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NO. 65092-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I  
(Snohomish County Superior Court Cause No. 07-2-08300-4)

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ENOS D. FERGUSON,

Appellant,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE  
EMPLOYEES, LOCAL 15, an international union; and  
THYSSENKRUPP SAFWAY, INC. fka SAFWAY SERVICES, INC.,  
a corporation,

Respondents.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

The trial court erred:

1. In entering its December 23, 2008 summary judgment order dismissing plaintiff Ferguson's claims against defendant International Alliance of Theatrical Employees Local 15 ("the Union"). CP 33-34.

2. In directing a verdict and granting a motion for judgment as a matter of law dismissing Ferguson's negligence and product liability claims against defendant ThyssenKrupp Safway ("Safway") for supplying a defective, frozen ladder attachment clamp, RP 651-52; CP 35-36, in withdrawing those claims from the jury, CP 52, and in preventing Ferguson from arguing his theory of the case that Safway's failure to supply a non-defective clamp was negligent, made its ladder unreasonably dangerous, and was a proximate cause of his injuries, RP 425-438.

3. In commenting on the evidence and erroneously instructing the jury that "the existence or nonexistence of a guard gate is not relevant or material to the issues that are before this jury", RP 322, in denying Ferguson's motion for a curative jury instruction, CP 102-04, and in excluding Ferguson's expert evidence and preventing him from arguing his theory of the case that Safway's failure to supply a guardrail gate was

negligent, made its scaffold unreasonably dangerous, and was a proximate cause of his injuries, RP 425-438.

4. In entering its February 25, 2010 Judgment for Defendant Safway Services, CP 37-38.

## **II. ISSUES PRESENTED FOR REVIEW**

1. Did the trial court err in ruling that a union cannot be liable under agency principles when its steward negligently injures a union member?

2. Did the trial court err in ruling that a union member's state law tort claim against his union arising from the negligence of the union's steward is pre-empted by Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 when the tort claim is independent of and does not require construing a collective bargaining agreement?

3. Did the trial court err in granting judgment as a matter of law that Safway was not liable for supplying a defective, frozen ladder attachment clamp when there was substantial evidence from Safway's ladder installation instructions and lay and expert testimony that its failure to supply a non-defective clamp violated its standards, made its ladder unreasonably dangerous, and was a proximate cause of Ferguson's injuries?

4. Did the trial court comment on the evidence and err in orally instructing the jury that Safway's failure to furnish a guardrail gate was "not relevant or material" when there was substantial evidence from Safway's guardrail gate installation instructions, lay testimony, and the testimony of Ferguson's engineering expert that the lack of a guardrail gate violated Safway's standards and industry standards, made its scaffold unreasonably dangerous, and was a proximate cause of Ferguson's injuries?

5. Did the trial court fail to adhere to the requirements of ER 401 and 402 and abuse its discretion in excluding Ferguson's evidence that Safway's failure to furnish a guardrail gate was a proximate cause of his injuries when its reasons for this ruling had no tenable basis in fact or law?

6. Did the trial court's oral instruction that Safway's failure to furnish a guardrail gate was "not relevant or material" erroneously prevent Ferguson from arguing his negligence, product liability and proximate causation theories of the case, mislead the jury, and misinform the jury as to the applicable law?

7. Did the trial court abuse its discretion in preventing Ferguson from arguing that Safway breached its duty to inspect for defects in its ladder

attachment clamps and for its missing guardrail gate when its reasons for this ruling had no tenable basis in fact or law?

8. Did the errors and abuses of discretion identified above, singly or cumulatively, prejudice Ferguson and deprive him of a fair trial?

### **III. STATEMENT OF THE CASE**

#### **A. The Nature of this Case.**

Appellant Enos “Don” Ferguson brought this negligence and product liability action to recover compensation for injuries he suffered when he fell approximately 18 feet to the ground after a ladder collapsed from a scaffold during a concert at King County’s Marymoor Park. Ferguson had been dispatched by his union, defendant International Alliance of Theatrical Employees Local 15, to work as a spotlight operator on the scaffold, called a “spot tower”, at the concert. RP 569-70. His injuries included a brain hemorrhage, a closed head injury, multiple facial fractures, an orbital fracture, back fracture at T-9, a dislocated left shoulder, a complete rotator cuff tear, an elbow injury, and a split nose. CP 549-570.

**B. The Proceedings in the Trial Court.**

Ferguson commenced this action in October 2007. CP 1053-59.<sup>1</sup> In April 2008, he filed his first amended complaint which alleged defendant International Alliance of Theatrical Employees Local 15 (“the Union”) was liable for the negligence of its agents in improperly installing the ladder and in failing to perform its workplace safety obligations; that defendant Safway was liable in negligence and product liability for supplying defective scaffold components and not furnishing product installation instructions or warnings; and that King County and The Lakeside Group (“Lakeside”) negligently failed to provide safe equipment and a safe workplace. CP 1260-66. Safway cross-claimed against King County based on an indemnification clause in their scaffolding rental agreement. CP 1316-1328.

On July 25, 2008, the late Judge Allendoerfer dismissed Lakeside on summary judgment under the employer immunity in Title 51 RCW. CP 346-47. On December 23, 2008, Judge Thorpe dismissed the Union on summary judgment, ruling that it did not breach any duty to refrain from tortiously

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<sup>1</sup> Ferguson originally filed his lawsuit in King County Superior Court. He voluntarily dismissed that lawsuit after Lakeside, King County and Lakeside’s insurer became involved in third-party indemnification and insurance disputes in that action.

injuring Ferguson. CP 33-34.<sup>2</sup> Ferguson settled with King County and voluntarily dismissed his claims against it. Supp. CP \_\_\_\_\_. In January 2010, Ferguson tried his negligence and product liability claims against Safway to a jury before Judge Castleberry. CP 211-232. The jury returned a verdict that Safway was negligent but was not a proximate cause of Ferguson's injuries. CP 41-42. On February 25, 2010, Judge Castleberry entered judgment on the verdict for Safway. CP 37-38. Safway then tried its contractual indemnification claims against King County to Judge Castleberry, who entered a final judgment in favor of King County on July 9, 2010. CP 1554-58.

