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NO. 63923-4-I

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

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JAMES KENNETH MORGAN and KAY ELAINE MORGAN,

Appellants,

v.

AURORA PUMP, et al.,

Respondents.

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BRIEF OF RESPONDENT LESLIE CONTROLS, INC.

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ORIGINAL

**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

**II. ISSUES RELATING TO ASSIGNMENTS OF ERROR ..... 2**

**III. LESLIE’S COUNTERSTATEMENT OF THE CASE..... 2**

    A. Appellant Has Produced No Evidence Establishing That Mr. Morgan Was Exposed to Asbestos-Containing Products Manufactured or Supplied by Leslie.....3

        1. Michael Farrow .....3

        2. Jack Knowles .....6

        3. Melvin Wortman.....8

    B. Leslie’s Summary Judgment and Procedural Posture.....9

**IV. ARGUMENT ..... 15**

    A. Summary Judgment Standard .....15

    B. Liability is Limited to Parties in the Chain of Distribution of a Hazardous Asbestos-Containing Product Which Constitutes a Substantial Factor in Causing the Illness at Issue.....17

    C. The Trial Court’s Conclusion That Appellant’s Design Defect Fails to Survive *Braaten* and *Simonetta* Is Correct and Should Not Be Disturbed .....18

    D. There Is No Evidence Mr. Morgan Was Exposed To Asbestos-Containing Products Manufactured or Supplied by Leslie .....19

        1. Melvin Wortman.....19

        2. Michael Farrow and Jack Knowles.....20

        3. Matthew Wrobel .....21

E.	Even Assuming Sufficient Evidence of Product Identification Against Leslie, Appellant Failed to Offer Admissible Evidence of Causation Under Applicable Washington Law .....	23
1.	<i>Lockwood</i> .....	23
2.	<i>Hue</i> .....	28
3.	<i>Mavroudis</i> .....	29
4.	None of the Authorities Cited by Appellant Have Employed Her “Each and Every Exposure” Theory in Asbestos Litigation .....	32
5.	Appellant’s “Each and Every Exposure” Theory Does Not Satisfy <i>Frye</i> , and Should Not Be Considered Here .....	36
a.	<i>Frye</i> Requires General Acceptance of a Scientific Theory in the Relevant Scientific Community Before It Can Be Introduced in Washington Courts .....	36
b.	Appellant’s “Each and Every Exposure” Theory Lacks Support in the Published Literature.....	39
c.	Multiple Courts Have Recently Rejected Appellant’s “Each and Every Exposure” Theory.....	40
d.	The Trial Court Incorrectly Considered Dr. Mark’s Opinion Regarding Appellant’s “Each and Every Exposure” Theory.....	46
V.	<b>JOINDER IN RESPONDENTS’ BRIEFS</b> .....	49
VI.	<b>CONCLUSION</b> .....	49

## TABLE OF AUTHORITIES

### **Cases**

<i>Allen v. Asbestos Corp.</i> , 138 Wn.App. 564 (2007).....	21, 33, 34
<i>Berry v. Crown Cork &amp; Seal Co.</i> , 103 Wn App. 312 (2000).....	33, 34
<i>Billiar v. Minn. Mining &amp; Mfr. Co.</i> , 623 F.2d 240 (2d Cir. 1980) .....	49
<i>Borg-Warner v. Flores</i> , 232 S.W.3d 765 (Tex. 2007).....	34, 35
<i>Braaten v. Saberhagen Holdings</i> , 165 Wn.2d 373 (2008).....	passim
<i>Bruns v. Paccar</i> , 77 Wn.App. 201 (1995) .....	47
<i>Buile v. Ballard Community Hosp.</i> , 70 Wn.App. 18 (1993).....	16
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	16
<i>Cowiche Canyon Conser. v. Bosley</i> , 118 Wn.2d 801 (1992).....	18
<i>Deschamps v. Mason County Sheriff's Office</i> , 123 Wn.App. 551 (2004) .....	22
<i>Eakins v. Huber</i> , ___ Wn.App. ___ [225 P.3d 1041] (Feb. 23, 2010) .....	38, 41
<i>Fairbanks v. J.B. McLoughlin</i> , 131 Wn.2d 96 (1997) .....	22
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923) .....	passim
<i>Georgia-Pacific Corp. v. Stephens</i> , 239 S.W.3d 304 (Tex. App. 2007).....	35, 46
<i>Grant v. Bocca</i> , 133 Wn.App. 176 (2006).....	38, 41
<i>Hue v. Farmboy</i> , 127 Wn.2d 67 (1995) .....	passim
<i>In re Asbestos Litigation</i> , 542 A.2d 1205 (Del. Sup. Ct. 1986) .....	49

<i>In Re Hawaii Federal Asbestos Cases</i> , 960 F.2d 806 (9 <sup>th</sup> Cir. 1992) .....	27
<i>In re Related Asbestos Cases</i> , 543 F. Supp. 1142 (N.D. Cal. 1982) .....	49
<i>Ingram v. AC&amp;S, Inc.</i> , 977 F.2d 1332 (9 <sup>th</sup> Cir. 1992).....	27
<i>Johnson v. American Standard, Inc.</i> , 43 Cal.4 <sup>th</sup> 56, 179 P.3d 905, 74 Cal.Rptr.3d 108 (2008) .....	49
<i>Kahn v. Salerno</i> , 90 Wn.App. 110 (1998) .....	16
<i>Lindstrom v. A-C Product Liability Trust, et al.</i> , 424 F.3d 488 (6 <sup>th</sup> Cir. 2005) .....	19, 27
<i>Lockwood v. AC&amp;S, Inc.</i> , 109 Wn.2d 235 (1987).....	passim
<i>Lohrmann v. Pittsburgh Corning Corp.</i> , 782 F.2d 1156 (4 <sup>th</sup> Cir. 1986) .....	35
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn.App. 372 (1999).....	22
<i>Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	16
<i>Mavroudis v. Pittsburgh-Corning Corp.</i> , 86 Wn.App. 22 (1997) .....	passim
<i>Nast v. Michels</i> , 107 Wn.2d 300 (1986) .....	19
<i>Niven v. E.J. Bartells Co.</i> , 97 Wn.App. 507 (1999).....	22
<i>Parmelle v. Chicago M. &amp; St. P. Ry. Co.</i> , 92 Wash. 185 (1916).....	22
<i>Reed v. Pennwalt Corp.</i> , 22 Wn.App. 718 (1979).....	49
<i>Retired Pub. Employees Council of Wash. v. Charles</i> , 148 Wn.2d 602 (2003) .....	22
<i>Ruff v. Department of Labor and Industries</i> , 107 Wn.App. 289 (2001) .....	37, 38

<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1 (1986).....	22
<i>Simonetta v. Viad Corporation</i> , 165 Wn.2d 341 (2008).....	passim
<i>State v. Canady</i> , 90 Wn.2d 808 (1978).....	37
<i>State v. Cauthron</i> , 120 Wn.2d 879 (1993).....	37, 38, 41, 46
<i>State v. Copeland</i> , 130 Wn.2d 244 (1996).....	passim
<i>State v. Martin</i> , 101 Wn.2d 713 (1984).....	37
<i>State v. Meekins</i> , 125 Wn. App. 390 (2005).....	34
<i>State v. Phillips</i> , 123 Wn. App. 761 (2006).....	39
<i>State v. Riker</i> , 123 Wn.2d 351 (1996).....	38
<i>Van Hout v. Celetex</i> , 121 Wn.2d 697 (1993).....	34
<i>White v. State</i> , 131 Wn.2d 1 (1997).....	22
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216 (1989).....	16
<b>Statutes and Rules</b>	
CR 56(b).....	16
CR 56(c).....	16
ER 702 .....	39
RAP 10.1(g).....	49
RCW 7.72 .....	10

**Treatises and Publications**

Iwatsubo, *Pleural Mesothelioma: Dose Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study*, American Journal of Epidemiology, Vol. 148, No. 2, pp. 133-42 (1998) ..... 40

Keeton, W., D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 41 (5<sup>th</sup> ed. 1984) ..... 34

Rodelsperger, et al., *Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results From a German Hospital-Based Case-Control Study*, American Journal of Industrial Medicine 39:262-75 (2001) ..... 40

## I. INTRODUCTION

The trial court correctly granted summary judgment to Defendant/ Respondent Leslie Controls, Inc. (“Leslie”). The trial court found that any “duty to warn” and “design defect” claims of Plaintiffs/Appellants James and Kay Morgan (“Appellant”)<sup>1</sup> were precluded by the Washington Supreme Court decisions in *Simonetta v. Viad Corporation*, 165 Wn.2d 341 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373 (2008), and that Mr. Morgan’s incidental exposure, if any, to asbestos-containing product(s) manufactured or supplied by Leslie did not constitute a substantial factor in causing Mr. Morgan’s mesothelioma.

The trial court’s grant of summary judgment to Leslie should be affirmed. Although not reached by the trial court, there is no admissible evidence that Mr. Morgan ever worked with or around any asbestos-containing product (gaskets, packing, or external insulation) manufactured or supplied by Leslie. There is no duty under Washington law to warn about the hazards of another’s product. Appellant has not appealed the trial court’s dismissal of her design defect claim, and the trial court’s well-reasoned ruling on that issue should not be disturbed. Moreover, while it is harmless error here, the trial court incorrectly considered evidence that

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<sup>1</sup> The complaint in this action has not been amended to reflect Mr. Morgan’s death following its filing. Kay Morgan has recently filed a separate action both individually and as Personal Representative of Mr. Morgan’s estate alleging the same claims against the respondents and others.

