
Those who make improvements to real property occupy a working environment that provides a variety of unique situations. They design, assemble, and adapt raw materials in varied settings. Each finished product is an amalgam of past practice and experiment. Although they must use a standard of care based on experience, each improvement includes novel and untested aspects. This process can create long-term and unforeseeable risks. The legislature determined that those who make improvements to real property should not be liable in tort within the discovery rule as it is applied generally and enacted a statute of repose that places a six-year limit on the rule for claims arising out of the construction process.  

2. Wash. Rev. Code § 4.16.300 provides in part:
   RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alterion or repair of any improvement upon real property. This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers. . . .

Wash. Rev. Code § 4.16.310 provides in part:
   All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: Provided, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986. . . .

Wash. Rev. Code § 4.16.320 provides:
The discovery rule protects injured plaintiffs when the negligent acts of others are not discovered until the harm occurs,\(^3\) which can be a substantial time after the original tortious act. If not for the discovery rule, the statute of limitations would commence at the time of the tortious act and expire long before the injury actually occurs. The rule simply shifts the onset of the statute of limitations from the date of the tortious act to the date of the harm's discovery.

This protection is appropriate in situations where the intervening acts of others do not affect the original act, or where the original harm is easily proven and foreseen. However, in the case of improvements to real property, the longer the improvement has been out of the control of its creator, it becomes more likely that the cause of the damage was the present owner's fault or the fault of natural forces. As a result, the original risk grows much more difficult to assess and allegations of fault more difficult to defend.

Statutes of repose are a legislative solution to the effect of the discovery rule on potentially long-term liability. In contrast to statutes of limitation, which begin to operate when the harm arises, statutes of repose commence operation at a neutral point in time and cut off the plaintiff's right to sue for harm that occurs after a specified period of time has passed. They create a window of insurable risk of definite duration in which a potential defendant is exposed to the threat of liability. As applied to real property improvements, statutes of repose promote the social policy of encouraging such improvements by lowering insurance costs to builders.\(^4\)

In Washington, Wash. Rev. Code §§ 4.16.300–320 impose a six-year limitation period on the accrual of causes of action that arise from making improvements to real property.\(^5\) The statute operates by establishing a six-year time limit after the improvement is substantially completed\(^6\) within which the cause of action must arise. If damage occurs after this time

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5. See supra note 1.

6. "The phrase 'substantial completion of construction' shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use." Wash. Rev. Code § 4.16.310.
limit has passed, regardless of the cause, any action is barred by operation of law.

*Pfeifer v. Bellingham*\(^7\) is the latest in a series of Washington State cases to analyze and apply Wash. Rev. Code §§ 4.16.300-.320. The case involves a novel and successful attempt to circumvent the operation of the statute. The *Pfeifer* decision removes the protection of the statute from builders who purchase unimproved property and build "spec" houses\(^8\) for subsequent sale. Clearly, claims brought against these builders couched in terms negligence and falling outside the statute's window period are barred by the statute of repose. The *Pfeifer* decision, however, allows such plaintiffs to recast claims as misrepresentation claims against builders as vendors of land under § 353 of the Restatement (Second) of Torts for failure to disclose dangerous concealed defects to their vendees.\(^9\) Now, the builder's posture as a vendor leaves him potentially open to attack for an indefinite period of time under a tort theory developed specifically for an entirely different group of defendants—those who transfer possessory interests in land. Holding that the Restatement theory should be applied to builders as well as other vendors of real property, the *Pfeifer* court reversed a summary judgment in favor of a builder-defendant and remanded the case for trial on its facts.\(^10\)

In reaching its holding, the court faced an apparent conflict between the statute of repose which protects builders and the Restatement theory which does not, and determined that one need not preempt the other. The court held that the two rules do not conflict.\(^11\) The court's reasoning suggests that exempting vendors from § 353 because they happened to have built the improvement would be unfair.\(^12\) Asserting that

\(^7\) 112 Wash. 2d 562, 772 P.2d 1018 (1989).

\(^8\) "Spec" or speculation: A "spec" house is financed by the builder in the hope of finding a buyer at some future time; it is distinguished from "custom" construction, in which the future homeowner finances the construction. Justice Durham notes that "custom" builders also frequently retain a property interest to facilitate the homeowner's financing. 112 Wash. 2d at 572, 772 P.2d at 1023-24 (Durham, J., dissenting).

\(^9\) See infra note 33 for text of § 353.

\(^10\) 112 Wash. 2d at 571, 772 P.2d at 1023.

\(^11\) Id. at 570, 772 P.2d 1023. The court held quite simply that when the cause of action arises from the sale of land, the statute is inapplicable. Id.

\(^12\) "A seller who also happens to be a builder should not be shielded from liability. . . . If builders also engage in the activity of selling, they should face the liability of sellers." *Pfeifer*, 112 Wash. 2d at 568, 772 P.2d at 1022.
greater proof is required for § 353 actions than for negligence claims, the court claimed that its holding did not defeat the purpose of the Statute of Repose.\textsuperscript{13} The court's attempt to synchronize the rules, however, left their underlying policies in hopeless conflict. In so doing, the court has opened the door to suits that the statute of repose was intended to prevent. In suits couched in terms of misrepresentation, the holding leaves unresolved the conflict between the Restatement theory as it applies to builder/vendors and the statute of repose which seemingly protects the builder persona of the defendant. While the statute of repose protects a builder who intentionally creates a dangerous condition, the Restatement theory imposes liability on one who passively fails to disclose a dangerous condition to his buyer.

