NO. 737481

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Appellant/Cross-Respondent,

v.

ESTATE OF BARBARA BRANDES

Respondent/Cross-Appellant.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

Respondent's brief fails to address any of the salient points made in Brand Insulation Inc.'s ("Brand") opening brief. When confronted with the fact that the trial judge erred in failing to apply Washington's construction statute of repose to bar Mrs. Brandes' claims, Respondent chooses to argue an interpretation of the statute that has been repeatedly rejected by the Washington Supreme Court. Washington Supreme Court case law clearly demonstrates that the pivotal question in determining the statute's applicability is whether the activity engaged in by a defendant was an activity conducted in furtherance of the construction of an improvement to real property. The inquiry is not, as urged by Respondent, whether or not a subcontractor's activity, in and of itself, constitutes an improvement to real property. The appropriate inquiry is whether the contractor's work activity is conducted as part of the construction, repair or alteration of an improvement to real property. Respondent fails to address at all the trial court's misapplication of the "discovery rule" when evaluating the applicability of the construction statute of repose.

Likewise, plaintiff's discussion of whether this court should recognize a general negligence duty in a situation involving disease allegedly caused by a "take home exposure to asbestos" fails to recognize

that the Washington cases that have found such a duty have done so based on facts unique to each situation. In *Lundsford v. Saberhagen Holdings*, 125 Wn.App. 784, 106 P.3d 808 (2005), the Court found that the policy considerations of strict liability justified imposition of a duty, despite the Court's recognition that no other principle of law would support such a duty. In *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 240 P.3d 162 (2010), the duty was predicated on a premises owner's having undertaken a specific obligation for workplace safety that extended to a subcontractor's employees. No such justification exists in a garden variety negligence case such as is presented here.

Respondent's argument regarding its "negligent sale" claim does not address the fundamental issue presented. Brand was not a seller for the purposes of Restatement (Second) Torts § 402A (1965) liability.[1] The transaction by which it supplied insulation material for installation at the refinery pursuant to its subcontract was not a sale for the purposes of Restatement (Second) Torts § 402A. If Brand was not a seller and its installation of insulation not a sale for the purposes of section 402A, it cannot be a seller, and the transaction cannot be a sale for the purposes of Respondent's Restatement (Second) Torts § 388 "negligent sale" claim.

[1] A conclusion not challenged by Respondent.

Finally, Respondent's argument regarding Dr. Churg's causation testimony completely misses the point of Brand's objection. Brand does not dispute that Dr. Churg is imminently qualified to testify in an asbestos case. However, where an expert has a specific threshold exposure requirement that is necessary to support his causation opinion, it is axiomatic that the party calling that expert provides evidence that the threshold exposure has been exceeded. No such evidence was presented by Respondent. Defendant's evidence clearly demonstrated the exposure threshold had not been met.

II. ARGUMENT

i. Appeal

A. Washington's Statute of Repose Bars Respondent's Claims

1. The "Activities Analysis" Defines who is Protected

There is no dispute that Respondent's claims fall outside the time limit provided in Washington's construction statute of repose, RCW 4.16.300-310. There is no contention that the ARCO Refinery is not an improvement to real property. The trial court erred by engaging in an analysis of whether the particular component installed in the course of a subcontractor's construction activities constituted an improvement to real property, in and of itself.

The Washington Supreme Court has specifically held that, in addressing the applicability of the statute of repose, a three step approach is to be used. *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 567, 772 P.2d 1018 (1989). First, the court must address the scope of the statute, whether it applies in the given case. If the statute applies, the cause of action must accrue within six years of substantial completion of the project. If the claim accrues, the party must file within the applicable statute of limitations. *Id.* The appropriate consideration in addressing whether the statute applies is "an activities analysis." *Id.* The statute of repose bars all claims against any person arising from the activities of having constructed, altered or repaired-- on account of those activities. *Id.* at 568 (citations omitted). "RCW 4.16.310 applies to all claims of causes of action arising from the activities covered." *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 500, 687 P.2d 212 (1984). The pertinent inquiry is whether a contractor performed construction services or is a manufacturer of a product. *Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 578-79, 29 P.3d 1249 (2001).

That Brand's activity at the ARCO site falls within the ambit of the statute of repose is best illustrated by *Smith v. Showalter,* 47 Wn.App. 245, 734 P.2d 928 (1987). In *Smith*, a home was destroyed by fire caused

by faulty wiring. *Id.* at 246-47. The defendants were responsible for the wiring alleged to have been faulty. *Id.* While the statute of repose was found not to apply under the circumstances due to the court's determination of when the cause of action accrued, it is clear from the opinion that, had the accrual date been more than 6 years after substantial completion, the statute of repose would have defeated liability. *Id.* at 249; 251. "Here, the house was the entire improvement—construction services were not terminated until sometime in 1981...." *Id.* at 251. No meaningful distinction can be drawn between an electrician installing wiring which he presumably provided himself and an insulation contractor installing insulation that he provided as part of his subcontract.

Respondent's argument and the trial court's ruling on summary judgment miss the defining point of the analysis as set forth by the Washington Supreme Court: "the focus is on the activities. If the claim arises from those activities, the person is covered; if it does not, he is not covered." *Pfeifer*, 112 Wn.2d at 569. Here, Respondent's claims allegedly arose from dust that got onto Mr. Brandes' clothing during or as a result of Brand's installation of thermal insulation at the refinery. Under the Washington Supreme Court's approach, Brand's construction activities are covered by the statute of repose. There is no "question of fact" regarding the scope and nature of those activities. In fact, there is no

dispute at all as to what Brand did at the ARCO site. The trial court's interpretation of the RCW 4.16.300-310 and the consequent denial of Brand's summary judgment motion was clear error.

