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)

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Nineteen-year-old Daren LaFayette burned to death after rescuing innocent members of the public from imminent collision with construction machinery that rolled away due to the concurrent negligence of a general contractor and subcontractor. But for the failure to use a simple, fail-safe device—a wheel chock—this tragic accident would not have happened, and LaFayette's life would not have been lost. Undisputed evidence established that the general contractor, N.A. Degerstrom, Inc., failed to supervise or enforce compliance with chock requirements, and it advanced no valid excuse or justification for this violation of the Washington Industrial Health and Safety Act of 1973 (WISHA). Yet, as a result of errors by the trial court, the jury returned and the court entered judgment on a verdict that absolved N.A. Degerstrom of negligence.

The trial court committed evidentiary error when it denied LaFayette's estate's motion in limine to exclude evidence that N.A. Degerstrom attempted to delegate to subcontractor Sharp-Line Industries, Inc., its nondelegable duty to ensure compliance with safety regulations. Such evidence was not relevant, and its erroneous admission was prejudicial because it provided N.A. Degerstrom an improper basis to argue—and the jury to find—that Sharp-Line, an immune nonparty, was solely negligent. This requires reversal and a new trial.

Setting aside the erroneously admitted evidence, LaFayette's estate was entitled to judgment as a matter of law on breach of duty and proximate causation. Because there was no evidence that N.A.

Degerstrom supervised or enforced compliance with the chock requirements, no properly admitted evidence supported a verdict that N.A. Degerstrom was blameless. Absent such evidence, N.A. Degerstrom was negligent as a matter of law, and its negligence was a proximate cause of the accident that killed LaFayette. The trial court thus erred in denying the estate's motion for judgment as a matter of law and a new trial limited to the issue of damages.

In addition, the trial court erred in refusing to instruct the jury that N.A. Degerstrom owed a duty to protect members of the public from harm while traveling through the construction site, independent of the duty to protect the health and safety of workers. Under the estate's proposed instruction, the jury could have found that N.A. Degerstrom's breach of this duty was a proximate cause of LaFayette's death in that he acted to rescue members of the public from imminent peril caused by N.A. Degerstrom's omissions. The refusal to give this instruction requires a new trial.

This Court should direct entry of judgment as a matter of law on negligence and proximate causation and remand for a new trial on damages. If this Court grants such relief, it should also reverse the summary judgment dismissal of LaFayette's mother's claim, as she raised a genuine issue of material fact regarding her dependence on her son for financial support under RCW 4.20.020.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. Appellants assign error to the trial court's denial of the estate's motion in limine no. 2, which requested exclusion of any evidence or argument that N.A. Degerstrom attempted to delegate responsibility for safety or otherwise relinquish control over Sharp-Line's work.

2. Appellants assign error to the trial court's denial of the estate's motion for judgment as a matter of law and a new trial.

3. Appellants assign error to the trial court's refusal to give the estate's proposed instruction no. 18, which would have instructed the jury that N.A. Degerstrom owed a duty to exercise ordinary care to protect the traveling public from dangerous conditions within the construction site.

4. Appellants assign error to the trial court's entry of summary judgment dismissing Dorothy Millican's personal claims on the grounds that she failed to raise an issue of material fact with respect to her dependence on LaFayette for financial support.

5. Appellants assign error to the trial court's entry of judgment on the verdict.

B. Statement of Issues.

1. Where a general contractor owes a nondelegable duty to ensure compliance with safety regulations, did the trial court err in refusing to exclude in limine evidence or argument that N.A. Degerstrom

attempted to delegate responsibility for safety or otherwise relinquish control over Sharp-Line's work?

2. Where the undisputed trial evidence was that N.A. Degerstrom made no effort to supervise or enforce compliance with chock requirements, in its accident prevention program or otherwise, did the trial court err in denying judgment as a matter of law on liability and a new trial on damages?

3. Where the estate presented evidence from which a jury could have found that N.A. Degerstrom's failure to supervise or enforce compliance with chock requirements put members of the public in imminent peril, prompting a successful rescue by LaFayette, did the trial court err in refusing to instruct the jury that N.A. Degerstrom owed a duty to exercise ordinary care to protect the traveling public from dangerous conditions within the construction site?

4. Where Mrs. Millican presented ample evidence to create a genuine issue of material fact regarding her dependence on LaFayette for financial support, did the trial court err in granting summary judgment and dismissing her personal claims?

III. STATEMENT OF THE CASE

A. N.A. Degerstrom, Inc., General Contractor, Subcontracted with Sharp-Line, Inc., for Road Signage and Striping.

The Federal Highway Administration awarded N.A. Degerstrom the prime contract to improve a five-mile stretch of the Flowery Trail Road near Chewelah, Washington. RP 1305-06; Exh. P1. That vehicles

and machinery could roll away was a foreseeable hazard on the project, which consisted of a steep, mountain road leading up to a ski resort. RP 251, 473. Less than a year before LaFayette's death, another subcontractor's vehicle rolled down an embankment when its brakes failed to keep it on the inclined roadway. Exhs. P7, P51.

A major purpose of the project was to make the road safer for public travel, including by straightening some of its sharper curves. RP 584. The project spanned the 2005 and 2006 construction seasons and involved blasting, grading, paving, and related construction. RP 468-69, 584. N.A. Degerstrom's contract with the federal government required it to "provide and maintain work environments and procedures which will...safeguard the public[.]" Exh. P1 at 111.

N.A. Degerstrom subcontracted with Sharp-Line Industries, Inc., for road striping and installation of permanent highway signs. RP 251, 280-81, 1305; Exh. P5. Sharp-Line had in its fleet of equipment an auger truck—a 1978 Chevrolet C-65 outfitted with a hydraulic auger mounted on a boom, which Sharp-Line used to drill holes in the ground for sign posts. RP 175; Exhs. P46, D111. The truck's machinery included outriggers that extended to stabilize the truck while the auger was in use and a tamper, a hydraulic device that bounced up and down to tamp the soil around sign posts. RP 176, 198-202, 811.

The auger, tamper, and related machinery were powered by a power take-off or "PTO," a device that engaged the truck's transmission to transmit power from the engine. RP 201-02. To engage the power take-

off, the truck's engine had to be running and the transmission had to be in neutral. RP 201-02, 359-60. Thus, the engine would always be running and the transmission in neutral while the crew was performing sign installation work. *Id.*

Behind the auger truck, Sharp-Line towed a flat-bed trailer loaded with sign posts and materials. RP 66, 93, 821-22.

