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COURT OF APPEALS

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STATE OF WASHINGTON Court of Appeals Case No.: 34725-3-II

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**COURT OF APPEALS DIVISION II OF THE STATE OF
WASHINGTON**

Jack and Jean DUNCAN,

Plaintiffs/Appellants

vs.

SABERHAGEN HOLDINGS, INC. et al.,

Defendants/Respondents.

**BRIEF OF RESPONDENTS UNOCAL CORPORATION
AND COLLIER CHEMICAL CORPORATION**

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... III

I. STATEMENT OF THE CASE..... 1

 A. Duncan’s 1997 Lawsuit for Asbestos-Related Injuries..... 1

 B. Duncan’s Current Lawsuit 2

 C. Trial Court’s Grant of Summary Judgment for Unocal, ConocoPhillips, and J.T. Thorpe..... 4

II. ISSUES ON APPEAL 5

III. ARGUMENT..... 5

 A. Summary of Response 5

 B. Standard of Review..... 6

 C. Duncan’s Current Claims are Time-Barred Because His Cause of Action Accrued By the Time He Filed His 1997 Lawsuit..... 7

 1. The Undisputed Facts Show that Duncan Knew He Had an Asbestos-Related Injury in 1997..... 8

 2. Alaska’s Discovery Rule Does Not Delay Accrual of a Cause of Action Until a Plaintiff Knows the Full Extent of His Injuries..... 11

 D. Duncan Seeks to Violate the Equitable Rule Against Splitting Causes of Action..... 19

 1. No Alaska Case has Allowed Two Limitation Periods for Separate Injuries Sustained from the Same Tortious Conduct..... 19

 2. The Non-Alaska Cases That Duncan Cites Do Not Mandate Allowing Duncan to Bring Two Causes of Action..... 24

3.	The Alaska Legislature Has Not Adopted any Exceptions for Accrual Periods for Asbestos-Related Diseases.	33
E.	<u>No Tolling Principle Applies to Delay the Running of the Statute of Limitations</u>	35
1.	Alaska’s Discovery Rule Does Not Toll the Statute of Limitations Until the Plaintiff Knows the Full Extent of His Injuries.....	36
2.	Equitable Tolling Does not Apply to Create a Second Limitations Period.	37
IV.	<u>CONCLUSION</u>	39

TABLE OF AUTHORITIES

Washington Cases

Berry v. Crown Cork & Seal Co., 103 Wn. App. 312 (2000)..... 2

Niven v. E.J. Bartells Co., 97 Wn. App. 507 (1999) 27, 28

Steele v. Organon, Inc., 43 Wn. App. 230 (1986) 26, 27

Wesche v. Martin, 64 Wn. App. 1 (1992)..... 35

Alaska Cases

Beesley v. Van Doren, 273 P.2d 1280 (Alaska 1994). 14, 24, 39, 40

Brannon v. Continental Cas. Co., 137 P.3d 280 (Alaska 2006). 23,
24

Cameron v. State of Alaska, 822 P.2d 1362 (Alaska 1991). 12, 36,
39

Cikan v. ARCO Alaska, Inc., 125 P.3d 335 (Alaska 2005)..... 7

Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002)..... 31

Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143 (Alaska 1984). 12

John's Heating Serv. v. Lamb, 129 P.3d 919 (Alaska 2006). 20,
21, 22, 23

Larman v. Kodiak Elec. Ass'n., 514 P.2d 1275 (Alaska 1973)..... 8

Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983). 8

Mine Safety Appliances Co. v. Stiles, 756 P.2d 288 (Alaska 1988).
..... 19

Pedersen v. Zielski, 822 P.2d 903 (Alaska 1991) 20, 21

Russell v. Anchorage, 743 P.2d 372 (Alaska 1987) 7

Smith v. Thompson, 923 P.2d 101 (Alaska 1996). .. 16, 17, 37, 38,
40

Sopko v. Dowell Schlumberger Inc., 21 P.3d 1265 (Alaska 2000).
..... 7, 8, 9, 12, 13, 15, 16, 23, 37, 40

<i>Wettanen v. Cowper</i> , 749 P.2d 362 (Alaska 1988).....	14, 40, 41
---	------------

Other Cases

<i>Carroll v. Owens-Corning Fiberglas Corp.</i> , 37 S.W.3d 699 (Ky. 2000)	24
<i>Combs v. Albert Kahn & Assoc., Inc.</i> 183 S.W.3d 190 (Ky. Ct. App. 2006).....	25
<i>Gilcrease v. Tesoro Petroleum Corp.</i> , 70 S.W.3d 265 (Tex. Ct. App. 2001).....	31, 32
<i>Joyce v. A.C. and S. Inc.</i> , 785 F.2d 1200 (4th Cir. 1986)	33, 34
<i>Matthews v. Celotex Corp.</i> , 569 F. Supp. 1539 (N.D. 1983)	33
<i>Parks v. A.P. Green Indus.</i> , 754 N.E.2d 1052 (Ind. Ct. App. 2001).....	34
<i>Syms v. Olin Corp.</i> , 408 F.3d 95 (2d Cir. 2005).....	34

Washington Statutes

RCW 4.16.300	30
RCW 4.16.310	30
RCW 4.18.030.....	8

Alaska Statutes

Act of 1986, ch. 139 §1, 1986 Alaska Sess. Laws 1.	34
Act of 1997, ch. 26 §5, 1997 Alaska Sess. Laws.	35
Act of 1997, ch. 26 §6, 1997 Alaska Sess. Laws.	35
AS 09.10.055	4, 30, 31, 32, 35
AS 09.10.070	4, 7, 35

Washington Court Rules

R.A.P. 2.5	35
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Alaska Court Rules

Alaska's Civil Rule 56(c) 6

Other Authorities

American Heritage Dictionary at 76 (1981)..... 2

I. STATEMENT OF THE CASE

Appellant Jack Duncan (“Duncan”)¹ appeals the trial court’s dismissal of his asbestos injury claims under Alaska’s applicable statute of limitations. Duncan claims that he was exposed to asbestos while employed by various independent contractors as a pipefitter at multiple facilities located in Alaska, some of which he maintains were owned by respondents Unocal Corporation and Collier Chemical Corporation (collectively “Unocal”). Prior to Unocal’s summary judgment motion in this case, Duncan settled with the majority of the named defendants (roughly 23 out of 27).²

A. Duncan’s 1997 Lawsuit for Asbestos-Related Injuries.

Duncan is an Alaska citizen, who has lived in Alaska since 1949.³ In April 1997, he filed a law suit in the United States District Court for the District of Alaska based on diversity of citizenship that alleged injuries caused by occupational asbestos exposure.⁴ Duncan ultimately reached

¹ Appellant Jean Duncan claims through her husband appellant Jack Duncan; we use the singular for ease of reference.

² As indicated by Duncan’s certificate of service, only four defendants remain in the case. *See also* Clerk’s Papers (CP) at 443, 1036, 1126.

³ CP at 211, 216 (Dec. of Catharine Morisset in Support of Unocal’s Mot. for Summ. J. (Morisset Dec.”), Ex. A: Vol. I of Duncan Dep. Transcript (“Vol. I Duncan Dep.”), at 12:21-23).

⁴ CP at 218 (Morisset Dec. Ex. A: Vol. I Duncan Dep. at 143:20); CP at 231 (Ex. D: Complaint ¶¶3-5).

monetary settlements for his claims for asbestos-related injuries.⁵

Prior to filing suit, Duncan apparently participated in a screening process for asbestos-related lung disease in connection with that lawsuit. He received a letter from a doctor informing him that he had asbestosis,⁶ a kind of lung disease generally associated with prolonged inhalation of asbestos particles.⁷ Duncan's own medical records from 1997 also indicate that he confirmed this diagnosis with his own treating physicians because of his concerns about possible asbestos exposure.⁸ Those medical records show that Duncan knew of his asbestos-related disease at least by April of 1997.

B. Duncan's Current Lawsuit

Duncan alleges that he was diagnosed with mesothelioma, a type of lung cancer,⁹ in April 2005.¹⁰ In his current lawsuit, he alleges that he contracted mesothelioma from exposure to asbestos-containing products while serving in the military from 1944-48, as well as during his career as a pipe

⁵ CP at 218 (Morisset Dec. Ex. A: Vol. I Duncan Dep. at 145:19-24)

⁶ CP at 218 (Morisset Dec. Ex. A: Vol. I Duncan Dep. at 142:16-20).

⁷ American Heritage Dictionary at 76 (1981).