2. The Trial's Court's Denial of Summary Judgment was Contrary to the Law and, therefore, Error

Respondent's assertion that the issue is not properly before this Court is without merit. Whether the statute of repose bars suit is a matter of law for the trial court to decide. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 263, 840 P.2d 860 (1992). There may be instances in which factual issues need to be resolved by a jury, however, this is not such a case. *Id.* There was no question as to the scope and nature of Brand's construction activities at the refinery. Brand was an insulation subcontractor installing thermal insulation products pursuant to a subcontract with ARCO's general contractor Ralph M. Parsons Co. (CP 000428-79). That subcontract specified the precise insulation products to be installed. *Id.* Respondent's argument that a question of fact was presented as to whether or not Brand's work was, in and of itself, an improvement to real property is irrelevant. The legal question to be addressed in determining whether the statute applies is whether the activity performed is covered under the statute. Is the activity undertaken in connection with the construction of an improvement to real property?

The issue is not whether a particular component used or created in the course of that activity constitutes an improvement to real property. *Pfeifer*, 112 Wn.2d at 569.

3. The Trial Court's Determination that the Statute of Repose does not Bar Respondent's Negligent Sales Claims is also Error

Brand installed thermal insulation which it supplied pursuant to its subcontract with the general contractor Ralph Parsons. Those installation activities were a significant part of the overall construction of the refinery. This is precisely the situation the statute of repose was intended to address. The court's position that a "negligent sale" claim is somehow exempt from the statute finds no support in the statute, or in case law interpreting the statute. *Id.*

4. The Discovery Rule is Not Applicable

Brand made a motion for reconsideration of the trial court's denial of summary judgment, which the court denied by way of an order attached to an email. (CP 003458-59). The email body is attached to Brand's opening brief as appendix B and states in part:

> I was interested to be reminded of Justice Owens' recitation (at p. 577-8) of the primary purposes of statutes of repose. With these in mind, it seems pretty clear the statute should not be used to preclude a claim based on asbestos exposure that is alleged to have occurred soon after, and directly due to, the defendants' negligent sale or use in

> question but which could not have led to any claim until several decades later.

Summary judgment orders are reviewed *de novo*. *Heg v. Alldredge*, 157 Wn.2d 154, 160, 137 P.3d 9 (2006); *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 522, 280 P.3d 1133 (2012). This Court should reverse the trial court's order denying summary judgment on Respondent's claims.

Respondent does not address the trial court's ruling on reconsideration. However, there should be no question before this Court that the statute of repose is not subject to the discovery rule. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 574–75, 146 P.3d 423 (2006) (quoting *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211–12, 875 P.2d 1213 (1994) (emphasis added)); *see also Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols–Kiewit Constr. Co.*, 176 Wn.2d 502, 511, 296 P.3d 821 (2013).

The trial court simply refused to apply the statute in circumstances like asbestos cases that involve a latent injury. There is no basis in law to support that ruling. Washington jurisprudence has long distinguished between statutes of limitation in which a discovery rule is appropriate and the statute of repose to which a discovery rule is wholly inapplicable. The statute of repose holds that a cause of action must accrue, if at all, within a

specific time frame. There is no exception. If a party falls within one of the categories protected by the statute, then any claim made against that party outside the repose period fails. Under the Washington statute of repose, a claim could be barred before it even arose, which is the case here. The denial of Brand's motion for summary judgment and Brand's motion for reconsideration was error.

B. Common Law Negligence does not Recognize a Duty Under the Facts of this case

1. There is no Legal Basis under a Common Law Negligence Theory to Extend Liability Under These Circumstances

Established legal principles governing the law of negligence guide the Court's application of the law to the facts of this case. Legal standards do not change because a plaintiff alleges her personal injury was caused by exposure to asbestos. Under a negligence standard, the plaintiff must still prove the existence of a duty, breach, proximate cause and injury. Respondent cannot prove the existence of a duty under the facts of this case.

Respondent asserts that common law negligence imposes a generalized "duty of ordinary care" under which Brand is subject to liability to anyone, anywhere, who happens to come into contact with another who may have worked in proximity to Brand. That is not the law in Washington or anywhere else:

> The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff? Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree" (citations and internal quotation marks omitted).

In re New York City Asbestos Litig., 5 N.Y.3d 486, 493, 840 N.E.2d 115, 119 (2005). Contrary to Respondent's claim, there is no "ordinary duty of reasonable care" under the law.

Reasonable care is the standard of conduct to which one must conform in order to avoid being negligent. *State v. Ramser*, 17 Wn.2d 581, 590, 135 P2d 1013 (1943). Whether or not one has exercised reasonable care is an entirely separate inquiry from the question of whether or not a duty to exercise reasonable care exists in the first instance. Restatement (Second) Torts § 282 (1965). Similarly, foreseeability does not establish a duty. Foreseeability bears on the scope of a duty but does not create one in the first instance. *Mc. Kown v. Simon Property Group*, 182 Wn.2d 752, 764, 344 P.3d 661 (2015). In order to find a duty was owed to Mrs. Brandes in the first instance, this Court would have to find that a subcontractor at a work site, who had no control over anyone but its own

employees, owed a duty to a wife of the premise owner's worker, to protect her from harms which the premise owner's employee may carry from the workplace into her home. There is no authority in Washington or any other state (that we have located) to support such a conclusion.[2]

Only after a determination of whether a legal duty is owed does the Court look to concepts such as the standard of care owed and the foreseeability of harms. *Id.* Moreover, an underlying principle of negligence law is that, if a duty is to be found, it must be within the power of the party charged with the duty to fulfill it. Under the circumstances of this case, Brand had no ability to control the conduct of an ARCO employee. Brand could not require him to shower or change his clothing prior to returning home. In short, Brand had no ability to protect Mrs. Brandes from the conduct of her husband or of ARCO.

