No. 99278-9

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 80162-7-I)

PUGET SOUND ENERGY, INC.,

Plaintiff/Appellant,

v.

PILCHUCK CONTRACTORS, INC.,

Defendant/Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Puget Sound Energy, Inc. ("PSE") is the petitioner.

II. COURT OF APPEALS DECISION

PSE respectfully seeks review of the Court of Appeal's opinion, *Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc.*, No. 80162-7-I http://www.courts.wa.gov/opinions/pdf/801627.pdf, (unpublished), 2020 WL 6395578. A copy of the slip opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Is a contractor barred from claiming the construction statute of repose applies as a matter of law where: (a) the scope of the relevant "improvement upon real property" is a disputed fact; and (b) the contractor fails to substantially complete any essential work on a specific parcel of real property despite doing different work, at other addresses, at other times?

2. Should Washington law permit a fraud or equitable estoppel exception to the construction statute of repose in order to preserve adequate rights for injured parties?

IV. STATEMENT OF THE CASE

A. OVERVIEW

Pilchuck Contractors, Inc. ("Pilchuck") falsely certified to PSE that Pilchuck deactivated a specific natural gas service line at 8409 Greenwood Avenue North in Seattle. Pilchuck did not deactivate the gas line. It did not

perform **any** of the work required to deactivate the gas line. Years later, the service line leaked and the natural gas ignited, causing an explosion.

PSE sued Pilchuck for recovery of the damages PSE has had to pay on account of Pilchuck failing to deactivate PSE's gas line. Pilchuck sought summary judgment to avoid liability under the construction statute of repose. The superior court granted Pilchuck's motion.

The Court of Appeals determined the scope of "work" or "improvement" is immaterial to whether the statute applies. Nonetheless, to affirm, the Court of Appeals applied the factually disputed scope-of-work definition proffered by Pilchuck. The Court of Appeals also denied a fraud exception to the statute of repose by equating "latent defects" with "fraud" and stating the "plain language of the statute evidences the legislature's intent" not to except "latent defects" from the statute of repose.

B. RELEVANT FACTS

1. PSE Hired Pilchuck to Perform Utility Services on an Ongoing Basis Under a Master Services Agreement with Individual Services Defined by a Work-Number System.

PSE and Pilchuck entered into a Master Services Agreement ("MSA") in January 2001,[1] whereby Pilchuck agreed to perform to-be-defined utility construction, operations, and maintenance services for PSE

[1] Clerk's Papers ("CP") 281-326.

over several years. The MSA itself did not identify the actual work required; rather, the MSA contemplated work "as may be specified" and "from time to time."[2] To keep track of the work subsequently specified, the parties used a work-number system.

The specific services Pilchuck was to perform were identified by "specific work notifications."[3] The specific work notification number relevant here was "10552392."[4] It identified the specific service address and subject gas service line that was supposed to be deactivated.[5] "Specific work notifications" were grouped into broader "sub orders"; the "sub order number" here was "1080521011" and described work Pilchuck was to perform on various gas lines.[6] "Sub orders" were grouped into still broader "superior work orders," which defined the type of utility (i.e., gas or electric) upon which work was to be done and the general area in which the work was to be done. This "'superior work order number' . . . is assigned more for accounting purposes. It does not detail the work to be performed like the work notifications."[7] The "superior work order number" here was

[2] *E.g.*, CP 281.

[3] CP 266 n.1, 353 (D-4 Card with "specific work notification," "sub order" numbers).

[4] CP 353, 461-62.

[5] CP 266 n.1.

[6] CP 353, 266 n.1.

[7] CP 461.

"109017644" and referred to all the different types of gas utility work (deactivation, installation, relocation, etc.) to be done across various addresses throughout the Greenwood neighborhood in 2004.[8]

2. Pilchuck Did No Work on the Subject Gas Service Line.

To deactivate the subject gas service line, Pilchuck was required to perform specified work. Specifically, Pilchuck was required to:

(1) disconnect the service line from all sources and supplies of gas;
(2) shut off the valve(s) on the service line that connect from the main gas line;
(3) purge the service line;
(4) seal the service line at each end with expansive foam; and
(5) cut-and-cap the service line.[9]

Pilchuck then needed to physically remove the above-ground portion of the deactivated service line to complete the deactivation.[10] Pilchuck did not perform **any** of the work required to deactivate the subject gas service line.[11]

3. Pilchuck Certified it Deactivated the Subject Gas Line.

When work is performed on each natural gas line, the work must be documented on a Gas Service Card.[12] This documentation is referred to as

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[8] CP 266 n.1, 461-62.

[9] CP 265-66, 328, 331.

[10] CP 265-66.

[11] *E.g.*, CP 266, 356-57 (¶¶ 5-6), 379 (33:9-12), 381 (35:14-22), 389-91 (79:1-19), 395-96 (¶ 9 WUTC Settlement Agreement).

[12] CP 267 (¶8), 385 (45:4-22), 387 (47:3-22). *See also* 49 C.F.R. § 192.13(c); *id*. §§ 192.603 & § .605; *id*. § 192.727; *id*. § 192.614; *see also* WAC 480-93-018(1); WAC 480-93-018(4).

a "D-4 Card," and PSE required such documentation under the MSA.[13] PSE used the information certified in the D-4 Cards to update its natural gas maps—essential for PSE to provide the public with accurate information on where it is safe to dig, and essential for PSE to conduct inspections, leak surveys, and corrosion tests of active gas lines to keep the public safe.[14]

Pilchuck admitted the D-4 Card it certified for "8409 GREENWOOD AVE N SEATTLE" under "specific work notification" number "10552392" was false.[15] Pilchuck certified deactivation of the 8409 Greenwood gas service line even though Pilchuck had not deactivated the line. Notably, the falsified D-4 Card did not mention "superior work order number" "109017644," the number Pilchuck claimed defined the scope of work relevant for statute-of-repose purposes.[16]

There is no dispute PSE's reliance on Pilchuck's certification was reasonable.[17] Pilchuck also does not dispute on summary judgment that it acted with intent to defraud PSE and falsely represented that it deactivated the subject service gas service line to induce PSE to pay for work not done.[18]

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[13] CP 267, 286, 291, 322, 340-51, 387 (47:3-22).

