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DIVISION II

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STATE OF WASHINGTON

CASE NO. 34406-8 II

BY


DEPUTY

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

MARK EDER

Appellant,

vs.

ASC PROFILES, INC.

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
HONORABLE M. KARLYNN HABERLY

BRIEF OF RESPONDENT

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I. INTRODUCTION AND CASE SUMMARY

This brief is filed on behalf of the Respondent, ASC Profiles, Inc. Mark Eder, the Plaintiff/Appellant (hereinafter “Mr. Eder”), has brought this claim for injuries arising out of an incident occurring on July 5, 2000. At the time of this incident, Mr. Eder was working as a roofer installing metal roofing panels manufactured by ASC Profiles, Inc. under the name of Skyline Roofing on a condominium on Bainbridge Island, Washington. Mr. Eder sustained injuries to his inner portion of his left arm above the elbow while carrying a panel of Skyline Roofing. (RP 23) Alleging that ASC Profiles was the manufacturer of the Skyline Roofing panel, Mr. Eder brought suit against ASC Profiles, Inc. pursuant to the Washington State Products Liability Act. (CP 5)

Mr. Eder’s claims went to trial before a jury of twelve with the Honorable M. Karlynn Haberly presiding. After receiving testimony and evidence, the jury deliberated and returned a verdict in favor of ASC Profiles on all claims made, which was reduced to verdict. (CP 88, 92) This appeal followed. (CP 94)

II. STATEMENT OF FACTS

This case stems from an incident occurring on July 5, 2000, when Appellant, Mark Eder, was engaged in installing metal roofing panels manufactured by respondent, ASC Profiles, on a building on Bainbridge Island, Kitsap County, Washington. At the time, Mr. Eder was acting in the scope of his employment with Hanley Construction, Inc. (CP 5)

Respondent generally agrees with the description of the work activities of Mr. Eder as described in Appellant's opening brief, except as noted or supplemented hereinbelow.

When Mr. Eder was handed the Skyline Roofing panel from Mr. Eagleburger, he tucked the panel under his left arm and held and carried it in a vertical orientation. Despite wearing gloves, Mr. Eder carried the panel with the female edge of the panel in his hand and the straight male edge of the panel up against the inner portion of his left arm above his elbow. (RP 68) While carrying the panel in such a configuration, Mr. Eder then proceeded to walk backwards down the sloped roof with the intention of stepping off of the sloped roof and onto the flat roof surface. (RP 69) There was an approximately 18 inch drop from the bottom edge of the sloped roof to the flat roof surface. (RP 70) As Mr. Eder approached the bottom edge of the sloped roof surface, the back end of the roofing panel caught on an object on the flat roof surface, such as a vent or a skylight, which effectively stopped the backwards travel of the roofing panel. (RP 72) Mr. Eder was not able to stop his backwards motion, however, and he continued to move backwards where he eventually ended up sitting on his butt on the flat roof surface. (RP 73-75) In falling backwards in such a manner, the inner portion of the Mr. Eder's left arm, above the elbow, was drawn against the straight male edge of the roofing panel with the force of his body weight as he fell to the ground. (RP 20-23 and 72-77)

Mr. Eder acknowledged that it was his choice as to how he carried the panel and further acknowledged that had he carried the panel in a way other than having the straight male edge tucked under his arm, he would not have sustained his injuries. (RP 74-76)

At the time of this accident, Mr. Eder had some 22 years of experience in the roofing industry. (RP 58-59) At the time of the accident, Mr. Eder considered himself to be an expert on roofing and also considered himself to be an expert with metal roofing. (RP 59) Prior to the accident, Mr. Eder had been working at the job site for approximately one week, so there was nothing about the physical layout or the materials being used at the work site that he was not aware of at the time of the accident. (RP 59-60) Of the workers at the work site on the day of the accident, Mr. Eder was the only individual who had also been a professionally licensed roofing contractor. (RP 60) Ironically, Mr. Eder considered the Skyline Roofing product to be the best product that he had ever had the experience to use and install. (RP 61)

In his employment with a roofing contractor prior to his employment with Hanley Construction, Inc., Mr. Eder had received safety training that included training as to how to safely handle metal roofing panels. (RP 63-64) Mr. Eder acknowledged being part of safety discussions while employed by Hanley Construction, Inc. and acknowledged that the safe handling of metal roofing was always an issue in such discussions. (RP 64) Mr. Eder also wore gloves while working with metal roofing panels, “[b]ecause I knew the edges were sharp.”

