NO. 93581-5

SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY AND JUDITH HOFFMAN,

Appellants,

v.

ALASKA COPPER COMPANIES, INC., ET AL.,

Respondents.

PETITION FOR REVIEW OF DEFENDANT AND RESPONDENT KETCHIKAN PULP COMPANY

David A. Shaw, WSBA #08788
Malika I. Johnson, WSBA #39608
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondent
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATE STATUTES

RULES

I. IDENTITY OF RESPONDENT

Ketchikan Pulp Company (KPC) asks this Court to accept review of the decision designated in Part II.

II. COURT OF APPEALS DECISION

In an unpublished decision filed August 9, 2016, Division II of the Court of Appeals reversed the trial court's summary judgment dismissal of plaintiffs' negligence/personal injury action even though the plaintiffs failed to present any evidence that their claims fell within one of the enumerated exceptions to Alaska's Statute of Repose, the operable law of the case.[1] On August 29, 2016, KPC filed a Motion for Reconsideration arguing that the Court of Appeals committed error by applying incorrect legal standards to their analysis.[2] The Court of Appeals signed an Order Denying Review on September 1, 2016. The Court of Appeals did not send KPC counsel a copy of the order denying reconsideration. A copy was obtained when KPC counsel called the Court of Appeals on October 13, 2016 to inquire as to the status of its

[1] A copy of the Court of Appeals decision is attached as Appendix A.
[2] A copy of the Motion for Reconsideration is attached as Appendix B.

motion for reconsideration and was told an order had been signed denying reconsideration. KPC counsel requested and was provided a copy of the order via email the same day.[3]

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly determine that Alaska law governed the resolution of Mr. Hoffman's claims when the actual facts considered by the trial court were not in dispute?

2. Did the trial court correctly determine that the Alaska Statute of Repose barred Mr. Hoffman's claims?

3. Did the Court of Appeals err in holding that the trial court dismissed plaintiff's claims pursuant to CR 12(b)(6) contrary to the clear rules set forth under CR 12(b)?

4. Did the Court of Appeals err in failing to apply a de novo review standard to the choice of law question?

5. Did the Court of Appeals err when it insisted[4] on applying a CR 12(b)(6) standard in contravention of *United Food*

[3] Declaration of Malika Johnson attached as Appendix C. A copy of the electronic transmission from Division II of the Court of Appeals is attached as Exhibit D.

& Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217, 218 (1985).

IV. STATEMENT OF THE CASE

The underlying case is a personal injury action filed by plaintiffs alleging that Larry Hoffman developed mesothelioma after he was exposed to asbestos fibers carried home by his father from the KPC mill when he was a child from 1954-1966[5]. Mr. Hoffman was later a mill employee and asserted claims against General Electric alleging asbestos exposure as an employee. Plaintiffs' claims against KPC based on his time as an employee were barred by the Alaska Workers Compensation Act. Dismissal of those claims as to KPC was not opposed by plaintiffs.

Defendants initially brought a motion for application of Alaska law. (VRP March 13, 2015). Mr. Hoffman never worked in the State of Washington. There is no claim that Mr. Hoffman

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[4] Given its curt order on KPC's motion for reconsideration, the Court of Appeals continues to insist that CR 12(b)(6) is the operative rule, despite the fact that such a conclusion is both factually and legally incorrect.

[5] The asbestos was allegedly brought home from the mill on his father Doyle's person and clothing. Mr. Hoffman makes a number of other exposure claims not relevant to KPC.

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). KPC was incorporated in the State of Washington in 1947, prior to Alaskan Statehood. (CP 1367). Notwithstanding the fact that KPC was, by necessity, incorporated in the State of Washington, KPC was always domiciled and conducted all of its operations in Ketchikan, Alaska and the Tongass National Forest in Southeastern Alaska. Dave Kiffer, *Boom Town, Ketchikan in the 1950s*, SitNews, February 20, 2006 at 7.[6] The purpose of the Mill was to bring economic infrastructure to the region, promote the employment of local Alaskans, and to exploit the natural resources of the Tongass National Forest.[7]

The trial court correctly ruled that Alaska law and, in particular, the Alaska Statute of Repose governed the resolution of

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

[7] "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.*

plaintiffs' claims. (VRP March 13, 2015). KPC then brought a 12(b)(6) motion to dismiss Mr. Hoffman's claims based on the uncontroverted fact that his lawsuit was filed after the expiration of the time period provided for in the Alaska Statute of Repose. Plaintiffs opposed that motion by arguing that several exceptions to the Statute of Repose applied.[8]

In response, the trial court continued the CR 12(b)(6) motion, permitted further briefing and, in ruling, considered matters outside the pleadings. (VRP March 24, 2015 at 72). Under established Washington precedent, the original CR 12(b)(6) motion was converted into a CR 56 summary judgment motion.

