

No. 47439-5-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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HOFFMAN, LARRY AND JUDITH, husband and wife,

Plaintiffs-Appellants,

v.

ALASKA COPPER COMPANIES, INC., et al.,

Defendant-Respondents.

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**BRIEF OF APPELLANTS  
LARRY AND JUDITH HOFFMAN**

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## I. INTRODUCTION

The Superior Court dismissed Larry and Judith Hoffman's suit against General Electric ("GE") and Ketchikan Pulp Company ("KPC"), by concluding that Alaska's Statute of Repose applies to the Hoffmans' claims and that their suit was barred by that statute. This Court should correct the Superior Court's legal errors and remand for trial.

Neither the Washington nor Alaska statutes of repose bars the Hoffmans' claims, and thus no actual conflict of law exists that would require a Washington court to choose between the two statutes. The Superior Court's ruling that the Alaska Statute of Repose bars the Hoffmans' suit would foreclose most personal injury suits based on asbestos exposure under Alaska law. Nowhere in the language or legislative history of Alaska's Statute of Repose is there even a hint of such a stark proposition.

If the Court were to conclude that a conflict of law exists and that the Alaska Statute of Repose would bar the Hoffmans' claims, the Court should, under Washington choice of law principles, apply Washington law to the Hoffmans' claims as they are Washington



residents suing at least one Washington defendant, and it is an unacceptable policy to Washington courts that asbestos victims be deprived of a remedy altogether.

## **II. ASSIGNMENT OF ERROR**

1. Did the Pierce County Superior Court err in ruling that the Washington and Alaska Statutes of Repose Conflict?

2. If the Alaska Statute of Repose conflicts with the Washington Statute of Repose, should the Court, under Choice of Law Principles, apply Washington's Statute of Repose to the asbestos personal injury claims of a Washington resident against two defendants, one of whom is also a Washington resident?

## **III. STATEMENT OF CASE**

### **A. Procedural History**

On December 16, 2014, Larry Hoffman and Judith Hoffman filed their Second Amended Complaint ("Complaint") against GE KPC and other defendants. CP 13-18. The Hoffmans are Washington residents. CP 347-48. KPC was incorporated in Washington and remained a Washington corporation during the period it operated the Ketchikan mill and Larry Hoffman was exposed to asbestos. *See* Wash. Sec. of State, Corp. Div.,

*Registration Data Search, available at*

[https://www.sos.wa.gov/corps/search\\_detail.aspx?ubi=601111573](https://www.sos.wa.gov/corps/search_detail.aspx?ubi=601111573).

GE is a New York corporation with a principal place of business in Fairfield, Connecticut. CP 20.

On March 13, 2015, the Superior Court ruled that a conflict of laws exists between the states of Alaska and Washington, and determined that Alaska law applies to the Hoffmans' claims. CP 1535. The Order did not identify the specific conflict of law or which Alaska law applies in light of the conflict. *Id.* On March 25, 2015, however, the Superior Court entered an Order granting GE's and KPC's motions to dismiss under Alaska's Statute of Repose. CP 2912-13. Taking the March 13, and March 25 orders together, the Superior Court concluded that the Washington and Alaska statutes of repose conflict, and under choice of law principles, applied the Alaska Statute of Repose to dismiss the Hoffmans' claims.

Plaintiffs filed their Notice of Appeal on April 9, 2015 (CP 2914-24), and on June 3, 2015, the Superior Court entered a CR 54(b) final judgment as to GE and KPC. CP 2936-38.

## **B. Factual Background**

Larry and Judith Hoffman are Washington residents. While living in Washington, Larry was diagnosed with malignant pleural mesothelioma on December 19, 2013. Declaration of John W. Phillips in Support of Appellants' Motion for Expedited Appeal (June 10, 2015) at Ex. A (May 28, 2015 Declaration of Dr. Andrew Tzong-Yow Chen, D.O.).

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 steam 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. Each and every exposure to asbestos

that is above background level increases the risk of developing mesothelioma. CP 311-12.

Larry Hoffman graduated from Ketchikan High School in 1966, and then served two years in the United States Army. CP 350-51. After his service, from December 1968 through January 1970 Larry Hoffman worked for the KPC Mill as a yard crew member. CP 214-15. The yard crew, including Mr. Hoffman, was responsible for mill cleanup. CP 214. Mr. Hoffman cleaned the mill powerhouse once a week and on two two-week long occasions, Mr. Hoffman was responsible for cleanup throughout the entire mill. CP 216-18. Two GE turbines were in the powerhouse. CP 221. Mr. Hoffman was responsible for cleanup wherever the work was done—the powerhouse, the finishing room, around the turbines—wherever workers made a mess. CP 217-18, 225. Around the turbines, Mr. Hoffman cleaned, swept, and hauled away waste. *See* CP 225. Inevitably, Mr. Hoffman inhaled some asbestos dust from the turbine maintenance when he cleaned up waste on the shop floor.

Larry Hoffman also worked periodically at the Ketchikan and Sitka Pulp Mills from 1974 to approximately 1978. CP 223. During

that time, the Sitka Pulp Mill had two GE turbines, *see* CP 226 & 2236, and Mr. Hoffman worked in the room housing those turbines. CP 203. While on the job, Mr. Hoffman was exposed to significant concentrations of airborne asbestos from asbestos products in and around those turbines. CP 299.

The Hoffmans will demonstrate through fact and expert testimony that the GE turbines that Larry Hoffman worked around at the KPC and Sitka Mills contained asbestos-containing components, including thermal insulation, gaskets, and packing. *See e.g.*, CP 1252, 1254. GE sold gaskets to the Sitka and Ketchikan mills during Larry Hoffman's tenure there. *See* CP 1175, 1177, 1179-80. When maintenance was performed on the turbines, the insulation materials wrapping the turbines was disturbed. CP 1251-52. The turbines contained asbestos-containing components, and Mr. Hoffman was exposed to airborne asbestos from the turbines both from his cleanup duties and from direct exposure working near the turbines when they were undergoing maintenance. *See* CP 299.

The Hoffmans claim 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.

The Hoffmans' claims against GE are based on GE's negligent maintenance and supervision of turbines at the Sitka and KPC mills, defective product negligence claims associated with the original asbestos gaskets and packings at the KPC mill, and the sale of defective asbestos gaskets to the Sitka and Ketchikan mills, which were used in the maintenance of GE turbines, none of which were sold with warnings. GE's negligence caused Larry Hoffman to be exposed to asbestos fibers when his father Doyle Hoffman carried asbestos fibers home on his clothing and when Larry swept up asbestos dust at the Sitka and Ketchikan pulp mills, where GE sold gaskets and maintained the turbines. CP 13-18.

#### **IV. SUMMARY OF ARGUMENT**

To prove that an actual conflict exists, KPC and GE must demonstrate that application of the Washington and Alaska statutes of repose would produce different results for the Hoffmans' claims.

They cannot demonstrate an actual conflict because both statutes preserve the Hoffmans' claims. All parties agree that the Washington Statute of Repose does not bar the Hoffmans' claims, and multiple provisions of the Alaska Statute of Repose also preserve their claims. To rule otherwise would abolish most asbestos personal injury claims from the face of Alaska law. The Alaska Legislature has never even hinted that it sought to wipe out most asbestos personal injury claims, and the Alaska Supreme Court continues to support the validity of asbestos personal injury claims, governed by the discovery rule. The Court should reject such a stark, and unconstitutional, construction of the Alaska Statute of Repose.

