72824-5

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NO. 72824-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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/Cross-Respondents,

vs.

HDR ARCHITECTURE, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation; NOISE CONTROL OF WASHINGTON, INC., a Washington corporation,

Respondents/Cross-Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Douglass A. North, Judge

BRIEF OF RESPONDENT/CROSS-APPELLANT TURNER

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I. NATURE OF THE CASE[1]

Marshall Donnelly was seriously injured when he fell through a metal security ceiling at the Washington State Penitentiary, where he worked. The ceiling at issue had been installed almost two years before by respondent Noise Control as part of a design/build construction project awarded to a joint venture comprised of respondents HDR, Inc., and Turner Construction, Inc. HDR/Turner had designed and built the project according to DOC/WSP specifications. No one had ever told HDR or Turner that WSP workers were accustomed to walking on the ceilings and expected to do so on the project's new ceilings. In fact, the project's metal security ceilings were not designed to hold a person's weight.

Nonetheless, Mr. Donnelly's representative and family (hereinafter "plaintiffs") sued Turner, HDR, and Noise Control. A jury found defendants not negligent.

II. ISSUES PRESENTED

A. Was it reversible error to give Instruction No. 14, instructing the jury that there were no breach of contract claims against defendants and that whether the contract was breached could not be considered in determining whether defendants were negligent, where

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[1] Pursuant to RAP 10.1(g)(2), Turner incorporates by references the Brief of Respondent HDR Architecture, Inc., and Noise Control of Washington's Response Brief.

plaintiffs agreed to the instruction, which correctly stated the law, there was no breach of contract in any event, and even if there had been, plaintiffs were able to, and did, argue their theory of the case?

B. Did the trial court abuse its discretion in declining to give plaintiffs' proposed Instruction No. 32, where Instruction No. 14 already permitted them to argue what Instruction No. 32 would have said?

C. Is a new trial required because the special verdict form listed the joint venture members separately where (1) plaintiffs sued the members, not the joint venture, (2) plaintiffs acquiesced to the separate listing on the special verdict form, (3) plaintiffs have never challenged Instruction No. 6, which required the jury to decide the case of each defendant separately, and/or (4) a joint venture cannot be liable for negligence unless one of its members has been negligent?

D. Is a new trial required because the trial court told the jury that plaintiffs' counsel had failed to comply with an agreement amongst counsel requiring advance notice for using trial transcripts in closing argument where counsel did breach the agreement, but even if there were no agreement, the admonition did not misstate the law, did not deal with the merits of the case, was short and mild in nature, and was made before several parties had even begun their closing argument?

E. Is there any need for this Court to review plaintiffs' remaining issues, which are dependent on the jury having found one or more defendants negligent, which the jury did not do? If so—

1. Is a new trial necessary because the trial court ruled that members of the joint venture could not be liable for its independent contractor, Noise Control, where the general rule is that the employer of an independent contractor is not liable for its negligence, and plaintiffs failed to prove any exceptions to that rule applied?

2. Did the trial court abuse its discretion in refusing to allow expert testimony about the joint venture's alleged right and obligation to control Noise Control, where the joint venture could not be liable for Noise Control as a matter of law?

3. Is a new trial required because the trial court included "superseding cause" in the proximate cause instruction, where (a) plaintiffs did not except to the instruction when exceptions were taken, (b) plaintiffs did not object to the instruction when it was given to the jury, (c) plaintiffs did not object when HDR's counsel talked about "superseding cause" in closing argument, (d) the instruction was not erroneous, (e) even if it were, there could have been no prejudice?

III. STATEMENT OF THE CASE[2]

A. STATEMENT OF RELEVANT FACTS.

In December 2009 plaintiff/appellant Marshall Donnelly was seriously injured when he fell through a metal security ceiling at his place of employment, the Washington State Penitentiary (WSP) in Walla Walla. Donnelly, an electrician, was attempting to install conduit in the area above the ceiling. (CP 115-16, ¶¶ 2.2-2.4, 2.6)

1. Prison Ceilings.

Prison security ceilings prevent prisoners from hiding contraband or getting up above the ceiling. Thus, security ceilings are designed to keep people from breaking through them *from below,* not from above. Such ceilings can consist of concrete, plaster with metal lathing, or gypsum board with metal studs. More recently, metal security ceilings have become popular; most newer federal prisons use them. Code does not require that suspended metal security ceilings be strong enough to walk on. (9/22 RP 621, 630-31, 636; 9/18 RP 410-11, 456, 536; 9/23 RP 938, 965, 999; 10/2 RP 2064-65, 2067; 10/6 RP 2451)

Amongst the metal security ceilings available are Celline and

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[2] RAP 10.4(f) requires references to the record by page. Plaintiffs have referred to the clerk's papers dozens of times by trial court subnumber, providing CP page numbers only occasionally. This is grounds for declining review. *Keiffer v. City of Seattle Civil Serv. Comm'n,* 87 Wn. App. 170, 172 n.1, 940 P.2d 704 (1997).

Lockdown, manufactured by Environmental Interiors. Celline, the stronger of the two, consists of planks that run the width of a room. (9/22/RP 617, 618; 629-30; 10/6 RP 2424-25; Ex. 5-005) Lockdown is similar to the familiar acoustical tile system—it consists of 2'x 2' panels laid out in a grid and suspended from above. (9/22 RP 636; 9/23 RP 870; 10/2 RP 2066) Both are designed to keep people from breaking through *from below*. Neither is designed to be walked upon. (9/22 RP 619) In fact, the federal prison system, which uses both products in many of its prisons, has a rule against walking on metal security ceilings. (10/2 RP 2066-67, 2069)

Often HVAC and other infrastructure systems are located in the area above the ceiling, called "the plenum." (9/23 RP 957-58) When prison maintenance personnel need access to systems unreachable via special access panels, an appropriate portion of the metal security ceiling must be disassembled. (10/2 RP 2069-70)

2. The WSP North Close Project.

In 2004 the WSP, in conjunction with the Washington State Department of Corrections (DOC), issued a request for proposal (RFP) for the design and construction of what would be called the North Close Project. The RFP sought bids from design/build teams. (9/16 RP 75; 9/18 RP 533-34; 10/6 RP 2427-28) In a design/build contract, the project owner retains a team consisting of an architect and a contractor. (10/6 RP 2427)

The architect then fleshes out the RFP specifications in consultation with the owner and contractor, and the contractor builds the project. (10/6 RP 2428-29) A joint venture, HDR/Turner, composed of defendants/respondents HDR Design-Build, Inc., and Turner Construction Co., an architect and a contractor respectively, was awarded the WSP contract. (9/16 RP 114; Exs. 3-004, 4)

Unbeknownst to Turner or HDR, WSP maintenance personnel had been walking on nonmetal WSP ceilings for years to perform maintenance or repairs on infrastructure in the plenum. But not only did the RFP not specify the material for the new security ceilings, it did not specify the security ceilings had to support a person's weight. (9/23 RP 839, 844-45; 10/2 RP 2071; 10/6 RP 2448; 10/7 RP 2612) In fact, no one ever told HDR or Turner, or the ceiling subcontractor, defendant/respondent Noise Control, Inc., that prison personnel were accustomed to walking on prison ceilings or that WSP expected the new security ceilings to be walkable. HDR and Turner had done prison projects before: no one at those projects had ever said they wanted to walk on the security ceilings. (9/18 RP 553; 9/23 RP 894-95; 10/2 RP 2071-72; 10/6 RP 2306-07, 2424-27, 2439-40, 2450; 10/7 RP 2612, 2614)

HDR selected Celline and Lockdown for the project. Although WSP had never had metal security ceilings before, both products met the

RFP specifications and were well-regarded in the industry. DOC approved HDR's choice. (9/18 RP 552; 9/23 RP 838, 863, 871; 10/6 RP 2438)

