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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NINA MARTIN, individually and as Personal Representative of the ESTATE OF DONALD R. MARTIN, RUSSELL L. MARTIN, THADDEUS J. MARTIN, and JANE MARTIN,

Appellants,

vs.

DEMATIC dba/fka RAPISTAN, INC., MANNESMANN DEMATIC, and SIEMEN DEMATIC; GENERAL CONSTRUCTION COMPANY; WRIGHT SCHUCHART HARBOR COMPANY; and FLETCHER CONSTRUCTION COMPANY NORTH AMERICA,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENT/CROSS APPELLANT GENERAL CONSTRUCTION COMPANY

GROFF MURPHY, PLLC
Michael P. Grace, WSBA #26091
Brittany Stevens, WSBA #44822

300 East Pine Street
Seattle, Washington 98122
Telephone: (206) 628-9500
Facsimile: (206) 628-9506
Attorneys for Respondents/Cross-Appellants

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ORIGINAL

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I. REPLY IN SUPPORT OF CROSS-APPEAL

A. The Trial Court Should Have Granted General's First Motion for Summary Judgment Regarding Successor Liability, Because General Did Not Assume or Acquire Liability for the Martin Claim Through the 1996 Agreement.

As explained in General's Respondent Brief (June 22, 2012), General did not make or acquire a blanket assumption of WSH's tort liabilities as part of the 1996 Agreement. As such, the trial court properly dismissed the claims against General, whether based upon the definitions in Article I of the Agreement or whether based upon the provisions of Article II, which implement the definitions by specifying who is assuming the "Assumed Liabilities," and under what circumstances.

First off, it must be kept in mind that the Martin claim is based upon alleged acts or omissions of WSH in 1979-81. There is no allegation or evidence that WSH did anything following completion of the TM5 project in 1981 to cause or contribute to Mr. Martin's death in 2004. Although throughout much of the litigation, Martin alleged – without any evidentiary support – that WSH or General performed post-completion modifications to the conveying equipment that caused or contributed to Mr. Martin's death, Martin has now abandoned that claim.

There can be no reasonable dispute that the Martin claim is an "Excluded Liability" per the definitions in Article I of the Agreement: *"As*

so conditioned, the Excluded Liabilities include, without limitation...all obligations or liabilities of the Business, Seller or any of its Affiliates of any nature whatsoever, arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996." CP 2485. Because Martin's claim is based upon alleged acts or omissions of WSH in 1979-81, it follows that the Martin claim is an "Excluded Liability" per the definition of that term. Martin's arguments to the contrary require one to ignore the portion of the definition which states "*prior to July 1, 1996.*"

Second, even if it is assumed for sake of argument that the Martin claim falls within the definition of an Assumed Liability in Article I, Article I only provides *definitions* of Assumed and Excluded Liabilities; it does not specify *which entity* is "assuming" an Assumed Liability or under what circumstances. CP 2474. Stated differently, nowhere in Article I does it state that *General* is the entity that is assuming the Assumed liabilities, as opposed to Fletcher General, Fletcher Pacific or GC Investment Co.[1] By asserting that Article I assigns the Assumed Liabilities to General rather than any other entity, Martin is asking this Court to read language into Article I that simply is not there.

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[1] Keep in mind that *General was not a party to the 1996 Agreement*; the only parties to the Agreement were Fletcher General, Inc., Fletcher Pacific Construction Co. Ltd., and GC Investment Co. CP 2472.

Rather, one must turn to Article II in order to determine which entity is assuming the Assumed Liabilities, and under what circumstances. Article II specifies that General would assume "all of the Assumed Liabilities to which [Fletcher General] was subject as of [October 10, 1996]. CP 2485. Because Mr. Martin was killed almost eight years after October 10, 1996, it was literally impossible for Fletcher to be "subject to" the Martin claim at that time.

Martin's argument that Fletcher was "subject to" the Martin claim at the time of the 1996 Agreement because the claim was an "inchoate" or "contingent" liability defies common sense and Washington law, and is not supported by any provision of the 1996 Agreement, which does not use those terms. Washington law requires "injury" or "harm" before a personal injury claim can be asserted. *See, e.g.,* RCW 7.72.010 (4) and (6). Under Washington law, Fletcher was not "subject to" a claim by Mr. Martin until such time as the alleged injury or harm occurred.

B. Regardless of How the Court Interprets the 1996 Agreement, Martin's Claim is Time Barred by the Statute of Repose Because it is Based on WSH's Installation Work in 1979-81.

There is no dispute that Martin's claims accrued in 2004, more than 23 years after WSH completed its work on the TM5 Project in 1981. As a result, even if General acquired liability for the Martin claim as part

of the 1996 Agreement, Martin's claim is nonetheless time barred by the statute of repose (RCW 4.16.310).

