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NO. 62399-1

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

GEORGE ABBAY and LYNN
ABBAY, husband and wife,

Appellants,

v.

LESLIE CONTROLS, INC., et al.,

Respondents.

APPEAL FROM THE KING COUNTY
SUPERIOR COURT

Cause Nos. 07-2-36540-1 SEA and 07-2-36537-1 SEA

APPELLANTS' REPLY BRIEF

Brian P. Barrow, *pro hac vice*
Counsel for Appellants
SIMON, EDDINS & GREENSTONE LLP
301 E. Ocean Boulevard, Suite 1950
Long Beach, California 90802
(562) 590-3400

Janet L. Rice, WSBA #9386
Counsel for Appellants
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

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REPLY ARGUMENT

Respondents assert a number of arguments to support affirmance of the summary judgment in this case. A main issue in this appeal, however, is whether naval vessels are themselves, or can become, federal enclaves. If the answer is “yes,” then plaintiffs suffer a harsh result as the consequence of trying to avoid the delays associated with removal to federal court. If the answer is “no,” as the Abbays assert, their claims involving exposures to asbestos aboard naval vessels remain viable, were not disclaimed, and the trial court’s order granting summary judgment should be reversed.

I.

Respondents Do Not Distinguish Either *McCormick* or *Anderson*, Two Cases Holding that Vessels Present In Naval Shipyards Are Not, and Do Not Become, Federal Enclaves.

At the outset, it is important to recognize that respondents never argue that naval vessels are themselves federal enclaves. They are foreclosed from making that argument because the Enclave Clause of the U.S. Constitution does not specify vessels as being a “place” subject to the exclusive legislation of the United States government. U.S. Const., art. 1, sec. 8, cl. 17. Common legal usage defines “place” as a “locality, situation, or site,” limited by boundaries, however large or small. Black’s

Law Dictionary 1148 (6th ed. 1990). In the context of the enclave clause, a “place” obviously refers to land, a conclusion that is supported by the clause’s purpose to establish governance of places that “shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings.” Forts, magazines, arsenals, dockyards, and other buildings can only be erected on land. See *United States v. Johnson*, 994 F.2d 980, 984-985 (2nd Cir. 1993). Stated simply, federal enclaves don’t move.

A “vessel,” in turn, is commonly defined as “a ship, brig, sloop, or other craft used, or capable of being used, in navigation on water.” Black’s Law Dictionary 1562 (6th ed. 1990). A naval vessel is therefore not a “place,” but rather an object that moves on water. Importantly, none of the respondents suggest that a fort, magazine, arsenal, dockyard, or building could be erected on water or, for that matter, a vessel. A “place,” at least as used in the Enclave Clause of the Constitution, thus does not mean a “vessel,” and certainly not a naval vessel.

It follows that a naval vessel is not a federal enclave for purposes of invoking federal enclave jurisdiction. *Anderson v. Crown Cork & Seal*, 93 F.Supp.2d 697, 700 (E.D. Va. 2000); *McCormick v. C.E. Thurston and Sons, Inc.*, 977 F.Supp. 400, 402 (E.D. Va. 1997) [“The amount of authority suggesting that this ground for federal jurisdiction should extend beyond torts that occur on federally procured *lands* is imperceptible.”]. It

is thus plaintiffs' primary position that asbestos exposures that occur aboard a naval vessel do not arise on a federal enclave.

Precluded from arguing that naval vessels are themselves federal enclaves, respondents resort to arguing that vessels that enter a federal enclave become enclaves themselves for as long as they remain within its boundaries. As respondent Leslie Controls put it, "the clear weight of legal authority and logic show that naval vessels are considered within and part of the federal enclave when present thereon." Leslie RB at pp. 1-2.

Not so. The only two cases addressing this issue, both of which involved asbestos exposure aboard naval vessels, hold to the contrary. In *McCormick*, the court generally held that federal enclave status applies to land, thereby precluding vessels from being enclaves. *McCormick, supra*, 977 F.Supp. at p. 402. Extending *McCormick*, the *Anderson* court held that even a naval vessel docked within a federal enclave did not become part of that enclave: "the court cannot find . . . that the decedent was exposed 'in' the Norfolk Naval Shipyard, as opposed to on a vessel docked in the Shipyard." *Anderson, supra*, 93 F.Supp.2d at p. 701. The key fact in *Anderson* was that the asbestos exposure occurred aboard the vessel, and had nothing to do with the location of that vessel in the supposed federal enclave. The circumstances here are the same in that

respondents do not dispute that Mr. Abbay sustained exposures to asbestos while aboard naval vessels at the PSNS.

