NO. 93581-5 (CoA No. 47439-5-II)

SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY AND JUDITH HOFFMAN,

Plaintiffs and Appellants,

v.

ALASKA COPPER COMPANIES, INC., ET AL.,

Defendants and Respondents.

PETITION FOR REVIEW OF DEFENDANT AND RESPONDENT 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. IDENTITY OF PETITIONER

The petitioner is defendant and respondent General Electric Company ("GE").

II. CITATION TO COURT OF APPEALS DECISION

GE seeks review of the decision terminating review by the Court of Appeals, Division I, in *Hoffman v. General Electric Company,* No. 47439-5-II, filed August 9, 2016. Appendix ("App.") at 1-16. The decision is unpublished. No motion for reconsideration was filed by GE; a motion for reconsideration was filed by defendant and respondent Ketchikan Pulp Company ("KPC") on August 29, 2016, and is pending.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it reversed the judgment dismissing plaintiff's personal injury claim based upon a legal theory which plaintiff had not only failed to properly preserve for review, but affirmatively repudiated before the trial court?

2. Did the Court of Appeals err when it relied solely upon Washington law to construe the meaning of a "product" in the Alaska statute of repose, and then held that Alaska's statute of repose, as so construed, did not conflict with Washington's statute of repose?

3. Did the Court of Appeals err when it held that the exception for gross negligence in the Alaska statute of repose preserved

the plaintiff's claim against GE, even though plaintiff never raised the argument before the trial court?

4. Did the Court of Appeals err when it held that plaintiff's allegations that GE failed to warn of risks it knew or should have known about satisfied the exception for gross negligence in the Alaska statute of repose, even though the Alaska Supreme Court has treated such allegations as amounting to only ordinary negligence?

IV. 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 KPC pulp mill in Ketchikan, Alaska, and at the Alaska Pulp and Paper Mill in Sitka, Alaska. CP 114, 116. Plaintiffs also allege that Hoffman was exposed to asbestos as a child on the work clothes of his father, who worked at the Ketchikan mill. CP 201-02.

Because the mills were in remote locations, each had two steam turbines, allegedly manufactured by GE, which were used to generate the power needed for the mills to operate. CP 62, 66, 266, 1145.

Each GE turbine is custom designed and manufactured to be integrated into a specific plant based upon that plant's individual

requirements, which are given to GE by the plant owner and its engineers for use in the design process. CP 71. Designing a turbine requires thousands of hours of design and engineering work, as well as additional thousands of hours of manufacturing.[1] *Id.*

2. Larry Hoffman's Work at the Ketchikan Mill

Larry Hoffman worked at the Ketchikan mill from December 1968 to January 1970. CP 58-60, 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.

Hoffman testified that he saw others work on the GE turbines from time to time doing maintenance and repair. CP 62, 65, 220. He never saw anyone open up either of the turbines or remove or install anything in either turbine. CP 66-67. Hoffman never did any maintenance or repair work on the turbines, nor did he see any maintenance or repair records for either turbine. CP 60, 62-63, 215, 1154.

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[1] The Court of Appeals' opinion states that "Consistent with GE's own recommendations, turbines and associated piping systems were often covered by thermal insulation material that contained asbestos." Opn., p. 3. The Court cites nothing in the record, and the record is to the contrary. GE provided drawings showing the operating temperature of each region of the turbine. The decision whether or not to insulate the turbine, and if so, what material to use, was the owner's to make. CP 2724, 2726-28.

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 at the Sitka mill 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.

B. Procedural History

1. The Superior Court Grants GE's Motion to Dismiss

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

In late February 2015, GE moved for an order holding that Alaska law applied to Hoffman's claims, based upon the conflict between the Alaska and Washington statutes of repose and other features of the two states' laws. CP 1029-1048. The Superior Court granted the motion to apply Alaska law. CP 1535.

GE and KPC moved to dismiss on the grounds that the plaintiffs' claims were barred by the Alaska statute of repose, A.S. § 09.10.055. Both defendants' motions were granted. CP 2912-13.

2. The Court of Appeals Reverses the Judgment

The Court of Appeal reversed. The Court held that there was some evidence that GE had occasionally shipped another manufacturer's replacement gaskets for the GE turbines to the mills. Opn., p. 9. Relying solely upon Washington law, the Court held that such gaskets constituted "products" under the Alaska statute of repose independent of the turbines they were purportedly used in. *Id.*, pp. 10-11. The Court also held that Hoffman's allegations that GE had failed to warn of asbestos-related risks could satisfy the gross negligence exception to the Alaska statute of repose. *Id.*, p. 14.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Reversing the Judgment Based on an Argument Hoffman Not Only Failed to Preserve But Emphatically Repudiated Below Conflicts With Many Decisions of This Court and the Court of Appeals, as Well as CR 46

The Alaska statute of repose provides that "[A] person may not bring an action for personal injury, death or property damage unless commenced within 10 years . . . of . . . (2) the last act alleged to have caused the personal injury, death, or property damage." AS § 09.10.055(a). The statute "does not apply if . . . the personal injury, death, or property damage resulted from . . . (E) a defective product." AS § 09.10.055(b)(1)(E).

Although Hoffman's principal argument on appeal was that GE's

steam turbines were a "product" under the statute, he argued in the alternative that certain replacement gaskets GE allegedly shipped to the mills on a few occasions in 1974 and 1975 separately satisfied the "product" exception.

GE answered that its steam turbines were an "improvement to real property" as a matter of law under the Alaska statute, not a "product." With respect to the gaskets, GE demonstrated that (1) Hoffman had failed to preserve any such argument for appeal; and (2) even if he had preserved the argument, given the plaintiffs' insistence that the gaskets were an integral part of the turbines, the gaskets were part of a single, unitary improvement to real property. Respondent's Brief ("RB"), pp. 34-38.

Although Hoffman did not challenge GE's showing that he failed to expressly raise the gaskets argument below, the Court of Appeals did, commenting in a footnote that "Hoffman did not make a detailed argument, but he did raise the issue of gaskets as a hearing below." Opn., p. 9, n. 8.

