SUPREME COURT NO. 94199-8
COURT OF APPEALS NO. 73748-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Petitioner,

v.

ESTATE OF BARBARA BRANDES

Respondent.

BRAND INSULATIONS, INC.'S OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

David A. Shaw, WSBA #08788
Malika I. Johnson, WSBA #39608
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph: (206) 628-6600
Fx: (206) 628-6611
Attorneys for Petitioner Brand Insulations, Inc.

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A. Brief Procedural History

Brand Insulations, Inc. ("Brand") is in the process of securing a supplemental bond, and plaintiff counsel have been advised of that fact. Brand anticipates the bond will be in place before June 27, 2017. The pending motion was unnecessary as a simple telephone call would have sufficed; it is also without merit as there has been no prejudice to Respondent. Final judgment in this case was entered against Brand Insulations, Inc. ("Brand") on June 19, 2015 in the amount of $927,431.39 plus $7343.80 in taxable costs and statutory attorney fees as well as post-judgment interest at the rate of 5.25%. *Id.* Brand filed a notice of appeal and Plaintiff cross-appealed. After Brand filed its notice of appeal, it obtained a supersedeas and cost bond on appeal in the amount of $1,008,389. That bond is currently in place.

On January 23, 2017, the Court of Appeals, Division One, affirmed the jury's liability finding and reversed the trial court's remittitur. Brand filed a Petition for Review with this Court. The Petition was tentatively set to be considered by Department One on May 30, 2017. Respondent requested and was granted an extension of time to file their Answer. The matter is now set for consideration on June 27, 2017.

On April 20, 2017, Plaintiff filed a renewed Motion for Modification of the Supersedeas Amount in the trial court to reflect the opinion issued by Division One. Brand opposed the motion on a number of grounds, including the plain language of RAP 8.1. On April 28, 2017, the trial court granted Plaintiff's motion. The court did not send Brand a copy of the signed Order, however counsel for Plaintiff did forward it to Brand. On May 7, 2017, Plaintiff's counsel sent Brand a letter indicating that Brand must increase its supersedeas bond by May 12, 2017. The order of the court did not provide any date certain for the filing of an increased supersedeas bond.

Brand moved this Court to vacate the trial court's order because the under the plain language of the rule, the trial court did not (and does not) have authority to set the supersedeas amount over a million dollars in excess of the judgment. "The amount of the supersedeas bond ... *shall* be as follows: (1) *Money Judgment.* The supersedeas amount *shall* be the amount of the judgment, plus interest likely to accrue during the pendency of the appeal...." RAP 8.1(c)(1)(emphasis on *shall* added). The only operable judgment is that entered by Judge Downing on June 19, 2015.

The Commissioner of this Court denied Brand's motion, holding that RAP 8.1(g) gives a trial court authority to increase the bond amount regardless of the "amount of judgment" where petitioner shows good

cause After the ruling was issued, Brand received an email from plaintiff counsel inquiring as to how Brand wished to proceed. Brand counsel suggested a telephone conference. No further communication on the issue was received by Brand counsel and its suggestion never acted upon. When the subject motion was filed, Brand counsel advised plaintiff counsel that, while he disagreed with plaintiff's position he had recommended that a bond be secured and that plaintiff counsel would be notified when the bond is secured.

B. Sanctions are not warranted

The Court clearly has the authority to impose sanctions for the violation of a court rule. RAP 18.9(a). However, before this Court issues sanctions, let alone dismiss an appeal, at a minimum, the moving party must show how they have been prejudiced by the alleged violation. *Martin v. Huston*, 11 Wn. App. 294, 522 P.2d 192 (1974). Here, Petitioner has made no claim of prejudice and nor can she because an increased bond will be filed prior to the date set for Department One's consideration of Brand's petition.

