

64032-1

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Cause No. 64032-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

WROUGHT CORPORATION, INC.

Appellant,

v.

MARIO INTERIANO,

Respondent.

**BRIEF OF APPELLANT
WROUGHT CORPORATION**

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I. SYNOPSIS OF THE MATTER ON REVIEW

This is a personal injury claim. The defendant/appellant, Wrought Corporation, Inc. (“Wrought”), was the general contractor on a residential construction project. The plaintiff/respondent, Mario Interiano, doing business as “Nelson General Contractor,” a sole proprietorship business (“Interiano”), was a subcontractor that Wrought retained to do interior trim work for the project. Mr. Interiano was injured when he fell down a shaft that was not protected by an appropriate barrier.

At the trial of Mr. Interiano’s personal injury claim, Wrought sought to admit the testimony of an unavailable witness - Interiano’s employee, Nelson Rodriguez – to establish the scope of Interiano’s work and Interiano’s control over the work area where he was injured. The trial court refused to admit the testimony.

Wrought attempted to present the testimony of its expert, Mark Lawless, to establish the standard of care and duties of Interiano to maintain a safe work area. The trial court refused to admit the testimony.

Wrought asked the trial court to instruct the jury on subcontractor Interiano’s independent duty to maintain a safe work place. The trial court refused to give the instruction.

The jury returned a verdict for Interiano of \$1.56 million.

Wrought sought a new trial, arguing that the court's exclusion of evidence and refusal to instruct the jury had denied Wrought a fair opportunity to put on its defense. The trial court declined to grant a new trial.

In this appeal, Wrought asks the Court to reverse and remand this matter for a new trial, with direction to the trial court to admit the excluded evidence and to properly instruct the jury on Interiano's independent duty of care as subcontractor for the project.

II. ASSIGNMENTS OF ERROR

Wrought assigns error to the following trial court rulings:

1. The trial court's refusal to allow Wrought to introduce the deposition testimony of Nelson Rodriguez to establish Interiano's scope of work and control over the work area on the day of his injury.
2. The trial court's refusal to allow Wrought to present the expert testimony of Mark Lawless to establish Interiano's independent duty as a subcontractor to provide a safe work place for its own employees.
3. The trial court's refusal to give Wrought's proposed instruction based upon RCW 49.17.060 regarding Interiano's duty to provide a safe workplace for its employees.
4. The trial court's denial of Wrought's motion for reconsideration, including its request for a new trial.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion by refusing to admit the deposition testimony of Nelson Rodriguez, when (a) Mr. Rodriguez declined to attend trial in response to a proper subpoena and (b) Rodriguez's testimony was vital to establish Ineriano's scope of work, control over the work area and independent duty to maintain a safe work place?

2. Did the trial court abuse its discretion by refusing admit the expert testimony of Mark Lawless to establish subcontractor Interiano's independent duty to provide a safe work place for its own employees?

3. Did the trial court err by refusing to instruct the jury that Interiano had an independent duty to keep the work area around the elevator shaft safe?

4. Did the trial court err by refusing to reconsider its earlier rulings and grant Wrought a new and fair trial?

IV. STATEMENT OF THE CASE

1. **Interiano was injured because a proper barrier had not been erected in front of the elevator shaft in his work area.**

Wrought Corporation was the general contractor on a residential construction project. Interiano, doing business as "Nelson General Contractor," was injured when he fell from the third floor on the unfinished building, down the shaft where an elevator was to be installed. (CP 4, ¶¶ 5-6.) Following the incident, the Department of Labor and Industries

determined Mr. Interiano was entitled to recover workers compensation benefits and assigned the claim to Wrought's account. (CP 189.) The Department notified Mr. Interiano that he was "a self-employed subcontractor entitled to workers' compensation through" Wrought's policy. (CP 233.)