Finally, even if KPC and GE were to demonstrate that the Alaska Statute of Repose bars the Hoffmans' claims, this Court, applying Washington Choice of Law principles, should apply Washington law to the claims of Washington residents against at least one Washington defendant, to ensure that this State – which bears the burdens of Mr. Hoffman's disease – provides them a means of recovering from those who caused his injury.



## V. ARGUMENT

### A. The Court Reviews *de novo* the March 13, 2015, Choice of Law Order and the March 25, 2015 Rule 12(b)(6) Dismissal Order.

This Court reviews *de novo* the Superior Court's decision to apply the Alaska Statute of Repose. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008) (citing *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 690-91, 167 P.3d 1112 (2007)). This Court also "applies the *de novo* standard of review to a trial court's decision to dismiss pursuant to CR 12(b)(6)." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 865, 309 P.3d 555 (Div. I 2013) (citation omitted). The Hoffmans' factual allegations are 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) (citation omitted).

### B. The Washington and Alaska Statutes of Repose Do Not Conflict.

Unless a conflict of laws actually exists, Washington courts presumptively apply the law of the forum, here Washington law, to a claim filed in a Washington court by Washington residents, such as the Hoffmans. *See Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 210, 875 P.2d 1213 (1994) (citing *Burnside v. Simpson Paper Co.*, 123

Wn.2d 93, 100-01, 864 P.2d 937 (1994)). A mere difference in laws does not establish a conflict. The competing state laws must present an “actual conflict,” *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007) (quoting *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997)). An actual conflict requires that “the *result* of the issues is different under the law of the two states.” *Seizer*, 132 Wn.2d at 648-49 (citation omitted) (emphasis added); *see also Erwin*, 161 Wn.2d at 692 (citation omitted). If the laws are different but do not produce a different “result,” the difference is a “false conflict” and presumptively the court applies forum law. *Erwin*, 161 Wn.2d at 692 (citation omitted). As detailed below, the Washington and Alaska statutes of repose do not conflict because they do not produce a different “result.” Both laws preserve the Hoffmans’ claims. Thus, the Washington Statute of Repose presumptively applies to the Hoffmans’ claims, and does not bar them, which requires reversal.

**1. The Washington Statute of Repose Preserves the Hoffmans’ Claims.**

The Washington Statute of Repose, RCW 4.16.310, protects builders, design and engineering professionals from suits filed more

than six years after improvements to real property are substantially complete. The statute has been narrowly construed to apply only to builders and associated professionals. *See Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 899, 741 P.2d 75 (Div. II 1987) (describing the statute as a “builder-limitation” statute and discussing the purpose of such statute). Both GE and KPC conceded in the Superior Court that the Washington Statute of Repose does not affect the Hoffmans’ claims. *See* CP 1040-41 (“Washington has a six-year statute of repose that applies to actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc. of improvements upon real property.”); CP 1033 (“The Washington statute is narrowly tailored in terms of who may benefit from its protections.”).

## **2. The Alaska Statute of Repose Preserves the Hoffmans’ Claims.**

The Hoffmans’ claims also are plainly preserved under a number of the provisions in the Alaska Statute of Repose. Accordingly, there is no “actual conflict” between the Washington and Alaska statutes of repose. The Alaska statute is structured expressly to protect claims that are hidden or are latent for long

periods of time. For example, the Alaska repose statute does not apply to personal injury claims that result from “prolonged exposure to hazardous waste.” AS 09.10.055(b)(1)(A). The use of the term “prolonged” signals the legislature’s intent to preserve claims for latent injury from toxic exposures that do not manifest as disease for decades. The statute preserves claims based on the presence of an “undiscovered presence of a foreign body.” AS 09.10.055(c). The statute preserves claims where the defendant “intentionally conceal[s]” the facts that would give notice of a claim. AS 09.10.055(b)(2). The statute also preserves personal injury claims based on fraud or misrepresentation, which might prevent a plaintiff from understanding that they have a claim (AS 09.10.055(b)(1)(C)), and it preserves claims where the facts that would constitute accrual of a cause of action of a minor are not discoverable in the exercise of reasonable care by the minor’s guardians (AS 09.10.055(b)(5)).

By concluding that the Hoffmans’ asbestos personal injury claims are barred by the Alaska Statute of Repose, the Superior Court in effect concluded that the 1997 Alaska law abolished most asbestos personal injury claims from Alaska substantive law. As

Justice Madsen observed in dissent in *Kilpatrick v. Dept. of Labor & Industries*, 125 Wn.2d 222, 234, 883 P.2d 1370 (1995), “[i]t is common knowledge that physical manifestation of asbestos-related disease can take years. . . . The latency period between the first asbestos exposure and the appearance of lung cancer is generally 15 years or more; however, it is not unusual for a 30- to 35-year lag before the onset of this disease.” (citation omitted). Thus, if the Alaska Statute of Repose did not preserve the Hoffmans’ claims, as the Superior Court concluded, then most asbestos-related personal injuries would be barred under Alaska law, because such injuries do not manifest in 10 years. Yet the legislative history of the 1997 amendment to the Alaska Statute of Repose contains no hint that the Legislature intended to eliminate asbestos-related personal injury claims as a category.

Given the numerous ways in which the Alaska repose statute preserves concealed or latent personal injury claims, the notion that most asbestos personal injury claims were abolished under the statute is completely inconsistent with the tenor of the law. And since passage of the 1997 amendment to the Alaska Statute of

Repose, the Alaska Supreme Court has continued to acknowledge the existence of asbestos-related personal injury claims under Alaska law. For example, in *Sopko v. Dowell Schulmberger, Inc.*, 21 P.3d 1265 (Alaska 2001), written four years after the 1997 amendment to the Alaska Statute of Repose, the Alaska Supreme Court acknowledged the continued vitality of the “discovery rule” in toxic tort cases, using asbestos-related personal injury claims as the paradigmatic exemplar:

In toxic tort cases, such as cases where the plaintiff contracts silicosis or asbestosis from exposure to silicate dust or asbestos fibers, under the discovery rule the statute of limitations will generally not start running until the plaintiff’s disease manifests itself in an illness. In such cases, the plaintiff initially does not have any symptoms of injury, and therefore has insufficient information to prompt an inquiry into his cause of action.

*Sopko*, 21 P.3d at 1271.

As detailed below, multiple provisions of the Alaska Statute of Repose specifically apply to and preserve the Hoffmans’ claims against KPC and GE.

**a. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because Mr. Hoffman's Personal Injury Resulted From Prolonged Exposure to Hazardous Waste.**

The Alaska Statute of Repose preserves claims based on “prolonged exposure to hazardous waste.” While the statute does not define “hazardous waste,” it is apparent that the Legislature used the term broadly to refer to a category of harm that relates to Larry Hoffman’s injuries from handling hazardous asbestos waste. The sponsor of the bill, Representative Porter, explained that he could not think of a reason to distinguish hazardous “waste” from hazardous “material” under the new law. Appendix A (Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997), No. 1184). Representative Porter also responded to a question about what “hazardous waste” means, by stating “[i]t was an attempt to address another concern that was raised of the more typical kinds of ‘someone’s property leached chemicals into my property, and I don’t know about it,’ those kinds of things.” *Id.* at No. 1132. Representative Porter’s reference to leaching of chemicals into groundwater indicates that the Legislature did not intend a restrictive meaning for “waste,” as the chemical release into

soils and groundwater technically is not “waste” disposal, but the release of a hazardous substance into the environment the remediation of which is addressed by the federal CERCLA and counterpart state laws.

