

9-1-2009

Castorena v. General Elec. Augmentation Record Dckt. 35123

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AUGMENTATION RECORD

**IN THE
SUPREME COURT
OF THE
STATE OF IDAHO**

MILDRED CASTORENA, et al,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC, et al,

LAW CLERK Defendants-Respondents.

JOHN D. ADAMSON, et al,

Plaintiff-Appellant,

vs.

FMC CORPORATION, et al,

Defendants-Respondents.

Attorney__ for Appellant__

Trudy Hanson Fouse

Gary T. Dance

Attorney__ for Respondent__

FILED - COPY	
Filed this	day of
20	APR 27 2009
Supreme Court	Clerk

35123 / 35124 / 35852

puty

In the Supreme Court of the State of Idaho

MILDRED CASTORENA, individually and as)
spouse and Personal Representative of the Estate)
of TED CASTORENA; ALENE STOOR,)
individually and as spouse and Personal)
Representative of the Estate of JOHN D.)
STOOR; STEPHANIE BRANCH, individually)
and as Personal Representative of the Estate of)
ROBERT BRANCH, JR.; and MARLENE)
KISLING, individually and as Personal)
Representative of the Estate of WILLIAM D.)
FRASURE,)

Plaintiffs-Appellants,)

v.)

GENERAL ELECTRIC; ALASKA COPPER)
WORKS; AMERIVENT SALES, INC.,)
ANCHOR PACKING COMPANY; A. W.)
CHESTERTON COMPANY; BECHTEL aka)
SEQUOIA VENTURES; BULLOUGH)
ABATEMENT, INC.; BELL & GOSSETT;)
CERTAINTIED CORPORATION; CLEAVER-)
BROOKS, a division of Aqua Chem, Inc.;)
CRANE CO.; CUTLER HAMMER, EBONY)
CONSTRUCTION CO.; EMERSON)
ELECTRIC CO.; FAIRBANKS MORSE PUMP)
CORPORATION; FMC CORPORATION;)
FOSTER WHEELER COMPANY; GARLOCK)
INCORPORATED; GOULD)
INCORPORATED; GOULDS PUMPS)
TRADING CORP.; HENRY VOGT MACHINE)
CO.; HILL BROTHERS; HONEYWELL,)
INC.; INDUSTRIAL HOLDING)
CORPORATION; ITT INDUSTRIES, INC.;)
INGERSOLL-RAND COMPANY; JOHNSTON)
PUMPS; KELLY-MOORE PAINT COMPANY,)
INC.; METROPOLITAN LIFE INSURANCE)
COMPANY; NORDSTROM VALVE)
COMPANY; OBIT INDUSTRIES, INC;)
OWENS-ILLINOIS, INC.; PARAMOUNT)

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket Nos. 35123-2008
(35124-2008) (35852-2008)
Bannock County Bannock Nos. 2006-2474
(2006-2475)(2007-3166)

9-1-09

SUPPLY COMPANY; PAUL ROBERTS)
MACHINE SUPPLY DIVISION; ADVANCED)
INDUSTRIAL SUPPLY, INC. f/k/a)
POCATELLO SUPPLY, INC.; RUPERT IRON)
WORKS; SACOMA-SIERRA; SCHNEIDER)
ELECTRIC; SHEPARD NILES, INC.;)
STERLING FLUID SYSTEM; VIACOM INC.;)
WARREN PUMPS, INC.; WESTINGHOUSE)
ELECTRIC CORPORATION; and ZURN)
INDUSTRIES, INC.,)
))
))
Defendants-Respondents.)

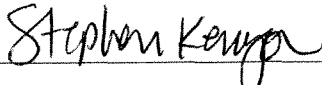
A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondents Cleaver Brooks, Inc., ITT Corporation and Bell & Gossett on August 27, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. ITT Corporation's Notice of Joinder in Motion for Summary Judgment, file-stamped November 15, 2007;
2. Cleaver-Brooks' Notice of Joinder in Motion for Summary Judgment, file-stamped November 15, 2007;
3. Cleaver-Brooks' Notice of Joinder in Defendants Sterling Fluid Systems (USA), LLC's, Warren Pumps, Inc., and Henry Vogt Machine Co.'s Motion for Reconsideration, file-stamped February 14, 2008; and
4. ITT Corporation's Notice of Joinder in Defendants Sterling Fluid Systems (USA), LLC's, Warren Pumps, Inc., and Henry Vogt Machine Co.'s Motion for Reconsideration, file-stamped February 14, 2008.

DATED this 1st day of September 2009.

For the Supreme Court



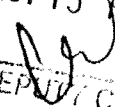
Stephen W. Kenyon, Clerk

cc: Counsel of Record

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FILED
BANNOCK COUNTY
CLERK OF THE COURT
2007 NOV 15 PM 2:12
BY 
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, Individually and as Spouse and Personal Representative of the ESTATE OF TED CASTORENA; ARLENE STOOR, Individually and as Spouse and Personal Representative of the ESTATE OF JOHN D. STOOR; STEPHANIE BRANCH, Individually and as Personal Representative of the ESTATE OF ROBERT BRANCH, JR.; ROBERT L. HRONEK; MARLENE KISLING, Individually and as Personal Representative of the ESTATE OF WILLIAM D. FRASURE; NORMAN L. DAY,

Plaintiffs,

vs.

GENERAL ELECTRIC, *et.al.*

Defendants.

Case No. CV-2006-2474-PI

ITT CORPORATION'S
NOTICE OF JOINDER IN MOTION
FOR SUMMARY JUDGMENT

STATE OF IDAHO }

ss.

County of Bannock

I hereby certify that the foregoing is a true and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed

this 25 day of August, 2007

DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER.

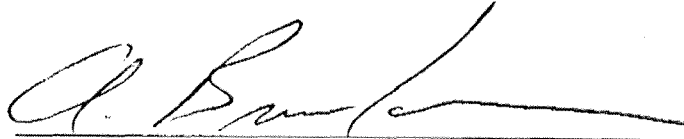
By Deputy 



Defendants ITT Corporation f/k/a ITT Industries Inc. and Bell & Gossett a division of ITT Corporation., by and through their counsel of record, A. Bruce Larson, joins and adopts as if its own, Defendants Ingersoll-Rand and Westinghouse's November 8, 2007 Motions for ITT CORPORATION'S NOTICE OF JOINDER IN MOTION FOR SUMMARY JUDGMENT

Summary Judgment, with all supporting papers, as to wrongful death plaintiffs Stoor, Branch,
and Frasure, and as to personal injury plaintiffs Hronek and Day.

DATED this 15th day of November, 2007.

A handwritten signature in black ink, appearing to read "A. Bruce Larson", written over a horizontal line.

A. Bruce Larson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November 2007, a true and correct copy of the within and foregoing ITT CORPORATION'S NOTICE OF JOINDER IN MOTION FOR SUMMARY JUDGMENT was served upon:

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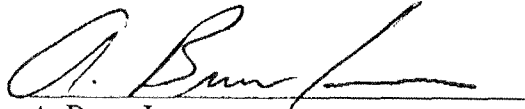
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FILED
BANNOCK COUNTY
CLERK OF DISTRICT COURT
2007 NOV 15 PM 2:12
BY [Signature]
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, Individually and as Spouse and Personal Representative of the ESTATE OF TED CASTORENA; ARLENE STOOR, Individually and as Spouse and Personal Representative of the ESTATE OF JOHN D. STOOR; STEPHANIE BRANCH, Individually and as Personal Representative of the ESTATE OF ROBERT BRANCH, JR.; ROBERT L. HRONEK; MARLENE KISLING, Individually and as Personal Representative of the ESTATE OF WILLIAM D. FRASURE; NORMAN L. DAY,

Plaintiffs,

vs.

GENERAL ELECTRIC, *et.al.*

Defendants.

Case No. CV-2006-2474-PI

CLEAVER-BROOKS'
NOTICE OF JOINDER IN MOTION
FOR SUMMARY JUDGMENT

STATE OF IDAHO }
County of Bannock } ss.



I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed

this 25 day of August, 2009

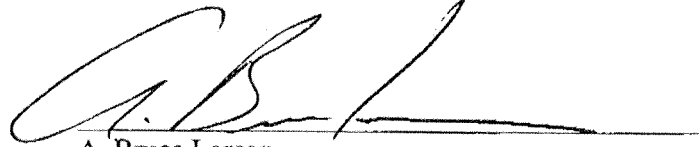
DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER.

By Deputy [Signature]

Defendants Cleaver-Brooks a division of Aqua Chem, Inc., by and through their counsel of record, A. Bruce Larson, joins and adopts as if its own, Defendants Ingersoll-Rand and Westinghouse's November 8, 2007 Motions for Summary Judgment, with all supporting papers, CLEAVER-BROOKS' NOTICE OF JOINDER IN MOTION FOR SUMMARY JUDGMENT

as to wrongful death plaintiffs Stoor, Branch, and Frasure, and as to personal injury plaintiffs Hronek and Day.

DATED this 15th day of November, 2007.



