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No. 63923-4-I

DIVISION I, CRT OF APPEALS
OF THE STATE OF WASHINGTON

JAMES and KAY MORGAN, husband and wife,

Appellants/Plaintiffs

v.

AURORA PUMP COMPANY, et al.,

Respondents/Defendants

ON APPEAL FROM KING COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT
BUFFALO PUMPS, INC.

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STATE OF WASHINGTON
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I. INTRODUCTION

More than two decades ago, the Washington Supreme Court, in *Lockwood v. AC&S*, instructed lower courts and litigants in the Washington Asbestos Litigation to “consider a number of factors” to determine whether a plaintiff’s exposure to an asbestos-containing product was sufficient to cause disease. Among the factors to be considered are the nature of the product, the manner in which it is handled and its tendency to release asbestos fibers, the plaintiff’s proximity to the product, and the amount of time that the plaintiff was exposed. The ultimate causation determination in Washington asbestos cases hinges on whether the plaintiff’s exposure to an asbestos-containing product was a “substantial factor” in causing his disease. Implicit in this analysis is the premise that certain exposures, because they are not close enough in proximity or not long enough in duration or not otherwise of sufficient intensity, are “insubstantial” and thus not causative of the plaintiff’s disease. It was based on this premise that the trial court ordered the summary judgment dismissal of plaintiffs’ claims against the respective defendants as it determined plaintiffs had not shown that James Morgan’s exposure, if any, could have been as substantial exposure in causing his tragic disease.

In this appeal plaintiffs not only challenge the finding of the trial court below, they ask this Court to adopt a substantial factor test that would disregard the *Lockwood* causation factors altogether and establish as a matter of law a standard by which any workplace exposure, however brief and however remote, would be deemed substantial. The causation standard that plaintiffs advance would effectively preclude judges and jurors from determining a workplace exposure to be “insubstantial.” Plaintiffs’ argument is based on the premise, espoused by their medical expert, that all exposures, however small, that are sustained prior to the development of a plaintiff’s asbestos-related disease contribute to its development and thus are causative. While not ultimately determinative of the causation issue, uncontested iterations of the belief that “every exposure” is causative have been introduced as evidence in prior asbestos cases and reported in court decisions. However, courts in this and other jurisdictions that have more closely examined this opinion have revealed it to be no more than an unproven “hypothesis” and excluded it from evidence. It lacks the necessary scientific foundation and should not serve as the basis for establishing a new causation standard in Washington.

Buffalo Pumps, Inc. (hereinafter “Buffalo”) is one of eight Navy equipment manufacturers dismissed from plaintiffs’ action on summary judgment. Plaintiffs sued Buffalo and the other seven defendants claiming

that their equipment exposed James Morgan to asbestos, thus causing him to contract mesothelioma. Although it denied defendants' several challenges to the foundation and admissibility of plaintiffs' medical and exposure evidence, the trial court found as to each of the eight defendants that any potential exposure Mr. Morgan may have sustained from working on or around products which they had supplied was so minimal that it could not have been a substantial factor in causing his disease. Central to the lower court's ruling was its recognition that the defendants could not be held responsible for asbestos-containing products that they did not manufacture, sell or otherwise distribute. Thus, they could not be responsible for asbestos-containing insulation applied to the exterior of their equipment or for asbestos-containing flange gaskets used to connect the equipment to piping systems aboard ship. Rather, the products for which the equipment defendants could be held responsible were those that they had actually manufactured or sold or otherwise distributed. As to Buffalo, this means only internal gasket and packing material that had been incorporated within its pumps.

There is no proof that Mr. Morgan ever worked on the internal components of a pump manufactured by Buffalo. As a pipefitter, he simply did not perform that kind of work. Plaintiffs offer evidence that Mr. Morgan sometimes worked in the same engine spaces as machinists as

they removed and/or replaced internal packing and gaskets to certain pumps. However, no witness testified that any of the internal packing or gasket material removed or replaced in Mr. Morgan's presence was material that Buffalo made, sold, or distributed; and it is only by conjecture that one may conclude otherwise. It was in light of these and all other facts presented on summary judgment in a voluminous record that the trial court determined there to be insufficient evidence that the products plaintiffs seek to attribute to Buffalo could have caused Mr. Morgan's disease. No juror could reasonably conclude otherwise without resorting to impermissible conjecture and, accordingly, the trial court's ruling should be affirmed.

In its summary judgment motion, Buffalo also argued that it could not be held liable for plaintiffs' injuries because its pumps and their internal components were furnished to the U.S. Navy in conformance with mandatory precise military specifications. To the extent any hazards were associated with its pumps, the U.S. Navy had knowledge of those hazards, more so than Buffalo. Accordingly, Buffalo qualified for immunity under the government contractor defense. Moreover, the government's superior knowledge of the hazards posed by asbestos exposure and its failure to warn Mr. Morgan of such dangers represents a superseding cause in the development of his disease. Both of these defenses serve as alternative

grounds upon which the trial court's summary judgment dismissal of Buffalo may be upheld.

II. JOINDER IN RESPONDENTS' BRIEFS

Pursuant to RAP 10.1(g), Buffalo joins in the Brief of Respondents William Powell Co., IMO Industries, Inc., Warren Pumps, Aurora Pumps, Leslie Controls, Inc., Elliott co., and in the Brief of Weir Valve & Controls USA Inc ("Co-Respondents' Briefs.") Buffalo joins in and adopts by specific reference, but without limitation, the Statement of Issues Pertaining to Assignments of Error, the Statement of the Case, and the Argument sections of the Co-Respondents' briefs and the authorities presented therein. In addition, Buffalo sets forth herein certain issues, facts, and arguments particularly pertinent to Appellants' appeal of the orders dismissing their claims as to Buffalo.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying defendants' collective motion to strike the declaration and testimony of Melvin Wortman based on his unfounded statements.

2. Whether there is sufficient evidence to conclude, without resorting to conjecture or speculation, that James Morgan breathed respirable asbestos fiber from an asbestos-containing product for which Buffalo may be held responsible.

3. Whether upon considering all the evidence presented on summary judgment and making all reasonable inferences in favor of plaintiffs as to the disputed facts, the trial court erred when it determined that James Morgan's alleged exposure to asbestos from Buffalo Pumps' products was not a substantial factor in causing his disease.

4. Whether this court should disregard the factors set out by the Washington Supreme Court in *Lockwood v. AC&S* for determining whether a plaintiff's exposure to an asbestos-containing product is sufficient to establish causation for disease.

5. Whether this court should adopt a substantial factor test for causation whereby all cumulative exposures sustained by an asbestos plaintiff would, as a matter of law, be considered a substantial factor in causing his asbestos-related disease.

6. Whether the superseding and intervening negligence of the United States government in failing to warn James Morgan of the hazards posed by asbestos exposure serves as an alternative basis for affirming the lower court's dismissal of plaintiffs' claims.

7. Whether this Court should affirm the trial court's dismissal of Plaintiffs' claims against Buffalo for conspiracy, spoliation, willful or wanton misconduct, product misrepresentation, breach of warranty,

enterprise liability, market share liability, and/or market share alternate liability, and concert of action.

IV. COUNTERSTATEMENT OF THE CASE

Buffalo presents the following factual and procedural background to this appeal.

