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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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**ALEX SALAS, Petitioner,**

v.

**HI-TECH ERECTORS, Respondent,**

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APPELLANT'S AMENDED BRIEF

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February 23, 2007

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## TABLE OF CONTENTS

### A. ASSIGNMENTS OF ERROR .....1

*Assignment of Error No. 1: The trial court erred in allowing appellant's immigration status to be heard by the jury.*

Issues Pertaining to Assignments of Error:

No. 1: Whether admitting evidence of appellant's immigration status was so prejudicial and improper that it could only have adversely affected the outcome of the trial.

No. 2: Whether appellant's immigration status was admitted without any relevance to the questions presented at the trial because defendant offered no evidence that appellant's immigration status could lead to his deportation and, thus, affect his ability to continue working profitably in this country.

*Assignment of Error No. 2: The trial court erred in contravening an earlier order when it ruled that appellant's counsel had "opened the door" and subsequently allowed defendant's principal, George Canney to testify as an expert.*

Issues Pertaining to Assignments of Error:

No. 1: Whether a discovery sanction order entered by one judge, prohibiting a witness from testifying as an expert because he was not disclosed as such during discovery and because none of his opinions had been provided in Interrogatory responses, can be dismissed by a different trial judge because of a single question asked during cross-examination.

No. 2: Whether a question that can easily be answered with everyday experience and knowledge "opens the door" such that the witness is then permitted to opine on matters calling for expert opinions, when the witness has not been qualified as an expert.

*Assignment of Error No. 3: The trial court erred in permitting defendant Hi-Tech to offer evidence of “justification” and “excuse” for failing to comply with the applicable WAC/WISHA regulations.*

Issues Pertaining to Assignments of Error:

No. 1: Whether defenses of “justification” or “excuse” must be pled and, if so, whether those defenses can properly be based on defendant’s simple belief that applicable WAC/WISHA codes did not apply to him.

No. 2: Whether the defenses of “justification” or “excuse” are permitted when none of the facts supporting those defenses are based on circumstances beyond the control of the defendant.

*Assignment of Error No. 4: The trial court erred in refusing to give appellant’s proposed jury instruction regarding defendant Hi-Tech’s non-delegable duty to provide a safe workplace.*

Issues Pertaining to Assignments of Error:

No. 1: Whether a proposed jury instruction can be properly refused when it accurately reflects Washington law and when its refusal denies its proponent a fair opportunity to argue its theory of the case.

**B. STATEMENT OF THE CASE .....2**

**C. ARGUMENT ..... 9**

1. Appellant’s immigration status had no relevance to any issue in the trial and its admission was grossly improper. . . . . 9

2. Permitting Mr. Canney to testify as an expert after he had previously been ordered not to so testify. . . . . . 17

a. Mr. Canney was ordered not to testify as an expert as a result of a pre-trial discovery sanction . . . . . 17

b. <u>ER 701 v. 702</u> .....	21
3. <u>Respondent did not plead excuse or justification and, in any event, such defenses must be based on factors beyond the control of the one asserting such a defense. Because there was no evidence of factors beyond Respondent's control, it was error to allow testimony to explain or justify noncompliance.</u> .....	30
4. <u>The Court erred in refusing to give Appellant's proposed instruction regarding Hi-Tech's nondelegable duty to provide a safe workplace within the scope of its subcontract</u> .....	35
<b>D. CONCLUSION</b> .....	36

**TABLE OF AUTHORITIES  
STATE CASES**

<i>State v. Avendano-Lopez</i> , 79 Wash.App. 706, 904 P.2d 324 (1995).....	9, 10, 11, 15, 16
<i>Tran v. State Farm Fire and Cas. Co.</i> 136 Wash.2d 214, 223, 961 P.2d 358, 362 (1998). .....	14
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 487, 824 P.2d 483 (1992). .....	30
<i>Yurkovich v. Rose</i> , 68 Wn.App. 643, 847 P.2d 925 (1993) .....	30, 31, 32
<i>Stute v. P.M.B.C., Inc.</i> , 114 Wn.2d 454, 461, 462, 464, 788 P.2d 545 (1990) .....	35
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 123, 52 P.2d 472 (2002) .....	35
<i>Weinert v. Bronco National Co.</i> , 58 Wn. App. 692, 697, 795 P.2d 1167 (1990). .....	35

**COURT RULES**

King County Local Rule 16 ..... 19  
King County Local Rule 26 ..... 19  
Evidence Rule 702..... 19  
Evidence Rule 701..... 21, 22

**SECONDARY AUTHORITY**

5 *Washington Practice*, § 103.14..... 19  
*McCormick on Evidence*, § 11 (6th Ed.) ..... 23  
6 Wash. Prac., *Wash. Pattern Jury Instr. Civ.* WPI 60.01.01 (5th ed.) . 31

**OUT OF STATE CASES**

*Balbuena v. IDR Realty LLC.*, 6 N.Y.3d 338, 845 N.E.2d  
1246, 1259 (2006)..... 14

## A. ASSIGNMENTS OF ERROR

*Assignment of Error No. 1: The trial court erred in allowing Appellant's immigration status to be heard by the jury.*

Issues Pertaining to Assignments of Error:

No. 1: Whether admitting evidence of Appellant's immigration status was so prejudicial and improper that it probably adversely affected the outcome of the trial.

No. 2: Whether Appellant's immigration status was admitted without any relevance to the questions presented at the trial because Respondent offered no evidence that Appellant's immigration status would probably lead to his deportation and, thus, affect his ability to continue working in this country.

*Assignment of Error No. 2: The trial court erred in contravening an earlier order entered by Judge Fox when it ruled that Appellant's counsel had "opened the door" and subsequently allowed Respondent's principal, George Canney, to testify as an expert.*

Issues Pertaining to Assignments of Error:

No. 1: Whether a discovery sanction order entered by one judge, prohibiting a witness from testifying as an expert because he was not disclosed as such during discovery and because none of his opinions had been provided in Interrogatory responses, can be dismissed by a different trial judge because of a single question asked during cross-examination.

No. 2: Whether a question- which can easily be answered with everyday experience and knowledge of a lay witness- "opens the door" so as to permit expert testimony, even when the witness has not been qualified as an expert.