A. Bruce Larson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November 2007, a true and correct copy of the within and foregoing CLEAVER-BROOKS' NOTICE OF JOINDER IN MOTION FOR SUMMARY JUDGMENT was served upon:

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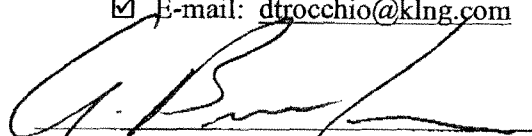
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CLEAVER-BROOKS' NOTICE OF JOINDER IN MOTION FOR SUMMARY JUDGMENT

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BANNOCK COUNTY
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, Individually and as
Spouse and Personal Representative of the
ESTATE OF TED CASTORENA; ARLENE
STOOR, Individually and as Spouse and
Personal Representative of the ESTATE OF
JOHN D. STOOR; STEPHANIE BRANCH,
Individually and as Personal Representative of
the ESTATE OF ROBERT BRANCH, JR.;
ROBERT L. HRONEK; MARLENE KISLING,
Individually and as Personal Representative of
the ESTATE OF WILLIAM D. FRASURE;
NORMAN L. DAY,

Plaintiffs,

vs.

GENERAL ELECTRIC, *et.al.*

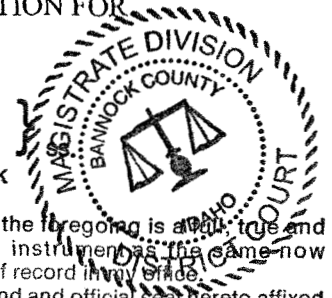
Defendants.

Case No. CV-2006-2474-PI

CLEAVER-BROOKS'
NOTICE OF JOINDER IN
DEFENDANTS STERLING FLUID
SYSTEMS (USA), LLC'S, WARREN
PUMPS, INC., AND HENRY VOGT
MACHINE CO.'S, MOTION FOR
RECONSIDERATION

STATE OF IDAHO

County of Bannock



I hereby certify that the foregoing is a true and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed

this 25 day of August, 2009

DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER

By Deputy [Signature]

Defendants Cleaver Brooks, Inc. f/k/a Cleaver-Brooks a division of Aqua Chem,

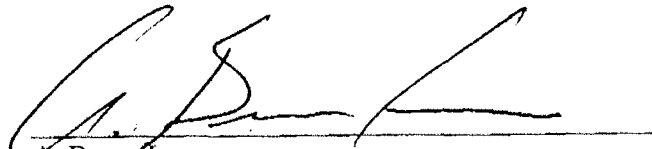
Inc., by and through its counsel of record, A. Bruce Larson, and joins in defendants Sterling

Fluid Systems (USA), LLC, Warren Pumps, Inc., and Henry Vogt Machine Co.'s Motion for

CLEAVER-BROOKS'
NOTICE OF JOINDER IN DEFENDANTS STERLING FLUID SYSTEMS (USA), LLC'S, WARREN PUMPS,
INC., AND HENRY VOGT MACHINE CO.'S, MOTION FOR RECONSIDERATION Page 1

Reconsideration, filed on February 8, 2008, for the reasons stated in their supporting memoranda.

DATED this 13th day of February 2008.



A. Bruce Larson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February 2008, a true and correct copy of the within and foregoing CLEAVER-BROOKS' NOTICE OF JOINDER IN DEFENDANTS STERLING FLUID SYSTEMS (USA), LLC'S, WARREN PUMPS, INC., AND HENRY VOGT MACHINE CO.'S, MOTION FOR RECONSIDERATION was served upon:

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In the Supreme Court of the State of Idaho

MILDRED CASTORENA, individually and as
spouse and Personal Representative of the Estate
of TED CASTORENA; ALENE STOOR,
individually and as spouse and Personal
Representative of the Estate of JOHN D.
STOOR; STEPHANIE BRANCH, individually
and as Personal Representative of the Estate of
ROBERT BRANCH, JR.; and MARLENE
KISLING, individually and as Personal
Representative of the Estate of WILLIAM D.
FRASURE,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC; ALASKA COPPER
WORKS; AMERIVENT SALES, INC.,
ANCHOR PACKING COMPANY; A. W.
CHESTERTON COMPANY; BECHTEL aka
SEQUOIA VENTURES; BULLOUGH
ABATEMENT, INC.; BELL & GOSSETT;
CERTAINTED CORPORATION; CLEAVER-
BROOKS, a division of Aqua Chem, Inc.;
CRANE CO.; CUTLER HAMMER, EBONY
CONSTRUCTION CO.; EMERSON
ELECTRIC CO.; FAIRBANKS MORSE PUMP
CORPORATION; FMC CORPORATION;
FOSTER WHEELER COMPANY; GARLOCK
INCORPORATED; GOULD
INCORPORATED; GOULDS PUMPS
TRADING CORP.; HENRY VOGT MACHINE
CO.; HILL BROTHERS; HONEYWELL,
INC.; INDUSTRIAL HOLDING
CORPORATION; ITT INDUSTRIES, INC.;
INGERSOLL-RAND COMPANY; JOHNSTON
PUMPS; KELLY-MOORE PAINT COMPANY,
INC.; METROPOLITAN LIFE INSURANCE
COMPANY; NORDSTROM VALVE
COMPANY; OBIT INDUSTRIES, INC;
OWENS-ILLINOIS, INC.; PARAMOUNT

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket Nos. 35123-2008
(35124-2008) (35852-2008)
Bannock County Bannock Nos. 2006-2474
(2006-2475)(2007-3166)

8-20-09

SUPPLY COMPANY; PAUL ROBERTS)
MACHINE SUPPLY DIVISION; ADVANCED)
INDUSTRIAL SUPPLY, INC. f/k/a)
POCATELLO SUPPLY, INC.; RUPERT IRON)
WORKS; SACOMA-SIERRA; SCHNEIDER)
ELECTRIC; SHEPARD NILES, INC.;)
STERLING FLUID SYSTEM; VIACOM INC.;)
WARREN PUMPS, INC.; WESTINGHOUSE)
ELECTRIC CORPORATION; and ZURN)
INDUSTRIES, INC.,)
))
))
Defendants-Respondents.)

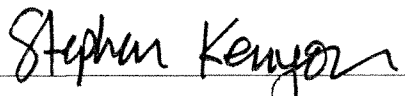
A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondent A.W. Chesterton Company. on August 10, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent A. W. Chesterton Company's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Defendant A.W. Chesterton Company's Joinder in Warren Pumps, Inc.'s Motion for Summary Judgment re Plaintiff Castorena, file-stamped May 2, 2008;
2. Defendant A.W. Chesterton Company's Joinder in Alaskan Copper Works, Kelly-Moore Paint Company, Inc., and Square D's Motion for Summary Judgment re Abatement of Plaintiff Castorena's Cause of Action, file-stamped May 2, 2008; and
3. Defendants A.W. Chesterton Company and Shepard Niles, Inc.'s Joinder in Defendants Ingersoll-Rand's and Westinghouse's Motion for Summary Judgment Against the Personal Representatives and Injured Plaintiffs Robert L. Hronek and Norman L. Day, and Defendants Ingersoll-Rand's and Westinghouse's Motion for Summary Judgment Against Wrongful Death Plaintiffs Stoor, Branch and Frasure, file-stamped November 30, 2007.

DATED this 20 day of August 2009.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

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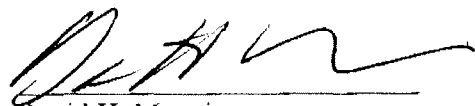
Attorney for Defendant A. W. Chesterton

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, et al.,	)	CASE NO. CV-2006-2474-PI
)	
Plaintiffs,)	
)	
vs.	)	DEFENDANT A. W. CHESTERTON
	)	COMPANY'S JOINDER IN
GENERAL ELECTRIC; A. W. CHESTERTON	)	WARREN PUMPS, INC.'S MOTION
COMPANY; SHEPARD NILES, INC., et al.,	)	FOR SUMMARY JUDGMENT RE
	)	PLAINTIFF CASTORENA
Defendants.)	
)	

COMES NOW Defendant A. W. Chesterton Company, by and through its counsel of record, David H. Maguire of Maguire & Kress, and hereby joins in Defendant Warren Pumps, Inc.'s Motion for Summary Judgment re Plaintiff Castorena dated April 18, 2008, and incorporates the arguments and authorities cited therein.

DATED this 1 day of April, 2008.


David H. Maguire
MAGUIRE & KRESS

S

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was:

- mailed, postage prepaid
- hand delivered
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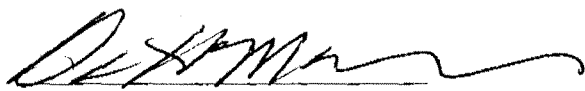
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, et al.,	)	CASE NO. CV-2006-2474-PI
)	
Plaintiffs,)	
)	
vs.	)	DEFENDANT A. W. CHESTERTON
	)	COMPANY'S JOINDER IN
GENERAL ELECTRIC; A. W. CHESTERTON	)	ALASKAN COPPER WORKS,
COMPANY; SHEPARD NILES, INC., et al.,	)	KELLY-MOORE PAINT COMPANY,
	)	INC., AND SQUARE D'S MOTION
Defendants.	)	FOR SUMMARY JUDGMENT RE
	)	ABATEMENT OF PLAINTIFF
	)	CASTORENA'S CAUSE OF ACTION
)	
)	

COMES NOW Defendant A. W. Chesterton Company, by and through its counsel of record, David H. Maguire of Maguire & Kress, and hereby joins in Defendants Alaskan Copper Works, Kelley-Moore Paint Company, Inc., and Square D's Motion for Summary Judgment re Abatement of Plaintiff Castorena's Cause of Action dated April 21, 2008, and incorporates the arguments and authorities cited therein.

