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Supreme Court No. 89690-9
Court of Appeals No. 30185-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioner/Appellant,

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 REPLY TO
ANSWER TO PETITION FOR REVIEW**

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ER 4026

RAP 13.4(b)8

I. INTRODUCTION

The trial court in this wrongful-death action allowed Respondent N.A. Degerstrom to offer evidence and thus argue to the jury that it contractually delegated all responsibility for worker safety to its subcontractor, the decedent's employer. Under this Court's decision in *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), such a contractual provision is invalid as to workers injured or killed in job-site accidents, and therefore is irrelevant and inadmissible in a negligence action.

The defense verdict in the original trial in this case illustrates the injustice that can result when a general contractor is allowed to argue, contrary to *Stute*, that a contract provision relieved it of responsibility for a subcontractor's serious and lethal violation of safety regulations. The Court of Appeals' finding of evidentiary error is consistent with *Stute* and with the decision of the Court of Appeals, Division Three, in *Degroot v. Berkley Construction, Inc.*, 83 Wn. App. 125, 920 P.2d 619 (1996). Furthermore, its determination that the evidentiary error resulted in incurable prejudice does not suggest any conflict with those decisions and is supported by the record. Review of the issue conditionally raised by N.A. Degerstrom is therefore not warranted.

II. COUNTERSTATEMENT OF THE CASE

N.A. Degerstrom was the general contractor on the road construction project where Daren LaFayette rescued members of the public from imminent collision with a runaway truck before

himself perishing in a fiery crash. N.A. Degerstrom subcontracted the road-striping and sign-installation work to Mr. LaFayette's employer, Sharp-Line Industries. RP 251, 280, 1305; Exh. P5. The subcontract required Sharp-Line to comply with applicable regulations and to hold N.A. Degerstrom harmless from liability for any loss or damage occasioned by Sharp-Line's failure to comply with such laws. Exh. P5 at 5. It also stated: "Subcontractor shall be solely responsible for the protection and safety of its employees[.]" *Id.* at 6. N.A. Degerstrom accordingly did not ensure that Sharp-Line parked its vehicles safely on inclines or used wheel chocks as required by regulation.¹

Before trial, N.A. Degerstrom moved for summary judgment on negligence, arguing that it was entitled as a matter of law to rely upon its contractual delegation of safety responsibilities to Sharp-Line. CP 63, 78. The trial court properly denied that motion. CP 637-41. Relying on the denial of summary judgment and referring specifically to the subcontract, Mrs. Millican moved in limine on behalf of her son's estate to exclude evidence or argument by N.A. Degerstrom that it did not exercise or retain supervisory control or authority over the safety of Sharp-Line employees such as Mr. LaFayette. CP 1548-49. Notwithstanding its rejection of

¹ N.A. Degerstrom failed to require that Sharp-Line adopt a site-specific accident prevention program or address safe parking of vehicles on an incline. *See* RP 320-21, 480, 1197-98. N.A. Degerstrom also failed to supervise or enforce compliance with applicable wheel chock requirements, including in WAC 296-155-610(2)(b). *See* RP 480, 1203-05. Sharp-Line was cited for violating this regulation. CP 544.

N.A. Degerstrom's legal position on summary judgment, the trial court denied the 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 subcontract was admitted into evidence and, relying on the trial court's pre-trial ruling, N.A. Degerstrom conveyed to the jury in opening statement, through testimony, and in closing argument, that its contractual delegation to Sharp-Line of all responsibility for the safety of its employees was "typical," "[not] anything out of the ordinary," "reasonable," "standard in the industry," "appropriate," and "allowable under Washington law." RP 46-47, 374, 847. The jury returned a defense verdict, and the trial court entered judgment on the verdict. CP 3205-07, 3208-11.

The Court of Appeals ruled that the delegation provision of the Sharp-Line subcontract was invalid as to Mr. LaFayette and his estate, such that it was error to deny the estate's motion in limine. *Slip op.* at 17. The Court of Appeals determined that N.A. Degerstrom's characterization of the subcontract as relieving it of responsibility "pervaded Degerstrom's presentation," such that the prejudice "could not be cured by the concluding instructions to the jury." *Id.* Accordingly, the Court of Appeals reversed the judgment and remanded for a new trial.

