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.

NOISE CONTROL OF WASHINGTON'S RESPONSE BRIEF

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Pursuant to RAP 10.1(g)(2), Noise Control of Washington, Inc. adopts the discussion of the Nature of the Case; the Issues Presented; and the Statement of the Case in the Brief of Respondent/Cross-Appellant Turner. Noise Control of Washington, Inc. also adopts the Introduction; Counterstatement of Issues Presented for Review; and Counterstatement of the Case in the Brief of Respondent HDR Architecture, Inc.

Noise Control of Washington adopts the Arguments in the Brief of Respondent/Cross-Appellant Turner and in the Brief of Respondent HDR Architecture, Inc., with the following supplementation.

IV. ARGUMENT

Washington has a strong presumption in favor of upholding jury verdicts. *Brashear v. Puget Sound Power & Light Co.,* 100 Wn.2d 204, 207, 667 P.2d 78 (1983). When a matter is decided by a jury after a full trial, a judgment should remain unmolested absent a significant and substantial showing by the party seeking to set it aside. *See, e.g., Valente v. Bailey*, 74 Wn.2d 857, 859, 447 P.2d 589 (1968). A reviewing Court must accept the evidence of the nonmoving parties — here, defendants — as true, and interpret all reasonable inferences therefrom in a light most favorable to them. *Bunnell v. Barr,* 68 Wn.2d 771, 775, 415 P.2d 640 (1966). Plaintiff received a trial that was more than fair, and the jury's verdict should be respected and affirmed.

Plaintiff's claims against Noise Control were summarized in Jury Instruction 7:

> ...
>
> (2) The plaintiffs claim that defendant Noise Control was negligent in one or more of the following respects:
>
> a. For failing to properly install the metal security ceiling in room C-165;
>
> b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operations and Maintenance Manual.

CP 8897-8898 (Appendix). With the jury's determination that Noise Control was not negligent, the claim that Noise Control failed to properly install the metal security ceiling in room C-165 is not directly at issue in this appeal.

A. The Trial Court Instructed the Jury Properly That it Should not Consider Whether the State's Contract With the Turner/HDR Joint Venture[1] was Breached in Deciding Whether the Defendants were Negligent. (Instruction No. 14)

The jury's determination of no negligence also resolves the second claim.[2] Plaintiff, however, argues that Instruction No. 14[3] (CP 8905

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[1] Plaintiff consistently referred to the State's contract with HDR/Turner, not the subcontract between Noise Control and HDR/Turner. That subcontract was not even admitted during Plaintiff's case in chief. (CP 12195 (Ex. 59 admitted 10/6/2014, RP 2384)).

[2] Noise Control maintained that the phrase, "or a list of circumstances and conditions that would affect the validity of the warranties" had no place in part (2).b. of

(Appendix)) prevented the jury from properly considering his claim that defendants were negligent because they did not include information mentioned in Instruction 7, that walking on the suspended ceiling would affect the ceiling warranty, in the Operations and Maintenance Manual.

The specific language of jury instructions are matters left to the trial court's discretion. *Bodin v. City of Lakewood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 176, 922 P.2d 59 (1996). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Bodin*, 130 Wn.2d at 732. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. *Walker v. State*, 67 Wn. App. 611, 615, 837 P.2d 1023 (1992).

The court recognized no defendant had a general duty to provide warnings about the strength of the ceiling. RP 2747-2752. Plaintiff's claims against Noise Control that were based on the Washington Product

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Instruction No. 7. RP 2941. *See also* RP 2856 (improper to base claim on alleged violation of the Noise Control subcontract, Ex. 59).

[3] Instruction No. 14 said:

> 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.

Liability Act or warranty had been dismissed, with Plaintiff's concession, by summary judgment (CP 515), and the court also agreed with Plaintiff there was not a sufficient basis to impose such a general duty of disclosure to list Environmental Interiors on the verdict form as a non-party to which fault could be allocated. RP 2760-2769.