A. Buffalo Pumps.

As its name implies, Buffalo manufactures pumps. For many years Buffalo has sold its pumps to commercial customers as well as to the United States Navy for installation aboard Navy vessels. CP 3754. The pumps themselves are made of metal alloys. CP 2309. During the 1950's, 1960', and 1970's, the pumps were sometimes shipped with two internal components that contained asbestos fibers. One of these components was a casing gasket that was placed between the two halves of the pump's metal casing. CP 2309, 5171-72. The other component was packing material that was inserted within a stuffing box to fit around the pump shaft. CP 2309, 5166. Buffalo did not manufacture either component but, pursuant to and consistent with military specification, it installed the internal gaskets and packing within its pumps prior to delivery to the Navy. CP 2309, CP 3754 Buffalo sold replacement mechanical components to its pumps and occasionally, but rarely, it sold replacement packing and casing gaskets to its customers. CP 2309, 5169-70. Like

other pumps installed aboard Navy vessels, Buffalo's pumps were sold and delivered without insulation, and they were typically installed to the piping systems aboard the vessels by flange connections. CP 1282, 1288. Buffalo neither sold nor supplied the gasket material inserted within the flange faces, nor did it sell or supply any of the materials used to insulate the exterior of the pumps after they were delivered and installed; and plaintiffs have no evidence to prove otherwise.

B. James Morgan and the Claims Asserted in This Action.

According to the Complaint and discovery obtained in this action, James Morgan worked for more than 35 years at the Puget Sound Naval Shipyard ("PSNS,") first as a pipefitter and later as an engineering technician and technical assistant. CP 1264, 1269-70. He started his career at PSNS in 1952 as an apprentice pipefitter. CP 1269. He achieved journeyman status as a pipefitter sometime prior to September 1957, when he left PSNS for other employment. *Id.* He returned to the shipyard to work as a pipefitter in February 1959, and he worked in that capacity until 1963 when he moved into the engineering design shop. CP 1269-70.

In March 2006, Mr. Morgan was diagnosed to have mesothelioma, and together with his wife he filed a Complaint seeking damages for his injuries, which he contended were caused by asbestos exposure sustained in the course of his work at PSNS. CP 1260-65. Plaintiffs asserted

several liability theories including products liability, negligence, conspiracy, spoliation, willful or wanton misconduct, strict products liability under Section 402A of the Restatement (Second) of Torts, breach of warranty, enterprise liability, market share liability and/or market share alternate liability. *Id.* Plaintiffs' legal theories were based on the factual contention that Mr. Morgan was exposed to asbestos from products manufactured or sold by the defendants or otherwise to products used "in conjunction" with the defendants' products. *Id.* Mr. Morgan's illness prevented him from completing a deposition whereby he could describe the manner in which he was exposed to asbestos,¹ however, his co-worker Michael Farrow provided testimony as to the nature of the work he performed and the products and equipment with which he worked.

C. Michael Farrow.

Michael Farrow and James Morgan were friends as well as co-workers. CP 1276. Their careers at PSNS followed similar paths as they both worked first as pipefitters in the 1950's. Later, starting in the early 1960's, they both worked as technicians in the engineering design shop. CP 1276-78. Mr. Farrow noted that once he and Mr. Morgan started in the design shop, they ceased "working with the tools."

¹ Mr. Morgan died January 27, 2008. See attached Appendix A (Notification of Plaintiff James Kenneth Morgan's Death.) The Complaint in the action from which this appeal is taken has never been amended to assert wrongful death or survival claims.

CP 1298-99. As a result, his testimony relative to Mr. Morgan's work with the defendants' equipment is limited to the time period from approximately 1954 to 1962 when they worked together as pipefitters. *Id.*

As pipefitters, Mr. Farrow testified that the work he and Mr. Morgan performed around pumps stopped at the flange connection and did not include work on the pump itself.

Q. Well, let me -- for all of these pumps, it was never your job to do any work inside the pumps; is that right?

A. No, we didn't work on the pump itself. We would disconnect the flanged connections to the pump. And a lot of times the riggers would lift up the pump if it needed to be sent off to a shop to be worked on and -- but I didn't work on the pump itself.

CP 1561. Mr. Farrow never saw Mr. Morgan install a brand new pump, although he could recall seeing him reinstall pumps after they had been refurbished in the machine shop. CP 1281, 1283. He confirmed that brand new pumps were delivered without exterior insulation and that such material was applied only after the pump was installed and hydro tested. CP 1282-84 In response to questioning by plaintiffs' counsel, Mr. Farrow described the work that he observed Mr. Morgan perform on Buffalo pumps. Specifically, he testified that Mr. Morgan removed insulation from around the flange connections, removed old flange gaskets, and fabricated and installed new gaskets within the flanges.

Q. (By Mr. Horn) What work did you see Mr. Morgan perform on Buffalo pumps?

MR. ZERINGER: Objection; form.

A. I saw him remove insulation pads from the flange connections. I saw him unbolt flanges. I saw him undo bolting of the foundation and get the pump up where he could work on it. I saw him scrape flange faces, get the gasket material off the flange faces. And I saw him fabricate new gaskets to -- for later installation of the pump.

CP 1308. Although he repeatedly described Mr. Morgan's work with flange gaskets, Mr. Farrow did not describe, because he never saw, Mr. Morgan work with casing gaskets or packing material internal to the pumps. He stated unequivocally that he had never seen Mr. Morgan perform work on the internals of any pump, and he explained that it was the job of machinists, rather than pipefitters, to work on the internal parts of pumps, and they performed that work in the machine shop. CP 1286.

D. The Impact of *Braaten* and *Simonetta* – Buffalo Moves for Summary Judgment.

In December, 2009, the Washington Supreme Court rendered its decisions in *Braaten v. Saberhagen Holdings, Inc.*, 165 Wn.2d 373, 198 P.3d 493 (2009) and *Simonetta v. Viad Corporation*, 165 Wn.2d 341, 349 P.3d 127 (2009.) In those decisions, the Court held that under common law principles of products liability and negligence, an equipment manufacturer, such as Buffalo, had no duty to warn of the hazards posed by asbestos-containing exterior insulation or flange gaskets that they did

not manufacture, sell, or otherwise distribute. *Braaten*, 165 Wn.2d, at 380; *Simonetta*, 165 Wn.2d, at 363. In *Braaten* the Court further ruled that the equipment manufacturer owed no duty, under negligence or strict products liability, as to the gaskets and packing that replaced the materials originally delivered with the defendants' equipment, provided the replacement material was not made or sold or otherwise placed into the stream of distribution by the equipment defendant. *Braaten*, 165 Wn.2d, at 380.

In light of these decisions and insofar as there was no evidence Buffalo had furnished either the insulation or flange gaskets with which Mr. Morgan had worked and there was also no evidence that Mr. Morgan had worked with or been exposed to any packing or gaskets that Buffalo had originally furnished with any of its pumps, Buffalo moved for summary judgment dismissal of plaintiffs' claims against it. CP 1396-1408. While not conceding the issues raised by Buffalo's summary judgment motion, plaintiffs could point to no evidence that Mr. Morgan was exposed to a product that had been made or sold by Buffalo. *See* CP 2874-75. However, plaintiffs argued that the *Braaten* and *Simonetta* decisions were limited in application to the "duty to warn" theory advanced in their Complaint. They contended that neither case affected their alternate theory of recovery under Restatement (Second) of Torts

§ 402A – that the defendants (including Buffalo) had defectively designed their equipment to incorporate asbestos-containing gaskets and packing and to require asbestos-containing insulation. CP 2871-74.