*Assignment of Error No. 3: The trial court erred in permitting Respondent Hi-Tech to offer evidence of "justification" and "excuse" for failing to comply with the applicable WAC/WISHA regulations.*

Issues Pertaining to Assignments of Error:

No. 1: Whether defenses of "justification" or "excuse" must be pled and, if so, whether those defenses can properly be based on Respondent's simple belief that applicable WAC/WISHA codes did not apply to him.

No. 2: Whether admission of evidence or Mr. Canney's testimony pertaining to defenses of "justification" or "excuse" was error, when none of the facts supporting those defenses were based on circumstances beyond the control of the Respondent.

*Assignment of Error No. 4: The trial court erred in refusing to give Appellant's proposed jury instruction regarding Respondent Hi-Tech's non-delegable duty to provide a safe workplace.*

Issues Pertaining to Assignments of Error:

No. 1: Whether a proposed jury instruction can be properly refused when it accurately reflects Washington law and when its refusal denies its proponent a fair opportunity to argue its theory of the case.

## **B. STATEMENT OF THE CASE**

This lawsuit arose from a construction site injury suffered by the Appellant when he fell from a height in excess of twenty four feet from a steel scaffold ladder attached to scaffolding while he was working for his employer, the general contractor on the jobsite, Charter Construction

Company. CP 2. The ladder and scaffolding were supplied and erected by Respondent Hi-Tech Erectors. Appellant Salas claimed that Respondent violated multiple Washington Industrial Safety and Health Act (WISHA) violations pertaining to ladders. *Id.*

Specifically, Appellant alleged that Respondent violated WAC 296-155-480, which provides in the relevant sections:

(1) General. The following requirements apply to all fixed ladders as indicated...

(e) The rungs of individual-rung/step ladders shall be shaped such that employees' feet cannot slide off the end of the rungs.

(f) (i) The rungs and steps of fixed metal ladders manufactured after the effective date of this standard, shall be corrugated, knurled, dimpled, coated with skid-resistant material, or otherwise treated to minimize slipping.

(r) Fixed ladders shall be provided with cages, wells, ladder safety devices, or self-retracting lifelines where the length of climb is less than 24 feet (7.3 m) but the top of the ladder is at a distance greater than 24 feet (7.3 m) above lower levels.

(s) Where the total length of a climb equals or exceeds 24 feet (7.3 m), fixed ladders shall be equipped with one of the following:

(i) Ladder safety devices; or

(ii) Self-retracting lifelines, and rest platforms at intervals not to exceed 150 feet (45.7 m); or

(iii) A cage or well, and multiple ladder sections, each ladder section not to exceed 50 feet (15.2 m) in length. Ladder sections shall be offset from adjacent sections, and landing platforms shall be provided at maximum intervals of 50 feet (15.2 m).

CP 141-142.

Prior to the trial, Judge Michael Fox granted Appellant's motion for partial summary judgment, ruling that "Plaintiff is granted summary judgment in this favor and against the Defendant with respect to Defendant's violation of WAC 296-155-480(1), sections (e), (f), (r) and (s)....", but that Respondent was not negligent as a matter of law. CP 225-226.

Judge Fox also previously ruled on May 2, 2006 that because Respondent did not comply with the discovery and the disclosure rules pertaining to experts and opinions of experts, as a remedy and as a discovery sanction, that the "defense may only call its principal as a witness at trial, but he shall not be able to testify as an 'opinion' or 'expert' witness". CP 226. This sanction pertained to witness John Canney, the principal of Respondent.

Just before the trial began, this matter was transferred from Judge Fox to Judge Michael Hayden to hear the jury trial. Judge Hayden heard the parties' motions in limine and denied Appellant's written motion to exclude reference to Appellant's immigration status. CP 307. Appellant had been living in the United States for about 15 years at the time of this trial but his visa had expired and he did not secure a renewal of it, but he had applied years previously for renewal. The visa application had not been processed and no decision had been received.

Appellant Salas, at the time of his accident, had been living in the United States as a married man with children. He and his wife had both been working in the U.S. for well over a decade. Both had paid all US taxes and withholdings. The Salas' had three children born in Washington state. They bought a home in Everett, Wa. and paid real estate taxes, and both were employed full time during the five years preceding this accident. VRP 5/22/06, pp. 29-34. However, at the time of his accident, Appellant was not a citizen. He did not have appropriate documentation to be living in this country. VRP 5/22/06, p. 63.

Because Judge Hayden did not grant Appellant's motion in limine to exclude reference to Mr. Salas' immigration status, Appellant had no choice but to discuss the issue openly during *voire dire*. While *voire dire* was not recorded, this issue was openly discussed by both parties. All trial attorneys will agree that once the Court refused to grant the Appellant's motion in limine, the issue had to be raised and discussed with prospective jurors. This turned out to be a very volatile and inflammatory issue as discussed in the declarations of Mr. Kornfeld and Ms. Lavin, CP 695-696; 727-729.

It was a hot bed issue, as Mr. Kornfeld noted in his declaration, all over the country at the time of this trial. One could not turn the news on any radio, TV or station, nor pick up a newspaper without seeing the

immigration issue as the top headline. There were demonstrations in the streets of our nation's capital and in Seattle on the very eve and week of this trial.

After Respondent learned that most potential jurors opposed allowing an "illegal alien", as counsel described the Appellant, to even sue in our court system, the dye was cast. Respondent immediately sought to inject the issue into the trial in his opening and on cross examination.

CP 307; VRP 5/22/06, p. 63

Moreover, it was quite clear from voir dire in this case that most of the potential jurors thought that illegal immigrants should not be permitted to even use the court system in this country. CP 695. At least two jurors with strong anti-illegal immigrant views were seated on the jury panel, even after Appellant's counsel had utilized all of his peremptory challenges. *Id.* Anti-immigrant sentiment from the seated jurors was palpable:

The notes I took during jury selection and which I independently recall are noted below for each of the jurors who heard this case and who were impaneled in the box:

Regarding Juror No. 1, he was strongly against illegal aliens.

Jurors No. 4 and No. 8 also agreed with No. 1 and they were strongly opposed to allowing illegal aliens to have any rights in this country.

Juror No. 2 felt it was very important for illegal immigrants to

follow the rules when it comes to staying in this country.