- a. *Shawn Roten's testimony established that Interiano's scope of work included elevator trim and installation of elevator doors and that Interiano had control over the work area around the elevator shaft where his injury occurred.*

Shawn Roten of Wrought Corporation testified at trial that Wrought retained Mr. Interiano's company as a subcontractor to do trim work on the interior of the house. (VRP 5/28/09, 36:1 – 3; 61:1 – 10; 61:19 – 21.) Mr. Roten testified that the interior trim is done after the "sheetrock is all painted and they bring the doors in." (*Id.*, 61:24 – 25.) He explained that the "interior trim person will be the person that cases the windows, trims them out, installs all the doors," puts in hand rails, and installs cabinets. (*Id.*, 62:5 – 15.) Mr. Roten testified that the trim work would include trim around the elevator doors. (*Id.*, 63:3 – 23; 67:3 – 13.) He also testified that Mr. Interiano was hired to install the elevator door. (*Id.*, 67:4.)

In addition to installing the trim and doors, Mr. Interiano's work included priming and painting the walls. (VRP 6/3/09 a.m., 85:3 – 7.) Mr. Roten testified that Mr. Interiano and his crew had painted the walls around

the elevator shaft where he fell before the incident occurred. (*Id.*, 84:3 – 17; 87:2 – 11.) He testified that no one else had responsibility for painting those walls and that no one else had any responsibility for hanging doors on the third floor. (*Id.*, 85:22 – 86:3.) He further testified that, in order to paint the walls around the elevator shaft opening, the boards creating the safety barrier to the elevator shaft would have to have been pulled off and then put back up. (*Id.*, 84: 18 – 85:2.)

Mr. Roten testified that Wrought installed barriers in front of the elevator shaft on the second and third floors as the framing was being done. (VRP 5/38/09, 43:3 – 13.) Mr. Roten described the safety barrier in front of the elevator shaft on the third floor of the house as having two parallel rails across the opening and a third rail going at a diagonal between those two rails to form a Z. (*Id.*, 51:2 – 24; 52:9 – 11.)

b. Interiano was injured while working in the area around the elevator shaft.

Mario Interiano testified that, on November 17, 2005, he arrived at the job site in the morning. (VRP 6/2/09, 43:8 – 13) His employee, Nelson Rodriguez, was with him, but no one else was at the site. (*Id.*, 43: 13 – 17.) Mr. Interiano testified that he was going to be installing trim around a sliding glass door on the third floor. (*Id.*, 43:21 – 44:1.) When he arrived at the site, he started unloading his tools, including an air compressor. (*Id.*, 45: 11 – 22; 46:2 – 7.) The compressor had a 100-foot hose and he had to straighten out

the kinks in it. (*Id.*, 46: 20 – 22; 46:25 – 5.) He decided to stretch the hose out by hanging it down the elevator shaft. (*Id.*, 47:6 – 8.) He testified that he got close to the elevator shaft and dropped the hose down the shaft to untangle it. (*Id.*, 47:17 – 21.) He had squatted down a bit and, when he went to get up, he held onto one of the two-by-four boards barring the shaft opening and the board gave way. (*Id.*, 47:21 – 24; 54:15 – 18.) Mr. Interiano fell down the shaft, causing his injuries. He testified that the barrier to the shaft was in the form of an X, not a Z. (*Id.*, 47:25 – 48:3.) He also testified that he did not inspect the barrier before throwing the hose over the edge because it “appeared to be safe.” (*Id.*, 53:16 – 21.)

c. The experts agreed that the elevator shaft was not properly protected at the time Mr. Interiano fell.

Richard Gleason, Plaintiff’s expert witness regarding workplace safety, testified that, after reading deposition testimony from various witnesses, in his opinion, there were likely two-by-fours forming a barrier, but they were in an X and they were not nailed to the walls outside the elevator shaft. (VRP 5/28/09, 119:19 – 120:4.) Rather, they were on the inside of the shaft door jamb, which would allow them to be easily taken out for painting. He did not know whether any nails would have been used. (*Id.*, 120:4 – 19.) He testified that he agreed with the deposition testimony of Wrought’s workplace safety expert Mark Lawless regarding the barrier. In Mr. Gleason’s words, they “both came to the same conclusion; they [the

boards] were jammed in there but not nailed in such that it was easy to take out each time.” (*Id.*, 121:2 – 5.)

Mr. Lawless testified at trial that he believed Mr. Interiano’s description of the barricade as an X and not a Z was “more likely than not the correct interpretation of the barricade.” (VRP 6/3/09, 37:9 – 16.)

