No. 90792-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 43941-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JACK DON KENNEDY and SANDRA KENNEDY,

Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. John R. Hickman)

RESPONDENT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Defendant and Respondent Saberhagen Holdings, Inc. ("Saberhagen"), seeks review of the decision terminating review designated in Section II of this petition.

II. COURT OF APPEALS DECISION

Saberhagen seeks review of the unpublished decision terminating review entered by the Court of Appeals on July 22, 2014, in which the Court of Appeals reversed a summary judgment of dismissal in favor of Saberhagen. A copy of the decision (the "Decision") is attached as App. A. Saberhagen timely moved for reconsideration, which the Court of Appeals denied by a summary order entered on August 22, 2014. A copy of the order is attached as App. B.[1]

III. ISSUES PRESENTED FOR REVIEW

This is an asbestos personal injury case, though the issues presented for review have little to do with asbestos but a great deal to do with fundamental matters of civil and appellate procedure. Plaintiffs and Appellants Jack and Sandra Kennedy[2] sued Saberhagen, claiming that Mr. Kennedy developed mesothelioma as a result of his exposure to asbestos products Saberhagen's alleged predecessor, Tacoma Asbestos. At the close of discovery Saberhagen brought a "no evidence" summary

[1] In denying reconsideration, the Court of Appeals also denied a motion to publish made by the Appellants, without calling for a response from Saberhagen.

[2] Mr. Kennedy died on May 12, 2014. As of the time of the filing of this Petition the Kennedys' counsel had yet to file a motion to substitute Mr. Kennedy's estate for him.

judgment motion, contending that the Kennedys had failed to identify sufficient admissible evidence to avoid a summary judgment dismissal of their claims. The trial court granted summary judgment. The Court of Appeals reversed. Saberhagen now seeks review of the following two issues:

1. **Untimely Notice of Appeal**. The Kennedys did not file their notice of appeal within 30 days of the entry of the trial court's order granting summary judgment. When Saberhagen moved to dismiss the appeal, the Kennedys argued to the Court of Appeals that the 30 day period had been reset by a letter from Saberhagen's counsel, in which Saberhagen proposed adding to the trial court's order a list of the materials submitted to the court, in accordance with RAP 9.12 and CR 56(h) for summary judgment orders. The Kennedys claimed this letter constituted a motion to alter or amend a judgment under CR 59(h), which reset the clock for filing a notice of appeal under RAP 5.2(e).

The letter enclosed a proposed form of summary judgment order that made no substantive change or addition to the trial court's original order. The only change was to the form of the order, by the addition of the RAP 9.12 and CR 56(h) recitals. The letter itself: (1) did not request any change in the nature or scope of relief granted by the trial court; (2) did not request that the court "alter" or "amend" its prior order; (3) did not refer in any way to a "motion" of any kind; and (4) was not accompanied by a note for motion. The letter was circulated to the trial court and the Kennedys' counsel, but was not filed. The Court of Appeals nonetheless

held the letter was a motion to alter or amend which reset the 30 day period, and denied the motion to dismiss.

If the letter did not constitute a CR 59(h) motion to alter or amend, the Kennedys' appeal was untimely and should have been dismissed. Whether the letter constituted a motion to alter or amend warrants review under RAP 13.4(b)(4).

2. Arguing a Ground For Relief under CR 7. At the close of discovery Saberhagen made a "no evidence" motion for summary judgment. In a "no evidence" summary judgment motion, the moving party meets it burden by pointing out to the trial court "that there is ***an absence of evidence*** to support the nonmoving party's case." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1, 770 P.2d 182 (1989) (citing and quoting *Celotex Corp. v. Catrett*, 447 U.S. 317, 106 S. Ct. 2548, 91 L. Ed 2d 265 (1986)) (emphasis added). In the "Relief Requested," "Statement of the Facts," and "Authority and Argument" sections of its motion, Saberhagen stated that summary judgment should be granted because the Kennedys had failed to identify sufficient admissible evidence that Mr. Kennedy either was actually exposed to ***or harmed by*** asbestos-containing products supplied by Tacoma Asbestos. The Kennedys opposed the motion with evidence purporting to show *exposure* to asbestos from Tacoma Asbestos products, but they did not offer any evidence to show that Mr. Kennedy was *harmed* by any such exposure.

CR 7(b)(1) requires that a motion state with "particularity" the grounds for the relief sought, and prior decisions of the Court of Appeals have held that this requirement is satisfied if a party "argues" a ground. Here, the Court of Appeals held that Saberhagen's several statements, pointing out the absence of evidence that Mr. Kennedy was harmed by any exposure to asbestos-containing products of Tacoma Asbestos, were too "cursory" to constitute "argument." The Court of Appeals did not explain what more Saberhagen should have said, in order to be credited with "arguing" the absence of evidence showing harm caused by exposure to Tacoma Asbestos products. The Court of Appeals' use of this "too 'cursory'" test for determining whether a party has argued a ground for relief warrants this Court's review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

A. Facts Pertaining to the "Untimely Notice of Appeal" Issue.

The trial court entered its order granting summary judgment on August 3, 2012 (the "August 3 Order"). CP 950-51. On August 10, Saberhagen circulated by letter a proposed summary judgment order including the RAP 9.12/CR 56(h) recital of matters submitted to the court for its consideration, which the court had not included in its August 3 Order. *See* App. C (copy of transmittal letter with enclosure).[3] Neither

[3] Documents relevant to the disposition of the untimely notice of appeal issue were submitted to the Court of Appeals as part of the briefing on Saberhagen's motion to dismiss. Because that motion was disposed of separate from the briefing on the merits of the Kennedys' appeal, documents bearing solely on the issue raised by the motion to dismiss were not subsequently included in the Clerk's Papers, and copies therefore are being submitted for the Court's convenience as appendices to this petition.

the letter nor the proposed order called for any substantive changes or additions to the court's August 3 Order. The only proposed change was the purely formal one of adding the RAP 9.12/CR 56(h) recital. Saberhagen's cover letter did not request that the court "alter" or "amend" its prior order, and made no reference to any sort of "motion." Saberhagen did not file its letter. Saberhagen also did not note any hearing on its proposed addition of the RAP 9.12/CR 56(h) recital by filing a "Note for Motion Docket," a step required by the Pierce County local rules for any written motion. *See* Pierce County Local Rule 7(a)(3).

Six days later -- 13 days after the trial court entered its August 3 summary judgment order -- the Kennedys moved for reconsideration. CP 952-56. Because the motion was filed more than ten days after the entry of the trial court's August 3 Order, the motion was untimely and therefore did not under RAP 5.2(e) reset the due date for filing a notice of appeal from that order. *Schaefco, Inc. v. Columbia River Gorge Comm.*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (a failure to perfect a motion for reconsideration by timely filing and service renders it a nullity for purposes of RAP 5.2(e)). The trial court denied reconsideration on August 31, at a hearing where the court also signed Saberhagen's proposed form of order adding the RAP 9.12/CR 56(h) recital. *See* CP 1083-85 (summary judgment order with RAP 9.12/CR 56(h) recital) (the "August 31 Order"); CP 1088-89 (denial of reconsideration order).

Because the Kennedys' motion for reconsideration was untimely and did not reset the clock for an appeal from the August 3 Order, the due

date for that appeal continued to be Tuesday, September 4 (the day after the Labor Day holiday). The Kennedys, however, did not file a notice of appeal on September 4. Rather, the Kennedys filed ***nine days later***, on September 13. *See* App. D (notice of appeal, with attachments). The Kennedys appealed from the August 3 summary judgment order and the August 31 order denying reconsideration; the Kennedys did *not* appeal from the August 31 order adding the RAP 9.12/CR 56(h) recital. *See id.*

Saberhagen moved to dismiss. *See* Motion to Dismiss (on file). A commissioner denied the motion; Saberhagen moved to modify, and a panel of three judges upheld the denial of dismissal. *See* Commissioner's Ruling Denying Dismissal (App. E); Order Denying Modification (App. F). Saberhagen moved for interlocutory discretionary review under RAP 13.5, and Commissioner Goff denied review. *See* Commissioner Ruling Denying Review (App. G). The Court of Appeals' ruling became subject to review under RAP 13.4 upon the issuance of the Court of Appeals' decision terminating review.

