

FILED  
Court of Appeals  
Division II  
State of Washington  
10/29/2019 3:58 PM  
No. 53252-2-II

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,

*Appellants,*

v.

BRAND INSULATION, INC.; and PARSONS  
GOVERNMENT SERVICES, INC.,

*Respondents*

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
Honorable Susan K. Serko

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**BRIEF OF RESPONDENT  
PARSONS GOVERNMENT SERVICES, INC.**

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## I. INTRODUCTION

Washington's statute of repose, RCW 4.16.300-310, is a clear and simple statute that broadly protects contractors from potentially endless liability for the buildings and other improvements that they design, construct, repair or supervise the construction thereof. Instead of exposure to continuing liability for improvements to real property that may last for decades, or even centuries, the statute provides that *six years* after substantial completion, those contractors are shielded from "all claims, of any kind" arising from their construction activities that haven't already accrued.

Appellants (hereinafter "the Browns") essentially ask this Court to repeal the statute of repose by ignoring its plain and sweeping language. Despite the broad statutory language protecting contractors from "all claims, of any kind" that arise from the construction of an improvement, the Browns nonetheless contend that *some* claims arising from construction *aren't* included: namely, claims arising from the contractor's use of *construction materials* in building those improvements—here, insulation and gaskets. Of course, *all* construction necessarily involves construction materials. Accordingly, by the same flawed reasoning, *every* construction claim could be conveniently recharacterized to circumvent the statute of repose: *i.e.*, by simply contending that the claim doesn't arise from the construction of an "*improvement*" per se (which *would* be barred), but rather arises from the use of one or more of the hundreds or thousands of *construction materials or components* that *make up* the improvement, none

of which – taken in isolation — is itself an “improvement” (which would *not* be barred). The Browns’ argument, if accepted, would subject the statute to death by a thousand loopholes.

This Court should not rewrite statutes to fill them with absurd loopholes that contradict their plain language. RCW 4.16.300 bars “*all claims, of any kind*” against contractors that arise from the design or construction of an “improvement to real property”, if those claims do not accrue within six years of substantial completion of the improvement. Each of those elements is clearly met as to Parsons:

- It was undisputed that Parsons *designed and constructed* (as general contractor) the Atlantic Richfield Cherry Point Refinery (“the ARCO Refinery”).
- It was undisputed that the ARCO Refinery was an “*improvement to real property.*”
- It was undisputed that plaintiffs’ claims against Parsons *arose from Parsons’ design and construction* of that improvement. Indeed, the Browns themselves specifically conceded that “[their] claims against Parsons . . . are based on its work *designing and constructing* the Atlantic Richfield Cherry Point Refinery[.]”<sup>1</sup>

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<sup>1</sup> See CP 221 (emphasis added).

- And it was undisputed that the Browns' claims did not accrue within six years after the substantial completion of the ARCO Refinery in 1972.

Thus, by their own admissions and the plain language of the statute, the Browns' claims against Parsons are barred. The trial court correctly granted summary judgment and this Court should affirm.

## **II. STATEMENT OF THE CASE<sup>2</sup>**

In 1968, Atlantic Richfield Company ("ARCO") engaged Parsons to serve as the design/build general contractor for the construction of ARCO's petroleum refinery at Cherry Point, Washington.<sup>3</sup> Parsons' work under the ARCO Contract consisted of "the design, engineering, purchasing and construction of the Refinery."<sup>4</sup>

In its role as the general contractor, Parsons subcontracted with various approved companies to provide the materials, equipment and labor to complete particular work necessary to the refinery's construction.<sup>5</sup> The primary insulation subcontractor was Brand Insulations ("Brand").<sup>6</sup>

It was undisputed below that the Refinery was operational in November 1971, and was substantially complete in 1972.<sup>7</sup> Edmond Brown

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<sup>2</sup> For summary judgment purposes, the facts are taken in the light most favorable to the plaintiff. No statement of fact herein should be construed as an admission of the truth of any fact that the Browns would have to prove at trial.

<sup>3</sup> CP 48-100.

<sup>4</sup> CP 54.

<sup>5</sup> CP 126.

