No. 93581-5

SUPREME COURT
OF THE STATE OF WASHINGTON

HOFFMAN, LARRY AND JUDITH, husband and wife,

Plaintiffs-Appellants,

v.

ALASKA COPPER COMPANIES, INC., et al.,

Defendant-Respondents.

LARRY AND JUDITH HOFFMAN'S ANSWER TO KETCHIKAN PULP COMPANY'S PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Ketchikan Pulp Company ("KPC") fails to address, let alone persuade, the Court that it should accept review under the standards imposed by RAP 13.4(b). The Court of Appeals' unpublished decision in this case was legally sound, and it raises neither questions of "substantial public interest" nor of conflict with decisions of this Court or other divisions of the Court of Appeals. Specifically, KPC claims that the Court of Appeals erred in applying the standard of review applicable for grant of a CR 12(b)(6) motion, but KPC agreed that was the applicable standard in the Court of Appeals and has waived the argument here. Moreover, the CR 12(b)(6) standard of review was appropriate, because the Court of Appeals reviewed the grant of KPC's "Motion to Dismiss for Failure to State a Claim," CP at 2914-24, and the Superior Court cited none of the Hoffmans' evidentiary submissions (in relation to summary judgment motions that the trial court had denied and which no one appealed) in granting the 12(b)(6) motion. CP 2912-13.

Similarly, the Court of Appeals correctly ruled that the Hoffmans should be free to prove KPC's gross negligence, which constitutes an express exception to Alaska's statute of repose. The Hoffmans' trial counsel explained to the trial court how the Hoffmans would prove KPC's gross negligence, the trial court acknowledged it was "going out on a limb" by dismissing the claim, as gross negligence is normally a "factual question," and the Court

of Appeals correctly ruled that the Superior Court had indeed gone too far out on that limb in rejecting the "gross negligence" exception to the Alaska statute of repose as a basis for sustaining the Hoffmans' case under Alaska law.

Finally, while the Court of Appeals did not need to reach other bases for sustaining the Hoffmans' claim against KPC under Alaska law, the Hoffmans' claims against KPC also met a number of other explicit exceptions to the Alaska Statute of Repose, permitting them to proceed against KPC under Alaska law on a number of grounds. These additional legal bases for sustaining the Court of Appeals underscore that the Petition is meritless.

II. THE HOFFMANS' STATEMENT OF THE CASE

Larry Hoffman's father, Doyle Hoffman, worked as a welder and pipefitter at the KPC Mill from its opening in 1954 until 1966. CP 200-01, 349-50. Doyle was exposed to substantial asbestos while working at the KPC Mill. *See* CP 1162-63. As a welder, Doyle Hoffman was present when asbestos blankets were removed from GE turbines as they were opened for repairs. CP 1162. During mill shutdowns, GE brought their own personnel to work on the General Electric turbines at the Ketchikan Pulp Mill, and Doyle worked around those turbines during mill shutdowns and emergency

repairs. CP 1162. The removal and installation of the asbestos blankets on the GE turbines created a tremendous amount of dust. CP 1162. Ketchikan Pulp Mill workers, including welders, staged the worksite, ferried materials, and swept up after the work was performed by the GE. CP 1162. Sweeping up the areas near the GE turbines during the shutdowns created a tremendous amount of dust. CP 1162.

In addition to his asbestos exposure from the GE turbines and their asbestos-containing components, Doyle was exposed to asbestos from his work on steam piping at the Ketchikan Pulp Mill. *See* CP 1162. Welders such as Doyle removed insulation on steam piping to get to valves, steam traps, and other worksites. CP 1162. All steam piping in the mill was insulated with asbestos, and stream traps were located throughout the Ketchikan Pulp Mill. CP 1162.

Unwittingly, Doyle Hoffman carried asbestos fibers home on his clothing, and exposed his son, Larry, to those deadly fibers. *See* CP 1162-63; 201-02. Doyle Hoffman came home in the clothing he wore to work, he would play with Larry, and then sit on the family couch — still dressed in his asbestos-laden work clothing. CP 201-

02. Doyle Hoffman wore his work clothing when he drove the family car to and from work each day, the same car used by the family on weekends. CP 201.

The Hoffmans will prove at trial that KPC negligently operated and controlled the premises where Doyle Hoffman worked, including negligent management and maintenance of defective asbestos products, which resulted in Doyle unwittingly carrying asbestos waste fibers home on his clothing where he exposed his son, Larry. CP 1254.

