

NO. 73127-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WILLARD E. BARTEL and DAVID C. PEEBLES, Administrators for the
Estate of PAUL S. MCCABE,

Appellants,

v.

MATSON NAVIGATION COMPANY, INC., on its own behalf and as
Successor-In-Interest to THE OCEANIC STEAMSHIP COMPANY, and
OLYMPIC STEAMSHIP COMPANY, INC.

Respondents.

FILED
COURT OF APPEALS DIVISION I
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BRIEF OF RESPONDENT OLYMPIC STEAMSHIP COMPANY, INC.

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TABLE OF CONTENTS

I. SUMMARY OF RESPONDENT’S ARGUMENT1

II. RESTATEMENT OF ISSUE PRESENTED BY APPELLANTS’
ASSIGNMENT OF ERROR3

III. COUNTERSTATEMENT OF THE CASE.....3

 A. Historical Background: Ohio MARDOC and Federal
 Multidistrict Litigation (MDL)3

 1. The “National Contacts” Theory Of Personal Jurisdiction
 Proffered By The Jaques Firm Was Rejected.4

 2. In 1989, the Ohio Federal Court Held There is No
 Personal Jurisdiction in Ohio Over More than 100
 Shipowner Defendants.5

 3. In 1998, The Jaques Firm Filed an Asbestos Case on
 Behalf of Mr. McCabe in the Northern District of Ohio
 against Olympic Steamship and Other Defendants.7

 4. The 1998 Lawsuit was Retroactively Dismissed.7

 5. In 2008, The Jaques Firm attempted to “Reinstate” The
 McCabe Lawsuit In Ohio.....8

 6. The *McCabe* Suit In Ohio Was Dismissed For Lack Of
 Personal Jurisdiction.8

 B. *McCabe* Action Filed In Washington.13

 1. Plaintiffs’ Complaint in Washington was Filed More than
 Three Years after Mr. McCabe’s Diagnosis and Death. 13

 2. The Trial Court Granted Olympic Steamship’s Motion to
 Dismiss Based on Statute of Limitations, Concluding that
 Appellants Were Not Entitled To Equitable Tolling.14

IV. ARGUMENT.....15

 A. Standard of Review.....15

 B. The Trial Court Correctly Concluded That There Is No Basis
 For Equitable Tolling In This Case.....16

 1. Appellants Claims Were Barred By The Statute Of
 Limitations16

 2. Requirements For Equitable Tolling.....17

3. Appellants Did Not Meet the Requirements For Equitable
Tolling In This Case.....19

4. Collateral Estoppel.....25

V. CONCLUSION.....26

TABLE OF AUTHORITIES

	Page(s)
WASHINGTON COURT CASES	
<i>Clare v. Saberhagen Holdings, Inc.</i> , 129 Wash.App. 599 (2005).....	15
<i>Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship</i> , 158 Wn. App. 203 (2010)	15
<i>Gildon v. Simon Prop. Grp., Inc.</i> , 158 Wn.2d 483 (2006)	15
<i>Recreational Equip., Inc. v. World Wrapps Nw., Inc.</i> , 165 Wn.App. 553 (2011)	15, 17
<i>SAC Downtown Ltd. P'ship v. Kahn</i> , 123 Wn.2d 197 (1994)), <i>review denied</i> , 171 Wn.2d 1014 (2011).....	15
UNITED STATES SUPREME COURT CASES	
<i>Burnett v. New York Cent. R. Co.</i> , 380 U.S. 424 (1965).....	18, 21, 24, 25
<i>Omni Capital Internation, Ltd. v. Rudolf Wolff & Co.</i> , 484 U.S. 97 (1987).....	5, 6, 20
<i>Pace v. DiGuglielmo</i> , 544 U.S. 408 (2005).....	18
OTHER FEDERAL CASES	
<i>Angles v. Dollar Tree Stores, Inc.</i> , 494 Fed.Appx. 326 (4 th Cir. 2012).....	17
<i>Azzopardi v. Ocean Drilling & Exploration Co.</i> , 742 F.2d 890 (5 th Cir. 1984)	16
<i>Bartel et al v. Various Defendants, MDL No. 875</i> , 2013 WL 4516651 (E.D. Pa. Aug. 26, 2013)	7

<i>Chao v. Virginia Dep't of Transp.</i> , 291 F.3d 276 (4th Cir. 2002)	18
<i>Covey v. Arkansas River Co.</i> , 865 F.2d 660 (5 th Cir. 1989)	21, 22
<i>Dow Chem. Co. v. Calderon</i> , 422 F.3d 827 (9 th Cir. 2005)	19
<i>Estate of Charles Welch v. Foster Wheeler Co.</i> , No. 1:94cv11801 (N.D. Ohio July 16, 2009) (Adams, J.) at 2749.....	17
<i>Finch v. Miller</i> , 491 F.3d 424 (8 th Cir. 2007)	17
<i>Flores v. Predco Servs. Corp.</i> , 2011 U.S. Dist. LEXIS 25588 (March 11, 2011)	24
<i>Fries v. Chicago & Northwestern Transp. Co.</i> , 909 F.2d 1092 (7 th Cir. 1990)	16
<i>Garrett v. Moore-McCormack Co.</i> , 317 U.S. 239 (1942).....	16
<i>Gayle v. UPS</i> , 401 F.3d 222 (4 th Cir. 2005)	17
<i>Harris v. Hutchinson</i> , 209 F.3d 325 (4 th Cir. 2000)	17, 18
<i>In Re Asbestos Prod. Liab. Litig. (No VI)</i> , MDL Docket No. 875, 02-md-875, 2014 WL 944227 (E.D. Pa. March 11, 2014).....	10, 12
<i>In Re Asbestos Prod. Liab. Litig. (No VI)</i> , MDL Docket No. 875, 02-md-875, Doc. No. 4286 (E.D. Pa. April 14, 2014).....	10
<i>In re Asbestos Prod. Liab. Litig (No VI)</i> , MDL Docket No. 875, Doc. No. 4286 (E.D.Pa. Apr. 14, 2014)	13