<sup>6</sup> *Id.*

<sup>7</sup> CP 31.

worked for ARCO as a technician and operator in the Coker Unit of the Refinery from 1971 to 1985.<sup>8</sup> He was a “Tech I” worker and his job duties included cleaning debris, picking up insulation and sweeping dust.<sup>9</sup>

In the course of his work at the Refinery, Brown alleged he was exposed to dust from asbestos-containing insulation and equipment that was being installed, removed or repaired. Brown claimed this exposure caused him to develop mesothelioma, which was first diagnosed in January 2018, more than 45 years after the construction of the ARCO Refinery was completed.<sup>10</sup> He and his wife, Marilou Brown, thereafter sued twelve defendants including Parsons.<sup>11</sup> The complaint alleged a number of common law and statutory claims.<sup>12</sup>

Parsons moved for summary judgment citing Washington’s construction statute of repose, RCW 4.16.300-310.<sup>13</sup> The trial court granted summary judgment to Parsons.<sup>14</sup> The Browns appealed.<sup>15</sup>

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<sup>8</sup> CP 201.

<sup>9</sup> *Id.*

<sup>10</sup> CP 204.

<sup>11</sup> CP 1-4.

<sup>12</sup> CP 3-4.

<sup>13</sup> CP 31-37.

<sup>14</sup> CP 1047-1049. Mr. Brown subsequently passed away. *See* Brief of Appellant (“App. Br.”) at 1, n. 1.

<sup>15</sup> CP 1052-1053.

### III. ARGUMENT

#### A. Standard of Review

This Court reviews an order for summary judgment *de novo*, performing the same inquiry as the trial court.<sup>16</sup> “We consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.”<sup>17</sup> “Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”<sup>18</sup>

The standard of review for an issue involving statutory interpretation and application to undisputed facts is a question of law, also reviewed *de novo*.<sup>19</sup> When reading a statute, courts do not construe language that is clear and unambiguous.<sup>20</sup> Rather, they give effect to the plain language without regard to rules of statutory construction.<sup>21</sup> Courts construe statutes to avoid strained or absurd results.<sup>22</sup>

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<sup>16</sup> *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

<sup>17</sup> *Ruble v. Carrier Corp.*, 192 Wn.2d 190, 199, 428 P.3d 1207 (2018).

<sup>18</sup> *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

<sup>19</sup> *Eelbode v. Chec Med. Centers, Inc.*, 97 Wn. App. 462, 466, 984 P.2d 436, 438 (1999), citing *In re Matter of Charles*, 135 Wn.2d 239, 245, 955 P.2d 798 (1998).

<sup>20</sup> *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 418, 832 P.2d 489 (1992).

<sup>21</sup> *Id.*

<sup>22</sup> *State v. Akin*, 77 Wn. App. 575, 580, 892 P.2d 774 (1995).

**B. The Washington Legislature Has Adopted a Broad Six-year Statute of Repose for “All Claims or Causes of Action” against Persons or Entities “Arising from Such Person Having Constructed...Any Improvement upon Real Property.”**

The Washington statute of repose as enacted in 1967<sup>23</sup> provided:

RCW 4.16.300 through RCW 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>24</sup>

RCW 4.16.310 (1967) provided that all such claims that have not accrued within six years of substantial completion of the improvement are barred.<sup>25</sup>

The Legislature drafted this statute broadly in two ways. First, it encompassed every conceivable type of claim by barring “*all claims or causes of action of any kind[.]*”<sup>26</sup> As the *Parkridge* court noted, the

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<sup>23</sup> The statute was later amended in 1986 and 2004, but the 1967 version was the version that was in effect at the time of the substantial completion of the ARCO Refinery in 1972 and therefore is the version that applies in this case. See *Cameron v. Atlantic Richfield Co.*, 8 Wn. App. 795, 800, 805-6, 809, 442 P.3d 31 (2019) (“A court looks to the date of substantial completion to determine which version of the statute of repose applies”).

<sup>24</sup> RCW 4.16.300 (1967) (emphasis added)

<sup>25</sup> RCW 4.16.310 (1967) provided:

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[.]

<sup>26</sup> RCW 4.16.300.

Legislature's choice of the words “*all* claims or causes of actions of *any kind* ... arising from . . . construction” is broad and sweeping.<sup>27</sup> And “all” means *all*.<sup>28</sup>

Second, the Legislature drafted the statute to encompass all claims “arising from”<sup>29</sup> a broad array of covered construction activities, *e.g.*, design, engineering, construction, alteration, repair, and supervision of construction of improvements to real property.<sup>30</sup>

**C. The Browns’ Policy Arguments about Construing the Statute Narrowly to Fulfill the Statute’s Purposes Are Unfounded. The Plain Language of the Statute Is Clear, Broad and Sweeping.**

The Browns argue, incorrectly, that the Legislature intended for RCW 4.16.300 to be construed narrowly.<sup>31</sup> To the contrary, Washington appellate courts have emphasized that “[t]he Legislature’s choice of the

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<sup>27</sup> *Parkridge Assocs., Ltd v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 602, 54 P.3d 225 (2002) (emphasis in original).

