No. 30185-1

COURT OF APPEALS
OF THE STATE OF 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
(Hon. Kathleen M. O'Connor)

APPELLANTS' ANSWER TO BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

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I. INTRODUCTION

The estate does not ask this Court to expand liability for the construction industry, but merely seeks application of existing law. Amicus curiae Associated General Contractors of Washington ("AGC") makes no arguments that should deter this Court from reversing the judgment as to N.A. Degerstrom and finding it negligent as a matter of law.

First, AGC acknowledges that a provision purporting to make a subcontractor solely responsible for compliance with safety regulations is "invalid as to the injured employee" and, therefore, must be excluded in an action based on the employee's injuries or death. But AGC ignores that this is precisely what N.A. Degerstrom's subcontract provision did here—it purported to make subcontractor Sharp-Line "solely responsible" for the safety of its employees, including Daren LaFayette. Exh. P5 at 6 (excerpt at Appendix A). The trial court's refusal to exclude that invalid and irrelevant provision wrongly allowed N.A. Degerstrom to argue it had no responsibility to supervise or enforce compliance with the chock regulation.

Second, the record conclusively establishes that N.A. Degerstrom, having presumed to wash its hands of any responsibility for the safety of Sharp-Line's employees, took full advantage of that absolution and did *nothing* to ensure that Sharp-Line used wheel chocks when required. This compels a conclusion that N.A. Degerstrom was negligent as a matter of law.

Third, Steven Arce's testimony created a jury question on whether a reasonable person in LaFayette's position would have perceived that Arce and his companion, Jacob Wells, were in imminent peril and thus acted to prevent injury to them. Accordingly, the estate was entitled to have the jury instructed on a general contractor's duty to members of the public within a construction zone.

II. ARGUMENT

A. AGC Acknowledges that a Provision Purporting to Delegate Sole Responsibility for Safety Is "Invalid as to the Injured Employee," but Ignores that N.A. Degerstrom's Subcontract with Sharp-Line Did Exactly That.

A general contractor and subcontractor have concurrent, nondelegable duties to comply with safety regulations for the benefit of all workers on a jobsite. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 463, 788 P.2d 545 (1990), citing RCW 49.17.060. The general contractor bears "the primary responsibility for compliance with safety regulations because [its] innate supervisory authority constitutes sufficient control over the workplace." *Id*. at 463.

AGC does not dispute that a provision that purports to make the subcontractor solely responsible the safety of its employees is "invalid *as to the injured employee*." *AGC Amicus Brief* at 4, quoting *Ward v. Ceco Corp.*, 40 Wn. App. 619, 629, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985) (emphasis by AGC). But AGC ignores that the provision at issue here did exactly that. The Sharp-Line subcontract stated: "Subcontractor shall be *solely responsible* for the protection and safety of

its employees." Exh. P5 at 6 (emphasis added, excerpt at Appendix A). The trial court's refusal to grant the estate's motion in limine and exclude this provision from evidence allowed N.A. Degerstrom to emphasize the provision to the jury and wrongly characterize it as "appropriate and allowable under Washington law." RP 46-48, 847.

AGC's description of *Ward*, as applying the general principle that a contract purporting to exculpate or shift responsibility cannot reduce or diminish the legal rights of those not a party to it, is fitting. *Ward* recognized that the admissibility of a contract provision in a construction injury or death case depends on its validity as to the injured employee. *Id*. at 627. The *Ward* court held that a provision delegating responsibility for safety measures is "invalid as to the injured employee" and therefore "irrelevant and…inadmissible." *Id*. at 629. That holding applies here.

AGC points out that requiring a subcontractor to promise compliance with safety regulations is one of the measures a general contractor can take in satisfying its duty under WISHA, as recognized in *Stute*, 114 Wn.2d at 464. In *Degroot v. Berkley Construction, Inc.*, a majority of this Court held that such a promise was relevant to whether a general contractor exercised reasonable care. 83 Wn. App. 125, 129-30, 920 P.2d 619 (1996). But unlike the provision in *Degroot*, the provision at issue here did not merely contain a promise to comply with safety regulations, but purported to make the subcontractor "solely responsible" for its employees' safety. *Id*. at 127. There is a material difference between a general contractor's requiring a subcontractor to a promise to

comply with safety regulations, while retaining its own concurrent obligation as general contractor, and purporting to delegate all responsibility for safety by making the subcontractor "solely responsible."