Ferguson timely appealed from the judgment on the jury verdict in favor of Safway, CP 31-32, and the final judgment in favor of King County on Safway's cross-claims. CP 1554-58. He now asks this Court to reverse the December 23, 2008 summary judgment order dismissing his claims against the Union, to reverse the January 28, 2010 order granting judgment as a matter of law dismissing his claims based on Safway's defective ladder

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<sup>2</sup> The Union moved to dismiss Ferguson's tort claim as being pre-empted by §301 of the Labor Management Relations Act, 29 U.S.C. §185(a). CP 948-63. In its reply brief, the Union raised new arguments that Ferguson's claims were barred by the Industrial Insurance Act Immunity in Title 51 RCW and that its steward John Poulson was not its agent. CP 1061-68.

attachment clamp, to reverse the February 25, 2010 judgment dismissing his claims against Safway, and to remand for a trial on his claims against the Union and a new trial on his claims against Safway.

**C. The Scaffolding Components Supplied by Safway.**

In October 2002, King County entered into a Special Use Permit contract with Lakeside to present a series of public concerts each summer at Marymoor Park. CP 398-432. The Prairie Home Companion concert on June 19 was the first in the series of summer concerts at Marymoor Park in 2005. RP 330.

On June 13, 2005, King County ordered the scaffolding for the concert spot tower from Safway. CP 464-67; RP 190-91. The next day, Safway's Seattle branch office selected the component parts for the scaffold based on King County's sketch of the spot tower, CP 464-67, RP 192, and delivered them to Marymoor Park. Ex. 115; CP 489-90; RP 193, 656-67. The components included 6-foot ladder sections with pre-mounted attachment brackets and swivel clamps to attach the ladder sections to the scaffold. Exs. 18A and 18B; CP 489; RP 315-16. The ladder sections were labeled with Safway's brand name. Exs. 18A and 18B; RP 679-80.

**D. Safway's Installation Instructions for Ladders, Guardrail Gates and Clamps.**

In January 2008, Ferguson asked Safway to produce its "rules, procedures or other safeguards... [and] "all documents, reports, instruction manuals, installation manuals" relating to the installation of the scaffold or ladder. Exs. 27 and 28, pp. 7, 15-16. In December 2009, Safway produced its ladder and guardrail gate installation instructions, Ex. 10, and video, Ex. 12, one month before trial after Ferguson's liability and causation experts were deposed. RP 428, 451-52, 454-57. Safway's installation instructions said to attach the ladder to the scaffold's vertical posts rather than to the horizontal members, and to install a guardrail gate to provide users with safe entrance and exit from the ladder to the work platform:

Experience has shown that it is best to install an SAU ladder on a scaffold leg post rather than on a horizontal member. Install the ladder sections on the scaffold leg (post) opposite the guardrail gate and hinge. This will provide the user a safe entrance/exit from the ladder to the platform. Ex. 10.

Safway's installation video also said to attach ladders to vertical posts, to install guardrail gates at all work platform levels, and to install clamps with the bolt on top:

As the scaffold is erected, a proper means of access must be provided. One way of achieving this is by installing a Safway access ladder. Clamp the ladder to the post as each level is erected and braced.

Attach the access ladder to the vertical posts.... Install guardrail gates at all platform levels... Install your clamps so that the bolt is on top with the clamp hanging down, like this. Ex. 12; RP 273-74.

About 80 percent of Safway's Seattle branch business involved having its own crews erect and dismantle scaffolds, and about 10 percent involved renting scaffold components to customers who erect the scaffolds themselves. RP 671. Safway did not furnish its ladder and guardrail installation instructions or video to King County or the Union stagehands who erected the scaffold at Marymoor Park. RP 194, 235, 295-96, 340-41, 345, 390-91, 402, 413, 683. Keith Crandall, Safway's Seattle branch operations manager who rented the scaffold to King County, and Safway's National Engineering Manager Dale Lindemer testified that Safway did not furnish its ladder and guardrail gate installation instructions to rental customers. RP 390-91, 774.

Safway did not furnish a guardrail gate for the work platform on top of the spot tower. CP 464-67; Ex. 22; RP 290.

Safway's swivel clamps are supposed to rotate into the vertical position so the ladder can be installed on a vertical post as recommended by Safway's instructions. Exs. 18A and 18B; RP 756. But one of the swivel clamps was frozen in the horizontal position with its claw portion on top and

its bolt on the bottom. Ex. 18B; RP 338-39, 407. Because the swivel clamp would not rotate, it was attached to a horizontal scaffold member with the bolt on the bottom where it could fall out of an improperly tightened clamp. RP 199, 337-39; 345, 364-66. Mr. Crandall testified it was below Safway's standards to supply a swivel clamp that would not rotate, RP 406, and that Safway's warehouse employees and its truck drivers who delivered its scaffold components to jobsites were not trained to inspect or recognize potential hazards in its ladders and clamps. RP 387-88.

The cross braces that Safway supplied to stabilize the spot tower could not be installed because they were the wrong size, RP 193, 331, 684, 734, and that made the spot tower "shaky." RP 333.

**E. The Erection of the Spot Tower and Installation of the Ladder.**

Lakeside entered into a Memorandum of Agreement with the Union to hire the Union's stagehands to erect the spot tower, rig the sound and lighting equipment, and operate the spotlight. CP 1002-03, 1202. The Union assigned John Poulson as its payroll and lead steward to supervise the Union stagehands in erecting the spot tower. CP 1198, 1208; RP 330.

On the morning of June 19, 2005, the Union stagehands erected the spot tower under steward Poulson's supervision. Ex. 22; CP 1205-06. The

spot tower ladder had three 6-foot sections. CP 1204. The middle ladder section extended above the scaffold's 14' high work platform. Ex. 22; RP 246, 373, 441-42, 934. The top ladder section nested into the middle ladder section above the work platform with steel coupling pins. Ex 22C; RP 444, The top ladder section was clamped to the top horizontal guardrail, RP 903, which was 42" above the work platform. Ex. 22; RP 698.

Steward Poulson discharged the Union crew at 1 p.m. on June 19 after telling them he would install the ladder later. CP 1201. He installed the ladder by himself after the crew left. CP 1204, 1211; RP 334. Poulson testified that if Safway had furnished its installation instructions, he would have installed the ladder on a vertical post. RP 345. If he had to clamp the ladder to a horizontal member, Poulson would have put the bolt on top, if he had the choice. RP 337-39. But he could not install the ladder on the vertical post because of the swivel clamp that was frozen in the horizontal position with the bolt on the bottom. Ex. 18B; RP 338-39. So Poulson attached the clamps to the horizontal members of the scaffold with the claw on top and the bolt on the bottom. *Id.*

The Union crew usually checked each other's work to make sure the nuts on the clamps were securely tightened, RP 315, but that was not done

here because Poulson discharged the crew, then installed the ladder by himself. RP 334. After he installed the ladder, Poulson climbed up and down it at least four times, and an employee of Seattle Stage Lighting named Dustin climbed up and down it at least three times without incident. RP 363.

