
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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.

PLAINTIFFS'/APPELLANTS' REPLY BRIEF

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I. ARGUMENT

Plaintiffs ask this Court to apply the plain language of RCW 4.16.300 *et seq.* and mandatory authority, which clearly state the protections of the statute apply only to claims arising from enumerated activities to structures or their integral systems, not accoutrements to the manufacturing process. Nothing more, nothing less. But respondents ask this Court to do more by judicially expanding the plain meaning of “arising from” (Respondent Parsons Government Services, Inc.) and do less by declining to apply the clear holding of *Condit v. Lewis Refrigeration Company*, 101 Wn.2d 106, 676 P.2d 466 (1984) and subsequent cases (Respondent Brand Insulations, Inc.). The Court should decline Respondents’ contradictory invitations.

A. *Condit v. Lewis Refrigeration Co. is mandatory, controlling authority that clearly defines an improvement upon real property as a structure or its integral system.*

Respondent Brand attempts to throw *Condit* “on the scrap heap”¹ despite the fact it is mandatory authority.² In *Condit*, the Washington Supreme Court clearly states that improvements upon real property only include structures of a building and their integral systems:

We believe our statute [RCW 4.16.300 *et seq.*] should be so limited. The test suggested by the *Brown* court protects individuals who work on structural aspects of the building, but not manufacturers of heavy equipment or nonintegral systems within the building.³

¹ Brief of Respondent Brand (“Brand Br.”) at 13.

² *Puente v. Resources Con. Co. Intern.*, 5 Wn. App. 2d 800, 809, 428 P.3d 415 (2018) (“The Washington Supreme Court decision in *Condit v. Lewis Refrigeration Co.*, controls.”); see also *Lakeview Blvd. Condo. v. Asc*, 144 Wn.2d 570, 578-79, 29 P.3d 1249 (2001).

³ *Condit*, 101 Wn.2d at 111 (emphasis added).

The *Brown* case from which the Washington Supreme Court took guidance clearly states so as well:

As best we can perceive, the intent of the language of the statute was to protect those who contribute to the design, planning, supervision or construction of a structural improvement to real estate and those systems, ordinarily mechanical systems, such as heating, electrical, plumbing and air conditioning, which are integrally a normal part of that kind of improvement, and which are required for the structure to actually function as intended.⁴

This is *Condit's* central holding—not “cherry picked dicta.”

Respondent Brand concedes the temporary insulation it installed on piping and manufacturing equipment in the refinery was not an improvement upon real property: “Brand did not present evidence that its work constituted an improvement, in and of itself, because it wasn’t an improvement, in and of itself, and Brand never contended it was.”⁵ Brand then argues whether its work constituted an improvement upon real property is a “completely irrelevant inquiry.”⁶ Brand attempts to buttress this bizarre argument by claiming other cases, unrelated statutes, and the purpose of RCW 4.16.300 *et seq.* either limit or abrogate *Condit*.

For example, Brand claims the Washington Supreme Court’s *Washburn* decision “refutes the argument that the statute of repose is restricted to structural elements of an improvement” because the court in that case, as a counter-example to the defendant’s argument, stated electricians are not manufacturers.⁷ In *Washburn*, the Washington Supreme Court was asked to determine whether an installer of a pipeline system could be considered a manufacturer as opposed to a builder of an

⁴ *Id.* at 110–11 (quoting *Brown v. Jersey Central Power & Light Co.*, 394 A.2d 397, 405 (N.J. App. Div. 1978)) (emphasis added).

⁵ Brand Br. at 3, n. 5.

⁶ *Id.*

⁷ Brand Br. at 15.

improvement upon real property.⁸ The central issue in that case was whether the terms “contractor” and “manufacturer” could be mutually exclusive and the court ruled they were not. In rejecting the defendant-contractor/manufacturer’s argument that such a finding would make all contractors into manufacturers, the Washington Supreme Court used the example of an electrician installing a service panel.⁹ Nowhere in the case does the court suggest it is overturning its prior decision in *Condit*, and in fact, the example of the electrician is consistent with the holding in *Condit*. As noted above, *Condit* defines “improvement upon real property” as a structure or its integral systems and uses electrical systems as an example of one such integral system. Brand’s interpretation of *Washburn* is totally unmoored from the Washington Supreme Court’s language.