“each and every exposure” to asbestos constitutes a substantial factor in the causation of Mr. Morgan’s illness. Thus, while this Court should affirm the trial court’s conclusion that Mr. Morgan’s incidental exposure, if any, to asbestos-containing product(s) manufactured or supplied by Leslie was not a substantial factor in causing his illness, any suggestion that Appellant’s “each and every exposure” theory satisfies the standard under *Frye v. United States* applicable in Washington for scientific and medical evidence should be eliminated.

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

1. The trial court correctly concluded that no triable issue of material fact existed with respect to Leslie’s summary judgment motion. There is no admissible evidence that Mr. Morgan worked with or around any asbestos-containing product(s) manufactured or supplied by Leslie. Nor is there a triable issue with respect to any other claim(s) raised by Appellant with respect to Leslie.

2. The trial court correctly granted summary judgment in favor of Leslie.

## **III. LESLIE’S COUNTERSTATEMENT OF THE CASE**

Mr. Morgan was born on April 21, 1934 in Spokane, Washington. CP 1018. From 1952-1957, Mr. Morgan worked as an apprentice and then journeyman pipefitter at Puget Sound Naval Shipyard (PSNS) in

Bremerton. CP 1024. After a two-year stint as a draftsman for Boise-Cascade in Walla Walla, Mr. Morgan returned to work at PSNS as a pipefitter from 1959-1963, an engineering technician from 1963-1975, and a technical assistant from 1975-1989. CP 1025. Plaintiff alleges in this action that Mr. Morgan was exposed over the course of his career at PSNS to asbestos from gaskets, packing, boilers, compressors, steam traps, pumps, generators, turbines, valves, engines, purifiers, heaters, feed tanks, insulation, blowers, feed pumps, distiller plants, remote level indicators, and brakes that were manufactured or distributed by over sixty different defendants, including Leslie. CP 1026-27.

A. **Appellant Has Produced No Evidence Establishing That Mr. Morgan Was Exposed to Asbestos-Containing Products Manufactured or Supplied by Leslie.**

Although Leslie was named as a defendant, Appellant failed to identify or produce any admissible evidence that Mr. Morgan was exposed to an asbestos-containing product manufactured or supplied by Leslie.

1. **Michael Farrow**

Michael Farrow testified in his deposition that he worked directly with Mr. Morgan as an apprentice and journeyman pipefitter at PSNS. CP 4197-98, 4202-03. As the name implies, pipefitters at naval shipyards such as Mr. Morgan and Mr. Farrow assemble and disassemble pipe runs; they also connect and disconnect equipment such as valves and pumps

into and from those pipe runs, on naval vessels. CP 6906. Such equipment generally connects to the pipe runs at flanges which typically required a sealing product such as a flange gasket, or at threaded connections. Mr. Farrow testified that he observed Mr. Morgan disconnect and connect eight flanged Leslie valves during their work together.<sup>2</sup> CP 1071. Mr. Farrow testified that, as a pipefitter, Mr. Morgan would not have performed any internal work on Leslie valves, and that he did not recall ever seeing anyone else open and perform internal work on a Leslie valve at any time, much less in Mr. Morgan's presence. CP 1057-58, 1084-85, 1087. Further, pipefitters like Mr. Morgan would not install or place insulation on valves or flange connections – other tradesmen called “lagers” would perform that work after the pipefitters were gone. CP 1050-51.

Mr. Farrow testified that the Navy used several different types of flange gaskets (including rubber, neoprene, and Teflon gaskets), and both asbestos and non-asbestos-containing insulation. CP 1044-45. Mr.

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<sup>2</sup> According to Mr. Farrow, Mr. Morgan spent only a matter of hours working on these Leslie valves. CP 1072-73. The only work Mr. Farrow saw Mr. Morgan perform on the Leslie valves was the removal and installation of flange gaskets which Leslie did not provide or specify. CP 1072-73, 1084, 1086-87. According to Mr. Farrow, the total time Mr. Morgan took to complete his work on each Leslie valve would be “somewhere between one hour and two hours,” of which only “half an hour to an hour” would be spent on cleaning the flange faces. CP 1072-73. Thus, Mr. Morgan spent a total of four to eight hours – between one-half and one workday – over the course of his entire 37-year career of more than 8,000 workdays cleaning the flange faces of these Leslie valves he removed.

Farrow also testified that the Navy would specify the type of gasket, packing, and insulation to use depending upon the application of the system, including the type, temperature, and pressure of the medium flowing through the pipes and equipment. CP 1045-49. Mr. Farrow did not know the type of application associated with any of the Leslie valves on or around which he saw Mr. Morgan work, nor did he know the model numbers of any Leslie valves Mr. Morgan encountered. CP 1077-78.

Mr. Farrow could not provide any evidence that Mr. Morgan was actually exposed to any asbestos-containing products manufactured or supplied by Leslie. He did not know if Leslie manufactured, supplied, or specified the use of asbestos-containing internal gaskets or packing, or exterior insulation in conjunction with its valves. CP 1075-76, 1085-87. He did not know if Mr. Morgan ever installed a brand new Leslie valve. CP 1059-60. He did not know if Leslie manufactured, supplied, or specified any of the flange gaskets that Mr. Morgan or others may have removed from or installed on Leslie valves. CP 1086-7. Notwithstanding the fact that he never saw Mr. Morgan work on them, Mr. Farrow did not know if Leslie manufactured, supplied, or specified the internal gaskets or packing that may have been used in Leslie valves. CP 1085. Mr. Farrow did not know whether Leslie manufactured, supplied, or specified the insulation that may have been used with the valves on or around which

Mr. Morgan worked, or the composition of any external insulation or pads used in conjunction with its valves or valve flanges. CP 1075-76, 1085-87.

**2. Jack Knowles**

Appellant offers responses by Jack Knowles to a series of leading deposition questions to support her assertion that Mr. Morgan worked on brand-new Leslie valves at PSNS during the time that Mr. Knowles and Mr. Morgan worked together as pipefitter apprentices from 1954-1957 – apparently with the implication that Mr. Morgan would have been exposed to gaskets and packing provided by Leslie before those consumable parts were replaced by products manufactured and supplied by others. *See, e.g.* CP 6558-60.<sup>3</sup> However, Mr. Knowles acknowledged in response to questioning by Leslie’s counsel that he in fact never saw a new Leslie valve in Mr. Morgan’s presence or otherwise, and could not say whether Mr. Morgan had ever worked on or around one:

Q: Okay. Did you ever see a new Leslie valve? [] Or other equipment?

A: I don’t think so, no, to the best of my recollection.

Q: And you don’t know whether Mr. Morgan would have worked with or seen one, do you?

A: Not unless he was working on that stuff after I did. The time that – like I said, primarily what – what we were – when I was around him was in – was removal.

Q: Okay.

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<sup>3</sup> Leslie objected to Mr. Knowles’ deposition testimony based on various grounds, including the leading nature of the questioning by Plaintiff’s counsel.

A: Piping removal.  
Q: Okay. So, you know, we can only ask you about what you saw.  
A: Yeah, that's –  
Q: We can't ask – we're not asking you about what he may or may not have done –  
A: Yeah.  
Q: – outside of your presence or outside of the time you were working with him –  
A: Yeah.  
Q: – because you can't testify about that.  
A: Right.  
Q: Okay. So you have no basis for saying that Mr. Morgan ever worked with, installed, [did] anything with a brand-new Leslie Controls valve or other piece of equipment?  
A: I didn't see him do that.

CP 6568-69 (objections omitted). There is thus no foundation for Mr. Knowles to testify that Mr. Morgan worked on or around new Leslie equipment. Nor is there any evidence Mr. Morgan was the first to service any Leslie equipment. In fact, Mr. Knowles testified that Mr. Morgan removed and installed pipes on ships at PSNS during complex overhauls rather than new construction, that whatever Leslie equipment he saw Mr. Morgan remove in the course of these overhauls had been in use for “quite a while,” and that the Leslie equipment he and Mr. Morgan installed in the overhauled vessels were not new but either was the very same equipment that had been removed or was equipment which had been refurbished in the machine shop. CP 6288-92, 6565.

Mr. Knowles did not know if any external flange gaskets, external insulation, or internal packing Mr. Morgan may have removed or installed on Leslie equipment were manufactured, supplied, or specified by Leslie. *See* CP 5141, 6561-68. Appellant asserts in her Opening Brief that the testimony of Mr. Knowles she cites for support is “not inconsistent” with Mr. Knowles’ sworn testimony that he never saw Mr. Morgan work on or around new Leslie equipment or Leslie-supplied asbestos-containing gaskets, packing, or insulation, *see* Opening Brief, p. 9 n. 7, but she offers no explanation or argument on that issue. Mr. Knowles moved to the shipyard’s design department as a design technician in 1961, and Mr. Morgan followed him in 1963. CP 1025.

**3. Melvin Wortman**

Appellant also offered the declaration and deposition of Melvin Wortman from *Nelson v. Buffalo Pumps, Inc.*, King County Superior Court Case No. 08-2-17324-1 SEA. However, Mr. Wortman does not address Leslie in either his declaration or deposition. Accordingly, Mr. Wortman offers no admissible evidence against Leslie in this matter.<sup>4</sup>

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<sup>4</sup> In fact, Leslie deposed Mr. Wortman in another asbestos case – *Anderson v. Armstrong International, Inc.*, King County Superior Court Case No. 07-2-40128-8 SEA – in which Mr. Wortman acknowledged in response to questioning by Leslie’s counsel that he had no knowledge about Leslie providing replacement gaskets and packing:

Q: As we talked a few minutes ago, you don’t know from either manuals or speaking with any Leslie personnel whether Leslie

**B. Leslie's Summary Judgment and Procedural Posture**

Mr. Morgan retired from PSNS in 1989. CP 1028. He was diagnosed with mesothelioma on March 26, 2007. CP 1030. On August 29, 2007, the Morgans filed their complaint naming sixty defendants, including Leslie, alleging asbestos-related injuries based on theories of

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recommended or specified the use of external insulation of any kind, do you?

