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No. 67502-8-I

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

KING CUSTOM FRAMING, INC., PAUL KING and
ANGELIQUE KING,

Appellants,

v.

JACOB L. BEGIS,

Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION AND STATEMENT OF THE CASE

The jury trial below established there was overwhelming evidence of the liability of the Appellants King Custom Framing and Paul King (“King”) for causing the life-threatening injuries suffered by Plaintiff Jake Begis. King’s failure to nail a guard rail to the stanchion on the third floor deck of Mr. Begis’ house when he knew Begis was going to be inspecting the deck and railing system on the day of the accident, and his admitted failure to comply with minimal building codes standards related to such guard rails were clearly established. King’s new counsel asks this court to set aside this verdict claiming the Court erred in giving Instruction 21 and failing to give a defense proposed Instruction 14 related the legal duties for safety of a general contractor.

King’s Opening Brief fails to even inform this court that Instruction 21 (related to the requirement that any “warning lines” be located 6 feet from the edge of a structure) given by Judge Ronald L. Castleberry was based upon the provisions of Washington Administrative Code that were cited in Exh. 58 which was admitted into evidence **without objection**. This WAC provision was testified to by Mr. Begis’ construction site expert, Mark Lawless, at length on both direct and cross examination. The “visual warning line” theory was central to its defense. Instruction 21 is an accurate statement of that WAC and the evidence was

properly admitted because it rebutted a central defense raised by King's counsel in his Opening Statement: that what King constructed on the third floor deck was not a guard rail system (because it admittedly could not bear 200 pounds of load and was not nailed to the post or stanchion) but rather a warning line or a "visual barrier".

The Court gave an Instruction 14 offered by the defendant related to the duties of a general contractor for safety on a construction site. This Instruction amply allowed King to argue his theory of the case that Begis, as the general contractor, failed in his responsibility to provide a safety plan or fall protection program at the job site. In fact, King's counsel admitted to the trial court that this topic was covered by some of the other instructions and that "I can argue that with this instruction..." Report of Proceedings, Vol. 3 at p. 358. In fact, the jury found that Begis bore 15% at fault for his own injuries and reduced his recovery accordingly.

For these reasons the jury verdict and judgment should be upheld.

II. STATEMENT OF FACTS

Shortly after founding Begis Homes, Mr. Jake Begis received a contractor's license and purchased two pieces of adjoining property on Possession Lane in Edmonds and embarked on a new adventure, building and selling luxury homes with a panoramic view of Puget Sound. Verbatim Report of Proceedings (RP), Vol. 1, pp 191-192. With the first

house under construction, Mr. Begis cleared a neighboring property for a construction of another luxury home, and began to purchase other properties in the Edmonds and Everett area. *Id.* Mr. Begis hired defendants Paul King and King Custom Framing to design and build the framing and the deck work including the posts and the railings for his home that he was building. *Id.* at pp. 193, 195.

Prior to January 21, 2008 Mr. Begis laid the foundation, the concrete slab for the home. *Id.* at pp. 195-196. King had introduced him to the siding contractors, Proline, owned by Sergey Melnik. *Id.* at p. 193. The contract with Proline only required them to do the siding. They had no responsibilities for doing the railing or installing the guard rail, that was Mr. King's duty.

Prior to the accident, Mr. Begis had been in Florida on business for a couple of days, and called Mr. King from there to find out what was the progress on the decking work. *Id.* at pp. 201-203. King told him it was going to be done, that he was nailing the handrail at that moment, and he wanted to get paid. *Id.* at p. 202. Mr. Begis said he wanted to inspect the work first. *Id.*

On January 21, 2008, Mr. Begis went to the home to inspect the work. *Id.* at p. 203. It was late morning, about 11:00 a.m., when Mr. Begis went to the home to inspect the progress King had made. *Id.* at

p. 203. He arrived at the site and said hello to the siding contract employees, Nikaly Melnik, Sergey's brother, and Pavel Melnik who were working on the side of the house. *Id.*

He walked through the house, noticed there were some lumber stockpiled in the stairway going downstairs and then walked out on the deck. *Id.* at p. 203. The deck designed by King extended the entire length of the front of the deck looking west toward Puget Sound. *Id.* at p. 195. There were decks and railing on the right side as well as under an alcove. *Id.* The guardrail had been placed around the perimeter of the deck on about three-foot posts, approximately nine four-by-four vertical posts topped by one-inch-by-four-inch guardrails that were eight-feet long. *Id.* at p. 195.

