IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGE ABBAY and LYNNE ABBAY, husband and wife, Appellants v. AURORA PUMP COMPANY; CAMERON INTERNATIONAL CORPORATION f/k/a COOPER CAMERON CORPORATION, (sued individually and as successor-in-interest to JOY MANUFACTURING COMPANY); CLEAVER-BROOKS, INC. f/k/a AQUA- CHEM, INC., d/b/a CLEAVER-BROOKS DIVISION; COLTEC INDUSTRIES, INC. (sued individually and as successor-in-interest to FAIRBANKS MORSE ENGINE); CRANE CO. (sued individually and as successor-in-interest to COCHRANE CORPORATION and CHAPMAN VALVE CO.); ELLIOTT TURBO MACHINERY COMPANY a/k/a ELLIOTT COMPANY; FAIRBANKS MORSE PUMP CORPORATION; FMC CORPORATION (sued individually and as successor-in-interest to PEERLESS PUMP COMPANY and CHICAGO PUMP COMPANY); FOSTER WHEELER	)	DIVISION ONE No. 62399-1-I UNPUBLISHED OPINION

ENERGY CORPORATION; GENERAL MOTORS CORPORATION (sued individually and as successor-in-interest to DELPHI HARRISON THERMAL SYSTEM and HARRISON RADIATOR); IMO INDUSTRIES, INC. (sued individually and as successor-in-interest to DELAVAL TURBINE, INC., and C.H. WHEELER); LESLIE CONTROLS, INC.; MCWANE INC. (sued individually and as successor-in-interest to KENNEDY VALVE MANUFACTURING COMPANY, KENNEDY VALVE, INC., and KENNEDY VALVE COMPANY); SABERHAGEN HOLDINGS, INC.; STERLING FLUID SYSTEMS, INC. f/k/a PEERLESS PUMP COMPANY; VIKING PUMP, INC.; WARREN PUMPS, LLC (sued individually and as successor-in-interest to QUIMBY PUMP COMPANY); YARWAY CORPORATION, (individually and as successor-in-interest to GIMPEL CORPORATION),

Respondents,

AFTON PUMPS, INC.; ALFA LAVAL, INC. (sued individually and as successor-in-interest to THE DELAVAL SEPARATOR COMPANY and SHARPLES CORPORATION); ALLIS CHALMERS CORPORATION PRODUCT LIABILITY TRUST (as successor-in-interest to ALLIS-CHALMERS CORPORATION); AMERICAN STANDARD, INC., d/b/a AMERICAN STANDARD PRODUCTS, INC. (sued individually and as successor-in-interest to AMERICAN BLOWER CORPORATION); ARMSTRONG INTERNATIONAL, INC.; ASCO VALVE, INC.; BUFFALO

FILED: August 8, 2011

PUMPS, INC. (sued individually and as successor-in-interest to BUFFALO FORGE COMPANY); CARVER PUMP COMPANY; CBS CORPORATION f/k/a VIACOM, INC. (sued as successor-by-merger to CBS CORPORATION f/k/a WESTINGHOUSE ELECTRIC CORPORATION and also as successor-in-interest to BF STURTEVANT); CLA-VAL CO. COEN COMPANY, INC. (sued individually and as successor-in-interest to COEN MANUFACTURING CORP.); CRANE ENVIRONMENTAL, INC. (sued individually and as successor-in-interest to COCHRANE CORPORATION); CROSBY VALVE, INC.; CROWN CORK & SEAL CO., INC. (sued individually and as successor-in-interest to MUNDET CORK COMPANY); CYCLOTHERM CORPORATION; DURABLA MANUFACTURING COMPANY; EATON HYDRAULICS, INC. (sued individually and as successor-in- interest to VICKERS, INC); FLOWSERVE US INC. (as successor-in-interest to PACIFIC PUMPS and BYRON JACKSON PUMP COMPANY); FRYER-KNOWLES, INC.; FRYER-KNOWLES, INC., A WASHINGTON CORPORATION; GARDNER DENVER, INC. (sued individually and as successor-in-interest to JOY MANUFACTURING COMPANY); GARDNER DENVER NASH, L.L.C. f/k/a THE NASH ENGINEERING COMPANY; GARLOCK SEALING TECHNOLOGIES, LLC (sued individually and as successor-in-interest to GARLOCK, INC.); THE

GOODYEAR TIRE & RUBBER)
COMPANY; THE GORMAN-RUPP)
COMPANY; GOULDS PUMPS, INC.;)
HARDIE-TYNES, LLC (sued)
individually and as successor-in-)
interest to HARDIE-TYNES)
MANUFACTURING COMPANY);)
INTERSOLL RAND COMPANY (sued)
individually and as successor-in-)
interest to TERRY STEAM TURBINE)
COMPANY); ITT INDUSTRIES, INC.)
(sued individually and as successor-in-)
interest to KENNEDY VALVE)
MANUFACTURING CO., KENNEDY)
VALVE, INC., and KENNEDY VALVE)
CO.); J.T. THORPE & SON, INC.;)
JOHN CRANE, INC.; M. SLAYEN AND)
ASSOCIATES, INC.; METALCLAD)
INSULATION CORPORATION;)
METROPOLITAN LIFE INSURANCE)
COMPANY; MUELLER COMPANY;)
THE NASH ENGINEERING COMPANY;)
THE NORTHROP GRUMMAN)
FOUNDATION (sued individually and as)
successor-in-interest to LITTON)
INDUSTRIES); PARKER-HANNIFIN)
CORPORATION (sued individually and)
as successor-in-interest to SACOMO)
SIERRA and SACOMO)
MANUFACTURING CO.); PEERLESS)
INDUSTRIES INC.; RAPID-AMERICAN)
CORPORATION (sued individually and)
as successor-in-interest to PHILIP)
CAREY MANUFACTURING)
CORPORATION); SB DECKING, INC.)
f/k/a SELBY BATTERSBY & CO.;)
SPIRAX SARCO, INC.; SYD)
CARPENTER, MARINE)
CONTRACTOR, INC.; TACO, INC.;)
TWC THE VALVE COMPANY, L.L.C.)
(sued individually and as successor-in-)
interest to THE WALWORTH)
COMPANY); VELAN VALVE)

CORPORATION; VIAD CORPORATION f/k/a THE DIAL CORPORATION (sued individually and as successor-in-interest to GRISCOM-RUSSELL COMPANY); WEIL PUMP COMPANY, INC.; WEIR VALVES & CONTROLS USA, INC. f/k/a ATWOOD & MORRILL,

Defendants.

Schindler J. — George Abbay and his spouse Lynne Abbay (Abbay) appeal summary judgment dismissal of his personal injury lawsuit against manufacturers and suppliers of asbestos-containing products or equipment used on United States Navy vessels at the Puget Sound Naval Shipyard (PSNS).[1] In an effort to prevent the respondents from seeking removal to federal court, Abbay disclaimed "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels." In the briefs submitted in opposition to summary judgment, Abbay clarified that the disclaimer excludes his causes of action under state law for exposure to asbestos while working on U.S. Navy vessels at PSNS. On reconsideration, the trial court applied the rules of grammar in ruling that Abbay disclaimed all state law causes of action that occurred at PSNS, including causes of action from exposure to asbestos on Navy ships. We conclude that grammatical rules do not require interpreting the relative clause, "which expressly excludes U.S. Navy vessels," as only applying to the antecedent noun, "federal enclave," and the meaning of the disclaimer is ambiguous. As clarified in the

[1] For simplicity and clarity, we refer to the numerous manufacturers and suppliers as the respondents.

briefs, the disclaimer does not exclude Abbay's state law causes of action from exposure to asbestos while working on U.S. Navy vessels. Accordingly, we need not address whether the trial court erred in ruling that as a matter of law, PSNS in its entirety, is a federal enclave.[2] We reverse dismissal of Abbay's lawsuit and remand.[3]

FACTS

George Abbay worked for approximately 26 years as a ship rigger on United States Navy vessels that were in dry dock or moored to piers at PSNS. In August 2007, Abbay was diagnosed with malignant pleural mesothelioma, a form of cancer caused by exposure to asbestos. On November 16, 2007, Abbay filed a personal injury lawsuit in state court against a number of manufacturers and suppliers alleging state law negligence and product liability causes of action from exposure to asbestos-containing products used on U.S. Navy vessels.

In an attempt to prevent the respondents from removing the lawsuit to federal

[2] We disagree with the characterization of the record by the concurrence. One of the important responsibilities of the appellate court is to thoughtfully and carefully review the record.

[3] Respondent Leslie Controls has filed a petition for relief pursuant to chapter 11 of the federal bankruptcy code in the United States Bankruptcy Court for the District of Delaware, case no. 10-12199. "The filing of a bankruptcy petition creates a bankruptcy estate, which is protected by an automatic stay of actions by all entities to collect or recover on claims." In re Palmdale Hills Prop., LLC, 423 B.R. 655, 663 (B.A.P. 9th Cir. 2009) (citing 11 U.S.C. §§ 541(a) and 362(a)). Accordingly, all proceedings in this matter against Leslie are stayed. However, the automatic stay provision, 11 U.S.C. section 362(a), does not apply to suits against non-debtors and does not stay proceedings against a debtor's co-respondents and co-defendants in multi-defendant litigation. See In re Matter of Johns-Manville Corp., 99 Wn.2d 193, 196, 660 P.2d 271 (1983); In re Excel Innovations, Inc., 502 F.3d 1086, 1095 (9th Cir. 2007); Ingersoll-Rand Fin. Corp. v. Miller Min. Co., 817 F.2d 1424, 1427 (9th Cir. 1987); In re Related Asbestos Cases, 23 B.R. 523, 528–30 (N.D. Cal. 1982). Therefore, our decision shall take immediate effect against all parties in this matter other than Leslie.