The juror at position No. 12 in the box was strongly against illegal aliens being allowed to work in this country at all.

Juror No. 4, a blonde-haired lady, Ms. Hollcraft, was also strongly opposed to allowing any illegal aliens to have rights or work in this country.

All of these jurors I have specific notes on and independently recall all of them being unsympathetic towards undocumented workers or illegal aliens, the latter term being used by defense counsel when he was up during his voir dire time with the jurors.

CP 727-728.

This case became one about the millions of illegal immigrants and not one about the merits of this injury case and/or about the violations of the WISHA regulations by Respondent.

Even Judge Hayden stated in the record that "These are volatile times in terms of immigration, no doubt... There might be some jurors who are so hung up on the immigration issue that they would really take it out on him". VRP 5/15/06 at 28. Despite the trial Court's recognition of the prejudicial nature of this hot bed issue, the Court failed to evaluate and consider the likely facts to be heard by the jury when it entertained the Appellant's motion in limine to exclude evidence of immigration status of Appellant. Short of speculation, there was to be no potential evidence at trial from either party suggesting or showing that the Appellant had any reasonable chance of being deported. Yet despite this, the Court refused to

grant Appellant's motion.

As a result of Judge Hayden's ruling, refusing to exclude Appellant's immigration status, and surely based in part on what he had heard from the jury during voir dire, Respondent's attorney took full advantage of the Court's failure to limit evidence of immigration status in a personal injury case. The Respondent, immediately upon beginning his cross-examination, asked "Mr. Salas, so currently you are in the United States illegally; isn't that correct?" *Id.* Appellant answered that that was correct. *Id.* The allowance of this evidence unfairly prejudiced the Appellant and caused great harm as shown by the verdict.

As to Appellant's second primary issue, the Court ruled in chambers on Thursday, late in the day, May 18, 2006, that the Appellant "opened the door" and that Mr. Canney would be allowed to testify as an expert witness. CP 749-750.

This ruling arose from Appellant's counsel asking Mr. Canney: "If he [Appellant] had been tied off, would this have prevented him from hitting the ground?" *Id.* Judge Hayden ruled, on the Court's own motion, that this question and answer called for expert testimony and that Appellant had "opened the door" to such testimony from Mr. Canney, based solely upon the above question. *Id.* Subsequently, the Court ruled, over Appellant's objection, that the Respondent could testify, provide

expert opinions, and, secondly, explain the reasons why his company did not comply with or follow the regulations that Judge Fox had already ruled had been violated.

Appellant submits that it was error to allow Respondent to testify as to what justification and excuses he had and what explanations he had, from both a lay and expert witness perspectives, and why it did not comply with the WISHA statute sections which were violated by Respondent. Appellant had no forewarning and was not prepared because this issue was never disclosed in discovery by Respondent.

### C. ARGUMENT

1. Appellant's immigration status had no relevance to any issue in the trial and its admission was grossly improper.

The Court's order allowing consideration of the Appellant's status as an illegal alien or undocumented worker was highly prejudicial and, as discussed below, likely and unfairly affected the outcome of this trial.

Appellant filed a motion in limine to exclude from consideration by the jury Alex Salas' immigration status because this information was highly prejudicial. CP 214, *et. seq.* That motion was denied by the court. CP 307.

The admission of such evidence by the Court was highly, if not grossly, improper. In *State v. Avendano-Lopez*, 79 Wash.App. 706, 904

P.2d 324 (1995), the prosecutor had ended his cross examination of the Respondent by asking "You are not legal in this country, are you?" On appeal, Division Two held quite strongly that:

It is well-established that appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose. (Citing, *State v. Belgarde*, 110 Wash.2d 504, 507-10, 755 P.2d 174 (1988) (prejudice engendered by prosecutor's arguments regarding American Indian Movement mandated reversal); *Schotis v. North Coast Stevedoring Co.*, 163 Wash. 305, 315-16, 1 P.2d 221 (1931); *State v. Suarez-Bravo*, 72 Wash.App. 359, 864 P.2d 426; *State v. Torres*, 16 Wash.App. 254, 257-58, 554 P.2d 1069 (1976)).

*State v. Avendano-Lopez, supra* at 718.

Beyond simple appeals to prejudice based upon nationality, the *Avendano-Lopez* Court went on to say that:

Questions regarding a Respondent's immigration status are similarly irrelevant and designed to appeal to the trier of fact's passion and prejudice and thus are generally improper areas of inquiry. Courts in other jurisdictions have uniformly condemned questions designed to appeal to national or other prejudice. (Citing, *Sandoval v. State*, 264 Ga. 199, 442 S.E.2d 746 (1994); *see also, People v. Maria*, 359 Ill. 231, 194 N.E. 510, 512 (1935); *People v. Mohammed*, 151 A.D.2d 1018, 1019, 542 N.Y.S.2d 82, *appeal denied*, 74 N.Y.2d 815, 546 N.Y.S.2d 573, 545 N.E.2d 887 (1989); *State v. Mehralian*, 301 N.W.2d 409, 418-19 (N.D.1981); *Riascos v. State*, 792 S.W.2d 754 (Tex.Ct.App.1990); *Garcia v. State*, 683 S.W.2d 715, 718-19 (Tex.Ct.App.1984)).

*State v. Avendano-Lopez, supra* at 719.

In this case, admission of evidence that Mr. Salas was not in this

country legally, was highly prejudicial. The fact of his immigration status was irrelevant to the injury and whether the Defendant was negligent. Immigration had no probative value to any issue in question at the trial. Mr. Salas had no prospect or desire or risk of returning to Mexico. No evidence was presented to show that there was a risk, any more so that the United States (US) was going to deport millions of other Mexicans who have lived in this country for over ten (10) years and who are tax paying, law abiding workers. The Court erred in permitting this evidence. Further, in the face of such inflammatory, improper and prejudicial evidence, a new trial should now be ordered.<sup>1</sup>

The Appellant's immigration status was not relevant to the issue of damages because there really was no prospect of the Appellant going back to Mexico, even involuntarily. Even after "9/11", Appellant testified that he called Immigration and he understood that his visa application had been further delayed. In this case, there has never been any effort by the US government to deport Mr. Salas. There is no evidence of even a threat or a receipt of even a "form" letter to this effect threatening deportation.