B. Sharp-Line's Crew Foreman Parked the Sharp-Line Auger Truck on an Incline without Wheel Chocks.

Other than flaggers and a pilot car guiding public traffic through the construction zone, Sharp-Line was one of the only subcontractors on the job site on September 12, 2006. RP 1184-85. Traffic control was needed because Sharp-Line's auger truck, with its outriggers deployed, was wider than the shoulder and encroached into the driving lane. RP 337.

A two-man crew of LaFayette and another Sharp-Line employee, William "Coit" Wright, was installing permanent highway signs on September 12. Wright was the crew's foreman. RP 336. Only Wright was qualified to drive the truck; LaFayette was not trained to do so nor was he old enough to obtain the required commercial driver's license. RP 352. Late in the afternoon, Wright and LaFayette stopped at the location for the last sign they were to install that day. Exh. P23. Wright parked the truck facing downhill and engaged the power take-off. *Id.*; RP 66. He did not engage the parking brake, nor did he chock the wheels. Exh. P23. He did engage a supplemental parking brake called a lever

lock, which locks the hydraulic fluid in the braking system to keep the brakes applied. *Id.*; RP 155, 172. The lever lock is not a substitute for the regular, mechanical parking brake or wheel chocks. RP 172.

C. When the Auger Truck Rolled Away, Daren LaFayette Heroically Rescued Members of the Public from an Imminent Collision Before Burning to Death in a Fiery Wreck.

LaFayette started assembling the sign while Wright deployed the outriggers and used the auger to drill a hole for the sign post. Exh. P23. Wright then stowed the auger and retracted the outriggers, and the men finished assembling the sign, cut the post, and set out to bury it in the hole. *Id.* Because the tamper was needed to bury the post, the power take-off remained engaged, meaning that the engine was running and the transmission was in neutral. RP 409. LaFayette was operating the tamper. Exh. P23. As N.A. Degerstrom admitted, the cab was unattended while the men worked behind the truck, near the trailer. RP 478-79, 608-09.

Meanwhile, members of the public were driving up the mountain behind a pilot car in a group of several vehicles. RP 63. The last vehicle in the group was a pickup driven by residential contractor Steven Arce. RP 60-63. Arce and his passenger, Jacob Wells, were en route to a customer's cabin to install drywall. RP 60-61. They saw the Sharp-Line crew working behind the auger truck. RP 64-65. As they approached, they noticed the truck start to roll and the Sharp-Line crew react:

> [W]e were—just normal, nice drive up there, and next thing we know, the vehicle started rolling toward us, both gentlemen, you know, appeared to be shocked and, you know, their eyes opened wide and they started—they

> moved from between the trailer and the truck, because the trailer was connected to it, they moved [from] between the two to the passenger side and started running after the vehicle.

RP 67. LaFayette dropped the tamper, and both he and Wright ran after the truck. RP 67-68; Exh. P23. The truck crossed the center line and headed directly toward Arce's pickup. RP 68-69. Arce pulled close to the guard rail on the right side but believed a collision was inevitable. RP 68-69.

LaFayette had a head start and was faster than Wright. RP 67-68. He sprinted 100 to 150 feet and managed to catch up with the truck and climb in through the passenger side door. RP 67-68. He immediately slid across the bench seat, took control of the steering wheel, and narrowly prevented an imminent collision, passing within a foot of Arce's pickup. RP 68-70, 84. Arce heard gears grinding, as though LaFayette was attempting to shift the truck into gear. RP 70. Although the truck was speeding up, LaFayette was able to steer it into the right lane and negotiate the next corner before Arce and Wells lost sight of the truck. RP 71-72.

Jack Mezzanatto, a flagger, was working downhill from the Sharp-Line auger truck. RP 811. Unaware the truck was a runaway, Mezzanatto noticed the tamper dragging behind and called out a notice on the CB radio. RP 811-12. He then saw Wright up the hill in the middle of the road waving his arms and drove up to meet him. RP 813. Wright got in Mezzanatto's vehicle, and they gave chase to the auger truck. RP 813.

LaFayette managed to keep the auger truck on the road for a mile and a half, without colliding with anything, until he was unable to make a

curve to the left. RP 120, 131. A state trooper testified that, at that point, the truck was "travelling at such a speed that any input he made with the steering wheel would have been insufficient to keep [it] on the road." RP 131. The truck probably reached 80 m.p.h. or more. *See* RP 131-32.

The auger truck smashed through a guardrail and went airborne before crashing down on its right side at the bottom of an embankment and bursting into flames. RP 127-29, 815; *see* Exhs. P52, P53. LaFayette burned to death as the wreckage became engulfed in flames, preventing anyone from attempting to rescue him. RP 815-16.

D. LaFayette's Estate and His Mother Sued for Damages, but the Trial Court Dismissed Mrs. Millican's Personal Claim.

LaFayette's mother, Dorothy Millican, as personal representative of LaFayette's estate and on her own behalf as a statutory beneficiary, sued N.A. Degerstrom and others[1] alleging negligence. CP 7-23. The trial court dismissed Millican's personal claims on summary judgment on the ground that, as a matter of law, she was not substantially dependent upon LaFayette for financial support under RCW 4.20.020. CP 943-46, 1284-87. The defendants conceded LaFayette was not at fault for his death. *See* RP 11, 915. The trial court ruled that Sharp-Line's negligence was not a superseding cause. RP 1321.

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[1] Millican asserted claims against MICO, the lever lock's manufacturer, and James Bonner, its installer. On appeal, Millican does not challenge the verdicts in favor of MICO and Bonner.

E. Washington Law Imposes on General Contractors a Primary and Non-Delegable Duty to Ensure Compliance with Safety Regulations for the Benefit of All Workers on the Job Site.

Although the Flowery Trail Road is on federal land, the project was subject to WISHA and the corresponding worker safety regulations promulgated by the Washington State Department of Labor and Industries, Title 296 WAC. RP 697, 1128. The Washington Supreme Court has held that WISHA imposes on employers a nondelegable duty to comply with WISHA regulations for the benefit of all workers on the job site. *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 457-60, 788 P.2d 545 (1990), citing RCW 49.17.060(2). The general contractor, because of its innate supervisory authority, bears the primary responsibility to ensure compliance. *Id.*; *see also Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 124, 52 P.3d 472 (2002). This includes, but is not limited to, an obligation to furnish safety equipment to subcontractors or contractually require them to furnish adequate safety equipment relevant to their responsibilities. *Stute*, 114 Wn.2d at 464.

F. The Trial Court Refused to Exclude the Subcontract, in Which N.A. Degerstrom Purported to Delegate to Sharp-Line Sole Responsibility for the Safety of Sharp-Line's Employees.

