No. 301851

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

DOROTHY A. MILLICAN, as Personal Representative of the Estate of DAREN M. LAFAYETTE, and on her own behalf as statutory beneficiary,

Appellants,

v.

N.A. DEGERSTROM, INC., a Washington corporation,

Respondent,

and

MICO, Incorporated, a Minnesota corporation, JAMES R. BONNER d/b/a INDUSTRIAL POWER BRAKE COMPANY,

Defendants.

RESPONDENT'S BRIEF

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I. INTRODUCTION

On September 2006, Daren Lafayette, the 19-year-old son of Plaintiff Dorothy A. Millican, an employee of Sharp-Line Inc., was helping a more senior worker and his supervisor, William "Coit" Wright, set sign posts on the Flowery Trail Road Project near Chewelah, Washington. With less than half an hour before the end of the workday to install the last sign post, Mr. Wright parked the Sharp-Line auger truck on a slight incline on the road and failed to turn the wheels uphill. Wright had brought up the "outriggers." He did not set the parking brake, as they went to work on setting the sign. The truck began to roll down the hill.

For reasons no one will ever know,[1] Mr. Lafayette raced after the truck and jumped in. He steered it down the mountain for a time, but he could not bring it to a stop. It plunged over the side of the mountain where the young man died in a fiery crash.

Dorothy Millican brought suit individually and as Personal Representative of the Estate of Daren M. Lafayette ("Plaintiff" or "Ms. Millican"). She had multiple theories of causation, alleging that the death was due to the fault of an auxiliary brake manufacturer for a defective product, the installer of that brake for negligence, as well as the general contractor on the project, the Respondent here,

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[1] Trial court excluded suggestion of Lafayette being a "hero" or "rescuing" the public. (MIL "B": "Lay witnesses may testify as to their personal observations of the actions of Daren Lafayette but may not speculate as to the state of mind of Daren Lafayette or the motives for his actions in this case." CP 1292-93.)

N.A. Degerstrom, Inc. ("NAD" throughout) for the retained control over the project site.

The parties undertook extensive discovery to learn the facts about the product defect claims, the truck maintenance, and the relationships of the construction project parties as background for that fateful day. Dispositive motions to eliminate liability issues were brought and denied. On the eve of trial, the court ruled on plaintiff's evidentiary motions (1) to bar evidence concerning Sharp-Line or its employees conduct in connection with Lafayette's death and (2) to bar evidence or argument that NAD did not exercise supervisory control or authority over Sharp-Line during its particular work on the project. The subcontract between Sharp-Line and NAD was not the focus of these motions. The exclusion of all evidence as to the conduct of Sharp-Line and Wright was Ms. Millican's aim.

The trial court judge's pre-trial denial of these motions in limine laid out for the parties the court's commitment to allow the jury to hear all the relevant evidence about how the accident occurred. In denying the limiting motions, the judge observed how the instruction phase of the case would determine the law for the jury to apply to the facts it had heard. The trial judge proceeded to do just that as the trial unfolded. Ms. Millican sought no curative relief before the jury deliberated.

The relevant evidence came in during the course of the several weeks of trial. The jury heard from two witnesses that immediately following the accident Mr. Lafayette's supervisor William "Coit" Wright admitted that the accident was entirely his fault for not setting the emergency parking brake. They heard that Sharp-Line, the subcontractor and employer of Mr. Lafayette and Mr. Wright, owned, maintained, and controlled the modified auger truck involved in the accident and was responsible for supplying its own safety equipment for its specialized work on the road project, like setting signs, all of which was typical for such projects. The jury heard exhaustive testimony about chocking, chocks on the truck, and whether or not chocks were required at that particular point in time during the workday when the truck rolled away.

At trial, the evidence established that NAD had logged over 85,000 hours of accident-free work on the project before the tragic accident. NAD presented evidence that it did not violate any applicable safety regulations, including the regulations concerning chocking. NAD showed how it adopted and implemented an accident prevention plan, and even had complied with the regulation on parking safely on an incline. NAD did not abdicate its responsibility for safety. It did provide a safe working environment. NAD was unable to prevent the tragic accident; but that inability was not the result of negligence or dereliction of any duty it owed Daren Lafayette.

The jury concluded that the accident simply was not the fault of the defendants. They returned a defense verdict after answering "no" to the question whether any named defendant was negligent. As to NAD, the evidence the jury heard at the trial squared with their verdict. Ms. Millican had every opportunity to present her several theories of liability to the jury.

Now Ms. Millican complains that the court should not have allowed the jury to hear selected relevant evidence describing the interrelationship of the various construction companies involved on the Flowery Trail Road project which concerned the accident. In this appeal, Ms. Millican seeks to recast her position from the time of trial when she agreed the contract between NAD and Sharp-Line should be admitted into evidence. She now objects that the subcontract should not have come in as it did. At trial, however, she made no request for any limiting instruction or to redact the objectionable safety provisions.

In any event, the contract was properly admitted under the *Stute* case. The trial judge properly instructed the jury concerning the duties owed by NAD. The law in Washington unequivocally allows for the jury to find that the sole proximate cause of the accident was the employer and/or a fellow employee. The instructions given the jury included the approved pattern instruction for cases with complex or multiple causation theories presented.

Based on the evidence properly admitted at trial, the court did not abuse its discretion in entering judgment on the jury's verdict; or in denying Ms. Millican's post-trial request for a new trial.

On a separate pre-trial issue, the trial court properly granted NAD's motion for summary judgment regarding Ms. Millican's personal wrongful death claim because she does not qualify as a statutory beneficiary under RCW 4.20.020. That ruling became moot in light of the defense verdict. Although the court does not need to reach this issue when it affirms the trial court judgment, it can be affirmed on this appeal. The issue was decided correctly.

II. STATEMENT OF ISSUES

Was the court correct in allowing the NAD/Sharp-Line subcontract into evidence based on the explicit statement in *19-year-old* that general contractors may contractually require subcontractors to remain responsible for the safety of their operations? (assignment of error 1)

Did Ms. Millican waive the present argument she makes about admission of the subcontract into evidence when she listed the contract for admission pursuant to ER 904, failed to redact portions now claimed as objectionable, and never requested any limiting instruction regarding the proffered subcontract? (assignment of error 1)

Did the court properly instruct the jury on *Stute,* the general contractor's duties, and proximate cause? (assignments of error 2, 3, and 5)

Did the court correctly conclude that substantial evidence supported the verdict and properly deny the motion for new trial? (assignments of error 2 and 5)

Was the jury verdict supported by substantial evidence where a fellow employee of the deceased worker admitted he was solely at fault for the accident, and substantial evidence elicited over the course of several weeks of trial established in many respects, including with respect to the chocking issue, that NAD's conduct was that of a reasonably careful general contractor? (assignments of error 2 and 5)

Did Ms. Millican waive the right to move for judgment as a matter of law by failing to move for judgment as a matter of law at the close of the evidence? (assignment of error 2)

In any event, was the motion for judgment as a matter of law properly denied, where the evidence was highly disputed as to the fault of NAD, the applicability of the WAC regulation on chocking was hotly disputed, and a reasonable jury properly instructed concluded that NAD was not negligent? (assignments of error 2 and 5)

Did the court correctly refuse to give plaintiff's proposed instruction no. 18 when there was no evidence presented that

Daren Lafayette actions were to protect the general public? (assignment of error 3)

Did the court correctly dismiss the personal claims of Ms. Millican pre-trial on summary judgment where as a matter of well-settled law on the facts of Ms. Millican's case she does not qualify as a statutory beneficiary of her adult son under RCW 4.20.020.? (assignment of error 4)

III. STATEMENT OF THE CASE

A. FACTS

In addition to the specific facts concerning the accident, the jury necessarily heard evidence about the relationship of the several contracting parties on the Flowery Trail Road project.[2] The Flowery Trail Road Project was a three phase project that involved improvement and reconstruction of a 22-mile long two lane road. RP 1128. NAD contracted with the U.S. Department of Transportation Federal Highway Administration ("FHA") to serve as the general contractor for one five mile stretch (phase three) of the Flowery Trail Road Project near Chewelah, Washington. RP 1129. The work involved a substantial amount of excavation; approximately 400,000 cubic yards of material were removed by NAD. RP 1129.