Brand goes on to claim the purpose of the statute contradicts the holding in *Condit*. Relying upon *Lakeview Blvd.*, Brand argues the Legislature’s goal in enacting the builder’s statute of repose was to insulate any and all contractors from unbounded liability.¹⁰ But the Washington Supreme Court in *Lakeview* was only deciding whether the statute was constitutional and in fact cited *Condit* with approval.¹¹ Moreover, the purpose of the statute as described by the Washington Supreme Court in *Lakeview* does not inure to Brand’s benefit in this case. As Plaintiffs explained in their opening brief, the primary purpose of the builder’s statute of repose is to protect builders from liability from others’ subsequent negligence.¹² Plaintiffs are seeking to hold Brand responsible for its own actions exposing Mr. Brown to asbestos. Furthermore, another purpose of

⁸ *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1993).

⁹ *Id.* at 262.

¹⁰ Brand Br. at 7–8.

¹¹ *Lakeview Blvd.*, 144 Wn.2d at 578–79.

¹² *Id.* at 577.

the statute is to limit claims where evidence and witnesses have been lost due to the passage of time.¹³ Here, there is abundant documentary evidence and witness testimony showing Brand and Parsons specified, sold, supplied, and installed asbestos-containing products at Cherry Point.¹⁴ Indeed, Brand has already tried and lost its case to a jury and the Court of Appeals for this exact same work once before.¹⁵ There is no lack of evidence in this matter.

Finally, Brand argues unrelated statutes provide an alternate, superseding definition for “improvement upon real property,” but none of the statutes to which it cites are related or actually provide any definition for the term. Brand incorrectly claims RCW 18.27.020 contains “a very broad definition of ‘improvement,’”¹⁶ but neither that section of the statute, nor its definition section, actually defines “improvement.”¹⁷ Brand goes on to claim RCW 60.04.011 is a related statute,¹⁸ but it is not referenced at all by the builder’s statute of repose, and Brand offers no explanation why the two are interrelated. Indeed, RCW 60.04.011 was enacted 24 years *after* the builder’s statute of repose and outlines procedural requirements for asserting liens.¹⁹ There is no basis for assuming the two are interrelated. Brand’s “overall statutory scheme” is an imagined one.

¹³ *Id.* at 578.

¹⁴ *See, e.g.*, Agreement for Design, Purchase of Materials and Construction between Atlantic Richfield Company and The Ralph M. Parsons Company, CP 499-570; Lump Sum-Unit Price Subcontract between The Ralph M. Parsons Company and Brand Insulations, Inc., CP777-833; 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 727-763; excerpts of deposition of Nils Johnson, CP 348–54; Excerpts of deposition of Trevor Pazaski, CP 356–66; excerpts of deposition of Abe Johnson, CP 475–89.

¹⁵ *Estate of Brandes v. Brand Insulations, Inc.*, 197 Wn. App. 1043, 2017 WL 325702 (2017) (unpublished).

¹⁶ Brand Br. at 19.

¹⁷ RCW 18.27.010.

¹⁸ Brand Br. at 18.

¹⁹ RCW 60.04.011.

In the end, Brand suggests the only question before the Court should be whether it could have filed a lien against the property for its labor or materials.²⁰ Not only is the record before the Court devoid of any evidence showing Brand could have filed such a lien, but this is precisely the type of mechanistic, property law-based analysis the Washington Supreme Court rejected in *Condit*.²¹ Brand has conceded the temporary insulation it installed on the piping and equipment used in the manufacturing process was not an improvement upon real property (“Brand did not present evidence that its work constituted an improvement, in and of itself, because it wasn’t an improvement, in and of itself, and Brand never contended it was”²²) and the Court should reverse the Superior Court’s grant of summary judgment.

B. The plain language of RCW 4.16.300 et seq. shows it only applies to claims “arising from” an improvement upon real property.

Courts interpreting statutes are bound by the Legislature’s choice of words and cannot construe those words to avoid giving effect to their plain meaning.²³ RCW 4.16.300 *et seq.* applies only to claims “arising from” improvements upon real property.²⁴ “Arising or arising out of is ordinarily understood to mean originating from, having its origin in, growing out of, or flowing from.”²⁵

The Legislature’s use of the term “arising from” is a clear instruction to limit application of the statute to claims which directly and wholly pertain

²⁰ Brand Br. at 20.

