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Washington State
Court of Appeals
Division Two

August 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JUDITH HOFFMAN, individually as the spouse of LARRY HOFFMAN, deceased, and as Personal Representative of the Estate of LARRY HOFFMAN, deceased,

Appellant,

v.

KETCHIKAN PULP CO.,

Respondent,

And

ALASKAN COPPER CO., INC., d/b/a Alaska Copper & Brass;
ARMSTRONG INT'L, INC.;
ASBESTOS CORPORATION LIMITED;
A.W. CHESTERTON CO.;
CERTAINTEED CORP.;
CRANE SUPPLY;
EXPERT DRYWALL, INC.;
FAMILIAN NW, INC., individually and as successor-in-interest and parent and alter ego to Alaska Pipe & Supply;
GEORGIA-PACIFIC LLC;
KAISER GYPSUM CO., INC.;

No. 51162-2-II

UNPUBLISHED OPINION

OJI HOLDINGS CORP. f/n/a Oji Paper Co., Ltd., individually and as successor-in-interest and parent and alter ego to Alaska Pulp Corp;
KANZAKI SPECIALTY PAPERS, INC. f/n/a Oji Paper USA, Inc.;
OWENS-ILLINOIS, INC.;
PACIFIC PLUMBING SUPPLY LLC;
SABERHAGEN HOLDINGS, INC.;
UNION CARBIDE CORP;

Defendants.

GLASGOW, J. — After Larry Hoffman developed mesothelioma from exposure to asbestos, he filed suit against Ketchikan Pulp Company (Ketchikan) and other defendants, alleging that their negligence contributed to his condition. The trial court dismissed Hoffman's case under CR 12(b)(6) after concluding that Alaska law applied and his claims were barred by Alaska's statute of repose. We reversed, holding that Hoffman had alleged facts that, if true, supported a conclusion that there was no conflict between Alaska and Washington law, and therefore Washington law applied and did not bar his claims.

On remand, the trial court granted Ketchikan's motion for summary judgment, again concluding that Alaska's statute of repose barred Hoffman's claims. The court concluded that Hoffman had not raised a genuine issue of material fact that would avoid a conflict of laws, and therefore his claim was barred by the Alaska statute of repose.

Hoffman appeals, arguing that by granting summary judgment the trial court violated the law of the case. He also argues that summary judgment was improper as a matter of law because the gross negligence, hazardous waste, and foreign body exceptions to Alaska's statute of repose apply to his claim, and so the claim is not barred and there is no conflict with Washington law.

We hold that the trial court did not violate the law of the case when it granted summary judgment. We further hold that under Alaska law, which is significantly different from Washington law in many relevant respects, none of the exceptions that Hoffman identifies apply to his claim. As a result, his claim is barred by the Alaska statute of repose. Because there is an actual conflict between Washington and Alaska law, and Alaska has the most significant relationship to the case, we hold that Alaska law applies to bar Hoffman's claim.

We affirm.

FACTS

I. BACKGROUND

Hoffman's father, Doyle Hoffman, worked as a welder and pipefitter at the Ketchikan pulp mill in Alaska from its opening in 1954 until 1966. Doyle's[1] job at the mill involved removing asbestos insulation from steam piping and then sweeping up the area. As a result, Doyle's clothing was often covered with asbestos dust by the end of a shift.[2]

When Hoffman was a child, Doyle would come home from work and play with Hoffman. Doyle would sit on the couch while still in his work clothes. Hoffman would also sometimes help his mother wash Doyle's work clothes. Doyle drove the family car to and from work each day, and the entire family would spend time in the car on weekends together.

As an adult, Hoffman also worked at pulp mills in Alaska, first with Ketchikan from

[1] Because Larry and Doyle Hoffman share the same last name, we refer to Doyle Hoffman by his first name for clarity.

[2] We describe the facts in the light most favorable to Hoffman as the nonmoving party on summary judgment. CR 56.

1968 to 1970, and then periodically at a mill in Sitka from 1974 to 1978. Hoffman's work at both mills involved significant exposure to asbestos.

Hoffman and his wife moved to Oregon in 1986, where he worked as a plumber and pipefitter for about 20 more years without any further alleged exposure to asbestos. In 2012, they moved to Washington. In 2013, Hoffman was diagnosed with mesothelioma.

II. PROCEDURE

In 2014 Hoffman filed a personal injury lawsuit in Washington against a number of defendants, including Ketchikan.[3] At the time of filing, the Hoffmans were Washington residents. Although Ketchikan operates solely in Alaska, it is incorporated in Washington and was a Washington corporation during the time it operated the mill.

