NO. 737481

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Appellants,
v.

ESTATE OF BARBARA BRANDES

Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Brand Insulations, Inc. ("hereinafter Brand") was an insulation subcontractor employed by general contractor Ralph M. Parsons during the construction phase of the ARCO Cherry Point refinery. Brand installed insulation specified by the owner and general contractor at the refinery, in this case, both asbestos and asbestos free insulation. Plaintiff Brandes was the wife of a man employed by ARCO as an operator at the facility. She developed mesothelioma and sued Brand, among others, alleging her disease was caused by asbestos brought home on her husband's clothing and person.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by ruling that Washington's construction statue of repose did not bar Mrs. Brandes' claims which accrued more than forty years after substantial completion of the refinery.

2. The trial court erred in recognizing a duty of care under the law of negligence in the context of a "take-home" exposure to asbestos where no special relationship existed between Brand and Plaintiff Mrs. Brandes.

3. The trial court erred in ruling that the plaintiff had presented sufficient evidence of causation to create a question for the jury.

4. The trial court erred in allowing plaintiff to assert a "negligent sales" cause of action and instructing the jury as to that cause[1]

5. The trial court erred in refusing to instruct the jury that a contractor who performs his work in accordance with specifications provided by the owner or the owner's agent is not liable if specified construction materials are later proven to be defective. The court erred in denying Brand's motion for dismissal on those grounds.

6. The trial court erred in allocating settlement proceeds from Mrs. Brandes' personal injury action to a possible future wrongful death case, where, under Washington law, future wrongful death claims against settling defendants are eliminated as a matter of law by the settlement.

7. The trial court erred in permitting Plaintiff to display experimental video evidence of the cutting of asbestos pipe insulation and the shaking out of asbestos laden clothing.

III. STATEMENT OF THE CASE

Barbara Brandes was born November 4, 1934 in Boise, Idaho. (CP 000376). Mrs. Brandes married her husband, Raymond Brandes, May 12, 1953. (CP 000377). Mrs. Brandes was diagnosed with mesothelioma June of 2014. (CP 000388). On August 6, 2014, Plaintiffs filed a personal injury action naming Brand as a defendant. (CP 000396). Plaintiffs

[1] In *Ehlert v. Brand Insulations,* this court previously ruled that Brand was not a product seller under 402A, in a case involving the same refinery construction project.

alleged Mrs. Brandes was exposed to respirable asbestos fibers carried home on Mr. Brandes' clothing during the time that he worked for the ARCO Cherry Point refinery from 1971 to 1975. (CP 000386). Mrs. Brandes laundered her husband's work clothes during their marriage. *Id.*

ARCO Cherry Point refinery was originally designed to be an asbestos-free facility. (CP 000414-17, CP 000423-24). Approximately half way through the construction phase the general contractor on the job, The Ralph M. Parsons Company, informed ARCO that the asbestos-free materials were inadequate. *Id.* At that time, the project began employing asbestos containing insulation materials. *Id.* The Crude unit was the first unit on line at the refinery, and therefore would have been insulated first, likely using the non-asbestos containing insulations. *Id.* According to ARCO, a good portion of the insulation in the Crude Unit did not contain asbestos. *Id.* Mr. Brandes' first duty station at ARCO was as an operator on the Crude Unit. (VRP 590).

In 1970, the Ralph M. Parsons Company subcontracted Brand to perform insulation installation at the Cherry Point Refinery. (CP 000428). The work was to be performed under Parsons' direction according to the specifications set forth by the agreement. *Id.* Parsons retained full authority over the administration of work performed and specified the materials to be used. (CP 000429). The contract outlined the type of

insulation, the performance standards, general procedures, and extent of work to be done. *Id.* The contract contained precise specifications as to what products were to be used by Brand to insulate piping on the project.

> c. All piping shall be insulated with "chloride free" calcium silicate insulation as manufactured by PABCO Division of Fibreboard Corporation, Emeryville, California and/or Johns-Manville Sales Corporation, Industrial Insulations Division.

(CP 000463). Brand performed the installation of insulation on the Crude Unit where Mr. Brandes first worked. *Id.* By September 1971, the Crude Unit had been turned over to ARCO for operation and maintenance. (CP 000485, CP 000503). Brand left the Cherry Point facility and turned over all their remaining inventory of insulation materials to Parsons as of February 1972. (CP 000505). Once Brand completed the construction phase of a unit, it was turned over to ARCO. ARCO contracted with TEMCO to perform maintenance services in August of 1971. (CP 000507).

Ray Brandes was hired to work as an operator at the Cherry Point refinery March of 1971. (VRP 588). From March until September, the ARCO employees attended classroom training off site that was provided by ARCO. (VRP 589). In September, the new employees began some on the job training at the facility. (VRP 635-36). By mid-November of 1971, Mr. Brandes was working in the Crude unit which was fully operational.

(VRP 589). Mr. Brandes worked out of the operator's room, a pre-fabricated metal enclosed building located within a unit. (CP 000529-30). An operator was charged with maintaining continuous operation of the processing unit. *Id.* This required an operator to walk through the unit 6-8 times a day to monitor and ensure proper operation of the equipment. *Id.* As an operator, Ray may have prepared equipment for whatever needed to be done to maintain it, which could have included removing insulation to gain access to the equipment. (CP 616). If the insulation was on a pipe, an operator would typically use a screwdriver to pull off the metal cladding and then break the insulation off the pipe. *Id.* If the insulation was saturated with oil, it would not necessarily be dusty, but sometimes it was. *Id.* According to Mr. Brandes, he removed insulation from pipes approximately one-two times per month. (CP 000567). During such work, Mr. Brandes wore an ARCO provided respirator approximately fifty percent of the time. *Id.*

Prior to trial, Brand moved for summary judgment on numerous grounds. (CP 000349-50). Metalclad, a co-defendant in the case moved for summary judgment based on the contractor's statute of repose and Brand adopted and incorporated by reference that argument into their motion. (CP 002778).

The trial court granted Brand's motion to dismiss Mrs. Brandes' strict liability claims on the grounds that Brand's conduct as a contractor installing insulation products did not constitute a product sale within the meaning of Restatement (Second) of Torts § 402A (1965).[2] (VRP 52). The trial court, denied the remainder of Brand's motion. (VRP 51-53).

Despite the fact that the trial judge dismissed the strict liability claims against Brand upon a finding that Brand was ***not a seller*** of insulation products, the judge allowed Plaintiffs to proceed on a purported "negligent sales" claim. (VRP 1490).

After a judgment for Plaintiff, Plaintiff brought a motion to allocate fifty percent of the settlement proceeds to a future wrongful death claim. (CP 005518). Brand opposed the motion. Brand filed a motion for new trial, judgment notwithstanding the verdict, or in the alternative, remittitur. (CP 005192). The trial judge denied Brand's motion for a new trial but granted remittitur, reducing the verdict from $3,500,000 to $2,500,000. (CP 005428-31). The trial judge ultimately granted Plaintiff's motion and set off twenty percent of the settlement proceeds to the statutory heir's future wrongful death claim. *Id.*

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[2] The trial court's ruling on the 402A issue was in accord with an unpublished Washington Court of Appeals Division I opinion involving the same defendant, the same refinery site and the same plaintiff attorneys. *See Ehlert v. Brand*, 183 Wn.App. 1006 (2014).

IV. ARGUMENT

A. Washington's Statute of Repose Bars Plaintiff's Claims

Washington's construction statute of repose, RCW 4.16.300-310, eliminates all claims or causes of action of any kind against any person arising from that person's participation in the construction, alteration or repair of any improvement to real property, unless such a claim or cause of action accrues within six years of substantial completion of the improvement. Brand was the primary insulation contractor for the construction of the ARCO refinery at Cherry Point, Washington. (VRP 1120). Brand commenced work on the project in early 1971 and left the project in February 1972. (VRP 1091, VRP 1118). The refinery produced its first barrel of refined Alaskan crude oil in November 1971. (VRP 589) Mr. Raymond Brandes began working for ARCO as an operator in 1971. (VRP 588). The Plaintiff, Barbara Brandes, was diagnosed with mesothelioma in 2014. (CP 000388).

