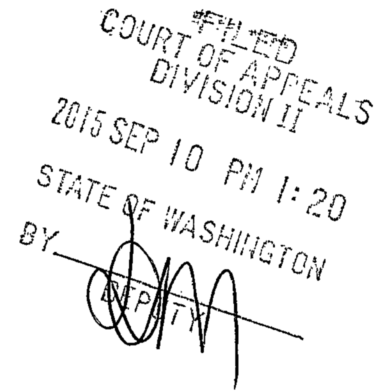

NO. 47439-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Pierce County Superior Court Cause No. 14-2-07178-2)

HOFFMAN, LARRY and JUDITH, husband and wife,

Appellant(s),

v.

ALASKAN COPPER COMPANIES, INC., et al.,

Respondent(s).

RESPONSE BRIEF

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I. INTRODUCTION

The trial court properly dismissed Appellants' cause of action because Appellants failed to state a claim against Ketchikan Pulp Company ("Ketchikan Pulp") upon which relief can be granted. Appellants' have asserted claims against Ketchikan Pulp that only sound in common law negligence. (Clerk's Papers "CP" 2045-49).[1] "I want to make it clear to the Court, we are pursuing a common law negligence claim against Ketchikan ... we claim Ketchikan knew or should have known of this risk." (Verbatim Report of Proceeding "VRP" at 8 (March 24, 2015). The alleged negligence on the part of Ketchikan Pulp occurred from 1954 through 1966, when Mr. Hoffman's father worked at the mill.[2] (CP 1347-48). Those negligence claims are barred by Alaska's statute of repose.

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[1] "The liability producing facts underlying this action arise for Ketchikan's status as an employer who negligently allowed it's employee, Mr. Hoffman's father, to bring asbestos dust home on his work clothes, when they knew or should have known that they were putting their entire family at risk." CP 2037.

[2] Mr. Larry Hoffman later worked at the Ketchikan Pulp Mill, but claims arising out of asbestos exposure during that period would have been barred by the Alaska Worker's Compensation Act (AS 20.30.055), in addition to the Alaska statute of repose.

Unlike the Washington statute, which is a construction statute of repose, Alaska's statute is a general statute of repose. In addition to claims arising out of construction activities, it also applies to all actions for personal injury, death or property damage unless commenced within ten years from the last causative act regardless of the nature of the claim. AS 09.10.055; *In re Jones v. Bowie Industries, Inc.*, 282 P.3d 316 (2012) (application of the statute of repose in a personal injury, knee-amputation case).

Statutes of repose are not statutes of limitation. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053 (Alaska 2002).

> Although sometimes referred to as statutes of limitation (citation omitted), statutes of repose are actually of a different nature than statutes of limitation. A statute of limitation bars plaintiff from bringing an already accrued claim after a specified period of time. *See, e.g., Van Slyke v. Worthington*, 265 N.J. Super. 603, 607, 628 A.2d 386 (1992); *Boudreau v. Baughman*, 322 N.C. 331, 339-40, 368 S.E.2d 849 (1988) (stating that the term "statute of repose" is used to distinguish ordinary statutes of limitation, limiting the time an action must be commenced after the action has accrued, from those that begin to run at a time unrelated to the accrual of the cause of action). A statute of

> repose terminates a right of action after a specific time, even if the injury has not yet occurred. *Morse v. Toppenish*, 46 Wn. App. 60, 729 P.2d 638 (1986), review denied, 108 Wn.2d 1007 (1987).

Rice v. Dow Chemical, Inc. at 124 Wn.2d at 211-12 .

While in certain circumstances, the "discovery rule" may be applicable to statutes of limitations, the rule is inapplicable to statutes of repose. In fact, the Alaska Supreme Court explicitly declared the discovery rule inapplicable within the context of the statute of repose. *Evans ex rel. Kutch*, 56 P.3d at 1064-66.[3] "A statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred." *Rice*, 124 Wn.2d at 212. In other words, a statute of repose "provides a time period in which the cause of action must accrue" regardless of when the injury is discovered or discoverable. *Donovan v. Pruitt*, 36 Wn.App. 324, 327, 674 P.2d 204 (1983).

---

[3] " . . . section .055 operates as a statute of repose, setting outer limits for commencing personal injury actions, even when the statute of limitations would allow them. *Evans v. Kutch* at 1065.
Appellants' Response in Opposition to Ketchikan Pulp's CR 12(b)(6) motion specifically acknowledged that the discovery rule does not apply, "[a] narrow exception to the discovery rule applies in actions which are barred by the statute of repose." CP 2039.

The trial court properly applied Alaska law in this case and AS 09.10.055 mandates dismissal of the cause of action against Ketchikan Pulp.

II. ASSIGNMENT OF ERROR

1. There was no error. There is a conflict of laws with respect to the relevant statutes of repose and Alaska has the most significant relationship to this claim under Washington conflict of law rules. The trial court correctly ruled that the respective statutes of repose conflicted and that Alaska law applies. The court properly dismissed Appellants' claims because those claims are barred under the Alaska statute of repose.

III. STATEMENT OF THE CASE

Mr. Hoffman never worked in the State of Washington. There is no claim that Mr. Hoffman was ever exposed to asbestos, or any asbestos-containing products in the State of Washington. In fact, Mr. Hoffman moved to Washington in 2012, four years after he retired from the trades. (CP 103). Ketchikan Pulp was incorporated in the State of Washington in 1947, prior to Alaskan

Statehood. (CP 1367). Ketchikan Pulp remains incorporated in Washington, however, the Mill was always domiciled and maintained its operations in Ketchikan, Alaska. Dave Kiffer, *Boom Town, Ketchikan in the 1950s*, SitNews, February 20, 2006 at 7.[4] The purpose of the Mill was to bring infrastructure to the region and employment to the locals.[5] And for nearly 50 years, that is just what it did. Alaska has the substantial relationship to this case.

The Alaska statute of repose and the Washington statute of repose are distinct. The prominent difference between the statutes is that the Alaska statute is a general statute of repose- a person may not bring an action for personal injury, death or property damage unless commenced within ten years from the last act alleged to have caused the personal injury, death or property damage- period. AS 09.10.055. "The ten year tolling period

[4] Electronic version available at http://www.sitnews.us/kiffer/boomtown/021906_ketchikan_50.html.

