

65092-1

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No. 65092-1

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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ENOS D. FERGUSON,

Appellant,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE  
EMPLOYEES, LOCAL 15, an international union,

Respondent,

THYSSENKRUPP SAFWAY, INC., fka SAFWAY  
SERVICES, INC., a corporation,

Respondent/Cross-Appellant,

KING COUNTY, a governmental entity,

Cross-Respondent.

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BRIEF OF RESPONDENT/CROSS-APPELLANT  
THYSSENKRUPP SAFWAY, INC.

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ORIGINAL

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## **I. INTRODUCTION**

Appellant, Enos Ferguson, seeks to recover damages for injuries he sustained in a fall at his worksite. At the time of the accident, Ferguson was descending from a “spot tower”—a scaffold with an elevated platform on top for a spotlight—during a show put on by The Lakeside Group (“Lakeside”) at King County’s Marymoor Park. King County rented the scaffolding for the spot tower from Thyssenkrupp Safway, Inc. (“Safway”).

Ferguson sued King County, Lakeside, Safway, and his union, the International Alliance of Theatrical Stage Employees, Local 15 (“IATSE”). The trial court dismissed the claims against Lakeside and IATSE on summary judgment, Ferguson settled with King County, and his claims against Safway were dismissed following a jury trial. Thereafter, the trial court conducted a bench trial to resolve cross claims by Safway against King County seeking indemnification for defense costs incurred by Safway. The court dismissed Safway’s cross claims and awarded attorney fees to the County. Ferguson now appeals from the dismissal of his claims against IATSE and Safway, while Safway seeks

review of a summary judgment precluding it from allocating fault to other entities and the judgment dismissing its cross claims.

Ferguson assigns error to two trial court rulings involving Safway—(1) the entry of judgment as a matter of law dismissing his claim that an allegedly “frozen” ladder clamp contributed to the accident and (2) the trial court’s refusal to permit him to raise a new issue in the middle of trial regarding a guardrail gate.

The trial court correctly removed the ladder clamp and guardrail gate issues from the jury’s consideration. First, Ferguson presented no evidence to show the clamp was in a defective condition when it was delivered by Safway to King County. Instead, the evidence presented at trial showed the clamp was working properly and that, even if it had not been, this would have played no role in causing the accident.

Second, Ferguson did not broach the subject of the guardrail gate until a juror asked a question about it. In light of its earlier ruling granting Safway’s unopposed motion to bar Ferguson from asserting new claims during trial, the court directed the jurors not to consider this issue.

Before trial, the court entered summary judgment precluding Safway from allocating fault to other entities, including King County. Because questions of fact exist as to whether the County retained the right to exercise control over the construction of the spot tower, the summary judgment order should be reversed, in the event the case is remanded for trial.

This Court also should reverse the trial court's judgment in favor of King County on Safway's cross claims seeking indemnity. The lower court erroneously concluded that an indemnification provision contained in a rental agreement provided to King County was not incorporated by reference into a rental quotation signed by the County's agent. The court also erred in determining that the County had not ratified the terms of the rental agreement.

Safway thus requests that the judgment dismissing Ferguson's claims against it be affirmed, and that the judgment dismissing Safway's claims against King County be reversed.

## **II. ASSIGNMENTS OF ERROR ON APPEAL**

Ferguson assigns error to (1) the trial court's entry of judgment as a matter of law in favor of Safway on the issue of the frozen ladder clamp (Appellant's Assignment of Error No. 2) and (2) the court's refusal to permit the jury to consider the absence of a guardrail gate when determining Safway's liability and orally instructing the jury accordingly (Appellant's Assignment of Error No. 3).<sup>1</sup> Because judgment was entered for Safway on the verdict, Safway is not aggrieved, but Safway assigns error to the Order Dismissing Defendant Thyssenkrupp Safway's Fault Apportionment Defenses as to The Lakeside Group, Plaintiff's Co-Workers, and King County, filed December 18, 2009, on the basis that such ruling would constitute error prejudicial to Safway in the event of remand. (Respondent's Assignment of Error No. 1).

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<sup>1</sup> Ferguson also assigns error to the order dismissing his claims against IATSE on summary judgment (Appellant's Assignment of Error No. 1). IATSE has filed a separate response brief addressing that issue.

**III. ASSIGNMENTS OF ERROR ON CROSS  
APPEAL**

Safway assigns error to the following Findings of Fact and Conclusions of Law entered June 24, 2010: Findings of Fact Nos. 46, 53, 54, 57, 58, 59, 60, 61; Conclusions of Law Nos. 4, 5, 6, 7, 8.

**IV. ISSUES PERTAINING TO  
ASSIGNMENTS OF ERROR ON APPEAL**

1. Ferguson presented no evidence at trial tending to prove a subject ladder clamp was frozen at the time the spot tower was erected, and evidence was presented that it was not frozen at that time. Did the trial court err in holding as a matter of law that Ferguson's claim for negligence resulting from a frozen clamp should be withdrawn from the jury? (Appellant's Assignment of Error No. 2)

2. An improper comment on the evidence by the court suggests the court's evaluation of a disputed issue. If the court properly removed an issue about a guardrail gate from the case, is an instruction informing the jury of its ruling that evidence about a guardrail gate is not relevant and therefore should not be considered by the jury an improper comment on the evidence? (Appellant's Assignment of Error No. 3)

3. If the court did not abuse its discretion in determining that evidence of a guardrail gate was irrelevant, does an instruction informing the jury that the evidence is not relevant and therefore should not be considered by the jury insufficient as an instruction? (Appellant's Assignment of Error No. 3)

4. The absence of a guardrail gate was not identified by Ferguson as a theory of liability before trial and, by order of the court on Safway's motion in limine, could therefore not be raised at trial. At trial, a juror asked about a guardrail gate. Did the trial court abuse its discretion by instructing the jury that a guardrail gate was not relevant and by declining Ferguson's request for an instruction that it was relevant? (Appellant's Assignment of Error No. 3)

5. The trial court held, as a matter of law, that no fault should be allocated to King County. Substantial evidence was presented by Safway that King County was responsible for erection of the spot tower and retained the right to control its construction. Did the trial court err in holding as a matter of law that King County could have no duty of care to Ferguson? (Respondent's Assignment of Error No. 1)

**V. ISSUES PERTAINING TO ASSIGNMENTS  
OF ERROR ON CROSS APPEAL**

1. King County's authorized agent signed a Rental Quotation for scaffolding that said—just above his signature—the quotation was subject to all terms of the rental/sales agreement, which included an indemnity provision. Are the terms of the rental/sales agreement incorporated into the agreement signed by the agent?