DATED this 21 day of April, 2008.


David H. Maguire
MAGUIRE & KRESS

S

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was:

- mailed, postage prepaid
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- faxed
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to the following, this 1 day of April, 2008, and addressed to the e-mail addresses of the following:

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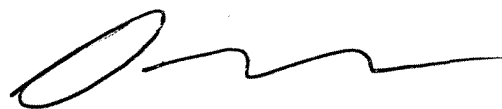
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 2007 NOV 30 AM 9:45
 BY  DEPUTY CLERK

Attorney for Defendants A. W. Chesterton
 & Shepard Niles, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, et al.,	)	CASE NO. CV-2006-2474-PI
)	
Plaintiffs,)	
)	
vs.	)	DEFENDANTS A. W. CHESTERTON
	)	COMPANY AND SHEPARD NILES,
GENERAL ELECTRIC; A. W.	)	INC.'S, JOINDER IN DEFENDANTS
CHESTERTON COMPANY; SHEPARD	)	INGERSOLL-RAND'S AND
NILES, INC., et al.,	)	WESTINGHOUSE'S MOTION FOR
	)	SUMMARY JUDGMENT AGAINST
Defendants.	)	THE PERSONAL REPRESENTATIVES
	)	AND INJURED PLAINTIFFS ROBERT
	)	L. HRONEK AND NORMAN L. DAY,
	)	AND DEFENDANTS INGERSOLL-
	)	RAND'S AND WESTINGHOUSE'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT AGAINST WRONGFUL
	)	DEATH PLAINTIFFS STOOR,
	)	BRANCH AND FRASURE
)	

COME NOW Defendants A. W. Chesterton Company and Shepard Niles, Inc., by and through their counsel of record, David H. Maguire of Maguire & Kress, and hereby join in Defendants Ingersoll-Rand's and Westinghouse's Motion for Summary Judgment Against the Personal Representatives and Injured Plaintiffs Robert L. Hronek and Norman L. Day, and



Defendants Ingersoll-Rand's and Westinghouse's Motion for Summary Judgment Against Wrongful
Death Plaintiffs Stoor, Branch and Frasure.

DATED this 14 day of November, 2007.



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MAGUIRE & KRESS

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Atty for Hill Brothers Chemical



David H. Maguire
MAGUIRE & KRESS

In the Supreme Court of the State of Idaho

MILDRED CASTORENA, individually and as)
spouse and Personal Representative of the Estate)
of TED CASTORENA; ALENE STOOR,)
individually and as spouse and Personal)
Representative of the Estate of JOHN D.)
STOOR; STEPHANIE BRANCH, individually)
and as Personal Representative of the Estate of)
ROBERT BRANCH, JR.; and MARLENE)
KISLING, individually and as Personal)
Representative of the Estate of WILLIAM D.)
FRASURE,)

Plaintiffs-Appellants,)

v.)

GENERAL ELECTRIC; ALASKA COPPER)
WORKS; AMERIVENT SALES, INC.,)
ANCHOR PACKING COMPANY; A. W.)
CHESTERTON COMPANY; BECHTEL aka)
SEQUOIA VENTURES; BULLOUGH)
ABATEMENT, INC.; BELL & GOSSETT;)
CERTAINTEED CORPORATION; CLEAVER-)
BROOKS, a division of Aqua Chem, Inc.;)
CRANE CO.; CUTLER HAMMER, EBONY)
CONSTRUCTION CO.; EMERSON)
ELECTRIC CO.; FAIRBANKS MORSE PUMP)
CORPORATION; FMC CORPORATION;)
FOSTER WHEELER COMPANY; GARLOCK)
INCORPORATED; GOULD)
INCORPORATED; GOULDS PUMPS)
TRADING CORP.; HENRY VOGT MACHINE)
CO.; HILL BROTHERS; HONEYWELL,)
INC.; INDUSTRIAL HOLDING)
CORPORATION; ITT INDUSTRIES, INC.;)
INGERSOLL-RAND COMPANY; JOHNSTON)
PUMPS; KELLY-MOORE PAINT COMPANY,)
INC.; METROPOLITAN LIFE INSURANCE)
COMPANY; NORDSTROM VALVE)
COMPANY; OBIT INDUSTRIES, INC;)
OWENS-ILLINOIS, INC.; PARAMOUNT)

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket Nos. 35123-2008
(35124-2008) (35852-2008)
Bannock County Bannock Nos. 2006-2474
(2006-2475)(2007-3166)

8-7-09

SUPPLY COMPANY; PAUL ROBERTS)
MACHINE SUPPLY DIVISION; ADVANCED)
INDUSTRIAL SUPPLY, INC. f/k/a)
POCATELLO SUPPLY, INC.; RUPERT IRON)
WORKS; SACOMA-SIERRA; SCHNEIDER)
ELECTRIC; SHEPARD NILES, INC.;)
STERLING FLUID SYSTEM; VIACOM INC.;)
WARREN PUMPS, INC.; WESTINGHOUSE)
ELECTRIC CORPORATION; and ZURN)
INDUSTRIES, INC.,)
))
Defendants-Respondents.)

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondents Gardner Denver, Inc., Paramount Supply Company and Zurn Industries, LLC on August 5, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent’s MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

Documents from Bannock County Court Case No. CV-2006-2474-PI

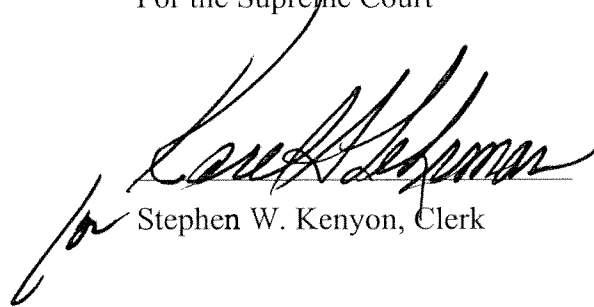
1. Defendant Paramount Supply Company’s Joinder in Defendants Ingersoll-Rand and Westinghouse’s Motion for Summary Judgment Against Personal Injury Plaintiffs Hronek and Day, file-stamped November 26, 2007;
2. Defendant Paramount Supply Company’s Joinder in Defendants Ingersoll-Rand and Westinghouse’s Motion for Summary Judgment Against Wrongful Death Plaintiffs Stoor, Branch and Frasure, file-stamped November 26, 2007;
3. Defendant Zurn Industries LLC’s Joinder in Defendants Ingersoll-Rand and Westinghouse’s Motion for Summary Judgment Against Personal Injury Plaintiffs Hronek and Day, file-stamped November 26, 2007;
4. Defendant Zurn Industries, LLC’s Joinder in Defendants Ingersoll-Rand and Westinghouse’s Motion for Summary Judgment Against Wrongful Death Plaintiffs Stoor, Branch and Frasure, file-stamped November 26, 2007;

Documents from Bannock County Court Case No. 2006-3166

5. Joinder of Defendant Paramount Supply Company in Defendant Sterling Fluid Systems (USA) LLC’s Motion for Summary Judgment, file-stamped October 1, 2007; and
6. Joinder of Defendant Gardner Denver, Inc. in Defendant Sterling Fluid Systems (USA) LLC’s Motion for Summary Judgment, file-stamped October 1, 2007.

DATED this 7 day of August 2009.

For the Supreme Court

A handwritten signature in black ink, appearing to read "Stephen W. Kenyon", written over a horizontal line. The signature is stylized and cursive.

Stephen W. Kenyon, Clerk

cc: Counsel of Record

A

STATE OF IDAHO }
County of Bannock } ss.

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I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed this 21 day of November, 2009

DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER.

Attorneys for Defendant Paramount Supply Company

FILED
BANNOCK COUNTY
CLERK OF DISTRICT COURT
2007 NOV 26 AM 10:26
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, Individually
and as Spouse and Personal
Representative of the Estate of Ted
Castorena, et al.,

Plaintiff,

vs.

GENERAL ELECTRIC, et al.,

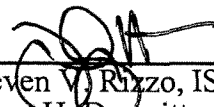
Defendants.

) Case No.: CV-2006-2474-PI
)
) DEFENDANT PARAMOUNT SUPPLY
) COMPANY'S JOINDER IN
) DEFENDANTS INGERSOLL-RAND
) AND WESTINGHOUSE'S MOTION
) FOR SUMMARY JUDGMENT
) AGAINST PERSONAL INJURY
) PLAINTIFFS HRONEK AND DAY

COMES NOW Defendant Paramount Supply Company by and through its counsel of record, Rizzo Mattingly Bosworth PC, and joins in Defendants Ingersoll-Rand and Westinghouse in their Motion for Summary Judgment Against Personal Injury Plaintiffs Hronek and Day and supporting memoranda, for the reasons stated therein.

DATED this 20th day of November, 2007.

RIZZO MATTINGLY BOSWORTH PC



Steven V. Rizzo, ISB #7632
Jason H. Day witt, admitted pro hac vice
Of Attorneys for Paramount Supply
Company

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STATE OF IDAHO } ss.

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I hereby certify that the foregoing is a full, true and correct copy of an Instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed, this 21 day of November, 2007.