B. Facts Pertaining to the "Arguing a Ground for Relief" Issue.

At the close of discovery, Saberhagen brought a "no evidence" summary judgment motion.

- In the "**Relief Requested**" section, which was the *first paragraph of the motion* appearing immediately below the caption and title, Saberhagen stated:

> Defendant Saberhagen Holdings, Inc., ("Saberhagen") ***seeks summary judgment dismissal*** based upon plaintiffs' failure to date to identify sufficient admissible evidence that Jack

Kennedy (hereinafter "Mr. Kennedy") was ever actually exposed to ***or harmed by*** asbestos-containing products supplied by Saberhagen or its alleged predecessors.

Motion for Summary Judgment, page 1 (CP 17) (emphasis added).

- In the "**Statement of the Facts**" section, Saberhagen stated:

> Despite six months of discovery and the broad factual allegations of plaintiffs' recently updated discovery responses, plaintiffs have failed to identify any admissible evidence ... to show that Tacoma Asbestos [Saberhagen's alleged predecessor] in fact supplied asbestos-containing products to Mr. Kennedy's worksites as alleged, much less that he was *actually* exposed to ***or harmed by*** asbestos from such products. .... Thus, with trial rapidly approaching, plaintiffs apparently will be unable to offer any admissible evidence showing that Mr. Kennedy was ever exposed to asbestos-containing products installed or supplied by Tacoma Asbestos, ***or that exposure to such products resulted in or contributed to the development of his illness***.

Motion for Summary Judgment, page 6 (CP 22) (emphasis added in part).

- In the "**Authority and Argument**" section, Saberhagen stated:

> Basic product liability theory requires a plaintiff to establish the element of proximate cause, *i.e.*, a reasonable connection between the injury, the product causing the injury, and the manufacturer of the product. *See Martin v. Abbott Labs*, 102 Wn.2d 581, 590, 689 P.2d 368 (1984). There is no product liability claim against a defendant unless the plaintiff can show that the defendant was the particular manufacturer of the product ***that caused the injury***. *See Lockwood v. A.C. & S.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987). *See generally*, W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 103 at 713 (5th ed. 1984).
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> * * * *
>
> Judging from discovery to date, plaintiffs apparently have no admissible evidence to show that Mr. Kennedy was actually exposed to dust from asbestos-containing products supplied or installed by Saberhagen or its alleged predecessors, ***or that such exposure was a substantial factor in causing his illness***.

Motion for Summary Judgment, pages 8 & 10 (CP 24 & 26) (emphasis added).

The Kennedys opposed Saberhagen's motion with what they claimed was evidence sufficient to raise a genuine issue of fact on whether Mr. Kennedy had been *exposed* to asbestos from the products of Tacoma Asbestos. But they did not offer any evidence to show Mr. Kennedy had been *harmed* by such exposure (e.g., that such exposure was a substantial contributing factor in causing his illness). The trial court granted Saberhagen's motion. *See* August 3 Order (CP 950-51).

On appeal, the Kennedys argued that they did not offer evidence of resulting harm (what they characterized as "medical causation" evidence) because they did not understand Saberhagen's motion to be challenging that point. Reversing the trial court's summary judgment, the Court of Appeals criticized Saberhagen for not referring expressly to the issue of no evidence of harm in the "Issue Presented" section of Saberhagen's motion, *see* Decision at 9 -- a three line section not required by either CR 7 or the Pierce County local rules, and which had been immediately preceded by a sentence in which Saberhagen (for the second of what would eventually be three times) expressly stated that the Kennedys had no evidence of resulting harm. *See* Motion for Summary Judgment, page 6 (CP 22). The Court of Appeals then held that the repeated express references to that issue, set forth in three sections of Saberhagen's motion (previously quoted), were too "cursory" to constitute "argument" of that issue, and that Saberhagen therefore had failed to satisfy the "particularity"

requirement of CR 7 and was not entitled to summary judgment on that ground. *See id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' Refusal to Dismiss the Kennedys' Appeal Undermines the Policy of Strictly Enforcing The Requirements For Timely Notices of Appeal.

A Commissioner of the Court of Appeals denied Saberhagen's motion to dismiss on two grounds: (1) the absence of a CR 56(h) recital rendered non-appealable the trial court's August 3 Order granting summary judgment; and (2) the Kennedys' appeal was timely under the decision of the Court of Appeals in *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983). *See* App. E. Reviewing the grounds for the Commissioner's ruling, a panel of three judges correctly struck the CR 56(h) recital ground[4] but still upheld the denial of Saberhagen's motion to dismiss, based on *Structurals Northwest*. *See* App. F.

In *Structurals Northwest* the trial court originally entered judgment on November 13, 1981. 33 Wn. App. at 713. Thereafter, counsel interlineated substantive changes to clarify the amount due to each party and eliminate the possibility of a double recovery. *Id.* When the

[4] The Commissioner cited *no authority* supporting her assertion that a CR 56(h) recital is a condition of appealability. In fact, CR 56(h)'s recital requirement was adopted *only* to help insure that trial courts and trial counsel did not overlook the recital requirement of RAP 9.12, which had long been recognized not to be a condition of appealability. For a more detailed discussion of this point, *see* Saberhagen's Motion to Modify at 10-14 (on file).

interlineations became confusing, the parties stipulated that amended findings, conclusions and judgment should be entered, and they were entered on November 23. *Id.* An appeal was taken within 30 days of entry of the *amended judgment*, but not within 30 days of the entry of the *original November 13 judgment*. *Id.* Denying a motion to dismiss the appeal as untimely, the Court of Appeals ruled that the stipulation was in effect a motion for an amended judgment under CR 59(h) and was brought within the time required for such a motion. *See* 33 Wn. App. at 714. The court treated the November 23 judgment as "having been entered pursuant to a motion to amend," and ruled that, under RAP 5.2(e), the time for appeal began to run with the entry of the decision on the timely filed post-judgment motion to amend. *Id.*

Here, in contrast to *Structurals Northwest*, the August 31 Order made no substantive change to the August 3 Order granting summary judgment. The August 31 Order only made the single, purely formal change of adding a recital of the parts of the record that had been before the trial court when it granted Saberhagen's motion for summary judgment on August 3. The controlling authority for this case is not *Structurals Northwest* but *Nestegard v. Investment Exchange Corp.*, 5 Wn. App. 618, 489 P.2d 1142 (1971), in which the Court of Appeals held that whether a trial court ruling is a judgment is a matter of *substance*, not *form*:

> In determining the nature of the court's determination, ***substance controls over form***. Hence, for this purpose the court looks not to the *title* of the instrument but to its *content*. Accordingly, the court may find that an instrument entitled as a

> judgment is in fact an order or final order; and an instrument entitled as an order may in fact be a final judgment.

Nestegard, 5 Wn. App. at 623 (citations omitted) (emphasis added); *see also* CR 54(a)(1) (defining "judgment"). The court dismissed the appeal before it because the appellant (1) did not appeal within 30 days a decision denominated an "order" but which *in substance* finally disposed of all the claims between the parties, but (2) did appeal within 30 days of a subsequent decision denominated a "judgment" but which only directed the performance of certain acts under the authority of the prior order. *Id.* at 620-23. The Court of Appeals held that the first order was the final judgment, and the later decision denominated "judgment" was merely a "subsidiary" ruling, whose entry did not reset the clock for taking a timely appeal from the earlier decision. *Id.* at 624-25.

