NO. 73748-1-I

94199-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Petitioner,

v.

ESTATE OF BARBARA BRANDES

Respondent.

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# PETITION FOR REVIEW

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David A. Shaw, WSBA #08788
Malika I. Johnson, WSBA #39608
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph: (206) 628-6600
Fx: (206) 628-6611
Attorneys for Petitioner Brand Insulations, Inc.


5997407.2

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## I. IDENTITY OF PETITIONER

Petitioner Brand Insulations, Inc. ("Brand") asks this Court to accept review of the Court of Appeals decision designated in Part II.

## II. COURT OF APPEALS DECISION

*Estate of Barbara Brandes v. Brand Insulations, Inc.*, 2017 WL 325702 (Jan. 23, 2017, unpublished). *See* App. A.

## III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in declining to review Brand's statute of repose argument by reasoning that (1) the issue was not preserved, (2) the insulation was not an improvement to real property and (3) the statute is limited to structural components?

2. Should this Court accept review to decide a matter of first impression in the State: Is there a common law duty on the part of a construction subcontractor at a worksite owned by a third party to protect the spouse of an employee of that third party from exposures to potentially toxic materials brought into the family home by the employee on his person and clothing?[1]

3. Did the Court of Appeals err in making a factual determination that Brand was a seller of insulation when the trial court made the opposite finding and that finding was not challenged on appeal?

[1] This type of exposure is often referred to as "take-home" exposure.

4. Did the Court of Appeals err in finding that Restatement (Second) of Torts § 388 duty of a supplier warranted a negligent sales claim?

5. Did the Court of Appeals err in reversing remittitur and affirming an allocation of settlement proceeds to claims that were extinguished as a matter of law.

## IV. STATEMENT OF THE CASE

### A. Underlying Facts.

Barbara Brandes was diagnosed with mesothelioma June of 2014. (CP 000388). On August 6, 2014, Ms. Brandes and her husband filed a personal injury action naming Brand as a defendant. (CP 000396). None of her children joined in the case. *Id.* Plaintiffs alleged Ms. Brandes was exposed to respirable asbestos fibers carried home on Mr. Brandes' person and clothing during the time that he worked for ARCO at ARCO's Cherry Point refinery from 1971 to 1975. (CP 000386).

In 1970, the Ralph M. Parsons Company contracted with ARCO for the construction of an oil refinery at Cherry Point. Brand was the primary insulation subcontractor for that construction. (CP 000428). Brand's work was performed under Parsons' direction according to specifications set forth in Brand's subcontract. *Id.* Parsons retained full authority over the work to be performed. (CP 000429). The subcontract

contained precise specifications as to what products were to be used by Brand to insulate piping, vessels and equipment on the project.

> c. All piping shall be insulated with "chloride free" calcium silicate insulation as manufactured by PABCO Division of Fibreboard Corporation, Emeryville, California and/or Johns-Manville Sales Corporation, Industrial Insulations Division.(CP 000463).

Brand installed insulation on the Crude Unit where Mr. Brandes first worked. *Id.* Once Brand completed insulating a unit, it was turned over to ARCO. By September 1971, the Crude Unit had been turned over to ARCO for operation. (CP 000485, CP 000503). All insulation installed by Brand was covered by sheet metal lagging. Brand left the Cherry Point facility as of February 1972. (CP 000505).

Ray Brandes was hired to work as an operator at the Cherry Point refinery in March of 1971. (VRP 588). From March until September, the ARCO employees attended classroom training off site. (VRP 589). In September, the new employees began some on the job training at the facility. (VRP 635-36). By mid-November of 1971, Mr. Brandes was working in the Crude unit, which was fully operational. (VRP 589). An operator was charged with maintaining continuous operation of the processing unit. *Id.* As an operator, Ray may have prepared equipment for whatever needed to be done to maintain it, which could have included removing insulation to gain access to the equipment. (CP 616). If the

insulation was on a pipe, an operator would typically use a screwdriver to pull off the metal cladding and then break the insulation off the pipe. *Id.* According to Mr. Brandes, he removed insulation from pipes approximately one-two times per month. (CP 000567).

B. This Litigation.

Brand filed a summary judgment motion seeking, *inter alia,* dismissal of Plaintiff's strict liability claims. The trial court found that Brand was not a "seller" and its installation of insulation pursuant to specifications provided by the owner was not a "sale" under Restatement (Second) of Torts § 402A. The court dismissed Plaintiff's strict liability claims. Brand sought dismissal of the balance of Plaintiff's claims pursuant to Washington's Construction statute of repose RCW 4.16.300-310. (CP 002778). The trial court denied Brand's motion, initially ruling that Plaintiff's raised a question of fact as to whether insulation, in and of itself, was an "improvement to real property," and whether the statute applied to Plaintiff's "negligent sales" claims (Brand Opening Brief, App. A). Brand brought a motion for reconsideration based on the clear language of the statute of repose and Washington precedent which demonstrate that the salient legal inquiry was not, as urged by Plaintiff, whether or not a subcontractor's work itself constituted an improvement to real property. Rather, the appropriate inquiry is simply whether the

contractor's work activity is conducted as part of the construction, repair or alteration of an improvement to real property. (CP 003458-59). Rather than addressing the merits of Brand's motion, the trial court determined that the statute repose was inapplicable to a case involving a disease like mesothelioma.

> 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[.]

The trial court denied reconsideration. *Id.*[2] The case proceeded to trial. On the night before closing argument, Ms. Brandes passed away. Prior to informing the court or Brand, Plaintiff counsel had Ms. Brandes' daughter appointed personal representative of the estate and requested the case be continued under RCW 4.20.060, as a special survival action. (VRP 1370-73). Plaintiff did not seek to amend the complaint to add wrongful death claims on behalf of the heirs/statutory beneficiaries.[3] (VRP 1373). The jury returned a verdict in Ms. Brandes favor and awarded her $3.5 million.

Brand and Plaintiff filed post-trial motions. Plaintiff requested a

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[2] The trial court denied the motion for reconsideration and sent the Order to the parties via email. The body of the email contained the court's reasoning and is attached here (as it was to the Court of Appeals) as App. B.

[3] The statutory beneficiaries under the Wrongful Death Act had not filed loss of consortium claims in the Brandes' personal injury action, although entitled to do so.

reasonableness hearing and moved the court to apportion fifty percent of the settlement proceeds to a future wrongful death case. (CP 005518). Brand moved for judgment notwithstanding the verdict, a new trial or, in the alternative, remittitur. (CP 005192). The trial court granted remittitur and reduced the verdict to $2.5 million. (CP 005428-31). The court also granted, in part, Plaintiff's motion and apportioned twenty percent of the prior settlements to a "future wrongful death claim." *Id.*

C. Court of Appeals Decision.

The Court of Appeals held that Brand did not effectively preserve for review its statute of repose argument (1) because Brand failed to present evidence at trial that insulation was an "integral" component or itself an improvement to real property, (2) because Brand did not present expert testimony, offer jury instructions or move for a directed verdict regarding the material facts that make up the defense, and (3) because the legal issue was not again raised before verdict, thereby affording the court the opportunity to correct any legal error. The Court, therefore, declined to address the issue on appeal.

As to the question of whether Brand owed a legal duty to Ms. Brandes, the Court of Appeals held that (1) Brand acted affirmatively when it installed insulation, (2) Brand engaged in this activity in a way that created an unreasonable risk of harm, and (3) the risk of harm as to

Ms. Brandes was forseeable.

The Court of Appeals further held that the trial court's instruction allowing the jury to consider whether Brand was negligent based on "sales" to the refinery, despite having ruled that Brand was not a "seller" of insulation was not error because (1) Brand had a duty to warn about the danger of the product it selected and sold, and (2) Brand was a supplier within the chain of distribution under Restatement (Second) of Torts § 388.