Martin's arguments that the statute of repose is inapplicable are without merit. First, the record clearly demonstrates that WSH, as general contractor for the TM5 project, performed construction and alterations to "improvements upon real property." Second, Martin's attempt to evade application of the statute of repose must be rejected because it relies upon an interpretation of the statute of repose that misconstrues relevant cases and ignores key legislative changes.

1. For the TM5 Project, the Evidence Demonstrates that WSH Performed Construction and Alterations to "Improvements Upon Real Property."

The statute of repose applies "to all claims or causes of action of any kind against any person, arising from[2] such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any … construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property." RCW 4.16.300.

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[2] The term "arising from" has a broader meaning than 'caused by' or 'resulting from.' *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989).

Martin first contends that the statute of repose does not apply because "the machinery that killed Donald Martin does not involve an improvement to real property." *See* Appellant/Cross Respondents Reply Brief at p. 9. Martin is incorrect for multiple reasons.

Martin grossly oversimplifies the work that WSH performed on the TM5 Project. In particular, Martin implies that WSH's work on the TM5 was limited to installation of the broke conveying equipment in the area where Mr. Martin was killed. Martin is incorrect. Although WSH may have installed the broke conveying equipment as one part of the TM5 Project, installation of the equipment was only a small part of the construction and alterations that WSH performed on the Project.

The "Project Completion Report" dated February 13, 1981 (CP 153-167) clearly demonstrates that WSH performed construction and alterations to "improvements upon real property." The Report states that WSH's work on the TM5 Project "consisted of the installation of the No. 5 Paper Machine Facility, the 5-line Paper Converting Facility, and two auxiliary buildings for parent roll and vital supplies storage." CP 157. The construction phase took approximately two years, beginning April 1, 1979 and finishing up on March 12, 1981 (CP 157), and cost approximately $34.5 million. CP 158. The Report further describes WSH's construction and alteration work in the following detail:

C. PROJECT DESCRIPTION

> The No. 5 Paper Machine Project consisted of the *construction of a paper machine facility*, vital supplies *building*, parent roll storage *building* and a *remodeling of the existing storage area* to house a new 5-line paper converting system. *The installation of the paper machine, all supporting process systems and the five converting lines were part of the construction effort.*
>
> *The facility was constructed* adjacent to the existing no. 4 paper machine building and utilized a common wall.
>
> The paper machine building was a *3-level structure* with the exterior walls of concrete block. The roof was metal deck with a unitized single application roofing. The vital supplies and parent roll storage buildings were prefabricated metal structures with metal siding and roofing.

CP 162. As demonstrated by the foregoing, WSH did far more on the Project than simply install equipment. The Report demonstrates that WSH "*constructed*" the paper machine facility, the vital supplies building and the parent roll storage building, and "*remodeled*" *(i.e., altered)* the existing storage area to house a 5-line paper converting system. CP 157. WSH clearly performed construction and alterations to improvements upon real property.

Martin's reliance upon the *Condit* case is misplaced, because *Condit* actually supports General's position. *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106 (1984). In *Condit*, the defendant "designed, manufactured and installed" a refrigeration system that injured the plaintiff more than six years after substantial completion of the system.

The trial court found that the statute of repose applied because the system was an improvement upon real property, citing *Pinneo v. Stevens Pass, Inc.*, 14 Wn. App. 848 (1976). *Id.* at 109.

The Supreme Court was troubled by the idea that a manufacturer of heavy machinery could escape product liability "by simply bolting, welding the equipment or fastening it in some other manner to the building." *Id.* at 111. The Court thus held that protection of statute of repose was intended to protect "individuals who work on structural aspects of the building but not manufacturers of heavy equipment or nonintegral systems within the building." *Id.*

As stated in the opening brief, General submits that Legislative changes to the statute of repose have effectively supplanted the "structures vs. fixtures" analysis in *Condit.* Irrespective of this point, *Condit* is nonetheless inapplicable because it is easily distinguishable from the case at bar:

- In *Condit*, there was no dispute that the defendant had "designed, manufactured and installed" the refrigeration system that injured the claimant. In contrast, there is absolutely no evidence that WSH designed or manufactured the broke conveyor that killed Mr. Martin.

- In *Condit*, there was no dispute that the defendant did not construct or alter any buildings, or work on other "structural aspects" of the building. In contrast, WSH "*constructed*" the paper machine facility, the vital supplies building and the

> parent roll storage building, and "*remodeled" (i.e., altered)* the existing storage area to house a 5-line paper converting system. CP 157.

Therefore, even if the "structures vs. fixtures" analysis in *Condit* is still relevant, the evidence demonstrates that General performed construction and alteration to structural aspects of the buildings within the TM5 Project. General was performing construction and alterations to improvements upon real property, satisfying the requirements of RCW 4.16.300 and *Condit*.

