Supreme Court No. 96551-0
Court of Appeals No. 76604-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CORINA PUENTE, individually and as Personal Representative of the Estate of Javier Puente, deceased,

Appellant,

v.

BAUGH INDUSTRIAL CONTRACTORS, INC., a Washington Corporation; SKANSKA USA BUILDING, INC., a Delaware Corporation; RESOURCES CONSERVATION COMPANY INTERNATIONAL, a Delaware Corporation; A SUBSIDIARY OF GE IONICS, INC., a Massachusetts Corporation; and STIRRETT-JOHNSEN, INC., a Washington Corporation; HARRIS GROUP, INC., a Washington Corporation; and NIPPON CHEMI-CON, a Japanese Corporation,

Respondents.

Appeal from the Superior Court of King County
Honorable Jean Rietschel
No. 14-2-28454-3 SEA

RESPONDENT RESOURCES CONSERVATION COMPANY INTERNATIONAL'S PETITION FOR REVIEW

Steven W. Fogg, WSBA No. 23528
Kelly H. Sheridan, WSBA No. 44746
Eric A. Lindberg, WSBA No. 43596
CORR CRONIN LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Telephone: (206) 625-8600

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I. INTRODUCTION

Washington's construction statute of repose, RCW 4.16.300 and .310, bars all claims relating to any "improvement upon real property" that do not accrue within six years of the improvement's date of substantial completion. This Court has not provided any guidance on what constitutes an improvement upon real property since its decision nearly 35 years ago in *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984). That decision affirmed the result in prior Washington cases applying the construction statute of repose, but also articulated a new "test" for what constitutes an improvement upon real property, thus creating significant confusion among Washington's lower courts.

The confusion created by the Court's decision in *Condit* is exemplified by the Court of Appeals' decision in this case, which reversed the trial court's grant of summary judgment based on a mechanistic application of the *Condit* court's new "test" that ignores both the prior case law expressly affirmed in *Condit* and this Court's more recent guidance about the scope of the statute of repose in *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001). The Court should accept review to clarify how Washington courts interpret the term "improvement upon real property" and give construction contractors throughout the state guidance about their potential liability for construction projects years after they are complete.

II. IDENTITY OF PETITIONER

Petitioner Resources Conservation Company International ("RCCI") was the respondent in the Court of Appeals and the defendant in the trial court.

III. COURT OF APPEALS DECISION

The Court of Appeals filed its decision on October 22, 2018 (Appx. 1-15).

IV. ISSUE PRESENTED FOR REVIEW

> Washington's construction statute of repose, RCW 4.16.300 and .310, bars "[a]ll claims or causes of action" arising out of the construction, design, planning, surveying, and provision of architectural, construction, or engineering services in connection with any "improvement upon real property" that do not accrue within six years of the date such construction is substantially complete or such services are terminated. The Court of Appeals held that the construction statute of repose does not apply to an industrial wastewater treatment system that RCCI designed and other entities constructed in Moses Lake, Washington on the ground that it did not constitute an improvement upon real property. Did the Court of Appeals err when reversing the trial court's grant of summary judgment?

V. STATEMENT OF THE CASE

A. RCCI Designed the Boric Acid Evaporator System at the Moses Lake Facility in 2001 and 2002.

This action arises out of an on-the-job injury plaintiff-decedent Javier Puente suffered while performing maintenance work at the Chemi-Con facility in Moses Lake, Washington in September 2012. Chemi-Con produces aluminum electrolytic capacitors through a process that produces significant quantities of wastewater contaminated with boric acid and

other suspended solids. CP 757-58. Because the wastewater produced by Chemi-Con's manufacturing process cannot legally be disposed of via Moses Lake's municipal sewer system, Chemi-Con treats the wastewater through a process that uses heating and cooling to separate the suspended solids (which can then be barreled and landfilled) from the pure water (which can be drained into the municipal sewer or reused). CP 763-65.

In the early 2000s, Chemi-Con began a plant upgrade known within the company as the LP3 West Bay Expansion. To accommodate and process the additional wastewater produced by this expansion of the plant's production capacity, the contract for the LP3 West Bay Expansion project included the construction of a stand-alone Environmental Building to house a boric acid evaporator system ("BAES") that is linked to the production facility by a permanent series of large pipes. CP 759-60, 781.

RCCI[1] successfully bid for the contract to design and procure the BAES for the LP3 West Bay Expansion. When RCCI takes on a project like the LP3 West Bay Expansion, it visits the customer's site both at the bidding stage and after contracting in order to understand the customer's needs, the specific composition of the waste stream it produces, and the physical limitations of the customer's facility. CP 746. RCCI then produces detailed piping and instrumentation drawings and installation

[1] RCCI is a Bellevue-based company that designs and builds industrial evaporator and crystallizer systems around the world. CP 746. RCCI's wastewater treatment systems are designed to meet the specific needs of its clients' waste streams and physical plants and, as such, each RCCI system is custom designed and built. CP 746. RCCI does not market any "turnkey" wastewater treatment systems, and each system it designs is unique. CP 746.

blueprints for its systems, specifies the components that comprise the system and has them shipped to the customer's facility, and works with the relevant general contractor to ensure the system is built according to plan. CP 746.

The BAES constructed at Chemi-Con's Moses Lake facility is not a part of the company's manufacturing process, nor was it installed within the company's pre-existing facilities. The BAES is comprised of a 50-to-60-foot-tall "vapor body" constructed outside the Environmental Building and set into its own concrete pad, as well as a number of components installed within the Environmental Building. CP 724, 761-64, 838-39. Chemi-Con was required to obtain building permits from Grant County for the vapor body's foundation and for the pipe racks connecting the wastewater plumbing leading from the facility's production area to the BAES. CP 841-44. The Environmental Building was built for the primary purpose of housing the remaining portions of the evaporator system and does not house any manufacturing equipment. CP 759-60.

Chemi-Con Plant Manager Joe Akers testified at his deposition that the vapor body and the remaining portions of the system were "part of an entire system." CP 763. Mr. Akers also testified that the BAES performed a critical utility role for the plant: Because the purpose of the system was to evaporate and process the boric-acid-contaminated "waste stream" produced by the plant, the Environmental Building could not function as designed if the BAES was not functioning. CP 763-66.

Construction of the Environmental Building and the BAES was substantially complete by the end of 2001. CP 846. Other than a series of troubleshooting visits to the plant in January through May of 2003, RCCI did not perform any other work on the Environmental Building or the BAES through the date of plaintiff's injuries. CP 746.

B. Plaintiff-Decedent Javier Puente is Injured on July 23, 2012 While Maintaining the Boric Acid Evaporator System.

On July 23, 2012, Javier Puente was attempting to remove a recirculation pump that was part of the BAES for maintenance. CP 70. Mr. Puente had been the primary Chemi-Con employee responsible for removing and maintaining the recirculation pump, and had done so at least three times a year without incident. CP 769, 857-58, 894-908. On the day in question, Mr. Puente was in fact training other Chemi-Con employees in how to remove the recirculation pump. CP 857-58.

