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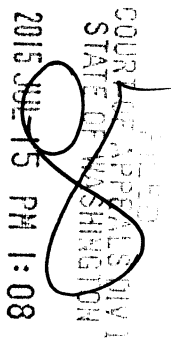

NO. 72824-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child,

Appellants,

v.

HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington Corporation; JANE and JOHN DOES, 1-20

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In 2007, the Washington Supreme Court in *Davis v. Baugh*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007), created a new rule of post-construction liability for negligent construction contractors:

> * * * **a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence.**

Id., 159 Wn. App. at 417 (emphasis supplied).

Washington State Penitentiary (WSP) electrician, 29 year old plaintiff Marshall Donnelly, suffered catastrophic and permanently disabling brain injuries after the metal security ceiling he was walking on to do his assigned work in a newly-constructed building collapsed. He and the WSP were unaware that this heavy-duty metal security ceiling was not designed to hold the weight of a person and was a latent hazard.

Plaintiffs[1] allege that the general contractor responsible for constructing the building, HDR/Turner,[2] became aware of this hazard for the first time midway through construction, three years before Mr. Donnelly's injuries, and failed to inform the WSP. Plaintiffs also allege

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[1] Appellants include Marshall Donnelly, the injured plaintiff; his wife (Jennifer) and minor daughter (Linley, through her Guardian ad Litem Keith Kessler) who had derivative claims. They are referred to collectively as "plaintiffs" here.

[2] HDR/Turner was a joint venture consisting of members HDR Architecture, Inc. ("HDR") and Turner Construction Company ("Turner").

that HDR/Turner's ceiling installation subcontractor, defendant Noise Control of Washington, Inc. ("Noise Control"), negligently failed to follow the ceiling manufacturer's installation instructions, contributing to the ceiling's failure and Mr. Donnelly's injuries, and that HDR/Turner shares responsibility for Noise Control's negligence.

The central issue in this appeal is whether the trial court erred by instructing the jury that it could not consider the HDR/Turner Design-Build Agreement with the State (the "Contract") on the issue of defendants' negligence. This Contract is the only source of information describing what HDR/Turner agreed to build and what ceiling product information it agreed to provide to the WSP upon project completion. This Contract is critically important evidence of the standard of care a jury must apply to determine negligence. Plaintiffs could not argue their theory of liability without it.

Defendants HDR and Turner offered the contract documents as evidence and no party challenged the admissibility of those documents or disputed their significance to plaintiffs' tort claims. HDR/Turner's defense focused instead, like plaintiffs' claims, on whether the Contract required HDR/Turner to provide the WSP with ceiling warranties and "lists of circumstances and conditions that would affect the validity" of the ceiling warranties. HDR/Turner learned midway through the project that

walking on metal security ceilings was unsafe and would violate all manufacturer's warranties but failed to provide this information to the WSP.

The trial judge erred at the end of trial, after all parties rested, by prohibiting the jury from considering the Contract on the issue of negligence and by prohibiting plaintiffs from arguing their liability theory to the jury. Plaintiffs address their additional claims of error below.

II. ASSIGNMENTS OF ERROR

The trial court erred in the following ways:

1. By giving Jury Instruction 14, prohibiting jury consideration of construction contract language as evidence of negligence, thereby expressly preventing plaintiffs from arguing their liability theory. (CP 542, p. 8905; RP 2924-25, 2945 (10-8-14pm)).

2. By refusing plaintiffs' proposed additional instruction language which would have mitigated the legal error in Instruction 14. (CP 535A; RP 2945 (10-8-14pm)).

3. By applying the Independent Contractor Rule as a matter of law, insulating general contractor HDR/Turner from liability for its subcontractor's negligence. (CP 540; RP 1679 (9-30-14am)).

4. By excluding plaintiffs' construction expert's testimony concerning the rights and obligations of HDR/Turner to inspect and

approve ceiling installation subcontractor Noise Control's work. (RP 1677-80 (9-30-14am)).

5. By giving the jury a Verdict Form with separate lines for defendant HDR and defendant Turner, thereby requiring plaintiffs prove the individual negligence of each joint venture member. (CP 541; RP 2925-26 (10-8-14pm)).

6. By failing to remove superseding cause language from Jury Instruction 15, the proximate cause instruction, after having previously stricken the superseding cause defense, compounded by the misconduct of HDR's counsel in using this instructional error to its advantage in closing argument by impermissibly linking superseding cause to negligence. (CP 542, p. 8906, 546, 547, 572, 573; RP 3088-89 (10-9-14pm)).

7. By rebuking plaintiffs' counsel in the middle of closing argument, in a manner criticizing his integrity by accusing him of violating an alleged agreement between counsel, when the trial court had before it sufficient information to determine that the defense allegations relied upon were false and where, months later, the trial court admitted the rebuke was in error. (RP 3010 (10-9-14am), 3058 (10-9-14pm), CP 573).

8. By denying plaintiffs' Motion for a New Trial. (CP 546, 547, 572, 573).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a construction negligence case brought by an injured third party employee of a building owner, should the jury be allowed to consider the terms of the contract between the defendant general contractor and the owner on the issue of negligence; (a) where that contract is the primary evidence of the applicable general contractor standard of care; (b) where every key general contractor manager and defendants' construction expert all admit that a reasonably prudent contractor would follow contract language requiring, as part of the project, that the contractor provide critical security ceiling warranty information to the owner in an Operations and Maintenance Manual; and (c) where the general contractor learned for the first time during construction that the metal security ceilings it chose for a prison building project were unsafe to walk on and walking on them would void all warranties, and yet failed to provide this information to the owner? (Assignment of Error 1).

2. Where Washington law provides for general contractor liability to those injured by negligent work after completion and acceptance of that work, should the jury be able to consider the terms of a contract between a defendant general contractor and the building owner to determine if the contractor met the applicable standard of care to

determine whether the contractor breached tort duties owed to a third person? (Assignments of Error 1 and 2).

3. Should the trial court be reversed where, after all parties rested, it expressly precluded the plaintiffs from arguing their theory of construction contractor tort liability by prohibiting the jury from considering contract language on the issue of negligence, after a five-week trial where no party challenged the relevance of contract language to plaintiffs' negligence claims, where the defense focused similarly on that contract language, and where no legal authority supported the trial court's decision to remove the contract language from the jury's consideration of negligence? (Assignment of Error 1 and 2).

4. Does a general contractor have a nondelegable duty to provide a reasonably safe building where the general contractor (a) is solely responsible for the final building project, (b) had the exclusive right and obligation to inspect its subcontractor's work, and (c) had the exclusive right to accept or reject that subcontractor's work? (Assignments of Error 3 and 4).

5. Should a trial judge's ruling that the Independent Contractor Rule applied as a matter of law be reversed where it was inconsistent with another judge's earlier summary judgment rulings, ignored issues of fact with respect to exceptions to the Rule, and where it

undermined the deterrent principles behind tort law and the Washington Supreme Court's clear decision not to insulate general contractors from tort liability for negligent work? (Assignments of Error 3 and 4).

6. Where members of a joint venture are vicariously liable for each other's acts, and where plaintiffs obtained pretrial summary judgment orders requiring proof of negligence as to defendants' joint venture entity but not requiring separate proof of each joint venturer's individual negligence, and where plaintiffs relied on that ruling throughout trial in presenting their case, was it error for a subsequently-assigned trial judge to reverse the earlier ruling and instead to provide the jury with a Verdict Form listing each individual joint member separately and retroactively requiring separate proof of negligence for each? (Assignment of Error 5).

7. Where the trial court admittedly erred by inadvertently leaving superseding cause language in the proximate cause jury instruction, does the flagrant and prejudicial misconduct of defense counsel in choosing not to inform the trial court or other parties of this oversight but, instead, using the instructional mistake to make superseding cause a central theme in his closing argument, including improperly linking superseding cause to negligence, require a new trial where the jury found defendants were not negligent? (Assignment of Error 6).

8. Where the law requires reversal when a trial judge criticizes an attorney's integrity in front of the jury, is reversal required here where, after the jury returned its verdict, the trial judge admits he erred by instructing the jury during the plaintiffs' closing argument that plaintiffs' counsel had violated an agreement between counsel and where, at the time of the rebuke, the trial judge had all of the necessary information to determine that the defense accusation of misconduct upon which the trial court relied was demonstrably false? (Assignment of Error 7).

IV. STATEMENT OF THE CASE

A. The North Close Project and Marshall Donnelly's accident.

Defendants HDR Architecture, Inc. ("HDR") and Turner Construction Company ("Turner") formed a joint venture ("HDR/Turner") to bid on and secure a $100 million "design-build" contract for the North Close Project at the maximum security penitentiary in Walla Walla, Washington. The North Close Project involved design and construction of new prison buildings, including Building C, where Marshall Donnelly's injuries occurred. On March 2, 2005, HDR/Turner, as the project's general contractor, signed a Design-Build Agreement (the "Contract") with the State of Washington. (Exh. 3; Exh. 3, p. 101; Exh. 4; Exh. 204).

Areas holding supervised prisoners required installation of "Security Level B" ceilings, including the Room C-165 hallway where

Mr. Donnelly's injury occurred. Security Level B ceiling materials must be capable of withstanding a 30-minute beating with a sledgehammer without failing. (RP 535 (9-18-14am)). [3]

HDR Vice President and lead project architect Larry Hartman selected "Lockdown" metal security ceilings manufactured by Environmental Interiors for the project's Security Level B ceilings. (RP 2469 (10-6-14pm)).[4] Lockdown is a unique, suspended, heavy-duty, steel grid and panel system designed for prisons and intended to prevent prisoners from hiding contraband above the ceiling or breaking into the space above (the "plenum" space) to escape. (RP 618 (9-22-14am)). The plenum space contains HVAC, plumbing, electrical and other fixtures requiring regular service. The only way for a worker to access the plenum space to maintain the building systems is through designated ceiling access panels. These access panels have red labels bearing the phrase "MEP Access," an undisputed reference to "mechanical, electrical and plumbing." (RP 191-93(9-17-14); Exh. 74-015). It is undisputed that plenum spaces contain systems and fixtures that cannot be reached from the access panels because they are too far away from the access point. (RP 195-197, 188-193 (9-17-14); RP 358-359, 380-382 (9-17-14);

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[3] Rooms for unsupervised prisoners required construction that met Security Level A with materials that can withstand a 60-minute sledgehammer beating. (RP 535 (18-14am)).
[4] The Security Level A ceiling selected by Mr. Hartman was an Environmental Interiors metal security ceiling product called "Celline." (RP 2469 (10-6-14pm)).

RP 446-449 (9-18-14); RP 1064 (9-24-14am); RP 1244, 1248 (9-24-14pm); RP 2634-2636 (10-7-14pm).

HDR/Turner subcontracted with Noise Control for the installation of all metal security ceilings. That contract required Noise Control to follow the Lockdown manufacturer's installation instructions. (Exh. 59).[5]

Prior to the North Close Project, WSP maintenance employees, including electricians, regularly walked on prison security ceilings to perform their work. (RP 455 (9-18-14), RP 863 (9-23-14am)).[6] After North Close Project completion in late 2007 and before Mr. Donnelly's injury, both he and his co-worker, fellow journeyman electrician Justin Griffith, entered plenum spaces in several of the new prison buildings through designated MEP Access panels and safely walked on Lockdown security ceilings to complete job assignments. (RP 442, 446-53 (9-18-14)). On December 29, 2009, Mr. Donnelly entered the plenum space above a Lockdown ceiling in Room C-165 through an MEP Access panel to drill holes in a wall for conduit. Mr. Donnelly suffered permanent brain damage resulting in total disability after he fell 10 feet to concrete when the ceiling failed and collapsed. (RP 462-67 (9-18-14); Exh. 66 (prison security video of ceiling collapse)).

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[5] The trial court agreed that "Noise Control's duty was to install the ceiling according to the manufacturer's instructions." (RP 2012-13 (10-1-14pm)).

[6] The North Close Project involved installation of the first ever "metal" security ceilings at the WSP. (RP 536 (9-18-14); RP 863 (9-23-14am)).

Plaintiffs allege that HDR/Turner negligently failed to inform the WSP of what they themselves had only learned half way through construction: that the metal security ceilings they selected for this project could not be walked on to perform work and, further, that walking on the ceilings would void ceiling warranties. Plaintiffs allege that the Contract required HDR/Turner to provide this same information to the WSP and that those provisions help establish HDR/Turner's standard of care in the performance of this construction project. Plaintiffs also allege that HDR/Turner had a nondelegable duty to inspect and approve the work of its ceiling installation subcontractor, Noise Control, and that Noise Control negligently failed to install the Lockdown metal security ceiling above C- 165 in accordance with the contractually-required manufacturer's instructions. (CP 74).

B. HDR/Turner and ceiling installation subcontractor Noise Control did not know whether these unique, metal security ceilings were safe to walk upon until May 23, 2006, more than a year after construction began.

When HDR's Vice President Larry Hartman selected Environmental Interiors, Inc. metal security ceiling products for the North Close Project he, like all other HDR and Turner managers who testified at trial, did not know these security ceilings were unsafe to walk on. This issue came to HDR/Turner's attention during a May, 2006 construction

meeting when subcontractors responsible for installing mechanical, electrical and plumbing systems above the ceilings asked Jim Elves, the Turner engineer responsible for managing ceiling installation, if they could walk on the ceilings to do their work. (RP 2468 (10-6-14pm); 2573 (10-7-14am); CP 613, pp. 11890-91).

Neither Mr. Elves nor HDR/Turner project manager Eric Wildt knew the answer, so Mr. Elves contacted Scott Cramer, President of the ceiling subcontractor Noise Control, to determine if people could safely walk on the security ceilings. (CP 613, p. 11890-91). Mr. Cramer contacted ceiling manufacturer Environmental Interiors and carefully documented his conversation with that manufacturer's representative in the first paragraph of a letter he sent to Mr. Elves on May 23, 2006: "**To answer your question, 'Can other trades walk on these ceilings?' We asked Environmental Interiors, the answer was '<u>No, it would void all warranties</u>.'**" (Exh. 38, p.1) (**Appendix A**).

The original letter contains the internal quotes and underlining. Mr. Cramer used for emphasis to make the letter "definitive, dramatic and clear." (RP 2375 (10-6-14am)). Upon receiving it, Mr. Elves provided a copy of the letter to his supervisor, HDR/Turner project manager Eric Wildt. (CP 613, pp. 11893-94)).

Mr. Wildt admitted that Turner did not know if workers could safely walk on the metal security ceilings before receiving Mr. Cramer's May 23, 2006 letter. Mr. Wildt concluded that the letter meant that no one could walk on metal security ceilings. (RP 1734-35 (9-30-14am)).

