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SUPREME COURT OF THE STATE OF WASHINGTON

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JENNIFER B. DONNELLY, as Guardian for MARSHALL S. DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER, as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child,

Petitioners,

v.

HDR ARCHITECTURE, INC., TURNER CONSTRUCTION COMPANY, a foreign corporation, NOISE CONTROL OF WASHINGTON, INC., a Washington corporation; "JANE and JOHN DOES, 1 – 20",

Respondents.

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# RESPONDENTS' JOINT ANSWER TO PETITION FOR REVIEW

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Mary H. Spillane, WSBA #11981
FAIN ANDERSON VANDERHOEF ROSENDAHL O'HALLORAN SPILLANE, PLLC
701 Fifth Avenue, Suite 4650
Seattle, WA 98104
(206) 749-0094
Attorneys for Respondent HDR Architecture, Inc.

Terence J. Scanlan, WSBA #19498
Lindsey M. Pflugrath, WSBA #36964
SKELLENGER BENDER, P.S.
1301 5th Ave, Suite 3401
Seattle, WA 98101-2630
(206) 623-6501
Attorneys for Respondent HDR Architecture, Inc.

Philip R. Meade, WSBA #14671
David Cottnair, WSBA #28206
MERRICK HOFSTEDT & LINDSEY PS
3101 Western Ave., Suite 200
Seattle, WA 98121-1024
(206) 682-0610
Attorneys for Respondent Noise Control of Washington, Inc.

Pam Okano, WSBA #7718
John Rankin, Jr., WSBA#6357
REED MCCLURE
1215 4th Ave., Suite 1700
Seattle, WA 98161-1087
(206) 292-4900
Attorneys for Respondent Turner Construction Company

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## I. IDENTITY OF RESPONDING PARTIES

Respondents HDR Architecture, Inc. (HDR), Turner Construction Company (Turner), and Noise Control of Washington, Inc. (Noise Control), jointly submit this Answer to Petition for Review.

## II. COURT OF APPEALS DECISION

On August 8, 2016, Division I issued its unpublished decision in this negligence case arising out of a construction project, affirming the judgment on unanimous jury verdict finding none of the defendants negligent, and concluding, among other things, that the trial court did not err in instructing the jury that it "may not consider whether the contract was breached in considering whether the defendants were negligent." On September 16, 2016, Division I denied petitioners' motion to publish.

## III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that Instruction 14, which told the jury that there were no breach of contract claims and that it "may not consider whether the contract was breached in considering whether the defendants were negligent," did not misstate the law?

2. Did the Court of Appeals correctly hold that the instructions to the jury, considered as a whole, correctly stated the law, were not misleading, and allowed the Donnellys to argue their theory of the case?

3. Did the Court of Appeals correctly conclude that the ration-

ale of *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007), was focused on negligent work in the design and physical construction of improvements to real property, and that its reference to "work" was not so expansive as to include each and every aspect of a contractor's duties under its contract with an owner, such as an alleged failure to fulfill an administrative obligation to include warranty information in a post-project manual?

## IV. COUNTERSTATEMENT OF THE CASE

### A. Nature of the Case and the Appeal.

Jennifer Donnelly, individually and as Guardian for her husband Marshall Donnelly, and Keith Kessler, as Guardian ad Litem for L.G.D., a minor ("the Donnellys"), brought this negligence action against architect HDR, general contractor Turner, and subcontractor Noise Control[1] for injuries Mr. Donnelly sustained as a journeyman electrician at Walla Walla State Penitentiary when he climbed onto, tried to traverse, and fell through a suspended metal security ceiling and landed on the concrete floor ten feet below. CP 1-11, 37-49, 113-27. Noise Control had installed the ceiling a couple of years earlier as part of a facilities expansion construction project awarded to the joint venture, HDR/Turner, to design and build according to Washington State Penitentiary ("WSP")

[1] The Donnellys also sued, but settled before trial with, Environmental Interiors, the ceiling manufacturer. CP 1-11, 37-49, 113-27, 11931-32.

specifications.[2] 10/6 RP 2384; Op. at 3; Pet. at 3.

