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NO. 72824-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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,

Appellants/Cross-Respondents,

vs.

HDR ARCHITECTURE, INC., a foreign corporation; TURNER CONSTRUCTION COMPANY, a foreign corporation; NOISE CONTROL OF WASHINGTON, INC., a Washington corporation,

Respondents/Cross-Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Douglass A. North, Judge

REPLY BRIEF OF CROSS-APPELLANT TURNER

REED McCLURE
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I. ARGUMENT[1]

If this Court agrees that the judgment based on the jury's defense verdict should be affirmed, there is no reason to decide this cross-appeal. The issue on cross-appeal is relevant only if this Court reverses and remands for a new trial.

As will be discussed, plaintiff's cross-respondent's brief barely bothers to answer the arguments set forth in cross-appellant Turner's brief. Rather, plaintiff seeks to turn this Court's attention from the real issues in the cross-appeal.

A. PLAINTIFF'S PROCEDURAL ARGUMENTS ARE MERITLESS.

1. Failure To Assign Error Does Not Preclude Review on the Merits in This Case.

First, plaintiff argues that there should be no review of the cross-appeal because Turner did not assign error to the summary judgment dismissing Environmental Interiors, the directed verdict removing EI as an empty chair to be listed on the special verdict form, and the alleged trial

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[1] Plaintiff has yet again used subnumbers to cite to the clerk's papers. *See, e.g.,* Appellants' Reply on Appeal and Response to Turner Cross-Appeal 41 & n.21.. In its respondent's brief, Turner pointed out that plaintiff had done this in its opening brief in violation of RAP 10.4(f). Brief of Respondent/Cross-Appellant Turner 4 n.2. Having been given this notice, plaintiff had no excuse for repeating this mistake in his reply and cross-respondent's brief. This court should not only decline to review, *Keiffer v. City of Seattle Civil Serv. Comm'n,* 87 Wn. App. 170, 172 n.1, 940 P.2d 704 (1997), *rev. denied,* 135 Wn.2d 1008, *cert. denied,* 525 U.S. 970 (1998), it should consider imposing sanctions on plaintiff's attorney.

court "finding" there was no evidence to support listing EI as an entity to which fault could be allocated on the verdict form. But this does not preclude review of the cross-appeal.

First, RAP 1.2(a) provides, "[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands." The Washington Supreme Court has explained how this rule should be applied:

> In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). This approach applies in civil cases as well. *Crosby v. County of Spokane,* 137 Wn.2d 296, 303-04, 971 P.2d 32 (1999); *see SentinelC3, Inc. v. Hunt,* 181 Wn.2d 127, 318 n. 4, 331 P.3d 40 (2014).

Here, the nature of the cross-appeal was clear: Turner argued the issue in the body of its cross-appeal brief and supplied citations to authority. Brief of Respondent/Cross-Appellant Turner 47-52. Moreover, plaintiff has not claimed he was prejudiced. There is no compelling reason for this Court not to exercise its discretion to consider the merits of the cross-appeal.

Further, the alleged finding of fact in the directed verdict was an oral statement by the trial court (RP 2767-68), not a formal finding. Even if it had been a formal finding, the result would be the same because findings of fact are completely unnecessary on a directed verdict. *DeHaven v. Gant,* 42 Wn. App. 666, 673-74, 713 P.2d 149, *rev. denied,* 195 Wn.2d 1015 (1986). This is because findings of fact are unnecessary and improper where the trial court does not weigh the evidence. *Robertson v. Club Ephrata,* 48 Wn.2d 285, 289, 293 P.2d 752 (1956). In determining whether to direct a verdict (*i.e.,* enter judgment as a matter of law), the trial court must not weigh the evidence. *Jones v. Chicago, M. & St. P. Ry. Co.,* 102 Wash. 120, 121-22, 172 P. 810 (1918). Therefore, the failure to assign error to the so-called finding does not make it a verity on appeal. *See DeHaven,* 42 Wn. App. at 673-74.

Plaintiff's argument about noncompliance with the appellate rules is thus without merit. This Court should decide the cross-appeal on the merits if it reverses and remands this case for trial.

2. Turner's Not Identifying Environmental Interiors in Its Affirmative Defenses Does Not Waive the Empty Chair Issue.

Next plaintiff contends that Turner's not identifying Environmental Interiors in its affirmative defenses as a nonparty to which

fault could be assigned waives the empty chair issue. Plaintiff is again wrong.

The failure to plead an affirmative defense need not be fatal. As the Washington Supreme Court has explained:

> It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless.

Mahoney v. Tingley, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975); *see also Estate of Becker v. Forward Technology Indus., Inc.,* ___ Wn. App. ___, ___, ___ P.3d ___ (2015), 2015 WL 9461623, at *6 (Dec. 28, 2015).