C. RAP 8.1 does not support the trial court's April order.

A decision from the Court of Appeals is not effective or binding until a mandate has issued terminating review. RAP 12.2. A trial court does not have independent authority to alter a judgment which is the

subject of both an appeal and a cross-appeal pending a decision on discretionary review by this Court. RAP 12.5(b)(3); RAP 7.2(e). Therefore, the trial court lacked authority to enter the April 28, 2017 Order which effectively modifed the underlying judgment. RAP 8.1(c) requires that a supersedeas bond be set in the amount of the judgment, here $927,431.39 plus $7343.80 in taxable costs and statutory attorney fees. That was done in this case.

Court rules are to be interpreted in the same manner as statutes. *State v. Greenwood,* 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Where the language of the rule is plain and unambiguous, the language will be given its full effect. *State v. Smith,* 117 Wn.2d 263, 270-71, 814 P.2d 652 (1991). "In order to interpret a statute, each of its provisions 'should be read in relation to the other provisions, and the statute should be constructed as a whole.'" *In re Detention of Williams*, 147 Wn.2d 476, 490, 55 P.3d 597 (2002).

There is no ambiguity in the language of the rule at issue here. "The amount of the supersedeas bond ... *shall* be as follows: (1) *Money Judgment.* The supersedeas amount *shall* be the amount of the judgment, plus interest likely to accrue during the pendency of the appeal...." RAP 8.1(c)(1)(emphasis on *shall* added). To read RAP 8.1(g) as providing

authority to set the supersedeas amount above the judgment would render section (c)(1) meaningless.

D. The Court of Appeals decision was erroneous and based on untenable grounds

Petitioner's pleadings in support of the additional supercedeas bond have all pointed to the Court of Appeals decision as the reason she is entitled to the relief sought. The Court of Appeals decision is based on reasoning inconsistent with and contrary to clear Washington Supreme Court precedent. A brief look at just the first issue raised by Brand evidences as much.

The Court of Appeals held that the denial of Brand's summary judgment motion on the statute of repose was not reviewable because Brand failed to present evidence at trial that its insulation work was in and of itself an improvement to real property.[1] In so ruling, the Court of Appeals necessarily made a legal finding that the Washington statute of repose requires that a contractor's work itself constitute an improvement to real property. Under the Court of Appeals analyses, it was not enough that such work be performed as part of the construction of an improvement to real property. Rather, it was necessary that the work itself constitute an improvement to real property. That evidentiary requirement can only be

[1] The trial court initially denied Brand's motion based on the claimed existence of questions of facts as to whether its work constituted an improvement to real property.

based on the courts' statutory interpretation of the statute of repose. It is a statutory construction supported by neither the plain language of the statute nor the Washington Supreme Court's and other Court of Appeals panels' interpretations of the statute. The practical result is that: the Court of Appeals held that a party's right to seek review of a trial court's legal interpretation of a statute is barred where the party proceeds to trial and does not present evidence that is neither material nor relevant to a proper determination of the applicability of the statute. That is not now, nor has it ever been, the law in Washington.

The applicability of the statute of repose is determined by a three step approach. *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 567, 772 P.2d 1018 (1989). First, the court must address the scope of the statute, whether it applies in the given case. If the statute applies, the cause of action must accrue within six years of substantial completion of the project. If the claim accrues, the party must file within the applicable statute of limitations. *Id.* The first step, as stated by this Court, is a mixed question of law and fact. The statute of repose bars all claims against any person arising from the activities of having constructed, altered or repaired an improvement to real property--on account of those activities. *Id.* at 568 (citations omitted). No Washington authority holds

that a contractor's work itself must be an improvement to real property.[2] It is only necessary that the work be a part of the construction of an improvement. *Pfeifer*, 112 Wn.2d at 569. *Pfeifer* and the 1986 and 2004 amendments to the statute of repose rejected the Court of Appeals' "integral" component test. *Id.*

In *Davis v. Baugh Indus. Contractors, Inc.,* 159 Wn.2d 413, 150 P.3d 545 (2007), the premise owner's employee was killed while inside an excavated trench when a wall collapsed on him. *Id.* at 416. The employee was attempting to locate a leak in the high density polyethylene pipe that had been negligently installed three years earlier. *Id.* The contractor who installed the pipe defended the suit, in part, on grounds that the "acceptance and completion" doctrine acted as a bar to plaintiff's claims. *Id.* This Court rejected the traditional "completion and acceptance" doctrine and adopted Restatement (Second) of Torts § 385 in its stead. This Court determined the Restatement approach was more practicable given that construction has become complex and the land owner should not be liable if they are incapable of recognizing substandard performance.

