Supreme Court No. 94199-8

Court of Appeals No. 73748-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Appellant/Cross-Respondent,

v.

ESTATE OF BARBARA BRANDES,

Respondent/Cross-Appellant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court should deny discretionary review because the Court of Appeals' analysis is consistent with this Court's precedent and Brand Insulations, Inc. does not raise any constitutional questions or matters of substantial public interest that merit this Court's review.

This appeal arose from a jury verdict of $3.5 million following a three-week trial. Barbara Brandes brought suit for injuries resulting from her secondary exposures to asbestos insulation negligently sold and installed by Brand at the ARCO Cherry Point refinery where her husband worked. In an unpublished opinion, Division One affirmed the jury's verdict after rejecting each of Brand's arguments (presented in almost the exact same form in Brand's petition) regarding the statute of repose, duty, contractors' defense, and allocation of settlement proceeds to wrongful death. Division One also reversed the trial court's remittitur of the jury's award by $1 million. The Court of Appeals correctly decided each of these issues, and its analysis does not warrant this Court's further review.

II. RESTATEMENT OF THE CASE

Barbara Brandes was diagnosed with malignant mesothelioma in June of 2014. CP 219. On August 14, 2014, she filed the present action alleging that she was secondarily exposed to asbestos from thermal insulation sold and installed by Brand at the ARCO Cherry Point refinery

where her husband, Raymond Brandes, worked during the 1970s. CP 2. She sought compensatory damages from Brand and other defendants based upon her diagnosis with mesothelioma.[1] CP 1-4.

Plaintiff marshalled substantial evidence at trial regarding both liability and damages. One of Mr. Brandes' co-workers, Dan Williams, testified that Mr. Brandes worked as an operator from 1971-75, starting in the crude area and later in the "coker" area of the refinery. RP 588-91. Mr. Williams described asbestos insulation being installed, removed and repaired in Mr. Brandes' proximity, which exposed him to dust. RP 594-99, 602-04. Nevertheless, Mr. Williams, former Brand insulator Nils Johnson, and ARCO's CR 30(b)(6) witness all testified that no industrial hygiene practices were employed in the 1970s to prevent workers from transporting workplace toxins to their home through contaminated work clothes. *E.g.,* RP 216, 232. Plaintiff also offered evidence that the asbestos-containing insulation products supplied and installed by Brand were sold in containers bearing warnings, yet Brand installed these products at the refinery without any effort to pass on those warnings to end-users. RP 612, 1156-77, 1181-83. Nor did Brand insulators utilize any engineering controls to reduce bystander exposure to the asbestos dust generated by

[1] Raymond Brandes asserted loss of consortium claims in the original Complaint, but died during the pendency of the case, prior to trial.

Brand's insulation installation activities at the refinery. RP 385-86, 436-39, 612-14.

Ms. Brandes also presented evidence of the injuries and disabilities she experienced as a result of her mesothelioma. *E.g.*, RP 140-76, 250-85, 354-72. Ms. Brandes and her two children described some of the symptoms of her mesothelioma, including shortness of breath, fatigue, weight loss, nausea, and neuropathy. *E.g.*, RP 165-67. Ms. Brandes' treating oncologist, Dr. Sharmila Ahmed, testified regarding the debilitating side-effects of the many rounds of chemotherapy Ms. Brandes underwent as well as the numerous bouts of pneumonia and septicemia she endured during her treatment. RP 456-81. Dr. Ahmed further testified that Ms. Brandes' mesothelioma was terminal, and that the cancer would eventually claim her life. RP 479-80. The jury also had the opportunity to observe Ms. Brandes in the courtroom where she was confined to a wheelchair and receiving supplemental oxygen.

