

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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CINDY MAXWELL, Personal Representative of the Estate of  
EDMOND BROWN, Deceased, and MARILOU BROWN,

Plaintiffs/Appellants,

v.

BRAND INSULATIONS, INC. and PARSONS GOVERNMENT SERVICES, INC.,

Defendants/Respondents.

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**PLAINTIFFS'/APPELLANTS' APPEAL**

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## Table of Contents

Table of Authorities .....	ii
I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR .....	1
A. Assignment of Error .....	1
B. Issues Pertaining to Assignment of Error .....	1
III. STATEMENT OF THE CASE .....	2
IV. ARGUMENT .....	11
A. Standard of Review .....	11
B. The Washington Legislature intended courts to construe RCW 4.16.300 <i>et seq.</i> narrowly and for a limited purpose: to protect builders from others’ subsequent negligence.....	12
C. RCW 4.16.300 <i>et seq.</i> is ambiguous because it does not define “improvement upon real property.” Mandatory authority interpreting the term is clear it does not include insulation and gaskets because they are accoutrements to the manufacturing process.....	17
D. Parsons and Brand’s sale and supply of insulation and gaskets are not protected by RCW 4.16.300 <i>et seq.</i> .....	25
E. Summary judgment was inappropriate because neither Parsons nor Brand offered any evidence showing the work they performed at Cherry Point was regulated under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041. ....	29
V. CONCLUSION .....	29

## TABLE OF AUTHORITIES

### Cases

<i>Buttz v. Owens-Corning Fiberglas Corp.</i> , 557 N.W.2d 90 (Iowa 1996).....	21
<i>Brandes v. Kaiser Gypsum Company, Inc.</i> , et al., Case No. 14-2-21662-9 SEA .....	7, 20, 27
<i>Condit v. Lewis Refrigeration Co.</i> , 101 Wn.2d 106, 676 P.2d 466 (1984) .....	17, 18, 19, 20, 22, 23, 26
<i>Covington v. W.R. Grace Co., Inc.</i> , 952 P.2d 1105 (Wyo. S.Ct. 1998) .....	21
<i>Ehlert v. Brand Insulations, Inc.</i> , No. 70309-9-I, 2014 Wn. App. LEXIS 2239, (Wash. App. Aug. 25, 2014) (unpublished).....	9
<i>Estate of Brandes v. Brand Insulations, Inc.</i> , No. 73748-1-I, 2017 Wash. App. LEXIS 234 (Wash. App. Jan. 23, 2017) (unpublished).....	7, 20
<i>Gill v. Evansville Sheet Metal Works, Inc.</i> , 970 N.E.2d 633 (Ind. 2012).....	21
<i>Hash v. Children's Orthopedic Hospital and Medical Center</i> , 110 Wn.2d 912, 757 P.2d 507 (1988) .....	11
<i>Heath v. Uraga</i> , 106 Wn. App. 506, 24 P.3d 413 (2001) .....	11
<i>Hope v. Larry's Markets</i> , 108 Wn. App. 185, 29 P.3d 1268 (2001) .....	11
<i>Jameson v. Saberhagen</i> , Case No. 02-2-01069-8 .....	7, 20, 24
<i>Jones v. Weyerhaeuser Co.</i> , 48 Wn. App. 894, 741 P.2d 75 (1987) .....	15, 16
<i>Pfeifer v. City of Bellingham</i> , 112 Wn.2d 562, 772 P.2d 1018 (1989).....	16, 25, 26, 28

<i>Pinneo v. Stevens, Pass, Inc.</i> , 14 Wn. App. 848, 545 P.2d 1207 (1976) .....	19
<i>Smith v. Showalter</i> , 47 Wn. App. 245, 734 P.2d 928 (1987) .....	13, 14
<i>State Farm v. W.R. Grace &amp; Co.</i> , 24 F.3d 955 (7th Cir. 1994) .....	21
<i>Stokes v. Bally's Pacwest, Inc.</i> , 113 Wn. App. 442, 54 P.3d 161 (2002) .....	11
<i>Sundberg v. ACandS, Inc.</i> , et al, Case No. 99-2-21756-0 SEA .....	7, 20, 27
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996) .....	16
<i>Willis v. Raymark Industries, Inc.</i> , 905 F.2d 793 (4th Cir. 1990) .....	21
<i>Yakima Fruit &amp; Cold Storage Co. v. Central Heating &amp; Plumbing Co.</i> , 81 Wn.2d 528, 503 P.2d 108 (1972) .....	19
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) .....	11

**Statutes**

CR 56 .....	11
RCW 4.16.300 .....	4, 14, 23, 29
RCW 4.16.300 <i>et seq.</i> .....	1, 2, 3, 5, 10, 11, 12, 15, 17, 19, 25, 29
RCW 4.16.300 (1967).....	14
RCW 4.16.300 (1986).....	14
RCW 4.16.300 (2004).....	14
RCW 4.16.310 .....	4
RCW 4.16.320 .....	4, 14
RCW 4.16.326 .....	11
RCW 18.08.310 .....	2, 4, 9, 29

RCW 18.27.020 .....	2, 4, 9, 29
RCW 18.43.040 .....	2, 4, 9, 29
RCW 18.96.020 .....	2, 4, 9, 29
RCW 19.28.041 .....	2, 4, 9, 29

## I. INTRODUCTION

Plaintiffs/Appellants are Cindy Maxwell, Personal Representative of the Estate of Edmond Brown, and Marilou Brown, widow of Edmond Brown.<sup>1</sup>

## II. ASSIGNMENT OF ERROR

### A. *Assignment of Error*

1. The Superior Court erred when it granted summary judgment for Defendants/Respondents Brand Insulations, Inc. (Brand) and Parsons Government Services, Inc. (Parsons) by order entered on July 27, 2018.

