “condition on the land.” RESTATEMENT

(SECOND) TORTS § 343. An injury that merely occurs on land, but is not caused by a “condition on the land,” does not give rise to premises liability. *See Mauch v. Kissling*, 56 Wn. App. 312, 319, 783 P.2d 601 (1989).

Construction activities are not “conditions of the land” for purposes of premises liability. *Morris v. Vaagen Brothers Lumber, Inc.*, 130 Wn. App. 243, 250, 125 P.3d 141 (2005). In *Morris*, an independent contractor’s employee died when a building collapsed while she and others were dismantling equipment. *Id.* at 246. Affirming dismissal of the premises liability claim, the *Morris* court held that “the death was caused when the building collapsed because the equipment being dismantled helped to anchor the walls of the building. ***This is not a condition on the land.***” *Id.* at 250 (emphasis added). *See also Gero v. J.W. Realty*, 757 A.2d 475, 478 (Vt. 2000) (holding that a dirt mound was a “construction means and method” to facilitate work on the premises, and thus not a “condition on the land”); *Lombardi v. Stout*, 604 N.E.2d 117, 119 (N.Y. 1992) (holding that injury was “caused by the manner in which removal of the branch was undertaken” and thus “there was no dangerous condition on the premises which caused the accident”). Here, Plaintiffs’ allegations against Lockheed Shipbuilding are based entirely on alleged hazards

associated with construction activity, specifically, Reuben Arnold's own installing of asbestos insulation on ships. Because such activity is not a "condition on the land," it does not create a duty on Lockheed Shipbuilding's part to "protect [Reuben Arnold] against the danger." *Kamla*, 147 Wash.2d at 126.

ii. *Reuben Arnold had superior knowledge of the alleged hazards of asbestos*

The second fatal flaw in Plaintiffs' premises liability claim is that Reuben Arnold, an expert insulator, knew the potential hazards of asbestos insulation, and there is no evidence that Lockheed Shipbuilding had knowledge superior to Reuben Arnold regarding the potential hazards of installing insulation. "In general, where the negligence of a possessor of land is predicated on a failure in maintaining reasonably safe conditions for an invitee, ***it must be shown that the possessor of land had knowledge superior to that of the invitee*** concerning the dangerous conditions on the premises ...." *Strong v. Seattle Stevedore Co.*, 1 Wn. App. 898, 904, 466 P.2d 545 (1970) (emphasis added); *see also PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 962 (Ind. 2005) (jury instruction allowing the jury to impose liability against property owner for harm caused to a contractor's employee by asbestos exposure was erroneous where the landowner had

no superior knowledge), *abrogated on other grounds by Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 854 N.E.2d 345 (Ind. 2006). A landowner also has no duty to protect invitees from a known hazard absent evidence that the landowner should have anticipated harm despite the known or obvious nature of the hazard. *Kamla*, 147, Wn.2d at 126.

In *Strong*, this Court explained that a pier owner could not be liable to a fireman invitee where the fireman, due to his expertise, had superior knowledge of the dangerous conditions on the premises. *Strong*, 1 Wn. App. at 904-05. *See also Kamla*, 147 Wn.2d at 126; *Stimus v. Hagstrom*, 88 Wn. App. 286, 296, 944 P.2d 1076 (1997); *Bozung*, 42 Wn. App. at 450. Likewise, Lockheed Shipbuilding cannot be held liable on a premises liability theory when Reuben Arnold, an expert insulator, admittedly knew the potential hazards of working with asbestos insulation and there is no admissible evidence that Lockheed Shipbuilding had knowledge superior to Reuben Arnold's career expertise.

Plaintiffs' premises liability theory rests on two fallacies. First, Plaintiffs suggest, without citing any evidence, that Reuben Arnold did not know the potential hazards of asbestos because he did not have a college degree. Appellants' Brief at p. 48. The canard that an expert insulator cannot know the dangers of his own trade if he lacks a college education

needs no further discussion. Reuben Arnold was a member of a trade in which the hazards of asbestos were a regular topic of discussion. *See* CP 3820-33. In fact, he admitted that he knew the potential health risks associated with asbestos long before he ever set foot on Lockheed Shipbuilding's premises. *See* CP 3811.

