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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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No. 43941-7-II
(No. 45381-9 Consolidated)

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY,

Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant-Respondent.

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STATE OF WASHINGTON
BY DEPUTY

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I. INTRODUCTION

In the underlying appeal with which this CR 60 appeal now has been consolidated, defendant Saberhagen Holdings, Inc. (“Saberhagen” or “Tacoma Asbestos”) repeatedly told this Court that plaintiff the Kennedys (“the Kennedys”) had “no evidence that *Tacoma Asbestos* workers had ever set foot on Pier 23,” Respondent’s Br. at 2¹, the same pier where Jack Kennedy (“Kennedy”) worked around and on vessels where he was exposed to airborne asbestos that caused his mesothelioma. The Kennedys disagreed, detailing the significant circumstantial evidence supporting the conclusion that Tacoma Boat worked with asbestos at Pier 23 where Mr. Kennedy was exposed, that Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat, and that Tacoma Asbestos, thus was the source of some of the airborne asbestos Mr. Kennedy inhaled when he poured and mixed bags of asbestos obtained from Tacoma Boat and when he worked on the FMS-789 as Tacoma Boat contractors conducted extensive asbestos insulation repairs on that vessel. *See* Br. of Appellants at 2-21; Reply Br. of Appellants at 3-13.

¹ All citations to briefing are to the briefing in the underlying appeal, Case No. 43941-7-II.

While, as the Kennedys have argued in the underlying appeal, such evidence is sufficient to create a triable issue concerning Tacoma Asbestos' responsibility for Mr. Kennedy's asbestos exposure, until discovery of new evidence directly linking Tacoma Asbestos to Tacoma Boat's work at Pier 23 when Mr. Kennedy worked there, the Kennedys did not have any specific evidence that Tacoma Asbestos was the contractor on Tacoma Boat's projects at Pier 23 in the mid-1960's. Indeed, Saberhagen's central criticism of the Kennedys' circumstantial evidence was that it did not include direct evidence that Tacoma Asbestos was present for the Tacoma Boat jobs at Pier 23 when Mr. Kennedy worked there. Respondent's Br. at 2, 10.

While the Kennedys' appeal of the superior court's summary judgment ruling was pending, the Kennedys' trial counsel discovered new direct evidence from a former Tacoma Asbestos employee creating the reasonable inference that Tacoma Asbestos conducted the asbestos insulation work for Tacoma Boat at Pier 23, including the asbestos pipe insulation work on the FMS-789, while Mr. Kennedy worked on and around that vessel.

Saberhagen does not dispute that this new evidence could not have been discovered before summary judgment was entered, and the

evidence directly refutes Saberhagen's assertion that there is no evidence that Tacoma Asbestos employees "ever set foot on Pier 23." Respondent's Br. at 2. This Court should vacate summary judgment for the reasons the Kennedys have articulated in their underlying appeal and for the reason that the newly discovered evidence provides a direct link between Tacoma Asbestos and Mr. Kennedy's inhalation of asbestos at Pier 23.

II. ASSIGNMENT OF ERROR

Did the superior court err in failing to grant the Kennedys' CR 60(b)(3) motion to vacate the summary judgment that is the subject of this consolidated appeal?

III. THE NEWLY DISCOVERED EVIDENCE

The Kennedys already have presented and will not repeat here the procedural history of this case and the evidence relating to Mr. Kennedy's exposure to asbestos for which Tacoma Asbestos is responsible. *See* Br. of Appellants at 2-21; Reply Br. of Appellants at 3-13. Because Saberhagen does not contest that the newly discovered evidence could not with diligence have been discovered before summary judgment was entered in the consolidated appeal, the Kennedys will detail here only the new evidence supporting his claims

against Tacoma Asbestos and how it is material to the underlying summary judgment.

The newly discovered evidence consists of five volumes of work journals written by Gary W. Yost, a former Tacoma Asbestos employee who died in 2011 from mesothelioma. CP 1193-1434. The journals comprise Mr. Yost's detailed work logs, meticulously documenting his daily activities while employed by Tacoma Asbestos in the mid-1960s at the same time that Mr. Kennedy was exposed to asbestos at Pier 23 in Tacoma. CP 1143-44. The journals demonstrate that Tacoma Asbestos performed substantial work on Tacoma Boat projects in the mid-1960's (CP 1234-1434), and strongly suggest that such work included asbestos insulation work for Tacoma Boat at Pier 23, including repairs on the Army Repair Ship, FMS-789, and the Victory Ships moored at Pier 23 that Mr. Kennedy and his colleagues described. *See* CP 408; CP 239-240.

