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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

LEO MACIAS and PATRICIA MACIAS,

Plaintiffs-Petitioners,

v.

SABERHAGEN HOLDINGS, INC., et  
al.,

Defendants-  
Respondents.

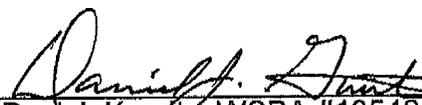
NO. 85535-8

**SUPPLEMENTAL AUTHORITY**

Defendant-Respondent Mine Safety Appliances Company submits the attached supplemental authorities, *Yankee v. APV North America, Inc.*, \_\_ Wn. App. \_\_, 2011 WL 4552184 (2011), and *Morgan v. Aurora Pump Co.*, 159 Wn.App. 724, 248 P.3d 1052 (2001).

Dated this 18<sup>th</sup> day of October, 2011.

Riddell Williams P.S.

By: 

Paul J. Kundtz, WSBA #13548  
Wendy E. Lyon, WSBA #34461  
Daniel J. Gunter, WSBA # 27491  
Attorneys for Defendant-Respondent  
Mine Safety Appliances Company

SUPPLEMENTAL AUTHORITY - 1

4833-7742-7980.01

Riddell Williams P.S.  
1001 FOURTH AVENUE  
SUITE 4500  
SEATTLE, WA 98154-1192  
206.824.3600

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**DECLARATION OF SERVICE**

I, Jan Sherred, declare as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Riddell Williams P.S.

2. On the date shown below, I caused to be served a copy of the within **SUPPLEMENTAL AUTHORITY** by the following methods and to the addresses listed below:

Via Messenger **Plaintiffs-Petitioners' Counsel**  
Matthew P. Bergman  
Brian F. Ladenburg  
David S. Frockt  
Glenn Draper  
**BERGMAN DRAPER & FROCKT**  
614 First Avenue, Fourth Floor  
Seattle, WA 98104  
Phone: 206-957-9510; Fax: 206-957-9549

Copies were also served via U.S. mail on the parties below:

<p><b>Counsel for American Optical Corporation</b> Kevin C. Baumgardner, WSBA #14263 Corr Cronin Michelson Baumgardner &amp; Preece LLP 1001 Fourth Avenue, Suite 3900 Seattle, WA 98154-1051</p> <p>Joseph J. Morford, pro hac vice Tucker Ellis &amp; West LLP 1150 Huntington Building 925 Euclid Avenue Cleveland, OH 44115</p>	<p><b>North Safety Products USA</b> Randy Allment Timothy Ashcraft Williams, Kastner &amp; Gibbs 601 Union Street, Ste 4100 Seattle, WA 98101</p>
<p><b>Counsel for Saberhagen Holdings</b> Timothy K. Thorson Carney Badley Spellman, PS 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 Phone: 206-607-4117</p>	<p><b>Associated Counsel for Plaintiffs-Petitioners</b> John W. Phillips Matthew Geyman Phillips Law Group, PLLC 315 Fifth Avenue, Suite 1000 Seattle, WA 98104</p>

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<b>Counsel Admitted Pro Hac Vice</b> Karen K. Maston Johnson, Spalding, Doyle, West & Trent, L.L.P. 919 Milam Street, Suite 1700 Houston, TX 77002	<b>Counsel for Amicus Curiae Pacific Legal Foundation</b> Brian T. Hodges 10940 NE 33 <sup>rd</sup> Place, Suite 210 Bellevue, WA 98004-1432
<b>Counsel for Amicus Curiae WSAJ Foundation</b> Bryan Harnetiaux 517 E 17 <sup>th</sup> Avenue Spokane, WA 99203  George M. Ahrend 100 E. Broadway Moses Lake, WA 98837	

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

DATED this 19<sup>th</sup> day of October, 2011 at Seattle, Washington.

  
\_\_\_\_\_  
Jan Sherred

--- P.3d ---, 2011 WL 4552184 (Wash.App. Div. 1)  
 (Cite as: 2011 WL 4552184 (Wash.App. Div. 1))

**H**

Only the Westlaw citation is currently available.

Court of Appeals of Washington,  
 Division 1.

Sandra YANKEE, Individually and as Personal  
 Representative of the Estate of Dennis Yankee, Re-  
 spondent,

v.

APV NORTH AMERICA, INC., Petitioner,  
 Atlas Supply, Inc.; MCK Tool & Supply, Inc.; and  
 Vaughn Co., Inc., Defendants.

Renata Needles, Individually and as Personal Rep-  
 resentative of the Estate of Witold Siemieniec, Ap-  
 pellant,

v.

APV North America, Inc., Respondent,  
 ASCO Valve, Inc.; Armstrong International, Inc.;  
 BW/IP International, Inc. (sued individually and as  
 successor-in-interest to Byron Jackson Pumps);  
 Buffalo Pumps, Inc. (sued individually and as suc-  
 cessor-in-interest to Buffalo Forge Company); C.H.  
 Murphy/Clark-Ullman, Inc.; Carver Pump Com-  
 pany; Chicago Pneumatic Tool Company; Cincin-  
 nati Valve Company (sued individually and as suc-  
 cessor-in-interest to The Lunkenheimer Company);

Crane Co. (sued individually and as successor-  
 in-interest to Chapman Valve Co. and Cochrane  
 Inc.); FMC Corporation (sued individually and as  
 successor-in-interest to Northern Pump and Peer-  
 less Pump Company); Fairbanks Morse Pump Cor-  
 poration; Flowserve U.S. Inc. (sued individually  
 and as successor-in-interest to Nordstrom Valves,  
 Inc., Kammer Valves Inc., Byron Jackson Pumps,  
 Pacific Pumps, and Durco International, Inc.); Fo-  
 seco Metallurgical Inc.; Foster Wheeler Energy  
 Corporation; Gardner Denver, Inc. (sued individu-  
 ally and as successor-in-interest to Joy Manufactur-  
 ing Company and Sutorbilt); Garlock Sealing Tech-  
 nologies, LLC (sued individually and as successor-  
 in-interest to Garlock, Inc.); Imo Industries, Inc.  
 (sued individually and as successor-in-interest to  
 DeLaval Turbine, Inc. and Warren Pumps, LLC);

Ingersoll-Rand Company; Kammer Valves Inc.;  
 Keeler/Dorr-Oliver Boiler Company (sued indi-  
 vidualy and as successor-in-interest to E. Keeler  
 Company); The Lunkenheimer Company; Maxon  
 Corporation; McNally Industries, Inc. (sued indi-  
 vidualy and as successor-in-interest to FMC Cor-  
 poration and Northern Pump); Metalclad Insulation  
 Corporation; Nordstrom Audco Inc. (sued individu-  
 ally and as successor-in-interest to Nordstrom  
 Valves, Inc.); Saberhagen Holdings, Inc.; Spence  
 Engineering Company, Inc.; Sterling Fluid Systems  
 (USA), LLC f/k/a Peerless Pump Company; Viking  
 Pump, Inc.; Warren Pumps, LLC (sued individually  
 and as successor-in-interest to Quimby Pump Co.);  
 Weir Valve & Controls USA, Inc. f/k/a Atwood &  
 Morrill; The William Powell Company; and Yar-  
 way Corporation, Defendants.

Nos. 64312-6-I, 65019-0-I.  
 Sept. 18, 2011.

**Background:** Two former aluminum mill workers brought separate products liability and negligence suits against seller of carbon mixers to mill and other defendants, alleging that they contracted mesothelioma based on exposure to asbestos while working on mixers. The Superior Court, King County, Bruce Heller, J., granted summary judgment to seller in first worker's suit, and first worker appealed. The Superior Court, King County, Michael J. Trickey, J., denied seller's motion for summary judgment on failure to warn claim in second worker's suit, and seller appealed.

**Holdings:** After consolidating appeals, the Court of Appeals, Schindler, J., held that:

- (1) seller had no duty to warn mill workers of dangers associated with exposure to asbestos in replacement parts for mixers;
- (2) seller did not specify use of asbestos-containing replacement parts for use with mixers such that seller would have a duty to warn based on specification; and
- (3) seller did not assume duty to warn based on

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seller's repair and inspection history of mixers.

Affirmed as to first worker; reversed as to second worker.

#### West Headnotes

#### [1] Products Liability 313A ⚡133

313A Products Liability  
 313AII Elements and Concepts  
 313Ak132 Warnings or Instructions  
 313Ak133 k. In General. Most Cited Cases

#### Products Liability 313A ⚡201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases  
 Seller of carbon mixers to aluminum mill had no duty to warn mill workers who worked on mixers of dangers associated with exposure to asbestos in replacement parts for mixers, even assuming that seller specified the use of asbestos-containing replacement parts for mixers, where workers were not exposed to original asbestos-containing parts in mixers and mill did not use the replacement materials or parts for mixers identified by seller.

#### [2] Products Liability 313A ⚡133

313A Products Liability  
 313AII Elements and Concepts  
 313Ak132 Warnings or Instructions  
 313Ak133 k. In General. Most Cited Cases

#### Products Liability 313A ⚡201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases  
 A manufacturer is not liable for failure to warn of the danger of exposure to asbestos-containing products that it did not manufacture without regard to whether the manufacturer knew its product

would be used in conjunction with other asbestos-containing products.

