No. 30185-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION THREE

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DOROTHY A. MILLICAN, as Personal Representative
of the estate of DAREN M. LAFAYETTE,
and on her own behalf as statutory beneficiary,

*Appellants*,

v.

N.A. DEGERSTROM, INC., a Washington corporation,

*Respondent*,

and

MICO, INCORPORATED, a Minnesota corporation;
JAMES R. BONNER and JANE DOE BONNER,
husband and wife, and the marital community comprised thereof,
d/b/a INDUSTRIAL POWER BRAKE COMPANY,

*Defendants*.



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ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
(Hon. Kathleen M. O'Connor)

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# APPELLANTS' REPLY BRIEF

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FELICE LAW OFFICES, P.S.
Roger A. Felice
Michael V. Felice
505 W. Riverside Ave, Suite 210
Spokane, Washington 99201-0518
(509) 326-0510

CARNEY BADLEY SPELLMAN, P.S.
Jason W. Anderson
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Appellants

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## Statutes, Court Rules, and Regulations

## I. INTRODUCTION

Unable to justify the trial court's refusal to exclude the provision that purported to make Sharp-Line "solely responsible" for the safety of Sharp-Line employees, N.A. Degerstrom resorts to misconstruing the subcontract and case law. But there is no eluding the contract's plain language, which was irrelevant and unfairly prejudicial because it allowed N.A. Degerstrom to argue to the jury, contrary to *Stute v. PBMC, Inc.*,[1] that it could not be held responsible for the safety of Sharp-Line employees such as Daren LaFayette. The evidentiary error requires a new trial, and N.A. Degerstrom fails to show that any avoidance doctrine should result in denial of that relief when the estate raised the issue in a motion in limine and the trial court denied the motion with a definitive and final ruling.

The estate is entitled to a new trial on negligence not only due to evidentiary error but the failure to give the estate's proposed instruction 18 on a general contractor's duty to protect the public within the construction zone, including from hazards resulting from subcontractors' negligence. N.A. Degerstrom's position that no such duty exists is contrary to Washington Supreme Court precedent, including *Blancher v. Bank of California*, 47 Wn.2d 1, 286 P.2d 92 (1955).

But this Court need not order a new trial on negligence. Had the trial court excluded the improper delegation provision, there would have

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[1] 114 Wn.2d 454, 457, 463, 788 P.2d 545 (1990).

been no evidence to sustain a verdict that N.A. Degerstrom was fault free, and the estate would have been entitled to judgment as a matter of law on breach of duty and proximate cause. N.A. Degerstrom was required under *Stute* and WISHA to establish, supervise, and enforce subcontractor compliance with an accident prevention program tailored to the specific hazards of the job site, including the undisputed hazard of rollaway vehicles. Because N.A. Degerstrom offered no evidence that it did *anything* to ensure that its subcontractors were parking safely on inclines, it cannot point to any such evidence on appeal. For the same reason, it can offer no excuse or justification for this WISHA violation, which means it must be deemed negligent as a matter of law. N.A. Degerstrom resorts to attacking a straw man (strict liability) and seeking to divert the court's attention to irrelevant matters (project records, safety meetings where chocks were not discussed, etc.). These efforts must fail. Because there is no triable issue on breach of duty or proximate cause, the new trial should be limited to the issue of damages.

Finally, Mrs. Millican is entitled to be reinstated as a plaintiff personally. Viewing all the evidence and reasonable inferences in her favor, she presented ample evidence for a jury to conclude she was substantially dependent on the valuable services her nineteen-year-old son, Daren LaFayette, provided her without compensation until his untimely death. A jury could readily conclude that, in the context of her health, living conditions, and financial circumstances, Mrs. Millican was substantially dependent on LaFayette's home improvement, construction,

landscaping, and maintenance services, as well as his performance of household chores, at her remote former residence.

## II. ARGUMENT

### A. The Trial Court Erred in Refusing to Exclude Evidence and Argument that N.A. Degerstrom Delegated Sole Responsibility for Safety to Sharp-Line.

#### 1. The Delegation Provision in the Sharp-Line Subcontract Was Improper and Not Relevant.

N.A. Degerstrom does not dispute that a general contractor's duty to ensure the safety of all workers is primary and nondelegable. *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 457, 463, 788 P.2d 545 (1990). Nor can it seriously dispute that the Sharp-Line subcontract purported to delegate that duty in providing that Sharp-Line was "solely responsible for the protection and safety of its employees." Exh. P5 at 6. N.A. Degerstrom fails to distinguish *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985), where the Court of Appeals upheld the exclusion of a subcontract that purported to delegate the responsibility to erect guardrails required by regulation for the safety of all employees.