Noise Control was the subcontractor responsible for installing the ceilings. The first metal security ceilings it put in, in December 2006, were "mock-ups", i.e., DOC/WSP was able to see, and determine whether to approve, both types of metal security ceilings before the remaining ceilings were installed. (Ex. 426; 9/30/RP 1700; 10/6 RP 2307-08)

HDR/Turner was authorized to begin the North Close project in March 2005 and substantially completed it by March 2008, almost 2 years before Mr. Donnelly's accident. (Ex. 3, p. 001; CP 40, 80)

3. WSP Safety Program.

Prior to Mr. Donnelly's accident, WSP had implemented a mandatory safety program called "Job Safety Analysis" or "JSA." Under the JSA program, checklists listing potential hazards were created annually for frequent or routine tasks; for atypical projects, separate checklists were developed. (9/17 RP 287, 290, 291, 298; 9/23 RP 887) A worker, with his/her manager and a safety officer, was supposed to review the checklist for potential hazards. If a potential hazard had been checked "yes," the JSA section setting forth applicable WAC regulations and recommendations for dealing with that hazard was to be reviewed. (9/17

RP 289, 292) The purpose of the JSA was to encourage people to pause and identify hazards. (9/17/ RP 298)

Job-specific JSA's were done for such projects as installing an electrical outlet for an automatic soap dispensing machine and for the installation of door stops. (9/17 RP 307-08; Exs. 677, 685)

4. The Accident.

On December 29, 2009, almost two years after the North Close project was completed, Mr. Donnelly and Justin Griffith, both WSP electricians, were assigned to install a conduit. (Ex. 407; 9/18 RP 419-22) Jim Atteberry, their supervisor, expected the job would require putting the conduit in the plenum above the metal security ceiling. But although metal security ceilings were new to WSP, he nevertheless felt the job was routine and did not require a job-specific JSA. (9/23 RP 838, 863, 950, 953, 960, 992)

The area where the conduit was to be installed had the Lockdown metal security ceiling. (CP 115: ¶ 2.3, 2.4) Since Lockdown panels typically cannot be removed without damaging them, Noise Control had installed removable access panels where specified by WSP. (9/22 RP 627, 9/30 RP 1690-91, 1699-1700, 1759) After removing an access panel, Mr. Donnelly climbed a ladder into the plenum. (9/18 RP 463-64) A few

minutes later, he fell through the ceiling, suffering serious permanent injuries. (CP 116: ¶ 2.6)

There was no evidence at trial that anyone else anywhere had ever fallen through a prison metal security ceiling. (9/23 RP 841-42; 9/30 RP 1683-84; 10/2 RP 2068-69; 10/6 RP 2307; 10/7 RP 2614)

5. The Aftermath.

After the accident, DOC prohibited its personnel statewide from walking on prison ceilings and hired engineers to investigate the accident and certain WSP ceiling areas not part of the North Close project. (9/23 RP 859, 901; 10/2 RP 2193-95; 10/7 RP 2655-56)

The first engineer determined the accident occurred because the ceiling was not designed to be accessible. (10/2 RP 2225) The second engineer inspected about ten nonmetal ceilings chosen by WSP. None was safe to walk on, even though WSP personnel had been walking on prison ceilings for years. (9/23 RP 998-99; 10/7 RP 2656, 2658; Ex. 706, p. 3)

In fact, unbeknownst to Mr. Donnelly's and Griffith's supervisor, Jim Atteberry, Mr. Donnelly and Griffith had, without incident, walked on the new metal security ceilings several times before the accident. (9/18 RP 432) Asked why he had not known that, Atteberry testified (9/23 RP 974):

> [T]here was no need for me, in my opinion, to micromanage and go out there and look at everything they did. ...I don't have time to do that ....

Indeed, the Washington Industrial Safety and Health Act (WISHA) regulations applicable to WSP required it to maintain a safe workplace for its employees. See RCW 49.17.060; WAC 296-155-005-040. (9/23 RP 885-86, 940) WSP personnel, both management like Atteberry and staff like Griffith, had simply assumed—without any investigation or expert advice—that a security ceiling must be safe to walk on simply because it was a security ceiling, and they had all walked on concrete security ceilings before. (9/18 RP 455-58, 552-53; 9/23 RP 895, 898, 966-67) But a former Federal Bureau of Prisons facilities manager and warden who was familiar with over 200 prisons over a career of 35 years would later testify (10/2 RP 2051-60, 2067, 2084):

> Q. What is your opinion of the practice of walking on those ceilings—that type of ceiling, assuming there was no previous assessment of the safety of doing it?
>
> A. Well, that was an activity that was going on at WSP that I have not seen going on at other facilities, and I'm not sure how that started, the staff felt like they could walk safely on those ceilings, and I'm certainly not sure how somewhere along the line there wasn't intervention by someone to say, "Let's stop and take a look at these ceilings and see if it's safe to walk on them."

B. STATEMENT OF PROCEDURE.

Plaintiffs sued HDR, Turner, Noise Control, and the supplier of the Lockdown and Celline ceilings, Environmental Interiors, Inc.

Environmental Interiors settled before trial. (CP 1-11, 37-49, 113-27, 7458-59; 11931-32)

1. Plaintiffs' Claims and Defendants' Responses.

Plaintiffs sued HDR and Turner for negligent design and construction and for failure to warn and/or train. (CP 120-21) The negligent design claims were dismissed before trial. (CP 4795)

The defense strategy included showing that the accident's sole proximate cause was DOC/WSP. (9/16 RP 112, 119, 128-29, 135-36, 147, 154) In fact, plaintiffs admitted in closing argument:

> And this gets to what the defendants spent so much time on in trial, so much time, and that was trying to prove that only the State, only Mr. Donnelly's supervisors, messed up in this case, that they were the sole proximate cause.
>
> ....
>
> ...***But there certainly was plenty of evidence presented on that***, because that's the defendants' argument.
>
> They're trying to say, "Hey, the only people who messed up here were [*sic*] the State of Washington, the employer."

(10/9 RP 2989-90) (emphasis added). In addition, the defense sought to combat plaintiffs' specific liability theories as follows:

a. Whether the May 23, 2006, Letter Should Have Been Given to WSP.

In May 2006, more than six months before the first metal security ceilings were even installed, a subcontractor asked Turner whether the Celline ceilings (the stronger plank style) could be walked on, so they

could be used as a construction staging area. (9/22 RP 672; 9/30 RP 1734, 1751; 10/6 RP 2287; 10/7 RP 2516-18) Turner asked Noise Control, the ceiling subcontractor. (9/30 RP 1749; 10/6 RP 2300-02; 10/7 RP 2516-17, 2520) Noise Control called Environmental Interiors, the ceiling supplier, which advised that walking on the ceilings would void the warranty. (9/22 RP 617-18; 9/30 RP 1750; 10/6 RP 2303) On May 23, 2006, Noise Control sent a letter to Turner explaining what Environmental Interiors had said. (Ex. 38)

Plaintiffs later claimed the letter should have been given to WSP, either as part of the project's Operation & Maintenance Manual (OMM) that HDR/Turner was contractually required to give WSP at completion, or independently of the OMM. (9/16 RP 84-85, 90-92)

The OMM, put together by Turner, was comprised of material the subcontractors had supplied as required by their subcontracts. (9/22 RP 648, 681) The OMM's primary content was product information for products installed by the subcontractors. (9/22 RP 681-82)

To comply with its contractual obligation to provide material for the OMM, Noise Control sent Turner the metal security ceiling brochures from the ceilings' manufacturer, Environmental Interiors. The brochures included warranty information, but did not include a warning that the ceiling was not walkable. Noise Control did not send the May 23, 2006,

letter—which addressed a subcontractor question whether the ceiling could be used as a construction staging area—to Turner to include in the OMM. (9/22 RP 630, 640-41; 10/6 RP 2304-05; Ex. 5)

The OMM also included contact information for project suppliers and contractors, so that if WSP had a question, it could determine who to contact and how. There was expert testimony that because WSP had never used metal security ceilings before, it should have contacted Noise Control or Environmental Interiors to determine whether the metal security systems were walkable. (Ex. 5; 10/2 RP 2085-86; 10/7 RP 2540-41)

