Filed
Washington State
Court of Appeals
Division Two

August 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARRY HOFFMAN and JUDITH HOFFMAN, husband and wife,

Appellants,

v.

GENERAL ELECTRIC COMPANY; KETCHIKAN PULP COMPANY,

Respondents,

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

No. 47439-5-II

UNPUBLISHED OPINION

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

Defendants.

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

FACTS[1]

I. BACKGROUND

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

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

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

[1] The facts are not in dispute.

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

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

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

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

II. PROCEDURE

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

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

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

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

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

ANALYSIS

I. STANDARD OF REVIEW

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

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

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

II. CONFLICT OF LAWS

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

A. LEGAL PRINCIPLES

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

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

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

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

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

> (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within 10 years of the earlier of the date of
>
> . . . .
>
> (2) the last act alleged to have caused the personal injury, death, or property damage.
>
> *(b) This section does not apply if*
>
> (1) the personal injury, death, or property damage resulted from
>
> (A) prolonged exposure to hazardous waste;
>
> (B) an intentional act or gross negligence;
>
> . . . .
>
> (E) a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce; or
>
> . . . .
>
> (c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on the presence of the foreign body.

ALASKA STAT. (AS) § 09.10.055.

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

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

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

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

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

1. DEFECTIVE PRODUCT

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

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

> a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. GROSS NEGLIGENCE

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

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

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

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

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

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

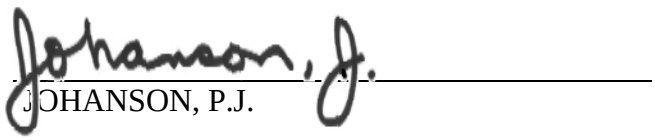
Likewise, regarding Ketchikan, there is some testimony in the record that tends to establish that it may have known of the dangers of asbestos in the 1950s. Specifically, Ketchikan's answer to an interrogatory explained that it would have expected Hoffman to have had some training working with hazardous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

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

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

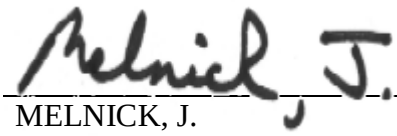
law existed and that Alaska law barred his claim. Accordingly, we reverse and remand for proceedings consistent with this opinion.

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



JOHANSON, P.J.

We concur:



MELNICK, J.

SUTTON, J.