A: No.

Q: Okay. You don't know that any Leslie valves that came into Shop 31 for evaluation, repair, maintenance, you don't know whether any of those valves contained original gaskets or packing that had come with the valve from the factory, do you?

A: No.

Q: Do you know the maintenance history of any of those valves?

A: No.

Q: And as we sit here today, you can't tell me, notwithstanding what you believe is the Navy standard operating procedure, you can't tell me whether replacement gaskets and packing were provided by Leslie, can you?

A: No, I can't –

Q: Okay.

A: – say.

Q: Okay.

A: That's true, they were – the packing and gaskets would be provided by the Navy supply system out of the shop's hands.

CP 6577-78. Thus, Mr. Wortman lacks the requisite foundation to testify that Leslie provided any replacement gaskets and packing to the Navy.

Further, Mr. Wortman explained during his *Nelson* deposition that the Navy decided to procure replacement gaskets and packing from equipment manufacturers as the “repair process at naval shipyards got more rigorous in the mid to late 1960s than it had been before, following the loss of the *USS Thresher* . . . [and 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.” See Appellant's Opening Brief, pp. 6-7. However, Mr. Morgan ceased working as a pipefitter and moved to the design department in 1963 – years before, according to Mr. Wortman, equipment manufacturers would have begun in the late 1960s to provide asbestos-containing replacement parts. CP 1025. Appellant has offered no admissible evidence that Mr. Morgan was present after 1963 during the removal or installation of any Leslie equipment, or during any maintenance work on such equipment in his presence involving Leslie-supplied asbestos-containing parts.

products liability (RCW 7.72 *et seq.*), negligence, conspiracy, spoliation, willful or wanton misconduct, strict product liability under Section 402B of the Restatement of Torts, premises liability, breach of warranty, enterprise liability, market share liability and/or market share alternate liability, and any other applicable theory of liability based on defendants' alleged negligent and unsafe design; failure to inspect, test, warn, instruct, monitor and/or recall; failure to substitute safe products; marketing or installing unreasonably dangerous or extra-hazardous and/or defective products; marketing or installing products not reasonably safe as designed; marketing or installing products not reasonably safe for lack of adequate warning and marketing or installing products not reasonably safe for lack of adequate warning and marketing or installing products with misrepresentations of product safety. CP 900-905. Mr. Morgan died on January 27, 2008 before his deposition could be completed. CP 1090.

Following the Washington Supreme Court decisions in *Simonetta* and *Braaten* in early December 2008, Leslie moved for summary judgment based on, *inter alia*, (1) the lack of evidence that Mr. Morgan had been exposed to any asbestos-containing products manufactured or supplied by Leslie, (2) that Mr. Morgan's exposure, if any, to Leslie asbestos-containing products was not a substantial factor in causing his illness; (3) the Navy's knowledge at the time of Mr. Morgan's

employment at PSNS regarding dangers to its employees from asbestos-containing products, and (4) the federal contractor defense. CP 987-1006. At that point in the litigation, Appellant had identified only Mr. Farrow as a product identification witness. Other defendants filed similar motions set for hearing on the same date in late January 2009. In response, Appellant asserted that Leslie had failed to specifically address her design defect claim because its valves could (but need not) utilize asbestos-containing products. CP 2849-63. After Leslie and the other defendants had submitted their reply briefs, the trial court granted Appellant's request for time to conduct additional discovery in light of the Supreme Court's recent decisions in *Simonetta* and *Braaten*, continued the trial date, and set summary judgment motion hearings for May 15, 2009.

Appellant subsequently identified Mr. Knowles and Mr. Wortman as additional witnesses, and submitted their supplemental response to Leslie's motion in April 2009. Leslie filed its supplemental reply which pointed out, *inter alia*: (1) that Appellant still had not submitted any admissible evidence that Mr. Morgan had been exposed to any asbestos-containing products manufactured or supplied by Leslie, (2) that Mr. Morgan's exposure to such products, if any, was not a substantial factor in causing his illness, (3) that the Supreme Court decisions in *Simonetta* and *Braaten* defeated Appellant's duty to warn and design defect claim against

Leslie as a matter of law, (4) that all Leslie valves provided to the Navy for use on its vessels had to comply with rigorous and specific military specifications issued by the U.S. Government before they could be installed on such vessels, and (5) that the Navy was a sophisticated user with knowledge of any asbestos-related dangers to its workforce at PSNS. CP 6534-48.

Following a lengthy hearing, the trial court granted the defendants' summary judgment motions and dismissed all claims against them in their entirety. According to the trial court in its ruling from the bench:

[T]here was a request for a *Frye* hearing with regard to [] some of the medical testimony.

I have ruled on this previously in other contexts, but the case that I think is on point and was cited by the plaintiff is [*Bruns v. Paccar*], 77 Wn. App. 201 (1995).

In that Judge Coleman drew a distinction between novel scientific evidence, which is governed by the *Frye* standard and medical causation testimony. I think that this falls within the realm of medical causation testimony.

I would deny the motion for a *Frye* hearing.

The Court and the State of Washington have been receiving this evidence for 20 plus years. I don't see it as novel evidence, regardless of what other developments in the medical or scientific community have come along to try to rebut it.

\* \* \*

I think that there is ample factual evidence here to take the case to the jury, but for this legal issue. This is the one. This is what I was trying to let the parties know, because this is the one that has caused the Court – I have been thinking about this now for a week, reading the material.

I was surprised by the Supreme Court decision in *Braaten – Braaten* and *Simonetta* in my view, it was a significant reversal in the course after 40 years of expanding [] strict liability, particularly for products liability.

The Court held in *Braaten* at paragraph 26:

“Because we have held in *Simonetta* that there is no duty to [warn] of the dangers of other manufacturers['] asbestos products[, w]e also conclude that there was not duty to [warn] with respect to the replacement packing and gaskets,” citing the *Lindstrom* decision.

“As in *Lindstrom* these manufacturers should not be held liable for harm caused by asbestos containing material, included in their products post manufacture. It does not comport with the principle of strict liability to impose on the manufacturer the responsibilities and costs of becoming experts in other manufactured products. Here, for example, there is evidence that more than 60 types of packing had been approved for naval use.”

Then in the *Simonetta* case itself, the holding there was [ – ] at least part of the holding [ – “It is] undisputed that Viad sold the evaporator to the [Navy] and did not manufacture, or sell, or select the asbestos insulation. Therefore, the completed product was the evaporator as delivered by Viad to the Navy, sans asbestos insulation. Under § 402A, strict liability attaches when a manufacturer sells an unreasonably dangerous product. Like the court in *Lindstrom*, we conclude that the unreasonably dangerous product in this case was the asbestos insulation. As in *Lindstrom*, we find Viad cannot be held responsible for the asbestos in another manufacturer’s product.”

The Supreme Court then in *Simonetta* went on in paragraph 37:

“Because Viad was not in the chain of distribution of the dangerous product, we conclude not only that it had no duty to warn under negligence, but also that it had cannot be strictly liable for failure to warn. That is, reasonable persons could conclude only that the evaporator was reasonably safe when it was sold without a warning of the dangers of asbestos exposure.”

On the one hand, we have a product that was sold without any asbestos in it.

On the other hand, we have a product where there was evidence of replacement asbestos. So in a sense, this case kind of comes in the middle.

We are not talking about the insulation, but we are talking about a number of pumps or valves, maybe even a tank that had component parts where there may have been initially some asbestos in the internal packing – in the internal gaskets.

One of the challenges, as a trial court judge, is to try to look at this appellate precedent and figure out how it applies to this case.

I cannot conceive of a way to be intellectually honest and apply this case without concluding that the same analysis in these two decisions, taken together, remove the design defect theory from the case, because it is precisely the same material – that is, the asbestos gaskets – that would give rise to either a failure to warn or a design defect.

It is true that the Supreme Court did not precisely deal with this issue. But the Supreme Court embraced *Lindstrom* in both of these decisions that [are] a significant change of course by our Court.

\* \* \*

So I just don't think that the design defect theory survives in the post *Simonetta* and post *Braaten* world.

I thought it was a closer issue on whether the fact that it is undisputed in this material that some of these products were delivered with asbestos containing materials in it.

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.

Reporter's Transcript ("RT"), pp. 154:14-161:1.<sup>5</sup> *See also* CP 6747-67 (trial court order incorporating its oral ruling and granting summary judgment). Appellant filed her Notice of Appeal on July 22, 2009. CP 6768-92. Appellant appears to have abandoned her design defect claim on appeal, and now focuses on the identification of asbestos-containing products purportedly supplied by Leslie and other defendants/respondents, and whether such products constitute a substantial factor in the causation of Mr. Morgan's illness. Appellant's Opening Brief, pp. 1-3.

#### IV. ARGUMENT

##### A. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue

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<sup>5</sup> Some misspellings and errors in syntax present in the Reporter's Transcript have been edited to the extent practicable, in an effort to improve readability. Leslie does not intend to alter or misrepresent the trial court's ruling through these edits.

as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(b), (c). A moving defendant may meet its initial burden (1) by demonstrating with admissible evidence the absence of an essential element of plaintiff's claim, such as causation, or (2) by "showing – that is, pointing out to the [trial court] – that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Buile v. Ballard Community Hosp.*, 70 Wn.App. 18, 21 (1993). In either case, the opposing party may not rest on mere allegations in response to the moving party's showing, but must set forth specific facts, through admissible evidence, showing the existence of a genuine issue of material fact on an element essential to the opposing party's case on which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23, 325; *Buile*, 70 Wn.App. at 21; *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("some metaphysical doubt as to the material facts" insufficient to defeat summary judgment); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216 (1989) (adopting standards). An appellate court reviews the trial court's grant of summary judgment *de novo* and "engages in the same inquiry as the trial court." *Kahn v. Salerno*, 90 Wn.App. 110, 117 (1998).

