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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.

BRIEF OF RESPONDENT/CROSS APPELLANT GENERAL CONSTRUCTION COMPANY

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I. INTRODUCTION

In 2004, Donald Martin[1] was struck and killed by a "dipping conveyor" while working at the Scott Paper mill in Everett. The dipping conveyor was designed, manufactured and sold to Scott Paper in 1981 by a manufacturer named Rapistan. The dipping conveyor was installed in 1981 by a construction company, Wright Schuchart Harbor, Co. ("WSH"), pursuant to plans and specifications provided by Scott Paper.

By 1993, WSH did business under the name Fletcher General, Inc. ("Fletcher General"). In 1996, General Construction Co. ("General") acquired the majority of Fletcher General's assets in exchange for $22.5 million. The agreement which governed the 1996 asset transfer specified that tort liabilities such as the Martin claim constituted "Excluded Liabilities" that General did not assume. Thereafter, General and Fletcher General both continued to operate and do business, until Fletcher General dissolved in 2007.

In 2007, Martin sued Dematic, the corporate successor to the conveyor manufacturer, Rapistan. Martin also sued General, contending that General assumed the tort liabilities of WSH in the 1996 asset purchase

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[1] For ease of reference, the Plaintiffs are collectively referenced in this brief as "Martin."

agreement. It is not clear what Martin contends WSH allegedly did wrong when it installed the dipping conveyor.

In its answer, General denied it assumed the tort liabilities of WSH in the 1996 asset purchase agreement. Furthermore, General explained that Fletcher General was the true successor for the tort liabilities of WSH. Despite General's identification of Fletcher, Martin did not sue Fletcher for more than two years. General further responded that even if it had assumed the tort liabilities of WSH, the Martin claim was time barred by the statute of repose, and that neither WSH nor General were liable under the Washington Product Liability Act.

After a series of motions, the trial court agreed that General did not assume the tort liabilities of WSH in the 1996 Agreement, and dismissed all claims against General based upon Martin's allegations of successor liability for WSH. General now seeks to have this decision affirmed. Alternatively, General cross appeals the trial court's denial of General's motions for summary judgment based upon the six-year statute of repose for construction claims and the Washington Product Liability Act. Both are independent grounds to affirm dismissal of Martin's claims against General.

II. ASSIGNMENTS OF ERROR FOR CROSS-APPEAL

1. The Superior Court erred by denying General Construction Co.'s Motion for Summary Judgment contending that the Martin claim constituted an "Excluded Liability" in the 1996 Asset Purchase Agreement (order dated March 16, 2010). CP 2172-74.

2. The Superior Court erred by denying General Construction Co.'s Motion for Summary Judgment contending that the Martin claim was time barred by the statute of repose (order dated September 13, 2010). Docket 179, p. 2.[2]

3. The Superior Court erred by denying General Construction Co.'s Motion for Summary Judgment contending that WSH did not qualify as a "seller" or "manufacturer" under the Washington Product Liability Act (order dated September 13, 2010). Docket 179, p. 2-3.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR FOR CROSS-APPEAL

1. Is the Martin Claim an "Excluded" Liability per the definitions in the 1996 Asset Purchase Agreement between

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[2] Any "Docket" citations reference documents that have been filed in General Construction Co.'s Second Supplemental Designation of Clerk's Papers, filed June 22, 2012.

Fletcher General, Inc. and GC Investment Co.?

(Assignment of Error #1)

2. Is the Martin Claim time barred by RCW 4.16.310, the six-year statute of repose for construction claims?

(Assignment of Error #2)

3. Was Wright Schuchart Harbor, Co., the construction company that installed the dipping conveyor, a "manufacturer" or "product seller" within the meaning of the Washington Product Liability Act? (Assignment of Error #3)

IV. STATEMENT OF THE CASE

A. Factual Background

1. Donald Martin was killed in 2004 when he was crushed by a "dipping conveyor."

Donald Martin was killed on August 13, 2004, while working at the Scott Paper mill in Everett, Washington. CP 2437. At the time of his death, Mr. Martin was working in the "broke[3] handling area" of Tissue

[3] "Broke" is a term for the paper scraps generated during the process of converting rolled paper products (e.g., paper towels and toilet paper), from large manufactured rolls into smaller rolls for retail sale. The term "broke" refers to a break in the rolled sheets. The broke is then recycled at the mill into other paper products.

Machine No. 5 ("TM5"). *Id.* Mr. Martin leaned over a guardrail in an effort to clear broke that was stuck at the intersection of two conveyors, so that the stuck broke could be fed into a "pulper" for recycling. CP 2018; CP 2086. The intersection of the two conveyors was beneath a dipping conveyor[4] that fed into a paper baler.

While Mr. Martin was leaning over the guardrail, a co-worker lowered the dipping conveyor directly above the intersection of the two other conveyors. CP 2018; CP 2086. Because Mr. Martin was not behind the guardrail, he was killed. *Id.*; CP 618 (Second Amended Complaint).

2. The dipping conveyor was installed in 1981 as part of a large construction project at the Scott Paper mill.

The dipping conveyor and the associated equipment in the broke handling area were installed as part of a large construction project from 1980-81 for Scott Paper.[5] CP 3082. The construction project included installation of a new paper machine for the mill, Tissue Machine No. 5 ("TM5"), and also required construction of an entire new building for the machine. CP 3083.

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[4] It is called a "dipping conveyor" because one end of the conveyor may be lowered and raised, so that broke may be fed on to the lowered end to be transported to the baler.

[5] Kimberly Clark purchased the Everett mill from Scott Paper, and currently owns the plant. The installation of TM5 took place when Scott Paper owned the mill.

Construction of the TM5 project involved several different construction contractors. CP 3081. There were separate contracts for building erection, site preparation, siding and roofing, and machine erection. CP 3117. Scott Paper put the separate contracts out to bid, and awarded the equipment erection contract to Wright Schuchart Harbor Co. ("WSH") CP 3116-17.

WSH did not design the layout or positioning of the component equipment in TM5, nor did WSH manufacture any of the component equipment or purchase the equipment. Scott Paper's engineering department in Philadelphia designed the assembly, positioning and layout of the component equipment which comprised TM5. CP 3117; CP 3137-45. Day & Zimmerman Engineers, a consulting engineer for Scott Paper, assisted with the design. CP 3156-3161. Dematic (Rapistan) designed and manufactured the dipping conveyor that killed Mr. Martin. CP 3147-54, CP 1008. Day & Zimmerman Engineers designed the electrical and hydraulic controls for the dipping conveyor. CP 3156-3161. The engineering drawings include only the names of Dematic (Rapistan), the Scott Paper Engineering Department, and Day & Zimmerman Engineers. CP 3137-45; CP 3147-54; CP 3156-61. Scott Paper's procurement department in Philadelphia directly purchased the major pieces of equipment for the TM5 installation. CP 3119; CP 3163-86.

