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NO. 96551-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CORINA PUENTE, individually and as Personal Representative  
of the Estate of Javier Puente, deceased,

Appellant,

v.

BAUGH INDUSTRIAL CONTRACTORS, INC., a Washington  
Corporation; SKANSKA USA BUILDING INC., a Delaware  
Corporation; RESOURCES CONSERVATION COMPANY  
INTERNATIONAL, a Delaware Corporation and A SUBSIDIARY OF  
GE IONICS, INC., a Massachusetts Corporation; STIRRETT-JOHNSEN,  
INC., a Washington Corporation; HARRIS GROUP, INC., a Washington  
Corporation; and NIPPON CHEMI-CON, a Japanese Corporation,

Respondents.

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Appeal from the Superior Court of King County  
Honorable Jean Rietschel  
NO. 14-2-28454-3 SEA

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APPELLANT PUENTE'S RESPONSE TO RESPONDENT  
RESOURCES CONSERVATION COMPANY INTERNATIONAL'S  
PETITION FOR REVIEW

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## I. INTRODUCTION

Javier Puente was performing routine maintenance on a Boric Acid Evaporator System designed by Defendant Resources Conservation Company International (RCCI), when it malfunctioned. The system spewed hot boric acid solution onto Mr. Puente, catastrophically burning him and resulting in his death. Mr. Puente's surviving spouse brought a lawsuit against RCCI for its defective design of the Boric Acid Evaporator System and its failure to provide adequate warnings and instructions.

The incident occurred about 10 years after the Boric Acid Evaporator System (BAES) was installed at Chemi-Con Materials' Moses Lake, Washington manufacturing plant. The trial court granted summary judgment to RCCI on the basis that the BAES was an "improvement upon real property" under RCW 4.16.300 and that Plaintiff's claim was therefore barred by the six-year construction statute of repose set forth in RCW 4.16.310.<sup>1</sup>

In *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984), this Court held that the construction statute of repose does not apply to industrial equipment used in manufacturing processes. The BAES involved in this case processed wastewater generated by Chemi-Con's manufacturing process. The evidence establishes that RCCI, as well as Chemi-Con and other parties involved in the acquisition and installation of the BAES, considered the BAES to be industrial equipment.

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<sup>1</sup> RCW 4.16.300 states that actions or claims arising from construction of an improvement upon real property are subject to the six-year statute of repose. RCW 4.16.310 bars claims that do not accrue within six years of substantial completion.

This Court warned in *Condit* that applying the construction statute of repose to protect manufacturers of industrial equipment from liability would eviscerate product liability law in the context of industrial equipment. *Condit*, 101 Wn.2d at 111. That is exactly what happened here when the trial court dismissed Plaintiff's claims against RCCI based on the construction statute of repose.

Because the trial court's summary judgment ruling dismissing Plaintiff's claims against RCCI was in direct conflict with this Court's decision in *Condit*, the Plaintiff appealed the trial court's ruling. The Court of Appeals reversed the trial court, holding that the BAES was not an improvement upon real property under *Condit* and was not subject to the six-year statute of repose set forth in RCW 4.16.310.

RCCI's petition for discretionary review is not warranted under RAP 13.4(b). The Court of Appeals correctly decided this case. No conflict exists between the Court of Appeals' decision and this Court's analysis and holding in *Condit*. Likewise, the Court of Appeals' decision does not conflict with any other decisions of this Court. Nor does the Court of Appeals' decision conflict with any other published decisions of the Court of Appeals. RCCI's petition for discretionary review does not involve any issues of substantial public interest that should be determined by this Court. Because it fails to satisfy any of the considerations governing the acceptance of review set forth in RAP 13.4(b), RCCI's Petition for Review should be denied.

## II. STATEMENT OF THE CASE

### A. Chemi-Con Materials' manufacturing plant and Defendant RCCI's Boric Acid Evaporator System

Javier Puente worked at Chemi-Con Materials' Moses Lake, Washington facility, which manufactures etched aluminum foil for use in electronics. Chemi-Con opened its manufacturing facility in 1995 using a building that was originally built to be an aircraft hangar.<sup>2</sup> In 2000, Chemi-Con decided to expand the facility to increase production. The project was called the "LP3 Expansion"<sup>3</sup> and included adding six additional formation machines.<sup>4 5</sup>

The total cost of the LP3 Expansion project was about \$29 million.<sup>6</sup> The project included the construction of structures and the installation of new equipment, such as the BAES.<sup>7</sup>

Chemi-Con's manufacturing process generates wastewater containing boric acid.<sup>8</sup> A BAES is needed to process the boric acid wastewater. The BAES uses heating and cooling to separate the wastewater into evaporated boric acid solids and distilled water. The boric acid solids form a sludge that is taken to a landfill, and the distilled water

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<sup>2</sup> CP 1089 (*Akers Dep.* at 12-13).