As Mr. Puente separated the recirculation pump from its housing, a significant quantity of hot boric acid solution suddenly drained from the system, knocking Mr. Puente over and severely burning him. CP 70, 857-59. Mr. Puente was airlifted to Harborview Medical Center, where he died of his injuries on July 25, 2012. CP 71.

C. Mr. Puente's Widow Files Suit and her Claims are Dismissed on Summary Judgment.

Mr. Puente's widow Corina Puente filed suit on October 15, 2014, individually and in her capacity as Mr. Puente's personal representative. Mrs. Puente's complaint named as defendants Baugh Industrial Contractors, Inc. ("Baugh"), RCCI, Stirrett-Johnsen, Inc. ("Stirrett-

Johnsen"), Skanska USA Building, Inc. ("Skanska"), Harris Group, Inc. ("Harris Group"), and Chemi-Con's parent corporation, Nippon Chemi-Con ("NCC"), and asserted negligence and product liability claims against each defendant. CP 1-22, 64-79.

On February 29, 2016, Baugh, Skanska, RCCI, Stirrett-Johnsen, and Harris Group moved for summary judgment under the statute of repose. CP 168-74, 267-93, 445-57, 720-44. On March 25, 2016, King County Superior Court Judge Jean Rietschel granted the parties' motions for summary judgment. CP 1382-84, 1385-88, 1389-91, 1392-94.

Mrs. Puente filed a "Motion for Clarification and/or Reconsideration" of Judge Rietschel's orders on April 5, 2016. CP 1399-405. Judge Rietschel granted Mrs. Puente's motion in part on May 13, 2016, ruling that she would consider two purportedly-new pieces of evidence submitted with Mrs. Puente's motion for reconsideration. CP 1548-50.

Mrs. Puente filed a second motion for reconsideration on July 19, 2016. CP 1551-67. On August 19, 2016, Judge Rietschel denied Mrs. Puente's second motion for reconsideration:

> The Court affirms its March 30, 2016 Order and finds that Baugh Industrial Contractors, Inc. and [sic] Skanska USA Building, Inc., RCCI, Stirrett-Johnsen, and Harris Group are construction contractors and/or engineers entitled to the protection of the construction statute of repose in RCW 4.16.300 and 4.16.310 against Plaintiff's claims herein, that the claims at issue against these Defendants arise out of construction activities related to improvements upon real property, and that Plaintiff's claims against these Defendants accrued after the expiration of the construction statute of repose in RCW 4.16.300 and 4.16.310.

CP 1771-73.

On March 24, 2017, Mrs. Puente timely appealed Judge Rietschel's order of dismissal as to RCCI only. CP 1801-18.

Division I of the Washington State Court of Appeals reversed. The Court of Appeals acknowledged that there is no dispute that plaintiff filed her lawsuit more than six years after substantial completion of the BAES, meaning that plaintiff's claims are barred if the statute of repose applies. Appx. at 9-10. The Court of Appeals went on to hold, however, that the BAES is not an improvement upon real property and the statue of repose does not apply. Appx. at 10-15. The Court of Appeals' cursory analysis was premised on two findings: (1) that the BAES was integral to the operation of the production lines and the manufacturing process; and (2) that the BAES was not integral to the structure of the environmental building. Appx. at 13-15. RCCI now brings the instant Petition for Review.

VI. ARGUMENT

The Court of Appeals' holding that the statute of repose does not apply to the BAES conflicts with this Court's prior decisions and raises an issue of substantial concern regarding the scope of the construction statute of repose. RAP 13.4(b)(1), (4).

A. Washington's Construction Statute of Repose Bars All Claims Arising from the Construction of Improvements upon Real Property that Do Not Accrue within Six Years.

Washington's construction statute of repose, RCW 4.16.300 and .310, applies to "all claims or causes of action of any kind against any

person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services . . ." RCW 4.16.300. The statute further provides:

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later . . . **Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred**.

RCW 4.16.310 (emphasis added).

"The legislature adopted the particular statute of limitations to protect architects, contractors, engineers, and others from extended potential tort and contract liability." *Pinneo v. Stevens Pass, Inc*., 14 Wn. App. 848, 852, 545 P.2d 1207 (1976). This Court has identified three discrete purposes for which the State Legislature enacted RCW 4.16.310. "One recognized purpose of RCW 4.16.310 is that it protects contractors from the possibility of being held liable for the acts of others. Thus, when a contractor no longer retains control, she is less likely to be held liable for damage caused by the owner or by natural forces." *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 577-78, 29 P.3d 1249 (2001) ("*Lakeview Boulevard*") (quotation omitted).[2] "Another

[2] *See also id.* at 580, 29 P.3d 1249 ("Owners may avoid liability by exercising reasonable care to protect third parties from danger and by performing regular

recognized purpose of the statute is that it limits the discovery rule and avoids placing too great a burden on defendants who construct improvements upon real estate." *Id.* at 578, 29 P.3d 1249 (citation omitted).[3] "Finally, a general purpose of statutes of limitation and repose is that such statutes serve to prevent plaintiffs from bringing stale claims when evidence might have been lost or witnesses might no longer be available." *Id.* (citation omitted).

Accordingly, "RCW 4.16.310 provides an absolute bar to any action against a person who has performed construction related services for an improvement to real property, that has not accrued within six years of substantial completion of the project." *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 852-53, 5 P.3d 49 (2000). When the statute of repose applies, it requires dismissal of any action against the entity that installed the improvement, including not only breach of contract claims but tort claims as well. *See, e.g.*, *Highsmith v. J.C. Penney & Co.*, 39 Wn. App. 57, 59-63, 691 P.2d 976 (1984) (affirming dismissal of personal injury claim against escalator manufacturer on statute of repose grounds).

Washington courts traditionally construed the term "improvement upon real property" (which is not defined in the statute) to include

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inspections and maintenance. In contrast, contractors do not have the ability to inspect and maintain the improvement." (citation omitted)).

[3] *See also Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 419, 150 P.3d 545 (2007) ("Our legislature has adopted a statute of repose to provide predictability and limit contractor liability . . . This statute of repose is a much clearer and simpler way to protect contractors from a long period of uncertainty.").

"betterments which are of a permanent nature and which add to the value of the property as real property." *Siegloch v. Iroquois Mining Co*., 106 Wash. 632, 636, 181 P. 51 (1919). In addition to "buildings and structures of every kind," Washington courts interpreted the term to include "such machinery as was placed thereon of a permanent nature and which tended to increase the value of the property for the purposes for which it was used." *Id*. Examples of machinery that have been held to be improvements to real property include water storage tanks;[4] commercial refrigeration systems;[5] gas pipelines,[6] escalators;[7] power lines;[8] and ski lifts.[9]

Washington courts also draw a bright line between claims against parties like RCCI who provide "design, planning, surveying, architectural or construction or engineering services"—which are subject to the

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[4] *Glacier Springs Prop. Owners Ass'n v. Glacier Springs Enters., Inc.*, 41 Wn. App. 829, 830-31, 706 P.2d 652 (1985) ("*Glacier Springs*").

[5] *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 531, 503 P.2d 108 (1972) ("*Yakima Fruit*").