Here, it is undisputed that the August 3 Order disposed of *all* the claims between the parties. The August 31 Order did nothing but add a formal, clerical trapping: a recital informing the Court of Appeals about what parts of the record had been before the trial court when it granted summary judgment on August 3. The August 31 Order is just as "subsidiary" as the later "judgment" was in *Nestegard*, and the Kennedys' failure to appeal within 30 days of the entry of the August 3 Order granting summary judgment is just as fatal to their appeal as was the failure of the appellant to appeal within 30 days of the earlier order in *Nestegard*.[5]

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[5] Nor would it matter if the August 31 order had been labelled an "amended judgment." *See Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255-56, 884 P.2d 13

(Footnote continued next page)

Attempting to distinguish this case from *Nestegard*, the Kennedys have argued that Saberhagen's counsel's August 10 letter was the "equivalent" of a motion to alter or amend the judgment under CR 59(h). According to the Kennedys, this supposed "letter motion" effectively reset the 30 day clock for appealing from the August 3 Order, which therefore did not begin to run until the "letter motion" was "granted" by the trial court with the entry of the August 31 Order. *See* Opposition to Motion to Modify at 6-8 (on file); RAP 5.2(e) (CR 59(h) motion resets the clock).

Saberhagen's letter of August 10 plainly was *not* a motion of any kind, never mind one to alter or amend under CR 59(h). The requirements for making a motion are laid out in CR 7, which states that a motion must be made in writing, or orally during a hearing or trial. If in writing, the motion must also satisfy the service, noting, filing, and form requirements of CRs 5, 6, and 10. Saberhagen's letter did not refer to a motion of any kind, much less to CR 59(h), and had none of the other indicia of a motion: it was not filed with the court, it was not scheduled for a hearing, (no Note for Motion Docket was filed), and no formal proof of service of the letter was filed.[6] And while the subsequent presentation of the order in

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(1994) ("Under *Nestegard*'s analysis, it is immaterial that Wlasiuk chose to call the September 24 [order] an Amended Judgment instead of a judgment or order for attorney fees. The issues of liability and damages resolved by the trial of Wlasiuk's claim and reduced to judgment on July 30 were no longer subject to de novo review once the court denied the new trial/JNOV motion on September 21").

[6] *Compare Kennewick v. Vandergriff*, 109 Wn.2d 99, 101-102, 743 P.2d 811 (1987) (letter filed with the court and which referenced the operative rule held to be a motion); *Colorado Nat'l Bank v. Merlino*, 35 Wn. App. 610, 668 P.2d 1304 (1983) (letter filed with the court and which referenced a motion for reconsideration deemed such a motion).

open court on August 31 (when it was signed) might arguably satisfy the CR 7 requirements for a motion made during a hearing, such a "motion" could not qualify as a motion to amend under CR 59(h) because it was made *too late*.[7]

Wlasiuk v. Whirlpool Corp., 76 Wn. App. 250, 884 P.2d 13 (1994), is fatal to the Kennedys' claim that Saberhagen's proposed order, which did nothing more than add the RAP 9.12/CR 56(h) recital, constituted a CR 59(h) motion to amend or alter the August 3 Order granting summary judgment. In *Wlasiuk*, a trial court entered a judgment on a jury verdict in favor of the plaintiff in an employment law case (July 30). 76 Wn. App. at 251-52. The employer timely moved for judgment notwithstanding the verdict or (alternatively) for a new trial. *Id.* at 252. The plaintiff moved for fees and costs. *Id.* The trial court entered an order denying the employer's motion for JNOV/new trial (September 21). The trial court then entered a document denominated an "amended judgment," but the only change made to the prior judgment was to add an amount for fees and costs (September 24). *Id.* The employer appealed within 30 days of the entry of the amended judgment, but not within 30 days of the order denying the motion for JNOV/new trial. *Id.*

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[7] CR 59(h) requires that any motion to alter or amend must be *filed* no later than 10 days after the entry of judgment; if that time period is not complied with, relief must be sought under CR 60. 4 K. Tegland, Washington Rules Practice, § 31 at 501 (5th ed. 2006). A CR 60 motion, however, ***does not "reset the clock" for taking an appeal under RAP 5.2(e)***. In telling contrast, the stipulation that was treated as an amendment under CR 59(h) in *Structurals* was entered in compliance with the time period for seeking relief under that rule. *See* 33 Wn. App. at 714.

The Court of Appeals ruled that the notice of appeal was not timely. The court rejected the employer's attempt to fit within *Structurals Northwest*, holding that the addition of fees to the judgment should not be treated as the result of a motion to alter or amend under CR 59(h) because there was no need to amend the prior judgment to add fees. *See id.* at 259. The court applied *Nestegard* and determined that the amount of fees was a "subsidiary issue" whose disposition did not affect finality and appealability.[8] Here, the addition of the RAP 9.12/CR 56(h) recital also involves a "subsidiary issue" that does not affect finality and appealability. The addition of the recital was one of *housekeeping*; nothing more There is no more basis for treating Saberhagen's August 10 letter circulating a proposed order adding the RAP 9.12/CR 56(h) recital as a motion to alter or amend than there was in *Wlasiuk* for treating the plaintiff's request for fees and costs as a motion to alter or amend. Federal cases are in accord: the rules governing motions to alter or amend contemplate motions seeking *substantive*, not mere *housekeeping* changes.[9]

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[8] The Court of Appeals in *Wlasiuk* ultimately denied a motion to dismiss, but only because under this Court's just-issued departmental decision in *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992) (*per curiam*), the employer's timely appeal from a separate and later-entered order setting forth findings and conclusions supporting the fees award was deemed to allow the employer to challenge the denial of a JNOV/new trial motion (under an expansive reading of RAP 2.4(b) subsequently abrogated by a rules amendment).

[9] Courts dealing with the comparable Federal Rule of Civil Procedure 59(e) have held that a motion is not one to alter or amend a judgment unless it seeks a ***substantive change*** in that judgment. *See, e.g., Yost v. Stout*, 607 F.3d 1239, 1243 (10th Cir. 2010) (dismissing appeal as untimely) (a motion is a Rule 59 motion to alter or amend only when it "requests a substantive change in the district court's judgment or otherwise questions its substantive correctness" (citations omitted)); *BBCA, Inc. v. United States*, 954 F.2d 1429, 1431-32 (8th Cir. 1992) (dismissing appeal as untimely) (same).

The ultimate legal concern here is jurisdiction. All of the motions that can "reset" the period for appealing -- motions to reconsider, motions for new trial, motions to alter or amend -- involve relief requests that implicate jurisdiction, because they all have the potential to change the ***substantive*** scope of relief initially granted by the trial court. It makes good sense to delay taking an appeal until after the trial court has had a chance to consider and resolve such substantive issues. Here, adding the RAP 9.12/CR 56(h) recital was a mere housekeeping matter that could not affect jurisdiction, because the addition would not affect the substantive scope of the trial court's earlier summary judgment. The Court of Appeals' refusal to dismiss undermines the fundamental and long-standing Washington rule of appellate procedure that "[o]ne of the necessary elements to confer appellate jurisdiction upon a court is the giving of a timely notice of appeal."[10] Review is warranted under RAP 13.4(b)(4).

B. The Court of Appeals' Test for Whether a Moving Party Has Argued a Ground for Granting a Motion, Under Which a Moving Party is Deemed Not to Have Argued a Ground if the Reference to It is Only "Cursory," Is Unworkable, Particularly When Applied to a "No Evidence" Summary Judgment Motion

In refusing to affirm the trial court's summary judgment on the ground that the Kennedys presented no evidence to show harm caused by exposure, the Court of Appeals stated:

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[10] *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974) (citing *Stark v. Jenkins*, 1 Wash. Terr. 421 (1874); *Cogswell v. Hogan*, 1 Wash. 4, 23 P. 835 (1890); *Isom v. Olympia Oil & Wood Products Co.*, 200 Wash. 642, 94 P.2d 482 (1939)).