AGC cautions this Court not to expand the holding of *Ward* or state it so broadly that it could interfere with the enforceability of indemnity provisions as between contractors, which was upheld in *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996). But AGC's concern is misplaced because the issue here is not indemnification of N.A. Degerstrom by its subcontractor, but N.A. Degerstrom's attempt to put sole responsibility for safety on the subcontractor and enforce that provision as to an injured worker. Nothing in Washington law supports upholding such an irresponsible action by a general contractor.

Under *Stute* and *Ward,* a provision purporting to delegate sole responsibility for safety is "invalid as to the injured employee" and thus irrelevant and inadmissible, and the prejudicial refusal to exclude such a provision in this case requires reversal. General contractors may not wash their hands of their safety obligations by contractually delegating sole responsibility to a subcontractor and then turning a blind eye to the subcontractor's practices. Yet that is exactly what the trial court's ruling permitted N.A. Degerstrom to claim it permissibly did here.

B. No Burden Shifting Is Required; the Uncontroverted Evidence Compels a Conclusion that N.A. Degerstrom Was Negligent as a Matter of Law.

Pudmaroff[1] and *Yurkovich*[2] apply the settled rule that "[i]f all reasonable minds would conclude that the defendant failed to exercise ordinary care, the judge can find negligence as a matter of law." *Pudmaroff*, 138 Wn.2d at 68, quoting *Mathis v. Ammons*, 84 Wn. App. 411, 418-19, 928 P.2d 431 (1996), *review denied*, 132 Wn.2d 1008 (1997). They recognize that, although violation of a statute is no longer negligence per se under RCW 5.40.050, "this does not mean RCW 5.40.050 necessarily bars a trial court from finding negligence as a matter of law." *Id*. A defendant's failure to present any excuse or justification for breaching the standard of care as expressed in the requirements of a statute, ordinance, or administrative rule compels a finding of negligence as a matter of law. *Id*.

The estate established that N.A. Degerstrom took full advantage of its contractual delegation of safety responsibilities to Sharp-Line and did nothing to ensure chocks were being used when required. There is no question that Sharp-Line violated WAC 296-155-610(2)(b) by failing to chock the wheels of its auger truck when parked on an incline. *See Appellant's Reply Brief* at 19-20. Sharp-Line was cited for violating that regulation. CP 544. As for N.A. Degerstrom, AGC asserts there is "a vast amount of evidence that the defendant met its duties of care." *AGC*

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[1] *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999).

[2] *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993).

Amicus Brief at 6. But while the record is vast, AGC—like N.A. Degerstrom itself—points to no specific evidence that N.A. Degerstrom did *anything* to ensure that subcontractors used wheel chocks when required, given the foreseeable hazard of rollaway vehicles on the Flowery Trail Road jobsite. Nor could AGC do so, because there *is* no such evidence.

The uncontroverted evidence was that N.A. Degerstrom failed to provide chocks or require Sharp-Line to do so, failed to require Sharp-Line to address parking on inclines in its accident prevention program, and failed to supervise or enforce compliance with the chock requirement in its own program. N.A. Degerstrom *never* inspected for chock usage by Sharp-Line; indeed, job site foreman Dennis Arndt drove by and observed the auger truck just an hour before LaFayette's death without looking to see if chocks were being used. RP 480, 513.

N.A. Degerstrom's only defense was that it delegated to Sharp-Line sole responsibility for the safety of Sharp-Line employees. AGC acknowledges that such a delegation is "invalid *as to the injured employee*." *AGC Amicus Brief* at 4, quoting *Ward*, 40 Wn. App. at 629 (emphasis by AGC). Under *Pudmaroff* and *Yurkovich*, the uncontroverted evidence compels a conclusion that N.A. Degerstrom was negligent as a matter of law and that its negligence was a proximate cause of LaFayette's death.

C. Because the Estate Presented Sufficient Evidence to Satisfy the Elements of the Rescue Doctrine, the Jury Should Have Been Instructed on a General Contractor's Duty to Members of the Public within a Construction Zone.

