NO. 47439-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LARRY AND JUDITH HOFFMAN,

Plaintiffs and Appellants,

v.

ALASKA COPPER COMPANIES, INC., ET AL.,,

Defendants and Respondents.

RESPONDENT'S BRIEF OF DEFENDANT GENERAL ELECTRIC COMPANY

On Appeal from the Superior Court
for the State of Washington,
County of Pierce, Case No. 14-2-07178-2, Hon. K.A. Van
Dooninck, Presiding

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I. INTRODUCTION

Plaintiff Larry Hoffman was allegedly exposed to asbestos while living and working in Alaska. He alleges that the asbestos was, in part, released as a result of repair and maintenance work around steam turbines custom-designed and built for Hoffman's Alaska-based employers by defendant General Electric ("GE"). The plaintiffs first moved to Washington years after Mr. Hoffman's last alleged asbestos exposure.

The Superior Court held that Alaska had the most significant contacts with Mr. Hoffman's alleged asbestos exposure, and accordingly, Alaska law applied. Because the plaintiffs' claims against GE were brought more than ten years after the last alleged injury-causing act, the court held that the plaintiffs' claims were barred by the Alaska statute of repose, Alaska Stat. § 09.10.055. The Superior Court's judgment was correct and should be affirmed.

The plaintiffs cite to several exceptions to the Alaska statute of repose in hopes of preserving their claims (three of four for the first time on appeal), but all their arguments fail. Plaintiffs' claims are not preserved by the exceptions for "prolonged exposure to hazardous waste," or the language tolling the statute for claims arising from the presence of foreign bodies with no therapeutic or diagnostic purpose, nor are GE's heavy industrial turbines a "defective product," nor are plaintiffs' claims

saved by the exception for gross negligence.

Plaintiffs knew from the outset that their claims would be governed by Alaska law, because all of Larry Hoffman's alleged exposures to asbestos took place in Alaska, where he lived and worked. The Alaska statute of repose unambiguously bars the plaintiffs' claims against GE. The judgment should be affirmed.

II. STATEMENT OF ISSUES

1. Did the Superior Court correctly hold that plaintiffs' claims against GE are barred by the Alaska statute of repose?

2. Did the Superior Court correctly hold that Alaska law applied to this case, where all of plaintiff's claimed exposures to asbestos occurred in Alaska, where plaintiff lived and worked at all relevant times, and where any relationship among the parties was centered?

III. STATEMENT OF THE CASE

A. Statement of Facts

1. The GE Turbines at the Ketchikan and Sitka Mills

Plaintiffs allege that Larry Hoffman was exposed to asbestos for which GE was responsible at the Ketchikan Pulp Company's ("KPC") pulp mill in Ketchikan, Alaska, and at the Alaska Pulp and Paper Mill in Sitka, Alaska. CP 114, 116. Plaintiffs also allege that Mr. Hoffman was exposed to asbestos as a child on the work clothes of his father, who

worked at the Ketchikan mill. CP 201-02.

The two mills were in remote locations. Ketchikan had no road to the outside world – supplies were brought in by water or air. Sitka was on a remote island, "[i]solated from the rest of the world" and "thousands of miles from sources of supply." CP 238-239, 1263, 2582-83. Therefore, both required steam turbines, allegedly manufactured by GE, to generate the power essential for the mills to operate. CP 62, 66, 266, 1145.

Steam turbines are complex, finely machined devices made of steel alloys and other metals. CP 71. The internal components are precision balanced to rotate at high speeds for extended periods. *Id.* Each GE turbine is custom designed and manufactured to be integrated into a specific plant based upon that plant's requirements, which are given to GE by the plant owner and its engineers. *Id.* Designing a turbine requires thousands of hours of design and engineering work, as well as additional thousands of hours of manufacturing. *Id.* Many large industrial plants, including pulp and paper mills, use steam turbines attached to generators to generate their own electric power. *Id.* In many instances, particularly in pulp and paper mills, steam will also be extracted from the turbines for use in the plant's other processes. *Id.*

GE turbines are designed and engineered so that a great deal of maintenance and inspection work can be done without disturbing any

insulation. *Id.* Only a handful of major maintenance tasks require any handling of such materials. *Id.*

Because the turbines were custom designed for the mills, GE employees were on site in Alaska during the installation and initial startup to offer their design expertise. CP 255. GE employees were also on site from time to time to observe and sign off on repair and maintenance work done by mill employees. CP 257.

2. Larry Hoffman's Work at the Ketchikan Mill

Plaintiff Larry Hoffman began working at the Ketchikan mill in December 1968. CP 58-59, 1153. He was initially assigned to the yard crew. CP 214. He alleges that he swept up used material in the turbine room about once a week. CP 216, 225, 1155, 1158. Hoffman was unable to recall ever working with any materials from GE. CP 65. Although Hoffman claimed that the mill used thermal insulation, he had no knowledge of who manufactured, installed or supplied it, or what it was made of. CP 62. Hoffman left the mill in January 1970. CP 60.

Hoffman testified that he saw others work on the GE turbines from time to time doing maintenance and repair. CP 62, 65, 220. However, he was unable to describe with any specificity what the work involved. *Id.* He never saw anyone open up either of the turbines or remove or install anything. CP 66-67. Hoffman never did any maintenance or repair work

on the turbines. CP 60, 215, 1154. Nor did he ever see any maintenance or repair records for either turbine. CP 62-63.

3. Larry Hoffman's Work at the Sitka Mill

Hoffman also alleges that he worked off and on as a pipefitter between 1974 and 1978 at the Alaska Pulp and Paper Mill in Sitka, Alaska. CP 63, 223, 1157. Hoffman claims to have worked in the turbine room from time to time. CP 1144. Although he testified that he saw repair work being done on the turbines, CP 1145, he never saw anyone open either of the GE turbines up, nor did he see any materials removed or installed from either turbine. CP 66-67.

4. Larry Hoffman's Alleged Secondary Exposure from His Father's Work Clothes

Hoffman first moved to Alaska in July 1954 when his father Doyle Hoffman was hired at the Ketchikan mill as a welder. Doyle Hoffman worked at the Ketchikan mill from 1954 until 1966. CP 200-01. Plaintiffs allege that Doyle Hoffman was exposed to asbestos while working in the turbine room when mill workers allegedly removed asbestos insulation from the turbines during emergency repairs and shutdowns. CP 1162. Mill workers swept up after the work was performed. *Id.* The plaintiffs allege that Hoffman was exposed to asbestos carried home on his father's work clothes. CP 202.

B. Procedural History

After Larry Hoffman was diagnosed with mesothelioma, plaintiffs sued numerous defendants, including GE and KPC. CP 13, 199.

GE gave notice to plaintiffs in its Answer that it would contend that Alaska law governed plaintiffs' claims. CR 21. In late February 2015, both GE and KPC moved for an order holding that Alaska law applied, based upon the conflict between the Alaska and Washington statutes of repose and other features of the two states' laws. CP 1029-1048.

On March 13, 2015, the Superior Court granted the motion:

> There is a conflict of laws between the states of Alaska and Washington. Because there is a clear conflict, the substantial relationship factors were analyzed. The factors weighed in favor of the application of Alaska law.
>
> Therefore Alaska law applies in the case.

CP 1535.

GE and KPC each moved to dismiss on the grounds that the plaintiffs' claims were barred by the Alaska statute of repose. Both defendants' motions were granted on March 25, 2015. CP 2912-13.

Plaintiffs' notice of appeal was filed on April 9, 2015. CP 2914-24. The court entered final judgment on June 3, 2015. CP 2936-38.

IV. SUMMARY OF ARGUMENT

Plaintiffs allege that the trial court erred by engaging in a choice of law analysis, since neither the Washington nor the Alaska statutes of

repose would bar their claims. Not so: the Superior Court correctly ruled that the plaintiffs' claims were barred by the Alaska statute of repose.

The plaintiffs argue for the first time on appeal that their claims against GE are preserved by the exception for claims arising from "prolonged exposure to hazardous waste." The plaintiffs are mistaken; nothing in the plain language of the statute indicates that the legislature intended such an expansive meaning for the term. The legislature deliberately limited the exception to "*prolonged* exposure to hazardous waste." The sponsor of the legislation which became the statute of repose explained that the exception was intended to reach chemicals leaching onto a neighbor's property, and "those kinds of things." Nothing in the legislative history suggests that the legislature intended to give the term "hazardous waste" an expansive construction encompassing asbestos. Further, the only authority to interpret the hazardous waste exception has squarely rejected the plaintiffs' argument.

Nor are the plaintiffs' claims preserved by the language tolling the statute for claims based upon "the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose" where "the action is based on the presence of the foreign body." Plaintiffs disregard the limitation to bodies with "no therapeutic or diagnostic purpose," an unambiguous reference to medical malpractice claims. Nor are asbestos

claims based on the mere "presence" of asbestos fibers, as opposed to the body's *response* to an unacceptable level of asbestos fibers. The legislative history confirms that the exception is intended to extend solely to medical malpractice claims, and the only authority construing the language agrees.

Nor are the plaintiffs' claims preserved by the exception for actions resulting from defective products (the only argument the plaintiffs raised with respect to GE below). The plain language of the exception does not extend to GE's turbines, which were custom designed and engineered to meet the requirements of the two Alaska pulp mills where plaintiff worked. The legislative history supports this construction. The only amendment to the language of the exception narrowed its scope. Courts all over the country have recognized that industrial machinery like steam turbines are improvements to real property, not products. Nor was any asbestos-containing insulation, packing or gaskets added to the turbines by their owner a product within the meaning of the statute of repose.

Finally, plaintiffs argue that their claims are preserved by the exception for gross negligence. Plaintiffs have waived their claim at least twice. Even if that were not so, plaintiffs' allegations amount to simple negligence at most, not gross negligence.

Since the Superior Court correctly found an outcome-determinative conflict of laws, the court correctly proceeded to analyze the contacts of Alaska and Washington with the dispute. Plaintiff lived and worked in Alaska at all relevant times. His asbestos exposure was the alleged result of being present during repair and maintenance work on GE turbines which were custom designed for plaintiffs' Alaska-based employers. Any relationship between the parties was centered in Alaska. The Superior Court correctly held that Alaska has the most significant contacts with the dispute, and Alaska law therefore applies.

Although the Superior Court had no need to proceed to the second step of the analysis, Alaska's interests in having its statute of repose applied are greater than Washington's minimal interest in this dispute. The Washington Supreme Court has held that Washington's interest in seeing its current residents compensated for their alleged injuries cannot as a matter of law outweigh the interests of other states where all relevant contacts among the parties occurred.

The judgment should be affirmed.

V. ARGUMENT

A. The Court Reviews the Superior Court's Orders *De Novo*

The Court reviews a dismissal for failure to state a claim *de novo*. *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings,*

Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014). The Court takes the facts alleged in the plaintiff's complaint as true, and may consider hypothetical facts supporting the plaintiff's claim. *Id.* Dismissal is appropriate if the plaintiff can allege no set of facts which would justify recovery. *Id.*

The Court also reviews conflict of law questions *de novo*. *McKee v. AT&T Corp.*, 164 Wn. 2d 372, 384, 191 P. 3d 845 (2008).

B. The Superior Court Correctly Held That the Alaska Statute of Repose Bars the Plaintiffs' Claims Against GE

Plaintiffs argue that the trial court erred by engaging in a choice of law analysis at all, because neither the Washington nor the Alaska statutes of repose would bar their claims against GE. Plaintiffs are mistaken.

1. Washington Applies the Law of the State With the Most Significant Relationship to the Issue

Washington has adopted the "most significant relationship" test as set forth in the Restatement (Second) of Conflict of Laws § 145 (1971) for analyzing conflicts of law. *Zenaida-Garcia v. Recovery Systems Technology,* 128 Wn. App. 256, 259-60, 115 P.3d 1017 (2005); *Johnson v. Spider Staging Corp.,* 87 Wn. 2d 577, 580, 555 P.2d 997 (1976). Washington courts engage in a choice of law analysis whenever an "actual conflict" exists, meaning that the two states' laws yield different results with respect to the issue at hand. *Erwin v. Cotter Health Ctrs.,* 161 Wn. 2d 676, 692, 167 P.3d 1112 (2007). Since GE agreed below that the

Washington statute of repose would not bar the plaintiffs' claims, CP 1040-41, the primary issue before the Court is whether the trial court correctly held that the plaintiffs' claims would be barred under the Alaska statute of repose.

2. The Alaska Statute of Repose Bars Plaintiffs' Claims

Alaska's statute of repose does bar the plaintiffs' claims.

Section 09.10.055 provides in pertinent part:

> (a) . . . [A] person may not bring an action for personal injury, death, or property damage unless commenced within 10 years of the earlier of the date of
>
> > (1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage . . . or
> >
> > (2) the last act alleged to have caused the personal injury, death, or property damage.
>
> (b) This section does not apply if:
>
> > (1) the personal injury, death, or property damage resulted from:
> >
> > > (A) prolonged exposure to hazardous waste . . .
> > >
> > > (B) . . . gross negligence . . .
> > >
> > > (E) a defective product; in this subparagraph, 'product' means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce . . .
>
> (c) The limitation imposed under (a) of this section is tolled

> during any period in which there exists the undiscovered presence of a foreign body that has 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.

Section 09.10.055 was adopted as part of a 1997 tort reform package. *Evans ex rel. Kutch v. State,* 56 P.3d 1046, 1048-49, 1067-69 (Ak. 2002). The 1997 Act was remedial legislation. *See* H.B. No. 58, § 1, Statement of Legislative Intent (to decrease "the amount, cost, and complexity of litigation . . . [and] control the increase of liability insurance rates"). As such, it should be construed in a manner that will avoid frustrating its remedial purpose. *State Farm Mut. Auto. Ins. Co. v. Houle,* 269 P.3d 654, 662 n. 39 (Ak. 2011); *accord, Bostain v. Food Exp., Inc.,* 159 Wn. 2d 700, 712, 153 P.3d 846 (2007). Construction of a statute is a question of law for the court to decide. *Wall v. Stinson,* 983 P.2d 736, 739 (Ak. 1999); *King County v. Central Puget Sound Growth Management Hearings Bd.,* 142 Wn. 2d 543, 555, 14 P.3d 133 (2009).

The starting point for statutory interpretation is the language of the statute itself, construed in the light of the purposes for which it was enacted. *D.H. Blattner & Sons, Inc. v. N.M. Rothschild & Sons, Ltd.,* 55 P.3d 37, 41 (Ak. 2002); *First Class Cartage, Ltd. v. Fife Serv. & Towing, Inc.,* 121 Wn. App. 257, 266, 89 P.3d 226 (2004). The court attempts to give effect to the intent of the legislature, with due regard for the meaning

which the statutory language conveys to others. *Alaska Nat'l Ins. Co. v. Northwest Cedar Structures, Inc.,* 153 P.3d 336, 339 (Ak. 2007); *see Seven Sales LLC v. Beatrice Otterbein,* -- P.3d --, 2015 WL 4627654, *2 (Wn. App. Aug. 4, 2015).