### B. *Issues Pertaining to Assignment of Error*

Plaintiffs filed suit against Defendants Brand and Parsons alleging Defendants caused Edmond Brown's mesothelioma by exposing him to asbestos-containing insulation and gaskets. Brand and Parsons moved for summary judgment under RCW 4.16.300 *et seq.* Are asbestos-containing insulation and gaskets improvements upon real property as contemplated by RCW 4.16.300 *et seq.*? (Assignment of Error 1). Are selling and supplying activities which are protected by RCW 4.16.300 *et seq.*? (Assignment of Error 1). To meet its burden, must a defendant who moves for protection

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<sup>1</sup> Edmond Brown was still living when the Superior Court granted summary judgment. He has since passed away.

under RCW 4.16.300 *et seq.* offer evidence showing no issue of material fact whether its activities were ones for which it was required to be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041? (Assignment of Error 1).

### **III.STATEMENT OF THE CASE**

After being diagnosed with mesothelioma, an incurable cancer caused by exposure to asbestos, Edmond and Marilou Brown filed suit against various entities responsible for his exposure to asbestos. Plaintiffs contended that Mr. Brown was exposed, *inter alia*, during his employment at the Atlantic Richfield Cherry Point oil refinery (Cherry Point), beginning in 1971.

The Atlantic Richfield Corporation hired Parsons to coordinate the construction of Cherry Point. It was built on a “cost-plus” basis, meaning Atlantic Richfield paid Parsons to procure construction materials, and then paid a separate fee for Parsons’ labor.<sup>2</sup> Parsons purchased all “equipment, machinery, apparatus, materials and supplies” for the refinery, and Atlantic Richfield paid Parsons for the cost of all such items; the contract between the two required Parsons to maintain all of its purchase records so Atlantic

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<sup>2</sup> Excerpts of deposition of Abe Johnson, Clerk’s Papers (CP) 321:8–322:17.

Richfield could inspect them.<sup>3</sup> Among the materials Parsons sold to Atlantic Richfield were asbestos-containing insulation and gaskets for the machinery at Cherry Point.<sup>4</sup>

Parsons, in turn, hired Brand to perform the majority, but not all, of the insulation work. Like the contract between Atlantic Richfield and Parsons, the contract between Parsons and Brand contemplated that Brand would be paid for the materials it supplied separately from its charges for labor.<sup>5</sup> Brand billed Parsons on an interim basis for the value of the asbestos-containing insulation materials it delivered separately from its labor.<sup>6</sup>

Plaintiffs filed suit on April 2, 2018, and Brand and Parsons quickly filed their motions for summary judgment under RCW 4.16.300 *et seq.* on June 15, 2018, and June 22, 2018, respectively. Under this statute, sometimes known as the “builders’ statute of repose,” all claims arising from certain activities on improvements upon real property must accrue within six years of substantial completion of construction.

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<sup>3</sup> Agreement for Design, Purchase of Materials and Construction between Atlantic Richfield Company and The Ralph M. Parsons Company, CP499-570, at CP506, CP540-541.

<sup>4</sup> Purchase orders from Ralph M. Parsons Company to Metalclad Insulation Corporation, CP643-725; Purchase orders from Ralph M. Parsons Company to E.J. Bartells Company, CP727-763; Purchase orders from Ralph M. Parsons Company to Scott-Groves Company, CP727-763.

<sup>5</sup> Lump Sum-Unit Price Subcontract between The Ralph M. Parsons Company and Brand Insulations, Inc., CP777-833, at 822, 824.

<sup>6</sup> Brand Insulation, Inc.’s Request for Progress 8 Payment, CP835-837.

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.<sup>7</sup>

Claims which do not accrue within six years are barred.<sup>8</sup>

Brand supported its motion with excerpts from two depositions in other cases showing Cherry Point became operational in 1971 and that Brand worked as the primary insulation contractor at Cherry Point between 1971 and 1972.<sup>9</sup> Brand also cited Plaintiffs' answers to Style Interrogatories showing Mr. Brown worked at Cherry Point beginning in 1971.<sup>10</sup> Brand did not provide any evidence regarding the nature or purpose of the insulation it sold and installed, copies of contracts, sales records regarding its work at Cherry Point, or any evidence whether it was licensed or registered to perform its work at Cherry Point.

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<sup>7</sup> RCW 4.16.300.

<sup>8</sup> RCW 4.16.310.

<sup>9</sup> Excerpts of deposition of Dan Williams, CP 23-24; excerpts of deposition of Michael McGinnis, CP 26-30.

<sup>10</sup> Plaintiffs' Answers to Style Interrogatories, CP 19-21, at 20.

Parsons joined Brand's motion, and supplemented the record with contracts between itself and Atlantic Richfield, between itself and Brand, and a selected portion of Plaintiffs' answers to its discovery requests, which stated, *inter alia*, that their claims against Parsons were based on supplying, distributing, and otherwise making available for use asbestos-containing products.<sup>11</sup> Parsons offered no evidence regarding the nature or purpose of the asbestos-containing insulation it sold, supplied and specified, or the asbestos-containing gaskets it also sold, supplied and specified, nor any evidence whether it had been licensed or registered to perform its work at Cherry Point.

