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

JUDITH HOFFMAN, as Personal Representative to the
Estate of LARRY HOFFMAN,

Appellant,

v.

KETCHIKAN PULP COMPANY,

Respondent.

Appeal from the Superior Court of Washington
for King County
(Cause No. 14-2-07178-2)

BRIEF OF APPELLANT

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I. INTRODUCTION

In reviewing these pleadings, this Court might get a sense of déjà vu. This case was previously on appeal before this Court on a very similar issue. In 2016, in an unpublished opinion, this Court held that neither Washington’s or Alaska’s statute of repose barred plaintiffs’ claims. In the two years since that opinion, nothing material has changed. However, despite this Court’s conclusion under essentially identical facts that there was no conflict of laws between Alaska and Washington as to the statute of repose, in 2017, the Pierce County Superior Court granted a summary judgment motion in favor of Defendant Ketchikan Pulp Co. The trial court concluded, inconsistent with this Court’s prior ruling, that there was a necessary conflict of laws as to the statute of repose between Alaska and Washington, and that Alaska’s statute of repose blocked Plaintiffs’ claims from going forward.

Appellants appear before this Court seeking clarity on “the law of the case” as previously decided. Plaintiff also explains that this Court should independently apply the gross negligence or “hazardous waste” or “foreign body” exceptions to the Alaska Statute of Repose to this case and thus reverse the Pierce County granting of summary judgment.

This Court previously held in *Hoffman, et al., v General Electric Co. et al.*, 195 Wn. App. 1037 (2016) (unpublished) that:

[T]he superior court erred by dismissing Hoffman’s claims against GE and Ketchikan on this second basis because we conclude Hoffman has alleged facts that, if presumed true, could support application of the gross negligence exception. Because Hoffman has alleged facts that, if presumed true, show that the exception would apply, his suit is arguably not barred by Alaska’s statute of repose. Under these facts there would be no conflict of laws.

CP 1174 (emphasis added). Evidence of those same alleged facts and additional evidence supporting plaintiff’s position were introduced at this summary judgment. The same result should apply for this appeal based either on the law of the case or based on an independent de novo review of the evidence and the law. Furthermore, two other exceptions to the Alaska Statute of Repose apply to this case: those related to “hazardous waste” and to a “foreign body.” The summary judgment also should be reversed on either or both of those grounds.

II. ASSIGNMENTS OF ERROR

1. The Pierce County Superior Court erred in granting Ketchikan Pulp Company’s (“KPC”) motion for summary judgment.
2. The Pierce County Superior Court erred in not concluding that this Court’s prior decision was the law of the case.
3. The Pierce County Superior Court erred in finding no material issues of disputed facts as to whether there was an actual conflict of law between the Washington and Alaska Statutes of Repose, whether the Alaska Statute of Repose applied, and whether plaintiff’s claims were barred under the Alaska Statute of Repose.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did this Court's opinion in the prior appeal set forth the law of the case with regard to whether plaintiff's stated a claim based on gross negligence and as to the effect of KPC's interrogatory answer referenced both in the prior 12(b)(6) dismissal and the present motion for summary judgment?
2. Did the evidence and reasonable inferences in this case, including defendant's answers to plaintiff's interrogatory and plaintiff's expert declarations raise material disputed issues of fact regarding whether any of the exceptions to the Alaska Statute of Repose apply to this case?

IV. STATEMENT OF THE CASE

A. Procedural History

On December 16, 2014, Larry Hoffman and Judith Hoffman filed their Second Amended Complaint against KPC, and other defendants. At the time they filed their Complaint, the Hoffmans were Washington State residents. Similarly, KPC was and is incorporated in Washington, and was a Washington resident during the time period of time it operated the Ketchikan Pulp Mill and Larry Hoffman was exposed to asbestos. CP 1246.

On January 16, 2015, KPC filed a Rule 56 summary judgment motion under Washington law, contending that KPC did not owe a duty to plaintiff Larry Hoffman. CP 16-27. In its papers, it argued unsuccessfully that it was not "reasonably foreseeable" that plaintiff's father, Doyle Hoffman, would bring home asbestos fibers on his work clothing from his

work at the KPC mill. *Id.* On February 23, 2015, the court denied that motion. CP 1248-49. KPC did not appeal that ruling.

On March 13, 2015, in a ruling related to a motion in limine, the Superior Court determined that “Alaska law” applies to the Hoffmans’ claims. CP 901. The Court’s order did not identify any specific conflict of law or which Alaska law applies in light of the perceived conflict. *Id.*

On March 24, 2015, approximately five days before trial was to begin, KPC’s counsel brought a 12(b)(6) motion contending that plaintiffs’ claims were barred pursuant to Alaska’s Statute of Repose. CP 902-906; CP 1039. The Superior Court entered an order granting KPC’s motion to dismiss under the Alaska Statute of Repose on March 25, 2015. CP 1268-69. Taking the March 13 and March 25 orders together, the trial court concluded that the Washington and Alaska Statutes of Repose conflict, and under choice of law principles, applied the Alaska Statute of Repose to dismiss the Hoffmans’ claims. CP 901; CP 1268-69.

Plaintiffs filed an appeal following this ruling. The issue on appeal as stated by this Court was that plaintiff “appeals the superior court’s ruling that Alaska substantive law applies to his case and its order granting ... Ketchikan’s CR 12(b)(6) motion.” CP 1170. This Court found that “Hoffman has alleged facts that, when presumed true, support recovery under a gross negligence theory.” CP 1173. Thus, this Court came to the

conclusion that, assuming the facts alleged to be true, there was no necessary conflict of law and that the trial court erred in applying Alaska law to ban plaintiff's claim. *See* CP 1174.

Furthermore, this Court, while reviewing the evidence in the case, noted that with regards to KPC there was some testimony in the record that tended to establish that a fact finder could find that KPC was grossly negligent by failing to sufficiently protect Larry Hoffman from asbestos hazards. *Id.* This Court made that conclusion in part based upon a response to a special interrogatory by KPC wherein it contended that is was well documented in the 1950s that work with asbestos-containing thermal insulation was potentially hazardous. *Id.*

Following, this Court's ruling in August of 2016 in this matter, Defendant KPC sought a petition for review to the Washington Supreme Court. That petition for review was denied on February 8, 2017. *Hoffman v. Gen. Elec. Co.*, 187 Wn.2d 1010, 388 P.3d 489 (2017).