Shortly before trial, the estate moved in limine to exclude any evidence or argument that N.A. Degerstrom delegated its safety responsibilities or otherwise did not retain control over Sharp-Line's work. CP 1548-49. In its subcontract with Sharp-Line, N.A. Degerstrom purported to delegate to Sharp-Line sole responsibility for the safety of Sharp-Line's employees:

> Subcontractor accepts responsibility to prevent accidents to any persons 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. . . .

Exh. P5 at 6 (emphasis added). N.A. Degerstrom responded to the motion in limine by arguing that *Stute* did not apply and that the delegation provisions in the subcontract were relevant to negligence. CP 1638-40, 1643.

The trial court made a definitive and final ruling denying the estate's motion in limine, reasoning, "In terms of if you can say there is a non-delegable [duty], well, *Stute* says you can enter into a contract with your subcontractor to deal with the safety issues." RP 2, 5-6; CP 1913-14. The court said the "bottom line" was that the evidence was "all going to come in." RP 2; *see also* RP 5-6.

The denial of the motion in limine allowed N.A. Degerstrom to profess in opening statements that N.A. Degerstrom validly and effectively delegated its safety responsibilities to Sharp-Line:

> And what I'm going to be providing you today are the several contract provisions that discuss safety between Sharp-Line and NA Degerstrom. And I will, again, . . . I will be showing you that all these provisions are appropriate and allowable under Washington law, and that ***safety is allowed to be [--] with regard to a specialty subcontractor, NA Degerstrom could delegate those responsibilities***.

. . .

> They also have—***we requested that Sharp-Line be solely responsible for providing protection and safety of its employees***. . . .

RP 46 (emphasis added).

Having lost its motion in limine, the estate sought to mitigate the adverse effects of the irrelevant evidence by introducing the subcontract in its case-in-chief and arguing that such delegation of responsibility was ineffective. RP 279, 299-300, 1239; Exh. P5. The estate thus elicited the following testimony from Michael Craig, president of Sharp-Line, regarding the subcontract's delegation provision:

> Q. Did you believe that by this provision, they were delegating all responsibility to you, Sharp-Line for the safety of your employees?
>
> A. I don't know about delegating all the responsibility, but I know what it's saying is we are responsible for our people.
>
> . . .
>
> Q. . . . But was it your understanding, based upon that provision that I just read, that NA Degerstrom was giving you, by this contract, sole responsibility for the safety—
>
> A. Yes.
>
> Q. —of your employees?
>
> A. Yes.
>
> Q. Is that correct?
>
> A. Yes.
>
> Q. Did you have any other understanding, outside of this contract, that Degerstrom was also responsible for the safety of your employees?
>
> A. No, I don't believe so.

RP 300-02. N.A. Degerstrom's attorney referred to this testimony during her cross examination of Mr. Craig, elicited further testimony that this contract was not "anything out of the ordinary," and referred to the testimony in her closing argument. RP 374, 847.

N.A. Degerstrom repeatedly argued in closing that it contractually delegated responsibility for employee safety to Sharp-Line. For instance, defense counsel argued:

> Now, a general contractor is not able to see all those trees in the forest at one time. Nor can it see any of the leaves at any given moment. But it's the subcontractors that have agreed to take care of those leaves.
>
> . . .
>
> [The subcontract provides that] Sharp-Line was solely responsible for the protection and safety of its employees.

RP 846-47. N.A. Degerstrom further argued that the accident was the result of Sharp-Line's sole negligence:

> Here we're asking that you [find that] the proximate cause of this accident was not Degerstrom's actions, but it was the result of . . . the act of some other person. And that person is Coit Wright of Sharp-Line.
>
> . . .
>
> This accident occurred...because of bad decisions by Coit Wright, making him the person responsible for this accident, not Degerstrom.
>
> . . .
>
> In your deliberations, if you are able to conclude that Coit Wright and Sharp-Line's negligence were the proximate cause of this accident, then even though you—even though you can't award them a line on the special verdict form, ***you can find that the other defendants were not negligent in this matter***.

RP 845, 868, 869 (emphasis added).

G. WISHA Regulations Require Employers to Establish, Supervise, and Enforce a Site-Specific Accident Prevention Plan and Require Equipment to be Chocked When Parked on Inclines.

A WISHA regulation required management to establish, supervise and enforce a safe and healthful working environment and an accident prevention program:

> It shall be the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice:
>
> (a) A safe and healthful working environment.
>
> (b) An accident prevention program as required by these standards.
>
> . . .

WAC 296-155-100(1). The required accident prevention program must be site specific in that it must be "tailored to the needs of the particular plant or operation and to the type of hazard involved." WAC 296-155-110(2).

There is no dispute that the Flowery Trail Road project was on an incline, making runaway vehicles a foreseeable hazard on this job site. RP 251, 473. Two WISHA regulations addressed safe parking on inclines, requiring that the wheels be chocked. One regulation addressed motor vehicles:

> Before leaving a motor vehicle unattended:
>
> (i) The motor must be stopped.

(ii) The parking brake must be engaged and the wheels turned into curb or berm when parked on an incline.

(iii) ***If parking on an incline and there is no curb or berm, the wheels must be chocked or otherwise secured.***

WAC 296-155-610(2)(b) (emphasis added).[2] A separate regulation addressed equipment:

(a) All equipment left unattended at night, adjacent to a highway in normal use, or adjacent to construction areas where work is in progress, shall have appropriate lights or reflectors, or barricades equipped with appropriate lights or reflectors, to identify the location of the equipment.

. . .

(c)(i) . . .

(ii) ***Whenever the equipment is parked, the parking brake shall be set. Equipment parked on inclines shall have the wheels chocked and the parking brake set.***

WAC 296-155-605(1)(c)(ii) (emphasis added). The code defined "equipment" broadly to include "all machinery, devices, tools, facilities, safeguards, and protective construction used in connection with construction operations." WAC 296-155-012.

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[2] N.A. Degerstrom argued that this regulation did not apply because the truck was not "unattended" if the motor was running. RP 861. But the Department of Labor and Industries cited Sharp-Line for violating this regulation. CP 544. Moreover, N.A. Degerstrom's interpretation is absurd. In requiring that the motor be stopped when a vehicle is unattended, the regulation does not provide that a vehicle is attended merely because the motor is running. N.A. Degerstrom's job site superintendent, Kenneth Olley, conceded that whether the motor is running does not dictate whether a vehicle is attended. RP 568-69. Furthermore, it was undisputed that the cab of the truck was unattended during sign installation, such that no one was in control of the vehicle or in a position to secure it. *See* RP 250-51, 478-79, 608-09.