It is undisputed that (1) HDR/Turner designed and built the Project entirely according to WSP specifications; (2) the specifications did not require that metal security ceilings be walkable or capable of supporting a person's weight; and (3) WSP did not disclose any expectation that its personnel would walk on the ceilings.[3]

At trial, the Donnellys did not claim that HDR, Turner, or Noise Control was negligent in failing to design or construct security ceilings that were walkable.[4] *See* CP 8897. Rather, relying upon a portion of WSP's Request for Proposal (RFP) advising bidders that, if selected, they would need to prepare at project closeout Operations and Maintenance Manuals (O&M Manuals) that included information relating to warranties, Ex. 44 at p. 6, the Donnellys claimed that HDR/Turner and Noise Control negligently failed to notify WSP that walking on the ceiling would void all warranties. *See* CP 8897-98; *Pet. at 3.*

The jury unanimously found none of the defendants negligent. CP 8885. The Donnellys appealed, claiming, among other things, that the

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[2] WSP and the Department of Corrections are collectively referred to as WSP.

[3] 9/18 RP 552-53; 9/23 RP 839, 844-45, 870-71, 881-82, 893-95. 10/2 RP 2071-72; 10/6 RP 2424-27, 2439-40, 2448, 2450, 10/7 RP 2612.

[4] The Donnellys did not appeal the trial court's ruling, CP 4793-96, that HDR met the standard of care and was not negligent in its design of the project, nor did they raise any issue on appeal as to the jury's finding of no negligence, with regard to their claim, CP 8897, that Noise Control negligently installed the ceiling.

trial court erred in giving Instruction No. 14, CP 8905, which told the jury:

> You have heard testimony about the language in the contract relating to maintenance and warranty information. You are instructed that there are no breach of contract claims against the defendants in this case, and you may not consider whether the contract was breached in considering whether the defendants were negligent. This evidence may be considered on the issue of causation.

The Court of Appeals found no error in giving the instruction. The Donnellys seek review of that decision and the court's discussion of *Davis v. Baugh Industrial Contractors, Inc.*, that the Donnellys principally relied upon for their negligence theory.

B. Factual Background.

In 2004, WSP sought to expand Walla Walla prison facilities, and chose a "design-build" procurement and delivery method, where the designer and contractor together bid on the project.[5] WSP created an RFP, Ex. 204, with detailed specifications, hundreds of pages in length, for bidders to use in preparing bids. 9/18 RP 549; 9/23 RP 844, 895-97. HDR and Turner as a joint venture (HDR/Turner) bid on the project and was awarded the job. 9/18 RP 533-34, 549; 9/23 RP 844; 10/6 RP 2427-28. HDR/Turner and WSP then worked to refine the specifications for various elements of the buildings and those refined specifications became the final contract document – the "Issued for Construction" specifications, Ex. 240;

[5] 9/16 RP 75; 9/18 RP 532-34, 576; 9/23 RP 837-38; 9/24 RP 1235-36; 10/6 RP 2427-28.

9/18 RP 549-50; 9/25 RP 1445-46. It is undisputed that HDR/Turner designed and built the project according to WSP's specifications. 9/18 RP 552; 9/23 RP 844, 871, 882, 894.

Mandatory security features were specified in the project's design, including for the building where the accident occurred, which was to house some of the most violent offenders. 9/18 RP 427-28, 534-36; 9/23 RP 838; Ex. 204 at H0159-H0166. While inmate cells were constructed of concrete prefabricated shells, other areas (where inmates would not be left unattended) were constructed with concrete floors, cinder block walls, and a suspended ceiling hung below a concrete lid that formed the floor of the next higher level. 9/23 RP 864-65, 891-94. Within the 16-foot vertical space of the hallway where the accident occurred, project specifications called for a suspended metal security ceiling 10 feet above the floor to seal off the "plenum" – the space between the suspended ceiling and the concrete lid above – where plumbing, electrical and HVAC systems could be safely located without any weight load on the suspended ceiling. 9/23 RP 839-41, 892-93, 957-58; 10/6 RP 2465.

"Lockdown" was the metal security ceiling product selected for the hallway. 9/23 RP 844-45; CP 115. It is undisputed that the Lockdown ceiling system selection was proper and consistent with WSP's requirements. 9/18 RP 552-53; 9/23 RP 844-46, 870-71, 881-82.