2. **The trial court excluded testimony that would have shown that Interiano controlled and had an independent duty to keep the area around the elevator safe.**

a. **The trial court excluded the deposition testimony of Interiano’s employee Nelson Rodriguez, offered to establish Interiano’s scope of work and control over the work area where Interiano was injured.**

Wrought attempted to introduce the deposition testimony of Mr. Interiano’s employee, Nelson Rodriguez. On June 3, 2009, Wrought’s attorney explained to the court on the record that his office had attempted to locate and personally serve Mr. Rodriguez, but had not been successful in doing so. (VRP 6/3/09 p.m., 16:23 – 17:2.) Counsel requested permission to read the witness’s testimony regarding a specific issue into the record if he was unable to locate the witness by the following morning. (*Id.*, 17:3 – 12) Mr. Interiano’s attorney confirmed that he knew a process server had been outside Mr. Rodriguez’s home attempting to serve Mr. Rodriguez with a subpoena. (*Id.*, 17:17 – 21.) He also explained that Mr. Rodriguez knew a process server was attempting to serve him with documents and that, because

he may not be in the country legally, he was concerned about “walking down to a courthouse after getting a subpoena[.]” (*Id.*, 19:22 – 4.)

Prior to trial, Mr. Interiano’s counsel had offered to assist with serving a subpoena on Mr. Rodriguez and Wrought’s attorney accepted the assistance, but there had apparently been a miscommunication between Mr. Interiano’s counsel and Mr. Rodriguez and service was not effected. (VRP 6/3/09 p.m., 20:24 – 11.) Following that failed attempt, Wrought’s counsel emailed Mr. Interiano’s counsel, apparently stating there was no need for Plaintiff’s counsel to serve Mr. Rodriguez. Rather, if Plaintiff called Mr. Rodriguez, then Wrought would cross-examine him.

However, it became clear during trial that Mr. Rodriguez’s testimony would be essential. Mr. Interiano testified that, on the day of the accident, he and Mr. Rodriguez could not have been installing doors because the doors had not been delivered. (VPR 6/2/09, 94:15 – 22.) In contrast, Mr. Rodriguez testified during his deposition that, on the day of the accident, they were going to install doors. (CP 1469, li. 25 – CP 1470, li. 2.) The court allowed Wrought’s counsel to continue the efforts to secure Mr. Rodriguez’s live testimony, but denied the request to introduce his deposition testimony as an unavailable witness. (VRP 6/3/09 p.m., 30:20 – 31:3.)

b. The court excluded the expert testimony of Mark Lawless, offered to establish that subcontractor Interiano had a duty to keep the area around the elevator shaft safe.

Mr. Interiano's safety expert, Richard Gleason, testified that responsibility for safety on a construction site is "almost like a pyramid," with the general contractor at the top and working "all the way down to the lower-tiered subcontractors and the workers on the site." (VRP 5/28/09, 101:2 – 15.) He testified that, although the general contractor's duty was non-delegable, subcontractors also have a duty to their own employees. (*Id.*, 101:16 – 19; 103:2 – 7.) However, he also testified that Mr. Interiano did not have a duty regarding the safety of the barrier to the elevator shaft "unless he built the shaft." (*Id.*, 112:16 – 19.) This was based upon his understanding that Mr. Interiano "didn't have anything to do with that work around the shaft." (*Id.*, 112:19 – 21.)

Wrought also presented its own construction site safety expert, Mark Lawless, to rebut Mr. Gleason's opinions. Before Wrought called Mr. Lawless to the stand, Mr. Interiano's counsel informed the court on the record that Mr. Lawless intended "to offer an opinion that Mr. Interiano had a duty as a subcontractor to keep – to inspect the barrier in the elevator shaft opening and make sure it was adequate, and since he didn't," he was negligent. (VRP 6/3/09 p.m., 31:16 – 24.) Mr. Interniano's counsel asked the court to exclude any such testimony. (*Id.*, 32:8 – 10.) Despite the