Larry Hoffman succumbed to his disease on February 25, 2017. On August 17, 2017, the plaintiffs/appellants in this action filed their third Amended Complaint alleging a cause of action for wrongful death under Washington law. Less than sixty days after having been served with plaintiffs' third amended Complaint, and prior to any additional factual or expert discovery being taken, Defendant KPC filed its motion for

summary judgment. CP 985-1005. Defendant KPC's motion was premised on the contention that Plaintiff would not be able to prove that it was "grossly negligent" under the Alaska Statute of Repose. *Id.* at 996-1001. It further contended that the other potential exceptions to the Alaska Statute of Repose, including the hazardous waste exception, and the undisclosed presence of a foreign body exception did not apply. *Id.* at 991-996.

That motion came for hearing before Pierce County Superior Court the Hon. Susan Serko on November 3, 2017. Judge Serko ultimately found that there was a conflict of law between the Washington and Alaska statute of repose, and ultimately decided that the Alaska Statute of Repose barred plaintiffs claim, and thus granted defendant's motion. Judge Serko's Order, as well as her decision on the record never explains why, with the evidence in front of her, she felt that there was not a question of fact as to whether defendant KPC had been grossly negligent. Similarly, her opinion and order are silent on why the hazardous waste exception and/or the foreign body exception to the Alaska Statute of Repose did not apply. CP 1451; 1452-55.

The Hoffman heirs filed a timely Notice of Appeal and Supplemental Notice of Appeal on November 30, 2017 and December 6, 2017. CP. 1456; 1459.

B. Factual Background

Defendant KPC has admitted that it was “well documented” by the 1950s that working with asbestos-containing products was potentially dangerous to your health. CP 1192; 1386. Larry Hoffman’s father, Doyle Hoffman, worked as a welder and pipefitter at the KPC Mill from its opening in 1954 until 1966. CP 1356-57. Larry Hoffman testified at his deposition that his father would arrive home at the end of the day in the clothes he had worn to work, would play with Mr. Hoffman and his brother, and sit on the couch, while still dressed in his work clothing. CP 1357-58. Doyle Hoffman’s work clothing would have been washed at home by Larry Hoffman’s mother, and Larry Hoffman himself sometimes carried the laundry basket of dirty clothes to the garage. CP 1358; 229; 235. Mr. Hoffman also remembers that his father drove the family car to and from work each day; the same car which was used by the family on weekends. CP 1357.

Another former employee of KPC, Monte Guymon, was deposed in this case, and also submitted a declaration in opposition to KPC’s prior rule 56 motion. CP 782-815; 167-169. Mr. Guymon worked at the Ketchikan Pulp Mill from 1958 to approximately 1995 (CP 698; 788; 800); he started as a machinist and later became the mill superintendent. *Id.* Mr. Guymon managed a crew consisting of workers in various trades,

including welders. *Id.* Mr. Guymon worked directly with Mr. Doyle Hoffman during the 1960s. CP 786-87.

Mr. Guymon stated at his deposition and in a filed declaration that as a welder, Doyle Hoffman's duties included the removal of insulation from steam piping to get to valves, steam traps, and other worksites. CP 787; CP 761. The steam piping in the mill was insulated with asbestos. CP 791-92; 699. The process of sweeping up the area, which welders such as Doyle Hoffman would have participated in, also created a tremendous amount of dust. CP 789; 699. By the end of a work shift, a welder's clothing would have been covered in asbestos dust. CP 700.

Plaintiff's response to KPC's summary judgment also attached the declaration, report, and excerpts from the deposition of William M. Ewing, a Certified Industrial Hygienist, who reviewed Mr. Hoffman's case for potential exposure to asbestos. CP 1271-76. In his declaration, Mr. Ewing opines that take-home exposure is well recognized as a pathway of asbestos exposure in the industrial hygiene community. *Id.* at 1274. Mr. Ewing discusses several studies focused on evaluating levels of asbestos dust that may be carried home by workers, particularly on levels of asbestos dust which may be carried on clothing. *Id.* at 1274-76. During his deposition, Mr. Ewing stated that in his opinion the take-home exposure on Doyle Hoffman's clothing, person, and in his vehicle

from Doyle Hoffman's employment at the Ketchikan Pulp Mill resulted in a "significant" exposure to asbestos for his son, Larry Hoffman. CP 1304-05.

Plaintiff also attached the declaration of Barry Horn, M.D., filed originally in opposition to KPC's original motion for summary judgment. CP 1340-44. Dr. Horn is board certified in pulmonary medicine and internal medicine. *Id.* at 1340. He currently practices at Alta Bates Medical Center, in Berkeley, California where he practices pulmonary medicine and critical care. *Id.* As part of his practice, he has diagnosed people with malignancies involving the lung and pleura, including mesothelioma. *Id.* Dr. Horn has diagnosed and treated numerous individuals with mesothelioma. *Id.* at 1341. Dr. Horn, based on his experience and review of the literature, is of the opinion that even very small doses of asbestos can cause mesothelioma, and that there is no known threshold of exposure to asbestos below which one is not at risk for the development of mesothelioma. *Id.* at 1343. Dr. Horn ultimately opined that Mr. Hoffman was exposed to asbestos fibers at levels above background levels from the asbestos fibers brought home on the dirty

work clothes and person of his father while working at the Ketchikan Pulp Mill. *Id.*¹

V. SUMMARY OF ARGUMENT

As with the prior appeal in this case, this appeal turns on the correctness of KPC's argument that there is an actual conflict of law between Washington and Alaska law and, therefore, Alaska law must apply. To prove that an actual conflict exists, KPC must demonstrate that application of the Washington and Alaska statutes of repose would produce different results for Ms. Hoffman's claims.

This Court set forth applicable legal principles in *Hoffman v. Gen. Elec. Co.*, 195 Wn. App. 1037 (2016) (2016 WL 4248865, *3) (CP 1171), holding:

A. LEGAL PRINCIPLES

When a party raises a conflict of law issue in a personal injury case, we apply the following analytical framework to determine which law applies: (1) identify an actual conflict of substantive law; (2) if there is an actual conflict of substantive law, apply the most significant relationship test to determine which State's substantive law applies to the case or, if there is no actual conflict, apply the presumptive law of the forum; (3) then, if applicable, apply the chosen substantive law's statute of limitations. *Woodward v. Taylor*, 184 Wn.2d 911, 917, 366 P.3d 432 (2016).

¹ Plaintiff also submitted the Declaration of Barry Castleman, discussed, *infra*, at pp. 21-22.

Under the first step, we must identify an actual conflict of law. *FutureSelect*, 180 Wn.2d at 967. An actual conflict of law exists where the result of an issue is different under the laws of the interested States. *Woodward*, 184 Wn.2d at 918. If there is no actual conflict, the local law of the forum applies and the court does not reach the most significant relationship test. *Woodward*, 184 Wn.2d at 918.²

KPC cannot demonstrate an actual conflict because there are at least disputed material issues of fact as to whether statutes preserve the Hoffmans' claims. All parties agree that the Washington Statute of Repose does not bar plaintiff's claims.³ There are disputed material issues of fact as to whether multiple provisions of the Alaska Statute of Repose preserve her claims.

