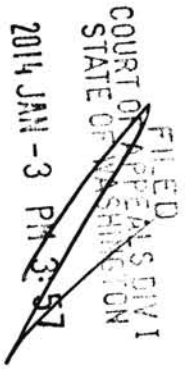
70568-7

70568-7

Court of Appeals No. 70568-7-I

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE




---

MR. NICHOLAS UHRICH, and THE MARTIAL COMMUNITY THEREOF,

Appellant/Plaintiff,

v.

MT. SI CONSTRUCTION, INC.

Respondent/Defendant,

---

# APPELLANT'S REPLY BRIEF

---

Catherine C. Clark
The Law Office of Catherine C. Clark PLLC
701 Fifth Avenue, Suite 4785
Seattle, WA 98104
Phone: (206) 838-2528
Fax: (206) 374-3003
Email: cat@loccc.com
Attorneys for Appellants

Table of Contents

Table of Authorities

**Cases**

**Statutes**



**Rules**



**Regulations**

## I. INTRODUCTION

This case presents a unique question as it relates to the application of an exception to WAC 296-155-24510 (the obligation to provide fall protection) as stated in WAC 296-155-24515(2)(a). Mr. Uhrich can find no reported decision on this regulation in Washington State.[1] As is shown herein, the exception contained in WAC 296-155-24515(2)(a) does not apply. The trial court should be reversed.

## II. ARGUMENT

### A. THE GENERAL PROVISIONS OF WAC 296-155 PROVIDE TO ALL WORKPLACES

Mt. Si complains that it had fall protection equipment available and Mr. Uhrich did as well, and thus, it had no duty to advise or warn Mr. Uhrich. Response Brief, p. 8. Thus, flows the argument, it was Mr. Uhrich's responsibility to make the determination of whether fall protection was appropriate to the situation and then don it. Response Brief, p. 8-9. At Page 9 of its brief, Mt. Si complains that the former WAC 296-155-040 did not apply to fall protection situations but was only a general statement.

---

[1] Mr. Uhrich has found two unreported decisions on WAC 296-155-24515 as follows: *King Custom Framing, Inc.*, Docket No. 67502-8-1 (March 11, 2013); *Washington Cedar & Supply Co., Inc.*, 119 Wn. App. 906, 83 P.3d 1012 (2003, partially published). Neither is cited as authority herein. GR 14.1(a).

Both of these arguments are incorrect.

> General contractors have a specific, non-delegable duty to comply with WISHA regulations for the benefit of their employees and independent contractors' employees. *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 248, 85 P.3d 918 (2004). WISHA requires the employer to "develop and implement a written fall protection work plan including each area of the work place where the employees are assigned and where fall hazards of 10 feet or more exist." WAC 29615524505 (emphasis added). "When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented." WAC 296-155-24510 (emphasis added).

*Hoff v. Mountain Const., Inc.,* 124 Wn.App. 538, 545, 102 P.3d 816, (2004). Mt. Si does not cite any authority that the decision to use fall protection falls on an employee who is exposed to a hazard in excess of 10 feet. Further, there is no authority for the implied argument that an employee must make an independent assessment of a job site and then make a decision as to whether fall protection is appropriate.

Further, nowhere in WAC 296-155-040 do its provisions eliminate its application to any work setting. Rather, it is such broad and general language that it applies to all work settings. WAC 296-155-001 and WAC 296-155-005. WAC 296-155-24510

requires that employees working at heights over 10 feet wear fall restraints. It applies:

> to any and all work places subject to the Washington Industrial Safety and Health Act (chapter 49.17 RCW), wehre construction, alteration, demolition, related inspection, and/or maintenance and repair work, including painting and decorating, is performed. These standards are minimum safety requirements with which all industries must comply when engaged in the above listed types of work.

WAC 296-155-005(1). *Hoff,* 124 Wn. App. at 546. *("*Requiring specific types of fall restraint for particular types of construction work, such as roofing and rock scaling, does not nullify the rest of this code provision's application to fall hazards in general.")

As is shown below, the specific provisions of WAC 296-155-24510 and WAC 296-155-24515 do not eliminate the obligation to provide fall protection and warnings to Mr. Uhrich.

