90792-7

No. ~~88518-4~~

SUPREME COURT OF
THE STATE OF WASHINGTON

43941-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JACK DON KENNEDY and SANDRA KENNEDY,

Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Defendant-Respondent.

RESPONSE TO RESPONDENT'S PETITION FOR REVIEW

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-Appellants

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I. INTRODUCTION

This Court already has denied discretionary review of Defendant Saberhagen Holdings, Inc. ("Saberhagen") argument that the Court of Appeals erred in failing to dismiss the plaintiff Kennedys' ("Plaintiff" or "Kennedys") appeal as allegedly untimely. *See Kennedy v. Saberhagen Holdings, Inc.*, No. 88518-4, Ruling Denying Review (August 7, 2013). Appendix G to Petition. Saberhagen has given the Court no reason to change its mind or to demonstrate that the Court of Appeals' Commissioner, the Court of Appeals' Panel or Commissioner Goff were wrong in concluding that the Kennedys' appeal was timely under *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983). Indeed, Saberhagen does nothing more than cut-and-paste arguments that those tribunals have soundly rejected.

Finally, Saberhagen asks this Court to accept review, because it claims that even though Saberhagen's summary judgment motion focused solely on the alleged absence of evidence that Mr. Kennedy was exposed to any asbestos fibers for which Saberhagen's predecessor – Tacoma Asbestos – was responsible, the Kennedys should have anticipated the need to present expert testimony that the

allegedly non-existent exposure caused Mr. Kennedy's disease. The Court of Appeals reasonably held that Saberhagen's summary judgment motion focused solely on the alleged absence of "exposure" evidence, the Kennedys responded to that motion by presenting evidence regarding Tacoma Asbestos' responsibility for Mr. Kennedy's asbestos exposure, and that Saberhagen did not squarely raise the question of medical causation until it filed its reply brief, giving the Kennedys no opportunity to present medical causation testimony, which they could have done. Nothing about the Court of Appeals' unpublished opinion raises a question of "substantial public interest" that justifies this Court's review.

II. ISSUE

Should the Court deny Saberhagen's Petition for Review, because the Court of Appeals' decision is sound, and Saberhagen fails to demonstrate how the two issues it raises involve matters of "substantial public interest"?

III. 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 that Tacoma Asbestos worked

on or supplied. CP 17-32. Saberhagen framed the sole issue for summary judgment thus:

"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. 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 August 3, 2012, the Superior Court granted Saberhagen's motion for summary judgment. CP 950-51. The summary judgment order was defective because it did not identify any documents or evidence relied upon by the Superior Court (*id.*), as required by CR 56(h), which provides that any order granting summary judgment "***shall*** designate the documents and other evidence called to the attention of the trial court before the order was entered." CR 56(h) (emphasis added).

On August 10, 2012, Saberhagen made a timely written request to the superior court to amend the defective summary judgment order by identifying the documents and evidence on which

the court relied, as required by CR 56(h). Appendix C to Petition. The request was accompanied by a proposed order.

On August 31, 2012, the superior court signed the parties' proposed amended judgment. In its August 31, 2012 order, the court specifically "incorporated herein" the August 3, 2012, summary judgment order. CP 1083-84 and Appendix C to Petition.

On September 13, 2012, less than two weeks after the superior court amended its summary judgment order, Plaintiffs filed their notice of appeal. Appendix D to Petition. The Court of Appeals' Commissioner denied Saberhagen's motion to dismiss Plaintiffs' appeal as untimely on November 6, 2012. Appendix E to Petition. The Court of Appeals denied Saberhagen's Motion to Modify on February 6, 2013. Appendix F to Petition. This Court denied Saberhagen's Motion for Discretionary Review on August 7, 2013. *Kennedy v. Saberhagen Holdings, Inc.*, No. 88518-4, Ruling Denying Review. Appendix G to Petition.

IV. ARGUMENT

A. The Standard for Granting a Petition for Review is High.

Saberhagen seeks 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." This criterion is the most often invoked and least often justified by litigants filing petitions for review before this Court. Other than invoking RAP 13.4(b)(4), Saberhagen does nothing to demonstrate how it can meet the "substantial public interest" test. It cannot do so.