> Saberhagen identified one issue on summary judgment: "Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos - containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?' CP at 22. And while Saberhagen did make cursory mention in its summary judgment motion that Kennedy failed to identify sufficient admissible evidence to show his harm was caused by asbestos containing products supplied by Saberhagen, it did not particularly identify this issue in its motion. Saberhagen's motion was clearly focused on exposure, arguing that Kennedy could not prove he was exposed to Saberhagen's product. Saberhagen merely mentioned the words "harmed by" or "causing his illness" ***without providing argument on the causation issue***.

Decision at 9 (emphasis added).

The Court of Appeals' assertion that Saberhagen did not "provide[e] argument on the causation issue" refers to case law interpreting the "particularity" requirement of CR 7. CR 7 governs the making of motions in civil cases, and by its terms requires that a party must state the grounds for relief requested with "particularity." *See* CR 7(b)(1). The decisions applying the requirements of CR 7 are clear that substance prevails over form. *Neal v. Wallace*, 15 Wn. App. 506, 508, 550 P.2d 539 (1976) ("Motions are to be construed [so] as to do substantial justice, with substance controlling over form" (footnote omitted)). Accordingly, the particularity requirement of CR 7(b)(1) is satisfied so long as the basis for the relief sought has been ***argued***. *Davis v. Bendix Corp.*, 82 Wn. App. 267, 271, 917 P.2d 586 (1996), *disapproved on other grounds in McIndoe v. Dept. of Labor & Industries*, 144 Wn.2d 252, 263, 26 P.3d 903 (2001).

Saberhagen's summary judgment motion was a typical "no evidence" motion. In a "no evidence" summary judgment motion, the moving party refers to the evidence that has been developed during discovery, and asserts entitlement to summary judgment due to the failure of the opposing party to produce evidence necessary to establish an essential element of their case.[11] Thus, when making a "no evidence" summary judgment motion, the "argument" consists of stating two things (1) the opposing party must establish X, and (2) the party has no evidence to establish X.

Davis v. Bendix Corp. (*supra*), is illustrative. There, the plaintiff in a worker's compensation matter claimed that the summary judgment in favor of the defendant could not be affirmed based on the plaintiff's failure to present evidence showing a loss of earning power. *See* 82 Wn. App. at 270-71. Rejecting this contention, the Court of Appeals stated:

> We first examine whether the court erred in granting summary judgment based on a finding that there was no evidence of a loss of earning power because Bendix did not argue this theory in its motion for summary judgment. Davis contends that Bendix

[11] This Court first recognized the concept of a "no evidence" summary judgment motion in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), in which this Court embraced the holding of the United States Supreme Court in *Celotex Corp. v. Catrett*, 447 U.S. 317, 106 S. Ct. 2548, 91 L. Ed 2d 265 (1986), that a party moving for summary judgment can meet its initial burden by " 'showing' -- that is, pointing out to the district [trial] court -- that there is ***an absence of evidence*** to support the nonmoving party's case." *See Young*, 112 Wn.2d at 225, n.1 (citing and quoting *Celotex*) (emphasis added), 226 ("The *Celotex* standard comports with the purpose behind the summary judgment motion). Since then the Court of Appeals has affirmed "no evidence" summary judgments in a variety of cases. *See Boguch v. Landover Corp.*, 153 Wn. App. 595, 609-610, 224 P.3d 795 (2009) (broker negligence); *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (premises liability) (both applying *Young/Celotex* to affirm "no evidence" summary judgments).

> requested that the court grant summary judgment solely on the ground that the correct measurement of damages was ascertained by comparing earning capacity during the aggravation period with that at the time of original claim closure on October 15, 1984.
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> * * * *
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> Davis's claim is meritless because Bendix argued the theory upon which summary judgment was granted. Bendix specifically argued that Davis failed to present expert testimony establishing a reduction in earning capacity during the aggravation period.

Id. at 271.

Likewise here, Saberhagen "specifically argued" -- repeatedly and throughout its motion -- that there was an absence of evidence showing that Mr. Kennedy had been *harmed by* exposure to Tacoma Asbestos products. Saberhagen did so *three times, in three sections of its motion* including in the opening "Relief Requested' section. *See* CP 17, 22, 24 & 26 (summary judgment motion at pages 1, 6, 8 & 10). The court's summary dismissal of Saberhagen's statements as too "cursory" to constitute argument gives no guidance on the question of ***what more*** Saberhagen was supposed to said, with ***how much detail*** it was supposed to have said it, or ***how many times*** it was supposed to have said it, before Saberhagen would be credited with having "argued" that the Kennedys could not show harm caused by exposure to Tacoma Asbestos products. The court's "too 'cursory' to be argument" test is entirely unworkable, particularly in the context of "no evidence" summary judgment motions, the whole point of which is simply to call attention to an absence of evidence on an essential element of the case -- which is exactly what Saberhagen did here.

Nor should the fact that Saberhagen did not expressly repeat its "no evidence of harm" point in the "Issues Presented" section of its motion be allowed to shield the Court of Appeals' refusal to affirm summary judgment on the ground. That Saberhagen chose to single out in that section the preliminary issue of lack of evidence of exposure (without also mentioning the secondary issue of resulting harm), did not void the resulting harm issue that was repeatedly raised elsewhere in the motion -- including in the *immediately preceding paragraph.* The Kennedys were not entitled to disregard those arguments just because they were not made for a *fourth time* in a section of the motion that Saberhagen was not even required to include, by either CR 7 or the Pierce County local rules.[12]

After long maintaining that they had no notice that Saberhagen had raised the issue of no evidence of harm, during their rebuttal oral argument before the Court of Appeals the Kennedys shifted to claiming only that they did not understand that Saberhagen was demanding *expert evidence of medical causation* until Saberhagen filed its summary judgment reply. *See* Division Two Docket Archive for May 13, 2014, Audio Recording of Oral Argument in *Kennedy v. Saberhagen* (rebuttal portion starting at time entry 28:50), www.washingtoncourts.gov. But that belated claim ignores

[12] The Court of Appeals also seemed to give weight to that fact that the trial court granted summary judgment solely on the "no evidence of exposure" ground. *See* Decision at 9. Washington appellate courts, however, review the grant of a summary judgment *de novo* and are supposed to affirm on any ground fairly supported by the record *so long as that ground* ***was argued to the trial court.*** *See, e.g., Bernal v. American Honda Motor Co., Inc.*, 87 Wn. 2d 406, 414-15, 553 P.2d 107 (1976) (discussing the rule).

Saberhagen's statement in its summary judgment motion that the Kennedys could not show "that exposure to such products resulted in or contributed to ***the development of his illness***." *See* Motion for Summary Judgment, page 6 (CP 22) (emphasis added). The Kennedys had to be aware that the only way they could establish that exposure resulted in or contributed to the development of Mr. Kennedy's illness was through expert testimony, given the scientific nature of the issue.

There is no doubt that Saberhagen is entitled to prevail on the "no evidence of harm" ground, if Saberhagen is credited with having argued the point. The Kennedys submitted evidence purporting to show exposure to Tacoma Asbestos products, but none showing harm caused by such exposure. The Court of Appeals' refusal to affirm summary judgment on this ground, based on its "too 'cursory' to be argument" approach to CR 7's particularity requirement, warrants review under RAP 13.4(b)(4).

VI. CONCLUSION

This Court should grant review of both of the issues raised in Saberhagen's petition.

RESPECTFULLY SUBMITTED this 22nd day of September, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Timothy K. Thorson, WSBA No. 12860
Michael B. King, WSBA No. 14405
Attorneys for Saberhagen Holdings, Inc.