FILED
BANNOCK COUNTY
DISTRICT COURT
2007 NOV 26 AM 10:26
BY [Signature]
DEPUTY CLERK

Attorneys for Defendant Paramount Supply Company
DALE HUNT, CLERK OF THE DISTRICT COURT,
EX OFFICIO

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, Individually	)	Case No.: CV-2006-2474-PI
and as Spouse and Personal)	
Representative of the Estate of Ted	)	DEFENDANT PARAMOUNT SUPPLY
Castorena, et al.,	)	COMPANY'S JOINDER IN
	)	DEFENDANTS INGERSOLL-RAND
Plaintiff,	)	AND WESTINGHOUSE'S MOTION
	)	FOR SUMMARY JUDGMENT
vs.	)	AGAINST WRONGFUL DEATH
	)	PLAINTIFFS STOOR, BRANCH AND
GENERAL ELECTRIC, et al.,	)	FRASURE
)	
Defendants.)	

COMES NOW Defendant Paramount Supply Company by and through its counsel of record, Rizzo Mattingly Bosworth PC, and joins in Defendants Ingersoll-Rand and Westinghouse in their Motion for Summary Judgment Against Wrongful Death Plaintiffs Stoor, Branch and Frasure and supporting memoranda, for the reasons stated therein.

DATED this 20th day of November, 2007.

RIZZO MATTINGLY BOSWORTH PC

[Signature]
Steven Rizzo, ISB #7632
Jason H. Daywitt, admitted pro hac vice
Of Attorneys for Defendant Paramount
Supply Company

CERTIFICATE OF SERVICE

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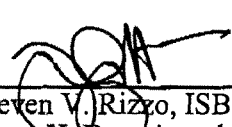
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County of Bannock } ss.
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BY DEPUTY CLERK AUDITOR AND RECORDER
By Deputy

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, Individually) Case No.: CV-2006-2474-PI
and as Spouse and Personal)
Representative of the Estate of Ted) DEFENDANT ZURN INDUSTRIES,
Castorena, et al.,) LLC'S JOINDER IN DEFENDANTS
Plaintiff,) INGERSOLL-RAND AND
vs.) WESTINGHOUSE'S MOTION FOR
GENERAL ELECTRIC, et al.,) SUMMARY JUDGMENT AGAINST
Defendants.) PERSONAL INJURY PLAINTIFFS
) HRONEK AND DAY
)
)
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COMES NOW Defendant Zurn Industries, LLC by and through its counsel of record, Rizzo Mattingly Bosworth PC, and joins in Defendants Ingersoll-Rand and Westinghouse in their Motion for Summary Judgment Against Personal Injury Plaintiffs Hronek and Day and supporting memoranda, for the reasons stated therein.

DATED this 20th day of November, 2007.

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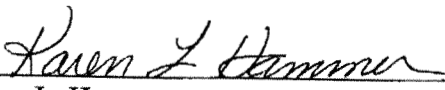
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Attorneys for Defendant Zurn Industries, LLC

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MILDRED CASTORENA, Individually
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Plaintiff,

vs.

GENERAL ELECTRIC, et al.,

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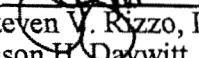
Case No.: CV-2006-2474-PI

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Karen L. Hammer
Paralegal

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STATE OF IDAHO }
County of Bannock ss.

Filed

2007 OCT -1 10:11:10

I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office. WITNESS my hand and official seal hereto affixed this 27 day of September, 2007.
DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO CLERK FOR AND RECORDER.

Attorneys for Defendant Paramount Supply Company

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

JOHN D. ADAMSON, individually and in his capacity as Personal Representative of the Estate of JOHN H. ADAMSON,

Plaintiff,

vs.

FMC Corporation individually and on behalf of its former Coffin Turbo Pump Operation and former Peerless Pump, et al.

Defendants.

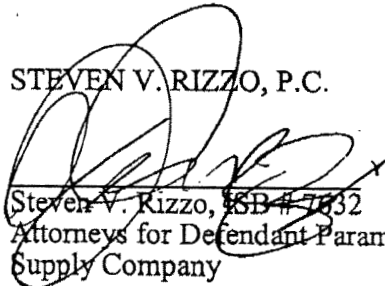
Case No: CV-06-3166-OC

JOINDER OF DEFENDANT
PARAMOUNT SUPPLY COMPANY
IN DEFENDANT STERLING FLUID
SYSTEMS (USA) LLC'S MOTION
FOR SUMMARY JUDGMENT

COMES NOW Defendant Paramount Supply Company in the above entitled action, by and through its attorneys of record, and hereby joins Defendant Sterling Fluid Systems (USA) LLC's Motion for Summary Judgment.

Dated this 27th day of September, 2007.

STEVEN V. RIZZO, P.C.


Steven V. Rizzo, ISB # 7632
Attorneys for Defendant Paramount Supply Company

Joinder of Defendant Paramount Supply Company
in Defendant Sterling Fluid Systems, LLC's
Motion for Summary Judgment

S

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of September, 2007, a true and correct copy of the within and foregoing instrument was served upon:

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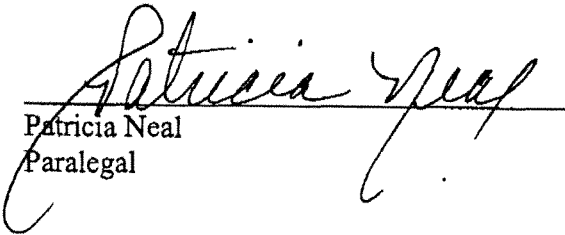
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Patricia Neal
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STATE OF IDAHO }
County of Bannock ss.

FILED
2007 OCT -1 11:10
DEPUTY CLERK

I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now exists on file and of record in my office. WITNESS my hand and official seal hereto affixed this 27 day of September, 2007
DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO ADMINISTRATOR AND RECORDER.

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By 

Attorneys for Defendant Gardner Denver, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

JOHN D. ADAMSON, individually and in his capacity as Personal Representative of the Estate of JOHN H. ADAMSON,

Plaintiff,

vs.

FMC Corporation individually and on behalf of its former Coffin Turbo Pump Operation and former Peerless Pump, et al.

Defendants.

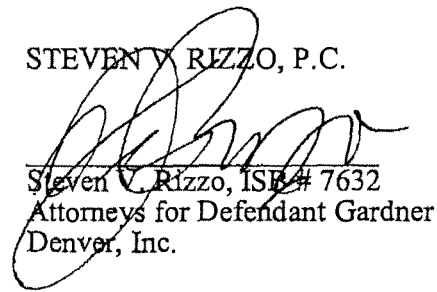
Case No: CV-06-3166-OC

JOINDER OF DEFENDANT
GARDNER DENVER, INC.
IN DEFENDANT STERLING FLUID
SYSTEMS (USA) LLC'S MOTION
FOR SUMMARY JUDGMENT

COMES NOW Defendant Gardner Denver, Inc. in the above entitled action, by and through its attorneys of record, and hereby joins Defendant Sterling Fluid Systems (USA) LLC's Motion for Summary Judgment.

Dated this 27th day of September, 2007.

STEVEN V. RIZZO, P.C.


Steven V. Rizzo, ISB # 7632
Attorneys for Defendant Gardner Denver, Inc.

Joinder of Defendant Gardner Denver, Inc.
in Defendant Sterling Fluid Systems, LLC's
Motion for Summary Judgment

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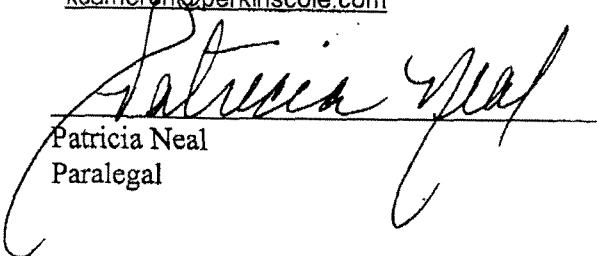
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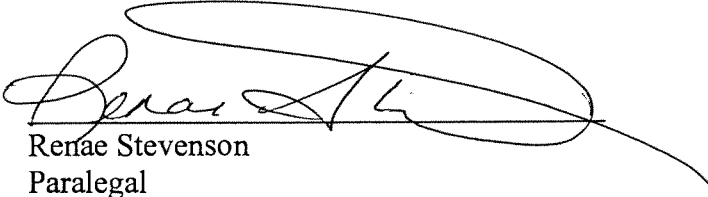
CERTIFICATE OF SERVICE
(*Castorena v. General Electric et al*)

I HEREBY CERTIFY that on the 31st day of July, 2009, a true and correct copy of the within and foregoing instrument was served upon the following parties in the manner indicated:

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<p>Alan C. Goodman GOODMAN LAW OFFICE 717 7th Street PO Box D Rupert, ID 83350 2goodman@pmt.org Attorneys for Rupert Iron Works</p>	<p>W. Marcus Nye RACINE OLSON NYE BUDGE 201 East Center P.O. Box 1391 Pocatello, ID 83204-1391 nye@racinelaw.net Attorneys for Advanced Industrial Supply Inc. (f/k/a Pocatello Supply, Inc.)</p>
<p>Thomas J. Lyons MERRILL & MERRILL 109 N. Arthur, 5th Floor P.O. Box 991 Pocatello, ID 83204-0991 toml@merrillandmerrill.com Attorneys for Owens-Illinois, Inc.</p>	<p>Murray Jim Sorenson BLASER, SORENSEN & OLESON 285 NW Main PO Box 1047 Blackfoot, ID 83221 mjs@ida.net Attorneys for Steel West, Inc</p>
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Renae Stevenson
Paralegal