Brand filed a motion for summary judgment seeking dismissal of plaintiff's claims based on the statute of repose and a dismissal of plaintiff's strict liability claims under Restatement (Second) of Torts §402A. (VRP 2). The trial court heard oral argument on motions for summary judgment March 6, 2015. (VRP 1). The court granted Brand's motion to dismiss the plaintiff's strict liability claims, but denied the

motion to dismiss remaining claims based upon Washington's construction statute of repose. (VRP 51-53). The court's order reads, in relevant part,

> "The court further finds that the contractor's statute of repose does not apply to Plaintiff's negligent sales claims.[3] 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." (Attached as Appendix A).

In reviewing a trial court's denial of summary judgment, this Court makes the same inquiry as was required below, summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Taggart v. State,* 118 Wn.2d 195, 199, 822 P.2d 243 (1992). The facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Id.* at 199. Questions of law are reviewed de novo. *Sherman v. State,* 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Brand's construction activities are protected by the statute of repose therefore this Court should reverse the trial court's denial of summary judgment and remand for a dismissal of the case.

1. Plaintiff's Claims Fall Outside of the Repose Period

RCW 4.16.310 provides in relevant part:

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[3] As discussed in Brand's assignment of error to the Jury Instructions, under the law there is no "negligent sale" claim applicable to Brand.

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitations 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 termination of services, whichever is later, shall be barred...

Plaintiffs' allegations of exposure stem from the time Mr. Brandes was employed at the ARCO Cherry Point refinery between 1971 and 1975. (VRP 588). Brand's work at the refinery ended no later than the end of February 1972. (VRP 1118). The refinery began refining oil in November 1971. (VRP 589). Under RCW 4.16.310, Mrs. Brandes' cause of action against Brand must have accrued, if at all, within six years the date the refinery became operational in November 1971.[4] In fact, she was not diagnosed with mesothelioma until 2014, more than forty years later. Even if we use one of the other potentially relevant dates, Brand's departure from the site or Mr. Brandes' departure from the site, the result is identical. Plaintiff's claims against Brand for asbestos exposure arising from Brand's use of specified asbestos containing insulation on the project did not accrue within six years of any arguably relevant date referenced in

[4] Once the claim accrued within the six year accrual period, Plaintiff would have had an additional three years under the applicable statute of limitations in which to file a lawsuit.

the statute. Plaintiff's claims were barred by the contractor statute of repose.

2. Brand's Construction Activities Are Protected

RCW 4.16.300 explicitly covers all claims and causes of action against Brand that might have arisen out of its construction activities at the refinery. There is no ambiguity in the statute. It shall apply to all claims or causes of action of any kind against any person. There is no exclusion in the statute for "negligent sales" claims, even if such a claim against Brand existed. (VRP 32; Appendix A).

Moreover, the trial court's focus on "improvement to real property" is misplaced. Brand was involved in the construction phase of the refinery and, therefore, Brand's insulation activities are protected under RCW 4.16.300. Much of the trial court level jurisprudence in recent years has focused on whether or not the particular work done by a contractor constituted an improvement to real property, in and of itself. That is apparently the inquiry the trial court engaged in when he found a "question of fact" as to whether Brand's work constituted an improvement to real property. (VRP 53). In fact, there was no dispute as to the scope and nature of Brand's activities at the site. The only issue was the legal implication of those activities. That is not a question of fact.

The Washington Supreme Court held in *Lakeview Blvd. Condominium Ass'n*,[5] that the relevant inquiry under the statute of repose is whether the defendant was a contractor who performed construction services or is a manufacturer of a product. *Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 578-79, 29 P.3d 1249 (2001). Contractors performing construction services are covered by the statute of repose, and product manufacturers are not. *Lakeview* gives context to the Court's prior ruling in *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110-11, 676 P.2d 466 (1984). *Condit* is often cited for the proposition, as it was in this case, that the critical inquiry is whether or not the specific work performed by the contractor is an "improvement" to real property. *Lakeview* clarified that the proper inquiry is whether or not the contractor was performing construction activities in connection with the construction, alteration or repair of an improvement to real property or whether it was a manufacturer of a product intended to be installed in the improvement. *Lakeview*, 144 Wn.2d at 579. Brand was a contractor installing a component of a refinery which was, unquestionably, an improvement to real property. Brand's activities fall within the scope of the statute. The trial court erred in denying Brand's Motion for Summary Judgment.

[5] Oddly enough, a case in which Judge Downing was the trial court judge and made the correct ruling.

3. The Discovery Rule Does Not Provide Shelter for Plaintiff's Claims

Brand made a motion for reconsideration of the trial court's denial of summary judgment, which the court denied by way of an order attached to an email. (CP 003458-59). The email body is attached as Appendix B and states in part:

> I was interested to be reminded of Justice Owens' recitation (at p. 577-8) of the primary purposes of statutes of repose. With these in mind, it seems pretty clear the statute should not be used to preclude a claim based on asbestos exposure that is alleged to have occurred soon after, and directly due to, the defendants' negligent sale or use in question but which could not have led to any claim until several decades later.

Essentially, the trial court judicially grafted a discovery rule onto the statute of repose. The plain language of the statute rejects the argument that a discovery rule can alter the date a cause of action accrues. Under a discovery rule, "a cause of action accrues and the statute of limitation does not begin to run until 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." *Metropolitan Services, Inc. v. Spokane,* 32 Wn.App. 714, 720, 649 P.2d 642 (1982); *see U.S. Oil & Refining Co. v. Department of Ecology,* 96 Wn.2d 85, 92, 633 P.2d 1329 (1981). "[T]he legislature has the constitutional power to enact a clear line of demarcation to fix a precise time beyond which no remedy will be available."

Rodriguez v. Niemeyer, 23 Wn.App. 398, 401, 595 P.2d 952 (1979); *see Ruth v. Dight,* 75 Wn.2d 660, 666, 453 P.2d 631 (1969). Statutes of repose differ from statutes of limitation because " '[a] statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time,' " whereas a " 'statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred.' " *1000 Virginia Ltd. P'ship v. Vertecs Corp.,* 158 Wn.2d 566, 574–75, 146 P.3d 423 (2006) (quoting *Rice v. Dow Chem. Co.,* 124 Wn.2d 205, 211–12, 875 P.2d 1213 (1994) (emphasis added)); *see also 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).

RCW 4.16.300 and .310 were adopted to protect architects, contractors, engineers, surveyors and others from extended potential tort and contract liability. *Pinneo v. Stevens Pass, Inc.,* 14 Wn.App. 848, 545 P.2d 1207 (1976). RCW 4.16.310 places an outer limit on when a cause of action can accrue. Our Supreme Court in *Gevaart v. Metco Construction, Inc.,* 111 Wn.2d 499, 502, 760 P.2d 348 (1988) rejected the proposition that the discovery rule overcomes the statute of repose. The *Gevaart* court held that the statute of absolutely bars claims that have not accrued within six years. *Gevaart,* 111 Wn.2d at 502. The fact that Plaintiff in this case could not have learned of her injury until "several

decades later" is irrelevant. RCW 4.16 .310 bars all claims that accrue more than six years after substantial completion of a construction project. Plaintiff filed her claim more than forty years after any date relevant to the application of the statute of repose. The denial of Brand's motion for reconsideration was error.

