Supreme Court No. 90960-1

Court of Appeals No. 70568-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NICHOLAS and KELLY UHRICH, and THE MARTIAL COMMUNITY COMPRISED THEREOF,

Respondents/Appellants/Plaintiffs,

v.

MT. SI CONSTRUCTION, INC.

Petitioner/Respondent/Defendant.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

Nicholas Uhrich, the plaintiff at the trial court, the appellant at the Court of Appeals and the respondent in this Court, asks this Court to deny the Petition for Discretionary Review filed by Petitioner Mt. Si Construction.

II. IDENTITY OF DECISION BELOW

The petition is based on an unpublished decision of the Court of Appeals dated August 25, 2014, entitled *Uhrich v. Mt. Si Construction*, Docket No. 70568-7-I ("Decision"). A copy is attached as Exhibit A.

III. STATEMENT OF THE CASE

A. INTRODUCTION

This cases involves Mr. Nicholas Uhrich's ("Mr. Uhrich") claim against Mt. Si Construction, Inc. ("Mt. Si"), for injuries he sustained as a result of falling from a roof of a home on which he was working. The trial court dismissed Mr. Uhrich's claims against Mt. Si accepting its argument that it had no obligation to warn Mr. Uhrich or protect him from falling from the roof. The Court of Appeals reinstated his claim in an unpublished decision dated August 25, 2014.

This Court should dismiss the Petition for the following reasons:

1. The Decision does not conflict with any opinion of this Court or the Court of Appeals.

2. The Decision is consistent with the decisional law of the State of Washington, namely *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990), *Kinney v. Space Needle Corporation*, 121 Wn. App. 242, 248, 85 P.2d 918 (2004), *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991), *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990), and *Husfloen v. MTA Constr. Inc.*, 58 Wn. App. 686, 794 P.2d 859 (1990).

3. There is direct Washington authority which contradicts Mt. Si's claim that assumption of the risk applies to Mr. Uhrich's claims, which authority is not cited or addressed by Mt. Si. More specifically, *Lyons v. Redding Const. Co.*, 83 Wn.2d 86, 515 P.2d 821 (1973) is directly on point and ignored by Mt. Si.

The Court of Appeals did not err by reinstating Mr. Uhrich's case. The Petition should be denied.

B. SUBSTANTIVE FACTS

On November 3, 2009, Mr. Uhrich was injured while working in his capacity as a journeyman electrician for his employer, Lander Electrical Services ("LES"). CP 23. LES was a subcontractor to Mt. Si in relation to a project on a residence located in Lake Forest Park, Washington ("Project"). CP 23. Mt. Si was the general contractor. CP 62. The purpose of this work was to locate and mark electrical wiring and switches located under the roof so as to prevent screws, nails, and other items from damaging them while additional work was performed. Mr. Uhrich was injured on his first day on the job within minutes of arriving. CP 100-101.

Mr. Uhrich was not warned against the edge of the roof nor was he instructed to stay away from it. CP 100-101. No safety plan (including a fall protection plan) was on site that day, Mr. Uhrich was not provided a copy of fall protection plan and it was not discussed with him. CP 103. Further, Mr. Uhrich was not instructed to use fall protection equipment, he was not required to use it nor was he using it. CP 63; 100. Further, no one else was using fall protection that day. CP 106. While performing his work, Mr. Uhrich fell from the roof to the ground, a distance of 17'6". CP 101.

As a result of the fall, Mr. Uhrich suffered a brain injury resulting in cognitive function loss, skull and facial fractures, brain damage, post-concussive syndrome, vision loss, double vision, optical myopathy, severe memory loss, soft tissue damage, broken teeth, or both fractures, and lacerations. CP 86. He has undergone and continues to undergo numerous surgeries to reconstruct his face. CP 86. Additionally, he has had cognitive therapy, physical therapy, neurological therapy, back therapy, psychological treatment and counseling, and post-concussive therapy and treatment. CP 86.

