

No. 47956-7-II

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

CHARLES PAMPLIN,

Respondent/Cross-Appellant,

v.

SAFWAY SERVICES, LLC, a Delaware Corporation,

Appellant/Cross-Respondent,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a
Nevada Corporation; PARKER TECHNOLOGY, INC., an
Oklahoma Corporation; PARKER DRILLING COMPANY, a
Delaware Corporation; THOMPSON METAL FAB, INC., an
Oregon Corporation,

Defendants.

BRIEF OF RESPONDENT PAMPLIN

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A. INTRODUCTION

Charles Pamplin, an independent contractor welder, was severely injured when a scaffold built by Safway Services LLC ("Safway") tipped, collapsed, and fell. He shattered his left heel and was left permanently disabled. A jury found that Safway was negligent and held it 65% responsible for Pamplin's injuries.

Safway now complains that the trial court improperly instructed the jury on liability and proximate cause and there was not substantial evidence to support the jury's verdict entered after a multi-day trial. Safway is incorrect. The trial court's instructions were in accord with well-developed principles of liability for a contractor on a multi-contractor job site, as well as the WPI on proximate cause. The jury's verdict on proximate cause was amply supported on this record and raising this issue only reinforces the fact that Safway merely seeks by this appeal to delay paying the judgment on the jury's verdict.

B. STATEMENT OF THE CASE

The present case arises out of a large construction project in Vancouver, Washington to build oil rigs for Alaska's North Slope for British Petroleum. RP 83. The work took place at the facility owned by defendant Thompson Metal Fab, Inc. ("Thompson"). CP 4. The Parker defendants contracted with Pamplin to provide welding services. RP 843.

Safway provided scaffolds for the work. RP 145. Its duties encompassed provision of all necessary scaffolding equipment and parts, erection of the scaffolds, and inspection of the scaffolds. RP 300-01.

The scaffold at issue was improperly designed by Safway employees. RP 221. The design was very narrow at the bottom (two feet) compared to its height (over ten feet), a violation of Washington Administrative Code (“WAC”) 296-874-20002. Ex. 39; RP 212, 499. The Safway employees also failed to guy or tie or attach the scaffold to the oil rig structure to prevent tip over which violated WAC 296-874-40004. RP 512. According to these regulations and Safway’s own policies, the scaffold should have been secured when it reached a height-to-base ratio of four to one, in this case when the scaffold reached eight feet high. WAC 296-874-40004; Ex. 61 at p. 1; Ex. 2 at p. 3; RP 512.

Under the Safway manual, “scaffolds are to be RED tagged as “DO NOT USE” and remain RED tagged while being erected.” Ex. 2 at p. 8. Again, Safway did not follow its own procedure, failing to red tag the scaffold. RP 92, 164, 181, 246, 994. Nor did the Safway workers affix “WARNING STAY OFF SCAFFOLD” signs on the scaffold. RP 181. They also did not place red “Danger: Authorized Scaffold Erectors

Only” barricade tape around the perimeter of the scaffold area. *Id.*¹ The Safway employees did not place mandatory scaffold tags, safety signs, and barricade tape such that they could be seen by users and other non-Safway personnel like Pamplin. Ex. 2 at p. 3.

Rather than affirmatively communicate the state of this scaffold by using tagging and other warning devices, Safway employees took a portion of the ladder away from the bottom of the scaffold, leaving a section still affixed. RP 474. This too violated Safway’s safety manual which stated that the warning scheme could *only* be altered in favor of a more “stringent procedure. Ex. 2 at p. 7; RP 251-52.

Again in violation of both its manual and WAC 296-874-20034, Safway failed to inspect this scaffold before Pamplin and the other welders came on to work the night shift that night. Ex. 2 at p. 3.

Working the night shift, Pamplin and his co-workers, welder Albert Scott, and welder-helper Clint Galloway were directed to work welding some gussets (braces) to an area of the oil rig above the incident scaffold. RP 436. Their supervisor, Errol Brooks, directed them where to work. RP 477. Brooks walked the site with Pamplin, and they viewed the

¹ Safway claimed that it left red “danger” barricade tape on partially completed scaffolds as a warning. RP 283. However, Safway workers testified that “99% of the time, red barricade tape was only used while Safway workers were up on the scaffold building it, and that the tape would be removed when the workers left the scaffold. RP 422, 454, 931. The jury was entitled to credit the evidence that no red barricade tape was left around the scaffold in question.

Safway scaffold. RP 574-75. The scaffold had a green tag affixed, indicating it was safe for use. RP 474, 575. It also had a partial ladder attached. RP 474. Pamplin and Scott filled out their Job Safety Analysis paperwork, obtained their "hot work permit" as they were to be welding, and Scott applied for and was granted a permit to use a manlift as he was the only one certified. Ex. 13. The welders could not sue the man lift exclusively to do their work on the gussets, because it was not logistically possible. RP 162.

After working for 6 hours, the welding crew took their lunch break at around midnight. RP 151. After their break, they walked back to their assigned worksite. RP 151-52. As Pamplin climbed up the scaffold ladder and as was reaching to clip in his fall protection, the entire scaffold tipped and collapsed falling away from the oil rig, and landing in a heap. Ex. 5. Pamplin fell straight down and shattered his heel in multiple places. Exs. 6, 36. Rather than call 911 right away, the supervisors instead called for their safety personnel to investigate. Ex. 26. After about an hour laying in the cold, an ambulance was finally summoned and Pamplin was finally taken to Southwest Washington Medical Center. Ex. 13.