We also note that Garlock Sealing Technologies, an original defendant in this matter but not a respondent on appeal, has also initiated chapter 11 proceedings and obtained a preliminary injunction staying all proceedings against it. See In re Garlock Sealing Techs. LLC, Ch. 11 Case No. 10-BK-31607, Adversary Proceeding No. 10-03145, slip op. at 6–10 (W.D.N.C. June 21, 2010). Garlock, however, has not filed a notice of bankruptcy filing in this matter, and it is not clear whether Abbay's cause against Garlock is still pending. In the event that proceedings in this matter are ongoing against Garlock, the automatic stay provision applies to those proceedings as well.

court and transferring the case to the asbestos multidistrict litigation (MDL) proceedings in the U.S. District Court for the Eastern District of Pennsylvania, Abbay included a disclaimer in the complaint for all causes of action resulting from exposure to asbestos dust in a federal enclave, except state law causes of action from exposure to asbestos while working on U.S. Navy vessels. The disclaimer provides, in pertinent part:

> Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.[4]

The respondents did not seek to remove the case to federal court.

After engaging in discovery, the respondents filed motions for summary judgment dismissal. The respondents pointed to the part of the disclaimer that waives "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave" to assert they were entitled to dismissal because PSNS, in its entirety, is a federal enclave.[5] To establish PSNS was a federal enclave, the respondents relied on federal and state laws governing the federal government's authority to acquire property for PSNS, and numerous exhibits for various parcels of the property comprising PSNS and the dates on which the federal government acquired title to the properties.

In the briefs filed in opposition to the motions for summary judgment, Abbay clarified the meaning of the disclaimer and in particular, the meaning of the language in the disclaimer excluding his state law claims for exposure to asbestos that occurred on

[4] Abbay also disclaimed any cause of action for injuries resulting from asbestos exposure committed by the respondents at the direction of an officer of the United States government.

[5] The respondents also asserted that they were entitled to summary judgment because there was no credible evidence establishing that their products were the proximate cause of Abbay's injuries.

the Navy ships at PSNS, and states that he "did not disclaim *all* exposures that occurred within" PSNS.

Abbay explained that the purpose of the disclaimer was to avoid removal to federal court and an effort to "preempt the delays associated with the removal and remand procedures." Abbay conceded he disclaimed "any recovery for exposures to asbestos that took place on land that was a federal enclave and not a ship," but asserts that the disclaimer clearly "does not include exposures that took place aboard navy ships." However, Abbay argued that if the meaning of the disclaimer was ambiguous, he was entitled to clarify the intent and meaning of the disclaimer as a matter of law. In clarifying, Abbay asserts he did not disclaim his state law negligence and products liability claims from asbestos exposure that occurred aboard U.S. Navy ships, regardless of whether PSNS is a federal enclave.

> First, plaintiffs did not disclaim *all* exposures that occurred within Puget Sound Naval Shipyard. Plaintiffs willingly concede that they disclaimed any recovery for exposures to asbestos that took place on land shown to be a federal enclave. But by its own terms, the disclaimer does not include exposures that took place aboard Navy ships: "Plaintiffs hereby disclaim any cause of action or recovery for any injuries by any exposure to asbestos dust that occurred in a federal enclave, *which expressly excludes U.S. Navy vessels*." It follows that even if [the respondents] establish[] that Puget Sound Naval Shipyard is a federal enclave, the disclaimer does not apply to any exposures that took place aboard ship.[6]

Abbay also argued that the respondents did not establish that PSNS in its entirety is a federal enclave, and that the federal enclave clause applies only to land, not U.S. Navy ships.

[6] (Italics in original) (emphasis added).

In reply, the respondents argued that under the rules of grammar, the phrase "which expressly excludes U.S. Navy vessels" as used in the disclaimer, only refers to and modifies the preceding noun, "federal enclave," and not the entire relative clause. The respondents also argued that the Navy ships Abbay worked on were part of a federal enclave and submitted additional documents showing that the United States had title to dry docks and piers at PSNS.

Argument at the summary judgment hearing focused almost entirely on the question of whether PSNS was a federal enclave. Abbay argued that the respondents did not meet their burden of showing that PSNS, in its entirety, is a federal enclave or that Navy ships are part of a federal enclave.

Towards the end of the hearing, one of the respondents argued that as an alternative to dismissal of Abbay's causes of action from exposure to asbestos while working on Navy ships, the court could require Abbay to amend his complaint and clarify the meaning of the disclaimer.

> I just wanted to point out that if Your Honor does decide that PSNS and the ships docked within its boundaries are a federal enclave, and nonetheless you're reluctant to dismiss all those claims, I would just point out that there is a lesser sanction available.
>
> I would simply request that you at least require plaintiffs to amend their pleadings to say what they mean. If PSNS is a federal enclave, the ships docked there are in the federal enclave. And plaintiffs then assert that, well then, we still should allow our claims to go forward, and we're not disclaiming that. Their pleadings should reflect that. They should be required to amend their pleadings and defendants, likewise, should be given their 30 days to move this to federal court. They can't have it both ways.

In response, Abbay's attorney said that Abbay disclaimed all causes of action for

exposure to asbestos in a federal enclave—"on the land," but did not disclaim causes of action from exposure to asbestos on Navy ships.

> The way I understand it is - the way I understand counsel's comments is that if the Court - he's asking us to essentially clarify our disclaimer, if I understand correctly.
>
> I think the disclaimer is very clear that we are disclaiming anything that is in a federal enclave. If Puget Sound Naval Shipyard, the land we're talking about is, in fact, a federal enclave, then Mr. Abbay has no claims for the work that he did, if any, on the land.
>
> Our point is that the vast majority, if not all, of his claims, took place - or his exposures took place on the ship, which is not a federal enclave. So to the extent that any defendant is asserting that we're trying to reinvigorate or somehow have it both ways and also claim land-based exposures, that's not what we're trying to do, and I think that our disclaimer is perfectly clear on that.

In a memorandum decision, the trial court granted the respondents' motions for summary judgment dismissal of Abbay's lawsuit. The court notes that the wording of the disclaimer is ambiguous and susceptible to two reasonable interpretations. The footnote states, in pertinent part:

> Did plaintiffs intend to disclaim all causes of action that arose in a federal enclave and then to assert that federal enclaves *always exclude* navy vessels? Alternatively, did plaintiffs intend to disclaim all causes of action that arose in a federal enclave *except* those that arose onboard a docked ship?

However, pointing to statements made by Abbay's attorney at the summary judgment hearing, the court concluded that if U.S. Navy ships were in a federal enclave, Abbay disclaimed all causes of action.

> Plaintiffs clarified their position at oral argument, indicating that they were disclaiming ALL causes of action that arose within a federal enclave and asserting as a matter of law that federal enclaves exclude navy vessels.

Citing the statutes, exhibits, and case law relied on by the respondents, the court ruled that PSNS in its entirety, is a federal enclave and dismissed Abbay's lawsuit.[7] The order granting the respondents' motions for summary judgment states, in pertinent part:

> [T]he Court FINDS that plaintiffs have disclaimed all causes of action arising out of a federal enclave; that plaintiff's employer, Puget Sound Naval Shipyard (PSNS), was at all times a federal enclave; and that all vessels plaintiff worked on that were dry docked, tied to a pier, or in any other way located at PSNS, were part of the federal enclave.

Abbay filed a motion for reconsideration of the court's decision. Abbay asserted that his attorney did not intentionally abandon the clarification he made in the briefs submitted in opposition to summary judgment. Abbay reiterated the two "distinct" positions in the briefs filed in opposition to summary judgment—first, that the disclaimer did not exclude his state law claims from exposure to asbestos dust that occurred aboard Navy ships; and second, that as a matter of law Navy ships are not a federal enclave.

> [P]laintiffs did not – certainly not intentionally – clarify the disclaimer during oral argument to mean that all of their claims within a federal enclave were disclaimed. Such a clarification would have amounted to an abandonment of plaintiffs' first argument – as set forth in their written oppositions – that the disclaimer did not include exposures aboard ships. . . . The court may recall that plaintiffs asserted two distinct arguments in their papers; first any exposures aboard ships were expressly excluded from the disclaimer and, second, ships are not federal enclaves as a matter of law. Although this court eventually found that ships are federal enclaves as a matter of law, the express exclusion of those ships from the disclaimer (whether enclaves or not) still precludes summary judgment on the scale of the July 17 order.

[7] The trial court did not address the respondents' arguments concerning proximate cause.

Abbay's attorney also submitted a declaration explaining that while the remarks he made at oral argument were perhaps "imprecise and ambiguous," he did not, "certainly not intentionally," mean to say "that all . . . claims within a federal enclave were disclaimed," or abandon the clarification in the briefs submitted in response to

summary judgment.[8]

In the order denying reconsideration, the court agreed with the respondents' argument that the clause "which expressly excludes U.S. Navy vessels" only "modifies" the immediately antecedent noun "federal enclave," and denied Abbay's motion to reconsider. The order states, in pertinent part:

> Pleadings are subject to the same rules of construction that apply to other legally significant documents. Applying basic rules of grammar, the Court concludes that the term "which" modifies the immediately antecedent noun "federal enclave," as opposed to the distant verb "disclaim."
>
> At the June 27, 2008 hearing, Plaintiffs' counsel confirmed this interpretation when he stated, "I think the disclaimer is very clear that we are disclaiming anything that is in a federal enclave." . . . Counsel went on to say, "[o]ur point is that the vast majority, if not all, of his claims took place -- or his exposure took place on the ship, which is not a federal enclave." . . .
>
> The Court concluded that, under the facts of this particular case, the ships that were docked at Puget Sound Naval Shipyard ("PSNS") were part of the federal enclave. Plaintiff's claims for injuries stemming from work on the ships at PSNS are therefore within the scope of the disclaimer and subject to dismissal.[9]

Abbay appeals.