In the Supreme Court of the State of Idaho

MILDRED CASTORENA, individually and as
spouse and Personal Representative of the Estate
of TED CASTORENA; ALENE STOOR,
individually and as spouse and Personal
Representative of the Estate of JOHN D.
STOOR; STEPHANIE BRANCH, individually
and as Personal Representative of the Estate of
ROBERT BRANCH, JR.; and MARLENE
KISLING, individually and as Personal
Representative of the Estate of WILLIAM D.
FRASURE,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC; ALASKA COPPER
WORKS; AMERIVENT SALES, INC.,
ANCHOR PACKING COMPANY; A. W.
CHESTERTON COMPANY; BECHTEL aka
SEQUOIA VENTURES; BULLOUGH
ABATEMENT, INC.; BELL & GOSSETT;
CERTAINTEED CORPORATION; CLEAVER-
BROOKS, a division of Aqua Chem, Inc.;
CRANE CO.; CUTLER HAMMER, EBONY
CONSTRUCTION CO.; EMERSON
ELECTRIC CO.; FAIRBANKS MORSE PUMP
CORPORATION; FMC CORPORATION;
FOSTER WHEELER COMPANY; GARLOCK
INCORPORATED; GOULD
INCORPORATED; GOULDS PUMPS
TRADING CORP.; HENRY VOGT MACHINE
CO.; HILL BROTHERS; HONEYWELL,
INC.; INDUSTRIAL HOLDING
CORPORATION; ITT INDUSTRIES, INC.;
INGERSOLL-RAND COMPANY; JOHNSTON
PUMPS; KELLY-MOORE PAINT COMPANY,
INC.; METROPOLITAN LIFE INSURANCE
COMPANY; NORDSTROM VALVE
COMPANY; OBIT INDUSTRIES, INC;
OWENS-ILLINOIS, INC.; PARAMOUNT

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket Nos. 35123-2008
(35124-2008) (35852-2008)
Bannock County Bannock Nos. 2006-2474
(2006-2475)(2007-3166)

8-7-09

SUPPLY COMPANY; PAUL ROBERTS)
MACHINE SUPPLY DIVISION; ADVANCED)
INDUSTRIAL SUPPLY, INC. f/k/a)
POCATELLO SUPPLY, INC.; RUPERT IRON)
WORKS; SACOMA-SIERRA; SCHNEIDER)
ELECTRIC; SHEPARD NILES, INC.;)
STERLING FLUID SYSTEM; VIACOM INC.;)
WARREN PUMPS, INC.; WESTINGHOUSE)
ELECTRIC CORPORATION; and ZURN)
INDUSTRIES, INC.,)

Defendants-Respondents.)

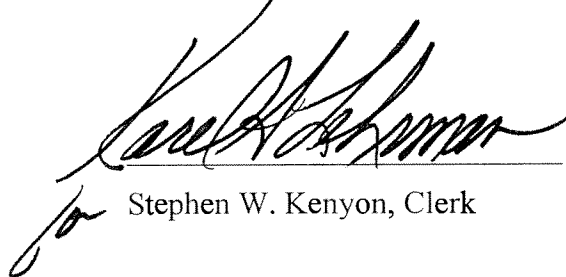
A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Appellants on July 30, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Memorandum Decision and Order, file-stamped January 28, 2008. (CV-2006-2474-PI)

DATED this 7 day of August 2009.

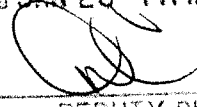
For the Supreme Court



for Stephen W. Kenyon, Clerk

cc: Counsel of Record

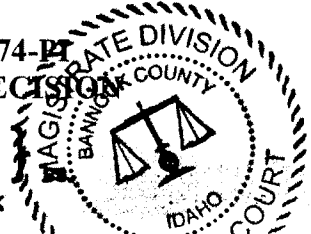
*This is a copy of the original, which has been misplaced. The clerk back-dated the file stamp at my direction 5-5-09
 Judge Peter O. McDermott*

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2008 JAN 28 PM 12:52
 BY 
 DEPUTY CLERK

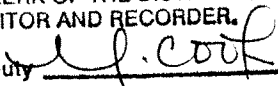
IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MILDRED CASTORENA, et al.)
)
 Plaintiffs,)
)
 vs.)
)
 GENERAL ELECTRIC, et al.,)
)
 Defendants.)
)
 _____)

Case No. CV-2006-2474-PI
 MEMORANDUM DECISION
 and ORDER
 STATE OF IDAHO



County of Bannock
 I hereby certify that the foregoing is a true, true and correct copy of an instrument as the same now remains on file and of record in my office.
 WITNESS my hand and official seal hereto affixed
 this 30 day of July 2009

DALE HATCH, CLERK OF THE DISTRICT COURT,
 EX OFFICIO AUDITOR AND RECORDER.
 By Deputy 

NATURE OF THE ACTION

This case is a products liability action wherein the Plaintiffs generally allege the Defendants are responsible for the manufacture of asbestos-containing products or machinery to which the Plaintiffs allege they were exposed. The Plaintiffs assert this exposure caused serious injury and/or death for which they are entitled to recover damages in this lawsuit.

CBS Corporation, a Delaware corporation, f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric Corporation (“Westinghouse”) and Ingersoll-Rand Corporation (“Ingersoll-Rand”) (collectively referred to herein as “Moving Defendants”) filed a Motion for Summary Judgment against Plaintiffs Robert L. Hronek and Norman L. Day (collectively referred to herein as “Plaintiffs” or “Personal Injury Plaintiffs”). The Moving Defendants also filed a Motion for Summary Judgment against Plaintiffs Alene Stoor, individually and as a spouse and personal representative of the Estate of John Stoor (“Stoor”), Stephanie Branch, individually and as personal representative of the Estate

of Robert Branch, Jr. ("Branch") and Marlene Kisling, individually and as personal representative of the Estate of William D. Frasure ("Frasure") (collectively referred to herein as "Plaintiffs" or "Wrongful Death Plaintiffs").

This Court heard oral arguments regarding these summary judgment motions on December 10, 2007, taking the case under advisement. After receiving oral arguments and reviewing the entire file, including the briefs filed by counsel, this Court enters the following Memorandum Decision and Order.

ISSUES

1. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Personal Injury Plaintiffs Hronek and Day.
2. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Wrongful Death Plaintiffs Stoor, Branch and Frasure.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment shall be rendered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that 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." I.R.C.P. 56(c). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of

Memorandum Decision and Order

Re: Ingersoll—Rand and Westinghouse's Motions for Summary Judgment
Case No. CV-2006-2474-PI

material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party's case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by *affidavits* or as otherwise provided in this rule, must *set forth specific facts showing that there is a genuine issue for trial.*" I.R.C.P. 56(e) (emphasis added).

DISCUSSION

1. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Personal Injury Plaintiffs Hronek and Day.

The complaint in this action was filed on June 2, 2006, and alleges nine counts, four of which are applicable to the Moving Defendants, including counts of negligence, strict liability, misrepresentation and battery, civil conspiracy and fraudulent concealment. Pursuant to their Motion for Summary Judgment, the Moving Defendants are requesting summary judgment on all of the above-named claims asserted against them.

a. **Whether Plaintiffs' negligence and strict liability claims are barred by the statute of limitations.**

First, the Moving Defendants argue that the Plaintiffs' negligence and strict liability claims are barred by the statute of limitations. Pursuant to Idaho Code ("IC") Section 5-219(4), personal injury actions must be brought within two years of the date the cause of action accrues. That section states in pertinent part:

5-219. Actions against officers, for penalties, on bonds, and for professional malpractice or for personal injuries. – Within two (2) years:

(4) An action to recover damages ... for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant; ... the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action ... must be commenced within ... two (2) years following the occurrence, act or omission complained of, whichever is later.

In addressing asbestos personal injury cases specifically, the Idaho Supreme Court has determined that a cause of action accrues "on the date the injury became 'objectively ascertainable.' This means that the cause of action accrues when 'objective medical proof would support the existence of an actual injury.'" *Brennan v. Owen-Corning Fiberglass Corp.*, 134 Idaho 800, 801, 10 P.3d 749, 750 (2000)(citing *Davis v. Moran*, 112 Idaho 703, 706, 735 P.2d 1014, 1020 (1987)). This rule applies even though the plaintiff may not be aware of the actual injury or its cause. *Id.* at 802, 10 P.3d at 751. The *Brennan* court further found that the cause of action accrues and the statute of limitation commences when objective medical proof would support the existence of an actual injury resulting from asbestos exposure. *Id.* Thus, if a plaintiff

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fails to file suit within two years from the date of first objective medical proof of disease or injury, his or her claims are barred by the statute of limitations as set forth in IC § 5-219(4). Facts that may constitute “objective medical proof that would support the existence of an actual injury resulting from exposure to asbestos,” thereby commencing the running of the statute of limitations, include: (1) an examination in order to detect asbestos-related diseases; (2) a chest x-ray which showed scarring of the lung of a kind that can be seen after asbestos exposure; (3) changes in the lung consistent with the type of injury and disease that can be seen after asbestos exposure; or (4) presence of pleural plaques or scarring in the lining of the lung which indicates asbestos exposure. *Id.* at 801.