C. HDR/Turner's own witnesses admit (1) the Contract required inclusion of ceiling warranties and lists of circumstances and conditions that would affect ceiling warranties; (2) that a reasonably prudent contractor should follow this Contract language; and (3) that HDR/Turner did not include critical ceiling warranty and safety information in the required building Operations and Maintenance Manual.

HDR/Turner affirmatively agreed by contract to provide to the WSP, at project completion, an Operations and Maintenance Manual ("OMM") containing specific ceiling warranty information. The Request for Proposal ("RFP") and the Issued for Construction Documents both identify the information HDR/Turner agreed to provide. (Exh. 204 (RFP), p. H-0119; Exh. 240, p. H-2810).[7] The trial court found that the language of these two documents is "exactly the same" and that "the contract is defined as encompassing all these documents." (RP 2851-52 (10-8-14pm)). The Contract required HDR/Turner to provide to the WSP:

> V. Warranties and Bonds: Include copies of warranties and bonds **and lists of circumstances and conditions that would affect the validity of warranties or bonds**.[8]

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[7] HDR offered Exhibit 240, the Issued for Construction Documents, and the trial court admitted them for illustrative purposes. (**Appendix C**).

[8] Exh. 204, p. H-0119 (emphasis supplied) (**Appendix B**); Exh. 240, p. H-2810 (**Appendix C**).

In opening statement, Turner's counsel referred to the RFP as "the Bible" for this project. (RP 153-54 (9-16-14)). Every significant HDR/Turner liability witness admitted that the Contract language was important to the standard of care HDR/Turner must meet. HDR Vice President and project architect Larry Hartman admitted that things the owner should not do and actions that would void a warranty should be included in the OMM. (RP 2460-61 (10-6-14pm)). The Turner engineer responsible for preparing the OMM, Jeremy McMullin, admitted that the Contract required HDR/Turner to include the May 23, 2006 letter or its ceiling-related substance in the OMM because the letter addresses both safety and warranties. (RP 650-53, 697-98 (9-22-14am)).

Larry Hartman, HDR/Turner Project Manager Eric Wildt, and defense construction expert Daniel Hobbs all admitted that a reasonably prudent contractor should follow the Contract language in preparing the OMM and in determining what HDR/Turner must include in the OMM (RP 2458-59 (10-6-14pm), RP 2589 (10-7-14am), RP 2107-08 (10-2-14am)). Defense expert Hobbs testified that a reasonably prudent contractor should include in the OMM "actions, circumstances, or conditions that could impact the validity of a warranty." (RP 2107-08 (10-2-14am)).

HDR and Turner CR 30(b)(6) designees admitted that they could find no evidence that HDR/Turner included in the OMM either the

May 23, 2006 letter or its substance, nor that they communicated to anyone at the WSP that its workers should not walk on the metal security ceilings. (CP 613, p. 11846-47; RP 1738 (9-30-14am)). A WSP witness confirmed that the OMM did not contain a copy of the May 23, 2006 letter. WSP employees testified that, had the May 23, 2006 letter been included in the OMM, the WSP would have prohibited workers from walking on the metal security ceilings. (RP 934-35, 1022-25 (9-23-14pm)).

D. The trial court prohibited the jury from considering Contract language on the issue of negligence.

1. The instruction given without legal authority – Jury Instruction 14.

Over plaintiffs' objections, the trial court gave Instruction 14:

> You have heard testimony about the language in the contract relating to maintenance and warranty information. You are instructed that there are no breach of contract claims against the defendants in this case **and you may not consider whether the contract was breached in considering whether the defendants were negligent**. This evidence may be considered on the issue of causation.

(CP 542, p. 8905 (emphasis supplied)) (**Appendix G**). The trial court based this instruction on one proposed by HDR and Turner at the very end of trial, during what the trial court accurately described as a "snowstorm" of paper. (RP 2738 (10-8-14am); CP 524A, 534). The trial court provided no legal authority for this instruction.

2. Plaintiffs preserved this issue and attempted to mitigate the legal error.

The genesis of Jury Instruction 14 was an HDR brief and proposed instruction filed late on October 7, 2014, after the parties rested. (CP 524A; *cf.* plaintiffs' response, CP 528, 529). The trial court heard argument the following morning. (RP 2768-2827 (10-8-14am)). Plaintiffs' counsel repeatedly argued that the Contract defines what work HDR/Turner was supposed to do, including providing closeout information in the OMM. (RP 2826-27 (10-8-14am)). Plaintiffs' counsel referenced defense witness testimony:

> The provisions in the contract are proper for jury consideration in determining whether the construction company complied with its general duty of care, as defined by the trial court and the instructions. In other words, that's why I kept asking their people, I said, 'Hey, does the reasonably prudent contractor follow the language of the contract when it comes to closeout?'

(RP 2778 (10-8-14am)).

Later, after Judge North rejected the defense claim that the Contract did not contain language requiring HDR/Turner to provide ceiling warranty information and lists of circumstances and conditions that would affect the validity of warranties in the OMM, plaintiffs' counsel tried unsuccessfully to preserve plaintiffs' right to argue their theory of liability to the jury:

> I want the instruction to say that I am not alleging a breach of contract, or can say just because there is a violation of contract negligence – or contract language does not prove negligence, **but to be – to not be able to refer to it as helping inform what the reasonably prudent contractor should do, I just – I think, then, you wouldn't have any case under Davis v. Baugh. You wouldn't have any. Because the construction companies, their obligations are always under the contract as to how to build the building**.

(RP 2853 (10-8-14pm) (emphasis supplied)). Plaintiffs' counsel emphasized the devastation this instruction would have on plaintiffs' ability to argue their negligence theory (RP 2855 (10-8-14pm)):

> You can see – you make that ruling, they go, 'The case is over. We are going to gut it right here.' That is their feeling right now. This is the Hail Mary, and the guy caught it.

At one point, it appeared the trial court understood that the Contract language was relevant and necessary evidence of the standard of care a contractor needed to follow in order to exercise reasonable care in this construction project:

> THE COURT: Well, I guess what I am a little confused about on this, Mr. Rankin, is – what I am trying to do is say that you can't rely on a breach of contract to determine that, therefore, somebody is negligent. **But on the other hand, Mr. Gardner makes a good point that – where you, in essence, determine that what the standard of care is on the basis of the contract because that's what you have to do.**
>
> For instance, when Noise Control's installing it, how are we to determine that it's installed incorrectly, other than

> that it's not installed according to the way the contractor or the manufacturer's specifications.
>
> So I am – I don't know. I mean, I don't know how to – I'm trying to figure out – I agree that it has to be a tort standard of liability, not a contract standard, but I don't know that I can totally expunge the contract from this altogether, because it eliminates – **then there is no standard left for them to determine whether there has been a breach or not**.

(RP 2855-2856 (10-8-14pm) (emphasis supplied)).

The trial court nonetheless decided to give Instruction 14, including the sentence, "You are instructed that there are no breach of contract claims against the defendants in this case, and **you may not consider whether the contract was breached in considering whether the defendants were negligent**." (CP 542, p. 8905 (emphasis supplied)).

In another effort to mitigate this legal error, plaintiffs' counsel sought to have the trial court add language to the instruction that would allow plaintiffs to argue their theory of liability – specifically, that the terms and conditions of the contract are relevant to the standard of care that applies to the defendants:

> One is, I attempted to modify – I still don't like the instruction at all, that contract instruction that was submitted by HDR. But I have added a clause, based upon both our conversation this morning and this afternoon when we talked about what do we do with things like the fact that these guys do have to follow the contract. I mean, I don't have a case without it.

> And that clause would say, '**You may consider the language of the contract on the issues of causation and as evidence of the standards and specifications that apply to the defendants**.'
>
> I have to have that, or I can't make an argument on any of them.

(RP 2913-14 (10-8-14pm) (emphasis supplied); CP 535A (*see* **Appendix F**)).

As the trial court considered plaintiffs' proposed language, **HDR's response was**:

> Which is exactly what we argued about all morning and what your Honor has already found that this is not evidence of the standard of care, that it goes to causation.

(RP 2914-15 (10-8-14pm)). The trial court then rejected plaintiffs' proposed modifications. (RP 2917 (10-8-14pm)). As a result, Instruction 14 precluded plaintiffs from arguing their theory of the case.

E. The trial judge's decision to apply the Independent Contractor Rule defense, reversing multiple pretrial rulings upon which the plaintiffs relied.

By Contract, HDR/Turner assumed responsibility for acts or failures to act of its subcontractors, including ceiling installer Noise Control. (Exh. 3, Sec. 3.1.2, p. 026; Sec. 3.9.1, p. 038 and Sec. 21.3, p. 087). On July 29, 2014, Judge Spearman denied Turner's summary judgment motion (and reconsideration) seeking to avoid liability for Noise Control's negligence under the Independent Contractor Rule, leaving this

question for the jury. (CP 261, 338, 372) (**Appendix D**).[9] During trial, plaintiffs sought an affirmative ruling from Judge North *precluding* the Independent Contractor Rule defense. (CP 471, 478).

Judge North appeared to recognize that a literal reading of *Davis v. Baugh, supra,* is inconsistent with application of the Independent Contractor Rule, and also correctly noted that there are a number of exceptions to the rule. Nonetheless, without any change in facts or law and rather than simply denying the plaintiffs' motion, Judge North ruled instead that "Turner and/or the joint venture comprised of HDR and Turner are not vicariously liable for the alleged negligence of Noise Control of Washington, Inc." (CP 471-74, 478, 487-88, 501-02, 540, p. 8883; RP 598-99 (9-22-14am); RP 1565-68 (9-29-14pm); RP 1678 (9-30-14am)).[10]

F. Plaintiffs' Offer of Proof – proposed testimony of construction expert Del Bishop.

Judge North prohibited plaintiffs' construction expert, Mr. Bishop, from offering opinions concerning a general contractor's responsibilities for a subcontractor, pending a trial court decision on the Independent

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[9] Plaintiffs filed this lawsuit in King County Superior Court on October 27, 2011. Judge Marianne Spearman was assigned to this case originally and heard pretrial summary judgment motions in July of 2014, issuing her orders on July 29, 2014. In the meantime, the case was reassigned for trial to Judge Douglass North in late July and this five-week trial commenced on September 8, 2014. (CP 1; CP 333; CP 541).

[10] *Cf.* King County Local Rule 7(b)(7) (requiring "new facts or other circumstances that would justify seeking a different ruling from another judge").

Contractor Rule issue. (RP 1049-50 (9-24-14am); RP 1460-61 (9-29-14am)). When the trial court imposed the Independent Contractor Rule defense as a matter of law, plaintiffs presented an Offer of Proof describing Mr. Bishop's proposed testimony concerning HDR/Turner's right and obligation to select and supervise ceiling installer Noise Control's work under its Contract with the State. Mr. Bishop would also have testified that the contract between HDR/Turner and Noise Control reserves to HDR/Turner the right to inspect and approve Noise Control's work and, if that work did not comply with the construction schematics, then HDR/Turner could reject that work and require Noise Control to install the security ceilings correctly, according to the manufacturer's specifications. (RP 1565-68 (9-29-14pm), RP 1677-80 (9-30-14am)).[11] This is consistent with HDR/Turner's assumption of responsibility for the acts or failures to act of its subcontractors, including Noise Control. (*See* Exh. 3 at Sec. 3.1.2, p. 026; Sec. 3.9.1 p. 038 and Sec. 21.3 p. 087).

[11] While the WSP was unaware that the Lockdown ceilings were not designed for workers to walk on, plaintiffs presented evidence at trial that, but for Noise Control's negligent installation of the Lockdown ceiling above Room C-165, the ceiling would nonetheless have supported Marshall Donnelly's weight. *See* RP 211 (9-17-14); (RP 442, 446-53 (9-18-14)).

G. The trial judge's decision to require proof of specific negligence by HDR and by Turner, reversing pretrial rulings finding HDR/Turner was a joint venture and that, as joint venturers, HDR and Turner were vicariously liable for each other's acts.

There is no question that HDR/Turner was a joint venture. (Exh. 4). They admitted before and during trial that each was vicariously liable for the other's acts. (CP 302, p. 4126, RP 2025 (10-1-14am)). Plaintiffs were careful to secure pretrial court rulings preventing an HDR/Turner "shell game" at trial. On July 29, 2014, Judge Spearman issued summary judgment orders establishing, as a matter of law, that: (1) HDR and Turner, as joint venturers, were vicariously liable for each other's acts; and (2) plaintiffs did not need to show which individual act by Turner or individual act by HDR breached a duty owed to the plaintiffs, as opposed to acts of the HDR/Turner joint venture. (CP 336, 337, 338) (**Appendix D**).

Plaintiffs' Proposed Jury Instruction 13 reflected the substance of these summary judgment rulings. Plaintiffs' Proposed Instructions also included a Verdict Form with one line "HDR/Turner" rather than separate lines for HDR and Turner. Plaintiffs relied on Judge Spearman's pretrial order requiring plaintiffs prove only HDR/Turner's negligence, rather than the specific negligence of HDR personnel and of Turner personnel during the course of this $100 million construction project involving hundreds of people and spanning years. Plaintiffs presented their entire case in a

manner consistent with Judge Spearman's order. (CP 411, pp. 6372-74, 6456; RP 2028-30 (10-1-14pm) (*see* **Appendix E**)).

After the parties had rested Judge North ignored Judge Spearman's prior orders, ruling instead that, even though HDR and Turner were admittedly joint venturers, plaintiffs had to prove specific negligence as to each of them individually. Therefore, he declined to give plaintiffs' proposed instruction that HDR and Turner were "responsible for the acts and failures to act of each other" (CP 542)[12] and, over plaintiffs' objection, gave the jury a Verdict Form with separate lines for HDR and Turner. (CP 541, pp. 8897-98).[13]

H. The trial court's admitted error in leaving "superseding cause" language in the proximate cause instruction, compounded by defense counsel's intentional exploitation of that mistake by focusing HDR's closing argument on that excluded defense.

The trial court denied defendants' request for a superseding cause instruction but inadvertently left the clause referring to "superseding cause" in the proximate cause instruction (Instruction 15). (CP 521, 522, 542, p. 8906, 573, pp. 9688-89; RP 2743-45 (10-8-14am)). Before closing argument only HDR's attorney, Mr. Scanlan, realized that Jury Instruction 15 mistakenly contained superseding cause language.

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[12] *Cf.* CP 542, p. 8897 (Jury Instruction 7, stating that "the plaintiffs claim that defendants HDR and Turner were negligent in one or more of the following ways* * *."

[13] Plaintiffs preserved this error by proposing jury instructions that included a Verdict Form listing HDR/Turner together and by taking exception to the verdict form given for failing to list HDR/Turner on the same line. (CP 411; RP 2925-26 (10-8-14pm)).

