

NO. 47956-7-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES PAMPLIN,

Respondent,

vs.

SAFWAY SERVICES, LLC, a Delaware Corporation; PARKER
DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation;
PARKER TECHNOLOGY, INC., an Oklahoma Corporation; PARKER
DRILLING COMPANY, a Delaware Corporation; THOMPSON METAL
FAB, INC., an Oregon Corporation,

Appellants.

APPELLANT SAFWAY SERVICES, LLC'S OPENING BRIEF

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Table of Contents

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF ISSUES	3
IV. STATEMENT OF THE CASE.....	3
A. The busy construction site where Pamplin was a welder and Safway erected scaffolding	3
B. During the day shift, Safway left a partially erected scaffold with signals that it was not ready for use	4
C. Pamplin later found the scaffold with signals that it was ready for use, causing Pamplin to climb the incomplete scaffold and pull it over on himself.....	9
D. A jury trial resulted in a verdict for Pamplin after the trial court denied Safway’s requested jury instructions and denied its motion for judgment as a matter of law	13
V. ARGUMENT	15
A. This Court should direct judgment to Safway as a matter of law because no evidence supports a reasonable inference that Safway proximately caused Pamplin’s injury	16
1. The standard of review is <i>de novo</i>	16
2. A gap exists in Pamplin’s proximate cause showing because he never established that Safway was responsible for the incorrect signals on the scaffold that caused Pamplin to climb it	17

3.	Precedent illustrates why no legitimate inference supports Pamplin’s causation theory	20
4.	Pamplin may not rely on “disbelief”.....	24
5.	The trial court’s explanation of denial of Safway’s motions is legally deficient	26
6.	The testimony of Pamplin’s experts does not fill the evidentiary gap	27
B.	This Court should require a new trial because the trial court committed harmful error when it refused to instruct the jury on superseding cause and abused its discretion by failing to grant a new trial to correct this error	29
1.	The standard of review of failure to instruct is either <i>de novo</i> or mixed.....	30
2.	The law required the judge to instruct the jury on superseding cause because substantial evidence supported the theory	31
3.	The jury should have resolved the issue of foreseeability	36
4.	The failure to instruct on superseding cause was harmful and not remedied through other instructions.....	41
VI.	CONCLUSION.....	45

APPENDIX

- A: Safway’s Proposed Instruction WPI 15.05 (CP 259)
- B: Safway’s Proposed Instruction WPI 15.01 (modified) (CP 258)
- C: Court’s Instructions to the Jury (CP 276-304)
- D: Worksite Photo (Exhibit 14)
- E: Accident Scene Photos (Exhibit 101)

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Albertson v. State</i> , 191 Wn. App. 284.....	30, 39-40
<i>Allen v. Hart</i> , 32 Wn.2d 173 (1948).....	42, 43
<i>Arnold v. Sanstol</i> , 43 Wn.2d 94 (1953).....	22, 23, 24, 32, 34
<i>Campbell v. ITE Imperial Corp.</i> , 107 Wn.2d 807 (1987).....	40
<i>City of Tacoma v. Belasco</i> , 114 Wn. App. 211 (2002).....	30, 31
<i>Coleman v. Ernst Home Center, Inc.</i> , 70 Wn. App. 213 (1993).....	22
<i>Cox v. Gen. Motors Corp.</i> 64 Wn. App. 823 (1992).....	31
<i>Cowsert v. Crowley Maritime Corp.</i> , 101 Wn.2d 402 (1984).....	17
<i>De Koning v. Williams</i> , 47 Wn.2d 139 (1955).....	42
<i>Douglas v. Freeman</i> , 117 Wn.2d 242 (1991).....	30
<i>Gardner v. Seymour</i> , 27 Wn.2d 802 (1947).....	21, 22, 23, 24
<i>Hester v. Watson</i> , 74 Wn.2d 924 (1968).....	35

<i>Jefferson County v. Seattle Yacht Club</i> , 73 Wn. App. 576 (1994)	32
<i>Kappelman v. Lutz</i> , 167 Wn.2d 1 (2009)	30
<i>Little v. PPG Indus., Inc.</i> , 19 Wn. App. 812 (1978), <i>affirmed in part</i> , 92 Wn.2d 118 (1979).....	30, 32
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372 (1991)	17, 20, 21, 23, 24
<i>Miller v. Likins</i> , 109 Wn. App. 140 (2001)	20
<i>Moore v. Chesapeake & O. R. Co.</i> , 340 U.S. 573 (1951).....	25
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417 (2002)	19
<i>Qualls v. Golden Arrow Farms</i> , 47 Wn.2d 599, 288 P.2d 1090 (1955).....	36, 37, 38, 39
<i>State v. Clausing</i> , 147 Wn.2d 620 (2002)	41
<i>State v. Golladay</i> , 78 Wn.2d 121 (1970)	41
<i>State v. Hackett</i> , 64 Wn. App. 780 (1992)	42
<i>State v. Walker</i> , 136 Wn.2d 767 (1998)	30, 31
<i>State v. Wanrow</i> , 88 Wn.2d 221 (1977)	41
<i>Thompson v. King Feed & Nutrition Serv.</i> , 153 Wn.2d 447 (2005)	30

Wuthrich v. King County,
____ Wn.2d ____, 2016 WL 348070, No. 91555-5 (Wash.
Jan. 28, 2016).....17

Other Authorities

Civil Rule 50.....16
Civil Rule 59(a)(7) and (8)30
Evidence Rule 60220
RAP 2.5(a)(2).....16

I. INTRODUCTION

This appeal arises from a negligence claim by a construction site welder against scaffold erector Defendant Safway Services, LLC (“Safway”) for injuries the welder suffered when he climbed on an incomplete scaffold and it fell. Safway seeks 1) judgment as a matter of law because the welder did not meet his burden to prove that Safway’s negligence was a proximate cause of his injury, or 2) a new trial to remedy erroneous jury instructions that prejudiced Safway by preventing the jury from considering Safway’s supported theory of a superseding cause.

Welder Charles Pamplin (“Pamplin”) testified that during his night shift at the busy construction site, he climbed on the incomplete scaffold because it had a green tag and a partial ladder affixed to it. Green tags and ladders affixed to scaffolds were signals at Parker’s construction site that a scaffold was ready for use. But Safway had only partially erected the scaffold during the day shift prior to Pamplin’s accident. The scaffold was incomplete and not ready for use. Uncontradicted testimony established that Safway employees left the scaffold with signals it was not ready for use, including: no ladder, no green tag and caution tape around it. Pamplin introduced no evidence that Safway was responsible for the signals that invited him to mount the unfinished scaffold.

The trial court erred when it denied Safway’s motions for

judgment as a matter of law despite this lack of evidence. This Court should reverse and vacate the judgment.

Alternatively, a new trial is warranted because the trial court failed to give Safway's requested superseding cause instructions, Washington Pattern Jury Instruction ("WPI") 15.05 and 15.01. These instructions would have allowed the jury to conclude that others at the construction site removed the red barrier tape and affixed the ladder and the green tag with welder's flux core wire to the scaffold after it was left by Safway, superseding any alleged negligence by Safway. Testimony showed that Safway did not use welder's flux core wire to affix tags to scaffolding, and that this material was carried by welders. The evidence permitted the jury to conclude that other workers had altered the condition of the scaffold to indicate the scaffold was ready for use when it was not.

The trial court's refusal to give a superseding cause instruction prejudiced Safway, who could not present its theory of causation to the jury.

II. ASSIGNMENTS OF ERROR

The trial court erred as a matter of law when it:

(1) denied Safway's motion for judgment as a matter of law at the close of Pamplin's case, entered judgment on the verdict and denied Safway's renewed motion for judgment as a matter of law after entry of judgment because Pamplin's evidence failed to establish that Safway was responsible for the green tag and the ladder that caused Pamplin to mount

the incomplete scaffold and, in fact, uncontested evidence showed that Safway left the scaffold without a tag, without a ladder and surrounded by caution tape; and

(2) denied Safway's proposed superseding cause instructions WPI 15.05 and WPI 15.01 as modified, which prevented the jury from considering Safway's superseding cause theory that others on the job site altered the condition of the scaffold to indicate that it was ready for use when it was not, and denied Safway's motion for a new trial.

III. STATEMENT OF ISSUES

(1) Did Pamplin fail to introduce evidence sufficient to support the verdict that conduct by Safway caused his injuries when Pamplin failed to introduce evidence establishing that Safway employees had affixed to the scaffold with welder's flux core wire a green tag and placed a partial ladder on the scaffold, the indicia that caused Pamplin to climb the scaffold when it was not ready for use? Was the evidence further insufficient in light of the affirmative and uncontested evidence that Safway left the scaffold with indicia it was not ready to be used, including: no ladder, no green tag and caution tape surrounding it? (Assignment of Error 1).

(2) Where a trial court must instruct the jury sufficiently to allow a party to argue its theory of the case, and where substantial evidence supported the conclusion that others on the job site altered the condition of the scaffold to indicate it was ready for use, was Safway entitled to its proposed superseding cause instructions WPI 15.05 and WPI 15.01 as modified, and to a new trial? (Assignment of Error 2).

IV. STATEMENT OF THE CASE

This case arises from a jury trial of a negligence claim for events on a construction site.

A. The busy construction site where Pamplin was a welder and Safway erected scaffolding

General contractor Parker Drilling Company was responsible for constructing an Alaskan Arctic Drilling Unit at a construction site located

in Vancouver, Washington.¹ Many tradesmen worked to build the rig, including electricians, mechanics, a drilling crew, welders, and scaffolders, all working under the direction of Parker.² Parker hired subcontractor Safway to be exclusively responsible for the construction, maintenance, and dismantling of hundreds of scaffolds at the worksite.³ Parker—not Safway—was responsible for developing workplace rules and ensuring scaffold training for all workers.⁴

Parker was highly satisfied with Safway's performance throughout the duration of the two-year long project.⁵

B. During the day shift, Safway left a partially erected scaffold with signals that it was not ready for use

On December 14, 2010, a four-person Safway scaffold crew (including Lonnie Brown, Danny Johnston, and Troy Bowen) began erecting the subject scaffold to about 11 feet high during their day shift.⁶ General contractor Parker interrupted that task, calling the crew to other pressing work.⁷ Undisputed evidence established that when the Safway

¹ 7/10/15 VR 11-15 (Nix testimony). *See* Exhibit 14 (worksite photo) (App. D).

² 7/10/15 VR 1060:13-1062:5 (Nix testimony).

³ *Id.* *See also* 434 VR 435:3-436:4 (Baker testimony).

⁴ 7/7/15 VR 202-03 (Schueler testimony); 7/7/15 VR 273:7-13 (Gill testimony); 7/10 VR 1111:25-1112:5-22, 1201:19-1202:2 (Curry testimony).

⁵ 7/10/15 VR 1062:6-18 (Nix testimony).

⁶ 7/9/15 VR 925:4-926:1, 935 (Brown testimony).

⁷ 7/10/15 VR 105016-21 (Nix testimony); 7/8/15 VR 444 (Baker testimony).

crew left the incomplete scaffold that afternoon, the Safway crew left it inaccessible with red barricade tape surrounding its base, no access ladder and no green tag. These were signals that the incomplete scaffold was not ready for use.⁸

Specifically, Safway crew members Lonnie Brown and Danny Johnston testified that, consistent with Parker's site-specific signaling rules, the crew removed the access ladder from the partially completed scaffold as a signal to others that the scaffold was not ready for use. The scaffold did not bear a green tag signed by the erectors signaling that it was ready for use. Mr. Johnston testified specifically as to each of these steps completed by Safway, as follows:

Q. Do you remember what you did to secure -- because this is a key issue that this jury needs to know about -- what did you folks do to make sure the scaffold remained safe when you left it in an incomplete status?

A. We took off the ladder. There was no ladder.

Q. What did you do with the ladder?

A. We put it around the corner in the rack that we had brought over for the scaffold.

⁸ 7/10/15 VR 1062:19-1063:7 (Nix testimony); 7/9/15 VR 753:2-13 (Dufrene testimony); 7/8/15 VR 583:16-584:9 (Johnston testimony); 7/8/15 VR 418:10-16, 429:2-7 (Baker testimony) (a scaffold with no ladder "means don't climb."); 7/9/15 VR 928:22-930:8 (Brown testimony) ("there is training that you go through and it specifies in there if the scaffold is not tagged, if it doesn't have a ladder on it, and if the tag that is on there is not signed, don't access the scaffold.")