[6] *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 253-54, 840 P.2d 860 (1992) ("[A]ssum[ing], without deciding, that the pipeline was an improvement upon real property, as the trial court held.").

[7] *Highsmith*, 39 Wn. App. at 60-62, 691 P.2d 976.

[8] *Wash. Nat. Gas Co. v. Tyee Constr. Co.*, 26 Wn. App. 235, 239, 611 P.2d 1378 (1980) ("*Tyee Construction*") ("[T]he power lines are an improvement upon real property even though potentially subject to removal under some circumstances. The power lines add to the value of the property and enhance its use, and Tyee, being a contractor, is clearly within the class to be protected by the statute.").

[9] *Pinneo*, 14 Wn. App. at 852, 545 P.2d 1207 (rejecting argument that ski area chairlift was a trade fixture on ground that life "adds to the value of the property, is an amelioration of its condition, and enhances its use").

"absolute bar" on liability under the statute of repose—and claims under the Washington Product Liability Act, RCW 7.72.010 *et seq*., which are subject to the three-year tort statute of limitations and the discovery rule. *See Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 822 n.1, 881 P.2d 986 (1994) ("Architectural services, engineering services, and inspection services are not 'products' under the WPLA."); *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 916, 103 P.3d 848 (2004) ("A 'product' is an object 'produced for introduction into trade or commerce.' Construction services are not products for purposes of the Product Liability Act." (citation omitted)). Claims that are subject to the construction statute of repose fall outside of the WPLA and are forever barred if they do not accrue within six years of substantial completion of construction regardless of whether they were filed within the WPLA's three-year statute of limitations. *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) ("The discovery rule is limited by RCW 4.16.310 which fixes a precise time beyond which no remedy will be available.").

B. The Court Should Accept Review Because the Court of Appeals Decision Conflicts With the Prior Decisions of this Court.

This Court has spoken definitively regarding the scope of the construction statute of repose only twice in the 99 years since *Siegloch*. The Court of Appeals' decision reversing summary judgment and holding that the statute does not apply is contrary to both decisions. RAP 13.4(b)(1).

1. The BAES is an Improvement to Real Property under *Condit* and this Court's Prior Decisions.

In 1984, for the first time in more than 60 years, the Court revisited its interpretation of the term "improvement to real property" in *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984). *Condit* involved the claims of a woman who was injured when her arm passed between an exposed gear and a conveyor belt she was cleaning while working at an industrial food processing plant. *Id.* at 108, 676 P.2d 466. The conveyor belt was "part of a large freezer tunnel system used to quick-freeze cut vegetables" that had been installed 14 years prior to the plaintiff's injury. *Id.* at 108-09, 676 P.2d 466.

The *Condit* court began its analysis by discussing two prior cases that interpreted the term "improvement to real property," *Yakima Fruit* and *Pinneo*, noting that both cases "borrowed the analysis for whether an item was an improvement on real property from other areas of property law." *Condit*, 101 Wn.2d at 109, 676 P.2d 466. While the Court noted that it "concur[red] with the results reached in these cases," it rejected the "mechanistic approaches" they employed in favor of an interpretive approach focused on the "underlying purpose" of the statute. *Id.* at 110, 676 P.2d 466.

In attempting to discern the Legislature's purpose in enacting the statute of repose, the Court first noted that the statute lists "various construction activities," reasoning that it evinced a focus "on individuals whose activities relate to construction of the improvement, rather than those who service or design items within the improvement." *Id.* The

Court adopted a recent statement by the New Jersey Supreme Court, holding that "the intent of the language of the statute was to protect those who contribute to the design, planning, supervision or construction of a structural improvement to real estate and those systems, ordinarily mechanical systems, such as heating, electrical, plumbing and air conditioning, which are integrally a normal part of that kind of improvement, and which are required for the structure to actually function as intended." *Id.* at 110-11, 676 P.2d 466 (quoting *Brown v. Jersey Central Power & Light Co.*, 163 N.J. Super. 179, 195, 394 A.2d 397 (1978)).

Turning to the facts of the case before it, the *Condit* court contrasted the freezer tunnel system that caused the plaintiff's injuries with the refrigeration system at issue in *Yakima Fruit*. *Id.* at 112, 676 P.2d 466. Noting for a second time that it "concur[red]" in the result in that case, the Court reasoned that because, "unlike the freezer tunnel here in issue," the refrigerator system in *Yakima Fruit* "was used to cool a cold storage warehouse," it was thus "an integral part of the warehouse." *Id.* Accordingly, the Court reversed the trial court's grant of summary judgment to the conveyor manufacturer. *Id.* at 113, 676 P.2d 466.

Here, the Court of Appeals erred in holding that the BAES is not an improvement to real property under *Condit* and the prior Washington decisions it expressly affirmed. The Court of Appeals based its decision on two conclusory assertions that are belied by the record and misapply *Condit*: First, the Court of Appeals characterized the BAES as "integral to

the operation of the production lines and the manufacturing process." Appx. at 13. Second, the Court of Appeals concluded that the BAES is "not integral to the environmental building structure." Appx. at 13.

First, it is undisputed that the BAES is not an integral part of Chemi-Con's production lines and manufacturing process. Chemi-Con's Plant Manager Joseph Akers made clear in his deposition testimony and declarations that the BAES functions to process the wastewater *produced by* the manufacturing activities taking place in the plant's production facility, not to aid in the conversion of raw materials into a finished product or in any other way assist *in the manufacturing process*—as evidenced by the fact that it is housed in the entirely separate Environmental Building along with other plumbing and electrical systems. CP 195-98, 520, 759-60, 763-64. The sole basis for the Court of Appeals' finding that the BAES is part of Chemi-Con's manufacturing process is Ms. Akers' testimony that the Chemi-Con plant cannot operate if the BAES is not functioning. *See* Appx. at 13-14. That is not dispositive—an industrial plant also needs electricity and plumbing to function, but that does not render those systems "products" that are outside the scope of the statute of repose.

Much to the contrary, because the sole function of the BAES is to treat and dispose of the wastewater *produced by* Chemi-Con's manufacturing process, it is analogous to a plumbing system, one of the *specific examples* of mechanical systems that qualify as improvements to real property in *Condit*. *See Condit*, 101 Wn.2d at 110-11. Moreover, the

other examples of machinery that have been held to be improvements to real property by Washington courts strongly indicate that the BAES should be viewed as an improvement to real property. Like the water storage tanks in *Glacier Springs*, the system's vapor body is a large, metal storage tank that was specified on RCCI's designs and installed by another party.[10] Like the ski lift poles at issue in *Pinneo*, the vapor body is set into its own concrete pad; it even required a separate building permit from Grant County. CP 761-64, 841-44. And like the gas pipelines at issue in *Washburn* and the power lines at issue in *Tyee Construction*, the evaporator system performs a basic utility function for the Chemi-Con plant. The results in these cases remain valid precedent that runs directly counter to the Court of Appeals' decision.