**F. The Collapse of the Ladder.**

Don Ferguson was not involved in erecting the spot tower or installing the ladder. RP 301-02, 346, 571-72. He arrived at Marymoor Park at 6:30 p.m., climbed up the ladder to the work platform and operated the spotlight until the concert intermission. RP 570, 574-75. At intermission, Ferguson climbed over the 42" high guardrail onto the top section of the ladder, which suddenly collapsed and he fell to the ground. RP 172-73. Ferguson was not at fault in the incident, as Safway recognized by withdrawing its defense of comparative fault on the first day of trial. RP 67.

Photos taken after the incident showed that the bolt dropped out of the clamp that was attached to the work platform guardrail and caused the top section of the ladder to collapse. Exs. 22. The lower and middle sections of the ladder remained clamped to the scaffold. *Id.* John Poulson knew he was supposed to torque nuts on a clamp to 40-45 foot lbs. CP 1205; RP 362. He

admitted that he might not have tightened the nut on the clamp that held the top section of the ladder. CP 1208; RP 362.

**G. Post-Incident Investigations and Testing.**

Two days after the incident, Safway sent two employees to Marymoor Park to investigate why the top ladder section collapsed. RP 197, 695-97. Safway's two investigators told King County's Senior Engineer David Sizemore that the bolt would have been a lot less likely to fall out of the clamp if it had been on top instead of on the bottom of the clamp. RP 199. After the inspection, Safway's investigators removed the top two ladder sections and clamps and took them to Safway's Seattle office, RP 699-700, which shipped them to Safway's National Engineering Manager Dale Lindemer at Safway's headquarters in Wisconsin, RP 414. Lindemer received them soon after the accident, RP 734, and evidently followed the standard protocol of not altering the clamps while they were in his possession from June 2005 until late 2009. RP 482. Lindemer attended the entire trial as Safway's corporate representative and did *not* testify, either in his deposition on November 10, 2009, RP 482, or at trial in January 2010, RP 718-801, that the clamp became frozen between the incident and the trial.

At Safway's headquarters, Lindemer built a scaffold to replicate the Marymoor Park spot tower and conducted a test which proved that if the nut had been properly torqued to 45 foot lbs., the clamp would not have opened regardless of the amount of additional sway caused by the lack of diagonal cross braces. RP 725, 735-39.

The Union's Executive Board Report for the Marymoor Park accident suggested that when steward Poulson released the crew and installed the ladder by himself, he did not meet his supervisory duty to maintain an adequate crew to safely complete the work:

A letter will be sent to the Marymoor Payroll Steward [*i.e.* John Poulson] emphasizing the responsibility of that position to the safety of the crew at all times. This includes supervision of all aspects of the call and maintaining the number of crew needed to safely complete the work. CP 1215.

#### **H. Ferguson's Liability and Causation Claims and Evidence.**

Ferguson's first amended complaint alleged that Safway was liable under theories of negligence and product liability because it:

supplied the unsafe scaffolding, ladder and other equipment for the spot tower; it failed to test, inspect and ensure that the scaffolding, ladder *and other equipment* were in a safe condition...it failed to exercise reasonable care to inform plaintiff of its unsafe condition or of the facts which make it likely to be unsafe; and it may have *engaged in other negligent or careless conduct which will be set forth during discovery and at trial.* CP 1333.

At trial, Ferguson contended that the ladder collapse was proximately caused by steward Poulson's negligent failure to tighten the nut and by Safway's negligence and product liability 1) in failing to furnish its written and video instructions to install ladders on vertical posts, guardrail gates at all platform levels, and clamps with the bolt on top; 2) in supplying a defective swivel clamp that prevented the ladder from being installed on a vertical post, 3) in not supplying a guardrail gate which would have allowed Ferguson to step onto the secure middle ladder section instead of having to climb over the guardrail onto the insecure top ladder section; and 4) in supplying the wrong size cross braces which created sway that may have loosened the nut on the clamp on the top ladder section.

Ferguson's engineering and human factors expert, Richard Gill, PhD testified in an offer of proof that Safway violated both industry standards, which require a self-closing gate on elevated work platforms, and its own standards by not furnishing a guardrail gate for the spot tower work platform. RP 448-50. He testified the lack of a guardrail gate was a "significant contributing factor" in causing the fall, RP 447, because if Safway had furnished a guardrail gate, Ferguson would have stepped through it onto the secure middle ladder section instead of having to climb over the 42" high

guardrail and swing out onto the insecure top ladder section. RP 443-47. Dr. Gill testified that the middle ladder section would have supported Ferguson's weight, and the steel coupling pins which attached the middle and top ladder sections would have prevented the top section from collapsing. RP 444-47.

Dr. Gill testified before the jury that "This clamp is defective. It won't rotate", RP 481, and that its defective condition prevented the ladder from being installed on a vertical post per Safway's instructions where the bolt would not fall out of the bottom of the clamp. RP 484.

**I. The Trial Court's Rulings on Safway's Failure to Furnish a Guardrail Gate.**

On the first day of trial testimony, Safway suggested the lack of a guardrail gate may have contributed to the accident by requiring Ferguson to climb over the top guardrail onto the top ladder section:

Q. What I'm most curious about is how did Mr. Ferguson manage to get from inside here -- there was no gate or any other device to get around or through the top rail; correct?

RP 180. On the first day of trial, Ferguson offered Safway's ladder and guardrail installation instructions, Ex. 10, into evidence, but the trial court reserved ruling. RP 219-220. On the second day of trial, the trial court admitted Safway's ladder and guardrail installation video, Ex. 12, stating it was relevant on "what the overall standard is, et cetera, in the industry as

known to the defendants”, RP 268. Ferguson showed the video, which said “install guardrail gates at all platform levels” to the jury on the second day of trial testimony. RP 272-74. After watching Safway’s video, a juror asked:

“Is there any industry standard height that requires a guard gate? If not, is the customer who determines whether or not this is included in the setup materials?” CP 118; RP 322.