Under Washington and Alaska law, Hoffman could recover only workers compensation for injuries and workplace illnesses sustained at work, so he could not sue his own employers for injuries from exposure to asbestos. *See Walston v. Boeing*, 181 Wn.2d 391, 396, 334 P.3d 519 (2014); *Schiel v. Union Oil Co. of Cal.*, 219 P.3d 1025, 1029 (Alaska 2009). The record reflects that each of the 24 other defendants in this case, including companies that manufactured the products containing asbestos at issue, such as General Electric, settled out of court or were dismissed.

The only remaining defendant is Ketchikan. Relevant here, Hoffman contended that his mesothelioma stemmed from his childhood exposure to asbestos caused by Ketchikan's negligence.

[3] Hoffman's wife, Judith Hoffman, was also a named plaintiff.

After extensive discovery and several pretrial motions, the trial court ruled that a conflict existed between Alaska and Washington law and concluded that Alaska law governed the case under the most significant relationship test. Ketchikan then moved to dismiss under CR 12(b)(6) for failure to state a claim on which relief could be granted, on the grounds that the Alaska statute of repose barred Hoffman's claim. The court dismissed the case.

On appeal, we held that, taking Hoffman's alleged facts as true, they would support recovery under the "gross negligence" exception to Alaska's statute of repose. *Hoffman v. Gen. Elec. Co.*, No. 47439-5-II, slip op. at 195 Wn. App. 1037, at *6 (Wash. Ct. App. Aug. 9, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/474395.pdf (*Hoffman* I). Thus, Hoffman had alleged facts that, when viewed as true, could support a conclusion that neither Washington's law nor Alaska's statute of repose barred Hoffman's claims. *Id.* at *7. The trial court did not establish that a conflict of law existed in the first instance. *Id.* Having reversed the trial court on the gross negligence issue, we declined to reach Hoffman's alternative arguments with respect to the "hazardous waste" and "foreign body" exceptions to Alaska's statute of repose. *Id.* at *3 n.7.

After we issued our decision, Hoffman died of his disease in Florida. His wife and his estate[4] then filed an amended complaint, adding a claim for wrongful death under Washington law.

Ketchikan then moved for summary judgment, arguing that Hoffman had not presented a genuine issue of material fact to support gross negligence and that none of the other exceptions to the Alaska statute of repose applied. Ketchikan again claimed there was a conflict between Alaska and Washington law, and Alaska law applied to bar Hoffman's claim.

[4] Larry Hoffman's estate was also added as a plaintiff. We refer to appellants collectively as "Hoffman" to avoid confusion.

Ketchikan argued that there was no evidence that it knew or should have known about the risks associated with take-home exposure to asbestos at the time it employed Doyle in the 1950s and 1960s. In support of its motion, Ketchikan presented a declaration of industrial hygienist Joseph Holtshouser, concluding that there was no consensus among the scientific community regarding take-home dangers before 1967, the year Doyle stopped working for Ketchikan.

In response, Hoffman presented Ketchikan's interrogatory answers and the declaration of Dr. Barry Castleman. In interrogatory answers, Ketchikan acknowledged that it expected Doyle would have had some training with respect to the hazards of asbestos because such hazards were "well documented in the literature promulgated by the pipefitters union to its members, dating back to the late 1950s." Clerk's Papers (CP) at 1192.

Castleman's declaration concluded that "in the 1950s it was knowable or known that implementing certain industrial hygiene practices, including but not limited to educating workers about the risks of asbestos exposure, providing separate lockers for street clothes and work clothes, and requiring workers exposed to asbestos dust to shower and change clothing before returning home, would reduce or eliminate exposures to family members." CP at 285. Castleman further explained that "[s]uch practices would have been part of a prudent industrial hygiene program for workers who handled asbestos as of the mid-1950s." CP at 285. He then concluded that the risk of disease to a family exposed to asbestos through take-home exposure "was reasonably foreseeable by 1964. Furthermore, it is my opinion that companies using asbestos should have understood that precautionary measures should have been taken to protect their workers and their workers' family members from the hazards of asbestos." CP at 285. Castleman also noted a 1965 article published in England that had "concluded that there was

little doubt that the risk of mesothelioma could arise from both occupational and domestic exposures to asbestos." CP at 282.

