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NO. 69364-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

v.

J-M MANUFACTURING COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENT

David A. Shaw, WSBA #08788
Tami Becker Gómez, WSBA #43247
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondents
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

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INTRODUCTION

The trial court correctly ruled that Appellants failed to produce sufficient evidence to raise a reasonable, non-speculative inference that their Decedent, Thomas Montaney was exposed to respirable asbestos fibers from asbestos cement pipe sold by Respondent J-M Manufacturing Company (hereinafter "J-MM."). Appellants produced no evidence that Decedent, or his employer, the Cedar River Water District, purchased or used asbestos cement pipe from J-MM. Neither Mr. Montaney, nor his employer the Cedar River Water District, had sales records reflecting sales of J-MM supplied pipe. The alleged supplier of the pipe, Pacific Water Works, had no records reflecting sales to Mr. Montaney or the Cedar River Water District. Finally, J-MM had no records reflecting sales of asbestos cement pipe to the alleged supplier Pacific Water Works. Nor was there any witness testimony to that effect. Moreover, Appellants produced no evidence that Decedent or his employer purchased new asbestos cement pipe, of any brand, or from any source, after 1983, the year that Respondent J-MM first came into existence.

The reasonable inferences from the evidence actually before the Court support Respondent's position, not Appellants. Decedent and two of his co-workers affirmatively identified working with specific brands of asbestos cement pipe during their tenure at the Cedar River Water District:

namely, Certainteed, Kubota, and Johns-Manville. CP 27-28, 130-32, CP 190. Although no witness, including the Decedent, affirmatively testified that the Cedar River Water District purchased new asbestos cement pipe after 1983, the year Respondent incorporated and began doing business, both of Decedent's co-workers testified that, to their knowledge, their employer stopped purchasing new asbestos cement pipe prior to that time. CP 3-4, 33, 58.

Kirk Hunkeler, who worked at the Cedar River Water District from 1984-1990, testified that his employer kept an inventory of old, pre-existing asbestos cement pipe in its yard but did not use the pipe or replenish the pipe during the course of his employment. CP 2-3, 33-35. Hunkeler further testified that the "inventory" of pipe in the yard was at least 30 years old by the time it was abated in 1993. CP 35-36. David Thomas, who worked at the Cedar Water River District from 1974 to 2001, testified that to his knowledge the Water District did not purchase new asbestos cement pipe for the entirety of his employment there. CP. 3-4, 58. Mr. Montaney, Decedent, testified that he purchased new asbestos cement pipe "into the 1980s", but did not specify what year in the 1980s nor the brand of pipe. CP 131. He further testified that his purchase of new asbestos cement pipe was only "as needed." CP 264. On this record,

it is clear that summary dismissal of Appellants' claims was correctly entered by the trial court below.

On appeal, Appellants present as evidentiary fact the inferential leaps of logic they had previously urged upon the trial court as a basis to deny J-MM's summary judgment motion. In other instances, Appellants affirmatively misstate the evidence presented to the trial court on summary judgment. Appellants' generalizations and mischaracterizations cannot change the import of the specific evidence presented to the trial court, and now to the Court of Appeal. Summary judgment was and remains proper.

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the trial court properly dismiss Appellants' claims where Plaintiffs failed to present sufficient evidence from which a reasonable jury could conclude that Mr. Montaney was exposed to respirable asbestos from asbestos cement pipe sold by J-MM?

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

Appellants allege that Mr. Montaney was exposed to respirable asbestos fibers from a variety of products throughout his working career, including his twenty-two year employment with the Cedar River Water District. Appellants further allege that exposure to such asbestos fibers led

to Mr. Montaney's development of mesothelioma and eventual death. CP 16-20. Appellants brought personal injury/wrongful death claims based on these allegations against eight defendants, including Respondent J-MM, on January 12, 2012. CP 16-20.

