NO. 99351-3

SUPREME COURT OF
THE STATE OF WASHINGTON

CINDY MAXWELL, Personal Representative for the Estate of EDMOND BROWN, deceased and MARILOU BROWN,

Appellant,

v.

BRAND INSULATIONS, INC., et al.,

Respondent.

and

ATLANTIC RICHFIELD CO., et al.,

Defendants.

RESPONDENT BRAND INSULATIONS, INC.'S OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Maxwell and Brown seek discretionary review of a 3-0 Court of Appeals, Division II decision affirming the trial court's enforcement of the clear meaning and intent of the Washington Statute of Repose; RCW 4.16.300 *et. seq.* Appellants claim that, in so doing, the Court of Appeals "abrogated" this court's decision in *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984). Appellants further claim that Division II's decision conflicts with the decision of the Court of Appeals, Division I in *Puente v. Resources Con. Co. Intern.*, 5 Wn. App. 2d 800, 428 P.3d 415 (2018), *review denied* 192 Wn.2d 1021 (2019). Neither claim has merit. The decision in the instant case follows Washington jurisprudence precisely, beginning with *Condit* and concluding with the Washington Legislature's 2004 revisions to the Statute of Repose. In short, the Statute of Repose is intended to protect design professionals and contractors from liability for activities performed in connection with the construction of an improvement to real property.

Respondent Brand Insulations, Inc. ("Brand") was the primary insulation subcontractor for the construction of the ARCO Cherry Point Refinery, circa 1971. In 2018, 46 years after Brand ceased work at the refinery, Brand and the general contractor Parsons Government Services, Inc. ("Parsons") were sued by the Brown plaintiffs for damages arising out

of Mr. Brown's claimed exposure to asbestos containing materials, including thermal insulation allegedly installed by Brand, while employed by ARCO at the refinery. There is no dispute that the refinery is an improvement to real property. For the purposes of Brand's motion, it was not disputed that Mr. Brown was exposed to asbestos containing thermal insulation products installed by Brand.

A. Whether or Not the Insulation Brand Installed Was an Improvement to Real Property, in and of itself, Is an Irrelevant Inquiry

Petitioner's first argument is that questions of fact were presented on the issue of whether or not the insulation installed by Brand was itself an improvement to real property. That is an irrelevant inquiry. Indeed, no question of fact was presented on the issue because Brand never contended that the insulation it installed was an improvement. The relevant inquiry *is not* whether the insulation was itself an improvement to property. Rather, the relevant inquiry is whether or not the insulation was installed in connection with the construction of an improvement to real property. Since the time of *Condit*, Washington Statute of Repose jurisprudence focused on a defendant's "activity"; not the characteristics of the material being installed.

Five years after deciding *Condit*, this Court analyzed the scope of the Statute of Repose in *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 772

P.2d 1018 (1989). The P*feifer* court explained that the critical analysis under the statute is whether or not the defendant performed construction activities in, of, to, or upon an improvement to real property. The *Pfeifer* court held that:

> In addressing a similar builders' statute of repose, a New Mexico appellate court found that the language required an activity analysis. *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied, Albuquerque v. Howell*, 91 N.M. 3, 569 P.2d 413 (1977). The language in *Howell* provided benefits to "`any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction . . [.] and on account of such activity. ...'" *Howell*, at 697. The Howell court concluded that summary judgment was appropriate to the extent that the defendant was sued as an installer of glass, but it was inappropriate where he was sued as a manufacturer or seller. 568 P.2d at 223. In two cases, this court has indicated that an activities analysis is appropriate. "RCW 4.16.310 applies to all claims of [sic] causes of action arising from the activities covered." (Second italics ours.) *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 500, 687 P.2d 212 (1984). This court has also emphasized activities as a means of defining persons covered by the statute. *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110, 676 P.2d 466 (1984) (the statute protects those whose activities relate to the structural aspects of the building).

Pfeifer v. City of Bellingham at 568-69.

This conclusion was reiterated by this Court in *Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d

1249 (2001). Again, this Court held that the relevant inquiry in a case involving the Statute of Repose is whether the defendant was a contractor who performed construction services, or, whether the defendant was a manufacturer of a product. Contractors (like Brand) performing construction services on an improvement to real property (like the ARCO refinery) are covered by the Statute of Repose. Product manufacturers are not. This has been the relevant distinction from the time of *Condit.* This is precisely the ruling made by the Court of Appeals.