Lockdown is a panel system similar to acoustical tile ceilings found in many offices. 9/22 RP 620. It consists of a two-foot by two-foot pattern grid, suspended by steel wires hung from the roof deck above, into which two-foot by two-foot metal panels fit. 9/22 RP 633, 635-36. The panels lock in place once installed. 9/22 RP 621, 626. The Lockdown ceiling is intended to resist someone trying to gain access from below, so that inmates could not escape through the ceiling or hide contraband in the plenum. 9/22 RP 618, 621, 635-56.

Another heavier-duty type of suspended metal ceiling product, "Celline," was used in some areas of the project where inmates would not be attended. 9/22 RP 641; 9/23 RP 864-67, 891-94; 9/30 RP 1751. Use of the Celline ceiling also was proper and consistent with WSP specifications. 9/22 RP 618; 9/23 RP 870, 881.

The Lockdown ceiling allows access to the plenum through removable panels installed in locations WSP directed near fixtures in the plenum requiring regular maintenance. 9/22 RP 670-71; 9/30 RP 1690-91; 10/6 RP 2476. If access to other parts of the plenum was needed, it was to be obtained by disassembling a portion of the ceiling. 9/22 RP 626-27, 639-40; 10/6 RP 2464-66.

It is undisputed that none of WSP's specifications for the project provided that any suspended metal security ceiling system be walkable or

capable of supporting a live load, much less that WSP expected that its personnel would walk on any suspended ceiling. 9/23 RP 839-40, 893-95.

HDR/Turner began construction in 2005 and substantially completed it in March 2008, at which time WSP began putting the buildings into service. 9/18 RP 528; 9/23 RP 866, 919; Ex.3; CP 40.

Before the first metal security ceilings were installed, an unidentified subcontractor asked Turner about sequencing of its work to install some electrical, plumbing, or HVAC systems in relation to installation of some of the Celline ceilings. 9/30 RP 1750-51. No such inquiry was made about the Lockdown ceilings. The subcontractor asked whether it was required to complete its work in the plenum before the ceiling was installed, or whether its tradespersons could wait until after the ceiling was installed and walk on it to complete their work. 9/22 RP 663-64, 670; 10/7 RP 2516-18, 2559-61. Turner asked Noise Control, who asked Environmental Interiors, the ceiling manufacturer. 9/22 RP 653-54; 10/7 RP 2520; *see* Ex. 38; CP 236-37. In a May 2006 letter, Noise Control told Turner that Environmental Interiors had said that walking on the ceiling would "void all warranties." Ex. 38; CP 236-37; 9/22 RP 653-54; 10/7 RP 2562-63. It is undisputed that HDR did not receive that letter, 10/6 RP 2437, and that it was not provided to WSP, 9/22 RP 654-55; 10/7 RP 2521, 2541, 2575.

HDR/Turner was contractually required to provide WSP with an O&M Manual at project close-out. *See* Ex. 44 at p. 006; Ex. 240 at pp. H2799-803. O&M Manuals typically contain manufacturer-provided information on materials, products, and systems featured in a project. 9/22 RP 680-82. The O&M Manuals delivered to WSP were assembled toward the end of 2007 and consisted of several binders, each several inches thick, containing thousands of pages of information, including product information subcontractors supplied to Turner and contact information for the various suppliers and contractors, should WSP need to contact them about a particular item.[6] For the metal security ceilings, Noise Control sent Turner the metal security ceiling brochures it had received from Environmental Interiors to include in the O&M Manuals. None of the product literature said anything about whether the ceilings were walkable. 9/22 RP 630, 640-41; 10/6 RP 2603-05; Ex. 5.

The May 2006 letter from Noise Control about the subcontractor's inquiry about sequencing of work was not included in the O&M Manuals delivered to WSP. 9/22 RP 650, 653-55; 10/7 RP 2541, 2575. It was heavily disputed whether that letter should have been included. *E.g.*, 9/25 RP 1386; 10/2 RP 2086-88, 2103; 10/7 RP 2541.