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[2] Much of the trial was devoted to Ms. Millican's product defect claims and her claim that the brake was negligently installed. That evidence is reviewed here only very briefly in subsection 4, *post.*

1. The FHA/NAD Contract Delineated Safety Obligations

The federal contract specifically stated that when the FHA became aware of any condition that posed a danger, it was obliged to notify NAD requesting immediate corrective action. Exh. P1 at 0111. It provided too that the FHA had the authority to issue a stop work order upon NAD until satisfactory corrective action was taken. RP 1131. To enforce the contract, an extensive federal highway staff on the project included a project engineer (Linda Persoon); engineer's assistant (John Foster); and between two to four on-site inspectors (including Brian Hausman and Jerry Daniels).[3] RP 497, 500, 561, 810.

Fourteen (14) specialty subcontractors worked with NAD. RP 1131. NAD established a strong tone of safety from the top down. RP 1129-38. Weekly Tailgate Safety Meetings with NAD project superintendants Ken Olley and Dennis Arndt took place, as well as weekly status meetings with the FHA. RP 486, 541-42, 561-62, 1138. The NAD employee in charge of safety, Mike Coleman, visited the site unannounced for spot check safety inspections. RP 1143. Inspectors from NAD, the Federal Government, Stevens County, City of Chewelah, Labor & Industries, and even the telephone company were routinely present on the project site. RP 1130-31.

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[3] The Federal Government's file consisted of almost 20,000 pages of documents. *See* RP 1131.

2. NAD Had an Accident Prevention Plan for Phase Three

NAD developed a 12-page site specific Accident Prevention Plan prior to starting work on phase three of the project that was reviewed and approved by the FHA. Exh. P4; RP 1151-54. That plan provided safety guidelines for all work to be performed on the Flowery Trail Road Project. *Id.*

3. The NAD/Sharp-Line Subcontract Was Typical for a Project of This Type

NAD did not have the expertise to perform all the work on the road-building project. RP 1132. NAD entered into separate agreements with specialty subcontractors. *Id.* NAD and Sharp-Line had previously worked together on 15 road construction projects. *Id.* As they had done on the others, Sharp-Line agreed to furnish all labor, material, skill and instrumentalities to install permanent traffic control features (*i.e.,* "signage") and roadway striping during construction of the project. *Id.* Sharp-Line's work at the site did not begin until late August 2006, sixteen months after NAD was awarded the prime contract. RP 255, 289; Exh. P5. Like all subcontractors on the project, Sharp-Line was responsible for supplying their own safety equipment for its scope of work. RP 1142.

Although installation of roadway striping and signage requires specialized equipment and expertise that NAD did not possess, the hazards on this Project were similar to those

encountered on the many other roads which Sharp-Line has signed and striped over the years. RP 273, 371, 1132. Subcontractors like Sharp-Line are in the best position to provide their own safety equipment and training because they understand the hazards associated with the specialized nature of their work. RP 259-60, 689-91, 1137.

a. Safety Provisions in Sharp-Line's Subcontract Were Typical for the Industry

NAD required that Sharp-Line have safety protocols in place. RP 1134. NAD's subcontract also required that Sharp-Line "comply with all federal and state laws, codes, and regulations and all municipal ordinances and regulations effective where the work is to be performed." Exh. P5 at 0005. Regarding worksite safety, the subcontract provided:

> Subcontractor accepts responsibility to prevent accidents to any person who may be close enough to its operations to be exposed to Subcontractor's work-related hazards. Subcontractor shall be solely responsible for the protection and safety of its employees, for final selection of additional safety methods and means, and for daily inspection of its work area and safety equipment....
>
> * * *
>
> Subcontractor shall furnish the following safety equipment as applicable...:
>
> 1. Written Site-Specific Safety Plans as required by law relating to hazards specific to the job, such as traffic control or fall protection plans...

> 3. Accident Prevention Programs as required by law concerning the Subcontractor's general safety policies...

Exh. P5 at 0006. Mike Craig, President of Sharp-Line executed the contract and understood these contract provisions. RP 299-300. Sharp-Line was required to furnish their own safety equipment to perform their work under the contact. *Id.* Such provisions are typical for subcontractors like Sharp-Line performing specialized work. *Id.*; RP 303-04, 644, 1142.

Plaintiff's liability expert, Mark Lawless, testified that Sharp-Line's agreement to take sole responsibility for the protection and safety of its employees, for the final selection of additional safety methods and means, and for daily inspection of its work area and safety equipment, was common in the industry. RP 644. The project was a typical one for Sharp-Line, with nothing unique about the work they were contracted to do. RP 643. Other witnesses agreed that the clause was a typical safety provision in a construction subcontract. RP 690, 1141-42.

b. Sharp-Line's Safety Training

Sharp-Line had conducted a yearly 2-3 day safety seminar to enhance safe work practices for all of its employees about six months before the accident. RP 192. Sharp-Line's Safety Plan (Exh. D104) addressed training, provided for weekly safety meetings, and employee responsibilities including equipment

responsibilities. RP 349-56. Sharp-Line employees specifically agreed to:

> Operate only the Equipment for which I am authorized and Properly Trained. Observe Safe Operating Procedures for this Equipment.

Exh. D104 (Employee Responsibilities item 11); RP 194

Sharp-Line employee and Mr. Lafayette's supervisor William "Coit" Wright participated in this training and acknowledged receipt of the Safety Plan. RP 349-50, 357. Mr. Lawless testified that Coit Wright's training should have heightened his common sense. RP 671-72. On the afternoon of the accident, Mr. Wright would ignore that training. *See* RP 1317-18, 648.

c. Sharp-Line Was Responsible for the Auger Truck and Related Equipment

Exhibit P46 was a DOT inspection report for the auger truck. An eleven-point brake inspection had occurred five months before the accident. RP 210-11; Exh. D110. For such equipment, the Sharp-Line supervisor was also required to inspect the equipment on a daily basis, including a brake inspection. *Id.* Sharp-Line owned, maintained, and controlled the truck involved in the accident; NAD did not use the truck, had no involvement with maintenance of the truck, and was not aware of any prior brake issues with the truck. RP 511; 1182. NAD did not have any familiarity with this equipment and was not authorized to operate it. RP 1132-33.

d. Chocks on Truck

At the time of the subject accident, Michael Craig of Sharp-Line testified that Sharp-Line's practice was to have auger trucks carry blocks of wood to use as chocks as part of its safety procedures and in compliance with its subcontract. RP 364-65. While some auger trucks carried commercial chocks, blocks of wood were more effective as chocks on that particular type of vehicle. *Id.* At trial, multiple witnesses, including a Washington State Trooper, and Sharp-Line's Michael Craig, testified that wooden sign posts are appropriate chocks. RP 189-90, 360-61, 979, 1157-59. Extensive evidence came in regarding the particulars of when the WAC regulations require the use of chocks on a project like this one. RP 694-98, 710-14. The testimony further discloses a hotly debated issue of whether at the time of the accident, chocks were even required. *See, e.g., id.; see also,* RP 472-75, 482-83, 509-11.

4. MICO and Bonner's involvement

Mico is the manufacturer of the Power Lever Lock Power Brake system. The Mico Lever Lock Power Brake system was purchased from NAPA by Sharp-Line's mechanic John Keller. RP 223. It was purchased because the old dual power brake lock was causing the service brakes to lock-up. RP 218-22.

Mr. Keller of Sharp-Line took the Lever Lock Power Brake system to Industrial Power Brake Co. on April 4, 2006, where it was

installed by the owner James Bonner. RP 222. Mr. Bonner stated that he did not like to install this type of power lock system on this size of truck because he feels they give a false sense of security if the power brake were to fail. RP 169-70.

Mico includes warning data in the packaging of their power brake systems that states:

> The brake lock is a supplemental safety device. It is not to be used in place of the original equipment parking brake.
>
> Always set parking brake and use wheel chocks and outriggers with brake lock.

RP 242; Exhs. D204, D205. NAD did not know that a MICO lever lock was installed on Sharp-Line's equipment. RP 1133.

5. Accident

On September 12, 2006, Mr. Lafayette was installing signs under the direction of his supervisor, Coit Wright. RP 194, 294. Throughout the day, Mr. Wright drove a 1978 Chevrolet Auger utility truck and trailer outfitted with the supplies necessary for sign installation. RP 175-76, 194. The utility truck was equipped with an auger mounted on a hydraulic boom, which was used for drilling postholes. RP 175-76. Setting their last sign post of the work day, at approximately 4:20 p.m., Mr. Wright parked the truck on a slight downhill slope, left the engine running, engaged the power take off to run the auger. RP 66, Exh. P23. He did not set the parking brake or chock the wheels, but he did set the Mico Power Lever

Lock Power Brake and moved alongside the truck to complete the installation a roadside sign with the assistance of Mr. Lafayette. *Id.;* RP 155, 172. Approximately fifteen to twenty minutes later, the truck began rolling down the hill. RP 67, 127, 752.