Appellant testified that he has never intended to return to Mexico.

CP 71. There was no evidence produced by the Respondent that Mr.

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<sup>1</sup>In this case, just as in the *Avendano-Lopez* case, questions about immigration status were "irrelevant and prejudicial and... a curative instruction could not cure the error". *State v. Avendano-Lopez, supra*, at 718.

Salas would not be able to stay and live and work in this country forever. For these reasons, to allow this information to be heard by the jury was so highly inflammatory and prejudicial that its potential for misuse outweighed its probative value and should have been excluded under ER 403.

The prejudicial nature of this testimony was apparent in voir dire. In voir dire, most potential jurors said that they thought that an "illegal" should have no rights.<sup>2</sup> This included access to the court system. Yet there was no evidence that ever suggested that Appellant would return, voluntarily or involuntarily, to Mexico to make the earning capacity issue a truly valid reason to allow the admission of his immigration status, inflammatory evidence, to be considered by the jury.

Moreover, such evidence was not relevant to any question put before the jury. The only possible issue on which this evidence could have been relevant was the issue of Appellant's future lost wages. But the reason Mr. Salas' immigration status was not relevant, even on that issue, was because the Respondent offered no evidence, none whatsoever, that

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<sup>2</sup> In fact, Judge Hayden acknowledged the dangerous nature of this evidence, stating that "If you know the immigration status is going to come in, I agree, you need it for voir dire. These are volatile times in terms of immigration, no doubt. It may be a difficult decision for him to decide which way to go. There might be some jurors who are so hung up on the immigration issue that they would really take it out on him." VRP, 5/15/06, p. 28. It is likely that the judge was right - it was clear during voir dire that juror #1 was strongly against illegal aliens and jurors 4 and 8 agreed that illegal aliens should have no rights in this country. Jurors 2 and 12 also expressed strong anti-immigrant views. CP 727-728.

Mr. Salas could not have continued his employment at Charter Construction indefinitely, had he not been injured. To put it another way, Respondent offered not a shred of evidence of any possibility that Mr. Salas might be deported and, as a result, that his future lost wages claim would be diminished.

Further, Mr. Salas had been in this country since 1991, over fifteen years, without any remote threat of deportation. Because he testified at trial that he intended to remain in the U.S. and because he testified that he contacted and spoke to US Immigration on several occasions about the status of his visa application without any threat or hint of deportation, and Respondent offered no contrary evidence of this, the issue of immigration status was not relevant.

On this issue, the most-recent case in this country addressing this problem analyzed the trial process this way:

An undocumented alien Appellant could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents required by IRCA and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a Respondent in a Labor Law action could, for example, allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied. In other words, a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.

*Balbuena v. IDR Realty LLC.*, 6 N.Y.3d 338, 845 N.E.2d 1246, 1259 (2006).

Like every other part of a case tried to a jury, the arguments for and against a proposition must be supported by evidence.<sup>3</sup> But in this case, there was not a single piece of evidence offered by the Respondent tending to show that Mr. Salas might be deported and that, as a result, the earnings he would accumulate in the future would be in pesos and not dollars. Without some evidence, permitting the jury to hear such prejudicial evidence as that he is an illegal alien had no bearing on any question presented. It was sheer speculation and prejudice upon which the jury would rely.<sup>4</sup>

Given the fact that Mr. Salas' immigration status had no bearing on any issue properly submitted to the jury, the question then becomes whether the improper evidence affected the jury result. The question is the relationship between the improper evidence and the jury verdict. As

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<sup>3</sup>That's true throughout the court system, as even "arguments unsupported by any authority will not be considered on appeal." *Tran v. State Farm Fire and Cas. Co.* 136 Wash.2d 214, 223, 961 P.2d 358, 362 (1998).

<sup>4</sup>To highlight the point, Respondent's attorney, arguing without any foundational basis for deportation, asked rhetorically of the jury to the effect of "who knows how long Mr. Salas will remain in this country, and who knows if he'll be able to earn these wages before he goes back to Mexico." Mr. Boyle may as well have asked the jury to refuse to award future lost wages because Mr. Salas might be hit by a bus the minute he walks out of the courthouse. Pure speculation does not form the basis of viable jury findings.

discussed below, the assertion here is that the jury did not reach the question of Appellant's damages because, even though they found the Respondent negligent, the improper evidence of Appellant's immigration status prejudiced them to find there was no causation between Respondent's negligence and Appellant's injuries.

In *Avendano-Lopez*, the Court outlined four considerations for determining whether the jury verdict had been affected, stating that:

...the misconduct likely did not affect the jury's verdict for a number of reasons. First, the seriousness of the irregularity was not overwhelming because the objection to the improper question was sustained and Avendano-Lopez was not permitted to answer the question. Second, as was noted above, the case against Avendano-Lopez was strong, and the evidence certainly supports Avendano-Lopez's conviction for possession with intent to deliver. Third, the jury was already aware of Avendano-Lopez's Hispanic background as it had been discussed by defense counsel on direct. Fourth, counsel for Avendano-Lopez did not attempt to obviate any resulting prejudice by requesting a curative instruction.

*Avendano-Lopez*, at 721-722.

But in this case, the four factors which lead the Avendano-Lopez Court to determine there was no prejudice in that case, are not present here. First, the "seriousness of the irregularity" was overwhelming in the present case because once the Court failed to enter an order in limine to exclude reference to the Appellant's immigration status, the issue was

injected into the case. This was “irregular” because there was no evidence that the Appellant was going back to Mexico. Secondly, the defense repeatedly informed the jury that Mr. Salas was an illegal alien, rubbing salt on the wound, whereas in *Avendano-Lopez*, the Respondent was not required to answer that question.

Second, while the case against *Avendano-Lopez* was strong and the jury verdict reflected that fact, the evidence in our case was not only very strong against Respondent *Hi-Tech*, virtually all of Appellant’s evidence was rebutted.<sup>5</sup> The strength of Appellant’s case was not reflected in this jury’s verdict and certainly gives rise to questions about the motives of the jury.

Third, while Mr. Salas’ Hispanic background was known to the jury, whether he was in the United States illegally was an entirely different question and was known to the jury because of the Court’s ruling in *limine*.