Mr. Begis wanted to inspect the deck below. He walked to the deck and railing on the right side (as one is facing west), which extended east/west. *Id.* at p. 204. As he approached, he grasped his hand on the railing itself. *Id.* He looked over and peered down to see that the deck below had not been done. *Id.* The railing held. He then went to do the same thing on the deck railing that extended the full length from north to south on the side facing Puget Sound to the west. There was about an eight-foot section of guard railing. As he approached it, he put his hands to grasp that railing. *Id.* As soon as he grasped that railing it gave way

took pictures, which were admitted into evidence. Exh. 3A. *Id.* at pp. 116-117.

Nikaly Melnick noticed that there were no nail holes in the railing on the right side in the post, and that the rail itself had no nail. It did on the left side of the railing which had nail holes in the posts and nails in the board itself. *Id.* at pp. 114-116.

King and his employee Howard Schatzka (RP, Vol. 1 at p. 57) failed to fasten the top guardrail to the post, resulting in Mr. Begis' fall and injury. RP Vol. I at pp. 114-116.

Plaintiff called a construction expert, Mark Lawless of CSMI, Inc., who testified that handrail assemblies shall be able to resist a single concentrated load of 200 pounds applied in any direction. RP, Vol. 2 at p. 149. Mr. King also testified that this hand railing could not sustain 200 pounds. RP Vol. 1 at p. 53 Mr. Lawless testified that the WAC standing railing, or its equivalent, must also consist of a top rail and intermediate rail and toe board and posts. This one did not. Posts and railings are part of the system. RP, Vol. 2 at pp. 159-160.

King's counsel, Matt Boyle maintained in his Opening Statement that this was a "temporary" structure that was meant to serve only as a "visual barrier" or warning line. RP Vol. 1 at pp. 49-50.

King was correct in saying the railing was a temporary structure, but, according to Lawless, the WAC applies to temporary or emergency conditions where there is danger of employees or materials falling from open-sided floor or other open-sided walking or working surfaces. *Id.* at pp. 160-161. These WACs comprised only a minimum safety standards. *Id.* Lawless reviewed the photographs, the Sheriff's department reports, the witnesses statements, Mr. King's deposition, Mr. Begis' deposition, and he wrote a written expert report. In Lawless' opinion, the nailing was inadequate to support 200 pounds of force, *Id.* He testified that guardrails are meant to prevent a person falling off an elevated surface. *Id.* He said they are not just a visual warning. He testified that King fell below the standard of care of a framing subcontractor by not adequately training, advising, and supervising that the guardrails would meet industry standards. *Id.* at p. 160.

He testified that the deck railing constituted a risk of injury to Jake Begis that resulted in his fall and injury. *Id.* at p. 161. By constructing a rail that was inadequately nailed, but gave the appearance of adequacy, King Framing created a hazard that led to this fall. *Id.*

Mr. King testified that he was not trained in the Washington State building codes. RP Vol. 1 at p. 53. He testified that he did not comply with the Washington Administrative Code in this construction because it

was not capable of withstanding 200 pounds of force. *Id.* He testified that even a temporarily railing must comply with the building codes. *Id.* He testified that he was aware that the railing must be anchored to the posts. *Id.*

He testified that Mr. Schatzka was an employee of his that was working under his supervision, was acting within the scope of his employment, as they were both working on this job site. RP Vol. 1 at p. 57. He understood that he knew that Mr. Begis would go on the premises that morning, as he had indicated, to inspect the work done, as he was entitled to do. *Id.* at pp. 48 and 60.