In attempting to distinguish *Ward*, N.A. Degerstrom points out that the problem there was the attempted delegation of the specific duty to erect guardrails, rather than of all safety responsibilities. But this merely highlights that the delegation provision here was broader than—and thus even more improper than—the one in *Ward*. The Sharp-Line subcontract purported to delegate not just one but *all* safety responsibilities, in clear

violation of *Stute*. Rather than being a basis to distinguish *Ward*, this compels that its holding be applied here.

Attempting to analogize to *Degroot v. Berkley Construction, Inc.*, 83 Wn. App. 125, 920 P.2d 619 (1996), N.A. Degerstrom asserts that, similar to the subcontract in *Degroot*, the Sharp-Line subcontract merely required Sharp-Line to comply with applicable safety regulations and protect its employees from harm. But this assertion ignores that the Sharp-Line subcontract purported to make Sharp-Line "solely responsible" for safety. Exh. P5 at 6. Because this is forbidden under *Stute*, the delegation provision was irrelevant and should have been excluded. *Ward*, 40 Wn. App. at 629 ("[A]ny provision in the contract between Ceco and Sellen designed to shift the duty to Sellen is invalid as to the injured employee. Thus, evidence concerning the Sellen-Ceco contract was irrelevant and, therefore, inadmissible.").

That the trial court fundamentally misunderstood *Stute* is demonstrated not only by the erroneous evidentiary ruling itself but by the court's comment that there is a "contradiction" in *Stute*:

> [T]here is a significant dispute, legal dispute, among the parties with regard to exactly how to apply *Stute* in this particular case. In terms of if you can say there is a non-delegable [duty], well, *Stute* says you can enter into a contract with your subcontractor to deal with the safety issues. Then we have the case law that says it is non-delegable. And I understand what Judge Sweeney is talking about [in *Degroot*], because it seems like there is a contradiction here.

RP 2. There is nothing contradictory in *Stute*. While the Supreme Court held in *Stute* that a general contractor must either "furnish safety

equipment or contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities," 114 Wn.2d at 464, the existence of a contractual requirement is merely one factor the trier of fact may consider in determining whether the general contractor satisfied its primary and nondelegable duty to ensure compliance with safety regulations. *See Degroot*, 83 Wn. App. at 129. A contractual provision alone does not discharge—*nor may it serve to delegate*—the general contractor's duty.[2] *Id.*; *Stute*, 114 Wn.2d at 457, 463.

The trial court's reference to Judge Sweeney's *Degroot* concurrence is particularly puzzling. Not only did Judge Sweeney find no contradiction in *Stute*, he disagreed with the majority that the subcontract provision at issue did not delegate responsibility, and thus maintained that it should have been excluded:

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[2] The trial court not only misunderstood *Stute* but its own role as the gatekeeper of evidence. After declaring that *Stute* allows contractual delegation of safety responsibilities, the trial court characterized the ultimate issue as "instructional," stating that the evidence was "all going to come in" and "[t]he real key here is trying to instruct the jury in a way that is going to be relevant for them[.]" RP 2-3. The court recognized that this approach would "probably" result in *irrelevant evidence being admitted*:

> One of the problems with going about it this way is that you want me to make instructional decisions first, and then decide on what facts the jury can hear based on the instructions I am giving, where it is just the opposite; they get to hear the facts and then we—and ***could they hear what ultimately might be legally irrelevant facts? Probably.*** I cannot sculpt a case to take out all the legally irrelevant facts because I do not give them the law first.

RP 7-8. Indeed, the court's failure to apply the substantive law properly in determining relevance and admissibility resulted in the prejudicial admission of irrelevant evidence—the delegation provision of the subcontract.

> I write separately because I believe the effect of giving this agreement to the jury was to suggest that the general contractor could discharge its nondelegable duty by contractually shifting that obligation to the subcontractor. It cannot.
>
> At issue in this case was what steps the general contractor took to protect the subcontractor's employees. Evidence showing that the general contractor required the subcontractor to hold regular safety meetings, erect handrails or guardrails, and furnish protective clothing or respiratory devices, or that it would periodically review the subcontractor's records or work site is relevant. ***For me this subcontract provision merely shows that the general contractor tried to shift its legal obligation to the subcontractor.***
>
> ***The provision was not relevant and therefore should not have been admitted.*** Its admission did not tend to "make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." ER 401. And admission of the provision could have misled and confused the jury. ER 402, 403.