C. PROCEDURAL FACTS

Mr. Uhrich filed his complaint on January 31, 2012, which was amended twice. CP 1-4; 17-20; 22-25. Mt. Si answered and a discovery process followed. CP 35 – 38. In May 2013, the parties made cross motions for summary judgment. On June 17, 2013, the trial court denied the Mr. Uhrich's motion for summary judgment and granted Mt. Si's motion, thereby dismissing Mr. Uhrich's case. CP 203-205. In its ruling the trial court made the following findings:

1. Mt. Si had no reason to believe that Mr. Uhrich would be exposed to any hazard of falling from the flat roof.
2. Thus, there was no "corresponding obligation to insist upon ... [Mr. Uhrich] using a safety harness or other fall protection device. See, WAC 296-155-24510.

3. As the flat roof qualifies as a "low pitched roof" as to which fall restraint or fall arrest systems are not required for a worker like plaintiff who is only on the roof to inspect or investigate roof level conditions. See, WAC 296-155-24515.

4. It could be argued that a "warning line system" near the edge would still be required but any such failure could not have been the proximate cause of this injury since the plaintiff was acting quite deliberately when, for whatever reason, he went to and leaned over the edge of the roof. The edge of the roof presented a known and obvious risk to which he did not need to be warned.

CP 201-202. The Court of Appeals reversed and stated:

1. Mt. Si had a non-delegable duty to ensure workplace safety, citing *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). Slip Op. p. 8.

2. Genuine issues of material fact exist as to whether Mr. Uhrich was exposed to a hazard in his scope of work. Slip Op. p. 10.

3. Genuine issues of material fact exist as to whether Mt. Si breached its duty to ensure that Mr. Uhrich used the required fall protection equipment. Slip Op. pp. 13-14.

The Petition followed.

V. ARGUMENT

RAP 13.4(b) governs petitions for review to this Court and sets forth the following considerations for review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law

under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As shown below, none of these standards are met in the Petition.

A. THE CONTROLLING CASE IS *STUTE V. P.B.M.C., INC.*

The controlling case is *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). In *Stute*, the general contractor P.B.M.C. contracted with to build a condominium complex. P.B.M.C. subcontracted with S & S Gutters to install gutters and downspouts. On March 13, 1984, Mr. Stute, an employee of S & S Gutters, was installing gutters and slipped off the roof, falling three stories. There was no scaffolding or other safety equipment to break the fall. Mr. Stute was injured by the fall. P.B.M.C. knew that employees of the subcontractor were working on the roof without safety devices. 114 Wn.2d at 456.

Stute sued P.B.M.C. alleging it owed him a duty to provide necessary safety devices at a job site. P.B.M.C. moved for summary judgment, which was granted. The trial court ruled that the general contractor did not owe Stute, an employee of a subcontractor, a duty to provide safety equipment because the

general contractor had not voluntarily assumed the duty in its contract with the owner or subcontractor. The trial court also ruled P.B.M.C. had not retained authority to control the safety practices of the subcontractor. 114 Wn.2d at 456. This Court disagreed and reversed, holding that the statutory directive to employers to comply with safety regulations applies to employees of a subcontractor as well as to the general contractor's direct employees. 114 Wn.2d at 457.

This Court held that RCW 49.17.060 creates a two-fold duty. Subsection (1) imposes a general duty on employers to protect only the employer's own employees from recognized hazards not covered by specific safety regulations. Subsection (2) imposes a specific duty to comply with WISHA regulations. 114 Wn.2d at 457. Thus, the employer's liability depends upon which section is being invoked. The employer's duty only extends to employees of independent contractors when a party asserts that the employer did not follow particular WISHA regulations. In such a case, all employees working on the premises are members of the protected class. *Id.* "Thus, the specific duty clause of RCW 49.17.060(2) requiring employers to comply with applicable WISHA regulations, applies to employees of subcontractors." *Id.*

The Court of Appeals applied this rule as it stated at page 8 of the Decision:

> In *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), the Washington Supreme Court held that a general contractor has a nondelegable duty to ensure compliance with safety regulations for the protection of all employees at the work site, including the employees of a subcontractor. *Stute*, 114 Wn.2d at 464. The court concluded that the general contractor assumes primary responsibility because its "innate supervisory authority constitutes sufficient control over the workplace." *Stute*, 114 Wn.2d at 464. The court explained that the policy rationale for placing this responsibility upon a general contractor is because the "general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations." *Stute*, 114 Wn.2d at 463.

