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COURT OF APPEALS

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No. 40015-4-II

STATE OF WASHINGTON

BY



COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

LOCKHEED SHIPBUILDING CORPORATION,

Respondent,

and

SABERHAGEN HOLDINGS, INC., as successor to TACOMA
ASBESTOS COMPANY and THE BROWER COMPANY;
AMERICAN OPTICAL CORPORATION; THE BOEING COMPANY;
CERTAINTIED 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; 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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A. INTRODUCTION

In summary judgment proceedings in this asbestos injury case, Respondent Lockheed argued strenuously that as a general contractor it could not be subject to the federal Walsh-Healey Act, which contained strict safety regulations to protect workers from asbestos exposure. Diligent and specific discovery requests uncovered no contracts holding Lockheed to the Walsh-Healey standard.

After Lockheed won summary judgment, attorneys for Reuben and Daniel Arnold (“the Arnolds”) learned that Lockheed had produced contracts in another asbestos case. Those contracts specified that Lockheed was indeed subject to Walsh-Healey.

The Arnolds were entitled to have summary judgment vacated under CR 60, based on the newly discovered evidence.

B. COUNTERSTATEMENT OF THE CASE

Lockheed suggests that Reuben Arnold did not work on any Navy vessels, and therefore could not have been working for Lockheed under any contract subject to Walsh-Healey.

Reuben Arnold did work on Navy vessels. He worked at Lockheed in 1967-1968 for Owens Corning, and in 1969 for Unicor, a contractor that obtained some Lockheed work during an interval of time when the union was on strike against other insulation contractors. CP

3179. This job which involved insulating steam pipe and a host of machinery on two vessels being built for the Navy – the LPD 11 and the LPD 13. CP 521.

Lockheed claims that the Arnolds failed to specifically request the Walsh-Healey contracts at issue in this appeal. Lockheed ignores the incontrovertible record which proves otherwise.

During their 30(b)(6) deposition of Ildiko M. Songrady, Lockheed's corporate secretary, the Arnolds asked detailed questions making reference to the Walsh-Healey Act and reiterating their desire to obtain shipbuilding contracts from the 1960's that made reference to the Act. CP 204-06. Songrady not only denied the existence of such contracts, she denied that Lockheed was even aware of the Act:

Q. Was Lockheed aware of the Walsh-Healey Act since it was a government contractor in the 1960's?

...

A. Like I said, I'm hoping they were aware of it, *but I have no evidence. But I will find out if there is.*

CP 206.

C. SUMMARY OF REPLY ARGUMENT

The evidence in question could not have been discovered before summary judgment, because Lockheed claimed it did not have them. The Arnolds requested the documents in question. Lockheed responded that they did not exist, or that it could not find them. When an opposing party

makes a statement under oath affirming or denying a particular fact, the requesting party has a right to rely on that statement and need not investigate further to complete due diligence.

Lockheed raises the issue of duty here, although that issue is already the subject of a separate appeal before this Court. Nevertheless, Lockheed did have a common law duty of care to the Arnolds, and the policy underlying that duty is expressed in the Walsh-Healey Act.

Lockheed's failure to disclose the documents in question would likely have changed the outcome of the summary judgment motion, and the trial court should have vacated judgment under CR 60.

D. REPLY ARGUMENT

(1) Lockheed Stated Under Oath It Had "No Evidence" that It Was Even Aware of the Walsh-Healey Act in the 1960s

In their opening brief, the Arnolds explained that during discovery they did, in fact, request the documents that are at issue in this appeal. Lockheed did not produce them. Br. of Appellants at 13. Specifically, they requested "contracts between Lockheed and the federal government for shipbuilding during the 1960s...." CP 50. They argued that because the documents were requested but not disclosed, they could not have been discovered earlier. Br. of Appellants at 14.

Lockheed responds that the contracts were available, but the Arnolds were not diligent in obtaining them. Br. of Resp't at 17. It contends that the Arnolds have "failed to explain why [they] could not have made their request earlier, citing *Vance v. Offices of Thurston Cty. Comm'rs*, 117 Wn. App. 660, 671-72, 71 P.3d 680 (2003), *review denied*, 151 Wn.2d 1013 (2004). In *Vance*, Division II of this Court denied a CR 60(b) motion because the supposed "newly discovered evidence" disclosed after trial was in response to a "new and different request" that the plaintiff could have, but did not, propound before trial. *Id.* at 671. Lockheed also argues that evidence indicating Lockheed "may have been subject to Walsh-Healey" was disclosed and/or was a matter of public record. Br. of Resp't at 19.