The only logical reading of AS 09.10.055’s preservation of claims for injuries resulting from “prolonged exposure to hazardous waste” is that it protects Larry Hoffman’s claim for personal injury caused by his “prolonged exposure to” hazardous asbestos dust that he collected on the floors of the Ketchikan and Sitka mills after being released from asbestos containing products.

Asbestos dust is treated as a “hazardous substance” and “hazardous waste” under the law. “Hazardous substance” is defined in section 101(14), 42 U.S.C. § 9601(14). That section, in turn, incorporates contaminants under both the Clean Water Act, 33 U.S.C. § 1317, and the Clean Air Act, 42 U.S.C. § 7412. Asbestos is classified as a “toxic pollutant” under the Clean Water Act and a “hazardous air pollutant” under the Clean Air Act. 33 U.S.C. § 1317; 42 U.S.C. § 7412; *see* 40 C.F.R. Part 122, App. D, Table V (1987); 40 C.F.R. § 401.15 (1987); 40 C.F.R. Part 61, Subpart M (1987).



Asbestos is also designated as a “hazardous substance” for purposes of sections 102 (authorizing Administrator to designate hazardous substances) and 105 (providing for the national contingency plan) of CERCLA. *See* 40 C.F.R. § 302.4, Table 302.4 (1987). The EPA’s National Emission Standard for Hazardous Air Pollutants (“NESHAP”) includes the National Emission Standard for Asbestos, currently 40 C.F.R. 61. NESHAP expressly includes “materials contaminated with asbestos . . . including . . . clothing” as “asbestos-containing waste materials.” 40 C.F.R. § 61.141.

In *Metal Trades, Inc. v. United States*, 810 F. Supp. 689 (D. S.C. 1992), the court explained that asbestos also is a “hazardous waste” under RCRA, the federal hazardous waste disposal statute:

[T]he term hazardous waste as defined by the actual legislation is sensible and clearly embraces waste asbestos as hazardous waste. 42 U.S.C. § 6903 defines “hazardous waste” as follows:

- ... (5) 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.

*As waste asbestos is “discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial... operations,” it clearly is a solid waste under RCRA. See 42 U.S.C. § 6903(27). Therefore, if asbestos possesses the characteristics described in § 6903(5), then it is a hazardous waste under RCRA.*

*Id.* at 697 (emphasis added). The court went on to explain (*id.* at 697-99) that asbestos also qualifies as “hazardous waste” under RCRA’s alternative definition of “hazardous wastes,” which provides:

Section 6903(5) provides alternative definitions for hazardous wastes. Under those definitions, if one of the following questions is answered affirmatively then the substance is a “hazardous waste”:

1. May it cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating, reversible illness? *or*
2. May it pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed?

*Id.* at 697.

If anything, Alaska law is even more expansive in its definition of hazardous substances and hazardous wastes. 18 AAC 62.020(a) (2003) adopts by reference the federal regulations as published as 40 C.F.R. Part 261 (revised July 1, 2002) for

identification and listing of hazardous wastes. In *Berg v. Popham*, 113 P.3d 604 (Alaska 2005), the Alaska Supreme Court interpreted Alaska's law paralleling CERCLA as even more inclusive and protective than CERCLA with respect to hazardous substances, *Berg*, 113 P.3d at 609. And in *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344 (Alaska 2001), the Alaska Supreme Court used the terms "hazardous substance", "hazardous waste", and "hazardous material" interchangeably in applying the same Alaska law. *FDIC*, 21 P.3d at 345, 349.

Nor is there any rational basis for distinguishing personal injuries due to "prolonged exposure to" asbestos waste from "prolonged exposure to" other hazardous wastes. To allow one group of victims of "prolonged exposure to hazardous waste" to recover for their injuries while prohibiting another group of victims of "prolonged exposure to hazardous waste" from doing so would violate the very same equal protection principles that required the Alaska Statute of Repose to be amended in 1997. See *Turner Construction Co., Inc. v. Scales*, 752 P.2d 467 (Alaska 1988) (court held that Alaska Statute of repose violated equal protection clause

because it protected some design professionals from stale claims but not others). As with any statute, this Court should strive to construe the Alaska Statute of Repose so as to avoid constitutional infirmities. *Barber v. State, Dept. of Corrections*, 314 P.3d 58, 68 (Alaska 2013) (“We generally seek to ‘narrowly construe statutes in order to avoid constitutional infirmity . . .’ ” (citation omitted)). Thus, under principles of legislative interpretation and logic, Mr. Hoffman’s claims are preserved under AS 09.10.055(b)(1)(A).

The sole authority for the illogical conclusion that “prolonged exposure to” asbestos waste dust does not preserve a victim’s claims under AS 9.10.055 is the intermediate Texas appellate decision in *Gilcrease v. Tesoro Petro. Corp.*, 70 S.W.3d 265 (Tex. Ct. App. 2001). That decision has no controlling effect here,<sup>1</sup> it has not been endorsed by the Alaska Supreme Court, and, with due respect, it is poorly reasoned and wrong.

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<sup>1</sup> Alaska courts are not bound by decisions by non-Alaska courts interpreting Alaska law. *See e.g., Phippen v. State*, 854 N.W.2d 1, 30 (Iowa 2014) (“Federal cases are not binding on questions of state law[.]”). This is particularly true where the Alaska Supreme Court has articulated Alaska law in a manner different than a Texas intermediate appellate court’s view of Alaska law. The Alaska Supreme Court has not cited or endorsed the Texas intermediate appellate decision in *Gilcrease*, and the *Gilcrease* court’s conclusion that asbestos personal injury claims have been virtually obliterated from the face of Alaska law is flatly contradicted by decisions of the Alaska Supreme Court. *See, e.g., Sopko v. Dowell Schulmberger, Inc.*, 21 P.3d 1265 (Alaska 2001) and pp. 12-15 above.

In *Gilcrease*, the court held that the phrase “hazardous waste” must refer to “solid waste,” but not “air contamination,” because of Representative Porter’s statement that “[i]t was an attempt to address another concern that was raised of the more typical kinds of ‘someone’s property leached chemicals into my property, and I don’t know about it,’ those kinds of things.” *Gilcrease*, 70 S.W.3d. at 270 (citing *Floor Debates on H.B. 58*, Ch. 26 SLA 97, Feb. 1997, no. 1050). But Representative Porter’s reference to leaching of underground chemicals was offered only as an example of “those kind of things,” and reference to underground leaching of chemicals would not lead one logically to conclude that the Legislature was preserving claims relating solely to hazardous *solid* waste. Such underground chemical releases generally are in *liquid* form and affect groundwater more than anything else. The only substantive difference between the definition of hazardous waste under Alaska law (AS 46.03.900(9)) and under the federal RCRA statute is that the Alaska statute omits the adjective “solid” before “waste,” squarely refuting the *Gilcrease* court’s speculation.

Moreover, an attempt to distinguish between hazardous waste

in a solid or airborne form would be specious. Asbestos comes in solid as well as particulate form, and it is treated as hazardous waste that must be disposed of consistent with federal (RCRA) and state law. As the Court in *Metal Trades* observed: “As waste asbestos is ‘discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial... operations,’” *Metal Trades, Inc.*, 810 F. Supp. at 697, it clearly is a hazardous waste under RCRA. Thus, when the *Gilcrease* court said that “the Alaska Legislature, like Congress, has drawn a distinction between the regulation of solid waste and regulation of air contaminants,” *Gilcrease*, 70 S.W.3d at 271, it simply misapprehends the law. True enough, federal and state law have separate regulatory provisions for regulating emissions from coal plants compared to regulating the clean-up of hazardous substances in the environment, but those two regulatory regimes overlap when toxic particulates from smokestacks land on the ground. That is why asbestos dust is both a hazardous air pollutant under federal and state law and also a hazardous substance and hazardous waste under federal and state law.

