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NO. 93581-5

SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY AND JUDITH HOFFMAN,

Appellants,

v.

ALASKA COPPER COMPANIES, INC., ET AL.,

Respondents.

PETITION FOR REVIEW OF DEFENDANT AND RESPONDENT
KETCHIKAN PULP COMPANY

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I. IDENTITY OF RESPONDENT

Ketchikan Pulp Company (KPC) asks this Court to accept review of the decision designated in Part II.

II. COURT OF APPEALS DECISION

In an unpublished decision filed August 9, 2016, Division II of the Court of Appeals reversed the trial court's summary judgment dismissal of plaintiffs' negligence/personal injury action even though the plaintiffs failed to present any evidence that their claims fell within one of the enumerated exceptions to Alaska's Statute of Repose, the operable law of the case.¹ On August 29, 2016, KPC filed a Motion for Reconsideration arguing that the Court of Appeals committed error by applying incorrect legal standards to their analysis.² The Court of Appeals signed an Order Denying Review on September 1, 2016. The Court of Appeals did not send KPC counsel a copy of the order denying reconsideration. A copy was obtained when KPC counsel called the Court of Appeals on October 13, 2016 to inquire as to the status of its

¹ A copy of the Court of Appeals decision is attached as Appendix A.

² A copy of the Motion for Reconsideration is attached as Appendix B.

motion for reconsideration and was told an order had been signed denying reconsideration. KPC counsel requested and was provided a copy of the order via email the same day.³

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly determine that Alaska law governed the resolution of Mr. Hoffman's claims when the actual facts considered by the trial court were not in dispute?

2. Did the trial court correctly determine that the Alaska Statute of Repose barred Mr. Hoffman's claims?

3. Did the Court of Appeals err in holding that the trial court dismissed plaintiff's claims pursuant to CR 12(b)(6) contrary to the clear rules set forth under CR 12(b)?

4. Did the Court of Appeals err in failing to apply a de novo review standard to the choice of law question?

5. Did the Court of Appeals err when it insisted⁴ on applying a CR 12(b)(6) standard in contravention of *United Food*

³ Declaration of Malika Johnson attached as Appendix C. A copy of the electronic transmission from Division II of the Court of Appeals is attached as Exhibit D.

& Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217, 218 (1985).

IV. STATEMENT OF THE CASE

The underlying case is a personal injury action filed by plaintiffs alleging that Larry Hoffman developed mesothelioma after he was exposed to asbestos fibers carried home by his father from the KPC mill when he was a child from 1954-1966⁵. Mr. Hoffman was later a mill employee and asserted claims against General Electric alleging asbestos exposure as an employee. Plaintiffs' claims against KPC based on his time as an employee were barred by the Alaska Workers Compensation Act. Dismissal of those claims as to KPC was not opposed by plaintiffs.

Defendants initially brought a motion for application of Alaska law. (VRP March 13, 2015). Mr. Hoffman never worked in the State of Washington. There is no claim that Mr. Hoffman

⁴ Given its curt order on KPC's motion for reconsideration, the Court of Appeals continues to insist that CR 12(b)(6) is the operative rule, despite the fact that such a conclusion is both factually and legally incorrect.

⁵ The asbestos was allegedly brought home from the mill on his father Doyle's person and clothing. Mr. Hoffman makes a number of other exposure claims not relevant to KPC.

was ever exposed to asbestos, or any asbestos-containing products in the State of Washington. In fact, Mr. Hoffman moved to Washington in 2012, four years after he retired from the trades. (CP 103). KPC was incorporated in the State of Washington in 1947, prior to Alaskan Statehood. (CP 1367). Notwithstanding the fact that KPC was, by necessity, incorporated in the State of Washington, KPC was always domiciled and conducted all of its operations in Ketchikan, Alaska and the Tongass National Forest in Southeastern Alaska. Dave Kiffer, *Boom Town, Ketchikan in the 1950s*, SitNews, February 20, 2006 at 7.⁶ The purpose of the Mill was to bring economic infrastructure to the region, promote the employment of local Alaskans, and to exploit the natural resources of the Tongass National Forest.⁷

The trial court correctly ruled that Alaska law and, in particular, the Alaska Statute of Repose governed the resolution of

⁶ Electronic version available at http://www.sitnews.us/kiffer/boomtown/021906_ketchikan_50.html.

⁷ "By the time the first bale of pulp left the new Ketchikan Pulp mill on July 1, 1954, Ketchikan had been changed irrevocably. A new economic engine had fired up and the era of year round jobs had finally reached Alaska's First City ... that all began in the mid-1950's and lasted for more than 40 years." *Id.*

plaintiffs' claims. (VRP March 13, 2015). KPC then brought a 12(b)(6) motion to dismiss Mr. Hoffman's claims based on the uncontroverted fact that his lawsuit was filed after the expiration of the time period provided for in the Alaska Statute of Repose. Plaintiffs opposed that motion by arguing that several exceptions to the Statute of Repose applied.⁸

In response, the trial court continued the CR 12(b)(6) motion, permitted further briefing and, in ruling, considered matters outside the pleadings. (VRP March 24, 2015 at 72). Under established Washington precedent, the original CR 12(b)(6) motion was converted into a CR 56 summary judgment motion.

[T]he following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted ... If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated* as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable

⁸ The Alaska Statute of Repose excepts from its application claims based on *inter alia* defective products, prolonged exposure to hazardous wastes, gross negligence and foreign objects left in the body of no therapeutic or diagnostic value.

opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(b)(emphasis added). If the trial court elects to consider facts and evidence outside of the pleadings, the onus is on the court to apply a CR 56 summary judgment standard, “the motion *shall* be treated as one for summary judgment.” CR 12(b). Judge van Doorninck treated KPC and General Electric’s Motion to Dismiss for Failure to State a Claim as summary judgement motions after she decided to consider evidence outside of pleadings. (VRP March 24, 2015 at 16). In accordance with the rule, the trial court specifically indicated the motion would be treated “like every other summary judgment.” *Id.* In fact, the transcript for the following day is entitled: “Summary Judgment Proceeding.” (VRP March 25, 2015 at 3).

V. ARGUMENT

A. **The Trial Court Correctly Determined that Alaska Law Governed Resolution of Plaintiffs’ Case**

The trial court analyzed the relevant contacts between the State of Alaska, the State of Washington and the plaintiffs. Based

on that analysis, the trial court correctly concluded that Alaska law should be applied.⁹ Mr. Hoffman was an Alaska resident during the relevant time period, all of his claimed asbestos exposures occurred in the State of Alaska, KPC's sole place of business was Ketchikan, Alaska and the Tongass National Forest, and, the mill was established pursuant to a long term timber lease with the Federal government in the Tongass to promote economic development in Southeastern Alaska. Mr. Hoffman's only contact with the State of Washington is that plaintiffs chose it as a place to retire and had lived there for approximately one year prior to Mr. Hoffman developing his disease. (CP 103). Under relevant Washington Supreme Court precedent on the subject of conflict of laws, the trial court's determination of the issue is unassailable. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555 P.2d 997 (1976).

Under Restatement (Second) of Conflict of Laws § 145-146 (1971), the law of the place where the injury occurred is to be

⁹ Washington and Alaska laws differ in three material areas: liability, allocation of fault, and the Statutes of Repose. KPC and GE sought to have Alaska law applied in each area.

displaced only by a showing that some other jurisdiction has a more significant relationship. The significant relationship test looks to four factors: 1) the place of injury, 2) the place where the conduct causing the injury occurred, 3) the domicile of the parties, and 4) the place where the relationship is centered. *Johnson*, 87 Wn.2d at 581. The contacts are evaluated according to their relative importance with respect to the particular issue. *Id.* "The approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found." *Southwell v. Widing Transportation*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984). "Under this rule, it is necessary to identify the crux or gravamen of the action to determine which contacts are relevant." *Dairyland Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 41 Wn.App. 26, 31, 701 P.2d 806 (1985). All of the factors which this Court has identified as considerations for determining choice of law issues favor the application of Alaska law. Mr. Hoffman's asbestos exposure occurred in the State of Alaska. KPC's alleged conduct occurred

in the State of Alaska. Both parties were Alaskan residents at the time of the alleged exposure. The relationship between KPC and plaintiffs was centered in Ketchikan, Alaska.

B. The Trial Court Correctly Concluded that the Alaska Statute of Repose Barred Plaintiffs' Claims

Following the trial court's determination that the Alaskan Statute of Repose governed plaintiffs' claims, KPC brought a 12(b)(6) motion seeking dismissal of those claims as time-barred. As noted above, the Judge van Doornick declined to rule on that motion, permitted further argument and evidence, and held a summary judgment hearing in which she determined that the Alaska Statute of Repose barred plaintiffs' claims. The gist of her opinion as to KPC was that none of the alleged exceptions to the Statute of Repose applied. The "defective product" exception did not apply because KPC was not a product seller, but rather a premises owner. The "hazardous waste" exception did not apply because asbestos is not a "hazardous waste" under Alaska law. The "medical malpractice" exception did not apply because this was not a case involving a medical device being left inside a

patient. Finally, the “gross negligence” exception did not apply because there was no evidence of gross negligence and plaintiff counsel orally and in written briefing stated that his clients’ claims against KPC sounded in “common law negligence.”¹⁰

C. The Court of Appeals Determination that the Trial Court Dismissed Plaintiffs’ Claims Pursuant to CR 12(b)(6) is Factually and Legally Wrong

The Court of Appeals opinion states: “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.” (Op. at 2). That statement is factually and legally wrong. It is factually incorrect because the court dismissed plaintiffs’ claims pursuant to a summary judgment motion, after continuing defendants’ 12(b)(6) motion to allow plaintiff counsel to present further briefing and evidence with respect to the applicability of claimed exceptions to the Alaska Statute of Repose. (VRP March 24 at 16; VRP March 25 at 3).

¹⁰ On Appeal, KPC argued that the trial court’s application of the Alaska Statute of Repose was a choice of law determination which is an issue of law, reviewed de novo. *Seizer v. Sessions*, 132 Wn.2d 642, 650, 940 P.2d 261 (1997).

The Court of Appeals decision is contrary to the plain language of CR 12(b)(6) which specifically states that:

If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated* as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

The Court of Appeals decision is likewise contrary to its own authority and authority of this Court because the Court of Appeals, similar to the trial court, considered matters outside of the pleadings in reaching their decision.¹¹ *Sulimann v. Lasher*, 48 Wn. App. 373; 739 P.2d 712 (1987)¹²; *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Affidavits and other extrinsic evidence may not be considered as part of the

¹¹ See for example Op. at 4 considering the testimony of "doctors and industrial hygienists" as well as Mr. Hoffman's own testimony and treating it as "fact" for purposes of whether the PLEADINGS contained allegations sufficient to survive a CR 12(b)(6) motion. Notably, the declarations of the "doctors and industrial hygienists" as well as Mr. Hoffman's deposition testimony were attached to the motions for summary judgment that had previously been filed in the case.

¹² Overruled to the extent that a contract attached to the pleadings is considered part of the pleadings.

pleadings. *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 204, 289 P.3d 638 (2012). Once extrinsic evidence is considered the 12(b)(6) motion shall be converted into a summary judgment motion. *Id.* at 206.

D. The Court of Appeals Determination that a “Possible” Claim for Gross Negligence Could be Used as a Contact for Purposes of a Choice of Law Analysis was Clear Error

The Court of Appeals, after acknowledging that the plaintiffs neither presented evidence of a claim for gross negligence nor included such an allegation in its Complaint, stated,

Again, considering the 12(b)(6) standard, we conclude that Hoffman has alleged facts when presumed true, support recovery under a 12(b)(6) standard.

(Op. at 14). The Court of Appeals committed clear error in concluding that allegations in the Complaint could be assumed to be true to defeat KPC’s summary judgment motion. The summary judgment standard is clear:

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the

inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion...

In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989)(citations omitted). Here, the applicability of the exceptions to the Alaska Statute of Repose was adjudicated during a CR 56 hearing. It was clear error to evaluate the trial court's decision utilizing a 12(b)(6) while at the same time electing to consider extrinsic evidence and use such evidence to create favorable inferences from allegations in the complaint.

E. The Court of Appeals Compounded its Error by Using the “Favorable Inferences” from its CR 12(b)(6) Analysis to Reverse the Trial Court’s Determination that Alaska Law Governed the Case

After determining that the allegations of the Complaint could support an assertion of “gross negligence”¹³ the Court of Appeals considered extraneous materials in order to find that the gross negligence exception to the Alaska Statute of Repose might apply. (Op. at 14-15). Nonetheless, the Court of Appeals reasoned, since there might not be a conflict between the Washington and Alaska Statutes of Repose “under a 12(b)(6) standard”, it was error for the trial court to dismiss plaintiff’s claim. (Op. at 15-16). The problem with the Court of Appeals analysis is that the trial court was not utilizing a 12(b)(6) standard and, under the law, the Court of Appeals was not permitted to do so either. CR 12(b); *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wash. 2d 800, 802, 699 P.2d 217, 218 (1985). Moreover, in this particular case, there is clear,

¹³ The Court of Appeals does not explain how allegations of negligence could support a gross negligence claim. Any doubt about that issue should have been resolved by the representation made by plaintiff counsel in briefing and in oral argument that plaintiff’s claims sounded in common law negligence.

irrefutable evidence that the trial court and the parties treated KPC and General Electric's original CR 12(b)(6) motion as a summary judgment motion.¹⁴ (VRP, March 24, 2015 at 16; VRP March 25, 2015 at 3).

"Gross negligence" is "negligence substantially and appreciably greater than ordinary negligence," i.e., "care substantially or appreciably less than the quantum of care inhering in ordinary negligence." *Nist v. Tudor*, 67 Wash.2d 322, 331, 407 P.2d 798 (1965); see 6 Washington Practice: Washington Pattern Jury Instructions: Civil 10.07 (6th ed.1997) ("gross negligence" is "the failure to exercise slight care."). A plaintiff seeking to prove gross negligence must supply "substantial evidence" that the defendant's act or omission represented care appreciably less than the care inherent in ordinary negligence. *Boyce v. West*, 71 Wn.App. 657, 665, 862 P.2d 592 (1993). To meet this burden of proof on summary judgment, the plaintiff must offer something

¹⁴ This Court's observation that the "parties treated the underlying motion as a 12(b)(6) motion" is both incorrect and of no moment. Once matters outside the pleadings were considered, it became a CR 56 motion. It is obvious that the Court of Appeal misreads those intentions.

more substantial than mere argument that the defendant's breach of care arises to the level of gross negligence. CR56(e); *Boyce*, 71 Wn.App. at 666.

Here, there was no evidence of gross negligence presented to the trial court. Nothing. Not only was no evidence of gross negligence presented, plaintiffs' counsel, in oral argument and in briefing, clearly stated that the claims against KPC sounded in common law negligence. (VRP March 24, 2015 at 8). Gross negligence was not pled nor were facts presented that would have supported such a claim. Furthermore, the Court of Appeals appears to have misunderstood the salient facts in evaluating the issue. This case, as against KPC, involves a claim referred to in asbestos litigation as a "take home exposure." Mr. Doyle Hoffman worked at the KPC mill in the 1950's and 1960's when plaintiff Larry Hoffman was a child. Plaintiffs claim that his father worked with asbestos at KPC and brought it home on his clothing and body thereby exposing Larry Hoffman to asbestos fibers. Fundamental to the Court of Appeal's misunderstanding of the nature of the

claim against KPC is the Court of Appeal's misinterpretation of a KPC Interrogatory Response.¹⁵ Not only is there no basis to conclude from the response that KPC had any knowledge of the danger of take-home exposure to asbestos, the Interrogatory Response was never presented to the trial court. The evidence before the trial court was that gross negligence was never pled and that plaintiffs' counsel asserted on the record that their claim against KPC was a common law negligence claim. "I want to make it clear to the Court, we are pursuing a common law negligence claim against Ketchikan ... we claim Ketchikan knew or should have known of this risk." *Id.* That was it. Plaintiffs offered nothing more than the argument of counsel (at a later time) that the gross negligence exception to the statute of repose applied.

¹⁵ The interrogatory question posed was whether Mr. Hoffman had any training with regards to hazards associated with asbestos prior to 1980. Mr. Hoffman testified that he was a member of the pipefitters union throughout his career. Retrospectively, counsel for KPC has learned in the course of litigation that the pipefitters union began warning their members of the potential hazards of asbestos in or around the late 1950s. KPC was never a member of any union nor did they receive publications from any union. There is no basis for the unsubstantiated leap that KPC was aware of the hazards of asbestos starting in the 1950s. More importantly, there is nothing to suggest that anyone at that time had knowledge of the potential risks of take-home asbestos exposure. Appendix A to KPC's Motion for Reconsideration at 8.

Because there was no admissible evidence before the court on the claim of gross negligence, dismissal of plaintiffs claim was warranted as a matter of law. "The trial court therefore properly concluded that the [plaintiffs] had produced no admissible evidence in support of their [claim of gross negligence] prior to [or during] the summary judgment hearing." *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 142, 331 P.3d 40 (2014).

The reason plaintiffs offered no evidence of gross negligence at or prior to the hearing is that no such evidence exists. The testimony from plaintiffs' own experts clearly establishes that gross negligence is not applicable. The record demonstrates that Dr. Castleman, plaintiffs' "state of the art" expert, had no knowledge of what was known or should have been known in Ketchikan, Alaska in 1966. (CP 944-47) Likewise, Mr. William Ewing, plaintiffs' Certified Industrial Hygienist, testified that the first publication related to the issue of risk of asbestos related disease from take home exposure was Dr. Kilburn's paper published in 1985, almost 20 years after Doyle Hoffman left

Ketchikan Pulp.¹⁶ (CP 951-52). Plaintiff did not and cannot establish that their claim falls within an exception to the Alaska Statute of Repose.

VI. CONCLUSION

Judge van Doorninck properly ruled that there was is a conflict between the Alaska and Washington Statutes of Repose and that the Alaskan statute applied to plaintiffs' claims. KPC's 12(b)(6) motion was converted to a CR 56 motion after plaintiffs requested the opportunity to brief the possible exceptions to the Statute. Judge van Doornick correctly ruled that none of the exceptions applied and plaintiffs' claims were barred by the Alaska Statute of Repose. The Court of Appeals decision is factually incorrect and conflicts directly with CR 12 and case of law both the Washington Supreme Court and the Washington Court of Appeals. Review by this court is appropriate.

¹⁶ Kilburn, et al, *Asbestos Disease in Family Contacts of Shipyard Workers*, Am. J. Pub. Health, June 1985 Vol, 75 No. 6, Pages 615-17. The Kilburn paper does not discuss mesothelioma among sons of shipyard workers at all. It purports to identify "asbestosis" among sons of shipyard workers although only 1 of 79 individuals examined met the 1985 American Thoracic Society definition of asbestosis. (CP 958-60)

Further proceedings in the trial court will be a complete waste of time. KPC will simply file a CR 56 motion identical to that previously heard by the court. The court will presumably grant it again as there is no new evidence to bring to bear on the issue. After dismissal, plaintiffs will file a new appeal and the Court of Appeals will have the opportunity to hear the identical case which it just heard. This court accepting review will prevent a monumental waste of judicial and legal resources.