Although the Court of Appeals offered no citation to the record, the Court is presumably referring to a single, conclusory remark by Hoffman's counsel at the hearing on the motions to dismiss: "And they sold gaskets and other materials for use on those turbines. All of that falls within the products exception." RP, p. 23:21-23.

But the Court simply ignored counsel's comment *later* in that same hearing not merely waiving, but emphatically repudiating the argument:

> . . . [T]he Alaska statute clearly says this does not apply in product liability. Now the 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 today, I've said all along, *the product at issue with regard to General Electric are its turbines. Those are the products*. GE does not dispute that it sold the product. GE does not dispute that it distributed the product.

RP 40:24-41:5 (emphasis added). Counsel for GE pointed out counsel's waiver in GE's brief and again during oral argument.[2] RB, p. 34, n. 5.

Hoffman's brief below on the conflict of laws issue is consistent with his counsel's waiver, not with his passing remark about gaskets earlier in the hearing. "Plaintiffs' claims against GE stem from products liability and negligence *in its design of its turbines,*" the plaintiffs argued. RP 1318 (emphasis added). And later: "Here, Mr. Hoffman's injury occurred because of defective products, *namely asbestos-containing turbines. GE's turbines constitute a defective product under the*

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[2] Hoffman waived the gaskets issue a second time before the Court of Appeal. According to R.A.P. 10.3(a)(4), appellants must include in their Opening Brief "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." Hoffman said nothing about the gaskets issue in his Assignments of Error section. "Appellate courts will only review claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." *Bender v. City of Seattle,* 99 Wn.2d 582, 599 (1983).

exception." RT 1323 (emphasis added). And later still: "Defendant is a manufacturer and supplier of asbestos-containing turbines . . ." RT 1324.

The trial court's ruling at the conclusion of the motion to dismiss hearing demonstrates that the court understood Hoffman's argument to be *solely* that GE's turbines satisfied the "products" exception:

> And the only real issue there is whether the GE turbines are a product or a defective product. And I think that the case law from other states talking about turbines not being products is very persuasive to me. That, in the context of how things run the mills, that it's an improvement to real property and it's not a product, a defective product that's an exception under the statute.

RT 49:22-50:5. The Court said nothing about counsel's passing remark about gaskets.

Although R.A.P. 2.5(a) gives appellate courts discretion to consider an issue raised for the first time on appeal, the Court of Appeals did not hold that it was exercising its discretion under Rule 2.5(a) to forgive Hoffman's repudiation of the gaskets argument; *it held that no waiver had happened in the first place.* That ruling squarely conflicts with many published decisions of this Court and the Court of Appeals on a fundamental issue of appellate procedure. This Court's review is needed. R.A.P. 13.4(b)(1), (2), (4).

As this Court held in *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702-03 (1993), an appellate court may consider an issue on appeal only if

the trial court was sufficiently apprised of the party's position to have an opportunity to correct the purported error in the trial court and prevent the unnecessary expense of a second trial. *Accord, Adcox v. Children's Orthopedic Hosp.,* 123 Wn.2d 15, 26-27 (1993); *Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114 (1978); *Roumel v. Fude,* 62 Wn.2d 397, 399-400 (1963). That rule of law is codified in CR 46, which provides that formal exceptions to court rulings are unnecessary, so long as the party "makes known to the court" the action which the party desires the court to take, or "the party's objection to the action of the court and grounds therefor." The rule that a case "cannot be tried on one theory and appealed on others," *Teratron Genl. v. Institutional Investors Trust,* 18 Wn.App. 481, 489 (1977) is mandated by fairness both to the trial court and to the opposing party. *Espinoza v. City of Everett,* 87 Wn.App. 857, 872 (1997).

Finding that counsel's "single, isolated remark," buried early in a lengthy motion to dismiss hearing, adequately preserved the gaskets issue for appeal despite counsel's subsequent repudiation of the theory represents a dramatic change to the long-settled rule that parties must preserve their arguments below in order to be heard on appeal, and sharply limits the ability of trial courts and opposing litigants to rely upon a counsel's unequivocal statement of what his legal theory is (and is not).

See Olson v. Siverling, 52 Wn.App. 221, 230, n.6 (1988) ("single, isolated remark" buried in a single brief not adequate to preserve issue). Here, the record shows that the trial court took Hoffman's counsel at his word and ruled on the motion to dismiss in the belief that Hoffman was arguing *only* that GE's turbines were a "product" under the Alaska statute. Counsel's repudiation of the gaskets argument, and the trial court's reliance upon it, should have been the end of the matter.

The Court of Appeals appears to justify its holding that counsel's passing remark preserved the gaskets issue based upon the rule that appellate courts may consider hypothetical facts proffered by plaintiff in reviewing a dismissal for failure to state a claim. Opn., p. 6. This holding conflicts with established law for two reasons. First, whether gaskets purportedly shipped to the mills by GE constitute a "product" within the meaning of the Alaska statute of repose separate and distinct from the turbines is not a "fact," it is a question of law. *Kovacs v. Dept. of Labor & Indus.*, -- Wn.2d --, 375 P.3d 669, 670 (2016); *Burton v. Twin Commander Aircraft LLC,* 171 Wn.2d 204, 216 (2011). No court has ever extended the "hypothetical facts" rule to legal contentions; in fact, a plaintiff's legal contentions are *not* presumed true on review from a CR 12(b)(6) dismissal. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn.App. 838, 843 (2015). Second, Hoffman did not merely neglect to raise his argument

that replacement gaskets are a distinct "product" under the Alaska statute; he affirmatively and emphatically repudiated it, and the trial court ruled accordingly. No court has ever held that courts must disregard plaintiffs' express waiver of particular legal theories in ruling on a motion to dismiss.

The Court of Appeals' holding that Hoffman preserved the gaskets issue for appeal is contrary to fundamental principles of appellate procedure and many published decisions of this Court and the Court of Appeals. The Court should accept review and reverse the Court of Appeals.