This Court has regularly imposed the *Stute* Rule. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002). The Court of Appeals decisions have repeatedly applied the *Stute* Rule. *See Kinney v. Space Needle Corporation*, 121 Wn. App. 242, 248, 85 P.2d 918 (2004); *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991); *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990); *Husfloen v. MTA Constr. Inc.*, 58 Wn. App. 686, 794 P.2d 859 (1990).

The Court of Appeals also went on to state:

> There must be a "reasonable predictability that, in the course of [the workers'] duties, employees will be, are, or have been in the zone of danger." *Adkins*, 110 Wn.2d at 147; *see also Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*,

136 Wn. App. 1, 7, 146 P.3d 1212 (2006) (holding WISHA regulations were violated because the employee was working within close proximity to the hazard).

Decision, p. 10.

Mt. Si relies heavily on *Adkins v. Aluminum Company of America,* 110 Wn.2d 128, 147, 750 P.2d 1257 (1988) in its pleas to this court. In *Adkins,* an injured worker sued his employer for injuries sustained as a result of him placing his hand near a running fan in an attempt to retrieve some caulk. This Court concluded that it was not reasonably predictable that the worker "would need access to the fan in the course of his normal duties as a roofer." *Id.* at 148.

In this case, the facts show that Mr. Uhrich was not warned against the edge of the roof nor was he instructed to stay away from it. CP 100-101. No safety plan (including a fall protection plan) was on site that day, Mr. Uhrich was not provided a copy of fall protection plan and it was not discussed with him. CP 103. Further, Mr. Uhrich was not instructed to use fall protection equipment, he was not required to use it nor was he using it. CP 63; 100. Further, no one else was using fall protection that day. CP 106. While performing his work, Mr. Uhrich fell from the roof to the ground, a distance of 17'6". CP 101.

Mt. Si argues that Mr. Uhrich did not need to access the full roof to perform his duties and it was not reasonably predictable the he would do so as a matter of law thus entitling it to summary judgment. *Petition* at 7-9. Such an argument involves clear questions of material fact to be resolved by the jury as stated by the Court of Appeals. Slip Op. pp. 10-11. Such a conclusion does not meet the standards of RAP 13.4.

B. ASSUMPTION OF THE RISK DOES NOT APPLY TO CONSTRUCTION SITES IN WASHINGTON STATE AS A MATTER OF LAW

At pages 11-20 of the Petition, Mt. Si argues that implied primary assumption of the risk should be applied to construction sites in Washington State. In support of this argument, Mt. Si cites only to out of state cases: *Larabee v. Triangle Steel, Inc.*, 451 N.Y.S.2d 258, 86 A.D.2d 289 (1982), and *Brady v. Ralph M. Parsons*, Co., 327 Md. 275, 292, 609 A.2d 297 (1992).

Long ago this Court rejected the application of assumption of the risk in the construction setting. In *Lyons v. Redding Const. Co.*, 83 Wn.2d 86, 515 P.2d 821 (1973), Mr. Lyons, an employee of an electrical subcontractor, sued Redding Construction Company, the general contractor, for damages as a result of injuries he sustained while standing on a foundation footing. Mr. Lyons was either hit by

a tractor performing road work or the tractor hit the footing on which Mr. Lyons was standing. *Id.*, 83 Wn.2d at 87. In ruling on an appeal by Mr. Lyons, this Court first said:

> In recent years we have recognized the anomaly of perpetuating a doctrine whose historical purpose is questionable and whose contemporary application is dubious. In *Siragusa v. Swedish Hosp.*, 60 Wn.2d 310, 319, 373 P.2d 767 (1962), *noted* 16 Vand. L. Rev. 465 (1963); 40 U. Det. L.J. 273 (1962), after an extensive review of the doctrine, we addressed assumption of risk in the context of the master servant relationship:
>
> > The time has now come . . . to state unqualifiedly that an employer has a duty to his employees to exercise reasonable care to furnish them with a reasonably safe place to work. We now hold that if an employer negligently fails in this duty, he may not assert, as a defense to an action based upon such a breach of duty, that the injured employee is barred from recovery merely because he was aware or should have known of the dangerous condition negligently created or maintained. However, if the employee's voluntary exposure to the risk is unreasonable under the circumstances, he will be barred from recovery because of his contributory negligence.
>
> *See Browning v. Ward*, 70 Wn.2d 45, 422 P.2d 12 (1966). The following year the defense was abolished in a relationship other than that of master-servant in *Engen v. Arnold*, 61 Wn.2d 641, 379 P.2d 990 (1963). The doctrine was further restricted in *Feigenbaum v. Brink* , 66 Wn.2d 125, 401 P.2d 642 (1965), wherein the reasoning of the *Siragusa* and *Engen* cases was found to control in a situation in which a landlord had not maintained rental premises in a reasonably safe condition. Thus, assumption of the risk has been extremely limited by prior Washington decisions in which the defense of contributory negligence was available. *Cf.* Smith, *The Last Days of Assumption of the Risk*, 5 Gonzaga L. Rev. 190 (1970).

