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COURT OF APPEALS

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No. 34406-8-II

STATE OF WASHINGTON

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**COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON**

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MARK EDER,

Plaintiff/Appellant,

v.

ASC PROFILES, INC.,  
Defendant/Respondent.

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**APPELLANT'S OPENING BRIEF**

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Thomas M. Geisness, WSBA#1878  
Robert A. Clough, WSBA#27447  
THE GEISNESS LAW FIRM  
Colman Building, Suite 675  
811 First Avenue  
Seattle, WA 98104  
(206) 728-8866  
Attorneys for Mark Eder - Plaintiff/Appellant

ORIGINAL

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error.

1. The trial court erred in charging the jury with instruction number 14 which provided that:

A product manufacturer does not have a duty to warn of obvious or known dangers regarding the product. (CP 36).

### B. Issues Pertaining to Assignments of Error.

1. Does instruction 14 misstate the law?
2. Did the jury instructions properly inform the trier-of-fact of the applicable law when read as a whole?
3. Did the trial court abuse its discretion in giving instruction 14?

## II. STATEMENT OF THE CASE

On July 5, 2000, plaintiff/appellant, Mark Eder, was injured on the job while employed as a roofer for Hanley Construction Company. Mr. Eder lacerated his left (major) arm, just above the elbow on the sharp edge of a Skyline metal roofing panel manufactured by defendant/respondent ASC Profiles, Inc..

Mr. Eder's injury occurred as he was assisting in the installation a metal roof on a condominium on Bainbridge Island. Mr. Eder was wearing jeans, a tee shirt, tennis shoes and gloves. The roof of the condominium was

designed so that the center area of the roof was flat with peaked roofs surrounding the perimeter of the flat area. (RP 8-9, 17-18; Ex 1)<sup>1</sup>.

Mr. Eder was working on the flat area in the middle of the roof. He would carry panels of the Skyline roofing from the base of the roof structure, located in the middle of the photograph, and then climb the sloping roof, located on the right of the photograph, to pass the panels to a co-worker, Wade Eagleburger, who was working along the far side attaching the panels to the roof. (RP 11, 15-16).

If any modifications needed to be made to a panel, Mr. Eagleburger would mark it accordingly and then pass the panel back to Mr. Eder, who would then carry the panel down to the flat area of the roof, make the appropriate cut and then return the panel to Mr. Eagleburger who would then secure the panel to the roof. (RP 16).

At the time of his injury, Mr. Eder was standing on the inside slope of the roof located to the right of Exhibit 1. He received a fourteen (14) foot by sixteen (16) inch panel from his coworker on the far side and planned to return it to the flat area so that he could cut a hole in the panel to accommodate a toilet vent. After he received the panel, Mr. Eder, carried it

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1. Exhibit 1 is a photograph of the roof area in which Mr. Eder was working at the time of his injury.

by holding the female edge of the panel in the palm of his left hand and carrying the panel vertically under his arm with the male edge facing upward toward his forearm. Then, Mr. Eder began backing down the inside slope of the roof. (RP 12, 20-23; Ex 22, p 4).<sup>2</sup>

As he backed down the slope, the rear end of the panel caught a skylight. This caused the panel to come to an abrupt stop, but Mr. Eder's weight was still traveling and the sharp male edge of the panel lacerated the inside of his left arm just above his elbow severing the main nerves and arteries. (RP 23, *see also* Ex 8; RP 65-77).

Mr. Eder was transported by helicopter to Harborview Medical Center for medical care and over the course of the next 2.5 years underwent 4 further surgeries to gain better use of his arm, hand and fingers. Mr. Eder suffers severe limitations to this date including the loss of 80% of the use of his left (major) arm and hand. (RP 23-47, 53-57).