RESPECTFULLY SUBMITTED this 24th day of October,
2016.



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 24th day of October, 2016, I caused a true and correct copy of the foregoing document, Petition for Review, to be delivered via email to the following counsel of record:

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DATED this 24th day of October, 2016, at Seattle, Washington.


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Subject: Hoffman v. Alaska Copper Companies, et al. - No. 93581-5

Good Afternoon,

Attached please find defendant Ketchikan Pulp Company's Petition for Review in the case of *Larry and Judith Hoffman v. Alaska Copper Companies, Inc., et al.*, No. 93581-5 (case number assigned to co-defendant's petition), Court of Appeals No. 47439-5. The Petition is submitted by David A. Shaw, WSBA #8788 and Malika I. Johnson, WSBA #39608 on behalf of Ketchikan Pulp Company. Mr. Shaw and Ms. Johnson's contact information is as follows:

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The appendices to this Petition are in excess of 50 pages and are therefore being sent to the Court via FedEx. The appendices should arrive tomorrow. A cover letter and check in the amount of \$200 for the filing fee will be attached.

The attached Petition complies with the Rules of Appellate Procedure (RAP) and should be deemed timely under RAP 18.8.

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WASHINGTON OREGON ALASKA

Appendix A

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

No. 47439-5-II

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 against 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.

FACTS¹

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 is 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.

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.

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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

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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

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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.

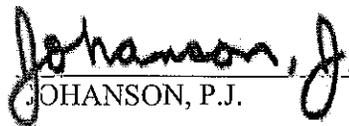
Thus, Hoffman has at least alleged facts that, if presumed true, establish that a fact finder could find that Ketchikan was grossly negligent by failing to sufficiently protect him from the asbestos hazard if Ketchikan itself knew of the danger. We hold that the superior court erred by dismissing Hoffman’s 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

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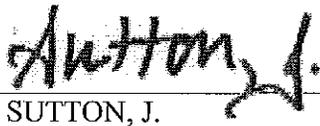
law existed and that Alaska law barred his claim. Accordingly, we reverse and remand for proceedings consistent with this opinion.

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, P.J.

We concur:


MELNICK, J.


SUTTON, J.

Appendix B

NO. 47439-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Pierce County Superior Court Cause No. 14-2-07178-2)

HOFFMAN, LARRY and JUDITH, husband and wife,

Appellant(s),

v.

ALASKAN COPPER COMPANIES, INC., et al.,

Respondent(s).

MOTION FOR RECONSIDERATION

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I. INTRODUCTION

[T]he following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted ... If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated* as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(b)(emphasis added). When this Court or any other court considers facts and evidence outside of the pleadings, a CR 12(b)(6) motion must be treated as a summary judgment motion. If the trial court elects to consider facts and evidence outside of the pleadings, the onus is on the court to apply a CR 56 summary judgment standard, “the motion *shall* be treated as one for summary judgment.” CR12(b). Judge van Doorninck treated Ketchikan Pulp Company (“KPC”) and General Electric’s Motion to Dismiss for Failure to State a Claim as a summary judgement motion after she decided to consider evidence outside of pleadings. VRP, March 24, 2015 at 16. Accordingly, pursuant to CR 12(b),

she allowed the parties additional time to brief the issues. VRP, March 24, 2015 at 72. Because the trial court, the parties and this Court considered matters outside of the pleadings, this Court's application of a CR 12(b)(6) standard of review was error under the plain language of the rule and the Washington Supreme Court precedent interpreting the rule.

It seems clear from this Court's opinion that the parties did not set out the procedural background of the case with sufficient clarity in the appellate briefing. The initial motion practice relevant to these proceedings involved a motion by KPC to have the trial court apply Alaska law to the case. *See generally* VRP, March 13, 2015. The trial court conducted a choice of law analysis and determined that Alaska law would govern. *Id.* KPC then brought a CR 12(b)(6) motion based on the Alaska statute of repose. That motion involved only the uncontroverted fact, gleaned from the pleadings, that Plaintiffs' cause of action arose after the cut-off date for filing provided for by the Alaskan statute of repose. Only after the trial court ruled that Alaska statute of

repose applied as to KPC did Plaintiffs assert that their claims fell within the terms of certain exceptions contained in the statute of repose. VRP, March 24, 2015 at 72. At that point, the trial court permitted further briefing on the exception issue and heard additional evidence and argument to determine the applicability of the exceptions. The trial court specifically indicated the motion would be treated "like every other summary judgment." VRP, March 24, 2015 at 16. This motion practice was no longer based on CR 12(b)(6), but rather was treated under a summary judgment standard, as evidenced by the title of the transcript on the following day: "Summary Judgment Proceeding." VRP, March 25, 2015 at 3.

KPC respectfully moves for reconsideration of the Court's opinion filed August 9, 2016 because the trial court and this Court's consideration of matters outside of the pleadings mandated CR 56 review. Moreover, the question of whether an actual conflict exists between the Washington and Alaska statutes of repose is a legal question based, in this case, on uncontroverted

facts. A 12(b)(6) standard of review is entirely inappropriate in such a situation.¹

II. BASIS FOR RECONSIDERATION

1. Reconsideration is warranted under RAP 12.4 because the law requires application of a summary judgment standard of review when facts and evidence outside of the pleadings are considered in determining the propriety of a trial court's dismissal under CR 12(b)(6). This result is mandated by the plain language of CR 12 and Washington Supreme Court precedent. See e.g. *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217, 218 (1985).

2. Reconsideration is warranted under RAP 12.4 because the trial court correctly determined that Alaska law governed the controversy and that the Alaska statute of repose barred Plaintiffs' claims. The presence or absence of a true conflict of law is the first step of a choice of law analysis and is not subject to a CR

¹ Every fact relevant to a substantial contacts conflict of laws analysis favored application of the laws of the State of Alaska. The only contact with the forum State of Washington was the fact that, at the time of diagnosis, Mr. Hoffman had retired and moved to Washington.

12(b)(6) standard of review. No legal authority supports the creation of a hypothetical cause of action based on hypothetical facts under the guise of using a CR 12(b)(6) standard of review where the complaint contains neither facts nor even allegations to support the cause of action.

III. STATEMENT OF THE CASE

The facts of the case have been fully set forth in KPC's Response filed in the underlying appeal.

IV. ARGUMENT

A. **The Law is Clear, if a Court Considers Facts and Evidence Outside the Pleadings, a CR 12(b)(6) Motion Shall be Converted to a Cr 56 Motion by the Court.**

The court rule is clear and is applicable to the trial court as well as Courts of Appeal. "A motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleading are presented to and not excluded by the court." CR 12(b); *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wash. 2d 800, 802, 699 P.2d 217, 218 (1985). Moreover, in this particular case, there is clear

evidence that the trial court and the parties treated KPC and General Electric's original CR 12(b)(6) motion as a summary judgment motion.² VRP, March 24, 2015 at 16; VRP March 25, 2015 at 3. Nonetheless, this Court incorrectly applied a CR 12(b)(6) review standard to the issues before it on appeal.

The proper standard of review under these circumstances is under CR 56. KPC's Response at 37. A summary judgment ruling is reviewed de novo, with the appellate court engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). On a motion for summary judgment, all facts submitted and reasonable inferences are viewed in the light most favorable to the nonmoving party. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331P.3d 40 (2014). A party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its claim. *Guile v. Ballard Commty Hosp.*, 70 Wn.App. 18, 21, 851

² This Court's observation that the "parties treated the underlying motion as a 12(b)(6) motion" is both incorrect and of no moment. Once matters outside the pleadings were considered, it became a CR 56 motion. The parties' "intentions" at that point are irrelevant.

P.2d 689, rev. denied, 122 Wn.2d 1010 (1993). Bare assertions do not constitute facts sufficient to defeat a motion for summary judgment. *SentinelC3*, 142 Wn.2d at 140. A party must present more than "ultimate facts" or conclusory statements to defeat summary judgment. *Id.* Similarly, supposition and opinion are insufficient to defeat summary judgment. *Id.*

"Gross negligence" is "negligence substantially and appreciably greater than ordinary negligence," i.e., "care substantially or appreciably less than the quantum of care inhering in ordinary negligence." *Nist v. Tudor*, 67 Wash.2d 322, 331, 407 P.2d 798 (1965); see 6 Washington Practice: Washington Pattern Jury Instructions: Civil 10.07 (6th ed.1997) ("gross negligence" is "the failure to exercise slight care."). A plaintiff seeking to prove gross negligence must supply "substantial evidence" that the defendant's act or omission represented care appreciably less than the care inherent in ordinary negligence. *Boyce v. West*, 71 Wn.App. 657, 665, 862 P.2d 592 (1993). To meet this burden of proof on summary judgment, the plaintiff must offer something

more substantial than mere argument that the defendant's breach of care arises to the level of gross negligence. CR56(e); *Boyce*, 71 Wn.App. at 666.

Here, there was no evidence of gross negligence presented to the trial court. Nothing. Not only was no evidence of gross negligence presented, plaintiff counsel, in oral argument and in briefing, clearly stated that the claims against KPC sounded in common law negligence. Gross negligence was not pled nor were facts presented that would have supported such a claim. Furthermore, this Court appears to have misundertood the salient facts in evaluating this issue. This case, as against KPC, involves a claim referred to in asbestos litigation as a "take home exposure". Mr. Doyle Hoffman worked at the KPC mill in the 1950's and 1960's when plaintiff Larry Hoffman was a child. Larry Hoffman claims that his father worked with asbestos at KPC and brought it home on his clothing and body thereby exposing Larry to asbestos fibers. Fundamental to this Court's misunderstanding of the nature of the claim against KPC is the Court's misinterpretation of a KPC

interrogatory response.³ Not only is there no basis to conclude from the response that KPC had any knowledge of the danger of take-home exposure to asbestos, the Interrogatory response was never presented to the trial court. The evidence before the trial court was that gross negligence was never pled and that Plaintiffs' counsel asserted on the record that their claim against KPC was a common law negligence claim. "I want to make it clear to the Court, we are pursuing a common law negligence claim against Ketchikan ... we claim Ketchikan knew or should have known of this risk." VRP, March 24, 2015 at 8. That was it. Plaintiffs offered nothing more than the argument of counsel (at a later time) that the gross negligence exception to the statute of repose applied. Because there was no admissible evidence before the court on the

³ The interrogatory question posed was whether Mr. Hoffman had any training with regards to hazards associated with asbestos prior to 1980. Mr. Hoffman testified that he was a member of the pipefitters union throughout his career. Retrospectively, counsel for KPC has learned in the course of litigation that the pipefitters union began warning their members of the potential hazards of asbestos in or around the late 1950s. KPC was never a member of any union nor did they receive publications from any union. There is no basis for the unsubstantiated leap that KPC was aware of the hazards of asbestos starting in the 1950s. More importantly, there is nothing to suggest that anyone at that time had knowledge of the potential risks of take-home asbestos exposure. Appendix A at p. 8.

claim of gross negligence, dismissal of Plaintiffs claim was warranted as a matter of law. "The trial court therefore properly concluded that the Respondents had produced no admissible evidence in support of their [claim of gross negligence] prior to [or during] the summary judgment hearing." *SentinelC3*, 181 Wn.2d at 142.

The reason Plaintiffs offered no evidence of gross negligence at or prior to the hearing is because no such evidence exists. The testimony from their own experts clearly establishes that gross negligence is not applicable. The record demonstrates that Dr. Castleman, Plaintiffs' "state of the art" expert, had no knowledge of what was known or should have been known in Ketchikan, Alaska in 1966. (CP 944-47) Likewise, Mr. William Ewing, Plaintiffs' Certified Industrial Hygienist, testified that the first publication related to the issue of risk of asbestos related disease from take home exposure was Dr. Kilburn's paper

published in 1985, almost 20 years after Doyle Hoffman left Ketchikan Pulp.⁴ (CP 951-52).

Plaintiff did not and cannot establish that their claim falls within an exception to the Alaska Statute of Repose.

B. Alaska's Statute of Repose Precludes Appellants' Claims and the Trial Court Properly Determined an Actual Conflict Existed.

1. Whether an Actual Conflict Exists is the First Step in a Choice of Law Analysis.

On March 13, 2015, the trial court ruled that the Alaskan statute of repose applied to the case. (CP 2920). Plaintiffs only argument to the trial court that no conflict existed was the purpose of the statutes was the same and that the product exception applied to General Electric. Appendix B, Plaintiffs' Response on Conflict of Law. After the CR 12(b)(6) motion was briefed (again Plaintiff never alleged there was no conflict due to the exceptions or that any exception applied) and the court indicated her belief that the

⁴ Kilburn, et al, *Asbestos Disease in Family Contacts of Shipyard Workers*, Am. J. Pub. Health, June 1985 Vol. 75 No. 6, Pages 615-17. The Kilburn paper does not discuss mesothelioma among sons of shipyard workers at all. It purports to identify "asbestosis" among sons of shipyard workers although only 1 of 79 individuals examined met the 1985 American Thoracic Society definition of asbestosis. (CP 958-60)

statute barred any claims against KPC, then Plaintiffs argued that an exception applied. Appendix C, Plaintiffs' Response to CR12(b)(6) Motion.

When choice of law is disputed, "there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington will engage in a conflict of law analysis." *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). The preliminary question of whether there is an actual conflict is a legal question which, in this case, is not subject to review under a CR 12(b)(6) standard. *Id.* at 650. Choice of law is a question of law that is reviewed de novo by the appellate courts. *Id.* In a conflict of laws case, Washington courts decide the applicable law by determining which jurisdiction has the "most significant relationship" to the issue presented. *Burnside v. Sampson Paper Co.*, 123 Wn.2d 93, 100, 864 P.2d 937 (1994); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976); *Werner v. Werner*, 84 Wn.2d 360, 368, 526 P.2d 370 (1974).

First, the trial court addressed the choice of law issue in a separate motion and had already determined that the Alaska Statute of Repose applied. Plaintiffs' efforts in the motion from which appeal was taken were directed to demonstrating that one of the exceptions to the Alaska statute of repose applied.⁵ Plaintiffs sought to have that decision reviewed under a CR 12(b)(6) standard, despite the fact that the choice of law question was brought in a separate motion and adjudged under a different standard. Second, even if this Court determined that the "actual conflict" question was part-and-parcel of the Cr 12(b)(6) motion, for the reasons stated above, that motion was treated by the trial court as a summary judgment proceeding and under the law, this Court was obligated to do the same.

As set forth above, there was no evidence supporting a claim for gross negligence and therefore, the trial court properly

⁵ If Plaintiffs are correct that one of the exceptions to the Alaska statute of repose applies, this is all much ado about nothing because the Alaska statute of repose would not bar plaintiffs' claims. At that point, it does not matter whether Washington or Alaska law governs that issue because neither would operate as a bar.

held that the Alaska general statute of repose applied to the case and barred Plaintiffs personal injury claims against KPC.

2. Even Assuming for the Sake of Argument that a CR 12(b)(6) Standard Applied, there were no Facts Alleged in the Complaint to Support the Last Minute Gross Negligence Claim.

On a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations "must be denied unless it appears beyond doubt that plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978) citing *Halverson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) and *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). All facts alleged in the complaint are taken as true. *FutureSelect Portfolio Management Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 331 P.3d 29 (2014). "Therefore, any hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Halverson*, 89 Wn.2d at 675.

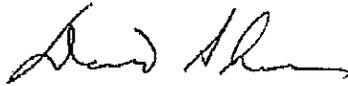
Here, Plaintiffs did not allege gross negligence in their Complaint, their First Amended Complaint or their Second Amended Complaint. Appendix D. In fact, Plaintiffs noted a special set motion to Amend the Complaint a third time on March 24, 2015, after all briefing on the Motion to Dismiss for Failure to State a Claim had been filed, wherein Plaintiffs' did not seek to amend the Complaint to add a claim of gross negligence against KPC nor did Plaintiffs seek to add any facts that would have supported such a claim. Appendix E. There are no hypothetical facts to be drawn from their Complaint that would warrant the assumption that KPC was grossly negligent. Even on appeal, Plaintiffs fail to set forth any additional facts that are not directly contradicted by the record which would warrant the assumption that gross negligence could apply in this case. The facts pleaded by Plaintiffs are insufficient to survive KPC's CR 12(b)(6) motion for failure to state a claim upon which relief can be granted.

As Judge van Doorninck properly ruled, there is an actual conflict of law, the Alaskan Statute of Repose applies to this case and bars Plaintiffs' common law negligence claims against KPC.

V. CONCLUSION

For the reasons stated herein, this Court should reconsider and reverse its determination that the Alaska Statute of Repose exception for gross negligence potentially applies as to KPC.

RESPECTFULLY SUBMITTED this 29th day of August,
2016.



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of August, 2016, I caused a true and correct copy of the foregoing document, Response Brief, to be delivered via email to the following counsel of record:

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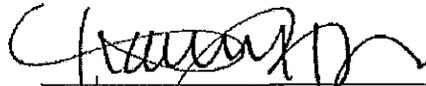
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Appendix A

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH HOFFMAN,
husband and wife,

Plaintiffs,

v.

ALASKAN COPPER COMPANIES, INC. et
al.

Defendants.

NO. 14-2-07178-2

KETCHIKAN PULP COMPANY'S
OBJECTIONS AND RESPONSES TO
PLAINTIFFS' INTERROGATORIES

Defendant, Ketchikan Pulp Company (hereafter "Ketchikan Pulp" or "Defendant"), hereby responds to Plaintiffs' Interrogatories (hereafter "Interrogatories") propounded by Plaintiffs Larry and Judith Hoffman (hereafter "Plaintiffs"), as follows:

PRELIMINARY STATEMENT

Louisiana-Pacific Corporation ("LP") acquired Ketchikan Pulp on September 1, 1972. Many of the documents relating to the time Larry Hoffman was employed at Ketchikan Pulp no longer exist. As a result, collecting the detailed information requested in these Interrogatories requires the company to rely on the best recollections of those witnesses with personal knowledge who are still available and the historical documents that still exist. These responses are based upon the information defendant has been able to obtain to date. However, Ketchikan Pulp's investigation of the facts relating to this case and its discovery in this action

1 are ongoing. Further discovery, independent investigation, legal research and analysis may
2 supply additional facts, add meaning to known facts, and establish new factual conclusions and
3 legal contentions, all of which may lead to additions, changes and or variations from the
4 present response. Therefore, these responses are made without prejudice to Ketchikan Pulp's
5 right to rely upon facts, documents, witnesses or other information discovered or developed
6 after the date of these responses. The responses are based on information and belief of the
7 person verifying the response.
8

9 The responses contained herein are made in a good faith effort to supply as much
10 factual information and as much specification of legal contentions as is presently known, but
11 shall in no way lead to the prejudice of Ketchikan Pulp in relation to further discovery,
12 research, or analysis.

13 Because Plaintiffs' discovery requests are not always limited to the specific premises
14 and time period alleged, such requests are overly broad, unduly burdensome, and
15 objectionable. Defendant therefore objects to Plaintiffs' discovery to the extent that it seeks
16 information not limited to Larry Hoffman's alleged work at Ketchikan Pulp during the years
17 1966-1970. Accordingly, Defendant will respond to this discovery to the extent possible and
18 supplement these responses as such information is obtained.
19

20 GENERAL OBJECTIONS

21 1. Ketchikan Pulp objects to Plaintiffs' Interrogatories to the extent that Plaintiffs
22 have sought to impose upon Defendant duties and obligations in excess of those expressly set
23 forth in the Washington *Code of Civil Procedure*.

