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No. 34725-3-II

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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JACK DUNCAN and JEAN DUNCAN,

*Appellants,*

v.

SABERHAGEN HOLDINGS, INC., et al.,

*Respondents.*

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**BRIEF OF RESPONDENT CONOCOPHILLIPS COMPANY**

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## **I. STATEMENT OF THE CASE**

Appellants Jack Duncan and his wife Jean (hereinafter “the Duncans”) filed suit in 2005 against ConocoPhillips Company (hereinafter “ConocoPhillips”) and numerous other defendants, alleging that Mr. Duncan was injured as a consequence of his exposure to asbestos at various work sites throughout his career as a pipefitter, from roughly 1949 (following service in the Navy from 1945-49) until 1980. CP 4-8, 257-259. His claims against ConocoPhillips are premised on his work at the Phillips Liquid Natural Gas facility in Kenai, Alaska, from September 9, 1968, until November 1, 1968, and a second job there from November 20, 1968, until January 7, 1969. CP 263 (p.152, lines 16-25 – p.153, line 1).

Jack Duncan was contacted by Florida attorneys in 1996 and at their invitation underwent a chest x-ray that was interpreted on or about June 26, 1996, as abnormal. CP 262 (p.142, lines 17-20), 941. Shortly after undergoing this x-ray, he received a letter from a doctor advising that he had asbestosis. CP 262 (p. 144, lines 10-11). No later than February 10, 1997, his Seattle doctors diagnosed asbestosis (CP 265), a disease caused by inhalation of asbestos fibers. On April 28, 1997, the Florida lawyers who had arranged for his chest x-ray in 1996 filed suit on his behalf in the U.S. District Court for the District of Alaska, alleging

asbestos-caused injury against a number of alleged manufacturers or suppliers of asbestos products or asbestos-containing equipment. CP 229-232. That case was ultimately settled with Mr. Duncan's receiving compensation for his claims of asbestos-caused disease. CP 262 (p.145, lines 19-24). In April 2005, Mr. Duncan was diagnosed with mesothelioma, a type of cancer of the lung usually related to asbestos exposure. CP 32, 260 (p.27, lines 8-15), 266-269. The Duncans filed suit in Pierce County Superior Court against ConocoPhillips and the other defendants on September 9, 2005, seeking damages arising from Mr. Duncan's mesothelioma. CP 4-8.

Jack Duncan was deposed in Anchorage on January 25, 2006, and in Seattle on February 21, 2006. His testimony revealed that he was at all relevant times a resident of Alaska (CP 312 – p.12, lines 21-23), and all of the work experiences during which he claims to have been exposed to asbestos occurred in Alaska (see, *e.g.*, CP 263 as to ConocoPhillips). Based on the foregoing facts, ConocoPhillips and Unocal/Collier Chemical Corporation filed separate motions for summary judgment (CP 233-269, 178-232, respectively), arguing that Alaska, not Washington, had the most significant relationship with the Duncans' claims and that Alaska law should apply to them. ConocoPhillips and Unocal/Collier Chemical

further argued that the claims were not timely under Alaska law and must be dismissed. Following a lengthy oral argument on March 30, 2006, the Honorable Beverly G. Grant held that Alaska law did apply and that it barred the Duncans' claims, justifying summary judgment in respondents' favor. CP 1112-1114. She certified the issue as appropriate for immediate appeal. CP 1115.

## II. ARGUMENT

### A. Standard of Review.

As this Court is well aware, it must perform a *de novo* review of a summary judgment. See *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 962-63, 948 P.2d 1264, 1269 (1997). It is well-settled that facts and inferences are viewed in the light most favorable to the nonmoving party. 133 Wn.2d at 963, 948 P.2d at 1269. Summary judgment is proper, of course, where there are no material issues of disputed fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). That is the case here.

### B. The Duncans' Causes of Action Accrued Upon Notification of his Diagnosis with Asbestosis.

The Duncans begin their argument, on page 17 of their brief, by discussing the "traditional damages rule," which they contend does not apply in this case. The so-called traditional rule, adopted in both Alaska

and arguably in Washington as well (see below), simply states that a cause of action accrues at the time when a party is in a position to know all the essential elements of the cause of action. In a claim for negligence, a party must prove duty, breach, causation, and injury. In the context of the traditional rule, that means the cause of action accrues, and the statute of limitations begins to run, when the claimant is in a position to know that a duty has been breached and that the breach has caused an appreciable injury (**but not all injuries that may ultimately result from the wrong**).

The Duncans argue for application in their case of the “separate and distinct injuries” rule. That rule allows for multiple causes of action corresponding to each separate injury that may result from a single wrong. The Duncans’ focus, which is mistaken, is on each of “the” injuries that arises from the allegedly wrongful conduct, but the applicable law focuses only on the first appreciable injury that arises. In this case, the relevant injury was Mr. Duncan’s asbestosis, diagnosed no later than April 1997.

