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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)

REPLY BRIEF

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I. The Parties Do Not Dispute Either The Standards For Reviewing Evidence In This Summary Judgment Or The Applicable Conflict Of Law Rules.

Alaska and Washington utilize the same standards for reviewing evidence submitted in opposition to motions for summary judgment.

Hughes v. Treadwell, 341 P.3d 1121, 1124 (Alaska Supreme Court 2015)

held:

We review a superior court's summary judgment decision de novo, reading the record in the light most favorable to, and drawing all reasonable inferences in favor of, the non-moving party.⁴ (Emphasis added.)

⁴ *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1072 (Alaska 2009) (citing *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006)).

That is the same standard this Court utilizes for summary judgment, e. g.:

We consider the evidence and the reasonable inferences from it in the light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). (Emphasis added.)

Deveny v. Hadaller, 139 Wn.App. 605, 616 P.3d 1059 (2007). *See also*

Allen v. Asbestos Corp., Ltd., 138 Wn. App. 565, 570, 157 P.3d 406

(2007) (same standard). These standards apply to this Court's review of

the evidence submitted by Ms. Hoffman ("Plaintiff"), the non-moving

party, concerning the applicability of the three exceptions to the statute of

repose at issue in this appeal. They also support plaintiff's position in this appeal.

This Court at CP 1171 laid out the proper analytical framework for the conflict of law issue on a personal injury case:

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).

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. (emphasis added.)

Citing *Seizer v. Sessions*, 132 Wn.2d 642, 649-59, 940 P.2d 261 (1997), defendant Ketchikan Pulp Company ("KPC") acknowledges at p.10 of its Response that if any of the exceptions to the Alaska Statute of repose apply to this case, there is no actual conflict of law between Alaska and Washington law.

II. The Law Of The Case Doctrine Applies To This Appeal And Supports Plaintiff’s Position Regarding The Gross Negligence Exception To The Alaska Statute Of Repose.

KPC’s Response does not dispute plaintiff’s assertion at p.14 of her Opening Brief that:

KPC's motion in the trial court acknowledged (1) that this Court's decision in *Hoffman v. Gen. Elec. Co.*, 195 Wn. App. I 037 (20 16) found that plaintiffs 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 (emphasis added). Several consequences relating to the law of the case flow from KPC’s acknowledgement. First, KPC’s argument at p.35 of its Response that “gross negligence has not been pled” is inconsistent with the law of the case, which is that plaintiff’s complaint “could be read as stating a possible cause of action for gross negligence,” which “could enable him to recover under a gross negligence theory.”

Secondly, the law of the case is that this Court in *Hoffman v. Gen. Elec. Co.*, 195 Wn. App. 1037 (2016) found that there is:

[s]ome testimony in the record that tends to establish that it may have known of the dangers of asbestos in the 1950s. Specifically, Ketchikan's answer to an interrogatory explained that it would have expected Hoffman to have had some training working with hazardous asbestos because it was well documented that work with asbestos-containing thermal insulation is potentially hazardous. This information was apparently disseminated by the pipefitters union to its members in the late 1950s.

From that evidence this Court held:

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. (Emphasis added.)

CP 1174.

Plaintiff's Opening Brief at pp.14-16 not only made that "law of the case" argument, but relied on multiple decisions¹ supporting plaintiff's position. KPC's Response neither effectively challenges plaintiff's interpretation of those decisions nor plaintiff's law of the case arguments.

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

This Court previously reversed the granting of KPC's motion to dismiss stating:

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

¹ *Adamson v. Traylor*, 66 Wn.2d 338, 402 P.2d 499 (1965); *Folsom v. Cty. of Spokane*, 111 Wn.2d 256, 759 P.2d 1196 (1988); *Greene v. Rothschild*, 68 Wn.2d 1, 414 P.2d 1013 (1966); *Matter of Estate of Langeland v. Drown*, 195 Wn. App. 74, 380 P.3d 573 (2016); *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005).

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.

CP 1174. KPC’s argument on the gross negligence exception never acknowledges that the same evidence that this Court relied upon in reversing the order of dismissal was also supplied in plaintiff’s opposition to KPC’s summary judgment motion. That can be seen from the following chart:

This Court’s Characterization Of The “Presumed” Facts	The Interrogatory Supplied By Plaintiff In Opposing Summary Judgment:
<p>Specifically, Ketchikan's answer to an interrogatory explained that it would have expected Hoffman to have had some training working with hazardous asbestos because it was well documented that work with asbestos-containing thermal insulation is potentially hazardous. This information was apparently disseminated by the pipefitters union to its members in the late 1950s.</p> <p>CP 1174.</p>	<p>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.</p> <p>KPC interrogatory answer set forth at CP 1192.</p>

Plaintiff’s Opening Brief at p.21 argued:

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

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

Nothing in KPS's Response in any way supports the position that this Court's holding or plaintiff's analyses quoted above are wrong for summary judgement purposes.