**B. Liability is Limited to Parties in the Chain of Distribution of a Hazardous Asbestos-Containing Product Which Constitutes a Substantial Factor in Causing the Illness at Issue.**

The Washington Supreme Court held in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 248 (1987), that a plaintiff must offer evidence supporting a reasonable inference that he or she was exposed to a defendant's asbestos-containing product that was a substantial factor in causing his injury. In rejecting a "market share" theory of liability, the *Lockwood* Court recognized:

Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between injury, the product causing the injury, and the manufacturer of a product. *In order to have a cause of action the plaintiff must identify the particular manufacturer of the product that caused the injury.*

*Id.* (emphasis added). Although Appellant attempts to characterize it otherwise, *Lockwood* identified multiple factors which constitute a form of the frequency/regularity/proximity test employed in other jurisdictions – among them, how often did the plaintiff contact a particular defendant's asbestos-containing product, the length of such contact, and the proximity of such contact – to assess the existence of a reasonable inference that the plaintiff's exposure to such product was a substantial factor in causing the injury at issue. *Id.* at 248-49.

The Supreme Court held in *Simonetta* and *Braaten* that potential product liability under both negligence and strict liability theories is

limited to defendants in a hazardous product's chain of distribution. In *Simonetta*, the Supreme Court held that an evaporator manufacturer had no duty to warn of dangers posed by asbestos insulation it did not manufacture, sell, or supply, even though the evaporator was built with the knowledge that the insulation would be used in conjunction with it. 165 Wn.2d at 354, 363. In *Braaten*, the Court held that equipment manufacturers had no duty to warn about asbestos-containing replacement gaskets and packing they did not manufacture or supply, even though the equipment may have been shipped with such asbestos-containing parts for which the equipment manufacturer would be liable, or knew that asbestos-containing replacement parts would be used. 165 Wn.2d at 391, 398.

These Supreme Court decisions control here, and require affirming the trial court's grant of summary judgment to Leslie.

C. **The Trial Court's Conclusion That Appellant's Design Defect Fails to Survive *Braaten* and *Simonetta* Is Correct and Should Not Be Disturbed.**

Appellant does not raise to this Court the trial court's conclusion that her design defect claims against Leslie and the other respondents do not survive the Supreme Court's decision in *Braaten* and *Simonetta*. *Cowiche Canyon Conser. v. Bosley*, 118 Wn.2d 801, 809 (1992) (argument not raised in opening brief is waived). The trial court's ruling on this issue is amply supported by legal authority in Washington State

and other jurisdictions. The Supreme Court's embrace in both *Simonetta* and *Braaten* of the Sixth Circuit's decision in *Lindstrom v. A-C Product Liability Trust, et al.*, 424 F.3d 488 (6<sup>th</sup> Cir. 2005) – a design defect case<sup>6</sup> – as well as its express recognition in *Simonetta* that its analysis “applies equally well to cases involving manufacturing defects, design defects, and failures to warn,” 165 Wn.2d at 355, demonstrate that the trial court was correct. Its conclusion on this issue should not be disturbed.

**D. There Is No Evidence Mr. Morgan Was Exposed To Asbestos-Containing Products Manufactured or Supplied by Leslie**

Having abandoned her design defect claim, Appellant focuses on whether she presented evidence sufficient to create a triable issue that Mr. Morgan was exposed to asbestos-containing products manufactured or supplied by each of the respondents, including Leslie. Although the trial court made no individualized findings on this issue, a review of the evidence shows that Appellant failed to do so at least with respect to Leslie. An appellate court may affirm a trial court order on any correct ground or basis, even though not reached by the trial court. *See, e.g., Nast v. Michels*, 107 Wn.2d 300, 308 (1986).

**1. Melvin Wortman**

Neither Mr. Wortman's declaration nor his deposition offered

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<sup>6</sup> *Braaten* notes that it found *Lindstrom* “particularly instructive.” 165 Wn.2d at 393.

below identify Leslie as one of the equipment manufacturers from whom he claims the Navy obtained half of all replacement parts, including gaskets and packing. Mr. Wortman testified that his knowledge about other equipment manufacturers was based on observing the actual packaging from those manufacturers as he walked through the machine shop he supervised, and he conceded in sworn testimony in the *Anderson* matter that he had no such knowledge with respect to Leslie. CP 6577-78. Mr. Wortman thus offers no testimony or other evidence with respect to Leslie, and lacks any foundation to do so.

**2. Michael Farrow and Jack Knowles**

Mr. Farrow and Mr. Knowles also conceded that they had no knowledge Leslie manufactured or supplied any of the gaskets, packing, or insulation that Mr. Morgan or others removed or installed in Mr. Morgan's presence. CP 1087, 6567-69. Mr. Farrow acknowledged that he did not recall ever removing or installing a new Leslie valve himself, and he did not know if Mr. Morgan had, either – any equipment he saw Mr. Morgan install was either recycled from or refurbished after a tear-out. CP 1058-59. Mr. Knowles acknowledged that he had never seen a new piece of Leslie equipment anywhere on the overhauls he worked with Mr. Morgan,

much less in Mr. Morgan's presence.<sup>7</sup> CP 6568-69.

**3. Matthew Wrobel**

Appellant's citation to testimony provided by Matthew Wrobel also fails to create a triable issue regarding the presence in Mr. Morgan's vicinity of asbestos-containing products manufactured or supplied by Leslie. Mr. Wrobel did not testify that *all* Leslie valves used asbestos-containing gaskets or that *all* gaskets contained asbestos. Rather, Mr. Wrobel testified that *some* Leslie valves *might* have used asbestos-containing gaskets, but that Leslie valves also used other types of gaskets that did not contain asbestos.<sup>8</sup> CP 2532-34.

Under *Braaten*, this evidence fails to create a genuine issue for trial. 165 Wn.2d at 394-97. Even assuming that Mr. Morgan worked on and around Leslie equipment which utilized them, Appellant offers no admissible evidence that Leslie manufactured or supplied any asbestos-

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<sup>7</sup> Any purported product identification contained in the declarations of Appellant's experts Dr. Eugene Mark and James Millette, Ph.D. is based solely on their review of declarations and deposition testimony of others, not their personal knowledge. CP 4558, 4587-8. Such evidence may be admissible for the limited purpose of explaining the basis of their expert opinions, but it is not admissible to create product identification itself. *Allen v. Asbestos Corp.*, 138 Wn.App. 564, 579-82 (2007).

<sup>8</sup> This accords with Mr. Farrow's testimony that the Navy used several different types of gaskets (including rubber, neoprene, and Teflon gaskets) and that the Navy used both asbestos and non-asbestos-containing insulation. CP 1044-47. Neither Mr. Farrow or Mr. Knowles knew the medium passing through or application associated with any of the Leslie valves on or around which they saw Mr. Morgan working, nor could they identify the type of Leslie valve they saw Mr. Morgan encounter. CP 1077-78. There is no admissible evidence that the Leslie valves on or around which Mr. Morgan worked used asbestos-containing gaskets or packing, or that they were wrapped with asbestos-containing insulation.

containing insulation, gaskets, or packing to which Mr. Morgan was exposed. Washington courts have repeatedly found that such showings would require a jury to speculate on an essential element of the asserted claims and are therefore insufficient to defeat summary judgment.<sup>9</sup> Appellant thus fails to create a triable issue under *Lockwood* that Mr. Morgan encountered asbestos-containing products manufactured or supplied by Leslie. See, e.g., *Lockwood*, 109 Wn.2d at 248; *Braaten*, 165 Wn.2d at 394-97. Given the lack of any “reasonable connection” between asbestos-containing products manufactured or supplied by Leslie, on the one hand, and Mr. Morgan’s injuries, on the other, this Court should affirm the trial court’s grant of summary judgment to Leslie.

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<sup>9</sup> See, e.g., *Niven v. E.J. Bartells Co.*, 97 Wn.App. 507, 518 (1999) (affirming summary judgment against plaintiff who offered testimony that people worked with him at Todd Shipyard who had worked for Saberhagen’s predecessor Brower on prior jobs: “[t]his is insufficient to establish more than a speculative link between Brower products and Niven’s injuries.”); *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13 (1986) (reliance on speculation insufficient to defeat summary judgment); *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612 (2003) (in responding to summary judgment, nonmoving party may not rely on speculation); *White v. State*, 131 Wn.2d 1, 9 (1997) (same); *Deschamps v. Mason County Sheriff’s Office*, 123 Wn.App. 551, 561 (2004) (same); *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn.App. 372, 381 (1999) (a claim which rests on speculation does not survive summary judgment). As the Washington Supreme Court has explained: “there can be no inference of fact unless an antecedent fact or condition [is] proven by direct or circumstantial evidence. Inference follows certainty, and is the ultimate and compelling conclusion of the mind from established facts.” *Parmelle v. Chicago M. & St. P. Ry. Co.*, 92 Wash. 185, 188 (1916); see also *Fairbanks v. J.B. McLoughlin*, 131 Wn.2d 96, 101-02 (1997) (an inference is not reasonable unless deduced “as a logical consequence” of proven or admitted facts).

**E. Even Assuming Sufficient Evidence of Product Identification Against Leslie, Appellant Failed to Offer Admissible Evidence of Causation Under Applicable Washington Law.**

Appellant's failure to produce admissible evidence sufficient to create a triable issue that Mr. Morgan was exposed to asbestos-containing products manufactured or supplied by Leslie requires affirming the trial court's grant of summary judgment. However, even if Appellant has produced such evidence, she has failed to create a triable issue that such exposure was a substantial factor in causing Mr. Morgan's mesothelioma.