Finally, it would have been pointless for Appellant’s counsel to

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<sup>5</sup>Specifically, Appellant’s evidence as to causation was rebutted, yet the jury found that Respondent, though negligent, was not the proximate cause of the injuries. Because Appellant’s evidence was so strong, it is reasonable to find that the evidence admitted showing Mr. Salas an undocumented worker caused the jury to find there was no proximate cause. Without finding proximate cause, the jury never reached the question of Appellant’s damages.

request a curative instruction as the Court had already denied Appellant's motion *in limine* on this issue.

2. Permitting Mr. Canney to testify as an expert after he had previously been ordered not to so testify.

a. Mr. Canney was ordered by Judge Fox that he could not testify as an expert as a pre-trial sanction because Respondent did not comply with the Court and Local Rules and did not answer Appellant's interrogatories pertaining to expert witness opinions.

As noted above, Judge Fox made a pre-trial ruling that George Canney, the principal of Respondent, could not testify as an expert witness, only as a lay witness. (*See also*, footnote No. 6).

In Appellant's case in chief, Appellant called George Canney to testify as an adverse witness. In accordance with the pre-trial order, Appellant did not lay a foundation to establish Mr. Canney as an expert witness. A question was posed which called for a lay opinion. Respondent did not object nor did Respondent make any motion, in open Court or in the meeting with the Court in chambers which ensued after the following colloquy:

Q) "If he [Appellant] had been tied off, would this have prevented him from hitting the ground?"

VRP 5/18/2006, p. 159.

In chambers, Judge Hayden ruled that this question “opened the door” to allow Mr. Canney to testify as an expert including on the issue of proximate cause. The court *sua sponte* decided this question opened the door to expert opinion testimony from Respondent. The parties entered into a stipulation and agreement since there was no record in chambers. CP 749-750.

The Court ruled that Appellant asked a question only an expert can answer and, hence, opened the door to any and all expert opinions Mr. Canney may have. Mr. Canney walked through that door and took advantage of this ruling when he was on direct exam by his counsel.

Unfortunately, placing to the side the evidentiary issue of lay v. expert opinion, the trial court’s ruling confused the principles of an evidentiary ruling versus a remedial discovery sanction. Because Respondent failed to follow the general and local civil rules, adhere to the case scheduling order and disclose any witnesses for trial, and answer numerous discovery requests propounded by Appellant to Respondent, including all interrogatories pertaining to expert opinions, sanctions and

remedies were ordered by Judge Fox to level the playing field.<sup>6</sup>

Typically, a door is opened when the party, in its case in chief, asks a question on direct exam of a witness that relates to a factual issue that has been excluded from consideration by the jury as a result of a pretrial evidentiary ruling, not as a result of a sanction order. It does not usually occur on cross exam:

The foregoing discussion relates largely to statements volunteered by a party or the party's witness during the party's own case in chief. By contrast, the open-door rule rarely justifies the admission of otherwise inadmissible evidence to contradict statements elicited from an adverse witness on cross-examination.

*5 Washington Practice*, § 103.14.

No door was opened by Appellant because there was no door to open. Mr. Kornfeld's question, and Mr. Canney's answer, did not require "scientific, technical, or other specialized knowledge" ER 702. The question was simply one of common understanding, e.g. if a person were to begin falling from 25-30 feet above the ground, and he had been tied off

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<sup>6</sup>Appellant filed a motion to exclude Respondent from calling any witnesses because it did not comply with the case scheduling order, did not list any primary witnesses, did not list any rebuttal witnesses, did not answer 10 interrogatory questions of Appellant's regarding expert opinions and witnesses, did not comply with KCLR 16 (a) and did not file any pretrial exhibit or witness list, and Respondent consequently violated KCLR 26 (b) 1-3 (a-c); and that this intentional or willful conduct gave rise to relief under KCLR 26 (b) (4) and CR 37, which Judge Fox relied on to sanction Respondent, by denying it the right to call an expert witness - even Mr. Canney as an expert at trial.

by an appropriate safety line, would he have been stopped from hitting the ground? This is not a question that required any type of “expert” testimony. It was a question asking for an observation of the “distance” from which one fell which Mr. Canney observed several hours after the accident when he went out to the scene to snap two photographs of the scaffold ladder, and the level from which the Appellant fell, laying on the ground. Mr. Canney had first hand witness knowledge of the “distance” as a fact witness.

The trial Court’s ruling that this opinion was one only an expert could make was incorrect. Any lay person can appreciate distance of a fall to the ground to give a common sense opinion from a visit to the scene of the event. If this invaded the province of the jury, it was incumbent on the Respondent to object, but no objection or motion to open the door was made by Respondent.

Moreover, there was no prejudice to the Respondent for Appellant to ask this question again since Mr. Salas’ lawyer already asked it at deposition of Mr. Canney and it also had already been asked and answered earlier at trial by Mr. Lawless. This information was already in the court record and there was no prejudice to Respondent, such as in the example

of the need to cure a prior error.

Because Respondent did not object to this question nor did it ask for a ruling by the Court to open the door, it was irregular for the Court, on its own volition- its own motion in chambers- to assist Respondent. This was improper and error. The Court's order on this issue flew in the face of Judge Fox's prior ruling.<sup>7</sup> Further Judge Hayden's in-chamber ruling was in error from either a remedial or evidentiary point of view.

b. ER 701 v. 702.

The Court told both counsel in chambers on May 18, 2006, at the time of this ruling, that the question asked of Mr. Canney called for a response that was not one of ordinary perception by a lay witness, but,

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<sup>7</sup>The most puzzling aspect of this is that Appellant had asked this very same question of Mr. Canney in his deposition and received the same answer e.g. Had Mr. Salas been tied off, would this have prevented him from hitting the ground?" That deposition was submitted in support of Appellant's Motion for Summary Judgment to Judge Fox and in support of the Appellant's pretrial motion for sanction and remedies to punish Respondent for not disclosing any primary or rebuttal witnesses in accordance the case schedule order, in accordance with KCLR 26 requiring disclosure of witnesses, and for not answering interrogatories pertaining to expert witnesses and the disclosures required under CR 26.

