No. 93581-5

SUPREME COURT
OF THE STATE OF WASHINGTON

HOFFMAN, LARRY AND JUDITH, husband and wife,

Plaintiffs-Appellants,

v.

ALASKA COPPER COMPANIES, INC., et al.,

Defendant-Respondents.

LARRY AND JUDITH HOFFMAN'S ANSWER TO GENERAL ELECTRIC'S PETITION FOR REVIEW

John W. Phillips, WSBA #12185
Michael Madderra, WSBA #48169
Phillips Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
(206) 382-6163

Counsel for Plaintiffs-Respondents

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1

II. ARGUMENT 2

A. General Electric Offers No Reason Why This Court Should Accept Discretionary Review. 2

B. Mr. Hoffman Did Not Repudiate His Claim that GE Sold Products, and the Court of Appeals Correctly Concluded that Washington and Alaska Law Do Not Conflict, Because Neither Bars the Hoffmans' Claims Based on Products Sold by GE.....5

1. The Hoffmans Did Not Waive Their Argument Under the "Products" Exception to Alaska's Statute of Repose.....5

2. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because Mr. Hoffman's Injuries Resulted from a Defective Product. 7

3. The Court of Appeals Properly Looked to *Simonetta* and *Braaten* in Absence of Controlling Alaska Authority.....10

C. The Court of Appeal Decision Sustaining the Gross Negligence Claim Was Correct And Also is Supported By Several Alternative Legal Bases That the Court of Appeals Did Not Need to Reach. 12

1. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because GE Was Grossly Negligent. 12

2. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because Mr. Hoffman's

Personal Injury Resulted From Prolonged Exposure to Hazardous Waste.....14

3. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because They Are Based on the Undiscovered Presence of Asbestos Fibers in Mr. Hoffman's Lungs.....16

III. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Cases

Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990) 7

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 864 P.2d 937 (1994).....4

Intl. Ass'n of Firefighters, Local 46 v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002).....4

Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 257 P.3d 532 (2011).....13

Morgan v. Aurora Pump Co., 159 Wn. App. 724, 248 P.3d 1052 (2011).....9

Newcomer v. Masini, 45 Wn. App. 284, 724 P.2d 1122 (1986) 6

Obert v. Envtl. Research & Dev. Corp., 112 Wn.2d 323, 771 P.2d 340 (1989).....5

Rice v. Dow Chem. Co., 124 Wn.2d 205, 875 P.2d 1213 (1994).....4

Seizer v. Sessions, 132 Wn.2d 642, 94 P.2d 261 (1997) 4, 11

State Farm Mut. Auto Ins. Co. v. Amirpanachi, 50 Wn. App. 869, 751 P.2d 329, *rev. denied,* 111 Wn.2d 1012 (1988).....6

Other Cases

Burnett v. Covell, 191 P.3d 985, (Alaska 2008).....11

Ervin v. Continental Conveyor & Equipment Co., Inc., 674 F. Supp.2d 709 (D. S.C. 2009) 10

Jones v. Bowie Indus., 282 P.3d 316 (Alaska 2012) 7, 10

Metal Trades, Inc. v. United States, 810 F. Supp. 689 (D. S.C. 1992) 16

Whitesides v. U-Haul Co. of Alaska, 16 P.3d 729 (2001) 4

Statutes with Legislative Authorities

42 U.S.C. § 6903(5) 15

45 FR 78538 (Nov. 25, 1980) 16

AS 09.10.055(b)(1)(A-F) 4, 9, 14, 16

AS 46.03.900(9) 15

Cal. C.C.P. § 340.5 17

F.S.A. § 766.102 17

Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997), No. 1184) 7, 10, 14

Minutes, S. Fin. Hearing on H.B. 58, 20th Leg., 1st Sess. (Apr. 11, 1997), SFC #101, Side 1 ..... 7, 14

