9-19-2007

Reply to State's Opposition to Petitioner's Motion for Reconsideration re: Legal Issue Number 2 07-2-02323-2-54

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("**NEWS**"),

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

Hearing Date:
3:00 p.m., Friday, September 21
(same date & time as the status conference)

No. 07-2-02323-2 SEA

REPLY TO STATE'S OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION RE: LEGAL ISSUE NUMBER 2

TABLE OF CONTENTS

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

I. INTRODUCTION

The Petitioners' Motion For Reconsideration Re Legal Issue #2 concerns only one of the issues raised in the August summary judgment proceeding – i.e., the statutory interpretation issue of whether RCW 29A.150.210 currently defines the substantive content of "basic education" in our State. The State's Opposition does not refute the reasons Petitioners presented for why this Court should reconsider its decision to not grant either party judgment on that issue.

II. RED HERRINGS

Petitioners initially note that several of the State's assertions have nothing to do with the statutory interpretation of RCW 29A.150.210. Three quick examples illustrate this point:

- The State asserts its education spending is "$1.8 billion more in the 2007 legislative session alone".[1] But that assertion has nothing to do with the legal issue of whether RCW 29A.150.210 defines the substantive content of "basic education" in our State. [Nor is the State's assertion candid – for its own testimony confirms the falsity of its representation to this Court.[2]]
- The State argues that Article IX only requires the State to provide funds for "basic education" or provide opportunities for "basic education" – not actually provide all children a "basic education". But that argument has nothing to do with the legal issue of whether RCW 29A.150.210 defines the substantive content of that "basic education". Instead, it's a repetition of the educational-outcomes-don't-matter argument that the State made on other issues raised in the August summary judgment proceedings.
- The State represents to this Court that "in fact, the adequacy of funding will be the sole issue for trial as the Petitioners have already conceded", and "there is no complaint regarding the State's "definition" of basic education".[3] But in truth Petitioners argue the exact opposite of that supposed concession,[4] and their complaint expressly seeks a declaratory judgment that RCW 29A.150.210 currently defines "basic education".[5]

In short, Petitioners respectfully request that this Court ignore the red herrings throughout the State's Opposition and focus instead on the merits of Petitioners' motion.

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[1] *State's Opposition Brief at 2:28.*

[2] *5/29 Complete Bergeson Tpt. Dec. at Tpt. pp 83:7-84:8 & Ex. 10 (confirming the $1.8 billion figure asserted by the State is in truth a $143 million/year State funding increase).*

[3] *State's Opposition Brief at 7:22-25 (emphasis in original).*

[4] *Petitioners' August 10 Closing Brief at 12:3-22.*

[5] *Petitioners' Complaint at ¶¶ 30 & 108(d) and Request For Relief ¶1.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

III. MERITS

1. Legislature's duty to define "basic education" consistent with Tab 2. Petitioners' motion points out the *Seattle School District* decision held that "The Legislature has the duty to define 'basic education'." 90 Wn.2d at 484. The State responds that this ruling should be ignored because the Supreme Court made it "at the outset of its opinion".[6] But the State offers no legal authority for its proposition that rulings at the beginning of Supreme Court opinions should be ignored. [Nor did the Supreme Court make this ruling only "at the outset" – for it reiterated throughout its opinion that the legislature has at least two duties: (1) to define "basic education" with additional substantive content beyond that in Tab 2 ***and*** (2) define a basic program of education to provide that basic education.[7]]

2. Parties' existing statutory interpretation dispute. Petitioners' motion points out that the parties actively dispute which statutory provision should be interpreted to provide the current legislative definition of "basic education" in compliance with the Supreme Court's above ruling – with Petitioners' interpreting the four numbered provisions of RCW 28A.150.210 to be that definition, and the State interpreting the program of education provided by RCW 28A.150.220 *et seq.* to be the equivalent of that "basic education" definition.[8] The State

