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No. 681320

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

NINA L. MARTIN, individually and as Personal Representative of the ESTATE OF DONALD R. MARTIN, RUSSELL L. MARTIN, THADDEUS J. MARTIN, and JANE MARTIN,

Plaintiffs-Appellants,

vs.

DEMATIC dba/fka RAPISTAN, INC., MANNESMANN DEMATIC, and SIEMENS DEMATIC; GENERAL CONSTRUCTION COMPANY; WRIGHT SCHUCHART HARBOR COMPANY; and FLETCHER CONSTRUCTION COMPANY NORTH AMERICA,

Defendants-Respondents.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

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I. INTRODUCTION

In this brief, Appellants/Cross Respondents Nina Martin, individually and as personal representative of the estate of her deceased husband, Donald, and their children Russell, Thaddeus and Jane (collectively the Martin family) combine their response to the cross appeal filed by Respondent/Cross Appellant General Construction Company (General), and their reply to the briefs filed by General and Respondent Fletcher Construction Company North America (FCCNA) in response to their own appeal.

II. RESTATEMENT OF ISSUES REGARDING GENERAL'S CROSS APPEAL

1. Is the machinery that killed Donald Martin an "improvement to real property," as required to trigger application of the statute of repose, RCW 4.16.300 and .310?

2. Did the Martin family's claims accrue within six years of the "termination of services" by General, as required by the statute of repose?

3. Was General's predecessor a "product seller" or "manufacturer," within the meaning of the Washington Product Liability Act, RCW 7.72.010(1) and (2)?

III. RESTATEMENT OF THE CASE REGARDING GENERAL'S CROSS APPEAL

A. Tissue Machine No. 5.

As part of a larger construction project, Wright Schuchart Harbor Co. (WSH) installed Tissue Machine No. 5 (TM5) at the Scott Paper (now Kimberly-Clark) paper mill in Everett, Washington. CP 1862. TM5 recycles defective or excess tissue products, called "broke," into large rolls of tissue that weigh 2,000-3,000 pounds. The large rolls are then taken to another part of the mill and further processed into various paper products. CP 1872.

Broke is collected from other parts of the plant in carts. The carts are emptied into the "cart dumper," which, in turn, dumps the broke onto Conveyor 6 of TM5. Conveyor 6 then transports the broke to one of two destinations, either to a "pulper vat" via Conveyor 7, or to a "baler" via Conveyor 8. Conveyor 8 is an overhead "dipping" conveyor. When it is raised, broke proceeds from Conveyor 6 to Conveyor 7 to the pulper vat. When it is lowered (or "dipped"), Conveyor 8 collects broke from Conveyor 6, diverting it from Conveyor 7 and transporting it to the baler. CP 1873-83.

Mill employees must activate a switch to lower Conveyor 8. When the switch is activated, Conveyor 8 drops 4.5 feet in approximately 1.5

seconds. CP 1880-81. In its lowered position, there is only a six-inch gap between the top of Conveyor 6 and the bottom of Conveyor 8. CP 1875.

On occasion broke jams prevent Conveyor 8 from being fully lowered. When this occurs, mill employees must clear the jam by raking the broke away from the gap between Conveyor 6 and Conveyor 8, while standing on an elevated walkway/work platform next to the conveyors. CP 1877-78.

WSH erected and installed the TM5 paper machine, its conveyors, and the equipment needed to operate them. CP 456-57 & 557. WSH also fabricated and installed the elevated walkway/work platform next to the unguarded crush point. CP 459. It was necessary for mill employees to stand on the walkway/work platform to clear broke jams, which they could not otherwise reach from the plant floor. CP 466.

As installed, TM5 violates several safety regulations and standards. There is an unguarded crush point at the location where mill employees must stand on the elevated walkway/work platform to clear broke jams, in violation of then-current Washington Industrial Safety and Health Act (WISHA) regulations, WAC 296-24-15001 (1980), and American National Standards Institute, Safety Standards for Conveyors and Related Equipment (ANSI Safety Standards), § 6.01.1.1 (1976). CP 323 & 341. The switch for lowering Conveyor 8 is located so that a mill employee

lowering the conveyor cannot see whether another employee is in harm's way, violating ANSI Safety Standards, § 5.11.2.1. CP 340. These safety violations subject mill employees to the risk of injury from Conveyor 8 being inadvertently lowered onto them while clearing a broke jam.

There is no audible or visible warning or signal before Conveyor 8 can be lowered, violating ANSI Safety Standards § 5.11.2, and there is no kill switch or other device that the employee can use to prevent Conveyor 8 from being lowered while clearing a broke jam, violating ANSI Safety Standards § 5.11.2.3. CP 340. These safety violations prevent mill employees from protecting themselves from injury.

After installation of TM5, WSH and its successor, General, maintained a continuous office presence at the paper plant. CP 1826-28. WSH and General had a series of "Evergreen" contracts for ongoing work. CP 1829. General continued providing construction services related to TM5 under these contracts until 2008. CP 1520-26 & 1830-32. For example, in 2004 General performed the following services: "TM5 #2 Printer Piping," "TM5 Air Line Replacement," "TM5 Transmitter Access Platform," "TM5 Shower Pump-1 Conduit," "TM5 Wire Frame Work," "TM5 Dust Collector Rebuild," "TM5 Scaffold," "TM5 Cantilever Strongback," "TM5 Roll-Up Door Repair," "TM5 Cameras," "TM5 Vacuum Line (Roof)," and "TM5 Latex Recovery." CP 1579-80 & 1582.

B. The death of Donald Martin.

On August 13, 2004, Donald Martin was working at the paper plant, clearing a broke jam below Conveyor 8. He could not see that a fellow employee was about to lower the conveyor, nor could the other employee see him. Without warning, the conveyor dropped, crushing Mr. Martin and causing his death. Immediately after Mr. Martin's death, General permanently locked out Conveyor 8 of TM5 to eliminate the crush point. CP 1568-70.

C. Denial of summary judgment in favor of General.

The Martin family filed suit against WSH, and against General as WSH's successor, among others. CP 3576-85. In addition to cross motions for summary judgment based on General's successor liability, which are the subject of the Martin family's appeal, General moved for summary judgment based on the statute of repose, RCW 4.16.300-.310, and the Washington Product Liability Act (WPLA), RCW ch. 7.72. CP 1947-61.

General argued that the repose period expired in 1987, six years after substantial completion of TM5. In response, the Martin family argued that the statute of repose did not apply because TM5 is not a building or other improvement upon real property. In addition, they argued that the repose period never began to run because General did not terminate its services regarding TM5 until after Donald Martin was killed.

With respect to the WPLA, General argued that it was neither a "product seller" nor a "manufacturer," as defined by the Act. The Martin family responded that General's erection and installation of TM5—in particular the fabrication and installation of the elevated walkway/work platform that created the unguarded crush point—satisfied both definitions, and that General was therefore subject to liability under the WPLA.

The superior court denied General's summary judgment motion, both as to the statute of repose and the WPLA. CP 3681-83. General cross appeals the denial of its motion.

IV. SUMMARY OF ARGUMENT REGARDING GENERAL'S CROSS APPEAL

The statute of repose only applies to improvements upon real property. An improvement upon real property refers to structural aspects of a building, and systems that are required for the structure to function as intended, such as heating, electrical, plumbing and air conditioning. Production equipment that is not integral to the function of a building in which it is located does not constitute an improvement upon real property. Here, TM5 is merely production equipment, and the statute of repose is inapplicable.

Even if the statute applied, however, the repose period does not begin to run until the termination of services. In this case, General and its predecessor continued construction services related to TM5 until 2008, after the Martin family filed their complaint, so the repose period never began to run and therefore did not expire.

