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I ASSIGNMENTS OF ERROR

Appellee/defendants, Pacific Rail Services, LLC, (“PRS”) and Patrick E. O’Shields (“O’Shields”), do not assign error to any ruling of the Superior Court.

II STATEMENT OF THE CASE

A. Summary

Appellants/plaintiffs, Negusie Birru (“Birru”) and his spouse, Almaz Tesemma, sued PRS and O’Shields for injuries to Birru and damages allegedly arising from a collision between Birru’s semi/tractor-trailer and an industrial lift-truck driven by O’Shields. The incident occurred in a Seattle intermodal (rail/truck/container) terminal. At the conclusion of a four-day bench trial, the Superior Court (Honorable Michael J. Trickey) rendered its oral decision. The Court subsequently issued comprehensive and specific written Findings of Fact and Conclusions of Law. The Findings included: 1) that “the most important safety rule [in the terminal], for purposes of this matter, was . . . ‘Yield to Trains, Yard Equipment and Pedestrians’”; 2) that O’Shields “immediately stopped his [vehicle]” and “sounded his horn” when he saw Birru’s truck moving directly toward him in the terminal; 3) that Birru did not yield to O’Shields, as required by “the most important safety rule,” but instead “hit the side of Mr. O’Shields’ [vehicle]”; 4) “that Mr. Birru was

not reasonably paying attention in the moments leading up to the incident”; 5) that “[Birru] failed to present any credible evidence at trial that any negligent act of Pacific Rail Services caused or contributed to the incident;” and, 6) that “[Birru] failed to present any credible evidence at trial that any negligent act of O’Shields caused or contributed to the accident.”

Given its other comprehensive Findings (stated above), the Court’s ultimate finding was equally accurate and inevitable: Birru “failed to provide by a preponderance of evidence that any negligent act of Patrick O’Shields caused or contributed to the incident.” Thus, the Court concluded: “Defendant Patrick O’Shields was not negligent. Defendant Pacific Rail Service was not negligent.”

The decision of the trial court was based on a careful evaluation of witness testimony, credibility, and documentary evidence. No error was made with respect to the admission or exclusion of evidence or testimony. No findings were made absent substantial evidence. No error occurred in the application of law to fact. The decision of the trial court should be affirmed.

B. Facts

Birru and O’Shields were involved in a vehicle-to-vehicle incident on December 18, 2006, at a Seattle intermodal terminal. CP 454. Birru

was driving his semi/tractor-trailer rig in the terminal after having just received a 20-foot shipping container loaded on his trailer/chassis by a PRS equipment operator. CP 455; RP 75. He was maneuvering to depart the terminal when the incident occurred. CP 455; RP 75.

The December 2006 incident took place in a Seattle intermodal transportation yard operated by PRS. CP 453. The intermodal yard is owned by BNSF (the Burlington Northern/Santa Fe Railroad). CP 454. BNSF carries cargo (i.e., shipping containers) into and out of the yard via railroad. RP 194. PRS equipment operators, including O'Shields, load and unload the containers from the railcars, stacking and unstacking the containers in the yard with various industrial yard trucks. RP 194-95. Truck drivers, such as Birru, operate semi/tractor-trailer trucks into and out of the terminal, with O'Shields and other PRS operators loading and unloading shipping containers on and off those over-the-road trucks by means of the industrial lift trucks. *Id.*

Birru was very familiar with the terminal, as he often drove into and out of the terminal dropping off and picking up intermodal containers. RP 71-72. Birru also knew very well the fundamental rule in the terminal: "They have the rule [sic] of way. . . . I have to give them [the PRS equipment operators]—give them to pass away. They have the right-of-

way.” RP 73. Birru readily admitted he had read and understood the “yield to equipment” signs in the yard. RP 137.¹

At trial, Birru testified he was making a turn to the right, with the 20-foot shipping container on his trailer, when the accident occurred. RP 75. He readily admitted to initiating the right turn, despite being unable to see down an alley-way that opened immediately to his left. RP 74-75. (“[T]here’s a lot of containers on the ground at that time . . . That’s why I couldn’t see him.”) O’Shields, meanwhile, was driving his top-pick slowly in the alley-way, in first gear, toward the “intersection.” RP 236. (“I was creeping along and . . . slowed down and came to a stop.”) The alley-way was created by shipping containers stacked four-high on the asphalt terminal. *Id.*

Birru admitted he was not stopped—that he was moving ahead—at the very moment that he drove his truck into the lift truck (called a “top-pick”) operated by O’Shields: “I have to try to turn by very slowly. . . . I’m turning, I’m making turn. At that time, the accident is happen right away.” CR 76; 89 (“[My truck], it’s moving, but almost kind of stopped. . . . It’s a very, very little move.”)