Because severe swelling prevented the hospital from performing surgery, Pamplin was discharged later that night and brought back to his motel room. RP 862. He sat for two days in excruciating pain as his foot

swelled dramatically. RP 732-33, 862. Then, he was flown back to his home in Houma, right outside New Orleans, Louisiana. RP 862. He had to wait over a month before his doctors could operate. They placed a plate and six surgical screws to reconstruct his broken bones. Ex. 11. Thereafter, it has been painful and debilitating for him to bear weight on his left foot. RP 646, 708. His injuries are permanent and he has lost his career as a welder due to his disability. RP 604.

Pamplin filed the present action in the Clark County Superior Court against Safway and various other defendants on February 24, 2012. CP 3. The case was assigned to the Honorable Scott A. Collier for trial. Ultimately, the case proceeded to trial only against Safway. CP 17.

At trial, it was undisputed by Safway that the scaffold was in a state of partial construction, and was not guy tied or otherwise secured despite its more than four-to-one height-to-base ratio. RP 89-91.² It was also undisputed that no red tag was affixed. RP 92. Pamplin testified that when he encountered it, it was marked with a green tag indicating it was safe to use, and had a partial ladder affixed. RP 847, 900.

Despite this physical and testimonial evidence, Safway defended the action claiming that its employees properly marked the scaffold, and

² Pamplin cites to Safway's opening statement not as evidence, but to clarify what issues were undisputed at trial.

that other non-Safway workers must have later changed the markings and affixed the ladder. RP 97-98. Safway argued that this factual theory warranted a superseding cause instruction, because the Safway workers who properly marked the scaffold could not have foreseen other workers deliberating altering their markings in violation of safety rules. RP 506. The trial court declined to instruct the jury on superseding cause, but did include a correct proximate cause instruction specifying that if the jury believed Pamplin's injuries were caused solely by third parties other than Safway, the jury should find for the defense. CP 294. Based on this instruction, Safway argued its third party causation theory to the jury. RP 1416-18.

At the conclusion of Pamplin's case, Safway filed a motion for judgment as a matter of law. CP 1251. The trial court denied that motion, after argument by the parties, on July 10, 2015, noting that after taking the evidence in a light most favorable to Pamplin as the non-moving party Pamplin was entitled to have the jury address his claims. RP 1256.

The jury did so, returning a verdict for Pamplin in which they reduced his recovery by his comparative fault of 35%. CP 305-07. The court entered a judgment on the jury's verdict in the amount of \$615,735.25 plus costs. CP 357-58. Safway renewed its CR 50 motion, CP 504, which the trial court denied. CP 675. Safway appealed. CP 676.

C. SUMMARY OF ARGUMENT

Safway's arguments – which all hinge on its speculative theory that unidentified third parties deliberately tampered with Safway's scaffold – were rejected by the jury based on substantial evidence. There is no legal or factual basis for overturning the jury's verdict.

First, Safway's claim of a lack of substantial evidence of causation ignores the copious physical circumstantial evidence that Safway was negligent. Safway would have this Court believe that even when it is undisputed that a negligent act was committed, all a defendant need do to escape liability *as a matter of law* is to offer testimony that unidentified third parties actually committed the negligent act. That is not the law in Washington. Even when the defendant is the only witness to a negligent act and denies liability, circumstantial and physical evidence is sufficient to take the issue to the jury.

Second, Safway's claim that its defense theory warranted a superseding cause instruction is incorrect. For superseding cause to be at issue presumes an antecedent *negligent act*. Safway's argument is that it acted without negligence, and that the negligence was committed solely by third parties. This hypothetical does not describe superseding causation, but instead simply a lack of proximate causation. The jury was properly instructed that if third parties were the sole proximate cause of Pamplin's

injuries, then Safway should not be held liable. On the other hand, if Safway's theory is that it negligently marked the scaffold, but then third parties altered it in some other fashion, the third party alteration would be eminently foreseeable, and would not have caused harm of a different kind than Safway's negligence. In short, whether Safway's theory is that it acted negligently or non-negligently, superseding cause was not at issue.

D. ARGUMENT

(1) Substantial Evidence Supports the Jury Verdict that Safway Proximately Caused Pamplin's Injuries

Safway argues that the trial court should have entered judgment as a matter of law in its favor. Br. of Appellant at 16. Safway argues that the verdict should be overturned because substantial evidence does not support it. *Id.* at 17.

(a) Standard of Review

A trial court appropriately denies a motion for judgment as a matter of law if, viewing the evidence most favorably to the nonmoving party, it can say as a matter of law that there is substantial evidence to sustain the verdict for the nonmoving party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). A motion for judgment as a matter of law should be denied when there is competent and substantial evidence on which the verdict can rest. *State v. Hall*, 74 Wn.2d 726, 727,

446 P.2d 323 (1968). Evidence is substantial to support a verdict if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

When reviewing a motion for judgment as a matter of law, this Court applies the same standard as the trial court. *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995). The inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury's verdict. *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992).

The requirement of substantial evidence necessitates that the evidence be such that it would convince "an unprejudiced, thinking mind." *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). When a party claims a jury verdict is based upon insufficient evidence, the record as a whole is viewed to see if there is sufficient quantity to persuade a fair-minded, rational person of the truth of the jury's finding. *State v. Sweany*, 162 Wn. App. 223, 232, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012).