Mr. Lafayette chased and caught up to the truck, got into the truck, and took the wheel. RP 67; 127. He continued downhill for approximately a mile and a half in the truck without stopping. The truck failed to negotiate a curve in the road and broke through the guardrail off the side of the highway. The truck crashed with Mr. Lafayette inside. He died as a result. RP 310-12.

6. Mr. Wright Admitted Fault for Lafayette's Death

Mr. Wright was only person on the entire jobsite who was trained, qualified, and authorized to use the auger truck including the MICO lever lock. RP 194. Immediately following the accident, Dennis Arndt, an NAD supervisor, saw Mr. Wright:

> Q: . . . Mr. Wright, what was his demeanor at the time?
> A: He was a very distraught individual.
> Q: Was he under stress?
> A: Very under stress. Babbling, screaming.
>
> * * *
>
> THE WITNESS: He was saying, "It was my fault. It was all my fault. I can't believe it. I can't believe it." And then he started dropping to the ground, rolling around, yelling and screaming incoherently.

RP 515-16. *See also,* RP 816 (witness Mezzanotto: "I told him [Wright], "Come on, you know, it ain't your fault." And he replied that, "Oh, yes it was." . . .")

B. PROCEDURE

1. Plaintiff Had Three Theories of Liability

Plaintiff filed suit against three different defendants and presented three different potential theories of liability for the cause of the accident at trial. CP 7-29; RP 10-11. Defendant Mico was sued for product liability as the result of a claimed defect in its brake lever lock. CP 20-21. Bonner/Industrial Brake faced claims for negligent installation of the lever lock in failing to connect the alarm system. CP 21. The claims against NAD alleged negligence for failure to provide a safe worksite. CP 19-20.

2. The Court Granted Partial Summary Judgment for All Defendants

After discovery into the support which Ms. Millican claimed from Lafayette, the defendants moved for partial summary judgment on whether Ms. Millican had standing as a Statutory Beneficiary with an individual damage claim. CP 642-54. Court granted the motion and dismissed Ms. Millican's individual claims. CP 943-46. The plaintiff brought a detailed motion for reconsideration. CP 947-59. After receiving opposition and reply pleadings, CP 1017-23, 1182-93, the court reconsidered but in a

memorandum decision affirmed her decision to dismiss the claims of Ms. Millican as a statutory beneficiary. CP 1284-1287.

3. The Court Ruled Against NAD on Summary Judgment

NAD moved for summary judgment on liability on April 9, 2010 and later, on December 17, 2010 for summary judgment on plaintiff's claim that the vehicle was "unattended" as it pertained to the chocking requirement. CP 61-86; 979-84. The court denied the motions and let these issues go to the jury. CP 637-41; 1268-71. As indicated, NAD presented the testimony that chocking was not required under the circumstances. *See,* section A.3.d, *ante.*

4. Rulings on Plaintiff's Motions in Limine Evidenced the Court's Desire to Allow the Jury to Hear the Relevant Facts

On April 7, 2011, the plaintiff brought motions in limine. CP 1545-61. One motion asked the court to exclude "evidence or argument of fault by Sharp-Line, Inc. as a cause of Daren Lafayette's death;" and a related motion moved to exclude any argument that NAD "did not exercise or retain supervisory control or authority over Sharp-Line during construction operations." CP 1548-49. The court denied the motions, stating:

> I'll look at your instructions. But what I'm telling you is the bottom line for a motion in limine has to deal with what evidence is coming in in front of the jury. The bottom line is that evidence is coming in. What we do with it is another matter.

* * *

> Just say the evidence is admitted. How we are going to instruct on the evidence is another matter.

RP 5-6. The plaintiff did not ask for any further relief from that order. *See, id.*

On April 8, 2011, the plaintiff had marked the Sharp-Line/ NAD contract as admissible under ER 904 in its submission. CP[4]*. NAD had done so as well. CP*. The objections lodged by plaintiff to defendant's ER 904 submissions did not question the admissibility of the subcontract. CP*. The plaintiff objected to the admissibility of the subcontract as submitted by NAD because it did not contain all provisions. *See* CP*. In fact, the plaintiff introduced the subcontract in her case-in-chief. RP 279, 299-300; Exh. P5. The motion in limine was more broadly concerned with eliminating all reference to the conduct of Sharp-Line and Wright (*see also,* Plaintiff's motion in limine to "eliminate any statements made by Wright other than his sworn declaration given to L&I," CP 1555-58.)

5. At Trial Plaintiff Presented and Argued for Several Theories of Causation for the Accident

The court observed Ms. Millican's case against the three defendants implicated complex theories of multiple causation in determining how to instruct the jury. RP 1341-53; *see also,* RP 915-16. At the close of all the evidence, the judge resolved jury

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[4] *The ER 904 identification and objections are subject to a supplemental designation of clerk's papers. Trial docket nos. 275, 277, 287, 288, 290.

instruction issues. RP 1341-64. The court rejected defendants' arguments that the jury should be instructed that they could find that the conduct of Wright was a superseding or intervening cause. RP 1320. Instead the court ruled in favor of Ms. Millican requiring that the jury would have to find Wright or Sharp-Line as the sole proximate cause of the accident:

> With regard to NA Degerstrom, the issues with NA Degerstrom, there are a lot of issues in terms of what happened on the job site, both in terms of what what's going on with Sharp-Line, which there is no question that Sharp-Line has a lot of -- people can be very critical of Sharp-Line in terms of how they managed this situation and how this all happen, and people can be very, very critical of Mr. Wright as well for failing to do some things that one would not have expected given his knowledge and given his seniority and given the fact that it is clear that Mr. Lafayette is the newbie, he does not have a CDL, he does not have any kind of understanding I think about how any of these systems operate. He is totally out there as a new worker, pretty much an inexperienced worker working with, theoretically, an experienced person, Mr. Wright, who undoubtedly would be relied upon.
>
> ... That becomes the question, in other words, that today -- on that particular day, he just did not act according to his training. He slipped up that day. Unfortunately it had just devastating consequences.

RP 1341, 1348-1349.[5]

Ms. Millican wanted the jury to ignore the conduct of Wright completely, proposing a truncated version of WPI 15.04 that

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[5] *See* full discussion and ruling by the trial court in Appendix A.

omitted the language allowing the jury to find the sole proximate cause for the accident in the conduct of a non-party. CP 1592. Ultimately, the judge reviewed WPI 15.04, the official comments and use note, and consistent with the evidence at trial, gave instruction 15 which included this language:

> [I]f you find that the sole proximate cause of injury or damage to the plaintiff was the act of another defendant or the act of some other person who is not a party to this lawsuit, then your verdict should be for the defendant(s) who did not proximately cause injury or damage to the plaintiff.

CP 3180.

The jury was instructed on plaintiff's claims against NAD, on negligence, *Stute,* the effect of a violation of WISHA and the provisions of WISHA at issue, employer's immunity, and sole proximate cause. CP 3176, 3178-80, 3182-84, 3191.

So instructed, the jury found all defendants were not negligent for the accident without making a determination on causation. CP 3205-07. Plaintiff did not meet her burden of proving the liability of any defendant on the various theories presented: brake installation failure, or a product defect, or alleged site safety shortcomings. *Id.*

The plaintiff then moved for new trial or for judgment as a matter of law.[6] The court denied the motions, CP 3285-87, and entered judgment on the verdict. CP 3208-11.

IV. SUMMARY OF ARGUMENT

As tragic as the death of 19-year-old Daren Lafayette may have been, his mother as personal representative of the estate had every opportunity to present her theories of liability to the jury in this case. Although the jury heard several theories of how the accident happened, the jury decided that NAD was not negligent. Substantial evidence supported that verdict. The judgment should be affirmed.

The court properly allowed all the relevant evidence to come in at trial. From denial of NAD's motions for summary judgment on facets of the plaintiff's claims against NAD to denial of plaintiff's motions in limine about which she now complains, the court consistently and correctly ruled for admissibility of all relevant evidence.

An important feature of Ms. Millican's strategy in pursuing the several defendants was to prevent the jury from hearing evidence or argument that Sharp-Line or Wright was responsible for the accident. Another aspect of the strategy was to argue that the violation of a WISHA and WAC regulations, particularly the one

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[6] The plaintiff did not move for judgment as a matter of law at the close of the evidence during trial.

involving chocks, somehow required a finding of negligence as a matter of law. Those positions contravened Washington law. When the relevant evidence came in, and the jury was properly instructed, Ms. Millican's theories against NAD were rejected.