Plaintiff does not claim the failure to plead that fault should be allocated to Environmental Interiors affected a substantial right or otherwise prejudiced it. Indeed, it could not have. Plaintiff was the party who initially sued Environmental Interiors, which was dismissed only after plaintiff reached a settlement with it. (CP 1-11, 5679, 7458-59, 11931-32) Moreover, both respondents/defendants HDR and Noise Control expressly pleaded they were entitled to allocate fault to parties and non-parties. (CP 160, 181) Thus, plaintiff could not have been surprised Environmental Interiors might have some fault that one or more defendants would seek to allocate to it.

Under these circumstances, the cross-appeal should be determined on the merits if this Court should reach it.

B. A JURY COULD HAVE ALLOCATED FAULT TO ENVIRONMENTAL INTERIORS.

Plaintiff does not dispute that Environmental Interiors was an "entit[y] released by the claimant" whose fault "shall be determined" within the meaning of RCW 4.22.070(1). Instead, plaintiff claims that "no defendant presented any evidence of EI liability under the WPLA." (Appellants' Reply on Appeal and Response to Turner Cross-Appeal 46).

But, as explained at page 48 of Brief of Respondent/Cross-Appellant Turner, "[e]ither the plaintiff or the defendant must present evidence of another entity's fault to invoke the statute's allocation procedure." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993). Thus under *Adcox,* any evidence of Environmental Interior's fault, regardless of which party introduced it, is sufficient. Plaintiff has failed to submit any legal authority to the contrary.

As Turner's opening brief explained, a jury could allocate fault to Environmental Interiors under RCW 7.72.030(1)(b), which provides:

> A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate

> and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

Plaintiff does not dispute the law set forth in Turner's cross-appeal brief that—

- liability under the above section is based on strict liability, *Ayers v. Johnson & Johnson Baby Prods. Co.,* 117 Wn.2d 747, 752, 818 P.2d 1337 (1991);
- the party claiming violation of RCW 7.72.030(1)(b) need not prove the exact wording of an adequate warning, *Ayers,* 117 Wn.2d at 756;
- no showing of foreseeability is required, so the likelihood of the metal security ceiling causing plaintiff's harm or similar harm does not depend on what could reasonably have been anticipated under the circumstances, *id.* at 752, 764;
- the trier of fact must balance the likelihood the product would cause harm and the seriousness of that harm against the manufacturer's burden of providing an adequate warning, *id.* at 765;
- even if the likelihood of the product's causing harm is low, the liability issue should go to the jury if the seriousness of the harm is great and the manufacturer's burden to provide an adequate warning is slight, *id.*;

- rather, the likelihood of the metal security ceiling causing plaintiff's harm or similar harm must be measured by an assessment of all relevant facts, including those "available only in hindsight." *Id.* at 764.

Plaintiff has also failed to dispute that based on all relevant facts, including those available in hindsight, a jury could find that the likelihood and seriousness of the potential harm, as demonstrated by the history of DOC employees walking on security ceilings and plaintiff's own catastrophic injuries, outweighed the very slight burden on Environmental Interiors to provide an adequate warning in its product brochure. Nor has plaintiff disputed that under his very own theory of the case, the accident could have been avoided had such a warning been included in that brochure, which was included in the OMM. Plaintiff's theory of the case was that Richard Howerton, DOC clerk of the works, would have seen the warning when he went through the OMM. (9/23 RP 1022-25)

Instead, plaintiff seeks to create a red herring by arguing that Environmental Interiors had no prior knowledge of a similar accident and that therefore, allocation of fault to Environmental Interiors can be based only on a post-manufacture WPLA claim. But foreseeability is not required under RCW 7.72.030(1)(b), and the likelihood of the metal security ceiling causing plaintiff's harm or similar harm does not depend on what could reasonably have been anticipated under the circumstances.

Ayers, 117 Wn.2d at 752, 764. Plaintiff has failed to cite a single authority that Environmental Interiors' prior knowledge of similar accidents is an element of liability under RCW 7.72.030(1)(b).

Plaintiff raises another red herring by arguing that Environmental Interiors issued a warning to Noise Control, which advised Turner, and that Turner should have relayed the warning to the prison. This is nothing more than improper argument on plaintiff's appeal in chief. In any event, it is irrelevant to Turner's argument that a jury could allocate fault to Environmental Interiors by finding that Environmental Interiors should have included a warning in its product brochure.

II. CONCLUSION

This Court should not even have to decide the cross-appeal because it should affirm judgment on the jury verdict. If the cross-appeal is reached, however, plaintiff's procedural objections ignore applicable Washington law, and this Court should rule that in any new trial, the jury should be given the opportunity to allocate fault to Environmental Interiors.

DATED this 11th day of March, 2016.

REED McCLURE

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