> [T]he question here is not whether Brand's insulation itself was an improvement upon real property. The question is whether Brand's installation of that insulation under its subcontract with Parsons involved the construction of an improvement upon real property. Opinion at 14.

Petitioner's characterization of the Court of Appeals' holding as a "new involvement analysis" is incorrect. The analysis is not "new" as it has been in effect since *Condit.* It is exactly this Court's holding in *Pfeiffer.* ([The Statute's] "language required an activity analysis") Whether one describes the operation of the statute as an "activity" analysis or an "involvement" analysis, the operation is the same approach historically used by this court, and it is the approach used by the Court of Appeals in this case. It is the correct approach. The distinction petitioner seeks to draw is no distinction at all.

That conclusion is further buttressed by the 2004 revisions to the Statute and the legislative history that accompanied those revisions. In 2004, the legislature enacted Substitute Senate Bill 6600 (2004), which clarified that any licensed or registered person may invoke the protections of the statute of repose and eliminated the statute's exclusion of "manufacturers." Laws of 2004, Ch. 257, § 1. As the legislative history notes, this change was intended to "specifically cover persons licensed or registered as contractors, architects, engineers, land surveyors, landscape architects, and electricians." House Bill Rep., S.B. 6600, 2004 Reg. Sess., Mar. 3, 2004. The legislative history of the revision stated that the bill "restores the original intent of the statute of repose" and would eliminate litigation over whether a contractor "is really a manufacturer." *Id*. Historically, the statute of repose distinguished between design and construction professionals involved in the construction of an improvement to real property and manufacturers of equipment installed in the improvement. Here, Brand was a registered contractor performing construction work on an improvement to real property. Those are the only facts relevant to the application of the statute of repose. Brand was not a manufacturer, and no one has claimed that it was.

Puente does not change that analysis. In *Puente*, a plaintiff was injured when a piping flange was opened adjacent to a pump associated with a boric acid evaporator system ("BAES) at an aluminum processing facility. When the piping flange was opened, Mr. Puente was sprayed with boric acid at 180 degrees Fahrenheit. He suffered severe burns and died two days later. The equipment he was working on at the time of his accident was not part of an improvement to real property, but was rather, like the conveyor belt in *Condit*, simply equipment installed in the building. Division I's decision in *Puente* is entirely consistent with *Condit*, and entirely consistent with Division II's decision in this case. The *Condit* case noted that:

> Mechanical 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.

Here, there is no dispute that the refinery was an improvement to real property and no dispute that insulation was necessary on the piping and vessels that comprised the refinery for production and health and safety purposes.

B. Petitioner's Dismissal of its Claims Against Parsons Argues Against Acceptance of Review

For reasons known only to petitioner, a joint motion by petitioner and Parsons was filed in the Court of Appeals seeking dismissal of

petitioner's claims against Parsons. The motion was granted and a mandate issued in favor of Parsons on 2-1-2021. In their respective briefing to the Court of Appeals on the trial court's grant of summary judgment, both Parsons and petitioner suggested that Parsons, as the general contractor, and Brand, as a mere subcontractor, were somehow differently situated for the purposes of application of the Statute of Repose.[1] Brand finds their attempt to draw a distinction between a subcontractor and a general contractor to be specious and unsupported by the plain language of the statute or relevant case law. Nonetheless, the attempt to draw such a distinction has important implications for determining whether or not this case is appropriate for discretionary review. To insure judicial economy and avoid piecemeal evaluation of potentially relevant issues associated with the Statute of Repose, including rulings with possibly unanticipated and ill-advised impacts, Brand submits that the court should avoid consideration of a case involving statutory interpretation when all of the likely stakeholders are not able to present comprehensive argument in connection with all of the legal issues presented. The current posture of the case, i.e. absent general contractor,

[11] Brief of Parsons at pages 10-11 and brief of Petitioner at pages 23-24.

prevents this Court from addressing all of the issues raised by the parties in the Court of Appeals in a way that would be binding on future litigants.

II. CONCLUSION

The 3-0 opinion of the Court of Appeals in this matter is entirely consistent with Washington jurisprudence on the application of Washington's Statute of Repose. Moreover, it is entirely consistent with the 2004 revisions to the language of the statute. The legislative history of those revisions clearly demonstrate the legislature has always intended for the statute to apply to Brand's alleged liability in this case. Finally, the dismissal of Parsons renders this case a poor candidate for a comprehensive review of the operation of the Washington Statute of Repose.

Respectfully submitted this 19th day of February, 2021.

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CERTIFICATE OF SERVICE

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