In this case, objective medical proof establishes that both Plaintiff Hronek and Plaintiff Day suffered from asbestos-related injuries more than two years before the complaint was filed in this case on June 2, 2006. For example, “Hronek testified in his deposition that he was first told that he had an asbestos-related disease by his doctor, Dr. Christon, in 2000 while he was still working at FMC.” (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Hronek (“Hronek Statement of Undisputed Facts”), Nov. 9, 2007, ¶ 2.) Further, a radiograph taken of his chest on April 29, 2003, revealed the presence of pleural plaques. Dr. Schonfeld, the doctor retained by Hronek, read that radiograph on November 17, 2005. Dr. Schonfeld “concluded in an ILO ‘B-reading’ report of that date that the 04/29/03 radiograph revealed pleural abnormalities consistent with pneumoconiosis (one form of which is asbestosis) and the existence of pleural plaques (evidence of exposure to asbestos).” (*Id.* at ¶ 3.) Additionally, in a Claim Form filed against Pfizer, Inc., wherein Plaintiff Hronek

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sought to recover compensation for his asbestos-related injury, Hronek admitted he “was diagnosed with asbestosis on 07/11/03, as a result of asbestos exposure from 1956 through 2001 at the FMC plant in Pocatello, Idaho.” (*Id.* at ¶ 5.) Hronek testified in his deposition that the information regarding his diagnosis of asbestosis included on the Claim Form was “accurate.” (*Id.*) Thus, it makes no difference that on November 17, 2005, the doctor retained by Hronek’s attorney confirmed the diagnosis of asbestos-related disease previously made by other medical doctors. Plaintiff Hronek’s admission that he had personal knowledge of his diagnosis of asbestos disease as early as 2000, and no later than July 11, 2003, is sufficient to commence the running of the limitation period under IC § 5-219(4). Because Hronek did not file his claim until June 2, 2006, his negligence and strict liability claims against Moving Defendants are barred by the statute of limitations.

The undisputed facts regarding Plaintiff Day similarly show that he suffered from asbestos-related injuries more than two years before the complaint was filed in this case. Like Hronek, Plaintiff Day admitted, through various documents, that he was diagnosed with asbestosis on February 17, 2004. (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Day (“Day Statement of Undisputed Facts”), Nov. 9, 2007, ¶¶ 5-6.) On March 20, 2004, a chest x-ray was taken of Day, “and a Chest X-Ray Report of that date was generated stating: ‘The patient states she (sic) has a history of pulmonary fibrosis secondary to asbestosis.’” (*Id.* at ¶ 8.) Also, on February 17, 2004, James W. Ballard, M.D., read a June 27, 2003, chest x-ray. Dr. Ballard “concluded in an ILO ‘B-reading’ report of that date that the 06/27/03 chest x-ray revealed parenchymal and pleural

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abnormalities consistent with pneumoconiosis (one form of which is asbestosis).” (*Id.* at ¶ 4.) Plaintiff Day’s counsel also asked Alice Boylan, M.D., to review that same ILO “B-reading” report. “Dr. Boylan concluded: ‘it is my opinion, to a reasonable degree of medical certainty, that the changes revealed in the ILO report of 2/17/04 are causally related to the disease asbestosis because of Mr. Day’s occupational exposure to asbestos.’” (*Id.* at ¶ 6.) Further, in a Claim Form also filed against Pfizer, Inc., seeking to recover from Pfizer compensation for Day’s asbestos-related injury, Day admitted he was diagnosed with asbestosis on February 17, 2004, the same date as Dr. Ballard’s 02/17/04 “B-reading” report. (*Id.* at ¶ 5.) In addition, Day signed an affidavit wherein he “admitted that he was presently suffering from asbestosis and/or the physical disorder arising from or related to exposure to asbestos which was confirmed by a written diagnosis of a medical doctor on 02/17/04.” (*Id.* at ¶ 7.) Thus, like Plaintiff Hronek, because Plaintiff Day did not file his claim until June 2, 2006, more than two years after the relevant February 17, 2004, date, his negligence and strict liability claims against Moving Defendants are barred by the statute of limitations.

In their response memorandum, Plaintiffs argue that “it was not until Dr. Schonfeld, a *qualified B-Reader*, actually read and interpreted the x-rays that plaintiffs’ asbestos-related injuries became ‘objectively ascertainable.’” (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day, Nov. 27, 2007, 3.) While the Plaintiffs argue that the first objective medical proof of their asbestos-related injuries did not occur until November of 2005 when Dr. Alvin Schonfeld, a doctor retained by their attorney, reviewed old x-rays and old x-ray reports of other physicians, and confirmed the

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diagnoses of asbestos disease previously made by those other physicians, the undisputed proof, as set forth above, shows otherwise.

The Plaintiffs further argue that the limitation period contained in IC § 5-219(4) did not accrue until they became aware they were suffering from asbestos-related injuries. (*Id.* at 4.) In support of that argument, the Plaintiffs cite to the case of *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969). However, the Plaintiffs' reliance on that case is misplaced, as *Renner* was overruled by the 1971 amendment of IC § 5-219(4) wherein the Idaho Legislature created two discovery exceptions only -- one for leaving a foreign object in a body and the other for fraudulent concealment of a wrongful or negligent act of professional malpractice. The pertinent portion of that statute states:

[W]hen the action is for damages arising out of the placement and inadvertent, accidental or unintentional leaving of any foreign object in the body of any person by reason of the professional malpractice of any hospital, physician or other person or institution practicing any of the healing arts or when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party, the same shall be deemed to accrue when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of

For cases falling outside of these two express exceptions, the 1971 amended version of IC § 5-219(4) provides that:

[I]n all other actions, whether arising from professional malpractice or otherwise, the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action within the foregoing foreign object or fraudulent concealment exceptions must be commenced within one (1) year following the date of

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accrual as aforesaid or two (2) years following the occurrence, act or omission complained of, whichever is later.

Further, the Idaho Supreme Court has specifically disagreed with the argument that damages must be objectively ascertainable to, or known by, the plaintiff in order to commence the running of the statute of limitations. That court held that such a rule “would amount to a discovery rule which our cases have expressly rejected in light of the legislature’s explicit rejection of the discovery rule, I.C. § 5-219(4).” *Davis*, 112 Idaho at 709, 735 P.2d at 1020. As such, whether or not a plaintiff knows or has been informed of his or her injury is not pertinent to a statute of limitation analysis under IC § 5-219(4). Therefore, based on the undisputed facts as set forth above, it is irrelevant that on November 17, 2005, Dr. Schonfeld, a doctor retained by Plaintiffs’ counsel, confirmed the diagnosis of asbestos-related disease previously made by other medical doctors since the Personal Injury Plaintiffs filed their complaint more than two years after their first diagnosis of asbestos-related disease. Therefore, the negligence and strict products liability claims of Plaintiffs Hronek and Day are barred by IC § 5-219(4).

The Plaintiffs also appear to argue that IC § 5-219(4) violates Art. 1, § 18 of the Idaho Constitution. (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day at 4.) However, that argument is based on the assumption that Plaintiffs’ causes of action were barred by IC § 5-219(4) before they had actual knowledge or reasonably should have discovered their injuries. As the Plaintiffs argued: “The Moving Defendants [sic] assertions that this court should refuse to hold that a cause of action accrues under I.C. § 5-219(4) only after the injured party discovers (or reasonably should have

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discovered) the facts giving rise to his or her cause of action, is seemingly oblivious to art. 1, § 18 of the Idaho Constitution” (Pls.’ Resp. to Defs.’ Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day at 4.) Such assumption is unfounded since the undisputed facts demonstrate that both Plaintiffs Hronek and Day had actual knowledge of their asbestos-related injuries *more* than two years before they filed their complaint. As such, neither claim was barred by the limitation period before they became aware of their injuries, as this Court has already determined that Hronek and Day should have filed their complaint within the applicable limitation period. As such, this Court disregards the Plaintiffs’ attempt to now attack the constitutionality of IC § 5-219(4) since both Personal Injury Plaintiffs simply failed to file their claim in a timely manner.

b. Whether this Court should dismiss the remaining causes of action.

In their Memorandum in Support of Motion for Summary Judgment, the Moving Defendants argue that Counts Three and Four of the complaint, including the Plaintiffs’ claims for misrepresentation, battery, fraudulent concealment and civil conspiracy, should also be dismissed. In their Response to Defendants Ingersoll-Rand and Westinghouse’s Motion for Summary Judgment Against Personal Injury Plaintiffs Hronek and Day, the Plaintiffs only addressed one of the Moving Defendants’ arguments for dismissal – failure to plead misrepresentation with particularity. Specifically, the Plaintiffs stated: “This claim and the other allegations in Count Three of Plaintiff’s Complaint clearly satisfy Idaho’s law requiring misrepresentation to be pled with particularity.” (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Personal Injury Pls. Hronek and Day at 6.)

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1. Whether the Plaintiffs pled their claims of fraudulent misrepresentation with any particularity.

Pursuant to Rule 9(b) of the Idaho Rules of Civil Procedure (IRCP), claims of fraud and misrepresentation must be pled with particularity. That rule states:

Rule 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.

In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

To prove fraud, a plaintiff must establish the following elements:

(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166, 1170 (2007) (citation omitted). Furthermore,

Rule 9(b) requires that “allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Silver Valley*

Partners, LLC v. De Motte, No. 06-429-N-ELJ, 2007 WL 2802315, at *4 (D. Idaho Sept. 24, 2007)(citation omitted). That court further stated:

“[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant. Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir.2007) (citation omitted) “On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each

defendant separately of the allegations surrounding his alleged participation in the fraud. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme.” *Id.* at 765-766 (citations and quotations omitted).