**C. Alaska Law, Not Washington Law, Applies.**

The Duncans agree that Alaska law, with its two-year statute of limitations for personal injury claims, applies to their claims in this case. Appellants’ Brief, p. 15, note 13. AS 09.10.070. They attempt to focus your attention, however, on a single decision from the state of

Washington, namely, *Niven v. E.J. Bartells Co., et al.*, 97 Wn. App. 507, 983 P.2d 1193 (Div. 1 1999), *review denied*, 141 Wn.2d 1016, 10 P.3d 1071 (2000). They argue that its holding recognizing a “two injury rule” or “separate and distinct injuries” rule, whereby the discovery rule permits application of separate statutes of limitations for each distinct injury arising from a toxic tort, establishes Washington law on the issue. They then argue that Alaska law is the same. In fact, there is no justification for believing that Alaska’s rule is consistent with *Niven*. Ironically, it is arguable that Alaska law is consistent with Washington law, but that law is not established by *Niven* but rather by the Washington Supreme Court decision of *Green v. A.P.C., et al.*, 136 Wn.2d 87, 960 P.2d 912 (1998), a decision that is notably cited only once in the Duncans’ brief and then only with respect to a statement of the standard of review for orders granting summary judgment. Appellants’ Brief, pp. 4-5.

Like the case at bar, *Niven* involved two lawsuits, the first filed in 1980 for personal injuries related to asbestosis, settled in 1986, and the second filed in 1993 following Niven’s diagnosis with lung cancer. The second suit was filed within three years of his diagnosis with cancer but obviously more than three years after he was aware he was suffering from asbestosis. Attempting to distinguish prior case law, the court emphasized

the evidence that asbestosis and lung cancer were different disease processes, as the Duncans do in this case, and held under the circumstances that it would be unfair to hold that the statute of limitations with respect to the claim related to lung cancer expired three years after accrual of the original cause of action. In so doing, the *Niven* court actually acknowledged that the Supreme Court in *Green* had declined to apply the so-called “separate and distinct injuries rule” but reasoned, tortuously, that its application of the accepted “traditional discovery rule” would have yielded the same result sought by Niven in his case, namely, a conclusion that the cause of action related to his lung cancer had not accrued until he discovered that he had lung cancer.

The language of the Washington Supreme Court in *Green* does not support *Niven*’s reasoning. Justice Talmadge began his opinion with the following summary:

We are asked in this case to decide if distinct statutory limitations periods apply to putatively separate and distinct injuries arising from exposure to toxic products. We reaffirm the basic rule that for purposes of the statute of limitations a cause of action claiming harm from exposure to a toxic product accrues when the plaintiff knew or should have known the essential elements of the claim. **As to the harm element of a claim, the plaintiff’s action accrues ordinarily upon awareness of some appreciable injury caused by the exposure to the defendant’s toxic product even if the full extent of the harm is unknown.** (emphasis added)

136 Wn.2d at 91, 960 P.2d at 913. Later, Justice Talmadge stated the general rule, and elaborated on it, as follows:

The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm...

The statute of limitations is not postponed by the fact that further, more serious harm may flow from the wrongful conduct... Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

**The adoption of the discovery rule...modified this statement by declaring the statute of limitations does not attach at once, but only upon discovery of the harm. Nevertheless, the essence of the statement remains the same: the running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur.**

136 Wn.2d at 96-97, 960 P.2d at 916 (emphasis added).

The court stated that the aforesaid rule was dictated by important policy considerations "such as Washington's strong preference for avoiding the splitting of causes of action." 136 Wn.2d at 97, 960 P.2d at 916. Significantly, in unmistakable and unequivocal language, the court noted the following:

**In effect, [recognizing the separate and distinct injuries rule would mean that] a plaintiff would have a new**

**action for damages for each new condition that became manifest. This could also lead to the highly impractical consequence of multiple statutes of limitations applying to the same allegedly wrongful conduct. We reject an approach leading to such a result.**

136 Wn.2d at 97, 960 P.2d at 916 (emphasis added).

The plaintiff in *Niven* argued that the *Green* court had adopted *sub silentio* the separate and distinct injuries rule that is endorsed by the Duncans herein. The *Green* court acknowledged that it had been urged by Green and *amicus curiae* to apply such a rule but stated that Washington had not yet applied such an exception to the traditional rule regarding the harm element of a cause of action, and the court declined to do so in that case. Admittedly, confusion was introduced in the opinion by language stating that the court refused to apply the separate and distinct injuries exception “in the absence of appropriate testimony” that the conditions in question in that case were truly separate and distinct consequences of the same toxic exposure. The court may have been intending to say, in effect, that the traditional rule was the law in Washington and that it would not even consider changing the rule without appropriate medical testimony, which it found lacking. Whether it would have adopted the separate and distinct injuries exception under different facts is pure speculation and

cannot change the fact that the court unequivocally stated that it declined the invitation to reject the traditional rule.

As far as ConocoPhillips has been able to determine, there is no decision by the Washington Supreme Court since *Green* that would change the law in Washington, and the *Niven* decision so heavily relied upon by the Duncans herein therefore must be considered not good law in Washington.

**D. Alaska Law Bars the Duncans' Mesothelioma Claim as Untimely.**

ConocoPhillips submits that there are two Alaska Supreme Court decisions, discussed at length before the trial court in the instant case, that resolve the issue before the Court here, *Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265 (Alaska 2001), and *Smith v. Thompson*, 923 P.2d 101 (Alaska 1996).