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[6] *State's Opposition Brief at 5, n.3.*

[7] *E.g., 90 Wn.2d at 482 ("The Legislature must act to carry out its constitutional duty by defining and giving substantive content to 'basic education' and a basic program of education"), at 519 (noting legislature had not yet passed legislation "defining or giving substantive content to 'basic education' or a basic program of education. Thus, the Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to them."), at 537 ("We have great faith in the Legislature and its ability to define 'basic education' and a basic program of education"), and thus at 484 ("The Legislature has the duty to define 'basic education' ") (emphasis added)).*

[8] *Petitioners' statutory interpretation is in their August 10 Closing Brief at 2:3-4:7, May 29 Reply Brief at 1:15-2:19; and May 4 Motion at 5:6-6:2 & n.13 and 12:1-14:12; accord State's May 21 Opposition Brief at 7:25-26 & 8:5-6 (admitting State adopted the Essential Academic Learning Requirements (EALRs) to establish the basic reading, writing, math, science, etc. skills set forth in RCW 28A.150.210); State's August 3 Supplemental Opposition Brief at 7:22-8:2 (admitting "The EALRs for reading, writing, math and science were all developed to carry out the four goals in the 1993 HB 1209 [RCW 28A.150.210]"). The State briefs its statutory interpretation in its May 21 Opposition Brief and August 3 Supplemental Opposition Brief, and reiterates it again in its September 17 Opposition To Reconsideration at 6:1-3 & n.3.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

does not dispute the existence of that dispute. Instead, the State insists this Court should not rule on that dispute because "unless and until the Legislature reforms the definitions ... there is no justiciable controversy."[9] But the State provides no binding legal authority for its notion that a current controversy over the interpretation of an existing statute is not justiciable if the statute might be changed in the future. [The State similarly provides no binding legal authority for its repeated claims that a court's ruling on the interpretation of education statutes impermissibly "meddles" in the legislature's work – and misses the judicial branch's fundamental role in our system of checks and balances.]

3. Statutory interpretation is a question of law. Petitioners' motion points out that none of the parties' briefing disputed that this statutory interpretation issue is a pure question of law for the Court to decide. The State responds by now insisting (for the first time) that issues of statutory interpretation are questions of fact.[10] But the *Ballard Square* case it cites for that proposition did not make that holding.[11] And the "fact" testimony that the State cites (the Salvi and Wilhoft testimony[12]) is the testimony that this Court struck from the record precisely because that testimony was about legal conclusions (for the Court to decide) rather than factual matters (for witnesses to testify about). [Indeed, is the State really contending that whenever the interpretation, meaning, or intent of a statute is raised in a case, the legislators who voted for that statute should (or even can) be deposed and called as fact witnesses at trial? Of course not. The meaning of statutes is a question of law for Courts to resolve based on the statute the legislators

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[9] *State's Opposition Brief at 8:26-9:1 (emphasis added).*

[10] *E.g., State's Opposition Brief at 5, n.2 (citing the Ballard Square case).*

[11] *Ballard Square upheld a summary judgment order based on statutory interpretation and the corresponding issue-of-law de novo standard. 158 Wn.2d at 612. That makes sense because Washington case law uniformly holds that "interpretation of a statute is a question of law, subject to de novo review". Restaurant Development v. Canawill, 150 Wn.2d 674, 681 (2003) (construing statutory language and legislative history as a matter of law); accord, Cosmopolitan Engineering v. Ondeo, 159 Wn.2d 292, 298 (2006) (statutory interpretation is a question of law); Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 808 (2001) (using "principles of statutory construction, legislative history, and relevant case law" to decide dispute over statutory construction as a matter of law).*

[12] *E.g., State's Opposition Brief at 5:7-8, 3:20-21, 6:5-6.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

passed – not the depositions, declarations, or trial testimony of legislators or other government witnesses as to their "intent" when they enacted that statute.]