Alaska courts apply "a sliding-scale approach to statutory interpretation." The court begins with the plain meaning, but the court always looks to the legislative history as well in order to understand what the legislature intended. *State Div. of Workers Compensation v. Titan Enter., LLC,* 338 P.3d 316, 320 (Ak. 2014). The plainer the statutory language, the more convincing evidence of some different purpose or meaning must be. *Id.* Because the Alaska statute of repose was intended as remedial legislation, the statutory exceptions must be narrowly construed. *Intl. Ass'n of Firefighters, Local 46 v. City of Everett,* 146 Wn.2d 29, 34, 42 P.3d 1265 (2002); *Whitesides v. U-Haul Co. of Alaska,* 16 P.3d 729, 732 (2001).

a. The Exception for "Prolonged Exposure to Hazardous Waste" Does Not Preserve Plaintiffs' Claims

According to the plaintiffs, the exception in the statute of repose for "prolonged exposure to hazardous waste" preserves their claims

against GE.[1] Plaintiffs argue that Federal law variously defines asbestos as a hazardous substance, waste or pollutant, and that "[i]f anything, Alaska law is even more expansive in its definition of hazardous substances and hazardous wastes." Appellants' Opening Brief ("AOB") at 18-19. Plaintiffs speculate that the Alaska legislature must have intended to import the definition of "hazardous waste" found in Federal or elsewhere in state law when it used the term in the statute of repose. *Id.* Finally, plaintiffs argue that if the exception for "prolonged exposure to hazardous waste" does not include asbestos, the statute violates the due process clause. *Id.* at 20. The plaintiffs are mistaken.

1) The Plain Language of the Hazardous Waste Exception

The Alaska statute of repose preserves actions resulting from "prolonged exposure to hazardous waste." Alaska Stat. § 09.10.055(b)(1)(A). The statute does not define the term "hazardous waste." Although plaintiffs claim that the legislature must have intended to incorporate the broad definition of similar terms found in Federal and

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[1] Before the trial court, the plaintiffs argued the hazardous waste, foreign bodies and gross negligence exceptions only with respect to KPC. CP 2559, 2561-62. Plaintiffs opposed GE's motion to dismiss based only on the defective products exception. CP 2564. Since plaintiffs failed to raise three of the four exceptions they rely on here before the trial court, those arguments are waived. RAP 2.5(a).

state environmental statutes, nothing in the language of the statute supports that conjecture; no other statute or regulation is incorporated by reference in Section 09.10.055. Assuming such a sweeping exception to the statute of repose without any textual support would violate the settled rule that exceptions to remedial legislation are narrowly construed to avoid frustrating the legislature's purpose. *Intl. Ass'n of Firefighters,* 146 Wn.2d at 34; *Whitesides,* 16 P.3d at 732.

The plain language reveals a second flaw in plaintiffs' argument. The statute only carves out actions resulting from "prolonged" exposure to hazardous waste. No Federal or Alaska statute limits remedies for asbestos to "prolonged" exposure. The plaintiffs never explain why the legislature would have included such an unusual limitation if it had intended that asbestos actions fall within the exclusion. Nor do the plaintiffs explain how they would reconcile their argument with their insistence before the trial court that *any* exposure to asbestos above background levels – not just a "prolonged" exposure – was potentially harmful. CP 311-12.

2) The Legislative History of the Hazardous Waste Exception

The plaintiffs argue that the trial court should have broadly construed the phrase "hazardous waste" to incorporate "hazardous

material" and "hazardous substances," insisting that the legislature's choice of the more restrictive term "waste" means nothing. AOB at 16. The plaintiffs' argument disregards the fundamental rule that a court must interpret a statute as a whole, giving meaning to every word and phrase. *Chugach Electric Ass'n, Inc. v. Regulatory Com'n of Alaska,* 49 P.3d 246, 253 n.20 (2002).

In fact, the legislature's limitation on the scope of the exception was deliberate. As originally proposed, paragraph (b)(1)(A) read:

> (b) This section does not apply if (1) the personal injury, death or property damage resulted from (A) exposure to a hazardous substance; in this subparagraph, 'hazardous substance' means an element or compound that, when it enters into the air or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to public or individual health and welfare.

H.B. 58, 20th Leg., 1st Sess. (Jan. 13, 1997), p. 2; Appendix at 2.

One month later, the sponsor introduced the first amended version of the bill. That amendment (and every version that followed) changed the language to read as the statute currently does, substituting the term "hazardous waste" in place of the broader term "hazardous substance" and further limiting the exception to only "prolonged" exposures. H.B. 58 (Feb. 17, 1997), p. 3; Appendix, p. 5.) Senator Adams tried to amend the bill before the Senate Finance Committee, changing the words "hazardous waste" back to "hazardous substance." The amendment was rejected.

Minutes, S. Fin. Hearing on H.B. 58, 20th Leg., 1st Sess. (Apr. 11, 1997), SFC-97, #101:1; Appendix at 11.

The sponsor of the Act discussed the hazardous waste exception before the House Judiciary Committee:

> REPRESENTATIVE ETHAN BERKOWITZ asked whether hazardous waste had a legal definition or was addressed by a body of law.
>
> REPRESENTATIVE PORTER replied, 'It is an attempt to address another concern that was raised of the more typical kinds of "someone's property leached chemicals into my property and I didn't know about it," those kinds of things.' He said if someone had a better definition, he would certainly look at it.
>
> REPRESENTATIVE BERKOWITZ asked whether there was a reason for using the term 'waste' instead of 'material.'
>
> REPRESENTATIVE PORTER said there may have been at the time; however, he could not recall one.

Minutes, H. Jud. Hearing on H.B. 58, 20th Leg., 1st Sess. (Feb. 21, 1997), Nos. 1132, 1184; Appendix at 16.

Thus, Rep. Porter made it clear that the hazardous waste exception was merely intended to cover what the plain language of the clause suggests – undiscovered environmental releases of waste products which can be harmful in cases of prolonged exposure, and "those kinds of things." Although the plaintiffs insist that this exchange was only an example of the exception's scope, AOB at 16-17, 22, they do not explain how Mr. Hoffman's alleged inhalation of asbestos while working at two

Alaska pulp mills is analogous to, for example, mercury leaking into groundwater from an industrial site.[2] Nor can they – the plaintiffs' allegations are *not* in any way comparable to such an event.

The legislative history compels rejection of the plaintiffs' argument for additional reasons. The Alaska legislature was well aware of asbestos litigation when it enacted the statute of repose. It had established the Asbestos Health Hazard Abatement Program in 1985. Alaska Stat. § 18.31.010. UNARCO and Johns Manville had filed for bankruptcy years before, and by 1989, forty-nine companies had sought bankruptcy protection because of asbestos claims. Larence G. Centrulo, *History of Asbestos, Asbestos Litigation and Regulation* (2013), p. 152.[3] Six years before, more than 20,000 asbestos personal injury claims pending in the Federal courts were transferred to an MDL court and consolidated as MDL 875. *Id.,* p. 154. And still, not only was asbestos not mentioned in

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[2] Neither *Berg v. Popham,* 113 P.3d 604 (Ak. 2005) nor *Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344 (Ak. 2001), cited by the plaintiffs, is to the contrary. *Berg* involved release of a cleaning solvent called perchlorethylene. *Berg,* 113 P.3d at 606. *Laidlaw Transit* relates to a release of "various hazardous substances, including fuel oil." *Laidlaw Transit,* 21 P.3d at 345. Neither mentions asbestos, and neither is authority for the novel proposition that exclusions to a remedial statute such as the statute of repose should be broadly construed.

[3] Available at http://www.dri.org/dri/course-materials/2013-asbestos/pdfs/05-Cetrulo.pdf.

the statute, but not one legislator suggested during the three months the bill was being considered that the hazardous waste exception was intended to cover asbestos claims. Surely if the legislature had intended to preserve asbestos claims through the curious vehicle of an exception for "prolonged exposure to hazardous waste," someone would have said so. Nor is there any indication that the legislature intended to adopt by reference definitions of superficially similar terms from Federal or state law.

3) The Only Authority to Address Plaintiffs' Construction of the Exception Squarely Rejects Their Argument

Gilcrease v. Tesoro Petroleum Corp., 70 S.W.3d 265 (Tex. App. 2001) is the only case to address the scope of the hazardous waste exception, and it fully supports the analysis above. Plaintiff allegedly contracted mesothelioma years after working in the defendant's Alaska oil refinery. The plaintiff argued that asbestos fell within the hazardous waste exception, but the court disagreed. Pointing to Rep. Porter's explanation that the exception was intended to cover chemicals leaching from one property to another and "those kinds of things," the court concluded that the exception was limited to "solid wastes, as opposed to air contaminants" such as asbestos. 70 S.W.3d at 270. The court noted that no Alaska statute defines asbestos as a "hazardous waste," and that both the Alaska legislature and Congress had drawn a distinction between the

regulation of solid waste and the regulation of air contaminants. *Id.* at 270-71; *see* Alaska Stat. §§ 46.03.900(9) (defining "hazardous waste") and 46.03.900(1) (separately defining "air contaminant").

The plaintiffs offer various responses to *Gilcrease*, insisting that Federal and Alaska state law have overlapping regulatory regimes governing solid wastes and airborne materials, AOB at 22-24, but plaintiffs lose sight of the question at hand, which is the scope of the hazardous waste exception. The *Gilcrease* court properly understood the exception – which must as a matter of law be narrowly construed - to be limited to events such as chemicals leaching from one property to another and episodes of a similar nature. The court correctly held that such a narrow exception could not be expanded to cover occupational inhalation of asbestos fibers by an industrial employee.

4) Plaintiffs' Equal Protection Challenge is Frivolous

The plaintiffs suggest for the first time on appeal that unless the hazardous waste exception is expansively construed to encompass asbestos claims, the statute violates equal protection. AOB at 20-21.

Because the plaintiffs failed to make their constitutional argument below, this Court may reverse only upon finding that the trial court's construction of the hazardous waste exception was "manifest error" – i.e.,

error that is "clear and indisputable." RAP 2.5(a); *State v. Bertrand,* 165 Wn. App. 393, 417, 267 P. 3d 511 (2011).

Plaintiffs cannot satisfy this standard. Where there is no unequal treatment of similarly situated persons, there can be no equal protection claim. *Matanuska-Susitna Borough School Dist. v. State,* 931 P.2d 391, 397 & n. 7 (1997). The statute of repose and its hazardous waste exception do not treat similarly situated persons differently. All persons whose claims are based upon "prolonged exposure to hazardous waste" such as chemicals leaching from one property to another are excluded. No persons whose claims are based on asbestos exposure fall within the scope of the exception. Plaintiffs make no attempt to show that asbestos plaintiffs and persons suffering from "prolonged exposure" to hazardous waste materials are similarly situated, nor could they.[4]

b. The Clause Tolling the Statute With Respect to Actions Based on the Presence of Foreign Bodies Does Not Preserve Plaintiffs' Claims

Next, plaintiffs argue for the first time that their claims against GE

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[4] Indeed, it is plaintiffs' theory of the statute which would render the statute constitutionally suspect. If "hazardous waste" were construed to encompass asbestos, then the statute would preserve claims based upon "*prolonged* exposure" to asbestos, while barring claims based on intense but more short-term exposures. Plaintiffs fail to even acknowledge the inconsistency in their argument, let alone explain it away. Accordingly, the doctrine of constitutional avoidance compels affirmance of the trial court's judgment.

are preserved by the clause tolling the statute for actions based upon the presence of foreign bodies. AOB at 25-31. Plaintiffs' argument is contrary to the plain language, the legislative history and the case law interpreting the exception.

1) The Plain Language of the "Foreign Bodies" Clause

Plaintiffs insist that the plain language of the "foreign bodies" clause extends to asbestos claims. The only authorities they cite are Wikipedia and two medical journal articles, each of which uses the phrase "foreign bodies" in describing asbestos disease. AOB at 25-27.

Plaintiffs' argument fails for the same reason their construction of the hazardous waste exception does: they construe a small part of the "foreign bodies" clause as broadly as possible and ignore the rest of the clause. But the Court must give meaning to every word or phrase in the statute. *Chugach Electric Ass'n,* 49 P.3d at 253 n. 20. Statutory exceptions to a remedial statute are *narrowly* construed. *Intl. Ass'n of Firefighters,* 146 Wn. 2d at 34; *Whitesides,* 16 P.3d at 732.

The "foreign bodies" clause reads:

> The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has 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.

Alaska Stat. § 09.10.055(c).

Plaintiffs claim that if the legislature had intended to limit the clause to medical malpractice claims it would have expressly said so. AOB at 28-29. But the legislature *did* say so. Plaintiffs attribute no significance to the limiting language "a foreign body *that has no therapeutic or diagnostic purpose or effect in the body of the injured person.*" Surely this would be a curious way for a legislature to reference asbestos claims; plaintiffs offer no examples of either statutes or case law using such language to refer to asbestos claims. But it is a perfectly clear way to refer to medical malpractice claims such as claims resulting from foreign bodies left in a patient's body by a physician.

Plaintiffs likewise ignore the limitation that for the statute of repose to be tolled, a lawsuit must be "based on presence of the foreign body," making no attempt to demonstrate that their claims satisfy this limitation. Nor could they. Asbestos is a naturally-occurring mineral whose fibers can be found in the ambient air. CP 732. A large percentage of urban dwellers have asbestos fibers in their lungs. CP 736. Asbestos claims are not based on the mere presence of asbestos fibers, nor do all exposures carry the same risk. CP 147. Asbestos disease arises from the body's *response* to the presence of an unacceptable level of asbestos fibers. CP 2527-29. While the limiting language cannot be read as a

reference to asbestos, it is a perfectly clear way of referring to medical malpractice claims which *do* often arise from the mere presence of a foreign body.

2) The Legislative History of the Foreign Bodies Clause

The legislative history confirms this narrow construction of the clause, and offers no support to the plaintiffs' argument.

Rep. Porter explained to the House Judiciary Committee that the foreign bodies clause was intended to address medical malpractice claims:

> REPRESENTATIVE PORTER referred to Section 5(2)(C), which he described as somewhat unusual . . . 'The old sponge left in the body after surgery' kept coming up, he said. 'We toll the statute of repose. Tolling is a nice legal word for meaning that it's null and void, held in abeyance until this thing is discovered, that if there is a foreign body that has no therapeutic or diagnostic purpose found . . . in a person's body, that that is an exception to the statute of repose.

Minutes, H. Jud. Comm. Hearing on H.B. 58, 20th Leg. 1st Sess. (Feb. 21, 1997), No. 1050; Appendix at 16.

The clause came up again a few days later during the testimony of Dr. David Johnson of Ketchikan Medical Center. Once again, the conversation focused solely on medical malpractice claims. *Id.* (Feb. 24, 1997), No. 2343, Appendix at 27-28.

Both the plain language of the foreign bodies clause and the legislative history show that the clause was intended to refer to medical

malpractice claims and nothing more. The trial court correctly declined to extend the scope of the clause to preserve plaintiffs' asbestos claims.