NO. 43941-7-II
(No. 45381-9-II Consolidated)

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY, Appellants, vs. SABERHAGEN HOLDINGS, INC., Respondent.	DECLARATION OF SERVICE

I certify that on the date set forth below I served a copy of *Respondent Saberhagen Holdings, Inc.'s Petition for Review* and, *Declaration of Service* on the following counsel:

Glenn S. Draper BERGMAN DRAPER LADENBURG 614 First Avenue – 4th Flr. Seattle, WA 98104	X U.S. Mail, postage prepaid X Email
John W. Phillips Phillips Law Group, PLLC 315 Fifth Avenue S., Suite 1000 Seattle, WA 98104	X U.S. Mail, postage prepaid X Email

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of September, 2014.

Patti Saiden, Legal Assistant

APPENDICES

Appendix A: Unpublished Opinion, filed July 22, 2014, Court of Appeals Case No. 43941-7-II.

Appendix B: Order Denying Motion for Reconsideration, filed August 22, 2014, Court of Appeals, Case No. 43941-7-II.

Appendix C: Cover letter from counsel enclosing proposed revised order granting defendant's motion for summary judgment, dated August 10, 2012 (filed July 23, 2013 as Exhibit A to Declaration of Timothy K. Thorson in Support of Motion for Discretionary Review, Supreme Court Case No. 88518-4).

Appendix D: Notice of Appeal to the Court of Appeals, Division II, filed September 13, 2012, Pierce County Superior Court Case No. 12-2-05289-7.

Appendix E: Commissioner's Ruling Denying Motion to Dismiss, filed November 6, 2012, Court of Appeals Case No. 43941-7-II.

Appendix F: Order Denying Motion to Modify Commissioner's November 6, 2012 Ruling; Order Striking CR 54 Language from the November 6, 2012 Ruling, filed February 6, 2013, Court of Appeals, Case No. 43941-7-II.

Appendix G: Ruling Denying Review, filed August 7, 2013, Supreme Court Case No. 88518-4.

APPENDICES

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Appendix G: Ruling Denying Review, filed August 7, 2013, Supreme Court Case No. 88518-4.

APPENDIX

A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY, husband and wife, Appellants, v. SABERHAGEN HOLDINGS, INC, Respondent.	No. 43941-7-II consolidated with No. 45381-9-II UNPUBLISHED OPINION

MELNICK, J. — Jack Kennedy appeals the trial court's grant of summary judgment for Saberhagen Holdings, Inc. and its denial of his CR 60(b)(3) motion. The trial court granted summary judgment in favor of Saberhagen because it concluded Kennedy failed to present sufficient evidence to create a reasonable inference that he was exposed to asbestos supplied by Tacoma Asbestos, Saberhagen's predecessor.[1] Kennedy argues that there is sufficient evidence to create a genuine issue of material fact regarding his exposure to Saberhagen's products. We agree. Because Kennedy presented sufficient evidence to avoid summary judgment, we do not consider Kennedy's appeal of his CR 60(b)(3) motion. We reverse and remand for further proceedings.

FACTS

I. BACKGROUND

In November 2011, a doctor diagnosed Kennedy with mesothelioma. Mesothelioma is a cancer in the lining of the lung usually caused by asbestos exposure. *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 314, 14 P.3d 789 (2000). Kennedy filed a lawsuit against Saberhagen, alleging that asbestos supplied by Saberhagen proximately caused his

[1] To avoid confusion, we refer to Tacoma Asbestos as Saberhagen.

mesothelioma. He alleged the exposure occurred on the Tacoma waterfront at pier 23 between 1964 and 1968 during his employment with the Washington Army National Guard.

While on Pier 23, Kennedy personally handled asbestos and he worked around others who installed and maintained insulation containing asbestos. Kennedy's exposure to asbestos occurred on a floating machine shop (FMS), the FMS-789. Kennedy and Richard Elmore, Kennedy's co-worker, testified in their depositions that the Army activated the FMS-789 in 1966 and awarded a contract to Tacoma Boat Building to prepare the FMS-789 for active duty. This preparation included asbestos insulation repair and installation. Kennedy and other guardsmen were on and off the FMS-789 during its repair to retrieve equipment and materials they needed from the vessel.

Kennedy's exposure also occurred while working on the FMS-6. In their depositions, Kennedy and Elmore testified that Kennedy replaced the insulation on the FMS-6's boiler with asbestos Kennedy procured from Tacoma Boat. The supplies for replacing the insulation typically came from the vessel under repair or the National Guard's main supply shop; however, Kennedy ran out of insulation during the boiler repair and his supervisor instructed him to get more from Tacoma Boat. Kennedy personally picked up the asbestos insulation from Tacoma Boat. Kennedy poured the powdered asbestos cement from the bags he retrieved from Tacoma Boat into buckets and added water to make insulating asbestos cement. He then applied the asbestos to the boiler with his bare hands.

Kennedy and Elmore also testified that Kennedy worked with asbestos while repairing insulation on a small tug boat, the ST-2104. Kennedy obtained the asbestos for the repair work from Tacoma Boat. Kennedy recalled obtaining a third bag of asbestos from Tacoma Boat, but did not remember what use he made of that asbestos material.

Kennedy provided evidence that Saberhagen, an insulation supplier and contractor in Tacoma during the 1960's, supplied asbestos to Tacoma Boat. Former Tacoma Boat employee, Dennis Legas, testified in his deposition that Saberhagen was the only insulation contractor he recalled working for Tacoma Boat in the 1960s. Legas saw Saberhagen trucks in the Tacoma Boat yard and testified that his brother-in-law delivered material from Saberhagen to Tacoma Boat. Another former Tacoma Boat employee, David Hansen, also testified in his deposition that Saberhagen was the only insulation contractor he recalled working for Tacoma Boat in the 1960s and that Saberhagen was present at Tacoma Boat "[d]efinitely frequently." Clerk's Papers (CP) at 668. Hansen also testified that he saw Ted Boscovich, who worked for Saberhagen, doing insulation work at Tacoma Boat. During its CR 30(b)(6) deposition, Saberhagen's representative testified that it had no evidence to either prove or disprove that Saberhagen supplied insulation to Tacoma Boat.

II. PROCEDURAL HISTORY

Kennedy filed a complaint for negligence and products liability, among other claims, against Saberhagen on January 11, 2012. Saberhagen moved for summary judgment, arguing that Kennedy failed "to identify sufficient admissible evidence showing that [Kennedy] was ever actually exposed to or harmed by asbestos-containing products supplied by Saberhagen or its alleged predecessors." CP at 17. Saberhagen identified and argued only one issue to the trial court: "Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?" CP at 22.

Saberhagen moved to strike several exhibits attached to Kennedy's response to summary judgment. The trial court denied Saberhagen's motion to strike, and in granting Saberhagen's

motion for summary judgment it considered the Kennedy, Elmore, Legas, and Hansen depositions taken for this specific litigation, in addition to the depositions Kennedy submitted that were taken in prior asbestos cases and a 1971 Saberhagen letter. Kennedy moved for reconsideration of the trial court's grant of summary judgment for Saberhagen, which the trial court denied. Kennedy timely appealed.

On July 25, 2013, Kennedy filed a CR 60(b)(3) motion for relief from the order granting Saberhagen summary judgment. With his motion, Kennedy submitted new evidence of his alleged exposure to asbestos from Saberhagen. The trial court considered the new evidence and denied Kennedy's CR 60(b)(3) motion, concluding that the "alleged 'newly discovered evidence' is not of sufficient consequence as to vacate the Court's prior order granting summary judgment." CP at 1597. Kennedy timely appealed and we consolidated that appeal with Kennedy's first appeal of the trial court's grant of summary judgment in favor of Saberhagen.