[5] "By the time the first bale of pulp left the new Ketchikan Pulp mill on July 1, 1954, Ketchikan had been changed irrevocably. A new economic engine had fired up and the era of year round jobs had finally reached Alaska's First City ... that all began in the mid-1950's and lasted for more than 40 years." *Id.*

applies to *all* personal injury actions." *Evans ex rel. Kutch,* 56 P.3d at 1065 (emphasis original). "No person may commence a personal injury action more than ten years after the last act that causes the injury." *Id.* The applicable Washington statute of repose applies only to construction related claims and does not protect premise owners from liability.

There is a clear conflict between Alaska and Washington law and because Alaska has the most significant relationship to this claim, Alaska law applies. Appellants argue that the trial court's reading of the Alaska statute of repose must be incorrect because such a reading would foreclose most personal injury suits based on asbestos exposure under Alaska law. Appellants are exactly correct. A simple Lexis Nexus or Westlaw search of "asbestos" in Alaska law reveals not a single personal injury asbestos lawsuit in the state court outside the context of workmen's compensation. In fact, the Alaska Supreme Court has specifically stated that the statue of repose would apply, even if the applicable statute of limitation had not yet run. The result Appellants decry is precisely

the result mandated by the Alaska Supreme Court. The trial court properly dismissed all claims against Ketchikan Pulp. Those claims are precluded under the Alaska statute of repose.

There is no factual dispute amongst the parties, Appellants allege exposure to asbestos containing products during the time Larry Hoffman lived and worked in Alaska. More importantly, every alleged exposure during his career stems from a job location in the State of Alaska. (CP 113-17); (CP 2057); (CP 93); (CP 92); (CP 113-17). There is not a single asbestos exposure alleged to have occurred outside the state of Alaska. *Id.*

Appellants' claim 1954-1966, Mr. Doyle Hoffman worked at the Ketchikan Pulp Mill and carried asbestos fibers home from work on his clothing, thereby exposing Larry Hoffman to asbestos. Appellant contends this take home exposure from the time his father worked at Ketchikan Pulp in Alaska contributed to the development of his mesothelioma.

IV. ARGUMENT

A. **There are Distinct Conflicts Between Alaska and Washington Law and under the Laws of this State Alaska Law Applies.**

To engage in a choice of law determination, there must be an actual conflict between the laws of Alaska and Washington. Washington and Alaska laws differ in three material areas: liability, allocation of fault, and the statutes of repose. Appellants have not assigned error to the trial court's application of Alaskan law with respect to liability or allocation of fault.

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1989). Dismissal is warranted where the court concludes, beyond a reasonable doubt, the plaintiff cannot prove "any set of facts which would justify recovery." *Id.* As noted *supra*, the material facts are undisputed. The trial court ruled Alaska law applies. This Court engages in the same inquiry as the trial court. *Syrovy v. Alpine Res., Inc.*, 122 Wn.2d 544, 548 n. 3, 859 P.2d 51 (1993).

Washington's Contractor statute of repose is restricted to claims arising out of the construction, alteration or repair of improvements to real property. It is specifically intended to apply to contractors. Premises owners are specifically <u>excluded</u> from the operation of the statute. RCW 4.16.300; RCW 4.16.310.

The Alaskan statute is not so limited. While the Alaska statute contains a provision specific to construction activities, it is not limited to construction activities. Rather, the Alaskan statute also applies to all personal injury actions. AS 09.10.055.

> (a) ... **a person may not bring an action for personal injury, death, or property damage unless commenced within 10 years of the earlier of the date of**
>
> (1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; . . .**OR**
>
> (2) **the last act alleged to have caused the personal injury, death, or property damage.**
>
> (b) This section does not apply if
>
> (1) the personal injury, death or property damage resulted from
>
> (A) prolonged exposure to hazardous waste;
> (B) an intentional act or gross negligence;
> (C) fraud or misrepresentation;
> (D) breach of an express warranty or guarantee;
> (E) a defective product; ... or
> (F) breach of trust or fiduciary duty;

(2) the facts that would give notice of a potential cause of action are intentionally concealed;

(3) a shorter period of time for bringing the action is imposed under another provision of law;

(4) the provisions of this section are waived by contract; or

(5) 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 parent or guardian.

(c) 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.

AS 09.10.055 (emphasis added).

There are clear conflicts between the statutes. The Washington statute of repose does not preclude Mr. Hoffman's cause of action against Ketchikan Pulp Company. The Alaska statute unequivocally does, unless one of the enumerated exceptions applies. Because none of the exceptions apply in this case, there is an actual conflict of law. *Seizer v. Sessions*, 132 Wn.2d 642, 649-50, 940 P.2d 261 (1997).

B. **Alaska's Statute of Repose Precludes Appellants' Claims and None of the Statutory Exemptions Apply.**

In 1997, the Alaska Legislature passed sweeping tort reform legislation in order to:

> (1) discourage frivolous litigation and decrease the costs of litigation, (2) stop 'excessive' punitive damages awards in order to foster a 'positive business environment,' (3) control the increase of liability insurance rates, (4) encourage 'self-reliance and independence by underscoring the need for personal responsibility, and, (5) reduce the cost of malpractice insurance for professionals. Chapter 26, section 1, SLA 1997.[6]

1. <u>The Discovery Rule does Not Apply to the Statute of Repose</u>.

In *Evans*, the plaintiffs were all injured parties with contemplated tort actions. *Evans ex rel. Kutch*, 56 P.3d at 1048. Plaintiffs sought a declaratory judgment that the 1997 tort reform legislation, including the newly enacted statute of repose, was unconstitutional. *Id.* The Alaska Supreme Court upheld the constitutionality of the legislation in its entirety.

> The plaintiffs ... ask us to independently review [the legislature's] conclusion and find that the evidence instead showed that these problems did not really exist. The plaintiffs ask us to delve into questions of policy formulation that are best left to the legislature. As we have noted previously, "[i]t is not a court's role to decide whether a particular

[6] *See* Alaska Stat. 09.10.055 (LEXIS 1998) (establishing new statute of repose); 09.17.010 (capping non-economic damages); 09.17.020 (capping punitive damages); 09.17.080(a) (modifying several liability provisions).

> statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people. *Id.*

The plaintiffs in *Evans* specifically argued that the 1997 AS 09.10.055 was unconstitutional because it abolished the discovery rule. *See Evans, supra* at 1068. The Court disagreed. The statute of repose imposes a ten-year ceiling, in addition to the two-year statute of limitations set forth under AS 09.10.140, for actions for personal injury, death or property damage. Even if the two-year limitations period of AS 09.10.140 is tolled by the discovery rule, the ten year period of AS 09.10.055 may still bar an action. *Evans ex rel. Kutch*, 56 P.3d at 1068-9. The Alaska Legislature declared the discovery rule inapplicable to the statute of repose. *Id.* The Court stated that the legislature was free to abolish the rule because the discovery rule was a common law rule created by the court and was not based on any constitutional principle. *Id.* In upholding the constitutionality of the 1997 statute of repose, the *Evans* court specifically acknowledged that there would be cases, as here, where a plaintiff might not discover a cause of action until after the

ten-year limitations period in the statute of repose had run and, therefore, the claim would be lost. Nonetheless, the court found that the Legislature was free to modify or abolish common law rules and that was precisely what they elected to do in enacting the statute. *Id.* at 1068-69.

Appellants argue that in *Sopko*, "the Alaska Supreme Court acknowledged the continued vitality of the 'discovery rule' in toxic tort cases." Appellants' Opening Brief ("AB") at 15. Appellants' argument is based on a fundamental misunderstanding of the differences between a statute of repose and a statute of limitations and, therefore, misrepresents the *Sopko* holding. The plaintiff in *Sopko* was allegedly injured while exposed to toxic fumes working from September 11 through 16, 1990, at a burned out warehouse owned by the defendant. *Sopko v. Dowell Schulmberger, Inc.*, 21 P.3d 1265, 1267 (Alaska 2001). As early as September of 1990, Mr. Sopko began experiencing symptoms of toxic exposure, however he did not obtain a medical diagnosis of his condition until April of 1994. *Id.* On April 11, 1996, Mr. Sopko filed a

personal injury action against the owner of the warehouse and one of his contractors. *Id.* at 1268. Defendants filed motions for summary judgment alleging that the two year statute of limitations on personal injury action under AS 09.10.140 barred Mr. Sopko's claims. *Id.* The trial court granted the defendants' motions and dismissed the claims; the Alaska Supreme Court upheld the dismissals. *Id.* at 1269.

The statue of repose was not at issue in *Sopko* because Mr. Sopko filed his claim six years from the last date of injury. What was at issue was the application of the discovery rule. The court held that that Mr. Spoko's cause of action accrued upon manifestation of his injuries, not at the final date of diagnosis. As such, the court properly dismissed the case. *Sopko*, 21 P.3d at 1271-72. As discussed in *Evans*, AS 09.10.140 is separate and distinct from AS 09.10.055. Even if the two-year limitations period of AS 09.10.140 is tolled by the discovery rule, the ten year period of AS 09.10.055 may still bar the action. *Evans ex rel. Kutch*, 56 P.3d at 1067. The discovery rule only applies to the

statute of limitation because it extends the time frame within which a cause of action may accrue. It is inapplicable in this case because the statute of repose bars Appellants' cause of action whether or not it had yet accrued. Under the Alaska statute of repose, a cause of action must accrue, if at all, within 10 years of substantial completion of a construction project from which the injury arises or the last act which caused the injury. That time frame cannot be satisfied in this case.

2. The "Prolonged Exposure to Hazardous Waste" Exception Does not Provide Safe Harbor for Appellants' Claims.

Appellants argue that the clothing which Mr. Doyle Hoffman wore work back and forth between his home and work at the Ketchikan mill and laundered at home constitutes "hazardous waste" as the term is used in the hazardous waste exclusion to the Alaska statute of repose. Nothing in the legislative history or the plain language of the statute supports such a bizarre interpretation. Moreover, Appellants presented no evidence in the trial court that Mr. Doyle Hoffman's clothing even qualified as "asbestos

containing material" under Alaska statutes or regulations.[7] Appellants further urge that the Alaska legislature must have been relying on federal statutes and regulations dealing in defining "hazardous waste" when crafting a definition of "hazardous waste" for the statute of repose. Appellants' argument is correct that Alaska relies on federal regulations for their statutory definition of "hazardous waste", but Appellants direct the court's attention to the wrong regulations. The regulation specifically adopted by the State of Alaska does not include asbestos in its definition of hazardous waste.[8]

Even if we were to assume that federal statutes and regulations generally dealing with hazardous wastes provide the source of Alaska's statutory definition of hazardous waste[9], the fact remains that those statutes and regulations define "waste" as "discarded material", or effluent discharge into navigable waters, or hazardous air pollutants measured in tons of material in air

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[7] To qualify as an asbestos containing material, a material must contain at least 1% asbestos. It is extraordinarily unlikely that, Mr. Hoffman's clothing would meet that criteria even had it been "waste".
[8] 40 CFR 261; 18 AAC 62.20
[9] Plaintiff relies on the Clean Air Act, Clean Water Act, RCRA and CERCLA.

emissions[10]. There is nothing remotely similar between the definition of waste under these statutes or regulations and Mr. Hoffman wearing his work clothing home. Simply put, "waste", for the purposes of these statutes and regulations is consistent with the common definition and understanding of the word. It means something intentionally discarded or released into the environment. It does not include clothing worn to work and laundered at home.

Finally, and most importantly, the State of Alaska's regulations governing waste disposal makes it clear that asbestos containing waste is not "hazardous waste" but rather, occupies its own specific category "regulated asbestos containing material."[11]

a. Mr. Doyle Hoffman's Clothing Is Not Hazardous Waste Under Alaska Statutes or Regulations.

The Alaska Legislature did not rely on CERCLA, RCRA, the Clean Air Act or the Clean Water Act to define hazardous

[10] See http://www.epa.gov/ttn/atw/pollsour.html (Clean Air Act); 40 CFR 401.11(f)(g)(h) (definition of pollutant, pollution and pollutant discharge under Clean Water Act); 40 CFR 261.2 (definition of "waste").

[11] Moreover, appellants made no showing at the trial court level that Mr. Doyle Hoffman's clothing would have even qualified as asbestos containing material (ACM) or regulated asbestos containing material (RACM) under the Alaska regulations. To qualify as ACM, a material must contain greater than 1% asbestos. RACM requires the additional component of friability. dec.alaska.gov/eh/docs/sw/Asbestos Disposal 2014.pdf.

waste.[12] Rather, 18 AAC 62.020 adopted by reference the "[r]egulations of the federal government for identification and listing of hazardous wastes, promulgated and published as 40 C.F.R Part 261...." 40 CFR Part 261 deals with the disposal of solid waste. Under the regulation, "hazardous waste" is simply a sub-category of "solid waste".