In a \textit{Pfeifer} scenario the rules cannot be synchronized because the policies behind them are directly opposed. The statute of repose operates to foreclose liability in order to protect defendants and encourage the activity of construction. By contrast, the Restatement theory extends liability to protect plaintiffs by allowing suits that previously had been barred by the principle of caveat emptor and the requirement of privity. During the six-year window of the statute of repose, one who makes improvements to real property is exposed to all liability, including that imposed by § 353. The \textit{Pfeifer} decision allows § 353 liability to continue indefinitely, even after the statute of repose closes the window of liability on negligence claims.

Section 353 was not created as a substitute for claims time-barred by legislative mandate; moreover, it is awkward to apply where the gravamen of the complaint is an action rather than a failure to act. In addition, since the exposure to liability for stale claims which vendors of real property face in § 353 actions is similar to the exposure from which builders of improvements are protected by Wash. Rev. Code §§ 4.16.300-.320, a policy that encourages transfers of real property may be as valuable as the policy encouraging construction of improvements thereon. Thus, when faced with the choice of curtailing liability to vendors or increasing it to builders, the court should have opted to limit liability to vendors to conform to legislative intent.

This Note criticizes \textit{Pfeifer}'s incomplete resolution of the apparent conflict between Wash. Rev. Code §§ 4.16.300-.320 and

\textsuperscript{13} \textit{Id.} at 570, 772 P.2d at 1023.
§ 353 of the Restatement (Second) of Torts and calls for a reconsideration of the case. The Note is premised on the general validity of statutes of repose and the merit of the policies that they promote.14 The Note first reviews briefly the development of statutes of repose generally, how they operate, and how courts in Washington and in other jurisdictions have applied them. It then analyzes the development of the Restatement’s § 353 and its policy. Next, it examines the Pfeifer court’s resolution of the rules conflict, its rationale, and the possible effects of applying the Pfeifer holding to the building industry.

This Note asserts that the Washington Supreme Court could have resolved Pfeifer’s issues in a manner more consistent with the purpose of the statute. It suggests that the statute be reworded to include expressly the sale of an improvement, or, alternatively, that the court or legislature place a six-year limit on causes of action for injuries arising from the transfer of land. This Note proposes that courts addressing this issue rule that § 353 claims be dismissed when they accrue six years after the transfer of the improvement, at least in those cases in which construction liability against the builder of the concealed condition would be barred under the statute of repose.

I. THE DEVELOPMENT OF THE STATUTE

At common law, privity of contract was required to impose liability in tort for damages arising under a contract.15 In the 1842 case of Winterbottom v. Wright,16 the defendant’s non-performance of a contract resulted in physical injury to a stranger to the contract. Although the court was sympathetic to the need for a remedy, it held that no matter how dire the need might be, any relaxation of the strict privity standard

would create an endless chain of liability for the original parties to the contract. Baron Rolfe warned: "Hard cases, it has been frequently observed, are apt to introduce bad law." Thus, the common law limited the liability of architects, builders, and others who make improvements to real property to the original parties to the contract.

The privity limitation met its demise in the 1916 case of MacPherson v. Buick Motor Company. The holding relaxed the Winterbottom standard and imposed liability on manufacturers to any foreseeable user of a negligently-made chattel that was "reasonably certain to place life and limb in peril." The MacPherson decision became a benchmark in the development of consumer protection law. Since the McPherson decision, courts have expanded on its holding to include ever more distant links in the manufacturing and distribution chain while the standard of care has evolved toward strict liability.

As this sphere of liability spread, it reached eventually those who make improvements to real property, particularly architects for negligent design and builders for negligent construction.

This expanded pool of foreseeable plaintiffs could include anyone who would subsequently own, rent, or visit the improvement. And, because the life of an improvement to real property is long, architects and builders developed a perilous exposure to actions for negligence. An architect or a builder facing an otherwise stale claim might find it more expedient, or perhaps, necessary, to settle the claim rather than to attempt a difficult defense in court, where the plaintiff's injuries are recent and the proof of standard of care must be argued on a stage set and dismantled long ago.

Architects' and builders' associations reacted to the increase in their exposure to liability by lobbying their legislatures for protection. They argued that the nature of their work prevented them from self-protection against stale claims.

20. Id. at 389, 111 N.E. at 1053.
22. The application of the MacPherson rule to architects and builders is generally traced to Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). The Inman court quoted MacPherson and found no difference between dangerous chattels and dangerous improvements to real property.
23. See, e.g., Comment, supra note 18, at 366 n.35; Hearings on H.R. 6527, H.R. 6678
and the negligence of others. Responsive state legislatures enacted statutes of repose for architects and builders. Washington enacted its original statute in 1967. As of 1986, forty-six states had enacted similar statutes. The statutes vary in length of time in which they allow an action to accrue and in the language describing the activities subject to them. They are all substantially the same in that, at some specified time subsequent to the completion of the project, they cut off a cause of action against persons who make improvements to real property. Needless to say, these statutes quickly became unpopular with plaintiff's bars. In the twenty-odd years since their enactment, different aspects of the statute have been tested in many jurisdictions under a variety of legal theories.


27. Id.

28. See id. at 89.


The constitutionality of the statute of repose has been attacked because it bars a plaintiff's cause of action before it occurs, while protecting a special favored class. Id. Commentators have argued that barring an unrealized cause of action violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and of various state constitutions. See Rogers, The Constitutionality of Alabama's Statute of Limitations for Construction Litigation: The Legislature Tries Again, 11 Cum. L. Rev. 1 (1980).