24 2. Ketchikan Pulp objects to Plaintiffs' Interrogatories on the grounds they contain
25

1 sub-parts, are compound, are conjunctive, are disjunctive, are not full and complete in and of
2 themselves, contain unauthorized definitions and instructions, and are otherwise violative of
3 the rules of civil procedure of Washington.

4 3. Ketchikan Pulp also objects to Plaintiffs' Interrogatories in that they are vague,
5 ambiguous, overbroad and excessively burdensome.

6 4. Further, although Ketchikan Pulp has made a good faith effort to respond to
7 these Interrogatories to which it has not objected, in making such response, Ketchikan Pulp
8 does not purport to have adopted or applied any definitions set forth at the outset of or at places
9 in Plaintiffs' Interrogatories, nor has Ketchikan Pulp assumed the improper, unproved, and
10 hypothetical facts proffered by Plaintiffs. Additionally, Ketchikan Pulp has not accepted the
11 terminology or substance of Plaintiffs' claims incorporated in, implied in, or alluded to within
12 Plaintiffs' Interrogatories.
13

14 5. The responses made herein are made without in any way waiving or intending
15 to waive, but on the contrary expressly reserving: the right to object on the grounds of
16 competency, privilege, relevancy, and materiality, or any other proper ground, to the use of
17 such information, for any purpose, in whole or in part, in any subsequent proceeding in this
18 action, or any other action; and the right to object on any grounds at any time, to any other
19 discovery procedure involving or relating to the subject matter of this request.
20

21 6. Ketchikan Pulp further objects to Plaintiffs' Interrogatories on the grounds and
22 to the extent that said Interrogatories seek information protected by the attorney-client
23 privilege, the attorney work-product privilege and any and all additional protections and
24 privileges pursuant to Washington case and statutory law.
25

1 7. Ketchikan Pulp objects to Plaintiffs' Interrogatories to the extent they are not
2 limited in scope to the specific location or products to which Plaintiffs were allegedly exposed.

3 8. Ketchikan Pulp objects to Plaintiff's Interrogatories as unreasonably cumulative
4 and duplicative.

5 These general objections are applicable to Ketchikan Pulp's response herein, whether or
6 not specifically stated in such response and are hereby incorporated into such response by this
7 reference.
8

9
10 **RESPONSES AND OBJECTIONS TO INTERROGATORIES**

11 **INTERROGATORY NO. 1:**

12 Do you contend that plaintiff was not exposed to asbestos-containing products for
13 which you are legally responsible?

14 **RESPONSE:**

15 Yes.

16 **INTERROGATORY NO. 2:**

17 If your response to Interrogatory No. 1 is anything other than an unqualified "no,"
18 please state all facts upon which you base your contention.

19 **RESPONSE:**

20 Ketchikan Pulp is an employer immune from civil suit by employees in the state of
21 Alaska.

22 **INTERROGATORY NO. 3:**

23 If your response to Interrogatory No. 1 is anything other than an unqualified "no,"
24 please identify every person with knowledge of any facts which support that contention.
25

1 **RESPONSE:**

2 We believe Mr. Hoffman would have that knowledge.

3 **INTERROGATORY NO. 4:**

4 If your response to Interrogatory No. 1 is anything other than an unqualified "no,"
5 identify every document containing any fact which supports that contention.

6 **RESPONSE:**

7 Mr. Hoffman's social security records identify the time he was a KPC employee.

8 **INTERROGATORY NO. 5:**

9 Do you contend that Plaintiff did not inhale any asbestos fibers from products that you
10 supplied?

11 **RESPONSE:**

12 Ketchikan Pulp did not manufacture or supply asbestos containing products.
13 Ketchikan Pulp was producer of wood pulp products.

14 **INTERROGATORY NO. 6:**

15 If your response to Interrogatory No. 5 is anything other than an unqualified "no,"
16 please state all facts supporting your contention.

17 **RESPONSE:**

18 See Response to INTERROGATORY 5

19 **INTERROGATORY NO. 7:**

20 If your response to Interrogatory No. 5 is anything other than an unqualified "no,"
21 please identify by address and phone number all individuals who support your contention.

22 **RESPONSE:**

23 Pretty much any adult and most children living in Ketchikan at the time Mr.
24 Hoffman was employed would be able to identify the products produced by KPC.

1 **INTERROGATORY NO. 8:**

2 If your response to Interrogatory No. 5 is anything other than an unqualified "no,"
3 please identify all documents that support your contention.

4 **RESPONSE:**

5 Ketchikan Pulp incorporates herein its Preliminary Statement and General
6 Objections and further objects to this interrogatory on the following specific
7 grounds: the interrogatory is overbroad, overly burdensome, lacks foundation and is not
8 reasonably tailored to the facts of this case, and seeks documents and information that
9 are not relevant or reasonably calculated to lead to the discovery of admissible evidence.
10 Defendant further objects to this interrogatory to the extent that it seeks information that
is protected by the attorney client privilege, work product doctrine or is otherwise
protected. Subject to and without waiving any objections, Defendant refers Plaintiffs to
its response and objections to Interrogatory No. 5, which are incorporated herein.

11 **INTERROGATORY NO. 9:**

12 Do you contend that Plaintiff's mesothelioma was caused by anything other than
13 exposure to asbestos fibers?

14 **RESPONSE:**

15 Ketchikan Pulp objects to this interrogatory on the grounds that it calls for expert
16 medical opinion which is non-discoverable expert information. CR 26 (5)(B) & (C).
Ketchikan Pulp is still conducting discovery with respect to medical causation.

17 **INTERROGATORY NO. 10:**

18 If your response to Interrogatory No. 9 is anything other than an unqualified "no,"
19 please state all facts supporting your contention.

20 **RESPONSE:**

21 Subject to and without waiving any objections, Defendant refers Plaintiffs to its
22 response and objections to Interrogatory No. 9, which are incorporated herein.

23 **INTERROGATORY NO. 11:**

24 If your response to Interrogatory No. 9 is anything other than an unqualified "no,"
25 please identify by address and phone number all individuals who support your contention.

1 **RESPONSE:**

2 Subject to and without waiving any objections, Defendant refers Plaintiffs to its
3 response and objections to Interrogatory No. 9, which are incorporated herein.

4 **INTERROGATORY NO. 12:**

5 If your response to Interrogatory No. 9 is anything other than an unqualified "no,"
6 please identify all documents that support your contention.

7 **RESPONSE:**

8 Subject to and without waiving any objections, Defendant refers Plaintiffs to its
9 response and objections to Interrogatory No. 9, which are incorporated herein.

10 **INTERROGATORY NO. 13:**

11 Did you hire any contractors to perform work at the Ketchikan Pulp mill during the
12 years 1968-1970, inclusive?

13 **RESPONSE:**

14 Ketchikan Pulp is aware of no person associated with company management who
15 is still living that has testimonial knowledge of this subject. However, Ketchikan believes
16 it is likely that work at the mill was performed by independent contractors during the
subject period.

17 **INTERROGATORY NO. 14:**

18 If your response to Interrogatory No. 13 is anything other than an unqualified "no,"
19 please state all facts supporting your contention.

20 **RESPONSE:**

21 See Response to Interrogatory No. 13

22 **INTERROGATORY NO. 15:**

23 If your response to Interrogatory No. 13 is anything other than an unqualified "no,"
24 please identify by address and phone number all individuals who support your contention.

1 **RESPONSE:**

2 See Response to Interrogatory No. 13

3
4 **INTERROGATORY NO. 16:**

5 If your response to Interrogatory No. 13 is anything other than an unqualified "no,"
6 please identify all documents that support your contention

7 **RESPONSE:**

8 Ketchikan Pulp is currently aware of no documents that address the subject of
9 Interrogatory 13.

10 **INTERROGATORY NO. 17:**

11 Do you contend that Plaintiff had any training with regards to hazards of asbestos prior
12 to 1980?

13 **RESPONSE:**

14 Yes.

15 **INTERROGATORY NO. 18:**

16 If your answer to the previous interrogatory was anything other than an unqualified
17 "no," state the facts that support your content your contention.

18 **RESPONSE:**

19 The fact that working with asbestos containing thermal insulation products was
20 potentially hazardous was well documented in the literature promulgated by the
21 pipefitters union to its members, dating back to the late 1950's.

22 **INTERROGATORY NO. 19:**

23 Do you contend that any entity names in the caption of the Complaint filed in this
24 action, is liable for plaintiff's alleged damages?
25

1 **RESPONSE:**

2 Ketchikan Pulp incorporates herein its Preliminary Statement and General
3 Objections and further objects to this interrogatory on the following specific
4 grounds: the interrogatory is overbroad, overly burdensome, lacks foundation and is not
5 reasonably tailored to the facts of this case, and seeks documents and information that
6 are not relevant or reasonably calculated to lead to the discovery of admissible evidence.
7 Defendant further objects to this interrogatory to the extent that it seeks information that
8 is within the Plaintiff's knowledge and control. We assume that the plaintiff satisfied its
9 Rule 11 obligations and had credible evidence against each party it sued at the time the
10 original complaint and subsequent amendments were filed.

11 **INTERROGATORY NO. 20:**

12 If your answer to the previous interrogatory was anything other than an unqualified
13 "no," state all facts that support your contention.

14 **RESPONSE:**

15 Defendant refers Plaintiffs to its response and objections to Interrogatory No. 19,
16 which are incorporated herein.

17 **INTERROGATORY NO. 21:**

18 Do you contend that any entity, including any bankrupt entity or trust, other than those
19 named in the Complaint, are liable for Plaintiff's alleged damages?

20 **RESPONSE:**

21 Yes.

22 **INTERROGATORY NO. 22:**

23 If your answer to the previous interrogatory was anything other than an unqualified
24 "no," state all facts that support your contention.

25 **RESPONSE:**

Plaintiff's work history discloses that he was likely exposed to asbestos containing
products from many different entities and by many different entities, including entities
for which a bankruptcy trust exists, particularly with respect to thermal insulation
products.

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INTERROGATORY NO. 23:

Identify each deposition in which your personnel provided testimony in an asbestos related action?

RESPONSE:

Ketchikan Pulp incorporates herein its Preliminary Statement and General Objections and further objects to this interrogatory on the following specific grounds: the interrogatory is overbroad, overly burdensome, lacks foundation and is not reasonably tailored to the facts of this case, and seeks documents and information that are not relevant or reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this interrogatory to the extent that it seeks information that is protected by the attorney client privilege, work product doctrine or is otherwise protected. Defendant further objects to this interrogatory to the extent that it seeks information for periods beyond when Mr. Hoffman was employed by the company. Subject to and without waiving these objections, Defendant will identify the transcripts of which it is aware. At this point, no such transcripts have been located.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Please produce all documents identified in response to the interrogatories served on you simultaneously herewith

RESPONSE:

Ketchikan Pulp objects to this request for production as overly broad, vague and unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to Plaintiff's alleged exposure. Ketchikan Pulp believes that all the documents specifically identified in the foregoing answers to interrogatories are either in the Plaintiff's possession or equally available to them.

REQUEST FOR PRODUCTION NO. 2:

All documents in your possession or control which support your contention, if any, that Plaintiff was never exposed to asbestos fibers released from asbestos containing products supplied by you.

1 **RESPONSE:**

2 Ketchikan Pulp did not manufacture or supply asbestos containing products.
3 Ketchikan Pulp was producer of wood pulp products.

4 **REQUEST FOR PRODUCTION NO. 3:**

5 All documents in your possession or control which support your contention, if any, that
6 Plaintiff was never exposed to asbestos fibers released from asbestos containing products used
7 by you.

7 **RESPONSE:**

8 Ketchikan Pulp objects to this request for production as overly broad, vague and
9 unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
10 Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
11 Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
12 Ketchikan Pulp Company did not have an established records retention policy. A
13 diligent search of the available Ketchikan Pulp Company records has revealed there are
14 no remaining Company records for the time periods sought. Investigation and discovery
continues and Ketchikan Pulp reserves its right to supplement this discovery
answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
that may be responsive and is in the process of reviewing those documents to determine
whether they are response and, or, privileged.

15 **REQUEST FOR PRODUCTION NO. 4:**

16 All documents in your possession or control which support your contention, if any, that
17 plaintiff was exposed to asbestos fibers, from any source, at any time during his lifetime.

18 **RESPONSE:**

19 Ketchikan Pulp objects to this request for production as overly broad, vague,
20 unduly burdensome and not reasonably calculated to lead to the discovery of admissible
21 evidence. Ketchikan Pulp further objects as the request calls for materials protected by
22 the work product doctrine and/or attorney/client privilege. Moreover, all of the materials
23 requested are equally available to or in the possession of the Plaintiff. Without waiving
24 such objections, the following may be potentially responsive: the complaint, Plaintiffs'
25 responses to discovery requests; responsive pleadings from the parties; deposition
transcripts and attendant documents of all witnesses proffered to date, Plaintiff's medical
and social security records; plaintiff's bankruptcy trust applications and related
documentation; any and all materials related to any union of which Plaintiff was a
member. Discovery and investigation are ongoing and Ketchikan Pulp reserves the right
to amend or supplement this response.

1 **REQUEST FOR PRODUCTION NO. 5:**

2 All documents in your possession or control which support your contention, if any, that
3 plaintiff's mesothelioma was caused by anything other than exposure to asbestos.

4
5 **RESPONSE:**

6 Expert discovery is ongoing in the case. Ketchikan Pulp reserves the right to
7 supplement this response after the conclusion of expert discovery.

8 **REQUEST FOR PRODUCTION NO. 6:**

9 All copies of all reports, declarations, correspondence and records which relate to the
10 subject matter of this case from any expert who is expected to testify at trial, either with respect
11 to issues such as state-of-the-art, standard threshold limits, government or military
12 specifications, industrial hygiene, ship or railroad design or construction warnings, friability of
13 your products, health hazard involving your products, general medical issues relating to
14 asbestos disease and their causes or and with respect to any individual plaintiff's case.

15 **RESPONSE:**

16 Ketchikan Pulp objects to this request for production as overly broad, vague,
17 unduly burdensome and not reasonably calculated to lead to the discovery of admissible
18 evidence. Ketchikan Pulp further objects as the request calls for materials protected by
19 the work product doctrine and/or attorney/client privilege. Moreover, all of the materials
20 requested are equally available to or in the possession of the Plaintiff. Without waiving
21 such objections, the following may be potentially responsive: all expert depositions and
22 materials discussed and or relied upon in the course thereof. Expert discovery is ongoing
23 in the case. Ketchikan Pulp reserves the right to supplement this response after the
24 conclusion of expert discovery.

25 **REQUEST FOR PRODUCTION NO. 7:**

All copies of reports, declarations, correspondence and records which relate to the
subject matter of this case from any non-expert witnesses, in your possession or control, that
pertain, in any way to the subject matter of this case.

1 **RESPONSE:**

2 Ketchikan Pulp objects to this request for production as overly broad, vague,
3 unduly burdensome and not reasonably calculated to lead to the discovery of admissible
4 evidence. Ketchikan Pulp further objects as the request calls for materials protected by
5 the work product doctrine and/or attorney/client privilege.

6 **REQUEST FOR PRODUCTION NO. 8:**

7 All documents in your possession or control which support your contention, if any, that
8 you did not hire contractors to perform work at Ketchikan Pulp Mill during the years 1968-
9 1970, inclusive.

10 **RESPONSE:**

11 Ketchikan Pulp objects to this request for production as overly broad, vague and
12 unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
13 Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
14 Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
15 Ketchikan Pulp Company did not have an established records retention policy. A
16 diligent search of the available Ketchikan Pulp Company records has revealed there are
17 no remaining Company records for the time periods sought. Investigation and discovery
18 continues and Ketchikan Pulp reserves its right to supplement this discovery
19 answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
20 that may be responsive and is in the process of reviewing those documents to determine
21 whether they are response and, or, privileged.

22 **REQUEST FOR PRODUCTION NO. 9:**

23 All documents in your possession or control relating to the contractors you hired to
24 work at Ketchikan Pulp Mill during the years 1968-1970, inclusive.

25 Ketchikan Pulp objects to this request for production as overly broad, vague and
unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
Ketchikan Pulp Company did not have an established records retention policy. A
diligent search of the available Ketchikan Pulp Company records has revealed there are
no remaining Company records for the time periods sought. Investigation and discovery
continues and Ketchikan Pulp reserves its right to supplement this discovery
answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
that may be responsive and is in the process of reviewing those documents to determine
whether they are response and, or, privileged.

1 **REQUEST FOR PRODUCTION NO. 10:**

2 All documents relating to your supply, purchase, ordering, requesting, or delivery of
3 asbestos-containing products to Ketchikan Pulp Mill in Ward Cove, AK during the years
4 1968-1970 inclusive.

5 **RESPONSE:**

6 Ketchikan Pulp objects to this request for production as overly broad, vague and
7 unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
8 Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
9 Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
10 Ketchikan Pulp Company did not have an established records retention policy. A
11 diligent search of the available Ketchikan Pulp Company records has revealed there are
12 no remaining Company records for the time periods sought. Investigation and discovery
13 continues and Ketchikan Pulp reserves its right to supplement this discovery
14 answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
15 that may be responsive and is in the process of reviewing those documents to determine
16 whether they are response and, or, privileged.

17 **REQUEST FOR PRODUCTION NO. 11:**

18 All turbine files in your possession for the Ketchikan Pulp Mill in Ward Cove, AK.

19 **RESPONSE:**

20 Ketchikan Pulp objects to this request for production as overly broad, vague and
21 unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
22 Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
23 Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
24 Ketchikan Pulp Company did not have an established records retention policy. A
25 diligent search of the available Ketchikan Pulp Company records has revealed there are
no remaining Company records for the time periods sought. Investigation and discovery
continues and Ketchikan Pulp reserves its right to supplement this discovery
answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
that may be responsive and is in the process of reviewing those documents to determine
whether they are response and, or, privileged.

REQUEST FOR PRODUCTION NO. 12:

All documents relating to your record retention policy.

1 **RESPONSE:**

2 Attached is the records retention system.

3 **REQUEST FOR PRODUCTION NO. 13:**

4 All documents that refer or relate to any warning, caution, notification, guidelines,
5 practices, advice, recommendation, and/or like information/communication concerning the
6 hazards of asbestos, the association between asbestos and asbestos-related diseases, TLVs,
7 recommended practices for working with and/or around asbestos/asbestos-containing products
8 and/or any risk/precaution relating to asbestos received or generated by you before 1980.

9 Ketchikan Pulp objects to this request for production as overly broad, vague and
10 unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
11 Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
12 Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
13 Ketchikan Pulp Company did not have an established records retention policy. A
14 diligent search of the available Ketchikan Pulp Company records has revealed there are
15 no remaining Company records for the time periods sought. Investigation and discovery
16 continues and Ketchikan Pulp reserves its right to supplement this discovery
17 answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
18 that may be responsive and is in the process of reviewing those documents to determine
19 whether they are response and, or, privileged.