<i>In Re Asbestos Prod. Liab. Litig. (No. VI), supra, 771 F. Supp. 424</i>	6
<i>In Re Asbestos Prod. Liab. Litig. (No VI), supra, 965 F. Supp. 2d 615</i>	6, 10, 11, 12
<i>In Re Asbestos Prods. Liabl. Litig. (No. VI), No. 2 MDL 875, 1996 WL 239863 (E.D. Pa. May 2, 1996)</i>	7
<i>Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)</i>	9
<i>Island Insteel Sys., Inc. v. Waters, 296 F.3d 200 (3d Cir. 2002)</i>	25
<i>Kuusk v. Holder, 732 F.3d 302 (4th Cir. 2013)</i>	17
<i>Miles v. Apex Marine Corp., 498 U.S. 19 (1990)</i>	16
<i>Pecoraro v. Diocese of Rapid City, 435 F.3d 870 (9th Cir. 2006)</i>	23
<i>Reichert v. Mon River Towing, Inc., No. 2:09-cv-1493, 2010 U.S. Dist. LEXIS 7491 (W.D. Pa. Jan. 29, 2010)</i>	22, 23, 24
<i>Robinson v. Illinois Central R.R. Co., No. 2:08-89339, 2011 WL 4907401 (E.D. Pa., Feb. 14, 2011) (Robreno, J.)</i>	16
<i>Schor v. Hope, No. 91-0443, 1992 WL 22189 (E.D. Pa. Fe. 4, 1992)</i>	21
<i>Tobey v. Atwood Oceanics, Inc., No. H-10-0154, 2010 U.S. Dist. LEXIS 89448 (S.D. Texas Aug 30, 2010)</i>	22
<i>Tolston v. National R.R. Passenger Corp, 102 F.3d 863 (7th Cir. 1996)</i>	16

<i>Valentin v. Ocean Ships, Inc.</i> , 38 F. Supp. 2d 511 (S.D. Tex 1999).....	22, 23
<i>Van Beeck v. Sabine Towing Co.</i> , 300 U.S. 342 (1937).....	16
<i>Weathers v. Bean Dredging Corp.</i> , 26 F.3d 70 (8 th Cir. 1994)	21, 22
<i>Wilson v. Zapata Off-Shore Co.</i> , 939 F.2d 260 (5 th Cir. 1991)	21

FEDERAL STATUTES

45 U.S.C. § 51.....	16
45 U.S.C. § 51 et seq.....	16
45 U.S.C. § 56.....	16
45 U.S.C. § 59.....	16
46 U.S.C. § 30106.....	16
Jones Act (46 U.S.C. § 30104(a)).....	16

RULES

Fed. R. Civ. P. 8(b)	9
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I. SUMMARY OF RESPONDENT'S ARGUMENT

Appellants do not dispute that this case is barred by the three-year statute of limitations. Appellants instead assign error to the trial court's dismissal of this case because it found that there was no equitable tolling of the statute. The Court should affirm because Appellants did not meet their burden on summary judgment, and they failed to satisfy any of the three circumstances for which equitable tolling is recognized. In addition, Appellants failed to demonstrate that they diligently pursued their rights. Contrary to Appellants' contention, Olympic Steamship never represented that it would "assent to litigate maritime asbestos claims" in the Ohio Forum, and in fact maintained its jurisdictional (and other) defenses in this case from the beginning. Moreover, upon dismissal of the Ohio action, the Court specifically held that there was no waiver of personal jurisdiction in this case.

No extraordinary circumstances beyond Appellants' control prevented them from timely filing their cause of action in a forum with personal jurisdiction over Olympic Steamship. Instead, they originally chose to sue where there was no personal jurisdiction. Given the history and volume of the MARDOC cases that were dismissed for lack of personal jurisdiction, the trial court correctly found that there is no basis for a reasonable belief that the Ohio courts had personal jurisdiction over

Olympic Steamship in 1998 or in 2008 when the Complaints were filed in Ohio. Moreover, Appellants chose not to file this action in Washington before the statute of limitations ran on their claim. There is no evidence that Appellants could not have done so.

Fundamental to each of the cases cited by Appellants was a finding that the plaintiff reasonably and in good faith proceeded in the wrong venue and then exercised diligence in filing the second action. In this case, Appellants did not have any grounds for filing the initial suit in Ohio. The record, including the materials submitted by Appellants, establishes beyond dispute that Appellants have been on notice since at least 1989 that the Ohio court in which they were filing seaman's asbestos lawsuits against Olympic Steamship and other shipowner defendants lacked personal jurisdiction. Yet, Appellants continued to file lawsuits in a court known to lack jurisdiction.

Appellants' conduct was unreasonable and cannot be reasonably viewed as consistent with an exercise of due diligence. Appellants not only knowingly filed in a court lacking jurisdiction, but waited more than nine years after the mesothelioma diagnosis and more than eight years after Decedent's death to file in a court with jurisdiction. The trial court's Order granting Olympic Steamship's Motion to Dismiss should therefore be affirmed.

II. RESTATEMENT OF ISSUE PRESENTED BY APPELLANTS’
ASSIGNMENT OF ERROR

In granting Olympic Steamship’s Motion to Dismiss Based on Statute of Limitations, did the trial court correctly conclude that Appellants were not entitled to equitable tolling?

