

No. 71214-4-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NO BOUNDARIES, LTD., a Washington corporation, and NBL II, LLC,
a Washington limited liability company

Respondents/Cross-Appellants

v.

PACIFIC INDEMNITY COMPANY (a member of the CHUBB GROUP
OF INSURANCE COMPANIES), an insurer authorized by the
Washington Insurance Commissioner

Appellant/Cross-Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
No. 09-2-10932-0 SEA
(Hon. Jeffrey M. Ramsdell)

**REPLY BRIEF OF RESPONDENTS/ CROSS-APPELLANTS
NO BOUNDARIES, LTD. AND NBL II, LLC**

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I. INTRODUCTION

According to Chubb, the jury did not really find that Chubb acted in bad faith and unreasonably—it was trying to punish Chubb; and the jury did not really find that NBL honestly represented its claim—it was acting out of sympathy for NBL. It is a creative narrative, but it is not what the jury found and not what happened. There is no basis to disturb the verdict or fee award. NBL’s cross-appeal is a different story. The trial court never let the jury decide whether the basement repairs were a “substantial alteration” under 2003 SBC. That was error. Whether the repairs satisfied the Sub Alt Trigger was a question of fact for the jury, and there was substantial evidence to support NBL’s proposed instruction on the issue.

II. ARGUMENT

Chubb does not dispute the standard of review. If there was substantial evidence at trial to show that repairing the collapsed Metropole basement would constitute a “substantial alteration” under the 2003 SBC, then NBL was entitled to a jury instruction on that theory of recovery. Because there was substantial evidence, the trial court’s refusal to give NBL’s proposed Sub Alt Trigger instruction was prejudicial error. NBL Op. Br. at 47-50. It is unclear whether Chubb argues otherwise; it never even acknowledges the substantial evidence test. Rather, Chubb argues, first, that the 2007 permit was “conclusive” on the issue as a factual matter

and, second, that the issue was a question of law for the trial court in any event. For the reasons explained below, Chubb is wrong on both counts.

A. There Was Substantial Evidence To Show That The Basement Repairs Would Constitute A “Substantial Alteration” Under The 2003 SBC; The 2007 Permit Was Not “Conclusive.”

In approving the 2007 permit for the “EMERGENCY structural repair” of the Metropole’s basement, Seattle’s Department of Planning and Development (“DPD”) did not treat that scope of work as a “substantial alteration.” Ex. 17. Chubb argues that the trial court properly refused to ask the jury to “second-guess,” “contradict” or “overrule” that decision. Chubb Opp. at 39-46. Chubb cites no authority to support that proposition as a legal matter—but, more importantly, that is not the factual question the jury would have (and should have) been asked to decide. The question for the jury was whether *complete* basement repairs, which included work NBL needed to do in addition to the work authorized by the 2007 emergency permit, would qualify as a “substantial alteration” under the 2003 SBC—an issue that the Seattle DPD never even considered.

The limited scope of the “EMERGENCY” repairs submitted to DPD in 2007 did *not* include all the work NBL’s engineers and architect later determined would be needed to completely repair the effects of the collapse. RP 10/08/13 at 719-20 (“There was an emergency repair permit that had been filed to be able to shore up the portion of the building and do

some limited ... structural work in the corner of the building, but it didn't include any other work"); *see also* RP 10/01/13 at 58; RP 10/03/13 at 305, 307; RP 10/08/13 at 722-23, 791; RP 10/09/13 at 903; Exs. 8-10, 14-15. Chubb's adjuster admitted this fact at trial. RP 10/07/13 at 630 (the "first construction drawings [for] the permits was April of 2006. Then it kept going east, they kept marching eastward and calling for more of the floor to be replaced."). Critically, Chubb agreed that this additional work was covered, and actually paid for some of it. RP 10/07/13 at 557-59, 630-31.¹

Seattle DPD never determined whether the basement repairs were a "substantial alteration" when considered together. Before NBL could seek a new permit that included both emergency and permanent repairs, fire swept through the Metropole. As Chubb notes, the scope of work for the basement and fire repairs was combined and later submitted under a single permit requiring all code upgrades. Chubb Opp. at 41. While the fire and superseding permit mooted the "substantial alteration" issue for DPD's review, it did not resolve the issue under the policy's "Ordinance or Law" clause. That was the issue for trial, and that is why both parties

¹ Chubb emphasizes the contrary testimony of its expert Dethlefs, who quibbled over whether the work covered by the 2007 permit was "temporary." Dethlefs, of course, was only one of several witnesses who testified on the issue and, in any event, he conceded on cross-examination that Chubb had, in fact, agreed with NBL that additional structural work was needed. RP 10/10/13 at 1109, 1144-47, 1156-57.

