

64032-1

64032-1

COURT OF APPEALS  
STATE OF WASHINGTON  
2010 JUN 30 PM 3:23

CAUSE NO. 64032-1-1

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

---

WROUGHT CORPORATION, INC,

Appellant,

v.

MARIO INTERIANO,

Respondent.

---

**BRIEF OF RESPONDENT  
MARIO INTERIANO**

---

CORRIE J. YACKULIC, WSBA #16063  
CORRIE J. YACKULIC LAW FIRM, PLLC  
315 Fifth Avenue S., Suite 1000  
Seattle, Washington 98104  
(206) 787-1915  
Counsel for Respondent Mario Interiano

Jeffery Robinson, WSBA #11950  
SCHROETER GOLDMARK & BENDER  
810 Third Avenue, Suite 500  
Seattle, WA 98104  
(206) 622-8000  
Counsel for Respondent Mario Interiano

## TABLE OF CONTENTS

	Page
I. SYNOPSIS OF THE MATTER ON REVIEW .....	1
II. STATEMENT OF THE CASE.....	2
A. Background: The Mukilteo Jobsite, Mario Interiano’s Work There, And Events Leading To Mario’s Fall Down The Unguarded Elevator Shaft.....	2
B. Wrought’s Aborted And Then Belated Effort To Serve A Trial Subpoena On Nelson Rodriguez.....	6
C. The Court’s Rulings On Mark Lawless’ Testimony And On Wrought’s Proposed Instruction Regarding The Scope Of A Subcontractor’s Duty To Ensure Safety On A Construction Site.....	12
D. The Court’s Denial Of The Motion For New Trial.....	14
III. SUMMARY OF ARGUMENT .....	15
IV. ARGUMENT .....	16
A. The Trial Court Did Not Abuse Its Discretion When It Refused To Allow Wrought To Read Rodriguez’s Deposition Testimony.....	16
1. Wrought Failed To Satisfy The Requirements Of ER 804(a)(5).....	17
2. Wrought Failed to Show That It Had Exercised “Due Diligence” In Attempting To Procure Rodriguez’s Attendance At Trial.....	19

3.	The Proposed Deposition Testimony Was Incomplete And Misleading.....	22
B.	The Trial Court Did Not Err By Refusing To Allow Wrought’s Safety Expert To Testify To An Expanded Subcontractor Duty Or To Reject Wrought’s Proposed Instruction Expanding The Subcontractor’s Duty.....	25
1.	The General Contractor Has A Non- Delegable Duty To All Workers On The Jobsite To Ensure Compliance With All WISHA Regulations. ....	26
2.	The Subcontractor’s Duty Is Limited To Complying With Those WISHA Regulations In Areas Of The Job That Are Within The Control Of The Subcontractor Or As To Hazards That The Sub Creates.....	27
3.	Wrought’s Proposed Expert Testimony And Instruction Was Contrary To <i>Stute</i> and <i>Ward v. Ceco Corp.</i> , and Was Inconsistent With The Evidence.....	28
4.	The Court’s Rulings On The Safety Expert’s Testimony And Wrought’s Proposed Instruction Were Not Error. ....	31
C.	The Trial Court Did Not Abuse Its Discretion When It Denied Wrought’s Post- Trial Motion For Reconsideration.....	35
V.	CONCLUSION.....	38