Castleman also wrote in a 1973 paper that the link between mesothelioma and asbestos "has been a matter of dispute until very recent times," and "[a]ssertions of family or neighborhood exposure should be viewed with caution, . . . as often there is a short but forgotten period of employment in an asbestos plant." CP at 1212-14. "Selikoff and Hammond [other prominent experts at the time], concluded that no quantitative conclusions regarding the close-response relationship will be available without epidemiological studies with indirect occupational exposure and environmental exposure." CP at 1214. Thus, Castleman's 1973 paper was not definitive about take-home exposure, assertions about family or neighborhood exposure were viewed as unreliable, and the paper noted that scientists were still gathering data about the risks of take-home exposure at that time. The Occupational Safety and Health Administration (OSHA) did not promulgate regulations addressing take-home exposure to asbestos until 1972.

The trial court agreed with Ketchikan and granted summary judgment.

Hoffman appeals.

ANALYSIS

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

In reviewing a grant of summary judgment, we apply the same standard as the trial court: summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR

56(c); *DeVeny v. Hadaller*, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007). We review the trial court's conclusions of law de novo. *Id.*

We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id*. "'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" *Id*. at 616-17 (quoting *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). Responses by an adverse party to a motion for summary judgment must be made on personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the declarant of such facts is competent to testify to the matters stated therein. *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 286, 227 P.3d 297 (2010). Where reasonable minds could reach only one conclusion from the admissible facts in evidence, summary judgment should be granted. *DeVeny*, 139 Wn. App. at 617.

When faced with a motion for summary judgment, if a party does not believe the facts have been sufficiently developed, it can respond by seeking a continuance under CR 56(f) to further develop the facts. It does not appear that Hoffman did so here.

II. LAW OF THE CASE

Hoffman argues, as an initial matter, that the trial court violated the law of the case when it granted summary judgment. He reasons that because we held in the initial appeal that he had alleged facts that supported a gross negligence theory, the trial court was precluded on remand from finding that no genuine dispute of fact existed as to gross negligence. We disagree.

A decision of the appellate court establishes the law of the case and must be followed by the trial court on remand. *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 58, 366 P.3d 1246 (2015). "[O]nce there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Kitsap County v. Kitsap County Corr. Officers' Guild, Inc.*, 193 Wn. App. 40, 63, 372 P.3d 769 (2016).

We held in Hoffman's first appeal that he had alleged sufficient facts to support a gross negligence theory and survive a CR 12(b)(6) motion to dismiss. Although there was some disagreement in the first appeal as to whether the underlying trial court ruling at issue was on a motion to dismiss or a motion for summary judgment, we explicitly applied the CR 12(b)(6) standard on review. *Hoffman* I, slip op at *7.

Courts apply different standards under CR 12(b)(6) and CR 56(c). When reviewing motions under CR 12(b)(6), we take all facts alleged in the complaint as true and may consider hypothetical facts supporting the plaintiff's claim. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). "Therefore, a complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery." *Id*. at 963.

In the context of summary judgment, on the other hand, the nonmoving party must set forth specific facts supporting their claim based on personal knowledge and cannot rely on speculation. *DeVeny*, 139 Wn. App. at 616. In reviewing a CR 12(b)(6) motion we presume the plaintiff's alleged facts to be true, but on summary judgment we instead consider the submitted evidence, and reasonable inferences from it, in the light most favorable to the nonmoving party. *FutureSelect*, 180 Wn.2d at 962; *DeVeny*, 139 Wn. App. at 616. Thus, the issue in this appeal is not whether any set of facts *could* exist to support a gross negligence theory, but whether

evidence *actually* exists to create a genuine issue of material fact as to whether Ketchikan was grossly negligent.

Whether the admissible evidence and resulting reasonable inferences create a genuine issue of material fact is an issue that we did not decide in the initial appeal. *Hoffman* I, slip op at *2 n.5. We explicitly confined our holding to CR 12(b)(6). *Hoffman* I, slip op at *7. Because the law of the case does not govern whether the court erred when it granted summary judgment, we now address that issue.

Hoffman also argues, in the alternative, that Ketchikan is precluded from moving for summary judgment now because it failed to do so before the initial appeal. Hoffman cites *In re Estate of Langeland v. Drown*, 195 Wn. App. 74, 82, 380 P.3d 573 (2016), *review denied*, 187 Wn.2d 1010 (2017), to argue that the law of the case doctrine precludes Ketchikan from moving for summary judgment because the doctrine precludes successive review of issues that a party could have raised in an earlier appeal in the same case. But in *Langeland*, the prior appellate decision had "necessarily rejected" the arguments that the party tried to raise on the second appeal. *Id.* at 83. That is not the case here. An appellate decision that a party survived a CR 12(b)(6) motion to dismiss does not necessarily reject an argument that the party has since failed to raise a genuine issue of material fact on summary judgment.

We hold that the law of the case did not preclude the trial court from granting summary judgment. We accordingly proceed to review the merits of that ruling.