The court determined that the claim Plaintiff based on defendants not alerting the DOC to the May 23, 2006 letter, obtained in response to the inquiry about whether the suspended ceiling would support the weight of a person walking on it, provided a basis to seek a recovery in tort. RP 2850. At the same time, the Plaintiff's arguments about the letter presented a risk the jury would be confused about the proper standard for determining whether any defendant's inaction concerning the letter received could be negligence actionable by Plaintiff. Personal injury claims must be decided under tort standards, not by deciding breach of contract issues. *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 402, 241 P.3d 1256 (2010) ("An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract."); *Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864 (2007) ("Tort law has traditionally redressed injuries properly classified as physical harm," quoting *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987)).

The Court explained it intended Instruction No. 14 to maintain the boundary between tort and contract. RP 2856; 2858; 2771-2772. Plaintiff's counsel agreed generally that such a line between contract and tort standards was proper:

> Ms. Pflugrath: I am going to ask ... that ... the proposed jury instruction ... limit the argument that can be made in closing so that the argument can't be made, "This is contract language, there was a breach of it, and therefore, that is negligence."
>
> Mr. Gardner: I agree. I can't argue "therefore, that is negligence."
>
> ... I want the instruction to say I am not alleging a breach of contract, or it can say just because there is a violation of contract ... language does not prove negligence.

RP 2852 - RP 2853.

The court decided that Plaintiff could not rely on a breach of contract to determine "that, therefore, somebody is negligent." RP 2855. The court confirmed that Plaintiff could discuss the contract's provisions in discussing the circumstances under which the May 23, 2006 letter came to the defendants' attention, and could also argue that the standard of reasonable care required that one or more defendants should have conveyed the information called for by the contract to the Department of Corrections by including the information in the OM Manual. RP 2823; RP 2826-27. *See* RP 2853 – 2854; RP 2917.

The court understandably was concerned that the jury would confuse the issue it must decide if it thought the question of negligence depended solely on whether the terms of the contract between the State and HDR/Turner obligated defendants to put the May 23, 2006 letter in the OM Manual – a type of "per se" determination of negligence – rather than the jury evaluating the defendants' conduct under a standard the court attributed to the Restatement (Second) of Torts, as discussed in *Davis v. Baugh*, 159 Wn.2d 413, 150 P.3d 545 (2009).[4] As the trial court observed, tort liability is limited by boundaries of foreseeability and reasonableness, requiring the jury to evaluate more than just a contract's specifications to determine a standard of care. RP 2781.

In *Davis*, the Supreme Court declared that even after a project has been completed and accepted by the owner, one who erected a structure or created a condition on land "is subject to liability to others upon ... the

[4] Plaintiff's argument, at page 34 of his Brief, is even bolder: that the contract provisions themselves should be relied on *to establish* the standard of care required in the construction – exactly what he previously agreed was forbidden. RP 2852. Certainly Plaintiff could say (and did say) that the contract had a term that called upon a defendant to do something (or not do something) in a particular way, at a particular time. Plaintiff could cite the provision, with adequate explanation, as evidence of the standard of care. But the fact such a provision is contained in a contract cannot *by itself* establish a standard of care. While some contract specifications might very well relate to the strength and durability of the structure and set minimum standards, others might set out aesthetic features, environmental considerations, or matters of political expediency or scheduling convenience. Specifications could provide features that far exceed structurally what might be required for a typical building (such as oversized pillars of a portico); a departure from those specifications would not establish that the structure was dangerous or in any way deficient from a safety and utilitarian perspective.

land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others." *Id.* 417 n.1, quoting Restatement (Second) of Torts § 385.