III. REPLY AUTHORITY AND ARGUMENT

In *Stute v. P.B.M.C.*, this Court interpreted the Washington Industrial Safety and Health Act (WISHA), the Washington statute that requires employers to protect the health and safety of all employees in the work place. See RCW 49.17.060. This Court ruled that WISHA imposes a nondelegable duty on each employer to ensure compliance with all applicable safety regulations for the benefit of all workers on a job site. 114 Wn.2d at 457. This Court recognized that a general contractor is in the best position to ensure compliance given its supervisory authority, and therefore held that a general contractor has the “prime responsibility” for worker safety. *Id.* at 463. This Court further held that a general contractor has a specific duty to furnish safety equipment or contractually require subcontractors to furnish safety equipment relevant to their responsibilities. *Id.* at 464.²

There is a material difference between a contractual promise to comply with safety regulations and a delegation of all responsibility, when it comes to admissibility as evidence in a negligence action. Consistent with *Stute*, a provision requiring a subcontractor to comply with safety regulations may be admissible as evidence of a measure taken by the general contractor to exercise reasonable care and fulfill its duty under WISHA. See, e.g., *Degroot*, 83 Wn. App. at 129. But where the contract

² N.A. Degerstrom’s suggestion that its contract with Sharp-Line included a requirement that Sharp-Line “furnish adequate safety equipment” (*Answer* at 11) perpetuates a repeated mischaracterization by N.A. Degerstrom of the contract, which contains no such provision. See *Appellant’s Reply Brief* at 17 n.8.

purports to make the subcontractor solely responsible for the safety of its employees—as did the Sharp-Line subcontract—such a provision is invalid as to the injured or deceased worker and therefore is irrelevant and inadmissible in a negligence action. *Stute*, 114 Wn.2d at 457; *see also Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985).

A comparison of the facts of this case with the distinguishable facts of *Degroot* shows that the decisions are consistent with each other and with *Stute*. In *Degroot*, unlike here, the subcontract did not provide that the subcontractor was solely responsible for the safety of its employees. Instead, as contemplated by *Stute*, the contract merely required the subcontractor to comply with applicable safety regulations. 83 Wn. App. at 127. Furthermore, the general contractor never argued, in the negligence action, that its duty had been delegated to the subcontractor. *Id.* at 130. The Court of Appeals held that the provision was admissible to show “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.

A case factually closer to the present case is *Ward*, a decision approved by this Court in *Stute*, 114 Wn.2d at 459-61, and distinguished by the *Degroot* court. 83 Wn. App. at 130. In *Ward*, an employee of the general contractor, Sellen Construction, was injured due to the negligence of a subcontractor, Ceco Corporation, in failing to erect and maintain guard rails as required by a WISHA regulation. 40 Wn. App. at 620-21.

The subcontract delegated to Sellen sole responsibility to erect and maintain guard rails. *Id.* at 621-22. Unlike the defendant in *Degroot* (but like N.A. Degerstrom), Ceco desired to offer the contract as evidence that the responsibility had been delegated. *Id.* 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 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 therefore was irrelevant and inadmissible under ER 402. *Id.* at 629.

Here, similarly, the contractual provision broadly delegating to Sharp-Line all responsibility for the safety of its employees was invalid as to Mr. LaFayette and his estate, and therefore was irrelevant and inadmissible under ER 402. The Court of Appeals correctly applied *Stute* in ruling that it was error to admit the Sharp-Line subcontract. *See Slip op.* at 17.

The Court of Appeals described the proper role of contractual safety and indemnity provisions in its discussion of this Court's decision in *Gilbert H. Moen v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996). *See Slip op.* at 13-15. Unlike N.A. Degerstrom, the general contractor in *Moen* did not rely on the contract to claim that it could not be held liable to the subcontractor's injured employee. Instead, the general contractor settled with the employee and then sought indemnity under the subcontract. *Id.* at 750-51. Reversing a summary

judgment entered in the subcontractor's favor, this Court upheld the enforceability of indemnification agreements as between general contractors and subcontractors. *Id.* at 753-55.