III. COUNTERSTATEMENT OF THE CASE

A. **Historical Background: Ohio MARDOC and Federal Multidistrict Litigation (MDL)**

U.S. District Judge Robreno, the current federal asbestos MDL transferee judge, provided an overview of the federal maritime asbestos litigation docket (“MARDOC”) filed by the Jaques firm in the Northern District of Ohio:

Beginning in the mid-1980’s, the Jaques Admiralty Law Firm began filing cases in the Northern District of Ohio on behalf of merchant marines [sic] who were alleged to have been injured from exposure to asbestos-containing products located aboard commercial vessels. Named as defendants were manufacturers and suppliers of the accused products, and the shipowners themselves. Typically, each case named upwards of 100 defendants. Ultimately, by the year 2009, more than 50,000 cases had been filed involving millions of claims against hundreds of defendants.

The cases initially progressed in the Northern District of Ohio under the superintendency of Judge Thomas Lambros. Because the claims fell within the admiralty jurisdiction of the court, they were administratively assigned to a maritime docket, titled “MARDOC.” [Citation omitted]. In 1991, the cases were consolidated and transferred to the Eastern District of Pennsylvania as part of MDL 875 ...

Olympic Steamship was among the shipowner-defendants in the Ohio MARDOC litigation.

1. The “National Contacts” Theory Of Personal Jurisdiction Proffered By The Jaques Firm Was Rejected.

In June of 1986, before defendants had been served with process in the more than 1,000 maritime asbestos cases filed in Ohio during the previous three months, the Jaques firm (dba “Maritime Asbestosis Legal Clinic”) asserted that a “national contacts” theory of personal jurisdiction authorized their mass filings of asbestos cases in Ohio against non-resident defendants (like Olympic Steamship). Counsel contended that personal jurisdiction in federal question cases, such as Jones Act actions, focused only on the defendant’s contacts with the United States as a whole and that shipowners could be sued in Ohio (or any other State) even though they had no jurisdictional contacts whatsoever with the State. CP 2361-2362.

On July 22, 1986, before U.S. District Judge Thomas Lambros, the Jaques Firm expounded the “national contacts” theory, admitting with regard to non-Great Lakes shipowners, “We are assuming they don’t do any business in the State of Ohio whatsoever.” CP 2393. Even as to shipowners without Ohio contacts, Mr. Jaques – citing a hypothetical defendant that operated tugs only around Morgan City, Louisiana – stated, “[T]here is not going to be any question in my opinion as to jurisdiction,”

only questions as to venue. CP 2391. On August 15, 1986, the Jaques firm reiterated its theory that shipowners could be sued in Ohio for the seamen's cases even though the shipowners had no jurisdictional contacts with Ohio. CP 2455-2478.

A unanimous U.S. Supreme Court agreed in 1987 with the 1986 *en banc* Fifth Circuit Court of Appeals that, in the absence of a statute authorizing nationwide service of process, federal courts cannot assert personal jurisdiction in federal question cases over a defendant who cannot be reached by the state's long-arm statute. *Omni Capital Internation, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), *aff'g Point Landing, Inc. v. Omni Capital Int'l., Ltd.*, 795 F.2d 415 (5th Cir. 1986). This decision in *Omni Capital* directly rejected the "national contacts" theory on which the Jaques Firm relied for filing suit in Ohio against non-resident shipowners. *Id.*

2. In 1989, the Ohio Federal Court Held There is No Personal Jurisdiction in Ohio Over More than 100 Shipowner Defendants.

From 1988 through 1989, more than 100 shipowner defendants filed personal jurisdiction motions in their MARDOC cases, and once again, the Jaques firm relied on the discredited "national contacts" theory without acknowledging that the Supreme Court had unanimously rejected that theory in *Omni Capital. Id.* CP 2479-2497.

On October 31, 1989, the judge presiding over the Ohio MARDOC litigation addressed the “national contacts” theory and the shipowners’ numerous personal jurisdiction motions. CP 2498-2620. In the presence of Leonard Jaques of the Jaques firm, Judge Lambros summarily rejected Mr. Jaques’ “national contacts” theory and found that personal jurisdiction was lacking over more than 100 additional shipowner defendants. *Id.*, at 2554-2558. Instead of dismissing the defendants for lack of personal jurisdiction, Judge Lambros said he was going to transfer the cases to other districts – but never did so.

Despite the judicial finding of no personal jurisdiction over a large number of shipowners, the Jaques firm continued to file as many as 50,000 additional maritime asbestos cases against shipowners in Ohio after October 31, 1989. *In Re Asbestos Prod. Liab. Litig. (No VI)*, *supra*, 965 F. Supp. 2d at 615.

With the creation of the federal asbestos MDL 875 in July 1991, all pending MARDOC cases not already in trial were transferred to the Eastern District of Pennsylvania and assigned to Judge Charles. R. Weiner; all later-filed cases were also ordered to be transferred. *In Re Asbestos Prod. Liab. Litig. (No. VI)*, *supra*, 771 F. Supp. at 424.

In May of 1996, Judge Weiner administratively dismissed the cases then pending, finding that the claimants had “provide[d] no real

medical or exposure history,’ and had been unable to do so...” *Bartel et al v. Various Defendants*, MDL No. 875, 2013 WL 4516651 (E.D. Pa. Aug. 26, 2013).. (quoting *In Re Asbestos Prods. Liabl. Litig.* (No. VI), No. 2 MDL 875, 1996 WL 239863, at *1-2 (E.D. Pa. May 2, 1996).

3. In 1998, The Jaques Firm Filed an Asbestos Case on Behalf of Mr. McCabe in the Northern District of Ohio against Olympic Steamship and Other Defendants.

