

NO. 69364-6-I

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

THOMAS G. MONTANEY and MARJORIE E. MONTANEY, husband
and wife,

Appellants,

v.

J-M MANUFACTURING COMPANY, INC.,

Respondent.

2013 JUL 30 PM 4:51
JUDICIAL DEPARTMENT
STATE OF WASHINGTON

APPELLANT'S REPLY BRIEF

Matthew P. Bergman, WSBA #20894
Chandler H. Udo, WSBA #40880
Kaitlin T. Cherf, WSBA #45241
BERGMAN DRAPER LANDENBURG, PLLC
614 First Avenue, Fourth Floor
Seattle, Washington 98104
Tel. (206) 957-9510

Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT3

 A. JMM Manufactured the Same Products From
 the Same Manufacturing Plant After it
 Purchased Johns-Manville’s PVC and Asbestos
 Cement Pipe Businesses.3

 B. Because there is Evidence Identifying JMM’s
 A/C Pipe Product, It is Reasonable to Infer that
 Mr. Montaney Was Exposed to that Product.4

 C. The Evidence Presented by the Appellants
 Supports the Reasonable Inference that the
 Cedar River Water District Purchased New
 JMM Transite Pipe After January 1, 1983.....9

 D. All of the Arguments and Evidence Presented
 by the Appellants Were Before the Trial Court
 at Summary Judgment.....12

III. CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>Allen v. Asbestos Corp., Ltd.</i> , 138 Wn. App. 564, 157 P.3d 406 (2007).....	1, 2, 6, 7, 8
<i>Berry v. Crown Cork & Seal Co. Inc.</i> , 103 Wn. App. 312, 14 P. 3d 789 (2000).....	1, 2, 5, 6, 7, 8
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 923, 296 P.3d 860 (2013).....	13
<i>Lockwood v. A.C. & S., Inc.</i> , 109 Wn. 2d 235, 744 P. 2d 605 (1987).....	1, 2, 5, 7, 8
<i>Martin v. Abbott Labs.</i> , 102 Wn.2d 581, 590, 689 P.2d 368 (1984).....	5
<i>Nigro v. Coca-Cola Bottling, Inc.</i> , 49 Wn.2d 625, 305 P.2d 426 (1957).....	8, 9
<i>Sheehan v. Central Puget Sound Reg'l Transit Auth.</i> , 155 Wn.2d 790, 797, 123 P.3d 88 (2005).....	13
<i>Souraki v. Kyriakos, Inc.</i> , 144 Wn. App. 501, 509, 182 P.3d 985 (2008).....	3, 13, 14

I. INTRODUCTION

This Court should reverse the grant of summary judgment dismissal in favor of respondent J-M Manufacturing (“JMM”) because the appellants have offered admissible evidence that leads to the undeniable inference that Thomas Montaney purchased A/C pipe manufactured by JMM for use at the Cedar River Water District after December 31, 1982.

JMM asks this Court to apply an elevated evidentiary burden that would effectively preclude *any* plaintiff from ever establishing exposure to the A/C pipe JMM manufactured and sold thereby insulating JMM from liability for its defective products. The heightened burden JMM proposes not only defies logic and fundamental fairness but also runs contrary to appellate authority governing asbestos litigation for over twenty five years in Washington State. *Lockwood v. A.C. & S., Inc.*, 109 Wn. 2d 235, 744 P. 2d 605 (1987); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 14 P. 3d 789 (2000); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 157 P.3d 406 (2007). Under *Lockwood*, plaintiffs may establish exposure to a defendant’s product through many types of evidence, including the testimony of witnesses placing the product at the jobsite at issue during the relevant time period. In this case, Kirk Hunkeler has testified that “J-M” A-C pipe was in the Cedar River Water and Sewer District after he started

in 1984, the time period when JMM was exclusively manufacturing and selling that product. According to JMM, this evidence is insufficient to meet *Lockwood's* product identification standard because Johns-Manville may have also produced other pipe products that also contained the J-M logo. If this were true, no witness could ever successfully identify J-M Manufacturing Transite pipe. JMM's theory is not and cannot be the product identification standard contemplated by *Lockwood, Berry* and *Allen*. Rather, circumstantial evidence identifying JMM's Transite at the time period when JMM was the only entity selling that product mandates that appellant's claims of exposure be submitted to the jury.

Relatedly, Mr. Montaney's own testimony that he continued to use new A/C pipe for repairs through the early-1990s and continued to purchase A/C pipe from Pacific Water Works Supply ("PWW") as needed prior to that time, further warrants the reversal of the trial court's decision. Under *Lockwood*, this circumstantial evidence supports the inference that Mr. Montaney purchased JMM A/C pipe after 1982.