On the eve of the last day of the defense case and closing arguments, Ms. Brandes succumbed to her mesothelioma. CP 5385. Her counsel immediately filed a Notice of Death and Motion for Substitution, requesting that the case go forward despite Ms. Brandes' passing. RP 1370-75; CP 3717. The trial judge then directly asked Brand's counsel for his position in light of Ms. Brandes' passing, to which counsel responded: "I don't think

there's any reason not to proceed." RP 1373. The court thereafter granted the motion for substitution, whereby the litigation continued as a survivorship action on behalf of the Estate of Barbara Brandes (hereinafter "Estate"), and advised the jury of Ms. Brandes' death and its impact on the case. *See* RP 1370-76; CP 3717.

At the conclusion of the case, the trial court instructed the jury as to the measure of damages, and clearly explained that the jury's award must reflect "the amount of money that will reasonably and fairly compensate the plaintiff," considering the 1) nature and extent of Ms. Brandes' injuries; 2) disability, inconvenience, and loss of enjoyment of life; and 3) pain and suffering. CP 5138 (Jury Instruction No. 10), RP 1492. In closing argument, Plaintiff's counsel asked the jury for damages to compensate Ms. Brandes for these injuries. RP 1530-36. At no time during Plaintiff's argument on damages did Brand's counsel raise any objection. RP 1528-37.

After its deliberation, the jury found that Brand was negligent and that Brand's negligence was a proximate cause of Ms. Brandes' injuries. CP 5142-43. The jury awarded Ms. Brandes' Estate non-economic damages in the amount of $3.5 million. CP 5143. Brand then filed a Motion for Judgment Notwithstanding the Verdict, New Trial or, in the Alternative, Remittitur. CP 5192-5212. The trial court ultimately concluded that remittitur was appropriate because the jury's verdict was "outside of the

range of what would be expected in light of the facts of the case." CP 5430. It therefore reduced the jury's award from $3.5 million to $2.5 million, but denied the other relief requested by Brand. CP 5431.

On appeal, Brand sought to overturn the jury's verdict based on Washington's statute of repose, absence of a tort duty, and evidentiary error. The Estate cross-appealed the trial court's remittitur of the jury's verdict from $3.5 million to $2.5 million. The Court of Appeals rejected each of the arguments raised by Brand in its appeal and reinstated the jury's original full award of $3.5 million as requested in the Estate's cross-appeal. *Estate of Barbara Brandes v. Brand Insulations, Inc*., No. 73748-1-I, slip op. at 2 (Div. I Jan. 23, 2017). Brand now seeks discretionary review and repeats the same arguments that the Court of Appeals rejected.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Determined that Brand's Statute of Repose Defense was Unreviewable.

Brand first urges review of the Court of Appeals' ruling regarding the statute of repose defense. This Court should reject Brand's request to resurrect this issue because the Court of Appeals properly declined review of the issue on two separate and valid bases. First, the appellate court declined review because summary judgment orders are "not reviewable … after a trial on the merits." Slip op. at 5. Second, the appellate court refused to review the issue because Brand waived the defense by failing to raise it

during the ensuing trial. Slip op. at 7-8. Both bases for denying review are consistent with this Court's precedent.

Brand tries to recharacterize the issue on appeal relating to the statute of repose by focusing on the trial court's denial of Brand's motion for reconsideration of the summary judgment ruling—rather than the summary judgment order itself. Concentrating on the motion for reconsideration, Brand misrepresents to this Court that the trial court's denial of summary judgment on the statute of repose defense was premised on a ruling that "a 'discovery rule' precluded application of the statute." Pet. at 8, 10. That is untrue. The trial court's order denying summary judgment plainly states that "with respect to Plaintiff's negligent installation claims, *there are disputed issues of fact as to whether insulation constitutes an improvement to real property*." App. A. to Brand's Opening Br. (attached hereto as App. A) (emphasis added). Brand correctly acknowledged in its subsequent motion for reconsideration that the trial court had found fact issues as to whether insulation constitutes an improvement to real property. CP 2985-86. After full briefing on the reconsideration motion, the trial court denied reconsideration without

further analysis, thus leaving in place its ruling that fact issues precluded summary judgment on this issue.[2] CP 3458-59.