AGC does not dispute that N.A. Degerstrom owed a duty of care to members of the public in the construction zone, such as Steven Arce and Jacob Wells. *See Argus v. Peter Kiewit Sons' Co.*, 49 Wn.2d 853, 856, 307 P.2d 261 (1957); *Blancher v. Bank of Cal.*, 47 Wn.2d 1, 8, 286 P.2d 92 (1955). Nor does AGC dispute that N.A. Degerstrom is liable to LaFayette for a breach of that duty if the elements of the rescue doctrine are met.[3]

It is true that the rescue doctrine requires evidence that the rescuer acted to effect a rescue after determining that another appeared to be in peril. But the rescuer's conduct must be judged according to an objective standard, lest the defendant benefit from the rescuer's incapacity or death from his injuries. The test is whether a "reasonably prudent person" would have concluded the person rescued appeared to be in imminent peril. *McCoy v. Am. Suzuki Corp.*, 136 Wn.2d 350, 355, 961 P.2d 952 (1998).

The estate presented sufficient evidence from which a jury could find that (1) a reasonably prudent person in LaFayette's position would have concluded that Mr. Arce and Mr. Wells appeared to be in imminent

[3] AGC misquotes the estate's Reply Brief regarding the rescue doctrine, leaving out the italicized word, "subjective": "The estate was not required under the rescue doctrine to present evidence of LaFayette's *subjective* state of mind in taking control of the runaway auger truck[.]" *Reply Brief* at 14-15 (emphasis added). AGC also omits the remainder of that sentence: "…or in diverting it from imminent collision with Arce's pickup." *Id*. at 15.

peril and (2) LaFayette responded by acting to prevent injury to them. Arce's pickup was plainly visible to LaFayette as the auger truck started rolling. RP 65-67. Arce saw the truck start to roll and came to the fearful realization that a head-on collision appeared unavoidable:

> …I didn't slam on the brakes or anything because it was—if I would have stopped or tried to stop, I was assuming that we were gonna get hit. And if I would have went any faster, it just would have made the collision sooner, so basically all I was able to do was pull to the right side of the road as far as I could against the guardrail, and at which time Jake told me, "Steve, you can't go any farther, we're gonna hit the guardrail." And right at that instant is when the gentleman [LaFayette] grabbed the steering wheel."

RP 69. Arce saw LaFayette run 100-plus feet from the rear of the auger truck and enter it. RP 67-68. LaFayette "jumped into the truck [and] grabbed the steering wheel, …popped up and slid over real fast into the driver's seat[.]" RP 70. The very first thing LaFayette did upon assuming control of the truck was to redirect it and narrowly prevent a head-on collision with Arce's pickup. RP 68-70. The two vehicles passed with no more than twelve inches between them. RP 70. Arce could see LaFayette's "shock[ed]" and "scared" expression as LaFayette successfully prevented the collision: "[H]e was just as shocked as we were." RP 69.

Given this evidence, it was error to refuse to instruct the jury regarding a general contractor's duty to members of the public in the construction zone—a duty actionable by a rescuer.

III. CONCLUSION

AGC ignores the record and raises concerns immaterial to this case. Nothing in AGC's brief should deter this Court from reversing the judgment as to N.A. Degerstrom and finding it negligent as a matter of law.

Respectfully submitted this 16th day of April, 2013.

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APPENDIX A

O. THIRD PARTY CLAIMS

That if notification of any claims have been made against the Subcontractor or the Contractor arising out of labor or materials furnished the project covered by this Subcontract Agreement, or otherwise on account of any actions or failures to act by the Subcontractor in the performance of this Subcontract Agreement, the Contractor may, at his discretion, pay such amounts, or withhold such amounts otherwise due or to become due hereunder to cover said claims and any costs or expenses arising or to arise in connection therewith pending legal settlement thereof, and any such amounts paid or withheld by the Contractor to be charged to the account of the Subcontractor. This right of the Contractor shall not be exclusive of any other rights of the Contractor herein or by law provided.

P. CORRECTION OF DEFICIENT WORK

That in case the Subcontractor shall fail to correct, replace and/or re-execute faulty or negligently done work and/or materials furnished under this Subcontract Agreement, when and as required by the Contractor, or shall fail to complete or diligently proceed with this Subcontract Agreement within the time herein provided for, or if the Contractor or any other Subcontractor shall be unable to proceed with the work because of any action by one or more employees of the Subcontractor or by a person or labor organization purporting or attempting to represent any employee of the Subcontractor, the Contractor, upon notice to the Subcontractor, shall have the right to correct, replace and or re-execute such faulty or defective work, or to take over this Subcontract Agreement and complete same, and to charge the cost thereof to the Subcontractor, together with any damages suffered by the Contractor, and caused by a delay in the performance of this Subcontract Agreement.