RCW 4.16.350 17

Rules

CR 12(b)(6) ..... passim

RAP 1.2(a) 5

RAP 2.5 ..... 5, 7

RAP 13(b) 2

I. INTRODUCTION AND SUMMARY OF ARGUMENT

GE offers no reason why this Court should review the Court of Appeals' sound decision that the Hoffmans' personal injury claim based on Mr. Hoffmans' exposure to asbestos – indisputably authorized under Washington law – is also authorized under Alaska's Statute of Repose, which contains numerous exceptions plainly applicable to the Hoffmans' case. GE's chief argument for review is its claim that the Hoffmans' counsel did not adequately preserve their defective products claim, and that GE gaskets do not qualify as products under the defective products exception to the Alaska Statute of Repose. Pet. at 6. The argument is wrong and does not justify review for several reasons. All of the arguments the Hoffmans made on appeal were also made in the trial court, and it is equally plain that the gaskets GE supplied are "products" for purposes of the Alaska Statute of Repose. The Court of Appeals analyzed this claim utilizing Washington case law as persuasive authority, and correctly and fairly concluded that the claim was preserved under the explicit language of the product exception to Alaska's Statute of Repose. This is hardly the stuff for discretionary review.

GE also claims that allowing the Hoffmans to pursue a claim under the gross negligence exception to the Alaska Statute of Repose would turn the statute upside down, but the Court of Appeals reviewed the trial court's ruling on a CR 12(b)(6) motion, and the

Hoffmans had a tenable basis to pursue a gross negligence claim against GE. This argument also does not justify discretionary review.

Not only did the Alaska Legislature create a clear exception for the Hoffmans' product defect and gross negligence claims, but it also established other exceptions that preserved the Hoffmans' claims relating to hazardous waste such as asbestos and inhaled foreign objects such as asbestos, which are not knowable until the disease manifests. Accordingly, not only does the Court of Appeals' reasoning not invite the Supreme Court's review, but the multiple alternative legal bases to affirm the Court of Appeals demonstrate that discretionary review in this case would be imprudent.

II. ARGUMENT

A. General Electric Offers No Reason Why This Court Should Accept Discretionary Review.

GE's petition fails to address the criteria for this Court's acceptance of discretionary review of the Court of Appeals' unpublished decision in this case. RAP 13(b) provides:

> Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

GE identifies no conflict in Washington appellate decisions, it fails to identify any constitutional question upon which the Court of Appeals' decision hinges, and there is no "substantial public interest" in the Court of Appeals' conclusion that Alaska and Washington law do not conflict in allowing the Hoffmans' personal injury claim based on exposure to asbestos fibers.

Instead, GE argues that the Court of Appeals was wrong in several respects, none of which meets the criteria for this Court's acceptance of discretionary review. GE argues that the Hoffmans' waived their claims but the record shows otherwise. GE complains that the Court of Appeals turned to persuasive Washington authority when no Alaska case law was on point, but the notion that gaskets are products is hardly novel, and on a CR 12(b)(6) motion, the Hoffmans allegation that GE sold gaskets that were placed in the turbines that exposed Mr. Hoffman to asbestos is more than sufficient. And GE critiques the Court of Appeals' opinion that sufficient facts were alleged to support a claim of gross negligence – as opposed to simple negligence – but that argument is irrelevant on a 12(b)(6) motion to proceed with their claim

Indisputably, Washington courts should follow the

Washington Statute of Repose unless the Alaska Statute of Repose would produce a different result. *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) (Washington courts presumptively apply the law of the forum *unless a conflict actually exists*); *Seizer v. Sessions*, 132 Wn.2d 642, 648-49, 94 P.2d 261 (1997) (citation omitted). GE concedes that the Washington Statute of Repose does not bar the Hoffmans' claims (CP 1040-41), and the Alaska statute of repose contains *eleven* explicit and exceptions to the 10-year bar. *See* AS 09.10.055(b)(1)(A-F), (b)(2)-(5) and (c).[1] A number of these exceptions preserve the Hoffmans' claims, in addition to those relied upon by the Court of Appeals. The Court of Appeals did not reach – because it did not need to – these several other legal bases upon which it could have concluded that Washington and Alaska law do not conflict with respect to treatment of the Hoffmans' claim. These additional bases underscore why review here is not warranted.