The asbestos dust in this case did not spew from a chimney, but was a byproduct of plant-floor operations, and it is the same as a whole host of other hazardous wastes that need to be disposed of and remediated. The *Gilcrease* court's exclusion of asbestos dust because the court surmised that asbestos had to be in solid form is particularly nonsensical in the case of asbestos, because that would mean that injuries from asbestos are excluded only when asbestos is most hazardous. Indeed, regulation of the disposal of hazardous asbestos waste focuses on preventing release of particulate asbestos fibers in the air.<sup>2</sup>

In short, AS 09.10.055 preserves Mr. Hoffman's personal injury claim resulting from "prolonged exposure to" hazardous asbestos dust waste. To rule otherwise makes no sense and would

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<sup>2</sup> The *Gilcrease* court noted that the Alaska environmental laws contain separate definitions for "air contaminants" and "hazardous wastes," *id.* at 270, n. 6 (citing AS 46.03.900(1) and (9)), but those definitions – on their face – are not mutually exclusive, and the cited definition of "hazardous waste" is the same language – taken from RCRA – that the *Metal Trades* court held included asbestos in solid, liquid, semi-solid, or . . . gaseous material" form. See *Metal Trades, Inc.*, 810 F. Supp. at 697. The *Gilcrease* court also said that the Alaska legislature chose to regulate asbestos in a section entitled "Health, Safety and Housing Code" and not in the section regulating "hazardous wastes," *Gilcrease*, 70 S.W.3d at 270-71, but the *Gilcrease* court again simply misunderstood environmental regulation. It is certainly true that AS 18.31.200, regulates asbestos abatement projects in the workplace and in a residential setting, but that is not the sole extent of regulation of asbestos under Alaska law.

render the statute unconstitutional.

**b. The Alaska Statute of Repose Preserves the Hoffman's Claims Because They Are Based on the Undiscovered Presence of Asbestos Fibers in Mr. Hoffman's Lungs.**

AS 09.10.055(c) provides:

The limitation imposed under (a) of this section is *tolled during any period in which there exists the undiscovered presence of a foreign body* that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on *the presence of the foreign body*.

(Emphasis added). Alaska courts examine a statute's plain meaning, its legislative purpose, and its intent. *State Dept. of Commerce, Community & Eco. Dev., Div. of Ins. v. Alyeska Pipeline Service Co.*, 262 P.3d 593, 597 (Alaska 2011) (citation omitted). They do not “mechanically apply the plain meaning rule[,]” but rather utilize “a sliding scale approach: ‘The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.’ ” *Id.* (citation omitted).

The plain language and meaning of “foreign body” includes asbestos fibers in Larry Hoffman's lungs that went undiscovered until his diagnosis with mesothelioma in 2013. The phrase “foreign



body” is broad and unrestricted in the statute. As a medical term, the phrase “foreign body,” plainly includes asbestos fibers lodged in the lungs. *See*

<http://medical-dictionary.thefreedictionary.com/foreign+body>

(including “asbestos” as an example of a foreign body in the lungs).

Wikipedia, in describing asbestosis, states:

All forms of asbestos fibers are responsible for human disease as they are able to penetrate deeply into the lungs. When such fibers reach the alveoli (air sacs) in the lung, where oxygen is transferred into the blood, *the foreign bodies (asbestos fibers)* cause the activation of the lungs local immune system and provoke an inflammatory reaction dominated by lung macrophages that respond to chemotactic factors activated by the fibers.

Wikipedia, *Asbestosis*, <https://en.wikipedia.org/wiki/Asbestosis> (citation omitted) (last checked July 29, 2015). And the medical literature is replete with references to asbestos fibers in lungs that are described as “foreign bodies.”<sup>3</sup>

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<sup>3</sup> *See e.g.*, Hiroshi Tazawa, Masayuki Tatemichi, et al., *Oxidative and nitrative stress caused by subcutaneous implantation of a foreign body accelerates sarcoma development in Trp52 mice*, 28 *Carcinogenesis* 1, 196 (2007) (noting that “in foreign body-induced carcinogenesis in humans, asbestos fibers are well known to induce malignant mesotheliomas after chronic inhalation.”); David G. Kaufman, *Assessment of Carcinogenicity: Generic Issues and Their Application to Diesel Exhaust in Air Pollution, the Automobile, and Public Health* 524 (1988, Ann Y. Watson, et al. eds.) (“The critical property of asbestos best associated with carcinogenicity is the physical

Based on the unrestrictive language of the statute and the plain meaning of the phrase, “foreign bodies,” the Alaska Statute of Repose preserves the Hoffmans’ claims relating to undiscovered asbestos fibers in his lungs. The court should stray from that statute’s plain meaning only if presented with convincing evidence of a contrary legislative intent. None exists.

The Texas intermediate appellate decision in *Gilcrease* stands alone in contradicting the plain meaning of AS 09.10.055(c), but once again, the *Gilcrease* decision is not controlling, is poorly reasoned, and is wrong.

In *Gilcrease*, the Texas court believed that the Alaska Statute of Repose’s preservation of undiscovered foreign body claims should be construed narrowly to toll only *medical malpractice* claims concerning foreign bodies that are placed in the body *during surgery* and are inadvertently left behind. *Gilcrease*, 70 S.W.3d at 271. Ignoring the plain language of the statute, the court seized the

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dimensions of fibers rather than the chemical composition of the asbestos[.] . . . The cellular response to asbestos fibers and other foreign bodies involves the foreign-body inflammatory reaction . . .”) (internal citations omitted); *see also* *Hubbs v. Anco Insulations, Inc.*, 747 So.2d 804, 807-08 (Louisiana App. Ct. 1999) (recognizing asbestos fibers as foreign bodies).

following snippet of legislative history:

Representative Porter referred to Section 5(2)(c), which he described as somewhat unusual, a sticking point for which accommodation was made along the way. “The old sponge left in the body after surgery” kept coming up, he said. “We toll the statute of repose. Tolling is a nice legal word for meaning that it's null and void, held in abeyance until this thing is discovered, that if there is a foreign body that has no therapeutic or diagnostic purpose found ... in a person's body, that that is an exception to the statute of repose.”

Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. at No. 1050 (Feb. 21, 1997). Representative Porter's reference to “the old sponge left in the body after surgery” plainly was offered only as an example of section (c)'s application, however, as he then referred to the broader language of the section. There is no question that section (c) preserves medical malpractice claims for failure to remove a foreign body during surgery that “has no therapeutic or diagnostic purpose or effect in the body,” but nothing in the statute confines the category of tolled claims to medical malpractice actions.

If the Alaska Legislature had intended to limit the scope of “foreign body” tolling to medical malpractice actions it would have

started the section by stating that it applied to medical malpractice actions. It did not do so. The *Gilcrease* court cited other state laws containing tolling provisions for medical malpractice actions where “foreign bodies” are left in the body after surgery, *Gilcrease*, 70 S.W.3d at 271, n. 8, but those laws prove the Hoffmans’ point. The California law (Cal. C.C.P. § 340.5) tolled the statute for actions “against a health provider”; the Florida law (F.S.A. § 766.102) addressed leaving a foreign body in a patient as prima facie evidence of negligence by a health care provider; and the Washington law (RCW 4.16.350) tolls only medical malpractice actions based on “foreign bodies.” The Alaska Statute of Repose contains no such limiting language. It unambiguously tolls all actions based on undiscovered “foreign bodies,” and “foreign body” is a medical term that includes, *inter alia*, “sponges” and “asbestos fibers” lodged in the lungs. The section thus preserves claims based on asbestos fibers in the lungs as well as sponges left after surgery.