Q. And did you believe, given the workplace-specific rules, that that rendered this scaffold safe when you left it?

A. Yes, everybody knew that they weren't supposed to access scaffold unless it was signed for that day [on a green tag] or had a ladder.

Q. So --

A. Or it wasn't "or" had a ladder, but it had to have a ladder and a signed tag for --

Q. You had to have both?

A. Yeah, both.

Q. And this had neither.

A. Yeah, it had neither.⁹

Similarly, Mr. Brown testified that Safway did not leave the scaffold with an access ladder, as follows:

Q. What did you do to this scaffold to make sure that it was safe and secure?

A. There was no access to it, so the ladder was removed at some point in time, and then we cleaned up our area and then left.

* * *

Q. When you left that scaffold, was there a ladder on that scaffolding?

A. No, there was not.¹⁰

Brown testified that it was known at the worksite not to get on a scaffold that had no ladder and no signed green tag.¹¹ After leaving the scaffold with no ladder and no green tag, the Safway crew went to perform other

⁹ 7/8/15 VR 583:16-584:9 (Johnston testimony). See also 7/8/15 VR 418:10-16, 429:2-7 (a scaffold with no ladder "means don't climb.") (Baker testimony).

¹⁰ 7/9/15 VR 928:8-12, 17-19 (Brown testimony).

¹¹ *Id.* at 928:22-930:8.

work at the job site, and then left the job site for the day by 4:30 p.m.¹²

Parker Drilling Rig Manager Randy Nix, the highest ranking Parker employee on the job site, confirmed the absence of a ladder and a green tag and testified that between 4:30 and 5:00 p.m., he walked by the scaffold knowing that it was only partially completed.¹³ Mr. Nix testified that he specifically saw that the scaffold correctly did not have a ladder or a tag, and that the scaffold was surrounded by red danger tape.¹⁴ He gave the following uncontradicted testimony regarding the scaffold's condition at the end of the day shift:

Q. Did you know that this scaffolding where Pamplin fell had not been completed?

A. Did I know it had not --

Q. And I mean, "know" as to before the fall.

A. Did I know that it had not been completed?

Q. Correct.

A. Yes.

Q. How did you know?

A. For one, I was walking around in my daily thing before - before Brooks came on. We would meet him about 5:30 to go over what needed to be accomplished on a night crew.

Q. And this is on the 14th?

A. Yes.

Q. Okay.

¹² 7/9/15 VR 925:10-19. (Brown testimony); 7/8/15 VR 444 (Baker testimony).

¹³ 7/10/15 VR 1040:13, 1050:16-1053:4 (Nix testimony).

¹⁴ *Id.*

A. **About 4:30**, . . . [Court colloquy omitted] [I] walked through that area and verified that it was not complete yet. I knew that I had pulled the scaffolders off and sent them to do another job earlier in the day. And I walked by to be sure that they had not had time to get back over there. One reason that I had to do that, again, was I had to call the inspector and schedule him.

....

Q. So how could you tell it was not complete? Because you were the one that had sent the Safway people someplace else?

MR. BABB: Do you mean how did he tell the scaffolding was not complete? Was that your question?

MR. D'AMORE: Yes.

MR. BABB: Okay.

THE WITNESS: That was one part of it. **Another part of it was the fact that there was no tag, there was no ladder, and it was not tied into the – at the top that would keep it from pulling over. And the red tape that went from the wheel on the east side all the way around the scaffold to the wheel on the west side, I had to step under that.**

....

Q. Mr. Nix, we were talking about tags or no tags on this scaffolding when Mr. Pamplin fell. Was there no tag?

A. No, there was no tag that I saw. But there was red tape, as I indicated earlier, from the east wheel around the scaffolding to the west wheel, that I had to walk under to pass through that area. **So that should have been enough that nobody would have been in there.**

Q. We had some prior testimony that the red tape was put on after the fall. Do you know for certain that there was red tape beforehand?

A. **I do know there was about 4:30, between 4:30 and 5:00 that afternoon before, because I had to crawl or -- duck under it to – to get through the area. The red tape**

that was put up afterwards in the pictures that I saw was across the entire scene keep [sic] to keep people out.¹⁵

Mr. Nix also testified that the post-incident photographs of the scene show remnants of the red tape he had ducked under between 4:30 and 5:00 p.m. on December 14, around one of the legs of the scaffolding and wadded up in a ball on a table near the scaffold.¹⁶

Pamplin never offered evidence to contradict this testimony regarding how Safway left the scaffold.

C. Pamplin later found the scaffold with signals that it was ready for use, causing Pamplin to climb the incomplete scaffold and pull it over on himself

Pamplin was a welder from Homer, Louisiana, who had travelled to Vancouver to work as a welder at the worksite.¹⁷ On December 14, 2010 Pamplin and co-worker Albert Scott arrived at the scaffold after 6:00 p.m., hours after Safway had left the scaffold with multiple signals it was not ready for use.¹⁸ According to Pamplin, he found a three foot long ladder section and a green tag affixed to the scaffold and, based on those

¹⁵ 7/10/15 VR 1039:24–1040:13; 1050:16-21; 1051:19-1052:6; 1052:12-1053:4 (Nix testimony) (bold emphasis added).

¹⁶ *Id.* at 1115:18-1117:17. See also Exhibit 101 at Photos 7, 9, 10, 11, 12, 13, and 16 (App. E).

¹⁷ 7/9/15 VR 840:3 (Pamplin testimony).

¹⁸ 7/9/15 VR 852:14-853:18 (Pamplin testimony).

signals, assumed it was ready for use.¹⁹ Pamplin testified, “Once I seen the tag, I never had a second thought.”²⁰ Pamplin admitted he did not know when or how the condition of the scaffold came to be changed between the time Safway left the scaffold earlier in the day and the time he later found the scaffold that evening, testifying:

Q. This ladder and this [green] tag, you don’t know who put it on, do you?

A. No, sir.

Q. You don’t know when it got put on?

A. No, sir.

Q. You don’t know how long it had been hanging on there?

A. No, sir.²¹

Similarly, Mr. Scott testified that he did not know anything about the condition of the scaffold when it was left by the Safway crew.²² Welder’s helper Clint Galloway testified that he also did not know how or when a green tag became affixed to the scaffold.²³

Although Pamplin admitted that he did not know how, when, or by

¹⁹ 7/9/15 VR 852:14-853:18, 861:1-2 (Pamplin testimony). *See also* 7/7/15 VR 151:2-9 (Scott testimony that no red caution tape was up around the scaffold when Pamplin and he arrived); 7/18/15 VR 519:17-19, 535-38 (Former Washington State Department of Labor and Industries Compliance Officer Vierela’s testimony that Pamplin told him he had seen a green tag on the scaffold); and Exhibit 67:19 (Vierela’s notes “per Pamplin” that scaffold was green tagged).

²⁰ 7/9/15 VR 852:11-853:18 (Pamplin testimony).

²¹ 7/9/15 VR 899:24-900:5 (Pamplin testimony).

²² 7/7/15 VR 179:3-17 (Scott testimony).

²³ 7/8/15 VR 486:23-24 (Galloway testimony).

whom the partial ladder or green tag became affixed to the scaffold, Pamplin testified that he thought the day shift welders had been working on the scaffold before he got to it and could have altered it.²⁴ Pamplin testified under questioning by his counsel as follows:

Q. Okay. And did you tell [the State's investigator] that the day shift was on the scaffold the previous shift?

A. Yes, sir, I did.

Q. Okay. And why did you tell them that?

A. It's always been my thinking that it was no way that [the day shift welders] could have got that man-lift in there with the tires where they was and got that man basket turned to fit those gussets where they was fitting at. I've heard they said they wasn't on that scaffold. And again, I can't -- it's just my word against theirs but...²⁵

In addition to Pamplin's testimony that he believed the day shift welders had accessed the scaffold prior to his arrival on the site, Pamplin also testified that the green tag he found on the scaffold was attached with "flux core wire," which is "the wire you use when you're welding."²⁶ Welder's helper Clint Galloway testified that he saw the green tag affixed to the scaffold prior to the accident and it was affixed with "a little small gauge wire" that you could "just twist together and twist off."²⁷

Uncontested testimony showed this was not how Safway attached

²⁴ 7/9/15 VR 852:14-854:8 (Pamplin testimony).

²⁵ 7/9/15 VR 878:2-11 (Pamplin testimony).

²⁶ 7/9/15 VR 901:3-13 (Pamplin testimony).

²⁷ 7/8/15 VR 486:25-487:5 (Galloway testimony).

green tags. Safway used zip ties or a very thick “9 wire” that needed to be applied with a big set of pliers known as Klein’s.²⁸

Additionally, Wesley Baker (who investigated the accident as Regional Safety Manager for Safway) testified as to another alteration: the addition of planking on the scaffold. Baker testified that when the accident occurred, planking was on the top of the scaffold, but that the Safway workers erecting the scaffold “did not plank out the scaffold.”²⁹ Pamplin and Scott also told the State Inspector Vierela that when they used it, the scaffold was planked.³⁰ This was further evidence that others—not Safway—had altered the scaffold after Safway left it earlier that afternoon.

Pamplin and Scott first accessed the scaffold at about 6:30 p.m. using a manlift.³¹ After their midnight lunch break, Pamplin attempted to retrieve a jacket he had left on the scaffold by climbing up a partial ladder attached to the scaffold.³² The scaffold tipped and he fell, injuring his ankle. *Id.* None of the testimony supports a conclusion that Safway was

²⁸ 7/10/15 VR 1105:5-1107:11 (Curry testimony).

²⁹ 7/8/15 VR 418:12-16, 448:15-449:9 (Baker testimony). *See also* 7/8/15 VR 452:5-12, 453:18-454:15 (Baker testimony explaining addition of planking to top of scaffold, and agreeing that two planks could have been left by Safway, but not a “planked out” scaffold).

³⁰ Exhibit 67:35, 37.

³¹ 7/9/15 VR 854:14-855:25; 857:11-858:4 (Pamplin testimony); 7/7/15 VR 148:18-152:5; 154:18-155:7 (Scott testimony).

³² *Id.*

responsible for the very signals that plaintiff relied upon.

D. A jury trial resulted in a verdict for Pamplin after the trial court denied Safway's requested jury instructions and denied its motion for judgment as a matter of law

Pamplin sued multiple parties after his accident. Only his claims against Safway went to trial. Pamplin asserted that Safway “negligently failed to properly erect, secure, and maintain scaffolding” at the worksite, which caused Pamplin’s injury and damages.³³

Before submission of the case to the jury, Safway moved for judgment as a matter of law on the basis that Pamplin had failed to introduce sufficient proximate cause evidence because Pamplin offered no evidence to dispute that Safway left the scaffold properly signaled.³⁴ Pamplin did not meet his burden to establish that Safway failed to warn and was responsible for the false indicia that Pamplin himself testified caused him to climb the scaffold. The trial court denied Safway’s motion.³⁵

Safway sought the superseding cause instruction based on WPI 15.05.³⁶ Safway also proposed and requested, as the WPI comments instruct, that the Court include in the Proximate Cause instruction WPI

³³ CP 3-8 at ¶ 4.1 (Complaint). *See also* CP 9-14 (Answer).

³⁴ 7/10/15 VR 1251:10-1256:20.

³⁵ *Id.* at 1256:16-19.

³⁶ CP 259 (Safway’s Proposed Instruction WPI 15.05) (full text at App. A).

15.01 the phrase “unbroken by any superseding cause,” so that the instruction would read: “The term ‘proximate cause’ means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.”³⁷ This instruction critically ties superseding cause into the jury’s proximate cause inquiry.

When Safway sought the instructions, the trial court recognized that the evidence presented “a couple theories that can be argued here,” among them “the superseding cause, because the testimony is by the erection crew that when they left it there was no ladder on it and tape was put around it. Uncontroverted, I agree, that’s what they are testifying to.”³⁸ This express recognition of the evidence and its relationship to superseding cause supported the giving of Safway’s requested instructions. But the trial court then refused to give those instructions, analogizing a red light/green light situation and postulating that the jury might not believe Safway’s theory “of what happened.”³⁹ Safway forcefully objected: “I think that’s clear error, Your Honor, for the

³⁷ CP 258 (Safway’s Proposed Instruction WPI 15.01 (modified) (full text at App. B).

³⁸ 7/13/15 VR 1283:8-14 (court addressing evidence in context of WPI 15.05).