Second, Plaintiffs contend that Lockheed Shipbuilding supposedly knew that Reuben Arnold's insulation work posed asbestos hazards because Lockheed Shipbuilding "was present for the 1945 conference that discussed the risks of asbestos disease." Appellants' Brief at pp. 47-48. The Record supports no such assertion. The conference supposedly attended by "Lockheed" in fact was attended by employees of an entirely different company -- Puget Sound Bridge & Dredging. *See* CP 566. Lockheed Shipbuilding did not purchase the shipyard from Puget Sound Bridge & Dredging until fourteen years *after* the purported conference. *See* CP 520, 613. "The knowledge of a purchased corporation's employees cannot properly be imputed to the purchasing corporation just because they went to work for the purchasing corporation." 18B AM.JUR.2D CORPORATIONS § 1454 at 438 (2004) (citing *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621 (7th Cir. 1971)). Rather, knowledge is imputed to a corporation only through its officers and agents

and only where these persons have acquired the information within the scope of their employment. *See* 18B AM.JUR.2D CORPORATIONS § 1441 at 426 (2004). Moreover, Plaintiffs present no evidence that the purported conference imparted any information regarding insulation work or which would lead one to anticipate that insulation contractors would not be aware of potential asbestos-related hazards of their own trade.

**4. Plaintiffs' Complaints About Lockheed Shipbuilding's Corporate Witness are Irrelevant and Untimely**

Plaintiffs inaccurately contend that the testimony of Lockheed Shipbuilding's corporate witness somehow renders them impervious to summary judgment. Ildiko Songrady, a witness who appeared for deposition pursuant to CR 30(b)(6), answered questions honestly and accurately. Plaintiffs' attack on her credibility is baseless, and more importantly, has no bearing on the trial court's dismissal of Plaintiffs' claims. Plaintiffs offer no explanation, nor can they, as to how Ms. Songrady's testimony relates to their inability to prove that Lockheed Shipbuilding owed Reuben Arnold a legal duty.

Plaintiffs mainly take issue with Ms. Songrady's supposed inability to answer questions seeking legal conclusions, but offer no persuasive argument as to how this testimony raises a triable issue as to

the fundamental question of whether Lockheed Shipbuilding owed Reuben Arnold a duty of care. *See, e.g.*, Appellants' Brief at p. 14 (criticizing Ms. Songrady's answer to the question "Did Lockheed Shipbuilding retain ultimate control of the safety of subcontractor employees when it came to any work that they would have done involving asbestos-containing insulation?"). Plaintiffs also critique Ms. Songrady for not knowing the answer to every question about decades-old events concerning a company that has not had active operations for over twenty years. Ms. Songrady's responses to such questions do not, as Plaintiffs contend, put her credibility into question. Plaintiffs' transparent attempt to manufacture a disputed fact by peppering their appeal with the word "credibility" should be ignored. *See Amend v. Bell*, 89 Wn.2d 124, 129 (1977) ("the opposing party [on summary judgment] may not merely recite the incantation 'credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof.").

At most, Plaintiffs' criticism of Ms. Songrady constitutes a discovery dispute *for which Plaintiffs sought no relief from the trial court*. Plaintiffs' feigned outrage is meritless. Lockheed Shipbuilding respectfully encourages this Court to decline Plaintiffs' effort to transform this tribunal into a discovery referee.

Indeed, even assuming Ms. Songrady's inability to answer questions calling for legal conclusions somehow called into question her credibility, her credibility is immaterial because Lockheed Shipbuilding's motion was not based on Ms. Songrady's testimony. Thus, the cases cited by Plaintiffs do not support their position. *See Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977) ("To hold that disputed facts about other issues preclude a summary judgment without facts related to the issue in point would abrogate the summary judgment procedure."); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 502-03, 722 P.2d 1343 (1986) (inconsistent statements of a witness on key issue in case precluded summary judgment).

5. **The Trial Court Properly Exercised Its Discretion To Deny Plaintiffs' Motion For Reconsideration And Strike Plaintiffs' Evidence Submitted Therewith**

The trial court acted well within its discretion in denying Plaintiffs' motion for reconsideration and striking Plaintiffs' untimely evidence submitted with that motion. Although Plaintiffs assign error to the order granting Lockheed Shipbuilding's motion to strike and denying their motion for reconsideration, they address in their brief only the striking of the Pashkowski, Northrup, and Hammar depositions. *See* Appellants' Brief at p. 28. Thus, Plaintiffs have waived any objection to the trial

court's order striking William Longo's declaration and the remaining exhibits to the Ladenburg declaration. *See Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (citing *Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 142, 542 P.2d 756 (1975)).