Despite the clarity of the trial court's rulings, Brand discusses an email from the trial judge to counsel sent contemporaneously with the order denying reconsideration to support its theory that denial of summary judgment was incorrectly premised on the notion that a "discovery rule" precludes application of the statute. However, the trial court's email simply informed counsel of the fact that the court had recently signed an order denying the defendant's reconsideration motion, after having re-read *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp*., 144 Wn.2d 570, 577, 29 P.3d 1249 (2001), which the trial judge observed "of course, does not at all direct a conclusion as to the present question."[3] App. B to Pet. Notably absent from the trial judge's email is any mention of the "discovery rule" that Brand argues was the basis for the court's outright

[2] The trial court's denial of a motion for reconsideration is purely discretionary and can only be overturned upon a showing of abuse of discretion, "that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *River House Dev. Inc. v. Integrus Architecture, P.S*., 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012), citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684–85, 41 P.3d 1175 (2002).

[3] Ironically, the catalyst for the court's re-visitation of the *Lakeview* case was Brand's strenuous argument in its motion for reconsideration that the *Lakeview* case gave "further context" to the criterion of the statute of repose defense that the contractor's work relate to installation of an improvement to real property—the very basis on which summary judgment was denied due to factual disputes, which the trial court left undisturbed. CP 2986-87.

denial of reconsideration of the summary judgment without additional analysis.

Brand's attempt to obfuscate the basis for the trial court's summary judgment ruling is further belied by the appellate court's analysis. The Court of Appeals explicitly noted the existence of questions of material fact regarding application of the statute of repose, including "the purpose, necessity, and permanence of the insulation that Brand installed in the refinery," before appropriately concluding that the summary judgment order could not be appealed because it was followed by a trial. Slip op. at 7, citing *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). RAP 2.2 and well-established case law clearly state that summary judgment orders cannot be appealed after a full trial on the merits. Slip op. at 6, citing *Johnson*, 52 Wn. App. at 303-04 and *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Brand has not demonstrated that the Court of Appeals' decision to decline review on the basis of the summary judgment denial conflicts with Washington law in any manner.

The Court of Appeals also provided additional rationale for its decision to decline review pursuant to RAP 2.5(a) and this Court's precedent prohibiting appellate review of "an error not raised in the trial court." Slip op. at 7, citing *State v. Scott*, 110 Wn.2d 301, 305, 814 P.2d 227 (1991) and *Adcox v. Children's Orthopedic Hosp. and Medical Center*,

123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993). Because Brand neither offered any evidence at trial relating to the disputed issue of whether insulation constitutes an improvement to real property, nor moved for a directed verdict or offered a jury instruction on the statute of repose, the Court of Appeals concluded that Brand failed to preserve the issue for review. Slip op. at 8. Rather than addressing the authority underlying the appellate court's holding that the statute of repose issue was unreviewable, Brand simply makes the conclusory allegation that the Court of Appeals' decision conflicts with established law and misinterprets a statute of broad legal application. Brand's argument fails because the appellate court did not engage in substantive statutory construction or apply any of the statute of repose case law Brand discusses to reach its decision that the statute of repose issue was unreviewable. Review of the Court of Appeals' decision declining to review the application of the statute of repose defense is thus wholly unwarranted under RAP 13.4(b).

B. Brand Owed a General Negligence Duty of Care to Barbara Brandes.

The Court of Appeals was correct in determining that Brand owed a duty of care to prevent unreasonable, foreseeable risks of harm from its actions at the ARCO refinery. Simple common law negligence principles, espoused in long-standing Washington case law, dictate that "[a] person has

a duty to prevent unreasonable risk of harm to others from his or her own actions" "if a reasonable person would have foreseen the risk." Slip op. at 9, citing *Minahan v. Western Wash. Fair Ass'n*, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003) and *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007). Foreseeability is an inherently fact-specific determination reserved for the jury. *Crowe v. Gaston*, 134 Wn.2d 509, 517, 951 P.2d 1118 (1998).