Rather than notify the court and other parties of this mistake, Mr. Scanlan instead deliberately focused HDR's closing argument on the superseding cause language improperly included in Jury Instruction 15:

> When you read that phrase, "**a cause in a direct sequence unbroken by any superseding cause"** I still don't get it really well.
> * * *
> But was that negligence a proximate cause, a direct – what's the phrase? – **A direct sequence unbroken by any superseding cause? Because you can't find any of us negligent, liable, responsible unless you find that direct, unbroken sequence**.

(RP 3088-89 (10-9-14pm) (emphasis supplied)).

Had this instruction only been read to the jury, without one of the attorneys commenting on the superseding cause language that the trial court later admitted should not have been included, there would not be any basis to assign error, as this mistake was missed by all counsel other than Mr. Scanlan. Therefore, no formal exception was taken to Jury Instruction 15.

I. The trial court's admitted error in rebuking plaintiffs' counsel during closing argument based on false defense claims of attorney misconduct.

After trial, the trial court admitted it erred by rebuking plaintiffs' counsel in the middle of plaintiffs' closing argument, instructing the jury that plaintiffs' counsel had violated an agreement. (CP 573, p. 9691). Counsel for each party obtained real-time transcripts of witness testimony throughout the trial. During closing argument, plaintiffs' counsel

presented portions of the testimony of various witnesses. No defendant objected. (RP 2969-3009 (10-9-14am)). Plaintiffs' closing argument was interrupted by the morning break. During the break, in chambers, defense counsel adamantly accused plaintiffs' counsel of violating an Order in Limine allegedly requiring 24-hours' notice before any attorney used trial transcript segments in closing argument. Defense counsel insisted that the trial court admonish plaintiffs' counsel in front of the jury for violating this alleged order. (CP 547, pp. 8989-91).

Plaintiffs' proved to Judge North, before he ruled, that no such Order in Limine existed.[14] In addition, Judge North had the opportunity to review the transcript of this discussion and the Order filed on the first day of trial which also proved that there was absolutely no formal or informal agreement between counsel to provide notice before using trial transcripts in closing argument. Nonetheless, relying solely on demonstrably false defense allegations, Judge North instructed the jury:

> THE COURT: Please be seated. Ladies and gentlemen, you should know that the lawyers had an informal agreement that they would let the other side know before they showed transcripts to the jury. Mr. Gardner did not let the other – the defendants know that he was going to be showing excerpts of transcripts to the jury before his closing. If you want to go ahead, Mr. Gardner.

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[14] The Motion in Limine to which defense counsel had referred was a motion by *plaintiffs* to preclude the use of transcripts of testimony during Closing, which the trial court had denied. (CP 459A).

(RP 3010 (10-9-14am); *see also* RP 3058 (10-9-14pm)).

Judge North later conceded that he based this rebuke on false information and the rebuke should never have been given. (CP 573, p. 9691).

V. ARGUMENT

A. The trial court misinterpreted the practical implications of *Davis v. Baugh* in a modern construction negligence case.

The Supreme Court in *Davis v. Baugh* established HDR/Turner's and Noise Control's duty to third persons like Mr. Donnelly to use reasonable care in their work:

> Under the modern, *Restatement* approach, **a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence**.

Davis, 159 Wn.2d at 417 (*citing* Restatement (Second) of Torts §§ 385, 394, 396 (1965)) (emphasis supplied). A reason for this new liability rule is the complexity of modern buildings:

> * * * Today, wood and metal have been replaced with laminates, composites, and aggregates. Glue has been replaced with molecularly altered adhesives. **Wiring, plumbing, and other mechanical components are increasingly concealed in conduits or buried under the earth. In short, construction has become highly scientific and complex. Landowners increasingly hire contractors for their expertise and a nonexpert landowner is often incapable of recognizing substandard performance**.

Davis, 159 Wn.2d at 419 (citations omitted; emphasis supplied).

HDR/Turner marketed itself as having considerable experience in modern prison design and construction. (Exh. 6; Exh. 7). The North Close Project design included "wiring, plumbing, and other mechanical components" requiring regular maintenance in the plenum spaces above metal security ceilings that could not be reached through MEP Access panels. Under these circumstances, the Lockdown ceilings presented a latent hazard to WSP employees like Mr. Donnelly. The WSP would not be in a position to know that their workers could not walk on metal security ceilings to access these systems, or to recognize Noise Control's "substandard performance" in failing to follow the ceiling manufacturer's instructions during ceiling installation above Room C-165.[15]

This is not and has never been a breach of contract case. This is a construction negligence claim under the Supreme Court's precise language in *Davis*: the issue here, as in *Davis*, concerns "negligent work" in the course of the North Close Project. *Davis*, 159 Wn.2d at 415, 421. The "work" to be performed is spelled out in the Contract documents.

HDR/Turner's "work" on North Close Project under *Davis* included (a) training the WSP on how to use the building and its fixtures, (b) providing information to the WSP about the building in the OMM

[15] *See* RP 294-95, 297, 316-17 (9-17-14); RP 432-33, 537 (9-18-14); RP 701, 704 (9-22-14am); RP 846-48, 915-16 (9-23-14am); RP 1740-41 (9-30-14am); RP 2464-65 (10-6-14pm); RP 2534, 2578-2581 (10-7-14am).

which specifically included an affirmative duty that HDR/Turner provide copies of warranties for metal security ceiling, and (c) "lists of circumstances and conditions that would affect the validity" of those ceiling warranties. Noise Control's "work" under *Davis* included installing the Lockdown ceiling above Room C-165 in compliance with the manufacturer's instructions. (Exh. 204, p. H-0119 (**Appendix B**); Exh. 240, p. H-2810 (*see* **Appendix C**); Exh. 44; Exh. 3, pp. 023, 026 and 101; RP 2015 (10-1-14pm)).

The trial court's primary errors of law reflect a misunderstanding of the practical and necessary implications of the *Davis* decision. Jury Instruction 14 and the trial court's application of the Independent Contractor Rule result directly from misapplying *Davis.*

B. Prohibiting jury consideration of the Contract to determine negligence and precluding plaintiffs from arguing their theory of liability was error requiring a new trial.

1. Jury Instruction 14 was a clear, prejudicial misstatement of law.

This Court reviews the legal accuracy of jury instructions de novo. *Thompson v. King Feed & Nutrition Serv., Inc.,* 153 Wn.2d 447, 453, 105 P.3d 378 (2005); *Cox v. Spangler,* 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Parties are entitled to jury instructions that accurately state the law. *Douglas v. Freeman,* 117 Wn.2d 242, 256–57, 814 P.2d 1160

(1991). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). However, if any of these elements are absent, the instruction is erroneous. *Id.* at 860. An erroneous instruction requires reversal if it prejudices a party. *Thompson,* 153 Wn.2d at 453. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading. *Anfinson*, 174 Wn.2d at 860. Instructions which provide inconsistent decisional standards are erroneous and require reversal. *Renner v. Nestor*, 33 Wn. App. 546, 550, 656 P.2d 533 (1983). Washington courts presume that jurors follow each of the court's instructions. *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). An error in instructing the jury is prejudicial if it affects the outcome of the trial. *Stiley v. Block,* 130 Wn.2d 486, 499, 925 P.2d 194 (1996).

On the day before closing arguments, after all parties rested, the trial court ordered the jury, in Instruction 14, that "you may not consider whether the contract was breached in considering whether the defendants were negligent." (CP 542, p. 8905). This instruction misstates the law.

In *Kelley v. Howard S. Wright Construction Co.,* 90 Wn.2d 323, 582 P.2d 500 (1978), a tort claim against a general contractor by a subcontractor's employee injured on a jobsite, our Supreme Court held that the terms of a contract between a construction contractor and a building owner are pertinent to the general contractor's duty to a third party:

> Although this court has not previously ruled on this question, our past decisions support the proposition that an affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them. * * *.

Kelley, 90 Wn.2d at 334.

Kelley involved contractor liability to third parties for negligence on the jobsite causing injuries during construction. *Davis v. Baugh* extends contractor liability for negligent work to injuries occurring after construction is finished. Otherwise, the principles are the same – contractors may be liable to third parties and the language of the contract between the contractor and the owner is relevant to show what the contractor agreed to do, what the standard of care is, and whether the contractor was negligent.

Similarly, in *Caulfield v. Kitsap County,* 108 Wn. App. 242, 29 P.3d 738 (2001), Kitsap County assumed, by contract, duties to manage the care of disabled individuals under a State program known as

"COPES." A disabled patient sued the county alleging negligence. The *Caulfield* court recognized that the plaintiff's argument was not based on the breach of this contract giving rise to an action in tort, nor did it rest on a third party beneficiary claim. The *Caulfield* court held that the county's contract with the State provides "evidence of the reasonable standard of care for caseworkers managing COPES in-home care placements." *Id.* at 257.

Oregon, Minnesota and Arizona construction negligence cases are instructive here.[16] For instance, in *Larson v. Heintz Construction Co.*, 219 Or. 25, 345 P.2d 835 (1959), the defendants were construction contractors engaged in building a highway pursuant to a contract with the State of Oregon. Plaintiff, injured while a passenger in a vehicle involved in a collision, was not a party to the contract between the defendants and the State. The Oregon Supreme Court held that the contractors' breach of contractual duties can be probative of negligence:

> * * * [A] construction contract which requires the use of warning signals is, by the weight of reason and authority, admissible in evidence against the contractor. * * * This is an action for damages arising out of negligence and the contractor's duty even in the face of such a contract as this remains a duty to use reasonable care. **But reasonableness depends on the circumstances, and here the contract was a circumstance. It is evidence of what the contractor conceived the measure of his duty to be.** * * *

[16] Plaintiffs provided this legal authority to the trial court. *See* CP 528; CP 546; CP 547; RP 2761; 2807-12; RP 2855-56 (10-8-14pm).

> **The contractor undertook the work knowing what was expected of him, and it is fair to let the contract enter into the jury's consideration of what was reasonable under the circumstances.**

Larson, 219 Or., at pp. 52-54 (emphasis supplied).

In a similar negligence action involving third-party personal injury tort claims against a construction company working under contract with the State of Minnesota, that state's Supreme Court held that "**the provisions in that contract are proper for jury consideration in determining whether the construction company complied with its general duty of due care * * *.**" *Dornack v. Barton Construction Co.,* 272 Minn. 307, 317-18, 137 N.W.2d 536, 544 (1965) (emphasis supplied).

The Arizona Supreme Court noted in a similar case that "**the jury was properly instructed that the standard of care to be used in measuring [the construction company's] conduct was that of ordinary care under the circumstances. In this case one of the circumstances which the jury might have considered was the existence and contents of [the construction company's] contract with the State.**" *Wells v. Tanner Bros. Contracting Co.,* 103 Ariz. 217, 222, 439 P.2d 489 (1968) (emphasis supplied).

In its trial court briefing, HDR admitted that Washington cases find contract language relevant "to the extent it provides evidence of the

standard of care as shown by the parties' practice." (CP 524A).[17] Defendant Turner's briefing agreed that contract provisions may be considered as evidence of the standard of care as part of the factual "circumstances" that a jury may consider "in determining the reasonableness of a defendant contractor's conduct." (CP 562, p. 9371). In other trial court briefing, Turner admitted that its "duty was to build the North Close Security Compound project *in accordance with the contract with the DOC, which included the DOC's RFP and HDR's resultant design*," consistent with its reference to the contract documents as "the Bible for this project." (CP 512, 513;[18] RP 153-54 (9-16-14)).

Further, Jury Instruction 14 was contrary to the evidence and testimony at trial. It rendered meaningless all of the testimony from HDR/Turner witnesses Hartman, Wildt, McMullin and Hobbs that the reasonably prudent contractor would follow the language of the closeout provisions of the Contract.[19]

HDR/Turner and Noise Control have tort duties to third parties under *Davis*. The Contract is the primary evidence of what defendants

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[17] HDR's argument cited the unpublished Division I case of *Weitz v. Alaska Airlns. Inc.*, 134 Wn. App. 1019 (2006) and quoted the following statement from *Weitz* in its brief to the trial court: The Court held that plaintiff was "not a party to the contract, and does not herself have an enforceable interest in the contract, **so it is useful only to the extent it provides evidence of the standard of care as shown by the parties' practice.**" *Id.* at p. 8614, lns. 20-21.

[18] "DOC" is a Turner reference to the Department of Corrections.

[19] *See* RP 650-53, 697-98 (9-22-14am); RP 2107-08 (10-2-14am); RP 2458-59, 2461 (10-6-14pm); RP 2589(10-7-14am).

agreed to do – what they agreed to build, how they agreed to build it, and the operational information they were required to provide the WSP at the conclusion of the project. The "construction complexity" rationale behind *Davis* certainly applies to this complex design-build project and each of these defendants where, as the State did here, "[l]andowners increasingly hire contractors for their expertise and a nonexpert landowner is often incapable of recognizing substandard performance." *Davis*, 159 Wn.2d at 419. The Contract language, requirements, obligations and terms – all agreed to by defendant – help define what "reasonable care" is in this case under *Davis*.

Jury Instruction 14 reflects a legal error with profound consequences. It completely undermined the plaintiffs' ability to argue their theory of the case. Juries may not choose whether to follow the law – they are required to do so and the law presumes they do so – which explains why this jury returned a defense verdict on the issue of negligence and never reached the issue of causation in this case.[20]

[20] Defendants may try to suggest that plaintiffs could have argued their theory of the case despite Jury Instruction 14. However, the trial court made absolutely clear, at the urging of defense counsel, that the contract provisions could not be argued by plaintiffs' counsel on the issue of negligence or considered as evidence of the standard of care. (RP 2913-18 (10-8-14pm)).

2. The trial court confused negligence with causation in giving Jury Instruction 14.

The trial court's decision to give Instruction 14 is perhaps explained, but not excused, by the trial judge's confusion between a tort theory of recovery (the only theory asserted by plaintiffs) and a contract theory of recovery (never asserted by plaintiffs), or by his apparent confusion between negligence and causation in this case. Late in trial, Judge North admitted being "sufficiently confused" concerning the Contract's importance to HDR/Turner's negligence as opposed to causation. The trial judge's own comments reveal his confusion and Jury Instruction 14 reflects this confusion. (RP 2016 (10-1-14pm); RP 2758-59, 2781-83 (10-8-14am); RP 2855-60 (10-8-14pm); CP 542).