Some 18 months after the project was completed and WSP put the

[6] 9/22 RP 647-48, 680-82, 686-88; 9/23 RP 1019; 10/2 RP 2076-77, 2086-87.; 10/7 RP 2540-41; Ex. 5.

buildings into service, Mr. Donnelly and another journeyman electrician, Justin Griffith, were assigned to run electrical conduit through the building, including through the plenum above the hallway, for installation of a new X-ray machine. 9/18 RP 419, 427-30; 9/23 RP 921-24, 959-61. Notwithstanding WSP rules, 9/18 RP 514; 9/23 RP 886-87, 909-10, neither Mr. Donnelly nor Mr. Griffith, nor their supervisor, prepared a Job Safety Analysis (JSA) to determine how the work could be performed safely. No tradesperson or supervisor apparently discussed or otherwise evaluated whether climbing through an access panel and walking on a suspended ceiling was a safe practice.[7] 9/18 RP 424, 487, 505-08, 514, 9/23 RP 922-25, 950-52, 959, 963-65, 970.

Nevertheless, Mr. Donnelly, wearing only a headlamp for illumination, climbed a ladder in the hallway, opened an access panel to the Lockdown ceiling, and climbed into the plenum, carrying a 25-pound roto-hammer, and trailing the cord behind him as he weaved his way across the suspended ceiling until he fell through the ceiling to the concrete floor below. 9/18 RP 463-65, 467, 489, 493; CP 3 at ¶2.6.

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[7] The plenum space above the ceiling is pitch black, "so dark, you can't even see your hand in front of you," much less your feet. 9/18 RP 464-65, 493-96. To traverse it, one would have to grab one "pole" (compression strut that prevents the ceiling from being pushed upward, but having nothing to do with the ceiling's suspension), wire, pipe, or I-beam and shuffle his feet along the runners, and then grab another, switching hands as needed to keep a minimum of three-point contact. 9/18 RP 459, 495-97, 510-11, 514-15, 526-27; 9/22 RP 635-36. If carrying something like a drill, one would need to set the drill against something before grabbing the next "pole", and then after grabbing the next "pole", move the drill again, set it against something else and repeat the process. *Id.*

C. Procedural Background.

The Donnellys' primary theory was that defendants were obligated to include the May 2006 letter in the O&M Manuals, because of a provision in the RFP concerning "Warranties and Bonds" that indicated that the Manuals were to include "copies of warranties and bonds and lists of circumstances and conditions that would affect validity of warranties or bonds." Ex. 44 at p. 006. They claimed that the failure to do so was negligent and a proximate cause of Mr. Donnelly's injuries. *See* CP 8897.

What the Donnellys ignored, however, was that the final Issued for Construction specifications required Turner to provide only "maintenance" information, not "warranty" information with respect to the metal security ceilings, unlike other elements of the buildings, like the roof, where the final Issued for Construction specifications required that "warranty" information be furnished. *See* Ex. 240 at pp. H2799; 9/25 RP 1395-96, 1407-08, 1412, 1424-25, 1430-34, 1440-41; 10/8 RP 2792-98. They also ignored the fact that each and every prison manager, supervisor and tradesperson the Donnellys called to testify at trial admitted that they had never referred to the O&M Manuals at any time before Mr. Donnelly's accident. *See* 9/18 RP 519-20; 9/23 RP 855-56, 882-84, 980-81, 992; 9/30 RP 1687, 1705, 1707-78.[8]

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[8] The only witness who looked at the O&M Manual pre-accident, the "Clerk of the

A unanimous jury found none of the defendants negligent, CP 8885. The Court of Appeals affirmed, finding, *inter alia*, no error in instructing the jury that it "may not consider whether the contract was breached in considering whether the defendants were negligent."

## V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Donnellys seek review of the Court of Appeals' decision under RAP 13.4(b)(1), (2), and (4). Because neither the Court of Appeals' discussion of *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007), nor its conclusion that there was no error in instructing the jury that it "may not consider whether the contract was breached in considering whether the defendants were negligent," is in conflict with any decision of this Court or of the Court of Appeals, or raises any issue of substantial interest that should be determined by this Court, the Donnellys' petition for review should be denied.