³⁹ *Id.* at 1283:15-1284:5 (denying instruction per WPI 15.05). *See also* 7/13/15 VR 1278:2-1280:18, 1284:9-11 (denying instruction per WPI 15.01 as modified by Safway, with the court stating, “I am giving the 15.01 modified version suggested by Defense, but I’m going to take out the ‘unbroken by superseding cause.’”).

record.”⁴⁰

After a five-day trial before twelve jurors, the jury returned a verdict in favor of Pamplin in the amount of \$947,285, with fault attributed 35% to Pamplin and 65% to Safway.⁴¹

The trial court denied Safway’s renewed motion for judgment as a matter of law or a new trial.⁴²

V. ARGUMENT

A gap exists in Pamplin’s causation case that is fatal to his claim. Pamplin never met his burden to prove proximate cause when the evidence showed that Safway left the scaffold with indicia it was not ready for use, but Pamplin hours later found the scaffold with indicia that it was ready for use so climbed it. Pamplin testified he only mounted the incomplete scaffold based on the indicia it was ready for use. Pamplin produced no evidence that Safway was responsible for the placement of the very indicia Pamplin relied on. Judgment to Safway should result.

Alternatively, reversal and a new trial are justified by the trial court’s refusal to instruct the jury on superseding cause.

⁴⁰ *Id.* at 1284:3-7.

⁴¹ CP 305-06 (Jury Verdict). See also CP 365-68 (Judgment).

⁴² CP 674-75; 8/24/15 VR 1482:19-21.

A. This Court should direct judgment to Safway as a matter of law because no evidence supports a reasonable inference that Safway proximately caused Pamplin's injury

Pamplin failed to meet his burden to prove that Safway proximately caused his injury. The incomplete scaffold tipped over because Pamplin climbed it when it was not ready for use. No evidence shows or supports a reasonable inference that Safway employees left the scaffold with signals that it was ready for use. To the contrary, the undisputed evidence showed that Safway left the scaffold signaled it was not approved for use. The jury verdict is unsupported by evidence sufficient to establish that actions by Safway proximately caused Pamplin's injuries. This Court should direct judgment to Safway.

1. The standard of review is *de novo*

A party may always appeal whether a verdict is supported by substantial evidence pursuant to RAP 2.5(a)(2). Further, Safway preserved its right to judgment as a matter of law pursuant to Civil Rule 50, moving both before submission of the case to the jury⁴³ and after entry of judgment.⁴⁴ A renewed motion for judgment as a matter of law after trial “is proper when, viewing the evidence and reasonable inferences therefrom most favorably to the nonmoving party, the court can say as a

⁴³ 7/10/15 VR 1251:10-1256:20.

⁴⁴ CP 142-531 (Safway's Renewed Motion for Judgment as a Matter of Law); 8/24/15 VR 1452-83 (Hearing on Renewed Motion).

matter of law that there is no substantial evidence supporting the verdict.”⁴⁵ “Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.”⁴⁶ Here, substantial evidence does not support the verdict.

2. A gap exists in Pamplin’s proximate cause showing because he never established that Safway was responsible for the incorrect signals on the scaffold that caused Pamplin to climb it

Pamplin’s proof of causation failed. To establish his negligence claim against Safway, Pamplin was required to prove each of the following essential elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury.⁴⁷ Division II has explained in *Marshall v. Bally’s Pacwest, Inc.*, that “[f]or legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury.”⁴⁸ The success of Pamplin’s claim against Safway required proof that Safway’s conduct proximately caused his accident. Pamplin had to show that Safway was responsible for the indicia falsely signaling that the scaffold

⁴⁵ *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 405 (1984) (citing *Hojem v. Kelly*, 93 Wn.2d 143, 145 (1980)).

⁴⁶ *Cowsert*, 101 Wn.2d at 405.

⁴⁷ *Wuthrich v. King County*, ___ Wn.2d ___, 2016 WL 348070, No. 91555-5 (Wash. Jan. 28, 2016); *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 378 (1991).

⁴⁸ *Marshall*, *supra*, at 378, citing *Pratt v. Thomas*, 80 Wash. 2d 117, 119, 491 P.2d 1285 (1971).

was ready for use that caused Pamplin to climb the incomplete scaffold.

Safway never disputed that the scaffold was incomplete and not ready for use. But it disputed the allegations of a failure to warn, presenting evidence that it *did* signal the scaffold should not be mounted.⁴⁹ Pamplin further testified that (1) he thought other welders used the scaffold in the interim before he did, and (2) the green tag he found was attached with welder's flux core wire,⁵⁰ which was not the manner in which Safway affixes tags.⁵¹ Pamplin also very candidly testified he did not know how these signals came to be on the scaffold.⁵² The affirmative testimony in the record showed that Safway did warn that the scaffold should not be mounted.⁵³

⁴⁹ This includes the uncontroverted testimony by Lonnie Brown and Danny Johnston that the scaffold was left with no ladder and no tag and uncontroverted testimony from Randy Nix that at the conclusion of the day shift, the scaffold had no ladder and no tag and was surrounded by red barricade tape. See, *supra*, Section IV, B.

⁵⁰ 7/9/15 VR 852:14-853:18 (Pamplin testimony). See also 7/7/15 VR 151:2-9 (Scott testimony that no red caution tape was up around the scaffold when Pamplin and he arrived); 7/18/15 VR 519:17-19, 535-38 (Former Washington State Department of Labor and Industries Compliance Officer Vierela's testimony that Pamplin told him he had seen a green tag on the scaffold); and Exhibit 67:19 (Vierela's notes "per Pamplin" that scaffold was green tagged).

⁵¹ 7/10/15 VR 1105:5-1107:11 (Curry testimony).

⁵² 7/9/15 VR 899:24-900:5 (Pamplin testimony).

⁵³ Pamplin did not present a failure to train case because the general contractor Parker was responsible for training all workers on safety, not Safway. This was confirmed by Pamplin's expert John Schueler, who testified as follows:

Question: And Parker is the one who makes the rules for the work site, do they not?

Answer: Yes.

Question: And they are the ones who are responsible, they and they

No evidence—direct or circumstantial—supports the conclusion that Safway falsely indicated the scaffold was ready for use and failed to warn it was unsafe. In his response to Safway’s post-trial motion, Pamplin argued that “testimony conflicted as to the presence and timing of red warning tape.”⁵⁴ This is false. Pamplin failed to point to any conflicting evidence regarding how Safway left the scaffold.⁵⁵ Simply saying that there is conflicting evidence does not make it so. Pamplin demonstrated only that certain “Safway erectors” testified that they could not remember whether there was red danger tape cordoning off the incomplete scaffold.⁵⁶ A witness’s testimony that the witness cannot recall a fact is not *contradictory* evidence where others have testified to that fact. Rather, lack of recall demonstrates that the witness’s testimony is not probative on the issue because the witness is incompetent for lack of personal knowledge. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430 (2002) (witness who did not recall EPA visit was incompetent for lack of personal knowledge to testify whether EPA notified him of pollution), citing

alone are responsible for training people like Mr. Pamplin about how to safely use scaffold, true?

Answer: That’s correct.

7/7/15 VR 202:22-203:2. Pamplin’s expert Joellen Gill also testified it was not Safway’s duty to train workers including Pamplin. 7/7/15 VR 273:7-13.

⁵⁴ CP 538 at ii.

⁵⁵ *See, e.g., id.*

⁵⁶ *Id.*

Evidence Rule 602.⁵⁷

The lack of recall by Lonnie Brown and Danny Johnston whether red barricade tape was up does not help Pamplin meet his evidentiary burden. Randy Nix's testimony was unequivocal that the red barricade tape was up. And Brown, Johnston and Nix all testified there was no green tag and no ladder. Pamplin offered nothing to counter this testimony.

3. Precedent illustrates why no legitimate inference supports Pamplin's causation theory

Established case law illustrates why Pamplin's showing was inadequate. This Court stated in *Marshall, supra*, it is axiomatic that "[t]he mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence."⁵⁸ "Even if negligence is clearly established, the respondents may not be held liable unless their negligence caused the accident."⁵⁹ In *Marshall*, this Court affirmed summary judgment to a defendant for lack of proximate causation evidence when the plaintiff alleged that she was thrown from a treadmill because the

⁵⁷ ER 602 "Lack of personal knowledge" reads: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

⁵⁸ *Marshall v. Bally's Pacwest, Inc., supra*, 94 Wn. App. at 381 (1991).

⁵⁹ *Id.* at 378. See also *Miller v. Likins*, 109 Wn. App. 140, 145-47 (2001) (to satisfy the proximate cause burden requires showing more than that a breach "might have caused the injury.") (emphasis original).

treadmill malfunctioned and was in an unsafe location. But plaintiff produced no witness testimony or other evidence as to how the accident occurred. This Court remarked that without actual testimony, the plaintiff presented only a theory.⁶⁰ Pamplin's case suffers from a similar lack of evidence. He presented the theory that the Safway crew placed the green tag on the scaffold and failed to signal that the scaffold was not ready for use, but he presented no evidence to support the theory. He simply asked the jury to assume it.

Pamplin argues that circumstantial evidence supports the verdict by supporting an inference that Safway did not leave the scaffold as the direct testimony shows. This is incorrect. No evidence supports the inference. To conclude that Safway was responsible for the false signals requires rank speculation.

Further, even if Pamplin had submitted some circumstantial evidence to support the inference, this still would be insufficient. In *Gardner v. Seymour*,⁶¹ the Washington Supreme Court explained that if the evidence at trial established two or more equally plausible inferences regarding what "might" have happened, then the plaintiff has not met his burden. "A theory cannot be said to be established by circumstantial

⁶⁰ *Id.* at 378-80.

⁶¹ *Gardner v. Seymour*, 27 Wn.2d 802, 809 (1947).

evidence, even in a civil action, unless the facts relied upon are of such a nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them.” (emphasis added).⁶² Said another way, “[w]here causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.”⁶³ The *Gardner* court reversed the jury’s verdict because “no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.”⁶⁴

The Supreme Court in similar circumstances directed judgment for the defendant in *Arnold v. Sanstol*, where the Court explained that a case cannot proceed to the jury where two or more conjectural theories compete, stating:

A verdict cannot be founded on mere theory or speculation.
If there is nothing more tangible to proceed upon than two

⁶² *Id.*

⁶³ *Id.* citing *Sanchez v. Haddix*, 95 Wn.2d 593, 599 (1981); *Arnold*, 43 Wn.2d 94, 99 (1953). See also *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 220 (1993).

⁶⁴ 27 Wn.2d at 809.

or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred.⁶⁵

In *Arnold*, plaintiff presented a theory that the cab driver had a duty to avoid the collision after he knew or should have known the other driver would not remain on that driver's side of the street.⁶⁶ The Court examined whether the jury could simply infer that the other driver crossed the center line with sufficient time for the cab driver to appreciate the danger and take precautions. No testimony was admitted to show "that the cab driver saw the other car coming and realized the problem."⁶⁷ The Court held that the verdict against the cab company could not stand because only conjecture and speculation supported the plaintiff's theory.

Pamplin's negligence claim fails under *Marshall*, *Gardner*, and *Arnold*. Pamplin argues, and the trial court agreed, that the jury could simply accept Pamplin's theory that Safway left the scaffold with a green tag and a ladder and without the red barricade tape around it. But Pamplin offered no evidence, direct or circumstantial, to contradict the witnesses' testimony to the contrary or otherwise prove that *Safway* placed the false signals on the scaffold and removed the barricade tape. Even if Pamplin

⁶⁵ *Arnold*, 43 Wn.2d at 99 (citing *Gardner*, 27 Wn.2d at 808 and the cases cited therein).

⁶⁶ *Id.*

⁶⁷ *Id.*

had offered some circumstantial evidence, and even if it was enough to say it was “equally plausible” as Safway’s theory that others altered the scaffold, the Washington Supreme Court has declared such proof to be insufficient. “Equally plausible” fails to meet the evidentiary burden of a plaintiff. *Marshall, Gardner, and Arnold* demonstrate that Pamplin’s case was inadequate to go to the jury.

Pamplin impermissibly relied on the jury filling the gaps for him through speculation or guessing. Pamplin’s attorneys invited the jury to do so in their Closing Argument, arguing, “Were they in a rush to get to another assignment? Did they just pull up a ladder and go? Or did they just leave the ladder there?”⁶⁸ But no evidence supported a conclusion that the Safway crew left the ladder on the scaffold. The only evidence showed that the crew removed it. And the only evidence showed that the crew did not affix a green tag to the scaffold, and that red caution tape surrounded the scaffold after the Safway crew had left by 4:30 p.m.