3) The Only Authority to Address the Foreign Bodies Clause Rejects Plaintiffs' Argument

Just as with the hazardous waste exception, only one case has construed the foreign bodies clause – *Gilcrease.* The *Gilcrease* court correctly held that "a narrow interpretation of the term is appropriate," relying on Rep. Porter's statement to the House Judiciary Committee that the clause is intended to address "'the old sponge left in the body after surgery'" and similar situations. 70 S.W.3d at 271. The court noted that a host of other jurisdictions, when they wanted to preserve asbestos actions from the statute of repose, did so in the plainest manner possible, by expressly mentioning "asbestos." *Id.* at 271-72.

Plaintiffs' attempts to respond to *Gilcrease* are meritless. According to plaintiffs, the court's holding "ignor[es] the plain language of the statute," AOB at 27, but as shown above, the plain language requires a narrow construction limited to medical malpractice claims. The plaintiffs dismiss Rep. Porter's explanation as a "snippet of legislative history" offering only "an example of section (c)'s application." AOB at 28. Nothing in the legislative history supports the plaintiffs' claims.

Finally, the plaintiffs suggest that the *Gilcrease* court made a

"remarkable analytical leap that has no place in statutory interpretation" by noting that most states wishing to exempt asbestos from statutes of repose had done so expressly. AOB at 30. Not so. The *Gilcrease* court made an important point which is equally applicable to the plaintiffs' arguments here. Because the statute of repose never mentions the word "asbestos," the plaintiffs are trying to hammer a square peg into various round holes. It is reasonable to suppose that if the legislature had wanted to exclude claims like plaintiffs', it would have done so plainly.

4) Plaintiffs' Equal Protection Challenge to the Foreign Bodies Clause is Frivolous

Plaintiffs suggest that interpreting the foreign bodies clause to exclude asbestos claims would render the statute unconstitutional. AOB at 31. Like their challenge to the hazardous waste statute, plaintiffs raise their constitutional argument for the first time on appeal, so review is for "manifest error." RAP 2.5(a); *State v. Bertrand,* 165 Wn. App. at 417.

Plaintiffs cannot satisfy their burden. The statute treats all similarly situated individuals the same, tolling the statute for anyone with a medical malpractice claim arising from the presence of an undiscovered foreign body. Plaintiffs offer no explanation of how such individuals are similarly situated to mesothelioma patients, nor does one exist. The foreign bodies clause is obviously constitutional.

c. The Defective Product Exception Does Not Preserve the Plaintiffs' Claims Because GE's Turbines are Not a Product as a Matter of Law

Next, plaintiffs argue that their asbestos claims are preserved by the exception to the statute of repose for claims resulting from a defective product. They are mistaken. As many courts in jurisdictions across the country have recognized, heavy industrial machinery like GE's turbines are not a "product" within the meaning of statutes of repose. Rather, because the turbines were a long-term addition to the mills which enhanced the value of the property in its intended use, they are improvements to real property as a matter of law.

1) The Plain Language of the Product Exception

> Section (b)(1)(E) of the Alaska statute of repose reads:
>
> This section does not apply if (1) the personal injury, death or property damage resulted from . . .
>
> (E) a defective product; in this subparagraph, 'product' means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce . . .

Alaska Stat. § 09.10.055(b)(1)(E).

GE's turbines were neither "capable of delivery as an assembled whole" nor "introduced into trade or commerce." Far from being off-the-shelf "products," they were custom designed and manufactured to meet the specific requirements of Hoffman's Alaska employers. CP 71. The

turbines were assembled on-site in a process which took thousands of worker-hours. CP 255. The turbines generated all the power used by the mills, and were necessary for the mills to operate. CP 71. Accordingly, the turbines were not "products" within the scope of the plain language of the exception.

2) The Legislative History of the Product Exception

The legislative history also shows that the GE turbines are not "products" within the meaning of the statute of repose.

The Alaska legislature expressed its concern for manufacturers of improvements to real property in a 1994 amendment to Section 09.10.055:

> (3) unlike manufactured products, the useful life of an improvement to real property can be hundreds of years; the availability of relevant evidence and witnesses . . . can be especially acute in suits involving improvements to real property because of this potential for long life . . . for these reasons, the burden of maintaining appropriate records and other documentation beyond a certain reasonable period of time may be excessive or even impossible.

1994 Alaska Laws Ch. 28 (H.B. 160); Appendix at 29.

The legislature's concerns are reflected in the undisputed facts here. The GE turbines were built at the Ketchikan and Sitka mills in the 1950s and operated for decades. Both mills have long since closed. CP 1248, 2566, 2783. The Ketchikan mill has only one employee remaining and almost no documents from the relevant period. CP 2066, 2072-73,

2076. None of the parties were able to find workers from the Sitka mill during the relevant period. CP 374. Of the two co-workers identified for Ketchikan, one was already deceased. CP 637. The parties have been unable, decades later, to locate documentary or testimonial evidence regarding the nature of the work performed, the identity of the workers or the manufacturer or supplier of materials at either mill. CP 2066, 2072-73, 2076. The Alaska statute of repose was designed to protect manufacturers from lawsuits under circumstances like this.

Rep. Porter narrowed the original scope of the product exception early in the legislative process. As introduced, the exception read:

> (b) This section does not apply if
>
> > (1) The personal injury, death, or property damage resulted from . . .
> >
> > > (E) a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce; "product" includes an element or compound that if ingested by humans or if humans are exposed to, or are in contact with the element compound or product, poses a threat to human health.

H.B. 58, 20th Leg., 1st Sess. (Jan. 13, 1997), p. 2; Appendix at 2.

Porter offered a substitute bill which entirely struck the second clause of the definition, leaving only the first clause (which is the text of

the statute as enacted). H.B. 58, 20th Leg., 1st Sess. (Feb. 17, 1997), pp. 3-4; Appendix at 5-6. No member of the legislature sought to have the language restored.

There is only one reference to the language defining a "product" in the legislative history. During the February 21, 1997 meeting of the House Judiciary Committee, Rep. Porter explained:

> REPRESENTATIVE PORTER believed one of the biggest exceptions was Section 5(2)(b)(1)(E), a defective product. There had been much testimony over the last four years about 'some of the more salient products that have come to light after an eight-year period.' He cited Thalidomide as an example. Although one could argue for a statute of repose in those cases, an accommodation and compromise existed in this legislation. 'We're saying, "Okay, we're not going to fight that battle today,"' he said.

Minutes, H. Jud. Hearing on H.B. 58, 20th Leg., 1st Sess. (Feb. 21, 1997), No. 846; Appendix at 16.

The plaintiffs insist that this language supports broadly construing the term "product." AOB at 32. Not so. A wide variety of things *do* qualify as "products" as that term is defined by the legislature. In that sense, Rep. Porter was correct to observe that the products exception was "one of the biggest exceptions" to the statute of repose.

But that is not the same thing as giving a broad construction to statutory language defining "product." Since the Alaska statute of repose is a remedial statute, exceptions must be *narrowly* construed. *Intl. Ass'n of*

Firefighters, 146 Wn. 2d at 34; *Whitesides,* 16 P.3d at 732. The only revision the legislature made to the exception narrowed the scope of the term "product." The only example Rep. Porter lists as falling within the scope of the exception is the pharmaceutical Thalidomide, which – unlike GE's turbines – plainly was capable of delivery as an assembled whole and introduced into trade or commerce by its manufacturer.

3) The Trial Court Correctly Concluded That GE Turbines are an Improvement to Real Property, Not a Product

The trial court correctly concluded that GE's turbines constituted an improvement to real property rather than a product. RP 3/25/2015, pp. 49:22-50:4.

Washington law defines an improvement to real property as anything built into property to enhance its value for a particular purpose. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 531, 503 P.2d 108 (1972). It is not required that the machinery be permanently built into the structure:

> If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening such as would cause permanent injury if removed.

Wade v. Donau Brewing Co., 10 Wn. 284, 289, 38 P. 1009 (1894); *see also K&L Distrib., Inc. v. Kelly Elec., Inc.*, 908 P.2d 429 (Alaska 1995)

(whether industrial lighting and circuit breakers were "fixtures" depended on "the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment").

Washington courts have held that an escalator system, a building refrigeration system and brewing machinery are all improvements to real property. *Highsmith v. J. C. Penney & Co.*, 39 Wn. App. 57, 63, 691 P.2d 976 (1984); *Yakima Fruit,* 81 Wn.2d at 531-32; *Wade,* 10 Wn. at 289-290.

Harder v. ACandS, 179 F.3d 609 (8th Cir. 1999) involved a worker who allegedly contracted mesothelioma as a result of asbestos exposure and sued GE, among others, alleging that he had been exposed to asbestos from thermal insulation blankets sometimes used in GE turbines. The court noted that the Iowa Supreme Court had defined an "improvement" as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the real property more useful or valuable." *Id.* at 612. The court therefore held that the turbines were improvements to real property within the meaning of the statute of repose. *Id.*

Courts throughout the country have frequently applied similar definitions to hold that electric generators manufactured by GE and others are improvements to real estate for purposes of applying statutes of repose.

E.g., Johnson v. Allis-Chalmers Corp. Prod. Liab. Trust, 11 F.Supp.3d 1119, 1138 (D. Wyo. 2014); *McSweeney v. AC&S, Inc.*, -- F.Supp.3d --, 2014 WL 4628030, *3-5 (C.D. Ill. 2014); *Reed v. American Steel and Wire Corp.*, Civ. Action No. CV10-1540-KA (Ga. Super. Ct., 2012)(CP 2674, 2675-80); *Rabatin v. Allied Glove Corp.*, 24 A.3d 388, 392-94 (Pa. Super. Ct. 2011); *Daniels v. F. B. Wright Co. of Pittsburgh,* 2010 WL 9095455, *1 (Pa. Com. Pl. 2010); *Sever v. Westinghouse Elec. Corp.,* Case No. A-3156-88T2 (N.J. Super. Ct. (App. Div.) 1990) (CP 2657, 2665-66).

Many courts have held that similar types of heavy industrial machinery are improvements to real property for purposes of applying statutes of repose, typically considering factors such as whether the machinery enhanced the value of the property for its intended use, the level of integration of the item and the item's permanence. *E.g., Associated Elec. & Gas Insur. Serv. v. Bendtec, Inc.*, 2015 WL 3915805 (D. Minn. 2015) (piping connecting turbine to boiler); *Kephart v. ABB, Inc.*, 2015 WL 1245825 (W.D. Pa. 2015) (boiler); *Graver v. Foster Wheeler Corp.*, 96 A.3d 383, 388 (Pa. Super. Ct. 2014) (same); *Barile v. 3M Co., Inc.*, 2013 WL 4727128, *8-9 (N.J. App. Div. 2013) (same); *Stanley v. Ameren Illinois Co.*, 982 F.Supp. 2d 844, 862-63 (N.D. Ill. 2013) (insulation for boiler); *Toole v. Georgia-Pacific, LLC,* 2011 WL 7938847, *5-6 (Ga. App. 2011) (insulation for pipes, vessels, boilers,

furnaces and other machinery); *Stone v. United Engineering,* 197 W.Va. 347, 356-58 (W.Va. 1996) (hotline conveyor system); *Adair v. Koppers Co.*, 741 F.2d 111, 114-15 (6th Cir. 1984).

The GE turbines were improvements to real property, not products. The turbines were essential to the operation of the two Alaska mills because of their remote locations, and added considerable value to the properties. The turbines were custom designed, affixed to the real estate, and were intended to, and did, remain in place for decades. CP 71. The removal and sale of one of the turbines not long before one of the mills closed does not change this conclusion. *Wade,* 10 Wn. at 289, 38 P. 1009.

4) The Alleged Use of Insulation, Packing and Gaskets in Connection with the Turbines Does Not Bring Plaintiffs' Claims Within the Scope of the Products Exception

For the first time on appeal, plaintiffs argue that even if the turbines themselves are improvements to real property, the insulation, packing and gaskets used in conjunction with the turbines were "indisputably products" under the statute. AOB at 33, n.5. Plaintiffs waived their argument by failing to raise it below.[5] R.A.P. 2.5(a).

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[5] In fact, plaintiffs affirmatively repudiated any such argument: "[T]he product here – and I want to make this 100 percent clear, and I'm sure the record is going to be clear on this because we have a court reporter here

Even if plaintiffs had properly preserved their argument, plaintiffs' argument has been repeatedly rejected. For example, in *Harder* the Eighth Circuit held that because asbestos-containing thermal blankets are "essential components" of turbines and "the turbines were not meant to function without the blankets," the thermal blankets were an improvement to real property. 179 F.3d at 612-13. The court likewise rejected a claim that the insulation ceased to be an improvement when it was detached from the turbine for maintenance:

> To revive liability long after it has expired based on the improvement's temporary detachment is contrary to Iowa's 'legislative policy decision to close the door after fifteen years on certain claim arising from improvements to real property.'

Id. at 613.

The Seventh Circuit has similarly emphasized in cases involving statutes of repose that "in making an improvement determination, courts must consider the entire system that the defendant helped to design or construct and not merely the component that may have caused the injury." *Garner v. Kinnear Mfg. Co.*, 37 F.3d 263, 267 (7th Cir. 1994); *Herriott v. Allied Signal, Inc.*, 998 F.2d 487, 490 (7th Cir. 1993) (citing cases). The Sixth Circuit is in agreement, holding that a single conveyor did not lose

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today – I've said all along, the product at issue with regard to General Electric are its turbines." RP 3/25/2015, pp. 40:24-41:3.

its character as an "improvement" because it could be removed when the conveyor was an integral part of a larger coal handling system which clearly was an improvement. *Adair,* 741 F.2d at 114-15.

In *Stanley,* the district court held that one could not properly view "the 'improvement question at the micro level, focusing on individual components of the construction rather than the larger system." *Stanley,* 982 F.Supp.2d at 863. Rather, "it is the macro-level inquiry that counts for purposes of the statute of repose." *Id.* Because the insulation at issue in *Stanley* was "a practical necessity for the operation of the plant," and "no power plant is designed or constructed without thermal insulation," the court concluded that the pipe insulation was an improvement to real property. *Id.* at 863-64.

McSweeney involved similar claims. The plaintiff alleged that he had been injured when asbestos-containing insulation and gaskets were removed from a turbine during maintenance and repair. The court held that the insulation and gaskets retained their character as an improvement to real property: "Essential components of the turbine are improvements to real property even if components are later removed and replaced, and statutory protection arising from the design and initial construction of the turbine extends to injury sustained during overhauls and outages." *McSweeney,* 2014 WL 4628030, *5; *accord, Daniels,* 2010 WL 9095455;

Stone, 197 W.Va. at 357-58.

Plaintiffs rely upon *Dinneen v. A.O. Smith Corp.*, -- A.3d --, 2011 WL 1566835 (Conn. Super. Ct. 2011) and *In re Asbestos Litig.*, -- A.3d --, 2011 WL 5395554 (Del. Super. Ct. 2011), for the proposition that asbestos-containing insulation, packing and gaskets can be separately considered products outside of the statute of repose even when they are components of larger systems that qualify as improvements to real property. AOB at 33, n.5.