All of the key defense witnesses, including Turner's own expert, admitted that a "reasonably prudent contractor" would follow the Contract and provide ceiling warranty information, including acts that would impact the validity of a warranty in the OMM. (RP 2458-59 (10-6-14pm) (Hartman); RP 2589 (10-7-14am) (Wildt); RP 2107-08 (10-2-14am) (Hobbs)). This is a negligence issue; not a causation issue.[21]

[21] By contrast, causation involved whether the WSP would have taken steps to act on the ceiling warranty information had HDR/Turner fulfilled the duty to provide it in the OMM. At trial, WSP employee Richard Howerton testified he was responsible for reviewing the OMM that he would have passed the information to Marshall Donnelly's supervisor, James Atteberry, at the WSP Engineering Department. (RP 1018, 1022, 1024-25 (9-23-14pm). Atteberry testified if the May 23, 2006 letter had been brought to

3. The trial court erred by refusing plaintiffs' proposed alternative language to Jury Instruction 14.

A trial court abuses its discretion if its decision was manifestly unreasonable, or if its discretion was exercised on untenable grounds or for untenable reasons. *Boeing Co. v. Harker–Lott,* 93 Wn. App. 181, 186, 968 P.2d 14 (1998). "Each party is entitled, when the evidence warrants it, to have his theory of the case submitted to the jury under appropriate and properly requested instructions." *Logue v. Swanson's Food, Inc.,* 8 Wn. App. 460, 463, 507 P.2d 1204 (1973).

Plaintiffs, faced with the lesser of two evils, attempted to mitigate the trial court's error in giving Instruction 14 with additional proposed supplemental language stating that ("**[y]ou may consider the language of the contract * * * as evidence of the standards and specifications that applied to the defendants.**" (CP 535A) (**Appendix F**). While not optimal, this would at least have allowed plaintiffs in closing argument to connect the Contract language requiring HDR/Turner to provide ceiling warranty information in the OMM to the undisputed admissions of HDR/Turner managers and their construction expert that a reasonably prudent contractor would follow the contract and include in the OMM "actions, circumstances, or conditions that could impact the validity of a

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his attention he would have prohibited all of the workers under his authority from walking on the metal security ceilings. (RP 934-35 (9-23-14pm); RP 1023-25 (9-23-14pm).

warranty." (RP 650-53, 697-98 (9-22-14am); RP 2107-08 (10-2-14am); RP 2458-59, 2461 (10-6-14pm); RP 2589 10-7-14am)).

The trial court rejected this attempt and, instead, the trial judge made it clear that he was prohibiting plaintiffs' counsel from arguing that the jury should consider the Contract to determine the applicable standard of care and negligence. Giving Instruction 14, as argued above, was error under a de novo standard of review. For the same reasons, rejecting plaintiffs' proposed additional language to that instruction was error.

C. The trial court erred by ruling, as a matter of law, that the Independent Contractor Rule provides immunity to general contractor HDR/Turner.

Application of the Independent Contractor Rule is a legal question reviewed de novo.[22] The Independent Contractor Rule is an affirmative defense.[23] Judge North ruled, as a matter of law, that "Turner and/or the joint venture comprised of HDR and Turner are not vicariously liable for the alleged negligence of Noise Control * * *." (CP 540; RP 1565-68 (9-29-14pm)). This decision was error for several reasons, particularly in light of the plain meaning of the Supreme Court's decision in *Davis*.

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[22] *See, e.g., Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 940, 29 P.3d 50 (2001) *aff'd and remanded*, 148 Wn. 2d 911, 64 P.3d 1244 (2003) (summary judgment on independent contractor issue); *Michaels v. CH2M Hill, Inc.*, 171 Wn. 2d 587, 597, 257 P.3d 532 (2011) (questions of law, including the meaning of immunity statutes, duty, and legal cause) *Reynolds v. Hicks*, 134 Wash.2d 491, 496, 951 P.2d 761 (1998) (Whether a defendant owes a legal duty of care to a plaintiff in the context of the independent contractor rule is a question of law, which this court reviews de novo).

[23] *See* CR 8(c) ("* * * and any other matter constituting avoidance or affirmative defense"). *See also* CP 84, p. 154 (Turner's "Fourth Affirmative Defense").

General contractor immunity under the Independent Contractor Rule is in modern times the exception rather than the rule. "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions." Comment b of the Restatement (Second) of Torts, § 409 (1965). As adopted by *Davis,* Section 385 of the Restatement[24] provides:

> **One who on behalf of the possessor of land erects a structure or creates any other condition thereon** is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 417, 150 P.3d 545 (2007) (*quoting* Restatement (Second) of Torts, § 385 (1965)) (emphasis supplied).

In this case, only HDR/Turner "acted on behalf of the possessor of land" (the WSP in this case). HDR/Turner was solely responsible for the final product – the building – and how that building was to be constructed. Only HDR/Turner had the right and obligation to inspect subcontractor Noise Control's work; only HDR/Turner had the right to accept or reject that work; and only HDR/Turner was answerable to the WSP. (Exh. 59).

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[24] "Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted."

No independent contractor on this project had that role, those rights, or this responsibility.

As Judge Spearman properly recognized in earlier rulings, HDR/Turner falls squarely within the Supreme Court's very purpose in adopting Restatement (Second) of Torts, § 385. (CP 338; 472, pp. 7674-83). Like the defendant in *Davis*, HDR/Turner, as the general contractor on this design-build project, was liable to plaintiffs regardless of the Independent Contractor Rule.

As Judge Spearman properly noted, there are three general areas from which the many exceptions to the Independent Contractor Rule flow, citing Comment b of the Restatement (Second) of Torts, § 409 (1965). That Comment establishes three broad sources of exceptions to the Independent Contractor Rule applicable to this case: (1) Negligence of the employer in selecting, instructing, or supervising the contractor; (2) Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff; and (3) Work which is s pecially, peculiarly, or "inherently" dangerous. *See* Restatement (Second) of Torts § 409 (1965), Comment b; (CP 338).

HDR/Turner clearly had a non-delegable duty to third parties like Mr. Donnelly. This is the only logical result after *Davis,* where the Washington Supreme Court unequivocally established defendants' legal

duty of *reasonable care in its work in constructing buildings*, and articulated a "deterrence" rationale behind its decision. *Davis,* 159 Wn.2d at 417-20. This policy basis is essentially identical to reasoning behind nondelegable general contractor duties in worksite safety cases such as *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990) and *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978).

The Washington Supreme Court in *Stute* noted that "the policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury." *Stute*, 114 Wn.2d at 461. The *Stute* court held that 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." *Id.* at 464.

In *Kelley*, the Supreme Court reasoned that placing "the ultimate responsibility" for safety on the general contractor "will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Kelley*, 90 Wn.2d at 331-32. The Supreme Court concluded that the best way to ensure that safety precautions are taken is to make the general contractor responsible

for them. *Id.* Clearly, the Supreme Court in *Davis* declined to "insulate" negligent "designers and builders" from liability, *Davis*, 159 Wn.2d at 419-20, for exactly the same reasons it did so in *Kelley* and *Stute*: because safety is "part of the business of a general contractor." *Kelley,* 90 Wn.2d at 331-32.

Where the Supreme Court creates exceptions to the Independent Contractor Rule, its rationale is to prevent an owner or general contractor from "shifting his or her liability by hiring an independent contractor to perform a task." *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 281, 635 P.2d 426 (1981). As joint venturers and collectively as the "general contractor" on this design-build project, HDR/Turner is in exactly the same position with the same liability as Baugh Industrial, the defendant general contractor in *Davis.*

By applying the Independent Contractor Rule to insulate HDR/Turner, Judge North rendered the Supreme Court's recognition in *Davis* of the importance of "the deterrent effect of tort law on negligent builders" meaningless. A general contractor like HDR/Turner does not "build" anything: instead, it hires subcontractors to construct the building. Allowing a general contractor to avoid liability under *Davis* simply by hiring subcontractors – as every general contractor does – would defeat

the Supreme Court's purpose in *Davis*. No court has allowed such a result and this Court should not allow it here.

D. The trial court erred by refusing to allow plaintiffs' expert Del Bishop to offer opinions concerning HDR/Turner's right and obligation to control its ceiling installation subcontractor, Noise Control.

While a trial court ordinarily has discretion to decide the admissibility of expert testimony, *Tauscher*, 96 Wn.2d at 281, a trial court abuses that discretion when it applies the wrong legal standard to an issue. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) *opinion corrected,* 22 P.3d 791 (2001). Here, the trial court excluded plaintiffs' expert's proposed testimony which would have confirmed HDR/Turner's right and obligation to supervise the work of a subcontractor like Noise Control. This went directly to the issue of HDR/Turner's nondelegable duty to Mr. Donnelly and to prove that exceptions to the Independent Contractor Rule apply. Judge North based his decision to exclude this testimony on his Independent Contractor Rule decision. His decision to exclude Mr. Bishop's related testimony was error for the reasons addressed above.

E. The trial court erred by including a Verdict Form requiring plaintiffs to separately prove the individual negligence of joint venturers HDR and Turner.

The trial court gave the jury a Verdict Form requiring plaintiffs to prove the individual negligence of each member of the HDR/Turner joint venture. This Court reviews the issue de novo. *See Thompson,* 153 Wn.2d at 453; *Cox,* 141 Wn.2d at 442. "The purpose of a joint venture is similar to a partnership but it is limited to a particular transaction or project" and partnership law generally applies to joint ventures. *Pietz v. Indermuehle,* 89 Wn. App. 503, 509-10, 949 P.2d 449 (1998). "**Joint venture members are vicariously liable for each other's acts**, such liability being founded on the voluntary relationship that has arisen between the parties." *Adams v. Johnston*, 71 Wn. App. 599, 610-11, 860 P.2d 423 (1993) *amended on other grounds,* 869 P.2d 416 (1994) (emphasis supplied).

HDR, an architectural firm, and Turner, a construction company, formed their joint venture for the purpose of securing a contract to design and build structures at the WSP. (Exh. 3; Exh. 4). HDR was not simply the "architect" here and Turner was not simply the "contractor:" "They were together the "general contractor" – the "design-build team" – hired to "perform all the work" required for the project. (Exh. 3, pp. 017, 023, 026, 101). They had concurrent project management responsibilities

under the HDR/Turner contract with the State (signed by "HDR/Turner") and under the joint venture contract between HDR and Turner (including, for instance HDR's responsibility for "management of the MEP and other design-build subcontractors"). (Exh. 3, p. 017; Exh. 4). These contracts define the project and they define the general contractor responsible for the project. HDR and Turner are, equally, the "general contractor" just as Baugh Industrial Contractors, Inc. was the general contractor in *Davis*.

Judge North's decision to reverse Judge Spearman's proper summary judgment rulings and, specifically, his decision to give the jury a Verdict Form with separate lines for HDR and Turner was clear, prejudicial legal error. Plaintiffs relied on Judge Spearman's July, 2014 rulings when they tried the entire case against "HDR/Turner" as the general contractor. The retroactive practical result of Judge North's Verdict Form was to create unnecessary juror confusion through a shell game at trial. While the plaintiffs had ample evidence that the design-build team (HDR/Turner) was negligent, it was often impossible to prove whose employee or manager made a particular error or omission. There was absolutely no legal basis to impose such a shell game on the plaintiffs or the jurors in this case.

F. The trial court's erroneous proximate cause instruction, Jury Instruction 15, requires reversal because of HDR's improper superseding cause argument.

"A new trial may be granted based on prejudicial misconduct of counsel if the moving party establishes that the conduct complained of constitutes misconduct, as distinct from mere aggressive advocacy, and that the misconduct is prejudicial in the context of the entire record." *Miller v. Kenny,* 180 Wn. App. 772, 814, 325 P.3d 278 (2014). The Washington Supreme Court in *Anfinson v. FedEx Ground Package Sys., Inc.* 174 Wn2d 851, 281 P.3d 289 (2012), addressed attorney misconduct involving erroneous jury instructions:

> In sum, instruction 8 was misleading because it was ambiguous, permitting both an interpretation that was, arguably, a correct statement of the law and an interpretation that was an incorrect statement of the law. **Anfinson has demonstrated that this misleading statement was prejudicial by showing that the incorrect statement was actively urged upon the jury during closing argument. No greater showing of prejudice from a misleading jury instruction is possible without impermissibly impeaching a jury's verdict.**[25]

It is undisputed that plaintiffs timely and repeatedly objected to a superseding cause instruction, that the trial court decided not to give one, and that the superseding cause language inadvertently left in the proximate cause instruction (Jury Instruction 15) was a mistake. It is beyond dispute that Mr. Scanlan, HDR's counsel was aware of this mistake, deliberately

[25] *Anfinson,* 174 Wn.2d at 876-77 (emphasis supplied).

chose not to disclose it to the trial court and other parties, and instead prepared his closing argument focusing on the erroneous instruction. His closing argument "actively urged" the jury to base their decision on the erroneous superseding cause language not just once, but twice. (RP 3088-89 (10-9-14pm)). Just as in *Anfinson,* no greater showing of prejudice is possible.

HDR's argument was more egregious than in *Anfinson* because it relied on an undisclosed and obvious oversight by the trial court and other parties' attorneys. This was not, as in *Anfinson*, an attorney compounding a trial court's intended but legally erroneous jury instruction by using it in closing argument, but rather an attorney making an improper and prejudicial closing argument focusing on a legal defense the trial court clearly and unequivocally rejected.

This misconduct was particularly prejudicial because HDR argued the superseding cause defense in the absence of the Court giving a proper jury instruction on the defendants' burden of proof. (CP 542). HDR's argument that, if there was a superseding cause, "you" (the jury) cannot find any of the defendants "negligent, liable, responsible," wrongly confuses the concepts of negligence and proximate cause.

Prejudice to plaintiffs could have been avoided had HDR's counsel advised the Court of the erroneous superseding cause language, rather than

taking advantage of the error ambushing the plaintiffs and the trial court. Indeed, the trial court had earlier cautioned all counsel not to misuse jury instructions when it gave the insurance instruction (WPI 2.13) when it ordered the parties not to argue it or to comment on it. (RP 2500-01 (10-7-14am); RP 2911 (10-8-14pm)).

Because HDR's misconduct was flagrant and likely to mislead the jury, plaintiffs sufficiently preserved this issue by raising it in their Motion for a New Trial. *Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967); *Riley v. Dep't of Labor & Indus.*, 51 Wn.2d 438, 443-44, 319 P.2d 549 (1957). Any argument that plaintiffs somehow waived this claim of error or HDR's misconduct related to it fails for several reasons. First, there is no doubt as to plaintiffs' position throughout the course of this case on the superseding cause issue as the record contains volumes of briefing and discussion of the issue. (CP 395, 523, 524, 546, 547, 572; RP 1371-72 (9-25-14pm); RP 2743-45 (10-8-14am)). Second, the trial court admitted that the superseding cause language never should have been included in Jury Instruction 15. (CP 191, 573, pp. 9688-89). Finally, the misconduct was flagrant, intentional and likely to mislead the jury. By the time HDR's attorney made his closing argument, objecting to the superseding cause comments was akin to the judicial recognition in Washington that "[t]he pain resulting from an evidential harpoon

frequently is exacerbated by extraction, and the prejudice may be compounded by an instruction to disregard." *Storey v. Storey,* 21 Wn. App. 370, 375, 585 P.2d 183 (1978).