3. General Construction Co. was created in 1996 after several corporate transfers.

There is no dispute that WSH, not General Construction Co. ("General"), installed the dipping conveyor. In fact, General was not incorporated until 1996—fifteen years after the dipping conveyor was installed. The events leading up to the incorporation of General in 1996 may be summarized as follows:

a. In the years following the TM5 construction project, WSH became part of Fletcher, a New Zealand based family of construction companies.

In 1981, Wright Schuchart Harbor (WSH) acted as the equipment erection contractor for the TM5 construction project. CP 3116-17. At the time of the project, WSH was owned by a parent construction company named Wright Schuchart Inc. CP 2451, ¶ 3.

In 1987, WSH's parent company, Wright Schuchart Inc., was purchased by a construction company named Fletcher Construction Co. (Delaware) Limited ("FCC Limited"). CP 2438; CP 2451, ¶ 3. FCC Limited was a subsidiary of Fletcher Construction Company North America ("FCC North America"), which was in turn a subsidiary of Fletcher Challenge, a New Zealand construction company that was expanding into the North American construction market. CP 2438; CP 2456-59; CP 2461-65; CP 2467-70.

In 1993, Fletcher Challenge merged WSH into subsidiary construction company named Fletcher General, Inc. ("Fletcher General"). CP 2451, ¶ 4. Fletcher General succeeded to the pre-existing liabilities of WSH, and continued to do business as a construction contractor. CP 2451, ¶ 4.

b. Fletcher General sold some of its assets to General Construction Investment Co., and retained other assets.

In 1996, Fletcher Challenge sought to withdraw from the North American construction market. CP 2451, ¶ 6. As part of this withdrawal process, Fletcher General agreed to a management buyout of certain Fletcher General assets. CP 2451, ¶ 6; CP 2456. The management buyout entity, GC Investment Co., incorporated General for the purchased assets. CP 2473. With these assets, General began operations in 1996. *Id.*

An agreement dated October 17, 1996 governed the details of the asset purchase (the "Agreement" or "1996 Agreement"). CP 2472-2508. The Agreement contained definitions for both "Assumed Liabilities" and "Excluded Liabilities." CP 2474-79. The Agreement provided that the following liabilities were "Excluded:"

> 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 2478. The Agreement further provided that the only "Assumed" liabilities that General assumed were those liabilities to which Fletcher General was "subject" on October 10, 1996, and those additional liabilities to which Fletcher General became subject between October 10 and "the Closing Date":

> Effective on *October 10, 1996* (the "Organization Date") and in order to permit General to obtain licensing and pre-qualification authority necessary to operate the Business as of the Closing, Buyer's Shareholders, acting in their capacity as the senior management of Seller, caused Seller to capitalize General by assigning to General all of the Included Assets held by Seller as of the Organization Date in exchange for the issuance of the Stock by General to Seller and *the assumption by General of all of the Assumed Liabilities to which Seller was subject as of the Organization Date*. In connection with the transfer of assets to General, General has provided Seller with a resale certificate for state tax purposes covering the 42' Clyde Crane and the Todd Whirely equipment. In addition, at the Closing (i) Seller shall transfer and assign to General all additional Included Assets acquired by Seller between the Organization Date and the Closing Date that are held by Seller as of the Closing Date and (ii) *General shall assume from Seller all additional Assumed Liabilities to which Seller becomes subject between the Organization Date and the Closing Date.*

CP 2485 (emphasis added). Closing occurred on October 17, 1996. CP 1493-94, ¶¶ 3-4.

c. After the asset purchase, Fletcher General continued to exist, held significant assets, and defended claims against General that were "Excluded" from the 1996 Agreement.

Fletcher General was a viable, operating company for many years after the 1996 asset sale. CP 2452, ¶ 8. In fact, Fletcher General received more than $22.5 million for the assets it sold under the terms of the 1996 Agreement. CP 2451, ¶ 6; CP 2485. Fletcher General also retained property that it later sold to the Port of Seattle in 1997 for over five million dollars. CP 2796.

Furthermore, for at least ten years following the asset purchase, Fletcher General arranged for the defense or payment of claims for Excluded Liabilities that General tendered to Fletcher General. CP 2452, ¶ 8. Fletcher General handled dozens of claims for Excluded Liabilities under the 1996 Agreement, ranging from workers compensation claims to personal injury lawsuits. CP 1913, ¶ 4. Greg Casper, the District Business Manager for General prior to March 1, 2010, personally tendered more than 30 such claims to Fletcher General CP 1912-13, ¶¶ 2, 4. See CP 1912-13, ¶¶ 6-8 for examples of such claims.

d. Fletcher General merged into FCC North America in 2001, and dissolved in 2007 after Mr. Martin's death.

In 2001, Fletcher General merged into FCC North America, which expressly agreed to assume Fletcher General's obligations after the merger.[6] CP 2452, ¶ 9; CP 2780. FCC North America also continued to defend and indemnify General against Excluded Liabilities from the 1996 Agreement until October 17, 2006, at which time the indemnity was terminated. CP 2452, ¶ 9. It even provided a surety bond of $5,000,000 to secure its obligation to indemnify General. CP 2781.

FCC North America continued to exist for several years after Mr. Martin was killed, until FCC North America filed a Certificate of Dissolution on June 26, 2007. CP 2861-62.

B. Procedural History

1. The trial court denied General's and Martin's first motions for summary judgment regarding the definitions of Assumed and Excluded liabilities.

The first motions filed by both General and Martin regarding the successor liability issue were each based upon the definitions of "Assumed Liability" and "Excluded Liability" in the 1996 Agreement.

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[6] Fletcher General, Fletcher Construction Co. Northwest, and FCC Limited merged with and into FCC North America in 2001. CP 2224.

On December 11, 2009, General brought a motion for summary judgment in which it argued that the 1996 asset purchase did not trigger any successor liability for the actions of WSH or Fletcher General. CP 2436-48. General contended that the Martin claim fell within the definition of an "Excluded Liability" under the Agreement. *Id.* General asserted that the Agreement governing this transaction specifically excluded "*[a]ll obligations or liabilities of [Fletcher General] of any nature whatsoever, arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996.*" CP 2478 (italics added). Martin advanced a different interpretation of the Agreement, contending that Mr. Martin's death was an "Assumed Liability" under the definitions in the Agreement. CP 2316-27. The trial court denied General's motion on March 16, 2010. CP 2172-74.