20 **REQUEST FOR PRODUCTION NO. 14:**

21 All documents prepared, reviewed, issued or commented on by you relating in any way
22 to warnings, potential health hazards, instructions or precautions regarding the use or handling
23 of, or exposure to, asbestos, asbestos-containing products, and/or asbestos-containing
24 materials.

25 **RESPONSE:**

Ketchikan Pulp objects to this request for production as overly broad, vague and
unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
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continues and Ketchikan Pulp reserves its right to supplement this discovery
answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
that may be responsive and is in the process of reviewing those documents to determine
whether they are response and, or, privileged.

1 **REQUEST FOR PRODUCTION NO. 15:**

2 All statements, recorded interviews, films, videotapes, reports, questionnaires, forms or
3 other documents made, submitted, compiled, prepared for filled out by you, on your behalf of,
4 or under your direction relating in any way to exposure or alleged exposure to asbestos,
5 asbestos-containing products relating to this lawsuit, except that information prepared by, for,
6 or at the request of defendant's counsel must be identified (including the date made), but need
7 not be produced without an order by the Court, provided that written or recorded
8 communication between plaintiff and counsel, made after an attorney-client relationship has
9 been established need not be produced or identified.

10 Ketchikan Pulp objects to this request for production as overly broad, vague and
11 unduly burdensome. Ketchikan Pulp further objects as the request is not tailored to
12 Plaintiff's alleged exposure. Subject to and without waiving such objects, Louisiana
13 Pacific purchased the Ketchikan Pulp mill in 1972. At the time of purchase, the
14 Ketchikan Pulp Company did not have an established records retention policy. A
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17 continues and Ketchikan Pulp reserves its right to supplement this discovery
18 answer. Ketchikan Pulp has identified volumes of archived documents from the 1990s
19 that may be responsive and is in the process of reviewing those documents to determine
20 whether they are responsive and, or, privileged.

21 Responses to INTERROGATORIES and REQUESTS FOR PRODUCTION submitted
22 this 30th day of January, 2015.

23 s/David A. Shaw, WSBA #08788
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1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that on the below date, I caused to be served via email, messenger, and/or U.S.
4 Mail, postage pre-paid, a true and correct copy of the foregoing document to the following:

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Signed at Seattle, Washington this 30th day of January, 2015.

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All Retention Records
343 results found

[Print](#)

Administration

Record Series	Retention Period	Office of Record	
LEG5020-21	Business Permits	ACT+6	Originating Dept/Location
ADM3000-8	Disaster Recovery Plans	ACT+10	Originating Dept/Location
ADM3000-9	Emergency Action Plans	ACT+10	Originating Dept/Location
REF0000-5	Employee Workfile Material	ACT	Originating Dept/Location
REF1000	File Component Material	ACT	Originating Dept/Location
ADM4000-5	Location Security Documentation	3	Originating Dept/Location
ADM2030-6	Office Layouts/Floorplans	ACT	Originating Dept/Location
MIS1010	Organizational Charts	ACT+10	Originating Dept/Location
ADM3000-12	Policy Statements (Official Corporate)	PERM	Originating Corporate Dept
ADM3000-11	Procedure Manuals/Standard Operating Procedures	ACT+10	Originating Dept/Location

Construction/Engineering

Record Series	Retention Period	Office of Record	
ACC2000-5	CPMS Documentation	PERM	Location Engineering
ACC2000-4	CPMS Invoices	PERM	Location Engineering
LEG2020-3	EWP Component Design Drawings and Supporting Documentation	PERM	Location Engineering
MAN2000-6	Non-Destructive Testlog	ACT+6	Location Engineering
MAN1000-3	Process Control Engineering	PERM	Originating Dept/Location
MIS2000	Programmable Logic Controllers (PLC) Programs	ACT+1	Location Engineering
ADM2030-17	Property Drawings/Blueprints (not CPMS)	ACT+6	Location Engineering

Contracts Management

Record Series	Retention Period	Office of Record	
LEG2010-9	Contracts & Contract Administration Including Change Orders, Compliance, & Related Documentation (Canada): Not Real Property	ACT+8	Originating Dept/Location
LEG2010-8	Contracts & Contract Administration Including Change Orders, Compliance, & Related Documentation: Not Real Property	ACT+6	Originating Dept/Location
LEG2020-9	Contracts & Contract Administration Including Change Orders, Compliance, & Related Documentation: Real Property	PERM	Originating Dept/Location
LEG2000-6	Leases: Not Real Property	ACT+6	Corporate Legal
LEG2000-7	Leases: Not Real Property (Canada)	ACT+8	Corporate Legal
LEG2000-8	Leases: Real Property	PERM	Corporate Legal

Corporate Affairs

Record Series	Retention Period	Office of Record	
PUB1000	Community Relations	ACT+3	Location Administration
PUB4000	Employee Relations	ACT	Location HR
PUB2000	Government Relations	ACT+6	Corporate Affairs
PUB5000	Industry Relations	ACT+3	Corporate Affairs
PUB3010-2	News Releases	6	Corporate Affairs
PUB6000	Publications	PERM	Originating Corporate Dept
PUB3010	Publicity Photographs	6	Corporate Affairs
PUB3010-3	Speeches	6	Originating Corporate Dept

Environmental

Record Series	Retention Period	Office of Record	
ENV3000-5	Air Quality Records	6	Location Environmental
LEG5020-20	Air Quality: Permits, Registrations, Applications, & Fees	ACT+6	Location Environmental
ENV2000	Asbestos Records	ACT	Location Environmental
LEG5000-10	CERCLA Records Including Phase I & II Reports and Release Reports	PERM	Location/Corporate Environmental
ENV9900	Community/Worker Right-to-Know	6	Location Environmental
LEG4000	Enforcement Actions and Related Records	ACT+6	Location Environmental
ACC3000-3	Environmental Management System (EMS) Records: General	SUP	Location Environmental
ENV1000-4	Environmental Management System (EMS): Training, Assessment, Audit & Incident Records	6	Location Environmental
ENV2000-3	Hazardous Substances & Waste	6	Location Environmental
LEG5020-10	Hazardous Waste RCRA Permit and Related Records	PERM	Location/Corporate Environmental
ADM4100-5	Industrial Hygiene Records	30	Location Environmental

Record Series	Retention Period	Office of Record	
HUM4031	Material Safety Data Sheets (MSDS)	ACT	Location Environmental
ENV9900-2	Solid Waste: Off-Site Disposal	6	Location/Corporate Environmental
ENV2000-2	Solid Waste: On-Site Landfill	PERM	Location/Corporate Environmental
ENV1000-5	Storage Tanks and SPCC Items	6	Location Environmental
LEG5020-12	Toxic Substances Control Act (TSCA) and Related Records	ACT+3	Location Environmental
ENV1000-2	Underground Storage Tanks	ACT+5	Location Environmental
ENV1000-3	Underground Storage Tanks: Closure Records	PERM	Location/Corporate Environmental
LEG5020-11	Waste Water NPDES Permit and Related Records	6	Location Environmental
ENV3000-6	Water Quality: Drinking/Potable Water	10	Location Environmental

Financial Services

Record Series	Retention Period	Office of Record	
LEG1020-9	10K's & 10Q's	PERM	Corporate Legal
ACC1000-14	A/P Detail	6‡	Accounting Center
ACC1000-15	A/P Ledger	20‡	Corporate IT
ACC1000-17	A/R Detail	6‡	Accounting Center
ACC1010-5	A/R Ledger	20‡	Corporate IT
MIS3000-5	Accounting Informational Reports	MAX6	Location Administration
MIS3000-6	Balance Sheets: Annual	PERM	Corporate IT
LEG2000-15	Bank Account Documentation	ACT+6‡	Originating Dept/Location
FIN1000-9	Bank Deposits	6‡	Accounting Center
FIN1000-10	Bank Reconciliations	6‡	Accounting Center
FIN1000-11	Bank Statements	6‡	Accounting Center
FIN2000-2	Budgets: Approved	6	Regional Finance
FIN1000-2	Canceled Checks: Electronic	PERM	Accounting Center
FIN1000-8	Canceled Checks: Paper	6‡	Accounting Center
ACC2000-9	Capital Property Acquisitions & Divestitures	ACT+6‡	Corporate Finance
ACC1000-19	Cash Disbursements	6‡	Accounting Center
ACC1000-20	Cash Journals	6‡	Corporate IT
ACC1000-21	Cash Transactions	6‡	Accounting Center
FIN6000	Collections/Bad Debts	10‡	Corporate Credit
FIN5000-7	Credit Agency Reports	3	Corporate Credit
FIN5000-8	Credit Applications	3	Corporate Credit
ACC1000-26	Credit Card Statements	6‡	Accounting Center
FIN5000-9	Customer Credit Files	ACT+8	Accounting Center

Record Series	Retention Period	Office of Record	
FIN1000-5	Deposit Slips	6†	Accounting Center
ACC2000-8	Depreciation Schedules: Financial	PERM	Accounting Center
FIN1000-4	Electronic Funds Transfer Agreements	ACT+6	Corporate Finance
ACC1000-28	Employee Expense Reports	6†	Accounting Center
FIN2000-3	External Financial Audit Reports	7	Corporate Finance
FIN5000-6	External Letters of Credit	ACT+6	Corporate Finance
FIN5000-2	Finance & Loan Agreements	ACT+6†	Corporate Legal
FIN2000-5	Financial Plans & Forecasts	3	Corporate Finance
FIN7000-4	Financial Statements: Annual	PERM	Corporate IT
MIS1000	Financial Statements: Quarterly Consolidation File & Report	6	Corporate IT
ACC1010-3	General Ledger: Annual	PERM	Corporate IT
LEG3000-5	Insurance Certificates: L-P	ACT+6	Corporate Finance
LEG3000-6	Insurance Certificates: Outside Contractors	ACT+6	Location Administration
LEG4000-3	Insurance Claims	ACT+6	Corporate Finance
LEG3000-4	Insurance Policies	PERM	Corporate Finance
FIN3000-5	Investments	ACT+10†	Corporate Finance
ACC1000-29	Journal Entries	6†	Accounting Center
ACC1000-30	Material Transfer/Release Files	3	Accounting Center
FIN5000-4	Mortgage Finance Records	ACT+10†	Corporate Legal
LEG2000-2	Promissory Notes: to L-P or Subsidiary	ACT+6†	Corporate Legal
LEG2000-3	Promissory Notes: to L-P or Subsidiary (Canada)	ACT+8†	Corporate Legal
LEG4000-9	Property Damage Accident Reports	ACT+3	Corporate Finance
FIN8100-2	Purchase Orders	6†	Corporate IT
FIN8000	Purchase Requisitions	2	Originating Dept/Location
FIN8100	Purchasing Bids	2	Originating Dept/Location
FIN8000-2	Purchasing Bids: Rejected	1	Originating Dept/Location
REP0000	Purchasing Catalogs & Price Lists: Supplier	ACT	Originating Dept/Location
FIN8200	Purchasing Shipment Documentation	CY+1	Accounting Center
MIS1010-2	Purchasing Supplier Lists	ACT	Originating Dept/Location
ACC1000-11	Royalty Payments	6†	Accounting Center
ACC1000-12	Sales Receipts	6†	Accounting Center
LEG1020-6	Stock Certificates	ACT+10	Corporate Finance
LEG1020-7	Stock Ledgers	ACT+6	Corporate Finance
LEG3000-3	Surety Bonds	ACT+3	Corporate Finance
FIN5000	Trade References to Suppliers	6	Corporate Credit
ACC1000-8	Unemployment Insurance Payments	6†	Accounting Center
FIN1000-3	Wire Transfers	6†	Corporate Finance

Record Series	Retention Period	Office of Record	
ACC1000-9	Workers' Compensation Insurance Payments	6‡	Accounting Center

Health & Safety

Record Series	Retention Period	Office of Record	
HUM4100	Fire Equipment Testing	ACT+3	Location Health & Safety
HUM4030-2	Hazard Communication Records	PERM	Location Health & Safety
LEG5000-11	OSHA Records	CY+5	Location Health & Safety
ADM4100	Safety Inspections	3	Location Health & Safety
ADM4100-2	Safety Inspections (Canada)	PERM	Location Health & Safety
ADM3000-2	Safety Programs	ACT+10	Location Health & Safety
ADM3000-3	Safety Programs (Canada)	PERM	Location Health & Safety
ADM4100-4	Safety Records Miscellaneous	CY + 3	Location Health & Safety
HUM5000-4	Safety Training Records: General	5	Location Health & Safety

Human Resources

Record Series	Retention Period	Office of Record	
ADM3000-7	Affirmative Action Plans	ACT+2	Location HR
HUM2000	Applicant Files: Hourly Positions	2	Location HR
HUM2000-2	Applicant Files: Positive Drug Tests	2	Location HR
HUM2000-3	Applicant Files: Salaried Positions	2	Corporate HR/Workforce Planning
HUM1010-3	Benefit Plans & Procedures: Actuarial Reports	ACT+7‡	Corporate HR/Benefits
HUM1010	Benefit Plans & Procedures: Disability, ESOP, ESPP, Group Insurance, Profit Sharing, and Sick Leave	99	Corporate HR/Benefits
HUM1010-2	Benefit Plans & Procedures: Educational Assistance & Relocation	ACT+7	Corporate Legal
HUM1020-3	Benefit Plans & Procedures: Employee Relocation Files	6‡	Originating Dept/Location
LEG2000-33	Collective Bargaining Agreements	PERM	Corporate Legal
HUM1010-4	Employee 401(k) Records	ACT+6	Corporate HR/Benefits
HUM1030	Employee Benefit Files Including Elections	ACT+5	Corporate HR/Benefits
HUM1020-2	Employee ESPP Records	ACT+6	Corporate HR/Benefits
ADM3000-10	Employee Manuals	PERM	Corporate HR
HUM4010	Employee Medical Files	PERM	Corporate HR/Benefits
HUM4040	Employee Occupational Health Files: Drug/Alcohol Testing	1	Location HR
	Employee Occupational Health Files:		

Record Series	Retention Period	Office of Record	
HUM4041	Drug/Alcohol Testing; Aviation/Transportation Workers	5	Location HR
HUM4030	Employee Occupational Health Files: Hazardous Exposure	PERM	Location HR
HUM3010-3	Employee Official Personnel Files: Hourly	PERM	Location HR
HUM3010-4	Employee Official Personnel Files: Salaried	PERM	Corporate HR/Payroll
ACC1020	Employee Payroll Files: Hourly	ACT+6	Corporate HR/Payroll
LEG5000-6	Equal Employment Opportunity Forms	CY + 3	Corporate HR/Workforce Planning
ACC1020-2	Garnishments	ACT+6	Corporate HR/Payroll
LEG5000-16	Government Reporting; Benefits & Salary Administration	6+	Corporate HR/Benefits
HUM5000-5	HR Training Materials	ACT+3	Location HR
LEG5000-15	I-9 Documentation	ACT+3+	Location HR
HUM2000-4	Job Announcements & Bids	ACT+2	Corporate HR/Workforce Planning
LEG4000-4	Labor Arbitration Files	ACT+6	Originating Dept/Location
HUM9900	Labor Union Meetings	3	Location HR
ACC1020-3	Payroll System Files	MAX6	Corporate HR/Payroll
HUM6000	Salary Surveys	CY + 3	Corporate HR/Compensation
HUM3010-6	Supervisor's Employee Files	ACT	Supervisor
ACC1021	Time Cards/Time Sheets & Payroll Documentation Records	3	Location HR
HUM4021	Workers' Compensation Claim Files	50	Claim Handling Location
HUM4020	Workers' Compensation Injury Files	50	Location HR

Information Technology

Record Series	Retention Period	Office of Record	
HIS1000	Computer Backups	SUP	Location IT
ADM2010-2	Computer Hardware Documentation	ACT	Location IT
MIS2000-2	Computer Software Documentation	ACT	Location IT

Internal Audit

Record Series	Retention Period	Office of Record	
ADM3010-4	Internal Audit Administration & Scheduling Reports	8	Corporate Internal Audit
			Corporate Internal

Record Series	Retention Period	Office of Record	
ADM3010-5	Internal Audit Reports & Workpapers	8#	Audit

Legal

Record Series	Retention Period	Office of Record	
LEG5000-2	Abandoned Property Reports	ACT+10	Corporate Legal
LEG1030-2	Acquisitions, Mergers, & Divestitures	PERM	Corporate Legal
LEG1000	Articles & Certificates of Incorporation & Bylaws	PERM	Corporate Legal
LEG1010	Board of Directors: Minutes, Consents, & Notices	PERM	Corporate Legal
LEG4000-5	Claims, Demands & Grievances: Not Related to Real Property	ACT+8	Corporate Legal
LEG4000-7	Claims, Demands & Grievances: Real Property	ACT+8	Corporate Legal
LEG3010	Claims: Product Liability	ACT+15	Claim Handling Location
LEG7000-3	Copyrights	PERM	Corporate Legal
LEG1000-2	Corporate Governance Records	PERM	Corporate Legal
LEG5000-14	Internal Compliance Investigations: Reports & Workpapers	ACT+6	Corporate Legal/Compliance
LEG5000-13	Legal Compliance Programs	ACT+5	Corporate Legal/Compliance
LEG6010-2	Legal Opinions	PERM	Corporate Legal
LEG6000	Legal Projects	ACT+5	Corporate Legal
LEG4000-8	Litigation: Court Case Files	ACT+15	Corporate Legal
LEG4010-2	Litigation: Judgments, Settlements, & Orders	PERM	Corporate Legal
LEG1020-8	NYSE Filings & Listings	6‡	Corporate Legal
LEG7000	Patents Including Patent Agreements & Applications	PERM	Corporate Legal
LEG1013	Proxy Statements Including Shareholder Notices	PERM	Corporate Legal
LEG5020-18	Qualifications To Do Business	PERM	Corporate Legal
LEG2020-8	Real Property Records: General	PERM	Originating Dept/Location
ADM3000-5	Records Retention Schedule	PERM	Corporate Legal/Corporate Records
LEG5000-20	Reports & Forms Submitted to Government	6	Corporate Legal
LEG5000-21	Reports & Forms Submitted to Government (Canada)	PERM	Corporate Legal
LEG1020-3	SEC Filings & Listings	ACT+10‡	Corporate Legal
ACC1000-13	Shareholder Dividends & Distributions	ACT+6‡	Corporate Legal
LEG1020-4	Shareholder Historical Reference Materials	PERM	Corporate Legal
LEG1010-3	Shareholder Minutes & Consents	PERM	Corporate Legal

Record Series	Retention Period	Office of Record	
LEG1013-2	Shareholder Proxies	CY+2	Corporate Legal
LEG1020	Shareholder Records	ACT+10	Corporate Legal
LEG1020-2	Shareholder Records (Canada)	PERM	Corporate Legal
LEG1010-2	Shareholder Voting	CY+2	Corporate Legal
LEG1020-5	Subsidiary Stock Books	PERM	Corporate Legal
LEG7000-4	Trademark/License Agreements	PERM	Corporate Legal
LEG7000-5	Trademarks	PERM	Corporate Legal
LEG2000-18	Warranties	PERM	Originating Dept/Location