There is no dispute in the relevant scientific communities that mesothelioma and other asbestos-related diseases are dose-responsive – that is, the risk of developing the disease rises as an individual's exposure to asbestos increases. However, there is no consensus among scientists as to the threshold level, if any, of exposure which causes a particular asbestos-related condition, or the rate at which the risk, if any, of disease increases relative to low levels of exposure. Yet Appellant asks this Court to contort Washington law to abrogate her burden of proof and impose joint and several liability on a defendant for even the most *de minimus* asbestos exposure without the necessary scientific proof to support her.

**1. Lockwood**

*Lockwood* remains “good law” in Washington – both *Simonetta* and *Braaten* cite *Lockwood* for the necessity of identifying a defendant's

product in asbestos and other product liability cases in order to impose liability. The problem is that Appellant misconstrues *Lockwood* and subsequent court decisions to suit her needs.

Mr. Lockwood was exposed to asbestos-containing insulation during his work as a rigger moving heavy machinery at various Puget Sound area shipyards from 1942 to 1972 when he retired on disability with asthma and emphysema from more than thirty years of cigarette smoking. 109 Wn.2d at 237-39. He was diagnosed with asbestosis in 1979 and filed suit against nineteen defendants including Raymark, the successor to asbestos cloth manufacturer Raybestos-Manhattan, alleging claims based on negligence and strict products liability. *Id.* at 239. Although Mr. Lockwood himself was unable to identify any Raymark product among the multiple asbestos-containing products with or around which he worked at his various workplaces, other witnesses identified large amounts of Raymark asbestos-containing cloth at Mr. Lockwood's worksites during his career to which he was exposed. *Id.* at 244-45.

Raymark moved for directed verdict based on the insufficiency of evidence to establish that its product proximately caused Mr. Lockwood's injury. *Id.* at 241. The trial court denied Raymark's motion and instructed the jury as follows on the issue of causation:

**Instruction No. 5:** If you find two or more causes combine to produce a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about harm, each is a substantial factor in bringing about the harm, each is charged with responsibility for the harm.

**Instruction No. 6:** When the concurring negligence and/or product liability of two or more defendants are each proximate cause of an injury, each is liable regardless of the relative degree in which each contributes to the injury.

*Id.* at 245. Following a jury verdict in Mr. Lockwood's favor, the trial court denied Raymark's motions for judgment notwithstanding the verdict and new trial based on the insufficiency of the evidence. *Id.* at 243.

The Washington Supreme Court affirmed the trial court's denial of Raymark's motions. *Id.* at 242. The Supreme Court agreed that Mr. Lockwood had presented sufficient evidence through the testimony of co-workers and experts to create a *prima facie* case of exposure to substantial amounts of Raymark asbestos-containing products on numerous projects at various worksites and causation. *Id.* at 247-48. The Supreme Court recognized that a plaintiff in a products liability action "must establish a reasonable connection between the [plaintiff's] injury, the product causing the injury, and the manufacturer of the product." *Id.* at 245. However, due to unique issues encountered in asbestos litigation such as the long latency periods and the potential for exposure at multiple worksites, the Court held that a plaintiff need not personally identify the manufacturers

of asbestos-containing products to which he was exposed in order to recover from them but may instead rely upon the testimony of co-workers and other witnesses. *Id.* at 246.

The Supreme Court expressly declined to create market share liability in asbestos litigation because it was possible by assessing the following factors for a plaintiff to identify the manufacturers whose products were a substantial factor in actually causing his injury:

- plaintiff's proximity to the asbestos-containing product in question when the exposure occurred;
- the expanse of the work site where asbestos fibers were released;
- the extent of time plaintiff was exposed to the product;
- the types of asbestos-containing products to which plaintiff was exposed;
- how plaintiff handled and used those products;
- expert testimony on the effects of inhalation of asbestos on human health in general and plaintiff in particular; and
- evidence of any other substances that could have contributed to the plaintiff's disease.

*Id.* at 245, 248-49. The Supreme Court recognized that “[u]ltimately, the sufficiency of the evidence of causation [to warrant giving the case to the jury] will depend upon the unique circumstances of each case.” *Id.* at 249. The Supreme Court concluded that these standards had been met in *Lockwood*, and in light of evidence that Mr. Lockwood's exposure to asbestos from Raymark's products was sufficient in and of itself to have

caused his asbestosis, affirmed the trial court's denial of Raymark's motions and the entry of judgment in Lockwood's favor. *Id.* at 248.

*Lockwood* may have eased the plaintiff's burden by recognizing the value of circumstantial evidence to demonstrate the sufficiency of his or her exposure to a defendant's asbestos-containing product. *Id.* at 246-47. However, nowhere in *Lockwood* does the Supreme Court conclude that the mere presence of a defendant's asbestos-containing product at a plaintiff's worksite is sufficient as a matter of law to establish causation and impose joint and several liability for all of a plaintiff's damages – if it did, the test would be “was defendant's product present” and would effectively render the substantial factor test “meaningless.” *See Lindstrom*, 424 F.3d at 493. Nor would the Supreme Court have identified multiple factors to assess whether there is even sufficient evidence to send the case to the jury on the issue of causation if that were its intention.<sup>10</sup>

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<sup>10</sup> Appellant cites *In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9<sup>th</sup> Cir. 1992), and *Ingram v. AC&S, Inc.*, 977 F.2d 1332 (9<sup>th</sup> Cir. 1992), for support on this point. *In re Hawaii* and *Ingram* correctly conclude that *Lockwood* created a less-rigid approach to presenting evidence of product identification at a plaintiff's worksite. *In re Hawaii*, 960 F.2d at 817; *Ingram*, 977 F.2d at 1344. However, nowhere does *Lockwood* hold that a defendant's mere presence at a worksite is sufficient as a matter of law to establish causation and impose liability. Any reading of *Lockwood* and its multiple factor frequency/regularity/proximity test to that effect is a misinterpretation thereof, and renders *In re Hawaii* and *Ingram* unpersuasive. Rather, it is *Lindstrom's* self-evident recognition that adopting Appellant's “each and every exposure” theory would render the substantial factor test “meaningless” which is consistent with the existence of the *Lockwood* factors and their case-specific application.

2. Hue

*Hue v. Farmboy*, 127 Wn.2d 67 (1995), does not support Appellant's position, either. *Hue* is not a substantial factor case in a multi-supplier context such as here. *Hue* addressed the liability for damage to plaintiffs' crops and ornamental plants allegedly due to multiple aerial applications of pesticides which drifted from the target wheat farms. *Id.* at 71-72. The defendants in *Hue* were the manufacturer of all the pesticides involved (DuPont), the company which performed all of the multiple aerial sprayings (Farmboy), and the 27 owners of the target farms who contracted for some or all of the multiple aerial applications. *Id.* at 70. The plaintiffs claimed that "1-3% of each application escaped and collectively" drifted due to wind patterns and damaged their crops and plants, and that it was "not possible to trace particular plant damage [] to particular applications of pesticide." *Id.* at 73-74.

The trial court instructed the jury that the plaintiffs had to prove that a particular defendant applied the pesticides at issue, that a portion of such application drifted over the plaintiffs' crops and plants, and that "the off target drift of the pesticides was a proximate cause of damage to an individual plaintiff's property or crops in a particular year." *Id.* at 91-92 (Jury Instruction No. 5) (internal punctuation omitted) (emphasis added). The Special Verdict form then asked the jury:

Do you find that any individual aerial application of any pesticide(s) by Farmboy during the period 1986 to 1989 inclusive was a proximate cause of loss or damage to any one or more of the plaintiffs?

*Id.* at 76 (Question No. 1). The jury answered “no” to Question No. 1, and the trial court entered judgment in favor of the defendants. *Id.* at 77.

The Supreme Court rejected plaintiffs’ argument that Jury Instruction No. 5 conflicted with Special Verdict Question No. 1, and affirmed the trial court’s denial of plaintiffs’ motion for a new trial. *Id.* at 92-93. According to the Supreme Court, Special Verdict Question No. 1 asked the jurors to determine “whether the plaintiffs had shown by competent evidence that any of the applications was a cause of harm to any of the plaintiffs,” and “did not require the jury to find that a single application drifted and caused particular damage, but allowed the jury to consider whether an application caused any part of any damage to any plaintiff’s plants.” *Id.*

**3. Mavroudis**

In *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 27 (1997), a former Navy serviceman diagnosed with mesothelioma sued multiple manufacturers of asbestos-containing products, including Owens-Corning Fiberglass (OCF) (the manufacturer of Kaylo insulation), under strict products liability, negligence, and failure to warn theories. Only

OCF proceeded to trial. Mr. Mavroudis presented evidence that Kaylo was one of three brands of asbestos-containing insulation used on a particular long-term project on which he worked, and that just 10% of his exposure to Kaylo was sufficient to cause his mesothelioma. *Id.* at 27.

The trial court instructed the jury on causation as follows:

The term “proximate cause” means a cause which in direct sequence, unbroken by a new independent cause, produces the injury complained of.

There may be one or more proximate causes of an injury.

If you find that two or more causes have combined to bring about an injury and any one of them operating alone would have been sufficient to cause the injury, each cause is considered to be a proximate cause of the injury if it is a substantial factor in bringing it about, even though the result would have occurred without it. A substantial factor is an important or material factor and not one that is insignificant.

If you find that the sole proximate cause of any injury to plaintiff was the act or omission of some other person(s) or entity(ies) not party to this lawsuit, then your verdict should be for the defendant as to that injury.