(Assignment of Error on Cross Appeal No. 1)

2. King County accepted and paid for the scaffolding after receiving a copy of the Rental Agreement containing an indemnity provision. Did King County ratify the terms of the Rental Agreement? (Assignment of Error on Cross Appeal

No. 1)

**VI. STATEMENT OF THE CASE**

**A. Factual Background**

On October 8, 2002, King County and Lakeside executed a Special Use Permit which allowed Lakeside to use a portion of Marymoor Park as a concert site beginning the following summer. Ex. 133. The County agreed to rent scaffolding to be used as a spot tower. 5/5 RP at 62.

**1. Facts Relating to Contract Between King County and Safway**

Senior Engineer David Sizemore handled the scaffold rental arrangements on behalf of King County. *Id.* at 53.

Before the first concert in 2003, Larry Huffines, the Lakeside production manager, provided a sketch of the spot tower to Sizemore. *Id.* at 63. Sizemore then contacted Safway and spoke with Phil Stephens, a Safway sales representative, about renting the scaffolding to construct the spot tower. *Id.* at 41, 64. Sizemore also faxed Stephens a copy of the drawing prepared by Huffines. *Id.* at 65.

Stephens sent Sizemore a rental quotation, which Sizemore signed and returned to Stephens. *Id.* at 66-68; Ex. 109. On June 13, 2003, Safway delivered the scaffolding to Marymoor Park together with a copy of a Rental Agreement. Ex. 102. Sizemore repeated the same rental process in 2004. 5/5 RP at 73.

In 2005, Lakeside changed the configuration of the scaffolding, reducing it from two bays to one bay. *Id.* at 78.

Sizemore drew up a new sketch and faxed it to Phil Stephens.<sup>2</sup> 1/20 RP at 192. Stephens responded with a rental quotation, which Sizemore signed and returned. 5/5 RP at 81-82; Exs. 110a, 110b. Safway delivered the scaffolding to Marymoor Park the next day, June 14, and King County Park Specialist II Eric Butler signed for the delivery. 5/5 RP at 117; Ex. 115.

## **2. Facts Relating to Incident**

On June 19, the day of the show, a work crew hired by Lakeside began to erect the scaffolding for the spot tower. 1/21 RP at 285-86. During the construction of the tower, the crew discovered that the cross bracing was the wrong length and could not be attached to the scaffolding. *Id.* at 288. They informed the crew leader, John Poulson, who told Huffines. *Id.* at 288, 331-32. Huffines asked Poulson, an experienced erector, whether the absence of cross bracing would render the scaffolding unsafe, and Poulson responded that it would not. *Id.* at 333. Poulson would not have used

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<sup>2</sup> Although Sizemore recalls faxing the drawing to Safway, it is not clear whether he actually did so. 5/5 RP at 110; *see also* CP 437-38, 439.

the scaffolding if he had any doubts about its safety. *Id.* at 349-50.

After the spot tower had been erected, Poulson installed a ladder up to the top of the tower. *Id.* at 335. None of the other crew members assisted Poulson. *Id.* at 334-35. Poulson attached the ladder to the scaffolding using a series of clamps—two clamps on the first section of the ladder and one clamp on each of the next two sections going up. *Id.* at 336-37. He attached the clamps to the ladder using bolts. *Id.* at 337. Poulson knew he needed to tighten the bolts using a torque wrench, but, apparently, he did not do so. 1/21 RP at 361-62, 415; 1/27 RP at 832, 904.

Ferguson, who had been hired to operate the spotlight, arrived at Marymoor Park approximately 6:15 p.m. 1/25 RP at 570. He had not been on site earlier in the day during the erection of the spot tower. *Id.* at 572. Upon his arrival, Ferguson learned that the tower did not have any cross bracing. *Id.* at 570. This did not cause him concern from a safety standpoint; he worried only that the absence of cross bracing might cause the tower to sway more than usual, making it difficult to operate the spotlight steadily. *Id.*

Ferguson climbed the ladder to the top of the tower without any problem. *Id.* at 574. During intermission, he decided to climb back down to visit with some friends who were attending the concert. *Id.* at 574-75. As he was climbing down, the ladder came loose from the scaffolding, causing Ferguson to fall. 1/20 RP at 172-73.

**B. Procedural Background**

Ferguson filed suit against King County, Lakeside, Safway, and IATSE.<sup>3</sup> CP 1449-55. In its answer, Safway asserted cross claims against the County for breach of contract and indemnity. CP 1319-20. King County answered Safway's cross claims with cross claims of its own for indemnity and/or contribution. CP 3067-68.

The trial court dismissed Ferguson's claims against Lakeside and IATSE on summary judgment, and Ferguson settled his claim against King County. CP 708-10, 1096-98, 2728-29. He then filed a motion to dismiss Safway's affirmative defense seeking to allocate fault to other entities, and the County joined in that motion. CP 588-602, 860-69.

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<sup>3</sup> Contrary to the assertion at page 5 of his opening brief, the complaint did not assert a products liability claim against Safway or allege that Safway failed to provide adequate warnings and instructions.

The trial court granted Ferguson's motion and barred Safway from allocating fault to Lakeside, Ferguson's co-workers, or King County. CP 233-35.

After the trial court granted Safway's request to bifurcate the hearing on its cross claims (1/19 RP at 21), Ferguson's case against Safway proceeded to trial. The jury found that Safway was negligent but that its negligence did not proximately cause Ferguson's injuries. CP 49-50.

Thereafter, the trial court conducted a bench trial to resolve Safway's cross claims against King County.<sup>4</sup> The court ruled that Safway was not entitled to indemnification and entered judgment dismissing its cross claims. CP 1559-74. The court also awarded King County attorney fees incurred in defending against Safway's cross claims. CP 1575-76.

Ferguson has now appealed from the summary judgment order dismissing his claims against IATSE and from the judgment dismissing his claims against Safway. CP 1554-74. Safway seeks review of the summary judgment order

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<sup>4</sup> King County did not pursue its cross claims against Safway.

regarding allocation of fault and the judgment in favor of King County. CP 1547-53.