## B. WAC 296-155-24510 APPLIES WHEN AN EMPLOYEE IS EXPOSED TO A HAZARD IN EXCESS OF 10 FEET AS A MATTER OF LAW

Mt. Si complains that Mr. Uhrich went beyond the scope of his work by going to the edge of the roof and thus, had he stayed within his scope, he would not have been injured. It states: "... pursuant to this regulation, Plaintiff must first prove his scope of work exposed him to a hazard of falling." Response Brief, p. 10.

Mt. Si then complains that since Mr. Uhrich's scope of work did not involve the edge of the roof, it had no duty to protect him.

This is not the law.

"By its plain language, WAC 296-155-24510 applies to construction work in general that present fall hazards to workers." *Hoff*, 124 Wn. App. at 546. In *Hoff*, the Court of Appeals was asked to review whether summary judgment was warranted in favor of an employee who fell into a pit which was twenty (20) feet deep. This Court specifically concluded that:

> Mountain had a specific duty under WAC 296-155-24505 and WAC 296-155-24510, respectively to develop and to implement a fall protection plan and a fall restraint/arrest or positioning system at the work site.

124 Wn. App. at 546.

Here, it is undisputed that Mr. Uhrich was more than 10 feet up just as it was in *Hoff*. 124 Wn. App. at 545 ("It is undisputed that Mountain's excavation pit was more than 10 feet deep."). Again, Mt. Si has admitted the hazard that Mr. Uhrich was exposed to:

> Q: How high was that roof?
>
> A: Depending on where you were standing but at the driveway edge it's probably 20 – well, there's a catwalk below there so – yea, if you fell from the roof at the driveway edge you'd come out on the catwalk so that's probably ten, twelve-foot drop and then down to the driveway it would be another eight feet.

And on the other end of the house it was less than ten.

Q: What about the highest part?

A: That driveway would be the highest part, yeah. **The 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.**

CP 198-199.

The argument that Mr. Uhrich didn't need to be near the edge of the roof to locate the internal as-built wiring system is contradicted by Mt. Si's agreement with Mr. Uhrich that he was on the roof to locate these items. Response Brief, p. 11-15. The argument that Mr. Uhrich did not need to be near the edge of the roof suggests that Mt. Si knew where the internal systems were. However, there is no evidence in the record as to the actual location of these systems at the time that Mr. Uhrich was injured. The only information presented is Mr. Arnold's opinion that he didn't need to be near the edge of the roof and states that the systems he was employed to locate were "well away" from the edge of the roof. CP 65 & CP 196. Mr. Arnold's opinions are not enough as such statements are self-serving. *E.g. Zellmer v. Zelmer*, 164 Wn.2d 147, 168, 188 P.3d 497 (2008). Further, the term "well away" is ambiguous at best.

As a matter of law, WAC 296-155-24510 applies.

## C. WAC 296-155-24515(2)(A) APPLIES TO THE WHOLE JOB AND NOT TO WORKERS ON AN INDIVIDUAL BASIS

Mt. Si contends that the fall protection requirements do not apply to Mr. Uhrich as he had not yet begun work, but was only "on the roof to "inspect, investigate and estimate the location of wire paths in the roof" and thus WAC 296-155-24515(2)(a) relieves them of the obligation to provide fall protection. Response Brief, p. 12. Further, Mt. Si contends that Mr. Uhrich was not engaged in roofing work and therefore was not entitled to fall protection. Response Brief, p. 12.

Again, Mt. Si is incorrect.

As for Mt. Si's argument that Mr. Uhrich was not engaged in roofing work and therefore was not entitled to fall protection, the *Hoff* court noted:

> The plain language of WAC 296-155-24510 does not limit its application to roofing or other above-ground work. Instead, it uses broader terminology, namely an employee's exposure to a "hazard of falling from a *location* 10 feet or more in height" ...

(Emphasis in the original.) 124 Wn. App. at 546.

Mt. Si's approach is to apply the exception in WAC 296-155-24515(2)(a) individually to each employee. Mt. Si makes this argument without any citation to authority.