- (b) Physical and Circumstantial Evidence Supported the Inference that Safway Was a Proximate Cause of Pamplin's Injuries; the Jury Was Not Obligated to Believe Safway's Testimony

Safway argues that the jury lacked substantial evidence supporting its verdict that Safway proximately caused Pamplin's injuries. Br. of Appellant at 16-29. Its theory on appeal is that no substantial evidence exists that would allow the jury to infer that Safway employees acted inappropriately, and that the only possible conclusion based on the facts is that unidentified third parties mismarked the scaffold. *Id.*

Safway cannot not deny the physical facts supported by substantial evidence: its scaffold was inappropriately marked and in a dangerous state of partial construction when Pamplin encountered it. Br. of Appellant at 5; Exs. 2, 61; RP 212, 475, 499, 512, 522. Safway also concedes that the scaffold was constructed unsafely, because it was not guy-tied or otherwise secured despite a height-to-base ratio that required it. Br. of Appellant at 26.

Despite this uncontroverted physical evidence of causation, Safway argues that Pamplin failed to demonstrate causation as a matter of law. Br. of Appellant at 17-28. Safway contends Pamplin "had to show that Safway was responsible for the indicia falsely signaling that the scaffold was ready for use" by offering *testimonial* evidence of who placed the green tags and ladder on the scaffold. Br. of Appellant at 17-18. Safway claims that because Pamplin offered no eyewitness testimony to contradict the Safway employees' claims that they acted appropriately,

the jury was not entitled to conclude that Safway employees were responsible for the negligently constructed and tagged scaffold that caused Pamplin's injuries. *Id.* at 19-20.

Safway's analytical error stems from its assertion that Pamplin was required to offer *testimonial* evidence to directly counter the testimonial evidence by Safway workers that they marked the scaffold with red barricade tape. Br. of Appellant at 20. Safway ignores the physical evidence that the scaffold was improperly marked. According to Safway's theory, unless Pamplin offered eyewitness testimony that Safway workers improperly marked the scaffold, then the jury was required as a matter of law to believe Safway's claim that a third party mismarked the scaffold. Br. of Appellant at 20.

Safway's theory on appeal is incorrect. Physical and circumstantial evidence can overcome a defendant's denial of negligence, even when the defendant is the only eyewitness to his or her actions. *Gerard v. Peasley*, 66 Wn.2d 449, 456, 403 P.2d 45 (1965). *Gerard* is instructive in analyzing a defendant's claims of insufficient evidence. In that case, two vehicles travelling in opposite directions collided head-on on a highway. *Id.* at 450. One driver died, one survived; there were no other witnesses. *Id.* The estate of the deceased driver sued the surviving driver for negligence. *Id.* at 449. At trial, the defendant testified

unequivocally that the collision occurred in his lane of travel. *Id.* at 452. On appeal, the defendant argued that insufficient evidence supported the jury's conclusion that he was at fault, because he testified that he stayed in his lane. *Id.* at 455. Our Supreme Court addressed the question of whether sufficient evidence supported the jury's verdict that the defendant crossed into the plaintiff's lane, causing the collision. It concluded that circumstantial evidence – the physical facts and expert testimony – were sufficient to create a jury question on causation. *Id.* at 456.

If the physical facts and other circumstantial evidence present conflicting theories regarding what occurred, it is the jury's job to evaluate that evidence and render a decision. *Leach v. Ellensburg Hosp. Ass'n*, 65 Wn.2d 925, 936, 400 P.2d 611 (1965). When physical facts are uncontroverted, reasonable minds may follow the physical evidence. *State v. Jelle*, 21 Wn. App. 872, 877, 587 P.2d 595 (1978).

Circumstantial evidence is proper to support liability, including proximate cause, in negligence cases. *Sketo v. Olympic Ferries, Inc.*, 436 F.2d 1107, 1109 (9th Cir. 1970). "Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for men of reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not." *Wise v. Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171 (1961).

Substantial physical and circumstantial evidence contradicted Safway's claim that it was not negligent. RP 221, 433, 475, 499, 512, 587. The following facts were in evidence: (1) Safway employees built the scaffold, RP 221; (2) Safway employees left the scaffold unfinished at the end of their shift and it was unsecured, RP 433, 587; (3) Safway employees' testimony conflicted regarding how they left the scaffold marked, RP 422, 454, 480, 931; (4) when Pamplin encountered Safway's scaffold it was mismarked as safe and had a ladder attached, RP 480; and (5) the scaffold tipped over because it was constructed contrary to regulations requiring it to be secured based on its height-to-width ratio. RP 230-31. The jury was entitled to credit the physical and circumstantial evidence over the workers' testimony that they left it properly marked.

(c) None of Safway's Cited Authorities Involve Situations Where Substantial Physical and Circumstantial Evidence Supports the Jury's Verdict

Safway cites four cases it claims are analogous and support upending the jury's verdict. Br. of Appellant at 20-25. None of the reasoning of these cases applies here.

First, Safway cites *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). Br. of Appellant at 20-21. In *Marshall*, the plaintiff was injured while exercising on a treadmill at her gym.