² This discussion of legal principle, *inter alia*, demonstrates the flaw in KPC's argument to the Superior Court in the November 3, 2017 hearing at TR 21 when KPC's counsel argued:

There is a clear conflict of law. The Court of Appeals did -- if there was no conflict of law, why would the Court of Appeals even address the Alaska statute? If they were going to adopt the Washington statute, the Washington law as governing the case, there would be no need for them to discuss the Alaska statute at all. (Emphasis added.)

That argument misunderstands this Court's analysis of relevant legal principles quoted above, which requires consideration of both Alaska and Washington laws.

³ For example, as KPS acknowledged at p. 6 of its prior Response Brief to this Court in this case that the "applicable Washington statute of repose applies only to construction related claims and does not protect premises owners from liability." (Emphasis added.) Page 10 of the same Response Brief similarly admitted that the "Washington statute of repose does not preclude Mr. Hoffman's cause of action against Ketchikan Pulp Company. The Alaska statute of repose unequivocally does unless one of the enumerated exceptions apply." (Emphasis added.)

VI. ARGUMENT

A. This Court Should Review *De Novo* The 2017 Summary Judgment Order.

This Court reviews summary judgment *de novo*. *LaCoursiere v. Cam West Development, Inc.*, 181 Wn.2d 734, 740, 339 P.3d 963 (2014); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 569-70, 157 P.3d 406 (2007). Furthermore, in reviewing KPC's motion and Ms. Hoffman's response, the Court must view all facts and make all inferences from those facts in favor of the non-moving party; in this instance, plaintiff. *LaCoursiere*, 181 Wn.2d at 740, *Wilson v. Steinbach*, 98 Wn.2d 434,437, 656 P.2d 1030 (1982). A court may grant summary judgment only if reasonable persons could reach but one conclusion. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992); *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

B. Applicable Choice Of Law Principles Support Plaintiff's Position.

Unless a conflict of laws actually exists, Washington courts presumptively apply the law of the forum, here Washington law, to a claim filed in a Washington court by Washington residents, such as the Hoffmans. *See Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 210, 875 P.2d 1213 (1994) (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01, 864 P.2d 937 (1994)). A mere difference in laws does not establish a

conflict. The competing state laws must present an “actual conflict,” *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007) (quoting *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997)). An actual conflict requires that “the result of the issues is different under the law of the two states.” *Seizer*, 132 Wn.2d at 648-49 (citation omitted) (emphasis added);⁴ *see also Erwin*, 161 Wn.2d at 692 (citation omitted). If the laws are different but do not produce a different “result,” the difference is a “false conflict” and presumptively the court applies forum law. *Erwin*, 161 Wn.2d at 692 (citation omitted). As detailed below, the Washington and Alaska statutes of repose do not conflict because, for summary judgment purposes, they do not produce a different “result.” Both laws preserve the Hoffman’s claims. Thus, the Washington Statute of Repose presumptively applies to the Hoffmans’ claims, and does not bar them, which requires reversal.

⁴ Defendant’s summary judgment motion at p.6 (CP 990) agreed that an “actual conflict exists where the result of an issue is different under the law of the interested states citing *Seizer*. *Id.*

C. This Court’s Prior Decision (That Hoffman Has Alleged Facts That, When Viewed As True, Could Support A Conclusion That Neither Washington Nor Alaska’s Statute Of Repose Bar Hoffman’s Claims) Constitutes The Law Of The Case.

Despite KPC’s rhetorical flourish asserting that this Court’s prior decision was only applicable in some “fantasy world,”⁵ KPC’s motion in the trial court acknowledged (1) that this Court’s decision in *Hoffman v. Gen. Elec. Co.*, 195 Wn. App. 1037 (2016) found that plaintiff’s complaint “could be read as stating a possible cause of action for gross negligence.” CP 985 and (2) that under the “CR 12(b)(6) standard, the appellate court determined that Mr. Hoffman’s hypothetical facts, when presumed true, could enable him to recover under a gross negligence theory. CP 1416.

This Court’s opinion in *Hoffman* at *6-7 (CP 1174) lays its analysis out with reference to specific “testimony in the record” that it presumed true for purposes of that appeal. That testimony “tends to establish that [KPC] may have known of the dangers of asbestos in the 1950’s.” This Court then concluded that:

Thus, Hoffman has at least alleged facts that, if presumed true, establish that a fact finder could find that Ketchikan was grossly negligent by failing to sufficiently protect him from the asbestos hazard if Ketchikan itself knew of the danger. We hold that the superior court erred by dismissing Hoffman’s claims against GE and Ketchikan on this second

⁵ At CP 1414, Ketchikan argued that the “Court of Appeals held that under CR 12(b)(6) Plaintiff’s Complaint alleged facts that might, in some fantasy world, constitute gross negligence. We are not in the Court of Appeals fantasy world now.” (Footnote omitted).

basis because we conclude Hoffman has alleged facts that, if presumed true, could support application of the gross negligence exception. Because Hoffman has alleged facts that, if presumed true, show that the exception would apply, his suit is arguably not barred by Alaska's statute of repose. Under these facts there would be no conflict of laws.

In conclusion, Hoffman has alleged facts that, when viewed as true, could support a conclusion that neither Washington's law nor Alaska's statute of repose bar Hoffman's claims. Thus, Hoffman has shown, at least under the CR 12(b)(6) standard, that there may be no conflict of law and, therefore, the trial court erred by dismissing his claim on the basis that a conflict of law existed and that Alaska law barred his claim. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Id. at pp. *6-7 (emphasis added).

Folsom v. Cty. of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196

(1988) explained that the law of the case doctrine means that:

Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal.

It is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause. The Supreme Court is bound by its decision on the first appeal until such time as it might be authoritatively overruled.

Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965) (citations omitted); *Greene v. Rothschild*, 68 Wn.2d 1, 7, 402 P.2d 356, 414 P.2d 1013 (1965). (Emphasis added.)

The law of the case doctrine also applies to arguments that were necessarily decided in the prior decision. *Matter of Estate of Langeland v. Drown*, 195 Wn. App. 74, 83, 380 P.3d 573 (2016) held:

We previously held that “[a]s a matter of law, Boone failed to overcome the joint property presumption with respect to all three contested probate assets”—the business, house, and sailboat. In doing so, we necessarily rejected the arguments Boone advances now, that the separate property agreement prevented Drown and Langeland from accumulating any joint property and that the alleged house agreement gave them separate interests in the house. Thus, we “actually decided” the issues Boone now raises again. (Emphasis added; footnotes omitted.)