Second, the record is also clear that the BAES is integral to the Chemi-Con plant's Environmental Building. The Environmental Building was built for the primary purpose of housing the evaporator system, and Chemi-Con's plant manager testified that the building could not function as it was intended to without an operative evaporator system. CP 759-60, 763-64. This fact alone renders the BAES an improvement to real property under *Condit* because it is "integrally a normal part of that kind of improvement," *i.e.*, an environmental facility that processes industrial wastewater. *Condit*, 101 Wn.2d at 112, 676 P.2d 466. Applying the

[10] *See Glacier Springs*, 41 Wn. App. at 830-32, 706 P.2d 652 ("[T]he water supply system was not capable of being used for its intended purpose until after the water storage tank was installed and hooked up to the system.").

comparative approach of the *Condit* court, the evaporator system is far closer to the refrigeration system at issue in *Yakima Fruit* than the freezer tunnel at issue in *Condit* because it is a permanent piece of infrastructure that is necessary for the Environmental Building to function as such, not an "accouterment to the manufacturing process" taking place in Chemi-Con's separate production facility. CP 766, 778; *Condit*, 101 Wn.2d at 112, 676 P.2d 466. The Court of Appeals' decision conflicts with these principles of Washington law and should be reversed.

2. RCCI Also Meets the Purpose of the Construction Statute of Repose as Found by this Court in *Lakeview Boulevard*.

The Court of Appeals' decision also contradicts this Court's more recent discussion of the scope and purpose of the statute of repose in *Lakeview Boulevard*. *Lakeview Boulevard* involved an Equal Protection challenge to the statute of repose, and in affirming the constitutionality of the statute, the Court articulated four "recognized" distinctions between "manufacturers" and "people who construct improvements upon real property" that justify the Legislature's protection of construction service providers from "excessive liability":

> (1) **Manufacturers have liability under products liability law, an independent area of law separate from basic negligence or breach of contract, and this area of law has its own statutes of limitation, which are keyed to the useful life of the product.**
>
> (2) **Manufacturers produce standardized goods from pretested designs and in large quantities whereas contractors make a unique product designed to deal with the distinct needs of a particular piece of real estate.**

> (3) **Manufacturers produce their goods in a controlled environment whereas contractors build improvements upon real estate in an ever-changing environment.**
>
> (4) **Manufacturers do not contribute to the structural aspects of real estate improvements; nor do they engage in any of the construction activities enumerated in RCW 4.16.310.**

Lakeview Boulevard, 144 Wn.2d at 579, 29 P.3d 1249 (emphasis added, citation omitted). *All four* of the factors articulated by the Court support the trial court's finding that RCCI is entitled to the protection of the statute of repose.

First, as the Court noted, manufacturers are subject to product liability law, which has its own three-year statute of limitations, subject to the discovery rule. RCW 7.72.060(3). Plaintiff's injuries, in contrast, occurred nearly 10 years *after* RCCI's design of the BAES had concluded and more than nine years after RCCI performed any work whatsoever at the Chemi-Con plant in Moses Lake. CP 70, 746, 848-49, 851. RCCI had no control over the manner in which the evaporator system was operated, maintained, or modified during the decade preceding plaintiff's injury, and it would make no sense from a policy perspective to treat RCCI as a "manufacturer" of the evaporator system subject to strict product liability when it had no way of preventing the evaporator system from being misused, overused, or altered. *Lakeview Boulevard*, 144 Wn.2d at 577-78, 29 P.3d 1249.[11]

[11] *See also Meneely*, 101 Wn. App. at 854, 5 P.3d 49 ("The protection [afforded by statute of repose] is based on the premise that the longer the owner possesses the improvement, the more likely it is that the damage was the owner's fault or

Second, it is beyond dispute that RCCI does not produce "standardized goods" from "pretested designs" in "large quantities." Each and every evaporator system designed by RCCI is unique and custom-designed to meet the distinct needs of the client's "particular piece of real estate." *Lakeview Boulevard*, 144 Wn.2d at 579, 29 P.3d 1249. Just as a plumber designs different plumbing systems based on the size and layout of a customer's home, RCCI specifically engineers each wastewater treatment system it designs for the specific physical characteristics of the customer's plant and the customer's wastewater treatment needs—RCCI does not design "standard" or "mass-produced" systems. CP 746.

Third, the BAES was not "produce[d] in a controlled environment" but was instead designed by RCCI engineers working in an office building in Bellevue. The component parts were manufactured elsewhere—and in most cases, shipped directly from the manufacturer to Moses Lake—and then constructed in the "ever-changing environment" of the LP3 West Bay Expansion project by Baugh.

Fourth, the construction of the BAES (which, again, required a concrete foundation for the vapor body and drove the design and construction of the Environmental Building) clearly contributed to the "structural aspects" of real estate improvements and was the product of the

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the result of natural forces." (quotation omitted)); *Jones v. Weyerhaeuser Co*., 48 Wn. App. 894, 899, 741 P.2d 75 (1987) (statutes of repose "exist for the purpose of protecting contractors from the possibility of being held liable for the acts of others. . . . The limitations [on liability provided by the statute of repose] encourage periodic inspection and maintenance." (citation omitted)).

construction activities listed in the statute of repose. *See* RCW 4.16.300 (statute of repose shall apply to "all claims or causes of action of any kind" against "any person . . . having performed or furnished any *design*, planning, surveying, architectural or [sic] construction or *engineering* services . . ." (emphasis added)).

In short, every distinction this Court has articulated between professional service providers that are protected by the statute of repose on one hand, and product manufacturers on the other hand, indicates that RCCI's work on the BAES falls within the scope of the construction statute of repose. The Court of Appeals' decision merely recited these factors, yet failed to analyze them, and ultimately reached a contrary determination. The Court should accept review to reverse and clarify the result dictated by its discussion in *Lakeview Boulevard*.

C. The Scope of the Construction Statute of Repose is a Matter of Substantial Public Interest

The scope of the construction statue of repose, and the class of individuals subject to its protection, is a matter of substantial public interest in the State of Washington. In light of the lack of recent guidance to Washington's lower courts on the scope of the statute, this Court should accept review to clarify the test courts should employ to determine whether a particular fixture is an improvement upon real property. RAP 13.4(b)(4).

If there is any case that that perfectly exemplifies the purpose behind the statute of repose, this is it. RCCI's work on the BAES installed

at the Chemi-Con plant was "substantially complete" more than six years before plaintiff's cause of action accrued in July 2012. Plaintiff was injured nearly 10 years after RCCI's involvement with the construction of the BAES concluded, and more than nine years after RCCI performed any work whatsoever at the Chemi-Con plant in Moses Lake. CP 70, 746, 848-49, 851. At the time RCCI's motion for summary judgment was heard, it had been almost 13 years since RCCI had even been to the Chemi-Con facility. CP 70, 720-42. A number of Chemi-Con employees involved in the LP3 West Bay Expansion project had long since retired or gone to work for other companies, including Chemi-Con's Site Manager, Environmental Manager, and Production Engineering Manager, and the RCCI Project Engineer for the project, William Richardson, had also since retired. CP 775-77, 746. This is the precise type of unavailable evidence and witnesses that undergird the statute of repose's bar on "stale claims." *Lakeview Boulevard*, 144 Wn.2d at 578, 29 P.3d 1249.