4. Pamplin may not rely on “disbelief”

Pamplin may argue that the jury could have disbelieved the testimony of the Safway employees and Mr. Nix regarding the condition in which Safway left the scaffold. This argument is unavailing because it does not satisfy Pamplin’s burden of proving his theory that Safway’s

⁶⁸ 7/13/15 VR 1383 (Plaintiff’s Closing Argument).

negligence proximately caused his injury.

The United States Supreme Court discussed this issue in *Moore v. Chesapeake*⁶⁹ when the plaintiff asserted that the jury was entitled to disbelieve the defendant's employee-engineer's version of the accident and to accept the plaintiff's version. The Supreme Court held that while it is the jury's function to credit or discredit all or part of the testimony it heard, "disbelief of the engineer's testimony would not supply a want of proof. . . . Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it."⁷⁰ Even if the jury had disbelieved the testimony affirmatively supporting the defense theory, the U.S. Supreme Court concluded that the plaintiff still failed to meet her burden of proof.⁷¹ The U.S. Supreme Court affirmed the trial court's grant of a motion for judgment notwithstanding the verdict.

Similarly, in this case, Pamplin's evidence shows that he mounted a scaffold that was not ready for use and it fell over. Even if the jury disbelieved the three witnesses who testified that Safway left the scaffold with signals it was not ready to use, Pamplin is still faced with a "want of proof" that Safway was responsible for the erroneous signals he found on the scaffold.

⁶⁹ *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 575-77 (1951).

⁷⁰ *Id.* at 576.

⁷¹ *Id.* at 577.

5. The trial court's explanation of denial of Safway's motions is legally deficient

When the trial court denied Safway's motion for judgment as a matter of law during trial, it reasoned that the jury could find that Safway placed the green tag on the scaffold when the crew left it, stating, "[T]here can be a reasonable inference that it was tagged at the time they left it, not that someone came along in the intervening hours and tagged it. That could be one argument, but I'm taking the inferences in favor of the nonmoving party."⁷² This was error. As previously discussed, an inference that Safway placed the green tag on the scaffold would be directly contrary to all evidence and based only upon speculation.

Further, the trial court became distracted by the evidence that the scaffold had not yet been tied in and therefore was less stable than a finished scaffold. This is a red herring. Safway conceded that the scaffold was not ready for use. Even assuming the scaffold was not ready for use because of negligence, i.e., that Safway should have immediately tied in the scaffold, the critical issue for causation is whether the condition of the scaffold caused Pamplin's injuries when Safway had signaled the scaffold was unsafe for use. Pamplin only climbed the scaffold because it lacked red barricade tape, he found a ladder on it, and he saw the affirmative

⁷² 7/10/15 VR 1253:23-1255:8.

signal of a “green tag.” These incorrect signals are the legal cause of the accident. No evidence shows Safway was responsible for them.

When the trial court denied Safway’s motions, it failed to enforce Pamplin’s evidentiary burden to introduce *evidence* to support his factual theory. The trial court allowed the jury to jump to its verdict without any evidence connecting the dots.

6. The testimony of Pamplin’s experts does not fill the evidentiary gap

Safway anticipates that Pamplin may attempt to argue that testimony of his experts filled the gap in his proximate cause case. It did not. The gap arises from the testimony of fact witnesses and cannot be cured by expert testimony. No testimony establishes how the scaffold—left by Safway employees with indicia it was not ready for use—came to acquire indicia that it could be climbed between the time that Safway left the scaffold and Pamplin later mounted it during the night shift. The experts simply relied on the facts they believed were in evidence to reach their conclusions. Supporting *factual* testimony, however, was simply not there.

Even reviewing the expert testimony shows the experts did not patch the hole. For example, “human factors” expert witness Joellen Gill testified that the “root cause” of Pamplin’s injury was “that the scaffold at

the time of Mr. Pamplin's incident was in a defective and hazardous condition” due to “the lack of an effective safety program on the part of Safway.”⁷³ Ms. Gill focused on the scaffold when Pamplin encountered it, and did not opine regarding how the scaffold came to be without the indicia that Safway had left on it. She recognized that the lack of signals on the scaffold *when Pamplin found it* was critical to her opinion. Addressing whether the scaffold had “unambiguous messages” that it was “not ready for you to get on,” she explained:

Whereas if there is nothing on the scaffold—like in this case there was no barricade tape, there were no signs, whether or not there was a green tag is a factual dispute, and there was no red tag, I think everybody agrees with that. So someone approaching this scaffold has a very ambiguous message and they don't—it doesn't say to them very clearly that this scaffold is not safe.⁷⁴

She acknowledged also the critical role of the green tag in inviting Pamplin to mount the scaffold, explaining that if Pamplin “did see a green tag, that would be even more reenforcement [sic] for him to access the scaffold.”⁷⁵ Ms. Gill's testimony does not establish that Safway was responsible for the signals on the scaffold when Pamplin found it.

Pamplin's two other experts also did not advance his proximate cause showing. Former Washington State Department of Labor and

⁷³ 7/7/15 VR 221:12-18 (Gill testimony).

⁷⁴ 7/7/16 VR 246:3-11 (Gill testimony). *See also id.* at 282:1-4 (Gill stating there was no barricade tape when Pamplin found the scaffold).

⁷⁵ *Id.* at 247:10-11.

Industries Compliance Officer Paul Vierela testified that the scaffold tipped over because Mr. Pamplin climbed it when it was not ready for use, testifying that the “tip over” of the scaffold was “initiated” by “Mr. Pamplin climbing onto that scaffold without it being tied, guyed or braced.”⁷⁶ Officer Vierela confirmed that the scaffold had remained upright for several hours during the night shift, despite being incomplete and not yet tied-in, and only fell over when Pamplin climbed up the outside of the scaffold without using the lift mechanism.⁷⁷ This testimony further illustrates the lack of proof of facts to support proximate causation. Expert witness John Schueler did not offer any opinion as to causation.⁷⁸

The verdict is not sufficiently supported by evidence to establish proximate cause. This Court should reverse.

B. This Court should require a new trial because the trial court committed harmful error when it refused to instruct the jury on superseding cause and abused its discretion by failing to grant a new trial to correct this error

The trial court erred as a matter of law when it denied Safway’s proposed superseding cause instructions WPI 15.05 and WPI 15.01 as modified. This error prejudiced Safway by preventing the jury from considering Safway’s superseding cause theory that others on the job site

⁷⁶ July 8, 2015 VR 555 (testimony of Vierela).

⁷⁷ *See, e.g., id.*

⁷⁸ *See, e.g.,* July 7, 2015 VR 186-214 (testimony of Schueler).

caused the accident when they—contrary to the law and workplace rules—altered the condition of the scaffold to indicate that it was ready for use when it was not. Safway presented the trial court an opportunity to remedy the faulty jury instructions when Safway moved under CR 59(a)(7) and (8) for a new trial, but the trial court denied the motion.⁷⁹ This also was reversible error warranting a new trial.

1. The standard of review of failure to instruct is either *de novo* or mixed

Jury instructions are reviewed to determine whether they (1) permit the parties to argue their theories of the case, (2) are not misleading, and (3) accurately inform the jury of the applicable law when read as a whole.⁸⁰ Here, the jury instructions fail these tests. The standard of review of a trial court’s refusal to give a requested instruction “depends on whether the trial court’s refusal to give the proposed jury instruction was based on a matter of law or fact.”⁸¹ If the refusal to give the instruction was based on a factual dispute, it is reviewable for abuse of

⁷⁹ CP 504-31 (Safway’s Renewed Motion for Judgment); CP 373-503 (supporting declaration); CP 674-75 (order of denial); 8/24/15 VR 1482:19-21 (denial at hearing).

⁸⁰ *Douglas v. Freeman*, 117 Wn.2d 242, 256-57 (1991) (addressing whether instructions were sufficient when trial court failed to give proposed instructions regarding licensing and affiliation of a practicing dentist); *Kappelman v. Lutz*, 167 Wn.2d 1, 6 (2009); *Albertson v. State*, 191 Wn. App. 284 (2015). *Thompson v. King Feed & Nutrition Serv.*, 153 Wn.2d 447, 453 (2005); *Little v. PPG Indus., Inc.*, 19 Wn. App. 812 (1978), *affirmed in part*, 92 Wn.2d 118 (1979).

⁸¹ *City of Tacoma v. Belasco*, 114 Wn. App. 211, 214 (2002) (citing *State v. Walker*, 136 Wn.2d 767, 771-72 (1998)).

discretion, but if based on a rule of law, it is reviewable *de novo*.⁸² When the trial court misinterprets what the defendant has to show to be eligible for a defense, for example, the trial court has erred based on the law.⁸³ If the rationale was mixed, the appellate court first should determine whether the trial court followed the proper rule of law, and then determine if the court adequately applied the law to the facts of the case.⁸⁴ Here, review should be *de novo* because the failure was one of incorrect application of the law. Under any of the three standards, reversal is warranted.

A trial court abuses its discretion when denying a motion for a new trial when the denial is based on untenable reasons, including errors of law.⁸⁵ If the reasons for the trial court's decision on a motion for a new trial involve questions of law, the standard of review is *de novo*.⁸⁶ Here, the denial of the motion for a new trial to remedy the failure to instruct was legal error.

2. The law required the judge to instruct the jury on superseding cause because substantial evidence supported the theory

The failure to instruct was legal error. A defendant is entitled to have its theory of the case submitted to the jury under appropriate

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Walker*, 136 Wn.2d at 776.

⁸⁵ *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826 (1992).

⁸⁶ *Id.*

instructions when the theory is supported by substantial evidence.⁸⁷ Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.⁸⁸ Substantial evidence “may be direct or circumstantial.”⁸⁹

Here, the trial court recognized substantial evidence in the record supporting the instruction (“the testimony is by the erection crew that when they left it there was no ladder on it and tape was put around it”) and expressly acknowledged that the evidence was “uncontroverted.”⁹⁰ Further, as already recounted, Pamplin testified that common sense indicated to him that the day welders altered the scaffold and that the green tag he had observed was affixed with welder’s flux core wire. Galloway concurred, testifying that the green tag was affixed with a small gauge wire that could easily be twisted with fingers.⁹¹ This evidence supported the conclusion that Safway did not affix the green tag because Safway used a thick “9 gauge” wire that could only be applied with pliers known as “Klein’s.”⁹² Additionally, Baker testified that the collapsed

⁸⁷ *Little v. PPG Indus., Inc.*, 19 Wn. App. 812, 823 (1978) (reversing failure to give superseding cause instruction in strict liability setting), *affirmed in part*, 92 Wash. 2d 118, 126 (1979).

⁸⁸ *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588 (1994).

⁸⁹ *Arnold*, 43 Wn.2d at 99.

⁹⁰ 7/13/15 VR 1283:8-14 (Court).

⁹¹ 7/8/15 VR 486:25-487:5 (Galloway testimony).

⁹² 7/10/15 VR 1105:5-1107:11 (Curry testimony).

scaffold included planking that Safway had never installed.⁹³

This evidence was sufficient to permit a fair-minded jury to conclude that Safway left the scaffold correctly signaled, and others such as the day welders subsequently altered it. To deny the superseding cause instructions on this record, the trial court misapplied the law of superseding cause, or committed a “mixed” error by concluding that the evidence did not support the instruction.

During oral argument of Safway’s post-judgment motion for a new trial, the trial court indicated that it did not find sufficient or persuasive Safway’s theory that others at the busy worksite altered the scaffold, stating,

I always kind of think of, and this is where I could be wrong, that there has to be something more than two different versions to create the indicia that supports a third party coming in, taking a—doing an unforeseeable act far enough to relieve the first negligent party of the negligence that they had. And that just didn’t feel like that was here.

8/24/15 VR 1480:4-9. These comments indicate that the trial court incorrectly believed Safway had to produce more evidence or a different type of evidence to justify the instruction. This was legally incorrect. Further, the comments indicate the ruling was reached by pre-judging the evidence, rather than allowing the jury to weigh it. The trial court did not

⁹³ 7/8/15 VR 418:12-16, 448:15-449:9 (Baker testimony).

give sufficient credence to the substantial evidence that Safway presented. The Supreme Court in *Arnold, supra*, expressly said the evidence of a superseding cause can be circumstantial, as it was in this case. But the trial court refused to let the jury judge the circumstantial evidence.

The trial court, despite recognizing the uncontroverted evidence that supported a superseding cause instruction, appeared to lose track of the legal significance of the evidence, becoming distracted by how the parties might argue that evidence. The trial court appeared to conclude that the parties were simply arguing over how Safway left the scaffold, analogizing it to a case regarding whether a traffic light was red or green.⁹⁴ The trial court concluded that the evidence supported only “two versions of how a scene was,”⁹⁵ meaning the jury faced two choices: either Safway affixed the green tag or there never was a green tag. This analysis was mistaken for two reasons. First, the evidence did not support that Safway affixed the green tag. Pamplin submitted no evidence, direct or circumstantial, that Safway employees left the scaffold the way Pamplin found it, i.e., with a green tag and a ladder on the scaffold.