Neither holds any such thing. The defendant in *Dinneen* moved for summary judgment on the grounds that plaintiff could not raise a triable dispute of fact on whether he was exposed to asbestos from the defendant's products. No question regarding a statute of repose was involved. *Dinneen,* 2011 WL 1566835, *1-3. The court in *Asbestos Litigation* held that defendant's "conclusory statement" first mentioning the statute of repose in a supplemental reply brief was insufficient to avoid waiver. *In re Asbestos Litig.,* 2011 WL 5395554, *3-4.

Plaintiffs point to no evidence that GE manufactured asbestos-containing insulation, packing or gaskets for use in conjunction with its turbines. The only evidence in the record is that insulation used at the mills was manufactured by Johns-Manville. CP 1023. Because the GE turbines *had* to have some form of insulation in order to work properly

without being a health hazard, the components are part of an improvement to real property – the turbines – as a matter of law. They do not lose their character as improvements even if they were at times removed as part of maintenance or repair.[6]

d. The Exception for Gross Negligence Does Not Preserve Plaintiffs' Claims

Finally, plaintiffs argue that their claims against GE are preserved by the exception for gross negligence. Alaska Stat. § 09.10.055(b)(1)(B). Plaintiffs are mistaken.

Plaintiffs never argued below that their claims against GE could be salvaged by the exception for gross negligence; their briefing and argument on that exception was directed solely against KPC. Arguments not raised below are waived on appeal. RAP 2.5(a).[7]

Plaintiffs waive the argument a second time in their Opening Brief. Plaintiffs suggest (in a single sentence) that GE supposedly knew by the

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[6] Plaintiffs repeatedly make the conclusory assertion in their brief that affirming the trial court would amount to holding that the Alaska statute of repose abolished asbestos claims in Alaska. AOB at 1, 9, 13-15, 42. Arguments which are not developed in the briefs, without argument or authority to support them, are waived. *Dickson v. Kates,* 132 Wn. App.724, 733 (2006). Although the statute's exception for products does not preserve the plaintiffs' claims against GE, it would preserve the vast majority of claims in typical asbestos litigation.

[7] The trial court's statement cited by the plaintiffs in their Opening Brief related only to plaintiffs' claims of gross negligence against KPC. AOB at 35; RP 3/25/2015, pp. 49:14-15.

1950s of the alleged hazards of asbestos, but they cite no evidence from the record in support of their conclusory claim. Nor do they cite any authority holding that distributing asbestos-containing products purportedly without a warning constitutes *gross* negligence. Arguments which are not developed in the briefs, without argument or authority to support them, are waived. *Dickson,* 132 Wn. App. at 733, n.10.

Even if plaintiffs had properly preserved and presented their argument on appeal, the argument would fail. Alaska law defines "gross negligence" as "a *major* departure from the standard of care." *Maness v. Daily,* 307 P.3d 894, 905 (Alaska 2013) (Emphasis added). Plaintiffs allege that GE failed to provide warnings regarding substantial risks of which it knew or reasonably should have known. AOB at 35. Such conduct, even if plaintiffs could prove it, merely describes negligent failure to warn under Alaska law, *not* gross negligence. *Jones v. Bowie Industries, Inc.*, 282 P.3d 316, 335-36 (Alaska 2012).

The Alaska statute of repose bars all actions for personal injury or death brought more than ten years after the date of the last act alleged to have caused harm. Neither the hazardous waste exception, the "foreign bodies" clause, the defective products exception nor the gross negligence exception preserves the plaintiffs' claims.

Since the plaintiffs' claims against GE are barred under Alaska

law, the trial court correctly held that an outcome-determinative conflict of laws exists.

C. The Superior Court Correctly Held That Alaska's Statute of Repose Applied to Plaintiffs' Claims

1. The Most Significant Relationship Test

Because the Superior Court correctly found that the Alaska statute of repose bars plaintiffs' claims, the court properly engaged in a conflict of laws analysis. As noted above, Washington courts determine tort issues according to the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. *Zenaida-Garcia,* 128 Wn. App. at 259-60. Relevant contacts to be taken into account include: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994). The court does not merely count contacts; rather, it considers which contacts are most significant with respect to the issue and to determine where those contacts are found. *Johnson,* 87 Wn.2d at 581.

When the contacts are evenly balanced between the two states, the second part of the analysis is performed. This step requires the evaluation of the interests and public policies of the involved states to determine

which state has the greater interest in the determination of the particular issue. *Johnson,* 87 Wn. 2d at 582.

2. Alaska Has More Significant Contacts With Respect to the Statute of Repose Issue Than Washington

Upon finding a "clear conflict" between the Alaska and Washington statutes of repose, the trial court analyzed whether Alaska or Washington had more significant contacts with the occurrence and parties. CP 1535. The court found that the relevant factors "weighed in favor of the application of Alaska law," and accordingly held that the Alaska statute of repose should apply. *Id.* That holding was correct and should be affirmed.

a. The First and Second *Johnson* Factors Weigh in Favor of Applying the Alaska Statute of Repose

With respect to the first and second *Johnson* factors – the place where the injury and the conduct causing the injury occurred – Alaska's contacts far outweigh those of Washington. Plaintiff Larry Hoffman moved to Alaska when he was seven years old, and lived and worked there for most of his career. CP 200.

Larry Hoffman's *only* asbestos exposures for which GE was allegedly responsible occurred at the Ketchikan and Sitka pulp mills. CP 114, 116. All of the Hoffman's additional alleged exposures occurred in Alaska as well. CP 113-117.

GE's turbines were custom designed and manufactured for the Ketchikan and Sitka mills in Alaska. CP 71. GE employees were involved in assembling the turbines on site and the initial startup. CP 255. GE employees were also on site to observe and sign off on repair work on the turbines at various times in the 1960s and 1970s. CP 257. Any conduct allegedly causing Mr. Hoffman's injury occurred in Alaska; *none* occurred in Washington. The first two factors weigh in favor of Alaska.

Plaintiffs respond that because they are alleging a negligent failure to warn claim against GE, the place of the negligent act causing plaintiffs' injury is the jurisdiction where the turbines were manufactured. AOB at 39. Plaintiffs also suggest that Mr. Hoffman's injury occurred in Washington, since he was living in Washington at the time of his diagnosis. *Id.* at 40.

Plaintiffs' arguments must be rejected. Plaintiffs claim that GE employees were present at times at the Alaska mills. CP 255, 257. All allegedly injurious contact between Larry Hoffman and GE's turbines occurred in Alaska.

The Washington Supreme Court analyzed quite similar facts in *Rice.* There, the plaintiff was exposed to certain herbicides while living and working in Oregon. *Rice,* 124 Wn.2d at 207. Although the plaintiff moved to Washington in 1967, he had only one additional limited contact

with the defendant's products. *Id.* The Supreme Court held that the balance of contacts between the parties clearly favored Oregon, the place of plaintiff's alleged exposures. *Id.* at 214.

The plaintiff argued that the tort was committed in Washington, since he lived there when the disease was diagnosed. The court disagreed. Although the defendant's herbicide was manufactured elsewhere, the court found that the place of the tort is the place of the allegedly injurious contact between the herbicide and the plaintiff. *Id.* at 215, 216 ("residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law").

The California Supreme Court addressed the same arguments in a similar case, *McCann v. Foster Wheeler LLC,* 48 Cal.4th 68 (2010). The plaintiff's employer, an Oklahoma oil refinery, ordered a steam generator from defendant consisting of "a custom-designed and extensively engineered boiler and related equipment." *Id.* at 77. Plaintiff alleged that he had been exposed to asbestos while observing a contractor applying asbestos insulation to the boiler. *Id.* at 74-75.

The defendant argued that the plaintiff's action was barred by the Oklahoma statute of repose for improvements to real property. *Id.* at 88-89. The plaintiff argued that the boiler was designed and manufactured outside of Oklahoma, but the court held that it made no difference:

> The statute of repose here at issue protects not only construction-related businesses that engage in their activities at the Oklahoma site of the improvement, but also commercial entities . . . that conduct their activities away from the location of the improvement but whose potential liability flows from a plaintiff's interaction with, or exposure to, the real property improvement in Oklahoma . . . Oklahoma clearly possesses an interest in having the statute applied in the present case and . . . its interest is not diminished by the circumstances that some of Foster Wheeler's activities occurred outside of Oklahoma.

Id. at 93-94, 97.

The plaintiff argued that his injury occurred in California because he had resided there at the time of his diagnosis. The court disagreed:

> Although in such a case the plaintiff's long-term medical expenses are likely to be incurred in California and, if the plaintiff's resources are insufficient, the state ultimately may expend considerable financial resources for his or her care, past California choice-of-law decisions as we have seen have not treated that type of case as one in which a defendant's conduct has caused an injury in California. Those decisions instead have . . . recognized that the state in which the alleged injury-producing conduct occurred . . . generally has the predominant interest in determining the appropriate parameters of liability for conduct undertaken within its borders.

Id. at 102.

Neither of the authorities relied upon by the plaintiffs is to the contrary. Plaintiff points to *Zenaida-Garcia,* which found that the injury-causing conduct in a case involving negligent design and manufacture of an allegedly defective trommel had occurred in Washington. 128 Wn. App. at 264. But there is no indication in *Zenaida-Garcia* that the

trommel was custom-designed to match the requirements of the plaintiff's employer. Besides, the original sale of the injury-causing device there was in Washington. *Id.* at 258. Nor is there any indication that plaintiff alleged in-state conduct by defendant's employees akin to the plaintiffs' allegations here.

Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 210 P.3d 337 (2009) is distinguishable for similar reasons. There, plaintiff was injured in Washington when an allegedly defective heart monitor designed and manufactured in California malfunctioned. *Id.* at 140. There is no indication that the heart monitor was custom-designed to satisfy the requirements of the plaintiff or any Washington entity, nor were there any allegations that the defendant engaged in conduct in Washington allegedly linked to plaintiff's injury.

b. The Third and Fourth *Johnson* Factors Weigh in Favor of Applying the Alaska Statute of Repose

The third and fourth factors – the domicil, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship between the parties is centered – weigh in favor of applying the Alaska statute of repose as well.

The Hoffmans' domicil and residence was Alaska at the time of his alleged exposures. CP 121. Defendant KPC is a Washington corporation,

but its sole place of business at all relevant times was Alaska. CP 1375. Although GE is a New York corporation with its principal place of business in Connecticut, CP 20, GE custom-designed its turbines for the two Alaska mills and installed the turbines on-site. CP 71. The relationship between the parties is entirely centered in Alaska, where Mr. Hoffman lived and worked.[8] CP 113-117.

The Washington Supreme Court held in *Rice* that the state where the plaintiff was allegedly exposed to harmful substances had the

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[8] Given that Washington's sole contact with this dispute arises from the Hoffmans' decision to relocate years after any relationship among the parties ceased, application of the Washington statute of repose here would be unconstitutional.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) was a nationwide class action venued in Kansas. The Kansas courts applied Kansas law to every claim in the case, even though almost none of the leases or plaintiffs had any apparent connection to Kansas. *Id.* at 814-16. The Supreme Court held that applying Kansas law under such circumstances violated the Due Process Clause: "Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22; *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981). Further, an "important element is the expectation of the parties." *Shutts,* 472 U.S. at 822. "There is no indication" that when the leases at issue were executed, "the parties had any idea that Kansas law would control." *Id.* Therefore, applying the substantive law of the forum violated the Full Faith and Credit Clause as well. *Id.*

Even if Hoffman was exposed to asbestos for which GE is somehow responsible, any relationship between the parties ended years before the Hoffmans moved to Washington. Therefore, applying Washington's statute of repose would violate GE's rights under the Due Process and Full Faith and Credit Clauses.

predominant interest in having its law govern plaintiffs' claims:

> Oregon's interest is in providing repose for manufacturers doing business in Oregon and whose products are used in Oregon state. The fact that a person living in Oregon, who is exposed to allegedly harmful chemicals while at work in Oregon, using products shipped to Oregon, later moves to another state does not extinguish Oregon's interest in allegedly dangerous or mislabeled products used within its state's boundaries. Applying Oregon law achieves a uniform result for injuries caused by products used in the state of Oregon and predictability for manufacturers whose products are used or consumed in Oregon.

Rice, 124 Wn. 2d at 216.[9]

The California Supreme Court agreed in *McCann,* holding that states have a legitimate interest in having their statutes of repose applied to out-of-state companies designing and constructing improvements to real estate inside the state because of the state's legitimate interest in obtaining the revenue that attracting out-of-state business can bring, as well as products and employment for residents. *McCann,* 48 Cal.4th at 91-92.

Plaintiffs argue that the facts here are "closer" to *Williams v. Leone & Keeble, Inc.,* 170 Wn. App. 696, 709, 285 P.3d 906 (Wn. App. 2012).

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[9] The plaintiffs briefly note that Mr. Hoffman's alleged asbestos exposure occurred years before the Alaska statute of repose was enacted, suggesting that Alaska has no interest in applying the statute "retroactively." AOB at 39, 41. Plaintiffs' comments are *ipse dixit,* without argument, analysis or authority, and are therefore waived. *Dickson,* 132 Wn.App. at 733, n.10. Alaska has a strong and legitimate interest in applying the statute of repose to claims which had neither accrued nor been filed at the time the statute was enacted – an application which is in no way "retroactive."

In fact, *Williams* supports affirming the trial court's decision. The *Williams* court held that Washington law governed in a case where the plaintiff was injured while a Washington resident by the negligence of a Washington corporation whose principal place of business was in Washington. *Id.* at 701. Here, the Hoffmans were residents of Alaska at the time of his alleged exposure to asbestos. CP 121. KPC's principal place of business was in Alaska throughout the relevant period. CP 1375. GE's only connection with the case arises because it custom-designed and installed turbines for two Alaska-based mills where plaintiff worked. CP 71, 114, 116. Thus, applying the rule of *Williams,* the trial court correctly held that contacts with Alaska predominated.

All four of the *Johnson* factors weigh in favor of applying Alaska's statute of repose. The Court should therefore affirm the judgment and order applying Alaska law without proceeding further. *Johnson,* 87 Wn.2d at 582 (evaluate interests and public policies of affected states only when contacts evenly balanced).

3. Alaska's Interest in Having Its Statute of Repose Applied Outweighs Washington's Interest

Although the Court need not proceed to the second step of the *Johnson* analysis in order to affirm, Alaska's interest in having its statute of repose applied here is greater as a matter of law than Washington's

interest in the dispute.

The plaintiffs argue that Washington's interest in seeing that the plaintiffs are compensated for Mr. Hoffman's alleged injuries, given that the plaintiffs currently reside in Washington, should override all other considerations. AOB at 41-42.