presented expert opinion on whether Seattle DPD would have considered all necessary basement repairs to be a “substantial alteration.”²

The jury was entitled to believe Cornell Burt’s testimony that the basement repairs satisfied that threshold. He would know; he is DPD’s senior structural engineer, intimately familiar with the 2003 SBC. Chubb makes the incredible argument that Burt did not actually testify that the repairs would qualify as a “substantial alteration.” Chubb Opp. at 42. But that is precisely what Burt said. This is what the jury heard:

Q. Based on your experience, would a repair project such as this, constitute an extensive structural repair under the subalterations figure?

A. It is definitely expensive - - definitely.

Q. Why do you say that?

A. Well, because this represents very large portion of the foundation system and the -- when you have a damage that requires repair and replacement of foundation and the supporting structure of the lower level of the building, it is

² If the 2007 emergency permit was truly “conclusive” or “binding,” as Chubb now claims, then Chubb would have moved for summary judgment on the issue prior to trial. But it never did. In fact, after this Court ruled that the 2003 SBC applied to NBL’s claim, Chubb asked its consultants to “analyze” whether Seattle DPD would consider the basement repairs to be “substantial alterations” because—contrary to what it now claims—Chubb knew the limited 2007 permit did not answer that question. RP 10/10/13 at 1131-33. Indeed, as discussed below, even when Chubb asked the trial court to decide the question itself, it conceded the issue was inherently factual and subject to competing expert opinion.

naturally going to have effects all throughout the building, going up. Your entire support system for the building is compromised at that point, or that portion of the building.

This represents, obviously, foundation systems compromised. There is wall ties that are not in place. Looks like the entire level of the floor system is removed. That provides lateral support for the basement. There is a number of extensive problems here.

Q. Would you consider this to be very minor repairs?

A. No.

Q. Would it make a difference in your opinion if this were, only, say, five percent of the buildings, five percent of the building area, this square footage?

A. No. Because, again, the problems from this would ripple throughout the -- all the way up to the [wall] upper level of the building. It is pretty easy to see that problems with this foundation system or this nature would ripple all the way through the building.

RP 10/03/13 at 397-99. There is no merit to Chubb's suggestion that this testimony can be ignored because Burt had no role in approving the 2007 permit and never had to address the issue "in his official capacity." *See* Chubb Opp. at 42. Burt properly testified based on his experience with the 2003 SBC, knowledge of the building and review of photographs. Of course, Chubb's expert Dethlefs had no role in the permitting process either. Indeed, unlike Burt—a Seattle DPD employee with literally no dog

in the fight—Dethlefs was a paid expert who “analyzed” the issue solely for purposes of litigation. RP 10/10/13 at 1148-49, 1157-59.³

Chubb’s claim that Burt’s testimony “had no evidentiary value” because it “contradicted” DPD’s published guidelines is equally baseless. Chubb Opp. at 44-45. Chubb did not even try to impeach Burt with the guidelines, nor could it have—its definition of “substantial alteration” mirrors Burt’s testimony. *See* Ex. 146 (“Extensive structural repair occurs when the structural system of a building undergoes significant repairs.”). That’s no surprise; Burt helped create the document. RP 10/03/13 at 410. If anything, the guidelines confirm that DPD has significant discretion when deciding whether a repair is a “substantial alteration”—a sentiment echoed by Chubb’s own expert. RP 10/10/13 at 1138-39. Here, too, Burt was far more qualified than Dethlefs to testify how DPD would classify the repairs. In any event, the jury should have been allowed to decide.

³ Chubb similarly characterizes Burt’s testimony as his “personal opinion.” Chubb Opp. at 44. Burt did not give *personal* opinion—he gave *expert* opinion based on his professional knowledge of and experience in evaluating permits under the 2003 SBC for the Seattle DPD. RP 10/03/13 at 389-90, 396-99. As discussed below, it is proper for employees of regulatory agencies and municipalities to provide expert opinion to juries on whether the conduct at issue complied with an applicable regulation or code. *See Short v. Hoge*, 58 Wn.2d 50, 54, 360 P.2d 565 (1961) (testimony by Seattle building department employee regarding building code); *Minert v. Harsco Corp.*, 26 Wn. App. 867, 873, 614 P.2d 686 (1980) (testimony by Department of Labor and Industries engineer regarding WISHA/OSHA regulations).