#### [3] Products Liability 313A ⚡133

313A Products Liability  
 313AII Elements and Concepts  
 313Ak132 Warnings or Instructions  
 313Ak133 k. In General. Most Cited Cases

#### Products Liability 313A ⚡201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases  
 Seller of carbon mixers to aluminum mill did not specify use of asbestos-containing replacement parts for use with mixers such that seller would have a duty to warn mill workers who worked on mixers of dangers associated with exposure to asbestos based on specification of replacement parts, where seller did not require mill to use asbestos-containing replacement parts.

#### [4] Products Liability 313A ⚡133

313A Products Liability  
 313AII Elements and Concepts  
 313Ak132 Warnings or Instructions  
 313Ak133 k. In General. Most Cited Cases

#### Products Liability 313A ⚡201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases  
 Seller of carbon mixers to aluminum mill did not assume duty to warn mill worker who worked on mixers of dangers associated with asbestos exposure based on seller's repair and inspection history of mixers, where seller did not perform ongoing inspections of mixers.

Appeal from King County Superior Court; Hon.

--- P.3d ----, 2011 WL 4552184 (Wash.App. Div. 1)  
 (Cite as: 2011 WL 4552184 (Wash.App. Div. 1))

Michael J. Trickey, J. John Michael Mattingly, Allen E. Eraut, Claude F. Bosworth, Rizzo Mattingly Bosworth PC, Portland, OR, for Petitioner/Respondent(s), APV North America, Inc.

Thomas J. Owens, Attorney at Law, Seattle, WA, for Respondent/Appellant(s), Sandra Yankee & Renata Needles.

#### UNPUBLISHED OPINION

SCHINDLER, J.

\*1 ¶ 1 In *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 380, 198 P.3d 493 (2008), the Washington Supreme Court held that a manufacturer has no duty under products liability or negligence principles to warn of the exposure to asbestos-containing replacement parts that it did not manufacture, sell, or supply. Sandra Yankee, individually and as the personal representative of the Estate of Dennis Yankee (Yankee); and Renata Needles, individually and as the personal representative of the Estate of her father Witold Siemieniec (Siemieniec), both filed lawsuits against a number of manufacturers, including APV North America, Inc., alleging products liability and negligence claims from exposure to asbestos while working at the Alcoa aluminum mill in Washington. There is no dispute that neither Siemieniec nor Yankee were exposed to gaskets, packing, or any other asbestos-containing parts manufactured, sold, or supplied by APV. Because the four documents Siemieniec and Yankee rely on in an attempt to show that APV specified the use of asbestos-containing parts do not constitute specifications, there is insufficient evidence to create a material issue of fact that APV had a duty to warn of asbestos exposure. We affirm summary judgment dismissal of Siemieniec's claims against APV and reverse denial of the summary judgment motion to dismiss Yankee's claims against APV.

#### Facts

¶ 2 In 1940 and 1941, the predecessor-in-interest to APV North America, Inc. (APV), Baker Perkins, Inc., sold five “[s]ize 22 DRM” car-

bon mixers to the Aluminum Company of America (Alcoa) aluminum mill in Vancouver, Washington. Under the asset purchase and sale agreements, APV is responsible for the carbon mixers Baker Perkins delivered to Alcoa.

¶ 3 A carbon mixer is a large piece of cast iron and steel equipment that is used to produce carbon to make aluminum. A carbon mixer contains two large paddles that mix the materials in a cast iron trough. The paddles and the trough are heated with steam to extremely high temperatures. The five carbon mixers Baker Perkins shipped to Alcoa contained gaskets and packing manufactured by other companies. After the carbon mixers were delivered, Alcoa workers applied asbestos-containing blanket insulation and mud under a one-sixteenth-inch metal sheet to cover the exterior of the mixers.

¶ 4 Every three or four years, the Alcoa workers would dismantle and overhaul, or “teardown,” the mixers. The millwrights were responsible for the initial teardown process. As part of the teardown, the millwrights would remove the exterior asbestos-containing insulation on the mixer. They also removed gaskets and packing from various parts of the mixers. The mixer was then moved with a crane to the machine shop where the welders would continue to work on dismantling the mixer. The welders and machinists would rebuild the mixer with a new trough lining and replacement gaskets and packing. After the welders and machinists finished, the millwrights would install new exterior asbestos-containing insulation with a sheet metal cover.

\*2 ¶ 5 Witold Siemieniec worked as a welder and mechanic at the Alcoa plant from 1966 until 1986. As a welder, Siemieniec worked on repairing, tearing down, and rebuilding the carbon mixers. Dennis Yankee began working as a laborer at the Alcoa plant in 1969. In 1973 he became a millwright and worked at the Alcoa mill until 1997. As a millwright, Yankee worked on the carbon mixers.

¶ 6 By the time Siemieniec and Yankee started

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working at Alcoa, the mixers were thirty years old and had been torn down and rebuilt numerous times. There is no dispute that during the time Siemieniec and Yankee worked at the mill, Alcoa only used insulation, gaskets, packing, and other replacement parts for the carbon mixers that were manufactured by Garlock Sealing Technologies, LLC.<sup>FN1</sup>

¶ 7 Siemieniec was diagnosed with mesothelioma in October 2006 and died in March 2007. Yankee was diagnosed with mesothelioma in February 2006 and died in June 2008. The Estate of Siemieniec and the Estate of Yankee filed lawsuits against a number of manufacturers, including APV and Garlock, alleging product liability and negligence claims from asbestos exposure while working on the carbon mixers at the Alcoa mill.

¶ 8 APV filed a motion for summary judgment in both cases arguing that because there was no evidence that either Siemieniec or Yankee were exposed to asbestos-containing products manufactured or sold by APV, as a matter of law, APV was not liable for asbestos exposure from the use of another manufacturer's materials or replacement parts. APV relied on the undisputed deposition testimony that showed that Siemieniec and Yankee only worked on the carbon mixers with materials and replacement parts that were manufactured by Garlock. APV also asserted that the mixers were not insulated when they were shipped to Alcoa, and there was no evidence that the original gaskets or packing contained asbestos.

¶ 9 In response, Siemieniec and Yankee argued that the carbon mixers originally shipped to Alcoa used asbestos-containing parts and that APV specified use of asbestos-containing replacement parts. In support, Siemieniec and Yankee submitted deposition testimony about the original gaskets and packing materials used for the carbon mixers. In an attempt to show that APV specified the use of asbestos-containing replacement products for the carbon mixers, Siemieniec and Yankee submitted four documents. In addition, Siemieniec argued that

APV assumed a duty to warn because it conducted periodic inspections of the mixers.

¶ 10 The trial court granted APV's motion for summary judgment in Siemieniec's lawsuit and dismissed his claims against APV. The court rejected Siemieniec's argument that the documents required Alcoa to use asbestos-containing materials or replacement parts. The court's oral ruling states, in pertinent part:

And so that brings us to the second issue: Did Mr. Siemieniec come into contact with any materials specified by APV? There is no Washington authority addressing the question of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer.

\*3 As already indicated, the Braaten Court expressly reserved that issue. This Court does not need to resolve the issue because it finds that there is no evidence that Mr. Siemieniec came into contact with replacement parts that were specified by APV.

Mr. Owens has pointed to three documents which he says shows that APV did specify the use of asbestos parts. Those are documents 112, 228 and 243. Document 112, which appears to be part of the original operating instructions from the early 1940s, says, quote, "Use packing Palmetto," close quotes. The parties disagree on whether this can be characterized as a specification. But even assuming that it is a specification—and by that, the Court means an instruction to the customer to always use Palmetto packing, it's clear that that instruction was not followed.

When Alcoa replaced the Palmetto packing, it did so with Garlock packing. Likewise, it replaced the original gaskets with Garlock gaskets. So document 228, which lists Durabla gaskets under the "specification" column cannot be a basis for liability.

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The same applies to document 243 from 1955, which lists U.S. Rubber gaskets. Putting aside the issue of whether plaintiff has sufficiently established that U.S. Rubber gaskets contained asbestos, for purposes of this analysis, the Court will assume that it has. But by the time that Mr. Siemieniec began working at the facility, those gaskets had been replaced by Garlock.

And finally, there is no evidence that APV specified what kind of insulation should be used by its customers. So in conclusion, even if the Washington Courts were to adopt a specification exception to Braaten, Simenetta [sic], plaintiff has simply not produced any evidence that Mr. Siemieniec was exposed to asbestos as a result of such specification.

¶ 11 In Yankee's lawsuit, a different judge granted APV's summary judgment motion in part but denied dismissal of Yankee's claim against APV that it had a duty to warn based on "specification of asbestos-containing components."<sup>FN2</sup> The trial court stated:

I think there is enough there for a question of fact and a trier of fact, whether or not the gaskets, or the insulation whether there was a sufficient specification to give rise to a duty to warn, barely. It is barely there.

But I think that resolving the inference in the favor of the non-moving party it survives.

We granted APV's motion for discretionary review of the trial court's decision in Yankee's lawsuit to deny summary judgment dismissal of the failure to warn claim.<sup>FN3</sup> We consolidated that case with Siemieniec's pending appeal challenging dismissal of his claims against APV on summary judgment.