The evidence conflicted on whether the May 23, 2006, letter should have been included in the OMM or otherwise given to WSP. (*E.g.,* 9/25 RP 1386; 10/2 RP 2103) For example, testifying for the defense, one expert said material like the May 23, 2006, letter, generated as part of the construction process, generally would not be given to the owner. (10/2 RP 2086-88) Another defense witness explained the letter would not have gone into the OMM because it dealt with how the construction work was to proceed. (10/7 RP 2541)

In any event, every WSP/DOC witness but one who was asked either admitted having not looked at the OMM, consisting of three large notebooks, before the accident or could not recall having done so. (9/18 RP 513, 519-20; 9/23 RP 883, 885, 980-81; 9/30 RP 1686, 1705) The only

witness who had looked at the OMM pre-accident was Rick Howerton, DOC clerk of the works for the project. Although claiming he would have read the May 23, 2006, letter had it been in the OMM, Howerton admitted he had not read every page of the manual. He was also unaware WSP personnel had been walking on the prison ceilings. (9/23 RP 1017-18, 1022; 9/30 RP 1708, 1714-15, 1724-25) As one expert testified, if no one had read the OMM, "it would be of no value at all." (10/2 RP 2171-72)

b. Whether Defendants Should Have Foreseen WSP Workers Would Walk on the Ceilings.

Plaintiffs claimed that because infrastructure such as HVAC equipment was located in the plenum, Turner and HDR should have known WSP workers would at some point need to access the plenum and walk on the metal security ceilings. (9/24 RP 1244; 10/9 RP 2978-79) There was no evidence, however, that either Turner or HDR knew WSP workers walked on the ceilings instead of disassembling them as was federal prison practice. (10/2 RP 2069-70, 2183; 10/7 RP 2521-23, 2612) Witnesses disagreed whether defendants should have foreseen WSP workers would be walking on the ceilings. (9/24 RP 1242; 10/2 RP 2088; *see also* 9/24 RP 1242; 10/6 RP 2425-27; 10/7 RP 2598)

c. Whether HDR/Turner Should Have Trained WSP on the Metal Security Ceilings.

The HDR/Turner-WSP contract provided that HDR/Turner would provide training to WSP on several specified aspects of the new construction. (9/22 RP 677-78; 9/30 RP 1704, 1742; Ex. 40) The contract did not call for training on the metal security ceilings. (Ex. 40; 9/30 RP 1725-26) Several witnesses at trial testified that static systems like ceilings need no training and are not part of the training contractors provide to prison personnel. (9/30 RP 1743; 10/2 RP 2076; 10/7 RP 2544)

2. The Verdict and Postjudgment Motion.

After a four-week trial, a unanimous jury found none of the defendants negligent. Judgment on the verdict was entered. (CP 8885, 9306-14, 12153) The trial court denied plaintiffs' motion for a new trial (CP 9688, 9691), saying, among other things (CP 9688-92):

> 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.

IV. ARGUMENT

Plaintiffs seek to overturn the verdict and obtain a new trial. But "[t]he right of trial by jury shall remain inviolate." WASH. CONST. art. I, § 21. "'To the jury is consigned under the constitution the ultimate power to

weigh the evidence and determine the facts ....'" *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 646, 771 P.2d 711 (1989). The jury is the sole judge of credibility and the weight of the evidence. *Heitfeld v. Benevolent & Protective Order,* 36 Wn.2d 685, 699, 220 P.2d 655 (1950).

Thus, "[a] new trial is not a matter of right." *Skov v. MacKenzie-Richardson, Inc.,* 48 Wn.2d 710, 712, 296 P.2d 521 (1956). Reversing and remanding for new trial "is a severe measure and should be reserved for more extreme cases." *Public Util. Dist. No. 1 v. Int'l Ins. Co.,* 124 Wn.2d 789, 813, 881 P.2d 1020 (1994). Accordingly, this 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).

A. THE CONDUCT OF THE TRIAL WAS CONSISTENT WITH *DAVIS.*

Plaintiffs claim the trial court's "primary errors of law" arise from its alleged misunderstanding of *Davis v. Baugh Indus. Contractors, Inc.,* 159 Wn.2d 413, 150 P.3d 545 (2007). (Appellants' Opening Brief 28) [hereinafter "Opening Brief"] *Davis* rejected the common law completion and acceptance doctrine, so a contractor no longer has a defense against third parties simply because its work has been completed and accepted by the owner. *Davis,* 159 Wn.2d at 415; *see First Church of Christ Scientist*

v. City of Seattle, 92 Wn. App. 229, 231, 964 P.2d 374 (1998). No defendant has raised this doctrine as a defense. (CP 154, 160-61, 180-81)

Davis also said a contractor could be liable to a third person as a result of negligent work, even after completion and acceptance, if injury to that person due to that negligence was reasonably foreseeable. 159 Wn.2d at 417, 420. Consistent with *Davis,* the jury was instructed (CP 8901):

> 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.

The jury considered the evidence, including the contract language, and decided defendants were not negligent. As will be discussed, plaintiff got a fair trial, consistent with *Davis.* This Court should affirm.

B. INSTRUCTION NO. 14 DOES NOT REQUIRE A NEW TRIAL.

Ex. 38, Environmental Interiors' May 23, 2006, letter to Turner, explained—in answer to a subcontractor's query whether Celline ceilings could be used as a construction staging area—that walking on such ceilings would void the warranty.[4] The letter was not included in the OMM. (9/22 RP 654) Plaintiffs claimed the following provision in

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[4] The ceiling that collapsed under Mr. Donnelly was the Lockdown, not the Celline, system. (CP 115: ¶¶ 2.3-2.4)

the contract required it to be included in the OMM (Ex. 44-006):

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

Instruction No. 14 told the jury (CP 8905):

> 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.

1. Plaintiffs Acquiesced to Instruction No. 14.

Plaintiffs' main argument on appeal is that Instruction No. 14 precluded them from arguing their theory of the case that the jury could consider whether the contract required the May 23, 2006, letter to have been put in the OMM. It is too late to make this argument because plaintiffs acquiesced to Instruction No. 14, when their counsel declared (10/8 RP 2853):

> 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*** negligence—or contract language ***does not prove negligence***, but to be—to not be able to refer to it as helping inform what the reasonably prudent contractor should do, I just—I think, then, you wouldn't have any case ....

Instruction No. 14 did exactly what plaintiffs' counsel said he wanted. It said, "You are instructed that there are no breach of contract claims against the defendants in this case" and that "***you may not consider***

whether the contract was breached in considering whether the defendants were negligent." (CP 8905) (emphasis added). If there were error (which there was not, as will be discussed), plaintiffs invited it. This Court should not review. *Sdorra v. Dickinson,* 80 Wn. App. 695, 910 P.2d 1328 (1996).

2. Instruction No. 14 Correctly Stated the Law.

In any case, the instruction correctly stated what plaintiffs acknowledge—there are no breach of contract claims against defendants. (Opening Brief 27) There could not be, because not only were plaintiffs not party to the design/build contract, personal injury is traditionally compensable in tort, not breach of contract, *Alejandre v. Bull,* 159 Wn.2d 674, 682, 153 P.3d 864 (2007), and tort liability must arise from a duty independent of contract. *American Nursery Prods., Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 230, 797 P.2d 477 (1990); *Howard v. Washington Water Power Co.,* 75 Wash. 255, 259, 134 P. 927 (1913).