## TABLE OF AUTHORITIES

	Page
<b><u>Cases</u></b>	
<i>Aluminum Co. of America v. Aetna Cas. &amp; Surety Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000).....	35
<i>Crossen v. Skagit County</i> , 100 Wn.2d 355, 669 P.2d 1244 (1983).....	34
<i>Davidson v. Municipality of Metropolitan Seattle</i> , 43 Wn. App. 569, 719 P.2d 569, <i>rev. denied</i> , 106 Wn.2d 1009 (1986).....	16
<i>Go2Net, Inc. v. CI Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003).....	36
<i>Graves v. Dept. of Game</i> , 76 Wn. App. 705, 887 P.2d 424 (1994).....	36
<i>Kelley v. Howard S. Wright Construction</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	27
<i>Phillips v. Kaiser Aluminum</i> , 74 Wn. App. 741, 875 P.2d 1228 (1994).....	27
<i>Stute v. P.B.M.C.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990) .....	25, 26, 35
<i>Sutton v. Shufelberger</i> , 31 Wn. App. 579, 643 P.2d 920 (1982).....	passim
<i>Ward v. Ceco Corp.</i> , 40 Wn. App. 619, 699 P.2d 814, <i>rev. denied</i> , 104 Wn.2d 1004 (1985).....	passim
<i>Wickswat v. Safeco Ins. Co.</i> , 78 Wn. App. 958, 904 P.2d 767, 772 (1995), <i>rev. denied</i> , 128 Wn.2d 1017, 911 P.2d 1342 (1996).....	34

**TABLE OF AUTHORITIES, continued**

	Page
<b><u>Other Authorities</u></b>	
<b>Revised Code of Washington</b>	
49.17.060.....	26, 31, 33
49.17.060(1).....	31
<b>Washington Annotated Code</b>	
296-155-040 .....	26
<b>Civil Rule</b>	
32(a)(3)(D).....	17, 19, 37
<b>Evidence Rule</b>	
403.....	22
804.....	17, 18, 19
804(a)(5).....	17, 19, 37
<b>Miscellaneous</b>	
5 K. Tegland, <i>Evidence Law &amp; Practice</i> §103.23 at 98 (2007).....	17
5C K. Tegland, <i>Evidence Law &amp; Practice</i> , § 804.8 at 175-76 (2007).....	18

## I. SYNOPSIS OF THE MATTER ON REVIEW

This case arose because a safety barrier across an elevator shaft opening on a Wrought Corporation construction site gave way, causing Mario Interiano, a subcontractor, to fall 20 feet onto a concrete slab and to sustain serious injuries to his feet and back. After a two-week trial, a jury found that Wrought was liable for Interiano's injuries, that Interiano was 20% comparatively negligent, and awarded \$1.95 million in damages.

The afternoon before the final day of trial Wrought sought permission to read four lines from the deposition of a witness who was on Wrought's witness list and whom Wrought had attempted to subpoena *that day*. The trial court did not abuse its discretion in finding that Wrought had not shown unavailability of the witness or due diligence by Wrought in attempting to procure his attendance at trial, and that the proposed testimony would be misleading, confusing, and unfair.

The trial court also did not abuse its discretion when it refused to allow the defense safety expert to testify that Interiano, a subcontractor, had the same scope of duty as Wrought, the general contractor, in ensuring that the barrier met WISHA regulations. Interiano's job was to install the trim around the patio doors. He did not create the barrier, and he had no responsibility for or control over that aspect of the work site.

The trial court also properly rejected Wrought's proposed instruction regarding Interiano's duty; it was an inaccurate statement of the law in multiple respects.

Wrought's post-trial "motion for reconsideration" rehashed the same issues and relied on evidence that had been available to Wrought's counsel before trial ended but which Wrought had chosen to withhold until after the verdict and judgment had been entered against it. The trial court did not abuse its discretion in denying that motion.

## **II. STATEMENT OF THE CASE**

### **A. Background: The Mukilteo Jobsite, Mario Interiano's Work There, And Events Leading To Mario's Fall Down The Unguarded Elevator Shaft.**

Mario Interiano, a specialty subcontractor, sustained serious and career-ending injuries to his feet and back when a barrier across an elevator shaft opening on a residential construction site gave way, causing him to fall from the third floor to a concrete slab below. Mario sued Wrought Corp., the general contractor, for breaching its nondelegable duty to ensure that the site complied with state safety regulations, including the rule for safety barriers across wall openings. After a two-week trial a King County jury found that Wrought Corp. was negligent and that its negligence caused Mario's injuries and losses. The jury also found 20%

comparative negligence. Judgment in the amount of \$1.56 million was entered on June 22, 2009. CP 1405.