[1] GE cites *Intl. Ass'n of Firefighters, Local 46 v. City of* Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002) and *Whitesides v. U-Haul Co. of Alaska*, 16 P.3d 729 (2001), both of which liberally interpreted laws granting workers greater rights. Neither supports the idea that the Court should construe a statute to eliminate an entire category of personal injury claims – asbestos personal injury claims – when the subject was never even addressed by the Legislature.

B. Mr. Hoffman Did Not Repudiate His Claim that GE Sold Products, and the Court of Appeals Correctly Concluded that Washington and Alaska Law Do Not Conflict, Because Neither Bars the Hoffmans' Claims Based on Products Sold by GE.

1. The Hoffmans Did Not Waive Their Argument Under the "Products" Exception to Alaska's Statute of Repose.

GE claims that under RAP 2.5, the Hoffmans waived the right to argue the product defects exception, and failed to argue that a GE gasket qualified as a defective product. GE misreads the Rules of Appellate Procedure. Under RAP 1.2(a), this Court construes the rules "liberally" to "promote justice and facilitate the decision of cases on the merits." For that reason, excluding an appellate argument under RAP 2.5(a) is discretionary. *See e.g., Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989) ("[T]he rule precluding consideration of issues not previously raised operates only at the discretion of this court.").

The "issue" raised before the Superior Court was whether the Alaska Statute of Repose bars the Hoffmans' suit. The Hoffmans addressed all the ways in which the statute preserves their claims, Defendants, including GE, argued all the ways they believed the statute bars the Hoffmans' claims, and the Superior Court ruled on each exception that the Hoffmans' argue here. The Hoffmans argued that the exceptions applied because of Mr. Hoffman's exposure to asbestos fibers due to GE's conduct, and GE responded to those arguments. The Hoffmans specifically raised their

argument about GE's sale of gaskets, and those arguments were not evaluated on the basis of sufficiency of evidence because the motion was decided under CR 12(b)(6). RP (Mar. 25, 2015) at 23:21-24; *see* CP 13-18; CP 2912-13; *see also* CP 1252, 1254, 1175, 1177, 1179-80. GE complains that trial counsel stated that the product was the "turbines," but the gaskets GE sold were installed in the turbines. *See* CP 1252, 1254, 1175, 1177, 1179-80. And Mr. Hoffman was exposed to airborne asbestos from the turbines both from his cleanup duties and from direct exposure working near the turbines when they underwent maintenance, including gasket replacement. *See* CP 299. Excluding an argument on appeal in this circumstance makes no sense at all, and certainly does not justify discretionary review.

The appellate court may consider any argument applied to a specific defendant when the general principles or legal theories were advanced in the Superior Court. *See, e.g., State Farm Mut. Auto Ins. Co. v. Amirpanachi*, 50 Wn. App. 869, 872 n. 1, 751 P.2d 329, *rev. denied*, 111 Wn.2d 1012 (1988) (appellants argued "the basic reasoning", allowing the court to review those issues on appeal "despite lack of citation to the crucial case law and treatises."); *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986) ("Even though the key words 'equitable subrogation' do not expressly appear", the appellate court chose to consider equitable subrogation theory where, on reconsideration, party argued theories of unjust enrichment and equitable indemnity). These authorities

apply here.[2] Thus, there is no conflict with other appellate decisions or appellate procedure, as suggested by GE. Pet. at 8-11. The Hoffmans adequately raised the issue before the Superior Court, and this Court should deny discretionary review.

2. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because Mr. Hoffman's Injuries Resulted from a Defective Product.