Marshall, 94 Wn. App. at 375. She alleged that the treadmill stopped abruptly, then restarted at a fast pace, throwing her off. *Id.* The last thing the plaintiff remembered was resetting the machine after it stopped—she did not remember how quickly the treadmill reached full speed again. *Id.* The treadmill was operational for another four years after the accident. *Id.* at 376. This Court concluded that the plaintiff failed to establish that a machine defect proximately caused her injuries. *Id.* at 379–80. Without any memory of the accident, she simply offered one of many plausible theories for her injuries. *Id.* at 379. Any jury verdict would have been impermissibly based on speculation. *Id.*

Here, unlike in *Marshall*, physical evidence supports the jury’s finding that the scaffold was unsafely built and marked, causing Pamplin’s injuries. Far from Pamplin’s causation evidence being speculative, it is *undisputed* that Safway employees built and marked the scaffold, and that the negligently marked scaffold caused the injury. What is “speculative” here is Safway’s defense theory, that mysterious third parties removed Safway’s proper markings and placed improper markings there. Pamplin’s theory is supported by evidence; this case is nothing like *Marshall*.

Second, Safway analogizes this case to *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). Br. of Appellant at 21-22. In that

case, an employee fell down a freight elevator shaft and died. *Id.* at 803–04. There were no witnesses to the accident. *Id.* at 805. *Without any direct evidence*, the court found the plaintiff's causation explanation (employer's unsafe workplace) as plausible as the defendant's causation explanation (employee's own negligence manipulating the elevator cables). *Id.* at 806. As a result, any jury verdict regarding the physical cause of the accident would have been based on conjecture. *Id.* at 812.

Here, again, there is no dispute about the physical cause of the accident: the improperly marked and dangerously constructed scaffold tipped over and injured Pamplin. Safway simply denies having created the dangerous condition that undisputedly existed, and instead blames unidentified third parties. That takes this case out of the realm of *Gardner*, because physical causation is undisputed here. If every defendant could obtain judgment as a matter of law simply by denying negligent actions, despite physical evidence to the contrary, very few jury verdicts would stand.

Third, Safway cites *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953). Br. of Appellant at 22-23. In *Arnold*, the Supreme Court discussed the level of certainty required by the party that seeks to establish its theory by circumstantial evidence. The plaintiff was injured in a head-on collision between a taxicab, in which she was a passenger, and a car

driven by another defendant. *Id.* at 328. The plaintiff theorized that the other car had crossed over the center line, and had done so well in advance of the accident, giving the cab driver time to avoid the collision. None of the parties in fact testified to the actions of the driver of the oncoming car, and there was no physical evidence to support the plaintiff's theory that the other driver had in fact crossed the center line in a way that provided the cab driver time to avoid the collision. *Id.* The jury returned a verdict against both the driver of the car and the taxicab company. *Id.* On appeal the defendant argued successfully that there was no actual evidence to support the plaintiff's assertion that the driver of the other car came over the centerline sufficiently far ahead of the taxicab to impose upon the driver of the taxicab the duty to see and avoid the oncoming car. *Id.* at 330. The Washington Supreme Court found that because there was no testimony concerning whether the oncoming car crossed the centerline gradually or suddenly, the plaintiff failed in her burden of proof. *Id.* at 331.

Here, there is both physical and testimonial evidence sufficient to support an inference that Safway caused Pamplin's injuries. Safway admits that it constructed the scaffold, admits that the scaffold was unsafe for use, and admits that when Pamplin encountered the scaffold, it was marked in a way that would lead Pamplin to incorrectly believe it was

safe. Safway's denials of having acted negligently were weighed and rejected on the basis of this circumstantial evidence. The facts created a reasonable inference that Safway left the scaffold in a dangerous condition, causing Pamplin's injuries.

Fourth, Safway cites *Moore v. Chesapeake*, 340 U.S. 573, 575-77 (1951). Br. of Appellant at 25. Safway claims that if the only evidence admitted contradicts the plaintiff's theory of causation, then the plaintiff has failed to meet the burden of proof. *Id.* In *Moore*, a train engineer testified that he saw the brakeman, who was holding on to the outside of the train as it moved, slump and fall. He said he made an emergency stop in an unsuccessful attempt to avoid injuring the train's brakeman, who fell in the path of the train. *Moore*, 340 U.S. at 575. At trial, the brakeman's widow asserted that the engineer's emergency stop threw her husband from the train. *Id.* at 576. However, there was no testimonial or physical evidence that the train stopped before he fell. The engineer's testimony was the only evidence on the issue of when and why the train stopped. *Id.* The Supreme Court found that "[i]f one does not believe the engineer's testimony that he stopped after – indeed, because of – the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof." *Id.* at 577.

Here, unlike in *Moore*, there is direct physical evidence of

Safway's negligence. Again, unlike in *Moore* and all of the cases Safway cites, the physical cause of the injuries here is undisputed. The dispute is over Safway's denials of responsibility. The jury was not required to believe Safway's denials in face of substantial physical and circumstantial evidence.

Safway's authorities are all distinguishable on the same ground: Safway fails to acknowledge the distinction between speculation based on no evidence, and a reasonable inference based on substantial evidence. The party having the burden of proof on an issue does not have to establish proof to an absolute certainty. It is sufficient if evidence affords room for reasonable minds to conclude that there is a greater probability that the thing in question happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable. *Gardner*, 27 Wn.2d 802. The distinction is between mere conjecture and reasonable inference. *Id.* at 809. Based upon the evidence at trial, a jury could infer that Safway negligently constructed and marked the scaffold that caused Pamplin's injury.

