No. 30185-1

COURT OF APPEALS
OF THE STATE WASHINGTON
DIVISION THREE

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

Appellants,

v.

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

Respondent,

and

MICO, INCORPORATED, a Minnesota corporation; JAMES R. BONNER and JANE DOE BONNER, husband and wife, and the marital community comprised thereof, d/b/a INDUSTRIAL POWER BRAKE COMPANY,

Defendants.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
(Honorable Kathleen M. O'Connor)

BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

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I. INTRODUCTION

The Associated General Contractors of Washington ("AGC") respectfully submits this amicus curiae brief in support of the position of the defendant N. A. Degerstrom, Inc. seeking affirmance of the jury verdict dismissing all claims against it.

The AGC will not restate the facts as presented by the parties, but will focus on three legal issues of importance to the construction industry in Washington:

1. Whether subcontract provisions imposing safety obligations are valid and admissible in evidence.

2. Whether allegations of statutory and regulatory violations shift the burden of proof on negligence to the defendant.

3. Whether an alleged rescuer's state of mind is an element of a claim based on the rescue doctrine.

The AGC will demonstrate that the trial court was correct in ruling on these issues, and that this Court should affirm those rulings in order to preserve the expectations of those engaged in the construction industry

II. ARGUMENT

A. Subcontract Provisions Imposing Safety Obligations Are Valid And Admissible In Evidence.

In *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996), which involved the enforceability of a subcontract indemnity provision in a case involving injury to the subcontractor's employee, the Washington Supreme Court reiterated its long-standing respect for contracting parties' allocation of responsibility for safety on construction projects:

> The construction industry is highly structured by contractual relationships. This court has historically deferred to such contractual relationships in lieu of adopting new tort principles in this field. The allocation of responsibility for workplace injuries by contract is consistent with this historical policy and was expressly approved by the legislature.

In that case, the court found that the subcontract's allocation of safety responsibility to the subcontractor augmented that imposed upon it as an employer under relevant statutes and regulations: "This duty is imposed on the subcontractor by RCW 49.17.060 and WAC 296-155-040[1]...as well as express promises in the subcontract to comply with regulations and supervise the work." *Id.* at 757, 912 P.2d at 479.

Writing such express promises into subcontracts is one of the ways a general contractor can satisfy its duty under *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), to "comply with, or ensure compliance with, safety regulations under WISHA." *Moen*, 128 Wn.2d at 756, 912 P.2d at 478, citing *Stute*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). In *Degroot v. Berkley Construction, Inc.*, 83 Wn.App. 125, 920 P.2d 619 (1996), which was decided later in the same year as *Moen*, the Washington Court of Appeals approved the admission of a subcontract safety provision by the general contractor "as direct evidence of their attempt to exercise reasonable care to enforce safety regulations on the work site."[2] The *Degroot* court found that any potential confusion about

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[1] It was on the basis of these statutes and regulations that WISHA cited Mr. Lafayette's employer, Sharp-Line, but not the Respondent, N. A. Degerstrom, for safety violations. CP 1646-48.

[2] Plaintiff seems to place great importance on the specific safety obligations a general contractor seeks to impose on a subcontractor, finding a large distinction between

the provision was adequately addressed by a specific limiting instruction offered by the plaintiff.[3] *Id.* at 131, 920 P.2d at 622.

The foregoing makes clear that the Plaintiff is wrong at page 6 of her Reply Brief when she cites *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985), for the proposition that a "provision that purports to delegate a general contractor's primary and nondelegable duty to ensure compliance with safety regulations is irrelevant and inadmissible."[4]

That is not what *Ward* or any other Washington case has said. What *Ward* actually said is that a contractual allocation of responsibility for constructing a guardrail was not valid to limit the claims of a plaintiff who was not a party to the contract: "Of course, the admissibility of the contract [to show allocation of responsibility] depends on the validity of the asserted contractual delegation of the statutory and regulatory duty to erect a guardrail *vis-à-vis Ceco* [the subcontractor] *and Ward* [the injured employee of the general contractor]." (emphasis added). The *Ward* court

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requiring the subcontractor to supply safety *equipment* and requiring the subcontractor to provide safety *information*. Appellant's Reply Brief at fn. 8. As noted, later cases interpreting *Stute* have not limited its holding in that way.

[3] In this case, the Plaintiff did not offer a specific limiting instruction. Rather, it was the Plaintiff who offered a general instruction that she now characterizes as "misleading."