Borrowing language from *Davis*, the trial court gave Instruction No. 10, which was based on the "duty" instruction Plaintiff proposed.[5] RP 2867-2869. Reading Instruction No. 14 together with Instruction No. 10, the instructions provided Plaintiff the pathway to argue his theories to the jury. And Plaintiff did so. *E.g.*, RP 2970; RP 2972- 2985; RP 2988. Plaintiff urged the jury to consider the contract language when deciding whether HDR or Turner were negligent in not putting the information from the May 23, 2006 letter in the OM Manual. *E.g.*, RP 2971 and 2995-96 (arguing a contract term obligated HDR and Turner to put the May 23, 2006 letter in the Manual); RP 3027-30028 and RP 3118 (arguing the contract language set out the standard of reasonable care: "Reasonable

[5] Instruction No. 10 (CP 8901) said:

> 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.
>
> It is not necessary that the sequence of events or the particular injury or event be foreseeable. It is only necessary that the resultant injury or event fall within the general field of danger which the defendant should reasonably have anticipated.
>
> The acceptance of the completed Project by the State of Washington is not a defense.

care, you send that thing in with the OMM.... It [the contract] sets forth a clear circumstance or condition that would affect the validity of the warranty on the metal security ceilings. 'Don't walk on them or you void the warranty.'").

Plaintiff's argument that Instruction No. 14 was erroneous asks this court to reject the jury's role in deciding whether defendants acted with reasonable care and instead allow the jury to impose liability if it decided a contract term was not followed – liability based upon contract breach rather than according to a tort standard. The court properly required the jury to dig deeper in evaluating whether failure to "send that thing in with the OMM" should result in tort liability. Plaintiff's challenge to Instruction No. 14 does not make the necessary "significant and substantial showing by the party seeking to set [the verdict] aside." *See, e.g., Valente v. Bailey*, 74 Wn.2d 857, 859, 447 P.2d 589 (1968).

Plaintiff proposed an alternative to Instruction No. 14[6] that, among other things, would have told the jury it "may consider the language of the contract on the issues of causation and as evidence of the standards and specifications that applied to defendants." A trial court's refusal to give a proposed instruction is reviewed for abuse of discretion. *Walker v. State*, 67 Wn. App. 611, 615, 837 P.2d 1023 (1992). The specific language of

[6] Plaintiff's proposed Instruction No. 32. CP 8877.

the instructions are matters left to the trial court's discretion. *Bodin*, 130 Wn.2d at 732; *Young*, 130 Wn.2d at 176. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Bodin*, 130 Wn.2d at 732. The jury instructions were sufficient, and the trial court acted within its discretion when it declined to use Plaintiff's proposed alternative Instruction No. 32.

B. The Trial Court Properly Instructed the Jury Regarding Proximate Cause, Despite an Inadvertent Reference to "Superseding Cause" in Instruction 15

Plaintiff also complains that Instruction No. 15 (CP 8906) retained language (alternative language from the standard WPI 15.01) that would be used when the issue of a "superseding cause" is an issue to be decided. While the Court said it did not intend to leave the term "superseding cause" in the instruction,[7] the court's final instruction inadvertently retained the term and nobody noticed the oversight when the instructions were read in open court or later when the language was discussed. Plaintiff remained silent when Instruction No. 15 was read verbatim to the jury in open court. RP 2959. Plaintiff has conceded that "Had this instruction only been read to the jury, without one of the attorneys

[7] Proposed instructions had included superseding cause language. *E.g.*, CP 6059; CP 6358.

commenting on the superseding cause language ... there would not be any basis to assign error, as ... no formal exception was taken to Jury Instruction 15." Appellant's Opening Brief, at 24. Plaintiff waived any objection to Instruction No. 15.

In an effort to resurrect a challenge to Instruction No. 15, Plaintiff has mounted a disingenuous misconduct allegation that does not fairly represent the record of the October 9, 2014 closing arguments. Plaintiff claims defense counsel "focus[ed] HDR's closing argument on that excluded defense." Appellant's Opening Brief, at 23. A fair reading of the transcript belies Plaintiff's contention.

As Plaintiff acknowledged, when discussing the proximate cause instructions with the jury, Plaintiff raised no objection to Instruction No. 15. He even showed the full instruction to the jury, and did not mention any issue with its wording, except to comment that in looking at the instruction for "proximate cause," the term "just sounds so weird." RP 2988-2989.