In 1998, the Jaques firm filed an asbestos case on behalf of Mr. McCabe, a resident of Washington, in the United States District Court for the Northern District of Ohio, under Case No. 1:98-cv-10272-JGC against Olympic Steamship and other defendants. CP 481-487. The Complaint claimed negligence under the Jones Act and unseaworthiness under general maritime law resulting from Mr. McCabe’s alleged exposure to asbestos while working aboard an Olympic Steamship vessel. *Id.*

4. The 1998 Lawsuit was Retroactively Dismissed.

At the time the original Complaint was filed, Mr. McCabe had not been diagnosed with a malignancy. Thus, the Complaint sought damages for “Fear of cancer and other asbestotic disease onset” as well as “Costs of being forever medically monitored for disease onset and worsening.” *Id.* The lawsuit was administratively dismissed retroactively pursuant to the 1996 Weiner Order, since Mr. McCabe had not shown that he had “an asbestos-related personal injury compensable under the law.” CP 480.

5. In 2008, The Jaques Firm attempted to “Reinstate” The McCabe Lawsuit In Ohio.

After Mr. McCabe’s passing in 2006, the Jaques Firm attempted to “reinstate” the McCabe lawsuit, and filed what they entitled their First “Amended” Complaint in Ohio on November 13, 2008, alleging survival and wrongful death claims under the Jones Act and general maritime law. CP 495-502. Olympic Steamship appeared in the action through counsel under jurisdictional protest with a Notice of Appearance and General Denial on August 18, 2011. CP 503-507. The Notice of Appearance and General Denial specifically asserted that “Ohio and Pennsylvania courts lack jurisdiction over the parties and subject matter of this action.” *Id.* Olympic Steamship answered the Complaint on February 8, 2012, asserting the applicable personal jurisdiction, statute of limitations, and other defenses. CP 508-516.

6. The McCabe Suit In Ohio Was Dismissed For Lack Of Personal Jurisdiction.

On November 20, 2012, Olympic Steamship filed several motions for summary judgment, seeking dismissal based on the statute of limitations, lack of jurisdiction, the Bareboat Charter, no evidence of causation, and for judgment on the pleadings regarding Plaintiffs’ punitive damages claims. CP 480. The Court dismissed the case for lack of

personal jurisdiction on April 14, 2014, and thus did not rule on the other motions filed by Olympic Steamship and others. CP 524-527.

In his April 14, 2014 Order dismissing Olympic Steamship, the Honorable Eduardo C. Robreno explained that because Ohio does not recognize general jurisdiction, and the Plaintiffs' complaints did not make jurisdictional allegations about any of the shipowner defendants' activities in Ohio that allegedly caused injury to the plaintiffs which would support the assertion of specific jurisdiction, the cases were dismissed due to lack of personal jurisdiction. CP 524-527. The Plaintiffs argued that the shipowner defendants waived the right to raise the defense of lack of personal jurisdiction. Judge Robreno disagreed, explaining:

...the shipowner defendants did not waive the defense of lack of personal jurisdiction because they consistently raised the defense throughout the litigation, and did not participate in the litigation of their own volition. *Bartel*, 2013 WL 4516651, at *6 (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)). "First, as early as 1987, while the cases were still in the Northern District of Ohio, defendants raised the issue of lack of personal jurisdiction." *Id.* (citations omitted). Moreover, defendants' motions to dismiss have routinely been denied without prejudice as they have been ordered to participate in the litigation prior to the disposition of these motions on the merits. *Id.* "Essentially, defendants are now, for the first time since 1989, being given the chance to argue the issue of personal jurisdiction before the Court." *Id.* Second, the shipowner defendants in *Bartel* did not intend to waive the defense despite filing answers. *Id.* at *7. "[T]he answers included prefaces that specifically stated that defendants were filing the answers 'under protest' pending review by the Court of Appeals of Judge Lambros' decision to transfer rather than dismiss the cases." *Id.*; see also Fed. R. Civ. P. 8(b).

Id.

Appellants' argument that Olympic Steamship and other shipowner defendants waived the affirmative defense of personal jurisdiction because of its conduct during the course of the Ohio asbestos litigation was in fact decisively rejected three times by Judge Robreno, who presided over the federal asbestos MDL 875 in the Eastern District of Pennsylvania. By way of three Orders issued in 2013 and 2014, the MDL court granted over 10,000 personal jurisdiction dismissals of hundreds of shipowners in cases filed by the Jaques firm in Ohio. *See In Re Asbestos Prod. Liabl. Litig (No. VI)*, 965 F. Supp. 2d 612 (E.D. Pa. 2013); *In Re Asbestos Prod. Liab. Litig. (No VI)*, MDL Docket No. 875, 02-md-875, 2014 WL 944227 (E.D. Pa. March 11, 2014); *In Re Asbestos Prod. Liab. Litig. (No VI)*, MDL Docket No. 875, 02-md-875, Doc. No. 4286 (E.D. Pa. April 14, 2014).

In his published opinion in *In re Asbestos Product Liability Litigation (No. VI)*, Judge Robreno undertook to “disentangle the parties from a web of procedural knots that have thwarted the progress of this litigation.” *In re Asbestos Products Liability Litigation (No. VI)*, 965 F.Supp.2d 612, 615 (E.D. Pa 2013). The opinion addressed 418 motions filed by shipowner defendants to dismiss for lack of personal jurisdiction, which called on Judge Robreno to adjudicate what he identified as

“important threshold issues. One, does the Court have personal jurisdiction over the defendants?” *Id.*

After reciting the procedural history of the Ohio federal asbestos litigation, Judge Robreno summarized the plaintiffs’ main argument in opposition to defendants’ motions to dismiss – namely that “these defendants waived or forfeited their personal jurisdiction defenses when they filed answers based on Judge Lambros’ Orders” in the Ohio cases. *Id.* at 618.