> [T]he following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted ... If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, ***the motion shall be treated*** as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable

[8] The Alaska Statute of Repose excepts from its application claims based on *inter alia* defective products, prolonged exposure to hazardous wastes, gross negligence and foreign objects left in the body of no therapeutic or diagnostic value.

> opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(b)(emphasis added). If the trial court elects to consider facts and evidence outside of the pleadings, the onus is on the court to apply a CR 56 summary judgment standard, "the motion ***shall*** be treated as one for summary judgment." CR 12(b). Judge van Doorninck treated KPC and General Electric's Motion to Dismiss for Failure to State a Claim as summary judgement motions after she decided to consider evidence outside of pleadings. (VRP March 24, 2015 at 16). In accordance with the rule, the trial court specifically indicated the motion would be treated "like every other summary judgment." *Id.* In fact, the transcript for the following day is entitled: "Summary Judgment Proceeding." (VRP March 25, 2015 at 3).

V. ARGUMENT

A. The Trial Court Correctly Determined that Alaska Law Governed Resolution of Plaintiffs' Case

The trial court analyzed the relevant contacts between the State of Alaska, the State of Washington and the plaintiffs. Based

on that analysis, the trial court correctly concluded that Alaska law should be applied.[9] Mr. Hoffman was an Alaska resident during the relevant time period, all of his claimed asbestos exposures occurred in the State of Alaska, KPC's sole place of business was Ketchikan, Alaska and the Tongass National Forest, and, the mill was established pursuant to a long term timber lease with the Federal government in the Tongass to promote economic development in Southeastern Alaska. Mr. Hoffman's only contact with the State of Washington is that plaintiffs chose it as a place to retire and had lived there for approximately one year prior to Mr. Hoffman developing his disease. (CP 103). Under relevant Washington Supreme Court precedent on the subject of conflict of laws, the trial court's determination of the issue is unassailable. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555 P.2d 997 (1976).

Under Restatement (Second) of Conflict of Laws § 145-146 (1971), the law of the place where the injury occurred is to be

[9] Washington and Alaska laws differ in three material areas: liability, allocation of fault, and the Statutes of Repose. KPC and GE sought to have Alaska law applied in each area.

displaced only by a showing that some other jurisdiction has a more significant relationship. The significant relationship test looks to four factors: 1) the place of injury, 2) the place where the conduct causing the injury occurred, 3) the domicile of the parties, and 4) the place where the relationship is centered. *Johnson*, 87 Wn.2d at 581. 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). All of the factors which this Court has identified as considerations for determining choice of law issues favor the application of Alaska law. Mr. Hoffman's asbestos exposure occurred in the State of Alaska. KPC's alleged conduct occurred

in the State of Alaska. Both parties were Alaskan residents at the time of the alleged exposure. The relationship between KPC and plaintiffs was centered in Ketchikan, Alaska.

B. The Trial Court Correctly Concluded that the Alaska Statute of Repose Barred Plaintiffs' Claims

Following the trial court's determination that the Alaskan Statute of Repose governed plaintiffs' claims, KPC brought a 12(b)(6) motion seeking dismissal of those claims as time-barred. As noted above, the Judge van Doornick declined to rule on that motion, permitted further argument and evidence, and held a summary judgment hearing in which she determined that the Alaska Statute of Repose barred plaintiffs' claims. The gist of her opinion as to KPC was that none of the alleged exceptions to the Statute of Repose applied. The "defective product" exception did not apply because KPC was not a product seller, but rather a premises owner. The "hazardous waste" exception did not apply because asbestos is not a "hazardous waste" under Alaska law. The "medical malpractice" exception did not apply because this was not a case involving a medical device being left inside a

patient. Finally, the "gross negligence" exception did not apply because there was no evidence of gross negligence and plaintiff counsel orally and in written briefing stated that his clients' claims against KPC sounded in "common law negligence."[10]