B. The Court of Appeals' Circular Conflict of Laws Analysis, Which Relies Solely on Washington Law to Decide What an Alaska Statute Means, Conflicts With Many Decisions of This Court and the Court of Appeals, as Well as Raising Substantial Constitutional Concerns

Conflicts of law analysis involves two steps. First, the Court determines whether there is an actual outcome-determinative conflict between the Alaska and Washington statutes of repose. *Woodward v. Taylor,* 184 Wn.2d 911, 917-18 (2016); *FutureSelect Portfolio Management, Inc. v. Tremont Grp.,* 180 Wn.2d 954, 967 (2014); *Erwin v. Cotter Health Ctrs.,* 161 Wn.2d 676 (2007). Second, if an outcome-determinative conflict is found, the Court determines whether Alaska or Washington has the most significant contacts with the dispute. *Woodward,* 184 Wn.2d at 918; *Erwin,* 161 Wn. 2d at 692-93.

Before the Court of Appeals, GE showed that even if Hoffman had properly preserved his gaskets argument for review, at least three Federal Circuits and an assortment of other Federal and state courts have rejected the argument that manufacturers may be deprived of the protection of a statute of repose by breaking down an improvement to real property into its smallest components. RB, pp. 35-37.

The Court of Appeals simply ignored GE's argument that the gaskets could not constitute a "product" distinct from the turbines for purposes of the Alaska statute of repose. The Court construed the Alaska statute relying solely upon two decisions of this Court, *Simonetta v. Vlad Corp.*, 165 Wn.2d 341 (2008) and *Braaten v. Saberhagen Holdings,* 165 Wn.2d 373 (2008). Opn., pp. 10-12. The Court of Appeals found that because *Simonetta* and *Braaten* held that an equipment manufacturer's duty to warn did not extend to replacement insulation and gaskets made by third parties,[3] Alaska law would consider gaskets to be a "product" within the meaning of the statute of repose.

The Court of Appeals' analysis conflicts with this Court's conflict-of-laws jurisprudence, raising issues of substantial importance, for a

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[3] In fact, neither *Simonetta* nor *Braaten* had anything to do with the issue of how courts should distinguish "products" from "improvements to real property" for purposes of a statute of repose.

simple reason: the Court's analysis is circular. The Court of Appeals did not hold that the Alaska courts would not only adopt but then extend *Simonetta* and *Braaten* in construing Alaska's statute of repose; it never considered what the Alaska legislature or the Alaska courts might think about the issue. Instead, it summarily concluded that there were no helpful Alaska cases on point and then construed Alaska law using nothing but Washington authorities. But if the courts are to determine other states' law based solely upon Washington law, the court will *always* find that that there is no actual conflict of laws. This renders the first step of the analysis – determining whether Alaska and Washington law differs with respect to the statute of repose – an empty formality with a foregone conclusion, contrary to *Woodward, FutureSelect, Erwin* and many other decisions. R.A.P. 13.4(b)(1), (2).

There is a fundamental issue at stake here worthy of this Court's review. The Due Process and Full Faith and Credit Clauses of the U.S. Constitution forbid a state from abrogating the rights of a party beyond its borders in connection with a dispute having no substantial contact or aggregation of contacts with that state. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821-23 (1985); *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312-13 (1981). Since the Washington courts never reach the issue of comparing contacts in cases where they find no conflict between

Washington and foreign law, it follows that the Court of Appeals' circular analysis – determining Alaska law based solely upon Washington law – is constitutionally impermissible, since it will inevitably result in applying Washington law to cases with no substantial Washington contacts.

That is exactly what happened here. *All* of the alleged asbestos exposures at issue here occurred in Alaska. CP 114, 116. GE's turbines were custom designed and manufactured for Ketchikan and Sitka mills in Alaska, CP 71, and GE employees were allegedly on-site in Alaska in connection with initial startup, and to sign off on repair work at various times in the 1960s and 1970s. CP 255, 257. The Hoffmans' domicil and residence at the time of his alleged exposures was Alaska. CP 121. The relationship between the parties is entirely centered in Alaska, where Mr. Hoffman lived and worked. CP 113-117. Given that, Alaska has a strong interest in having its statute of repose applied to this dispute. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 216 (1994); *McCann v. Foster Wheeler LLC,* 48 Cal.4th 68, 91-92 (2010). The Court of Appeals' decision applying Washington law to this dispute deprives GE of its rights under the Due Process and Full Faith and Credit Clauses. *Phillips,* 472 U.S. at 821-23; *Allstate,* 449 U.S. at 312-13. R.A.P. 13.4 (b)(3), (4).

Given that the Alaska statute of repose was enacted to decrease "the amount, cost, and complexity of litigation . . . [and] control the

increase of liability insurance rates," Ak. H.B. No. 58, § 1, Statement of Legislative Intent, Alaska would likely follow the weight of authority nationwide and hold that materials such as the replacement gaskets here are not a product under the statute of repose distinct from the improvement to real property built by GE.

For example, in *Harder v. AC&S, Inc.,* 179 F.3d 609, 612-13 (8th Cir. 1999) the Eighth Circuit held that where turbines were not intended to function without thermal blankets, those blankets were an improvement to real property even when they are detached from the turbine for maintenance. The Seventh Circuit has emphasized that in cases involving a statute of repose, courts must focus on the entire system that the defendant helped design or build, not just the individual 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). The Sixth Circuit has agreed with this analysis. *Adair v. Koppers Co.*, 741 F.2d 111, 114-15 (6th Cir. 1984). The district court in *Stanley v. Ameren Illinois Co.,* 982 F.Supp.2d 844, 863-64 (N.D. Ill. 2013) found that in applying a statute of repose, a court should not view "the improvement question at the micro level, focusing on individual components of the construction rather than the larger system." Where the insulation at issue was a practical necessity for the operation of the power

plant, it was an improvement to real property, the court found. *Id.*

McSweeney v. AC&S, Inc., 2014 WL 4628030 (C.D. Ill. 2014) involved the situation at issue here – the plaintiff alleged that he was injured when asbestos-containing insulation and gaskets were removed from a turbine during maintenance and repair. The court held that as "essential components of the turbine," the insulation and gaskets were still improvements to real property even when removed and replaced. *Id.*, *5.[4]

