No. 90792-7

SUPREME COURT OF
THE STATE OF WASHINGTON

JACK DON KENNEDY and SANDRA KENNEDY,

Plaintiffs,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant.

PLAINTIFFS KENNEDY'S ANSWER TO MEMORANDUM OF AMICUS WASHINGTON DEFENSE TRIAL LAWYERS

Matthew P. Bergman, WSBA 20894
Vanessa J. Finhaber Osland, WSBA 38252
Bergman Draper Ladenburg, PLLC
614 First Avenue, Fourth Floor
Seattle, WA 98104
(206) 957-9510

John W. Phillips, WSBA 12185
Phillips Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
(206) 382-6163

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Amicus Washington Defense Trial Lawyers ("WDTL") claims that this Court should review the unpublished Court of Appeals' decision to ensure a "predictable and consistent statewide framework" for application CR 7(b)(1). Such a "predictable and consistent statewide framework" already exists. A party seeking summary judgment is required to identify the issue or issues that it wants the Court to decide as a matter of law so that his adversary may respond to the issues presented. Summary judgment has never been an appropriate vehicle for surprise or trickery. The Court of Appeals' decision fully embraces this principle, and WDTL fails completely to provide a persuasive basis for reviewing the Court of Appeals' unpublished decision.

II. STATEMENT OF THE CASE

On July 6, 2012, Saberhagen moved for summary judgment, raising solely the question of whether Mr. Kennedy had evidence that he had been *exposed* to asbestos for which Saberhagen was responsible. CP 17-32. Saberhagen framed the sole issue for summary judgment thus:

III. ISSUE PRESENTED

> Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?"

CP 22. Saberhagen then proceeded to argue exclusively about the

alleged absence of evidence of exposure to Saberhagen's asbestos. CP 18-27. Not once did Saberhagen address the medical causation testimony that had been developed in the case. WDTL thus misrepresents the record in stating that Saberhagen moved for summary judgment based on the absence of "exposure" evidence and "medical causation" evidence. WDTL Amicus at 2.

Kennedy responded to that motion on July 23, 2012, detailing his evidence of exposure to asbestos for which Saberhagen is responsible. CP 136-72. On reply, Saberhagen then claimed that Kennedy had failed to present medical evidence of causation as an alternative basis for affirming summary judgment.

The Court of Appeals held that the Superior Court erred in granting summary judgment on the basis of exposure:

> Kennedy's summary judgment evidence is sufficient to raise an inference that Saberhagen's products were used by Tacoma Boat and at their worksites during the 1960s when Kennedy worked for the Washington Army National Guard. Further, the evidence is sufficient to raise an inference that Kennedy had exposure to those products. Accordingly, the trial court erred by granting summary judgment in favor of Saberhagen on the exposure issue because a genuine issue of material fact exists as to whether Kennedy was exposed to Saberhagen's products.

Kennedy v. Saberhagen Holdings, Inc., 2014 WL 3611327 (July 22,

2014) at *5. With respect to Saberhagen's assertion on reply that Kennedy lacked evidence of medical causation, the Court of Appeals held that Saberhagen's motion was not based on medical causation but on the alleged absence of evidence that Kennedy was exposed to asbestos for which Saberhagen was responsible. The Court noted that "[o]ur holding here does not prohibit Saberhagen from moving the trial court for summary judgment on issues not relating to exposure." 2014 WL 3611327 at *5, n. 4. Thus, WDTL again misrepresents the record by stating that the Court of Appeals "remanded for trial," erroneously suggesting that Saberhagen was precluded from seeking summary judgment on medical causation if it believed it had a basis for doing so.

IV. ARGUMENT

A. WDTL Cannot Meet the High Standard for Granting a Petition for Review.

WDTL supports review solely under RAP 13.4(b)(4), where "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." WDTL suggests that there is a "substantial public interest" in reviewing the Court of Appeals' decision to ensure a "predictable and consistent statewide framework" for application of CR 7(b)(1). As detailed below, such a "predictable and consistent statewide framework" already exists.

Parties moving for summary judgment are required to identify the factual and legal issues they seek to raise on summary judgment and may not augment those issues on reply, giving the opponent no opportunity to meet that belated challenge. The Court of Appeals' decision is entirely consistent with that principle and thus does not invite review.

B. The Court of Appeals Correctly Held That Saberhagen Did Not Assert on Summary Judgment That Kennedy Lacked Evidence off Medical Causation.