Contrary to Brand's assertion, the jury finding of the foreseeability of Barbara Brandes' asbestos exposure was amply supported by the evidence at trial. While Brand identifies two items of evidence it relied upon to argue that it did not in fact foresee a risk of harm to family members of asbestos-exposed workers, Brand fails to reconcile its position with the extensive evidence presented at trial regarding the *foreseeability* of the take-home asbestos exposure risk. Plaintiff marshalled evidence that Brand was the primary insulation subcontractor who procured the majority of the insulation at the Cherry Point refinery, including asbestos insulation, and sold such insulation products to ARCO pursuant to Brand's subcontract. RP 194-95, 237-39, 244-45, 316-19, 323-24, 432. Plaintiff also presented evidence that Brand installed the thermal insulation for piping and equipment in the two areas of the refinery where Mr. Brandes worked, and that Brand insulators took no precautions to minimize the dust generated by

their insulation activities. RP 385-86, 436-39, 612-14. The jury also heard evidence that at least two of Brand's competitors, J.T. Thorpe Insulation and Plant Insulations, *did* engage in safe industrial hygiene practices concerning asbestos insulation. RP 1302-05.

Mr. Brandes' co-worker, Dan Williams, as well as witnesses Nils Johnson and Leslie Pugh, further testified that visible dust was generated by Brand's on-site insulation work. RP 381-82, 433, 598-99. In conjunction, Plaintiff's expert industrial hygienist John Templin testified that whenever asbestos dust is visible, the concentration of asbestos in the atmosphere would exceed even the higher time-weighted average originally applied by OSHA in the early 1970s. RP 678-80, 708-09, 722. Furthermore, Plaintiff presented extensive evidence that the medical, scientific, and industry/trade literature in the decades leading up to Ms. Brandes' exposure confirmed the risk of workers' family members developing disease following exposure to toxic substances carried home on contaminated work clothing. *E.g.*, Exs. 35, 41, 50, 343. Plaintiff's state-of-the-art expert, Barry Castleman, Ph.D., testified to this body of knowledge and its availability to companies like Brand engaged in the insulation contracting business. RP 824-67.

The jury was thus presented with ample evidence to find that Brand could have foreseen harm to family members of workers exposed to

asbestos from Brand's insulation activities at Cherry Point.[4] Accordingly, the Court of Appeals appropriately concluded that "[g]iven the availability of information about the risk of harm to the families of asbestos workers, Brand could have foreseen injuries to the spouses of ARCO employees such as Barbara stemming from the unreasonable risk of harm it created in its installation of asbestos insulation at Cherry Point." Slip op. at 10. Brand's petition does not demonstrate that the Court of Appeals' conclusion that the jury's determination of foreseeability was supported by the evidence at trial is inconsistent with Washington law.

Brand repeats the same arguments it presented to the Court of Appeals in seeking this Court's review of whether it owed a duty of care to Barbara Brandes. Brand asserts that it owed no duty to Barbara Brandes either because: 1) Washington common law has not recognized a duty to family members of asbestos-exposed workers outside the context of strict liability and premises liability; 2) Brand's activities should be construed as

[4] A risk is foreseeable if it merely falls within the "general field of danger which should have been anticipated" by the defendant. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). That the particular mode, method, or cause of harm was not foreseeable does not relieve a tortfeasor from liability so long as the *general* nature of the harm was foreseeable. *See King v. City of Seattle,* 84 Wn.2d 239, 248, 525 P.2d 228 (1974) ("[l]iability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained."). Moreover, the foreseeability inquiry cannot be made in a vacuum, and depends in part on the defendant's circumstances and position, as well as the defendant's actual knowledge. *Id*.; *see also N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 175 Wn. App. 517, 530-31, 307 P.3d 730, 737 (2013).

"nonfeasance"; or 3) no special relationship existed between the parties. However, the Court of Appeals considered and properly rejected each of these arguments in turn, reasoning that Brand's (since unchanged) position "sidesteps the basic negligence principles that establish a duty of care in this case." Slip op. at 10.