⁸ CP at 224 (Morisset Dec., Ex. B: Vol. II of Duncan Dep. at 520: 16-24, 521:16-23, 523:12-19); CP at 226-28 (Ex. C: copies of medical records dated 10/15/96 and 2/10/97).

⁹ See *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 314 (2000).

¹⁰ Brief of Appellant at 1.

fitter from 1953-1985.¹¹ His apparent claims specifically against Unocal are premises liability claims, i.e. that Unocal was negligent by failing to warn of hazards related to asbestos-containing products that Duncan may have been exposed to while performing construction and/or repair work while working for an independent contractor at a facility that Unocal allegedly owned or operated.¹²

Nearly all of Duncan's alleged exposures occurred in the State of Alaska. In fact, it became clear after the conclusion of Duncan's deposition that other than Duncan's possible exposure to asbestos while in the Navy from 1944-48, all of his alleged asbestos exposures occurred in Alaska.¹³ Duncan specifically testified that all of his work at any facility that he maintains Unocal¹⁴ operated took place only in Alaska.¹⁵ According to Duncan's testimony, his union dispatch records, and his own notes regarding his job history, all of his alleged exposures at

¹¹ CP at 6 (Complaint Sect. III); CP at 258 (Dec. of James Whitehead in Support of ConocoPhillips Mot. for Summ. J., Ex. 1: Vol. I Duncan Dep. at 19:12-14).

¹² CP at 6-7 (Complaint Sect. IV.); CP at 226-28 (Morisset Dec. Ex. C);

¹³ CP at 212 (Morisset Dec. ¶4). *See also* CP at 6 (Complaint Sect. III.).

¹⁴ Duncan has alleged exposure at three facilities that he maintains were allegedly owned by Unocal's predecessor or related entities. Unocal does not concede that each of these facilities was owned or operated by Unocal on the dates relevant to Appellant's purported exposures..

¹⁵ CP at 219-22 (Morisset Dec. Ex. A: Exhibit 3 to Vol. I Duncan Dep., at 4 (Appellant's handwritten notes regarding work history)); CP at 617 (Declaration of Ari Brown, Ex. 1: Vol. II Duncan Dep. at 430-1:22-6).

any Unocal facility took place no later than 1976.¹⁶

C. **Trial Court's Grant of Summary Judgment for Unocal, ConocoPhillips, and J.T. Thorpe.**

On March 3, 2006, Unocal and co-defendant ConocoPhillips Corporation moved for summary judgment.¹⁷ They argued that (1) Alaska law clearly governed Duncan's claims because he is/was an Alaska resident and nearly all of his exposures took place in Alaska, (2) Duncan knew that he had asbestos-related injuries in 1997 when he filed a lawsuit, (3) Alaska's two-year statute of limitations, AS 09.10.070, barred Duncan's cause of action for asbestos-related injuries caused by his occupational exposure decades earlier because it accrued by 1997, and (4) if Duncan's cause of action did not accrue until he was diagnosed with mesothelioma in 2005, Alaska's statute of repose, AS 09.10.055, barred his claims. After hearing lengthy oral argument,¹⁸ the trial court agreed that under Alaska's discovery rule, Duncan's cause of action accrued at least by 1997, and thus it was time barred.¹⁹ The trial did not reach issues regarding Alaska's statute of repose because it dismissed

¹⁶ CP at 212, 219-22 (Morisset Dec. ¶ 5, Ex. C).

¹⁷ CP at 178-210; 989-1007 (Unocal's motion and reply); CP at 233-51; 976-987 (ConocoPhillips' motion and reply).

¹⁸ Verbatim Report of Proceedings, March 30, 2006 (VRP).

¹⁹ CP at 366-69 (Order granting summary judgment). Co-defendant J.T. Thorpe & Sons joined in this part of the motion, and was also granted summary judgment. CP at 366-69; 1112-14; VRP at 56:7-10.

the case based on the statute of limitations.²⁰

II. ISSUES ON APPEAL

1. Whether the trial court correctly found that Duncan's cause of action accrued at least by 1997 because he knew he had an asbestos-related injury caused by occupational exposure when he filed a lawsuit in the District Court of Alaska in 1997 alleging asbestos-related injuries and collected settlement money for those injuries? [Reviewed de novo.]

2. Whether the trial court properly found that Duncan's current claims were time-barred where he already sued and recovered money for asbestos-related injuries in 1997 and where Alaska's discovery rule clearly holds that knowledge of any injury triggers running of the limitation period, regardless of when the full extent of a plaintiff's injuries become known? [Reviewed de novo.]

III. ARGUMENT

A. Summary of Response

Duncan concedes that Alaska law applies to his claims,²¹ yet Duncan misframes the issue for this appeal. The issue is not whether the "discovery rule" applies in disease cases in Alaska; of course it does. The issue is whether Alaska law allows a plaintiff to split his cause of action and bring two different

²⁰ CP at 1113.

²¹ Brief of Appellants at 15 n.13.

lawsuits for two “separate” diseases allegedly caused by the same tortious conduct. By arguing that asbestosis and mesothelioma are “entirely different diseases,”²² which are “distinct” and “constitute separate injuries,”²³ Duncan clearly advocates two different accrual dates for statute of limitation purposes for two “separate” injuries.

But the Alaska Supreme Court has repeatedly held that *any* injury triggers commencement of the limitation period, and it has rejected calls to create an exception to this bright line rule. Alaska’s statute of limitation thus bars Duncan’s claims because he was diagnosed with, filed suit for, and collected money for an asbestos-related injury in 1997. This Court should deny Duncan’s invitation to create new Alaska law that would split causes of action for statute of limitation purposes in asbestos disease cases because it would contradict longstanding and unambiguous Alaska Supreme Court holdings.

B. Standard of Review

Duncan does not dispute that Alaska law governs his claims.²⁴ Alaska’s Civil Rule 56(c) is identical to Washington’s rule. Summary judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to

²² Brief of Appellants at 2.

²³ Brief of Appellants at 11, 26.

²⁴ Brief of Appellants at 15 n.13.

judgment as a matter of law.²⁵ Whether the statute of limitations has run can be decided as a matter of law where no genuine issue of material fact exists.²⁶ To defeat a motion for summary judgment, an adverse party must show there is a genuine issue of material fact, but “[t]o create a genuine issue of material fact there must be more than a scintilla of contrary evidence.”²⁷ Alaska law compels that this Court affirm the trial court’s dismissal of Duncan’s claims.

C. Duncan’s Current Claims are Time-Barred Because His Cause of Action Accrued By the Time He Filed His 1997 Lawsuit.

Under AS 09.10.070,²⁸ a plaintiff must bring his tort action within two years from the time plaintiff knows of, or reasonably should have discovered the existence of, all of the

²⁵ *Sopko v. Dowell Schlumberger Inc.*, 21 P.3d 1265, 1271 (Alaska 2000).

²⁶ *Sopko*, 21 P.3d at 1273; *Russell v. Anchorage*, 743 P.2d 372, 375-76 (Alaska 1987). If this Court finds that there is a genuine issue of material fact regarding the statute of limitations, Alaska law provides that factual dispute must resolved by the court at a preliminary evidentiary hearing in advance of trial. *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005). (remanding case for required evidentiary hearing where court found issue of fact regarding plaintiff’s mental incompetence).

²⁷ *Cikan*, 125 P.3d at 339.

²⁸ AS 09.10.070 (a) provides in relevant part: “Except as otherwise provided by law, a person may not bring an action . . . (2) for personal injury or death, or injury to the rights of another not arising on contract and not specifically provided otherwise; . . . unless the action is commenced within two years of the accrual of the cause of action.”

elements of his cause of action.²⁹ Under Alaska's discovery rule, the statute of limitations begins to run when a plaintiff "has sufficient information to prompt an inquiry" into his cause of action.³⁰ Here, Duncan indisputably knew all of the elements of his negligence claim – duty, breach, causation, damages³¹ – when he filed his 1997 lawsuit for asbestos-related injuries.

1. The Undisputed Facts Show that Duncan Knew He Had an Asbestos-Related Injury in 1997.

Duncan has not asserted that he was unaware of the duty, breach, or causation elements of his cause of action in 1997. He only focuses on the "damages" element. Yet Duncan cannot credibly dispute that he was diagnosed with an asbestos-related lung disease in 1997. He filed a lawsuit seeking compensation for injuries caused by occupational asbestos exposure, and he collected money for that cause of action.³² The only way for this Court to conclude that plaintiff was not

²⁹ *Sopko*, 21 P.3d at 1271. If the statute of limitations of another state applies to the assertion of a claim in a Washington court, the foreign state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period. RCW 4.18.030.