Mario, a finish carpenter, was at the Wrought jobsite on November 17, 2005 to “finish some window trim, and I believe it was some *window doors, like for a patio*,” on the third floor. VRP 6/2/09, 43:21-44:1 (emphasis added). In preparation for his work, Interiano went to shake out his compressor hose in the elevator shaft. The shaft provided a convenient space for shaking out the hose. Others on the job used it for other similar purposes, such as for running extension cords up or down. *See, e.g.*, VRP 5/28/09, 114:8-16. The only other person at the jobsite – a single-family house in Mukilteo – that morning was Mario Interiano’s helper, Nelson Rodriguez.

Interiano crouched to shake out his hose. As he rose he steadied himself by placing his hand on the “X-brace” that spanned the opening.<sup>1</sup> VRP 6/2/09, 47:20-24, 54:15-23 (Interiano). The brace appeared to be secure. *Id.*, 53:16-22. But the two-by-fours gave way, and Interiano fell

---

<sup>1</sup> Interiano testified that the barrier consisted of two 2 by 4s in the shape of an “X, and was inside the door jamb. Shawn Roten testified that he had been on-site the night before and that the barrier consisted of three 2 by 4s in a “Z” formation and was nailed to the outside of the elevator shaft opening. But both plaintiff’s *and Wrought’s* experts, Ric Gleason and Mark Lawless, agreed that Interiano’s description of the barrier was more probably correct. VRP 6/4/09, 37:9-12 (Lawless); VRP 5/28/09, 119:9-120:19 (Gleason). The jury agreed with Interiano.

down the shaft, along with the boards. VRP 6/2/09, 56:12-16 (Interiano); 5/28/09, 37:13-15 (Roten). Interiano shattered the heel bones of both feet and sustained a burst fracture in his lumbar spine.

A Washington State Industrial Safety and Health (WISHA) regulation requires that when there is a drop-off of at least four feet, wall openings must be guarded with three horizontal rails, a top rail, middle rail, and toe board, able to withstand 200 pounds force applied to the top rail. WAC 296-155-505(5), (7). The defense safety expert, Mark Lawless, agreed with plaintiff's expert that the barrier that was in place did not meet WISHA requirements. VRP 6/4/09, 32:9-12 (Lawless); VRP 5/28/09, 121:2-20 (Gleason).

Interiano's work had nothing to do with the elevator shaft or its opening. Photos of the shaft taken eight days after Interiano's fall show that it was framed and dry-walled but was otherwise unfinished. Supplemental CP (Pltff Exs. 30F, 30G, 54, 55). Moreover, the shaft had been framed to the wrong specifications and would have to be rebuilt before the elevator could be installed. VRP 6/2/09, 41:9-22, 95:23-96:13. (Shawn Roten, who testified after Interiano, did not dispute this testimony.) No "finish" work – i.e., the door and surrounding trim – could be done until *after* the elevator shaft was reframed and the elevator was installed. It would be weeks or months before the elevator opening was

ready for the finish work. Supplemental CP (Pltff Exs. 30F, 30G, 54 and 55) (photos of the unfinished elevator shaft taken November 25, 2006); VRP 5/28/09, 75:9-76:10 (Roten acknowledging that photos show the elevator shaft and barriers as of November 25, 2005).<sup>2</sup>

At trial Roten tried to insinuate that on November 17 Interiano's job included installing the finish doors to the elevator shaft, by testifying that "doors" were at the job site. *See* Appellant's Mem. at 4. But Roten stopped short of making the affirmative statement that Interiano was installing the finish doors to the elevator. Such statement would have been demonstrably false, given the condition of the elevator shaft at the time. Indeed, Roten conceded that Interiano knew better than anyone else what work he was intending to do on November 17. VRP 5/28/09, 83:2-8 ("Only Mario knows"). *See also id.*, 36:10-21; 65:14-66:14 (Roten: admitting that Interiano did not install the door or any of the trim shown in the photograph of the completed elevator opening, Exhibit 29D).

---

<sup>2</sup> Although Wrought's Clerk's Papers included almost the entire trial court file, Wrought *failed* to designate these photographs, which reveal an empty and unfinished elevator shaft, far from ready for the final "finish work," including the outside wood door and its frame and the surrounding trim.