Part 261.2 defines solid waste as "any discarded material" not meeting certain exemptions not applicable here. Part 261.3 defines "hazardous waste" as any "solid waste" which exhibits any of the characteristics of hazardous waste identified in Subpart C of Part 261. Mr. Hoffman's clothing cannot be "solid waste" as the term is defined in Part 261 because it is not "discarded material". If that clothing is not a "solid waste" under the Part 261, it cannot be a "hazardous waste" under Part 261. If clothing is not a "hazardous waste" under Part 261, it cannot be a "hazardous waste" under the statute of repose hazardous waste exclusion because Alaska law relies exclusively on Part 261 for its definition

[12] These are the sources of federal law relied upon by Appellants in arguing that federal law provides the definition of "hazardous waste" as used in the Alaska statute of repose

of "hazardous waste." The primary defining criteria that "hazardous waste" must be a "discarded material" cannot be satisfied.

Secondly, asbestos is not identified or listed as a hazardous waste under 40 C.F.R. Part 261. The word "asbestos" is not even mentioned in part 261. Part 261 defines "hazardous waste" as a "solid waste" that exhibits the "characteristics of hazardous waste identified in Subpart C of this Part". Part 261 Subpart C is comprised of 40 CFR Part 261.20 to 261.24. Those sections identify 4 characteristics of hazardous waste: ignitablility, corrosivity, reactivity or toxicity. The only possible characteristic applicable to asbestos is toxicity. However, under the regulations, "toxicity" has a specific definition that does not include asbestos.

<u>§261.24 Toxicity characteristic:</u>

> (a) A solid waste (except manufactured gas plant waste) exhibits the characteristic of toxicity if, . . . the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table.

Asbestos is not a substance listed in Table 1 to Section 261.24. Mr. Hoffman's clothing cannot be hazardous waste under Alaska statutes and regulations, by definition. Those materials do not constitute "discarded materials" nor was asbestos included in the definition of "hazardous waste" adopted by the Alaska legislature.

Appellant's reliance on *Metal Trades, Inc. v. United States,* 810 F. Supp. 689 (D S.C. 1992) provides no support for its position. *Metal Trades* was a South Carolina federal court's determination that asbestos waste should be classified as hazardous waste, despite the fact that the administrative regulations adopted pursuant to RCRA did not define it as such.[13] *Metal Trades*, 810 F. Supp. at 697. The Court was attempting to determine whether or not the increased costs associated with a contractor's disposal of asbestos containing waste qualified for additional compensation under 10 USC Section 7311. The court relied on the definition of "hazardous waste" contained in 42 USC Section 6903. Section

[13] Exactly, the point just made. The regulations adopted by the Alaska legislature to define "hazardous waste" do not include asbestos.

6903 contains a completely different definition of hazardous waste than that contained in 40 CFR Section 261 adopted by the Alaska legislature. *Metal Trades* has no application to the current case. It does not deal with Alaska law, but rather deals with an interpretation of 10 USC Section 7311 dealing with cost overruns on naval contracts. 42 USC 6903, relied upon by the *Metal Trades* court, has no application to this case. Chapter 40 of the Federal Code of Regulations part 261 provides the definition for 'hazardous waste' adopted by the Alaska Legislature. Neither asbestos nor asbestos containing materials is a part of that definition. Asbestos containing material cannot be considered a "hazardous waste" under the Alaskan statute of repose.

b. <u>Alaska Regulations Do Not Treat Asbestos Containing Waste as Hazardous Waste.</u>

A review of the Alaska statutory scheme dealing with hazardous waste and asbestos yields the same result.[14] Whether

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[1414] Though immaterial to the definition of prolonged exposure to hazardous waste, Appellants' factual argument set forth in this section misstates the legal issues presented. Any alleged exposure to asbestos fibers "that he collected on the floors of the Ketchikan ... mill[]" is immaterial to his claim against Ketchikan Pulp. Alaska Worker's Compensation Act provides the exclusive

asbestos is classified as a hazardous material or an air pollutant is irrelevant because the Alaska statute of repose AS 9.10.055 does not exempt claims involving "hazardous air pollutants" or "hazardous materials" from its operation. The plain language of the statute carves a narrow exception for civil actions alleging "prolonged exposure to hazardous waste." Asbestos containing materials are not classified as a hazardous waste under Alaska law.

Alaska Administrative Code (AAC) Title 18 regulates waste disposal in Alaska. 18 AAC Chapter 60 deals with solid waste management, including disposal. Under 18 AAC Section 60, there are separate provisions for disposal of "hazardous waste"[15] and asbestos containing waste.[16] Under no reading of the statute could it be inferred that "hazardous waste" is the same as "waste containing regulated asbestos containing material".

Asbestos material waste is specifically excluded from the Alaskan definition of hazardous waste. Waste material containing

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remedy for injuries incurred by an employee in the course of employment. *Rosales v. Icicle Seafoods, Inc.*, 316 P.3d 580 (2013); AS 20.30.055.

[15] 18 AAC 60.020

[16] 18 AAC 60.450

asbestos occupies a specific, defined place in Alaska's statutory scheme. It is defined as "Regulated Asbestos Containing Material" or an "Asbestos Containing Material." It is nowhere defined as "hazardous waste." Even if by some strange twist of logic, Mr. Hoffman's clothing could be considered "waste", that clothing cannot be "hazardous waste" under Alaska law.[17]

c. Appellants Statutory Interpretation Argument Is Wrong.

Appellants are also wide of the mark in their argument that the exceptions to the statute of repose should be interpreted "broadly" to include Appellants' claims. Nothing about Alaska's overall statutory scheme, the legislative history of the statute of repose, or legal authority supports Appellants' claim. It is clear from the legislative history of the statute and the stated purpose of that statute that the Alaska legislature intended to restrict access to the courts. See *infra* at 11. The Alaska Supreme Court addressed this precise issue in a case involving the Alaska Wage and Hour

[17] Ignoring for the purposes of argument that any of those materials qualify as "asbestos containing" under Alaska law, a point not addressed by Appellants in the trial court.