2. Martin's Interpretation of the Legislative Changes to the Statute of Repose Renders the Changes Meaningless.

As General explained in its Respondents Brief, the Legislature amended the statute of repose in 2004 to clarify that it applied to persons performing work which required registration as a contractor. In turn, there can be no reasonable dispute that WSH's work on the TM5 Project required that it register as a contractor.

The definition of "contractor" in effect in 1980/1981 was as follows:

> A "contractor" as used in this chapter is any person, firm or corporation who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the

> erection of scaffolding or other structures or works in connection therewith or who installs or repairs roofing or siding; or who, to do similar work upon his own property, employs a member of more than one trade upon a single job or project otherwise provided herein. A "general contractor" is a contractor whose business operations require the use of more than two unrelated building trades or crafts whose work the contractor shall superintend or do in whole or in part; the term "general contractor" shall not include an individual who does all work personally without employees or other "specialty contractors" as defined herein. The terms "general contractor" and "builder" are synonymous. A "specialty contractor" is a contractor whose operations as such do not fall within the foregoing definition of "general contractor."

RCW 18.27.010(1) (1973).[3] WSH qualified as a contractor under this definition because it engaged in construction, alterations, and repairs of various projects, developments, and improvements, and therefore, under any version of RCW 18.27.020(1), it was required to register as a

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[3] The current version of RCW 18.27.010(1) is as follows:

"Contractor" includes any person, firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter. "Contractor" also includes a consultant acting as a general contractor. "Contractor" also includes any person, firm, corporation, or other entity covered by this subsection, whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned.

contractor. Indeed, from 1979 until 1993, WSH was registered as a licensed contractor under license number WRIGHSH219CO, in accordance with RCW 18.27.010. CP 2082.

Finally, even if WSH's work on the TM5 Project was limited to installation of equipment, it would nonetheless be protected by the statute of repose because contractor registration is also required for industrial equipment installation. The provisions of the Washington Administrative Code which define the "specialty contractor classifications" demonstrate as much:

> (29) **"Industrial equipment/machines"** -- A contractor in this specialty installs all industrial machinery such as generators, compressors and processors which are bolted or otherwise attached so as to be permanently affixed to a structure. *Work in this specialty may also require an electrical license per chapter 19.28 RCW and/or plumber certification per chapter 18.106 RCW.*

WAC 296-200A-016 (italics in original).[4] Thus, whether or not WSH was performing only equipment installation, or construction and alterations to the structures upon which the improvements were performed, the Martin claim is time barred by the statute of repose.

[4] One of the express purposes of providing definitions of contractor classifications in the WAC is to "clarify issues related to suits against contractors and the collection of court judgments," and to ensure that the registration laws are properly administered. *See* WAC 296-200A-005 (2) and (3).

3. The Statute of Repose Began Running in 1981, Immediately Upon Completion of the TM5 Project.

Martin admits that "there is no question that TM5 was substantially completed and employed for its intended use beginning in 1981, more than six years before the Martin's family's claims accrued." Martin's Response to General's Cross-Appeal, p. 21. In order to evade the effect of this unassailable fact, Martin argues that General did not "terminate" its services on the TM5 Project until 2008. However, Martin's argument is based upon a gross distortion of the facts.

Although WSH and General may have performed certain work at the mill after completion of the TM5 project, the evidence demonstrates that the TM5 Project was a stand-alone contract completed in 1981. CP 381, (dep. p. 173). In turn, any work performed at the mill by WSH and General *after* completion of the TM5 Project in 1981 was performed under a series of separate contracts that "were term contracts for three or four years and then they had releases against that contract for individual work orders." CP 1603 (p. 24-25). "[E]ach one of the [agreements] stood on their own and didn't refer to any previous document or incorporate any previous document." CP 1613 (p. 63). Under these facts, the completion of each individual work order constituted the "termination of services" for purposes of the statute of repose.

Moreover, the evidence shows that after the 1996 Agreement and the incorporation of General, General *negotiated a new contract with Kimberly-Clark*. CP 1604 (p. 29) – CP 1606 (p. 36), CP 1609 (p.46). Thus, irrespective of the termination of services upon completion of the TM5 Project in 1981, it cannot be disputed that all services provided by WSH and Fletcher General were terminated, at the absolute latest, in 1996.

Finally, Martin ignores the fact that, under the "termination of services" provision of RCW 4.16.310, there "must be a nexus between the services performed and the cause of action." *Parkridge Associates, Ltd v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 599, 54 P.3d 225 (2002). In other words, in order for the "termination of services" date to apply, the services provided must relate to Martin's claim. Martin can provide no evidence that WSH or General performed post-completion work on TM5 that forms the basis for Martin's claim. Again, Martin's claims are solely premised upon allegations related to the original installation of TM5 by WSH. All other claims have been abandoned.