[14] CP 268.

[15] CP 390-91 (69:5-14, 79:1-19).

[16] CP 353.

[17] CP 3, 267-70, 385-86 (45:19-46:14).

[18] CP 411-17 (Pilchuck's Reply in Support of Summary Judgment).

Finally, it is undisputed on summary judgment that Pilchuck's false certification was a but-for cause of the explosion.[19]

C. PROCEDURAL HISTORY

PSE sued Pilchuck in March 2018.[20] Pilchuck moved for summary judgment, arguing its fraud should be excused under the statute of repose. The superior court granted Pilchuck's motion and adopted Pilchuck's scope-of-work definition as "the totality of Pilchuck's work described in the MSA and in [Superior] Work Order 109017644."[21] The superior court also determined a "fraudulent-concealment" or "equitable-estoppel" exception "[wa]s more appropriately saved for an appellate court."[22]

On appeal, Division One stated the scope-of-work issue was irrelevant, while at the same time accepting Pilchuck's scope-of-work definition as "[t]he broader project."[23] The court also declined to recognize a fraud or equitable estoppel exception and instead concluded the discovery rule does not apply to latent defects under the statute's plain language.[24]

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[19] CP 2, 267, 353, 390 (69:2-8), 394-406 (WUTC Settlement Agreement)

[20] CP 1-7.

[21] CP 496-97.

[22] CP 498.

[23] Slip Op. at *8, *11-12. Division One also cited a permit PSE obtained to validate its decision to adopt Pilchuck's "broader project" definition as the relevant scope of the "improvement." *Id*. at *2. But the permit discusses a different "superior work order," namely "109017658," not "109017644." CP 429.

[24] Slip Op. at 12-14.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court should accept review because the decision "involves an issue of substantial public interest that should be determined by the Supreme Court."[25] This is a case of first impression. No prior case has decided how the statute of repose applies when a contractor agrees to perform discrete improvements at different addresses but only performs some of the improvements at some of the addresses. The Court of Appeals here held a contractor that performed different work at other addresses and failed to do any work at the subject address is protected by the statute of repose. This Court should accept review to decide how lower courts can determine the scope of an "improvement upon real property" where a contractor performs different work at different locations at different times.

Also of substantial public interest is whether Washington recognizes an exception to the statute of repose where evidence of fraud exists.[26] The effect of fraud on Washington's statute of repose has been repeatedly identified as an unsettled question.[27] The Court should accept review to

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[25] RAP 13.4(b)(4).

[26] RAP 13.4(b)(4).

[27] *See 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932, 6 P.3d 74 (2000), *aff'd*, 144 Wn.2d 570, 29 P.3d 1249 (2001) ("Whether fraudulent concealment has the effect of tolling the statute is an unsettled question."); 16 *Wash. Prac., Tort Law & Prac.* § 10:12 (4th ed.) ("whether fraudulent concealment might toll the statute has not been decided by Washington courts"); 15A *Wash. Prac.,*

decide whether Washington will join many of its sister-states and formally recognize the existence of a fraud exception to the statute of repose.

A. THE COURT SHOULD ACCEPT REVIEW TO DETERMINE HOW THE STATUTE OF REPOSE APPLIES WHEN PARTIES CONTRACT FOR DIFFERENT IMPROVEMENTS UPON REAL PROPERTY AT DIFFERENT LOCATIONS AT DIFFERENT TIMES.

The issue here presents questions of broad application affecting the individual handyman, corporate contractors like Pilchuck, and property owners throughout the state. For example: How should a court assess what constitutes "an improvement upon real property" when a contractor agrees to perform multiple jobs at different addresses on a rolling basis; What is the rule where there are different types of work performed (or not performed) by the same contractor at different addresses at different times?

1. No Case Addresses How to Define the Statute's Scope Where the Contractor Is to Perform Different Improvements at Different Real Property Addresses.

The principle issue is how to define the statute's "scope."[28] Several cases state whether a particular type of work qualifies as an "improvement upon real property," but no Washington authority addresses **how** the scope of an "improvement upon real property," or "work," should be determined:

Handbook Civil Proc. § 4.12 (2018-2019 ed.) ("It is undecided whether fraudulent concealment tolls a statute of repose.").

[28] *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 567, 772 P.2d 1018 (1989) ("First, the court must determine the statute's scope, whether it applies at all.").

- *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*,[29] considered whether a refrigeration system, within a single building, was an improvement to real property covered by the statute of repose or a removable fixture not covered. **The scope of work was not at issue**, "Yakima Fruit and respondent entered into a written contract whereby respondent was to construct and install a refrigeration system and equipment." *Yakima Fruit* did not consider the scenario where, as here, the scope of relevant work at different addresses (and whether it was substantially completed) is disputed.

- In *Pinneo v. Stevens Pass, Inc.*,[30] Stevens Pass entered into a contract with Riblet Tramway to design and furnish a single chair lift in a single location. The issue was whether the chair lift was an improvement upon real property or a fixture. **The scope of Riblet's work, and its substantial completion, was not disputed**.

- In *Wash. Nat. Gas Co. v. Tyee Constr. Co.*,[31] Puget Sound Power & Light contracted with Tyee to convert overhead power lines to underground lines at one location. **The scope of work, and its completion, was not disputed.** The issue was whether the work, which was performed, was an "improvement" to real property.