## V. ARGUMENT

### A. Statute of Repose

The first issue in Brand's appeal presents an important but simple question of law that Brand raised repeatedly in the trial court: Does the statute of repose protect a subcontractor whose activities were undertaken in connection with the construction of an improvement to real property? The Court of Appeals held that because the trial court initially held that there was a question of fact as to whether insulation itself constituted an improvement to real property and because Brand did not present evidence at trial to establish that it was, Brand did not preserve the issue of the statute's application on appeal. That holding is a mischaracterization of the facts and a misapplication of the law. Brand's motion for summary judgment was based on the fact that Ms. Brandes' claim was filed

approximately 40 years after expiration of the latest possible statute of repose's accrual date. Initially, the trial court adopted Court of Appeals (and Plaintiff's) position that the statute only applied if the contractor's work was, in and of itself, an improvement to real property. (VRP 53). Brand moved for reconsideration pointing out that cases applying the statute of repose and the plain language of the statute required an "activities" based inquiry. (App. C). No question of disputed fact existed with respect to the scope and nature of Brand's work at the refinery. The trial court denied Brand's reconsideration motion, not by addressing the merits, but by ruling that a "discovery rule" precluded application of the statute. This Court in *Gevaart v. Metco Construction, Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) rejected the proposition that a discovery rule applies to the statute of repose. *Id.* The *Gevaart* Court held that the statute of repose limits the discovery rule and absolutely bars claims that have not accrued within six years. *Gevaart,* 111 Wn.2d at 502. The trial court's ruling was contrary to specific Supreme Court precedent regarding the existence of a statute of repose discovery rule. Both the proper application of the statute and the applicability of a "discovery rule" were legal issues that were preserved and should have been considered on its merits by the Court of Appeals. Denial of a motion for summary judgment is properly before the Court of Appeal where the question

presented turns solely on a substantive issue of law. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003).

The Court of Appeals failed to heed that principle here. Brand's argument presented a question of law, and Brand clearly articulated it as such. By holding that a "discovery rule" controlled, the trial court undoubtedly understood that an activities analysis was the proper inquiry. The Court of Appeals issued a decision that conflicts with *Kaplan* and the decisions of this Court, warranting review under RAP 13.4(b)(1) and RAP 13.4(b)(2).

B. Issues of Statutory Interpretation are Reviewed *De Novo.*

The Court of Appeals also erred because the trial court's ruling that there was a question of fact as to whether insulation was an improvement to real property is a matter of statutory interpretation and therefore, by definition, a legal issue. Trial court decisions which concern pure questions of law, and claims of error arising from those decisions, are reviewed *de novo*. In such instances, the appellate court will determine for itself what the law is, without any particular deference to what the trial court decided. *Circumstances Which May Affect Scope Of Review*, 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.); *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (Statutory

interpretation is a question of law, which we review *de novo*); *Lobell v. Sugar N' Spice*, 33 Wn.App. 881, 887, 658 P.2d 1267 (1983). ("Whether a statute applies to a factual situation is a question of law and fully reviewable on appeal" citing *Keyes v. Bollinger*, 31 Wn.App. 286, 640 P.2d 1077 (1982)). The determination of whether particular statutory language applies to a factual situation is a conclusion of law, reviewed *de novo*. *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 908, 73 P.3d 424 (2003). This court reviews de novo the trial court's application of the phrase "any control over the facility." *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 126–27, 144 P.3d 1185 (2006).

No question of fact was presented with respect to Brand's work. It installed insulation in a refinery under construction. The trial court's charge was to determine whether or not that activity fell within the statute of repose. The Court of Appeals charge was to determine whether the trial court's decision was correct interpretation of the statute. Neither fulfilled its obligation. The trial court took a position that was at odds with the language of the statute and the appellate court decisions interpreting the statute. When confronted with the disconnect between its interpretation of the statute and the language of the statute and case law, the trial court chose to hangs its hat on a non-existent "discovery rule." Both of these holdings were challenged by Brand on appeal. The Court of Appeals

declined to consider either legal issue, concluding instead that Brand's failure to present evidence that its work constituted, in and of itself, an improvement to real property barred review because Brand had failed to "preserve" its claim of error. The Court of Appeals position is indefensible. First, it ignores the fact that the trial court found the statute inapplicable due to the imposition of a phantom "discovery rule" and failed to address the issue raised by Brand's motion for reconsideration. Second, it assumes the correctness of the "work as improvement" concept initially adopted by the trial court. Again, that interpretation of the statute of repose is contrary to the language of the statute and the cases that have interpreted it. The Court of Appeals should have addressed the legal issues presented by Brand's appeal on their merits, because whether the statute applies to a given set of fact is a matter of law. *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110–11, 676 P.2d 466 (1984). The Court of Appeals' decision conflicts with established law and is procedurally defective. Review thus is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(2). Moreover, the practical consequences of the Court of Appeals' decision in asbestos and general construction litigation will be far reaching. The opinion presents a matter of substantial public interest because the decision misinterprets a statute of broad legal application. Review is warranted under RAP 13.4(b)(4).

C. There is No Legal Basis under a Common Law Negligence Theory to Extend Liability under the Facts of this Case.

Established legal principles governing the law of negligence guide the Court's application of the law to the facts of this case. 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 Mr. Brandes, an ARCO employee. Brand could not require him to shower or change his clothing prior to returning home, nor did Brand have any meaningful way to determine that, even if a warning was provided to Mr. Brandes, he would have heeded that warning or communicated it to Ms. Brandes once he got home.

Two Washington cases have addressed the issue of "take home exposure" liability. *Lundsford* involved strict liability claims against a manufacturer of asbestos products. *Lundsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 786-87, 106 P.3d 808 (2005). The Court, in reversing summary judgment, specifically held that the policy rationales underlying strict liability provided the basis of its decision. "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." *Id.* at 792-983.

In *Arnold*, the issue before Division II was whether Lockheed, a shipyard premises owner, could be liable to the son of a shipyard worker 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 v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 653-55, 240 P.3d 162 (2010). 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). The critical point to recognize when evaluating *Lunsford* and *Arnold* in the context of this case, which sounds in ordinary negligence, is that a negligence case does not provide a conceptual hook on which the court can hang a liability hat. There is no "retained control of the worksite." There is no social engineering policy recognized in strict liability. There is only the prospect of liability without limit for one in Brand's position.[4]

Washington negligence law does not recognize a duty to control the conduct of another person to prevent that person from causing harm to

[4] The authors of this brief are now handling a case in which liability is predicated in part on visits by a relative to the home of the asbestos worker. *Lynda Jolly v. Ashland LLC, Superior Court for Grays Harbor County No. 116-2-00714-3.*

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).

Under Washington law, no liability will attach in tort absent 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). No relationship existed between Brand and Ms. Brandes. There is neither a legal basis nor a policy basis upon which liability can be predicated in the circumstances presented by this case. The Court of Appeals' conclusion that Brand acted affirmatively thereby causing harm to Ms. Brandes is entirely inconsistent with Washington Supreme Court jurisprudence defining the parameters defining when a duty will be found to exist.

Moreover, the Court of Appeals' finding that sufficient evidence was presented suggesting that Brand should have foreseen a risk to family members of asbestos exposed workers is unsupported by the record. Brand presented specific evidence that Dr. Selikoff, the leading US asbestos researcher of the day, was telling insulation 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, four years after Brand left the ARCO site. (VRP 942-44).

The Court of Appeals holding that Brand owed a generalized duty of care to Ms. Brandes is contrary to existing Washington appellate jurisprudence. The issue is a matter of first impression. It is likely to recur absent clear direction from this Court. Review is warranted under RAP 13.4(b)(4).