Brand and Parsons moved for summary judgment before Plaintiffs had an opportunity to conduct discovery. Both argued Plaintiffs' claims against them were barred because they were contractors involved in Cherry Point's construction.

Plaintiffs allege Brand and Parsons exposed Mr. Brown to asbestos during the construction of Cherry Point between approximately 1971 and 1972. Plaintiffs argue Parsons and Brand failed to carry their burden to show RCW 4.16.300 *et seq.* barred Plaintiffs' claims against Parsons and Brand. In support thereof, Plaintiffs made three arguments on the basis of evidence

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<sup>11</sup> Plaintiffs' Responses to Defendant Parsons Governmental Services, Inc.'s First Set of Interrogatories and Requests for Production, CP219-235, at 221.

amassed in previous litigation regarding Cherry Point since they were not afforded the opportunity to conduct their own discovery.

First, Plaintiffs argued there was a question of material fact whether the insulation sold, supplied, and specified by Parsons, and sold, supplied and applied by Brand, was an “improvement upon real property.” Testimony by Cherry Point employees and Brand employees from previous cases showed the insulation was used on piping and machinery in the refinery, and required regular removal and replacement during the normal course of operations.<sup>12</sup> New insulation replaced the old insulation on a regular basis during shutdowns, when all the machinery was repaired, and Atlantic Richfield even hired a contractor specifically to remove and replace the insulation.<sup>13</sup> In fact, removal and replacement was so regular, Atlantic Richfield eventually instructed workers how to properly remove the insulation without damaging the underlying equipment.<sup>14</sup>

Under mandatory Washington authority, a defendant seeking immunity under the statute must show it worked on a structural aspect or integral system of a building, and not an “accoutrement to the

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<sup>12</sup> Excerpts of deposition of Nils Johnson, CP 348–54, at 352:5–7, 353:11–21; excerpts of deposition of Trevor Pazaski, CP 356–66, at CP 358:16–18, 362:1–363:4.

<sup>13</sup> Excerpts of deposition of Abe Johnson, CP475-489 at 486:5–12; excerpts of deposition of Trevor Pazaski, CP 356–66, at CP 362:1–20; Atlantic Richfield Company Internal Correspondence from W.R. Powell to W.J. Wakley, Jr., CP 876–77.

<sup>14</sup> Excerpts of deposition of Trevor Pazaski, CP 356–66, at CP 363:7–19.

manufacturing process” taking place within the building. Plaintiffs argued the insulation was an accoutrement to the manufacturing process, and cited three previous Superior Court decisions and one unpublished Appellate Court decision in support. The three Superior Court decisions, *Sundberg v. ACandS, Inc.*, *Jameson v. Saberhagen*, and *Brandes v. Kaiser Gypsum, et al.*,<sup>15</sup> all held there were issues of fact whether asbestos-containing insulation used in construction was an “improvement upon real property,” and in fact, the *Brandes* decision denied Brand’s motion for summary judgment for the exact same work at Cherry Point that is at issue in this case. The Court of Appeals, Division One, approved the Superior Court’s denial of Brand’s motion for summary judgment in an unpublished decision, *Estate of Brandes v. Brand Insulations, Inc.*<sup>16</sup>

Plaintiffs were unable to obtain evidence from the prior suits regarding the asbestos-containing gaskets Parsons sold to Cherry Point and were not given the opportunity to develop it in their own case. However, based on prior experience in asbestos litigation, Plaintiffs’ counsel informed the Superior Court they expected the evidence would show asbestos-containing gaskets were used on the piping and equipment, and were

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<sup>15</sup> Superior Court Order in *Sundberg v. ACandS, Inc.*, et al, CP371–73; Superior Court Order in *Jameson v. Saberhagen*, CP 375–413, at 410; Superior Court Order in *Brandes v. Kaiser Gypsum, et al*, CP766-767.

<sup>16</sup> No. 73748-1-I, 2017 Wash. App. LEXIS 234 (Wash. App. Jan. 23, 2017) (unpublished).

regularly removed and replaced as part of normal operations. Therefore, Plaintiffs argued there was a question of material fact whether the gaskets were accoutrements to the manufacturing process, or improvements upon real property.

Second, Plaintiffs argued there was a material question of fact whether Parsons and Brand were sellers or suppliers of the asbestos-containing insulation and gaskets. The statute lists specific activities which are protected, and selling is not one. Under mandatory Washington authority, a defendant's activities are parsed out and there is no protection for activities which are not enumerated in the statute, even if they are related to the enumerated activities. Plaintiffs argued both Parsons and Brand sold or supplied asbestos-containing products to Cherry Point in addition to their other activities. In support, Plaintiffs provided records showing Parsons had purchased asbestos-containing insulation and gaskets for Cherry Point.<sup>17</sup> Plaintiffs also provided monthly progress reports from Parsons to Atlantic Richfield which differentiated between the progress Parsons had made as a designer, builder, and procurement agent.<sup>18</sup> Invoices showed Brand sold

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<sup>17</sup> Purchase orders from Ralph M. Parsons Company to Metalclad Insulation Corporation, CP 643-725; purchase orders from Ralph M. Parsons Company to E.J. Bartells Company, CP 727-63; purchase orders from Ralph M. Parsons Company to Scott-Groves Company, CP 727-63.

<sup>18</sup> The Ralph M. Parsons Company Job 4450-1, Progress Report No. 34, CP 572-641, at 590.

asbestos-containing insulation to Parsons, which was billed separately from Brand's labor.<sup>19</sup> Finally, the Superior Court in *Brandes* held the plaintiff's claims for negligent sales against Brand at Cherry Point were not barred by the statute. Plaintiffs argued this evidence raised an issue of material fact whether Parsons and Brand had acted as sellers and suppliers of asbestos-containing products, for which they are not entitled to immunity under the statute.