admission of Mr. Gleason's opinions, Interiano counsel argued there was "not a factual predicate" for Mr. Lawless to testify regarding Mr. Interiano's duties based upon his status as a subcontractor. (*Id.*, 34: 11 – 14.) He also argued that, to the extent a subcontractor has any duty to maintain a safe workplace, that duty runs only to his employees, not to himself. (*Id.*, 35:5 – 9.) Although Mr. Lawless testified as to other issues, the court barred him from testifying about Mr. Interiano's duties as a subcontractor to maintain a safe work place. (*Id.*, 44:4 – 20; 46:19 – 47:1.) Having allowed Mr. Gleason to offer his opinions in favor of Interiano, the court barred Mr. Lawless from rebutting those opinions in Wrought's defense.

3. The trial court declined Wrought's request for a jury instruction on Interiano's statutory duty to maintain a safe workplace.

Wrought proposed the following jury instruction:

Every employer owes a duty to furnish a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to its employees or to other employees on the jobsite, and to comply with the rules, regulations, and orders promulgated in the Washington Industrial Safety and Health Act, known as WISHA.

(CP 864.) The court refused to give the instruction. Wrought's counsel stated his objection to that decision on the record. (VRP 6/4/09, 45:22 – 46:2; 114:20 – 115:10)

4. The trial court denied Wrought's motion for reconsideration and for a new trial.

The jury returned a verdict in favor of Mr. Interiano. (CP 1375 – 76.) The jurors found Mr. Interiano's total damages were \$1,950,000 and allocated 20% fault to him. (CP 1376.) The final judgment amount was, therefore, \$1,560,000. (CP 1405.)

Wrought filed a Motion for Reconsideration following entry of the judgment. (CP 1409 – 22.) Wrought asked the court to reconsider its decision not to allow Wrought to introduce the deposition testimony of Nelson Rodriguez; its decision to bar Mark Lawless from testifying about Interiano's duties as a subcontractor; and its decision not to instruct the jury on Interiano's duty as a subcontractor to maintain a safe workplace. (CP 1414, li. 18 – 1415, li. 5.) Wrought's Motion also asked the court to grant a new trial. (CP 1409, li. 15 – 1410, li. 3.)

Wrought also filed the Declaration of Clarence C. Jones, Jr., in support of its Motion for Reconsideration. (CP 1423 – 82.) The exhibits to that declaration provided the full story regarding Wrought's attempts to procure Nelson Rodriguez's attendance at trial. Wrought's attorney's office first sent a "Subpoena to Attend Trial Directed to Nelson Rodriguez" out for service on April 17, 2009. (CP 1428, li. 19 – 20.) However, they were informed by ABC Legal Messenger on April 22, 2009, that Mr. Rodriguez was no longer residing at the address he had given during his deposition. (CP

1428, li. 21 – 1429, li. 4.) Wrought’s counsel attempted to obtain a current address through Mr. Interiano’s attorneys, but had not received that information by April 27, 2009. (CP 1429, li. 3 – 9.) A paralegal for Mr. Interiano’s attorneys offered to assist in securing service. He indicated he had spoken to Mr. Rodriguez, who agreed to accept service of the Subpoena at a Starbucks on Mercer Island. (CP 1429, li. 9 – 14.) This meeting did not occur. (*Id.*, li. 14 – 17.) Although Mr. Interiano’s attorney agreed to serve Mr. Rodriguez and signed a statement to that effect on May 7, 2009, (CP 1430, li. 5 – 7; 1453) as explained during trial, Wrought’s counsel informed her that would not be necessary.

On June 2, 2009, when it became apparent that Wrought would need to call Mr. Rodriguez to rebut Mr. Interiano’s trial testimony, Wrought’s counsel retained an investigative service to locate Mr. Rodriguez. (CP 1430, li. 7 – 10.) An employee of the investigative service went to a possible current address on the morning of June 3, 2009, to attempt to serve Mr. Rodriguez. She observed two vehicles at the location, both apparently belonging to Mr. Rodriguez. A man named Edwin Gomez answered the door and stated that Mr. Rodriguez was working and would be home later. He indicated he would give the Subpoena to him. The investigator left a second copy of the Subpoena in the door of one of Mr. Rodriguez’s vehicles. (CP 1430, li. 10 – 20; 1461, li. 1 – 25.)