83 Wn. App. at 132-33 (Sweeney, J., concurring).[3] Judge Sweeney's *Degroot* concurrence is instructive here, where the Sharp-Line subcontract *unequivocally* delegated the general contractor's safety responsibilities.

### 2. The Trial Court's Refusal to Exclude the Improper Delegation Provision Was Reversible Error.

A provision that purports to delegate a general contractor's primary and nondelegable duty to ensure compliance with safety regulations is irrelevant and inadmissible. *Ward*, 40 Wn. App. at 629;

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[3] Judge Sweeney concurred with the majority in affirming the judgment on the basis that the error was harmless because the jury by special verdict found neither the general contractor nor the subcontractor negligent, and this meant it was clear that the jury did not rest its verdict on the subcontract's delegation provision. *Degroot*, 83 Wn. App. at 133. Here, unlike in *Degroot*, the jury was not asked to decide whether the subcontractor, Sharp-Line, was negligent. *See* CP 3205-07. Nor would it have been appropriate to include Sharp-Line on the verdict form, as it is immune from liability under Title 51 RCW. *See* RCW 4.22.070(1).

*Degroot*, 83 Wn. App. at 130. The trial court abused its discretion in refusing to exclude the improper delegation provision in the Sharp-Line subcontract. *See id.*

While not explicitly arguing harmless error, N.A. Degerstrom implicitly suggests the error was harmless for two reasons:

***First***, N.A. Degerstrom points out that the trial court instructed the jury regarding the general contractor's "nondelegable" duty to ensure compliance with safety regulations. *Respondent's Brief* at 33; CP 3182. But such a general instruction could not overcome the prejudice caused by the trial court's admitting the delegation provision and N.A. Degerstrom's taking full advantage of that ruling by presenting testimony and arguing not only that it had no responsibility for Sharp-Line employees' safety but that this was *consistent with Washington law*.

In its opening statement, following the trial court's denial of the estate's motion in limine no. 2, N.A. Degerstrom said it had "requested that Sharp-Line be solely responsible for providing protection and safety of its employees" and that this delegation of safety responsibilities was "standard in the industry" and "*appropriate and allowable under Washington law*." RP 46-48 (emphasis added). In its closing argument, N.A. Degerstrom directed the jury's attention to the subcontract because it provided that "Sharp-Line was solely responsible for the protection and safety of its employees." RP 847. *See also Appellants' Opening Brief* at 11-13, citing RP 46, 300-02, 374, 845, 846-47, 868-69. In this context, the nondelegable duty instruction was misleading at best, and this Court

must presume the trial court's evidentiary error was prejudicial. As the Washington Supreme Court recently held, where a misleading instruction was exploited in closing argument, there could be "[n]o greater showing of prejudice...without impermissibly impeaching a jury's verdict." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876, 281 P.3d 289 (2012).

***Second***, N.A. Degerstrom repeatedly references Coit Wright's admission of fault to suggest that the error was harmless. *See Respondent's Brief* at 27-28. But that hearsay evidence is not material to whether refusing to exclude the improper delegation provision was reversible error. N.A. Degerstrom states, "The jury...concluded that Mr. Wright's failures were the sole proximate cause of the subject accident." *Id.* at 28. This is incorrect. The jury found that N.A. Degerstrom was *not negligent*—presumably because N.A. Degerstrom was allowed to argue that it permissibly delegated all safety responsibility to Sharp-Line—and never reached the issue of proximate cause. CP 3205-07.

This Court should reverse and remand for a new trial.

### 3. The Estate's Motion in Limine Was Sufficiently Specific to Preserve the Error.

A motion in limine need only specify the objectionable evidence and the grounds for exclusion. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 287, 686 P.2d 1102 (1984). Even where the specific basis for exclusion is not raised, error is preserved where the trial court considered the issue in the context of ruling on a motion in limine. *Salas v. Hi-Tech*

*Erectors*, 168 Wn.2d 664, 671 n.2, 230 P.3d 583 (2010) (considering an ER 403 argument on appeal, although not raised in motion in limine, where the trial court addressed prejudice in determining admissibility).

The estate in its motion in limine no. 2 asked the trial court to exclude "evidence or argument that Degerstrom did not exercise or retain supervisory control or authority over SharpLine." CP 1548. This clearly encompassed the contractual provision purporting to delegate to Sharp-Line sole responsibility for the safety of its employees. Indeed, the estate argued that admission of such evidence would provide N.A. Degerstrom a basis to argue, contrary to *Stute*, that it had delegated its safety responsibilities.[4] CP 1548-49. The trial court's oral comments show it understood that the delegation provision was a principal focus of the estate's motion. *See* RP 2 ("In terms of if you can say there is a non-delegable [duty], well, *Stute* says you can enter into a contract with your subcontractor to deal with the safety issues."). The estate preserved its objection.