¹ Birru and his attorney both agreed that Birru did not need an interpreter for his trial testimony. ER 97.

With Birru approximately 45 feet away and moving directly toward O’Shields, O’Shields “saw him, reacted, and stopped.” RP 237. Birru did not yield to O’Shields and he did not slow down. RP 238. Despite knowing full-well the terminal rules requiring him to yield, he drove his truck into the side of O’Shields’ lift truck. RP 238 (O’Shields: “I saw him about 40, 45 feet away and stopped and then like, 1-1,000, 2-1[,000]—about like two seconds maybe, two, three seconds I saw him, stop and then impact.”)

In his pre-trial filings and allegations, Birru had always alleged he was stopped when the incident occurred and that O’Shields had rammed into him. CP 59 (“According to the Plaintiff, he was probably not moving at all . . . [A] top pick backing up, coming out of a stack of containers, . . . speeding crashed into his truck.”) Despite his inconsistent arguments, Birru eroded his credibility further when he testified that O’Shields had not only driven into him, but that O’Shields had slammed into him at a high rate of speed. RP 698 (Court: “But, it just does not seem plausible to me that [O’Shields] was going 20-25 miles an hour.”) Photographs of the damaged vehicles confirmed—as the trial court later found—that O’Shields did not and could not possibly have slammed his massive 170,000-pound top-pick into Birru’s relatively lightweight 18,500-pound truck given the relative position of the vehicles. RP 140 (“18,500

pounds”); RP 208 (“170,000 pounds”); RP 696 (“I do have a lot of photographs which were taken of the accident which the Court found to be instructive in making its decision.”)

In one of its most important factual findings, the Court found, “I think that because of the pressures of schedule, Mr. Birru was simply not paying attention at that point in time, and that he was looking over his right as he made that right-hand turn And had he been paying attention instead of being focused on trying to turn and go back . . . it should have caused him to be extremely concerned about top picks backing up in there.” RP 699-700; 696 (“The Court can consider direct and circumstantial evidence and any reasonable inferences from the direct or circumstantial evidence.”). PRS investigator Charles Reed had reached the same conclusion with respect to Birru’s inattention. RP 413. (“I don’t believe that Mr. Birru had a chance to see [O’Shields’] machine because I don’t believe that Mr. Birru was paying attention.”)

The overwhelming weight of evidence at trial confirmed the ultimate findings of the trial court: that Birru had failed to present any credible evidence that any negligent act of PRS or O’Shields caused or contributed to the accident. CP 456-47.

C. Trial Subpoenas

Five days before trial was originally set to begin, Birru's lawyer delivered to the offices of defense counsel trial subpoenas for several employees of PRS. CP 74-85; CP 412-14. The subpoenas noted the date set for trial (August 10, 2010) and commanded attendance. CP 74-85; CP 412-14. As it turned out, two of the witnesses sought by Birru (Charles Reed and Richard Morgan) were called by the defense and testified in-person on direct and cross-examination. RP 356-496 (Reed); RP 335-345 (Morgan). For the third PRS witness, Steve Schnurr, Birru agreed in open court that he was content to have the Court read Schnurr's deposition transcript in lieu of live testimony. RP 30 (Court: "Does the Plaintiff have an objection to me reading [Schnurr's] deposition?" Birru: "No, no; absolutely not, Your Honor. . . . Actually, if the Court reads his deposition, that would be sufficient actually.") The fourth subpoena, for PRS witness Steve Torres, was also hand-delivered by Birru's counsel to the offices of defense counsel, and mailed, as well, to Torres' last known address. CP 79. Birru apparently made no effort to personally serve the witness. CP 79. At trial, Birru raised issues about Torres' absence, then reversed himself and agreed Torres was not a necessary witness. RP 65-66.