Echoing that remark not long afterward, counsel for HDR commented, "Proximate cause is one of those things that, from the day I was a first-year 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." RP 3088. That passing reference to

"superseding cause" was less argument than it was part of a sardonic, self-deprecating colloquy.[8] The remarks that followed focused on whether an action complained of is a direct cause of an injury. RP 3088-3089. Counsel for HDR explained that a failure to place the May 23, 2006 letter into the OMM simply was not a "but for" cause of the Plaintiff's accident. That explanation had nothing to do with the "superseding cause" term, but discussed the improbability that placing the May 23, 2006 letter in the OM Manual would have made any difference to Marshall Donnelly: "Even if there was some duty, some obligation on the part of Turner or HDR or whoever to put this letter into the O & M, it simply doesn't matter. No one would have seen it." RP 3097.

That argument did not "comment on the superseding cause language," but rather observed that Plaintiff could not establish that the omission of the letter was a cause that "produces the injury complained of and without which such injury would not have happened."[9] The only

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[8] The jury was not even told what the term "superseding cause" meant, and they did not request guidance in understanding the term. The issue of proximate cause, including any discussion of superseding cause, would have been reached only if the jury had first determined that a defendant was negligent. Here, the first question the jury was asked to answer was "Were any of the following negligent?" They answered "No" as to all three defendants. CP 8885. Because the jury determined none of the defendants breached a duty owed, the jury did not consider whether such breach was a proximate cause of injury to plaintiffs. CP 8886.

[9] The argument of HDR's counsel focused on whether Mr. Donnelly's accident was a "direct" consequence of the failure of any defendant to place the information from the May 23, 2006 letter into the OM Manual: that Plaintiff had not shown the

other time HDR even mentioned the extraneous "superseding" term occurred when quoting Instruction No. 15 verbatim to argue there was not a direct connection between the "OMM omission" and Mr. Donnelly's accident; HDR's counsel did not identify anything as a "superseding cause" that would have interrupted an otherwise "direct sequence" that produced injury, the standard set out in the rest of Instruction No. 15. Plaintiff cites these innocuous references to the Instruction's language (RP 3088-3089) without acknowledging the context of the remarks more apparent from a review of the entire argument made. RP 3088-3097, and RP 3105.

Plaintiff's argument about Instruction No. 15 fails because his contention that HDR's counsel "deliberately focused HDR's closing argument on the superseding language" is patently inaccurate. Moreover, Plaintiff brought up and displayed the same language before the jury in the first discussion of Instruction No. 15. (And, after reviewing that

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accident would not have occurred "but for" that omission. As suggested at RP 3088, this argument also related to the second paragraph of Instruction No. 16 (CP 8907):

> There may be more than one proximate cause of the same injury. If you find that one or more of the defendants was negligent and that such negligence was a proximate cause of the injury or damage to the plaintiffs, it is not a defense that some of other cause or the act of some other person who is not a party to this lawsuit may also have been a proximate cause.
>
> However, if you find that the sole proximate cause of injury or damage to the plaintiffs was some other cause or the act of some other person who is not a party to this lawsuit then your verdict should be for the defendants.

instruction with the jury during the court's morning session (RP 2988-2989), Plaintiff did nothing to have the surplus term "superseding cause" removed before defendants presented closing argument that afternoon.) When counsel for HDR mentioned the surplus term in the course of reading the instruction to the jury (while disputing that Plaintiff had established the direct sequence required by the proximate cause formula), Plaintiff stayed silent, making no objection.[10]

By not objecting to HDR's argument, Plaintiff waived any claim of error based upon alleged misconduct in the argument. *See Christensen v. Munsen*, 123 Wn.2d 234, 248, 867 P.2d 626 (1994). He has not shown that a curative instruction could not have removed any jury confusion or other problem flowing from leaving the "superseding cause" language in the instruction or from not omitting the term while reading from the instruction. If there was any error in HDR's counsel having read the language of the jury instruction verbatim during his argument, it was not of such character as to constitute "misconduct so flagrant that no instruction would cure it." *See Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873(1967).