[4] It is unfortunate that the courts have approached this line of cases by questioning whether a legal duty of care is "delegable" or "non-delegable." In reality, it is hard to imagine any existing legal duty that is "delegable" by contract to someone else. Legal duties either exist or they do not. While contracting parties may allocate liability for violation of those duties amongst themselves, they cannot abrogate the existence of their duties to third parties by fiat.

then concluded that such a provision was "invalid *as to the injured employee.*" (emphasis added).

Ward thus does nothing more remarkable than apply the well-established principle that "[l]ike any contract...a contract purporting to exculpate can be enforced only against those party to it. Thus, it cannot reduce or diminish the legal rights of those not party to it." *Gall v. McDonald Industries*, 84 Wn. App. 194, 201, 926 P.2d 934, 938 (1996), citing *State v. Antione*, 82 Wn.2d 440, 444, 511 P.2d 1351 (1973).[5]

A ruling that subcontract provisions making subcontractors responsible for the safety of their own employees are invalid and inadmissible for *all* purposes would overrule *Moen* and its progeny and demolish the long-standing respect Washington courts have shown for contracting parties in the construction context. More importantly, doing so would remove an important incentive for subcontractors to take responsibility for the safety of their own employees, over which those subcontractors, as those employees' direct employers, usually have far more control than general contractors do.

B. Allegations Of Statutory And Regulatory Violations Do Not Shift The Burden Of Proof To Defendants On Negligence.

Plaintiff cites *Yurkovich v. Rose,* 68 Wn. App. 643, 847 P.2d 925 (1993) and *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999) as

[5] Viewing the issue in this way alleviates the confusion expressed by Judge Sweeney in his concurrence in *Degroot.* It is not a question of whether "the general contractor could discharge its nondelegable duty by contractually shifting that obligation to the subcontractor," 83 Wn.App. at 132 (Sweeney J., concurring). It is merely a question of whether that contractual agreement regarding responsibility for safety is binding on a plaintiff who is not a party to it.

somehow shifting the burden to defendants to disprove negligence when statutory or regulatory violations are alleged. That is not what those cases stand for.

In both of those cases, the *only* evidence before the court was that the defendants had acted negligently, including having failed to comply with statutory and regulatory requirements applicable to their activities. In *Yurkovich*, a 13-year-old girl was injured when a school bus driver failed to take even rudimentary steps to protect her safety when he dropped her off. The court stated:

> [T]he **evidence here is undisputed** that appellants breached the standard of care owed to Amanda Hebener. The evidence is clear, in fact, that the defendant bus driver did not use his stop sign or flashing lights, did not keep Amanda in his view until she was safely across the street, and permitted her to go to the back of the bus before crossing the highway, all in violation of clear legislative and/or administrative code requirements. There is **no competent evidence that defendants**, in dropping off a 13-year-old girl on the side of a highway when it was virtually dark and without taking any precautions to ensure that she crossed safely, **met the highest degree of care** consistent with the practical operation of the school bus. **It is uncontested that appellants violated legislative enactments** specially designed to protect the safety of children riding school buses. They have produced no admissible evidence to justify or excuse these violations. **From this evidence**, reasonable minds can reach only one conclusion, and that is that the defendants...violated the duty of care they owed to Amanda Hebener.
>
> Where the evidence fails to create an issue for the trier of fact, it promotes justice and conserves judicial resources to decide it as a matter of law. This fundamental tenet does not lose force simply because the evidence of negligence includes evidence of violations of statutes, ordinances, or

> administrative rules. If the state of the evidence meets the test for decision as a matter of law, it would serve no useful purpose to submit that issue to the trier of fact for decision.

Yurkovich, 68 Wn.App. at 653, 847 P.2d at 930. (emphasis added).

Similarly, in *Pudmaroff*, in which a bicyclist was hit by a car in a crosswalk, the court stated: "As in *Yurkovich*, Allen **clearly breached her duty of care** to the crosswalk user, and as indicated above, there is **no indication Pudmaroff acted unreasonably** in his use of the crosswalk." *Pudmaroff*, 138 Wn.2d at 69, 977 P.2d at 581. (emphasis added).

These cases embody the unremarkable proposition that when the evidence overwhelmingly points to the defendant's negligence—including statutory and regulatory violations—the defendant may be found negligent as a matter of law. They cannot reasonably be interpreted to do what the Plaintiff attempts to do here: shift to the defendant the burden of disproving its negligence simply because the plaintiff alleges a statutory or regulatory violation. That is particularly true when there is a vast amount of evidence that the defendant met its duties of care, both statutory and common law, as there is in this case.[6]

Holding to the contrary would contravene RCW 5.40.050 which explicitly states that "[a] breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence." Such a holding would also upend the expectations of contractors (and their

[6] Twenty-three witnesses testified during this month-long trial, and over 120 exhibits were admitted into evidence.

insurers) where regulatory violations are concerned, making them almost automatically liable for civil damages whenever WISHA takes issue with their practices on a project.