Second, the evidence supported a third conclusion at the heart of Safway’s defense: that others altered the scaffold’s condition between

⁹⁴ 7/13/15 VR 1283:16-22.

⁹⁵ 7/13/15 VR 1284:4.

when Safway left it and Pamplin encountered it bearing a green tag. The trial court's comments failed to account for the conclusion that others altered the scene before Pamplin arrived.

Precedent further demonstrates the error was one of law. The Washington State Supreme Court has explained in *Hester v. Watson* that “[i]f a given set of facts supports two or more theories of law, the court **must** instruct on all the theories to which the facts pertain.”⁹⁶ The *Hester* case involved a car accident and whether a party was entitled to an instruction for a “following-car situation” for which there is specifically applicable law, even though one party disputed that it was such a situation.⁹⁷ The Supreme Court reversed the trial court's failure to give the instruction, holding that, where witnesses had testified that one car was following another, the instruction was necessary because the jury could conclude that it was a “following-car” situation. “The court's failure to instruct on the theory . . . —there being substantial evidence to support each theory—was reversible error.”⁹⁸ The Supreme Court instructed that “[i]f a given set of facts supports two or more theories of law, the court must instruct on all the theories to which the facts pertain.”⁹⁹

Similarly, in this case, Safway was entitled to the superseding

⁹⁶ *Hester v. Watson*, 74 Wn.2d 924, 929 (1968) (emphasis added).

⁹⁷ *Id.* at 928-29.

⁹⁸ *Id.* at 927-28.

⁹⁹ *Id.* at 929 (emphasis added) (citing *Harris v. Fiore*, 70 Wn.2d 357 (1967)).

cause instruction because substantial evidence supported its theory that others altered the scaffold, breaking the chain of causation.

3. The jury should have resolved the issue of foreseeability

Pamplin's only argument against the trial court giving the superseding cause instructions Safway requested was his claim that a third person putting a green tag on the scaffold was foreseeable, so the instruction was not justified.¹⁰⁰ This argument is inadequate to justify failure to instruct. The jury should have determined foreseeability as it relates to superseding cause.

Pamplin's argument necessarily conceded the inference available from the evidence that a third person put a green tag (and ladder) on the scaffold, but argued this was foreseeable. This concession supported giving the instruction. The Supreme Court in *Qualls v. Golden Arrow Farms* answered the foreseeability argument by stating that foreseeability is a question for the jury.¹⁰¹ The Comment to WPI 15.05 explicitly states the same, instructing that "[i]f there are varying inferences to be derived from the evidence, the range of reasonable anticipation of foreseeability is

¹⁰⁰ 7/13/15 VR 1282:22-25 (Argument by Plaintiff's counsel).

¹⁰¹ *Qualls v. Golden Arrow Farms*, 47 Wn.2d at 603 ("Where varying inferences are possible from the evidence, the foreseeability of a particular event is a question for the jury.").

a question for the jury.”¹⁰² Thus, an issue of foreseeability does not prevent the giving of the instruction.

The Supreme Court in *Qualls* affirmed the giving of two superseding cause instructions when a milk truck driver left his milk truck parked off the street on a nearly level stretch of ground.¹⁰³ He testified that he left the truck with the motor off, the brake set, and the keys in the ignition.¹⁰⁴ Two children were playing nearby and their grandmother saw them standing on the doorway of the truck.¹⁰⁵ Shortly thereafter, one of the children was found injured in the street, the truck apparently having rolled backward over the child.¹⁰⁶ According to the Supreme Court, “there is no evidence as to what caused the truck to roll away, or in what manner the plaintiff received the injuries complained of.”¹⁰⁷ There was testimony that after the accident, the other child was inside the truck and the brake was not set.¹⁰⁸

The Supreme Court affirmed an intervening (or “superseding”) cause instruction, stating that “if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon

¹⁰² WPI 15.05 Comment citing *Kennett v. Yates*, 41 Wn.2d 558 (1952).

¹⁰³ *Qualls v. Golden Arrow Farms*, *supra*.

¹⁰⁴ *Id.*, 47 Wn.2d at 600.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 601.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.”¹⁰⁹ The Court instructed that “[w]here varying inferences are possible from the evidence, the foreseeability of a particular event is a question for the jury.”¹¹⁰ In *Qualls*, the intervening act was the second child who could have moved the truck. In the case at hand, the intervening cause was other workers, such as the welders, who could have altered the state of the scaffold to add the partial ladder and the green tag. The varying inferences from the evidence supported the instruction like the ones given and affirmed in *Qualls*.

Similarly, here the evidence established that the law and workplace rules prohibited any party other than Safway from altering the state of the scaffold including its signals.¹¹¹ Pamplin’s expert Gill testified that “Safway had the right to expect that others on the job site would not alter their scaffold in their absence.”¹¹² Gill agreed that no one on the job site is allowed to alter the scaffold except Safway, and that industry custom for the workplace is that “the party who places the red barrier tape is the only

¹⁰⁹ *Id.*, 47 Wn.2d at 602.

¹¹⁰ *Id.* at 603 (citing *Kennett v. Yates*, *supra*, 41 Wn.2d 558).

¹¹¹ 7/7/15 VR 145:12-21 (Scott’s testimony that workplace rules do not allow other workers to alter the scaffolding); 7/8/15 VR 449 (Baker’s testimony that nobody besides Safway is to add planking on the scaffold).

¹¹² 7/7/16 VR 290:15-18 (Gill testimony).

party who can remove it, typically.”¹¹³ The Court gave instruction WPI 12.07 regarding Safway’s right to rely on others’ obedience of the law.¹¹⁴ Additionally, where prior to this incident no one at this worksite had violated these laws and rules and altered the signals on Safway’s scaffolds,¹¹⁵ Safway had no reason to be on notice that workers were in fact altering its scaffolds.

This evidence and the WPI 12.07 instruction supported a conclusion by the jury that Safway should not have foreseen that others at the site would alter the scaffold. Under *Qualls*, the Court should reject Pamplin’s argument that an issue of foreseeability justified the failure to instruct. It did not. Foreseeability, too, should have gone to the jury.

The recent Division II decision *Albertson v. State, supra*, also supports reversal. *Albertson* concerned not a failure to instruct on superseding cause when the evidence supported the instruction, like here, but the giving of an instruction on superseding cause that was not supported by the evidence. This Court assessed the reasonable foreseeability of a father’s abuse if the Department of Social and Health Services returned a child to the father’s home after a faulty or biased investigation. The Court concluded that child abuse was “precisely the

¹¹³ 7/7/16 VR 289:14-20, 290:6-11 (Gill testimony).

¹¹⁴ CP 284 (Instruction No. 6).

¹¹⁵ 7/8/15 VR 434:1-3 (Baker testimony).

kind of harm” that DSHS should foresee.¹¹⁶ The alleged superseding event, i.e., the abuse, was not a superseding cause because it was “one of the hazards” that DSHS’s duty “is designed to prevent.”¹¹⁷ It was, therefore, foreseeable as a matter of law.¹¹⁸

The same cannot be said regarding the superseding act here. Safway’s duties were not in place to prevent workers or third parties from altering scaffolds. No evidence demonstrated that Safway had a duty to police the worksite or regulate the behavior of workers and other third parties at the busy construction site. Parker was the worksite supervisor, not Safway. Parker had a duty to train all workers on scaffold use, not Safway.¹¹⁹ Unlike in the *Albertson* case, here the superseding act of unauthorized alteration of the scaffold was not a harm Safway was tasked with preventing. *Albertson* supports reversal.

It was not foreseeable that any workers at the job site would alter the indicia left by Safway on the scaffold. At the very least, foreseeability was a question for the jury.

¹¹⁶ *Albertson, supra*, 191 Wn. App. at 298.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 289-99, citing *Seeberger v. Burlington N. R.R. Co.*, 138 Wn.2d 815, 823 (1999) (superseding act does not include the kind of harm that ordinarily would result from a breach of duty); *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807 (1987) (independent intervening act that is not reasonably foreseeable breaks the chain of causation).

¹¹⁹ *See, supra*, note 53.

Like Pamplin sought a jury's determination of its claims, so did Safway seek the jury's determination of its theories of defense. The trial court allowed Pamplin to present his theories to the jury, but unjustifiably prevented the jury from considering Safway's superseding cause theory.

4. The failure to instruct on superseding cause was harmful and not remedied through other instructions

The failure to instruct on superseding cause was harmful error. Pamplin may not justify the failure by asserting that the instructions might generally have allowed the jury to consider the superseding cause evidence. The instructions did not. Moreover, the jury was not instructed on the legal significance of the evidence, including that the superseding cause could break the chain of causation and result in a verdict for Safway.

“Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless.”¹²⁰ “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.”¹²¹ As the Court of Appeals has observed, “if the jury could well have returned a different verdict had it been instructed

¹²⁰ *State v. Clausen*, 147 Wn.2d 620, 628 (2002).

¹²¹ *State v. Wanrow*, 88 Wn.2d 221 (1977), citing *State v. Golladay*, 78 Wn.2d 121, 139 (1970).

[as requested], the error was not harmless.”¹²²

Here, the error must be presumed prejudicial because the jury could well have returned a different verdict if it had been permitted to accurately consider the evidence and Safway’s theory. It cannot be said that failure to instruct on superseding cause “in no way” affected the final outcome of the case. The error was substantial because it prevented consideration of a legal doctrine that would have averted Safway’s liability. As Safway argued to the trial judge in seeking a new trial, the theory was the “key” and the “heart and theme” of Safway’s case.¹²³ Instead, the trial court rulings impermissibly restricted the legal issues that the jury should have decided to the substantial benefit of Pamplin.

The instructions overall were insufficient. “Each party is entitled to have his theory of a case presented to the jury by proper instructions, if there is any evidence to support it, and this right is not affected by the fact that the law is covered in a general way by the instructions given.”¹²⁴ The Supreme Court explained this principle in *Allen v. Hart*, concluding that the right to proper instruction exists even where it might be tempting to

¹²² *State v. Hackett*, 64 Wn. App. 780, 787 (1992).

¹²³ 8/24/15 VR 1468:24-1469:6.

¹²⁴ *De Koning v. Williams*, 47 Wn.2d 139, 141 (1955) (emphasis added) (reversing for a new trial where court’s general instructions were not adequate and appellant was entitled to an instruction that “adequately” presented the jury his theory of the case), citing *Allen v. Hart*, 32 Wn.2d 173, 176 (1948) (reversing for a new trial for inadequate instruction on appellant’s theory of the case).

say that the instructions were generally fair without the specific instruction at issue:

Where the parties proceed upon different theories the court should, if requested, give instructions applicable to both theories, even though such theories are wholly inconsistent. The right to have one's theory presented is not affected by the fact that there is countervailing testimony, by the fact that the judge might deem the evidence inadequate to support such a view of the case were he the trier of the facts, or by the fact that the law is, in a general way, covered by the instructions given.¹²⁵

Without Safway's proposed instructions WPI 15.05 and WPI 15.01 as modified, the jury lacked a road map for consideration of the evidence favorable to Safway on superseding cause. The jury lacked knowledge of the legal significance of the evidence that Safway left the scaffold in a condition signaling it was not ready for use and others altered its condition by attaching a partial ladder and a green tag with welder's flux core wire and removing the caution tape.

The comments to WPI 15.05 also are clear that the superseding cause instruction should be given *together with* other proximate cause instructions.¹²⁶ The presence of the other instructions does not obviate the need for the instruction on superseding cause. No countervailing

¹²⁵ *Allen*, 32 Wn.2d at 176 (quoting with approval 2 *Bancroft's Code Practice and Remedies* 1969, § 1497).

¹²⁶ See 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.05 (6th ed.) ("Use WPI 15.01 (Proximate Cause-Definition) or WPI 15.01.01 (Proximate Cause-Definition- Alternative) with this instruction.").

consideration or justification excuses the failure to give the superseding cause instruction.