Mr. Eder brought this action pursuant to Washington's Product Liability Act, alleging, *inter alia*, that defendant ASC Profile's Skyline metal

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2. Appendix A to this brief is an enlargement of a drawing of a piece of Skyline metal roofing which is found at page 4 of Exhibit 22 which is the Skyline roofing installation manual. The Skyline metal roofing has what was termed at trial a female edge (left of the drawing) and a male edge (right of the drawing). (*See* RP 13).

roofing was unreasonably safe in that it was defective in design and did not contain adequate warnings regarding cut hazards, proper handling and the use of proper protective clothing. (CP 5-9).

At trial, evidence showed that the only warnings regarding the use of protective equipment provided with the Skyline metal roofing recommended that the user wear safety glasses and gloves:

**Safety Considerations**

\* \* \*

**\*Always wear proper clothing and safety attire.**

Wear proper clothing when working with sheet metal in order to minimize the potential for cuts, abrasions and other injuries. IMSA Building Products recommends safety glasses and gloves.

(Ex 22, p 3; RP 143-44).

While ASC Profiles only cautioned purchasers of the product to wear safety glasses and gloves, a video of the manufacturing process demonstrated that ASC employees who handled the metal roofing wore full protective arm guards while handling the product. (Ex 23; RP 169-71).

At trial, Mr. Eder testified that while he knew that the male edge of the Skyline roofing was sharp and could cut, he had no understanding of the extent of the risk of harm. (RP 64-65, 105).

After the close of testimony, the trial court considered the parties'

proposed instructions and their exceptions thereto. ASC Profiles proposed an instruction (number 14), which the jury was charged with and which stated:

A product manufacturer does not have a duty to warn of obvious or known dangers regarding the product.

(CP 36). Mr. Eder excepted to that instruction. (RP 390-92).

The jury returned a verdict in favor of ASC Profiles finding that its Skyline metal roofing product was not defective in design and contained adequate warnings. (CP 48-52 ).

### **III. STANDARD OF REVIEW - JURY INSTRUCTIONS**

Alleged errors of law in jury instructions are reviewed *de novo*. *Boeing Co. v. Key*, 101 Wn.App. 629, 632, 5 P.3d 16 (2000). The trial court's instructions to the jury are reviewed for abuse of discretion. *Herring v. Dept. of Social and Health Services*, 81 Wn.App. 1, 22, 914 P.2d 67 (1996). Jury instructions must be considered in their entirety. *Dean v. Municipality of Metro. Seattle-Metro*, 104 Wn.2d 627, 634, 708 P.2d 393 (1985).

Jury instructions are appropriate only if they: (1) are supported by substantial evidence; (2) permit each party to argue its theory of the case; (3) are not misleading; and (4) properly inform the trier of fact of the applicable law when read as a whole. *Boeing*, 101 Wn. App. at 633.

Even when an instruction given is misleading and therefore erroneous, reversal is not required unless prejudice can be shown. Error is not prejudicial unless it affects or presumptively affects the outcome of the trial. *Herring*, 8 Wn. App. at 23. Instructions that set forth conflicting standards for the jury's decision affect or presumptively affect the outcome of the trial. "Instructions which provide inconsistent decisional standards are erroneous and require reversal." *Renner v. Nestor*, 33 Wn.App. 546, 550, 656 P.2d 533 (1983) (citing *Crowley v. Barto*, 59 Wn.2d 280, 367 P.2d 828 (1962)).

#### **IV. WASHINGTON'S PRODUCT LIABILITY ACT**

The Washington Products Liability Act, (WPLA) provides a single cause of action for injury arising from defective products. In defining what makes a manufacturer liable, the statute offers four different approaches by which a plaintiff can show that the product was not "reasonably safe" which triggers liability under the act. RCW §7.72.030. Two of the approaches involve proof that the product is defective in design and/or does not contain adequate warnings or instructions.

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A product is "not reasonably safe" if it is defective in design and/or lacks adequate warnings. RCW 7.72.030(1)(a) & (1)(b).

RCW 7.72.030 provides, in relevant part, as follows:

(1) A product manufacturer is subject to liability to a claimant if the claimant's harm was *proximately caused* by the negligence of the manufacturer in that the product was not . . . reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the *likelihood* that the product would cause the claimant's harm or similar harms, and the *seriousness* of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product:...