In response, the trial court informed counsel that it intended to instruct the jury that the juror’s question was “not relevant or material.” RP 319. Ferguson responded that the question was relevant because Safway had suggested that he might have dislodged the top ladder section while climbing over the guardrail. RP 180. Ferguson objected that the proposed instruction would be a comment on the evidence. RP 321. The trial court overruled the objection, RP 321, then orally instructed the jury:

I’m not going to allow that question to be answered because the existence or nonexistence of a guard gate is not relevant or material to the issues that are before this jury. RP 322.

At the beginning of the next day of trial, Ferguson argued that the lack of a guardrail gate raised fact issues for the jury on proximate causation and Safway’s negligence, RP 424-28, 430, 434, and requested the following curative instruction:

“The Court previously instructed you that the absence of a guard gate on the spot tower scaffold was not relevant to the issues in this case.

That instruction is withdrawn. You are now instructed that you may consider the absence of a guard gate on the spot tower scaffold on the issues of negligence and causation.” CP 102-04.

After hearing argument, RP 425-432, the trial court refused Ferguson’s curative instruction, RP 437-38, and stated that in “the plaintiff’s trial brief, there is no mention of the gate”, RP 435, which is a “new theory of negligence and a new theory of causation” that was first raised “after almost a week of testimony”, *id.*, that “there is no proffered expert opinion in terms of the engineering factors that would lead to causation”, RP 437, and that the court’s oral instruction to the jury “was not objected to at the time.” RP 438.

Immediately after the trial court denied Ferguson’s proposed curative instruction, Ferguson made an offer of proof through Dr. Gill that Safway’s failure to provide a guardrail gate violated its own standards and industry standards and was a proximate cause of the ladder collapse. RP 438-457. Ferguson also contended that Safway would not be prejudiced if the jury considered guardrail gate evidence because it had withheld its ladder and guardrail gate installation instructions and video from discovery from January 2008 until December 2009, one month before the trial. RP 428, 454-57.

After the offer of proof, RP 438-57, the trial refused to allow Dr. Gill to testify and dismissed all claims based on the lack of a guardrail gate. RP 457.

**J. The Trial Court's Rulings on Safway's Frozen Ladder Attachment Clamp.**

After Ferguson rested, the trial court granted judgment as a matter of law that Safway was not negligent and did not proximately cause Ferguson's injury by supplying a frozen swivel clamp that would not rotate into the proper vertical installation position: "there is no evidence either, A, of negligence; or, B, that if there was negligence, that the negligence played a part or was a proximate cause of the subsequent failure." CP 77-78; RP 650-

51. The trial court gave the following reasons for its decision:

"it would be just pure speculation to say that now some five years...[the swivel clamp is] in a fixed position and therefore it must have been in a fixed position back when it was delivered prior to the accident", RP 649, and that "all of the evidence and the reasonable inferences from that evidence, are that Mr. Poulson had predetermined that he was going to put it on horizontal bars."

RP 650. The trial court also ruled that Ferguson could argue that Safway breached a duty to inspect for the wrong size cross braces, but could not argue that it breached a duty to inspect for frozen swivel clamps. RP 649.

At the end of the trial, the trial court gave Jury Instruction No. 2, CP 52, which said:

The Court hereby withdraws from your consideration the following claim of negligence: (1) That the bracket and clamp on the ladders were in a defective condition for allegedly being frozen or difficult to turn at the time of delivery on June 14, 2005. You are not to concern yourselves with why the court has withdrawn this claim.

Ferguson excepted to Jury Instruction No. 2 on grounds that “it was error to withdraw this claim that the clamp is in a defective condition because it would not turn or was frozen, but also that it is unnecessary and could be considered a comment on the evidence.” RP 989-90.

#### IV. ARGUMENT

##### A. **The Trial Court Erred in Ruling that a Union Cannot Be Liable for its Steward’s Negligence in Injuring a Union Member.**

In *O’Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004), this Court set forth the standard for reviewing a summary judgment determining agency liability:

The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. The trial court should grant the motion only if, from all the evidence, a reasonable person could reach only one conclusion. We review questions of law de novo.

The Union’s Executive Board determined which Union members were qualified to be a steward. CP 1199. In 2005, John Poulson was a member of the Union’s Executive Board. *Id.* The Union’s business agent

assigned Poulson with his consent to be its lead and payroll steward at the Marymoor Park concert. CP 1208, 1210. As steward, Poulson reported to the business agent who is a Union employee who reports to the Executive Board. CP 1209.

The Union steward determined the number of union workers who worked on the jobsite and acted as their supervisor and administrator. CP 1210. John Poulson had authority to determine if his crew was qualified to erect a scaffold and to replace them if they were unqualified, CP 1203, to “assign various union members to do specific tasks”, to “supervise the quality of the work”, “to make sure the work occurred in a safe manner”, and “to determine how many people were necessary to safely complete a particular job.” CP 1209. In conjunction with the concert promoter, Poulson determined when the Union crew would be released and whether or not the spot tower would be used. CP 1202, 1207.

As the Union steward, Poulson had “essentially total responsibility” for safety on the job site, CP 1198, and was “ultimately responsible for the safety of the crew on site.” CP 1206. He testified that “it’s the lead’s job to make sure that work is performed in a safe manner and that normal safety precautions are followed.” *Id.* Poulson testified that the steward’s safety

obligations to the crew were based on longstanding Union “tradition” that he had learned over “years of experience on the job.” CP 1199. Poulson confirmed the statement in the Union’s newsletter that “[a]s the Union’s supervisor and administrator of the crew, the Payroll Steward is ultimately responsible for the safety of the entire crew.” CP 1213. He testified that his work as steward furthered the Union’s business interests because “if you have a satisfied employer, you are liable to get more work.” CP 1210.