III. CONFLICT OF LAWS AND STATUTES OF REPOSE

When a party raises a conflict of law in a personal injury case, Washington courts apply the following analytical framework to determine which law applies: (1) identify whether there is 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 or, if there is no actual conflict, apply the law of the local forum; (3) then, if necessary, apply the chosen state law's statute of limitations. *Woodward v. Taylor*, 184 Wn.2d 911, 917, 366 P.3d 432 (2016).

An actual conflict of law exists where the result would be different under the substantive laws of the interested states. *Id.* at 918. Our Supreme Court has held that statutes of repose, unlike statutes of limitation, are substantive provisions in the choice of law context. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994). While a statute of limitations bars an already accrued cause of action after a certain period of time, a statute of repose terminates a right of action after a specific period of time regardless of whether it has accrued or injury has occurred. *Gunnier v. Yakima Heart Ctr., Inc., P.S.*, 134 Wn.2d 854, 863, 953 P.2d 1162 (1998).

The parties agree that there is no Washington statute of repose that would apply to bar Hoffman's claims in this case. The parties disagree, however, on whether Hoffman's claims would survive under Alaska's broadly applicable statute of repose. Under the Alaska statute, a plaintiff must bring an action for personal injury or death within 10 years of the date of the last act alleged to have caused the injury or death. ALASKA STATUTE (AS) 09.10.055(a)(2). Relevant to this appeal, the Alaska statute of repose does not apply if the injury resulted from an intentional act or gross negligence or from prolonged exposure to hazardous waste. AS 09.10.055(b)(1)(A), (B). Furthermore, the 10 year period "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." AS 09.10.055(c).

Thus, if any of those three exceptions—gross negligence, hazardous waste, or foreign body—applies to Hoffman's injury, his claim would not be barred under Alaska's statute of

repose. In that case, there would be no actual conflict of laws because the result would be the same under both Washington and Alaska law: Hoffman's claim would not be barred by a statute of repose. *See Woodward*, 184 Wn.2d at 917. Because Washington is the forum state, the case would then proceed under Washington law and Hoffman's claim would not be barred. *See id.*

On the other hand, if none of the three exceptions applies to Hoffman's injury, his claim would be time-barred under Alaska's statute of repose, establishing an actual conflict with Washington law. In that case, the most significant relationship test would govern which state's law, including which state's statute of repose, should apply. *See id.*

Here, on remand, the trial court's summary judgment dismissal necessarily assumed that Alaska law applied to bar Hoffman's claims, meaning the trial court concluded that the most significant contacts were with Alaska. Hoffman does not dispute this conclusion on appeal. We agree with the trial court and the parties that Alaska has the most significant relationship to this case. Thus, if there is a conflict, we must apply Alaska law, including its statute of repose. *See id.* at 917.

As a result, the central issue is whether one of the exceptions to Alaska's statute of repose applies, creating a conflict between Alaska and Washington law.

IV. EXCEPTIONS TO ALASKA'S STATUTE OF REPOSE

As discussed above, if none of the exceptions to Alaska's statute of repose preserves Hoffman's claim under the standards of CR 56, then applying Alaska law, Hoffman's claim would be barred. AS 09.10.055(a)(2). In making this determination, we must apply Alaska's statute of repose and the case law interpreting it. We hold that none of the exceptions to Alaska's statute of repose applies to Hoffman's claim. Therefore, his claim is barred under Alaska law, and summary judgment was properly granted.

A. Hoffman's Constitutional Argument

At the outset, Hoffman argues that if none of the Alaska exceptions apply, the 10 year Alaska statute of repose is unconstitutional as applied to his claim because it would effectively bar all claimants from seeking redress for asbestos-related injuries. This is because the latency period for asbestos-related mesothelioma is typically much longer than 10 years. *See Walston*, 173 Wn. App. at 277 n.6.

Hoffman cites to *Sands ex rel. Sands v. Green*, 156 P.3d 1130 (Alaska 2007). In that case, several Alaska tort reform provisions combined to establish that the parents or guardians of minors who sustained injuries prior to their eighth birthdays had only until their tenth birthday to file a personal injury claim. *Sands*, 156 P.3d at 1133. Under Alaska law, because those provisions established a shorter, two-year limitations period, the ten-year statute of repose did not apply. *Id.* Applying a three-part balancing test for procedural due process akin to the one adopted in *Mathews v. Eldridge*, the Alaska Supreme Court held that this statutory limitation violated minors' due process rights to access the courts. *Sands*, 156 P.3d at 1133-36; *see also Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The statute of limitations "effectively close[d] the courthouse doors to minors unfortunate enough to have parents or guardians who fail[ed] to diligently pursue their rights," and so "erect[ed] a direct and insurmountable barrier to that minor's right of access to the courts." *Sands*, 156 P.3d at 1133-36 (internal quotation marks omitted).