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[8] In the declaration, the attorney explained:

> I made statements regarding the language of the disclaimer that, in hindsight, were imprecise and ambiguous. My statements, however, were not intended as an abandonment of plaintiffs' argument that their disclaimer excluded ships. Rather, I was attempting to explain that the disclaimer only applied to land-based exposures and that if any claims had to be refiled, plaintiffs would not try to reinvigorate previously-disclaimed land-based exposures.
>
> . . . Again, I did not intend to concede or otherwise convey that the disclaimer applied to everything in a federal enclave. More precisely stated, my point would have been that plaintiffs' disclaimer applied to anything in a federal enclave *on land* as opposed to on *ships*. If interpreted otherwise, my statements are contradictory to the position consistently set forth in . . . written responses. Regardless of how my comments were interpreted, there was no intent or desire on my part to contradict or otherwise abandon plaintiffs' position that the disclaimer did not include ship-based claims.

[9] (Italics omitted) (footnote omitted).

ANALYSIS

We review a trial court's order granting summary judgment de novo. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009). In so doing, we review the same record that was before the trial court. Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 634, 854 P.2d 23 (1993).[10] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, 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." CR 56(c).

Abbay contends the trial court erred by interpreting the disclaimer to mean that he waived all state law causes of action from exposure to asbestos while working on Navy ships at a federal enclave, PSNS.

A "federal enclave" is land over which the federal government exercises exclusive legislative power under article I, section 8, clause 17 of the United States Constitution. United States v. Gabrion, 517 F.3d 839, 846 (6th Cir. 2008); see also

[10] At oral argument, counsel for the respondents referred to appendices in the appellate briefs filed in the linked case of Farrow v. Alfa Laval, Inc., Nos. 62996-4-I and 63554-9-I. Although the cases involve the same disclaimer and similar issues, we may not consider information that was not part of the record before the trial court in this case.

United States v. Fields, 516 F.3d 923, 935 (10th Cir. 2008).[11]

A cause of action arising out of events that occur within a federal enclave is treated as raising a federal question subject to subject matter jurisdiction in federal court. Mater v. Holley, 200 F.2d 123, 124–25 (5th Cir. 1952). "Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" Durham v. Lockhead Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006); see also Akin v. Ashland Chem. Co., 156 F.3d 1030, 1034 (10th Cir. 1998). If such claims are originally brought in state court, the lawsuit is subject to removal to federal court under 28 U.S.C. section 1441(a).[12] All federal court asbestos litigation is subject to transfer to the MDL

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[11] The federal enclave clause provides, in pertinent part:

> The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. Const., art. I, § 8, cl. 17.

The inclusion of the enclave clause in the Constitution reflected a concern among delegates to the Constitutional Convention that the federal government, rather than a state government, should exercise exclusive power over the location of the seat of the federal government and other areas acquired for federal governmental purposes. See Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 529–31, 5 S. Ct. 995, 29 L. Ed. 264 (1885); U.S. Interdepartmental Comm. for the Study of Jurisdiction Over Federal Areas Within the States, Jurisdiction Over Federal Areas Within The States, pt. 2 at 15–27 (G.P.O. 1957); Richard T. Altieri, Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction upon Civil Litigation, 72 Mil. L. Rev. 55, 57–58 (1976). Examples of areas over which the federal government has exclusive legislative power include the District of Columbia; see United States v. Jenkins, 734 F.2d 1322, 1325 (9th Cir. 1983); Paul v. United States, 371 U.S. 245, 263, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963); and certain military bases. See e.g., United States v. State Tax Comm'n, 412 U.S. 363, 371–73, 93 S. Ct. 2183, 37 L. Ed. 2d 1 (1973).

[12] The statute provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a).

proceedings in the U.S. District Court for the Eastern District of Pennsylvania. See generally In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

Abbay contends the trial court erred in ruling that he disclaimed all causes of action from exposure to asbestos on U.S. Navy ships at PSNS. We agree. Contrary to the trial court's conclusion, application of grammatical rules does not require interpreting the relative clause, "which expressly excludes U.S. Navy vessels," as applying only to the last antecedent noun, "federal enclave." For example, Webster's Third New International Dictionary 2603 (Unabridged ed. 1993) explains that the word "which" is used to "introduce a nonrestrictive relative clause and to modify a noun in that clause and to refer together with that noun to a word or word group in a preceding clause or to an entire preceding clause or sentence or longer unit of discourse."[13]

Consequently, the relative clause—"which expressly excludes U.S. Navy vessels," can also be interpreted as applying to the entire antecedent clause, thereby limiting the scope of the disclaimer to exclude state law causes of action from exposure to asbestos at PSNS on U.S. Navy ships, regardless of whether PSNS is a federal enclave. The respondents' reliance on the dictionary to explain how the word "which" operates only supports the conclusion that the disclaimer is unclear.

Language is ambiguous if it is "'susceptible to two or more reasonable interpretations.'" Cf. Homestreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (quoting State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

Here, as the trial court recognized, the disclaimer can be read to mean that

[13] (Emphasis added.)

Abbay is asserting either (1) exposure from asbestos occurring on a Navy ship cannot be considered as having occurred in a federal enclave, or (2) the scope of the disclaimer does not apply to claims arising out of asbestos exposure that occurred while working on Navy ships at PSNS.

Because the words used in the disclaimer are susceptible to two reasonable interpretations, Abbay was entitled to clarify the intended meaning of the disclaimer in the briefs filed in opposition to summary judgment. If the meaning of the words used in the complaint can be fairly read as having more than one meaning, the plaintiff may clarify the meaning of the complaint. State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987); Schoening v. Grays Harbor Cmty. Hosp., 40 Wn. App. 331, 336-37, 698 P.2d 593 (1985). It is well established that pleadings must be liberally construed "to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process." Adams, 107 Wn.2d at 620. The meaning of "initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings." Adams, 107 Wn.2d at 620; see also Adams v. King County, 164 Wn.2d 640, 657–58, 192 P.3d 891 (2008) (reaffirming principle permitting clarification of ambiguous pleadings).

In Adams, the Supreme Court held that even though the State's initial pleadings did not specifically request a money judgment, "the State's brief in support of summary judgment made it clear that it sought such alternative relief in the present action." Adams, 107 Wn.2d at 620. Likewise, in Schoening, the court rejected the argument

that the plaintiffs did not properly state their theory of liability in the complaint.

> Even if plaintiffs' theory was not made clear in their pleading, it certainly was made clear before argument on defendants' motion for summary judgment. The Schoenings' memorandum to the court discusses at length

> their view that the determination of independent liability of the defendant hospital was at issue.

Schoening, 40 Wn. App. at 337.[14]

In the briefs filed in response to summary judgment, Abbay asserted two distinct options. First, that the disclaimer did not exclude his state law causes of action from exposure while working on U.S. Navy ships. And second, that as a matter of law Navy vessels are not a federal enclave. Abbay conceded the disclaimer waives "recovery for exposures to asbestos that took place on land shown to be a federal enclave" but states that "by its own terms, the disclaimer does not include exposures that took place aboard navy ships." Abbay argued that the language of the disclaimer was clear but if ambiguous, clarified that the disclaimer expressly excludes his state law tort claims from exposure to asbestos-containing products or equipment while working on Navy ships at PSNS, without regard to whether the Navy ships at PSNS were part of a federal enclave.

The statements counsel made at oral argument did not abandon the clarification of the disclaimer Abbay made in the briefs submitted in opposition to summary judgment. Immediately following the attorney's statement that "we are disclaiming anything that is in a federal enclave," the attorney expressly reiterates the distinction between Abbay's waiver of claims for work that occurred on land and his claims for damages for exposure to asbestos that occurred on the U.S. Navy vessels.

> If Puget Sound Naval Shipyard, the land we're talking about is, in fact, a federal enclave, then Mr. Abbay has no claims for the work that he did, if

[14] We note that the rule as applied by the court in Adams and Schoening is meant to not allow a party to try to state a claim of action not properly pleaded and thereby circumvent CR 11 or CR 15.

> any, on the land.
>
> Our point is that the vast majority, if not all, of his claims, took place – or his exposures took place on the ship.

On reconsideration, the trial court recognized that in context, Abbay's attorney did not concede that Abbay disclaimed his state law causes of action from exposure to asbestos while working on Navy ships. For the first time in the order on reconsideration, the court relies on grammatical rules to conclude that the language used in the disclaimer meant the relative clause, "which expressly excludes U.S. Navy vessels," only modified the noun, "federal enclave." Based on that interpretation of the disclaimer, the court ruled that because U.S. Navy vessels were part of the federal enclave, the respondents were entitled to summary judgment dismissal.

Because we conclude that grammatical rules do not support the trial court's interpretation of the disclaimer and Abbay was entitled to clarify the meaning of the disclaimer, we reverse summary judgment dismissal and remand.[15]

We concur:

[15] Various respondents also argue that they are entitled to summary judgment because Abbay has failed to produce evidence creating a genuine issue as to whether the respondents' products were in fact the cause of his alleged injuries as a result of his work in the shipyard. Because the trial court did not address the argument, we decline to do so. Snohomish Reg'l Drug Task Force v. 414 Newberg Road, 151 Wn. App. 743, 758, 214 P.3d 928 (2009).

Abbay v. Aurora Pump Company, No. 62399-1-I

Dwyer, C.J. (concurring)—Perhaps the most extensively litigated question in this appeal is whether the respondents established—as required by summary judgment standards—that the Puget Sound Naval Shipyard is, in its entirety, a federal enclave. I entirely disagree with the majority's determination that we can properly decide this case without resolving that issue.

As to the meaning of the disclaimer, I do not join in the majority's criticism of the means employed by the trial judge to force the prevaricating plaintiff's lawyer to declare its meaning nor do I criticize the trial judge's decision to reject plaintiff's counsel's later attempt to opt-out of the choice made. Whereas the majority condemns the trial judge's actions as reversible error, I see the court's behavior as an exemplary piece of trial judging.

In the end, however, both the majority and I see this case as one in which the summary judgment of dismissal must be reversed. Accordingly, I write in concurrence, rather than in dissent.