<sup>28</sup> Citing the American Heritage Dictionary, the *Parkridge* court explained that “all” means “being or representing the entire or total number, amount, or quantity,” “constituting, being, or representing the total extent or the whole,” “being the utmost possible of,” “every,” “any whatsoever,” and other, similarly comprehensive terms. 113 Wn. App. at 602.

<sup>29</sup>The phrase “arising from” is unambiguous and has a broader meaning than “caused by” or “resulted from.” *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543, 543 P.2d 645 (1975), *review denied*, 87 Wn.2d 1003 (1976). It is ordinarily understood to mean “originating from”, “having its origin in”, “growing out of”, or “flowing from”. *Parkridge*, 113 Wn. App. at 602; *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986).

<sup>30</sup> *See* RCW 4.16.300 (1967). Notably, while the statute was twice amended in later years to clarify precisely who is and who is not entitled to its protection (1986 amendment, removing manufacturers; 2004 amendment, specifically identifying licensed professions that are protected), general contractors such as Parsons have *always* been squarely within the scope of protection. *See* RCW 4.16.300 (2004) (current statute protects contractors performing construction work requiring registration/licensing under RCW 18.27.020, which includes general contractors, RCW 18.27.010(1)(a), 1(b) and (5)).

<sup>31</sup> App. Br. 12-17.

words, ‘all claims or causes of action of any kind ... arising from ... construct [ion]’, is *broad and sweeping*[.]”<sup>32</sup>

The expansive language in the statute unambiguously communicates the message: the statute’s protections are intended to be *broad*, not narrow. The policy behind providing such broad repose to contractors is founded upon the durability of improvements to real property and the resulting “long tail of liability.”<sup>33</sup> The Legislature enacted the statute of repose to prevent stale claims and to place a reasonable time limitation on the personal liability exposure of construction industry defendants.<sup>34</sup> The statute of repose protects architects, *contractors*, engineers, and others from extended potential tort liability.<sup>35</sup>

The Washington Supreme Court summarized the statute of repose as a “clear and simple” protection for contractors:

The statute of repose terminates a negligence claim six years after “substantial completion of construction,” even if the injury caused by contractor negligence has not yet occurred. *Id.* This statute of repose is a much *clearer and simpler way* to protect contractors from a long period of uncertainty.<sup>36</sup>

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<sup>32</sup> *Parkridge*, 113 Wn. App. at 602 (emphasis added).

<sup>33</sup> *New Meadows Holding Co. v. Washington Water Power Co.*, 34 Wn. App. 25, 29, 659 P.2d 1113 (1983), *aff’d in part, rev’d in part*, 102 Wn.2d 495, 687 P.2d 212 (1984).

<sup>34</sup> RCW 4.16.300 *et seq.*; *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 120, 691 P.2d 178 (1984).

<sup>35</sup> *Pinneo v. Stevens Pass, Inc.*, 14 Wn. App. 848, 852 545 P.2d 1207 (1992).

<sup>36</sup> *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419, 150 P.3d 545 (2007) (emphasis added).

**D. Parsons Was the General Contractor That Built the ARCO Refinery. All of the Browns' Claims against Parsons Arise from the Construction, Design, Planning, and/or Construction Supervision of the ARCO Refinery and Are Barred by Washington's "Clear and Simple" Six-year Statute of Repose.**

This Court should affirm the trial court's ruling because the Browns' claims indisputably fall into the category of "*all claims...of any kind*," and because the Browns have *admitted* that those claims flow from Parsons' work *designing and constructing* the ARCO Refinery, *i.e.* construction activities that are specifically mentioned and protected in the statute. They acknowledged that the claims against Parsons were "based on [Parsons'] work *designing and constructing*" the ARCO Refinery.<sup>37</sup> It is also undisputed (and indisputable) that the ARCO Refinery itself was "an improvement to real property" within the meaning of the statute.<sup>38</sup>

The Browns' arguments for reversal seek to persuade the Court that the statute of repose does not mean what it clearly says. Instead of applying the statute as written, to "*all claims...of any kind*" arising from a general contractor's activities in constructing an improvement to real property, the Browns argue that it should be interpreted to mean that only *some* claims, based on only *some* of a general contractor's activities in constructing an improvement, are in fact protected. According to the Browns, the general contractor's construction of what is undeniably an "improvement to real property" (*i.e.*, the Refinery) must nonetheless be dissected into its

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<sup>37</sup> CP 221 (emphasis added). Similarly, in response to Brand Insulation's motion for summary judgment, the Browns argued: "Parsons was responsible for the *design, procurement, and construction* of the refinery and then turned over the final product to Atlantic Richfield." CP 298 (emphasis added).