Respondents nevertheless attempt to distinguish *McCormick* and *Anderson* by arguing that Mr. Abbay was a shipyard worker employed at PSNS and not a navy seaman, and therefore his asbestos exposures (even those aboard the naval vessels) were connected to PSNS by his employment status. See, e.g., Crane Co. RB at p. 22; Leslie RB at p. 21. But employment status had nothing to do with the holdings in either *McCormick* or *Anderson*. The explicit basis for the *McCormick* holding was, put simply, the rejection of “any suggestion that the USS Nimitz is or ever was a ‘federal enclave’ sufficient to establish jurisdiction” *McCormick, supra*, 977 F.Supp. at p. 402. Contrary to respondents’ argument, the *McCormick* court never made any statement that the Nimitz would have been a federal enclave if the decedent had been a shipyard worker instead of a naval seaman.

Likewise, in *Anderson*, the underlying rationale was that “the decedent’s exposure occurred on the U.S.S. Laffey, and not as a result of the Laffey’s location ‘in’ the Shipyard.” *Anderson, supra*, 93 F.Supp.2d 697, 701. And, again, there was no specific finding by the *Anderson* court that a naval vessel could become a federal enclave depending on the employment status of persons who might be exposed to asbestos aboard it.

The *Anderson* court did not hold that federal enclave status was so flexible or migratory; to the contrary, the court's holding ultimately rested on the same analysis as in *McCormick*, which was based on the legal and factual conclusion that naval vessels cannot be enclaves because they are not land acquired by the United States government. *Ibid.*

Respondents' attempt to distinguish *McCormick* and *Anderson* is consistent with the trial court's finding that whether a particular naval vessel is a federal enclave is subject to a case-by-case analysis turning on the plaintiff's employment status. Such an approach runs contrary to the constitutional definition of a federal enclave, and leads to the illogical conclusion that a vessel may be considered a federal enclave for some people, but not others. There is no authority for such a conclusion and respondents offer no explanation or showing that the Abbays' position on this is incorrect.

Because federal enclaves are clearly "places," and not objects, the analysis must look to the location of the exposure (i.e., the vessel), not the status of the person who was exposed. Respondents failed to provide any general authority that a place may be deemed a federal enclave for one person, and not for another. More specifically, respondents failed to provide any authority that a shipyard worker like Mr. Abbay would be subject to federal enclave jurisdiction for exposure on a particular vessel,

while other personnel – such as a naval seaman sustaining similar asbestos exposures on the same vessel – would not be. If federal enclave status is so flexible and amorphous, the federal government would never have exclusive jurisdiction over any place if that place was only sometimes a federal enclave, or only a federal enclave for certain people. Respondents offer no counter to this, and without supporting authority, cannot validly distinguish this case from either *McCormick* or *Anderson*.

II.

Respondents Have No Authority Holding That Navy Vessels Become Federal Enclaves When Docked At a Naval Shipyard.

Respondents rely on a series of cases for the proposition that federal enclave status attaches to vessels when they are located within, tied up to, or dry-docked at an alleged enclave. Most of these cases involve different circumstances, such as crimes, automobile accidents, and aircraft crashes that occurred on land within federal enclaves. None of them directly address the question of whether naval vessels either are, or can become, federal enclaves depending on their location. Respondents do cite to four cases that actually involve naval shipyards and/or vessels, but – as will be explained – none of them are valid support for their argument, particularly in light of *McCormick* and *Anderson*.

First, as discussed in the opening brief, *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D. Cal. 1992) contains no legal or factual discussion about whether the subject vessels – submarines under repair or construction at a naval shipyard – were or had become federal enclaves. The court merely assumed, without any analysis or apparent argument to the contrary from plaintiffs, that the submarines were federal enclaves. *Fung's* value as guiding precedent is minimal because it contains no suggestion that federal enclaves can be anything other than land, and contains no explicit holding that naval vessels are, or can become, federal enclaves.

Likewise, in *In re Welding Rod Prods. Liab. Litig.*, 2005 WL 147081 (N.D. Ohio 2005), numerous plaintiffs brought suit for damages arising from exposure to toxic fumes produced during welding. As to one of those plaintiffs, Buteaux, the court apparently identified federal enclave jurisdiction because his alleged exposure took place aboard a naval vessel docked at the Charlestown Naval Shipyard. Just as in *Fung*, however, there was no legal or factual analysis as to whether the vessel was an enclave, and the plaintiff made no contention that it was not. In assuming that the vessel was an enclave, the *In re Welding Rods* court neither addressed nor held that a naval vessel was, or could become, a federal enclave. Like *Fung*, its precedential value in these circumstances is minimal.