Act. (AWHA) *Whitesides v. U-Haul Co. of Alaska,* 16 P.3d 729, 732 (Alaska 2001).

Noting that the AWHA, like the statute of repose, was a remedial statute, the court noted that exemptions to such statutes are to be narrowly construed and limited to those situations "plainly and unmistakably within their terms and spirit." *Id.* Appellants' argument that the hazardous waste exemption to the statute of repose should be broadly interpreted to include their claims finds no support in law or fact.[18]

Nothing in the language of the statute of repose or the statute's legislative history suggests the legislature intended a definition different in the statute of repose that it did in other Alaska statutes which define "hazardous waste."

Recognizing the futility of these arguments, Appellants claim for the first time in their opening brief that the hazardous

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[18] Washington law is no different in applying this rule of narrow construction. "Finally, we must bear in mind that the act is remedial and its exemptions must be "narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz,* 140 Wn.2d at 301, 996 P.2d 582; *accord Strain v. W. Travel, Inc.* 117 Wn. App. 251, 254, 70 P.3d 158 (2003).

waste exception under the statute of repose is unconstitutional as a violation of equal protection principles. AB at 20. That issue was not raised at the trial court and should not be considered on appeal. *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977).[19]

Nonetheless, the Alaskan Supreme Court has already upheld the constitutionality of the 1997 statute of repose in 2002. *Evans ex rel. Kutch*, 56 P.3d at 1068. The right to sue a particular party is not a fundamental constitutional right, it is a common law right of action. *Turner Const. Co., Inc. v. Scales*, 752 P.2d 467, 471, (1988). There are no suspect classes or fundamental rights involved. *Id.* As discussed previously, the legislature is free to modify or abolish common law. *Evans ex rel. Kutch*, 56 P.3d at 1067. "Assuming that at common law respondent would have had a right of action, the rule upon which such right was founded was changed by the Legislature, which it had the right to do. A person has no vested interest in any rule of common law." *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101

[19] Not to mention the odd precedent of one State's courts determining that the conduct of a different State's legislature violated that State's constitution or the U.S. Constitution.

Wn. App 923, 6 P.3d 74 (2000) *quoting Shea v. Olson*, 185 Wash. 143, 156, 53 P.2d 615 (1932).

The "hazardous waste" exception to the Alaska statute of repose does not extend to claims asserted by Appellants. Doyle Hoffman's clothing is not "waste" as the term is used in common parlance or Alaska statutes and regulations. Nor can this clothing qualify as "hazardous waste" under Alaska statutes, even if they were contaminated by asbestos. Finally, Appellants produced no evidence supporting the proposition that these items even qualified as "asbestos containing" under Alaska law.

3. The Medical Malpractice Exception to the Statute of Repose does not Apply to Appellants' Claims.

Appellants also assert that their claims fall within the exception to the statute of repose dealing with foreign objects or bodies left in an individual's body which have no diagnostic or therapeutic value. An analysis of the language of the exception and the legislative history demonstrates the argument to be specious.

The 1997 tort reform bill was sponsored by Representative Porter. Mr. Porter clearly articulated the exact purpose of the "foreign body" exception to the statue of repose- the old sponge left in someone after a surgery.

> 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 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. The only further comment in the legislative history with respect to the medical exception under Section (5)(c) came on February 24 when a medical doctor was invited to the House Judiciary Committee hearings to address the exception.

> REPRESENTATIVE BERKOWITZ referred to Section 5, subsection (c) on page 4, which tolls the statute of repose upon discovery of a foreign body. It seemed to him that lawyers are trying to out diagnose doctors, and he wondered if there is any other medical procedures that could

> cause a problem down the road, other than leaving a foreign body inside a human body.
>
> DR. JOHNSON responded that in terms of lurking for years and years, and causing problems, and then all of the sudden being a problem, something that's left as a foreign body, generally if it's going to cause problems, will do so relatively soon. It's mere presence there is an affront and clearly an error. The reason there is an exception for this type of situation isn't that it will somehow lay there, and then at a later time cause a problem. If it is there, by definition it's an error, which needs to be addressed. The degree of injury created by it is another issue, but it's precisely listed in this section as something which isn't covered in a statute of limitations.

Id. at No. 2343 (Feb. 24, 1997).

There is no doubt that the exception applies only to medical procedures wherein a foreign object or body is left inside the patient. The exception states:

> (c) 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.

As the trial court noted:

> Then the next one I think is the easy one is foreign body for therapeutic or diagnostic purposes. I think

> it clearly – I mean, it says that in the legislative history, that's what the sponsor's purpose was and I'm very well aware of how legislation occurs and we add things in ways that don't make sense, but it's clearly separated out as dealing with medical malpractice that you can't discover until after ten years, perhaps, because something has been left in. So that one does not apply. I do not believe they were contemplating asbestos at that time.

VRP at 48-49 (March 25, 2015). The language of the statute is clear; the legislative history is crystal clear, Appellants' cause of action does not fall within the exception set forth in subsection (c) to Alaska's statute of repose.[20]

4. The Defective Product Exception to the Statue of Repose Because Appellant Did Not and Could Not Assert a Products Liability Claim Against Ketchikan Pulp.

The defective product exception was intended to apply and does apply to manufacturers who place dangerous or defective products into the stream of commerce. There is not the remotest suggestion in the legislative history that a premises owner sued

[20] Unsurprisingly, the only record of an Alaska case which uses the phrase "foreign body" is an unreported case from 2014 dealing with a metal object that was left in a patient after surgery. *Jones v. Corrections Corp. of America*, 2014 WL 72761 (noted for factual basis rather than legal precedent).

under common law negligence principles was intended to fall within the ambit of that exception. Moreover, and more importantly, Appellants did not assert a products liability claim against Ketchikan. Counsel for Appellants specifically stated in oral argument on Ketchikan Pulp's motion that his clients' claims against Ketchikan Pulp sounded in common law negligence. Ketchikan Pulp made wood pulp products. Its mill was constructed using asbestos containing thermal insulation products. It did not manufacture or sell those products and there is no evidence before the court that it did. The exception to the statute of repose for defective products would apply to a manufacturer or seller of those products, not to a user.