(RP 64) “. . . I have seen a lot of hands cut from the male edge.” (RP 22)
A Mr. Eder acknowledged that before his accident there was no doubt whatsoever in his mind that if he ran any part of his body hard enough against the male edge of the roofing panel, he could sustain a cut and laceration. (RP 64-65) He had this knowledge from his years of experience working with metal roofing panels. (RP 65)

The Skyline Roofing panels manufactured by ASC Profiles start out as a coil of flat steel manufactured by a company named Steelscape, Incorporated. (RP 179) Companies such as ASC Profiles manufacture metal roofing panels, such as Skyline Roofing, are manufactured in a machine called a Roll Former. (RP 182) In the manufacturing process, coiled flat steel is passed through a series of progressive dies in the Roll Former at a rate of 200 feet per minute to bend the flat steel into a specific panel profile. (RP 237, 312) The profile of the panel is what the panel looks like when viewed as a cross section. Appendix 1 to Appellant’s opening brief shows the profile of the Skyline Roofing panel. There is no patent for the Skyline Roofing panel and, as a result, the Skyline profile is one of the most copied profiles in the industry of manufacturing metal roofing panels.

The Skyline Roofing panel is referred to as a snap panel because of the way that it joins together with other panels on the roof. (RP 182) There was testimony at trial that there are at least a half dozen manufacturers of metal roofing panels that copy the profile to include the female and male edge of the panel of the Skyline Roofing panel.

Additionally, the thickness of the metal used in the Skyline Roofing panel is very common in the industry. (RP 222)

ASC Profiles produces an installation guide to be used while installing Skyline Roofing panels and the installation guide includes written warnings regarding the Skyline Roofing panel. (RP 299-301) The warnings included the following:

Always wear proper clothing and safety attire. Wear proper clothing when working with sheet metal in order to minimize potential for cuts, abrasions, and other injuries. IMSA Building Products recommends safety glasses and gloves. (RP 299-301) (CP Ex. 22)

III. STANDARD OF REVIEW

The only assignment of error asserted by the Appellant was the court's giving to the jury instruction no. 14. The court's instruction no. 14, read as follows:

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

We start with the premise that “[e]ach party to a lawsuit is entitled to have its theories presented to the jury if evidence to support them has been presented.” *Gammon v. Clark Equipment*, 104 Wn.2d 613, 616, 707 P.2d 685 (1985). The question of whether to give a particular instruction to the jury is “. . . a matter within the discretion of the trial court.” *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). If there is substantial evidence to support the giving of a jury instruction, the court is required to instruct the jury on the theory argued by the proponent of the instruction. *Id.* at 498. Substantial evidence exists if the evidence is sufficient to

persuade a fair-minded person. *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005).

It is a well recognized principle that “. . . the trial court has considerable discretion in deciding how the instructions will be worded.” *Gammon*, supra at 617. As such, “[t]he test for sufficiency of instructions is whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law.” *Gammon*, supra at 617.

The Appellate Court reviews the trial court’s decision to give a requested jury instruction for an abuse of discretion. *Fox v. Evans*, 127 Wn.App. 300, 304, 111 P.3d 267 (2005). It is also recognized that on appeal, “trial court error on jury instructions is not a ground for reversal unless it is prejudicial.” *Stiley*, supra at 498-499. An error is prejudicial if it effects the outcome of the trial. *Id.* at 499.

IV. THE HONORABLE TRIAL COURT PROPERLY THE JURY WITH INSTRUCTION NO. 14

A. The Court’s Instruction No. 14 Properly States Washington Law.

Mr. Eder’s claims against ASC Profiles, as a product manufacturer, were properly brought pursuant to the Washington State Products Liability Act, Chapter 7.72 RCW. RCW 7.72.030(1) describes the liability of a product manufacturer, as follows:

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 product was not reasonably safe as designed or not

reasonably safe because adequate warnings or instructions were not provided.

RCW 7.72.030(1)(b) provides what has been described as a risk utility test, as follows:

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

RCW 7.72.030(3) provides what has been referred to as the consumer expectations test, as follows:

- (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.

The court instructed the jury with instruction no. 11, which included both the risk utility test, as well as the consumer expectation test. (CP 87)

Mr. Eder's assertion that the court's instruction no. 14 misstates Washington law is made without any citations to authority and is contradicted by established Washington case law.