³⁰ *Sopko*, 21 P.3d at 1271.

³¹ The Alaska Supreme Court has held that the elements of a cause of action for the tort of negligence are: (1) existence of a duty of care; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage. *Larman v. Kodiak Elec. Ass'n.*, 514 P.2d 1275 (Alaska 1973); *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983).

³² CP at 218 (Morisset Dec., Ex. A: Duncan Dep. at 145:19-24); CP at 231 (Ex. D: Complaint in Alaska federal case at 3 re "asbestos-related work.")

diagnosed with an asbestos-related disease by 1997 is to conclude that his entire previous lawsuit was a fraud on the court. Instead, his Alaska court filings, his own medical records, and his own expert's testimony indisputably show that he understood he had an asbestos-related lung disease no later than 1997.

First, Duncan admitted in his medical records that he knew he had an asbestos-related disease. These statements contained in his medical records are admissible as admissions by a party opponent.³³ At least one 1997 medical record shows that Duncan told his doctor that he understood he had an asbestos-related disease:

[Duncan] has a known abnormal chest x-ray from asbestosis and is considered [sic] closing the case and would like one more follow up chest x-ray, as the last one was done in 3/94.³⁴

Thus, Duncan knew no later than 1997 that he had been diagnosed with asbestosis related to "significant asbestos exposure as a pipe fitter."³⁵

Second, Duncan's medical records also indisputably show that he had been diagnosed with asbestos-related disease in 1997. Specifically, those medical records show that he was

³³ *Sopko*, 21 P.3d at 1270.

³⁴ CP at 228 (Morisset Dec., Ex. C at 3).

³⁵CP at 224 (Morisset Dec., Ex. B: Vol. II Duncan Dep. at 521:16-22); CP at 226-28 (Ex. C: medical records dated 10/15/96 and 2/10/97).

diagnosed with asbestosis and/or pleural plaques as early as 1997. A February 1997 Radiological Consultation shows that Duncan had “scattered plaque of pleural thickening.”³⁶ Like mesothelioma, pleural plaques³⁷ and pleural thickening³⁸ also occur in the lung’s pleura. Duncan’s own medical expert, Dr. Hammar, testified that asbestosis, pleural plaques, and pleural thickening are all asbestos-related lung diseases.³⁹ He further testified that the February 1997 report established that Duncan had pleural plaques, and thus, the report indicated that Duncan had an “asbestos-related disease” in 1997.⁴⁰

This diagnosis is further supported by a September 1998 Radiology Consultation, which states that plaintiff’s x-rays showed “scattered calcified [and] non-calcified pleural plaqueing are present consistent with asbestos-related disease.”⁴¹ Furthermore, Dr. Hammar’s declaration that Duncan submitted in support of his opposition below clearly states that Duncan’s “asbestosis and mesothelioma . . . were [both] caused by

³⁶ CP at 1017 (Second Dec. of Catharine M. Morisset (“2d Morisset Dec.”) ¶ 4; Ex. B: copy of 2/10/97 Radiological Consultation).

³⁷CP at 1015 (2d Morisset Dec., Ex. A: Hammar Dep. at 72:16-24).

³⁸ CP at 1013 (2d Morisset Dec., Ex. A: Hammar Dep. at 10:4-5).

³⁹CP at 1012 (2d Morisset Dec., Ex. A: excerpts of deposition testimony of Dr. Samuel Hammar, 3/26/06 (“Hammar Dep.”) at 8:9-10).

⁴⁰ CP at 1016 (2d Morisset Dec., Ex. A: Hammar Dep. at 35:24-25; 36:16-21; 37:8-12).

⁴¹ CP at 1018 (2d Morisset Dec., ¶ 4; Ex. C: copy of 9/08/98 Radiological Consultation).

asbestos.”⁴² Dr. Hammar testified that these are both lung diseases that are caused by asbestos exposure.⁴³ Thus, Duncan’s own medical expert’s testimony establishes that Duncan knew that he had an asbestos-related disease caused by his occupational exposure to asbestos when he filed his 1997 lawsuit.

Duncan can neither ignore nor dispute the fact that he was diagnosed with asbestos-related lung disease in the 1990s, filed a lawsuit in 1997 based on that diagnosis, had his own doctor at Virginia Mason confirm that diagnosis, and accepted settlement money in connection for his asbestos-related injury. Duncan’s opportunistic effort to second guess that diagnosis is revisionist history. Duncan knew he had an asbestos-related injury at least by 1997.

2. Alaska’s Discovery Rule Does Not Delay Accrual of a Cause of Action Until a Plaintiff Knows the Full Extent of His Injuries.

Duncan devotes the majority of his brief to arguing that his current mesothelioma⁴⁴ is a “different,” “independent,” and “distinct” disease from his asbestosis.⁴⁵ Yet under Alaska law, it

⁴² CP at 647 (Hammar Affidavit at 2).

⁴³ CP at 1011-13 (2d Morisset Dec., Ex. A: Hammar Dep. at 1:14-17; 2:17-20; 3:17-25; 4:1-20; 8:8-25; 9:1-4;11:22-24).

⁴⁴ For summary judgment purposes, this Court must assume that Duncan has mesothelioma, but Unocal does not concede this.

⁴⁵ Brief of Appellants at 2, 11, 26.

is irrelevant whether mesothelioma is a “continued expression” of asbestosis, or whether they are separate and distinct injuries. It is also irrelevant to the statute of limitations when Duncan learned the full extent of his injuries caused by his occupational asbestos exposure.⁴⁶ Alaska law does not allow a plaintiff to split the “damages” element of his cause of action for statute of limitations purposes.

Preliminarily, Duncan is simply wrong in asserting that Alaska’s discovery rule is premised upon “principles of fundamental fairness”⁴⁷ by relying on *Hanebuth v. Bell Helicopter International*.⁴⁸ Since that decision, the Alaska Supreme Court has clarified the basis for the discovery rule. In *Cameron v. State of Alaska*,⁴⁹ the court rejected the “fundamental fairness” rationale offered in *Hanebuth*: “[R]ather than characterize the discovery rule as a mitigating, pseudo-equitable doctrine, it is more appropriate to view it as specifying the meaning of **accrual** under the statute.” This rationale is consistent with subsequent Alaska Supreme Court cases applying the discovery rule that are discussed below. It is also

⁴⁶ *Sopko*, 21 P.3d at 1271.

⁴⁷ Brief of Appellant at 20–21.

⁴⁸ *Hanebuth v. Bell Helicopter Int’l*, 694 P.2d 143 (Alaska 1984).

⁴⁹ *Cameron v. State of Alaska*, 822 P.2d 1362, 1365 n.5 (Alaska 1991). (emphasis added).

consistent with the trial court's application of Alaska's discovery rule in this case.

As explained further below, Alaska courts have long applied the rule that for statute of limitations purposes, there is but a single, indivisible cause of action for all damages caused by the same tortious conduct, regardless of whether all of the injuries are immediately apparent. Contrary to Duncan's implication,⁵⁰ Unocal does not maintain, nor did it argue below, that a cause of action for a latent occupational disease must accrue at the time of exposure. Instead, under Alaska law's discovery rule, a claim accrues when a plaintiff has sufficient information to prompt an inquiry into his cause of action once he "learns that he has a 'medically documented condition.'"⁵¹ Thus, in a latent injury case (e.g., an asbestos-related injury), the cause of action accrues, and the statute starts running, when "the plaintiff's disease manifests itself *in an illness*."⁵² Here, Duncan's asbestos-related injuries manifested at least by 1997 when he was diagnosed with asbestosis, and no later than when he filed suit for those injuries.

Yet Duncan urges this Court to create an exception allowing multiple causes of action with multiple accrual dates

⁵⁰ Brief of Appellant at 31.

⁵¹ *Sopko*, 21 P.3d at 1271.

⁵² *Sopko*, 21 P.3d at 1271 (emphasis added).

for asbestos-injury cases in the absence of any Alaska law – case-related or statutory – that even hints at the exception he seeks. No Alaska case has held that a plaintiff can bring two different causes of action for two different latent diseases caused by the same exposure. Indeed, as the Alaska Supreme Court cases on point singularly show, that court would reject calls to create any such exception.