Id.

In this case, the Plaintiffs’ Complaint makes the same conclusory misrepresentation allegations against each of the 65 Defendants, without making any specific allegations that any representations, false or otherwise, were made by the Moving Defendants to Plaintiff Hronek or Plaintiff Day or that the Plaintiffs relied on representations made by those Defendants. For example, the Complaint includes allegations that the Moving Defendants “affirmatively misrepresent[ed] ... in advertising, labels and otherwise, that the asbestos containing products ... were safe in their ordinary and foreseeable use.” (Compl., June 2, 2006, ¶ 74(e)). The Complaint further alleges that “by placing [asbestos-containing products and/or machinery] on the market, [Moving Defendants] represented that they would safely do the job for which they were intended” (*Id.* at ¶ 82.) These allegations amount to general averments and do not satisfy the requirements of Rule 9(b) as the allegations of fraud here are not specific enough and do not “identify the role of each defendant in the alleged fraudulent scheme.” Thus, the Plaintiffs general averments directed at fraud are insufficient to satisfy the requirements of IRCP 9(b). *See Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005). As such, any fraud claims alleged by the Plaintiffs in Counts Three and Four should be dismissed for failure to plead with specificity.

Additionally, it is important to note that even if the Plaintiffs had satisfied the requirements of IRCP 9(b), they have failed to satisfy their burden pursuant to IRCP 56, as the

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Plaintiffs have simply cited allegations included in their complaint and have failed to file any affidavits pertaining to their fraud claims.

2. Whether the Plaintiffs satisfied the requirements of IRCP 56.

Moreover, the Plaintiffs' failure to present any evidence or argument in opposition to the Defendants' other arguments is also viewed by this Court not only as a concession of those points, but as a further violation of Rule 56. As explained previously, Idaho law provides that a party against whom summary judgment is sought may not merely rest on the allegations contained in the complaint, but must come forward with evidence to contradict the assertions of the moving party in order to establish a genuine issue of material fact. As the Plaintiffs have failed to produce any affidavits regarding their claims of misrepresentation, battery, fraudulent concealment and/or civil conspiracy setting forth "specific facts showing that there is a genuine issue for trial", these claims must be dismissed pursuant to IRCP 56.

2. Whether to grant the Moving Defendants' Motion for Summary Judgment as to Wrongful Death Plaintiffs Stoor, Branch and Frasure.

The Moving Defendants also filed a Motion for Summary Judgment against Wrongful Death Plaintiffs Stoor, Branch and Frasure, which motion is similar to their request for summary judgment against Plaintiffs Hronek and Day as set forth previously.

a. Whether the Plaintiffs' negligence and strict liability claims are barred by the statute of limitations.

The Moving Defendants argue that, like Plaintiffs Hronek and Day, the decedents' claims for negligence and strict liability are also barred by the two-year statute of limitations contained in IC § 5-219(4) since objective medical proof established that the decedents suffered from

asbestos-related injuries more than two years before the complaint was filed in this case on June 2, 2006. As a result, the Moving Defendants contend the Wrongful Death Plaintiffs are now also barred from pursuing their claims. The Moving Defendants argue:

[A] condition precedent to pursuing a claim for wrongful death is that the decedent must have been able to maintain a cause of action had he lived. In other words, Wrongful Death Plaintiffs may not ‘revive’ decedents’ negligence and strict products liability claims if the decedents’ claims would have been barred by the statute of limitations, had their deaths not ensued.

(Def. Ingersoll-Rand and Westinghouse’s Mem. in Supp. of Mot for Summ. J. against Wrongful Death Pls., Nov. 9, 2007, 11.)

1. Whether the decedents’ claims were time-barred before their deaths.

As set forth above, pursuant to IC § 5-219(4), personal injury actions must be brought within two years of the date the cause of action accrues. That section states in pertinent part:

5-219. Actions against officers, for penalties, on bonds, and for professional malpractice or for personal injuries. – Within two (2) years:

(4) An action to recover damages ... for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant; ... the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action ... must be commenced within ... two (2) years following the occurrence, act or omission complained of, whichever is later.

In addressing asbestos personal injury cases specifically, the Idaho Supreme Court has determined that a cause of action accrues “on the date the injury became ‘objectively ascertainable.’ This means that the cause of action accrues when ‘objective medical proof would

support the existence of an actual injury.” *Brennan v. Owen-Corning Fiberglass Corp.*, 134 Idaho 800, 801, 10 P.3d 749, 750 (2000)(citing *Davis v. Moran*, 112 Idaho 703, 706, 735 P.2d 1014, 1020 (1987)). This rule applies even though the plaintiff may not be aware of the actual injury or its cause. *Id.* at 802, 10 P.3d at 751. The *Brennan* court further found that the cause of action accrues and the statute of limitation commences when objective medical proof would support the existence of an actual injury resulting from asbestos exposure. *Id.* Thus, if a plaintiff fails to file suit within two years from the date of first objective medical proof of disease or injury, his or her claims are barred by the statute of limitations as set forth in IC § 5-219(4). The facts that may constitute “objective medical proof that would support the existence of an actual injury resulting from exposure to asbestos,” thereby commencing the running of the statute of limitations include: (1) an examination in order to detect asbestos-related diseases; (2) a chest x-ray which showed scarring of the lung of a kind that can be seen after asbestos exposure; (3) changes in the lung consistent with the type of injury and disease that can be seen after asbestos exposure; or (4) presence of pleural plaques or scarring in the lining of the lung which indicates asbestos exposure. *Id.* at 801.

In this case, objective medical proof establishes that the decedents suffered from asbestos-related injuries more than two years before the complaint was filed. In fact, the Plaintiffs do not dispute that the claims of the decedents would have been barred had they lived. For example, Stoor admitted, and the medical records establish, that he was diagnosed with an asbestos-related disease on or before September 28, 2001. (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Stoor

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(“Stoor Statement of Undisputed Facts”), Nov. 9, 2007, ¶¶ 3-8.) Specifically, a claim for personal injury arising from asbestos exposure filed in August of 2001 included statements that “Stoor had been diagnosed with the following asbestos-related injuries: bilateral pleural disease and nondisabling bilateral interstitial lung disease.” (*Id.* at ¶ 3, citations omitted.) Additionally, on September 28, 2001, Dr. Alvin J. Schonfeld read a chest radiograph taken of Stoor on August 24, 1991, and “concluded that Stoor had pleural abnormalities consistent with pneumoconiosis (one form of which is asbestos) and had pleural thickening of the chest wall.” (*Id.* at ¶ 4, citations omitted.) Since Stoor did not file his personal injury complaint within two years of either the 1991 radiograph or the 2001 diagnosis, his claims were time-barred.

Similar to Stoor, Branch had a chest radiograph taken on July 1, 2003, which indicated abnormalities consistent with asbestos and evidence of asbestos exposure. (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Branch (“Branch Statement of Undisputed Facts”), Nov. 9, 2007, ¶¶ 5-6.) In an emergency room visit on May 11, 2003, Branch also “reported a past medical history of, *inter alia*, asbestos exposure from working at the FMC plant.” (*Id.* at ¶ 4, citations omitted.) Thus, since Branch did not did not file a personal injury complaint relating to an asbestos-related injury within two years from the date of objective medical proof of injury, his personal injury claims were also barred by the statute of limitations.

Likewise, Frasure’s medical records establish that there were pleural plaques present suggesting asbestos disease. After a review of a chest x-ray taken of Frasure on August 24, 2000, Dr. James E. Pearl prepared a report, concluding that “[Frasure] does have pleural plaques

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suggesting asbestos disease.” (Defs. Ingersoll-Rand and Westinghouse’s Statement of Undisputed Facts in Supp. of Mot. for Summ. J. against Frasure (“Frasure Statement of Undisputed Facts”), Nov. 9, 2007, ¶ 4.) On August 25, 2000, another chest x-ray was taken, showing ‘bilateral calcified pleural plaque consistent with asbestos exposure’ (*Id.* at ¶ 5.) Therefore, since Frasure also failed to file an actionable claim, his negligence and strict products liability claims were also barred by the statute of limitations.

2. Whether the Wrongful Death Plaintiffs’ negligence and strict liability claims are barred by the condition precedent rule.

As mentioned, the Moving Defendants contend that because the decedents’ claims would have been barred pursuant to IC § 5-219(4), the negligence and strict liability claims of the Wrongful Death Plaintiffs are also barred. The Moving Defendants argue that “a condition precedent to pursuing a claim for wrongful death is that the decedent must have been able to maintain a cause of action had he lived.” (Defs. Ingersoll-Rand and Westinghouse’s Mem. in Supp. of Mot. for Summ. J. against Wrongful Death Pls. at 11.) In support of that argument, the Plaintiffs rely heavily on a case decided in the United States District Court for the District of Idaho. That court, in applying Idaho law to an asbestos wrongful death case, determined that the condition precedent rule does apply in the statute of limitations context. *Adams v. Armstrong World Indus., Inc.*, 596 F.Supp. 1407, 1412, 1414 (D. Idaho 1984), *rev’d on other grounds sub nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir. 1985). However, it is important to note that, in making that determination, the *Adams* court also conceded that “[t]he Idaho Supreme Court has never specifically addressed the question of whether the heirs may

maintain a wrongful death action if the deceased, at the date of his death, would have been barred by the statute of limitations.” Nevertheless, the U.S. District Court decided “that, if faced with the question, the Idaho court would apply the condition precedent rule to the statute of limitations situation, as it has done in situations involving contributory or comparative negligence.” *Id.* at 1414.

