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

SUPREME COURT
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Petitioner,

v.

ESTATE OF BARBARA BRANDES

Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. REPLY

A. Statute of Repose

Respondent argues for the first time that Brand's Petition for Review failed to address the authority supporting the Court of Appeals holding that the trial court's ruling on the statute of repose was unreviewable, and that there is no need to engage in substantive statutory construction in reaching the decision of whether the statute of repose argument was preserved by Brand. Answer to Petition for Review, p. 9. Both arguments are nonsense. The Court of Appeals held that the denial of Brand's summary judgment motion on the statute of repose was not reviewable because Brand failed to present evidence at trial that its insulation work was in and of itself an improvement to real property.[1] In so ruling, the Court of Appeals necessarily made a legal finding that the Washington statute of repose requires that a contractor's work itself constitute an improvement to real property. Under the trial court and the Court of Appeals analyses, it was not enough that such work be performed as part of the construction of an improvement to real property. Rather, it was necessary that the work itself constitute an improvement to real property. That evidentiary requirement can only be based on the respective courts' statutory interpretation of the statute of repose. It is a

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

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

The trial court made an erroneous legal interpretation of the statue of repose. That erroneous legal interpretation became the law of the case. The Court of Appeals relied on *Johnson v. Rothstein* to support its position that because "there were disputed materials facts on whether the statute of repose applied," Brand's statute of repose argument was not reviewable after a trial on the merits. *Johnson v. Rothstein,* 52 Wn.App. 303, 759 P.2d 471 (1988). In so doing, the Court of Appeals made the precise, erroneous legal interpretation of the statute as the trial court did:

> Given the requirement in Condit to determine whether the insulation was 'integral' to the refinery, disputed material facts include the purpose, necessity, and permanence of the insulation that Brand installed at the refinery. Slip Op. at 3.

The Court of Appeals reliance on *Johnson* does not alter the fact its interpretation of the statute of repose is contrary to the authority of this

Court and other panels of the Court of Appeals. The question presented on Brand's summary judgment motion was purely a legal issue. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 799, 65 P.3d 16 (2003). The critical inquiry under Washington jurisprudence is whether or not the contractor's work was performed in connection with the construction of an improvement to real property. There were no questions of fact presented as to the scope and nature of Brand's work at the site. Its subcontract with the general contractor was an exhibit at the summary judgment motion and at trial. Testimony from Brand's onsite supervisor described that work in detail in the motion and at trial. This Court and other panels of the Court of Appeals have clearly articulated an activities-based analysis in determining whether the statute of repose applies to a contractor defendant.

The applicability of the statute of repose is determined by a three step approach. *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 567, 772 P.2d 1018 (1989). First, the court must address the scope of the statute, whether it applies in the given case. If the statute applies, the cause of action must accrue within six years of substantial completion of the project. If the claim accrues, the party must file within the applicable statute of limitations. *Id.* The first step, as stated by this Court, is a mixed question of law and fact. The statute of repose bars all claims

against any person arising from the activities of having constructed, altered or repaired an improvement to real property--on account of those activities. *Id*. at 568 (citations omitted). No Washington authority holds that a contractor's work itself must be an improvement to real property.[2] It is only necessary that the work be a part of the construction of an improvement. *Pfeifer*, 112 Wn.2d at 569. *Pfeifer* and the 1986 and 2004 amendments to the statute of repose rejected the Court of Appeals' "integral" component test. *Id*.

In *Davis v. Baugh Indus. Contractors, Inc.,* 159 Wn.2d 413, 150 P.3d 545 (2007), the premise owner's employee was killed while inside an excavated trench when a wall collapsed on him. *Id*. at 416. The employee was attempting to locate a leak in the high density polyethylene pipe that had been negligently installed three years earlier. *Id*. The contractor who installed the pipe defended the suit, in part, on grounds that the "acceptance and completion" doctrine acted as a bar to plaintiff's claims. *Id*. This Court rejected the traditional "completion and acceptance" doctrine and adopted Restatement (Second) of Torts § 385 in its stead. This Court determined the Restatement approach was more practicable

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

given that construction has become complex and the land owner should not be liable if they are incapable of recognizing substandard performance.