An early Alaska Supreme Court case underscores the strict application of Alaska’s discovery rule. In *Wettanen v. Cowper*, the court held the statute of limitations commenced running on a client’s malpractice case against his attorney when a partial judgment was first entered against him, not when the judgment became final, because he suffered “actual harm” at the earlier time.⁵³ Thus, the statute of limitations began running when the client first suffered actual damages. It did not matter that the client did not know the entire scope of damages at that time, or that he would suffer additional damages thereafter.⁵⁴

The Alaska Supreme Court followed this principle in later cases. In *Sopko v. Dowell Schlumberger*, the plaintiff was exposed to toxic chemicals in 1990. He developed symptoms at

⁵³ 749 P.2d 362, 365 (Alaska 1988). See also *Beesley v. Van Doren*, 273 P.2d 1280, 1283 (Alaska 1994). (holding that plaintiff’s malpractice claim was time-barred because statute of limitations in attorney malpractice action was not tolled pending final resolution of litigation underlying malpractice claim).

⁵⁴ *Wettanen*, 749 P.2d at 365.

the time of his exposure and was diagnosed within days with “toxic fume exposure.”⁵⁵ In 1994, Sopko filed a claim against his employer for partial disability workers’ compensation based on symptoms of eye irritation, light headedness, and nasal congestion.⁵⁶ It was not until 1995 that Sopko was first diagnosed with a permanent injury: permanent dementia.⁵⁷ In 1996, he sued the premises owner (like Unocal here) claiming permanent dementia.

The Alaska Supreme Court held that Sopko’s cause of action accrued in 1990 because he had sufficient information to investigate his cause of action when he was diagnosed with an injury from “toxic fume exposure,”⁵⁸ even though the full extent of his injury was not revealed until years five years later when he was diagnosed with permanent dementia.⁵⁹ The court emphasized that under Alaska law, it was “irrelevant that the full extent of his injuries did not become apparent until later,” because “commencement of the statute of limitations will not be put off until one learns the full extent of his damages.”⁶⁰ Thus, because the statute of limitations started to run in 1990, his

⁵⁵ *Sopko*, 21 P.3d at 1271.

⁵⁶ *Sopko*, 21 P.3d at 1267-8.

⁵⁷ *Sopko*, 21 P.3d at 1268, 1270.

⁵⁸ *Sopko*, 21 P.3d at 1271

⁵⁹ *Sopko*, 21 P.3d at 1272.

⁶⁰ *Sopko*, 21 P.3d at 1271-72.

1996 action was time-barred.⁶¹ The accrual period was not delayed until Sopko later developed and was diagnosed with permanent dementia.

Similarly in *Smith v. Thompson*,⁶² the Alaska Supreme Court rejected plaintiff's argument that she was entitled to bring a claim for later manifesting permanent serious neck injuries where she had earlier received a nominal settlement "only . . . for the neck soreness" within days of the injury-causing accident. Smith was symptom free for a couple of years, but later developed "unbearable pain" and doctors eventually diagnosed that her neck was vertically deranged. Four years after the accident, Smith filed suit after she underwent surgery to fuse her vertebrae, had a bone graft, and doctors drilled a halo brace into her head to stabilize her neck.⁶³

The court held that because Smith knew that she had suffered *some* injury on the date of the accident, the statute of limitations began running then and had already expired. The fact that Smith did not know the full extent of her damages until after the limitations period expired did not save her claims.⁶⁴ The *Smith* court was not swayed by the harsh consequence of its

⁶¹ *Sopko*, 21 P.3d at 1272.

⁶² *Smith v. Thompson*, 923 P.2d 101 (Alaska 1996).

⁶³ *Smith*, 923 P.2d at 103.

⁶⁴ 923 P.2d at 105-06.

ruling, which prevented the plaintiff from recovering anything beyond than the nominal amount she received shortly after the accident. The court also rejected all of plaintiff's equitable tolling arguments.⁶⁵

Duncan argued below that Smith's lawsuit was time-barred only because Smith's later-diagnosed severe orthopedic injury was a "continued expression" of neck muscle soreness Smith suffered at the time of the accident.⁶⁶ But the court's decision did not discuss any connection between the two injuries. It was also irrelevant to application of the discovery rule that Smith first showed only neck "muscle soreness," but later manifested a severely disabling vertebrae injury. Even if it was such a "continued expression," Duncan cannot make a principled argument for why the result in his case should be different. In both *Sopko* and *Smith*, the plaintiff suffered injuries that were worse than originally known. If, as Duncan wrongly contends, equitable notions control application of the discovery rule, there would be no principled reason to allow Duncan a second cause of action but deny both Smith and Sopko the same legal right.

Moreover, contrary to plaintiff's position, under Alaska law, it is irrelevant that Duncan "could not have sued based on

⁶⁵ *Smith*, 923 P.2d at 104.

⁶⁶ CP at 456:16-17.

mesothelioma”⁶⁷ in the 1997 case. In *Sopko*, the plaintiff was not diagnosed with permanent dementia based on chemical exposure until after the limitation period had expired; he was unable to recover any damages for this injury because he had been diagnosed with a milder chemical exposure injury earlier. In *Smith*, the plaintiff initially recovered a nominal amount for neck soreness, but she could not recover any damages for her more severe disabling injuries that later manifested. In neither case did the fact that the plaintiffs’ more serious injuries manifested years later change the court’s analysis of when the statute of limitations accrued under Alaska’s discovery rule. It is clear that Alaska has adopted a bright line accrual rule and has strictly rejected any invitation to allow separate accrual dates for later developing, so-called independent injuries.

Thus, because Duncan knew the elements of his cause of action - the potential source of his exposure, the potential cause of his injuries, and that he had an asbestos-related disease at least by 1997, his cause of action accrued in 1997. Under Alaska’s “discovery rule,” it is irrelevant that he was not diagnosed with mesothelioma until later. His cause of action expired in 1999, and thus, his current claims are time-barred.

⁶⁷ Brief of Appellant at 26.

D. Duncan Seeks to Violate the Equitable Rule Against Splitting Causes of Action.

Duncan cannot escape that the result he advocates would split causes of action by allowing multiple limitations periods for multiple “separate and distinct” injuries caused by the same wrong. This result is not supported by Alaska law.

1. No Alaska Case has Allowed Two Limitation Periods for Separate Injuries Sustained from the Same Tortious Conduct.

Duncan fails to appreciate that the flawed premise of his argument assumes that Alaska law allows a plaintiff to split a cause of action and bring two lawsuits for two separate injuries caused by the same wrong. These cases do not stand for the proposition that Alaska’s discovery rule law allows a plaintiff to bring a second lawsuit for a second, later manifesting injury because it carries its own accrual date and limitations period.

Nothing in *Mine Safety Appliances Co. v. Stiles*⁶⁸ suggests that the Alaska Supreme Court favors splitting a cause of action. Duncan misreads *Mine Safety* when he asserts that Alaska recognizes a “special application” of the discovery rule in asbestos-injury cases.⁶⁹ The discovery rule applies the same in both traumatic and latent injury cases. In both instances, the cause of action accrues when a plaintiff knows he has suffered

⁶⁸ *Mine Safety Appliances Co. v. Stiles*, 756 P.2d 288 (Alaska 1988).

⁶⁹ Brief of Appellant at 35.

some injury and has had reasonable opportunity to learn the cause of the injury.⁷⁰ The only difference is that in a latent injury case, more time usually passes before an injury manifests itself. That is why under Alaska's discovery rule, Duncan's cause of action for injuries caused by his occupational exposure to asbestos that occurred decades earlier did not accrue until 1997 when he was diagnosed with asbestosis.

Neither does Duncan's reliance on *Pedersen v. Zielski*⁷¹ and *John's Heating Service v. Lamb*⁷² change the basic rule that under Alaska law, it is irrelevant whether a plaintiff knows the full extent of his injuries for the cause of action to accrue and thus trigger running of the limitations period.

The main issue in *Pederson* was when a cause of action accrued under Alaska's discovery rule when the *cause* of plaintiff's injuries was not apparent at the time he discovered he was injured. There, plaintiff brought a malpractice action against doctors who had performed his major surgery immediately following a car accident.⁷³ The plaintiff knew that he was injured immediately following the accident and surgery, but the relevant question was when he first should have known

⁷⁰ *John's Heating Serv. v. Lamb*, 129 P.3d 919, 923-4 (Alaska 2006).

⁷¹ *Pedersen v. Zielski*, 822 P.2d 903 (Alaska 1991).

⁷² 129 P.3d 919.

⁷³ *Pederson*, 822 P.2d at 905.

that that his operation (and not the car accident) was the *cause* of his paralysis.⁷⁴ The case had nothing to do with whether Alaska's discovery rule allowed plaintiff to bring a second cause of action where a *second injury* later manifested after plaintiff was already aware of, and sued for, an injury caused by the same tortious conduct.