## VII. ARGUMENT ON APPEAL

### A. Standard of Review

Ferguson assigns error to the trial court's dismissal of his "frozen clamp claim" pursuant to CR 50. When reviewing a CR 50 order granting judgment as a matter of law, this Court applies the same standard as the trial court.<sup>5</sup> A motion for judgment as a matter of law should be granted when (1) the nonmoving party has been fully heard with respect to an issue and (2) no legally sufficient basis exists for a reasonable jury to find in favor of the nonmoving party with respect to that issue.<sup>6</sup>

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to support a verdict for the nonmoving party.<sup>7</sup>

Ferguson also assigns error to the trial court's refusal to allow him to present evidence regarding the absence of a

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<sup>5</sup> *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

<sup>6</sup> CR 50.

<sup>7</sup> *Sing*, 134 Wn.2d at 29.

guardrail gate. A trial court's evidentiary decisions are reviewed for abuse of discretion and will not be disturbed on review absent a clear showing that the lower court's decision was manifestly unreasonable or based upon untenable grounds or reasons.<sup>8</sup> In addition, trial judges have wide discretion with respect to managing their courtrooms and conducting trials.<sup>9</sup>

As noted above, Safway is not aggrieved by the judgment dismissing Ferguson's claims against it. However, if that judgment were reversed and the case remanded to the trial court, the summary judgment order barring Safway from allocating fault to other entities should also be reversed.

Decisions granting summary judgment are subject to de novo review.<sup>10</sup> Summary judgment should not be granted unless the moving party can establish that there is no genuine issue as to any material fact and that he is therefore entitled to judgment

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<sup>8</sup> *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010); *Houck v. Univ. of Wash.*, 60 Wn. App. 189, 201, 803 P.2d 47 (1991).

<sup>9</sup> *In re Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 815, 226 P.3d 202 (2010).

<sup>10</sup> *N.H. Indem. Co. v. Budget Rent-a-Car Sys., Inc.*, 148 Wn.2d 929, 933, 64 P.3d 1239 (2003).

as a matter of law.<sup>11</sup> When determining whether a material issue of fact exists, the court must construe all facts and inferences from those facts in favor of the nonmoving party.<sup>12</sup> The court should grant summary judgment only if reasonable persons could reach but one conclusion.<sup>13</sup>

**B. Safway cannot be held strictly liable for its alleged failure to provide adequate instructions.**

In his opening brief, Ferguson states that Safway should be subject to strict liability.<sup>14</sup> He offers no argument in support of this statement. Nor does he claim that the trial court erred with respect to this issue. Because Ferguson neither assigned error to any decision by the trial court regarding the application of strict liability nor offered any argument to explain why strict liability should apply, the Court should not consider this issue.<sup>15</sup>

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<sup>11</sup> CR 56(c); *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

<sup>12</sup> *Ranger Ins. Co.*, 164 Wn.2d at 552; *Adams v. King Cnty.*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008).

<sup>13</sup> *Adams*, 164 Wn.2d at 647.

<sup>14</sup> Brief of Appellant at 35.

<sup>15</sup> See *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993) (“A ruling of the trial court to which no error has been assigned is not subject to review.”); *Ensley v. Mollmann*, 155 Wn. App. 744, 755 n.12, 230 P.3d 599 (2010) (assignments of error not supported by argument will not be considered by appellate courts).

Even if Ferguson had properly raised the strict liability issue on appeal, the doctrine of invited error applies to preclude him from arguing that Safway can be held strictly liable. Ferguson proposed a jury instruction characterizing Safway as a product supplier and manufacturer and providing that “[a] product supplier has a *duty of ordinary care* to supply products that are reasonably safe.” CP 18 (emphasis added). Ferguson cannot now assert that strict liability applies when the jury instruction he proposed contained a negligence standard.<sup>16</sup>

**C. The trial court correctly dismissed Ferguson’s claims based upon the allegedly frozen ladder clamp.**

Ferguson adduced evidence at trial showing that, at the time of trial, one of the swivel clamps used to attach the ladder to the scaffolding appeared to be stuck in one position. 1/21 RP at 338. He argued that, because the clamp would not rotate into the vertical position, it had to be attached to a horizontal member instead of a vertical post, as recommended by Safway. Ferguson further asserted that, because the clamp would not move, Poulson could not install the bolt on the top

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<sup>16</sup> See *State v. Schaler*, 169 Wn.2d 274, 292, 236 P.3d 858 (2010) (invited error doctrine precludes party from arguing that an instruction he proposed was erroneous).

side of the clamp and, instead, was forced to install it on the bottom, where it was more likely to fall off if not properly tightened.<sup>17</sup>

However, while Ferguson presented evidence showing the clamp was difficult to move at the time of trial, in 2010, he did not show that the clamp was in this condition at the time Safway delivered the scaffolding to Marymoor Park on June 14, 2005. Accordingly, at the close of Ferguson's case, Safway moved for judgment as a matter of law, asserting Ferguson had failed to carry his burden of proof because he had not shown that any of the scaffolding components were in an unsafe condition when delivered. CP 91-92.

The trial court granted Safway's motion, noting that (1) no evidence had been presented regarding the condition of the clamp at the time of delivery, (2) Poulson testified he did not notice any problems with the clamp, and (3) Poulson testified that he attached the clamp to a horizontal member for convenience reasons, not because of any defect in the clamp. 1/26 RP at 649-50. The court later instructed the jury that:

The court hereby withdraws from your

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<sup>17</sup> See Brief of Appellant at 8-9.

consideration the following claim of negligence:  
(1) That the bracket and clamp on the ladders were in a defective condition for allegedly being frozen or difficult to turn at the time of delivery on June 14, 2005. You are not to concern yourselves with why the court has withdrawn this claim.

CP 52.

Ferguson's assertion that the trial court erred in removing the issue regarding the clamp from the jury is based upon a fundamental error. In particular, he *assumes* the ladder clamp was stuck in a fixed position in 2005 and asserts the jury should have been allowed to determine whether the frozen clamp proximately caused his damages.<sup>18</sup> In fact, as explained above, Ferguson failed to satisfy his burden of establishing that the ladder clamp was in a fixed position at the time Safway delivered the scaffolding to Marymoor Park. In fact, he presented no evidence whatsoever regarding the condition of the clamp at the time of delivery.