In *Sopko*, plaintiff Sopko was allegedly exposed to toxic fumes in September 1990 while working at a warehouse following a fire. He experienced serious physical symptoms on the first day of his work at the warehouse, and a doctor diagnosed him as suffering from “toxic fume exposure” no more than nine days later. He did not file suit against the owners of the warehouse until 1996, however, after he had been diagnosed with dementia. Defendant Schlumberger asserted that Sopko’s claims

were barred by the two-year statute of limitations for injury claims, but the case turned on whether plaintiff's claims were protected by Alaska's discovery rule. The court noted that the discovery rule tolls the usual two-year statute of limitations until the plaintiff discovers or reasonably should discover the existence of all of the elements of his cause of action. 21 P.3d at 1270. The court also noted that the discovery rule protects plaintiffs whose injury is known but the cause is not reasonably discoverable during the limitations period. 21 P.3d at 1270.

The Alaska Supreme Court held that plaintiff "reasonably should have discovered" all of the elements of his cause of action when he had "sufficient information to prompt an inquiry into the cause of action, if all of the essential elements of the cause of action may reasonably be discovered within the statutory period at a point when a reasonable time remains within which to file suit." 21 P.3d at 1271.

Sopko argued that he did not know until at least 1995 that he had a permanent injury caused by the defendant's conduct. The court held, however, that he had sufficient information in the form of a doctor's diagnosis of "toxic fume exposure" on or about September 20, 1990, combined with the severe symptoms he experienced while performing his job at the warehouse earlier that month, to prompt an inquiry into his cause

of action. The court stated that an injured plaintiff has sufficient information to prompt an inquiry into his cause of action once he learns that he has a “medically documented...condition,” citing *Cameron v. State*, 822 P.2d 1362, 1367 (Alaska 1992).

In *Smith v. Thompson*, the plaintiff Barbara Smith was involved in a motor vehicle accident in November 1987 when John Thompson was unable to stop his truck before sliding across slick pavement and striking Ms. Smith’s car. 923 P.2d at 102. Ms. Smith first suffered a muscle strain that resolved shortly after her accident. She settled with Thompson’s insurer and proceeded to enjoy a pain-free year in 1988 and into 1989. She experienced problems in 1989 but attributed them to circumstances other than her 1987 accident. Finally, in 1992 she was diagnosed with a “vertically disarranged” neck, which she attributed to the 1987 accident, and thereafter filed suit against Thompson. 923 P.2d at 103.

The *Smith* court held that the limitations period was triggered when Ms. Smith discovered that she might have a compensable injury. 923 P.2d at 106. The court’s statement of the relevant question it faced is instructive: “Does knowledge of some compensable injury ... trigger the statute of limitations even if the full extent of damages is as yet unknown?” 923 P.2d at 106. Because the court characterized the

“vertically disarranged” neck as a latent condition, Ms. Smith’s later-diagnosed condition, albeit developing from a discrete traumatic incident, was comparable to Jack Duncan’s mesothelioma.

In reaching the decision that knowledge of a compensable injury does, in fact, trigger the statute of limitations, the *Smith* court cited approvingly two cases from other jurisdictions, *Golla v. General Motors Corp.*, 167 Ill.2d 353, 657 N.E.2d 894 (1995), and *Stephens v. Dixon*, 449 Mich. 531, 536 N.W.2d 755 (1995), for the proposition that plaintiffs need not realize the full extent of their injuries to trigger the running of the statute of limitations. The *Golla* case is particularly relevant to an understanding how Alaska would rule in a case like the one at bar.

In *Golla*, the Illinois Supreme Court held that the limitations period began to run on plaintiff at the time of her accident when she suffered contusions on her chest and wrist. 657 N.E.2d at 899. Although the plaintiff eventually developed reflex sympathetic dystrophy, the court held that her cause of action accrued, and the limitations period commenced, at the time plaintiff knew or should have known that she had suffered “an injury and that the injury may have been wrongfully caused.” 657 N.E.2d at 899.

The plaintiff in *Golla* cited to the court cases involving actions for latent physical injuries, including cases of exposure to toxic products in the workplace, generally involving asbestos-related diseases, in which the plaintiffs did not know within the applicable limitations period that a harm-producing event had occurred. Concluding that the asbestos cases cited by Ms. Golla were not supportive of her claims, the court noted that in those cases, “the plaintiffs did not discover that they suffered *any* injury until long after the tortious conduct occurred.” 657 N.E. 2d at 901. Of course, in the instant case, although discovery of any injury was postponed many years after the allegedly causative events, the Duncans knew no later than 1997 that Mr. Duncan had suffered an injury, and they were then in a position to know that it was wrongfully caused.

Ms. Golla acknowledged in her case that she was aware at the time of her accident that she had suffered “*some*” injury but argued that it was *de minimis* when compared with the latent injury (reflex sympathetic dystrophy) she discovered later. She argued that adopting a rule that the statute of limitations was triggered upon knowledge of any injury “would encourage plaintiffs to sue over virtually every minor injury for fear that more significant injuries might appear later.” 657 N.E.2d at 902. The court responded as follows:

The injuries that the plaintiff suffered at the time of the accident, even if appropriately characterized as *de minimis*, were sufficient to put her on notice that her rights had been violated and gave her a reasonable opportunity to bring an action within the limitations period. To hold that the statute of limitations did not begin to run until the plaintiff realized the full extent of her damages would circumvent the legislature's intent to promote the prompt resolution of claims.