*John's Heating Service v. Lamb*⁷⁵ similarly dealt with the issue of when a cause of action accrued under Alaska's discovery rule when the *cause* of plaintiffs' injuries was not readily apparent. In that case, plaintiff homeowners contacted John's Heating Service in October 1991 because their furnace was emitting soot and odor. John's Heating Service negligently repaired the furnace, which plaintiffs later learned was emitting carbon monoxide.⁷⁶ Plaintiffs began to suffer physical ailments soon after. In January 1993, plaintiffs called a different repairman after their furnace "started making a racket."⁷⁷ At that time, they first learned from this new repairman that the furnace was probably circulating carbon monoxide and told them they should see a doctor. Plaintiffs did not receive a physician's

⁷⁴ *Pederson*, 822 P.2d at 907.

⁷⁵ 129 P.3d 919.

⁷⁶ Contrary to Duncan's suggestion, nothing in *Lamb* suggests that the repairman failed to fix the soot and odor problem. Therefore, nothing suggests that the Lambs had an earlier case for failure to repair the soot and odor problem.

⁷⁷ *Lamb*, 129 P.3d at 921.

opinion that they had neurocognitive impairment caused by the carbon monoxide until December 1993, and they filed suit immediately.⁷⁸

The Alaska Supreme Court affirmed the trial court's finding that plaintiffs' cause of action was timely because the two year statute of limitations did not begin to run until January 1993, when they first learned from the repairman that their injuries might be caused by carbon monoxide exposure.⁷⁹ In other words, plaintiffs did not have sufficient information as to an essential element of their claim – causation – until they had “enough information to alert them to a cause of action for their symptoms.”⁸⁰ *Lamb* had nothing to do with a second, later manifesting, physical injury. *Lamb* is a one injury case.

Lamb requires finding that Duncan's cause of action accrued in 1997 when he sued for asbestos-related injuries, not when he had a “definitive diagnosis” of a second injury mesothelioma. It is important to note that the Lambs' cause of action accrued (i.e., they were put on inquiry notice) in 1993 when they had both physical symptoms and information regarding the potential cause; the court did *not* hold that their cause of action accrued only after doctors finally gave a

⁷⁸ *Lamb*, 129 P.3d at 921.

⁷⁹ *Lamb*, 129 P.3d at 926.

⁸⁰ *Lamb*, 129 P.3d at 926.

“definitive diagnosis” eleven months later.⁸¹ This accrual date is entirely consistent with cases applying Alaska’s discovery rule, which have repeatedly held that “commencement of the statute of limitations will not be put off until one learns the full extent of his damages.”⁸² Consequently, Duncan’s arguments that his current cause of action did not accrue until he received a “definitive diagnosis” of a *second* injury caused by the same occupational asbestos exposure are wholly without support under Alaska law.

Furthermore, the Alaska Supreme Court has recently recognized that its formulation of the discovery rule is the minority view in another statute of limitations context. In *Brannon v. Continental Casualty Company*,⁸³ the court determined when a cause of action for an insurer’s breach of duty to defend accrued. The court acknowledged that the majority of courts examining this issue have held that the cause of action accrues “with the termination of the underlying litigation that the insurer refused to defend.”⁸⁴ But the Alaska Supreme Court determined that under Alaska law, the cause of action accrued earlier -- when the insurer refused to defend the

⁸¹ *Lamb*, 129 P.3d at 926.

⁸² *Sopko*, 21 P.3d at 1271-72.

⁸³ 137 P.3d 280 (Alaska 2006).

⁸⁴ *Brannon*, 137 P.3d at 285.

insurer -- because this rule was “closely aligned with general Alaska statute of limitation principles.”⁸⁵ As the court pointed out, one justification for the majority rule was that “the extent of injury is unknown until final judgment,” but “in Alaska it is irrelevant if the full scope of injury is known[.]”⁸⁶ Here too, it is irrelevant that Duncan did not know the full scope of his asbestos-related injuries when he filed suit in 1997. Duncan’s reliance on *Brannon* is thus misplaced.

2. The Non-Alaska Cases That Duncan Cites Do Not Mandate Allowing Duncan to Bring Two Causes of Action.

Even though Duncan admits that Alaska law governs, he relies on several out-of-state cases to attempt to show that he should be able to split his cause of action. Yet these cases do not mandate the result that Duncan seeks.

First, Duncan’s reliance on *Carroll v. Owens-Corning Fiberglas Corporation*⁸⁷ is utterly misplaced. Fundamental to the Kentucky Supreme Court’s holding was the fact that the plaintiff had *not* brought an earlier lawsuit for injuries related to his asbestosis. Thus, the case had nothing to do with “the rule against splitting causes of action[.]”⁸⁸ Moreover, just this

⁸⁵ *Brannon*, 137 P.3d at 285. See also *Beesley*, 873 P.2d at 1283 (holding that statute of limitations in attorney malpractice action was not tolled pending final resolution of litigation underlying malpractice claim).

⁸⁶ *Brannon*, 137 P.3d at 285-6 (citing *Sopko*, 21 P.2d at 1272).

⁸⁷ 37 S.W.3d 699 (Ky. 2000).

⁸⁸ *Carroll*, 37 S.W.3d at 700.

year, the Kentucky Court of Appeals acknowledged this critical point in *Combs v. Albert Kahn & Assoc., Inc.*⁸⁹

In *Combs*, the plaintiff brought a suit alleging asbestosis in 2000, but moved to amend his complaint to include a claim for lung cancer one month after he was diagnosed in 2003. Combs also sought to recover for his lung cancer injury from two new defendants.⁹⁰ Applying Kentucky's one year statute of limitations, the court affirmed the trial court's dismissal of Combs' claims against the two new defendants as time-barred because "Kentucky has never been a 'two disease state' and that requires that "a plaintiff seek recovery for all possible injuries due to asbestos exposure at the first sign of exposure."⁹¹ The court rejected Combs' argument that under *Carroll* his cause of action against the two new defendants did not accrue until he learned he had cancer.⁹²

Here, Duncan's case differs from *Carroll* on the same fundamental point as *Combs*. Duncan has already filed claims for – and collected money for – injuries related to his asbestos exposure. Thus, he does in fact seek to split his cause of action. *Carroll* does not support the result Duncan seeks here.

⁸⁹ 183 S.W.3d 190, 197-8 (Ky. Ct. App. 2006).

⁹⁰ *Combs*, 183 S.W.3d at 193.

⁹¹ *Combs*, 183 S.W.3d at 196-7.

⁹² *Combs*, 183 S.W.3d at 196.

Second, the Washington cases that Duncan cites are not only distinguishable from Alaska law, but they also do not mandate the result that Duncan seeks. Duncan’s heavy reliance⁹³ upon *Steele v. Organon, Inc.*,⁹⁴ is puzzling because it follows the dissent’s proposal that there should be a separate accrual period for “separate and distinct” injuries.⁹⁵ But the majority forcefully rejected the dissent’s view.⁹⁶ In *Steele*, the plaintiff experienced loss of sensation in her limbs after an unintended prescription drug overdose. She received treatment in hospital for these symptoms. After consulting with an attorney, she decided not to pursue a “failure to warn” claim against her doctor in connection with the dosage instructions provided with the medication because her damages were minimal.⁹⁷ Eight years later, she suffered a heart attack and stroke that was caused by the overdose. Steele sued at that time for her injuries.

Division III of the Court of Appeals held that her cause of action accrued when she was initially hospitalized with loss of limb sensation, so her lawsuit years later was time barred. The

⁹³ Brief of Appellant at 33-36.

⁹⁴ *Steele v. Organon, Inc.*, 43 Wn. App. 230 (1986)

⁹⁵ *Steele*, 43 Wn. App. at 236-37 (McInturff, J., dissenting).

⁹⁶ *Steele*, 43 Wn. App. at 237-39 (specifically referring to earlier asbestosis and subsequent lung cancer diagnoses)

⁹⁷ *Steele*, 43 Wn. App. at 231-32

court found that because Steele “was aware of some injury,” the statute of limitations began to run at that time.⁹⁸ *Steele’s* brief discussion of application of the discovery rule to “occupational diseases” is entirely consistent with application of that rule here: Duncan’s cause of action accrued in 1997 when his asbestosis diagnosis informed him that he had suffered “some injury” as a result of his occupational exposure to asbestos. *Steele* does not support the result Duncan seeks.

Duncan next tries to avoid Alaska law by relying upon Division I’s result in *Niven v. E.J. Bartells Co.*,⁹⁹ even though he acknowledges that Alaska law governs. Not only is *Niven* contrary to Alaska law, the decision is flawed for several reasons.