The fifth and final witness allegedly subpoenaed by Birru—PRS employee Eric Strandberg—did not appear at trial. Birru, who variously endorsed, then opposed, Strandberg’s deposition testimony, apparently thought Strandberg should have appeared. Birru’s counsel told the Court, unequivocally, he had subpoenaed Strandberg and the other witnesses. RP 15 (“I did subpoena them.”) To clarify, the Court asked counsel, “[D]id you actually individually subpoena Strandberg?” RP 23. He asserted, “I did serve them individually” *Id.* The Court, clearly dubious, inquired further: “Do you have copies of the affidavit of service?” RP 24. When Birru’s counsel answered, “I do, Your Honor,” the Court responded, “[W]hy don’t you get me copies of the affidavit of service and I’ll see if they’re served.” *Id.*; RP 25 (“I have to resolve the fact, was he, in fact, subpoenaed?”)

Birru did not, for good reason, follow up on the Court’s request for the affidavit of service. No subpoena was ever served on Mr. Strandberg. RP 63 (“I didn’t see a subpoena in [the Court file] for Strandberg.”) Birru, who had had Strandberg’s home address since at least early July 2009 (six weeks before trial), did not, in fact, ever serve Strandberg a trial subpoena. CP 18. The Excerpts of Records have no documents whatsoever showing that Birru personally served Strandberg, as alleged by counsel.

Ultimately, the issue of service or non-service of the Strandburg subpoena proved moot. Birru, reversing himself again, conceded he had no dispute over the Court's review of Strandberg's deposition transcript and no dispute about Strandberg's absence at trial:

Your Honor, about Strandberg's deposition, obviously I'm not trying to say the Court would not read the whole document, but I want to bring to the Court's attention a notice that the deposition was not completed and that would readily be seen in the deposition. And I just want to bring that to the Court's . . . attention. Other than that, I have no objection at all.

RP 353. Birru himself had earlier requested that the Court read Strandberg's deposition. CP 336 ("Depositions of Steve Schnurr and Eric Strandberg filed at the Plaintiff's request.")

D. Trial Testimony of Charles Reed

Charles Reed, Terminal Manager at the Seattle yard, testified on the third day of trial. RP 356. In a pre-trial motion, Birru had argued with respect to Charles Reed appearing and testifying at trial, "it's very, very important for us to have the manager [testify at trial] . . . who took pictures, who has an opinion about [this] accident." RP 16. Reed's direct examination lasted one hour. CP 337; ER 356-413.

In describing his post-incident involvement in the December 2006 incident, Reed testified in detail about his comprehensive investigation. RP 391-411. His investigation included, first, making sure both parties

were not injured, then reviewing the accident site and taking photos of the vehicles. *Id.* Reed reviewed and described on the witness stand the numerous post-incident photographs admitted into evidence. RP 405-09. He stated his *findings*. RP 405 (Q: “Was your report [on the incident] ‘findings’ or was your report ‘opinions’?” A: “Findings.”). Reed then offered his *opinions* with respect to the accident:

Q: Is it your opinion that Mr. O’Shields was not at fault for this accident?

A: That’s my opinion.

Q: Is it your opinion that Mr. Birru was not at fault for the accident?

A: [I]t was my opinion that Mr. Birru had not broken any *safety rules* during this incident.

Q: Is it your – it is your opinion that Pacific Rail Services should be held accountable or responsible for this accident?

A: I don’t think that Pacific Rail Services should be held accountable, no.

Q: Why is that?

A: Because my employee – I don’t believe my employee could have done anything differently or – or changed, how he conducted himself in order to . . . not have this accident.

Q: Did you find any evidence that Mr. Birru either yielded right-of-way to Mr. O’Shields or that he even saw Mr. O’Shields before the accident?

A: No I don't believe that Mr. Birru had a chance to see the machine because I don't believe that Mr. Birru was paying attention.

RP 412-13.

Birru cross-examined Reed for 1½ hours following the direct examination. CP 337. During his cross-examination, Birru made several efforts to impeach Reed by use of Reed's deposition. RP 420, 422, 426, 480-81. Birru's obvious goal was to have Reed testify, then affirm, repeat, restate, and reiterate the opinion Reed had already stated so clearly on direct examination: "it was my opinion that Mr. Birru had not broken any safety rules during this incident." RP 412.²

Throughout the cross-examination and impeachment efforts, Reed openly acknowledged that, in his opinion, Birru had not violated any specific yard rule. RP 468-69. Reed's cross-examination testimony was entirely consistent with his direct examination testimony and his earlier deposition testimony:

Birru: Who's at fault, in your opinion for this accident?

Reed: I believe that neither Patrick O'Shields or the driver [Birru] broke any of the BNSF safety rules on the facility.