The Court of Appeals correctly concluded that the fact that a take-home duty of care has been recognized in other contexts (strict and premises liability), in no way negates or precludes the recognition of such a duty in a basic negligence case. Slip op. at 10, citing *Lunsford v. Saberhagen Holdings, Inc*., 125 Wn. App. 784, 106 P.3d 808 (2005) and *Arnold v. Saberhagen Holdings, Inc*., 157 Wn. App. 649, 240 P.3d 162 (2010). Furthermore, the appellate court rejected Brand's "special relationship" argument on the basis that this Court's precedent prescribes that the existence of a duty is only contingent upon a special relationship is cases where injury results from a third party's criminal conduct or the defendant's nonfeasance. Slip op. at 10, citing *Tae Kim v. Budget Rent A Car Sys., Inc.,* 143 Wn.2d 190, 195, 15 P.3d 1283 (2001). Because neither situation applies in the current case, the Court rejected Brand's argument outright. Again, Brand's conclusory contention, without citation to any case law, that the issue of whether it owed a duty to Barbara Brandes is one of first impression warranting review ignores the Court of Appeals' unequivocal

articulation that its decision was premised on basic and long-established principles of common law negligence.

C. The Negligence Jury Instructions Given in this Case Adequately Articulated the Governing Negligence Standard and Permitted the Parties to Argue Their Theories of the Case.

Brand next argues that the Court of Appeals erred in approving the lower court's "negligent sales" instruction to the jury because—according to Brand—it was not a "seller." As it did in the Court of Appeals, Brand misses the mark by ignoring the nature of Plaintiff's simple negligence claim litigated at trial. As Plaintiff's sole theory of liability against Brand was negligence, the jury was able to consider—and Brand was able to argue—the nature of its relationship to ARCO and Parsons (the general contractor for the Cherry Point refinery construction), including any variations in Brand's conduct from the accepted definition of a "seller."

In approving the lower court's instruction, the Court of Appeals discussed this Court's opinion in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 348, 197 P.3d 127 (2008), adopting the scope of the duty to warn set forth in the Restatement (Second) of Torts § 388 (1965). Slip op. at 14. As the Court of Appeals observed, *Simonetta* clearly provides that the duty to warn extends to all entities within the chain of distribution of a hazardous product. *Id.* Brand fundamentally fails to demonstrate that the Court of Appeals misapplied *Simonetta* sufficient to justify this Court's review.

Brand also urges, as it did to the Court of Appeals, that the trial court's summary judgment ruling dismissing Plaintiff's strict product liability claim on the basis that Brand was not a "seller" under Restatement (Second) of Torts § 402A (1965) precluded the negligent sales instruction submitted to the jury at trial. To sustain this theory, Brand offers a strained interpretation of the Court of Appeals' decision that, because the appellate court observed that Brand "sold insulation to Parsons"—yet the lower court ruled that Brand was not a seller under § 402A and no party challenged that ruling—the Court of Appeals made a "factual finding contrary to an unchallenged factual finding of the trial court." Pet. at 16. The Court of Appeals succinctly explained why Brand's argument in this regard fails:

> These two sections of the restatement have different language, interpretative caselaw, and policy rationales. In addition, the trial court's dismissal of Barbara's § 402A strict liability claim does not bind this court to an outcome on § 388 that is inconsistent with the law.

Slip op. at 15. The Court of Appeals thus concluded "that Brand is a supplier within the chain of distribution of insulation" and "the trial court did not err when it instructed the jury on negligent sales." *Id.*

Contrary to Brand's assertion that the Court of Appeals' analysis was founded upon the Court's *sua sponte* disturbance of an "uncontested trial court finding," the trial court followed the exact same approach, premised on the same factual findings, as the appellate court when it

permitted the Plaintiff to proceed on a negligence claim. The trial court denied summary judgment on Plaintiff's negligence claim—encompassing Brand's activities in installing *and* selling asbestos insulation—but granted summary judgment on Plaintiff's § 402A product liability claim. *See* App. A. Indeed the trial court's order, while dismissing Plaintiff's § 402A claim against Brand, unambiguously states that summary judgment was denied "with respect to Plaintiff's negligence claims pertaining to defendants' *sale* and installation of asbestos-containing insulation products at the ARCO Cherry Point Refinery." *Id.* (emphasis added). It is not only inaccurate but disingenuous for Brand to argue that the Court of Appeals disturbed the lower court's factual findings in any respect. Ultimately, Brand fails to demonstrate that the Court of Appeals' analysis in any way conflicts with appellate precedent sufficient to justify review under RAP 13.4(b)(1)-(2).