1. The Law Of the Case Applies To This Court’s Prior Ruling Regarding Plaintiff’s Complaint.

As recognized by KPC, this Court necessarily found that plaintiff’s complaint “could be read as stating a possible cause of action for gross negligence.” CP 985. While defendant argues at CP 1415 that RAP 2.5(c) changed the “law of the case doctrine” so that the “doctrine has no application to this case,” that argument misreads Washington law interpreting that doctrine. Defendant at CP 1415 cites *Folsom, supra*, when arguing that the RAP limits the law of the case doctrine, but fails to point out that those limitations only apply when the prior ruling was “clearly erroneous” or “authoritatively overruled”:

Reconsideration of an identical legal issue in a subsequent appeal of the same case will be granted where the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice.

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are “authoritatively overruled.” Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

(Citations omitted.) *Greene*, 68 Wn.2d at 10, 402 P.2d 356, 414 P.2d 1013. (Emphasis added.)

Folsom, at 264. *See also Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005).⁶ There has not been a change in intervening precedent on the issue of whether plaintiff’s complaint could be read to raise a claim of gross negligence. Nor is there any sound basis for a finding that this Court’s prior decision is “clearly erroneous” and would work a “manifest injustice” to any party.

⁶ *Roberson* stated at p. 42:

First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. *See, e.g., First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.*, 108 Wn.2d 324, 333, 738 P.2d 263 (1987). This commonsense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error.

Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal. *See* RAP 2.5(c)(2) (authorizing appellate courts to review prior decisions on the basis of the law “at the time of the later review.”). (Emphasis added.)

2. The Law Of the Case Also Applies To the Reasonable Inferences From KPC's Interrogatory Answer Relating to Its Gross Negligence.

The same is true as to this Court's conclusion that the inference it discussed relating to Ketchikan's interrogatory answer, if presumed true, would "establish that a fact finder could find that Ketchikan was grossly negligent by failing to sufficiently protect him [Hoffman] from the asbestos hazard if Ketchikan itself knew of the danger." The present motion was brought under CR 56, and under the gross negligence exception to the Alaska Statute of Repose requires that the plaintiff produce evidence of "gross negligence." Defendant's argument appears to be that the 12(b)(6) standard (which this Court utilized in the prior appeal), and the CR 56 standard are so different as to make this Court's prior conclusion inapplicable and thus "clearly erroneous" when applied to the subsequent summary judgment hearing. CP 1414. What defendant's argument ignores is that the "testimony in the record that tends to establish that it [KPC] may have known of the dangers of asbestos in the 1950's" was "Ketchikan's answer to an interrogatory." 195 Wn. App. 1037.

(CP 1174). That is the same interrogatory answer submitted by KPC in the present motion. CP 1192.⁷

The only material differences between the CR 12(b)(6) and the CR 56 standards in Washington are that in the 12(b)(6) context as articulated by defendant:

[A] complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery.” *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 963 (1988). The Court of Appeals assumed all Plaintiff’s facts to be true, even hypothetical facts, as is required under a CR 12(b)(6) analysis, and *on that basis alone* determined that Mr. Hoffman had alleged facts which could possibly support the conclusion that the gross negligent exception applied to Plaintiff’s claim.

CP 998-99 (italic emphasis in original). That is not a material difference in this case because the actual evidence in the Interrogatory Answer submitted by both parties in the summary judgment is essentially identical to the answer discussed in this Court’s prior opinion. As such, there is no reason that the law of the case would not apply.

⁷ That interrogatory provided:

INTERROGATORY NO. 18:

If your answer to the previous interrogatory was anything other than an unqualified “no,” state the facts that support your content your contention.

RESPONSE:

The fact that working with asbestos containing thermal insulation products was potentially hazardous was well documented in the literature promulgated by the pipefitters union to its members, dating back to the late 1950’s. (Emphasis added.)

Significantly, there is no material difference in the way evidence is viewed under both CR 12(b)(6) and CR 56. Both the assumed facts under 12(b)(6) and the actual evidence under CR 56 are viewed in favor of the non-moving party and judgment against the non-moving party should only be entered if no reasonable jury could support the claim. *Compare LaCoursiere* and *Allen* cited above with respect to CR 56 with *Tabingo v. Am. Triumph LLC*, 188 Wn.2d 41, 45, 391 P.3d 434 (2017); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978), with respect to CR 12(b)(6).⁸

D. Summary Judgment Should Be Reversed Under the Gross Negligence Exception Even Assuming The Law Of The Case Does Not Apply.

Even assuming that the law of the case doctrine does not apply, the trial court's summary judgment should be reversed because there are material disputed issues of fact as to whether the gross negligence

⁸ As an alternative argument, plaintiff notes that in the most recent summary judgment motion Defendant contended that this Court's prior ruling did not apply, since that ruling was determined on a 12(b)(6) standard, and not on a Rule 56 standard. However, the appellate courts are clear that the question is not whether the exact issue was raised, but rather, whether the defendant had the opportunity to raise it. *Matter of Estate of Langeland v. Drown*, 195 Wn.App. at 82. Here, there is no question that defendant KPC had an ample opportunity to bring a Rule 56 summary judgment motion with regards to choice of law, but, instead filed a Rule 12(b)(6) motion. KPC had the opportunity to file a CR 56 motion on this issue prior to the trial because it brought its 12(b)(6) motion on the eve of trial, after extensive factual and expert discovery. Indeed KPC filed a summary judgment motion in January 2015. The fact that KPC could have brought a Rule 56 motion for summary judgment previously is especially apparent given that its 2017 motion cites no new evidence or legal issues, and just rehashes old arguments.

exception to the Alaska Statute of Repose bars Hoffman's claim. Since it is conceded that the Washington Statute of Repose does not bar plaintiff's claim, the existence of such a disputed issue of fact requires reversal of the summary judgment. *See Rice supra; Erwin, supra; Hoffman, supra.*

The existence of such a disputed material issue of fact is compelled by the evidence in the present summary judgment. Both defendant and plaintiff submitted the same interrogatory answer referred to by this Court in its opinion. CP 1174. A reasonable jury could have interpreted this interrogatory answer in the same way that this Court held that a jury could have so interpreted it, e.g., *Hoffman*, 195 Wn. App. 1037 at *6-7 (CP 1174).⁹

Plaintiff also submitted evidence to the trial court not considered by this Court in its earlier opinion. For example, plaintiff submitted a declaration by Barry Castleman, Sc.D. That declaration at CP 284-285 concluded after extensive discussion and citation that:

1. Based on my studies and research, I have formed the following conclusions.

....