After the trial court denied General's motion, on April 8, 2010, Martin filed a motion for summary judgment seeking to have General declared to be a successor in interest based upon the argument that its claims fell within the definition of the "Assumed Liabilities" in the Agreement. CP 2114-21. General disputed that the Martin claim fell within the definition of an "Assumed Liability" under the Agreement. *Id.* Moreover, General stated that regardless of whether Martin's claims met the definition of "Assumed Liability," General *only* assumed those

"Assumed Liabilities" to which Fletcher General was "subject to" as of October 1996. Docket 134, p. 5-10. Because Mr. Martin was not killed until 2004, Fletcher General was not "subject to" liability for Mr. Martin's death at that time. The trial court agreed, and denied Martin's motion for summary judgment. CP 1388-90.

2. The trial court granted General's renewed motion for summary judgment regarding successor liability, finding that Fletcher General was not "subject to" liability for the Martin Claim on October 17, 1996.

On October 1, 2010, General filed a renewed motion for summary judgment on successor liability grounds. CP 1249-61. General's motion argued that (regardless of whether the Martin Claims fell within the definition of an "Assumed Liability") the operative language of the Agreement provided that General only assumed those "Assumed Liabilities" to which Fletcher General was "subject" in 1996. *Id.* General claimed that Fletcher General was not "subject to" Martin's claims in 1996 because Mr. Martin was not killed until 2004, so any claims based on alleged acts or omissions of WSH or Fletcher General prior to October 1996 against General must be dismissed. *Id.*

The trial court granted General's motion for summary judgment on October 29, 2010. CP 802-805. The Court held that General "is not a successor to the liabilities of [Fletcher General], [FCC North America],

[WSH], or Wright Schuchart, Inc." and dismissed all claims against General on successor liability grounds. CP 804.

On November 9, 2010, Martin sought reconsideration of the Court's order granting General's renewed summary judgment motion based on successor liability. CP 796-801. The trial court denied Martin's motion for reconsideration on November 24, 2010. CP 661.

3. The trial court denied General's motion for summary judgment based on the statute of repose and the Washington Product Liability Act.

On May 11, 2010, General filed a motion for partial summary judgment seeking dismissal of all claims against General (1) pursuant to the six year construction statute of repose contained in RCW 4.16.310, and (2) for Martin's product liability claims because General is not a product seller or manufacturer subject to the Washington Product Liability Act. CP 1947-61. Martin responded that the statute of repose was not applicable because the TM5 project constituted manufacturing, and was not an improvement upon real property. Docket 137, p. 8-14. Further, Martin claimed that the statute of repose had not run because Mr. Martin's death occurred in 2004, and that General had not terminated its services at the Kimberley Clark mill until after Mr. Martin's death. *Id.* at p. 12. General replied that the statute of repose unequivocally barred claims against construction contractors, and that there was no evidence that

General was a product manufacturer or seller under the Washington Product Liability Act. CP 1684-97. The Court denied General's motions on September 3, 2010 because it found that genuine issues of material fact remained. Docket 179, p. 2-3.[7]

V. SUMMARY OF ARGUMENT

Martin's successor liability claim against General fails for two primary reasons. **First**, the Martin Claim falls within the definition of "Excluded Liabilities" in the 1996 Agreement. The trial court denied General's motion for summary judgment on this point, which General now appeals. **Second**, even if it is conceded for purposes of argument that the Martin Claim falls within the definition of "Assumed Liabilities," it is not a liability that General assumed. In particular, the 1996 Agreement provides that General only assumed those "Assumed Liabilities" which Fletcher General was "subject to" on October 17, 1996. CP 2485. Because the Martin claim did not accrue until 2004, Fletcher was not subject to liability at that time.

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[7] Martin originally alleged that regardless of the claim for successor liability, General was liable for unspecified actions after incorporation in 1996. CP 2114-21. On October 1, 2010, General moved for summary judgment on that claim, asserting that Martin had no evidence that General's activities after October 1996 caused or contributed to Mr. Martin's death. CP 1249-61. Martin did not oppose General's motion, and on January 13, 2011, the trial court dismissed all claims against General with prejudice. CP 13-14.

Even if the Martin Claim is an Assumed Liability acquired by General as part of the 1996 Agreement, it is still barred by the six year statute of repose for construction claims contained in RCW 4.16.310. WSH's work in 1981 on the TM5 Project was construction services for an improvement on real property within the scope of the statute of repose. Finally, WSH was not acting as a seller or manufacturer within the meaning of the Washington Product Liability Act. Both of these defenses constitute independent grounds for affirming the trial court's dismissal of Martin's claims against General.

VI. ARGUMENT IN RESPONSE TO MARTIN APPEAL

A. Standard of review.

The standard of review for the appeal of a trial court's order on summary judgment is de novo review. *Enterprise Leasing, Inc. v. City of Tacoma,* 139 Wn.2d 546, 551 (1999). The appellate court considers the facts in a light most favorable to the nonmoving party. *Bremerton Pub. Safety Ass'n v. City of Bremerton,* 104 Wn. App. 226, 229-30 (2001). Summary judgment is proper if "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300-301 (2002).

B. The trial court properly dismissed Martin's claim that General assumed the tort liabilities of WSH.

The trial court properly rejected Martin's claim that General has successor liability for the Martin claim. General is not now and has never been a successor in interest to WSH, and did not assume its liabilities merely by purchasing assets of Fletcher General.

1. General did not acquire successor liability simply because it acquired assets from Fletcher General.

The mere purchase of assets of another corporation does not subject the purchasing corporation to the debts and liabilities of the selling corporation. *See Hall v. Armstrong Cork, Inc.,* 103 Wn.2d 258, 261-62 (1984). The sale of corporate assets transfers an interest separate from the corporate entity, and this sale does not result in a transfer of unbargained-for liabilities from the seller to the purchaser. *Id.* at 262.

Typically, liabilities remain with the selling corporation when a corporation sells its assets to a purchasing corporation. However, the purchasing corporation may be liable for the selling corporation's liabilities if the purchasing corporation expressly or impliedly agrees to

assume this liability. *Id.*[8] *See also Atchinson, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 361 (9th Cir. 1997) ("[A]sset purchasers are not liable as successor corporations unless… the purchasing corporation expressly or impliedly agrees to assume the liability").

2. General did not expressly or impliedly agree to assume WSH's liabilities.

Under the terms of the 1996 Agreement, General only assumed those "Assumed Liabilities" to which Fletcher General was subject as of the date of closing.[9] The relevant language in the Agreement is in Article II, Section 1, titled "organization of General Construction Company." CP 2485. The section provides that General assumed only a limited subset of "Assumed Liabilities," as follows:

> Effective on October 10, 1996 (the "Organization Date") and in order to permit General to obtain licensing and pre-qualification authority necessary to operate the Business as of the Closing, Buyer's Shareholders, acting in their capacity as the senior management of Seller, caused Seller to capitalize General by assigning to General all of the

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[8] The *Hall* case sets out several other exceptions to the general rule, *Hall*, 103 Wn.2d at 261-62, but the only exception that Martin argues here is that General "expressly assumed" liability for the Martin Claims. *See* Brief of Appellants, filed May 7, 2012, p. 16.