Pamplin incorrectly argued during the hearing of the post-verdict motions that Instruction No. 16 was alone adequate.¹²⁷ It was not. As a general instruction, it does not excuse the failure to specifically instruct on superseding cause. Further, Instruction No. 16 fails to convey that acts of another person can *interrupt* the chain of causation and relieve Safway of liability. Instruction No. 16 reads,

The term “proximate cause” means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of the same injury. If you find that Safway was negligent and that such negligence was a proximate cause of injury or damage to Plaintiff, **it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.**

However, if you find that the sole proximate cause of injury or damage to Plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for Safway.¹²⁸

Instruction No. 16 informed the jury to Pamplin’s benefit that there may be multiple proximate causes and that multiple causes do not relieve Safway of liability. The reference in the last sentence to another person being a “sole proximate cause” does not adequately convey superseding cause. The word “sole” is inadequate to convey all that is explained by

¹²⁷ 8/25/15 VR 1478:17-23.

¹²⁸ CP 294 (Instruction No. 16) (App. C) (emphasis added)

proposed WPI 15.05. The jury cannot have been expected to understand from Instruction No. 16 that if it found that Safway was negligent in how it constructed the scaffold without tying it or in how it left the scaffold, a superseding act of another—including the alteration of the signals—could break the chain of causation and result in a verdict for Safway. Instead, the instruction emphasized that multiple actors can cause the same injury. Exculpation by a superseding cause was not presented to the jury.

After considering anew the law and the evidence, this Court should conclude that the trial court's failure to instruct the jury on superseding cause was harmful error. Had the jury been instructed on the legal significance of the superseding cause evidence, the jury could well have answered the proximate cause question differently. A new trial is due.

VI. CONCLUSION

Courts must ensure that if a verdict is reached, it will be supported by substantial evidence and be consistent with the law. The verdict reached in this case is neither.

The negligence claim should not have been submitted to the jury. Safway can only be liable for its own conduct. Pamplin presented no evidence and no theory that demonstrated that conduct by Safway was the cause of his injuries. Pamplin asked the jury to blame Safway for causing his injuries when no evidence connected Safway's conduct to the false

signals that the scaffold was ready for use that caused Pamplin to climb it and fall. By denying Safway's motion for judgment as a matter of law, the trial court allowed the jury to find that Safway's conduct caused the injuries despite the lack of supporting evidence. Reversal is warranted.

Alternatively, a new trial is warranted. The law required instruction on superseding cause so that the jury properly could consider the uncontroverted evidence that workers other than the Safway crew placed the indicia on the scaffold and were an independent and superseding cause of the accident. The evidence supported the instruction. Without it, the jury could not consider this important evidence and the relevant law when reaching its verdict.

Respectfully submitted on this 8th day of February, 2016.

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*Attorneys for Appellant, Safway
Services, LLC*

Instruction No. _____

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury or event.

If you find that Safway was negligent but that the sole proximate cause of Plaintiff's injury was a later independent intervening cause that Safway, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of Safway is superseded and such negligence was not a proximate cause of Plaintiff's injury. If, however, you find that Safway was negligent and that in the exercise of ordinary care, Safway should reasonably have anticipated the later independent intervening act, then that act does not supersede Safway's original negligence and you may find that Safway's negligence was a proximate cause of Plaintiff's injury.

It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which the defendant should reasonably have anticipated.

WPI 15.05

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Instruction No. _____

The term “proximate cause” means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of the same injury. If you find that Safway was negligent and that such negligence was a proximate cause of injury or damage to Plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to Plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for Safway.

WPI 15.01 (modified)

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FILED

JUL 13 2015

Scott G. Weber, Clerk, Clark Co.

Deputy Clerk

12:34pm
Michelle Duhl

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

CHARLES PAMPLIN,

Plaintiff,

Vs.

SAFWAY SERVICES, LLC, a
Delaware Corporation,

Defendant.

No. 12 2 00764 4

**COURT'S INSTRUCTIONS
TO THE JURY**

Scott G. Weber

SUPERIOR COURT JUDGE

DATED this 13 day of July, 2015.

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0-000000276
(VVV)

Instruction No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any

bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after

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an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

Instruction No. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Instruction No. 3

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 4

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

Instruction No. 5

Every person has a duty to see what would be seen by a person exercising ordinary care.

Instruction No. 6

Every person has the right to assume that others will exercise ordinary care and comply with the law, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

Instruction No. 7

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 8

Safway Services LLC is a corporation. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

INSTRUCTION NO. 9

An independent contractor is a person who undertakes to perform work for another but who is not subject to that other person's control of, or right to control, the manner or means of performing the work.

One who engages an independent contractor is not liable to others for the negligence of the independent contractor.

Instruction No. 10

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Instruction No. 11

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

INSTRUCTION NO. 12

- (1) Mr. Pamplin claims that Safway was negligent in one or more of the following respects:
- a. Failing to properly erect the scaffold:
 - b. Failing to secure the scaffold:
 - c. Failing to inspect the scaffold before each work shift:
 - d. Failing to maintain the scaffold in a safe manner by failing to warn the scaffold was incomplete and not ready for use.

Mr. Pamplin claims that Safway's conduct was a proximate cause of injuries and damage to plaintiff. Safway denies these claims.

- (2) In addition, Safway claims as an affirmative defense that Mr. Pamplin was contributorily negligent in one or more of the following respects:
- a. Failing to exercise the care a reasonably careful person would exercise under the same or similar circumstances; and
 - b. Failing to train himself with regard to safe and proper use of a scaffold.

Safway claims that Mr. Pamplin's conduct was a proximate cause of plaintiff's own injuries and damage. Mr. Pamplin denies these claims.

- (3) Safway further denies the nature and extent of Mr. Pamplin's claimed injuries and damages.

Instruction No. 13

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Instruction No. 14

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

Instruction No. 15

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

Instruction No. 16

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of the same injury. If you find that Safway was negligent and that such negligence was a proximate cause of injury or damage to Plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to Plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for Safway.

Instruction No. 17

A Washington administrative rule, WAC 296-874-20072, provides that:

Train employees or independent contractor who work on a scaffold.

You must:

Have a qualified person train each employee or independent contractor who works on a scaffold to:

- Recognize the hazards associated with the type of scaffold they are using; and
- Understand the procedures to control or minimize the hazards. Include the following subjects in your training:
- Hazards in the work area and how to deal with them, including:
 - Electrical hazards;
 - Fall hazards;
 - Falling object hazards;
 - How to erect, maintain, and disassemble the fall protection and falling object protection systems being used;
- How to:
 - Use the scaffold;
 - Handle materials on the scaffold;
- The load-carrying capacity and maximum intended load of the scaffold;
- Any other requirements of this chapter that apply.

Instruction No. 18

Washington administrative rule, WAC 296-874-40004, provides that:

Prevent supported scaffolds from tipping.

You must:

- Make sure supported scaffolds with a height to least base dimension ratio of greater than four to one are prevented from tipping by one or more of the following:
 - o Guying;
 - o Tying;
 - o Bracing;
 - o Other equivalent means.

You must:

- Install guys, ties, and braces where horizontal members support both the inner and outer legs of the scaffold.
- Install guys, ties, and braces:
 - According to the scaffold manufacturer's recommendations;

OR

- At all points where the following horizontal and vertical planes meet:
 - First vertical level at a height equal to four times the least base dimension;
 - Subsequent vertical levels every:
 - Twenty feet (6.1m) or less for scaffolds having a width of three feet (0.91 m) or less;
 - Twenty six feet (7.9 m) or less for scaffolds more than three feet (0.91 m) wide;
 - Horizontally at:

- ♦ Each end of the scaffold;

AND

- ♦ Intervals of thirty feet (9.1 m) or less.

You must:

- Make sure the highest level of guys, ties, or braces is no further from the top of the scaffold than a distance equal to four times the least base dimension.
- Make sure scaffolds that have an eccentric load applied or transmitted to them, such a cantilevered work platform, are prevented from tipping by one or more of the following:
 - Guying;
 - Tying;
 - Bracing;
 - Outriggers;
 - Other equivalent means.

Instruction No. 19

Washington administrative rule, WAC 296-874-20002, provides that:

Make sure scaffolds are properly designed and constructed.

You must:

- Make sure scaffolds are:
 - o Designed by a qualified person;

AND

- o Constructed according to that design.
- o Prohibit the use of shore and lean-to scaffolds.

Definition:

A **qualified person** is one who has demonstrated the ability to solve problems related to the subject matter, work, or project. This can be done by having either:

- A recognized degree, certificate, or professional standing;

OR

- Extensive knowledge, training, and experience.

Instruction No. 20

A Washington administrative rule, WAC 296-874-200034, provides that:

Inspect scaffolds and scaffold components.

You must:

- Make sure scaffolds and scaffold components are inspected for visible defects by a competent person:

- o Before each work shift;

AND

- o After anything occurs that could affect the scaffolds structural integrity.

Instruction No. 21

Washington administrative rule, WAC 296-800-11035, provides that:

Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.

You must:

- Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.

Instruction No. 22

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of Safway, apart from any consideration of contributory negligence.

If you find for the plaintiff, you must award the following past economic damages:

- a. Past medical expenses: \$42,584

In addition, you should consider the following past economic damages elements:

- b. The reasonable value of earnings or earning capacity lost to the present time;
- c. The reasonable value of necessary substitute household services/nonmedical expenses that have been required to the present time.

In addition you should consider the following future economic damages elements:

- a. The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future; and
- b. The reasonable value of earnings and earning capacity with reasonable probability to be lost in the future; and
- c. The reasonable value of necessary substitute household services/nonmedical expenses with reasonable probability to be required in the future.

In addition you should consider the following noneconomic damages elements:

- a. The nature and extent of the injuries;
- b. The disability, disfigurement, and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future; and
- c. The pain, suffering, both mental and physical and inconvenience experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 23

Noneconomic damages such as pain and suffering, disability, disfigurement, and emotional distress, *and inconvenience*

are not reduced to present cash value.

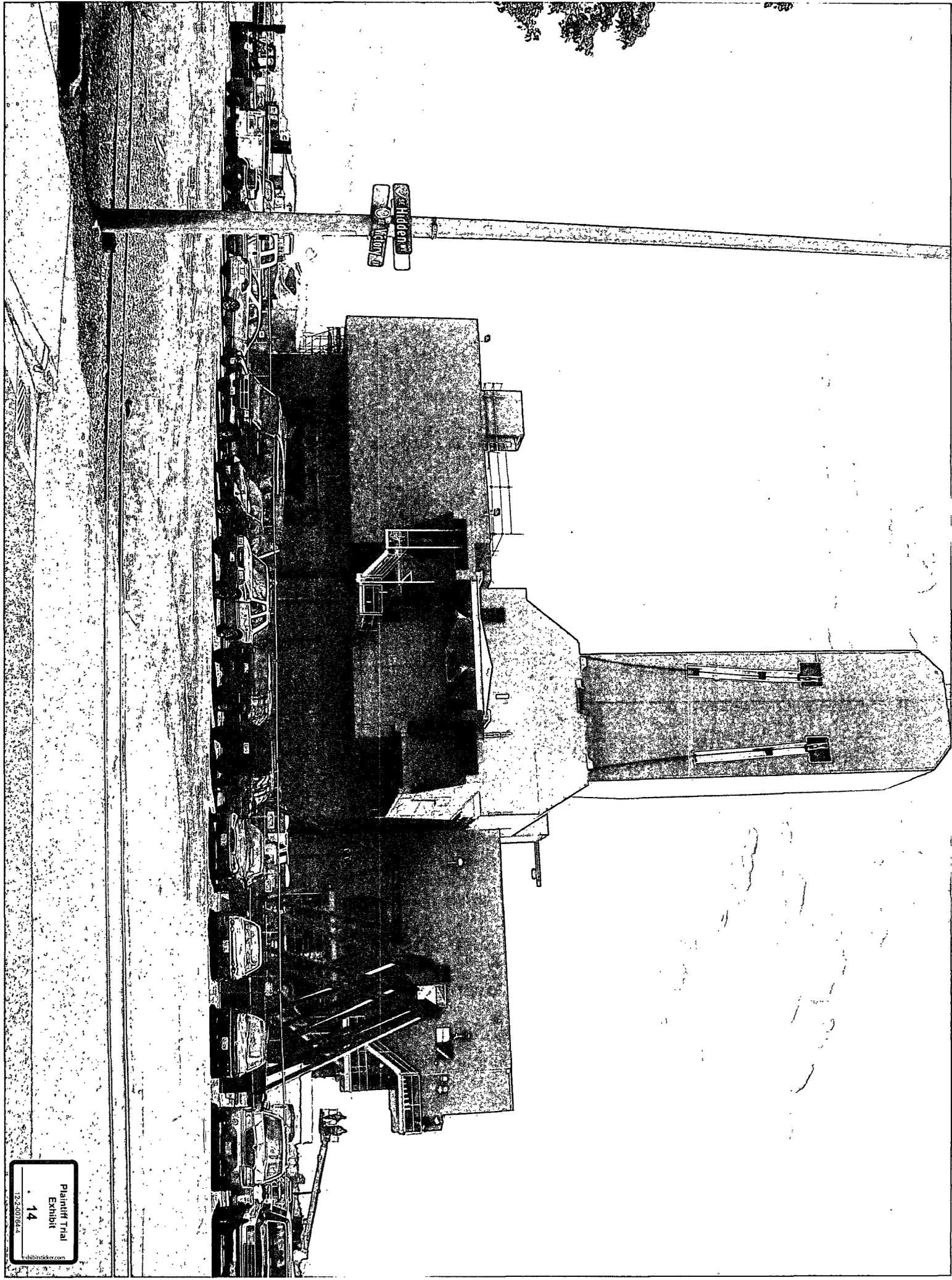
"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the expenses must be paid, or the earnings would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