Id. at 93. This Court went on to say:

> In *Greenleaf v. Puget Sound Bridge & Dredging Co.*, 58 Wn.2d 647, 364 P.2d 796 (1961), we held that a general contractor owes an equal duty of care to his employees and the employees of a subcontractor. We are convinced that *Siragusa* and the *Engen* case are controlling in this appeal. Appellant Lyons stood in the shoes of an employee of respondent, Redding Construction Co. As we have noted, *Siragusa* eliminated the defense of assumption of the risk in the master-servant context while *Engen* abolished the doctrine in other relationships. Thus the defense of assumption of the risk is not available, and furthermore we are convinced the maxim, volenti non fit injuria, is inappropriate and inapplicable.

Id. at 94.

Mt. Si ignores this line of cases and instead relies on out of state cases. There is no legal basis to overturn *Lyons* or any other case which follows it (an argument impliedly made here by Mt. Si). *Lyons* was decided the same year that the Legislature adopted the Washington Industrial Safety and Health Act of 1973. RCW 49.17.900. Laws of 1973, Chapter 80, Section 1 provides:

> The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section

> 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

RCW 49.17.030 provides: "This chapter shall apply with respect to employment performed in any work place within the state."

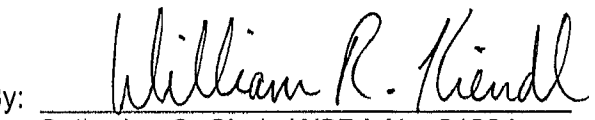
There is a clear policy in Washington that employers have higher duties than employees in a workplace setting. The notion that construction sites are littered with dangers is obvious. The idea that a contractor need not warn and take action to protect against them is directly contrary to the statutory and regulatory scheme established by Chapter 49.17 RCW and WAC 296-155. Any effort to weaken these policies should be rejected.

VI. CONCLUSION

For the above stated reasons, the petition should be denied.

DATED this 17th day of November, 2014.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 17th day of November, 2014:

Via e-mail transmission:

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Exhibit A

Decision of the Washington Court of Appeals,
Division One, dated August 25, 2014
(unpublished)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MT. SI CONSTRUCTION, INC., and CONTRACTORS BONDING AND INSURANCE COMPANY,	)	No. 70568-7-I
	)	DIVISION ONE
Respondents,	)	
v.	)	UNPUBLISHED OPINION
NICHOLAS AND KELLY UHRICH, and the marital community thereof,	)	
Appellants.	)	FILED: August 25, 2014

SCHINDLER, J. — Nicholas Uhrich appeals summary judgment dismissal of his personal injury lawsuit against general contractor Mt. Si Construction Inc. Uhrich contends Mt. Si had a duty to ensure he was using fall protection equipment while working on the roof under former WAC 296-155-24510 (2000) and former WAC 296-155-24515 (2000). Mt. Si argues neither former WAC 296-155-24510 nor former WAC 296-155-24515 apply because the scope of work did not expose Uhrich to the hazard of falling. Mt. Si also contends that fall protection was not required by an exception under former WAC 296-155-24515(2)(a) because Uhrich was on the roof "only to inspect, investigate, or estimate roof level conditions." Because there are genuine issues of material fact as to whether the scope of work exposed Uhrich to the hazard of falling, we reverse and remand for trial.

FACTS

Mt. Si Construction Inc. was the general contractor for a remodeling project. David Arnold, the president of Mt. Si, testified that "[a]s part of the remodeling work, it was necessary to locate the electrical wires just underneath the surface of the roof so that when the new roof surface was applied the roofers would not nail into the electrical wires." Mt. Si hired subcontractor Lander Electrical Services (LES) "to come locate the wire paths and mark their locations on the roof."