In so holding, this Court specifically noted that contractors, such as Baugh Industrial, who are responsible for a component of the construction processes, are already protected by the Washington statute of repose:

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

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

The trial court's and the Court of Appeals' legal interpretation of the Statute of Repose was error. The trial court's error, being one of law, is reviewable in the Court of Appeals. The Court of Appeals necessarily embraced the identical erroneous interpretation in finding that Brand's right to appeal the trial court's legal error was barred. The "evidence" Brand failed to produce would only be material or relevant if the trial court's and the Court of Appeals' statutory interpretation were correct. That interpretation is not correct. It is directly contrary to the decisions in

Johnson, *Kaplan*, *Pfeifer* and *Davis*, as well as the clear legislative intent as set forth in RCW 4.16.310 *et. seq.* While this unreported decision is not citable as precedent, under GR 14.1 the decision remains citable as "persuasive" authority. The possibility, indeed, the likelihood that it will be cited in future cases is high. The case was wrongly decided. The issue of the proper interpretation of the statute of repose will continue to arise. There is a clear and present controversy as to the proper interpretation of the statute of repose.[3] Clear direction from this Court is required to resolve that controversy. Review is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(2).

B. <u>There is No Legal Basis under a Common Law Negligence Theory to Extend Liability under the Facts of this Case</u>.

Petitioner argues that common law imposes a generalized duty to prevent harm to all others if a reasonable person would have foreseen a risk of injury. That is not the law in Washington and is not even the standard applied by the Court of Appeals in this case.[4] This Court has

[3] We are aware of two cases, one from Pierce County and one from King County in which the trial courts recently dismissed plaintiffs' claims under similar facts. *Broy v. Atlantic Richfield, Pierce County Cause No. 15-2-06590-0* and *Cameron v. Pacific Corp., King County Cause No. 15-2-05179-2 SEA.*

[4] Nor is it likely the law anywhere else. Otherwise, the majority of courts that have addressed the take home exposure issue under a negligence standard would not have rejected a finding that liability should attach. Nor would the *Arnold* and *Lunsford* courts have found it necessary to predicate liability on a particular "special" aspect of the case before them. In *Arnold*, the court relied on the public policy supporting strict liability

time and again recognized that, absent an affirmative act *vis-à-vis* the injured person, or a special relationship, there is no duty of care owed to a third party. The Court of Appeals' conclusion that Brand acted "affirmatively" thereby causing harm to Mrs. Brandes is factually incorrect and entirely inconsistent with Washington Supreme Court jurisprudence defining the parameters of when a duty will be found to exist. Moreover, both the plaintiff and Court of Appeals ignore the fact that the existence of a duty is a question of law, not a question of fact. The Court of Appeals blithely states that because injury was foreseeable, there was necessarily a duty. That is not the law and has never been the law. Foreseeability is but one element of the inquiry. See generally *Hertog v. City of Seattle,* 138 Wn.2d 265, 979 P.2d 400 (1999); *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013); *Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006).

The only affirmative act on the part of Brand was the installation of insulation at the Cherry Point Refinery. Brand had no contact with Mrs. Brandes and made no affirmative act as to her. At least half of the insulation used on the project was asbestos free. (VRP 1098-1101; 207). The insulation material was completely covered in metal lagging, thereby preventing any exposure to respirable asbestos fibers. (VRP 1102). Mr.

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under 402A. In *Lunsford,* it was the control the shipyard owner retained over the safety of work conducted on its premises, i.e. a special relationship recognized under the law.