As the trial court pointed out, the only evidence regarding the condition of the clamp at the time the scaffolding was erected established that the clamp worked properly. Poulson testified that he did not recall any problem

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<sup>18</sup> Brief of Appellant at 37-38.

moving the clamp in June 2005.<sup>19</sup> 1/21 RP at 356. And, even if there had been a problem, he could have flipped the clamp around so that he could switch the orientation of the bolt. *Id.* at 358. In addition, Safway delivered four ladders to the site, only three of which were used, so Poulson could have used another ladder with a clamp that could be moved more easily. *Id.* at 359.

Poulson further testified that whether the clamp was difficult to turn played no role in any design decisions for the ladder assembly. *Id.* at 356-57. In fact, contrary to Ferguson's unsupported assertion,<sup>20</sup> Poulson testified that he had already made the decision to attach the ladder to horizontal rather than vertical members before he began installing the first section of the ladder. *Id.* He stated that he attached the ladder to a horizontal runner instead of a vertical post so that there would be clear access to swing a leg over the horizontal member to get on the platform. *Id.* at 356. He explained, "If you put it on the vertical post, then a

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<sup>19</sup> Safway's National Engineering Manager (Product Applications), Dale Lindemer, took custody of the clamp after the accident. CP 672. He testified that he inspected the clamp, did not notice anything out of the ordinary, and deemed the clamp to be in proper working order. *Id.*

<sup>20</sup> Brief of Appellant at 38.

person would have half a ladder as they're going up. The other half of the ladder is hanging out in midair, so you've got less space to swing your leg over." *Id.* at 358. Poulson then reiterated that his decision to attach the ladder to the horizontal members had nothing to do with whether the clamp was difficult to move. *Id.*

In sum, Ferguson presented no evidence regarding the condition of the clamp at the time of delivery. And, even if the clamp had been in a fixed position, Poulson testified that this had no effect on his decision to attach the clamp to a horizontal member. Nor would the configuration of the clamp have prevented him from installing it with the bolt on top. Under these circumstances, the trial court did not err in granting judgment as a matter of law in favor of Safway, and its decision should therefore be affirmed.

**D. The trial court did not abuse its discretion in refusing to admit evidence regarding a guardrail gate and orally informing the jury that the existence or nonexistence of a gate was not relevant.**

Ferguson argues that the trial court improperly commented on evidence and orally instructed the jury regarding whether a guardrail gate should have been installed

on the spot tower. He further contends that evidence regarding the guardrail gate was relevant and that the trial court therefore abused its discretion in refusing to admit such evidence.<sup>21</sup>

Ferguson ignores the basis for the trial court's refusal to permit him to raise the guardrail gate issue—the fact that he did not raise that issue until the middle of trial, after a juror submitted a question asking whether a gate was required. The trial court acted well within the scope of its discretionary authority in prohibiting Ferguson's belated attempt to inject a new theory of liability into the case, and its rulings regarding the guardrail gate issue should not be overturned.

### **1. Procedural Background**

Safway filed a motion in limine to exclude any claims, theories, or evidence not disclosed before trial. CP 3075-77. Ferguson did not object, and the trial court granted Safway's motion. 1/19 RP at 59-60. It is undisputed that Ferguson did not raise the guardrail gate issue before trial. 1/25 RP at 427-29; CP 145.

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<sup>21</sup> Brief of Appellant at 1.

During trial, Ferguson played an instructional video prepared by Safeway showing how to install tube and clamp scaffolding—a type different from the System Scaffolding at issue here. 1/21 RP at 267, 273-74. Although the scaffold erected in the video did not include a guardrail gate, the video noted that a gate should be installed on the scaffold platform. Ex. 12; 1/21 RP at 274.

Testimony by Edward Dupras, one of the crew members who erected the spot tower, followed the presentation of the video. At the conclusion of Dupras's testimony, one of the jurors asked if any industry standard required a guardrail gate or whether the customer decided if a gate should be included. 1/21 RP at 318. The trial judge informed counsel that he did not intend to ask the question because Ferguson had never made a claim that a gate should have been installed. *Id.*

Ferguson's counsel responded that Safeway had raised the issue by implying that Ferguson was negligent because he exited the platform by lifting his leg over the guardrail. *Id.* at 319. The court pointed out that Safeway had never asserted Ferguson was at fault. *Id.*; *see also* 1/19 RP at 67. The court

then confirmed that it would not ask the question, and Ferguson's counsel stated, "I understand your ruling." *Id.*

Safway's counsel subsequently expressed concern that the jury might be confused because the video mentioned a guardrail gate, so the trial court agreed to read the juror's question and explain that it would not be answered because the existence or nonexistence of a gate was not relevant to Ferguson's case. *Id.* at 321. Ferguson did not object (*Id.* at 322), and trial proceeded for the rest of the day, with testimony by crew leader John Poulson and Safway employees Keith Crandall and Scott Rowden.

The following Monday, Ferguson submitted a request for a curative instruction asking the court to inform the jury that the absence of a guardrail gate was, in fact, relevant. 1/25 RP at 425; CP 102-04. The court declined to give a curative instruction, and Ferguson made an offer of proof regarding the issue. 1/25 RP at 435, 438-57.

**2. The trial court did not comment on the evidence.**

Ferguson asserts the trial court improperly commented on the evidence by informing the jury that evidence regarding

a guardrail gate was not relevant.<sup>22</sup> Article 4, § 16 of the Washington State Constitution prohibits judges from commenting on the evidence. The purpose of this prohibition is to prevent the judge's opinion from influencing the jury.<sup>23</sup> As our supreme court explained, "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement."<sup>24</sup> The court added, "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of the witness has been communicated to the jury."<sup>25</sup>

The statement by the trial court regarding the guardrail gate does not fall into this category. That is, the trial court judge did not offer his opinion regarding the merits of Ferguson's claim regarding the guardrail gate or the evidence proffered in support of that claim. Nor did the court resolve a disputed issue of fact. Instead, in light of Ferguson's failure to raise the issue in a timely manner, the court merely

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<sup>22</sup> Brief of Appellant at 37-40.