B. Factual Background.

Plaintiffs' statement of the case includes multiple factual errors. First and foremost, J-M Manufacturing Company, Inc. ("J-MM") was not a manufacturer of asbestos cement pipe, nor did it purchase the asbestos cement pipe making assets of the Johns-Manville Corporation as Appellants assert. CP 5, 82-84, 297, 304-364. J-MM was a manufacturer of PVC (plastic) pipe and purchased the PVC pipe making assets of the Johns-Manville Corporation. CP 297, 304-313. In addition to selling PVC pipe which it manufactured, J-MM also sold asbestos cement pipe manufactured by a different corporation, the J-M A/C Pipe Corporation, between the years 1983 and 1988. CP 5, 82-84.

C. Proceedings Below.

On June 27, 2012, J-MM filed a motion for summary judgment asserting that the Appellants had insufficient evidence to create a question of fact for trial on the issue of whether or not Mr. Montaney had ever been exposed to asbestos fibers from asbestos cement pipe sold by J-MM. CP

1-84. Defendant Pacific Water Works also filed a summary judgment motion that was set to be heard at the same time and on the same day as J-MM's motion.

J-MM supported its motion with the following evidence:

(1) Mr. Hunkeler's, one of Mr. Montaney's coworkers, testimony that, although the water district had an inventory of asbestos cement pipe, pipe was not taken from inventory and used for repairs during the 1984-1990 time frame. CP 2-3, 28, 35. Rather, repairs of broken asbestos cement pipe were effected with cast iron, ductile iron or PVC, primarily PVC. CP 2-3, 33.

(2) Mr. Hunkeler's testimony that the water district's inventory of asbestos cement pipe was abated in 1993, at which time the pipe in the inventory was 30 years old—too old to have been sourced from J-MM. CP 3, 35-36.

(3) Documentary evidence of the 1993 abatement indicating that the pipe abated was 30 years old. CP 45.

(4) Mr. David Thompson's, another coworker of Mr. Montaney, testimony that the water district used ductile iron for repairs and that no asbestos cement pipe was purchased by the water district after the 1970's,

and that the newest pipe in the water district inventory dated from 1973.
CP 3-4, 58.

Plaintiff filed a 34 page opposition brief, styled as an “omnibus” response, to the summary judgment motions filed by Pacific Water Works and J-MM. Of those 34 pages, only two pages of the statement of facts related to the J-MM motion and only two pages of Plaintiffs’ argument section addressed J-MM’s motion. CP 96-98, 116-118. The balance of the 28 pages of briefing was devoted to opposing Pacific Water Works’ motion for summary judgment. CP 85-96, 98-116.

Appellants asserted two bases for denying J-MM’s motion in their response brief. J-MM addressed both arguments in its reply in support of summary judgment, and the trial court ultimately ruled that neither ground created a triable fact dispute on the threshold issue of whether Appellants could show that Decedent worked with or around any asbestos cement pipe supplied by J-MM.

First, Appellants argued that Mr. Thompson and Mr. Hunkeler recalled seeing the initials JM on the pipe in the water district inventory and that the initials JM were associated only with asbestos cement pipe sold by J-MM, and not by Johns-Manville.¹ CP 116-117. Appellants

¹ Plaintiff’s argument ignored the fact that both men testified that the J-M initials appeared on Johns-Manville pipe. CP 53, 58, 165, 180. The argument also ignored the

provided no evidence in support of their assertion that asbestos cement pipe supplied by J-MM was the only type of pipe that bore the letters “JM.”

In reply, J-MM introduced evidence that the initials JM and J-M were used by Johns-Manville. CP 297, 304-360, 365-368. Appellants’ false assertion that only J-MM pipe bore these initials was highlighted by the fact that every witness, including the Decedent, who testified in response to Plaintiffs’ counsel’s examination regarding the brand name of the pipe used by the water district testified that the pipe Appellants now attempt to attribute to J-MM was manufactured by Johns-Manville. CP 27-28,130-132, 165, 190.