There is a difference between evidence that negligence was committed but a dispute over who committed it, as happened here, and a total lack of evidence that any negligence occurred, as happened in the

cases Safeway cites. Safeway would have this Court believe that circumstantial evidence that a defendant was negligent is never sufficient to meet a plaintiff's burden of proof if the defendant simply denies having committed the negligent act, and places the blame on unidentified third parties. A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact. Credibility determinations cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The jury was not obligated to believe Safeway workers' denials that they acted negligently. The circumstantial physical and testimonial evidence supports the conclusion that they did.

(d) Safeway's Complaints About the Trial Court's Oral Statements and Pamplin's Expert Testimony Rely on the Same False Premise that No Evidence Supported the Inference that Safeway Was Negligent

Safeway next disputes the trial court's oral reasoning underpinning its decision to deny Safeway's motions. Br. of Appellant at 26-27. Safeway argues that the trial court was "distracted" by the issue of whether the scaffold was secured arguing that, as a matter of law, the jury could only have found that Safeway properly marked the scaffold, and thus the failure to secure it was irrelevant to the causation question. *Id.*

As a threshold matter, this Court does not review the trial court's oral reasoning underpinning its written order denying judgment as a matter of law. A party cannot assign error to oral comments regarding the trial court's reasoning upon entering a decision. *State ex rel. Flieger v. Hendrickson*, 46 Wn. App. 184, 192, 730 P.2d 88 (1986) ("The State directs our attention to the oral comments made by the trial judge at the conclusion of the case and concludes the judge considered irrelevant evidence. This is not a proper assignment of error."); *see also, Jones v. Nat'l Bank of Commerce of Seattle*, 66 Wn.2d 341, 344, 402 P.2d 673 (1965).

On the merits, Safway's complaint is unpersuasive because it rests on the faulty premise as its previous arguments: that no substantial evidence supports the conclusion that Safway mismarked the scaffold and left it in a dangerous condition. Safway's argument that the jury or trial court was obligated to conclude Safeway workers marked the scaffold properly has already been dispensed with in previous discussion.

Finally, Safway complains that Pamplin's expert testimony does not fill what it calls "the evidentiary gap" in his causation evidence. Br. of Appellant at 27-29. Relying on the same faulty premise as the rest of its argument, Safway claims that expert testimony regarding the dangerous condition of the scaffold was irrelevant because Safway proved

definitively that its workers left the scaffold “with indicia it was not ready for use....” *Id.* at 27.

While Safway is certainly correct that Pamplin’s experts did not offer eyewitness testimony that Safway workers mismarked the scaffold, Safway is incorrect that such testimony was required to prove Pamplin’s case. As explained above, physical and circumstantial evidence supported Pamplin’s theory that Safway workers mismarked the scaffold, and it was undisputed that the scaffold was left unsecured and prone to tipping over.

Pamplin’s experts explained to the jury why the scaffold was dangerously marked, what physical conditions caused it to tip over, and why the failure to follow clear regulations regarding the safe construction and marking of scaffolds on a construction site is negligence. RP 230-319. These experts provided substantial evidence supporting not only causation, but duty and breach.

Despite approaching the argument from many angles, Safeway’s complaint regarding causation evidence comes down to one flawed premise: that substantial physical and circumstantial evidence does not support the jury’s conclusion that Safway negligently constructed and marked the scaffold. Safway is incorrect. The jury’s verdict should stand.

(2) The Trial Court Did Not Abuse Its Discretion in Instructing the Jury on Proximate Cause

Safway argues that the trial court should have granted it a new trial on the grounds that the court declined to offer Safeway's preferred instruction on superseding cause. Br. of Appellant at 29-45. Safway claims that it was prejudiced by the claimed error because it was prevented from arguing its theory that non-Safway workers on the job site altered the scaffold, and that these unidentified workers were the sole proximate cause of Pamplin's injuries. *Id.* at 29-30.

(a) Standard of Review

A party seeking to overturn a jury's verdict and obtain a new trial bears a heavy burden. The appellate court, as is the trial court, is bound to the rule that in considering a motion for new trial the evidence of the nonmoving party must be accepted as true. *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254-55, 386 P.2d 958 (1963). If the verdict is supported by substantial evidence adduced at trial, which is interpreted in a light most favorable to the non-moving party together with all reasonable inferences that may be drawn therefrom, the jury's decision will stand. *Id.* Likewise, courts are cognizant of the principle that except where questions of law are involved, the trial court is invested with broad discretion in granting or denying motions for new trial, and that the trial court's determination will not be disturbed on appeal absent an abuse of discretion. *Cyrus v. Martin*, 64 Wn.2d 810, 394 P.2d 369 (1964); *Sargent v. Safeway Stores, Inc.*, 67

Wn.2d 933, 410 P.2d 918 (1966).

The trial court may not weigh evidence and substitute its judgment for that of the jury, simply because the trial court disagrees with the verdict. *Knecht v. Marzano*, 65 Wn.2d 290, 396 P.2d 782 (1964). A disagreement between the trial court and the jury is not an adequate reason for granting a new trial when the verdict of the jury is otherwise supported by substantial evidence. *Bunnell v. Barr*, 68 Wn.2d 771, 777, 415 P.2d 640 (1966). Such action invades the province of the jury:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

Rettinger v. Bresnahan, 42 Wn.2d 631, 633, 257 P.2d 633 (1953).