Hoffman does not ask us to engage in a due process analysis like the court in *Sands*, but rather suggests only that there are "serious constitutional issues" in the context of his claim that we should seek to avoid by applying the exceptions to the Alaska statute of repose in his favor. Br. of Appellant at 27. But it is not clear that the 10-year statute of repose constitutes a "direct

and insurmountable barrier" to pursuing negligence claims based on mesothelioma resulting from asbestos exposure. *See Sands*, 156 P.3d at 1135. Alaska's gross negligence exception broadly provides an avenue of recourse for plaintiffs with injuries linked to asbestos exposure, provided their factual circumstances meet the gross negligence standard. AS 09.10.055(b)(1)(B). The statute does not categorically bar Hoffman's claim, but rather requires him to make a heightened factual showing that Ketchikan's conduct constituted gross negligence. Moreover, the Alaska Supreme Court has held that Alaska's statute of repose is facially constitutional. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1068-69 (Alaska 2002).

We reject Hoffman's constitutional argument and accordingly proceed to the issue of whether one of the exceptions to Alaska's statute of repose preserves Hoffman's claim.

B. Gross Negligence Exception

Hoffman argues summary judgment was improper because there remains a genuine issue of material fact as to whether Ketchikan was grossly negligent in failing to protect Hoffman from take-home asbestos exposure. We disagree.

The Alaska statute of repose does not apply if the plaintiff's injury or death resulted from an intentional act or gross negligence. AS 09.10.055(b)(1)(B). Alaska law defines gross negligence 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)). The Alaska civil pattern jury instruction defines gross negligence as "'an extreme departure from [the reasonably careful person] standard,' and 'more than ordinary inadvertence or inattention, but less than conscious indifference to consequences.'" *City of*

Hooper Bay v. Bunyan, 359 P.3d 972, 982 n.50 (Alaska 2015) (quoting ALASKA PATTERN JURY INSTRUCTIONS (APJI): CIVIL at Article 3, § 3.14 (alteration in original).

Considering the evidence and the reasonable inferences therefrom in the light most favorable to Hoffman, we must determine whether Hoffman has raised a genuine issue of material fact as to whether Ketchikan's conduct was more than ordinary inadvertence or inattention, but less than conscious indifference to consequences associated with the take-home dangers of asbestos exposure. *See* APJI: Civil at Article 3, § 3.14. Facts supporting ordinary negligence are not enough to meet Alaska's gross negligence standard. *See id.* [5]

Hoffman argues that his submissions, when viewed in the light most favorable to him, suggest that Ketchikan knew or should have known as early as the 1950s of the dangers of asbestos and the various procedures that could be taken to limit exposure of family members.

Specifically, he points to Ketchikan's answer in an interrogatory explaining that the pipefitters union distributed literature to its members starting in the late 1950s explaining potential hazards of working with asbestos. The answer to the interrogatory refers to "[t]he fact that working with asbestos containing thermal insulation products was potentially hazardous." CP at 1192. But the interrogatory answer addressed the dangers of asbestos generally, not the specific danger of take-home exposure. The interrogatory answer did not suggest that the union was educating on the potential hazards *of take-home exposure* in the 1950s and 1960s.

Hoffman also points to Castleman's conclusions that the risks associated with take-home exposure to asbestos were reasonably foreseeable as early as the 1950s, and companies should

[5] Hoffman also relies on Washington's definition of gross negligence and Washington courts' discussion of that standard in *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986) and *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965). But because this analysis must address whether there was gross negligence under an Alaska statute, we rely on Alaska's definition of gross negligence.

have been aware of those risks at least by 1964. Castleman in particular noted the 1965 paper that concluded that mesothelioma could arise from domestic as well as occupational exposures to asbestos.

There is no evidence in the record that Ketchikan, or any other entity in Alaska, actually knew of the take-home dangers of asbestos in the late 1950s and early 1960s. The record shows that there was no real consensus about the risk of exposure to family members until several years after Hoffman's take-home exposure to asbestos had ended. Castleman himself acknowledged as late as 1973 that the link between asbestos and mesothelioma had only recently been established, and that other leading asbestos researchers had concluded that further studies on environmental exposure were needed before making "quanti[ta]tive conclusions regarding the close-response relationship." CP at 1212-14.