#### ANALYSIS

##### *Standard of Review*

¶ 12 We review a trial court's summary judgment decision de novo. *Tiffany Family Trust Corp.*

*v. City of Kent*, 155 Wash.2d 225, 230, 119 P.3d 325 (2005). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "If ... the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Summary judgment is appropriate if in view of all of the evidence, reasonable persons could reach only one conclusion. *Hansen v. Friend*, 118 Wash.2d 476, 485, 824 P.2d 483 (1992).

\*4 ¶ 13 Siemieniec and Yankee concede that they were not exposed to gaskets, packing material, or any other asbestos-containing replacement parts that were manufactured, sold, or installed by APV.<sup>FN4</sup> There is no dispute that by the time Siemieniec and Yankee began working at Alcoa, the original gaskets and packing had been replaced numerous times during routine maintenance and the tear-downs. Yankee conceded that it was not possible that he was exposed to the original gaskets and packing installed or supplied by APV. There is also no dispute that during the time that Siemieniec and Yankee worked at the mill, Alcoa used only gaskets, packing, and replacement parts and materials that were manufactured by Garlock.

[1] ¶ 14 Nonetheless, Siemieniec and Yankee assert that because APV specified the use of asbestos-containing replacement parts, it had a duty to warn of asbestos exposure. Siemieniec and Yankee rely on four documents in support of the claim that APV specified the use of asbestos-containing parts with the carbon mixers.

¶ 15 APV asserts that under *Braaten and Simenetta v. Vlad Corp.*, 165 Wash.2d 341, 197 P.3d

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127 (2008), an equipment manufacturer is not liable for asbestos-containing products that it did not manufacture or sell, even if the manufacturer knew that asbestos-containing products would be used with the equipment. APV also argues that the documents do not show that it specified the use of asbestos-containing products. In addition, APV asserts that even if the documents showed that APV specified the use of asbestos-containing replacement parts or materials, the record establishes that Alcoa did not use the materials or parts identified in the documents.

¶ 16 In *Simonetta*, the Washington Supreme Court held that an equipment manufacturer does not have a duty to warn of the dangers of asbestos-containing products under *Restatement (Second) of Torts* section 388 (1965) and *Restatement (Second) of Torts* section 402A (1965) if the equipment manufacturer was not “in the chain of distribution” and “did not manufacture, sell, or supply the asbestos insulation.” *Simonetta*, 165 Wash.2d at 354–55, 197 P.3d 127. The court also stated that the manufacturer did not have a duty to warn because it “had no control over the type of insulation the navy would choose and derived no revenue from sales of asbestos-containing products.” *Simonetta*, 165 Wash.2d at 363 n. 8, 197 P.3d 127.

[2] ¶ 17 The court in *Simonetta* expressly rejected the argument that an equipment manufacturer was liable because it knew the equipment would be used in conjunction with asbestos-containing insulation. *Simonetta*, 165 Wash.2d at 361, 197 P.3d 127. Under *Simonetta*, a manufacturer is not liable for failure to warn of the danger of exposure to asbestos-containing products that it did not manufacture without regard to whether the manufacturer knew its product would be used in conjunction with other asbestos-containing products. *Simonetta*, 165 Wash.2d at 357, 197 P.3d 127.

\*5 We justify imposing liability on the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of the product and to translate

that knowledge into a cost of production against which liability insurance can be obtained. Here, Viad did not manufacture or market the asbestos insulation. Nor did Viad have control over the type of insulation the navy selected.

*Simonetta*, 165 Wash.2d at 355, 197 P.3d 127.

¶ 18 In *Braaten*, the court addressed the question of whether a manufacturer was liable for asbestos-containing replacement products such as insulation, gaskets, and packing that were used with the original equipment but were manufactured or supplied by another manufacturer. *Braaten*, 165 Wash.2d at 380, 198 P.3d 493.

¶ 19 The court held that because the equipment manufacturer did not manufacture the asbestos-containing insulation, gaskets, and packing originally used with the equipment, and did not manufacture, sell, or supply the replacement parts and “did not ... otherwise place them in the stream of commerce,” the manufacturer had no duty to warn under common law products liability or negligence principles, “even if the replacement part is virtually the same as the original part.” *Braaten*, 165 Wash.2d at 380, 392, 198 P.3d 493.

Some of the defendant-manufacturers' products originally contained packing and gaskets with asbestos in them, but the defendants did not manufacture these products themselves. Rather, the packing and gaskets were manufactured by other companies and installed in the defendants' products. According to Mr. Braaten's uncontroverted testimony, however, it was not possible to tell at the time he worked on the pumps and valves how many times gaskets and packing had been replaced with packing and gaskets manufactured and sold by other companies.

*Braaten*, 165 Wash.2d at 380, 198 P.3d 493.

¶ 20 The court also held the manufacturers did not have a duty to warn of the danger of exposure to asbestos-containing replacement parts

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that the defendants did not manufacture, sell, or otherwise supply, which replaced asbestos-containing packing and gaskets in their products as originally sold. We hold that the general rule that there is no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in other manufacturers' products applies with regard to replacement packing and gaskets. The defendants did not sell or supply the replacement packing or gaskets or otherwise place them in the stream of commerce and did not specify asbestos-containing packing and gaskets for use with their valves and pumps, and other types of materials could have been used.

*Braaten*, 165 Wash.2d at 380, 198 P.3d 493. Accordingly, the court states that it did not reach the question of whether a duty to warn "might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design." *Braaten*, 165 Wash.2d at 397, 198 P.3d 493.

\*6 [3] ¶ 21 Here, Siemieniec and Yankee rely on the specification language in *Braaten* to argue that APV had a duty to warn of the dangers of exposure to asbestos. Siemieniec and Yankee assert that APV specified the use of asbestos-containing replacement parts for use with the carbon mixers. APV contends that the court in *Braaten* did not create an exception for the duty to warn of asbestos exposure where the manufacturer specifies use of asbestos-containing replacement parts. Nevertheless, APV asserts that the documents in this case do not establish a specification by APV to use only certain products with the carbon mixers. We agree. The four documents that Siemieniec and Yankee rely on do not show that APV specified use of the asbestos-containing gaskets, packing material, or replacement parts manufactured by Garlock.

¶ 22 The first one-page document labeled "Operating Instructions" is dated 1941 and is appar-

ently related to the carbon mixers originally shipped to the Alcoa mill. The document contains a typed heading titled, "Use Packing," with a handwritten notation, "Palmetto 1" x 1". Assuming Palmetto packing contained asbestos, there is no evidence that APV manufactured, sold, or provided Palmetto packing or that Alcoa ever used Palmetto packing with the carbon mixers. The uncontroverted evidence also establishes that neither Siemieniec nor Yankee ever worked with either Palmetto or the original packing used on the carbon mixers.

¶ 23 The second one-page document titled "Maintenance of Glands with Soft Packing" does not refer to asbestos. The document refers to "[s]quare braided packing, as called for on the parts list," that can be obtained from the hardware store. The document states, in pertinent part:

Square braided packing, as called for on the parts list, if used at the factory and is obtainable from large hardware stores, millwright supply houses, or direct from Baker Perkins Inc. An inferior grade of packing should not be used for re-packing glands.

....

When a lantern ring, or other means of applying a lubricant (other than that impregnated in the packing) is used, a lubricant that is *not detrimental* to the material being processed must be used. (Use Dow Corning Silicone Grease # DC-44[.] )

¶ 24 The two other one-page documents are "Dispatch List[s]" for repair orders in 1943 and 1955. The 1943 Dispatch List shows APV shipped a "Saddle Section" for one of the mixers along with studs, hex nuts, cover plates, and two "Durabla" gaskets with instructions to "[a]ssemble above parts." The document states that the saddle section part was a "standby pending outcome of repairs made locally on original saddle section." There is no evidence that the saddle section or the gaskets referred to in the Dispatch List were used by Alcoa. The Dispatch List dated 1955 shows that APV sent

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parts for a mixer, including liners for the trough shell, a valve door, hex nuts, door jacket plates, and "U.S. Rubber Co. # 899" gaskets. But again, there is no evidence that Alcoa used the U.S. Rubber Co. gaskets.

\*7 ¶ 25 We conclude these four documents do not constitute specifications to use asbestos-containing replacement parts. The documents do not require Alcoa to use the asbestos-containing parts referred to in either the original operating and maintenance instructions or in the two Dispatch Lists.

¶ 26 There is insufficient evidence to create a material issue of fact that APV had a duty to warn based on a handwritten note to use Palmetto with the original carbon mixers sent in 1941, a maintenance document that does not refer to asbestos, and the two Dispatch Lists. Further, the uncontroverted evidence establishes that even if these documents are treated as specifications, there is no evidence that Alcoa used the products identified in the documents. To the contrary, the record shows that when Siemieniec and Yankee worked at the mill, Alcoa used only replacement parts manufactured by Garlock.