Instructional error is reversible only if it can be shown that the error affected the outcome of the trial. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996). The specific language of jury instructions is within the discretion of the trial court. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991). A trial court's decision to give a particular jury instruction is reviewed for abuse of discretion if based upon

a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

Jury instructions must permit each party to argue its theory of the case, must not be misleading, and when read as a whole must properly inform the jury of the applicable law. *Leeper v. Dep't of Labor and Indus.*, 123 Wn.2d 803, 809, 827 P.2d 507 (1994). “Although each party is entitled to have its theory of the case set forth in the jury instructions, the trial court has considerable discretion in deciding how the instructions will be worded and whether more specific or clarifying instructions are necessary to guard against misleading the jury.” *Gammon v. Clark Equip. Co.*, 104 Wn. 2d 613, 617, 707 P.2d 685 (1985).

(b) A Superseding Cause Instruction Was Inappropriate; Superseding Cause Presumes that the Initial Torfeasor Was Negligent and that the Type of Harm Suffered Is of a Different Kind that that Threatened by the Antecedent Negligence

Safway argues the facts here warranted a superseding cause instruction. The theory is that the jury might have believed Safway employees properly marked and secured the scaffold, but that later other workers on site altered the scaffold, causing Pamplin to believe it safe. Br. of Appellant at 31-41. Safway argues that if Safway workers properly marked the scaffold when they left the site, it was unforeseeable that other

workers would have changed the scaffold from one clearly marked as unsafe to one marked as safe. *Id.*

“Superseding cause” is defined as “an act of a third person ... which by its intervention prevents the actor from being liable for harm to another *which his antecedent negligence* is a substantial factor in bringing about.” *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 812, 733 P.2d 969 (1987) (emphasis added).

When the initial tortfeasor is negligent, a subsequent negligent act is only a superseding cause if the resulting harm is of a different kind than the harm threatened by the original negligent act. *Id.* at 814. This concept is commonly described in terms of “foreseeability.” *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975). The theoretical underpinning of an intervening cause which is sufficient to break the original chain of causation [*i.e.*, constitute a superseding cause] is the absence of its foreseeability. *Herberg v. Swartz*, 89 Wn.2d 916, 927–28, 578 P.2d 17 (1978) (citing *Boeing Co. v. State*, 89 Wn.2d 443, 446, 572 P.2d 8 (1978)); *Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967). The question of whether the intervening act is a superseding cause depends upon: (1) whether the intervening force brings about a different kind of harm that would have otherwise resulted from the defendant's negligence, (2) whether the intervening act was extraordinary or its consequences were

extraordinary, and (3) whether the intervening act operated independently of a situation created by the defendant's negligence. *Campbell*, 107 Wn.2d at 812–13 (citing *Restatement (Second) of Torts* § 442).

The logical flaw in Safway's superseding cause argument is manifest. For a superseding cause instruction to be appropriate, the trial court had to assume (1) Safway was negligent in marking the scaffold, but (2) other workers later negligently and unforeseeably re-marked the scaffold in some different negligent way, and (3) that subsequent act caused a different kind of harm than Safway's original negligent marking would have caused.

There is simply no support for a superseding cause instruction here in fact, law, or logic. Safeway's foreseeability argument hinges on its factual assertion that Safway workers were not negligent. Br. of Appellant at 33. However, if Safway workers were not negligent in marking the scaffold, then a superseding cause defense does not apply because there is no original negligent act, and therefore no proximate cause, to "supersede." The jury would simply find no causation at all on Safway's part.³ On the other hand, if Safway workers *were* negligent in marking the scaffold, then other workers' changes to the scaffold would not break the

³ In fact, the jury was instructed that if it believed Safway acted properly, and that third parties caused Pamplin's injuries, it should find for Safway.

causal chain between Safway's negligence and Pamplin's injuries. The harm is the same, and the subsequent negligence would have led to the same kind of injury as Safway's negligence.

Safway cites the inapposite *Hester v. Watson*, 74 Wn.2d 924, 929, 448 P.2d 320, 323 (1968) in support of the proposition that it was legal error to decline a superseding cause instruction based on the "competing theory" that third parties unforeseeably altered the scaffold. *Hester* was a rear-end collision case involving the question of how long one car had to be behind another car before a "following car" instruction was warranted. *Hester*, 74 Wn.2d at 926-27. Our Supreme Court concluded that testimony putting the rear car's following time of about 76 seconds was sufficient to warrant the instruction. *Id.* at 928.

Here, the question is not whether Safway's "third party negligence" theory might be true, it is whether that theory, as a matter of law, warranted a *superseding* cause instruction, rather than an instruction on third party *sole* causation, which was in fact given here. Safway did not assert that it was negligent, but that third party negligence of a different and unforeseeable nature caused Pamplin's injuries. Safway claimed that it was not negligent, and that the unidentified third parties' alteration of the scaffold was unforeseeable. That theory supported precisely the proximate cause instruction that the trial court gave here.

Safway also argues that when superseding causation is at issue, foreseeability is generally a jury question. Br. of Appellant at 37-41. Safway cites *Qualls v. Golden Arrow Farms*, 47 Wn.2d 599, 600, 288 P.2d 1090, 1091 (1955); and *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015).

Although foreseeability of a superseding cause is generally a jury question, a superseding cause instruction is improper if the original negligence was “one of the actual causes” of the resulting harm. *Egede-Nissen v. Crystal Mountain, Inc.*, 21 Wn. App. 130, 143, 584 P.2d 432, 441 (1978), *aff’d and modified*, 93 Wn.2d 127, 606 P.2d 1214 (1980). Also, if the intervening act that could be reasonably anticipated by the wrongdoer, it does not constitute a superseding cause as a matter of law. *Id.* at 441 n.9.