Because the Court of Appeals' conclusion that Saberhagen's summary judgment motion focused exclusively on the alleged absence of exposure is both brief and sound, the Kennedys simply repeat it here:

> Saberhagen argues that Kennedy raised no issue of material fact regarding whether exposure to Saberhagen's product caused him injury. Kennedy argues that Saberhagen did not sufficiently raise this issue in the trial court. We agree with Kennedy.
>
> Every motion made to the trial court "must specify the grounds and relief sought 'with particularity', and courts may not consider grounds not stated in the motion." *Orsi v. Aetna Ins. Co.*, 41 Wn.App. 233, 247, 703 P.2d 1053 (1985) (citations omitted). Specifically, "CR 7(b)(1) requires that a motion 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.' "*Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 402, 622 P.2d 1270 (1981). "The purpose of a motion under the civil rules is to give the other party notice of the *relief sought.*" *Pamelin*, 95 Wn.2d at 402.

> Saberhagen identified one issue on summary judgment: "Where plaintiffs will be unable to introduce evidence at trial that Mr. Kennedy was ever exposed to asbestos-containing products supplied by Saberhagen or its alleged predecessors, should plaintiffs' claims against Saberhagen be dismissed?" CP at 22. And while Saberhagen did make cursory mention in its summary judgment motion that Kennedy failed to identify sufficient admissible evidence to show his harm was caused by asbestos containing products supplied by Saberhagen, it did not particularly identify this issue in its motion. Saberhagen's motion was clearly focused on exposure, arguing that Kennedy could not prove he was exposed to Saberhagen's product. Saberhagen merely mentioned the words "harmed by" or "causing his illness" without providing argument on the causation issue. Our reading of Saberhagen's motion is supported by the fact the trial court ruled only on the exposure issue: "The primary issue in this case is the issue of alleged exposure that Mr. Kennedy experienced while working at the National Guard Marine Facility" and concluding Kennedy failed to present sufficient evidence of exposure. CP at 950.
>
> Here, the mere mention of the words "harmed by" or "causing his injury" was insufficient to raise the issue of causation with particularity. Saberhagen provided insufficient notice to the other party that causation was one of the grounds for the relief sought.[4] Accordingly, we reviewed summary judgment only for sufficiency of evidence as to Kennedy's exposure to asbestos products from Saberhagen and its predecessors.

2014 WL 3611327 at *5.

On the record before it, the Court of Appeals was plainly correct. Saberhagen's entire motion was based on its assertion that Tacoma Asbestos (Saberhagen's predecessor) was never present at

Pier 23 when Mr. Kennedy worked there in the mid-1960's. CP 18-25. It offered no attack on the sufficiency of Kennedy's medical causation expert testimony. Accordingly, the Kennedys responded to Saberhagen's motion by detailing all the evidence that placed Tacoma Asbestos at Pier 23, detailing the circumstantial evidence that Mr. Kennedy was exposed on multiple occasions on Pier 23 to asbestos for which Tacoma Asbestos bears responsibility. CP 136-57.

WDTL suggests that Kennedy knew that Saberhagen had challenged Kennedy's expert medical causation testimony in its summary judgment motion, but that is untrue. Because Saberhagen did not challenge Kennedy's medical causation testimony, Kennedy did not introduce his expert medical causation testimony. In responding to the motion, Kennedy noted only in the context of Saberhagen's challenge to the "exposure" evidence that many Washington appellate courts had found similar circumstantial evidence of exposure sufficient to overcome summary judgment under the factors detailed in *Lockwood v. AC&S*, 109 Wn.2d 235, 744 P.2d 605 (1987).

In a similar procedural context, the court in *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 810 P.2d 4 (1991) rejected an attempt by the party moving for summary judgment to inject of new issues on reply:

> It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.

Id. at 168-69. The court noted that this rule is similar to the principle that a party cannot inject new issues in its reply brief on appeal. *Id.* The entire point of *White* and the civil rules (see CR 7(b)(1) and CR 56(c)) is that a non-moving party should have an opportunity to respond to the summary judgment argument pressed by his opponent.

This Court ruled similarly in *R. D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 969 P.2d 458 (1999), where the Court reversed summary judgment for Merrill that was based on plaintiff's failure to present evidence of Merrill's non-use, even though plaintiff had the burden of proof to show Merrill's alleged abandonment and relinquishment of water rights, where Merrill did not focus on non-

use in its summary judgment motion. This Court rejected Merrill's argument that non-use was implicit in its request for summary judgment on plaintiff's abandonment and relinquishment claims. The logic and fairness of this Court's decision in *R. D. Merrill* is mirrored in the Court of Appeals' decision.