The Court of Appeals collapsed the Court's reasoning in *Condit* to the simple proposition that systems that relate in any way to a manufacturing process cannot be improvements to real property. But *Condit* makes clear that the statute of repose also applies to "mechanical systems, such as heating, electrical, plumbing and air conditioning . . . ." *Condit*, 101 Wn.2d at 110, 676 P.2d 466 (quoting *Brown*, 163 N.J.Super. at 195, 394 A.2d 397). The Court of Appeals' conclusory and, to borrow a term from *Condit*, "mechanistic" analysis demonstrates the need for additional guidance from this Court on the proper scope of the statute.

VII. CONCLUSION

The Court of Appeals erred in reversing the grant of summary judgment based on the construction statute of repose. This Court should accept review, reverse the Court of Appeals, and affirm the trial court's order granting summary judgment.

Respectfully submitted this 21st day of November, 2018.

CORR CRONIN LLP

s/ Kelly H. Sheridan

Steven W. Fogg, WSBA No. 23528
Kelly H. Sheridan, WSBA No. 44746
Eric A. Lindberg, WSBA No. 43596
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
(206) 625-8600 Phone
(206) 625-0900 Fax
sfogg@corrcronin.com
ksheridan@corrcronin.com
elindberg@corrcronin.com
Attorneys for Respondent Resources Conservation Company International

Supreme Court No. _____
Court of Appeals No. 76604-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CORINA PUENTE, individually and as Personal Representative of the Estate of Javier Puente, deceased,

Appellant,

v.

BAUGH INDUSTRIAL CONTRACTORS, INC., a Washington Corporation; SKANSKA USA BUILDING, INC., a Delaware Corporation; RESOURCES CONSERVATION COMPANY INTERNATIONAL, a Delaware Corporation; A SUBSIDIARY OF GE IONICS, INC., a Massachusetts Corporation; and STIRRETT-JOHNSEN, INC., a Washington Corporation; HARRIS GROUP, INC., a Washington Corporation; and NIPPON CHEMI-CON, a Japanese Corporation,

Respondents.

Appeal from the Superior Court of King County
Honorable Jean Rietschel
No. 14-2-28454-3 SEA

APPENDIX TO RESPONDENT RESOURCES CONSERVATION COMPANY INTERNATIONAL'S PETITION FOR REVIEW

Steven W. Fogg, WSBA No. 23528
Kelly H. Sheridan, WSBA No. 44746
Eric A. Lindberg, WSBA No. 43596
CORR CRONIN LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Telephone: (206) 625-8600

Pursuant to RAP 13.4(c)(9), Respondent Resources Conservation Company International submits this Appendix in support of its Petition for Review. The following documents are attached to this Appendix:

1. The Washington Court of Appeals for Division I's October 22, 2018 Published Opinion (Appx. 1 – 15).
2. RCW 4.16.300 (Appx. 16).
3. RCW 4.16.310 (Appx. 17).

Respectfully submitted this 21st day of November, 2018.

CORR CRONIN LLP

s/ Kelly H. Sheridan

Steven W. Fogg, WSBA No. 23528
Kelly H. Sheridan, WSBA No. 44746
Eric A. Lindberg, WSBA No. 43596
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
(206) 625-8600 Phone
(206) 625-0900 Fax
sfogg@corrcronin.com
ksheridan@corrcronin.com
elindberg@corrcronin.com
Attorneys for Respondent Resources Conservation Company International

CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Respondent Resources Conservation Company International.

2. On November 21, 2018, I caused a true and correct copy of the foregoing document to be served on the following attorneys of record in the manner indicated below:

Attorneys for Plaintiff: G. Joseph Schwab Ashley White CALBOM & SCHWAB 1240 South Pioneer Way P.O. Drawer 1429 Moses Lake, WA 98837 gjs@cslawteam.com aw@cslawteam.com ***Via E-Service***	***Attorneys for Plaintiff:*** Ray W. Kahler Garth L. Jones STRITMATTER KESSLER WHELAN KOEHLER MOORE KAHLER 413 8th Street Hoquiam, WA 98550 ray@stritmatter.com garth@stritmatter.com ***Via E-Service*** Karen K. Koehler STRITMATTER KESSLER WHELAN KOEHLER MOORE KAHLER 3600 15th Avenue West #300 Seattle, WA 98119 karenk@stritmatter.com ***Via E-Service***

Attorneys for Defendants Baugh Industrial Contractor, Inc. and Skanska USA Building Inc.: Mark B. Tuvim Patrick T. Jordan GORDON & REES LLP 701 5th Avenue, Suite 2100 Seattle, WA 98104 mtuvim@gordonrees.com pjordan@gordonrees.com ***Via E-Service***	***Counsel for Nippon Chemi-Con:*** Robert R. Siderius JEFFERS DANIELSON SONN & AYLWARD PS 2600 Chester Kimm Rd. Wenatchee, WA 98801 bobs@jdsalaw.com ***Via E-Service***
Counsel for Harris Group, Inc.: Terence J. Scanlan Alan D. Schuchman Rochelle Y. Nelson SKELLENGER BENDER, P.S. 1301 – 5th Avenue, Suite 3401 Seattle, WA 98101 tscanlan@skellengerbender.com aschuchman@skellengerbender.com rnelson@skellengerbender.com ***Via E-Service***	***Attorneys for Defendant Stirrett-Johnsen, Inc.:*** Patrick N. Rothwell Suzanne Pierce John E. Moore DAVIS ROTHWELL EARLE & XOCHIHUA, PC 520 Pike Street, Suite 2500 Seattle, WA 98101 prothwell@davisrothwell.com spierce@davisrothwell.com jmoore@davisrothwell.com ***Via E-Service***

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of November, 2018 at Seattle, Washington.

s/ Lauren Beers
Lauren Beers

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CORINA PUENTE, individually and as Personal Representative of the Estate of Javier Puente, deceased, Appellant, v. RESOURCES CONSERVATION COMPANY INTERNATIONAL, a Delaware Corporation and a SUBSIDIARY of GE IONICS, INC., a Massachusetts Corporation, Respondent, BAUGH INDUSTRIAL CONTRACTORS INC., a Washington Corporation; SKANSKA USA BUILDING, INC., a Delaware Corporation; STIRRETT-JOHNSEN, INC., a Washington Corporation; HARRIS GROUP, INC., a Washington Corporation; and NIPPON CHEMI-CON, a Japanese Corporation, Defendants.	No. 76604-0-I DIVISION ONE PUBLISHED OPINION FILED: October 22, 2018

SCHINDLER, J. — Chemi-Con Materials Corporation (CMC) manufactures anode aluminum foils for electrolytic capacitors. The manufacturing process produces liquid boric acid. A boric acid evaporator system (BAES) converts the 180-degree liquid boric acid into distilled water for reuse in manufacturing anode

aluminum foil and into solid waste for disposal. In July 2012, CMC worker Javier Puente suffered fatal injuries while performing maintenance work on the BAES pump that had been installed in the environmental building of the facility in 2002. Corina Puente individually and as the personal representative of the Estate of Javier Puente (collectively, the Estate) filed a lawsuit against GE Ionics Inc. and Resources Conservation Company International (collectively, RCCI) alleging claims of negligence and liability under the Washington product liability act (WPLA), chapter 7.72 RCW. The court ruled on summary judgment that the lawsuit against RCCI is barred by the six-year statute of repose for claims arising from construction, design, or engineering "of any improvement upon real property."[1] The Estate appeals the order granting summary judgment dismissal of the lawsuit and the order denying reconsideration. We conclude the BAES installed in the environmental building is not an improvement upon real property and reverse and remand.