Roten also testified that Interiano's job included painting around the elevator shaft opening, again in an effort to hold him responsible for the condition of the barrier on November 17, 2005. But on cross examination Roten conceded that the painting crew had completed its work by October 20 at the *latest* – 28 days *before* the accident. VRP 6/3/09 a.m., 96:10-16. Wrought fails to mention this important fact in its opening brief.

**B. Wrought's Aborted And Then Belated Effort To Serve A Trial Subpoena On Nelson Rodriguez.**

The afternoon of Wednesday, June 3 – the second-to-last day of trial – defense counsel announced that he had decided to call Rodriguez as a trial witness but that he had not yet served Rodriguez with a trial subpoena. Here is what counsel told the Court about his effort to serve Rodriguez: “I have attempted to locate and to serve Nelson Rodriguez who is an individual whose testimony I wanted to offer into evidence. And I have not yet been able to do so . . . I don't believe that he's available,” VRP 6/3/09, 16:25-17:2, and “I actually have a process server that went to a residence that we believed to be where he lived. We found that information out today.” VRP 6/3/09 p.m., 23:13-15. He did not offer a declaration of the process server or other proof of service or attempted service. Based on this information, he asked the Court's permission to

read “four lines” from Rodriguez’s deposition. VRP 6/3/09, 26:5-19 (“I intend to call him to speak to the scope of what they were to do that day. . . it’s four lines. . . . That’s it.”)

Wrought’s counsel did not make an offer of proof of the deposition testimony he wanted to read. This is what he told the trial court about the testimony:

MR. JONES: I intend to call him to speak to the scope of what they were to do that day; the scope of work that they were to do that day.

THE COURT: And does his deposition indicate that?

MR. JONES: Yes. It’s one page. It’s not even a page. I think it’s four lines. It’s a question, it’s a response, another question and a response, I believe.

THE COURT: . . . That’s all that you were going to ask him to testify to is to what the scope of work was for that day.

MR. JONES: That day.

VRP 6/3/09 p.m., 26:5-19. In objecting to Wrought’s last minute effort to read deposition testimony, Plaintiff’s counsel told the court that the four lines contained reference to “doors,” which was what Wrought wanted the jury to hear. *Id.*, 26:20-27:3. Defense counsel then conceded that Rodriguez had not been asked, and did not identify, *what* doors or *where* those doors were. *Id.*, 28:7-9 (“it wasn’t in the deposition. It didn’t come

out. I didn't take the dep.") Defense counsel provided the trial court no further description of the proposed testimony during trial.

Plaintiff's counsel Jeff Robinson objected to the proposed testimony on two grounds, first, that defendant had not met its burden of showing "due diligence" in trying to get service on Rodriguez, and second, that the "four lines" of the deposition were incomplete, misleading and unfair.

Mr. Robinson explained that before trial, defendant had sought to serve Rodriguez with a trial subpoena. Plaintiff's counsel learned that Wrought had sent a process server to the homes of Rodriguez's friends and relatives. VRP 6/3/09 p.m., 19:23-25. Rodriguez, an undocumented worker who spoke little English, was concerned about "walking down to a courthouse after getting a subpoena and who was going to be here waiting for him, like the INS." VRP 6/3/09 p.m., 20:1-4. In an effort to reassure Rodriguez ("it's just a subpoena") and to eliminate any actual or perceived intimidation, plaintiff's counsel offered to help with service. But due to an honest mistake about which Starbucks everyone was supposed to meet at, service of the subpoena did not happen. *See* CP 1446 (post-trial motion attaching email explaining the mix-up).

Then, before a second meeting was scheduled, defense counsel decided to cancel the subpoena. On May 18, 2009, eight days before trial

was to begin, he sent an email stating, “Clarification. We are not intending to call these witnesses in our case in chief. We intend only to cross-examine them after you call them to the stand. Teresita Aguilar, Ana Garcia Interiano, *Nelson Rodriguez*.” VRP 6/3/09 p.m., 25:2-6 (emphasis added). As a result, plaintiffs’ attorneys stopped their efforts to arrange for service of the subpoena on Rodriguez. VRP 6/3/09 p.m., 18:17-19:5 (“we were ready to give him a subpoena, and we were told don’t do it.”).