In so holding, this Court specifically noted that contractors, such as

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[2] The *Condit* court drew a distinction between the construction of an improvement to real property and equipment separately manufactured and later installed in the improvement. The *Condit* court included a statement in its opinion regarding the construction of "structural" elements of the improvement. That comment was *dictum* and no later court has adopted such a limitation. Indeed, the subject matter of later cases clearly demonstrates that no such "structural" limitation exists. *See Pfiefer*, 112 Wn.2d at 569.

Baugh Industrial, who are responsible for a component of the construction processes, are already protected by the Washington statute of repose:

> Our legislature has adopted a statue of repose to provide predictability and limit contractor liability. RCW 4.16.310. The statute of repose terminates a negligence claim six years after "substantial completion of construction," even if the injury caused by contractor negligence has not yet occurred. *Id.* This statue of repose is a much clearer and simpler way to protect contractors from a long period of uncertainty.

Davis, 159 Wn.2d at 548 (emphasis added). Brand, like Baugh Industrial, was responsible for a component of the construction of the refinery and that activity is protected by the statute of repose.

The trial court's and the Court of Appeals' legal interpretation of the Statute of Repose was error. The trial court's error, being one of law, is reviewable in the Court of Appeals. The Court of Appeals necessarily embraced the identical erroneous interpretation in finding that Brand's right to appeal the trial court's legal error was barred. The "evidence" Brand failed to produce would only be material or relevant if the trial court's and the Court of Appeals' statutory interpretation were correct. That interpretation is not correct. It is directly contrary to the decisions in *Johnson*, *Kaplan*, *Pfeifer* and *Davis*, as well as the clear legislative intent as set forth in RCW 4.16.310 *et. seq.* While this unreported decision is not citable as precedent, under GR 14.1 the decision remains citable as

"persuasive" authority. The possibility, indeed, the likelihood that it will be cited in future cases is high. The case was wrongly decided. A Court of Appeals decision which fails to adhere to the law as set forth by the legislature and this Court cannot provide "good cause" for increasing a supercedeas bond beyond that allowable by court rule.

II. CONCLUSION

Brand respectfully requests that the Court deny Petitioner's Motion for Sanctions.

RESPECTFULLY SUBMITTED this 19th day of June, 2017.

David A. Shaw, WSBA #08788
Malika I. Johnson, WSBA #39608
Attorneys for Petitioner
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph. (206) 628-6600 Fx: (206) 628-6611

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 19th day of June, 2017, I caused a true and correct copy of the foregoing document, Brand Insulations, Inc.'s Opposition to Respondent's Motion for Sanctions to be delivered via electronic filing system to the following counsel of record:

Matthew P. Bergman
Glenn S. Draper
Kaitlin T. Wright
BERGMAN DRAPER LADENBURG
HART, PLLC
821 2nd Avenue Suite 2100
Seattle, WA 98104
Email: matt@bergmanlegal.com;
glenn@bergmanlegal.com;
kaitlin@bergmanlegal.com

Leonard J. Feldman
PETERSON WAMPOLD
1501 4th Avenue, Suite 2800
Seattle, WA 98101
Email: feldman@pwrlk.com

Jeffrey Mark Wolf
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Email: jeff.wolf@seattle.gov

Thomas H Hart III
207 E. 1st North Street
Sommerville, SC 29483
Email: tom@thhpc.com

DATED this 19th day of June, 2017, at Seattle, Washington.

Diane M. Bulis, Legal Assistant

WILLIAMS KASTNER & GIBBS

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Comments:

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Address:
601 UNION ST STE 4100
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