More than ample evidence supported an instruction that the jury could consider whether the fault of Sharp-Line or Wright was the sole proximate cause of the accident. WPI 15.04 was given. As for NAD's negligence, the violation of a statute or regulation is at most evidence of negligence. The issue of whether or not chocks were even required was hotly disputed, with evidence on both sides of the proposition.[7]

Even if the jury had considered and found NAD violated the chocking regulation or another WISHA regulation, it could reasonably have given more weight to other evidence and determined that NAD was not negligent on the totality of the evidence of NAD's reasonable and safe conduct on this project. At that moment in time at the end of that one fateful workday, Mr. Wright's neglect caused the death of Mr. Lafayette.

Ms. Millican waived the arguments she makes about error in admitting the subcontract, and in the court's denial of motion for a judgment as a matter of law. Ms. Millican never asked for it during trial, and she was not entitled to it.

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[7] NAD had moved for summary judgment as a matter of law that the vehicle was unattended prior to trial, and maintained that position at trial.

In conclusion, judgment on the jury verdict should be affirmed. The court ruled correctly on the legal issue presented by the motion for partial summary judgment and dismissed Ms. Millican's individual claim as a statutory beneficiary. She was not dependent for support upon her son. Although correctly decided, this partial summary judgment ruling becomes moot if the Court affirms the jury's verdict.

V. ARGUMENT

A. Standard of Review: Abuse of Discretion

A denial of a motion for new trial is only reversed upon a showing that the trial court abused its discretion. *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103, 841 P.2d 1300 (1992)). Abuse of discretion is found only if the trial court based its decision on untenable grounds or acted for untenable reasons. *Kramer v. J.I. Case Mfg. Co.,* 62 Wn. App. 544, 561, 815 P.2d 798 (1991).

Evidentiary rulings lie within the sound discretion of the trial court judge and will not be disturbed absent a manifest abuse of discretion. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662–63, 935 P.2d 555 (1997). The issue of witness credibility can only be determined by the finder of fact. *See State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

B. Motion for new trial under CR 59(a)(7) and (9) correctly denied

New trial under CR 59(a)(7) requires a showing "[t]hat there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." A court will overturn a jury's verdict "only rarely." *Valente v. Bailey,* 74 Wn.2d 857, 859, 447 P.2d 589 (1968). Granting a motion for a new trial is only appropriate "if, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party." *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997) (citing *Hizey v. Carpenter,* 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (emphasis added)).

Courts rarely grant new trials under CR 59(a)(9) because of the other more specific grounds for relief under CR 59(a). *McCoy v. Kent Nursery, Inc.,* 163 Wn. App. 744, 769, 260 P.3d 967 (2011) (citing *Jaeger v. Cleaver Const. Inc.,* 148 Wn. App. 698, 717-18, 201 P.3d 1028, *review denied,* 166 Wn.2d 1020, 217 P.2d 335 (2009)); *see also Kohfeld,* 85 Wn. App. at 41. The appeal by Ms. Millican really concerns whether substantial evidence supports a finding of no negligence on the part of NAD and whether the court's evidentiary rulings constitute an abuse of discretion.

Substantial evidence simply means that "the evidence be such that it would convince an unprejudiced, thinking mind of the truth of a declared premise." *Kohfeld,* 85 Wn. App. at 41 (citations omitted). Courts recognize that litigation is costly and stressful, and "absent supportable reasons [for granting a motion for a new trial] the parties should not be subjected to the expense and strain of another trial before another judge." *Bjork v. Bjork*, 71 Wn.2d 510, 511, 429 P.2d 234 (1967) (citing *Knecht v. Marzano*, 65 Wn.2d 290, 396 P.2d 782 (1964)).

A court may not grant a motion for new trial even when there is some conflicting evidence which could possibly be interpreted in favor of the appellant. As the Supreme Court stated in *Rettinger v. Bresnahan*, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953):

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. **The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.**

(emphasis added). The court of appeals must not invade the province of the jury. *Bunnell v. Barr,* 68 Wn.2d 771, 775, 415 P.2d 640 (1966).

Ms. Millican argues that the jury's verdict in this case is contrary to the "undisputed" evidence in her favor, and is thus, unsustainable. Appellant's Brief, at 2. When a non-prevailing party challenges the sufficiency of the evidence on which a verdict is based in a motion for a new trial, the party admits the truth of the opponent's evidence and all inferences which can reasonably be drawn from the evidence. *Davis v. Early Const. Co.,* 63 Wn.2d 252, 254-55, 386 P.2d 958 (1963); *Haft v. Northern Pac. Ry. Co.,* 64 Wn.2d 957, 960, 395 P.2d 482 (1964).

A motion for a new trial, "requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent. No element of discretion is involved." *Davis*, 63 Wn.2d. at 254-55. As a matter of law, a court cannot grant a motion for a new trial unless there is no substantial evidence to support the non-moving party's claim. *Id.*

The Supreme Court has stated, "We interpret the evidence 'against the [original] moving party and in a light most favorable to the opponent.'" *Faust v. Albertson,* 167 Wn.2d 531, 537-38, 222 P.3d 1208 (2009) (alteration in original) (quoting *Davis,* 63 Wn.2d at 254). The Court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. See *Faust*, 167 Wn.2d at 537-38. Jury instructions to which no exceptions are taken become the law

of the case. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

C. No Abuse of Discretion Denying New Trial: Substantial Evidence Properly Admitted Supported the Verdict of a Properly Instructed Jury

1. The Court Correctly Decided the Pre-Trial Motions In Limine

In her motion in limine number 1, Ms. Millican sought to have the court exclude **all** evidence that Sharp-Line or Wright caused the accident. CP 1520-1544. In her motion in limine number 2, she sought to prevent NAD from arguing that it contractually required Sharp-Line to take responsibility for the safety of its operations and equipment. The stark exclusionary relief sought left the court with no alternative but to deny the motions in limine. *See,* RP 2-3, 5-6 ("The bottom line is that evidence is coming in"). The propriety of the court's pre-trial rulings is demonstrated below. The attempt now to parse out these motions and to transform them into a request for narrower relief simply reveals that Ms. Millican waived the narrower arguments pre-trial by not preserving them.

a. Wright's Admission of Fault was Highly Relevant

On this appeal, Ms. Millican no longer argues that Wright's admission of fault could be excluded; or that nothing except his sworn statement should come in. CP 1520-44, 1554-58. Ms. Millican's counsel nevertheless argued to the court about the

impact of the evidence about Mr. Wright in connection with instructions:

> [The proposed instruction] overemphasizes the fault of Mr. Wright and the employee.
>
> THE COURT: I'm not sure you can overemphasize that.

RP 1412. The court was correct about the impact this evidence had. NAD had no way of knowing Mr. Wright would not correctly use the Mico lever lock, as it did not know this device was even installed on the truck. NAD could not anticipate the conspiracy of events, including Wright's raising the outriggers or failure to set the parking brake, nor could it predict that a sudden break failure would occur at 4:30 p.m. on September 12, 2006. The jury had substantial evidence from which they could conclude NAD was not negligent in avoiding this accident.

Two eye witnesses at the scene, Mr. Arndt and Mr. Mezzanatto, both recounted that Mr. Wright knew that he did not follow his training by repeatedly stating at the scene that the accident was his fault. RP 515-16; 816. The jury reasonably concluded that Mr. Wright's failures were the sole proximate cause of the subject accident. The fact that he is immune from liability does not automatically create liability on the part of NAD. *Edgar v. City of Tacoma,* 129 Wn.2d 621, 630, 919 P.2d 1236 (1996).

b. The Court properly admitted the subcontract between NAD and Sharp-Line

Ms. Millican waived her objection to the admission of the subcontract. Looking past the waiver, however, well-established case law in Washington recognizes the relevance of the subcontract to the defense of NAD. The subcontract delineates Sharp-Line's role on the project where Daren Lafayette died.

The subcontract was properly admitted because as a non-immune defendant, NAD was entitled to establish that the negligence of Daren Lafayette's employer, Sharp-Line, or the fellow employee Mr. Wright was the sole proximate cause of the accident. *Edgar, supra.* The cases cited by Ms. Millican in her argument do not vary this precedent.[8] NAD was entitled to have the subcontract in evidence to establish that Sharp-Line breached its duties to provide for the safety of its employees.