These cases illustrate the problem with the Court of Appeals' micro-level analysis here. Settled law holds that a remedial statute such as the Alaska statute of repose must be construed broadly, and its exceptions must be narrowly construed. *Intl. Ass'n of Fire Fighters v. City of Everett,* 146 Wn.2d 29, 34 (2001); *Whitesides v. U-Haul Co. of Ak.*, 16 P.3d 729, 732 (Ak. 2001). There are *always* components to any improvement to real property which might seem, viewed separately, like "products" – every wall, for example, contains plywood, or nails, or perhaps concrete blocks. If it is permissible to view a defendant's work from the lowest-level

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[4] *Accord, Toole v. Georgia-Pacific LLC,* 2011 WL 7938847, *5 (Ga. App. 2011); *Daniels v. F.B. Wright Co.*, 2010 WL 9095455 (Pa. Com. Pl. 2010); *Giest v. Sequoia Ventures, Inc.*, 83 Cal.App.4th 300, 304-306 (2000); *Pendzsu v. Beazer East, Inc.*, 219 Mich. App. 405, 410-12 (1996); *Kleist v. Metrick Elec. Co., Inc.*, 212 Ill.App.3d 738, 742-43 (1991); *Conley v. Scott Prods., Inc.*, 401 Mass. 645, 647 (Mass. 1988); *Mullis v. S. Co. Servs., Inc.*, 250 Ga. 90, 94 (1982).

component rather than the entire system, it is difficult to imagine when a statute of repose protecting those who build improvements to real property will *ever* apply. Because the Court of Appeals' holding causes the "product" exception to all but swallow up the Alaska statute of repose, the Court should accept review and reverse the Court of Appeals.

C. The Court of Appeals' Holding that Hoffman Could State a Claim for Gross Negligence Against GE Despite His Failure to Raise the Argument Below Conflicts With Many Decisions of This Court and the Court of Appeals, as Well as CR 46

Hoffman also argued that the exception to the Alaska statute for claims of gross negligence preserved his claims against GE. GE pointed out that Hoffman had waived any such argument, having never suggested that the gross negligence exception applied to GE before the trial court. (CP 2560-61, 2564 (raising gross negligence solely against co-defendant KPC); RP 49:14-15 (same); RB, pp. 38-39.) The Court of Appeals agreed with Hoffman and reversed. Opn., pp. 13-16.

Once again, the Court of Appeals did not exercise its discretion under R.A.P. 2.5(a) to acknowledge but overlook Hoffman's waiver – it simply ignored the issue. Because the Court of Appeals reversed the judgment based upon an issue which was never raised or ruled upon below, the Court's opinion squarely conflicts with each of the published authorities discussed earlier, *supra* at 8-11, *citing Van Hout,* 121 Wn.2d at

702-03; *Adcox,* 123 Wn.2d at 26-27; *Ryder's Estate,* 91 Wn.2d at 114; *Roumel,* 62 Wn.2d at 399-400; *Teratron,* Wn. App. at 489; *Espinoza,* 87 Wn.App. at 872; CR 46.[5] The Court should accept review and reverse the Court of Appeals. R.A.P. 13.4(b)(1), (2).

D. The Court of Appeals' Holding That Hoffman's Allegations are Sufficient to Constitute Gross Negligence Construes An Exception to the Alaska Statute of Repose So Broadly As to Render the Statute a Dead Letter, Conflicting With This Court's Conflict of Laws Jurisprudence and Raising Substantial Constitutional Concerns

In support of its holding that Hoffman's claims were preserved by the exception to the Alaska statute of repose for gross negligence, the Court of Appeals cited evidence which it said indicated that GE might have known that asbestos involved some risks "as early as the 1930s," and might have known "perhaps as early as the 1940s that asbestos could cause cancer." Opn., p. 14. The Court concluded that this evidence could amount to a "major departure from the standard of care" under Alaska law. *Maness v. Daily,* 307 P.3d 894, 905-06 (2013).

The Court of Appeals' holding that a mere failure to warn of a substantial risk which the defendant knew or should have known about is

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[5] Hoffman waived the gross negligence issue a second time before the Court of Appeal by failing to refer to the issue in either of his Assignments of Error or disclose the point in the associated issues pertaining thereto. R.A.P. 10.3(a)(4); *Bender,* 99 Wn.2d at 599.

sufficient to allege gross negligence is inconsistent with Alaska law and with Washington law. The Alaska Supreme Court held in *Jones v. Bowie Indus., Inc.,* 282 P.3d 316, 335 (2012) that whether "the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property" is the first factor in establishing a claim for *ordinary* negligence failure to warn.

The court in *Maness,* cited by the Court of Appeals, relied upon the Supreme Court's holding in *Storrs v. Lutheran Hosp. & Homes Soc. of Am., Inc.,* 661 P.2d 632, 634 (1983). But the *Storrs* court held that gross negligence "involves a risk *substantially* greater in amount than that which is necessary to make conduct negligent." *Id.* (emphasis added). In *Storrs,* the court held that gross negligence was established by evidence that a doctor failed to take basic steps of treatment in response to a patient presenting with a life-threatening case of hemorrhagic shock. *Id.* Nothing here is remotely comparable. The evidence showed here that it was necessary to disturb insulation or gaskets in GE's turbines only for "a relative handful of major maintenance tasks." CP 71. Nearly every urban dweller has been exposed to asbestos, but comparatively few are ever diagnosed with an asbestos-related disorder. The Court of Appeals' holding substantially expands the scope of the exception in the statute of repose for gross negligence to the point where few plaintiffs will ever have

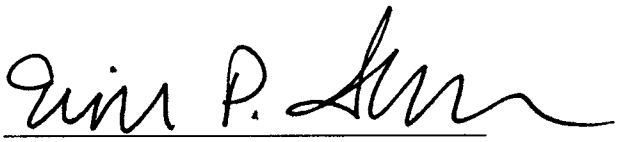
any difficulty satisfying it. The Court of Appeals' holding cannot be reconciled with settled law requiring that remedial statutes be construed broadly and their exceptions construed narrowly. *Intl. Ass'n of Fire Fighters,* 146 Wn.2d at 34; *Whitesides,* 16 P.3d at 732. The Court should accept review and reverse the Court of Appeals. R.A.P. 13.4(b)(1), (2).