Appellants' Counsel could scarcely articulate the argument, "[y]our question to me is what's the product, and I understand that question and I understand it this is somewhat of a difficult – it's a difficult thing to wrap our brains around. Even I'm having a hard time myself." VRP at 19 (March 25, 2015). Counsel went on to state "[t]he product in question is the thermal insulation products

… that were purchased and acquired by Ketchikan Pulp, which caused Doyle Hoffman to be exposed to asbestos." *Id.* at 20. "The products that caused Mr. Hoffman's injury were manufactured without warnings in places other than Alaska and Washington." AB at 39.

Appellants allege that Doyle Hoffman carried home asbestos fibers from those products on his clothes, subjecting Larry Hoffman to asbestos exposure. There is absolutely nothing to support the strained interpretation that the defective product exclusion applies to a take-home exposure negligence claim against a non-manufacturer. The exception simply cannot be read in that way. As the trial court succinctly put it, "it's the mill. It's not a defective product." VRP at 49 (March 25, 2015). The sponsor of the bill described what was meant by the exception:

> REPRESENTATIVE PORTER believed one of the biggest exceptions was the 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.

There is no indication that the defective product exception was meant to apply to defendants such as Ketchikan Pulp.

Appellants' cite to *Jones v. Bowie Industries, Inc.* in support of their argument that the defective product exception applies in all cases where the plaintiff alleges contact with a defective product. 282 P.3d 316 (2012). *Jones* does not support such a contention. In *Jones*, the plaintiff was injured in 2003 while operating a mulch machine at work. *Id.* at 322. Prior to trial, which was scheduled for August 2007, Bowie, the manufacturer of the machine, moved for dismissal of the plaintiff's negligence claims based on the statue of repose. The court denied the motion without explanation. *Id.* The jury returned a verdict for Bowie and Jones appealed. Bowie cross-appealed, raising their statute of repose argument, among others. *Id.* at 337. The Supreme Court rejected Bowie's argument, holding that the defective product exception to the statute of repose allows plaintiffs to assert both product liability and negligence claims <u>against manufacturers of</u>

defective products. *Id.* at 338. The case does not stand for the proposition that a plaintiff may assert negligence and product liability claims against a non-manufacturer defendant. Ketchikan Pulp did not manufacture or produce a defective product, therefore Appellants' claim is not preserved by the defective product exception to the statute of repose.

5. The Intentional Act or Gross Negligence Exception to the Statute of Repose does not Preserve Appellants' Claims.

The best evidence of what Appellants believe their cause of action is against Ketchikan Pulp is Appellants' Complaint for Personal Injuries. No claim was asserted by Appellants for gross negligence in the Complaint. Moreover, no evidence of gross negligence was presented in support of Appellants' argument. The court specifically noted during the course of the hearing that: "there's [no] evidence to indicate that there is gross negligence." [21] VRP at 49 (March 25, 2015). Finally, during oral argument and in the briefing to the court, Appellants' trial counsel repeatedly

[21] Appellants' counsel raised the gross negligence argument for the first time at trial, during preliminary motions.

asserted its claims against Ketchikan Pulp were "common law negligence" claims. "I want to make it clear to the Court, we are pursuing a common law negligence claim against Ketchikan ... we claim Ketchikan knew or should have known of this risk." VRP at 8 (March 24, 2015).

AS 09.10.055 does not define "gross negligence."[22] *Storrs v. Lutheran Hosps. & Homes Soc'y of America, Inc.* is an appeal from an administrative proceeding suspending the medical rights of Dr. Storrs. 661 P.2d 632 (Alaska 1983). Dr. Storrs contested the Committee's definition of gross negligence as applied at his hearing. The definition used:

> Gross negligence requires a choice of a course of action either with knowledge of a serious danger to [individuals] involved in it or with knowledge of facts which would disclose this danger to any reasonable [person]. Gross negligence involves a risk substantially greater in amount than that which is necessary to make conduct negligent.

Storrs, 661 P.3d at 634. The court held that since the Committee employed the Restatement (Second) of Torts definition of reckless

[22] In this counsel's review of Alaska case law, there is not a single personal injury action wherein the court defines the term gross negligence.

disregard, which may be stricter than gross negligence, it was an appropriate definition. *Id.* Gross negligence is an extreme departure from the failure to use ordinary care or failure to take precautions to cope with a possible or probable danger. *Id.*; AS Pattern Jury Instruction 03.14.

Appellants make the argument here, as they did at the trial court, that Ketchikan Pulp knew as early as 1950 the dangers of asbestos. AB at 35. There is absolutely no evidence in the record (or otherwise) to substantiate that claim.[23] In fact, Appellants' own expert testimony proves the gross negligence exception does not apply. The record demonstrates that Dr. Castleman, Appellants' "state of the art" expert doesn't have a clue what was known or should have been known in Ketchikan, Alaska in 1966. (CP 944-47) Likewise, Mr. William Ewing, Appellants' Certified Industrial Hygienist, testified that the first publication remotely related to the

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[23] Again, Appellants make allegations regarding what Ketchikan Pulp may have known during the time Larry Hoffman worked at the mill. The only relevant time frame before this court is 1958 to 1966 when Doyle Hoffman worked at the mill and Larry Hoffman lived in the family home. Any claims regarding Larry Hoffman's time working at the mill are precluded by Workman's Compensation.

issue as presented here of take home exposure was Kilburn's paper published in 1985, almost 20 years after Doyle Hoffman left Ketchikan Pulp.[24] (CP 951-52).

In 1966, there was not a single Alaskan statute regulating the use of asbestos. OSHA was not in existence. (CP 694) Five years after Mr. Hoffman's father retired, OSHA declared to the world that the safe level of exposure to asbestos fell somewhere between a 5 f/cc TWA and a 2 f/cc TWA. *Id.* There was no literature and is no literature, even today, supporting the proposition that take home exposures would have exceeded OSHA's declared safe exposure level. More to the point, there is nothing in the literature to suggest that take home exposure from a welder (such as Doyle Hoffman) would have exceeded OSHA's stated safe level of exposure and Appellants cannot produce evidence that it did. The initial OSHA regulations established a 12

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[24] Kilburn, et al, *Asbestos Disease in Family Contacts of Shipyard Workers,* Am. J. Pub. Health, June 1985 Vol. 75 No. 6, Pages 615-17. The Kilburn paper does not discuss mesothelioma among sons of shipyard workers at all. It purports to identify "asbestosis" among sons of shipyard workers although only 1 of 79 individuals examined met the 1985 American Thoracic Society definition of asbestosis. (CP 958-60)

f/cc PEL[25] in May 1971.[26] This level was reduced in December 1971 to 5 f/cc.[27] Mr. Holtshouser, a Certified Industrial Hygienist, observed in his declaration, there is simply no basis to conclude that the medical and scientific community recognized a risk of mesothelioma from take home exposures from a welder at the time Mr. Hoffman senior was an employee of Ketchikan Pulp. (CP 162-65).