D. The Court of Appeals' Reinstatement of the Jury's Damage Award was Consistent with the High Threshold for Remittitur Under Washington Law.

The Court of Appeals correctly reversed the trial court's $1 million remittitur upon concluding that "the jury's damages award was not unmistakably the result of passion or prejudice, and that it was supported by substantial evidence." Slip op. at 23. Washington law is clear that remittitur is inappropriate unless the record obviously indicates that the jury was prejudiced against a party, or its reasoning was overcome by passion.

Jacobs v. Calvary Cemetery & Mausoleum, 53 Wn. App. 45, 765 P.2d 334 (1988). A trial court has no discretion to reduce a verdict if the verdict is within the range of the credible evidence. *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000), *as amended on clarification*, (Nov. 22, 2000). Applying this high threshold for remittitur, the Court of Appeals reasoned that Brand's failure to object or take other action regarding the effect of Barbara Brandes' death or counsel's closing argument demonstrated that "any passion or prejudice that may have motivated the jury was not overpowering or unmistakable." Slip op. at 22. Moreover, the appellate court determined that substantial evidence of Ms. Brandes' pain and suffering was presented at trial, sufficiently supporting the jury's award of damages. *Id.* at 22-23.

Despite acknowledging that the standard of review for a court's reduction of a jury's award of damages is *de novo*, Brand argues that the Court of Appeals failed to give adequate deference to the trial court in adjudicating Plaintiff's cross-appeal of the remittitur in a manner contrary to prior decisions of the Courts of Appeals. Pet. at 18. That assertion is both factually and legally flawed. Factually, the appellate court expressly noted and considered the trial court's findings in support of remittitur when analyzing whether the jury's award of $3.5 million in non-economic damages was outside the range of substantial evidence, shocks the

conscience, or was unmistakably the result of passion or prejudice. Slip op. at 21. The Court of Appeals, therefore, did not ignore the trial court's analysis as Brand claims.

Legally, the Court of Appeals was required by this Court's opinion in *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989), to give "great deference to the jury's determination of damages." Slip op. at 20. Brand fails to demonstrate that Washington law requires that *greater* deference be given to a trial court's analysis than a jury's determination of damages. The opinion cited by Brand—*Pederson v. Dumouchel*, 72 Wn.2d 73, 83, 431 P.2d 973, 980 (1967) (Pet. at 18)—does not support such an argument because it did not involve appellate review of a trial court's modification of a jury's damages award. Nor does *Pederson* articulate the principle that an appellate court must give deference to a trial court's determination of remittitur with respect to the impact of improper attorney arguments.

The other case on which Brand relies for this proposition, *Miller v. Kenny*, 180 Wn. App. 772, 815-16, 325 P.3d 278, 300 (2014) (Pet. at 18), also does not state such a rule. Moreover, the result in *Miller* is the opposite of what Brand suggests here. Like Brand, the defendant in *Miller* did not timely object to an allegedly improper closing argument. The court therefore held that the "argument of counsel did not furnish a basis for

ordering a new trial." *Id.* at 817. There is no conflict with this Court's precedent or other appellate court opinions that would remotely support discretionary review of the reinstatement of the jury's award.

E. The Court of Appeals' Approval of the Settlement Allocation Between Personal Injury and Wrongful Death Claims was Correct.

Lastly, Brand asserts that the Court of Appeals' decision conflicts with Washington law because there was no wrongful death claim to allocate to, citing this Court's recent decision in *Deggs v. Asbestos Corp., Ltd.*, 186 Wn.2d 716, 725, 381 P.3d 32 (2016). Pet. at 19. Brand then asserts that it was consequently error to include a "valueless claim" in the settlement allocation, Pet. at 19, conditioning its request for review on a premise directly inconsistent with the Court of Appeals' logical conclusion that Barbara Brandes' wrongful death claim was "a necessary concession to reach a negotiated settlement" and "clearly valuable consideration." Slip op. at 18.