C. The Court of Appeals Determination that the Trial Court Dismissed Plaintiffs' Claims Pursuant to CR 12(b)(6) is Factually and Legally Wrong

The Court of Appeals opinion states: "The superior court dismissed Hoffman's case pursuant to CR 12(b)(6) after it determined that his claims were barred by Alaska's Statute of Repose." (Op. at 2). That statement is factually and legally wrong. It is factually incorrect because the court dismissed plaintiffs' claims pursuant to a summary judgment motion, after continuing defendants' 12(b)(6) motion to allow plaintiff counsel to present further briefing and evidence with respect to the applicability of claimed exceptions to the Alaska Statute of Repose. (VRP March 24 at 16; VRP March 25 at 3).

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[10] On Appeal, KPC argued that the trial court's application of the Alaska Statute of Repose was a choice of law determination which is an issue of law, reviewed de novo. *Seizer v. Sessions*, 132 Wn.2d 642, 650, 940 P.2d 261 (1997).

The Court of Appeals decision is contrary to the plain language of CR 12(b)(6) which specifically states that:

> If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, ***the motion shall be treated*** as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

The Court of Appeals decision is likewise contrary to its own authority and authority of this Court because the Court of Appeals, similar to the trial court, considered matters outside of the pleadings in reaching their decision.[11] *Suliemann v. Lasher, 48 Wn. App. 373; 739 P.2d 712 (1987)*[12]*; Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Affidavits and other extrinsic evidence may not be considered as part of the

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[11] *See for example* Op. at 4 considering the testimony of "doctors and industrial hygienists" as well as Mr. Hoffman's own testimony and treating it as "fact" for purposes of whether the PLEADINGS contained allegations sufficient to survive a CR 12(b)(6) motion. Notably, the declarations of the "doctors and industrial hygienists" as well as Mr. Hoffman's deposition testimony were attached to the motions for summary judgment that had previously been filed in the case.

[12] Overruled to the extent that a contract attached to the pleadings is considered part of the pleadings.

pleadings. *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 204, 289 P.3d 638 (2012). Once extrinsic evidence is considered the 12(b)(6) motion shall be converted into a summary judgment motion. *Id.* at 206.

D. The Court of Appeals Determination that a "Possible" Claim for Gross Negligence Could be Used as a Contact for Purposes of a Choice of Law Analysis was Clear Error

The Court of Appeals, after acknowledging that the plaintiffs neither presented evidence of a claim for gross negligence nor included such an allegation in its Complaint, stated,

> Again, considering the 12(b)(6) standard, we conclude that Hoffman has alleged facts when presumed true, support recovery under a 12(b)(6) standard.

(Op. at 14). The Court of Appeals committed clear error in concluding that allegations in the Complaint could be assumed to be true to defeat KPC's summary judgment motion. The summary judgment standard is clear:

> In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the

> inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion...
> In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989)(citations omitted). Here, the applicability of the exceptions to the Alaska Statute of Repose was adjudicated during a CR 56 hearing. It was clear error to evaluate the trial court's decision utilizing a 12(b)(6) while at the same time electing to consider extrinsic evidence and use such evidence to create favorable inferences from allegations in the complaint.

E. The Court of Appeals Compounded its Error by Using the "Favorable Inferences" from its CR 12(b)(6) Analysis to Reverse the Trial Court's Determination that Alaska Law Governed the Case

After determining that the allegations of the Complaint could support an assertion of "gross negligence"[13] the Court of Appeals considered extraneous materials in order to find that the gross negligence exception to the Alaska Statute of Repose might apply. (Op. at 14-15). Nonetheless, the Court of Appeals reasoned, since there might not be a conflict between the Washington and Alaska Statutes of Repose "under a 12(b)(6) standard", it was error for the trial court to dismiss plaintiff's claim. (Op. at 15-16). The problem with the Court of Appeals analysis is that the trial court was not utilizing a 12(b)(6) standard and, under the law, the Court of Appeals was not permitted to do so either. CR 12(b); *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wash. 2d 800, 802, 699 P.2d 217, 218 (1985). Moreover, in this particular case, there is clear,

[13] The Court of Appeals does not explain how allegations of negligence could support a gross negligence claim. Any doubt about that issue should have been resolved by the representation made by plaintiff counsel in briefing and in oral argument that plaintiff's claims sounded in common law negligence.

irrefutable evidence that the trial court and the parties treated KPC and General Electric's original CR 12(b)(6) motion as a summary judgment motion.[14] (VRP, March 24, 2015 at 16; VRP March 25, 2015 at 3).