LES electrician Nicholas Uhrich arrived at the house at around 9:00 a.m. on November 3, 2009. Arnold took Uhrich up the "set of stairs on the outside of the addition we'd done . . . , in through what was to be a set of French doors . . . into the master bedroom." Arnold testified that he and Uhrich then walked "down the hallway and the living room" so that he could show Uhrich "the light and the switch locations that we needed to mark out in the roof." Arnold said that Uhrich "took out his sending device and attached it to a light switch at one of the locations" before returning to the master bedroom. Arnold testified that he then "set up a ladder in a skylight that—we'd just built a skylight that's a pitched skylight, there was no glass on it yet and it was right in the middle of a master bedroom addition to be done, and we went up through that [opening] and got onto the roof." The roof is flat with a 2-1/2-foot-wide gutter along the perimeter. At its highest point, the roof is 17-1/2 feet from the ground.

Arnold testified that earlier that morning, he had "gone up with a bucket of paint, and . . . marked the lights and the switch locations on top of the roof with paint." Arnold said that he showed Uhrich the light and switch locations he had marked on the roof

before "somebody called," and he left. Uhrich was not wearing fall protection equipment and there was no warning line system around the perimeter of the roof. Shortly after Uhrich started working, he fell off the roof. Uhrich sustained serious injuries, including a traumatic brain injury.

Uhrich and his spouse Kelly Uhrich (Uhrich) filed a personal injury lawsuit against Mt. Si. Uhrich alleged Mt. Si breached its duty to provide a safe work environment by allowing him to work on the roof without providing fall protection as required under former WAC 296-155-24510 and failing to have "a written fall protection work plan" as required under former WAC 296-155-24515. Mt. Si filed an answer denying liability and asserting Uhrich's negligence barred or reduced "any recovery."

Mt. Si filed a motion for summary judgment dismissal. Mt. Si argued that because the scope of work did not expose Uhrich to the hazard of falling, neither former WAC 296-155-24510 nor former WAC 296-155-24515 applied. Mt. Si also argued that fall protection was not required under the exception in former WAC 296-155-24515(2)(a) for a worker who is on a low-pitched roof only to "inspect, investigate, or estimate roof level conditions." Mt. Si also claimed it was entitled to judgment as a matter of law because Uhrich assumed the risk of falling from the roof.

Mt. Si submitted excerpts of the deposition testimony of Arnold and Uhrich, the declaration of Arnold, and the declaration of a painter at the work site, Jason Pontious. Arnold states that in his opinion, the "scope of work did not include getting anywhere near the edge of the roof or working in any area where there was a potential fall

hazard," and "[t]he closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 17' 6"."

In his declaration, Jason Pontious states that while he was painting the trellis on the west side of the house, he saw Uhrich "pacing around an area near the center of the roof. Mr. Uhrich was complaining to himself and tapping on a machine that he was holding in his hand." Pontious testified that Uhrich "was trying to locate the wires in the roof." Pontious states that he told Uhrich "the lights and switches were in a general area over the center of the roof," and "gestured towards some painted marks . . . on the roof showing the location of the switches and lights." Pontious testified that instead of walking over toward the painted marks, "Uhrich walked in the opposite direction to the west edge of the roof," and "leaned over . . . while commenting that he was just going to peek over the edge of the roof and take a look." Pontious said he saw Uhrich "crouch down into a 3-point stance," and as he started to fall, Pontious tried to reach out "to try to grab him. . . . This all happened very quickly. Mr. Uhrich went up to the gutter, leaned over the edge of the roof, started to place his hand on the decorative trellis and fell right off the roof in one continuous motion."

In the excerpts from the deposition submitted by Mt. Si, Uhrich states that he has no memory of the fall and cannot remember why he walked over to the edge of the roof. Uhrich testified that he was familiar with fall protection gear and he understood "that if you get too close to the edge of the roof there's a potential of falling." Uhrich also described how he traces electrical wires and the equipment he uses.

Uhrich filed a cross motion for partial summary judgment on breach of duty. Uhrich argued Mt. Si "breached its statutory duties by not providing a safe work environment, not having a written fall protection plan on the job site, by not furnishing such plan to the plaintiff, and by failing to ensure that the plaintiff was wearing fall protection gear."[1]

In support of the motion for partial summary judgment, Uhrich submitted Mt. Si's supplemental answers to interrogatories and requests for production and excerpts from Arnold's deposition. In answer to the interrogatories, Mt. Si admits Uhrich was an employee of the independent contractor it hired "to locate and mark the wiring paths between two light and switch locations on the roof."