¶ 27 Siemieniec also argues there are material issues of fact as to whether he was exposed to asbestos-containing Superex insulation encapsulated inside the trough extension covers of the carbon mixers sold to Alcoa. In support of his argument, Siemieniec submitted diagrams for a mixer with the same model number as the Alcoa mixers. The diagrams show a cover fabricated from two layers of one-quarter-inch steel filled with Superex asbestos-containing insulation. Siemieniec asserts that because he was a welder, it is reasonable to infer that he was exposed to Superex when the Superex insulation was replaced during the teardowns. APV contends the diagrams Siemieniec relies on are for mixers shipped to Alcoa in Texas, and the mixers shipped to Alcoa in Washington did not include trough extension covers.

¶ 28 The evidence does not support Siemieniec's argument that he was exposed to the original encapsulated Superex insulation or that the internal insulation was replaced during the time Siemieniec worked at the Alcoa mill. The testimony shows that the only insulation Siemieniec worked with was the exterior insulation installed by Alcoa.<sup>FN5</sup>

[4] ¶ 29 Siemieniec also argues that based on a lengthy repair and inspection history, APV assumed a duty to warn. The case Siemieniec relies on, *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wash.2d 423, 100 P.2d 1024 (1940), is distinguishable. In *Sheridan*, the insurance company assumed the duty to perform mandatory safety inspections of an elevator every three months. *Sheridan*, 3 Wash.2d at 440, 100 P.2d 1024.

¶ 30 Here, unlike in *Sheridan*, the record does not show that APV assumed a duty to warn based on ongoing inspections. Most of the documents Siemieniec cites are related to inspections done by APV when the carbon mixers were originally delivered in 1941. Some documents show APV shipped a number of replacement parts to Alcoa, including trough liners, gears, and other parts that Alcoa did not fabricate. Several documents refer to inspections of the replacement parts before APV shipped the parts to Alcoa.<sup>FN6</sup> It appears that only one document shows that an APV engineer actually went to the Alcoa mill in the late 1980s to inspect a failed bearing in one of the carbon mixers.

\*8 ¶ 31 We affirm the trial court's decision to grant summary judgment dismissal of Siemieniec's claims against APV. We reverse the trial court's decision to deny APV's motion for summary judgment dismissal of Yankee's claim that APV had a duty to warn.

WE CONCUR: COX and GROSSE, JJ.

ORDER GRANTING MOTION TO PUBLISH

Petitioner-Respondent APV North America, Inc. filed a motion to publish the opinion filed on July 18, 2011 in the above case. Sandra Yankee, respondent in Appeal No. 64312-6-1, and Renata

--- P.3d ----, 2011 WL 4552184 (Wash.App. Div. 1)  
(Cite as: 2011 WL 4552184 (Wash.App. Div. 1))

Needles, appellant in Appeal No. 65019-0-I, has filed an answer to the motion. A majority of the panel has determined that the motion should be granted;

Now, therefore, it is hereby

ORDERED that petitioner-respondent APV North America's motion to publish the opinion is granted.

FN1. Garlock Sealing Technologies, LLC is the successor-in-interest to Garlock, Inc.

FN2. But the court granted APV's motion to dismiss Yankee's claims for design defect and a duty to warn based on inspections.

FN3. Yankee did not cross appeal the trial court's dismissal of his design defect and duty to warn based on inspection claims against APV.

FN4. APV disputes whether the original gaskets and packing contained asbestos.

FN5. The case Siemieniec cites in his statement of additional authorities, *Morgan v. Aurora Pump Co.*, 159 Wash.App. 724, 248 P.3d 1052 (2011), is distinguishable. Unlike here, in *Morgan* the plaintiff presented evidence that he was exposed to asbestos from the original products or replacement parts supplied by the defendants. *Morgan*, 159 Wash.App. at 734, 248 P.3d 1052.

FN6. A few documents show an inspection of the mixers' gears after one or more of the mixers broke down. But the documents are not dated and the plaintiffs offer no evidence establishing APV performed the inspections.

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END OF DOCUMENT

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▷

Court of Appeals of Washington,  
Division 1.

James and Kay MORGAN, husband and wife, Appellants,

v.

AURORA PUMP CO., Buffalo Pumps, Inc., Elliott Turbomachinery Company a/k/a Elliot Company IMO Industries, Inc. (sued individually and as), Successor-in-interest to DeLaval Turbine, Inc., Leslie Controls, Inc., Warren Pumps LLC; Weir Valve & Controls USA, Inc. f/k/a Atwood & Morrill; and The William Powell, Co., Respondents. AGCO Corporation (sued individually and as successor-in-interest to The Buda Co.); Alfa Laval Inc., (sued individually and as successor-in-interest to The DeLaval Separator Company and The Sharples Corp.); Allis Chalmers Corporation Product Liability Trust, (sued individually and as successor-in-interest to Allis Chalmers Corporation and The Buda Company); Armstrong International, Inc.; Atlas Valve Company, Inc.; Blackmer Pump Company; BW/IP International, Inc. (sued individually and as successor-in-interest to Byron Jackson Pump Company); Cameron International Corporation, f/k/a Cooper Cameron Corporation (sued individually and as successor-in-interest to The Cooper-Bessemer Corporation); Carrier Corporation; CLA-VAL Co.; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks, Division; Coltec Industries, Inc. (sued individually and as successor-in-interest to Fairbanks Morse Engine); Crane Co. (sued individually and as successor-in-interest to Deming Pump); Crane Environmental Inc., (sued individually and as successor-in-interest to Cochrane Corporation); Crosby Valve, Inc.; Crown Cork & Seal Co., Inc. (sued individually and as successor-in-interest to Mundet Cork Company); Detroit Diesel; Dover Corporation (sued individually and as successor-in-interest to The Blackmer Pump Company); Durabla Manufacturing Company; Eaton Hydraulics, Inc. (sued individually and

as successor-in-interest to Vickers, Inc.); Fairbanks Morse Pump Corporation; Flowserve US, Inc. (sued individually and as successor-in-interest to Durco International and Byron Jackson Pumps); FMC Corporation (sued individually and as successor-in-interest to Chicago Pump Company, Northern Pump Company f/k/a Northern Fire Apparatus Company and Chicago Pump Company and Peerless Pump Company); Fryer-Knowles Inc.; Gardner-Denver, Inc.; Gardner Denver Nash, L.L.C. f/k/a The Nash Engineering Company; Garlock Sealing Technologies, LLC. (sued individually and as successor-in-interest to Garlock, Inc. and U.S. Gasket Co.); General Motors Corporation; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Hardie-Tynes, LLC. (sued individually and as Hardie-Tynes Manufacturing Company); Hopeman Brothers Inc.; Hopeman Brothers Marine Interiors, a/k/a Hopeman Brothers, Inc.; Ingersoll-Rand Company (sued individually and as successor-in-interest to Terry Steam Turbine); John Crane, Inc.; McNally Industries, Inc. (sued individually and as successor-in-interest to Northern Pump Company f/k/a Northern Fire Apparatus Company); Metallo Gasket Company, Inc.; Metropolitan Life Insurance Company; The Nash Engineering Company; Northern Pump Company (sued individually and as successor-in-interest to Northern Fire Apparatus); O.C. Keckley Company (sued individually and as successor-in-interest to Klipfel Valves, Inc.); Parker-Hannifin Corporation, (sued individually and as successor-in-interest to Sacomo Sierra and Sacomo Manufacturing Co.); Peerless Heater Company; Peerless Industries, Inc.; Sterling Fluid Systems, Inc. f/k/a Peerless Pumps Co.; Tuthill Corporation; Tyco Flow Control (sued individually and as successor-in-interest to Gimpel Corporation Hancock, Lunkenheimer); Velan Valve Corp.; Viad Corporation f/k/a (sued individually and as successor-in-interest to Griscom Russell Company); Viking Pump, Inc.; Weil Pump Company; Yarway Corporation and York International Corporation, Defendants.

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No. 63923-4-I.  
 Jan. 31, 2011.

**Background:** Shipyard worker with mesothelioma and worker's wife brought negligence and product liability action against manufacturers of pumps and valves allegedly containing asbestos packing material to which worker was exposed. The Superior Court, King County, Michael Trickey, J., granted defendants summary judgment. Wife appealed.

**Holding:** The Court of Appeals, Spearman, J., held that factual issues as to whether worker was exposed to asbestos-containing products supplied by defendants, and whether such exposure was a substantial factor in causing his mesothelioma, precluded summary judgment.

Reversed.

#### West Headnotes

#### [1] Bankruptcy 51 ↪2392

51 Bankruptcy  
 51IV Effect of Bankruptcy Relief; Injunction and Stay  
 51IV(B) Automatic Stay  
 51k2392 k. Property and claims subject to stay. Most Cited Cases

#### Bankruptcy 51 ↪2394.1

51 Bankruptcy  
 51IV Effect of Bankruptcy Relief; Injunction and Stay  
 51IV(B) Automatic Stay  
 51k2394 Proceedings, Acts, or Persons Affected  
 51k2394.1 k. In general. Most Cited Cases

#### Bankruptcy 51 ↪2492

51 Bankruptcy  
 51V The Estate  
 51V(A) In General

51k2492 k. Creation of estate; time. Most Cited Cases

The filing of a bankruptcy petition creates a bankruptcy estate, which is protected under the federal bankruptcy code by an automatic stay of actions by all entities to collect or recover on claims. 11 U.S.C.A. §§ 362(a), 541(a).