In *Ward v. Ceco Corp.,* 40 Wn. App. 619, 623-25, 699 P.2d 814 (1985), a subcontractor attempted to avoid a duty to erect guardrails in its subcontract with the general contractor. A specific statute and regulation imposed a non-delegable duty **on the subcontractor** to erect guardrails for the protection of its own employees and other workers whom the subcontractor within the "zone of danger." *Id.* Unlike the subcontract in *Ward,* the subcontract between NAD and Sharp-Line did not delegate a duty

[8] Ms. Millican does not acknowledge this precedent.

which was made specifically non-delegable by a statute or regulation. Instead, *Stute* provides:

> A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor's responsibility to furnish safety equipment **or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities**.

Stute v. P.B.M.C., 114 Wn.2d. 454, 464, 788 P.2d 545 (1990) (emphasis added). Consistent with *Stute*, the subcontract properly required Sharp-Line to furnish adequate safety equipment relevant to their responsibilities.

The subcontract between NAD and Sharp-Line bears more similarities to the subcontract in *Degroot v. Berkley Construction,* 83 Wn. App. 125, 920 P.2d 619 (1996). That contract did not delegate specific duties declared non-delegable by statute or regulation. The subcontract in *Degroot* simply required that the subcontractor comply with all safety regulations and indemnify the general contractors for any liability incurred as a result of the subcontractor's violation of safety violations. 83 Wn. App. at 127.

Like the *Degroot* subcontract, the subcontract between NAD and Sharp-Line required that Sharp-Line furnish adequate safety equipment relevant to their responsibilities and have a safety program in place. Exh. P5 at 0006. Such a contractual allocation

of responsibility is specifically permissible under *Stute*. *See,* 114 Wn.2d at 464.

The subcontract in *Degroot* was admissible because it was relevant to the general contractors' defense. 83 Wn. App. at 129. The subcontract in this case was properly admitted for the same purpose. Unlike *Ward,* where the contract specifically delegated a specific safety duty made non-delegable by both statute and regulation (the duty to erect guardrails), the subcontract in this case dealt with Sharp-Line's duty of safety in a general sense.

Even without considering that Ms. Millican waived any objection to the subcontract, this Court cannot conclude the admission of the Subcontract under the circumstances at trial amounts to a manifest abuse of discretion. New trial is not warranted on this issue.

2. Ms. Millican Waived Objection to the Subcontract

Several reasons support the conclusion that Ms. Millican waived the issue regarding the admission of the subcontract. First, Ms. Millican actually submitted a copy of the subcontract in her ER 904 which was submitted on April 7, 2011. CP[9]*. Unlike NAD, which also submitted a copy of the subcontract, Ms. Millican did not redact any of the subcontract, including the language she claims was so prejudicial. CP*. When NAD submitted its ER 904 copy of

[9] *The ER 904 identification and objections are subject to a supplemental designation of clerk's papers. *See* note 4, *ante.*

the subcontract, it specifically redacted items such as the amount of the contract. NAD did this was because it brought a specific motion in limine on the subject of contract amounts, and it did not wish to submit such evidence to the jury.

Second, Ms. Millican links the trial court denial of her motion in limine no. 2 as necessarily admitting the entire contract. A redaction of offensive language would have dovetailed with the relief requested in motion no. 2, that NAD be barred from arguing it did not retain *some* responsibility for the worksite. CP 1548-49. Redacting the word "solely" from Exhibit P5 (at 0006) presumably would have sufficed:

> Subcontractor shall be [] responsible for the protection and safety of its employees, for final selection of additional safety methods and means, and for daily inspection of its work area and safety equipment . . . .

If Ms. Millican found particular language in the subcontract particularly offensive, she had the opportunity to request that the court redact the particular language from the subcontract before being presented to the jury. When the trial court denied her motion in limine no. 2 she had the option to make a motion to redact the language she now deems prejudicial. Again, redacting the word "solely" from Exhibit P5 presumably would have sufficed.[10]

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[10] The jury was instructed that NAD owed "non-delegable duties," including the specifications of negligence Ms. Millican identified for instruction. *See* CP 3176, *see also,* CP 3182 "*Stute* instruction" properly instructing the jury on non-delegable duties of NAD.

Third, Ms. Millican relies on *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 430-31, 814 P.2d 687 (1991), *review denied,* 118 Wn.2d 1011 (1992), and *Garcia v. Providence Medical Center,* 60 Wn. App. 635, 640, 806 P.2d 766 (1991), to argue that a party prejudiced by an evidentiary ruling may introduce the adverse evidence in an effort to mitigate its prejudicial effect and is not precluded from obtaining a review of the ruling. Unlike *Dickerson* and *Garcia,* the evidence at issue here is not testimony of witnesses, but documentary evidence which was addressed in each party's ER 904. The fact that Appellants submitted the subcontract as an exhibit to their ER 904 in early April 2011, a month before the trial began, indicates that Appellants intended to use the subcontract as an exhibit.

Finally, Ms. Millican made no objection to NAD's opening statement or closing argument regarding NAD delegating safety to Sharp-Line, despite complaining about it now on appeal.[11] The Court can reach only one conclusion: Ms. Millican waived these objections. Again, no basis exists on the issue of the subcontract's admission for a new trial. Taken together with the jury instructions that properly advised the jury of the law in Washington regarding non-delegable duties owed by NAD, the evidence admission was not an abuse of discretion.

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[11] *See* Appellant's Bief at 11, 13.

3. *Stute* and the WISHA regulations do not impose Strict Liability: Substantial Evidence proved that NAD fulfilled its Duties

Ms. Millican's argument on appeal equates the existence of the "non-delegable" duty imposed by *Stute* on NAD with strict liability for workplace injuries where some issue of fact exists as to whether NAD met its duty. In arguing the motions in limine, Ms. Millican's counsel made this claim. RP 2-6. The court did not grant the motions in limine. During several weeks of trial, the jury heard substantial evidence to conclude that NAD acted reasonably and was not negligent. The approach of Ms. Millican in this appeal emphasizes on one narrow issue, "chocking," the requirement for which and the circumstances surrounding its practice on the job was hotly contested.

The parties did not contest that the general contractor has primary responsibility under WISHA to make sure that it and its subcontractors at a common construction site comply with specific WISHA regulations to protect all employees of all entities working at the site. The court instructed the jury accordingly. CP 3182.

This "primary" responsibility does not mean that general contractors are the guarantors of all workers' safety. *Kasparian v. Old Nat. Bank,* 6 Wn. App. 514, 516-17, 494 P.2d 505 (1972), *compare* CP 3182. The law requires only that general contractors take reasonable safety precautions. "WISHA incorporates an employer's common law duty to take those precautions to keep the

workplace reasonably safe that an ordinarily prudent person would take." *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 812, 6 P.3d 30 (2000) (emphasis added) (citing *McCarthy v. Department of Social & Health Serv.,* 110 Wn.2d 812, 818, 759 P.2d 351 (1988); RCW 49.17.060).

Courts have long recognized that "[G]eneral contractual rights [such] as the right to order the work stopped or to control the order of the work do not mean that the general contractor controls the method of the subcontractor's work." *Bozung v. Condominium Builders, Inc.,* 42 Wn. App. 442, 447, 711 P.2d 1090 (1985). In fact "[w]hether a right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors." *Cano-Garcia v. King Cnty,* 168 Wn. App. 223, 235, 277 P.3d 34 (2012) (quoting *Phillips v. Kaiser Aluminum & Chem. Corp.,* 74 Wn. App. 741, 750, 875 P.2d 1228 (1994)).

The Plaintiff's site safety expert Mark Lawless testified that it was not reasonable or industry standard to expect a general contractor to follow each subcontractor movement by movement to ensure that the subcontractor was performing work correctly and safely. RP 646.

NAD enacted safety policies and procedures that were effective in practice and were extensively communicated to subcontractors and their employees. NAD's duty to keep the work site reasonably safe that was that of an ordinary prudent person

under the same circumstances. *See* CP 3179. Ms. Millican did not carry her burden.