1. N.A. Degerstrom Admitted that Its Own Accident Prevention Program Did Not Address the Hazard at Issue.

N.A. Degerstrom included the following provision in its accident prevention program, which mirrored the WISHA regulation on equipment:

> All equipment left unattended at night, adjacent to the highway in normal use, or adjacent to areas where work is in progress, shall have appropriate lights or reflectors, or barricades equipped with lights or reflectors, in order to identify the location of the equipment. ***Whenever the equipment is parked, the parking brake shall be set. In addition to having the parking brake set, equipment on inclines will be chocked.***

Exh. P4 at 0009 (emphasis added). During the trial, N.A. Degerstrom asserted that this provision applied only to equipment left unattended at night and not while the highway was in use or work was in progress. RP 473, 477-48, 748.[3] N.A. Degerstrom did not address motor vehicles, as distinguished from equipment, in its accident prevention program. *See* RP 523. N.A. Degerstrom's vice president and safety officer, Michael Coleman, and its expert witness, Kurt Stranne, and testified that nothing in N.A. Degerstrom's accident prevention program required Sharp-Line to use chocks under the circumstances involved here. RP 748-49, 1182-83.

N.A. Degerstrom admitted that the purpose of chock requirements is to provide fail-safe protection against the consequences of human error or mechanical failure and that the failure to use chocks poses a risk to workers and the general public. RP 473-74, 484; *see also* RP 666

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[3] After the trial, N.A. Degerstrom cited this provision as evidence of its compliance with WISHA under the circumstances of this case. CP 3261.

(LaFayette estate's expert). Yet, according to N.A. Degerstrom's own witnesses, its accident prevention program did not address the hazard at issue and did not require chock usage in circumstances where it would have prevented great risk to workers and the general public and, ultimately, a worker's death.

2. N.A. Degerstrom Failed to Require Sharp-Line to Establish a Site-Specific Accident Prevention Plan that Addressed Parking on an Incline.

N.A. Degerstrom's subcontract allowed it to demand Sharp-Line's accident prevention program at any time:

> ***Whenever requested by Contractor***, Subcontractor shall furnish the following safety information as applicable. . . .
>
> 1. Written Site-Specific Safety Plans as required by law relating to hazards specific to the job, such as traffic control or fall protection plans.

Exh. P5 at 0006 (bold-italics added). Nevertheless, N.A. Degerstrom never demanded that Sharp-Line establish or provide a site-specific safety program. RP 320-21, 1197-98. The program Sharp-Line submitted to N.A. Degerstrom was not site specific, but was a generic handbook that had been in existence more than three years and was not tailored to the hazards of this project. RP 314-16; Exh. D104. Despite the steep grade of Flowery Trail Road, the WISHA regulation requiring a site-specific accident prevention program, and the specific WISHA regulations requiring chocks, Sharp-Line's accident prevention program did not

address parking on inclines and never mentioned chocks. Exh. D104; RP 318.[4]

In fact, Sharp-Line never had a written policy regarding chocks before the incident. RP 186, 407-08, 1192. Nor could Sharp-Line produce any written documentation that it ever discussed chocks at any safety meeting. RP 408. The training for parking trucks on an incline consisted of "park them, make sure they're safe, make sure they won't roll away." RP 245; *see also* RP 391-92. There was no documentary evidence that Sharp-Line attended any of N.A. Degerstrom's safety meetings as required under WAC 296-155-110(5), (6). *See* Exh. P22. Sharp-Line's president, Michael Craig, admitted that an accident prevention program that does not require chocks is a hazard. RP 320. But, again, no one from N.A. Degerstrom ever required that Sharp-Line's program be site specific or address parking on inclines. RP 320-21; 1197-98.

3. N.A. Degerstrom Presented No Evidence that It Took Any Actions to Ensure Chock Use.

N.A. Degerstrom did not provide chocks to Sharp-Line nor did it contractually require Sharp-Line to furnish chocks for use by its workers. RP 480, 1203-05. *See Stute*, 114 Wn.2d at 464. Although N.A. Degerstrom's vice president and safety officer, Michael Coleman, testified in a declaration before trial that the subcontract required Sharp-Line to furnish safety equipment, that testimony was demonstrated to be false, as

[4] The Department of Labor and Industries cited Sharp-Line for failing to tailor its accident prevention program to the hazards involved, contrary to WAC 296-155-110(2). CP 545.

the subcontract contains no such requirement. RP 1203-05; CP 89; Exh. P5.

N.A. Degerstrom's job site superintendent, Mr. Olley, and job site foreman, Dennis Arndt, agreed that Sharp-Line crews should have used chocks while they were installing signs and the cab was unattended. RP 479, 573-74. N.A. Degerstrom vice president and safety officer Michael Coleman likewise agreed and further admitted that Mr. Olley and Mr. Arndt should have been inspecting for chock use by subcontractors. RP 1175, 1178-79. Mr. Arndt drove by and observed Wright and LaFayette working about an hour before the accident, RP 513-14, yet neither Mr. Arndt nor Mr. Olley ever checked or inquired whether Sharp-Line was using chocks. RP 255, 476-77, 480, 542.[5] There was no evidence that anyone from N.A. Degerstrom ever supervised Sharp-Line's compliance with the requirements to use chocks on inclines, much less did anything to enforce them. In fact, Mr. Arndt knew that Sharp-Line crews were not using chocks during the work day, but took no action. RP 480.

Had N.A. Degerstrom supervised Sharp-Line's use of chocks, it would have discovered that Sharp-Line did not regularly keep chocks on the auger truck. Sharp-Line maintained a four-page inventory of tools and equipment on the truck. RP 183-84, 304-05; Exh. P46. This document listed nearly 250 items, including screwdrivers, wrenches, saws, shovels,

[5] Mr. Arndt testified that, to his knowledge, Mr. Olley never inquired whether Sharp-Line crews were using chocks. RP 480. Mr. Olley himself could not recall whether he ever did, but testified that chock usage was not something he would specifically look for. RP 542.

ladders, gas cans, extension cords, jumper cables, and more—but not chocks. Exh. P46; RP 184, 304-05, 364. Some Sharp-Line employees had an informal practice of using as chocks wooden sign post ends that would accumulate "as the day went," but this practice was unwritten, unsupervised, and unenforced. RP 186, 189, 199. Furthermore, wooden blocks are not rated for use as chocks, nor are they effective in practice for heavy equipment. RP 402, 603-08. The day after the incident, Sharp-Line purchased commercial chocks for all its trucks and instituted a chock usage policy. RP 186-87.

H. The Jury Absolved N.A. Degerstrom of Negligence, and the Trial Court Denied the Estate's Motion for Judgment as a Matter of Law and a New Trial.