Mr. Hunkeler testified as follows:

Q: (By Ms. Oslund) Okay. And when you dug up this type that you needed to – this AC pipe that you needed to do repairs on, could you ever tell what the brand name was?

A: From time to time, yes.

Q: And do you recall what those brand names were?

...

A: The two I recall were CertainTeed and Johns Manville.

fact that the plaintiff himself identified the pipe he worked with as having been manufactured by Kubota, Certainteed and Johns-Manville. CP 130-132. Not a single witness identified J-MM as the source of pipe used by the water district.

CP 27-28.

Mr. Montaney testified as follows:

Q: (By Mr. Draper) Did the water district maintain an inventory of asbestos cement pipe for use for repairs.

A: Yes, we did.

Q: What brands of asbestos cement pipe did the district have in its inventory when you worked their?

...

A: We had Johns Mansville, Certainteed and Kubota.

CP 130-132.

Mr. Thompson testified as follows:

Q: All right. And you said another one was Johns-Manville—is another brand that you brought out.

A: That's positive.

Q: All right. And what about the brands that you put in the ground as replacement pipe?

A: Mostly Manville.

CP 53.

Second, Appellants argued that the jury should be permitted to speculate that the abatement documents which stated the pipe being abated in 1993 was 30 or more years old at the time of the abatement were not

accurate, although no evidence was presented that suggested the records were inaccurate. CP 116-117.

To the extent Appellant makes additional arguments or unrelated arguments² in its opening brief before this court, J-MM objects as such arguments were not before the trial court. One such glaring example is Appellants' new argument, not raised before the court on summary judgment, that Mr. Montaney purchased pipe sold by J-MM from Pacific Water Works in the 1980s. Appellant's Brief pp. 4-6. At no point in his testimony did Mr. Montaney testify that he purchased asbestos cement pipe sourced from J-MM, or purchased asbestos pipe after 1982. Indeed, the record indicates the contrary. Mr. Montaney did not purchase new pipe very often. CP 131. He only purchased pipe as necessary. CP 264. He purchased pipe into the 1980's, but is never asked how far into the 1980's. CP 131. There is no testimony or evidence that Mr. Montaney purchased pipe between 1983 and 1984 or that it was ever necessary to purchase pipe between 1983 and 1984.³

² Appellants spend several pages of their brief discussing their claim that Mr. Montaney was exposed to respirable dust from the cutting of asbestos cement pipe and how often those claimed exposures occurred. Appellant's Brief at pp. 3-4, 6-9. J-M Manufacturing does dispute and has never disputed that Mr. Montaney's testimony was sufficient to create a question of fact on the issue of whether or not he was historically exposed to respirable asbestos from the cutting of asbestos cement pipe. That discussion is simply not material to this appeal.

³ J-MM commenced business January 1, 1983. PWW, Mr. Montaney's alleged source of purchased pipe ceased selling AC pipe towards the end of 1984, at the latest. CP 402-404.

In summary, the critical and uncontroverted facts that controlled the trial court's decision to grant summary judgment, and which should control the resolution of this appeal are as follows:

- (1) Mr. Montaney testified that the water district used pipe manufactured by Johns-Manville. CP 130-32. Decedent's co-worker Kirk Hunkeler testified that the water district used pipe manufactured by Johns-Manville. CP 27-28. Decedent's co-worker David Thompson testified that the water district used pipe manufactured by Johns-Manville. CP 190.
- (2) No one testified that pipe sold by J-MM was used by the water district. There are no sales records to Decedent's employer Cedar River Water District from J-MM or from any distributor indicating sales of asbestos cement pipe.
- (3) Pacific Water Works sold asbestos cement pipe manufactured by Johns-Manville. CP 404, 410. Mr. Montaney claims to have only purchased pipe from Pacific Water Works. CP 94-95.
- (4) Mr. Montaney did not purchase new pipe very often. CP 131. He claimed to have purchased pipe into the 1980's, but provided no testimony on the critical issue of how far into the 1980's he purchased pipe. CP 131. He only purchased pipe as necessary. CP 264. There was no testimony that he purchased pipe between

1983 and 1984 or that it was ever necessary to purchase pipe between 1983 and 1984.