4. Rule 56 mandates judgment on matters of law shall be granted forthwith. Petitioners' motion points out that Rule 56(c) mandates that "The judgment sought shall be rendered forthwith if ... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The State does not contest this point.

5. Rule 59 allows this Court to do substantial justice. Petitioners' motion points out that Rule 59(a)(9) allows this Court to reconsider a decision if it determines that "substantial justice has not been done". The State responds that reconsidering a decision in order to do "substantial justice" should be "relatively rare".[13] But rare does not mean never. And the State does not refute the various reasons presented in Petitioners' motion as to why this Court's resolving the statutory interpretation issue at hand now (rather than later) would do substantial justice in this case.

6. If the State's statutory interpretation is correct, there is nothing for trial. Petitioners' motion points out that the fundamental issue in this case is whether the State is complying with its "basic education" obligation under Washington law. The State's Opposition agrees with this point, asserting that this "entire case boils down to whether or not the State is

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[13] *State's Opposition Brief at 3:13-16. Moreover, the one case the State cites to support its "relatively rare" argument held that courts should rarely use Rule 59's substantial justice provision to overturn a* ***jury verdict*** *when they "simply disagree[] with the jury". Knecht v. Marzano, 65 Wn.2d 290, 291-92 (1964) (reversing trial court's decision to order new trial based on an "impression" and "strong feeling that substantial justice was not done"). Such reversals are not allowed because "a trial judge is not a 'thirteenth juror' ". State v. Williams, 96 Wn.2d 216, 221-22 (1981)(explaining Knecht). Petitioners, however, are not asking this Court to substitute its opinion for a jury's. They are instead asking for a legal ruling that will streamline discovery and trial. Not only does CR 59 allow this Court to make such a ruling, CR 16 encourages this Court to do so to "expedite the final determination of the issues being litigated". In re Glant's Estate, 57 Wn.2d 309,312 (1960). See also Karl B. Tegland, 3A* Washington Practice: Rules of Practice *at 355 (explaining CR 16 adoption to "shorten trial time and limit the issues to be tried").*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

making ample provision for education in compliance with Article IX."[14] The State's Opposition also does not dispute that if this Court adopts the State's (rather than Petitioners') statutory interpretation, then a trial may be completely unnecessary because the State interprets the basic program of education established by RCW 28A.150.220 *et seq.* to be the equivalent of the legislature's "basic education" definition – and insists that the State's enactment and funding of that program is therefore all Washington law requires. The State accordingly does not refute that if its statutory interpretation is correct, substantial justice is best served by this Court issuing that statutory interpretation ruling now, instead of burdening all concerned with preparing for a trial that (under the State's statutory interpretation) is completely unnecessary as a matter of law.

7. Proving whether the "basic education" standard is met requires knowing what the definition of that "basic education" is. Noting the practical realities of this case and the experience of litigation in other States, the Petitioners' motion also points out that this Court's decision to not rule on the legislative definition of "basic education" under the Washington statutes increases the burden and expense of the upcoming discovery phase and eventual trial – for the parties cannot effectively or efficiently prepare for a trial on whether the State is complying with its "basic education" duty if they do not know what the legal definition of that "basic education" is. The State accordingly does not refute that substantial justice is best served if this Court rules on this legal interpretation issue before the parties embark on discovery and trial preparation.

8. Delaying this statutory interpretation ruling only invites wasteful remand & retrial. Noting the practical realities of this case and the experience of litigation in other States, the Petitioners' motion also points out that a court's failure to establish the underlying legal standard that will apply before the trial at hand runs a significant risk of unnecessarily wasting the time and resources of the litigants and judicial system – and needlessly delaying resolution

