

The Honorable Sharon Armstrong
Hearing Date: Friday, February 17, 2006
Time: 3:30 p.m.
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RANA FRENCH, as Personal Representative of
the Estate of RALPH DALE,

Plaintiff,

v.

SAGERHAGEN HOLDINGS, INC., et al.

Defendants.

Case No. 05-2-09268-8SEA

**DEFENDANT WARREN PUMPS,
LLC'S REPLY TO PLAINTIFF'S
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT AND
MOTIONS TO STRIKE**

I. RELIEF REQUESTED

In her Response to Warren Pumps' Motion for Summary Judgment, plaintiff largely rehashes arguments which have been soundly rejected on multiple occasions by Washington courts, including this Court.¹ Plaintiff offers no new arguments to explain why a pump

¹ In her Response, plaintiff claims that she is seeking "punitive damages from Warren Pumps." (Plaintiff's Response, p.2). Plaintiff has not alleged a claim for punitive damages, and it is well established that punitive damages cannot be recovered in Washington.

1 manufacturer such as Warren Pumps should be held liable for products that it neither made nor
2 sold. In addition, plaintiff relies on decedent's responses to leading questions from his
3 perpetuation deposition testimony even though Warren Pumps never had an opportunity to cross
4 examine him, and was given an inadequate time to fully develop his testimony during a
5 discovery deposition. Finally, plaintiff relies on numerous articles and publications that provide
6 no notice to Warren Pumps prior to 1973 (the last year that decedent worked for the Ketchikan
7 Pulp Mill) that asbestos-containing gaskets and/or packing may have ever presented a risk of
8 harm. Accordingly, Warren Pumps moves to strike this inadmissible evidence from the record.

9 II. MOTIONS TO STRIKE

10 When considering a Motion for Summary Judgment, a Court is permitted to consider
11 only that evidence that "would be admissible in evidence * * * ." CR 56(e). Numerous exhibits
12 submitted by the plaintiff in her Response to Warren Pumps' Motion for Summary Judgment do
13 not consist of admissible evidence and should not be considered. "A court may not consider
14 inadmissible evidence when ruling on a motion for summary judgment." King County Fire
15 Protection Districts #16, #36 and #40 v. Housing Auth. of King County, 123 Wash.2d 819, 826,
16 872 P.2d 516 (1994).

17 1. Motion to Strike Plaintiff's Exhibit "C" (Perpetuation Deposition Testimony 18 of Ralph Dale)

19 Warren Pumps moves the Court for an Order striking the perpetuation deposition
20 testimony of decedent Ralph Dale. Warren Pumps based this motion on the grounds that it did
21 not have an opportunity to cross examine decedent with respect to his perpetuation deposition
22 testimony, and it did not have an adequate opportunity to conduct a discovery deposition of him
23 with respect to its own products.

24 This matter was filed on March 21, 2005 against Warren Pumps and numerous other
25 defendants. Plaintiff's perpetuation deposition occurred one month later on April 21, 2005.
26 (Supp. Mattingly Dec., Ex. H). At the conclusion of that deposition, counsel for the defendants
reserved the right to cross examination pending the completion of a discovery deposition. (Id.

1 at p.113).

2 Plaintiff's discovery deposition began after his perpetuation deposition on April 21,
3 2005, and it continued on April 22, 28, and 29, 2005. Warren Pumps was unable to ask any
4 questions until April 29 due to the length of the examinations by several other defendants.
5 Because many defendants (including Warren Pumps) had not had an opportunity to examine
6 plaintiff, his counsel advised that she would "go around the room and give everybody 30
7 minutes." (Supp. Mattingly Dec., Ex. I at pp.5-6). A moment later, she reiterated that "after 30
8 minutes, I'll stop each person and we'll go and the next, and we'll keep going around the room
9 until we're done." (Id. at p.6).

10 During Warren Pumps' examination of plaintiff during his discovery deposition, after
11 questioning that totaled only 24 pages of transcript, plaintiff's counsel advised Warren Pumps
12 counsel as follows: "Steve, we have to move it around, so finish your questions." (Supp.
13 Mattingly Dec., Ex. I at p.49).