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Works," Richard Howerton, admittedly performed only a cursory review and did not review the manuals in their entirety. 9/23 RP 1018-19, 1022-23. Although claiming that, if it had been included, he would have read the May 2006 letter and passed along the "void the warranty" language, 9/23 RP 1024-25, and would always notice information that could raise a safety concern or affect warranties, 9/23 RP 1022-24; 9/30 RP 1708-09, 1715, his claims were belied by other parts of the Manuals he was shown while testifying that contained specific safety admonitions that he admittedly had not noticed or brought to anyone's attention. 9/30 RP 1707, 1718-19, 1721. He also admitted that he was not aware of prison staff sometimes walking on older ceilings in other parts of the prison and thus would not have known this was even a potential safety issue when he made his cursory review of the O&M Manuals. 9/30 RP 1714-15.

A. The Court of Appeals' Discussion of *Davis* Does Not Conflict with Any Decision of this Court or of the Court of Appeals and Does Not Raise an Issue of Substantial Public Interest.

As the Court of Appeals correctly noted, *Op. at* 7, the Donnellys relied heavily on *Davis* for their negligence theory that Turner was obligated to include a copy of the May 2006 letter in the manuals because the RFP specifications required that any information affecting a product warranty be included in the O&M Manuals,. The Court of Appeals correctly observed that *Davis* rejected the completion and acceptance doctrine and held that "a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable [that] a third person would be injured due to that negligence." *Op. at 8* (quoting *Davis*, 159 Wn.2d at 417).

The Donnellys argued that the negligent "work" referred to in *Davis* was not limited to negligence in the design and physical construction of improvements to real property, but included the "'work' to be performed [as] spelled out in the Contract documents,'" which included "providing information to the WSP about the building in the [O&M manuals],'" including copies of warranties and lists of circumstances and conditions that could affect the validity of those warnings. *Op. at 8* (quoting App. Br. at 27-28). So, the Court of Appeals looked to *Davis*'s

rationale for abandoning the completion and acceptance doctrine, and correctly recognized that:

> The *Davis* court's focus was on negligent work relating to latent construction defects and hazards that property owners would not be able to identify. The decision is restricted to the physical limitations on a landowner's ability to meaningfully inspect modern-day constructed facilities.

*Op. at 9.* In reaching that conclusion, the Court of Appeals quoted directly from *Davis*, where this Court explained:

> Today ... [w]iring, plumbing, and other mechanical components are increasingly concealed in conduits or buried under the earth. In short, construction has become highly scientific and complex. Landowners increasingly hire contractors for their expertise and ***a nonexpert landowner is often incapable of recognizing substandard performance.***

*Op. at 9* (quoting *Davis*, 159 Wn. 2d at 419, with emphasis added). The Court of Appeals further quoted from *Davis*, where this Court reasoned: that "[b]y insulating contractors from liability, the completion and acceptance doctrine increases the public's exposure to injuries caused by ***negligent design and construction*** of improvements to real property and undermines the deterrent effect of tort law." *Op. at 9* (quoting *Davis*, 159 Wn.2d 419-20, with emphasis added). Thus, the Court of Appeals correctly concluded, *Op. at 9*, that:

> Contrary to Donnelly's assertions, the *Davis* court's reference to "work" was not so expansive as to include each and every aspect of a contractor's duties under its contract with an owner. An alleged failure to fulfill an administrative contractual obligation to include warranty

information in an O&M Manual is not negligent work under *Davis* as though akin to a latent physical defect.

Indeed, *Davis* says nothing about a contractor's duties under its contract with an owner. *Davis* nowhere states that breach of an administrative, aesthetic, environmental, scheduling, or politically expedient provision in a construction contract gives rise to tort liability. Nothing in *Davis* refers to allegedly negligent work other than that related to design and physical construction, use of physical materials, and modern realities that an owner may not be able to detect latent defects and hazards resulting from negligent design and construction.

What the Court of Appeals said about *Davis* came from *Davis* itself. Contrary to the Donnellys' assertions, *Pet. at 6, 8, 9*, nothing the Court of Appeals said about *Davis* narrows or is in conflict with *Davis* or conflicts with *Jackson v. City of Seattle*, 158 Wn. App. 647, 244 P.3d 425 (2010), a case involving a latent hazard created by the manner in which a contractor had installed a water line on a steep slope. As with *Davis*, nothing in *Jackson* talks about a contractor's alleged failure to fulfill an administrative contractual obligation that had nothing to do with the design and physical construction of the project.