In the underlying appeal, Saberhagen criticized Mr. Kennedy's circumstantial evidence, because it did not directly link Tacoma Asbestos to the Tacoma Boat projects performed at Pier 23 where Mr. Kennedy worked in the mid-1960's. Respondent's Br. at 2, 10. Mr. Yost's journals provide such direct evidence.

Time, Week Ending JULY 24, 1965 I certify that the time given each man has been made by him.
TACOMA ASBESTOS Foreman

Social Security No.	EMPLOYEES NAME	S	M	T	W	T	F	S	Total Time Worked	Rate Per	Wages or Salary	Deductions			Net Pay	
												Old Acc.	Med. Ins.	Other Deduct.		
	WESTERN BOAT			1	3				4							
	MARTINOLICH BOAT			5					5							
	TACOMA BOAT			8					8							
	ARMY REPAIR SHIP															
	PORT OF TACOMA PIER					8	8		16							
									33	1.00	158.40	-	31.70	8.25	118.45	

CP 1375.

During the approximate 45-day period that Tacoma Boat conducted repairs aboard the FMS-789, Mr. Kennedy periodically boarded the FMS-789 and “observ[ed]” the asbestos insulation repair work. CP 408 at 115:16-24 and 116:17; CP 407; CP 238-240. Mr. Kennedy testified that he thought that the FMS-789 was repaired in the Spring of 1965 or 1966 (CP 407), approximately the same time when Tacoma Asbestos conducted asbestos insulation work on the “Army Repair Ship, Port of Tacoma Pier” as detailed in Mr. Yost’s

journal. The only “Army Repair Ship” moored at Pier 23 in 1965 was the FMS-789, and the National Guard leased Pier 23 from the Port of Tacoma for its work on Army vessels. CP 237-38. There is no evidence of any other “Army Repair Ship” located at a “Port of Tacoma Pier” in July 1965 to which Mr. Yost could have been referring other than the FMS-789.

Mr. Elmore testified that he observed the Tacoma Boat contractors conducting asbestos insulation work on the FMS-789, and that he saw Mr. Kennedy aboard the vessel when Tacoma Boat and its contractors were performing their work. CP 239-40. Mr. Kennedy testified that his knowledge of the Tacoma Boat asbestos repair on the FMS-789 was based on his “observ[ation].” CP 408 at 116:17.

Mr. Kennedy also testified that he conducted extensive asbestos insulation repair on the FMS-6, the replacement vessel for the FMS-789, which disembarked Pier 23 sometime in late 1965 or early 1966. On two to three occasions, in working on the FMS-6 in 1966, Mr. Kennedy obtained bags of asbestos from the Tacoma Boat trailer on Pier 23, which Tacoma Boat maintained as part of its work on WWII Victory Ships moored at Pier 23. He then poured, mixed and applied that asbestos, inhaling asbestos fibers in the process. *See Appellants’*

Br. at 32-33; Appellants' Reply Br. at 25. The Kennedys presented circumstantial evidence that the asbestos Mr. Kennedy obtained from the Tacoma Boat trailer at Pier 23 came from Tacoma Asbestos based on testimony from four witnesses (two from Tacoma Boat and two from Tacoma Asbestos) that Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat. Appellants' Reply Br. at 9-12.

On appeal, Saberhagen's chief criticism of the Kennedys' circumstantial evidence is that it does not constitute direct evidence that Tacoma Asbestos provided the asbestos in the Tacoma Boat trailer at Pier 23, which held supplies for work on Victory Ships at Pier 23. Respondent's Br. at 19-20. Mr. Yost's journals provide such direct evidence.

According to Mr. Yost's journal, he worked for Tacoma Asbestos on a "Victory Ship" during the weeks of February 5, 12 and 19, 1966, approximately eight months after he worked on the Army Repair Barge at the Port of Tacoma Pier, roughly the same time interval Mr. Elmore and Mr. Kennedy remembered between when Tacoma Boat worked on the FMS-789 and when Mr. Kennedy obtained asbestos from the Tacoma Boat trailer for use on repairs to

the FMS-6, the barge that replaced the FMS-789. (CP 220; CP 240; CP 288). Mr. Kennedy obtained the asbestos from the Tacoma Boat trailer at Pier 23. (CP 401-402). There is no evidence of other Victory Ships for whom asbestos pipe insulation work was performed in February 1966 other than the Victory Ships at Pier 23, which was the location dedicated to the repair of Army vessels.