During his deposition, Arnold testified that "[t]he biggest fall potential is right where Mr. Uhrich fell off the roof and that was—I believe I measured it at 17'6" to the ground from there." Arnold also admitted he did not have a fall protection plan on site and did not discuss safety or the use of fall protection equipment with Uhrich. Arnold said he was not familiar with the "safe place standards" adopted by the Department of Labor and Industries[2] and did not know if he was "currently following the directives from that act." Arnold testified that on the day of the accident, there were roofers working on the other side of the house insulating the addition Mt. Si had just built, and the roofers were using fall protection equipment.

The court denied Uhrich's motion for partial summary judgment, granted Mt. Si's motion for summary judgment, and dismissed the lawsuit.

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[1] Emphasis omitted.

[2] WAC 296-155-040 describes the "safe place standards."

ANALYSIS

Uhrich argues the court erred in denying his motion for partial summary judgment and dismissing his personal injury lawsuit. Uhrich contends Mt. Si had a duty under former WAC 296-155-24510 and former WAC 296-155-24515 to ensure he was using fall protection equipment while working on the 17-1/2-foot-high roof. Mt. Si contends that because the scope of work did not expose Uhrich to the hazard of falling, neither former WAC 296-155-24510 nor former WAC 296-155-24515 applies. Mt. Si also claims a fall restraint or fall arrest system was not required, asserting the exception under former WAC 296-155-24515(2)(a) where a worker is on a low-pitched roof "only to inspect, investigate, or estimate roof level conditions" applies. In the alternative, Mt. Si contends that even if there were a duty under former WAC 296-155-24510 or former WAC 296-155-24515, it met that duty because fall protection gear was available for Uhrich to use.

This court reviews summary judgment de novo, engaging in the same inquiry as the trial court. Afoa v. Port of Seattle, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). In determining whether a genuine issue of material fact exists, we consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Where different competing

inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Johnson v. UBAR, LLC, 150 Wn. App. 533, 537, 210 P.3d 1021 (2009).

In a negligence action, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The existence of a legal duty is generally a question of law. Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). But where the existence of a legal duty depends on disputed material facts, summary judgment is inappropriate. Afoa, 176 Wn.2d at 466.

The Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, governs safety standards for employers. The purpose of WISHA is to supplement the federal Occupational Safety and Health Act of 1970 (OSHA) and "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010; Afoa, 176 Wn.2d at 470. "OSHA requires states to comply with its rules or else enact safe workplace standards at least as effective as OSHA in ensuring worker safety." Afoa, 176 Wn.2d at 470. Under WISHA, the Department of Labor and Industries must promulgate regulations that equal or exceed the OSHA standards. RCW 49.17.010, .040. As a remedial statute, WISHA and its regulations are liberally construed to carry out its stated purpose. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257, 756 P.2d 142 (1988). "[R]egulations promulgated pursuant to WISHA . . . must also be construed in light of WISHA's stated purpose." Adkins, 110 Wn.2d at 146.[3]

[3] Footnote omitted.

RCW 49.17.060 and WAC 296-155-040 impose a nondelegable duty on employers to comply with WISHA. RCW 49.17.060 states, in pertinent part:

> Each employer:
> (1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees . . . ; and
> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

The WAC regulation mirrors RCW 49.17.060. WAC 296-155-040 provides, in part:

> (1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.
> (2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

In Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 788 P.2d 545 (1990), the Washington Supreme Court held that a general contractor has a nondelegable duty to ensure compliance with safety regulations for the protection of all employees at the work site, including the employees of a subcontractor. Stute, 114 Wn.2d at 464. The court concluded that the general contractor assumes primary responsibility because its "innate supervisory authority constitutes sufficient control over the workplace." Stute, 114 Wn.2d at 464. The court explained that the policy rationale for placing this responsibility upon a general contractor is because the "general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations." Stute, 114 Wn.2d at 463.