Gross negligence has not been pled and there is no evidence in the record to support such a claim. The trial court properly held that, as a matter of law, the exception did not apply. To raise the issue of gross negligence to a jury, there must be substantial evidence of the claim. *Boyce v. West*, 71 Wn.App. 657, 666, 862 P.2d 592 (1993). Here, there is no material issue of fact as to the existence of gross negligence. Allegations and argument are insufficient to establish a gross negligence claim. *Id.* Appellants presented no evidence that the Alaskan government, let

[25] PEL is the permitted exposure level under OSHA regulations calculated on an 8 hour TWA.
[26] 36 FR 10466
[27] 36 FR 23207

alone Ketchikan Pulp, had any knowledge that the families of workers could be placed in danger from exposures to asbestos fibers carried home on worker's clothing. Again, Appellants' belated effort to attempt to fit their cause of action into an exception to the statute of repose falls short.

A "real conflict" exists because, contrary to the Washington statute of repose, the Alaska statute of repose mandates a dismissal of Appellants' claims, therefore the trial court properly engaged in a choice of law analysis.

C. **Washington has Adopted the Substantial Factor Test and Under that Analysis Alaska Law Applies.**

1. This Court Begins its' Analysis with the Presumption that Alaska Law Applies.

In personal injury cases, the law of the state where the injury occurred applies, unless another state has a greater interest in determination of that particular issue. *Bush v. O'Connor*, 58 Wn. App. 138, 791 P.2d 915 (1990). There is a presumption that the law of the place of injury applies in personal injury cases, that presumption is only overcome if another state has a greater interest

in the determination of the particular issue. *Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn. App 256, 263, 115 P.3d 1017 (2005). "To determine which state's law applies to a particular issue, Washington has adopted the 'most significant relationship' test as set forth in the Restatement (Second) of Conflicts of Laws § 145 (1971)". *Rice v. Dow Chemical Company*, 124 Wn.2d 205, 213, 875 P.2d 1213 (1994). The Restatement (Second) Conflicts provides:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in 6 to the occurrence and the parties, in which event the local law of the other state will apply. Restatement (Second) of Conflicts of Laws § 145 (1971).

In *Johnson*, the Court set forth a two-step analysis for determining which jurisdiction's law applies. First, courts are to evaluate the contacts, qualitatively and quantitatively, with each potentially interested jurisdiction. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555 P.2d 997 (1976).

2. The Four Factors Set Forth Under the Significant Relationship Test all Conclusively Establish that Alaska Law Applies.

Appellant relies exclusively on policy considerations and the purported interests of the state of Washington in presenting its choice of law argument. However, the analysis begins with the contacts between the parties. And, in this case, ends there as well. It is only when the contacts are balanced that courts resort to policy considerations to break the tie. The contacts in this case overwhelmingly endorse the application of Alaska law. Under Restatement (Second) of Conflicts § 145-146. Section 146, the law of the place where the injury occurred is to be displaced only by a showing that some other jurisdiction has a more significant relationship. The significant relationship test looks to the four factors below. The contacts are evaluated according to their relative importance with respect to the particular issue. *Id.* "The approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found." *Southwell v. Widing Transportation*, 101

Wn.2d 200, 204, 676 P.2d 477 (1984). "Under this rule, it is necessary to identify the crux or gravamen of the action to determine which contacts are relevant." *Dairyland Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 41 Wn. App. 26, 31, 701 P.2d 806 (1985).

(a) The place where the injury occurred:

Appellants allege that the place where the injury occurred is Washington because Appellant was diagnosed with mesothelioma while living in Washington. According to the medical records produced in this case, Appellant was diagnosed with mesothelioma in the State of Oregon and has undergone all of his treatment in Oregon. (CP 1401-03). Washington may be where the Appellant resided when he was diagnosed with mesothelioma, but it is not the place of injury. All the exposures alleged in the complaint occurred in the State of Alaska. According to Appellants, those exposures led to the development of Mr. Hoffman's disease. Appellants do not allege a single exposure originating in Washington. The place where the disease

becomes manifest is not the place of injury. *Rice*, 124 Wn.2d at 215 (1994). In this case, the tort occurred in Alaska. *Id.*

(b) The place where the conduct causing the injury occurred:

There is no dispute that the allegedly negligent conduct occurred in Alaska. Ketchikan Pulp owned and operated a pulp mill in Ketchikan, Alaska. Doyle Hoffman worked at the mill and allegedly carried asbestos fibers into his home in Ketchikan. Mr. Larry Hoffman was also employed at the mill and at multiple other locations in the State of Alaska where he had significant "hands on" exposure to asbestos.

(c) The domicile, residence, nationality, place of incorporation and place of business of the parties:

Larry Hoffman lived in Alaska from approximately 1954 until 1989. Appellants assert that Mr. Hoffman had over a decade of asbestos exposure in the State of Alaska. The Ketchikan Pulp Mill was located in Ketchikan, Alaska. All operations with respect to the mill were conducted there.

Ketchikan Pulp is a Washington corporation.[28] However, the company has always had its domicile and sole place of business in Ketchikan, Alaska. Kiffer, *supra* at 7. The headquarters has always been in Ketchikan, the place where its products were produced. The raw materials for its pulp products were obtained from the Tongass National Forest in S.E. Alaska pursuant to a 50 year timber lease with the US Forest Service. *Id.* at 2. The finished pulp products were shipped from the Ketchikan facility worldwide. The Ketchikan Pulp mill was the foundation for the town of Ketchikan.[29] The domicile, nationality, principal place of business and residence of Ketchikan Pulp was always and only Ketchikan, Alaska. Generally, "a corporation's principal place of business is more important than the place of incorporation." Restatement (Second) Conflict of Laws § 188,

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[28] As noted previously, at the time of the incorporation of Ketchikan Pulp in 1947, Alaska was not yet a State and Ketchikan Pulp could not have been incorporated there. Alaska only obtained statehood in 1959.