[9] Plaintiffs erroneously state in their brief that General does not dispute that the Martin claim is an "assumed liability." *See* Brief of Appellants, filed May 7, 2012, p. 22. This is incorrect. General disputed this claim in its initial summary judgment filing and its second summary judgment filing. CP 2436-48, Docket 134, p. 5-10.

> Included Assets held by Seller as of the Organization Date in exchange for the issuance of the Stock by General to Seller and *the assumption by General of all of the Assumed Liabilities to which Seller was subject as of the Organization Date*. In connection with the transfer of assets to General, General has provided Seller with a resale certificate for state tax purposes covering the 42' Clyde Crane and the Todd Whirely equipment. In addition, at the Closing (i) Seller shall transfer and assign to General all additional Included Assets acquired by Seller between the Organization Date and the Closing Date that are held by Seller as of the Closing Date and (ii) General shall assume from Seller *all additional Assumed Liabilities to which Seller becomes subject between the Organization Date and the Closing Date*.

CP 2485 (emphasis added). It appears that Closing occurred on October 17, 1996, but in no event later than the end of October 1996. CP 1493-94, ¶ 3-4.

As demonstrated above, even if the Martin Claims constituted an "Assumed Liability," General only assumed *a limited subset* of the "Assumed Liabilities." Specifically, General only assumed (1) liabilities to which Fletcher General was subject as of October 10, 1996 (the Organization Date), and (2) additional liabilities to which Fletcher General became subject between October 10, 1996 (the Organization Date) and October 17, 1996 (the Closing Date). CP 2485. Stated differently, if the liability arose after October 17, 1996, it was not assumed by General. Because Mr. Martin was not killed until 2004, Fletcher General could not have been subject to liability for claims relating to his death in 1996. As a

result, General did not assume liability for the Martin Claims in the 1996 Agreement.

3. Under the terms of the Agreement, the Martin Claims were within the definition of "Excluded Liabilities," and were therefore retained by Fletcher General.

The Agreement also specifically excluded liability for:

> 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 2478 (emphasis added). Martin's claims "arise" out of alleged acts or omissions of WSH occurring prior to July 1, 1996, i.e., WSH's work on the TM5 Project in 1981. Martin's claims cannot "arise" from actions occurring after 1996, because Martin does not contend that WSH or General performed any work after 1996 that is alleged to have caused or contributed to his death.

4. Martin takes an inconsistent position with respect to whether liability for Mr. Martin's death existed prior to July 1, 1996.

It must be noted that Martin takes an inconsistent position regarding whether the Martin Claims "arise" out of acts or omissions of WSH occurring prior to July 1, 1996. On the one hand, in an attempt to argue that the liability for Mr. Martin's death is an "Assumed Liability," Martin argues that the liability did not accrue until after July 1, 1996. On

the other hand, in an attempt to argue that the liability was "assumed" under the terms if the Agreement, Martin argues that the unspecified faulty work by WSH existed before July 1, 1996. However, Martin cannot have it both ways: if the liability existed prior to July 1, 1996, then it is an Excluded Liability; if the liability did not exist until 2004, then it was not assumed because Fletcher General was not subject to the liability on or prior to the Closing Date of the 1996 Agreement.

VII. ARGUMENT IN SUPPORT OF GENERAL'S CROSS-APPEAL

A. The trial court erred in denying General's first motion for summary judgment regarding successor liability.

General addressed this argument in section VI, *infra*, which is incorporated herein by reference.

B. Even if General assumed liability for the Martin Claim, the trial court erred by denying General's motion for summary judgment based on the statute of repose.

1. The statute of repose applies to all claims arising from WSH's construction work on the TM5 project, which was completed in 1981.

Washington law provides a six-year statute of repose for construction claims, which states in relevant part:

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The

> phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. *Any cause of action which has not accrued within six years after such substantial completion of construction*, or within six years after such termination of services, whichever is later, *shall be barred*[.]

RCW 4.16.310 (emphasis added). In turn, RCW 4.16.300 defines the types of claims to which the six-year statute of repose applies:

> RCW 4.16.300 through 4.16.320 *shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property*, or having performed or furnished any design, planning, surveying, architectural *or 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. *This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW* 18.08.310, *18.27.020*, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

RCW 4.16.300 (emphasis added). WSH's installation work for the TM5 Project was completed in 1981. The statute of repose applies because there is no dispute that Mr. Martin's death did not occur within six years of that time.

2. Legislative amendments make it clear that the statute of repose applies to claims arising from WSH's work.

At the trial court, Martin argued that the statute of repose did not apply to WSH's work on the TM5 Project. Martin is incorrect. The construction statute of repose was specifically intended by the legislature

to benefit and protect contractors such as WSH from the dangers of stale claims and litigation. In fact, changes to the language in the statute of repose over the past 30 years illustrate that Martin's claim related to WSH's work in 1981 is time barred by the statute of repose because WSH was performing for which it was required to be licensed and registered as a construction contractor, and was not a manufacturer.

In *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 108 (1984), the defendant had "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 to real property, citing *Pinneo v. Stevens Pass, Inc.*, 14 Wn. App. 848 (1976). *Id.* at 109. In analyzing the scope of RCW 4.16.300, the *Condit* Court acknowledged that the term "improvement" traditionally applied to large machinery permanently installed within a building. *Condit,* 101 Wn.2d at 110. However, the 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 employed the principle of *ejusdem generis* to ascertain the intent of the Legislature, and limited the application of the statute to protect "individuals who work on structural aspects of the building but not

manufacturers of heavy equipment or nonintegral systems within the building." *Id.*

In 1986, the *Condit* decision caused the Legislature to amend RCW 4.16.300 as part of the Tort Reform Act. In an effort to prevent manufacturers from taking advantage of the statute of repose, the Legislature added a single line to the end of RCW 4.16.300: "This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers." RCW 4.16.300 (1986 version). As subsequent legislative history explained:

> Before this 1986 amendment, the statute of repose was construed as applying to parties "who work on structural aspects of a building, but not manufacturers of heavy equipment or nonintegral systems within the building." *Condit v. Lewis Refrigeration Co.*

House Comm. on Judiciary, House Bill Report SSB 6600 (Wash. 2004).

However, the 1986 amendment had an unintended effect. Plaintiffs who sought to assert claims against contractors could circumvent the statute of repose by arguing that contractors were actually manufacturers, and as a result, the statute of repose did not apply. For example, in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246 (1992), an injured plaintiff successfully argued that a licensed contractor specializing in the construction and installation of propane systems had been acting as a manufacturer when it constructed the system which injured the plaintiff.