Respondents next argue that *Torrens v. Lockheed Martin Serv. Group, Inc.*, 396 F.3d 468 (1st Cir. 2005) supports their position. *Torrens*, however, was a wage and benefits case for past work performed in the piers area of a navy base in Puerto Rico. The court concluded that federal enclave jurisdiction might extend to facilities built in the area, which extended from landfill, including a dry dock. *Id.* at p. 469, 473. The opinion focuses on the facilities located on the base, and makes no statement regarding vessels. *Id.* at p. 473.

Finally, respondents rely on *EEX Corn. v. ABB Vetco Gray, Inc.*, 161 F.Supp.2d 747 (S.D. Tex. 2001). This opinion, however, involves federal jurisdiction pursuant to the Outer Continental Shelf Lands Act, and not the Enclave Clause of the U.S. Constitution: “Both parties agree that this court has original jurisdiction based on the shelf act.” *Id.* at p. 750. Moreover, the facts involve an oil drilling platform, which under the shelf act, “ceases to be a vessel the moment it attaches itself to the shelf” *Id.* at p. 751. There are no facts here suggesting that any of the naval vessels that Mr. Abbay worked aboard ever attached themselves to either a continental shelf or a federal enclave. And like the other cases cited by respondents, there is no discussion in *EEX* about whether vessels are, or can become, federal enclaves upon entering a naval shipyard.

The bottom line is that the two most direct and applicable opinions as to whether vessels can be federal enclaves are *McCormick* and *Anderson*. Both opinions support the well-reasoned proposition that vessels such as those Mr. Abbay worked aboard are not federal enclaves and do not become such merely upon entering a naval shipyard. Their holdings directly contradict respondents' argument, and require three conclusions: (1) the vessels that Mr. Abbay worked aboard were not federal enclaves; (2) the exposures to asbestos that he sustained aboard those vessels did not occur on a federal enclave; and, (3) the Abbays' disclaimer does not apply as a bar to any claims arising aboard those vessels. The trial court's decision to grant summary judgment based on the Abbays' disclaimer was incorrect and should be reversed.

III.

This Court Should Not Adopt Respondents'

Alternative Arguments as Grounds to Affirm.

All of the respondents, except for Foster Wheeler Energy Corporation, asserted alternative grounds to affirm summary judgment based on duty and/or causation. Stated generally, these respondents assert that the Abbays have no evidence to show that Mr. Abbay ever worked with asbestos-containing products actually manufactured, distributed, sold, or supplied by the respondents. These arguments are unique to each

respondent, but rely on the holdings of two recent Washington Supreme Court cases that were issued *after* the trial court granted summary judgment in this case, *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373 (2008) and *Simonetta v. Viad Corp.*, 165 Wn.2d 341 (2008). These opinions, which were issued in December 2008, arguably reversed the direction of the law and imposed certain limits on failure to warn claims.

The trial court in this case granted summary judgment in July 2008, before issuance of the *Braaten* and *Simonetta* opinions. As a result, the new legal and factual issues arising from those cases were never fully developed, argued, or briefed before the trial court. In fact, the general types of issues raised in *Braaten* and *Simonetta* (i.e., duty to warn where a manufacturer's product works in conjunction with a product of another) were never argued before the trial court. The only issue argued before the trial court, and the only ground discussed in the trial court's order granting summary judgment, was whether the Abbays' federal enclave disclaimer applied to all of their claims.

While the Abbays concede that this court has discretion to affirm a trial court decision based on grounds not presented to the trial court, it is well-established that the record below must be sufficiently developed in order to consider such grounds. RAP 2.5(a); *Plein v. Lackey*, 149 Wash.2d 214, 222 (2003). Indeed, a case will not be resolved on an issue

not presented below unless it is clear that the parties had a full and fair opportunity to develop facts related to the issue. *Bernal v. Am. Honda Motor Co.*, 87 Wash.2d 406, 414 (1976); see also *Braaten, supra*, 165 Wash.2d at p. 400 [Stephens, dissenting].