² RP 468 ("Who's at fault, in your opinion [?]?"); RP 469, ln 2 ("[Y]ou're testifying that my client did not break the BNSF rule [.]?"); RP 469, ln. 10 ("Is that your opinion?"); RP 469, ln. 14 ("Is there in your deposition, again, that you told me this is the opinion?") RP 469, ln. 22; ("So the opinion or your company that my client did not break the yard rule?"); RP 470, ln. 26 ("He did not break the yield to the right-of-way?").

Birru: Did my client broke [sic] the rule that said yield the right-of-way to equipment –

Reed: I don't think he did.

RP 467. Reed, whose investigation was clearly directed to BNSF's *yard rules*, was not asked by Birru to re-state his opinions with respect to ultimate fault.

Toward the end of Reed's cross-examination, after Birru had elicited from Reed the entirety of his involvement, findings and opinions with respect to the accident, Birru moved to admit Reed's deposition transcript into evidence. RP 481. Birru argued that admission of the deposition would be "efficient and probably serve as justice." *Id.* Defense counsel responded, "[I]t's neither efficient [n]or promotes justice to have the Court read a 100-page document we object just because I don't think [having the Court read the deposition is] necessary when we have the witness." RP 481. The Court sustained the objection, as it were, denying Birru's request to admit Reed's deposition. *Id.*

Birru did not promptly make an offer of proof after the Court declined to admit Reed's deposition. RP 482. Birru likewise made no further efforts in his cross-examination of Reed to impeach him with his deposition testimony. RP 482-96.

In his closing argument, Birru summarized Reed's testimony: "Pacific Rail Services, through their . . . manager, Charlie Reed, said that . . . [Birru] is not at fault My client, according to Pacific Rail Services [i.e., Charles Reed] did not do anything wrong, so I'm not going to argue anything against them. He's [Charles Reed] the company's liability expert. He came and told us that my client did not do anything wrong that day." RP 603-06. Birru, though he largely mischaracterized Reed's testimony, had clearly obtained from Reed the testimony he had sought and which had seemed to Birru so important to his case.

At the close of trial, after the parties had rested and given their closing arguments, Birru tried once more to gain admission of Reed's deposition. RP 686. Birru offered the deposition under CR 32(a)(3)(E).³ The Court renewed its earlier ruling—

I think [Reed] testified thoroughly. And you [Birru's counsel] attempted to impeach him with what you felt were the inconsistent portions. And that was received into evidence. So I, -- I'm going to deny the motion.

RP 687. Birru then made his offer of proof—

Plaintiff makes the deposition upon oral examination of Charles Reed as offer of proof, to the record, Your Honor. Thank you."

³ CR 32(a)(3)(E): The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

RP 688.

Nothing more was stated in Birru's offer of proof. *Id.* He offered the Court nothing with respect to the contents of Reed's deposition or what he believed would be added to the Record with the deposition testimony.

E. Birru's Insurance Premiums

At trial, Birru offered into evidence his tax returns for the years 2002 to 2008. RP 115. The exhibit was admitted without objection. *Id.* The exhibit contained information about operating costs for Birru's trucking business, including costs of insurance. RP 665. As business expenses, the insurance premiums were itemized as deductions from Birru's gross income. *Id.*

During his direct examination, Birru had claimed income losses (related to the accident) based solely on his *gross* earnings. RP 124. Birru admitted, however, that his gross monthly earnings as a self-employed truck driver (ostensibly in the range of \$7,000 - \$9,000 per month) would naturally be reduced for maintenance and other operating expenses so as to identify a net monthly income. RP 124. ("That's my gross [income] I'm talking about . . . [b]efore deductions.") Insurance costs were specifically itemized on Birru's income tax records as a deductible expense. RP 665-66. Birru nevertheless claimed damages in his Closing

Arguments based on monthly *gross*—not net—income. RP 613 (“You know, it will be up to the Court to see [what] is reasonable. You know, could be probably 8,000 [dollars per month]. . . . But we claim that his loss of wages are from 7,000 to 9,000 [dollars per month]. Anything in between that, it’s fair.”)