Ultimately, the Donnellys' assertion of a conflict rests on erroneous claims that the Court of Appeals has somehow limited "a contractor's

tort liability to 'latent physical defects,'"[9] *Pet. at 8, n.1*, or limited "the liability of contractors for their negligence in failing to disclose an unsafe condition," *Pet at 9.* But that is not what the Court of Appeals did. Nowhere in its decision does the Court of Appeals state that a contractor's tort liability is limited to "latent physical defects" or that a contractor cannot be liable for negligence in failing to disclose an unsafe condition.

Indeed, in holding that "Instruction 14 is consistent with *Davis* and therefore, is not a misstatement of the law," *Op. at 13*, the Court of Appeals recognized that the jury was instructed (1) in accordance with *Davis* that: "[a] defendant is liable for negligent acts or failures to act in its work on th[e] Project at the WSP if it was reasonably foreseeable that a third person would be injured as a result of that negligence" and that "[t]he acceptance of the completed Project by the State of Washington is not a defense," *Op. at 12 (quoting CP 8901)*; and (2) that the Donnellys were

[9] Citing RP 455, which does not so state, the Donnellys erroneously claim, *Pet. at 2*, that the WSP was unaware that the metal security ceiling "was not designed to hold the weight of a person and was a latent hazard." They further erroneously claim, *Pet. at 7-8*, that "WSP, did not and could not know that it was unsafe to allow its employees to walk on the heavy-duty, metal 'Lockdown' security ceilings ..." and that "WSP had no other means of becoming aware of the latent hazard created by this security ceiling without being informed by the general contractor who selected the product, defendant HDR/Turner." First, the selection and installation of the security ceiling, which was done in accordance with WSP specifications, did not create a latent hazard. Second, WSP knew that its specifications for the project did not call for walkable ceilings. If the WSP wanted or intended the ceilings to be walkable, it could have so specified in the RFP. Third, WSP was not even aware that its employees had been walking on ceilings and did not give them any approval to do so. Fourth, WSP had in place safety program requirements that Mr. Donnelly, Mr. Griffith, and their supervisor ignored, but that, if followed, would have resulted in a JSA evaluation before Mr. Donnelly attempted to climb onto and traverse the ceiling without having assessed the safety of doing so.

claiming that defendants were negligent "[f]or failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operation and Maintenance Manual," *Op. at 11-12 (quoting CP 8897).* Thus, when the Court of Appeals held that "Instruction No. 14 is consistent with *Davis* and therefore, is not a misstatement of the law," it applied the clear and unambiguous language of *Davis* rejecting the completion and acceptance doctrine and adopting a negligence standard of liability.

The Court of Appeals' discussion of *Davis* is not in conflict with *Davis* or *Jackson*. Nothing in the Court of Appeals' decision changes what this Court has already held in *Davis* – that the completion and acceptance doctrine is no longer the law in Washington and that a negligence standard of liability applies. Nor does the Court of Appeals discussion of *Davis* raise an issue of substantial public interest. Ultimately, the Court of Appeals' discussion of *Davis* in its unpublished decision is not even integral to its holding – that Instruction 14 did not misstate the law and allowed the Donnellys to fully argue their theory of negligence. The trial court did not limit the jury's consideration of the alleged negligence to design or construction of physical features. Nor did the Court of Appeals hold that the trial court should have so limited the Donnellys' negligence claim. Contrary to the Donnellys' assertion, *Pet. at*

*10*, the Court of Appeals' decision does not in any way suggest that tort law does not "provide a remedy" in negligence "to those injured by foreseeable risks arising from the construction of real property."

B. The Court of Appeals' Affirmance of Instruction 14 Also Does Not Conflict with Any Washington Appellate Decision and Does Not Raise Any Issue of Substantial Public Interest.

