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NO. 72824-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child,

Appellants,
v.

HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1 – 20",

Respondents.

Cross App

BRIEF OF RESPONDENT HDR ARCHITECTURE, INC.

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I. INTRODUCTION

Jennifer Donnelly, as Guardian for Marshall Donnelly, her husband, and Keith Kessler, as Guardian ad Litem for L.G., a minor child (collectively "the Donnellys"), brought this negligence action against HDR Architecture, Inc., Turner Construction Company, and Noise Control of Washington, Inc., for injuries Mr. Donnelly sustained when, while working as a journeyman electrician at the Walla Walla State Penitentiary, he climbed onto and walked upon a "suspended metal security ceiling" and then fell through the ceiling onto a concrete floor more than ten feet below. Noise Control, an independent contractor, had installed the ceiling a couple of years earlier as part of a design/build facilities expansion construction project awarded to HDR and Turner, the joint venture chosen to design and build the project according to Washington State Penitentiary specifications. After a four-week trial, the jury unanimously found none of the defendants negligent, never reaching causation or damages issues.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly give Instruction No. 14, which told the jury that there were no breach of contract claims against defendants and that it may not consider whether the contract was breached in considering whether defendants were negligent, but could consider such evidence on the issue of causation, where (a) the Donnellys' counsel

acknowledged that he could not argue that a breach of the contract equaled negligence; (b) the instruction correctly stated the law and was not misleading; (c) there was no breach of contract; and (d) the Donnellys were fully able to argue their theory of the case?

2. Did the trial court properly exercise its discretion in declining to give the Donnellys' Proposed Instruction No. 32, which, in addition to what was already conveyed in Instruction No. 14, would have told the jury that it could consider "the language of the contract ... as evidence of the standards and specifications that applied to the defendants," where (a) nothing in Instruction No. 14 precluded the Donnellys from making such an argument; (b) the trial court told them that they could show the jury the contract standards and argue that those standards were what defendants were supposed to do; (c) the Donnellys did just that; and (d) their Proposed Instruction No. 32 would have unduly emphasized their theory of the case, if not commented on the evidence?

3. Did the trial court properly exercise its discretion in listing HDR and Turner separately, rather than as a joint venture, on the verdict form, where (a) the Donnellys sued HDR and Turner individually; (b) they did not except to Instruction No. 6, which told the jury that it must "decide the case of each defendant separately"; (c) a joint venture cannot be held liable for negligence absent negligence of one of its members; (d) the

Donnellys' counsel acquiesced in the separate listing, after HDR's counsel and the court made clear that, if one joint venturer was liable, the other would be too; and (e) the jury found neither HDR nor Turner negligent?

4. Did the trial court properly decline to grant a new trial on grounds that it told the jury in closing argument that the Donnellys' counsel failed to comply with an agreement to give advance notice for using trial transcripts, where (a) the Donnellys' counsel did breach the agreement; and (b) the court's statement was short, mild, and insignificant in the context of the entire trial, and did not comment on the case's merits?

5. Did the trial court properly rule that HDR and Turner could not be held vicariously liable for the alleged negligence of independent contractor Noise Control, where the general rule is that one who employs an independent contractor is not liable for the torts of the independent contractor and the Donnellys failed to prove the applicability of any exception to that general rule; and is such ruling moot in any event because the jury found no negligence by Noise Control?

6. Did the trial court properly exercise its discretion in excluding the Donnellys' expert's testimony concerning alleged rights and obligations of the HDR/Turner joint venture to inspect and control Noise Control's work, where the joint venture could not be held liable for Noise Control's alleged negligence as a matter of law; and is such ruling moot in

any event because the jury found no negligence by Noise Control?

7. Did the trial court properly decline to grant a new trial because of the trial court's inadvertent inclusion of, and HDR's counsel's references in closing argument to, superseding cause language in the proximate cause instruction, Instruction No. 15, where (a) the Donnellys did not except to any part of the instruction during the instructions conference, or when formal exceptions were taken, or when the trial court read the instruction to the jury; (b) the Donnellys did not object when HDR's counsel made reference to the instruction's superseding cause language in closing argument; (c) HDR's counsel did not commit misconduct in referring to that language in connection with his sole proximate cause argument in closing; (d) the instruction was not erroneous; and (e) the jury never reached the issue of causation?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

Respondent HDR adopts the "Statement of Relevant Facts" set forth in the Brief of Respondent/Cross-Appellant Turner Construction Company and provides the following supplementation.

1. The project for the Washington State Penitentiary.

In 2005, the Washington State Penitentiary (WSP) sought to expand facilities at Walla Walla in a project known as the "North Close

Project", involving construction of several new buildings, including an Intensive Management Unit (IMU South), where Mr. Donnelly's accident subsequently occurred in hallway C-165. 9/16 RP 75; 9/18 RP 532:14-16, 576:3-13; 9/23 RP 837:17-838:2; CP 310.

WSP chose a "design-build" procurement and delivery method for the Project – a more efficient and cost-effective method well suited to large capital and infrastructure jobs. 9/18 RP 532:14-533:4-5. In the more traditional "design-bid-build" model, the owner contracts with a designer who prepares the plans and specifications for the project, and then contracts separately with a contractor who builds the design. *See* 10/6 RP 2427:14-16. In the "design-build" model, the owner directs the designer and contractor to team together to bid and then contracts with that team for both design and construction of the project, and the design-build team's members contract with each other to define their respective scopes of work. 9/24 RP 1235:3-1236:17; 10/6 RP 2427:16-2428:2. In this case, HDR, the architect, and Turner, the contractor, formed a joint venture to bid on, and then complete, WSP's Project. 9/18 RP 533:16-18, 534:18-23, 549:2-8; 10/6 RP 2427:7-2428:5.

Public projects like WSP's must go through a competitive bidding process, with proposals sought from interested and qualified design-build teams. RCW 39.04.020, .210 and .280. Before requesting bids, the public

entity develops the project's parameters and requirements that bidders rely upon to submit uniform bids. 9/18 RP 532:14-533:15. Here, a detailed technical document – the Project "specifications" – set forth the layouts, materials, square footages and products for the design and construction of the buildings. Ex. 44; 9/23 RP 895:8-16, 896:16-897:14.

Those detailed specifications, hundreds of pages in length, were set forth in a request for proposal (RFP), Ex. 44, WSP issued to prospective bidders. 9/18 RP 533:4-15, 549:2-6; 9/23 RP 844:11-17. HDR/Turner's joint venture used the specifications to prepare its bid, and was awarded the job. 9/18 RP 533:4-534:23; 9/23 RP 844:11-17; 10/6 RP 2427:7-2428:20. HDR/Turner and WSP then worked to refine the specifications as to the various elements of the buildings and those refined specifications became the Issued for Construction specifications – the final contract document between the joint venture and WSP. 9/18 RP 549:2-550:10; 9/25 RP 1446:13-25; Ex. 240.

It is undisputed that the HDR/Turner joint venture designed and built the Project entirely according to WSP's specifications. 9/18 RP 552:11-14; 9/23 RP 871:18-23, 882:16-19, 894:17-21. Upon completion, WSP accepted the Project and turned it over to the Department of Corrections (DOC) for operation. 9/23 RP 871:18-23. The trial court ruled that HDR met the standard of care and was not negligent in its

design of the Project. CP 4793-96. Donnelly has not appealed that ruling.

2. The suspended metal security ceilings.

Security is a primary design consideration in the construction of any prison facility. *See* 9/18 RP 534:24-536:19. The IMU South building (referred to as "Building C" during design and construction) where Mr. Donnelly's accident occurred was to house some of the most violent offenders incarcerated at Walla Walla. Thus, mandatory security features were incorporated into the design. Ex. 204 at pp. H0159-H0166

Unlike for inmate cells requiring the highest level of security because prisoners are unattended in those areas for significant periods of time, DOC specified lower security requirements for areas such as hallway C-165. 9/23 RP 864:8-865:10. Whereas inmate cells were constructed of concrete, prefabricated shells, areas such as hallway C-165 were designed and constructed with concrete floors, cinder block walls, and a suspended ceiling hung below a concrete lid that formed the floor of the next higher level. 9/23 RP 864:8-865:10, 891:23-894:16.

