No. 90792-7

SUPREME COURT OF
THE STATE OF WASHINGTON

JACK DON KENNEDY and SANDRA KENNEDY

Respondents,

v.

SABERHAGEN HOLDINGS, INC.,

Petitioner.

MEMORANDUM SUPPORTING PETITION FOR REVIEW BY AMICUS WASHINGTON DEFENSE TRIAL LAWYERS

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I. INTRODUCTION

Washington Defense Trial Lawyers ("WDTL") files this memorandum in support of the petition for review filed by Saberhagen Holding, Inc. ("Saberhagen") with respect to the issue of particularity under CR 7(b)(1). Division II's decision on this issue altered the basic understanding of what is required in written motions under CR 7(b)(1). This decision threatens to limit parties' ability to avoid unnecessary trials and adds confusion to the array of standards and procedures outlined in the local rules of any given jurisdiction. There is a substantial public interest in maintaining uniformity in the interpretation and application of the requirements for written motions under CR 7(b)(1). Accordingly, WDTL respectfully requests that this Court grant review under RAP 13.4(b)(4) in order to provide a predictable and consistent statewide framework for lower courts and litigants under CR 7(b)(1).

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Established in 1962, WDTL is a statewide association of more than 750 Washington attorneys principally engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve its members through education, recognition, collegiality, professional development, and advocacy. One important way in which WDTL represents its members is through *amicus curiae* submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients. The issue of what exactly needs to be included

in a motion to be eligible for relief is of even broader substantial interest to all civil litigants—not just civil defendants, but also to plaintiffs.

III. STATEMENT OF THE CASE[1]

In the underlying proceedings, a defendant in a personal injury lawsuit involving mesothelioma sought summary judgment dismissal of the claims against it based on the plaintiffs' failure to identify sufficient evidence of exposure to or harm from the defendant's asbestos-containing product. CP 17. The trial court judge in Pierce County granted the motion and Division II of the Court of Appeals reversed. CP 950-51; *Kennedy v. Saberhagen Holdings, Inc.*, 2014 WL 3611327 at *5 (July 22, 2014). In reversing, the Court of Appeals held, in part, that the defendant failed to sufficiently raise the issue of causation with particularity as required by CR 7(b)(1). Notwithstanding the plaintiffs' failure to present any medical evidence on the issue of causation, the case was remanded for trial. The defendant, Saberhagen, has petitioned this Court for review.

IV. ARGUMENT

This Court should grant review because the concern for uniform and objective requirements and standards in written motions practice under CR 7(b)(1) is "an issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4).

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[1] WDTL incorporates Petitioner Saberhagen's "Statement of the Case." *See* Pet. at 5–9.

A. CR 7(b)(1) is of Substantial Public Interest Because it Impacts All Litigants.

The underlying Division II opinion addresses the threshold level of substance required in a dispositive motion in order to put an opponent on notice of the relief being requested under CR 7(b)(1). Division II criticized Saberhagen's motion for being "too cursory," identifying only "one issue," and providing "insufficient notice" that dismissal of plaintiffs' claims was being sought. *Kennedy*, 2014 WL 3611327 at *9. It nonetheless offers no guidance to future litigants or lower courts with regard to what more is needed to satisfy CR 7(b)(1).

Division II's interpretation of CR 7(b)(1)—*i.e.*, a rule that applies to defendants and plaintiffs—has a substantial impact on the rights and duties of moving and responding parties. By focusing on a subjective "too cursory" standard for ascertaining notice, Division II has imposed a high burden on moving parties. It is difficult to imagine what more moving parties that ask for dismissal based upon a lack of evidence could say, as the entire point of such a motion is that the opponent has no evidence. It is simply not possible for a party to delve into detail about something that, by its very nature, does not exist. At the same time, Division II has incentivized and rewarded responding parties that know (or should know) that their case is subject to dismissal yet opt not to respond with evidence to support the claims being asserted. Indeed, that appears to be precisely what happened in this instance, as plaintiffs' opposition to the defendant's motion makes quite clear at one point that plaintiffs fully understood that the motion raised the issue of proximate cause (whether Mr. Kennedy was

harmed by any exposure to a Saberhagen product), but nonetheless chose not to submit any medical causation evidence or other evidence of resulting harm. It is telling that plaintiffs specifically acknowledged in their response that Saberhagen was challenging their proof of causation. *See* CP 156.