2. Washington's "Take-Home" Jurisprudence

Two Washington cases have addressed the issue of "take home exposure" liability. *Lundsford* involved strict liability claims against a manufacturer of asbestos products. *Lundsford*, 125 Wn.App. at 786-87. The Court, in reversing summary judgment, specifically held that the policy rationales underlying strict liability provided the basis of its decision:

[2] The fact that Respondent has failed to cite to such a case in their materials leads us to reasonable conclusion that our research did not overlook an existing case.

> Given the lack of clear authority and the literal language of section 402A, policy considerations are key in determining whether strict liability should extend to injuries to plaintiffs like Lunsford. The American Law Institute discussed the policy reasons for imposing strict liability:
> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the products.
> *Restatement (Second) of Torts* § 402A cmt. *c* (1965). These policy rationales support application of strict liability to a household family member of a user of an asbestos containing product, if it is reasonably foreseeable that household members would be exposed in this manner.

Id. at 792-983.[3] None of these considerations are applicable in the context of this case, which is based solely on common law negligence—regardless of how many times Respondent claims Brand was a "seller."[4]

In *Arnold*, the issue before Division II was whether Lockheed, a shipyard premises owner, could be liable to the son of a shipyard worker

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[3] The issue of whether a "take home" strict liability claim was available against a manufacturer in Washington was not before the Supreme Court.
[4] The trial court dismissed all of Respondent's §402A strict liability claims on summary judgment and Respondent has not challenged that ruling. VRP 52:6-53:1.

for asbestos exposures allegedly incurred by the son as a result of his father bringing asbestos home on his clothing and person during the time the father worked at the shipyard. *Arnold,* 157 Wn.App. at 653-55. The court did not specifically analyze the take home exposure question but found that the Arnolds had presented sufficient evidence "to resist summary judgment on their claims against Lockheed as a general contractor with control over the common work areas on the ships where Reuben worked." *Id.* at 666 (emphasis added).

Respondent argues the *Arnold* court recognized the existence of a common law negligence duty of care by Lockheed that extended to family members of workers. Respondent-Cross-Appellant Brief at 14. That is a misstatement of the *Arnold* court's holding. The court held that, in a situation in which Lockheed retained control of the premises and had the right to control the conduct of its subcontractors, a duty of care could exist by virtue of that special relationship of employer-employee. *Arnold*, 157 Wn.App at 666. The court did not find a duty of care existed under general common law negligence that extended to a worker's family members in situations where the right to control the conduct of others did not exist. *See Id.*

In addition, Respondent's argument that "ample evidence" was presented suggesting that Brand should have foreseen a risk to family

members of asbestos exposed workers is a mischaracterization of the evidence. Brand presented specific evidence that Dr. Selikoff, the leading US asbestos researcher of the day, was telling workers that his research into that issue was reassuring. That was in the Fall of 1971, precisely the time Brand was working at the ARCO refinery. (VRP 895-96; 899-900; 942-944). Definitive articles on that issue with respect to asbestos containing thermal insulation products were not published until 1976 4 years after Brand left the ARCO site. (VRP 942-44).

Respondent alleges that co-worker testimony, expert witness testimony and testimony of what other companies may have done under similar situations assist in establishing the existence of a legal duty. Respondent's Brief, at 15. This argument fails. The conduct described by Respondent may have been relevant to determine whether a duty had been breached, but it plays no role in determining whether a duty exists in the first instance. Moreover, the "evidence" Respondent points to fails to support the proposition for which it is cited. There was no evidence two of the alleged co-workers ever worked with or around Mr. Brandes and, therefore, their testimony cannot establish the conditions present when Mr. Brandes was working in the Coke or Crude units. (VRP 377-79; 447-48). Second, Mr. Templin testified that "whenever asbestos dust is visible it would exceed even the highest time weighted average originally applied

by OSHA in the early 1970s." Mr. Templin also testified that asbestos dust is invisible. (VRP 679). His opinions are complete nonsense. There are methodologies available for calculating airborne concentrations of asbestos. There are also accepted methodologies for estimating occupational exposures. Mr. Templin did not conduct a retrospective exposure analysis in this case. There was no basis for his opinions regarding what concentrations of air borne asbestos Mr. Brandes may have been exposed.[5] In fact, the only testimony as to the level of exposure that Mr. Brandes may have encountered came through Joseph Holtshauser who actually performed a dose reconstruction analysis and determined that, if Mr. Brandes was exposed to asbestos containing materials while working for ARCO at their facility, any exposure would have been well below that which was permitted under the federal regulations at the time. (VRP 1392).

There is no court in Washington, or in any other state that Brand could find, that has recognized a legal duty under the factual scenario presented to this court. As the United States Supreme Court cautioned:

> Courts, however, must resist pleas of the kind [Plaintiff] has made, essentially to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis. Cf. *Metro-North,* 521 U.S., at 438, 117

S.Ct. 2113 ("[C]ourts ... must consider the general impact ... of the general liability rules they ... create.").

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 166, 123 S. Ct. 1210, 1228, 155 L. Ed. 2d 261 (2003).

3. Brand Owes No Duty Because the Parties Were Legal Strangers

Respondent agrees, Washington negligence law does not recognize a duty to control the conduct of another person to prevent that person from causing harm to a third person, absent a special relationship between the actor and the third person or some other policy consideration. "[I]n the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another." *Tae Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (quoting *Richards v. Stanley,* 43 Cal.2d 60, 65, 271 P.2d 23 (1954)).