657 N.E.2d at 902.

The court said plaintiff's position, if adopted, would give her and others like her the power to determine when they should bring an action, namely, only at the time when they subjectively decided their injuries were sufficiently serious. Acknowledging that a rule allowing tolling of the statute of limitations until that determination was made by each plaintiff would afford greater opportunities for redress against alleged wrongdoers, the court nonetheless stated that adoption of such an approach 'would eliminate the statute of limitations as a viable defense and undermine the purposes underlying such statutes.' 657 N.E.2d at 902. The court unequivocally rejected plaintiff's position, and the position taken by the Duncans herein, as follows:

[T]he proposed rule would allow injured parties to bring a separate cause of action for each newly discovered injury, even in circumstances where the injured party has already gone to trial and recovered damages for other injuries. Adoption of the plaintiff's approach would also require recognition of a separate two-year limitations period for

each medically distinct injury arising from a single traumatic event...The limitations period is not tolled and does not begin anew simply because a latent injury may arise from the same traumatic event.

657 N.E. 2d at 902-903.

In *Stephens*, another case cited by the Alaska Supreme Court in *Smith*, the plaintiff was in an automobile accident and sustained minor contusions, abrasions, as well as muscle pain and stiffness throughout her body, including her neck. 536 N.W.2d at 756. Although these conditions resolved themselves within a few weeks, she developed more neck pain two years later. 536 N.W.2d at 756. Plaintiff was later diagnosed with spondylolysis of the neck vertebrae, a condition she characterized as latent and associated with her prior injuries. 536 N.W.2d at 756. She filed suit against defendant following diagnosis of her spondylolysis. The Michigan Supreme Court held that plaintiff's case was time-barred and that the limitations period begins to run upon notice of all the elements of an action, including an injury: "Later damages may result, but they give rise to no new cause of action nor does the statute of limitations begin to run anew as each item of damage is incurred." 536 N.W.2d at 758, quoting from *Connelly v. Ruddy's Equipment Repair*, 388 Mich. 146, 151, 200 N.W.2d 70, 73 (1972). The *Stephens* court explained that "[i]n order to promote finality and prevent overburdening of our judicial resources, we

cleave to the general principle that the discovery of an injury, not its attainment of some threshold status, commences the running of the statute of limitation.” 536 N.W.2d at 759.

Similar to Mr. Duncan, in each of the cases above, after a period of time had passed since the event(s) that caused his or her original condition, the plaintiff suffered another condition worse than the first. In *Sopko*, the plaintiff first suffered from “toxic fume exposure” but later developed dementia. In *Smith*, the plaintiff first suffered from a muscle strain but later manifested symptoms of a structurally disarranged neck. In *Golla*, the plaintiff suffered sprains and contusions, but eventually developed reflex sympathetic dystrophy. Finally, in *Stephens*, the plaintiff first suffered from contusions, abrasions, and muscle pain and stiffness but eventually developed spondylolysis of the neck.

The Duncans seek to distinguish the foregoing cases by arguing that, unlike their case, the later claimed injuries were related to the first-noted conditions, but there is simply no reason to believe that is so or to believe that the referenced courts would have found such a distinction relevant. For example, the injuries suffered initially by Sopko, even including the reported mental confusion, cannot seriously be considered to have progressed inevitably to the claim of dementia five years later.

Similarly, the development of reflex sympathetic dystrophy in the plaintiff in *Golla* cannot be seen as an inevitable progression of the contusions suffered initially.

Further, the Duncans attempt to characterize *Sopko* and *Smith* as distinguishable from the case at bar because they involved a sudden traumatic event (or “particularized tortious incident with immediate injury” – Appellants’ Brief, p. 36) rather than an ongoing series of allegedly wrongful acts resulting in Mr. Duncan’s exposure to asbestos, but this distinction has no significance. Neither the *Sopko* nor *Smith* decision turns on the fact that the accidents involved a single traumatic event but rather on the timing of the plaintiffs’ acquiring knowledge of their causes of action.

In short, Alaska law, applying the discovery rule, is clear that the statute of limitations for Mr. Duncan’s cause of action against all potentially responsible defendants for alleged exposures to asbestos began to run when Mr. Duncan acquired notice that he had a medically documented condition, namely, his diagnosis with asbestosis in (or before) April 1997, because at that point he was in a position to realize that he had a cause of action and to identify the potentially responsible parties. It would be completely disingenuous for him to argue otherwise in light of

his filing suit in 1997 for his asbestos-related injuries. He not only had sufficient information in 1997 to prompt an inquiry, but he clearly made such inquiry, leading him to file suit in the U.S. District Court for the District of Alaska. As such, the statute of limitations certainly began to run at the latest in February 1997 and expired, as to all defendants allegedly responsible for his asbestos-related disease, in February 1999.

**E. Mesothelioma Does Not Constitute a New Cause of Action.**

The Duncans argue, as did Sopko in his lawsuit, that they had insufficient information to start an inquiry into their cause of action until the full extent of the injury was revealed. In so arguing, the Duncans continue to confuse “cause of action” with “injury” or “damages.” Their argument that mesothelioma gave rise to a new cause of action betrays a misunderstanding of the terms and their distinctions.