In fact, none of plaintiffs' cited cases support their position. All involved contracts that contemplated the contractor would be responsible ***during*** the contract period for the safety of workers on a construction site or members of the public. *See Kelley v. Howard S. Wright Constr. Co.,* 90 Wn.2d 323, 582 P.2d 500 (1978) (onsite injury to construction worker where contractor was contractually solely responsible for taking reasonable safety safeguards); *Wells v. Tanner Bros. Contract. Co.,* 103

Ariz. 217, 439 P.2d 489 (1968) (member of public hurt at highway construction site where contractor was contractually responsible to take actions reasonably necessary to protect public's safety); *accord Dornack v. Barton Constr. Co.,* 272 Minn. 307, 137 N.W.2d 536 (1965); *accord Larson v. Heintz Constr. Co.,* 219 Or. 25, 345 P.2d 835 (1959); *Caulfield v. Kitsap County,* 108 Wn. App. 242, 29 P.3d 738 (2001) (disabled adult injured where County assumed responsibility for monitoring and managing services to impaired vulnerable adults under federal program).

In contrast, this case involves a design/build contract between DOC and the joint venture that did not purport to obligate the joint venture to provide for the safety of WSP personnel ***after*** the project was done and specifically said that "the provisions of this Agreement are intended for the ***sole*** benefit of Owner and Design-Builder; and there are no third-party beneficiaries ...." (Ex. 3, p. 099) (emphasis added). Thus, Instruction No. 14 properly told the jury they could not consider breach of contract to determine whether defendants were negligent.

3. Plaintiffs Were Able To Argue Their Theory of the Case.

Nonetheless, plaintiffs claim that giving Instruction No. 14 was reversible error. A jury instruction is reviewed de novo if the trial court's decision to give it was based upon a matter of law, for abuse of discretion

if the trial court's decision was based upon a matter of fact. *Kappelman v. Lutz,* 167 Wn.2d 1, 6, 217 P.3d 286 (2009). The particular language used in an instruction is reviewed for an abuse of discretion. *In re Detention of Bergen,* 146 Wn. App. 515, 533, 195 P.3d 529 (2008).

An individual instruction cannot be singled out without reference to the entire set of instructions given. *Rekhter v. Department of Social & Health Servs.,* 180 Wn.2d 102, 118, 323 P.3d 1036 (2014). "Jury instructions are reviewed as a whole to determine if they permit a party to argue his or her theory of the case." *Fergen v. Sestero,* 182 Wn.2d 794, 808 n.4, 346 P.3d 708 (2015). If instructions, as a whole, allow the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the law, they are sufficient. *Gregoire v. City of Oak Harbor,* 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Plaintiffs claimed *"[p]rovisions in the contract* are proper for jury consideration in determining whether the construction company complied with its general duty of care." (10/8 RP 2780) (emphasis added). In their posttrial motion, plaintiffs again argued it was error to tell the jury to not "consider the *language of the contract* with respect to the issue of negligence." (CP 8968) (emphasis added).

Even if the jury may consider contract provisions as evidence of the standard of care in a claim by one not a party to, or beneficiary of, the

contract, Instruction No. 14 did not tell the jury not to consider the *contract provisions*. Rather, it told the jury not to consider any *breach of contract.* (CP 8905)

Indeed, when plaintiffs' attorney asked how he could argue his case under Instruction No. 14, the trial court explained:

> ***You can put the standards [of the contract] 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 ....

(10/8 RP 2917) (emphasis added). Thus, the trial court was telling counsel he could do exactly what plaintiffs are arguing now: that there should have been "jury consideration of construction contract language as evidence of negligence." (Opening Brief 3) Plaintiffs' claim that "the trial court made absolutely clear ... that the contract provisions could not be argued ... on the issue of negligence or considered as evidence of the standard of care" is not true. (*Id.* at 34 n.20)

Moreover, plaintiffs' counsel did exactly what the trial judge told him he could do—he put up the contract and argued that "this is what they were supposed to do under the contract." (10/8 RP 2917) In closing argument, plaintiffs' counsel argued as follows to the jury:

> Now, we also have the contract, look at page 44, or Exhibit 44, page six. This has been up a lot, so I'm not going to put it up too many times.

> It says, "The OMM include copies of warranties and bonds, and lists of circumstances and conditions that would affect the validity of warranties or bonds."
>
> ***Every single witness admitted that the May 23rd, '06 letter includes information about a circumstance or condition that would affect the validity of the warranty.*** It says, "If you walk on the ceiling, you void the warranty." Okay. ***So it should have been part of it.***

(10/9 RP 2995) (emphasis added). Further, plaintiffs' rebuttal closing argument again mentioned the standard of care, as well as causation, in connection with the contract language (10/9 RP 3118) (emphasis added):

> And then absolutely in the OMM, this is a cause. Another cause of this disaster is the—another opportunity, in fact, an absolute thing. ***They should have sent it in. Reasonable care, you send that thing in with that OMM.***
>
> I mean, ***Exhibit 38*** [the May 23, 2006, letter], they are not denying, they have given up trying to claim that it says anything different than what it is. It 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." Can't get much clearer than that.

Counsel's reference to "circumstance or condition that would affect the validity of the warranty" was a paraphrase of the contract language, "lists of circumstances and conditions that would affect validity of warranties or bonds." (Ex. 44-006)

The jury was well aware counsel was referring to the contract language. Not only was the contract admitted into evidence (Ex. 44-006), the jury heard (or saw projected on a screen) that very language or

paraphrases thereof repeatedly over the course of trial. For instance, plaintiffs' opening argument told the jury:

> And let's look at what the contract says is supposed to go in the operations and maintenance manual. ....
>
> Let's look at item V. What does item V show? This has to be included in the maintenance manual. Warranties and bonds. "Include copies of warranties and bonds that [sic] and *lists of circumstances and conditions that would affect validity of the warranties* and bonds."

(9/16 RP 90-91) (emphasis added). Plaintiffs' counsel repeated the language or its paraphrase at least 28 times more in front of the jury. *e.g.,* 9/22 RP 652-53, 654, 655; 9/23 RP 854-55; 9/24 RP 1072-73, 1253-54;; 9/29 RP 1624, 1626-27, 1630-31; 9/30 RP 1688; 10/2 RP 2099-100, 2107-10; 10/6 RP 2462-63; 10/7 RP 2572-74, 2590-91, 2732. In addition, during closing argument, plaintiffs' counsel referred to the contractual language or a paraphrase thereof at least five times. (10/9 RP 2971, 2974-76, 2995, 3028)

Plaintiffs' counsel did argue that consideration of the contract was relevant to causation, an issue the jury never reached. But by telling the jury "So it should have been part of it", and "They should have sent it in. Reasonable care, you send that thing in with that OMM," counsel was arguing his theory of the case on the standard of care—that the contract language required the May 23, 2006, letter be included in the OMM.

Moreover, Instruction No. 7 told the jury:

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

(CP 8897) (emphasis added). As the jury well knew, the phrase "lists of circumstances and conditions that would affect validity of warranties" is, of course, the precise contract language. (Ex. 44-006)

Nothing in the instructions as a whole told the jury they could not consider the contract language as a factor in determining negligence. In fact, Instruction No. 1 told the jury that "[i]n order to decide whether any party's claim has been proved, you must consider *all of the evidence* that I have admitted that relates to that claim." (CP 8889) (emphasis added). The jury had before it Ex. 44, an excerpt from the contract, and all the testimony relating to what should have gone into the OMM. (CP 8889) Thus, Instruction No. 14 allowed plaintiffs to argue their theory of the case, which they in fact did. Plaintiffs' claim the instruction was contrary to the evidence and rendered "meaningless" the testimony of certain witnesses is baseless. (Opening Brief 33)

Even if Instruction No. 14 were erroneous, it would not be grounds for a new trial absent prejudice. *Stiley v. Block,* 130 Wn.2d 486, 498-99,

925 P.2d 194 (1996). To be prejudicial, an error must affect a trial's outcome. *Id.* at 499. The party challenging the instruction has the burden of showing prejudice. *Fergen,* 182 Wn.2d at 803.

First, there could have been no prejudice in telling the jury they could not consider "breach of contract" in determining negligence because neither HDR nor Turner breached the contract for the reasons set forth at pages 14-15 & n.3 of the Brief of HDR. Since there was no breach of contract, the jury could not have considered whether the contract was breached in considering whether one or more defendants was negligent.