#### [2] Bankruptcy 51 ↪2396

51 Bankruptcy  
 51IV Effect of Bankruptcy Relief; Injunction and Stay  
 51IV(B) Automatic Stay  
 51k2394 Proceedings, Acts, or Persons Affected

51k2396 k. Co-debtors and third persons. Most Cited Cases

The automatic stay of action provision under the federal bankruptcy code does not apply to suits against a debtor's co-respondents and co-defendants in multi-defendant litigation. 11 U.S.C.A. §§ 362(a), 541(a).

#### [3] Products Liability 313A ↪201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases

#### Products Liability 313A ↪380

313A Products Liability  
 313AIV Actions  
 313AIV(C) Evidence  
 313AIV(C)4 Weight and Sufficiency of Evidence  
 313Ak380 k. In general. Most Cited Cases

Asbestos plaintiffs may establish exposure to a defendant's product through direct or circumstantial evidence; however when reliance is placed upon circumstantial evidence, there must be reasonable inferences to establish the fact to be proved.

#### [4] Products Liability 313A ↪201

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313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases

**Products Liability 313A ↪380**

313A Products Liability  
 313AIV Actions  
 313AIV(C) Evidence  
 313AIV(C)4 Weight and Sufficiency of Evidence  
 313Ak380 k. In general. Most Cited Cases

Instead of personally identifying the manufacturers of asbestos products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace, and need not offer a detailed recollection of facts surrounding the exposure to the asbestos-containing product.

**[5] Evidence 157 ↪528(2)**

157 Evidence  
 157XII Opinion Evidence  
 157XII(B) Subjects of Expert Testimony  
 157k526 Cause and Effect  
 157k528 Injuries to the Person  
 157k528(2) k. Effect. Most Cited Cases

**Products Liability 313A ↪201**

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases

**Products Liability 313A ↪390**

313A Products Liability  
 313AIV Actions  
 313AIV(C) Evidence  
 313AIV(C)4 Weight and Sufficiency of Evidence  
 313Ak389 Proximate Cause  
 313Ak390 k. In general. Most Cited

Cases

Evidence for determination of whether a worker's exposure to a manufacturer's product in the workplace is medically related to worker's disability includes expert testimony on the effects of inhalation of asbestos on human health in general and on the plaintiff in particular, as well as evidence of any other substances that could have contributed to the plaintiff's disease, and expert testimony as to the combined effects of exposure to all possible sources of the disease.

**[6] Products Liability 313A ↪147**

313A Products Liability  
 313AII Elements and Concepts  
 313Ak146 Proximate Cause  
 313Ak147 k. In general. Most Cited Cases

**Products Liability 313A ↪165**

313A Products Liability  
 313AII Elements and Concepts  
 313Ak163 Persons Liable  
 313Ak165 k. Manufacturers in general; identification. Most Cited Cases

**Products Liability 313A ↪349**

313A Products Liability  
 313AIV Actions  
 313AIV(C) Evidence  
 313AIV(C)2 Presumptions and Burden of Proof  
 313Ak348 Proximate Cause  
 313Ak349 k. In general. Most Cited

Cases

The plaintiff in a product liability or negligence action bears the burden to establish a causal connection between the injury, the product and the manufacturer of that product.

**[7] Judgment 228 ↪185.3(21)**

228 Judgment  
 228V On Motion or Summary Proceeding  
 228k182 Motion or Other Application

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228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

Genuine issue of material fact as to whether shipyard worker was exposed to asbestos-containing products supplied by defendant manufacturers pumps and valves precluded summary judgment in worker's suit for personal injuries based on theories of products liability, negligence, and strict liability; co-worker testified he saw worker break flanges at pumps, remove and scrape flange gaskets from pumps, and make new gaskets for use on pumps, superintendent of machinists testified that at one time almost all of pumps used on board ships contained asbestos gaskets and packing, and expert testified that the work resulted in exposures to asbestos that were substantially above ambient levels.

[8] Products Liability 313A ⚡147

313A Products Liability  
 313AII Elements and Concepts  
 313Ak146 Proximate Cause  
 313Ak147 k. In general. Most Cited Cases

Products Liability 313A ⚡201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases

A plaintiff is not required to show that he worked directly with a defendant's asbestos-containing material in order to present evidence that he was exposed to asbestos contained in the product.

[9] Judgment 228 ⚡185.3(21)

228 Judgment  
 228V On Motion or Summary Proceeding  
 228k182 Motion or Other Application  
 228k185.3 Evidence and Affidavits in Particular Cases  
 228k185.3(21) k. Torts. Most Cited Cases

Genuine issue of material fact as to whether

shipyard worker's alleged exposure to asbestos-containing products supplied by defendant manufacturers pumps and valves was a substantial factor in causing his mesothelioma precluded summary judgment in worker's negligence and products liability suit for personal injuries; worker was a pipefitter at shipyard for approximately nine years, co-worker testified that he saw worker work with defendants' pumps and valves, and that at least some, if not most, of gaskets and packing were made of asbestos, and medical expert concluded that worker had "developed a diffuse malignant mesothelioma of the pleura" and that asbestos at shipyard was the cause of the disease.

[10] Products Liability 313A ⚡201

313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases

Products Liability 313A ⚡409

313A Products Liability  
 313AIV Actions  
 313AIV(D) Questions of Law or Fact  
 313Ak408 Proximate Cause  
 313Ak409 k. In general. Most Cited Cases

Proximity and time factors necessary to present sufficient circumstantial evidence to create issue of fact that a plaintiff's exposure to manufacturer's asbestos produces was a substantial factor in causing his disability can be satisfied if there is evidence that the plaintiff worked at a job site where asbestos products were used, particularly where there is expert testimony that asbestos fibers have the ability to drift over an entire job site.

[11] Products Liability 313A ⚡177

313A Products Liability  
 313AII Elements and Concepts  
 313Ak177 k. Government contractors. Most Cited Cases

Products Liability 313A ⚡201

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313A Products Liability  
 313AIII Particular Products  
 313Ak201 k. Asbestos. Most Cited Cases

**Products Liability 313A ↪325**

313A Products Liability  
 313AIV Actions  
 313AIV(B) Pleading  
 313Ak324 Defenses and Mitigating Circumstances  
 313Ak325 k. In general. Most Cited Cases

**Products Liability 313A ↪414**

313A Products Liability  
 313AIV Actions  
 313AIV(D) Questions of Law or Fact  
 313Ak413 Defenses and Mitigating Circumstances  
 313Ak414 k. In general. Most Cited Cases

Asbestos product manufacturer's government-contractor defense, that it could not be liable because its pumps and components were furnished to the Navy in conformance with precise specifications, presented an affirmative defense that was fact-intensive and a matter for the jury in shipyard worker's negligence and product liability suit for personal injuries due to asbestos exposure.

**\*\*1054** William Joel Rutzick, Schroeter Goldmark & Bender, Seattle, WA, for Appellants.

**\*\*1055** John M. Mattingly, Allen E. Eraut, Jeanne F. Loftis, Bullivant Houser Bailey, Portland, OR, Barry N. Mesher, Brian D. Zeringer, Jeffrey M. Odoom, Lane Powell, E. Pennock Gheen, Walter Barton, Karr Tuttle Campbell, James E. Horne, Michael E. Ricketts, Gordon Thomas Honeywell-Malanca Peterson, Mark B. Tuvin, Kevin J. Craig, Gordon & Rees, Dana C. Hoerschelmann, Russell C. Love, Thorsrud Cane & Paulich, Jerret Sale, Deborah L. Carstens, Bullivant House Bailey, Carl E. Forsberg, Melissa L. Carstens, Bullivant House

Bailey, Carl E. Forsberg, Melissa K. Roeder, Forsberg & Umlauf, Seattle, WA, Brian Barrow, Simon Eddins & Greenstone, Long Beach, CA, for Respondents.

SPEARMAN, J.

[1][2] \*726 ¶ 1 This appeal stems from an asbestos lawsuit. Kay Morgan appeals the summary judgment dismissal of the Morgans' claims against Aurora Pump Co., Buffalo Pumps, Inc., Elliott Co., IMO Industries, Inc. (formerly DeLaval Turbine, Inc.), Leslie Controls, Inc., Warren Pumps LLC, Weir Valves & Controls USA, Inc. (formerly Atwood & Morrill Co., Inc.), and Wm. Powell Co. (Respondents).<sup>FN1</sup> James Morgan worked for Puget Sound \*727 Naval Shipyard (PSNS) for approximately 37 years, at times during which he performed functions that exposed him to asbestos. He eventually developed mesothelioma. On August 29, 2007, Morgan filed a lawsuit in King County Superior Court against numerous defendants for personal injuries sustained due to asbestos exposure. The trial court dismissed the action on summary judgment as to Respondents. Morgan appeals. We reverse and remand for trial.