- *New Meadows Holding Co. v. Washington Water Power Co.*[32] held the statute of repose begins to run upon substantial completion "of a project." But, again, **the "project"—its scope and terms—was not at issue**. The issue was whether the statute applied to claims of damage to real property adjacent to an improvement.

- In *Dania, Inc. v. Skanska USA Bldg. Inc.*,[33] Dania entered into a construction contract with a builder to build a warehouse at a single address. **There was no dispute there was a single contract for building the warehouse, and the plaintiff conceded the construction of the entire warehouse at that address was the**

[29] 81 Wn.2d 528, 529, 503 P.2d 108 (1972).

[30] 14 Wn. App. 848, 545 P.2d 1207 (1976).

[31] 26 Wn. App. 235, 611 P.2d 1378 (1980).

[32] 102 Wn.2d 495, 687 P.2d 212 (1984).

[33] 185 Wn. App. 359, 371, 340 P.3d 984 (2014).

relevant "improvement." The statute of repose issue was whether the warehouse (the improvement) was "substantially complete" when the warehouse was put to full use, or whether the later date of termination of services applied. The court held substantial completion was a fact issue, and substantial completion occurs when the entire improvement may be used for its intended purpose.

- *1519-1525 Lakeview Blvd. Condo Ass'n v. Apt. Sales Corp.*,[34] is another example of an owner contracting for work as specified in the contract where the **scope of required work under the contract was not in dispute**. Whether the "work" was "substantially complete" likewise never was a disputed issue. The issue was whether one looks to termination of services or occupancy readiness to determine the statute's starting point.

- In *New Grade Int'l v. Scott Techs.*,[35] a defendant sprinkler system company had a contract to design and install a sprinkler system in a single building. The system failed. **There was no issue on the scope of work (designing and installing the sprinkler system in the one building)** or whether the defendant's work was "substantially complete." The issue was whether the statute of repose was meant to benefit the defendant company, which was a manufacturer.

- In *Smith v. Showalter*,[36] the defendant built one home at one address, with construction spanning from 1975-1981. In 1977, the builder built a room with substandard wiring. In 1981, and the builder sold the home. The issue was whether 1977 or 1981 controlled for statute of repose purposes. The court held 1981 was the year of substantial completion as "improvement" means the "entire improvement" not a sub-component. **The court did not consider how to determine the scope of the "entire improvement."**

Here, there is no dispute deactivating a gas service line (had it been done) would be an "improvement" under the statute of repose. It is also

[34] 101 Wn. App. 923, 6 P.3d 74 (2000), *aff'd* 144 Wn.2d 570, 29 P.3d 1249 (2001).

[35] 2004 WL 5571416 (W.D. Wash. Nov. 30, 2004) (unpublished).

[36] 47 Wn. App. 245, 734 P.2d 928 (1987).

undisputed Pilchuck did not perform any portion of the deactivation work.[37] The issue this Court should decide on review is **how** to evaluate on summary judgment whether the scope of the "improvement" is the deactivation of the gas line at 8409 Greenwood Ave. N. only (per specific work notification 10552392) or all gas-related work done at various addresses throughout the 8400 block of Greenwood Ave. N. (per superior work order 109017644).

2. The Court of Appeals Concluded the Parties' Disagreement on Scope Was Irrelevant but Then Adopted and Applied Pilchuck's Definition Nonetheless.

The Court of Appeals acknowledged the parties had a factual disagreement on the scope of the "improvement," but concluded the scope did not matter.[38] Instead, the Court of Appeals determined the statute was intended to broadly protect contractors, so "[t]he fact that the work was not done as represented may give rise to a claim but does not remove the situation from the purview of the statute of repose."[39]

This cannot be the correct analysis. If scope were irrelevant, the language of the statute would not limit its protection only to those contractors "**having constructed, altered or repaired any improvement**

[37] CP 265-66, 328, 331; App. Br. at 20-22.

[38] Slip Op. at *8.

[39] *Id*.

upon real property."[40] And, if scope were irrelevant, the statute would not be limited only "to benefit persons **having performed work** for which the persons must be registered or licensed."[41] Understanding the scope of the improvement, or work, also must be relevant because if there is no improvement, or the work was not performed, then there is nothing for the statute of repose to protect (other than liability from fraud).

Yet, despite acknowledging the factual dispute about the relevant scope of work, the Court of Appeals nonetheless adopted Pilchuck's definition to reach its conclusion. The Court of Appeals began its recitation of facts by agreeing with Pilchuck's factually disputed claim that, "In 2004, PSE contracted with Pilchuck to perform work on the 8400 block of Greenwood Avenue North in Seattle."[42] The Court of Appeals then only considered "[t]he broader project" when addressing the "substantial completion" question.[43] Adopting as fact that "the 8400 block of Greenwood Avenue North" and "[t]he broader project" was the relevant scope of "work" or "improvement" for purposes of analyzing the statute of

[40] RCW 4.16.300 (emphasis added).

[41] *Id*.; *Pfeifer*, 112 Wn.2d at 567 ("First, the court must determine the statute's scope").

[42] Slip Op. at *2 *accord* Resp. Br. at 2 ("There is no dispute that PSE contracted with Pilchuck in 2004 to perform a construction project."), *id.* at 4 ("In 2004, and pursuant to the MSA, . . ."). *Cf.* Reply Br. at 6-13.