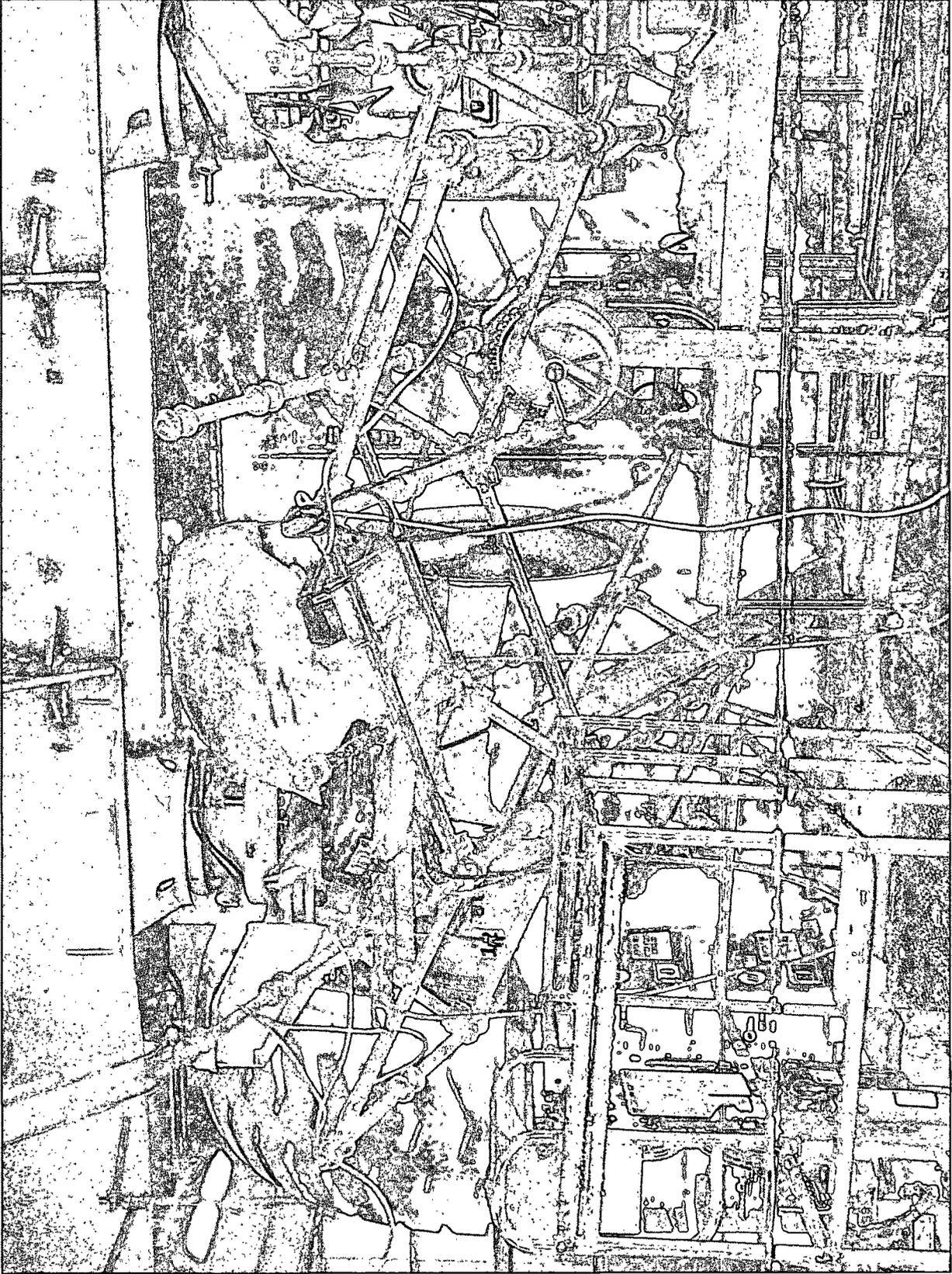
In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

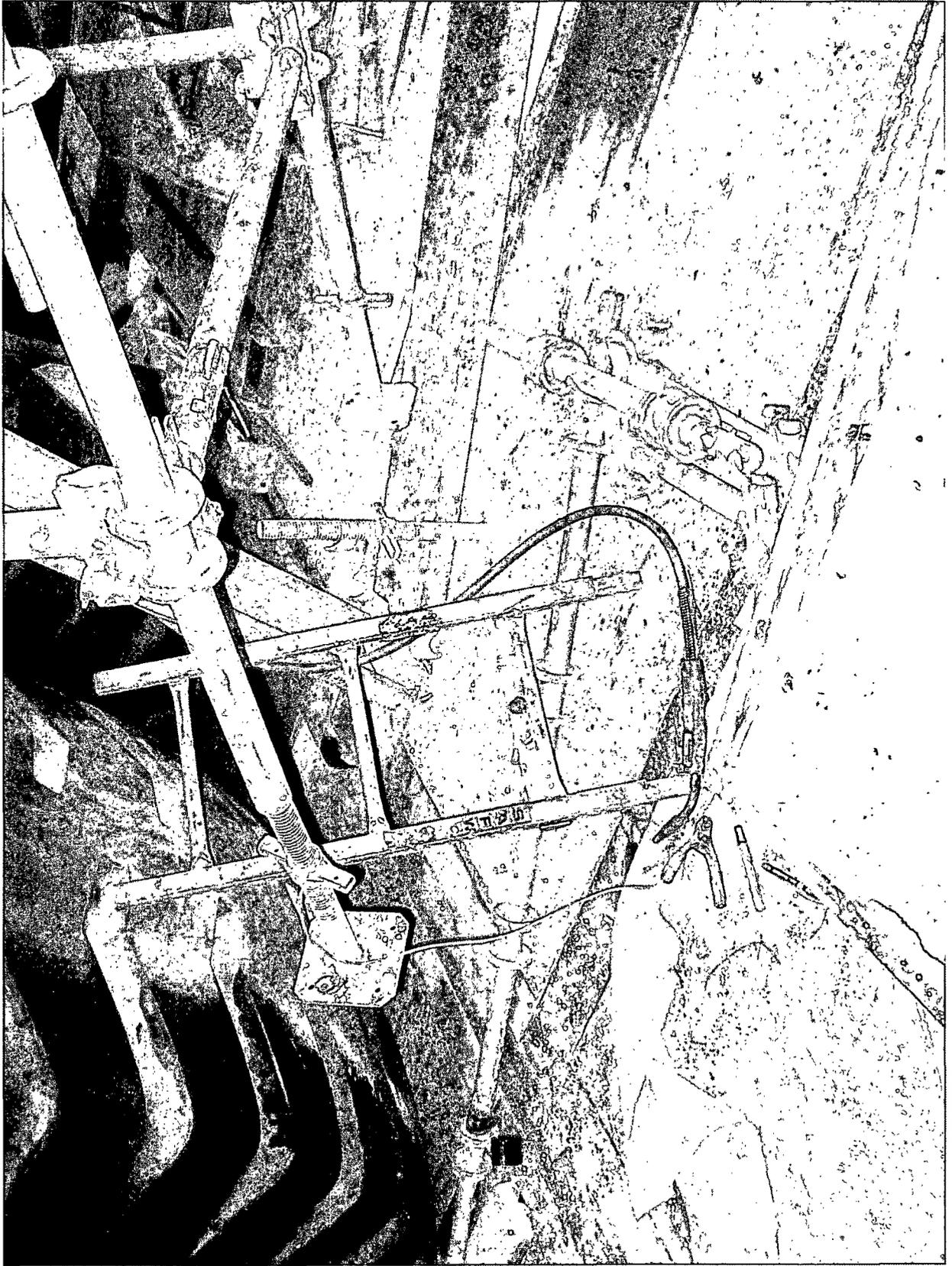
INSTRUCTION NO. 24

According to mortality tables, the average expectancy of life of a white male aged 51 years is 28 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