However, when an opposing party makes a statement under oath affirming or denying a particular fact, the requesting party has a right to rely on that statement and need not investigate further to complete due diligence. *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964). In *Kurtz*, a personal injury plaintiff stated under oath that she had not suffered from fainting spells prior to the accident that injured her. *Id.* at 872-73. The trial resulted in a verdict for the plaintiff. The defendant sought new trial on ground of evidence newly discovered after trial that plaintiff had in fact suffered fainting spells before the accident. *Id.* Our Supreme Court

concluded that the defendant had right to rely on plaintiff's statements under oath without conducting further investigation to verify them.

Vance is inapposite; *Kurtz* applies. The documents here *were* specifically requested, Lockheed simply did not disclose them. CP 50. In fact, when specifically asked about disclosure of those documents under oath, Lockheed's representative claimed that Lockheed had no "hard copy evidence" of any contracts implicating Walsh-Healey, and that there was "no evidence" that Lockheed was even aware of the Act in the 1960's. CP 206. The Arnolds were not under any duty to assume that Lockheed's representative was lying and make additional inquiries.

Lockheed inappropriately suggests that the Arnolds should have *deduced* it was subject to Walsh-Healey based on public records regarding the Act. Br. of Resp't at 19. The evidence cited is nothing more than general documents regarding procurement regulations and public notice regarding Walsh-Healey from the United States Department of Labor. CP 291.

Having denied that it was even aware of Walsh-Healey, Lockheed cannot put the burden on the Arnolds to assume otherwise and rely on those assumptions as evidence. This assertion is directly contrary to *Kurtz*. Lockheed had a responsibility to disclose the specifically requested evidence, and its failure to do so is not the Arnolds' responsibility.

The Arnolds made diligent attempts to obtain the documents at issue here, they were not disclosed and Lockheed's representative denied their existence. The Arnolds have successfully demonstrated that the documents at issue could not have been obtained upon request, because they were requested, they were within Lockheed's control, and they were not provided to the Arnolds.

(2) The Walsh-Healey Evidence Is Critical to Issues of Duty and Breach

The Arnolds demonstrated in their opening brief that evidence Lockheed was subject to Walsh-Healey in its federal contracts – but failed to obey it – probably would have changed the outcome of summary judgment. Br. of Appellants at 10-13. They noted that Washington law allows courts to find a common duty of care stemming from a corresponding statutory duty. *Id.* at 12.

Lockheed's response is threefold: (1) Lockheed had no duty and therefore breach is irrelevant; (2) there is no authority for using Walsh-Healey as evidence of negligence in an action not arising from a Walsh-Healey contract, and (3) a statute that provides for no private right of action cannot be the source of the standard of care for a tort claim. Br. of Resp't at 20-27.

The Arnolds' negligence action turns on demonstrating Lockheed's common law duty to exercise reasonable care. *Mathis v. Ammons*, 84 Wn. App. 411, 415-16, 928 P.2d 431 (1996), *review denied*, 132 Wn.2d 1008 (1997). The duty is breached when a defendant fails to exercise ordinary care. *Gall v. McDonald Indus.*, 84 Wn. App. 194, 203, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997). Any such failure is "negligence." *Mathis*, 84 Wn. App. at 416.

(a) Lockheed's Duty

Lockheed misleadingly suggests that the Arnolds' sole basis for finding a common law duty of care is the corresponding statutory duty imposed by Walsh-Healey. Br. of Resp't at 36. It also incorrectly suggests that the Arnolds' argument regarding the CR 60 motion is foreclosed by the holding of *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 683, 990 P.2d 968, *review denied*, 141 Wn.2d 1008 (2000).¹

¹ Lockheed claims that the Arnolds' "fail to mention" *Templeton*, which it describes as "a controlling case that [this] Court would have to overrule" in order to rule in favor of the Arnolds. Br. of Resp't at 21, 36 n.5. Lockheed incorrectly accuses the Arnolds of violating the ethical rules. Duty is not directly at issue in this appeal. The duty issue is the subject of the first appeal in this case, in Cause No. 39055-8-II. The Arnolds recognized that the duty issue is intertwined with this appeal, and asked this Court to consolidate the two cases. That request was opposed by Lockheed and denied. Therefore, the two appeals must be handled in a piecemeal fashion. Should this Court conclude that Lockheed did have a duty in the first appeal, then that ruling will become the law of the case here. Therefore, *Templeton* is not directly germane to the issues in this appeal. However, Lockheed is also incorrect. *Templeton* supports the Arnolds' argument and has been raised by Lockheed, so the Arnolds addressed it here.