With respect to the WPLA, General's predecessor, WSH, is a "product seller" and "manufacturer" as defined by the Act because it fabricated and installed the elevated walkway/work platform that created the unprotected crush point where Donald Martin was killed.

At a minimum, the superior court's order denying General's motion for summary judgment based on the statute of repose and the WPLA should be affirmed.

V. ARGUMENT IN RESPONSE TO GENERAL'S CROSS APPEAL

A. The statute of repose does not bar the Martin family's claims.

The superior court denied General's motion for summary judgment based on the statute of repose. Review of the superior court's order is de novo. *See Elcon Constr., Inc. v. Eastern Wash. Univ.*, 174 Wn. 2d 157, 164, 273 P.3d 965 (2012). In addition, the standard of review must account for the placement of the burden of proof. The statute of repose is an affirmative defense for which General bears the burden of proof. *See* CP 3547 (General's affirmative defense #4); *see also Estate of Palmer*,

145 Wn. App. 249, 258-59, 187 P.3d 758 (2008) (indicating statute of repose is affirmative defense, involving repose period under RCW 11.11.070(3)); *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn. 2d 261, 267, 189 P.3d 753 (2008) (placing burden of proof on defendant raising affirmative defense, involving limitations period under RCW 4.16.350).

Because the burden is on General, the company is obligated to produce evidence supporting every element of its statute of repose defense, as well as demonstrate an absence of any genuine issues of disputed material fact, in order to obtain summary judgment in its favor. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225-26, 770 P.2d 182 (1989) (adopting *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), standard). For their part, the Martin family may simply point to the absence of evidence supporting one or more elements of General's statute of repose defense to obtain summary judgment in their favor, or they may demonstrate the existence of a genuine issue of disputed material fact regarding one or more elements to affirm the superior court. *See id.*

The statute of repose requires certain claims to accrue, if at all, within six years of either substantial completion of construction or termination of services. RCW 4.16.310. Claims subject to the statute of repose must arise from improvements to real property, and also involve

the performance of work requiring certain business or professional licenses. RCW 4.16.300.[1]

In analyzing a statute of repose defense, the Court must first determine whether the statute of repose applies under the circumstances. *See Pfeifer v. Bellingham,* 112 Wn. 2d 562, 567, 772 P.2d 1018 (1989) (describing steps of analysis under statute of repose). Then, if the statute is applicable, the Court must determine whether the plaintiffs' claims accrued within the repose period. *See id.*, 112 Wn.2d at 567.

In this case, General has failed to satisfy its burden of proof, and, at a minimum, the superior court's denial of its motion for summary judgment on the statute of repose should be affirmed. The statute of repose does not apply because the machinery that killed Donald Martin does not involve an improvement to real property. However, even if the statute of repose applied, it would not bar the Martin family's claims because General did not terminate its services related to TM5 until after Donald Martin's death. In this sense, their claims accrued before the repose period began to run. Either one of these reasons would be sufficient to enter summary judgment in the Martin family's favor, dismissing General's statute of repose defense.

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[1] The full text of the current versions of RCW 4.16.300 and .310 are reproduced in the Appendix to this brief.

1. The statute of repose does not apply because the machinery that killed Donald Martin is not an improvement upon real property.

The statute of repose is limited by its terms to "any improvement upon real property." RCW 4.16.310. An improvement upon real property refers to structural aspects of a building, and it includes systems that are required for the structure to function as intended, such as heating, electrical, plumbing and air conditioning. *See Condit v. Lewis Refrig. Co.*, 101 Wn. 2d 106, 110-11, 676 P.2d 466 (1984) (adopting test from *Brown v. Jersey Central Power & Light Co.*, 163 N.J. Super. 179, 195, 394 A.2d 397 (1978)). It does not include heavy equipment or non-integral systems within the structure, such as "production equipment" or "accouterments [sic] to the manufacturing process taking place within the improvement." *Condit*, 101 Wn. 2d at 111-12 (brackets added). As explained in *Condit,* "[m]echanical 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." *Id.* at 111.

This understanding of improvements upon real property avoids the difficulties involved in making a formalistic distinction between real property and personal property that may be affixed to real property. *See Condit,* at 109-10. It is consistent with the purpose of the statute of repose,

which focuses on structures rather than items located within such structures. *See id.* at 110-11. It also minimizes the possibility of abuse by product manufacturers and others, who could insulate themselves from liability beyond the repose period by simply bolting, welding or fastening equipment in some other manner to a building. *See id.* at 111.

With a proper understanding of improvements upon real property, it is apparent that the statute of repose does not apply to the machinery that killed Donald Martin. The machinery was installed as part of a project including both the construction of buildings ("a paper machine facility, vital supplies building, parent roll storage building and a remodeling of the existing storage area to house a new 5-line paper converting system") and the installation of machinery located within the buildings ("the paper machine, all supporting process systems and the five converting lines"). CP 162. The machinery that killed Donald Martin is not itself a building, nor is it required for the structure to function as intended. In fact, TM5 was "mothballed" for a period of time before Donald Martin was killed, CP 1861, and Conveyor 8 was "locked out" afterward, CP 1568-70, confirming that it was not integral to the building within which it was located.

TM5 is precisely the sort of equipment described in *Condit*, to which the statute of repose does not apply. In *Condit*, the plaintiff suffered

injury when her hand passed between an exposed gear and a conveyor belt that were part of a large freezer tunnel system used to process vegetables. *See* 101 Wn. 2d at 108 (describing machinery and injury). The Court held that the machinery causing the injury was not an improvement to real property within the meaning of the statute of repose. *See id.* at 112 (stating "[r]ather than designing an improvement on real property, respondent was engineering and designing accouterments [sic] to the manufacturing process taking place within the improvement"). The Court reversed summary judgment in favor of the company that designed, manufactured and installed the machinery, and allowed the plaintiff's claims to proceed to trial. *See id.* at 112-13. On the authority of *Condit*, the superior court below properly denied General's motion for summary judgment based on the statute of repose, and this Court should find as a matter of law that the machinery that killed Donald Martin is not an improvement to real property.

General does not attempt to distinguish *Condit*. Instead, General argues that the 2004 amendment to the statute of repose "effectively supersedes" *Condit,* and automatically confers the protection of the statute upon all licensed contractors. *See* General Br., at 26. This approach is contrary to the text of the statute as amended and the legislative history of the amendments.

a. Amendments to the statute of repose have not changed the statutory requirement of an improvement upon real property.

The post-*Condit* amendments to the statute of repose have left the "improvement upon real property" language intact, and the phrase remains part of the current version of the statute. *See* RCW 4.16.300. Where the Supreme Court has construed statutory language, that construction is read into, and becomes part of a statute, as if it were part of the original statutory enactment. *See State v. Regan,* 97 Wn. 2d 47, 51-52, 640 P.2d 725 (1982). In this way, the holding of *Condit* has been incorporated into the meaning of an improvement upon real property under the statute of repose.

The Legislature is presumed to be aware of the Court's interpretations of its statutes, and to acquiesce in such interpretations in the absence of amendment. *See Federal Way v. Koenig,* 167 Wn. 2d 341, 348, 217 P.3d 1172 (2009). The lack of any amendment to the language of the statute of repose referring to an improvement of real property is deemed to be legislative approval of the holding in *Condit.*

In 1986, the Legislature amended the statute of repose to add language stating:

> This section is intended to benefit only those persons referenced herein, and shall not apply to claims or causes of action against manufacturers."