Rather, the exception applies before construction work begins on the project as a whole and after work, as a whole, is completed. 29 C.F.R. 1926.500(a)(1) .) Appendix A, p. 1-2. Letter #20091112-9340. There is no authority for the argument that the statute is applied to each employee individually and on a case-by-case basis. Further, WAC 296-155-24515(2)(a) does not include such language. Again, it states:

> 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**.

Mt. Si's position is to add additional language to WAC 296-155-24515(2)(a) such as "before each employee begins construction work" or something similar. This statute is not ambiguous and thus, such an exercise is not permitted.

> An unambiguous statute is not subject to judicial construction, and we will not add language to an unambiguous statute even if we believe the legislature intended something else but did not adequately express it.

*American Continental Ins., Co, v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

## D. RCW 49.17.010 IS PART OF THE STATUTORY SCHEME CONSIDERED BY THE TRIAL COURT

Mt. Si contends that RCW 49.17.010 is not properly before this court as it was not presented to the trial court. Response Brief, p. 15. This is incorrect.

RAP 9.12 requires that only issues brought to the attention of the trial court in a summary judgment proceeding are considered by the appellate court. RAP 9.12 does not proscribe additional arguments relating to the same issue particularly when a statute which is part of the same statutory scheme is raised. The Washington Supreme Court has stated:

> The other issue which defendant maintains was not raised below and therefore is not properly before this Court is plaintiffs' argument that RCW 49.44.090 and RCW Ch. 49.60 create separate and distinct causes of action. The record does not reveal any specific request by plaintiffs that the court consider the statutes independently from one another. In fact, no mention of RCW 49.40 4.090 is found in plaintiffs' memorandum opposing summary judgment. However, a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal. *State v. Fagalde*, 85 Wash. 2d 730, 732, 539 P.2d 86 (1975). Both RCW 49.44.090 and RCW Ch. 49.60 relate to discriminatory practices in employment. Therefore it is both appropriate and necessary for this court to consider these 2 obviously related statutes in determining whether plaintiffs' cause of action exists.
>
> Moreover, we recognize another exception to the general rule and have considered issues not raised below quote when the question raise affects the right to maintain the action." *Maynard Inv. Co., Inc. v. McCann*, 77 Wash. 2d 616,

> 621, 465 P.2d 657 (1970). *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 498, 687 P.2d 212 (1984). The central issue of this case is Plaintiff's right to maintain their action. Under this exception consideration of RCW 49 .40 4.090 is appropriate.

*Bennett v. Hardy,* 113 Wash. 2d 912, 918, 784 P.2d 1258 (1990).

RCW Ch. 49.17 is the statute upon which the WACs at issue in this case are based. RCW 49.17.040 ("The director shall make, adopt, modify, and repeal rules and regulations governing safety and health standards for conditions of employment as authorized by this chapter.") Thus, the application of any provision of RCW Ch. 49.17, including RCW 49.17.010, is appropriately before this court. Moreover, the central issue here is whether Mr. Uhrich may maintain his case. The argument is properly before this court.

## E. THIS COURT SHOULD FOLLOW THE FEDERAL APPLICATION AND INTERPRETATION

Mt. Si agrees that 29 C.F.R. 1926.500, Subpart M applies only before construction begins and after it is completed. Response Brief, p. 17-19. But does not address the argument that RCW 49.17.010 specifically provides:

> The legislature ... 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).

WAC 296-155-001(1) specifically states:

> It is also the intent that the safety standards of the Washington state department of labor and industries, **will be at least as effective** as those adopted by the U.S. Department of Labor and administered by the Occupational Safety and Health Administration as published in the Code of Federal Regulations.

(Emphasis added.). Mt. Si's argument completely ignores the mandate of the Legislature, and the Department of Labor and Industries, that OSHA, as adopted by the Department of Labor and administered as published in the CFR is the basement of safety standards in Washington State. Its argument falls below this standard as it seeks to reduce the safety standards, not expand them. This is not the law in Washington state.

## F. THE INTERSTATE COMMERCE ARGUMENT IS A RED HERRING

Mt. Si complains at page 16 of its Response Brief, that OSHA only applies to interstate commerce citing 29 USC §651 and thus does not apply here as there is no evidence of interstate commerce in the record.