The jury returned a complete defense verdict, and the trial court entered judgment on the verdict. CP 3205-07, 3208-11. The estate timely moved for judgment as a matter of law and a new trial. CP 3235-53. The estate requested judgment as a matter of law on breach of duty and proximate causation, arguing that no evidence or reasonable inference justified the verdict that N.A. Degerstrom was fault free when it presented no evidence that it supervised or enforced compliance with chock requirements. CP 3235-47, 3277-83. The trial court denied the motion. CP 3285-87. The estate and Mrs. Millican timely filed a notice of appeal. CP 3288-3321.

IV. ARGUMENT

A. Standards of Review.

Rulings admitting or excluding evidence are reviewed for an abuse of discretion, but the trial court's interpretation and application of the evidence rules and statutes underlying such rulings is reviewed *de novo*. *Hensrude v. Sloss*, 150 Wn. App. 853, 209 P.3d 543 (2009). Alleged errors of law in the jury instructions are reviewed *de novo*. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004). Jury instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Id.* "Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error." *Id.* at 266-67. All summary judgment rulings, including related evidentiary rulings, are reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). A decision on a motion for judgment as a matter of law is likewise reviewed *de novo*. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

B. The Trial Court Erred in Refusing to Exclude Evidence and Argument that N.A. Degerstrom Delegated Sole Responsibility for Safety to Sharp-Line.

1. The General Contractor Has a Primary and Non-Delegable Duty to Ensure Compliance with Safety Regulations.

WISHA requires employers to protect the health and safety of employees in the work place. It provides:

Each employer:

(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees . . . and

(2) Shall comply with the rules regulations, and orders promulgated under this chapter.

RCW 49.17.060.

The Washington Supreme Court interpreted this statute in *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). The court held that subsection (1) requires an employer to protect its own employees from recognized hazards, whether or not covered by specific safety regulations, while subsection (2) imposes non-delegable duty upon each employer to comply with all applicable WISHA regulations for the benefit of *all* workers on the job site. *Id.* at 457. The court reasoned that, when violation of particular WISHA regulations is alleged, "all employees working on the premises are members of the protected class." *Id.*; *see also Ward v. Ceco Corp.*, 40 Wn. App. 619, 624-25, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985).

The Supreme Court recognized in *Stute* that the general contractor is in the best position to ensure compliance with safety regulations because of its supervisory authority over the job site. 114 Wn.2d at 463. Accordingly, the court held that the general contractor has the primary responsibility for WISHA compliance:

> Inasmuch as both the general contractor and subcontractor come within the statutory definition of employer, the primary employer, the general contractor, has, as a matter of public policy, the duty to comply with or ensure

> compliance with WISHA and its regulations. A general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the general contractor.

Id. at 463. The general contractor's duty remains primary even where the general contractor and subcontractor have concurrent duties under specific regulations; both the general contractor and subcontractor are responsible to ensure compliance within their respective areas of control. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 756, 912 P.2d 472 (1996).

2. Because N.A. Degerstrom's Duty Was Primary and Non-Delegable, It Was Error to Admit Evidence that N.A. Degerstrom Delegated to Sharp-Line Sole Responsibility for Safety.

Only relevant evidence is admissible. ER 402. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probably than it would be without the evidence." ER 401. Because the duty to ensure WISHA compliance is nondelegable, evidence that an employer delegated responsibility for compliance is irrelevant and inadmissible. *Ward*, 40 Wn. App. at 629.

In *Ward*, an employee of the general contractor, Sellen Construction, was injured due to the negligence of the subcontractor, Ceco Corporation, in failing to erect guardrails in violation of a WISHA regulation. *Id.* at 620-21. The subcontract purported to delegate to Sellen all responsibility to erect and maintain guardrails. *Id.* at 621-22. The trial

court granted a motion in limine to exclude the contract. *Id.* On Ceco's appeal from a verdict for the plaintiff, the court of appeals affirmed. The court observed that the admissibility of the contract depended on the validity of the asserted contractual delegation of duty. *Id.* at 627. The court held that, because an employer's duty to comply with WISHA regulations is nondelegable, any contractual provision designed to shift the duty is "invalid as to the injured employee" and thus irrelevant and inadmissible under ER 402. *Id.* at 629.

This Court addressed a markedly different situation in *Degroot v. Berkley Construction, Inc.*, 83 Wn. App. 125, 920 P.2d 619 (1996). Unlike in *Ward*, the subcontract in *Degroot* did not delegate responsibility for safeguards but merely required the subcontractor to comply with all safety regulations and indemnify the general contractors for any liability incurred as a result of the subcontractor's violation of safety regulations. *Id.* at 127. This Court held that the trial court acted within its discretion in admitting the subcontract as relevant to the general contractors' defense, "showing one of the many steps the general contractors had taken to use reasonable care and to comply with the WISHA safety regulations." *Id.* at 129. This Court distinguished *Ward* because "the *Ward* subcontractor sought admission of the contract to prove the duty to erect guardrails had been delegated," whereas in *Degroot* the parties did not dispute that the general contractors' duties were nondelegable. *Id.* at 129-30.[6]

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[6] Judge Sweeney concurred in the result but would have held it was error to admit the subcontract as evidence because "the effect of giving this agreement to the jury was to suggest that the general contractor could discharge its nondelegable

The present case is akin to *Ward* and distinguishable from *Degroot*. The subcontract did not merely require Sharp-Line to comply with safety regulations but purported to delegate sole responsibility to Sharp-Line for the safety of its employees, stating, "Subcontractor shall be solely responsible for the protection and safety of its employees." Exh. P5 at 6. Moreover, N.A. Degerstrom argued to the jury that these provisions relieved it of any obligation to provide for the safety of Sharp-Line's employees. RP 846-847. The trial court misread *Stute* in concluding it allows delegation of the responsibility to ensure WISHA compliance. RP 2, 5-6. Such delegation is invalid as to the injured employee under *Stute* and *Ward* and therefore is irrelevant under and inadmissible under ER 402.

3. The Estate Preserved the Evidentiary Error for Appellate Review.

The estate was not required to renew its objection to the admission of the subcontract following the denial of its motion in limine. "[U]nless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion in limine has a standing objection." *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 641, 806 P.2d 766, *review denied*, 117 Wn.2d 1015 (1991), quoting *State v. Ramirez*, 46 Wn. App. 223, 229, 730 P.2d 98 (1986); *see also Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 557 n.9, 815 P.2d 798 (1991) ("No

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duty by contractually shifting that obligation to the subcontractor. It cannot." *Degroot*, 83 Wn. App. at 132 (Sweeney, C.J., concurring).

objection to trial testimony is needed to preserve the right to review a ruling denying a motion in limine, so long as the ruling was final and definitive."). Here, there was no indication that the trial court's denial of the motion in limine was anything other than final. *See* RP 2; CP 1913-14.