Mr. King admitted he had not inspected his employee's (Howard Schatzka) work before he left the job and before he finished it. *Id.* at pp. 62-63. He said he instructed his employee to "nail some stuff up." *Id.*

Mr. Lawless had testified that a visual barrier or a warning line can typically be used in roof construction, but, under the building code it has to be set back six feet from the edge. His testimony was:

"This is not anything of a permanent rail. So it's a standard guardrail, whereas what was actually installed out there with only one nail in the end allowing pivot. I think that's why King has characterized it as a warning line. I actually think they recognized that it's not a standard guardrail, so they call it a warning line...In the warning line environment we're going to look at the top of the deck now. And if this is the outboard edge and that is the house,

if it was truly a warning line, the warning line would need to be placed six feet back from the edge of the deck all the way around.

So this distance between the edge of the deck and the warning line is a minimum of six feet, because a warning line is just that. It's not intended as fall restraint, which is part of a fall protection system in the way of encountering the edge. It's intended as a fall restraint mechanism to warn somebody that they're approaching the edge, so that you hit this line and you still have six more feet to be before you're over the edge and you say, oh, my goodness, I hit the line. I've got to back off or I've got to do something else. So that's the warning aspect.

So they're both recognized as acceptable practices from a regulatory standpoint. They both have completely different functions of warning versus restraining. So what was placed on the top here. Again, nowhere does it even represent or come close to being an actual warning line. It actually is a very badly-built restraint."

RP Vol. 2 at pp. 148-149.

All of this testimony was given without the slightest objection from defense counsel. Lawless went on to testify that the building code provides that even a warning line must minimally be able to bear a load of 16 pounds with a tensile resistance of 200 pounds. *Id.* at p. 149.

Later in his testimony Mr. Lawless was provided with Exhibits. 55-58 which were portions of the Washington Administrative Code governing safety on job sites. These included Ex. 58, WAC 296-155-24515 (a)(i), which was admitted without objection from the defense. *Id.* at p.157. Reading from Ex. 58 Lawless stated that the warning line

“shall be erected not less than six feet or 1.8 meters from the edge of the roof.” *Id.* He was then asked:

Q. (Mr. Withey) This deals with a roof situation. We don't have a roof situation here; correct?

A. (Mr. Lawless) That's correct.

Q. If, however, if by analogy, if you're going to call it a warning line on a deck, would this provision apply?

A. Yes. The roofing aspects are precisely the standard, but the standard is applicable to any horizontal surface.

Q. And then it goes---

A. Including decks...

Q. To the extent to which what Mr. King constructed was a warning barrier or a visual warning, do you have an opinion as to whether he complied with the provisions of the Washington Administrative Code requirements?

A. He did not comply. He fell below the standard.”

RP Vol. 2 at pp. 157-158.

All of this testimony, including that the WAC cited in Ex. 58 deals with roofs but is applicable to any horizontal surface like decks, was admitted without the slightest objection from the defense. As a result Ex. 58 went to the jury with the other admitted Exhibits. This is the same WAC that was contained in the Court's Instruction No. 21 which the defense later objected to and which forms one of the bases of this appeal.

Mr. Lawless also testified about other aspects of the WACs as contained in Exs. 55-57, again without objection. Nor did the defense call

any expert or lay witness who challenged or disagreed with this testimony of Plaintiff's expert Mark Lawless.

Lawless also testified at some length about the responsibilities for a safe construction site imposed on Mr. Begis, as the general contractor on the job site. *See* RP Vol. 2 at pp. 152-153.

On cross examination of Mark Lawless, Mr. King's counsel's also solicited Mr. Lawless' testimony about whether the guard rail structure constitute a "visual barrier" or "warning line". *See* RP, Vol. 2 at p. 167.

The precise testimony was as follows:

Q. (Mr. Boyle) Now, you talked about some standards about warning lines, do you recall that?

A. I do, yeah.

Q. Those are specifically with regard to roofs; correct?

A. The standard is addressing roofs, but the application is for horizontal surfaces, as well.

Q. It doesn't say that in the regulation, does it?

A. It does not, that's correct.

Q. And in fact, there is no specific regulation that deals with warning lines on a deck?

A. There is, but it's in a different context, in what they call leading edge work. A warning line is an acceptable means of protecting workers behind the leading edge of the deck."