G. The trial court erred by rebuking plaintiffs' counsel during closing argument, falsely instructing the jury that plaintiffs' counsel had cheated by violating an agreement.

"There are limits to the remarks a judge may make in rebuking an attorney" in front of a jury, beyond which reversal is required. *State v. Whalon*, 1 Wn. App. 785, 798-800, 464 P.2d 730 (1970). Rebukes of an attorney within the presence of the jury warrant reversal where prejudice is shown. Prejudice may be presumed if the remarks were calculated to have a prejudicial effect. *State v. Gairns*, 20 Wn. App. 159, 163, 579 P.2d 386 (1978). A trial judge's rebuke that reflects negatively on the *integrity* of counsel or suggests counsel acted unethically requires reversal. *Whalon*, 1 Wn. App. at 799; *State v. Levy*, 8 Wn. 2d 630, 648, 113 P.2d 306, 313 (1941). A "**judge's comment must not reflect on the integrity of counsel" because "[s]uch a reflection destroys the effectiveness of counsel in the eyes of the jury.**" *Whalon*, 1 Wn. App. at 798-800 (emphasis supplied).[26]

---

[26] *See also State v. Levy*, 8 Wn. 2d 630, 644, 113 P.2d 306 (1941) ("The language of the court here complained of was a rebuke to counsel, and would clearly tend to put counsel in an unfavorable light before the jury, entitling the accused to a new trial before a jury not subject to such unfavorable influence or comment. * * * Thus, the reflection on

A trial court crosses that line when it instructs the jury that an attorney violated an agreement, particularly during closing argument and where that allegation is demonstrably and admittedly false. Judge North instructed the jury, in the middle of plaintiffs' closing argument:

> Ladies and gentlemen, you should know that the lawyers had an informal agreement that they would let the other side know before they show transcripts to the jury. Mr. Gardner did not let the other – the defendants know that he was going to be showing excerpts of transcripts to the jury before his closing.

(*See* RP 3010 (10-9-14am)). Judge North's rebuke of plaintiffs' counsel, at the insistence of and upon the misrepresentations of defense counsel, directly attacked plaintiffs' counsel's integrity and ethics. The accusation was clearly false at the time, and the trial court had before it all the information necessary to determine that defense counsel was incorrectly representing the record. In his post-trial Order, Judge North admitted that the accusations by the defense were false and his rebuke should never have been given. (CP 573, p. 9691). Prejudice is presumed and, given the timing of the rebuke during plaintiffs' closing argument, it was severe. Reversal is required.

---

counsel's integrity, or, to be more accurate, the inference to that effect, clearly constituted error").

H. Plaintiffs are entitled to a new trial.

A trial court's decision to deny a new trial is reversible where there is an abuse of discretion or "when it is predicated on an erroneous interpretation of the law." This Court gives less deference to a trial court decision to deny a new trial than it would where the trial court granted the request. *See Kuhn v. Schnall,* 155 Wn. App. 560, 570-71, 228 P.3d 828 (2010). For the same reasons set forth above, Judge North abused his discretion by denying plaintiffs' Motion for a New Trial.

Further, the Cumulative Error Doctrine recognizes that multiple errors might combine to deny a litigant a fair trial, even where each individual error does not prejudice the litigant in isolation. *State v. Davis,* 175 Wn.2d 287, 345, 290 P.3d 43 (2012); *Storey,* 21 Wn. App. at 374, Washington courts apply the doctrine in civil cases. *See Storey,* 21 Wn. App. at 374. The doctrine applies here because each of the errors described above were prejudicial and the trial court's decision to prohibit the jury from considering key Contract language to determine negligence and preventing plaintiffs from arguing their liability theory under *Davis* was fundamentally unfair.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and remand this case for a new trial on all issues.

Dated: July 14, 2015 SWANSON ❖ GARDNER, PLLC

By: _____
Todd W. Gardner, WSBA#11034
Peter E. Meyers, WSBA#23438
Attorneys for Appellants

APPENDIX A

NOISE CONTROL OF WASHINGTON, INC.

812 N. Mödella • Box 2784 • Spokane, WA 99220 • 509/534-6284 • FAX 509/534-5598 • 1-800-284-3756

May 23, 2006

Turner Construction Inc.
1415 N. 13th Ave,
Walla Walla, WA 99362

Attn: Jim Elves:

Re: WSP North Close Security Compound
Security Plank Ceilings

To answer your question, "Can other trades walk on the ceilings?" We asked Environmental Interiors, the answer was "No, it would void all warranties."

The installation of the plank ceilings is a one step operation. The wall angle is installed and the planks installed and screwed to the wall angle. It is a progressive system. Fortunately the light fixtures are surface mounted only requiring a power drop and the HVAC is minimal. Enclosed, please find the Security Plank Ceiling Schedule reflecting the Addenda 2 finish schedule, and the Larry Hartman clarifications for MSC 1 & 2.

2' x 2' Security Lock-Down Ceilings:

The 2'x 2' Security ceilings are standard Acoustical "T" grid with a special metal panel with flared edges that snap down under the "T" bulk. The installation will be similar to the Acoustical Ceilings in that we will first install the grid, and then allow other trades to do there work before snapping in the panels. The access panels have 90o edges to allow for future removal, and are screwed to the grid. Enclosed please find the revised 2'x 2' Security Ceiling Schedule for MSC 3 & 4.

Construction Schedule:

As the installation is similar we hereby request that the MSC 3 & 4 ceilings are combined with the AM 1 & 3 ceilings. We plan to segment our crew into 2 sections, One for MSC 1 & 2 and the other for the balance of the work including the Acoustical Wall Panels. We are currently preparing a Building by building time to install schedule for your scheduler.

EXHIBIT 38 - emphasis added

TC000043

Pltfs' Exh. 38 - 001

APPENDIX B

2. Maintenance and Service Record: Include manufacturers' forms for recording maintenance.

T. Spare Parts List and Source Information: Include lists of replacement and repair parts, with parts identified and cross-referenced to manufacturers' maintenance documentation and local sources of maintenance materials and related services.

U. Maintenance Service Contracts: Include copies of maintenance agreements with name and telephone number of service agent.

V. Warranties and Bonds: Include copies of warranties and bonds and lists of circumstances and conditions that would affect validity of warranties or bonds.
1. Include procedures to follow and required notifications for warranty claims.

W. Operation and Maintenance Documentation Directory: Prepare a separate manual that provides an organized reference to emergency, operation, and maintenance manuals.

X. Operation and Maintenance Manuals: Assemble a complete set of operation and maintenance data indicating operation and maintenance of each system, subsystem, and piece of equipment not part of a system.
1. Engage a factory-authorized service representative to assemble and prepare information for each system, subsystem, and piece of equipment not part of a system.
2. Prepare a separate manual for each system and subsystem, in the form of an instructional manual for use by Owner's operating personnel.

Y. Manufacturers' Data: Where manuals contain manufacturers' standard printed data, include only sheets pertinent to product or component installed. Mark each sheet to identify each product or component incorporated into the Work. If data include more than one item in a tabular format, identify each item using appropriate references from the Design/Build Contract Documents. Identify data applicable to the Work and delete references to information not applicable.
1. Prepare supplementary text if manufacturers' standard printed data are not available and where the information is necessary for proper operation and maintenance of equipment or systems.

Z. Drawings: Prepare drawings supplementing manufacturers' printed data to illustrate the relationship of component parts of equipment and systems and to illustrate control sequence and flow diagrams. Coordinate these drawings with information contained in Record Drawings to ensure correct illustration of completed installation.
1. Do not use original Project Record Documents as part of operation and maintenance manuals.
2. Comply with requirements of newly prepared Record Drawings in Design/Builder's Specification Division 1 Section "Project Record Documents."

.04 *Closeout Submittals: Project Record Documents*

A. General:
1. Record Drawings: Submit to Owner's Representative copies of Record Drawings as follows:
a. Final Submittal: Submit two sets of Record CAD Drawing files; annotate all contract modifications.
1) Electronic Media: CD-R.
2. Record Specifications: Submit two copies of Project Manual in electronic format, Specifications, including addenda. Annotate all contract modifications.
3. Record Prints: Maintain one set of blue-line or black-line white prints of the Contract Drawings and Shop Drawings.
a. Mark Record Prints to show the actual installation where installation varies from that shown originally. Require individual or entity who obtained record data, whether individual or entity is Installer, Subcontractor, or similar entity, to prepare the marked-up Record Prints.
1) Give particular attention to information on concealed elements that would be difficult to identify or measure and record later.

APPENDIX C

T. Spare Parts List and Source Information: Include lists of replacement and repair parts, with parts identified and cross-referenced to manufacturers' maintenance documentation and local sources of maintenance materials and related services.

U. Maintenance Service Contracts: Include copies of maintenance agreements with name and telephone number of service agent.

V. Warranties and Bonds: Include copies of warranties and bonds and lists of circumstances and conditions that would affect validity of warranties or bonds.
   1. Include procedures to follow and required notifications for warranty claims.

W. Operation and Maintenance Documentation Directory: Prepare a separate manual that provides an organized reference to emergency, operation, and maintenance manuals.

X. Operation and Maintenance Manuals: Assemble a complete set of operation and maintenance data indicating operation and maintenance of each system, subsystem, and piece of equipment not part of a system.
   1. Engage a factory-authorized service representative to assemble and prepare information for each system, subsystem, and piece of equipment not part of a system.
   2. Prepare a separate manual for each system and subsystem, in the form of an instructional manual for use by Owner's operating personnel.

Y. Manufacturers' Data: Where manuals contain manufacturers' standard printed data, include only sheets pertinent to product or component installed. Mark each sheet to identify each product or component incorporated into the Work. If data include more than one item in a tabular format, identify each item using appropriate references from the Design/Build Contract Documents. Identify data applicable to the Work and delete references to information not applicable.
   1. Prepare supplementary text if manufacturers' standard printed data are not available and where the information is necessary for proper operation and maintenance of equipment or systems.

Z. Drawings: Prepare drawings supplementing manufacturers' printed data to illustrate the relationship of component parts of equipment and systems and to illustrate control sequence and flow diagrams. Coordinate these drawings with information contained in Record Drawings to ensure correct illustration of completed installation.
   1. Do not use original Project Record Documents as part of operation and maintenance manuals.
   2. Comply with requirements of newly prepared Record Drawings in Design/Builder's Specification Division 1 Section "Project Record Documents."

END OF SECTION

APPENDIX D

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child, Plaintiffs, vs. ENVIRONMENTAL INTERIORS, INC., a foreign corporation; HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation, TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20", Defendants.	NO. 11-2-37290-1 SEA ORDER ON DEFENDANT TURNER CONSTRUCTION COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come on before this Court on Defendant Turner Construction Company's Motion for Partial Summary Judgment. Turner sought an order dismissing plaintiffs' claims that (1) Turner is vicariously liable for the alleged fault of Noise Control, (2) Turner had a duty to provide a means of access the ceiling besides the access panels (3) Turner negligently constructed the ceiling and (4) the HDR/Turner joint venture has liability independently from the duties of its members. The Court having considered:

1. Defendant Turner Construction Company's Motion for Partial Summary Judgment;

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2. Declaration of John W. Rankin, Jr in Support of Defendant Turner Construction Company's Motion for Partial Summary Judgment, with exhibits thereto;
3. Plaintiffs' Combined Memorandum in Opposition to Defendants' HDR and Turner's Motions for Partial Summary Judgment;
4. Declaration of Todd W. Gardner in Opposition to Defendants' HDR and Turner's Motions for Partial Summary Judgment, with exhibits thereto;
5. Declaration of Peter E. Meyers in Opposition to Plaintiffs' Combined Response to Defendants HDR and Turner's Motions for Partial Summary Judgment, with exhibits thereto;
6. Defendant Turner Construction Company's Reply in Support of Motion for Partial Summary Judgment; and
7. Declaration of John W. Rankin, Jr., in Support of Turner Construction Company's Reply Re: Motion for Partial Summary Judgment, with exhibit thereto.

And the Court having heard the argument of counsel and having considered the files and pleadings previously filed in this action,

Turner motion to dismiss plaintiffs' negligent construction claim turns on the issue of whether it is legally responsible for the acts of independent contractor, Noise Control. Plaintiffs cite *Davis v Baugh*, 159 Wn2d 413, 417, 150 P.3d 545 (2007). In *Baugh*, the Supreme Court abandoned the completion and acceptance doctrine and instead adopted the Restatement (Second) of Torts § 385:

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the **dangerous character** of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

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Turner claims it is not responsible for the acts of independent contractor Noise Control citing the *Restatement (Second) of Torts* § 426:

> an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor.

There are exceptions to this rule, however, when any of the following situations exist:

> 1. Negligence of the employer in selecting, instructing, or supervising the contractor.
> 2. Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff.
> 3. Work which is specially, peculiarly, or **"inherently" dangerous.**
>
> *Restatement (Second) of Torts* § 409, cmt. b.

There is no dispute that Noise Control is an independent contractor. The issue is whether the alleged negligent acts of Noise Control caused there to be a dangerous condition such that Turner/HDR should be liable to third persons that were injured. *Jackson v. City of Seattle,* 158 WnApp. 647, 656, 244 P.3d 425 (2010). Whether Noise Control created a "dangerous" condition when it allegedly installed the ceiling improperly is a question for the jury. *Williamson v. Allied Group,* 117 WnApp. 451, 459, 72 P.3d 230 (2003). This issue is inter-related with the other disputed factual issues such as whether or not it was foreseeable that workers would walk on the ceiling and whether sufficient warning and/or training was provided to WSP. Turners' motion to dismiss plaintiff's claim that it bears vicarious liability for the acts of Noise Control is DENIED.

For the foregoing reasons, Turners motion to dismiss plaintiffs' negligent construction claims is DENIED.

For the same reason HDR's motion was denied, Defendant Turner's motion that plaintiffs must show which individual acts by Turner breached a duty owed to plaintiffs (as opposed to acts of the Joint Venture) is DENIED.

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DATED this 29th day of July, 2014.

Honorable Mariane C. Spearman

Presented by:

REED McCLURE

By _____
John W. Rankin, Jr., WSBA No. 6357
Suzanna Shaub, WSBA No. 41018
Attorneys for Defendant Turner Construction Company

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child,

Plaintiffs,

v.

ENVIRONMENTAL INTERIORS, INC., a foreign corporation; HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20,"

Defendants.