In addressing the plaintiffs’ argument, Judge Robreno first analyzed Ohio’s long-arm jurisprudence and concluded that personal jurisdiction over the movants was lacking. *Id.* at 616-20. He then decisively rejected plaintiffs’ waiver arguments, holding that the defendants at all relevant times preserved their defense of lack of personal jurisdiction because (a) they did not fail to timely raise the defense in the Ohio litigation; and (b) their participation in the Ohio litigation was not of “their own volition” but at order of the Ohio district court, even after they raised their jurisdictional defense. *Id.* at 621. After a thorough analysis, Judge Robreno granted the motions to dismiss, “given that there is no personal jurisdiction over the defendants.” *Id.* at 623. The Order and published decision resulted in the dismissal of hundreds of cases classified

as “Group 1” on the court’s massive asbestos docket. 965 F.Supp.2d at 615 n.2.

In connection with nearly 6,000 additional personal jurisdiction motions in Groups 4, 5, 6, and 7 cases, the plaintiffs claimed they had supplemented “‘new’ evidence that allegedly show[ed] that defendants waived the defense of lack of personal jurisdiction either explicitly, or through their conduct throughout the litigation.” *In re Asbestos Prods. Liab. Litig. (No VI) (Jacobs v. A-C Prod. Liab. Trust)*, 2014 WL 944227, *2 (E.D. Pa. March 11, 2014). Those motions were again fully briefed and argued at an oral hearing. *Id.* at *1 n.2. After considering the “new” evidence as to the shipowner defendants’ purported waiver or forfeiture of their defense of lack of personal jurisdiction, the court again found no waiver: “Viewed together, the Court is not persuaded that [plaintiffs’] exhibits show by a preponderance of the evidence a universal waiver [of personal jurisdiction] by all defendants, in all cases, in perpetuity.” *Id.* at *5. The court again held that it lacked personal jurisdiction, this time granting nearly 6,000 additional personal jurisdiction dismissals. *Id.* at Exhibit A (listing dismissals).

Finally, Judge Robreno issued the third Order on April 14, 2014, granting an additional 4,400 motions to dismiss on the same bases as his previous two orders (again rejecting plaintiffs’ “new” evidence as to

purported waiver of the personal jurisdiction defense). *In re Asbestos Prod. Liab. Litig (No VI)*, MDL Docket No. 875, Doc. No. 4286 (E.D.Pa. Apr. 14, 2014). That Order had the effect of dismissing Plaintiffs' claims against Olympic Steamship with respect to Mr. McCabe here. *Id.*

B. McCabe Action Filed In Washington.

After Judge Robreno dismissed certain defendants, including Olympic Steamship, from the Ohio/Pennsylvania cases for lack of personal jurisdiction in 2014, some of those cases (including *McCabe*) were filed in state court.

1. Plaintiffs' Complaint in Washington was Filed More than Three Years after Mr. McCabe's Diagnosis and Death.

Mr. McCabe was diagnosed with mesothelioma in June 2005. CP 481-487. He was a resident of Washington, and he died in Washington on June 16, 2006. CP 442. Appellants filed this action on August 1, 2014, more than nine years after Mr. McCabe's 2005 diagnosis and more than eight years after his death. CP 1-14. Olympic Steamship moved to dismiss based on the Statute of Limitations.

2. The Trial Court Granted Olympic Steamship’s Motion to Dismiss Based on Statute of Limitations, Concluding that Appellants Were Not Entitled To Equitable Tolling.

On January 9, 2015, the Honorable Bruce E. Heller conducted a hearing on Olympic Steamship’s Motion to Dismiss. RP 1. In its letter ruling, the trial court stated:

Suffice it to say, by the time Mr. McCabe filed his action in 1998, it was clear that neither of the defendants had any contacts with the Northern District of Ohio and that there was no jurisdictional basis for filing there. The “national contacts” theory of personal jurisdiction that served as the rationale for filing asbestos cases in Ohio against non-resident defendant was rejected by the Supreme Court back in 1987. *Omni Capital International, Ltd.* 484 U.S. 97 (1987). Nonetheless, thousands of asbestos lawsuits continued to be filed in Ohio after 1987, including this one.

...Plaintiffs argue that their filing in Ohio was reasonable given the willingness of at least some asbestos defendants to litigate in Ohio, notwithstanding their lack of contacts with that jurisdiction. Plaintiffs have raised similar arguments in the federal asbestos litigation when they urged the court to find that Defendants had waived their personal jurisdiction defense. On three separate occasions, the Eastern District of Pennsylvania, where most of the maritime asbestos cases were consolidated, rejected the waiver argument.

...At oral argument, Plaintiffs’ counsel acknowledged the preclusive effect of these decisions under collateral estoppel. Yet, Plaintiffs’ equitable estoppel¹ argument is based in part on waiver...Plaintiffs also contended at oral argument that the Court could apply equitable tolling even without finding waiver by the defendants. The Court is not

¹ The trial court’s “equitable estoppel” statement appears to be a clerical error, as the context is clearly about “equitable tolling.”

persuaded. If the defendants did not waive the personal jurisdiction defense, then it is difficult to fathom how Plaintiffs could have reasonably concluded that jurisdiction was proper in Ohio. There was no evidence that the Defendants had any contacts with Ohio, and the “national contacts” theory which might have been colorable at one time, had been unanimously rejected by the Supreme Court more than 20 years before this action was filed in Ohio.

The Court therefore grants Defendants’ motion for summary judgment...

CP 2068-2070.

IV. ARGUMENT

A. **Standard of Review**

While Plaintiffs are correct that an order on summary judgment is reviewed by the appellate court de novo², when an issue relates to equitable matters, such matters will only be disturbed on appeal if the trial court abused its discretion. *See Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wn.App. 553, 559 (2011). “Because the trial court has broad discretionary authority to fashion equitable remedies, such remedies are reviewed for an abuse of discretion.”³ “An abuse of discretion occurs when the trial court’s decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.”⁴

² *See Clare v. Saberhagen Holdings, Inc.*, 129 Wash.App. 599, 602 n.1 (2005)

³ *Id.*, citing *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 221 (2010) (citing *SAC Downtown Ltd. P’ship v. Kahn*, 123 Wn.2d 197, 204 (1994)), *review denied*, 171 Wn.2d 1014 (2011).