ANALYSIS

Kennedy argues the trial court improperly granted summary judgment because sufficient circumstantial evidence exists to create a genuine issue of material fact as to whether Kennedy was exposed to asbestos supplied by Saberhagen. We hold sufficient circumstantial evidence exists based on the Kennedy, Elmore, Legas, and Hansen depositions from which a reasonable fact finder could infer that Kennedy's worksite used Saberhagen's product between 1964 and 1968 and that Kennedy suffered exposure to Saberhagen's product. Because Saberhagen moved for summary judgment only on the exposure issue, we do not consider its additional argument that Kennedy failed to offer any evidence that he suffered harm from being exposed to asbestos

that Saberhagen supplied. Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.[2]

I. SUMMARY JUDGMENT IMPROPERLY GRANTED

We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

Generally, asbestos plaintiffs in Washington may establish exposure to a defendant's product through circumstantial evidence. *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 246-47, 744 P.2d 605 (1987). Due to the long latency of asbestos related diseases, a plaintiff's ability to recall specific manufacturers of asbestos he was exposed to may be seriously impaired. *Lockwood*, 109 Wn.2d at 246. "Hence, instead of personally identifying the manufacturers of asbestos products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace." *Lockwood*, 109 Wn.2d at 246-47. But the circumstantial evidence must be sufficient to allow a

[2] Because we determine summary judgment was improper, we do not consider whether the trial court erred by denying Kennedy's CR 60(b)(3) motion.

reasonable fact finder to deduce that the plaintiff contacted the defendant's product. *Lockwood*, 109 Wn.2d at 247-48.

In *Lockwood*, our Supreme Court found sufficient evidence of exposure where (1) shipyard workers testified that the defendant's product was used on a large liner conversion and the plaintiff testified that he worked on a similar ship overhaul in the same area in the same time period, and (2) an expert testified that "after asbestos dust was released, it drifted in the air and could be inhaled by bystanders who did not work directly with asbestos." *Lockwood*, 109 Wn.2d at 247.

In *Berry*, the court found sufficient evidence of exposure where (1) a purchaser for the plaintiff's workplace testified that some of the insulation products used at the workplace were supplied by the defendant, and (2) an employee of the plaintiff's workplace saw Plant and Carey products almost every day at the workplace and another employee testified that the defendant was a distributor of Plant and Carey products. 103 Wn. App. at 324. The court in *Berry* held that the evidence of exposure was not too speculative and did raise an inference that the defendant's products were used at the plaintiff's workplace during the relevant time period. 103 Wn. App. 324-25.

In *Allen v. Asbestos Corp. Ltd.*, the court found sufficient evidence of exposure where (1) evidence existed of three sale orders of asbestos cloth from the defendant over a period of three years, and (2) an expert testified that if the plaintiff's workplace used asbestos cloths, the plaintiff would have been exposed because the asbestos dust would have drifted throughout the workplace. 138 Wn. App. 564, 572-73, 157 P.3d 406 (2007). The court in *Allen* determined that it would be reasonable to infer that because the sales records establish that the plaintiff's

workplace ordered large quantities of asbestos over multiple years, it would be reasonable to infer that the plaintiff's workplace used the asbestos it ordered. 138 Wn. App. at 573.

When viewing the evidence in the light most favorable to Kennedy, we determine it would be reasonable for a fact finder to find that Kennedy came in contact with Saberhagen's product. Kennedy and Elmore provided evidence that Tacoma Boat overhauled the FMS-789 in 1966, which included asbestos insulation repair and installation, and that Kennedy was occasionally on board the FMS-789 while Tacoma Boat did the repair. Kennedy and Elmore also stated that Kennedy worked directly with asbestos insulation he retrieved from Tacoma Boat on the FMS-6's boiler and the tug boat, ST-2104. Additionally the plaintiff presented evidence that Saberhagen performed insulation work for Tacoma Boat using insulation containing asbestos. Two former Tacoma Boat employees testified that they remember Saberhagen as the only insulation contractor working with Tacoma Boat in the 1960s and one testified that he saw his brother-in-law, who worked for Saberhagen, deliver products to Tacoma Boat. Further, Saberhagen could not offer any evidence to either refute or confirm the claims of the witnesses.

Saberhagen argues the evidence leads to impermissible speculation that Kennedy's exposure came from its insulation materials. We reject Saberhagen's argument. Testimony from two former Tacoma Boat employees shows that Saberhagen worked extensively with Tacoma Boat in the 1960s. Kennedy, similarly situated to the plaintiffs in *Lockwood*, *Berry*, and *Allen*, was a bystander while the FMS-789 had asbestos insulation work performed on it. And Kennedy possibly had more exposure than the plaintiffs in *Lockwood*, *Berry*, and *Allen*, because there is evidence that Kennedy worked directly with asbestos.

Kennedy's summary judgment evidence is sufficient to raise an inference that Saberhagen's products were used by Tacoma Boat and at their worksites during the 1960s when

Kennedy worked for the Washington Army National Guard. Further, the evidence is sufficient to raise an inference that Kennedy had exposure to those products. Accordingly, the trial court erred by granting summary judgment in favor of Saberhagen on the exposure issue because a genuine issue of material fact exists as to whether Kennedy was exposed to Saberhagen's products.[3] We reverse the order granting summary judgment and remand for further proceedings.

II. SABERHAGEN DID NOT RAISE THE ISSUE OF CAUSATION ON SUMMARY JUDGMENT

Saberhagen argues that Kennedy raised no issue of material fact regarding whether exposure to Saberhagen's product caused him injury. Kennedy argues that Saberhagen did not sufficiently raise this issue in the trial court. We agree with Kennedy.

Every motion made to the trial court "must specify the grounds and relief sought 'with particularity', and courts may not consider grounds not stated in the motion." *Orsi v. Aetna Ins. Co.*, 41 Wn. App. 233, 247, 703 P.2d 1053 (1985) (citations omitted). Specifically, "CR 7(b)(1) requires that a motion 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 402, 622 P.2d 1270 (1981). "The purpose of a motion under the civil rules is to give the other party notice of the *relief sought*." *Pamelin*, 95 Wn.2d at 402.

[3] Because we hold the Kennedy, Elmore, Legas, and Hansen depositions Kennedy took for this case are sufficient to overturn summary judgment, we do not consider the admissibility of the evidence Saberhagen challenged in its motion to strike at the trial court.

Saberhagen identified one issue on summary judgment: "Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?" CP at 22. And while Saberhagen did make cursory mention in its summary judgment motion that Kennedy failed to identify sufficient admissible evidence to show his harm was caused by asbestos containing products supplied by Saberhagen, it did not particularly identify this issue in its motion. Saberhagen's motion was clearly focused on exposure, arguing that Kennedy could not prove he was exposed to Saberhagen's product. Saberhagen merely mentioned the words "harmed by" or "causing his illness" without providing argument on the causation issue. Our reading of Saberhagen's motion is supported by the fact the trial court ruled only on the exposure issue: "The primary issue in this case is the issue of alleged exposure that Mr. Kennedy experienced while working at the National Guard Marine Facility" and concluding Kennedy failed to present sufficient evidence of exposure. CP at 950.

Here, the mere mention of the words "harmed by" or "causing his injury" was insufficient to raise the issue of causation with particularity. Saberhagen provided insufficient notice to the other party that causation was one of the grounds for the relief sought.[4] Accordingly, we reviewed summary judgment only for sufficiency of evidence as to Kennedy's exposure to asbestos products from Saberhagen and its predecessors.

[4] Our holding here does not prohibit Saberhagen from moving the trial court for summary judgment on issues not relating to exposure.

We reverse and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Johanson, C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY,

Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Respondent.