B. The Kennedys' Appeal Was Timely, and Saberhagen's Arguments to the Contrary Do Not Present an Issue of "Substantial Public Interest."

1. Commissioner Goff and the Court of Appeals Correctly Concluded the Kennedys' Appeal Was Timely.

As Commissioner Goff reasoned the first time this Court rejected discretionary review of the Court of Appeals' conclusion that the Kennedys' appeal was timely:

> *Structurals Northwest*[*, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983)] say[s] that substance should control . . . . While the amendment in *Structurals Northwest* clarified the amount due each party, the amendment here clarified the documents relied upon by the court in granting summary judgment. Thus, the August 31, 2012, order was an amended final judgment, and Saberhagen does not contend otherwise. Neither CR 59(h) nor *Structurals Northwest* suggests that the amendment has to change the substance of the judgment, and it is not even clear that the amended judgment in *Structurals Northwest* did anything but clarify the original judgment. By entering the amended judgment on August 31, 2012, in response to Saberhagen's August 10, 2012, timely written request filed with the consent of Plaintiffs, the superior court in effect granted a motion to amend the judgment under CR 59(h).

> Thus, under RAP 5.2(e) Plaintiffs' notice of appeal was timely filed within 30 days after entry of the amended judgment in response to Saberhagen's timely August 10, 2012, written request to amend the judgment.

Ruling Denying Review, Case No. 88518-4, at 3 (Appendix G). Thus, Commissioner Goff concluded not only that the Court of Appeals did not commit "obvious error" in finding the Kennedys' appeal timely, but that the Court of Appeals' analysis was correct. There is simply no substantial public interest in reviewing the Court of Appeals' appropriate application of *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983), in holding that the Kennedys' appeal was timely.

In *Structurals*, the trial court entered judgment on November 13, and on November 18, counsel for the parties stipulated that an amended judgment should be entered. 33 Wn. App. at 713. The court entered the amended judgment on November 23, and appellant filed its notice of appeal on December 17. *Id.* Respondent argued that appellant had not timely appealed the November 13 judgment. *Id.*

The *Structurals* Court disagreed. It held that "[w]hile the stipulation allowing entry of the amended judgment was technically

not a motion for amended judgment brought under CR 59, we note that in all practical effect the result is the same as if such a motion had been made and granted." *Structurals*, 33 Wn. App. at 714. The Court noted that the rules "are designed to 'allow some flexibility in order to avoid harsh results'; substance is preferred over form." *Id.* (quoting *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982)). The Court treated the November 23 amended judgment as having been entered pursuant to a timely motion to amend under CR 59(h), and held that the appeal within 30 days of the amended judgment was timely.

The holding of *Structurals* applies with full force here. Plaintiffs' notice of appeal was filed less than two weeks after the amended judgment – entered in response to Saberhagen's August 10, 2012, timely written request that the Court amend its judgment. As in *Structurals*, the ***effect*** of the trial court's August 31, 2012 amended judgment was a ruling on a CR 59(h) motion, one of the civil motions denominated in RAP 5.2(e). The effect of the August 31, 2012, amended judgment is the same as if one of the RAP 5.2(e) motions "had been made and granted," *Structurals*, 33 Wn. App. at

714, and Plaintiffs' appeal from that amended judgment less than two weeks later was therefore timely.