Because of the language in the statute prohibiting application to manufacturers, the court found that the statute of repose did not apply. *Id.* at 265.

The Legislature stepped in again in 2004 to clarify that the statute of repose is intended to apply to contractors. The House Committee Report specifically referenced *Washburn*:

> After the 1986 amendment excluding "manufacturers" there have been several lawsuits in which plaintiffs have successfully argued that construction contractors are also 'manufacturers' and, therefore, not protected by the statute of repose. For example, *Washburn v. Beatt Equipment Co.*"

House Comm. on Judiciary, House Bill Report SSB 6600 (Wash. 2004). Thus, the legislature clarified that licensed contractors were entitled to the protections of the statute of repose, and eliminated the exception for "manufacturers:"

> Language in the statute of repose excluding "manufacturers" from the statute's protection is deleted. The coverage of the statute of repose is intended specifically to cover persons licensed or registered as contractors, architects, engineers, land surveyors, landscape architects, and electricians.

Id. As such, the last line of RCW 4.16.300 was amended to its current form:

> This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

RCW 4.16.300 (effective June 10, 2004).

The legislature's 2004 amendment of RCW 4.16.300 effectively supersedes the "structure vs. fixture" analysis in *Condit*, *Washburn*, and other cases decided prior to the amendment. It no longer matters whether the party worked on "structural elements" or "nonintegral systems," or whether the party could be characterized as a "manufacturer." These judicially-crafted criteria have all been rejected by the legislature. The only consideration under the current, applicable version of the statute of repose is whether the party is registered or licensed by the Department of Labor and Industries as a contractor.

WSH was properly registered as a construction contractor with the Department of Labor and Industries from 1979 to 1993, when WSH merged into Fletcher General. CP 2092. Because WSH performed the TM5 work as registered contractor, the six-year statute of repose applies.[10]

3. Important public policy considerations support application of the statute of repose.

Statutes of repose "afford plaintiffs what the legislature deems a reasonable time to present their claims" and "protect defendants and the

---

[10] The statute of repose also bars Martin's product liability claims, because it bars "all claims or causes of action *of any kind*" against "persons having performed work for which the persons must be registered or licensed under RCW ... 18.27.020." RCW 4.16.300 (emphasis added). There is no exclusion for product liability claims.

courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick,* 444 U.S. 111, 117 (1979) ("the right to be free of stale claims in time comes to prevail over the right to prosecute them"). Statutes of repose are intended to protect construction contractors from excessive litigation, especially in light of their lack of control over their construction after completion.[11]

Construction contractors may be subject to particular injustice if the statute of repose is not properly applied. The contractor may construct work that will be in use for decades in the future. This poses several problems.

First, if the statute of repose is not applied, contractors may have to defend decisions and choices they made decades earlier. The long passage of time may mean that important documents have been discarded or lost,

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[11] In 2007, the Washington Supreme Court abandoned the "completion and acceptance doctrine" which shielded contractors from liability for defective work after that work has been completed and accepted by the property owner. *Davis v. Baugh Indus. Contractors, Inc.,* 159 Wn.2d 413, 415 (2007). The Supreme Court abandoned the doctrine in part because the legislature's creation of a statute of repose under RCW 4.16.310 undercut the policy justifications for the doctrine. *Id.* at 419. As such, to the extent that contractors no longer are able to take advantage of the completion and acceptance doctrine, the statute of repose must be broadly applied to effect the purpose of protecting contractors from stale claims.

and that key witnesses have moved or forgotten the important events. Decades can pass, companies can merge and relocate, and normal document retention procedures may have allowed for the routine destruction of documents. All of these factors will impair a party's ability to defend itself from ancient claims.

Second, contractors typically have no control of improvements after the construction is completed. Improvements deteriorate over time, and owners may make modifications to the improvements to suit later needs without the approval or review of the original contractor. If the improvement is the cause of an injury, the injury may be the result of improper modifications or maintenance.

These general problems are apparent in this case. For example, the parties able to locate only one witness who worked on the TM5 Project for Scott Paper.[12] The passage of over twenty years meant the parties could not locate the vast majority of documents for the TM5 project, thereby unfairly limiting General in its ability to defend against the Martin Claims. Similarly, the parties were unable to find any maintenance records for the dipping conveyor regarding whether any modifications were made to the machine. Failing to apply the statute of repose to this case will work an injustice against General.

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[12] That witness, Sam Rarig, is now deceased.

C. The trial court erred by denying General's motion for summary judgment seeking dismissal of Martin's Washington Product Liability Claim.

The Washington Product Liability Act applies to manufacturers and sellers of products. RCW 7.72.010-.070. However, there is no evidence that General, Fletcher General, or WSH were manufacturers or sellers of TM5 or the dipping conveyor within the meaning and scope of the Washington Product Liability Act. Instead, the evidence shows that several other parties were involved in the design and manufacture of the machine, and the layout and positioning of the machine in the new paper plant:

- **Design of TM5.** Scott Paper's engineering department in Philadelphia, Dematic (Rapistan), and Day & Zimmerman Engineers collaborated to prepare the design for TM5. CP 3117; CP 3137-45; CP 3147-54; CP 3156-3161.
- **Design of TM5 Controls.** Day & Zimmerman Engineers designed the electrical and hydraulic controls for the TM5 Conveyor. CP 3156-3161.
- **Manufacture of TM5.** Dematic (Rapistan) manufactured the TM5 Conveyor. CP 1008.
- **Layout and Positioning of TM5.** Scott Paper Company designed the layout and positioning of the TM5 Conveyor. CP 3117; CP 3137-45.
- **Procurement.** Scott Paper's procurement department in Philadelphia directly purchased the major pieces of equipment for the TM5 Conveyor installation. CP 3118-19; CP 3163-86.

WSH's only responsibility on the TM5 installation was erecting the equipment designed, manufactured, and purchased by other parties. A contractor providing construction and installation services in accordance with designs provided by others cannot be liable under the Washington Product Liability Act.

1. WSH was not a product seller within the scope of RCW 7.72.010.

WSH was not a "product seller" within the meaning of the Washington Product Liability Act. The Act defines a "product seller" as follows:

> [A]ny person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

RCW 7.72.010. WSH performed construction services, including the installation of products purchased by other parties, such as Scott Paper. CP 3119, CP 3163-86. Sam Rarig, the construction crew manager at the time TM5 was installed, recalled that Scott Paper *directly purchased* all significant machinery for the project, and the purchase order and bills of lading for the TM5 Conveyor list Scott Paper as the purchaser. CP 3118-19; CP 3163-86. There is no evidence that WSH ever sold any products "for resale, use or consumption." Instead, WSH was a licensed industrial

construction contractor involved exclusively in installing equipment and machinery for industrial workplaces.