[43] Slip Op. at *11-12.

repose enabled the Court of Appeals to avoid dealing with the elephant in the room—where and how does one draw the line in a case involving **different** improvements at **different** addresses? It also upended the summary judgment standard, as these "facts" were clearly in dispute.[44]

3. The Statute Should Define the Scope.

The statute's language shows scope of the "improvement" should be a singular enhancement to the value of real property. This supports PSE's view that the relevant scope of "improvement" should be analyzed on a real-property-parcel/address basis, as was defined by "specific work notification 10552392." ***First***, the statute of repose only applies to benefit a contractor who constructs, alters, or repairs "**any** improvement [singular]."[45] The limitations period does not begin until "substantial completion" of "**an** improvement [again singular] upon real property."[46] Meaning, if Pilchuck performed multiple improvements at multiple addresses, there must be multiple improvements. And, conversely, if Pilchuck did not perform an improvement at an address, as here, such cannot constitute an improvement under the statute.

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[44] *Porter v. Kirkendoll*, 194 Wn.2d 194, 200, 449 P.3d 627 (2019).

[45] RCW 4.16.300 ("any") (emphasis added); RCW 4.16.310 ("an" "the").

[46] RCW 4.16.310 (emphasis added).

Further, the singular use of "improvement" and "work" does not support inferring that work on **other** improvements at **other** locations should factor into whether one "substantially completes" "an improvement." Yet that is what the Court of Appeals concluded when it decided the "project as a whole was substantially complete because PSE began serving its customers using the new gas lines and PSE treated the subject gas line as abandoned."[47] Contrary to the Court of Appeals' determination of fact, the new gas service line was located on a different street and was not the same gas service line Pilchuck claimed it deactivated.

Second, an "**improvement**" is defined as something that "adds to the value of the property," is an "amelioration of its condition," and "enhances its use."[48] Here, Pilchuck failed to perform any of the work necessary to deactivate the active gas service line and falsely stated it had deactivated the line. There is at least a question whether: (1) Pilchuck added to the value of the property on which the gas line was located (or detracted from it), (2) Pilchuck's failure to deactivate the gas line ameliorated the property's condition (or left the condition as is or made it worse), and (3) Pilchuck's failure to deactivate the gas line enhanced the use of the property (or made the property less safe).

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[47] Slip Op. at *11.

[48] *Wash. Natural Gas Co.*, 26 Wn. App. at 238-39.

Finally, "**real property**"[49] is "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land…. Also termed realty; real estate."[50] Here, the gas service line to be deactivated was "attached to, or erected on" the real property at 8409 Greenwood. It serviced that address **only**—not any of the surrounding parcels of real estate. It would be nonsensical to conclude deactivation of other gas lines "attached to, or erected on" other real property constitutes "an improvement upon real property" at 8409 Greenwood Ave. North. In sum, the statutory language supports that the relevant scope of "improvement" should be analyzed on a real-property-parcel/address basis, as was defined in this case by "specific work notification 10552392."

4. "Substantial Completion" Is an Issue of Fact Here.

The Court of Appeals in *Dania, Inc. v. Skanska USA Bldg. Inc.* held "substantial completion" was a fact issue and the fact occurred when the entire improvement could be used for its intended purpose.[51] The California Court of Appeals recently considered this issue and agreed: "The date of substantial completion is an objective fact about the state of construction of the improvement, to be determined by the trier of fact. It is a statutory

[49] RCW 4.16.300 (emphasis added)

[50] PROPERTY, BLACK'S LAW DICTIONARY (11th ed. 2019).

[51] *Dania*, 185 Wn. App. at 371.

standard, not a contractual one."[52] "What matters, [ ] is the actual state of construction of the improvement and whether it is substantially complete."[53]

Here, the Court of Appeals either treated the question as a matter of law or ignored PSE's evidence. The Court of Appeals asserted, "The specific project of retiring the subject gas service line was substantially complete because the line was being 'used . . . for its intended use,' which, in this instance, was disuse. As intended, the subject gas service line was no longer being used to provide gas service to PSE's customers."[54] Here, the court inexplicably equated mere "disuse" with affirmative "deactivation." To be clear, the intended purpose behind deactivating a gas service line is to prevent it from leaking and causing a safety risk. That is why the most critical part of the deactivation process is to permanently purge the line of gas and remove any above-ground portion, as certified by a D-4 Card.

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[52] *Hensel Phelps Constr. Co. v. Super. Ct. of San Diego County*, 44 Cal. App. 5th 595, 613, 257 Cal. Rptr. 3d 746 (2020).

[53] *Id.* at 616.

[54] Slip Op. *12. The Court of Appeals misconstrues the California case. The Court of Appeals states that "the scope of the project does not affect the conclusion on this issue" **yet follows that statement with a discussion of the "scope of the project."** Clearly, if the "scope of the project" was only to deactivate the gas line at 8409 Greenwood, then the "project" was not substantially completed.

B. THE COURT SHOULD ACCEPT REVIEW TO DECIDE WHETHER FRAUDULENT CONCEALMENT OR EQUITABLE ESTOPPEL IS AN EXCEPTION TO THE STATUTE OF REPOSE.

The law on a fraud or equitable estoppel exception is "unsettled" in Washington.[55] The Court of Appeals acknowledged as much.[56] Here, the issue would be squarely before the Court because Pilchuck admits for purposes of these proceedings that it defrauded PSE.[57] The Court should accept review and join the many other courts that have recognized an exception to the statute of repose where the contractor engages in fraud.[58]

The Mississippi Supreme Court's opinion in *Windham v. Latco of Mississippi, Inc.* is instructive.[59] In *Windham*, chicken farmers sued a chicken-coop builder for building coops with leaky roofs.[60] The farmers

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[55] *1519-1525 Lakeview Blvd. Condo. Ass'n*, 101 Wn. App. at 932-33 ("unsettled"); *see also Pfeifer*, 112 Wn.2d at 568; 15A *Wash. Prac., Handbook Civil Proc.* § 4.12 (2018-2019 ed.); 16 *Wash. Prac., Tort Law & Prac.* § 10:12 (4th ed.).