If the court accepts the truth of NAD's evidence and the inferences that can reasonably drawn from that evidence, as it must, the court must conclude that the jury heard a "sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question." *Washburn v. City of Federal Way,* ___ Wn. App. ___, 283 P.3d 567, 577 (2012) (quoting *Canron, Inc. v. Fed. Ins. Co.,* 82 Wn. App. 480, 486, 918 P.2d 937 (1996) (citing *Bering v. Share,* 106 Wn.2d 212, 220, 721 P.2d 918 (1986))); *see also, Davis, supra*, 63 Wn.2d. at 254–55. A court cannot grant a motion for a new trial unless there is no substantial evidence to support the non-moving party's claim. *Id.* In the following section, the substantial evidence the jury heard is reviewed in the context of the jury's instructions, the law of the case in light of the failure to except to the court's instructions on negligence.

a. Violation of a WAC Regulation does not Prove Negligence

Plaintiff asserts that violation of a regulation or statute is "negligence as a matter of law." To the contrary, evidence of such a violation is merely a factor that "may be considered by the trier of fact as evidence of negligence." RCW 5.40.050. The jury was properly instructed to this effect. CP 3183 (violation of WAC "may

be considered by you as evidence"). The language is permissive, not mandatory that the jury even must consider it evidence of negligence.

Each party's liability experts testified that there are over 35,000 Washington Administrative Code provisions. RP 643, 754. The law does not automatically impose liability upon NAD for a violation of any of these myriad regulations. Properly instructed on Ms. Millican's theories and the WAC regulations she contended were violated, the jury heard the evidence and concluded that NAD was not negligent in this case.

b. NAD Acted Reasonably as a General Contractor

General contractors must take reasonably safe precautions in fulfilling their duties under applicable WAC provisions or WISHA for construction sites. In this case, the jury considered whether the general contractor NAD acted as a reasonable or an ordinary prudent person would to keep the work site reasonably safe. CP 3178-79; *see also, Guijosa,* 144 Wn.2d at 917, *supra,* (jury instructions given without objections become the law of the case).

The jury heard the testimony of a strong tone of safety from the top down, starting with the Federal Government, as well as inspections by Mr. Coleman, NAD onsite personnel, Stevens County, City of Chewelah, Washington State Labor & Industries, Telephone Company. RP 1129-38, 1143.

The jury heard expert testimony from Kurt Stranne that NAD was also in compliance with construction safety regulations and the WAC regulations applicable to the Project. RP 695-98, 714-15, 723. Ms. Millican simply did not persuade the jury otherwise, that NAD acted unreasonably.

c. WAC for Chocks Not Violated

A centerpiece of this appeal is Ms. Millican's assertion that NAD violated applicable safety regulations, justifying a finding that NAD was negligent per se. Plaintiff refers to Washington Administrative Code 296-155-610(2)(b), which contemplates securing unattended vehicles. The WAC provides:

> [B]efore leaving a motor vehicle unattended: (i) the motor must be stopped, (ii) the parking brake must be engaged and the wheels turned into curb or berm when parked on an incline. (iii) If parking on an incline and there is no curb or berm, the wheels must be chocked or otherwise secured.

WAC 296-155-610(2)(b).

The Washington Administrative Code requires a vehicle's motor to be stopped[12] in order for it to be considered "unattended." Substantial evidence was presented that would justify a finding that no violation of the WAC occurred. NAD presented evidence that Mr. Wright and Mr. Lafayette were using the hydraulic tamper on the auger truck at the time of the accident. RP 176, 472-75, 482-83,

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[12] Ms. Millican now agrees that the truck's engine was running at the time of the accident. *See* Appellant's Brief at 5-6.

494, 509-11, 710-11. The jury heard substantial evidence from which it could have concluded the WAC did not apply, that the vehicle's engine was running, and that the vehicle was "attended" or in use. *Id.*

Sharp-Line witnesses and all experts testified that the vehicle's motor must be running in order to operate the tamper. *See,* RP 201-02, 359. If the jury believed this testimony, it would have concluded that the motor was not stopped; the vehicle was not unattended; and there was no requirement for the vehicle to be chocked during the relevant time prior to the accident.

Mr. Arce stated the workers were within one foot of the truck when it started to roll. RP 65. Mr. Arndt agreed. RP 483. Taken together, this Court must recognize, as did the trial court, the jury heard substantial evidence that NAD did not violate the WAC regulation regarding chocks.

d. Sharp-Line Truck had Chocks Available

At trial, it was established that chocks – in the form of sign-post ends – were on Sharp-Line's auger truck at the time of the accident. *See* RP 550, 574-75. Sharp-Line's John Keller and Washington State Patrol Trooper Halle and Mr. Stranne all testified that sign-post ends are proper chocks. RP 189-90, 360-61, 979, 1158-59. Mr. Craig testified it was Sharp-Line's practice to use wood block chocks for auger trucks. RP 364-65. No evidence was

presented that Mr. Wright and Mr. Lafayette were not using chocks on the day prior to and just before the accident. Plaintiff is only speculating when they claim that Sharp-Line was not using chocks prior to the accident and only speculating in its claim that NAD should have noticed this alleged non-use of chocks.

It is not speculation, and the evidence came in, that this one time, just prior to the accident, Mr. Wright did not use chocks, just as he failed to set the parking brake, turn the wheels uphill and utilize the other safety measures for securing truck which he had been trained to do. *See* Exh. P23, sections III.A.5 and III.A.6, *ante,* setting out what Wright did not do.

e. NAD Could Not Have Seen, let alone foreseen, Mr. Wright's Failure to Set the Parking Brake

Even if someone from NAD had been present immediately prior to the truck rolling away, the experts agreed he could not have detected that Mr. Wright did not set the parking brake. RP 719, 648.

f. Accident Prevention Plan Effective

To ensure that the accident prevention plan was effective in practice, NAD performed weekly safety meetings and ensured that Sharp-Line conducted its own safety meetings. NAD adopted a site-specific Accident Prevention Plan and implemented it during the Project. Ms. Millican introduced the plan in her case-in-chief as Exhibit P4. Further, defendants' Exhibit D115 is a Statement of

Acknowledgment signed by Sharp-Line's President, confirming that the company had read and understood NAD's safety plan and would comply with that plan. RP 317-18, 1139, Exhs. P4, D115.

g. NAD had No Responsibility for the Truck

Substantial evidence supports the finding that NAD could not have foreseen the catastrophic brake failure that occurred prior to the accident. NAD had no responsibility for the truck. This proposition was not reasonably disputed. RP 511. Plaintiff simply failed to establish any connection between NAD's actions and the catastrophic brake failure that precipitated this accident.

h. NAD Discharged its Duties as a General Contractor

At trial substantial evidence was presented by NAD's project personnel and its site safety expert, Kurt Stranne, and reference to the 20,000 pages of project records to support the jury's verdict and the contention that NAD acted to keep the workplace reasonably safe in accordance with the responsibilities of a general contractor. In fact, jury instruction number 16 outlined general contractor responsibility for jobsite safety. That instruction was proffered by plaintiff. Site safety expert Kurt Stranne testified that NAD complied with its obligations as a general contractor. RP 714

Indeed, this project had 85,000 hours without a reported accident prior to Mr. Lafayette's accident; prior to the accident, no

one had opened a first aid kit.[13] The instant accident resulted when Mr. Wright ignored his training. Plaintiff simply failed to show NAD breached the duties outlined in jury instruction number 16. CP 3182.

4. The Court Properly Instructed the Jury on the Properly Admitted Evidence

a. Instructions on Negligence Proper

At trial, the jury was given negligence and proximate cause instructions in the form of jury instructions 13 and 14 based on the WPI and adapted to the claims in this case. CP 3178-79. Ms. Millican's theory against NAD was completely and fairly presented to the jury. The jury was instructed Ms. Millican alleged NAD was negligent regarding the "following non-delegable duties:" (1) failing to provide a safe workplace with an appropriate accident prevention plan, (2) failing to have a safe practice pertaining to chocking, (3) failing to enforce compliance with WAC safety regulations, (4) failing to comply with safety requirements imposed by FHA/NAD contract. CP 3176. As demonstrated above, in respect of each of these specifications, the jury heard substantial evidence to conclude that NAD acted reasonably and was not negligent.

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[13] The other incident mentioned in Ms. Millican's brief was not a brake failure and did not involve chocks. *See* RP 648-49, RP 708. The subcontractor's employee drove onto a soft shoulder and truck tipped onto its side—it was attributed to driver error. *Id.*

b. Instruction on Wright's Fault Proper

The plaintiff's proposed jury instruction would have contradicted the approved language of WPI 15.04 for use in cases of "complex causation." *See,* CP 1592 ("...it is not a defense that the act of some other person or entity who is not a party to this lawsuit may also have been a proximate cause.").

The instructions given followed the Washington pattern instruction and use notes. *See,* WPI 15.04 as given, CP 3180. Instruction 15 stated in part:

> [I]f you find that the sole proximate cause of injury or damage to the plaintiff was the act of another defendant or the act of some other person who is not a party to this lawsuit, then your verdict should be for the defendant(s) who did not proximately cause injury or damage to the plaintiff.