Second, that part of the instruction that said "[t]his evidence [of breach of contract] may be considered on the issue of causation" could not have been prejudicial, because the jury never reached causation. The special verdict form first asked whether any defendant had been negligent. The jury answered "no." The special verdict form then stated, "If you answered 'no' as to all defendants, do not answer any further questions …." (CP 8885) Thus, the jury never reached the second question, on causation.[5] (CP 8886)

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[5] If the jury had instead found defendants negligent, nothing in the law prevented it from considering breach of contract as evidence of causation, as Instruction No. 14 provided. Plaintiff's theory in this regard was that had the May 23, 2006, letter been included in the OMM, the accident would not have occurred because DOC's Rick Howerton would have read the letter and advised appropriate WSP personnel. (10/9 RP 2995-96, 3118)

Finally, plaintiffs claim Instruction No. 14 "result[ed] directly from misapplying *Davis.*" (Opening Brief 28) *Davis* had nothing to do with whether a jury can consider breach of contract in determining negligence. *Davis* never even mentioned the terms of the contract there. Rather, *Davis* simply abandoned the rule that builders cannot be liable to third persons after the project is complete and the owner has accepted it. 159 Wn.2d at 415. Furthermore, the trial court gave a foreseeability instruction consistent with *Davis,* 159 Wn.2d at 417. (CP 8901)

Giving Instruction No. 14 was not error; it correctly stated the law, and plaintiffs were able to, and did, argue their theory of the case. Even had there been error, it was harmless. Plaintiffs cannot show the instruction resulted in any prejudice.

4. Not Giving Proposed Instruction No. 32 Was Not an Abuse of Discretion.

Plaintiffs submitted proposed Instruction No. 32, a revision to Instruction No. 14, that would have read (CP 8877):

> You have heard testimony about the language in the ~~contract~~ ***Request for Proposal*** 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~~ ***have any liability to Mr. Donnelly for his fall.*** ~~This evidence may be considered on the issue of causation.~~ ***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.

(Emphasis and strikethroughs added.) Plaintiffs claim the revised language "would at least have allowed plaintiffs in closing argument to connect the Contract language" to whether a reasonable contractor would have included the May 23, 2006, letter in the OMM. (Opening Brief 36)

The refusal to give an instruction is reviewed for abuse of discretion. *Martini v. Boeing Co.,* 88 Wn. App. 442, 468, 945 P.2d 248 (1997), *aff'd*, 137 Wn.2d 357, 971 P.2d 45 (1999). Abuse of discretion is also the standard of review for an instruction's precise language. *Young v. Key Pharm., Inc.,* 130 Wn.2d 160, 176, 922 P.2d 59 (1996).

The trial court did not abuse its discretion. Instruction No. 14 as given permitted plaintiffs to argue that the contract language could be considered to determine whether Turner had been negligent. Indeed, the trial court expressly told plaintiffs' counsel he could make that argument, which counsel in fact did. (10/8 RP 2917; 10/9 RP 2995, 3118)

C. SEPARATELY LISTING TURNER AND HDR ON THE SPECIAL VERDICT FORM DOES NOT REQUIRE A NEW TRIAL.

Plaintiffs contend that listing Turner and HDR as separate entities on the special verdict form was error. Plaintiffs sued Turner and HDR as separate entities, not HDR/Turner, the joint venture. Turner and HDR have, however, acknowledged that because they acted as a joint venture in

the WSP project, one is vicariously liable for the other. (CP 3122; 10/8 RP 2817)

This Court should affirm on this issue because plaintiffs conceded in the trial court that Turner and HDR could be listed separately on the special verdict form. Although plaintiffs initially excepted to this, (CP 8279-82), their counsel eventually agreed to it (RP 10/8 RP 2816-19):

> Mr. Scanlan: ...Your Honor had indicated in your initial draft of the instructions that on the verdict form it would show HDR as a separate entity from Turner. We obviously agree with that. I think plaintiffs are taking exception with that ....
>
> The Court: ...your argument that they're in this thing as a joint venture, and, ... judgment is going to be entered—...suppose, hypothetically, that the jury comes back and finds Turner 50 percent at fault, finds no fault for Noise Control, no fault for HDR, finds Mr. Donnelly 50 percent at [fault], awards $4 million, then I would enter a judgment for $2 million against both, Turner and HDR ....
>
> Mr. Gardner: Are you going to stipulate to that?
>
> Mr. Scanlan: Oh, yeah. That's what we've always said.
>
> ....
>
> Mr. Scanlan: ...I think that's the way the court handles it, because of [t]he joint venture status. If it wasn't clear to plaintiffs before, when we said we recognize we're a guarantor on the judgment, that means that, as a member of the joint venture, if there's a finding against one of us, but it does matter to us that we remain on separate lines.
>
> The Court: ...[T]he only evidence here has to do with the joint venture, so I can't see how it could be—if either of them is liable, the other is liable.
>
> ....
>
> Mr. Gardner: ***Then we don't have any problem***....

The Court: They're like partners in a partnership.

Mr. Gardner: ***We're fine***.

Counsel's acquiescence to listing HDR and Turner separately was tantamount to withdrawing his earlier objection. Plaintiffs cannot now predicate error upon the special verdict form. *State v. Kerr,* 14 Wn. App. 584, 591, 544 P.2d 38 (1975).

Further, plaintiffs did not except to Instruction No. 6, which told the jury, "You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant." (CP 8896; 10/8 RP 2819) Instruction No. 6 is the law of the case. *Washburn v. City of Federal Way,* 169 Wn. App. 588, 600, 283 P.3d 567 (2012).

Even had plaintiffs not agreed to listing HDR and Turner separately and even absent Instruction No. 6, the result would be the same. A joint venture, such as the HDR/Turner joint venture, is nothing more than a partnership limited to a single project and is thus governed by partnership law. *See Pietz v. Indermuehle,* 89 Wn. App. 503, 510, 949 P.2d 449 (1998). Partnerships, in turn, are governed by the law of agency. *Id.* at 512.

Accordingly, each member of a joint venture is the agent of the other members. *Wilkinson v. Smith,* 31 Wn. App. 1, 11, 639 P.2d 768

(1982). The "liability of the partner and the partnership are co-extensive." *Huf v. Arctic Alaska Drilling Co.,* 890 P.2d 579, 580 (Alaska 1995). *See also Estep v. Hamilton,* 148 Wn. App. 246, 258, 201 P.3d 331 (2008); *Caplan v. Caplan,* 243 A.D. 456, 458, 278 N.Y.S. 475, 477 (1935) ("partnership [is] liable only to the same extent as a person so acting").

Hence, plaintiffs were required to show that one or the other or both members of the joint venture had been negligent. No legal authority to the contrary has been cited. This Court will not consider any issue for which no authority is cited or support given. *King Aircraft Sales, Inc. v. Lane,* 68 Wn. App. 706, 717, 846 P.2d 550 (1993).

Plaintiffs complain Judge North's separately listing HDR and Turner overruled Judge Spearman's pretrial ruling.[7] (Opening Brief 23) But a trial court order can be changed any time before entry of final judgment. *Glass v. Windsor Navigation Co.,* 81 Wn.2d 726, 728, 504 P.2d 1135 (1973). Plaintiffs turned down the trial court's offer to allow them to show which joint venture member was at fault. (10/1 RP 2031) Nor have they explained how the separate listing created "unnecessary juror confusion." (Opening Brief 44) There is no reason for a new trial.

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[7] Judge Spearman had denied HDR and Turner's motions that the joint venture could not be liable unless at least one of its members had been negligent. (CP 4795-96, 4803)

D. THE ADMONITORY INSTRUCTION WAS NOT AN ABUSE OF DISCRETION WARRANTING A NEW TRIAL.

Plaintiffs complain the trial court impugned their counsel's integrity. Because the trial court did not act improperly and even if it had, there was no prejudice, it did not abuse its discretion in denying a new trial.