The investigator returned to the residence that afternoon of June 3. (CP 1464, li. 25 – 1465, li. 1.) A woman answered the door and explained that Edwin Gomez was her husband. She said Mr. Rodriguez worked nights and would not be back home until the next day. (CP 1465, li. 10 – 14.) The investigator left a copy of the subpoena with the woman and also slid one through the window of Mr. Rodriguez’s car, which was parked in front of the house. (*Id.*, li. 19 – 24.)

Mr. Rodriguez failed to appear at trial. Nevertheless, the trial court declined to admit brief portions of his deposition testimony to establish the scope of Interiano’s work on the day of the accident.

The court denied Wrought’s Motion for Reconsideration. (CP 1489 – 91.) Regarding the decision not to allow Wrought to introduce Nelson Rodriguez’s deposition testimony, the order stated:

The court precluded the deposition testimony of Nelson Rodriguez because he was available to testify and this court expected that defense counsel would call Mr. Rodriguez. There was no evidence presented that allowed the court to find that Mr. Rodriguez refused to appear and defense counsel did not advise the court that such was the case. The court assumed that counsel had simply decided to drop the issue and not call Mr. Rodriguez.

(CP 1490, li. 5 – 11.) As to the decision not to allow Mr. Lawless to testify regarding a subcontractor’s duties and the related decision not to instruct the jury on that issue, the court explained it had concluded “that defendants

retained control over the premises (elevator shaft) and thus retained the primary statutory duty for safety.” (CP 1490, li. 15 – 19.)

V. SUMMARY OF ARGUMENT

It was not disputed at trial that, as a general contractor, Wrought had its own duty to keep the work place safe. What *was* disputed was whether, as a subcontractor, Interiano had an independent duty to keep its own work area safe, including a duty to ensure a proper barrier was erected around the elevator shaft in that work area. Interiano’s duty as a subcontractor was separate and apart from his personal duty of due care for his own safety.

The trial court committed three errors by refusing to admit testimony and to provide instruction to the jury on the subcontractor’s duty to maintain a safe work place. *First*, the court abused its discretion when it precluded Wrought from introducing deposition testimony of an unavailable witness. The testimony would have assisted Wrought in establishing the factual predicate to support its assertion that Mr. Interiano had a duty as a subcontractor for the safety of the area around the elevator shaft. *Second*, the trial court abused its discretion when it precluded Wrought’s safety expert from providing his opinion that Mr. Interiano had such a duty to maintain a safe work place. The court did this, despite having allowed Mr. Interiano’s own safety expert to opine that Mr. Interiano did not have such a duty. *Third*,

the court erred when it refused to give a jury instruction regarding a subcontractor's duty of care to its employees.

The trial court's errors precluded Wrought from asking the jury to consider Interiano's own failure, as a subcontractor, to ensure there was a proper barrier in front of the elevator shaft opening in its own work area. Rather, the jury could consider only whether Mr. Interiano was contributorily negligent. As a result of these errors, Wrought was not afforded a fair trial and justice was not done. Therefore, the court further erred when it denied Wrought's request for a new trial. The judgment against Wrought should be reversed and the case should be remanded for a new trial.

VI. ARGUMENT AND AUTHORITIES

I. Standard of review

The trial court's evidentiary rulings are reviewed for an abuse of discretion.¹ The standard of review for the refusal to give a requested jury instruction depends upon whether the decision was based upon a matter of law or fact.² If the trial court's decision was based on the facts in the record, the appellate court reviews that decision for an abuse of discretion.³ If the decision was based upon a ruling of law, review is *de novo*.⁴

¹ *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004).

² *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998).

³ *Id.*, 136 Wn.2d at 772 (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)).