Third, Plaintiffs argued both Parsons and Brand failed to carry their burden to provide evidence showing their work at Cherry Point was work for which they had to be registered or licensed under one of RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041.<sup>20</sup> Because the statute of repose is an affirmative defense, failure to do so was a failure to meet their burdens.

Neither Parsons nor Brand disputed any of the Plaintiffs' evidence or challenged its admissibility. They only disputed its interpretation and the controlling law.

In rebuttal, Brand cited another unpublished appellate decision which held Brand's activities were not sales for purposes of strict liability; however, the decision did not address common law negligence claims such

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<sup>19</sup> Brand Insulation, Inc.'s Request for Progress 8 Payment, CP 835-37.

<sup>20</sup> Verbatim Transcript of Proceedings in *Brown v. Atlantic Richfield Co.*, at RP 31:11-22.

as the ones Plaintiffs made in this case.<sup>21</sup> Parsons supplied an order granting summary judgment for its work at Cherry Point in another case heard by the same Superior Court judge,<sup>22</sup> and argued its role as a supplier and seller of insulation could not be distinguished from its role as a builder of the refinery. Both argued RCW 4.16.300 *et seq.* was a broad statute meant to provide extensive protections to builders. Failure to grant summary judgment, they argued, would yield an absurd result and beg the question of when the statute would apply.

The Superior Court heard the parties' arguments and ultimately ruled for Defendants, holding:

I will tell you that I struggled with this a little bit; and I think the most sympathetic argument frankly is the one against Brand Insulation. I do not buy that Parsons is a seller. I will stand to be corrected but I don't believe that they are a seller. And, again, the decisions of my colleagues that there's an issue of fact as to whether or not this is an improvement or whether you have to let a jury decide this, certainly gave me some concern; **but if indeed the statute of repose does not govern this, I don't know when the statute of repose would, and that's primarily why I'm granting summary judgment.**<sup>23</sup>

Plaintiffs appeal the grant of summary judgment.

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<sup>21</sup> *Ehlert v. Brand Insulations, Inc.*, No. 70309-9-I, 2014 Wn. App. LEXIS 2239, (Wash. App. Aug. 25, 2014) (unpublished).

<sup>22</sup> Order Granting Defendant Parsons Government Services, Inc.'s Motion for Summary Judgment, CP1045-1046.

<sup>23</sup> Verbatim Transcript of Proceedings in *Brown v. Atlantic Richfield Co.*, at RP 38:13-23 (emphasis added).

## IV.ARGUMENT

### A. *Standard of Review*

Review of summary judgment is *de novo*, and all evidence is viewed in the light most favorable to the non-moving party.<sup>24</sup> RCW 4.16.300 *et seq.* is an affirmative defense, and Parsons and Brand must carry the burden of showing it applies.<sup>25</sup> Parsons and Brand were also the moving parties, and under CR 56 the moving party bears the initial burden of showing the absence of an issue of material fact and an entitlement to judgment as a matter of law.<sup>26</sup> If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.<sup>27</sup> A material fact is one upon which the outcome of the litigation relies in whole or in part.<sup>28</sup>

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<sup>24</sup> *E.g.*, *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 444–45, 54 P.3d 161 (2002); *Heath v. Uraga*, 106 Wn. App. 506, 512, 24 P.3d 413 (2001) (internal citations omitted).

<sup>25</sup> See RCW 4.16.326.

<sup>26</sup> *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

<sup>27</sup> *Hash v. Children's Orthopedic Hospital and Medical Center*, 110 Wn.2d. 912, 915–16, 757 P.2d 507 (1988).

<sup>28</sup> *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001); *Young*, 112 Wn.2d at 234. In *Young*, the Washington State Supreme Court explained the defendant's burden:

[I]t is important to note that the affidavit performs a radically different function in the defendant's case as opposed to the plaintiffs. . . . The defendant's task, to show that there are no disputed facts, is necessarily much more difficult. In contrast to the plaintiff's situation, the mere fact that the defendant does assert some relevant facts will not necessarily meet his burden. **The defendant's task of showing that there are no disputed facts means that the facts asserted in his affidavit, together with the plaintiff's allegations taken as true, must support only inferences in the defendant's favor.** 112 Wn.2d at 235 (emphasis added).

A defendant must satisfy three elements before it may invoke the protection of RCW 4.16.300 *et seq.* First, the defendant must show the plaintiff's claims arise out of an "improvement upon real property," a term undefined in the statute. Second, the defendant must show the claims arise out of one of the specifically enumerated activities in the statute. Finally, the defendant must show it performed work for which it must be registered or licensed under one or more specified statutes. Because the statute of repose is an affirmative defense, Parsons and Brand must each show that all the evidence, and reasonable inferences therefrom, support only the conclusion that the Plaintiffs' claims arise from an enumerated activity to an improvement upon real property, and that each was required to be registered or licensed under one or more statutes for said activities. For the reasons set forth below, neither Parsons nor Brand made the requisite showing.

***B. The Washington Legislature intended courts to construe RCW 4.16.300 et seq. narrowly and for a limited purpose: to protect builders from others' subsequent negligence.***

RCW 4.16.300 *et seq.* can deprive victims of tortious conduct of any remedy for their otherwise meritorious claims. It is a harsh statute, particularly in the context of asbestos litigation, where the victims develop their fatal disease decades after the defendant's tortious conduct and are prevented from filing suit earlier through no fault of their own. If read too

broadly, the 1967 statute (enacted before the insidious dangers of asbestos exposure were fully appreciated by the Legislature) can allow a party to escape liability for its tortious conduct simply because the resulting harm does not accrue within six years. This contravenes legislative intent.