Nor did the estate waive its objection to the admissibility of the subcontract by introducing the evidence to mitigate its adverse effects. *See* RP 279, 299-300. "[A] party prejudiced by an evidentiary ruling who then introduces the adverse evidence in an effort to mitigate its prejudicial effect is not precluded from obtaining review of the ruling." *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 430-31, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992); *see also Garcia*, 60 Wn. App. at 641 ("A party is entitled to try to minimize the adverse effect of a decision by raising the damaging testimony first.").

4. The Evidentiary Error Was Not Harmless and Requires Reversal.

The refusal to exclude the subcontract was prejudicial and not harmless. Evidentiary error requires reversal unless the error was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *Veit ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98, 249 P.3d 607 (2011), quoting *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284, 288 (1995), quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

It cannot be said that the admission of the subcontract, and particularly the invalid and irrelevant delegation clause, in no way affected the verdict. The error allowed N.A. Degerstrom to divert the jury's attention from its own inaction and assert that Sharp-Line was solely negligent. *See First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 615, 971 P.2d 953 (1999) (holding that the admission of irrelevant evidence was prejudicial where the result was to change the focus of the trial from the conduct of the defendant to the conduct of another entity not subject to liability).[7] That is precisely what N.A. Degerstrom did when it argued it could not be held liable because it delegated to Sharp-Line responsibility for worker safety. RP 846-47. The refusal to exclude the subcontract was reversible error. *See Ward*, 40 Wn. App. at 629.

The trial court committed legal error in concluding that the subcontract was relevant, and thus abused its discretion in admitting the evidence. This error was not harmless. This Court should reverse and remand for a new trial.

C. The Trial Court Erred in Denying Judgment as a Matter of Law on Liability Given that the Verdict Was Not Supported by

[7] In *First State*, the plaintiff excess insurer, First State, alleged that the defendant primary insurer, Lumbermens, acted in bad faith. 94 Wn. App. at 605. Lumbermens failed to plead as affirmative defenses contributory negligence, failure to mitigate, or bad faith. *Id.* at 614. Yet the trial court admitted evidence relevant to these defenses and not relevant to Lumbermens' liability or First State's damages. *Id.* Reversing the judgment on a defense verdict, the court of appeals reasoned, "Not only was the evidence irrelevant to any claim before the jury, it was also highly prejudicial. The transcript reveals that this testimony changed the focus of the trial from Lumbermens' inaction in settling the claim to whether First State failed to act." *Id.* at 615.

Any Properly Admitted Evidence and the Estate's Evidence Established Breach of Duty and Proximate Causation as a Matter of Law.

1. The Plaintiff Is Entitled to Judgment as a Matter of Law on Negligence Where a Defendant Violated a Controlling Statute Without Excuse or Justification.

A party is entitled to judgment as a matter of law when, "viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Guijosa*, 144 Wn.2d at 915, quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Substantial evidence is evidence "sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Id.*, quoting *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

Although violation of a statute or regulation that establishes a standard of conduct is not negligence per se, it remains a basis to find negligence and is "strong evidence" of negligence. *Gilbert H. Moen Co.*, 128 Wn.2d at 755 (holding that violation of WISHA remains a basis for tort liability after RCW 5.40.050); *see also Doss v. ITT Rayonier Inc.*, 60 Wn. App. 125, 129, 803 P.2d 4 (1991) (same). Moreover, negligence is established as a matter of law where the plaintiff proves that the defendant violated a controlling statute or regulation and the defendant fails to establish any excuse or justification. *Pudmaroff v. Allen*, 138 Wn.2d 55, 68, 977 P.2d 574 (1999), citing *Yurkovich v. Rose*, 68 Wn. App. 643, 653-54, 847 P.2d 925 (1993).

In *Pudmaroff*, a driver violated a statute in colliding with a bicyclist who was using a crosswalk, and the bicyclist sued the driver. 138 Wn.2d at 58-59, 63-64. The Supreme Court affirmed a summary judgment on liability in favor of the plaintiff based on the lack of any excuse or justification for the statutory violation. *Id.* at 68-69. In doing so, the court observed:

> RCW 5.40.050 permits a defendant shown to have violated the literal requirements of a statute, ordinance, or administrative rule to present evidence of excuse or justification and leaves it to the trier of fact to determine whether the violation should be treated as evidence of negligence. The defendants' efforts at showing excuse or justification failed in this case. This left the trial court no choice but to rule that negligence had been established as a matter of law.

Id. at 68, quoting *Yurkovich*, 68 Wn. App. at 653-54. These principles apply here because, as the estate will now demonstrate, N.A. Degerstrom failed to advance any excuse or justification for violating WISHA.

2. Undisputed Evidence Established that N.A. Degerstrom Failed to Supervise or Enforce Compliance with Applicable Chock Requirements.

It is a violation of WISHA to fail to establish, supervise, and enforce, in a manner that is effective in practice, an accident prevention program tailored to the specific hazards of the job site. WAC 296-155-100(1)(b), -110(2); *Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 598-99, 215 P.3d 951 (2009). When a subcontractor violates a specific WISHA requirement, there is no requirement to show actual knowledge by the general contractor—"showing that the general

contractor could have known of the violative condition through the exercise of reasonable diligence is sufficient." *Express Constr.*, 151 Wn. App. at 599.

N.A. Degerstrom failed to provide chocks or contractually require Sharp-Line to provide safety equipment relevant to its responsibilities as required by *Stute*. RP 1203-05. It also failed to require Sharp-Line to establish a site-specific accident prevention program that addressed parking on inclines. RP 320-21, 480, 1197-98. As a result, Sharp-Line had no chock policy, did not keep chocks on the auger truck, and failed to use chocks consistently. RP 182, 184, 199, 304-05, 407-08, 1192.

In addition, N.A. Degerstrom's own accident prevention program was either deficient or compliance was not supervised or enforced. If the provision in N.A. Degerstrom requiring that equipment parked on inclines be chocked did not apply as N.A. Degerstrom asserted at trial, then the plan was deficient as a matter of law because it failed to address a foreseeable and undisputed hazard on this job site, contrary to WAC 296-155-100(1)(b) and -110(2). RP 473, 477-48, 748-49, 1182-83. If instead that provision *did* apply, then N.A. Degerstrom failed to supervise or enforce compliance with the requirement, also contrary to WAC 296-155-100(1)(b).

Indeed, regardless of accident prevention program provisions, the undisputed trial evidence was that N.A. Degerstrom made no effort to supervise or enforce compliance with the WISHA chock requirements as required by WISHA and *Stute*. This, by itself, means N.A. Degerstrom

was negligent as a matter of law. Although N.A. Degerstrom observed Sharp-Line's crews on the job site, no one from N.A. Degerstrom ever inspected or inquired whether Sharp-Line used chocks. RP 255, 476-77, 480, 542.[8] Mr. Arndt had actual knowledge that Sharp-Line was not using chocks and observed the Sharp-Line crew about an hour before the accident without checking for chocks. RP 513-14. Even absent actual knowledge, N.A. Degerstrom could have known of the violative condition through the exercise of reasonable diligence, as chocks would have been readily visible if used. *See Express Constr.*, 151 Wn. App. at 599.