WDTL next says that the "Issues Presented" section is not a requirement, and that if a defendant must present *all* issues on which it seeks summary judgment in the "Issues Presented" section, such a requirement would trip up defendants. What is so difficult about identifying all the issues on which a party seeks a ruling as a matter of law in the "Issues Presented" section of its motion? Whether or not required, the "Issues Presented" section is what adversaries and the Court first read in order to frame the debate. Because the "Issues Presented" section mentioned only alleged lack of "exposure" evidence, a passing reference in the motion to the fact that Kennedy allegedly would not be able to prove that he was caused harm by Saberhagen, is in fact "too cursory" and oblique to signal that Saberhagen was trying to re-write the "Issues Presented" section of its Motion into one challenging both "exposure" and "medical causation" evidence. A lack of evidence of exposure, would, *a fortiori*, mean that Saberhagen had not caused harm. Thus, reference to "harm" does not signal a shift away from the singular focus of the motion on "exposure." If Saberhagen intended to challenge

Kennedy's medical causation testimony, it should have addressed that testimony. It did not.

WDTL asks rhetorically what else could Saberhagen have said in its motion? The answer is really quite simple. It could have and should have said that the record reflects a complete absence of evidence of asbestos exposure with which Saberhagen could be tagged, and that as to any possible such exposure, Kennedy's medical causation expert testimony was insufficient to raise a material issue of fact that such exposure caused him injury. What is so hard about that?

Finally, WDTL also suggests that the Court of Appeals' unpublished ruling somehow motivates litigants to sand-bag with their medical causation evidence. WDTL postulates no plausible motivation for such hypothesized conduct. Before summary judgmente, Kennedy had disclosed medical causation experts who had been deposed and could easily have raised a material issue of fact regarding medical causation. What leverage would Kennedy obtain by delaying in doing so? It certainly would not mean that Kennedy could sail through to trial, as the Court of Appeals invited further summary judgment practice if Saberhagen actually believes it can overcome Kennedy's expert medical causation testimony and obtain summary judgment.

In short, CR 7(b)(1) requires movants to identify with particularity the basis for their motion, so that adversaries can meet

the specific challenge made. Motions should be based on the law and the evidence, not on surprise or trickery.

V. CONCLUSION

For the reasons stated above and in response to Saberhagen's Petition for Review, this Court should deny Saberhagen's Petition for Review.

DATED this 16th day of December, 2014.

Respectfully submitted,

BERGMAN DRAPER LADENBURG, PLLC

By: _____
Matthew P. Bergman, WSBA 20894
Vanessa J. Firnhaber Oslund, WSBA 38252

PHILLIPS LAW GROUP, PLLC

By: _____
John W. Phillips, WSBA 12185

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that today I served via email a true and correct copy of the foregoing document upon:

Timothy K. Thorson
Michael B. King
Christine D. Sanders
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
thorson@carneylaw.com
king@carneylaw.com

Melissa O. White
Megan K. Kirk
Ryan J.P. Dyer
COZEN O'CONNOR
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
mwhite@cozen.com
mkirk@cozen.com
rdyer@cozen.com

Stewart A. Estes
KEATING, BUCKLIN & McCORMACK, Inc.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104-3175
sestes@kbmlawyers.com

DATED at Seattle, Washington this 16th day December, 2014.

Kimm Harrison

OFFICE RECEPTIONIST, CLERK

To: Kimmberly Harrison
Cc: John Phillips; thorson@carneylaw.com; king@carneylaw.com; mwhite@cozen.com; mkirk@cozen.com; rdyer@cozen.com; sestes@kbmlawyers.com; vanessa@bergmanlegal.com; matt@bergmanlegal.com
Subject: RE: Kennedy v. Saberhagen - No. 90792-7

Received 12-16-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kimmberly Harrison [mailto:kharrison@jphillipslaw.com]
Sent: Tuesday, December 16, 2014 10:00 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: John Phillips; thorson@carneylaw.com; king@carneylaw.com; mwhite@cozen.com; mkirk@cozen.com; rdyer@cozen.com; sestes@kbmlawyers.com; vanessa@bergmanlegal.com; matt@bergmanlegal.com
Subject: Kennedy v. Saberhagen - No. 90792-7

Supreme Court Clerk:

Per your office's instructions, attached for filing is Plaintiffs Kennedy's Answer to Memorandum of Amicus Washington Defense Trial Lawyers, that is due today, December 16, 2014 per Commissioner Narda Pierce's letter dated December 4, 2014.

Thank you.

Kimm Harrison
Legal Assistant/Office Manager to John W. Phillips

Phillips Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, Washington 98104-2682
Tel: (206) 382-6163
Direct: (206) 382-1058

kharrison@jphillipslaw.com
www.jphillipslaw.com