III. ARGUMENT

A. The Court of Appeals Correctly Evaluated Plaintiffs' Claims Under CR 12(b)(6).

KPC argues that the Court of Appeals erred in applying the "favorable inference" standard appropriate to review of dismissal under CR 12(b)(6). Petition at 14. KPC has waived this argument and it is wrong. Even if it had not waived its erroneous argument, this is hardly the stuff of discretionary review.

In their Opening appellate brief, the Hoffmans clearly stated the standard of review as review of a CR 12(b)(6) dismissal in which the court takes "[t]he Hoffmans' factual allegations [as] presumed true, and the Court may consider hypothetical facts that support their claims. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)."

Appellants' Brief (July 30, 2015) at 10-11. KPC accepted that standard. KPC stated, "A trial court's *ruling to dismiss a claim under CR 12(b)(6*) is reviewed de novo." Respondent KPC's Brief at 8 (emphasis added). KPC made no argument that the trial court did or the appellate court should convert the CR 12(b)(6) motion to a summary judgment.

At oral argument, the panel quizzed appellate counsel regarding whether the standard of review should be under CR 12(b)(6), and both sides confirmed that was the appropriate standard of review. For example, at oral argument, The Hoffmans' appellate counsel reiterated that the 12(b)(6) standard was applicable. Appellate Hearing at 15:25-16:30.[1] And Respondents' Counsel agreed that the CR 12(b)(6) standard applied:

> Judge: Let me ask you a question.
>
> (Kirk Jenkins for GE): Yes your Honor.
>
> Judge: You say he's waived it but we're in a 12(b)(6), do you agree with that?
>
> Atty: Yes, I agree with that your Honor.
>
> Judge: Okay, so that hypothetical situations can also be considered by the Court. In other words, no hypothetical facts would fit this. Do you agree that's our standard?

[1] *Available at* https://www.courts.wa.gov/content/OralArgAudio/a02/20160401/474395%20-%20Hoffman%20v%20Alaskan%20Copper.mp3.

Atty: I agree that's your standard, would be a standard in a general way . . .

. . .

Judge: We are not bringing in evidence because it's a 12(b)(6) motion. That's why we're getting some confusion I think up here. So under a 12(b)(6) we consider, is there a realistic hypothetical situation. Correct? And you're saying no, not in this situation so tell me what the standard is that you think we should apply?

Atty: In this standard that hypothetical has been closed off.

Judge: What's the standard? We are not talking about the facts, but tell me is the standard different than what I am understanding?

Atty: No your Honor, the standard as of matter of law across the broad run of cases would be that a hypothetical situation could be applicable.

Judge: Okay.

Atty: That's the general rule of law.

Id. at 19:23-20:42.[2]

Thus, KPC's argument here that the Court of Appeals should not have concluded that the Hoffmans' factual "allegations in the Complaint [are presumed] to be true" and the Court may consider hypothetical facts that support their claims (Petition at 12-13) was waived in the Court of Appeals and cannot be resurrected here. Just

[2]Appellate counsel for KPC said nothing on the subject, having agreed in its brief that the CR 12(b)(6) standard applied.

to the contrary, KPC endorsed the CR 12(b)(6) standard in the Court of Appeals. *See Crystal Ridge Homeowners Assoc. v. City of Bothell*, 182 Wn.2d 665, 678, 343 P.3d 746 (2015) (citing *State v. Benn*, 161 Wn.2d 256, 262 n. 1, 165 P.3d 1232 (2007)) (the Supreme Court "generally does not consider issues, even constitutional ones, raised first in a petition for review").

What was peculiar about the CR 12(b)(6) dismissal reversed by the Court of Appeals is that it came on the eve of trial when a factual record had been developed and summary judgment arguments were being argued simultaneously. Indeed, KPC moved for summary judgment, but the Superior Court denied that motion, and KPC did not appeal that denial (CP 73-84, 1007-08). Because of the state of the record, both sides referred to the record when they argued whether the Hoffmans could, under a CR 12(b)(6) standard, prove a gross negligence claim. *See, e.g.*, RP (3/25/2015) at 15:12-16:4. Thus, counsel referred to the existing record to demonstrate that the Hoffmans were entitled to the favorable inference that they could prove such a claim under the CR 12(b)(6) standard.

What is patently clear, however, is that the Superior Court did not transform the CR 12(b)(6) motion into a summary judgment motion, because it did not refer to any of the Hoffmans' summary judgment pleadings or evidence in its order granting the CR 12(b)(6) motion. CP 2912-13.