The Alaska Supreme Court has defined these three terms. *See Doe v. Colligan*, 753 P.2d 144, 145 n.2 (Alaska 1988). The court defined damages as the “relief which the law affords for the invasion of [a] right ... the relief being limited by the measure of the damage which the law prescribed” whereas an injury “denotes the legal wrong to be redressed.” 753 P.2d at 145 n.2. On the other hand, the court stated that “[a] *cause of action must be distinguished ... from the remedy*[,] which is simply the

means by which the obligation or corresponding duty is effectuated *and also from the relief sought.*” 753 P.2d at 145 n.2 (quoting *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App.3d 116, 122, 99 Cal. Rptr. 350, 354 (1971)). The *Venuto* court defined “cause of action” as follows:

The essence of a cause of action is the existence of a primary right and one violation of that right, i.e., it arises out of an antecedent primary right and corresponding duty, and a breach of such primary right and duty by the person upon whom the duty rests...The primary right and duty and the delict or wrong constitute the cause of action in the legal sense...‘The cause of action is simply the obligation sought to be enforced.’

22 Cal. App.3d at 122, 99 Cal. Rptr. at 354, quoting from *Colvig v. RKO General, Inc.*, 232 Cal. App.2d 56, 65-66, 42 Cal. Rptr. 473, 480 (1965).

Based on these definitions, Mr. Duncan’s “cause of action” must have accrued when he discovered that his rights were violated and was in a position to determine causation and to identify the potentially responsible parties. While Mr. Duncan was allegedly exposed to asbestos for many years, it was not until he discovered an appreciable injury, or a “medically documented condition,” that he was in a position to act against the alleged wrongdoers. His asbestosis and mesothelioma are within the definition of “injury,” and any recovery would be within the definition of “damages.” Thus, as Alaska law defines these terms, the cause of action relates to the

asbestos exposure, and the asbestosis and mesothelioma are injuries arising from his cause of action.

**F. John's Heating Service v. Lamb Does Not Help the Duncans.**

The Duncans spend several pages of their brief discussing the recent Alaska Supreme Court case of *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002), *aff'd on reh'g following remand*, 129 P.3d 919 (Alaska 2006). They cite these two decisions as support for their thesis that claims for a latent injury that was undiscovered or undiscoverable more than two years prior to a party's filing suit cannot be barred by the statute of limitations. In fact, the decisions do not stand for that proposition at all. In *John's Heating Service*, plaintiffs had hired a repair company to fix a balky furnace in October 1991. They developed symptoms of carbon monoxide poisoning but continued to live in the house. In January 1993 they hired a repairman from a different company to look at the furnace, and he suggested to them that their physical problems might be related to carbon monoxide poisoning caused by the furnace and recommended they see a doctor.

Plaintiffs filed suit in December 1993. The court held that until they were alerted to the possible cause of their physical complaints in January 1993, plaintiffs neither knew, nor should have known, that they

had a cause of action because they were not in a position to determine all the essential elements of a cause of action against John's Heating Service, the original contractor. The court held that their December 1993 suit was timely because under the discovery rule the statute of limitations did not begin to run until January 1993. Although the Lambs knew they had physical problems prior to January 1993, and evidently prior to December 1991, they did not know until at least January 1993 what was causing their problems. The Duncans knew no later than 1997, however, not only that Jack Duncan had a medically documented condition, but, unlike the Lambs, the Duncans knew as soon as the condition was diagnosed what had caused it. In short, there is nothing in the two *John's Heating Service* decisions that is helpful to the Duncans on this appeal.

**G. The Duncans Misunderstand the Alaska Rule Regarding Tolling.**

At pages 42-43 of their brief, the Duncans emphasize that they made reasonable inquiries about Jack Duncan's condition following receipt of the diagnosis of asbestosis in 1997. They repeat their argument that no inquiry could have revealed that he would develop mesothelioma and further contend that because he was making a reasonable but "ultimately unproductive inquiry," the statute of limitations, if it should be held to have started to run on the diagnosis of asbestosis, should be held to

have been tolled until the diagnosis of mesothelioma had been rendered. Once again, the Duncans confuse the applicable rules and relevant considerations. Under Alaska law (and arguably under Washington law), it does not matter whether mesothelioma is a separate and distinct injury from asbestosis (a contention that ConocoPhillips did not contest for purposes of its motion for summary judgment because it is irrelevant under Alaska law). Mesothelioma is the injury for which damages are sought, not the obligations to Jack Duncan that the instant lawsuit seeks to enforce.

ConocoPhillips acknowledges, as it has always done, that Alaska has a discovery rule (were that not so, it would be arguing that the statute expired two years after Mr. Duncan's last exposure to asbestos). The crux of its disagreement with the Duncans is how the discovery rule is applied, however. Alaska law, and the so-called traditional rule recited in the Washington Supreme Court's decision in *Green*, holds that the statute begins to run when the claimant is in a position to determine all the essential elements of his/her cause of action and defines that date as the time when the claimant realizes or should realize that he/she has been injured, in some appreciable, medically documented way, and is in a position to determine what has caused that condition, and further can

determine, in the event it has resulted from breach of an obligation owed to the claimant, who the potentially responsible parties are.

The realization, actual or constructive, of the injury relates only to an appreciable injury, not every injury, whether separate or related to the first, that may ultimately arise from the allegedly wrongful conduct. Therefore, when the Duncans argue in the last paragraph of their brief, at page 44, that “[a]t the very least there exists a genuine issue of material fact on whether Duncan made reasonable inquiries about the presence of mesothelioma once he had notice of a possible claim,” they are missing the point. Once Jack Duncan was diagnosed with asbestosis, his further inquiries were irrelevant to a determination of when the statute of limitations began to run. Alaska law provides that a statute of limitations may be tolled under some circumstances, but in a case like the instant one it does not recognize tolling after a claimant knows or should know all the essential elements of his/her cause of action, including knowledge that he/she has suffered a compensable injury, albeit not the only or most serious compensable injury he/she may develop as a result of the allegedly wrongful conduct.