First, the Legislature intentionally chose to write the statute narrowly, and has further narrowed the statute's scope since it was enacted. In *Smith v. Showalter*, the court noted the Legislature intentionally chose to use language which would begin ticking the statute's six year clock as late as possible in order to prevent defendants from escaping liability for their own actions merely because their negligence might hide for six years:

Senator Guess: Mr. President, would Senator Uhlman yield:

Would you explain again, Senator Uhlman, the intent of the Senate Judiciary Committee amendment removing the word, 'earlier,' and replacing it with, 'later'?

Senator Uhlman:

Senator Guess, it is conceivable that the following facts would be applicable under the previous wording: You are an architect. You design a building. You then do not supervise the construction of that building. The building is the I.B.M. building in the city of Seattle which may take eight or nine years to build. You would be out of the picture. **You would have rendered your services long before the six-year period which is the subject matter of this proposed legislation, and this would then cut off your liability as an architect after six years, and then even though the building went up in nine years and your errors or omissions would not be discovered until some nine years later when the building was actually built. It was felt by the Senate Judiciary Committee that we should wait until a substantial completion and tenants had moved in and**

**had a chance to find out any errors or omissions on your part. Thus we should then have an opportunity to sue you as the architect if you had any errors or omissions through that longer period of time.** We felt then as of the time of substantial completion *or as of the time the tenant moved in*, they had an opportunity to observe the building and were able to find out whether or not there were any errors or omissions on your part, from satisfactory completion of construction.<sup>29</sup>

Since then, the Legislature has repeatedly narrowed the scope of the statute by restricting the classes of persons who may invoke its protections.

The original statute contained only the first sentence of the current version:

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.<sup>30</sup>

Anyone who engaged in the enumerated activities was permitted to invoke the statute. However, in 1986, the Legislature narrowed the statute to exclude manufacturers, and in 2004, the Legislature amended the statute once more to exclude all persons from its protections except those registered or licensed under one or more statutes.<sup>31</sup> Each amendment has significantly

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<sup>29</sup> *Smith v. Showalter*, 47 Wn. App. 245, 249–50, 734 P.2d 928 (1987) (quoting from Senate Journal (1967)) (emphasis added).

<sup>30</sup> RCW 4.16.300 (1967).

<sup>31</sup> RCW 4.16.300 (1986), RCW 4.16.300 (2004).

narrowed the scope of the statute until now only those who are otherwise regulated by the Legislature can enjoy its substantial benefits, even if they otherwise would be protected by the statute.

Second, the Legislature enacted RCW 4.16.300 *et seq.* to protect defendants from liability for others' subsequent negligence. The longer an improvement stands, the more likely it is that any problem which arises is due not to the builder's negligence, but from some other factor, such as the owner's lack of maintenance or natural forces. The six-year limitation protects builders from forces outside of their control by codifying this presumption.

*Jones v. Weyerhaeuser* illustrates this. In that case, a longshoreman was injured after a dock collapsed and brought suit against the owner and two contractors who built the dock. The owner cross-claimed against the contractors. The trial court granted summary judgment for the contractors because the dock had been built eight years before it collapsed. There was no evidence the dock had caused any injury before it collapsed. The Court of Appeals, Division Two, upheld summary judgment, and as to the owner's argument that the statute was unfair, held: "The longer the owner has possession of the improvement, the more likely it is that the damage was the owner's fault or the result of natural forces. The limitations [of the

statue] encourage periodic inspection and maintenance. The result is in accordance with the legislative intent.”<sup>32</sup>

Clearly, the Legislature envisioned a limited purpose for the statute: protecting builders from liability for others’ subsequent negligence. Readings that do not inure to this purpose contravene Legislative intent and should be avoided.<sup>33</sup>

Here, there is no question that extending the protection of the statute to Parsons and Brand would contravene legislative intent. Parsons caused Mr. Brown’s exposure when it specified, sold, and supplied asbestos-containing insulation and gaskets. Brand caused Mr. Brown’s exposure when it sawed and mixed in his presence the asbestos-containing insulation it sold and supplied. These activities did not somehow become dangerous years later due to some force outside of Parsons and Brand’s control – they were dangerous at the time, and no amount of inspection or maintenance after the fact could have undone the exposures Mr. Brown suffered at their hands. Plaintiffs are not seeking to impose liability on Parsons and Brand

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<sup>32</sup> *Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 899, 741 P.2d 75 (1987) (internal citations omitted); *see also Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 570, 772 P.2d 1018 (1989) (“[T]he statute is designed to protect builders from being held liable for the acts of others.”).

<sup>33</sup> *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording.”) (internal citations omitted).

for others' subsequent negligence; they simply seek to hold Parsons and Brand responsible for their own actions.

***C. RCW 4.16.300 et seq. is ambiguous because it does not define "improvement upon real property." Mandatory authority interpreting the term is clear it does not include insulation and gaskets because they are accoutrements to the manufacturing process.***

Under RCW 4.16.300 *et seq.* a defendant must show the claims arise out of work on an "improvement upon real property;" however, the Legislature did not define this key term. This rendered the statute ambiguous, and generated multiple decisions defining the term.