VI. CONCLUSION

The Court of Appeals' opinion conflicts with published decisions of this Court and the Court of Appeals, raises significant questions of law under the U.S. Constitution, and raises issues of substantial public interest which should be determined by this Court. The Court should accept review and reverse the Court of Appeals.

DATED: September 8, 2016

SEDGWICK LLP



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DATED this 8th day of September, 2016.

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Appendix

Filed
Washington State
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August 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARRY HOFFMAN and JUDITH HOFFMAN, husband and wife,

Appellants,

v.

GENERAL ELECTRIC COMPANY; KETCHIKAN PULP COMPANY,

Respondents,

ALASKAN COPPER COMPANIES, INC. d/b/a Alaska Copper and Brass; ALASKA PULP CORPORATION; ARMSTRONG INTERNATIONAL, INC.; ASBESTOS CORPORATION LIMITED; AW CHESTERTON COMPANY; CERTAINTEED CORPORATION; CHICAGO BRIDGE AND IRON COMPANY; CLEANER BROOKS, INC.; CRANE SUPPLY; EXPERT DRYWALL, INC.; FAMILIAN NORTHWEST, INC., individually and as successor-in-interest and parent and alter ego to Alaska Pipe & Supply; GEORGIA-PACIFIC LLC; KAISER GYPSUM COMPANY, INC.; OAKFABCO, INC., individually and as successor-in-interest to and/or f/k/a and/or f/d/b/a Kewanee Boiler Corporation; OJI HOLDINGS CORPORATION f/k/a Oji Paper Co., Ltd., individually and as successor-in-interest and parent and alter ego to Alaska Pulp

No. 47439-5-II

UNPUBLISHED OPINION

Corporation and Alaska Pulp Corporation, Ltd.; PACIFIC PLUMBING SUPPLY LLC; SABERHAGEN HOLDINGS, INC.; TRANE U.S., INC. f/k/a American Standard, Inc., individually and as successor-in-interest to Kewanee Boiler Corporation; UNION CARBIDE CORPORATION; WHITNEY HOLDING CORP.,

Defendants.

JOHANSON, P.J. — After Larry Hoffman developed mesothelioma from exposure to asbestos, he filed suit again Ketchikan Pulp Company (Ketchikan) and General Electric Company (GE), alleging that each negligently contributed to his condition. The superior court dismissed Hoffman's case pursuant to CR 12(b)(6) after it determined that his claims were barred by Alaska's statute of repose. Hoffman appeals, arguing that the trial court erred by ruling that there is a conflict of laws and that Alaska's statute of repose governs this dispute such that it bars Hoffman's claims. We conclude that the superior court erred by dismissing Hoffman's case under CR 12(b)(6). When the facts are viewed as true under CR 12(b)(6) standards, Hoffman has at least alleged facts that would entitle him to relief. Hoffman's alleged facts support a conclusion that there is no conflict of laws, that Washington law therefore applies, and that Hoffman's claims are not barred. We reverse and remand for proceedings consistent with this opinion.

FACTS[1]

I. BACKGROUND

Hoffman was born in Washington, but moved to Alaska in the 1950s when his father took a job as a welder in a pulp mill. Hoffman's father, Doyle,[2] worked at the mill owned by Ketchikan from 1954 to 1967. During Doyle's time at the mill, his work often required him to disturb asbestos-containing materials. Specifically, Doyle removed asbestos insulation from pipes that he worked on and assisted with the removal of asbestos blankets from the mill's turbines. This process created a significant amount of dust and during this period in time workers took no special precautions when handling these materials. Dust and asbestos fibers would get on Doyle's clothing and person that was then introduced into Doyle's home when Hoffman was a child.

Later, Hoffman also worked at pulp mills in Alaska. From 1968 to early 1970, Hoffman worked at Ketchikan and then from 1974 until 1978, a pulp mill in Sitka periodically employed him. Although it operated solely in Alaska, Ketchikan is a Washington corporation, having incorporated in 1947 before Alaska became a State.

Due to their remote locations, both mills required power-generating turbines to operate. Each mill featured steam turbines manufactured and installed by GE. Consistent with GE's own recommendations, these turbines and associated piping systems were often covered by thermal insulation material that contained asbestos. Other turbine parts, including a certain type of gasket,

[1] The facts are not in dispute.

[2] We refer to Doyle by his first name for clarity, intending no disrespect.

also contained asbestos. Around the time period that Hoffman would have been employed at the mills, GE at least occasionally facilitated the purchase and shipping of these parts.

Hoffman's job at Ketchikan did not require him to work directly with the turbines, but because he was a member of the "yard crew" doing general labor, he was often required to clean up after maintenance work had been performed that disturbed the thermal insulation. Hoffman used no respiratory protection when he swept up dust and debris left behind from the repair work. Hoffman later became a pipefitter. At some point in time, part of Hoffman's work also included replacement of asbestos-containing gaskets.[3] While in place and undisturbed, no asbestos hazard is present, but when gaskets and "packing materials" are removed or cut, asbestos fibers can be released. Clerk's Papers at 526. At the Sitka mill, Hoffman did not perform repairs on the turbines, but did work in and around the turbine room.

In 2013, after moving back to Washington, Hoffman was diagnosed with mesothelioma. In addition to the possibility of his own exposure working with a "variety" of asbestos-containing products, doctors and industrial hygienists opined that Hoffman was likely exposed to asbestos from his father's work clothing, which contaminated the family vehicle and home.