No. 43941-7-II

ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH

RESPONDENT moves for reconsideration of the Court's August 8, 2014, opinion. **APPELLANTS** move to publish the Court's August 8, 2014, opinion. Upon consideration, the Court denies both motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Worswick, Melnick

DATED this 22nd day of August, 2014.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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APPENDIX C

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August 10, 2012

HAND-DELIVERED

The Honorable John R. Hickman
Pierce County Superior Court
County-City Building
930 Tacoma Avenue South
Tacoma, WA 98402

Re: *Kennedy v. Saberhagen Holdings, Inc.*, No. 12-2-05289-7

Dear Judge Hickman:

Pursuant to the Court's Decision Re: Defense Motion for Summary Judgment and Motion to Strike (issued on August 3, 2012), I am submitting the enclosed proposed Order Granting Defendant Saberhagen Holdings' Motion for Summary Judgment, which reflects the Court's Decision and contains the CR 56(h) list of documents considered.

Very truly yours,

CARNEY BADLEY SPELLMAN, P.S.

Timothy K. Thorson
Counsel for Defendant Saberhagen Holdings, Inc.

Enclosure
cc: Glenn S. Draper, counsel for plaintiffs

Pursuant to U.S. Treasury Circular 230, this communication is not intended or written by Carney Badley Spellman, P.S. to be used, and it may not be used by you or any other person or entity, for the purpose of (i) avoiding any penalties that may be imposed on you or any other person or entity under the United States Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is addressed herein.

HONORABLE JOHN R. HICKMAN

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

JACK DON KENNEDY and SANDRA KENNEDY, husband and wife, Plaintiffs, v. SABERHAGEN HOLDINGS, INC., Defendant.	NO. 12-2-05289-7 **ORDER GRANTING DEFENDANT SABERHAGEN HOLDINGS, INC.'S MOTION FOR SUMMARY JUDGMENT** [PROPOSED] **[Clerk's Action Required]**

THIS MATTER came before the Court upon Defendant Saberhagen Holdings, Inc.'s Motion for Summary Judgment. The Court reviewed the following materials submitted by the parties:

1. Defendant Saberhagen Holdings, Inc.'s Motion for Summary Judgment;
2. Declaration of Timothy K. Thorson in Support of Defendant Saberhagen Holdings, Inc.'s Motion for Summary Judgment and exhibits thereto;
3. Plaintiffs' Response in Opposition to Defendant Saberhagen Holdings, Inc.'s Motion for Summary Judgment;
4. Declaration of Vanessa Firnhaber Oslund in Support of Plaintiffs' Response in Opposition to Defendant Saberhagen Holdings, Inc.'s Motion for Summary Judgment and exhibits thereto;
5. Defendant Saberhagen Holdings, Inc.'s Summary Judgment Reply Brief;

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6. Supplemental Declaration of Timothy K. Thorson in Support of Defendant Saberhagen Holdings, Inc.'s Summary Judgment Motion and exhibits thereto;

7. Defendant Saberhagen Holdings, Inc.'s Motion to Strike;

8. Declaration of Timothy K. Thorson in Support of Defendant Saberhagen Holdings, Inc.'s Motion to Strike and exhibits thereto;

9. Defendant Saberhagen Holdings, Inc.'s Motion to Shorten Time Regarding Motion to Strike;

10. Declaration of Timothy K. Thorson in Support of Defendant Saberhagen Holdings, Inc.'s Motion to Shorten Time for Hearing on Motion to Strike;

11. Plaintiffs' Response in Opposition to Defendant's Motion to Shorten Time;

12. Declaration of Vanessa Firnhaber Olsund in Support of Plaintiffs' Opposition to Defendant's Motion to Shorten Time;

13. Defendant Saberhagen Holdings, Inc.'s Reply in Support of Motion to Shorten Time; and

14. Declaration of Christine D. Sanders in Support of Defendant Saberhagen Holdings, Inc.'s Motion to Shorten Time.

The arguments of counsel with respect to this matter having been heard, and the Court having previously issued its Decision Re: Defense Motion for Summary Judgment and Motion to Strike (August 3, 2012), which Decision is incorporated herein, now therefore,

IT IS HEREBY ORDERED that:

Defendant Saberhagen Holdings, Inc.'s Motion for Summary Judgment is GRANTED. All of plaintiffs' claims against defendant Saberhagen Holdings, Inc. are dismissed with prejudice.

DONE THIS _____ day of August, 2012.

HONORABLE JOHN R. HICKMAN

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Presented by:

CARNEY BADLEY SPELLMAN, P.S.

By _____
Timothy K. Thorson, WSBA No. 12860
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APPENDIX D

HONORABLE JOHN R. HICKMAN

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

JACK DON KENNEDY and SANDRA KENNEDY, husband and wife, Plaintiffs, v. SABERHAGEN HOLDINGS, INC., Defendant.	NO. 12-2-05289-7 NOTICE OF APPEAL TO THE COURT OF APPEALS, DIVISION II

Plaintiffs Jack and Sandra Kennedy seek review by the Court of Appeals, Division II, of the Order Granting Summary Judgment for Defendant entered on August 3, 2012 and the Order Denying Plaintiffs' Motion for Reconsideration entered on August 31, 2012. Copies of the pleadings for which review is sought are attached hereto.

DATED this 13th day of September, 2012.

BERGMAN DRAPER LADENBURG, PLLC

By _____

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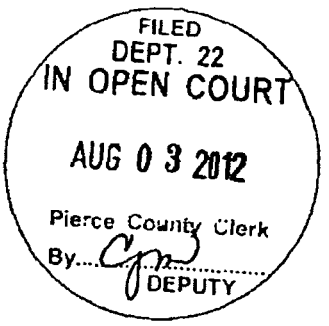


IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JACK DON KENNEDY , Plaintiff(s) , vs. SABERHAGEN HOLDINGS INC, Defendant(s) .	Cause No: 12-2-05289-7 **COURT'S DECISION RE: DEFENSE MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE**

The Court, having reviewed the records and files contained herein, as well as material submitted by both defense and plaintiff's counsel, hearing oral argument of the 3rd day of August, 2012, it is hereby,

ORDERED, ADJUDGED AND DECREED:

Motion to Strike: The motion to strike by defense counsel is denied. The Court having reviewed the contested matters submitted by Plaintiff's counsel, the Court, in its discretion, weighs the reliance and importance of each document in its ultimate decision, but does not find striking of documents are warranted.

Motion for Summary Judgment: The primary issue in this case is the issue of alleged exposure that Mr. Kennedy experienced while working at the National Guard Marine Facility and whether the defense was a supplier of the asbestos products

used at the Port of Tacoma. Specifically, the four vessels moored at Pier 23 where Mr. Kennedy performed dock-side maintenance.

FMS 789: The Court finds that there is insufficient evidence to show any exposure to an asbestos product that would meet the Lockwood factors for the Court's review. In addition, there is a lack of evidence to confirm if and how often Plaintiff went to the boiler room, or any other part of the vessel, where he might have been exposed. Further, there is no evidence to show if the Defendant's product was involved beyond speculation by the Court.

FMS 6 and FMS Small Tug: The issue is whether the amount of asbestos used on the vessels and whether the Defendant supplied such asbestos products was sufficient to meet the criteria in Lockwood and the associated cases following that decision. This Court finds that there is no such evidence. There were a number of suppliers on the water front of asbestos products. The agreement that Tacoma Boat always used Tacoma Asbestos products and, thus, Defendant's product was the sole supplier on these various work orders is not sufficient. The inferences requested by Plaintiff as to the role of Defendant or its predecessor businesses are not sufficient, under the facts of this case, to deny Defendant's motion for summary judgment. For these reasons, as well as argument and briefing of Defendant, the Court grants summary judgment in favor of Defendant SABERHAGEN.

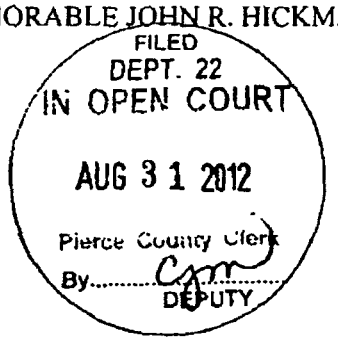
DATED this 3rd day of August, 2012.