WISHA requires contractors ensure workers use specific fall protection equipment when the work presents a hazard of falling 10 feet or more. The WISHA fall protection requirements apply to workers "in construction, alteration, repair, maintenance (including painting and decorating), demolition workplaces, and material handling covered under chapter 296-155 WAC." Former WAC 296-155-24501 (2000).

Former WAC 296-155-24510 provides, in pertinent part:

> When employees are exposed to a hazard of falling from a location ten feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented according to the following requirements.[4]

Former WAC 296-155-24515 is a more specific standard that applies to work on low-pitched roofs "with a potential fall hazard greater than ten feet."[5] Former WAC 296-155-24515 requires contractors ensure employees use a fall restraint or fall arrest system, or erect a warning line system. Former WAC 296-155-24515 provides, in pertinent part:

> (1) General Provisions. During the performance of work on low pitched roofs with a potential fall hazard greater than ten feet, the employer shall ensure that employees engaged in such work be protected from falling from all unprotected sides and edges of the roof as follows:
>
> (a) By the use of a fall restraint or fall arrest systems, as defined in WAC 296-155-24510; or
>
> (b) By the use of a warning line system erected and maintained as provided in subsection (3) of this section and supplemented for

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[4] Former WAC 296-155-24510(1)-(3) outlines the requirements for each of the three alternative forms of fall protection. Fall restraint systems include guardrails, safety belts or harnesses, warning lines, and safety monitors; fall arrest systems include full body harnesses, safety nets, and catch platforms; and positioning device systems include a body belt or harness system rigged so that an employee cannot free fall more than two feet and must be secured to appropriate anchorages. Former WAC 296-155-24510(1)-(3).

[5] "Low pitched roofs" are defined as roofs "having a slope equal to or less than four in twelve." WAC 296-155-24603.

> employees working between the warning line and the roof edge by the use of a safety monitor system as described in WAC 296-155-24521.

Uhrich argues Mt. Si had a duty to ensure use of fall protection equipment under former WAC 296-155-24510 and former WAC 296-155-24515 because he was exposed to the hazard of falling from a 17-1/2-foot-high roof. Mt. Si relies on Arnold's testimony to argue the undisputed facts establish Uhrich was not exposed to the hazard of falling because the scope of work did not require him to go near the edge of the roof.

WAC 296-155-012 defines "hazard" to mean a "condition, potential or inherent, which is likely to cause injury, death, or occupational disease." A worker is exposed to a hazard in violation of WISHA where the worker has "access to the violative conditions." Adkins, 110 Wn.2d at 147. There must be a "reasonable predictability that, in the course of [the workers'] duties, employees will be, are, or have been in the zone of danger." Adkins, 110 Wn.2d at 147; see also Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 7, 146 P.3d 1212 (2006) (holding WISHA regulations were violated because the employee was working within close proximity to the hazard).

Viewing the evidence in the light most favorable to Uhrich, we conclude there are material issues of fact as to whether the scope of work exposed Uhrich to the hazard of falling and, therefore, whether former WAC 296-155-24510 or former WAC 296-155-24515 apply. Arnold testified that before Uhrich arrived, he "marked on the roof with paint the location of all the lights and switches from the main floor below," and "[m]ost of the switch and light locations were towards the center of the roof." But Arnold stated that on November 3, he told Uhrich to "trace the wire paths between the switch and light locations that were marked on the roof, and then to mark those paths with the paint I

had supplied." Arnold concedes in his deposition that he did not say anything to Uhrich "about not being near the edge of the house." Further, nothing in the record shows that the wiring ran in a straight line between the light and switch locations Arnold had previously marked with paint on the roof. Uhrich testified that he had to go up and down from the roof in order to locate and trace each line. In his deposition, Uhrich explained that he had to attach one part of the circuit tracer to the circuit inside the house, then return to the roof and use the hand-held receiver to locate the electrical wire.[6] Pontious also testified Uhrich appeared to have difficulty locating the electrical wires, "pacing around an area near the center of the roof . . . complaining to himself and tapping on a machine that he was holding in his hand."