(c) ... in the 1950s it was knowable or known that implementing certain industrial hygiene practices, including but not limited to educating workers about the risks of asbestos exposure, providing separate lockers for

⁹ While *Hoffman* was not published, the reasoning in *Hoffman* may appropriately be referenced pursuant to GR 14.1, for its persuasive value.

street clothes and work clothes, and requiring workers exposed to asbestos dust to shower and change clothing before returning home, would reduce or eliminate exposures to family members. It was foreseeable that such practices could potentially prevent disease from occurring among those family members. Such practices would have been part of a prudent industrial hygiene program for workers who handled asbestos as of the mid-1950s.

(d) Given the fact that lethal asbestos-related disease has been well known and documented in medical, industrial, and insurance circles since at least the 1940s, it is my opinion that the risk to bystanders of disease from exposure to asbestos was reasonably foreseeable by 1964. Furthermore, it is my opinion that companies using asbestos should have understood that precautionary measures should have been taken to protect their workers and their workers' family members from the hazards of asbestos. These precautionary measures should have included most importantly educating their workers about the hazards of asbestos.

CP 285 (emphasis added). In determining whether a jury could reasonably find gross negligence, the evidence from Drs. Castleman and Horn, and Messrs. Ewing, Hoffman, and Guymon, should be evaluated together with the reasonable inferences from the KPC interrogatory answer.

Based on all of that evidence, a jury could reasonably find that KPC negligently dealt with a hazard it knew to exist. A jury could reasonably conclude that was an extreme departure from the failure to use ordinary care or failure to take precautions to cope with a possible or probable danger or a "major departure from the standard of care," the two definitions cited by KPC both at CP 997-98 (2015); CP 1240-41 (2017).

Failing to take precaution about a known danger – as opposed to a “should have known” danger is an accepted basis for finding gross negligence rather than simple negligence. See, e.g., *Bader v. State*, 43 Wn. App. 22, 716 P.2d 925 (1986); *Nist v. Tudor*, 67 Wn.2d 322, 330, 407 P.2d 798 (1965), and *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), which all support a gross negligence claim herein. For example, *Kelley v. State*, 104 Wn. App. 328, 337, 17 P.3d 1189 (2000), this Court examined both *Bader* and *Nist* and explained that:

In each, the defendant knew of the impending danger and failed to take appropriate action. In *Bader*, the treatment center failed to report that Roseberry was violating the conditions of his release even though it knew that Roseberry had missed several appointments, was not taking his medication, and was exhibiting paranoid behavior. And in *Nist*, Tudor knew there was a truck coming and turned in front of it anyway because she failed to realize its speed.¹⁰

¹⁰ *Peterson* also involved actual knowledge of a potential danger. In *Lennox v. Lourdes Health Network*, 195 Wn. App. 1003 (Div. 3 2016) at #14, the court explained *Petersen* as follows:

In *Petersen v. State*, Larry Knox, while under the influence of drugs, sped through a red light, hitting and injuring Cynthia Petersen. Earlier, while at Western State Hospital, Knox was diagnosed as having a schizophrenic reaction to the use of "angel dust." His treating physician knew that he was potentially dangerous, that he disliked taking prescribed medication, and that he was likely to relapse. Nonetheless, the physician chose not to petition the court for commitment and released him. Five days after release from Western State Hospital, Knox drove into Petersen. Based on these facts, the court affirmed a jury finding of gross negligence. Though the court decided *Petersen* before enactment of RCW 71.05 .120, gross negligence was the applicable standard because Petersen presented no expert testimony. (Emphasis added.)

The facts herein similarly would support a jury finding of gross negligence, much as was recognized in this Court's prior decision.

E. Alaska Law Calls For Interpreting The Statute Of Repose, Including Its Exceptions, In A Way To Avoid The Serious Due Process Issue Raised By A Law That, If Interpreted As KPC Argues, Would Prevent Access To The Courts For Essentially All Mesothelioma Claims Against KPC.

Plaintiff and KPC agree that unless one or more of the statutory exceptions apply, the 10-year statute of repose would present an insurmountable barrier to the Alaska courthouse doors for most, if not all persons seeking redress for injury or death caused by an asbestos-related disease. KPC, in its earlier appeal to this Court explicitly acknowledged this:

Appellants argue that the trial court reading of the Alaska statute of repose must be incorrect because such a reading would foreclose most personal injury suits based on asbestos exposure under Alaska law. Appellants are exactly correct. A simple Lexis Nexus or Westlaw search of "asbestos" in Alaska law reveals not a single personal injury asbestos lawsuit in the state court outside the context of workmen's compensation. (Emphasis added.)

Ketchikan's Response Brief dated 9/8/15 in *Hoffman v. Alaskan Copper Co., Inc., et al.*, Div. II No. 47439-5-II, P.G. KPC then argued that "the result Appellants decry is precisely the result mandated by the Alaska Supreme Court." *Id.*

In opposing summary judgment being appealed herein, plaintiff argued at CP 1240 that the statute of repose should be interpreted to avoid

conflict with the “constitutional right of access to the courts.” Plaintiff argued:

Given the minimum 10 year latency period for the mesothelioma to appear, excluding application of the tolling provision to asbestos would effectively bar all mesothelioma cases and erect a direct and “insurmountable barrier” to the courthouse doors for all persons suffering from an asbestos-caused mesothelioma. Such a limitation on the tolling provision violates the constitutional “right of access” to courts and there is nothing in the statute or legislative history that the legislature intended such a harsh result. As such, the Court should apply the tolling provision to the instant case.¹¹

Opinions in Washington and throughout the United States agree on the long latency period for asbestos-related mesothelioma. That latency period far exceeds the 10 years during which non-exempted lawsuits are permitted under the Alaska Statute of Repose. For example, this Court in *Walston v. Boeing Co.*, 173 Wn. App. 271, 278, 294 P.3d 759 (2013) discussed Dr. Brodtkin’s testimony that:

The “time between exposure and development of illness is called the ‘latent period:’” CP at 2850. Asbestos-related diseases have a prolonged latent period, often decades. For mesothelioma, an average latency may be 35 years. The “latency is one of sub-clinical effects, where there is injury to the DNA, tumor initiation and tumor promotion” but “[i]t’s not until the ... change in the behavior of the cells, and the development of a clinically apparent tumor, that

¹¹ Plaintiff also previously explained to this Court that it is well-established that the minimum latency period for asbestos related cancer exceeds 15 years and usually is well over 30 years for mesothelioma. Brief of Appellants Larry and Judith Hoffman, p. 14.

one gets the clinical illness, ... and usually diagnoses are obtained at that time.” CP at 2850. (Emphasis added.)