On May 22, before the first day of trial, plaintiff’s counsel advised the counsel and the court that plaintiff was not calling Rodriguez as a trial witness. VRP 6/3/09 p.m., 25:11-16. Despite this, defense counsel made no further effort to serve Rodriguez ***until the day before closing argument***. VRP 6/3/09, 16:23-17:12.

According to defense counsel, Rodriguez’s reference to “doors” was important because Interiano “didn’t mention doors. He didn’t mention sliding glass doors.” *Id.*, 30:7-9. Defense counsel simply misunderstood or misremembered Interiano’s testimony. In fact, as the transcript shows, Interiano testified that he was installing the trim around the sliding glass doors (“window doors, like for a patio”) on the third

floor. VRP 6/2/09, 43:21-44:1.<sup>3</sup> Thus, Wrought's premise – that Rodriguez's deposition testimony undermined Interiano's – was erroneous.

Judge Yu denied the request to read the “four lines” from Rodriguez's deposition. Regarding Wrought's effort to submit Rodriguez's deposition reference to “doors:”

Mr. Jones, we know the facts of this case. You know this case now because you've deposed people, you've talked to people, you know it from your clients. . . . I would think that there's some knowledge now among everybody in this room about what doors would have been there, not there, and what they were there to do or not.

So I have to ask you: Would that be really misleading material that you're going to present to the jury, because the issue really would have been sliding doors and not doors that somehow give you the opportunity to argue something that really doesn't have any evidentiary basis? You should know this case.

VRP 6/3/09 p.m., 28:18-29:7. Mr. Jones conceded:

I do have to admit that if his version of the events is accurate, that it would not be as helpful testimony to my case as I would like it to be

VRP 6/3/09 p.m., 29:23-25. The Court then ruled:

---

<sup>3</sup> Mr. Robinson also mentioned a document from the project file showing “that the elevator doors were being installed on March 10, 2006. There were no elevator doors that were going to be installed on November 17, 2005, at all. Period. End of story.” VRP 6/3/09 p.m., 27:20-23. Because of the Court's ruling on Rodriguez's deposition testimony, plaintiff apparently did not offer that document into evidence.

Mr. Jones, unless you give me something else, I'm really – I can't – I really believe that as much as this is an adversarial process, these is an overall pall that covers what we do in trial; and, that is, an attempt to really be faithful to the facts viewed in the light from one another's side. And that is so misleading. . . .

I'm going to . . . give you more time in the sense that you have today and you have tomorrow to secure this individual in terms of his testimony live in court. I'm not going to allow you to utilize that deposition because of whatever language barriers there may be, because of the limited record of a deposition, because of the possible misrepresentation that can't be corrected once we just simply rely on a deposition. I can't do that, and I won't allow it. You can try to secure this individual.

So if you can get him here, he will testify. Otherwise, I'm not allowing use of the deposition.

VRP 6/3/09 p.m., 30:20-31:4, 9-11.<sup>4</sup>

Defense counsel did not again raise the issue of Rodriguez's availability or unavailability before trial ended. Nor did he advise the court the morning of June 4 that Rodriguez had been served and, *e.g.*, request a one-day continuance to obtain his appearance at trial, which he could have done if he had been intent on obtaining Rodriguez's live testimony. Then, ten days *after* judgment was entered against it, Wrought file its motion for new trial along with two declarations from a process

---

<sup>4</sup> The judge correctly noted that Rodriguez gave the deposition testimony through an interpreter. *See* CP 676 (excerpt of Rodriguez' deposition). Defense counsel spent the first 15-20 minutes of the deposition trying to get Rodriguez to answer questions about his immigration status. *See* CP 674-690.

server regarding her two attempts to serve Rodriguez on June 3, the day before closing arguments.