Nonetheless, Respondent argues that Brand was not a third party with respect to its relationship with Mrs. Brandes. That argument is legally and factually incorrect. Brand never came into contact with Mrs. Brandes. Respondent alleges that it is Brand's contact with Mr. Brandes, at Mr. Brandes' workplace, that lead to Mr. Brandes carrying asbestos dust home on his clothing, exposing Mrs. Brandes to asbestos. The argument that Mrs. Brandes was not a third party defies logic. There was neither

contact nor relationship between Brand and Mrs. Brandes. They were legal strangers.

The Washington rule that no liability will attach in tort absent a special relationship between the parties precludes liability in this case. "A duty to a particular individual will be imposed only upon a showing of a definite, established and continuing relationship between the defendant and the third party." *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988). The relationship between Brand and Mrs. Brandes is far too tenuous and inconsequential to warrant the establishment of an actionable duty. The trial court's determination that such a duty existed and its resultant denial of Brand's motion for summary judgment was error.

Respondent champions the conclusion that imposing of a duty under the facts of this case will not pose the risk of limitless liability. However, no attempt is made to address how, practically, the duty they propose would be limited. If Brand had a duty to Mrs. Brandes, there is no logical way to deny such a duty to all persons who had ever set foot in her home or sat in her motor vehicle, who laundered or dry cleaned Mr. Brandes' clothing or had personal contact with Mr. Brandes after work—an undefined class with limitless liability. No public policy or legal analysis would support such liability.

C. Respondent Failed to Prove an Essential Element of Her Negligence Claim.

It is true that Dr. Churg testified as described in Respondent's brief. The problem is that Dr. Churg should not have been permitted to testify at all on the subject of causation because there was no foundation for his testimony. Dr. Churg holds the opinion that an exposure to asbestos is not a substantial factor in causing or contributing to cause mesothelioma unless it exceeds .1 f/cc-year. (VRP 567-68). Mrs. Brandes presented no evidence that the exposure she sustained as a result of Brand's conduct exceeded Dr. Churg's .1 f/cc-year cumulative exposure threshold for attributing substantial factor causation. That was the basis of Brands initial CR 50 motion at the end of plaintiff's evidence. (VRP 1481-82). Then, Brand's Industrial Hygiene expert testified that the exposure Mrs. Brandes would have experienced, on a worst case basis, would not have been anything remotely approaching Dr. Churg's threshold. (VRP 1392). No evidence supported Dr. Churg's opinions. His opinion testimony should have been held inadmissible because that testimony lacked evidentiary foundation. Moreover, after Mr. Holtshouser's testimony, there was affirmative evidence that his exposure threshold for attributing causation had not been met. (VRP 1392).

Brand's motion for directed verdict at the end of its case should have been granted.

Respondent had the burden of establishing medical causation. To do so, Respondent had to show that Mrs. Brandes experienced exposures in excess of .1 f/cc years.[6] Dr. Churg was never provided with any industrial hygiene analysis of the exposures allegedly experienced by Mrs. Brandes. (VRP 568). Plaintiff had an expert qualified to produce the required exposure evidence, if it existed. Plaintiff's industrial hygiene expert Mr. John Templin testified that he had performed dose reconstructions in the past but he did not do so in this case because it was not requested of him. (VRP 798).

Pursuant to ER 104(a), ER 401-403 and ER 701-703, an expert witness must have an adequate foundation for his opinions before those opinions are admissible as evidence. Expert testimony must be based on facts and data – not speculation. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha,* 126 Wn.2d 50, 103, 882 P.2d 703 (1994). Conclusory or speculative opinions lacking an adequate foundation will not be admitted. *Id.* Unreliable expert testimony is excluded. *Lakey v. Puget Sound Energy,* 176 Wn.2d 909, 918, 296 P.3d 860 (2013). Importantly, ER 702 provides when expert testimony may be considered:

[6] This is Dr. Churg's causation threshold for exposure to amphibole asbestos.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id. In ruling on the admissibility of expert testimony under ER 702, the court should keep in mind the danger that the jury may be swayed by a witness possessing the aura of an expert. *Davidson v. Metropolitan Seattle*, 43 Wn.App. 569, 572, 722 P.2d 569 (1986). Expert testimony offered without a proper foundation is unreliable; unreliable testimony does not assist the trier of fact. Brand's foundation objections to Churg's testimony should have been sustained, and Brand's CR 50 motions should have been granted. Had the trial court sustained Brand's foundation objections to Dr. Churg's testimony, Mrs. Brandes would have had no admissible evidence on the critical issue of medical causation. Without that essential element of her claim, there was no basis for submitting the case to the jury.

D. The Court's Jury Instructions Must Apprise the Jury of the Applicable Law.

1. The Court's Negligent Sale Instruction was Prejudicial Error

It is reversible error to instruct the jury in a manner that is inconsistent with the law. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Because there is no viable "negligent sales" claim against

Brand, the court erred when it provided an instruction to the jury encompassing that claim.

Respondent's "duty of ordinary care" conflates two theories of law in an attempt to justify a claim that never existed. Duty is a legal question to be determined by the court depending on mixed considerations of "logic, common sense, justice, policy, and precedent." *Keates v. Vancouver*, 73 Wn.App. 257, 265, 869 P.2d 88 (1994). The exercise of reasonable care is the standard of care that is applicable once a duty has been established. Restatement (Second) Torts § 282 (1965). The two are distinct concepts in tort law and cannot be blended together as Respondent suggests in order to impose a generalized duty of ordinary care to all, regardless of the circumstances.