Plaintiff also supplied additional evidence opposing summary judgment not contained in the prior appeal. Plaintiff's Opening Brief at pp.21-22, for example, quoted portions of Dr. Castleman's declaration which provided additional support for plaintiff's position by stating in relevant part:

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 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.

CP 285 (emphasis added). Giving plaintiff as the non-moving party the benefit of that evidence and inferences, a jury also could reasonably conclude from that evidence that this information was "known" to KPC rather than simply "knowable" during the 1950's. Moreover, even if it was simply "knowable" (the less favorable view of the evidence), such

constructive knowledge combined with the inference of actual knowledge of risk described above would support a jury finding of gross negligence.

As this Court previously explained:

Under Alaska law, gross negligence is defined as “a major departure from the standard of care.” *Maness v. Daily*, 307 P.3d 894, 905 (Alaska 2013) (quoting *Storrs v. Lutheran Hosp. & Homes Soc. of Am., Inc.*, 661 P.2d 632, 634 (Alaska 1983)).

CP 1173. Failing to take proper precautions to protect from a known risk could reasonably be viewed as a major departure from the standard of care.

That is particularly so because KPC’s 35-page Response never disputes plaintiff’s argument at p.23 of her Opening Brief that:

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.²

KPC also fails in its attempts at pp.29-33 of its Response to characterize as “meritless” the position that a jury could find gross negligence from the evidence submitted by plaintiff. First, as this Court recognized in its prior opinion, a jury could reasonably conclude that KPC knew in the 1950’s about the dangers of asbestos because it was “well documented” that work “with asbestos-containing thermal insulation was potentially hazardous” and that such information was apparently disseminated “by the pipefitters union to its members” in “the late 1950’s.” CP 1174. That remains true for purposes of the appeal of this summary judgment order.

Secondly, KPC never quotes or even discusses Dr. Castleman’s evidence in CP 285 quoted above. Instead, at pp.30-34 of its Response, it implicitly asks this Court to discount the weight a jury may give to that evidence because other statements made by Dr. Castleman or others are supposedly inconsistent. Weighing various portions of the evidence is not permitted at the summary judgment stage. *See, e.g., O’Connell v. MacNeil Wash Sys. Ltd.*, 2 Wn.App. 2d 238, 252 (2017):

² Indeed, KPC never cites any of those cases.

MacNeil asks us to find his opinion “unconvincing,” Brief of Respondent at 14, essentially asking us to question the weight of Sloan's opinion as part of balancing the evidence, an exercise we are not permitted at the summary judgment stage. See *Nichols*, 197 Wn. App. at 498, 389 P.3d 617. With that, we conclude that Sloan's declaration creates a genuine issue of fact as to the likelihood of harm from the absence of bollards and whether MacNeil was aware of this type of danger in the car wash industry. Although Sloan's evidence is not grounded in industry custom, the genuine issues of fact that it raises are sufficient to preclude summary judgment. See *Soproni*, 137 Wn.2d at 328-29, 971 P.2d 500. (Emphasis added.)

Thirdly, the supposed inconsistencies do not exist. For example, evidence that the State of Alaska had limited knowledge about (or specified the use of) asbestos in 1971 does not mean that KPC had no such knowledge, particularly given its interrogatory answer discussed above. Similarly, contrary to KPC's purported block quote at the bottom of p.31 of its Response, Dr. Castleman never said at CP 1212 that “mesothelioma was not associated with asbestos exposure until the late 1950's.” He actually said:

The first report of pleural mesothelioma with asbestosis was made to 1943 by Wedler in Germany (62). In 1952 Cartier (63) reported 2 cases of pleural mesothelioma among Canadian chrysotile miners. Two years later Iaicher (65) reported finding a primary peritoneal tumor to an asbestos worker. By use of X-ray diffraction techniques he detected the presence of asbestos within the tumor. Bonser and co-workers (65), reporting 72 cases of asbestosis (in factory workers examined post-mortem), found 2 pleural and 4 peritoneal cancers, "the

primary site not being found to any organ".³ (Emphasis added.)