The Washington Supreme Court rejected exactly that argument in *Rice,* pointing out that although Washington's interest in protecting its current residents was a "real interest," treating it as an "overriding concern" would mean that Washington law was applied globally to all cases involving Washington residents, regardless of where the relevant contacts took place. *Rice,* 124 Wn.2d at 216. The Court held that a plaintiff's decision to move to Washington long after the relevant events cannot extinguish the alternative state's strong interest in ensuring predictability for corporations – whether in-state or out-of-state companies doing business in state. *Id.* at 216. The California Supreme Court agreed in *McCann,* 48 Cal.4th at 98.

Alaska's interest in governing conduct within its borders and protecting corporations by application of its statute of repose outweighs any interest Washington has in this dispute arising solely out of the plaintiffs' decision, years after the relevant events, to move here. The second step of the *Johnson* conflict of laws analysis weighs in favor of

applying the Alaska statute of repose. Since both steps of the analysis support applying the Alaska statute of repose, the trial court's judgment should be affirmed.

VI. CONCLUSION

The Superior Court's judgment and orders applying Alaska law and dismissing all claims against GE are correct and should be affirmed.

DATED: August 31, 2015

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on 31st day of August, 2015, I served a copy of the foregoing document on all counsel of record as indicated below:

Plaintiff's Counsel: **COUNSEL FOR APPELLATE:** Brian D. Weinstein Benjamin R. Couture WEINSTEIN COUTURE PLLC 818 Stewart Street, Suite 930 Seattle, WA 98101 service@weinsteincouture.com John W. Phillips Phillips Law Group, PLLC 315 Fifth Avenue South, Suite 1000 Seattle, W A 98104 jphillips@jphillipslaw.com kharrison@jphillipslaw.com	**Via Email** **Via Email &** **Via Legal Messenger**
Co-Defendants: **ALASKA COPPER COMPANIES, INC.; CRANE CO.:** G. William Shaw K&L Gates 925 Fourth Avenue, Suite 2900 Seattle, WA 98104 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 asbestos@poglaw.com	**Via Email**

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DATED this 31st day of August, 2015.

Maria S. Tiegen

APPENDIX

HOUSE BILL NO. 58

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PORTER, Cowdery

Introduced: 1/13/97
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Rules 49 and 68, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 09.10.055 is repealed and reenacted to read:

Sec. 09.10.055. Statute of repose of eight years. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within eight years of the earlier of the date of

(1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; or

(2) the last act alleged to have caused the personal injury, death, or

property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage resulted from

(A) exposure to a hazardous substance; in this subparagraph, "hazardous substance" means an element or compound that, when it enters into the air or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to public or individual health and welfare;

(B) an intentional act or gross negligence;

(C) fraud or fraudulent misrepresentation;

(D) breach of an express warranty or guarantee; or

(E) a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce; "product" includes an element or compound that if ingested by humans or if humans are exposed to, or are in contact with the element compound or product, poses a threat to human health;

(2) the facts that would give notice of a potential cause of action are intentionally concealed;

(3) a shorter period of time for bringing the action is imposed under another provision of law; or

(4) a longer period of time for bringing the action was provided under a contract.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has 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.

(d) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended.

* **Sec. 2.** AS 09.10.070(a) is amended to read:

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PORTER, Cowdery, Bunde

Introduced: 2/17/97
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; relating to independent counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** LEGISLATIVE INTENT. In enacting this bill, it is the intent of this legislature as a matter of public policy to

(1) encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others;

(2) provide for reasonable, but not excessive, punitive damage awards against

tortfeasors sufficient to deter conduct and practices that harm innocent Alaskans while not hampering a positive business environment by allowing excessive penalties;

(3) encourage individual savings and economic growth by fostering an environment likely to control the increase of liability insurance rates to individuals and businesses resulting in a savings to the state, municipalities, and private businesses that are self-insured;

(4) encourage the traditionally recognized Alaska values of self-reliance and independence by underscoring the need for personal responsibility in making choices and personal accountability for the consequences of those choices;

(5) alleviate the high cost of malpractice insurance premiums that discourage physicians, architects, engineers, attorneys, and other professionals from rendering needed services to the public;

(6) ensure that hospitals that comply with the disclosure requirements set out in this Act are not liable for the negligence of independent contractors; to this extent, this Act is intended to overrule Jackson v. Powers, 743 P.2d 1376 (Alaska 1987);

(7) ensure that one of several tortfeasors is not held responsible for the negligence of an employer; to this extent, this Act is intended to overrule Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990);

(8) enact a statute of repose that meets the tests set out in Turner Construction Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);

(9) ensure that in actions involving the fault of more than one person, the fault of each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages be determined and awards be allocated in accordance with the fault of each, thereby overruling Benner v. Wichman, 874 P.2d 949 (Alaska 1994); and

(10) reduce the amount of litigation proceeding to trial by modifying the allocation of attorney fees and court costs based on the offer of judgment and the final court award, thereby providing a financial incentive to both parties to settle the dispute.

*** Sec. 2.** AS 06.05.473(h) is amended to read:

(h) After the payment of all other claims, including interest at the rate **of 10.5 percent a year** [ESTABLISHED UNDER AS 09.30.070], the department shall pay

claims that are otherwise valid but that were not filed within the time prescribed.

* **Sec. 3.** AS 09.10.050 is repealed and reenacted to read:

Sec. 09.10.050. Certain property actions to be brought in six years. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.

* **Sec. 4.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.053. Contract actions to be brought in three years. Unless the action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, except as provided in AS 09.10.040 or as otherwise provided by law.

* **Sec. 5.** AS 09.10.055 is repealed and reenacted to read:

Sec. 09.10.055. Statute of repose of eight years. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within eight years of the earlier of the date of

(1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; in this paragraph, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended; or

(2) the last act alleged to have caused the personal injury, death, or property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage resulted from

(A) prolonged exposure to hazardous waste;

(B) an intentional act or gross negligence;

(C) fraud or fraudulent misrepresentation;

(D) breach of an express warranty or guarantee; or

(E) a defective product; in this subparagraph, "product" means

an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce;

(2) the facts that would give notice of a potential cause of action are intentionally concealed;

(3) a shorter period of time for bringing the action is imposed under another provision of law.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has 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.

* **Sec. 6.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. Limitation of actions against health care providers. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), an action based on professional negligence may not be brought against a health care provider if the injured person is, on the date of the alleged negligent act or omission, less than six years of age unless the action is commenced before the person's eighth birthday.

(b) The limitation imposed under (a) of this section is tolled during any period in which there exists

(1) fraud, including fraud or collusion by a parent, guardian, insurer, or health care provider, resulting in the failure to bring an action on behalf of an injured minor;

(2) intentional concealment of facts that would give notice of a potential action; or

(3) the undiscovered presence of a foreign object that has 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 object.

(c) In this section,

(1) "health care provider" has the meaning given in AS 09.55.560;

(2) "professional negligence" has the meaning given in AS 09.55.560;

(3) "professional services" has the meaning given in AS 09.55.560.

* **Sec. 7.** AS 09.10.070(a) is amended to read:

20th Legislature(1997-1998)
Committee Minutes
SENATE FINANCE
Apr 11, 1997
HB 58 CIVIL ACTIONS/ATTY FEES/INSURANCE

Vice-Chair Phillips took testimony via statewide teleconference between 5:00 P.M. and 7:30 P.M. After a brief recess, COCHAIR SHARP reconvened the meeting to take up amendments. SENATOR TORGERSON MOVED Amendment an Amendment to Amendment #1. Without objection, the Amendment to Amendment #1 was ADOPTED. There was no further objection, and Amendment #1 was ADOPTED. SENATOR TORGERSON MOVED Amendment #2. COCHAIR SHARP objected. Amendment #2 FAILED by a 3 to 4 vote. SENATOR ADAMS did not offer Amendment #3. Amendment #4 was not offered. SENATOR DONLEY MOVED Amendment #5. Objection was heard. Amendment #5 FAILED by a 2 to 5 vote. SENATOR DONLEY MOVED Amendment #6. SENATOR DONLEY MOVED an Amendment to Amendment #6. SENATOR TORGERSON objected. SENATOR DONLEY MOVED to amend the Amendment to Amendment #6. Without objection, it was ADOPTED. There being no further objection, Amendment offer Amendment #7. SENATOR DONLEY MOVED Amendment #8. COCHAIR PEARCE objected. SENATOR DONLEY withdrew Amendment #8 without objection. SENATOR ADAMS MOVED Amendment #9. COCHAIR PEARCE objected. Amendment #9 FAILED by a 2 to 5 vote. SENATOR ADAMS MOVED Amendment a 2 to 5 vote. SENATOR ADAMS MOVED Amendment #11. SENATOR TORGERSON objected. Amendment #11 FAILED by a 2 to 5 vote. SENATOR ADAMS MOVED Amendment #12. Objection was heard. Amendment #12 FAILED by a 2 to 5 vote. SENATOR ADAMS MOVED Amendment #13. COCHAIR PEARCE objected. Amendment #13 FAILED by a 2 to 5 vote. SENATOR ADAMS MOVED Amendment #14. COCHAIR PEARCE objected. Amendment #14 FAILED by a 1 to 6 vote. SENATOR ADAMS MOVED Amendment #15. SENATOR TORGERSON objected. Amendment #15 FAILED by a 2 to 5 vote. SENATOR ADAMS MOVED Amendment #16. SENATOR PARNELL objected. Amendment #16 failed by a 2 to 4 vote. SENATOR ADAMS did not offer Amendment #17. SENATOR ADAMS MOVED Amendment #18. COCHAIR PEARCE objected. Amendment #18 FAILED by a 1 to 6 vote. SENATOR PARNELL MOVED Amendment #19. SENATOR TORGERSON objected. Amendment #19 was ADOPTED by a 6 to 1 vote. SENATOR PARNELL MOVED Amendment #20. COCHAIR SHARP objected then withdrew his objection. Without further objection, Amendment #20 was ADOPTED. SENATOR TORGERSON MOVED SCSCSSSHB 58(FIN) from committee with individual recommendations. SENATOR ADAMS objected. By a vote of 6 to 1, SCSCSSSHB 58(FIN) was REPORTED OUT with previous zero fiscal notes from the Department of Law and the Department of Commerce and Economic Development, fiscal notes from the Judicial Council (26.5) and the Court System (19.4) and a new zero fiscal note from the Department of Administration.

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58(FIN) am "An Act relating to civil actions; relating to independent

counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; and amending Rule 511, Alaska Rules of Appellate Procedure."

VICE-CHAIR PHILLIPS announced that teleconferenced testimony would be limited to two minutes per person. He invited Representative Porter, Sponsor of HB 58, to address the committee.

REPRESENTATIVE PORTER kept his remarks brief, stating it was more relevant to say what the bill did not do as opposed to what it did. It did not limit economic damage recovery. The three avenues of request for recovery for a person who had been injured or had property damage were economic damages, non-economic damages and punitive damages. He provided additional detail and gave examples. He pointed out that non-economic damages were capped at $300 thousand but could go to $500 thousand in exceptional cases and punitive damages were capped at three times compensatory damages or $300 thousand, whichever was greater up to $600 thousand and four times compensatory damages in extreme cases. REPRESENTATIVE PORTER stated that the bill did not affect Workers Compensation cases and then concluded his introduction.

The presence of Senators Donley and Parnell was noted.

SENATOR ADAMS stated that the legislation did not allow for fair and just compensation for Alaskans because it did not favor the injured party, but instead favored businesses. He continued by stating that the belief that insurance rates would go down as a result was a myth. REPRESENTATIVE PORTER spoke to the issue of insurance rates, pointing out that they were regulated by the state and companies are asked to justify their rates based on experience in paying claims. The inability to lower rates immediately was because current cases had to be tried and compensated under existing law, which could take up to ten years.

VICE-CHAIR PHILLIPS called for statewide teleconference testimony next. The following individuals testified.

Valdez:
JAMES CULLEY, CEO, Valdez Community Hospital: Support
MIKE LOPEZ, Fisherman: Oppose

Ketchikan:
DAVID JOHNSON, M.D., Alaska State Medical Association: Support

Cordova:
CHERI SHAW, Cordova District Fishermen United: Oppose
COLLETTE PETIT: Oppose
AMY BROCKERT, Eyak Village Corporation: Oppose
JACK HOPKINS: Oppose
CHRISTINE HONKOLA: Oppose
ROSS MULLINS: Oppose
LINDEN O'TOOLE: Oppose

DENNY WEATHERS: Oppose
ROXY ESTES: Oppose

Kenai:
JOHN SIVELY, Kenai Central Labor Council: Oppose
ROBERT COWAN: Oppose

End SFC-97 #99, Side 1, Begin Side 2

PHIL SQUIRES: Oppose
SUSAN ROSS: Oppose
HUGH TORDOFF: Oppose

Mat-Su:
ROBERT MARTINSON: Oppose
DAVID GLEASON: Oppose

Sitka:
JANET LEEKLEY KISARAUSKAS: Support

Kodiak:
CHRIS BERNS: Oppose

The presence of Senator Donley was noted.

Anchorage:
KAREN COWART, Alaska Alliance: Support
COLIN MAYNARD, Professional Design Council: Support
STEPHEN CONN: Oppose
FRANK DILLON; Alaska Trucking: Support
DICK CATTANACH: Support
MONTY MONGTOMERY, Associated General Contractors: Support
KEVIN MORFORD: Oppose
RANDY RUEDRICH: Support
LES GARA, AKPIRG Board Member: Oppose
AL TAMAGNI: Support
STEVE BORELL, Executive Director; Alaska Miners Assn.:
Support

Fairbanks:
RICHARD HARRIS, Geologist: Support

The following individuals testified in person in Juneau.

JIM JORDAN, Executive Director, Alaska Medical Association:
Support CYNTHIA BROOKE, M.D., Anchorage: Support

End SFC-97 #99, Side 2
Begin SFC-97 #100, Side 1

KEVIN SMITH, Risk Manager, Alaska Municipal League: Support
CHRISTY TENGS FOWLER, Haines: Support
The presence of Cochair Sharp, Senators Torgerson and
Parnell was noted.

PAMELA LA BOLLE, Alaska State Chamber of Commerce: Support
MICHAEL LESMEIER, State Farm Insurance: Support

After a brief recess, COCHAIR SHARP reconvened the meeting
to take up amendments.

SENATOR TORGERSON MOVED Amendment #1. He explained that the amendment clarified that the legislation would not affect existing litigation taken in the Exxon Valdez case. SENATOR ADAMS objected. SENATOR TORGERSON MOVED an Amendment to Amendment #1 relating to maritime law. Without objection, the Amendment to Amendment #1 was ADOPTED.

COCHAIR SHARP asked for comments from the bill sponsor. REPRESENTATIVE PORTER welcomed the amendment and had no problem with it.

There was no further objection, and Amendment #1 was ADOPTED.

SENATOR TORGERSON MOVED Amendment #2. COCHAIR SHARP objected. SENATOR TORGERSON explained the amendment. REPRESENTATIVE PORTER spoke in opposition, as did SENATOR DONLEY.