Plaintiffs had moved pretrial to preclude use of trial transcripts during closing argument. (CP 5709-10) At a September 8, 2014, hearing, plaintiffs conceded such a prohibition would be unnecessary if they knew beforehand transcripts could be used. (9/8 RP 238) A defense counsel suggested requiring 24-hour notice of which transcripts would be used. Plaintiffs objected to the 24-hour period. (9/8 RP 236-41)

Because the defense disagreed with the motion to preclude *any* use of transcripts in closing, the trial court denied plaintiffs' motion. (9/8 RP 240-41; CP 9254) The following colloquy, however, took place (9/8 RP 239):

> Mr. Scanlan: ...But ***we're fine with some kind of advanced notice*** to make sure that there's no prejudice to either party about the use of specific use of transcripts in closing.
>
> Mr. Merrick: Your Honor.
>
> Mr. Gardner: ***Are we using transcripts or not. If we are, fine.***

Thirty-one days later, on October 9, 2014, plaintiffs claimed that during a break in plaintiffs' initial closing argument, HDR's counsel,

joined by other defense counsel, had argued plaintiffs' counsel had violated an order or agreement to provide 24-hours' notice. (CP 8978-79) As plaintiffs have explained, the trial court then had "about 60 seconds" to review the six pages of transcript of the September 8, 2014, argument. (CP 8979) When the jury came in, the trial court advised them:

> …Ladies and gentlemen, you should know that the lawyers had an informal agreement that they would let the other side know before they showed 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. If you want to go ahead, Mr. Gardner.

(10/9 RP 3010) Plaintiffs' counsel went on with his closing argument, followed by defendants' closing and plaintiffs' rebuttal. (10/9 RP 3010-54, 3059-3125) The matter was not mentioned again to the jury by either the trial judge or defense counsel. (10/9 RP 3010-3126)

The order denying new trial declared (CP 9691):

> The court incorrectly admonished plaintiff's counsel during closing argument. It was, however, a very mild admonishment 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. …

Denying a new trial was not an abuse of discretion. Despite the court's belief it should not have admonished counsel, the transcript shows plaintiffs' counsel had been "fine" with advance notice, albeit not 24 hours. Thus, there ***had been*** an advance notice agreement. (9/8 RP 239)

In any event, plaintiffs have cited only criminal cases to support their argument. Criminal cases ordering a new trial are inapposite because trial courts are held to a higher standard where loss of liberty or even life are at stake. *See* Annot., 94 A.L.R.2d 826 n.1 (1964). Indeed discrediting counsel in a criminal case can be improper because "'[t]he aid of counsel is guaranteed by the constitution to every person ***accused of crime***.'" *State v. Levy,* 8 Wn.2d 630, 643, 113 P.2d 306 (1941) (quoting *State v. Phillips,* 59 Wash. 252, 259, 109 P. 1047 (1910)) (emphasis added). Plaintiffs have not cited a single civil case applying criminal cases' presumption of prejudice or low standard of what is an impermissible rebuke.

Further, the circumstances warranting a new trial in plaintiffs' cited cases were far more egregious than here.[8] *See Levy,* 8 Wn.2d at 638, 645 (trial court refused to accept counsel's check to pay fine, where counsel's client was charged with writing a bad check); *State v. Whalon,* 1 Wn. App. 785, 464 P.2d 730 (1970) (trial court repeatedly rebuked defense counsel without rebuking prosecutor for similar conduct). In contrast, the instruction here was oral, used neutral language, and had nothing to do with the merits; there were no repeated rebukes; nor was

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[8] Plaintiffs' other case, *State v. Gairns,* 20 Wn. App. 159, 163, 579 P.2d 386 (1978), found no prejudice from trial court remarks like "counsel, just don't try the case on voir dire."

there discrimination against plaintiffs' counsel. In fact, most rulings at trial had been in plaintiffs' favor. (CP 9691)

The admonitory instruction was not erroneous, but even if it had been, any error was harmless.

****

Plaintiffs' remaining arguments all depend on a finding of negligence by one or more defendants. Consequently, unless this Court finds that one or more of the issues previously discussed herein warrant reversal and a new trial, it need not reach the remaining issues.

E. TURNER AND HDR CANNOT BE LIABLE AS TO NOISE CONTROL.

The jury found Noise Control, the ceiling subcontractor, not negligent. Thus, whether Turner and HDR can be liable with respect to Noise Control is moot unless this Court orders a new trial that includes relitigating Noise Control's liability. *See Glover v. Tacoma Gen'l Hosp.,* 98 Wn.2d 708, 720, 658 P.2d 1230 (1983).

In any event, a joint venture member cannot be liable for any negligence by Noise Control because it is undisputed that Noise Control was an independent contractor. The employer of an independent contractor cannot be liable for the independent contractor's torts. *Bill v Gattavara,* 24 Wn.2d 819, 837, 167 P.2d 434 (1946); *Ventoza v. Anderson,* 14 Wn. App.

882, 896, 545 P.2d 1219 (1976); *see generally* RESTATEMENT (SECOND) OF TORTS § 409 (1965) [hereinafter "RESTATEMENT"].

Plaintiffs claim that under *Davis,* the exception to this rule for an employer's nondelegable duties arising out of some relation toward the public or the particular plaintiff applies. RESTATEMENT § 409, comment *b.* (Opening Brief 39-40) Plaintiffs are wrong.

In *Davis* the sole issue was "whether the common law doctrine of completion and acceptance, which shields contractors from liability for negligent work after that work has been completed and accepted" should be abandoned. 159 Wn.2d at 415. The majority concluded it should be, citing RESTATEMENT § 385, which provides:

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by a 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.

Section 385 abolishes the completion and acceptance doctrine and creates a foreseeability standard. Although *Davis* did involve a subcontractor's allegedly negligent work, neither *Davis* nor section 385 says anything about the issue here—whether the nondelegable duty exception to the rule that employers of independent contractors cannot be

liable for them applies. In fact, briefing at the trial and appellate courts in *Davis* says nothing about the independent contractor rule. It simply was not at issue. (CP 7888-8062, 8160-8263)

Moreover, the independent contractor rule does not render *Davis* "meaningless," as plaintiffs claim. (Opening Brief 41) As will be discussed, this case does not involve any of the many nondelegable duty exceptions to that rule, as set forth in the RESTATEMENT §§ 416-29. Moreover, the operation of section 385 does not require a contractor retaining a subcontractor. *See, e.g., Jackson v. City of Seattle,* 158 Wn.App. 647, 244 P.3d 425 (2010).

RESTATEMENT § 409 sets forth the independent contractor rule. Neither section 385 nor section 409 says that either is an exception to the other. As section 409 demonstrates, when the RESTATEMENT intends one of its sections to be an exception to another, it says so. *See also* RESTATEMENT §§ 333, 352, 355-56.

Further, plaintiffs cite no authority for what their brief implies: that a nondelegable duty to a third person arises simply because the contract *between the contractor and premises owner* makes the contractor responsible for subcontractors' work. In addition, the contract here expressly stated that the joint venture would be responsible only "to [the] Owner" for subcontractors' work and declared, "[T]he provisions of this

Agreement are intended for the ***sole*** benefit of Owner and Design-Builder, and there are no third-party beneficiaries ...." (Ex. 3, pp. 026, 099)

Tort liability must arise independent of contract. *American Nursery Prods.*, 115 Wn.2d at 230. Sections 416-29 of the RESTATEMENT set forth when a contractor has nondelegable duties. RESTATEMENT Introductory Note at 394. Section 422, the only section even remotely pertinent here, provides:

> A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure
>
> (a) while the possessor retained possession of the land during the progress of the work, or
>
> (b) after he has resumed possession of the land upon its completion.

This section does not apply because Turner was not a possessor of land. It was the contractor and part of the joint venture that contracted with DOC to construct the new prison project. Even if it had been a possessor of land, the result would be the same because by its terms, section 422 applies only to injury caused *while* the possessor retains possession of the land during the progress of work, or *after* the possessor has resumed possession of the land upon completion of the work. *Ft. Lowell-NSS LP v.*

Kelly, 166 Ariz. 96, 800 P.2d 962, 968 (1990). The injury here occurred after Turner had completed the project and turned it over to WSP.