"Gross negligence" is "negligence substantially and appreciably greater than ordinary negligence," i.e., "care substantially or appreciably less than the quantum of care inhering in ordinary negligence." *Nist v. Tudor,* 67 Wash.2d 322, 331, 407 P.2d 798 (1965); *see* 6 Washington Practice: Washington Pattern Jury Instructions: Civil 10.07 (6th ed.1997) ("gross negligence" is "the failure to exercise slight care."). A plaintiff seeking to prove gross negligence must supply "substantial evidence" that the defendant's act or omission represented care appreciably less than the care inherent in ordinary negligence. *Boyce v. West,* 71 Wn.App. 657, 665, 862 P.2d 592 (1993). To meet this burden of proof on summary judgment, the plaintiff must offer something

[14] This Court's observation that the "parties treated the underlying motion as a 12(b)(6) motion" is both incorrect and of no moment. Once matters outside the pleadings were considered, it became a CR 56 motion. It is obvious that the Court of Appeal misreads those intentions.

more substantial than mere argument that the defendant's breach of care arises to the level of gross negligence. CR56(e); *Boyce,* 71 Wn.App. at 666.

Here, there was no evidence of gross negligence presented to the trial court. Nothing. Not only was no evidence of gross negligence presented, plaintiffs' counsel, in oral argument and in briefing, clearly stated that the claims against KPC sounded in common law negligence. (VRP March 24, 2015 at 8). Gross negligence was not pled nor were facts presented that would have supported such a claim. Furthermore, the Court of Appeals appears to have misunderstood the salient facts in evaluating the issue. This case, as against KPC, involves a claim referred to in asbestos litigation as a "take home exposure." Mr. Doyle Hoffman worked at the KPC mill in the 1950's and 1960's when plaintiff Larry Hoffman was a child. Plaintiffs claim that his father worked with asbestos at KPC and brought it home on his clothing and body thereby exposing Larry Hoffman to asbestos fibers. Fundamental to the Court of Appeal's misunderstanding of the nature of the

claim against KPC is the Court of Appeal's misinterpretation of a KPC Interrogatory Response.[15] Not only is there no basis to conclude from the response that KPC had any knowledge of the danger of take-home exposure to asbestos, the Interrogatory Response was never presented to the trial court. The evidence before the trial court was that gross negligence was never pled and that plaintiffs' counsel asserted on the record that their claim against KPC was a common law negligence claim. "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." *Id.* That was it. Plaintiffs offered nothing more than the argument of counsel (at a later time) that the gross negligence exception to the statute of repose applied.

[15] The interrogatory question posed was whether Mr. Hoffman had any training with regards to hazards associated with asbestos prior to 1980. Mr. Hoffman testified that he was a member of the pipefitters union throughout his career. Retrospectively, counsel for KPC has learned in the course of litigation that the pipefitters union began warning their members of the potential hazards of asbestos in or around the late 1950s. KPC was never a member of any union nor did they receive publications from any union. There is no basis for the unsubstantiated leap that KPC was aware of the hazards of asbestos starting in the 1950s. More importantly, there is nothing to suggest that anyone at that time had knowledge of the potential risks of take-home asbestos exposure. Appendix A to KPC's Motion for Reconsideration at 8.

Because there was no admissible evidence before the court on the claim of gross negligence, dismissal of plaintiffs claim was warranted as a matter of law. "The trial court therefore properly concluded that the [plainitffs] had produced no admissible evidence in support of their [claim of gross negligence] prior to [or during] the summary judgment hearing." *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 142, 331 P.3d 40 (2014).

The reason plaintiffs offered no evidence of gross negligence at or prior to the hearing is that no such evidence exists. The testimony from plaintiffs' own experts clearly establishes that gross negligence is not applicable. The record demonstrates that Dr. Castleman, plaintiffs' "state of the art" expert, had no knowledge of what was known or should have been known in Ketchikan, Alaska in 1966. (CP 944-47) Likewise, Mr. William Ewing, plaintiffs' Certified Industrial Hygienist, testified that the first publication related to the issue of risk of asbestos related disease from take home exposure was Dr. Kilburn's paper published in 1985, almost 20 years after Doyle Hoffman left

Ketchikan Pulp.[16] (CP 951-52). Plaintiff did not and cannot establish that their claim falls within an exception to the Alaska Statute of Repose.