On these basic facts, the trial court correctly granted summary judgment and dismissed Appellants' claims against J-MM. This Court should likewise find in favor of J-MM and affirm the trial court's order.

STANDARD OF REVIEW

Orders granting summary judgment are reviewed *de novo*. *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010). An appellate court may affirm a trial court ruling on any ground supported by the record, whether or not the trial court based its ruling on that ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

ARGUMENT

No jury could reasonably conclude that Mr. Montaney was ever exposed to respirable asbestos from asbestos cement pipe sold by J-MM based on the evidence before the trial court at the summary judgment hearing.

- A. No Evidence Exists that Mr. Montaney Was Exposed to Asbestos Containing Pipe Sold By J-MM.

1. Because no evidence exists that Mr. Montaney worked with asbestos containing pipe sold by J-MM, the question of exposure is not reached.

There can be no question that Washington asbestos law is lenient with respect to the level of evidence a plaintiff must present to establish exposure to asbestos fibers from a defendant's product present in his work environment. However, here, Appellants never reach the issue of exposure because they did not present evidence that Decedent ever came into contact with any asbestos containing product supplied by J-MM in the first place. In other words, they cannot pass the initial hurdle of "product identification." Appellants' argument that Mr. Montaney was exposed to asbestos cement pipe sourced from J-MM confuses the concept of product identification with the concept of fiber exposure.

Appellants' reliance on *Lockwood v. A.C. & S., Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) is misplaced. *Lockwood* and its progeny stands for the proposition that once a product is identified at a worker's location, a question of fact is created with respect to the issue of whether exposure to fibers from that product occurred. The leniency with which this exposure question is treated does not extend to the question of product identification. Liability is contingent on positive product identification.⁴

⁴ The *Lockwood* court does describe the issue before it as one of product identification, but an analysis of the opinion clearly reflects it is discussing the issue of what evidence is required to create a question of fact as to whether exposure occurred. The product

The only leniency shown plaintiffs in asbestos cases on the issue of product identification is the holding that the plaintiff or the injured party need not be the witness providing the product identification. *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 323, 14 P.3d 789 (2000); *Allen v. Asbestos Corp.*, 162 Wn.2d 1022, 178 P.3d 1033. Rather, that testimony can be provided by a co-worker, another witness or documentary evidence. *Id.*

The *Lockwood* court specifically noted that, in order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury, citing *Martin v. Abbott Labs.*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). *Lockwood*, 109 Wn.2d at 245. In *Lockwood*, the plaintiff presented two witnesses who identified the defendant's product at the shipyard where the plaintiff was employed. *Id.* It is clear from the court's opinion that, although evidence of exposure can be inferred from the presence of a defendant's product at the plaintiff's worksite, the plaintiff must still prove that the product was, in fact, present at the worksite. *Id.* Hence, the only proposition which *Lockwood* stands for that is relevant to this appeal is that, instead of personally identifying the manufacturers of asbestos products to which a plaintiff was allegedly exposed, a plaintiff may rely on the testimony of witnesses who identify

identification was uncontrovertibly provided by co-workers. See *Lockwood* 109 Wn.2d at 244.

manufacturers of asbestos products which were then present at the plaintiff's workplace. *Id.* at 246-47.