This Court declines to presuppose how the Idaho Supreme Court would rule. Instead, the first step is to turn to the relevant statutory language for guidance. “Judicial interpretation of a statute begins with an examination of the statute’s literal words.” *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct.App. 2000)(citing *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999)). It is well established that where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *Burnight*, 132 Idaho at 659, 978 P.2d at 219; *Escobar*, 134 Idaho at 389, 3 P.3d at 67. “The language of the statute is to be given its plain, obvious and rational meaning.” *Burnight*, 132 Idaho at 659, 978 P.2d at 219. Furthermore, “[i]f the language is clear and unambiguous, ... there is no occasion for the court to resort to legislative history or rules of statutory interpretation.” *Escobar*, 134 Idaho at 389, 3 P.3d at 67. However, when a court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. “To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history.” *Id.* “It is ‘incumbent upon a court to give a statute an interpretation,

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which will not render it a nullity.” *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct.App. 2001)(citing *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct.App. 1991)).

§ 5-311. Suit for wrongful death by or against heirs or personal representatives – Damages. -

(1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

The language of the Wrongful Death Statute is plain and unambiguous. As such, this Court must give effect to the statute as written, without engaging in statutory construction.

It is instructive that the act makes no mention and provides no provision for limitations on wrongful death actions. Furthermore, a clear reading of the words and considering that the Idaho Legislature created another statute to address personal injury claims, this Court finds that the Wrongful Death Statute is an act separate from a personal injury cause of action. In reaching that conclusion, this Court was influenced by the view expressed by the Idaho Supreme Court in the *Chapman* case:

[T]he law is clear that a cause of action for wrongful death accrues on the death of the injured party, and not before. ... This is so because the cause of action did not accrue to the decedent. ... The cause of action which accrues to an injured person during his lifetime is altogether separate from the cause of action accruing to the person’s heirs should he die from that injury. ... Therefore, the “occurrence” giving rise to the cause of action is the decedent’s wrongful *death*, and the statute of limitations must date from that event.

Chapman v. Cardiac Pacemakers, Inc., 105 Idaho 785, 786-87, 673 P.2d 385, 386-87 (1983) (citations omitted). Furthermore, as noted in the *Adams* case, “It is true that Idaho Code § 5-311 does not contain the proviso common to most wrongful death statutes allowing the heirs to maintain an action for wrongful death only ‘whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued.’” 596 F.Supp. at 1413.

Thus, the Wrongful Death Statute is a cause of action distinct and separate from an action for personal injury. As such, there is no condition precedent bar to the Wrongful Death Plaintiffs’ claim here. Furthermore, the relevant statute of limitations dates from the event of the decedent’s death. The claim in this case was filed on June 2, 2006. Stoor died on June 13, 2004; Branch died on July 11, 2005; Frasure died on February 17, 2006. Therefore, the Plaintiffs filed their complaint within the relevant time frame. As such, this Court declines to grant the Motion for Summary Judgment submitted by the Moving Defendants regarding this issue.

b. Whether this Court should dismiss the remaining causes of action.

Similar to their Motion for Summary Judgment against Plaintiffs Hronek and Day, the Moving Defendants are also arguing that Counts Three and Four, including claims of fraud or fraudulent concealment, misrepresentation and battery should be dismissed. However, in responding to that motion, the Wrongful Death Plaintiffs only addressed the Moving Defendants’ arguments regarding the issues of pleading fraud with particularity and whether Counts Three and Four are barred by the condition precedent rule. In referring to their claim of misrepresentation, the Moving Plaintiffs state: “This claim and the other allegations in Count Three of Plaintiff’s Complaint clearly satisfy Idaho’s law requiring misrepresentation to be pled

with particularity.” (Pls.’ Resp. to Defs. Ingersoll-Rand and Westinghouse’s Mot. for Summ. J. against Wrongful Death Pls. at 5.) The Wrongful Death Plaintiffs also argue that the allegations contained in Count Four “satisfy Idaho’s law and clearly and unambiguously set forth the claims upon which Plaintiff relies. Additionally, ... Plaintiff’s claims are not barred by the so-called ‘condition precedent rule.’” (*Id.* at 6-7.)

1. Whether the Wrongful Death Plaintiffs pled their claims of fraudulent misrepresentation with any particularity.

Pursuant to Rule 9(b) of the Idaho Rules of Civil Procedure (IRCP), claims of fraud and misrepresentation must be pled with particularity. That rule states:

Rule 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.

In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

To prove fraud, a plaintiff must establish the following elements:

(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166, 1170 (2007) (citation omitted). Furthermore, Rule 9(b) requires that “allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Silver Valley*

Partners, LLC v. De Motte, No. 06-429-N-ELJ, 2007 WL 2802315, at *4 (D. Idaho Sept. 24, 2007)(citation omitted). That court further stated:

“[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant. Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir.2007) (citation omitted) “On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme.” *Id.* at 765-766 (citations and quotations omitted).

Id.

In this case, the Plaintiffs’ Complaint makes the same conclusory misrepresentation allegations against each of the 65 Defendants, without making any specific allegations that any representations, false or otherwise, were made by the Moving Defendants. These allegations amount to general averments and do not satisfy the requirements of Rule 9(b), as the allegations of fraud here are not specific enough and do not “identify the role of each defendant in the alleged fraudulent scheme.” Thus, Plaintiffs general averments directed at fraud are insufficient to satisfy the requirements of IRCP 9(b). *See Dengler*, 141 Idaho at 127, 106 P.3d at 453. As such, any fraud claims alleged by Plaintiffs in Counts Three and Four should be dismissed for failure to plead with specificity.

In addition, even if the Plaintiffs had satisfied the requirements of IRCP 9(b), they have failed to satisfy their burden pursuant to IRCP 56, as the Plaintiffs have simply cited allegations included in their complaint and have failed to file any affidavits pertaining to their fraud claims.

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2. Whether the Wrongful Death Plaintiffs' claims are barred by the condition precedent rule.

Based on this Court's prior determination as set forth above, there is no condition precedent rule since the Wrongful Death Statute is a cause of action distinct and separate from an action for personal injury. Clearly, the Wrongful Death Plaintiffs also filed their claim within the relevant time frame. As such, the claims of the Wrongful Death Plaintiffs are not dismissed for failure to satisfy the statute of limitations.

3. Whether the Plaintiffs satisfied the requirements of IRCP 56.

Moreover, the Plaintiffs' failure to present any evidence or argument in opposition to the Defendants' other arguments is also viewed by this Court not only as a concession of those points, but as a further violation of Rule 56. As explained previously, Idaho law provides that a party against whom summary judgment is sought may not merely rest on the allegations contained in the complaint, but must come forward with evidence to contradict the assertions of the moving party in order to establish a genuine issue of material fact. As the Plaintiffs have failed to produce any affidavits regarding their claims of fraud, fraudulent concealment, misrepresentation and/or battery setting forth "specific facts showing that there is a genuine issue for trial", these claims must be dismissed pursuant to the IRCP 56.

CONCLUSION

Based on the foregoing, this Court hereby GRANTS the Moving Defendants' Motion for Summary Judgment in part and DENIES the Motion for Summary Judgment in part.

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Specifically, this Court GRANTS the Motion for Summary Judgment against all of the above-named Plaintiffs as to Counts Three and Four, including the claims of misrepresentation, battery, fraudulent concealment and civil conspiracy. This Court determined that the Plaintiffs failed to satisfy the requirements of IRCP 9(b), as the allegations of fraud were not specific enough. Furthermore, summary judgment as to those issues is appropriate because the Plaintiffs also failed to satisfy the requirements of IRCP 56. Pursuant to that rule, the party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” The Plaintiffs offered nothing more than mere allegations and provided no evidence showing that there is a genuine issue for trial regarding those claims.

In addition, this Court also hereby GRANTS the Motion for Summary Judgment as to the negligence and strict liability claims submitted by Plaintiffs Hronek and Day. Objective medical proof established that both Plaintiff Hronek and Plaintiff Day suffered from asbestos-related injuries more than two years before their complaint was filed in this case on June 2, 2006. Therefore, their negligence and strict products liability claims are barred by the statute of limitations requirement contained in IC § 5-219(4). However, the Moving Defendants’ Motion for Summary Judgment as against the Wrongful Death Plaintiffs is hereby DENIED. Because the Wrongful Death Statute is a cause of action distinct and separate from an action for personal injury, there is no condition precedent bar to the claim submitted by the Wrongful Death

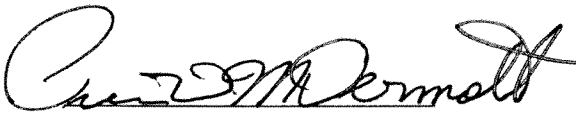
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Plaintiffs. Furthermore, the relevant statute of limitations dates from the event of the decedent's death, and the claim in this case was filed within the relevant time frame.

IT IS SO ORDERED.

Dated this 28 day of January, 2008.


PETER D. MCDERMOTT
DISTRICT JUDGE