[10] That silence likely reflected Plaintiff's accurate assessment at the time that HDR's argument was not even directed at any "superseding cause" defense.

C. The Court Did Not Rebuke Plaintiff's Counsel, and Did not Err in Giving a "Very Mild Admonition"

With dramatic flourish, Plaintiff asserts that "after trial, the trial court admitted it erred by rebuking plaintiff's counsel in the middle of closing argument, instructing the jury that plaintiff's counsel had violated an agreement." Appellant's Opening Brief at 24, citing CP 9691, the trial court's Order Denying Plaintiff's Motion for New Trial."[11] In fact, the trial court's Order said:

> 3) Although the court should not have admonished plaintiffs' counsel during argument, it was not a significant event in light of all of the proceedings and plaintiffs' received a fair trial.
>
> The court incorrectly admonished plaintiffs' counsel during closing argument. It was, however, a very mild admonition and was not significant in light of over three weeks of proceedings before the jury. A party is not entitled to a perfect trial, only a fair trial. That is what plaintiffs received. The court allowed almost all of plaintiffs' evidence, excluded over defendants' objection a good part of the evidence defendants sought to introduce, and provided a set of jury instructions which allowed plaintiffs to argue their theory of the case to the jury. The jury simply did not agree with the plaintiffs.

CP 9691. Plaintiff's further lamentations added the trial judge to the culpable-list:

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[11] Plaintiff also cites CP 8989 – 8991, a declaration of Plaintiff's counsel, to make additional assertions. Appellant's Opening Brief, at 25.

> The trial court erred by rebuking plaintiff's counsel during closing argument, falsely instructing the jury that plaintiffs' counsel had cheated by violating an agreement.

Appellant's Opening Brief at 48.

> Judge North's rebuke of plaintiff's counsel, at the insistence of and upon the misrepresentations of defense counsel, directly attacked plaintiff's counsel's integrity and ethics.

Appellant's Opening Brief at 49.

Not so.[12]

While Plaintiff's counsel might have felt wounded by the trial court's statement, which the court characterized as a "very mild admonition," it was neither as malicious nor as momentous as Plaintiff contends. The court's brief remark appears to have been intended to reduce the possible prejudice that might occur from having transcripts of testimony (not admitted as documentary evidence) displayed to the jury during closing argument without first informing the opposing parties, believing there had been some type of agreement to provide advance notice. RP 3010.[13] In that respect, it is similar to the convention of

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[12] Judge North was charitable to Plaintiff's counsel in recounting the history of the admonition, but the transcript of the 9/8/2014 hearing shows there was good reason for defense counsel, and Judge North, to have expected advance notice before a trial transcript was displayed to the jury during closing argument. *See* RP 237-241.

[13] "Ladies and gentlemen, you should know that the lawyers had an informal agreement that they would let the other side know before they show transcripts to the jury. Mr. Gardner did not let the other – the defendants know that he was going to be showing excerpts of transcripts to the jury before his closing." RP 3010.

showing an illustrative exhibit to opposing counsel before showing it to the jury. In explaining that Mr. Gardner had not informed the defendants before showing the transcript excerpts to the jury, the court did nothing more than explain why defendants might have been caught by surprise by not receiving the advance notice, without assessing motivation or assigning culpability. *Id.*

The comments were innocuous and appear in context to have been of no particular moment at the time. And, Plaintiff's counsel told the jury he did not know of any such agreement; ignored any concern that evidence should be reviewed by opposing counsel before it was displayed to the jury; and suggested to the jury that the defendants were concerned the testimony was unfavorable.[14]

In any event, nothing Judge North said called into question the integrity of Plaintiff's counsel or suggested he acted unethically in not following a courtroom procedure the court attributed to an informal agreement. Plaintiff has cited no civil case indicating a new trial is required when the trial court admonishes counsel during trial. The cited criminal cases are simply inapposite. Moreover, nothing about Judge

[14] Mr. Gardner: "Thank you your Honor. I, frankly, didn't know there was such an agreement, but my apologies, if putting up testimony does something that harms you guys in some way, but certainly that was not my understanding." RP 3010.