[14] *State's Opposition Brief at 7:19-20. Recall that the Seattle School District case established that a "basic education" is the "education" required by Article IX.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

for the children whose education is ultimately at stake in such litigation. The State's response is that this point should be ignored because cases like this "are inevitably appealed and in most instances retried in whole or in part."[15] But that response misses the point. Such cases are re-tried (and resources wasted, and children's education delayed) precisely because the trial court in those cases applied the wrong legal definition of the education State law required. The State's point that re-trials inevitably result in cases where the legal standard is not resolved first therefore supports (rather than negates) the fact that substantial justice is best served if the definition of "basic education" is established before the parties undertake lengthy discovery and trial over whether or not that "basic education" standard is being met – a step which, as Petitioners' motion noted, would also allow the parties to confirm the correctness of that ruling on the governing legal standard by seeking interlocutory appeal if appropriate.

9. Delaying this statutory interpretation ruling defeats the value of the upcoming Washington Learns II exercise touted by the State. As Petitioners have pointed out previously, the Washington Learns I report noted the State should consider redefining "basic education" by amending the statute at issue in this motion – i.e., RCW 28A.150.210.[16] And the Respondent State thus noted in the underlying summary judgment proceedings that the State is about to commence a Washington Learns II study which (according to the authorizing bill) promises to "make provision for some significant steps towards a new basic education funding system", and whose first responsibility is to "review the definition of basic education and all current basic education funding formulas".[17] The Petitioners' motion accordingly pointed out that this new Washington Learns II endeavor – along with its studies and resulting report – will be of doubtful relevance if it does not employ the same "basic education" definition that this Court eventually holds is the proper interpretation under Washington law. The State does not

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[15] *State's Opposition Brief at 8:5-7.*

[16] *5/29 Complete Bergeson Tpt. Dec. at Tpt. pp 79:10-80:25 & Ex. 6 at 48-9.*

[17] *Senate Bill 5627, Sections 1 & 2.*

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

dispute the fact that taxpayer funds for the State's upcoming education study would be better directed – and our State's children would receive their Constitutionally mandated "basic education" more promptly – if this Court were to rule, before the above Washington Learns II study begins, on this case's currently active dispute as to whether RCW 28A.150.210 provides the current definition of "basic education" under Washington law. Instead, the State's responds that this Court should simply ignore this fact. That is not substantial justice.

IV. CONCLUSION

The State clearly does not want this Court to rule on the statutory interpretation issue at hand – i.e., whether the four numbered provisions of RCW 29A.150.210 currently define the substantive content of "basic education" in our State in accordance with Tab 2. But the State does not refute the Petitioners' underlying point that the parties, this Court, our State's taxpayers, and the students whose education is ultimately at stake in this suit are all better served if this Court resolves the parties' dispute over the legal interpretation of "basic education" under Washington law now rather than later. The State does not refute that this is a pure issue of statutory interpretation as to which one side or the other is entitled to a judgment as a matter of law "forthwith" under CR 56. The Petitioners therefore respectfully request that this Court grant their motion for reconsideration on legal issue #2, and enter judgment for either the State or the Petitioners on this case's threshold legal issue of statutory interpretation.

RESPECTFULLY SUBMITTED this 19th day of September, 2007.

FOSTER PEPPER PLLC

Thomas F. Ahearne, WSBA No. 14844
Edmund W. Robb, WSBA No. 35948
Attorneys for Petitioners

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206)-447-9700

Exhibit 1

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("**NEWS**"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

Hearing Date:
3:00 p.m., September 21, 2007

No. 07-2-02323-2 SEA

[PROPOSED]
ORDER GRANTING PETITIONERS' MOTION FOR RECONSIDERATION REGARDING LEGAL ISSUE NUMBER 2

Clerk's Action Required

THIS MATTER came before this Court on Petitioners' Motion For Reconsideration, which was fully briefed by the parties and argued at the September 21, 2007 status conference. This Court has considered the pleadings and files in this case, including:

1. The August 24, 2007 Order Denying Petitioners' Motion For Summary Judgment (including pleadings listed therein);

2. Petitioners' September 4, 2007 Motion For Reconsideration Re: Legal Issue Number 2;

3. Respondent's September 17, 2007 Opposition To Motion For Reconsideration Of Ruling Re: RCW 28A.150.210; and

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

4. Petitioners' September 19, 2007 Reply To State's Opposition To Petitioners' Motion For Reconsideration Re: Legal Issue Number 2.