Finally, the *Gilcrease* court observed that other courts interpreting different state statutes have tolled statutes of repose where the statute specifically refers to asbestos-related injuries. The

*Gilcrease* court concluded that the Alaska statute's failure to call out asbestos injuries must mean that such claims are not preserved. *Gilcrease*, 70 S.W.3d at 271-72. This observation constitutes a remarkable analytical leap that has no place in statutory interpretation. No tenable rule of statutory interpretation holds that a court should ignore the plain language of one state's statute, because another state's legislature chose to pass a different and more detailed law. The Alaska Statute of Repose contains broad provisions preserving the claims of persons who have suffered from "prolonged exposure to hazardous waste" or who have been injured by "undiscovered foreign bodies". On its face, the statute preserves claims based on asbestos injuries, which take at least 15 years to manifest as disease. The *Gilcrease* court's rationale stands for the untenable proposition that unless asbestos injuries are specifically mentioned in the portion of Alaska's Statute of Repose preserving entire categories of claims, they are not covered by the statute. That is an absurd principle of statutory interpretation, particularly when the legislative history of the Alaska law contains not a single shred of debate about eliminating asbestos-related injuries from personal

injury claims under Alaska law.<sup>4</sup> Nor is there any logic to preserving one claim for injury from foreign bodies but barring another. As with the “hazardous waste” provision of the law, this Court should interpret the statute so as to avoid constitutional infirmity.

The Court should hold that the Hoffmans’ claims are also preserved under the “foreign body” provision of the Alaska Statute of Repose.

**c. The Alaska Statute of Repose Preserves the Hoffmans’ Claims Because His Injuries Resulted from a Defective Product.**

If “the personal injury . . . resulted from . . . a defective product,” AS 09.10.055(b)(1)(E), the Alaska Statute of Repose preserves all claims relating to such personal injury. The statute defines “product” broadly, as “an object that has intrinsic value, is

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<sup>4</sup> The cited Alabama (Ala. Code § 1975 § 6-2-30), Indiana (IC 34-20-3-2), Nebraska (Neb. Rev. St. § 25-224), and Kansas (K.S. 60-3303) laws simply codified the “discovery rule” for asbestos claims, but that principle already exists under Alaska law. *See Sopko, supra*. The cited Tennessee (T.C.A. § 29-28-103) and Maryland (MDC § 5-108) laws carve asbestos exceptions to their statutes of repose, but those laws are remarkably different in their structure from the Alaska Statute of Repose. The Maryland statute states that “[a] cause of action . . . accrues when the injury or damages occurs”, MDC § 5-108(e), but creates an exception for asbestos claims to the extent it is unclear when injury or damage occurs with respect to such claims. The Tennessee statute bears no resemblance to the Alaska Statute of Repose, as it identifies only two specific product exceptions, one for asbestos and one for silicone gel breast implants.

capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce[.]” *Id.* Critically, the statute is not limited solely to preserving claims denominated “product liability” actions, but it preserves any claim related to a personal injury resulting from a defective product. *See Jones v. Bowie Indus.*, 282 P.3d 316, 338 (Alaska 2012) (“the legislature defined ‘product,’ and this definition refers to the tangible thing that causes an injury, not to the legal theory that a plaintiff might use to recover for the injury.”).

While the language of the defective product provision is clear and broad, it also is reinforced by the legislative history where Representative Porter noted that the defective production exception was “one of the biggest exceptions[.]” Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997). The plain language of the statute and Representative Porter’s comments illustrate that the defective product exception should be broadly construed.

The Hoffmans will present evidence from which a jury could conclude that GE sold the turbines to the Sitka and KPC mills; that

the turbines when sold contained asbestos packing and gaskets; that GE also sold asbestos gaskets to those mills for purpose of maintenance; that GE conducted maintenance work on those turbines that disturbed these asbestos products; and that Larry Hoffman suffered personal injury from his exposure to those asbestos products. *See* pp. 4-8 above. Thus, under the broad definition of product as “an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce,” the GE turbines containing asbestos gaskets and packing when sold to the mills; the original gaskets and packing and the replacement gaskets sold by GE all are products under the Alaska statute, and they were defective because they were unaccompanied by any warnings about exposure to asbestos fibers.<sup>5</sup>

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<sup>5</sup> GE claimed in the Superior Court (CP 2568) that “turbine[s]” are “improvement[s]” to real property and not products as defined by the statute. This argument is of little consequence for several reasons. First, it ignores that the insulation, packing and gaskets that were either original “components” of the turbines or later sold by GE for maintenance of the turbines, are indisputably “products” under the statute. *See e.g., Dinneen v. A.O. Smith Corp.*, 2011 WL 1566835 at \*3 (Conn. Superior Ct. 2011) (questions of material fact existed where evidence showed that “asbestos-containing material existed in GE turbines and its associated parts and components.”); *In re Asbestos Lit.*, 2011 WL 5395554 at \*1 (Del. Superior Ct. 2011) (GE turbine insulation contained asbestos). Second, GE’s argument ignores the very broad definition of “product” in the statute that a court must apply here. No Alaska court has held that a turbine is an



Similarly, the Hoffmans' premises liability negligence claim against KPC is based on KPC's failure to maintain and control the premises where defective products (asbestos insulation, packings and gaskets) released asbestos fibers into the air onto Doyle Hoffman's clothing, which Larry Hoffman inhaled, leading to his personal injury.

On the face of the Alaska Statute of Repose, the Hoffmans' claims are also preserved under this provision of the statute.

**d. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because GE and KPC Were Grossly Negligent.**

The Alaska Legislature also broadly preserved any personal injury claim resulting from "gross negligence". AS § 09.10.055(b)(1)(B). Gross negligence requires "a major departure from the standard of care[.]" *Storrs v. Lutheran Hosps. & Homes Soc'y of America, Inc.*, 661 P.2d 632 (Alaska 1983). The Hoffmans will prove that both KPC and GE were grossly negligent.

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improvement to real property and thus not a "product" for purposes of the definition in Alaska's Statute of Repose. And third, the evidence will establish that the turbines were not treated as improvements to real property but as removable goods. One turbine was sold while the plant was still operating, and the second was sold after the plant closed. Verbatim Report of Proceedings, March 25, 2015, at 41:14-23.

The Hoffmans will present evidence that KPC knew as early as the 1950's of the hazards of asbestos, KPC installed asbestos-containing block and pipe insulation, gaskets, and other products throughout the mill. Despite its knowledge of the dangers of working with hazardous asbestos dusts, and the need to provide workers with protection, changing rooms, laundry services, and warnings not to take home work clothing, KPC failed to undertake any of those services or warnings when Doyle and Larry Hoffman worked at the Ketchikan mill.

The Hoffmans also will present evidence that GE knew by the 1950's of the hazards of asbestos, yet GE sold turbines containing asbestos components, sold asbestos gaskets, and conducted maintenance on turbines, disturbing asbestos-containing materials in and around the turbines, all without any warnings.

