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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA VARNEY, Individually and as
Personal Representative for the Estate of
Donald Varney,

Plaintiff-Appellant,

v.

GOODYEAR TIRE & RUBBER
COMPANY; CROSBY VALVE, LLC;
JOHN CRANE, INC.; FLOWSERVE US,
INC.; WEIR VALVES & CONTROLS
USA INC; WARREN PUMPS LLC;
INGERSOLL-RAND COMPANY,

Defendants-Appellees,

and

ALFA LAVAL, INC.; ARMSTRONG
INTERNATIONAL, INC.; AURORA
PUMP COMPANY; BLACKMER PUMP
COMPANY; BNS CO.; BW/IP
INTERNATIONAL; CARRIER GLOBAL
CORPORATION; CBS CORPORATION;
CLA-VAL COMPANY; CLARK-
RELIANCE CORPORATION; CRANE
CO.; CRANE ENVIRONMENTAL, INC.;

No. 19-35859

D.C. No. 3:18-cv-05105-RJB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

CROWN CORK & SEAL COMPANY
INC.; DARIGOLD, INC.; ELLIOTT
TURBOMACHINERY CO. INC.; FMC
CORPORATION; FRYER-KNOWLES,
INC.; FRYER-KNOWLES, INC.;
GENERAL ELECTRIC COMPANY;
THE GORMAN-RUPP COMPANY;
GOULDS PUMPS LLC; GRINNELL
LLC; HOPEMAN BROTHERS, INC.;
IMO INDUSTRIES, INC.; ITT , LLC;
MCNALLY INDUSTRIES, INC.;
METROPOLITAN LIFE INSURANCE
COMPANY; NASH ENGINEERING
COMPANY; SB DECKING, INC.;
STERLING FLUID SYSTEMS (USA)
LLC; SUPERIOR-LIDGERWOOD-
MUNDY CORPORATION; TACO, INC.;
UNIROYAL HOLDING, INC.; VIKING
PUMP, INC.; WM. POWELL
COMPANY,

Defendants.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Submitted February 1, 2021**
San Francisco, California

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: SILER,^{***} RAWLINSON, and BUMATAY, Circuit Judges.

Appellant Maria Varney appeals the district court's evidentiary ruling that a declaration from her husband, Donald Varney, stating that his mesothelioma was caused by products manufactured by Appellees,¹ was inadmissible as a dying declaration pursuant to Federal Rule of Evidence 804(b)(2). Mrs. Varney contends that the district court erred in holding that the evidence and testimony submitted during an evidentiary hearing did not sufficiently establish that Mr. Varney had personal knowledge of the declaration's contents.

Contrary to Mrs. Varney's assertions, the district court conducted a thorough review of the testimony, depositions, and statements submitted during the evidentiary hearing, and did not abuse its discretion in holding that the evidence did not establish who prepared the declaration, the source of the details concerning the manufacturers' liability and Mr. Varney's exposure to asbestos, that Mr. Varney read the declaration, or that Mr. Varney had personal knowledge of the declaration's contents. *See Clare v. Clare*, 982 F.3d 1199, 1201 (9th Cir. 2020)

^{***} The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

¹ On December 17, 2020, we administratively closed the appeal as to Ingersoll-Rand Company due to its pending bankruptcy proceedings and imposition of the automatic stay.

Based on the parties' stipulation, Air & Liquid Corp. has been voluntarily dismissed from this appeal.

(articulating that “[w]e review evidentiary rulings for an abuse of discretion even when the rulings determine the outcome of a motion for summary judgment”) (citation and internal quotation marks omitted); *see also* *Endy v. Cty. of Los Angeles*, 975 F.3d 757, 763 (9th Cir. 2020) (explaining that “affidavits or declarations supporting [an] opposition [to summary judgment] must be made on personal knowledge”) (citation and internal quotation marks omitted).

The district court also properly determined that the testimony did not resolve the discrepancies between Mr. Varney’s interrogatories that he “believe[d] [his] attorneys ha[d] information suggesting that [he] was exposed to the defendants’ asbestos products,” and details subsequently provided in Mr. Varney’s declaration that he had personal knowledge of the specific products resulting in his asbestos exposure. As a result, Mrs. Varney fails to sufficiently establish that the district court clearly erred in its factual findings in support of its ruling that Mr. Varney’s declaration was inadmissible as a dying declaration. *See In re Nat’l Collegiate Athletic Ass’n Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1252-53 (9th Cir. 2020) (explaining that “[u]nder clear error review, we must accept the district court’s findings of fact unless we are left with the definite and firm conviction that a mistake has been committed”) (citations and internal quotation

marks omitted).² Beyond her evidentiary challenge, Mrs. Varney does not otherwise appeal the district court's entry of summary judgment in favor of Appellees because, without Mr. Varney's declaration, she was unable to demonstrate the requisite causation in support of her claims.

AFFIRMED.

² The district court's factual findings also support its ruling that the declaration was not admissible under Federal Rule of Evidence 807(a). *See* Fed. R. Evid. 807(a)(1) (excluding statement from hearsay rule if "the statement is supported by sufficient guarantees of trustworthiness –after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement"); *see also United States v. \$11,500.00 in U.S. Currency*, 710 F.3d 1006, 1014 n.3 (9th Cir. 2013) (explaining that "a statement qualifying under the residual exception [provided in Fed. R. Evid. 807(a)(1)] must have equivalent circumstantial guarantees of trustworthiness") (citation and internal quotation marks omitted).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>
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