North's statement even remotely parallels the remarks at issue in the criminal cases Plaintiff cited.

In *State v. Whalon*, 1 Wn. App. 785, 797, 464 P.2d 730 (1970), the criminal defendant's conviction was reversed after the trial Judge angrily rebuked defense counsel and, in the presence of the jury, accused him of deliberate misconduct, with statements such as "That is highly improper...." "It's pre-determined by Counsel. I will not allow that in this court." "I say, it was pre-determined on Counsel's part." ... "... it's highly improper." ... "Mr. Fountain, you will remain silent at this time and I will excuse the jury." Nothing like that occurred in Judge North's courtroom.

In *State v. Levy*, 8 Wn.2d 630, 113 P.2d 306 (1941), the court ordered a new trial where, in the jury's presence, the trial judge declared the criminal defendant's counsel in contempt of court, summarily imposed a fine upon him, refused to accept his check in payment of the fine, and enforced instant payment of the penalty in cash, under threat of immediate arrest. *Id.* at 638. The court allowed the rebuke and fining in the presence of the jury, *Id.* at 642, but held that stating in the presence of the jury that it would not accept counsel's check in payment allowed the jury to infer the trial judge distrusted defense counsel. *Id.* at 643.

And, in *State v. Gairns*, 20 Wn. App. 159, 579 P.2d 386 (1978), the Court denied the request for a new trial and upheld the conviction despite the trial court's unflattering remarks to defense counsel: "Oh that is enough of it;" "He answered the question, but counsel, just don't try the case on voir dire;" and, "You are not giving [the prospective juror] a fair chance." *Id.* at 163. The Court said the remarks complained of did not impugn the integrity of defense counsel or insinuate unethical conduct, and did not warrant granting a new trial. *Id.* Even if the standard applied in these criminal cases is appropriate when reviewing a civil jury's verdict, Plaintiff has not demonstrated any rebuke by Judge North that would support a new trial here.

Finally, Plaintiff's argument that cumulative errors satisfy the "significant and substantial showing" of prejudice necessary to overturn the strong presumption in favor of jury verdicts fails, irrespective of whether the cumulative error doctrine applies in a civil case. As discussed above and in the Briefs of HDR Architecture, Inc. and Turner Construction Company,[15] Plaintiff's claims of error should be rejected.

[15] As previously stated, pursuant to RAP 10.1(g), Noise Control of Washington, Inc. relies upon these briefs to augment the arguments presented in this brief.

After all that has been said about this lengthy trial, Judge North deserves the final word. In his November 17, 2014 Order Denying Plaintiff's Motion for New Trial, he said:

> A party is not entitled to a perfect trial, only a fair trial. That is what plaintiffs received. The court allowed almost all of plaintiffs' evidence, excluded over defendants' objection a good part of the evidence defendants sought to introduce, and provided a set of jury instructions which allowed plaintiffs to argue their theory of the case to the jury. The jury simply did not agree with the plaintiffs.

CP 9691. The jury's verdict should be upheld and the trial court's judgment should remain unmolested.

RESPECTFULLY SUBMITTED this 13th day of November, 2015.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 
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DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date set forth below, I caused to be served in the manner indicated a copy of the **Noise Control of Washington's Response Brief** to the parties identified below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 13th day of November, 2015, at Seattle, Washington.