Notwithstanding its ruling that Brand was not a seller and its installation of thermal insulation pursuant to its contractual obligations was not a "sale" under section 402A, the court permitted plaintiff to assert a "negligent sales" claim under section 388, found that the claim was beyond the scope of the statute of repose, and provided a specific jury instruction describing the elements of the claim. (VRP 1360).[7] The error was not harmless. It allowed the jury to predicate liability on a legal

[7] In addition, Mrs. Brandes was not a "user" of such products as the term is used in the Restatement Torts (Second) of Torts § 388 (1965), upon which the Court's instruction was based.

theory that did not exist. There is no question but that, under Washington law, the scope of those charged with a duty under §388 is identical to the scope of those charged with a duty under §402A. This precise issue was addressed by the Washington Supreme Court in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008):

> Washington cases discussing and analyzing §388 liability generally limit the analysis of the duty to warn of the hazards of a product to those in the chain of distribution of the product, such as manufacturers, suppliers, or sellers. Therefore, we find little to no support under our case law for extending the duty to warn to another manufacturer's product.

Id. at 353. Chain of distribution is also the scope of the application of §402A liability. Brand has tried three cases arising out of its work at the ARCO facility.[8] (CP000356). In all three cases, the trial courts have ruled that Brand was not a "seller" of insulation products at the ARCO facility. This Court upheld the trial court's finding in the *Ehlert* and *Jones* matters that Brand was not a §402A "seller" of insulation products at ARCO in an unpublished decision[9]. The trial court in this case held that Brand was not a "seller" of insulation products at the ARCO facility:

> There are policy reasons that underlay the principles of strict liability for product sellers, and those do have significant weight to them in interpreting the statute. Chief among those is the forced reliance of buyers on the superior

[8] Counsel for Respondent has represented the plaintiff in each action.
[9] *Ehlert v. Brand Insulations, Inc.*, 2014 Wash. App. LEXIS 2239 (Wash. Ct. App., Aug. 25, 2014)

> information of sellers. In this particular case, the buyer, whether that is ARCO, or Parsons, the general contractor, is the one who is specifying the asbestos product that was simply being provided by the defendants. So the Court would conclude as a matter of law that Brand and Metalclad were not acting as sellers with respect to this particular product on this particular occasion.

(VRP 52). Brand was not a seller under Restatement (Second) of Torts §402A and, as explained by the Supreme Court in *Simonetta* and *Braaten*, could not have been a seller for purposes of §388. Moreover, the trial court explicitly held that Brand was not a seller of the insulation products that it installed at the ARCO facility. Under the law, there was no sale. Brand was "simply [] providing" the materials it used during construction. It was prejudicial error to instruct the jury otherwise. (VRP 52).

The trial court permitted the Respondent to assert a Restatement (Second) of Torts § 388 negligent sales cause of action. If Brand was not a "seller" and the installation of thermal insulation not a sale, it cannot be found liable on a theory of "negligent sale." Yet, that is what the court's instructions presented to the jury. There is no way to determine the basis of the jury's liability finding. It could have been negligent installation, it could have been negligent sales, and it could have been both. The fact that the jury's verdict could have been based on negligent sales requires a new trial. In order to determine whether the erroneous jury instruction that misstates the law is harmless, the appellate court must conclude that the

jury verdict would have been the exact same absent the error. *State v. Peters*, 163 Wn.App. 836, 850, 261 P.3d 199 (2011).

Respondent's argument is largely devoted to challenging the trial court's conclusion that Brand was not a seller and its installation of owner specified insulation not a sale. The primary focus of the argument is the claim that Brand's selling excess insulation back to ARCO once its' work was completed is evidence of a "sale" to support their claim. Trial Exhibit 20, Respondent's Brief at 24. Respondent did not challenge the trial court's "no sale" finding as part of its appeal and cannot be heard to argue the point now. The trial court specifically found that these excess sales that Respondent relies on were not "sales" for the purpose of Restatement (Second) of Torts § 402A. Simply put, if Brand's conduct is not a sale for the purposes of section 402A strict liability claim, that conduct cannot be a sale for the purposes of a section 388 negligence claim. (VRP 52).

The court's instructions to the jury were error and the error was prejudicial:

> When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless.

Blaney, 151 Wn.2d at 211 (citations omitted). The instruction was clearly prejudicial because it invited the jurors to find that Brand was negligent under a theory that is not available under the law. More importantly, reversal is warranted because there is no way to determine whether the jury rendered their verdict based on the negligent sales or negligent conduct claims. An erroneous jury instruction is harmless if it is "not prejudicial to the substantive rights of the part[ies] ..., and in no was affected the final outcome of the trial." *Id.* quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

2. Failure to Instruct the Jury on the Applicable Law is Error.

a. Contractor's Defense is a Recognized Defense

The law does not require contractors to sit in judgment on the plans and specifications or the materials required for use by his employer. Restatement (Second) of Torts § 404 (1965) Comment (a). (CP 000368). This is true under the Restatement and under Washington law. *Weston v. New Bethel Missionary Baptist Church*, 23 Wn.App 747, 753, 598 P.2d 411 (1979) citing *Armstrong Construction Co. v. Thomson*, 64 Wn.2d 191, 390 P.2d 976 (1964). A contractor is not a guarantor of the proper functioning of materials when the materials are installed in accordance with the contractee's plans and contract. *Clark v. Fowler*, 58 Wn.2d 435,

363 P.2d 812 (1961). Restatement (Second) of Torts § 404 provides that "an independent contractor [who] negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." However, where a contractor builds to the specifications of another, comment *a* provides:

> In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer. The contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.