**4. The Estate Did Not Waive Its Objection or Invite Error.**

Unable to justify the trial court's failure to exclude the delegation provision before trial, N.A. Degerstrom resorts to various waiver arguments, all without merit. The estate did not waive its objection or invite evidentiary error by including the subcontract in its ER 904 submission, by not requesting redaction of the provision at issue, by

[4] N.A. Degerstrom argued that *Stute* did not apply to this case (an argument it has abandoned on appeal). CP 1643.

offering the subcontract in its case-in-chief, or by not renewing its objection after the trial court's definitive and final denial of its motion in limine.

*a. Even Assuming the Estate's ER 904 Submission Were in the Record, Which It Is Not, It Was Subject to the Estate's Simultaneously Filed Motion in Limine.*

Contrary to N.A. Degerstrom's assertion, the estate's ER 904 submission is not in the record. Our appellate courts do not consider facts recited in briefs that are unsupported by the record. *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007), citing RAP 10.3(a)(5). In any event, inclusion of the Sharp-Line subcontract in that submission clearly would have been *subject to* the motion in limine. Indeed, notwithstanding the deficient record, the estate does not dispute N.A. Degerstrom's assertion that the estate served its ER 904 submission on April 7, 2011—*the same day it filed its motions in limine*. *See Respondent's Brief* at 31; CP 1543-44. Inclusion of a document in an ER 904 submission cannot be deemed waiver of objections made in a simultaneously filed motion in limine. Had the trial court *granted* the motion in limine, the estate would have had no need to put the entire subcontract before the jury and could have withdrawn the exhibit or redacted the delegation provision.

*b. The Estate Was Not Required to Request Redaction in Its Motion in Limine.*

The estate requested exclusion of evidence of improper delegation. CP 1548-49. Again, this clearly encompassed the subcontract's delegation provision. Although nothing precluded the trial court from redacting the inadmissible portions of the subcontract and admitting the balance, N.A. Degerstrom cites no authority requiring a party to request such relief expressly in advance. Had the trial court granted the motion in limine, any party might have requested that the trial court redact the inadmissible portions and admit the balance. Any such request would have been moot once the trial court made its definitive and final ruling denying the motion in limine.

*c. The Estate Did Not Waive Its Objection by Offering the Erroneously Admitted Evidence.*

After the trial court's definitive and final ruling, the estate did not then waive its objection by offering the subcontract in its case-in-chief and referencing the delegation provision as evidence of negligence. This is allowed under *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 430-31, 814 P.2d 687 (1991), and *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 650, 806 P.2d 766 (1991). *Dickerson* and *Garcia* are not distinguishable on the grounds that they involved trial testimony as opposed to documentary or other evidence. *See Respondent's Brief* at 33. Nothing in those decisions suggests their holding should not apply equally to all types of evidence. *See also State v. Whelchel*, 115 Wn.2d 708, 727-28, 801 P.2d 948 (1990) (holding that the defense did not invite

evidentiary error by referring to co-defendants' tape-recorded statements during opening statements after the trial court had ruled them admissible)[5]; *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 831-31, 696 P.2d 28 (1985) (holding that the plaintiff did not waive its objection to admission of a deposition into evidence by introducing it after the objection was overruled).

*d. The Estate Was Not Required to Renew Its Objection After the Denial of Its Motion in Limine.*

N.A. Degerstrom does not dispute that the trial court's ruling was final, nor does it address the holding of *Garcia*, quoted in Appellants' Opening Brief, that "unless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion in limine has a standing objection." 60 Wn. App. at 641. The trial court repeatedly stated the "bottom line" was that the evidence was coming in and never indicated that further objections would be required. RP 2, 5. This relieved the estate of any obligation to renew its objection.

The trial court abused its discretion in refusing to exclude the improper delegation provision in the Sharp-Line subcontract. The error was neither harmless nor was it waived. This Court should reverse and remand for a new trial.

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[5] Although the Washington Supreme Court in *Whelchel* affirmed the defendant's conviction on harmless error grounds, a federal district court subsequently disagreed and issued a writ of habeas corpus. *Whelchel v. Wood*, 996 F. Supp. 1019 (E.D. Wash. 1997), *aff'd sub nom. Whelchel v. Wash.*, 232 F.3d 1197 (9th Cir. 2000).