*Id.* at 28 (citing Instruction No. 22) (emphasis added). OCF appealed the jury verdict in favor of Mr. Mavroudis, arguing that the trial court erred by failing to require Mr. Mavroudis to prove that, without the exposure to Kaylo, he would not have contracted mesothelioma. *Id.*

The *Mavroudis* Court rejected OCF’s instructional error argument. It found use of a “substantial factor” jury instruction appropriate in

asbestos litigation where the plaintiff had been exposed to products from multiple defendants, and that the evidence demonstrated that just a fraction of Mr. Mavroudis' exposure to OCF's Kaylo was sufficient in and of itself to have caused his mesothelioma. *Id.* at 29-30. It noted that, unlike Instruction No. 22, the Supreme Court in "*Hue* did not require a showing that an individual defendant's contribution to the pesticide cloud would have been sufficient to cause the injury," but only that "a portion of the defendant's pesticide became part of the total cloud that had caused damage." *Id.* Without concluding that such an instruction would have been appropriate in multi-manufacturer/supplier asbestos litigation such as there (and here), the *Mavroudis* Court recognized that:

While the substantial factor test may be unclear with regard to an *insubstantial* cause that combines with other causes to produce an injury, we need not reach that issue. If the substantial factor instruction in this case went further than the Supreme Court would require in an asbestos-injury case under the reasoning in *Hue*, the "error" was not prejudicial to OCF because it *heightened* Mr. Mavroudis's burden by requiring him to show that exposure to OCF's product, Kaylo, standing alone, would have been sufficient to cause Mr. Mavroudis's injury. Mr. Mavroudis met that standard in this trial by showing that Kaylo was one of only three asbestos-containing products used during the time that he was assigned to the U.S.S. Wright project, that Kaylo gave off very substantial amounts of asbestos when cut, and that as little as 10% of the asbestos exposure Mr. Mavroudis received would have been sufficient to cause his mesothelioma. Thus, regardless of the possible effect of *Hue* with respect to causation instructions in future asbestos-injury trials, it is enough to say, here, that the trial

court did not err in giving Instruction 22, in that substantial evidence provided a basis for a rational jury to find that exposure to Kaylo, standing alone, would have been sufficient to cause Mr. Mavroudis to contract mesothelioma, even though he might have contracted the cancer from his exposure to the other asbestos-containing products used on the Wright project, instead of Kaylo.

86 Wn.App. at 30-31 (*italics in original*). The trial court's recognition that the substantial factor paradigm includes by its terms the concept that some asbestos exposure might be insignificant was not disturbed on appeal.

4. **None of the Authorities Cited by Appellant Have Employed Her "Each and Every Exposure" Theory in Asbestos Litigation.**

Neither *Lockwood*, *Hue*, nor *Mavroudis* adopt the standard which Appellant urges here. *Lockwood* is a multi-supplier case involving exposure to asbestos from Raymark cloth which the medical evidence at trial established was sufficient in and of itself to have caused the plaintiff's asbestosis. *Hue* involved a single source – defendant DuPont – for all of the pesticide involved; it therefore did not matter which part of the cloud may have caused the plaintiffs' alleged damages (or what percentage of the cloud such product constituted) since DuPont provided all of it. Further, this was a pesticide – not an asbestos – case, where exposure to even a minute part of the pesticide cloud could in and of itself damage a plant. *Mavroudis* merely explained that, in the multi-supplier asbestos case before it, the plaintiff would have prevailed even if the *Hue* standard

had been applied because there was evidence that the plaintiff's exposure to Kaylo was sufficient in and of itself to have caused the disease at issue – it did not adopt the *Hue* analysis in multi-supplier asbestos litigation.

No Washington appellate court has done what Appellant asks of this Court: to conclude as a matter of law – regardless of the *Lockwood* factors and their application, the amount of asbestos exposure attributable to a defendant's product and percentage it constitutes of the plaintiff's lifetime exposure, the specific injury involved, and the lack of peer-reviewed science to support such a conclusion – that a defendant's most minute contribution (perhaps as small as a single fiber) to a defendant's cumulative lifetime exposure somehow constitutes a substantial factor in causing an injury for which that defendant would be jointly and severally liable.<sup>11</sup> To the contrary, *Mavroudis* notes that the substantial factor test is

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<sup>11</sup> Appellant's other authorities cited on this issue are also distinguishable from the circumstances here involving potential exposure to a limited number of gaskets and amount of packing manufactured or supplied by an equipment manufacturer such as Leslie. For example, the record in *Allen* on Uniroyal's summary judgment motion included evidence that "large quantities of Asbeston [asbestos-containing cloth manufactured by Uniroyal's predecessor United States Rubber Company] were ordered by [PSNS] over multiple years" during the period of plaintiff's father's employment at the shipyard. 138 Wn. App. at 573. Similarly, the record in *Berry v. Crown Cork & Seal Co.*, 103 Wn App. 312, 322-23 (2000), on the summary judgment motion of Brower's successor Saberhagen included evidence that "at least 50 percent of asbestos-containing products were purchased from local distributors such as Brower" during periods of plaintiff's employment. As discussed above, there is no analogous evidence regarding Leslie in the record here. Nor is there evidence here of "fiber drift" from other parts of the shipyard which the courts in *Allen* and *Berry* found crucial to their analysis. *Allen*, 130 Wn.App. at 571; *Berry*, 103 Wn.App. at 318. Here, Dr. Millette addresses only exposure from work by Mr. Morgan himself and others working in close proximity to him in enclosed spaces. CP 4589-91. What is significant from these cases is their

helpful in resolving analogous cases where no liability would exist under the substantial factor paradigm such as when “the defendant has made a clearly proven but insignificant contribution to the result, as where he throws a lighted match into a forest fire.” 86 Wn.App. at 689 (*citing* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 41 (5<sup>th</sup> ed. 1984)). Asbestos from a limited number of gaskets and packing *even if supplied by Leslie* would be the proverbial match tossed into a roaring forest fire of asbestos from insulation.<sup>12</sup>

Appellant seeks to distinguish the Texas Supreme Court’s application of the substantial factor test in *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007). In fact, Texas employs the same substantial factor test for proximate causation found in section 431 of the Restatement (Second) of Torts and Washington law. *Id.* at 769-70; *State v. Meekins*, 125 Wn.App. 390, 396-97 (2005). As the Texas Supreme Court explained, “implicit in this test . . . must be a requirement that asbestos fibers were released [from the defendant’s product] in an amount sufficient to cause

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respective application of the *Lockwood* factors to identify a defendant’s product as a substantial factor in causing the disease at issue – an analysis which Appellant apparently seeks to render meaningless. *See, e.g., Allen*, 138 Wn.App. at 571; *Berry*, 103 Wn.App. at 323-24. *Van Hout v. Celetex*, 121 Wn.2d 697 (1993), notes only that the jury instructions were “very similar” to those approved in *Lockwood*.

<sup>12</sup> While it discusses purported asbestos exposure from work with or around asbestos-containing products in general, Dr. Millette’s declaration fails to quantify Mr. Morgan’s purported asbestos exposure specifically from asbestos-containing products manufactured or supplied by Leslie – he concludes only that Mr. Morgan’s cumulative exposure from all the respondents’ products was “excessive” and “exceeded background levels by many times.” CP 4589-91, 4594-95, 4606.

[the plaintiff's injury]," and thereby "separate[] the speculative from the probable." *Id.* at 772-73 (overturning decision below that "[i]n the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied *any* of the asbestos to which the plaintiff was exposed, then the plaintiff has met the burden of proof" [emphasis added by Supreme Court]); *see also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4<sup>th</sup> Cir. 1986). Thus, evidence proffered of merely some asbestos exposure without evidence of the actual dose related to a particular defendant and comparison to the dose necessary to cause the disease at issue cannot satisfy the substantial factor test and does not defeat summary judgment. 232 S.W.3d at 772 ("[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."); *see also Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 311 (Tex. App. 2007) (noting that courts in nearly every federal circuit as well as courts in several states (including Washington) "have adopted the frequency-regularity-proximity test" utilized in *Borg-Warner*). No matter how labeled, Appellant fails to satisfy the Lockwood factors. Nor does she offer any quantification of Mr. Morgan's actual exposure from asbestos-containing products manufactured or supplied by Leslie or any comparison to the dose necessary to cause Mr. Morgan's disease so as to permit a

determination of its relative significance.

5. **Appellant’s “Each and Every Exposure” Theory Does Not Satisfy *Frye*, and Should Not Be Considered Here.**

Though she tries to mask it, there is no demonstrable, peer-reviewed science to support Appellant’s theory that “each and every exposure” to asbestos, no matter how *de minimus*, constitutes a substantial factor in the causation of Mr. Morgan’s illness as part of his cumulative lifetime exposure.<sup>13</sup>

a. ***Frye* Requires General Acceptance of a Scientific Theory in the Relevant Scientific Community Before It Can Be Introduced in Washington Courts.**

The admissibility in Washington State of testimony derived from scientific theory and principles is assessed under the standard enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).<sup>14</sup> *See, e.g., State v.*

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<sup>13</sup> Appellant asserts in her Opening Brief that all defendants withdrew their objections or motions to strike Dr. Eugene Mark’s declaration to the extent it addressed Appellant’s “each and every exposure” theory. Leslie addressed the issue of substantial factor in its moving and reply papers, stood on its papers at oral argument, and never withdrew its concerns on this issue. *See* CP 998-1001, 6541-42. The trial court’s denial of a *Frye* hearing on the issue clearly implies that the issue remained before the trial court.