JUDGE JOHN R. HICKMAN

Mailed 8-3-12
To Counsel

FILED
DEPT. 22
IN OPEN COURT
AUG 03 2012
Pierce County Clerk
By ..... DEPUTY

HONORABLE JOHN R. HICKMAN



SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

JACK DON KENNEDY and SANDRA KENNEDY, husband and wife,

Plaintiffs,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant.

NO. 12-2-05289-7

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

[PROPOSED]

[Clerk's Action Required]

THIS MATTER came before the Court upon Plaintiffs' Motion for Reconsideration. The Court has reviewed the materials submitted by the parties and has heard the arguments of counsel. Now, therefore,

IT IS HEREBY ORDERED that:

Plaintiffs' Motion for Reconsideration is DENIED on the grounds that it is untimely under CR 59(b). Even if timely submitted, the Court sees no cause for reconsideration under CR 59(a).

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DONE THIS 31 day of August, 2012.

HONORABLE JOHN R. HICKMAN

FILED
DEPT. 22
IN OPEN COURT
AUG 31 2012
Pierce County Clerk
By DEPUTY

Presented by:

CARNEY BADLEY SPELLMAN, P.S.

By
Timothy K. Thorson, WSBA No. 12860
Of Attorneys for Defendant Saberhagen Holdings, Inc.

Approved as to Form

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APPENDIX E

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts OFFICE HOURS: 9-12, 1-4.

November 6, 2012

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CASE #: 43941-7-II, Jack and Sandra Kennedy, Apps v Saberhagen Holdings, Inc, Resp

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

The Motion to Dismiss is denied. The notice of appeal was timely filed in that filing period runs from entry of amended order. See *Structurals Northwest, Ltd. v. Fifth and Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983). Moreover, the original order was unreviewable due to CR 56(h) defects.

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY, husband and wife, Appellants, v. SABERHAGEN HOLDINGS, INC., Respondent.	No. 43941-7-II ORDER DENYING MOTION TO MODIFY COMMISSIONER'S NOVEMBER 6, 2012 RULING; ORDER STRIKING CR 54 LANGUAGE FROM THE NOVEMBER 6, 2012 RULING

Respondent, Saberhagen Holdings, Inc. moves to modify the November 6, 2012 commissioner's ruling denying the motion to dismiss. After consideration, it is hereby

ORDERED that the motion to modify the November 6, 2012 commissioner's ruling is denied. However, the last sentence in the ruling that reads: "Moveover, the original order was unreviewable due to CR 56(h) defects." is stricken from the ruling.

IT IS SO ORDERED.

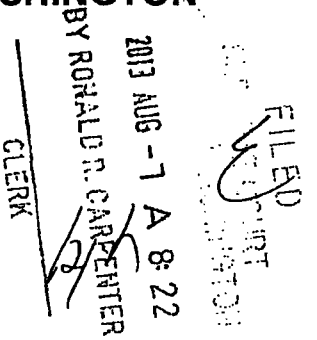
DATED this 6th day of February, 2013.

Johanson, A.C.J.

Acting Chief Judge

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF WASHINGTON



JACK DON KENNEDY and SANDRA KENNEDY,

Respondents,

v.

SABERHAGEN HOLDINGS, INC.,

Petitioner.

NO. 88518-4

RULING DENYING REVIEW

The Court of Appeals seemingly determined that Jack and Sandra Kennedy's notice of appeal was timely filed within 30 days of the August 31, 2012, amended summary judgment order dismissing their lawsuit against Saberhagen Holdings, Inc. Saberhagen now seeks this court's review, arguing that the superior court's original dismissal order of August 3, 2012, controls the timeliness question, and that the September 13, 2012, filing of the notice was therefore untimely.

Court of Appeals Commissioner Bearse relied on *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 713-14, 658 P.2d 679 (1983), in ruling that the notice was timely filed within 30 days of the amended order.[1] The trial court there entered judgment and a decree of foreclosure on November 13, 1981.

[1] Saberhagen devotes much of its argument to the commissioner's additional suggestion that the original order was "unreviewable due to CR 56(h) defects." But the Court of Appeals judges struck that part of the ruling, and it is their decision that is subject to this court's review.

669/140

Thereafter counsel interlineated changes in the judgment and findings to clarify the amount due each party and eliminate the possibility of double recovery. When the interlineations became confusing, on November 18 the parties stipulated that amended findings, conclusions, and judgment be entered. The trial court entered the amended findings, conclusions, and judgment on November 23, 1981. The defendants filed their notice of appeal on December 17, 1981, less than 30 days from the November 23 judgment but more than 30 days from the November 13 judgment. One of the plaintiffs moved to dismiss the appeal as untimely filed. But the Court of Appeals denied the motion to dismiss based on the stipulation and amended judgment. While the court recognized that the stipulation was technically not a motion for amended judgment brought under CR 59, the court noted that in all practical effect the result was the same as if such a motion was made and granted. The stipulation was made within five days of the original judgment as required for a post-judgment motion, and RAP 2.4(c) provides for review of a final judgment not designated in the notice of appeal where the appeal is taken from an order deciding a timely post-trial motion to amend the judgment under CR 59.

Here, the August 3, 2012 order did not designate the documents and other evidence called to the court's attention, as required by RAP 9.12. *See also* CR 56(h). On August 10, 2012, Saberhagen's counsel hand-delivered a letter to the trial judge which submitted a proposed order reflecting the court's decision and containing a list of documents the court considered. At a hearing on August 31, 2012, the parties jointly submitted the proposed order, and the court entered the order as submitted.[2]

The Court of Appeals likely viewed Saberhagen's "submittal" of the proposed order as the functional equivalent of a motion to amend, which under the

[2] The court also denied the Kennedys' motion for reconsideration as untimely. As Saberhagen correctly points out, an untimely motion for reconsideration cannot extend the time within which a party must file a notice of appeal. But the Court of Appeals did not suggest that the motion for reconsideration affected the timeliness of the Kennedys' notice.

current version of CR 59 must be filed not later than 10 days after entry of the judgment. *See* CR 59(h). The court understandably viewed the case as similar to *Structurals Northwest*, where the stipulation had the same effect as a motion to amend.

Saberhagen urges that the Court of Appeals committed obvious error under RAP 13.5(b)(1) by relying on *Structural Northwest*, since here the substance of the order of summary judgment was not changed by the amendment adding the list of documents considered by the court in making its decision. Saberhagen contends that this case is controlled instead by *Nestegard v. Investment Exchange Corp.*, 5 Wn. App. 618, 489 P.2d 1142 (1971), where the court held that a trial court judgment was not in substance an appealable final judgment but instead merely an indirect affirmance or recognition of the expiration of a grace period in which the defendant could pay off a real estate contract, as specified in an earlier order granting the plaintiff's motion for summary judgment.

But both *Structurals Northwest* and *Nestegard* say that substance should control, and of the two only *Structurals Northwest* dealt with an amended final judgment under CR 59(h). While the amendment in *Structurals Northwest* clarified the amount due each party, the amendment here clarified the documents relied upon by the court in granting summary judgment. Thus, the August 31, 2012, order was an amended final judgment, and Saberhagen does not contend otherwise. Neither CR 54(h) nor *Structurals Northwest* suggests that the amendment has to change the substance of the judgment, and it is not even clear that the amended judgment in *Structurals Northwest* did anything but clarify the original judgment. It may be debatable whether *Structurals Northwest* ought to control here, but the Court of Appeals reliance on that decision cannot be characterized as obvious error under RAP

13.5(b)(1). As importantly, the court's decision to permit the appeal to continue cannot be said to render further proceedings useless within the meaning of that rule.

The motion for discretionary review is denied.

COMMISSIONER

August 7, 2013