[56] Slip Op. at *12.

[57] CP 479.

[58] *E.g.*, *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608 (Miss. 2008); *Stark v. Merchantile Bank, N.A.*, 29 Kan. App. 2d 717, 724, 33 P.3d 609 (2000); *Mohamed v. Donald J. Nolan, Ltd.*, 967 F. Supp. 2d 647, 658–59 (E.D.N.Y. 2013), *aff'd sub nom. Mohamed v. Nolan Law Grp.*, 574 Fed. Appx. 45 (2d Cir. 2014); *Wilhelm v. Houston Cnty*, 310 Ga. App. 506, 713 S.E.2d 660 (2011); *Lantzy v. Ventex Homes*, 31 Cal.4th 363, 367, 73 P.3d 517 (2003); *Tomlinson v. George*, 116 P.3d 105 (N.M. 2005); *Sanders v. Gray, Inc.*, 183 N.C. App. 490, 645 S.E.2d 229 (2007); *South Dakota Wheat Growers Assoc. v. Chief Indus., Inc.*, 337 F. Supp. 3d 891 (N.D. South Dakota 2018); *Horvath v. Liquid Controls Corp.*, 455 N.W.2d 60 (Ct. App. Minn. 1990); *Fueston v. Burns and McDonnell Eng'rs Co., Inc.*, 877 S.W.2d 631 (Ct. App. Mo. 1994); *Wosinski v. Advance Cast Stone Co.*, 377 Wis. 2d 596, 630, 901 N.W.2d 797 (2017).

[59] 972 So.2d 608.

[60] *Id*. at 609.

argued the statute of repose did not bar their claims because the builder fraudulently concealed the defective design and construction. The Supreme Court held the defendant's fraud could equitably estop the defendant builder from relying on the statute of repose to bar the plaintiffs' causes of action.[61]

Rooted in public policy, the *Windham* court's holding "still allows architects, contractors, and engineers who do not fraudulently conceal the cause of action 'to close their books' at the conclusion of the repose period,"[62] and "require[s] plaintiffs to exercise due diligence."[63] However:

> The logic supporting the availability of common-law equitable estoppel as a remedy to bar application of a statute of repose is compelling.
>
> * * *
>
> If fraudulent concealment is proven, equity mandates that the tortfeasor be barred from benefitting from the statute of repose.[64]

Washington's policy considerations mirror those expressed by the Mississippi Supreme Court. *Pfeifer* explains that Washington's statute of repose was intended to "protect contractors from the possibility of being held liable **for the acts of others**," and the "protection is based on the premise that the longer the owner possesses the improvement, the more likely it is that the damage was the owner's fault or the result of natural

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[61] *Id.* at 614.

[62] *Id*.

[63] *Id*. at 615.

[64] *Id.* at 612, 614.

forces."[65] But, "these considerations **do not apply** when [one] conceals a known dangerous condition that [the other] has no reason to discover."[66]

Here, a fraud exception does not subvert the policy of "protect[ing] contractors from the possibility of being held liable for the acts of others," because contractors would only be liable if there was evidence of their own fraud. Similarly, a fraud exception does not interfere with the "premise that the longer the owner possesses the improvement, the more likely it is that the damage was the owner's fault or the result of natural forces" because the damage would be a result of the contractor's fraud. Indeed, use of equitable estoppel to prevent a defendant from benefiting from its own fraud is already a well-accepted principle in Washington in a variety of contexts.[67]

In *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, the Court held Washington's waste regulatory scheme "mandates the application of a discovery rule" because the state "must rely on industry reporting to discover violations."[68] The Court explained: "Without a discovery rule, industries can discharge pollutants, and by failing to report the violation,

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[65] *Pfeifer*, 112 Wn.2d at 568 (emphasis added).

[66] *Id*.

[67] *Del Guzzi Const. Co., Inc. v. Glob. Nw., Ltd., Inc.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986); *Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 713, 142 P.3d 179 (2006); *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 454, 6 P.3d 104 (2000).

[68] 96 Wn.2d 85, 92, 633 P.2d 1329 (1981).

can escape penalties." And, the Court rejected the same legislative intent analysis relied on by the Court of Appeals below:

> That the legislature has not acted is not determinative. . . . In *Gazija*, we recognized the difficulty of inferring legislative intent from inaction and suggested that the legislature may have decided to defer to the court's judgment, in most cases, as to when to apply the rule. We have a duty to construe and apply limitation statutes in a manner that furthers justice.[69]

VI. CONCLUSION

For the foregoing reasons, PSE respectfully requests the Court grant this petition for review.

Respectfully submitted this 2nd day of December, 2020.

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[69] *Id*. at 92–94 (citations omitted).

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered, via the method indicated, to counsel of record:

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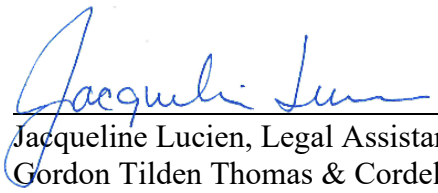
DATED this 2nd day of December, 2020, at Seattle, Washington.



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APPENDIX A

FILED
11/2/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUND ENERGY, INC., a Washington corporation, Appellant, v. PILCHUCK CONTRACTORS, INC., a Washington corporation, Respondent.	)	No. 80162-7-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Puget Sound Energy, Inc. (PSE) seeks reversal of summary judgment for Pilchuck Contractors, Inc. PSE contends that the court erred in determining that its claims against Pilchuck were barred by Washington's construction statute of repose. Because PSE's claims arise from the type of activity that the statute was intended to cover and did not accrue within the allowable period, they are barred by the statute of repose. Although PSE urges this court to recognize a fraud exception to the statute, the broad language of the statute indicates the legislature's intent to restrict the application of the discovery rule and establish a firm endpoint of liability for those who engage in construction activities. We affirm.