\* \* \*

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

\* \* \*

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

RCW 7.72.030 (emphasis added).

Under the WPLA a design defect and/or warnings claim can be proven either one or both of two ways; by the "risk-utility test" (RCW 7.72.030 (1)(a) & (b)) or by the "consumer expectation test." (RCW 7.72.030(3)). Ultimately these tests differ little in terms of the proof required, because in assessing what a reasonable consumer should expect, there is must be some evidence of risk versus utility and a balancing calculus is, therefore, inescapable.

Thus, as to an inadequate warnings claims, the jury is instructed, per WPI 110.03 as follows:

A manufacturer has a duty to supply products that are reasonably safe. A product manufacturer is subject to liability if the product was not reasonably safe because adequate warnings or instructions were not provided with the product and this was a proximate cause of the plaintiff's injury or damage.

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if:

At the time of manufacture, the likelihood that the product would cause injury or damage similar to that claimed by the plaintiff, and the seriousness of such injury or damage, rendered the warnings or instructions of the manufacturer inadequate, and the manufacturer could have provided adequate warning or instruction; or

The product is unsafe to an extent beyond that which would be contemplated by an ordinary user. In determining what an ordinary user would reasonably expect, you should consider

the relative cost of the product, the seriousness of the potential harm from the claimed defect, the cost and feasibility of eliminating or minimizing the risk and such other factors as the nature of the product and the claimed defect indicate are appropriate.

Washington Pattern Instruction 110.03; *See also* Washington Pattern Instruction 110.02 regarding design defect claims.

These instructions recognize the two tests for determining whether a product is defective. The risk-utility test requires a showing that the likelihood and seriousness of a harm outweigh the burden on the manufacturer to design a product/provide warnings with a product that would have prevented that harm and would not have impaired the product's usefulness. RCW 7.72.030(1)(a) & (b). The consumer-expectation test requires a showing that the product is more dangerous than the ordinary consumer would expect. RCW 7.72.030(3); *see Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn.App. 28, 36, 991 P.2d 728 (2000). This test focuses on the reasonable expectation of the consumer. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 326-27, 971 P.2d 500 (1999). A number of factors influence this determination including the intrinsic nature of the product, its relative cost, the severity of the potential harm from the claimed defect, and the cost and feasibility of minimizing the risk. *Seattle-First Nat'l Bank v. Tobert*, 86 Wn.2d 145, 154, 542 P.2d 774 (1975).

Specifically, the statute makes the conclusion that a product is “not reasonably safe” in design or due to inadequate warnings dependant on the relationship between the harm and the product as connected by “likelihood,” “seriousness” and “cause” of the injury as well as the “adequacy” of the warnings.

## V. SUMMARY OF ARGUMENT

Washington’s Product Liability Act requires that the trier-of-fact, in a product’s liability case, apply either the “risk utility balancing test” and/or the “consumer expectation test” in determining whether a product is reasonably safe.

By charging the jury with instruction 14 which told the jury that there is no duty to warn of obvious or known dangers regarding the product, the trial court misstated the law and told the trier-of-fact that it need not engage in the balancing process mandated by the WPLA if the dangerous nature of the product was known or obvious.

This was error. Frequently, as in this case, although the danger may be known or obvious there may still be some likelihood that those known or obvious dangers will cause harm. If there is, then the issue of whether the extent of that danger or how to protect oneself against that danger should be

the subject of an alternative design and/or additional warnings and instructions is a question that should be decided by the trier-of-fact by applying the two balancing tests mandated by the statute.

## VI. ARGUMENT

The appellate court decision relied upon by the trial court in deciding to charge the jury with instruction 14 was *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 906 P.2d 336 (1995).