Having reviewed the materials submitted by the parties; having heard from the parties, and the Court being fully informed,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Petitioners' Motion For Reconsideration Re: Issue Number 2 is GRANTED.

2. The four numbered provisions of RCW 29A.150.210 currently define the substantive content of "basic education" in our State.

DATED this _____ day of September, 2007.

The Honorable Paris K. Kallas
Washington Superior Court Judge

Presented by:
FOSTER PEPPER PLLC

Thomas F. Ahearne, WSBA No. 14844
Edmund W. Robb, WSBA No 35948
Attorneys for the Petitioners

Approved as to form and for entry;
Notice of presentation waived:
OFFICE OF THE WASHINGTON ATTORNEY GENERAL
ROBERT M. MCKENNA

William G. Clark, WSBA No. 9234
David S. Stolier, WSBA No. 24071
Jon P. Ferguson, WSBA No. 5619
Dierk Meierbachtol, WSBA No. 31010
Attorneys for the Respondent State

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Exhibit 2

unfit for use." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). A constitution is "intended to endure for the ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416, 4 L. Ed. 579, 619. In short, the constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, as it is, a living document with current effectiveness. As it was so well stated by Mr. Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433, 64 L. Ed. 641, 40 S. Ct. 382, 11 A.L.R. 984 (1920):

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created a nation. The case before us must be considered in the light of our whole experience and not merely in that

[13] Consequently, the State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas. *Robinson v. Cahill*, 62 N.J. 473, 515, 303 A.2d 273 (1973); *see also Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967). Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. *See Wisconsin v. Yoder*, 406 U.S. 205, 221, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain

TAB 2

maturity and understanding. The constitutional right to have the State "make ample provision for the education of all [resident] children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the marketplace of ideas.

EXHIBIT 2 Hearing 2-7-22

and judgment as to express these same broad educational concepts in terms of constitutional rights. The trial court did not, nor do we, deal with the above mentioned educational concepts as fully definitive of the State's paramount duty. Rather, we hold that they constitute broad guidelines that the effective teaching and opportunities to learn these essential skills make up the *minimum* of the education that is constitutionally required.

We hold further that the mandate of Const. art. 9, § 1 is addressed to the State and requires, as a first priority, full sufficient funds for the general and uniform system of public schools" which the *Legislature* is obligated to provide pursuant to Const. art. 9, § 1. Through this system our children will receive their constitutionally guaranteed education.

B. Legislative implementation of State's mandatory duty.

Although the mandatory duties of Const. art. 9, § 1 are imposed upon the *State*, the organization, administration, and operational details of the "general and uniform system" required by Const. art. 9, § 2 are the province of the *Legislature*. In the latter area the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and having acted, whether it has done so constitutionally. Within the parameters, the system devised is within the domain of the Legislature.

[14] While the judiciary has the duty to construe and interpret the word "education" by providing broad constitutional guidelines, the Legislature is obligated to give spe-

The Honorable Nicole MacInnes
Hearing Date: September 24, 2007
Hearing Time: 9:00 am
Oral Argument Requested
Moving Party

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GENE W. McCLEARY,

Plaintiff,

v.

ALBANY INTERNATIONAL; et al.,

Defendants.