FACTS

Puget Sound Energy, Inc. (PSE) is a public utility company that provides electricity and natural gas service to customers in the Puget Sound region. In 2001, PSE and Pilchuck Contractors, Inc. entered into a Master Services Agreement (MSA) in which Pilchuck agreed to perform construction, operations, and maintenance projects for PSE from time to time. The MSA required Pilchuck to "defend, indemnify and hold harmless PSE from and against any and all Claims or Losses" arising from Pilchuck's conduct as PSE's contractor.

In 2004, PSE contracted with Pilchuck to perform work on the 8400 block of Greenwood Avenue North in Seattle. PSE obtained a permit from the City of Seattle Department of Transportation to install new gas lines "to serve the property lines in the 8400 [block] of Greenwood Avenue North also, to cut and cap existing serves in Greenwood Avenue North." All of the Greenwood gas relocation work in 2004 fell under one "superior work order number," while "specific sub order numbers" described discrete work to be done, and "specific work notification numbers" were assigned to each address to be serviced under a sub order.

The deactivation of the gas service line at 8409 Greenwood Avenue North was assigned work notification number 10552392. The version of the Gas Operating Standards in effect in 2004 required that the following be performed to properly deactivate a gas service line: (1) disconnect the service line from all sources and supplies of gas, (2) purge the line of existing natural gas, (3) seal the line at each end with expansive foam, (4) cut and cap the line, and (5) remove any above-ground portion of the retired or deactivated service line. Compliance with

the Gas Operating Standards is mandatory for PSE employees, service providers, and contractors.

Pilchuck submitted to PSE the required Gas Service Card, commonly referred to as a "D-4 Card," for work notification number 10552392. The D-4 Card, dated September 1, 2004, indicated that the gas service line at 8409 Greenwood Avenue North had been retired. The information on the D-4 Card was entered in PSE's mapping system, and PSE's master map of gas service lines was updated to indicate that the service line no longer existed. Pilchuck finished work on the area of 8400 Greenwood Avenue North in September 2004 and was paid in full. By that time, PSE's customers on the block were receiving gas service through the newly installed service lines.

In the early hours of March 9, 2016, gas leaked from the line and ignited, causing an explosion that destroyed several businesses. The Washington Utilities and Transportation Commission (WUTC) issued an investigation report finding that the gas leak was directly caused by external physical damage to the gas service line. The WUTC determined that "the service line had not been 'cut and capped' as documented by PSE's contractor" and found that "the leak and explosion would not have occurred but for PSE's improper abandonment of the service line in September 2004."

In 2018, PSE filed a lawsuit against Pilchuck for breach of contract, breach of warranties under the MSA, and fraud. PSE argued that Pilchuck was required under the MSA to indemnify PSE for its costs stemming from the emergency response to the explosion, WUTC enforcement proceeding, and third-party claims.

Pilchuck moved for summary judgment, arguing that all of PSE's claims were barred by Washington's construction statute of repose. The court granted summary judgment for Pilchuck. PSE appealed.

ANALYSIS

PSE contends that the trial court erred in granting summary judgment for Pilchuck on the grounds that PSE's claims were barred by the construction statute of repose. We review a summary judgment order de novo, engaging in the same inquiry as the trial court. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper when, viewing all facts and inferences in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Id.

The meaning of a statute is a question of law that we also review de novo. Porter v. Kirkendoll, 194 Wn.2d 194, 200, 449 P.3d 627 (2019); Smith v. Showalter, 47 Wn. App. 245, 248, 734 P.2d 928 (1987). Our purpose in interpreting a statute is to ascertain and carry out the intent of the legislature. Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). If the plain meaning of the statute is clear on its face, we must give effect to that plain meaning as an expression of the legislature's intent. Id. Appellate courts will avoid adding to or taking away from the language of a statute; statutes are construed to avoid rendering any language superfluous, void, or insignificant, and the court cannot insert words that the legislature has chosen not to include. Porter, 194 Wn.2d at 211–12.

To ascertain a statute's plain meaning, courts "consider the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." Columbia Riverkeeper, 188 Wn.2d at 435. If the meaning of the statute remains unclear or ambiguous after this inquiry, "it is appropriate to resort to canons of construction and legislative history" to determine the legislature's intent. Id.

Washington's construction statute of repose is set out in two parts:

> RCW 4.16.300 defines the scope of the statute and describes those entitled to claim its protection. RCW 4.16.310 defines when this statute of repose bars a claim. Together, they bar certain claims arising from construction of any improvement on real property that have not accrued within six years after substantial completion of construction.

Cameron v. Atl. Richfield Co., 8 Wn. App. 2d 795, 800, 442 P.3d 31 (2019). Washington courts use a three-step analysis in cases involving the statute. Pfeifer v. City of Bellingham, 112 Wn.2d 562, 567, 772 P.2d 1018 (1989). First, we decide whether the claims fall within the scope of the statute. Id. If the statute applies, we determine whether the cause of action accrued within the time period allowed by the statute. Id. Finally, the plaintiff must have filed suit within the appropriate statute of limitation for the cause of action.[1] Id.

[1] Although the statute of limitation is relevant to the statute of repose analysis, the two are significantly different. Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 176 Wn.2d 502, 511, 296 P.3d 821 (2013). "A statute of limitation bars a plaintiff from bringing an accrued claim after a specific period of time. A statute of repose terminates the right to file a claim after a specified time even if the injury has not yet occurred." Id.

I. Scope of the Statute of Repose

PSE first argues that the statute of repose does not bar its claims against Pilchuck because the claims do not fall within the scope of the statute. As noted above, RCW 4.16.300 sets out the scope of the statute of repose:

> 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.