D. Brand is Not a "Seller" Under the Law.

The Court of Appeal erred in holding that the trial court's "negligent sales" instruction to the jury was proper. Brand was not a seller of insulation materials. Brand's installation of insulation was not a sale. Those specific factual findings were made by the trial court in granting Brand's motion to dismiss Plaintiff's Restatement (Second) of Torts § 402A claims. (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 "in the chain of distribution" for purposes of section 388. Those finding were unchallenged by the Plaintiff on appeal and, therefore, must be treated as verities by the Court

of Appeals. *Bernett v. Brandrud Mfg. Co.*, 1 Wn. App. 183, 184, 459 P.2d 977 (1969).

No concept of jurisprudence allows the Court of Appeals to make a factual finding contrary to an unchallenged factual finding of the trial court. Yet, that is precisely what occurred here. The Court of Appeals opinion states: "Brand sold insulation to Parsons." That statement is incorrect. The Court of Appeals used that incorrect finding to then justify its conclusion that Brand was a "supplier" under Restatement (Second) of Torts § 388, thus supporting its claim that the trial court properly instructed the jury that it could find Brand liable based on "negligent sales." The unchallenged law of the case was that Brand was not a seller, and the remaining materials were never "supplied" to anyone.[5]

Even if the Court of Appeals determined that when Brand turned materials over to ARCO, Brand was a "supplier," Plaintiff had no section 388 claim because both Parsons and ARCO were undeniably well aware of the potentially harmful characteristics of asbestos-containing insulation. Section 388 requires a plaintiff to establish, as an element of the offense, that Brand had "no reason to believe that those for whose use the chattel is

[5] Division One of the Court of Appeals, in an appeal stemming from Brand's work at the Cherry Point refinery, previously affirmed the trial court's dismissal of the strict liability claim, "[w]e conclude that substantial evidence supports the court's ruling that Brand was not a "seller" for the purposes of § 402A and affirm the judgment as a matter of law." *Ehlert v. Brand Insulations, Inc.*, 183 Wn. App. 1006, *4 (not reported in P.3d) (2014).

supplied will realize its dangerous condition." Restatement (Second) Torts § 388. As of April 1971, OSHA advised all employers of the potential dangers of asbestos products, and both Parsons and ARCO admitted having that knowledge. (VRP 193-98). In finding the "negligent sales" instruction appropriate, the Court of Appeals did not even address the fact that Parsons specified the insulation used and that both ARCO and Parsons were aware of potential hazards associated with asbestos insulation.[6]

It was error for the Court of Appeals to disturb an uncontested trial court finding on appeal and then attempt to use its own finding to support a "negligence sales" claim that is not even supported by the Restatement section they use to justify their holding. This analysis is contrary to decisions of this Court and the Court of Appeals warranting review under RAP 13.4(b)(1) and 13.4(b)(2).

E. It Was Error to Disturb the Trial Court's Remittitur.

The Court of Appeals 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). Circumstances justifying remittitur include: (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

[6] In fact, ARCO had initially requested that the refinery insulation be asbestos free.

conscience. RCW 4.76.030; *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 268-69, 840 P.2d 860 (1992).

While the Court of Appeals addresses the issue de novo, the judgment of the trial court is afforded great discretion because of the trial judge's 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. The trial court acted within its authority in granting remittitur and properly found that the jury verdict was clearly influenced by passion and prejudice. It was error for the Court of Appeals to disregard the trial court's well-reasoned reduction of the verdict. The Court of Appeals' failure to give deference to the trial court, especially with respect to the impact of Plaintiff's improper arguments to the jury, was error and contrary to prior decisions from the Court of Appeals. *Miller v. Kenny*, 180 Wn. App. 772, 815-16, 325 P.3d 278 (2014). As well as this Court. *Pederson v. Dumouchel*, 72 Wn.2d 73, 83, 431 P.2d 973 (1967). Review is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(2).

F. It Was Error to Allocate Settlement Proceeds to a Non-Existent Wrongful Death Claim.

Wrongful death claims against defendants who settle a personal injury action are extinguished by the settlement, as a matter of law, under *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 725, 381 P.3d 32 (2016). Notwithstanding the fact that those claims had zero value, the Court of Appeals affirmed the trial court's allocation of 20% of the settlement amounts to those claims. The Court of Appeals reasoned that the settlements would not have occurred with a dismissal of future wrongful death claims, and therefore an allocation was appropriate. No authority supports the proposition that including a valueless claim in a settlement agreement allows the allocation of portions of the settlements to those claims and the Court of Appeals identified none. The appellate court held that under RCW 4.22.060(2), Brand was not entitled to a set-off "of claims that were not pursued against it at trial, such as wrongful death." That is directly contrary to the law. The settlements were entered into between defendants and Ms. Barbara Brandes. The Brandes children did not assert claims in the personal injury action. Once those defendants settled with Ms. Brandes, any future wrongful death claims to her heirs were extinguished as a matter of law, regardless of whether the settlement agreement included a provision for "wrongful death claims." The heirs

had the right to bring claims for loss of consortium; indeed they had the obligation to bring such claims "if feasible." *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 132, 691 P.2d 190 (1984) (general rule), *Kelley v. Centennial Contractors Enterprises, Inc.*, 169 Wn.2d 381, 383, 236 P.3d 197 (2010) (feasibility proviso). They failed to do so, both in the original action and when moving to amend to a special survival action. The decision to prosecute an underlying injury claim to judgment, without joining consortium claims, binds the plaintiff, who cannot thereafter bring a new claim based on the same facts. "A claim includes 'all rights of the [claimant] to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose,' without regard to whether the issues actually were raised or litigated." *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986) (*quoting* Restatement (Second) of Judgments § 24(1) (1982)). There is no wrongful death claim to allocate proceeds to under Washington law, therefore the Court of Appeals erred. Review is warranted under RAP 13.4(b)(1).

## VI. CONCLUSION

For the foregoing reasons, this Court should grant review pursuant to RAP 13.4(b)(1), (2) and (4) and reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 22nd day of February, 2017.

s/David A. Shaw, WSBA #8788
David A. Shaw, WSBA #08788
Malika I. Johnson, WSBA #39608
Attorneys for Petitioner
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph. (206) 628-6600 Fx: (206) 628-6611

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of February, 2017, I caused a true and correct copy of the foregoing document, "Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

**Counsel for Respondent:**

Glenn S. Draper
Brian F. Ladenburg
BERGMAN DRAPER LADENBURG
HART, PLLC
b.614 First Avenue, Fourth Floor
Seattle, WA 98104
Email: service@bergmanlegal.com

Leonard J. Feldman
PETERSON WAMPOLD ROSATO LUNA
NOPP
1501 4th Avenue, Suite 2800
Seattle, WA 98101
Email: feldman@pwrlk.com

DATED this 22nd day of February, 2017, at Seattle, Washington.

s/Diane M. Bulis
Diane M. Bulis, Legal Assistant

# Appendix A

RICHARD D. JOHNSON,
*Court Administrator/Clerk*

*The Court of Appeals*
of the
*State of Washington*
*Seattle*

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

January 23, 2017

Leonard J. Feldman
Peterson Wampold Rosato Luna Knopp
1501 4th Ave Ste 2800
Seattle, WA 98101-3677
feldman@pwrlk.com

Matthew Phineas Bergman
Bergman Draper Ladenburg, PLLC
821 2nd Ave Ste 2100
Seattle, WA 98104-1516
matt@bergmanlegal.com

Kaitlin Tess Wright
Bergman Draper Ladenburg, PLLC
821 2nd Ave Ste 2100
Seattle, WA 98104-1516
kaitlin@bergmanlegal.com

Glenn S Draper
Bergman Draper Ladenburg, PLLC
821 2nd Ave Ste 2100
Seattle, WA 98104-1516
glenn@bergmanlegal.com