In *Woods v. Graphic Communications*, 925 F.2d 1195 (9<sup>th</sup> Cir. 1991), the Ninth Circuit Court of Appeals held that a union member may recover damages against his union for injuries tortiously caused by the union’s steward. In *Woods*, the plaintiff brought a state tort law claim against his union to recover for offensive racial remarks made by the union’s shop steward. The federal district court found that the steward racially harassed Wood and others and held the Union liable under agency principles. *Id.* at 1198. The Union appealed, arguing that it could not be liable because its steward had acted outside the scope of his agency. *Id.* at 1202. The 9<sup>th</sup> Circuit affirmed, holding that “a union may be liable for the acts of its stewards, even when they violate union policy.” *Id.*

In *O'Brien v. Hafer*, 122 Wn. App. at 281, 283-84, this Court discussed the legal elements of benefit, right of control, and mutual consent in determining agency liability:

A master-servant relationship under agency principles may arise when one engages another to perform a task for the former's benefit. [Citation omitted] In such a case, the one who seeks the benefit may either control or have the right to control the performance of the benefit. [Citation omitted] "It is the existence of the right of control, not its exercise, that is decisive." [Citations omitted]

"[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." [quoting from *Moss v. Vadman*, 77 Wash.2d 396, 402-03, 463 P.2d 159 (1969)] Both the principal and agent must consent to the relationship.... "The negligence of the agent is imputed to the principal because he has the right to control the acts of the agent." [Citation omitted]

In *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 898, 521 P.2d 946 (1974), Division Two held that when the facts giving rise to the agency relationship are undisputed, agency can be determined as a matter of law:

Usually the question of control or right of control is one of fact for the jury. *Jackson v. Standard Oil Co.*, *supra*, 8 Wash.App. at 91, 505 P.2d 139. However, this is true only where the facts as to the agreement between the parties are in dispute, or are susceptible of more than one interpretation. If the facts are undisputed, as in this case, and, without weighing the credibility of witnesses, there can be but one reasonable conclusion drawn from the facts, the nature of the relationship between the parties becomes a question of law.

Under *Woods*, *O'Brien* and *Baxter*, the Union is liable for any negligence by its steward John Poulson because the uncontradicted evidence shows he was its agent. The Union chose Poulson to perform supervisory and administrative tasks as its lead and payroll steward for its benefit and with his consent. Poulson reported to the Union's business agent who along with the Union's Executive Board had a right to control his work as steward. The Union charged Poulson with carrying out its longstanding tradition of having its steward assume "ultimate" and "essentially total responsibility" for the safety of the crew on the jobsite. Benefit, right of control, and mutual consent all exist as a matter of law.

**B. The Trial Court Erred in Ruling that Section 301 of the Labor Management Relations Act Pre-empted Ferguson's State Law Tort Claims against the Union.**

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce... may be brought in any district court of the United States having jurisdiction of the parties....

In *Allis-Chalmers Corp. v. Leuck*, 471 U.S. 202, 208, 220, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), the United States Supreme Court held that

§301 only preempts state law claims that are “substantially dependent” on an analysis of the terms of a collective bargaining agreement:

“We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and the unions; obviously, much of this is left to the States.”...

We do hold that when resolution of a state-law claim is *substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract*, that claim must either be treated as a §301 claim [citations omitted] or dismissed as preempted by federal labor-contract law.<sup>3</sup>

**1. The pertinent provisions of the Union’s collective bargaining agreement.**

The Memorandum of Agreement, CP 1002-04, between Lakeside and the Union incorporated the Union’s collective bargaining agreement, CP 1005-26, which sets forth Lakeside’s workplace safety obligations as the employer and the Union steward’s representative role concerning the interpretation and enforcement of the agreement:

7.1 The Employer [*i.e.* Lakeside] agrees to provide a safe and healthful workplace and comply with all safety and health standards in the Washington State General Safety and Health Standards (WAC chapter 296-24) General Occupational Health Standards (WAC chapter 296-62) and Construction Work (WAC chapter 296-155).

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<sup>3</sup> *Quoting in part from Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289, 91 S.Ct.1909, 29 L.Ed.2d 473 (1971) (emphasis supplied).

7.2 The Employer agrees to provide all required safety equipment when needed, and to insure that all safety equipment meets safety standards.

7.3 The Employer shall provide and maintain a first-aid kit appropriate to the hazards of the work and the number of employees at each location where employees are working, along with a telephone for contacting emergency service providers.

7.4 The Employer shall provide adequate lighting and ventilation in all work areas, including trucks. CP 1012-13.

5.2 The Employer agrees to recognize the Job Steward appointed by the Union as the employee's on-site representative of the Union and to involve the Job Steward in any question concerning the interpretation or enforcement of this Agreement. All employees covered by the Agreement shall have reasonable access to a Job Steward during work hours. ... CP 1012.

The Memorandum of Agreement and collective bargaining agreement do *not* contain any instructions for tightening nuts or installing ladders or impose any workplace safety obligations on the Union. CP 1002-26. Ferguson's complaint against the Union does *not* rely on or reference the Memorandum of Agreement or collective bargaining agreement. CP 1333. John Poulson did not reference or discuss the collective bargaining agreement, CP 1211, and as far as Laurel Horton, the Union's President in 2005 was aware, the collective bargaining agreement was not considered or discussed by anyone in connection with this incident. CP 1199, 1218.

**2. Section 301 does not pre-empt state law injury claims by union members against their unions whose resolution does not require construing a collective bargaining agreement.**

In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), the Supreme Court held that a union member's state law retaliatory discharge claim was not preempted by §301, even though the union member was covered by a collective bargaining agreement with a "just cause for discharge" provision, because the resolution of the claim did not require construing the collective bargaining agreement:

[A]pplication of state law is pre-empted by §301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement. *Id.* at 413.

[T]he state-law remedy in this case is "independent" of the collective bargaining agreement in the sense of "independent" that matters for 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective bargaining agreement. ... *Id.* at 407.

In *United Steelworkers of America v. Rawson*, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990), the Supreme Court recognized that §301 does not preempt a union member's tort claim against his union based on a union delegate's failure to exercise reasonable care. In *Rawson*, survivors of union members who perished in a mine fire brought state-law wrongful death actions against their union, alleging it had negligently failed to perform mine safety inspection responsibilities that it had undertaken in its collective

bargaining agreement. The Supreme Court ruled that the claims were preempted by §301 because:

The only possible interpretation of these pleadings, we believe, is that the duty on which respondents relied as the basis of their tort suit was one allegedly assumed by the Union in the collective bargaining agreement.

*Id.* at 370. But the Supreme Court also said that §301 preemption does not apply when a union delegate injures a union member through ordinary negligence that would create tort liability to a non-member:

This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society. There is no allegation, for example, that members of the safety committee negligently caused damage to the structure of the mine, an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might possibly be in the vicinity.

Nor do we understand... that any casual visitor in the mine would be liable for violating some duty to the miners if the visitor failed to report obvious defects to the appropriate authorities.

495 U.S. at 371.

The dissent in *Rawson* cited well-established U.S. Supreme Court and state court precedent that unions owe a duty of ordinary care not to tortiously injure their members, and that such claims are not pre-empted by §301:

Our decision in *Farmers v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977)... held that the NLRA did not pre-empt a

union member's action against his union for intentional infliction of emotional distress. ...