2. WSH was not a "manufacturer" within the scope of RCW 7.72.010.

Similarly, WSH was not a "manufacturer" under the Washington Product Liability Act. The Act defines a "manufacturer" as:

> *[A] product seller* who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product *before its sale* to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

RCW 7.72.010. As a threshold matter, because WSH was not a product seller, it cannot be a product manufacturer. Regardless, there is no evidence that WSH designed, produced, made, fabricated, constructed, or remanufactured the TM5 Conveyor prior to sale. The evidence instead shows that WSH installed equipment manufactured by Dematic (Rapistan), purchased by Scott Paper and designed by Scott Paper, Dematic (Rapistan), and Day & Zimmerman. CP 3117-19; CP 3137-45; CP 3147-54; CP 3156-3161; CP 1008. Finally, the definition of manufacturer requires that the product seller perform its work on the alleged product "before its sale" to a user or consumer. RCW 7.72.010. There is no evidence that WSH performed any work on the dipping

conveyor before its sale to Scott Paper. WSH was not a product manufacturer within the scope of the Washington Product Liability Act.

3. Washington case law holds that construction services are not "products" for purposes of the Washington Product Liability Act.

Washington case also establishes that construction services, such as those allegedly provided by WSH, are not "products" within the scope and meaning of the Washington Product Liability Act.

In *Graham v. Concord Construction, Inc.*, 100 Wn. App. 851, 856 (2000), the Court held that a contractor performing construction services in accordance with designs prepared by engineers was not manufacturing or selling a product for purposes of the Washington Product Liability Act. The Court held that "[t]his was not a contract for a 'product' but rather a contract for construction services. The Washington Product Liability Act does not, therefore, apply." *Id.*

Another case, *Garza v. McCain Foods, Inc.* 124 Wn. App. 908 (2004), contains facts that are similar to those presented here. In *Garza,* the defendant assembled and installed a conveyor belt system in a food plant in the early 1970s, according to the manufacturer's specifications. *Id.* at 911. Plaintiff was an employee at the food plant who was injured by the conveyor approximately 26 years later. *Id.* at 912. The plaintiff

asserted a claim under the Washington Product Liability Act, which the Court dismissed:

> A "product" is an object "produced for introduction into trade or commerce." RCW 7.72.010(3). *Construction services are not products for purposes of the Product Liability Act.* [citation omitted]. The contract in *Graham* was for services to construct a fish screen facility. The fish screen was not produced for introduction into trade or commerce. This court held the contract was not, therefore, one for a "product" but for construction services. The Washington product liability act did not apply. [citation omitted]. *Likewise, this is not a product liability case.*

Id. at 916-917 (emphasis added).

Moreover, the Washington Product Liability Act does not apply to contracts for construction services *even if the contract includes sale of products that are incidental to the construction contract*. Thus, in *Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc.*, 119 Wn. App. 249, 252 (2003), a general contractor erected *and sold* a manufactured building to the plaintiff. The plaintiff specified use of a particular manufactured building. *Id.* at 252-253. The court held that the "contract was primarily for construction services" and that the sale of the manufactured building was merely incidental to the services provided. *Id.* at 260-261. As a result, the court concluded that the contractor was not a "product seller" within the meaning of the Washington Product Liability Act. *Id.* at 261. The same conclusion can be drawn here. WSH was

acting as a licensed and registered construction contractor when it performed its work on the TM5 project in 1981. Under any fair interpretation of the law and facts, WSH was not a product seller or manufacturer.

VIII. CONCLUSION

For the foregoing reasons, General respectfully requests the Court affirm the trial court's grant of summary judgment to General, on the grounds that (1) General did not assume the liabilities of WSH for the Martin claim; (2) any claim regarding work completed by WSH in 1981 is time barred by the statute of repose; and (3) WSH does not have the liability of a product seller or manufacturer under the Washington Product Liability Act.

Dated this 22nd day of June, 2012.

Respectfully submitted,

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68132-0-1

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.

APPENDIX OF OTHER WASHINGTON AUTHORITIES IN SUPPORT OF BRIEF OF RESPONDENT/CROSS APPELLANT GENERAL CONSTRUCTION COMPANY

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June 22, 2012

OTHER WASHINGTON AUTHORITIES

1. RCW 4.16.300 (1986).

2. House Comm. on Judiciary, House Bill Report SSB 6600 (Wash. 2004).

Dated this 22nd day of June, 2012.

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Exhibit 1

West's RCWA 4.16.300

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 4. CIVIL PROCEDURE
CHAPTER 4.16. LIMITATION OF ACTIONS

6.300. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or 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. This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers.

CREDIT(S)

1988 Main Volume

[1986 c 305 § 703; 1967 c 75 § 1.]

HISTORICAL AND STATUTORY NOTES

1988 Main Volume

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

Laws 1986, ch. 305, § 703, added the last sentence, excepting claims or causes of action against manufacturers from the scope of this section.

LAW REVIEW AND JOURNAL COMMENTARIES

What shelter remains for builder/vendors under RCW 4.16.300-320 after *Pfeifer v. Bellingham*? 14 U.Puget Sound L.Rev. 183 (1990).

LIBRARY REFERENCES

1988 Main Volume

provements ⚿4(6).
nitation of Actions ⚿46(1).
I.S. Improvements § 14.
I.S. Limitations of Actions § 131 et seq.

provements on real property, see Wash.Prac. vol. 15, Orland and Tegland, § 413.
itutes of limitations, in general, see Wash.Prac. vol. 15, Orland and Tegland, § 411.

NOTES OF DECISIONS

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1. Validity

Construction statute of repose [§§ 4.16.300 to 4.16.320] that covers claims arising from building, but not builders' actions in selling property, is not unconstitutional special legislation; it could be rational for Legislature to distinguish between sellers who improve property and those who do not when purpose of statute is to provide protection to those who improve property, but it is equally rational to impose duties of seller on builders who also sell their property. Pfeifer v. City of Bellingham (1989) 112 Wash.2d 562, 772 P.2d 1018.

Section 4.16.300 et seq., which limit actions arising from building construction activities, are not violative of the equal protection provisions of the state and federal constitutions. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co. (1972) 81 Wash.2d 528, 503 P.2d 108.

1.5. In general

The statute of limitations and the statute of repose together create a two-step analysis for computing the limitations period for a tort action arising from improvements on real property: first, the cause of action must accrue within six years of substantial completion of construction, and second, suit must be filed within the applicable statute of limitations. Architechtonics Const. Management, Inc. v. Khorram (2002) 111 Wash.App. 725, 45 P.3d 1142.