FACTS

Chemi-Con Materials Corporation (CMC) is a wholly owned subsidiary of Nippon Chemi-Con Corporation (NCC). CMC manufactures anode aluminum foils at its facility in Moses Lake, Washington. NCC uses the anode aluminum foils to manufacture aluminum electrolytic capacitors.

The CMC manufacturing facility at Moses Lake operated in a building originally built as a United States Air Force base hanger. CMC decided to

[1] RCW 4.16.300.

expand the west bay building of the existing facility and add six new aluminum formation machines to increase production.

Baugh Industrial Contractors Inc.[2] was the general contractor for the approximately $32.6 million "Large Phase 3" (LP3) "West Bay Expansion Project." Baugh retained architect and engineering firm Harris Group Inc. to design the expansion. Stirrett-Johnsen Inc. was the mechanical piping subcontractor.

The LP3 West Bay Expansion Project began in 2000. In addition to the six new aluminum formation machines in the main facility, the "environmental building" was expanded to house utility systems and "support equipment," including "[c]ity water reverse osmosis" systems, deionization units, a phosphoric acid recovery system, air compressors, and a new, larger boric acid evaporator system (BAES). A BAES converts the liquid boric acid produced during the manufacturing of anode aluminum foils into distilled water and into solid waste for disposal. The distilled water is stored in a condensate tank and reused in the manufacturing process.

Baugh entered into a contract with GE Ionics Inc. and Resources Conservation Company International (collectively, RCCI)[3] for the new BAES. RCCI designs, builds, and sells industrial evaporator and wastewater treatment systems worldwide:

> RCCI produces detailed piping and instrumentation drawings and installation blueprints for its systems, procures the components that comprise the system, and then works with the relevant general contractor to ensure the system is constructed according to plan.

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[2] Skanska USA Building Inc. acquired Baugh in 2000.

[3] In 2001, RCCI was doing business as "RCC Ionics."

> After construction is complete, RCCI provides startup assistance and technical support services as the general contractor and the customer work to bring the system online. RCCI does not manufacture any components of its boric acid evaporator systems, but instead provides design and specification services.

The contract between Baugh and RCCI identifies RCCI as the "Seller." The contract states the Seller shall provide "the design, procurement, manufacturing, and delivery of Boric Acid Evaporator System."

Exhibit B identifies the scheduled delivery dates for the components for the BAES, including tanks to collect and store the liquid boric acid produced during the manufacturing process, a heat exchanger and recirculation pump, a "heater shell," and a 4- to 5-story or 50- to 60-foot-tall evaporator tank or "vapor body" to be located outside the environmental building.

Exhibit C identifies the technical design specifications for the BAES:

> Vendor agrees to supply the design, procurement, manufacturing, and delivery of the Boric Acid mechanical vapor recompression type evaporator system designed for 32 gpm[4] average flow and 40 gpm peak flow per the design conditions listed in RFP[5] 05-870/Q/2003 and per the scope of supply that includes, but is not limited to the following:
>
> 1. Complete evaporator assembly. . . .
> 2. Heat Exchangers
> 3. Pumps
> 4. Liquid/solid separation equipment
> 5. Compressors
> 6. Control valves and in-line instruments
> 7. All interconnecting piping and ductwork up to owner interface

[4] Gallons per minute.

[5] Request for proposal.

8. Support structure for furnished equipment. RCC[I] to provide the vapor body support legs, upper access platform, and ladder. RCC[I] to provide support legs for heater. RCC[I] to provide 4'x30' maintenance platform for heater including access ladder.

9. All manual valves

10. Painting. . . .

11. Motors — High Efficiency . . . .

12. Noise insulation system. RCC[I] to provide noise insulation blankets for both compressors to achieve performance of 86-88 dBA[6] @ 3ft.

13. Control panels and PLC[7] control system

14. Design engineering and drawings

15. Erection supervision, training, and start-up assistance as required and requested from Contractor and/or Owner . . . .

16. Testing to verify equipment fabrication, operation, and process guarantees

17. All electrical and control equipment will be UL[8] rated. . . .

18. Flow Transmitters will be used in place of magnetic flow meters due to the low conductivity of the fluids.

CMC issued a certificate of completion for the LP3 West Bay Expansion Project on August 23, 2002. The "Project Completion Report" describes the work completed and the new equipment installed. The report identifies the BAES as a new "major process" system that is "[m]ajor equipment installed as part of the LP3 west bay expansion project." The RCCI BAES "Maintenance Manual"

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[6] Decibels.

[7] Programmable logic controller.

[8] *Underwriters Laboratory.*

contains "the equipment manufacturers' instructions for installation and maintenance" of the BAES.

On July 23, 2012, CMC shut down the Moses Lake "manufacturing plant" for "routine maintenance." Sixty-four-year-old Javier Puente had been a CMC maintenance department employee for more than 10 years and had been responsible for maintenance of the BAES for "many years." Before performing maintenance on the BAES recirculation pump located in the environmental building, the CMC employees drained the liquid from the BAES. Puente and the other maintenance workers removed the bolts that attached the BAES recirculation pump to the piping system. Puente was "standing near the joint between the pump and the piping system" when a large volume of 180-degree "boric acid solution" burst onto him. Puente died two days later from thermal burns to 80 percent of his body.

Corina Puente individually and as the personal representative of the Estate of Javier Puente (collectively, the Estate) filed a lawsuit against GE Ionics Inc. and Resources Conservation Company International (collectively, RCCI) alleging claims of negligence and liability under the Washington products liability act (WPLA), chapter 7.72 RCW.[9] The Estate alleged RCCI is a "product manufacturer." The Estate alleged RCCI negligently installed equipment, provided defective designs and equipment, did not design a reasonably safe

[9] When the Estate filed the lawsuit, RCCI was doing business as "GE Power & Water." The Estate also sued Baugh, Skanska USA, the Harris Group, Stirrett-Johnsen, and CMC parent company NCC.

BAES, breached express and implied warranties, and did not provide adequate warnings.

A chemical engineer expert retained by the Estate concluded the BAES designed by RCCI was "inherently dangerous."