NO. 03-2-37208-1 SEA

DEFENDANT SCAPA DRYER FABRIC, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF JAMES MILLETTE

Brayton Group 2

I. INTRODUCTION

Defendant Scapa Dryer Fabrics, Inc., submits this reply in support of its motion in limine to exclude testimony of plaintiff's expert, James Millette, about tests he performed in 2003 and 1998 on dryer felt materials, and his papers titled "Dryer Felts Fiber Release Testing" dated January 27, 2003, and "Microscopical Studies of the Asbestos Fiber Releasability of Dryer Felt Textiles" dated 1999. Exs. A and B to 9/10/07 Christopher S. Marks Declaration. Plaintiff's response does not show that Dr. Millette's tests of dryer felts followed a generally accepted scientific protocol, nor does plaintiff establish that Dr. Millette's testimony about those tests and related papers would assist the trier of fact under the circumstances of this case.

II. ARGUMENT IN REPLY

Plaintiff wants to introduce certain testimony of Dr. Millette to support his contention that he has an asbestos-related disease caused by asbestos allegedly released from Scapa dryer

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

felts. Millette's 9/5/07 deposition transcript is not yet available, but his July 2007 deposition in Barabin v. Albany International Corp., King County No. 06-2-39452-6 SEA and deposition testimony in other cases show that Millette's testing of dryer felts discussed in the 1999 and 2003 reports was not performed in a scientifically sound manner, nor was it representative of actual working conditions at any paper mill. See Marks Declaration, Exs. D-H.

A. Millette's 2003 and 1998 Tests Did Not Follow a Generally Accepted Protocol.

Plaintiff's argument that Millette used NIOSH Methods 7400 and 7402 in his tests to count asbestos fibers misses the mark. If the asbestos fibers he purported to count were not the result of a reliable test, then his counting methods are irrelevant. Millette claims that his 2003 test protocol was "based on information" from U.S. Consumer Product Safety Commission (CPSC) Memorandum of October 18, 1985, and U.S. Environmental Protection Agency (EPA) 600/S2-85/044, and that his 1998 glove box test was based on protocols from the same agencies. Exs. A and B. He did not comply, however, with any of the following EPA protocol mandates for verification of test results:

> (1) performing glove box experiments of asbestos release rates to develop and verify consistent fiber generation and sampling analytical procedures;
>
> (2) developing a mathematical model that accounts for the environmental field parameters and predicts asbestos breathing zones concentration in the field using glove box release rate data;
>
> (3) performing full room tests (in a standard test room) simulating field conditions in an attempt to calibrate the field model; and
>
> (4) conducting field experiments to verify the usefulness of the model in predicting asbestos breathing zone concentrations in the field from glove box asbestos release data.

Ex. H, 6/16/98 Millette Dep. at 139, 188-89, 194, and 230. Moreover, in contrast to the 2001 continuous 30-day study at Western Michigan University simulating plant conditions, Millette's 2003 test lasted only 10 minutes, and did not reflect actual papermaking working conditions. Compare Ex. A with Ex. C; see also Ex. G, 7/13/07 Dep. at 23-25, 28-36.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

The 1998 glove box test likewise did not comply with the EPA protocols. Ex. B. In addition, the Post-It note and "finger touch" techniques he says he used in the 1998 study, Ex. B, are not generally accepted scientific methodologies, and have apparently only been used in asbestos litigation. See Ex. F at 163. Plaintiff's response fails to show that the scientific community has accepted Millette's "protocol" as a reliable and verifiable methodology for testing potential asbestos fiber release from dryer felts.

The analysis under Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), as to whether offered evidence is based on established scientific methodology, "requires both an accepted theory and a valid technique to implement that theory." Grant v. Boccia, 133 Wn. App. 176, 179, 137 P.3d 20 (2006), rev. denied, 154 P.3d 919 (2007) (citation omitted) (holding that plaintiffs provided no evidence that their experts' methodologies were sufficiently established to have gained general acceptance); see also State v. Huyhn, 49 Wn. App. 192, 194-95, 742 P.2d 160 (1989).

B. Millette's Tests Do Not Reflect the Relevant Plant Conditions or Practices and Are Irrelevant; Thus, Millette's Testimony About Them Will Not Be Helpful to the Jury.