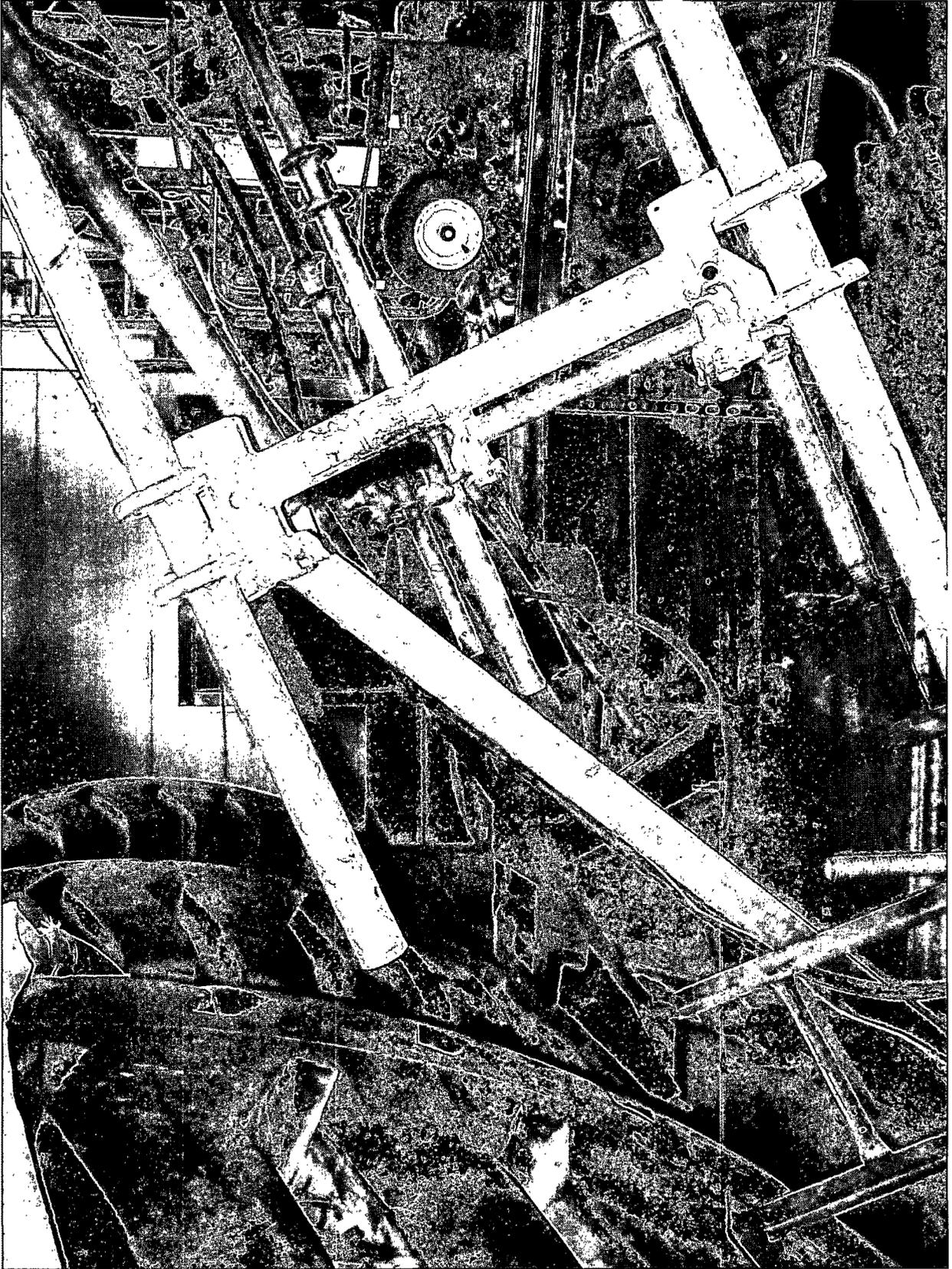


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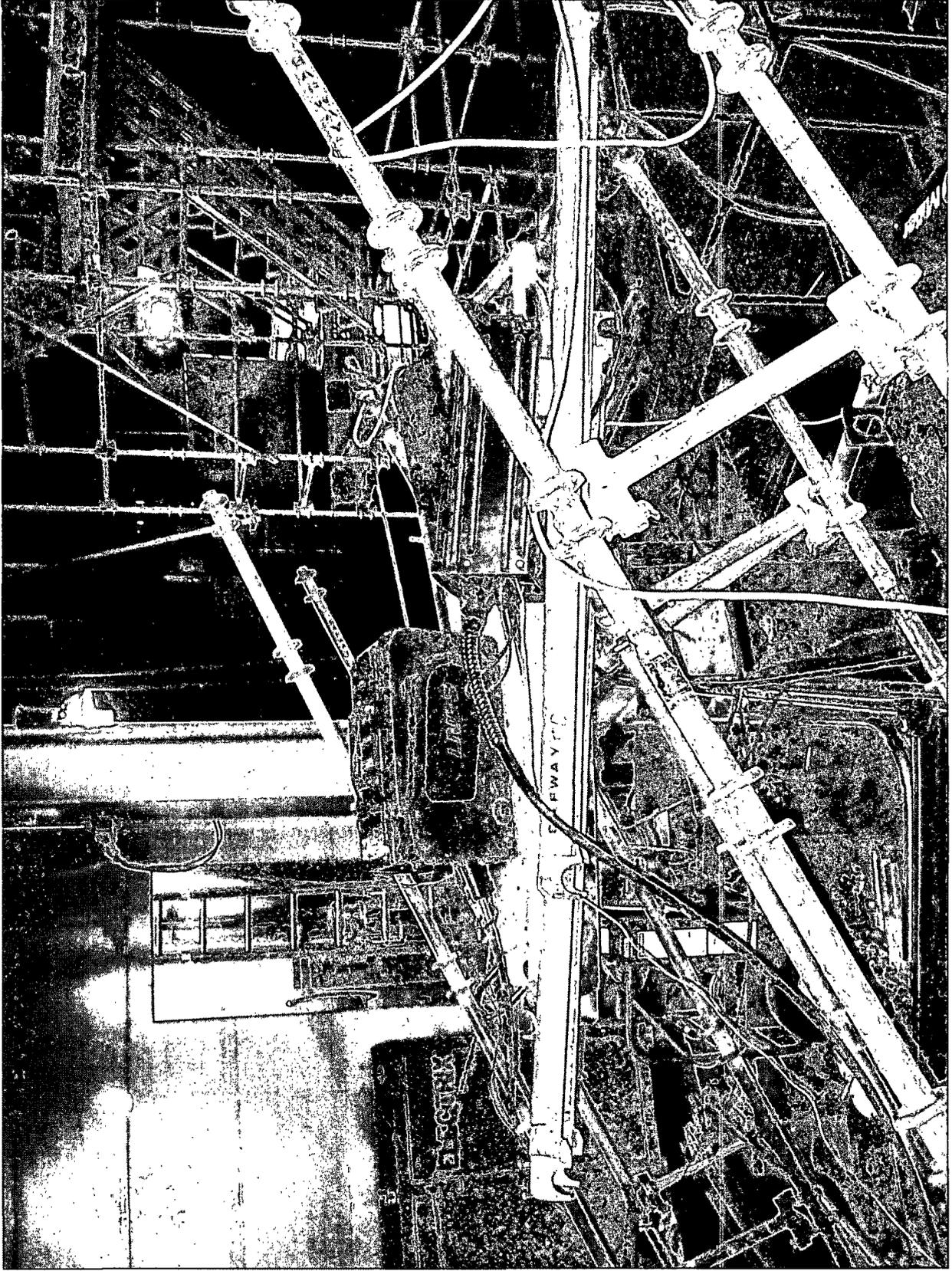
PARKER 0009



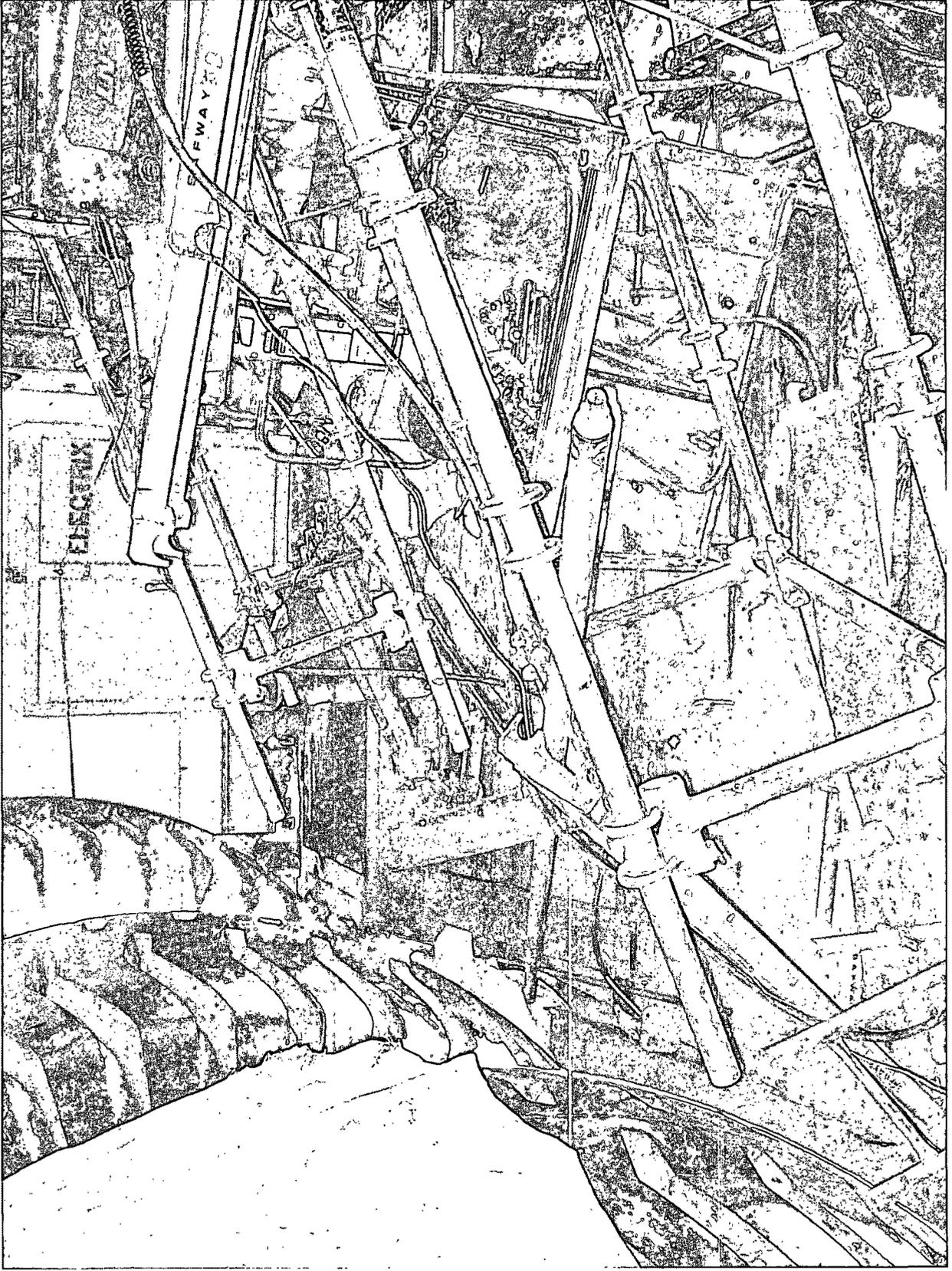
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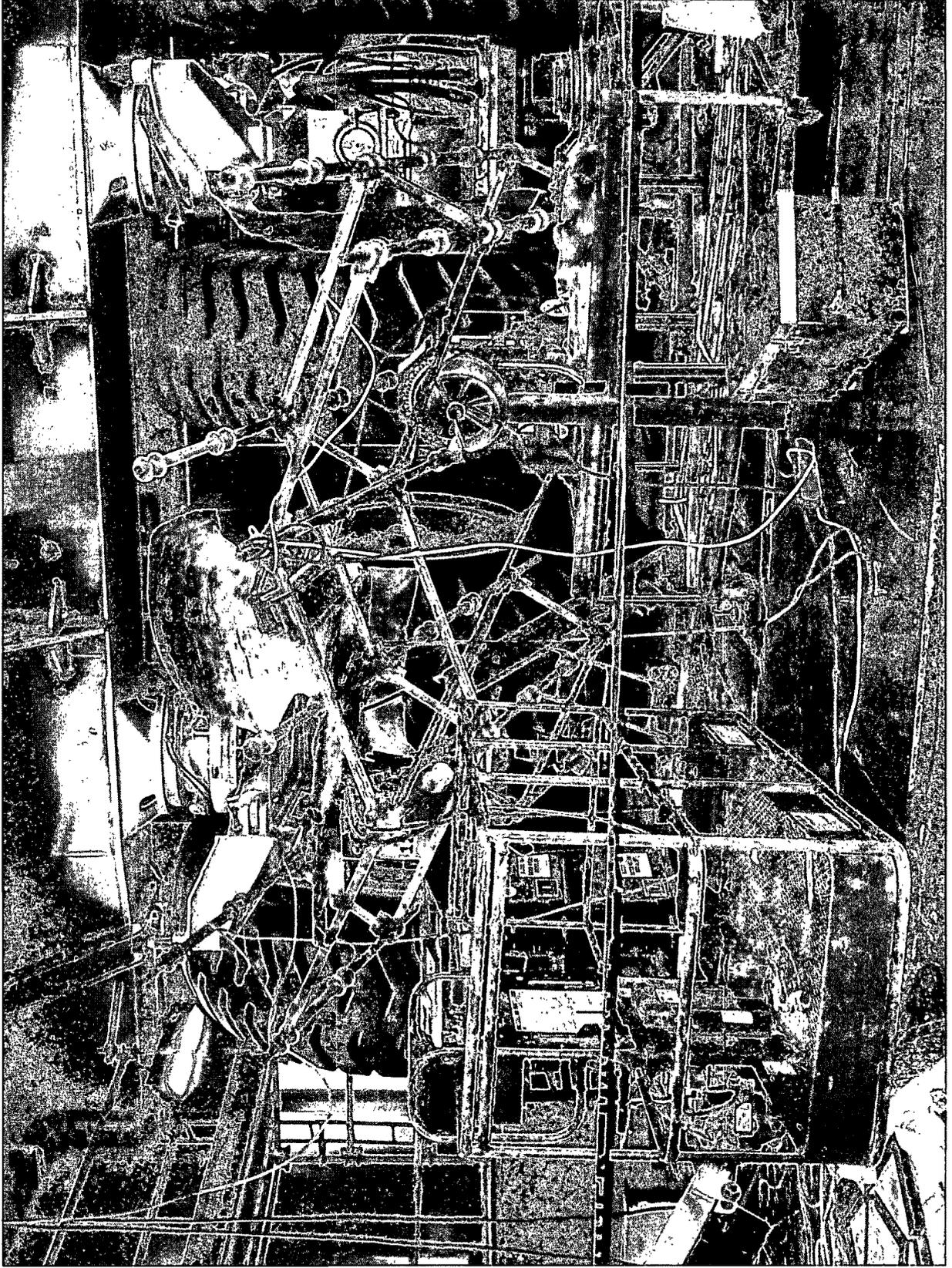


PARKER 00011



PARKER 00012





PARKER 00016

CERTIFICATE OF MAILING AND SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 8th day of February, 2016, I arranged for mailing via U.S. mail to Division II Court of Appeals and service *via E-mail (per Stipulated E-Service Agreement) and U.S. mail as indicated* of the foregoing APPELLANT SAFWAY SERVICES, LLC'S OPENING BRIEF as follows:

VIA U.S. MAIL

Clerk of the Court
Court of Appeals Division II
950 Broadway Suite 300
Tacoma, WA 98402

VIA E-SERVICE AGREEMENT

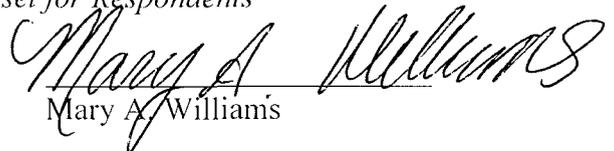
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