2. Purpose

Statutes of limitation pertaining to construction, alteration, or repair of any improvement upon real property were adopted to protect architects, contractors, engineers, surveyors, and others from extended potential tort and contract liability. Meneely v. S.R. Smith, Inc. (2000) 101 Wash.App. 845, 5 P.3d 49, as amended, review denied

142 Wash.2d 1029, 21 P.3d 290.

This section and § 416.310 pertaining to construction, alteration or repair of any improvement upon real property were adopted to protect architects, contractors, engineers, surveyors and others from extended potential tort and contract liability. Hudesman v. Meriwether Leachman Associates, Inc. (1983) 35 Wash.App. 318, 666 P.2d 937, review denied.

3. Persons liable

Application of this section to action against builder/vendor requires analysis of activities; this section shields builders in building activities and, if builders also engage in activity of selling, they should face liability of sellers. Pfeifer v. City of Bellingham (1989) 112 Wash.2d 562, 772 P.2d 1018.

Construction statute of repose [§§ 4.16.300 to 4.16.320] did not shield builder/vendor from personal injury action premised on alleged concealment of known, dangerous condition during sale. Pfeifer v. City of Bellingham (1989) 112 Wash.2d 562, 772 P.2d 1018.

Claim against telephone company to recover damages arising out of a fire allegedly caused by a gas line damaged while the telephone company's cable was being laid and claim of gas company for indemnity from the telephone company were not barred by statute of limitations governing claims or causes of action arising from construction, alteration, or repair of any improvement upon real property, even though the action was brought after the limitations period, since the telephone company was the owner of the cable being laid when the gas line was damaged. New Meadows Holding Co. by Raugust v. Washington Water Power Co. (1984) 102 Wash.2d 495, 687 P.2d 212.

This section focuses on individuals whose activities relate to construction of improvement rather than those who service or design items within improvement. Condit v. Lewis Refrigeration Co. (1984) 101 Wash.2d 106, 676 P.2d 466.

This section should be restricted to contractors or individuals whose services contribute to construction of structure rather than property within it. Condit v. Lewis Refrigeration Co. (1984) 101 Wash.2d 106, 676 P.2d 466.

Manufacturers of heavy equipment or nonintegral systems within building were not intended to be protected by this section. Condit v. Lewis Refrigeration Co. (1984) 101 Wash.2d 106, 676 P.2d 466.

Section 4.16.300 et seq., which limit actions on construction work to those accruing within 6 years after completion of the work, are not rendered inapplicable merely because the person performing the construction services also performed other services in violation of another statute. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co. (1972) 81 Wash.2d 528, 503 P.2d 108.

4. Claims or causes of action—In general

Statute of limitations governing all claims or causes of action arising from construction, alteration, or repair of any improvement upon real property (§§ 4.16.300 to 4.16.320) applies to all claims or causes of action arising from the activities covered and applies to claims arising from adjacent property. New Meadows Holding Co. by Raugust v. Washington Water Power Co. (1984) 102 Wash.2d 495, 687 P.2d 212.

4.5. —— Trade associations, claims or causes of action

Six-year statute of repose for actions against persons who have performed construction related services, including design services, for an improvement to real property did not apply to action, brought by swimmer who broke neck when he struck bottom of pool following dive off diving board, against trade association that set generally applicable safety standards for swimming pools and related equipment. Meneely v. S.R. Smith, Inc. (2000) 101 Wash.App. 845, 5 P.3d 49, as amended, review denied 142 Wash.2d 1029, 21 P.3d 290.

5. —— Accrual, claims or causes of action

Homeowners' contract cause of action for defective construction of their house accrued, and six-year statute of limitations began to run, when homeowners discovered dry rot in walls. Architechtonics Const. Management. Inc. v. Khorram (2002) 111 Wash.App. 725, 45 P.3d 1142.

Statute governing claims or causes of action arising from construction, alteration, or repair of any improvement upon real property (§§ 4.16.300 to 4.16.320) begins to run upon substantial completion of the project and not upon the accrual of a claim and, in fact, runs against the accrual of any claim arising from the project. New Meadows Holding Co. by Raugust v. Washington Water Power Co. (1984) 102 Wash.2d 495, 687 P.2d 212.

Where former homeowners discovered allegedly dangerous condition of window which did not contain safety glass when their son shattered original pane with a ball, former homeowners knew or had reason to know of the condition of such window; therefore, subsequent homeowner could not recover from original vendor for injuries which occurred when she fell through similar, nonsafety glass that former homeowners had placed in window. Porter v. Sadri (1984) 38 Wash.App. 174, 685 P.2d 612, review denied.

Cause of action for erroneous survey accrued approximately five years after substantial completion of construction when a second survey uncovered error. Hudesman v. Meriwether Leachman Associates, Inc. (1983) 35 Wash.App. 318, 666 P.2d 937, review denied.

5.5. —— Manufacturers, claims or causes of action

Jury question existed as to whether contractor hired to make, fabricate and construct pipeline system for propane furnace qualified as "manufacturer" of system, under special instruction that contractor requested based on definition found in products liability act; under instruction requested by contractor, contractor did not have to be engaged in standardized production of large quantity of products in order to qualify as "manufacturer," any personal injury claim against which would not be barred by special statute of repose on claims for injuries arising out of defects in improvements to real property. Washburn v. Beatt Equipment Co. (1992) 120 Wash.2d 246, 840 P.2d 860, reconsideration denied.

6. Improvement upon real property

Installation of power lines was an "improvement upon real property" within meaning of special six-year statute of limitation, §§ 14.16.300 to 14.16.320, even though lines were potentially subject to removal under some circumstances, and thus, action by gas company against power and light company and contractor employed by power and light company to underground its lines to recover for damage to gas company's underground gas lines brought more than six years after contractor completed work on project was barred. Washington Natural Gas Co. v. Tyee Const. Co. (1980) 26 Wash.App. 235, 611 P.2d 1378, review denied.

An improvement upon real property, for purposes of §§ 4.16.300 to 4.16.320 which establish a statute of limita-

tion regarding such improvements, is any betterment of a permanent nature which causes the realty to become more valuable. It may include fixtures or trade fixtures in specific instances. Pinneo v. Stevens Pass, Inc. (1976) 14 Wash.App. 848, 545 P.2d 1207, review denied.

A ski lift betters the value of the realty it is placed upon, is of a permanent nature, and is properly classified as an improvement upon real property for purposes of the construction statute of limitation, §§ 4.16.300-.320. Pinneo v. Stevens Pass, Inc. (1976) 14 Wash.App. 848, 545 P.2d 1207, review denied.

7. Instructions

Trial court did not have to instruct on meaning of "installer," in personal injury case in which contractor hired to provide pipeline system for furnace argued that it was "installer" and not "manufacturer," any tort claims against which were barred by special statute of repose on claims for injuries arising out of defects in improvements to real property; jury was fully instructed, in accordance with contractor's request, on meaning of "manufacturer," which permitted contractor to argue its theory to jury. Washburn v. Beatt Equipment Co. (1992) 120 Wash.2d 246, 840 P.2d 860, reconsideration denied.