The Division II opinion has a far-reaching impact on moving parties' rights to avoid unnecessary trials and on responding parties' rights to receive notice and be given an opportunity to respond. Although the opinion is unpublished, it is widely available[2] and serves as a resource for litigants looking for guidance on how to present a motion that includes properly raised issues that will be decided by the court. Notwithstanding the limitations of GR 14.1, some trial courts permit citation to unpublished Court of Appeals opinions, and others even actively encourage it. This is because many day-to-day issues that arise in trial courts are never addressed in published appellate opinion; although unpublished opinions are not precedent, they nonetheless are seen as containing helpful insight and are relied upon by litigants and lower courts throughout the state. In order to provide concrete guidelines for moving and responding parties, this Court should grant review of this issue of public importance.

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[2]Washington State Court unpublished opinions are available for free on the internet at www.courts.wa.gov, and at law libraries and other locations.

B. Division II's Opinion Adds New Requirements to CR 7(b)(1) Without Explaining What Parties are Required to Do.

Division II's opinion represents a significant expansion of the requirements for written motions under CR 7(b)(1). By its plain language, CR 7(b)(1) requires only that motions "shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." CR 7(b)(1). Accordingly, a trial court "may not consider grounds not stated in the motion." *Orsi v. Aetna Ins. Co.*, 41 Wn. App. 233, 246, 703 P.2d 1053 (1985). "The purpose of a motion under the civil rules is to give the other party notice of the relief sought." *Pamelin Indus. v. Sheen-U.S.A.*, 95 Wn.2d 398, 402, 622 P.2d 1270 (1981) (addressing a collateral attack on a default judgment). Rather it is sufficient to merely "state the relief sought and the grounds justifying the relief." *Id.*

Saberhagen's motion for summary judgment fulfilled the requirements of CR 7(b)(1) because it stated, numerous times, both the relief sought and the grounds justifying the relief. The very first sentence of Saberhagen's motion states the relief sought: "summary judgment dismissal." CP 17. The same sentence also identifies the particular grounds justifying relief: "plaintiffs' failure to date to identify sufficient admissible evidence showing that Jack Kennedy (hereinafter "Mr. Kennedy"), was ever actually exposed to or harmed by asbestos-containing products supplied by Saberhagen." CP 17. Under CR 7(b)(1), nothing more was required.

Despite this well-established law, Division II has indicated that CR 7(b)(1) requires something more to effectively raise an issue with

particularity. In doing so, Division II interjected a subjective (and seemingly unattainable and unknowable) standard that turns on whether an argument is either "too cursory" or is sufficient to put the responding party on notice. By focusing on the more concrete elements of relief sought and grounds justifying the relief, CR 7(b)(1) does not compel moving and responding parties to guess whether an argument raises an issue with sufficient particularity. This is because CR 7(b)(1) is concerned with notice, not argument. *See Pamelin*, 95 Wn.2d at 402. Saberhagen's motion plainly gave clear and adequate notice to plaintiffs of what was at issue in the "Relief Requested" section, including the issue of causation.[3]

C. Division II's Opinion Undermines Dispositive Motions and Will Result in Scores of Unnecessary Trials.

If Division II's opinion declining to dismiss plaintiffs' case (despite there being no evidence whatsoever to support it) is allowed to stand, it is difficult to imagine how any "no evidence" summary judgment motion could succeed. Dispositive motions further the laudable objectives of avoiding unnecessary trials and protracted litigation. A party has the right to move for summary judgment on the grounds that the other party lacks evidence to establish a *prima facie* case or claim. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 447 U.S. 317, 325 (1986)). These "no

[3] The "Relief Requested" section of the motion stated as follows: "Defendant ... seeks summary judgment dismissal based upon plaintiffs' failure to date to identify sufficient admissible evidence that Jack Kennedy ... was ever actually exposed to or harmed by asbestos-containing products supplied by Saberhagen or its alleged predecessors." CP 17.

evidence" summary judgment motions are a vital tool in promoting judicial economy by avoiding the unnecessary time and resources of trial when no genuine issue of material fact exists. *See id.* Further, "no evidence" summary judgment motions are not just utilized by defendants, but are also frequently brought by plaintiffs to dismiss counterclaims or affirmative defenses. *See, e.g., Bellevue Pac. Ctr. Ltd. P'ship v. Bellevue Pac. Tower Condo. Owners Ass'n*, 171 Wn. App. 499, 516-17, 287 P.3d 639 (2012) (upholding summary judgment dismissal of counterclaims and affirmative defenses because record contained no supporting evidence).