**B. A General Contractor Owes a Duty to Members of the Public in the Construction Zone, Which Was Actionable by the Estate Under the Rescue Doctrine, and the Jury Should Have Been Instructed on This Theory.**

N.A. Degerstrom does not dispute that the trial court's refusal to give the estate's proposed instruction 18 precluded it from arguing that N.A. Degerstrom breached its duty to the public at large—a breach actionable by the estate under the rescue doctrine. N.A. Degerstrom argues the duty does not exist. This is incorrect.

The Washington Supreme Court held in *Argus v. Peter Kiewit Sons' Co.* that a contractor owes a duty to exercise ordinary care to protect members of the public from foreseeable harm on a construction site. 49 Wn.2d 853, 856, 307 P.2d 261 (1957). The plaintiff alleged that the depression or trough that caused him to lose control of his motorcycle resulted from the contractor's negligent maintenance of a detour. 49 Wn.2d at 855. The Supreme Court held that the contractor had a duty to "anticipate the development of a dangerous condition and guard against it." *Id.* at 856; *see also Smith v. Acme Paving Co.*, 16 Wn. App. 389, 393-94, 558 P.2d 811 (1976); *Cummins v. Rachner*, 257 N.W.2d 808, 813-14 (Minn. 1977).

*Argus*, *Smith*, and *Cummins* are not distinguishable on the basis that the hazards in those cases were conditions created by the contractor's own work. *Respondent's Brief* at 46. N.A. Degerstrom fails to explain why this should make any difference. Moreover, in another case cited in Appellants' Opening Brief, *Blancher v. Bank of California*, the Washington Supreme Court held that a general contractor is subject to

liability to invitees for negligently supervising a subcontractor. 47 Wn.2d 1, 286 P.2d 92 (1955). N.A. Degerstrom is wrong to place *Blancher* in the same category as *Argus, Smith*, and *Cummins*.

In *Blancher*, a bank hired McClelland Sons, Inc., to redecorate its lobby. 47 Wn.2d at 2. McClelland, in turn, hired a subcontractor, Patent Scaffolding Company. *Id.* at 3. While the work was in progress, a bank customer tripped on a stepladder laid flat on the floor by Patent's employee. *Id.* The jury returned a verdict against the bank, McClelland, and Patent. *Id.* at 4. On appeal, the Supreme Court affirmed and held that McClelland, as the general contractor, assumed a nondelegable duty to keep the lobby clear of obstructions and to exercise reasonable care to protect the bank's business invitees from injury. *Id.* at 5, 8.

Here, similarly, N.A. Degerstrom assumed a nondelegable duty to exercise reasonable care to protect members of the public traveling through the construction zone—including from hazards created by the negligence of its subcontractors. Had the trial court given proposed instruction 18, the estate could have argued and the jury could have found that N.A. Degerstrom breached this duty when its negligent supervision of the job site and Sharp-Line resulted in Mr. Arce and Mr. Wells being put in imminent peril. Such a breach was actionable by the estate under the rescue doctrine. *See McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 355-56, 961 P.2d 952 (1998).

The estate was not required under the rescue doctrine to present evidence of LaFayette's subjective state of mind in taking control of the

runaway auger truck or in diverting it from imminent collision with Arce's pickup. *See Respondent's Brief* at 47. The rescue doctrine applies where the defendant's negligence placed the rescued person in imminent peril. *McCoy*, 136 Wn.2d at 355. The existence of imminent peril or the appearance of such peril is judged according to an objective standard. *Id.* If the rule were otherwise, the defendant would unfairly benefit in cases, such as this one, where the rescuer is unavailable to testify regarding his state of mind because he perished in effecting the rescue.[6]

The estate was wrongly precluded from arguing this theory because the trial court refused to give the estate's proposed instruction no. 18. This Court should reverse and remand for a new trial.

### C. Having Presented No Evidence at Trial That It Did Anything to Ensure Safe Parking by Subcontractors on Inclines, N.A. Degerstrom Can Point to None on Appeal, and Its WISHA Violation Must Be Deemed Negligence as a Matter of Law.

The estate does not advocate that general contractors be held strictly liable for their subcontractors' WISHA violations or negligence. While it attacks a straw man of strict liability, N.A. Degerstrom does not dispute that violation of a statute or regulation *absent an excuse or justification* is negligence as a matter of law. *See Appellants' Opening Brief* at 28-29, citing *Pudmaroff v. Allen*, 138 Wn.2d 55, 68, 977 P.2d 574

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[6] In addition, that LaFayette may have placed himself in danger before undertaking specifically to rescue Mr. Arce and Mr. Wells is irrelevant where N.A. Degerstrom stipulated that LaFayette was fault free. *See* RP 11, 915. *See also Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 834, 99 P.3d 421 (2004) (holding that comparative negligence and assumption of risk do not apply where the rescuer acted neither rashly nor recklessly).