Brandes started in the Crude Unit in November of 1971. Brand turned over the Crude Unit to ARCO as complete prior to Mr. Brandes beginning his work there. (CP 000498; 501; 503). Once a unit was turned over to ARCO, any and all insulation maintenance or installation in the unit was performed by TEMCO, ARCO's in-house contractor. (CP 507). The exposure history given by Mr. Brandes was that he removed asbestos-containing materials once or twice a month while working in the coke ovens. (CP 000567; CP 000592). The only co-worker who had personal knowledge relating to Mr. Brandes testified, on cross-examination, that from September until November, they did limited on-site training, but prior to that they only had three or four opportunities to visit the units at the refinery. (CP 503; VRP 635-636).[5] The "affirmative acts" found by the Court of Appeals were the installation of insulation, the failure to label the material and the failure to employ industrial hygiene controls during the installation of the material.[6] The failure to act is an omission, nonfeasance. Mr. Brandes was an ARCO employee. (CP 000386; CP 000414). Brand had no ability to control his conduct. The testimony from

[5] The only conceivable time Mr. Brandes could have been in the vicinity of a Brand employee installing insulation.

[6] Contrary to Respondent's insinuation, there was no evidence that JT Thorpe or Plant Insulations used such controls in 1971 or 1972. Both companies are bankrupt due to the asbestos litigation and have set up Bankruptcy Trust Funds. www.http://pastrust.com; www.http://jttstrust.com. Nor was there evidence that industrial hygiene controls were required given the potential exposure levels to a bystander like Mr. Brandes, much less to his wife.

ARCO in the case established that their employees were told to consider all insulation material to be asbestos containing unless there was a blue band around the metal lagging. (VRP 207). ARCO provided change rooms and showers for their employees. (VRP 194). ARCO further provided safety training to their employees. (VRP 196-97). By 1972, ARCO had an employee handbook which included sections on the potential hazards of working with asbestos containing materials. (VRP 196-97; 208-09). In order to impose a duty on Brand in this case, Washington law requires a finding that Brand took some affirmative action as to Mrs. Brandes that greatly increased the risk of harm to her. *Tallariti v. Kildare*, 63 Wn.App. 453, 460, 820 P.2d 952 (1991); *Robb*, 176 Wn.2d at 437-38; *Binschus v. State*, 186 Wn.2d 573, 582-83, 380 P.3d 468 (2016). There is no such evidence here and therefore no general duty to prevent harm to third parties.

Moreover, the Court of Appeals' finding that sufficient evidence was presented suggesting that Brand should have foreseen a risk to family members of asbestos exposed workers was based on literature which addressed the potential hazards of asbestos generally rather than any recognized peer-reviewed literature which associated mesothelioma with take home exposures from tradesmen and more specifically, from an

operator at an oil refinery site such as Mr. Brandes.[7] Brand presented specific evidence that Dr. Selikoff, the leading US asbestos researcher, was telling the actual insulation workers he was studying that the research did not support the conclusion that carrying asbestos fibers home on their clothing could pose a risk to their family members. (VRP 895-96; 899-900; 942-944). The medical and scientific community did not begin to come to any type of consensus on the issue until 1976, four years after Brand left the ARCO site. (VRP 942-44). Where the information was not known to the experts in the relevant field, it cannot be held foreseeable to Brand, an insulation contractor with no medical or science expertise, as a matter of law. The Court of Appeals' determination that asbestos disease from take home exposure to insulation products was a recognized hazard during the time period the ARCO refinery was constructed is not only unsupported by the record, it is contradicted by the record.

The Court of Appeals holding that Brand owed a generalized duty of care to Ms. Brandes under common law negligence is contrary to existing Washington appellate jurisprudence. The issue is a matter of first impression. It is likely to recur absent clear direction from this Court. Review is warranted under RAP 13.4(b)(1), RAP 13.4(b)(2) and RAP 13.4(b)(4).

[7] Mr. Brandes' job duties never included working with asbestos containing materials or performing any type of maintenance.

II. CONCLUSION

For the foregoing reasons, this Court should grant review pursuant to RAP 13.4(b)(1), (2) and (4) and reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 5th day of May, 2017.

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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 5th day of May, 2017, I caused a true and correct copy of the foregoing document, "Reply in Support of Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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