Comment *a* sets forth a defense, *New Bethel*, *Armstrong*, and *Clark* use the same language to employ the precise principal. In other jurisdictions, the defense is routinely permitted in negligence and product liability cases.[10]

It was undisputed that Brand was following the specifications of its subcontract, which it was contractually bound to do. Brand did not participate in the selection of the materials to be used. Brand completed its work in the precise manner contemplated and, there was no evidence

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[10] *Leininger v. Sterns Roger Mfg Co.*, 17 Utah 2d. 37, 404 P.2d 33 (1965); *Hatch v. Trail King Industries, Inc.*, 656 F.3d 59 (1st Cir. 2011); *Littlehale v. E.I. du Pont de Nemours & Co.*, 268 F.Supp. 791 (S.D.N.Y.1966), *aff'd*, 380 F.2d 274 (2d Cir.1967); *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir.1973); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 595 (Ky.1980); *Houlihan v. Morrison Knudsen Corp.*, 2 A.D.3d 493, 768 N.Y.S.2d 495, 496 (2003); *Bloemer v. Art Welding Co.*, 884 S.W.2d 55, 59 (Mo. Ct. App. 1994)

presented otherwise. The contractor's defense is a complete defense in this state and every other state that has addressed the issue.

Respondent's argument that Brand was entitled to argue its theory of the case does not address the court's improper denial of Brand's motion for summary judgment or the fact that Brand cannot properly argue the law of the case when it has not been presented to the jury for consideration via a specific instruction. While Brand may have been free to argue the point, the jury was free to ignore that argument because it had not been provided an instruction encompassing the legal basis for the argument.

b. Even if Questions of Fact Precluded Summary Judgment Brand was Entitled to a Jury Instruction on the Law.

The trial court denied summary judgment on the issue without explanation. Even if there was of a question of fact, Brand was, at minimum, entitled to a jury instruction on the contractor specification defense, which is a complete defense. A party is entitled to a jury instruction on the applicable law. *Anfinson v. FedEx Ground Packaging System, Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Each party is entitled to have its theory of the case set forth in the jury instructions. *Gammon v. Clark Equipment Co.*, 104 Wn.2d 613, 617, 707 P.2d 685

(1985).[11] "Parties are entitled to jury instructions that accurately state the law. *Eagle Group, Inc. v. Pullen*, 114 Wn.App. 409, 420, 58 P.3d 292 (2002). It is the trial court's duty to instruct the jury on the law. The instructions the trial court gave did not inform the jurors that Brand had a legal defense if Brand could convince the jurors that it was following specifications with which Brand was contractually obliged to follow. Consequently, Brand did not have the opportunity to argue its theory of the case under the law provided to the jury. The jury instructions did not accurately state the law.

The error was prejudicial because it deprived Brand of the right argue a valid defense and failed to inform the jury of the applicable law. Given the absence of any evidence that a reasonable insulation contractor would have done anything differently under the circumstances present at the ARCO site, a properly instructed jury could easily have reached a defense verdict. Accordingly, the Court should grant a new trial.

E. Allocation of Set-Off Amounts to a Non-Existent Cause of Action Was Error

Shortly after the jury rendered the verdict in Mrs. Brandes' personal injury action, Respondent filed a Wrongful Death action naming

[11] Respondent's discuss of compliance with industry standards has no bearing on the section 404 comment *a* Contractor's Defense.

Brand and three previously unnamed entities as defendants.[12] *Ramona C. Brandes v. Brand Insulations, Inc. et al.*, 15-2-17723-1, filed July 22, 2015. Brand filed a 12(b)(6) motion. On January 5, 2016, the Honorable Jean Rietschel dismissed the cause of action as to all defendants. Rietschel Order, attached as Exhibit A. In the final judgment in the Brandes personal injury action, Judge Downing allocated 20% of settlements received by Mrs. Brandes's Estate to future "wrongful death claims". Brand opposed that allocation on two grounds. First, no evidence of the value of these "future wrongful death claims" had been presented to the court. Second, when a defendant settles a personal injury action, the plaintiff's right to pursue a wrongful death claim against that settled defendant is extinguished by the settlement, as a matter of law. In short, the allocation of any moneys from settled defendants to a future wrongful death claim was error because, at the time settlement was consummated, there was no longer a wrongful death claim against the settling defendants to which an allocation could be made. We now have the additional fact that those wrongful death claims have been dismissed, establishing as a matter of fact that they were valueless.

[12] The fact that previously unnamed entities were named in the wrongful death case is particularly troublesome. See e.g. Judge Hodges discussion of this issue in his opinion in the Garlock Bankruptcy matter. *In Re: GARLOCK SEALING TECHNOLOGIES, LLC., et al., Debtors*, Case No. 10-31607, 504 B.R. 471, 2014 LEXIS Bankr. 157 at Paragraphs 57-71 discussing asbestos plaintiff counsel withholding evidence of "other exposures."

1. A Personal Injury Plaintiff's Action or Inaction Bars the Wrongful Death Action of her Heirs.

Under Washington law, once a plaintiff settles with defendants in a personal injury case, wrongful death claims against those settled defendants are extinguished. Extinguishment occurs as a matter of law, not due to language set forth in the parties' settlement agreement. *See Deggs v. Asbestos Corp. Ltd.*, 188 Wn.App. 495, 351 P.3d 1 (2015). It does not matter whether those "claims" are included in the settlement agreement or not. Once the settlement was consummated, Mrs. Brandes no longer had a "subsisting cause of action" against the settling defendants, and therefore, her statutory beneficiaries had no wrongful death claim that could be the subject of allocation. *Id.* "[T]he action for wrongful death is extinguished by an effective release executed by the deceased in [her] lifetime...." *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 581, 44 P.2d 193 (1935). It is error to allocate any portion of the personal injury action settlements to wrongful death claims that do not exist.

Respondent claims *Deggs* is distinguishable. It is not. Moreover, the *Deggs* opinion made clear that the court was not interpreting a new area of law, rather, the court was applying over 80 years of Washington Supreme Court precedent to the facts of the case before it:

> Although the case law in Washington is indeed old, the Washington Supreme Court previously chose between these possible outcomes when it decided *Calhoun* and *Grant* in the 1930s.[6] It chose finality of settlements and judgments and preclusion of stale claims and potential double recovery. The legislature has not seen fit to correct this interpretation of the wrongful death statute. We see no reason to advocate for a change in Washington law.