The issue of duty is primarily the subject of the concurrent appeal in this case, Court of Appeals Cause No. 39055-8-II. Arnold did request consolidation of the two appeals, which was opposed by Lockheed. The motion was denied. Because Lockheed has raised the duty issue in its response brief, Arnold must address the issue here, creating unavoidable duplication between the two appeals.

Whether a defendant owes a common law duty of reasonable care is a question of law. *Hansen*, 118 Wn.2d at 479. It should be answered “generally, without reference to the facts or parties in a particular case,” in part by “tak[ing] notice of ‘legislative facts’-social, economic, and scientific facts that ‘simply supply premises in the process of legal reasoning.’” *Templeton*, 98 Wn. App. at 687. Other considerations include logic, common sense, justice, policy, and precedent; earlier constitutional, legislative, and judicial expressions of public policy; and a balancing of interests that well may compete. *Keates v. City of Vancouver*, 73 Wn. App. 257, 265, 869 P.2d 88, review denied, 124 Wn.2d 1026 (1994); *Roberts v. Dudley*, 92 Wn. App. 652, 659, 966 P.2d 377 (1998), review granted, 137 Wn.2d 1019 (1999); *Whaley v. State*, 90 Wn. App. 658, 672, 956 P.2d 1100 (1998).²

² These considerations are different from, and much broader than, the *Restatement (Second) of Torts* four-part test for whether a particular statute imposes a statutory duty. That test requires that the statute's purposes be (1) to protect a class of

Washington law generally provides that a person does not owe a duty of care to the employees of independent contractors working for that person. *Larson v. Centennial Mill Co.*, 40 Wash. 224, 228, 81 P. 294 (1905). However, that general rule has three significant exceptions: (1) where the owner of premises or a general contractor on a jobsite retain control over the jobsite and the work performed on it by the contractor; (2) where the owner or general contractor has a statutory obligation with respect to safety on the jobsite; or (3) where the owner has a duty with respect to hazards on the premises.

Lockheed owed a duty to the Arnolds because as a premises owner/general contractor, it retained control over the work performed by Reuben Arnold, as a premises owner/general contractor, it had a nondelegable duty by statute with respect to the safety of workers like Reuben Arnold, or it had a duty as a premises owner to business invitees like Reuben Arnold to deal with an warn about hazards on its premises.

(i) Lockheed Had a Duty to Reuben Arnold as a General Contractor and Because It Retained Control over His Work

A general contractor is an entity in the business of constructing a structure for a third party and whose business operations require the use of

persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted. *Id.*

more than one tradesperson on the site of the project. See RCW 18.27.010 (defining “contractor” as anyone who “in the pursuit of an independent business undertakes to . . . construct, alter, repair . . . or demolish any building, highway . . . or other structure . . .” and “general contractor” as a contractor whose business requires it use more than one building trade or craft upon a single project). Lockheed was a general contractor because it contracted with third parties, including the U.S. Navy and State of Alaska, to construct and maintain ships, and it employed various subcontractors, including insulators, to complete those contracts. 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); *Poole v. Quality Shipyards, Inc.*, 668 So.2d 411 (La. App. 1996), *writ denied*, 669 So.2d 1215 (La. 1996); *Amato v. U.S.*, 167 F. Supp. 929 (S.D.N.Y. 1958) (in all of these cases, the court refers to the shipyard as a “general contractor”).

As a premises owner/general contractor, Lockheed owed a duty of care to the Arnolds to prevent their exposure to asbestos on its jobsite.

Washington law has long recognized that a general contractor, by virtue of its retained general supervisory control over a jobsite, has a duty to provide a safe workplace for employees of subcontractors working at its jobsite. *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323,

330-32, 582 P.2d 500 (1978). Where the general contractor retains the right to control over some part of the subcontractor's work, even if control is not actually exercised, the general contractor owes a duty of care to the subcontractor's employees. *Id.* at 330-31.