Qualls is unhelpful to Safway. That case did not involve a dispute over the propriety of giving a superseding cause instruction, but merely the wording of it. In *Qualls*, a delivery driver parked his van near where children were playing. *Qualls*, 47 Wn.2d at 600. Two children entered the van, and it subsequently rolled away, injuring one of the children. There was competing evidence as to whether the handbrake was not set, or whether it was set and one of the children released it. *Id.* In fact, there was no direct evidence of what caused the truck to roll. *Id.* The trial court

offered a superseding cause instruction, because evidence supported the driver's claim that even if he was negligent, he could not have foreseen that children would enter the van. *Id.* at 601-02. On appeal, there was no controversy over whether a superseding cause instruction was warranted, only whether the trial court should have referred to an intervening cause as the "immediate cause" of the injury. *Id.* Our Supreme Court concluded the jury instruction was proper based on case law. *Id.*

Alberston, which Safway cites in support, actually holds that when the original negligence leads to precisely the harm that would be expected by the original tortfeasor, a superseding cause instruction is *not* warranted as a matter of law. In that case, the Department of Social and Health Services ("DSHS") negligently investigated suspected severe child abuse. *Albertson*, 361 P.3d at 811. As a result, the child was returned to his abusive father, who less than 30 days later, catastrophically injured him, causing permanent damage. *Id.* At trial, DSHS requested and received a superseding cause instruction, arguing that its investigation concluded the initial abuse was accidental, and that the father's subsequent intentional abuse broke the chain of causation between DSHS's negligence and the injuries. *Id.* at 813.

On appeal in *Albertson*, this Court concluded that offering a superseding cause instruction was improper as a matter of law, because the

harm suffered – child abuse – was precisely the same harm DSHS should have anticipated as a result of DSHS’ negligence. *Id.* at 815:

We cannot say that Mejia's abuse of ARB was “ ‘so highly extraordinary or improbable’ ” that no reasonable person could be expected to anticipate it. Mejia's abuse of ARB is “ ‘one of the hazards’ ” that DSHS's duty to investigate allegations of child abuse is designed to prevent. Mejia's abuse of ARB did not act “independently of any situation” created by DSHS's alleged negligence.

Id. (citations omitted).

Here, presuming *arguendo* that Safway’s superseding cause theory started with an act of negligence, then Safway’s claim of unforeseeability fails as a matter of law. Safway’s duty was to secure and mark the scaffold in order to prevent persons from being injured using an unsafe scaffold. The harm Pamplin suffered – falling off an unsecured and incomplete scaffold – is precisely the same kind of harm that Safway’s original negligence caused. It is not extraordinary to think that an improperly marked and unsecured scaffold would cause the type of injuries Pamplin incurred, regardless of whether third parties committed some other additional negligence.

Recognizing the fatal legal flaw in Safway’s superseding cause theory, the trial court instructed the jury not on superseding cause, but on the issue of third party sole proximate cause, which correctly fit Safway’s defense theory as explained below.

(c) The Jury Instructions Allowed Safway to Argue Its Causation Theory to the Jury; any Error Was Harmless and Safway Was Not Prejudiced

The trial court did, in fact, instruct the jury to allow Safway's "third party causation" defense theory, although it did not instruct on superseding cause.⁴ Instruction No. 16, informed the jury that that if a third party was the sole proximate cause of Pamplin's injuries, then the jury should render verdict for Safway:

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened. There may be more than one proximate cause of the same injury. If you find that Safway was negligent and that such negligence was a proximate cause of injury or damage to Plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause. *However, if you find that the sole proximate cause of injury or damage to Plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for Safway.*

CP 294 (emphasis added). Thus, the jury was instructed that if it believed Safway's defense that Safway marked the scaffold appropriately, and third parties later altered the scaffold's markings causing Pamplin to believe it was safe, Safway should prevail.

⁴ Again, "superseding cause" is defined as "an act of a third person ... which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Campbell*, 107 Wn.2d at 812. As explained *supra*, superseding cause was not at issue here.

This accurate proximate cause instruction regarding third party sole causation allowed Safway to robustly argue its third party causation theory in closing:

So there's this whole notion about whether or not some third person came in and altered the scaffold. Right. I mean, Mr. Nix and the scaffold crew's testimony is uncontradicted, five people under oath have all testified this is the way it was left. And Mr. Pamplin comes in and says it was found by him in an entirely different condition. So how did that happen? *Well, if it was put there, we know it was put there by some third party.*

RP 1416 (emphasis added).

Safway relied on the “third party” causation language from Instruction 16 to make its argument on its theory:

...Even if we were [negligent], they would have to prove that this negligence had an unbroken series of events which led to the plaintiff's injury.

This whole third party involvement is the thing that breaks up their causation argument because it wasn't what we did or didn't do. It wouldn't have made any difference. Any person who is willing to fraudulently mess with this workplace environment isn't going to be deterred or stopped by a little plastic flag. That breaks causation.

RP 1417 (emphasis added).

And the judge gave you the instruction that Safway had the legal right to expect others to obey the law until you're put on notice of otherwise. Right. So it wasn't like we had to guard against vandalism or some other act of a third party.

RP 1418.