In reply Buffalo argued that § 402A imposed liability only as to defective products that Buffalo had made or sold, but not as to products that were made and sold by others but used “in conjunction with” its pumps. In addition, as to the only asbestos-containing products that Buffalo had supplied (original packing and internal gaskets) Buffalo argued that plaintiffs’ defective design theory of liability was precluded by the government contractor’s defense as set out by the United States Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988.)

Under *Boyle*, a military contractor could not be sued in state court for design defects when: (1) the government approved reasonably precise specifications; (2) the equipment conformed to the specifications; and (3) the contractor warned of dangers with the design that it knew but which were not known by the government. 487 U.S., at 512, 108 S. Ct., at 2518. In support of its argument and to establish the first two prongs of the *Boyle* test, Buffalo furnished the affidavits of Martin Kraft and Admiral David Sargent to show that the Navy governed all aspects of the design and construction of pumps that were installed to its ships, including

the internal gaskets and packing used in its pumps, and that Buffalo complied with the Navy requirements in all respects.² Buffalo also submitted the Affidavit of Dr. Samuel Forman to establish the depth of the Navy's longstanding knowledge regarding the hazards of asbestos exposure and thereby satisfy the third prong of the *Boyle* test.³ Because the application of plaintiffs' design defect theory and the corresponding government contractor defense was not fully briefed and discovery on said issues was not fully developed, an additional round of briefing was ordered. During this time, plaintiffs also conducted additional discovery in their attempt to avoid the impact of the *Braaten* and *Simonetta* rulings and to prove Mr. Morgan was somehow exposed to a product for which Buffalo could be held responsible.

E. Jack Knowles.

Jack Knowles also worked with Mr. Morgan. Mr. Knowles became an apprentice pipefitter at PSNS in 1952, and he worked in the pipefitter's trade with Mr. Morgan until 1957, when he went into the design shop. CP 5114. Although they worked together again aboard ships

² The text of Martin Kraft's affidavit is at CP 3753-58 and the attachments thereto are at CP 3759-819. The text of Admiral Sargent's affidavit is at CP 3429-54 and the attached exhibits thereto are at CP3455-748. Exhibits A and B attached to Admiral Sargent's affidavit are military specifications that specifically pertain to centrifugal pumps, which Buffalo manufactured for the Navy. CP 3455-99.

³ The text of Dr. Samuel Forman's affidavit is at CP 3876 – 91 and the attached exhibits thereto are at CP 3892 – 4148.

when Mr. Morgan later entered the design shop, Mr. Knowles testified he could not identify any equipment that was serviced or repaired in their presence during that time frame. CP 5127. His testimony regarding the defendants in this action pertains to the time when both he and Mr. Morgan worked as pipefitters. CP 5129, 5130.

Mr. Knowles deposition was noted and taken by plaintiffs' counsel. Under questioning by plaintiffs' counsel that was both leading and overbroad, Mr. Knowles testified that Mr. Morgan worked "with and around" pumps manufactured by Buffalo and other manufacturers:

Q. Do you recall the brand name or manufacturer of any of the pumps that you saw Mr. Morgan work with or around?

A. Worthington, Aurora, Buffalo, DeLaval. That's -- yeah, that's all I can remember right now.

Q. For each of the pumps that you've identified, did you see him work both with and around brand-new as well as existing pumps?

DEFENSE COUNSEL: Object to form.

A. Yes.

CP 5123

Under cross examination, Mr. Knowles confirmed what Mr. Farrow had said earlier concerning the limited work pipefitters performed on pumps. The pipefitters' responsibility went only up to the flange connection whereas machinists refurbished the pumps and

performed work on its internal parts. CP 5137. Thus, as pipefitters, Mr. Knowles and Mr. Morgan fabricated and changed out many flange gaskets CP 5123-24, but the casing gasket and the internal packing lay within the jurisdiction of the machinist. CP 5125, 5143. Indeed, Mr. Knowles acknowledged that he never saw Mr. Morgan change packing within a pump. CP 5143.

Under further cross-examination, Mr. Knowles testified that he could recall working with Mr. Morgan on the USS Coral Sea, the USS Midway, and the USS Roosevelt. CP 4847-48. Each of those vessels were built at other shipyards in the 1940's, and they were at PSNS for conversion CP 5548-53, 5628. Mr. Knowles had no knowledge as to the maintenance requirements for pumps in general. CP 5628. Specifically as to the pumps he associated with Buffalo, he could not associate them with a particular ship or a particular system within the ship; nor did he know their maintenance history. CP 5629. Thus, he had no way of knowing how long the packing or the internal gasket incorporated within the pumps had been in place. *Id.*

F. Melvin Wortman.

Plaintiffs also make use of a declaration and a deposition given by Mr. Wortman to address Buffalo's summary judgment motion. Both the declaration and the deposition were provided in the context of a different

case. CP 5189–94, 6657-746. Mr. Wortman’s declaration specifically relates to the time period between 1967 and 1971, when the plaintiff in the other action, Douglas Nelson, worked as a machinist in the inside machine shop at PSNS known as Shop 31. *Id.* Mr. Wortman was the superintendent of machinists at PSNS during this time period; meanwhile Mr. Morgan worked as a technician in the engineering design shop. In his declaration, Mr. Wortman described among other things the work of machinists at PSNS, particularly the work of inside machinists as it pertained to the repair and reconditioning of pumps at PSNS. Confirming what Mr. Farrow and Mr. Knowles both said, during a ship’s overhaul the pumps within the machinery spaces that were bolted down on foundations were typically removed from the ship and repaired within Shop 31. CP 6665. In the course of their work, the inside machinists routinely removed and replaced the packing and gaskets of the pumps (and other equipment) inside the machine shop before they were returned to the ship for reinstallation. CP 5193.

Mr. Wortman’s declaration also contains statements regarding the source of the replacement materials used in the repair of pumps and other equipment that was delivered to the machine shop. He generally states that “approximately fifty percent of the replacement parts” obtained by PSNS between 1967 and 1971, including replacement parts for pumps,

compressors, valves and other equipment, came from the manufacturer. CP 5192. He also claimed that most of the gaskets and packing that were in valves, pumps, and compressors when they came to the shop for overhaul were “probably” provided by the original manufacturer. *Id.* Buffalo, along with the other defendants moved to strike this testimony on the basis that it was based on Mr. Wortman’s unfounded “information and belief.” CP 5631-45. This was demonstrated in the deposition that Mr. Wortman subsequently provided wherein defendants collectively showed that he was never responsible for acquiring materials 5636-37, that he never worked in the department that acquired materials 5638, that he did not know where replacement parts were obtained 5639-40 and that he was unaware of the Qualified Products List (known as the “QPL”), a list of companies whose products are approved for use in Navy shipyards. CP 5636–40.

G. James Millette, Ph.D.

Dr. Millette is a scientist who studies fiber release among other things. By means of an April 1, 2009 declaration that he signed (“Millette Declaration”),⁴ plaintiffs furnished evidence to show:

⁴ Prior to his April 1, 2009 declaration, Dr. Millette authored four other declarations, including declarations dated October 3, 2008, January 8, 2009, January 14, 2009, and January 19, 2009. Dr. Millette states that the opinions expressed in his April 1, 2009 declaration are in addition to those set out in his earlier declarations, however, the April 1, 2009 declaration appears to encompass the opinions he previously expressed.