Martin's "termination of services" argument is without merit. Because Martin's claims accrued on August 13, 2004, more than 23 years after substantial completion of the TM5 Project, they are time barred by the statute of repose. General is entitled to have the trial court's dismissal affirmed on those grounds.

C. Because WSH Was Not a Product Manufacturer or Seller, Martin's Product Liability Claims Must Also Fail.

Without any evidence whatsoever, Martin contends that WSH was a "product seller" and "manufacturer" under the Product Liability Act. Martin states that WSH fabricated and installed the elevated walkway/work platform that Martin contends contributed to Mr. Martin's death. In support of this assertion, Martin cites testimony from Vern Rasmussen, who simply stated that WSH set up all the equipment. Rasmussen had no specific recollection of WSH fabricating or installing the particular walkway that Martin was standing on CP 459. Stated differently, Martin simply assumes that the mere presence of the walkway after TM5 was installed proves that WSH *fabricated and manufactured* the walkway. Martin has not provided any evidence that WSH either fabricated or manufactured the walkway. The same holds true for Martin's allegation regarding the controls for the conveyor. Martin has provided no evidence that WSH fabricated or manufactured any such controls.

In short, Martin fails to consider the activities of various other parties involved in the TM5 project, including other parties involved in the design of TM5, design of TM5 controls, the manufacture of TM5, and layout and positioning of TM5. Any of a number of other parties could have fabricated or manufactured the walkway or controls, including other

contractors, engineers, Scott Paper or Rapistan. Martin fails to provide any direct proof to show that WSH was responsible for fabrication or manufacture of the walkway or controls.

In addition, even if WSH installed the walkway, WSH did not act as a manufacturer or product seller. The available evidence about TM5 itself, makes it clear that WSH did not manufacture TM5, nor did it sell it. Scott Paper directly purchased all of the TM5 equipment directly from the manufacturer, Dematic, and simply had WSH install the equipment. There is no evidence to suggest that WSH performed any work on the alleged product "before its sale" to Scott Paper, so it cannot qualify as a product manufacturer under the Washington Product Liability Act. RCW 7.72.010.

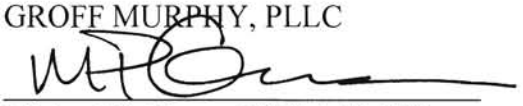
II. CONCLUSION

For the reasons stated herein, General respectfully requests the Court to affirm the trial court's dismissal of all claims against General.

Dated this 18th day of September, 2012.

Respectfully submitted,

GROFF MURPHY, PLLC



Michael P. Grace, WSBA #26091
Brittany Stevens, WSBA#44822
Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on September 18, 2012, true and correct copies of the foregoing document to the counsel of record listed below, via the method indicated:

John Budlong, WSBA # 12594 Faye J. Wong, WSBA # 30172 Law Offices of John Budlong 100 Second Avenue South, Suite 200 Edmonds, WA 98020 Ph. 425/673-1944 E. johnbudlong@lojb.net E. fayewong@lojb.net E. deb@budlonglawfirm.com E. tara@budlonglawfirm.com ***Co-Counsel for Appellants***	❑ ☒ ❑ ❑ ❑	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail
George M. Ahrend, WSBA # 25160 Ahrend Albrecht PLLC 100 E. Broadway Avenue Moses Lake, WA 98837 Ph. 509/764-9000 Fx. 509/464-6290 E. gahrend@ahrendlaw.com ***Co-Counsel for Appellants***	❑ ☒ ❑ ❑ ❑	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail
Douglas A. Hofmann, WSBA # 06393 Eliot Harris Williams, Kastner & Gibbs, PLLC Two Union Square, Suite 4100 Seattle, WA 98101 **Mailing:** P.O. Box 21926 Seattle, WA 98111-3926 Ph. 206/628-6600 E. dhoffman@williamskastner.com E. eharris@williamskastner.com E. DAdams@williamskastner.com E. MoJones@williamskastner.com ***Co-counsel for Respondents***	❑ ☒ ❑ ❑ ❑	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail

Francis S. Floyd, WSBA # 10642
Troy Hunter, WSBA # 29243
Amber L. Pearce, WSBA # 31626
Floyd, Pflueger & Ringer P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119-4296Ph. 206/441-4455
Fx. 206/441-8484
E. ffloyd@floyd-ringer.com
E. thunter@floyd-ringer.com
E. apearce@floyd-ringer.com
E. yalda@floyd-ringer.com
(assistant)
Counsel for Appellants Fletcher Construction Company of North America; Fletcher General, Inc.; Fletcher, Building, Ltd.

- ☐ Hand Delivery Via Messenger Service
- ☒ First Class Mail
- ☐ Federal Express
- ☐ Facsimile
- ☐ E-mail

DATED: September 18, 2012

Sarah Damianick, Legal Secretary
Groff Murphy, PLLC
E. sdamianick@groffmurphy.com