The first state to find its statute of repose unconstitutional was Illinois. In Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967), the Illinois Supreme Court struck down the statute because it protected the special classes of architects and contractors. The Washington statute has survived its constitutional attack. In Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972), the Washington Supreme Court distinguished the Skinner decision on the basis that the Washington statute, which protects "any person" making an improvement to real property, differs from the Illinois statute, which protects only particular vocations. 81 Wash. 2d at 532, 108 P.2d at 111. The statutes have been scrutinized in most jurisdictions, with the majority of jurisdiction upholding them. Rogers, supra at 17. Cases upholding the statutes are discussed thoroughly in many critical law review articles. See supra note 14.
that a particular action is not barred by the statute because the
time limit has not elapsed, and arguments that a particular
action is not barred by the statute of limitations because the
harm was not caused by an improvement to real property.

Statutes of repose encourage the socially desirable goal of
improving real property by protecting from liability those per-
sons who make such improvements. Courts have recognized
that these statutes have a dual rationale for eliminating stale
claims. These protections apply to injuries that occur long
after their involvement in the improvement has ended
when allegations would be difficult to defend, and (2) when
the damage is likely due to the actions of others. Despite this
straightforward message from the legislature, courts sympa-
thetic to plaintiffs continue to poke holes in these statutes.
The Pfeifer court is no exception.

II. DEVELOPMENT OF § 353

Liability in Pfeifer is based on failure to disclose a latent
dangerous condition under § 353 of the Restatement (Second)

31. In the second general area of attack on the statutes, plaintiffs attempt to
deflect the bar of the statute by distinguishing the work done from “substantial
completion.” See, e.g., Glacier Springs Property Owners v. Glacier Springs Enterprises,
system, although installed and in operation, found not substantially complete until
installation of water storage tank by second contractor ten months later). Differing
formulas for determining the commencement of the bar have developed in various
jurisdictions. See A. LEVY, SOLVING STATUTE OF LIMITATIONS PROBLEMS (1987). In
Washington, the cause of action must accrue within six years of the substantial
completion of the improvement. WASH. REV. CODE § 4.16.310, see supra note 2. At the
time of discovery, the pertinent statute of limitation for the particular cause of action
begins to run. WASH. REV. CODE § 4.16.320. Thus, an action for negligence that accures
close to six years after the substantial completion of the improvement may be brought
up to three years later. Id. This means that the builder is liable for harm up to nine
years after substantial completion of the improvement. See Hudesman v. Meriwether

32. Most cases in which defendants raise the statute as a bar attempt to exclude
the cause of the harm from the definition of the statute on the basis of an ambiguity.
As an example, the Washington statute specifically excludes “manufacturers.” As a
result, these potential ambiguities become arguable issues. See e.g., Condit v. Lewis
equipment for use within building not intended to be protected by statute of repose);
Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528,
503 P.2d 108 (1972) (refrigerating plant installed in building is realty, not personality);
Morse v. Toppenish, 46 Wash. App. 60, 729 P.2d 638 (1986) (swimming pool is
improvement, diving board is not); Pinnce v. Stevens Pass, Inc., 14 Wash. App. 848, 845
P.2d 1207 (1976) (a ski lift improves value of property, is permanent in nature, and is
classified as improvement to real property).
of Torts. Section 353 was developed as an exception to the rule of caveat emptor, which had immunized vendors from liability for physical harm caused by dangerous conditions existing at the time of transfer of possession. Because § 353 was developed simply to impose a duty to warn, its standard for concealment is much broader than the standard for fraud and it intentionally overlaps the boundaries of negligence.

The duty imposed in a negligence action usually depends upon what the actor "knew or should have known" under the facts of the case. The § 353 standard for concealment, however, is what the vendor actually "knew or had reason to know." Significantly, the terms "should have known" and "had reason to know" are not synonymous. Section 12 of the Restatement points out that the former imposes a duty upon the actor to ascertain the fact in question, while the latter implies that a reasonable person could infer the existence of the fact in question from facts already known. Thus, because he should have known of the risk, a builder might be negligent for using floor joists that are too flimsy to support a normal load. However, he can be culpable as a seller for failure to disclose this defect only if he actually knows, or has reason to know, that the floor joists are dangerous. In this sense, the proof required to demonstrate knowledge may be greater for knowing concealment than for negligence, as the Pfeifer court claims. However, in application, the difference may be moot.

Reasonable minds might disagree whether the hapless

33. RESTATEMENT (SECOND) OF TORTS (1965):
   § 353. Undisclosed Dangerous Conditions Known to Vendor
   (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
      (a) the vendee does not know or have reason to know of the condition or the risk involved, and
      (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
   (2) If the vendor actively conceals the condition, the liability stated in subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

34. RESTATEMENT (SECOND) OF TORTS § 352, comment a (1965).
35. Id. § 353 (1965), see supra note 33.
36. Id. § 12, comment a (1965).
floor-builder knew or merely should have known of the risk, a
distinction that would be irrelevant in a determination of his
negligence. The determination of whether the floor-builder
should have realized the danger turns on whether a reasonable
person would infer the danger. The outcome of this determi-
nation will likely depend upon the standard of knowledge
imputed to the actor, naturally higher for a professional floor-
builder than, for instance, for the writer of this Note.

What a floor-builder can (or should be able to) infer about
his work depends upon his level of knowledge. Although the
distinction between what a floor-builder can infer and what he
should be able to infer is irrelevant for a finding of negligence,
if the point is argued, the trier of fact might find that a negli-
gent floor-builder had knowledge of his negligence. The point
is easy to allege, and when the builder is also the vendor, the
point becomes worth arguing if the floor collapses more than
six years after completion of the structure. Potentially, when
the vendor and the builder are the same person, the vendor
could have reason to know what the builder should have
known.