<sup>38</sup> RP 33.

*subcomponent* parts (e.g. the insulation, gaskets, drywall, rebar, paint, roofing, piping, electrical panels, moldings, walls, foundations, etc.); and if the particular subcomponent that caused the injury is not *itself* an “improvement to real property” then the statute of repose does not apply to protect the general contractor.

This Court should reject this attempt to judicially rewrite the statute of repose. Whatever dubious merit this “subcomponents” approach might conceivably have in other contexts, or to subcontractors, manufacturers or other persons whose *only* role in constructing an improvement was to supply or install some *subcomponent* of the entire improvement, it has zero merit as to general contractors like Parsons who constructed *the entire improvement*.<sup>39</sup> Parsons’ job was not simply to supply and install insulation or gaskets or some other subcomponent of the Refinery; rather, *it was to design and construct the ARCO Refinery itself*. And the Browns specifically conceded that their claims against Parsons “are based on its work *designing and constructing* the Atlantic Richfield Cherry Point Refinery.”<sup>40</sup> The

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<sup>39</sup> See, e.g., *Hilliard v. Lummus Co.*, 834 F.2d 1352, 1356 (7th Cir.1987) (to “artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property”); *Stanley v. Ameren Ill. Co.*, 982 F. Supp. 2d 844, 863 (N.D. Ill. 2013) (citations omitted) (criticizing asbestos plaintiff’s “micro-level” approach to determining what is an “improvement,” *i.e.*, focusing on *individual* components rather than the *larger* system, the “from-scratch construction of a new power plant, which is undoubtedly an improvement to real property . . . . [T]he Seventh Circuit has emphasized that ‘in making an improvement determination, courts must consider *the entire system* that the defendant helped to design or construct and not merely the component that may have caused the injury’”) (emphasis added).

<sup>40</sup> CP 221.

application of the statute of repose to bar plaintiffs' claims against Parsons could not be clearer.

**1. *Condit* and the Browns' other "subcomponent" authorities have no application to general contractors like Parsons who construct an *entire improvement*—as opposed to manufacturers, suppliers or subcontractors who may supply or construct only a portion thereof.**

Relying on *Condit*<sup>41</sup> and scattered trial court and out-of-state authorities, the Browns argue that the ARCO Refinery insulation and gaskets were not *themselves* "improvements to real property" because they supposedly were not "structural elements," or "integral," or "permanent," and therefore *those aspects* of Parsons' overall construction of the Refinery, and of Brand's insulation subcontracting work, are not protected by the statute.<sup>42</sup> Parsons disagrees with this argument, which in any event appears to be directed primarily at Brand rather than Parsons. But whatever conceivable merit it might have against Brand, whose work in constructing the Refinery was limited to the *insulation work*, it has *none* against Parsons.

Unlike Brand, Parsons' work as general contractor was not simply to install insulation or gaskets or some other isolated subcomponent or system; it was *to build an entire refinery*. Accordingly, it makes no difference—at least as to Parsons—whether the insulation or gaskets were "structural" or non-structural, "integral" or non-integral, "permanent" or impermanent, since it is undisputed that (1) supplying and installing those materials were part of Parsons' construction activities in building the *entire*

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<sup>41</sup> *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984).

<sup>42</sup> App. Br. at 17-24.

ARCO Refinery, and (2) the ARCO Refinery was “an improvement to real property” within the meaning of the statute.

*Condit* did not involve any claims against building construction contractors like Parsons, who are plainly protected by the statute. Rather, it involved a claim against the manufacturer/installer of a discrete item of equipment, *i.e.*, a freezer tunnel system that was installed in a processing plant, who claimed the protection of the statute of repose from the personal injury claims of a worker injured by a conveyor belt in that system. Obviously, the manufacturer/installer could not claim to have built the *entire* processing plant, which would plainly have qualified as “an improvement to real property” within the meaning of the statute of repose. Nonetheless, it argued that it should be protected by the statute because the freezer tunnel system that it installed within the processing plant *was itself* an “improvement” and therefore was also protected.<sup>43</sup> *Id.*

In rejecting this argument, the Court emphasized the purposes of the statute, which are to protect individuals who engage in the enumerated *construction activities* that relate to the process of building a structure: “[T]he statute focuses on individuals whose activities relate to *construction of the improvement*, rather than those who service or design items *within the improvement*.”<sup>44</sup> Indeed, if manufacturers or suppliers of components

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<sup>43</sup> Notably, the general contractor who built the warehouse was *not* a defendant.