<sup>3</sup> "LP3" stands for "Large Phase 3." CP 1108 (*Akers Dep.* at 209).

<sup>4</sup> The formation machines produce etched aluminum. CP 1114 (*Akers Dep.* at 346).

<sup>5</sup> CP 1089 (*Akers Dep.* at 15-16).

<sup>6</sup> CP 1094, 1096 (*Akers Dep.* at 41, 51); CP 1152.

<sup>7</sup> See CP 1118 (30(b)(6) *Deposition* at 18); CP 1159 (listing the BAES under "Equipment"); CP 1161 ("The project will include the addition of 14 new formation machines . . . and all supporting utility and waste processing equipment.").

<sup>8</sup> CP 1089 (*Akers Dep.* at 13-15).

is re-used in Chemi-Con's manufacturing process.<sup>9</sup> The LP3 Expansion project included the acquisition of a new, larger BAES to process the additional wastewater that would be generated by the six additional formation machines.<sup>10</sup>

The BAES is an integral part of Chemi-Con's *manufacturing* process.<sup>11</sup> A smaller system for processing boric acid wastewater was in place before the LP3 Expansion and was removed after Defendant RCCI's BAES was installed.<sup>12</sup>

The BAES was bid as a standalone piece of equipment. Harris Group, an architectural and engineering firm, prepared specifications for the BAES and solicited bids from two companies.<sup>13</sup> RCCI was chosen to supply the BAES.<sup>14</sup>

RCCI designs, builds, and sells industrial evaporator and crystallizer systems around the world.<sup>15</sup> RCCI was obligated under its contract with Baugh Industrial Contractors, the general contractor for the LP3 Expansion project, to "supply the design, procurement, manufacturing, and delivery of Boric Acid Evaporator System."<sup>16</sup> In

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<sup>9</sup> CP 1089, 1091, 1095 (*Akers Dep.* at 15, 30-31, 45).

<sup>10</sup> CP 1096 (*Akers Dep.* at 49).

<sup>11</sup> CP 1096, 1106, 1110 (*Akers Dep.* at 49, 180, 237) ("Without the Boric Acid Evaporator System operating, we can't operate the production line."); CP 1125 (*30(b)(6) Dep.* at 93).

<sup>12</sup> CP 1090, 1096 (*Akers Dep.* at 18, 50); CP 1119 (*30(b)(6) Deposition* at 59-60).

<sup>13</sup> CP 1236; 1259-1260; 1308-1324.

<sup>14</sup> CP 1275-1287; CP 1111 (*Akers Dep.* at 304).

<sup>15</sup> CP 746.

<sup>16</sup> *See* CP 1276 (Section 2).

addition to designing the BAES and procuring the component parts for the system, RCCI prepared Operation and Maintenance Manuals for the BAES.<sup>17</sup> RCCI also sent personnel to the Chemi-Con plant to provide training on the operation of the BAES.<sup>18</sup>

Although the BAES consisted of several components, including a large tank/vapor body, pipes, a pump that circulated the boric acid solution within the system, and a heat exchanger, and was connected by pipes to other equipment at the plant, RCCI identified the BAES on drawings as the “Boric Acid Evaporator *System*.”<sup>19</sup> Likewise, Chemi-Con considered the BAES to be a single system.<sup>20 21</sup> Because the BAES was equipment used in Chemi-Con’s manufacturing process, it qualified for a sales tax exemption for equipment used in manufacturing.<sup>22</sup>

The BAES was housed in the Environmental Building, along with other equipment.<sup>23</sup> The Environmental Building “is pre-engineered type

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<sup>17</sup> See CP 1278; CP 1284; CP 1165-1175; CP 1144-1147 (RFAs Nos. 9, 10, 15 & 17); CP 1178 (Interrogatory No. 3(a)).