Other than delegation of responsibility to Sharp-Line, which was invalid under *Stute*, N.A. Degerstrom never offered any excuse or justification for its omissions. In the absence of substantial evidence of WISHA compliance or a legitimate excuse or justification, the estate was entitled to judgment as a matter of law that N.A. Degerstrom breached its duty. *Pudmaroff*, 138 Wn.2d at 68; *Yurkovich*, 68 Wn. App. at 653-54. Furthermore, because there is no dispute that the auger truck would never have rolled away had the wheels been chocked as required, that breach was, as a matter of law, a proximate cause of LaFayette's death.

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[8] Mr. Arndt testified that, to his knowledge, Mr. Olley never inquired whether Sharp-Line crews were using chocks. RP 480. Mr. Olley himself could not recall whether he ever did. RP 573.

3. The Estate Was Not Required to Make a Futile Motion for Judgment as a Matter of Law at the Close of the Evidence.

The estate was not required to move for judgment as a matter of law before the close of the evidence to preserve the issue for appellate review. Judgment as a matter of law is appropriate where "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue." CR 50(a). A party is not required to move for judgment as a matter of law before the close of the evidence if the motion would be futile because the court previously made a definitive ruling that resolved the underlying issue. *See Kaplan v. N.W. Mut. Life Ins. Co.*, 115 Wn. App. 791, 804 n.6, 65 P.3d 16 (2003) (holding that the plaintiff was not required to bring "a futile CR 50 motion at the close of the evidence" where the court had previously denied summary judgment on the same issue).[9]

Here, it would have been futile for the estate to move for judgment as a matter of law at the close of the evidence when trial court had admitted the subcontract into evidence after definitively refusing to

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[9] Although *Kaplan* was decided before the 2005 amendments to CR 50, which now mandates that a party move for judgment as a matter of law before the court submits the case to the jury to preserve the opportunity to renew its motion after the case is submitted, *see Hanks v. Grace*, __ Wn. App. __, 273 P.3d 1029, 1034 (2012), *Kaplan* is still good law for the proposition that such a motion is not necessary where it would be futile. This is consistent with the general rule that a party need not renew an objection where the trial court has made a definitive and final ruling on an issue. *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 641, 806 P.2d 766 (1991); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 557 n.9, 815 P.2d 798 (1991).

exclude it in limine. Given the evidentiary error, judgment of as a matter of law would have been inappropriate because the erroneously admitted subcontract provided the jury a sufficient evidentiary basis to absolve N.A. Degerstrom of negligence. *See* CR 50(a). But had the trial court excluded the subcontract as it should have, there would have been no basis to absolve N.A. Degerstrom of negligence, and the estate would have been entitled to judgment as a matter of law based on the properly admitted evidence.

The trial court erred in denying the estate's post-trial motion for judgment as a matter of law and a new trial. This Court should reverse the judgment and remand with instructions to enter judgment as a matter of law on breach of duty and proximate causation and hold a new trial limited to the issue of damages.

D. The Trial Court Erred in Refusing to Instruct the Jury that N.A. Degerstrom Owed a Duty to the Public Traveling Through the Construction Site.

Jury instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett*, 152 Wn.2d at 266. "Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error." *Id.* at 266-67. The trial court abused its discretion in refusing to give the estate's proposed instruction 18 on a contractor's duty to the public.[10]

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[10] The estate's proposed instruction 18 stated as follows:

A contractor owes a duty to exercise ordinary care to protect members of the public from foreseeable harm while traveling through a construction site. *Argus v. Peter Kiewit Sons' Co.*, 49 Wn.2d 853, 856, 307 P.2d 261 (1957). In *Argus*, the plaintiff was injured when he lost control of his motorcycle while traversing a gravel-surfaced highway detour. *Id.* at 854-55. The defendant contractor unsuccessfully argued for dismissal on the basis that it owed no duty so long as it performed its work in accordance with the contract. *Id.* at 855. On appeal, the supreme court held that the contractor owed a duty to use ordinary care, including by anticipating a dangerous condition and guarding against it. *Id.* at 856. *See also Smith v. Acme Paving Co.*, 16 Wn. App. 389, 393-94, 558 P.2d 811 (1976) (holding that a contractor on a highway construction project, along with the state, was subject to liability to the public for negligence); *Cummins v. Rachner*, 257 N.W.2d 808, 813-14 (Minn. 1977) (holding that a road construction contractor owed a mutual duty with the state to protect the public from dangerous conditions within the construction zone).

This is consistent with the general rule applicable in the context of premises liability, which holds that a contractor is subject to liability for a dangerous condition on the land and must exercise the same degree of care as the owner while the work is in his charge. *Williamson v. Allied Group,*

> The general contractor on a highway construction project who is responsible for construction, repair or maintenance on the roadway has a duty to exercise ordinary care to protect the traveling public from dangerous conditions that may arise within the construction zone.

CP 1597.

Inc., 117 Wn. App. 451, 456-60, 72 P.3d 230 (2003), citing RESTATEMENT (SECOND) OF TORTS § 384 (1965), and *Blancher v. Bank of Cal.*, 47 Wn.2d 1, 9, 286 P.2d 92 (1955). As the court of appeals observed in *Williamson*, "[A] contractor is not privileged to go about the contract work with blinders on. . . . The contractor may, if necessary, contract with the owner for indemnification, or for sufficient control of the project to ensure its safe performance." 117 Wn. App. at 460.

In addition to common law, N.A. Degerstrom owed a duty under its contract with the federal government, which required it to "provide and maintain work environments and procedures which will . . . safeguard the public[.]" Exh. P1 at 111. *See Cummins*, 257 N.W. at 813 (holding that the road construction contractor owed a duty to the public under its contract with the state).

Regardless of whether the jury found N.A. Degerstrom liable for breach of its nondelegable duty under WISHA and *Stute*, it could have found that N.A. Degerstrom breached its separate and independent duty to members of the public traveling through the job site by placing Mr. Arce, Mr. Wells, and others in imminent peril, and that this breach was a proximate cause of LaFayette's death. The estate presented circumstantial evidence at trial that LaFayette acted purposefully to rescue Mr. Arce and Mr. Wells. LaFayette acted swiftly and immediately to prevent an imminent collision with Arce's pickup. RP 68, 70. Arce could see a shocked expression on LaFayette's face as LaFayette succeeded in preventing the collision, narrowly missing Arce's pickup. RP 69. N.A.