<sup>44</sup> 101 Wn.2d at 110 (emphasis added). *See also Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 569, 772 P.2d 1018 (1989) (“[T]he focus [of the statute of repose] is on *activities*. If the claim arises from those activities, the person is covered; if it does not, he is not covered” (emphasis added)).

installed within a preexisting building 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.”<sup>45</sup> Instead, the Court adopted a New Jersey appellate court’s test for determining whether such *subcomponent* parts or systems could qualify *on their own* as “improvements”, entitled their suppliers to protection under the statute of repose: whether those systems are of a type that are “integrally a *normal part* of that kind of improvement and which are required for the structure to actually function *as intended*.”<sup>46</sup>

Accordingly, *Condit* may limit the application of the statute of repose where the individual claiming its protection has only designed, supplied or installed *subcomponents* or *items housed within a preexisting improvement* constructed by someone else, *e.g.*, those individuals who supply “accouterments to the manufacturing process taking place within the

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<sup>45</sup> *Id.* at 110-11. The Court distinguished the “activity” of building an improvement from the “activity” of designing a product that is used within an improvement:

Here, the conveyor belt and refrigeration unit which caused the injury were installed by the class of individuals doing a class of activities not named in the statute. Rather than designing an improvement on real property, respondent was engineering and designing accouterments to the manufacturing process taking place within the improvement.

*Id.* at 112; *see also* 1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp., 144 Wn.2d 570, 579, 29 P.3d 1249 (2001) (contrasting the roles of contractors and manufacturers in explaining why manufacturers are not protected by the statute of repose, *e.g.*, that “manufacturers produce standardized goods . . . whereas contractors make a unique product designed to deal with the distinct needs of a particular piece of real estate”). An oil refinery is certainly not a “standardized good.”

<sup>46</sup> *Id.* at 110-11, *quoting* Brown v. Jersey Central Power & Light Co., 163 N.J. Super. 179, 195, 394 A.2d 397 (1978) (emphasis added).

improvement.”<sup>47</sup> *Condit* (and the Browns’ other cited subcomponent/subcontractor cases<sup>48</sup>) might thus be germane to cases in which the *only* role of individuals claiming the protection of statute of repose was to supply or install insulation or gaskets or some other *subcomponent* of a larger improvement like an oil refinery. But *Condit* says nothing to limit or qualify the statute’s protection of *general contractors* like Parsons, who have designed and constructed *entire structures* that indisputably are “improvements to real property” and who are the very persons the statute of repose was expressly enacted to protect. Because all

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<sup>47</sup> *Id.* at 112.

<sup>48</sup> App. Br. at 19-21, citing **equipment manufacturer/supplier** cases (*Condit*; *State Farm v. W.R. Grace & Co.*, 24 F.3d 955 (7th Cir. 1994); *Covington v. W.R. Grace & Co.*, 952 P.2d 1105 (Wyo. S. Ct., 1998); *Buttz v. Owens-Corning Fiberglass Corp.*, 557 N.W.2d 90 (Iowa 1996); *Willis v. Raymark Indus. Inc.*, 905 F.2d 793 (4th Cir. 1990)) and **insulation contractor** cases (*Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633 (Ind. 2012); *Brandes v. Kaiser Gypsum Co.* (King Co. Super. Court, CP 766-67); and *Sundberg v. AC&S, Inc.* (King Co. Super. Court, CP 371-73).