> [I]t is my opinion that Defendant RCCI designed the BAES, knowing that the hazard of hot boric acid solution would exist and that the recirculation pump would need to be removed for maintenance periodically, and did not provide any way to block the hazard of hot boric acid solution when workers removed the recirculation pump for maintenance. It is my opinion that Defendant RCCI designed a product that was inherently dangerous because Defendant RCCI knew that the BAES included wearable parts that would require maintenance (e.g., the recirculation pump), and they did not include double block and bleed mechanisms so that the pump could be safely removed without workers being exposed to the hazard of hot boric acid solution.[10]

RCCI filed a motion for summary judgment dismissal on the grounds that the six-year construction statute of repose barred the lawsuit. RCW 4.16.300 states actions or claims arising from construction of an improvement upon real property are subject to the six-year construction statute of repose. RCW 4.16.310 bars claims that accrue within six years of substantial completion. RCCI argued the BAES is an improvement upon real property because it was integral to the function of the environmental building.

In opposition to summary judgment, the Estate argued the construction statute of repose did not bar the lawsuit because the record established the BAES was part of the manufacturing process, not an improvement upon real property.

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[10] CMC replaced the BAES that RCCI designed after Puente was severely injured.

The court entered an "Order Granting Defendant Resources Conservation Company International's Motion for Summary Judgment Pursuant to Construction Statute of Repose." The court denied the motion for reconsideration. The order denying reconsideration states the court finds RCCI are "engineers entitled to the protection of the construction statute of repose in RCW 4.16.300 and 4.16.310 against Plaintiff's claims herein," the claims "arise out of construction activities related to improvements upon real property," and the claims "accrued after the expiration of the construction statute of repose in RCW 4.16.300 and 4.16.310."

The Estate appeals the summary judgment order of dismissal and the order denying the motion for reconsideration.[11]

ANALYSIS

The Estate contends the court erred in ruling that the BAES is an improvement "upon real property" barred by the construction statute of repose.

We review an order of summary judgment dismissal de novo and engage in the same inquiry as the trial court. Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Kofmehl, 177 Wn.2d at 594. A material fact is one upon which the outcome of the litigation depends. Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). We consider all

[11] The court also dismissed the lawsuit against the general contractor Baugh, Skanska USA, the construction project architect and engineer the Harris Group, the mechanical piping subcontractor Stirrett-Johnsen, and CMC parent company NCC as barred by the six-year statute of repose. The Estate does not appeal the order dismissing these defendants.

facts and make all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment should be granted only "if reasonable minds could reach only one conclusion from the evidence presented." Estate of Becker v. Avco Corp., 187 Wn.2d 615, 621, 387 P.3d 1066 (2017); Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992).

"A statute of repose terminates the right to file a claim after a specified time even if the injury has not yet occurred." Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 176 Wn.2d 502, 511, 296 P.3d 821 (2013). The construction statute of repose bars all claims arising from construction of "any improvement upon real property" that has not accrued within six years after substantial completion. RCW 4.16.300, .310.

RCW 4.16.300 states:

> RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310 [(architects)], 18.27.020 [(contractors)], 18.43.040 [(engineers and land surveyors)], 18.96.020 [(landscape architects)], or 19.28.041 [(electricians)], and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

RCW 4.16.310 states, "All claims or causes of action as set forth in RCW 4.16.300 . . . which ha[ve] not accrued within six years after such substantial completion of construction . . . shall be barred." There is no dispute the Estate

filed the lawsuit against RCCI more than six years after substantial completion of the CMC LP3 expansion project.

RCCI and the Estate dispute whether the BAES is an "improvement upon real property" under RCW 4.16.300 that is barred by the six-year statute of repose. RCW 4.16.310.

The Washington Supreme Court decision in Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 676 P.2d 466 (1984), controls. In Condit, the court rejected the analysis but affirmed the result in Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 503 P.2d 108 (1972), and Pinneo v. Stevens Pass, Inc., 14 Wn. App. 848, 545 P.2d 1207 (1976). Condit, 101 Wn.2d at 109-10. The court in Condit concluded the statute of repose, RCW 4.16.300, applies only to claims "against any person, arising from such person having constructed, altered or repaired any improvement upon real property" and specifically, "construction activities, including designing, planning, surveying, architectural, or construction or engineering services." Condit, 101 Wn.2d at 110. Because "[e]ach of these activities relates to the process of building a structure," the court rejected the analysis in Yakima Fruit and Pinneo[12] as contrary to the intent of the statute. Condit, 101 Wn.2d at 109-10. The court held the statute "focuses on individuals whose activities relate to construction of the

[12] In Yakima Fruit, the court looked to the "manner, purpose and effect of annexation to the freehold" to determine "whether improvements or installations on the realty retain their character as personalty or become a part of the realty." Yakima Fruit, 81 Wn.2d at 530-31. In Pinneo, the court cited Siegloch v. Iroquois Mining Co., 106 Wash. 632, 636, 181 P. 51 (1919), to conclude an improvement upon real property is a "betterment of a permanent nature which added to the value of the property as real property." Pinneo, 14 Wn. App. at 851.

improvement, rather than those who service or design items within the improvement." Condit, 101 Wn.2d at 110.

With respect to "those who service or design items" installed within a building, the court observed that "if these individuals were protected, they could easily avoid product liability law, if they desired, by simply bolting, welding the equipment or fastening it in some other manner to the building." Condit, 101 Wn.2d at 110-11. The court held, "Mechanical fastenings may attach a machine to the building, but they do not convert production equipment into realty or integrate machines into the building structure, for they are not necessary for the building to function as a building." Condit, 101 Wn.2d at 111.

The court concluded the engineering and design of the conveyer belt and refrigeration unit that caused the injury to the plaintiff was not an improvement upon real property. Condit, 101 Wn.2d at 112. But instead, the conveyor belt and refrigeration unit were engineered and designed as part of the "manufacturing process taking place within the improvement." Condit, 101 Wn.2d at 112.

> Rather than designing an improvement on real property, respondent was engineering and designing accoutrements to the manufacturing process taking place within the improvement. As such, they are more properly subject to product liability law and its statute of limitations.

Condit, 101 Wn.2d at 112.

The decisions in Pinneo and Yakima Fruit are consistent with the analysis adopted in Condit and further amplified in 1519-1525 Lakeview Boulevard

Condominium Ass'n v. Apartment Sales Corp., 144 Wn.2d 570, 29 P.3d 1249 (2001).

In Pinneo, the operator of the Stevens Pass ski area retained a contractor to replace and install a ski lift. Pinneo, 14 Wn. App. at 849. Yakima Fruit involved the repair of a building refrigeration system integrated into the structure of the building such that the system could not be removed from the building with either the system or the building remaining intact. Yakima Fruit, 81 Wn.2d at 529-31. The repair required the removal of an entire floor of the building structure. Yakima Fruit, 81 Wn.2d at 529.

In Lakeview, the Washington Supreme Court considered the class of persons affected by the statute, noting that the statute applies to claims of any kind against any person arising from that person having constructed, altered, or repaired any improvement upon real property or from having performed or furnished a limited set of delineated services for the construction, alteration, or repair of any improvements on real property. Lakeview, 144 Wn.2d at 578 (citing RCW 4.16.300). In further defining the class of persons affected by the statute, the court drew a number of distinctions between contractors who are within the class of persons affected by the statute and manufacturers who are not. Lakeview, 144 Wn.2d at 578-79.