The Washington Supreme Court resolved this ambiguity in *Condit v. Lewis Refrigeration Co.*<sup>34</sup> The Court considered a personal injury case where the plaintiff was injured by a conveyor belt in a refrigeration unit installed in a food processing plant, and brought suit against the defendant who had designed, installed, and manufactured the conveyor belt. The conveyor belt and freezer tunnel were used to quick-freeze cut vegetables. Lower courts had granted summary judgment for the defendant under the statute, holding that the conveyor belt and refrigeration tunnel were improvements upon real property.

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<sup>34</sup> 101 Wn.2d 106, 676 P.2d 466 (1984).

Importantly, the Court began its analysis by noting the term “improvement upon real property” was ambiguous; it therefore had the duty to “ascertain and give effect to the intent and purpose of the legislation as expressed in the act as a whole.”<sup>35</sup> The Court held that the Legislature intended to protect only individuals whose activities related to structures or buildings, and therefore the term “improvement upon real property” meant structural aspects of buildings.<sup>36</sup> The statute required this limitation because otherwise it would operate too broadly and protect defendants whose actions were more properly analyzed under product liability law. “[I]f 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. 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.”<sup>37</sup> “Integral systems” which were required for a building to function as a building could be considered structural, but because the conveyor belt in *Condit* was only an

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<sup>35</sup> *Id.* at 110.

<sup>36</sup> *Id.* at 111.

<sup>37</sup> *Id.*

“accoutrement to the manufacturing process taking place within the improvement” it was not an “improvement upon real property.”<sup>38</sup>

In defining “improvement upon real property,” the Court overturned prior cases’ interpretation of the term. Those prior cases, *Yakima Fruit*<sup>39</sup> and *Pinneo*,<sup>40</sup> had drawn from property law to define “improvement upon real property.” But the approaches in *Yakima Fruit* and *Pinneo* were too “mechanistic” and subverted the intent of the Legislature.<sup>41</sup> *Condit*, therefore, requires a highly fact-sensitive inquiry informed by legislative intent into whether something is an improvement upon real property, or only an “accoutrement to the manufacturing process taking place within the improvement.”

Another court which considered the installation of insulation at Cherry Point recognized this highly fact-sensitive inquiry when denying Brand’s motion for summary judgment on this same issue. In *Brandes v. Kaiser Gypsum Company, Inc.*, et al., the Superior Court denied the parties’ cross motions for summary judgment under RCW 4.16.300 *et seq.* and found “there are disputed issues of fact as to whether insulation constitutes

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<sup>38</sup> *Id.* at 112.

<sup>39</sup> *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1972).

<sup>40</sup> *Pinneo v. Stevens Pass, Inc.*, 14 Wn. App. 848, 545 P.2d 1207 (1976).

<sup>41</sup> *Condit*, 101 Wn.2d at 109–10.

an improvement upon real property.”<sup>42</sup> It was improper to say the insulation at Cherry Point was or was not an improvement upon real property at summary judgment; that was a factual issue to be determined by the jury. The Court of Appeals, Division One, approved the trial court’s ruling in an unpublished decision, stating: “We agree that the disputed questions of fact are material. Given the requirement in *Condit* to determine whether insulation was ‘integral’ to the refinery, disputed material facts include the purpose, necessity, and permanence of the insulation that Brand installed in the refinery.”<sup>43</sup>

This fact driven approach has been used by other trial courts to consider this issue. In *Jameson v. Saberhagen*, the defendant was the designer and constructor of an oil refinery, just as Parsons in this case. The Superior Court ruled that there were serious material issues of fact with respect to the insulation at issue and whether it was an improvement upon real property.<sup>44</sup> And in *Sundberg v. ACandS, Inc., et al.*, the Superior Court ruled that an insulation subcontractor, like Brand in this case, was not entitled to summary judgment because there was a material question of fact whether the insulation was installed on an integral system on real property.<sup>45</sup>

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<sup>42</sup> Superior Court Order in *Brandes v. Kaiser Gypsum, et al*, CP 766–67.

<sup>43</sup> *Estate of Brandes*, 2017 Wash. App. 234, at \* 3.

<sup>44</sup> Superior Court Order in *Jameson v. Saberhagen*, CP 375–413, at 410.

<sup>45</sup> Superior Court Order in *Sundberg v. ACandS, Inc., et al*, CP 371–73.

Installers and suppliers of asbestos-containing products have for years attempted to take advantage of similar statutes of repose around the nation. Like Washington, most courts rebuff such attempts, holding that asbestos-containing insulation cannot be deemed an improvement upon real property at summary judgment. For example, Judge Posner writing for the Seventh Circuit held that spray-on asbestos fireproofing was not an improvement, and calling it so “would do violence to the ordinary meaning of the word when it is used in the context of construction, as well as impart a breathtaking scope to the statute. An extension to a kitchen is an improvement; the paint is not.”<sup>46</sup> Similarly, the Wyoming Supreme Court ruled that a jury must decide whether insulation that had to be regularly removed and replaced at a refinery constituted an improvement upon real property.<sup>47</sup> Other examples abound.<sup>48</sup>

In this case, there were clear issues of material fact whether the asbestos-containing insulation and gaskets were improvements upon real

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<sup>46</sup> *State Farm v. W.R. Grace & Co.*, 24 F.3d 955, 958 (7th Cir. 1994).

<sup>47</sup> *Covington v. W.R. Grace Co., Inc.*, 952 P.2d 1105, 1108 (Wyo. S.Ct. 1998).