Judge Fox had this page of Mr. Canney's deposition and the question and answer at issue which was asked of Mr. Canney at trial which Judge Hayden ruled called for expert, not lay, opinions. Judge Fox ruled that Mr. Canney nor Respondent could not testify as an expert at trial after having reviewed the very same line of questioning as verbatimly asked at trial.

The undersigned reasonably concluded that this was not an expert opinion since Judge Fox had ruled that Respondent did not disclose any opinions in discovery, hence, they were remedially barred from presenting any expert opinions at trial through Mr. Canney. Therefore, it was reasonably assumed by Mr. Kornfeld that to ask this very same question would not open the door, or that there was even any door to open given Judge Fox's ruling e.g. no expert testimony from Respondent.

rather, one on which an expert opinion would be required and that, as a result, the door was now open for Mr. Canney to testify as an expert. CP 749-750.

But a review of ER 701 shows that a witness' lay opinion is admissible if it is: a) rationally based on a perception of the witness and, b) helpful to a clear understanding of a fact in issue: *e.g.* if he was tied off by fall protection provided by Respondent, he would not have fallen to the ground 20-25 feet below. Appellant's counsel believed that this opinion was precisely that of a lay person.

This opinion was foundationally justified, from a lay person perspective, regarding the issue of the "distance" *e.g.*, from the point at which Mr. Salas fell to the ground below. This was an observation George Canney personally made a few hours post accident when he showed up at the scene.<sup>8</sup> Mr. Canney observed the height from which Appellant fell to be able to determine if there was enough distance for fall protection to have worked before he hit the ground. Mr. Canney took two photographs at that time, which were admitted into evidence at trial.

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<sup>8</sup>Because of this, and because Mr. Canney is and was a speaking agent for the Respondent, his testimony on this subject should more properly be considered an admission of a party-opponent under ER 801(d)(2).

The general rule is that opinion testimony by a lay witness is admissible if the opinion is helpful and does not invade the province of the jury. The types of opinions or inferences from opinions which are allowed or admitted include topics of appearances, manner of conduct, size, weight and "distance". *McCormick on Evidence*, § 11 (6th Ed.). Lay opinions involve "results from a process of reasoning familiar in everyday life."

Applying these principles to the Appellant's question of George Canney, his opinion involves his personal observations - not those of an expert. Every laborer or worker on a construction site would also be familiar with seeing the use of fall protection at various heights and distances to the ground below to determine if there was enough distance for it to work. It's an everyday life experience on a construction site when someone is at 10 feet or higher. You see them use fall protection every day on the jobsite.

The facts of this case were such that everyone knew Appellant fell from the third scaffold level. Mr. Canney knew this and personally observed the level from which he fell. It is within the common knowledge of a lay person that, if one is tied off, there is ample room before that

person will hit the ground to stop the fall. This is an issue of whether there is enough distance from the point of the start of the fall to the ground below for a lay person to conclude that he would not have hit the ground if tied off.

The estimate of distance was based on Mr. Canney's observations after he came out to the job site, climbed the ladder, checked it out and was told the level from which Appellant fell. This is not an expert opinion. Judge Fox had this very question and answer in the record before him when he ruled that Mr. Canney could not testify as an expert. Judge Fox obviously did not consider this very line of questioning and answer, which was submitted with Appellant's motion for sanctions and for summary judgment, to be an expert opinion either.

As a result of the Court's ruling, Respondent was allowed to ask any and all expert opinions of Mr. Canney, and not just limited ones regarding being tied off. He was essentially rewarded for not complying with the Civil Rules, the case schedule order, for not answering any of the 10 interrogatories on experts, for not disclosing the subject matter and each of his expert opinions under CR 26 in those ten interrogatories, nor for ever supplementing answers under CR 26 (e), and for not designating

any witnesses for trial, particularly experts.

Even after the Court's order in chambers, allowing Mr. Canney to testify as an expert, Respondent's counsel informed Appellant's counsel that Mr. Canney would testify only to those factual matters in his deposition and no expert opinions. This turned out not to be true.

At trial, after the Court ruled that the door was open, Respondent took this opportunity and walked through it. He testified as an expert witness. Mr. Canney testified to expert opinions at trial on direct exam. These expert opinions were not disclosed in answers to expert interrogatories or in answers to questions at his deposition. CP 740. This amounted to issues of surprise for which Appellant was ill prepared in advance at trial.

These new expert opinions played a part in the Appellant not to be prepared to anticipate and meet surprise expert opinions on causation at trial, such as: 1) OSHA and WISHA standards and their similarities and differences VRP 5/22/06, p. 92; 2) That the scaffolding from which Mr. Salas fell was "in full compliance" with the applicable codes. *Id.* at 95; 110; 3) Industry practice and what his competitors provide regarding ladders, skid resistant rungs, shaped rungs, and fall protection; what his

company routinely provides in accordance with industry practice; what is industry practice for a scaffold supplier v. what the general contractor supplies; and what manufacturers supply regarding the same, including A1-Plank the principal supplier of his product and equipment; *Id.* at 96 - 98. 4) That the general contractor has an obligation to inspect the scaffolds. *Id.* at 111; 5) Why fall restraint or fall protection is not available and why it can't be used with his scaffold and ladder and why its' impractical. *Id.* at 114.; 6) Why the WISHA rules don't apply to his company and this scaffold system. *Id.* at 93-94; 7) How and why he did comply with the WISHA rules and that Judge Fox's contrary ruling did not apply in this circumstance. *Id.* 8) Why its' not possible to place an anchor point on the building for fall restraint or fall protection and the reasons why self-retracting lifelines can or cannot be used with or without this ladder; *Id.* at 114; and that, 9) It is the general contractor's responsibility to protect Appellant not his. *Id.* at 111. Mr. Canney's testimony included many other expert opinions, none of which were disclosed in deposition and all of which affected causation and the outcome of this trial.

Appellant was surprised by the Court's ruling and the

Respondent's expert testimony at trial. Appellant had absolutely no meaningful time and opportunity pre-trial or during trial to discover those expert opinions of George Canney. Respondent never provided Mr. Canney's experts opinions with supplemental answers to interrogatories pertaining to experts and those surprise expert opinions were never disclosed until Appellant heard them for the first time in the direct exam of Mr. Canney by Respondent. There was no reasonable time to prepare for those questions and have a chance to prepare cross examination. Our civil rules are designed to avoid trial by ambush and not to reward the party which does not take responsibility to comply with the civil and local King County rules.