Laws of 1986, ch. 305, § 703. The amendment clarifies a distinction present in the statute of repose, and highlighted in *Condit*, based upon the type of activity that triggers application of the statute. The statute specifies a list of activities involved in different aspects of the construction or repair of a building. *See* RCW 4.16.300. In order to obtain the protection of the statute, a party must have been engaged in one of the specified activities in the course of making an improvement upon real property. *See Condit*, at 111; *see also Pfeifer,* 112 Wn. 2d at 567-68 (applying "activities analysis" to distinguish construction of building from fraudulent concealment during sale of the building, and finding statute of repose inapplicable to sale). The 1986 amendment specifically excludes such activities when performed by a manufacturer. This amendment seems to reinforce rather than supersede *Condit's* interpretation of activities triggering the application of the statute of repose, and it does not affect the meaning of an improvement upon real property.

In 2004, the Legislature amended the statute of repose again, rewriting the sentence added in 1986 to state:

> This section is specifically intended to benefit persons having performed work for which the persons must be registered under RCW 18.08.310 [architects], 18.27.020 [contractors], 18.43.040 [engineers & land surveyors], 18.96.020 [landscape architects], or 19.28.041 [electricians], and shall not apply to claims or causes of

> action against persons not required to be so registered or licensed."

Laws of 2004, ch. 257, § 1 (brackets added). The 2004 amendment adds references to the specific registration and licensing statutes in lieu of "those persons referenced herein," and excludes all others, presumably including, but not limited to, "manufacturers." By these changes, the 2004 amendment further clarifies the activity-based distinction that was present in *Condit* and the earlier versions of the statute of repose. The activities that trigger application of the statute of repose are confined to the performance of work for which a person must have a specified business or professional license or registration. While the amendment provides further clarity regarding the specific activities triggering the statute, it does not undermine *Condit* in any respect, let alone its understanding of an improvement upon real property.

Under the plain language of the 2004 amendment,[2] General is obligated to satisfy its burden of proving that it performed specified services with respect to an improvement upon real property, and also that it only could have performed such services by virtue of its contractors license. *See Louisiana-Pac. Corp. v. Asarco Inc.*, 131 Wn. 2d 587, 600,

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[2] The 2004 amendment to the statute of repose governs this case. The effective date of the 2004 amendment is June 10, 2004, approximately two months before Donald Martin was killed on August 13, 2004. *See* Laws of 2004, ch. 257. Statutes of repose apply to causes of action accruing after their enactment. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn. 2d 566, 583-84, 146 P.3d 423 (2006).

934 P.2d 685 (1997) (stating plain and unambiguous statutory language is controlling). However, General cannot satisfy its burden. As noted above, the machinery that killed Donald Martin was not an improvement upon real property. Moreover, there is no evidence in the record that the installation of TM5 was work for which General must be licensed as a contractor. *See Pfeifer,* 112 Wn. 2d at 567-68 (discussing "activities analysis"). The only evidence in the record is the bare fact that General was licensed, without regard for whether or not such a license was required to install the machinery. *See* General Br., at 26 (citing CP 2092).[3] On either count, dismissal of General's statute of repose defense is warranted.

General argues that its status as a licensed contractor, ipso facto, triggers application of the statute of repose, without regard for whether the work involves an improvement upon real property, or whether it requires one of the specified business or professional licenses. *See* General Br., at 26. This interpretation would render superfluous the improvement upon real property language, the list of activities specified in the statute of repose, and the language referring to "persons having performed work for which the persons must be registered[.]" If General's argument were

[3] General did not produce evidence in the superior court below regarding the necessity for a contractors license to install TM5. The absence of such evidence constitutes an alternate ground to affirm denial of summary judgment under RAP 2.5(a), given General's burden to produce evidence supporting every element of its statute of repose defense.

correct, then the statute would simply refer to a person's license or registration status as the sole basis for triggering its protection. Statutes should be construed to give each word meaning, and to avoid rendering language superfluous. *See Whatcom County v. Bellingham,* 128 Wn. 2d 537, 546, 909 P.2d 1303 (1996) (stating "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous").

General's interpretation would also allow unscrupulous actors to insulate themselves from liability beyond the repose period by simply obtaining a contractor's license, regardless of the activity they performed. This is precisely the type of result that *Condit* tried to avoid. *See* 101 Wn. 2d at 111 (indicating manufacturer should be entitled to insulate itself from liability beyond the repose period by simply attaching a machine to a building). Statutes should be construed to avoid absurd results. *See Estate of Bunch v. McGraw Res. Ctr.,* 174 Wn. 2d 425, 433 & 435-36, 275 P.3d 1119 (2012) (acknowledging duty to avoid absurd results in interpreting statutes). On these grounds, General's interpretation of the amendments to the statute of repose should be rejected.

b. The legislative history of the statute of repose has not changed the statutory requirement of an improvement upon real property.

To support its interpretation of the statute of repose, General principally relies on a Washington State House of Representatives Committee on the Judiciary report for the 2004 amendment to the statute. *See* General Br., at 22-26 (citing Wash. H.R. Comm. on Judiciary, 58th Legis., 2nd Reg. Sess., House Bill Rep. S.S.B. 6600 (Mar. 3, 2004)).[4] Legislative intent is discerned from the plain meaning of a statute, and resort to legislative history is unwarranted if the statutory language is unambiguous. *See Bunch,* 174 Wn. 2d at 432. Because the language of the statute of repose as amended is plain and unambiguous, it is not necessary or appropriate to delve into legislative history in this case.

Nonetheless, legislative history is consistent with the plain and unambiguous meaning of the statute of repose as amended. The House committee report on which General relies describes the statute of repose as "relating to the construction of buildings and other improvements to real property." *See* General App. ("Background" section). The report cites *Condit*, apparently with approval, for the proposition that "the statute of repose was construed as applying to parties 'who work on structural aspects of a building, but not manufacturers of heavy equipment or

[4] The full text of the committee report is reproduced in the separately bound Appendix to General's brief, cited as "General App."

nonintegral systems within the building." *See id.* This is entirely consistent with the Martin family's argument regarding the statutory requirement of an improvement upon real property.

According to the House committee report, the 2004 amendment was prompted by cases "in which plaintiffs have successfully argued that construction contractors are also 'manufacturers' and, therefore, not protected by the statute of repose." *See id.* (citing *Washburn v. Beatt Equip. Co.*, 120 Wn. 2d 246, 840 P.2d 860 (1992)). The intent of the amendment was not to change the requirement of an improvement upon real property. *Washburn* specifically declined to address that issue. *See* 120 Wn. 2d at 254-55.

The intent of the 2004 amendment was not to confer the protection of the statute of repose on manufacturers or others who do not perform the specified activities, or even to overrule *Washburn*. Instead, the intent was to clarify what activities trigger application of the statute. *See* General App. ("Testimony For" section). For example, in *Washburn* the Court instructed the jury using the definition of manufacturer in the WPLA, RCW 7.72.010. *See* 120 Wn. 2d at 255 & n.4. On appeal, the defendant argued that the term manufacturer must be given its plain and ordinary meaning, since it was undefined in the statute of repose. *See id.* at 257. The 2004 amendment to the statute of repose removed uncertainty

regarding the application of the statute of repose by specifying what activities were included in the statute (i.e., work for which persons must be registered or licensed), rather than what activities were excluded (i.e., manufacturing), and doing so with greater specificity (i.e., by referring to specific registration and licensing statutes rather than using an undefined term).

General emphasizes a statement in the House committee report stating "[t]he coverage of the statute of repose is intended specifically to cover persons licensed or registered as contractors," as support for its argument that licensure or registration automatically confers the protection of the statute of repose. *See* General Br., at 25-26. This statement does not exclude or eliminate other requirements for application of the statute of repose, such as an improvement upon real property as defined by *Condit,* or the activities analysis described in *Pfeiffer*.