Whether KPC's or GE's conduct was a "major departure from the standard of care" will be a question of fact for the jury. The Superior Court acknowledged as much when it stated "I'm clearly going out on a limb [regarding gross negligence], because usually that's a question of fact." Verbatim Report of Proceedings, March

25, 2015, at 49:14-15. Washington courts allow parties to amend their claims where the claim requires “essentially the same proof” as an existing claim and the nonmoving party will not be prejudiced. *See Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (Div. I 2001) (upholding trial court’s decision to allow amendment to counterclaim three weeks before trial). The Hoffmans pled “negligence” in their Complaint, CP 15, and the evidence developed plainly justifies allowing the complaint to be deemed amended to conform to the proof. Accordingly, this Court should rule that the Hoffmans’ claims are also preserved under the “gross negligence” provision of the Alaska Statute of Repose.

**C. In the Event of a Conflict, Choice of Law Principles Dictate the Application of Washington’s Statute of Repose to the Hoffmans’ Claims.**

If the Court were to conclude that the Washington and Alaska Statutes of Repose would produce different results for the Hoffmans’ claims, it should decide which law to apply under the “‘most significant relationship’ test as set out in the Restatement (Second) of Conflict of Laws § 145 (1971).” *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 210, 213, 875 P.2d 1213 (1994) (citation omitted). The “most significant relationship” test requires that “the rights and

liabilities of the parties [be] determine[d] by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.” *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 260, 115 P.3d 1017 (Div. 1 2005) (citation omitted). “If the contacts are evenly balanced,” the court will evaluate “the interests and public policies of the concerned states, to determine which state has the greater interest[.]” *Id.* at 260-61.

**1. Washington Has the Most Significant Relationship to This Controversy**

Under the “most significant relationship” test, the court evaluates the contacts of each state that has a potential interest, including:

- (a) the place where the injury occurred;
- (b) the place where the conduct causing the injury occurred;
- (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

*Id.* at 260 (citations omitted). Washington courts have emphasized

the need to apply these factors to the specific issue and case before it. *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 143, 210 P.3d 337 (Div. I 2009).

Larry Hoffman lived in Alaska when he inhaled asbestos fibers that triggered the process leading to his diagnosis while living in Washington. In *Rice*, the Court ruled that Oregon law applied to a Washington resident's toxic tort claims based on long-term toxic exposures in Oregon. The Court held that the plaintiff's residence in Washington, standing alone, was insufficient to justify applying Washington law. *Rice*, 124 Wn.2d at 215-16.

The specific facts of this case are materially different. KPC is domiciled in Washington State. KPC was incorporated as a Washington corporation before Alaska became a state, and it has remained a Washington corporation after Alaska statehood and throughout the tenure of the Ketchikan mill's operations, which closed in 1997. *See Last Pulp Mill in Alaska Closes, And Ketchikan Braces for Impact*, The New York Times (Mar. 25, 1997), available at <http://www.nytimes.com/1997/03/25/us/last-pulp-mill-in-alaska-closes-and-ketchikan-braces-for-impact.html>. The Alaska Statute of

Repose that KPC seeks to enforce against the Hoffmans was not even enacted until after KPC's operations in Alaska had terminated. KPC thus enjoyed the protection of Washington business and corporation laws for the entire period of its operations, and the Alaska law it now seeks to enforce did not exist when it conducted industrial operations in Alaska.

GE, a resident of neither Alaska nor Washington, sold its turbines to KPC, a Washington corporation. The products that caused Mr. Hoffmans' injury were manufactured without warnings in places other than Alaska or Washington. In product liability cases the place where the conduct *causing* the injury occurred is where the product was designed and manufactured without warnings. *See Zenaida-Garcia*, 128 Wn. App. at 263 (while Oregon was the location of the injury, Washington—where the device was designed and manufactured—was where the conduct causing the injury occurred); *Singh*, 151 Wn. App. 137 (finding California had the greater interest where entity was headquartered in California and the harmful conduct—discovery of a software defect and the decision to not warn about defect or recall the product—occurred in California).

Mr. Hoffman was diagnosed with mesothelioma in 2013 while living in Washington. As a Washington resident, Mr. Hoffman became aware that he had suffered asbestos exposure, was diagnosed with asbestos-related disease, and sought treatment for his terminal illness.

The facts of this case thus are closer to *Williams v. Leone & Keeble, Inc.*, 170 Wn. App. 696, 285 P.3d 696 (Div. III 2012), where the Court held that Washington had the most significant relationship to a controversy between a Washington resident who was injured in Idaho, because of alleged tortious conduct by a Washington corporation in Idaho. The *Williams* court's holding that "Washington can protect the interests of its citizens seeking a full recovery, and Washington is able to regulate one of its corporations" *id.* at 711, has equal force here. *Accord, Zenaida-Garcia*, 128 Wn. App at 263 (court held interests between Oregon and Washington were equally balanced where injury occurred in Oregon but manufacturer was from Washington).

The KPC mill where Doyle and Larry worked has long been shuttered. There is no ongoing business in Alaska where evidence

needs to be gathered, and the Alaska statute at issue did not even exist when Larry Hoffman's asbestos exposure occurred. In these particular circumstances, the weight to be given the place where the conduct giving rise to the injury occurred should be reduced, and the weight to be given to the residence of the Hoffmans and KPC should be enhanced. This Court should conclude that Washington has the most significant relationship to this controversy, or at minimum, that the interests are equally balanced.

**2. Public Policies and Interests Favor Applying Washington Law**

If the Court concludes that the interests of Washington and Alaska are equally balanced, public policy favors applying Washington's Statute of Repose. Washington has a "real interest" in compensating its residents for personal injuries. *See Williams*, 170 Wn. App. at 711. Alaska has little to no interest in denying relief to non-residents or to protecting out of state corporations, by retroactively applying a law that did not even exist when the Washington corporation conducted operations in Alaska.

More fundamentally, Washington has a strong public policy of allowing asbestos victims to obtain relief for their personal



injuries, a policy enshrined in our case law. *See e.g., Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987). If the Superior Court’s construction of the Alaska Statute of Repose were accepted, asbestos personal injury claims largely would be abolished under Alaska substantive law. Such a result would conflict with the Washington Constitution’s direction that all citizens should have equal access to our courts. *See Putman v. Wenatchee Valley Med. Cntr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (“The people have a right of access to courts; indeed it is ‘the bedrock foundation upon which rest all the people’s rights and obligations.’ ”) (citation omitted). Where the asbestos tort victim lives in Washington State, one of the defendants is a Washington corporation that has enjoyed the protection of our laws, and Washington State resources will be drawn upon to address that injury, the public policy of Washington dictates that the asbestos tort victim should be entitled to seek relief in our courts. *See e.g., Williams*, 170 Wn. App. at 711.<sup>6</sup>

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<sup>6</sup> While the Superior Court held that all of Alaska’s substantive law would be applied to the Hoffmans’ claims (CP 1535), the proper approach is to presumptively apply Washington substantive law, and to carve an exception as to specific Alaska laws when an actual conflict exists between a specific provision of Washington and Alaska law and choice of law principles dictate that the specific Alaska law be applied. *See e.g., FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840,

## VI. CONCLUSION

For the reasons set forth above, this Court should reverse and remand this case for trial.

DATED this 30th day of July, 2015.

Respectfully submitted,

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856, n. 15, 309 P.3d 555 (Div. I 2013) (stating “[u]nder the principle of *dépeçage*, different issues in a single case arising out of a common nucleus of facts may be decided according to the substantive law of different states.”) (citation omitted); *see also Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 143, 210 P.3d 337 (Div. I 2009) (explaining that “[w]here a conflict exists, Washington courts decide which law applies by determining which jurisdiction has the most significant relationship to a *given issue*.”) (emphasis added and citation omitted). In remanding, the Court should instruct the Superior court to apply this principle of *dépeçage* to any other claimed conflict.