(1999), and *Yurkovich v. Rose*, 68 Wn. App. 643, 653-54, 847 P.2d 925 (1993). N.A. Degerstrom does not address, much less attempt to distinguish, *Pudmaroff* or *Yurkovich*.

N.A. Degerstrom failed to establish, supervise, or enforce an accident prevention program tailored to the specific hazards of the job site. *See* WAC 296-155-100(1)(b), -110(2); *Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 598-99, 215 P.3d 951 (2009). There is no dispute that the Flowery Trail Road project was on a steep, mountain road, making rollaway vehicles a foreseeable hazard throughout the job site. Yet, as N.A. Degerstrom's brief confirms, it did *nothing* to ensure that its subcontractors used chocks as required under WAC 296-155-610(2)(b). N.A. Degerstrom:

- Failed to provide chocks or contractually require Sharp-Line to provide safety equipment relevant to its responsibilities as required by *Stute*, 114 Wn.2d at 464. RP 480, 1203-05.

- Failed to require Sharp-Line to establish a site-specific accident prevention program that addressed parking on inclines, which was required under *Stute* and WAC 296-155-100(1)(b) and -110(2) because rollaway vehicles were a specific, foreseeable hazard on this job site. RP 320-21, 480, 1197-98.

- Failed to supervise or enforce compliance with the chock requirement in its own accident prevention program, contrary to WAC 296-155-100(1)(b).[7] *See Express Constr.*, 151 Wn. App. at 598-99.

N.A. Degerstrom addresses none of these failures, discussed in Appellants' Opening Brief at 30-31, except to misquote and misconstrue the subcontract as requiring Sharp-Line to furnish its own safety equipment. In the trial court, N.A. Degerstrom repeatedly misquoted the subcontract as requiring Sharp-Line to "furnish...safety equipment" relevant to its responsibilities, when the subcontract actually only required Sharp-Line to "furnish...safety *information*." Exh. P5 at 6 (emphasis added). N.A. Degerstrom has now repeated this misquote on appeal, even after it was pointed out in cross examination at trial, RP 1201-05, and in Appellants' Opening Brief at 18.[8] *Respondent's Brief* at 10, 30. A vague

[7] N.A. Degerstrom appears to have abandoned its position that this chock requirement did not apply, recognizing that the result of this position was that it failed to address in its accident prevention program a foreseeable and undisputed hazard on this job site, contrary to WAC 296-155-110(2).

[8] N.A. Degerstrom has persistently misquoted the subcontract in this manner. When N.A. Degerstrom moved for summary judgment on negligence, it misquoted the subcontract and argued that argued that its supposed requirement that Sharp-Line furnish safety equipment demonstrated compliance with *Stute*. CP 63, 70. N.A. Degerstrom submitted a declaration by its vice president of environmental safety and health, Michael Coleman, which also misquoted the subcontract. CP 506. N.A. Degerstrom misquoted the subcontract again in its trial brief, CP 1728, 1733, and it has done so yet again on appeal, even after Mr. Coleman acknowledged the misquote during cross examination at trial. RP 1201-05.

requirement to furnish safety information, as opposed to equipment, does not demonstrate compliance with *Stute*.[9]

Absent any valid excuse or justification, N.A. Degerstrom's WISHA violations must be deemed negligence as a matter of law. *Pudmaroff*, 138 Wn.2d at 68; *Yurkovich*, 68 Wn. App. at 653-54. Other than the inadmissible delegation provision, N.A. Degerstrom can point to no evidence of any excuse or justification for its violations because it presented none. Thus, rather than address the violations, N.A. Degerstrom seeks to divert this Court's attention to irrelevant matters. For instance, N.A. Degerstrom emphasizes its frequent safety meetings, voluminous project records, and incident-free record at this job site (other than two rollaway trucks in twelve months). *Respondent's Brief* at 40-42. But none of this demonstrates any effort to ensure safe parking of vehicles on inclines. One incident was enough to take Daren LaFayette's life.

N.A. Degerstrom points out that it lacked responsibility for Sharp-Line's auger truck and could not have known of Wright's failure to set the parking brake. *Respondent's Brief* at 39-41. But rather than demonstrating any effort by N.A. Degerstrom to supervise or enforce compliance with chock requirements, these facts merely demonstrate why chocks are a mandatory safety device: not only do they offer fail-safe

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[9] Not only did N.A. Degerstrom misquote and misconstrue the subcontract in the trial court, it produced as its accident prevention plan a document that did not apply to the Flowery Trail Road project and was not the plan on file with the Federal Highway Administration. CP 1275-79. The trial court found this was a "serious discovery violation" and imposed nearly $28,000 in sanctions. CP 1279-80.

protection against mechanical failure and human error, they are, unlike a parking brake, plainly visible upon inspection.[10] *See* RP 473-74, 484, 666.