IV. ARGUMENT

A. Standard of Review

The standard of review for the underlying appeal is *de novo* review. Appellant's Br. at 22; Br. of Respondent at 15-16. The Court reviews the superior court's denial of a CR 60(b)(3) motion for an abuse of discretion. *Pybas v. Paolino*, 73 Wn.App. 393, 399, 869 P.2d 427 (1994). A court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Luckett v. Boeing Co.*, 98 Wn.App. 307, 309-10, 989 P.2d 1144 (1999). Given that Saberhagen does not challenge that the newly discovered evidence could not have been discovered before the summary judgment in the underlying appeal, which is the key discretionary factor under CR 60(b)(3), and given that this appeal has been consolidated with the underlying appeal, the Kennedys submit that this Court should review all the

evidence – the newly discovered evidence along with the evidence presented in the underlying appeal – and conduct a *de novo* review of summary judgment in light of all the evidence implicating Tacoma Asbestos. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. The Newly Discovered Evidence Is Material and is Not Cumulative.

Because it is indisputable that Mr. Yost’s journals could not have been discovered before the summary judgment that is the subject of the underlying appeal, the question here is whether those journals are “material” and “not merely cumulative or impeaching.” *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003); Karl B. Teglund, WASHINGTON PRACTICE: RULES PRACTICE CR 60, 612-13 (6th ed. 2013) (“The test for newly discovered evidence under CR 60 is the same as the test for newly discovered evidence under CR 59 (new trial).”).

Saberhagen’s chief argument against granting the Kennedys’ CR 60 motion was that Mr. Yost’s journals are merely cumulative of the circumstantial evidence the superior court found inadequate to raise a triable issue. CP 1479-1483. While Mr. Yost’s journals certainly reinforce the evidence the Kennedys had already developed,

the journals add important direct evidence that Tacoma Asbestos did indeed conduct asbestos work at Pier 23 in the mid-1960's when Mr. Kennedy worked at Pier 23 and inhaled asbestos fibers.

Saberhagen's arguments in the underlying appeal are the best explanation for why Mr. Yost's journals are in fact not cumulative. In attacking the Kennedys' circumstantial evidence in the underlying appeal, Saberhagen's chief point was that the Kennedys "presented no evidence that *Tacoma Asbestos* workers had ever set foot on Pier 23." Respondent's Br. at 2. Saberhagen argued that the Kennedys' had no witnesses who could place Tacoma Asbestos workers on any "Pier 23 vessel or even at Pier 23 – ever." *Id.* at 10. While the Kennedys' presented evidence that Tacoma Boat conducted asbestos activity at Pier 23 and the testimony of four witnesses who said that Tacoma Asbestos was Tacoma Boat's sole asbestos supplier and contractor, the Kennedys had no direct evidence placing Tacoma Asbestos workers at Pier 23 when Tacoma Boat renovated the FMS-789 and the Victory Ships.

Mr. Yost's journals provide direct evidence that Tacoma Asbestos was Tacoma Boat's asbestos contractor on the FMS-789 and on the Victory Ships at Pier 23. Such evidence is plainly "material."

Because the Kennedys lacked evidence placing Tacoma Asbestos at Pier 23, the superior court granted summary judgment, stating that “the agreement that Tacoma Boat always used Tacoma Asbestos products, and thus Defendant’s product was the sole supplier of the various work orders is insufficient.” CP 950-51. The Yost journals, properly considered, are plainly “material.”

C. The Kennedys Have Presented a Convincing Circumstantial Case That Tacoma Asbestos Bears Responsibility for Mr. Kennedy’s Asbestos Exposure.