Jeffrey Mark Wolf
Seattle City Attorneys Office
701 5th Ave Ste 2050
Seattle, WA 98104-7095
jeff.wolf@seattle.gov

Thomas H Hart, III
Attorney at Law
223 Sumter Ave
Summerville, SC 29483-5951
tom@thhpc.com

Malika Johnson
Williams Kastner & Gibbs PLLC
601 Union St Ste 4100
Seattle, WA 98101-1368
mjohnson@williamskastner.com

David Albert Shaw
Williams Kastner & Gibbs
601 Union St Ste 4100
Seattle, WA 98101-2380
dshaw@williamskastner.com

CASE #: 73748-1-I
Brand Insulation, Inc., Appellant/Cr-Respondent v. Kaiser Gypsum Co., Inc., Respondent/Cr-Appellant

King County, Cause No. 14-2-21662-9.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed in part and reversed in part."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Honorable William Downing

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

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| ESTATE OF BARBARA BRANDES,<br><br>Respondent/Cross-Appellant,<br><br>v.<br><br>BRAND INSULATIONS, INC.<br><br>Appellant/Cross-Respondent.<br><br>and<br><br>KAISER GYPSUM COMPANY, INC., ATLANTIC RICHFIELD COMPANY,HANSON PERMANENTE CEMENT, INC., f/k/a KAISER CEMENT CORPORATION; METALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; and UNION CARBIDE CORPORATION,<br><br>Defendants. | ) | No. 73748-1-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: January 23, 2017 |

SPEARMAN, J. — Brand Insulation, Inc. (Brand) appeals the trial court verdict finding it liable for the asbestos-related personal injuries of Barbara Brandes (Barbara).[1] Brand subcontracted to install asbestos-containing insulation at ARCO's Cherry Point Refinery. Barbara was the wife of Raymond Brandes (Raymond), who was exposed to asbestos while employed at the ARCO

[1] We refer to Ms. Barbara Brandes by her first name to avoid confusion with Respondent Brand, LLC.

Cherry Point Refinery from 1971 to 1975. Raymond brought asbestos home on his clothes, which Barbara regularly laundered. She eventually developed mesothelioma. On August 16, 2014, Barbara filed a lawsuit in King County Superior Court against numerous defendants for personal injuries sustained due to asbestos exposure. The case proceeded to trial with Brand as the sole remaining defendant. The jury rendered a verdict in favor of Barbara and awarded her $3,500,000 in damages, which was reduced to $2,500,000 on remittitur. Brand appeals, and Barbara cross-appeals the remittitur. We affirm the verdict and reverse the remittitur.

## FACTS

Brand was an insulation subcontractor to general contractor Ralph M. Parsons (Parsons) during the construction phase of the ARCO Cherry Point Refinery. Brand sold to Parsons the insulation that it installed on pipes and other installations. Brand began work in January 1971 and concluded in February 1972. At the beginning of the project, Brand used asbestos-free insulation. At some point, Brand began installing asbestos-containing insulation because the asbestos-free insulation performed poorly. The asbestos insulation was purchased by Brand in containers bearing warnings. Brand did not pass along those warnings to Parsons or to ARCO employees. Brand did not label the pipes it fitted with asbestos insulation. Brand's installation work produced asbestos dust and ARCO employees were nearby when the work was performed. Brand

did not employ industrial hygiene practices to contain asbestos dust or to prevent exposed employees from transporting asbestos away from the work site.

Raymond was an operator at Cherry Point. In November 1971, he began work in the crude unit, which Brand insulated. An operator was responsible for maintaining continuous operation of the processing unit, which required walking through the unit six to eight times a day to monitor and ensure proper operation of the equipment. An operator also prepared equipment for maintenance by removing insulation to gain access to a pipe. Raymond removed insulation by hammering it off or sawing through it. This sometimes produced dust. He performed this activity at least twice each month.

Barbara washed her husband's uniform about twice each week. She shook his uniform before placing it in the washing machine. She also swept up the floor of the laundry area. Barbara was diagnosed with mesothelioma at the age of 79. It caused shortness of breath, fatigue, weight loss, nausea, and neuropathy. She underwent chemotherapy, but her disease was terminal.

Prior to trial, Brand moved for summary judgment on numerous grounds. Co-defendant Metalclad moved for summary judgment based on the contractor's statute of repose. In its reply to Barbara's response, Brand adopted that defense and incorporated it by reference.[2] Barbara also moved for summary judgment to strike Brand's affirmative defenses, including their statute of repose defense. The trial court granted Brand's motion to dismiss Barbara's strict liability claims, but

[2] Barbara did not object to Brand raising this issue on reply.

denied the remainder of Brand's motion. The trial court also denied Barbara's motion to strike Brand's statute of repose defense. Brand moved for reconsideration on the statute of repose issue, which the trial court denied.

Trial began on April 6, 2015. On the day before closing arguments, Barbara passed away at the age of 80. Her counsel filed a Notice of Death and Motion for Substitution, requesting that the trial proceed despite her passing. The trial court granted the motion for substitution and authorized continuation of the litigation as a survivorship action. The trial judge advised the jury of Barbara's death and gave instructions on the new procedural posture of the case.

The jury rendered a verdict in favor of Barbara's estate and awarded $3,500,000 in damages. Barbara's estate brought a motion to allocate fifty percent of the settlement proceeds to a future wrongful death claim. Brand opposed the motion and filed a motion for new trial, or in the alternative, remittitur. The trial judge denied Brand's motion for a new trial but granted remittitur, reducing the verdict by $1,000,000. The trial judge granted Barbara's motion and set off twenty percent of the settlement proceeds to the statutory heirs' future wrongful death claim.

## DISCUSSION

### Statute of Repose

We review a summary judgment order de novo, engaging in the same inquiry as the superior court. Lybberts v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts and all reasonable inferences therefrom in the

light most favorable to the nonmoving party. Id. However, we will only review trial court decisions as a matter of right as provided in RAP 2.2. Summary judgment orders are not reviewable under RAP 2.2 after a trial on the merits. Johnson v. Rothstein, 52 Wn. App 303, 759 P.2d 471 (1988).

Brand argues that the six year construction statute of repose bars Barbara's claims because the refinery's insulation is an improvement on real property and Barbara brings her claim well after the repose period ended. Barbara argues that this issue is not properly before the court because it was denied on summary judgment and the case proceeded to trial and judgment.

A statute of repose terminates a potential claim after a specified time, even if an injury has not yet occurred. 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). It bars an action for construction defects that does not accrue within six years from the time construction is completed. RCW 4.16.310. The statute of repose applies 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 . . . ." RCW 4.16.300.

The statute of repose only "protects individuals who work on structural aspects of the building." Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 111, 676 P.2d 466 (1984). "[T]he statute focuses on individuals whose activities relate to construction of the improvement." Id. at 110. The Condit court endorsed New Jersey's interpretation of its statute of repose:

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

Id. at 110-111 (citing Brown v. Jersey Central Power & Light Co., 163 N.J. Super. 179, 195, 394 A.2d 397 (1978)). In Condit, a conveyer-belt freezer tunnel was not "integral" to the factory in which it was installed. Condit affirmed the holding in Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 503 P.2d 108 (1972) that a refrigeration system used to cool a cold warehouse is integral to the warehouse and falls within the scope of the statute of repose. But in Morse v. City of Toppenish, 46 Wn. App. 60, 64, 729 P.2d 638 (1986), the court held that a diving board is not integral to a swimming pool.