N.A. Degerstrom points out that Sharp-Line had lumber scraps in the auger truck that could have been used as rudimentary chocks. *Respondent's Brief* at 39-40. But again, rather than demonstrating the exercise of care by N.A. Degerstrom, Sharp-Line's failure to take even this precaution only illustrates why the general contractor's supervision of WISHA compliance, as required under *Stute* and WAC 296-155-100(1)(b), is essential. N.A. Degerstrom was on the job site daily, "supervising" its subcontractors, but never inspected for chock usage. RP 255, 476-77, 480, 542; Exh. P14. Just one hour before the incident, N.A. Degerstrom's job site foreman, Dennis Arndt, drove by and observed the auger truck but failed to inspect for chock usage. RP 480, 513. Constructive knowledge is sufficient to establish a violation of the requirement to supervise and enforce. *Express Constr.*, 151 Wn. App. at 599.

N.A. Degerstrom asserts, as it did at trial, that the Sharp-Line auger truck was not required to be chocked because the motor was running. N.A. Degerstrom strains its credibility by contradicting its own job site superintendent, Kenneth Olley, who testified that whether a

[10] No speculation is required to conclude that the auger truck was not chocked. First, the fact that truck rolled away is conclusive: N.A. Degerstrom's own expert witness testified that chocks would have prevented the truck from rolling. RP 792; *see also* RP 484. Second, all eyewitnesses testified no chocks were found anywhere near where the truck had been parked. RP 96, 132-33; *see also* Exh. P23 (Wright explaining his actions in parking the truck).

vehicle is "unattended" (and therefore must be chocked) sensibly does *not* depend on whether the motor is running. RP 568-69. The WISHA regulation does not define "unattended" but requires that ***if*** a vehicle is unattended, the motor be stopped:

> ***Before leaving a motor vehicle unattended***:
>
> (i) The motor must be stopped.
>
> (ii) The parking brake must be engaged and the wheels turned into curb or berm when parked on an incline.
>
> (iii) If parking on an incline and there is no curb or berm, the wheels must be chocked or otherwise secured.

WAC 296-155-610(2)(b) (emphasis added). That the auger truck's motor was running, contrary to subsection (i) of this regulation (and, in fact, had to be running to operate the hydraulic equipment), does *not* mean chocks were not required under subsection (iii). *See also* WAC 296-155-605(1)(c) (requiring that equipment be chocked on inclines without regard to whether the motor is running).

Whether a safety regulation applies on a particular job site is a question of law for the court. *Manson v. Foutch-Miller Corp.*, 38 Wn. App. 898, 902, 691 P.2d 236 (1984). There is no dispute that no one was in control of the auger truck or in a position to secure it safely in the event of a brake failure. *See* RP 250-51, 478-79, 608-09. Nor is there any dispute that the Sharp-Line auger truck was parked on an incline where there was no curb or berm. RP 251, 473, 538-39. Sharp-Line was cited for violating the chock regulation for vehicles, WAC 296-155-610(2)(b). CP 544.

The estate does not contend N.A. Degerstrom is strictly liable for Sharp-Line's WISHA violation. Instead, N.A. Degerstrom is liable for *its own* failure to establish or supervise or enforce compliance with an accident prevention program that addressed the foreseeable, undisputed hazard of rollaway vehicles, contrary to WAC 296-155-100(1)(b) and -110(2), allowing Sharp-Line to violate the chock regulation without any supervision. *See Express Constr.*, 151 Wn. App. at 598-99. Because N.A. Degerstrom offered no excuse or justification for violating WISHA (other than attempted delegation of a nondelegable duty), this must be deemed negligence as a matter of law. *Pudmaroff*, 138 Wn.2d at 68; *Yurkovich*, 68 Wn. App. at 653-54.

Furthermore, N.A. Degerstrom does not dispute that this Court can find that its negligence was, as a matter of law, ***a*** proximate cause of Daren LaFayette's death (not necessarily the *sole* proximate cause). *See Appellants' Opening Brief* at 31. *See, e.g., VanCleve v. Betts*, 16 Wn. App. 748, 753, 559 P.2d 1006 (1977) (affirming judgment on a directed verdict for the plaintiff on negligence and proximate cause); *Foster v. Bylund*, 7 Wn. App. 745, 750, 503 P.2d 1087 (1972) (same). There is no dispute that the auger truck would not have rolled away had the wheels been chocked as required. N.A. Degerstrom's own expert witness testified that a six-by-six block of wood "placed under the tire on that slope...would prevent that vehicle from rolling." RP 792.