Deggs v. Asbestos Corp., 188 Wash. App. 495, 510-11, 354 P.3d 1, 8, review granted, 184 Wash. 2d 1018, 361 P.3d 746 (2015). As noted above, the *Grant* court specifically held that a settlement by the decedent during her lifetime bars any subsequent wrongful death claim. The trial court's allocation determination was an error of law because the court allocated settlement funds to a future cause of action that did not (and does not) exist. Errors of law are reviewed de novo. *Jackson v. Fenix Underground, Inc.*, 142 Wn.App. 141, 145, 173 P.3d 977 (2007). In addition, the ability of Respondent to bring a wrongful death claim has been adjudicated; the court held there was no valid claim and dismissed Respondent's wrongful death action as to all the defendants. Judge Downing's decision to allocate a portion of personal injury action settlement funds to future wrongful death cases was clear error under Washington Supreme Court precedent. In the event, this case is not reversed, the Court should enter an order directing the trial court to revise

the judgment against Brand such that it gets full credit for 100% of prior settlements as a setoff against the judgment.

F. Challenge to MAS Video Evidence

As noted by our Supreme Court, "[h]ighly prejudicial images may sway the jury in ways that words cannot." *In re Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). The MAS videos employed by Respondent were not reliable evidence; they did not accurately depict any work condition experienced by Mr. Brandes, nor were they intended to do so. The videos certainly did not accurately represent any asbestos exposure allegedly sustained by Mrs. Brandes who did not work at and had never visited the ARCO facility. The videos were prejudicial, inaccurate and presented no evidence relevant to Mrs. Brandes claimed exposures to asbestos. Such evidence is inadmissible. The error was not harmless.

B. Cross-Appeal

The main thrust of Respondent's argument that the trial court committed reversible error in granting remittitur is that Brand failed to object during Respondent's closing argument. The argument ignores the true bases of Judge Downing's decision. Judge Downing himself determined that "it is 'unmistakable' that 'passion' played an inappropriate part in the jury's determination of compensatory damages."

(CP 005428-31). In support of that conclusion, the Court set forth the three primary bases for the finding:

> 1. The jury was visibly and audibly shaken when told of the plaintiff's death....[due to a prior experience] this Court believes it may have overestimated the jury's ability to calmly and rationally compartmentalize this unquestionably emotional new information.
>
> 2. The Court did orally inform the jury that Mrs. Brandes' death had no impact on the decisions they had to make which remained the same. To the Court's thinking, this implied that if they reached damages, they were still only to consider Mrs. Brandes pre-death pain and suffering, etc., and not her death and the grieving caused to other family members. This may well have been lost in the emotion of the moment. Since this occurred on the last day of trial, shortly before closing arguments, the Court did not modify the previously finalized jury instructions in a way that may have made this point more clear.
>
> 3. Plaintiff's closing argument contained an inappropriate appeal for punitive and exemplary damages. It is true that by not objecting, the defense may have waived any argument for a new trial on this basis. However, it remains a consideration for the Court in its conclusion about how the jury arrived at its damages award. Counsel's proposed measure of damages involved "testifying" to defendant's profits ("$600,000") and then to the current value of that amount ("$6,000,000"). As a matter of economics, that is incorrect ($600,000 in 1972 would actually be worth $3.5 million today) and the accuracy of the proffered profit figure is unknown since there was no testimony on that subject. What is clearly known is that the entire approach is impermissible as it focused on punishing the defendant by taking away its profits and making an example of it ("as the Congressional Medal of Honor does for a fallen soldier.") While counsel carefully used the label "compensation," the measure suggested was not rationally related to compensating the plaintiff but rather to impacting

> the defendant and, critically, this occurred in the emotionally charged context of the recently "fallen" plaintiff.

Id.

While not enumerated in the order, the trial court also found that the award was "outside the range of what would be expected in light of the facts of the case." The law limited the jury to a determination of compensation for the pain and suffering of Mrs. Brandes from the time of diagnosis until the time of her death. *Thompson v. Seattle, R & S Ry. Co.*, 71 Wn. 436, 443, 128 P. 1070 (1912). "The jury could award nothing for her death, nothing for the losses caused the respondents by reason of her death, and nothing by way of punishment of the [defendant] because of its negligence." *Id.* (citations omitted).

Within the confines of that limitation, the jury's verdict was excessive and was not supported by the evidence presented at trial. Mrs. Brandes was diagnosed with mesothelioma 11 months prior to her death. (CP 000388). Her treating physician Dr. Ahmed testified regarding her symptoms. Those were described as pain controlled by medication, shortness of breath controlled by chemotherapy until shortly before her death, neuropathy, and a loss of mobility. (VRP 469). Mrs. Brandes was able to appear in court and remain for an entire trial day and was in no apparent distress during that period. She passed away on the eve of

closing argument. Brand does not take the position that these were not serious disabilities. However, they were not disabilities the gravity of which would justify an award of 3.5 million dollars. This is precisely why the trial court determined that the facts presented at trial did not justify the amount of the verdict. "The Court must also observe that the amount awarded by the jury is outside the range of what would be expected in light of the facts of this case." (CP 005428-31).