Division II's opinion, however, threatens the continued validity of "no evidence" summary judgment motions because it mandates substantive argument where none is practical. In a "no evidence" summary judgment motion a movant satisfies its initial burden by merely pointing to a lack of evidence supporting a material element of the nonmovant's claim. *Young*, 112 Wn.2d at 225 n.1. This initial showing is inherently cursory because the movant's entire basis for seeking summary judgment is that there is *nothing to argue* over. Thus, the Court of Appeals' new requirement that additional substantive argument is required under CR 7(b)(1) renders typical "no evidence" summary judgment motions unworkable.

Division II's opinion also impedes several other dispositive motions that entail similar "no evidence" standards. Specifically, motions to dismiss under CR 12(b)(6) and motions to strike an insufficient defense under CR 12(f) can both be premised on a lack of underlying factual

allegations. In such instances, a movant is entitled to dismissal "if it appears beyond a doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995). Thus, a movant effectively raises this issue in its motion by merely stating the lack of factual allegations or otherwise provable facts to sustain the underlying claim or defense—again, an inherently cursory exercise. Unless the notions set forth in the opinion are addressed by this Court, dispositive motions will be undermined, leading to scores of unnecessary trials.

D. Division II's Opinion Undermines and Adds Confusion to Local Rules.

Finally, Division II's opinion adds confusion to the already complex array of requirements imposed under local civil rules across the state. The Court criticized Saberhagen for failing to expressly identify the specific causation issue in the "Issue Presented" section of its motion, and relied upon this so-called omission as proof that the issue was never properly raised. This signals to future litigants that any grounds for dismissal must be expressly articulated in an "Issue Presented" section of summary judgment motions lest they run afoul of CR 7(b)(1)'s particularity requirement.

It is significant that neither the statewide rules nor the governing local rules in Pierce County requires that an "Issue Presented" section be included in a motion. *See* CR 7(b)(1); Pierce County Local Rule 7(a)(11), 10(e). Although counties such as King and Snohomish have local rules

that expressly require an "Issue Presented" or "Statement of Issues" section, most counties' local rules have no such requirement or are silent on the issue. *See* King County Local Civil Rule 7(b)(5)(B)(iii); Snohomish County Local Civil Rule 7(b)(D); *see also* Spokane County Local Civil Rules 7, 10, 56.

The attention devoted to the language included—or not included—in an optional "issue" section in the Division II opinion raises concerns about whether "Statement of Issues" sections are now required for all summary judgment motions despite no uniform requirement under the various local rules. In order to provide moving parties with assurances that they will not be penalized for following the local rules that apply in each county, and provide uniformity, predictability, and fairness, this Court should grant review and issue an opinion that instructs lower courts and litigants what exactly needs to be included in such a motion.

V. CONCLUSION

For the reasons set forth above, WDTL respectfully requests that this Court grant review under RAP 13.4(b)(4) in order to consider how to provide a predictable and consistent statewide framework for lower courts and litigants under CR 7(b)(1).

RESPECTFULLY SUBMITTED this 21st day of November, 2014.

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DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 21st day of November, 2014, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing MEMORANDUM SUPPORTING PETITION FOR REVIEW BY AMICUS WASHINGTON DEFENSE TRIAL LAWYERS. I also served copies of said document on the following parties as indicated below:

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

Executed at Seattle, Washington, this 21st day of November, 2014.

Dava Bowzer, Legal Assistant to
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Subject: No. 90792-7 - Kennedy v. Saberhagen Holdings - WDTL Amicus Memo in Support of Petition for Review

Attached for filing in Case No. 90792-7, Kennedy v. Saberhagen Holdings, Inc., please find a Memorandum Supporting Petition for Review by Amicus Washington Defense Trial Lawyers (WDTL). WDTL's application to file an amicus curiae brief was filed with this Court on September 30, 2014.

The attached document is filed by Melissa O'Loughlin White, phone: (206) 373-7240, WSBA No. 27668, email: mwhite@cozen.com.

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