The trial court erred in refusing to grant judgment as a matter of law.[11] This Court should reverse the judgment and remand with instructions to enter judgment as a matter of law on breach of duty and proximate cause and to hold a new trial on damages only.

### D. Mrs. Millican Is Entitled to Be Reinstated as a Plaintiff Personally on Remand Because She Set Forth Evidence from a Jury Could Conclude She Was Substantially Dependent on the Services He Was Providing Until His Untimely Death.

To survive summary judgment, Mrs. Millican needed only present evidence from which a jury could infer that she was substantially dependent on the services LaFayette provided. *See Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). N.A. Degerstrom does not dispute that "financial support" under RCW 4.20.020 need not be monetary but may be in the form of services for which an economic value can be determined. *See Armantrout v. Carlson*, 166 Wn.2d 931, 941, 214 P.3d 914 (2009). N.A. Degerstrom's claims that LaFayette "simply did not provide financial support" and that "[n]o evidence" showed Mrs. Millican was dependent on LaFayette's services are contrary to the record. *Respondent's Brief* at 48.

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[11] N.A. Degerstrom does not dispute that the estate was not required to make a futile motion for judgment as a matter of law at the close of the evidence. Although N.A. Degerstrom mentions that the estate did not make such a motion, *Respondent's Brief* at 21 n.6 (Statement of Facts), 22 (Summary of Argument), it does not argue that the estate was required to do so and does not respond to the estate's argument on this point. *See Appellants' Opening Brief* at 32-33. In addition, N.A. Degerstrom did not raise this defense in the trial court when the estate moved for judgment as a matter of law after the verdict. *See* CP 3255-68.

Only substantial dependence is required, and this does not mean the deceased must have been the parent's sole means of support or livelihood. *Armantrout*, 166 Wn.2d at 936. The Supreme Court has repeatedly rejected such a construction of the statute as being "too harsh and not in accordance with the humane purpose of the act." *Id.*, quoting *Bortle v. N. Pac. Ry.*, 60 Wash. 552, 554, 111 P. 788 (1910). Instead, the statute only requires "a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child." *Id.*, quoting *Bortle*, 60 Wash. at 554. The parent's need is determined in relation to his or her circumstances. *Id.*

In *Armantrout*, the Supreme Court held the evidence was sufficient to support a finding of substantial dependence where the plaintiff's deceased daughter decedent had provided reading and driving services for her blind mother and assisted with medical needs. 66 Wn.2d at 934, 940. The court concluded the jury was entitled to find that, "in the context of their financial situation, the Armantrouts were substantially dependent on [their adult daughter] for support and would not otherwise have been able to pay for the services provided." *Id.*

Here, Mrs. Millican presented evidence that she was unable to perform basic household chores and maintenance due to physical limitations following a pulmonary embolism. CP 798-99, 874, 905-08. Her son, Daren LaFayette, regularly provided home improvement, construction, landscaping, and maintenance services at her remote residence without compensation. *See* CP 801-03, 815-16, 854-75. A

contractor opined that the services LaFayette provided in the two years preceding his death would have cost nearly $14,000. CP 897-903. These services were expected to continue, as LaFayette had specific plans for additional work that would have been worth $60,000. *Id.* In addition, LaFayette did various chores around the house, such as cleaning and shoveling snow. CP 831, 875. Mrs. Millican testified that she and her husband were unable to perform for themselves any of the work LaFayette did for them and could not afford to hire outside help. CP 800.

Mrs. Millican presented evidence sufficient to survive summary judgment. A jury could have found based on the evidence that she was substantially dependent on the services LaFayette provided. This Court should reverse the summary judgment and allow Mrs. Millican to pursue her claim on remand.

## III. CONCLUSION

This Court should reverse and remand with directions to reinstate Mrs. Millican as a plaintiff personally, enter judgment as a matter of law on breach of duty and proximate cause, and hold a new trial limited to the issue of damages.

Respectfully submitted this 21st day of November, 2012.

FELICE LAW OFFICES, P.S.

By 
for Roger A. Felice,
WSBA No. 5125

By 
for Michael V. Felice,
WSBA No. 34952
505 W. Riverside Ave, Suite 210
Spokane, Washington 99201-0518
(509) 326-0510

CARNEY BADLEY SPELLMAN, P.S.

By 
Jason W. Anderson,
WSBA No. 30512
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Appellants