Plaintiffs' reliance on *Stute v. P.B.M.C., Inc.,* 114 Wn.2d 454, 788 P.2d 545 (1990), and *Kelley v. Howard S. Wright Constr. Co.,* 90 Wn.2d 323, 582 P.2d 500 (1978), is misplaced. Although *Stute* and *Kelley* held the general contractors there had nondelegable duties, those nondelegable duties arose from statute—the Washington Industrial Safety & Health Act (WISHA), RCW ch. 49.17, or its predecessor. *Stute,* 114 Wn.2d at 463; *Kelley,* 90 Wn.2d at 332-33. WISHA requires employers to "furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees." RCW 49.17.060. Although WISHA defines "employer" broadly to include entities that contract with one or more persons, RCW 49.17.020(4), neither Turner nor HDR could possibly be deemed Mr. Donnelly's "employer." *Kelley* construed WISHA's predecessor to impose a duty "on employers to all workers lawfully on the premises." 90 Wn.2d at 332-33. Mr. Donnelly was not a worker for Turner. Thus, unlike this case, *Stute* and *Kelley* met the requirements of RESTATEMENT § 424. Plaintiffs cannot cite a statute that would give rise to Turner's and HDR's having a nondelegable duty to Mr. Donnelly.

Tauscher v. Puget Sound Power & Light Co., 96 Wn.2d 274, 281, 635 P.2d 426 (1981), does not apply. Not only did the court there affirm summary judgment *for the defendant*, it also held that the basis of the inherently dangerous work exception to the independent contractor rule was that "an owner should not be permitted to shift from himself or herself liability for injuries arising out of work that is inherently dangerous by the simple expedient of entrusting that work to an independent contractor." *Id.* No one here claims the work Noise Control did was inherently dangerous.

As a result, the public policy discussed in *Kelley, Stute,* and *Tauscher* does not apply because there is no pertinent statute as there was in *Kelley* and *Stute* and no independent contractor performing inherently dangerous work as there was in *Tauscher*.

Even if Turner and HDR did have a nondelegable duty with respect to Noise Control's work and even if foreseeability is now the test, the result would be no different. The jury was given a foreseeability instruction (CP 8901), and heard the testimony and determined that Noise Control was not negligent. (CP 8885)

Plaintiffs imply that Judge North's ruling that Turner and HDR could not be liable as to Noise Control impermissibly overruled Judge Spearman's pretrial rulings. (Opening Brief 19-20) But a trial court order

can be changed any time before entry of final judgment. *See Glass,* 81 Wn.2d at 728.

Judge North was correct that the independent contractor rule applies. This Court, should it reach this issue, should affirm.

F. PRECLUDING EXPERT TESTIMONY ON THE JOINT VENTURE'S ALLEGED RIGHT AND DUTY TO CONTROL NOISE CONTROL WAS NOT AN ABUSE OF DISCRETION.

Plaintiffs claim a new trial is required on the ground their expert should have been allowed to testify about the joint venture's alleged right and duty to supervise Noise Control's work. (Opening Brief 42) This Court need not decide this issue because the jury found Noise Control not at fault (CP 8885), so anything the joint venture did or did not do to control it is moot.

Moreover, plaintiffs have cited no authority for this argument, arguing merely that the independent contractor rule does not apply on the ground that the joint venture had a nondelegable duty. As discussed *supra,* there is no applicable nondelegable duty here.

G. HDR'S ALLEGED MISCONDUCT REGARDING THE PROXIMATE CAUSE INSTRUCTION DOES NOT REQUIRE A NEW TRIAL.

Plaintiffs argue HDR's counsel committed misconduct by mentioning "superseding cause" in closing argument. Instruction No. 15 on proximate cause mentioned "superseding cause," although the trial court had rejected a separate proposed superseding/intervening cause

instruction. (CP 8906; 10/8 RP 2743-44) Because defendants were found not negligent, the jury never reached causation, so this issue is moot. *See Jones v. Robert E. Bayley Constr. Co.,* 36 Wn. App. 357, 362, 674 P.2d 679, *overturned on other grounds, Brown v. Prime Constr. Co.,* 102 Wn.2d 235, 240 n.3, 684 P.2d 73 (1984).

In any case, plaintiffs admit giving the instruction was harmless. (Opening Brief 24) Instead, they claim HDR's closing argument was prejudicial misconduct and confused negligence and proximate cause. But plaintiffs did not object to either the instruction or HDR's closing. (*Id.* at 24) (CP 9378-79; 10/9 RP 2959) Had they done so, any error would have been discovered, and the jury would have either never been instructed on "superseding cause" or would have been instructed to disregard that phrase and any argument discussing it. By neither excepting to the instruction nor objecting to HDR's alleged misconduct, plaintiffs waived any error. *Christensen v. Munsen,* 123 Wn.2d 234, 248, 867 P.2d 626 (1994); *M.R.B. v. Puyallup School Dist.,* 169 Wn. App. 837, 854, 282 P.3d 1124 (2012). This Court should decline to review.[10]

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[10] Plaintiffs claim the trial court failed to give a proper jury instruction on defendants' burden of proof (Opening Brief 46), but has not assigned error to the alleged failure or explained what a proper instruction would have been.

To circumvent their failure to preserve the issue, plaintiffs claim HDR's alleged misconduct was "flagrant and likely to mislead the jury." (Opening Brief 47) That is not the test: any misconduct must have been so flagrant, ***no instruction could have cured it***. *Warren v. Hart,* 71 Wn.2d 512, 518, 429 P.2d 873 (1967); *Riley v. Dep't of Labor & Indus.,* 51 Wn.2d 438, 443-44, 319 P.2d 549 (1957).

A curative instruction would have remedied the problem had plaintiffs timely objected. Unlike many instructions or comments that cannot be cured by instruction, Instruction No. 15 was not inflammatory. *See, e.g., Osborn v. Lake Washington School District No. 414,* 1 Wn. App. 534, 538-39, 462 P.2d 966 (1969). In addition, the jurors were never told the legal meaning of "superseding cause." *See* WASHINGTON PATTERN JURY INSTRUCTION NO. 15.05.[11] Thus, a simple curative instruction telling the jury to completely disregard the term and any argument discussing it would have solved the problem.

Moreover, Instruction No. 16 told the jury, without objection, that if "the sole proximate cause of injury" had been "some other cause or the act of some other person who is not a party," the verdict should be for the

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[11] When a superseding cause instruction is given, the jury "must" be instructed what "superseding cause" is. 6 WASHINGTON PRACTICE, *Wash. Pattern Jury Instructions - Civil* 196 (2012).

defense. (CP 8907) HDR's counsel sought to show that DOC was the sole proximate cause of the injury. (10/9 RP 3088) The jury could have found DOC the sole proximate cause under Instruction No. 16, even had "superseding cause" never been mentioned. Any error was thus harmless. *See State v. Cogswell,* 54 Wn.2d 240, 246, 339 P.2d 465 (1959); *State v. Neher,* 52 Wn. App. 298, 301 n.3, 759 P.2d 475 (1988).

In any event, a superseding cause instruction would have been proper because the intervening act cannot have been reasonably foreseen by the defendant. "'[O]nly intervening acts which are *not* reasonably foreseeable are deemed superseding causes.'" *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand,* 110 Wn. App. 412, 431, 40 P.3d 1206 (2002) (quoting *Anderson v. Dreis & Krump Mfg. Corp.,* 48 Wn. App. 432, 442, 739 P.2d 1177 (1987)) (emphasis in original).

As discussed at p. 6 *supra,* the contract here did not call for walkable ceilings; no one told Turner or any other defendant ceilings should be walkable or that WSP personnel were accustomed to walking on them. In Turner's prior prison construction work, no one had asked to walk on the ceilings. Turner could not have reasonably foreseen WSP workers would walk on the ceiling.