While Castleman's declaration, when viewed in the light most favorable to Hoffman, likely established an issue of fact as to whether Ketchikan should have known of the take-home danger in the 1950s and 1960s that would be relevant to ordinary negligence, it does not suggest that Kechikan's actions constituted an extreme departure from the reasonably careful person standard. APJI: CIVIL at Article 3, § 3.14. At best, Castleman's declaration raises an issue of ordinary inadvertence or inattention, but more is needed to establish gross negligence under Alaska law. *Id.*

Dr. Irving Selikoff, a leading asbestos researcher during the 1970s, publicly harbored doubts about the risks associated with take-home exposure. Although Selikoff noted in 1971 that "the data look reassuring" in his preliminary studies of the issue, he also acknowledged that "[t]his is a worry to us" and noted other studies that had found cases of mesothelioma in family members of asbestos workers, presumably "from the dust brought home by the worker on his

clothes." CP at 1217. Ultimately, Selikoff advised that work clothes should "always be changed before going home." CP at 1217. Even so, the publication in the record occurred in 1971, well after Hoffman's take-home exposure had ended. And OSHA did not publish regulations addressing the risks of take-home exposure until 1972.

In sum, taking the evidence in the light most favorable to Hoffman, he has established only that by 1965 there was literature available, first published in England, that warned of potential risks of take-home exposure. However, Doyle stopped working at Ketchikan in 1966; there is no evidence that Ketchikan, or anyone in Alaska, was cognizant of take-home exposure risks at the time; OSHA did not promulgate regulations on restricting take-home asbestos until 1972; and even as late as the 1970s there remained disagreement among experts as to the level of risk presented by take-home exposure. Moreover, Castleman's declaration, including his conclusion that the risks of take-home exposure were at least knowable during the 1950s, was not based on any personal knowledge of what Ketchikan knew or what was generally known in Alaska, and his conclusions about what companies should have known during the 1960s was belied by his own study from the early 1970s in which he admitted that the risks of take-home exposure had been disputed until very recently and that further research was still needed.

Hoffman has not presented facts specific to Ketchikan that would show "an extreme departure from [the reasonably careful person] standard." APJI: Civil at Article 3, § 3.14. While Hoffman may not have been required to show that Ketchikan knew of the specific danger of take-home exposure, he did have to show at least "more than ordinary inadvertence or inattention." *Id.* The lack of evidence of what Ketchikan knew, combined with the lack of even expert agreement about the risks of take-home exposure at the time, support the trial court's decision.

Hoffman has not cited, and we have not located, a single Alaska case where a claim based on asbestos exposure satisfied the gross negligence standard to trigger the exception under that statute. We are bound to apply Alaska law in this case. We conclude that Hoffman has not presented evidence sufficient to create a genuine dispute of material fact with regard to gross negligence as defined under Alaska law, and the trial court properly ruled that the gross negligence exception does not preserve Hoffman's claim on summary judgment.

C. Hazardous Waste Exception

Hoffman also argues that his claim survives under the hazardous waste exception to the Alaska statute of repose because asbestos qualifies as hazardous waste under Alaska law. We disagree.

The Alaska statute of repose does not apply to claims based on "prolonged exposure to hazardous waste." AS 09.10.055(b)(1)(A). The statute does not define "hazardous waste."

1. Alaska's framework for statutory interpretation

Alaska's analytical framework for interpreting a statute requires courts "'to ascertain the legislature's intent and then to construe the statute so as to implement that intent.'" *Brown v. State*, 404 P.3d 191, 193 (Alaska App. 2017) (quoting *Williams v. State*, 2015 WL 4599554 (Alaska App. 2015)). "Courts are to interpret statutes 'according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.'" *Id.* (quoting *ARCTEC Servs. v. Cummings*, 295 P.3d 916, 920 (Alaska 2013)). Unlike Washington courts, Alaska courts apply a "'sliding scale approach'" when interpreting a statutory term: courts first consider the "'plain meaning'" of the term, and then examine whether

the statute's legislative history "'reveals a legislative intent and meaning contrary to the plain meaning of the statute.'" *Id.* at 193-94 (quoting *Liddicoat v. State*, 268 P.3d 355, 360 (Alaska App. 2011)). Technical words and phrases "shall be construed according to the[ir] peculiar and appropriate meaning." AS 01.10.040(a).

2. Alaska law incorporates federal regulations to define hazardous waste

At the outset, Ketchikan argues the term "hazardous waste" cannot include Doyle's clothing because clothing is not "waste." Br. of Resp't at 15-16. But Hoffman is correct that the issue is not whether the clothes Doyle wore home were hazardous waste, but whether the asbestos dust on his clothes was hazardous waste.