<sup>23</sup> *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

<sup>24</sup> *Id.*, 125 Wn.2d at 838.

<sup>25</sup> *Id.*

explained that the jury should not consider the guardrail gate issue.

**3. The trial court did not improperly instruct the jury regarding the guardrail gate.**

Ferguson also argues that the trial court's statement to the jury "failed" the test for sufficiency of jury instructions.<sup>26</sup> In support of this argument, he relies upon *Douglas v. Freeman*,<sup>27</sup> in which the supreme court explained that the test for sufficiency of jury instructions requires that (1) the instructions permit a party to argue his theory of the case, (2) the instructions are not misleading, and (3) when read as a whole, the instructions properly inform the trier of fact on the applicable law.<sup>28</sup>

Ferguson does not explain how this test, which applies to the written instructions provided to the jury at the conclusion of the case, relates to the trial court's oral statement to the jury regarding the guardrail gate. Nor does he explain how the court's statement was misleading or misstated the applicable law. And, Ferguson ignores the fact

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<sup>26</sup> Brief of Appellant at 40-41.

<sup>27</sup> 117 Wn.2d 242, 814 P.2d 1160 (1991).

<sup>28</sup> Brief of Appellant at 40 (quoting *Douglas*, 117 Wn.2d at 257-58).

that the only reason he could not present the guardrail gate issue to the jury was his failure to raise that issue until the middle of trial.<sup>29</sup>

**4. The reasons articulated by the trial court for its decision are valid and supported by the record.**

Finally, Ferguson contends the trial court abused its discretion, asserting the reasons it gave for its decision to exclude evidence regarding the guardrail gate were untenable.<sup>30</sup> In particular, Ferguson asserts that, contrary to the trial court's statements, (1) he was not required to raise the guardrail gate issue in his trial brief, (2) the issue was raised at the beginning of trial, and (3) he properly objected to the trial court's instruction to the jury not to consider the guardrail gate issue.<sup>31</sup> None of these arguments is well taken.

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<sup>29</sup> Ferguson asserts that he was not allowed to present his theory of the case while Safway was allowed to argue that Ferguson caused the ladder to collapse by climbing over the guardrail. Brief of Appellant at 40-41. As Ferguson acknowledges, Safway did not assert, at trial, that Ferguson was in any way responsible for the accident. *See id.* at 12. Instead, Safway argued that the sole cause of the ladder collapse was Poulson's failure to properly tighten the bolt on one of the clamps attaching the ladder to the scaffolding. *See* CP 2257-58.

<sup>30</sup> Brief of Appellant at 43-45.

<sup>31</sup> *Id.*

First, Ferguson ignores the fact that the trial court granted Safway's motion in limine precluding him from raising any issues at trial that had not been raised before trial. He did not object to this ruling, and he cannot now avoid its application.<sup>32</sup> Moreover, there is no reason Ferguson could not have raised the guardrail gate issue earlier. He argued he did not learn of the gate "requirement"<sup>33</sup> until December 11, 2009, when Safway produced a scaffolding installation instruction video during the course of discovery. 1/25 RP at 427-28. As the trial court pointed out, Ferguson did not file his trial brief until over a month later. *See* CP 141.

In addition, despite Safway's specific request that Ferguson update his interrogatory responses before trial, Ferguson did not take this opportunity to assert a claim based

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<sup>32</sup> *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004), relied upon by Ferguson, is therefore distinguishable, as that decision did not reference a motion in limine similar to Safway's. Moreover, in *Barrett*, unlike the present case, the plaintiff had raised the issue in his complaint. *Id.*, 152 Wn.2d at 263.

<sup>33</sup> In fact, neither state or federal law, nor industry standards require the installation of a gate. 1/27 RP at 937-38. Ferguson's expert witness testified that industry standards call for a gate (1/25 RP at 450), but if this were true, Ferguson presumably would have been aware of the need for a gate before receiving a copy of Safway's instructional video.

upon the absence of a guardrail gate. CP 2602, 3075-77. As the Washington courts have repeatedly recognized, “the trial by ambush style of advocacy has little place in our present adversarial system.”<sup>34</sup> Recognizing this principle, the trial court acted within the scope of its discretion by precluding Ferguson from raising the guardrail gate issue for the first time in the middle of trial.

Second, contrary to Ferguson’s assertion, Safway did not “suggest” that the absence of a guardrail gate contributed to the accident when it asked a witness to describe how Ferguson stepped onto the ladder.<sup>35</sup> That is, Safway’s inquiry regarding the sequence of events leading up to Ferguson’s fall does not suffice to raise an issue as to Ferguson’s responsibility for the accident. Nor, as Ferguson claims, did he raise the issue by introducing Exhibits 10 and 12. Exhibit 10 sets forth the instructions for installing a ladder and contains only a single reference to a guardrail gate in three pages of instructions. Similarly, Exhibit 12, the installation

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<sup>34</sup> *Harris v. Drake*, 152 Wn.2d 480, 499, 99 P.3d 872 (2004) (quoting *Lybbert v. Grant Cnty.*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000)).

<sup>35</sup> Brief of Appellant at 16.

video, contains a single reference to a gate, and the scaffolding shown does not have a gate.<sup>36</sup>

Third, Ferguson did not object when the court informed the jury that the existence or nonexistence of a guardrail gate was not relevant. 1/21 RP at 322. By the time he requested a curative instruction, all of the relevant witnesses had testified, including the crew members responsible for erecting the scaffolding as well as David Sizemore, the King County employee who ordered the scaffolding. CP 219-23.

Ferguson never mentioned the absence of a guardrail gate as a potential theory of liability until a juror asked whether a gate was required. The trial court properly ruled that Ferguson could not raise a new theory of liability in the middle of trial. The court did not abuse its discretion in directing the jury not to consider the issue, and its rulings regarding the issue must therefore be upheld.

**E. The trial court erred in dismissing Safway's allocation of fault defense on summary judgment.**

As noted above, the trial court granted Ferguson's motion for partial summary judgment seeking to preclude

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<sup>36</sup> In addition, it is important to recognize that the guidelines set forth in Exhibits 10 and 12 are just that—they are not requirements. 1/27 RP at 866, 870-71, 936-37.