RP Vol. 2 at p. 167.

Mr. Boyle also solicited Mr. Lawless' opinions on the duty of general contractors for fall protection programs on a construction project

and the fact that Mr. Begis did not have such a program. *See* RP Vol. 2 at p. 165.

King’s credibility was seriously challenged at trial. He had originally had testified under oath in his two depositions that he had taken pictures right after the accident (“in case something “bad” might happen”—i.e., a lawsuit) and that there were nails in the railing that had fallen to the ground and that the railing on a portion of the deck was missing. *See* RP Vol. 2 at pp. 65-67. But, at trial, he admitted that the pictures he took were taken long after the accident and that no picture showed a board that was missing. *See* RP, Vol. 2 at pp. 68-70. Although he had originally denied under oath that he was on the ground when one of the pictures (Exh. 4-H) was taken, RP Vol. 2 at pp. 72-73, he admitted after seeing one of the pictures at trial that he must have been on the ground. *Id.* at p. 73.

III. LEGAL ARGUMENT

A. INSTRUCTION 21 PROPERLY INFORMED THE JURY OF THE PROVISIONS OF THE WASHINGTON ADMINISTRATIVE CODE RELATED TO WARNING LINES WHICH HAD BEEN ADMITTED INTO EVIDENCE WITHOUT OBJECTION

It is clear that under Washington law it is completely appropriate for the Court to instruct the jury as to the provision of the Washington Administrative Code or other governmental regulations. *See Hoff v. Mountain Construction*, 124 Wn. App. 538, 102 P. 3d 816 (2004)

(approving of jury instructions on WACs related to fall protection where the danger came from an open pit rather than a structure, holding that such WACs apply); *Industrial Indem. Co. of the Northwest v. Kallevig*, 114 Wn.2d 907, 797 P.2d 520 (1990). Defendant does not contest the right of Judge Castleberry to give Instruction 21 but rather argues that this particular WAC 296-155-24515 applies only to roofs and was therefore inapplicable to a case involving a horizontal surface like a deck on the edge of a structure. King also faults the wording of the Instruction 21 but the Instruction clearly cited the Title section of the WAC, which states it applies to “Guarding of low pitched roof perimeters”. CP 29. See King’s Opening Brief at p. 6.

Both arguments fail. As the trial transcript reveals, a central tenet of the defense, as stated by Mr. Boyle in his Opening Statement, was that what King constructed was not a proper guard rail system but rather merely a “visual barrier” or “warning” of the edge of the deck. Because King placed emphasis on this defense the Plaintiff was entitled to rebut it. Mr. Begis, through Mark Lawless, did so by pointing out that regulatory provisions for such a “warning line” would require that such a structure be erected not less than 6 feet from the edge. King now argues that instructing the jury on what it had already received into evidence without

objection (E. 58 and the direct and cross examination of Plaintiff's construction expert, Mark Lawless) was error.

The evidence (including WAC 296-155-24515 cited in Instruction 21) and expert testimony on "visual barriers" or "warning lines" was un rebutted and not objected to. Plaintiff did not proceed on the liability theory that what King constructed was an inadequate warning line. This was a defense that King constructed out of whole cloth. It was thus completely proper for the Plaintiff to point out, in evidence not objected to and by the Court's instructions on the WACs, that if King is going to call the structure he built merely a visual warning, then it wasn't properly constructed because it was not 6 feet away from the edge and could not bear 16 pounds of load as required the WAC.