General does not acknowledge the summary of the bill in the Senate Committee on the Judiciary report or the joint Final Bill Report compiled by both the House and Senate Committees, both of which emphasize the required activities analysis: "[t]his applies only to persons *having performed work for which the persons must be registered or licensed*[.]" Wash. Sen. Comm. on Judiciary & H.R. Comm. on Judiciary, 58th Legis., 2nd Reg. Sess., Final Bill Rep., Bill 6600 (Apr. 5, 2004)

("Summary" section; italics added); *accord* Wash. Sen. Comm. on Judiciary, 58th Legis., 2nd Reg. Sess., S.B. 6600 (Feb. 5, 2004) ("Summary of Substitute Bill" section). These expressions of legislative intent, mirroring the language of the 2004 amendment itself, indicate that General is reading too much into the House committee report on which it relies. *Cf. Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn. 2d 46, 65, 821 P.2d 18 (1991) (cautioning that it would be "pure speculation" to conclude that preliminary committee report to legislature "is indicative of legislative intent").

2. Even if the statute of repose were applicable, the repose period did not begin to run until General terminated its construction services related to TM5 in 2008, and the Martin family's complaint filed beforehand is timely.

The repose period does not expire until six years after "substantial completion of construction, or . . . termination of the services enumerated in RCW 4.16.300, whichever is later." RCW 4.16.310. "Substantial completion of construction" is defined to "mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use." RCW 4.16.310. Here, there is no question that TM5 was substantially completed and employed for its intended use beginning in 1981, more than six years before the Martin family's claims accrued.

Nonetheless, General did not terminate its services with respect to TM5 until after Donald Martin's death in 2004. The services enumerated in RCW 4.16.300 consist of:

> any design, planning, surveying, architectural or construction or engineering services, or services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.

There must simply be a nexus between the claim and the specified services for construction, alteration or repair of the improvement upon real property. *See Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 599, 54 P.3d 225 (2002). In this case, both the nature of the services and the required nexus to the Martin family's claims arising from TM5 are conceded by General when it admits providing "construction services related to TM5" until 2008. CP 1520. As a result, the repose period did not begin to run before the Martin family's claims, and therefore the repose period did not expire.

Where services continue beyond substantial completion of the improvement, the rationale for the statute of repose evaporates. The rationale is based upon the loss of control that normally follows substantial completion of an improvement upon real property:

> The purpose of the statute is to prevent stale claims and place a reasonable time limitation on the personal liability

> exposure of construction industry defendants. The statute is intended to protect contractors "from the possibility of being held liable for the acts of others. 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 premise for providing such ultimate repose to contractors is the durability of improvements to realty and the resulting "long tail of liability": *"'Without protection such persons would be subject to liability for many years after they had lost control over the improvement or its use or maintenance.'"*

1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 101 Wn. App. 923, 940, 6 P.3d 74 (2000), *aff'd*, 144 Wn. 2d 570, 29 P.3d 1249 (2001) (footnotes omitted; italics added); *accord id.*, 144 Wn. 2d at 577 (carrying control rationale forward). Where the services in question continue beyond substantial completion, "control over the improvement or its use or maintenance" is retained and the protection of the statute of repose is unwarranted.[5] The control retained by General is illustrated by the nature and extent of construction services related to TM5, as well as the fact that it permanently locked out Conveyor 8 to eliminate the crush point after Donald Martin was killed. CP 1520 & 1568-70. Under these

[5] The centrality of control as the rationale underlying the statute of repose is confirmed by the proviso, which prevents "an owner, tenant or other person in possession and control of the improvement" from raising the statute of repose as a defense. *See* RCW 4.16.310.

circumstances, giving General the protection of the statute of repose would not serve the purpose of the statute. [6]

3. General's discussion of "public policy considerations" is overblown in light of the company's continuing construction services related to TM5.

General spends more than two pages of briefing discussing the general policy rationales for the statute of repose. *See* General Br., at 26-28. As it pertains to this case, General argues that the passage of time since the installation in TM5 has made it difficult to locate witnesses and documents. *See id.* at 28. As an initial matter, the policies underlying the statute of repose should not alter the interpretation of the statute as written. Moreover, General's policy-based argument ignores the control that the company exercised at all relevant times by providing construction services related to TM5 up until 2008.[7]

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[6] In its statement of the case, General acknowledges the termination of services issue raised by the Martin family below, but it does not provide any argument regarding the issue in its brief. *See* General Br., at 14. This issue is independently sufficient to affirm the superior court's summary judgment order, regardless of whether TM5 is considered an improvement upon real property as defined in *Condit*, or whether General satisfies the activities analysis described in *Pfeiffer*. Appellate courts should not consider arguments raised for the first time on appeal. *See Hansen v. Friend,* 118 Wn. 2d 476, 485, 824 P.2d 483 (1992). Appellate courts should also decline to consider issues in the absence of adequate briefing and argument. *See Satomi Owners Ass'n v. Satomi, LLC,* 167 Wn. 2d 781, 225 P.3d 213 (2009). General should not be allowed to brief and argue the issue for the first time in its reply. *See In re Kennedy,* 80 Wn. 2d 222, 236, 492 P.2d 1364 (1972) (stating "[p]oints not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits").

[7] General also ignores the fact that all of the relevant documents, i.e., the design drawings for TM5, CP 492-93, the layout drawings for the machine, CP 505-12, the machine as constructed and installed by WSH, CP 487, and the relevant safety standards, are all readily available. Nothing more is required to prosecute or defend this case.

B. General is both a "product seller" and a "manufacturer" with respect to the elevated walkway/work platform it fabricated and installed, and is therefore subject to liability under the WPLA.

The superior court denied General's motion for summary judgment based on the WPLA, and this order is also subject to de novo review. If there is a question of fact regarding application of the WPLA under the circumstances presented by this case, then the denial of summary judgment must be affirmed. *See Young,* 112 Wn. 2d at 225-26. In reviewing the facts, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the Martin family, as the nonmoving parties. *See id.*

The WPLA defines a "product seller" to mean "any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption." RCW 7.72.010(1). A product seller includes a "manufacturer," which, in turn, consists of "a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user[.]" RCW 7.72.010(1) & (2). Product seller and manufacturer are both defined in terms of a "product," which means "any object possessing intrinsic value, capable of delivery either as an

assembled whole or as a component part or parts, and produced for introduction into trade or commerce." RCW 7.72.010(3).[8]

In order to determine whether a defendant is a product seller or manufacturer, the focus is on the "relevant product," and does not involve consideration of services or other products sold by the same defendant. A "product liability claim" is defined as:

> any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of *the relevant product*.

RCW 7.72.010(4) (italics added); *accord* RCW 7.72.010(2) (defining "manufacturer" in terms of the "relevant product or component part of a product"). The relevant product refers to "that product or its component part or parts, which gave rise to the product liability claim." RCW 7.72.010(3). The focus is not on the nature of production, i.e., standardized products, or the quantity of production, i.e., mass produced products, as no such limitations are contained in the relevant definitions. *See Washburn*, 120 Wn. 2d at 258-59. "To make, produce, fabricate, or construct a single product or even a single component part of a single

[8] The full text of the current version of RCW 7.72.010 is reproduced in the Appendix to this brief.

product can render [a] defendant a manufacturer[.]" *See id.* at 259 (brackets added).[9]

Under the WPLA's definitions of terms, General's predecessor, WSH, is a product seller and manufacturer to the extent that it designed, constructed and installed the elevated walkway/work platform that created the unguarded crush point on TM5. CP 459. The elevated walkway/work platform is an object possessing intrinsic value, produced for introduction into trade or commerce in the paper plant, and sold on a time and materials basis. *Id.* It did not appear in the design drawings, CP 492-93, nor in the layout drawings, CP 505-12, but it was present when the installation of TM5 was completed, CP 487. General has never denied that its predecessor manufactured and sold the elevated walkway/work platform. *See* General Br., at 29 (discussing aspects of TM5 that WSH did *not* manufacture).[10]

General is comparable to the defendant in *Washburn*, where the defendant's predecessor "specialized in pipeline excavation and construction[.]" 120 Wn. 2d at 252-53. The predecessor installed pipe that

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[9] The Court in *Washburn* was discussing a jury instruction based on the WPLA definition of "manufacturer" used to define the term "manufacturer" in the prior version of the statute of repose. *See* 120 Wn. 2d at 255 & n.4.