Saberhagen claimed that Mr. Yost’s journals do not conclusively establish that Mr. Yost worked on the FMS-789. CP 1481-84. That is certainly true, but that is not the test of “circumstantial evidence,” particularly when piecing together events that occurred 50 years ago. The Washington Supreme Court has firmly established, given the vagaries of time and memory, that “circumstantial evidence” must play a critical role in proving that a plaintiff was exposed decades earlier to asbestos for which a defendant is responsible. *Lockwood v. AC&S*, 109 Wn.2d 235, 246, 744 P.2d 605 (1987). The test for such “circumstantial evidence” is whether, “based on [the jury’s] common sense and experience, [it] may reasonably infer something that is at issue in this case.” Washington Pattern Instruction 1.03

We don't know with certainty that the "Port of Tacoma Pier" was "Pier 23," but:

- Pier 23 was where the FMS-789 was moored; the FMS-789 was an "Army Repair Ship" (CP 238-240; CP 408);
- the National Guard conducted repairs of Army vessels at Pier 23, which it leased from the Port of Tacoma (CP 289);
- Mr. Yost worked for Tacoma Asbestos, which performed work for Tacoma Boat on an Army Repair Ship in July 1965 (CP 1375-1376; CP 1406-1408);
- Tacoma Boat performed asbestos insulation repairs on the FMS-789 in 1965 at a time coincident with when Mr. Yost worked on the Army Repair Ship at the Port of Tacoma Pier (CP 220);
- four witnesses testified generally that Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat in the mid-1960s (CP 637; CP 668; 677-678 and CP 691-692); and
- the record is devoid of any other "Army Repair Ship, Port of Tacoma Pier" than the FMS-789 to which Mr. Yost's work can be attributed.

Similarly, Mr. Yost's journals do not establish conclusively that the "Victory Ship" he worked on in Tacoma eight months later in February 1966 was one of the Victory Ships at Pier 23, but again that is not the test for "circumstantial evidence." We know that:

- the National Guard leased Pier 23 to work on Army ships (CP 289);
- the Victory Ships docked at Pier 23 were Army ships (CP 240);
- Tacoma Boat overhauled the Victory Ships at Pier 23, which included asbestos insulation work (CP 240-244 and CP 610-611);
- four witnesses testified Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat during the mid-1960's (CP 637; CP 668; 677-678 and CP 691-692);
- Mr. Yost worked on a Victory Ship for Tacoma Asbestos in February 1966, eight months after working on the "Army Repair Ship, Port of Tacoma Pier" (CP 1406-1408);
- the time interval between when Mr. Yost's worked on the "Army Repair Ship, Port of Tacoma Pier" and the Victory Ship was roughly the same time interval identified by Mr.

Kennedy between when the FMS-789 had asbestos pipe insulation repairs and when he retrieved asbestos from the Tacoma Boat trailer at Pier 23 that was a staging area for Tacoma Boat's work on the Victory Ships (CP 1375-1376; CP 1406-1408; CP 220); and

- the record is devoid of any Victory Ship other than the Victory Ships at Pier 23 that required asbestos insulation work in February 1966.

Finally, Mr. Yost's records provide concrete documentation that Tacoma Asbestos performed a significant amount of asbestos work for Tacoma Boat from 1963 through 1966, thus concretely corroborating the testimony of four witnesses who testified that in their experience Tacoma Asbestos was the exclusive asbestos supplier and contractor for Tacoma Boat. Notably, none of Mr. Yost's journal entries when he was working for employers other than Tacoma Asbestos, such as "Fiberglass," include any work for Tacoma Boat, thus reinforcing the exclusive relationship between Tacoma Boat and Tacoma Asbestos. Saberhagen does not contest that Mr. Kennedy was exposed to asbestos as a result of Tacoma Boat activities at Pier 23, and Mr. Yost's journals provide important concrete documentation

linking Tacoma Asbestos, as Tacoma Boat's asbestos supplier and contractor, to Mr. Kennedy's asbestos exposures at Pier 23.