<sup>48</sup> *See, e.g., Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 644 (Ind. 2012) (holding that issues of fact existed as to whether application of insulation was an improvement upon real property where it was not clear that such insulation was a “permanent addition”); *Buttz v. Owens-Corning Fiberglas Corp.*, 557 N.W.2d 90, 92 (Iowa 1996) (“The asbestos products were not attached at the time these plaintiffs were exposed and could not be considered to be improvements to real estate”); *Willis v. Raymark Industries, Inc.*, 905 F.2d 793, 797–98 (4th Cir. 1990) (allegations relating to dust inhaled during the manipulation of asbestos insulation prior to actually being incorporated into realty did not concern improvements upon real property).

property. Plaintiffs are entitled to all reasonable inferences, but even neutral readings of the evidence plainly show the asbestos-containing insulation was attached to the piping and machinery in the refinery instead of structures or buildings, and that it was regularly removed and replaced. Neither Parsons nor Brand provided any evidence showing the insulation was structural in nature, part of an integral system, or permanent. Indeed, it is difficult to draw any conclusion other than the insulation was an impermanent “accoutrement to manufacturing process” taking place within the refinery. The same can be said of the asbestos-containing gaskets Parsons sold and supplied. It was Parsons’ burden as the moving party to affirmatively show no reasonable factfinder could conclude the gaskets were something other than improvements upon real property, yet it produced no evidence on this issue. Material questions of fact for both the asbestos-containing insulation and gaskets exist on this threshold question, and the Superior Court erred when it granted summary judgment.

Both Brand and Parsons will argue the Court’s analysis should center on the whole refinery, rather than the asbestos-containing insulation and gaskets which Plaintiffs allege caused Mr. Brown’s mesothelioma. They do so because they cannot meet their burden to show, as a matter of law, the asbestos-containing products at issue are improvements upon real property under *Condit*.

As to Brand, this argument is objectively meritless. Brand acted as an insulation subcontractor. It did not build the refinery. Its actions consisted entirely of selling and supplying asbestos-containing insulation which it later applied to the piping and machinery at the refinery. As in *Condit*, where the analysis focused on the conveyor belt because that was the equipment the defendant had installed, the analysis as to Brand must focus on the insulation because that was the product that Brand sold, cut, and applied.

Parsons, on the other hand, was the general contractor, but centering the analysis on the refinery instead of the insulation and gaskets from which Plaintiffs' claims arise contravenes the plain language of the statute and the case law. RCW 4.16.300 is clear: only claims which "arise from" an improvement upon real property are barred. The analysis, then, should focus on what Plaintiffs' claims "arise from." Plaintiffs' claims clearly sound in products liability because they arise from the asbestos-containing insulation and gaskets Parsons specified, supplied, and sold. Parsons may want to shift the focus to the refinery as a whole, but doing so brings irrelevant facts to the analysis because Plaintiffs' claims do not arise from a flaw in the refinery's structure, or a failure in any of its integral systems. Plaintiffs don't claim Mr. Brown's mesothelioma arose from the electrical system, the buildings, or any of the myriad other parts that make up the refinery,

and it is unhelpful to bring them into the analysis, especially when Parsons offered no evidence to show Mr. Brown may have been exposed to asbestos from anything other than insulation and gaskets applied and removed from the machinery. Moreover, the Superior Court in *Jameson v. Saberhagen*, when faced with this issue regarding another general contractor at a refinery, clearly restricted the analysis to the asbestos-containing products at issue.<sup>49</sup> Finally, the Legislature’s clear intent to narrowly read the statute supports restricting the analysis to the products from which Plaintiffs’ claims arise, and not broadening the analysis to include unrelated buildings and systems.

The statute’s plain language and Legislative intent make it clear the Superior Court should have considered whether the asbestos-containing insulation and gaskets were “improvements upon real property,” rather than evaluating the refinery as a whole, because Plaintiffs’ claims arise exclusively from the insulation and gaskets rather than faulty construction. Neither Parsons nor Brand offered any evidence to show the insulation and gaskets from which Plaintiffs’ claims arise were “improvements upon real property,” and Plaintiffs offered several pieces of evidence to show such products were “accoutrements to the manufacturing process.” Material

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<sup>49</sup> Superior Court Order in *Jameson v. Saberhagen*, CP 375–413, at 410.

questions of fact existed on this issue, and the Superior Court improperly granted summary judgment.

***D. Parsons and Brand's sale and supply of insulation and gaskets are not protected by RCW 4.16.300 et seq.***

Even if the Court assumes the insulation and gaskets used on machinery and piping at Cherry Point were improvements upon real property as a matter of law—which is what Parsons and Brand urge this Court to do—the analysis does not end there. Parsons and Brand must still show each of their activities at Cherry Point are enumerated in the statute.

*Pfeifer v. City of Bellingham* sets forth the activities analysis. In *Pfeifer*, the defendant built and sold a condominium to the plaintiff. After a fire revealed the condominiums lacked proper fire protections, the plaintiff brought suit and the defendant moved for summary judgment under RCW 4.16.300 *et seq.* The Washington Supreme Court, sitting *en banc*, held that summary judgment was inappropriate under the statute because the plaintiff's claims arose out of the defendant's activities as a seller, and not out of the defendant's activities as a builder. Building is an activity enumerated in the statute. Selling is not. Once again, the Court's narrow reading of the statute contemplated the statute's limited purpose: protecting builders from other's subsequent negligence:

A seller who also happens to be the builder should not be shielded from liability. Selling and building involve

different activities. The statute shields builders. If builders also engage in the activity of selling, they should face the liability of sellers. A primary purpose of the limitation is to protect contractors from the possibility of being held liable for the acts of others. The protection is based on the premise that the longer the owner possesses the improvement, the more likely it is that the damage was the owner's fault or the result of natural forces. These considerations do not apply when a seller conceals a known dangerous condition that the buyer has no reason to discover.<sup>50</sup>

Importantly, the activities analysis in *Pfeifer* does not supplant the improvement analysis in *Condit*—it supplements it. The key statutory language for both cases was “arising from such person having constructed, altered or repaired any improvement upon real property.” Claims that are barred must arise from 1) enumerated activities (construction, alteration, or repair) to 2) an improvement upon real property. *Condit* provides a definition for the term “improvement upon real property.” *Pfeifer* makes it clear that the claims must sound solely in the specifically enumerated activities. The fact that a party performs some activity enumerated in the statute does not shield it from liability arising out of its unenumerated activities, even if the activities are related. Falling within the statute's penumbra does not entitle a defendant to the statute's protection.

Again, other Superior Courts have properly distinguished between the related but separate activities of defendants when faced with this issue.

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<sup>50</sup> *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 568, 772 P.2d 1018 (1989) (citing *Jones v. Weyerhaeuser*, 48 Wn. App. 894, 741 P.2d 75 (1987) (internal quotations omitted)).

In *Sundberg v. ACandS, Inc., et al.*, the Superior Court denied summary judgment to an insulation contractor for installation of insulation it also sold and distributed.<sup>51</sup> And in *Brandes v. Kaiser Gypsum*, the Superior Court held that the statute did not bar the plaintiff's negligent sales claims against Brand at Cherry Point.<sup>52</sup>

At summary judgment, Plaintiffs provided evidence that both Parsons and Brand had acted as sellers and suppliers of insulation to Cherry Point. While these activities were related to Parsons' role as a builder, and Brand's role as an installer, the selling and supplying activities were distinct. Sales records between Parsons and Brand clearly show Brand selling the insulation it installed to Parsons. Parsons' invoices for insulation and gaskets show Parsons sold the same to Atlantic Richfield. Indeed, the contract between Atlantic Richfield and Parsons clearly stated Parsons was to sell the materials for the refinery to Atlantic Richfield, and Parsons in fact billed Atlantic Richfield for these materials. Parsons also made progress reports to Atlantic Richfield which clearly demarcated between Parsons' role as a designer and builder, and as a seller and supplier. Part of the gravamen of Plaintiffs' claims clearly sound in sale and supply of hazardous products: if Parsons and Brand had not sold or supplied the

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<sup>51</sup> Superior Court Order in *Sundberg v. ACandS, Inc., et al.*, CP 371-73.

<sup>52</sup> Superior Court Order in *Brandes v. Kaiser Gypsum, et al.*, C766-67.

dangerous asbestos-containing products to Cherry Point, then Mr. Brown would never have been exposed to asbestos.

Both Parsons and Brand urged the Superior Court to ignore the activities analysis set forth in *Pfeifer* and hold that their selling and supplying activities were inseparable from their construction activities. But this argument not only ignores *Pfeifer*, it also yields absurd results. The Court should consider the following scenario: a supply house sells asbestos-containing insulation and gaskets, but also has personnel who will apply the products to the customer's equipment at the customer's request. Clearly, the supply house could not claim the protection of the statute if it only sold the insulation and gaskets to a customer who was later exposed to asbestos from someone else applying the products. Yet, under Parsons and Brand's argument, the same supply house could claim the protection of the statute if it sold the products and then sent its personnel to the customer's location to apply the products, thereby directly causing the exposure. Such a result is absurd because it would perversely protect the supply house when it took a greater hand in causing the customer's exposure by both selling and applying the asbestos-containing products, but not when it took a lesser hand by only selling the products.

Plaintiffs presented evidence creating a genuine issue of material fact whether Parsons and Brand sold and supplied asbestos-containing

materials, and the Superior Court erred when it failed to follow mandatory authority and ignored this evidence.

***E. Summary judgment was inappropriate because neither Parsons nor Brand offered any evidence showing the work they performed at Cherry Point was regulated under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041.***

RCW 4.16.300 states “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.” The referenced statutes apply to architects, engineers, landscapers, electricians, and “contractors.” Because the statute is an affirmative defense, Brand and Parsons bore the burden to show all of their activities at Cherry Point were regulated under one or more of the enumerated statutes. It is undisputed that neither presented evidence that any – let alone all – of their activities were regulated. The Superior Court erred in granting summary judgment because Parsons and Brand failed to show there was no issue of material fact whether all of their activities were regulated.

## **V.CONCLUSION**

RCW 4.16.300 *et seq.* is a narrow statute enacted to achieve a limited purpose: to protect builders from others’ subsequent negligence.

Because it is an affirmative defense, Defendants/Respondents Brand Insulations, Inc. and Parsons Government Contractors, Inc. bore the burden of showing no material question of fact existed on each of the three elements in the statute. The Superior Court erred when it granted summary judgment because neither Parsons nor Brand offered any evidence as to any of the three elements, and because the Superior Court ignored Plaintiffs' evidence showing a material issue of fact whether 1) the asbestos-containing gaskets and insulation from which their claims arise were "improvements upon real property," and 2) Parsons and Brand had engaged in selling and supplying activities which were not protected by the statute. For the foregoing reasons, Plaintiffs/Appellants request the Superior Court's grant of summary judgment for Defendants/Respondents Brand Insulations, Inc. and Parsons Government Contractors, Inc. be REVERSED.

Respectfully submitted this 31st day of July, 2019.

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