In *Niven*, the plaintiff filed a 1981 lawsuit against product manufacturers alleging asbestosis caused by exposure to asbestos products. (He eventually settled.) After *Niven* was diagnosed with lung cancer in 1993, he brought a second lawsuit against different defendants alleging that his cancer was caused by the same workplace asbestos exposure. One of the new defendants alleged that *Niven’s* claims were time-barred.¹⁰⁰

⁹⁸ *Steele*, 43 Wn. App. at 235

⁹⁹ *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507 (1999).

¹⁰⁰ *Niven*, 97 Wn. App. at 509 (discussing Washington’s three year statute of limitations, RCW 4.16.080(2)).

Division I acknowledged that it would be inappropriate to adopt a “separate and distinct” injury rule that allowed a plaintiff to bring separate causes of action for “separate and distinct” asbestos-related diseases.¹⁰¹ Thus, it purportedly went on to apply what it called “the traditional discovery rule.”¹⁰² But instead of examining when Niven first knew all of the elements of his cause of action for occupational asbestos injury (duty, breach, causation, damages), Division I held that there was an issue of fact whether Niven should have known about the second disease, i.e. “should have known of the presence of his lung cancer”¹⁰³ when he filed his first lawsuit.

Thus, *Niven* limited the relevant “damages” or “harm” inquiry to the specific injury alleged in the second lawsuit, rather than examining when the plaintiff first should have known he suffered some injury from occupational asbestos exposure. The *Niven* court fundamentally misframed the relevant issue by stating that the relevant determination was whether the plaintiff could have known he had lung cancer at the time of his prior law suit. By artificially narrowing the relevant inquiry, *Niven*’s result does exactly what Washington

¹⁰¹ *Niven*, 97 Wn. App. at 516 (discussing *Green v. A.P.C.*, 136 Wn.2d 87, 97-98 (1998)).

¹⁰² *Niven*, 97 Wn. App. at 517.

¹⁰³ *Niven*, 97 Wn. App. at 517.

law prohibits. The decision permits two causes of action for two “separate and distinct” injuries caused by the same tortious conduct by allowing each injury its own accrual date and limitations period. That, by definition, is splitting a cause of action.

Furthermore, even if *Niven* were good law, Duncan overreaches when he claims that Alaska law mirrors Washington law. First, as *Sopko* and *Smith* make clear, the relevant inquiry in Alaska for statute of limitations purposes is *not* when plaintiff could have discovered the particular, specific injury, but when the plaintiff could have discovered some injury caused by the allegedly tortious conduct. *Niven* can only be read to hold that the relevant inquiry is whether plaintiff could have known the “full extent of his injuries” at the time of his first lawsuit. This holding is squarely contrary to *Sopko* (which was decided two years after *Niven*), *Smith*, *Wettanen*, and other Alaska cases, which all hold that accrual of the claim is not delayed until the plaintiff knows the full extent of his injuries.

Second, there are other differences between Washington and Alaska law in the limitations period context. For example, Washington’s and Alaska’s statutes of repose have different effects on claims against premises owners such as Unocal in this

case.¹⁰⁴ Washington’s construction statute of repose, RCW 4.16.310, limits liability by barring certain causes of action that do not accrue within six years of substantial completion of construction.¹⁰⁵ This statute of repose only applies to causes of action based on various construction activities or supervision, observation, or administration of construction contracts.¹⁰⁶ The statute is also not an available defense for an owner in possession or control of the property at the time a cause of action “accrues,” i.e. when the construction is completed.¹⁰⁷ Nor is it available to product manufacturers.¹⁰⁸ Thus, for example, Washington’s statute of repose would not prevent a plaintiff who was exposed to asbestos during construction of a facility from suing the premises owner for injuries related to this exposure.

In Alaska, however, not only is the language of the statute of repose different, but it also does not contain a premises owner or product manufacturers exception. AS 09.10.055(a), which applies to causes of action “accruing on or

¹⁰⁴ Because it held that Duncan’s claims were barred by the statute of limitations, the trial court did not decide whether the statute of repose barred Duncan’s claims. This issue has been preserved for further consideration by the trial court.

¹⁰⁵ RCW 4.16.310 provides in relevant part: “Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred[.]”

¹⁰⁶ RCW 4.16.300.

¹⁰⁷ RCW 4.16.310.

¹⁰⁸ RCW 4.16.300.

after August 7, 1997,”¹⁰⁹ requires that plaintiff bring suit within ten years of “the last act to have caused the personal injury, death, or property damage.” When a cause of action “accrues” for purposes of the statute of repose is identical to the discovery test that applies for Alaska’s statute of limitations.¹¹⁰ Alaska’s Supreme Court has noted that the statute of repose could limit application of the discovery rule in the statute of limitations context, but the court also acknowledged that this result was within the Alaska legislature’s power.¹¹¹

Thus, for example, even if Duncan’s cause of action “accrued” in 2005 when he was diagnosed with mesothelioma, AS 09.10.055(a) necessarily bars his general negligence and failure to warn claims against Unocal because his alleged exposure occurred more than ten years before this suit. At least one court has already applied Alaska’s statute of repose in this manner to bar a plaintiff’s mesothelioma claim.

In *Gilcrease v. Tesoro Petroleum Corporation*, the court held that AS 09.10.055(a) operated to bar a former oil refinery worker’s claim of mesothelioma caused by asbestos exposure at a

¹⁰⁹ *Gilcrease v. Tesoro Petroleum Corp.*, 70 S.W.3d 265, 269 (Tex. Ct. App. 2001) (citing editors’ notes to AS 09.10.055 and applying Alaska law).

¹¹⁰ *Gilcrease*, 70 S.W.3d at 269-70.

¹¹¹ *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1069 (Alaska 2002). (concluding that statute of repose did not violate due process or equal protection considerations).

refinery in Kenai, Alaska. Plaintiff claimed that his cause of action accrued when he was exposed to the asbestos (and thus before the statute of repose was enacted). But applying *Sopko*, the court held that his cause of action accrued when he was first diagnosed with his illness after 1997, and thus the statute of repose barred his claims.¹¹² The court also noted that Alaska does not have a statutory or tolling exception for asbestos-exposure claims.¹¹³ In sum, because all of plaintiff's alleged exposure had occurred more than ten years prior to his filing suit, *Gilcrease* held that Alaska's statute of repose barred plaintiff's claims.¹¹⁴

Here too, if Duncan is correct that his cause of action did not accrue until his 2005 mesothelioma diagnosis, Alaska's statute of repose bars his claims.¹¹⁵ Duncan's last alleged exposure at a purported Unocal facility was in 1976,¹¹⁶ and in fact, he has not alleged any asbestos exposure after 1985.¹¹⁷

¹¹² *Gilcrease*, 70 S.W.3d at 269-70.

¹¹³ *Gilcrease*, 70 S.W.3d at 271-2.

¹¹⁴ *Gilcrease*, 70 S.W.3d at 271-2.

¹¹⁵ Duncan maintains that he has asserted a claim for "gross negligence," which is an exception to the statute of repose. Duncan is correct that AS 09.10.055(b)(1)(B) exempts injuries caused by "intentional conduct or gross negligence." Yet Unocal argued below that Duncan had failed to assert such a claim and that he lacked admissible evidence against Unocal to prove it. CP at 1000-01; 1028-32. This issue, however, was not reached by the trial court. CP at 1114.

¹¹⁶ CP at 219-22 (Morisset Dec. ¶ 5, Ex. B (work history)).

¹¹⁷ CP at 6 (Complaint Sect. III).

Duncan filed his current law suit in 2005, nearly thirty years after his last exposure at any purported Unocal facility, and nearly twenty years after any purported exposure plead in his Complaint. Duncan’s claims clearly fall outside the ten year statute of repose.

3. The Alaska Legislature Has Not Adopted any Exceptions for Accrual Periods for Asbestos-Related Diseases.

Alaska is not alone in rejecting the result that Duncan advocates here, i.e. that successive “separate and distinct” asbestos-related injuries caused by the same wrongful act should each carry their own cause of action and limitations period. For example, in applying Virginia law and its two year statute of limitations, the Fourth Circuit held in *Joyce v. A.C. and S., Inc.*,¹¹⁸ that plaintiff was *not* entitled to a new cause of action for successive asbestos diseases. Thus, the Fourth Circuit held that the plaintiff’s current claims for pleural effusion and asbestosis were barred because plaintiff had developed asbestos-related pleural thickening more than two years before filing his current suit.¹¹⁹ The Fourth Circuit emphasized that Virginia courts had long applied the rule that “there is but a single

¹¹⁸ *Joyce v. A.C. and S. Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986).