<sup>14</sup> According to *Frye*:

Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitted expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Canady*, 90 Wn.2d 808 (1978); *State v. Martin*, 101 Wn.2d 713, 719 (1984); *State v. Copeland*, 130 Wn.2d 244, 255 (1996); *Ruff v. Department of Labor and Industries*, 107 Wn. App. 289 (2001). Under *Frye*, such evidence is admissible “only if the theory has achieved general acceptance in the relevant scientific community.” *Martin*, 101 Wn.2d at 719; *see also Copeland*, 130 Wn.2d at 255; *State v. Cauthron*, 120 Wn.2d 879, 888 (1993) (“[T]he relevant inquiry is general acceptance by the scientists, not the courts.”). As the Washington Supreme Court has explained:

The rationale of the *Frye* standard, which requires general acceptance in the relevant scientific community, is that expert testimony should be presented to the trier of fact only when the scientific community has accepted reliability of the underlying principles. In other words, scientists in the field must make the initial determination whether an experimental principle is reliable and accurate. The *Frye* standard recognizes that judges do not have the expertise required to decide whether a challenged scientific theory is correct, and therefore courts defer this judgment to scientists. The court does not itself assess the reliability of the evidence. If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.

*Copeland*, 130 Wn.2d at 255 (internal citations and punctuation omitted).

Materials considered in determining whether the requisite consensus of scientific opinion has been achieved include “expert testimony, scientific

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293 F. at 1014.

writings that have been subject to peer review and publication, secondary legal sources, and legal authorities from other jurisdictions.” *Eakins v. Huber*, \_\_\_ Wn.App. \_\_\_ [225 P.3d 1041] (§ 19) (Feb. 23, 2010) (citing *Copeland*, 130 Wn.2d at 256-57; *Cauthron*, 120 Wn.2d at 888; *Grant v. Bocca*, 133 Wn.App. 176, 179 (2006)). In examining evidence under the *Frye* standard:

courts look at whether the underlying theory is generally accepted in the appropriate scientific community and whether there are experiments or studies using that theory that are capable of producing reliable results and are generally accepted in the scientific community.

*Eakins*, 225 P.3d 1041, § 17 (citing *State v. Riker*, 123 Wn.2d 351, 359 (1996), *Copeland*, 130 Wn.2d at 255). The Supreme Court has recognized that “[t]he trial court’s gatekeeper role under *Frye* involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that ‘pseudoscience’ is kept out of the courtroom.” *Copeland*, 130 Wn.2d at 259. Under this standard, “[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.” *Id.* at 255; *Cauthron*, 120 Wn.2d at 887. A reviewing court’s review of admissibility under *Frye* is *de novo* and involves a mixed question of fact and law. *Copeland*, 130 Wn.2d at 255; *Ruff*, 107 Wn.App. at 300.

As with all evidence, the party proffering scientific or medical testimony bears the burden of establishing its admissibility under *Frye*. *State v. Phillips*, 123 Wn.App. 761, 765-69 (2006). Only if the *Frye* test is satisfied will the evidence then analyzed under the two-part test of ER 702 to determine (1) if the witness qualifies as an expert and (2) whether the expert's testimony would be helpful to the trier of fact.

b. **Appellant's "Each and Every Exposure" Theory Lacks Support in the Published Literature.**

Appellant's "each and every exposure" theory set forth in Dr. Mark's declaration is not generally accepted in the relevant scientific communities. Dr. Mark opines in his declaration that:

All special exposures to asbestos that occur prior to the development of a diffuse malignant mesothelioma contribute to his pathogenesis. A "special exposure" means an exposure for which there is a scientific reason to conclude it created or increased the risk of developing the disease.

CP 4560. Dr. Mark does not otherwise explain the term "special exposure" (a term he created) or identify any peer-reviewed literature or study to support his opinion, nor to Leslie's knowledge can he. In fact, peer-reviewed studies addressing the causal relationship between asbestos exposure and mesothelioma have documented a relationship no lower than

0.15 fibers/cc year.<sup>15</sup> See Rodelsperger, et al., *Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results From a German Hospital-Based Case-Control Study*, American Journal of Industrial Medicine 39:262-75 (2001); see also Iwatsubo, *Pleural Mesothelioma: Dose Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study*, American Journal of Epidemiology, Vol. 148, No. 2, pp. 133-42 (1998) (.5 fbrs/cc years). Clearly these peer-reviewed studies rebut Appellant’s “each and every exposure” theory since there are exposures below the cited levels which have no documented effect on the development of asbestos-related illness. At the very least they signify a lack of consensus which renders Dr. Mark’s “each and every exposure” testimony inadmissible under *Frye*.

c. **Multiple Courts Have Recently Rejected Appellant’s “Each and Every Exposure” Theory.**

At least four courts – including two here in Washington – have conducted formal *Frye* hearings in the last four years on proposed expert testimony similar or identical to that contained in the Mark declaration and found it inadmissible.<sup>16</sup>

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<sup>15</sup> This is an exposure to asbestos equal to a time-weighted average of 0.15 fibers per cubic centimeter of air breathed over the course of a work year. As a point of reference, the current OSHA standard on a time-weighted average is 0.10 fiber/cc year.

<sup>16</sup> The following cases do not constitute binding precedent and are not offered as such. They do, however, demonstrate judicial recognition in Washington State and other jurisdictions that Appellant’s “each and every exposure” theory lacks the requisite consensus in the relevant scientific communities to satisfy *Frye*. As noted in the body,

**Free v. Ametek:** In *Free v. Ametek, et al.*, King County Superior Court Case No. 07-2-04091-9 SEA, Judge Suzanne M. Barnett addressed the proposed testimony by plaintiffs experts (including pathologist Samuel Hammar) that “once a product is identified and exposure is established, any level of exposure greater than ambient levels or greater than 0.1 fibers per cubic centimeter of air per work-year is a substantial factor, undifferentiated and incapable of differentiation, in proximately causing plaintiff’s disease.” CP 1107. With respect to Dr. Hammar, defendants did not dispute that mesothelioma is a “dose-response” disease with a positive correlation between increased concentration of exposure and risk of development of the disease, or that it has a protracted latency period of up to several decades. CP 1108. Defendants challenged Dr. Hammar’s conclusions “that (1) because mesothelioma is a dose-response disease, and because of its latency, it is undifferentiated cumulative exposure that cause the disease; and (2) every exposure to asbestos can and should be considered a substantial factor contributing to the development of mesothelioma.” CP 1109.

The court conducted a two-and-a-half day *Frye* hearing on this and other issues. According to the court:

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Washington law recognizes the value of such sources in evaluating the existence (or lack) of such consensus. *See, e.g., Eakins*, 225 P.3d 1041 (¶ 19); *Copeland*, 130 Wn.2d at 256-257; *Cauthron*, 120 Wn.2d at 888; *Grant*, 133 Wn.App. at 179.

During his testimony, Dr. Hammar conceded that an exposure would have to be at least a level of 0.1 fbrs/cc yr to be considered a contributing factor. Dr. Hammar also concedes that his opinion is a hypothesis, not a scientific conclusion. As support for his opinion, Dr. Hammar relied on various studies and regulatory analysis. The regulatory standards are not probative of scientific analysis or acceptance in the scientific community. The epidemiological studies and meta-analyses do not analyze cases of exposures at very low levels.

The assumption of some epidemiologists and practitioners in the field of asbestos-related diseases is that the risk of occurrence at low levels of exposure follows a straight line below the level of available data. This downward extrapolation of a straight line correlation between exposure and risk of development of mesothelioma is, however, not proven by empirical data. In fact, according to defendants' biostatistician, Dr. Garabrandt, just the opposite is true. Referring to the meta analysis performed by Hodgson and Darnton, he and they conclude that a straight-line correlation is not accurate for the data that are available, let alone for extrapolation to data that are not collected.

Conventional wisdom is that there is no safe level of exposure to asbestos. A more accurate statement of conventional wisdom, however, would be that there is no *known* safe level of exposure, just as there is no known threshold level of causation of asbestos-related disease. Dr. Hammar's hypothesis, therefore, while persuasive in lay, "common sense" terms, is not supported by replicable, scientific methodology. While it may be *assumed* to be accurate and sufficient for purposes of connecting asbestos exposure to mesothelioma in general, the assumption that every exposure to asbestos over a life's work history, even every exposure greater than 0.1 fbrs/cc yr, is a substantial factor contributing to development of an asbestos-related disease, is not a scientifically proved proposition that is generally accepted in the field of epidemiology, pulmonary pathology, or any other field relevant to this cause.

There is no *known* threshold; there is no *known* safe level of exposure. That does not mean none exists; it simply means modern science has not and cannot, with current scientific expertise or relying on existing studies, determine what level of exposure is. Dr. Hammar may not testify that any exposure at the level of 0.1 fbrs/cc yr or less is a substantial contributing factor to the development of mesothelioma.

CP 1109-10 (footnotes omitted) (italics in original) (underlining added); *see also* CP 1110-11 (precluding on similar grounds testimony by occupational medicine physician Dr. Carl Brodtkin that “every biologically significant exposure to asbestos above ambient levels is an undifferentiated proximate cause of mesothelioma” – “Dr. Brodtkin’s analogies are not good science and they do not make good law.”). Dr. Hammar’s acknowledgement noted by Judge Barnett that his testimony was a hypothesis, not a demonstrated scientific conclusion, is telling. The court also rejected as insufficient the same arguments made here by Appellant that *Lockwood*, *Hue*, and *Mavroudis* control and demonstrate that the science offered by plaintiff’s experts “is not novel, but is rather accepted and part of the legal record of this state.” As Judge Barnett correctly concluded, “none of the cases upon which plaintiff relies is the result of a *Frye* inquiry [nor] reaches the point central to this case.” CP 1111-13.