There appears to be little, if any, serious dispute on those issues in numerous appellate opinions, including that asbestos exposure in the 10 years preceding a mesothelioma diagnosis is likely unrelated to that disease.¹² Under KPC’s interpretation of Alaska law, a person contracting

¹² See, e.g., *Zimko v. Am. Cyanamid*, 905 So. 2d 465, 471, n.2 (La. Ct. App. 2005):

Dr. Victor Roggli, Mrs. Zimko’s expert pathologist, identified the pertinent period during which Kenneth Zimko was potentially exposed to asbestos at the Domino plant as from 1977 to 1990. Dr. Roggli explained that given the latency period of mesothelioma, he would exclude backwards ten years from the date of diagnosis (in this case 2000) in identifying potential causative exposures to asbestos. (Emphasis added.)

In Tisco Intermountain v. Indus. Comm’n of Utah, 744 P.2d 1340, 1342 (Utah 1987), the Utah Supreme Court similarly held:

The medical issues were submitted to a medical panel, which concluded that the delay between first exposure to asbestos and the development of malignant mesothelioma can range from fifteen to twenty years. Any latency period less than fifteen years would cast doubt on the relationship of the disease to a particular occupational or environmental exposure. (Emphasis added);

In the course of holding that work-related mesothelioma were not excluded from the tort system by the Pennsylvania Workers Compensation Act, the Pennsylvania Supreme Court stated in *Tooley v. AK Steel Corp.*, 623 Pa. 60, 80, 81 A.3d 851, 863 (2013):

[T]he average latency period for mesothelioma is 30 to 50 years. See *Daley v. A.W. Chesterton, Inc.*, 614 Pa. 335, 37 A.3d 1175, 1188 (2012). Even mesothelioma that manifests at the lower end of this average will not occur for decades following an employee’s exposure to asbestos. Thus, Section 301(c)(2)’s 300–week time window [approximately 6 years] operates as a de facto exclusion of coverage under the [Workers Compensation] Act for essentially all mesothelioma claims.⁵ (Emphasis added);

The Ohio Supreme Court in *State ex rel. Liposchak v. Indus. Comm.*, 73 Ohio St. 3d 194, 196, 652 N.E.2d 753, 755 (1995), explained that mesothelioma, at a minimum, has a

mesothelioma caused by KPC's negligence would never have access to court's to recover for their consequent injury and death.

An interpretation of Alaska's Statute of Repose that precludes essentially all mesothelioma claims against KPC from being resolved by the court system would raise serious constitutional issues. The statute of

latency period of twenty-five to thirty years as that latency periods of up to forty years are not uncommon).

The Oregon Supreme Court in *Beneficiaries of Estate of Strametz v. Spectrum Motorwerks, Inc.*, 325 Or. 439, 443, 939 P.2d 617 (1997) affirmed a decision in which no possible liability was found for asbestos exposure within 10 years of the mesothelioma diagnosis stating:

Dr. Dobrow, claimant's treating physician and the only medical witness to testify regarding causation, testified that mesothelioma has a minimum latency period of 10 years. The Board found that the asbestos exposure that caused the mesothelioma must have occurred before 1980. That led the Board to conclude that it was impossible for any Oregon employment to have caused claimant's mesothelioma and the Board affirmed employer's denial." *Strametz*, 135 Or.App. at 69-70, 897 P.2d 335. (Emphasis added);

The District Court in *Stearns v. Metro. Life Ins. Co.*, CV 15-13490-RWZ, 2018 WL 1610539, at *4 (D. Mass. Mar. 30, 2018), relied, *inter alia*, on a decision from the Massachusetts Appeals Court, in distinguishing another Massachusetts case involving the statute of repose in a non-asbestos context:

The same is categorically untrue of asbestos exposure, whose effects will rarely, if ever, appear within the six-year window deemed sufficient for ordinary personal injury claims. *See Morin v. AutoZone Northeast, Inc.*, 943 N.E.2d at 499 n.9 ("The latency period for asbestosis-induced mesothelioma is long, with a mean value of 30 to 40 years." (quoting Churg & Green, *Pathology of Occupational Lung Disease* 350 (2d ed. 1998)))

Congress has also adopted legislation recognizing the "latency period of mesothelioma." *See, e.g., Barraford v. T & N Ltd.*, 778 F.3d 258, 260 (1st Cir. 2015) (A personal injury trust is a special tool authorized by Congress for dealing with the long latency period of mesothelioma. *See* 11 U.S.C. § 524(g); *See also In re Federal-Mogul Global Inc.*, 684 F.3d 355, 357-59 (3d Cir.2012)). If the asbestos exposure due to KPC was less than 10 years from diagnosis, that exposure would not have been causative. If, as here, the asbestos exposure was more than 10 years before diagnosis, the statute of repose would bar the claim unless one of the exceptions applied.

repose, therefore, should be interpreted to avoid those serious constitutional issues. This statutory interpretation argument is well-supported under controlling Alaska law. Alaska law provides a state constitutional right to access to the courts. In *Sands ex rel. Sands v. Green*, 156 P.3d 1130, 1134 (Alaska 2007), the Alaska Supreme court held that due process includes a right of access to the courts and that right is “ordinarily implicated” when a legislative enactment “erects a direct and insurmountable barrier in front of the courthouse doors.”¹³ Alaska law also calls for rejecting a statutory construction that would involve “serious constitutional difficulties,” if there is an alternative interpretation that avoids those difficulties. *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974), held:

¹³ *Sands* held:

In *Bush v. Reid*, we recognized that *the due process clause of the Alaska Constitution* contains within it a “right of access” to the courts.¹³ Although this right of access “may not be a fundamental right ... [it] is an important one.”¹⁴ Our case law has clarified that this important right is more expansive than that provided by the federal constitution and applies to suits for property, but is ordinarily implicated only when a legislative enactment or governmental action erects a direct and “insurmountable barrier” in front of the courthouse doors.¹⁵ Thus, in *Bush* we held that parolees’ right of access was unconstitutionally burdened by a statute barring them from filing suit during their period of probation.¹⁶ On the other hand, in *In re K.A.H.*, we held that plaintiffs’ right of access was not unconstitutionally burdened by a rule prohibiting their lawyers from loaning them money for living expenses since that rule did not prohibit plaintiffs from filing suit.¹⁷ (Emphasis added; footnotes omitted.)