Moreover, all of the evidence, arguments, and pleadings were before the trial court when it erroneously granted JMM's summary judgment on July 20, 2012. Pursuant to RAP 9.12 and the well-known principle of *de novo* review, this Court must consider that same evidence and arguments in deciding the issues before it. The sole case cited by

JMM is distinguishable from the facts presented here because the appellant in that case raised entirely different legal theories that were not before the trial court. *Souraki v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008). In contrast, the appellants in this case are citing to the same evidence that was identified in the trial court's order granting summary judgment and are basing their arguments on exactly the same legal theories. Thus, it is appropriate for this Court to consider all the evidence and arguments before it.

II. ARGUMENT

A. **JMM Manufactured the Same Products From the Same Manufacturing Plant After it Purchased Johns-Manville's PVC and Asbestos Cement Pipe Businesses.**

JMM seeks to distinguish itself from Johns-Manville by arguing that it simply sold products produced by a separate entity named J-M A-C Pipe after it purchased the PVC pipe business from Johns-Manville in 1982.¹ While it is true that Johns-Manville and JMM were distinct companies, it is not correct to assume that the distinction would have been necessarily apparent to its suppliers or end users such as Mr. Montaney. According to Jim Reichert, JMM's corporate designee, on January 1, 1983, JMM manufacturing took control of Johns-Manville production facility in Stockton, California and continued to produce both PVC pipe

¹ See Brief of Respondent at 4.

and A/C pipe just as Johns-Manville had done the day before. CP 496-498; 508. According to the transactional documents, JMM hired all of the existing employees of JMM, were assigned existing sales contracts, and maintained existing customer relationships. CP 325; 327.

Importantly, rather than try to distinguish itself from Johns-Manville, JMM expressly sought to benefit from existing goodwill by purchasing the rights to use the “J-M” name. CP 309. Accordingly, JMM’s arguments regarding the identification of “Johns-Manville” A/C pipe by Mr. Montaney and his co-workers, does not preclude the reasonable inference that these witnesses were identifying JMM A/C pipe, particularly when the testimony pertained to new A/C pipe purchased after Johns-Manville ceased producing A/C pipe on December 31, 1982. Indeed, even JMM’s own suppliers could not distinguish between the two companies. CP 439.

B. Because there is Evidence Identifying JMM’s A/C Pipe Product, It is Reasonable to Infer that Mr. Montaney Was Exposed to that Product.

JMM correctly states that Washington asbestos law is lenient with respect to the level of evidence the plaintiff must present to establish exposure to a defendant’s product.² However, JMM incorrectly argues that a higher evidentiary burden applies to product identification evidence.

² See Brief of Respondent at 12.

Under the product identification standard articulated in *Lockwood, Allen,* and *Berry*, the plaintiffs offered more than enough evidence to infer exposure to A/C pipe products manufactured and sold by JMM.

In *Lockwood*, the court restated the principle that, in order to have a viable cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury. 109 Wn.2d at 245, *citing to, Martin v. Abbott Labs.*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). However, the court further recognized that it has been appropriate to ease the strict requirements of the traditional approach where there are unusual problems involved in product identification. *Id.* at 245 fn. 6. In the context of asbestos litigation, the *Lockwood* Court recognized several specific problems facing asbestos plaintiffs:

Because of the long latency period of asbestosis, the plaintiff's ability to recall specific brands by the time he brings an action will be seriously impaired. A plaintiff who did not work directly with the asbestos products would have further difficulties in personally identifying the manufacturers of such products. The problems are even greater when the plaintiff has been exposed at more than one jobsite and to more than one manufacturer's product.

Lockwood, 109 Wn.2d at 246.

Thus, because of the unique problems identified by the Washington Supreme Court in *Lockwood*, courts have permitted the use of both direct and circumstantial evidence to establish product identification in asbestos cases including testimony of side-by-side coworkers, direct

testimony from the plaintiff himself, testimony from others at the jobsite, and documentary evidence. *Id.* (product identification evidence supplied by other shipyard workers); *Allen*, 138 Wn. App. 568-69 (evidence identifying the defendant's asbestos containing products based solely on three sales records); *Berry*, 103 Wn. App. at 323-25 (testimony of shipyard purchaser who recalled that the defendant supplied some products to the shipyard during the times when plaintiff worked there).

Here, the Appellants have offered precisely the type of product identification evidence that has previously been deemed sufficient to satisfy the threshold burden to place the defendant's product at the jobsite in question. First, Mr. Montaney's coworker, Kirk Hunkeler, identified "J-M" labeled A/C pipe in the Water District's inventory during the time periods when JMM was the exclusive supplier of the product after he started at the Cedar River Water and Sewer District in 1984. CP 28; 496. Mr. Montaney himself testified that one of the two sources of A/C pipe used by the water district was what he described as "Johns-Manville" pipe purchased from PWW prior to the early-1990s. CP 130; 377.