⁴ *Id.*

A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.⁵ Untenable reasons include errors of law.⁶

The standard of review for the court's decision not to grant a new trial is also abuse of discretion.⁷

2. **The trial court erred when it refused to allow Wrought to introduce the deposition testimony of Nelson Rodriguez.**

Pursuant to CR 32(a)(3)(D), a deposition “may be used by any party for any purpose if the court finds . . . that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.” The party offering the deposition must show “that due diligence was exercised in attempting to procure the attendance of the witness at trial.”⁸

ER 804(b) excepts a deposition from the hearsay rule if the party against whom it is offered “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Pursuant to ER 804(a), the party offering the deposition must show the witness is “unavailable,” which includes a witness who “is absent from the hearing and the proponent of the statement has been unable to procure” the witness’s attendance “by process or other reasonable means.”

⁵ *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

⁶ *Id.*

⁷ *Aluminum Co. of America v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

⁸ *Sutton v. Shufelberger*, 31 Wn. App. 579, 585, 643 P.2d 920 (1982).

Wrought satisfied all of these requirements with regard to Nelson Rodriguez. Prior to trial, Wrought attempted to subpoena Mr. Rodriguez, but was unsuccessful, even with the assistance of Plaintiff's counsel. Once trial began and it became clear to Wrought's counsel that Mr. Rodriguez's testimony would be necessary whether Plaintiff called him or not, additional efforts were made to secure his attendance through service of a subpoena. Pursuant to CR 45(b), a subpoena may be served "by leaving a copy at the place of" the witness's abode. The investigator retained by Wrought's attorney did this twice on June 3. That subpoena directed Mr. Rodriguez to appear in the courtroom at 9:00 a.m. on June 4, 2009. (CP 1457.) However, Mr. Rodriguez did not respond to the subpoena in any manner and did not appear for trial. It was undisputed that Mr. Rodriguez was likely reluctant to appear at the court house given his uncertain immigration status. Nonetheless, the court denied Wrought's request to introduce Mr. Rodriguez's deposition testimony.

Mr. Rodriguez's deposition testimony directly contradicted Mr. Interiano's own testimony regarding the work he and his employee were to perform on the day of the accident. Wrought was entitled to have a jury hear Mr. Rodriguez's testimony that they were going to be installing doors that day. This evidence related directly to the scope of the work to be performed by Mr. Interiano as a subcontractor. If this evidence had been admitted it

would have provided support for the admission of Mark Lawless's testimony regarding a subcontractor's duty. Thus, the court's decision not to admit the Rodriguez testimony created the same gap in the evidence of evidence the court relied on in turn to exclude Mr. Lawless' opinions concerning Interiano's duties of care as a subonctractor. This compound error prevented Wrought from putting on its defense. The court committed outcome determinative, reversible error.

3. **The trial court erred when it refused to give the proposed jury instruction regarding a subcontractor's duty to provide a safe workplace and refused to allow Mark Lawless to testify concerning that duty.**

RCW 49.17.060 provides:

Each employer:

(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

Similarly, WAC 296-155-040 provides, in relevant part, as follows:

(1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.

(2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

...

(4) No employer shall fail or neglect:

(a) To provide and use safety devices and safeguards.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do everything reasonably necessary to protect the life and safety of employees.

...

(6) No person shall do any of the following:

(a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment.

(b) Interfere in any way with the use thereof by any other person.

(c) Interfere with the use of any method or process adopted for the protection of any employee, including themselves, in such employment, or place of employment.

(d) Fail or neglect to do everything reasonably necessary to protect the life and safety of

employees.

...

Wrought proposed an instruction based directly on the applicable statute and regulations:

Every employer owes a duty to furnish a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to its employees or to other employees on the jobsite, and to comply with the rules, regulations, and orders promulgated in the Washington Industrial Safety and Health Act, known as WISHA.

(CP 864.)

Mr. Interiano's own safety expert, Mr. Gleason, offered his opinion that Interiano did not have a duty as a subcontractor to ensure the safety of the elevator shaft barrier. Wrought's expert was of a different opinion and was barred from testifying that Interiano *did* have a duty to ensure the safety of the workplace, including the integrity of the elevator shaft barrier. The court refused to give the proposed instruction concerning Interiano's duty under applicable statutes and regulations.