Degerstrom's breach of duty was actionable by LaFayette's estate under the rescue doctrine, which allows an injured rescuer to sue the party that placed the rescued person in peril for breach of the duty owed to that person. *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 355-56, 961 P.2d 952 (1998).

The failure to give the estate's proposed instruction 18 was prejudicial error. Without an instruction setting forth this duty, the estate was precluded from arguing this theory to the jury.[11] This Court should reverse and remand for a new trial.

E. The Trial Court Erred in Granting Summary Judgment and Dismissing Mrs. Millican's Claim for Lack of Dependence on LaFayette for Financial Support.

LaFayette was unmarried and without children. His mother, Mrs. Millican, asserted a wrongful death claim as a second tier beneficiary under RCW 4.20.020, alleging she was substantially dependent upon her son for financial support. CP 8. The defendants successfully moved for summary judgment on the issue of financial dependence, resulting in dismissal of Mrs. Millican's claim. CP 943-46, 1284-87. If this Court reverses and remands for a new trial, it should also reverse the summary judgment.

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together

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[11] That the estate did not propose an instruction on the rescue doctrine itself is immaterial because such an instruction would have been moot where the trial court refused to instruct on the underlying duty that gave rise to this claim.

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56. The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* This Court reviews a summary judgment *de novo*, giving no deference to the trial court's rulings. *Id.*; *Folsom*, 135 Wn.2d at 663.

The first tier beneficiaries of a wrongful death action are the decedent's wife, husband, or children. RCW 4.20.020. If, as here, no first tier beneficiaries exist, then the action may be maintained for the benefit of qualified second tier beneficiaries; that is, "for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support." *Id.* The purpose of the statute is to compensate the decedent's dependents for maintenance or assistance they might naturally have received from the decedent had he lived. *Upchurch v. Hubbard*, 29 Wn.2d 559, 563, 188 P.2d 82 (1947), *overruled on other grounds by Sargent v. Selvar*, 46 Wn.2d 271, 276, 280 P.2d 683 (1955).

Only substantial—not complete—dependency is required. *Armantrout v. Carlson*, 166 Wn.2d 931, 936, 214 P.3d 914 (2009), citing *Bortle v. N. Pac. Ry. Co.*, 60 Wash. 552, 554-55, 111 P. 788 (1910). Moreover, the financial support need not be in the form of monetary contributions but may be in the form of valuable services rendered. *Id.* at

941. In *Armantrout*, the decedent's mother had diabetes and was blind. *Id.* at 934. Before her death, the decedent had read and driven for mother and assisted with medical needs such as glucose readings and insulin injections. *Id.* There was evidence that these services were worth approximately $36,000 annually and that the decedent's parents lacked the means to pay for the services. *Id.* at 934, 940. The supreme court reinstated a jury verdict for the plaintiffs that the court of appeals had vacated, holding that the evidence was sufficient to demonstrate substantial dependence on the decedent's services. *Id.* at 941.

Viewing the facts and reasonable inferences in the light most favorably to Mrs. Millican, she presented evidence sufficient to raise a genuine issue of material fact regarding her substantial dependence on LaFayette for financial support. Her physician, Julie Moran, M.D., testified that Mrs. Millican suffered a massive pulmonary embolism in 1992. CP 905. Since that time, Mrs. Millican had suffered progressively worsening symptoms of pulmonary hypertension, including shortness of breath, chest pressure or pain, heart palpitations (arrhythmia), leg and ankle swelling, and fatigue. CP 906-07. Dr. Moran testified that Mrs. Millican's condition would preclude her from performing routine home maintenance or chores and that even climbing a flight of stairs "would be dangerous, not recommended and if done would require substantial assistance." CP 908.

Mrs. Millican confirmed Dr. Moran's description of her condition and symptoms, noting that she had indeed "passed out" after walking up a

short flight of stairs. CP 798-99, 874. Mrs. Millican's husband and LaFayette's stepfather, David Millican, was likewise physically unable to perform home repairs, maintenance, or improvement, and lacked the knowledge and experience to undertake such work. CP 800, 824-26, 829-31.

The family resided in a log cabin on ten acres of land owned by Mrs. Millican. CP 798, 879, 961-63. The cabin and property was repaired, maintained, and improved largely through LaFayette's efforts and services. At summer jobs during high school and full-time work after graduation, LaFayette acquired construction and landscaping skills. CP 841-48. Before moving out and establishing his own residence in 2006, LaFayette completed numerous projects at the Millican property, including constructing and maintaining decks and fences; replacing doors and windows; improving a stairway; repairing structure damage from fallen trees; electrical work; performing landscape work, including excavation and grading; and more. CP 801-02, 815, 857-71. After moving out, LaFayette continued to provide similar services, including installing an irrigation system; continuing to maintain the decks; substantially completing construction of a pole building, including excavation work; installing insulation, ceiling fans, and lighting; and improving an interior staircase. CP 802-03, 815-16, 851, 854-44, 856, 875. In addition, LaFayette routinely did household chores the Millicans were incapable of, including shoveling snow and cleaning. CP 831, 875.

Before his untimely death, LaFayette had planned to continue providing maintenance and repair services as well as to complete significant additional improvements to the property, including completing the pole building; remodeling and adding onto the house to make it handicapped-accessible and suitable to host foster children; building a two-car garage with an apartment; completing further improvements to the landscaping; and several other significant repairs and improvements. CP 804, 816-18, 876.

Although Mr. and Mrs. Millican were both employed, Mrs. Millican testified that their financial circumstances precluded them from paying contractors to perform the services LaFayette had provided at no charge and planned to continue providing in the future. CP 800. Indeed, a few years after Daren's death, Mrs. Millican had been unable to maintain the property or stay current on the mortgage payments, and she lost the property in a foreclosure sale. CP 961-63.

All of the above facts and more were presented to the trial court and, viewed in the light most favorable to Mrs. Millican, were more than sufficient to raise an issue of fact on whether she was substantially dependent on LaFayette for financial support. The facts are at least as compelling as those of *Armantrout*, which led the supreme court to reinstate a jury verdict. This Court should reverse the summary judgment and allow Mrs. Millican to pursue her claim on remand.

V. CONCLUSION

The trial court committed prejudicial evidentiary error when it denied the estate's motion in limine to exclude the delegation provision of the subcontract. Moreover, based on the properly admitted evidence, the estate was entitled to judgment as a matter of law on breach of duty and proximate causation. This Court should reverse and remand for a new trial on damages to be awarded the estate and Mrs. Millican.

Respectfully submitted this 22nd day of June, 2012.

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