The "products" exception to Alaska's statute of repose is not confined to "product liability" actions. "[T]he legislature defined 'product' and this definition refers to the tangible thing that causes an injury, not to the legal theory that a plaintiff might use to recover for the injury." *Jones v. Bowie Indus.*, 282 P.3d 316, 338 (Alaska 2012). The bill's sponsor described the "products" exception as "one of the biggest exceptions[.]" Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997). Both the statute's plain language and Representative Porter's comments illustrate that the defective product exception should be broadly construed.

GE says that the Hoffmans' waived their argument that GE gaskets were products, and then says that turbines are not products

[2] Even where an argument could have been made more clearly, this Court will consider arguments advanced at the trial level. *See e.g., Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990) ("Plaintiffs may have framed their argument more clearly [on appeal], but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5 (a) is served[.]").

so the exception does not apply. GE is wrong for a number of reasons. First, the Hoffmans argued – with evidentiary support from the trial court record – the following to the Court of Appeals:

> The Hoffmans will demonstrate through fact and expert testimony that the GE turbines that Larry Hoffman worked around . . . contained asbestos-containing components, including thermal insulation, gaskets, and packing. *See e.g.*, CP 1252, 1254. GE sold gaskets to the Sitka and Ketchikan mills during Larry Hoffman's tenure there. *See* CP 1175, 1177, 1179-80.

App. Br. at 7. This clearly shows that the Hoffmans properly raised the issue with the Court of Appeals (Opn. at 9, n.8) and presented evidence of sale of GE gaskets, as products, to the trial court.[3] The Hoffmans' trial counsel also argued to the Superior Court that GE "***sold gaskets and other materials for use on those turbines.*** All of that falls within the products exception. So ***our case against GE is that it's a products case.***" RP (Mar. 25, 2015) at 23:21-24 (emphases added).

GE's further contention that the gaskets were not products borders on the absurd. Asbestos gaskets are indisputably products, as dozens of cases have held. *E.g., Morgan v. Aurora Pump Co.*,

[3] GE also alleges that waiver occurred before the Court of Appeals (as to both the defective product and gross negligence exceptions), but ignores the Hoffmans' straightforward explanation that the "issue" raised before the Superior Court was whether the Alaska Statute of Repose bars the Hoffmans' suit. *See* Section II.B, above. The Hoffmans plainly did not waive this claim in their assignments of error. App. Br. at 2.

159 Wn. App. 724, 248 P.3d 1052 (2011) (asbestos-containing gaskets are products under product liability statute).

As the Court of Appeals explained, "we agree with Hoffman because Hoffman has presented some evidence that GE delivered gaskets that could have caused Hoffman's injury." Opn. at 9; *see also* CP 1252, 1254, 1175, 1177, 1179-80. The Court also stated, "although [GE] disputed whether its turbines would be considered products and vehemently argued that there was no evidence that it manufactured, supplied, or sold thermal asbestos insulation, GE does not say the same about replacement gaskets." Opn. at 12. The Court of Appeals plainly considered – but reasonably rejected – GE's argument that gaskets were not "products" as contemplated by the statutory exception. The Court's opinion should not be disturbed.

GE's second argument, that the "steam turbines were an 'improvement to real property'" (Pet. at 6) is beside the point. The Alaska Statute of Repose is not limited to design and construction claims, but addresses all personal injury claims, and it contains numerous exceptions, including a "defective products" exception. The exception (AS 09.10.055(b)(E)) specifically states that a "component part" is a "product." The explicit language of the statute governs here, and none of the out-of-state case law cited by GE involves such a specific and governing statute.

Additionally, while the GE turbines here may have been custom-made, as GE points out (Pet. at 2), the turbines themselves

were removed and re-sold like any other "product" when the mill closed. A number of courts, even when interpreting statutes of repose addressing only "improvements to real property," have concluded that such statutes of repose do not apply to "conveyor belts and other industrial equipment," particularly when the equipment could be disassembled and moved or sold. *See Ervin v. Continental Conveyor & Equipment Co., Inc.*, 674 F. Supp.2d 709, 719-22 (D. S.C. 2009) (gathering cases).