Had there been any indication from Judge Fox when he made his initial ruling on this issue that there was even a possibility that counsel's question could be calling for an expert opinion, Appellant's counsel would have prepared his case differently. For instance, had Mr. Kornfeld known that George Canney was going to be allowed to testify as an expert witness, he would have deposed him again to ask questions about his expert opinions. CP 701. Most importantly, if Respondent had disclosed those opinions of Mr. Canney and had the undersigned had an chance to

take his deposition to ask expert witness questions in accordance with CR 26 and KCLR 26, which Appellant did not have, Mr. Kornfeld would have prepared his expert witness Mr. Lawless to testify in opposition to the same on rebuttal. This was not possible since Mr. Lawless had testified already and the expert opinions of Mr. Canney were too many and too overwhelming after Mr. Lawless. These new expert opinions were so many and so scattered that there was no time to do any due diligence to investigate each and whether they were true. Appellant would have conducted an investigation in the field and called Mr. Canney's competitors. Further, there were so many new opinions which were heard for the first time at trial, it was not practicable to expect counsel to have the retention of a stenographer and the detail for each.

In closing, it was simply unfair to admit new or any expert opinions from Respondent. These opinions were never disclosed or heard beforehand, nor were any to be expected in accordance with Judge Fox's pretrial rulings. Judge Hayden's ruling created an unfair advantage to Respondent without offering the Appellant any meaningful opportunity to meet new expert opinions from Respondent when none were disclosed.

Remedial relief for Appellant was never offered by the trial judge, such as, a trial continuance or the entry of an order requiring Respondent

to answer expert interrogatories or allowing Appellant to depose Mr. Canney the evening of trial if he was going to testify as an expert. However, opposing counsel assured Mr. Kornfeld that Mr. Canney would not "go through that door" and that he "would not" testify as an expert. This was not true.

The remedies which the Court should have offered or allowed as Appellant suggests were never suggested by the Court. The Court assisted the Respondent on its own motion but handcuffed Appellant. The trial court should also have assisted the Appellant so as to allow a reasonable opportunity to meet new evidence and to have a meaningful opportunity to prepare and meet this new expert testimony, none of which was ever disclosed prior to Mr. Canney's direct testimony at trial and none of which was offered to Appellant by the trial court.

No party should be rewarded for shunning one's responsibilities to follow the civil and local rules governing experts. This is exactly the net effect of what has transpired in this trial court's ruling has had re: opening the door without conversely ordering compliance with CR 26 and KCLR 26.

3. Respondent did not plead excuse or justification and, in any event, such defenses must be based on factors beyond the control of the one asserting such a defense. Because there was no evidence of factors beyond Respondent's control, it was error to allow testimony to explain or justify noncompliance.

In Washington, a statutory violation may be excused where non-compliance is beyond the violator's control. *Hansen v. Friend*, 118 Wn.2d 476, 487, 824 P.2d 483 (1992). In *Hansen*, the Court held that the jury may find a statutory violation is not negligence where the violation is beyond the violator's control and ordinary care could not have guarded against the violation. In this action, however, Hi-Tech simply argued that it didn't know the regulations applied to its conduct. If this argument is ever allowed, the construction safety codes would be meaningless.

Ignorance is no defense.

Additionally, the Court in *Yurkovich v. Rose*, 68 Wn.App. 643, 847 P.2d 925 (1993), stated in that case that:

[A]ppellants attempted to justify their drop-off procedure with evidence that on past occasions vehicles would ignore stopped buses and attempt to pass on the left or right, exposing children to extreme danger. The court properly sustained Respondents' objections to this testimony as immaterial. Although evidence of justification or excuse for violating applicable statutes and codes is relevant to the question of negligence, Appellants presented no evidence that hazards from passing vehicles on the night of the accident justified their violation of the law. *See Houck v. University of Washington*, 60 Wash.App. 189, 201-02, 803 P.2d 47

(1991) (evidence properly excluded where it related to neither the place nor the actual time of the accident).

*Id.* at 649-650.

Justification or excuse is a defense of avoidance and must be pled as an affirmative defense under CR 8(c). 6 Wash. Prac., *Wash. Pattern Jury Instr. Civ.* WPI 60.01.01 (5th ed.). But Respondent Hi-Tech did not plead, in accordance with Rule 8(c), nor disclose in discovery or in opposition to the motion for summary judgment any explanation, justification or excuse as to why it did not comply with the applicable WAC regulations.

Because Respondent never pled an affirmative defense under CR 8(c) nor did it answer interrogatories in discovery providing a factual basis for justification or excuse for noncompliance that it would assert at trial for not meeting WAC regulations, Appellant was surprised, and prejudiced, by such a defense coming out for the first time during trial after the door was opened by the Court to expert testimony from Respondent.<sup>9</sup>

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<sup>9</sup>Once the Court ruled that the door was open, Appellant was simply not ready to understand, remember and respond to each new expert opinion to which the Court allowed Respondent to testify. This surprised the Appellant and it was unfair. It amounted to trial by ambush since there was no time to prepare. In effect, Appellant was punished for following all court rules before trial and Respondent was rewarded for not following the court rules given the trial judge's ruling that the door was open and that Mr. Canney could now testify as an expert witness, without ordering

It was error to allow Mr. Canney to explain why he did not comply with the WISHA violations because there was no evidence that compliance was beyond his control. Neither did his testimony contain any specific details as to why Hi-Tech was justified at the time of Appellant's injury, as required by *Yurkovich, supra*, why Respondent did not follow the requirements of the WAC code. Rather, Mr. Canney was allowed to testify generally that he didn't know the WAC code applied and gave industry practice examples that only an expert in his field would know or be familiar with in the scaffold and regulatory industry of ladders for steel scaffolds. This was error.