When one construction of an initiative would involve serious constitutional difficulties, that construction should be rejected if an alternative interpretation would render the initiative constitutionally permissible. (Emphasis added.)¹⁴

Both *Bush* and *Sands* shed considerable light on the relevant statutory interpretation issue, which is whether defendant's interpretation of the statute of repose would involve "serious constitutional difficulties" that would be avoided by the alternative interpretation advocated by plaintiff. *Sands* is particularly instructive because the dissent there echoes KPC's position in relying on the statute of repose. The dissent argued that there was no constitutional problem in denying court access to the claims of a group of people, i.e., minors under 8 years of age, who, through no fault of their own, were unable to file a claim within the legislatively prescribed period.¹⁵ The majority in *Sands*, however, held at p. 1136 that:

¹⁴ In *Hammond v. Hoffbeck*, 627 P.2d 1052, 1059 (Alaska 1981), the court similarly held:

[W]e must, when possible, construe statutory provisions in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm. See 2A C. Sands, Sutherland Statutory Construction s 45.11 (4th ed. 1973); *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974). (Emphasis added.)

¹⁵ At 1137, the dissent argues "because the Sandses do not suggest that the statute of repose is unconstitutional, their challenge to subsection .140(c) should be rejected," and disagrees with the majorities' holding, which was that:

Although the court's opinion acknowledges that the state has "legitimate" interests in preventing the litigation of stale claims, encouraging self reliance, and reducing the cost of insurance, the court's opinion holds that these interests are not "weighty enough to justify depriving minors of access to the courts."

Id.

We therefore conclude that when subsection .140(c) forecloses a minor’s personal injury claim because his or her parents or guardians have failed to timely file suit it violates that minor’s procedural due process right of access to the courts. (Emphasis added.)

The majority’s analysis in *Sands*¹⁶ applies even more strongly to persons like plaintiff because neither they nor anyone else can decide when they will be diagnosed with asbestos-related mesothelioma, and all of those affected would be barred by the statute of repose. *Sands* thus supports plaintiff’s position that there are serious constitutional issues regarding the statute of repose in the context of mesothelioma. Those serious constitutional issues, however, would be resolved by plaintiff’s proposed interpretation of the statutory exceptions discussed *infra* (the “hazardous waste” and “foreign body” exceptions).

F. The Alaska Statute Of Repose Preserves Plaintiff’s Claims Because Mr. Hoffman’s Personal Injury And Death Resulted From Prolonged Exposure to Hazardous Waste.

The Alaska Statute of Repose preserves claims based on “prolonged exposure to hazardous waste.” While the statute does not define “hazardous waste,” the legislature’s history supports a broad interpretation. The sponsor of the bill, Representative Porter, explained that he could not think of a reason to distinguish hazardous “waste” from

¹⁶ E.g., “but matters of fate and fortune are not surmountable barriers, and having parents or guardians who are unwilling or unable to timely file suit is not something a minor can overcome.” *Sands*, 156 P.3d at 1135.

hazardous “material” under the new law. Appendix A (Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997), No. 1184);¹⁷ Appendix B (Minutes, S. Fin. Hearing on H.B. 58, 20th Leg., 1st Sess. (Apr. 11, 1997), SFC #101, Side 1).

The most logical reading of AS 09.10.055’s preservation of claims for injuries resulting from “prolonged exposure to hazardous waste” is that it preserves Larry Hoffman’s claim for personal injury and death caused by his “prolonged exposure to” hazardous asbestos dust that he was exposed to from his father in the 1954 - 1966 period when he was living at home and was exposed to asbestos waste from his father’s clothes.

Asbestos dust is treated both as a “hazardous substance” and “hazardous waste” under the law. “Hazardous substance” is defined in section 101(14), 42 U.S.C. § 9601(14). That section, in turn, incorporates contaminants under both the Clean Water Act, 33 U.S.C. § 1317, and the Clean Air Act, 42 U.S.C. § 7412.¹⁸

¹⁷ Representative Porter also responded to a question about what “hazardous waste” means, by stating “[i]t was an attempt to address another concern that was raised of the more typical kinds of ‘someone’s property leached chemicals into my property, and I don’t know about it,’ those kinds of things.” *Id.* at No. 1132. Representative Porter’s reference to leaching of chemicals into groundwater indicates that the Legislature did not intend a restrictive meaning for “waste,” as the chemical release into soils and groundwater technically is not “waste” disposal, but the release of a hazardous substance into the environment the remediation of which is addressed by the federal CERCLA and counterpart state laws.

¹⁸ Asbestos is classified as a “toxic pollutant” under the Clean Water Act and a “hazardous air pollutant” under the Clean Air Act. 33 U.S.C. § 1317; 42 U.S.C. § 7412; see 40 C.F.R. Part 122, App. D, Table V (1987); 40 C.F.R. § 401.15 (1987); 40 C.F.R.

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

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

... (5) The term “hazardous waste” means a solid waste, or combination of solid wastes which because of its quantity, concentration, or physical chemical or infectious characteristics may-

- (A) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible, illness; or
- (B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

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

Id. at 697 (emphasis added).¹⁹

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

¹⁹ The court went on to explain (*id.* at 697 -99) that asbestos also qualifies as “hazardous waste” under RCRA’s alternative definition of “hazardous wastes,” which provides:

If anything, Alaska law is even more expansive in its definition of hazardous substances and hazardous wastes. 18 AAC 62.020(a) (2003) adopts by reference the federal regulations as published as 40 C.F.R. Part 261 (revised July 1, 2002) for identification and listing of hazardous wastes. In *Berg v. Popham*, 113 P.3d 604 (Alaska 2005), the Alaska Supreme Court interpreted Alaska's law paralleling CERCLA as even more inclusive and protective than CERCLA with respect to hazardous substances, *Berg*, 113 P.3d at 609. And in *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344 (Alaska 2001), the Alaska Supreme Court used the terms "hazardous substance", "hazardous waste", and "hazardous material" interchangeably in applying the same Alaska law. *FDIC*, 21 P.3d at 345, 349.

Nor is there any rational basis for distinguishing personal injuries due to "prolonged exposure to" asbestos waste from "prolonged exposure to" other hazardous wastes. To allow one group of victims of "prolonged

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

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

exposure to hazardous waste” to recover for their injuries while prohibiting another group of victims of “prolonged exposure to hazardous waste” from doing so would violate the very same equal protection principles that required the Alaska Statute of Repose to be amended in 1997. *See Turner Construction Co., Inc. v. Scales*, 752 P.2d 467 (Alaska 1988) (court held that Alaska Statute of Repose violated equal protection clause because it protected some design professionals from stale claims but not others). As discussed above, this Court also should strive to construe the Alaska Statute of Repose so as to avoid constitutional infirmities. Thus, under principles of legislative interpretation and logic, Mr. Hoffman’s claims are preserved under AS 09.10.055(b)(1)(A).²⁰

²⁰ The sole authority for the illogical conclusion that “prolonged exposure to” asbestos waste dust does not preserve a victim’s claims under AS 9.10.055 is the intermediate Texas appellate decision in *Gilcrease v. Tesoro Petro. Corp.*, 70 S.W.3d 265 (Tex. Ct. App. 2001). That decision has no controlling effect here, it has not been endorsed by the Alaska Supreme Court, and, with due respect, it is poorly reasoned and wrong.