I

Here is this case as I see it.

From 1967 to 1993, George Abbay worked as a ship rigger at the Puget Sound Naval Shipyard. In the course of his employment, Abbay came into contact with

equipment used in United States Navy vessels that were undergoing service at the shipyard. In 2007, Abbay was diagnosed with mesothelioma, a form of cancer associated with exposure to asbestos. He and his wife, Lynne, subsequently brought various tort claims against more than 60 corporations. Abbay alleges that he developed mesothelioma as a result of exposure during the course of his employment at the shipyard to asbestos-laden products used in vessels and that the respondents were responsible for such products.

The central issue raised in the trial court concerned the effect of the following disclaimer in Abbay's complaint:

> Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.

Clerk's Papers (CP) at 11. As discussed further below, a "federal enclave" is a place within a state that the United States has acquired for a federal governmental purpose and over which Congress has exclusive legislative power pursuant to the "Enclave Clause" of the United States Constitution. U.S. Const., art. I, § 8, cl. 17. Abbay included the disclaimer to avoid removal of his lawsuit to federal court.

Despite Abbay's concern about removal, the respondents did not endeavor to remove the case. Instead, they moved for summary judgment, arguing that Abbay had effectively pleaded himself out of court by including the disclaimer in his complaint. They contended that the entire shipyard constitutes a federal enclave. From that premise, they argued that any exposure that Abbay might have had to asbestos while

working in or on a vessel located in the shipyard necessarily occurred within a federal enclave. Thus, they reasoned, Abbay had disclaimed any cause of action arising out of exposure to asbestos in or on a vessel in the shipyard that occurred during the course of his employment at the shipyard.

In support of their motions, the respondents relied heavily on three cases. See Murray v. Joe Gerrick & Co., 291 U.S. 315, 54 S. Ct. 432, 78 L. Ed. 821 (1934), affirming 172 Wash. 365, 20 P.2d 591 (1933); Brem-Air Disposal v. Cohen, 156 F.3d 1002 (9th Cir. 1998); United States v. Kiliz, 694 F.2d 628 (9th Cir. 1982). Those cases, the respondents asserted, established that the shipyard, in its entirety, is a federal enclave. In addition, the respondents directed the trial court's attention to federal and state laws pertaining to the federal government's power to acquire property for the shipyard and the extent to which the state ceded sovereign power over such properties to the federal government. Further, they submitted to the trial court numerous documents pertaining to the various parcels of property comprising the shipyard and the dates on which the federal government acquired the titles to such properties either through purchase or condemnation.

In his responsive briefing, Abbay initially stated that he "did not disclaim *all* exposures that occurred within" the shipyard. CP at 3904. Abbay "concede[d] that . . . [he had] disclaimed any recovery for exposures to asbestos that took place on land that was a federal enclave and not a ship." CP at 3904. But he took the position that the disclaimer, "[b]y its own terms . . . does not apply to all exposures, but only those that

did not take place aboard ship [*sic*]." CP at 3904.

However, at oral argument on the respondents' motions, Abbay offered an interpretation of the disclaimer that differed from the one presented in his briefing. Abbay's counsel stated that

> the disclaimer is very clear that *we are disclaiming anything that is in a federal enclave*. . . .
>
> Our point is that the vast majority, if not all, of his claims, took place—or his exposures took place on the ship, which is not a federal enclave. So to the extent that any defendant is asserting that we're trying to reinvigorate or somehow have it both ways and also claim land-based exposures, that's not what we're trying to do, and I think that our disclaimer is perfectly clear on that.

Report of Proceedings (RP) (June 27, 2008) at 29–30 (emphasis added).

Based on those statements of Abbay's counsel at oral argument, the trial court subsequently ruled that Abbay had clarified the intended meaning of the disclaimer, "indicating that [he was] . . . disclaiming ALL causes of action that arose within a federal enclave and asserting as a matter of law that federal enclaves exclude navy vessels." CP at 1002. Citing to the legal authorities upon which the respondents relied and to the documentary evidence submitted by the respondents, the trial court concluded that the shipyard, in its entirety, is a federal enclave. In particular, the trial court observed that Abbay had "not produced any evidence suggesting that [the shipyard] . . . is not a federal enclave, while [the defendants had] . . . supplied over 200 exhibits tracking the transfer of [shipyard] . . . land to the federal government." CP at 1004. The trial court further concluded that any exposure to asbestos that Abbay might have suffered while working in or on vessels at the shipyard occurred within a

federal enclave. Thus, the trial court ruled, Abbay had disclaimed all claims arising out of any exposure to asbestos in the shipyard, and it granted the respondents' motions for summary judgment, dismissing all of Abbay's claims.

Abbay subsequently moved for reconsideration, arguing that the trial court had erroneously interpreted the disclaimer as covering all causes of action arising within a federal enclave. Abbay asserted that he had not intended to clarify the disclaimer "during oral argument to mean that all . . . claims within a federal enclave were disclaimed" because such a clarification would have been inconsistent with the argument advanced in his responsive briefing. CP at 6683. Abbay's counsel acknowledged in a declaration attached to the motion that the statements he made at oral argument were "imprecise and ambiguous," but he maintained that they "were not intended as an abandonment" of earlier arguments. CP at 6991. Retreating from his statement at oral argument that "the disclaimer is very clear that *we are disclaiming anything that is in a federal enclave*," RP (June 27, 2008) at 29–30 (emphasis added), Abbay's counsel represented that the disclaimer was intended to apply only to occurrences "*on land* as opposed to *on ships*." CP at 6691. The trial court denied Abbay's motion for reconsideration.

II

This court reviews de novo a trial court's order granting summary judgment. Boguch v. Landover Corp., 153 Wn. App. 595, 608, 224 P.3d 795 (2009) (citing Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009)).

In so doing, we engage in the same analysis as the trial court. Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 634, 854 P.2d 23 (1993). Accordingly, our review is confined to "the evidence—and only that evidence—in the record before the trial court when the summary judgment motion and any responsive memoranda were filed."[16] Boguch, 153 Wn. App. at 608 (citing Hines v. Data Line Sys., Inc., 114 Wn.2d 127, 147, 787 P.2d 8 (1990)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, 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." CR 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). The party moving for summary judgment "bears the burden of demonstrating there is no genuine dispute as to any material fact." Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 319, 111 P.3d 866 (2005) (citing Green v. Am. Pharm. Co., 136 Wn.2d 87, 100, 960 P.2d 912 (1998)). In determining whether a genuine issue of material fact exists, we "must view all facts and reasonable inferences in the light most favorable to the

[16] At oral argument, counsel for the respondents referred to appendices in the appellate briefing filed in another asbestos products liability case pending before us: Farrow v. Alfa Laval, Inc., Nos. 62996-4-I and 63554-9-I. That case and this case involve similar claims against some of the same defendants and the same disclaimer language. Further, the same attorneys represent some of the respondents in both cases. Although the cases involve similar issues and were linked for oral argument on the same day, this court may not consider information that was not part of the record before the trial court in this case.

nonmoving party." Versuslaw, 127 Wn. App. at 320 (citing City of Lakewood v. Pierce County, 144 Wn.2d 118, 125, 30 P.3d 446 (2001)). Thus, "[t]he moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party." Atherton Condo, 115 Wn.2d at 516.

If the moving party is the defendant, it may meet its burden by pointing to an absence of evidence to support an essential element of the plaintiff's claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). By the same token, however, a defendant cannot meet its burden by pointing to an absence of evidence pertaining to a particular fact unless the fact is an essential element of the plaintiff's claim. The respondents appear to contend that Abbay bears the burden of showing either that his alleged exposures did not occur within a federal enclave or that the disclaimer does not apply to all of his possible bases of recovery. They do not explain, however, why such a showing is an essential element of Abbay's tort claims. Accordingly, the respondents, as the moving parties, have the burden of establishing that the disclaimer applied to all of Abbay's causes of action.

III

The respondents contend that the shipyard, in its entirety, is a federal enclave. Therefore, they maintain, Abbay effectively pleaded himself out of court because he brought claims for alleged exposures to asbestos that occurred during his work in the shipyard but disclaimed any cause of action arising out of an occurrence in a federal

enclave. At issue, then, is whether the respondents have established that the entire shipyard is a federal enclave and whether Abbay indeed disclaimed all causes of action arising out of his alleged exposure to asbestos while working in the shipyard. Accordingly, we should first analyze that which constitutes a federal enclave—that is, we should identify the material facts that the respondents, as the moving parties, must establish in order to show that Abbay's alleged exposure could have occurred only within areas constituting a federal enclave subject to the disclaimer. In sharp dispute is whether the entire shipyard may be properly considered as a federal enclave over which the State of Washington has no jurisdiction, where the United States has acquired exclusive jurisdiction over some, but not all, of the areas comprising the shipyard. A proper analysis leads to the conclusion that, for purposes of applying the disclaimer, the entire shipyard qualifies as a federal enclave only if the state government either ceded exclusive legislative power to the federal government over all of the areas comprising the shipyard or ceded legislative power over the subject matter underlying Abbay's claims and the federal government correspondingly accepted that cession.

