

62996-4

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No. 62996-4-I
(Consolidated)

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

MICHAEL FARROW and LIDIA FARROW,

Appellants,

v.

LESLIE CONTROLS, INC., et al.,

and

ALFA LAVAL, INC., et al

Respondents.

APPEAL FROM THE KING COUNTY SUPERIOR COURT
Cause No. 08-2-07177-4 SEA

BRIEF OF RESPONDENT IMO INDUSTRIES, INC.

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I. INTRODUCTION

As in another case already before this Court involving the same plaintiffs' law firms,¹ in order to avoid having their lawsuit removed to federal court, Appellants Michael and Lidia Farrow included a clause in their complaint that disclaimed "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessel." Appellants now assert this disclaimer either was misinterpreted by the trial court (in this and several other King County Superior Court cases), or that they are empowered to now reinterpret the language to attach an altogether different meaning than was found to exist by those trial courts. In either event, Appellants' attempt to overturn the summary judgment ruling enforcing their disclaimer is unpersuasive, contrary to existing case law and, more importantly, contrary to the very language chosen by their counsel to avoid removal to federal court.

In the underlying lawsuit, IMO Industries, Inc.² ("IMO") moved for summary judgment based upon Appellants' disclaimer of all

¹ *Abbay v. Leslie Controls, Inc., et al.*, No. 62399-1-I ("*Abbay*"). Before the trial court, both here and in *Abbay*, plaintiffs were represented by the Seattle law firm of Schroeter Goldmark & Bender and Simon Eddins & Greenstone of Long Beach, California. In the *Abbay* appeal, appellants, again, are represented by both Schroeter Goldmark & Bender and Simon Eddins & Greenstone. In the present appeal, however, appellants are represented only by Schroeter Goldmark & Bender.

² IMO Industries, Inc. was sued individually and as a successor-in-interest to DeLaval Turbine, Inc.

enclave-related exposures. IMO also moved for summary judgment on any claim that Michael Farrow was exposed to asbestos while serving in the United States Navy from 1950 to 1953, or while working at various nuclear submarine facilities between 1974 and 1991. Appellants did not oppose IMO's latter bases for summary judgment, choosing to respond only to IMO's arguments regarding the disclaimer of enclave-related claims and the effect of that disclaimer on claims for asbestos exposure at Puget Sound Naval Shipyard ("PSNS").

Following the presentation of extensive briefing, evidentiary materials, and oral argument, the trial court initially concluded (1) that the final clause of Appellants' disclaimer ("which expressly excludes U.S. Navy vessel") was not ambiguous and clearly encompassed all land and ship-based claims arising within a federal enclave. Thereafter, to permit Appellants to challenge the adequacy and admissibility of documentation submitted by IMO to demonstrate that PSNS was and is, in fact, a federal enclave, the trial court permitted additional briefing on those issues.

Following the submission of opposing briefing by both Appellants and Respondents, the trial concluded the submitted documents were admissible and that they established PSNS was a federal enclave. The trial court, on October 22, 2008, issued its Order

Granting Defendant IMO Industries, Inc.'s Motion for Summary Judgment and, except for relatively minor issues, denied Plaintiffs' motions for reconsideration of the Orders Granting Motions for Summary Judgment.

It is respectfully submitted that this Court should affirm each of the trial court's rulings. First, there is no triable issue with respect to the federal enclave status of PSNS. The trial court's determination of that issue is consistent with prevailing law throughout the United States and in accordance with prior determinations of the status of PSNS as a federal enclave by the U.S. Supreme Court, the Washington Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit. It also is supported by specific evidence produced in this case. Second, the clear weight of legal authority and logic support the determination that U.S. Navy vessels tied to the pier and/or dry docked at a federal enclave are part of the enclave. Accordingly, any exposures to asbestos dust by Mr. Farrow while working on those vessels was likewise encompassed by the federal enclave disclaimer at issue in this case. Third, despite Appellants' contention they never intended to disclaim ship-based asbestos exposure claims occurring within a federal enclave, the plain language of their disclaimer is to the contrary. Generally accepted rules of grammar and construction, when applied to the language of that disclaimer, supports the trial

court's conclusion that Appellants' language fails to exclude or except from the broad disclaimer language any such ship-based asbestos exposure claims that occurred within the federal enclave of PSNS or other federal enclaves.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court correctly dismissed IMO on IMO's own federal enclave-based summary judgment motion.

2. The trial court correctly found that U.S. Navy vessels on which Mr. Farrow worked were either in dry dock or tied to a pier at PSNS and, therefore, were part of the federal enclave.

3. Case law and logic supports the trial court's conclusion that Navy vessels that were dry-docked or tied to a pier at PSNS for maintenance and repair become part of the federal enclave.

4. The trial court's interpretation of Appellants' disclaimer, which is based both on its plain language and Appellants' counsel's clarifying remarks, is consistent with rules of grammar and construction and should be affirmed.

III. JOINDER IN BRIEFS OF OTHER RESPONDENTS

Pursuant to RAP 10.1(g), IMO joins in the Brief of Respondents Leslie Controls, Inc. and ITT Corporation, and in the Response Brief of Respondents Crane Co.; Garlock Sealing Technologies, Inc., Fairbanks Morse Pump Corporation; Coltec Industries; and McWane, Inc.

IV. COUNTER-STATEMENT OF THE CASE

As noted above, pursuant to RAP 10.1(g), IMO joins in the briefs of Respondents Leslie Controls, Inc. and ITT Corporation, and of Respondents Crane Co.; Garlock Sealing Technologies, Inc., Fairbanks Morse Pump Corporation; Coltec Industries; and McWane, Inc., including the counter-statements of the case contained therein. IMO provides the following additional facts particular to its motion for summary judgment before the trial court:

On May 23, 2008, Defendant IMO Industries, Inc.'s Motion for Summary Judgment was filed along with the Declaration of James E. Horne in Support of Defendant IMO Industries, Inc.'s Motion for Summary Judgment which sought dismissal of all claims by Appellants based upon (1) Appellants' disclaimer of all enclave-related exposures to asbestos at PSNS, and (2) all claims pertaining to pertaining to Michael Farrow's alleged exposure to asbestos in the United States Navy as a Messenger aboard the USS Princeton (CV-37) from 1950 to 1953, and Mr. Farrow's alleged exposure to asbestos from his work as an Engineering Technician on nuclear submarines at various federal enclaves for the United States Department of Defense between 1974 and 1991. L-CP 51-141.³

³ The separate appeals filed by Appellants Farrow in *Farrow v. Leslie Controls, Inc., et al.* (No. 62996-4-1) and *Farrow v. Alfa Laval, Inc., et al.* (No. 63554-9-1), while now consolidated, have separate sets of Clerk's Papers. The prefix "L-CP" will be

On August 25, 2008, Appellants' filed Plaintiffs' Opposition to the Motions for Summary Judgment by Defendants IMO, Thomas Dee, Elliott, and All Joinders in One or More of Such Motions (L-CP 229-42), along with the Supporting Declaration of William Rutzick. L-CP 179-228. In their responsive brief, Appellants challenged the sufficiency of evidence regarding the transfers of land purportedly constituting the federal enclave of PSNS. L-CP 237-41.

On September 2, 2008, IMO filed Defendant IMO Industries, Inc.'s Reply Brief in Support of Summary Judgment which exposed Appellants' recently revised arguments about their "interpretation" of the disclaimer language as false and contrary to the position taken by Appellants' co-counsel in numerous King County cases as well as cases filed in other jurisdictions. L-CP 243-56. In addition, the Second Declaration of James E. Horne in Support of Defendant IMO Industries, Inc.'s Motion for Summary Judgment introduced the deeds and other documents establishing the basis for the federal enclave status of PSNS. L-CP 257-1442.⁴

used herein to refer to the Clerk's Papers submitted in the *Farrow v. Leslie Controls, Inc., et al.* matter and the prefix "A-CP" will be used to refer to the Clerk's Papers submitted in the *Farrow v. Alfa Laval, Inc., et al.* matter. Citations to the Reporter's Transcript of the Summary Judgment Oral Argument of September 5, 2008, before King County Superior Court Judge Dean S. Lum are referred to as "RT."

⁴ The very same deeds and other documents pertaining to the proof of the federal enclave status of PSNS had been produced 75 days earlier to the very same law firms representing Appellants Farrow, because the very same issues were then pending in *Abbay*. RT 6:4-7:20.

After oral argument on September 5, 2008, the Honorable Dean S. Lum, King County Superior Court Judge, issued the following preliminary oral ruling:

I would like to accommodate the parties in kind of a different way than just taking a meat cleaver and deciding the whole thing today. Here is what I'll decide. **Number One, I do not believe, and I will so find, that the disclaimer is not ambiguous. I read the disclaimer language about 20 times, and then I typed it out and put it on a piece of paper. And I couldn't construe that language in the way Mr. Rutsick [sic] wished to have me construe it.** That is contrary to how I speak English and read English. I can't come to that interpretation. The interpretation that Mr. Rutsick [sic] says, that is not my reading of the facts from the disclaimer language. **And the only reasonable interpretation I can glean from that is as the Defendant urges me to interpret it.** And I don't believe it is ambiguous, because they would include two unreasonable interpretations. **And I can't find there is an ambiguity here.**

In the alternative, if there were an ambiguity here, I would find the most reasonable interpretation would suggest that the word which modifies the term federal enclave, as the Plaintiffs urge. But **I can't construe this language in any other way than how Mr. Horn [sic] has asked me to construe it. And so that issue is decided.**

What is less clear to me is this whole Federal enclave issue, and here is the problem. I'm not criticizing anyone. I understand how this was happening. You have Defendants who have published cases, saying that this particular shipyard was a federal enclave, is a federal enclave for years and years and years. Nobody had suggested otherwise. And it is not the kind of property that one would question as to whether this has a federal nexus. And it shouldn't be a

surprise to anyone that the courts have found that this is a federal enclave, and has been for a number of years.

And the Defendants moved for a summary judgment, citing both some published cases and some unpublished cases. And they thought that was good enough. The response of Mr. Rutsick [sic] was, as he points to Washington law, and say it is not that clear, and perhaps we need to take a look at some laws of acquisition about whether a piece of property is a federal enclave. There may be State, and Federal Jurisdiction may effect the inclusion of whether that is a federal enclave, with this particular Plaintiff.

And then he challenges the Defendant's - whether they have carried that burden, establishing it was a federal enclave during the relevant time period. And then it was implied, that is when we get to the final pages of documents to which the Plaintiff's counsel has not had a chance to respond. But in many ways, I fully understand how this happened. So I'm not being critical, and so I don't fully understand this conduct, but I do think Mr. Rutsick [sic] and his clients deserve a chance to respond to the materials that were submitted. And I think, then, tell me whether State v. Williams, Williams v. The State makes a difference. Tell me whether there is really an issue or is just a potential issue. There is a difference between a potential issue, regarding condemnation and concurrent state jurisdiction, and an actual issue of jurisdiction. I would treat this as a de facto 56F continuance only.

And we have put to bed the disclaimer clause issue. And I am not accepting any further remark on that status, but as to whether the Defendants have carried their burden on the federal enclave issue, you may totally reopen. I will accept further briefing on whether I can accept judicial notice of the published cases, in addition to Mr. Rutsick's [sic] response, either legally or factually.

And I will set a briefing schedule. . . .

TR 41:19-44:12 (emphasis added). See also Clerk's Minutes L-CP 1927.

Pursuant to the trial court's oral ruling, on September 22, 2008, Appellants filed Plaintiffs' Supplemental Memorandum Relating to Exhibits Attached to the Second Declaration of James Horne L-CP 1448-74. In turn, on September 29, 2008, Respondents jointly filed Defendant IMO Industries, Inc.'s Response to Plaintiffs' Supplemental Memorandum Relating to Exhibits Attached to the Second Declaration of James Horne in Support of Its Motion for Summary. L-CP 1475-95. Once again, on October 1, 2008, Appellants filed Plaintiff's Objections Relating to IMO's Response to Plaintiff's Supplemental Memorandum. L-CP 1496-97.

After carefully considering the parties' additional briefing, on October 22, 2008, the Honorable Dean S. Lum, King County Superior Court Judge, ruled in favor of Respondents on all issues, signed the Order Granting Defendant IMO Industries, Inc.'s Motion for Summary Judgment dismissing with prejudice all claims against IMO (L-CP 1498-1502), signed numerous other orders on summary judgment, and signed still other orders granting summary judgment in favor of those parties who joined in Defendant IMO Industries, Inc.'s Motion for Summary Judgment.

The trial court thereafter denied Appellants' motions to reconsider its federal enclave rulings on two separate occasions, and this appeal followed. L-CP 1643-49; A-CP 823-46.

V. LEGAL ARGUMENT

As noted above, IMO moved for summary judgment based upon two separate grounds: (1) Appellants' disclaimer of all enclave-related exposures to asbestos at PSNS, and (2) all claims pertaining to Mr. Farrow's alleged exposure to asbestos while serving in the United States Navy aboard the USS Princeton (CV-37) from 1950 to 1953, and while working as an Engineering Technician for the Department of Defense on nuclear submarines at various federal enclaves between 1974 and 1991, based upon the lack of any evidence of exposure to IMO products during those times. L-CP 51-141.

At the trial court level, Appellants did not contest IMO's motion for summary judgment with respect to the alleged exposures to asbestos of Mr. Farrow during his U.S. Navy service aboard the USS Princeton (CV-37), nor did they contest the dismissal of claims pertaining to Mr. Farrow's alleged exposure to asbestos from his work as an Engineering Technician on nuclear submarines. L-CP 179-228; 229-242. In addition, Appellants did not assign error to the dismissal of such U.S. Navy-based claims, nor did Appellants appeal the

dismissal of such claims from the Order and Judgment. A-CP 823-34; 918-22.

The only legal issues arising from Appellants' claims of trial court error involving the summary judgment dismissal in favor of IMO relate to this Court's review of (1) the trial court's oral decision of September 5, 2008; (2) the October 22, 2008, Order Granting Defendant IMO Industries, Inc.'s Motion for Summary Judgment and dismissing with prejudice all claims against IMO regarding the issue of the Appellants' disclaimer of any cause of action or recovery for injuries caused by exposure to asbestos dust that occurred in the federal enclave of PSNS; (3) the November 25, 2008, Order Granting Plaintiffs' Motion for Reconsideration Relating to Various Orders Granting Summary Judgments But Denying Motions for Reconsideration in All Other Respects (L-CP 1515-17); and (4) the November 25, 2008, Order Granting Plaintiffs' Second Motion for Reconsideration Relating to Various Orders Granting Summary Judgments But Denying Motions for Reconsideration in All Other Respects. L-CP 1647-49.

Given Appellants' failure to appeal any other aspect of the trial court's rulings in favor of IMO, this Court's determination of the meaning, scope, and effect of Appellants' federal enclave disclaimer language will resolve the federal enclave issues with respect to IMO

(and virtually all respondents in this case). Therefore, pursuant to RAP 10.1(g), IMO joins in and adopts by specific reference the Issues Pertaining to Assignments of Error, Respondents' Counter-Statement of the Case, and Argument sections of the Brief of Respondents Leslie Controls, Inc. and ITT Corporation, as well as the Statement of Issues Pertaining to Assignments of Error, Defendants' Counter-Statement of the Case, and Argument sections contained in the Response Brief of Respondents Crane Co.; Garlock Sealing Technologies, Inc., Fairbanks Morse Pump Corporation; Coltec Industries; and McWane, Inc.

VI. CONCLUSION

For the reasons stated herein, Respondent IMO Industries, Inc. respectfully requests that this Court affirm (1) the trial court's oral decision of September 5, 2008; (2) the November 25, 2008, Order Granting Plaintiffs' Motion for Reconsideration Relating to Various Orders Granting Summary Judgments But Denying Motions for Reconsideration in All Other Respects; (3) the November 25, 2008, Order Granting Plaintiffs' Second Motion for Reconsideration Relating to Various Orders Granting Summary Judgments But Denying Motions for Reconsideration in All Other Respects; and (4) the October 22, 2008, Order Granting Defendant IMO Industries, Inc.'s Motion for Summary Judgment and dismissing with prejudice all claims against IMO regarding the issue of the Appellants' disclaimer of any cause of

action or recovery for injuries caused by exposure to asbestos dust that occurred in the federal enclave of PSNS.

In addition, Respondent IMO Industries, Inc. respectfully requests that all of the issues relating to Appellants' disclaimer of any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in the federal enclave of Puget Sound Naval Shipyard be resolved in its favor and that the trial court rulings on all federal enclave issues be affirmed in all respects.

DATED this 8th day of September, 2009.

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