In the case of *Soproni v. Polygon Apartment Partners*, 88 Wn.App. 416, 941 P.2d 701 (1997), upheld on failure to warn theory at 137 Wn.2d

319 (1999), a claim for personal injuries was brought on behalf of a minor child against the developer/builder of an apartment complex, the architect for the apartment complex project and the manufacturer of the apartment's windows, for injuries sustained by the minor child when he fell out of an apartment window. The Appellate Court reviewed the trial court's granting of a motion for summary judgment in favor of the manufacturer of the apartment complex windows under the liability principles announced in the Product Liability Act RCW 7.72.030. The court analyzed the liability theory under both the risk utility test, as well as the consumer expectation test. One of the claims made against the window manufacturer was that there should be liability under the Products Liability Act because of alleged inadequate warnings on the windows and their component parts. *Id.* at 422. The Appellate Court noted that "[s]trict liability is not absolute liability." *Id.* at pp. 422-423. The court went on to point out that Washington law ". . . holds that a manufacturer has no duty to warn when the product user is aware of the risk," and concluded that "[a] manufacturer is not an insurer, and need not warn against hazards known to everyone." *Id.* at pp. 422-423. The Supreme Court upheld the Appellate Court's ruling on the failure to warn issues at 137 Wn.2d 319, 971 P.2d 500 (1999).

In the case of *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 906 P.2d 336 (1995), plaintiff sustained injuries while attempting to do a double flip on a trampoline manufactured by Weslo, Inc. *Id.* at 832. One of plaintiff's liability theories against Weslo, Inc. was that liability should be

established under RCW 7.72.030. Plaintiff argued that Weslo, Inc. should be liable for both a defective design of the trampoline and for failure to warn of the dangers associated with its use. *Id.* at 836. In deposition testimony, plaintiff stated that he “. . . knew he could get hurt jumping on a trampoline, but had never considered whether he could be seriously injured.” *Id.* at 833.

Plaintiff also argued that the warnings provided by Weslo, Inc. were inadequate because “. . . they did not inform him of every possible injury that could occur or of the mechanism that would cause injury.” *Id.* at 840. The court analyzed plaintiff’s product liability claims under both the risk utility test as well as the consumer expectation test. That analysis did not preclude the Appellate Court from ruling that the trial court’s dismissal on summary judgment of plaintiff’s failure to warn claims was proper, noting that “. . . a manufacturer does not have a duty to warn of obvious or known dangers.” *Id.* at 840. This observation was in accord with Washington law. “It is established Washington law that a warning need not be given at all in instances where a danger is obvious or known.” *Baughn v. Honda Motor Company*, 107 Wn.2d 127, 139, 727 P.2d 655 (1986). Also, “[a] manufacturer is not an insurer, and need not warn against hazards known to everyone.” *Id.* at 139.

B. The Honorable Trial Court Did Not Abuse Its Discretion In Giving Instruction No. 14.

A key component to ASC Profiles’ defense to plaintiff’s failure to warn claim was Mr. Eder’s self-acknowledged expertise and knowledge of

the features and characteristics of the Skyline Roofing panels. Mr. Eder acknowledged in testimony that he was fully aware that the male edge of the panel was sharp and that it could cause cuts and lacerations if the edge was drawn in contact with skin and tissue. Mr. Eder's employer testified as to the fact that their safety training always included the safe handling of metal roofing product, such as Skyline Roofing, and he described Mr. Eder's expertise and knowledge of metal roofing product to make him a "Picasso" of roofers. (CP 67)

It is settled law that under RCW 7.72.030(1), a claimant must prove that the absence of a warning of possible dangers from the usage of a product was the proximate cause of the plaintiff's injuries. *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 256, 978 P.2d 505 (1999). See also, *Anderson v. Weslo*, supra, ". . . [a] plaintiff must first show that the lack of adequate warnings or instructions proximately caused his or her injury." *Id.* at 838. Proximate causation includes ". . . both cause in fact and legal causation," and "[c]ause in fact refers to the - 'but for' consequences of an act - the physical connection between an act and an injury." *Hiner v. Bridgestone/Firestone, Inc.*, supra at 256.

At trial, Mr. Eder produced engineer Randy K. Kent as an expert witness. (RP 109) Asked what warnings Mr. Kent felt that should have been given with regard to the Skyline Roofing panels, he testified that there should be a warning against the sharpness. (RP 143) This is contrasted with Mr. Eder's own testimony on the issue of warnings.