- a. that gasket and packing materials used on pumps installed to Navy vessels when Mr. Morgan worked as a pipefitter often contained asbestos. CP 4588-89.
- b. that removing an asbestos-containing gasket from a flange releases asbestos fibers in the breathing zones of those who perform the task and those in close proximity. CP 4590-91.
- c. that fabricating an asbestos-containing gasket by hammering it and filing its edges releases asbestos fibers in the breathing zones of those who perform the task and those in close proximity. *Id.*
- d. that asbestos-containing packing is not friable in its original condition, but can become friable and can release asbestos fibers during valve packing removal operations. CP 4590.

The Millette Declaration furnishes no evidence as to the ability or the propensity of any of the activities he describes to release asbestos fibers outside of the room in which the activity takes place. CP 4583-607. Dr. Millette relied on the testimony of Mr. Farrow and Mr. Knowles as to the work that Mr. Morgan performed, the kind of products with which he worked, the manner in which he was exposed to asbestos, and the frequency and duration of his exposures. CP 4587, 4600-01. Thus, he learned from Mr. Farrow and Mr. Knowles about Mr. Morgan's work from the removal and/or installation by him and others of flange gaskets and flange insulation. CP 4600-01. He also learned from Mr. Knowles that Mr. Morgan was in the presence of others as they removed gaskets or somehow were "working with packing" in connection with a Buffalo pump. CP 4601. On the basis of this information, Dr. Millette concludes

that Mr. Morgan's work with or in proximity to pumps manufactured by Buffalo exposed him to levels of asbestos several times that found in the ambient air. CP 4590-91, 4606. Dr. Millette offers no opinion as to the quantity of asbestos exposure Mr. Morgan sustained specifically from internal gaskets or packing furnished by Buffalo. CP 4583-607.

H. Dr. Eugene Mark.

Dr. Mark is a pathologist. In a declaration dated April 7, 2009, Dr. Mark confirms Mr. Morgan's mesothelioma diagnosis. In it he also offers opinions as to the cause(s) of Mr. Morgan's disease.⁵ CP 4559-61. Like Dr. Millette, Dr. Mark derives his information concerning the work Mr. Morgan performed, the products with which he worked, the manner in which he was exposed to asbestos, and the frequency and duration of that exposure from Mr. Farrow and Mr. Knowles. CP 4558. Based on that information and Dr. Millette's April 1, 2009 declaration, Dr. Mark concludes that Mr. Morgan's "work with Buffalo pumps," as described by Mr. Farrow and Mr. Knowles, constituted an "occupational" exposure to asbestos and a substantial factor in causing Mr. Morgan's mesothelioma.⁶

⁵ Prior to his April 7, 2009 declaration, Dr. Mark authored a report dated December 20, 2008 and a declaration dated January 10, 2009 both of which are annexed respectively to his April 7, 2009 declaration as Exhibits A and B. The opinions expressed in his report and in his prior declaration are adopted in his April 7, 2009 declaration. CP 4559.

⁶ Dr. Mark makes virtually identical findings and offers the same opinions as to each of the other defendants. See CP 4555-75.

CP 4561, 4575. Dr. Mark's declaration makes no finding as to the nature or the level of exposure Mr. Morgan may have sustained specifically to casing gaskets or internal packing supplied by Buffalo. *Id.*

Dr. Mark's declaration also makes reference to a "special exposure," which he defines as "an exposure for which there is scientific reason to conclude it created or increased the risk of developing the disease." CP 4560. He offers no opinion whether Mr. Morgan may have sustained a "special exposure" specifically by virtue of exposure to internal gaskets and packing supplied by Buffalo. *Id.* However, Dr. Mark also opines that all exposures Mr. Morgan sustained prior to the occurrence of his malignancy together contributed to cause his mesothelioma. CP 4561.⁷ Certain defendants moved under *Frye v. United States*, 293 Fed. 1013 (1923) to exclude that opinion, however, the Court ruled that it would deny a *Frye* hearing as to that evidence. CP 6761.

⁷ The referenced statement is found at Paragraph 28 of Dr. Mark's April 7, 2010 Declaration. CP 4561. At Paragraph 24 of the same declaration, Dr. Mark states that "[a]ll special exposures to asbestos that occur prior to the development of a diffuse malignant mesothelioma contribute to its pathogenesis." (Emphasis added.) CP 4560. No explanation is provided as to the distinction between a "special" exposure and one that is not "special" in this context.

V. ARGUMENT

A. The Trial Court Properly Determined That Plaintiffs' Evidence Was Insufficient to Conclude That Mr. Morgan's Exposure to Buffalo Products Was a Substantial Factor in Causing His Disease.

Pursuant to the Supreme Court's holdings in *Braaten* and *Simonetta* equipment manufacturers owe no duty under § 402A and cannot be held responsible for products they did not manufacture or sell. Accordingly, the only materials for which Buffalo owed any duty under § 402A were the casing gaskets and internal packing material that it supplied with its pumps. While there is evidence that Buffalo furnished such gaskets and packing material when it delivered its pumps to the Navy, there is no evidence by which to reasonably conclude that Mr. Morgan ever worked with that material or was otherwise exposed to it. Moreover, there is no evidence by which to determine that exposure to such material was a substantial factor in causing his disease.

1. Mr. Morgan Did Not Work With Products Made or Sold by Buffalo.

Plaintiffs rely on two witnesses, Mr. Farrow and Mr. Knowles, to establish the nature of Mr. Morgan's work, the products with which he worked, and the manner and extent to which he was exposed to asbestos from those products. Like Mr. Morgan, both of these men were pipefitters. Both men testified that as a pipefitter Mr. Morgan's work with pumps consisted of removing and re-installing them to piping systems or

machinery aboard ship. Their work as pipefitters extended only to the flange connections and did not involve the internal parts of a pump. Although both men described Mr. Morgan's work to gain access to and remove flange gaskets when taking a pump off line and also to fabricate new gaskets to insert within a flange when re-installing the pump, any exposures Mr. Morgan may have sustained from those activities are simply not relevant as to Buffalo because Buffalo did not manufacture or sell or otherwise furnish that material, and plaintiffs do not dispute this.

As for the asbestos-containing product that Buffalo did furnish with its pumps, namely the casing gasket and internal packing, the testimony provided by Mr. Farrow and Mr. Knowles wholly discounts the possibility that Mr. Morgan would have installed or removed or otherwise worked with such material. Mr. Knowles observed that while pipefitters would make up the gasket inserted to the mating flange, the casing gaskets were the responsibility of the machinists.⁸ Mr. Knowles further testified that it was the machinist who inserted packing to a pump rather than a pipefitter and that he never saw Mr. Morgan replace packing in a pump. Similarly, Mr. Farrow testified that he never saw Mr. Morgan work on the

⁸ At page 21 of Appellants' Brief, plaintiffs state that Mr. Knowles saw Mr. Morgan make new gaskets for use on new and existing pumps made by various defendants, including Buffalo. This statement is made without reference to the record. At CP 5125 Mr. Knowles clearly states that pipefitters like him and Mr. Knowles fabricated only mating (flange) gaskets as opposed to casing gaskets.

internal parts of a pump, and there was good reason for this. As he repeatedly observed, PSNS workers respected the jurisdictions of the differing crafts, and the work on the internal parts of a pump belonged to the machinist, not the pipefitter. Mr. Knowles and Mr. Wortman both agreed with Mr. Farrow on this point, and they all also agreed that such work was typically performed off the ship and in the machine shop.

2. Mr. Morgan's Alleged Exposure From the Work of Others.

Plaintiffs contend, in part, that Mr. Morgan was exposed to asbestos not only from his own work but also from the work performed by others nearby. Mr. Farrow gave testimony as to such exposures, but the exposures he described were also to exterior insulation and flange gaskets, which are not relevant to Buffalo.