CP 3180. The instruction properly stated Washington law. "Non-immune defendants, like the City, may still avoid liability by establishing that the negligence of the plaintiff's employer was the sole proximate cause of the accident." *Edgar v. City of Tacoma,* 129 Wn. 2d at 630.

The Notes on Use accompanying WPI 15.04 state that the jury should be instructed on multiple proximate causes "when an act of some person who is not a party to the suit, or when some other event, happening or condition may have concurred with the negligence of a defendant to constitute a proximate cause." The court had determined that the defendants could not argue that Mr.

Wright's conduct was an intervening or superseding cause to excuse their negligence. Instead she properly instructed the jury that the act of another person, Mr. Wright in this case, does not excuse the defendant's negligence unless the other person's negligence was the sole proximate cause of the plaintiff's damage.

The Official Comment to WPI 15.04 provides, *inter alia,* that the instruction "setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation..." WPI 15.04 Official Comment (citing *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985); *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983)). "Failure to give WPI 15.04 may be reversible error." WPI 15.04 Official Comment. Under the circumstances of this case, the court correctly instructed the jury.

The plaintiff's proposal for instructing the jury impermissibly ignored the conduct of Mr. Wright. CP 1592. His admission that he was solely at fault for the accident came in at trial from two witnesses. *See,* RP 515-16; 816. Mr. Wright failed to follow his years of training on the last 15 minutes of the workday just prior to this accident occurring.

c. Proposed Jury instruction that NAD owed a duty to the general public properly rejected

The Court reviews whether or not an instruction is a correct statement of the law and whether or not the court should have

instructed on the topic in the first place de novo. *Burchfiel v. Boeing Corp.,* 149 Wn. App. 468, 491, 205 P.3d 145, *review denied,* 166 Wn.2d 1038 (2009). The trial court has considerable discretion in determining the exact language of jury instructions, the number of instructions to give, and whether a particular instruction should have been given. *Enslow v. Helmeke,* 26 Wn. App. 101, 104, 611 P.2d 1338 (1980). The number and precise language of jury instructions is discretionary. *Watson v. Hockett,* 42 Wn. App. 549, 552, 712 P.2d 855 (1986). Instructions are sufficient if they (1) permit each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Hyatt v. Sellen Const.,* 40 Wn. App. 893, 895, 700 P.2d 1164 (1985). Error is harmless if the outcome of the trial would not have been different if error had not occurred. *Caruso v. Local Union No. 690,* 107 Wn.2d 524, 530, 730 P.2d 1299 (1987).

The case law Ms. Millican cites provides no support for giving the instruction. Relying on *Argus v. Peter Kiewit Sons' Co.,* 49 Wn.2d 853, 856, 307 P.2d 261 (1957), Ms. Millican argues that the failure of Mr. Wright, Lafayette's supervisor, to follow his specific safety training in operating the truck is analogous to creating a dangerous condition in the physical characteristics and environment of a construction project, *e.g.,* a depression in a

gravel-surfaced detour at the point of entry to a highway. 49 Wn.2d at 854-55.

The cases cited by Ms. Millican concern dangerous conditions within a construction zone or premises itself created on the land by a contractor's work: a telephone pole which was situated in the middle of the road due to ongoing construction without any warning devices such as lights or barricades, *Smith v. Acme Paving Company,* 16 Wn. App. 389, 390-91, 558 P.2d 811 (1976); an unimproved grassy slope between a parking lot and an apartment building, *Williamson v. Allied Group, Inc.,* 117 Wn. App. 451, 454, 72 P.3d 230, (2003); a stepladder lying flat on the lobby floor of a bank during banking hours, *G.W. Blancher v. Bank of California,* 47 Wn.2d 1, 2-3, 286 P.2d 92 (1955).

Cummins v. Rachner, 257 N.W.2d 808 (Minn. 1977), like the other cases, concerns conditions within a construction zone itself created on the land by a contractor's work. The contractor failed to completely obliterate old traffic lines in a highway improvement project, effectively causing a motorist to be directed in a straight line directly into oncoming traffic in the opposite direction. 257 N.W.2d at 810-11. In addition, no overhead lights or flashing warning signals in the immediate area alerted the public of the land's condition in the construction zone. *Id.* at 811.

None of the cases cited by Ms. Millican deal with the negligence of a supervisor in operating equipment or machinery in

a manner contrary to all of the supervisor's and subcontractor's safety training. None of the cases concern injury or death of a subcontractor's employee as a result.

The reason proffered now for proposing the instruction violates an evidentiary ruling by the trial court. The trial court excluded suggestion of Lafayette being a "hero" or "rescuing" the public. *See* CP 1292-93, 1995 ("Lay witnesses may testify as to their personal observations of the actions of Daren Lafayette but may not speculate as to the state of mind of Daren Lafayette or the motives for his actions in this case."). Ms. Millican has not assigned error to the court's ruling on Motion in Limine B. Speculation about Mr. Lafayette's motives cannot supply a basis for instructing the jury.

The fortuitous presence of Mr. Arce and Mr. Wells, in the area, but not present on the construction site, does not create that basis. The trial court did not err by not instructing on duty to the traveling public.

D. Partial Summary Judgment was Properly Granted since Dorothy Millican was not a statutory beneficiary under the Wrongful Death Act

The Court reviews the grant of summary judgment de novo. The court should grant summary judgment when there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. *Weyerhaeuser Co. v. Aetna*

Cas. and Sur. Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A "material fact" is one upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.,* 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Marshall v. Bally's Pacwest, Inc.,* 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

Ms. Millican failed to present the requisite evidence of her "dependence" on the deceased sufficient to meet the criteria developed in the case law. In *Armantrout v. Carlson,* 166 Wn.2d 931, 214 P.3d 914 (2009), the court held that services of a deceased adult child to the parent can have economic value and be considered as support. It also discussed the concept of dependence as used in this statute:

> All parties in this case agree that Washington courts have long interpreted "dependent for support" to require a showing of financial dependence.

Id. at 937.

As established by the factual record submitted in the trial court, Mr. Lafayette simply did not provide financial support to Ms. Millican. CP 642-787, 797-946. No evidence showed that Ms. Millican and her husband were dependent on Mr. Lafayette for living expenses. *See* order on motion for reconsideration, CP 1284-87, Appendix B.

At most, certain declarations indicated Mr. Lafayette did help with some projects on his mother's property and would have been willing to do additional projects in the future as the Ms. Millican's purchased the materials for those projects. Unlike the adult child in *Armantrout*, Mr. Lafayette did not provide medical care to Ms. Millican, did not live with the Millicans, and did not contribute financially to household expenses. In fact, the Millicans had multiple fulltime jobs at the time of Mr. Lafayette's death. CP 651. The court affirmed summary judgment after reconsideration, finding "[T]here is no evidence that the Millican's were dependent on these services for their support." CP 1287; order attached as Appendix B.

The wrongful death statute upon which Ms. Millican bases her claim only applies to the beneficiaries who are "'clearly contemplated by the statute.'" *Masunaga v. Gapasin,* 57 Wn. App. 624, 631, 790 P.2d 171 (1990) (non-dependent parents of an adult child are not contemplated by the statute) (quoting *Roe v. Ludtke Trucking, Inc.* 46 Wn. App. 816, 819, 732 P.2d 1021 (1987) (cohabitant of decedent not "wife" within meaning of RCW 4.20.020)). Ms. Millican is not a beneficiary who is clearly contemplated by Washington's wrongful death statutes. The change that Ms. Millican seeks must come from the legislature, not the court. *Philippides v. Bernard,* 151 Wn.2d 376, 390, 88 P.3d 939 (2004). Washington courts have routinely held that that causes of action for wrongful death are strictly in the province of the

legislature, not the judiciary. *See e.g., Tait v. Wahl,* 97 Wn. App. 765, 771, 987 P.2d 127 (1999) ("courts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law."); *Triplett v. Wash. State Dep't of Soc. & Health Serv.,* 166 Wn. App. 423, 431-34, 268 P.3d 1027 (2012) (policy matters pertaining to causes of action for wrongful death is for a legislative, not judicial decision). "[T]he legislature has defined who can sue for the wrongful death and injury of a child and we cannot alter the legislative directive." *Philippides,* 151 Wn.2d at 390.

VI. CONCLUSION

The judgment of the trial court should be affirmed in all respects. If the Court affirms, it need not reach the issue concerning the partial summary judgment. If it does reach that issue, the Court should affirm the trial court's grant of partial summary judgment.

RESPECTFULLY SUBMITTED September 21st, 2012.