FN1. We note that Morgan has voluntarily dismissed his appeal as to Elliott Co. In addition, Respondent Leslie Controls, Inc. has filed a petition for relief pursuant to chapter 11 of the federal bankruptcy code in the United States Bankruptcy Court for the District of Delaware, case no. 10-12199. "The filing of a bankruptcy petition creates a bankruptcy estate, which is protected by an automatic stay of actions by all entities to collect or recover on claims." *In re Palmdale Hills Prop., LLC*, 423 B.R. 655, 663 (B.A.P. 9th Cir.2009) (citing 11 U.S.C. §§ 541(a) and 362(a)). Accordingly, all proceedings against Leslie in this matter are stayed. However, the automatic stay provision does not apply to suits against a debtor's co-respondents and co-defendants in multi-defendant litiga-

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tion. *In re Matter of Johns-Marville Corp.*, 99 Wash.2d 193, 196, 660 P.2d 271 (1983). Therefore, our opinion in this case applies to all remaining Respondents except Leslie.

#### FACTS

¶ 2 On August 29, 2007, James and Kay Morgan filed a lawsuit against approximately 50 defendants for personal injuries sustained by James Morgan due to asbestos exposure. Their claims were primarily based on the theories of products liability, negligence, strict liability under RESTATEMENT (SECOND) OF TORTS § 402, and breach of warranty. Morgan had been employed by PSNS from 1952 to 1989. He worked as a pipefitter/steamfitter from 1952 to 1957 and from 1959 to 1963, and as a marine/mechanical engineering technician and design division test coordinator from 1963 to 1989. In 2006 or 2007, he was diagnosed with mesothelioma. Morgan died in January 2008, before his deposition could be completed. After his death, Kay Morgan maintained the action.<sup>FN2</sup>

FN2. Although James Morgan died in 2008, it does not appear that a personal representative has been substituted as the plaintiff. For that reason, as well as for clarity and ease of reference, we will refer to James Morgan as if he were the sole Appellant "Morgan."

¶ 3 Respondents are manufacturers of pumps and valves. Morgan alleges that while he was employed at PSNS, Respondents supplied his employer with pumps and valves that included packing or gaskets containing asbestos. He further alleges that Respondents supplied replacement packing or gaskets to PSNS that also contained asbestos. Morgan claims that when he and others in his presence \*728 worked on Respondents' products, asbestos fibers were released into the air. He claims that he developed mesothelioma as a result of inhaling some of these fibers.

¶ 4 Respondents filed separate motions for

summary judgment dismissal of Morgan's claims, relying primarily on *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 198 P.3d 493 (2008) and \*\*1056 *Simonetta v. Vlad Corp.*, 165 Wash.2d 341, 197 P.3d 127 (2008). In those cases, the Washington Supreme Court held, in relevant part, that a manufacturer owes no common law duty to warn of the hazards of an asbestos-containing product that it did not manufacture, sell, or supply. *Simonetta*, 165 Wash.2d at 354, 197 P.3d 127; *Braaten*, 165 Wash.2d at 389-90, 198 P.3d 493. Respondents argued below that under *Simonetta* and *Braaten*, dismissal was proper because Morgan could not produce evidence creating a material factual dispute that Respondents manufactured, sold, or supplied any of the asbestos-containing products to which he may have been exposed. Respondents also argued that Morgan's evidence did not establish a material factual dispute that their products were a substantial factor in causing his mesothelioma.

¶ 5 The trial court granted the Respondents' motions and dismissed Morgan's claims with prejudice. Morgan appeals.<sup>FN3</sup>

FN3. Morgan does not appeal the trial court's dismissal of his design-defect claims.

#### DISCUSSION

¶ 6 The court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court. *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 794-95, 64 P.3d 22 (2003). "When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party." *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000) (citing *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994)). \*729 Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

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[3][4] ¶ 7 It is well settled that asbestos plaintiffs in Washington may establish exposure to a defendant's product through direct or circumstantial evidence. *Allen v. Asbestos Corp., Ltd.*, 138 Wash.App. 564, 571, 157 P.3d 406 (2007). "[I]nstead of personally identifying the manufacturers of asbestos products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace." FN4 *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 246-47, 744 P.2d 605 (1987). They need not offer a detailed recollection of facts surrounding the exposure to the asbestos-containing product. See *Van Hout v. Celotex Corp.*, 121 Wash.2d 697, 706-07, 853 P.2d 908 (1993); *Lockwood*, 109 Wash.2d at 246, 744 P.2d 605. For instance, in *Van Hout*, the Washington Supreme Court held that the evidence was sufficient to sustain the jury's verdict for an asbestos plaintiff where the plaintiff testified that he worked in asbestos dust on ships, and witnesses placed the defendant's asbestos-containing insulation materials on those ships. *Van Hout*, 121 Wash.2d at 707, 853 P.2d 908. However, "[w]hen reliance is placed upon [circumstantial] evidence, there must be reasonable inferences to establish the fact to be proved." *Arnold v. Sanstol*, 43 Wash.2d 94, 99, 260 P.2d 327 (1953).

FN4. The court explained: "Because of the long latency period of asbestosis, the plaintiff's ability to recall specific brands by the time he brings an action will be seriously impaired. A plaintiff who did not work directly with the asbestos products would have further difficulties in personally identifying the manufacturers of such products. The problems of identification are even greater when the plaintiff has been exposed at more than one job site and to more than one manufacturer's product." *Lockwood*, 109 Wash.2d at 246-47, 744 P.2d 605 (internal citation omitted).

[5][6] ¶ 8 It is equally well settled that the

plaintiff in a product liability or negligence action bears the burden to establish a causal connection between the injury, the product and the manufacturer of that product. RCW 7.72.030(1); \*730 *Iwai v. State*, 129 Wash.2d 84, 96, 915 P.2d 1089 (1996); *Lockwood*, 109 Wash.2d at 245, 744 P.2d 605. In *Lockwood*, the Washington Supreme Court set forth several factors for courts to consider when evaluating whether sufficient evidence of causation exists against a particular defendant: (1) plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product; (3) the types of asbestos products to which plaintiff was exposed and the ways in which the products were handled and used, and (4) the evidence presented as to medical causation of the plaintiff's particular disease. *Lockwood*, 109 Wash.2d at 248-49, 744 P.2d 605. The court noted, "[u]ltimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case," but that "[n]evertheless, the factors listed above are matters which trial courts should consider when deciding if the evidence is sufficient to take such cases to the jury." *Id.* at 249, 744 P.2d 605. The parties agree that the *Lockwood* "substantial factor" test applies at summary judgment.

¶ 9 The *Lockwood* court held that the worker established a prima facie case against the manufacturer of asbestos cloth "by presenting evidence that exposure to asbestos causes asbestosis; that once asbestos dust is released, it can remain in the air and drift with air currents for a long period of time; and that [defendant's asbestos] product was located at shipyards where [the worker] was employed during the period when he worked there," even though he did not introduce evidence that he directly handled the defendant's asbestos products. FN5 *Lockwood*, 109 Wash.2d at 243, 744 P.2d 605.

FN5. *Lockwood* involved an appeal from a denial of the defendant's motions for a dir-

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ected verdict, judgment notwithstanding the verdict, or a new trial.

¶ 10 In *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wash.App. 312, 14 P.3d 789 (2000), we held that the evidence was sufficient to raise a genuine issue of material fact that a PSNS machinist was exposed to asbestos-containing products\*731 of the defendant. The machinist worked at PSNS for six years aboard a number of ships and worked around insulators who used insulation materials that created substantial amounts of dust. *Id.* at 318, 14 P.3d 789. The machinist offered testimony that a distributor was among those who supplied asbestos-containing thermal insulation material to PSNS; certain brands of asbestos-containing thermal insulation were commonly used on ships repaired at PSNS; PSNS obtained those products from distributors; and defendant had been a distributor of those brands of products. *See id.* at 315–18, 14 P.3d 789. The machinist also offered expert testimony that “because asbestos dust had the ability to drift, an asbestos product used in one part of a ship could expose ‘workers in vast areas in a shipyard.’ ” *Id.* at 318, 14 P.3d 789. The machinist did not submit evidence that he worked directly with the distributor’s asbestos products and the evidence did not show how much, if any, of defendant’s product was actually released into the shipyard. But this court held that the evidence created a prima facie case under the *Lockwood* exposure test. *Id.* at 323–25, 14 P.3d 789. In doing so, we rejected the defendant’s argument that the evidence required “impermissible speculation” because the plaintiff did not provide evidence as to how much and how often PSNS purchased products from the defendant as opposed to other distributors. *Id.* at 324–25, 14 P.3d 789. We wrote, “The extent to which [defendant] supplied the products as compared with other distributors is irrelevant for purposes of summary judgment.” *Id.* at 325, 14 P.3d 789.

¶ 11 In this case, at summary judgment, Morgan provided the declaration and deposition testimony of Melvin Wortman, the declarations of Dr.

Eugene Mark and James Millette, Ph.D., the deposition testimony of Jack Knowles, and his own interrogatory answers.