The Alaska Statute of Repose intended the "products" exception to be one of the "biggest exceptions" to the statute of repose, and the Alaska Supreme Court has held it is not limited to "product liability" actions. *See Jones v. Bowie Indus.*, 282 P.3d at 338; Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997). Accordingly, both the turbines and the asbestos gaskets that GE sold the mills during the life of the mills are products within the meaning of the statute. Review should be denied.

3. The Court of Appeals Properly Looked to *Simonetta* and *Braaten* in Absence of Controlling Alaska Authority

GE takes issue with the Court of Appeals Conflict of Laws analysis (Pet. at 11-17), by "constru[ing] Alaska law using nothing but Washington authorities." Pet. at 13. The Court of Appeals' analysis does not conflict with Washington Conflict of Laws jurisprudence, and GE's misleading argument ignores the Court of

Appeals' rationale. The Court of Appeals employed *Simonetta* and *Braaten* to determine whether a supplier of component parts could be held liable – under a defective products exception – for supplying a defective component part. Opn. at 10-12. The Court explained that Washington's approach was "consistent with Alaska law". Opn. at 10-12 (citing *Burnett v. Covell*, 191 P.3d 985, 987-88 (Alaska 2008). GE cites no authority suggesting that the Court of Appeals erroneously utilized Washington authority as persuasive to interpret Alaska substantive law.

There is no "fundamental issue at stake" implicating either the Due Process Clause or Full Faith and Credit Clause. *See* Pet. at 13. Under both the Washington and Alaska statutes of repose, the Hoffmans' claims are preserved. *See* Section II.A, above. GE argues that "determining Alaska law based solely upon Washington law – is constitutionally impermissible," but GE ignores that a conflict of laws analysis focuses on whether the application of a different States' law will affect the outcome. *Seizer*, 132 Wn.2d at 648-49.

GE also facetiously argues that "plywood, or nails, or perhaps concrete blocks" would be included within the "products" exception, such that the statute of repose would be "swallow[ed] up" by the defective products exception. Pet. at 16-17. This argument asks the Court to ignore the specific facts alleged by the Hoffmans and to address irrelevant questions of statutory interpretation that are better

addressed by the Alaska Legislature. The Hoffmans will present evidence that the turbines, when sold, contained asbestos packing and gaskets and that GE also sold asbestos gaskets to the mills for the purpose of turbine maintenance. *See* CP 1162, 201-02, 214-18, 225-26, 2236, 299, 1175, 1177, 1179-80, 1251-52, 1254. The Court of Appeals correctly determined that a CR 12(b)(6) dismissal was inappropriate in light of the facts alleged.

C. The Court of Appeal Decision Sustaining the Gross Negligence Claim Was Correct And Also is Supported By Several Alternative Legal Bases That the Court of Appeals Did Not Need to Reach.

The Court of Appeals also determined that the Hoffmans asserted sufficient facts, under a CR 12(b)(6) standard, for gross negligence. Opn. at 13-16. GE presents no tenable reason to reverse that ruling. And while the Court of Appeals did not address the Hoffmans' argument that prolonged exposure to hazardous waste and the presence of asbestos foreign bodies constituted additional exceptions to the Alaska Statute of Repose (Opn. at 9, n.7), both exceptions apply here and provide additional legal grounds why this Court should deny GE's petition for review.

1. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because GE Was Grossly Negligent.

GE claims that this exception cannot apply because the Hoffmans waived the issue of "gross negligence" (Pet. at 17-18), the Hoffmans allegedly don't have evidence of "gross negligence," and

the Hoffmans pled negligence only. GE Opp. at 38-40. As for GE's first point, it forgets that the Court reviewed the grant of a CR 12(b)(6) motion, not a summary judgment motion. In any event, the Hoffmans' disclosed a "state of the art" expert, Dr. Castleman, who is prepared to testify that GE knew of the deadly nature of asbestos fiber inhalation long before Mr. Hoffman's suffered his deadly exposures, yet did nothing about it to protect the safety of those exposed to asbestos fibers, such as Mr. Hoffman. RP (Mar. 24, 2015) at 20:15-21:10. That evidence is not before the Court on a CR 12(b)(6) motion, and this Court is no position to evaluate it on discretionary review. The Court of Appeals decision thus did not conflict with any of the decisions cited by GE. *See* Pet. at 17.