The obvious lesson from the leading cases is that – given the difficulties of proof regarding asbestos exposure 50 years after-the-fact – the test for circumstantial evidence sufficient to join the question of exposure to a defendant's asbestos-related activities is quite liberal. The Kennedys have produced evidence from multiple sources creating the reasonable inference that Tacoma Asbestos is responsible for some of his asbestos exposure at Pier 23, which compares favorably with the quantum of evidence in the leading cases. *See Lockwood*, 109 Wn.2d at 244-45 (holding that circumstantial evidence created jury question concerning plaintiff's exposure to defendant's asbestos product, even though plaintiff did not personally handle the asbestos product, could not identify it, did not generally work around asbestos insulation, and his exposure to defendant's asbestos was based on reasonable inference from worker testimony that he worked on ship on which plaintiff also worked that used same asbestos products as were used when he worked at Todd Shipyard, and that Todd had used defendant's asbestos products); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 572-73, 157 P.3d 406 (2007)

(court reversed summary judgment and held that circumstantial evidence of three sales of defendant's product to shipyard where plaintiff worked was sufficient to establish prima facie case of exposure); *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000) (court reversed summary judgment because evidence that plaintiff, a machinist, worked in vicinity of other workers who had handled asbestos sold by defendant distributor to shipyard where plaintiff worked was sufficient to establish prima facie case of exposure, even though there was no evidence that plaintiff handled distributor's asbestos); Appellants' Reply Br. at 5-15.

In *Allen*, for example, the only evidence of asbestos use at the jobsite was three sales orders of the defendants' product to the shipyard. 138 Wn. App. at 571-72. Based on that evidence alone, the court held that there was sufficient evidence for a jury to reasonably infer that the Plaintiff's father and, therefore, the plaintiff himself, was exposed to the defendant's asbestos. *Id.* Here, the Kennedys' circumstantial evidence is far more compelling. Indisputably, Tacoma Boat's asbestos-related activities at Pier 23 exposed Mr. Kennedy to airborne asbestos. Four witnesses testified that Tacoma Asbestos was Tacoma Boat's exclusive asbestos supplier and contractor in the mid-

1960's. Mr. Yost's detailed records working on many Tacoma Asbestos jobs for Tacoma Boat from 1963 to 1966 corroborate that testimony. And Mr. Yost's journals showing precise dates, location, and ships (Army Repair Ship in July 1965 and Victory Ship in February 1966) where Tacoma Asbestos performed asbestos work that dovetails with Mr. Kennedy's exposures to asbestos at Pier 23.

D. On Remand, the Kennedys Will Present Evidence That Mr. Kennedy's Exposure To Asbestos For Which Tacoma Asbestos is Responsible Was a Substantial Factor in Causing His Mesothelioma.

Mr. Yost's journals do not establish medical causation, but that was not the basis for Saberhagen's motion, which it framed thus:

Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?

CP 22. Once the Court concludes that the Kennedys have presented a triable case that Mr. Kennedy was exposed to asbestos for which Tacoma Asbestos is responsible, the Kennedys will present expert testimony showing that such exposures were a substantial contributing factor in causing his disease. Both sides have designated medical experts, but neither side presented any expert testimony on summary judgment given how Saberhagen framed the dispositive issue. As a

practical matter, such testimony could not be rendered until the Court determines the exposures for which Tacoma Asbestos bears responsibility.² *See R. D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 969 P.2d 458 (1999) (court reversed summary judgment for Merrill that was based on plaintiff's failure to present evidence of Merrill's non-use, even though plaintiff had burden of proof to show Merrill's alleged abandonment and relinquishment of water right, where Merrill did not focus on non-use in its summary judgment motion, and rejecting Merrill's argument that non-use was implicit in its request for summary judgment on plaintiff's abandonment and relinquishment claims). In any event, even without such medical testimony it is clear that under *Lockwood*, the circumstantial evidence presented here is

² The Court may judicially notice that both parties designated experts on medical causation, and that the Kennedys' expert, Dr. Churg, identified Mr. Kennedy's exposures at Pier 23, among others, as possible substantial contributing factors in causing his disease. He also testified at deposition that amosite asbestos, which is generally the form of asbestos used in asbestos insulation, is so dangerous that it would be hard to conclude that any exposure to it would be inconsequential or trivial. *See Ex. A* hereto. Once the court determines that the Kennedys have presented a triable issue concerning Mr. Kennedy's exposure to asbestos for which Tacoma Asbestos is responsible, Dr. Churg will be asked to opine concerning whether Mr. Kennedy's exposures to asbestos at Pier 23 for which Tacoma Asbestos is responsible were a substantial contributing factor in causing his mesothelioma. The Court also has authority under RAP 9.11(a) to order the taking of such testimony before deciding this appeal, if, in fairness to the Kennedys, the Court believes such evidence first should be taken.

more than enough to create a triable issue that Mr. Kennedy's exposure to and handling of asbestos from Tacoma Asbestos was a substantial factor in causing his mesothelioma. *See* Reply Br. at 20-25.