The term "federal enclave" refers to an area located entirely within a state but over which the federal government exercises exclusive legislative power pursuant to article I, section 8, clause 17 of the United States Constitution, the so-called enclave clause. United States v. Gabrion, 517 F.3d 839, 846 (6th Cir. 2008), cert. denied, 129 S. Ct. 1905, 173 L. Ed. 2d 1061 (2009); see also United States v. Fields, 516 F.3d 923,

935 (10th Cir. 2008), cert. denied, 129 S. Ct. 1905, 173 L. Ed. 2d 1060 (2009). The enclave clause provides:

> The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. Const., art. I, § 8, cl. 17.[17] Where the federal government has the power of exclusive legislation over a place as provided in the enclave clause, the federal government has, "in essence[,] complete sovereignty" over that place. S.R.A., Inc. v. Minn., 327 U.S. 558, 562–63, 66 S. Ct. 749, 90 L. Ed. 851 (1946). The power of exclusive legislation is equivalent to "exclusive jurisdiction." Howard v. Comm'rs of Sinking Fund of City of Louisville, 344 U.S. 624, 626, 73 S. Ct. 465, 97 L. Ed. 617 (1953); see also Surplus Trading Co. v. Cook, 281 U.S. 647, 652, 50 S. Ct. 455, 74 L. Ed. 1091 (1930). Thus, where the federal government has power over an area pursuant to the enclave clause, it acts "with total legislative, executive and judicial power." United States v. Jenkins, 734 F.2d 1322, 1326 (9th Cir. 1983) (citing Palmore

[17] The inclusion of the enclave clause in the Constitution reflected a concern among delegates to the Constitutional Convention that the federal government—rather than a state government—should exercise exclusive power over the location of the seat of the federal government and other areas acquired for federal governmental purposes. See Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 529–31, 5 S. Ct. 995, 29 L. Ed. 264 (1885); U.S. Interdepartmental Comm. for the Study of Jurisdiction Over Federal Areas Within the States, Jurisdiction Over Federal Areas Within The States, pt. 2 at 15–27 (G.P.O. 1957); Richard T. Altieri, Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction upon Civil Litigation, 72 Mil. L. Rev. 55, 57–58 (1976). Examples of areas over which the federal government has exclusive legislative power include the District of Columbia, see United States v. Jenkins, 734 F.2d 1322, 1325 (9th Cir. 1983) (citing Palmore v. United States, 411 U.S. 389, 397, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973); Paul v. United States, 371 U.S. 245, 263, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963), and certain military bases. See, e.g., United States v. State Tax Comm'n, 412 U.S. 363, 371–73, 93 S. Ct. 2183, 37 L. Ed. 2d 1 (1973) (Mississippi Tax Commission I).

v. United States, 411 U.S. 389, 397, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973)).

Whether a place is a federal enclave is significant because causes of action arising out of events taking place within a federal enclave are treated as raising federal questions over which federal courts have original subject matter jurisdiction. Mater v. Holley, 200 F.2d 123, 124–25 (5th Cir. 1952). In particular, "[f]ederal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" Durham v. Lockhead Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1331; Willis v. Craig, 555 F.2d 724, 726 n.4 (9th Cir. 1977)); see also Akin v. Ashland Chem. Co., 156 F.3d 1030, 1034 (10th Cir. 1998). If such claims are originally brought in state court, they are subject to removal to federal court pursuant to 28 U.S.C. § 1441(a).[18] In addition, all federal court asbestos litigation is subject to being transferred to multidistrict litigation proceedings (the asbestos MDL) that are ongoing in the United States District Court for the Eastern District of Pennsylvania. See generally In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

Abbay has represented that he included the disclaimer in the complaint to avoid removal to federal court and subsequent transfer to the asbestos MDL. Whatever the ultimate effect of the disclaimer might be on Abbay's claims, the respondents did not remove this matter to federal court. Instead, they opted to litigate in state court the

[18] The statute provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a).

legal meaning of the disclaimer and the related factual issue of whether Abbay's alleged exposure to asbestos could have occurred only in areas constituting a federal enclave.

In approaching the question of whether the entire shipyard has been shown to be a federal enclave, it must be recognized that "[w]hether the United States has acquired exclusive jurisdiction over a federal enclave is a federal question." Paul v. United States, 371 U.S. 245, 267, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963); see also Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 197, 58 S. Ct. 233, 82 L. Ed. 187 (1937) (citing Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87, 43 S. Ct. 60, 67 L. Ed. 140 (1922)). Accordingly, this court must "apply the same body of decisional law as would be applied in a federal court charged with deciding identical issues." S.S. v. Alexander, 143 Wn. App. 75, 93, 177 P.3d 724 (2008). Further, although resort must be taken to some decisions analyzing the jurisdiction of federal courts over actions concerning occurrences within federal enclaves, the required inquiry is not an attempt to define the jurisdiction of federal courts. Instead, the analysis is limited to evaluating whether the respondents have met their burden of demonstrating that there are no genuine issues of material fact as to whether Abbay's alleged exposure to asbestos could have occurred only within areas constituting a federal enclave, thus triggering the application of the disclaimer to all of his claims.

The question of whether a place constitutes a federal enclave is "complex." Celli v. Shoell, 40 F.3d 324, 328 (10th Cir. 1994) (citing Willis, 555 F.2d at 726). Indeed, no

less of an authority than the United States Supreme Court has observed that "[t]he course of construction of [the enclave clause] cannot be said to have run smooth." Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 256, 76 S. Ct. 814, 100 L. Ed. 1151 (1956). Courts have identified, however, the following factors as being determinative of the mixed question of law and fact as to whether a place is a federal enclave giving rise to federal subject matter jurisdiction: "whether the federal government exercises exclusive, concurrent or proprietarial jurisdiction over the property, when the property became a federal enclave and what the state law was at that time, whether that law is consistent with federal policy, and whether it has been altered by national legislation." Celli, 40 F.3d at 328 (citing Willis, 555 F.2d at 726); see also Torrens v. Lockheed Martin Servs. Group, Inc., 396 F.3d 468, 470 (1st Cir. 2005) (explaining that a "web of statutory provisions, practice and case law has developed to determine" whether a place is a federal enclave).

A place over which the federal government has exclusive jurisdiction is a federal enclave. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 182 n.4, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988); Evans v. Cornman, 398 U.S. 419, 419–20, 423–24, 90 S. Ct. 1752, 26 L. Ed. 2d 370 (1970); Paul, 371 U.S. at 249. As explained above, where the federal government has exclusive jurisdiction over a place, it exercises undivided sovereign power over that place to the exclusion of the governing authority of the surrounding state.[19] Accordingly, unless otherwise permitted to do so, a state is

[19] The federal government's exclusive jurisdiction does not preclude service of process for both civil and criminal matters pursuant to state law. See James v. Dravo Contracting Co., 302 U.S. 134, 146–49, 58 S. Ct. 208, 82 L. Ed. 155 (1937).

precluded from taking governmental action affecting a place over which the federal government has exclusive jurisdiction. See United States v. State Tax Comm'n, 412 U.S. 363, 369–73, 93 S. Ct. 2183, 37 L. Ed. 2d 1 (1973) (Mississippi Tax Commission I) (involving state attempt to tax out-of-state distributors' sale of alcohol to proprietor operating on military bases over which the federal government exercised exclusive jurisdiction); Pac. Coast Dairy, Inc. v. Dep't of Agric. of Cal., 318 U.S. 285, 294–95, 63 S. Ct. 628, 87 L. Ed. 761 (1943) (involving state enforcement of minimum price laws on the sale of goods within federal enclaves).

Although the federal government's acquisition of exclusive jurisdiction over a place divests the surrounding state of the power to continue governing the area comprising the federal enclave after federal acquisition, state law may nonetheless still apply to some matters within the enclave. Where the federal government exercises exclusive legislative power over a place ceded to it by a state and has neither enacted a law superseding that of the respective state nor acquired the property for a purpose inconsistent with existing state law, the state law becomes federal law. Mississippi Tax Commission I, 412 U.S. at 370 n.12 (quoting James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99–100, 60 S. Ct. 431, 84 L. Ed. 596 (1940)); Chicago, Rock Island & Pac. R.R. Co. v. McGlinn, 114 U.S. 542, 547, 5 S. Ct. 1005, 29 L. Ed. 270 (1885). This rule applies to a state's common law governing civil actions such as the tort claims brought herein by Abbay. Mater, 200 F.2d at 124. "In effect, the acceptance of jurisdiction over the ceded territory is tantamount to an adoption of the existing state laws by the

Federal Government." Stokes v. Adair, 265 F.2d 662, 664 (4th Cir. 1959). Thus, state-law causes of action arising out of occurrences within federal enclaves are treated as raising federal questions over which federal courts have original jurisdiction. Mater, 200 F.2d at 124.

In addition, the enclave clause provides that the federal government shall have exclusive legislative power over places acquired for the purposes specified in the clause, which includes places acquired for construction of "dock-Yards." However, both the United States Supreme Court and Congress have made clear that the federal government need not acquire exclusive jurisdiction over such places. Silas Mason Co., 302 U.S. at 208; 40 U.S.C. § 3112(a). Rather, states may cede only concurrent jurisdiction to the federal government. That is, either by consent granted pursuant to the enclave clause or by statutes governing the cession of property and attendant jurisdiction to the federal government (cession statutes), states may grant less than exclusive jurisdiction to the federal government or grant to the United States all of the powers associated with exclusive jurisdiction while simultaneously retaining jurisdiction to exercise those same powers concurrently with the federal government. James v. Dravo Contracting Co., 302 U.S. 134, 147–49, 58 S. Ct. 208, 82 L. Ed. 2d 155 (1937); Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 539, 5 S. Ct. 995, 29 L. Ed. 264 (1885). Where states cede only concurrent jurisdiction or less than exclusive jurisdiction, they retain concurrent jurisdiction over the transferred property to an extent consistent with the federal governmental purpose for which the property was acquired.

James, 302 U.S. at 147; United States v. Unzeuta, 281 U.S. 138, 142, 50 S. Ct. 284, 74 L. Ed. 761 (1930); Arlington Hotel Co. v. Fant, 278 U.S. 439, 451, 49 S. Ct. 227, 73 L. Ed. 447 (1929). And where the federal government has only proprietary interests in places, the surrounding states have jurisdiction over those places to the same extent that they have over any federal instrumentality. Fort Leavenworth R.R., 114 U.S. at 539.