End SFC-97 #100, Side 1, Begin Side 2

A roll call vote was taken on the MOTION to adopt Amendment
IN FAVOR: Phillips, Torgerson, Adams
OPPOSED: Donley, Parnell, Sharp, Pearce
Amendment #2 FAILED by a 3 to 4 vote.

SENATOR ADAMS did not offer Amendment #3.

Amendment #4 was not offered because it was identical to Amendment #1 which had been adopted.

SENATOR DONLEY MOVED Amendment #5 and explained that the amendment related to limited immunity for emergency room doctors. Objection was heard. REPRESENTATIVE PORTER spoke to the amendment. Although he philosophically agreed, he opposed the amendment.
A roll call vote was taken on the MOTION to adopt Amendment

IN FAVOR: Donley, Adams
OPPOSED: Torgerson, Parnell, Phillips, Pearce, Sharp.
Amendment #5 FAILED by a 2 to 5 vote.

SENATOR DONLEY MOVED Amendment #6. SENATOR DONLEY MOVED an Amendment to Amendment #6. SENATOR TORGERSON objected. SENATOR DONLEY explained that the amendment related to posting notice of limited liability. There was lengthy discussion, with support expressed by SENATORS ADAMS and TORGERSON. SENATOR DONLEY MOVED to amend the Amendment to Amendment #6. Without objection, it was ADOPTED. There being no further objection, Amendment #6, as amended, was ADOPTED.

SENATOR DONLEY did not offer Amendment #7.

SENATOR DONLEY MOVED Amendment #8. COCHAIR PEARCE objected. SENATOR DONLEY explained the amendment. There was lengthy discussion between SENATOR DONLEY, COCHAIRS PEARCE and SHARP and REPRESENTATIVE PORTER concerning the effect of the amendment. SENATOR DONLEY withdrew Amendment #8 without

objection.

SENATOR ADAMS MOVED Amendment #9 which repealed the statute of repose. COCHAIR PEARCE objected. REPRESENTATIVE PORTER spoke to the amendment and discussion continued.

End SFC-97 #100, Side 2
Begin SFC-97 #101, Side 1

A roll call vote was taken on the MOTION to adopt Amendment
IN FAVOR: Adams, Donley
OPPOSED: Torgerson, Parnell, Phillips, Pearce, Sharp
Amendment #9 FAILED by a 2 to 5 vote.

SENATOR ADAMS offered Amendment #9B and explained that it was a one word change. COCHAIR SHARP declared the amendment out of order.

SENATOR ADAMS MOVED Amendment #10, explained that it changed the term "hazardous waste" to "hazardous substance" and gave examples. COCHAIR PEARCE objected. REPRESENTATIVE PORTER spoke to the amendment and concluded that "hazardous waste" was inclusive and didn't need to be changed. A roll call vote was taken on the MOTION to adopt Amendment #10.
IN FAVOR: Adams, Donley
OPPOSED: Parnell, Phillips, Torgerson, Pearce, Sharp
Amendment #10 FAILED by a 2 to 5 vote.

SENATOR ADAMS MOVED Amendment #11. SENATOR TORGERSON objected. SENATOR ADAMS explained that the amendment deleted the new caps on non-economic damages. A roll call vote was taken on the MOTION to adopt Amendment #11.

IN FAVOR: Donley, Adams
OPPOSED: Phillips, Torgerson, Parnell, Pearce, Sharp
Amendment #11 FAILED by a 2 to 5 vote.

SENATOR ADAMS MOVED Amendment #12. Objection was heard. SENATOR ADAMS explained that the amendment changed "and" to "or" concerning the standards for higher punitive damages. REPRESENTATIVE PORTER spoke in opposition to the amendment. A roll call vote was taken on the MOTION to adopt Amendment
IN FAVOR: Adams
OPPOSED: Phillips, Donley, Torgerson, Parnell, Pearce, Sharp
Amendment #12 FAILED by a 1 to 6 vote.
SENATOR ADAMS MOVED Amendment #13. COCHAIR PEARCE objected. SENATOR ADAMS explained that the amendment deleted the section related to collateral benefits. Some discussion was had between SENATORS DONLEY, ADAMS and REPRESENTATIVE PORTER . A roll call vote was taken on the MOTION to adopt Amendment #13.
IN FAVOR: Donley, Adams
OPPOSED: Torgerson, Parnell, Phillips, Pearce, Sharp
Amendment #13 FAILED by a 2 to 5 vote.

SENATOR ADAMS MOVED Amendment #14. COCHAIR PEARCE objected. SENATOR ADAMS explained that the amendment cleared up language related to expert witness qualifications of the bill. A roll call vote was taken on the MOTION to adopt Amendment #14.

IN FAVOR: Adams
OPPOSED: Donley, Torgerson, Parnell, Phillips, Pearce, Sharp
Amendment #14 FAILED by a 1 to 6 vote.

SENATOR ADAMS MOVED Amendment #15. SENATOR TORGERSON objected. SENATOR ADAMS explained the amendment. A roll call vote was taken on the MOTION to adopt Amendment #15.
IN FAVOR: Adams, Donley
OPPOSED: Parnell, Phillips, Torgerson, Sharp, Pearce
Amendment #15 FAILED by a 2 to 5 vote.

SENATOR ADAMS MOVED Amendment #16. SENATOR PARNELL objected. SENATOR ADAMS described the amendment concerning offers of settlement prior to litigation. REPRESENTATIVE PORTER commented on the amendment, stating it would not be prudent. Additional discussion was had between he, SENATORS ADAMS, DONLEY and PARNELL. A roll call vote was taken on the MOTION to adopt Amendment #16.
IN FAVOR: Adams, Donley
OPPOSED: Phillips, Torgerson, Parnell, Sharp
Amendment #16 failed by a 2 to 4 vote.

SENATOR ADAMS did not offer Amendment #17, but did provide a brief description.

SENATOR ADAMS MOVED Amendment #18. COCHAIR PEARCE objected.

SENATOR ADAMS explained that the amendment would set up a pilot program for alternative dispute resolution to help streamline the justice system. REPRESENTATIVE PORTER spoke against the amendment. A roll call vote was taken on the MOTION to adopt Amendment #18.
IN FAVOR: Adams
OPPOSED: Phillips, Donley, Torgerson, Parnell, Pearce, Sharp
Amendment #18 FAILED by a 1 to 6 vote.

SENATOR PARNELL MOVED Amendment #19. SENATOR TORGERSON objected. SENATOR PARNELL explained that the amendment deleted periodic payments of a settlement. REPRESENTATIVE PORTER opposed the amendment. A roll call vote was taken on the MOTION to adopt Amendment #19.
IN FAVOR: Donley, Parnell, Adams, Phillips, Pearce, Sharp
OPPOSED: Torgerson
Amendment #19 was ADOPTED by a 6 to 1 vote.

SENATOR PARNELL MOVED Amendment #20. COCHAIR SHARP objected for the purpose of discussion. SENATOR PARNELL explained the amendment which related to reckless conduct.

End SFC-97 # 101, Side 1, Begin Side 2

COCHAIR SHARP withdrew his objection. Without further objection, Amendment #20 was ADOPTED.

COCHAIR SHARP announced there were no further amendments and requested the pleasure of the committee.

SENATOR TORGERSON MOVED SCSCSSSHB 58(FIN) from committee with individual recommendations. SENATOR ADAMS objected. A roll call vote was taken on the MOTION to report the bill

from committee.
IN FAVOR: Parnell, Phillips, Donley, Torgerson, Pearce, Sharp
OPPOSED: Adams

By a vote of 6 to 1, SCSCSSSHB 58(FIN) was REPORTED OUT with previous zero fiscal notes from the Department of Law and the Department of Commerce and Economic Development, fiscal notes from the Judicial Council (26.5) and the Court System (19.4) and a new zero fiscal note from the Department of Administration.

20th Legislature(1997-1998)
Committee Minutes
HOUSE JUDICIARY
Feb 21, 1997
SSHB 58 - CIVIL ACTIONS & ATTY PROVIDED BY INS CO.

The only order of business was Sponsor Substitute for House Bill No. 58, "An Act relating to civil actions; relating to independent counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and providing for an effective date."

CHAIRMAN GREEN said the sponsor would explain the bill and questions for clarity would be addressed. However, there would be no debate on substantive issues. Public testimony would be taken that day and Monday, February 24. The committee would then debate and discuss SSHB 58 on Wednesday, February 26.

Number 0221

REPRESENTATIVE BRIAN PORTER, sponsor of SSHB 58, read from Section 1, subsection (1), which set forth the legislative intent: "encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others". He said that was the legislation in a nutshell.

REPRESENTATIVE PORTER said Section 2 was not substantive but a minor consistency change. A change existed in Section 23 reflecting the thought of the Governor's Advisory Task Force on civil justice reform, as well as the previous year's bill, that the rate of prejudgment interest should more adequately reflect the marketplace instead of being a fixed rate, which was currently 10.5 percent. The provision in Section 23 provided for a floating rate. Section 2 was a consistency change to leave 10.5 percent interest in a section of the banking code that was referenced to this section, he said. The banking statute was being left in place, with this being a conformity change to what was done in Title 9.

Number 0439

REPRESENTATIVE PORTER said the next sections dealt with the statute of repose and the statute of limitations. In layman's terms, a statute of repose is an absolute outer limit on when a case can be brought, based on the length of time since the action took place that supposedly caused injury or damage. SSHB 58 proposed an eight-year statute of repose. Within that eight years, varying statutes of limitations shortened the time period allowed if the plaintiff knew or should have known that the damage or injury had taken place. The bill suggested what those limits should be in several areas.

Number 0615

REPRESENTATIVE PORTER said Section 3 reflected suggestions from the task force. It addressed a law that had contained a six-year statute of limitations on several provisions. Section 3 specified

what would retain that six-year statute of limitations. "And further limitations will be shown from that law that -- as it had existed in subsequent sections," he added.

REPRESENTATIVE PORTER referred to Section 4. Again from the task force, it imposed a three-year statute of limitations, reduced from six years, on contract actions.

Number 0666

REPRESENTATIVE ERIC CROFT said some task force conclusions were compromises between doing nothing and having more extreme provisions. He asked whether Representative Porter intended to include the compromises as well as the original legislation.

REPRESENTATIVE PORTER said he was on the subcommittee that dealt with the statute of limitations issue. He believed the provisions did not result from discussion of "outer limits" or a "compromise to the middle." He said it was a suggestion by a subcommittee member that was discussed, adopted, and then subsequently adopted by the entire task force.

Number 0764

REPRESENTATIVE CROFT asked whether Representative Porter's intention on the statute of repose was to keep the discovery rule intact. For example, if someone had no way of knowing a harm had been done until nine years had passed, would that be barred? Was there any relief for someone who, through no fault of their own, did not know?

REPRESENTATIVE PORTER said he hadn't yet explained the statute of repose. However, to that specific question, there certainly could be a situation where someone did not have, for whatever reason, knowledge of an injury or a damage. If the statute of repose had been completed, that would be a bar to filing a case. However, there were exceptions where the statute of repose would not apply. He offered to go through those.

CHAIRMAN GREEN suggested he address them as they came up, but only for clarification.

Number 0846

REPRESENTATIVE PORTER pointed out the statute of repose is similar to the hearsay rule in that the meat of the law is in the exceptions. He listed exceptions to the eight-year statute of repose from Section 5(2)(b)(1): (A) any prolonged exposure to hazardous waste; (B) an intentional act or gross negligence; (C) fraud or fraudulent misrepresentation; (D) breach of an express warranty or a guarantee.

REPRESENTATIVE PORTER said one criticism of a statute of repose is the supposition that people wanting to provide a longer period of time were seemingly barred from doing so. That is not the case, he said. Citing the example of a school roof falling in, he said no such cases on record had occurred within the allotted time period. However, nobody constructing a building was barred from having a contract with the contractor for a longer period of statute of repose if both parties agreed to it.

REPRESENTATIVE PORTER believed one of the biggest exceptions was Section 5(2)(b)(1)(E), a defective product. There had been much testimony over the last four years about "some of the more salient products that have come to light after an eight-year period." He cited Thalidomide as an example. Although one could argue for a statute of repose in those cases, an accommodation and compromise existed in this legislation. "We're saying, `Okay, we're not going to fight that battle today,' he said. "Quite frankly, I don't intend to fight it ever, but if someone wants to, welcome."

Number 1050

REPRESENTATIVE PORTER said another cause for exception would be if a defendant had intentionally tried to conceal any element that would go to establish the occurrence of the injury or negligence.

REPRESENTATIVE PORTER referred to Section 5(2)(c), which he described as somewhat unusual, a sticking point for which accommodation was made along the way. "The old sponge left in the body after surgery" kept coming up, he said. "We toll the statute of repose. Tolling is a nice legal word for meaning that it's null and void, held in abeyance until this thing is discovered, that if there is a foreign body that has no therapeutic or diagnostic purpose found ... in a person's body, that that is an exception to the statute of repose."

Number 1132

REPRESENTATIVE ETHAN BERKOWITZ asked whether hazardous waste had a legal definition or was addressed by a body of law.

REPRESENTATIVE PORTER replied, "It is an attempt to address another concern that was raised of the more typical kinds of `someone's property leached chemicals into my property and I didn't know about it,' those kinds of things." He said if someone had a better definition, he would certainly look at it.

Number 1184

REPRESENTATIVE BERKOWITZ asked whether there was a reason for using the term "waste" instead of "material."

REPRESENTATIVE PORTER said there may have been at the time; however, he could not recall one.

REPRESENTATIVE BERKOWITZ asked whether a person committing a criminal act would fall outside the statute of repose.

REPRESENTATIVE PORTER said, "The exception regarding an intentional act, would, I'm sure, bring that outside."

REPRESENTATIVE BERKOWITZ asked, "That would include even if the criminal statute of limitations precluded a criminal action?"

REPRESENTATIVE PORTER said yes. The statute of limitations for prosecution would not apply to a civil case.

Number 1235

REPRESENTATIVE BERKOWITZ asked whether defective products included products involving "intellectual property" such as an idea.

REPRESENTATIVE PORTER replied, "Well, the definition, of course, is an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part and is introduced into trade or commerce. I don't think thoughts would fall into that definition."

Number 1270

REPRESENTATIVE BERKOWITZ asked, "If there's an indication of intentional concealment, the tolling period begins at what point?"

REPRESENTATIVE PORTER replied, "When the injury, damage, whatever is discovered, or should have been discovered, and that's put in there, obviously, so that you can't just say, `I didn't know' and (indisc.) to prove what's in a person's head. Then the two-year statute of limitations would start accruing, but the statute of repose, the eight-year limitation, would be tolled, so that if this discovery were made ten years after the fact, and it was as a result of an intentional concealment or fraud or something like that, then you would have two years to get it in."

Number 1308

REPRESENTATIVE CROFT asked, "The statutes of limitations don't mention it, but do they still contain the discovery rule?"

REPRESENTATIVE PORTER said yes. The definition of "from the time of accrual" was not currently in statute, but it fairly reflected the case law. He explained that the statute of limitations begins from the time a person knew or should have known, which was basically the time of accrual.