As with any modern construction, the building's utility systems had to be located in a safe and secure environment. Ex. 204 at pp. H0126-H0140. Thus, within the 16-foot vertical space of hallway C-165, the Project specifications called for a suspended metal security ceiling system to be installed 10 feet above the floor to seal off the "plenum" – the space

between the suspended ceiling and the concrete hard deck above – where the plumbing, electrical and HVAC systems could be safely located, 9/23 RP 841:17-22. "Lockdown" was the suspended metal security ceiling product selected for the hallway (and various other areas of the Project). 9/23 RP 845:3-12. It is undisputed that selection of the Lockdown ceiling system was proper and consistent with WSP's requirements. 9/18 RP 552:2-553:4; 9/23 RP 844:18-846:3, 871:18-23, 882:16-19.

The Lockdown ceiling is a panel system similar to acoustical tile ceilings found in many offices. 9/22 RP 620:15-22. Like acoustical tile ceilings, the Lockdown ceiling consists of a 2'x2' pattern grid, suspended by steel wires hung from the roof deck above the grid, and into which the 2x2 panels fit. 9/22 RP 633:2-6, 635:17-636:11. As with acoustical tile ceilings, elements such as light fixtures and fire sprinklers are independently hung from the roof-deck above, and many of the building's infrastructural systems, such as electrical, plumbing, and air conditioning systems, are independently suspended or mounted above the suspended ceiling, so that they do not impose any weight load on the suspended tile/grid system. 9/22 RP 666:25-667:1.

The key difference between Lockdown metal security ceilings and acoustical tile ceilings is that Lockdown panels are made of perforated metal, and the panels "lock" into place once installed. 9/22 RP 621:1-10,

626:6-21. The application is obvious: the ceiling is intended to resist the efforts of someone trying to gain access from below, so that inmates cannot escape through the ceiling or access the area above the ceiling to hide contraband. 9/22 RP 635:13-636:6, 621:1-5. Prisons and jails all over the United States commonly use Lockdown in the same way and for the same reasons it was used in hallway C-165. 9/22 RP 630:17-631:12.

Lockdown is not intended to be impenetrable. 9/22 RP 630:17-631:12; 9/23 RP 844:18-24, 865:11-866:22. It is used in areas where prisoners spend limited periods of time while under supervision of corrections officers. 9/23 RP 842:7-15; Ex. 204 at pp. H0159-H0166.

A specific benefit of the Lockdown product is that it allows access to the plenum while simultaneously meeting security requirements. 9/22 RP 631:1-12. Access to the plenum is accomplished in one of two ways. 10/6 RP 2466:2-12. The first is through installation of discrete access panels (fastened with security screws) near features in the plenum that require regular access, such as valves which require manual adjustments, or filters which may require periodic replacement, so that periodic maintenance can be accomplished via ladder or other working platform. 9/22 RP 671:5-9, 10/6 RP 2476:7-16. Here, access panels were installed in locations DOC personnel specifically selected – locations where it was expected that prison staff would climb a ladder, open an access panel, and

reach into the plenum from the ladder to access systems within arm's reach. 9/22 RP 671:5-9; 9/30 RP 1690:18-1691:8; 10/6 RP 2476:7-16.

The second means of access to the plenum above the Lockdown ceiling is by disassembling a portion of the ceiling by removing as many panels as needed for prison staff to perform work in areas of the plenum that are not within arm's reach of the access panels, and then, after completion of such work, reassembling the ceiling by reinstalling the panels, or replacing any damaged panels with new panels, in the grid (DOC was given a surplus supply of such panels at completion of the Project, each of which cost approximately $12.00). 9/22 RP 626:22-627:16, 639:6-640:4; 10/6 RP 2464:25-2466:12.

A second type of suspended metal security ceiling – "Celline" – was also used in some areas of the Project. 9/22 RP 617:5-8; 9/23 RP 845:3-12. Unlike the 2x2 Lockdown panels, Celline panels are long "planks", typically two feet in width, which are cut to a custom length for a given room, depending on room dimensions. 9/22 RP 629:7-24, 641:7-18. The two-foot wide Celline planks lock into a frame on the wall at either end of the length of the plank, and butt against each other as the planks are laid in a parallel array and, unlike with the Lockdown system, no suspended grid or wires hold the Celline planks up. *Id.* As with Lockdown, it is undisputed that the selection of Celline for portions of the

Project was appropriate and fully compliant with WSP's specifications. 9/22 RP 618:9-11; 9/23 RP 871:18-23, 882:7-19.

It is also undisputed that none of the documents setting forth WSP's specifications and requirements for the Project contains any mention that any suspended metal security ceiling system be capable of supporting a live load, much less that WSP expected that its personnel would walk on any suspended ceiling. 9/23 RP 839:9-15, 894:22-895:1.

3. Project construction and the May 2006 letter.

Project construction occurred primarily during 2006 to 2008, with the Project completed and turned over to WSP in early 2008, and DOC then putting the new buildings into service. 9/18 RP 528:2-8; 9/23 RP 867:4-14; 920:4-14.

At some point in early 2006, a subcontractor (the subcontractor who asked, and the building in question, was never identified) asked Turner about the sequencing of work to install some of the systems such as electrical, plumbing or HVAC relative to the installation of the Celline plank metal security ceilings. 9/22 RP 667:20-669:1. The question posed was whether the subcontractor was required to complete its work in the plenum area before the Celline plank ceiling was installed, or whether its tradespersons could wait until after the Celline plank ceiling was installed and walk on the ceiling to install the systems. 9/22 RP 667:20-669:1; 10/7

RP 2560:15-2561:8. Turner contacted Noise Control to ask whether the trades could walk on the plank ceiling. 9/22 RP 653:19-654:12; 10/7 RP 2520:7-17. In a May 2006 letter, Noise Control told Turner that it had inquired of Environmental Interiors, the ceiling manufacturer, who had responded that walking on the ceiling would "void the [manufacturer's] warranty". Ex. 38; CP 236-37; 9/22 RP 654:10-17; 10/7 RP 2563:16-24. Turner apparently then advised its subcontractor that it should sequence its work to install utilities before the Celline plank ceiling was installed and that was the end of this issue during construction. 9/22 RP 669:5-670:10.

Noise Control's May 2006 letter to Turner made no mention of safety or hazards, but spoke only to "warranties". Ex. 38; CP 236-37. It was completely silent as to any aspect of the "safe" use of the product. *Id.* And, it addressed the Celline ceiling product, not the Lockdown ceiling product that was installed in hallway C-165. *Id.*

It is undisputed that the May 2006 letter was not provided to WSP at the time it was received. 9/22 RP 654:18-655:16; 10/7 RP 2521:9-23, 2541:7-25, 2575:10-15. It is also undisputed that HDR did not receive the letter. 10/6 RP 2437:13-25. The letter was not included in the Operations and Maintenance Manuals (O&M Manuals), that Turner prepared and delivered to DOC at Project close-out. 9/22 RP 650: 14-20, 653:5-9, 654:18-655:16; 10/7 RP 2541:7-25, 2575:10-15. The evidence at trial was

in dispute as to whether the May 2006 letter should have been included in the O&M Manuals or otherwise sent to WSP. *See, e.g.*, 9/25 RP 1386; 10/2 RP 2086-88, 2103; 10/7 RP 2541.

4. O&M manuals.

O&M manuals typically contain manufacturer-provided information on the myriad of materials, products and systems featured in the Project. 9/22 RP 680:17-682:14. The O&M manuals Turner delivered to DOC consisted of several binders, each several inches thick, containing thousands of pages of information. 9/22 RP 686:23-688:10; 9/23 RP 1019:6-13. They contained materials the subcontractors supplied to Turner as required by their subcontracts, primarily product information for the products the subcontractors installed. 9/22 RP 648, 681-82. The O&M Manuals Turner delivered to DOC also included contact information for the various project suppliers and contractors, so that, if a question arose about a particular piece of equipment, WSP could determine who to contact with questions and how to do so. Ex. 5; 10/2 RP 2085-86; 10/7 RP 2540-41.