Where states have ceded to the federal government only concurrent jurisdiction over places, the question arises as to whether those places are federal enclaves in the same sense as are places over which the federal government has exclusive jurisdiction. This question is salient to this matter because, as explained below, the record reveals that the State of Washington ceded concurrent jurisdiction, rather than exclusive jurisdiction, over some portions of the total area comprising the shipyard, although it ceded exclusive jurisdiction over other such areas. It is improper to view areas over which the federal government and a state share concurrent jurisdiction as enclaves, such that the states lack governing authority over those places pursuant to the enclave clause. To do so would directly undermine the accepted principle that states may properly exercise governmental power concurrently with the federal government where states have ceded less than exclusive control.

Two decisions of the United States Supreme Court are instructive. See Mississippi Tax Commission I, 412 U.S. 363; United States v. State Tax Comm'n, 421 U.S. 599, 95 S. Ct. 1872, 44 L. Ed. 2d 404 (1975) (Mississippi Tax Commission II). In

those two cases, which involved the same controversy, the Court held unconstitutional a state law that effectively taxed the sale of alcohol by certain vendors on four military bases, two of which were areas of exclusive federal jurisdiction and two of which were areas over which the state had retained concurrent jurisdiction. Mississippi Tax Commission I, 412 U.S. at 366–67; Mississippi Tax Commission II, 421 U.S. at 600–01, 609–10. With respect to the two bases over which the federal government had exclusive jurisdiction, the Court explained that the nature of the federal government's jurisdiction over those areas precluded the state from taking the regulatory action at issue, unless some other federal law permitted it to do so or the state had expressly reserved such power at the time it ceded jurisdiction to the federal government. Mississippi Tax Commission I, 412 U.S. at 373, 375. With respect to the two bases over which the state had concurrent jurisdiction, the Court observed that those bases "present[ed] somewhat different problems" because the United States had not acquired exclusive jurisdiction over those places and was therefore "unable to rest its claims for immunity" from the tax on the enclave clause. Mississippi Tax Commission I, 412 U.S. at 379–80.

Although the Court did not address the precise issue presented herein, Mississippi Tax Commission I stands for the proposition that, for purposes of determining whether a place is a federal enclave over which a state lacks governing power, areas over which the federal government and states have concurrent jurisdiction are meaningfully different from areas over which the federal government has exclusive

jurisdiction. As explained, the latter is a federal enclave. And as places of concurrent jurisdiction are different from places of exclusive federal jurisdiction, they do not automatically qualify as federal enclaves.

In Mississippi Tax Commission II, the Court reaffirmed its earlier observation that areas of concurrent jurisdiction are different from areas of exclusive jurisdiction. 421 U.S. at 613. Once again, it explained that the principle of federal immunity from state action based on the enclave clause that is applicable to areas of exclusive federal jurisdiction "does not apply" to areas of concurrent jurisdiction. Mississippi Tax Commission II, 421 U.S. at 613. However, that does not mean that states have the same power to govern areas of concurrent jurisdiction that they enjoy over areas where there has been no transfer of the state's jurisdiction to the federal government. States may not exercise such concurrent power in a manner that would interfere with general powers and immunities of the federal government. Mississippi Tax Commission II, 421 U.S. at 614. Although the federal government had only concurrent jurisdiction over two of the bases affected by the state law, those bases were federal instrumentalities, Mississippi Tax Commission II, 421 U.S. at 606, and were therefore immune from state taxation as are all federal instrumentalities, "'in the absence of express congressional consent.'" Mississippi Tax Commission II, 421 U.S. at 612–13 (quoting United States v. County of Allegheny, 322 U.S. 174, 177, 64 S. Ct. 908, 88 L. Ed. 1209 (1944)). Accordingly, the Court held that the state was powerless to tax the sale of alcohol on the bases, even though it had concurrent jurisdiction over those areas. Mississippi Tax

Commission II, 421 U.S. at 614. Significantly, however, the Court did not hold that the enclave clause stripped the state of its power to do so. Rather, the general constitutional prohibition against state interference with federal instrumentalities was that which rendered the state's alcohol tax unconstitutional.

The Court's holding in Mississippi Tax Commission II is consistent with its earlier pronouncement that where a state has ceded less than exclusive jurisdiction to the federal government, "the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction." James, 302 U.S. at 142. In that regard, the scope of a state's concurrent jurisdiction over a place—the corollary of which is the extent to which that place may be considered a federal enclave over which the state has no jurisdiction—is determined by the scope of jurisdiction ceded to the federal government. To treat areas of concurrent jurisdiction as being necessarily equivalent in all circumstances to areas of exclusive federal jurisdiction, as the respondents urge us to do, would be inconsistent with the pronouncements of the United States Supreme Court. It would also render nugatory the recognized principle that states may retain concurrent jurisdiction over areas ceded to the federal government.

Accordingly, as the court indicated in Celli, a host of factors must be considered in determining whether a place is a federal enclave, including "whether the federal government exercises exclusive [or] concurrent . . . jurisdiction over the property, when

the property became a federal enclave and what the state law was at that time, whether that law is consistent with federal policy, and whether it has been altered by national legislation." 40 F.3d at 328 (citing Willis, 555 F.2d at 726). Specifically with respect to the respondents' contention that Abbay has disclaimed all causes of action, the respondents must establish one of three things: (1) that the federal government has exclusive jurisdiction over the entire shipyard; or (2) that Abbay could have been exposed to asbestos only in areas under the federal government's exclusive jurisdiction; or (3) if the state has concurrent jurisdiction over some or all of the area comprising the shipyard, that the state ceded jurisdiction over the types of claims brought by Abbay.

IV

Now to the question: did the respondents conclusively establish any of those three alternative bases for applying the disclaimer so as to mandate dismissal of all claims? They did not.

One of the state legislature's first actions after Washington achieved statehood was to enact a statutory regime governing the use and acquisition of property within the state by the federal government. In 1890, the legislature enacted a statute granting the federal government the right to use state tide lands adjoining upland areas that it might acquire for purposes identified in the enclave clause. See Laws of 1890, ch. XIV, § 1.[20]

[20] The 1890 session law read as follows:

> *Be it enacted by the Legislature of the State of Washington*:
>
> Section I. That the use of any tide-lands belonging to the State of Washington, and adjoining and bordering on any tract, piece or parcel of land held or reserved by the government of the United States for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dock yards and other needful buildings, be and the same is

That statute did not, however, cede any of the state's jurisdiction over such tide lands to the federal government. The following year, the state legislature passed a statute generally consenting to the past and future acquisition of land by the federal government in accordance with the enclave clause and specifically ceding the state's jurisdiction over such property to the federal government except for the service of

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> hereby granted to the United States so long as the upland adjoining such tide-lands shall continue to be held by the government of the United States for any of the public purposes above mentioned: *Provided*, That this grant shall not extend to or include any lands covered by more than four fathoms of water at ordinary low tide: *And provided further*, That whenever the government of the United States shall cease to hold for public purposes any such tract, piece or parcel of land, the use of the tide-lands bordering thereon shall revert to the State of Washington.

Laws of 1890, ch. XIV, § 1.

process in both civil and criminal matters. See Rem. Rev. Stat. § 8108.[21] Between 1891 and 1892, the federal government acquired title to approximately 190 acres of land in Kitsap County on the shore of Sinclair Inlet. That property constitutes the original area of the shipyard.

Over the course of the following decade, the federal government acquired title to several additional smaller parcels, expanding the size of the shipyard. In 1909, the legislature enacted a statute amending the 1890 law concerning the federal

[21] The 1891 law read as follows:

> **§ 8108. Consent to acquisition of certain rights by United States, etc.** The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States, which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent, or other official document or papers describing such lands; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit occurring without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted.

Rem. Rev. Stat § 8108 (Laws of 1891, ch. XVIII, § 1).

government's use of tide lands. See Rem. Rev. Stat. 8116.[22] Again, however, that statute did not cede jurisdiction over such tide lands to the United States.

On November 4, 1918, a week before the signing of the armistice ending military hostilities in Western Europe during World War I, President Woodrow Wilson executed a presidential proclamation pursuant to an act of Congress for the acquisition of title to three additional parcels adjacent to the existing shipyard. One of the parcels designated in the presidential proclamation included submerged lands extending to the outer harbor line of the nearby town of Bremerton. Approximately five months later, in March 1919, Washington's Governor signed into law a special statute specifically granting to the federal government the right to use the area designated in the November 1918 presidential proclamation and providing for the reversion of title to the state in the event that the property acquired by the federal government ceased to be used "for naval

[22] That statute provided in full:

> **§ 8116. Use of tide lands granted to United States—Limitations.**
> The use of any tide and shore lands belonging to the state of Washington, and adjoining and bordering on any tract, piece or parcel of land, which may have been reserved or acquired, or which may hereafter be reserved or acquired, by the government of the United States, for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dock-yards, navy-yards, prisons, penitentiaries, lighthouses, fog-signal stations, or other aids to navigation, be and the same is hereby granted to the United States, so long as the upland adjoining such tide or shore lands shall continue to be held by the government of the United States for any of the public purposes above mentioned: Provided, that this grant shall not extend to or include any lands covered by more than four fathoms of water at ordinary low tide; and shall not be construed to prevent the citizens of the state of Washington from using said lands for the taking of food fishes so long as such fishing does not interfere with the public use of them by the United States: And provided further, that whenever the government of the United States shall cease to hold for public purposes any such tract, piece or parcel of land, the use of the tide and shore lands bordering thereon shall revert to the state of Washington.

Rem. Rev. Stat. § 8116 (Session Laws 1890, ch. 110 § 1).

purposes."[23] Nothing in that statute, however, ceded jurisdiction over submerged lands to the federal government. During the course of the following four years, the federal government acquired title to various parcels comprising the areas designated in the presidential proclamation.