Addressing *Moen*, the Court of Appeals stated in this case:

Given [the] statutory authorization of indemnification agreements, the Degerstrom/Sharp-Line contract may well have been "typical" and "industry standard," as Degerstrom drove home during the trial, but not with the legal effect that Degerstrom then suggested to the jury. Indemnification provisions enable the general contractor, if liable to the employee, to recover its defense costs and judgment liability from the culpable subcontractor. They do not enable the general contractor to disavow its primary responsibility for WISHA compliance. *See Moen*, 138 Wn.2d at 753....

The facts of *Moen* illustrate the proper role and relevance of delegation and indemnification agreements. ... If it complies with the statute, then as between Sharp-Line and Degerstrom the agreement is controlling. As between Mr. Lafayette and Degerstrom, for any WISHA violation established by the evidence, it is irrelevant.

Slip op. at 13-15.

The Court of Appeals' discussion of *Moen* is consistent with the position advocated by Associated General Contractors of Washington (AGC) as amicus curiae in the Court of Appeals. AGC acknowledged that a provision that purports to make the subcontractor solely responsible for the safety of its employees is "invalid as to the injured employee." *AGC Amicus Brief* at 4, quoting *Ward*, 40 Wn. App. at 629. AGC cautioned the Court of Appeals against holding broadly that provisions allocating responsibility are invalid and admissible in all circumstances, which could undermine or overrule *Moen*. *Id.* The Court of Appeals was careful to

rule narrowly—and consistent with *Stute*, *Degroot*, and *Ward*—that safety and indemnity provisions are invalid, and thus irrelevant, *as to an employee injured or killed in a job site accident*.

N.A. Degerstrom’s ultimate argument for accepting review is that the Court of Appeals failed to presume that the jury followed an instruction describing a general contractor’s duty to workers as “nondelegable.” *Answer* at 12. But this argument does not suggest any conflict with *Stute* or *Degroot*. Furthermore, as observed by the Court of Appeals, N.A. Degerstrom conveyed throughout the trial—in accordance with the trial court’s pre-trial ruling—that the subcontract relieved it of any responsibility for Mr. LaFayette’s safety. *See Slip op.* at 17. Given that context, the Court of Appeals was justified in concluding that the prejudice was incurable. *Id.*; *see also Storey v. Storey*, 21 Wn. App. 370, 374-75, 585 P.2d 183 (1978) (presumption that juries follow instructions is inapplicable where prejudice from inadmissible evidence is incurable).

Finally, that N.A. Degerstrom seeks review only conditionally suggests that it does not perceive any genuine conflict warranting review under RAP 13.4(b). Indeed, N.A. Degerstrom’s request for review only in the event that this Court grants Mrs. Millican’s petition regarding an unrelated issue appears motivated primarily by a desire to influence the settlement value of the case by introducing risk to Mrs. Millican that acceptance of her petition could result in elimination of any possibility of recovery by the estate. *See Answer* at 10 (suggesting that the Court might “use[] the issues raised in respondent’s answer as the vehicle to reinstate


the jury's verdict"). Such considerations do not warrant acceptance of review.


IV. CONCLUSION

Conditional review of the issue raised by N.A. Degerstrom is not warranted because the Court of Appeals' finding of prejudicial evidentiary error is consistent with *Stute* and *Degroot*. This Court should accept review of the issue raised by Mrs. Millican in her petition, but not the issue conditionally raised by N.A. Degerstrom.


Respectfully submitted this 18th day of February, 2014.

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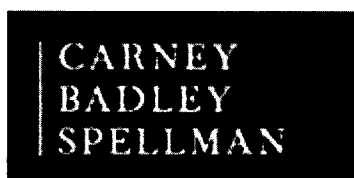
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My apologies for not including the attachment. Attached please find Appellant's Reply to Answer to Petition for Review and Declaration of Service for filing, thank you. If you have any questions, please do not hesitate to contact our office.



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