This Court reviews the trial court's reduction of a jury verdict de novo. *Snowhill v. Lieurance,* 72 Wn.2d 781, 783-85, 435 P.2d 624 (1967); *Hendrickson v. Konopaski,* 14 Wn.App. 390, 394-95, 541 P.2d 1001 (1975). A jury damage award should be overturned only if specific circumstances are met. *See Miller v. Yates,* 67 Wn.App. 120, 124, 834 P.2d 36 (1992). Those circumstances are: (1) the award is outside the range of the evidence, (2) the jury was obviously motivated by passion or prejudice, or (3) the verdict amount is shocking to the court's conscience. RCW 4.76.030; *Washburn v. Beatt Equip. Co.,* 120 Wn.2d 246, 268-69, 840 P.2d 860 (1992); *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 654-55, 771 P.2d 711, 780 P.2d 260 (1989); *Bingaman v. Grays Harbor Comm'ty Hosp.,* 103 Wn.2d 831, 835, 699 P.2d 1230 (1985); *Hill v. GTE Directories Sales Corp.,* 71 Wn.App. 132, 138, 856 P.2d 746, 750 (1993).

A trial court has the ability to reduce the judgment relying on any one of the three bases. Here, the trial court specifically identified the first two bases as present and intimated as to the existence of the third. Judge Downing is an experienced trial judge. He observed firsthand the jurors' response when they learned Mrs. Brandes had passed. Judge Downing expressed no doubt that the jury's verdict resulted from passion and was not supported by the evidence presented in the case.

While this Court addresses the issue de novo, the judgment of the trial court is afforded great discretion because of their ability to perceive firsthand the potential for prejudice.

> ... Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, on the other hand, is tied to the written record and partly for that reason rarely exercises this power.

Washburn, 120 Wn. 2d at 268. Judge Downing observed the jury's reaction to learning of Mrs. Brandes' death firsthand. He also had the opportunity to watch the jurors as Respondent improperly urged the jurors to use that passion as a basis for determining damages. The trial court acted within its authority in granting remittitur and properly found that the jury verdict was clearly influenced by passion and unsupported by the

evidence adduced at trial. Should this Court uphold the verdict, the Judge Downing's Order of Remittitur should be similarly upheld.

Respondent urges this court to look to other verdicts in order to support her argument that the jury's award in this case was not excessive. The Washington Supreme Court has made it clear that resort to the amounts of other awards is an improper inquiry. The *Washburn* court specifically observed that, "it is improper to assess the amount of a verdict based upon comparisons with verdicts in other cases. *Id.* The true issue is whether the evidence in the case matched the amount of the award. Judge Downing was in the perfect position to make that assessment.

III. CONCLUSION

Brand respectfully requests that this Court vacate the judgment against it and remand with instructions to dismiss all claims against Brand. In the alternative, Brand requests that the matter be remanded for a new trial. In the event this court affirms the judgment, Brand requests that the court affirm Judge Downing's remitted judgment and requests that the matter be remanded with instructions directing the trial court to modify the amount of the judgment such that Brand receives a set off for the full amount of prior settlements received by plaintiff.

RESPECTFULLY SUBMITTED this 21 day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21st of April, 2016, I caused a true and correct copy of the foregoing document, to be delivered via email to the following counsel of record:

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DATED this 21st day of April, 2016, at Seattle, Washington.

Diane M. Bulis, Legal Assistant

Exhibit A

HONORABLE JEAN RIETSCHEL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ESTATE OF BARBARA BRANDES, Plaintiff, v. BRAND INSULATIONS, INC., Defendant.	NO. 15-2-17723-1 SEA [CORRECTED] ORDER GRANTING BRAND INSULATIONS, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED Trial Date: 1/3/2017

THIS MATTER came before the Court on Brand Insulations, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, and the joinders therein filed by defendants Parsons Government Services, Inc. and Saberhagen Holdings, Inc. The Court considered the following pleadings and records herein, including:

1. Brand Insulations, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted;

2. Declaration of David A. Shaw in Support of Brand Insulation, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and exhibits thereto;

3. Praecipe to Attach Appendix A to Brand Insulations, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted;

4. Defendant Saberhagen Holdings, Inc.'s Joinder in Brand Insulation, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted;

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5. Defendant Parsons Government Services, Inc.'s Joinder in Brand Insulation, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted;

6. Defendant Saberhagen Holdings, Inc.'s Joinder in Brand Insulation, Inc.'s Re-Noted Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted;

7. Defendant Parsons Government Services, Inc.'s Joinder in Brand Insulation, Inc.'s Re-Noted Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted;

8. Declaration of Timothy K. Thorson in Support of Defendant Saberhagen Holdings, Inc.'s Joinder in Brand Insulation, Inc.'s Re-Noted Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and the exhibits thereto;

9. Declaration of Timothy K. Thorson in Support of Defendant Parsons Government Services, Inc.'s Joinder in Brand Insulation, Inc.'s Re-Noted Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and the exhibits thereto;

10. Plaintiff's Omnibus Response to Defendants' Motion to Dismiss;

11. Declaration of Colin B. Mieling in Support of Plaintiff's Omnibus Response to Defendants' Motion to Dismiss and exhibits thereto;

12. Consolidated Reply of Defendants Saberhagen Holdings, Inc. and Parsons Government Services, Inc. in Support of their Joinders in Defendant Brand Insulations, Inc.'s Motion to Dismiss; and

13. Brand Insulation, Inc.'s reply in Support of Its Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.

The Court being fully advised, hereby rules and orders as follows:

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Brand Insulations, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, in which defendants Parsons Government Services, Inc. and Saberhagen Holdings, Inc. have joined, involves a singular legal issue. The basic operative facts are undisputed and the core issue is one of law; ~~therefore, consideration of the materials attached to~~ the parties' pleadings was unnecessary. ~~Accordingly, the Court has excluded these materials from its consideration and grants relief under CR 12(b)(6).~~

Brand Insulations, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted is hereby GRANTED as to all defendants. Plaintiff's claims against all defendants are hereby dismissed.

DONE IN COURT this 5 day of April, 2016

HONORABLE JEAN RIETCHEL

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