This issue is a red herring. The Legislature, in adopting RCW 49.17.040, specifically adopted the provisions of OSHA as administered and published by the Code of Federal Regulations. Mt. Si cites no legal authority that suggests that the Legislature's

specific act of adopting OSHA under RCW 49.17.040 has been pre-empted by 29 USC §651. That section of the Federal Code is a limitation by Congress on its application. The several states, as here with Washington State, are free to adopt any provision of the United States Code it sees fit to irrespective of what Congress has to say on the subject. The argument is a red herring.

## G. MT. SI CONFLATES ASSUMPTION OF THE RISK WITH NON-DELEGABLE DUTIES

Mt. Si asserts that Mr. Uhrich's claims are barred by the doctrine of assumption of the risk citing a premises liability case and a personal property case namely *Jessee v. City Council Dayton*, ___ Wn. App. ___, 293 P.3d 1290 (2013) and *Erie v. White*, 92 Wn. App. 297, 966 P.2d 342 (1998). In *Jessee*, the plaintiff fell and was injured on an old firehouse stairway which she was visiting. *Erie* involved the use of equipment for tree climbing and cutting. Neither involved construction sites, WISHA or any of the statutory regulations. Again, the obligations imposed under RCW 49.17 are non-delegable. *Hoff,* 124 Wn. App. at 545. In fact, there is no Washington case (published or unpublished) applying assumption of the risk to construction sites or to other statutorily imposed and non-delegable duties.

Further, the assumption of the risk doctrine is at odds with the non-delegable duties imposed under RCW 49.17.010 *et seq.; Kinney v. Space Needle Corporation*, 121 Wn. App. 242, 248, 85 P.2d 918 (2004). In order to impose an assumption of the risk claim against a plaintiff, a defendant must show that the plaintiff consented, "before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff." *Egan v. Cauble*, 92 Wn. App. 372, 966 P.2d 362 (1998). Mt. Si has not cited any authority that the non-delegable duties under RCW 49.17.010 *et seq.* can be waived or negated by an employee.

If the court is inclined to go further than this point, summary judgment on this record was not appropriate under an assumption of the risk theory. Under Washington law, a plaintiff must have knowledge of the risk, appreciate and understand its nature and voluntarily chose to encounter it at the time the injury occurred. *Egan*, 92 Wn. App. at 377. "Knowledge and voluntariness are questions of fact for the jury, except when reasonable minds could not differ." *Egan,* at 378.

> Whether a plaintiff decides knowingly to encounter a risk turns on whether he or she, at the time of decision, actually and subjectively knew all facts that a reasonable person in the defendant's shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the

> plaintiff's shoes would want to know and consider. Thus, "The test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk." **The plaintiff must "be aware of more than just the generalized risk of [his or her] activities; there must be proof [he or she] knew of and appreciated the specific hazard which caused the injury."** And a plaintiff "appreciates the specific hazard" or risk only if he or she actually and subjectively knows all facts that a reasonable person in the defendant's shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the plaintiff's shoes would want to know and consider when making the decision at issue.

(Emphasis added; citations omitted.). *Egan*, 92 Wn. App. at 378.

There are no facts in the record on what Mr. Uhrich knew and appreciated at the time of his fall and subsequent injuries. Rather, what the record shows is that no-one discussed the height or any other potential for injury prior to the accident as admitted by Mr. Arnold. CP 100-101; 103. Summary judgment was not warranted.

## III. CONCLUSION

For the above stated reasons, the trial court should be reversed, Mr. Uhrich's case should be reinstated, and this matter remanded for further proceedings.

Dated this 3d day of January, 2014.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: _____
Catherine C. Clark, WSBA 21231
Attorneys for Appellants Mr. Nicholas Uhrich, and the Martial Community thereof

**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 3d day of January, 2014

**Via Hand Delivery/ABC Legal Services & Email**

Mr. Keith A. Bolton
Bolton & Carey
7016 – 35th Avenue NE
Seattle, WA 98115-5917
Attorneys for Defendant/Respondent Mt. Si Construction

Tamara Morgan