By _____

Lori K. O'Tool, WSBA #26537
Earl Sutherland, WSBA #23928
Megan M. Coluccio, WSBA #44178

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Attorneys for Respondent N.A. Degerstrom, Inc.

APPENDIX A

I know this is a difficult issue and it is doubly difficult for me because I do not see all these defendants together. I see each defendant separately and there are nuances for each defendant, which can make instructing this case somewhat complicated.

* * *

With regard to NA Degerstrom, the issues with NA Degerstrom, there are a lot of issues in terms of what happened on the job site, both in terms of what what's going on with Sharp-Line, which there is no question that Sharp-Line has a lot of -- people can be very critical of Sharp-Line in terms of how they managed this situation and how this all happen, and people can be very, very critical of Mr. Wright as well for failing to do some things that one would not have expected given his knowledge and given his seniority and given the fact that it is clear that Mr. Lafayette is the newbie, he does not have a CDL, he does not have any kind of understanding I think about how any of these systems operate. He is totally out there as a new worker, pretty much an inexperienced worker working with, theoretically, an experienced person, Mr. Wright, who undoubtedly would be relied upon.

This is probably the murkiest issue for me because you are trying to see, first of all, the issue about whether it is reasonably foreseeable that Mr. Wright would not do the things he's trained to do; set the parking brake, take these posts out, do something, chock the wheels. That becomes the question, in other words, that today -- on that particular day, he just did not act according to his training. He slipped up that day. Unfortunately it had just devastating consequences.

RP 1341, 1348-1349

The problem is, they can say I have a right to have an expectation that Mr. Wright is going to do his job and he is going to set that parking brake in this case like he's done in 200 other cases. I cannot fault that. But the problem is with a non-delegable duty of safety, you cannot just fall back on a right to rely, if you have some knowledge that there is a safety problem. And the issue here for the jury to decide is whether or not there was adequate supervision by --there was adequate supervision by Degerstrom on the job site, on whether or not they could -- that they observed these people at work, did they observe what they could observe. The jury is going to have to weigh all that and ultimately make a determination whether or not Degerstrom is negligent.

And all of these things that you have argued to me I think have some bearing on whether or not these individual defendants were negligent. They do not really have any bearing on superseding cause or intervening cause. If, in fact, the jury does not think one or more of the defendants is negligent, they can say so. But if, in fact, they determine a defendant is negligent, they might view these other factors, whether it be the horn not being installed, not following directions on installing the horn, Mr. Wright not setting the parking brake and not putting the chocks out, they don't relieve people of their negligence, which is what superseding intervening cause does.

So, having been long-winded in this event, I have concluded, and I have read all this material and I am satisfied that giving the superseding intervening cause in this case would be inappropriate,

RP 1351-1352

APPENDIX B

Please see attached:

CP 1284-87.

FILED

APR 01 2011

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

DOROTHY A. MILLICAN, as Personal Representative of the Estate of **DAREN M. LAFAYETTE,** and on her own behalf as statutory beneficiary,

Plaintiff,

v.

N.A. DEGERSTROM, INC., a Washington corporation; **MICO, INCORPORATED,** a Minnesota corporation; **JAMES R. BONNER** and **JANE DOE BONNER,** husband and wife and the marital community comprised thereof; d/b/a **INDUSTRIAL POWER AND BRAKE COMPANY; JOHN DOE MANUFACTURER,** 1 through 10; **JOHN DOE CORPORATIONS,** 1 through 10,

Defendants.

NO. 2009-2-02837-5

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

This matter originally came before the court for oral argument on November 18, 2010. An Order Of Partial Summary Judgment Dismissing The Individual Statutory Wrongful Death

Judge Kathleen M. O'Connor
Spokane County Superior Court
1116 W. Broadway
Spokane, WA 99260
(509) 477-4707

Claim Of Dorothy A. Millican was entered on December 1, 2010. A motion for reconsideration was filed on December 8, 2010 and the court received the following pleadings:

1. Plaintiff's Motion For Reconsideration
2. Plaintiff's Memorandum In Support Of Motion For Reconsideration
3. Declaration Of Dorothy A. Millican In Support Of Motion For Reconsideration, with attachments
4. Defendants' Joint Response To Plaintiff's Motion For Reconsideration Of Court's Order Of Partial Summary Judgment
5. Plaintiff's Reply To Defendants' Joint Response To Motion For Reconsideration

The central issue in this motion is the provision of RCW 4.20.020 which states ". . . such action may be maintained for the benefit of the parents . . . who may be dependent upon the deceased person for support . . .".

Plaintiff asserts two bases for the motion; CR 59(a)(4) – newly discovered evidence and CR59(a)(8) - the Court committed error when it determined, as a matter of law, that the Plaintiff was not dependent upon her son pursuant to RCW 4.20.020.

1. CR 59(a)(4) – Newly Discovered Evidence

The Plaintiff argues the notice of eviction from her home she received on October 27, 2010, constitutes newly discovered evidence with respect to whether she was "dependent on the deceased person for support." This notice was received after the original pleadings were filed for the partial summary judgment motion; however, the foreclosure sale, which was the basis for the eviction notice, occurred in June 2010. Defense counsel argue due diligence on the part of the plaintiff would have discovered the foreclosure process prior to filing the partial summary judgment motion. While that may be so, the eviction notice was not received until after the motion was filed. I will consider it.

Apparently, this mortgage was entered into by the Plaintiff in July 2007. Mr. Lafayette died on September 12, 2006. Presumably, the mortgage was

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foreclosed because mortgage payments had not been made. There is no evidence before the court to connect this mortgage to any prior mortgage or deed of trust. There is no evidence before the court that Mr. Lafayette financially contributed to any prior mortgage payments before his death. Therefore, the mortgage foreclosure is not a basis to reconsider my prior decision.

2. CR 59(a)(8) The Court committed error when it determined, as a matter of law, that the Plaintiff was not dependent upon her son pursuant to RCW 4.20.020

The Plaintiff's argument in this motion is basically the same argument proffered at the original hearing. This court recognizes that taking the decision on a factual issue away from the jury should be considered carefully under the "no reasonable minds could differ" standard. However, the Plaintiff must have evidence that the type of "dependence" the Plaintiff had on the deceased meets the criteria developed in the case law.

The parties and the court considered the Supreme Court's decision in *Armantrout v. Carlson, etal,* 166 Wn.2d, 931, 214 P.3d 914 (2009). That case stands for the proposition that services of the deceased to the parent can have economic value and be considered as support. It also discussed the concept of dependence as used in this statute. "All parties in this case agree that Washington courts have long interpreted "dependent for support" to require a showing of financial dependence." *Id.* at 937. The Court cited to *Garrison v. Wash. State Nursing Bd.,* 87 Wn.2d, 195, 196, 550 P.2d 7 (1976) which, in turn, cited to the Third New International Dictionary 604 (2002) and Black's Law Dictionary 1577-78 (9th ed.2009) :

> "[D]ependent" is defined as "unable to exist, sustain oneself, or act suitably or normally without the assistance or direction of another or others" . . . .
> "[S]upport" is defined as food and clothing that allow one to live in the degree of comfort to which one is accustomed" and "[o]ne or more monetary payments to a current or former family member for the purpose of helping the recipient maintain an acceptable standard of living."

Judge Kathleen M. O'Connor
Spokane County Superior Court
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The deceased did not provide any financial support to Plaintiff. There is no evidence that his mother and her husband were dependent on him for living expenses. There were declarations that indicated he did help with some projects on his mother's property and would have been willing to do additional projects as the Millican's purchased the materials for those projects. However, "[T] dependency must be based on the situation existing at the time of the decedent's death and not on promises of future contributions." *Armantrout,* pg. 936 citing *Grant v. Libby, McNeil & Libby,* 145 Wash. 31, 37, 258 P. 842 (1927). Also, the *Armantrout* court, at page 939, specifically approved the trial court's jury instruction that "explicitly excluded the "everyday services a child would routinely provide"." For these reasons, although the deceased provided some services to the Millican's, there is no evidence that the Millican's were dependent on these services for their support.

The motion for reconsideration is denied.

IT IS SO ORDERED.

Dated: 1st day of April, 2011.

Kathleen M. O'Connor
Superior Court Judge

Judge Kathleen M. O'Connor
Spokane County Superior Court
1116 W. Broadway
Spokane, WA 99260
(509) 477-4707

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

1. Respondent's Brief;

directed to the following individuals:

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DATED at Seattle, Washington, this 21st day of September, 2012.

Tamara M. Whitney