With regard to the metal security ceilings, Noise Control sent Turner the metal security ceiling brochures it had received from the manufacturer, Environmental Interiors, for inclusion in the O&M Manuals. 9/22 RP 630, 640-41, 10/6 RP 2304-05; Ex. 5. Those brochures

contained warranty information, but did not contain any information as to whether the ceilings were walkable. *Id.*

In arguing that Turner should have included the May 2006 letter from Noise Control in the O&M Manuals, the Donnellys chose to rely on a discrete portion of the RFP, Ex. 44 at p. 6, which advised bidders that the contractor would be required to prepare the O&M manuals, and that the manuals were to contain information relating to warranties:

> Warranties and Bonds: Include copies of warranties and bonds and lists of circumstances and conditions that would affect validity of warranties or bonds.

CP 4645-81. During trial from opening through closing, the Donnellys' counsel showed the jury or specifically referenced Exhibit 44 multiple times,[1] and repeated or paraphrased the language quoted above many more times in the presence of the jury.[2] What the Donnellys ignored, however, was that the final Issued for Construction specifications required Turner to provide only "maintenance" information, not "warranty" information with respect to the metal security ceilings, unlike other elements of the buildings, like the roof, where the final Issued for Construction

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[1] *See* 9/22 RP 651:3-16; 9/23 RP 854:5-9; 9/24 RP 1071:23-1072:25; 9/29 RP 1624:11-1625:1; 10/2 RP 2107:5-16; 10/6 RP 2349:6-18, 2461:3-2462:10; 10/7 RP 2589:24-2590:11; 10/9 RP 2995:13-23.

[2] *See, e.g.,* 9/16 RP 90-91; 9/22 RP 653, 654, 655; 9/23 RP 855-56; 9/24 RP 1073, 1253-54; 9/29 RP 1626-27, 1630-31; 9/30 RP 1688; 10/2 RP 2107-10, 10/6 RP 2462-63; 10/7 RP 2572-74, 2590-91, 2732; 10/9 RP 2971-72, 2974-75, 3028.

specifications required that "warranty" information be furnished.[3] *See* Ex. 240 at pp. 2799, 3279; 9/25 RP 1395:9-1396:19, 1407:13-1408:10, 1412:1-16; 1414:217, 1424:20-1425:1, 1430:18-1431:2, 1432:20-1433:5, 1434:2-24, 1440:16-1441:2; 10/8 RP 2792:19-2798:4.

Turner delivered the O&M manuals to DOC's "clerk of the works", Richard Howerton, whose duty it was to receive and review the O&M manuals for compliance with DOC's requirements. 9/23 RP 1017:22-1018:1, 1018:23-1019:5, 1022:24-1023:10. Howerton performed a cursory review, but admittedly did not read the O&M manuals in their entirety. 9/23 RP 1022:17-23. As he explained, 9/23 RP 1022:17-23:

> My job was to go through them – I wouldn't read page by page, but I would thumb through them, make sure they had

[3] Although the Donnellys' tactic at trial was to elicit testimony from various witnesses that HDR or Turner supposedly breached the "Warranties and Bonds" provision in the RFP because they did not provide the May 2006 letter in the O&M Manuals, *see, e.g.*, 9/17 RP 186:23-187:9; 9/22 RP 650:14-656:10; 695:9-698:14; 9/23 RP 853:1-856:2, 1022:14-1025:4. 9/25 RP 1384:16-1387:5, 1413:23-1414:14, 1425:18-1426:4; 9/29 RP 1623:9-1632:10; 9/30 RP 1686:6-1688:25; 10/7 RP 2573:18-2575:15; 2588:16-2593:8, the Donnellys never called any witness who had reviewed the entirety of the contract documents as they were refined over time and could testify that the RFP "Warranties and Bonds" provision was the operative contract provision at project closeout for what information about the metal security ceilings needed to be include in the O&M Manuals. HDR, however, demonstrated to the trial court that the RFP "Warranties and Bonds" language was amended in the more refined documents – the Issued for Construction Specifications – which required Turner to provide only "maintenance" information, not "warranty" information, with respect to the metal security ceilings. *See* Ex. 240 at pp. 2799, 3279; 9/25 RP 1395:9-1396:19, 1407:13-1408:10, 1412:1-16; 1414:217, 1424:20-1425:1, 1430:18-1431:2, 1432:20-1433:5, 1434:2-24, 1440:16-1441:2; 10/8 RP 2792:19-2798:4. Thus, even if the May 2006 letter ordinarily would, or should, have been included in the O&M Manuals under the RFP "Warranties and Bonds" provision, a premise that HDR and Turner heavily disputed at trial, there still would be no breach of the contract provisions, when, after development of the Issued for Construction Specifications, the RFP "Warranties and Bonds" provision was not the operative contract provision for metal security ceilings.

> the contact information for all warranty items, for what the materials was, what the contacts were for the material. If you needed a certain part, what it was and where you could go get it.

Although Howerton claimed that, if the May 2006 letter had been in the O&M manuals, he would have seen it, made note of the letter, and passed along to DOC personnel the "void the warranty" language, 9/23 RP 1024:8-11, 1024:25-1025:18, and that it would have been his practice while "thumbing through" the O&M manuals to always notice information that could raise a safety concern or affect warranties, 9/23 RP 1022:14-22; 9/30 RP 1707:18-1708:6, 1715:2-17, those claims were belied when he was shown other parts of the O&M manuals that contained specific safety admonitions that he admittedly had not noticed or passed on to prison staff. 9/30 RP 1718:12-1719:14, 1721:10-1722:6. Howerton admitted that there had never been any previous occasion on other construction projects at the prison where he had forwarded any such information to prison staff. 9/30 RP 1706:6-1707:24. He also admitted that, before Mr. Donnelly's accident, he did not even know that prison staff sometimes walked on ceilings in older parts of the prison and therefore would not have known this was a potential safety issue with the new construction, 9/30 RP 1714:22-1715:1, making it doubtful that the ceiling warranty information would have somehow alerted him to a potential safety issue.

Ultimately, after the Project was completed and HDR/Turner demobilized from the site, the O&M manuals were stored in the prison trade shop office so that they would be available to any of the prison tradespeople and their supervisors. 9/17 RP 383:20-384:11; 9/23 RP 882:12-883:1. Every prison manager, supervisor and tradesperson the Donnellys called to testify at trial admitted that they had never referred to the O&M manuals at any time before Mr. Donnelly's accident. *See* 9/17 RP 384:2-11; 9/18 RP 512:13-513:11, 520:7-10; 9/23 RP 855:19-856:2,; 882:12-18, 884:10-14, 980:22-981:14, 992:19-22, 980:10-14.

5. DOC's safety program.

DOC had a robust written safety program – more detailed and rigorous than WISHA required – to ensure that its employees would perform tasks without injury. 9/17 RP 364:8-375:18. The program had three major components: (1) ongoing and regular discrete training for prison personnel on a variety of safety topics; (2) an independent, task-specific evaluation known as a "Job Safety Analysis" (JSA) that was to be conducted before undertaking any trade project assigned to prison staff; and (3) "work stop authority" where any staffer could stop work if and when a potentially unsafe condition was encountered. 9/17 RP 351:2-356:15, 373:16-376:4, 385:17-386:23.

The ongoing training component included training about the risk of

falling and fall protection practices and equipment. CP 11721-24, 11726-51. About six weeks before the accident, Donnelly, his co-worker Justin Griffith, and their supervisor James Atteberry all went through, and signed off as having participated in, fall protection training. 9/18 RP 512:3-12; 9/23 RP 917:24-918:5, 918:5-919:10, 924:3-13.. Over defense objections, Judge North granted the Donnellys' motion in limine to exclude evidence of that training, 9/8 RP 55:15-91:16, as unduly prejudicial to the Donnellys. 9/8 RP 73:1-20, 87:3-89:11.