A premises owner/general contractor meets the requirements of the retained control doctrine when it either (1) retains the right to direct the manner in which a contractor does its work; *or* (2) affirmatively assumes responsibility for worker safety. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121-22, 52 P.3d 472 (2002). The proper inquiry is not whether there is an *actual* exercise of control over the manner the work is performed, only that the retention of the *right* to control is required. *Id.* at 121. In fact, merely retaining general supervisory and coordinating responsibility over the worksite is enough to establish the requisite control for purposes of this rule. *Kelley*, 90 Wn.2d at 331. As our Supreme Court stated in *Stute*:

A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor's responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.

114 Wn.2d at 464.

While in *Kamla*, the Supreme Court determined the Space Needle Corporation did not retain control over a pyrotechnical contractor's work in preparing a fireworks display, in *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (2004), the court found that the retained control rule applied. The court there found that the right of control is a question of fact. *Id.* at 247-48. While *Kinney* and *Kamla* both arose from workplace injuries sustained at the Space Needle in Seattle, *Kinney* presented evidence from a Space Needle employee that detailed factually the extent to which the Space Needle retained control over the worksite – particularly those remote areas where *Kinney* was injured just below the Needle's antenna. The Space Needle provided instruction to *Kinney* on how to gain access to the area, on how to use safety equipment, and on how to descend the area where *Kinney* was ultimately injured. No such evidence was offered by the plaintiffs in the *Kamla* case where the Space Needle provided no equipment and no instructions, and where plaintiff's employer was in full control of the work area for a fireworks display. All the Space Needle did in the *Kamla* case was hire the vendor to come to the premises and provide its staff with a platform to set up their fireworks display.

In this case, Lockheed had guarded access to its properties and only allowed Reuben Arnold to gain access through use of an ID badge, it

provided asbestos out of a central building for insulators' use. CP1 552, 553. Lockheed required contractors to adhere to its safety policies, and it had staff on site who retained the power not only to correct workplace safety violations, but to review insulation work and safety procedures associated with it. CP1 488, 506-08. As Harris explicitly testified, Lockheed not only controlled safety on its site, it coordinated the work of craftsmen on its ship projects and it had quality control staff pushing production. CP1 447-48.

Lockheed's retention of control over the work of people like Reuben Arnold only confirmed that Lockheed owed him a duty of care; the trial court erred in granting summary judgment to Lockheed.

(ii) As a Premises Owner, Lockheed Owed a Duty of Care to Reuben Arnold as a Business Invitee

Finally, in *Kamla*, our Supreme Court applied traditional premises liability principles to workplace hazard exposures. 147 Wn.2d at 125-27. Washington law on premises liability is well-developed. Washington has adopted the standard for liability of a premises owner articulated in the *Restatement (Second) of Torts* § 343. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 138-39, 875 P.2d 621 (1994). *See also, Mucsi v. Graoch Assoc. Ltd. P'ship No. 12*, 144 Wn.2d 847, 31 P.3d 684 (2001);

Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996). Under that standard, a premises owner owes a duty to an invitee 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 they 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.

As the *Tincani* court observed, the premises owner may even owe a duty to an invitee where the risk is obvious under § 343A of the *Restatement* where the premises owner should have anticipated the harm.³ 124 Wn.2d at 139-40. The *Kamla* court reiterated these clear principles, 147 Wn.2d at 123-25, recognizing that a premises owner owed a duty of care to the employees of contractors on its premises.

The starting place in the premises liability analysis is the status of the person coming on to the premises. It is well-established that employees of contractors on the premises are invitees. *Kamla*, 147 Wn.2d at 125; *Epperly v. City of Seattle*, 65 Wn.2d 777, 786, 399 P.2d 591

³ *Restatement (Second) of Torts* § 343A(1) states:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(1965). Thus, the duty owed by Lockheed to the Arnolds was the duty of care for invitees.