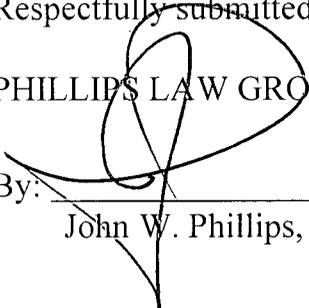
V. CONCLUSION

For the foregoing reasons, the Court should reverse summary judgment and remand for further proceedings.

DATED this 21st day of November, 2013.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By: 

John W. Phillips, WSBA #12185

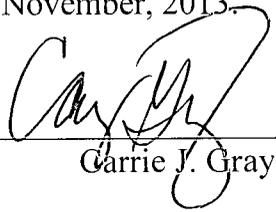
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CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy
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Timothy K. Thorson
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DATED this 21st day of November, 2013.



Carrie J. Gray

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Jack Kennedy Churg notes

Hx: Presented age 75 in 2011 with SOB, weight loss. Imaging showed a large pleural effusion. PET showed increased uptake along the effusion. Pleural nodules seen at thoracoscopy. Thoroscopic bx interpreted as a mesothelioma. Mechanical pleurodesis and decortication performed. Treated with chemotherapy.

PMH: Smoked 12 to 24 pack-years, quit in 1964. Aortic stenosis, CABG 12 yrs PTA.

Path:

22 slides NG11-1342 Kennedy, J PI Fluid Madigan Army Medical Center. Pleural fluid cytology specimen show large empty spheres of mesothelial cells (calretinin, WT-1 positive, neg for CK5/6, MOC-31, BerEP4). ? mesothelioma

16 slides NG11-1404 Kennedy, J PI Fluid Madigan Army Medical Center. Pleural fluid cytology specimen showing hemorrhagic fluid with rare groups of atypical cells (paucicellular specimen).

16 slides S11-13715 Kennedy, J Madigan Army Medical Center. Large pleural biopsy showing an epithelial malignant neoplasm in a greatly thickened pleura. Tumor forms adenomatoid patterns with attenuated glands, and tubulopapillary patterns. Tumor cells calretinin positive, negative for BerEP4, MOC-31. Definite mesothelioma.

Claimed Exposures: From Appendix A:

1964-1968: Worked at the Tacoma waterfront overhauling ships (adjacent to Tacoma Boat). Reconditioned boilers on WWII Barges, stripped boilers and then reinsulated by mixing asbestos cement and reapplying. Assisted in the removal and installation of pipe covering, steam valves, pumps. Also exposed to asbestos insulation products being replaced by other trades onboard liberty ships being renovated for the Navy.

1969-1979: Electrical technician Army National Guard. Exposed to asbestos insulation products being removed and replaced by other trades.

1960s: Performed sewer pipe repair at his own home.

1963 to 70: Performed several brake jobs on personal vehicles.

Impression: Epithelial mesothelioma of pleura caused by waterfront/shipyard work, possibly exposures in Army National Guard and possibly home exposure if to amphibole-containing pipe.



EXHIBIT A

1 **A** So that gives us less than a month.

2 **Q** And in that month period, can you be any more specific?

3 **A** No, except as I said before, they were prepared before I
4 got that -- that supplemental materials with the summary
5 of exposures.

6 **Q** Supplemental materials a couple of days ago?

7 **A** That's right.

8 **Q** With the depositions and so forth?

9 **A** That's right.

10 **Q** Okay. And so -- Dr. Churg, is it your view that every
11 exposure to -- that's above background level is, in fact,
12 a substantial factor in causing a person's mesothelioma?

13 **A** For chrysotile, it's certainly not true. For amosite,
14 it's a much more difficult proposition. Amosite is much
15 more dangerous than chrysotile. It produces mesothelioma
16 at vastly lower levels.

17 Now, could you have a trivial exposure to amosite?
18 The answer is I suppose so, although figuring out what
19 that is is difficult, but if you're getting exposures up
20 on the order probably of the current permitted level of
21 .1 fiber per cc, you're probably in a danger zone.

22 **Q** And I think you anticipated my next question. I was
23 going to ask you whether, in your view, there's any
24 particular threshold below which you believe a particular
25 exposure can not be considered a substantial factor in