[10] General argues in passing that the there is no evidence that WSH performed any work on the dipping conveyor "before its sale" to the paper plant, as required by the WPLA definition of a manufacturer. *See* General Br., at 31-32. This argument does not focus on the relevant product (i.e., the elevated platform/walkway), and it ignores the fact that the "sale" did not occur until completion and acceptance. *See* CP 3119.

was too thin and improperly coated under the contract specifications and industry standards. *See id.* In a lawsuit that resulted after the pipeline exploded and injured a worker, an instruction was submitted to the jury based on the WPLA definition of a "manufacturer." *See id.* at 255 & n.4. The Court held that there was sufficient evidence to support the jury's special verdict finding the defendant's predecessor to be a manufacturer based on its manufacture of the pipe, even though the defendant's predecessor also provided construction and installation services. *See id.* at 258. Similarly, in this case, there is sufficient evidence to withstand summary judgment that General's predecessor manufactured the elevated platform/walkway and is thereby subject to the Martin family's claims under the WPLA.

The cases on which General relies, involving mere "construction services," are all distinguishable. *See* General Br., at 32-33 (citing *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 999 P.2d 1264 (2000); *Garza v. McCain Foods, Inc.,* 124 Wn. App. 908, 103 P.3d 848 (2004), *rev. granted, cause remanded on other grounds,* 160 Wn. 2d 1004, 156 P.3d 904 (2007); *Anderson Hay & Grain Co. v. United Dominion Indus.*, 119 Wn. App. 249, 76 P.3d 1025 (2003), *rev. denied,* 151 Wn. 2d 1016 (2004)). *Graham* is distinguishable because the defendant did not produce any product for introduction into trade or commerce when it installed a

"fish screen" designed by the U.S. Bureau of Reclamation for Toppenish Creek. *See* 100 Wn. App. at 852-53 & 856. *Garza* and *Anderson* are likewise distinguishable because they involved products purchased directly from the manufacturer by the property owner, and assembled by the defendants according to the manufacturer's specifications. *See Garza,* 124 Wn. App. at 911 & 916-17 (conveyor system); *Anderson,* 119 Wn. App. at 252-53 & 261-62 (pre-fabricated buildings). None of the cases cited by General involves products similar to the elevated walkway/work platform that was fabricated and installed by WSH.[11]

VI. ARGUMENT IN REPLY TO GENERAL

In response to the Martin family's appeal, General acknowledges that a corporation purchasing the assets of another is liable as a successor if it expressly assumes such liability. *See* General Br., at 17-18. The focus of the dispute in this case is whether General did, in fact, assume liability for the Martin family's claims.

[11] This is not a case involving a provider of professional services who utilizes or sells products within the legally authorized scope of his or her professional practice. *See* RCW 7.72.010(1)(b). "Professional services" is undefined by the WPLA, but the ordinary meaning of the phrase refers to a vocation requiring advanced training, confidential relationships, and a standard of ethics higher than the marketplace. *See* Black's Law Dictionary, *s.v.* "profession" & "professional" (9th ed. 2009); Merriam-Webster Online, *s.v.* "profession" & "professional" (viewed July 27, 2012; available at www.m-w.com).

A. General assumed all "Assumed Liabilities," as defined by the Stock Purchase Agreement.

General makes the counterintuitive argument that it "only assumed a limited subset of the 'Assumed Liabilities.'" *See* General Br., at 19. In making this argument, General does not address the definition of Assumed Liabilities. Instead, it relies on a strained reading of a provision of the Stock Purchase Agreement relating to the organizational phase of the transaction. The company completely ignores the dispositive Memoranda of Assumption of Liabilities delivered at the closing of the transaction.

1. General does not address the definition of Assumed Liabilities in the Stock Purchase Agreement.

As pointed out in the Martin family's opening brief, Assumed Liabilities is a specially defined phrase in the Stock Purchase Agreement, which includes, inter alia, all uninsured tort claims occurring (i.e., accruing) after July 1, 1996. *See* Martin Br., at 20-22. General does not address or otherwise take issue with the Martin family's analysis of the definition, or the fact that their claims fall within the definition. *See* General Br., at 17-20. To be sure, General disputes whether the Martin family's claims are an assumed liability, but the dispute is not based on the definition of Assumed Liabilities. *See* General. Br., at 18-20 & n.9.

2. General improperly relies on a strained reading of a provision of the Stock Purchase Agreement relating to the "Organization of General Construction Company."

General argues that "subject to" language in the organizational provision all but eliminates its assumed liabilities, notwithstanding the contractual definition of Assumed Liabilities. *See* General Br., at 18-19. Specifically, the organizational provision refers to "the assumption by General of all of the Assumed Liabilities *to which Seller was subject* as of the Organization Date" of the transaction, and "*to which Seller becomes subject* between the Organization Date and the Closing Date" of the transaction. CP 2485 (italics added). General reasons that the Seller could not have been "subject to" liability for Donald Martin's death before the Organization or Closing Dates of the transaction because he did not die until afterward. *See* General Br., at 19-20.

As pointed out in the Martin family's opening brief, this reasoning is based on an unduly restrictive definition of the phrase "subject to." The ordinary meaning of the phrase is sufficiently broad to encompass inchoate or contingent future liabilities as well as past liabilities. *See* Martin Br., at 24. General does not address or take issue with the ordinary meaning of the phrase, nor does it offer a countervailing definition. *See* General Br., at 17-20.

In addition, General's interpretation of the "subject to" language in the organizational provision conflicts with the definition of Assumed Liabilities. Under General's interpretation of the "subject to" language, assumed liabilities are limited to those incurred before October 17, 1996. *See* General Br., at 19. This conflicts with the definition of Assumed Liabilities, which consists of all liabilities incurred after July 1, 1996, not those incurred before October 17, 1996, nor those incurred between July 1 and October 17, 1996. *See* Martin Br., at 25-26. General does not address these conflicts. *See* General Br., at 17-20.

3. General ignores the dispositive Memoranda of Assumption of Liabilities.

At the closing of the transaction, General executed and delivered two separate Memoranda of Assumption of Liabilities, one corresponding to the Organization Date of the transaction, and the other corresponding to the Closing Date. CP 2691 & 2745. These Memoranda, including their specific form and contents, were required under the terms of the Stock Purchase Agreement and became part of the agreement. CP 2486. Both memoranda provide that General "does hereby assume and accept" all Assumed Liabilities, as defined, without limit or qualification. Because the Martin family's claims fall squarely within the definition of Assumed Liabilities, liability for their claims was assumed by General upon

execution and delivery of these Memoranda. The Memoranda were highlighted in the Martin family's opening brief, and they have been ignored by General in response. *See* Martin Br., at 23; General Br., at 17-20.

B. General takes a single sentence from the definition of "Excluded Liabilities" out of context to support its argument.

General quotes part of the definition of Excluded Liabilities from the Stock Purchase Agreement suggesting that liabilities arising from acts occurring prior to July 1, 1996, are not assumed. *See* General Br., at 20. General omits the first sentence of the definition of Excluded Liabilities, which states: "'Excluded Liabilities' means all liabilities of Seller and the Business that are not specifically included within the definition of Assumed Liabilities." CP 2478. In this way, the fact that the Martin family's claims fall within the definition of Assumed Liabilities precludes them from being considered as Excluded Liabilities. *See* Martin Br., at 22.

C. The fact that Fletcher General continued to exist in some fashion after closing the Stock Purchase Agreement is immaterial.