State courts long have held unions liable for personal injuries under state law. *See e.g., DiLuzio v. United Electrical Radio and Machine Workers of America*, 386 Mass. 314, 318, 435 N.E.2d 1027, 1030 (1982) (assault at a workplace); *Brawner v. Sanders*, 244 Ore. 302, 307, 417 P.2d 1009, 1012 (1966) (in banc) (personal injuries); *Marshall v. International Longshoremen's and Warehousemen's Union*, 57 Cal.2d 781, 787, 22 Cal.Rptr. 211, 215, 371 P.2d 987, 991 (1962) (stumble in union hall parking lot); *Inglis v. Operating Engineers Local Union No. 12*, 58 Cal.2d 269, 270, 373 P.2d 467, 468 (1962) (assault at union meeting); *Hulahan v. Sheehan*, 522 S.W.2d 134, 139-141 (Mo.App. 1975 (slip and fall on union hall stairs)).

*Id.* at 382-83.

Similarly, in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397, n. 10, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), the Supreme Court said:

Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by §301. (See also *Franchise Tax Board*, 463 U.S. at 25, n. 28, 103 S.Ct. At 3854, n. 28 (“[E]ven under §301 we have never intimated that any action merely relating to a contract within the coverage of §301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under §301 simply because the strike may have been a violation of an employer-union contract.”))

Unlike the union delegates in *Rawson*, steward Poulson allegedly did “violate a duty of reasonable care owed to every person in society” when he installed the ladder by himself and did not tighten the nut properly or make

sure the clamp was secure. Unlike in *Rawson*, in this case there is evidence that steward Poulson “negligently caused damage to the structure of the [ladder]... and could foreseeably cause injury to any person who might possibly be in the vicinity.” For example, Dustin of Seattle Stage Lighting, who went up and down the ladder before this incident, could have fallen from the ladder. If that had happened, Dustin would have a state law tort claim against the Union. Conversely, if Dustin or “any casual visitor” had negligently failed to tighten the nut properly, he “would be liable for violating some duty to [Ferguson].” 495 U.S. at 371.

Washington courts also hold that §301 does not prevent union members from bringing independent state law tort claims against their employer or union. In *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 129, 839 P.2d 314 (1992), our Supreme Court ruled that “a state statutory or common law claim [for racial discrimination, defamation, outrage or tortious interference with business relationships] is independent of the CBA [Collective Bargaining Agreement]—and therefore should not be preempted by §301—if it could be asserted without reliance on an employment contract.” It held that those state statutory and common law claims were not pre-empted by §301 and further noted:

If nonunion employees can maintain a cause of action under a state statute or under common law without reference to an employment contract, then union employees should be afforded the same opportunity—*i.e.* their state law claims should not be pre-empted.

In *Rhoads v. Evergreen Utilities Contractors, Inc.*, 105 Wn. App. 419, 425, 20 P.3d 460 (2001), Division Three held that §301 did not pre-empt common law negligence claims by two union apprentices against a union-management joint apprenticeship program for failing to provide a safe work place: “Because the claims sound in tort, arise from state common law, and do not require reference to or interpretation of the CBA, they are not preempted under §301.” Ferguson’s tort claims against the Union based on steward Poulson’s allegedly improper installation of the ladder and failure to perform the Union steward’s safety obligations to the crew are not preempted by §301 because they are ordinary negligence claims, *Rawson*, that are independent of and do not require construing the collective bargaining agreement, *Allis-Chalmers* and *Lingle*. Under *Commodore*, Ferguson as a union member has the same legal right to bring a negligence action against his union that a non-member like Dustin would have.

**3. Section 301 does not pre-empt state law injury claims based on a union's voluntary assumption of and failure to perform safety obligations to its members.**

In *Electrical Industrial Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 95 L.Ed. 791 (1987), the Supreme Court held that a state law tort claim that a union breached its duty of care to provide a union member with a safe work place is pre-empted by §301, if the claim is substantially dependent on the union's collective bargaining agreement and is not based on an independent statutory or common law duty to exercise reasonable care. Since the collective bargaining agreement in *Hechler* did create, and the common law did not create, an obligation on the union to provide a safe workplace, the Supreme Court said "in this case as in *Allis-Chalmers*, it is clear that questions of contract interpretation... underlie any finding of tort liability", and held that the tort action was pre-empted by §301. *Id.* at 862.

In *Rawson*, however, the dissent pointed out that a union can voluntarily assume legally enforceable safety obligations to its members under Restatement 2d of Torts §323 (1965), which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection for the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of harm; or

(b) the harm is suffered because of the other's reliance upon the undertaking.

495 U.S. at 377.

A jury could reasonably conclude that the Union recognized it was necessary to have its stewards undertake workplace safety responsibilities to protect its members from injury, rather than relying solely on the employer. A jury further could conclude that steward Poulson's failure to exercise due care for the safety of the crew by installing the ladder himself instead of "maintaining the number of crew needed to safely complete the work", CP 1215, increased the risk of harm to Ferguson, and that Ferguson was harmed by relying on the Union steward to make sure the ladder was properly clamped, checked and safe to use. Consequently, under *Rawson* and §323 of the Restatement 2d of Torts, Ferguson has an independent common law claim against the Union for voluntarily undertaking and failing to perform its safety obligations to its members on the jobsite.

The Union's collective bargaining agreement does not impose on it any obligation concerning the safety of its members on the jobsite. CP 1002-26. It only requires Lakeside as the employer to comply with WISHA workplace safety regulations and to provide required safety equipment, a first

aid kit and a telephone, and adequate lighting and ventilation in all work areas. CP 1012-13. It was never at issue in this incident. CP 1211, 1218. The Union's safety obligations to its members arose solely from voluntarily undertaking through "years of experience" a "tradition" of making its steward, "as the Union's supervisor and administrator of the crew,... ultimately responsible for the safety of the entire crew." CP 1199, 1213. Thus, it is not necessary to analyze the collective bargaining agreement to resolve Ferguson's claim that the Union voluntarily undertook, then failed to render through steward Poulson, jobsite safety services which it recognized as necessary, and which Ferguson relied on for his personal protection.