Safway from allocating fault to other entities. For purposes of this appeal, Safway does not challenge the trial court's ruling regarding Lakeside and Ferguson's co-workers. However, at a minimum, questions of fact exist as to whether fault may be allocated to King County, rendering summary judgment improper. In particular, reasonable minds could differ as to whether King County retained sufficient control over the premises in general and the spot tower in particular to warrant the imposition of a common law and/or statutory duty of care owed to Ferguson.

This inquiry is highly fact-specific, and the courts have frequently recognized that summary judgment should not be granted where issues have been raised regarding the extent of the jobsite owner's control.<sup>37</sup> Because Safway presented evidence establishing that King County retained the right to supervise the premises and that the County was responsible for renting and erecting the spot tower, the jury should have been permitted to decide whether fault could be allocated to the County.

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<sup>37</sup> See, e.g., *Humes v. Fritz Cos.*, 125 Wn. App. 477, 482, 105 P.3d 1000 (2005); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 244, 85 P.3d 918 (2004).

Ferguson and King County argued that fault could not be allocated to the County because the County owed no common law or statutory duty of care to Ferguson. In support of this assertion, they relied upon the Washington Supreme Court's decision in *Kamla v. Space Needle Corp.*<sup>38</sup> In *Kamla*, the employee of a contractor sued the jobsite owner for injuries he sustained while installing fireworks on the Space Needle. The owner moved for summary judgment asserting it owed no duty of care to the employee. The trial court granted summary judgment, and the court of appeals affirmed.<sup>39</sup> The employee then sought review in the supreme court.<sup>40</sup>

The court began its analysis by considering whether the owner owed a common law duty of care.<sup>41</sup> The court noted that, as a general rule, a jobsite owner is not liable for injuries sustained by a contractor's employees.<sup>42</sup> However, an exception to this rule exists when the owner retains the right to exercise control over the manner in which the work is

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<sup>38</sup> 147 Wn.2d 114, 52 P.3d 472 (2002).

<sup>39</sup> *Kamla*, 147 Wn.2d at 117. The court of appeals reversed the summary judgment order with respect to the employee's claims based upon his status as an invitee.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 119-22.

<sup>42</sup> *Id.* at 119.

performed.<sup>43</sup> The court explained, “When we distill the principles evident in our case law, the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed.”<sup>44</sup> The court concluded that, under the particular circumstances of the case before it, the owner did not retain sufficient control to warrant the imposition of a duty of care to the plaintiff.<sup>45</sup>

The *Kamla* court next considered whether the owner owed a statutory duty of care under the Washington Industrial Safety and Health Act (“WISHA”), RCW ch. 49.17.<sup>46</sup> WISHA imposes a nondelegable duty on general contractors to ensure compliance with all WISHA regulations.<sup>47</sup> The court concluded that a jobsite owner is not automatically liable under WISHA.<sup>48</sup> However, when the owner retains the right to control the manner in which the work is performed,

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<sup>43</sup> *Id.* at 121.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 122.

<sup>46</sup> *Id.* at 122-25.

<sup>47</sup> *Id.* at 122.

<sup>48</sup> *Id.* at 123.

liability may be imposed.<sup>49</sup> Because the owner in *Kamla* did not retain such control, it owed no duty to comply with WISHA.<sup>50</sup>

Thus, under *Kamla*, in order to determine whether King County can be liable to Ferguson (and thus whether fault can be allocated to the County), the issue is whether the County retained the right to control the work—i.e., the construction of the spot tower. “When determining whether the right to control exists, a court can consider such factors as the parties’ conduct and the terms of their contract.”<sup>51</sup> Here, both the terms of the Special Use Permit and the parties’ actions show that the County not only retained the right to control the construction of the spot tower, it was responsible for doing so. At a minimum, material questions of fact exist with respect to this issue making summary judgment improper.

It is undisputed that King County owned the premises where the accident occurred. CP 398. It also is undisputed that King County arranged for, accepted delivery of,

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<sup>49</sup> *Id.* at 125.

<sup>50</sup> *Id.*

<sup>51</sup> *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wn. App. 243, 251, 125 P.3d 141 (2005).

disassembled, and paid for the rental of the scaffolding in 2005. CP 436, 448, 603-04; 5/5 RP at 72-73.

Ferguson and King County asserted that Lakeside was responsible for erecting the spot tower. This assertion is not supported by the evidence, however, including Ferguson's own sworn statement. Ferguson submitted a claim for damages to the County, which he signed under penalty of perjury. CP 548. In that document, he asserted, "King County and its agents supplied and negligently installed the subject ladder from which claimant fell and had the right and duty to maintain and control the premises where the incident occurred." *Id.*

David Littrell, principal of Lakeside, testified that the spot tower was part of the venue provided by King County and therefore it was the County's responsibility to provide and erect the spot tower. CP 513. He explained that, before the first show in 2003, he spoke with a representative of the County regarding the issue: "I do not recall the conversation specifically. But I know there was a conversation about it because at some point they were—I said, 'We need a spot tower. Well, you know, you have to do that. No, you do.

You're providing the venue. I'm renting a venue. Venues have spot towers.'" CP 515. Littrell added that the County obviously agreed with his position because they provided the scaffolding, including ordering it and paying for it. *Id.* According to Littrell, June 19, 2005, was the only day Lakeside erected the spot tower at Marymoor, either before or after the accident. CP 535.

Littrell also testified that the County was responsible for making sure the spot tower was safe:

Q When it was put up, whose responsibility was it in your judgment to install that scaffolding and ladder in a safe manner?

A Well, I think that—that the responsibility—first of all, it was in the county's hands.

Q Why do you say that, sir?

A It was their responsibility to provide the tower. It was their responsibility to erect the tower.

Q When the County had done that on your previous shows—

A Okay.

Q —had they had someone come on the premises and inspect the scaffolding and ladder to make sure they were safe?

A I don't—I don't know.

Q Okay. But it was your understanding that both on this show and the previous shows that was the county's responsibility, correct?

A Yes, it was.

*Id.*

When Littrell arrived at Marymoor Park on June 19, 2005, the day of the accident, he expected the tower to have already been constructed. CP 513. When Larry Huffines, Lakeside's production manager, informed Littrell the tower had not been erected, thus requiring Lakeside to put it up, Littrell told Huffines that the County would have to pay Lakeside for its services. CP 514.