14 At the end of the day on April 29, 2005, counsel for defendants noted for the record that
15 the defendants had made their best effort to examine plaintiff within the limitations permitted by
16 his counsel, but that there were still many areas that needed to be addressed. (Supp. Mattingly
17 Dec., Ex. I at p.185-186). Warren Pumps further stated on the record:

18 MR. RIZZO: This is Steve Rizzo, just to go on the record, what I would like to do is
19 point out that I don't believe the perpetuation deposition is currently able to be used as
20 evidence in light of the fact that there's been no cross. And I think that that's at least in
21 part caused by the fact that the discovery deposition, was extenuated for health reasons,
and based on the number of defense counsel. And so even that I would say is subject o
our reservation to object to that in the even [sic] that the Plaintiff will attempt to use that,
if we're not capable of finishing one or both of the (indiscernible)."

22 (Supp. Mattingly Dec., Ex. I at pp.186-187).

23 No dates for either the completion of plaintiff's discovery deposition or cross-
24 examination on his perpetuation deposition were provided by plaintiff. He died on June 23,
25 2006, with his perpetuation deposition incomplete and Warren Pumps never having had the
26 opportunity to cross-examine him.

1 The transcripts from decedent's perpetuation deposition constitute hearsay. ER 801(c).
2 As a general rule, hearsay evidence is inadmissible. ER 802. Among the exceptions to the
3 hearsay rule is former testimony from a declarant who is unavailable for trial. ER 804(b)(1).
4 For former testimony to be admissible against a party as an exception to the hearsay rule, either
5 that party or a predecessor-in-interest must have had an opportunity and similar motive to
6 develop the declarant's testimony by direct, cross, or redirect examination. Id.

7 Plaintiff's perpetuation deposition testimony was not subject to cross-examination by
8 any defendant. Rather, plaintiff conducted the perpetuation deposition at a time when
9 defendants had very little information about the plaintiff's claims against them and at a time
10 when they had not had an opportunity to gather sufficient information to allow them to conduct
11 a meaningful cross-examination. Indeed, the defendants expressly reserved their right to
12 conduct a cross-examination of plaintiff's perpetuation deposition, but they were unable to
13 exercise that right due to plaintiff's failure to provide dates for the completion of testimony and
14 his subsequent passing. Accordingly, decedent's testimony should now be stricken from the
15 record as inadmissible hearsay. ER 802; ER 804(b)(1).

16 In addition, under Article I, Sec. 3 of the Washington Constitution, "[n]o person shall be
17 deprived of life, liberty, or property, without due process of law." Due process guarantees the
18 right to a full and fair hearing. Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wash.2d
19 418, 422, 511 P.2d 1002 (1973). Although the scope of due process can vary among different
20 types of proceedings, "cross examination is an integral part of both criminal and civil judicial
21 proceedings." Baxter v. Jones, 34 Wash.App. 1, 3, 658 P.2d 1274 (1983). Prior testimony must
22 be stricken where an adverse party is unable to complete an effective cross-examination. See
23 Rutger v. Walken, 19 Wash.2d 681, 143 P.2d 866 (1943); Thomas v. Dower, 162 Wash. 54, 297
24 P. 1094 (1931).

25 In Baxter, the Court of Appeals held that, although trial courts are given considerable
26 latitude in limiting the scope of cross examination, fundamental fairness required that the case

1 be remanded for a new trial where the trial court precluded the plaintiff from cross-examining
2 the defendant on issues pertinent to the plaintiff's claims. Baxter, 34 Wash.App. at 3-4. Here,
3 plaintiff's counsel limited the defendants' examination of many defendants, including Warren
4 Pumps, in his discovery deposition. More importantly, dates for the completion of his
5 discovery deposition or the cross-examination on his perpetuation deposition were never given.

6 In light of his inability to provide any testimony to identify any work with or around
7 Warren Pumps in his discovery deposition, cross-examination of plaintiff would have been vital
8 to Warren Pumps' defense. Accordingly, pursuant to the Washington's due process
9 requirements, decedent's perpetuation deposition transcript should be stricken.