Approximately one decade later, our Supreme Court and the United States Supreme Court considered whether the state government had retained governing authority over the shipyard. See Murray v. Joe Gerrick & Co., 172 Wash. 365, 367, 20 P.2d 591 (1933), aff'd, 291 U.S. 315, 316, 54 S. Ct. 432, 78 L. Ed. 821 (1934). At issue in Murray was whether Washington's worker's compensation law, enacted in 1911, applied to a negligence action arising out of an industrial accident in the shipyard. Murray, 172 Wash. at 367; Murray, 291 U.S. at 316–17. Both courts held that the state law was inapplicable because (1) the federal government had acquired exclusive jurisdiction over the shipyard prior to the enactment of the statute at issue, making

[23] The special statute read as follows:

> Section 1. There is hereby granted to the United States of America the right to use for naval purposes the following described harbor area in front of the city of Bremerton, to wit:
>
> All harbor area belonging to the State of Washington and lying westerly of the line between Lots 8 and 9, Block 1 of the Town of Bremerton produced southeasterly to and across the harbor area to the outer harbor line, as shown on the official maps of Bremerton Tide Lands filed in the office of the Commissioner of Public Lands at Olympia, Washington, February 28, 1913; it being the intention to include in the above description all of the harbor area embraced within the area designated as Parcel 1 of Tract No. 2 in the proclamation of the President of the United States relating to title to and possession of land for naval purposes dated November 4, A.D. 1918.
>
> Sec. 2. Whenever the lands designated in the said presidential proclamation as Parcel 1 of Tract No. 2 (including the harbor area described in section 1 of this act) shall cease to be held and used for naval purposes, the right to use the said harbor area belonging to the State of Washington shall be terminated thereby, and the title shall revert to the State of Washington.

Laws of 1919, ch. 161.

subsequently enacted laws ineffective in the shipyard, and (2) the federal government had not incorporated the subsequently enacted state law into the legal regime governing the shipyard. Murray, 172 Wash. at 369; Murray, 291 U.S. at 318. As the respondents emphasize, both courts observed that the federal government had exclusive jurisdiction over the shipyard. Murray, 172 Wash. at 370; Murray, 291 U.S. at 318.

However, after Murray was decided, both the state and the federal statutory regimes governing the transfer of jurisdiction over property in the State of Washington to the United States changed dramatically. In 1939, the state legislature significantly altered the statutory scheme governing the cession of jurisdiction over property acquired by the federal government. This scheme is codified in chapter 37.04 of the Revised Code of Washington.[24] In particular, one of the newly enacted statutes repealed the then-existing statute ceding exclusive jurisdiction to the federal

[24] The pertinent sections of chapter 37.04 RCW are as follows:

37.04.010 Consent given to acquisition of land by United States. The consent of this state is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired, in this state by the United States, from any individual, body politic or corporate, as sites for forts, magazines, arsenals, dockyards, and other needful buildings or for any other purpose whatsoever. The evidence of title to such land shall be recorded as in other cases.

37.04.030 Reserved jurisdiction of the state. The state of Washington hereby expressly reserves such jurisdiction and authority over land acquired or to be acquired by the United States as aforesaid as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition.

37.04.040 Previous cessions of jurisdiction saved. Sections 8108 and 8109, Remington's Revised Statutes [1891 pp 31, 32 §§ 1, 2], and all other acts and parts of acts inconsistent with the provisions of this chapter are hereby repealed: PROVIDED, That jurisdiction heretofore ceded to the United States over any land within this state by any previous act of the legislature shall continue according to the terms of the respective cessions: PROVIDED FURTHER, That if jurisdiction so ceded by any previous act of the legislature has not been affirmatively accepted by the United States, or if the United States has failed or ceased to use any such land for the purposes for which acquired, jurisdiction thereover shall be governed by the provisions of this chapter.

government, Rem. Rev. Stat. § 8108, and provided that the state would retain concurrent jurisdiction over all property acquired by the federal government in the future. RCW 37.04.030.[25]

In 1940, Congress enacted a statute providing that the federal government was not required to obtain exclusive jurisdiction over all areas acquired from states. 40 U.S.C. § 3112(a) (previously codified at 30 U.S.C. § 255).[26] That statute further provides that "[i]t is conclusively presumed that jurisdiction has not been accepted until the [federal g]overnment accepts jurisdiction." 40 U.S.C. § 3112 (c). That enactment followed a series of decisions by the United States Supreme Court holding that the federal government was not constitutionally required to obtain exclusive jurisdiction over property acquired from states and that states could not foist jurisdiction on the federal government without the federal government's acceptance thereof. See Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 522–24, 58 S. Ct. 1009, 82 L. Ed. 1502

[25] We also note that RCW 37.08.180 provides: "Jurisdiction ceded when [there has been an] acquisition of land for permanent military installations, see RCW 37.16.180." In turn, RCW 37.16.180, which was adopted in 1917, provides that the state shall cede the power of "exclusive legislation" to the federal government over lands acquired from counties. However, the respondents do not contend that those statutory provisions apply to the shipyard. Accordingly, we do not consider them further.

[26] The full statute provides:

> **(a) Exclusive jurisdiction not required.**— It is not required that the Federal Government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires.
>
> **(b) Acquisition and acceptance of jurisdiction.**— When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.
>
> **(c) Presumption.**— It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section.

40 U.S.C. § 3112.

(1938); James, 302 U.S. at 141–42; Silas Mason Co., 302 U.S. at 197–99.

Subsequent to the enactment of the new statutory regimes, the federal government acquired more property adjacent to the existing shipyard, thus expanding the shipyard's size. The record indicates that the federal government acquired title to dozens of parcels in the early– to mid–1940's and formally accepted concurrent jurisdiction over such properties, consistent with both the federal and state statutory schemes for the cession and acceptance of jurisdiction. In addition, in 1951, the United States District Court for the Western District of Washington entered a judgment confirming title in the federal government to 440 acres of land in Kitsap County. The 1951 judgment, however, does not address the federal government's jurisdiction over that area. The metes and bounds description of the property taken by the United States matches that of "Parcel 84" described in the Declaration of Karen Booth. See Ex. FE388U. Further, the map submitted by the respondents indicates that Parcel 84 is an area of submerged land, some of which has been filled, that extends to the "outer harbor line" and contains what appear to be piers and dry docks.[27] See Ex. FE388U. The record also indicates that after the federal government effected the 1951 taking, it acquired several more parcels through the year 1994, further expanding the shipyard.

Based on the above-described documents, the respondents assert that they have proved the shipyard, in its entirety, to be a federal enclave. However, the record belies this assertion. That portion of the shipyard acquired by the federal government

[27] The respondents have failed to cite to specific portions of the record that was before the trial court establishing the locations of the piers and dry docks.

under the statutory regime ceding exclusive jurisdiction to the federal government undoubtedly qualifies as a federal enclave, and both the United States Supreme Court and our Supreme Court effectively recognized it as such in the Murray decisions. But the areas acquired by the federal government subsequent to 1939 are not areas over which the state ceded exclusive jurisdiction. Rather, pursuant to RCW 37.04.030, the state reserved to itself concurrent jurisdiction over those areas. That the state did so is significant because Abbay alleges that he was exposed to asbestos after the state changed the statutory regime governing cession of jurisdiction. Moreover, the respondents point to nothing indicating that the state ceded jurisdiction over the types of claims brought by Abbay.

In addition, the record does not support the respondents' contention that the formerly submerged tide lands that were partially filled to accommodate the construction of piers and dry docks were within the federal government's exclusive jurisdiction. They identify no statutes ceding such jurisdiction. Nor do they point to any specific portions of the record establishing that the state ceded exclusive jurisdiction over such areas. Indeed, the only state statutes addressing submerged lands or tide lands grant to the federal government only the right to use such lands. Those statutes do not cede jurisdiction to the federal government.

The respondents mistakenly rely on two federal circuit court cases concerning the shipyard for the proposition that the facility, in its entirety, is a federal enclave. See Brem-Air Disposal v. Cohen, 156 F.3d 1002 (9th Cir. 1998); United States v. Kiliz, 694

F.2d 628 (9th Cir. 1982). At issue in Brem-Air was whether a city of Bremerton garbage contractor had standing under the federal Administrative Procedure Act to sue the United States Secretary of Defense for awarding a shipyard garbage collection contract to another service provider. Brem-Air, 156 F.3d at 1003. Although the court observed that the "United States Navy operates" the shipyard, it did not address the question of whether the shipyard, in its entirety, is a federal enclave. Brem-Air, 156 F.3d at 1003. At issue in Kiliz was whether a federal trial court had correctly applied a Washington criminal statute in a prosecution for driving with a suspended license committed inside the shipyard pursuant to the Assimilative Crimes Act (ACA), 18 U.S.C. §§ 7 and 13. 694 F.2d at 629. The court found no error in the trial court's application of state law, referring to the shipyard multiple times as a federal enclave in which state criminal law had been incorporated pursuant to the ACA. Kiliz, 694 F.2d at 629–32. However, nothing indicates that the particular issue raised herein was resolved by the court in Kiliz. Therefore, neither Brem-Air nor Kiliz controls this matter.

In addition, the respondents contend that the areas of the shipyard wherein Abbay's alleged asbestos exposures were most likely to have occurred—the piers and dry docks—were necessarily within the federal government's exclusive jurisdiction because the structures are partially located on reclaimed land adjacent to the area of the original shipyard, which, as we explained above, is under the federal government's exclusive jurisdiction. For that proposition, the respondents rely on Torrens v. Lockheed Martin Servs. Group, Inc., 396 F.3d 468, 470 (1st Cir. 2005), which

concerned the deactivated Roosevelt Roads Navy base in Puerto Rico. At issue in Torrens was whether certain piers and dry docks built partially on original upland and partially on reclaimed land were within a federal enclave. 396 F.3d at 469. When the federal government acquired the upland areas upon which the structures were built in the early 1940s, a Puerto Rico statute ceded exclusive jurisdiction over all lands acquired by the federal government. Torrens, 396 F.3d at 470. That statute, however, did not address submerged lands or reclaimed lands. Regardless of whether the instrument conveying the subject property to the federal government had included the submerged lands that the federal government subsequently reclaimed, the court held that the federal government nonetheless took that land by filling it and constructing the piers and dry docks upon it. Torrens, 396 F.3d at 473. In addition, the court held that, assuming the authenticity of a letter accepting exclusive jurisdiction over both the original upland and the reclaimed land, the federal government accepted exclusive jurisdiction over that entire area in fulfillment of the requirements of former 40 U.S.C. § 255. Torrens, 396 F.3d at 473.