⁴ *Id.*, citing *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 494 (2006).

As set forth below, in this case, the trial court's decision that equitable tolling was unavailable to Appellants was reasonable, and properly based on the record.

B. The Trial Court Correctly Concluded That There Is No Basis For Equitable Tolling In This Case.

1. Appellants Claims Were Barred By The Statute Of Limitations

Plaintiffs' claims are subject to a federal three-year statute of limitations.⁵ When an action is filed more than three years after death, both the survival and wrongful death claims are barred by the statute of limitations.⁶

⁵ Plaintiffs' Complaint asserts federal claims under the Jones Act and general maritime law doctrine of unseaworthiness. While state courts have concurrent jurisdiction with federal courts to try actions under the Jones Act, the governing law is federal, not state law. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942). The Jones Act (46 U.S.C. §30104(a)) incorporates and makes applicable to seamen the substantive recovery provisions of the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 et seq.) *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 33 (1990). Actions under the Jones Act are subject to the FELA three-year statute of limitations, 45 U.S.C. § 56. Actions for maritime torts, including plaintiffs' unseaworthiness claim, are subject to a substantially identical three-year statute of limitations, 46 U.S.C. § 30106.

⁶ The federal MDL judge currently handling the many thousands of MARDOC cases explained that, for Jones Act/FELA occupational disease cases, "The statute of limitations begins to run when "a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause... This is an objective inquiry and imposes an affirmative duty on the plaintiff to investigate what caused his or her injury." *Robinson v. Illinois Central R.R. Co.*, No. 2:08-89339, 2011 WL 4907401, n.1 (E.D. Pa., Feb. 14, 2011) (Robreno, J.), citing *Tolston v. National R.R. Passenger Corp.*, 102 F.3d 863, 865 (7th Cir. 1996), citing *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990). FELA creates two separate causes of action for an injury resulting in the death of a railroad worker (or seaman), generally referred to as "wrongful death" (45 U.S.C. Sec. 51) and "survival" (45 U.S.C. Sec. 59). The two claims are "quite distinct, no part of either being embraced in the other." *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347 (1937) (Jones Act case). The survival action compensates for the personal injuries and losses sustained by the employee before his death, (*See Azzopardi v. Ocean Drilling & Exploration Co.*, 742

In this case, Appellants do not dispute that Mr. McCabe knew or had reason to know of his injury in June 2005, when he was diagnosed with mesothelioma. Further, Mr. McCabe had been legally represented since at least 1998 and had filed an asbestos personal injury action in 1998, years before his 2005 mesothelioma diagnosis. Mr. McCabe knew of his diagnosis and knew or should have known that the mesothelioma might be work-related. Thus, the survival claim accrued prior to his death, and since the complaint in this case was filed more than three years after Mr. McCabe's death in 2006, both the survival and the wrongful death claims are barred by the statute of limitations.⁷ Appellants admit that the statute of limitations bars this action. (See, e.g., RP 7:23-8:4.)

2. Requirements For Equitable Tolling.

Equitable tolling of a federal statute of limitations is *extraordinary* relief that is to be applied only sparingly.⁸

[A]ny resort to equity must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result.”

F.2d 890, 893 (5th Cir. 1984), while the wrongful death action compensates the statutory beneficiaries for their own pecuniary losses sustained as a result of the death. *Id.*

⁷ When there is no question that the decedent's claim accrued prior to his death, the court need not engage in a lengthy analysis of proper accrual date for the survival claim; if the complaint is filed more than three years after decedent's death, both the survival claim and the wrongful death claim are barred by the statute of limitations. CP 2747-49 (*Estate of Charles Welch v. Foster Wheeler Co.*, No. 1:94cv11801 (N.D. Ohio July 16, 2009) (Adams, J.) at 2749).

⁸ *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000).

Id. at 330 (emphasis added).⁹

Equitable tolling of a federal statute of limitations has been recognized in only three limited circumstances: (1) where the defendant actively misleads the plaintiffs regarding the cause of action, or (2) where extraordinary circumstances beyond the plaintiff's control prevents him from timely filing the action;¹⁰ or (3) where the plaintiff has raised the precise claim at issue in a court of competent jurisdiction but mistakenly has done so in a court without proper venue.¹¹ Even where one of these circumstances exists, however, a plaintiff must still prove that he exercised diligence in pursuing his rights.¹²

⁹ See also *Gayle v. UPS*, 401 F.3d 222, 226 (4th Cir. 2005) (“[t]he rarity of our resort to equity does not spring from miserliness. Rather, equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.”); *Kuusk v. Holder*, 732 F.3d 302, 306 (4th Cir. 2013) (equitable tolling will be granted “only sparingly,” and not in “a garden variety claim of excusable neglect,” citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *Angles v. Dollar Tree Stores, Inc.*, 494 Fed.Appx. 326 (4th Cir. 2012) (“caselaw on equitable tolling has consistently focused on external factors hampering the ability to file a timely claim”); *Finch v. Miller*, 491 F.3d 424 (8th Cir. 2007) (“Equitable tolling is an exceedingly narrow window of relief.”)

¹⁰ *Harris, supra*, 209 F.3d at 330

¹¹ *Burnett v. New York Cent. R. Co.*, 380 U.S. 424 (1965)

¹² *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (“a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way”); *Chao v. Virginia Dep’t of Transp.*, 291 F.3d 276, 283 (4th Cir. 2002) (“Equitable tolling is not appropriate...where the claimant failed to exercise due diligence in preserving his legal rights”) (internal quotation marks and citation omitted).