Section 353 was developed originally to create a cause of
action for vendees, who were prevented from suing by the doc-
trine of caveat emptor, and for remote parties, who were pre-
vented from suing by privity requirements. A § 353 cause of
action differs from a negligence cause of action because it
requires actual knowledge of an operative fact. However, it is
similar to a negligence claim because ultimate knowledge
based upon the operative fact need only be inferred. Further,
the vendor may be held liable even if he does not actually real-
ize the risk. Although § 353 embraces intentional misrepre-
sentation, its standard for scienter is broader, including implied
misrepresentation and possibly negligent failure to disclose.
The Tentative Draft to the 1965 Restatement lists cases that
use "reason to know" and "should have known" interchangea-
bly. The comments refer to the exercise of "reasonable care

37. See supra note 33.
38. Restatement (Second) of Torts § 353, comment c (1965).
39. The Restatement provides that such liability may be imposed if the vendor:
"realizes or should realize the risk involved." Id. at § 353(1)(b).
40. See id. § 354, comment b (1965).
41. A lessor must exercise "reasonable care" to disclose defects. See id. § 358,
comment c (1965).
42. Restatement (Second) of Torts, § 358, p. 129, comment b (Tent. Draft No. 5,
April 8, 1960).
to disclose."\textsuperscript{43}

Finally, while § 353 imposes a duty to disclose, the Institute left within the courts the discretion to resolve the issue of how long this duty should continue on a case-by-case basis.\textsuperscript{44} The Institute recognized that the duty should not continue after the vendee has had sufficient time to discover the danger himself. Thus, the Institute faced the same question that the legislature resolved when it created the statute of repose. The Institute, however, decided not to decide this question but determined that the duty should continue for a reasonable but indefinite period of time.

A reasonable but indefinite length of time is a determination made traditionally by the trier of fact. The uncertainty of the determination depends, not only upon the facts of the case, but upon the relative skills of the adversaries and the sympathies of the jury. The legislature intentionally foreclosed this risk to builders at six years by enacting the statute of repose. In \textit{Pfeifer}, the court has reestablished this risk for builder/vendors by allowing the trier of fact to determine the period in which the builder/vendor should remain subject to liability.

\section*{III. The \textit{Pfeifer} Solution: A Novel Choice of Rules Attack}

On June 2, 1986, a fire broke out in one of the units of the Willowwood Condominiums in Bellingham, Washington.\textsuperscript{45} Because the fire blocked the only exit from the building, Holly Pfeifer had to jump from her window to escape. As a lessee, Ms. Pfeifer could not sue the builder/vendor of the condomin-
ium for breach of contract. Thus, for her physical and emotional damages, she sued, among others, the builders of the condominium, in tort. Based on a theory of negligent construction, Mrs. Pfeifer originally argued that the builder's failure to provide adequate fire exits, fire-stops, and two hour fire walls proximately caused her injuries.46

Although the building had been completed in 1979, Ms. Pfeifer's negligence complaint would have been timely under the three-year statute of limitations for negligence47 because Washington's discovery rule provides that a cause of action accrues when the harm is discovered.48 However, because the building had been completed and sold in 1979, her suit was barred by Washington's statute of repose, which forecloses any action that arises more than six years after substantial completion of an improvement to real property against the person who made the improvement.49

Because the statute barred her claim for negligence, Ms. Pfeifer amended her complaint against Island Construction by stating a cause of action under § 353 of the Restatement (Second) of Torts alleging "negligent and intentional concealment of a dangerous condition"50 by a seller of real property.51 Ms. Pfeifer contended that Island Construction knowingly altered plans that the architect had presented for pre-approval to the Bellingham Building Department. The altered plans recharacterized the building as a two-story building with a daylight basement rather than a three-story building by making changes in the surrounding grade.52 This regrading of the land around the building reduced the distance from the top story to the ground. A two-story building requires only one fire exit and fewer structural fire protection designs, thus greatly reducing construction costs.53 Ms. Pfeifer contended that the dangerous conditions were known to Island Construction.54 Island Construction responded by claiming that the

46. Id.
49. See supra note 2.
50. Pfeifer, 112 Wash. 2d at 564, 772 P.2d at 1020.
51. Id.
52. Id.
53. Id.
building was in fact a two-story structure with a basement.\textsuperscript{55}
other vendors would remain liable under § 353. By contrast, the Pfeifer dissent found that the statute plainly protected all builders, including those who also sold the improvements. The majority stated that its holding still precluded suits against builders for negligence because the proof required under § 353 is greater than that for mere negligence. The dissent claimed that the majority's opinion effectively repealed the statute.

The unfairness that the majority feared would accrue to a special class of vendors if allowed to invoke the statute on the basis of involvement in the construction of the improvement can only occur when the vendor is substantially involved in the construction. The majority justified its holding on the basis that builders remain sufficiently protected because the proof required under § 353 is greater than that required for negligence. Such a justification, however, is irrelevant to the analysis that the court should have undertaken. The statute of repose bars all causes of action, regardless of the level of proof. Further, a § 353 cause of action can be framed solely on a negligence standard in some cases because the duty to disclose is grounded on reasonableness, not scienter.

On the other hand, the dissent may have gone too far in the other direction by incorrectly predicting the demise of the statute. Whether the holding will affect others involved in the construction of the improvement, such as architects, engineers, and subcontractors, is at this point unclear. However, the decision suggests that the court will entertain other theories of misrepresentation. A strict reading of the holding would limit liability to builders who transfer interests in the property. However, an expansive interpretation might allow the entertainment of other theories of misrepresentation as well.