Second, the difference between negligence and gross negligence is a matter of degree, *see* WPI 10.07, and whether an act constitutes one or the other is ordinarily a factual question for trial. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, 257 P.3d 532 (2011). The Superior Court acknowledged as much in conceding that "I'm clearly going out on a limb [regarding gross negligence], because usually that's a question of fact." RP (Mar. 25, 2015) at 49:14-15. GE's argument offers no basis for discretionary review.

GE makes the unsupported assertion that "[n]early every urban dweller has been exposed to asbestos" (Pet. at 19) to argue that the Hoffmans' alleged facts – "that Hoffman worked around GE turbines, with or around GE-supplies asbestos gaskets, and work

with or around those gaskets may have exposed him or his father to asbestos" (Opn. at 13) – is not "remotely comparable" to grossly negligent conduct. Pet. at 19. Whether the Hoffmans can prove "gross negligence" is for another day, and this Court lacks the record to evaluate that question on discretionary review. No conflict of law exists as suggested by GE. *See* Pet. at 19-20. The exception applies, and the Court of Appeals correctly recognized that Hoffman alleged sufficient facts to prove gross negligence. Opn. at 13-16.

2. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because Mr. Hoffman's Personal Injury Resulted From Prolonged Exposure to Hazardous Waste.

AS 09.10.055(b)(1)(A)'s preservation of claims based on "prolonged exposure to hazardous waste" was intended to protect claims based on exposure to hazardous substances that take a long time to manifest as disease. The bill's sponsor explained that there was no reason to distinguish hazardous "waste" from hazardous "material."[4] The Legislature chose not to change "hazardous waste" to "hazardous substance," because 'hazardous waste' was inclusive and didn't need to be changed."[5]

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[4] Appendix A (Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997), No. 1184).

[5] Appendix B (Minutes, S. Fin. Hearing on H.B. 58, 20th Leg., 1st Sess. (Apr. 11, 1997), SFC #101, Side 1)), *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=0054&end_line=0426&session=20&comm=FIN&date=19970411&time=1709).

"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 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 CFR Part 261.1(b)(2) – (2)(i).

> 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.

42 U.S.C. § 6903(5). This is the ***very same definition*** of hazardous waste as under Alaska law:

> **(9)** "hazardous waste" means a waste or combination of wastes that because of 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 managed, treated, stored, transported, or disposed of[.]

AS 46.03.900(9). As the court forcefully explained in *Metal Trades,*

Inc. v. United States, 810 F. Supp. 689 (D. S.C. 1992), asbestos fibers plainly meet the federal and state definitions of "hazardous waste." The only reason asbestos is not listed under 40 CFR 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).

This alternative legal ground for leaving the Court of Appeals' decision alone is another reason to deny review.

3. The Alaska Statute of Repose Preserves the Hoffmans' Claims Because They Are Based on the Undiscovered Presence of Asbestos Fibers in Mr. Hoffman's Lungs.

Asbestos fibers are considered "foreign bodies" both in science and medicine. GE told the Court of Appeals that AS 09.10.055(c) is limited to medical malpractice claims because the statute includes the phrase "that has no therapeutic or diagnostic purpose or effect in the body." This language, however, does not demonstrate that AS 09.10.055(c) applies *solely* to medical malpractice actions. The cited language simply demonstrates that the section includes medical malpractice actions, a point the Hoffmans never have contested.

If the Alaska Legislature had intended to limit the scope of "foreign body" tolling solely to medical malpractice actions, it would have said so explicitly, as have other states. The Alaska statute does not state that the section applies only to claims against a "health care provider" or to "medical malpractice actions," as other

state legislatures have done in limiting such a statute of repose exception to medical malpractice actions,[6] and this Court should deny discretionary review, because the "foreign bodies" exception provides yet another basis to leave undisturbed the Court of Appeals decision.