## CERTIFICATE OF SERVICE

I certify that on this day, I served by email a copy of the foregoing, along with this Certificate of Service, on all parties listed below:

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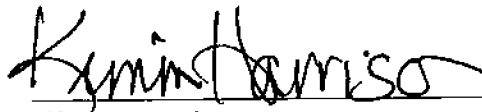
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DATED this 30th day of July, 2015, in Seattle, Washington.



Kimm Harrison

Legal Assistant to John W. Phillips

20th Legislature(1997-1998)

**Committee Minutes**

HOUSE JUDICIARY

**Feb 21, 1997**

HOUSE JUDICIARY STANDING COMMITTEE

February 21, 1997

1:04 p.m.

MEMBERS PRESENT

Representative Joe Green, Chairman  
 Representative Con Bunde, Vice Chairman  
 Representative Brian Porter  
 Representative Jeannette James  
 Representative Norman Rokeberg  
 Representative Eric Croft  
 Representative Ethan Berkowitz

MEMBERS ABSENT

All members were present

COMMITTEE CALENDAR

\* SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58  
 "An Act relating to civil actions; relating to independent counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD AND HELD

Governor's Appointments: Violent Crimes Compensation Board

- REMOVED FROM AGENDA

(\* First public hearing)

PREVIOUS ACTION

BILL: HB 58

SHORT TITLE: CIVIL ACTIONS & ATTY PROVIDED BY INS CO.

SPONSOR(S): REPRESENTATIVE(S) PORTER, Cowdery

JRN-DATE JRN-PG ACTION

01/13/97 43 (H) READ THE FIRST TIME - REFERRAL(S)

01/13/97 43 (H) JUDICIARY, FINANCE

01/16/97 95 (H) COSPONSOR(S): COWDERY

02/17/97 373 (H) SPONSOR SUBSTITUTE INTRODUCED-  
 REFERRALS

02/17/97 374 (H) JUDICIARY, FINANCE

02/19/97 (H) JUD AT 1:00 PM CAPITOL 120

02/19/97 (H) MINUTE(JUD)

02/21/97 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JIM SOURANT, Legislative Assistant

to Representative Brian Porter

Alaska State Legislature

Capitol Building, Room 216

Juneau, Alaska 99801

Telephone: (907) 465-4930

POSITION STATEMENT: Answered questions regarding SSHB 58.

THOMAS B. STEWART, Judge (Retired)

Alaska Superior Court

# APPENDIX A

P.O. Box 114100  
Juneau, Alaska 99811-4100  
Telephone: (907) 463-4741  
POSITION STATEMENT: Testified on behalf of Governor's Advisory  
Task Force on Civil Justice Reform regarding  
SSHB 58.

DAVID A. MCGUIRE, M.D., Representative  
Alaska Liability Reform Group  
4048 Laurel Street, Suite 202  
Anchorage, Alaska 99508  
Telephone: (907) 562-4142  
POSITION STATEMENT: Testified on SSHB 58.

JOEL BLATCHFORD  
1983 Waldron Drive  
Anchorage, Alaska 99507  
Telephone: (907) 563-3743  
POSITION STATEMENT: Testified on SSHB 58.

CHERI SHAW, Executive Director  
Cordova District Fishermen United; and  
Chair, Tort Reform Committee  
United Fishermen of Alaska  
P.O. Box 939  
Cordova, Alaska 99574  
Telephone: (907) 424-3447  
POSITION STATEMENT: Testified in opposition to SSHB 58; provided  
suggestions.

DALE BONDURANT  
HC 1, Box 1197  
Soldotna, Alaska 99669  
Telephone: (907) 262-0818  
POSITION STATEMENT: Testified in opposition to SSHB 58.

PAUL SWEET  
P.O. Box 1562  
Palmer, Alaska 99645  
Telephone: (907) 745-2242  
POSITION STATEMENT: Testified in opposition to SSHB 58.

STEVE CONN, Director  
Alaska Public Interest Research Group  
P.O. Box 101093  
Anchorage, Alaska 99510  
Telephone: (907) 278-3661  
POSITION STATEMENT: Testified on SSHB 58.

BONNIE NELSON  
20615 White Birch Road  
Chugiak, Alaska 99567  
Telephone: (907) 688-3017  
POSITION STATEMENT: Testified in opposition to portions of SSHB  
58.

ROSS MULLINS  
P.O. Box 436  
Cordova, Alaska 99574  
Telephone: (907) 424-3664  
POSITION STATEMENT: Testified on SSHB 58.

DARYL NELSON  
4334 Vance Drive, B-5  
Anchorage, Alaska 99508  
Telephone: (907) 333-9713  
POSITION STATEMENT: Testified in opposition to SSHB 58.

ERIC YOULE, Executive Director  
Alaska Rural Electric Cooperative Association

703 West Tudor Road, Number 200  
Anchorage, Alaska 99503  
Telephone: (907) 561-6103  
POSITION STATEMENT: Testified on SSHB 58.

JEFFREY W. BUSH, Deputy Commissioner  
Office of the Commissioner  
Department of Commerce and Economic Development  
P.O. Box 110900  
Juneau, Alaska 99811-0800  
Telephone: (907) 465-2500  
POSITION STATEMENT: Provided Administration's position on SSHB 58.

#### ACTION NARRATIVE

TAPE 97-23, SIDE A  
Number 0020

CHAIRMAN JOE GREEN called the House Judiciary Standing Committee to order at 1:04 p.m. Members present at the call to order were Representatives Green, Bunde, Porter, Croft and Berkowitz. Chairman Green noted that Representatives James and Rokeberg would be late; they arrived at 1:56 p.m. and 2:00 p.m., respectively.

#### SSHB 58 - CIVIL ACTIONS & ATTY PROVIDED BY INS CO.

The only order of business was Sponsor Substitute for House Bill No. 58, "An Act relating to civil actions; relating to independent counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and providing for an effective date."

CHAIRMAN GREEN said the sponsor would explain the bill and questions for clarity would be addressed. However, there would be no debate on substantive issues. Public testimony would be taken that day and Monday, February 24. The committee would then debate and discuss SSHB 58 on Wednesday, February 26.

Number 0221

REPRESENTATIVE BRIAN PORTER, sponsor of SSHB 58, read from Section 1, subsection (1), which set forth the legislative intent: "encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others". He said that was the legislation in a nutshell.

REPRESENTATIVE PORTER said Section 2 was not substantive but a minor consistency change. A change existed in Section 23 reflecting the thought of the Governor's Advisory Task Force on civil justice reform, as well as the previous year's bill, that the rate of prejudgment interest should more adequately reflect the marketplace instead of being a fixed rate, which was currently 10.5 percent. The provision in Section 23 provided for a floating rate. Section 2 was a consistency change to leave 10.5 percent interest in a section of the banking code that was referenced to this section, he said. The banking statute was being left in place, with this being a conformity change to what was done in Title 9.

Number 0439

REPRESENTATIVE PORTER said the next sections dealt with the statute of repose and the statute of limitations. In layman's terms, a statute of repose is an absolute outer limit on when a case can be brought, based on the length of time since the action took place that supposedly caused injury or damage. SSHB 58 proposed an

eight-year statute of repose. Within that eight years, varying statutes of limitations shortened the time period allowed if the plaintiff knew or should have known that the damage or injury had taken place. The bill suggested what those limits should be in several areas.

Number 0615

REPRESENTATIVE PORTER said Section 3 reflected suggestions from the task force. It addressed a law that had contained a six-year statute of limitations on several provisions. Section 3 specified what would retain that six-year statute of limitations. "And further limitations will be shown from that law that -- as it had existed in subsequent sections," he added.