Motions for reconsideration are reviewed for abuse of discretion. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997); *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994). Civil Rule 59, which governs motions for reconsideration, enumerates specific grounds upon which a Court, in its discretion, may reconsider prior rulings. Plaintiffs, however, do not (and did not below) even attempt to argue that their motion for reconsideration, and the 600-plus pages of additional documents submitted therewith, fit into *any* of the enumerated categories for reconsideration. Nor could they.

Washington courts have consistently affirmed a trial court's discretionary right to strike untimely evidence submitted with a motion for reconsideration, particularly where such evidence was available before the court ruled on the underlying motion, as was the case here. *See, e.g., Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989). Likewise, if the newly-presented evidence could have been obtained before the challenged ruling, it is *not* "newly discovered evidence" and

cannot be considered on a reconsideration motion. *See West v. Thurston County*, 144 Wn. App. 573, 580 (2008).

Here, the trial court properly refused to consider Plaintiffs' belated evidence because all such evidence was available long before the summary judgment hearing. The Pashkowski deposition was taken in 1988, and the Northrup deposition in 1998. CP 2901, 2926. Plaintiffs deposed Hammar on December 2, 2008 – more than two months before the hearing on Lockheed Shipbuilding's motion for summary judgment.<sup>10</sup> *See* CP 3236.

The belatedly submitted evidence also suffered from fatal evidentiary flaws. The Pashkowski and Northrup deposition transcripts, for example, were inadmissible hearsay. Lockheed Shipbuilding was not a party to the lawsuits in which these two individuals testified and thus had

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<sup>10</sup> Although this Court need not consider the trial court's exclusion of the remaining Ladenburg exhibits in light of Plaintiffs' waiver of any challenge to this portion of the Court's ruling, the trial court certainly acted within its discretion in striking these untimely exhibits. *See, e.g.*, CP 2853, 2868, 2885, 2892, 2926, 2974, 3159, 3263, 3301, 3339, 3362.

Likewise, Plaintiffs do not appeal the trial court's decision to strike the tardy Declaration of William Longo. Nonetheless, the trial court acted well within its discretion by striking this belated submission. The Longo Declaration was available long before Lockheed's summary judgment hearing. Longo's opinion relies on a study from 1962 and an article from 1971. *See* CP 3448, 3465. He also referred to the deposition of Reuben Arnold, taken in March 2008. *See* CP 3440. Plaintiff did not, and cannot, argue that the Longo Declaration was "newly-discovered" evidence.

neither the opportunity nor the motive to examine either witness.<sup>11</sup> See CR 804(b)(1).

Plaintiffs' counsel refused to address, let alone refute, these evidentiary objections in response to Lockheed Shipbuilding's Motion to Strike. See CP 3515. Having refused to defend their inadmissible evidence before the trial court, Plaintiffs cannot now complain that the trial court exercised its discretion not to consider such evidence.

Notably, Plaintiffs do not cite a single case in which an appellate court reversed a trial court's discretionary decision to deny reconsideration and exclude untimely evidence. The trial court's discretionary decision in this regard should be affirmed in its entirety.

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<sup>11</sup> The stricken Longo declaration likewise was replete with inadmissible evidence. As just one example, Longo's opinions relied on a report which stated that its conclusions "*are somewhat tentative and apply only to the environmental conditions existing on the experimental site.*" CP 3448-3449 (emphasis added). The report utterly failed to support Longo's opinions about conditions at Lockheed Shipbuilding's shipyard. Lockheed established a myriad of other flaws in the Longo Declaration. See CP 3488-93.

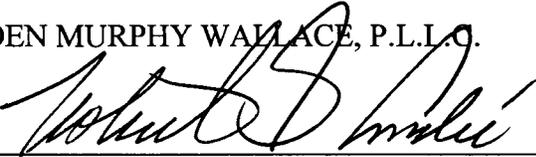
E. **CONCLUSION**

For all the foregoing reasons, the trial court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 22<sup>d</sup> day of July, 2009.

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By



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**DECLARATION OF SERVICE**

On July 22, 2009, I caused to be served upon counsel of record, at the addresses stated below, via the method(s) of service indicated copies of Brief of Respondent Lockheed Shipbuilding Company:

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DEPUTY CLERK OF COURT

DATED this 22<sup>nd</sup> day of July 2009, at Seattle, Washington.

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s/ Robert G. André