Logistics

Record Series	Retention Period	Office of Record	
LEG4000-2	All Departments: Carrier/Reload Damage Claims	6	Logistics
ACC1000	All Departments: Check Requests	6‡	Accounting Center
ACC1000-2	All Departments: Vendor Invoices	6‡	Accounting Center
TRA1000-4	CCM: Automated Export System (AES)	6‡	Logistics - CCM
TRA1000-5	CCM: Certificate of Origin	6	Logistics - CCM
TRA1000-7	CCM: Continuous Surety Bond	6	Logistics - CCM
TRA1000-6	CCM: Customs Binding Rulings	6	Logistics - CCM
TRA1000-9	CCM: Customs Compliance Manual (SOPs)	ACT+6	Logistics - CCM
TRA1000-10	CCM: Customs Import Entry Pkg 7501/3461	7‡	Logistics - CCM
TRA1000-11	CCM: Customs Mgt. & Compliance Request Datasheet	7‡	Logistics - CCM
TRA1000-12	CCM: Customs Request for Information	6	Logistics - CCM
TRA1000-13	CCM: Drawbacks (refunds of duty)	6‡	Logistics - CCM
TRA1000-8	CCM: Export Order Files and Shipping Documents	6‡	Logistics - CCM
LEG5000-24	CCM: FCC Form 740	6‡	Logistics - CCM
LEG5000-25	CCM: FDA Form 2877	6‡	Logistics - CCM
MIS3000-3	CCM: Internal Trade Compliance Training Database	ACT	Logistics - CCM
TRA1000	CCM: Liquidation Courtesy Notices	6‡	Logistics - CCM
ACC1000-3	CCM: Manual BOL	6‡	Logistics - CCM
ACC1000-4	CCM: Manual Picking List	6‡	Logistics - CCM
TRA1000-2	CCM: NAFTA Certificates	6‡	Logistics - CCM
TRA1000-3	CCM: NAFTA Qualifications/Build-up	6	Logistics - CCM
LEG2000-23	CCM: Power of Attorney	6	Logistics - CCM
LEG2000-24	CCM: Power of Attorney Termination	6	Logistics - CCM
ENV1000	CCM: Toxic Substance Control Act Certification (TSCA)	6	Logistics - CCM
LEG2000-21	OSI: Adjustments	6‡	Logistics - OSI

Record Series	Retention Period	Office of Record	
LEG2000-22	OSI: Consignment Agreements	7‡	Logistics - OSI
ACC1000-6	OSI: Credit Reissues	6‡	Accounting Center
ADM2010-3	OSI: Inventory Reports	7‡	Logistics - OSI
ADM2010-4	OSI: Physical Inventory Reconciliations	6‡	Logistics - OSI
ACC1000-5	OSI: Receiving Documents	7‡	Logistics - OSI
LEG2000-28	OSI: Reload/VMI Approval Forms	7	Logistics - OSI
LEG2000-29	OSI: Reload/VMI Closing Forms	7	Logistics - OSI
LEG3000-2	OSI: Reload/VMI Insurance Certificates	6	Logistics - OSI
FIN8200-9	OSI: Shipping Documents	7‡	Logistics - OSI
LEG2000-27	OSI: UCC-1	10‡	Logistics - OSI
FIN8200-8	OSI: VMI Unit Tag Information	3	Logistics - OSI
LEG2000-30	OSI: Warehouse Agreements	6	Logistics - OSI
ACC1000-7	Rail: Car Issue Resulting in Balance Due	6‡	Logistics - Rail
LEG2000-31	Rail: Rail Contracts	6	Logistics - Rail
FIN1000	Rail: Refund Checks	6‡	Logistics - Rail
LEG2000-32	Truck: Carrier Contracts	6	Logistics - Truck
LEG3000	Truck: Carrier Insurance Certificates	6	Logistics - Truck
HUM4035	Truck: Driver Logs	6M	Logistics - Truck
HUM4035-2	Truck: Driver Qualifications	ACT+3	Logistics - Truck
FIN8200-7	Truck: Manual Dispatches	6	Logistics - Truck
LEG5020-13	Truck: Motor Cargo Authorization	6	Logistics - Truck
HUM3010-5	Truck: NWT Driver Applications	3	Logistics - Truck
MIS3000-4	Truck: NWT Financial Papers	6‡	Logistics - Truck
FIN8200-11	Truck: Proof of Delivery	6	Logistics - Truck
LEG2000-25	Truck: Rate Sheets - Contracts	6	Logistics - Truck
ADM4100-3	Truck: Safety Procedures	3	Logistics - Truck
FIN8200-10	Truck: Scale Sheets/Tickets	6	Logistics - Truck
LEG5020-14	Truck: W-9	6‡	Logistics - Truck

Maintenance & Repair

Record Series	Retention Period	Office of Record	
ADM2020-9	Motor Vehicle Maintenance Records	ACT+6	Originating Dept/Location
ADM2020	Property & Equipment Maintenance & Repair Records	ACT+6	Originating Dept/Location

Manufacturing

Record Series	Retention Period	Office of Record	

Record Series	Retention Period	Office of Record	
MAN2000-8	Manufacturing Inventories: Year End	6†	Accounting Center
MAN2000-10	Manufacturing Inventories: Year End (Canada)	7†	Accounting Center
MAN9900	Production/Usage/Operating Reports	5H	Location Production
FIN8200-5	Unit Tags	3	Location Production

Marketing/Sales

Record Series	Retention Period	Office of Record	
MAR3000	Advertising Campaigns	6	Sales Center
MAR2010	Customer & Dealer Complaints/Problems	ACT+1	Customer Service Center
MAR2000	Customer Lists	ACT	Sales Center
LEG2000-13	Customer Orders	6†	Sales Center
LEG2000-14	Customer Orders (Canada)	8†	Sales Center
MAR1000	Dealer Lists	ACT	Sales Center
ADM1020	Market Research Data	ACT	Sales Center
ADM1020-2	Marketing Plans	6	Sales Center
LEG2000	Product Literature	PERM	Originating Dept/Location
MAR3000-4	Product Literature Production Files	3	Originating Dept/Location
MAR9900-2	Trade Show Records	3	Sales Center

Quality & Technology

Record Series	Retention Period	Office of Record	
MAN1000-2	Product Development	PERM	Location QC
MAN2000-12	Test Documentation	5H	Location QC

Resources - Canadian

Record Series	Retention Period	Office of Record	
ADM1015-2	Aerial Photographs (Canada)	ACT	Location Resources
LEG2010-2	Contractor Files (Canada)	ACT+8	Location Resources
LEG2010-3	Contracts (Canada): Forest License	ACT+8	Location Resources
LEG2010-4	Contracts (Canada): Timber Tenure (TO)	ACT+15	Location Resources

Record Series	Retention Period	Office of Record	
LEG2010-5	Contracts (Canada): Tree Farm License	ACT+8	Location Resources
FRS2000-13	Cutting Permits and Supporting Documentation (Canada)	ACT+10	Location Resources
FRS2000-5	Five-year forest management plan and five-year agreement (Quebec)	ACT	Location Resources
LEG2000-19	Foreshore Lease (Canada)	ACT+6	Location Resources
ADM3000	Forest Certification SFI Handbook (Canada)	ACT+15	Location Resources
FRS2000-11	Forest Development Plans and Forest Stewardship Plans (Canada)	ACT+10	Location Resources
FRS2000-9	Forest Inventories (Quebec)	ACT+6	Location Resources
FRS2000-12	Geographic Information System Data - Spatial and Non-Spatial (Canada)	ACT	Location Resources
ACC1000-10	Government Sponsored Forest Management: Finance Records (Canada)	ACT+6	Location Resources
FRS2000-10	Government Sponsored Forest Management: Stand Management (Canada)	ACT+6	Location Resources
FRS2000-6	Government-sponsored agreements: Component II (Quebec)	ACT+6	Location Resources
FRS2000-3	Introductory documents for silviculture (Canada)	ACT+6	Location Resources
ADM1015	Maps: Digital & Topographic (Canada)	ACT	Location Resources
FRS2000-2	Measurement records of the Department of Forestry (Canada)	7	Location Resources
PIN8200-6	Ministry of Forests Scale Records (Canada)	7	Location Resources
FRS2000	Ministry's Annual Report (Canada)	ACT+6	Location Resources
LEG2010	Pulpwood Agreements (Canada)	ACT+6	Location Resources
FRS2000-16	Pulpwood Agreements: Timber Sale License or Forestry License to Cut (Canada)	ACT+6	Location Resources
LEG2000-20	Records of contractors and private forests (Canada)	ACT	Location Resources
LEG5020-4	Road Permit (Canada)	ACT+6	Location Resources
LEG2010-6	Silviculture Contracts (Canada)	ACT+6	Location Resources
FRS2000-8	Silviculture data system (Quebec)	ACT+8	Location Resources
LEG2010-7	Silviculture Opening File (Canada)	ACT+6	Location Resources
LEG5020-3	Silviculture Permits (Canada)	ACT+6	Location Resources
FRS2000-15	Silviculture Record System (Canada)	ACT+6	Location Resources

Record Series	Retention Period	Office of Record	
LEG5020-5	Special Use Permits (Canada)	ACT+6	Location Resources
FRS2000-7	The government's silviculture records (Quebec)	ACT+15	Location Resources
LEG2000-26	Third Party Agreement (Canada)	ACT	Location Resources
ACC2000-3	Timber Cruises (Canada)	ACT+6	Location Resources
FRS2000-14	Timber Supply Review, Management & Working Plan Documentation: Tree Farm License (Canada)	ACT+6	Location Resources
FRS2000-4	Timber Supply and Forest Management Agreement and amendments (Quebec)	ACT+8	Corporate Supply Mgmt

Resources - US

Record Series	Retention Period	Office of Record	
LEG5011-10	Ad Valorem Timberland Property Tax Receipts	ACT+10‡	Location Resources
ADM2020-3	Aerial Photographs	ACT+10‡	Location Resources
ADM2010	Log Inventory Reports: Year End	3‡	Location Resources
FIN8200-2	Log Scale/Weigh Tickets	3	Location Resources
FIN8200-4	Log Scaling Worksheets	3#	Location Resources
LEG2020-4	Mnps: Digital & Topographic	ACT	Location Resources
FRS2000-1	Sustainable Forestry Records	3	Location Resources
ACC2000	Timber Cruises	ACT+10‡	Location Resources
ACC2000-2	Timber Harvest Plans	ACT+10	Location Resources
LEG2020-5	Tract Files	ACT+10‡	Location Resources

Tax

Record Series	Retention Period	Office of Record	
ACC2000-6	Depreciation Schedules: Tax	PERM	Corporate Tax
LEG1030-3	Federal Acquisition/Divestiture Tax Files	ACT+5‡	Corporate Tax
LEG1030-4	Federal Acquisition/Divestiture Tax Files (Canada)	ACT+5‡	Corporate Tax
LEG5000-9	Federal Corporate Income Tax Correspondence	15	Corporate Tax

Record Series	Retention Period	Office of Record	
LEG5010-9	Federal Corporate Income Tax IRS Audit Reports	PERM	Corporate Tax
LEG5010-12	Federal Corporate Income Tax Protests/Appeals/Claims for Refunds	PERM	Corporate Tax
LEG5010-10	Federal Corporate Income Tax Returns	PERM	Corporate Tax
LEG5010-11	Federal Corporate Income Tax Workpapers	PERM	Corporate Tax
LEGS011	Federal Employment Tax Returns	6‡	Corporate HR/Payroll
LEG5020-19	Federal Employment Withholding Certificates	ACT+7	Corporate HR/Payroll
LEG5011-3	Federal Excise Tax Returns	6‡	Regional Finance
LEG5011-4	Federal Informational Returns & Workpapers	6	Corporate Tax
LEG1030	Federal Reorganization Tax Files	PERM	Corporate Tax
LEG5010-4	Federal Tax Year-End Closing	PERM	Corporate Tax
LEG5010-5	Foreign Tax Examinations	PERM	Corporate Tax
LEG5010-6	Foreign Tax Returns	PERM	Corporate Tax
LEG5010-7	Foreign Tax Workpapers	PERM	Corporate Tax
LEG5010-8	Logging Tax (Canada)	6	Regional Finance
LEG5010-13	Property Transfer Tax (Canada)	7	Regional Finance
LEG5010	State/Local Corporate Income & Franchise Tax	PERM	Corporate Tax
LEG5011-6	State/Local Employment Tax	6	Corporate HR/Payroll
LEG5010-14	State/Local Informational Returns & Workpapers	6	Corporate Tax
LEG5011-7	State/Local Personal Property Tax	6‡	Regional Finance
LEG5011-8	State/Local Real Property Tax	ACT+10‡	Regional Finance
LEG5020-6	State/Local Sales Tax Exemption Certificate	ACT+6	Location Accounting
LEG5020-7	State/Local Sales Tax License	ACT+6	Regional Finance
LEG5011-5	State/Local Sales Tax Returns	6	Regional Finance
LEG5010-2	State/Local Tax Audit Reports	PERM	Corporate Tax
LEG5010-3	Tax Letter Rulings	PERM	Corporate Tax
RBP0000-4	Tax Research Files	ACT	Corporate Tax
LEG5011-9	W-2's	7	Corporate HR/Payroll

Appendix B

March 11 2015 11:51 AM

THE HONORABLE K. A. VAN DOORNINCK

With Oral Argument
KEVIN STOCK
SUICAN CLERK
NO: 14-2-07178-2

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH HOFFMAN,
husband and wife,

Plaintiff(s),

v.

ALASKAN COPPER COMPANIES, INC., et
al.,

Defendants.

NO. 14-2-07178-2

PLAINTIFFS' RESPONSE TO
DEFENDANTS KETCHIKAN PULP
COMPANY AND GENERAL
ELECTRIC COMPANY'S MOTION
TO APPLY ALASKA LAW

COMES NOW, Plaintiffs Larry and Judith Hoffman, by and through their counsel, and files their Response to Defendants Motion to Apply Alaska Law.¹

I. INTRODUCTION

Defendant Ketchikan Pulp Company ("Ketchikan") and Defendant General Electric Company ("GE") motion to apply Alaska law in this case should be denied for the following reasons:

1. Alaska has no interest in applying its law to this case;
2. With respect to the Statute of Repose, there is no conflict because both statutes serve the same purpose and if applied, either would bar his mesothelioma claims because they occurred after the applicable time periods; and

¹ Plaintiffs acknowledge that this response exceeds the page limits because they are responding to both Motions to apply Alaska law by GE and Ketchikan.

1 3. With respect to any of the choice of law issues raised, even if the Court were to
2 engage in a balancing of the interests of the respective states to the issues presented in
3 this case, it would show that Washington has a significant interest in this case, and
4 Alaska has no real identifiable interest in this matter.

5
6 Defendant's moving papers cite to only one factor, that Mr. Hoffman was exposed to
7 asbestos in Alaska, in arguing that Alaska law should apply. Plaintiffs and Ketchikan Pulp
8 Company are Washington residents. The other defendants in this action, including moving party
9 GE, and co-defendants Crane Co. and Armstrong Int. Co., are all domiciled in other states, but
10 have long and significant contacts with this forum. It should be noted that none of these entities
11 are domiciled in Alaska.

12
13 Mr. Hoffman's injuries, damages and treatment are all occurring in Washington.
14 Plaintiffs in this action live and pay taxes in this state, was diagnosed with mesothelioma in this
15 state, and have significant treatments for his mesothelioma in this state. Further, given the
16 latency period of this disease and the fact that Mr. Hoffman last lived in Alaska almost 30 years
17 ago, Plaintiff could not have brought this action in Alaska at the time of the exposure.

18
19 Defendants' motion also seems to request that this Court should apply "all" of Alaska's
20 laws without briefing what exactly that means. In order to accomplish this, we would have to
21 analyze each and every provision of the tort and damages laws of both states, and each and every
22 jury instruction to determine where conflicts exist and which state has a more significant interest.
23 For example, would we be giving Alaska negligence or products liability instructions in this
24 case, because there is a conflict of laws? Would the jury be allowed to assess punitive damages?
25 For this reason, Plaintiffs contend that Defendants' motion should be broken into separate
26 categories to see whether they would apply in this case. The two main issues in these briefs are
27
28

1 (1) the various statutes of repose; and (2) the various damages limitations and nuisances in each
2 state.

3 First, with regards to the various states statute of repose, Plaintiffs contend that there is
4 no actual conflict of laws for the Court to examine in this case, because both statutes of repose
5 serve the same purpose, i.e., to protect builders and designers of buildings from latent defect
6 claims. *See, e.g., Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 899 (1987); *Turner Constr. Co.,*
7 *Inc. v. Scales*, 752 P.2d 467, 471 (Alaska 1988) (noting that the Legislature's purpose in enacting
8 this statute in 1967 was "to encourage *construction* and avoid stale claims by shielding certain
9 defendants from potential liability"). Plaintiffs' claims against Ketchikan Pulp Co. in this action
10 stem from its negligence operation and maintenance of the pulp mill. It has nothing to do with
11 the actual construction or design of the pulp mill. Alaska law does allow for premises liability
12 causes of action. *See, e.g., Webb v. Sitka*, 561 P.2d 731 (Alaska 1977). Plaintiffs' claims against
13 GE stem from products liability and negligence in its design of its turbines.

14
15
16 Alaska's statute of repose is seven years, while Washington's statute of repose is 10
17 years. Consequently, for the purposes of a mesothelioma case with a long latency period, the
18 length of the repose period would not matter because Mr. Hoffman's mesothelioma claims would
19 be barred under either statute irrespective of the length of the repose period.² Significantly,
20 application of Alaska's statute of repose (if applicable) might actually produce a more favorable
21 result for Mr. Hoffman because it explicitly states that there is a products liability exception. But
22 a careful analysis of the purpose and language of both statutes clearly shows that neither was
23 intended to protect Ketchikan Pulp or General Electric from Mr. Hoffman's mesothelioma
24 claims. But even under Washington's statute of repose, although the statute does not contain an

25
26
27
28 ² For example, in two prior motions for summary judgment in this action brought by a general contractor (Kiewit Bros.) and a drywall contractor (Expert Drywall), this Court granted the motions without going through the exercise of a balancing of the interests of the various states, because under both states' laws the claims were barred.