The JSA component was a mandatory pre-requisite to any work to be completed by a prison tradesperson (such as an electrical or carpentry or plumbing tradesperson). 9/17 RP 376:1-4, 362:7-8. The JSA required a trade supervisor to evaluate the assigned job in conjunction with the tradesperson assigned to the task, and to complete a JSA form before work on a given task was begun. 9/17 RP 362:9-364:25, 368:14-24. The JSA form contained 22 specific safety hazards for maintenance personnel to evaluate with the supervisor. 9/17 RP 351:21-353:15. If a potential hazard at the work site was identified on the JSA form, the corresponding box on the form reflecting that safety issue would be checked. Attached to the cover of the JSA form was a multi-page document that contained detailed safety requirements and practices relating back to each of the 22 risk categories identified on the JSA cover. Ex. 676. If any box was

checked, the supervisor and tradesperson were expected to refer to the detailed discussion set forth in the JSA for instructions on how to safely address the risk. 9/17 RP 351:2-356:15. The JSA was specifically intended to make DOC workers and their supervisors stop and evaluate risks before beginning work, and to be thoughtful and deliberate in performing tasks safely. 9/18 RP 514:2-5; 9/23 RP 910:13-18.

About one month before Mr. Donnelly's accident, the electrical department prepared a "generic" JSA. CP 1307-14; 9/17 RP 353:16-354:11. Workers were to refer to the generic JSA in the event a job-specific JSA was not prepared for a given task. 9/17 RP 354:22-356:15, 376:15-22. On the electrical department's generic JSA, 21 of 22 boxes were selected; in other words, the mandatory and non-discretionary direction to electricians and their supervisors was that, unless a job-specific JSA was prepared for a given task, then each of the 21 categories of risk was required to be evaluated before performing an assigned job. Ex. 676; CP 1307-14; 9/17 RP 366:10-367:1, 376:23-377:21; 9/23 RP 941:13-942:3. In the event a job was assigned and no job-specific JSA was prepared, electrical department staff and supervisors alike were aware that the generic JSA was both available and required to be applied to any task assigned. 9/17 RP 366:10-367:1; 9/23 RP 950:22-951:9, 991:10-15.

As for "work stop" authority, if any employee felt a task presented a hazard, or had questions or concerns about how to complete a job safely, that employee was vested with authority to stop work, or decline to even start work, without penalty. 9/17 RP 386:1-23; 9/23 RP 889:13-24.

With regard to the JSA form and packet discussed above, the trial court (over defense objections) granted the Donnellys' motion in limine to have it redacted to black out two of the 22 safety items: (1) fall hazards, and (2) entry into a confined space. 9/12 RP 46:3-57:20. During trial, the jury was not allowed to see the form or packet without those redactions. That remained true even after the Donnellys' counsel, during the direct examination of electrician supervisor James Atteberry, projected Exhibit 676, the generic 22-item JSA checklist with the items for fall hazards and entry into confined space items redacted, onto a large screen for the jury to view, 9/23 RP 1004:15-23, and inquired of the witness as follows:

> Q: I am sure you are tired of talking about the JSA, and I am tired of talking about the JSA. Let's go through it and see if stopping and thinking on any item of the JSA would reasonably lead somebody to think whether or not a security ceiling can't be walked on.
>
> * * *
>
> This is the annual JSA, right? [Mr. Gardner is displaying Ex. 676.]
>
> A: Yes sir.
>
> * * *
>
> Q: So if Mr. Griffith and Mr. Donnelly had stopped and thought about material handling, manual or forklift one

and two, would that have anything to do with thinking about whether this security ceiling, unlike others, can't be walked on?

A: No.

Q: What about material equipment and staging? Would stopping and thinking about material, equipment, and staging cause them to think about whether this security ceiling is different from others and can't be walked on?

A: No.

Q: And use of ladders or use of tools, hand or power tools, would either one of those make them think that this metal security ceiling, unlike other security ceilings, can't be walked on?

A: No.

Q: I am not going to bore the folks with the rest of this. You are going to have the list in front of you as an exhibit. ***Is there a single item on this list that, if they had stopped and thought about it, it would lead them to think, wow, this security ceiling can't be walked on, unlike the others***?

A: Not that I am aware of, no.

Q: Does the JSA have anything to do with this?

A: Not really.

9/23 RP 1004:15-1006:2 (emphasis added). The trial court denied the ensuing joint defense motion to remove the redactions because of the false impression created by not allowing the jury to see the redacted fall risk and entry into confined space checklist items, 9/23 RP 1026:24-1040:12, even though the trial court admonished the Donnellys' counsel that: "But obviously, I – I think it comes very close to being a misrepresentation. I don't think it's serious enough that it – that it requires that we reveal it to the jury, but I want you to understand, Mr. Gardner, that you came very

close to getting to the point of having that happen." 9/23 RP 1040:7-12; *see also* 9/23 RP 1037:21-1038:10.

6. The accident.

Roughly 18 months after the Project was completed and DOC had put the buildings into service, prison maintenance staff were tasked with a new construction project to run electrical conduit throughout the building, including within the plenum above hallway C-165 and through a concrete wall into the sergeant's office, so that a new X-ray machine could be installed there. 9/18 RP 427:6-430:3, 457:5-7; 9/23 RP 923:20-924:6, 959:13-961:5. That job had absolutely nothing to do with the North Close Project, completed a year and a half before. 9/23 RP 861:3-13, 952:16-953:8. Instead, it was intended to add a new feature to the building for the use of the corrections officers working there. 9/23 RP 923:20-924:6.

Electrician supervisor James Atteberry assigned the job to Mr. Donnelly and his fellow journeyman electrician, Justin Griffith. 9/18 RP 419:6-11, 481:1-1; 9/23 RP 921:23-922:3. The job apparently was not time-critical – the original work order for it was prepared in May, 2008, but not assigned out by Atteberry until 18 months later December, 2009. 9/18 RP 420:17-421:5; 9/23 RP 923:20-924:6, 925:21-926:4, 950:2-4.

Notwithstanding DOC rules, neither Atteberry, nor Donnelly and Griffith, prepared a JSA for the job. 9/18 RP 424:9-12, 487:20-25,

505:15-21; 9/23 RP 922:24-923:4, 924:3-6, 959:8-18, 950:17-951:9, 970:11-22. Before assigning out the work, Atteberry never went to the IMU South and reviewed the job site, or otherwise considered what the job was required or how it might be safely accomplished. 9/23 RP 934:1-8; 953:13-21. And, notwithstanding DOC rules, before attempting this new construction, neither Atteberry, nor Donnelly and Griffith, ever consulted the generic JSA in lieu of preparing a job-specific JSA. 9/18 RP 514:6-9; 9/23 RP 922:24-923:4, 924:3-6, 950:17-951:9, 959:8-18. No tradesperson or supervisor apparently even discussed or otherwise evaluated whether climbing through an access panel and walking on a suspended ceiling was a safe or appropriate practice. 9/18 RP 508:11-20; 9/23 RP 925:3-18, 963:8-965:12. Atteberry simply assigned the work without further consideration of safety procedures, and Donnelly and Griffith proceeded to perform the installation without reference to how to do so safely. 9/18 RP 506:8-507:3; 9/23 RP 923:1-6, 925:3-18, 951:18-955:1, 963:8-965:12.

Apparently Donnelly and Griffith assumed their activity safe. Griffith testified that both he and Donnelly had previously "walked on ceilings" for other jobs, including on at least one other suspended metal security ceiling. 9/18 RP 432:7-19, 507:8-508:6509:4-23. If Griffith's claim is true, whenever walking on a suspended metal security ceiling was

ever first considered, neither he nor Donnelly nor their supervisor Atteberry ever conducted a Job Safety Analysis to determine whether doing so was safe or not. 9/18 RP 507:8-508:20; 9/23 RP 972:8-974:18.

The plenum space above the metal security ceiling is pitch black, "so dark, you can't even see your hand in front of you"; much less your feet. 9/18 RP 464:23-465:1, 495:24-496:6. The space is crisscrossed with wires, conduit, pipe and ducts. *See* Ex. 71 at pp. 32, 34; Ex. 73 at pp. 54, 58-59; Ex. 74 at pp. 51-53,85-86,242, 245-49; Ex. 79. To traverse it, Griffiths testified that one would have to grab hold of one "pole," wire, sprinkler pipe, or I-beam (anything "you could get ahold of") and shuffle your feet along the runners, and then grab hold of another "pole," wire, etc., switching hands as needed to try to keep a minimum of three-point contact.[4] 9/18 RP 459: 10-23, 495:10-107:17, 510:22-511:4, 514:18-515:5, 526:16-527:2. If carrying something like a drill, one would need to set the drill against something before grabbing the next "pole," and then after grabbing the next "pole," move the drill again, set it against something and repeat the process. *Id.*

On December 20, 2009, Marshall Donnelly, wearing only a headlamp for illumination, climbed a ladder in hallway C-165, opened an

[4] The "poles" are actually compression struts that prevent the ceiling from being pushed upward by someone down below and have nothing to do with the suspension of the ceiling. 9/22 RP 635:13-636:6. The only thing suspending the ceiling are 12 gauge wires attached to the ceiling grid at four feet intervals. *Id.*

access panel to the Lockdown ceiling, and climbed into the plenum, carrying a 25-pound roto-hammer, and trailing the cord behind him as he weaved his way through the plenum space. 9/18 RP 464:16-465:17, 489:10-16, 493:8-10, 500:12-24. He traversed some distance across the suspended ceiling, at which point he fell through the ceiling to the concrete floor below. CP 3 at ¶2.6; 9/18 RP 467:3-24..