The Donnellys assert, *Pet. at 13-14*, that the Court of Appeals' affirmance of Instruction 14, somehow conflicts with this Court's decisions indicating that a jury may consider contract terms as evidence of what a reasonably prudent contractor would do and "presents an issue that will arise again and again ...." But, none of the cases the Donnellys cited below, as the Court of Appeals correctly observed, stand for the proposition the Donnellys tried to advance that:

> [I]n a negligence case grounded in contract provisions, one is entitled to argue breach of contract; not merely that the contract provisions apply and the defendant failed to comply with the provisions, but that the breach of contract was a violation of the applicable negligence standard of ordinary care causing foreseeable injury to a third party.

*Op. at 11* (citing App. Reply Br. at 1, 14-17). Nor do any of the cases cited in the Donnellys' Petition (whether of this Court, the Court of Appeals, or other jurisdictions) stand for such a proposition.[10]

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[10] The Donnellys cite this Court's decisions in *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 334, 582 P.2d 500 (1978), *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 92, 312 P.3d 620 (2013), *Pet at 12*, the Court of Appeals decision in *Caulfield v. Kitsap County*, 108 Wn. App. 242, 257, 29 P.3d 738 (2001), *Pet. at 13*, and a

Neither the trial court nor the Court of Appeals has suggested that contract provisions are not admissible in a negligence case as evidence of the applicable standard of care. What both courts have indicated, and quite correctly so, is that the mere fact that a contract provision was supposedly breached does not establish negligence. Personal injury claims must be decided under tort standards, not by deciding breach of contract issues. *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 402, 241 P.3d 1256 (2010) ("An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract"). Personal injury is traditionally compensable in tort, not breach of contract, *Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864 (2007), and tort liability must arise from a duty independent of contract, *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 797 P.2d 477 (1990). Indeed, notwithstanding the Donnellys' current arguments, the Donnellys' counsel in the trial court acknowledged that "just because there is violation of contract ... language does not prove negligence," and agreed that he could not argue to the jury that there was a breach of contract and "therefore, that is negligence." RP 2852-53

The Donnellys assert, *Pet at 11-12*, that, by giving Instruction 14, the trial court "told the jury that it could not look at the most important, if

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**number of decisions from other jurisdictions, *Pet. at 13 n.4*, for the proposition that a jury may consider contract terms as evidence of what a reasonable contractor would do.**

not *only* point of reference, to determine whether the defendants breached the tort duty of reasonable care in performing their work." But the trial court did no such thing. In fact, as the Court of Appeals correctly notes, *Op. at 13* (citing 10/8 RP 2803, 2917), the trial court told the Donnellys' counsel he could "certainly argue to the jury … that the May 23rd letter ought to have been included," and that he could "put the [contract] standards up there and talk about this is what they were supposed to do under the contract, but [couldn't] argue that that – the breach provides a basis for determining liability." In closing, the Donnellys' counsel did exactly what the trial court told him he could do – he put the contract standards up and argued that that was what defendants were supposed to do. *See Op at 14-16* (citing 10/9 RP 2971, 2974-75, 2985, 2995-96, 3028, 3117-18).

As the Court of Appeals correctly observed, *Op. at 11-13*, the jury instructions, read as a whole, correctly stated the law and allowed the Donnellys to argue their theory of the case. Instruction No. 7, CP 8897, unequivocally explained their claim that the defendants were negligent "[f]or failing to include the letter of May 23, 2006, or a list of circumstances and conditions that would affect the validity of the warranties, in the Operation and Maintenance Manual." Instruction No. 10, CP 8901, borrowing language from *Davis*, told the jury that:

> A defendant is liable for negligent acts or failures to act in its work on the Project at the WSP if it was reasonably foreseeable that a third person would be injured as a result of that negligence.
>
> * * *
>
> The acceptance of the completed Project by the State of Washington is not a defense.

Instruction No. 12, CP 8903, defined "negligence" consistent with WPI 10.01. And, as the Court of Appeals correctly observed, *Op. at 16*:

> Nothing in the instructions as a whole told the jury they could not consider the contract language as a factor in determining negligence. Indeed, Instruction 1 told the jury "In order to decide whether any party's claim has been proved, you must consider all of the evidence I've admitted that relates to that claim."