II. PROCEDURE

Hoffman filed a personal injury lawsuit, naming a number of defendants including Ketchikan and GE. Hoffman alleged theories of products liability and negligence for failure to

[3] It was unclear from Hoffman's testimony whether and to what extent he assisted with removal or removed turbine parts, including the asbestos gaskets. The declaration of William Ewing, the industrial hygienist expert, suggested that Hoffman did perform such work although he did not specify whether this happened at Ketchikan, Sitka, or elsewhere. However, because we are required to presume that Hoffman's allegations are true and because even hypothetical facts are sufficient to survive a CR 12(b)(6) dismissal, we treat those assertions as fact.

warn, among others. He contended that he had been exposed to asbestos and asbestos-containing products that GE manufactured. After extensive discovery and several pretrial motions, the superior court ruled that a conflict of laws existed between Alaska's and Washington's respective statutes of repose and other features of the two States' laws.[4] The superior court then concluded under the "most significant relationship test" that Alaska law governed the case. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

GE and Ketchikan then moved to dismiss. They argued that Hoffman's action should be dismissed under CR 12(b)(6) for failure to state a claim on which relief can be granted because the Alaska statute of repose barred Hoffman's action. Hoffman urged the court to deny the CR 12(b)(6) motion, arguing first that Alaska's statute of repose did not apply.

Hoffman asserted that even if Alaska law applies, his case should survive dismissal because Alaska's statute of repose contained several exceptions to its procedural bar, some of which applied to his case. The superior court disagreed that any exception applied. Hoffman appeals the superior court's ruling that Alaska substantive law applies to his case and its order granting GE and Ketchikan's CR 12(b)(6) dismissal motion.

ANALYSIS

I. STANDARD OF REVIEW

We review CR 12(b)(6) dismissals de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)). "'Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the

[4] In addition to conflicts created by the statutes of repose, Washington and Alaska differ in their approach to caps on noneconomic damages and issues of joint and several liability.

plaintiff cannot prove any set of facts which would justify recovery.'" *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014) (internal quotation marks omitted) (quoting *Kinney*, 159 Wn.2d at 842). All facts alleged in the complaint are taken as true and we may consider hypothetical facts supporting the plaintiff's claim. *FutureSelect*, 180 Wn.2d at 962. "Therefore, a complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781, 776 P.2d 963 (1988) (citing *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)).[5]

II. CONFLICT OF LAWS

Hoffman argues that the trial court erred by ruling that Alaska substantive law applies to his case after finding that the laws of the two States conflict. We conclude that the trial court erred in dismissing his action under CR 12(b)(6) because Hoffman alleged facts that would justify recovery.

A. LEGAL PRINCIPLES

When a party raises a conflict of law issue in a personal injury case, we apply the following analytical framework to determine which law applies: (1) identify an actual conflict of substantive law; (2) if there is an actual conflict of substantive law, apply the most significant relationship test to determine which State's substantive law applies to the case or, if there is no actual conflict,

[5] The parties characterize the superior court's ruling as a CR 12(b)(6) dismissal and both parties assert that the CR 12(b)(6) standard of review applies. But when a superior court considers matters outside the pleadings in response to a CR 12(b)(6) motion to dismiss, it should then treat that motion as one for summary judgment. CR 12(b). The superior court here did consider matters outside the pleadings, including declarations and exhibits. But because the parties rely on the CR 12(b)(6) standard in their briefing, we do the same.

apply the presumptive law of the forum; (3) then, if applicable, apply the chosen substantive law's statute of limitations. *Woodward v. Taylor*, 184 Wn.2d 911, 917, 366 P.3d 432 (2016).

Under the first step, we must identify an actual conflict of law. *FutureSelect*, 180 Wn.2d at 967. An actual conflict of law exists where the result of an issue is different under the laws of the interested States. *Woodward*, 184 Wn.2d at 918. If there is no actual conflict, the local law of the forum applies and the court does not reach the most significant relationship test. *Woodward*, 184 Wn.2d at 918.

Our Supreme Court has explained that statutes of repose are to be treated as a State's substantive law in making choice-of-law determinations and that they may raise a conflict of substantive law. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994). Relating to personal injury actions, Alaska's statute provides,

> (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 10 years of the earlier of the date of
>
> . . . .
>
> (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;
>
> . . . .
>
> (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; or
>
> . . . .
>
> (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.

ALASKA STAT. (AS) § 09.10.055.

Washington's equivalent statute of repose—and the only one that Hoffman suggests could govern his claims—applies only to claims or causes of action brought against construction, engineering, and design professionals and does not contain any provision relating to personal injuries arising from nonconstruction claims. *See* RCW 4.16.300, .310. There is no applicable statute of repose relating to personal injuries such as mesothelioma in Washington.

B. FACTS SUPPORT A CONCLUSION THAT THERE IS NO CONFLICT OF LAWS

The parties agree that under Washington's statute of repose, Hoffman's claim is not barred. RCW 4.16.300. The parties disagree concerning whether Alaska's statute of repose bars Hoffman's claims. Hoffman contends that the superior court erred by granting the defendants' CR 12(b)(6) motion to dismiss because AS 09.10.055 preserves his claims under several provisions that apply here. Specifically, Hoffman argues that Alaska's statute of repose does not apply if personal injuries result from (1) prolonged exposure to hazardous waste, (2) the presence of "foreign bodies," (3) defective products, and (4) intentional acts or gross negligence. To the contrary, Ketchikan and GE argue that Hoffman's claims do not fall under these provisions.[6] We agree with Hoffman that the superior court erred by dismissing his claims under CR 12(b)(6) because he alleged facts that, if presumed true, would support a conclusion that one or more

[6] In two footnotes, Ketchikan refers to Hoffman's inability to establish that Ketchikan is liable for any exposure in the workplace that was directly to his person because the "Alaska Workers' Compensation Act," ch. 23.30 AS, is the sole method of redress when an employee in injured while working for his employer. But the superior court never ruled on the effect of the Alaska Workers' Compensation Act and, therefore, this issue is not properly before us.

exceptions to the statute of repose apply and thus his claims are not barred under either Washington or Alaska law.[7]

1. DEFECTIVE PRODUCT

Hoffman contends that the statute of repose does not apply to injuries resulting from defective products. GE responds that the turbines that it manufactured for the mills are not "products" as that term is defined.[8] Whether or not the turbines could be considered "products," we agree with Hoffman because Hoffman has presented some evidence that GE delivered gaskets that could have caused Hoffman's injury. Ketchikan responds that it likewise cannot be held liable under a theory of product liability because Hoffman did not assert such a theory against it and because Ketchikan did not manufacture or supply any product, it was merely the premises owner. As to this argument, we agree with Ketchikan.