REPRESENTATIVE PORTER referred to Section 4. Again from the task force, it imposed a three-year statute of limitations, reduced from six years, on contract actions.

Number 0666

REPRESENTATIVE ERIC CROFT said some task force conclusions were compromises between doing nothing and having more extreme provisions. He asked whether Representative Porter intended to include the compromises as well as the original legislation.

REPRESENTATIVE PORTER said he was on the subcommittee that dealt with the statute of limitations issue. He believed the provisions did not result from discussion of "outer limits" or a "compromise to the middle." He said it was a suggestion by a subcommittee member that was discussed, adopted, and then subsequently adopted by the entire task force.

Number 0764

REPRESENTATIVE CROFT asked whether Representative Porter's intention on the statute of repose was to keep the discovery rule intact. For example, if someone had no way of knowing a harm had been done until nine years had passed, would that be barred? Was there any relief for someone who, through no fault of their own, did not know?

REPRESENTATIVE PORTER said he hadn't yet explained the statute of repose. However, to that specific question, there certainly could be a situation where someone did not have, for whatever reason, knowledge of an injury or a damage. If the statute of repose had been completed, that would be a bar to filing a case. However, there were exceptions where the statute of repose would not apply. He offered to go through those.

CHAIRMAN GREEN suggested he address them as they came up, but only for clarification.

Number 0846

REPRESENTATIVE PORTER pointed out the statute of repose is similar to the hearsay rule in that the meat of the law is in the exceptions. He listed exceptions to the eight-year statute of repose from Section 5(2)(b)(1): (A) any prolonged exposure to hazardous waste; (B) an intentional act or gross negligence; (C) fraud or fraudulent misrepresentation; (D) breach of an express warranty or a guarantee.

REPRESENTATIVE PORTER said one criticism of a statute of repose is the supposition that people wanting to provide a longer period of time were seemingly barred from doing so. That is not the case, he said. Citing the example of a school roof falling in, he said no such cases on record had occurred within the allotted time period. However, nobody constructing a building was barred from having a contract with the contractor for a longer period of statute of



repose if both parties agreed to it.

REPRESENTATIVE PORTER believed one of the biggest exceptions was Section 5(2)(b)(1)(E), a defective product. There had been much testimony over the last four years about "some of the more salient products that have come to light after an eight-year period." He cited Thalidomide as an example. Although one could argue for a statute of repose in those cases, an accommodation and compromise existed in this legislation. "We're saying, 'Okay, we're not going to fight that battle today,' he said. "Quite frankly, I don't intend to fight it ever, but if someone wants to, welcome."

Number 1050

REPRESENTATIVE PORTER said another cause for exception would be if a defendant had intentionally tried to conceal any element that would go to establish the occurrence of the injury or negligence.

REPRESENTATIVE PORTER referred to Section 5(2)(c), which he described as somewhat unusual, a sticking point for which accommodation was made along the way. "The old sponge left in the body after surgery" kept coming up, he said. "We toll the statute of repose. Tolling is a nice legal word for meaning that it's null and void, held in abeyance until this thing is discovered, that if there is a foreign body that has no therapeutic or diagnostic purpose found ... in a person's body, that that is an exception to the statute of repose."

Number 1132

REPRESENTATIVE ETHAN BERKOWITZ asked whether hazardous waste had a legal definition or was addressed by a body of law.

REPRESENTATIVE PORTER replied, "It is an attempt to address another concern that was raised of the more typical kinds of 'someone's property leached chemicals into my property and I didn't know about it,' those kinds of things." He said if someone had a better definition, he would certainly look at it.

Number 1184

REPRESENTATIVE BERKOWITZ asked whether there was a reason for using the term "waste" instead of "material."

REPRESENTATIVE PORTER said there may have been at the time; however, he could not recall one.

REPRESENTATIVE BERKOWITZ asked whether a person committing a criminal act would fall outside the statute of repose.

REPRESENTATIVE PORTER said, "The exception regarding an intentional act, would, I'm sure, bring that outside."

REPRESENTATIVE BERKOWITZ asked, "That would include even if the criminal statute of limitations precluded a criminal action?"

REPRESENTATIVE PORTER said yes. The statute of limitations for prosecution would not apply to a civil case.

Number 1235

REPRESENTATIVE BERKOWITZ asked whether defective products included products involving "intellectual property" such as an idea.

REPRESENTATIVE PORTER replied, "Well, the definition, of course, is an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part and is introduced into trade or commerce. I don't think thoughts would fall into that definition."

Number 1270

REPRESENTATIVE BERKOWITZ asked, "If there's an indication of intentional concealment, the tolling period begins at what point?"

REPRESENTATIVE PORTER replied, "When the injury, damage, whatever is discovered, or should have been discovered, and that's put in there, obviously, so that you can't just say, 'I didn't know' and (indisc.) to prove what's in a person's head. Then the two-year statute of limitations would start accruing, but the statute of repose, the eight-year limitation, would be tolled, so that if this discovery were made ten years after the fact, and it was as a result of an intentional concealment or fraud or something like that, then you would have two years to get it in."

Number 1308

REPRESENTATIVE CROFT asked, "The statutes of limitations don't mention it, but do they still contain the discovery rule?"

REPRESENTATIVE PORTER said yes. The definition of "from the time of accrual" was not currently in statute, but it fairly reflected the case law. He explained that the statute of limitations begins from the time a person knew or should have known, which was basically the time of accrual.

REPRESENTATIVE CROFT said, "So the statute of limitations provisions didn't mean any change in the discovery rule."

REPRESENTATIVE PORTER concurred.

REPRESENTATIVE CROFT continued, "But the statute of repose provisions do. I mean, that's the point of a statute of repose."

REPRESENTATIVE PORTER replied, "By definition; that's correct."

REPRESENTATIVE CROFT said, "And my original question from before was: Something that someone has no way of learning, if it doesn't fall into these exceptions, would be barred after eight years?"

REPRESENTATIVE PORTER said that was correct.

Number 1382

REPRESENTATIVE PORTER referred to Section 6, the limitation of actions against health care providers. He said it provides an exception to the statute of limitations for children from zero to six years old. He explained, "It, by its first statement, notwithstanding the disability of a minor, shortens an exception that currently exists in law that provides ... that the statute of repose, if you will, is tolled for minors, for incompetent persons, and in cases of adult recollection of child abuse when the memory was suppressed and was later recalled as an adult."

REPRESENTATIVE PORTER said those three exceptions to the statute of repose were existing law. In this statute, the exception for minors was being changed from eighteen years to eight years of age. As a result, the statute of repose would be in place for these kinds of cases for injuries to children up to six years of age, such as at-birth injuries. "The statute of limitations is tolled, but the statute of repose fits with this," he said.

Number 1470

REPRESENTATIVE CROFT asked whether there was a statute of repose previously or simply a tolling of the statute of limitations up to 18 years, the age of majority.

REPRESENTATIVE PORTER indicated the statute of repose was repeatedly in and out of the statutes, based on actions by the

**PHILLIPS LAW GROUP PLLC**

**July 30, 2015 - 2:57 PM**

**Transmittal Letter**

Document Uploaded: 5-474395-Appellants' Brief.pdf

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Court of Appeals Case Number: 47439-5

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

Appendix A is attached to Brief of Appellants Larry and Judith Hoffman

Sender Name: Kimmberly Harrison - Email: [kharrison@jphillipslaw.com](mailto:kharrison@jphillipslaw.com)