¹¹⁹ *Joyce*, 785 F.2d at 1203, 1205. *See also Matthews v. Celotex Corp.*, 569 F. Supp. 1539, 1543 (N.D. 1983)(applying ND law to hold that injured workers’ cause of action based on asbestos exposure accrued when he first learned that he had breathing difficulties related to asbestos exposure).

indivisible cause of action for all injuries sustained, whether or not all of the damage is immediately apparent.”¹²⁰ In noting that the result may be “harsh when applied to asbestos or other ‘creeping disease’ cases,” the Fourth Circuit emphasized that it was “not, of course, at liberty to modify the rule,” and any change needed to come from the Virginia Supreme Court or the state’s legislature.¹²¹

Here too, any change to Alaska’s law must come from the Alaska legislature. Other states have enacted asbestos-related exceptions.¹²² But in passing its Tort Reform Act in 1986,¹²³ Alaska’s legislature did not pass any exceptions for latent asbestos diseases. Neither did it adopt any such exception in 1997, when it made changes to several Alaska rules of civil procedure and evidence, including re-wording the statute of

¹²⁰ *Joyce*, 785 F.2d at 1204.

¹²¹ *Joyce*, 785 F.2d at 1205.

¹²² See e.g., *Syms v. Olin Corp.*, 408 F.3d 95, 109 (2d Cir. 2005) (discussing NY code provision with discovery rule for environmental contamination cases); *Parks v. A.P. Green Indus.*, 754 N.E.2d 1052, 1059 (Ind. Ct. App. 2001)(discussing two Indiana code provisions which allow that an asbestos-related case can be commenced beyond the ten-year statute of repose if brought against persons who mine or sell commercial asbestos and also that “[t]he subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action”).

¹²³ Act of 1986, ch. 139 §1, 1986 Alaska Sess. Laws 1.

limitations, 09.10.070,¹²⁴ and rewriting the statute of repose, 09.10.055.¹²⁵

Thus, the Alaska legislature and courts have not chosen to create exceptions for two-injury asbestos cases. It would not be proper for this Court to create an exception that does not exist under Alaska statutes or case law.

E. No Tolling Principle Applies to Delay the Running of the Statute of Limitations.

For the first time on appeal, Duncan argues that because of “fundamental fairness” he should be able to toll the statute of limitations for his current case because it was not possible to discover his mesothelioma in 1997. In both his brief¹²⁶ and at oral argument below, however, Duncan only focused on his “two, separate and distinct independent disease processes”¹²⁷ argument. Issues not raised in the trial court will not be considered for the first time on appeal.¹²⁸ Therefore, this Court may not consider this issue on appeal.

¹²⁴ Act of 1997, ch. 26 §6, 1997 Alaska Sess. Laws. Copy available at: http://www.legis.state.ak.us/cgi-bin/folioisa.dll/slpr/query=*/doc/{@2154}?

¹²⁵ Act of 1997, ch. 26 §5, 1997 Alaska Sess. Laws. Copy available at: http://www.legis.state.ak.us/cgi-bin/folioisa.dll/slpr/query=*/doc/{@2154}?

¹²⁶ CP at 446, 448 (Plaintiff’s Omnibus Response in Opp. to Summ. J. at 2:8-9, discussing the “entirely different disease process;” 3:7-8, framing the relevant issues).

¹²⁷ VRP at 5, 8.

¹²⁸ R.A.P. 2.5; *Wesche v. Martin*, 64 Wn. App. 1, 6 (1992). (citing *Ruddach v. Don Johnston Ford, Inc.*, 97 Wn.2d 277, 281 (1982) (not considering statute of limitations defense because it was first raised on appeal)).

Even if this Court considered the issue, however, it would not help Duncan here. Duncan confuses the “tolling” principle of Alaska’s discovery rule with equitable tolling doctrine. Neither of these applies to delay the running of the limitations period in this case.

1. Alaska’s Discovery Rule Does Not Toll the Statute of Limitations Until the Plaintiff Knows the Full Extent of His Injuries.

Duncan is correct that Alaska’s discovery rule delays the running of the limitations period where a plaintiff made inquiry, but he could not have discovered the elements of his cause of action, such as the cause of his injuries, through that initial inquiry.¹²⁹ Yet Duncan continues to ignore that what he actually seeks is permission to split his cause of action and bring two separate lawsuits for two “separate” injuries allegedly caused by the same exposure. As already explained in detail above, Alaska’s discovery rule does not toll the limitations period where a plaintiff files suit and recover damages, but seeks to bring a second cause of action case after the limitation period expired for a second latent injury caused by the same exposure. In *Sopko*, the plaintiff was precluded from recovering damages for his permanent dementia that had not manifested until years after

¹²⁹ *Cameron*, 822 P.2d at 1366.

he was first diagnosed with toxic fume exposure.¹³⁰ In *Smith*, the plaintiff could not recover for her serious neck and spine injuries requiring surgeries that did not manifest until 4 ½ years after she recovered for neck “soreness.”¹³¹ There is no basis in Alaska law to split causes of action for two separate injuries by allowing two different accrual dates and two different limitations periods.

Alaska’s “tolling” principle of the discovery rule might apply if, for example, had Duncan sought treatment for potential injuries from asbestos exposure in 1997, but not been diagnosed with an asbestos-related disease until later. This is not Duncan’s case. Duncan knew he had an asbestos-related injury as early as 1997, and he did, in fact, file suit and collect money to enforce his rights. His cause of action for all injuries caused by his occupational asbestos exposure accrued at that time. Duncan’s claims are time-barred.

2. Equitable Tolling Does not Apply to Create a Second Limitations Period.

Neither does Duncan meet the requirements for equitable tolling to apply. Under Alaska law, the equitable tolling doctrine relieves a plaintiff from the bar of the statute of limitations period where: (1) the plaintiff has more than one

¹³⁰ *Sopko*, 21 P.3d at 1272.

¹³¹ *Smith*, 923 P.2d at 106.

legal remedy available to him, (2) pursuit of the initial remedy gives defendant notice of plaintiff's claim, (3) defendant's ability to gather evidence is not prejudiced by the delay, and (4) the plaintiff acted reasonably and in good faith.¹³²

The equitable tolling doctrine clearly does not apply here. As Duncan admits, neither Unocal Corporation (nor any of its related entities such as Collier Chemical Corporation) were named and/or served in the 1997 lawsuit.¹³³ But it is clear that either Duncan and/or his attorneys were aware of the sites of his occupation exposure in 1997. Duncan implies that no one performed any investigation to identify the job sites where he was allegedly exposed to asbestos-containing products in connection with his Alaska lawsuit.¹³⁴ Yet in October 1999, Duncan filed an amended complaint with a "Schedule" (missing from the Alaska court's file copy of Duncan's original complaint)¹³⁵ that listed his job sites. The amended complaint plainly states that Duncan claimed an "asbestos-related injury." The "Schedule" listed various job sites on the Kenai Peninsula where Duncan worked, including the "Collier and Chemical Carbon Company a/k/a Urea Chemical Plant, Kenai, AK," one of

¹³² *Smith*, 923 P.2d at 105.

¹³³ Brief of Appellants at 9 n. 11.

¹³⁴ Brief of Appellants at 8.

¹³⁵ CP at 1009 (2d Morisset Dec. ¶5).

the same job sites where he alleges exposure in this case against Unocal.¹³⁶ Thus, Duncan could have, but did not give Unocal notice of his potential claims in 1997. He cannot meet Alaska's requirements for equitable tolling.

IV. CONCLUSION

The Alaska Supreme Court has strongly endorsed the rule of *stare decisis*.¹³⁷ Moreover, as Alaska courts have acknowledged, "a statute of limitations 'avoids the injustice which may result from the protection of stale claims . . . [and] protects against the difficulties caused by lost evidence, faded memories and disappearing witnesses.'"¹³⁸ That policy is intended for cases like this one, where most of factual issues of plaintiff's exposure pertain to events, memories, and records that are over 30-40 years old. Furthermore, the normally harsh results of statutes of limitations are absent here. Plaintiff collected money in his prior Alaska lawsuit, and he settled with 23 out of the 27 defendants in this case. He is not left wholly without a remedy.

¹³⁶ CP at 1024 (2d Morisset Dec., ¶ 5; Ex. D at 6).