H. **The Duncans' Emphasis on the Acts of Prior Counsel is Misplaced.**

The Duncans attempt under RAP 10.3(a)(7) to introduce new evidence into the record that the Florida attorney involved in their 1997 lawsuit has been indicted in connection with his handling of client funds in asbestos cases. The cited rule permits inclusion of such materials not contained in the record on review only upon leave of this Court, but the Duncans have not properly sought such leave. RAP 9.11 sets forth conditions in which the Court could appropriately permit additional evidence at this stage of proceedings, but they do not apply in this case. Regardless, evidence of the Duncans' prior counsel's indictment is not relevant to the issues on appeal in this case.

The record available to the trial court did indicate that the Duncans' Florida counsel has been disbarred. The Duncans also argued in their brief to this Court that Florida counsel never interviewed Mr. Duncan and failed to advise him of his rights. The Duncans seem to be suggesting that Florida counsel was never authorized to file suit on their behalf in 1997. What is not emphasized in their brief, although briefly acknowledged, is that they accepted settlement money from this lawsuit, thus ratifying what had been done for them. *See Morr v. Crouch*, 19 Ohio St.2d 24, 29, 249 N.E.2d 780, 783 (1969). They also conveniently choose

not to note in their brief that Florida counsel associated on the 1997 case with Fairbanks counsel, Arthur Lyle Robson (CP 229), and they do not suggest that Mr. Robson failed to advise them of their rights.

This would not seem to be a situation where the Duncans can fairly claim to have been taken advantage of or manipulated by unscrupulous counsel. If they can, however, prove such a claim, their recourse for their counsel's failure to name as defendants in the 1997 lawsuit all the potentially responsible parties for Mr. Duncan's exposure to asbestos is against their counsel in that lawsuit. It was at that time that ConocoPhillips and the other respondents should have been identified and sued, rather than eight years later, if the Duncans believed those parties truly shared in the responsibility for their injuries and damages.

**I. All Parties, Not Just Plaintiffs, Are Entitled to Fundamental Fairness.**

The Duncans argue at great length that rejecting the so-called "separate and distinct injuries" rule would lead to "absurd and unjust" results. While reasonable people could differ on whether the so-called traditional rule or the "separate and distinct injuries" rule is the better approach to the problems and policy considerations presented in this case, the trial court, and this Court in reviewing the trial court's decision *de novo*, must simply apply Alaska law to decide the issue.

Although the Duncans repeatedly cite the mantra of “fundamental fairness” in their brief, there is nothing fundamentally unfair about applying the traditional rule, a rule that has enjoyed wide acceptance in many jurisdictions, including Washington, for a long time. Alaska, like those jurisdictions, has endorsed the concept that it is not unfair to expect a party who is on notice that he may have a cause of action to commence an investigation to determine whether that is so and, if he concludes that he does, to file suit in a timely manner. It is not unfair because there is value in minimizing stale claims, and the longer an aggrieved party delays in filing suit, the greater the likelihood of unfairness to the defendant who often faces with each day that passes a more difficult task of locating witnesses or documents or other evidence that may be relevant to the merits of the claim.

In the case at bar, fundamental fairness would seem to dictate that the Duncans be required to sue ConocoPhillips within two years of their realization that Jack Duncan had suffered an appreciable injury, namely, by 1998 or 1999, because he believed by 1996 or 1997 at the latest that his injury was caused by exposure to asbestos during his work history, and he was then in a position to identify all of the potentially responsible parties. ConocoPhillips submits that fundamental fairness requires no less. This is

not a situation where so little time had passed since the allegedly wrongful act that the Duncans could not have discovered they had a cause of action. Thirty years had passed since the alleged exposures at the Phillips Liquid Natural Gas plant in Kenai, Alaska. Allowing the Duncans to wait another six years to sue is fundamentally unfair to ConocoPhillips and the other respondents herein who were named defendants for the first time in the 2005 lawsuit.

### **III. CONCLUSION**

The Duncans ask this Court to ignore Alaska law and reverse the trial court's Order granting summary judgment to ConocoPhillips and the other respondents. Although no Alaska Supreme Court case has dealt with the exact same fact pattern that is presented herein, the Duncans are wrong in arguing that the Alaska Supreme Court has not revealed how it would rule in a case like this one. The Alaska decisions in *Sopko* and *Smith*, and the *Golla* decision from Illinois, are easily extrapolated to provide guidance for the instant case. The Alaska rule is that the statute of limitations begins to run on accrual of the cause of action, which is the time when a claimant is put on inquiry notice and realizes, or should realize, that he/she has all the elements of a cause of action. With respect to the harm element of the inquiry, it is enough that there has been an

appreciable, medically documented injury, provided the claimant realizes or should realize the likely cause of the injury and the potentially responsible parties. To conclude that the statute of limitations should either not run unless the claimant believes the documented condition is sufficiently serious, or that the statute should be tolled indefinitely pending development of a sufficiently serious condition, cannot be justified. In the words of the *Golla* court, adoption of the Duncans' proposal would "require recognition of a separate limitations period for each medically distinct injury arising from a single traumatic event." Although a legislature could endorse that proposal, there is no evidence that it has been endorsed by Alaska.