B. Procedural Background.

Respondent HDR adopts the "Statement of Procedure" set forth in the Brief of Respondent/Cross-Appellant Turner Construction Company.

IV. ARGUMENT

Respondent HDR adopts the "Argument" sections of the Brief of Respondent/Cross-Appellant Turner and Noise Control's Response and provides the following supplementation.

A. The Donnellys' Negligence Claims Against HDR and Turner Are Premised on an Incorrect Reading of *Davis v. Baugh Indus. Contractors, Inc.*

The Donnellys' primary theory at trial was that, because the RFP Project specifications set forth a requirement that any information that could affect a product warranty be included in the O&M manuals, Ex. 44 at p. 6, Turner was obligated to include in the manuals a copy of the May 2006 letter it received from Noise Control, Ex. 38, and that its failure to do

so was negligent and proximately caused Mr. Donnelly's injuries.[5]

Central to that claim is the Donnellys' erroneous view that the "negligent work" to which the court referred in *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007), when it rejected the completion and acceptance doctrine and concluded, consistent with RESTATEMENT (SECOND) OF TORTS, §§ 385, 394, and 396 (1965), that "a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence," encompasses more than just negligence in the design and physical construction of improvements to

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[5] Although the jury never reached the issue of causation, having found no negligence on the part of any defendant, the record does not support a causal link between the failure to include the March 2006 letter in the O&M Manuals, as no evidence was produced at trial that the O&M manuals were ever read or consulted with regard to any prison operations, much less as to anything pertaining to the Lockdown metal security ceilings. Only one DOC employee ever even looked in the O&M Manuals before the accident – clerk of the works, Rick Howerton. No other DOC employee ever opened or read the O&M manuals at any time before the accident. *See* 9/17 RP 384:2-11; 9/18 RP 512:13-513:11, 520:7-10; 9/23 RP 855:19-856:2, 882:12-18, 884:10-14, 980:22-981:14, 992:19-22, 980:10-14. Howerton admitted that he did not actually read the O&M Manuals, but rather, just "skimmed" them. 9/23 RP 1022:17-23. Although the Donnellys' causation theory hinged on Howerton's self-professed speculative belief that he would have (1) found the May 2006 letter and (2) passed it on to DOC's staff had it been included in the O&M manual, 9/23 RP 1024:8-11, 1024:25-1025:18. Howerton admitted that he had never before forwarded any other safety-related O&M literature to DOC staff for any construction project. 9/30 RP 1706:6-1707:24. And, when shown actual safety-related literature contained in the Project's O&M manual, Howerton admitted that he had not noticed this information, or passed any of it on to DOC staff. 9/30 RP 1718:12-1719:14, 1721:10-1722:6. Additionally, Howerton admitted that, prior to Mr. Donnelly's accident, he did not even know that DOC staff had ever walked on ceilings anywhere at the prison; hence even if he had seen the May 2006 letter, which discussed only warranties and made no mention of safety, he would have had no reason to either consider it a "safety"-related notice, or to pass it on to prison staff. 9/30 RP 1714:22-1715.

real property.

Apparently recognizing that nothing in *Davis* so states, the Donnellys assert that the "practical and necessary implications of the *Davis* decision" supports their claim against HDR and Turner that:

> HDR/Turner's "work" on North Close Project under *Davis* included (a) training the WSP on how to use the building and its fixtures, (b) providing information to the WSP about the building in the OMM which specifically included an affirmative duty that HDR/Turner provide copies of warranties for metal security ceiling [sic], and (c) "lists of circumstances and conditions that would affect the validity" of those ceiling warranties.

App. Br. at 27-28. But, neither the rationale nor "the practical and necessary implications" of the Court's decision in *Davis* supports the Donnellys' overly expansive view of the type of "negligent work" that can give rise to liability to third persons after completion and acceptance.

In *Davis*, a site owner's employee was killed while inside an excavated hole when a wall collapsed on top of him. The employee had entered the hole because of ponding water and it was suspected that a plastic pipe buried there during a construction project for which Baugh was the general contractor was leaking. Baugh's subcontractor had installed the pipe three years earlier. Baugh defended the lawsuit in part on grounds that the "completion and acceptance doctrine" acted as a bar to the plaintiff's claim. The trial court granted summary judgment in favor

of Baugh on that basis, but the Supreme Court reversed, holding that the completion and acceptance doctrine was no longer valid in Washington, and adopting the RESTATEMENT approach instead.

As the Donnellys correctly note, *App. Br. at 26*, the Court gave as part of its rationale the complexity of modern buildings, stating:

> The completion and acceptance doctrine is also grounded in the assumption that if owners of land inspect and accept the work, the owner should be responsible for any defects in that accepted work. While this assumption may have been well founded in the mists of history, it can no longer be justified. Today, wood and metal have been replaced with laminates, composites, and aggregates. Glue has been replaced with molecularly altered adhesives. **Wiring, plumbing, and other mechanical components are increasingly concealed in conduits or buried under the earth. In short, construction has become highly scientific and complex. Landowners increasingly hire contractors for their expertise, and a nonexpert landowner is often incapable of recognizing substandard performance.**

Davis, 159 Wn.2d at 418-19 (citations omitted; emphasis supplied in Appellant's Opening Brief). Thus, the *Davis* court reasoned that the traditional rationale for the completion and acceptance doctrine was technologically anachronistic and no longer appropriate in the modern era of complex, new construction materials and processes and concealed construction components. The *Davis* court was concerned with the reasonableness of the completion and acceptance doctrine as applied to latent physical defects – such as a hidden leak in a buried plastic pipe.

Nowhere in its decision did the Court even remotely suggest that a failure to include a letter about *warranty viability* (and that says nothing about "safety") in an O&M Manual is the same as, or the functional equivalent of, a defectively built structure.

Indeed, the analysis the *Davis* court used to explain its decision belies the Donnellys' claim. In addition to observing that the modern complexity of *things built* with new materials and processes made the completion and acceptance doctrine inappropriate to contemporary times, the *Davis* court discussed that "[b]y insulating contractors from liability, the completion and acceptance doctrine increases the public's exposure to injuries caused by negligent design and ***construction*** of improvements to real property and undermines the deterrent effect of tort law." *Id.* at 419-420 (emphasis added). Thus, *Davis* was about ***things built***.

The *Davis* court's reasoning as to why it was appropriate to abandon the completion and acceptance doctrine related to the design and construction of improvements to real property. The *Davis* court started its discussion of the completion and acceptance doctrine, by stating:

> Under the completion and acceptance doctrine, once an independent contractor finishes work on a project and the work has been accepted by the owner, the contractor is no longer liable for injuries to third parties, even if the work was negligently performed. Historically, after completion and acceptance, the risk of liability for the project belonged solely to the property owner.

Id. at 417. The Court then specifically discussed how the doctrine had previously been justified based on the owner's negligence in failing to remedy dangerous conditions upon the land and the owner's assumed responsibility for any defects in the work that remained after inspection and acceptance, stating:

> A second, oft-cited rationale for this doctrine is the theory that the owner's negligence in failing to remedy ***a dangerous condition upon the land*** is an intervening cause, which breaks the chain of causation and cuts off the contractor's liability.
>
> * * *
>
> The completion and acceptance doctrine is also grounded in the assumption that ***if owners of land inspect and accept the work, the owner should be responsible for any defects in that accepted work***.