<sup>18</sup> CP 1290-1299; CP 1115 (*Akers Dep.* at 349-350).

<sup>19</sup> CP 1821-1825 (emphasis added).

<sup>20</sup> CP 1094-1095 (*Akers Dep.* at 44-45) (“Internally what we called the boric evaporator is one system itself in how we look at it internally.”).

<sup>21</sup> See also CP 1091, 1095, 1098, 1105-1106 (*Akers Dep.* at 29-30, 47, 74, 176-178); CP 1181; CP 1185; CP 207 (*Declaration of Takayuki Noguchi* at ¶6) (“The LP3 would also include an ancillary facility . . . , which would contain peripheral and support **equipment** for the Main Facility, including the BAE system that is the subject of this lawsuit.” (emphasis added)); CP 1123 (*(30(b)(6) Dep.* at 80) (BAES is a piece of equipment); CP 1109 (*Akers Dep.* at 231) (“[T]he BAE is tied into the East Bay and the West Bay. All the formation machine’s waste would go to that one piece of equipment.”); CP 1120 (*(30(b)(6) Dep.* at 61-62) (referring to the BAES as “long-lead equipment”).

<sup>22</sup> CP 1124 (*(30(b)(6) Dep.* at 85-86).

<sup>23</sup> CP 1092 (*Akers Dep.* at 34).



construction . . . to house equipment and tanks that process the liquids used within the formation machines.”<sup>24</sup> Although the BAES was anchored to the foundation of the building, it could be removed without any structural impact to the Environmental Building and in fact has since been removed and replaced with a new, more efficient BAES.<sup>25</sup>

### **B. Javier Puente’s fatal burn injuries**

In July 2012, the Chemi-Con plant was scheduled to be shut down to allow for a few days of maintenance, including the recirculation pump in the BAES.<sup>26</sup> The pump was removed once or twice a year for maintenance.<sup>27</sup>

Javier Puente had been employed in Chemi-Con’s maintenance department for over 10 years.<sup>28</sup> On the afternoon of July 23, 2012, Mr. Puente and other maintenance personnel followed their normal procedures for completely draining the BAES before attempting to remove the recirculation pump.<sup>29</sup> After encountering some difficulty removing the pump, they connected come-a-longs to the pump to try to pull it out of its housing. During that process, the pump suddenly came out, followed by what was estimated to be hundreds of gallons of hot (180°) boric acid

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<sup>24</sup> CP 1192.

<sup>25</sup> CP 1124 (30(b)(6) Dep. at 86-87); CP 1415 (Olson Dep. at 222); CP 1574 (Declaration of Joseph W. Akers Re: BAES Replacement at ¶¶ 4-5).

<sup>26</sup> CP 1112 (Akers Dep. at 311).

<sup>27</sup> CP 1097 (Akers Dep. at 54).

<sup>28</sup> CP 1093 (Akers Dep. at 39).

<sup>29</sup> CP 1099-1100, 1114 (Akers Dep. at 136-137, 348).

solution.<sup>30</sup> Mr. Puente was closest to the pump and was severely burned over most of his body. He was airlifted to Harborview Medical Center but died from his burn injuries. Mr. Puente, who was 63 years old at the time of his death, is survived by his wife, Corina, and three adult children.

### **C. Procedural history**

Corina Puente individually, and as the personal representative of the Estate of Javier Puente, filed a lawsuit against RCCI alleging claims of negligence and liability under Washington's Products Liability Act (see Chapter 7.72 RCW).<sup>31</sup> The Estate alleged RCCI is a "product manufacturer." In addition, the Estate alleged that RCCI negligently installed equipment, provided defective designs and equipment, did not design a reasonably safe BAES, breached express and implied warranties, and did not provide adequate warnings.

In response, RCCI filed a motion for summary judgment dismissal on the grounds that the six-year construction statute of repose barred the lawsuit, arguing that the BAES was an improvement upon real property because it was integral to the function of the environmental building. In opposition, the Estate argued the construction statute of repose did not bar the lawsuit because the record established that the BAES was part of

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<sup>30</sup> CP 853-854.