²¹ *Condit*, 101 Wn.2d at 110 (“[W]e believe that the mechanistic approach evident in these two cases discourages the primary goal of this court in interpreting statutes.”).

²² Brand Br., at 3, n. 5.

²³ *E.g.*, *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 418 832 P.2d 489 (1992).

²⁴ RCW 4.16.300.

²⁵ *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 471, 804 P.2d 659 (1991) (internal quotation marks and citation omitted).

to improvements upon real property. Parsons attempts to circumvent the plain language of the statute by asking the Court to broaden the term “arising from.” Instead of analyzing which products exposed Mr. Brown to asbestos and caused his mesothelioma and death, Parsons argues the analysis should focus on its own status as a general contractor. In effect, Parsons would have the Court re-write the statute such that a defendant’s status as a general contractor would drive the analysis rather than the physical item which actually caused the injury. Such a revision would swallow the limitations established by the Legislature’s language and give the statute an unbounded scope because *any* action, no matter how far attenuated or removed from an actual improvement upon real property, could be protected so long as the defendant performed the action in its capacity as a general contractor.

Courts reject this approach. Washington courts interpreting the statute clearly focus upon the physical item which caused the injuries. *Condit* focused on the conveyor belt which injured the plaintiff.²⁶ *Jones* focused on the dock that collapsed.²⁷ *Washburn* focused on the piping system,²⁸ and *Puente* on the boric acid evaporator system that exploded.²⁹ The trial court decision in *Jameson v. Saberhagen* confronted this issue head-on when it ruled, “Whether one is a general or a sub, it is probably not very relevant to whether or not one is liable for the placement of this material in the – around the pipes at the refinery.”³⁰ The status of the defendant is not relevant to the analysis. What matters is whether the item

²⁶ *Condit*, 101 Wn.2d 106, 676 P.2d 466 (1984).

²⁷ *Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 741 P.2d 75 (1987).

²⁸ *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1993).

²⁹ *Puente*, 5 Wn. App. 2d 800.

³⁰ King County Superior Court Order in *Jameson v. Saberhagen*, No. 02-2-01069-8 (Super. Ct. July 31, 2003), CP 410:24–11:2.

that caused the injury—be it a dock, conveyer belt, or asbestos-containing insulation and gaskets – is an improvement upon real property. Focusing on the item which actually caused the injury is not “death by a thousand loopholes.”³¹ It is simply what is required by the Legislature’s language and mandatory authority.

Plaintiffs’ claims in this case clearly arise from exposure to asbestos-containing insulation and gaskets intended for and used upon the manufacturing equipment in the refinery because those were the products that contained asbestos. This is and always has been clear:

Specifically, Parsons: 1) specified, directed, required, prescribed, and otherwise called for the use of asbestos-containing materials and products, including but not limited to thermal insulation, at the Cherry Point Refinery; 2) supplied, distributed, and otherwise made available for use asbestos-containing materials and products, including but not limited to thermal insulation, at the Cherry Point Refinery; and 3) directed, supervised, and otherwise participated in the installation, removal, replacement, and other work with asbestos-containing materials and products, including but not limited to thermal insulation, at the Cherry Point Refinery.³²

Parsons repeatedly attempts to use an introductory phrase designed to provide context for Plaintiffs’ answer as an admission against interest, but the specific nature of Plaintiffs’ claims is and always has been grounded firmly and totally in exposure to asbestos-containing materials and products—not exposure to the refinery itself. Moreover, as this case is still at the summary judgment stage, Plaintiffs are entitled to all reasonable inferences from the evidence, including their answers to Parsons’ interrogatories.

It was not the cement in the foundation, the tiles on the roof, or the insulation in the walls which exposed Mr. Brown to asbestos, but the

³¹ Brief of Respondent Parsons (“Parsons Br.”) at 2.

³² Plaintiffs’ Responses to Defendant Parsons Governmental Services, Inc.’s First Set of Interrogatories and Requests for Production, CP 925:13–23 (emphasis added).

insulation and gaskets used on the manufacturing equipment. Plaintiffs' claims clearly arise from these products, and mandatory authority requires a finder of fact to determine whether these products are improvements upon real property. Despite attempting to shoehorn it into its response brief,³³ Parsons provided no evidence or argument at summary judgment even suggesting these asbestos-containing products were structural in nature or integral to the refinery's operation. The Superior Court erred and summary judgment should be reversed.