VI. CONCLUSION

Judge van Doorninck properly ruled that there was is a conflict between the Alaska and Washington Statutes of Repose and that the Alaskan statute applied to plaintiffs' claims. KPC's 12(b)(6) motion was converted to a CR 56 motion after plaintiffs requested the opportunity to brief the possible exceptions to the Statute. Judge van Doornick correctly ruled that none of the exceptions applied and plaintiffs' claims were barred by the Alaska Statute of Repose. The Court of Appeals decision is factually incorrect and conflicts directly with CR 12 and case of law both the Washington Supreme Court and the Washington Court of Appeals. Review by this court is appropriate.

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[16] 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)

Further proceedings in the trial court will be a complete waste of time. KPC will simply file a CR 56 motion identical to that previously heard by the court. The court will presumably grant it again as there is no new evidence to bring to bear on the issue. After dismissal, plaintiffs will file a new appeal and the Court of Appeals will have the opportunity to hear the identical case which it just heard. This court accepting review will prevent a monumental waste of judicial and legal resources.

RESPECTFULLY SUBMITTED this 24th day of October, 2016.

David A. Shaw, WSBA #08788
Malika I. Johnson, WSBA #39608
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondent Ketchikan Pulp Company
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
PH: (206) 628-6600
Fax: (206) 628-6611
Email: dshaw@williamskastner.com;
mjohnson@williamskastner.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 24th day of October, 2016, I caused a true and correct copy of the foregoing document, Petition for Review, to be delivered via email to the following counsel of record:

Counsel for Appellant:

Brian D. Weinstein
Benjamin R. Couture
Marissa C. Langhoff
WEINSTEIN COUTURE PLLC
818 Stewart Street, Suite 930
Seattle, WA 98101
Email: service@weinsteincouture.com

John W. Phillips
Michael Madderra
PHILLIPS LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, Washington 98104-2682
jphillips@jphillipslaw.com
kharrison@jphillipslaw.com

Counsel for Co-Defendants

G. William Shaw
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
Email: SE.Asbestos@klgates.com
Attorney for Alaskan Copper Companies

William E. Fitzharris, Jr.
Jennifer Loynd
David E. Chawes
Preg O'Donnell
901 Fifth Avenue, Suite 3400
Seattle, WA 98164
asbestos@poglaw.com
Attorney for Armstrong International, Inc.

Mark B. Tuvim
Kevin J. Craig
GORDON & REES, LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
Email: asbestos-sea@gordonrees.com
Attorneys for Asbestos Corporation Limited

Diane J. Kero
GORDON THOMAS HONEYWELL, LLP
600 University Street, Suite 2100
Seattle, WA 98101
Email: service@gth-law.com
Attorney for CertainTeed Corporation

Barry Mesher
Brian Zeringer
SEDGWICK, LLP
520 Pike Street, Suite 2200
Seattle, WA 98101
Email: Asbestos.Seattle@sedgwicklaw.com
Attorney for Chicago Bridge and Iron Company; Georgia Pacific

Timothy K. Thorson
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Email: asbestos@carneylaw.com
Attorney for Cleaver Brooks, Inc. and Saberhagen Holdings, Inc.

Christopher S. Marks
Megan M. Coluccio
SEDGWICK, LLP
520 Pike Street, Suite 2200
Seattle, WA 98101
Email: Asbestos.Seattle@sedgwicklaw.com

Kirk C. Jenkins
SEDGWICK, LLP
One North Wacker Drive, Suite 4200
Chicago, IL 60606
Email: kirk.jenkins@sedgwicklaw.com
Pro Hac Vice for General Electric Company
Attorneys for General Electric Company

Robert Andre
Ogden Murphy
1601 Fifth Avenue, Suite 2100
Seattle, WA 98101
Email: asbestos@omwlaw.com
Attorney for Oakfabco, Inc.

DATED this 24th day of October, 2016, at Seattle, Washington.

Diane M. Bulis, Legal Assistant
WILLIAMS, KASTNER & GIBBS PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
PH: (206) 628-6600
Fax: (206) 628-6611
Email: dbulis@williamskastner.com