<sup>31</sup> The Estate also filed suit against Baugh Industrial Contractors (the general contractor for the LP3 Expansion Project), Harris Group (the engineering firm for the project), Stirrett Johnsen, Inc. (the piping subcontractor), and Nippon Chemi-Con (the parent company for Chemi-Con Materials). These other entities were all dismissed from the lawsuit. Plaintiff only appeals the dismissal of Defendant RCCI, the designer/seller/manufacture of the Boric Acid Evaporator System.

Chemi-Con's manufacturing process, not an improvement upon real property. The trial court granted RCCI's summary judgment motion, agreeing with RCCI that BAES was an improvement upon real property.

The Estate appealed and on October 22, 2018, the Court of Appeals issued an opinion finding that the BAES was not an improvement on real property. Instead, the court found that the BAES was part of Chemi-Con's manufacturing process for producing anode aluminum foils for electrolytic capacitors. Based on these findings, the Court of Appeals reversed the trial court and remanded this case back to the lower court for trial. Defendant RCCI then petitioned this Court for discretionary review.

### **III. SUMMARY OF ARGUMENT**

Defendant RCCI fails to demonstrate how the BAES is an "improvement upon real property" for purposes of the construction statute of repose given this Court's holding in *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984), that industrial equipment is subject to product liability law, not the construction statute of repose. Because the BAES services Chemi-Con's manufacturing process rather than the functioning of the Environmental Building in which it is housed, the BAES is not an integral building system and therefore is not within the scope of the construction statute of repose.

Here the Court of Appeals properly reversed and remanded this case for trial on Plaintiff's product liability claims arising out of RCCI's

unsafe design of the BAES. Because the Court of Appeals was correct, RCCI's Petition for Review should be denied by this Court.

#### IV. ARGUMENT

**A. The Court of Appeals correctly held that the construction statute of repose does not apply to the Chemi-Con BAES based on this Court's analysis in *Condit v. Lewis*.**

The construction statute of repose, RCW 4.16.310, applies only to an "improvement upon real property":

RCW 4.16.300 through 4.16.320 shall apply to all claims . . . 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 . . . for any construction, alteration or repair of any *improvement upon real property*.

RCW 4.16.300 (emphasis added).

Thus, the key issue in this appeal is whether or not the BAES is an "improvement upon real property." This issue is controlled by this Court's decision in *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984). In *Condit*, this Court interpreted the term "improvement upon real property" in the construction statute of repose and held that the construction statute of repose does not apply to industrial equipment used in manufacturing processes.

The plaintiff in *Condit* was injured when cleaning a conveyor belt at a food processing plant. The conveyor belt was part of a large freezer tunnel system used to quick-freeze cut vegetables. The defendant designed, manufactured and installed the system in 1965, and the plaintiff

was injured in 1979. As here, the plaintiff brought a product liability claim, and the defendant pleaded the six-year construction statute of repose as a defense. *Condit*, 101 Wn.2d at 107-108. The Court rejected the defendant's defense, concluding that the statute of repose, RCW 4.16.300, applies only to claims "against any person, arising from such person having constructed, altered or repaired any improvement upon real property" and specifically, "construction activities, including designing, planning, surveying, architectural, or construction or engineering services." *Condit*, 101 Wn.2d at 110. Noting that "[e]ach of these activities relates to the process of building a structure," this Court held that the statute "focuses on individuals whose activities relate to construction of the improvement, rather than those who service or design items within the improvement." *Condit*, 101 Wn.2d at 109 -10.

In *Condit*, this Court emphasized that the construction statute of repose only applies to integral building systems which the Court defined as "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 a building. *Condit*, 101 Wn.2d at 110-111 (emphasis added) (quoting *Brown v. Jersey Central Power & Light Co.*, 394 A.2d 397 (1978)). Applying this definition, this Court stated that "[m]echanical fastenings may attach a machine to the building, but they do not convert production equipment into realty or integrate machines into the building structure, for they are not necessary for the building to

function as a building." *Condit*, 101 Wn.2d at 111. This Court then concluded that the engineering and design of the conveyer belt and refrigeration unit that caused the injury to the plaintiff was not an improvement upon real property, but instead was engineered and designed as part of the "manufacturing process taking place within the improvement":

Rather than designing an improvement on real property, respondent was engineering and designing accoutrements to the manufacturing process taking place within the improvement. As such, they are more properly subject to product liability law and its statute of limitations.

*Condit*, 101 Wn.2d at 112.