The Pfeifer application of § 353 is a departure from traditional judicial construction of the statute of repose. The court based its rationale for limiting the reach of the statute in order to apply § 353 on a minor point derived from the New Mexico case Howell v. Burk. By isolating sale of the

61. Id.
62. Id. at 571-75, 772 P.2d at 1023-25 (Durham, J., dissenting).
63. Id. at 570, 772 P.2d at 1023.
64. Id. at 571-72, 772 P.2d at 1023 (Durham, J., dissenting).
65. See cases cited supra note 42.
improvement and removing it from the cloak of the statute, the Pfeifer holding creates a new area of attack upon a substantial pool of builders involved in the financing of improvements. This attack is then realized with the broadsword of § 353.

A. The Point of the Sword: The "activity analysis" of Howell v. Burk

In order to help get a handle on the overlapping areas of concern in its own statute of repose,67 the Court of Appeals of New Mexico developed the "activity analysis," which predicates liability on the basis of the activity in which the actor engages.68 In Howell v. Burk, which was cited by and applied by the Pfeifer court, the plaintiff collided with a glass door on an airport observation deck. The collision occurred outside of the window period of the New Mexico statute of repose. The plaintiff sued the owner, the contractor, the architect, and the firm that designed, manufactured, sold, and installed the glass. The Howell court easily found that the statute protected the architect and the contractor but not the owner of the improvement. The court created the "activity analysis" to disentangle the potential liabilities of the firm for its multiple roles as the designer, manufacturer, vendor and installer of the glass.69

The firm argued that it should be completely protected because it was part of the "construction team."70 In response, the court quoted language from the New Mexico statute stating specifically that liability would not adhere to persons involved in making improvements upon real property "on account of such activity."71 The court found that the statutory language thus required an "activity analysis".72 The court held that the statute protected the firm to the extent that it designed and installed the glass.73 However, because the activities of manufacturing and selling were not listed in the New


69. Id. at 697, 568 P.2d at 223.

70. Id.

71. Id (emphasis in original).

72. Id. This language is absent from the Washington statute, suggesting that it should have a broader protective reach. See supra note 2.

73. Howell, 90 N.M. at 697, 568 P.2d at 223.
Mexico statute, the firm would not be protected to the extent that it was sued in those capacities.74

As far as the Howell "activity analysis" distinguished the activity of manufacturing from that of designing and installing the glass, it comported with decisions in jurisdictions having statutes that distinguish the work of designers and construction laborers from that of materialmen and manufacturers.75 However, to the extent that the analysis found separate liability for selling the glass, it created a weak spot in statutory construction. This weak spot has been magnified by the Pfeifer decision.

The Pfeifer court examined the Washington statute and found that the activity of selling was absent from the list of activities mentioned.76 Consequently, the court determined that it was possible that the legislature did not intend selling to be protected.77 The court chose to construe the statute strictly, based on the rule of statutory construction that statutes should not be construed to supplant the common law "[a]bsent an indication that the legislature intends [it to]."78 The court found § 353 to be part of the common law of Washington, although to do so, it admitted it was using the term common law "in its broader sense."79 Having determined that § 353 is Washington common law, the court scrutinized the statute of repose and asserted that it contained no legislative intent to supplant § 353.80

Section 353 is a Restatement theory that addresses liability arising from the transfer of possessory interests in land. It is not specific to construction and it mirrors a companion theory for the liability of landlords to lessees.81 Section 353 imposes a duty of care on vendors—a duty nonexistent at common law. In addition, § 353's historical genesis is a response to real property rights, not the law of sales.

While the Pfeifer court determined that the act of selling was not protected by the statute of repose because of the

74. Id.
75. See Note, supra note 30, at 264-65 nn.23-28.
76. Pfeifer, 112 Wash. 2d at 569, 771 P.2d at 1022.
77. Id. at 570, 772 P.2d at 1022.
78. Id. at 566, 772 P.2d at 1020 (citing 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 50.01, at 422 (4th ed. 1984)).
79. Id.
80. Id.
81. RESTATEMENT (SECOND) OF TORTS § 358 (1965).
absence of the activity of selling, listed in the numerous activities in the statute, one could as easily argue that its absence from the list was an oversight. It is more consistent with the policy of the statute of repose that the legislature would have stated so explicitly had it intended to exclude § 353 actions against builders from the protection of the statute.

The statute of repose is likely silent about the activity of selling because the legislature did not believe that selling the improvement is an activity that is severable and distinct from the activity of its construction. The different types of financial return that those in the construction industry receive for their work are not discussed in Washington's statute nor in any of the statutes of repose nationwide.

The sale of a product or a service is the culminating act of any commercial endeavor. However, the aspect of sale involved in such endeavors is largely ignored in delineations of the rights and obligations involved in the endeavors themselves. In defense of the *Howell* court, the activity of sale is traditionally linked to the activity of manufacture. The statutory language that encouraged the line of analysis applied in *Howell* to distinguish between construction and manufacturing activities would induce the legal mind to categorize each act alleged. Because the plaintiff in *Howell* alleged liability for manufacture and sale of the glass, the court ascribed liability to each act. The *Howell* court did not, however, identify any particular aspect of the sale that might result in liability.

The *Pfeifer* court's application of *Howell*’s "activity analysis" distorted this categorizing perspective by distinguishing the activity of selling from the totality of the construction process. This distortion is contrary to the purpose of a statute that grants builders a cloak of protection for their work. Because the statute bars "any cause of action," it bars a builder's intentional acts as well as his negligent acts. The builder remains liable for all of his actions for six years. The legislature thus decreed that six years is an adequate time for the new owner of the property to discover any defects. The intent of the legislature is to start the clock running when the improvement is substantially completed.82 Whether the new owner hires a

82. *JOURNAL OF THE SENATE*, Report of Standing Committee, at 994-95 (1967). In point of inquiry, Senator Uhlman explained the striking of the word "earlier" and its replacement with "later" to reflect the intent that the statute begin to roll for those involved with the construction of the improvement only after its substantial completion.
contractor to make an improvement, or whether he buys the improvement from a contractor, the legal result should be the same.