B. Brand Did Not Owe Ms. Brandes a Duty Under the Laws of Negligence

1. There is no Legal Basis under a Common Law Negligence Theory to Extend Liability Under These Circumstances

In order to prevail in an action for negligence, the Plaintiff must establish: (1) the existence of a duty; (2) breach of that duty; (3) proximate cause; (4) and, resulting injury. *Alhadeff v. Meridian on Bainbridge Island, Ltd.*, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). Whether an actionable duty was owed by the defendant to the particular plaintiff is a threshold determination. *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012). That determination is a question of law reviewed de novo. *Id.* There can be no tort liability unless the defendant owes a duty to the plaintiff. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). When no duty of care exists, a defendant cannot be subject to liability for negligent conduct. *Webstad v. Stortini*, 83 Wn.App. 857, 865, 924 P.2d 940 (1996). We are unaware of any Washington case that has addressed the issue of duty to a plaintiff alleging

"take home" exposure to asbestos in the context of a common law negligence claim, absent a special relationship between the parties. The Court of Appeals have addressed the issue in strict liability and premises liability cases where the premises owner was also a general contractor and retained control over how work was to be performed. *See generally 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). Where the appellate courts extended liability to include a "take home" exposure plaintiff, the courts have focused on a particular aspect of the liability theory pursued by the plaintiff. This approach has allowed the court to find a special relationship that warranted extension of liability. In the strict liability context, while recognizing that the clear language of Restatement (Second) of Torts § 402A (1965) would argue against extending liability to include a "take home" exposure plaintiff, the court found that the underlying principles of strict liability supported such an extension.

> The precise issue here is whether the trial court erred in determining, as a matter of law, that Lunsford is not a user under Washington law. Saberhagen argues that under a strict interpretation of the language of the restatement, a bystander or person in Lunsford's position would not fall within the protection of strict liability. Policy considerations, however, support an expansion of coverage to include bystanders and other persons that the

> manufacturer could reasonably foresee would come into contact with its product.

Lunsford, 125 Wn. App. at 789. The Court of Appeals determined that policy considerations underpinning the purpose behind strict liability justified extending strict liability to "take home" plaintiffs. *Id.* at 792.

In *Arnold*, the court focused on the authority retained by a premises owner that was also a general contractor to supervise and control the work done by subcontractors whom it had employed.

> We conclude that the Arnolds presented sufficient evidence to successfully resist summary judgment on their claims against Lockheed as a general contractor with control over the common work areas on the ships where Reuben worked. The Arnolds introduced evidence that, at the time of Reuben's employment, Lockheed owned and controlled access to the work site, was the general contractor, provided and enforced standards for installing insulation, monitored and coordinated the work of multiple subcontractors in close quarters below deck, and retained safety oversight over all workers, including subcontractors, on the ships that it constructed at its Harbor Island shipyard.

Arnold, 157 Wn.App. at 666. It appears that Lockheed's retained control over the job site as a general contractor and its ability to provide showers and changing rooms were keys to the court's ultimate decision to reverse the grant of summary judgment on the son's take home claim. The critical point to recognize when evaluating *Lunsford* and *Arnold* in the context of this case, which sounds in ordinary negligence, is that a negligence case

does not provide a conceptual hook on which the court can hang a liability hat. There is no "retained control of the worksite." There is no social engineering policy recognized in strict liability. There is only the prospect of liability without limit for one in Brand's position. This case involves the wife of an employee of the owner of the facility. However, under Plaintiff's theory of liability, Brand's potential liability would extend to any person who had ever been in the Brandes' home, in the Brandes' car, in Mr. Brandes' presence after work, or even in Mr. Brandes' presence anywhere and anytime. There is no social or legal justification for imposing a duty that would be tantamount to unlimited for a defendant.

> Yes, one can reason in so many instances that an extension of liability is merely a small step flowing naturally and logically from the existing case law. Yet each seemingly small step, over time, leads to an ever proliferating number of small steps that add up to huge leaps in terms of extension of liability. At some point it must stop....

Emerich v. Philadelphia Center for Human Development, Inc., 554 Pa. 209, 720 A.2d 1032, 1045 (1998). With few exceptions, courts throughout the county who have confronted the issue have declined to recognize such a duty.[6] The exceptions all deal with the duty of an employer or a party

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[6] *Gillen v. Boeing Co.*, 40 F. Supp.3d 534, 542 (2014) (applying Pennsylvania law and finding no duty); *See Riedel v. ICI Americas Inc.*, 968 A.2d 17 at 18–19 (2009) (applying Delaware law and finding no duty); *CSX Transp., Inc. v. Williams*, 278 Ga. 888, 608 S.E.2d 208, 210 (2005) (applying Georgia law and finding no duty); *Nelson v. Aurora Equip. Co.*, 391 Ill.App.3d 1036, 330 Ill.Dec. 909, 909 N.E.2d 931, 939 (2009) (applying Illinois law and finding no duty); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d

subject to strict liability. In our review of the "take home" cases, we were unable to find a single case that mirrored the factual scenario currently before this Court.[7]

689, 697 (Iowa 2009) (applying Iowa law and finding no duty); *Adams v. Owens–Illinois, Inc.*, 119 Md.App. 395, 705 A.2d 58, 66 (1998) (applying Maryland law and finding no duty); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 479 Mich.498, 740 N.W.2d 206, 218 (2007) (applying Michigan law and finding no duty); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 5 N.Y.3d 486, 806 N.Y.S.2d 146, 840 N.E.2d 115, 116 (2005) (applying New York law and finding no duty); *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 929 N.E.2d 448, 451 (2010) (applying Ohio law and finding no duty).

[7] "See Kan. Stat. Ann. § 60-4905(a) (2006) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property."); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (employer has no duty under Kentucky substantive law); Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 405 (Ct. App. 2012) (property owner has no duty); Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162, 170 (Del. 2011) (employer has no duty); CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005) (employer has no duty); Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 938 (Ill. App. Ct. 2009) (employer or premises owner has no duty); Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 699 (Iowa 2009) (employer has no duty); Zimko v. Am. Cyanamid, 905 So. 2d 465, 484 (La. Ct. App. 2005) (employer has a duty); Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (employer has no duty); In re Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 220 (Mich. 2007) (premises owner has no duty); Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006) (employer or premises owner has a duty); In re N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005) (employer has no duty); Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 452 (Ohio 2010) (holding that Ohio Code § 2307.941 "bars tort liability for asbestos claims stemming from exposure that does not occur at the premises owner's property"); Hudson v. Bethlehem Steel Corp., No. 1991-C-2078, 1995 WL 17778064, at *4 (Pa. Ct. C.P. Dec. 12, 1995) (employer has no duty); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 375 (Tenn. 2008) (employer has a duty); Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 462 (Tex. Ct. App. 2007) (employer has no duty); Rochon v. Saberhagen Holdings, Inc., 140 Wash. App. 1008, at *4 (2007) (finding that employer and premises owner has no duty but still finding it liable under general negligence principles." Fn. 20 from Meghan E. Flinn, *Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707, 757 (2014).

2. Brand Owes No Duty Because the Parties Were Legal Strangers

Moreover, Washington negligence law does not recognize a duty to control the conduct of another person to prevent that person from causing harm to a third person, absent a special relationship between the actor and the third person or some other policy consideration. "[I]n the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another." *Tae Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (quoting *Richards v. Stanley*, 43 Cal.2d 60, 65, 271 P.2d 23 (1954)).

Washington courts have recognized a special relationship warranting imposition of liability in a variety of circumstances: psychotherapist and patient, there is a duty by the therapist to persons injured by the patient *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983); hotel has duty to protect guests against violent acts of other guests *Gurren v. Casperson*, 147 Wn. 257, 259, 265 P. 472 (1928); common carrier and passengers *Benjamin v. City of Seattle*, 74 Wn.2d 832, 833, 447 P.2d 172 (1968). "[T]he special relationship involve[s] situations where one party was, in some sense, entrusted with the well-being of another. The entrustment aspect is what appears to us to underlie the

imposition of the additional duty to protect someone from foreseeable acts of third parties." *Lairitzen v. Lauritzen*, 74 Wn.App. 432, 440, 874 P.2d 861 (1994); *see generally Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988).

This general rule is widely recognized and memorialized in the Restatement (Second) of Torts §314-315 (1965). Section 314 of the Restatement (Second) of Torts comment (c) outlines the general rule that,

> [t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." "The rule stated in this section is applicable irrespective of the gravity of danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.

Sections 314A and 316 through 324A provide exceptions to this general rule (such as when the actor has control of the third party, or of land or chattels, or there is an employment relationship between the parties). None of those exceptions are applicable under the facts presented by this case.

Restatement (Second) Torts § 315 explains that:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relationship exists between the actor and the other which gives rise to the other a right to protection.