The testimony of Mr. Montaney's coworker, Kirk Hunkeler alone is sufficient to establish product identification, particular where JMM's corporate representative, Jim Reichert, acknowledged that beginning in January of 1983, JMM began manufacturing A/C pipe under the name "J-

M Transite”. CP 496-98; 514-15. Rather than acknowledge the clear import of Mr. Hunkeler’s testimony, JMM argues that the evidence is inadequate because Johns-Manville may have also used the logo “J-M” on some of its other pipe products. This argument should be rejected for several reasons. First, the appellants do not have to prove a negative in order to meet their product identification burden under *Lockwood, Berry,* and *Allen*. (i.e. that J-M did not use the logo on any of their other pipe products). Moreover, it is not clear from the evidence offered by JMM that the logo “J-M” ever appeared on asbestos-cement Transite pipe itself. In the journals submitted by JMM in its original reply brief, the logo “JM” appears on a coupling attached to the end of a piece of Transite pipe. CP 366. Similarly, the logo “J-M” appears on a piece of polyvinyl chloride (“PVC”) Blue Brute pipe. CP 368. Neither of these pictures shed any light on the issue of whether “J-M” actually was stamped on Transite pipe. Accordingly, this Court should reject JMM’s effort to apply a heightened product identification standard and find that the testimony of Mr. Montaney and his co-workers is adequate to meet *Lockwood’s* product identification standard.

Moreover, the Court should also reject JMM’s argument that the witness’s identification of “Johns-Manville” pipe necessarily precludes a finding that Mr. Montaney ever worked with or around JMM’s Transite

pipe after 1982. On January 1, 1983, J-MM took over Johns-Manville's A/C pipe business and continued producing the same product from the same location just as Johns-Manville had done the day before. CP 496. Thus, from the perspective of distributors, suppliers, and end users, there was no reason to suspect that anyone other than Johns-Manville was producing the pipe. According to Francis Ferrara, PWW's designated corporate witness in this case, he did not appreciate the difference between Johns-Manville and JMM. CP 439. All he knew was that PWW maintained a relationship with a J-M entity until at least 1984. CP 438-39. Likewise, when Mr. Hunkeler started at the Water District in 1984, he identified what he believed to be "Johns-Manville" pipe because the logo said "J-M". CP 28.

JMM's reliance on *Nigro v. Coca-Cola Bottling, Inc.*, 49 Wn.2d 625, 305 P.2d 426 (1957) is completely inapposite. That case has nothing to do with asbestos and, accordingly, has absolutely no bearing on the product identification standard articulated in *Lockwood, Berry, and Allen*. In *Nigro*, the Court found that there was no evidence that a specific bottle of Coca-Cola was supplied by the Coca-Cola Bottling Company or that the defendant had any connection to the vending machine in question. 49 Wn.2d at 626. The *Nigro* court applied a standard of proof regarding the supply of a product which is unrecognizable in the asbestos context. To

the contrary, testimony of the plaintiff or co-workers identifying the brand or manufacturer name of an asbestos containing product has always been considered sufficient to infer that the manufacturer or distributor was the source of the product. *Lockwood*, 109 Wn.2d at 246. Therefore, because the *Nigro* decision is inapplicable and confuses, rather than clarifies, the issues to be decided, it should be disregarded.

C. The Evidence Presented by the Appellants Supports the Reasonable Inference that the Cedar River Water District Purchased New JMM Transite Pipe After January 1, 1983.

The timing of Mr. Montaney's purchases of Transite A/C pipe from PWW further supports the inference that those purchases included some A/C pipe manufactured and distributed by JMM. In its attempt to counter this argument, JMM offers an incomplete recitation of the pertinent facts and contends that the plaintiffs have somehow misrepresented Mr. Montaney's own testimony.³ In fact, when evaluating all of the applicable testimony, it is reasonable to infer that Mr. Montaney did purchase JMM pipe from PWW after 1982.

It is undisputed that Mr. Montaney only purchased A/C pipe from Pacific Water Works Supply. CP 131; 264; 375. The pipe that Mr. Montaney recalled personally purchasing from PWW was what he described as Johns-Manville. CP 131. Mr. Montaney was the primary

³ See Brief of Respondent at 14-15.

purchaser of materials for the water district and the exclusive purchaser of A/C pipe. CP 375. Mr. Montaney did not have to buy asbestos cement pipe from PWW very often because it was only used for repair jobs and thus only purchased when the District was running low. CP 131. The pipe was purchased as needed to keep in stock in case of an emergency. CP 131. Mr. Montaney testified that he would perform approximately ten repair jobs per month using A/C pipe. CP 130. This would amount to one hundred twenty repairs a year and two hundred forty repairs over a two year period. Mr. Montaney continued to purchase A/C pipe from PWW into the 1980s. CP 131.