The threshold question is whether this court should consider the summary judgment ruling after the case proceeded to trial and judgment. "A denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the trier of fact." Johnson, 52 Wn. App at 303-304. "The primary purpose of a summary judgment procedure is to avoid a useless trial." Id. at 307 (citing Olympic Fish Prods., Inc. v. Lloyd, 93 Wn.2d 596, 602, 611 P.2d 737 (1980)). Once a trial on the merits is held, review of summary judgment does nothing to further this purpose. Id. However, an appellate court may review such a denial where the disputed issues of fact were not material and the decision on summary

judgment turned solely on a substantive issue of law. Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn. App. 791, 804, 65 P.3d 16 (2003) (citing Univ. Vill. Ltd. Partners v. King County, 106 Wn. App. 321, 324-25, 23 P.3d 1090 (2001)).

In this case, the trial court considered summary judgment motions by both parties on the statute of repose. The court found that there were disputed material facts on whether the statute of repose applied, and denied both parties' motions for summary judgment on that issue. We agree that the disputed questions of fact are material. Given the requirement in Condit to determine whether insulation was "integral" to the refinery, disputed material facts include the purpose, necessity, and permanence of the insulation that Brand installed in the refinery. Because material disputed facts must be resolved by the trier of fact, the summary judgment order cannot be appealed because it was followed by a trial. Johnson, 52 Wn. App 303.

Nevertheless, Brand asks this court to review the denial of summary judgment and find that the statute of repose applies. But even if this issue turned on a question of law and were reviewable under Kaplan, we would still decline to review it. We will not consider an error that was not raised in the trial court. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This rule encourages the efficient use of judicial resources: parties must allow the trial court to rule on all disputed issues and correct an error in order to avoid appeal. Scott, 110 Wn.2d 682; State v. Ramirez, 62 Wn. App. 301, 305, 814 P.2d 227 (1991); See Adcox v. Children's Orthopedic Hosp. and Medical Center, 123

Wn.2d 15, 35 n.9, 864 P.2d 921 (1993). At trial, Brand did not elicit expert testimony or offer exhibits to develop the material facts which formed the basis for the trial court's denial of summary judgment. Nor did Brand renew the issue at trial by moving for a directed verdict or offering jury instructions on the statute of repose for this court to review. As a result, we conclude that Brand failed to preserve the issue for review by this court and we decline to consider it on appeal.

Duty of Care

Whether the defendant owes duty of care is a question of law reviewed de novo. Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 288 P.3d 328 (2012). Brand contends that there is no precedent that establishes a duty of care in a take-home asbestos case where the defendant did not have control over the actions of the individual exposed to asbestos. It argues that recognizing such a duty would result in a slippery slope of liability.

A duty of care is an essential element of common law negligence. It is an "obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks." Daly v. Lynch, 24 Wn. App. 69, 76, 600 P.2d 592 (1979) (quoting W. Prosser, Law of Torts § 30, at 143 (4th ed.1971)). Whether an affirmative duty to act exists depends upon many factors, including "mixed considerations of logic, common sense, justice, policy, and precedent." Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation omitted). A person has a duty

to prevent unreasonable risk of harm to others from his or her own actions. Minahan v. Western Wash. Fair Ass'n, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003) (quoting RESTATEMENT (SECOND) OF TORTS § 321 (1965)). An unreasonable risk gives rise to a duty of care only if a reasonable person would have foreseen the risk. Parrilla v. King County, 138 Wn. App. 427, 436, 157 P.3d 879 (2007) (citing Minahan, 117 Wn. App. at 897).

The asbestos insulation at Cherry Point posed a danger to workers and their families. The insulation was habitually removed in the general maintenance of the refinery. This created asbestos dust that could injure those who inhaled it. When Brand installed asbestos insulation, it did not label the material as asbestos-containing. Brand also created dangerous asbestos dust while installing insulation but it did not take protective measures to prevent exposure to nearby ARCO employees. Brand's failure to label asbestos insulation and contain asbestos dust during construction created an unreasonable risk of harm.

Barbara presented evidence that exposure to families of asbestos workers was foreseeable when Brand insulated Cherry Point. Medical, scientific, and industry/trade literature in the decades leading up to Barbara's exposure had conclusively established the risk of inhaled asbestos dust. Additional studies linked asbestosis or mesothelioma in the spouses and children of asbestos workers to asbestos dust brought home by the worker. Given the availability of information about the risk of harm to the families of asbestos workers, Brand could have foreseen injuries to the spouses of ARCO employees such as

Barbara stemming from the unreasonable risk of harm it created in its installation of asbestos insulation at Cherry Point.

Brand contends that Barbara has not identified a legal duty because Washington law has recognized a duty for "take-home" exposure only in the context of strict liability and premises liability where the premises owner was also the general contractor. Lunsford, 125 Wn. App. 784 (strict liability); Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 240 P.3d 162 (2010) (general contractor premises liability). This argument sidesteps the basic negligence principles that establish a duty of care in this case. The recognition of a duty of care in the context of strict liability and premises liability does not preclude recognizing such a duty here under well-established principles of negligence.

Brand also argues that its activities should be characterized as inaction or nonfeasance, which does not give rise to a duty of care. This argument fails because Brand acted affirmatively when it installed insulation. And it engaged in this activity in a way that created an unreasonable risk of harm was foreseeable as to Barbara. Under these circumstances, we conclude that Brand owed a duty of care to Barbara.

Finally, Brand argues no duty of care exists because there is no special relationship between the parties. A special relationship is required if the plaintiff's injury is caused by the criminal conduct of a third party or a defendant's nonfeasance. See Tae Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 195, 15 P.3d 1283 (2001); 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON

PRACTICE: TORT LAW AND PRACTICE § 2.8 at 52 (4th ed. 2013). Barbara's injuries were not caused by criminal conduct, nor by Brand's nonfeasance. No special relationship is required to establish duty of care in this case.

Brand did not label the location of asbestos insulation, knowing that it would be habitually removed and create dust. Brand did not employ industrial hygiene practices to control asbestos dust during installation. The risks of asbestos dust to workers and others residing in their household was foreseeable at the time of these activities. Under these circumstances, we hold that a duty of care exists because Brand created a foreseeable risk of harm to Barbara.

Causation

Appellate courts review a motion for directed verdict de novo. Ramey v. Knorr, 130 Wn. App 672, 675-76, 124 P.3d 314 (2005). A directed verdict is granted if "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue." CR 50(a)(1).

Brand argues that there is not a sufficient basis to find causation because Barbara did not demonstrate how much asbestos she was exposed to. In response, Barbara points to an expert witness who testified that Barbara's mesothelioma was caused by Brand and argues that this is sufficient for a reasonable jury to find causation.

To prove causation in an asbestos-related case, the plaintiff must present evidence that the defendant's conduct was a substantial factor in bringing about the plaintiff's harm. Morgan v. Aurora Pump Co., 159 Wn. App. 724, 740, 248

P.3d 1052 (2011). Courts consider several factors when evaluating whether there is sufficient evidence of causation against a particular defendant: (1) plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product; (3) the types of asbestos products to which plaintiff was exposed and the ways in which the products were handled and used, and (4) the evidence presented as to medical causation of the plaintiffs' particular disease. Morgan, 159 Wn. App. at 740 (citing Lockwood v. AC &S, Inc., 109 Wn.2d 235, 248-49, 744 P.2d 605 (1987)). "Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case," but "[n]evertheless, the factors listed above are matters which trial courts should consider when deciding if the evidence is sufficient to take such cases to the jury." Lockwood, 109 Wn.2d at 249.