In its statement of the case, General claims that Fletcher General, Inc. ("Fletcher General"), "continued to operate and do business" from 1996, when General purchased its assets, until 2007, when Fletcher dissolved. *See* General Br., at 1. While the continued existence of a predecessor is relevant to some theories of successor liability, it is not

material to successor liability based upon assumption of liabilities, and General provides no argument or authority to the contrary.

D. The fact that Fletcher General accepted tender of unspecified claims after closing the Stock Purchase Agreement is immaterial.

In its statement of the case, General also claims that it tendered "dozens of claims for Excluded Liabilities . . . ranging from workers compensation claims to personal injury lawsuits." General Br., at 10 (citing CP 1912-13). The record citations for this claim do not establish whether such claims were comparable to those alleged by the Martin family. For example, if those claims were insured, then they would be considered Excluded rather than Assumed Liabilities under the terms of the agreement. *See* CP 2474. FCCNA's representative testified that at least some, if not all, were insured, and that "the majority of items were not actually claims, but they were these information letters that were being sent out by asbestos lawyers and just trying to obtain employment information and letters." CP 656 (internal 32:19-25 & 33:16-34:5). In any event, the tender of claims and the relationship between General and FCCNA inter se is not material to General's successor liability vis-à-vis the Martin family, and General provides no argument or authority to the contrary.

VII. ARGUMENT IN REPLY TO FCCNA

A. Wright Schuchart Harbor *Company*, not Wright Schuchart Harbor *Joint Venture*, installed TM5; but the distinction between the company and the joint venture, if any, is immaterial in any event because FCCNA is a successor to both.

FCCNA claims that an entity called Wright Schuchart Harbor *Joint Venture*, rather than Wright Schuchart Harbor *Company*, installed TM5 in 1981, and that the joint venture never merged into FCCNA. *See* FCCNA Br., at 2-3 (citing CP 425-26). In support of these claims, FCCNA cites its own answer to an interrogatory propounded by the Martin Family. CP 425-26. The interrogatory answer is signed on behalf of FCCNA by Ronald A. Johnson. CP 27. In his subsequent deposition, Mr. Johnson testified that he did not actually know whether the joint venture or the company installed TM5:

> Q. Do you know if Wright Schuchardt [sic] Harbor Company, the division of Wright Schuchardt, Inc., was doing the industrial general contracting at the Scott Paper plant in connection with the installation of Tissue Machine No. 5 between 1979 and 1981?
>
> A. I'm not sure which entity might have been involved in that.
>
> Q. So, as far as you know, Wright Schuchardt Harbor Company, the division of Wright Schuchardt, Inc., may have been doing the industrial general contracting of installing Tissue Machine No. 5 at the Scott Paper plant in Everett between 1979 and 1981, correct?
>
> A. [By Mr. Johnson] I'm really not sure on that. I did – Jack did provide me with a copy of one document and that document was in the name of Wright-Schuchardt-Harbor.

> And so that was just one case I saw. I didn't look at all of the documents that have been produced or provided.
>
> Q. And, of course, you don't have any personal knowledge?
>
> A. I don't have any personal knowledge.

CP 418-19 (internal 23:10-24:13; brackets added).

Before signing interrogatory answers or answering deposition questions, Mr. Johnson tendered the defense of the Martin family's lawsuit to FCCNA's insurers. CP 401-02. The tender of defense stated that FCCNA "is the successor to . . . Wright Schuchart, Inc. and Wright Schuchart Harbor," among others. CP 401. The letter does not mention Wright Schuchart Harbor *Joint Venture*, nor distinguish it from Wright Schuchart Harbor *Company*. *See id.*

Other than the interrogatory answer signed by Mr. Johnson, FCCNA identifies no evidence that the joint venture was responsible for installing TM5, and FCCNA ignores the other evidence in the record that Wright Schuchart Harbor *Company* installed TM5. Wright Schuchart Harbor *Company* was a registered contractor at the relevant time. CP 2092. There is no comparable evidence of contractor registration by any joint venture sharing the same name. The other witnesses in the case consistently testified that "Wright Schuchart Harbor," identified as a division of Wright Schuchart Harbor, Inc., installed TM5. *See* CP 409-12

& 688-90 (Casper); CP 692-93 (Woodward); CP 456-62 (Rasmussen); CP 557 (Rarig).

By relying on its own interrogatory answer and ignoring the other evidence in the record, FCCNA does not respect the standard of review on summary judgment. In any event, an organizational chart for Wright Schuchart, Inc., indicates that Wright Schuchart Harbor *Co.* was an "operating division" of the company since 1979, and that "Wright-Schuchart-Harbor, a joint venture," was merely an "other or former business name" of Wright Schuchart, Inc. CP 686. FCCNA ultimately became a successor to Wright Schuchart, Inc., after a series of mergers. *See* FCCNA Br., at 3. To the extent that the joint venture is merely another name or former business of Wright Schuchart, Inc., it is not material whether the joint venture installed TM5 because FCCNA is admittedly a successor to Wright Schuchart, Inc.

B. The discovery rule is not limited to product liability actions, and it provides that a cause of action does not accrue until discovery of the elements of a plaintiff's claim, including the identity of the proper defendant.

FCCNA acknowledges that the discovery rule includes the identity of the proper defendant. *See* FCCNA Br., at 25-26 (citing *Orear v. International Paint Co.*, 59 Wn. App. 249, 796 P.2d 759 (1990), *rev. denied,* 116 Wn. 2d 1024 (1991)). However, FCCNA incorrectly argues

that this aspect of the discovery rule is limited to product liability actions. *See id.* at 25. To the extent the Martin family's complaint includes product liability claims, as noted above, this would not pose an impediment.

However, the Martin family is entitled to the benefit of the rule no matter how their claims are characterized. As in this case, *Orear* involved both the product liability statute of limitations, RCW 7.72.060, and the general personal injury statute of limitations, RCW 4.16.080(2), because the relevant events occurred before and after the effective date of the WPLA. *See* 59 Wn. App. at 252 & nn.1-2.

Orear phrased its statement of the discovery rule in general terms not limited to the product liability context:

> Although no Washington court has explicitly decided whether knowledge or imputed knowledge of a particular defendant's identity is necessary for the plaintiff's cause of action against that defendant to accrue, we hold that such knowledge is necessary, absent countervailing statutory language.

Id. at 255. *Orear* relied on non-product liability authority within Washington to formulate the rule. *See id.* at 253-54 (discussing *Ruth v. Dight,* 75 Wn. 2d 660, 453 P.2d 531 (1969) (medical malpractice); *Ohler v. Tacoma Gen. Hosp.*, 92 Wn. 2d 507, 598 P.2d 1358 (1970) (medical malpractice and product liability). *Orear* also relied on non-product liability authority outside of Washington. *See id.* at 256-57 (citing *Spitler*

v. Dean, 436 N.W.2d 308 (Wis. 1989) (assault and battery); *Meyers v. Larreategui,* 509 N.E.2d 971 (Ohio App. 1986) (medical malpractice); *Foster v. Harris,* 633 S.W.2d 304 (Tenn. 1982) (medical malpractice); *Adams v. Oregon St. Police,* 611 P.2d 1153 (Or. 1980) (auto accident); *Mullinax v. McElhenney,* 817 F.2d 711 (11th Cir. 1987) (civil rights); *Royal Indem. Co. v. Petrozzino,* 598 F.2d 816 (3rd Cir. 1979) (conversion); *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989) (conversion); *O'Keeffe v. Snyder,* 416 A.2d 862 (N.J. 1980) (conversion)). Importantly, *Orear* specifically disapproved of non-product liability cases that declined to base accrual upon discovery of the proper defendant's identity. *See id.* at 256 n.4 (disapproving *Smith v. Sinai Hosp.*, 394 N.W.2d 82 (Mich. App. 1986) (medical malpractice); *Guebard v. Jabaay,* 381 N.E.2d 1164 (Ill. App. 1978) (same)). FCCNA does not address *Orear's* treatment of these cases.