KPC ignores these dispositive points and instead argues that the Superior Court converted the motion to one for summary judgment based on an opportunistic and erroneous use of the record. On March 24, 2015, at oral argument, counsel for KPC began by discussing its "motion for dismissal pursuant to 12(b)(6) based on the Alaska statute". RP (3/24/2015) at 3:16-17. Counsel for GE interjected to "move to dismiss under 12(b)(6) as well because [GE is arguing] the same set of facts." *Id.* at 15:16-21. The Hoffmans' trial counsel then expressed concern to the court that if the CR 12(b)(6) motion were granted "what we then have is a situation where Plaintiffs can't be made whole without having to try [the] case twice if the appellate court ultimately rules that the decision granting the motion was incorrect." *Id.* at 16:10-14. The Hoffman's counsel urged the court to certify the issue to the Court of Appeals to conserve resources. *See id.* at 16:14-19. But the Court denied certification, comparing its CR 12(b)(6) ruling to a summary judgment ruling: "It's like every other summary judgment, it is – if I'm wrong, you come back and you retry the case and that happens." *Id.* at 16:20-23. The trial court did not, however, convert the CR 12(b)(6) motion to a summary judgment motion.

KPC also cites a title "Summary Judgment Motions" entered by the court reporters before the Court addressed counsel and before arguments commenced on March 25, 2015. *See* KPC Pet. at 6. Last we knew, court reporters' titles lack any precedential value. While

the defendants' summary judgment arguments were also before the trial court, the hearing focused on whether – based on the pleadings – any exception to the Alaska Statute of Repose might apply to the Hoffmans' claims. *See* RP (3/25/2015) at 3:22-25.

At most, the trial court considered the Hoffmans' counsel's argument about evidence they would present at trial in considering whether the claim could be sustained on the pleadings as applying to one of the exceptions to the Alaska Statute of Repose. *See* RP (3/25/2015) 15:21-17:25.

KPC's argument is waived, it is wrong, and it provides no basis for this Court to review the Panel's decision.

B. Multiple Legal Bases Justified the Court of Appeals' Conclusion that the Hoffmans' Claims Were Not Barred Under Alaska Law, Including the Gross Negligence Exception to the Alaska Statute of Repose.

The Court of Appeals correctly concluded that under the CR 12(b)(6) standard of review, the Hoffmans' were free to present evidence of KPC's "gross negligence," an express exception to the Alaska Statute of Repose. Moreover, a number of additional exceptions to the Alaska Statute of Repose, which the Court of Appeals did not need to reach, authorized the Hoffmans' claims against KPC. KPC's argument provides no basis for this Court to take discretionary review.

1. The Alaska Statute of Repose Preserves the Hoffmans' Gross Negligence Claim Against KPC.

KPC claims that had the panel reviewed the record as one on summary judgment, it should have concluded that there was no evidence of KPC's "gross negligence." As for the first postulate of KPC's argument, the Court of Appeals correctly applied the CR 12(b)(6) standard to the gross negligence claim. The order appealed was on a "motion to dismiss" and that order referred to none of the Hoffmans' evidentiary submissions on summary judgment. CP 2914-24. *See* pp. 1 & 4-9, above. As to KPC's second assertion, that there was no evidence of KPC's gross negligence, the Hoffmans' trial counsel outlined to the trial court the basis for the gross negligence claim:

> I believe that the evidence in this case will show that Ketchikan acted with a conscious disregard for the health and safety of Larry Hoffman and the employees who worked at the plant, or at the pulp mill. And the reason why I say this is because, first off, we have Ketchikan itself, in its interrogatory responses, saying everybody knew that asbestos was hazardous in the 1950s. That's what their own interrogatory responses say. So that means that they knew that asbestos was hazardous in the 1950s. In addition – and this is something that has come up, and it's not in my papers and it's an interesting issue . . . So what you have here is you have a witness who is going to come in and testify when we used to manufacture this stuff,

> standards in 1964, we sent a warning label. We boxed up the materials and we put a warning label on the box – not on the product itself, but on the box – that got sent to the purchaser. The purchaser being Ketchikan Pulp Company. Ketchikan Pulp Company then put it into its inventory without the boxes. The employees then go and use those products without seeing the boxes. And so what you have here is an employer, Ketchikan Pulp Company, given warnings about the hazards of asbestos from the manufacturers – and there's going to be testimony on the subject from Jerry Hellsworth – who then don't provide the warning to its own employees. That's another fact here that I see that's going to increase this to the level of gross negligence. There's also this information about – and there's going to be testimony in this case about what was known or knowable, not only about the hazards of asbestos and mesothelioma in paraoccupational settings, but also what was known or knowable about taking home carcinogens on a person's clothing.