In order to suggest that the BAES is integral to the Environmental Building, RCCI claims that the Environmental Building was specifically built to house the BAES. But the evidence in this case is that the Environmental Building is essentially a shell that houses a variety of equipment in addition to the BAES.<sup>32</sup> Unlike plumbing, electrical, or heating/ventilation systems, the BAES does not serve any function for the Environmental Building itself.<sup>33</sup> Although RCCI claims that "the Environmental Building could not function as it was designed to if the boric acid evaporator was not functioning," the evidence shows that it is Chemi-Con's *manufacturing process* that cannot function without the

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<sup>32</sup> CP 1092 (*Akers Dep.* at p.34-35); CP 1120-1121 (*30(b)(6) Dep.* at 64-65).

<sup>33</sup> CP 1106; CP 1121-1122 ("Q: Okay. So does the boric acid evaporator provide any kind of utility support for any of the structures on the building other than acting as the boric acid evaporator? A: No.").

BAES. The Environmental Building itself could function as intended as a structure without the BAES.

The trial court's summary judgment ruling dismissing Plaintiff's claims against Defendant RCCI was in direct conflict with this Court's analysis in *Condit*. Based on the evidence, the Court of Appeals in this case properly applied *Condit* in ruling that the BAES was not an improvement upon real property and that therefore the construction statute of repose did not apply to the BAES.

**B. In *Condit*, this Court specifically limited the application of the cases relied upon by RCCI in its Petition for Review.**

RCCI relies on a hundred year old property law case -- *Seigloch v. Iroquois Mining Co.*, 106 Wash. 632, 181 P. 51 (1919) -- to construe the term "improvement upon real property." *Seigloch* involved a dispute between a receiver and a mining company that defaulted on a loan. The dispute involved the question of what constituted "improvements," which belonged to the receiver and could not be removed by the mining company after it defaulted on the loan. *Seigloch* included machinery within the scope of "improvements" to real property. *Seigloch*, 106 Wash. at 636. But in *Condit*, this Court specifically cautioned against borrowing the analysis from other areas of property law in determining whether an item was improvement on real property. See *Condit*, 101 Wn.2d at 109. Instead, as this Court stated in *Condit*, the construction statute of repose must be construed in a way that effectuates the legislative intent of the statute. *Condit*, 101 Wn.2d at 110.

RCCI also relies on *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1972) and *Pinneo v. Stevens Pass, Inc.*, 14 Wn. App. 848, 545 P.2d 1207 (1976). In *Condit*, this Court rejected the analysis of *Pinneo* -- which relied on *Seigloch* -- and *Yakima Fruit*, stating:

Both *Pinneo* and *Yakima Fruit* borrowed the analysis for whether an item was an improvement on real property from other areas of property law. Although we concur with the results reached in these cases, we believe that the mechanistic approaches evident in these two cases discourage the primary goal of this court in interpreting statutes. We believe that to determine whether RCW 4.16.300 applies we must examine the underlying purpose of the statute.

*Condit*, 101 Wn. 2d at 109–10.

As this statement makes clear, the controlling analysis of the term “improvement upon real property” for purposes of RCW 4.16.310 is *Condit*, which specifically analyzed the legislative intent in determining the scope and meaning of the term “improvement upon real property” in the statute.

RCCI also relies on *Parking Springs Property Owners Assn. v. Glacier Springs Enterprises, Inc.*, 41 Wn. App. 829, 706 P.2d 652 (1985), for the proposition that a water storage tank is an improvement upon real property and therefore the evaporator body for the BAES should be considered an improvement to real property. But *Glacier Springs* involved more than just a water tank. *Glacier Springs* involved leaks in water lines that supplied water to a housing development. The homeowners association brought suit against the engineer and contractor



that designed and installed the water system. It is not surprising that the court considered a water system to be an integral building system subject to the construction statute of repose, because water supply is a basic requirement of any building, like electricity and heating/ventilation. Unlike the BAES, the water supply system in *Glacier Springs* was not industrial equipment used in a manufacturing process.

**C. As a matter of public policy, the construction statute of repose should not be interpreted in a manner that would eviscerate product liability law in the context of industrial facilities.**

This Court in *Condit* was specifically concerned about preserving product liability claims and not bringing manufacturers of industrial equipment within the scope of the construction statute of repose. Thus, this Court warned that applying the construction statute of repose to protect manufacturers of industrial equipment from liability would eviscerate product liability law in the context of industrial facilities. *Condit*, 101 Wn.2d at p.111.