Saberhagen argues that it did not file a formal motion but simply sent a timely letter to the superior court requesting amendment of the summary judgment order. But in *Structurals,* the parties also did not file a motion, but submitted a stipulation within the time allotted for CR 59 motions. In both cases, the parties stipulated to the amended judgment. Saberhagen protests that it did not "file" its letter requesting the court to amend its judgment, but there is no question that the letter and proposed amended order was sent to the court with a request for judicial action. It plainly was "equivalent," within the meaning of *Structurals*, to a CR 59(h) motion. Saberhagen says that here there was no substantive change in the order, but the same was true in *Structurals*, as noted by Commissioner Goff, as the agreed changes simply clarified the court's original order, and a CR 59(h) motion does not require that the party request substantive changes.[1]

[1] Saberhagen asserts in a footnote (Petition at 14, n. 9) that some federal decisions have required a substantive change in the judgment to qualify as a Rule 59 motion. Nothing in the language of CR 59 compels such a

Both *Structurals* and the Court of Appeals' ruling here were animated by the unfairness of, on the one hand, the parties timely agreeing to an amended order and, on the other hand, having one of the parties use that agreement as a basis for later sabotaging the appeal.

Saberhagen has failed to demonstrate that three different tribunals – the Court of Appeals' Commissioner, the Court of Appeals' Panel, and Commissioner Goff of this Court -- erred in concluding that the Kennedys' appeal was timely, or that their unanimity raises an issue of substantial public interest.

2. Saberhagen's Authorities Are Not on Point.

Saberhagen argues that *Nestegard v. Investment Exchange Corp.*, 5 Wn. App. 618, 489 P.2d 1142 (1971), demonstrates that the Court of Appeals committed obvious error, but *Nestegard* obviously is not on point. Unlike *Structurals*, *Nestegard* pre-dates the Washington Rules of Appellate Procedure (originally effective on July 1, 1976), and, in particular, pre-dates RAP 1.2(a)'s instruction that the appellate rules shall "be liberally interpreted to promote

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conclusion, and if it did, then *Structurals* itself would have been wrongly decided.

justice and facilitate the decision of cases on the merits." RAP 1.2(a). Since the adoption of RAP 1.2(a) in 1976, and as reflected in *Structurals*, Washington courts have permitted the timely appeal of an amended order if the amended order results from a timely request (within 10 days of the court's first order) that the order be amended, no matter how the request is denominated.

Moreover, *Nestegard* did not even involve a timely request by the parties to amend the judgment, as was the case here and in *Structurals*. Instead, *Nestegard* involved the appearance of new counsel three months after a summary judgment was entered, who then sought and obtained from the court findings of fact and conclusions of law relating to the prior summary judgment. By then, the time to move to amend or to appeal had long since lapsed. The Court ruled that a party cannot manufacture a new appeal period by obtaining another court order long after the time to appeal has expired. That did not happen here. The Kennedys filed their notice of appeal 13 days after the court ruled on the parties' timely request that the court amend its order to add the evidentiary detail required by CR 56(h).

Next, Saberhagen cites *Wlasiuk v. Whilrpool Corp.*, 76 Wn. App. 250, 884 P.2d 13 (1994), but that case also is plainly distinguishable. In *Wlasiuk*, the appellant did not file a notice of appeal within 30 days of denial of a timely motion for reconsideration. Instead, the appellant filed the notice of appeal within 30 days of a later order granting attorney fees. *Wlasiuk*, 76 Wn. App. at 252. Motions for attorney fees are not one of the motions denominated in RAP 5.2(e) that extends the time for appeal. The court in *Wlasiuk* noted that while the appellant chose to denote its order as an "amended judgment," the order plainly was only an order awarding attorney fees, which under RAP 5.2(e), does not extend the time for appeal. *Wslasiuk*, 76 Wn. App. at 256-57. Indeed, the Rules of Appellate Procedure specifically address attorney fee orders and provide that "appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits." RAP 2.4(g). There is simply no question that when RAP 2.4(g) and RAP 5.2(e) are read together, a post-judgment order on attorney fees does not extend the time for appeal. This case is not remotely similar. Saberhagen timely asked the superior court to

amend its judgment by detailing the evidence and pleadings upon which it relied, the Kennedys' agreed with Saberhagen's request, and the request was plainly equivalent to a CR 59(h) motion, which *is* one of the motions listed in RAP 5.2(e) that extends the time for appeal.