For his part, Mr. Knowles testified under plaintiffs' direct examination that he observed Mr. Morgan in the vicinity of others as they worked with packing and gaskets on equipment, including Buffalo pumps. However, under cross examination, Mr. Knowles acknowledged that he could recall working with Mr. Morgan on three vessels, each of which had been built during the 1940's at other shipyards, and brought to PSNS for a conversion.⁹ As to the pumps on these vessels and all pumps in general,

⁹ Mr. Knowles could remember them working together on the USS Coral Sea, the USS Midway, and the USS Roosevelt. CP 5115. These vessels was built in the
(continued . . .)

Mr. Knowles acknowledged that he did not know their maintenance requirements. As to the pumps that he associated with Buffalo, he had no idea what maintenance had been performed on them previously; thus, he could make no reliable conclusion whether any of the packing or any of the casing gaskets were original to the pump.

3. Applying the *Lockwood* Factors, the Trial Court Properly Dismissed Plaintiffs' Claims as to Buffalo.

In *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987), the Washington Supreme Court confirmed that an asbestos plaintiff must establish a reasonable connection between his injury, the product causing the injury, and the manufacturer of that product. *Lockwood*, 109 Wn.2d, at 245. To assist in the determination whether, as to a particular defendant, a reasonable connection exists, the Supreme Court, set forth a number of factors to consider. The *Lockwood* factors include: the plaintiff's proximity to the product, the expanse of the work site where the asbestos fibers were released, the amount of time the plaintiff was exposed, the types of products to which plaintiff was exposed, the amount of asbestos contained in the product, the tendency of the product to release asbestos fiber, and the manner in which the

(. . . continued)

1940's. Coral Sea and Midway were built at Newport News, VA and Roosevelt was built at New York Naval Shipyard. CP 5543-55.

products were handled. *Lockwood*, 109 Wn.2d, at 248. The trial court analyzed plaintiffs' proof of exposure as to Buffalo in light of these factors and found it "insufficient." A review of the record should confirm its decision.

a. Plaintiffs Evidence Is Based on Speculation.

Although in the context of a summary judgment motion, the non-moving party is entitled to all reasonable inferences as to disputed facts, a plaintiff may not rely on mere speculation or empty allegation to carry his burden. *Free v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). A review of the evidence plaintiffs submit in opposition to Buffalo's motion largely explains its insufficiency – too much is left to speculation. The court is required to speculate first as to whether Mr. Morgan was ever exposed to a casing gasket or packing material delivered by Buffalo, and it must further speculate to conclude that such exposure could have been a substantial factor in causing his disease.

Rather than "proof" of asbestos exposure from a product attributable to Buffalo, plaintiffs offer only supposition that at some time and at some place within the shipyard, Mr. Morgan was in the near vicinity of other workers as they removed and/or replaced a casing gasket or a piece of internal packing of a pump manufactured by Buffalo – and that in that on that occasion the casing gasket or packing material in

question was being replaced for the first time.¹⁰ Even assuming that at some time during his career persons nearby to Mr. Morgan were working on a casing gasket or removing packing that was original to the pump, there is no evidence by which to determine the fiber release from that work or how close Mr. Morgan was to the operation or for how long he stayed in the vicinity. According to *Lockwood*, these are all factors to consider in determining causation, but they are left to speculation here. Indeed the layers of speculation mount to make it sheer guesswork whether and to what extent Mr. Morgan was exposed to a Buffalo product, and that is not a sufficient basis upon which to determine causation.

b. The Nature and Quantity of the Products at Issue.

Plaintiffs' burden is to establish that Mr. Morgan's exposure to asbestos from Buffalo's product was a substantial factor in causing his

¹⁰ By means of the Wortman Declaration, plaintiffs seek to enlarge the possibilities for Mr. Morgan's exposure to casing gaskets and packing furnished by Buffalo. His declaration states that equipment manufacturers such as Buffalo furnished replacement parts for their equipment, suggesting that half of the replacement packing and gaskets for Buffalo's pumps were supplied by Buffalo. In a joint motion to strike Mr. Wortman's testimony, defendants collectively argued there was no foundation for his statements showing his overall lack of familiarity with the purchasing process at PSNS and the listing (QPL) of approved vendors from which the Navy purchased the products it used in the shipyard. Aside from being unfounded, Mr. Wortman's statements are hopelessly overbroad in that they lump literally dozens of parts and numerous manufacturers together in his sweeping declaration. Although the court did not strike Mr. Wortman's testimony, it apparently recognized that his testimony does little to carry plaintiffs' burden or to even advance their position. It does not establish that Mr. Morgan ever sustained asbestos exposure from a casing gasket or from packing furnished by Buffalo. It only adds to the speculation. Buffalo assigns error to the Court's denial of the joint motion to strike Mr. Wortman's declaration and joins in the arguments made in the briefing of its co-defendants on that issue.

disease. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997.) By implication, Washington’s substantial factor test for causation means that certain exposures may be insubstantial and not causative. With reference to the *Lockwood* factors, exposures may be “insubstantial” because the source is remote, because they are infrequent, because they brief in duration, or because the potential for fiber release in one’s breathing zone is minimal. In this case, the court found the evidence insufficient not only because there was no positive proof of an exposure, but also because there was no proof as to its proximity, its duration, its frequency, or its intensity. Positive proof of these factors is particularly important given the nature of the products involved – specifically internal gaskets and packing.

The nature and quantity of the products at issue distinguishes this case from most, if not all, of the cases previously presented to this Court. Unlike *Lockwood* and the progeny of cases that followed it, the products for which plaintiffs would hold the defendants accountable are not insulation products, such as asbestos cloth, pipe covering, block or cement. The exposure potential for such products is more general and widespread among all trades working aboard ship. Indeed, in cases where insulation products were at issue, it was not unusual for plaintiff’s proof to include testimony as to the ability of the fiber released from such products

to drift throughout the shipyard. No such testimony is presented in this case.

Unlike insulation, which is friable and plentiful in the shipyard, and for which exposure can generally be established merely by showing that it was used aboard ship, the products that are at issue in this case are different. They are not-friable.¹¹ They can release asbestos fiber, but generally only in the removal process or, in the case of gaskets, when they are fabricated or altered to fit the location to which they are being installed. The work activity that releases asbestos from these products is generally performed by certain trades and typically in a single location – the machine shop. Furthermore, as to Buffalo, the potential for exposure is limited by the number of its pumps aboard ship and, further, by the number of pumps that remain equipped with original packing and gaskets. In light of the foregoing, proof as to the identity of the product and the extent of the exposure should be precise and reliable rather than vague and overbroad, yet that is all that exists. Indeed, plaintiffs' proof that any exposure to an original gasket or original packing attributable to Buffalo is uncertain at best, much less so is their proof that such exposure could be a substantial factor in the development of disease.

¹¹ See CP 4651 (Millette Declaration, Exhibit B, p.1) and CP 4616 (Millette Declaration, Exhibit A, p.2)

c. Plaintiffs' Expert's Opinions.

The lower court's ruling is appropriate notwithstanding the evidence tendered by Dr. Millette and Dr. Mark. Both experts base their opinions on the testimony of Mr. Farrow and Mr. Knowles. Thus, their conclusions are based on proof of exposures that either do not pertain to Buffalo or which otherwise are not proven to have occurred. Notably, neither expert offers an opinion as to the level of exposure Mr. Morgan sustained from asbestos-containing products that were actually furnished by Buffalo. This is understandable given there is no reliable factual basis upon which such an opinion could be provided.