10 Finally, this Court has previously addressed the issue presented in this motion and has
11 stricken the decedent's deposition transcripts with respect to two (2) similarly situated parties.
12 (Supp. Mattingly Dec., Ex. J). The same result should apply for Warren Pumps.

13 **2. Motion to Strike Plaintiff's Exhibits "K" Through "S"**

14 Plaintiff offers into evidence numerous portions of articles, abstracts, and similar
15 documents that constitute inadmissible hearsay and are inadmissible under ER 401, ER 402, and
16 403.

17 Plaintiff purportedly offers these articles to establish that Warren Pumps had knowledge
18 of the risks associated with certain asbestos-containing products as far back as the 1940's and
19 1950's. However, the articles do not make any mention of the specific type of product at issue
20 with respect to Warren Pumps (gaskets) and there is no indication from plaintiff as to how these
21 documents would convey knowledge to Warren Pumps as to any health risks associated with
22 gaskets. Moreover, even if the articles were somehow relevant, plaintiff fails to establish that
23 Warren Pumps was aware of the articles or was in a position to learn of them.

24 In addition, the articles at issue all constitute hearsay and are inadmissible. ER 801(c);
25 ER 802. They have not been properly authenticated, and they are not admissible under any
26 exception to the hearsay rule.

1 **3. Motion to Strike Plaintiff's Exhibits "T" Through "X"**

2 Plaintiff's exhibits "T" through "X" consist of a series of five (5) articles from the
3 Southern Power and Industry publication from 1945 and 1945. These exhibits should be
4 stricken as inadmissible on the grounds that they constitute inadmissible hearsay, are not
5 relevant, and ER 403.

6 Of these articles, three (3) do not even mention asbestos: Exhibit T, U, and V. Since
7 these articles do not even mention asbestos and otherwise contain no information pertinent to
8 this litigation, they are irrelevant and should be stricken. ER 401, 402, 403. Moreover, the
9 articles constitute inadmissible hearsay. ER 801(c), 802.

10 The final two (2) articles, Exhibits "W" and "X," mention asbestos, but only in passing.
11 No reference is made to the specific product at issue with respect to Warren Pumps (gaskets),
12 and plaintiff makes no attempt to explain how these articles are expected to notify a party such
13 as Warren Pumps that gaskets could present a risk of harm. Accordingly, these articles should
14 be stricken from the record on the grounds that they are not relevant and constitute inadmissible
15 hearsay. ER 401, 402, 403, 801(c), 802.

16 **III. EVIDENCE RELIED UPON**

17 In addition to the evidence previously identified in its Motion for Summary Judgment,
18 Warren Pumps relies on the Supplemental Declaration of J. Michael Mattingly in Support of
19 Defendant Warren Pumps, LLC's Motion for Summary Judgment.

20 **IV. ARGUMENT**

21 In her Response to Warren Pumps' Motion for Summary Judgment, plaintiff simply
22 reiterates arguments that have been considered and rejected by this Court on numerous
23 occasions, including in this case for other defendants. Plaintiff offers no new argument nor any
24 compelling reason why this Court should rule differently from its prior common sense rulings
25 on the issues before the Court on many prior occasions.

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1 **I. Plaintiff Has Failed to Offer Admissible Evidence that He Was Ever Exposed to an**
2 **Asbestos-Containing Product Made or Sold by Warren Pumps.**

3 As noted above, Warren Pumps has moved the Court for an Order striking decedent's
4 perpetuation deposition testimony on several grounds. If granted, then plaintiff's testimony is
5 insufficient to establish any exposure to a Warren Pumps pump, much less one with some
6 asbestos-containing components.

7 In Lockwood v. ACandS, Inc., 109 Wash.2d 235, 245, 744 P.2d 605, 612 (1987), the
8 Supreme Court expressly held that a plaintiff must offer admissible evidence to support an
9 inference that respirable fibers from the defendant's product were present where the plaintiff
10 worked. The plaintiff must establish a reasonable connection between the injury, the product
11 causing the injury, and the manufacturer or seller of that product. Id. Notably, plaintiff does
12 not even attempt to distinguish these fundamental holdings from the Washington Supreme
13 Court's Lockwood opinion.