PRS and O’Shields, who had had no reason during trial to discuss Birru’s insurance costs, had no choice but to respond in their closing arguments to Birru’s alleged income loss of \$8,000 per month. They explained to the Court why a wage loss award based on Birru’s *gross* income would not accurately reflect Birru’s actual loss. RP 662 (“[Birru has] never had . . . earnings approaching \$8,000 a month.”) Specifically, PRS and O’Shields directed the Court to Birru’s own tax records—which Birru had offered into evidence—as proof that maintenance, repairs, fuel, *insurance* and other variable operating costs should not be included in any net wage loss award—

Schedule C, Profit and Loss from Business . . . show[s] that when Mr. Birru’s revenues, income, go up, his expenses also go up. . . . So, when you start to break it down, he has expenses . . . either fixed expenses or they’re variable. . . . So what are his expenses? These variable expenses are going to give us a little bit of light on his net loss, if anything. Well, he pays a dispatch service . . . He pays for parking. . . . Gasoline . . . We have his oil. These are all in his expense sheets. Tires, repairs, and *insurance*, those are all variable expenses. To give us an idea, Exhibit 14, [page] 160, for that year gas was \$17,000, tires are \$2,000, insurance was \$6,500. And, again,

we're just talking about property insurance. We're not going to assume any sort of liability here.

RP 664-665.

Birru, who had offered his tax records as evidence, objected to the insurance reference. RP 665. The Court, clearly recognizing the relevance of the deductible expenses, summarily ruled against Birru—

The way I'm going to rule on it is this, is I don't think the issue is what part of the insurance covered the loss. The issue is how the actual income was calculated. So for that purpose, I would overrule the objection.

RP 666.

F. Post-Trial Motions

At the conclusion of the Court's oral ruling on August 28, 2009, Birru notified the Court he would be moving for "judgment notwithstanding the verdict." RP 703. Ten days later, on September 8, 2009, Birru filed a motion he designated "Plaintiffs' CR 50(b) and CR 59 Motion for Judgment as a Matter of Law After Trial and Entry of Judgment Against Defendants, and a Request for a New Trial." CP 346.⁴

The core argument of Birru's CR 50 motion was that there was "no evidence presented" to sustain the Court's ruling that defendants were not

⁴ As Birru did not include any discussion or arguments about his CR 59 motion in his opening *Brief*, PRS and O'Shields do not address the CR 59 motion on appeal.

negligent. RP 346. As such, Birru argued, the trial Court should have reversed itself and entered judgment for Birru or, alternatively, granted Birru a new trial. RP 377. Birru did not mention in his CR 50 motion the substantial evidence supporting the Court's decision, including Birru's own testimony and admissions, and the testimony and exhibits offered by Reed and O'Shields. CP 346.

PRS and O'Shields filed their opposition to Birru's post-trial motions on September 21, 2009. CP 436. The Court thereafter entered its Findings of Fact and Conclusions of Law on October 13, 2009. CP 453.

III ARGUMENT

A. Summary of Argument

The Superior Court fully heard and carefully considered the witness testimony and other evidence presented at trial. The Court made detailed findings of fact wholly consistent with the evidence. The Court followed the applicable procedural and evidentiary rules. Its conclusions of law were without error. There is no genuine basis to overturn the Court's fundamental conclusion: "I do not find that the Plaintiff has proven by a preponderance of the evidence that the – either Defendant was negligent in this case." RP 697. Each of the five issues made by Birru on appeal is equally misplaced.

B. The Trial Court Properly Exercised Its Discretion in Excluding the Deposition Transcript of Charles Reed; Any Error in Refusing Admission of the Deposition was Harmless

1. ER 411: Reed's Deposition Offered the Court Only Cumulative Evidence and a Waste of the Court's Time

The trial court did not error in refusing to admit into evidence the deposition transcript of PRS manager, Charles Reed. Reed testified in-person at trial. He was cross-examined at length by Birru. He was handed his deposition and asked to read from it for impeachment purposes. RP 420, 422, 426, 466, 480-81. Reed testified in every instance consistent with his prior deposition testimony. *Id.* The trial court heard and considered everything Reed had to offer with respect to his findings and opinions. Reed's deposition transcript was merely cumulative testimony that would have offered nothing to Reed's trial testimony. ⁵

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Stinson*, 132 Wn.2d 668, 701, 940 P.2d

⁵ Birru argues that the Court's "tight schedule" prevented it from availing itself of hearing, reviewing and contemplating all relevant evidence, including Reed's deposition. *Brief*, p. 14-15. The proposition that the Court was in a hurry to proceed due to other, more pressing, matters is, at best, disingenuous. The Court went above and beyond what was required of it to give Birru a full and fair trial—a four day bench trial for an uncomplicated and straightforward vehicle collision case, with over a half-day allowed for Birru's testimony. CP 334. The Court, too, offered to accommodate Birru by accepting a delayed submission of his physician's testimony, to be reviewed after the Court's scheduled vacation. RP 14. At the close of evidence, the Court reiterated its comprehensive deliberations, which included a review of the Court's notes, exhibits, and depositions. RP 694. Birru's suggestion that the Court was in a hurry and thus did not fairly consider the evidence is neither accurate nor proper.