The *only* decision, from *any* jurisdiction, cited by the Browns that involved the assertion of the statute of repose **by a general contractor** for the construction of an entire facility is *Jameson v. Saberhagen Holdings, Inc.*, a 2003 Skagit County Superior Court decision. Notably, in denying the general contractor’s summary judgment motion, the trial judge candidly acknowledged her inability to articulate the applicable test under the statute of repose, expressing hope for future guidance from the appellate courts. See App. Br. at 20 citing decision at CP 375; CP 411-12.

of the Browns' claims against Parsons arise from Parsons' activities in constructing that improvement, all of them are barred.<sup>49</sup>

**2. The Browns' "seller" argument has already been rejected and would lead to absurd results by effectively repealing the statute of repose as to all contractors.**

The Browns also claim that the statute of repose doesn't protect Parsons because they are suing Parsons not for its "construction activities" (which they concede would be protected), but only for its supposed "selling" activities, *i.e.*, the "selling" to ARCO of the insulation and gaskets used in the construction of the ARCO Refinery.<sup>50</sup> Notably, the Browns do not contend that Parsons was *in the business* of selling, marketing, or promoting the insulation, gaskets, or other materials that were needed for construction of the ARCO Refinery and that were billed through to ARCO per the contract. Instead, the Browns argue that Parsons' purchasing of construction materials for its construction work and its subsequent reimbursement from ARCO under its cost-plus contract constitutes "selling", and the activity of "selling" isn't protected by the statute.

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<sup>49</sup> Notably, even if *Condit's* subcomponent test (adopted from *Brown*) were somehow applicable to Parsons as the general contractor for the construction of the *entire* Refinery, Parsons would still qualify for protection under the statute. It is undisputed that insulation is commonly used in oil refineries (*i.e.*, is "integrally a normal part of that kind of improvement"); and it is likewise undisputed that the function of the Refinery *as intended by ARCO* required the use of insulation (*i.e.*, was "required for the structure to actually function *as intended*"). See *Condit*, 101 Wn.2d at 110-111, *quoting* *Brown*, 163 N.J. Super. at 195. See also, *e.g.*, CP 839 ("Hot insulation *shall be required* for all piping and equipment where heat loss is critical or where close temperature control is required. Under normal conditions insulation shall start for piping and equipment at 170° F and higher" (emphasis added)).

<sup>50</sup> App. Br. 25-28.

Notably, however, the Browns have elsewhere *conceded* that Mr. Brown's injury was caused by Parsons' and Brands' *construction activities*, not by some unrelated "sales" activities. They have stated:

*[T]he injury at issue was immediately and directly caused by the construction activity itself* because the cutting and sawing of the insulation created dust which Mr. Brown breathed.<sup>51</sup>

*Construction activities* are expressly covered by the statute of repose.

Furthermore, the Browns' argument ignores the terms of Parsons' construction contract with ARCO and the plain language of the statute, and it would lead to absurd results. The trial court properly rejected it.<sup>52</sup> Parsons contracted with ARCO to construct the ARCO Refinery. Parsons subcontracted with Brand to perform insulating work. The ARCO Contract required Parsons to perform *all work necessary* to complete the Refinery.<sup>53</sup> That work included the engineering, procurement and construction for *the entire Refinery*, which of course included procuring and installing all of the piping, gaskets, insulation and the millions of other sundry equipment, parts and materials required to build this large, complex and sprawling industrial facility.<sup>54</sup> Parsons' contract to construct the Refinery was a cost-plus contract, whereby Parsons was reimbursed by ARCO for the actual costs of all labor, equipment and materials used to construct the Refinery plus a 0.5% percentage fee.<sup>55</sup> Thus, Parsons' activities of procuring and receiving

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<sup>51</sup> CP 465 (emphasis added).

<sup>52</sup> RP 38 ("I do not buy that Parsons is a seller").

<sup>53</sup> CP 54-56.

<sup>54</sup> CP 54. The 1970 target contract cost for Parsons' design and construction of this huge facility was \$155,292,000 (*see* CP 117), more than *\$1.027 billion* in today's dollars.

<sup>55</sup> CP 74-75, 83.

reimbursement from ARCO for the insulation, gaskets, and other construction materials were not somehow “distinct” from Parsons’ *construction* activities; rather they were *inherent* in and *essential* to those construction activities as defined by the ARCO Contract.

The logical fallacy of the Browns’ argument is clear. Obviously, a contractor cannot construct any improvement without the acquisition and use of *some* kind of construction materials, whether it be insulation, lumber, cement, nails, drywall, roofing, wiring, *etc.* It is equally obvious that construction contracting is generally not a *pro bono* pursuit; certainly as part of their contracts—whether cost-plus, lump sum, or otherwise—all contractors try to recover in some manner the cost of their construction materials. If that cost recovery for the contractor’s construction materials transforms the contractor into a “seller” of those materials, outside the reach of the statute of repose, then the “broad and sweeping” protections of the statute of repose against claims arising from construction activity simply vanish. A contractor building a home would no longer be protected from claims arising from their installation of, *e.g.*, drywall or roofing, because the contractor had to *purchase* that drywall and roofing from suppliers and, according to the Browns, is therefore a “seller” of those items when the contractor passes through that cost to the homeowner. And this logic would extend to literally everything and anything the contractor purchases to build a home.