CP 1212. Dr. Castleman also stated at CP 1214 that “[a]ssociation of family or neighborhood exposure should be viewed with caution, according to Selikoff.” Given what Dr. Castleman actually said at CP 1212-14, KPC’s assertion that “Mr. Castleman’s research as of 1973 led him to inform his readers that there was no known risk of mesothelioma from take-home or environmental exposures” (Response p.32 (emphasis added)), is not the most favorable reasonable inference to be drawn from the article, e.g., assertions of family or neighborhood exposure should be viewed with caution” is hardly the same as “there is no known risk.”⁴

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

Plaintiff’s Opening Brief at p.31 argued that:

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

³ While the CP excerpt does not give a date for the Bonser article, it is 1955 and is entitled, Occupational Cancer: Of the Urinary Bladder in Dyestuffs Operatives and of the Lung in Asbestos Textile Workers and Iron-Ore Miners, Am J Clin Pathol 1955; 25, 126-134.

⁴ Similarly, contrary to KPC’s Response at p.33 concerning Dr. Selikoff’s remarks contained at CP 1217. Dr. Selikoff’s actual response was hardly limited to the term “reassuring” e.g. “I would advise, nevertheless, work clothes always be changed before going home.” *Id.* (emphasis added).

when he was living at home and was exposed to asbestos waste from his father's clothes. (Emphasis added.)

KPC argues at pp.12-14 of its Response that plaintiff's argument are inconsistent with the plain meaning on the word "waste", and the legislative history. Neither of those arguments are persuasive since plain and common meaning and legislative history support plaintiff's position.

A. Plain and Common Meaning of "Waste" and "Hazardous Waste" Supports Plaintiff's Position.

Hazardous waste is not defined in the Alaska Statute of Repose AS 09.10.055.⁵ The Alaska Supreme Court in *Arnesen v. Anchorage Refuse, Inc.*, 925 P.2d 661, 664 (Alaska 1996) held that "where a term used in a statute is not defined in that statute, 'the plain or common meaning ... is controlling.' *Tesoro*, 746 P.2d at 905." As quoted above at p.10, plaintiff's actual argument is not that Doyle Hoffman's clothes were hazardous waste. Rather, it was that he was exposed to hazardous waste from the "asbestos deposited on his father's clothes." KPC argues at p.12 that "[s]imply put, 'waste', as it is defined in the statute, is consistent with the common definition and understanding of the word. It means something intentionally discarded or released into the environment."

⁵ Contrary to defendant's argument at pp.12-13 of its Response, there is no statutory definition of "hazardous waste" in the Alaska statute of repose. 18 AAC 62.020 referred to in KPC's Response is a regulation not a statute.

Plaintiff agrees with that definition and points out that KPC also agrees “[t]hat commonly understood definition is the precise definition adopted by the Alaska legislature when it defined ‘hazardous waste’ in related statutes.” As such, KPC’s argument at p.12 that “plaintiff has presented no evidence that Mr. Doyle Hoffman’s clothing would ever qualify as “‘asbestos-containing material’ under Alaska statutes or regulations” misses the point. KPC sets up and then demolishes the “strawman” argument that waste “does not include clothing worn to work and laundered at home.” *Id.* at 12. The problem with KPC’s argument is that it misstates plaintiff’s argument, which is not that plaintiff’s father’s clothes were the hazardous waste. As can be seen from the quote at p.10, plaintiff’s actual argument quoted there is that Larry Hoffman “was exposed to hazardous waste from his father’s clothes.” (Emphasis added.) The asbestos waste came from the cutting and sweeping of asbestos-containing materials at KPC and was simply deposited onto clothes.

KPC’s Response never provides a dictionary definition of “hazardous waste.” The dictionary defines “**hazardous waste**” as “a substance, such as nuclear waste, that is potentially damaging to the environment and harmful to the health of humans and other living organisms.” AMERICAN HERITAGE DICTIONARY (3d Ed.), p.624 (emphasis

added). That is plaintiff's position. BLACK'S LAW DICTIONARY (7th Ed.), at p.1584 defines "**hazardous waste**" as:

Waste that – because of its quantity, concentration, or physical, chemical, or infectious characteristics – may cause or significantly contribute to an increase in mortality or otherwise harm human health or the environment. 42 USCA § 6903(5) – Also termed *hazardous substance*. (Emphasis added.)

Plaintiff presented evidence that Doyle Hoffman's removal of asbestos insulation and sweeping up while working at KPC contaminated Doyle Hoffman's clothes, which in turn exposed Larry Hoffman. See, e.g., the Hoffman, Guyman, Ewing, and Horn evidence cited at Plaintiff's Opening Brief at pp.7-10. This evidence shows that the clothing itself was not hazardous waste. Rather, it was "hazardous waste" on the clothing that exposed Larry Hoffman to dangerous levels of "hazardous waste" asbestos resulting in his mesothelioma.

B. Legislative Intent Also Supports Plaintiff's Position.

The best indication of legislative intent other than the dictionary definitions and analyses discussed above is the statement of Representative Porter that he could not think of a reason to distinguish hazardous "waste" from hazardous "material" as discussed at pp.30-31 of Plaintiff's Opening Brief.