Judge Castleberry cogently described his thought process in giving this Instruction as follows:

Finally as to the court giving the instruction dealing with the warning lines, number one, that has already been admitted as an exhibit in the case, and the court is not giving an instruction saying that this necessarily is the applicable WAC, rather, indicating that there is a WAC of this nature that exists and certainly allowing each side to use their own arguments. The plaintiff can argue the only expert in this case said that this WAC is applicable, the defendant can argue you can read this WAC as well as anybody else and it refers to roof lines...To not give this instruction, in this court's opinion, would almost be a comment in terms of which argument the court is siding with and no one's asked me to do that. So I don't think

now is the time that I should be, by simply eliminating an instruction, go into that implication.

RP Vol. 3 at p. 361.

The time to raise objections to the inapplicability of this particular WAC was when the evidence was offered by the Plaintiff during trial. Such an objection would have provided the Court with the opportunity to determine, based upon an analysis of the WAC and the testimony by the only expert in the case, whether the WAC should be admitted into evidence or not. King never gave the Court the chance to do so, at least in terms of the evidence admitted. By failing to object, King waived any objection to the subject matter of this Instruction. To not give this Instruction when the underlying evidence was not objected to would have had the court comment on the evidence. King set up the trial court by not objecting to the evidence (the WAC and testimony based thereupon) and then by objecting to the Instruction which merely stated what the WAC provided.

Nor has King established that the jury must have been confused or misled by the Instruction 21 because it allegedly applied only to roofs. No such confusion was generated. As soon as Ex. 58 was admitted into evidence without objection, Plaintiff's counsel immediately pointed out that this WAC by its terms deals with roof situations which were not

p. 11. King cites no case law or Washington Pattern Jury Instructions which form the legal basis for a court giving this instruction. This is particularly true in the particular circumstances here, where it was the failure of King to nail the horizontal guard rail to a post or stanchion which was a proximate cause of Begis' injury, not some other vague "safety device and safeguard or method" that Begis supposedly had control over. Tellingly, King failed to call any construction site expert or even develop any testimony that Begis' failure to develop a safety plan or fall protection program as a general contractor was somehow a proximate cause of Begis' fall. Thus the evidentiary support for this proposed instruction was lacking and the trial court was correct to reject it.

King relies upon the general uncontested notion that each side is entitled to have the trial court instruct upon its theory of the case, citing *State v. Hackett*, 64 Wn. App. 780, 785, 827 P.2d 1013 (1992). But the case also held that (1) such an instruction should be given only if there is evidence to support that theory and (2) a requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions. *Id.*

Hackett was a criminal case where the trial court failed to give an instruction on voluntary intoxication. This ruling was held to be error because none of the other jury instructions addressed the effect of

intoxication on the requisite criminal intent. The only instruction given was on the general *mens rea* element of the offense, i.e., the intent to inflict great bodily harm. Thus it was clear that the failure of the trial court to address the topic of intoxication prevented the defendant from arguing to the jury that his narcotic intoxication vitiated the requisite criminal intent.

Here, as Judge Castleberry noted in his ruling on this proposed instruction, the trial court gave an instruction No. 14 which imposed a duty on a general contractor (like Begis) to comply with state safety regulations for all employees on the job site. This instruction was offered by the defense and objected to by the Plaintiff. It clearly provided King with the opportunity to argue that Begis failed his own safety requirement to comply with state regulations, including his failure to provide a safety plan and a fall protection program or equipment. Had the trial court failed to give any instruction on a general contractor's duties, some argument might exist. But here Judge Castleberry gave such an instruction.

In fact, the defense conceded in oral argument on the instructions that other instructions that were given by the court did allow him to argue his theory. King does not even cite this portion of the transcript which states:

“(By Mr. Boyle, King’s counsel): [D]efendant takes exception to the court’s failure to give the defendant’s proposed Instruction No. 11, which was the safe place standards from...WISHA. **And I realize that this is sort of covered in some of the other instructions**, but I think this part about each employer shall furnish to each employee a place of employment free from recognized hazards, et cetera, goes to the heart of something that Mr. Lawless said, and that is that the general contractor was supposed to have a safety plan, was supposed to have a fall protection plan, **and I can argue that without this instruction**, but I think this instruction...is a correct statement of the law and should have been given.”

RP Vol. 3 at p. 358 (emphasis added).