1 explicitly stated products liability exception, Washington case law has consistently held that such
2 an exception exists. *See, e.g., Morse v. City of Toppenish*, 46 Wn. App. 60 (1986), wherein the
3 Washington Court of Appeals determined that a swimming pool itself is the improvement to real
4 property and that the diving board is a mere component part to the improvement, which should
5 not be afforded the protection of repose simply because it was incorporated into an improvement.
6

7 Plaintiffs acknowledge that although there are some differences between Washington and
8 Alaska's damage statutes, those differences do not lead to the conclusion that Alaska has an
9 interest in the application of its statute. Nor do those differences lead to the conclusion that
10 Alaska has a greater interest than Washington in the application of its damages statute. In fact
11 the Washington Supreme Court held that even Washington's own damages cap violated the
12 Washington State Constitution. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636 (1989) (see
13 discussion *supra* in Section C(2)(b)). If Washington's own damages cap was unconstitutional,
14 why would we apply the damages cap of a foreign jurisdiction?
15

16 Plaintiffs contend that the state of Washington has significantly more interest in applying
17 its damages laws and protecting Plaintiffs rights as to damages and that Alaska has no
18 discernable interest in applying its damages cap to the Plaintiffs' claims. Plaintiffs point out that
19 Defendants' moving papers fail to cite to a single case or any justification to support their novel
20 position that this Court should apply damages caps from foreign jurisdictions to mesothelioma
21 cases involving long term Washington residents.
22

23 The facts of this case are similar to *Williams v. Leone & Keeble, Inc.*, 170 Wn. App. 696
24 (2012), where the court held Washington had a greater interest in applying Washington law to
25 the cap on damages issue in a case involving a Washington resident injured in Idaho and a
26 Washington corporation because Washington has an interest in allowing full recovery for its
27
28

1 residents and in regulating the conduct of a Washington corporation. Similarly, Mr. Hoffman, a
2 Washington resident was exposed to asbestos in Alaska and is pursuing his claims against a
3 Washington corporation and other non-Alaskan corporations.

4
5 Finally, Plaintiffs' contend that the case that defendants rely on almost exclusively in this
6 matter for their argument that Alaska law should apply, *Rice v. Dow Chemical Co.*, 124 Wn.2d
7 205, 210 (1994), is distinguishable from the issue that it presented to this Court. First, in *Rice* there
8 was a substantial conflict of law that barred the plaintiffs' claims under one state's statute, and would
9 have allowed the plaintiffs' claims to go forward in the state of Washington. Thus, there was a real
10 conflict of laws. It is important to note that the Washington resident who brought the claim had
11 waited almost three years to bring its claim, before it filed its moving papers. Thus, that plaintiff had
12 deliberately failed to bring a timely claim. In contrast, Mr. Hoffman could not have brought a claim
13 when he lived in Alaska, and when he did bring a claim in Washington, there were no actual conflicts
14 as to the statute of repose when it was applied in the case against a general contractor and drywall
15 contractor.
16

17 II. ISSUES PRESENTED

18 Should Alaska law be applied in this case where:

- 19 1. No actual conflict exists as to either state's statute of repose because both are
20 inapplicable in the present case?
- 21 2. Where Washington has more significant contacts to this case?
- 22 3. Where Washington has a greater interest in protecting its citizens and regulating a
23 Washington corporation?
24

25 III. STATEMENT OF FACTS

26
27 Larry Hoffman is living with mesothelioma, a fatal cancer of the lining of the lung,
28 invariably caused by exposure to asbestos. See Plaintiffs' Complaint for Personal Injuries, attached to

1 the Timothy F. Pearce Declaration ("Pearce Decl.") as Exhibit A. Mr. Hoffman was diagnosed with
2 mesothelioma in December 2013 and filed the instant lawsuit in March 2014. *Id.* The Hoffmans are
3 Washington residents. *See* Plaintiffs' Complaint for Personal Injuries, attached to the Pearce Decl. as
4 Exhibit A.

5
6 Mr. Hoffman was exposed to asbestos by asbestos-containing GE turbines through his
7 work at the Sitka mill from 1976 to 1978. *See* Perpetuation Deposition of Larry Hoffman taken
8 on November 4, 2014, attached as Exhibit B to the Pearce Decl., p. 72:10-14; 73:4-7, *see also*
9 Discovery Deposition of Larry Hoffman taken on September 29, 2014, attached as Exhibit C to
10 the Pearce Decl., p. 31:4-6; 37:5-7; 38:15-21; 46:12-22; 81:17-23; 165:6-11.

11
12 Mr. Hoffman's father, Doyle Hoffman, was a welder and pipefitter at the Ketchikan Pulp
13 Mill in Ketchikan, Alaska, starting in 1954, when the mill first opened. *See* the Perpetuation
14 Deposition of Larry Hoffman, attached as Exhibit B to the Pearce Decl., p. 19:4-20:6. Defendant
15 Ketchikan is a Washington corporation. *See* Washington Secretary of State website printout attached
16 as Exhibit D to the Pearce Decl. Doyle Hoffman worked at the Ketchikan Pulp Mill until 1966. In
17 the course of his work, Doyle Hoffman would also have been working around turbines
18 manufactured by GE during shutdowns and emergency repairs, and during the removal and
19 installation of asbestos blankets on these turbines, which created a tremendous amount of dust.
20
21 *See* the Declaration of Monte Guymon, attached as Exhibit E to the Pearce Decl., at ¶ 6-10. The
22 process of sweeping up the area, which welders such as Doyle Hoffman would have participated
23 in, also created a tremendous amount of dust. *Id.* at ¶ 11-12. By the end of a work shift, a
24 welder's clothing would have been covered in asbestos dust. *Id.* at ¶ 23. Plaintiff Larry Hoffman
25 testified at his deposition that his father would arrive home at the end of the day in the clothes he
26 had worn to work, and would play with Mr. Hoffman and his brother, and sit on the couch, while
27 still dressed in his work clothing. *See* the Perpetuation Deposition of Larry Hoffman, attached as
28

1 Exhibit B to the Pearce Decl., p. 21:2-12. Mr. Hoffman also remembers that his father drove the
2 family car to and from work each day; the same car which was used by the family on weekends.
3 See the Perpetuation Deposition of Larry Hoffman, attached as Exhibit B to the Pearce Decl., p.
4 20:18-23.
5

6 IV. ARGUMENT AND AUTHORITIES

7 A. *Washington Law Applies to This Case*

8 To engage in a choice of law determination, there must first be an actual conflict between the
9 laws or interests of Washington and the laws or interests of another state. *Rice v. Dow Chemical Co.*,
10 124 Wn.2d 205, 210 (1994), citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01, (1994).
11 Where there is no conflict between the laws or interests of two states, the presumptive local law is
12 applied. *Rice*, 124 Wash.2d at 210, citing *Burnside*, supra, at 101. Defendants' argue there is a
13 conflict between Alaska and Washington law on the issues of liability (in the context of both states'
14 statutes of repose), the allocation of fault, and damages. Plaintiffs' disagree as to the conflict on the
15 issue of liability.
16

17 B. *No Conflict Exists Because Neither State's Statute of Repose Applies In This Case*

18 Neither Washington's nor Alaska's statute of repose applies in this case. Both statutes are
19 intended to protect and benefit builders from injuries incurred as a result of construction defects.
20 Washington's statute of repose is narrowly construed and from looking at the plain language of
21 the statute it clearly displays the purpose behind enacting the statute.
22

23 Washington's Statute of Repose, codified at RCW 4.16.310, applies to:

24 all claims or causes of action of any kind against any person, arising from such
25 person having constructed, altered or repaired any improvement upon real
26 property, or having performed or furnished any design, planning, surveying,
27 architectural or construction or engineering services, or supervision or observation
28 of construction, or administration of construction contracts for any construction,
alteration or repair of any improvement upon real property. (Emphasis added.)

1 The purpose of Washington's Statute of Repose is to protect *builders* from being held
2 liable for the acts of others. See, *Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 899 (1987).

3 Alaska Stat. § 09.10.055 is in derogation of the common law because it limits liability for
4 negligent conduct and premises liability; therefore, it should be interpreted narrowly. The statute
5 contains an exception, which excludes claims arising from defective products. *Id.* at (b)(1)(E).
6 The exception codified in Alaska Stat. § 09.10.055(b)(1)(E) states a defective product means an
7 object that has intrinsic value, is capable of delivery as an assembled whole or as a component
8 part, and is introduced into trade or commerce. Here, Mr. Hoffman's injury occurred because of
9 defective products, namely asbestos-containing turbines. GE's turbines constitute a defective
10 product under the exception. Therefore, even assuming that the Alaska statute of repose applies,
11 Plaintiffs' claims are exempted therefrom.

12
13
14 Assuming, *arguendo*, that the exception contained in Alaska Stat. § 09.10.055(b)(1)(E)
15 does not apply, according to *Turner Constr. Co., Inc. v. Scales*, 752 P.2d 467, 471 (Alaska 1988),
16 the Legislature's purpose in enacting this statute in 1967 was "to encourage *construction* and
17 avoid stale claims by shielding certain defendants from potential liability." This purpose was
18 reiterated by the Legislature in its findings in connection with the 1994 amendment to this
19 statute. The Legislature found "this Act is in the public interest and in the interest of providing
20 the due process rights to potential litigants in the area of *design and construction of an*
21 *improvement to real property . . .*" 1994 AK, ALS 28, *1.

22
23
24 Here, Plaintiffs are not alleging Mr. Hoffman's injuries resulted from any improvement
25 to real property. Plaintiffs' claims are based on his exposure to defective products, some of
26 which were manufactured and supplied by Defendant GE, throughout Mr. Hoffman's
27 employment as a pipefitter. Plaintiffs' also allege Mr. Hoffman was exposed to asbestos fibers
28

1 from the asbestos dusts brought home on his father, Doyle Hoffman's clothing, when his father
2 worked at the Ketchikan Pulp Mill from 1954 through 1966. Mr. Hoffman's injury does not stem
3 from any construction defects, nor do Plaintiffs' allege so. These are negligence and premises'
4 liability claims which is allowed under Alaska law.

5
6 In *Webb v. Sitka*, the Alaskan Supreme Court adopted a general rule of negligence with
7 regards to premises owners. 561 P.2d 731, 735 (Alaska 1977). It held that a landowner "must act
8 as a reasonable person in maintaining his property in a reasonably safe condition in view of all
9 the circumstances, including the likelihood of injury to others, the seriousness of the injury, and
10 the burden on the respective parties of avoiding the risk." *Id.* The Alaskan Court went on to say
11 that in general, issues of negligence are "not susceptible to summary determination" and are
12 better left to the trier of fact because of the question of reasonableness. *Id.* Here, Plaintiffs
13 contend that Ketchikan Pulp acted unreasonably because it failed to protect its workers from
14 exposure to asbestos, and from taking these deadly dust home on their clothes despite what was
15 known or knowable about the hazards of asbestos in the 1950s and 1960s.

16
17
18 Further, neither Defendant has met their burden to show they qualify as constructors, or
19 builders, whom the statutes were solely intended to protect. Defendant Ketchikan is a pulp mill.
20 Defendant GE is a manufacturer and supplier of asbestos-containing turbines that were present at
21 the Ketchikan and Sitka Pulp Mills. Neither Defendant has put forth any evidence indicating they
22 were involved in the improvement to real property that allegedly caused Mr. Hoffman's injuries.
23 This case is based on Plaintiffs' claims of exposure to asbestos-containing products that were
24 present on his and his father's jobsites.
25

26 *C. A Choice of Law Analysis Shows That Washington Has a Greater Interest in This*
27 *Case*

1 Plaintiffs' concede that under Washington law when a conflict of law exists the most
2 significant relationship test should be applied in order to determine which state has a greater interest
3 in applying that state's laws. Here, the facts clearly show that Washington has more significant
4 contacts with this case and they have a greater interest in adjudicating the case. Defendants argue
5 there is a conflict as to the issue of liability (which Plaintiffs' contend is a false conflict), allocation
6 of fault, and damages.
7

8 *1. Washington Has More Significant Contacts*

9 Where an actual conflict exists, the court must apply the "most significant relationship" test.
10 *Johnson v. Spider Staging Corp.*, 87 Wash.2d 577, 580 (1976). The first step is to take into account
11 the following contacts:

- 12 2. (a) The place where the injury occurred;
- 13 3. (b) The place where the conduct causing the injury occurred;
- 14 4. (c) The domicile, residence, nationality, place of incorporation and place of
15 business of the parties; and
- 16 5. (d) The place where the relationship, if any, between the parties is centered.
Restatement (Second) of Conflict of Laws §145(2) (1971)

17 The court is not merely to count contacts, but rather to consider which contacts are most
18 significant and to determine where these contacts are found. *Id.* at 581. If the contacts are evenly
19 balanced, the second step is to consider the interests and public policies of the concerned states. *Id.* at
20 582. "The extent of the interest of each potentially interested state should be determined on the basis,
21 among other things, of the purpose sought to be achieved by their relevant local law rules and the
22 particular issue involved." *Southwell v. Widing Transport, Inc.*, 101 Wn.2d 200, 204 (1995).
23

24 Applying the facts of the instant matter to the most significant relationship test, the place
25 where the injury occurred is Washington. It is undisputed that Mr. Hoffman was diagnosed with
26 mesothelioma in 2013 while living in Washington. At that time, he became aware that his exposure
27 to asbestos dust from GE turbines and other sources, including exposure to asbestos dusts brought
28 home on his father's clothing while working for Ketchikan, had caused him to develop a terminal

1 illness and his claim, as well as his wife's claim became actionable for the first time. It is
2 disingenuous to argue that the injury occurred in Alaska, since neither Mr. Hoffman nor his wife had
3 any way of bringing an action against any defendant when the exposure occurred there.

4 As for the second factor, the place where the conduct causing the injury occurred in a product
5 liability action is the place where the defendant designed, manufactured or was otherwise involved
6 with the product in question. *Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn. App.
7 256, 263 n. 20 (2005). GE offers no evidence showing where this might be, but Plaintiffs assume it
8 would be its place of incorporation or principal place of business: New York or Connecticut. In any
9 event, it is neither Washington nor Alaska, rendering this factor neutral for each of these states.
10

11 Next, Mr. and Mrs. Hoffmans' domicile is Washington. Defendant Ketchikan is a
12 Washington corporation. As set forth above, GE's principal place of business and place of
13 incorporation is neither Washington nor Alaska. Therefore, this factor weighs heavily in favor of
14 Washington.
15

16 Washington's contacts are more significant in this case. Not one factor weighs in favor of
17 Alaska. This should end the Court's inquiry into the issue of choice of law in regards to both the
18 allocation of fault and the cap on damages.

19 *2. Public Policies and interests of the Concerned States as to the Issues of Allocation of Fault*
20 *and Damages*

21 Washington has a "real interest" in compensating its residents, such as Plaintiffs, for personal
22 injuries. *Rice*, supra, 124 Wash.2d at 215-216. Washington also has an interest in adjudicating claims
23 against a Washington corporation. Alaska has no real interest in protecting out of state residents or
24 out of state corporations.
25

26 *a. Allocation of Fault*

27 As to the allocation of damages, the Washington legislature drafted the statute regarding joint
28 and several liability in only certain situations, which include the situation where the plaintiff is free

1 of fault. Clearly, it is Washington's purpose in creating such a statute that those Plaintiffs such as the
2 Hoffmans (which neither Defendant argues are at fault for any of their injuries), who have had no
3 part in contributing to the devastating illness affecting both of them. It would be against public policy
4 to permit Defendants to benefit from the law of another state when Plaintiffs, as Washington
5 residents, should be protected by the laws that were specifically designed for cases like theirs.
6

7 *b. Damages Cap*

8 As to Alaska's damages cap, the legislature "appears to have intended, in passing [the
9 damages cap] to control excessive compensation for tortious injuries, and to reduce the costs of
10 liability and malpractice premiums." *L.D.G., Inc.*, supra, 211 P.3d at 1132. However, there is no
11 authority that suggests the damages cap was created to limit the damage dollar amount for non-
12 Alaskan corporations responsible for injuring non-Alaskan residents.
13

14 The Washington Supreme Court struck down as unconstitutional a Washington damages
15 cap in *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636 (1989). Like the Alaska statutory cap^[1] that
16 Defendants seek to apply here, the Washington statute was passed in response to claims of rising
17 insurance premiums for liability coverage and operates on a formula based on the life expectancy
18 of the plaintiff. The *Sofie* court held that the statute violated the state's constitutional guarantee
19 that "the right of trial by jury shall remain inviolate" since it operated to take a jury's finding of
20 fact as to the quantum of damages and alter it to conform to a predetermined formula. *Id.* at
21 653. Recognizing the constitutional nature of the jury's damage-determining role and that "the
22 jury's role in determining *noneconomic damages* is perhaps *even more essential*," the *Sofie* court
23 struck down Washington's statutory cap. *Id.* at 646. The Washington Supreme Court's ruling in
24
25

26 _____
27 [1] The Alaska statute caps the amount of damages that a tort victim may recover at "\$ 400,000 or the injured
28 person's life expectancy in years multiplied by \$ 8,000, whichever is greater." Personal injury claim recoveries are
limited to the greater of \$ 1 million or the person's life expectancy in years multiplied by \$ 25,000 when the
damages are awarded for severe physical impairment or severe disfigurement.

1 *Sofie* highlights the state's strong interest in providing full recovery for its residents and rejecting
2 application of statutory caps of other states, such as Alaska, in cases before this court.

3 Further, in the *Williams* case the court held Washington had a greater interest in applying
4 Washington law to the issue of damages in a case involving a Washington resident and
5 Washington corporation because Washington has an interest in allowing full recovery for its
6 residents and in regulating the conduct of a Washington corporation. *See e.g., Williams v. Leone*
7 *& Keeble, Inc.*, 170 Wn, App. 696 (2012). The court found the purpose of Idaho's cap was to
8 protect Idaho citizens from excessive liability insurance premiums, and also found Idaho law
9 does not express any interest in protecting Washington corporations doing business in Idaho. *Id.*
10 at 712. In contrast, the court held Washington had an interest in protecting the rights of its
11 citizens to a full jury trial. *Id.*

12 In *Williams*, defendant L&K argued that the Idaho cap must be applied because the
13 parties' only relationship with Washington is their residence and relied upon *Rice v. Dow*
14 *Chemical Co.*, 124 Wn.2d 205, 216 (1994), where the court stated that "'residency in the forum
15 state alone has not been considered a sufficient relation to the action to warrant application of
16 forum law.'" *Id.* at 713. However, the court found in *Rice*, only one of the parties was a resident
17 of Washington, whereas in *Williams*, all of the parties were Washington residents. *Id.* at 714.

18 Similarly, Defendants also rely on the *Rice* case to support their argument that Alaska
19 law should apply because they allege Mr. Hoffman's exposure occurred in Alaska. However, the
20 present case involves a Washington resident and a Washington defendant. While GE may not be
21 a Washington defendant, they are certainly not an Alaskan defendant. Further, no other
22 Defendants left in this case are Alaskan corporations. Therefore this Court has a greater interest
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1 in applying Washington law to ensure the Hoffmans are afforded a full jury trial and in
2 regulating a Washington corporation.

3 Although we strongly disagree that the Court should apply an Alaska damages cap to
4 Washington residents, we do need to point out that the Court has not been provided with an
5 accurate description of what the actual statute in Alaska really provides.
6

7 The Alaska Statute §09.17.010 provides as follows:

8 (a) In an action to recover damages for personal injury or wrongful death, all damage
9 claims for noneconomic losses shall be limited to compensation for pain, suffering,
10 inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of
consortium, and other nonpecuniary damage.

11 (b) Except as provided under (c) of this section, the damages awarded by a court or a jury
12 under (a) of this section for all claims, including a loss of consortium claim, arising out of
13 a single injury or death may not exceed \$400,000 or the injured person's life expectancy
in years multiplied by \$ 8,000, whichever is greater.

14 (c) In an action for personal injury, the damages awarded by a court or jury that are
15 described under (b) of this section may not exceed \$ 1,000,000 or the person's life
16 expectancy in years multiplied by \$ 25,000, whichever is greater, when the damages are
awarded for **severe permanent physical impairment** or severe disfigurement.