The County did, in fact, reimburse Lakeside for erecting the spot tower. An invoice from the County to Lakeside dated October 6, 2005, includes a "Spot Tower labor credit" of \$400.<sup>52</sup> CP 544. Littrell explained:

Q Why did King County give The Lakeside Group \$400 spot tower labor credit?

A Because they were responsible for constructing the tower. They did not. These guys came to me after the fact, said we had to build the tower, and I told King

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<sup>52</sup> The invoice also includes a \$25 charge for renting the spot tower to Lakeside—further evidence that King County was responsible for the tower. CP 544.

County that they would have to reimburse me.

Q Okay. So that \$400 figure was for money that Lakeside spent on the construction of the tower rather than for Mr. Ferguson's lighting services on the tower later?

A Correct.

CP 531.

Huffines confirmed Littrell's position that the County, not Lakeside, was responsible for erecting the spot tower:

Q It's my understanding that—or what was your understanding of how the spot tower was to be erected for The Prairie Home Companion Show?

A It was supposed to be erected by the County on that show or for all shows.

CP 472.

Huffines explained that he attempted to get the County to come and put the spot tower up but that “[t]hey didn't have anyone to erect the spot tower in the time frame that we needed it.” CP 473. Accordingly, the only way to get the spot tower built was to have the union workers do it. *Id.*

Huffines' recollection is confirmed by John Poulson, the crew leader. Poulson testified that Huffines had informed him that, when the crew arrived at Marymoor Park on June

19, 2005, the spot tower would have already been erected. CP 493. He added that he would have requested a bigger crew had he known that it would be necessary to build the spot tower. CP 495.

Under these circumstances, King County retained sufficient control to impose a common law duty of care owed to Ferguson. Because the County was responsible for constructing the spot tower, it necessarily had the authority to control how the tower was constructed. The fact that the County chose not to assert this authority is immaterial—as the *Kamla* court explained, it is the *right* to control the work that is determinative, not the exercise of that right.

The County’s retention of control also means that it owed a non-delegable duty to comply with WISHA regulations.<sup>53</sup> And, the County’s status as a landowner and the party responsible for erection of the scaffolding imposes a duty of care toward Ferguson as an invitee.<sup>54</sup> Accordingly, it

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<sup>53</sup> Several WISHA regulations pertaining directly to scaffolding are implicated here. See CP 595 (citing WAC 296-874-20074, 296-874-20072, 296-874-20034).

<sup>54</sup> See, e.g., *Ward v. Thompson*, 57 Wn.2d 655, 659, 359 P.2d 143 (1961) (landowner had duty to invitee to maintain scaffolding in reasonably safe condition); *Kamla*, 147 Wn.2d at 125 (employee

is appropriate to allocate fault to King County, and Ferguson's motion for summary judgment on this issue should have been denied.

### VIII. ARGUMENT ON CROSS APPEAL

#### A. Standard of Review

Safway challenges the trial court's determination that the terms of Safway's Rental Agreement were not incorporated by reference into the Rental Quotation executed by Sizemore. Whether material is incorporated by reference presents a question of law subject to de novo review.<sup>55</sup>

Although, as explained below, the issue is mooted by the trial court's finding that Sizemore had authority to enter into an indemnity agreement with Safway, the court erred in finding that King County did not ratify Sizemore's conduct. Ratification ordinarily presents a question of fact that must be supported by substantial evidence.<sup>56</sup> Where, as here, the

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of independent contractor hired by landowner is invitee on landowner's premises).

<sup>55</sup> *Hofmeyer v. Iowa Dist. Court for Fayette Cnty.*, 640 N.W. 2d 225, 228 (Iowa 2001); *N.H. Indem. Co.*, 148 Wn.2d at 933.

<sup>56</sup> *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 85, 701 P.2d 1114 (1985); *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

relevant facts are undisputed, the issue may be decided as a matter of law.<sup>57</sup>

**B. King County owed a duty to defend and indemnify Safway with respect to Ferguson's claims.**

The Rental Agreement between Safway and King County includes an indemnification provision requiring the County to defend and indemnify Safway from all claims “which may be brought or made against [Safway] which in any way arise out of, or by reason of, or are claimed to arise out of or by reason of the manufacture, ownership, installation, maintenance, sale, disposition, use or misuse of the EQUIPMENT hereunder,” except claims resulting from Safway’s sole negligence. Ex. 115. In accordance with this provision, Safway tendered defense of Ferguson’s lawsuit to King County. CP 1978-82. The County rejected the tender, asserting it had not agreed to the indemnification provision. CP 1984. Safway then filed cross claims against King County for breach of contract and indemnity. CP 1319-20.

Following the trial on Ferguson’s claims against Safway, the trial court conducted a bench trial to determine

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<sup>57</sup> See, e.g., *O’Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004) (question of fact may be decided as a matter of law where facts are undisputed).

whether King County was required to indemnify Safway for the cost of defending against Ferguson's claims. The Court found that Sizemore had both actual and apparent authority to agree to the indemnification provision but ruled that he had not done so because the provision was not incorporated by reference into the Rental Quotation that he signed. CP 1773, 1775. Although not necessary to its decision, the court also ruled that King County did not ratify Sizemore's actions by accepting delivery of and paying for the scaffolding. CP 1775. As explained below, the trial court's rulings regarding incorporation by reference and ratification are in error.

**1. The terms of the Rental Agreement were incorporated by reference into the Rental Quotation, as a matter of law.**

King County did not dispute that Ferguson's claims fell within the scope of the indemnity provision. Instead, the County argued the provision was not part of its agreement with Safway because it was included in a separate document not signed by Sizemore. CP 1842-46. In fact, the terms of the Rental Agreement, including the indemnity provision, were incorporated by reference into the Rental Quotation

signed by Sizemore, and the indemnity provision thus forms a part of the contract between Safway and the County.

The doctrine of incorporation by reference allows parties to incorporate terms into their contract by referring to a separate document.<sup>58</sup> “It is well established that, if the parties to a contract clearly and unequivocally incorporate by reference into their contract the terms of some other document, those terms become part of the contract.”<sup>59</sup> It must be clear that the parties had knowledge of and assented to the incorporated terms.<sup>60</sup>

In this case, King County Senior Engineer David Sizemore signed a Rental Quotation on June 13, 2005, thereby entering into an agreement on behalf of the County to rent scaffolding from Safway. Ex. 110b. The Rental Quotation plainly stated, directly above Sizemore’s signature, that “All quotes are subject to all terms and conditions referred to in the SAFWAY rental/sales agreement.” *Id.* Sizemore asserts he did not review the terms of the Rental Agreement, despite signing a document stating those terms

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<sup>58</sup> *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000).