NO. 11-2-37290-1 SEA

ORDER ON DEFENDANT HDR'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. HEARING

1. Date. July 25, 2014

2. Appearances.

a. Plaintiffs appeared through their counsel of record, Peter E. Meyers of Swanson Gardner PLLC.

b. Defendant HDR Architecture, Inc., appeared through its counsel of record, Terence J. Scanlan and Lindsey M. Pflugrath of Skellenger Bender, PS.

skellengerbender
1301 - Fifth Avenue, Suite 3401
Seattle, Washington 98101-2605
(206) 623-6501

c. Defendant Noise Control of Washington, Inc., appeared through its counsel of record, Thomas R. Merrick Merrick Hofstedt & Lindsey, PS.

d. Defendant Turner Construction, Inc., appeared through its counsel of record, John W. Rankin, Jr., of Reed McClure.

3. Purpose. To consider the partial summary judgment motions of HDR Architecture, Inc. to dismiss Plaintiffs' claims that HDR was negligent in (1) failing to place a warning in the OMM and (2) its design of the IMU South Building.

4. Evidence. The Court considered the pleadings and records on file, as well as oral arguments and the following submissions by the parties:

a. HDR Architecture's Submissions and Evidence:

(1) Defendant HDR's Motion for Partial Summary Judgment dated June 26, 2014;

(2) Declaration of Terence J. Scanlan in Support of HDR's Motion for Partial Summary Judgment dated June 26, 2014, and exhibits attached thereto; and

(3) Defendant HDR's Reply in Support of its Motion for Partial Summary Judgment dated July 21, 2014.

b. Plaintiffs' Submissions and Evidence:

(1) Plaintiffs' Combined Memorandum in Opposition to Defendants' HDR and Turner's Motions for Partial Summary Judgment dated July 14, 2014;

(2) Declaration of Peter E. Meyers in Opposition to Plaintiffs' Combined Response [sic] to Defendants HDR and Turner's Motions for Partial Summary Judgment dated July 14, 2014, and exhibits attached thereto; and

(3) Declaration of Todd W. Gardner in Opposition to Defendants' HDR and Turner's Motions for Partial Summary Judgment dated July 14, 2014, and exhibits attached thereto.

II. FINDINGS

Following oral argument, review of the pleadings submitted in conjunction with this motion, and being fully apprised in the premises, the Court FINDS as follows:

1. An issue of fact exists as to whether the May 23, 2006, letter would have been circulated if it had been included in the O&M Manual. Therefore, HDR's motion to dismiss Plaintiff's failure to warn claims is DENIED.

2. Plaintiffs are not making claims that that HDR's design of the IMU South Building for the Washington State Penitentiary North Expansion Project was negligent. HDR's motion is GRANTED as follows:

(1) HDR's design was not negligent;

(2) HDR was not negligent as to the choice of ceiling system as between Celline and Lockdown;

(3) HDR had no duty to design a ceiling that could be walked upon; and

(4) HDR had no duty to design access to the plenum area beyond the access panels provided in its design.

3. HDR is not challenging its joint venture status with Turner or any vicarious liability that might flow therefrom. Instead, HDR seeks a ruling reflecting that, in its individual capacity, HDR was not negligent in its design of the IMU South building. (HDR mot. p 11, ln 6-9). As noted above, Plaintiffs are not alleging that HDR/Turner was negligent in its design of the building. This is not an architect malpractice case. Plaintiffs claim that HDR/Turner was negligent in its failure to warn and/or train the WSP employees about the ceiling. Certainly Plaintiffs must prove that the joint venture HDR/Turner was negligent in either the design or the construction, or both, of the IMU. *Estep v Hamilton,* 148 WnApp. 246, 201 P.3d 331 (2008), a case cited by HDR during oral argument, is distinguishable. In *Estep* the partnership had dissolved prior to the plaintiff's claim arising against one of the partners. Here there is no dispute that HDR/Turner was still in existence as a joint venture entity at the time of the alleged negligent design/construction of the ceiling. Therefore, Plaintiffs are not

required to prove that HDR was individually negligent. HDR's motion seeking to establish that it was not negligent in its individual capacity is DENIED.

DATED this 29th day of July, 2014.

Mariane C. Spearman, Judge
King County Superior Court

Presented by:

s/ Terence J. Scanlan
Terence J. Scanlan, WSBA No. 19498
Lindsey M. Pflugrath, WSBA No. 36964
SKELLENGER BENDER, P.S.
Attorneys for HDR Defendants

FILED
KING COUNTY, WASHINGTON

JUL 29 2014

SUPERIOR COURT CLERK
BY PHILLIP HENNINGS
DEPUTY

THE HONORABLE MARIANE C. SPEARMAN
Hearing: July 25, 2014 @ 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child Plaintiffs, vs. ENVIRONMENTAL INTERIORS, INC., a foreign corporation; HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20," Defendants.	NO. 11-2-37290-1 SEA ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER having come on before the undersigned judge of the above entitled Court on the Plaintiffs Motion for Partial Summary Judgment and the Court having reviewed the supporting and responsive pleadings filed herein as follows:

1. Plaintiffs' Motion for Partial Summary Judgment

2. Declaration of Todd W. Gardner in Support of Plaintiffs' Motion for Partial Summary Judgment with Exhibits 1 – 26

3. HDR's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment

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4. Declaration of Terence J. Scanlan in Opposition to Plaintiffs' Motion for Partial Summary Judgment with Exhibits 1-8

5. Noise Control's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment

6. Errata to Noise Control's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, at P. 17, 1, 22-23

7. Declaration of Rossi F. Maddalena in Support of Noise Control's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment with Exhibits A-E

8. Declaration of Jeremy Jeffers in Support of Noise Control's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment

9. Defendant Turner Construction Company's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment

10. Declaration of John W. Rankin, Jr. in Opposition to Plaintiffs' Motion for Partial Summary Judgment with Exhibits 1-9

11. Plaintiffs' Reply in Support of Motion for Partial Summary Judgment

12. Reply Declaration of Peter E. Meyers in Support of Plaintiffs' Combined Reply re Plaintiffs' Motion for Partial Summary Judgment with Exhibits 1-12.

It is hereby ORDERED that Plaintiffs' Motion for Partial Summary Judgment is GRANTED IN PART AND DENIED IN PART as follows:

1. **Foreseeability**: That, as a matter of law, it was foreseeable that WSP employees or contractors may enter and walk in the plenum space on a metal security ceiling for the purpose of maintaining, repairing or modifying mechanical, electrical or plumbing systems during the useful life of the buildings constructed in the 2005-2007 WSP North Close Project, unless they were warned or provided training that the metal security ceilings were not designed to support the weight of a worker. **DENIED**

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2. **Operations and Maintenance Manual (OMM):** It has been established, as a matter of law:

a. That there is nothing in the OMM provided to the WSP warning, training or instructing WSP employees that the metal security ceilings were not designed to support the weight of a worker, or that walking on the metal security ceilings would void all manufacturer's warranties; **DENIED**

b. That defendants did not provide any written or other communication to the WSP warning or instructing its employees that the metal security ceilings were not designed to support the weight of a worker, or that walking on these ceilings would void all warranties; **DENIED**

c. That defendants should have included the May 23, 2006 letter in the OMM; **DENIED**

d. That had the May 23, 2006 letter been included in the OMM, that the letter, or the information in the letter about the metal security ceilings, would have been circulated to Marshall Donnelly's and Justin Griffith's supervisor, Jim Atteberry. **DENIED**

3. **The HDR/Turner Joint Venture:** As a matter of law, defendants Turner and HDR, the design/build team for the construction of the WSP North Close Project, operated as a joint venture and, as joint venturers, they are vicariously liable for each other's acts in this case. **GRANTED**

4. **Affirmative defenses lacking factual and/or legal support.** The following affirmative defenses are hereby stricken and will not be allowed at trial by any defendant:

a. HDR's "intervening acts" affirmative defense. **DENIED. Whether it is appropriate to give a jury instruction on this issue will be decided by the trial judge.**

b. Affirmative defenses seeking allocation of fault to the State of Washington. As a matter of law, the jury in this case cannot allocate fault to the State of Washington or any department of the State. **GRANTED**

c. Affirmative defenses seeking allocation of fault, apportionment of fault or to otherwise assign fault to other nonparty persons or entities. **GRANTED, except as to Environmental Interiors, Inc.**

d. Affirmative defenses alleging that any plaintiff failed to mitigate damages **GRANTED**

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e. Noise Control and HDR affirmative defense alleging that plaintiffs fail to state a claim upon which relief may be granted. **GRANTED**

f. Assumption of the Risk. **GRANTED**

g. Noise Control's affirmative defense that it "complied with [the] manufacturer's installation [instructions], and further instruction from co-defendants Turner Construction, HDR Architecture and Environmental Interiors as to choice of product, placement and installation." **GRANTED**

h. Turner's affirmative defense that it "complied with the requirements of the project owner in the construction of the subject ceiling." **GRANTED**

j. Turner's affirmative defense that the "ceiling system in place at the location of the subject accident was properly selected and appropriate for its intended use." **GRANTED**

k. HDR's affirmative defense of "unavoidable accident." **GRANTED**

DONE this 29th day of July, 2014.

THE HONORABLE MARIANE C. SPEARMAN

PRESENTED BY
SWANSON ❖ GARDNER, PLLC

By: _____
Todd W. Gardner, WSBA #11034
Peter E. Meyers, WSBA#23438
Attorneys for Plaintiffs

COPY RECEIVED: APPROVED AS TO FORM:

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Thomas R. Merrick, WSBA#10945
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By: _____
Terence J. Scanlan, WSBA#19498
Attorney for Defendant HDR

By: _____
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APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child Plaintiffs, vs. HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20," Defendants.	NO. 11-2-37290-1 SEA

PLAINTIFFS' PROPOSED INSTRUCTIONS TO THE JURY

Dated: August 29, 2014

SWANSON ❖ GARDNER, PLLC

By: _____
Todd W. Gardner, WSBA#11034
Attorneys for Plaintiffs

Petra E Meyers
#23438

INTRODUCTION

This is a civil case brought by plaintiffs Jennifer Donnelly, as Co-Guardian of Marshall Donnelly, Jennifer Donnelly, individually, and Keith Kessler as Guardian ad Litem for Linley Donnelly against defendants HDR Inc., Turner Construction Company and Noise Control of Washington, Inc. The plaintiffs' lawyers are Todd Gardner and Peter Meyers. Defendant HDR's lawyers are Terry Scanlan and Lindsey Pflugrath. Defendant Turner's lawyers are John Rankin and Suzanna Shaub. Defendant Noise Control's lawyers are Thomas Merrick and David Cottnair. This case arises out of the construction of buildings at the Washington State Penitentiary by the defendants as part of what was known as the North Close Project in 2005-2007 and Marshall Donnelly's fall and injuries sustained when a metal security ceiling installed as part of that Project collapsed on December 29, 2009.

The plaintiffs claim that the defendants negligently failed to inform, train or warn the Washington State Penitentiary that workers could not safely walk on metal security ceilings in order to access mechanical, electrical or plumbing systems installed in the plenum spaces above metal security ceilings in order to repair, maintain or modify those systems. Plaintiffs also claim that the portion of the metal security ceiling that collapsed on December 29, 2009 was negligently installed by defendant Noise Control. The defendants deny these claims. The defendants claim that Marshall Donnelly was contributorily negligent. The defendants also claim that the Washington State Penitentiary was negligent for failing to instruct and train Marshall Donnelly not to walk on metal security ceilings, and that its negligence was the sole proximate cause of

Marshall Donnelly's injuries. The defendants deny the nature and extent of Marshall Donnelly's injuries and plaintiffs' damages.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion

about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.

WPI 1.01

NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the

issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02

NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03

NO.3

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07

NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10

NO. 5

(1) The plaintiffs claim that defendants HDR and Turner were negligent in one or more of the following respects:

a. For failing to inform, train or warn the WSP that the metal security ceilings were not designed to hold the weight of a worker, and that walking on those ceilings would void the manufacturer's warranties.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of warranties, in the Operation and Maintenance Manual.

c. For failing to inspect the work of its subcontractor, defendant Noise Control.

d. For the failure of its subcontractor, defendant Noise Control, to install the metal security ceiling in room C-165 in accordance with the manufacturer's installation instructions.

(2) The plaintiffs claim that defendant Noise Control was negligent in one or more of the following respects:

a. For failing to install the metal security ceiling in room C-165 in accordance with the manufacturer's installation instructions.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of warranties, in the Operation and Maintenance Manual.

The plaintiffs claim that one or more of these acts or failures to act was a proximate cause of Marshall Donnelly's injuries and plaintiffs' damages. The defendants deny these claims.

(3) In addition, the defendants claim as an affirmative defense that plaintiff Marshall Donnelly was contributorily negligent for entering the plenum space and walking on the metal security ceiling on December 29, 2009.

The defendants claim that this act was a proximate cause of plaintiff Marshall Donnelly's own injuries and plaintiffs' damages. The plaintiffs deny these claims.

(4) In addition, the defendants claim that the manufacturer, Environmental Interiors, designed an unreasonably dangerous product and that this failure was a proximate cause of Marshall Donnelly's injuries and plaintiffs' damages.

The defendants further deny the nature and extent of the claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party, and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

WPI 20.01 and 20.05.

(1) The plaintiffs claim that defendants HDR and Turner were negligent in one or more of the following respects:

a. For failing to inform, train or warn the WSP that the metal security ceilings were not designed to hold the weight of a worker, and that walking on those ceilings would void the manufacturer's warranties.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of warranties, in the Operation and Maintenance Manual.

c. For failing to inspect the work of its subcontractor, defendant Noise Control, and require that it install the metal security ceiling in room C-165 as required by the project plans and the manufacturer's instructions.

d. For the failure of its subcontractor, defendant Noise Control, to install the metal security ceiling in room C-165 in accordance with the manufacturer's installation instructions.

(2) The plaintiffs claim that defendant Noise Control was negligent in one or more of the following respects:

a. For failing to install the metal security ceiling in room C-165 in accordance with the manufacturer's installation instructions.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of warranties, in the Operation and Maintenance Manual.

The plaintiffs claim that one or more of these acts or failures to act was a proximate cause of Marshall Donnelly's injuries and plaintiffs' damages. The defendants deny these claims.

(3) In addition, the defendants claim as an affirmative defense that plaintiff Marshall Donnelly was contributorily negligent for entering the plenum space and walking on the metal security ceiling on December 29, 2009.

The defendants claim that this act was a proximate cause of plaintiff Marshall Donnelly's own injuries and plaintiffs' damages. The plaintiffs deny these claims.

(4) In addition, the defendants claim that the manufacturer, Environmental Interiors, designed an unreasonably dangerous product and that this failure was a proximate cause of Marshall Donnelly's injuries and plaintiffs' damages.

(5) In addition, the defendants claim and plaintiffs' deny that the failure of the WSP to prohibit workers like Marshall Donnelly from walking on metal security ceilings was an independent intervening cause that was not foreseeable to the defendants.