RP (3/25/2015) at 15:21-17:25.

KPC quotes from the Hoffmans' trial counsel to the effect that the Hoffmans' claim against KPC sounded in "negligence," to suggest that counsel conceded the Hoffmans' did not have a gross negligence claim. KPC misuses the record once again. Trial counsel's statement was in response to a question about whether the Alaska Statute of Repose was a construction statute of repose, and whether the Alaska Statute of Repose applied to negligence claims. *See* RP (3/24/2015) at 4:16-10:12. The broad category of negligence

subsumes "gross" negligence, and there is no statement in the trial court record where the Hoffmans' counsel disavowed a gross negligence claim against KPC. Just to the contrary. *See* pp. 10-11, above & RP (3/25/2015) at 15:21-17:25.

The concrete evidence of gross negligence was not before the Court of Appeals panel and is not before this Court, because the Superior Court ruled on KPC's Motion to Dismiss for Failure to State a Claim. CP 2912-13. Thus, KPC's claim that the Court of Appeals panel erred by failing to take account of the absence of evidence of "gross" negligence is off the mark, because the trial court failed to address any of the Hoffmans' evidence in ruling on the motion to dismiss. The Superior Court acknowledged that it was not considering evidence on the subject of gross negligence: "I'm clearly going out on a limb [regarding gross negligence], because usually that's a question of fact." RP (3/25/2015) at 49:14-15.

KPC's argument provides no basis for this Court to take review.

2. The Alaska Statute of Repose Also Preserves the Hoffmans' Claim Against KPC Because Mr. Hoffman's Personal Injury Resulted From Prolonged Exposure to Hazardous Waste.

The Alaska Statute of Repose, AS 09.10.055(b)(1)(A), also preserves the Hoffmans' claims because they are based on "prolonged exposure to hazardous waste." This provision was intended to protect claims based on exposure to hazardous substances that take a long time to manifest as disease. The bill's sponsor explained that there was no reason to distinguish hazardous "waste" from hazardous "material."[3] Federal law defines hazardous waste as follows:

> The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). As the court forcefully explained in *Metal*

[3] Appendix A (Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997), No. 1184).

Trades, Inc. v. United States, 810 F. Supp. 689 (D. S.C. 1992), asbestos fibers plainly meet the federal and state definitions of "hazardous waste."

Alaska law incorporates the very same federal definition of hazardous waste:

> **(9)** "hazardous waste" means a waste or combination of wastes that because of quantity, concentration, or physical, chemical, or infectious characteristics may
> **(A)** cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
> **(B)** pose a substantial present or potential hazard to human health or the environment when improperly managed, treated, stored, transported, or disposed of[.]

AS 46.03.900(9).

Thus, consistent with the plain language of the Alaska Statute of Repose, and the state and federal definition of asbestos as "hazardous waste," the Hoffmans' claim against KPC is authorized under this exception to the Alaska Statute of Repose as well. This straightforward alternative basis for sustaining the Panel's decision counsels against granting review here.

3. The Alaska Statute of Repose Preserves the Hoffman's Claim Against KPC Because It Is Based on the Undiscovered Presence of Asbestos Fibers in Mr. Hoffman's Lungs.

Asbestos fibers are considered "foreign bodies" both in science and medicine. *See* Appellants' Br. at 25-31. There is no question the exception applies to medical malpractice claims, but as drafted the exception is not confined to medical malpractice claims.

If the Alaska Legislature had intended to limit the scope of "foreign body" tolling solely to medical malpractice actions, it would have said so explicitly, as have other states, including Washington.[4] The Alaska statute does not state that the section applies only to claims against a "health care provider" or to "medical malpractice actions," as other state legislatures have done in limiting such a statute of repose exception to medical malpractice actions. Under its plain language, the section preserves claims based on asbestos fibers in the lungs as well as sponges left after surgery. Thus, the Hoffmans' claim against KPC was preserved under this

[4] *See* Cal. C.C.P. § 340.5 (tolled the statute for actions "*against a health care provider*") (emphasis added); F.S.A. § 766.102 (addressed leaving a foreign body in a patient as prima facie evidence of *negligence by a health care provider*); RCW 4.16.350 (tolls *only medical malpractice actions* based on "foreign bodies.").

alternative legal basis as well.

IV. CONCLUSION

For the reasons set forth above, this Court should deny KPC's Petition for Review.

DATED this 2nd day of December, 2016.

Respectfully submitted,

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DATED this 2nd day of December, 2016, in Seattle, Washington.

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