While, Dr. Mark offers the opinion that every exposure a plaintiff sustains to asbestos is causative of a subsequently developed asbestos-related disease, the trial court is not required to accept such testimony as controlling, even when it declines to conduct a *Frye* hearing as to its admissibility.¹² This is particularly so in this case where there has been no

¹² The trial court determined not to conduct a *Frye* hearing as to Dr. Mark's opinion, citing to *Bruns v. Paccar, Inc.*, 77 Wn. App. 201, 890 P.2d 469 (1995) and characterizing Dr. Mark's opinion as a medical causation testimony that was not novel. However, the *Bruns* decision distinguished novel scientific methodology (for which a *Frye* hearing is appropriate) from medical causation testimony that was based on established scientific technique. While Dr. Mark's opinion may be characterized as medical causation testimony that is not "novel" the *Bruns* decision requires that it be based on established scientific methods rather than mere theory. The fact that the trial court did not conduct a *Frye* hearing as to Dr. Mark's opinion does not legitimize it. Notwithstanding Dr. Mark's opinion, the trial court found the alleged exposures to internal gaskets and packing to be so minimal, even if proven, that it could not be deemed causative of Mr. Morgan's disease.

proof of exposure to a Buffalo product – only speculation that an exposure must have occurred at some time. Moreover, even if the Court were to determine that at some point an exposure had occurred, Washington has not determined as a matter of law that every exposure to asbestos is causative of disease. Rather, the Court is required to review and consider the *Lockwood* factors in conjunction with the medical evidence that is offered to determine if the exposure was substantial. That is precisely what the court did in this case, and its ruling should stand.¹³

B. The Court Should Reject Plaintiffs' Proposal to Establish a New Causation Standard.

Plaintiffs propose that this case be decided on the basis of a substantial factor instruction similar to one provided in *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995.) They seek to establish a substantial factor causation standard in asbestos cases whereby they would not be required to prove a defendant's individual causation. Based on the opinion of their medical expert, Dr. Mark, plaintiffs would have the court predetermine all exposures sustained by an asbestos plaintiff prior to the

¹³ Buffalo anticipates that plaintiffs will claim entitlement to a reasonable inference of causation based on Dr. Mark's opinion. However, the trial court is entitled to determine which inferences are reasonable and which are not; and in this case the court determined not to allow Dr. Mark's opinion to dictate its ruling. The court is properly allowed this discretion, otherwise it would be required to find exposures at levels below the regulatory limits established by OSHA or even levels comparable to those in the ambient air to be causative. *See generally* 29 CFR 1926.1101 Occupational Safety and Health Administration Rules and Regulations regarding Occupational Exposure to Asbestos.

development of his disease to be substantial factors in its causation. Plaintiffs would apply this new causation standard when determining summary judgment motions, and they would also incorporate it within a jury instruction that dispenses with the need to prove that an individual defendant's conduct or product was a substantial factor in causing the plaintiff's asbestos injury.¹⁴ If accepted by this Court plaintiffs' new substantial factor standard would effectively preclude judges and juries from finding a particular asbestos exposure to be "insubstantial," and determine as a matter of law, all asbestos exposures, however small, to be substantial factors in causing disease.

Plaintiffs' proposal should be rejected. As set forth above, in the *Lockwood* case the Washington Supreme Court directed courts to determine whether "exposure to a particular defendant's asbestos product actually caused the plaintiff's injury." *Lockwood*, 109 Wn.2d., at 248. *Lockwood* requires that an individual defendant's product or conduct be shown to have caused the plaintiff's injury; and to assist in that determination, the Supreme Court set out the *Lockwood* factors by which

¹⁴ Buffalo observes that this case is on appeal from the trial court's order granting it and other defendants' motion for summary judgment. This case has not gone to trial and there have been no orders issued with respect to appropriate jury instructions. To the extent plaintiffs seek an order directing the issuance of jury instructions, their request should be denied as prematurd.

well as the neighboring wheat farmers. In that case the trial court applied a substantial factor test for causation. The trial court fashioned, and the Supreme Court approved, an instruction whereby plaintiffs' burden as to each individual defendant was to simply prove that he had contributed a portion of the pesticide that was "part of a cloud that then was the proximate cause of the damage." *Hue*, 127 Wn.2d, at 91 (quoting from the trial court's oral ruling.)¹⁵ Notably absent from the instruction was a requirement that plaintiffs prove an individual defendant's causation.

The Supreme Court's approval of the substantial factor instruction used in *Hue* led this Court to consider whether a similar instruction would be appropriate for asbestos cases. Indeed, the Court viewed the Supreme Court's approval of the *Hue* instruction as an implication that proof of individual causation might not be necessary in asbestos cases. *Mavroudis*, 86 Wn. App, at 30. However, this Court ultimately approved the substantial factor instruction as it had been given by the *Mavroudis* trial court, finding that it fell "well within the parameters of substantial factor causation theory. *Id.*, at 33.¹⁶

¹⁵ The jury instruction used in Hue is not set out in its entirety in the text of the Hue opinion or as an appendix to it, although the opinion quotes from it. See Hue, 127 Wn.2d, at 76 and 91-92.

¹⁶ The Court's opinion reflects its awareness that there can be "insubstantial" factors and its concern how such factors that might

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2. Courts Have Required Proof of Individual Causation Since Mavroudis.

Since *Mavroudis* was decided, and as instructed by the Supreme Court's opinion in *Lockwood*, trial courts and appellate courts, including this Court, have continued to analyze the sufficiency of plaintiffs' causation evidence as to individual asbestos defendants in light of the *Lockwood* causation factors.¹⁷ Indeed, the issue briefed and argued to the trial court below was whether, in light of the *Lockwood* factors, Mr. Morgan's alleged asbestos exposure from products attributable to Buffalo (and the other defendants) constituted a substantial factor in causing his disease. Although plaintiffs made no argument to the trial court that the *Hue* substantial factor analysis should apply to this case and that they should be excused from having to show individual causation on

(. . . continued)

combine with other causes to produce injury should be handled in substantial factor jury instructions. See *Mavroudis*, 86 Wn. App, at 30.

¹⁷ See e.g. *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 570-573, 157 P.3d 406 (2007) (applying and finding the *Lockwood* factors satisfied where evidence was that large quantities (more than 6 tons in one particular year) of asbestos insulation materials were ordered by the shipyard over multiple years and that the fibers released from insulation products drifted throughout the shipyard) and *Berry v Crown Cork & Seal*, 103 Wn. App. 312, 323-325, 14 P.3d 789 (2000) (applying and finding the *Lockwood* factors satisfied where evidence was that 50 percent of insulation products used at PSNS were purchased from local distributors like the defendant and that products that the defendant distributed by defendant were observed almost every day by the testifying witnesses.)

the part of each defendant, they now characterize the *Hue* decision as “directly on point,”¹⁸ and they argue for its application in this case.¹⁹

3. Plaintiffs Have Not Shown the Circumstances in *Hue* to Be Analogous to the Asbestos Litigation or This Case.

If, as plaintiffs contend, the *Hue* decision is directly on point in justifying a change in the causation standard in asbestos cases, then the circumstances of that case must be analogous to asbestos cases, including this one. Buffalo does not believe this to be so.