The Pfeifer decision finds a lack of statutory intent to supplant § 353. In so doing, the court failed to consider that the legislature had no reason to contemplate the Restatement theory when it framed the statute. Thus, Justice Durham, in her dissent, correctly stated that the holding is contrary to "plain sense."\(^{83}\) The practical result of the court's holding is to transfer the latent liability of the construction activity to the act of selling. It makes no sense for the court to acquiesce to the legislature's determination that six years is a reasonable length of time to discover construction defects, including those intentionally created, and then to determine that the act of selling the property can alter this length of time.

B. The § 353 Broadsword

The Pfeifer court justified its analysis by suggesting that it would be unfair to protect a vendor of real property from an action for concealment merely because he had built the improvement.\(^{84}\) Although at first glance this reasoning seems appealing, it raises an equally valid counter-argument that the fairness of the statute should not depend on the builder's involvement in the financing of the improvement.

1. Fairness Can Cut Either Way

The holding in Pfeifer that § 353 actions will not be barred by Wash. Rev. Code §§ 4.16.300-.320 leaves the builder/vendor exposed to liability for negligent construction based solely on his posture in the financing of the improvement. The holding is based on considerations of fairness, but this fairness is directed to the pool of potential plaintiffs who raise § 353 complaints. The holding creates and leaves unresolved unfairness more likely to occur to other potential plaintiffs under the statute of repose. Although the thrust of the Pfeifer holding reflects the court's failure to recognize the unfairness to potential defendants, the court also missed an obvious class of plaintiffs. This anomaly can be illustrated in the following hypothetical situation:

\(^{83}\) Pfeifer, 112 Wash. 2d at 571, 772 P.2d at 1023 (Durham, J., dissenting).
\(^{84}\) Id. at 568, 722 P.2d at 1022.
Bob Builder acquires Blackacre, an undeveloped tract section. He sells lots to Carl, Dave, and Ethel, retaining unsold lots for himself. Carl, Dave, and Ethel arrange financing and hire Bob to build houses for them on their lots. Bob builds "spec houses" on the lots remaining unsold. All the houses are substantially identical. Bob then sells the spec houses to Fred, Gary, and Helen. Seven years pass, and damage occurs allegedly because of poor construction that Bob failed to mention. Carl, Dave, and Ethel cannot sue Bob as a builder under § 353 and are barred from doing so under a negligence theory by the statute of repose. However, Fred, Gary, and Helen can sue him as a vendor, even though he is equally culpable or innocent in relation to all of the parties.

By taking the hypothetical further, more problems arise. As it happens, Carl bought his land on a contract from Bob. When Carl fell behind in payment, Bob repossessed. Bob subsequently sold the house to Ignacio. Seven years later, Ignacio can sue Bob. Can Jack, who bought Gary's contract from Bob and dispossessed Gary, sue Bob?

Although the law of sales can be applied to solve the riddle of who owes whom and for what, the hypotheticals illustrate how quickly the focus of argument can drift away from the simple rubric of the statute of repose when the liability of the builder is determined by his status as a vendor of the improvement.

This illustration merely raises an argument counter to the Pfeifer court's interpretation of fairness, but the arguments are not in equipoise. While the court's analysis creates a wider pool of potential defendants, the pool of plaintiffs profiting therefrom is based upon the serendipitous timing of the improvement's transfer. On the other hand, if the statute of repose controls, no sub-group of plaintiffs gains an advantage to sue in causes of action based on the construction of the improvement.

2. The Strings of Negligence Trailing From § 353.

The court justified its holding by stating that the proof required under a § 353 action is greater than that required for a negligence action. In many factual scenarios, however, including that involved in Pfeifer, this is not the case. The first element of the Restatement theory depends upon facts
known to the vendor but not to the vendee. The vendor need not have actual knowledge of the dangerous condition, but only a "reason to know" of the condition from other facts known to him.

Reason to know, as explained in § 12 of the Restatement, means that "the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question [i.e. the danger] exists. . . ." The only distinction between this standard and the reasonable person standard in a negligence analysis is the need to determine if the actor as a reasonable person actually took the inductive step from "should have known" to "would have known." While imposition of liability for negligence requires imputation of a reasonable standard of behavior, imposition of liability for this element of § 353 requires only imputation of a reasonable standard of awareness. Liability under § 353 does not require greater proof, it simply requires an extra inferential step.

The second element of § 353 is purely a negligence standard—a determination whether the vendor realized or should have realized the risk. This element seems to be the major point at issue in the Pfeifer case. If Island Construction did not realize the risk, but should have, it will be liable under § 353. The proof required to find liability in Pfeifer, therefore, is the proof required for negligence.

Finally, § 353 imposes liability only until the vendee has had a reasonable time to discover the condition. A reasonable time standard is a negligence standard requiring no greater proof than any other. The policy that allows these negligence standards to trail for an extended length of time from the transfer of the land conflicts with the policy that cuts off liability for building upon the land after six years have passed. That liability depends upon an imputation of knowledge to the actor does not resolve the conflict.

In contrast to § 353, the statute of repose does not contemplate the builder's state of mind at all. It makes no difference whether intent or carelessness is involved. The statute oper-

85. RESTATEMENT (SECOND) OF TORTS § 353(1)(b) (1965).
86. Id. § 12.
87. Id. § 353 (1)(b).
88. Id. § 353 (2).
ates to bar "all claims or causes of action of any kind . . . ."\textsuperscript{89}

The battle facing a possibly negligent builder/vendor in a § 353 action is thrown into stark relief when one considers that an electrical subcontractor who knowingly installs substandard wiring with a seven-year failure time is immune from suit under the statute of repose. The liberal protection of the statute of repose for defendants stands in complete opposition to the liberal posture for plaintiffs of § 353.