Q: There was some talk at the start of these proceedings about not receiving a warning about the leading edge. You knew all the characteristics of the leading or the male edge of these panels, didn't you?

A: If we are talking written warning, I knew by looking at it it was sharp. I didn't have to see it in writing. And I had no idea how deep a cut could be made with that panel, either.

(RP 65)

Read as a whole, Instructions 11 and 14 correctly stated Washington law and allowed ASC Profiles to argue to the jury that ASC Profiles had indeed provided warnings with this product and that any alleged lack of warning as to the sharpness of the Skyline Roofing panels was not a proximate cause of plaintiff's injuries. The Honorable Trial Court exercised proper discretion in giving Instruction 14 in conjunction with Instruction 11.

C. There Was Substantial Evidence To Give Instruction No. 14.

There was more than substantial evidence to support the giving of instruction no. 14. Under the facts of this case, it would have been reversible error for the court not to give the instruction. This is the case because a product manufacturer, with regard to a failure to warn allegation, is not an insurer and it was one of ASC Profiles' case theories that there could be no proximate causation if Mr. Eder was already aware or knowledgeable of the condition that the warning was to address. In that regard, there is no evidence in the court's record that Mr. Eder ever read the written warnings contained in ASC Profiles' installation guide and by

his own acknowledgment, he did not need such a warning because he knew the male edge of the roofing panel was sharp and could cut and lacerate. His claim that he was not aware as to how deep a cut he might have received, is the same type of argument that was made as to the type of injury that one could sustain while jumping on a trampoline and which was rejected by the Appellate Court and affirmed by the Supreme Court in *Soproni v. Polygon Apartment Partners*, supra.

D. The Adequacy Of Any Warning Given By Respondent Is Not At Issue In This Appeal.

The sufficiency of the safety warnings given by ASC Profiles is not at issue in this appeal. The Brief of Appellant makes reference to a videotape introduced at trial for the manufacturing process of Skyline Roofing showing ASC employees wearing forearm protection while handling the product. The contents of the videotape are not relevant to this appeal because Mr. Eder never saw the videotape before his accident and the necessity of forearm protection was explained because as the roofing panels are forced through the roll former machine under pressure, they travel at 200 feet per minute. (RP 119, 253, 312) Additionally, the type of arm protection shown in the video did not extend above the elbow of the wearer, and as Mr. Eder's injury was above the elbow no protection would have been provided to Mr. Eder.

V. CONCLUSION

Mr. Eder argues that the court's jury instruction no. 14 misstated the law and told the jury that it need not engage in the balancing process

mandated by the Washington State Products Liability Act. Mr. Eder's arguments in such regard are made without any supporting authority and, in fact, ignore long established case law on the subject. It is established law that there is no duty to warn of known or obvious hazards or dangers. Instruction no. 14 properly informed the jury of the law on this issue.

Instruction no. 14 did not instruct the jury that ASC Profiles had no duty to warn, it only instructed them that there was no duty to warn of obvious or known dangers regarding a product. If the purpose of a warning is to inform a product user of a danger regarding the use of a product, there can be no proximate causation between an injury and the failure to give a warning, if the alleged omitted information is already known to the product user. The jury concluded that ASC Profiles did not supply a product that was not reasonably safe as designed. They also found that ASC Profiles did not supply a product that was not reasonably safe because adequate warnings or instructions were not provided with the product. Mr. Eder proposed no questions for the jury whereby the jury could explain how it reached its decisions and there was ample evidence produced at trial that Mr. Eder was fully aware of the condition of the product in question, which he alleges was responsible for his injuries. If the jury was not given instruction no. 14, the jury would effectively not be able to consider the issue of Mr. Eder's knowledge of the product in their determination of whether the product was not reasonably safe because adequate warnings were not given.

Instruction no. 14 correctly stated the law. ASC Profiles gave written warnings in the materials supplied with the Skyline Roofing product. There is no evidence in the record that Mr. Eder ever read the warnings given by ASC Profiles, and by Mr. Eder's own admission, he did not need to read any such warnings. There was more than substantial evidence given at trial concerning Mr. Eder's knowledge of the characteristics and properties of the Skyline Roofing panels and ASC Profiles was entitled to have an instruction given that supported its theory of the case.

Instruction 14 was properly before the jury and their decision should be affirmed. This appeal should be denied.

Respectfully submitted this 14th day of December, 2006.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the day noted below, I served by ABC Legal Services a true and correct copy of Brief Of Respondent, to:

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