It is understood from the Supreme Court’s decision in *Hue*, that contributions of varying degrees and from varying sources over time were made to a “cloud” of pesticide that drifted on to the plaintiffs’ land causing damage to the land. It is also understood that the trial court in *Hue* determined that every contribution to the cloud caused the damage, although it is unclear, at least to Buffalo, how the court reached that determination. Regardless of how it made its determination, the court

¹⁸ See Appellants’ Brief, at p. 23.

¹⁹ At no time did plaintiffs argue to the trial court that the *Hue* decision excused them from establishing individual causation as to Buffalo. Their arguments pertained only to *Lockwood* and its progeny, including this Court’s decisions in *Allen* and *Berry*, *supra*. See CP 2864-2875 (Plaintiffs’ Response to Buffalo’s Motion for Summary Judgment) and CP 5090-5108 (Plaintiffs’ Supplemental Response to Buffalo’s Motion for Summary Judgment.) Having never raised to the trial court the application of the *Hue* decision with respect to its substantial factor analysis, they should be precluded from raising it as an assignment of error now. RAP 2.5.(a).

instructed the jury that rather than having to prove that any of the individual contributions to the cloud were causative of the damage, plaintiffs had to prove only that an individual defendant contributed to the cloud and that the cloud caused damage.²⁰

In this case, an opinion is offered by plaintiffs' expert, Dr. Mark, whereby he opines that "all the asbestos exposures (sustained by plaintiff) that occurred prior to the malignancy together contributed to cause the diffuse malignant mesothelioma" which the plaintiff ultimately contracted. Plaintiffs contend that this "every exposure does it" opinion corresponds to the trial court's determination in *Hue* that every contribution to the cloud could be deemed causative of the landowner's damage, and would presumably argue that this asbestos case may be analogized to *Hue*. However, a significant difference lies in the fact that the trial court in *Hue* accepted a particular theory as determinative of the causation issue, whereas in this case, the trial court did not. Although the trial court below declined to hear a *Frye* challenge and thus considered Dr. Mark's opinion as evidence, its July 2, 2009 order (from which this appeal is taken) clearly reflects that it did not accept Dr. Mark's "every exposure does it" opinion as determinative of the causation analysis – at least not in asbestos

²⁰ *Hue*, 197 Wn.2d, at 67. The Supreme Court approved the instruction provided by the trial court. *Id.*

cases. Dr. Mark's opinion notwithstanding, the trial court ruled that summary judgment dismissal of eight defendants was appropriate because the evidence, including Dr. Mark's opinion, failed to establish that the asbestos containing materials attributable to each of the defendants were "enough to be a substantial factor" in causing Mr. Morgan's disease." CP 6767. This case is not analogous to *Hue*, and decisions as to what was an appropriate causation standard for pesticide drift should not affect what is appropriate for asbestos, even if they are both toxic torts.

4. Opinions Similar to Dr. Mark's Have Previously Been Admitted as Evidence, But Not Deemed Controlling of the Causation Determination.

Although uncontested opinions similar to the one expressed by Dr. Mark have been admitted in prior asbestos cases and reported in decisions, they have not by themselves controlled the court's causation analysis. For instance in *Lockwood*, evidence that all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis was admitted. In addition to that evidence, there was evidence that defendants asbestos cloth was used on the same vessel on which the plaintiff worked, that the handling of defendant's asbestos cloth created dust, and that the dust released from asbestos insulation products like those manufactured by defendant drifted throughout the shipyard where it could be inhaled by

bystanders. Based on the combined evidence, the trial court was deemed sufficient to send the case to the jury, and the Supreme Court agreed. *Lockwood*, 109 Wn.2d 2d 247-248.

While the Supreme Court in *Lockwood* agreed with the trial court's decision in that case, it was careful to instruct lower court's that "ultimately the sufficiency of the evidence of causation will depend on the unique circumstances of each case." *Id.*, at 249. It further instructed the lower courts that they were to determine whether the "exposure to a particular defendant's asbestos product actually caused the plaintiff's injury." *Id.*, at 248. It then proceeded to provide the factors that courts were to consider when assessing the sufficiency of plaintiff's proof as to each defendant. *Id.* Thus, notwithstanding the admission into evidence of an opinion similar to that which Dr. Mark apparently holds, the *Lockwood* court declined to find the medical opinion testimony to be controlling but instead directed that all the exposure factors be considered. *Id.*, at 248-49.

It was several years later that this Court decided the *Mavroudis* case. Notably, as it considered the appropriate form of the substantial factor jury instruction and whether to remove from that instruction the requirement for finding causation as to individual defendants, the Court had before it opinion evidence from Dr. Hammar similar to that now expressed by Dr. Mark. In *Mavroudis*, Dr. Hammar had opined that "all of

Mr. Mavroudis's exposure to asbestos probably played a role in causing the mesothelioma." *Mavroudis*, 86 Wn. App., at 27. Notwithstanding Dr. Hammar's opinion that every exposure counts, the *Mavroudis* court retained an instruction that preserved the necessity for plaintiffs to prove causation as to each defendant as *Lockwood* had instructed. *Id.*, at 33.

More than twenty years have now passed since *Lockwood* directed courts to determine causation as to each defendant and almost twelve years have passed since *Mavroudis* approved the substantial factor jury instruction that preserves the need for plaintiffs to show that exposure as to each defendant's product was a substantial factor in causing disease. What then, if anything, has occurred to justify acceptance of the opinion offered by Dr. Mark, whereby every exposure that an individual sustains to asbestos is determined to be causative and plaintiffs are relieved of the necessity to prove causation as to each defendant under the substantial factor test? The answer as far as Buffalo is concerned is nothing. On the contrary, what has occurred is that the opinions such as expressed by Dr. Mark have been challenged, and when challenged they have been shown to lack the requisite scientific foundation for admissibility under a Frye analysis.

In October 2006, King County Superior Court Judge John Erlick rejected the "every fiber counts" theory the context of a *Frye* test in

Anderson v. Asbestos Corp., No. 05-2-04551-5SEA (King Co. Super. Court, Oct. 31, 2006). Announcing his decision, Judge Erlick concluded:

With respect to the opinion that any and all asbestos at any level - -excuse me, any and all exposure to asbestos at any level is a substantial factor in causing mesothelioma, the court, after reviewing the record and, in particular, Dr. Hammar's prior testimony stating that this was a proven hypothesis, concludes that this is not a theory which is generally accepted in the scientific community and that there are no techniques, experiments or studies that are capable of producing reliable results or otherwise replicating that thesis

Transcript of Proceedings at 144-45 (emphasis added), *Anderson v. Asbestos Corp.*, *supra*. CP 1092-104,

More recently, in *Free v. Ametek* Judge Barnett rejected the theory, ruling that:

Dr. Brodtkin will not be permitted to testify that every biologically significant exposure above ambient levels is an undifferentiated proximate cause of mesothelioma. We do not know, and modern science cannot tell us, what a biologically significant exposure is. We cannot tell which fiber or group of fibers from which sources at what time in the life of a patient overwhelmed that patient's individual bodily defenses.

Ruling on Motion in Limine under *Frye v. United States*, at 5, *Free v. Ametek*, No. 07-2-04091-9 SEA (King Co. Super. Court, February 29, 2008) CP 1106 – 13.

Courts in other jurisdictions have also found opinions in which plaintiffs' experts have opined that every exposure to asbestos causes disease. For instance, in the First Judicial District of Pennsylvania,

Philadelphia County, in a matter entitled *In Re Asbestos Litigation*, Judge Allan Tereshko issued a Findings, Memorandum and Order dated September 24, 2008, wherein he determined that the “every exposure counts” theory failed under a *Frye* challenge. Among the opinions he excluded was that of Dr. Mark. Judge Tereshko determined that Dr. Mark’s opinion lacked sufficient scientific foundation. *See* CP 1106 – 1170, especially pages 1130 – 1140. Indeed Judge Tereshko determined that Dr. Mark’s methodology was either nonexistent or otherwise so contradictory as to defy comprehension. CP 1137.