This case is similar to *Short v. Hoge*, 58 Wn.2d 50, 360 P.2d 565 (1961). There, the plaintiff claimed she was injured because the defendants failed to provide a stairway handrail as required by a Seattle city ordinance. A building department employee testified that the city had approved a permit for the building and that, in his opinion, the stairway complied with the ordinance. *Id.* at 52-53. The Supreme Court held that the trial court properly admitted the employee's testimony and that the jury was properly instructed on the ordinance:

The fact that the city inspectors, whose duty it was to examine the structure and determine if it met the requirements of the building code, had approved it is some evidence of compliance. *Such evidence is not conclusive. It was the province of the jury to determine from all of the evidence relative thereto whether, in fact, the structure did constitute a handrail as contemplated by the ordinance.*

Id. at 55-56 (emphasis added). Much the same can be said here. While the 2007 permit may be relevant as to whether the basement repairs triggered code upgrades under the 2003 SBC, it was "not conclusive"; it was for the jury to determine from all the evidence, including the partial scope of the permit and Burt's expert testimony, whether the Seattle DPD would consider all of the necessary repairs to be a "substantial alteration."

Finally, Chubb claims the basement repairs were not a "substantial alteration" because the amount it agreed to pay for the additional work was only a "marginal increase" over what it paid for the emergency work

covered by the 2007 permit. Chubb Opp. at 41, 45. But Chubb's expert conceded that the substantial alteration trigger does not turn on cost. RP 10/10/13 at 1138. On the contrary, as Burt testified, anything "beyond very, very minor repairs" can be "substantial" under the 2003 SBC. RP 10/03/13 at 396. And, even if cost mattered, Chubb's own consultants estimated the total cost of basement repairs for purposes of "code review" to be \$646,704 (Ex. 64)—more than a quarter of the value that Chubb ascribed to the entire building. RP 10/10/13 at 1088-89. Certainly, a jury could agree with Burt that such extensive repairs were "substantial." The trial court's refusal to give NBL's instruction was error for this reason too.

B. Whether The Basement Repairs Satisfied The 2003 SBC's "Substantial Alteration" Trigger Was A Question Of Fact For The Jury, Not A Question Of Law For The Court.

This Court must also reject Chubb's alternative argument that the "substantial alteration" issue was not a question for the jury. As Chubb notes, Chubb Opp. at 46 n. 114, on the first day of trial, after the jury was empaneled, Chubb asked the trial court to decide the issue as a question of law. RP 10/01/13 at 59-81. It did not argue that NBL lacked evidence to support its theory or that the 2007 permit was "binding." Chubb conceded that "there are going to be experts who will say that ... the repairs to the collapse are a substantial alteration," *id.* at 76, but rather claimed that *Ball v. Smith*, 87 Wn.2d 717, 556 P.2d 936 (1977), required the court to resolve

“these very challenging issues” itself. *Id.* at 69. The trial court rejected Chubb’s last-minute request and let the parties present their evidence, *id.* at 79-81—although, as explained above, it ultimately and erroneously refused to instruct the jury on the issue. RP 10/10/13 at 1195.

Chubb’s resurrected reliance on *Ball v. Smith* to defend the court’s error is misplaced. *Ball* stands for the proposition that a court, not a jury, must decide the threshold question of whether the standards embodied in a particular regulation or municipal code even apply to the conduct at issue. In *Ball*, the plaintiff offered expert testimony to show that the defendant’s temporary wiring job violated the city electrical code. 87 Wn.2d at 722. The trial court concluded that the code’s standards did not apply because, after questioning, the expert conceded that temporary repairs were outside the scope of the code. *Id.* at 723. Because the trial court concluded as a matter of law that the defendant’s conduct was not governed by the code, the Supreme Court agreed that the expert’s opinion was properly excluded as irrelevant and unhelpful on the issue of negligence. *Id.* at 725.

In short, *Ball* requires the trial court to determine as a matter of law whether the conduct at issue is subject to a regulatory standard in the first instance. *Manson v. Foutch-Miller*, 38 Wn. App. 898, 902, 691 P.2d 236 (1984) (“Whether such a regulation is applicable at all is a question of law for the court.” (citing *Ball*)). If the court concludes that the conduct does

not fall within the scope of the regulation, as in *Ball*, then there is no need for expert evidence or jury instructions on the issue. See, e.g., *Wash. Nat. Gas Co. v. Sea-Con Corp.*, 34 Wn. App. 879, 880-81, 665 P.2d 405 (1983) (trial court properly refused to instruct jury on regulation “inapplicable” to defendants); *Blodgett v. Olympic Sav. and Loan Ass’n*, 32 Wn. App. 116, 121-24, 646 P.2d 139 (1982) (trial court erred in instructing jury on municipal code sections that did not apply to defendants).