¹³⁷ *Beesley*, 873 P.2d at 1283. As the court stated: "Under the rule of *stare decisis*, this court will overrule precedent only "where the court is 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.'" (citations omitted)

¹³⁸ *Cameron*, 822 P.2d at 1365 (quotation omitted) (holding that a tunnel digger's action to recover for asthma was time-barred).

Alaska’s discovery rule contemplates that the plaintiff may not know the full scope of his injuries at the time he files suit. Duncan argues for such a judicially-created exception here in the absence of any Alaska law – case-related or statutory – supporting the exception they seek. Indeed, as the Alaska Supreme Court cases on point singularly show, that court would reject calls to create any such exception. This Court must follow Alaska law, under which its courts have consistently refused to split causes of action because of later manifesting injuries, and instead strictly applied the statute of limitations.¹³⁹

In sum, this Court must follow Alaska’s “guiding principle,” which is “that the statute of limitations commences running when one is actually damaged . . . the statute of limitations will not be put off until one learns the full extent of his damages.”¹⁴⁰ The Alaska Supreme Court has consistently applied this principle in numerous cases, including *Wettanen*,¹⁴¹ *Smith*,¹⁴² and most importantly, *Sopko*.¹⁴³ Applying this “guiding principle” here, the statute of limitations commenced running when plaintiff knew in 1997 that he had suffered

¹³⁹ *Sopko*, 21 P.3d at 1276; *Smith*, 923 P.2d at 103; *Wettanen*, 749 P.2d at 365; *Beesley*, 273 P.2d at 1283.

¹⁴⁰ *Wettanen*, 749 P.2d at 365.

¹⁴¹ 749 P.2d at 365.

¹⁴² 923 P.2d at 106.

¹⁴³ *Sopko*, 21 P.3d at 1272.

damages as a result of his alleged asbestos exposure, regardless of whether he knew the full scope of his injuries at that time.

The few facts relevant to the statute of limitations determination are undisputed. The limitations period for all of his claims resulting from his alleged asbestos-exposure expired in 1999. Duncan filed the current complaint six years later, long after the two year limitations period expired. These facts compel the conclusion that Duncan knew of his cause of action against Unocal and suffered actual damages more than two years before he filed his current case.¹⁴⁴ This Court should affirm the trial court's dismissal of Duncan's new lawsuit.

DATED this 30th day of August, 2006.

KESAL, YOUNG & LOGAN



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Attorneys for Respondents Unocal
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¹⁴⁴ *Wettanen*, 749 P.2d at 365.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing Brief of Respondents Unocal Corporation and Collier Chemical Corporation upon the following persons via Hand Delivery:

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DATED this 30th day of August, 2006, at Seattle, Washington.

Kerri Beebe

Kerri Beebe, Legal Assistant

SE45230

STATE OF WASHINGTON
 BY *Kerri Beebe*
 DEPUTY

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JACK N. DUNCAN and JEAN W. DUNCAN, husband and wife,

Plaintiff/Appellant,

v.

SABERHAGEN HOLDINGS, INC., et al.,

Defendant/Respondent.

**RESPONDENT J.T. THORPE & SON, INC.'S JOINDER TO UNOCAL
CORPORATION AND COLLIER CHEMICAL CORPORATIONS'
RESPONSE TO APPELLANTS' BRIEF**

ATTORNEYS FOR RESPONDENT J.T. THORPE & SON, INC.

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE	1
JOINDER	5
CONCLUSION	5

I. STATEMENT OF THE CASE

In 1997, appellant Jack Duncan (“Mr. Duncan”) was diagnosed with asbestosis allegedly due to workplace exposure to asbestos. CP 231; CP 265. On April 29, 1997, he and his wife, Jean Duncan, the plaintiffs-appellants in this lawsuit (“appellants”), filed suit against a number of alleged manufacturers or suppliers of asbestos-containing equipment in the U.S. District Court for the District of Alaska alleging asbestos-related injury. CP 229-232. The case settled and appellants received compensation for their claims related to Mr. Duncan’s asbestos-related disease. CP 262, at p. 145:19-24.

In April 2005, Mr. Duncan was diagnosed with mesothelioma. CP 429. Appellants filed this suit on September 9, 2005. CP 4. Appellants sued numerous defendants, including J.T. Thorpe & Son, Inc. (“J.T. Thorpe”), again seeking damages for injuries they attributed to Mr. Duncan’s alleged exposure to asbestos. CP 6. Appellants asserted liability under various theories, including products liability under RCW 7.72. *et seq.*, negligence; conspiracy; spoliation; willful or wanton misconduct; strict product liability under Section 402B of the Restatement of Torts; (RCW 62A); enterprise liability; market share liability and/or market share alternate liability; and other applicable theories of liability. CP 6.

As to J.T. Thorpe, appellants alleged that Mr. Duncan was exposed to asbestos-containing products manufactured, supplied or installed by J.T. Thorpe while he served in the Navy on board the USS Osage and the USS Coral Sea. CP 383. Mr. Duncan served in the Navy from approximately 1945-1949. CP 383. At no time during his service in the Navy, was Mr. Duncan stationed in or around Washington State. CP 1189. All of Mr. Duncan's alleged exposure to asbestos occurred while he was in the Navy and/or during his 35-year career as a pipe fitter in Alaska. CP 427-28; CP 435. Mr. Duncan has resided in Alaska since 1949. CP 216, at p. 12:21-23.

J.T. Thorpe incorporated in California in 1922 and remains an active California Corporation specializing in the installation of refractory materials. CP 1165.

Respondent ConocoPhillips Company ("ConocoPhillips") filed a motion for summary judgment based on the applicable statute of limitations and statute of repose under Alaskan law, AS 09.10.070 and AS 09.10.055. CP 233-245. Respondents Unocal Corporation ("Unocal") and Collier Chemical Corporation ("Collier") filed a joint motion for summary judgment based on the applicable statute of limitations and statute of repose under Alaskan law, AS 09.10.070 and AS 09.10.055. CP 178-188. In their motions, ConocoPhillips and Unocal/Collier argued that

under the most significant relationship rule, Alaska, not Washington, law should apply, and that under Alaska law appellants' claims began tolling no later than 1997, when appellants had discovered the existence of their cause of action and filed the Alaska federal court lawsuit. CP 237-242; CP 180-186. The issue regarding the statute of repose was not addressed by the court, thus is not at issue in this appeal. CP 1139.

J.T. Thorpe joined ConocoPhillips' and Unocal/Colliers' motions and incorporated their statute of limitations arguments by reference. CP 358-361; CP 366-369. J.T. Thorpe did not join the motions as to the statute of repose. CP 358; CP 366.

On March 30, 2006, Pierce County Superior Court Judge Beverly Grant heard oral argument on ConocoPhillips' and Unocal/Colliers' motions and on J.T. Thorpe's joinder to the motions. CP 1111. After concluding that Alaska law governs Appellants' claims in this matter, Judge Grant granted ConocoPhillips and Unocal/Colliers' motions for summary judgment, finding as follows:

Based on the foregoing, the Court FINDS that there is no dispute as to the following material facts:

1. Plaintiffs knew or should have known that Jack Duncan had suffered some injury related to his asbestos exposure at the time they filed the 1997 Alaska federal court law suit.
2. Plaintiffs filed their current lawsuit in April

2005, more than two years after the 1997 Alaska federal court lawsuit.

In light of the applicable facts and law, the Court CONCLUDES:

1. Alaska substantive law governs plaintiff's claims, and, thus Alaska's statute of limitations applies under RCW 4.18.020(1)(a); and

2. Plaintiff's claims are time-barred by the applicable statute of limitations, AS .09.10.070.

IT IS HEREBY ORDERED THAT

1. Unocal Corporation and Collier Chemical Corporation's and ConocoPhillips' Motion for Summary Judgment is GRANTED.

CP 1139.¹ The court also dismissed appellants' claims against J.T. Thorpe, pursuant to its joinder. CP 1134. Although J.T. Thorpe's name was inadvertently left off the final page of the order, the minute order and verbatim report of proceedings confirm the court and parties' intent to include dismissal of claims against J.T. Thorpe along with those of ConocoPhillips and Unocal/Collier. CP 1134; CP 1142; VRP 53-56. This appeal followed.

¹ Although the court entered its order immediately after oral argument on March 30, 2006, the order mistakenly states the entry date as March 30, 2004.

II. JOINDER

J.T. Thorpe joins Respondents Unocal and Colliers' Response to Appellants' Brief and joins the legal authority and argument cited by Respondents therein.

III. CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 30th day of August, 2006.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on August 30, 2006 copies of the foregoing document were served on the following parties:

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