1239 (1997). All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. Evidence Rule 403 gives wide discretion to trial courts on evidentiary matters:

Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of . . . waste of time, or needless presentation of cumulative evidence.

ER 403.

Birru had every opportunity at trial to explain to the Court what additional probative testimony, if any, lay in the pages of Reed's deposition transcript. Birru offered the Court nothing in his offer of proof. *See* ER 103(a)(2) (Error in the exclusion of evidence will be preserved for review only if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."); *Sturgeon v. Celotex Corp*, 52 Wn. App. 609, 617-18, 762 P.2d 1156 (1988) ("[M]erely making a copy of a deposition available to the trial court falls far short of the requirement that the trial court be advised of the specific testimony to be offered and the reasons supporting its admissibility. An adequate offer of proof having not been made, this assignment of error is rejected."). The Supreme Court explained in *Sturgeon*—

It is duty of the party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid

the trial court, then the appellate court will not make assumptions in favor of the rejected offer[.]

Sturgeon, 52 Wn. App. at 617-18, 762 P.2d 1156 (citing *Tomlinson v. Bean*, 26 Wn.2d 354, 361, 173 P.2d 972 (1946)).

Before it declined Birru's request to admit Reed's deposition, the trial court carefully weighed the probative value of the deposition against the cumulative nature of the testimony. The Court recognized there was no need to read the deposition in light of Reed's direct and cross-examination testimony, including deposition impeachment. RP 687 ("I think [Reed] testified thoroughly. And you [Birru's counsel] attempted to impeach him with what you felt were the inconsistent portions. And that was received into evidence.").

The trial court properly exercised its discretion under ER 403 in excluding the deposition of Charles Reed. Birru's failure to make any detailed offer of proof with respect to the deposition sustained the Court's decision.

2. Any Error in Excluding Reed's Deposition Was Harmless

If the Court committed error in refusing to admit Reed's deposition, any such error was harmless. Everything Reed could have offered the Court, including his own credibility, was in fact offered in his direct and cross-examination. Reed's deposition would not have added

any information to that given in his oral testimony or otherwise developed during his direct or cross-examination.

A trial court's rulings on evidentiary matters may also be sustained on alternative grounds. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097, 1101 (1983). Error in limiting the deposition of a party to impeachment purposes, if error, is harmless where material matters covered in the deposition is covered by other trial evidence. *Pingatore v Montgomery Ward & Co.* 419 F.2d 1138, 1142, 13 Fed. R. Serv. 2d 790 (6th Cir. 1969), *cert. denied* 398 US 928, 26 L Ed 2d 90 (1970); *see also Fenstermacher v. Philadelphia Nat'l Bank*, 493 F.2d 333, 338, 18 Fed. R. Serv. 2d 372 (3rd Cir. 1974) (Refusal of district court to allow depositions of vice-chairmen and senior vice president of defendant corporation was not prejudicial "since the depositions do not appear to add any information to that given in oral testimony by the deponents and otherwise developed at the hearing.")⁶

In his *Brief of Appellant* ("Brief"), Birru cites at length to Reed's deposition transcript. *Brief*, pp. 15-32. He includes wholesale quotations from no less than 27 pages of Reed's deposition testimony. *Id.* It is not clear, given the excessiveness, what portion(s) of Reed's deposition

⁶ Where, as here, a state rule (CR 32(a)(2)) is identical to its federal counterpart (Fed.R.Civ.P. 32(a)(3)), analysis of the federal rule provides persuasive guidance as to the application of our comparable state rule. *See e.g., Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1988).

testimony Birru believes was absent at trial, but his arguments on appeal are equally inadequate to his offer of proof at trial: “Had the trial court read Mr. Reed’s testimony . . . then the Court would have easily seen that liability is easily established.” *Brief, p. 9.*

Reed’s deposition transcript—quoted so extensively by Birru—adds no new information to the testimony Reed gave at trial. Further, Birru does not offer any explanation whatsoever as to what testimony by Reed, if any, the Court failed to consider. If Birru believed he had something more to gain by the trial court reading Reed’s deposition, any such explanation was absent in Birru’s offer of proof at trial and is absent on appeal. Any error committed by the Superior Court in refusing to admit the deposition transcript of Charles Reed was harmless.