The court apparently relied on *Stute v. P.B.M.C., Inc.* to conclude Wrought was the only party with a duty to provide Mr. Interiano with a safe workplace.⁹ But *Stute* does not stand for the proposition that a subcontractor has no duty to provide a safe workplace. Instead, *Stute* held only that "the *prime* responsibility for safety of all workers should rest on the general

⁹ 114 Wn.2d 454, 788 P.2d 545 (1990).

contractor.”¹⁰ Where, as in this case, a subcontractor has control over a specific portion of the work area, the subcontractor has its own duty to keep the work place safe.

In *Ward v. Ceco Corporation*¹¹, this Court addressed a subcontractor’s duties to a non-employee regarding safety. In that case, Ward was working on a construction site and slipped and fell from a wooden platform erected by Ceco Corporation. Ward was employed by the general contractor. Therefore, the question before the Court was whether, as a subcontractor, Ceco owed any duty to keep the work place safe for Ward’s benefit.

The *Ward v. Ceco* Court started with the premise that Ceco had a duty to protect its own employees.¹² It then held that duty extended to “other workers whom Ceco had reason to know would be working within the ‘zone of danger’ created by Ceco.”¹³ Thus, it is clear that a subcontractor maintains a duty of safety with regard to its own employees, as well as employees of other subcontractors, as to those areas within the subcontractor’s control and/or scope of work.

In our own case, the evidence established the area around the elevator shaft was within Interiano’s scope of work and control. It was undisputed at

¹⁰ 114 Wn.2d at 463 (emphasis added).

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

¹² 40 Wn. App. at 625.

¹³ *Id.*

trial that he was responsible for painting the wall where the shaft was located, which meant he or his employee had to remove and replace the barrier to the shaft. Thus, the trial court erred when it concluded there was nothing in the record that required an instruction regarding Interiano's duties as a subcontractor. In addition, if the court had not erred by excluding the deposition testimony of Nelson Rodriguez, there would have been additional evidence supporting the conclusion that Interiano was going to install elevator doors and, therefore, had a duty to keep the area around the elevator shaft safe. As a result, the court's decisions not to give the jury instruction and not to allow Mr. Lawless to testify regarding Mr. Interiano's duties as a subcontractor were made on untenable grounds and were, therefore, an abuse of discretion.

The record indicates the court believed an instruction on Interiano's duty as a subcontractor was not required because Wrought could argue Mr. Interiano was contributorily negligent. (VRP 6/3/09 p.m., 33:4 – 14; 39:23 – 40:3; 44:4 – 6.) However, the distinction between the duty of Interiano the subcontractor, versus Mr. Interiano's personal duty as an employee to exercise due care for his own safety, was extremely important. If Interiano *qua* subcontractor had a duty to provide a safe workplace for its employees, including a duty to ensure there was a barrier properly fixed around around the elevator shaft, the record is clear Interiano did not do what was required.

Interiano the subcontractor was required to affirmatively check the barrier and make sure it was *actually* safe, not simply to observe whether it *appeared* safe. A barrier that was wedged into the door jamb may have appeared safe, but upon inspection it would have been apparent that it was not safe.¹⁴ In contrast, with regard to contributory negligence, the only real question was whether the barrier *appeared* safe when Mr. Interiano decided to put the air hose down the elevator shaft. The court's decisions not to give the jury instruction and not to allow Mr. Lawless to testify regarding a subcontractor's duty failed to recognize this important distinction. Thus, the decisions were based on untenable grounds and untenable reasons and were an abuse of discretion.

4. ***The trial court erred when it denied Wrought's Motion for Reconsideration.***

Following the trial, the court had the opportunity to correct these errors by granting Wrought a new trial. Instead, the court erroneously denied Wrought's Motion for Reconsideration and denied a new trial.

Wrought based its post-trial motion on CR 59(a)(1), (8) and (9):

¹⁴ Interiano's duty as a subcontractor would run not only to his employees, but to Mr. Interiano himself as well. At trial, the court stated Interiano's duty as a subcontractor would only run to his employees. (VRP 6/3/09 p.m., 35:5 – 9.) However, in the Order Denying Defendant Wrought Corporation, Inc.'s Motion for Reconsideration, the court clarified that its decision regarding the jury instruction and Mr. Lawless's testimony was based upon its conclusion that Wrought had the primary duty for safety. (CP 1490.) The court apparently recognized that it would be illogical to conclude that, if Interiano did have a duty as a subcontractor to provide a safe place for his employees and he breached that duty, his fault in that regard could not be considered when assigning fault for his own injuries.