Following *Orear,* accrual based on discovery of the identity of the proper defendant has been recognized and applied outside of the product liability context in Washington. *See Allyn v. Boe,* 87 Wn. App. 722, 943 P.2d 364 (1997) (timber trespass), *rev. denied*, 134 Wn.2d 1020 (1998). The same rule should also be applied in this case. Although *Orear* stated that the rationale of the discovery rule is "particularly compelling in latent-injury, products liability cases where the connection between the

plaintiff's injury and the allegedly defective product is difficult to trace," *see* 59 Wn. App. at 256, the case did not purport to limit accrual based on discovery of the identity of the proper defendant to the product liability context. The rationale is equally compelling in a case such as this involving a complex series of non-public mergers and acquisitions over an extended period of time. Accordingly, application of the discovery rule in this case should not hinge upon the characterization of the Martin's claims as product liability or non-product liability.

C. The Martin family could not have discovered FCCNA's relationship to WSH within three years of Donald Martin's death in the exercise of reasonable diligence.

Under the discovery rule, a cause of action accrues when the plaintiff knows, or with reasonable diligence should know, the identity of the proper defendant. *See Orear,* 59 Wn. App. at 257. Here, there is no dispute that the Martin family lacked actual knowledge that FCCNA was a successor to WSH until shortly before amending their complaint to name the company as a defendant.

FCCNA argues that such knowledge should be imputed because "the Martin family could have availed themselves to [sic] the readily available public records with the Secretary of State's office from 2004 to 2007." *See* FCCNA Br., at 26; *see also id.* at 6-7 (identifying records). None of the records refer to WSH, let alone connect the dots between

WSH and FCCNA. *See* CP 722-27 (1976 articles of incorporation of "Wright Schuchart, Inc."); CP 729 (1993 certificate of amendment changing name of Wright Schuchart, Inc., to "Fletcher General, Inc."); CP 731 (2001 articles of merger, merging "Fletcher General, Inc.," into "Fletcher Construction Company North America").

FCCNA also points to a 1993 newspaper article and an undated internet web page printout to establish constructive knowledge of the relationship between WSH and FCCNA. *See* FCCNA Br., at 7. The newspaper article refers to WSH and several entities with "Fletcher" in the name, but not FCCNA. *See* CP 733-34.[12] The web page printout appears to be from General's website, and, as with the newspaper article, the web page refers to WSH and two "Fletcher" entities, but not FCCNA. *See* CP 736-37. Neither the public records available from the Secretary of State, nor these items describe the relationship between WSH and FCCNA, and they cannot establish constructive knowledge. It was only through the discovery of non-public corporate information in this case that the Martin family learned of the relationship between these companies.

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[12] Fletcher's statement elsewhere that the newspaper article "identifies FCCNA as an entity related to 'Wright Schuchart'," FCCNA Br., at 18, is simply not correct. FCCNA is not identified in the article, either by its full name, "Fletcher Construction Company North America," or its acronym. The closest name is "Fletcher Construction Co. Northwest." CP 734. It is not apparent whether "Fletcher Construction Co. Northwest" is a misnomer or a separate company.

D. Naming WSH in the complaint identifies WSH's successors, including FCCNA, with sufficient particularity to toll the statute of limitations under RCW 4.16.170.

FCCNA recognizes the dicta from *Sidis v. Brodie/Dorhmann,* 117 Wn. 2d 325, 331, 815 P.2d 781 (1991), that a plaintiff can toll the period for suing an unnamed defendant by filing the complaint and serving a named defendant, as long as the unnamed defendant is identified with "reasonable particularity." *See* FCCNA Br., at 16. While FCCNA correctly notes that this is dicta, it is nonetheless entitled to special solicitude as the interpretation of a statute by our state's highest court. *See State v. Nikolich,* 137 Wash. 62, 66, 241 Pac. 664 (1925) (stating the deliberate expression of the court upon the meaning of a statute should not be disregarded as dicta); *Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.,* 136 Wn. 2d 38, 53 n.7, 959 P.2d 1091 (1998) (same).

FCCNA argues that naming WSH does not identify WSH's successors, including FCCNA, with sufficient particularity. *See* FCCNA Br., at 18-19. At one level, this argument seems to be at odds with its claim that the identity of FCCNA as WSH's successor was "readily available" through public records. *See* FCCNA Br., at 26. In actuality, the identity of FCCNA as a proper defendant was readily identifiable to FCCNA itself (but not the Martin family) because FCCNA was privy to the non-public records relating to the series of mergers and acquisition by

which it became a successor to WSH, and based upon the nature of the relationship between merging and surviving corporations, *see* RCW 23B.11.060(1)(a), (c) & (d).[13] The record in this case confirms that the Martin family's complaint identified FCCNA with sufficient particularity because the company recognized its own potential liability even before it was formally joined as a party. CP 62-63 & 401-02. Under these circumstances, the requirements of *Sidis* are satisfied, and the statute of limitations is tolled pursuant to RCW 4.16.170.

E. FCCNA does not address the argument or authority that the amendment identifying FCCNA as the successor to WSH does not change the parties against whom a claim is asserted.

As noted in the Martin family's opening brief, an amendment identifying a corporate successor to a merged defendant merely involves correction of a misnomer rather than the addition of a new party. *See* Martin Br., at 37-39 (discussing *Bailey v. Innovative Mgmt. & Inv., Inc.,* 890 S.W.2d 648, 651 (Mo. 1995); *Mitchell v. CFC Financial LLC,* 230 F.R.D. 548, 549-50 (E.D. Wis. 2005)). This result is entirely consistent with existing Washington law, and it obviates the need to establish that the amendment relates back to the date of the Martin family's original

[13] Contrary to FCCNA's characterization of their argument, the Martin family does not seek to impose liability under RCW 23B.11.060. *See* FCCNA Br., at 23-24. Instead, the Martin family cites the Washington Business Corporation Act to illustrate the identity of interest between a predecessor and successor corporation and how the reasonable particularity standard of *Sidis* has been satisfied. *See* Martin Br., at 33-34.

complaint for statute of limitations purposes. *See* Martin Br., at 39 (discussing *DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn. 2d 222, 222-25, 427 P.2d 728 (1967)). FCCNA completely ignores this argument and authority.

F. FCCNA urges the court to apply the wrong standard of review to the question of whether the Martin family's amended complaint relates back to the date of their original complaint.

Assuming that it is necessary to establish grounds for relation back under CR 15(c), FCCNA argues that the standard of review is abuse of discretion. *See* FCCNA Resp. Br., at 13. This argument is incorrect and it ignores the procedural posture of this case. FCCNA relies on *Foothills Development Co. v. Clark County Bd. of County Commr's*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986), *rev. denied*, 108 Wn.2d 1004 (1987), as authority for an abuse of discretion standard of review. *Foothills* is incorrect to the extent it relies on authority holding that *leave to amend* under subsection (a) of CR 15 is subject to review for an abuse of discretion. *See* 46 Wn. App. at 374 (citing *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983)). The case on which *Foothills* relies does not address the standard of review for *relation back* under subsection (c) of CR 15. *See Caruso*, 100 Wn. 2d at 351; *accord Perrin v. Stensland*, 158 Wn. App. 185, 192-93, 240 P.3d 1189 (2010) (discussing *Caruso*).

In *Perrin*, the court specifically rejected application of the abuse of discretion standard of review to relation back under CR 15(c). *See* 158 Wn. App. at 193. The court explained that some opinions incorrectly refer to abuse of discretion as the standard of review because the issue often arises in connection with a motion for leave to amend under CR 15(a), questioning *Foothills* on this basis. *See id.* at 192. Although *Perrin* was discussed in the Martin family's opening brief, it is not cited in FCCNA's response.