Ferguson's state law tort claims that the Union through its agent steward Poulson negligently failed to tighten the nut, check the work, and perform the steward's safety obligations to the crew are "independent of the collective bargaining agreement in the sense ...[that] ....resolution of the state-law claim does not require construing the collective bargaining agreement. *Lingle, supra* at 407. *Hechler* therefore does not bar Ferguson's claims, and the trial court erred in ruling on summary judgment that the Union could not be liable for negligently injuring Ferguson.

**C. Safway Has the Liability of a Product Seller and Manufacturer.**

RCW 7.72.010(1) provides that

“Product seller” means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

Washington’s Product Liability Act, RCW 7.72.040(1)(a) provides that “a product seller... is liable to the claimant only if the claimant's harm was proximately caused by the negligence of such product seller...” except that “(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if: ...(e) The product was marketed under a trade name or brand name of the product seller.” As a product seller who marketed its ladders under its brand name, Safway was subject to liability in negligence, *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 15 P.3d 188 (2000), and strict product liability, *Falk v. Keene Corp.*, 113 Wn.2d 645, 654, 782 P.2d 974 (1989).

**D. The Trial Court Erred in Granting Judgment as a Matter of Law Dismissing Ferguson’s Negligence and Product Liability Claims based on the Frozen Ladder Attachment Clamp.**

The following standard applies in reviewing motions for judgment as a matter of law:

“Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” [Citation omitted] “Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.” [Citation omitted] “Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” [Citation omitted].

When reviewing a motion for judgment notwithstanding the verdict (judgment as a matter of law), this Court applies the same standard as the trial court.

*Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

The trial court erred in granting Safway’s motion for judgment as a matter of law that it was not negligent and did not proximately cause injury by supplying a defective, frozen swivel clamp, and it erred in giving Jury Instruction No. 2, which withdrew those issues from the jury. A company’s internal policies and procedures are relevant to establish the standard of care.

*Warner v. Regent Assisted Living*, 132 Wn. App. 126, 135-36, 130 P.3d 865

(2006) (nursing home's internal standards admissible on standard of care). Safway's operations manager testified it was below Safway's standards to supply a ladder attachment clamp that would not swivel. RP 406. Safway's ladder and guardrail gate installation instructions, Ex. 10, said "it is best to install an SAU ladder on a scaffold leg post rather than on a horizontal member." Safway's ladder installation video, Ex. 12, says and shows how to "Install your clamps so that the bolt is on top with and the clamp hanging down, like this." Dr. Gill testified that Safway's clamp was defective because it wouldn't rotate into the vertical position and could not be installed on a horizontal member with the bolt on top rather than on the bottom, as recommended in the installation video. RP 481, 484-85.

John Poulson testified that if he had to attach the ladder to a horizontal member, he would have put the bolt in the top position, if he had the choice, RP 337-39, but the clamp was frozen in the horizontal position with the bolt on the bottom. Safway's accident investigators said the bolt would have been a lot less likely to fall out of clamp if it had been installed on top instead of on the bottom of the clamp. RP 199.

"[T]he existence of factual causation is generally a question for the jury. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*,

122 Wn.2d 299, 314, 858 P.2d 1054 (1993). “It is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that [proximate cause] may be a question of law for the court.” *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982), quoting *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945); *Bordynoski v. Bergner*, 97 Wn.2d 335, 644 P.2d 1173 (1982). The trial court erred in granting judgment as a matter of law because there was substantial evidence from which the jury could have inferred that Safway violated its internal standards and procedures by supplying a frozen, defective swivel clamp that was a proximate cause of the ladder collapse.

No evidence supports the trial court’s speculation (even Safway did not claim) that the swivel clamp became frozen in Safway’s custody between the accident in 2005 and the trial in 2010. The trial court’s statement that “Mr. Poulson had predetermined that he was going to put it on horizontal bars”, RP 650, also is unfounded and contrary to Poulson’s testimony.

**E. The Trial Court Erred in Commenting on the Evidence and Instructing the Jury that Safway’s Failure to Furnish a Guardrail Gate Was “Irrelevant and Immaterial.”**

Wa. Const. Art. IV, sec. 16 states: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the

law.” The objective of this mandate is “to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court’s opinion is on the testimony submitted.” *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). In *State v. Levy*, 156 Wn.2d 709, 723-24, 132 P.3d 1076 (2006), our Supreme Court said:

Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of article IV, section 16. Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. ...

The presumption of prejudice test has consistently been applied to oral comments made by a judge during the course of a trial.

“An instruction improperly comments on the evidence if the instruction resolves a disputed issue of fact that should have been left to the jury.” *State v. Eaker*, 113 Wn. App. 111, 118, 53 P.3d 37 (2002).

Proximate causation is a fact question for the jury. *Fisons, supra*. The trial court’s oral instruction that “the existence or nonexistence of a guard gate is not relevant or material to the issues that are before this jury”, RP 322, “resolve[d] a disputed issue of fact that should have been left to the jury.” *State v. Eaker, supra*. Contrary to the instruction, the existence or nonexistence of a guardrail gate was directly relevant to the proximate cause

of the ladder collapse, and to whether Safway breached its duty to provide a safe scaffold.

In *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 479, 804 P.2d 659 (1991) this Court said, “If there is no duty, then the presumption of the duty would indeed be a comment on the evidence.” Conversely, in this case the trial court commented on the evidence by giving an oral instruction which presumed that no duty existed—*i.e.* “the existence or nonexistence of a guard gate is not relevant or material”—when in fact a duty to furnish a “guardrail gate ... [that] will provide the user a safe entrance/exit from the ladder to the platform”, Ex. 10, did exist.

In *Douglas v. Freeman*, 117 Wn.2d 242, 257-58, 814 P.2d 1160 (1991), our Supreme Court said:

The test for the sufficiency of instructions involves three determinations: (1) that the instructions permit the party to argue that party’s theory of the case; (2) that the instruction(s) is/are not misleading; and (3) when read as a whole all the instructions properly inform the trier of fact on the applicable law.

The trial court’s oral instruction failed all three of these tests. It allowed Safway to suggest through a lay witness, RP 180, its theory that Ferguson caused the ladder collapse by climbing over the guardrail and dislodging the clamp, but did not allow Ferguson to argue his theory that if

Safway had furnished a guardrail gate, he would have stepped from the work platform onto the secure middle ladder section and would not have fallen.

The trial court's oral instruction made during the course of the trial was presumptively prejudicial under *State v. Levy, supra*, especially because the jury found that Safway was negligent but was not a proximate cause of Ferguson's injury. The instruction allowed the jury to conclude that Ferguson proximately caused the ladder collapse by climbing over the guardrail, but prevented the jury from finding that Safway's failure to furnish a guardrail gate was a proximate cause of the ladder collapse.