As relevant here, the court noted (1) manufacturers are subject to product liability laws that have their "own statutes of limitation" tied to the "useful life of the product," (2) contractors "make a unique product designed to deal with the

distinct needs of a particular piece of real estate,"[13] (3) contractors "build improvements upon real estate in an ever-changing environment," and (4) manufacturers "do not contribute to the structural aspects of real estate improvements." Lakeview, 144 Wn.2d at 579.[14]

Here, the record establishes the BAES equipment located in the environmental building, including the pump Puente was working on at the time of his fatal injury, was integral to the operation of the production lines and the manufacturing process. CMC vice president Joseph Akers testified the BAES is essential to the manufacturing process:

> Q. And the — and tell us again what the purpose or the intent of that entire system is.
> A. To evaporate the boric waste stream.
> Q. Because if you didn't do that what would be the consequence?
> A. We couldn't operate the facility.
> Q. Okay. . . . And, just to follow up, why isn't it that you couldn't operate the facility if you didn't have this system in place?
> A. Because our process utilizing the boric acid to form our product it has that waste stream and that waste stream we can't just dump anywhere, we have to treat it based on a permit that we're issued.
> Q. I see. Okay. So if that system shuts down the plant shuts down?
> A. Yes.
> . . . .
> Q. And I believe you say, I just want to make sure, that the system that we see . . . is it fair to say it's crucial to the operation of the plant?
> A. Yes.
> Q. And this is what you're referring to if that system goes down then the plant has to go down for a little while, correct?
> A. Yes.
> . . . .

[13] RCCI argues it produces unique equipment for every site, but the unique design is driven by the manufacturing process, not by the distinct needs of a particular piece of real estate.

[14] *Emphasis added.*

> Q. I think you said earlier — I think you were answering questions because of the critical nature, the Boric Acid Evaporator System. What did you mean by that?
> A. Without the Boric Evaporator System operating, we can't operate the production lines.

The Supreme Court in Condit and Lakeview has been very clear that in order for a mechanical system within a building constructed on real property to be integral so as to constitute an "improvement upon real property," the system must actually be integrated into and a part of the structure itself. Condit, 101 Wn.2d at 112; Lakeview, 144 Wn.2d at 578-79; RCW 4.16.300. The record establishes the BAES equipment located in the environmental building was not integral to the environmental building structure. Rather, the equipment was simply "house[d]" within the environmental building. Akers testified part of the LP3 project was to expand the environmental building to "house additional equipment," including the BAES:

> Q. So tell — what sort of additions to the physical plant took place out there, modifications to the physical plant took place out there as part of the LP3 expansion?
> A. So in production we added of course the six additional formation lines with all the equipment that's related to that on the production side. We added additional cooling capabilities, so cooling towers and air cooled heat expansion changers, the environmental building was expanded to house the additional equipment used to either supply product to production or to handle the waste in production.
> Q. So had there — I have heard talk of this environmental building, was there always an environmental building in existence in some fashion since the time you got there in '95?
> A. Yes.
> Q. But what happened in 2000 is that it was expanded?
> A. Correct.
> Q. And what was the purpose of why was it expanded?
> A. To house the additional equipment needed to treat the additional formation lines.
> . . . .

Q. So it's fair to say that that vapor body that we see there is part of an entire system?
A. Correct.

Like the conveyor belt and freezer tunnel system in Condit, we conclude the BAES is an "accoutrement[ ] to the manufacturing process taking place within the improvement." Condit, 101 Wn.2d at 112.

We reverse and remand.

Schindler, J.

WE CONCUR:

Appelwick, C.J.

Becker, J.

RCW 4.16.300

Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property.

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

[2004 c 257 § 1; 1986 c 305 § 703; 1967 c 75 § 1.]

NOTES:

Severability—2004 c 257: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2004 c 257 § 2.]

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

RCW 4.16.310

Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property—Accrual and limitations of actions or claims.

All claims or causes of action as set forth in RCW **4.16.300** shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW **4.16.300**, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW **4.16.300** brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

If a written notice is filed under RCW **64.50.020** within the time prescribed for the filing of an action under this chapter, the period of time during which the filing of an action is barred under RCW **64.50.020** plus sixty days shall not be a part of the period limited for the commencement of an action, nor for the application of this section.

[**2002 c 323 § 9; 1986 c 305 § 702; 1967 c 75 § 2.**]

NOTES:

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW **4.16.160**.

CORR CRONIN MICHELSON BAUMGARDNER FOGG &

November 21, 2018 - 3:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
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Appellate Court Case Title:	Corina Puente, Appellant vs. Resources Conservation Co Intl, Respondent
Superior Court Case Number:	14-2-28454-3

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Comments:

Sender Name: Kelly Sheridan - Email: ksheridan@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051

Phone: 206-625-8600

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Respondent Resources Conservation Company International.

2. On November 21, 2018, I caused a true and correct copy of the foregoing document to be served on the following attorneys of record in the manner indicated below:

Attorneys for Plaintiff: G. Joseph Schwab Ashley White CALBOM & SCHWAB 1240 South Pioneer Way P.O. Drawer 1429 Moses Lake, WA 98837 gjs@cslawteam.com aw@cslawteam.com ***Via E-Service***	***Attorneys for Plaintiff:*** Ray W. Kahler Garth L. Jones STRITMATTER KESSLER WHELAN KOEHLER MOORE KAHLER 413 8th Street Hoquiam, WA 98550 ray@stritmatter.com garth@stritmatter.com ***Via E-Service*** Karen K. Koehler STRITMATTER KESSLER WHELAN KOEHLER MOORE KAHLER 3600 15th Avenue West #300 Seattle, WA 98119 karenk@stritmatter.com ***Via E-Service***

Attorneys for Defendants Baugh Industrial Contractor, Inc. and Skanska USA Building Inc.: Mark B. Tuvim Patrick T. Jordan GORDON & REES LLP 701 5th Avenue, Suite 2100 Seattle, WA 98104 mtuvim@gordonrees.com pjordan@gordonrees.com ***Via E-Service***	***Counsel for Nippon Chemi-Con:*** Robert R. Siderius JEFFERS DANIELSON SONN & AYLWARD PS 2600 Chester Kimm Rd. Wenatchee, WA 98801 bobs@jdsalaw.com ***Via E-Service***
Counsel for Harris Group, Inc.: Terence J. Scanlan Alan D. Schuchman Rochelle Y. Nelson SKELLENGER BENDER, P.S. 1301 – 5th Avenue, Suite 3401 Seattle, WA 98101 tscanlan@skellengerbender.com aschuchman@skellengerbender.com rnelson@skellengerbender.com ***Via E-Service***	***Attorneys for Defendant Stirrett-Johnsen, Inc.:*** Patrick N. Rothwell Suzanne Pierce John E. Moore DAVIS ROTHWELL EARLE & XOCHIHUA, PC 520 Pike Street, Suite 2500 Seattle, WA 98101 prothwell@davisrothwell.com spierce@davisrothwell.com jmoore@davisrothwell.com ***Via E-Service***

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of November, 2018 at Seattle, Washington.

s/ Lauren Beers
Lauren Beers

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- tscanlan@skellengerbender.com
- twhitney@davisrothwell.com

Comments:

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Address:
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