Barbara's expert witness, Dr. Andrew Churg, testified about the cause of mesothelioma. He testified that Brand's activities as an insulation contractor contributed to Barbara's mesothelioma. Dr. Churg also testified that the asbestos exposure threshold for mesothelioma is even lower than .1 asbestos fiber per cubic centimeter (.1 f/cc) per working year. Brand cross-examined Dr. Churg on the latter point, noting his prior testimony in another case that mesothelioma requires asbestos exposure to at least a .1 f/cc per working year. VRP 567-568. Brand argues that there is no evidence that Barbara was exposed in excess of .1 f/cc per working year, so there is a legally insufficient basis to find causation. But

Barbara presented expert medical testimony that her mesothelioma was caused by Brand's activities. Based on this testimony, a reasonable jury could, and in this case did, find causation. The jury was made aware of Dr. Churg's purportedly contradictory testimony and it was free to credit or discredit his opinion. We do not reweigh the evidence or question the jury's credibility determinations on appeal. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Because Barbara presented sufficient evidence of causation, we conclude that the trial court did not err when it denied Brand's motion for a directed verdict.

Duty to Warn

We review alleged errors of law in jury instructions de novo. Blaney v. Int'l Ass'n of Machinist & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Jury instructions are proper when they allow parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Id.

Brand argues that the trial court erred by instructing the jury to consider whether Brand was negligent with respect to its sales of insulation at the refinery. It contends that if Brand is not a "seller" for the purposes of Barbara's dismissed strict liability claim under RESTATEMENT (SECOND) OF TORTS § 402A, it cannot be a "supplier" for the purposes of a negligent sales claim under RESTATEMENT (SECOND) OF TORTS § 388.

Under the law of negligence, a defendant's duty is to exercise ordinary care. A manufacturer's duty of ordinary care includes a duty to warn of hazards involved in the use of a product, which are or should be known to the manufacturer. Simonetta v. Viad Corp., 165 Wn.2d 341, 348, 197 P.3d 127, 131 (2008) citing Restatement (Second) of Torts § 388 (1965). Restatement (Second) of Torts § 388 applies to "sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or a third person." Restatement (Second) of Torts § 388, cmt.c (1965). The rule encompasses "any person who ... gives possession of a chattel for another's use ... without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied." Id. Simonetta clarifies that "the duty to warn is limited to those in the chain of distribution of the hazardous product." Simonetta, 165 Wn.2d at 354.

Brand selected, ordered, supplied, and sold the insulation that it installed in the refinery.[3] Brand invoiced general contractor Parsons for the cost of materials. Brand had some discretion to select its materials. It did not simply procure the material that Parsons or ARCO specified. While Parsons and/or ARCO were sophisticated buyers, they did not select the exact material for Brand

[3] Brand selected its insulation from several options. Brand's subcontract specified that the insulation be either from PABCO or Johns-Manville. The contract specification stated that the insulation could be Unibestos, Kaylo, Thermobestos, or Super Caltemp. Valve bodies had to be insulated with PABCO #127 insulated cement. Brand selected PABCO to supply the majority of the insulation for the project. Johns-Manville and Owens Corning product was also used. Brand selected PABCO material because it was the cheapest to ship. Brand purchased and took possession of the insulation at Cherry Point, and invoiced Parsons for the insulation on a monthly basis.

to purchase. It follows that Brand has a duty to warn about the danger of the product it selected and sold.

Brand argues that if it is not a seller under RESTATEMENT (SECOND) OF TORTS § 402A (1965), then it cannot be a seller for the purposes of RESTATEMENT (SECOND) OF TORTS § 388. This argument fails. These two sections of the restatement have different language, interpretive caselaw, and policy rationales. In addition, the trial court's dismissal of Barbara's § 402A strict liability claim does not bind this court to an outcome on § 388 that is inconsistent with the law. We conclude that Brand is a supplier within the chain of distribution of asbestos insulation. Accordingly, the trial court did not err when it instructed the jury on negligent sales.

Contractor's Defense

Brand contends the trial court erred when it refused to give a "contractor's defense" instruction.[4] Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Blaney, 151 Wn.2d 203. The instruction is erroneous if any of these elements are missing, but an erroneous instruction is reversible error only if it prejudices a party. Anfinson v. FedEx Ground Package System,

[4] Brand also argues that the trial court erred by denying summary judgment on contractor's defense grounds. "'A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that the material facts are disputed and must be resolved by the factfinder.'" Kaplan, 115 Wn. App. at 799 (quoting Brothers v. Pub. Sch. Employees of Washington, 88 Wn. App. 398, 409, 945 P.2d 208 (1997)). The trial court denied Brand's summary judgment motion on its affirmative contractor's defense due to questions of fact on the negligence claim. We do not review a motion for summary judgment after a trial.

Inc., 174 Wn.2d 851, 281 P.3d 289 (2012). We review alleged errors in instructing the jury de novo. Blaney, 151 Wn.2d at 210.

Brand's proposed instruction advised the jury that a contractor who performs work in accordance with specifications provided by the owner is not liable if specified construction materials are later proven to be defective. The trial court gave a general negligence jury instruction instead. Employing this general negligence instruction, Brand argued in closing that it was not negligent because its contract specifications called for asbestos insulation. Brand was permitted to argue its theory of the case, the instructions did not mislead the jury, and the jury was properly informed of the applicable law. The trial court did not err by refusing to instruct the jury on a contractor's defense.

Allocation to Wrongful Death Cause of Action

A trial court's ruling on the reasonableness of a settlement is a factual determination. This court reviews the trial court's approval of settlement agreements for substantial evidence. Brewer v. Fibreboard Corp., 127 Wn.2d 512, 523, 901 P.2d 297 (1995) (citing Glover v. Tacoma General Hosp., 98 Wn.2d 708, 711, 658 P.2d 1230 (1983) (overruled on other grounds).

Brand argues that the trial court erred when it allocated twenty percent of settlement proceeds to a future wrongful death claim. Prior to trial, Barbara settled her personal injury claims against multiple defendants. The parties agree that Barbara explicitly or impliedly released future wrongful death claims in exchange for settlement monies. After trial, the plaintiff requested that half of the

settlement proceeds be allocated to the wrongful death claim released by Barbara, and the other half allocated to the personal injury claim released by Barbara. Under principles of joint and several liability, Brand was not entitled to set-off the value of claims that were not pursued against it at trial, such as wrongful death. Thus, Brand opposed this allocation, which reduced the amount of settlement proceeds that would set off the $3,500,000 judgment against it. Brand requested that the court allocate none of the settlement to a wrongful death action. This would allocate all of the settlement proceeds to the released personal injury claims and reduce the personal injury judgment against Brand. The trial court ordered that twenty percent of the settlement proceeds be allocated to future wrongful death claims:

> The jury awarded noneconomic damages in the amount of $3,500,000.00. On Brand's motion, the Court granted remittitur, reducing the judgment to $2,500,000.00. The total settlement proceeds prior to judgment were $1,965,710.76. Under RCW 4.22.060(2), Brand is entitled to a set-off of 80% of that amount.
> . . .
> [Brand] is liable for Plaintiff's damages in the amount of $927,431.39.

Clerk's Papers (CP) at 5426-27.

On appeal, Brand argues that any allocation of settlement proceeds to a wrongful death action was improper because the settlement of Barbara's personal injury claim extinguished a wrongful death claim. "When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death. . . ." RCW 4.20.010. The wrongful death action is for the

benefit of statutory heirs. RCW 4.20.020. But a decedent, in her lifetime, may pursue a course of action that extinguishes an heir's cause of action for wrongful death. Deggs v. Asbestos Corp. Ltd., 186 Wn.2d 716, 725, 381 P.3d 32 (2016). "[A] release and satisfaction by the person injured of his right of action for the injury bars the right in the beneficiaries to maintain an action for his death occasioned by the injury." Brodie v. Washington Water Power Co., 92 Wash. 574, 576-77, 159 P.791 (1916). Brand asks that we reverse the trial court's allocation of settlement proceeds because Barbara's settlement bars the wrongful death action under Brodie and Deggs.