In short, the Duncans were in a position in 1996-97 to identify ConocoPhillips as a potentially responsible party for the medically documented condition of asbestosis revealed to the Duncans at that time. In 1997 they sued a number of parties seeking to recover damages for that injury. The cause of action related to an alleged breach of a duty owed to Jack Duncan not to expose him to asbestos in the workplace. It is not unfair to require a party with the information available to the Duncans in 1997 to bring before the court all of the parties they believed responsible for their injuries. Their decision, or the decision of their attorneys, not to

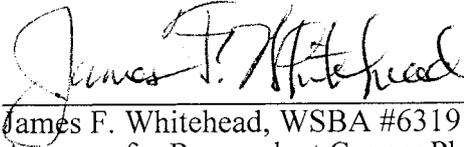
sue all of the potentially responsible parties may have been made for strategic reasons unknown to us today, but it should have consequences for them. ConocoPhillips was denied for six years the opportunity to defend itself. Given that the allegedly wrongful acts or omissions occurred in 1968-69, it is almost certain that an additional six years resulted in a loss by death, disappearance, or failed memories of witnesses who might have addressed in 1997 (or as late as 1999) the allegations of wrongdoing, and it is also likely that even if relevant documentary evidence could have been located in 1997-1999, with the additional passage of time locating such evidence became more problematic.

It is precisely in a case like this that it is not unfair to require claimants to act promptly to preserve their claims once they are in a position to know that they do, in fact, have viable causes of action. Certainly, that is what the law applicable to this case requires.

ConocoPhillips respectfully requests that this Court affirm the decision of the trial court, barring the Duncans' claims for damages asserted in their 2005 lawsuit.

DATED this 16<sup>th</sup> day of August, 2006.

Respectfully submitted,

A handwritten signature in cursive script that reads "James F. Whitehead". The signature is written in dark ink and is positioned above a horizontal line.

James F. Whitehead, WSBA #6319  
Attorney for Respondent ConocoPhillips

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**CERTIFICATE OF SERVICE**

**The undersigned certifies under penalty of perjury under the laws of the state of Washington that on August 16, 2006, she caused to be served a copy of the foregoing BRIEF OF RESPONDENT CONOCOPHILLIPS COMPANY upon the following persons via U.S. Mail.**

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DIVISION II  
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STATE OF WASHINGTON  
BY  DEPUTY

**DATED this 16th day of August, 2006 at Seattle, Washington.**

  
**Karyn Luckett, Legal Coordinator**

FILED  
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DIVISION II

No. 34725-3-11

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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STATE OF WASHINGTON  
BY C. Miller  
Clerk

JACK N. DUNCAN and JEAN W. DUNCAN,

*Plaintiffs/Appellants,*

v.

SABERHAGEN HOLDINGS, INC., et al.,

*Defendants/Respondents.*

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**RESPONDENT J.T. THORPE & SON, INC.'S  
JOINDER TO RESPONDENT CONOCOPHILLIPS COMPANY'S BRIEF  
IN RESPONSE TO APPELLANTS' BRIEF**

---

*ATTORNEYS FOR RESPONDENT J.T. THORPE & SON, INC.*

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## I. STATEMENT OF THE CASE

In 1997, appellant Jack Duncan (“Mr. Duncan”) was diagnosed with asbestosis allegedly due to workplace exposure to asbestos. CP 231; CP 265. On April 29, 1997, he and his wife, Jean Duncan, the plaintiffs-appellants in this lawsuit (“appellants”), filed suit against a number of alleged manufacturers or suppliers of asbestos-containing equipment in the U.S. District Court for the District of Alaska alleging asbestos-related injury. CP 229-232. The case settled and appellants received compensation for their claims related to Mr. Duncan’s asbestos-related disease. CP 262, at p. 145:19-24.

In April 2005, Mr. Duncan was diagnosed with mesothelioma. CP 429. Appellants filed this suit on September 9, 2005. CP 4. Appellants sued numerous defendants, including J.T. Thorpe & Son, Inc. (“J.T. Thorpe”), again seeking damages for injuries they attributed to Mr. Duncan’s alleged exposure to asbestos. CP 6. Appellants asserted liability under various theories, including products liability under RCW 7.72. *et seq.*, negligence; conspiracy; spoliation; willful or wanton misconduct; strict product liability under Section 402B of the Restatement of Torts; (RCW 62A); enterprise liability; market share liability and/or market share alternate liability; and other applicable theories of liability. CP 6.

As to J.T. Thorpe, appellants alleged that Mr. Duncan was exposed to asbestos-containing products manufactured, supplied or installed by J.T. Thorpe while he served in the Navy on board the USS Osage and the USS Coral Sea. CP 383. Mr. Duncan served in the Navy from approximately 1945-1949. CP 383. At no time during his service in the Navy, was Mr. Duncan stationed in or around Washington State. CP \_\_\_\_ (*Miller Decl.*, ¶ 5, *Ex. C: Abstract of Service.*)<sup>1</sup> All of Mr. Duncan's alleged exposure to asbestos occurred while he was in the Navy and/or during his 35-year career as a pipe fitter in Alaska. CP 427-28; CP 435. Mr. Duncan has resided in Alaska since 1949. CP 216, at p. 12:21-23.

J.T. Thorpe incorporated in California in 1922 and remains an active California Corporation specializing in the installation of refractory materials. CP \_\_\_\_ (*Miller Decl.* ¶ 2.)