When read as a whole, all the instructions could not properly inform the jury on the applicable law because the trial court's oral instruction told the jury that the existence or nonexistence of the guardrail gate was irrelevant and immaterial when it actually was relevant and material to Ferguson's liability theories and to both parties' proximate causation theories. ER 401 says: "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 402 says: "All relevant evidence is admissible...." In *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976), our Supreme Court

said, “All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant.”

In *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wn.2d 701, 706, 575 P.2d 215 (1978), the Supreme Court said, “facts tending to establish a party’s theory, or to qualify or disprove the testimony of an adversary, is relevant evidence” that is admissible on issues of negligence and proximate cause:

it was [defendant’s] theory that the sole proximate cause of [plaintiff’s] injury was (1) employer Widing’s negligence in failing to properly instruct appellant on safety precautions or to furnish him with safe equipment; (2) appellant’s own negligence in failing to seek training or to wear a gas mask; or, (3) a concurrence of the two. Consequently, evidence of Widing’s negligence would tend to establish either that Widing alone, or in conjunction with [plaintiff], proximately caused the injury. As such, the evidence was both relevant and properly admitted by the trial court.

Appellate courts “review the trial court’s interpretation of statutes and evidentiary rules de novo [citations omitted and] review the trial court’s decision not to admit evidence under a correctly interpreted evidentiary rule for abuse of discretion.” *Hensrude v. Sloss*, 150 Wn. App. 853, 860, 209 P.3d 543 (2009). “Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.” *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). “Discretion is abused if it is exercised on untenable grounds or for untenable reasons.” *State v. Thang*, 145 Wn.2d 630,

642, 41 P.3d 1159 (2002). Since Safway's failure to furnish a safe guardrail gate, alone or in conjunction with the evidence of the way Ferguson accessed the ladder, was relevant to the parties' negligence, product liability and proximate causation theories, the trial court's failure to adhere to the requirements of ER 401 and 402 and admit that evidence was an abuse of discretion. *State v. Foxhoven, supra*.

The trial court's oral instruction that "the existence or nonexistence of a guard gate is not relevant or material", RP 322, contradicted its earlier ruling, which admitted Safway's ladder and guardrail installation video into evidence as relevant on "what the overall standard is, et cetera, in the industry as known to the defendants." RP 268. The trial court also abused its discretion because all of the reasons it gave for its oral instruction—*i.e.* the nonexistent guardrail gate was not mentioned in Ferguson's trial brief, RP 435, it was a "new theory of negligence and a new theory of causation" that was first raised "after almost a week of testimony", *id.*, "there is no proffered expert opinion in terms of the engineering factors that would lead to causation", RP 437, and the court's oral instruction to the jury "was not objected to at the time," RP 438—were contrary to the record and untenable.

Ferguson was not required to specify in his trial brief that the guardrail gate was the “unsafe....other equipment” or that Safway’s failure to furnish one was “other negligent or careless conduct which will be set forth during discovery and at trial”, as pleaded in his amended complaint. CP 1333. *See e.g. Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 283, 96 P.3d 386 (2004) (Plaintiff could contend at trial that an “apparent intoxication” rather than an “obvious intoxication” standard applied to dramshop liability, even though his trial brief said the “obvious intoxication” standard applied). The trial court’s statement that negligence and causation theories based on the non-existence of a guardrail gate were first raised “after almost a week of testimony” was incorrect—they actually were raised on the first day of trial by Safway’s suggestion that Ferguson dislodged the clamp when climbing over the guardrail, and by Ferguson’s offer of Safway’s guardrail gate instructions, Ex. 10, into evidence followed by the admission and playing of Safway’s guardrail gate installation video, Ex. 12, on the second day of trial. RP 219-220, 268. The trial court’s statement that “there is no proffered expert opinion in terms of the engineering factors that would lead to causation”, RP 437, was incorrect because Ferguson immediately made an offer of proof through Dr. Gill which demonstrated that the lack of

a guardrail gate was relevant on liability and proximate cause. RP 438-57. And its statement that its oral instruction “was not objected to at the time”, RP 438, is contrary to the record, which shows that Ferguson timely objected to it, RP 321, and timely requested a curative instruction. CP 102-04.

Safway had “a duty to use ordinary care to test, analyze and inspect the products it sells, and is charged with knowing what such tests should have revealed.” *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. at 476. The trial court also abused its discretion by ruling that Ferguson could argue that Safway breached its duty to inspect for proper cross braces, but could *not* argue that it breached its duty to inspect for defective swivel clamps and missing guardrail gates. RP 649. The trial court’s ruling permitted Ferguson to argue his weakest product defect claim based on the wrong size cross braces, but arbitrarily forbade him from arguing his strongest product defect claims based on the frozen swivel clamp and the missing guardrail gate. There was no tenable basis in law for distinguishing among the three defects in Safway’s scaffold and selectively allowing Ferguson to argue his weakest evidence, but preventing him from arguing his best evidence, which gravely prejudiced his right to prove his case.

**F. The Trial Court's Rulings, Viewed Singly or Cumulatively, Prejudiced Ferguson and Deprived Him of a Fair Trial.**

Based on the accumulation of the trial court's legal, evidentiary and instructional errors that prejudiced Ferguson and deprived him of a fair trial, this Court should reverse the judgment on the jury verdict in favor of Safway and remand for a new trial. What our Supreme Court stated in *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (citations omitted) applies here:

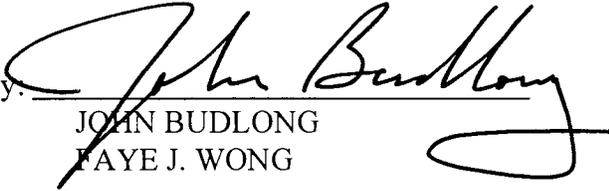
While it is possible that some of these errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.

**V. CONCLUSION**

Ferguson respectfully asks this Court to reverse the December 23, 2008 summary judgment order dismissing the Union, to reverse the January 28, 2010 order granting judgment as a matter of law dismissing his claims based on Safway's defective ladder attachment clamp, and to reverse the February 25, 2010 judgment dismissing his claims against Safway and remand for a trial of his claims against the Union and a new trial of his claims against Safway consistent with this Court's opinion.

RESPECTFULLY OFFERED this 13<sup>th</sup> day of September, 2010.

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