IV. LEGAL UNCERTAINTIES IN THE WAKE OF \textit{Pfeifer}

A. Standard of Proof

The \textit{Pfeifer} court claimed that its holding harmonized with the policy behind the statute of repose of protecting builders from damage caused by the actions of others.\textsuperscript{90} However, the court ignored the statute’s sister policy of protecting builders against stale claims because allegations are difficult to defend. By failing to address the affect of its holding on this latter policy, the court did not have to address the dilemma of a builder/vendor when defending a § 353 suit brought years after he has completed his work. In 1984, a New York court refused to allow a plaintiff to amend his complaint to allege scienter in order to escape the bar of a statute of limitations for breach of contract when a negligently built brick wall-facing started to pull away from a building.\textsuperscript{91} The \textit{Pfeifer} decision holds contra.

A central issue in \textit{Pfeifer} is whether the building was two or three stories.\textsuperscript{92} The building code does not require a two-story building to have an additional fire exit or additional fire-stops or firewalls.\textsuperscript{93} If plaintiff prevails in her argument that the building was three stories, she must further prove that the defendants should have realized that the building was dangerous, that she had no reason to know it was dangerous, that the builder knew or had reason to know that she would not discover the danger, and that she did not have a reasonable opportunity to discover the danger in order to prevail in her § 353 claim.

Without denying any fact alleged, the builder can still con-

\textsuperscript{89} See supra note 2.
\textsuperscript{92} Pfeifer, 112 Wash. 2d at 564, 772 P.2d at 1019.
\textsuperscript{93} Id.
tend that he built the structure in good faith and did not actively misrepresent its condition. Clearly, reasonable minds can disagree whether failure to inform the vendee that the building had only one fire exit and fewer structural safety features than a three-story building comprised culpable concealment of dangerous condition.

In other cases of failure to disclose arising out of negligent construction, the outcome of a trial on the merits can be as uncertain. Because § 353 imposes liability on an actor who does not actually know of the danger but, because of his position and level of skill, has reason to know, it retains a negligence standard of behavior. For instance, does a do-it-yourself homeowner have a duty to tell his buyer that the wiring in his house was not done by a professional?94

The distinction that the Pfeifer court sees between hazardous construction and a failure to disclose a dangerous condition becomes less clear as time passes. Because negligence is predicated on what the actor knew or should have known, it becomes difficult to unravel whether the actor had or did not have reason to know of the likelihood of danger at the point of sale. Courts, therefore, must be particularly careful in their analysis to distinguish between the culpability of the builder for what he should have known and for what he failed to disclose because he had reason to know. This analysis may not be difficult if the facts establish a knowing disregard for the incorporation of safety features into the improvement. But in cases where the gravamen of the action is negligence, as in the principal case, proof of negligence easily translates into a duty to disclose.

Although Island Construction altered the architect’s pre-approved plans, the altered plans were subsequently submitted to the Bellingham Building Department and approved, and the city inspected the work and accepted it.95 Co-defendant City of

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94. See, e.g., Smith v. Showalter, 47 Wash. App. 245, 734 P.2d 928 (1987). In this case, plaintiff’s house was damaged by faulty wiring installed by the previous homeowner/vendor. The court avoided the bar of WASH. REV. CODE §§ 4.16.300-320 by interpreting “substantial completion” strictly. If the claim had been barred by the statute of repose, under Pfeifer, the plaintiff would have been allowed to recast the negligence claim as a § 353 claim for failure to disclose.

The Pfeifer court did not address the issue of vendor liability when it cited Smith: it dismissed the issue by stating only that the plaintiffs did not allege a claim against the defendants as sellers. Pfeifer, 112 Wash. 2d at 569, 772 P.2d at 1022.

Bellingham asserted that Island Construction purposely altered building plans after they had been pre-approved so that the new plans would receive only cursory inspection. It is equally possible, however, that Island Construction merely altered the plans in response to circumstances at the job site.

Construction began in 1978 and the Willowwood Condominiums were completed by 1979. The case is currently in litigation twelve years later. The facts of the case suggest that the lack of an alternate fire exit was a patent defect that a vendor would have no duty to disclose. The lack of fire stops and two-hour fire walls would be latent defects because the plaintiff can assert that she had no knowledge that two-story buildings did not require them. By holding that the plaintiff had stated a cause of action under § 353, the court implies that a vendor has a duty to disclose the danger of a single fire exit or the lack of latent fire protection features. If the court bases liability on the existence of only a single fire exit, then the trier of fact must find that Island Construction not only realized the risk, but realized that the plaintiff would not discover it herself. The Pfeifer decision provides no guidance whether proof of knowing concealment requires direct or merely inferential evidence. Regardless of the majority's assertion that the proof required under § 353 is higher than that for negligence, the level of proof it now requires to allege the duty to disclose a dangerous condition is in fact negligence.

B. Parties Affected

The Pfeifer decision does not specify which defendants are now potentially subject to liability under a fraudulent concealment theory. If the court refuses to entertain other creative theories, only builder/vendors will be affected directly. General contractors seeking indemnity from negligent subcontractors would be barred by the statute. Other parties to the improvement without transferable property rights would be protected as well. However, in Howell v. Burk, the New Mexico court permitted liability predicated on the sale of glass, not

96. Brief for Respondent City of Bellingham at 13-14, Id.
97. Brief for Appellant Pfeifer at 3, Id.
98. 112 Wash. 2d at 564, 772 P.2d at 1019.
on the transfer of land. Thus, because the *Pfeifer* Court adopted *Howell*, it did not limit its "activity analysis" to § 353.