H. PLAINTIFFS GOT A FAIR TRIAL AND THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

Plaintiffs claim the cumulative error doctrine requires a new trial. That doctrine does not apply because there were no cumulative errors. But even if there had been, the cumulative error doctrine is primarily a doctrine used in criminal cases. *See, e.g., In re Personal Restraint of Cross,* 180 Wn.2d 664, 690-91, 327 P.3d 660 (2014); *In re Personal Restraint of Yates,* 177 Wn.2d 1, 65-66, 296 P.3d 872 (2013). Although *Storey v. Storey,* 21 Wn. App. 370, 374, 585 P.2d 183 (1978), applied the doctrine to support a new trial, that case was unusual. Division III affirmed the *granting* of a new trial because defendant and her daughter had repeatedly given such inflammatory and unresponsive answers to questions that the trial court believed no curative instruction could have removed the prejudice to plaintiff. *Id.* at 373, 374

Moreover, even had there been cumulative error, plaintiffs would bear the burden of showing the multiple errors' accumulated prejudice affected the trial outcome. *Cross,* 180 Wn.2d at 690. Plaintiffs must "specifically address the cumulative prejudicial impact," not merely make a conclusory assertion of cumulative error without referring to the facts. *Id.* at 691. Yet, plaintiffs have made only a conclusory statement without

specific reference to the facts or discussion about the alleged cumulative prejudice. Their cumulative error theory should be rejected.

V. CONCLUSION

Plaintiffs were entitled to a fair trial, not a perfect trial. They got a fair trial. This Court should affirm.

VI. ASSIGNMENT OF ERROR ON CROSS-APPEAL

As discussed *supra*, there is no reason for this Court to reverse and remand for a new trial. But, in the event this Court should disagree, Turner cross-appeals from the following trial court ruling:

The trial court's refusal to list Environmental Interiors, the manufacturer of the Lockdown security ceiling, on the special verdict form as an "empty chair" to which the jury could allocate fault, if any. (10/8 RP 2767; CP 8885)

VII. ISSUE PRESENTED

If plaintiffs are entitled to a new trial, should – under plaintiffs' theory of the case – the special verdict form list Environmental Interiors as an entity to which the jury can assign fault for failing to warn in its product brochure that the Lockdown metal security ceiling was not walkable?

VIII. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

See Statement of Relevant Facts, *supra,* pp. 4-10.

B. STATEMENT OF PROCEDURE.

Environmental Interiors, the metal security ceiling manufacturer, was originally a party defendant, but settled before trial. (CP 5679, 7458-59, 11931-32) The trial court refused to include it on the special verdict form as an "empty chair" to which the jury could allocate fault, if any. (CP 8885; 10/8 RP 2767)

IX. ARGUMENT ON CROSS-APPEAL

The jury found that none of the defendants were negligent. There is no reason to disturb that verdict. But should this Court reverse and remand for a new trial, plaintiffs' theory of the case demands that Environmental Interiors, the metal security ceiling manufacturer, be placed on the special verdict form as an entity to whom the jury may assign fault.

RCW 4.22.070(1) provides:

> In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW [Industrial Insurance Act]. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include ... entities released by the claimant ..., but shall not include those entities immune from liability to the claimant

> under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint ....

Environmental Interiors, which was sued but settled before trial (CP 5679, 7458-59, 11931-32), was an "entit[y] released by the claimant"—an empty chair—whose fault was required to be determined by the trier of fact under RCW 4.22.070, if there was sufficient evidence from which the jury could find fault, if any. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.,* 123 Wn.2d 15, 25, 864 P.2d 921 (1993). Either plaintiffs or the defense may present such evidence. *Id.* The trial court refused to include Environmental Interiors on the special verdict form. (10/8 RP 2767; CP 8885)

Plaintiffs' theory against Environmental Interiors was that the manufacturer's fault, if any, was its failure to warn under the Washington Products Liability Act, RCW ch. 7.72. (CP 1-11, 37-49, 113-27) *See Macias v. Saberhagen Holdings, Inc.,* 175 Wn.2d 402, 409, 282 P.3d 1069 (2012) ("WPLA is the exclusive remedy for product liability claims"). Specifically, RCW 7.72.030(1)(b), provides:

> (1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by

> the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.
>
> ....
>
> (b) A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided warnings or instructions which the claimant alleges would have been adequate.

"[T]he test for inadequate warnings under RCW 7.72.030(1)(b) is based on a strict liability standard ...." *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 752, 818 P.2d 1337 (1991). "Fault" as used in RCW 4.22.070(1) includes strict tort liability or liability on a product liability claim. RCW 4.22.015.

The party claiming product liability need not establish the exact wording of an adequate warning under RCW 7.72.030(1)(b). *Ayers*, 117 Wn.2d at 756. Further, the test under that statute "requires no showing of foreseeability." *Id.* at 752. Instead, the issue is whether the product's likely actual uses give rise to predictable hazards. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 418, 282 P.3d 1069 (2012). The trier of fact "must balance the likelihood that the product would cause the harm

complained of, and the seriousness of that harm, against the burden on the manufacturer of providing an adequate warning." *Ayers,* 117 Wn.2d at 765. Even if the likelihood of the product causing harm is low, a jury question exists if the seriousness of the harm is great and the manufacturer's burden to provide an adequate warning is slight. *Id.*

If plaintiff is entitled to a new trial, that would be the case here. The potential harm of falling through the ceiling because there was no warning it was not weight-bearing was very serious, as Mr. Donnelly's injury shows. (Ex. 5-005, -020-047) In contrast, the burden on Environmental Interiors to provide an adequate warning was slight. There is no dispute its Lockdown brochure did not warn that the ceilings were not load-bearing or walkable. It would have been easy to include a sentence to that effect. (Ex. 5-032-046)

Finally, what, at manufacture, was the likelihood the Lockdown ceiling would cause the claimant's harm or similar harms? Unlike with negligence, such likelihood "does not depend on what a reasonable person would have anticipated under the circumstances, but on an assessment of all relevant facts, including those available only in hindsight." *Ayers,* 117 Wn.2d at 764.

The jury properly found that no defendant here was negligent. (CP 8885) But should this Court remand for a new trial, plaintiffs will renew

their claim it is common knowledge that building infrastructure such as HVAC is often installed above a ceiling. Given that Environmental Interiors failed to include instructions that access to the plenum required removal of the ceiling panels (9/22 RP 626-27; Ex. 5-032-046), plaintiffs' theory was that it was likely that at least some metal security ceiling users would try to walk on them and be injured as a result. Even if the likelihood of harm was small, however, the seriousness of the harm and the slight burden to provide an adequate warning permitted the jury to find the Lockdown ceiling was a dangerous product that should have had an adequate warning. *Ayers,* 117 Wn.2d at 765.

Under plaintiffs' theory, Environmental Interiors' failure to warn could also be found to have been a proximate cause of Mr. Donnelly's injuries. *See Hiner v. Bridgestone/Firestone, Inc.,* 138 Wn.2d 248, 256, 978 P.2d 505 (1999). Plaintiffs' theory against Turner was that it was negligent in failing to include a warning in the OMM. Environmental Interiors intended its product brochures to be included in the OMM, which in fact they were. (9/22 RP 640; Ex. 5-001-047) Plaintiffs' theory was that had the Lockdown brochure warned the ceiling could not be walked on, a jury question would have existed whether Richard Howerton, DOC clerk of the works, would have seen it when he went through the manual. (9/23 RP 1022-25) If this Court orders a new trial, when the failure to warn

claim against Turner is submitted to the jury on the evidence presented by plaintiffs, the jury should be permitted to assess whether Environmental Interiors was also at fault in failing to warn.

X. CONCLUSION

The cross-appeal should never be reached because the judgment and denial of plaintiffs' motion for new trial should be affirmed. But if this Court reaches the cross-appeal, it should reverse the trial court's decision not to permit the jury to determine whether to allocate fault to Environmental Interiors.

Dated this 13th day of November 2015.

REED McCLURE

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