Alaska's statute of repose contains an exception for defective products that precludes the statute from barring a claim from someone whose personal injury or property damage was caused by

> 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.

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[7] We decline to address the prolonged exposure to hazardous waste and presence of foreign bodies exceptions and we make no ruling as to their potential application because the superior court erred by dismissing Hoffman's suit in its entirety for the reasons explained.

[8] This is GE's sole argument. GE does not address Hoffman's claim that GE was in the chain of distribution for the defective gaskets. GE asserts briefly that Hoffman raises the defective gasket argument for the first time on appeal, but that is not accurate. Hoffman did not make a detailed argument, but he did raise the issue of gaskets at a hearing below.

AS 09.10.055(b)(1)(E). As with each of the other exceptions, there is no relevant Alaska case construing the defective products exception as it pertains to the procedural bar within the statute of repose.[9]

But our Supreme Court decided two companion cases that are informative: *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

In *Simonetta*, a Navy sailor developed lung cancer that he alleged was caused by an exposure to asbestos from regularly performing maintenance on a device that converts seawater to freshwater. 165 Wn.2d at 346. After the "evaporator" was shipped from the manufacturer, it was insulated with asbestos mud and cloth products supplied and manufactured by a different company and installed by the Navy or a third entity. *Simonetta*, 165 Wn.2d at 346. Simonetta was exposed to asbestos when he removed the asbestos insulation to service the device, then reapplied it when he was finished. *Simonetta*, 165 Wn.2d at 346.

Following his diagnosis, Simonetta filed negligence and products liability lawsuits against the successor-in-interest of the manufacturer of the evaporator. *Simonetta*, 165 Wn.2d at 346. He did not know the identity of the company that manufactured or installed the asbestos insulation. *Simonetta*, 165 Wn.2d at 346. Our Supreme Court collected cases from other jurisdictions and discussed our own precedent applying *Restatement of Torts* § 388 (1934), which governs the "duty to warn" in a negligence action. *Simonetta*, 165 Wn.2d at 351-54.

[9] One Alaska Supreme Court decision examined the defective product exception but did so to decide an issue that is not relevant here. *Jones v. Bowie Indus., Inc.*, 282 P.3d 316 (Alaska 2012).

The *Simonetta* court held that the evaporator manufacturer was not liable because the duty to warn of a hazardous product under a negligence theory extends only to those in the chain of distribution and the part manufacturer did not manufacture, sell, or supply the asbestos insulation. 165 Wn.2d at 354. Likewise, the court held that the manufacturer was also not liable under a strict liability theory because it did not manufacture an unreasonably safe product. *Simonetta*, 165 Wn.2d at 362-63. The unreasonably safe product was the asbestos insulation, not the evaporator. *Simonetta*, 165 Wn.2d at 362. But here, Hoffman has alleged some facts that support a conclusion that GE sold or facilitated the supply of gaskets that could have caused Hoffman's injuries.

Then in *Braaten*, our Supreme Court addressed whether manufacturers of products that contained component parts with asbestos in them had a duty to warn users of their product when they did not manufacture the asbestos-containing parts nor did they manufacture, supply, or sell asbestos-containing replacement parts. 165 Wn.2d at 380. A pipefitter who worked for the Navy sued several defendants who were companies that manufactured valves and pumps used aboard the ships. *Braaten*, 165 Wn.2d at 381. The Navy insulated some of these products with asbestos insulation and some of the defendant's products came with packing material and gaskets that contained asbestos, but no defendant was the manufacturer of the asbestos materials in either instance. *Braaten*, 165 Wn.2d at 381.

Braaten was exposed to asbestos when he removed and reapplied the insulation and worked otherwise with the gaskets in a manner that caused the asbestos to become airborne. *Braaten*, 165 Wn.2d at 381. But Braaten also testified that it was not possible to tell how many times the original packing and gaskets had been replaced with the same parts manufactured by other companies and he did not work on brand new parts. *Braaten*, 165 Wn.2d at 381-82. Braaten attempted to provide

evidence to show that some of the defendants either supplied or specified asbestos-containing insulation for use with their products, but these attempts failed to show that the defendants were in the chain of distribution because they were not sufficiently connected to Braaten himself or to the pumps that he may have worked on. *Braaten*, 165 Wn.2d at 388-89. Braaten therefore could not withstand summary judgment. *Braaten*, 165 Wn.2d at 389.

The product manufacturers did not dispute that they would be liable for failure to warn if the original parts contained in their products contained asbestos, but they argued that because they could not tell how many times those parts had been replaced, they were not in the replacement chain of distribution. *Braaten*, 165 Wn.2d at 391. Because no genuine issue of material fact could be established as to whether the defendants sold, supplied, or otherwise placed any of the replacement asbestos-containing parts into the stream of commerce, the court affirmed the summary dismissal of the plaintiff's case. *Braaten*, 165 Wn.2d at 380-81. This approach is consistent with Alaska law that holds that products liability actions apply to only manufacturers, sellers, and suppliers of products. *Burnett v. Covell*, 191 P.3d 985, 987-88 (Alaska 2008).

Significantly, however, the alleged facts and procedural posture here are different from those in *Simonetta* and *Braaten*. First, these cases were dismissed on summary judgement, rather than under CR 12(b)(6). This is an important distinction. Second, here, there is at least some evidence in the record to suggest that GE did in fact suggest or specify that asbestos insulation should be used with its turbines. Also, although it disputed whether its turbines would be considered products and it vehemently argued that there was no evidence that it manufactured, supplied, or sold thermal asbestos insulation, GE does not say the same about replacement gaskets.