As these lower court decisions reflect, the opinion espoused by Dr. Mark and upon which plaintiffs rely to justify a change in the causation standard in asbestos cases lacks the requisite scientific foundation. Indeed, as Judge Erlick and Judge Barnett determined, because it was admitted by Dr. Hammar, the opinion is in actuality nothing more than unproven hypothesis. *See* CP 1108 – 10; CP 1102. Such opinions can not serve as the basis for a change in the causation standard in Washington.

C. The Navy’s Knowledge of the Risks Associated With Asbestos Defeats Legal Causation as a Matter of Law.

At the trial court, Plaintiffs alleged that Buffalo’s failure to warn about the risks of asbestos exposure rendered their pumps defective. However, Plaintiffs failed to show evidence of how any warning from Buffalo pumps would have somehow affected whatever dangers Mr. Morgan

may have faced from exposure to asbestos containing products related to his work on or around Buffalo pumps while working at PSNS.

The undisputed evidence is that the United States Navy and Department of Defense were aware long before Mr. Morgan's employment with them at PSNS of the dangers from asbestos dust and of precautions to address those dangers. CP 3876–4148.²¹ This defeats legal causation because the Navy's failure to warn Mr. Morgan of known danger (1) constitutes a superseding cause relieving Buffalo from liability and (2) triggers the "sophisticated user" doctrine that negates a manufacturer's duty to warn of known hazards.

1. The Navy's Failure to Warn and Protect Plaintiff Was a Superseding Cause of His Injuries.

The Navy's knowledge of the dangers of asbestos and its resulting duty to warn and protect Mr. Morgan act as a superseding cause relieving Buffalo from any liability in this matter. A manufacturer's failure to warn must be a proximate cause of injury to recover. *Minert v. Harsco Corp.*, 26 Wn. App. 867, 875, 614 P.2d 686 (1980). The Washington Supreme Court has held that "an employer's failure to warn and protect an employee from a product which is unreasonably unsafe" constitutes a

²¹ Beginning at CP 3876, the Affidavit of Samuel Forman, M.D. sets forth in specific detail knowledge the Navy possessed regarding asbestos hazards as early as 1922 and their commitment to address the asbestos related health-concerns of Navy workers.

superseding cause of harm when “the employer had actual, specific knowledge that the process was unreasonably unsafe and failed to warn or protect.” *Campbell v. JTE Imperial Corp.*, 107 Wn.2d 807, 817, 733 P.2d 969 (1987); *see also Reed v. Pennwalt Corp.*, 22 Wn. App. 718, 722-25, 591 P.2d 478 (1979) (affirming defense verdict because employer’s knowledge insulates manufacturer/supplier from liability to employee end user). The Navy’s failure to warn or protect Mr. Morgan constitutes a superseding cause of Mr. Morgan’s injury that relieves Buffalo of any liability under Washington law for that injury. *See, e.g., Little v. PPG Indus., Inc.*, 19 Wn. App. 812, 825, 579 P.2d 940 (1978) (employer failed to warn employee despite knowledge of product’s danger).

Notwithstanding the Navy’s superior knowledge regarding asbestos hazards, the Navy took affirmative steps to impose binding specifications which required the use of asbestos gasket and packing material in certain pumps manufactured by Buffalo for the Navy. CP 3753–58. In fact, military specifications required that “pump casing joints shall be made up using compressed asbestos sheet gaskets.” CP 3755, 3437–38. Hence, the Navy required Buffalo, as a government contractor, to utilize certain asbestos materials in its pumps.

In light of the Navy’s prior knowledge concerning hazards from exposure to asbestos-containing products, Plaintiffs can present no evidence

that action or inaction by Buffalo had any effect on whatever dangers Mr. Morgan may have faced from exposure to asbestos-containing products during his employment. Accordingly, on these alternative grounds, this court should affirm the trial court's granting of summary judgment.

2. Buffalo Had No Duty to Warn Because the Navy Was a Sophisticated User of Asbestos.

In addition to acting as a superseding cause, the Navy's prior knowledge of the dangers of asbestos further negates any duty by Buffalo to warn the Navy about such risks as a matter of law. Under Washington law, a manufacturer need not warn of a product's obvious or known hazards. RCW 7.72.030(1)(b); *Davis v. Globe Mack. Mfg Co.*, 102 Wn.2d 68, 73, 684 P.2d 692 (1984); *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 840, 906 P.2d 335 (1995); see Restatement (Second) of Torts § 388(b) & cmt. k. The corollary "sophisticated user" doctrine (which multiple jurisdictions have expressly adopted but Washington has yet to address) springs from the same known danger rule, and negates a manufacturer's duty to warn of such hazards known to an employer. See, e.g., *Johnson v. American Standard, Inc.*, 43 Cal. 4th 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.”).

In recently adopting the sophisticated user doctrine, the California Supreme Court explained the necessity for this rule:

Because these sophisticated users are charged with knowing the particular product’s dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer’s employees or downstream purchasers. This is because the user’s knowledge of the dangers is the equivalent of prior notice.

43 Cal. 4th at 66 (internal citations and punctuation omitted). In particular, the Johnson Court recognized that an employer is in a far better position to warn about and protect an employee from a product’s known dangers than a manufacturer with no knowledge of how the employer would actually utilize the product or the employee’s working conditions. *Id.*; see *Akin v. Ashland Chemical*, 156 F.3d 1030, 1037 (10th Cir. 1998) (no need to warn a sophisticated purchaser like the United States Air Force about the dangers of chemical exposure); *Strong v. E.I. DuPont de Nemours Co., Inc.*, 667 F.2d 682, 686-87 (8th Cir. 1981) (natural gas pipe manufacturer had no duty to warn a natural gas utility, or the utility’s employees, of known gas line dangers); *Plenger v. Alza Corp.*, 11 Cal. App. 349, 362 (1992) (holding in a case where patient died after doctor

implanted manufacturer's IUD that "[w]e are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician"). The same rule and result are applicable here.

In light of the Navy's prior knowledge concerning hazards from exposure to asbestos-containing products and of remediation techniques still in use today, Plaintiff cannot present any evidence that a warning from Buffalo would have had any effect on whatever dangers Mr. Morgan may have faced from exposure to asbestos-containing products during his shipyard employment. Accordingly, on this alternative ground, the trial court's granting of summary judgment should be affirmed.

D. This Court Should Affirm Dismissal of Plaintiffs' Alternative Theories of Liability Against Buffalo.

In addition to asserting negligence and product liability claims, Plaintiffs asserted claims against Buffalo for additional theories of liability, including conspiracy, spoliation, willful or wanton misconduct, product misrepresentation, breach of warranty, enterprise liability, market share liability and/or market share alternate liability, and concert of action. CP 10, 1260. Buffalo moved for summary judgment dismissal of these alternative theories of liability and Plaintiffs did not oppose dismissal of said claims. On appeal, Plaintiffs have not challenged dismissal of these

alternative theories of liability and, accordingly, this Court should affirm dismissal of these claims against Buffalo.

VI. CONCLUSION

For the foregoing reasons, trial court's summary judgment dismissal of Buffalo should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of April, 2010.

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