The defense also fails to cite what the trial court said about his ruling:

“As to the defense position in terms of the court not giving the defense No. 11, **Mr. Boyle is correct in that fact that I have given the instruction that is broad enough that it allows the defense to argue that the general contractor does have a duty**. I think to go beyond that would be overstating the case.”

RP Vol. 3 at p. 360 (emphasis added).

Thus, the two elements required before reversible error can be found are not present:

- (1) That the subject matter of the proposed instruction not have been covered by other instructions, and
- (2) That counsel was prevented from arguing his theory of the case.

Thus, Mr. King's new counsel is now arguing in this appeal the exact opposite of what Mr. Boyle correctly conceded to the trial court. Such argument should be rejected as fatally inconsistent with Mr. King's position at trial.

Importantly, Plaintiff's counsel had argued against giving this instruction. RP Vol. 3 at pp. 354-357. As argued in Plaintiff's trial brief and at argument on the instructions, it is well-settled in Washington law that a subcontractor, not just a general contractor, is liable for failure to comply with safety regulations when the condition was under the control of or created by the subcontractor. *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814 (1985); *See also Gilbert H. Moen Company v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 756, 912 P.2d 472 (1996) (holding that a subcontractor is responsible to ensure compliance with safety regulations within their areas of control).

At oral argument Plaintiff's counsel pointed out that here the subcontractor King, not the general contractor Begis, had "created the dangerous condition within the workplace" and that "only the employers having control over the area in which the hazard exists must comply with the regulations." *Id.* at pp. 356-357 (citing *Ward v. Ceco*, *supra* and *Kelley v. Howard S. Wright*, 90 Wn. 2d 323, 582 P.2d 500 (1978)). Because such an Instruction presumed that Begis had created the hazard

and/or had control over those portion of the work site premises, giving this instruction actually gave King an unfair advantage in arguing the instructions to the jury. No prejudice at all existed, let alone reversible error. The evidence at trial was unrebutted that the sub-contractor King had control over the work performed on the deck and guard rails and had created the specific hazard encountered by Begis, to wit, a guard rail that was not fastened to the post but which gave the appearance of such.

As such, even if it was error to fail to give the proposed Instruction, such error was not prejudicial and in fact harmless because of the overwhelming evidence of King's liability and the fact the jury was persuaded by Mr. Boyle's argument that Begis was at least partially at fault for his own injuries. The jury verdict assigned Begis 15% fault and reduced his compensatory damages award accordingly. An error in instructing the jury is only prejudicial where the party asserting error can establish that the outcome of the trial was affected. *Hoddevik v. Arctic Alaska Fisheries Corp.*, 94 Wn. App. 268, 277-78, 970 P.2d 828 (1999). No such showing can be made here, particularly since Mr. Boyle, on behalf of Mr. King, frankly and correctly conceded that the other instructions of the court allowed him to argue his theory of the case. The trial court relied upon this concession in not giving the proposed

instruction. It is unfair for King to now try to retract that important concession through substituted counsel.

IV. CONCLUSION

An experienced trial court, the Hon. Ronald Castleberry, made correct judgment calls on the instructions offered by the parties based upon the unrebutted evidence that was not even objected to by the defense. Instruction 21 was a correct instruction on the law which merely restated the WAC which had already been admitted. To claim error in doing so is simply wrong. Proposed Instruction 11 was not based upon the evidence in the case, was covered by other instructions, and Instruction 14 allowed the defense to argue its theory of the case. No error was committed here. Affirmance should follow.

RESPECTFULLY SUBMITTED this 13th day of June, 2012.

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DECLARATION OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on June 13, 2012, I caused to be served upon Appellants, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

BRIEF OF RESPONDENT

Douglas J. Green, WSBA 8364	<input checked="" type="checkbox"/>	via WA Legal Messenger
GREEN & YALOWITZ, PLLC	<input type="checkbox"/>	via Facsimile
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 13th day of June, 2012.

/s/ Ronnette Peters Megrey
Ronnette Peters Megrey, Paralegal