Q. WORK COMPLETION AFTER SUBCONTRACTOR DEFAULT

That in case of default on the part of the Subcontractor under the terms of this Subcontract Agreement, the material and equipment of the Subcontractor shall be left on the job for the use of the Contractor in completing the work covered by the terms of this Subcontract Agreement.

R. COMPLIANCE WITH LAWS

To comply with all federal and state laws, codes, and regulations and all municipal ordinances and regulations effective where the work is to be performed under this Subcontract Agreement, and to pay all costs and expenses connected with such compliance, to pay all applicable fees and taxes, including sales and use taxes, on all goods and services purchased by the Subcontractor, and also to pay all taxes imposed by any state or federal law for any employment insurance, pensions, old age retirement funds or any similar purpose and to hold the Contractor, other subcontractors, vendors, and the Owner harmless from any and all loss or damage occasioned by the failure of the Subcontractor to comply with the terms of this clause.

S. SPECIFIC PRIME CONTRACT PROVISIONS

To comply with such specific regulations, special provisions, or programs by which the Contractor is bound and which, if listed on the signature page of this Subcontract Agreement, will be attached to and included as a part of this Subcontract Agreement and acknowledged by the dated signatures or initials of both parties to this Subcontract Agreement.

T. HOUSEKEEPING AND SAFETY

Subcontractor shall regularly and legally remove all refuse, waste and debris produced by its operation. Subcontractor shall not permit its refuse to interfere with free access to the work site. In the event Subcontractor fails to remedy these cleanup obligations after notification of violation of these requirements, refuse removal may be done by Contractor and charged against the account of Subcontractor.

Subcontractor accepts responsibility to prevent accidents to any person who may be close enough to its operations to be exposed to Subcontractor's work-related hazards. Subcontractor shall be solely responsible for the protection and safety of its employees, for final selection of additional safety methods and means, and for daily inspection of its work area and safety equipment. Failure on the part of Contractor to stop unsafe Subcontractor practices shall in no way relieve Subcontractor of its responsibility hereunder. Subcontractor shall conform to Contractor's site-specific safety plan(s) and policies as directed by Contractor in writing or by Contractor's project supervisor.

Whenever requested by Contractor, Subcontractor shall furnish the following safety information as applicable. Failure to do so may be considered grounds for Contractor to require Subcontractor to cease work, without relieving Subcontractor's performance obligations under this Subcontract Agreement, until such information has been furnished and corresponding job safety measures have been provided.

1. Written Site-Specific Safety Plans as required by law relating to hazards specific to the job, such as traffic control or fall protection plans.

2. Material Safety Data Sheets as required by law for materials used by the Subcontractor on the site.

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

4. Any other safety documentation pertaining to the project that the law requires.

U. USE OF CONTRACTOR'S EQUIPMENT

That the Contractor's equipment shall be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

V. ROYALTIES, LICENSE FEES AND PATENTS

To pay all royalties and license fees, and to defend all suits or claims for infringement of any patent rights involved in the work of the Subcontractor under this Subcontract Agreement, and to save the Contractor harmless from loss, cost or expenses on account of such use or infringement by the Subcontractor.

W. LABOR PRACTICES

To make an assignment of the work to the proper craft in accordance with decisions of record or in accordance with the prevailing practice in the locality of the job. In the event there is a possibility of work stoppage over a dispute of assignment, the Contractor shall be notified.

X. CONTRACTOR'S LABOR AGREEMENTS

To abide by the labor agreements applicable to the Contractor insofar as they may apply to workers employed by the Subcontractor.

Y. BID VERSUS PAY QUANTITIES

In the event this Subcontract Agreement contains unit priced bid items, it is understood and agreed that any quantities and amounts mentioned are approximate only and may be increased or decreased without adjustment to the unit prices, and subject to final determination based upon final pay quantities as received by the Contractor from the Owner according to conditions that may be stipulated in the plans and specifications. Quantities and amounts which are not established on the basis of Prime Contract pay quantities will be determined by mutual agreement of the Contractor and Subcontractor. When Prime Contract pay quantities vary significantly from the bid quantities, the Subcontractor shall have the same opportunities for price adjustment as afforded the Contractor by the Prime Contract, providing such adjustments are agreed to in writing by all parties having authority to control the quantity of units installed or provided.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date stated below, I sent a copy of the foregoing document to be delivered in the manner indicated on the following parties:

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DATED this 16 day of April, 2013.

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