C. The Court Properly Identified the Duties Owed by PRS and O’Shields; There Was No Breach of Duty

In Assignment of Error No. 2, Birru argues alternatively that a) the trial court did not properly identify the “duty” owed by PRS and O’Shields and/or b) the court did not properly evaluate the element of “breach.”

Birru’s arguments are not easily followed, but the court clearly did apply the correct legal standard for “duty.” Likewise, the evidence at trial fully supported the Court’s evaluation of “breach.”

Birru’s first argument—that the trial court erred by failing to evaluate liability based on the “ordinary care” standard—is clearly misplaced. *See Brief, p. 33.* The Court plainly evaluated liability based on Washington’s “ordinary care” negligence standard, of which Birru argues in favor. *Brief, pp. 33-34; RP 457-58* (“Plaintiffs failed at trial to offer credible evidence that the actions of either PRS or Patrick O’Shields fell below the standards of ordinary care.”); *RP 695* (“So, the only issue is the negligence and the duty and the breach and the resultant damages involved.”); *CP 457* (Conclusion of Law No. 2: WPI 10.01–Negligence–Adult–Definition). There was no error by the Court in its application of “duty” under ordinary negligence standards.

Birru’s second argument—that the trial court improperly found “no breach of duty owed” by PRS—is equally erroneous. The issue of “breach” of duty is reviewed under the substantial evidence standard. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.2d 562, 566 (2002). Whether a duty of care has been breached is a question of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). An appellate court’s review of factual determinations is limited to “ascertaining whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment. *Morgan v. Prudential Ins. Co. of America*, 86 Wn.2d 432, 437, 545 P.2d

1193 (1976). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975).

To support the alleged trial court error on causation, Birru asserts that PRS should have: 1) had a spotter on the ground in the terminal to direct traffic, and, 2) attached some sort of flag to the PRS top-picks operating in the facility. *Brief, p. 34*. The trial court properly evaluated and dismissed both allegations based on substantial evidence:

[T]he other allegations against Pacific Rail Services is that there was no spotter or flagger and that there was no flag out the back. And, to my mind, these would require some sort of foundational testimony that a standard of safety or a standard of care in the industry, or at least as it applied to the operation of this yard, was breached. And we didn't have that. We had the testimony by the Defense that it would be dangerous to have the spotters out. The railroad workers are in danger if they're out by the railroad. . . . It's just not good to have pedestrians out and that the flags might – might not be safe. You can debate that. But, the fact of the matter for this Court is, there was no proof by a preponderance of the evidence that the flag or spotter was required.

RP 701-02.⁷

⁷ Birru had allegedly retained expert witnesses prior to trial, but provided no opinions with respect to the accident. RP 8. Birru withdrew his experts before the start of trial. *Id.* (“At this point, actually, we will withdraw the expert witnesses.”)

The Court explained specifically the bases for finding that Birru had not proven by a preponderance of the evidence that O’Shields was negligent. RP 697. The Court found, for instance, that O’Shields was an experienced driver of his top pick. RP 697. O’Shields was aware of the rules of the facility. *Id.* O’Shields was driving his top pick in an acceptable manner. *Id.* There was nothing improper in O’Shields driving in reverse between the stacks of containers, as the truck drivers (e.g., Birru) were all “aware of that.” RP 699. Having spotters in the PRS yard (on foot) to give directions to the PRS operators or affixing horizontal flags to the backs of the PRS lift trucks—both arguments offered up by Birru—would have done nothing to prove negligence. Each of the inferences “require[d] some sort of foundational testimony that a standard of safety or a standard of care in the industry, or at last as it applied to the operation in [the PRS] yard, was breached.” RP 702. Birru called no expert witness to provide such a standard of care. Thus, “the fact of the matter for the Court [was], there was no proof by a preponderance of the evidence that the flag or the spotter was required.” RP 702.

Birru’s allegations of error related to “duty” are clearly groundless, as evidenced by the Court’s reference to “ordinary” care. The Court’s finding that neither PRS nor O’Shields breached any duty owed to Birru was supported by substantial evidence. There was no error.

D. Birru Did Not Subpoena Eric Strandberg for Trial; Birru Consented to the Court's Review of Strandberg's Deposition

Birru argues next that the trial court should have “compelled or forced the testimony of [PRS employee] Eric Strandberg to come to Court and testify instead of reading his incomplete deposition.” *Brief*, p. 38. The Court erred, Birru argues, by “admitting and giving weight to Strandberg’s incomplete deposition when Mr. Strandberg refused to testify in trial in defiance of subpoena.” *Brief*, p. 37. Birru’s arguments have no merit.