Id. at 418-19 (citations omitted; emphasis added).

The *Davis* court's focus was on negligent work relating to design and physical construction, and latent construction defects and hazards that owners would not be able to identify, and the *Davis* opinion says nothing about the language or terms of any contract. Yet, the Donnellys nevertheless erroneously insist that *Davis* stands for the proposition that the "work" to which *Davis* refers is any work that is spelled out in the contract documents. As the Donnellys put it, *App. Br. at 27*:

> This is not and has never been a breach of contract case. This is a construction negligence claim under the Supreme Court's precise language in *Davis*: the issue here, as in *Davis*, concerns "negligent work" in the course of the

> North Close Project. [citations omitted]. The "work" to be performed is spelled out in the contract documents.

Contrary to the Donnellys' assertions, "the work" to which the *Davis* court referred was not so broadly expansive as to include each and every aspect of a contractor's duties under its contract with an owner, such that any alleged failure to fulfill an administrative contractual obligation to include warranty information in an O&M manual must be considered "negligent work" under *Davis* as though akin to a latent physical defect.

Davis exclusively addressed physical construction. The Donnellys cannot point to any part of the *Davis* decision that refers to anything other than design and physical construction, the use of physical materials, and the attendant realities that "modern" materials may not be readily susceptible to visual inspection. That is all the *Davis* decision is about – the physical limitations on an owner's ability to meaningfully inspect modern-day constructed facilities make the acceptance and completion doctrine out of step with modern technology. The *Davis* court found the doctrine outdated precisely because it denied an injured third party the ability to recover when hidden physical defects, which may only be discernable on a "molecular" level, act as a shield from liability due to an owner's inability to discover the defect at the time of accepting a completed project. *Davis*, 159 Wn.2d at 419.

Davis is silent as to a contractor's other myriad duties to perform contractual obligations that have no bearing at all the physical completion of a project. Apparently recognizing this, the Donnellys try to engraft the duty a contractor owes to third parties on a construction site during construction set forth in *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), onto the *Davis* court's analysis of why the completion and acceptance doctrine should be abandoned. Thus, the Donnellys claim, *App. Br. at 30*, that:

> *Kelley* involved contractor liability to third parties for negligence on the jobsite causing injuries during construction. *Davis v. Baugh* extends contractor liability for negligent work to injuries occurring after construction is finished.

But, *Davis* has nothing to do with *Kelley*, and *Kelley* is inapposite to the Donnellys' claims.

In *Kelley*, when a subcontractor's employee was injured on a job site, the jury found the general contractor that hired the subcontractor at fault for the subcontractor's employee's injury. The Supreme Court affirmed, holding that a general contractor who has control over a work site owes a duty to third parties, including employees of independent subcontractors. *Kelley*, 90 Wn.2d at 330-31. The *Kelley* court based the third party duty a contractor owes to others on the construction site on three things: (1) the common law duty a contractor owes due to its ability

to exercise control over the work, *id.* at 330-331; (2) the statutory non-delegable duty to provide a "safe place of work," *id.* at 332-333; and (3) a responsibility assumed under contract "for initiating, maintaining and supervising all safety precautions and programs in connection with the work," *id.* at 333. These three sources of the *Kelley* duty all share the rationale that the general contractor is uniquely in control of the construction worksite.

Contrary to the Donnellys' assertions, *Davis*, which makes no mention of *Kelley* at all, does not say anything about extending *Kelley*'s reasoning to *Davis*'s facts. The *Kelley* court's 3-pronged bases for imposing a duty on contractors to protect third parties at the construction site boil down to a single rationale – the contractor's unique control over the site ***during*** construction. In *Davis*, however, the court offered an entirely different rationale for imposing third party liability ***post*** completion and acceptance – rejection of an outdated defense that could no longer be justified because of modern-day technological innovation. There is no connection between the two cases, and the Donnellys' attempt to forge a link should be rejected.

The Donnellys' claims are premised upon an incorrect reading of *Davis*, as well as on an erroneous attempt to link *Davis* with *Kelley*. The trial court allowed the Donnellys' claims to proceed consistent with the

Donnellys' incorrect view of the law. The trial court instructed the jury consistent with *Davis* that:

> A defendant is liable for negligent acts or failures to act in its work on the Project at the WSP if it was reasonably foreseeable that a third person would be injured as a result of that negligence.

CP 8901. And, the trial court allowed the Donnellys to base their claims of negligence on contract provisions and standards that had nothing to do with the actual design and physical construction of the Project or the creation of latent defects or hazards. Under such circumstances, the Donnellys cannot seriously claim that the trial court somehow misunderstood their view, albeit an erroneous one, of "the practical and necessary implications of the *Davis* decision." *See App. Br. at 28.*

B. The Trial Court Did Not Err in Giving Instruction No. 14 or Abuse Its Discretion in Declining to Give the Additional Language Contained in Donnellys' Proposed Instruction No. 32.

The Donnellys concede, *App. Br. at 27*, that "[t]his case is not and has never been a breach of contract case." Yet, despite that concession, they assert, *App. Br. at 28-34*, that the trial court erred in giving Instruction No. 14, CP 8905, which told the jury:

> You have heard testimony about the language in the contract relating to maintenance and warranty information. You are instructed that there are no breach of contract claims against the defendants in this case, and you may not consider whether the contract was breached in considering whether the defendants were negligent. This evidence may be considered on the issue of causation.

They further assert, *App. Br. at 36-37*, that the trial court erred in refusing to add to Instruction No. 14 additional language from the last sentence of their Proposed Instruction No. 32, CP 8877, which would have told the jury that: "You may consider the language of the contract ... as evidence of the standards and specifications that applied to defendants." The Donnellys' assertions are wrong on both counts.

1. Instruction No. 14 was a correct statement of law, was not misleading, and did not prevent the Donnellys from arguing their theory of the case.

Respondent HDR adopts the arguments concerning Instruction No. 14 contained in the Brief of Respondent/Cross-Appellant Turner and the Noise Control of Washington's Response Brief, and add the following supplementation.

The standard of review to be applied to jury instructions depends upon the decision being reviewed. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145, *rev. denied*, 166 Wn.2d 1038 (2009). Alleged errors of law in jury instructions present legal questions that appellate courts review de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012); *Miller v. Kenny*, 180 Wn. App. 772, 796, 325 P.3d 278 (2014). But, when a jury instruction correctly states the law, a trial court's decision to give it will not be disturbed absent an abuse of discretion. *See Rekhter v. Dep't of Soc. and*

Health Servs., 180 Wn.2d 102, 120, 323 P.3d 1036 (2014); *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002).

Jury instructions must be sufficient to allow the parties to argue their theories of the case. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). They are sufficient if they (1) permit each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole properly inform the trier of fact of the applicable law. *Rekhter*, 180 Wn.2d at 117; *Anfinson*, 174 Wn.2d at 860.

As set forth in the Brief of Respondent/Cross-Appellant Turner, Instruction No. 14 – an instruction to which the Donnellys acquiesced – correctly stated the law, did not prevent the Donnellys from arguing their theory of the case, and was not prejudicial. Indeed, not only did the Donnellys acquiesce in the giving of Instruction No. 14, but also their counsel acknowledged its legal correctness, when he told the trial court that he agreed that he could not argue that there was a breach of a contract and that "therefore, that is negligence." *See* 10/8 RP 2852:10-18. And, despite the Donnellys' assertions to the contrary, nothing in Instruction No. 14 either suggested that the jury could not consider the language or the provisions of the contract or prevented the Donnellys from showing the jury the contract's provisions and arguing that the contract's provisions

evidenced what reasonable care under the circumstances required. As the trial court itself told the Donnellys' counsel, 10/8 RP 2917: 10-18:

> You can put the [contract] standards up there and talk about this is what they were supposed to do under the contract, but you can't argue that – the breach provides a basis for determining liability ....

The Donnellys make *Davis* the centerpiece of their argument of error in the giving of Instruction No. 14 but, as discussed more fully in the preceding discussion of what *Davis* did – and did not – change with regard to contractor responsibilities and duties, the Donnellys' reliance on *Davis* is misplaced.

2. The trial court did not abuse its discretion in refusing to give the additional language posited in the Donnellys' Proposed Instruction No. 32.