[29] For the better part of four decades the mill was the largest employer in that remote southeast Alaska island town. Ketchikan Pulp Mill Closing Down After 43 Years, March 27, 1997 available at http://www.dessertnew.com/article/551263/Ketchikan-pulp-mill-closing-down-after-43-years.html.

comment on Subsection (2). The fact that one of the parties is domiciled or does business in a particular state assumes greater importance ...." than the place of actual incorporation. *Id.* In short, a company's domicile or principal place of business, rather than the state of incorporation, is the operative inquiry under this contact, "and this is particularly true in situations where the corporation does little, or no, business in the latter state." *Id.* Ketchikan Pulp mill was the core of the Ketchikan community. In this instance, the place of incorporation is irrelevant to the analysis.

(d) The place where the relationship is centered:

There was a relationship between the parties in this case, and that relationship was centered upon the employment of both Doyle and Larry at the pulp mill in Ketchikan, Alaska and Larry's employment at other industrial and commercial facilities in the State of Alaska.

Consideration of the presumption in favor of the law of the place of injury and all four supplemental factors can only lead to the clear conclusion that Alaska law applies to the claims asserted

in this case. Balancing the relative interests of the States involved has no place in this analysis.

The facts of this case are virtually identical to those that were before the *Rice* court, except that Mr. Rice actually lived in Washington for nearly 20 years before he filed suit. *Rice*, 124 Wn.2d at 207. Howard Rice alleged he was exposed to herbicides from 1959-1963 while working in Hebo, Oregon. Mr. Rice moved his family to Washington in 1967 and lived there continuously after. *Id.* In July of 1985, Mr. Rice was diagnosed with chronic lymphocytic leukemia and was informed of the possible connection between his illness and his exposure to products manufactured by Dow. *Id.* Mr. Rice brought a personal injury action in 1988. On motion for summary judgment, Dow argued that Oregon law applied to the case and the Oregon statute of repose barred Rice's claims. *Id.* at 208. The court granted summary judgment in favor of Dow. *Id.* On appeal, the Court of Appeals found a clear conflict of laws between the Washington

and Oregon statutes of repose and engaged in the most significant relationship test. *Id.* at 213.

Examining the contacts, the court found that virtually all Rice's exposures occurred in Oregon,[30] "the relationship between the parties occurred in Oregon, the damaging product was placed in the stream of commerce and sent to Oregon, at the time of the injurious contact plaintiff lived in Oregon, and plaintiff was exposed to the chemicals while employed in Oregon." *Rice*, 124 Wn.2d at 214. As here, the only connection with Washington was the fact that plaintiff lived there when the disease manifested itself. *Id.* The fact that Rice resided in Washington was given little weight, "[t]he possibility that the employee might change his residence at any time, after the injury, and thus shift the burden of support to another state, makes the fact of present residence less significant." *Id.* at 216 quoting Robert A. Leflar, *American Conflicts Law* § 160, at 329-30 (3d ed. 1977)).

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[30] There was one allegation of being splashed with chemicals in Washington that the court determined was "almost irrelevant when compared to the frequency and lengthy exposure which occurred in Oregon." *Rice*, 124 Wn.2d at 214.

Mr. Rice argued that Washington did have a significant connection with the claim because he was injured in Washington. *Id.* at 214. The court rejected that argument reasoning that the injurious contact between Mr. Rice and the product occurred in Oregon. Therefore Oregon was the place of injury. *Id.* at 216. In the present action, as in *Rice*, Appellants' cause of action merely accrued in Washington, that is completely unrelated to where the injury actually occurred. *Id.* at 215. Though the contacts established that Oregon law applied, the court did address the Oregon interest involved:

> Oregon's interest is in providing repose for manufacturers doing business in Oregon and whose products are used in Oregon state. The fact that a person living in Oregon, who is exposed to allegedly harmful chemicals while at work in Oregon, using products shipped to Oregon, later moves to another state does not extinguish Oregon's interest .... Applying Oregon law achieves a uniform result for injuries caused by products used in the state of Oregon and predictability for manufacturers whose products are used or consumed in Oregon.

The same is true in the instant matter. All of the contacts establish that Alaska law applies. Alaska has a strong interest in

protecting construction, infrastructure and economic development in their region. Alaska set forth their interests in the articulated purposes of the 1997 tort reform legislation. Even if the Court were to look beyond the contacts, the Court's analysis under the second *Johnson* step centers upon "the principles behind the statute of repose to see which state's interest would prevail." *Zenaida-Garcia,* 128 Wn. App. at 262. Alaska law applies to Appellants' case.

Appellants attempt to argue that because the 1997 version of the statute of repose was not enacted until after the mill ceased operations it is somehow inapplicable to this case. Not only does Appellants' argument misunderstand the legislative purpose behind the statute of repose, it was not raised at the trial court and is therefore not properly before this court. "Issues not raised in the trial court will not be considered for the first time on appeal." *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P,2d 704 (1980).

D. This Court does not Address the Public Policy Issue because There is no Balanced Result under the Substantial Factor Test.

In the present action, the Court does not proceed to the second of the two *Johnson* steps – evaluating the jurisdictions' interests and public policies – because the contacts here are not evenly balanced, but weigh overwhelmingly in favor of applying Alaska law. "A court must first evaluate the contacts with each potential state and then, only if evenly balanced, will a court 'evaluat[e] ... the interests and public policies of the concerned states, to determine which state has the greater interest in determination of the particular issue.'" *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 28-29, 190 P.3d 102 (2008) (quoting *Zenaida-Garcia*, 128 Wn. App. at 263). As outlined above, an evaluation of the contacts in this case emphatically establishes that Alaska law applies. Under the law, the Court's analysis stops there. The Court does not and need not address the relevant policy interests of the states. Appellants ignore the contacts and instead, ask this court to ignore the law. Their plea is

an impassioned policy plea that plays no bearing on the legal issues before this court. The substantial relationship test applies in Washington and under that test, Alaska law applies.

V. CONCLUSION

For the reasons stated herein, this Court should affirm the lower court's dismissal of the case.

RESPECTFULLY SUBMITTED this 8th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 4th day of September, 2015, I caused a true and correct copy of the foregoing document, Response Brief, to be delivered via email to the following counsel of record:

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