V. The “Foreign Body” Exception Also Applies To Asbestos Related Injury.

Plaintiff’s Opening Brief at pp.37-38 argued that “as ordinarily defined a ‘foreign body’ is not restricted to something introduced into the body by a doctor.” Plaintiff supported this argument with dictionary definitions including one from the American Heritage Dictionary. Alaska courts use dictionary definitions from the American Heritage Dictionary to interpret a statute. *See Arnesen v. Anchorage Refuse, Inc.*, 925 P.2d at 664. KPC’s Response disputes neither plaintiff’s argument about the dictionary definitions nor that medical literature and case law often refer to asbestos fibers in the body as “foreign bodies.” *See* n.23 to Plaintiff’s Opening Brief as well as *Ambrose’s Case*, 138 N.E.2d 630, 632 (Mass. Supreme Judicial Court 1956) (equating asbestos bodies with foreign bodies); *Riverwood Int’l Corp. v. Employers Ins. of Wausau*, 420 F.3d 378, 384 (5th Cir. 2005) (“foreign body, such as an asbestos fiber”); *Barabin v. Scapa Dryer Felts, Inc.*, 2018 WL 1570781, *1 (W.D. Wash. Mar. 30, 2018) (equating asbestos fiber with “foreign body”); and *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983) (same). *See also* the affidavit

of Dr. Craighead attached as Appendix A to *Lloyd E. Mitchell, Inc. v. Maryland Cas. Co.*, 324 Md. 44, 66 (1991).⁶

KPC's only "contextual" argument at Response p.18 is that AS 09.10.055(c) tolls the 10-year statute of limitations for undiscovered foreign bodies that have "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." According to KPC, that language must mean that .055(c) only "refers to surgical instruments." *Id.* That is untrue. The plain meaning of "foreign body" includes much more than "surgical instruments. The fact that some foreign bodies have therapeutic purpose and were provided by doctors does not logically mean that all "foreign bodies" must be provided by doctors any more than it means that all foreign bodies have a therapeutic purpose. For example, stores could sell products that, when eaten or inhaled, result in undiscovered foreign bodies

⁶ Dr. Craighead stated:

This tumor appears to result from the deposition of asbestos fibers in the external lining surface of the lung. Experimental studies have shown that foreign bodies implanted under the skin of animals cause irreversible changes in tissues and cells within a relatively short period after the implant is produced. Even though these changes and injuries to tissues occur, they do not necessarily cause disease that is detectable clinically for many years after exposure to asbestos ceases. Why these disease processes exist for latent periods of 20, 30 or 40 years is not known scientifically, but latency for the development of cancer is quite common in man. (Emphasis added.)

including asbestos in a person with no therapeutic purpose and delayed harmful effects.⁷

KPC's reliance on legislative history to persuade this Court that "foreign body" only means "surgical instrument" rather than the broader meanings from dictionary definitions, and medical and legal usage also fails. Representative Porter's statement about the "sponge left in the body after surgery" quoted by KPC at pp.18-19 was an example, not a definition.⁸ Had the legislature intended § .055(c) only to apply to medical malpractice, it would have been easy to say so explicitly as did the 22 states cited by KPC at n.10 of its Response. Defendant acknowledges at n.10 that, unlike § 9.10.055, all of those 22 statutes refer to "malpractice" claims.

KPC at p.21 also acknowledges that the Alaska statute "may appear to lack the context which is consistently apparent when the legislature refers to foreign body claims, they refer to medical malpractice claims." KPC tries to argue that "the lack of a malpractice reference in the title or text of the Alaska statute" is because "Alaska is unique in that it has a general statute of repose" *Id.* at 21. That argument fails because

⁷ Another Alaska statute (AS 08.72.273) is entitled "Removal of Foreign Bodies." The term "foreign body" in that statute dealing with eye doctors is obviously not referring to "surgical instruments."

⁸ Similarly, while the legislative history quoted at pp.19-20 of the Response addressed the issue as it applies to doctors, that does not override the broader language of the Act.

this subsection (.055(c)) is not a general statute of repose. Instead, it is a specific “tolling” provision limited to foreign bodies. If .055(c) had been intended to apply only to malpractice claims involving foreign bodies, the word “malpractice” would easily have been inserted, e.g., “and the [malpractice] action is based on the presence of the foreign body.”

VI. Conclusion

For the foregoing reasons as well as the reasons set forth in Plaintiff’s Opening Brief, the Trial Court’s decision should be reversed and this case remanded for trial.

RESPECTFULLY SUBMITTED this 8th day of October, 2018

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