<sup>59</sup> *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994).

<sup>60</sup> *Ferrellgas*, 102 Wn. App. at 494-95.

applied. 5/5 RP at 68. The day after Sizemore signed the Rental Quotation, Safway delivered the scaffolding to King County together with the two-page Rental Agreement containing the indemnity provision. Ex. 115.

The Rental Quotation clearly and unambiguously provides that the terms and conditions of the Rental Agreement apply. Sizemore apparently chose not to read the terms of the Rental Agreement, but that decision cannot relieve King County of its obligations under that agreement.<sup>61</sup> The terms of the Rental Agreement, including the indemnity provision, are therefore incorporated by reference into the Rental Quotation signed by Sizemore, and this Court should therefore conclude that the indemnity provision forms a valid and enforceable part of the contract between King County and Safway.

**2. King County ratified the terms of the Rental Agreement by accepting and paying for the scaffolding.**

In the trial court, King County asserted Sizemore did not have authority to agree to the indemnity provision

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<sup>61</sup> See *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 679-80, 578 P.2d 530 (1978) (party cannot escape liability under a contract by claiming he did not read it or was ignorant of its contents).

contained in the Rental Agreement and he therefore could not bind the County with respect to that provision. CP 1839-42. Safway responded that, even if Sizemore lacked such authority, the indemnity provision was enforceable against King County because the County had impliedly ratified the Rental Agreement. CP 1807-08.

The trial court correctly found that Sizemore had both actual and apparent authority to agree to the indemnity provision. CP 1773. Although this finding made a determination regarding ratification unnecessary, the trial court nevertheless found that King County had not impliedly ratified the Rental Agreement. CP 1775. Because the County may challenge the trial court's findings regarding Sizemore's authority, Safway raises the ratification issue for the Court's consideration. If the County does not challenge the trial court's findings regarding Sizemore's authority or if that challenge is unsuccessful, the Court need not reach this issue.

The trial court's finding that the County did not ratify the indemnity provisions was error. A principal may impliedly ratify the unauthorized contract of his agent if the

principal, “with full knowledge of the material facts, (1) receives, accepts, and retains benefits from the contract, (2) remains silent, acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of the contract as binding.”<sup>62</sup>

The undisputed evidence establishes that these requirements have been satisfied. King County received, accepted, and retained the benefits from the Rental Agreement—i.e., rental of the scaffolding for the spot tower. 5/5 RP at 117.

Furthermore, the County demonstrated its recognition of the binding nature of the Rental Agreement by making payment to Safway in accordance with the terms of the contract. 5/5 RP at 72-73.

In the trial court, King County argued that, although it agreed to rent scaffolding, it did not agree to the indemnity provision. However, it is undisputed that the County’s finance department both received a copy of the Rental Agreement containing the indemnification provision and made payment, without objection, to Safway in accordance

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<sup>62</sup> *Hoglund v. Meeks*, 139 Wn. App. 854, 870 n.7, 170 P.3d 37 (2007) (citing *Barnes v. Treece*, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976)).

with that agreement. 5/5 RP at 39-40; Ex 116; CP 1771. The County's apparent failure to read the terms of the Rental Agreement does not relieve it of responsibility.<sup>63</sup>

Because the undisputed evidence establishes that King County received, accepted, and retained the benefits from the Rental Agreement and did not repudiate or disaffirm the contract after having an opportunity to review it, the doctrine of ratification applies, and King County is therefore bound by the terms of the Rental Agreement, as a matter of law.

**C. Safway is entitled to recover attorney fees incurred in seeking indemnification from King County.**

Paragraph 5 of the Rental Agreement requires King County to pay Safway's attorney fees in the event the County breaches any of the terms of the agreement. Ex. 115. In addition, Paragraph 9 of the agreement requires the County to indemnify Safway with respect to all costs, including reasonable attorney fees, arising out of the rental of the scaffolding to King County. *Id.* As explained above, (1) King County is bound by the terms of the Rental Agreement based upon the doctrine of incorporation by reference, (2) the

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<sup>63</sup> *Alexander & Alexander*, 19 Wn. App. at 679-80.

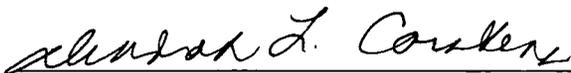
agreement requires the County to defend and indemnify Safway, and (3) the County breached that obligation. In accordance with paragraphs 5 and 9 of the Rental Agreement, Safway is entitled to recover its attorney fees incurred in this action, both in this Court and in the trial court, pursuant to RCW 4.84.330 and RAP 18.1.

**IX. CONCLUSION**

For the reasons set forth above, Safway respectfully requests that the judgment dismissing Ferguson's claims against Safway be AFFIRMED and that the judgment dismissing Safway's claims against King County be REVERSED.

DATED: November 29, 2010.

BULLIVANT HOUSER BAILEY PC

By 

Jerret E. Sale, WSBA #14101

Deborah L. Carstens, WSBA #17494

Attorneys for Respondent Thyssenkrupp  
Safway, Inc. fka Safway Services, Inc

**CERTIFICATE OF SERVICE**

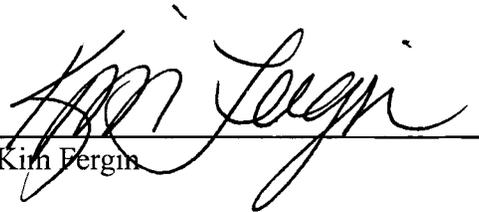
The undersigned certifies that on this 29<sup>th</sup> day of  
November, 2010, I caused to be served this document to:

John Budlong  via hand delivery.  
Law Offices of John Budlong  via first class mail.  
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Edmonds WA 98020

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I declare under penalty of perjury under the laws of the  
state of Washington this 29<sup>th</sup> day of November, at Seattle,  
Washington.

  
\_\_\_\_\_  
Kim Fergin

2010 NOV 29 PM 5:02