REPRESENTATIVE CROFT said, "So the statute of limitations provisions didn't mean any change in the discovery rule."

REPRESENTATIVE PORTER concurred.

REPRESENTATIVE CROFT continued, "But the statute of repose provisions do. I mean, that's the point of a statute of repose."

REPRESENTATIVE PORTER replied, "By definition; that's correct."

REPRESENTATIVE CROFT said, "And my original question from before was: Something that someone has no way of learning, if it doesn't fall into these exceptions, would be barred after eight years?"

REPRESENTATIVE PORTER said that was correct.

Number 1382

REPRESENTATIVE PORTER referred to Section 6, the limitation of actions against health care providers. He said it provides an exception to the statute of limitations for children from zero to six years old. He explained, "It, by its first statement, notwithstanding the disability of a minor, shortens an exception that currently exists in law that provides ... that the statute of repose, if you will, is tolled for minors, for incompetent persons, and in cases of adult recollection of child abuse when the memory was suppressed and was later recalled as an adult."

REPRESENTATIVE PORTER said those three exceptions to the statute of repose were existing law. In this statute, the exception for minors was being changed from eighteen years to eight years of age. As a result, the statute of repose would be in place for these kinds of cases for injuries to children up to six years of age, such as at-birth injuries. "The statute of limitations is tolled, but the statute of repose fits with this," he said.

Number 1470

REPRESENTATIVE CROFT asked whether there was a statute of repose previously or simply a tolling of the statute of limitations up to 18 years, the age of majority.

REPRESENTATIVE PORTER indicated the statute of repose was repeatedly in and out of the statutes, based on actions by the legislature and the courts. He did not know when the exception for the three kinds of cases was put into law. However, he said, it would have stayed in effect "during this transition of up and down, in and out, statutes of repose, anyway."

Number 1503

REPRESENTATIVE CROFT stated, "This has the same effect of the other statute of repose, that if it doesn't fall within an exception, it doesn't matter whether they knew or reasonably should have known of their cause of action; it's an absolute bar."

REPRESENTATIVE PORTER replied, "It begs an editorial response, but I will not make one." He referred to Section 7 and said it "basically, again, confirms a reduction that is the final portion of the section that I told you about where everything had had a six-year, and again brings in the suggestions of the task force for recovery of damages for personal property, that -- which sat at two years instead of at six."

REPRESENTATIVE PORTER indicated Section 7 retained the language regarding penalties and forfeitures to the state. Litigation had occurred over "what should have been obvious" because the statutes did not provide that an intentional act can be considered a tort. This clarified that negligence or an intentional act can result in a recognized claim for, and award of, civil damages.

Number 1598

REPRESENTATIVE PORTER said for the next section, it would benefit nonlawyers to explain the kinds of damages that can be sought in tort cases. He said a tort is a civil wrong that results in injury or damage to someone's property or person as a result of an act committed by, or an omission by, somebody else that was negligent, grossly negligent or intentional. There are three areas of claims: economic, noneconomic and punitive.

REPRESENTATIVE PORTER explained that economic damages resulting from the action that caused damage or injury were meant to make the plaintiff whole to the extent that, if the injury required medical attention or other costs, economic damages would provide those costs.

REPRESENTATIVE PORTER cited examples such as future medical costs, assistive technology including in-home adjustments to accommodate

20th Legislature(1997-1998)
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SSHB 58 - CIVIL ACTIONS & ATTY PROVIDED BY INS CO.

Number 055

CHAIRMAN JOE GREEN indicated the committee would hear SSHB 58, "An Act relating to civil actions; relating to independent counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and providing for an effective date." He set a deadline of 5:00 p.m. for members to submit proposed amendments on SSHB 58, and noted there might be an exception for an extenuating circumstance.

Number 115

JOHN WHEATLEY, Vice President of Policy, Support Industry Alliance, testified via teleconference from Anchorage. He said the alliance has over 300 member companies and individuals supporting petroleum, mining and resource development in the state of Alaska. He stated Alaska is competing for investment dollars in a global basis and we must continue to send a message that we are open for business. This can be done by stabilizing the economic climate through fiscal restraint and stabilizing the legal climate through comprehensive tort reform.

MR. WHEATLEY said the cost of personal litigation of liability insurance has a dramatic impact on large and small businesses. The ever increasing private liability personal injury suits and the unpredictability of damage awards has caused costs to soar. Tort reform legislation will help control these expenditures while assuring appropriate compensation for persons injured through the fault of others. Over the years, the tort litigation system has been increasingly criticized by many public and private sectors. Efforts to institute change to reduce opportunities for abuse have been hindered by fears that a change in the system would not allow just compensation for injury.

MR. WHEATLEY said the alliance believes tort reform should: Limit non-economic damages; prohibit punitive damages unless malice or a concrete act showing deliberate disregard for another person can be shown; limit punitive damages; allow jurors to be informed about awards already collected by claimants for state injuries; allow courts to decide each of the shares of damages; provide monetary sanctions against any attorney in civil cases for filing frivolous, unnecessary and/or legally deficient pleadings; bar damage suits if injuries were received while committing a felony; and establish guidelines for the qualification of expert witnesses. The alliance believes the ability to recover costs in damages is manyfold, it should be protected. Punitive damages should be capped by a multiple of actual damages and assessed when willful negligence or malicious intent is proven. If the intent of punitive damages is to punish rather than award, it would follow that a portion of punitive damages could be allocated to the state. Government officials must continue to search for ways to reduce costs for doing business in Alaska, including comprehensive review of liability laws affecting the economics of business. Comprehensive

review of tort reform is a positive step toward improving the business climate in Alaska. He expressed their support for SSHB 58.

Number 358

JUDY BRADY, Executive Director, Alaska Oil and Gas Association (AOGA), testified next via teleconference from Anchorage. She said AOGA is a trade association whose 19 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska. She said AOGA believes that Alaska should adopt reforms to its civil justice system. The civil justice system gives juries and judges discretion to impose unlimited punitive damage awards without adequate guidelines and criteria necessary to insure the constitutional protection of due process. The civil justice system, in some instances, discourages investment in the state.

MS. BRADY said a variety of reforms have been suggested and AOGA believes the most important is limitations on punitive damages which would make it clear that awards, beyond those necessary, compensate claims for real damages and would need to be justified by clear and convincing evidence about rates and conduct. This amount would be capped so that juries and judges cannot impose a financially ruinous or undue award. Judgment should be proportionate to fault. It's unfair to require a defendant to pay a much larger share of damages [indisc.--simult.speech] fault.

Number 505

STEPHANIE GALBRAITH, Attorney, Municipality of Anchorage, testified next via teleconference from Anchorage. She said she is in support of SSHB 58. She said she would like to suggest some things that would greatly assist the municipality. Changing the statute of limitations to property claims to two years, instead of the current statute of six years. That six year period has been a problem for the municipality, in particular for the Anchorage Police Department. Handling adjoining property and claims that can be up to six years old is difficult because witnesses and evidence are gone at that point. She said the municipality strongly supports changing the statute of limitations to two years which is consistent with almost all other tort claims.

MS. GALBRAITH said, in addition, the municipality supports limits on non-economic damages and punitive damages. They also strongly support language that any person responsible for damages may be assessed for a percentage of fault regardless of whether that person is named in a particular lawsuit. It is very expensive and time consuming to file third party complaints and this would be a method to make sure that fault is proportioned fairly without uncontrolled [indisc.]. The municipality also supports change of prejudgment interest, which, as it currently stands ends up developing a windfall towards many claims.

Number 661

REPRESENTATIVE ETHAN BERKOWITZ asked how many times the municipality was involved in civil actions last year as a plaintiff, as opposed to being involved as a defendant.

Number 669

MS. GALBRAITH said she did not have that exact number, but it is a very small number and on fairly small claims in terms of recovering damages for property.

Number 700

REPRESENTATIVE BERKOWITZ referred to her suggestions about limitations and asked her how many cases the municipality had involving the statute of limitations.

Number 723

MS. GALBRAITH said there were 250 property claims against the city.

REPRESENTATIVE BERKOWITZ asked how many claims would be affected if it were changed from six years to two years.

MS. GALBRAITH responded a small percentage of claims would be affected. It may not be a small number, but it is significant in terms of dollar amounts.

Number 795

LEONARD EFTA testified via teleconference from Kenai. He feels the jury should decide what is fair and what is not fair. His understanding is that less than one-tenth of 1 percent of lawsuits have been frivolous. Mr. Efta referred to the sponsor statement and said over 50 percent of the lawsuits that go on to lawyers [indisc.], and according to the bill, the lawyer will still get his share and now the state will take 50 percent of it too. The claimant will end up with maybe 10 percent. It appears that SSHB 58 is intended to protect the insurance companies [indisc.] and doesn't think it will help him. He opposed SSHB 58.

Number 869

SUSAN ROSS testified next via teleconference from Kenai. She read the section of SSHB 58 regarding legislative intent and then compared that intent with quotes from the Governor's Advisory Task Force report of civil justice reform located on page 7. She said SSHB 58 appears to address the wrong problem, the problems are: Excessively high attorney fees, and excessively high insurance premiums that have not been reduced in spite of 16 very historical court reforms since 1967.

Number 1061

ROSS MULLINS, Chairman, Prince William Sound Fisherman Plaintiff Committee, testified next via teleconference from Cordova. He said he did not understand why SSHB 58 was necessary when even Representative Porter agreed that only about 5 percent of the cases procede to trial and of that 5 percent only 1 out of 20 has a punitive damages award. Out of 2,000 cases, 1,900 were settled out of court, 100 go to trial and approximately 5 of them result in punitive damages being awarded. He assumed that the trial cases are those with the most seriously injured and damaged plaintiffs. It is unclear whether the punitive award often exceeded the punitive caps, as proposed in SSHB 58. If they did, this would have been brought forth and it wasn't. It seems likely these punitive awards are not of serious consequences. To fix punitive

caps does not serve the best interest of the citizens of Alaska. Today's dollar is worth approximately 38 cents of a 1970 dollar. A fixed cap of any kind will only serve the interests of a liability over time as the value of the dollar diminishes, the cap's value would also be diminished.

MR. MULLINS said this bill will clearly reduce the financial risk of doing business with the major oil corporations and their insurers, particularly wrongdoers who have a potential capacity to devastate the natural environment and common property resources in Alaska, and of those Alaskans who depend on them for their livelihood, except with the commercial fishermen. He questioned if this is what we want in Alaska. The possibility of large punitive damage awards is a great motivation and explains why the major oil companies are seriously attempting to improve their marine transportation operations. When the cost of compliance rises above the possible consequences, then he feared that we would no longer see big oil complying with what is best for Alaska and its citizens.

MR. MULLINS said SSHB 58 is similar to the bill vetoed last year by the Governor. Maybe the legislation had a different provision regarding punitive damages, but it would have had a retroactive effect in a case where final judgment had not been entered. It was vetoed, in part, due to the opposition expressed by the Exxon Valdez plaintiffs out of concern for the causal effect of the bill on the Exxon Valdez verdict. In an attempt to avoid another veto, the current bill now states that it has a separate effect only, and it does not apply to the Exxon Valdez litigation. This change does not reduce the threat of SSHB 58. It is obvious that state law, regarding punitive damages, does not apply by its own force in an award of punitive damages in a federal maritime action. Instead, this state law would apply by [indisc.] the interstice of federal maritime law to indicate public policy regarding punitive damages. We could count on Exxon's counsel to prominently display the current bill's [indisc.] damage limitation, if enacted, in support of their public policy argument. This bill would have as much effect, or nearly as much effect on appeal, as would the vetoed bill.

MR. MULLINS referred to a chart of the ocean survival of pink salmon at the [indisc.] hatchery right in the path of the oil spill. Prior to 1989, they were averaging returns of 4 to 8 billion fish a year, with ocean survivals between 4 and 8 percent. Since 1989, ocean survivals have dropped down to about 1 to 1.25 percent and we are returning less than 1.3 million fish per year. The long term effects of the Valdez oil spill is continuing to have an affect on the facilities and fishermen, and cannot be remedied by punitive caps that are of a paltry nature and do not necessarily reflect the major environmental consequences of large oil spills when they occur. He said those spills are inevitable over time.

Number 1332

REPRESENTATIVE ERIC CROFT clarified that he is getting significant changes from Exxon because of the threat of punitive damages.

Number 1340

MR. MULLINS said one of the reasons that the oil industry is making major efforts to work with their SURGE program, and with the

commercial fishing industry in attempting to upgrade their transportation facilities, is largely due to the threat of a large award such as the one that occurred from the Exxon Valdez spill. He said we need to show companies that it costs more to be careless then it does to do business straight. He said SSHB 58 would put the state right back to where the state was pre-1989.

Number 1457

JACK HOPKINS testified next via teleconference from Cordova. He said he is opposed to SSHB 58. The common man has very few tools to work with in this world, and said this bill appears to take one more tool away from him.

Number 1490

DICK CATTANACH, Chairman of Legislative Committee, Associated General Contractors (AGC), testified next via teleconference from Anchorage. He said AGC represents approximately 600 construction members in the state of Alaska. He referred to Section 8, Statute of Repose, 1999 and 1992 and said Shinaner [Ph] Management Services, Inc. reviewed four studies that measured the claims that were brought on construction projects, and it indicated that the vast majority of the claims were filed within six years of substantial completion of the construction project. He said claims filed more than six years after substantial completion almost always involved users of projects. Due to the complexity of the construction process, it is unrealistic to expect parties involved in the design and construction of any project to defend state stale claims brought many years after their involvement when the project has ended. This section of the statute does not impose an unfair burden on the injured party because it allows them to seek redress from the owner, or the occupier of the project, who are the parties most likely to be responsible for the injury, and the one in the best position to have prevented it.

Number 1575

MR. CATTANACH said that section of SSHB 58 provides protection to some injured parties by tolling the time period if the cause of action was the result of an intentional, or fraudulent action, which contributed to the cause of action. The matter of Frederick W. Triem, the Alaska Supreme Court held that a five year statute of limitation governed the filing of attorney grievances. This reflected the judgment that five years is the outer limit of time in which responding attorneys are able to defend themselves against charges, given the loss of memory, evidence and witnesses over time. He did not believe that anyone would argue that the construction industry does not face the same problem as the legal profession does in defending themselves against suits. He questioned why the construction industry had a longer period of time before they are free from litigation.

MR. CATTANACH said that according to reports through legislative research, the eight year period was exceeded by only four states. Statute of reposes are commonly three, four and five years, and the proposed time frame of eight years seems to be more than adequate to provide the detection of any construction and design defects to allow property owners to take action to remedy them. He provided written testimony to the committee since he would not be able to review the second area of concern, punitive damages, due to time

constraints. He did say, though, that 95 percent of businesses in the state of Alaska are classified by the state as small businesses. Punitive damages are not covered by insurance, and therefore must be borne by the parties themselves. This is an undue burden, not only do businesses have to pay damages awarded, but also pay for the defense of the award.

Number 1675

REPRESENTATIVE CROFT clarified that Mr. Cattanach was referring to a five year statute of limitations for grievances.