As the court in *Structurals* observed, the Rules of Appellate Procedure "were designed to 'allow some flexibility in order to avoid harsh results." *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982). The "trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form." *Weeks*, 96 Wn.2d at 896 (quoting *First Federal Savings & Loan Ass'n v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979)). Under that standard, the Kennedys timely appealed within two weeks of the Superior Court's amended summary judgment order, entered upon the timely request of Saberhagen.

C. The Court of Appeals Did Not Err in Concluding that Saberhagen Did Not Squarely Raise the Issue of Medical Causation on Summary Judgment.

Because the Court of Appeals' conclusion that 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 insists that its motion was a "typical 'no evidence'" motion, but the motion actually asserted only that there was "no evidence" of Mr. Kennedy's exposure to asbestos for which Tacoma Asbestos was responsible. As Saberhagen put it, the motion asserted that the sole issue was whether "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." CP 22. Its entire motion was based on its assertion that Tacoma Asbestos was never present at Pier 23 when Mr. Kennedy worked there in the mid-1960's. 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.

Saberhagen seizes on the occasional use in its motion of the terms "harmed by" and "causing his injury," but such terms are consistent with the "no exposure" focus of Saberhagen's motion: The absence of exposure would mean that Mr. Kennedy was not "harmed by" or "caused injury" by asbestos for which Tacoma Asbestos was responsible. In its Motion, Saberhagen developed no argument that the Kennedys could not prove medical causation even if they were able to present evidence of exposure. Saberhagen itself presented no expert testimony on medical causation, because the entire burden of its argument was that Tacoma Asbestos was nowhere near Pier 23, and it cited only record evidence in support of its argument that Mr. Kennedy was not exposed to asbestos for which Tacoma Asbestos is responsible.

Saberhagen quotes a passage in its summary judgment motion to the effect that the Kennedys would be unable to present evidence that exposure to Tacoma Asbestos products or activity "contributed to

the development of his illness," but the passage is preceded by the motion's sole and fundamental tenet that the Kennedys' "will be unable to offer any admissible evidence showing that Mr. Kennedy was ever exposed to asbestos containing products installed or supplied by Tacoma Asbestos." CP 22. Saberhagen seized upon medical causation only in its reply papers.

Saberhagen cites *Bendix v. Davis*, 82 Wn. App. 267, 271, 917 P.2d 586 (1996), *disapproved on other grounds in McIndoe v. Dept of Labor and Industries*, 144 Wn2d 252, 263, 26 P.3d 903 (2001), but that court affirmed summary judgment because the movant "specifically argued that Davis failed to present expert testimony establishing a reduction in earnings capacity during the aggravation period." That is precisely what Saberhagen did not do in its summary judgment motion, instead focusing exclusively on the absence of exposure, a challenge the Kennedys then met.

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 in rebuttal:

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* applies here, and demonstrates that Saberhagen has not raised a question of "substantial public interest."

V. CONCLUSION

For the foregoing reasons, this Court should deny Saberhagen's Petition for Review.

DATED this 17th day of October, 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-Appellants

CERTIFICATE OF SERVICE

I certify that today I caused to be served 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

(Via email)

DATED at Seattle, Washington this 17th day October, 2014.

Marly Moil-Lazenby

OFFICE RECEPTIONIST, CLERK

To: Marly Moil-Lazenby
Cc: thorson@carneylaw.com; king@carneylaw.com; sanders@carneylaw.com; matt@bergmanlegal.com; John Phillips
Subject: RE: Response to Respondent's Petition for Review

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Cc: thorson@carneylaw.com; king@carneylaw.com; sanders@carneylaw.com; matt@bergmanlegal.com; John Phillips
Subject: Response to Respondent's Petition for Review

Case Name: JACK DON KENNEDY AND SANDRA KENNEDY V. SABERHAGEN HOLDINGS, INC.
Case Number: 88518-4
Name of Filing Attorney: John W. Phillips, WSBA #12185
Documents for filing: Response to Respondent's Petition for Review

Marly Moil-Lazenby, Office Manager
Phillips Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

t 206.382.1058
mmoil-lazenby@jphillipslaw.com
www.jphillipslaw.com