The defendants further deny the nature and extent of the claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

WPI 20.01 and 20.05.

NO. 7

The plaintiffs have the burden of proving each of the following propositions:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiffs in that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that Marshall Donnelly was injured;

Third, that the negligence of one or more of the defendants was a proximate cause of Marshall Donnelly's injuries.

The defendants have the burden of proving both of the following propositions:

First, that plaintiff Marshall Donnelly acted, or failed to act, in one of the ways claimed by the defendants, and that in so acting or failing to act, plaintiff Marshall Donnelly was negligent;

Second, that the negligence of plaintiff Marshall Donnelly was a proximate cause of his own injuries and was therefore contributory negligence.

WPI 21.02.01, 21.03 and 21.05;

NO. 8

The plaintiffs have the burden of proving each of the following propositions:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiffs in that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that Marshall Donnelly was injured;

Third, that the negligence of one or more of the defendants was a proximate cause of Marshall Donnelly's injuries.

The defendants have the burden of proving both of the following propositions:

First, that plaintiff Marshall Donnelly acted, or failed to act, in one of the ways claimed by the defendants, and that in so acting or failing to act, plaintiff Marshall Donnelly was negligent;

Second, that the negligence of plaintiff Marshall Donnelly was a proximate cause of his own injuries and was therefore contributory negligence.

The defendants also have the burden of proving the superseding cause affirmative defense.

WPI 21.02.01, 21.03 and 21.05.

NO. 9

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

WPI 21.01

NO. 10

Defendants are liable for negligent acts or failures to act in their work on the Project at the WSP when it was reasonably foreseeable that a third person would be injured as a result of that negligence.

It is not necessary that the sequence of events or the particular resultant injury or event be foreseeable. It is only necessary that the resultant injury or event fall within the general field of danger which the defendant should reasonably have anticipated.

The acceptance of the completed Project by the State of Washington is not a defense.

Davis v. Baugh, 159 Wn2d 413, 417,
150 P.3d 545 (2007).

NO. 11

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

WPI 10.01, 10.02

NO. 12

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

The negligence, if any, of a co-employee or employer of plaintiff Marshall Donnelly may not be imputed or charged to Marshall Donnelly.

You may not consider any evidence of alcohol consumption by Marshall Donnelly as evidence of contributory negligence or the part of any of the plaintiffs or as a failure to mitigate damages.

WPI 11.01 (modified)
Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment dated 7-29-14

NO. 13

Defendants HDR and Turner formed a Joint Venture for the purpose of serving as the Design/Build team and General Contractor for the Project at the WSP. HDR and Turner are responsible for the acts and failures to act of each other. So long as plaintiffs can carry their burden of proof that HDR or Turner acted or failed to act in one of the ways claimed by the plaintiffs, it is not necessary that plaintiffs prove which one was individually responsible for that act or failure to act.

Defendants HDR and Turner are responsible for the acts or failures to act of the subcontractors they contracted with to work on this Project.

NO. 14

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of the same injury. If you find that a defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiffs, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiffs the act of some other person who is not a party to this lawsuit then your verdict should be for the defendants.

WPI 15.01, 15.04 (modified)

NO. 15

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an event.

If you find that one or more of the defendants was negligent but that the sole proximate cause of the event was a later independent intervening cause or act of the State of Washington that the defendants, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendants is superseded and such negligence was not a proximate cause of the event. If, however, you find that one or more of the defendants was negligent and that in the exercise of ordinary care, the defendants should reasonably have anticipated the later independent intervening cause; then that cause does not supersede defendant's original negligence and you may find that one or more of the defendant's negligence was a proximate cause of the event.

It is not necessary that the sequence of events or the particular resultant[event be foreseeable. It is only necessary that the resultant event fall within the general field of danger which the defendant should reasonably have anticipated.

WPI 15.05 (modified)

NO. 16

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury and damages to the plaintiffs. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendant(s), the plaintiff, Marshall Donnelly. Entities may not include Marshall Donnelly's employer or co-employees, or plaintiffs Jennifer Donnelly or Linley Donnelly.

WPI 41.03, 41.04 (modified)

NO. 17

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury and damages to the plaintiffs. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendant(s), the plaintiff, Marshall Donnelly, and Environmental Interiors, Inc. Entities may not include Marshall Donnelly's employer or co-employees, or plaintiffs Jennifer Donnelly or Linley Donnelly.

WPI 41.03, 41.04 (modified)

NO. 18

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiffs for the total amount of such damages as you find were proximately caused by the negligence of one or more defendants, apart from any consideration of contributory negligence.

If you find for the plaintiffs, you should consider the following past economic damages elements for claims made on behalf of plaintiff Marshall Donnelly:

1. The reasonable value of necessary medical care, treatment and services received to the present time.

2. The reasonable value of earnings lost to the present time.

3. The reasonable value of necessary substitute domestic services and nonmedical expenses that have been required to the present time. Recovery for the reasonable value of services gratuitously rendered by a member of the family is permitted.

In addition, you should consider the following future economic damages elements for claims made on behalf of plaintiff Marshall Donnelly:

1. The reasonable value of necessary medical care, treatment and services with reasonable probability to be required in the future.

2. The reasonable value of earnings or earning capacity with reasonable probability to be lost in the future.

3. The reasonable value of necessary substitute domestic services and nonmedical expenses that will be required with reasonable probability in the future. Recovery for the reasonable value of future services gratuitously rendered by a member of the family is permitted.

In addition, you should consider the following non-economic damages elements for the claims made on behalf of plaintiff Marshall Donnelly:

1. The nature and extent of the injuries.

2. The disability, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

3. The pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future.

You should consider the following non-economic damages in your verdict for plaintiff Jennifer Donnelly, individually:

> Loss of the consortium of her husband, Marshall Donnelly. The term "consortium" means the fellowship of husband and wife and the right of one spouse to the company, cooperation and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.

You should consider the following non-economic damages in your verdict for Linley Donnelly, through her Guardian ad Litem, Keith Kessler:

> Loss to Linley Donnelly of the love, care, companionship and guidance of her father, Marshall Donnelly.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case and by these instructions.

WPI 30.02.01, 30.04, 30.05, 30.06, 30.07.01, 30.07.02, 30.08.01, 30.08.02, 30.09.01, 30.09.02, 32.04, 32.05 and *Howells v. North American Transportation and Trading Co.*, 24 Wash. 689, 64P. 786 (1901) and Washington Supreme Court Committee on Jury Instructions, Washington Pattern Jury Instructions-Civil, pages 309-310 Comment to WPI 30.09.01 (6th Ed. 2012).

NO. 19

Any award for future economic damages must be for the present cash value of those damages.

Noneconomic damages such as pain and suffering, disability, loss of enjoyment of life, disfigurement and loss of spousal and parental consortium are not reduced to present cash value.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the expenses must be paid or the earnings would have been received or the benefits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

WPI 34.02

NO. 20

According to mortality tables, the average expectancy of life of a male aged 31 years is 44.96 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

WPI 34.04

NO. 21

The law of torts serves two basic functions: it seeks to prevent future harm through the deterring effect of potential liability and it provides a compensation for damages suffered.

Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 481, 656 P.2d 483 (1983); *Shoemaker v. Ferrer*, 168 Wn.2d 193, 203 (2010); *Davis v. Baugh Industries Contractors*, 159 Wn.2d 413, 419-20 (2007); *Alejandre v. Bull*, 159 Wn.2d 674, 682 (2007), and *State v. P.B.M.C.*, 114 Wn.2d 454, 462-63, 788 P.2d 545 (1990); *Johnson v. Spider Staging Co.*, 87 Wn.2d 577, 583, 555 P.2d 997 (1976); *Babcock v. State*, 112 Wn.2d 83, 113, 768 P.2d 481 (1989) (Utter dissent); *Barr v. Interbay Citizen's Bank of Tampa, Fla.*, 96 Wn. 2d 698,699, 635 P.2d 441 (1981); *Jackowski v. Borchelt*, 151 Wn. App. 1, 12 (2009), *Stanton v. Bayliner Marine Corp.*, 68 Wn. App. 125, 132, 844 P.2d 1019 (1992) *rev'd on other grounds*, 123 Wn. 2d 64, 886 P.2d 15 (1993); *Tiegs v. Boise Corp.*, 83 Wn. App. 411, 419-20, 922 P.2d 115 (1996) (instruction on policy statement or purpose of the law or statute is permissible); 3 Harper, James & Gray, Law of Torts, §12.4 (2d Ed., 1986); W. Page Keeton et al, Prosser & Keeton on the Law of Torts § 4 @ pages 20-26 (5th Ed., 1984).

NO. 22

Many times jurors are tempted to speculate that a party has insurance, or worker's compensation, or other funds to pay for accidents or damage. Jurors are not to speculate. You are not to consider whether plaintiffs, defendant, neither or both, have insurance or other funds or programs available to them.

You are neither to make or increase an award because you think a defendant has insurance, or to decline or decrease an award because you think a plaintiff may have insurance to cover or help pay for such damages, if any, as may have occurred.

You are to decide only those questions that are given to you for decisions in this case. Even if there is insurance or other funding available to a party, the question of who pays or reimburses whom would be decided in a separate proceeding. Do not speculate about matters which are not an issue.

Whether or not a party has insurance or any other source of recovery available has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, workers' compensation, liability insurance, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to decide only those questions that are given to you to decide in this case.

Malavotte v. Bitney, King County Superior Court Cause No. 95-2-02345-2 by the Honorable Robert H. Alsdorf in 1996; *Watson v. Food Services,* King County Superior Court Cause No. 97-2-16226-2 KNT by the Honorable Jay V. White, May, 1999; *Ploegman v. Burlington Northern,* King County Superior Court Cause No. 98-2-17013-1 KNT by the Honorable Jeanette Burrage, Feb. 2000; *Lingen v. Vashon Pharmacy,* King County Superior Court Cause No. 98-2-19410-3 SEA by the Honorable Sharon Armstrong, April, 2000; *Green v. Food Services of America, Inc.,* King County Superior Court Cause No. 98-2-27296-1 KNT by the Honorable Jay V. White, over the objection of defense counsel, Dec. 2000; *Ashley v. City of Seattle, et al.,* King County Superior Court Cause No. 05-1-04447-1 SEA by the Honorable William L. Downing, Jan. 2007; *Walters v. Vashon Island Golf & Country Club,* King County Superior Court, Cause No. 05-2-23001-1 SEA by the Honorable William L. Downing, April 2008; Plaintiffs' Trial Brief

NO. 23

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

WPI 2.13

NO. 24

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room.

In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11

Honorable Douglass A. North

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child Plaintiffs, vs. HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20," Defendants.	NO. 11-2-37290-1 SEA JURY VERDICT

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was there any negligence by any of the following that was a proximate cause of injury to the plaintiff, Marshall Donnelly?

ANSWER: Circle Yes or No for each entity below:

Defendant: HDR/Turner: Yes No

Defendant: Noise Control: Yes No

(DIRECTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: What do you find to be the plaintiffs' amount of damages? (Do not consider the issue of contributory negligence, if any, in your answer.)

Marshall Donnelly:

Past Economic Damages: $_____

Future Economic Damages: $_____

Non-economic Damages: $_____

Non Economic Damages for:

Jennifer Donnelly: $_____

Linley Donnelly: $_____

(DIRECTION: If you answered Question 2 with any amount of money, answer Question 3. If you found no damages in Question 2, sign this verdict form.)

QUESTION 3: Was there any negligence by Marshall Donnelly that was a proximate cause of injury to himself?

ANSWER: (Write "yes" or "no") _____

(DIRECTION: If you answered "no" to Question 3, answer Question 4. If you answered "yes" to Question 3, skip Question 4 and answer Question 5.)

QUESTION 4: Assume that 100% represents the total combined negligence that proximately caused the plaintiffs' damage. What percentage of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question 1 to have been a proximate cause of the damage to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant: HDR/Turner: _____%
Defendant: Noise Control: _____%

TOTAL: 100%

QUESTION 5: Assume that 100% represents the total combined negligence that proximately caused the plaintiffs' damage. What percentage of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question 1 to have been a proximate cause of the damage to the plaintiffs and what percentage is attributable to the plaintiff, Marshall Donnelly's, negligence? Your total must equal 100%.

ANSWER:

Defendant: HDR/Turner: _____%

Defendant: Noise Control: _____%

Plaintiff, Marshall S. Donnelly: _____%

TOTAL: 100%

(DIRECTION: Sign this verdict form and notify the bailiff.).

_____

Foreperson

Honorable Douglass A. North

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child Plaintiffs, vs. HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20," Defendants.	NO. 11-2-37290-1 SEA JURY VERDICT

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was there any negligence by any of the following that was a proximate cause of injury to the plaintiff, Marshall Donnelly?

ANSWER: Circle Yes or No for each entity below:

Defendant: HDR/Turner: Yes No

Defendant: Noise Control: Yes No

Non-Party Environmental Interiors: Yes No

(DIRECTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: What do you find to be the plaintiffs' amount of damages?

(Do not consider the issue of contributory negligence, if any, in your answer.)

Marshall Donnelly:

Past Economic Damages: $_____

Future Economic Damages: $_____

Non-economic Damages: $_____

Non Economic Damages for:

Jennifer Donnelly: $_____

Linley Donnelly: $_____

(DIRECTION: If you answered Question 2 with any amount of money, answer Question 3. If you found no damages in Question 2, sign this verdict form.)

QUESTION 3: Was there any negligence by Marshall Donnelly that was a proximate cause of injury to himself?

ANSWER: (Write "yes" or "no") _____

(DIRECTION: If you answered "no" to Question 3, answer Question 4. If you answered "yes" to Question 3, skip Question 4 and answer Question 5.)

QUESTION 4: Assume that 100% represents the total combined negligence that proximately caused the plaintiffs' damage. What percentage of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question 1 to have been a proximate cause of the damage to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant: HDR/Turner: _____%
Defendant: Noise Control: _____%
Non-Party Environmental Interiors: _____%

TOTAL: 100%

QUESTION 5: Assume that 100% represents the total combined negligence that proximately caused the plaintiffs' damage. What percentage of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question 1 to have been a proximate cause of the damage to the plaintiffs and what percentage is attributable to the plaintiff, Marshall Donnelly's, negligence? Your total must equal 100%.

ANSWER:

Defendant: HDR/Turner: _____%

Defendant: Noise Control: _____%

Non-Party Environmental Interiors: _____%

Plaintiff, Marshall S. Donnelly: _____%

TOTAL: 100%

(DIRECTION: Sign this verdict form and notify the bailiff.).