3. Appellants Did Not Meet the Requirements For Equitable Tolling In This Case.

In this case, Appellants did not satisfy any of the three circumstances for which equitable tolling is recognized, and could not show that they diligently pursued their rights.

First, at no time did Olympic Steamship mislead Appellants regarding their cause of action. Appellants' claim that Olympic Steamship somehow "agreed" to litigate this case in Ohio due to what other defendants did in other cases is without merit. *See Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835, 836 (9th Cir. 2005) ("we hold that defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties"; held, defendants "did not consent to jurisdiction in this action by waiving their personal jurisdiction objection in" a different prior action.)

Contrary to Appellants' assertions, Olympic Steamship never waived its personal jurisdiction defense to allow for future litigation in Ohio, or ever represented that it would "assent to litigate maritime asbestos claims" in the Ohio Forum. In fact, given that Olympic Steamship maintained its jurisdictional (and other) defenses from the beginning, the undisputed evidence shows that the opposite is true. Olympic Steamship maintained its defenses in its Notice of Appearance

and General Denial; in its Answer to Mr. McCabe's "Amended" Complaint, and in its subsequent Motion to Dismiss, which was granted. Moreover, upon dismissal of the Ohio action, Judge Robreno specifically held that there was no waiver of personal jurisdiction in this case.

Second, even if the court were to ignore the fact that there was no waiver, in this case, there were no extraordinary circumstances beyond Appellants' control that prevented them from timely filing their cause of action in a forum with personal jurisdiction over Olympic Steamship. Instead, they originally chose to sue where there was no personal jurisdiction. Appellants had and have no legitimate claim that they reasonably believed the Ohio court had personal jurisdiction over Olympic Steamship. In 1987, eleven years before Appellants filed their original Ohio complaint (that was dismissed), and 21 years before filing their 2008 "Amended" Complaint in Ohio, the U.S. Supreme Court decided *Omni Capital*, rejecting Plaintiffs' "national contacts" theory of personal jurisdiction.

Moreover, given the history and volume of these MARDOC cases that were dismissed for lack of personal jurisdiction, there could certainly be no basis for a reasonable belief that the Ohio courts had personal jurisdiction over Olympic Steamship in 1998 or in 2008 when the Complaints were filed in Ohio.

Third, Appellants' Ohio action was not filed in a court of competent jurisdiction, but rather filed intentionally in a court known to have no personal jurisdiction over Olympic Steamship. (*See Burnett, supra*, 380 U.S. at 428 (“[W]hen a plaintiff brings a timely FELA action in a state court of competent jurisdiction...the FELA limitations is tolled during the pendency of the state action.”)). As courts have recognized, a dismissal for improper venue, as was the case in *Burnett*, is not the same as a dismissal for lack of personal jurisdiction. *See, e.g., Schor v. Hope*, No. 91-0443, 1992 WL 22189, *2 (E.D. Pa. Fe. 4, 1992) (for equitable tolling purposes, “Dismissal for lack of personal jurisdiction is not the same as dismissal for improper venue.”).

No United States court has held that a federal statute of limitations can be equitably tolled by the filing of a complaint in a court that lacked personal jurisdiction over the defendant.¹³ Numerous federal appellate and district courts have held that where, as here, a Jones Act plaintiff files an action in a court without any reasonable expectation of personal

¹³ U.S. Courts of Appeals confronted with the issue have declined to hold that equitable tolling can be applied where a previous action was filed in a court that lacked personal jurisdiction. *See Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 267 (5th Cir. 1991) (“This Circuit has addressed, but not yet resolved, the issue of whether the Jones Act statute of limitations may be tolled by pursuit of a Jones Act claim that was denied on jurisdictional grounds.”); *Covey v. Arkansas River Co.*, 865 F.2d 660 (5th Cir. 1989) (“This Court has not yet decided the applicability of equitable tolling to Jones Act cases which are dismissed for want of jurisdiction and refiled subsequent to the limitations period.”); *Weathers v. Bean Dredging Corp.*, 26 F.3d 70 (8th Cir. 1994) (“We also decline to decide the question of whether or not equitable tolling should be allowed where the prior dismissal was on jurisdictional grounds.”).

jurisdiction over the defendant, equitable tolling is unavailable due to the plaintiff's failure to diligently pursue his rights.¹⁴

In *Valentin v. Ocean Ships, Inc.*, *supra*, the defendant asserted lack of personal jurisdiction as an affirmative defense, and after three years, moved to dismiss for lack of personal jurisdiction, which the court granted. *Id.* at 512. The plaintiff re-filed in the U.S. District Court for the southern District of Texas. The defendant moved for summary judgment on the ground that the lawsuit was barred by the statute of limitations. *Id.* at 512-513. The Court granted the motion, rejecting the plaintiff's argument that the statute of limitations was equitably tolled by his prior timely filing in New York. *Id.* at 514. The Court noted that it had not been decided whether equitable tolling applies to Jones Act cases dismissed for lack of personal jurisdiction. *Id.* at 513. However, "in an abundance of caution", the Court considered and then rejected the plaintiff's argument for tolling, finding he could not establish due diligence in pursuing his rights. *Id.* The Court reasoned:

¹⁴ See e.g., *Covey, supra*, at 660, 662 (Jones Act statute of limitations was not equitably tolled by the filing of complaints in two previous courts lacking personal jurisdiction; "equity is not intended for those who sleep on their rights", and the plaintiff's "failure to determine which court had proper jurisdiction...negates any serious diligent intention on her part to pursue available legal remedies"); *Weathers v. Bean Dredging Corp.*, 26 F.3d 70, 73 (8th Cir. 1994) (Jones Act statute of limitations was not equitably tolled during the pendency of an action in a court with no personal jurisdiction over the defendant); *Valentin v. Ocean Ships, Inc.*, 38 F. Supp. 2d 511 (S.D. Tex 1999) (same); *Tobey v. Atwood Oceanics, Inc.*, No. H-10-0154, 2010 U.S. Dist. LEXIS 89448 (S.D. Texas Aug 30, 2010) (same); *Reichert v. Mon River Towing, Inc.*, No. 2:09-cv-1493, 2010 U.S. Dist. LEXIS 7491 (W.D. Pa. Jan. 29, 2010) (same).