Brand was a subcontractor performing work at ARCO. Mr. Brandes was an ARCO employee. There was no relationship between Mr. Brandes and Brand. Mrs. Brandes is one step further removed. As to Mrs. Brandes, the relationship between her and Brand is one of complete legal strangers.

"A duty to a particular individual will be imposed only upon a showing of a definite, established and continuing relationship between the defendant and the third party." *Honcoop*, 111 Wn.2d at 193. The relationship between Brand and Mrs. Brandes is far too tenuous and inconsequential to warrant the establishment of an actionable duty. Because Mrs. Brandes and Brand are legal strangers in the context of negligence, Brand owned Mrs. Brandes no duty as a matter of law.

3. Even If the Court Were to Find a Special Relationship Between the Parties Brand's Failure to Act Does Not Warrant Imposition of a Duty

In addition, the law of negligence distinguishes between the scope of liability based on misfeasance and the scope of liability based on nonfeasance. In this case, Plaintiff seeks to impose liability on the theory that Brand failed to protect Mrs. Brandes from asbestos exposure, i.e.

failed to prevent her husband from exposing her to asbestos fibers. In *Robb v. City of Seattle*, the Washington Supreme Court explained:

> "The common law of torts has long distinguished between 'acts' and 'omissions,' refusing to impose liability for the latter, even though the line between the two is far from easy to draw." *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 300, 545 P.2d 13 (1975) (citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 56, at 339–40 (4th ed. 1971)). This is more properly considered a case of omission than affirmative action. *Restatement* § 314 comment a refers to misfeasance as circumstances where an actor exposes another to danger by creating a situation of peril. Misfeasance involves active misconduct resulting in positive injury to others. Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability,* 56 U. Pa. L. Rev. 217, 219 (1908); *see also Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 217–18, 543 P.2d 338 (1975). Misfeasance necessarily entails the creation of a new risk of harm to the plaintiff. Keeton, *supra,* § 56, at 373. On the other hand, through nonfeasance, the risk is merely made no worse. *Id.; Lewis v. Krussel,* 101 Wash.App. 178, 184, 2 P.3d 486 (2000). Nonfeasance consists of "passive inaction or failure to take steps to protect others from harm." *Lewis,* 101 Wash.App. at 184, 2 P.3d 486 (citing Keeton, *supra,* § 56, at 373).

Robb v. City of Seattle, 176 Wn.2d 427, 436-37, 295 P.3d 212 (2013). In *Robb*, Seattle police officers stopped two individuals on suspicion of burglary. *Id.* at 430. A neighbor had reported seeing the individuals throw several shotgun shells to the ground. *Id.* The officers acknowledged they had seen the shells during the *Terry* stop but did not pick the shells up or question the suspects regarding the shells because the

shells were unrelated to the reported burglary. *Id.* The suspects were released after the officers determined they did not have possession of any of the stolen property. *Id.* Twenty minutes later, one of the suspects returned to the location of the *Terry* stop, retrieved a shotgun shell and used it to kill Mr. Robb. *Robb*, 176 Wn.2d at 430. Mr. Robb's wife filed a wrongful death lawsuit alleging common law negligence. *Id.* at 431.

The City of Seattle moved for summary judgment asserting the officers did not owe Mr. Robb a duty under the law. *Id.* The trial court denied summary judgment by finding the plaintiff had produced sufficient evidence that the police acted affirmatively in creating a risk to third parties and therefore a duty could be found. *Id.* at 432. The Court of Appeals affirmed the denial of summary judgment. *Id.* The Washington Supreme Court reversed the decision and remanded with directions to dismiss the case. *Id.* According to the Court:

> The outcome of this case is dictated by basic tort principles. In order to properly separation conduct giving rise to liability from other conduct, courts have maintained a firm line between misfeasance and nonfeasance. To label the conduct here as affirmative, danger-creating conduct would threaten this distinction, leading to unpredictable and unprecedented expansion of [tort] liability.

Brand did not expose Mrs. Brandes to asbestos. At best for Plaintiff, Brand failed to prevent her husband from exposing her to asbestos. Washington law does not recognize a cause of action sounding in

negligence under those circumstances. As the United State Supreme Court aptly recognized:

> Courts, however, must resist pleas of the kind [Plaintiff] has made, essentially to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis. Cf. *Metro-North,* 521 U.S., at 438, 117 S.Ct. 2113 ("[C]ourts ... must consider the general impact ... of the general liability rules they ... create.").

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 166, 123 S. Ct. 1210, 1228, 155 L. Ed. 2d 261 (2003).

This case presents starkly the question of where liability should end. If Brand had a duty to Mrs. Brandes, there is no logical way to deny such a duty to all persons who had ever set foot in her home or sat in her motor vehicle, who dry cleaned Mr. Brandes' clothing or had personal contact with Mr. Brandes after work. No public policy or legal analysis would support such limitless liability.

Even if the court were to recognize that a duty exists under a negligence theory for a "take home" asbestos exposure, plaintiff presented no evidence that Brand should have or could have known that an unreasonable risk of developing mesothelioma from "take home" exposures existed at the relevant time. Dr. Irving Selikoff, the leading asbestos researcher of the day in the U.S., harbored doubts about the exposure histories of those claiming to have developed mesothelioma

from "take home" exposure. He stated explicitly in response to an inquiry from an insulation union member that preliminary data from his own work on the subject were "reassuring." That was in the Fall of 1971, precisely the time Brand was working at the ARCO refinery. (VRP 895-96; 899-900; 942-944).

C. Plaintiff Failed to Prove an Essential Element of Her Negligence Claim.

A directed verdict shall be granted if "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue." CR 50(a)(1). A motion for a directed verdict admits the truth of the evidence of the non-moving party and all inferences that reasonably can be drawn therefrom. *Ramey v. Knorr*, 130 Wn.App 672, 675-76, 124 P.3d 314 (2005). The trial court shall direct a verdict when, as a matter of law, there is no evidence, or reasonable inferences from the evidence to sustain the verdict. *Id.* at 676. Appellate courts review a motion for a directed verdict de novo. *Id.*

At trial, Plaintiff presented Dr. Andrew Churg as their causation expert. (VRP 496-97). Brand does not dispute that Dr. Churg is well qualified to express causation opinions in a mesothelioma case, if an adequate factual foundation for that opinion is shown to exist. Dr. Churg testified that eighty percent of mesotheliomas in women worldwide are

unrelated to asbestos exposure. (VRP 565-66). In the United States, there are approximately fifty mesotheliomas annually that occur in women and are attributable to asbestos exposure. (VRP 566). Dr. Churg does not ascribe to the theory that every asbestos exposure is causative in the development of mesothelioma. In fact, Dr. Churg testified that there is a minimum threshold of asbestos exposure required before he could testify that such an exposure was a cause of mesothelioma. (VRP 567-68). This is so because mesothelioma is a dose-dependent disease when it is associated with asbestos exposure. *Id.*. The threshold of exposure that Dr. Churg requires before he can conclude that an exposure is a cause of mesothelioma is an exposure of between .1 f/cc years and 1 f/cc years. (VRP 567-68).

In Washington asbestos cases, to prove causation the plaintiff must establish that the defendant's negligence was a substantial factor in bringing about the plaintiff's harm. *Morgan v. Aurora Pump Co.*, 159 Wn.App. 724, 740, 248 P.3d 1052 (2011). The standard used to evaluate whether an alleged asbestos exposure was a substantial factor is the same as is used in other negligence cases: is there a reasonable medical probability based on competent expert testimony that the defendant's conduct substantially contributed to plaintiff's injury. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 32, 935 P.2d 684 (1997).

Under that test, Plaintiffs must establish that exposure to a particular defendant's product was a "substantial factor" in causing the purported injury. "Substantial" means something that is important or material and not insignificant. *Id.* As it is defined in *Mavroudis*, "substantial" is a comparative term — substantial as compared to an exposure that is not important or is immaterial and insignificant. Plaintiffs cannot establish causation without expert testimony on the subject. Whether a plaintiff can get to the jury depends on evidence of exposure to the defendant's asbestos containing product and sufficient proof of frequency, regularity and proximity of exposure to airborne asbestos from that product or from defendant's conduct such that the exposure substantially contributed to cause the injury. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 248-49, 744 P.2d 605 (1987). The *Lockwood* court specifically noted the importance of expert testimony on the subject of medical causation. *Id. De minimus* exposures are insufficient to prove that the exposures are a substantial factor in causing mesothelioma. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 31, 935 P.2d 684 (1997).