Lockheed owed a duty of care to the employees of subcontractors on its jobsite under § 343 because it was aware of the risk of harm presented by asbestos exposure. Lockheed knew of the risk of asbestos exposure since the 1940s. It was present for the 1945 conference that discussed the risks of asbestos disease, CP 498-500, a conference that took place more than 15 years before Reuben Arnold ever worked on Lockheed's premises. Lockheed knew that if workers were using asbestos at its facilities, there was a condition on its premises that created an unreasonable risk to invitees. Indeed, one of the purposes of the 1945 conference appears to have been to address this very risk and to develop ways to address it. CP 644, 648-58, 668.

Under § 343, Lockheed should have expected that its invitees did not know of the danger of asbestos exposure. Reuben Arnold was a blue collar insulator, without a college degree. His job was to insulate. The danger of asbestos was latent at all times he worked at these facilities in the 1960s. Lockheed did not warn him of the hazards associated with using asbestos on its premises. While Lockheed should have known of the hazard of asbestos exposure after 1945, invitees like Reuben Arnold did know of the hazards associated with asbestos at that time. In fact, Bruce

Curtis testified that Arnold's union did not begin advising its members of the hazards of asbestos until the early 1970s. CP 576. Similarly, John Tanner testified that the pipefitters' union did not provide education on respirators, and he did not begin wearing such protection until 1982. CP 421. Moreover, they were not aware of the risk of asbestos being brought home on Reuben's clothing.

In conclusion, Lockheed was liable to Reuben Arnold as a business invitee under § 343 or § 343A of the *Restatement (Second) of Torts*.

(iii) Walsh-Healey Is a Valid Source of Law and Policy to Inform the Common Law Standard of Care

Lockheed denies that the Arnolds meet the test for finding a common law duty of care informed by Lockheed's Walsh-Healey responsibilities. Br. of Resp't at 21. It claims that the Arnolds argued for must meet the four part test in the *Restatement (Second) of Torts* § 286 for establishing a statutory duty under RCW 5.40.050, citing *Estate of Kelly By and Through Kelly v. Falin*, 127 Wn.2d 31, 896 P.2d 1245 (1995). *Id.* at 28.

Lockheed misreads *Falin* when it claims that the Arnolds must meet the four-part *Restatement* test for adopting a statutory pronouncement as the mandatory standard of reasonable care. In *Falin*, the Washington Supreme Court analyzed a whether a statutory enactment

could establish the duty of care *after completing its analysis of whether the common law imposed a separate duty*. 127 Wn.2d at 36-38. The Court distinguished between the two analyses, stating: “The [plaintiffs] argue that even if the court rejects liability under the common law rule, RCW 66.44.200 establishes a duty of care on [defendants].” *Id.* at 38.

Again, the Arnolds are not arguing that Walsh-Healey creates negligence per se, or that Walsh-Healey should be adopted as the statutory standard for reasonable care in this case. These concepts are separate from the *Hansen/Templateon* method of establishing a common law duty of care, and Lockheed should not blur the lines between them.

A statutory provision can provide the source for a common law duty of reasonable care without reference to RCW 5.40.050 or the now-defunct negligence per se rule. *Hansen v. Friend*, 118 Wn.2d 476, 480-81, 824 P.2d 483 (1992); *Templateon*, 98 Wn. App. at 687. As this Court has stated, determining the common law duty of care is not mechanical or formulaic, but is informed by logic, policy, precedent, legislative statements, a balancing of interests, and so forth. *Templateon*, 98 Wn. App. at 687.

Logic, justice, policy, precedent, and many other factors support a finding of a common law duty by Lockheed to protect workers assisting Lockheed to complete its lucrative government contracts from deadly

asbestos exposure. Walsh-Healey, to which Lockheed was subject in many government contracts, provided Lockheed with specific information on the fatal effects of asbestos and how to prevent them.

A jury could conclude that a reasonable general contractor and premises owner would employ the same health safeguards on all of its projects, and not pick and choose safety protocols based on which contract it happened to be working on at the time.

E. CONCLUSION

The trial court erred in refusing to grant the Arnolds' CR 60 motion. The newly discovered evidence of Lockheed's knowledge of, and duties to comply with, the Walsh-Healey Act belied Lockheed's statements to the trial court during summary judgment argument, and would likely have changed the outcome of the motion.

DATED this 11th day of June, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE OF WASHINGTON

On said day below emailed and deposited ^{BY} in the US mail a true and accurate copy of: Reply Brief of Appellants Arnold in Court of Appeals Cause No. 40015-4-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 11, 2010, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick