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NO. 63923-4-I

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

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JAMES and KAY MORGAN, husband and wife,  
Appellant/Plaintiff,

v.

AURORA PUMP COMPANY, et al.,  
Respondent/Defendant.

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Appeal from the Superior Court of  
Washington for King County  
(Cause No. 07-2-28464-8 SEA)

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**BRIEF OF APPELLANTS**

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## **I. ASSIGNMENTS OF ERROR**

1. The King County Superior Court (“trial court”) erred in granting respondents’ (defendants) motions for summary judgment against appellants James and Kay Morgan (“plaintiffs”).

2. The trial court erred in concluding that there were no material disputed issues of fact in connection with defendants’ motions for summary judgment.

## **II. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Does the record, including, but not limited to, the evidence submitted by plaintiffs in opposition to summary judgment, contain material disputed issues of fact as to whether plaintiffs’ exposure to asbestos-containing products distributed by each defendant was a substantial factor in causing Mr. Morgan’s mesothelioma?

2. Do Braaten or Simonetta permit liability for defendants who supplied replacement asbestos-containing gaskets and packing to which Mr. Morgan was exposed?

3. Does Lockwood v. AC&S remain good law in Washington on the issue of what evidence is needed to show causation?

### III. STATEMENT OF THE CASE

#### A. Procedural History.

James Morgan filed this case against a number of defendants claiming that they were responsible for the development of his mesothelioma. All of the eight respondents – Aurora Pumps, Buffalo Pumps, Elliott Turbomachinery, IMO, Leslie Controls, Warren Pumps, Weir Valves, and The William Powell Company – filed separate motions for summary judgment on a variety of bases, including lack of exposure to asbestos from their products, lack of proximate cause, and affirmative defenses, including the government contractor defense.

In its order granting summary judgment, the trial court referred to “the hearing of these motions on February 15, 2009, a transcript of which is attached hereto and incorporated herein.” CP 6745, emphasis added. Indeed, the order states that the trial court granted “for the reasons set forth therein . . .” in the transcript of the hearing. Id. The portions of the transcript attached to the order indicate which of defendants’ arguments the court accepted and which the court rejected. For example, the court denied all of the various motions to strike, as well as the requests for a Frye hearing. CP 6761. The court also denied defendants’ common law “military contractor defense” and found the statutory military contractor defense inapplicable as a matter of law. CP 6763.

While indicating that otherwise “there is ample factual evidence here to take the case to the jury,” the court granted summary judgment because it concluded that the Supreme Court decisions in Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493 (2008) and Simonetta v. Viad, 165 Wn.2d 341, 349, 197 P.2d 127 (2008), applied to design defect claims as well as failure to warn claims. CP 6763-6767. The court then resolved what it characterized as the “closer issue” of “new material internal to the product.” The court concluded that:

Even resolving all inferences in favor of the non-moving party in the factual issues, I think that there is insufficient evidence that the new material internal to the product here would be enough to be a substantial factor in the tragic mesothelioma that Mr. Morgan suffered.

So reluctantly, very reluctantly, I am granting the summary judgment on all of these defendants. That is my ruling.

CP 6767, RP 160-161.

**B. Statement of Relevant Evidence.**

Much of the relevant evidence in connection with this appeal is provided by the declaration and deposition of Melvin Wortman, the declarations of Dr. Eugene Mark, the declarations of James Millette, Ph.D. (with attachments), the deposition of Jack Knowles, and James Morgan’s interrogatory answers.

**1. James Morgan**

Defendant Leslie Controls introduced Morgan's Answers To Style Interrogatories. CP 1014. At pages 11 and 12 of those answers, Mr. Morgan provided evidence as to when he worked at Puget Sound Naval Shipyard ("PSNS") and what types of work he did there:

- a) June 1952 – September 1957
- b) Puget Sound Naval Shipyard, Bremerton, WA
- c) Ship building and repair
- d) Apprentice Marine Pipefitter/Steamfitter and Journeyman Pipefitter/Steamfitter  
\* \* \*
- d) Journeyman Pipefitter/Steamfitter, 1959-1963  
Marine/Mechanical Engineering Technician, 1963-1975  
Technical Assistant for Testing, Design Division, 1975-1989

CP 1024-1025, emphases added.<sup>1</sup>

**2. Melvin Wortman.**

The summary judgment record contains both Melvin Wortman's March 13, 2009 declaration (CP 5189-5194) and his complete deposition taken in the Nelson case (CP 6657-6746). Among the material evidence and reasonable inferences therefrom contained in that declaration are the following:

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<sup>1</sup> "I contend that I was exposed to the asbestos-containing products manufactured, sold, and/or supplied by defendants during my employment at Puget Sound Naval Shipyard from 1952 through to mid to late 1970s. The products include equipment products such as boilers, engines, motors, pumps, compressors and valves that contained, were provided with and/or required asbestos-containing products." CP 1026.

1. Apart from several years during World War II, Mr. Wortman worked at PSNS from 1940 through 1976 as a machinist and as a supervisor, and from approximately 1966 through 1976 he was superintendent of machinists at PSNS. CP 5189.

2. During his work at PSNS, Mr. Wortman remembered six manufacturers of pumps that were “in common use aboard naval ships” and were “extensively used on Navy ships, particularly aircraft carriers.” CP 5190. Three of those six manufacturers of pumps are defendants in the present case – Buffalo, Warren Pumps and DeLaval (IMO). CP 5190.

3. During 1967 through 1971, “almost all of the pumps used on board Navy ships contained asbestos gaskets and packing.” CP 5190-5191.

4. Based on his observations of the replacement parts that came into PSNS, approximately 50 percent of the replacement parts for pumps, compressors and valves came from the manufacturers, including most of the gaskets and packing. CP 5192. Indeed, it was “standard operating procedure to procure the gaskets and packing from the equipment manufacturers via the Navy supply system.” Id.<sup>2</sup>

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<sup>2</sup> He later explained at CP 6732 that part of his foundation for knowing this was his observation of the packaging of the replacement parts:

Q: Okay. Did you – you talked a little bit in earlier testimony about replacement parts coming in to the machine shop. Do you remember that?

A: Yes.

5. Pipefitters<sup>3</sup> as well as machinists routinely removed and inserted both packing and gaskets on pumps, valves and compressors. The packing was often dried and dusty when removed and the gaskets also gave off dust when they were scraped off. CP 5193.

Mr. Wortman's deposition, which was also made part of the record, corroborates and amplifies many of these points. For example, at CP 6662, in response to a question from a lawyer for Buffalo Pumps, he testified that although the defendants did not necessarily make gaskets used with their equipment, they sold such gaskets as replacements:

Q. When you were at Puget Sound Naval Shipyard, do you recall the manufacturers of gaskets?

[*Objection*]

A. The gasket manufacturer I would not know because, normally speaking, it was normal practice to buy them through the supply system from the original vendor. (Emphasis added.)

Mr. Wortman also explained in his deposition that the repair process at naval shipyards got much more rigorous in the mid to late 1960s than it had been, following the loss of the *USS Thresher*. As one

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Q: Okay. Did you have an opportunity to observe the packaging that the machine – that the replacement parts came in?

[*Objection*]

THE WITNESS: Only in passing.

Q: What do you mean by "passing"?

A: Well, as I walked around the shop, I might see a package that had been opened. And obviously it had come from the supply department and had been opened, and I would only see it in passing.

<sup>3</sup> Mr. Morgan was a pipefitter for part of his work at PSNS.

element of the tightening of procedures for repairs, the Navy decided it needed to make sure that replacement parts for equipment on its vessels fit the equipment as well as possible and that the best way to do that was to get the replacement parts from the original manufacturer of the equipment. CP 6731-6732. Although workers would sometimes use bulk gasketing and packing material to fashion seals, as a matter of quality control, it was preferable to use gaskets and packing from the manufacturers of the equipment. CP 6732, 6734. Packing material was used on both pumps and valves. It was often threaded around machinery parts, so that it was particularly important that the packing fit the dimensions of the particular piece of equipment. CP 6706.

As a result of the Navy policy intended to bring about better quality control, Mr. Wortman estimated that during the late 1960s and the early 1970s, 50 percent of replacement parts, including asbestos-containing gaskets and packing, came from the equipment manufacturers. CP 6707. Mr. Wortman relied on both his observation and his experience in inferring that 50 percent of the replacement parts came from the original manufacturers. Ibid.

### **3. Jack Knowles.**

Jack Knowles was deposed in this case and was a co-worker of Mr. Morgan at PSNS both as a pipefitter and in the design division. He

worked aboard ships as a pipefitter. He testified that, while in the design division at PSNS, he also went aboard ships. CP 4990. He testified extensively about working with Mr. Morgan, including going aboard ships with Mr. Morgan when they were both working in the design shop. CP 4587. He explained that as a pipefitter, Mr. Morgan would do internal work on valves, such as replacing packing material. CP 4998. At CP 5000, Mr. Knowles testified that packing was “probably” recommended or specified by the valve manufacturer. He also reiterated his belief that valve manufacturers provided some gaskets and packing. CP 5000, 5131, 5141.<sup>4</sup>

Mr. Knowles gave extensive testimony concerning specific defendants that manufactured various types of shipboard equipment. For example, he testified to recalling “seeing Mr. Morgan work with and

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<sup>4</sup> Mr. Knowles was able to identify new equipment. For example, at CP 5138, he testified as follows:

Q. Okay. Am I correct that you on the – on the – and let me talk about your apprenticeship time period there. That when you talked about various pumps on various ships, you wouldn’t have any knowledge of the maintenance history of any of those pumps?

A. None.

Q. Okay. You wouldn’t know if they had been – if they were – if they were new versus old, refurbished once or refurbished ten times? You wouldn’t have any way of knowing any of that; correct?

MR. HORN: Misstates previous testimony.

A. Oh, yes, you would know. You know, if it’s a refurbished pump, you most generally would have paint existing, you know, paint poured on it before they repainted it, you know, before they decked the compartment out, something like that. A new pump, nice bright and shiny, you know, type of situation. Yeah, you can pretty well tell between an existing older pump that’s maybe been taken to the shop to be refurbished.

around new Leslie Valves.” CP 5154. He also testified that he saw Mr. Morgan “replacing packing” on Leslie valves.

Q. Can you tell me specifically what that would have been, the work with packing?

A. Just basically pulling the bonnets off of valves. And if they, you know, were leakers. Or told – you know, sometimes ship crew will come by and tell you that it was. You have work orders that says: Hey, we’ve got word that it was a leaker, and stuff like that.

We would do it at that time. And then when we would come up to test later on. If she leaked well, then we would close down the system and – and put new packing in.

CP 4993; see also CP 5000.<sup>5</sup>

Mr. Knowles also saw people at PSNS working with packing in connection with both new and existing Buffalo Pumps. CP 5125.<sup>6</sup> Mr. Knowles testified to seeing Mr. Morgan make new gaskets for use on both new and existing Aurora Pumps. CP 4582. He testified to seeing Mr. Morgan in the presence of other people who were making new gaskets for

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<sup>5</sup> This testimony is not inconsistent with Mr. Knowles later testimony that he did not observe Mr. Morgan ever working with “brand new Leslie Control valves.” *Id.* at 139-140. CP 5277.

<sup>6</sup> Specifically, Knowles testified as follows:

Q. Did you ever have occasion to see other people working with packing in connection with brand-new Buffalo Pumps?

DEFENSE COUNSEL: Objection, form.

A. Yes. Yes.

Q. When you saw them performing that work with the packing, would you describe for me what the conditions in the air were like?

DEFENSE COUNSEL: Objection, form.

A. The same, dusty and dirty.

CP 5125.

use on both new and existing DeLaval pumps and working with packing on those DeLaval pumps in Mr. Morgan's presence. CP 4854, 4855.

Mr. Knowles testified to seeing Mr. Morgan in the presence of people who were both making and removing gaskets and packing for new and existing Warren Pumps. CP 4586. Mr. Knowles also testified regarding both Powell and Atwood (Weir) valves. He testified that he saw Mr. Morgan "make new gaskets for use on brand-new Powell valves," and seeing people work with packing on brand-new Powell valves in Mr. Morgan's presence. CP 4701. The same was true in regard to Atwood valves, i.e., he observed Mr. Morgan being in the presence of people who were making gaskets for use in both new and existing Atwood valves as well as working with packing on new Atwood valves. CP 5121-5122.

#### **4. James Millette, Ph.D.**

Dr. Millette, a materials scientist, provided several declarations in this case. He relied, *inter alia*, on information contained in Knowles's deposition and Wortman's declaration as well as several scientific articles, including ones that he co-authored. In his declaration dated January 14, 2009, after describing several defendants' equipment, he testified that working with asbestos gaskets and packing on such equipment gave off excessive amounts of asbestos:

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.

CP 3067, emphasis added.

In his declaration dated April 1, 2009 (CP 4583-4607), Dr. Millette discussed equipment manufactured by Leslie, Powell, Atwood-Morrill, Buffalo, Aurora, DeLaval, Warren, and Elliott. He also testified that during the time period in question gaskets and packing to which Mr. Morgan was exposed were primarily made of asbestos. CP 4588.

Dr. Millette's declaration also included several scientific articles that corroborated his expert opinions. Those articles explained how gasketing operations could release asbestos that contaminated not only the workers immediate breathing area but also their "workrooms":

A U.S. government-sponsored report on the exposures from gasketing operations was compiled by the GCA Corporation in 1982. They summarized their findings on gaskets as follows:

Secondary processing of compressed sheet gaskets can result in comparatively high workroom fiber concentrations, on the order of 3.0 to 5.0f/cc during hand and machine punching, if control measures are not employed.

CP 4647, emphasis added.

**5. Dr. Eugene Mark.**

Dr. Mark, a pathologist who teaches at Harvard University, provided a report and several declarations in this case. At page 3 of his report dated December 20, 2007, Dr. Mark stated:

The patient was exposed to asbestos for many years according to work history sheets, which total four pages in length. Exposure occurred when he worked as a pipe fitter/steamfitter/marine/mechanical engineering technician and technical assistant for design division at Puget Sound Naval Shipyard, Washington from 1952 to 1989 according to the work history sheets. Exposure occurred to a variety of asbestos-containing products according to the work history sheets.

\* \* \*

I conclude that the patient has developed a diffuse malignant mesothelioma of the pleura. I conclude that the asbestos to which he reportedly was exposed caused the diffuse malignant mesothelioma. I conclude that all of the exposures which occurred prior the occurrence of the malignancy together contributed to cause the diffuse malignant mesothelioma. I conclude that each of the exposures which contributed to the total cumulative exposure was a significant contributing cause of the diffuse malignant mesothelioma.

CP 4565, emphasis added.

In his supplemental declaration dated April 15, 2009, Dr. Mark explained that asbestos exposure from each of these defendants contributed to cause Mr. Morgan's mesothelioma:

27. Paragraph 14 of the 10 January 2009 declaration reflects my opinion that Mr. Morgan's occupational asbestos exposures include exposures from Buffalo pumps, Atwood-Morrill valves, Leslie valves, and Elliott

deaerating feed systems, and that those exposures contributed to cause the diffuse malignant mesothelioma.

28. . . . Since I believe that all of the exposures which occurred prior to the occurrence of the malignancy together contributed to cause the diffuse malignant mesothelioma, Mr. Morgan's exposures to asbestos products associated with Powell valves, Aurora pumps, Warren pumps, and DeLaval pumps would also be among those occupational exposures at Puget Sound Naval Shipyard to which I previously referred in my 20 December 2007 report, and which I conclude also contributed to cause the diffuse malignant mesothelioma.

CP 4561, emphasis added.<sup>7</sup>

#### **6. Admissions From Defendants Support Plaintiffs' Evidence.**

The record also contains defendants' admissions corroborating Mr. Wortman's and Mr. Knowles's testimony regarding the supply of both original and replacement asbestos gaskets and packing to PSNS where Mr. Morgan worked:

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<sup>7</sup> Some, but not all, defendants initially challenged Dr. Mark's declaration. Those defendants withdrew their motions to strike (RP 28-29) in light of the following argument: Leslie and a number of the other defendants cite to the trial court opinion in Free v. Ametek to support their argument that the declarations of Drs. Millette and Mark should be stricken. (*See e.g.*, Leslie Reply, p. 4.) The *Free* case involved limits imposed by the trial court pursuant to the *Frye* doctrine on certain testimony offered by Dr. Samuel Hammar. Plaintiffs submit that the ruling in *Free* is inconsistent with cases such as Bruns v. PACCAR, 77 Wn. App. 201, 890 P.2d 469 (1995), in which *Frye* was held inapplicable to medical causation testimony. The medical causation testimony offered by plaintiffs in the case at bar is consistent with Mavroudis v. Pittsburgh Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997), Lockwood v. A C & S, 109 Wn.2d 235, 744 P.2d 605 (1987), and Hue v. Farmboy Spray, Co., 127 Wn.2d 67, 896 P.2d 682 (1995). CP 5234.

Aurora Pumps: Aurora designed its pumps to use (and originally shipped with) asbestos gaskets and packing. Aurora also sold replacement gaskets and packing for its pumps. CP 6369, 6371-6372, 6440. According to Aurora's corporate representative, "asbestos was the common material used in all of industry." CP 6343. Indeed, the record here indicates that Aurora's own technical manual specified that "long fibre" asbestos be used for replacement packing in its pumps:

PACKING: Pumps leaving our plant are packed and lubricated ready for use. However, when a pump is to be repacked the following procedure, as herein outlined, must be rigidly followed. The packing used for clear cold water is long fibre asbestos, square braided, and well impregnated with oils and graphite.

CP 6245, 6440, emphasis added.

Buffalo Pumps: Buffalo's corporate representative admitted that from the 1930s to the early 1980s, Buffalo supplied asbestos gaskets and packing as original equipment with its pumps. CP 5160. Buffalo also supplied "spare" asbestos gaskets and packing for its pumps. CP 5169-5170. Along with supplying gasket and packing material, Buffalo issued instructions to "[p]ack stuffing box with good quality of long fibre graphite asbestos packing and renew when necessary." CP 2376. In those instructions, Buffalo specified "DO NOT PACK WITH BULK PACKING UNDER ANY CIRCUMSTANCES." CP 2376.

Leslie Controls: Leslie Controls' corporate representative, Matthew Wrobel, admitted that, until 1988, Leslie's valves were designed to use asbestos gaskets and packing. CP 5335, 5345, 5350. Wrobel also admitted that Leslie sold replacement asbestos-containing gaskets and packing for its equipment. CP 5346. The record contains a copy of instructions for Leslie valves installed aboard approximately 20 U.S. naval destroyers. CP 5315-5323. In those instructions, Leslie insisted that when renewing gaskets "be sure to use standard parts made by Leslie Co." CP 5321, emphasis added. When its customers ordered replacement parts, in order to supply the correct items, Leslie requested them to provide certain information such as serial numbers, quantity, size, and part name. CP 5347-5348.

IMO (DeLaval Pumps): Richard Salzmann, IMO's corporate representative, testified that IMO sold DeLaval-brand pumps that originally contained asbestos gaskets and packing. CP 4884. Salzmann also admitted that DeLaval (IMO's predecessor) sold replacement asbestos gaskets and packing material from the 1930s to the 1970s. CP 3083. Likewise, until 1972, IMO also sold the asbestos insulation materials that were used with its products. Ibid.

Weir Valves and Controls (Atwood & Morrill): Weir sold Atwood & Morrill valves that contained asbestos gaskets and packing until 1985.

CP 2020, 2023, 2043, 2092. Weir also sold replacement, or “additional,” asbestos gaskets and packing for Atwood & Morrill valves. CP 2022.

William Powell: Powell’s representative, William McClure, admitted in deposition that Powell sold valves that contained asbestos gaskets. CP 4783. McClure also admitted that “most” of Powell’s valves were sold with the asbestos packing already in them. CP 4784. Powell also sold replacement asbestos gaskets and packing for its valves. Ibid.

#### **IV. SUMMARY OF ARGUMENT**

Defendants’ motions for summary judgment took the position that (a) Braaten and Simonetta applied both to plaintiffs’ design defect and failure to warn claims, and that (b) under those cases, plaintiffs could not show that exposure to asbestos from products sold by defendants were a substantial factor in causing Mr. Morgan’s mesothelioma. In the trial court, plaintiffs disputed both of those propositions. The trial court concluded that Braaten and Simonetta did apply to plaintiffs’ design defect, as well as their failure to warn claims. Plaintiffs challenge the trial court’s conclusion that in applying Braaten and Simonetta to plaintiffs’ claims, there was not sufficient evidence that defendants’ products could be a proximate cause of Mr. Morgan’s mesothelioma.

Given the change in law enunciated in Braaten and Simonetta, plaintiffs adduced substantial evidence that these defendants sold to PSNS

substantial amounts of replacement asbestos-containing gaskets and packing to which Mr. Morgan was exposed. Much of this evidence was contained in the Wortman declaration and deposition and the Knowles deposition. Plaintiffs also obtained admissions from various defendants corroborating their testimony. This evidence was very different, and provided greater details, than the evidence provided in Braaten and Simonetta. The record in this case, which is far more developed with regard to the defendants' supply of asbestos materials, called for a different result.

Plaintiffs also provided expert testimony having to do with such matters as the cumulative effect of asbestos in causing mesothelioma and how asbestos was released in substantial quantities from the application and replacement of gaskets and/or packing. This evidence, together with the factual evidence described above, provides a basis on which a reasonable trier of fact could conclude that each of these defendants' products was a substantial factor in causing Mr. Morgan's mesothelioma under the criteria set forth in such cases as Lockwood v. AC&S, 109 Wn.2d. 235, 744 P.2d 605 (1987) and Allen v. Asbestos Corp., 138 Wn.App. 564, 157 P.3d 406 (2007).

## V. ARGUMENT

### A. Standard Of Review.

In reviewing a summary judgment order de novo, appellate courts should:

Examine the pleadings, affidavits, and depositions before the trial court and “take the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Owen is the nonmoving party. Thus, all facts and reasonable inferences must be viewed in the light most favorable to her.

Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (emphasis added). See also Ross v. Kirner, 162 Wn.2d 493, 500, 172 P.3d 701 (2007).

### B. Defendants Are Liable For Replacement Asbestos Gaskets And Packing Which They Sold And To Which Mr. Morgan Was Exposed.

Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493 (2008) and Simonetta v. Viad, 165 Wn.2d 341, 349, 197 P.2d 127 (2008), do not affect the standard for proving exposure to an asbestos-containing product. Indeed both cases cite Lockwood, the leading Washington case on that issue. They do, however, limit the liability of a manufacturer of a piece of equipment for exposure to replacement asbestos-containing component parts of such equipment. Braaten held that the manufacturer of

equipment in a failure to warn case is not liable for asbestos containing replacement parts unless it “supplied” them:

...The evidence is insufficient to establish that Mr. Braaten was exposed to the asbestos-containing packing or gaskets in the products when they were originally supplied rather than replacement packing and gaskets which were not designed, manufactured, specified, or supplied by the manufacturers... (emphasis added)

Braaten, 165 Wn.2d at 396.

For example, in Braaten, there was “no evidence that Buffalo Pumps manufactured, sold or supplied replacement gaskets.” Id. at 395. In this case, to the contrary, Mr. Wortman and Mr. Knowles provided such evidence for not only defendant Buffalo, but also defendants Aurora, Warren, IMO (DeLaval), Leslie, Powell and Weir. Mr. Wortman testified in his deposition that it was normal practice for PSNS to buy replacement gaskets for equipment through the supply system from the original vendor of the equipment. CP 6662.<sup>8</sup> He testified similarly in his declaration that it was standard operating procedure for PSNS to procure replacement packing and gaskets from the manufacturer of the various pumps and that approximately 50% of the replacement parts for pumps, including gaskets and packing, came directly from the manufacturers. He identified Buffalo,

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<sup>8</sup> These gaskets and packing contained asbestos. CP 4588, 5190-5191.

Warren and DeLaval as three of the six manufacturers of pumps that were in “common use” aboard naval ships and were “very extensively” used.

It is a reasonable inference from that evidence that Buffalo, Warren and DeLaval (which were among the major commonly used manufacturers of pumps used at PSNS) were part of that “standard operating procedure.” As such, it is reasonable to conclude that they supplied PSNS with substantial quantities of asbestos-containing replacement gaskets and packing. CP 5190, 5192. Allen (inferring that defendant’s product was used from fact that it was purchased in substantial quantities over a several year period). See Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, 360-361 (1977) (once it was determined that discrimination was defendants “standard operating procedure,” that determination provided an inference that each employee within the discriminated class was affected by that standard operating procedure).

Jack Knowles provided additional evidence with respect to most defendants. He testified that he worked with Mr. Morgan aboard ships both while they worked as pipefitters and when they both worked in the design shop. His testimony differed substantially from the evidence in Braaten. For example, Mr. Braaten testified that he did not work with new pumps and was not exposed to internal components of the pumps. Id. at

395. Mr. Knowles, on the other hand, testified that he saw Mr. Morgan making new gaskets for use on both new and existing Aurora, DeLaval, Buffalo and Warren pumps. He also testified to seeing Mr. Morgan in the presence of other people who were making new gaskets for use on both new and existing DeLaval pumps, as well as working with internal packing on such pumps. Mr. Knowles also testified to seeing Mr. Morgan make new gaskets for use on brand new Powell valves, as well as seeing people working with packing inside of new Powell valves in Mr. Morgan's presence. He also observed Mr. Morgan working around people who were making gaskets for use in both new and existing Atwood (Weir) valves, as well as working with packing on new Atwood valves.<sup>9</sup>

Mr. Knowles' testimony, as to each of those defendants, is at least as detailed as the evidence adduced by the insulator in Lockwood regarding the use of Raymark products aboard a ship where Mr. Lockwood worked. Indeed, Mr. Knowles' testimony placed Mr. Morgan nearer to the asbestos from defendants' products than did the testimony in Lockwood.

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<sup>9</sup> As set forth in Section 6 of the Statement of Facts, the defendants admitted to selling replacement packing and/or gaskets. Moreover, defendants generally acknowledged that, under Braaten, a party is responsible for asbestos-containing products it supplies.

**C. This Case Should Be Decided Based On A Substantial Factor Instruction Similar To The One Contained At WPI 15.02 Or In Hue v. Farmboy Rather Than The Instruction Used In Mavroudis.**

Defendants' motions acknowledged the applicability of a substantial factor test as the applicable test for causation. For example, Leslie Controls' motion for summary judgment at CP 998 acknowledged that:

Washington law requires that the exposure attributable to a particular defendant must be a *substantial factor* in causing the alleged injury for liability to attach. See WPI 15.02 (5<sup>th</sup> ed. 2005), *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 28, 935 P.2d 684 (1997)

(Emphasis in original.)

Plaintiffs agree that WPI 15.02 is an appropriate statement of Washington law, as is the jury instruction approved by the Supreme Court in Hue v. Farmboy Spray Co., 127 Wn.2d 67, 896 P.2d 682 (1995). Mavroudis v. Pittsburgh-Corning Corp., 86 Wn.App. 2d 935 P.2d 684 (1997), however, is "more restrictive" than Washington law requires and should not be used as the outer boundary of "substantial factor" law in Washington.

WPI 15.02 (5<sup>th</sup> Edition) provides:

The term "proximate cause" means a cause that was a substantial factor in bringing about the [injury] [event] even if the result would have occurred without it.

That instruction is similar to the instruction given by the trial court in Lockwood. See 109 Wn.2d at 267-268. The comment to WPI 15.02, cites Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997), as calling for the use of a substantial factor instruction in multi-supplier asbestos-injury cases such as this one:

In *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 32, 935 P.2d 684 (1997), the Court of Appeals concluded that the substantial factor test should be used in multi-supplier asbestos-injury cases when expert testimony establishes that "all of the plaintiff's exposure probably played a role in causing the injury and that it was not possible to determine which exposures were, in fact, the cause of the condition." *Mavroudis*, 86 Wn.App. at 32, 935 P.2d 684. The *Mavroudis* court reasoned that "[t]his is exactly the kind of situation that calls for application of the substantial factor test, in order that no supplier enjoy a causation defense solely on the ground that the plaintiff probably would have suffered the same disease from inhaling fibers originating from the products of other suppliers." *Id.*

WPI (5<sup>th</sup> Edition), p. 188. The WPI, however, did not use the instruction given in Mavroudis. Rather, it explained that the Mavroudis court questioned whether that instruction "went further than the Supreme Court would require in an asbestos injury case. Mavroudis, 86 Wn.App. at 30-31, 935 P.2d 684." *Id.*

Hue v. Farmboy Spray Co. is also directly on point. Hue holds:

The trial court correctly determined that plaintiffs did not have to prove or apportion individual causal responsibility.<sup>22</sup> Rather, plaintiffs' burden was, as the trial

court ruled, to prove that a portion of a particular application “was . . . part of a cloud that then was the proximate cause of damage.” (emphasis added)

127 Wn.2d at 91 (footnote omitted.) Hue, thus, indicates that in cases involving multiple suppliers of a toxic material, it is not necessary to show individual causation for a particular supplier.<sup>10</sup>

In Mavroudis v. Pittsburgh-Corning Corp., *supra*, this Court read Hue as implying that Washington law does not require proving “individual causal responsibility”:

By citing *Lockwood* in conjunction with *Martin v. Abbott Lab.*<sup>7</sup>, the case eliminating the need to show individual causal responsibility in DES cases, the *Hue* court certainly implied that asbestos-injury plaintiffs need not prove or apportion individual causal responsibility but need only show that the defendant’s asbestos products were among those in the plaintiff’s work environment when the injurious exposure occurred.

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<sup>10</sup> The comment to WPI 15.02 agrees with this analysis:

In another toxic tort case, *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995), the Supreme Court approved application of the substantial factor test to a claim for damages from the drift of a chemical cloud where the claim was brought against the manufacturer, the applicator, and numerous upwind wheat growers who had used the chemical at various times. The court required the plaintiff to prove that an individual defendant used the pesticide, that it became part of the drifting cloud, and that the cloud caused damage to the plaintiff.

Id. at 189 (emphasis added).

Id. at 30 (footnote omitted).<sup>11</sup>

The Court of Appeals in Mavroudis made clear that the instruction it approved in that case was more stringent than that required under Washington law: the instruction “even if more stringent in its requirement on plaintiffs than *Hue* would seem to require, falls well within the parameters of substantial factor causation theory.” Id. at 33. Thus, defendants’ analysis relating to proximate cause and substantial factor is inconsistent with Hue and the analysis of Mavroudis, as well as with Lockwood and the WPI. It is not necessary to prove under Washington substantial factor law that any particular product asbestos exposure, standing alone, was sufficient to cause Mr. Morgan’s mesothelioma. Both Dr. Mark and Dr. Millette’s evidence provides the necessary factual predicate for the analysis approved by Lockwood, Hue, and Mavroudis. For example, Dr. Mark stated:

I conclude that all of the exposures which occurred prior to the occurrence of the malignancy together contributed to cause the diffuse malignant mesothelioma. I conclude that

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<sup>11</sup> This is also consistent with the recommendation in Prosser And Keeton On Torts, Fifth Edition, p. 268. As explained in Mavroudis at pp. 29-30:

Unlike Instruction 22 in the instant matter, *Hue* did not require a showing that an individual defendant’s contribution to the pesticide cloud would have been sufficient to cause the injury. Professor Keeton recommends this rule. In Keeton’s words:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

each of the exposures which contributed to the total cumulative exposure was a significant contributing cause of the diffuse malignant mesothelioma.

Defendants in the trial court paid little attention to the relevant Washington cases. Defendants instead relied on cases such as Borg-Warner Corporation v. Arturo Flores, 232 S.W. 3d 765, 772 (Tex. Supreme Ct. 2007):

[P]roof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law.

CP 999.

Borg-Warner, of course, is not the law in Washington. There are two basic approaches in asbestos litigation in the United States to proving causation. The more rigid approach is exemplified by Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480 (11<sup>th</sup> Cir. 1985) and Lohrman v. Pittsburg Corning Corp., 782 F.2d 1156, 1162-63 (4<sup>th</sup> Cir. 1986), and is sometimes referred to as the “frequency, regularity, proximity” test. Lockwood, supra, is an often cited example of the less rigid “work site” approach. See e.g., In Re Hawaii Federal Asbestos Cases, 960 F.2d 806, 817 (9<sup>th</sup> Cir. 1992) (“[t]he [Lockwood] Court concluded that, as long as a plaintiff introduces evidence suggesting that the products of a particular defendant were present at the worksite and thus could be said to have contributed to

the asbestos exposure of which she complains, she can recover from that defendant.”).

These two approaches are well described by the Ninth Circuit in Ingram v. ACandS, Inc., 977 F.2d 1332, 1343 (9th Cir. 1992):

O-I urges us to apply the so-called "frequency, regularity, proximity" test and require particularized proof of Becker's exposure to Kaylo. See *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985).

Some courts have adopted the "frequency, regularity, proximity" test, but others have held that so long as a plaintiff introduces evidence to show that the product of a particular defendant was present at the worksite and thus could be said to have contributed to the asbestos exposure of which he complains, he can recover from the defendant. See, e.g., *In re Hawaii Federal Asbestos Cases*, 960 F.2d at 817-818 (applying Hawaii recognized public policy); *Lockwood v. AC & S, Inc.*, 744 P.2d 605, 612-13 (Wash. 1987). (Emphasis added.)

As noted above, both Oregon and Hawaii utilize the less restrictive approach adopted by the Supreme Court in Lockwood. See also, Horton v. Harwick Chemical Corporation, 653 N.E. 2d 1196 (Ohio Supreme Court 1995) (rejecting the “frequency, regularity, proximity” test).

The Washington Supreme Court followed Lockwood in Van Hout v. Celotex Corp., 121 Wn.2d 697, 853 P.2d 908 (1993). Van Hout was an asbestos injury case based on exposure at PSNS between 1946 and 1980.

As with the present case, the plaintiff himself in that case:

could not identify the manufacturers of the asbestos products to which he had been exposed. Instead he relied

on the testimony of co-workers who placed Philip Carey's products at the shipyard during the time Van Hout was employed.

Id. at 699. In Van Hout, the defendant Celotex contended "[t]hat Van Hout failed to establish that exposure to the defendant's products caused his injury". Id. at 706.

The Supreme Court rejected defendant's contention and explained that Mr. Van Hout properly relied on witnesses placing defendant's asbestos products on ships on which Mr. Van Hout was working. Id. at 707. The Supreme Court did not require proof of frequency, regularity or proximity. Rather, it agreed with the Court of Appeals finding that the evidence was sufficient to support the jury verdict that exposure to Celotex's products caused his injury.

Other states, including Texas after Borg-Warner, use the frequency, regularity and proximity test. In fact, Borg-Warner goes beyond that test, stating that:

In a case like this, proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law.

232 S.W.3d at 772 (emphasis added). Since Washington does not accept even the frequency, regularity and proximity test, it certainly would not accept the stricter version of the test adopted in Borg-Warner.

Defendants also argued to the trial court that Washington would adopt the causation test in Lindstrom v. A-C Product Liability Trust, 424 F.3d 488 (6<sup>th</sup> Cir. 2005).<sup>12</sup> CP 1447. Its argument to the trial court was:

As noted, Washington also applies a substantial factor test. And in *Simonetta*, the Supreme Court—noting that the central issue in *Lindstrom* was causation—cited that decision with approval. 2008 WL 5175068, at \*10 (citing *Lindstrom*, 424 F.3d at 496) (noting that the Sixth Circuit "found no causation because it concluded that a manufacturer cannot be held responsible for the asbestos contained in another product."). And although the Supreme Court did not specifically cite *Lindstrom's* substantial factor analysis, there is no reason to conclude that it would reject that portion of the decision and allow expert's to opine that every exposure to asbestos is a substantial factor in the development of an asbestos-related disease.

However, that argument ignores the fact that the Simonetta court only relied on Lindstrom for the principle that:

the court found no causation because it concluded that a manufacturer cannot be held responsible for the asbestos contained in another product. Lindstrom, 424 F.3d at 496.

Simonetta, *supra*, 165 Wn.2d at 362.

The Simonetta court did not suggest that it was adopting the general causation analysis in Lindstrom. Moreover, the Lindstrom

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<sup>12</sup> The *Lindstrom* court rejected the expert's opinion, stating that accepting the affidavit would render the substantial factor test meaningless. 424 F.3d at 493. The court further said:

A holding to the contrary would permit imposition of liability on the manufacturer of any product with which a worker had the briefest of encounters on a single occasion. *Id.*

CP 1448.

analysis is inconsistent both with Lockwood and Van Hout. Defendant Aurora Pumps at CP 1448 recognizes that inconsistency but attempts to distinguish “proximate cause” from “substantial factor”:

Lockwood does not support a contrary argument. In Lockwood, the Supreme Court concluded that the evidence presented at trial permitted “a reasonable inference that [Lockwood] was exposed to Raymark’s product. When this is combined with expert testimony that all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis, it would be reasonable for a jury to conclude that Lockwood’s exposure to Raymark’s product was a proximate cause of his injury.” 109 Wn.2d at 247-48 (emphasis added.) Here, the question is whether exposure to asbestos from an unknown number of Aurora pump gaskets could be a substantial factor in development of disease; not whether it could be a proximate cause of that disease. This requires – at a minimum – evidence regarding the number of asbestos fibers Mr. Morgan was exposed to from Aurora Pump gaskets.

Contrary to defendant’s arguments, substantial factor is, as recognized in WPI 15.02, a way of proving proximate cause. Thus, there is no difference between the proof under Washington law that something was a substantial factor in developing disease and proof that it was a proximate cause in developing that same disease. Indeed, the trial court in Lockwood gave a “substantial factor” proximate cause instruction.

**D. Lockwood, Van Hout, and Their Progeny Call For Denying Summary Judgment Based On Lack of Product Exposure Or Lack Of Proximate Cause Under The Facts Presented Here.**

The Washington cases most on point on the necessary proof of exposure to defendants' asbestos-containing products for causation purposes are Lockwood; Van Hout; Berry v. Crown Cork & Seal Co., Inc., 103 Wn. App. 312, 14 P.3d 789 (2000), and Allen v. Asbestos Corp. In Lockwood, supra, the only evidence of exposure to defendant Raymark's product, relied upon by the Supreme Court, related to a single ship. There was testimony by an insulator that "Raymark's product was used on a large liner conversion at Puget Sound Bridge and Dredge in 1947 and 1948", as well as Mr. Lockwood's testimony that he "had worked on the overhaul of the George Washington and that there was asbestos on that kind of a job". Lockwood, 109 Wn.2d at 244. As explained by the Supreme Court, that evidence "indicate[d] that Raymark's product was used on a ship where Lockwood worked". Id.

Significantly, the evidence did not show when or where during that 1947-48 period Raymark cloth was used on that ship, or how much such cloth was used. Rather, the evidence was that Mr. Lockwood worked for some time during the 1947-48 period on the overhaul of one ship where Raymark cloth was also used at some times during the overhaul. There

was thus no evidence in the record, other than inference, that the Raymark product was being used at the same time that Mr. Lockwood worked on that ship.

The Lockwood court also relied on expert evidence that:

[A]fter asbestos dust was released, it drifted in the air and could be inhaled by bystanders who did not work directly with asbestos. Thus, even if Lockwood did not work directly with Raymark's product on the George Washington, it is reasonable to infer that since that product was used on that ship when Lockwood worked there, Lockwood was exposed to it. . . .

109 Wn. App. at 247.

Finally, the Lockwood court relied on:

[E]xpert testimony that all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis, [so that] it would be reasonable for a jury to conclude that Lockwood's exposure to Raymark's product was a proximate cause of his injury.

Id. at 247-48.

Berry involved asbestos exposure at PSNS, as does this case. In

Berry, this Court analyzed the Lockwood factors, and held that:

The proximity and time factors are satisfied by the fact that Berry worked at PSNS during times that asbestos products were used. . . . Finally, Drs. Churg and Hammar provided evidence that the cumulative effect of the asbestos exposure led to Berry's death.

103 Wn. App. at 324.<sup>13</sup> In Allen v. Asbestos Corp., 138 Wn. App. 564, 571, 157 P.3d 406 (2007), another PSNS case, this court summarized the Lockwood factors for determining “whether sufficient evidence of causation exists:

Lockwood v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987). Lockwood established factors that a court should consider to determine whether sufficient evidence of causation exists: (1) plaintiff's proximity to the asbestos product when the exposure occurred, (2) the expanse of the work site where asbestos fibers were released, (3) the extent of time plaintiff was exposed to the product, (4) what types of asbestos products the plaintiff was exposed to, (5) how the plaintiff handled and used those products, (6) expert testimony on the effects of inhalation of asbestos on human health in general and the plaintiff in particular, and (7) evidence of any other substances that could have contributed to the plaintiff's disease (and expert testimony as to the combined effect of exposure to all possible sources of the disease).

The Lockwood, Van Hout, Berry, and Allen analysis applies to the evidence presented here. Evidence of Mr. Morgan's proximity to asbestos products of these defendants was provided by:

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<sup>13</sup> In the trial court, several defendants relied on Niven v. E.J. Bartells Co., 97 Wn. App. 507, 518, 983 P.3d 1193 (1999). That reliance is unwarranted because Niven is distinguishable from this case. In Niven, the plaintiff's argument was:

To establish that Brower products were being installed at Todd during the month Niven worked there, Niven declares that he saw people working at Todd who to his knowledge had worked for Brower on previous jobs.

Niven did not, however, provide evidence that supported the position that because a person worked for Brower in the past, he or she likely continued to work for Brower in other subsequent jobs. As such, this Court rejected the inference as being “a speculative link between Brower's products and Niven's injuries.” Id. There is no similar logical inferential gap in the evidence presented in this case.

(1) Mr. Wortman's and Dr. Millette's testimony that the gaskets and packing used at PSNS during the relevant time periods contained asbestos,

(2) Mr. Wortman's testimony that replacement gaskets and packing supplied by defendants Buffalo, Warren and DeLaval ("IMO") were extensively used at PSNS during relevant periods, and

(3, 5) Mr. Knowles' testimony of observing Mr. Morgan, either himself working with or being near individuals working with gaskets and replacing packing on new and existing Leslie valves, Buffalo pumps, Aurora pumps, Warren pumps, DeLaval (IMO) pumps, Powell valves, and Atwood (Weir) valves. Evidence concerning the expanse of the work site where such asbestos fibers were released was contained in the testimony of Mr. Knowles, who discussed being in the same ship compartments with Mr. Morgan when the work described above was being carried out. It is also contained in the testimony and studies submitted by Dr. Millette, which not only showed substantial amounts of asbestos being given off from the activities described by Mr. Knowles, but also provided evidence that the asbestos released would contaminate entire workrooms.

(4, 5) Mr. Morgan's interrogatory answers, as well as Mr. Knowles' deposition testimony, established that plaintiff was exposed to

these products periodically over many years. Mr. Knowles, Mr. Wortman and Dr. Millette provided evidence that the types of asbestos products to which Mr. Morgan was exposed included those sold by the defendants here.

(6, 7) Dr. Mark provided expert testimony on the affects of inhalation of asbestos, on human health in general and the plaintiff in particular, as well as expert testimony “as to the combined effect of exposure” to asbestos in causing Mr. Morgan’s mesothelioma (CP 4561, 4565), e.g., paragraphs 27 and 28 of Dr. Mark’s Declaration at CP 4561. This evidence is equivalent or greater than the evidence found sufficient by the Appeal Courts and Supreme Court in Lockwood, Berry and Allen. Furthermore, as this Court explained in Berry, “the extent to which Brower [the defendant who moved for summary judgment] supplied the products as compared with other distributors is irrelevant for purposes of summary judgment.” 103 Wn. App. at 325.

**E. The Record Provides More Than Adequate Foundation For Mr. Wortman’s Declaration.<sup>14</sup>**

In its order granting summary judgment, the trial court denied defendants’ motions to strike the Wortman declaration. CP 6754.

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<sup>14</sup> This issue was raised by the cross-appeal of several defendants, and they have the burden of proof. Plaintiffs are discussing this issue now to give context to defendants’ anticipated arguments.

Defendants' motion to strike was properly denied given that Washington law provides that:

[U]nder ER 602, "testimony should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge." *State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984), citing 5 Karl Tegland, Wash. Prac. § 219 (2d ed. 1982)).

Herring v. DSHS, 81 Wn. App. 1, 21, 914 P.2d 67 (1996).

Both Mr. Wortman's declaration and his deposition demonstrate facts from which a trier of fact could reasonably find that Mr. Wortman had firsthand knowledge of his declaration testimony. Turning first to the declaration, Mr. Wortman explains that his testimony was "based on my observations of the replacement parts we received when we were doing work on equipment as part of an overhaul, conversion or a modernization of a ship." CP 5192, emphasis added. Furthermore, Mr. Wortman talks in his deposition both about how he toured the machine shop every day and how he frequently observed replacement packaging from the manufacturers. CP 6727, 6732.

A witness such as Mr. Wortman may properly testify pursuant to ER 602 and 701 to inferences and opinion rationally based on perception and helpful to a determination of a fact in dispute. Numerous federal circuits hold similarly construing the identical provisions of FRE 602 and 701. Burlington N. R. Co. v. Nebraska, 802 F.2d 994, 1005 (8<sup>th</sup> Cir.

1986).<sup>15</sup> See United States v. Cantu, 167 F.3d 198, 204 (5<sup>th</sup> Cir. 1999) (“personal knowledge can include inferences and opinions, so long as they are grounded in personal observation and experience”); United States v. Neal, 36 F.3d 1190, 1206 (1<sup>st</sup> Cir. 1994) (same). See also Farner v. Paccar, Inc., 562 F.2d 518, 520 (8th Cir. 1977) (allowing lay opinion testimony of truck operator with extensive experience in the industry regarding the proper use of safety chains); Gravelly v. Providence Partnership, 549 F.2d 958, 961 (4th Cir. 1977) (allowing lay opinion testimony of company's president regarding relative safety of conventional versus spiral staircase).

It is also important to point out that in Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518, 1523 (7th Cir. 1989), Judge Posner (writing for the Seventh Circuit and relying on cases from the First and Ninth Circuits) held, for upper level managers, personal experience includes what they are told by subordinates:

The items whose exclusion we especially question were statements by the plaintiff's expert witness and by Agfa's own board of directors regarding the quality of the A-1. The principal ground for exclusion was that these statements were based on what the expert and the directors had been told by customers and engineers and were therefore hearsay. We agree only up to "therefore." Business executives do not make assessments of a product's quality and marketability by inspecting the product at first hand. Their assessments are inferential, and as long as they

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<sup>15</sup> As plaintiff explains at page 260 of Mr. Wortman's deposition (CP 6726), Mr. Wortman is a lay expert on certain matters and may give opinion evidence pursuant to ER 701.

are the sorts of inference that businessmen customarily draw they count as personal knowledge, not hearsay. See *Navel Orange Administrative Comm. v. Exeter Orange Co.*, 722 F.2d 449, 453 (9th Cir. 1983); *Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 739 (1st Cir. 1982) ("most knowledge has its roots in hearsay"); *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055, 1060 (7th Cir. 1987) (dictum). All perception is inferential, and most knowledge social; since Kant we have known that there is no unmediated contact between nature and thought. Knowledge acquired through others may still be personal knowledge within the meaning of Fed.R.Evid. 602, rather than hearsay, which is the repetition of a statement made by someone else -- a statement offered on the authority of the out-of-court declarant and not vouched for as to truth by the actual witness. Such a statement is different from a statement of personal knowledge merely based, as most knowledge is based, on information obtained from other people.

(Emphasis added.) Thus, Mr. Wortman's personal experience also includes information he gained from others in his role as a high level supervisor, including information that shop planners within the Machine Shop specifically requested replacement parts from the original manufacturers of the equipment being worked on. Both the trial judge in this case and Nelson v. Buffalo Pumps, Inc., thus properly denied defendants' motion to strike Mr. Wortman's declaration.<sup>16</sup> See Oltman v. Holland Am. Line USA, 163 Wn.2d 236, 248-49 (2008).

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<sup>16</sup> A copy of the order in Nelson is attached as Appendix A to this brief.

**VI. CONCLUSION**

Appellant respectfully requests this Court reverse the dismissal of the case, and remand this case for trial.

Dated this 27th day of January 2010,

Respectfully submitted,

**SCHROETER, GOLDMARK & BENDER**

A handwritten signature in cursive script, appearing to read "William Rutzick", is written over a horizontal line.

WILLIAM RUTZICK, WSPA NO. 11533

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LISA M. BARLEY, *pro hac vice*

Counsel for Appellant/Plaintiff

## **APPENDIX A**

THE HONORABLE MARY ROBERTS  
Noted for Hearing: July 17, 2009 at 9:00 a.m.  
Trial Date: September 14, 2009

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PENNY NELSON, individually and as  
Personal Representative of the Estate of  
DOUGLAS NELSON,

Plaintiff,

v.

BUFFALO PUMPS, INC., et al.,

Defendants.

NO. 08-2-17324-1 SEA

~~DENYING~~

ORDER GRANTING DEFENDANTS  
CRANE CO. AND BUFFALO PUMPS,  
INC.'S JOINT MOTION TO STRIKE  
PORTIONS OF THE DECLARATION OF  
MELVIN WORTMAN ~~[PROPOSED]~~  
AND PERMITTING WORTMAN  
DEPOSITION TO BE REOPENED

THIS MATTER having come on regularly for the Court's consideration, without oral argument, upon Defendants Crane Co. and Buffalo Pumps, Inc.'s Joint Motion to Strike Portions of the Declaration of Melvin Wortman, and the Court, having reviewed ~~the motion papers and the records and files herein, including:~~

1. Defendants Crane Co. and Buffalo Pumps, Inc.'s Joint Motion to Strike Portions of the Declaration of Melvin Wortman;

2. Declaration of Jeffrey M. Odom in Support of Defendants Crane Co. and Buffalo Pumps, Inc.'s Joint Motion to Strike Portions of the Declaration of Melvin Wortman, and exhibits 1 - 3 attached thereto;

3. Plaintiff's Opposition to Defendants' Buffalo and Crane's and Buffalo Pumps, Inc.'s Joint Motion to Strike Portions of the Declaration of Melvin Wortman;

[PROPOSED] ORDER GRANTING CRANE CO. AND  
BUFFALO PUMPS, INC.'S JOINT MOTION TO STRIKE



FILE

THE HONORABLE MARY ROBERTS  
Trial Date: September 14, 2009  
Hearing Date: August 7, 2009  
Hearing Time: 9:00 a.m.

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PENNY NELSON, individually and as  
Personal Representative of the Estate of  
DOUGLAS NELSON,

Plaintiff,

v.

BUFFALO PUMPS, INC., et al.,

Defendants.

NO. 08-2-17324-1 SEA

ORDER GRANTING DEFENDANT  
BUFFALO PUMPS, INC.'S MOTION FOR  
SUMMARY JUDGMENT [PROPOSED]

*IN PART AND DENYING IN PART*  
*WR*  
*6/2*

THIS MATTER having come before this Court for hearing upon Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment, and the Court having heard the argument of counsel, reviewed the motion papers and the records and files herein, including:

1. Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment;
2. Declaration of Abraham K. Lorber in Support of Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment, and exhibits 1 - 7 attached thereto;
3. Plaintiff's Memorandum in Opposition to Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment;
4. Declaration of Kristin Houser in Support of Plaintiff's Memorandums in Opposition to Various Motions for Summary Judgment, and Exhibits 1 through 21 annexed thereto;
5. Declaration of Melvin Wortman, dated March 13, 2009;

ORDER GRANTING DEFENDANT BUFFALO PUMPS, INC.'S  
MOTION FOR SUMMARY JUDGMENT [PROPOSED] - 1

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1 6. Supplemental Declaration of Kristin Houser in Support of Plaintiff's  
2 Memorandums in Opposition to Various Motions for Summary Judgment and the  
3 Supplemental Declaration of Melvin Wortman annexed thereto;

4 7. Plaintiff's Supplemental Memorandum in Opposition to Buffalo Pumps  
5 Motion for Summary Judgment;

6 8. Declaration of William Rutzick in Support of Plaintiff's Memorandums in  
7 Opposition to Various Motions for Summary Judgment and Exhibits 23 through 40 annexed  
8 thereto; *except Exhibits 23, 26-28, 37, 38, and 40.*

9 9. Buffalo Pumps, Inc.'s Reply in Support of Motion for Summary Judgment;

10 10. Declaration of Brian D. Zeringer, dated July 13, 2009, and Exhibits 1 through  
11 4 (a-f) annexed thereto;

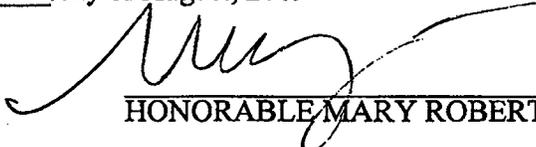
12 11. Supplemental Statement of Authorities, submitted by Plaintiff and dated July  
13 24, 2009; and

14 12. *WR* Signed Declaration of Samuel P. Hammar, M.D. dated *March 18, 2009*

15 *The court did not consider Defendant's Crane and*  
16 *Buffalo Pumps' "Jonaw" filed after hearing of this motion*  
IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

17 Defendant Buffalo Pumps, Inc.'s Motion for Summary Judgment is GRANTED in  
18 part and DENIED in part. Plaintiff's survival claim and her claim for loss of consortium have  
19 been extinguished by the statute of limitations and are hereby DISMISSED WITH  
20 PREJUDICE. Plaintiff's claims based on willful or wanton misconduct, breach of warranty  
21 (Title 62A RCW), *MARKET SHARE LIABILITY, MARKET SHARE ALTERNATE LIABILITY* *WR* enterprise liability, concert of action and conspiracy are DISMISSED  
22 WITH PREJUDICE. In all other respects, Defendant Buffalo Pumps, Inc.'s Motion for  
23 Summary Judgment is DENIED.

24 DONE IN ~~OPEN COURT~~ this *13th* day of August, 2009

25  
26   
HONORABLE MARY ROBERTS

ORDER GRANTING DEFENDANT BUFFALO PUMPS, INC.'S  
MOTION FOR SUMMARY JUDGMENT [PROPOSED] - 2

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1 Presented by:

2 LANE POWELL PC

3

4 By

Barry N. Mesher, WSBA No. 07845

5 Brian D. Zeringer, WSBA No. 15566

6 Abraham K. Lorber, WSBA No. 40668

Attorneys for Defendant Buffalo Pumps, Inc.

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8

Copy Received, Approved as to Form:

9

10 SCHROETER GOLDMARK & BENDER

11

12 By

Kristin Houser, WSBA No. 7286

13 William Rutzick, WSBA No. 11533

14 Attorneys for Plaintiff

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ORDER GRANTING DEFENDANT BUFFALO PUMPS, INC.'S  
MOTION FOR SUMMARY JUDGMENT [PROPOSED] - 3

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

JAMES KENNETH MORGAN and  
KAY ELAINE MORGAN, Husband  
and Wife,

Appellant,

v.

AGCO CORPORATION, et al.,

Respondents.

NO.63923-4-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 Schroeter Goldmark & Bender, over the age of 18, not party to this action and competent to make the following statements:

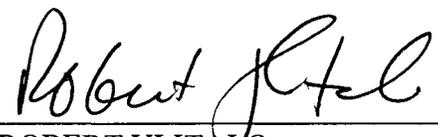
2. **On January 27, 2010**, the original and one copy of the Brief of Appellants was filed with the Court of Appeals of the State of Washington, Division I and copies served upon the attorneys of record for the

defendant/respondents by having said copies sent via U.S. Mail, postage pre-paid, to the office addresses below:

<p><b>Counsel for William Powell Co.</b>          Melissa K. Habeck          FORSBERG &amp; UMLAUF, PS          901 Fifth Avenue, Suite 1700          Seattle, WA 98164</p>	<p><b>Counsel for Leslie Controls, Inc.</b>          Mark Tuvim          Kevin Craig          Gordon &amp; Rees LLP          701 Fifth Avenue, Suite 2130          Seattle, WA 98104</p>
<p><b>Counsel for IMO Industries, Inc.</b>          James Horne          Michael E. Ricketts          GORDON THOMAS          HONEYWELL          One Union Square          600 University, Suite 100          Seattle, WA 98101</p>	<p><b>Counsel for Buffalo Pumps</b>          Barry N. Mesher          Brian D. Zeringer          LANE POWELL PC          1420 Fifth Avenue, Suite 4100          Seattle, WA 98101-2338</p>
<p><b>Counsel for Warren Pumps</b>          J. Michael Mattingly          RIZZO MATTINGLY          BOSWORTH, PC          411 SW 2<sup>nd</sup> Avenue, Suite 200          Portland, Oregon 97204</p>	<p><b>Counsel for Elliott Co.</b>          Pennock Gheen          KARR TUTTLE &amp; CAMPBELL          1201 3rd Avenue          Suite 2900          Seattle, Washington 98101</p>
<p><b>Counsel for Aurora Pumps</b>          Jeanne F. Loftis          BULLIVANT HOUSER          BAILEY PC          888 SW Fifth Avenue, Suite 300          Portland, OR 97204-2089</p>	<p><b>Counsel for Weir Valve &amp; Controls USA Inc;</b>          Lori Nelson Adams          Dana Hoerschelmann          THORSRUD CANE &amp; PAULICH          1300 Puget Sound Plaza          1325 Fourth Ave.          Seattle, WA 98101</p>

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

DATED at Seattle, Washington this 27<sup>th</sup> day of January 2010.

  
\_\_\_\_\_  
ROBERT YLITALO