Recent trends show that courts are applying more rigorous analysis with respect to substantial factor causation for diseases that are dose-responsive. Courts are routinely rejecting plaintiff's "any exposure"

theory as unscientific, excluding expert testimony or evidence grounded in this theory reasoning that it lacks sufficient support in facts or data.[8]

In this case, Dr. Churg's expert causation opinion is quantitative; he defined causation by reference to a specific quantum of cumulative exposure. Dr. Churg testified that an exposure must be between .1 f/cc years and 1 f/cc years in order for him to conclude that the exposure was a cause of Plaintiff's mesothelioma. Therefore, in order to meet their burden of establishing medical causation, Plaintiff had to show that Mrs. Brandes experienced exposures in excess of .1 f/cc years.[9]

Dr. Churg was never provided with any industrial hygiene analysis of the exposures allegedly experienced by Mrs. Brandes. (VRP 568). Plaintiff had an expert qualified to produce the required exposure evidence, if it existed. Plaintiff's industrial hygiene expert, Mr. John Templin testified that he had performed dose reconstructions in the past but he did not do so in this case because it was not requested of him. (VRP 798). After Plaintiff rested, Brand made a motion for a directed verdict because there was no legally sufficient evidence that Dr. Churg's

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[8] *E.g. Yates v. Ford Motor Co.*, --F.Supp.3d--, 2015 WL 3948303 (2015); *Anderson v. Ford Motor Co.*, 950 F.Supp.3d 1217, 1225 (D. Utah 2013); *Henricksen v. ConocoPhillips Co.*, 605 F.Supp.2d 1142, 1166 (E.D. Wash. 2009); *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 954 (6th Cir. 2011); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771-72 (Tex. 2007); *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114, 1121-22 (N.Y. 2006); *Howard ex rel. Estate of Ravert v. A.W. Chesterton, Inc.*, 78 A.3d 605, 608 (Pa. 2013); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 732 (Va. 2013).

[9] This is Dr. Churg's causation threshold for exposure to amphibole asbestos.

stated causation threshold had been exceeded by Mrs. Brandes' claimed exposures attributable to Brand. (VRP 976). The motion was denied.

There was no evidence presented by Plaintiff at trial suggesting Mrs. Brandes experienced exposures anywhere near what Plaintiff's own expert testified he would require in order to conclude that Mrs. Brandes' alleged exposures were causative of her mesothelioma. Mr. Holtshouser, Brand's industrial hygiene expert, testified that he had been asked by defense counsel to conduct a dose reconstruction for Mrs. Brandes' claimed exposures to asbestos from the ARCO facility. (VRP 1388). Mr. Holtshouser conducted his assessment based upon Mrs. Brandes' testimony, the testimony of Mr. Brandes' co-workers, Mr. Brandes' statements made to Dr. Muramoto and the relevant industrial hygiene literature. (VRP 1390-93). Despite using very conservative assumptions regarding exposure parameters, Mr. Holtshouser's conclusion was that Mrs. Brandes' claimed exposures to asbestos from the ARCO facility were far less than Dr. Churg's required .1 f/cc year threshold for assigning causation. (VRP 1392). At the close of the defense case, the defense renewed their motion for a directed verdict which was again denied. (VRP 1481-82).

Dr. Churg testified that he has a threshold that must be exceeded before he can conclude that any exposure was medically causative. That

is the causation standard Plaintiff set in this case. Yet, at the time Plaintiff rested, there was no evidence presented that Dr. Churg's causation threshold had been exceeded by asbestos exposures for which Plaintiff claimed Brand was liable. By the time the defense rested, the evidence was uncontroverted that any exposure Mrs. Brandes may have experienced during the time Mr. Brandes was employed as an operator by ARCO did not exceed Dr. Churg's threshold.

Consequently, Mrs. Brandes failed to prove that any act or omission on Brand's part was a proximate cause of her injury. The court's denial of Brand's motion for a directed verdict was error. *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986).

D. The Court's Jury Instructions Failed to Inform the Jury of the Applicable Law.

1. The Court's Negligent Sale Instruction was Prejudicial Error

This Court reviews alleged errors of law in jury instructions de novo. *Blaney v. Int'l Ass'n of Machinist & Aerospace Workers Dist. No. 160,* 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Boyd v. State Dept. of Social and Health Services,* 187 Wn.App. 1, 11, 349

P.3d 864 (2015). It is reversible error to instruct the jury in a manner that is inconsistent with the law. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). A reviewing court analyzes a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Pirtle,* 127 Wn.2d at 656–57.

Notwithstanding its ruling that Brand was not a seller under 402A,, the court permitted plaintiff to assert a "negligent sales" claim, found that the claim was beyond the scope of the statute of repose, and provided a specific jury instruction describing the elements of the claim. (VRP 1360)[10] The error was not harmless. It allowed the jury to predicate liability on a theory of liability that did not exist.

In *Simonetta*, the Washington Supreme Court specifically held that Restatement Torts (Second) of Torts § 388 applied only to those "in the chain of distribution" as that chain of distribution has been defined in connection with Restatement Torts (Second) of Torts § 402A. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 348-55, 197 P.3d 127 (2008).

The *Simonetta* Court held that Restatement Torts (Second) of Torts § 388 is essentially the negligence counterpart to Restatement Torts (Second) of Torts § 402A. *Simonetta*, 165 Wn.2d at 355.

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[10] In addition, Mrs. Brandes was not a "user" of such products as the term is used in the Restatement Torts (Second) of Torts § 388 (1965), upon which the Court's instruction was based.

> In all of these cases, the plaintiffs claimed § 388 failure to warn against the alleged hazardous product's manufacturer, seller, or supplier. The language of § 388 discusses the supplier's responsibility to warn of the dangers of a product. A supplier is defined in the Restatement as "any person, who for any purpose or in any manner gives possession of a chattel for another's use ... without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied or for which it is permitted to be used." Restatement (Second) of Torts § 388 cmt. c (1965). Suppliers include vendors, lessors, and donors. The cases discussed above are consistent with the limitation established under the Restatement.

Id. at 352. Therefore, the court concluded

> Under the language of § 388 and our precedent applying § 388, we hold the duty to warn is limited to those in the chain of distribution of the hazardous product. Because Viad did not manufacture, sell, or supply the asbestos insulation, we hold that as a matter of law it had no duty to warn under § 388.

Id. at 354. The Supreme Court reiterated Washington's application of section 388 in *Braaten*:

> Because "the duty to warn is limited to those in the chain of distribution of the hazardous product," [*Simonetta*] at 133, the defendants here had no duty to warn of the danger of exposure to asbestos in the insulation applied to their products. None of the defendants were in the chain of distribution of the exterior insulation applied to their products, and under our analysis in *Simonetta,* the plaintiff's negligence claims based upon exposure to the insulation applied to the defendants' products were properly dismissed on summary judgment.

Braaten v. Saberhagen Holdings, 165 Wash. 2d 373, 390-91, 198 P.3d 493, 501 (2008). Brand was not a seller, manufacturer or in the chain of distribution as defined by the Supreme Court. The trial court so ruled.

> There are policy reasons that underlay the principles of strict liability for product sellers, and those do have significant weight to them in interpreting the statute. Chief among those is the forced reliance of buyers on the superior information of sellers. In this particular case, the buyer, whether that is ARCO, or Parsons, the general contractor, is the one who is specifying the asbestos product that was simply being provided by the defendants. So the Court would conclude as a matter of law that Brand and Metalclad were not acting as sellers with respect to this particular product on this particular occasion.

(VRP 52). Brand was not a seller under Restatement (Second) of Torts § 402(A) and as explained by the Supreme Court in *Simonetta* and *Braaten*, could not have been a seller for purposes of § 388. Under the law, there was no sale and it was error to instruct the jury as if there were.