The trial court's interpretation of the construction statute of repose and dismissal of Plaintiff's claims against RCCI based on the construction statute of repose conflict with *Condit* and would deny workers who are injured or killed by unsafe industrial equipment the right to obtain compensation for their losses under the Product Liability Act.<sup>34</sup> Including

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<sup>34</sup> Not only would the trial court's ruling that industrial equipment like the BAES is subject to the construction statute of repose deprive workers of a remedy when they are injured or killed by dangerous industrial equipment, but it would also deprive the Department of Labor & Industries of its right to be reimbursed for medical expenses and wage loss the Department pays to workers who are injured or killed as a result of dangerous industrial equipment. RCW 51.24.060(1)(c) (Department's statutory right to reimbursement for benefits paid from third-party tort recoveries).

industrial equipment within the scope of the construction statute of repose would eviscerate the rights of Washington workers under the Product Liability Act by immunizing manufacturers of dangerous industrial equipment attached to real property from liability six years after such equipment is sold, contrary to the legislative intent that manufacturers of dangerous equipment be subject to liability under the Product Liability Act. See *Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn. App. 256, 266, 115 P.3d 1017 (2005) (recognizing Washington’s strong policy interest “in deterring the design, manufacture and sale of unsafe products within its borders”).

**D. RCCI is a product seller/manufacture and is therefore subject to liability under the Product Liability Act.**

RCCI “designs and builds industrial evaporator and crystallizer systems around the world.”<sup>35</sup> RCCI produces drawings and specifications for these systems and procures the component parts for the systems.<sup>36</sup>

RCCI admits that it “provided design, procurement, manufacturing, and delivery” of the BAES.<sup>37</sup> RCCI is therefore subject to liability as a product manufacturer and seller.

The Product Liability Act provides for liability on the part of product manufacturers and product sellers if products are not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided. RCW 7.72.030; RCW 7.72.040. A

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<sup>35</sup> CP 746.

<sup>36</sup> CP 746.

<sup>37</sup> CP 1178-1179; *see also* CP 1134-1135 (Request for Admission No. 9 & 10).

“product” is “any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.” RCW 7.72.010(3). The BAES falls within this definition of a “product” – it possessed intrinsic value; was delivered as component parts; and was produced for introduction into trade or commerce.

A product manufacturer includes “a product seller who designs . . . the relevant product.”<sup>38</sup> RCW 7.72.010(2). RCCI is “engaged in the business of selling products” – wastewater evaporator and crystallization systems. RCW 7.72.010(1) (defining “product seller”).<sup>39</sup> It is clear from RCCI’s contract with Baugh that RCCI sold the BAES.<sup>40</sup> RCCI admits that it designed the BAES.<sup>41</sup> Because RCCI designed and sold the relevant product in this case, it is a “product manufacturer” for purposes of the Product Liability Act. RCW 7.72.010(2).

RCCI admits that it prepared the plans and specifications for the BAES. The harm in this case was caused by Defendant RCCI’s defective design of the BAES and inadequate warnings and instructions.<sup>42</sup>

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<sup>38</sup> “The relevant product” is defined as “that product or its component part or parts which gave rise to the product liability claim.” RCW 7.72.010(3). The relevant product here is the BAES, not the Environmental Building, the natural gas piping system at the Chemi-Con plant, or the LP3 Expansion Project in general.

<sup>39</sup> CP 746.

<sup>40</sup> CP 1275-1287.

<sup>41</sup> CP 1132.

<sup>42</sup> CP 1069-1073.

In *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 724 P.2d 389 (1986), the plaintiff's arm was crushed in the nip point of a conveyor at a fruit packing plant. The production line was designed and installed by the plaintiff's employer, but a number of conveyor parts were purchased from the defendant. Although the defendant generally incorporated guards and warnings when it supplied an assembled conveyor, it did not provide any guards or warnings to the plaintiff's employer because the employer purchased unassembled conveyor parts.

The Court of Appeals held that the defendant conveyor manufacturer was a product manufacturer subject to the Product Liability Act:

While it did not design, construct, or install the *pear processing line*, it did design and manufacture the component parts used and installed without substantial modification in assembling the conveyor. ***It is the design, and the subsequent injury because of that design, which form the basis of Ms. Parkins' claim, i.e., the conveyor parts were designed to be assembled in one unique way and because that design did not incorporate guards or warnings, it is not reasonably safe.*** Van Doren is a product manufacturer within the provisions of the act.