Here, given that *Braaten* and *Simonetta* were not issued until *after* the trial court granted summary judgment, the Abbays did not have a full and fair opportunity to either develop the facts, brief the issues, or argue them to the trial court. Most notably, the Abbays did not have the benefit of either *Braaten* and/or *Simonetta* to guide their underlying fact discovery with regard to whether respondents manufactured, distributed, sold, or supplied the particular asbestos-containing products that Mr. Abbay was exposed to. Moreover, if the Abbays had known how *Braaten* and *Simonetta* would impact failure to warn claims, they would have undertaken further discovery in support of their defective design and general negligence claims. Should this court reverse the trial court's order granting summary judgment on the disclaimer issue as discussed above, the Abbays request this court to decline affirmance based on respondents' alternative grounds for summary judgment and remand this case for further proceedings in light of the new duty and causation issues raised by *Braaten* and *Simonetta*.

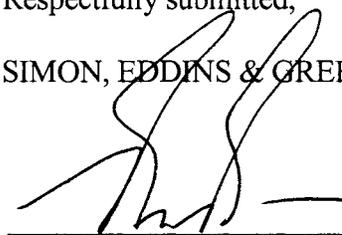
CONCLUSION

The only two cases directly addressing the issues presented by this appeal hold that naval vessels are not federal enclaves and that injuries occurring aboard them do not arise on a federal enclave. Respondents' and the trial court's attempts to distinguish these cases on the basis of Mr. Abbay's employment status leads to inconsistent results that run contrary to the ultimate purpose of the Enclave Clause. Respondents provide no other valid support for their argument that exposures to asbestos aboard naval vessels (wherever they might be located) arise on a federal enclave. It follows that the Abbays did not disclaim recovery for Mr. Abbay's exposures that occurred on naval vessels in PSNS, and that the trial court's order granting summary judgment was incorrect.

Dated: September 16, 2009

Respectfully submitted,

SIMON, EDDINS & GREENSTONE LLP



BRIAN P. BARROW, *pro hac vice*
Attorney for Appellant

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

GEORGE ABBAY and LYNN
ABBAY

Appellant,

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NO. 62399-1-I

DECLARATION OF
SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am an employee of Simon, Eddins & Greenstone, over the age of 18, not party to this action and competent to make the following statements:

2. **On September 16, 2009**, copies of Appellant's Reply Brief; and this Declaration of Service were served upon the attorneys of record for the plaintiff/appellant by having said copies sent via Federal Express to the office addresses below:

Counsel for Leslie Controls;

Mark Tuvim
Kevin Craig
Gordon & Rees LLP
701 Fifth Avenue, Suite 2130
Seattle, WA 98104

via Federal Express

**Counsel for Warren Pumps LLC; Cameron
International Corp.**

J. Michael Mattingly
RIZZO MATTINGLY
Lincoln Place, Suite 350
1620 S.W. Taylor Street
Portland, Oregon 97205

via Federal Express

Counsel for Elliott Company

E. Pennock Gheen
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900
Seattle, Washington 98101-3028

via Federal Express

Counsel for Viking Pump

Jason C. Hawes
JACKSON & WALLACE, LLP
1201 3rd Ave, Suite 3080
Seattle, WA 98101

via Federal Express

Counsel for Foster-Wheeler Energy Corp.

Dirk Bernhardt
MURRAY DUNHAM & MURRAY
200 West Thomas, Suite 350
Seattle, Washington 98119

via Federal Express

Counsel for IMO

James Horne/ Michael Ricketts
GORDON THOMAS HONEYWELL
One Union Square
600 University, Suite 100
Seattle, Washington 98101

via Federal Express

Counsel for Aurora Pump

Jerret E. Sale
Deborah L. Carstens
BULLIVANT HOUSER BAILEY PC
1601 Fifth Ave., Ste. 2300
Seattle, WA 98101

via Federal Express

Counsel for FMC Corp.; Sterling Fluid

Katherine Steele
STAFFORD FREY COOPER
601 Union Street; Suite 3100
Seattle, Washington 98101-1374

via Federal Express

Counsel for Aurora Pump

Jeanne F. Loftis
BULLIVANT HOUSER BAILEY PC
888 SW Fifth Avenue, Suite 300
Portland, Oregon 97204-2089

via Federal Express

Counsel for Yarway Corp.

Ronald C. Gardner
GARDNER BOND TRABOLSI
2200 Sixth Avenue, Suite 600
Seattle, Washington 98121

via Federal Express

Counsel for Cleaver Brooks; Saberhagen Holdings

Timothy K. Thorson
Aaron V. Rocke
CARNEY BADLEY SPELLMAN, PS
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104

via Federal Express

Counsel for Crane Co.

Paul Lawrence
Michael K Ryan
K & L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104

via Federal Express

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

DATED at Long Beach, California, this 16th day of September 2009.



GABRIELA MERCADO