An error is prejudicial when it "affects or presumptively affects the results of a case, and is prejudicial to a substantial right." *Blaney,* 151 Wn.2d at 211. When evaluating an erroneous instruction, we presume the error is prejudicial "subject to a comprehensive examination of the record." *Id.*

> When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial,

> and to furnish ground for reversal, unless it affirmatively appears that it was harmless.

Id. The instruction was clearly prejudicial because it invited the jurors to find that Brand was negligent under a theory that is not available under the law. More importantly, reversal is warranted because there is no way to determine whether the jury rendered their verdict based on the negligent sales or negligent conduct claims.

2. Brand is Entitled the Contractor's Defense.

a. The Court Erroneously Denied Summary Judgment

The law does not require contractors to sit in judgment on the plans and specifications or the materials required for use by his employer. Restatement (Second) of Torts § 404 (1965) Comment (a). (CP 000368). A contractor is not subject to liability if the specified design or material turns out to be insufficient to make safe for use. *Id.* It is well established in Washington that when a contractor is required to build in accordance with plans and specifications, it is the designer or owner who impliedly guarantees that the plans are workable and sufficient. *New Bethel Missionary Baptist Church*, 23 Wn.App 747, 753, 598 P.2d 411 (1979) citing *Armstrong Construction Co. v, Thomson*, 64 Wn.2d 191, 390 P.2d 976 (1964). A contractor is not a guarantor of the proper functioning of materials when the materials are installed in accordance with the

contractee's plans and contract. *Clark v. Fowler*, 58 Wn.2d 435, 363 P.2d 812 (1961). Restatement (Second) of Torts § 404 provides that "an independent contractor [who] negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." However, where a contractor builds to the specifications of another, comment a provides:

> In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer. The contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.

Though no Washington court has expressly adopted section 404 comment a of the Restatement, the cases cited above *New Bethel*, *Armstrong*, and *Clark* use the same language to employ the exact principal. In other jurisdictions, the defense is routinely permitted in negligence and product liability cases.[11]

The only courts that have specifically rejected the contract specifications defense have done so only as to strict liability claims against

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[11] *Leininger v. Sterns Roger Mfg Co.*, 17 Utah 2d. 37, 404 P.2d 33 (1965); *Hatch v. Trail King Industries, Inc.*, 656 F.3d 59 (1st Cir. 2011); *Littlehale v. E.I. du Pont de Nemours & Co.*, 268 F.Supp. 791 (S.D.N.Y.1966), *aff'd*, 380 F.2d 274 (2d Cir.1967); *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir.1973); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 595 (Ky.1980); *Houlihan v. Morrison Knudsen Corp.*, 2 A.D.3d 493, 768 N.Y.S.2d 495, 496 (2003); *Bloemer v. Art Welding Co.*, 884 S.W.2d 55, 59 (Mo. Ct. App. 1994)

manufacturers. Those courts rejecting application of the principle have reasoned that a defense based on an absence of fault is inconsistent with the policies that underlie the doctrine of strict liability. *See Challoner v. Day & Zimmermann, Inc.*, 512 F.2d 77, 83 (5th Cir. 1975), vacated on other grounds, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975) ("A strict liability case, unlike a negligence case, does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control."); *Johnston v. United States,* 568 F.Supp. 351, 354 (D.Kan.1983) ("A necessary corollary of the fact that the contract specification defense has its source in ordinary negligence principles is that it does not apply to actions grounded in strict liability."); *Michalko v. Cooke Color and Chem. Corp.*, 91 N.J. 386, 451 A.2d 179, 182 (1982); *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265, 1267 (Fla.1987) ("[T]he contract specification defense is not, strictly speaking, a defense at all but an aspect of the negligence elements of foreseeability and duty of care.").

In a negligence setting, the law is clear that an installation contractor is not liable for the overall safety of a product that it installs according to another's specifications, unless the specifications are so obviously dangerous that no reasonable contractor would follow them. *Hunt v. Blasius,* 74 Ill.2d 203, 384 N.E.2d 368, 371 (1978) (*citing*

Restatement Second of Torts § 404, comment (a) (1965); *Prosser on Torts,* § 104 at 681-682 (4th ed.1971); *Am.Jur.2d Independent Contractors* § 50 (1968)) ("If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them.").

It was undisputed that Brand was following the specifications of its contract, which it was contractually bound to do. Brand did not participate in the design or select the materials to be used. Brand completed its work in the precise manner contemplated and, and there was no evidence presented otherwise. The contractor's defense is a complete defense in this state and every other state that has addressed the issue.

There was no evidence that the specifications were so glaringly dangerous that Brand should have refrained from complying with the specifications. There is no evidence that any other insulation contractor in Brand's position would have refrained from complying with the specifications. As a matter of law, there is no basis upon which Brand can be held liable in negligence for merely complying with ARCO or Parson's contract specifications. Summary judgment should have been granted in Brand's favor.

b. Even if Questions of Fact Precluded Summary Judgment Brand was Entitled to a Jury Instruction on the Law.

The trial court denied summary judgment on the issue without explanation. Even if there was of a question of fact Brand was, at minimum, entitled to a jury instruction on the contractor specification defense. A party is entitled to a jury instruction on the applicable law. *Anfinson v. FedEx Ground Packaging System, Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Brand submitted their proposed jury instructions including a §404 comment a instruction. The court declined to adopt Brand's proposed instruction and Brand took exception. (VRP 1360). The failure to instruct the jury on the law was error.

The error was prejudicial because it deprived Brand of the right argue the defense and failed to inform the jury of the applicable law. Given the absence of any evidence that a reasonable insulation contractor would have done anything differently under the circumstances present at the ARCO site, a properly instructed jury could easily have reached a defense verdict. Accordingly, the Court should grant a new trial.

E. Allocation of Set-Off Amounts to a Non-Existent Cause of Action Was Error

After the jury rendered the verdict in Mrs. Brandes' personal injury action, Plaintiff made a motion to allocate fifty percent of the settlement proceeds she had received from settled defendants to a potential wrongful

death claim to be brought by her statutory heirs. (CP 005518). Brand opposed the motion, pointing out that Mrs. Brandes' heirs had no wrongful death claim against settled defendants or against Brand. Brand was, therefore, entitled to full credit of the settlement amounts as a setoff against the jury verdict. (CP 16). Moreover, Brand pointed out that no evidence had been presented to the court to support the proposition such wrongful death claims had any value at all.[12] The court granted the motion and allocated fifty percent of the settlement proceeds to Mrs. Brandes' heirs future wrongful death claim. (VRP 1621). Brand timely moved to amend the judgment under CR 59(a)(7). Ultimately, the court ruled that twenty percent of the settlement proceeds would be allocated to future wrongful death claims. That ruling was clear error because no wrongful death claim exists against a party who has settled a plaintiff's personal injury claim, as a matter of law.

1. A Personal Injury Plaintiff's Action or Inaction Bars the Wrongful Death Action of her Heirs.

In the event this Court were to affirm the underlying judgment, Brand is entitled to the full value of prior settlements as a setoff against the judgment.

[12] We will demonstrate below that the wrongful death claims had no value, because the statutory beneficiaries failed to assert loss of consortium claims in Mrs. Brandes' personal injury action.

a. Settled Defendants

After trial, prior to the reasonableness hearing, Plaintiff moved this court to allocate fifty percent of the settlement funds to "wrongful death claims not adjudicated at trial." (CP 5518). Plaintiff asserted that the settlement agreements took into consideration the availability of future wrongful claims on behalf of the Brandes children, accruing upon Mrs. Brandes' death, and, therefore, the court should assign a portion of the settlement funds to the wrongful death claim. *Id.* When Mrs. Brandes settled her personal injury action with ARCO, Metalclad, and Metropolitan, the wrongful death claims of the statutory beneficiaries of her estate were extinguished by operation of law. *See Deggs v. Asbestos Corp. Ltd.*, 188 Wn.App. 495, 351 P.3d 1 (2015). It does not matter whether those "claims" are included in the settlement agreement or not. Once the settlement was consummated, Mrs. Brandes no longer had a "subsisting cause of action" against the settling defendants, and therefore, her statutory beneficiaries had no wrongful death claim that could be the subject of allocation. *Id.* "[T]he action for wrongful death is extinguished by an effective release executed by the deceased in [her] lifetime...." *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 581, 44 P.2d 193 (1935). It is error to allocate a portion of the settlement to claims that do not exist.

b. Mrs. Brandes' Obtained a Verdict on Her Personal Injury Action and No Wrongful Death Claim Accrues to the Statutory Beneficiaries Under the Law.