Birru did not serve Strandberg with a subpoena. RP 63 (“I didn’t see a subpoena in [the Court file] for Strandberg.”); CP 414 (Affidavit of Service: delivered to Defendants’ attorneys). More importantly, Birru readily agreed he had no objection to Strandberg’s absence at trial so long as the Court read Strandberg’s deposition. RP 353 (“I want to bring to the Court’s attention a notice that the deposition was not completed Other than that, I have no objection at all.”). Indeed, the deposition of Strandberg was filed with the Court at Birru’s request. CP 336. Lastly, and most importantly, the trial court did not rely whatsoever on Strandberg’s opinion in issuing its Findings of Fact and Conclusions of Law. CP 453. ⁸

⁸ In its oral ruling, the Court disregarded entirely Strandberg’s speculative belief that Birru was on his radio phone when the accident occurred. RP 698.

Eric Strandberg did not, for good reason testify at trial. He was not subpoenaed by Birru nor was he called as a witness by PRS or O'Shields.

The Court did not err when it admitted and read Strandberg's deposition at Birru's request.

E. Birru's CR 50 Motion Was Procedurally Invalid; Substantial Evidence Supported the Court's Findings and Conclusions

Birru's Assignment of Error No. 4, based on CR 50 ("Judgment As A Matter of Law In Jury Trials"), is procedurally groundless. The Rule is simply not applicable in a bench trial. The motion, which asked improbably that the trial court declare its own findings and conclusions unreasonable as a matter of law, was substantively baseless. At its core, the motion is simply a conglomeration of Birru's other arguments on appeal: "[t]here is no evidence for the trial Court to find that the Defendants were not negligent and did not owe a duty to the Plaintiff, and did not proximately cause[] Plaintiff's injury." *Brief*, p. 39.

Findings of fact will not be overturned if supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). The standard is met "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993).

The court fully itemized in its oral ruling and its Findings of Fact and Conclusions of Law the testimony, documents, and photographs reviewed and analyzed in reaching its opinion. RP 695-703; CP 453. The Court also determined, on several issues, that Birru was not credible. CP 696; 698. There was substantial evidence to support the Court’s findings. The ultimate decision was grounded on Birru’s own failure to meet the requisite standard of proof. CP 457 (“Plaintiff failed to prove [his case] by a preponderance of the evidence.”).

The Superior Court did not error in refusing to grant Birru’s procedurally invalid and substantively groundless CR 50 motion.

F. Birru’s Insurance Premiums, Offered as Evidence by Birru, Were Properly Argued in Closing by PRS/O’Shields as Evidence Mitigating Alleged Damages

The final Assignment of Error, No. 5—dealing with Birru’s insurance premiums—is equally without merit. Neither PRS nor O’Shields made counter-claims against Birru, thus, ER 411 (“Liability Insurance”) has no link to Birru’s insurance costs.²

The relevance of Birru’s insurance premiums was argued by PRS/O’Shields in their Closing Argument solely for the purposes of

⁹ ER 411. LIABILITY INSURANCE. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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mitigating Birru's claims for damages. The insurance documentation itself had already been admitted into evidence at Birru's request. The insurance costs were operating expenses that clearly lessened the (gross) income Birru had claimed as damages. There was no error when the Court allowed argument—solely for purposes of damages calculation—related to Birru's earlier-admitted insurance premiums.

IV CONCLUSION

Based on the foregoing, PRS and O'Shields submit that the Superior Court made no error in its Oral Decision or in its Findings of Fact and Conclusions of Law. The judgment of the Superior Court should be affirmed.

DATED: August 12, 2010

BAUER MOYNIHAN & JOHNSON LLP



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Attorneys for Respondents

Pacific Rail Services, LLC and Patrick E. O'Shields

V CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on August 12, 2010, I caused to be served in the manner indicated a true and accurate copy of the foregoing document upon the following:

Shakespear N. Feyissa [] By U.S. Mail
Law Offices of Shakespear N. Feyissa [✓] By Hand Delivery
1001 Fourth Avenue, Suite 3200 [] By Facsimile
Seattle, WA 98154

BAUER MOYNIHAN & JOHNSON LLP


By: Suyu Edwards

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