C. Whether Parsons or Brand engaged in selling is a question of fact for the jury to decide.

Neither Parsons nor Brand disputes the holding of the Washington Supreme Court's decision in *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 772 P.2d 1018 (1989). Rather, each argues the Appellate Court's decision in *Ehlert v. Brand Insulations, Inc.*, 183 Wn. App. 1006, 2014 WL 4198355 (2014) (unpublished) precludes *Pfeifer's* application as to them since the court there held as a matter of law that Brand's actions in that case did not rise to the level of selling. However, that decision was restricted to selling for purposes of strict liability claims, which has more stringent requirements than those for negligence and is not controlling for purposes of Plaintiffs' negligent sales claims. Indeed, other trial courts have rejected Respondents' proposed application.³⁴

Both respondents go on to conjure up a parade of horrors which would result from applying the rule in *Pfeifer*. The dubious merit of this argument notwithstanding, it is clear the contract at issue was a cost-plus

³³ Parsons Br. at 15 n. 49.

³⁴ King County Superior Court Order in *Sundberg v. ACandS Inc.*, et al., No. 99-2-21756-0 (Super. Ct. December 18, 2000), CP 371-73; King County Superior Court Order in *Brandes v. Kaiser Gypsum*, et al., No. 14-2-21662-9 (Super. Ct. March 13, 2015), CP 766-67.

contract. Such contracts specifically contemplate purchases of materials by the owner from the contractor, with a certain percentage on top for profit. Administrative and overhead services are generally not charged because the percentage on the materials and labor sold covers such expenses.³⁵ Other types of contracts exist,³⁶ including types where the owner supplies the materials or does not otherwise require the contractor to procure the materials. Plaintiffs have clearly argued their claims against Parsons and Brand arise from their respective selling activities and provided evidence in support.³⁷ Parsons and Brand chose to use a cost-plus contract and in so doing acted as sellers of asbestos-containing products.³⁸ Mandatory authority clearly permits actions against contractors for their selling activities and Plaintiffs presented evidence showing Parsons and Brand sold asbestos-containing insulation and gaskets. The Superior Court erred in finding there was no genuine issue of material fact, and summary judgment should be reversed.

II. CONCLUSION

Respondents Parsons Government Services, Inc. and Brand Insulations, Inc. alternately ask this Court to do too much and do too little. Brand asks the Court to decline to apply mandatory authority holding an improvement upon real property is a structure or one of its integral systems.

³⁵ See *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 737, 739–40, 119 P.3d 926 (2005) (“In a cost-plus-a-percentage-of-the-cost contract, the contracting party reimburses the contractor for the costs of the material and labor and the contractor’s profit or gain is to be a certain percentage of the total cost of the project”) (internal citations omitted).

³⁶ Excerpts of deposition of Abe Johnson, CP 480:10–18.

³⁷ *E.g.*, Excerpts of deposition of Abe Johnson, CP 481:11–17 (“In this case they [Parsons] charged us [Atlantic Richfield] an overhead charge, as I recall, for the offices and then there was fixed fee – or a percentage fee – excuse me – on the total expenditure at the end of the day and they got it whether it was for engineering, **procurement**, or construction.”) (emphasis added).

³⁸ Excerpts of deposition of Abe Johnson, CP 480:19–25.

On the other hand, Parsons would have this Court judicially re-write the term “arising from” out of the statute and grant it immunity simply by virtue of its status as general contractor. Such a holding would give the statute a potentially limitless scope unmoored from the Legislature’s language. Plaintiffs ask this Court to apply the statute and case law as written, which require a showing that the claims “arise from” an enumerated activity to “an improvement upon real property.” Plaintiffs’ evidence shows a genuine material issue of fact whether 1) the asbestos-containing gaskets and insulation from which their claims arise were “improvements upon real property,” 2) Parsons and Brand engaged in selling and supplying activities which were not protected by the statute, and 3) Plaintiffs’ claims arise therefrom. 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 30th day of December, 2019.

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