Calhoun, *Grant, Johnson* and more recently *Deggs* definitively establish that a personal representative cannot bring a claim for wrongful death if no subsisting cause of action remained in the decedent at the time of her death. *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 160, 15 P.2d 943 (1932); *Grant*, 181 Wn. at 580-81, *Johnson v. Ottomeier*, 45 Wn.2d 419, 421, 275 P.2d 723 (1954); *Deggs*, 188 Wn.App at 510. "Appellant did not have a cause of action against respondent because of the death of her husband, but because of the negligence of respondent. The negligence was the cause; the death was the result." *Calhoun*, 170 Wn. at 160. When one injured by the wrongful act or neglect of another brings suit and recovers damages for the injury, where death subsequently results from the injury, her personal representatives cannot maintain an action under the wrongful death act. *Littlewood v. Mayor etc. of New York*, 89 N.Y. 24, 1 Am. Law Mag. 271 (1882) (cited in *Grant* for the exact proposition).

> Said act was not intended to impose a double liability, but simply to give a right of action where a party, having a good cause of action for a personal injury, was prevented,

by death resulting from such injury, from enforcing his right or who omitted in his life-time so to do.[13]

Id. Once a party has been called to answer for their alleged negligence, any future action based on that same negligent conduct is extinguished as a matter of law.

c. The Statutory Beneficiaries Failed to Bring a Loss of Consortium Claim

In the instant matter, Ms. Barbara Brandes filed her personal injury action against Brand and others claiming their negligence caused her to develop the disease mesothelioma. Plaintiff's children, who are the beneficiaries of the current wrongful death claim, could have brought their own claims for loss of consortium in their mother's personal injury case. Indeed, the Washington Supreme Court has held that children's loss of consortium claims must be brought with their injured parent's personal injury claim where feasible. *See Ueland v. Pengo Hydro-Pull Corp.*, 103

[13] Defendant having once responded in damages for the negligent act, which is the foundation of the plaintiff's action, all liability for such act has been extinguished, and compensation therefor cannot be exacted a second time. (Addison on Torts [Dudley & Baylie's ed.], 735, 1156; 1 Sedgwick on Measure of Damages [7th ed.], 705; *Fetter v. Beale,* 1 Ld. Raym. 339; *Bonomi v. Backhouse,* 27 L. J. Q. B. 390; *Whitford v. Panama R. R.,* 23 N. Y. 487; *Hodsoll v. Stollebras,* 11 Ad. & Ell. 301; *Whitney v. Clarendon,* 18 Vt. 252; *Read v. Gt. E. R. Co.,* L. R., 3 Q. B. 555; *Filer v. N. Y. C. R. R. Co.,* 49 N. Y. 42; *Curtis v. R. & S. R. R. Co.,* 18 Id. 534; *Drew v. Sixth Ave. R. R. Co.,* 26 Id. 49; Sedgwick on Measure of Damages [7th ed.], 544; *Dibble v. N. Y. & E. Ry.,* 25 Barb. 187; *McGovern v. N. Y. C. & H. R. R. R. Co.,* 67 N. Y. 417.) The statute should be so construed that its results will be in conformity with the established rules of the common law, and not with the exceptions thereto. (Sedgwick on Construction of Statutes, 270; *Wilbur v. Crane,* 13 Pick. 284, 290; Maxwell's Interpretation of Statutes, 264; Potter's Dwarris on Statutes, 185; Smith's Commentaries on Stat. and Const. Law, §§ 448-449.). *Id.* at 26.

Wn.2d 131, 691 P.2d 190, (1984)[14] "We [] hold that the children's claims for loss of parental consortium must be joined with the injured parent's claims whenever feasible. A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible." *Id.* at 137. For whatever reason, the Brandes children chose not to make such claims in connection with their mother's personal injury lawsuit. In the event they had brought such claims, the wrongful death statute was the vehicle pursuant to which those claims would have been preserved following their mother's passing. Not having made those claims in her personal injury case, Mrs. Brandes' children cannot make them in a subsequent wrongful death action.

d. Washington Precedent Precludes the Wrongful Death Claim

On the night before closing arguments in the trial of her personal injury case, Mrs. Brandes passed away. Plaintiff's moved the court to appoint Ms. Ramona Brandes as Personal Representative to the Estate and proceed with trial under the Washington Survival Statute. RCW 4.20.060. The court granted the motion, closing arguments ensued and the case was turned over to the jury. The jury rendered a verdict in Ms. Brandes' favor.

[14] A limitation to this requirement involves minor children and whether or not it was "feasible" for them to join in that action. *Kelley v. Centennial Contractors Enter., Inc.*, 169 Wn.2d 381; 236 P.3d 197 (2010) Feasibility is not an issue here, where all of the children are adults, two testified at trial and a third attended.

The trial court used the jury instructions from the personal injury action and merely substituted "the Estate of" for "Barbara Brandes." (VRP 1492). Upon the jury's finding that Brand was negligent and that its negligence was a proximate cause of Barbara Brandes' injuries, Brand's liability for those alleged negligent acts was exhausted. There is no liability that remains to be enforced in a subsequent wrongful death action under *Calhoun* and *Grant.* Since no further action is possible, allocation of settlement proceeds to such a phantom action was error. The Washington Supreme Court holdings in *Calhoun, Grant* and *Johnson* establish that the judgment entered in her personal injury lawsuit eliminated any further right of action which Mrs. Brandes may have wished to assert. Because the judgment in her personal injury lawsuit eliminated any further right of action in Mrs. Brandes against Brand, no right of action against Brand survives to her personal representative on behalf of the statutory beneficiaries of the wrongful death act. *Grant*, 172 Wn. at 160.

> Although such recovery should be by an executor or administrator in a suit commenced by the intestate, or commenced by such executor or administrator, if the recovery be in the right of the intestate while living, such recovery, in legal effect, would antedate the death of the intestate, exhaust his right of action, and nothing would remain to survive for a subsequent action. It would also exhaust the liability of the wrongdoer, and no liability would remain to be enforced in a subsequent suit.

Legg v. Britton, 64 Vt. 652, 24 A. 1016, 1017 (1892). Barbara Brandes exhausted her claims against Brand and her children have no valid wrongful death claim for loss of consortium. Under RCW 4.22, Brand is entitled to the full settlement proceeds from Mrs. Brandes' personal injury action.

F. Challenge to Evidentiary Issue

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn.App. 702, 728, 315 P.3d 1143 (2013). Abuse of discretion is established where the trial court's decision was manifestly unreasonable, based on improper grounds or unsupported by reason. *Id.* Prior to trial, Brand moved in limine to exclude experimental videos produced by the employer of Plaintiff's industrial hygiene expert. The motion was denied. (CP 003246-49)(VRP 695-696). The Court's evidentiary rulings regarding the Materials Analytical Sciences, Inc. ("MAS") videos was erroneous and substantially affected the jury's verdict.

1. MAS Videos

Plaintiff's industrial hygiene expert witness John Templin is an employee of MAS. (VRP 653). Dr. William Longo is the president of MAS. He and his colleagues at MAS have been providing expert

testimony to plaintiff counsel in asbestos litigation for many years. Dr. Longo has conducted approximately 100 of what he describes as "work studies". (VRP 785-87). These work studies purport to demonstrate that products manufactured by asbestos litigation defendants release asbestos fibers when used as intended. (VRP 725). Dr. Longo has conducted several work studies involving the use of thermal insulation products, including a product called KAYLO. *Id.* In conjunction with his oral testimony, Mr. Templin was permitted to show the jury videotapes produced during the course of one of the MAS KAYLO work studies. The videotapes are filmed under normal lighting conditions and also using Tyndall lighting, an illumination method designed to enhance the visibility of dust particles in an aerosol. (VRP 728-29). Mr. Templin then testified about the data generated by from such a studies and videotape purporting to show asbestos-containing dust generated during such "work studies", including the "shaking out" of allegedly asbestos contaminated clothing. (VRP 730-33).