Torrens is inapposite in this context. As explained above, Washington's statutory regime governing the cession of jurisdiction to the federal government underwent significant alterations in 1939, changing from the cession of exclusive jurisdiction to the cession of only concurrent jurisdiction. The respondents have failed to establish that the federal government acquired exclusive jurisdiction over the reclaimed land where all of the dry docks and piers are located. Further, their various

arguments that it would be nonsensical to treat portions of the shipyard as constituting a federal enclave and other portions as being within the state's concurrent jurisdiction are themselves nonsensical. They cite to no authority for the implicit premise that where a portion of a federal governmental installation is within the federal government's exclusive jurisdiction, all other areas within that installation must also be within the federal government's exclusive jurisdiction. Indeed, the various documents in the record indicating that the United States accepted concurrent jurisdiction over areas acquired after 1940 supports the opposite conclusion: that the state retained concurrent jurisdiction over areas acquired after 1940.

None of this analysis is to say that the areas pertinent to Abbay's claims are conclusively not within a federal enclave. They very well might be. However, the respondents have failed to carry the burden of establishing that there is no genuine issue as to that material fact, a task which could likely be accomplished by way of unrefuted affidavits and supporting documents showing that Abbay could have been exposed to asbestos only in areas within the federal government's exclusive jurisdiction. In light of the absence of evidence that Abbay's alleged injuries could have occurred only within a federal enclave to which the disclaimer applies, the respondents were not entitled to summary judgment. Therefore reversal and remand is required.

V

The majority agrees that reversal is required, but for an entirely different reason. While acknowledging that the disclaimer at issue was ambiguous, in that it could

reasonably be read in more than one way, the majority faults the procedure employed by the trial judge to seek and enforce clarification of the disclaimer's meaning. The majority concludes that the trial judge thus gave the disclaimer an impermissible meaning and, further, erred by ruling in reliance on that meaning. I disagree.

Again, Abbay included the following disclaimer in his complaint:

> Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.

CP at 11. Abbay asserts that the trial court's reading of the disclaimer as applying to all exposures that allegedly occurred within the area comprising the shipyard—including exposures that occurred on vessels located in the shipyard—is overly broad and distorts his attempt to clarify the meaning of the disclaimer. He argues that the relative clause—"which expressly excludes U.S. Navy vessels"—applies to the disclaimer itself, not merely to the immediately antecedent term—"federal enclave." Thus, he contends, he did not disclaim causes of action arising out of occurrences on vessels.

The record, however, indicates otherwise. At oral argument, Abbay's attorney unequivocally stated "the disclaimer is very clear that we are *disclaiming anything that is in a federal enclave*." RP (June 27, 2008) at 29 (emphasis added). Then, Abbay argued that a vessel does not constitute a federal enclave. However, after the trial court granted summary judgment in favor of the respondents, Abbay argued in a motion for reconsideration that the disclaimer was intended to apply only to occurrences "*on*

land as opposed to *on ships*." CP at 6691.

"[I]nitial pleadings which may be unclear may be clarified during the course of summary judgment proceedings." State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987) (citing Schoening v. Grays Harbor Cmty. Hosp., 40 Wn. App. 331, 336–37, 698 P.2d 593 (1985)). The attorney is the master of that attorney's initial pleadings. Where the words used can be fairly read to have more than one meaning, the attorney is allowed to clarify the pleadings by identifying the meaning that the words convey. Abbay availed himself of that opportunity at oral argument. However, once the meaning of the words used has been clarified, that meaning is fixed. Thereafter, an attorney who seeks to alter the meaning of the words used is seeking to amend the pleadings. Any

such alteration is subject to the requirements of CR 15(a).[28] Abbay did not seek leave to amend his complaint. The trial court did not err either by accepting Abbay's clarification at oral argument or by rejecting his attempt to alter the clarified meaning of the words used in his complaint in the motion for reconsideration.[29]

The majority sees the issue differently. Based upon its review of the record, it concludes that—prior to the hearing—Abbay's counsel made several statements in pleadings which, as a matter of law, should have been deemed by the trial judge as binding on Abbay as to the meaning of the disclaimer. I disagree.

This case was extensively litigated by a multitude of parties. In preparing for argument on the various dispositive motions, the trial judge was required to review an

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[28] CR 15(a) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[29] To be clear: this procedure does not authorize an attorney to "sit back," wait for the trial court to rule (or begin to rule) on an issue before it, and then propose an altered meaning of a pleading—in the guise of a clarification— in an effort to avoid the trial court's ruling.

As set forth above, a clarification is appropriate only when the words used in a pleading can be fairly read as having more than one meaning. The clarification is in the nature of an election. Once the clarification is made, it is binding, subject to the amendment procedure of CR 15(a).

Here, although Abbay's briefing discussed alternative meanings of the words used in the disclaimer, at the time the motion hearing commenced the trial court was of the view that Abbay had not yet clarified the meaning of the words used. Under these circumstances, the trial court properly allowed the clarification. It then ruled based on the clarified meaning.

As discussed above, having done so, the trial court properly denied Abbay's attempt to interpose a second, contrary clarification.

enormous amount of pleadings and an even greater quantity of declarations and exhibits. Indeed, the summary judgment motions submittals to the trial judge exceeded 8,000 pages in all. For the trial judge, this was an imposing endeavor.

I have no doubt that, in the lofty quietude of appellate chambers, it is possible to leaf through thousands of pages of documents, seize upon an entry or two in this or that pleading, and declare victory in a scavenger hunt for certitude. However, this trial judge, working in a perhaps less serene environment and faced with more immediate time demands, chose a different course.

It is true that the disclaimer is ambiguous. It is also true that plaintiff's counsel prevaricated as to its intended meaning. Thus, it was entirely appropriate for the trial judge—at the hearing on the motions—to require plaintiff's counsel to elect a meaning in open court. It was entirely appropriate for the trial judge to then rule on the issues presented based upon that election. It was even more appropriate for the trial judge to refuse to allow plaintiff's counsel to choose a different meaning when bringing a motion for reconsideration.

No court rule sets forth a mandated procedure for clarification of an ambiguous pleading. Here, the trial judge employed a reasonable procedure of the judge's own choosing. The judge was authorized by statute to do so. Indeed, RCW 2.28.150 provides that "in the exercise of the [court's] jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws."

The majority holds that the trial judge was required to discern the disclaimer's clarified meaning only from the pleadings submitted prior to the hearing. I believe the trial judge properly exercised that judge's discretion by requiring plaintiff's counsel to elect a meaning in open court. That which the majority views as reversible error, I view as exemplary trial judging.

VI

A proper resolution of this appeal requires a discussion of an additional issue extensively briefed by the parties but not addressed by the majority.

Abbay contends that the disclaimer does not apply to claims arising out of alleged asbestos exposure in or on ships located in the shipyard because the vessels themselves are not land and therefore cannot qualify as federal enclaves. This contention fails.

Contrary to Abbay's contention, if his alleged exposure to asbestos occurred in or on a vessel that was otherwise located in an enclave, it occurred within a federal enclave. The enclave clause does not refer to land. It refers to places. That a vessel is not a fixture on land is of no moment. If the mobility of a vessel were dispositive, as Abbay contends, then a person injured in a motor vehicle while that vehicle was located in a federal enclave could not be said to have been injured in an enclave. However, injuries arising out of motor vehicle accidents occurring on federal enclaves are in fact recognized as occurring in enclaves. See, e.g., Reed v. Charizio, 183 F. Supp. 52, 53 (E.D. Va. 1960).

The two federal district court cases on which Abbay principally relies are readily distinguished. See Anderson v. Crown Cork & Seal, 93 F. Supp. 2d 697 (E.D. Va. 2000); McCormick v. C.E. Thurston & Sons, Inc., 977 F. Supp. 400 (E.D. Va. 1997). Both of those cases involved asbestos-related, state-law personal injury actions brought by seamen whose exposures to asbestos occurred during their deployment aboard vessels. The courts emphasized that the vessels, by themselves, did not constitute federal enclaves and that the plaintiffs' exposures were not connected to their respective vessels' location within areas that were otherwise federal enclaves. Anderson, 93 F. Supp. 2d at 701; McCormick, 977 F. Supp. at 402–03. In contrast, Abbay contends that he was exposed to asbestos while working on vessels located in the shipyard. Thus, his claims differ from those of the plaintiffs in Anderson and McCormick in that they arise out of activity that specifically occurred within the shipyard, not as part of a deployment at sea. If the locations in which Abbay worked on such vessels are proved to be federal enclaves, then his alleged exposure occurred in enclaves and would be subject to the disclaimer.

In this regard, Abbay's case is analogous to Fung v. Abex Corp., 816 F. Supp. 569 (N.D. Cal. 1992). In that case, the court concluded that it had federal subject matter jurisdiction over state-law, asbestos-related tort claims arising out of work on submarines at Navy shipyards because the shipyards constituted federal enclaves and the vessels on which the plaintiffs worked were located in the enclaves. Fung, 816 F. Supp. at 571. Like Abbay, the plaintiffs in Fung were shipyard employees, not sailors

at sea, when they were allegedly exposed to asbestos. Fung, 816 F. Supp. at 571. If the respondents were to establish that the locations wherein Abbay worked on vessels are within a federal enclave, then the disclaimer should apply so as to bar the assertion of claims arising out of alleged exposure in those locations.

VII

For the reasons stated, I concur that the summary judgment of dismissal must be reversed.