MR. CATTANACH responded that in the matter of Frederick W. Triem, the Alaska Supreme Court held the five year statute of limitations for the filing of attorney grievances due to the fact that attorneys would not be able to fairly defend themselves against charges given the loss of memory, evidence and witnesses that occur over time.

Number 1710

REPRESENTATIVE CROFT asked Mr. Cattanach if he understood that this was a statute of limitations with a discovery rule. What he's asking for is an absolute bar after 8, something that attorneys have never gotten to his knowledge.

MR. CATTANACH stated that this was not an absolute bar if there is any proof that any defects were intentional, or that there was a fraudulent action.

Number 1740

REPRESENTATIVE CROFT asked if Mr. Cattanach wanted the same standards that the lawyers have.

MR. CATTANACH responded that what's fair for one should be fair for all.

Number 1750

REPRESENTATIVE NORMAN ROKEBERG asked Mr. Cattanach if he thought it would be fair to draw a distinction between construction and design, in regards to statute of repose. Clearly, if there was a construction defect it would probably come to light sooner than a design defect. He asked Mr. Cattanach if these should be approached differently in this statute.

MR. CATTANACH spoke from his experiences with dealing in areas that do have building codes, and consequently, they do have municipal or borough oversight. He thought they should be the same. The designers design the project, the contractor builds it according to plans and specifications. All of these must meet the building codes that are in place at that time. There are state and local inspectors who make sure that these projects are built according to design. Plans must go through a plan review, and under the city of Anchorage, this is a very rigorous review. They make sure that the design professionals do, in fact, comply with the building codes. He felt that a similar statute of repose for both parties is only appropriate.

Number 1818

REPRESENTATIVE ROKEBERG asked if Mr. Cattanach was suggesting that the city plan reviewers can verify the structural integrity of a design based on their review of blueprints.

MR. CATTANACH stated that it was his understanding that the municipality, whether they like it or not, go over the structural design, and actually recompute all of the calculations. In fact, he responded, yes.

Number 1848

REPRESENTATIVE BERKOWITZ questioned Mr. Cattanach's position. He clarified his position that the cost of defending suits is too high, and that the punitive damages place an undue burden on businesses through insurance.

MR. CATTANACH stated that this was the second part he didn't get to testify on, but clarified by personal example. His firm was involved as a second party two years after the first party was sued, in a particular case. The plaintiffs found that the initial defendants didn't have deep enough pockets, hence his firm was named. The initial request was for $225,000. The insurance company refused the case as blameless and denied the claim. The attorney was very aggressive and boosted the claim to $500,000 and stated that they believed punitive damages also applied. His firm is small. Once punitive damages are assessed, they come directly out of the firm's pocket, not to mention costs to litigate, all totaled, this added up to about $50,000 to $100,000. Their instructions to their insurance company were to settle, no matter what the costs were within the policy limits. This is why they don't see a lot of punitive damages going to court, since people can't afford the risk of losing everything they've worked all their lives for, just to say they've won.

Number 1941

REPRESENTATIVE BERKOWITZ asked how many construction cases there were that fell within the proposed statute of repose. Mr. Cattanach indicated that most cases take place within the first six years. He asked for a breakdown of cases within the six year period, within 8 years and then outside of 8.

MR. CATTANACH stated that he would provide that information to the committee within the next day or two.

Number 1974

DR. DAVID JOHNSON, Ketchikan Medical Center, testified by teleconference from Ketchikan on behalf of the State Medical Association in support of SSHB 58. He addressed three sections which particularly relate to medicine. The first, Section 6 regarding statute of limitation, and the concern about changing this to eight years, especially for children under age six, would be unfair. He stated that there is a suspicion that there are seminal birth injuries that lurk undiscovered for years, and show themselves much later. He noted that this has not been shown to be true, most bad things that happen at birth are evident at birth. They believe the language proposed is the safeguard of the school system, as well as other physicians caring for a child, and certainly they trust parents to make these judgments regarding an

impaired child. They support this language.

Number 2046

DR. JOHNSON stated in regards to the section on noneconomic damages that there was nowhere in law a Faustian bargain trading an injury for any amount of money. This rapidly becomes something arbitrary. In jurisdictions where limitations have been enacted conspicuously, California, with their Medical Injury Compensation Reform Act (MICRA) reforms, the single thing which made the most difference on liability insurance premiums was injecting predictability, which is to say, a limitation on what is essentially unlimited, mainly, non-economic damages. They applaud the attempt to make some type of definition here.
Number 2082

DR. JOHNSON referred to Section 29 and 30 that address the expert advisory panel. This is something that's been a difficulty for all parties. The way it is currently being administered in the courts makes it difficult for them, as an association, to do their job in choosing people to serve on these panels. They thought the questions, as posed, sharpen the questions that were written twenty years ago. They do believe the expert advisory panels have a place and role, as well as helping to accomplish the legislative intent at the beginning of the bill.

Number 2113

REPRESENTATIVE BERKOWITZ referenced Section 35 regarding civil liability of hospitals, which basically exempts contractual emergency room physicians. He asked if Dr. Johnson would share his comments on that section.

DR. JOHNSON responded that what Section 35 does, is shift liability from a hospital to the hospital medical staff in those cases where the hospital medical staff is not employed by the hospital. There are a number of ancillary issues raised in a proposal like this, and it's something of more interest to them. Hospitals are released from their liability, but there is the section that specifies the amount of professional liability insurance, the physician must carry this in order to qualify.

DR. JOHNSON noted that there was a variety of arrangements for physicians working for hospitals, government entities, state or federal, various of the private or non-profits, such as the native corporations and physicians in private practice, that there are a number of ways that physicians are paid. He felt that this had the potential for being a confusing issue, but it's a policy call on whether hospitals or physicians ought to be liable. In general, before Jackson v. Powers, it was generally held that each party was responsible for their own actions. This case created an agency relationship between the hospital and the physicians. This legislation is trying to change that back to hospitals being liable for themselves, and physicians liable for themselves. He noted again, that this is a very confusing issue and there were a number of ancillary issues raised in Section 35.

Number 2210

REPRESENTATIVE CROFT stated since Dr. Johnson is a pediatrician that he was particularly interested in the doctor's input on

discoverability of childhood illnesses. He asked if there were any childhood injuries, whether birth, mental or physical that are difficult to discover until later.

DR. JOHNSON stated that "any" was a big word, and in answer to this "any" question, he noted that someone could think of one, but added, "are there many? No." He used the example of brain damage from a childbirth accident, a child that has seizures on the basis of a birth injury. If they don't have seizures in the neo-natal period, their later seizures are not related to the birth injury. In general, as a practical matter, there aren't things that lurk and would be hidden past the child starting school.

Number 2281

REPRESENTATIVE CROFT asked if there were any forms of childhood traumatic injury that would only show up in mental slowness. He noted that seizures seem to be an obvious, and good example, but he asked if there are injuries that show up only as "Johnny not being as bright as the other kids."

DR. JOHNSON responded that describing these two injuries earlier, or assuming that if there is a big variance in a family, it's from an injury and he didn't think there is data to support this. He would have to say, no, there's no evidence for an isolated injury that's visible in no other part of a child, except one certain aspect; birth injury doesn't cause the inability to learn calculus, for example.

Number 2322

REPRESENTATIVE CROFT stated that this never happens, that it doesn't just show up in a mental slowness.

DR. JOHNSON stated again, if he's asking any, or many, he would say as a practical matter, there is no data that he knows of in the pediatric or the neurological literature that has a causal relationship between some specific trauma earlier, and any specific learning disability later.

Number 2343

REPRESENTATIVE BERKOWITZ referred to Section 5, subsection (c) on page 4, which tolls the statute of repose upon the discovery of a foreign body. It seemed to him that lawyers are trying to out diagnose doctors, and he wondered if there is any other medical procedures that could cause a problem down the road, other than leaving a foreign body inside a human body.

DR. JOHNSON responded that in terms of lurking for years and years, and causing problems, and then all of a sudden being a problem, something that's left as a foreign body, generally if it's going to cause problems, will do so relatively soon. It's mere presence there is an affront and clearly an error. The reason there is an exception for this type of situation isn't that it will somehow lay there, and then at a later time cause a problem. If it's there, by definition it's an error, which needs to be addressed. The degree of injury created by it is another issue, but it's precisely listed in this section as something which isn't covered in a statute of limitations.

Number 2428

REPRESENTATIVE BERKOWITZ stated that he was concerned that this might be a narrow definition, and there might be something other than leaving a foreign body in a person that can cause problems down the road. He wondered if in this situation a problem could eventually surface.

DR. JOHNSON stated that by and large, if something bad is happening, it doesn't start and stop being bad. It's just bad. It stays this way. If it's not bad early on, the likelihood that it will become bad later on is, in his experience, doesn't happen. I can't say always or never. He added that there aren't lurking time bombs within us.

TAPE 97-25, SIDE B
Number 000

DR. JOHNSON stated that this is a continuous thing. Significant trauma is not discontinuous, but rather continuous. As a practical matter, covering 99.99 and on, no it's not going to be something lurking undiscovered that will later rear it's ugly head.

REPRESENTATIVE ROKEBERG asked in his 27 years of practice as a pediatrician, has he ever personally had a case that came before him where after a child reached 8 years of age that he discovered some malady as a result of something which happened earlier.

Number 039

DR. JOHNSON responded no.

REPRESENTATIVE ROKEBERG referred to Section 35 regarding emergency room physicians, and asked if the provisions of this would, in any way, make more difficult the hiring of emergency room physicians in the state of Alaska.

Number 047

DR. JOHNSON responded that he thought the requirement for a half million dollars insurance coverage will potentially be a problem, particularly in smaller hospitals. He knows there are some hospitals who require physicians to carry liability insurance, others do not. He wasn't sure what the limits of each of them require in each specific case.

REPRESENTATIVE ROKEBERG referenced a letter submitted by the Association where they would like to see a recommended ceiling of $250,000 on non-economic damages. He asked if Dr. Johnson agreed with this.

Number 080

DR. JOHNSON stated that the reason for the $250,000 is that this is the number included in the MICRA reforms he mentioned earlier; the program in California which has been in operation for quite a number of years. Whatever number is picked, the key from the insurance side is that a predictable number can be funded. It's an unpredictable number which can't be funded and $250,000 happens to be the number that's micro legislation. This is a pure judgment call.

1994 Alaska Laws Ch. 28 (H.B. 160)

ALASKA 1994 SESSION LAWS
SECOND REGULAR SESSION OF THE 18TH LEGISLATURE

Additions are indicated by <<+ Text +>>; deletions by
<<- Text ->>. Changes in tables are made but not highlighted.

Ch. 28
H.B. No. 160
CIVIL PROCEDURE—FILING CIVIL ACTIONS—DEFECTS IN REAL PROPERTY IMPROVEMENTS

AN ACT relating to the time for filing certain civil actions based on a defect in an improvement to real property.

* Section 1. FINDINGS. The legislature finds that

(1) upon the completion of the construction of an improvement to real property, those persons involved in the design and construction of the improvement relinquish control over the determination of the need for, or responsibility for, maintenance and control over the use of the facility, and may not be made aware of or have the opportunity to evaluate the effect of subsequent forces that may result in excessive stress or strain to the structure;

(2) a recent study by Victor O. Schinnerer and Co., the major provider of professional liability insurance, indicates 83.6 percent of claims filed against design professionals for injuries due to alleged design deficiencies associated with improvements to real property are brought within five years of substantial completion of the improvement, 95.5 percent within eight years, and 96.8 percent within 10 years; the study also indicates that claims made 10 or more years after substantial completion of an improvement are primarily the result of inadequate maintenance by the owner of the facility and not as a result of inadequate service by the original design professionals;

(3) unlike manufactured products, the useful life of an improvement to real property can be hundreds of years; the availability of relevant evidence and witnesses is problematic in all suits, but can be especially acute in suits involving improvements to real property because of this potential for long life; the inherently complex nature of construction projects and the numerous parties typically involved further exacerbate this problem; for these reasons, the burden of maintaining appropriate records and other documentation beyond a certain reasonable period of time may be excessive or even impossible;

(4) even though design professionals or others involved in design or construction may be proven to have no responsibility for claimed damages, the legal costs of defending against a claim can be substantial;

(5) this Act is in the public interest and in the interest of providing the due process rights to potential litigants in the area of design and construction of an improvement to real property in an equitable manner; this Act also adjusts the standard of care so that those attempting to bring an action under a general standard of care against a person involved in the design or construction of an improvement to real property may bring the action only within 10 years following substantial completion of the construction, unless the claimed deficiency can be shown to have been the result of gross negligence, fraud, fraudulent concealment, fraudulent misrepresentation, breach of an expressed warranty or guaranty, or intentional misconduct in the design or construction of the improvement.

* Sec. 2. AS 09.10.050 is amended to read:

<< AK ST § 09.10.050 >>

Sec. 09.10.050. ACTIONS TO BE BROUGHT IN SIX YEARS. <<+Unless the action is commenced within six years, a+>> <<-no->> person may <<+not+>> bring an action

(1) upon a contract or liability, express or implied, excepting those mentioned in AS 09.10.040 <<-or 09.10.055->>;

(2) for waste or trespass upon real property; or

(3) for taking, detaining, or injuring personal property, including an action for its specific recovery<<-, except those mentioned in AS 09.10.055; unless commenced within six years->>.

* Sec. 3. AS 09.10.055 is repealed and reenacted to read:

<< AK ST § 09.10.055 >>

Sec. 09.10.055. CERTAIN ACTIONS THAT MUST BE BROUGHT IN 15 YEARS. (a) Notwithstanding AS 09.10.140, a person may not bring an action for personal injury, death, or property damage, if the action is based on a defect in the design, planning, supervision, construction, or inspection or observation of construction of an improvement to real property unless the action is brought within 15 years of the date of substantial completion of the improvement.

(b) Notwithstanding (a) of this section, if personal injury, death, or property damage occurs in the 15th year after substantial completion of the improvement, a person may bring a negligence action to recover damages if the negligence action is brought within one year after the date on which the personal injury, death, or property damage occurs.

(c) This section does not apply

(1) to an action against a person who was in actual possession and lawful control of the improvement at the time the defect caused the personal injury, death, or property damage;

(2) if the personal injury, death, or property damage was caused intentionally or resulted from gross negligence, fraud, fraudulent concealment, fraudulent misrepresentation, or breach of an express warranty or guarantee; or

(3) if a longer period of time for bringing the action was provided under a contract.

(d) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or use the improvement in the manner for which it was intended.

<< Note: AK ST §§ 09.10.050, 09.10.055 >>

* Sec. 4. APPLICABILITY. This Act applies to all causes of action based on a defect that occurs in design, planning, supervision, construction, or observation of construction of an improvement to real property on or after the effective date of this Act.

Approved by the Governor: May 7, 1994.

Actual Effective Date: August 5, 1994.

AK LEGIS 28 (1994)

End of Document

1994 Alaska Laws Ch. 28 (H.B. 160)

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