17 (d) Multiple injuries sustained by one person as a result of a single incident shall be
18 treated as a single injury for purposes of this section.

19 A severe permanent physical impairment is one that causes permanent loss of normal use
20 of a body system necessary for day-to-day life. *State v. Johnson*, 2 P.3d 56, 65 (Alaska 2000). In
21 the *State v. Johnson* case the court held the non-economic damages cap did not apply to the
22 Plaintiff because he suffered from a severe permanent physical impairment. *Id.*, at 64-65. In
23 *Johnson*, after falling off the top of a flight of stairs the Plaintiff's sacral root nerves that control
24 his urinary, bowel, and erectile functions were damaged and he permanently lost urinary and
25 bowel functions. *Id.* at 58, 65. The court held the permanent loss of Plaintiff's urinary and bowel
26 functions constituted a severe permanent physical impairment." *Id.* at 65.
27
28

1 Similarly, Mr. Hoffman suffers from pleural mesothelioma, an always fatal form of
2 cancer caused by his exposure to asbestos. Mr. Hoffman suffers from ongoing persistent
3 symptoms such as shortness of breath and fatigue. These are symptoms that often make day-to-
4 day activities impossible for Mr. Hoffman. Mesothelioma is a progressive cancer and causes
5 patients, like Mr. Hoffman, to experience increasing levels of pain and side effects from the
6 disease. Mr. Hoffman's side effects from mesothelioma will only worsen, until eventually he will
7 lose control of his bodily functions and his ability to perform necessary tasks in his day-to-day
8 life as his disease progresses. As such, mesothelioma is a severe physical impairment and even
9 under Alaska's damages cap the non-economic portion would be limited to \$1,000,000 not
10 \$400,000 to Mr. Hoffman.
11

12
13 ***D. Punitive Damages Under Alaska Law***

14 Although we object to the application of Alaska law to any issue in this case, should the
15 Court look to Alaska law as the governing law in this case, we request to leave to amend the
16 complaint to include a claim for punitive damages under Alaska law. Alaska law allows for punitive
17 damages as follows:
18

19 Alaska Punitive Damages Statute § 09.17.020 states:

20 (a) In an action in which a claim of punitive damages is presented to the fact finder, the
21 fact finder shall determine, concurrently with all other issues presented, whether punitive
22 damages shall be allowed by using the standards set out in (b) of this section. If punitive
23 damages are allowed, a separate proceeding under (c) of this section shall be conducted
24 before the same fact finder to determine the amount of punitive damages to be awarded

25 If this Court is to apply Alaska law, Plaintiffs' would request leave to amend their
26 complaint in order to add a claim for punitive damages.

27 ***E. The Law of the Case***

28 Finally, we need to point out that the Court has already relied on Washington law in its
prior rulings on motions for summary judgment. If we are going to now switch to Alaska law,

1 we would also ask the Court for leave to file motions for reconsideration of its prior rulings
2 under Alaska law.

3
4 **V. CONCLUSION**

5 Based on the foregoing, The Defendants' choice of law motion should be denied and
6 Washington law should be applied in this case.

7 Dated this 11th day of March, 2015.

8
9 LEVIN SIMES LLP

10 /s/ Timothy F. Pearce

11 Timothy F. Pearce, CSBN # 215223

12 William A. Levin, CSBN #98592

13 *Admitted Pro Hac Vice*

Counsel for Plaintiffs

14 WEINSTEIN COUTURE PLLC

15 Benjamin R. Couture, WSBA #39304

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17 Marissa C. Langhoff, WSBA #48323

18 Alexandra B. Caggiano, WSBA #47862

19 Counsel for Plaintiffs
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Appendix C

March 20 2015 1:47 PM

THE HONORABLE K.A. VAN DOORNINCK

Trial Date: March 24, 2015 at 1:30 PM

KEVIN STOCK
COUNTY CLERK
NO: 14-2-07178-2

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH
HOFFMAN, husband and wife,

Plaintiffs,

v.

ALASKAN COPPER COMPANIES, INC.,
d/b/a Alaska Copper and Brass; et al.,

Defendants.

NO. 14-2-07178-2

PLAINTIFFS' OPPOSITION TO
DEFENDANT KETCHIKAN PULP
COMPANY'S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM

I. INTRODUCTION

Defendant Ketchikan Pulp Co.'s ("Ketchikan") motion to have Plaintiffs' Complaint dismissed for failure to state a claim should be denied because Alaska's statute of repose is not relevant to Plaintiffs' negligence claims against it in this action. This is the third time that the Defendant has requested that this Court dismiss Plaintiffs' claims, and the second time that it has requested that this Court apply Alaska's statute of repose, designed to protect architects and contractors, in this action.

PLAINTIFFS' OPPOSITION TO DEFENDANT KETCHIKAN PULP
COMPANY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM -

WEINSTEIN COUTURE PLLC
818 STEWART STREET, SUITE 930
SEATTLE, WASHINGTON 98101
(206) 508-7070 • FACSIMILE (206) 237-9650

1 Defendant's motion fails to recognize that the liability producing facts in this action do
2 not stem from Ketchikan's acts as a contractor or a premises owner. Rather, the liability
3 producing facts underlying this action arise from Ketchikan's status as an employer who
4 negligently allowed it's employee, Mr. Hoffman's father, to bring asbestos dust home on his
5 work clothes, when they knew of should have known that they were putting their entire family at
6 risk. Defendant in its responses to interrogatories even admits that it knew or should have
7 known about the hazards of asbestos dating back to the 1950's, when Doyle Hoffman first started
8 working at the mill. This breach of the duty of care has nothing to do with an improvement to
9 real property or with Defendant's status as a premises owner.

10 The Alaska legislative's history is clear that the purpose of enacting the Statute of Repose
11 in 1967 was "to encourage *construction* and avoid stale claims by shielding certain defendants
12 from potential liability." Defendant's moving papers can cite to no case wherein an Alaska has
13 articulated that the purpose of the Statute of Repose was anything other than to protect architects
14 and general contractors from liability stemming from improvements to real property.

15 II. STATEMENT OF FACTS

16 Larry Hoffman is living with mesothelioma, a fatal cancer of the lining of the lung,
17 invariably caused by exposure to asbestos. *See* Plaintiffs' Complaint for Personal Injuries,
18 attached to the Timothy F. Pearce Declaration ("Pearce Decl.") as Exhibit A. Mr. Hoffman was
19 diagnosed with mesothelioma in December 2013 and filed the instant lawsuit in March 2014. *Id.*
20 The Hoffmans are Washington residents. *See* Plaintiffs' Complaint for Personal Injuries,
21 attached to the Pearce Decl. as Exhibit A.

22 Mr. Hoffman's father, Doyle Hoffinan, was a welder and pipefitter at the Ketchikan Pulp
23 Mill in Ketchikan, Alaska, starting in 1954, when the mill first opened. *See* the Perpetuation

1 Deposition of Larry Hoffman, attached as Exhibit B to the Pearce Decl., p. 19:4-20:6. Doyle
2 Hoffman worked at the Ketchikan Pulp Mill until 1966. In the course of his work, Doyle
3 Hoffman would also have been working around turbines manufactured by GE during shutdowns
4 and emergency repairs, and during the removal and installation of asbestos blankets on these
5 turbines, which created a tremendous amount of dust. See the Declaration of Monte Guymon,
6 attached as Exhibit C to the Pearce Decl., at ¶ 6-10. The process of sweeping up the area, which
7 welders such as Doyle Hoffman would have participated in, also created a tremendous amount of
8 dust. *Id.* at ¶ 11-12. By the end of a work shift, a welder's clothing would have been covered in
9 asbestos dust. *Id.* at ¶ 23. Plaintiff Larry Hoffman testified at his deposition that his father would
10 arrive home at the end of the day in the clothes he had worn to work, and would play with Mr.
11 Hoffman and his brother, and sit on the couch, while still dressed in his work clothing. See the
12 Perpetuation Deposition of Larry Hoffman, attached as Exhibit B to the Pearce Decl., p. 21:2-
13 12. Mr. Hoffman also remembers that his father drove the family car to and from work each day;
14 the same car which was used by the family on weekends. See the Perpetuation Deposition of
15 Larry Hoffman, attached as Exhibit B to the Pearce Decl., p. 20:18-23.

16 During the discovery phase of this case, Defendant Ketchikan has admitted that it was
17 known in the 1950's about the hazards of asbestos. See Ketchikan Pulp Co.'s Answers To
18 Interrogatories attached as Exhibit D to the Pearce Decl.

19 III. ARGUMENT

20 A. ALASKA'S STATUTE OF REPOSE DOES NOT APPLY IN THIS CASE

21 Alaska law, like Washington, generally applies the "discovery" rule to the statute of
22 limitations as to toxic tort cases. Alaska case law has previously held that in toxic tort cases,
23 such as where the plaintiff develops an asbestos-related disease, under the discovery rule the

1 statute of limitations will generally not start running until the plaintiff's disease manifests itself
2 in an illness. In such case, because the plaintiff initially does not have any symptoms of injury,
3 and there is insufficient information to prompt an inquiry into his cause of action. *See Sopko v.*
4 *Dowell Schulmberger*, 21 P.3d 1265. A narrow exception to the discovery rule applies in actions
5 which are barred by the statute of repose.

6 The Alaska Statute of Repose purpose according to *Turner Constr. Co., Inc. v. Scales*, 752
7 P.2d 467, 471 (Alaska 1988), was "to encourage *construction* and avoid stale claims by
8 shielding certain defendants from potential liability." This purpose of encouraging construction
9 was reiterated by the Legislature in its findings in connection with the 1994 amendment to this
10 statute. The Legislature found "this Act is in the public interest and in the interest of providing
11 the due process rights to potential litigants in the area of *design and construction of an*
12 *improvement to real property . . .*" 1994 AK. ALS 28, *1.

13 Here, Plaintiffs are not alleging Mr. Hoffman's injuries resulted from any improvement
14 to real property. Plaintiffs' claims are based on his exposure to asbestos brought home on his
15 father's clothing. Plaintiffs' contend that Ketchikan Pulp as an employer of Plaintiffs' father,
16 Doyle Hoffman, was negligent when they exposed the senior Mr. Hoffman to asbestos, and
17 caused him to bring home the asbestos fibers on his clothing and person causing plaintiff Larry
18 Hoffman to be exposed to a substantial amount of asbestos at an early age.

19 The cases cited by Defendant in its moving papers do not stand for the proposition that
20 this case should be precluded by Alaska's statute of repose. Instead, the cases are easily
21 distinguishable from this situation.

22 First in *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1065 (2002), the Alaskan Supreme
23 Court does not address whether the statute of repose would apply in this context, or any context.

1 Rather, in *Evans*, the Alaskan Supreme court mainly upholds the constitutionally validity of
2 Alaska having a statute of repose. In this matter, Plaintiffs do not contest the constitutionality of
3 having a statute or repose, rather, they contend that it does not apply in employer/employee
4 situations, or in contexts where the issue is not the improvement of real property.

5 The second case that defendant relies upon is *Gilcrease v. Tesoro Petroleum Corp.* 70
6 S.W. 3d 265 (2001). With regards to *Gilcrease*, first, it's important to point out that the case is
7 not controlling. The case is the decision by the Fourth Dist. Court of Appeals in Texas, applying
8 Alaskan law. The case, at best, can only be relied upon as secondary authority. However, even
9 assuming if the Court were to consider the *Gilcrease* decision, the case is easily distinguishable
10 from the facts and circumstances in this case.

11 In *Gilcrease*, the decedent who has been exposed to asbestos to asbestos in Alaska passed
12 away from complications related to mesothelioma. The *Gilcrease's* heirs brought a suit in Texas
13 alleging exposure to asbestos in a variety of locations including in Alaska. The plaintiffs brought
14 suit against a variety of companies including Tesoro, where the decedent had worked as a
15 pipefitter at their facility in Kenai, Alaska, on two different occasions during 1976 and 1980. *Id.*
16 at 267. Because of the Worker's Compensation block, while not explicitly stated in the opinion,
17 it is reasonably assumed that Mr. Gilcrease had been working at the Tesoro refineries as an
18 employee of another contractor. In addition, because of the work occurring at the location at two
19 different times, years apart, it should be assumed that Mr. Gilcrease had been brought in to
20 perform specific work at the plant or on its premises most likely for some sort of improvement
21 on the property.

22 The *Gilcrease* decision does not address the situation we have here wherein a plaintiff
23 has brought a claim of negligence for a defendant's conduct towards an employee, wherein it

1 caused him to be exposed to a toxic substance which he ultimately brings home on his clothing.
2 Furthermore, the Gilcrease decision is silent on whether it addresses a situation wherein the
3 premises owner is alleged to have caused exposure to individuals not from the improvement to
4 real property, but rather from the premises' negligence in operating the plant.

5 Dated this 20th day of March, 2015.

6
7 LEVIN SIMES LLP

8 /s/ Timothy F. Pearce

9 William A. Levin, CA Bar No. 98592

10 Timothy F. Pearce, CA Bar No. 215223

11 *Admitted Pro Hac Vice*

12 Counsel for Plaintiffs

13 WEINSTEIN COUTURE PLLC

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15 Brian D. Weinstein, WSBA #24497

16 Marissa C. Langhoff, WSBA #48323

17 Alexandra B. Caggiano, WSBA #47862

18 Counsel for Plaintiffs

Appendix D

December 16 2014 3:56 PM

THE HONORABLE K.A. VAN DOORNINCK

KEVIN STOCK
COUNTY CLERK
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH
HOFFMAN, husband and wife,

Plaintiffs,

v.

NO. 14-2-07178-2

SECOND AMENDED COMPLAINT
FOR PERSONAL INJURIES

ALASKAN COPPER COMPANIES, INC.
d/b/a Alaska Copper and Brass;
ALASKA PULP CORPORATION;
ARMSTRONG INTERNATIONAL, INC.;
ASBESTOS CORPORATION LIMITED;
AW CHESTERTON COMPANY;
CERTAINTTEED CORPORATION;
CHICAGO BRIDGE AND IRON
COMPANY;
CLEAVER 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;
GENERAL ELECTRIC COMPANY;
GEORGIA-PACIFIC LLC;
KAISER GYPSUM COMPANY, INC;
KETCHIKAN PULP COMPANY;
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

SECOND AMENDED COMPLAINT FOR PERSONAL
INJURIES - 1

WEINSTEIN COUTURE PLLC
818 STEWART STREET, SUITE 930
SEATTLE, WASHINGTON 98101
(206) 508-7070 • FACSIMILE (206) 237-8650

1 successor-in-interest and parent and alter ego
2 to Alaska Pulp Corporation and Alaska Pulp
3 Corporation, Ltd;
4 PACIFIC PLUMBING SUPPLY LLC;
5 SABERHAGEN HOLDINGS, INC.;
6 TRANE U.S., INC., f/k/a American Standard,
7 Inc. individually and as successor-in-interest
8 to Kewanee Boiler Corporation;
9 UNION CARBIDE CORPORATION;
10 WHITNEY HOLDING CORP.;

11 Defendants.

12 I. PARTIES

13 Plaintiffs LARRY HOFFMAN and JUDITH HOFFMAN are a married couple who
14 reside in Vancouver, Washington.

15 Defendants and/or their predecessors-in-interest are corporations who, at all times
16 relevant herein, manufactured, sold, and/or distributed asbestos-containing products or products
17 that were used in conjunction with asbestos, and/or owned, operated, and/or controlled premises
18 where Plaintiff was exposed to asbestos.

19 Defendant Oji Holdings, Inc. is being sued as the successor-in-interest to Alaska Pulp
20 Corp. and Alaska Pulp Corp. Ltd. To that extent, Plaintiffs' complaint alleges negligence and
21 products liability against Oji Holdings for their negligent maintenance, supervision, and
22 ownership of the Alaska Pulp Corp. Mill.

23 II. JURISDICTION

This Court has jurisdiction over this cause under RCW 4.12.025 because, at all times
relevant herein, defendants transacted business and/or may be served with process in Pierce
County, Washington. Defendants Kaiser Gypsum Company, Inc. and Saberhagen Holdings, Inc.
are Washington corporations.

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III. FACTS

Plaintiff LARRY HOFFMAN (DOB: November 26, 1947; SSN: XXX-XX-3137) was exposed to asbestos and asbestos-containing products which had been mined, manufactured, produced, and/or placed into the stream of commerce by the defendants and/or was exposed to asbestos through the use of products manufactured by defendants or products that were used in conjunction with asbestos. As a direct and proximate result of this exposure, plaintiff LARRY HOFFMAN developed mesothelioma. Plaintiffs provide the following information:

- A. Specific Disease: Mesothelioma
- B. Date of Diagnosis: December 19, 2013
- C. Military: 1966-1968, 6th Army Intelligence Unit
- D. Occupation: Laborer; pipefitter
- E. Places of Exposure: Various places in Alaska
- F. Dates of Exposure: Approximately 1947-1980
- G. Current Address: 8621 NE 30th Street
Vancouver, WA 98662

IV. LIABILITY

Plaintiffs claim liability based upon the theories of product liability (RCW 7.72 et seq.); negligence; conspiracy; strict product liability under Section 402A and 402B of the Restatement of Torts; premises liability; breach of warranty; (RCW 62A); and any other applicable theory of liability. The liability-creating conduct of defendants consisted, inter alia, of negligent and unsafe design; failure to inspect, test, warn, instruct, monitor, and/or recall; failure to substitute safe products; marketing or installing unreasonably dangerous or extra-hazardous and/or defective products; marketing or installing products not reasonably safe as designed; marketing

1 or installing products not reasonably safe for lack of adequate warning and marketing or
2 installing products with misrepresentations of product safety.

3 Plaintiffs expressly disclaim and are not seeking relief for any and all claims for injury
4 against any defendant whose conduct, whether by omission or commission, was engaged in at
5 the behest of the United States or any agency or person acting under him or under color of such
6 office to the extent such a claim would implicate federal court jurisdiction under the federal
7 officer removal statute, 28 U.S.C. § 1442(a)(1), predicated on the government contractor's
8 defense articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Most
9 specifically with respect to Plaintiffs' state tort law failure-to-warn claims, Plaintiffs allege that
10 no U.S. agency, officer, or person prohibited or forbid any defendant in this case from issuing
11 and placing warnings on or with its products. Such a showing is mandatory for any defendant to
12 meet the *Boyle* test. All such claims that legitimately implicate such a defense, in the unlikely
13 event that they exist and are factually supported, are not asserted and are hereby expressly and
14 preemptively disclaimed. Plaintiffs put any defendant who may nonetheless assert such a
15 defense as a basis for federal jurisdiction over this case that Plaintiffs seek no recovery for
16 injuries sustained as a result of conduct that meets the three-prong *Boyle* test and constitutes
17 actions of a federal officer sufficient to trigger jurisdiction under 28 U.S.C. §1442(a)(1).
18 Plaintiff specifically advises all defendants of its position that such express, clear, and
19 unequivocal disclaiming of claims implicating the substantive *Boyle* defense, as well as any other
20 claims that legitimately implicate 28 U.S.C. § 1442(a)(1), render any potential future removal of
21 this case to federal court on one of these clearly-disclaimed bases objectively unreasonable under
22 *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

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V. DAMAGES

As a proximate result of defendants' negligence and/or product liability, plaintiff LARRY HOFFMAN sustained pain, suffering, and disability in an amount not now known, but which will be proven at trial. Plaintiff JUDITH HOFFMAN has sustained loss of spousal relationship as a result of LARRY HOFFMAN's illness, including a loss of emotional support, love, affection, care, services, companionship, and assistance in an amount to be proven at trial. Plaintiff LARRY HOFFMAN also sustained medical expenses, economic losses in an amount to be proven at trial. Plaintiff LARRY HOFFMAN's children have sustained loss of parental-child relationship as a result of LARRY HOFFMAN's illness.