14 The Supreme Court's Lockwood opinion further holds that the mere presence of a
15 manufacturer's product at the plaintiff's work site is not enough by itself. Rather, the mere
16 presence of the product only creates a possibility that the product caused the plaintiff's injury.
17 The Supreme Court instructed that trial courts must scrutinize the plaintiff's proof of causation
18 to determine whether there is sufficient evidence of actual exposure. Lockwood, 109 Wash.2d
19 at 247.

20 Decedent's own discovery deposition testimony establishes that he had no recollection
21 of ever being in the vicinity of a Warren Pumps pump when it was being repaired, whether
22 during the mill's operation, a shutdown, or repair in the shop. (Mattingly Dec., Ex. C at pp.39-
23 40, 45-46). Indeed, this is not surprising in light of the fact that the Ketchikan Pulp mill covers
24 approximately ten (10) acres and encompasses approximately twenty-five (25) buildings.
25 (Mattingly Dec., Ex. C at pp.31-32).

26 Decedent further acknowledged that he had no knowledge whether any Warren Pumps
pump included an asbestos-containing component. (Id. at p.46). Moreover, he testified that the

1 pumps at the Ketchikan Pulp Mill arrived without any flange gaskets or insulation. (Id. at p.10;
2 Ex. B at pp.112-114). The decisions whether to insulate pumps, the type of insulation used, and
3 the types of flange gaskets to use were made by the mill, not the pump manufacturers.
4 (Mattingly Dec., Ex. B at pp.112-113). Accordingly, assuming that any of the products that the
5 Ketchikan Pulp Mill or its employees chose to use in conjunction with a Warren Pumps pump
6 contained asbestos, those asbestos-containing products were not made or sold by Warren
7 Pumps. It cannot be held liable for other manufacturers gaskets or insulation.

8 With respect to packing, a third type of component frequently identified by plaintiffs
9 with respect to pumps, the record is silent. Decedent did not testify about the replacement of
10 packing in a Warren Pumps pump, and even if he had, there is no evidence in the record to
11 suggest that any such pump's packing contained asbestos.

12 Since plaintiff is unable to identify any exposure to an asbestos-containing Warren
13 Pumps pump, summary judgment is appropriate.

14 **II. Warren Pumps Did Not Owe a Duty to Warn With Respect to Products that it**
15 **Neither Made Nor Sold.**

16 Plaintiff, as in case before, seeks to hold Warren Pumps (and other defendants) liable
17 under a theory that they owed a duty to warn users of the risks associated with products that
18 Warren Pumps neither made nor sold. Plaintiff's novel theory, rejected by this Court on many
19 prior occasions, has not been recognized by any Washington court, and the reported opinions
20 from other courts have almost uniformly rejected her theory.²

21 The only Washington cases cited by plaintiff in support of her theory that a
22 manufacturer owes a duty to warn with respect to other manufacturers products are easily
23 distinguishable. In Bich v. General Electric, 27 Wash.App. 25, 614 P.2d 1323 (1980), the
24 plaintiff was injured when a transformer manufactured by defendant GE exploded. The cause

25 ² Because the overwhelming (if not universal) weight of reported opinions supports Warren Pumps,
26 plaintiff relies instead on several unreported opinions from trial courts in other states. Such authority is
not permitted in Washington and should be given no consideration in this case.

1 of the explosion was a fuse manufactured by Westinghouse that had been substituted into the
2 GE transformer after the product had left GE's control. Among other theories, plaintiff
3 contended that GE was liable for failure to warn about the substitution of a Westinghouse fuse
4 with certain time delay properties. The Court of Appeals held that GE did not have a duty to
5 warn of the risk created by the Westinghouse fuse, although it could be held liable for the risks
6 associated with the time-delay characteristics of its own fuse. Plaintiff never explains how this
7 ruling purports to support her position that, unlike GE, Warren Pumps should be held liable for
8 not warning about products that it neither made nor sold. Warren Pumps was in the business of
9 manufacturing and selling pumps, not gaskets.