_____

Foreperson

APPENDIX F

Honorable Douglass A. North

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child Plaintiffs, vs. HDR ARCHITECTURE, INC., a foreign corporation; HDR CONSTRUCTORS, INC., formerly known as HDR DESIGN-BUILD, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20," Defendants.	NO. 11-2-37290-1 SEA

PLAINTIFFS' SUPPLEMENTAL PROPOSED INSTRUCTIONS TO THE JURY

Dated: October 8, 2014

SWANSON ❖ GARDNER, PLLC

By: _____
Todd W. Gardner, WSBA#11034
Attorneys for Plaintiffs

NO. 32

You have heard testimony about the language in the Request for Proposal relating to maintenance information. You are instructed that there are no breach of contract claims against the defendants in this case, and you may not consider whether the contract was breached in considering whether the defendants have any liability to Mr. Donnelly for his fall. You may consider the language of the contract on the issues of causation and as evidence of the standards and specifications that applied to the defendants.

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child, Plaintiff, vs. HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20", Defendants.	NO. 11-2-37290-1 SEA JURY INSTRUCTIONS

COURT'S INSTRUCTIONS TO THE JURY

Douglass A. North
JUDGE DOUGLASS A. NORTH

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the

issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

HDR Architecture, Turner Construction Company, and Noise Control of Washington are corporations. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

INSTRUCTION NO. 4

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

INSTRUCTION NO. 7

(1) The plaintiffs claim that defendants HDR and Turner were negligent in one or more of the following respects:

a. For failing to inform, train, or warn the WSP that the metal security ceilings were not designed to hold the weight of a worker, and that walking on those ceilings would void the manufacturer's warranties.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operation and Maintenance Manual.

c. For failing to adequately inspect the work of its subcontractor, defendant Noise Control, to determine if it properly installed the metal security ceiling in room C-165.

(2) The plaintiffs claim that defendant Noise Control was negligent in one or more of the following respects:

a. For failing to properly install the metal security ceiling in room C-165.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operation and Maintenance Manual.

The plaintiffs claim that one or more of these acts or failures to act was a proximate cause of Marshall Donnelly's injuries and plaintiffs' damages. The defendants deny these claims.

(3) In addition, the defendants claim as an affirmative defense that plaintiff Marshall Donnelly was contributorily negligent in one or more of the following ways:

a. For failing to follow the requirements of the annual Job Safety Analysis;

b. For failing to determine whether or not it was safe to walk on the ceiling at C-165, and/or exercising his stop work authority.

The defendants claim that one or more of these acts was a proximate cause of plaintiff Marshall Donnelly's own injuries and plaintiffs' damages. The plaintiffs deny these claims.

The defendants further deny the nature and extent of the claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 8

The plaintiffs have the burden of proving each of the following propositions:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that Marshall Donnelly was injured;

Third, that the negligence of one or more of the defendants was a proximate cause of Marshall Donnelly's injuries.

The defendants have the burden of proving the following affirmative defenses claimed by the defendant:

First, that plaintiff Marshall Donnelly acted, or failed to act, in one of the ways claimed by the defendants, and that in so acting or failing to act, plaintiff Marshall Donnelly was negligent;

Second, that the negligence of plaintiff Marshall Donnelly was a proximate cause of his own injuries and was therefore contributory negligence.

INSTRUCTION NO. 9

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 10

A defendant is liable for negligent acts or failures to act in its work on the Project at the WSP if it was reasonably foreseeable that a third person would be injured as a result of that negligence.

It is not necessary that the sequence of events or the particular resultant injury or event be foreseeable. It is only necessary that the resultant injury or event fall within the general field of danger which the defendant should reasonably have anticipated.

The acceptance of the completed Project by the State of Washington is not a defense.

INSTRUCTION NO. 11

There are no claims for negligent design against HDR Architecture. You may not consider the design of the hallway, including the selection of the product, or the number and/or location of the access panels in reaching your verdict.

INSTRUCTION NO. 12

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

INSTRUCTION NO. 13

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 14

You have heard testimony about the language in the contract relating to maintenance and warranty information. You are instructed that there are no breach of contract claims against the defendants in this case, and you may not consider whether the contract was breached in considering whether the defendants were negligent. This evidence may be considered on the issue of causation.

INSTRUCTION NO. 15

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

INSTRUCTION NO. 16

There may be more than one proximate cause of the same injury. If you find that one or more of the defendants was negligent and that such negligence was a proximate cause of injury or damage to the plaintiffs, it is not a defense that some other cause or the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiffs was some other cause or the act of some other person who is not a party to this lawsuit then your verdict should be for the defendants.

INSTRUCTION NO. 17

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

The negligence, if any, of a co-employee or employer of plaintiff Marshall Donnelly may not be imputed or charged to Marshall Donnelly.

You may not consider any evidence of alcohol consumption by Marshall Donnelly as evidence of contributory negligence on the part of any of the plaintiffs or as a failure to mitigate damages.

INSTRUCTION NO. 18

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 19

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury and damage to the plaintiffs. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendant(s) and plaintiff Marshall Donnelly. Entities may not include Marshall Donnelly's employer or co-employees, or plaintiffs Jennifer Donnelly or Linley Donnelly.

INSTRUCTION NO. 20

You may not consider specific numbers provided by counsel during the cross-examination of Christina Tapia, PhD, for the cost of an annuity or the specific benefits provided as evidence.

INSTRUCTION NO. 21

You have heard evidence of two stuck access panels in Building A. You have also heard evidence of Environmental Interiors panels being refabricated into access panels at the request of Noise Control. You are instructed that this evidence is not to be considered as evidence of negligent installation at the area where Mr. Donnelly fell.

INSTRUCTION NO. 22

If you find for the plaintiffs, you should determine the damages of each plaintiff separately.

You should decide the case of each plaintiff separately as if it were a separate lawsuit. The instructions apply to each plaintiff unless a specific instruction states that it applies only to a specific plaintiff.

INSTRUCTION NO. 23

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiffs for the total amount of such damages as you find were proximately caused by the negligence of one or more defendants, apart from any consideration of contributory negligence.

If you find for the plaintiffs, you should consider the following past economic damages elements for claims made on behalf of plaintiff Marshall Donnelly:

1. The reasonable value of necessary medical care, treatment and services received to the present time, $1,404,721.00.

2. The reasonable value of earnings lost to the present time, $328,075.00.

3. The reasonable value of necessary substitute domestic services and nonmedical expenses that have been required to the present time. Recovery for the reasonable value of services gratuitously rendered by a member of the family is permitted.

In addition, you should consider the following future economic damages elements for claims made on behalf of plaintiff Marshall Donnelly:

1. The reasonable value of necessary medical care, treatment and services with reasonable probability to be required in the future.

2. The reasonable value of earnings or earning capacity with reasonable probability to be lost in the future.

3. The reasonable value of necessary substitute domestic services and nonmedical expenses that will be required with reasonable probability in the future. Recovery for the reasonable value of future services gratuitously rendered by a member of the family is permitted.

In addition, you should consider the following non-economic damages elements for the claims made on behalf of plaintiff Marshall Donnelly:

1. The nature and extent of the injuries.

2. The disability, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

3. The pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future.

If you find for plaintiffs, you should consider the following non-economic damages in your verdict for plaintiff Jennifer Donnelly, individually:

> Loss of the consortium of her husband, Marshall Donnelly. The term "consortium" means the fellowship of husband and wife and the right of one spouse to the company, cooperation and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.

If you find for plaintiffs, you should consider the following non-economic damages in your verdict for Linley Donnelly.

> Loss to Linley Donnelly of the love, care, companionship and guidance of her father, Marshall Donnelly.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case and by these instructions.

INSTRUCTION NO. 24

Any recovery for Marshall Donnelly or Linley Donnelly will be kept separately under supervision by the court.

INSTRUCTION NO. 25

The remaining life expectancy of a man aged 32 years is 44.33 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

INSTRUCTION NO. 26

Any award for future economic damages must be for the present cash value of those damages.

Noneconomic damages such as pain and suffering, disability, loss of enjoyment of life, disfigurement and loss of spousal and parental consortium are not reduced to present cash value.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the expenses must be paid or the earnings would have been received or the benefits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

INSTRUCTION NO. 27

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 28

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror

should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child, Plaintiff, vs. HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20", Defendants.	NO. 11-2-37290-1 SEA SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the following negligent? (Write "yes" or "no" for each)

ANSWER:

Defendant HDR Architecture: No

Defendant Turner Construction: No

Defendant Noise Control: No

(DIRECTION: If you answered "no" as to all defendants, do not answer any further questions, sign this verdict form and notify the bailiff. If you answered "yes" as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury to the plaintiffs? (Write "yes" or "no" for each defendant and non-party found negligent by you in Question 1)

ANSWER:

Defendant HDR Architecture: _____

Defendant Turner Construction: _____

Defendant Noise Control: _____

(DIRECTION: If you answered "no" to all the above parties, do not answer any further questions, sign this verdict form and notify the bailiff. If you answered "yes" as to any defendant, answer Question 3.)

QUESTION 3: What do you find to be the plaintiffs' amount of damages? *(Do not consider the issue of contributory negligence, if any, in your answer.)*

ANSWER:

Plaintiff Marshall Donnelly:

Past Economic Damages $_____

Future Economic Damages $_____

Non-Economic Damages $_____

Plaintiff Jennifer Donnelly: $_____

Plaintiff Linley Donnelly: $_____

(DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form and notify the bailiff.)

QUESTION 4: Was plaintiff Marshall Donnelly also negligent?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 4, skip Question 5 and answer Question 6. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was plaintiff Marshall Donnelly's negligence a proximate cause of the injury to plaintiffs?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 5, answer Question 6. If you answered "yes" to Question 5, skip Question 6 and answer Question 7.)

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant HDR Architecture: _____%

Defendant Turner Construction: _____%

Defendant Noise Control: _____%

(DIRECTION: Sign this verdict form and notify the bailiff.)

QUESTION 7: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the negligence of each defendant and non-party whose negligence was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff, and what percentage of this 100% is attributable to the plaintiff's negligence? Your total must equal 100%.

ANSWER:

Defendant HDR Architecture: _____%

Defendant Turner Construction: _____%

Defendant Noise Control: _____%

Plaintiff Marshall Donnelly: _____%

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATED: 10-10, 2014.

Danielle Malachon

Presiding Juror

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child, Plaintiff, vs. HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20", Defendants.	No. 11-2-37290-1 SEA ORDER DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL CLERK'S ACTION REQUIRED

Having considered all of the materials filed in support of and in opposition to plaintiffs' Motion for a New Trial, the court DENIES the motion.

1) **The court's inadvertent inclusion of the bracketed language concerning superseding cause did not deny the plaintiffs a fair trial.**

The court should not have included the superseding cause language in the proximate cause instruction. However, this language was not called to the court's attention by any party and did not deprive the plaintiffs of a fair trial considering the instructions as a whole.

a) **No party objected to the language in the proximate cause instruction.**

Plaintiffs are correct that the court's proximate cause instruction should not have included the bracketed language concerning superseding cause since the court had ruled that it would not submit the issue of superseding cause to the jury. But no party raised this issue with the court during the discussion of the proposed instructions on October 8, 2014. And no party assigned error to the language of the proposed instruction, so the court had no opportunity to correct the instruction prior to its submission to the jury. Parties waive errors in instructions when they fail to object to the instructions prior to the court's instructing of the jury.

b) **The superseding cause language did not deny the plaintiffs a fair trial.**

The instructions, taken as a whole, allowed all parties to argue their respective theories of the case, did not misstate the law, and fairly presented the case to the jury. Furthermore, it is not clear how this language could have had an impact on the jury's decision in this case. The language addressed the issue of proximate cause. The jury never reached the issue of proximate cause since the jury answered the very first question (negligence) "No" as to each defendant. It never reached the issue of proximate cause.

2) **The court's instructions fully allowed plaintiffs to argue that violations of the contract provided the causal connection between defendants' failure to warn the State and Mr. Donnelly's injury.**

Plaintiffs were able to argue their claim to the jury based upon the court's instructions. The plaintiffs' claims about violation of the contract went not to negligence but to the causal connection between the defendants' alleged negligent failure to warn the State and Donnelly's injury.

a) **Contrary to plaintiffs' assertion the court had not decided the issue of HDR's proposed instruction prior to hearing oral argument on the subject.**

Prior to oral argument, the court indicated that it thought there was some merit to HDR's argument that tort liability could not be solely based upon a negligence allegation arising from violation of the contact (10/8/14 transcript pp. 32-33). The court had not made a decision on the issue, however, prior to allowing for full presentations by all counsel.

b) **The plaintiffs could, and did, fully argue that the violations of the contract provided the causal connection between the defendants' failure to warn the State and Mr. Donnelly's injuries.**

The court's instructions in no way prevented plaintiffs from arguing their theory of the case to the jury. The plaintiffs' argument about violations of the contract went to the issue of the causal connection between defendants' alleged negligence and the injury, not to the issue of whether defendants were negligent.

The defendants had no duty to warn Mr. Donnelly, individually. They had no knowledge of Mr. Donnelly's existence. Their duty, if any, was to warn their client, the State, that it was unsafe to walk on the metal security ceilings in order to access the mechanical, electrical and plumbing equipment in the space above the ceilings. Plaintiff's theory was that the defendants' contract with the State required them to provide all information which affected the warranties to the State and that this included the information about the danger of walking on the security ceilings. Their allegation was that had the defendants complied with their contractual duties on

warranty information, this information would have been included in the OMM and in turn be transmitted to state workers at the penitentiary. This was not an issue about the negligence of the defendants in failing to warn, but rather about the causal connection between the failure to warn the State and Donnelly's injuries.

This argument was allowed by the jury instruction about which plaintiff complains. Jury instruction # 14 stated (emphasis added):

> You have heard testimony about the language of the contract relating to maintenance and warranty information. You are instructed that there are no breach of contract claims against the defendants in this case, and you may not consider whether the contract was breached in considering whether the defendants were negligent. <u>This evidence may be considered on the issue of causation.</u>

This instruction supported the argument that the plaintiffs made that the defendants' negligent failure to warn the State was casually connected to Mr. Donnelly's injury.

3) **Although the court should not have admonished plaintiffs' counsel during argument, it was not a significant event in light of all of the proceedings and plaintiffs received a fair trial.**

The court incorrectly admonished plaintiffs' counsel during closing argument. It was, however, a very mild admonition and was not significant in light of over three weeks of proceedings before the jury. A party is not entitled to a perfect trial, only a fair trial. That is what plaintiffs received. The court allowed almost all of plaintiffs' evidence, excluded over defendants' objection a good part of the evidence defendants sought to introduce, and provided a set of jury instructions which allowed plaintiffs to argue their theory of the case to the jury. The jury simply did not agree with the plaintiffs.

Dated this 17th day of November, 2014.

Douglass A. North

Honorable Douglass A. North