As noted above, no witness testified that Mr. Montaney worked with or around asbestos cement pipe sold by J-M Manufacturing. Mr. Montaney testified that he worked with pipe manufactured by Kubota, Certainteed and Johns-Manville. CP 130. Mr. Hunkeler testified that he worked with Certainteed and Johns-Manville pipe. CP 27-28. Mr. Thompson identified the pipe as Johns-Manville. CP 190. No witness provided testimony that Decedent, or his employer, purchased asbestos cement pipe – of any brand – after 1983, when Respondent J-MM first came into existence. Because no evidence exists that identifies asbestos containing pipe sold by J-MM as a product to which Mr. Montaney was exposed, the question of exposure under *Lockwood* is never reached. Appellant's failure to provide evidence of product identification controlled the trial court's decision to grant summary judgment and should guide the Court's analysis on appeal.

2. Mr. Montaney's testimony regarding purchasing pipe from Pacific Water Works "as necessary" does not defeat summary judgment.

In an attempt to overcome the unequivocal lack of product identification testimony from Mr. Montaney and his coworkers, Appellants' claim J-MM and the trial court deliberately ignored Mr.

Montaney's testimony regarding purchases of asbestos containing pipe from Pacific Water Works after 1982. *See* Appellants Brief at 15. Appellants urge the Court to infer that Mr. Montaney's testimony regarding general pipe purchases "into" the 1980s somehow indicates that the pipe purchased, if any, might have been supplied by J-MM. However, a review of Mr. Montaney's testimony cannot support the proposition that he purchased pipe that had been supplied by J-MM.

Appellants' citations to the record in its argument establish the following unremarkable points:

- (1) The water district had an inventory of pipe.
- (2) Some of that pipe was purchased and some was obtained from contractors.
- (3) The pipe in inventory was Johns-Manville and Certainted. CP 130.
- (4) The pipe Mr. Montaney purchased was Johns-Manville. CP 131.
- (5) The Johns-Manville pipe purchased by Mr. Montaney was purchased from Pacific Waterworks. CP 131, 264.
- (6) Mr. Montaney was the primary purchaser of materials for the water district and the only purchaser of pipe. CP 375.

(7) Pacific Waterworks was the only supplier of Johns-Manville pipe the water district used. CP 375.⁵

(8) Pipe was purchased as needed. CP 131.

These citations to the record establish nothing more than the uncontroverted fact that the water district utilized asbestos cement pipe manufactured by Certaineed and Johns-Manville and that pipe manufactured by those two companies was in the water district's inventory in 1993.

Appellants seek to avoid the clear import of this evidence by misrepresenting Mr. Montaney's testimony. In particular, at page 17 of Appellant's brief, the statement is made that Mr. Montaney testified that he personally ordered Johns-Manville pipe from Pacific Waterworks through the early 1990's. Mr. Montaney never testified that he purchased pipe through the early 1990's. He testified that he used AC pipe for repairs through the 1990's, and used new rather than used pipe for those repairs. He did not testify that he purchased pipe specifically to effect those repairs, as opposed to using pipe from inventory or pipe obtained from contractors. Most significantly, at no time did he testify that he

⁵ A claim disputed by Mr. Thompson who testified Western Utilities was the source of most of the pipe purchased by the water district. CP 53.

purchased AC pipe from any source between 1983 and 1984⁶ Mr.

Montaney's actual testimony as elicited by plaintiff counsel on direct examination was the following:

Q: Okay. How long during your career with the water district did you continue to make repairs using asbestos cement pipe?

A: Well, we always did up to the time I retired.

Q: Okay. Did there come a time that you stopped using new asbestos cement pipe for repairs and used a different material?

A: Yes.

Q: Can you estimate when that was for me, sir?

A: Oh, probably in the early '90s.

Q: All right. And so prior to that, did you continue to purchase new asbestos cement pipe as necessary?

A: Prior to that?

Q: Prior to that time when you stopped using asbestos cement pipe.

A: Yes.

CP 264.