Because Ms. *Parkins* was injured by machinery purchased from Van Doren, as opposed to other equipment which made up the pear processing unit, those parts constitute "relevant" products for the purposes of the act. RCW 7.72.010(3). Therefore, the provisions of the act apply to this action.

*Parkins*, 45 Wn. App. at 25 (emphasis added). Like the conveyor systems in *Parkins* and *Condit*, the BAES is equipment used in an industrial manufacturing process and therefore is not within the scope of the construction statute of repose. And like the conveyor system

designers/sellers in *Parkins* and *Condit*, RCCI is subject to the Product Liability Act.

**E. The Court of Appeals decision in this case does not contradict this Court's decision in *Lakeview Boulevard Condominium Assn. v. Apartment Sales Corp.***

RCCI also claims that the Court of Appeals decision contradicts this Court's decision in *Lakeview Boulevard Condominium Assn. v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001). But *Lakeview* did not address the meaning of "improvement upon real property" for purposes of the construction statute of repose. Instead, *Lakeview* involved a constitutional challenge to the construction statute of repose and whether there is a rational basis for excluding product manufacturers from the statute. And, in fact, an analysis of the factors set forth in *Lakeview* supports Plaintiff's position that Defendant RCCI is a product manufacturer/seller:

1. Manufacturers have liability under products liability law, an independent area of law separate from basic negligence or breach of contract, and this area of law has its own statutes of limitations, which are keyed to the useful life of the product.

**RCCI has liability under the Product Liability Act for its defective design of the BAES and inadequate warnings and instructions. The Product Liability Act has its own statute of limitations and a presumptive 12-year "useful safe life" for products. RCW 7.72.060. The incident in this case occurred about 10 years after the BAES was installed at the Chemi-Con plant.**

2. Manufacturers produce standardized goods from pretested designs and in large quantities whereas contractors make a

unique product designed to deal with the distinct needs of a particular piece of real estate

**While this distinction might provide a rational basis for distinguishing between contractors and manufacturers, it is not an accurate distinction in reality. Many manufacturers customize their products. Large industrial equipment in particular is almost always customized to the needs of a particular user. The conveyor system at issue in *Condit* was no doubt customized for the particular applications for which they were being used. RCCI is in the business of selling wastewater treatment systems but customized the design of the BAES installed at Chemi-Con to meet the needs of Chemi-Con's manufacturing process. Further, the BAES was not (like a building) designed to meet the "needs of a particular piece of real estate"; it was designed (like all industrial equipment) to meet the needs of a particular *manufacturing process*.**

3. Manufacturers produce their goods in a controlled environment whereas contractors build improvements upon real estate in an ever-changing environment.

**Defendant RCCI's counsel stated that the BAES was designed in an office building in Bellevue. VRP (3/25/16) at p.25-26. RCCI designed the BAES in a controlled environment. RCCI did not build any "improvements upon real estate in an ever-changing environment."**

4. Manufacturers do not contribute to the structural aspects of real estate improvements; nor do they engage in any of the construction activities enumerated in RCW 4.16.310.

**RCCI's role was to design the BAES, supply its component parts, provide operation and maintenance manuals, and provide start up training for the BAES. It did not contribute to the structural aspects of the Environmental Building. It did not engage in any construction or engineering services related to the Environmental Building or its integral building systems.**

It is clear from the evidence and the law that RCCI is a product manufacturer and seller for purposes of the Product Liability Act and that RCCI did no construction or design work with regard to the Environmental Building or its integral building systems. Under this Court's analysis in *Condit*, RCCI's activities are outside the scope of the construction statute of repose and are instead governed by the Product Liability Act, as the Court of Appeals correctly held.

#### V. CONCLUSION

RCCI meets none of the factors for discretionary review set forth in RAP 13.4. Under the Court's analysis in *Condit*, Plaintiff's claims against RCCI are governed by product liability law rather than the construction statute of repose. The Court of Appeals properly applied this analysis in this case. For this reason, RCCI's Petition for Discretionary Review should be denied.

Respectfully submitted this 21<sup>st</sup> day of December, 2018.

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