In *Anderson*, plaintiff, a teenager, injured when he landed incorrectly on a trampoline while attempting to do a double somersault, sought damages from the trampoline's manufacturer under several theories including failure to warn "him of the kinds of injuries that could result from doing somersaults on the trampoline." *Id.* at 833.

Anderson was an experienced user of trampolines, had been injured while using trampolines in the past, knew that one of his friends had recently been injured on the trampoline and testified that he knew that "he could get hurt jumping on a trampoline, but had never considered whether he could be seriously injured." *Id.* at 832-33.

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Defendant, Weslo, Inc., provided numerous warnings with the trampoline including one which stated:

CAUTION SHOULD BE USED TO AVOID THE FOLLOWING TYPES OF ACCIDENTS

\* \* \*

4. Landing incorrectly on the trampoline mat.

\* \* \*

9. Do not attempt somersaults without proper instruction . . . or without the aid of safety apparatus such as overhead suspension, training rig, or spotting machine. Most serious trampoline injuries occur during somersaults.

*Id.* at 839.

The trial court granted summary judgment in defendant's favor. The Court of Appeals affirmed finding that plaintiff could not prove cause in fact because Anderson was aware of the risk of somersaults, but chose to disregard the risk.

With regard to cause in fact, when a person is aware of a risk and chooses to disregard it, the manufacturer's warning "serves no useful purpose in preventing the harm."

*Id.* at 839 (quoting *Lunt v. Mt. Spokane Skiing corp.*, 62 Wn.App. 353, 362, 814 P.2d 1189, review denied, 118 Wn.2d 1007 (1991)).

Thus, *Anderson* does not stand for the proposition that there is no duty to warn of known or obvious dangers regarding a product. Rather, *Anderson* simply recognizes that in some situations additional warnings/instructions

proposed by a WPLA plaintiff would have had no bearing on the user's actions and therefore their absence cannot be considered a proximate cause of the injury as a matter of law.

*Anderson* does not stand for the proposition that there is *absolutely* no duty to warn of known or obvious dangers. No other authority supports the instruction. It was therefore error to instruct the jury in that regard.

In its other instructions, specifically instructions 10 and 11 which are based on WPI 110.02 and 110.03, respectively, the trial court correctly stated the applicable standard of care regarding design defect and duty to warn. (CP 32-33).

As discussed above, where instructions set conflicting standards for the jury's decision, reversal is required. Even though Mr. Eder knew that the edge of the metal roofing was sharp, whether:

(A) *The likelihood* and seriousness of harm: (1) outweighed the burden on the manufacturer to design a product that would have prevented those harms; and/or (2) rendered the warnings or instructions inadequate;

AND

(B) [W]hether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

Were issues to be determined by the trier-of-fact pursuant to the "risk-utility"

and/or "consumer expectation test" mandated by the WPLA.

The court's instruction, however, compelled the jury to find for ASC if they determined that the hazard was known or obvious. Instruction 14 was not only a comment on the evidence that precluded the jury from finding any likelihood of harm if a danger is known or obvious; Instruction 14 was a limiting and erroneous statement as to application of the balancing process mandated by the WPLA.

In determining both design defect and failure to warn claims, the trier-of-fact must balance likelihood and seriousness of harm against steps that the manufacturer could take to mitigate that harm. Instruction 14, directs the jury to disregard the balancing process when a danger is known or obvious, thereby eliminating the balancing process from the jury's consideration in disregard of the applicable law.

## **VII. CONCLUSION**

While instructions 10 & 11 are accurate statements regarding the balancing process that the trier-of-fact must apply in a design defect/failure to warn - products liability case, instruction 14 was not. Instruction 14 improperly directed the jury that there can be no likelihood of harm if a danger is known or obvious and thus limited the jury's inquiry by instructing

the jury that, in certain circumstances, it must forego the balancing process mandated by the statute.

We cannot know which one of the conflicting standards the jury applied, and thus prejudice is presumed. As such, this matter should be reversed and remanded for a new trial.

DATED this 22nd day of August, 2006.