Mr. Montaney testified that he purchased pipe as necessary, but he was never asked whether or not it was, in fact, necessary, or, if it was

⁶ The date that J-MM commenced business and the date Pacific Water Works' 30(b)(6) witness testified that Pacific Water Works ceased selling AC pipe.

necessary, when it was necessary. Most importantly, plaintiff counsel never asked the simplest of questions, to wit: “Did you, Mr. Montaney, purchase asbestos cement pipe from Pacific Waterworks between January 1983 and the end of 1984?” Rather than pose that simple question and live with whatever answer Mr. Montaney gave, counsel chose to attempt to create an affirmative answer to the unasked question by cobbling together unrelated bits of testimony, none of which tend to prove the answer and most of which tend to disprove it.⁷ Even if Mr. Montaney had answered the question affirmatively, appellants would still have to prove any such pipe was sourced from J-MM. That is a hurdle appellants cannot get over.

3. Appellants’ trade dressing argument is without merit and unsupported by any evidence.

Appellants’ next sought to buttress their position with an argument about “trade dressing,” and, in so doing, essentially sought to impeach the testimony of their own witnesses. Despite the fact that each and every witness, including Mr. Montaney, who testified regarding the identity of the manufacturer of the pipe used by the water district testified that the manufacturer was Johns-Manville, plaintiff counsel asserted in their

⁷ At the time of the summary judgment motion, Mr. Montaney was still alive and could have submitted a Declaration addressing the points made in J-MM’s motion. Likewise, Mr. Montaney had an opportunity to review and make corrections to his deposition testimony if he believed it was not accurate.

response brief that the pipe must have been pipe sold by J-MM because the initials JM or J-M appeared on the pipe. CP 116-117. Appellants' argument only works if Johns-Manville never used the initials JM or J-M on its pipe. Appellants offered no evidence in support of this proposition.

J-MM demonstrated to the trial court at the summary judgment motion that Johns-Manville used both the JM initials and J-M initials as part of their "trade dressing, as evidenced by various Johns Manville advertisements from the American Water Works Journal. CP 304-360, 365-368. The testimony of Kirk Hunkeler – upon whom Appellants relied so heavily in opposing summary judgment - is further evidence that Johns Manville labeled its pipe with the "JM" and "J-M" initials, since he testified to seeing the "J-M" logo on pre-existing pipe in the Water District's inventory, along with pipe that had previously been buried and was being excavated from the ground. CP 170, 180. In short, the undisputed evidence is entirely consistent with the testimony of the other witnesses, i.e. that the pipe used by the water district and Mr. Montaney was manufactured by Johns-Manville.

Even if Appellants had evidence that Decedent or his employer purchased asbestos cement pipe after 1983 that bore the initials "JM" or "J-M" (which, as set forth above, they do not), their claims would still fail on summary judgment absent additional evidence indicating that the pipe

was supplied by J-MM, rather than from remaining stock of Johns-Manville asbestos cement pipe.⁸

Appellants cannot meet their burden of establishing the identity of the manufacturer or supplier of an allegedly defective product by asking the court or the jury to make inferences based exclusively on similarities in name between the product at issue and the Defendant. In *Nigro v. Coca-Cola Bottling Inc.*, 49 Wash. 2d 625, 305 P.2d 426 (1957), the Washington Supreme Court overturned a trial court's entry of judgment against Defendant Coca-Cola Bottling Company for injuries sustained by the Respondent who fell ill after drinking an allegedly contaminated bottle of Coca-Cola taken from a vending machine at the United States Naval Station located at Tacoma, Washington. Although the evidence showed that the Coca-Cola Bottling Company was a Washington corporation and did in fact bottle the *brand* of soft drink at issue, the Court held that the Respondent had offered "no evidence that the [specific] bottle of Coca-Cola was supplied by the defendant, or that the defendant had any connection whatsoever with the vending machine." *Id.* at 626.