But where a court concludes that a regulation or code does apply to the conduct at issue—as this Court did when it held that the 2003 SBC governed the basement repairs, *No Boundaries, Ltd. v. Pac. Indem. Co.*, 160 Wn. App. 951, 249 P.3d 689 (2011)—then the jury must decide whether the code was violated or satisfied. *Manson*, 38 Wn. App. at 902 (“Only rarely, however, is it proper to take ... the question of whether a regulation was violated ... from the jury.”). That is why, contrary to Chubb’s entire premise, Washington courts routinely hold that it is proper to instruct the jury (and admit expert testimony) on the applicable building code where compliance is a relevant issue. *Wells v. Vancouver*, 77 Wn.2d 800, 804-05, 467 P.2d 292 (1970); *Reuter v. Rhodes Invest. Co.*, 71 Wn.2d 31, 38, 425 P.2d 929 (1967); *Short*, 58 Wn.2d at 55. And that is why, for the same reason, it is reversible error to refuse such an instruction. *Pettit*

v. Dwoskin, 116 Wn. App. 466, 469, 475, 68 P.3d 1088 (2003) (“[i]t was for the jury to decide whether the [building] code was violated”).

The *Ball* court recognized this itself. *Ball*, 87 Wn.2d at 725 (“We do not mean to suggest that expert testimony is never admissible to show a violation of an ordinance or statute.”). But, in *Ball*, not only did the trial court conclude that the electrical code did not apply to the defendant’s conduct, the plaintiff did not plead a violation of the code or even ask for an instruction on the issue. *Id.* at 722. Moreover, the *Ball* court concluded that, even had the code applied, “no expert testimony would have been needed to show a violation” and that the expert’s opinion regarding the hazardous nature of the defendant’s wiring “was a matter easily within the common understanding of man.” *Id.* at 725, 726. Certainly, that was not the case here; Chubb never sought to preclude NBL’s witnesses from giving expert opinion on the 2003 SBC’s “substantial alteration” trigger and, as noted, Chubb called its own expert Dethlefs to testify on the issue.

The *Ball* court cited its own decision in *Wells*, *supra*, as a case where the jury *should* decide compliance with a municipal code. In *Wells*, the plaintiff claimed he was injured because the defendant did not build a collapsed hanger in compliance with a city building code. In upholding the trial court’s jury instructions on the code, the Supreme Court analyzed the issue in two steps: first, applicability of the code to the defendant’s

conduct, which was a question of law for the court; second, compliance with the code, which was a question of fact for the jury:

The scope of the duty imposed by [the statute] is a matter of law. ...[¶] Defendant argues that the jury should not have been instructed as to those provisions because [they] are intended only to protect persons injured by toppling or collapsing buildings and the plaintiff was not within this class of persons. We do not agree. ... Since plaintiff produced expert testimony that the hanger did not satisfy those provisions ..., the trial court was correct in submitting those provisions and this theory to the jury. The jury was then left with the task of determining whether the defendant's conduct violated those provisions.

77 Wn.2d at 804-05. Here, by the time of trial, there was no dispute that the 2003 SBC applied to NBL's repairs as a matter of law—and, thus, the only issue left was whether the code's "substantial alteration" trigger was satisfied. That was a question of fact for the jury and, because there was substantial evidence, including expert testimony, to support NBL's claim, the trial court should have given NBL's Sub Alt Trigger instruction.

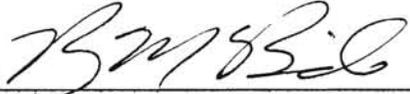
III. CONCLUSION

Neither party was completely satisfied with the outcome of the trial; both parties prevailed on some claims, but not on others. Ultimately, however, the jury got to decide who won and who lost—with one significant exception. The trial court erroneously refused to instruct the jury on NBL's code upgrade claim under the 2003 SBC's "substantial alteration" trigger. There was no basis in the evidence or law to keep that

issue from the jury. The jury's verdict on the claims submitted to it must be affirmed, but the case remanded for a new trial on this narrow issue.

RESPECTFULLY SUBMITTED this 7th day of January, 2014.

LANE POWELL PC

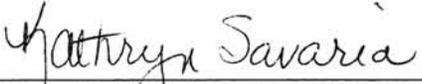
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on January 7, 2015, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

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Executed on the 7th of January, 2015, at Seattle, Washington.



Kathryn Savaria