In *Gilcrease*, the court held that the phrase “hazardous waste” must refer to “solid waste,” but not “air contamination,” because of Representative Porter’s statement that “[i]t was an attempt to address another concern that was raised of the more typical kinds of ‘someone’s property leached chemicals into my property, and I don’t know about it,’ those kinds of things.” *Gilcrease*, 70 S.W.3d. at 270 (citing Floor Debates on HB. 58, Ch. 26 SLA 97, Feb. 1997, no. 1050). But Representative Porter’s reference to leaching of underground chemicals was offered only as an example of “those kind of things,” and reference to underground leaching of chemicals would not lead one logically to conclude that the Legislature was preserving claims relating solely to hazardous solid waste. Such underground chemical releases generally are in liquid form and affect groundwater more than anything else. The only substantive difference between the definition of hazardous waste under Alaska law (AS 46.03 .900(9)) and under the federal RCRA statute is that the Alaska statute omits the adjective “solid” before “waste,” squarely refuting the *Gilcrease* court’s speculation.

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

The asbestos dust in this case did not spew from a chimney, but was a byproduct of plant-floor operations, and it is the same as a whole host of other hazardous wastes that need to be disposed of and remediated.

The *Gilcrease* court's exclusion of asbestos dust because the court surmised that asbestos had to be in solid form is particularly nonsensical in the case of asbestos, because that would mean that injuries from asbestos are excluded only when asbestos is most hazardous. Indeed, regulation of the disposal of hazardous asbestos waste focuses on preventing release of particulate asbestos fibers in the air.²¹

KPC misreads federal and state law in claiming at the Superior Court level that Alaska adopted federal regulations, and that asbestos is not listed as a "hazardous waste" under those regulations. The problem with the argument is that the list KPC cites in 40 C.F.R. Part 261 is not intended to be exhaustive. 40 C.F.R. Part 261.1 (b)(2) recognizes that "[t]his part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA." (emphasis added). "A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a

²¹ The *Gilcrease* court noted that the Alaska environmental laws contain separate definitions for "air contaminants" and "hazardous wastes," id. at 270, n. 6 (citing AS 46.03.900(1) and (9)), but those definitions- on their face- are not mutually exclusive, and the cited definition of "hazardous waste" is the same language- taken from RCRA – that the Metal Trades court held included asbestos in solid, liquid, semi-solid, or ... gaseous material" form. See *Metal Trades, Inc.*, 810 F. Supp. at 697. The *Gilcrease* court also said that the Alaska legislature chose to regulate asbestos in a section entitled "Health, Safety and Housing Code" and not in the section regulating "hazardous wastes," *Gilcrease*, 70 S.W.3d at 270-71, but the *Gilcrease* court again simply misunderstood environmental regulation. It is certainly true that AS 18.31.200, regulates asbestos abatement projects in the workplace and in a residential setting, but that is not the sole extent of regulation of asbestos under Alaska law.

solid waste and a hazardous waste ... if ... [i]n the case of sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of section 1004(27) of RCRA and a hazardous waste within the meaning of section 1004(5) of RCRA . . . “40 C.F.R. Part 261.1 (b)(2) - (2)(i). As the court forcefully explained in *Metal Trades, Inc.* quoted *supra* at 32-33, asbestos fibers meet the federal and state definitions of “hazardous waste.”²² The only reason asbestos is not listed under 40 C.F.R. Part 261 is because EPA was concerned that it would create a duplicative regulatory regime by doing so. *See* 45 FR 78538 (Nov. 25, 1980).

G. The “Foreign Body” Exception Also Applies To Asbestos.

AS 09.10.055(c) provides:

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

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

²² The fact, as KPC observes (KPC Opp. at 22), that Alaska also has separate regulations for landfill disposal of asbestos and other hazardous wastes does not change Alaska’s broad definition of hazardous waste. It simply shows the regulatory need for a separate scheme for landfilling.

unrestricted in the statute, and as ordinarily defined a “foreign” body is not restricted to something introduced into the body by a doctor. For example, the definition of “foreign” in the AMERICAN HERITAGE COLLEGE DICTIONARY (3d Ed.), p. 533 includes:

4. Situated in an abnormal or improper place in the body and typically introduced from outside.

As a medical term, the phrase “foreign body,” includes asbestos fibers lodged in the lungs. See <http://medical-dictionary.thefreedictionary.com/foreign+body> (including “asbestos” as an example of a foreign body in the lungs). The medical literature is replete with references to asbestos fibers in lungs that are described as “foreign bodies.”²³

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

²³ See e.g., Hiroshi Tazawa, Masayuki Tatemichi, et al., Oxidative and nitrate stress caused by subcutaneous implantation of a foreign body accelerates sarcoma development in Trp52 mice, 28 *Carcinogenesis* 1, 196 (2007) (noting that “in foreign body-induced carcinogenesis in humans, asbestos fibers are well known to induce malignant mesotheliomas after chronic inhalation.”); David G. Kaufman, Assessment of Carcinogenicity: Generic Issues and Their Application to Diesel Exhaust in Air Pollution, the Automobile, and Public Health 524 (1988, Ann Y. Watson, et al. eds.) (“The critical property of asbestos best associated with carcinogenicity is the physical dimensions of fibers rather than the chemical composition of the asbestos[.] . . . The cellular response to asbestos fibers and other foreign bodies involves the foreign-body inflammatory reaction . . .”) (internal citations omitted); see also *Hubbs v. Anco Insulations, Inc.*, 747 So.2d 804, 807-08 (Louisiana App. Ct. 1999) (recognizing asbestos fibers as foreign bodies).

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

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

Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. at No. 1050 (Feb. 21, 1997). Representative Porter’s reference to “the old sponge left in the body after surgery” reasonably was offered only as an example of section (c)’s application, however, as he then referred to the broader language of the section.²⁴

²⁴ There are a variety of other ways other than medical negligence in which foreign bodies can come into a person’s body as a result of negligence or gross negligence, e.g., contaminated food or contaminated air. If the legislature had intended to limit this exception to medical negligence, it could and would have said so explicitly. *See, e.g.*, Cal. C.C.P. § 340.5 (toll the statute for actions “*against a health care provider*”) (emphasis added); F.S.A. §766.102 (addressed leaving a foreign body in a patient as prima facie evidence of *negligence by a health care provider*); RCW 4.16.350 (tolls *only medical malpractice actions* based on foreign bodies.”).

VII. CONCLUSION

For the foregoing reasons, the trial court's judgment should be reversed and this matter should be remanded for trial.

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