THE GEISNESS LAW FIRM

By:



THOMAS M. GEISNESS, WSBA#1878

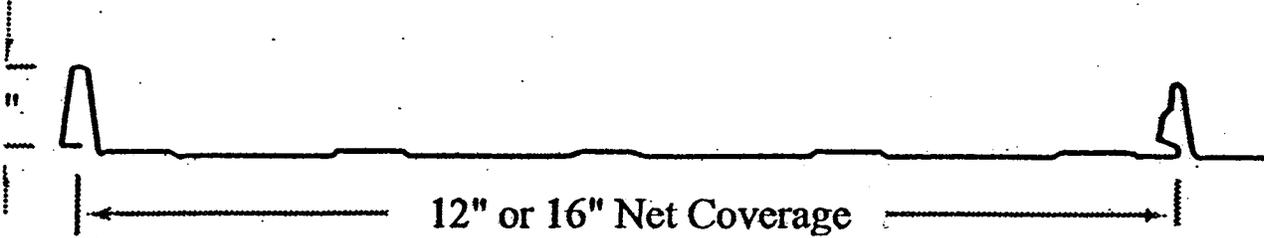
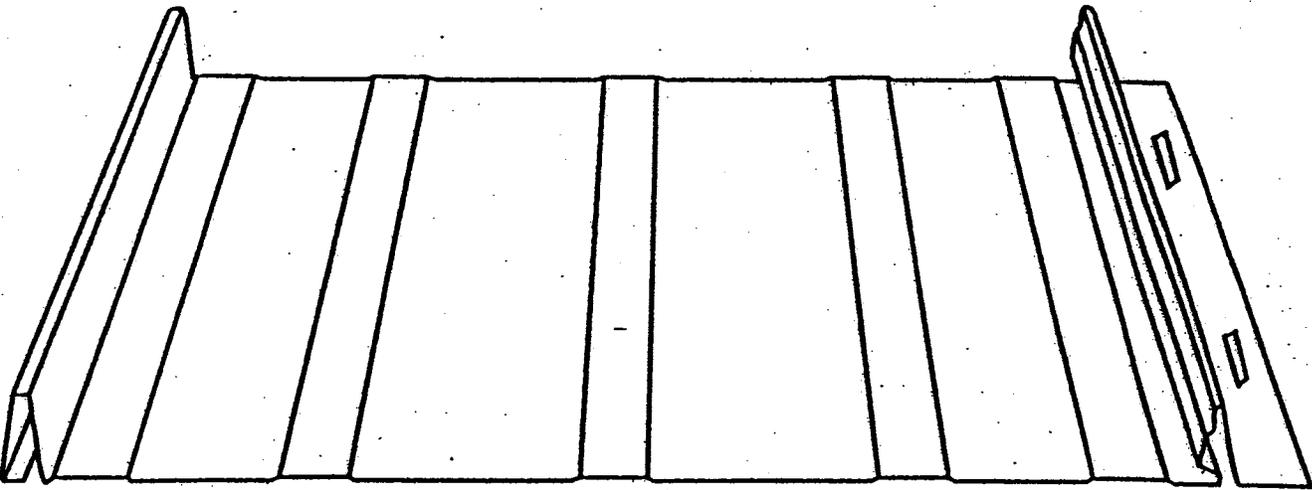
ROBERT A. CLOUGH, WSBA#27447

Attorneys for Mark Eder, Plaintiff/Appellant

## **APPENDIX**

# Skyline Roofing®

## *Installation and Flashings & Details Guide*



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STATE OF WASHINGTON

BY YJN  
DEPUTY

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NO. 34406-8-II

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that I served through ABC Legal Messengers a copy of the below listed documents on August 23, 2006, as follows:

DOCUMENTS: APPELLANT'S OPENING BRIEF

TO: David Hansen  
Aiken, St. Louis & Siljeg  
1200 Norton Building  
801 Second Avenue  
Seattle, WA 98104

DATED this 23rd day of August, 2006.

  
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Melinda Birch