A. Construction Activities

PSE contends that "there is, at minimum, an issue of material fact precluding summary judgment on whether Pilchuck 'constructed, altered or repaired' an 'improvement,' or 'performed work' to deactivate the subject gas service line." Pilchuck argues that there is no factual dispute and PSE's argument concerns the legal definition of an "improvement" under the statute of repose.

Washington courts have interpreted the phrase "improvement to real property" as used in the construction statute of repose. The first in the line of cases concerning this definition found that the replacement and reinstallation of pipe, coils, hangers, and rods in a cold storage warehouse constituted an improvement to real property rather than installation of a removable trade fixture. Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co., 81 Wn.2d 528, 530–31, 503

P.2d 108 (1972). This court then applied Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co. to determine that a ski lift was an improvement to real property rather than a fixture because it "adds to the value of the property, is an amelioration of its condition, and enhances its use." Pinneo v. Stevens Pass, Inc., 14 Wn. App. 848, 852, 545 P.2d 1207 (1976). We in turn applied Pinneo v. Stevens Pass, Inc. to find that installation of underground power lines was "an improvement upon real property even though potentially subject to removal under some circumstances" because "[t]he power lines add to the value of the property and enhance its use, and Tyee, being a contractor, is clearly within the class to be protected by the statute." Wash. Nat. Gas Co. v. Tyee Const. Co., 26 Wn. App. 235, 239, 611 P.2d 1378 (1980).

PSE does not appear to be arguing that the work, if completed, would not have constituted an improvement. Rather, PSE argues that actions not taken cannot constitute an improvement. However, this argument does not quite square with the definition of "improvement on real property" developed in the case law. Under Washington National Gas Co. v. Tyee Construction Co., gas service lines, like power lines, are an improvement on real property because they add to the value of the property and enhance its use. Id. at 239. Pilchuck was hired to alter these existing improvements. The fact that Pilchuck did not complete that work does not change the status of gas service lines as an "improvement upon real property" for purposes of the statute of repose.

Although Pilchuck contracted with PSE to perform construction work on the gas service line, PSE contends that the question of whether Pilchuck actually

"constructed, altered or repaired" the gas service line affects the applicability of the statute of repose. The parties disagree on the scope of the project relevant to this analysis. Pilchuck contends that the entirety of the work around 8400 Greenwood Avenue North constituted one construction project, as it fell under one superior work order number. In contrast, PSE argues that the court should consider the specific work notification number covering the deactivation of this specific service line as its own project.

This disagreement, however, does not affect the applicability of the statute of repose because the statute evidences a legislative intent to apply broadly to protect contractors such as Pilchuck. This court has noted that the language of RCW 4.16.300 covering "all claims or causes of actions of any kind" is "broad and sweeping." Parkridge Assocs., Ltd. v. Ledcor Indus., Inc., 113 Wn. App. 592, 602, 54 P.3d 225 (2002) (emphasis omitted). As this court recognized in Pinneo, the legislature adopted the statute of repose "to protect architects, contractors, engineers, and others from extended potential tort and contract liability." 14 Wn. App. at 852.

PSE contracted with Pilchuck to retire the gas service line, that is, to alter an improvement on real property, and Pilchuck represented to PSE that it had done so. Had Pilchuck properly retired the gas service line, its conduct would certainly fall within the scope of the statute of repose. The fact that the work was not done as represented may give rise to a claim but does not remove the situation from the purview of the statute of repose. To except this situation from the statute of repose

would not serve the legislature's intent to protect contractors from extended liability. PSE's claims fall within the scope of the statute of repose.

B. Reporting Activities

PSE briefly argues that Pilchuck's submission of a false report on the D-4 Card is not within the scope of the statute of repose because it is not a protected construction activity under the statute. The statute of repose applies 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 . . . administration of construction contracts for any construction, alteration or repair of any improvement upon real property." RCW 4.16.300. In this context, "[t]he phrase 'arising out of' means 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" Parkridge Assocs., 113 Wn. App. at 603.

Both parties cite to Pfeifer in support of their arguments. In Pfeifer, the court engaged in an "activity analysis" to determine whether the claim of concealment during a sale arose from the enumerated activities in the statute. 112 Wn.2d at 567–69. The court reasoned that "[s]elling and building involve different activities" and noted that a seller who was not the builder would not be shielded by the statute of repose for the same conduct. Id. at 568.

PSE contends that the distinction between building and reporting parallels the distinction between building and selling. However, unlike selling a building, "record keeping, certifying records, and reporting a gas service change on a D-4 Card" are activities arising from the construction activities specified in the statute. The MSA between PSE and Pilchuck required Pilchuck to submit such

documentation when performing construction on its gas utilities. The activities are not separable like the activities in Pfeifer. There would be no need to submit a D-4 Card to PSE if Pilchuck had not been engaged in construction activities. The reporting activities arose from the construction activities and the statute of repose applies.

II. Accrual of Cause of Action

We next consider whether the cause of action accrued within the period allowed by the statute. Pfeifer, 112 Wn.2d at 567. The construction statute of repose bars claims that do not accrue within the allowable period:

> 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: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues.

RCW 4.16.310. "The fact that additional contract work remains, including punch list work, does not affect the conclusion that a project is substantially complete if it is otherwise fit for occupancy." Dania, Inc. v. Skanska USA Bldg. Inc., 185 Wn. App. 359, 371, 340 P.3d 984 (2014).