Additionally, FCCNA ignores the procedural posture of this case, involving summary judgment granted in favor of FCCNA based on its statute of limitations defense. Even rulings that would otherwise be subject to abuse of discretion review are subject to de novo review when decided on summary judgment. *See Folsom v. Burger King*, 135 Wn.2d 658, 664, 958 P.2d 301 (1998).[14] In light of *Perrin* and the procedural posture of this case, the question of whether the Martin family's amended complaint relates back under CR 15(c) should be reviewed de novo.

G. The requirements for relation back are satisfied in this case.

FCCNA appears to agree with the Martin family regarding the requirements for an amendment adding a defendant to relate back to the

[14] Although *Folsom* involved evidentiary rulings, the Court emphasized that *all* trial court rulings made in connection with summary judgment are reviewed de novo. *See* 135 Wn. 2d at 664.

date of the original complaint for purposes of the statute of limitations; namely, notice within the limitations period (notice), actual or constructive knowledge that the defendant was mistakenly omitted (mistake), and lack of inexcusable neglect. *See* Martin Br., at 35-36; FCCNA Br., at 19-23. However, in the course of its argument, FCCNA ignores the evidence in the record relating to the notice and mistake requirements, and it applies the wrong standard for determining whether there is inexcusable neglect.

1. FCCNA ignores the evidence in the record regarding the notice requirement.

FCCNA argues that "the Martin family has not produced any evidence that FCCNA had notice of the complaint by August 14, 2007, when the statute of limitations expired." FCCNA Br., at 19. The argument is unsupported by citation to the record, and it wrongly assumes that the statute of limitations expired three years after the death of Donald Martin, rather than three years after discovery of the proper defendant, *see supra* § VII(B), and that the limitations period was not tolled upon filing of the complaint, *see supra* § VII(D).

FCCNA's notice argument is also incorrect as a matter of fact. As pointed out in the Martin family's opening brief, co-defendant General tendered defense of the Martin family's lawsuit to "Fletcher General, Inc." (which had merged into FCCNA by that point) on July 24, 2007, enclosing

a copy of the complaint. CP 62-63. Although this letter was cited in the Martin family's opening brief, FCCNA does not acknowledge or otherwise address it.

2. FCCNA ignores the evidence in the record regarding the mistake requirement.

FCCNA also argues that the Martin family has failed to meet their burden to establish that FCCNA and Fletcher General knew or should have known that, but for a mistake concerning the identity of the proper party, they would have been named as defendants in the original complaint. *See* FCCNA Br., at 20. This argument ignores the evidence in the record regarding the mistake requirement. As pointed out in the Martin family's opening brief, the fact that its predecessor (WSH) was named in the original complaint, the tender of defense from General to Fletcher General, CP 62-63, and FCCNA's act of forwarding the tender to its own insurers, CP 401-02, establish, at a minimum, constructive knowledge sufficient to satisfy the mistake requirement. *See* Martin Br., at 40. Although this evidence was cited in the Martin family's opening brief, FCCNA does not acknowledge or otherwise address it.

3. FCCNA applies the wrong standard for determining whether there is inexcusable neglect.

FCCNA completely ignores this Court's most recent and extended discussion of inexcusable neglect in *Perrin, supra*. *Perrin* recognizes that

"CR 15(c) is to be liberally construed on the side of allowance of relation back of an amendment that adds or substitutes a new party after the statute of limitations has run, particularly where the opposing party will be put to no disadvantage. *See* 158 Wn. App. at 194. *Perrin* further recognizes that, where the notice and mistake requirements for relation back are satisfied, an amendment adding a new party does not subvert the policies underlying the statute of limitations. *See id.* at 197. In this regard, it is worth noting that FCCNA fails to identify any prejudice resulting from relation back in this case. *See* FCCNA Br., at 19-23.[15]

Although relation back may be denied on grounds of inexcusable neglect, such denial is limited to cases where the failure to name a defendant is likely the result of "a strategic choice rather than a mistake." 158 Wn. App. at 201-02. Under the circumstances presented by this case, there is no indication of a strategic choice. Given the complex series of non-public mergers and acquisitions over an extended period of time, the Martin family simply did not know that FCCNA was a proper party. After discovering that FCCNA was, in fact, a proper party, they promptly sought to amend.

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[15] *Perrin* also raises the question of whether satisfaction of the notice and mistake requirements should eliminate the need to consider inexcusable neglect. *See* 148 Wn. App. at 199-200 (discussing *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485 (2010)). The Martin family agrees that it should.

FCCNA relies for the most part on case law that was discussed in and distinguished by *Perrin* in synthesizing the standard for inexcusable neglect. *See* FCCNA Br., at 21-23 (citing *Tellinghuisen v. King County Council,* 103 Wn. 2d 221, 691 P.2d 575 (2010); *Haberman v. Washington Public Power Supply Sys.,* 109 Wn. 2d 107, 744 P.2d 1032 (1987); *Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 142 P.3d 179 (2006)). All of these cases involve circumstances suggesting that the plaintiff made a strategic choice to omit a defendant, based on the existence of public records that readily identified that defendant. *See Perrin*, at 202 (distinguishing *Tellinghuisen* and the rule applied in *Haberman* and *Teller* on this basis); *Tellinghuisen,* 103 Wn. 2d at 224 (stating "the identity of the omitted parties was a matter of public record); *Haberman,* 109 Wn. 2d at 174 (stating "the record shows that the identities of all the defendants sought to be added was readily available to plaintiffs from a variety of public sources"); *Teller*, 134 Wn. App. at 707-08 (referring to signage, actual knowledge based upon correspondence, and public records that identified the proper defendant). Here, the available public records do not establish the connection between WSH and FCCNA, and there was no such strategic choice. Under these circumstances, inexcusable neglect should not prevent the Martin family from obtaining relation back.

IX. CONCLUSION

Based on the foregoing argument and authority, the Martin family respectfully asks the Court to grant the following relief:

1. Reverse and vacate the superior court's summary judgment and reconsideration orders in favor of General, and grant summary judgment in their favor on the issue of successor liability; and

2. Reverse and vacate the superior court's summary judgment and reconsideration orders in favor of FCCNA on its statute of limitations defense; and

3. Affirm the superior court's denial of summary judgment to General based on the statute of repose and the WPLA, and grant summary judgment in their favor on the statute of repose.

Submitted this 1st day of August, 2012.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On August 1, 2012, I served the document to which this is annexed by First Class Mail, postage prepaid, as follows:

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APPENDIX

RCW 4.16.300. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property

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

[2004 c 257 § 1, eff. June 10, 2004; 1986 c 305 § 703; 1967 c 75 § 1.]

RCW 4.16.310. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property--Accrual and limitations of actions or claims

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

in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

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

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

RCW 7.72.010. Definitions

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(1) Product seller. "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: PROVIDED, That when it is resold, the used product is in essentially the same condition as when it was acquired for resale;

(d) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession,

maintenance, and operation of the product are controlled by a person other than the lessor; and

(e) A licensed pharmacist who dispenses a prescription product manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed prescribing practitioner if the claim against the pharmacist is based upon strict liability in tort or the implied warranty provisions under the uniform commercial code, Title 62A RCW, and if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules as provided in RCW 7.72.040. Nothing in this subsection (1)(e) affects a pharmacist's liability under RCW 7.72.040(1).

(2) Manufacturer. "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.

(4) Product liability claim. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage

or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) Claimant. "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) Harm. "Harm" includes any damages recognized by the courts of this state: PROVIDED, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW.

[1991 c 189 § 3; 1981 c 27 § 2.]