There was no evidence that the work studies conducted by Dr. Longo replicate the work conditions Mr. Brandes may have encountered at ARCO, and Dr. Longo and Mr. Templin do not claim otherwise. (VRP 735). In fact, they have repeatedly testified that the work studies are not intended to replicate actual working conditions. *Id.* The MAS KAYLO

study involves sawing insulation. There is no evidence that Mr. Brandes ever cut insulation with a saw or that insulation was cut in his presence. (VRP 763-64) (CP 000616). There is no evidence that the "shaking out" of clothing portion of the video replicated Mrs. Brandes' claimed exposures.

The offering party bears the burden of establishing that the circumstances and conditions depicted in the demonstration are substantially similar to those intended to be replicated. *State v. McMurray,* 47 Wn.2d 128; 286 P.2d 684 (1955); *U.S. v. Gaskell,* 985 F.2d 1056, 1060 (11th Cir. 1993)(*citing Barnes v. General Motors Corp.*, 547 F.d 275, 277 (5th Cir. 1977).

Experimental evidence may be used at trial only when the evidence depicts the same or similar conditions as that which they are intending to demonstrate. Where "the circumstances of the [incident], as alleged, are so different from [the] test as to make the results largely irrelevant if not misleading," a new trial is warranted. *Barabin v. AstenJohnson, Inc.*, 700 F.3d 429 (9th Cir. 2012).

The *Gaskell* court held that the "ability to cross-examine is not a substitute for the offering party's burden of showing that a proffered demonstration or experiment offers a fair comparison to the contested even." *Gaskell,* 985 F.2d at 1062. Here, not only is there no showing of

similarity, there is an admission by the plaintiff's expert that the conditions are neither similar nor intended to be similar.

The videotapes are also highly prejudicial in that the workers depicted are clothed in Tyvek suits and wear full face respirators to conduct a simulation of a work practice that, during the time period in question in this case, was permitted by applicable regulations to be conducted without any protective measures at all.[15]

Nor is the product the same or even similar. KAYLO, according to the bulk sampling conducted by MAS in its work study, contained 15% asbestos, comprised of a combination of chrysotile (12%) and amosite (3), PABCO insulation, even if it contained asbestos, contained only 3.5% asbestos in 1971. (VRP 788). Mr. Brandes' exposures to asbestos would have occurred outside in an environment described as very windy. The MAS work study was conducted in an enclosure measuring 15 x 20 x 8, with no discernable air currents. (VRP 726)

The OSHA exposure limit ("PEL") of 12 fibers/cc prior to December 7, 1971 and 5 fibers/cc after December 7, 1971 was based on an 8 hour time weighted average basis. None of the values presented in the MAS KAYLO II study have been presented as 8 hour time weighted

[15] During the time period Mrs. Brandes claimed to have been exposed to asbestos, OSHA regulations permitted 8 hour time weighted average exposures of 12 f/cc (prior to Dec. 7, 1971) and 5 f/cc (after Dec. 7, 1971).

averages. All are samples taken over a 20-30 second period. The OSHA regulations prior to June 7, 1972 did not have any provision for evaluating short term exposures. Indeed, NIOSH evaluated the time weighted exposures of insulators actually performing insulation work at approximately 2.2 f/cc (VRP 1454). Even when a ceiling limit was adopted in June 1972, it provided for time weighting the exposure over a 15 minute period.[16] The values obtained by MAS in its testing are not relevant to an evaluation of health based risks. More importantly, they misrepresent the nature of those exposures in comparison to the exposure levels permitted by regulations.

The trial court's admission of the MAS video evidence and testimony regarding the attendant testing was error and the error was not harmless. But for the admission, the trial outcome could have been different. *State v. Smith*, 106 Wn.2d 772, 780, 775 P.2d 951 (1986). Brand presented uncontraverted evidence that Mr. Brandes would have never experienced asbestos exposures in excess of the permissible exposure levels, however, the scientific testimony was potentially overshadowed by the imagery the MAS videos portrayed, albeit completely fabricated and irrelevant to the claimed exposures in the case. As noted by our Supreme Court, "[h]ighly prejudicial images may sway

[16] See *Martonik, et al, The History of Osha Rulemaking, AIHAJ, 62:208-17 (2001)*

the jury in ways that words cannot." *In re Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Because the error was not harmless, a new trial is required.

V. CONCLUSION

For these reasons, Brand respectfully requests that this Court reverse the erroneous underlying rulings and remand for a dismissal of all claims, remand for a new trial, or remand for full settlement credits against the judgment.

RESPECTFULLY SUBMITTED this 11 day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 11th of December, 2015, I caused a true and correct copy of the foregoing document, to be delivered via email to the following counsel of record:

Counsel for Respondent:

Glenn S. Draper
Brian F. Ladenburg
BERGMAN DRAPER LADENBURG
HART, PLLC
614 First Avenue, Fourth Floor
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Thomas H. Hart, III
LAW OFFICES OF THOMAS H. HART III,
PC
2212 Queen Cross Street
Christiansted, VI 00820
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DATED this 11th day of December, 2015, at Seattle, Washington.

Diane M. Bulis, Legal Assistant

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.

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

Presented by:

BERGMAN DRAPER LADENBURG HART, PLLC

Glenn S. Draper, WSBA #24419
Kaitlin T. Wright, WSBA #45241
Counsel for Plaintiffs

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Appendix B

Johnson, Malika

From: WKG Asbestos Mailbox
Sent: Tuesday, March 31, 2015 3:15 PM
To: Brandes 00910-0356
Subject: FW: Brandes

From: Downing, William
Sent: Tuesday, March 31, 2015 3:15:12 PM (UTC-08:00) Pacific Time (US & Canada)
To: Shaw, Dave; glenn@bergmanlegal.com; kaitlin@bergmanlegal.com; WKG Asbestos Mailbox
Cc: Reese, Ricki
Subject: RE: Brandes

Counsel:

I wanted you to know that I have just signed an Order Denying the defendants' Motion For Reconsideration. I was happy to take a look back at the Lakeview Condo Association case which, of course, does not at all direct a conclusion as to the present question. I was interested to be reminded of Justice Owens' recitation (at p. 577-8) of the primary purposes of statutes of repose. With these in mind, it seems pretty clear the statute should not be used to preclude a claim based on asbestos exposure that is alleged to have occurred soon after, and directly due to, the defendants' negligent sale or use in question but which could not have led to any claim until several decades later.

--WLD

Judge William L. Downing
King County Superior Court
Seattle, WA 9810[illegible]

206.477-1585

-----Original Message-----
From: Shaw, Dave [mailto:DShaw@williamskastner.com]
Sent: Tuesday, March 31, 2015 11:13 AM
To: Downing, William; glenn@bergmanlegal.com; kaitlin@bergmanlegal.com; WKG Asbestos Mailbox
Cc: Reese, Ricki
Subject: RE: Brandes

Your honor
A brief is on its way within the hour. The case has not settled.

From: Downing, William [William.Downing@kingcounty.gov]
Sent: Tuesday, March 31, 2015 10:34 AM
To: glenn@bergmanlegal.com; Shaw, Dave; kaitlin@bergmanlegal.com; WKG Asbestos Mailbox
Cc: Reese, Ricki
Subject: Brandes

Counsel,

The timing in this case is somewhat tight. Trial is set for Monday but, first, I have before me a defendant's MFR seeking dismissal that is calendared for today. Having just received plaintiff's response this morning, and wanting to deal with the motion as expeditiously as possible, I am writing to inquire if any reply is on its way or if the briefing is complete. Of course, you should also feel free to let me know the case has settled and that this issue is moot.

--WLD

Judge William L. Downing
King County Superior Court
Seattle, WA 98104

206.477-1585