The refusal to give an instruction is reviewed for abuse of discretion, as the trial court has considerable discretion as to the wording, choice, and number of instructions needed for the parties to present their theories fairly. *See Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92 n.23, 896 P.2d 682 (1995); *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994); *Burchfiel*, 149 Wn. App. at 491.

The Donnellys cite no authority suggesting that a trial court is obligated to bolster a party's claims or theories by affirmatively telling the jury that it may consider particular evidence the party wants the jury to consider as evidence on some issue the party has the burden of proving.

Yet, that is exactly what the language the Donnellys sought to add to Instruction No. 14 would have done. It would have served only to bolster and unduly emphasize the Donnellys' theory that the contract's provisions evidenced the standards and specifications that applied to defendants.

Indeed, the rule is to the contrary – courts should not give instructions that bolster or buttress portions of counsel's argument. *See, e.g., Laudermilk v. Carpenter*, 78 Wn.2d 92, 100-01, 457 P.2d 1004 (1969). As the court, in *Harris v. Groth*, 31 Wn. App. 876, 881, 645 P.2d 1104 (1982) (citing *Laudermilk*, 78 Wn.2d at 100), *aff'd*, 99 Wn.2d 438 (1983), explained, in affirming the trial court's refusal to instruct the jury that it should consider materials available in the University of Washington medical library in determining what the knowledge the average medical practitioner should have possessed:

> The basic purpose of instructions is to enunciate the essential elements of the legal rules necessary for a jury to reach a verdict. Instructions should not emphasize certain aspects of the case which might subject the trial judge to the charge of commenting on the evidence.

Instruction No. 14 made clear only that, in this – a negligence, not a breach of contract – case, the jury could not consider whether the contract was breached in deciding whether defendants were negligent. Instruction No. 14 did nothing to limit the jury's ability to look to the language of the contract in deciding what a reasonably prudent design-

build team should have done. Thus, there was no need to affirmatively tell the jury that it could consider the contract's language for the purposes for which the Donnellys wanted the jury to consider it. Had the trial court included the Donnellys' additional language, it would have served only to comment on the evidence and bolster the Donnellys' arguments.

3. The Donnellys have not established any prejudice from the giving of Instruction No. 14 or the failure to include their additional language from their Proposed Instruction No. 32.

An erroneous instruction is reversible error only if it prejudices a party. *Anfinson*, 174 Wn.2d at 860. Prejudice is presumed only if an instruction contains a clear misstatement of the law; prejudice must be demonstrated if an instruction is merely misleading. *Id.*; *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008). The party challenging an instruction bears the burden of establishing prejudice. *See, e.g.*, *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001). "An error is prejudicial if it affects the outcome of the trial." *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955 (2006), *rev. denied*, 159 Wn.2d 1013 (2007).

Respondent HDR adopts the arguments set forth in the Brief of Respondent /Cross-Appellant Turner as to the lack of prejudice in instructing the jury that it could not consider "breach of contract" in

determining negligence or that evidence of breach of contract could be considered on the issue of causation and provides the following supplementation.

Although the Donnellys claim, *App. Br. at 3, 15-19, and 28*, that, under Instruction No. 14, the jury was prohibited from considering the contract in connection with their negligence claim, nothing could be farther from the truth. The trial court even told them that they could show the jury the contract provisions and standards and argue that they set forth what the defendants were supposed to do. 10/8 RP 2917:10-18. And, from opening statement, through the presentation of their case, and in their closing argument, the Donnellys were fully able to do, and did, just that. *See* footnotes 1 and 2, *supra*, and accompanying text. It is difficult to conceive what more the Donnellys could have done to present their theories of negligence against HDR and Turner to the jury. Even if they could have, or believe they should have, done more, Instruction No. 14 did not prevent them from doing so. The jury simply did not agree with the Donnellys' theories of negligence.

C. The Trial Court Properly Exercised Its Discretion in Separately Listing HDR and Turner on the Special Verdict Form.

For the reasons set forth in the Brief of Respondent/Cross-Appellant Turner Construction Company, the trial court's listing of HDR

and Turner separately, rather than together as a joint venture, on the verdict form was neither erroneous nor prejudicial. Additionally, although the Donnellys complain, *App. Br. at 44*, that Judge North's decision to separately list HDR and Turner on the Special Verdict Form reversed an earlier summary judgment ruling entered by Judge Spearman, the Donnellys' counsel, when making that same argument to the trial court, correctly recognized that: "I understand that the law of the case does not apply ... and the Court has to do what the Court thinks is right, and I respect that." 10/8 RP 2924:17-19. Indeed, as Respondent/Cross-Appellant Turner also notes in its brief, an interlocutory trial court order can be changed any time before entry of final judgment. *Snyder v. State*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978) (citing *Owens v. Kuro*, 56 Wn.2d 564, 354 P.2d 696 (1960)) ("[t]he court's final say on the merits is subject to revision at any time before final judgment.").

D. The Trial Court Properly Declined to Grant a New Trial Based on What It Told the Jury about the Donnellys' Counsel's Use of Trial Transcripts in Closing.

Respondent HDR adopts the arguments on this issue that are set forth in the Brief of Respondent/Cross-Appellant Turner and in Noise Control's Response Brief, and adds the following supplementation.

As set forth in the Brief of Respondent/Cross-Appellant Turner, the statement the trial court made to the jury about the Donnellys'

counsel's noncompliance with an agreement to provide advance notice of transcripts to be shown to the jury in closing arguments was not an abuse of discretion warranting a new trial, as there was such an agreement that the Donnellys' counsel breached and the statement the court made was short, mild, and insignificant in the context of the entire trial. Also, when the Donnellys' counsel resumed closing argument after the trial court made the statement, he told the jury that he "frankly, didn't know there was such an agreement," and apologized "if putting up testimony does something that harms you guys [defense counsel] in some way." 10/9 RP 3010.

The Donnellys cannot seriously contend that the jury's finding of no negligence was premised on one short, mild statement that the trial court made in closing argument. The trial court certainly did not find that it was a significant event in light of over three weeks of trial or that it deprived the Donnellys of a fair trial. CP 9691. Appellate courts give considerable deference to the trial court when reviewing a ruling on the effect of a particular event on the jury. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 831, 696 P.2d 28, *rev. denied*, 103 Wn.2d 1040 (1985); *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *rev. denied*, 118 Wn.2d 1011 (1992).

E. The Trial Court Properly Ruled that HDR and Turner Could Not Be Held Vicariously Liable for the Alleged Negligence of Independent Contractor Noise Control.

The Donnellys claim, *App. Br. at 37*, that the trial court erred when it held that, under the Independent Contractor Rule, HDR and Turner could not be held liable for any negligence of Noise Control in the installation of the Lockdown suspended metal security ceiling installed in Hallway C-165. They also claim, *App. Br. at 37*, that the Donnellys' construction management expert witness, Del Bishop, should have been allowed to testify as to his opinions about Turner's "right and obligation to control ... Noise Control." For the reasons stated in the Brief of Respondent/Cross-Appellant Turner, not only are these claims moot since the jury found no negligence by Noise Control, but also the trial court's legal ruling was correct[6] and its evidentiary ruling was not an abuse of discretion.[7]

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[6] Appellate courts review rulings on pure questions of law "de novo." *See, e.g., Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172, 322 P.3d 1219 (2014).

[7] Trial court decisions to admit or exclude evidence are reviewed for abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). Even an erroneous evidentiary ruling, however, is not grounds for reversal unless it was prejudicial – that is, unless "it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred." *Miller v. Kenny,* 180 Wn. App. at 772, 794 (citation omitted). Here, the exclusion of expert testimony concerning any alleged right or obligation on the part of Turner to control Noise Control could not have been prejudicial since the jury found no negligence on the part of Noise Control.

Moreover, the Donnellys' claim that the trial court erred by not finding that the third exception to the Independent Contractor Rule[8] for "[w]ork which is specially, peculiarly, or 'inherently' dangerous" applied to deny Turner (and by extension, HDR) immunity, especially after Judge Spearman had found on Turner's motion for partial summary judgment that there was a question of fact as to whether that exception applied, CP 9791-9794, ignores the fact that, as the evidence was presented at trial, Noise Control's installation of the Lockdown ceilings did not qualify for that exception to the Independent Contractor Rule, and Judge North correctly so ruled. 9/29 RP 4:19-22.