Mr. Montaney also testified that there came a time that he stopped using new A/C Pipe for repairs in the early-1990s. CP 264. Prior to that time, Mr. Montaney continued to purchase A/C Pipe as necessary. CP 264. On January 1, 1983, JMM became the exclusive supplier of Transite pipe when it purchased Johns-Manville's A/C pipe business. CP 496-98. PWW was a distributor of Johns-Manville A/C pipe and JMM A/C pipe through the mid-1980s. CP 402-04; 413; 427-28; 438-39.

Based on the foregoing complete recitation of facts, it is reasonable to infer that Mr. Montaney purchased JMM Transite during the approximately two year period (1983-1984) that JMM was the exclusive supplier of that product. According to Mr. Montaney's own testimony, the

water district continued to use new A/C pipe to make repairs through the early-1990s. CP 264. Prior to that time, Mr. Montaney purchased A/C pipe as necessary to replenish the stock in inventory to effectuate emergency repairs. CP 264. Mr. Montaney himself estimated that he made ten repairs per month – which amounts to two hundred and forty repairs in a two year period. CP 130. Given the foregoing testimony, it is more than reasonable for a jury to infer that new A/C pipe was needed to effectuate the repairs that were required during the 1983 and 1984 time period. In its effort to avoid this clear inference, JMM argues that when Mr. Montaney testified that he purchased A/C pipe prior to 1990, he really meant that those purchases ended on December 31, 1982, with no purchases whatsoever during the eight year period between 1983 and 1990. JMM contends that it is plaintiff's burden to have asked Mr. Montaney about each specific year that he made purchases of new A/C pipe. This position is not only unreasonable, but also imposes a burden on plaintiffs that does not exist in Washington. Rather, based on the totality of evidence, it is reasonable for the jury to infer that Mr. Montaney did purchase JMM's A/C pipe between 1983 and 1984.

D. All of the Arguments and Evidence Presented by the Appellants Were Before the Trial Court at Summary Judgment.

Finally, all of the arguments and evidence presented by the appellants in their opening brief were before the trial court when it erroneously granted JMM's summary judgment motion on July 20, 2012. RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court.") First and foremost, it is completely inaccurate that plaintiffs submitted only two pages of facts and two pages of argument in response to JMM's motion for summary judgment.⁴ Given the similar evidence that applied to both PWW and JMM, the plaintiffs submitted voluminous testimony from Mr. Montaney and his co-workers describing their work with and around Transite A/C pipe. All of that evidence was identified in Judge Erlick's order granting JMM's summary judgment. RAP 9.12. More specifically, JMM argued that plaintiffs had insufficient evidence of identification and exposure to its asbestos containing products. In response, the plaintiffs presented arguments to the trial court, based upon the testimony of Mr.

⁴ See Brief of Respondent at 21.

Montaney and his coworkers, that he was exposed to JMM's products.

Thus, all of the evidence and arguments presented by the appellants to this Court were also called to the attention of the trial court.⁵

More importantly, the review of the trial court's summary judgment decision is *de novo*, and the appellate court performs the same inquiry as the trial court. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923, 296 P.3d 860 (2013). Under that standard of review, summary judgment is only appropriate where the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Souraki v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *citing to*, *Sheehan v. Central Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). As with the trial court, the appellate court reviews all the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. Here, all of the arguments, depositions, affidavits, pleadings, and other documents were considered by the trial court when it heard oral argument on July 20, 2012. *Cf. Souraki*, 144 Wn. App. at 507-08 (holding that the appellants arguments based upon the rescue doctrine and contractual

⁵ With respect to the argument that Mr. Montaney purchased A/C Pipe from Pacific Waterworks as necessary prior to the early-1990s, that argument was expressly considered by Judge Erlick when it was raised by Plaintiff's counsel at oral argument and addressed by Counsel for JMM.

duties were not before the trial court when the appellant based its argument on the completely different theory of premises liability). Accordingly, under these well-established principles, this Court should find that the arguments and evidence were before the trial court.

III. CONCLUSION

A reasonable jury could find that Tom Montaney purchased Transite asbestos cement pipe from Pacific Water Works Supply during the times when that product was exclusively manufactured and distributed by defendant J-M Manufacturing Company, Inc. Plaintiffs have therefore presented sufficient circumstantial evidence of product identification and exposure to withstand summary judgment under firmly established Washington precedent. Accordingly, this Court should reverse the grant of summary judgment in favor of JMM and remand this case for trial.

DATED this 30th day of July, 2013.

Respectfully submitted,



Matthew P. Bergman, WSBA #20894
Chandler H. Udo, WSBA #40880
Kaitlin T. Cherf, WSBA #45241
BERGMAN DRAPER LANDENBURG, PLLC
614 First Avenue, Fourth Floor
Seattle, Washington 98104
Tel. (206) 957-9510
Attorneys for Appellants