The record contains admissions by former GE personnel that some GE shipping orders showed requests for gaskets and that "Flexitallic" gaskets containing asbestos were commonly used on the GE turbines. There are also copies of what appear to be purchase orders or requests for quotes, some of which specifically list Flexitallic gaskets. Unlike *Simonetta* and *Braaten*, Hoffman has alleged facts that, if presumed true, would support a claim that GE was the supplier of some of the replacement parts and, therefore, was within the chain of distribution.

Under CR 12(b)(6), we assume the truth of Hoffman's allegations and may consider even hypothetical facts in support of the same. The record contains at least some alleged facts along with inferences from hypothetical facts, to support that Hoffman worked around GE turbines, potentially with GE-supplied asbestos gaskets, and work with or around those gaskets may have exposed him or his father to asbestos. Hoffman alleges that this exposure led to his injuries. Therefore, under Hoffman's alleged facts, GE could be liable to Hoffman as the supplier of defective products. It is at least possible that Alaska's statute of repose does not apply to Hoffman's claims against GE because Hoffman's injuries may have been caused by GE's defective product. However, there is no evidence, nor any hypothetical facts, that Hoffman's injuries were caused by Ketchikan's defective product and, thus, the "defective product" provision does not save Hoffman's claims against Ketchikan from Alaska's statute of repose.

2. GROSS NEGLIGENCE

Next, Hoffman argues that the exception in the Alaska statute of repose of intentional acts or gross negligence precludes dismissal of his claims against both Ketchikan and GE. Ketchikan responds that there is no evidence in the record that it is liable for gross negligence and, in any event, Hoffman did not plead gross negligence in his complaint. GE responds that it also cannot

be liable for gross negligence because Hoffman never pleaded gross negligence and did not cite any evidence from the record that would support an allegation. Again, considering the CR 12(b)(6) standard, we conclude that Hoffman has alleged facts that, when presumed true, support recovery under a gross negligence theory. Thus, dismissal under CR 12(b)(6) was not warranted.

Alaska's statute of repose does not bar claims where a person has suffered injury through intentional acts or gross negligence. AS 09.10.055(b)(1)(B). Under Alaska law, gross negligence is defined as "'a major departure from the standard of care.'" *Maness v. Daily*, 307 P.3d 894, 905 (Alaska 2013) (quoting *Storrs v. Lutheran Hosp. & Homes Soc. of Am., Inc.*, 661 P.2d 632, 634 (Alaska 1983)).

Hoffman alleges that both parties knew as early as the 1950s of the hazards of asbestos. The fact that Ketchikan continued to use asbestos insulation, gaskets, and other products throughout the mill despite this knowledge is gross negligence in Hoffman's view. Similarly, according to Hoffman, GE purposely disregarded the hazardous nature of asbestos and continued to supply asbestos products and perform maintenance that disturbed asbestos-containing materials without warning.

There is evidence in the record to suggest that GE knew of at least some danger associated with asbestos as early as the 1930s. In 1935, GE knew that asbestos was a recognized disease. And further, GE knew perhaps as early as the 1940s that asbestos could cause cancer. Hoffman alleges facts that if presumed true, combined with all reasonable inferences therefrom, establish that GE purposefully disregarded this knowledge or ignored the recognized dangers by continuing to send asbestos materials to either mill where Hoffman worked. Therefore, Hoffman has at least alleged facts that, when presumed true, establish that GE engaged in conduct that a finder of fact

could determine constituted a "'major departure from the standard of care.'" *Maness*, 307 P.3d at 905 (quoting *Storrs*, 661 P.2d at 634).

Likewise, regarding Ketchikan, there is some testimony in the record that tends to establish that it may have known of the dangers of asbestos in the 1950s. Specifically, Ketchikan's answer to an interrogatory explained that it would have expected Hoffman to have had some training working with hazardous asbestos because it was well documented that work with asbestos-containing thermal insulation is potentially hazardous. This information was apparently disseminated by the pipefitters union to its members in the late 1950s.

Thus, Hoffman has at least alleged facts that, if presumed true, establish that a fact finder could find that Ketchikan was grossly negligent by failing to sufficiently protect him from the asbestos hazard if Ketchikan itself knew of the danger. We hold that the superior court erred by dismissing Hoffman's claims against GE and Ketchikan on this second basis because we conclude Hoffman has alleged facts that, if presumed true, could support application of the gross negligence exception. Because Hoffman has alleged facts that, if presumed true, show that the exception would apply, his suit is arguably not barred by Alaska's statute of repose. Under these facts there would be no conflict of laws.

In conclusion, Hoffman has alleged facts that, when viewed as true, could support a conclusion that neither Washington's law nor Alaska's statute of repose bar Hoffman's claims. Thus, Hoffman has shown, at least under the CR 12(b)(6) standard, that there may be no conflict of law and, therefore, the trial court erred by dismissing his claim on the basis that a conflict of

law existed and that Alaska law barred his claim. Accordingly, we reverse and remand for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, P.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

West's Alaska Statutes Annotated
Title 9. Code of Civil Procedure
Chapter 10. Limitations of Actions

AS § 09.10.055

§ 09.10.055. Statute of repose of 10 years

Currentness

(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 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; 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 misrepresentation;

(D) breach of an express warranty or guarantee;

(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; or

(F) breach of trust or fiduciary duty;

(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;

(4) the provisions of this section are waived by contract; or

(5) the facts that would constitute accrual of a cause of action of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.

(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.

Credits

SLA 1967, ch. 61, § 2; SLA 1994, ch. 28, § 3; SLA 1997, ch. 26, § 5.

Notes of Decisions (5)

AS § 09.10.055, AK ST § 09.10.055
Current with Chapters 2-6, 9-13, 16, 19-20, 23-24, 27 and 33 from the 2016 2nd Reg. Sess. of the 29th Legislature

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