In the alternative, Mt. Si claims that the exception under former WAC 296-155-24515(2)(a) applies. Former WAC 296-155-24515 states, in pertinent part:

> (2) Exceptions.
> (a) The provisions of subsection (1)(a) of this section do not apply at points of access such as stairways, ladders, and ramps, or when employees are on the roof only to inspect, investigate, or estimate roof level conditions. Roof edge materials handling areas and materials storage areas shall be guarded as provided in subsection (4) of this section.[7]

Preliminarily, Mt. Si argues that Uhrich may not for the first time on appeal rely on RCW 49.17.010 and the OSHA regulations to interpret the exception under former WAC 296-155-24515(2)(a). We disagree. "[A] statute not addressed below but pertinent to

[6] The part of the circuit tracer attached to the circuit inside the house emits a radio frequency that the hand-held receiver picks up.

[7] Emphasis added.

the substantive issues which were raised below may be considered for the first time on appeal." Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990).

RCW 49.17.010 specifically incorporates OSHA, expressly stating that the regulations promulgated under WISHA "shall equal or exceed the standards prescribed by [OSHA]." Accordingly, in construing WISHA regulations, we can look to OSHA regulations and the federal decisions interpreting OSHA. Adkins, 110 Wn.2d at 147.

The OSHA regulation for fall protection in construction workplaces has a similar exception to former WAC 296-155-24515(2)(a), providing, in pertinent part:

> The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.

29 C.F.R. § 1926.500(a)(1).[8]

The OSHA exception applies only to workers engaged in "inspecting, investigating and assessing workplace conditions before the actual work begins or after work has been completed" because workers "are exposed to fall hazards for very short durations, if at all, since they most likely will be able to accomplish their work without going near the danger zone." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672-01 (Aug. 9, 1994).[9] In addition, the OSHA regulations state, in pertinent part:

> [E]mployees who inspect, investigate or assess workplace conditions will be more aware of their proximity to an unprotected edge than, for example, a roofer who is moving backwards while operating a felt laying

[8] Emphasis added.

[9] Emphasis added.

> machine, or a plumber whose attention is on overhead pipe and not on the floor edge.

59 Fed. Reg. 40,672-01. Accordingly, the exception does not apply "if inspections are made while construction operations are underway," in which case "all employees who are exposed to fall hazards while performing these operations must be protected." 59 Fed. Reg. 40,672-01.

Construction on the remodeling project was already underway when Uhrich was on the roof. There is no dispute that Uhrich was on the roof to locate and mark the locations for the electrical wiring underneath the surface of the roof. Uhrich was not on the roof "only to inspect, investigate, or estimate roof level conditions."[10]

Mt. Si also argues that even if it had a duty to provide fall protection equipment, the record shows it met that duty. Mt. Si relies on Uhrich's admission that he had fall protection gear in his van and Arnold's testimony that lanyards and safety harnesses were available for use at the project site. We reject Mt. Si's argument.

In Washington Cedar & Supply Co. v. Department of Labor & Industries, 137 Wn. App. 592, 154 P.3d 287 (2007), we held that former WAC 296-155-24510 "imposes three mandatory duties on employers." Wash. Cedar, 137 Wn. App. at 600. The employer must make certain that a fall system is provided, installed, and implemented. Wash. Cedar, 137 Wn. App. at 601. And former WAC 296-155-24515 explicitly requires

[10] (Emphasis added.) We note that even if the exception in former WAC 296-155-24515(2)(a) applies, there is no dispute that Mt. Si failed to provide a warning line system as required under former WAC 296-155-24515(1)(b).

the employer "ensure" the worker is using fall protection equipment or erect a warning line system.[11]

Because there are genuine issues of material fact as to whether the scope of work exposed Uhrich to the hazard of falling and whether Mt. Si breached the duty to ensure Uhrich used fall protection equipment, we reverse and remand for trial.

WE CONCUR:

[11] We also reject Mt. Si's argument that Uhrich's assumption of the risk of falling off the roof bars his recovery. For assumption of the risk to be a complete bar to recovery, the plaintiff must consent "to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks." Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 497, 834 P.2d 6 (1992). Because a general contractor has a nondelegable duty to comply with WISHA regulations, assumption of risk is not a complete bar to recovery. Whether Uhrich was contributorily negligent is a question for the trier of fact. See Scott, 119 Wn.2d at 503.

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To Whom It May Concern:

Attached for filing is the following brief:

1. Response to Petition for Review, filed by Respondent Nicholas Uhrich and dated November 17, 2014.

Counsel for Petitioner is served by e-mail as part of this message.

Please contact the undersigned should you have any questions about this filing. Thank you.

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