¶ 12 Jack Knowles was a pipefitter at PSNS, where he worked with Morgan. Knowles testified that they worked on three aircraft carriers together: the USS Roosevelt, the USS Midway, and the USS Coral Sea. When they worked together, he and Morgan spent most of their time aboard ship and in machinery spaces. Knowles saw Morgan remove \*732 and install piping from equipment, as well as dismantle sections of piping and dismantle valves from piping. Knowles testified that the work Morgan did on flanges included removing asbestos coating on flanges, cutting insulation back from the flanges, removing flange gaskets, and cutting away pieces of pipe to remove flanges.<sup>FN6</sup> He and Morgan worked in the presence \*\*1058 of machinists, who were responsible for removing and refurbishing the pumps and working on their internal components, including changing the packing. He testified that as pipefitters, he and Morgan did not change the packing in pumps. However, there were times when he and Morgan did internal work on valves, such as replacing packing material. According to Knowles, the flange gaskets he and Morgan removed and installed were primarily made of asbestos, and the packing was pliable asbestos.

FN6. It is undisputed that Respondents did not manufacture, sell, or supply flange gaskets or insulation.

¶ 13 Knowles testified that Morgan and other workers in Morgan’s presence worked with and around new and existing<sup>FN7</sup> pumps manufactured by Aurora, Buffalo, DeLaval (IMO), and Warren. He testified that he saw Morgan perform the following tasks on these pumps: break flanges at the pumps, remove and scrape flange gaskets from the pumps, make new flange gaskets for use on new and existing pumps, and remove insulation from flanges. Knowles testified that he saw other workers in Morgan’s presence work with packing in connection with new and existing pumps of each of

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these manufacturers. As to the valve manufacturers, Powell and Weir (Atwood), Knowles testified that he witnessed Morgan remove and scrape gaskets from their valves, and make new gaskets for use on their new and existing valves.<sup>FN8</sup> Knowles also saw other workers work with packing on and make gaskets for \*733 Powell's and Weir's new and existing valves around Morgan, and scrape old gaskets from their valves.<sup>FN9</sup> Knowles believed the packing was "probably" recommended or specified by the valve manufacturer. Knowles testified repeatedly that the conditions in the air were dusty and dirty when work on the valves and pumps was being performed.

FN7. The word "existing" is used by the parties to refer to non-new pumps and valves.

FN8. In a different part of his testimony, he stated that he did not know if any of the Atwood valves that he witnessed Morgan working with were brand new.

FN9. Knowles stated later in the deposition that he did not have a specific recollection that the Atwood valves he witnessed Morgan working with contained packing.

¶ 14 The deposition and declaration of Melvin Wortman were taken in another case and related to the period from 1967 to 1971, when he was the superintendent of machinists at PSNS.<sup>FN10</sup> Wortman stated that during that period, almost all of the pumps used onboard Navy ships contained asbestos gaskets and packing. He estimated that 50 percent of the replacement parts obtained by PSNS, including replacement parts for pumps, compressors, valves, and other equipment, came from the original manufacturer. Wortman also stated that most of the gaskets and packing that were in valves, pumps, and compressors when they came into the shop for overhaul were probably provided by the original manufacturer.<sup>FN11</sup>

FN10. During this time, Morgan was a

technician in the engineering design shop.

FN11. Warren Pumps filed a notice of cross-appeal of the trial court's denial of Warren's Joint Motion to Strike Portions of the Declaration of Melvin Wortman. However, Warren does not preserve this issue by properly raising and discussing the issue in its opening brief. *See Sacco v. Sacco*, 114 Wash.2d 1, 5, 784 P.2d 1266 (1990). While IMO's briefing includes argument as to why the Wortman declaration should not be considered by this court, it acknowledges that it has not cross-appealed the trial court's ruling not to strike. Accordingly, we decline to review the trial court's admission of this evidence, and consider the Wortman declaration as the trial court did.

¶ 15 James Millette, Ph.D., stated in his declaration:

James Morgan's work to remove asbestos-containing gaskets and packing from the above equipment as well as fabricating new gaskets, resulted in exposures to asbestos that were substantially above ambient levels. This would also hold true whenever he remained in airspaces contaminated by such work conducted by others that involved gasket removal, fabrication, and replacement.

\*734 Additionally, he stated that during the time period in question, gaskets and packing to which Morgan was exposed were primarily made of asbestos.

¶ 16 Dr. Eugene Mark, a pathologist, concluded that Morgan had "developed a diffuse malignant mesothelioma of the pleura" and \*\*1059 that the asbestos to which Morgan was reportedly exposed while working at PSNS was the cause of the disease.

¶ 17 In addition, Morgan points to certain

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"admissions from defendants" as corroborating his evidence about where the original and replacement packing and gaskets came from. Specifically, each of the Respondents, other than Warren, conceded that the new pumps or valves that it supplied included asbestos-containing packing and gaskets and that it sold, in varying degrees, asbestos-containing replacement packing or gaskets.

¶ 18 Based on this evidence, Morgan argues that he has raised a genuine issue of material fact that he was exposed to asbestos contained in products that were made, sold, or supplied to PSNS by each of the Respondents and that such exposure was a substantial factor in causing his mesothelioma.

¶ 19 Respondents acknowledge supplying PSNS with pumps or valves, but argue that Morgan's evidence is insufficient to create a material dispute about whether the new pumps and valves or the replacement materials they supplied to PSNS contained asbestos. For example, Aurora claims that "the only evidence regarding a brand-new Aurora pump that was sent to PSNS concerns a GNC-17 End Suction Navy Pump that was shipped in 1960 and that was used to pump aviation fuel on the *U.S.S. Coral Sea*." It claims that pump utilized mechanical seals that eliminated the need for packing and internal gaskets, and thus a jury could not reasonably infer that Morgan was exposed to asbestos packing or gaskets that it sold or supplied. IMO argues that "[e]ven if one could conclude that Mr. Knowles observed Mr. Morgan working around DeLaval pumps in which new packing supplied by DeLaval was being installed,\*735 there is no basis to also conclude that the packing contained asbestos.... [T]he evidence regarding the particular types of pumps described by Mr. Farrow and Mr. Knowles is that the 'vast majority' did not have asbestos-containing packing (or gaskets)." Weir argues that "while there is evidence that Atwood & Morrill may have sold some replacement parts to the Navy, plaintiff offered no evidence to prove that any asbestos-containing replacement parts sup-

plied by Atwood & Morrill were actually present at PSNS, or were ever used on any ship in Mr. Morgan's presence."

¶ 20 The Respondents also contend that Morgan presented insufficient evidence that he worked on or around any of their products in such a manner that he was exposed to any asbestos. For example, Weir points out that Michael Farrow testified that he saw Morgan working with Atwood valves "many times." But Weir contends that when pressed for specifics, Farrow could only point to an instance when Morgan removed an Atwood valve "from the machinery space in the engine room aboard the USS Princeton in March 1954." Farrow did not know whether the valve contained asbestos packing, nor did he see Morgan working on the internal components of the valve.

¶ 21 Finally, Respondents argue that even to the extent Morgan offered evidence of his exposure to asbestos contained in products that they sold, the evidence is insufficient to establish a material dispute that the exposure was a substantial factor in causing his mesothelioma. They contend that the evidence of Morgan's exposure to their individual products is insufficient as a matter of law to find that their products were a substantial factor in causing his disease, particularly in comparison to his exposure to other asbestos-containing products at PSNS. They also argue, in regard to Morgan's exposure to asbestos in packing, that it cannot be a substantial factor because Morgan's own expert opined that new and unused packing is not "friable," i.e., does not release respirable asbestos fibers when manipulated. In addition, Respondents point out that Morgan's \*736 causation experts have no personal knowledge of Respondents' specific products or of Morgan's alleged exposure to them but instead rely on the testimony of Farrow, Knowles and Wortman.<sup>FN12</sup>

FN12. Some Respondents also argue that Morgan's claims against them are barred by the government-contractor defense. Buffalo cites *Boyle v. United Technologies*

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*Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) and argues that it cannot be held liable because its pumps and their components were furnished to the Navy in conformance with its precise specifications, making Buffalo immune under the government-contractor defense. Moreover, it argues that the Navy had superior knowledge of any hazards posed by asbestos exposure and was a superseding cause. Powell and Weir also claim the government-contractor defense.

In response, Morgan points out that in *Timberline Air v. Bell Helicopter-Textron*, 125 Wash.2d 305, 324-30, 884 P.2d 920 (1994), the Washington Supreme Court explained that the issues are "generally different in a government specification defense based on warnings than in a government specification defense based on design defect." He also points out that Buffalo admits that the military specification defense was only raised with regard to Morgan's design defect claim. "Thus, there is no basis to dismiss plaintiffs' warning claims based upon the government-contractor defense."

**\*\*1060 [7] ¶ 22** We agree with Morgan that when the evidence is viewed in a light most favorable to him, there are disputed issues of material fact regarding: (1) whether Morgan was exposed to asbestos-containing products made, sold, or supplied by Respondents and (2) whether, under *Lockwood*, such exposure was a substantial factor in causing his mesothelioma.

¶ 23 First, Morgan has presented evidence that he was exposed to asbestos contained in products manufactured, sold, or supplied by Respondents. This evidence is found in the combined testimony of various witnesses. Knowles testified that he saw Morgan, or other workers in Morgan's presence, work on the internal parts of all of the Respondents'

pumps and valves. And all of the Respondents, except Warren, acknowledge supplying replacement parts to PSNS on occasion. In addition, Wortman testified that approximately 50 percent of replacement parts he saw came from the original manufacturers.

