

64032-1

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Cause No. 64032-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

WROUGHT CORPORATION, INC.

Appellant,

v.

MARIO INTERIANO,

Respondent.

WROUGHT CORPORATION'S REPLY BRIEF

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I. INTRODUCTION

In each of the rulings to which Wrought has assigned error, the trial court abused its discretion by making decisions that were manifestly unreasonable or exercising its discretion on untenable grounds or for untenable reasons. When the court refused to allow Wrought to present the deposition testimony of Nelson Rodriguez, it based its decision on arguments that should have been presented to the jury *after* the jury had been given the opportunity to consider the testimony at issue. In refusing to allow Wrought to present expert testimony regarding a subcontractor's duties and in refusing to give the companion jury instruction relating to that testimony, the court improperly precluded Wrought from rebutting expert testimony Mr. Interiano was allowed to present on precisely the same issue. The court further compounded these errors by denying Wrought's motion for a new trial.

As a result of the multiple errors made by the trial court, Wrought is entitled to a new trial.

A. The trial court abused its discretion in refusing to admit the deposition testimony of Nelson Rodriguez

1. Wrought satisfied its obligation to exercise due diligence in procuring Mr. Rodriguez's attendance at trial.

Mr. Interiano argues that Wrought failed to make sufficient efforts to secure Mr. Rodriguez's appearance at trial. However, the record shows that, prior to trial, Wrought attempted to serve a subpoena on Mr. Rodriguez. The initial attempts were unsuccessful and Wrought's counsel concluded he

would not call Mr. Rodriguez. However, during trial, it became apparent that Mr. Rodriguez's testimony regarding work on the doors would be necessary. Wrought's counsel then retained a process server who effected service on the witness by leaving a subpoena at his place of abode with an adult who had answered the door. (CP 1461.) Thus, Mr. Rodriguez was served, but did not appear at trial.

Mr. Interiano asserts Wrought should have done more to secure Mr. Rodriguez's attendance, but nothing else could have been done. Wrought attempted to serve Mr. Rodriguez before trial, but those efforts proved unsuccessful and it decided not to call Mr. Rodriguez. It was events during trial that made it clear the witness's testimony would be needed. These facts materially distinguish this matter from *Sutton v. Shufelberger*,¹ cited by Mr. Interiano. In that case, there is no indication any attempt was made to serve the witness until the next to last day of trial. Here, Wrought did all it could do, but was still not successful in securing Mr. Rodriguez's attendance. As a result, the trial court abused its discretion when it did not allow Wrought to introduce the deposition testimony.

- 2. Mr. Rodriguez's testimony would have assisted the trier of fact in determining whether Mr. Interiano had control of the area where his accident occurred.**

¹ 31 Wn. App. 579, 643 P.2d 920 (1982).

Wrought sought to introduce the deposition testimony of Mr. Rodriguez that they were going to install doors on the day of the accident. The arguments Mr. Interiano asserts in support of the court's decision to exclude the testimony are actually arguments that should have been presented to the jury after all the relevant evidence was admitted. If Mr. Interiano contended Mr. Rodriguez could not have been referring to the elevator doors when he testified they were going to work on doors that day, he could have pointed to any evidence supporting that contention and the jury could have reached its own conclusions.

The trial court's error in excluding the deposition testimony precluded the jury from considering *all* the relevant evidence and reaching its own conclusions. It, therefore, also precluded Wrought from receiving a fair trial.

B. The trial court abused its discretion in failing to give the requested instruction regarding Interiano's duty as a subcontractor and in refusing to allow Mark Lawless to testify about that duty.

The trial court allowed Mr. Interiano to present expert testimony that he did not have a duty as a subcontractor with regard to the safety of the barriers to the elevator shaft "unless he built the shaft." (VRP 5/28/09, 101:2 – 15.) Wrought had a right to rebut that testimony and intended to do so through the testimony of its own expert witness, Mark Lawless. Mr. Lawless was prepared to express his own well-founded expert opinion that Interiano *did* have a duty as a subcontractor to ensure the barriers were safe. However,

before Mr. Lawless began to testify, Mr. Interiano's counsel objected to any such testimony and the court agreed to exclude it. (VRP 6/2/09 p.m., 44:4 – 20; 46:19 – 47:1.) The court improperly deprived Wrought of the opportunity to put on an essential element of its defense through the testimony of Mr. Lawless. Having allowed Mr. Interiano to present expert testimony on the very same point, the court committed prejudicial and reversible error by barring Wrought from doing so.

Under *Ward v. Ceco Corporation*,² a subcontractor's duty is not limited to those areas he built. As even Mr. Interiano acknowledges, under *Ward*, a subcontractor has a duty of safety if he created the dangerous condition or had control over the dangerous area.³ Mr. Interiano also acknowledges that he painted the area around the elevator shaft.⁴ Because the barriers had originally been nailed to the walls that were painted, his employees would necessarily have had to remove the barrier to paint behind it. Thus, he had control over the area. The jury should have been allowed to hear Mr. Lawless's testimony regarding Mr. Interiano's duties as a subcontractor. Mr. Interiano would have had the opportunity to cross-examine him and question the facts upon which his opinion was based.

² 40 Wn. App. 619, 699 P.2d 814 (1985).

³ 40 Wn. App. at 627; Brief of Respondent at 25.

⁴ Brief of Respondent at 29.

The court, likewise, erred when it declined to give the jury instruction regarding Wrought's duties as a subcontractor. That instruction stated that "every employer owes a duty to furnish a safe place of employment free from recognized hazards that are causing or likely to cause serious injury or death to its employees or to other employees on the jobsite. . . ." (CP 864) Mr. Interiano argues that, because the instruction included a reference to "other employees on the jobsite," it was erroneous because a subcontractor would not have such a duty. However, whether Mr. Interiano had a duty to employees of anyone other than his own company was not at issue. Therefore, the fact that instruction referred to "other employees" was irrelevant. The only employee at issue was Mr. Interiano. Thus, he fit squarely within the portion of the instruction referring to an employer's duties to its own employees. Nonetheless, the trial court refused to give the instruction. That refusal precluded the jury from considering Interiano's own duty as a subcontractor with regard to safety. Because the statutes and case law are clear that he did have such a duty, the trial court was in error.

C. *The trial court abused its discretion when it denied Wrought's Motion for Reconsideration.*

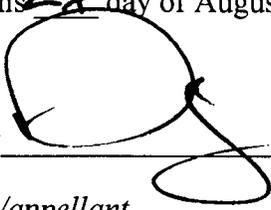
Wrought did not base its motion for reconsideration on newly discovered evidence. Therefore, CR 59(a)(4) is inapplicable, as are Mr. Interiano's arguments regarding that section of the Court Rule.

The motion for reconsideration was based on CR 59(a)(1), (8) and (9). (CR 1409.) As discussed above and in Wrought's opening brief, the trial court abused its discretion and committed errors of law; as a result, substantial justice was not done. Accordingly, the requirements of CR 59(a)(1), (8) and (9) were met and a new trial was warranted. The trial court's failure to grant one was further error.

II. CONCLUSION

For the reasons stated above and in its opening brief, Wrought Corporation requests that the Court REVERSE the judgment entered in Plaintiff's favor and REMAND this matter for a new trial.

Respectfully submitted this ^{27th} day of August, 2010.

By  

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

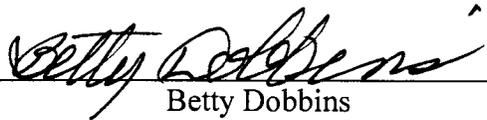
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Betty Dobbins