Because "hazardous waste" is a technical term, we first look to its peculiar and appropriate meaning under Alaska law. AS 01.10.040(a). The Alaska statute governing the disposal of hazardous waste directs the State to adopt regulations "for the identification and management of hazardous waste as defined by the Environmental Protection Agency [EPA] and hazardous waste that exhibits the characteristic of toxicity, persistence, or carcinogenicity." AS 46.03.299(a). The statutory definition of "hazardous waste" under Alaska law is therefore linked to the EPA's regulatory definition of the term. AS 46.03.299(a).

As Ketchikan notes, the Alaska regulation dealing with solid waste management and disposal contains separate provisions for disposing of "hazardous waste" and "regulated hazardous waste asbestos-containing waste material." *See* 18 ALASKA ADMIN. CODE (AAC) 60.020, .450. Although this separate statutory treatment is one indicator of legislative intent, it does not end our inquiry because Alaska's hazardous waste regulations, promulgated under AS

46.03.299, also explicitly incorporate federal regulations for the purpose of identifying hazardous wastes. 18 AAC 62.020(a) (incorporating 40 C.F.R. Part 261). Therefore, we must also look to the incorporated federal regulations to determine what Alaska has deemed to be a hazardous waste. 40 C.F.R. Subpart D §§ 261.30 through .35.

3. The relevant federal regulations do not identify asbestos as a hazardous waste

The federal regulations provide that to be a hazardous waste, a solid waste must exhibit certain characteristics. 40 C.F.R. §§ 261.20 through .24. The regulations further provide that the administrator of the EPA shall identify and define the relevant characteristics of hazardous waste. 40 C.F.R. § 261.10(a)(1). Characteristics identified pursuant to this requirement include ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. §§ 261.20 through .24. Each of those characteristics is defined with respect to specific technical terminology and scientific testing methods. *See* 40 C.F.R. §§ 261.20 through .24. For example, 40 C.F.R. 261.24 defines the toxicity characteristic and lists contaminants and concentrations at which a solid waste containing the contaminant meets the definition of hazardous waste. Asbestos is not on the list of contaminants in the toxicity regulation, 40 C.F.R. 261.24, and Hoffman does not appear to argue that asbestos is ignitable, corrosive, or reactive, nor does the record contain the expert analysis that would be required to establish that asbestos meets the technical tests for these characteristics that are established in the federal regulations. 40 C.F.R. 261.21 through .23.

Alternatively, a material not identified as hazardous waste under 40 C.F.R. Part 261 is still considered a hazardous waste for the purposes of the federal regulations if the EPA "has reason to believe" that the material may be a solid waste and a hazardous waste under the federal

Resource Conservation and Recovery Act (RCRA). 40 C.F.R. § 261.1(b)(2)(i). Solid waste is hazardous waste under RCRA if "because of its …physical, chemical [or other] characteristics may—(A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5) (Pub. L. 89-272, title II, § 1004).

But the regulation's reference to the RCRA standard carries several limitations. First, for the purposes of 40 C.F.R. Part 261, the scientific, hypertechnical task of identifying hazardous wastes is given only to the EPA. 40 C.F.R. §§ 261.1(b)(2)(i), .10(a)(1). Given that the federal regulations reserve this gatekeeping function to the EPA, it follows that the Alaska hazardous waste regulations incorporating 40 C.F.R. Part 261 only apply to materials that the EPA has determined to be hazardous waste. Although the EPA has identified asbestos as a "pollutant" under the Clean Air Act and Clean Water Act, *see* 42 U.S.C. § 7412(b)(1); 40 C.F.R. Part 122, App. D, Table V, it apparently has not determined that asbestos is a hazardous waste, and neither 40 C.F.R. Part 261 nor 18 AAC 62.020(a) appear to authorize any other entity to make such a determination.

Second, the regulation's reference to RCRA is only triggered in the context of three specific statutory provisions of RCRA: section 3007 allowing inspections, 42 U.S.C. § 6927; section 3013 allowing monitoring and testing, 42 U.S.C. § 6934; and section 7003 regarding imminent hazards, 42 U.S.C. § 6973. 40 C.F.R. § 261.1(b)(2). None of those circumstances are relevant here.

These limitations on the regulation's reference to RCRA support our conclusion that the regulation does not cover asbestos as a hazardous waste unless the EPA has identified it as such. Furthermore, if the Alaska legislature or state agencies had intended to adopt RCRA's more general definition of hazardous waste, they could have easily done so directly and explicitly. Instead, the legislature chose to incorporate 40 C.F.R. Part 261. Consistent with this conclusion, Alaska's state agency regulations established wholly separate schemes for disposing of "hazardous waste" and "regulated asbestos-containing material." *See* 18 AAC 60.020, .450. Asbestos is not identified as a hazardous waste under the incorporated federal regulations, and so is not a hazardous waste under Alaska's statute of repose.