[8] ¶ 24 The Respondents vigorously contest this evidence, but the majority of their arguments go to the weight and credibility of Morgan's evidence or attempt to contradict his \*737 evidence with their own evidence.<sup>FN13</sup> Some Respondents contend that Morgan does not offer evidence that *he* directly worked with the internal parts of their pumps, while overlooking Morgan's evidence that he worked around *others* who did this work.<sup>FN14</sup> Washington courts do not require a plaintiff himself to work directly with a defendant's asbestos-containing material. Warren makes the point that Wortman's testimony relates to a different time period, which is a relevant consideration. But a reasonable inference can be drawn that the brands of parts used at PSNS did not change significantly within a few years.<sup>FN15</sup> Whether new packing is friable is also relevant, but as Morgan points out, there is conflicting evidence about that issue. Moreover, Morgan claims not only that he was exposed to asbestos in new packing; he also alleges he was exposed to asbestos during the removal of used packing and gaskets. Some Respondents put forth their own evidence about the specific products they supplied to PSNS and why Morgan could not have been exposed to asbestos from these \*738 products, but Morgan is correct in that this evidence is contradicted by his own witnesses' testimony.<sup>FN16</sup>

FN13. For example, Weir points out that Michael Farrow testified that he saw Morgan working with Atwood valves " 'many times.' " But Weir contends that when pressed for specifics, Farrow could only point to an instance when Morgan removed an Atwood valve "from the machinery space in the engine room aboard the USS Princeton in March 1954." Farrow did not

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know whether the valve contained asbestos packing, nor did he see Morgan working on the internal components of the valve. Weir argues that "while there is evidence that Atwood & Morrill may have sold some replacement parts to the Navy, plaintiff offered no evidence to prove that any asbestos-containing replacement parts supplied by Atwood & Morrill were actually present at PSNS, or were ever used on any ship in Mr. Morgan's presence."

FN14. For example, according to Warren, Morgan presented no evidence that he worked on the internal parts of a Warren pump. "Thus, Plaintiffs' entire claim against Warren is founded on Mr. Knowles's testimony that Plaintiff was nearby when someone else worked with brand-new packing on a Warren pump."

FN15. Warren points out that Wortman's testimony was limited to 1967 to 1971, when Morgan worked in the engineering design shop. "Because Plaintiff was not working with Mr. Wortman in Shop 31, and was not working on any equipment during the relevant time period (1967-1971), Mr. Wortman's testimony about the use of replacement components inside the machine shop is not relevant to plaintiff's claims."

FN16. For instance, IMO argues that "[e]ven if one could conclude that Mr. Knowles observed Mr. Morgan working around DeLaval pumps in which new packing supplied by DeLaval was being installed, there is no basis to also conclude that the packing contained asbestos.... [T]he evidence regarding the particular types of pumps described by Mr. Farrow and Mr. Knowles is that the 'vast majority' did not have asbestos-containing packing (or gaskets)."

Morgan argues that evidence that he worked with or around material originally supplied by DeLaval *was* contained in Knowles's testimony: He answered "yes" to the question, "Do you recall seeing other people work with packing in Mr. Morgan's presence on brand-new DeLaval pumps?" Morgan argues that IMO's claim that he worked only around fuel oil/lube oil pumps and its corporate representative's testimony that the vast majority of those gaskets and packing were non-asbestos materials did not have to be believed by the jury, because there was conflicting testimony. Morgan points to Knowles' testimony that "'most of that [packing] was a pliable asbestos.'"

\*\*1061 ¶ 25 The Respondents rely on *Braaten*, and *Simonetta* to argue that Morgan's evidence is insufficient as a matter of law to survive summary judgment, but their reliance on these cases is misplaced. *Braaten* is the more relevant decision because in *Braaten* the defendants were also manufacturers of pumps and valves that were sold to the Navy and used aboard ships. The trial court dismissed Mr. Braaten's case on summary judgment and the Washington Supreme Court affirmed because his evidence was insufficient to show that he was exposed to asbestos originally contained in packing and gaskets supplied by the defendants, and there was no evidence that the defendants sold or supplied the replacement packing or gaskets to which Mr. Braaten was allegedly exposed. *Braaten*, 165 Wash.2d at 380-81, 198 P.3d 493. The court specifically noted the uncontroverted testimony of Mr. Braaten that he did not work with new pumps and valves; that he was not exposed to asbestos when others installed new pumps; and that by the time he worked on the defendants' products, it was impossible to tell how many times the original packing and gaskets supplied by the defendants had been replaced with packing and gaskets supplied by other companies. *Id.* at 381-82, 198 P.3d 493. But

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Morgan, unlike Mr. Braaten, presented evidence that he was exposed to asbestos originally contained in products \*739 supplied by Respondents or asbestos in replacement products supplied by Respondents.

[9][10] ¶ 26 The next issue is whether Morgan presented sufficient circumstantial evidence to create an issue of fact that under *Lockwood*, his alleged exposure to Respondents' asbestos products was a substantial factor in causing his mesothelioma. The first factor concerns Morgan's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released. The second factor is the extent of time the plaintiff was exposed to the product. "The proximity and time factors can be satisfied if there is evidence that the plaintiff worked at a job site where asbestos products were used, particularly where there is expert testimony that asbestos fibers have the ability to drift over an entire job site." *Allen*, 138 Wash.App. at 571, 157 P.3d 406. Morgan worked as a pipefitter at PSNS for approximately nine years and developed mesothelioma.<sup>FN17</sup> It would be virtually impossible to know exactly how much time Morgan was exposed to the products of each Respondent. But Knowles testified that he saw Morgan or workers around Morgan work with Respondents' pumps and valves, and both Knowles and Wortman testified that at least some, if not most, of the gaskets and packing were made of asbestos. Also, Morgan provided expert testimony that removing asbestos-containing gaskets and packing resulted in exposures to asbestos that were "substantially above ambient levels." This was also "true whenever he remained in airspaces contaminated by such work conducted by others that involved gasket removal, fabrication, and replacement."

FN17. Although he was employed at PSNS for approximately 37 years, his claim focuses primarily on the time that he worked as a pipefitter.

¶ 27 The third factor is the types of asbestos

products to which a plaintiff was exposed and the ways in which the products were handled and used. Here, the asbestos attributed to Respondents was in packing and gaskets that either arrived at PSNS with or inside their pumps and valves, or \*740 were supplied to PSNS as replacement packing and gaskets. The parties generally dispute both that Respondents' pumps and valves contained asbestos and that they were handled\*\*1062 and used in such a manner that asbestos fibers were released in Morgan's vicinity. But he presented evidence that, at the very least, created an issue of fact as to whether the work he or others did on Respondents' pumps and valves resulted in asbestos exposure.

¶ 28 The last *Lockwood* factor is the evidence presented as to medical causation of the plaintiff's particular disease.

Such evidence would include expert testimony on the effects of inhalation of asbestos on human health in general and on the plaintiff in particular. It would also include evidence of any other substances that could have contributed to the plaintiff's disease, and expert testimony as to the combined effects of exposure to all possible sources of the disease. The consideration of other potential sources of the plaintiff's injury is necessary because exposure to materials other than asbestos may also cause a number of the diseases associated with inhalation of asbestos fibers, and the risk of contracting disease may be increased by the combined effects of exposure to more than one substance, such as asbestos and cigarette smoke.

*Lockwood*, 109 Wash.2d at 248-49, 744 P.2d 605 (internal citation omitted). Here, pathologist Eugene Mark, M.D., concluded that Morgan had "developed a diffuse malignant mesothelioma of the pleura" and that the asbestos to which Morgan was reportedly exposed while working at PSNS was the cause of the disease. Respondents do not allege that there was any other factor causing Morgan's mesothelioma besides his exposure to asbestos at PSNS.

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¶ 29 Respondents argue that the evidence of Morgan's exposure to their individual products is insufficient as a matter of law to find that their products were a substantial factor in causing his disease, particularly considering his likely exposure to other asbestos-containing products at PSNS. While we do not decide the frequency of asbestos exposure a plaintiff must demonstrate to survive summary judgment, we note that this case involves allegations of more than a single instance of exposure to asbestos from \*741 each Respondent's products. Knowles testified that Morgan worked with new and existing pumps or valves—plural—from each Respondent, which means that Morgan could have been exposed to asbestos in each Respondent's products numerous times during the years he worked at PSNS, particularly in his capacity as a pipefitter/steamfitter. For purposes of summary judgment, this showing is sufficient.

[11] ¶ 30 Finally, regarding Respondents' government-contractor defense, we agree with the trial court that it is an affirmative defense that is fact-intensive and a matter for the jury.<sup>FN18</sup>

FN18. In its oral ruling, the court stated, "With regard to the military specification defense, it would be an affirmative defense. The burden would be on any or all of the defendants to prove it by a preponderance of the evidence to the trier of the fact."

¶ 31 In sum, Morgan alleges evidence that raises an issue of material fact as to whether he was exposed to asbestos from each Respondent and whether the exposure was a substantial factor in causing his mesothelioma. The trial court erred in dismissing his claims on summary judgment.

¶ 32 *Reverse.*

WE CONCUR: GROSSE and SCHINDLER, JJ.

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