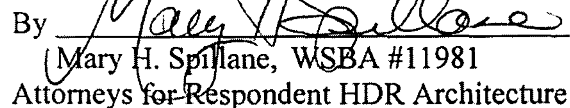
Because the Court of Appeals' affirmance of Instruction 14 does not conflict with any Washington appellate decision or raise any issue of substantial public interest, the Petition for Review should be denied.

## VI. CONCLUSION

For all these reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 11th day of November, 2016, and signed with email approval of all respondents' counsel.

FAIN ANDERSON VANDERHOEF ROSENDAHL
O'HALLORAN SPILLANE, PLLC

By 
Mary H. Spillane, WSBA #11981
Attorneys for Respondent HDR Architecture

## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 11th day of November, 2016, I caused a true and correct copy of the foregoing document, "Respondents' Joint Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:


Counsel for Petitioners:
Todd W. Gardner, WSBA #11034
Peter E. Meyers, WSBA #23438
SWANSON GARDNER, PLLC
4512 Talbot Rd S
Renton, WA 98055-6216
Ph: (425) 226-7920
Fx: (425) 226-5168
Email: todd@swansongardner.com
peter@swansongardner.com


SENT VIA:
- ☐ Fax
- ☐ ABC Legal Services
- ☐ Express Mail
- ☑ Regular U.S. Mail
- ☑ E-file / E-mail


Counsel for Petitioners:
Howard M. Goodfriend, WSBA #14355
Catherine W. Smith, WSBA #09542
SMITH GOODFRIEND PS
1619 8th Ave N
Seattle WA 98109-3007
Ph: (206) 624-0974
Fx: (206) 624-0809
Email: howard@washingtonappeals.com
cate@washingtonappeals.com

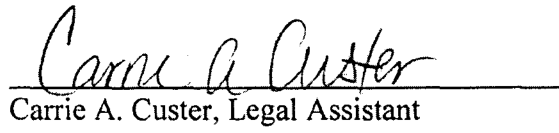

SENT VIA:
- ☐ Fax
- ☐ ABC Legal Services
- ☐ Express Mail
- ☑ Regular U.S. Mail
- ☑ E-file / E-mail

| Counsel for Respondent Turner Construction Company: | SENT VIA: |
|---|---|
| Pamela A. Okano, WSBA #7718<br>John W. Rankin, Jr., WSBA #06357<br>REED MCCLURE<br>1215 4th Ave, Suite 1700<br>Seattle, WA 98161-1087<br>Ph: (206) 386-7002<br>Fx: (206) 223-0152<br>Email: pokano@rmlaw.com<br>jrankin@rmlaw.com | ☐ Fax<br>☐ ABC Legal Services<br>☐ Express Mail<br>☑ Regular U.S. Mail<br>☑ E-file / E-mail |

| Counsel for Respondent Noise Control of Washington: | SENT VIA: |
|---|---|
| Philip R. Meade, WSBA #14671<br>David S. Cottnair, WSBA #28206<br>Rossi F. Maddalena, WSBA #39351<br>MERRICK HOFSTEDT & LINDSEY PS<br>3101 Western Ave Suite 200<br>Seattle, WA 98121-3017<br>Ph: (206) 467-2649<br>Fx: (206) 467-2689<br>Email: pmeade@mhlseattle.com<br>dcottnair@mhlseattle.com<br>rmaddalena@mhlseattle.com | ☐ Fax<br>☐ ABC Legal Services<br>☐ Express Mail<br>☑ Regular U.S. Mail<br>☑ E-file / E-mail |

| Co-counsel for Respondent HDR Architecture, Inc.: | SENT VIA: |
|---|---|
| Terence J. Scanlan, WSBA #19498<br>Lindsey M. Pflugrath, WSBA #36964<br>SKELLENGER BENDER, P.S.<br>1301 5th Ave Ste 3401<br>Seattle, WA 98101-2630<br>Ph: (206) 623-6501<br>Fx: (206) 447-1973<br>Email: tscanlan@skellengerbender.com<br>lplugragth@skellengerbender.com | ☐ Fax<br>☐ ABC Legal Services<br>☐ Express Mail<br>☑ Regular U.S. Mail<br>☑ E-file / E-mail |

DATED this 11th day of November, 2016, at Seattle, Washington.



Carrie A. Custer, Legal Assistant