C. An Alleged Rescuer's State Of Mind Is An Element Of A Claim Based On The Rescue Doctrine.

At page 14 of her Reply, Plaintiff claims that the "estate was not required under the rescue doctrine to present evidence of LaFayette's state of mind in taking control of the runaway auger truck..." That is a misstatement of Washington law.

In the seminal Washington case involving the rescue doctrine, *French v. Chase*, 48 Wn.2d 825, 297 P.2d 235 (1956), the Washington Supreme Court made it very clear that in order for the doctrine to apply, the rescuer must both perceive imminent peril to another and be motivated by a desire to avert it.

> The application of the rescue doctrine is not a matter of first impression in this jurisdiction. In *Highland v. Wilsonian Inv. Co.*, 1932, 171 Wash. 34, 17 P.2d 631, we held that, where the defendant's negligence creates a dangerous situation which imminently imperils the life or limb of another, such peril invites rescue, and that, if the rescuer is injured in effecting a rescue, the defendant's negligence is the proximate cause of the rescuer's injury. **The rescuer may act either upon impulse or after deliberation, so long as his act is**, as stated by Judge Cardozo in *Wagner v. International R. Co.*, 1921, 232 N.Y. 176, 133 N.E. 437, 438, 19 A.L.R. 1, '**the child of the occasion.**' However, **in determining whether there is peril to some person, and in acting to effect a rescue after the determination that there is peril**, the rescuer must be guided by the standard of reasonable care under the circumstances.

Id. at 829, 297 P.2d at 238. (emphasis added).

The foregoing makes it clear that for the rescue doctrine to apply, the rescuer himself must be shown to have: (1) determined that there was peril to another person; and (2) acted to effect a rescue.

The *French* Court reiterates these two requirements of the rescuer's perception and motivation in the individual elements it then enumerates:

> (3) (The issue of whether the rescuer's determination [of imminent peril to another] conformed with the reasonably prudent man standard is a question for the jury...)
>
> (4) **After determining that imminent peril to the life or limb of a person exists, the rescuer, in effecting the rescue**, must be guided by the standard of reasonable care under the circumstances.

Id. at 830, 297 P.2d at 239. (emphasis added).

In this case, it is a complete mystery whether the deceased was even aware of a pickup truck on the road when he jumped into the cab of the runaway auger truck, much less whether he made a determination—reasonable or otherwise—that its occupants were in imminent peril. Nor is there any evidence that he was in any sense "acting to effect a rescue" when he did what he did.[7]

In the absence of any evidence at all as to these elements of the rescue doctrine, the court properly excluded as irrelevant a jury instruction relating to a general contractor's duty to the general public. No member

[7] Plaintiff argues that state-of-mind cannot be an element of the rescue doctrine because the state-of-mind of a deceased alleged rescuer cannot be known. That is true in this case, but in many, if not most others, the perceptions and motivation of the alleged rescuer will be inferable from the objectively observable facts. The trial judge allowed lay witnesses to testify as to those facts, but properly prohibited them from speculating as to the state of mind of the deceased. CP 1292-93, 1995

of the public was injured in this incident, and the Plaintiff failed as a matter of law to show the deceased had the welfare of any member of the public in mind when this tragedy occurred.

Applying the rescue doctrine to a construction workplace injury claim appears to be a novel concept in Washington. The Court should not expand the potential liability of participants in the construction industry in that way unless the Plaintiff has clearly satisfied all of the elements of the doctrine. In this case it is clear that the Appellant has not.

III. CONCLUSION

The construction industry relies on contractual agreements to define the roles and obligations of its participants, and Washington courts are extremely deferential to those agreements. One of the ways Washington courts have recognized for a general contractor to fulfill its obligation to provide a safe workplace is to contractually assign responsibility for safety to subcontractors. The courts have found such agreements valid and admissible in evidence for that purpose, and this case presents no reason to change the existing law.

The construction industry also relies on pronouncements of the legislature regarding potential civil liability arising from regulatory violations. Transferring the burden of proof to contractors to show the lack of negligence any time such a violation was alleged (or even proved) would undermine that reliance.

Finally, this Court should not take the novel step of applying the rescue doctrine to a workplace injury on a construction site when the

Plaintiff has failed to prove the elements of that doctrine. The jury's verdict should be affirmed.

DATED this 27th day of March, 2013.

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