In raising this argument in its petition for review—the same argument that it unsuccessfully asserted in the Court of Appeals—Brand ignores the fact that the Court of Appeals explicitly determined that *Deggs* did not control because the issue presented by the allocation question was "not whether Barbara's personal representative can maintain a wrongful death suit, but whether a settlement would have occurred *at all* but for

settlement of the potential wrongful death suit." Slip op. at 18 (emphasis added). As such, there is no conflict with *Deggs* and no reason to grant review on that basis.

Moreover, the only issue that the Court of Appeals identified for review was "to what degree" the wrongful death settlements were allocated. Slip op. at 18. Critical here as it was to the Court of Appeals, Brand *had not challenged* the trial court's finding that the release was worth twenty percent of the settlement proceeds. As a result, there was nothing further for the Court of Appeals to address beyond approving the fact that some portion of the settlement proceeds had been attributed to wrongful death. The Court of Appeals cannot be faulted for failing to review a factual finding not challenged on appeal. Nor does such a ruling conflict with decisions of this Court or appellate authority. For this reason too, discretionary review of the allocation issue is not warranted.

IV. CONCLUSION

For the foregoing reasons, Brand's petition for review should be denied.

RESPECTFULLY SUBMITTED this 20th day of April 2017.

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Appendix A

HONORABLE WILLIAM DOWNING
Hearing Date & Time: Friday, March 6, 2015 @ 1:30 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BARBARA BRANDES and RAYMOND BRANDES, wife and husband, Plaintiffs, v. KAISER GYPSUM COMPANY, INC., et al., Defendants.	NO. 14-2-21662-9 SEA ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT BRAND AND METALCLAD'S MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Defendant Brand Insulations, Inc.'s Motion for Summary Judgment; Defendant Metalclad Insulation Corporation's Motion for Summary Judgment; and Plaintiff's Motions for Partial Summary Judgment Against Brand Insulations, Inc. and Metalclad Insulation Corporation Re: Affirmative Defenses. In adjudicating these Motions, the Court has considered the pleadings submitted by the parties and the oral arguments presented by the parties with respect to these matters having been heard.

IT IS THEREFORE ORDERED that Defendant Brand Insulations, Inc. and Metalclad Insulation Corporation's Motions for Summary Judgment, are **DENIED** in part with respect to Plaintiff's negligence claims pertaining to the defendants' negligent sale and negligent installation of asbestos-containing insulation products at the ARCO Cherry Point Refinery. The Court finds

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that there are factual disputes as to the foreseeability of the risk of developing mesothelioma through "take-home" or secondary exposure in the 1971-1975 timeframe.

As to Plaintiff's common law strict product liability claims under the RESTATEMENT § 402A OF TORTS (1965) arising out of Brand and Metalclad's status as product sellers, the defendants' motions for summary judgment are **GRANTED** in part. Plaintiff's § 402A strict product liability claims against Brand and Metalclad as sellers are hereby dismissed. (The WPLA, RCW 7.72, is not applicable.)

As to Plaintiff's motion for partial summary judgment as well as defendants' motions for summary judgment regarding the defendants' affirmative defense of the contractor's statute of repose, RCW 4.16.310, summary judgment is **DENIED**. The Court finds that the contractor's statute of repose does not apply to Plaintiff's negligent sales claims. The Court further finds that, with respect to Plaintiff's negligent installation claims, there are disputed issues of fact as to whether insulation constitutes an improvement to real property.

DONE IN COURT this 13 day of March, 2015.

HONORABLE WILLIAM DOWNING
KING COUNTY SUPERIOR COURT JUDGE

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CERTIFICATE OF SERVICE

I certify that on April 20, 2017, I caused to be served a true and correct copy of the foregoing document via electronic service upon:

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