This case offers numerous examples of Plaintiff's lack of diligence in prosecuting his action. First, Plaintiff failed to act on the possibility that jurisdiction in New York was improper during the first three years of that lawsuit. That omission is particularly vexing as Defendant raised lack of personal jurisdiction in its Answer, putting Plaintiff on notice that jurisdiction might not be proper. More troubling is the fact that in a similar, earlier case filed in New York by Plaintiff's counsel against this Defendant, the court there held that Defendant was not subject to personal jurisdiction.

Id.¹⁵

Appellants chose not to file this action in Washington before the statute of limitations ran on their claim. There is no evidence that Appellants could not have done so, and in fact, it is undisputed that their counsel timely filed other maritime cases in Washington.

Moreover, it was not reasonable for Appellants to file suit in Ohio in 1998 or 2008 knowing that Olympic Steamship was not subject to personal jurisdiction in Ohio. Under no reading of the law of equitable tolling could Appellants establish that they are entitled to the extraordinary relief of equitable tolling. The statute of limitations cannot be tolled by Appellants' unreasonable actions in filing suit in Ohio, a forum they knew lacked personal jurisdiction over Olympic Steamship,

¹⁵ See also *Reichert*, 2010 WL 419435 (no equitable tolling of Jones Act statute of limitations; prior filing in Ohio not reasonable when no connection to parties or accident); *accord Pecoraro v. Diocese of Rapid City*, 435 F.3d 870, 875 (9th Cir. 2006) (applying South Dakota law) (equitable tolling not available where prior suit brought in a state clearly lacking minimum contacts with defendant and plaintiff unreasonably failed to heed numerous warnings regarding the lack of personal jurisdiction over the defendant).

and in waiting eight years after Mr. McCabe's death to file this action in Washington.

Fundamental to each of the cases cited by Appellants was a finding that the plaintiff reasonably and in good faith proceeded in the wrong venue and then exercised diligence in filing the second action.¹⁶ In this case, Appellants did not have any grounds for filing the initial suit in Ohio.¹⁷ The record, including the materials submitted by Appellants, establishes beyond dispute that they have been on notice since at least 1989 that the Ohio court in which they were filing seaman's asbestos lawsuits against Olympic Steamship and other shipowner defendants lacked personal jurisdiction. Yet, Appellants continued to file lawsuits in a court known to lack jurisdiction.

While Appellants rely heavily on *Burnett*, again, fundamental to the decision in *Burnett* to allow equitable tolling was the fact that the court there had jurisdiction – it was simply a matter of the plaintiff having reasonably filed in Ohio state court as opposed to Ohio federal court. *See*

¹⁶ *See e.g. Flores v. Predco Servs. Corp.*, 2011 U.S. Dist. LEXIS 25588, *12, *13, *16 (March 11, 2011) (citing the third circumstance in which equitable tolling may be warranted as based on a timely but mistaken initial filing; noting the court initially held it had personal jurisdiction; and plaintiff refiled eight days after dismissal). In fact, the *Flores* court distinguished its case from *Reichert* on the basis that the *Flores* trial court's initial finding it had personal jurisdiction rendered plaintiff's belief reasonable, whereas it was unreasonable for the *Reichert* plaintiff to proceed in Ohio against a defendant lacking minimum contacts. *Id.* at *20. As in *Reichert*, there is no rational basis for concluding that Plaintiffs in 1998 held a reasonable belief that the Ohio court had personal jurisdiction over these defendants.

¹⁷ *See Opp.*, p. 23, ll. 18-20.

Burnett, supra, 380 U.S. at 424, 434-35.

Appellants' conduct in this case was unreasonable and cannot be reasonably viewed as consistent with an exercise of due diligence.¹⁸ Appellants not only knowingly filed in a court lacking jurisdiction, but waited more than nine years after the mesothelioma diagnosis and more than eight years after Decedent's death to file in a court with jurisdiction.

4. Collateral Estoppel

Appellants' Assignment of Error on Appeal relates directly to whether equitable tolling is a remedy to which they are entitled *regardless of the earlier ruling concerning waiver*. See, Brief of Appellants, at p. 3. Therefore, Olympic Steamship will not address the fact that Appellants are clearly barred from re-litigating the waiver of Personal Jurisdiction here. However, to the extent that this Court deems Olympic Steamship's collateral estoppel argument and the trial court's consideration of it relevant on this Appeal, Olympic Steamship hereby adopts the facts and legal argument contained in Respondent Matson Navigation Company, Inc.'s Brief filed herein, as well as those made in the trial court below.

¹⁸ In *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 218 (3d Cir. 2002), the court recognized that failing to promptly seek a transfer when there was no personal jurisdiction was unreasonable, and waiting three months to refile may preclude a finding that the plaintiff exercised diligence.

V. CONCLUSION

In this case, there was never any impediment to Appellants timely filing suit on behalf of Mr. McCabe in a court with jurisdiction. Appellants admit that this case was filed after the statute of limitations had expired. Appellants did not satisfy any of the three circumstances for which equitable tolling is recognized. Moreover, the record reflects that Appellants did not diligently pursue their rights.

For these and the foregoing reasons, Olympic Steamship respectfully requests that this Court affirm the trial court's Order on Summary Judgment.

RESPECTFULLY SUBMITTED this 5th day of August, 2015.

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