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, the verdict may be vacated and a new trial granted to all or any of the parties, on all issues or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court . . . or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

. . .

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

The court's original decision to exclude the deposition testimony of Nelson Rodriguez was an abuse of discretion. Because that evidence was relevant to the scope of Interiano's work and duties as a subcontractor, the court error in excluding the evidence prevented Wrought from obtaining fair trial. Thus, a new trial was warranted under CR 59(a)(1) and (9).

In its order denying the Motion for Reconsideration, the court also opined that Nelson Rodriguez "was available to testify" and the court expected defense counsel to call him. (CP 1490.) However, pursuant to CR 32(a)(3)(D), a deposition "may be used by any party for any purpose if the court finds . . . that the party offering the deposition has been unable to

procure the attendance of the witness by subpoena.” In addition, pursuant to ER 804(a) a witness is “unavailable” when he “is absent from the hearing and the proponent of the statement has been unable to procure” his attendance “by process or other reasonable means.” The trial transcript shows that the court knew Wrought’s counsel was having difficulty serving Mr. Rodriguez and that the witness was reluctant to appear at the courthouse given his uncertain immigration status. (VRP 6/3/09 p.m., 16:23 – 17:21; 19:22 – 4.) In addition, evidence submitted with the Motion for Reconsideration established that service of the subpoena was actually effected on Mr. Rodriguez by leaving a copy of the subpoena at his place of residence at two separate times on June 2, 2009, but Mr. Rodriguez simply did not appear to testify. (CP 1428 – 1430; 1453.) The also court erred by concluding that “[t]here was no evidence presented that allowed the court to find that Mr. Rodriguez refused to appear[.]” (CP 1490.) The only reasonable conclusion that could be reached was that Mr. Rodriguez was served and *did* refuse to appear in response to service of a subpoena.

The court also stated that it “assumed that counsel had simply decided to drop the issue and not call Mr. Rodriguez.” (*Id.*) Again, this statement is directly contradicted by the record. On June 3, 2009, the court specifically held that Nelson Rodriguez could testify only if he actually appeared and Wrought could not introduce his deposition testimony. (VRP 6/3/09 p.m.,

30:20 – 31:3.) Thus, on June 4, 2009, when Mr. Rodriguez failed to appear, the court had already given its final ruling that the deposition could not be used. As a result, there was nothing in the record to indicate Wrought had “dropped” the issue.

The court’s abuse of discretion regarding the use of Mr. Rodriguez’s deposition unfairly prejudiced Wrought and supported a new trial under CR 59(a)(1) and (9). It was therefore a further abuse of discretion for the court to deny Wrought’s Motion for Reconsideration based on the exclusion of the Rodriguez evidence.

The facts also supported giving the requested jury instruction based upon RCW 49.17.060 and WAC 296-155-040, as well as allowing Mark Lawless to testify regarding a subcontractor’s duty to provide a safe workplace for its employees. Thus, the court erred when it refused to give the instruction and precluded Mr. Lawless from testifying regarding a subcontractor’s duty. Those errors prejudiced Wrought because the jury was not allowed to consider Interiano’s duty *qua* subcontractor to provide a safe workplace.

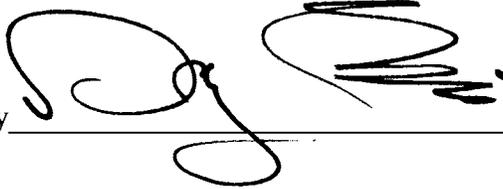
The trial court’s errors prevented Wrought from having a fair opportunity to present its defense to the jury and, ultimately, from having a fair trial on the merits. The trial court should have granted a new trial.

VII. CONCLUSION

For the reasons stated above, Wrought Corporation requests that the Court reverse the judgment entered in Plaintiff's favor and remand this matter for a new trial.

Respectfully submitted this 2nd day of April, 2010.

By _____



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DECLARATION OF SERVICE

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

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