No case law supports such absurd results. To the contrary, in the 2014 unpublished *Ehlert* decision<sup>56</sup>, this Court specifically *rejected* the proposition that Brand (Parsons’ insulation subcontractor) was a “product seller” simply because it acquired the insulation for its work at the ARCO Refinery and thereafter invoiced Parsons for it. The plaintiff there made basically the same argument against Brand that the Browns now advance against Parsons, *i.e.*, that Brand was a “seller” of the asbestos insulation it installed under its subcontract with Parsons because it “acquired the insulation itself, through its own business channels, and invoiced Parsons for the product.”<sup>57</sup>

Division One of this Court in *Ehlert* flatly rejected that argument.<sup>58</sup> The Court noted that, at most, the purchase and invoicing of the asbestos-containing insulation was “incidental” to Brand’s business of construction subcontracting:

The record shows that Brand *merely received reimbursement* for the cost of materials it used to complete a service contract; any alleged “sale” was incidental to the contract to provide installation services. At most, Brand was an occasional seller of insulation.<sup>59</sup>

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<sup>56</sup> *Ehlert v. Brand Insulations, Inc.*, 183 Wn. App. 1006, 2014 WL 4198355 at \*4-\*5 (2014), cited as persuasive authority under GR 14.1. Parsons was not a party to *Ehlert*.

<sup>57</sup> *Id.* at \*3.

<sup>58</sup> *Id.* at \*4.

<sup>59</sup> *Id.* (emphasis added).

Accordingly, such incidental transactions as part of its subcontract did not make Brand a “seller” of insulation under Restatement (Second) of Torts 402A (1965).<sup>60</sup>

The same logic applies directly to Parsons: the evidence submitted by the Browns showed, unsurprisingly, that Parsons received reimbursement from ARCO for the cost of materials it used to complete the ARCO Contract and to construct the Refinery. As in *Ehlert*, any purported “sale” of insulation and gaskets by Parsons to ARCO was, at most, incidental to *Parsons’ construction of the Refinery*. And because the Browns’ claims arise from Parsons’ *construction* of the Refinery, they are barred by the plain language of the statute of repose.

*Pfeifer* and the other authorities cited by the Browns do not support their implausible “seller” argument. In *Pfeifer*, a property owner, Island Construction, built condominium units with allegedly inadequate fire protection stops. After construction was complete, Island sold one of the units to the plaintiff, without disclosing to her the inadequate fire protection. Plaintiff was subsequently injured when a fire broke out. She sued Island not as the *builder* of the defective condominium, but as a *seller*—on the grounds that Island had negligently and intentionally *concealed* a dangerous condition during the sales transaction.<sup>61</sup> Island argued that the statute of repose barred plaintiff’s claim, since her claim arose from Island’s (allegedly defective) construction of the condominium. The plaintiff

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<sup>60</sup> *Id.* at \*4, n.13.

<sup>61</sup> 112 Wn.2d at 564.

countered that her claim did not arise from the *defective construction* but rather from Island's separate, post-construction act of *concealment*.<sup>62</sup>

The trial court agreed with Island and dismissed plaintiff's claim, but the Supreme Court reversed, holding that because the plaintiff's claim was based on the seller's concealment of a defect during the sale, the statute of repose did not apply, despite the fact that the seller had also *built* the improvement.<sup>63</sup> In determining the applicability of the statute of repose, the Court emphasized that the statute contemplates an "activities" analysis:

[T]he focus [of the statute] is on activities. If the claim arises from those activities, the person is covered; if it does not, he is not covered.<sup>64</sup>

Finding that the plaintiff's claim did not arise from a *construction activity*, but rather from the activity of *concealment during sale*, the Court held that the statute of repose did not bar plaintiff's claim.<sup>65</sup>

Far from supporting the Browns' "seller" argument, *Pfeifer* underscores the *applicability* of the statute to bar their claims against Parsons. Unlike the plaintiff's claims in *Pfeifer*, the Browns' claims do not arise from any tortious *post*-construction activities of Parsons or any other activities that were unrelated to Parsons' construction work. Rather, their claims arise directly and exclusively from Parsons' activities in *constructing the ARCO Refinery*, which, like all construction, necessarily included the procurement and use of construction materials. Unlike the

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<sup>62</sup> *Id.* at 567.