A lengthy discussion was had and Appellant took exception to the Court order that allowed the Respondent to explain or to provide an excuse for avoiding those WISHA rules the Court ruled were violated. This right to explain a justification or excuse a failure to comply with the WISHA regulatory violations amounted to expert opinions. It was unfair to allow Respondent's principal Mr. Canney to testify and provide expert opinions pertaining to explanations, justifications or excuses for

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the Respondent to disclose all expert opinions that night before trial the following court date. The net result was Appellant had no idea what Respondent would testify to without the protection of CR 26 disclosure and KCLR 26 disclosures.

non-compliance after Judge Fox barred such expert testimony.

As a consequence of the trial court's ruling that the door was opened and as a consequence of the court allowing the Respondent to explain the justification or excuse for not complying with WAC rules, which previously were ordered that Respondent violated, Appellant was harmed. Appellant was not able to meet the surprise expert opinions of Respondent which were heard in court for the first time. Appellant had no reasonable time and opportunity to explore and evaluate these opinions of Mr. Canney about industry practice, through the discovery process, by redepositing Respondent, or by contacting other competitors in Respondent's industry to verify whether his statements in Court were accurate or not. Appellant was simply not prepared to cross examine the Respondent Mr. Canney as there was no time to perform any discovery about these new opinions which surprised the Appellant the fourth and fifth days of trial.

The expert testimony on excuse and justification included the expert opinions that HiTech's competitors don't have ladders with texture or shaped rungs, you can't buy these types of ladders, they don't come with either safety protection, and you can't put fall protection or fall

restraint on the scaffold, ladders or attach anything to the building. VRP 5/22/06, p. 94-111. This information and evidence would not have been admissible and considered by the jury if Judge Fox's ruling was followed. All of this testimony went to the issue of causation e.g. even if Mr. Canney did not comply, he could not have purchased them anyway, an expert opinion.

At the time when Respondent supplied the scaffold ladder before Appellant's injury, Respondent did not know of WAC 296-155-480 or, if he did, he subsequently testified at trial that it did not apply to him. Therefore, as a matter of law, he had no justification or explanation other than his "ignorance of the law" which would be legally not an excuse. It was therefore an error of law to allow him to testify about "excuse" or "justification" since ignorance of the law cannot be explained away.

The Court had already ruled that these WAC sections were violated and that these sections applied despite Respondent's disagreement. CP 225-226. Respondent had control over and could have guarded against his violation of these sections. Hence, any excuse of justification was irrelevant and should not have been allowed. To allow the testimony of Mr. Canney on these irrelevant issues was harmful and prejudicial.

4. The Court erred in refusing to give Appellant's proposed instruction regarding Hi-Tech's nondelegable duty to provide a safe workplace within the scope of its subcontract.

Appellant proposed, and the Court refused to give, the following

Jury Instruction:

A subcontractor like Respondent Hi-Tech, owes a duty to every employee within the scope of its subcontract to ensure that it complies with all applicable safety regulations. The subcontractor is the party with innate supervisory authority and per se control over the scope of its subcontract, so it bears the primary, non-delegable duty to provide a safe workplace for workers. In Washington, subcontractors have a non-delegable duty to ensure compliance, within the scope of their subcontracts, with all Washington State construction safety regulations. This liability is justified because a subcontractor's supervisory authority is per se control over the workplace within the scope of its subcontract.

This instruction is in accord with Washington law, specifically *Stute v. P.M.B.C., Inc.*, 114 Wn.2d 454, 461, 462, 464, 788 P.2d 545 (1990); *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123, 52 P.2d 472 (2002); and *Weinert v. Bronco National Co.*, 58 Wn. App. 692, 697, 795 P.2d 1167 (Div. I 1990). As these cases show, responsibility for construction site safety usually begins with general contractor, but each mid-tier or sub-tier contractor also has similar safety responsibilities within the scope of their respective sub-contracts. Hi-Tech is no exception and this instruction should have been given to the jury.

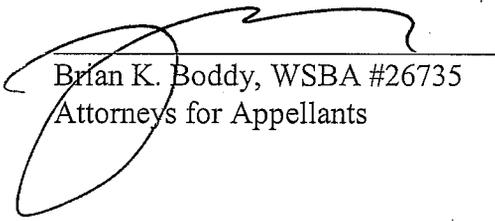
#### D. CONCLUSION

For two reasons, a new trial should be ordered in this case. First, the trial judge's ruling permitting evidence of Appellant's immigration status was so prejudicial that a fair trial was not had. The vast weight of the factual evidence adduced at trial, in conjunction with Judge Fox's prior rulings that the Respondent had violated numerous WISHA provisions, in addition to undisputed medical evidence that the subject accident was the sole cause of Appellant's injuries, could only have led a rational finder of fact to render a substantial verdict in Appellant's favor. Because, however, the verdict was against the tremendous weight of the evidence, it must be inferred that the evidence of the Appellant's illegal immigration status adversely and unfairly affected the outcome of this trial.

Secondly, Judge Hayden's ruling that Appellant's counsel had somehow "opened the door" to expert testimony, in contravention of Judge Fox's prior order precluding such testimony as a discovery sanction, was wholly improper. This ruling by Judge Hayden allowed the Respondent to argue a theory of the case, excuse and justification, that was not plead and that should not have been heard by the jury. It also permitted the Respondent to get in unrebutted expert testimony that

Appellant's counsel could not address through his own experts. Again, the harm to the Appellant resulting from this ruling is evident in the verdict - that the Respondent breached a duty to the Appellant, but that somehow that breach was not a cause of his injuries. The great weight of the evidence was clearly contrary to that result. A new trial should be ordered.

Respectfully submitted this 23<sup>rd</sup> day of February, 2007.



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NO. 58511-8-I  
COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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**ALEX SALAS, Petitioner,**

v.

**HI-TECH ERECTORS, Respondent,**

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PROOF OF SERVICE RE:  
APPELLANT'S AMENDED BRIEF

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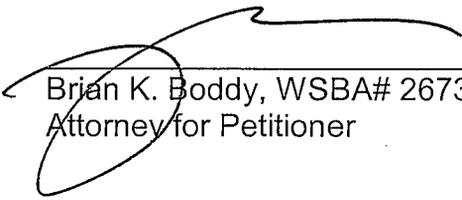
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**Certification**

I hereby certify that, on or about February 23, 2007, I caused to be served on each counsel of record for the parties named above a true and correct copy of Appellant's Amended Brief.



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