8. Fact or law questions

Whether accident victim's tort claims against contractor hired to construct pipeline system for furnace were barred by special statute of repose on claims for injuries arising out of defects in improvements to real property was question of law for court, though jury might have to decide underlying questions of fact. Washburn v. Beatt Equipment Co. (1992) 120 Wash.2d 246, 840 P.2d 860, reconsideration denied.

9. Admissibility of evidence

Trial court did not have to segregate evidence of contractor's "construction" and "installation" activities, in order to prevent jury from considering evidence of its installation activities in deciding whether it qualified as "manufacturer," any personal injury claims against which would not be barred by special statute of repose, where contractor had been hired to provide entire pipeline system for furnace and it was close question as to when manufacturing process was completed. Washburn v. Beatt Equipment Co. (1992) 120 Wash.2d 246, 840 P.2d 860, reconsideration denied.

West's RCWA 4.16.300
WA ST 4.16.300

END OF DOCUMENT

Exhibit 2

HOUSE BILL REPORT
SSB 6600

As Reported by House Committee On:
Judiciary

Title: An act relating to construction liability.

Brief Description: Revising construction liability provisions.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Brandland, T. Sheldon, Hale, Stevens and Murray).

Brief History:
Committee Activity:
Judiciary: 2/24/04, 2/27/04 [DP].

Brief Summary of Substitute Bill

- Specifically applies the six year construction statute of repose to specified registered and licensed persons.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 8 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Flannigan, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 1 member: Representative Kirby.

Staff: Bill Perry (786-7123).

Background:

Washington has a "statute of repose" relating to the construction of buildings and other improvements to real property. A statute of repose is similar to a statute of limitations in some respects. The statute prevents lawsuits from being brought beyond some point following the completion of a construction project. A suit against parties protected by the statute is barred unless the right to bring the action accrues within six years after substantial completion of construction, or after termination of specified construction-related services, whichever is later. One provision in the statute of repose identifies whom the statute protects. The statute applies to all claims involving the construction, alteration, or repair of any improvement upon real property, or performing or furnishing design, planning, surveying, architectural, construction, or engineering services. It also applies to the supervision of construction, or administration of construction contracts, for any construction, alteration or repair of any improvement upon real property. The provision states that it is intended to benefit only those persons referenced in it, and that it does apply to claims against "manufacturers."

The language excluding "manufacturers" from the statute's protection was added by a 1986 amendment. Before this 1986 amendment, the statute of repose was construed as applying to parties "who work on structural aspects of a building, but not manufacturers of heavy equipment or nonintegral systems within the building." *Condit v. Lewis Refrigeration Co.*

After the 1986 amendments excluding "manufacturers," there have been several lawsuits in which plaintiffs have successfully argued that construction contractors are also "manufacturers" and, therefore, not protected by the statute of repose. For example, *Washburn v. Beatt Equipment Co.*

As noted above, the statute of repose is similar to a statute of limitations in preventing lawsuits after a certain time. However, while the statute of repose provides a time period during which a right of action must accrue, the statute of limitations provides a time period during which legal action must be commenced after the right of action has accrued. The statute of limitations time periods vary according to the nature of the legal action.

In tort actions, Washington follows the discovery rule. This rule means that the three-year limitations period applicable generally to tort cases accrues at the later of the time of the tortious conduct or of the time the injured party discovers it or should have discovered it. See: RCW 4.16.080; and, for example, *Gazija v. Nicholas Jerns Co.*

One effect of the statute of repose is to provide a time limit on the discovery rule that applies to the statute of limitations in tort cases. The statute of repose does not necessarily bar all lawsuits outside its six-year period; rather it bars lawsuits where the cause of action accrues outside the six-year period. For example, the statute of repose might operate in either of two ways in the case of a building destroyed by fire as a result of the negligent installation of wiring, the existence of which was reasonably discovered only after the fire. If the negligent installation was reasonably discovered in the sixth year following the installation, the building owner would have three years after the discovery to sue the contractor. The statute of repose would not bar the suit because the action accrued within the six years after installation. If, however, the negligent installation was reasonably discovered in the seventh year following installation, then the statute of repose would bar the suit.

Summary of Bill:
Language in the statute of repose excluding "manufacturers" from the statute's protection is deleted. The coverage of the statute of repose is intended specifically to cover persons licensed or registered as contractors, architects, engineers, land surveyors, landscape architects, and electricians.

Appropriation: None.

Fiscal Note: Availiable.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The bill restores the original legislative intent of the statute of repose. It clarifies what was meant by excluding manufacturers from the protection of the statute. The current law invites the court to ask in every case whether or not a construction worker is really a manufacturer. A separate scheme for dealing with manufacturing exists in other laws.

Testimony Against: The bill does not restore legislative intent. It shifts the analysis away from what people actually do, to what kind of license they have. The bill will give statute of repose protection to on-site manufacturing. It will shift the costs of some on-the-job injuries to innocent employers.

Persons Testifying: (In support) Senator Brandland, prime sponsor; Rick Slunaker and Douglas Roach, Associated General Contractors of Washington; Cliff Webster, Associated Builders and Contractors; Larry Stevens, National Electrical Contractors Association and Mechanical Contractors Association; and Mike Brown

(Opposed) Larry Shannon, Washington State Trial Lawyers Association.

Persons Signed In To Testify But Not Testifying: None.

HONORABLE JUDGE LINDA C. KRESE

COURTESY COPY

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 07-2-05566-3

APPEAL CASE NO. 681320

GENERAL CONSTRUCTION COMPANY'S SECOND SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

Defendant General Construction Company hereby submits the following supplemental designation of clerk's papers for transmittal to the Court of Appeals, Division I, Case No. 681320:

SUB #	***DATE***	***DESCRIPTION***
134	05/28/2010	General Construction's Response to Plaintiff's Motion for Partial Summary Judgment
137	05/28/2010	Plaintiff's Memorandum in Opposition to General Construction's Motion for Partial Summary Judgment Based on Statutes of Repose and Product Liability
179	09/03/2010	Order Denying General Construction's Motion for Partial

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		Summary Judgment Based on Statutes of Repose and Product Liability and Denying Plaintiff's Motion to Dismiss Statute of Repose Defense
203	10/25/2010	General Construction's Reply in Support of Its Renewed Motion for Summary Judgment Regarding Successor Liability
213	11/16/2010	General Construction's Response to Plaintiff's Motion for Reconsideration
260	01/10/2011	General Construction's Reply in Support of Motion for Summary Judgment Regarding Lack of Evidence

Dated this 22nd day of June, 2012.

Respectfully submitted,

GROFF MURPHY, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on June 22, 2012, true and correct copies of the foregoing documents to the counsel of record listed below, via the method indicated:

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DATED: June 22, 2012

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