Results of experiments are "helpful" and admissible only if "the conditions under which they are conducted are substantially similar to those existing at the time of the . . . occurrence in question." Knight v. Borgan, 52 Wn.2d 219, 230, 324 P.2d 797 (1958). Evidence of experiments "should be admitted with care -- and only when it appears that the conditions under which the test was made and all of the surrounding circumstances are reasonably comparable to those with which the court is concerned." Quinn v. McPherson, 73 Wn.2d 194, 201-02, 437 P.2d 393 (1968) (citation omitted). The burden of demonstrating similarity rests with the party seeking to admit the evidence. Id. at 201.

Plaintiff provides no support for his assertion that Millette's tests mimic the way that dryer felts are used in a paper mill, much less the Weyerhaeuser Longview Paper Mill, and

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

Millette's own testimony belies that assertion. Although Millette thought, for purposes of his 2003 study, that a worker "might" use different angles that those used in the 30-day Western Michigan University study conducted to replicate actual papermaking processes, Millette did not record what angles he used over the 10-minute period of his test. Ex. D at p. 36; Ex. G at 33. In designing his 1998 test, he did not observe or conduct any tests of a dryer felt in use. Ex. H at 185. He did not determine the percentage of liquid or moisture typically found in a dryer felt or account for the effect of the composition of paper stock. Ex. F at 32-33. The same is true for his 2003 test. Ex. A. In both instances he failed to simulate actual blowdown practices.[1] Indeed, Millette has never seen a blowdown or a paper break at any commercial paper mill. Ex. G at 24-25.

Millette has admitted that his tests cannot be used to make a quantitative estimate of actual exposure in a paper mill from working with or around dryer felts. Ex. F at 162. He conducted no air sampling at any mill to determine what level of exposure, if any, a worker would have from working around an asbestos-containing dryer felt. Id. at 25. He likely cannot provide any actual exposure number for Mr. McCleary as he has been unable to do so for plaintiffs in other mills. E.g., Ex. G at 43. Millette agreed that the potential for asbestos exposure varies by job location and work activity, and that the mere fact of asbestos released from a product does not mean it will be breathed in; it has to be in the breathing vicinity. Id. at 26. Both ventilation and humidity levels are important factors affecting a worker's potential exposure to asbestos. Id. at 26, 29-31. Although some allowance was made for humidity in the glove box test, neither Millette's Post-It note test nor his glove box test made any attempt to

[1] In his 1998 glove box test, Millette used a six-inch square piece of felt, blew 60 psi of compressed air for five minutes at a 90° angle four inches from the felt and measured particulate in front of the air stream. Ex. B. In the 2003 test, the angle was restricted to perhaps 30°. Ex. G at 33. He did not measure fibers released at each angle, but only cumulatively. Id. Under plant conditions, however, the worker performing the blowdown stands outside the dryer section and directs compressed air into the operating, ventilated and partially enclosed machine at far greater distances and the compressed air impacts the dryer felt or fabric at approximately 15° - 20° angles, see Ex. C, Figure 1, not the 90° angle Millette used in 1998 or the greater than 30° angles used in the 2003 test. Ex. C.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

replicate actual paper mill conditions, including ventilation conditions. Id. at 34-35. Thus, by his own testimony, Millette's tests did not reflect the working environment at any mill, and any testimony about the tests and related papers should be excluded.

V. CONCLUSION

Millette's tests fail to meet the Frye standard and any testimony based thereon should be excluded. Moreover, testimony as to the tests would not be helpful to the trier of fact because the testing conditions were not substantially similar to conditions at any paper mill. An additional ground for exclusion is plaintiff's failure to make Millette available for deposition until more than two weeks after the deadline passed.

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WILLIAMS, KASTNER & GIBBS PLLC

By _____
Christopher S. Marks, WSBA #28634
Attorneys for Defendant Scapa Dryer Fabrics, Inc.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600