10 The Court of Appeals' opinion in Parkins v. Van Doren Sales, Inc., 45 Wash.App. 19,
11 724 P.2d 389 (1986), is even more attenuated to the issues presented in this case. In Parkins,
12 the defendant sold various components to plaintiff's employer that it knew or should have
13 known could be assembled into a conveyer belt. When the defendant sold fully manufactured
14 conveyer belts, it included guards and a warning at a certain point where the belt was fed over a
15 roller called a "nip point." However, no guards or warning were supplied with the components
16 that were sold to plaintiff's employer. Plaintiff was injured when her arm was caught in a nip
17 point. The Court of Appeals held that the defendant could be held liable because the parts that
18 it sold were designed to be assembled in one unique way, and that design did not incorporate
19 guards or warnings. Notably, and unlike the case before this Court, the plaintiff was not
20 seeking to hold the defendant liable for products made or sold by some other manufacturer.

21 Plaintiff offers no other persuasive argument why Warren Pumps should be held liable
22 for products that it neither made nor sold. Summary judgment is appropriate.

23 **III. Plaintiff Has Failed to Establish That He Was In the Presence of Any Warren**
24 **Pumps Pump When an Original Internal Gasket Was Removed.**

25 In a final attempt to salvage this claim, plaintiff points to a record showing that Warren
26 Pumps supplied a single pump that may have included internal asbestos-containing gaskets to
the Ketchikan Pulp Mill in 1953. However, plaintiff's claims still fails because, as shown

1 above, there is simply no admissible evidence that decedent was ever in the vicinity of that
2 particular pump when the original internal gaskets were removed (if ever).

3 Of even more concern, decedent was not continuously employed by the Ketchikan Pulp
4 Mill after the pump's delivery in 1953. Indeed, decedent did not work at the mill from 1954
5 (after the construction of the mill was completed) through 1956, and again did not work at the
6 mill from 1957 through 1959. It is entirely speculative for plaintiff to suggest that the decedent
7 would have been present during the first occasion when internal gaskets were removed from a
8 Warren Pumps pump (if they were, in fact, ever removed). Under Washington law, a claim that
9 rests solely on speculation will not survive a motion for summary judgment. Marshall v. Bally's
10 Pacwest, Inc., 94 Wash.App. 372, 381, 972 P.2d 475 (1999). Because plaintiffs have no
11 admissible evidence showing that decedent was ever exposed or harmed by any asbestos-
12 containing products manufactured, sold, leased, distributed or certified by Warren Pumps,
13 plaintiff's claims against Warren Pumps should be dismissed.

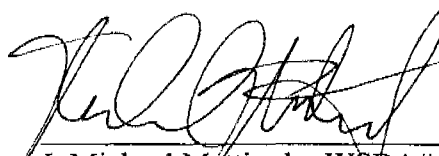
14 CONCLUSION

15 For the reasons stated above, the Court should grant Warren Pumps, LLC's Motion for
16 Summary Judgment.

17 Dated: February 16, 2006.

18 Respectfully submitted,

19 STEVEN V. RIZZO, P.C.

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22 J. Michael Mattingly, WSBA# 33452
23 Attorney for Warren Pumps, LLC
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8 SUPERIOR COURT FOR THE STATE OF WASHINGTON
9 FOR THE COUNTY OF KING

10 RANA FRENCH, as Personal Representative of
11 the Estate of RALPH DALE,

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14 SABERHAGEN HOLDINGS, INC., et al.,

15 Defendants.

Case No. 05-2-09268-8SEA

**DECLARATION OF DELIVERY
AND/OR MAILING**

16
17 I am employed by the law firm of Steven V. Rizzo, P.C. in Portland, Oregon. I am over
18 the age of eighteen years and not a party to the subject cause. My business address is Lincoln
Place, Suite 350, 1620 SW Taylor Street, Portland, OR 97205.

19 On the date below, I caused to be served **Defendant Warren Pumps, LLC's Reply to**
20 **Plaintiff's Response to Motion for Summary Judgment And Motion to Strike** on all parties
in this action by transmitting a true copy thereof in the following manner unless otherwise
indicated.

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18 I declare under penalty of perjury and under the laws of the State of Washington (RCW
19 9A.72.085) that the foregoing is true and correct.

20 Executed at Portland, Oregon, this 16 day of February, 2006.

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Rosanna Santos
Litigation Assistant