Finally, Appellants assert that their evidence is even more compelling that the evidence before the courts in *Lockwood*, *Berry*, or *Allen*. They follow that assertion with citations to the record which they

⁸ The Pacific Water Works 30(b)(6) witness Mr. Ferrara testified that, by 1984, the market for AC pipe in the northwest had "dried up." CP 404.

characterize as Mr. Hunkeler and Mr. Montaney testifying that Mr. Montaney worked around new J-M A/C pipe during the years the pipe was exclusively manufactured (sic) and sold by J-MM. Again, the citations to the record do not support Appellants' assertions. In the first citation, Mr. Hunkeler testifies that the water district had a pipe inventory from 1984 when he arrived on the job, until the 1990's. CP 28-29. He testified that the pipe in that inventory consisted of pipe manufactured by Johns-Manville and Certainteed. CP 28-29. In the second record citation, Mr. Montaney testified that there was an inventory at the water district and it contained pipe manufactured by Johns-Manville and Certainteed. CP 130-131. He testified that he purchased pipe "into the 1980's". CP 130-131. Again, testimony completely consistent with the pipe being manufactured by Johns-Manville.

B. Appellants' Argument on Appeal Is Beyond the Scope of its Argument Below.

An appellant may not seek reversal of the trial court's decision on arguments neither pleaded nor argued before the trial court. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008). As previously noted, Appellants' response to J-MM's motion for summary judgment consisted of two pages of "facts" and two pages of "argument". The "argument" consisted of a paragraph asserting that Mr. Hunkeler, Mr.

Thompson and Mr. Montaney all testified “to the presence of ‘JM’ AC pipe at the water district after 1983,” and that Mr. Hunkeler testified to the presence of the “distinctive J-dash-M logo on the pipe in the inventory.” CP 116-118. From these assertions and these alone, Appellants argued that a question of fact was created as to whether or not pipe sold by J-MM was used by the water district. This argument was followed immediately by Appellants’ entreaty to the trial court that the jury should be entitled to ignore the documents and testimony demonstrating that the water district’s inventory was at least 30 years old at the time it was abated in 1993, making it 20 years older than any pipe sold by J-MM could have been. CP 117-118.

From this record, Appellants claimed a question of fact was created regarding Mr. Montaney’s alleged exposure to pipe sold by J-MM. Now, as then, the evidence does not support the fundamental requirement of Washington law that a defendant’s product must be proven to be at the plaintiff’s work site before he can avail himself of the leniency of *Lockwood* as to whether or not a plaintiff sustained an exposure to asbestos from that defendant’s product.⁹ The court ought not entertain the

⁹ *Lockwood* actually involves three different inquiries. First, was the defendant’s product present at the plaintiff’s worksite? Second, was there a release of asbestos from the defendant’s product that was potentially inhaled by the plaintiff? Third, was the quantum of exposure a substantial contributing factor in the development of the plaintiff’s disease?

additional arguments proffered by appellants in its appellate brief as they were not made in the trial court.

CONCLUSION

For the foregoing reasons this Court should affirm the reasoned decision of the trial court.

RESPECTFULLY SUBMITTED this 15th day of May, 2013.

WILLIAMS, KASTNER & GIBBS PLLC

By 
David A. Shaw, WSBA #08788
Tami Becker Gómez, WSBA #43247
Attorneys for Respondent
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600 Fax: (206) 628-6611
Email: dshaw@williamskastner.com
tbeckergomez@williamskastner.com

At this point, we are only concerned with the first inquiry. This is a purely factual inquiry, whereas, inquiries two and three also require expert testimony.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 15th day of May, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

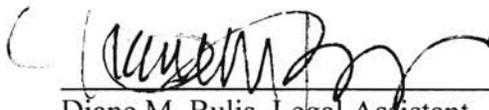
Counsel for Appellant:

Glenn S. Draper
Matthew P. Bergman
Chandler H. Udo
BERGMAN DRAPER LADENBURG
614 First Avenue, Fourth Floor
Seattle, WA 98104
Email: glenn@bergmanlegal.com
matt@bergmanlegal.com;
Chandler@bergmanlegal.com

SENT VIA:

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DATED this 15th day of May, 2013, at Seattle, Washington.



Diane M. Bulis, Legal Assistant

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