WHEREFORE, plaintiffs pray for judgment against the defendants and each of them as follows:

1. For general and special damages specified above, including pain, suffering, loss of parental-child relationship, and disability;

2. For medical and related expenses economic loss, all of which will be proven at the time of trial;

3. Past and future loss of care, maintenance, services, support, advice, counsel, and consortium which Plaintiff JUDITH HOFFMAN would have received from Plaintiff LARRY HOFFMAN before his illness and disability caused by his exposure to asbestos;

4. For plaintiffs' costs and disbursements herein;

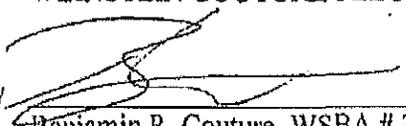
5. For prejudgment interest in the amount to be proven at trial; and

6. For such other relief as the Court deems just.

///

1 DATED this 16th day of December, 2014

2
3 WEINSTEIN COUTURE PLLC

4
5 By 

6 Benjamin R. Couture, WSBA # 39304
7 Brian D. Weinstein, WSBA # 24497
8 Marissa C. Langhoff, WSBA # 48323
9 818 Stewart Street, Suite 930
10 Seattle, Washington 98101
11 Telephone: (206) 508-7070
12 Facsimile: (206) 237-8650
13 Counsel for Plaintiffs

14
15 LEVIN SIMES LLP
16 William A. Levin, CA Bar No. 98592
17 Timothy F. Pearce, CA Bar No. 215223
18 Admitted *Pro Hac Vice*
19 353 Sacramento Street, Suite 2000
20 San Francisco, CA 94111
21 Telephone: (415) 426-3000
22 Facsimile: (415) 426-3001
23 Counsel for Plaintiffs

Appendix E

THE HONORABLE K. A. Van DOORNINCK
Hearing Date: March 24, 2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH HOFFMAN,
husband and wife,

Plaintiffs,

v.

ALASKAN COPPER COMPANIES, INC.; et
al.,

Defendants.

NO. 14-2-07178-2

PLAINTIFFS' MOTION TO AMEND
COMPLAINT

I. RELIEF REQUESTED

Plaintiffs seek leave to amend their complaint pursuant to CR 15(a) to add a claim for punitive damages as allowed under Alaska Statute § 09.17.020.

II. RELEVANT FACTUAL BACKGROUND

On March 24, 2014, Plaintiffs' filed a Complaint in Washington Superior Court alleging product liability claims. Washington law disallows claims for punitive damages. In their complaint Plaintiffs' did not include a prayer for punitive damages. On February 26, 2015 Defendant Ketchikan Pulp Company filed a Motion to Apply Alaska law. On March 13, 2015, the Court ruled Alaska law would apply to this case. Under Alaska law Plaintiffs are entitled to

1 plead a prayer for relief of punitive damages in personal injury cases.

2 III. QUESTION PRESENTED

3 Should Plaintiffs be granted leave to amend their complaint to add a punitive damages
4 claim pursuant to Alaska Statute § 09.17.020?

5 IV. ARGUMENT

6 Civil Rule 15(a) provides that leave to amend "shall be freely given when justice so
7 requires." See *Olsen v. Roberts & Schaeffer Co.*, 25 Wn. App. 225, 227 (1980). Amendments
8 should be freely granted unless the opposing party would be prejudiced. *Id.* Thus, the touchstone
9 inquiry in adjudicating a motion to amend is prejudice to the opposing party. *Id.*; see also *Del*
10 *Guzzi Construction Co. v. Global Northwest, Ltd.*, 105 Wn.2d 878, 888 (1986). Here, no
11 prejudice would result to Defendants from Plaintiffs amending their complaint to add a claim for
12 punitive damages. Both General Electric Company and Ketchikan Pulp Company argued Alaska
13 law should apply in this case. Further, in Plaintiffs' response to Defendant Ketchikan Pulp
14 Company's motion to apply Alaska law, which was served on all active defendants in this case,
15 Plaintiffs informed all defendants that they would be requesting leave to amend their complaint if
16 Alaska law applied in this case. All defendants have been put on timely notice regarding the
17 possibility that Plaintiffs' would amend their complaint to include a punitive damages claim. All
18 defendants will be served with the proposed amendment to the complaint before trial starts.

19 Unlike Washington, Alaska law allows punitive damages claims. Alaska Statute
20 §09.17.020 states the following:

- 21 (a) In an action in which a claim of punitive damages is presented to the fact finder, the
22 fact finder shall determine, concurrently with all other issues presented, whether
23 punitive damages shall be allowed by using the standards set out in (b) of this section.
If punitive damages are allowed, a separate proceeding under (c) of this section shall
be conducted before the same fact finder to determine the amount of punitive
damages to be awarded.

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THE HONORABLE K. A. Van DOORNINCK
Hearing Date: March 24, 2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH HOFFMAN,
husband and wife,

Plaintiffs,

v.

ALASKAN COPPER COMPANIES, INC.; et
al.,

Defendants.

NO. 14-2-07178-2

DECLARATION OF TIMOTHY
PEARCE IN SUPPORT OF
PLAINTIFFS' MOTION TO AMEND
COMPLAINT

I, Timothy F. Pearce, declare and state the following:

1. I am one of the attorneys for Plaintiffs in this lawsuit and have personal knowledge of the matters set forth herein.
2. Attached hereto as Exhibit A is a true and correct copy of Plaintiffs' Proposed Amended Complaint.

///

///

DECLARATION OF TIMOTHY F. PEARCE IN SUPPORT OF
PLAINTIFFS' MOTION TO AMEND COMPLAINT- 1

WEINSTEIN COUTURE PLLC
818 STEWART STREET, SUITE 900
SEATTLE, WASHINGTON 98101
(206) 508-7070 - FACSIMILE (206) 237-8650

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 above is true and correct.

3
4 DATED this 18th day of March, 2015.

5 LEVIN SIMES LLP

6 /s/ Timothy F. Pearce

7 William A. Levin, CA Bar No. 98592

8 Timothy F. Pearce, CA Bar No. 215223

9 *Admitted Pro Hac Vice*

10 Counsel for Plaintiffs

11 WEINSTEIN COUTURE PLLC

12 Benjamin R. Couture, WSBA #39304

13 Brian D. Weinstein, WSBA #24497

14 Marissa C. Langhoff, WSBA #48323

15 Alexandra B. Caggiano, WSBA #47862

16 Counsel for Plaintiffs

EXHIBIT A

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH HOFFMAN,
husband and wife,

Plaintiffs,

v.

ALASKAN COPPER COMPANIES, INC.
d/b/a Alaska Copper and Brass;
ALASKA PULP CORPORATION;
ARMSTRONG INTERNATIONAL, INC.;
ASBESTOS CORPORATION LIMITED;
AW CHESTERTON COMPANY;
CERTAINTTEED CORPORATION;
CHICAGO BRIDGE AND IRON
COMPANY;
CLEAVER BROOKS, INC.;
CRANE SUPPLY;
GENERAL ELECTRIC COMPANY;
GEORGIA-PACIFIC LLC;
KETCHIKAN PULP COMPANY;
OAKFABCO, INC., individually and as
successor-in-interest to and/or f/k/a and/or
f/d/b/a Kewanee Boiler Corporation;
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;

Defendants.

NO. 14-2-07178-2

PLAINTIFFS' THIRD AMENDED
COMPLAINT FOR PERSONAL
INJURIES

And Prayer for PUNITIVE DAMAGES

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I. PARTIES

Plaintiffs LARRY HOFFMAN and JUDITH HOFFMAN are a married couple who reside in Vancouver, Washington,

Defendants and/or their predecessors-in-interest are corporations who, at all times relevant herein, manufactured, sold, and/or distributed asbestos-containing products or products that were used in conjunction with asbestos, and/or owned, operated, and/or controlled premises where Plaintiff was exposed to asbestos.

II. JURISDICTION

This Court has jurisdiction over this cause under RCW 4.12.025 because, at all times relevant herein, defendants transacted business and/or may be served with process in Pierce County, Washington. Defendants Kaiser Gypsum Company, Inc. and Saberhagen Holdings, Inc. are Washington corporations.

III. FACTS

Plaintiff LARRY HOFFMAN (DOB: November 26, 1947; SSN: XXX-XX-3137) was exposed to asbestos and asbestos-containing products which had been mined, manufactured, produced, and/or placed into the stream of commerce by the defendants and/or was exposed to asbestos through the use of products manufactured by defendants or products that were used in conjunction with asbestos. As a direct and proximate result of this exposure, plaintiff LARRY HOFFMAN developed mesothelioma. Plaintiffs provide the following information:

- A. Specific Disease: Mesothelioma
- B. Date of Diagnosis: December 19, 2013
- C. Military: 1966-1968, 6th Army Intelligence Unit
- D. Occupation: Laborer; pipefitter

- 1 E. Places of Exposure: Various places in Alaska'
- 2 F. Dates of Exposure: Approximately 1947-1980
- 3 G. Current Address: 8621 NE 30th Street
- 4 Vancouver, WA 98662

5 **IV. LIABILITY**

6 Plaintiffs claim liability based upon the theories of product liability (RCW 7.72 et seq.);
7 negligence; conspiracy; strict product liability under Section 402A and 4028 of the Restatement
8 of Torts; premises liability; breach of warranty; (RCW 62A); and any other applicable theory of
9 liability, the liability-creating conduct of defendants consisted, inter alia, of negligent and unsafe
10 design; failure to inspect, test, warn, instruct, monitor, and/or recall; failure to substitute safe
11 products; marketing or installing unreasonably dangerous or extra-hazardous and/or defective
12 products; marketing or installing products not reasonably safe as designed; marketing or
13 installing products not reasonably safe for lack of adequate warning and marketing or installing
14 products with misrepresentations of product safety. Plaintiffs expressly disclaim and are not
15 seeking relief for any and all claims for injury against any defendant whose conduct, whether by
16 omission or commission, was engaged in at the behest of the United States or any agency or
17 person acting under him or under color of such officer to the extent such a claim would implicate
18 federal court jurisdiction under the federal officer removal statute, 28 U.S.C. §1442(a)(1),
19 predicated on the government contractor's defense articulated in *Boyle v. United Technologies*
20 *Corp.*, 487 U.S. 500 (1988). Most specifically with respect to Plaintiffs' state tort law failure-to-
21 warn claims, Plaintiffs allege that no U.S. agency, officer, or person prohibited or forbid any
22 defendant in this case from issuing and placing warnings on or with its products. Such a showing
23 is mandatory for any defendant to meet the Boyle test. All such claims that legitimately implicate
such a defense, in the unlikely event that they exist and are factually supported, are not asserted

1 and are hereby expressly and preemptively disclaimed. Plaintiffs put any defendant who may
2 nonetheless assert such a defense as a basis for federal jurisdiction over this case that Plaintiffs
3 seek no recovery for injuries sustained as a result of conduct that meets the three-prong Boyle
4 test and constitutes actions of a federal officer sufficient to trigger jurisdiction under 28 U.S.C.
5 §1442(a)(1). Plaintiff specifically advises all defendants of its position that such express, clear,
6 and unequivocal disclaiming of claims implicating the substantive Boyle defense, as well as any
7 other claims that legitimately implicate 28 U.S.C. §1442(a)(1), render any potential future
8 removal of this case to federal court on one of these clearly-disclaimed bases objectively
9 unreasonable under *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

11 V. DAMAGES

12 As a proximate result of defendants' negligence and/or product liability, plaintiff LARRY
13 HOFFMAN sustained pain, suffering, and disability in an amount not now known, but which
14 will be proven at trial. Plaintiff JUDITH HOFFMAN has sustained loss of spousal relationship
15 as a result of LARRY HOFFMAN's illness, including a loss of emotional support, love,
16 affection, care, services, companionship, and assistance in an amount to be proven at trial.
17 Plaintiff LARRY HOFFMAN also sustained medical expenses, economic losses in an amount to
18 be proven at trial. Plaintiff LARRY HOFFMAN's children have sustained loss of parental-child
19 relationship as a result of LARRY HOFFMAN's illness,

20 WHEREFORE, plaintiffs pray for judgment against the defendants and each of them as
21 follows:

22 1. For general and special damages specified above, including pain, suffering, loss of
23 parental-child relationship, and disability;

- 1 2. For medical and related expenses economic loss, all of which will be proven at the time
- 2 of trial;
- 3 3. Past and future loss of care, maintenance, services, support, advice, counsel, and
- 4 consortium which Plaintiff JUDITH HOFFMAN would have received from Plaintiff
- 5 LARRY HOFFMAN before his illness and disability caused by his exposure to asbestos;
- 6 4. For plaintiffs' costs and disbursements herein;
- 7 5. For prejudgment interest in the amount to be proven at trial;
- 8 6. For punitive damages according to proof; and
- 9 7. For such other relief as the Court deems just.

10 Dated this 18th day of March, 2015.

11 LEVIN SIMES LLP

12 /s/ Timothy F. Pearce

13 William A. Levin, CA Bar No. 98592
14 Timothy F. Pearce, CA Bar No. 215223
15 *Admitted Pro Hac Vice*
16 Counsel for Plaintiffs

17 WEINSTEIN COUTURE PLLC
18 Benjamin R. Couture, WSBA #39304
19 Brian D. Weinstein, WSBA #24497
20 Marissa C. Langhoff, WSBA #48323
21 Alexandra B. Caggiano, WSBA #47862
22 Counsel for Plaintiffs
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THE HONORABLE K. A. Van DOORNINCK
Trial Date: March 24, 2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

LARRY HOFFMAN and JUDITH HOFFMAN,
husband and wife,

Plaintiffs,

v.

ALASKAN COPPER COMPANIES, INC.; et
al.,

Defendants.

NO. 14-2-07178-2

[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR LEAVE
TO AMEND COMPLAINT

THIS MATTER comes before the Court on Plaintiffs' Motion to Amend Complaint pursuant to CR 15(a). In adjudicating this Motion, the Court has considered the following pleadings submitted by the parties:

1. Plaintiffs' Motion to Amend Complaint
2. [Proposed] Third Amended Complaint for Personal Injuries;
3. Declaration of Timothy F. Pearce in Support of Motion to Amend Complaint;
4. _____; and
5. _____; and
6. _____.

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The Court finds that Plaintiffs' are entitled to amend the complaint pursuant to CR 15(a).

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Amend Complaint is
GRANTED.

DONE IN OPEN COURT this _____ day of March, 2015.

HONORABLE K.A. VAN DOORNINCK

Presented By:

LEVIN SIMES LLP

/s/ Timothy F. Pearce
William A. Levin, CA Bar No. 98592
Timothy F. Pearce, CA Bar No. 215223
Admitted Pro Hac Vice
Counsel for Plaintiffs

WEINSTEIN COUTURE PLLC
Benjamin R. Couture, WSBA #39304
Brian D. Weinstein, WSBA #24497
Marissa C. Langhoff, WSBA #48323
Alexandra B. Caggiano, WSBA #47862
Counsel for Plaintiffs

Appendix C

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LARRY HOFFMAN and JUDITH HOFFMAN,
as husband and wife,

Plaintiff,

v.

ALASKAN COPPER COMPANIES, INC., et
al.,

Defendants.

DECLARATION OF MALIKA I.
JOHNSON IN SUPPORT OF
DEFENDANT KETCHIKAN PULP
COMPANY'S PETITION FOR
DISCRETIONARY REVIEW

I, Malika I. Johnson, am an attorney with Williams Kastner & Gibbs, PLLC, and one of the counsel of record for defendant Ketchikan Pulp Company in the above captioned matter. I make this declaration based on personal knowledge and am competent to testify to the matters contained therein.

1. David A. Shaw and I are counsel of record for Ketchikan Pulp Company.

2. We are both designated recipients with Division II of the Court of Appeals for the *Hoffman* matter.

3. We are also the attorneys who have signed all of the pleadings on behalf of Ketchikan Pulp Company filed with Division II of the Court of Appeals and the Pierce County Superior Court.

4. Neither Mr. Shaw nor I received a copy of the Order Denying Ketchikan Pulp Company's Motion for Reconsideration in the *Hoffman* matter which was apparently filed in Division II of the Court of Appeals on September 1, 2016 at 3:09 p.m.

1 5. On October 13, 2016, I called Division II to check on the status of the motion
2 and was informed the Order Denying had been filed.

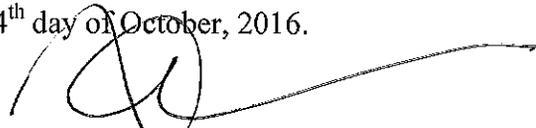
3 6. I inquired why we had not received a copy and was told that the Order was sent
4 to David Chawes via email. David Chawes is an attorney at Preg, O'Donnel & Gillett and does
5 not represent Ketchikan Pulp Company in this matter.

6 7. Debbie Marks, who works at Division II, emailed me a copy of the Order on
7 October 13, 2016.

8 8. October 13, 2016 was the first time counsel for Ketchikan Pulp Company was
9 provided notice of the Order Denying Reconsideration issued by Division II of the Court of
10 Appeals.

11 The foregoing statement is made under penalty of perjury under the laws of the State of
12 Washington and is true and correct.

13 Signed at Seattle, Washington, this 24th day of October, 2016.



14
15 Malika I. Johnson, WSBA #39608
16 WILLIAMS, KASTNER & GIBBS PLLC
17 601 Union Street, Suite 4100
18 Seattle, WA 98101-2380
19 Tel: (206) 628-6600 Fax: (206) 628-6611
20 Email: wkgasbestos@williamskastner.com

Appendix D

Johnson, Malika

From: Marks, Debbie <Debbie.Marks@courts.wa.gov>
Sent: Thursday, October 13, 2016 10:33 AM
To: Johnson, Malika
Attachments: Order Larry Hoffman v General Electric Company.pdf

FILED
COURT OF APPEALS
DIVISION II

2016 Sept. 1 PM 3:09

STATE OF WASHINGTON

BY DM
DEPUTY

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

ORDER DENYING MOTION TO
RECONSIDER

No. 47439-5-II

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.

The respondent Ketchikan Pulp Company has filed a motion for reconsideration of the unpublished opinion filed August 9, 2016. For the first time, the respondent asks us to apply the summary judgment standard whereas both respondents argued and applied the CR 12(b)(6) standard in their direct appeal briefs. Therefore, it is hereby

ORDERED, that the motion for reconsideration is denied.

FOR THE COURT

PANEL: Jj. Johanson, Melnick, Sutton

DATED this 1st day of September, 2016.


RESIDING JUDGE