Nevertheless, Safway argues that the instructions offered were erroneous and prejudiced the outcome of the trial, necessitating a new trial. Br. of Appellant at 41-45. Safway claims that the jury was precluded from considering its third party negligence defense because a superseding cause instruction was not offered. *Id.*

An erroneous jury instruction is harmless if it is not prejudicial to the substantial rights of the complaining party, and in no way affected the final outcome of the case. *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). A prejudicial error, on the other hand, affects or presumptively affects the results of a case, and is prejudicial to a substantial right. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004).

When considering erroneous instructions, this Court presumes prejudice, subject to a comprehensive examination of the record:

When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. However, it becomes our duty, whenever such a question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial.

Id. at 341 (citation omitted).

As explained above, Safway's claim that it marked the scaffold properly and third parties later altered the scaffold does not support a superseding cause instruction, but only a standard proximate cause instruction. A subsequent act only "supersedes" the original act if the original act was also negligent. *Campbell*, 107 Wn.2d at 814.

Even assuming instructional error on the failure to include an instruction on superseding cause, Safway cannot demonstrate such error affected the outcome of the trial. Safway's theory was that it was not negligent, and that the negligent acts of third parties solely caused Pamplin's injuries. That is *precisely* what the jury instructions allowed the jury to consider: that third parties altered the scaffold and "broke the chain of causation." Ironically, the trial court's proximate cause instruction was *better* for Safway than their proposed superseding cause instruction. If the jury had been instructed on superseding cause, it would have ruled in favor of Safway only if it believed the "replacement tag" theory was foreseeable. However, the court's proximate cause instruction stated that *any* other sole cause, whether foreseeable or not, should result in a verdict for Safway.

Safway argues that the jury should have been instructed to consider whether, despite any negligence by Safway, third party interference with the scaffold was unforeseeable, breaking the causal chain. Safway claims

that the trial court was bound by Pamplin's "concession" that third party interference with the scaffold necessitated offering a superseding cause instruction to the jury. Br. of Appellant at 36-41.

However, Safway also ignores that foreseeability analysis includes whether the harm the plaintiff suffered is a different kind of harm than would have resulted from the original negligent act. *See Campbell, supra*. Pamplin introduced evidence of Safway's negligence on three grounds: 1) creation of a dangerous condition by building and leaving an incomplete scaffold; (2) failure to secure a scaffold with a height to least-width base ratio of greater than 4: 1 in violation of Washington and federal law; and (3) failure to warn workers such as Plaintiff of the scaffold's dangerous condition. The jury heard evidence that Pamplin's injuries were caused by believing that the scaffold was safe to climb, and that it tipped over because it was unsecured. *Id.* Even if third parties tampered with the scaffold, the harm Pamplin ultimately suffered was precisely the same harm that Safway's original negligent acts threatened. Thus, a superseding cause instruction would have resulted in the same verdict.

A properly instructed jury found Safway to be a proximate cause of Pamplin's injury. The verdict should stand.

E. CONCLUSION

Safway's appeal is not well grounded in fact or law. The jury was properly instructed on causation, and found based upon substantial evidence that Safway breached its duty of care and caused Pamplin's injuries. The jury's considered verdict should be upheld.

DATED this 21st day of March, 2016.

Respectfully submitted,



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APPENDIX

Instruction No. 16

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of the same injury. If you find that Safway was negligent and that such negligence was a proximate cause of injury or damage to Plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to Plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for Safway.

3
mvd

FILED

JUL 13 2015

Scott G. Weber, Clerk, Clark Co.

6:15 pm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

CHARLES PAMPLIN,

Plaintiff,

vs.

SAFWAY SERVICES, LLC, a Delaware
Corporation;

Defendant.

Case No.: 12-2-00764-4

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the defendant negligent?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the defendant's negligence a proximate cause of injury to the plaintiff?

ANSWER: yes (Write "yes" or "no")

0-000000305

mvd

(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer.

ANSWER:

Past Medical Care	\$	<u>42,584</u>	
Past Wage and Household Services Loss	\$	<u>135,889</u>	- Wages Household
Future Medical Care	\$	<u>30,000</u>	
Future Wage and Household Services Loss	\$	<u>260,812</u>	Wages
		<u>25,000</u>	Household
Noneconomic Damages	\$	<u>450,000</u>	

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Was the plaintiff also negligent?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: yes (Write "yes" or "no")

0-000000306

(INSTRUCTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined fault of the parties that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence and what percentage of this 100% is attributable to the negligence of the defendant? Your total must equal 100%.

ANSWER:

To Plaintiff Charles Pamplin:	<u>35</u> %
To Defendant Safway	<u>65</u> %
TOTAL:	100%

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

DATE: 13 July 15

L. P. H. T.
Presiding Juror

0-000000307

DECLARATION OF SERVICE

On said day below, I e-served a true and accurate copy of the Brief of Respondent Pamplin in Court of Appeals, Division II, Case No. 47956-7 to the following parties:

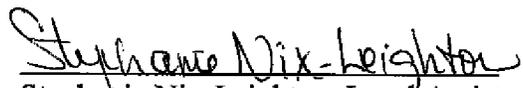
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 22, 2016 at Seattle, Washington.


Stephanie Nix-Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

March 22, 2016 - 10:42 AM

Transmittal Letter

Document Uploaded: 4-479567-Respondent Cross-Appellant's Brief.pdf

Case Name:

Court of Appeals Case Number: 47956-7

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Motion: _____

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Brief: Respondent Cross-Appellant's

Statement of Additional Authorities

Cost Bill

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Brief of Respondent Pamplin

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