"Inherently dangerous work" has been identified as readily apparent hazards inherent to a particular type of work. For example, in *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 941, 29 P.3d 50 (2001), *aff'd*, 148 Wn.2d 911 (2003), the court described as "inherently dangerous" such activities as including "use of dynamite, gunpowder, firearms, or other flammable or explosive materials that fit our common understanding of the term." By contrast, the court in that case declined to treat hauling fruit waste as "hazardous." This is consistent with RESTATEMENT (SECOND) OF TORTS, § 416, Comment d (1965):

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[8] The three exceptions to the Independent Contractor Rule recognized in Washington are those set forth in RESTATEMENT (SECOND) OF TORTS, § 409, Comment b (1965), quoted in the Brief of Respondent/Cross-Appellant Turner.

> A "peculiar risk" is a risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions. (See § 413, Comment *b*.) Thus if a contractor is employed to transport the employer's goods by truck over the public highway, the employer is not liable for the contractor's failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for.

Ultimately, the Donnellys' claim that Turner (or HDR as Turner's joint venturer) can be held liable for any alleged negligence of Noise Control is premised upon the Donnellys' erroneous interpretations of *Davis* and its alleged linkage not only to *Kelley*, but also to *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). The Donnellys, *App. Br. at 39-40*, not only cite *Kelley* and *Stute* for the proposition that a contractor has a non-delegable duty to ensure a safe work site, but also try to cite *Davis* for the proposition that that nondelegable "duty" extends to Donnelly for an accident that occurred 18 months after construction was completed. *App. Br. at 39-40.* Yet, neither *Kelley* nor *Stute* make the linkage the Donnellys claim. The source of the non-delegable duty described in *Stute* is rooted in site safety rules that apply at a construction site, during construction, and in the codification of the principles addressed in *Kelley* in the Washington Industrial Safety and Health Act of

1973 (WISHA). *Stute*, 114 Wn.2d at 460-64; *see also Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002). *Stute* makes no mention of extending that WISHA rationale to future site occupants or users, and the WISHA regulations governing safe worksites have no bearing whatsoever on duties conceivably owed to future occupants or users of the site. The Donnellys' erroneous attempts to link or conflate *Davis* with *Kelley* and *Stute* should be rejected.

F. The Trial Court Properly Declined to Grant a New Trial Because of the Inadvertent Inclusion of Superseding Cause Language in the Proximate Cause Instruction and HDR's Counsel's Reference to that Language in Closing Argument.

Respondent HDR adopts the arguments set forth in the Brief of Respondent/Cross-Appellant Turner and in Noise Control's Response Brief as to why the inadvertent and unexcepted to inclusion of superseding cause language in the proximate instruction, as well as HDR's counsel's unobjected to reference to that language in closing argument did not and do not justify the grant of a new trial. Respondent HDR also provides the following supplementation with regard to the Donnellys' claim that HDR's counsel committed misconduct in referencing the superseding cause language in closing argument.

Decisions on motions for a new trial are reviewed for abuse of discretion, unless the decision is based on an error of law. *Teter v. Deck*,

174 Wn.2d 207, 215, 222, 274 P.3d 336 (2012); *Ramey v. Knorr*, 130 Wn. App. 672, 686, 124 P.3d 314 (2005), *rev. denied*, 157 Wn.2d 1024 (2006). To justify the grant of a new trial based on alleged misconduct of counsel:

> [T]he movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. ... The movant must ordinarily have properly objected to the misconduct at trial ... and the misconduct must not have been cured by court instruction.

Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 539-40, 998 P.2d 856 (2000) (citation omitted). In reviewing a decision on motion for new trial based on alleged misconduct of counsel in a civil case for abuse of discretion, the appellate court determines whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial ...." *Id.* at 537.

Here, the Donnellys have not shown that HDR's counsel engaged in misconduct, much less intentional flagrant misconduct which could not have been cured had the Donnellys timely objected, when, in connection with his proximate cause and sole proximate cause arguments, he read from the proximate cause instruction which included the superseding cause language. Mr. Scanlan, the counsel who presented HDR's closing argument, had been excused from the afternoon proceedings in which the trial court and counsel finalized and took exceptions to the jury

instructions. *See* 10/8 RP 2742, 2810. When the court read the instructions to the jury before closing arguments, no one raised any concern about the inclusion of the phrase "unbroken by any superseding cause" in the proximate cause instruction. *See* 10/9 RP 2959, 2969. Indeed, the Donnellys' counsel did not raise any concern about it even when he showed the jury the proximate cause instruction and commented that the term "proximate cause" is an "awkward term" and just "sounds so weird." 10/9 RP 2988-89. He did not raise any concern about the inclusion of the phrase "unbroken by any superseding cause" until he brought his motion for new trial.

In connection with HDR's argument on proximate cause and sole proximate cause, Mr. Scanlan, made two brief references to the "unbroken by any superseding cause" language in the proximate cause instruction. 10/9 RP 3088-89. He did not argue that any entity was a "superseding cause." *Id.* He argued that the failure to include the May 2006 letter in the O&M Manuals was not a proximate cause, 10/9 RP 3089-97, and that the DOC was the sole proximate cause of Mr. Donnelly's injuries. 10/9 RP 3088, 3097-3106. The sum of what HDR's counsel said about the "unbroken by any superseding cause" language in the proximate cause instruction, 10/RP 3088-89, was:

> I do want to touch upon two of the instructions that you have in your packet. Instructions 15 and 16 that deal with proximate cause, and this issue of sole proximate cause, which we assert the blame for his accident falls on the Department of Corrections.
>
> Proximate cause is one of those things that, from the day I was a first-year law student, still makes my brain hurt. When you read that phrase, "a cause in a direct sequence unbroken by any superseding cause," I still don't get it really well.
>
> But what it boils down to is connecting dots, that there is an unbroken sequence of events that is foreseeable, that leads from someone doing something wrong to that's the reason why that person got hurt.
>
> And, so when you are evaluating the evidence and considering this concept, the proximate cause, you will have to decide not just did someone – did my client HDR, did Turner, did Noise Control – were they negligent? That is, did they do something that violated the standard of care? But was that negligence a proximate cause, a direct – what's the phrase? – a direct sequence unbroken by any superseding cause? Because you can't find any of us negligent, liable, responsible unless you find that direct, unbroken sequence.

Contrary to the Donnellys' assertions, there was nothing flagrant or ill-intentioned about HDR's counsel's argument. Nor does it appear that it even made an impression on the Donnellys' counsel given the fact that the Donnellys' counsel did not object at the time HDR's counsel referenced the "unbroken by any superseding cause" language, or even after the jury was excused once closing arguments were concluded.

It cannot fairly be said that HDR's counsel's two references to the "unbroken by any superseding cause" language so engendered such a

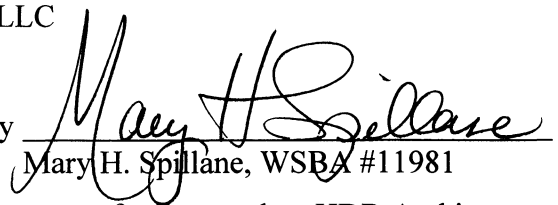
feeling of prejudice in the jurors' minds as to have deprived the Donnellys of a fair trial. Indeed, there was no prejudice as the jurors never reached the proximate cause issues, as they found none of the defendants negligent.

V. CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Respondent/Cross-Appellant Turner, this Court should affirm the trial court's judgment on the jury's verdict in favor of HDR and Turner and its denial of the Donnellys' motion for new trial. Similarly, for the reasons set forth in the Noise Control of Washington's Response Brief, this Court should affirm those trial court rulings in favor of Noise Control as well.

RESPECTFULLY SUBMITTED this 13th day of November, 2015.

FAIN ANDERSON VANDERHOEF ROSENDAHL O'HALLORAN SPILLANE, PLLC

By 
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 13th day of November, 2015, I caused a true and correct copy of the foregoing document, "Brief of Respondents HDR Architecture, Inc.," to be delivered in the manner indicated below to the following counsel of record:

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