<sup>63</sup> *Id.* at 568.

<sup>64</sup> *Id.* at 569.

<sup>65</sup> *Id.*

plaintiffs in *Pfeifer*, the Browns did not claim that Parsons’ “selling” of asbestos-containing products unrelated to its construction activities caused Mr. Brown’s injury; rather, they claimed that he was injured by Parsons’ and Brands’ *construction activities* in the handling of these products, *i.e.*, activities that caused the release of asbestos dust that Mr. Brown inhaled. They stated:

*[T]he injury at issue was immediately and directly caused by the construction activity itself* because the cutting and sawing of the insulation created dust which Mr. Brown breathed.<sup>66</sup>

Elsewhere the Browns specifically conceded that “[p]laintiffs’ claims against Parsons . . . are based on its work *designing and constructing* the Atlantic Richfield Cherry Point Refinery[.]”<sup>67</sup> “Designing” and “constructing” of an improvement are protected activities that are *specifically listed* in the statute of repose.<sup>68</sup> The Browns’ have thus admitted that their claims against Parsons arise from *construction activities* that are expressly covered by the statute of repose, not by any supposed “selling” of asbestos products to ARCO. And as the *Pfeifer* Court held, if the claim arises from the activities listed in the statute, *the person is covered*.<sup>69</sup> Accordingly, Parsons is covered.

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<sup>66</sup> CP 465 (emphasis added).

<sup>67</sup> See CP 221. (emphasis added)

<sup>68</sup> RCW 4.16.300.

<sup>69</sup> 112 Wn.2d at 569.

**3. The Browns’ “contractor registration” argument is based on an inapplicable statute.**

Citing to the current (2004) version of RCW 4.16.300, the Browns proceed to argue that, in order to claim the protection of the statute of repose, Parsons was required to present evidence proving that it was “registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041.”<sup>70</sup>

Because construction of the ARCO Refinery was substantially completed in 1972, it is the 1967 version of the statute of repose that applies to this case.<sup>71</sup> And the 1967 version did not contain the registration and licensing citations relied upon by the Browns; those were added in 2004. Their “contractor registration” argument therefore fails as a matter of law.

**IV. CONCLUSION**

This Court cannot and should not judicially repeal the “broad and sweeping” language of the statute of repose by adopting the Browns’ arguments. Our Supreme Court has repeatedly focused its statutory analysis on whether the persons and activities that are the subject of the complaint are the ones contemplated by the statute, which specifically includes the *designing* and *constructing* of an improvement to real property.

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<sup>70</sup> See App. Br. at 29. Notably, the Browns never actually disputed that Parsons was in fact duly and properly licensed; rather, they argued only that Parsons did not *present evidence* of its licensing in support of its summary judgment motion and therefore the trial court should have denied summary judgment on account of this supposed procedural oversight. In fact, the ARCO Contract itself contains Parsons’ affirmation of compliance with all applicable laws, regulations and departmental requirements (CP 61), and the Browns offered no evidence to dispute that affirmation.

<sup>71</sup> See *Cameron*, 8 Wn. App. at 809 (applying the 1967 version of RCW 4.16.300 where the “substantial completion” of construction was in 1972: “the operative date of the statute of repose is the date of substantial completion of construction [.]”).

It is undisputed that Parsons was the designer and general contractor for construction of the ARCO Refinery.

It is undisputed that the ARCO Refinery built by Parsons was “an improvement upon real property.”

It is undisputed—and in fact the Browns *conceded*—that their claims against Parsons are “based on [Parsons’] work *designing and constructing* the [ARCO] Refinery”<sup>72</sup> and that Mr. Brown’s injury “*was immediately and directly caused by the construction activity itself.*”<sup>73</sup>

And it is likewise undisputed that the Browns did not bring these claims within six years after the “substantial completion” of the ARCO Refinery in 1971.

Accordingly, the Browns’ claims against Parsons are barred by RCW 4.16.300-.310, the trial court properly granted summary judgment. This Court should affirm that judgement.

Respectfully submitted this 29<sup>th</sup> day of October, 2019.

**CARNEY BADLEY SPELLMAN, P.S.**

By   
\_\_\_\_\_  
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<sup>72</sup> CP 221.

<sup>73</sup> CP 465 (emphasis added).

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED: October 29, 2019.

*S: Patti Saiden*  
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Patti Saiden, Legal Assistant

# CARNEY BADLEY SPELLMAN

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