*Anderson v. Asbestos Corp., Ltd.*: In *Anderson v. Asbestos Corp., Ltd., et al.*, King County Superior Court Case No. 05-2-04551-5 SEA, Judge John P. Erlich similarly concluded after a *Frye* hearing that proposed testimony by Dr. Hammar that “any and all exposure to asbestos at any level is a substantial factor in causing mesothelioma . . . is not a theory which is generally accepted in the scientific community and . . . there are no techniques, experiments, or studies that are capable of producing reliable results or otherwise replicating that thesis.” CP 1102. Judge Erlich also precluded testimony concerning the existence of a range of exposure which could cause disease without a proper foundation laid with evidence generally accepted in the scientific field:

With regard to the issue of studies showing a range, this court would conclude that whatever probative value such a study would have would be greatly outweighed by confusion to the jury and potentially misleading because it would not tell the trier of fact what the threshold exposure to asbestos would be in order to be a substantial factor; in other words, it could fall anywhere within that range, and one of the key issues that has been presented here is how much – how much asbestos is released from the manipulation of the grinding of the subject gaskets.

And, therefore, the court believes that without scientific testimony to support a determination of that threshold amount, a range is not helpful to the trier of fact and may, in fact, be confusing and misleading. So, therefore, the court will exclude testimony regarding ranges as well with respect to the 0 to .15.

CP 1102-3. To Leslie’s knowledge, the respective plaintiffs in *Free* and

*Anderson* did not appeal the trial court rulings on this issue.<sup>17</sup>

**Other Jurisdictions:** The same result has been reached in at least two out-of-state cases. In September 2008, Allan T. Tereshko, the Coordinating Judge of the Complex Litigation Center in the First Judicial District of Pennsylvania, conducted a multiple-day *Frye* hearing which addressed the admissibility of the same theory advanced by Appellants here that “each and every breath of asbestos is a substantial contributing factor in the causation of any asbestos disease.” *See* CP 1116-70, *specifically* CP 1164. Plaintiffs there offered, among other witnesses, Dr. Mark (Appellant’s declarant here), who testified at length on the basis of his opinion and methodologies employed in reaching it. CP 1131-41. In his comprehensive “Findings, Memorandum and Order” issued on September 24, 2008 in *In re Asbestos Litigation*, Judge Tereshko rejected the proffered testimony for failing to satisfy *Frye*:

Plaintiffs here presented a maze of evidence in an attempt to support their experts’ opinions. Within this maze, no recognizable methodology was found. The written reports were bald conclusions which contained no process or procedure detailing how the conclusions were reached or what supporting material or analyses were employed in the process. The testimonial evidence, although more lengthy and complicated, fails to establish that there was any methodology employed and how such (if it existed) was used to arrive at the respective conclusions. The mere

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<sup>17</sup> Simon Eddins & Greenstone was the plaintiff’s counsel in *Free*, and Schroeder Goldmark & Bender was the plaintiff’s counsel in *Anderson*. Both firms are counsel for Appellant below and before this Court.

mention of methodologies, *i.e.* chemical structure analysis, animal studies without a detailed explanation of how such was used in arriving at certain conclusions, produces scientifically incoherent opinions based upon artificially incoherent methodologies and such are not generally accepted in the relevant scientific community.

Plaintiffs' experts rely upon the conclusion that each and every exposure to asbestos is a substantial contributing factor in causing Plaintiffs' diseases. They have not demonstrated any methodology for arriving at such conclusions. It must follow that this failure cannot meet the *Frye* requirements.

CP 1169-70 (footnote omitted). *See also Stephens*, 239 S.W.3d at 320-21 (concluding that plaintiff's experts – including Dr. Hammar – had failed to show that their “any exposure” theory – “that any exposure to a product that contains asbestos results in a statistically significant increase in the risk of developing mesothelioma” – is “generally accepted in the scientific community”).

d. **The Trial Court Incorrectly Considered Dr. Mark's Opinion Regarding Appellant's “Each and Every Exposure” Theory.**

The trial court below employed the wrong standard in concluding that Appellant's “each and every exposure” theory was admissible below. The touchstone is general acceptance *in the relevant scientific community*, not whether the testimony may have been previously presented in court without or over an objection. *Martin*, 101 Wn.2d at 719; *Copeland*, 130 Wn.2d at 255; *Cauthron*, 120 Wn.2d at 888. Testimony's admissibility

may change as the underlying science evolves – for example, testimony that the sun revolved around the flat earth might have been admissible centuries ago under a *Frye* analysis as generally accepted among scientists of that time, but it certainly would not be admissible today.

Moreover, the *Bruns v. PACCAR* case on which the trial court relied involved circumstances where (as in *Hue*) there was a single product supplier (Paccar), so there was no need to determine what particular component part of the plaintiffs’ total toxic exposure caused their conditions. 77 Wn.App. 201 (1995). Nor does *Bruns* distinguish between novel scientific evidence, on the one hand, and medical causation testimony, on the other. Rather, medical opinions regarding causation must still be:

based on established scientific technique. Here the experts relied on air sampling, chemical analysis, clinical examinations, and questionnaires. These qualify as established scientific methods of the type relied upon by experts in the field, not novel scientific theories.

*Id.* at 215-16 (internal citations omitted). Appellant has demonstrated no reliance on established scientific techniques validated in peer-reviewed studies. Appellant’s “each and every exposure” theory is subject to *Frye*.

It is clear from recent trial and appellate court decisions discussed above and the lack of published peer-reviewed literature or studies to support it that Appellant’s “each and every exposure” hypothesis remains

just that, and has not reached the requisite general acceptance in the relevant scientific communities to satisfy *Frye*. As Judge Barnett recognized, *Lockwood*, *Hue*, and *Mavroudis* did not reach the issue and provide no support. Nor has Appellant or her experts identified any peer-reviewed literature or studies or other scientific authorities which have demonstrated such acceptance subsequent to these decisions. This Court should conclude based on, *inter alia*, the existing peer-reviewed scientific literature and studies, expert testimony, and court decisions from Washington State and other jurisdictions, that the requisite consensus does not exist in the relevant scientific communities with respect to Appellant's "each and every exposure" theory, and that it therefore does not satisfy the *Frye* test applicable here in Washington.<sup>18</sup> See, e.g., *Copeland*, 130 Wn.2d at 255.

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<sup>18</sup> Even if this Court is unable to conclude as a matter of law based on the available peer-reviewed literature/studies and recent court decisions cited above that Appellant's "each and every exposure" hypothesis has not reached the requisite consensus in the relevant scientific communities to satisfy the *Frye* test for consideration here, there is no basis in the record or in the secondary sources available to the Court to support Appellant's stance that this Court should recognize, as a matter of law, that "each and every exposure" to asbestos is a substantial factor in causing any asbestos-related disease as a part of the injured's lifetime cumulative exposure. Significantly, the plaintiffs in *Free* and *Anderson* – where the records would have been more comprehensive – did not appeal the trial court's ruling on the *Frye* issues. However, the same counsel now seek in a case with no underlying record a ruling from this Court which would effectively reverse those adverse decisions and create a precedent which would immunize their experts and theories from any future scientific challenge. This is bad science, and bad law.

## V. JOINDER IN RESPONDENTS' BRIEFS

Pursuant to RAP 10.1(g), Leslie joins in the arguments contained in the briefs of the other respondents to the extent applicable.<sup>19</sup>

## VI. CONCLUSION

Appellant failed to produce admissible evidence that Mr. Morgan had been exposed to any asbestos-containing products manufactured or supplied by Leslie, and her “failure to warn” and “design defect” claims are precluded by the Washington Supreme Court decisions in *Simonetta* and *Braaten*. Even assuming that Appellant had produced such evidence, her expert’s testimony that “each and every exposure” to asbestos no matter how small constitutes a substantial factor in the causation of Mr.

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<sup>19</sup> Leslie presented undisputed evidence below which demonstrates as a matter of law the Navy’s knowledge long before Mr. Morgan’s employment at PSNS about the dangers of exposure to asbestos dust and procedures to decrease the risk from those dangers. See, e.g., CP 1172-1204 (November 1922 United States Naval Medical Bulletin); 1206-17 (1940 paper entitled *Industrial Hygiene and the Navy in National Defense*), 1219-24 (June 1940 United States Naval Medical Bulletin) 1226-45 (Minimum Requirements for Safety in Contract Shipyards (1943)). The Navy’s prior knowledge supersedes any potential liability on Leslie’s part. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817 (1987); RCW 7.72.030(1)(b); *Davis v. Globe Mach. Mfg Co.*, 102 Wn.2d 68, 73 (1984); *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 840 (1995); see Restatement (Second) of Torts § 388(b) & cmt. k. The corollary “sophisticated user” doctrine springs from the same known danger rule, and negates a manufacturer’s duty to warn of such hazards known to an employer such as the Navy. See, e.g., *Johnson v. American Standard, Inc.*, 43 Cal.4<sup>th</sup> 56, 179 P.3d 905, 74 Cal.Rptr.3d 108 (2008) (sophisticated user/buyer need not be warned about dangers of which they are already aware or should be aware); *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1151 (N.D. Cal. 1982); *Billiar v. Minn. Mining & Mfr. Co.*, 623 F.2d 240, 243 (2d Cir. 1980) (“[N]o one needs notice of that which he already knows.”). At least one jurisdiction has cited *Reed v. Pennwalt Corp.*, 22 Wn.App. 718 (1979) for the proposition that the Washington Court of Appeals “certainly indicate[d] [it] would accept a sophisticated [user] defense.” *In re Asbestos Litigation*, 542 A.2d 1205, 1209-10 (Del. Sup. Ct. 1986) (referring to the sophisticated user doctrine as the “sophisticated purchaser” doctrine).

Morgan's mesothelioma as part of his cumulative lifetime exposure is not generally accepted in the relevant scientific communities and therefore should not be considered by this Court on appeal. The trial court's grant of summary judgment to Leslie should be affirmed.

DATED this 15<sup>th</sup> day of April, 2010.

GORDON & REES LLP

A handwritten signature in black ink, appearing to read 'Mark B. Tuvim', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I caused a copy of the foregoing to be Hand Delivered to plaintiff's counsel, and sent via e-mail to all defendants' counsel, addressed as follows:

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