S. Jean Ballard, Assistant to
Philip R. Meade, WSBA #14671

APPENDIX

NO. 32

You have heard testimony about the language in the Request for Proposal relating to maintenance 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 have any liability to Mr. Donnelly for his fall. You may consider the language of the contract on the issues of causation and as evidence of the standards and specifications that applied to the defendants.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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, Plaintiff, vs. HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1-20", Defendants.	NO. 11-2-37290-1 SEA SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the following negligent? (Write "yes" or "no" for each)

ANSWER:

Defendant HDR Architecture: No

Defendant Turner Construction: No

Defendant Noise Control: No

(DIRECTION: If you answered "no" as to all defendants, do not answer any further questions, sign this verdict form and notify the bailiff. If you answered "yes" as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury to the plaintiffs? (Write "yes" or "no" for each defendant and non-party found negligent by you in Question 1)

ANSWER:

Defendant HDR Architecture: _____

Defendant Turner Construction: _____

Defendant Noise Control: _____

(DIRECTION: If you answered "no" to all the above parties, do not answer any further questions, sign this verdict form and notify the bailiff. If you answered "yes" as to any defendant, answer Question 3.)

QUESTION 3: What do you find to be the plaintiffs' amount of damages? *(Do not consider the issue of contributory negligence, if any, in your answer.)*

ANSWER:

Plaintiff Marshall Donnelly:

Past Economic Damages $_____

Future Economic Damages $_____

Non-Economic Damages $_____

Plaintiff Jennifer Donnelly: $_____

Plaintiff Linley Donnelly: $_____

(DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form and notify the bailiff.)

QUESTION 4: Was plaintiff Marshall Donnelly also negligent?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 4, skip Question 5 and answer Question 6. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was plaintiff Marshall Donnelly's negligence a proximate cause of the injury to plaintiffs?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 5, answer Question 6. If you answered "yes" to Question 5, skip Question 6 and answer Question 7.)

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant HDR Architecture: _____%

Defendant Turner Construction: _____%

Defendant Noise Control: _____%

(DIRECTION: Sign this verdict form and notify the bailiff.)

QUESTION 7: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the negligence of each defendant and non-party whose negligence was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff, and what percentage of this 100% is attributable to the plaintiff's negligence? Your total must equal 100%.

ANSWER:

Defendant HDR Architecture: _____%

Defendant Turner Construction: _____%

Defendant Noise Control: _____%

Plaintiff Marshall Donnelly: _____%

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATED: 10-10, 2014.

Danielle Malashon

Presiding Juror

INSTRUCTION NO. 7

(1) The plaintiffs claim that defendants HDR and Turner were negligent in one or more of the following respects:

a. For failing to inform, train, or warn the WSP that the metal security ceilings were not designed to hold the weight of a worker, and that walking on those ceilings would void the manufacturer's warranties.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operation and Maintenance Manual.

c. For failing to adequately inspect the work of its subcontractor, defendant Noise Control, to determine if it properly installed the metal security ceiling in room C-165.

(2) The plaintiffs claim that defendant Noise Control was negligent in one or more of the following respects:

a. For failing to properly install the metal security ceiling in room C-165.

b. For failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operation and Maintenance Manual.

The plaintiffs claim that one or more of these acts or failures to act was a proximate cause of Marshall Donnelly's injuries and plaintiffs' damages. The defendants deny these claims.

(3) In addition, the defendants claim as an affirmative defense that plaintiff Marshall Donnelly was contributorily negligent in one or more of the following ways:

a. For failing to follow the requirements of the annual Job Safety Analysis;

b. For failing to determine whether or not it was safe to walk on the ceiling at C-165, and/or exercising his stop work authority.

The defendants claim that one or more of these acts was a proximate cause of plaintiff Marshall Donnelly's own injuries and plaintiffs' damages. The plaintiffs deny these claims.

The defendants further deny the nature and extent of the claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 10

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.

It is not necessary that the sequence of events or the particular resultant injury or event be foreseeable. It is only necessary that the resultant injury or event fall within the general field of danger which the defendant should reasonably have anticipated.

The acceptance of the completed Project by the State of Washington is not a defense.

INSTRUCTION NO. 14

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.

INSTRUCTION NO. 15

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

INSTRUCTION NO. 16

There may be more than one proximate cause of the same injury. If you find that one or more of the defendants was negligent and that such negligence was a proximate cause of injury or damage to the plaintiffs, it is not a defense that some other cause or the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiffs was some other cause or the act of some other person who is not a party to this lawsuit then your verdict should be for the defendants.