4. Alaska legislative history on hazardous waste does not require a different result

The Alaska framework for statutory interpretation requires us to consider whether legislative history reveals a contrary meaning of hazardous waste. *Brown*, 404 P.3d at 193-94; AS 01.10.040. Hoffman argues that the term "hazardous waste" should be interpreted broadly to include any hazardous "material" or "substance" because the bill's sponsor explained that he could not remember whether there was a reason to distinguish hazardous "waste" from hazardous "material." Br. of Appellant at 30-31 (Appx. A & B); Hr'g on S.S.H.B. 58 Before the House Jud. Comm., 20th Leg., 1st Sess. (AK Feb. 21, 1997). In response to a question about whether the term "hazardous waste" had a legal definition, the bill's sponsor also explained: "It [is] an attempt to address another concern that was raised of the more typical kinds of someone's property leached chemicals into my property and I [didn't] know about it, those kinds of things." Hr'g on S.S.H.B. 58 (Feb. 21, 1997); CP at 31 n.17 (internal quotation marks omitted). Hoffman argues this statement suggests that the legislature did not intend to limit the definition of "waste"

because the accidental release or leaching of chemicals is not typically addressed as waste disposal.

Contrary to Hoffman's claim, this evidence of legislative history is inconclusive as to how "hazardous waste" should be interpreted. The bill's sponsor could not recall why the bill used the term "waste" instead of "material," nor could he provide a satisfactory legal definition for the term. Hoffman has not identified any legislative intent sufficient to contradict the meaning of "hazardous waste" as that term is defined in the Alaskan and federal regulatory framework discussed above, which does not include asbestos.

For these reasons, we conclude the trial court properly ruled that the hazardous waste exception to Alaska's statute of repose does not apply to Hoffman's claim.

D. Foreign Body Exception

Finally, Hoffman argues that his claim survives under the "foreign body" exception to Alaska's statute of repose. Br. of Appellant at 37. We disagree.

The Alaska statute of repose tolls the 10 year period when "there exists the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose or effect." AS 09.10.055(c). Hoffman argues that "foreign body" includes asbestos fibers because the term itself is broad and the dictionary definition does not restrict its meaning only to objects introduced by a medical professional. Br. of Appellant at 37-38. However, this reasoning fails to consider the meaning "foreign body" in the context of the remaining words in the tolling section. The Alaska legislature's reference to "no therapeutic or diagnostic purpose or effect" reflects that it was contemplating foreign bodies related to medical procedures. Thus, the plain

language of the tolling section, including the phrases "therapeutic" and "diagnostic purpose," support a limited reading of the term "foreign body."

To the extent there is any ambiguity, Alaska's framework for statutory interpretation next considers legislative history. *Brown*, 404 P.3d at 193-94. The legislative history of the statute of repose suggests that "foreign body" narrowly refers to surgical instruments in the context of medical malpractice claims. During a committee hearing on the bill, the bill's sponsor explained the origins of this provision: "The old sponge left in the body after surgery kept coming up," so the bill tolled the statute of repose "until this thing is discovered, that if there is a foreign body that has no therapeutic or diagnostic purpose found . . . in a person's body, that that is an exception to the statute of repose." Hr'g on S.S.H.B 58 (Feb. 21, 1997) (internal quotation marks omitted); CP at 39.

It is true, as Hoffman contends, that if Alaska had intended to apply this exception only in the context of medical malpractice claims, it could have included specific language to that effect. However, the legislature's use of the terms "therapeutic" and "diagnostic purpose," as well as the legislative history, reflect that the legislature intended the term "foreign body" to refer only to objects related to healthcare, not substances like asbestos.

Hence, the foreign body exception does not preserve Hoffman's claim.

CONCLUSION

Applying Alaska law, as we must, we hold that the trial court did not err when it concluded none of the three exceptions to Alaska's statute of repose apply to Hoffman's claim. Therefore, his claim is barred under that statute. Because the result of this issue is different under Washington and Alaska law, there is an actual conflict. *See Woodward*, 184 Wn.2d at 917. Alaska has the most significant relationship to Hoffman's claim, so Alaska's statute of

repose applies and Hoffman's claim is barred. *See id.* For these reasons, the trial court properly granted summary judgment to Ketchikan.

We affirm.

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.

Glasgow, J.

We concur:

Worswick, P.J.

Cruser, J.