Section 353 deals with concealment during transfers of real property. There may be other theories, however, that can be applied in situations that do not involve vendors. As an example, section 557A of the Restatement (Second) of Torts, which deals with liability for fraudulent misrepresentations causing physical harm states as follows:

One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land of chattel or another who justifiably relies upon the misrepresentation, is subject to liability to the other.100

Under this theory, it is possible that subcontractors could be liable for failure to reveal their negligence to their general contractors. Too, receipt of payment under false pretenses is not an activity listed in the statute of repose. This would allow indemnity actions by contractors who are sued in the wake of *Pfeifer*. It would also allow actions against contractors who fail to reveal negligent repair, renovation, and remodeling work done for owners who already control the property. The complaint is easy to allege. It is proper for a property owner to rely on the representations of a contractor, because the contractor knows how to do his job. If he is in fact negligent in his work, his defense must be that he is too poor a workman to realize it, because if he is not, then he is liable for failure to disclose his mistakes. *Pfeifer* invites this type of creative pleading.

V. SUGGESTIONS FOR THE COURT AND THE LEGISLATURE

*Pfeifer v. Bellingham* should be reconsidered. Because a § 353 cause of action is so easily alleged, the court must set out criteria for determining when the condition created by the builder/vendor has breached the threshold of unwitting negligence to the level of knowing failure to disclose. The § 353 standard for scienter blends too smoothly into negligence to be easily distinguished from the areas that are intended to be protected by the statute of repose.

The threshold necessary to survive a motion to dismiss should be higher—a finding that reasonable minds must agree

that the proof offered demonstrates that the actor was aware of the danger. This standard requires more than mere proof that he simply did the work. Such a showing should demonstrate some positive action to conceal the condition rather than the ambiguous § 353 standard of failure to disclose. The Pfeifer court's own assertion that § 353 requires greater proof than does negligence echoes the argument that the burden of persuasion should be high. However, it is likely that the development of this burden in subsequent cases may result in further confusion simply because of the ambiguity of the facts of Pfeifer.

In an attempt to provide a remedy for damage caused by fraudulent construction, the Washington State Trial Lawyers Association, in an amicus brief, urged the court to carve out an exception for fraud. The court unanimously declined to do so, the dissent stating that such an exception would be a job for the legislature, not the court. Such an exception would undermine the policies of the statute of repose. Any exception contemplated certainly should not depend on the builder's posture as the vendor of the improvement.

A clearer solution is possible. A § 353 vendor is under no duty to inspect for dangerous conditions. Further, § 353 liability runs only until the vendee has had reasonable time to discover the defect himself. The drafters of the Restatement considered the question of a reasonable length of time for this discovery found it to be an unsettled issue. Courts considering this time period, however, have, on an ad hoc basis, arrived at a variety of different interpretations of the phrase "a reasonable length of time." This time limit should not extend past a statutory cut-off based on the premise that most if not all defects can be discovered in that period of time. An open-ended time limit for § 353 actions is in direct conflict with a statute having the purpose of barring all causes of action, negligence and fraud alike, that arise out of the creation of the dangerous condition.

The Pfeifer court left itself and the legislature a loophole to escape the potential morass of future suits. In its dismissal

101. Pfeifer, 112 Wash. 2d at 570-71, 772 P.2d at 1023.
102. Id. at 574, 772 P.2d at 1025 (Durham, J. dissenting).
103. RESTATEMENT (SECOND) OF TORTS § 353, comment b (1965).
104. See supra note 33, § 353(2).
105. TENT. DRAFT NO. 5, supra note 44.
106. See supra note 33, § 353 at 121.
of the parties' constitutional arguments, the court suggested that the legislature might have a rational basis to distinguish between "sellers who improve property and those who do not." However, without any findings in the record, the court chose to assume that "it is equally rational to impose the duties of a seller on those builders who also sell their property."

The court's adoption of the former statement leaves a clear path for a legislative reworking of the statute to make its intent more clear. The statute has received minor amendments in the past. Moreover, it would be easy to add after the phrase "... six years after the substantial completion of construction," the phrase "or its transfer by the builder, by sale or otherwise." Such an addition would indicate that the sale of the improvement is not meant to be distinguished from the activities more clearly protected by the statute, such as those related to making improvements to real property.

A better solution would be to place a six year limitation of repose on claims brought under a § 353 theory. Although this solution might not completely satisfy the policy of encouraging new construction, the policy still remains. Moreover, the solution also furthers the rationale for protecting against stale claims. Should this suggestion be considered too broad, the court could simply hold that the legislature's determination that six years is a reasonable length of time to discover construction defects applies equally to defects alleged under § 353 theories.

VI. CONCLUSION

The holding in Pfeifer not only destroys the cloak of the statute of repose for builders who subsequently sell an improvement, but may open the door to claims against others who make improvements to real property as well. The supreme court must make clear guidelines for acceptable levels of proof required to carry forward a claim against a builder/vendor. Even better, the court should heed statutory intent and apply the six-year time limit in the statute of repose to transfers of interest in land. Alternately, the legislature

107. Pfeifer, 112 Wash. 2d at 570, 772 P.2d at 1023.
108. Id.
should reword the statute to point out clearly whether the court's interpretation in *Pfeifer* is incorrect. The legislature could add an exception for intentional construction of dangerous improvements, but it makes no sense for this exception to depend solely on the financial posture of the builder in relation to the improvement.

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