But on the facts before us, Brodie and Deggs do not control. The issue here is not whether Barbara's personal representative can maintain a wrongful death suit, but whether a settlement would have occurred at all but for settlement of the potential wrongful death claim. Stated differently, because the release of Barbara's wrongful death claim was a necessary concession to reach a negotiated settlement, it is clearly valuable consideration which is reflected to some degree in the settlement amount. We conclude that the trial court did not err when it allocated a portion of the settlement to the potential wrongful death claim. The only issue is to what degree. But because Brand does not challenge the trial court's finding that the release was worth twenty percent of the settlement proceeds, that issue is not before us.

Work Simulation Video

We review the trial court's decision to admit or exclude evidence for manifest abuse of discretion. Degroot v. Berkley Const., Inc., 83 Wn. App. 125, 128, 920 P.2d 619 (1996).

Brand argues that the trial court erred when it refused to exclude from evidence a work simulation video that showed a worker sawing asbestos-containing insulation and shaking out asbestos-containing clothes. Brand argues that the evidence was irrelevant and prejudicial because it did not replicate the conditions experienced by Barbara and Raymond.

Demonstrative evidence is permitted "if the experiment was conducted under substantially similar conditions as the event at issue." State v. Finch, 137 Wn.2d 792, 816, 975 P.2d 967 (1999) (citing Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 107, 713 P.2d 79 (1986)). Determining whether the similarity is sufficient is within the discretion of the trial court. Id. If the evidence is admitted, any lack of similarity goes to the weight of the evidence. Id. We review the trial court's evidentiary ruling for abuse of discretion and will only disturb the ruling if it is manifestly unreasonable or based on untenable grounds. In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). A ruling is manifestly unreasonable if it "'adopts a view that no reasonable person would take.'" Id. (quoting Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115 (2006)).

Brand argues there are substantial differences between the work simulation video and the actual conditions under which Barbara and Raymond were exposed to asbestos. It points out that the video was illuminated to enhance the visibility of the asbestos particles and that Raymond's work took place outside in windy conditions. Whereas the video was filmed inside with no air currents and a different brand of insulation was used in the video. Brand also argues the video was prejudicial because the individuals in the video wore protective clothing and facemasks. The trial court determined that in spite of these differences, the conditions shown in the video were substantially similar to the conditions experienced by Raymond and Barbara because it showed individuals sawing insulation and shaking out clothing that had been exposed to the dust created by that activity. We cannot say that no reasonable person would adopt this view. In addition, in light of the similar conditions, the relevance of the video outweighs any prejudicial effect of seeing workers handle asbestos in protective gear. We conclude that the trial court did not abuse its discretion by denying Brand's motion in limine and admitting the video. There was no error.

Remittitur

Barbara cross appeals the trial court's reduction of her damages award from $3,500,000 to $2,500,000. A decision to decrease a jury's award is reviewed de novo. RCW 4.76.030; Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989). But we give great deference to the jury's determination of damages. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771

P.2d 711 (1989). "'An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.'" Bunch v. King Cty. Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (quoting Bingaman v. Grays Harbor Cmty Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985). The "shocks the conscience" test asks if the award is "flagrantly outrageous and extravagant." Bingaman, 103 Wn.2d at 836-37. Passion and prejudice must be "unmistakable" before they affect the jury's award. RCW 4.76.030; Bingaman, 103 Wn.2d at 836.

The trial court remitted Barbara's damages on several bases. First, "[t]he jury was visibly and audibly shaken when told of the plaintiff's death." CP at 5429. Second, the jury instructions did not emphasize that damages included only pre-death pain and suffering. Id. Third, plaintiff's closing argument contained an inappropriate appeal for punitive and exemplary damages. Id.

Barbara argues that Brand waived any assignment of error to the amount of the award because it failed to object to the continuation of the trial after Barbara's death and to alleged improper arguments at closing. She argues that even if the assignment of error was not waived, her award should not have been reduced because it was not unmistakably the result of passion or prejudice. Brand argues that their failure to object is immaterial. It contend that the grant of remittitur should be upheld because the jury verdict was influenced by passion and unsupported by evidence.

We agree with Barbara. Brand did not object to notifying the jury of the plaintiff's death or to continuing the trial as a survivorship action. When the jury was so instructed and appeared shaken, Brand did not respond by requesting clarifying instructions on the impact of Barbara's death on the case. Brand also did not object to inappropriate closing remarks, and contends that this decision was tactical. While these failures to object do not preclude our review, they do indicate that Barbara's death was not so shocking that Brand felt compelled to object, ask for a new trial, or request clarifying jury instructions. Given that we overturn a jury's verdict only in the face of unmistakable passion and prejudice, Brand's inaction shows that any passion or prejudice that may have motivated the jury was not overpowering or unmistakable.

In ordering remittitur, the trial court also reasoned that the jury may not have followed instructions to consider only pre-death damages. A jury is presumed to follow jury instructions and that presumption will prevail until it is overcome by a showing otherwise. Tennant v. Roys, 44 Wn. App. 305, 315-16, 722 P.2d 848 (1986) (citing In re Municipality of Metro. Seattle v. Kenmore Properties, Inc., 67 Wn.2d 923, 930–31, 410 P.2d 790 (1966)). Even if the trial court could have given more elaborate instructions after Barbara's death, there is no showing that the jury did not follow the instructions that were given.

Finally, Barbara offered substantial evidence of her pain and suffering, and that her condition was terminal. The jury knew that Barbara would die of her disease, and so, the fact of her death does not necessarily undermine their

verdict. We conclude that the jury's damages award was not unmistakably the result of passion or prejudice, and that it was supported by substantial evidence. Accordingly, we reverse the trial court's grant of remittitur and we remand to the trial court to reinstate the jury's verdict and damages award.

Affirmed in part and reversed in part.

Spearman, J.

WE CONCUR:

Becker, J.

# Appendix B

## Johnson, Malika

**From:** WKG Asbestos Mailbox
**Sent:** Tuesday, March 31, 2015 3:15 PM
**To:** Brandes 00910-0356
**Subject:** FW: Brandes

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**From:** Downing, William
**Sent:** Tuesday, March 31, 2015 3:15:12 PM (UTC-08:00) Pacific Time (US & Canada)
**To:** Shaw, Dave; glenn@bergmanlegal.com; kaitlin@bergmanlegal.com; WKG Asbestos Mailbox
**Cc:** Reese, Ricki
**Subject:** RE: Brandes

Counsel:

I wanted you to know that I have just signed an Order Denying the defendants' Motion For Reconsideration. I was happy to take a look back at the Lakeview Condo Association case which, of course, does not at all direct a conclusion as to the present question. 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.

--WLD

**Judge William L. Downing**
**King County Superior Court**
**Seattle, WA 98104**

206.477-1585

-----Original Message-----
From: Shaw, Dave [mailto:DShaw@williamskastner.com]
Sent: Tuesday, March 31, 2015 11:13 AM
To: Downing, William; glenn@bergmanlegal.com; kaitlin@bergmanlegal.com; WKG Asbestos Mailbox
Cc: Reese, Ricki
Subject: RE: Brandes

Your honor
A brief is on its way within the hour. The case has not settled.

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From: Downing, William [William.Downing@kingcounty.gov]
Sent: Tuesday, March 31, 2015 10:34 AM
To: glenn@bergmanlegal.com; Shaw, Dave; kaitlin@bergmanlegal.com; WKG Asbestos Mailbox
Cc: Reese, Ricki
Subject: Brandes

Counsel,

The timing in this case is somewhat tight. Trial is set for Monday but, first, I have before me a defendant's MFR seeking dismissal that is calendared for today. Having just received plaintiff's response this morning, and wanting to deal with the motion as expeditiously as possible, I am writing to inquire if any reply is on its way or if the briefing is complete. Of course, you should also feel free to let me know the case has settled and that this issue is moot.