Respondent ConocoPhillips Company ("ConocoPhillips") filed a motion for summary judgment based on the applicable statute of limitations and statute of repose under Alaskan law, AS 09.10.070 and AS 09.10.055. CP 233-245. Respondents Unocal Corporation ("Unocal") and Collier Chemical Corporation ("Collier") filed a joint motion for summary judgment based on the applicable statute of limitations and statute of repose under Alaskan law, AS 09.10.070 and AS 09.10.055. CP

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<sup>1</sup> J.T. Thorpe has filed a Supplemental Designation of Clerk's Papers, but as of

178-188. In their motions, ConocoPhillips and Unocal/Collier argued under the most significant relationship rule Alaska, not Washington, law should apply, and that under Alaska law appellants' claims began tolling no later than 1997, when appellants had discovered the existence of their cause of action and filed the Alaska federal court lawsuit. CP 237-242; CP 180-186. The issue regarding the statute of repose was not addressed by the court, thus is not at issue in this appeal. CP 1139.

J.T. Thorpe joined ConocoPhillips' and Unocal/Colliers' motions and incorporated their statute of limitations arguments by reference. CP 358-361; CP 366-369. J.T. Thorpe did not join the motions as to the statute of repose. CP 358; CP 366.

On March 30, 2006, Pierce County Superior Court Judge Beverly Grant heard oral argument on ConocoPhillips' and Unocal/Colliers' motions and on J.T. Thorpe's joinder to the motions. CP 1111. After concluding that Alaska law governs Appellants' claims in this matter, Judge Grant granted ConocoPhillips and Unocal/Colliers' motions for summary judgment, finding as follows:

Based on the foregoing, the Court FINDS that there is no dispute as to the following material facts:

1. Plaintiffs knew or should have known that Jack Duncan had suffered some injury related to his

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the date of filing, no CP numbers have been assigned by the court.

asbestos exposure at the time they filed the 1997 Alaska federal court law suit.

2. Plaintiffs filed their current lawsuit in April 2005, more than two years after the 1997 Alaska federal court lawsuit.

In light of the applicable facts and law, the Court CONCLUDES:

1. Alaska substantive law governs plaintiff's claims, and, thus Alaska's statute of limitations applies under RCW 4.18.020(1)(a); and

2. Plaintiff's claims are time-barred by the applicable statute of limitations, AS .09.10.070.

IT IS HEREBY ORDERED THAT

1. Unocal Corporation and Collier Chemical Corporation's and ConocoPhillips' Motion for Summary Judgment is GRANTED.

CP 1139.<sup>2</sup> The court also dismissed appellants' claims against J.T. Thorpe, pursuant to its joinder. CP 1134. Although J.T. Thorpe's name was inadvertently left off the final page of the order, the minute order and verbatim report of proceedings confirm the court and parties' intent to include dismissal of claims against J.T. Thorpe along with those of ConocoPhillips and Unocal/Collier. CP 1134; CP 1142; VRP 53-56. This appeal followed.

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<sup>2</sup> Although the court entered its order immediately after oral argument on March 30, 2006, the order mistakenly states the entry date as March 30, 2004.

## II. JOINDER

J.T. Thorpe joins Respondent ConocoPhillips Response to Appellants' Brief and joins the legal authority and argument cited by Respondent therein.

## III. CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of August, 2006.

STAFFORD FREY COOPER



Katherine M. Steele, WSBA #11927

J. William Ashbaugh, WSBA #21692

Karen L. Cobb, WSBA #34958

Attorneys for Respondent J.T. Thorpe &  
Son, Inc.

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON

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DEPUTY

I certify under penalty of perjury under the laws of the state of Washington that on August 16, 2006 copies of the foregoing document were served on the following parties:

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Seattle, WA 98104-7010

DATED this 16<sup>th</sup> day of August, 2006, at Seattle, Washington.

  
Emily Rayborn



Respondent Saberhagen Holdings, Inc. hereby joins in the arguments and citations of authorities set forth in the Brief of Respondent ConocoPhillips Company filed herein on August 16, 2006. Based upon those arguments and authorities, the Court should affirm the trial court's Order Granting Defendant Saberhagen Holdings' Motion for Summary Judgment Based on Alaska Statute of Limitations (April 13, 2006).

Respectfully submitted this 5th day of September, 2006.

CARNEY BADLY SPELLMAN, P.S.



Timothy K. Thorson, WSBA 12860  
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Attorneys for Respondent  
Saberhagen Holdings, Inc.

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7 IN THE COURT OF APPEALS  
8 OF THE STATE OF WASHINGTON  
9 DIVISION II

10 JACK N. DUNCAN and JEAN W.  
11 DUNCAN,

12 Appellants,

13 v.

14 SABERHAGEN HOLDINGS, INC. et  
15 al.,

16 Respondents.

NO. No. 34725-3-11

DECLARATION OF SERVICE

17 I, Daniel J. Naspinski, hereby declare that on the 5th day of September, 2006, I caused  
18 to be served in the manner indicated below, a copy of the following pleadings:

- 19 1. Joinder of Respondent Saberhagen Holdings, Inc. in Brief of Respondent  
20 ConocoPhillips Company; and  
21 2. Declaration of Service

DECLARATION OF SERVICE - 1

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22 DATED AT Seattle, Washington this 5th day of September, 2006.

23   
24 DANIEL J. NASPINSKI

25 DECLARATION OF SERVICE – 2

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