Although there does not appear to be any dispute that Pilchuck terminated its work in September 2004, PSE contends that Pilchuck never substantially

completed the construction work on the subject gas service line. The parties again disagree on the scope of the construction. Pilchuck argues that the 8400 Greenwood Avenue North project as a whole was substantially complete because PSE began serving its customers using the new gas lines and PSE treated the subject gas service line as abandoned. PSE contends that Pilchuck did not substantially complete the work of the specific work notification and that "a reasonable jury could find that the businesses in the area could not be used or occupied for their intended purpose when there was a hidden, active, and unmonitored gas line that could break and cause an explosion."

PSE argues that the scope of the project and whether it was substantially complete are disputed issues of fact precluding summary judgment. It submitted as additional authority a recent California case in which the Court of Appeals determined that the contractual standard of substantial completion did not conclusively establish the date of substantial completion for purposes of the statute of repose. Hensel Phelps Constr. Co. v. Super. Ct. of San Diego County, 44 Cal. App. 5th 595, 616, 257 Cal. Rptr. 3d 746 (2020). The California court remarked:

> The date of substantial completion is an objective fact about the state of construction of the improvement, to be determined by the trier of fact. It is a statutory standard, not a contractual one. The parties to a construction contract may not arrogate to themselves the ability to conclusively determine when the statutory limitations period begins to run.

Id. at 613.

Here, no party is arguing for any standard of substantial completion other than that defined in RCW 4.16.310. Again, the scope of the project does not affect the conclusion on this issue. The broader project was substantially complete

because PSE's customers were receiving service via the new gas lines and PSE treated the subject gas service line as retired. PSE does not point to anything in the record to suggest that the businesses in the area were not being used or occupied normally despite the hidden danger of the gas line. The specific project of retiring the subject gas service line was substantially complete because the line was being "used . . . for its intended use," which, in this instance, was disuse. As intended, the subject gas service line was no longer being used to provide gas service to PSE's customers. Because substantial completion and termination of the construction both occurred in 2004 and PSE's claims did not accrue until 2016, the claims accrued outside of the allowable period and are barred by the statute of repose.

III. Fraud Exception to Statute of Repose

PSE argues that we should recognize a fraud or equitable estoppel exception to the statute of repose. Although PSE cites to cases from multiple other jurisdictions recognizing an exception to the statute of repose when there is evidence of fraud, Washington courts have not yet decided whether a fraudulent concealment exception to the statute of repose exists. In Pfeifer, the Washington Supreme Court declined to address an argument urging the court "to create an exception to the statute for a cause of action based on intentional or fraudulent concealment" and instead resolved the case on the basis of statutory construction. 112 Wn.2d at 569–71. This court has also declined to reach the issue. See 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 101 Wn. App. 923, 932–33, 6 P.3d 74 (2000). We noted that "[w]hether fraudulent concealment has

the effect of tolling the statute is an unsettled question" but found that we need not resolve the question because there was no evidence of concealment in that case. Id.

In other contexts, Washington courts have generally interpreted the language of the statute of repose broadly in favor of the parties that it is "specifically intended to benefit." RCW 4.16.300. In Parkridge, this court considered "whether the Legislature intended to include equitable indemnity claims within the broad sweep of RCW 4.16.310." 113 Wn. App. at 602. The court noted that "[t]he Legislature's choice of the words 'all claims or causes of actions of any kind . . . arising from . . . construction' is broad and sweeping," and it did not read that language "to imply an exception for equitable indemnity claims." Id. (emphasis omitted) (quoting RCW 4.16.300). Even if a contractor committed an unlawful act by performing work for which it was not licensed, the broad language providing protection for "[a]ny person" allowed the contractor to "fit into the statute regardless of its allegedly having furnished design services in violation of another statute." Yakima Fruit, 81 Wn.2d at 531–32.

PSE argues that, "without a mechanism akin to the discovery rule (like equitable estoppel), businesses can escape penalties by failing to make accurate reports as otherwise required." This court has noted that "RCW 4.16.310 legislatively restricts the application of the discovery rule," under which a cause of action accrues when "'the plaintiff learns of or in the exercise of reasonable diligence should have learned of the facts which give rise to the cause of action.'" Hudesman v. Meriwether Leachman Assocs., Inc., 35 Wn. App. 318, 321, 666 P.2d

937 (1983) (quoting Metro. Servs., Inc. v. City of Spokane, 32 Wn. App. 714, 720, 649 P.2d 642 (1982)). In doing so, the statute "sets an outer limit for discovery" of contractor conduct giving rise to a claim. Id. at 322. Division Three of this court also remarked on the statute's interaction with the discovery rule in Rodriguez v. Niemeyer:

> While important policy reasons support the accrual at discovery rule, we also recognize it may be desirable to place some outer limit upon the delayed accrual of actions in order to avoid an undue burden on potential defendants. . . . The creation of limitation periods is primarily a legislative function, and the legislature has the constitutional power to enact a clear line of demarcation to fix a precise time beyond which no remedy will be available. . . . [RCW 4.16.310] has a broad scope barring [a]ll causes of action that do not accrue within 6 years after substantial completion or termination of any of the specified services, whether the damage was or could have been discovered within that period. This court cannot constitutionally ignore such a clear mandate from the legislature.

23 Wn. App. 398, 400–01, 595 P.2d 952 (1979) (citations omitted) (citing Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 222 n.2, 543 P.2d 338 (1975)).

Considering the broad language of the statute and Washington courts' repeated deferral to the legislature's authority to limit periods of liability, we decline to adopt an exception to the statute of repose. The plain language of the statute evidences the legislature's intent for the statute to apply broadly to "all claims . . . of any kind" and to restrict the application of the discovery rule, even for latent defects. The trial court did not err in granting summary judgment for Pilchuck.

Affirmed.

WE CONCUR:

Andrus, A.C.J.

Mann, C.J.

GORDON TILDEN THOMAS CORDELL LLP

December 02, 2020 - 1:28 PM

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