--WLD

Judge William L. Downing
King County Superior Court
Seattle, WA 98104

206.477-1585

# Appendix C

The Honorable William Downing
Trial Date: April 6, 2015
Hearing Date: Tuesday, March 31, 2015
***Without Oral Argument***

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

| | |
|---|---|
| BARBARA BRANDES and RAYMOND BRANDES, wife and husband,<br><br>Plaintiffs,<br><br>v.<br><br>KAISER GYPSUM COMPANY, INC., et al.,<br><br>Defendants. | NO. 14-2-21662-9 SEA<br><br>DEFENDANTS BRAND INSULATIONS INC. & METALCLAD INSULATION INC.'S MOTION FOR RECONSIDERATION |

COMES NOW, defendants Brand Insulations Inc. ("Brand") and Metalclad Insulation Inc. ("Metalclad") in the above-entitled action, and move this court to reconsider the denial of defendant's motion to dismiss based on the WA Contractor's Statute of Repose. This motion this brief and the briefing and exhibits filed in connection with the principal motion for summary judgment.

## I. RELEVANT FACTS

The Court heard oral argument on motions for summary judgment March 6, 2015. The court granted Metalclad and Brand's motion to dismiss the plaintiff's strict liability claims under Restatement (Second) of Torts § 402A (1965), but denied the joint motion to dismiss remaining claims based upon Washington's Construction Statute of Repose, RCW 4.16.300. The Court's order reads, in relevant part, "The Court further finds that the contractor's statute of repose does not apply to Plaintiff's negligent sales claims. The court further finds that, with



**Williams, Kastner & Gibbs PLLC**
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

respect to Plaintiff's negligent installation claims, there are disputed issues of fact as to whether insulation constitutes an improvement to real property."

## II. ARGUMENT

Civil Rule 59(a) provides a party may bring a motion for reconsideration where there has been a ruling that is contrary to the law. CR 59(a)(7). Under the WA Statute of Repose, Metalclad and Brand are entitled to dismissals as a matter of law. The focus on "improvement to real property" is misplaced, as the statute was clearly enacted to protect all those engaged in construction activities. As evidenced by the Washington Supreme Court's ruling upholding the decision of this trial court in *Lakeview Blvd. Condominium Ass'n*, the relevant inquiry is whether the defendant is a contractor who performed construction services or a manufacturer of products. *Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001). *Lakeview* gives further context to the Court's prior ruling in *Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 110-11, 676 P.2d 466 (1984)*. *Condit* is often cited for the proposition, as it was in this case, that the critical inquiry is whether or not the work performed by the contractor is an "improvement" to real property. *Lakeview* makes it clear that the proper inquiry is whether or not the contractor was performing construction activities in connection with an improvement to real property or whether it was a manufacturer of a product intended to be installed in the improvement. There can be no question but that Brand and Metalclad were contractors installing a component of the refinery which was, in fact, the improvement to real property.

*Lakeview* involved three contractors, consultants who evaluated soil conditions, an architect and structural engineer, and a project manager. *Id.* at 574. After the condominiums at issue were damaged due to a land slide, the owners brought suit against the contractors. *Id.* at 575. This court granted summary judgment to all the contractors and the Court of Appeals affirmed. *Id.* Petitioners challenged the Statute of Repose on equal protection and due process



**Williams, Kastner & Gibbs PLLC**
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

grounds. The Statute of Repose does not deny equal protection because it limits the liability of all people involved in the construction process who create or alter improvements upon real property. *See Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co., 81 Wn.2d 528, 532, 503 P.2d 108 (1972).*

Manufacturers, on the other hand are not protected under the statute and that was the precise distinction made in *Condit.* The *Condit* court recognized that rational distinctions existed between manufacturers and those peoples who were involved in the actual construction process. See *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110-11, 676 P.2d 466 (1984). The recognized rational distinctions between the two classes include: (1) manufacturers have protections under the useful life of the product in products liability law; (2) manufacturers produce standardized goods whereas contractors make a unique product designed to deal with the needs of the property; (3) manufacturers produce their good sin a controlled environment whereas contractors build in ever-changing environments. *Lakeview Blvd. Condominium Ass'n*, 144 Wn.2d at 579. The legislature's exclusion of manufacturers was rationally related to its purpose of protecting contractors engaged in construction activities. *Id.*

Metalclad and Brand were contractors engaged in the construction of the ARCO refinery. Neither was a manufacturer as the term was used by the Washington Supreme Court in *Lakeview.* The Statute of Repose protects both as having performed construction services at the refinery. It was error for the court to deny the motion.

Moreover, there is no language in the statute that supports the Court's decision that the Plaintiff's "negligent sales" claim falls outside the scope of the statute. *RCW 4.16.300* provides that the statute of repose:

> 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



**Williams, Kastner & Gibbs PLLC**
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.

The statute could not be clearer. It shall apply to all claims or causes of action of any kind against any person. There is no exclusion in the statute for "negligent sales" claims.

## III. CONCLUSION

For the reasons stated herein defendant's respectfully move for reconsideration of the denial of summary judgment and for a dismissal of Plaintiff's claims as they are barred by the Statute of Repose.

DATED this 23rd day of March, 2015.

s/*David A. Shaw*
David A. Shaw, WSBA #08788
Katherine M. Steele, WSBA #11927
Attorneys for Brand Insulations, Inc. and Metalclad Insulation, Inc.
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Fax: (206) 628-6611
Email: wkgasbestos@williamskastner.com

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused to be served via email, messenger, and/or U.S. Mail, postage pre-paid, a true and correct copy of the foregoing document to the following:

Glenn S. Draper
Brian F. Ladenburg
BERGMAN DRAPER LADENBURG HART, PLLC
614 First Avenue, Fourth Floor
Seattle, WA 98104
Email: service@bergmanlegal.com
***Attorneys for Plaintiff***

Thomas H. Hart, III
LAW OFFICES OF THOMAS H. HART III, PC
2212 Queen Cross Street
Christiansted, VI 00820
Email: tom@thhpc.com
***Pro Hac Vice for Plaintiffs***

K. Michael Fandel
MILLER NASH GRAHAM & DUNN LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121
Email: asbestos@grahamdunn.com
***Attorney for Atlantic Richfield Company (ARCO)***

Albert H. Parnell
HAWKINS & PARNELL, LLP
303 Peachtree Street N.E., Ste. 4000
Atlanta, GA 30308
Email: aparnell@hptylaw.com
***Pro Hac Vice for Atlantic Richfield Company (ARCO)***

Richard G. Gawlowski
WILSON, SMITH, COCHRAN & DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
Email: gawlowski@wscd.com; metlifeasbestos@wscd.com
***Attorney for Metropolitan Life Insurance***

Katherine M. Steele
Malika I. Johnson
WILLIAMS, KASTNER & GIBBS
601 Union Street, Suite 4100
Seattle, WA 98101
Email: wkgasbestos@williamskastner.com
***Attorneys for Metalclad Insulation Corporation***

Signed at Seattle, Washington this 23rd day of March, 2015.

s/Diane M. Bulis, Legal Assistant
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Email: dbulis@williamskastner.com

**WILLIAMS KASTNER & GIBBS/SEATTLE**

**February 22, 2017 - 4:03 PM**

**Transmittal Letter**

Document Uploaded: 737481-Petition for Review.pdf

Case Name: Brand Insulations, Inc. v. Estate of Barbara Brandes

Court of Appeals Case Number: 73748-1

Party Respresented: Brand Insulations, Inc.

**Is this a Personal Restraint Petition?** ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

**The document being Filed is:**

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

**Comments:**

No Comments were entered.

Sender Name: Mark R Desierto - Email: dbulis@williamskastner.com