Each of the four exceptions provides an alternative legal ground to allow the Court of Appeals' decision to stand and to deny discretionary review.

III. CONCLUSION

For the reasons set forth above, this Court should deny GE's Petition for Review.

DATED this 10th day of October, 2016.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By: _____
John W. Phillips, WSBA #12185
Michael Madderra, WSBA #48169

Attorneys for Plaintiffs-Respondents

[6] *See* Cal. C.C.P. § 340.5 (tolled 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.").

CERTIFICATE OF SERVICE

I certify that on this day, I served by email a copy of the foregoing, along with this Certificate of Service, on all parties listed below:

PLAINTIFFS:
Benjamin Couture
Brian Weinstein
Marissa Langhoff
Alexandra Caggiano
WEINSTEIN COUTURE PLLC
818 Stewart Street, Suite 930
Seattle, WA 98101
ben@weinsteincouture.com
brian@weinsteincouture.com
marissa@weinsteincouture.com
alex@weinsteincouture.com

ALASKA COPPER COMPANIES, INC.; CRANE CO.:
G. William Shaw
K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
bill.shaw@klgates.com
janet.lewis2@klgates.com
SE.asbestos@klgates.com

ARMSTRONG INTERNATIONAL, INC.:
William E. Fitzharris, Jr.
Jennifer Loynd
David E. Chawes
Preg O'Donnell
901 Fifth Avenue, Suite 3400
Seattle, WA 98164
wfitzharris@pregodonnell.com
jloynd@pregodonnell.com
dchawes@pregodonnell.com
twhitney@pregodonnell.com
asbestos@poglaw.com

ASBESTOS CORPORATION LIMITED TRANE U.S., INC.:
Mark Tuvim
Kevin Craig
Gordon & Rees
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
SEAasbestos@gordonrees.com

CERTAINTEED CORPORATION; UNION CARBIDE CORPORATION:
Diane Kero
Gordon Thomas Honeywell
600 University, Suite 2100
Seattle, WA 98101
service@gth-law.com

KETCHIKAN PULP COMPANY
David Shaw
Tami Becker-Gomez
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101
wkgasbestos@williamskastner.com

GENERAL ELECTRIC COMPANY:
Christopher Marks
Megan Coluccio
Sedgwick
520 Pike Street, Suite 2200
Seattle, WA 98101
chris.marks@sedgwicklaw.com
megan.coluccio@sedgwicklaw.com

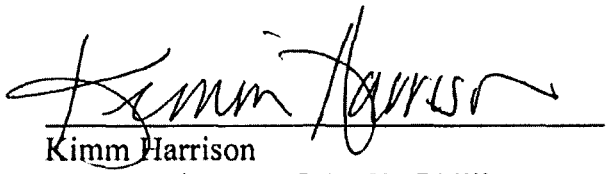
Kirk C. Jenkins
Sedgwick
One North Wacker Drive, #4200
Chicago, IL 60606
Kirk.jenkins@sedgwicklaw.com

CHICAGO BRIDGE AND IRON COMPANY; GEORGIA-PACIFIC:
Barry Mesher
Brian Zeringer
Sedgwick
520 Pike Street, Suite 2200
Seattle, WA 98101
barry.mesher@sedgwicklaw.com
brian.zeringer@sedgwicklaw.com
asbestos.seattle@sedgwicklaw.com

OAKFABCO, INC.:
Robert Andre
Odgen Murphy
1601 Fifth Avenue, Suite 2100
Seattle, WA 98101
asbestos@omwlaw.com

CLEAVER-BROOKS, INC.; SABERHAGEN HOLDINGS, INC.:
Tim Thorsen
Carney Badley
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
asbestos@carneylaw.com

DATED this 10th day of October, 2016, in Seattle, Washington.



Kimm Harrison
Legal Assistant to John W. Phillips