**C. The Court's Rulings On Mark Lawless' Testimony And On Wrought's Proposed Instruction Regarding The Scope Of A Subcontractor's Duty To Ensure Safety On A Construction Site.**

In two related rulings – one regarding the scope of the testimony of defense expert Mark Lawless, the other on jury instructions – the trial court rejected the defense theory that Interiano, as a subcontractor, had an independent duty to ensure that the barrier across the elevator shaft complied with the WISHA regulation. According to Wrought, this duty attached simply because Interiano “was working on the entire third floor” and “it was within the scope of his duties . . . to work at or near the elevator shaft to uncoil the hose.” VRP 6/3/09 p.m., 41:12-14, 18-20.

In the first ruling, Judge Yu refused to allow defense counsel to elicit testimony from Wrought's construction site safety expert that Interiano had an independent duty, as a subcontractor, to ensure that the elevator shaft barrier met the WISHA standard. In rejecting the defense theory that Interiano assumed this duty simply because “he was working on the entire third floor,” VRP 6/3/09 p.m., 41:12-14, Judge Yu stated:

The logic of that argument would turn *Stute* . . . on its head, because . . . that would say that then any time a sub comes into a construction zone that that contractor . . . becomes responsible.

A painter who is painting walks up the stairs, thinks the railing is affixed, holds onto the railing, and, in fact, it's not affixed to the wall and he falls off and he falls down. The logic of your argument is that that painter, because that's the zone of where he's working, is responsible now somehow for ensuring the safety that that rail is attached to the wall before the steps are used. That's precisely the argument that governs all of these cases that says it can't be that. It's until the sub controls the zone in terms of what they're doing, how they're doing it, that then they need to secure it before they work on it.

. . . I haven't heard any testimony that . . . put that within the scope of Mario's zone of which he then becomes responsible to secure the safety.

. . . . [T]here's a real question of contributory negligence. And that's going to go to them. . . . But in terms of the law, I don't believe there's any facts to support anybody coming in here to say he had control over that. . . .

VRP 6/3/09 p.m., 43:1-44:8. Judge Yu further explained that she was

premiering her ruling on the evidence of Interiano's "scope of duty":

He was going to be doing some trim work. He was not going to be working around that elevator. He wasn't going to be setting the door in that day at all, and out of convenience puts this hose down there . . . .

VRP 6/3/09 p.m., 45:6-13. *See also* VRP 6/3/09 p.m., 46:19-47:6 (trial judge confirming that Lawless was not to testify that Interiano had a duty to ensure that the barrier complied with WISHA; "there are no facts that have been presented that will allow for somebody to offer that opinion.").

The closest that defendant came to making a formal offer of proof regarding Lawless's anticipated testimony was in response to a question from the Court, asking what Lawless's testimony would be if he knew that

Interiano was doing nothing more than “unraveling his hose” at the elevator shaft opening. Defense counsel responded, “I believe he would say that he had a duty to ensure that the barricade was present and properly erected. I think he would also say that by unraveling that hose in that location he is working in that area. . . . as a proffer, that’s what I think that he would say . . . “VRP 6/3/09 p.m., 48:13-19.

Consistent with her ruling on Lawless’s testimony, Judge Yu refused to give a proposed defense instruction that would have extended the general contractor’s duty to “all employees” throughout the jobsite to all subcontractors, including Interiano. CP 765 (proposed instruction-- annotated); VRP 6/4/09, 45:22-46:2, 114:20-115:10.

**D. The Court’s Denial Of The Motion For New Trial.**

Ten days after judgment was entered, Wrought filed a “motion for reconsideration and for new trial,” revisiting the issue of Rodriguez’s deposition. Wrought *for the first time* provided declarations of the process server who apparently attempted service on June 3. Both declarations are *dated* June 3, 2009, yet they were not filed with the Court until *July 9*. CP 1460-62, 1464-66. According to the process server the only date she attempted service on Rodriguez was June 3 -- the day before closing arguments. She never served Rodriguez, but twice gave the subpoena to other individuals at the apartment and stuck a copy in the door of a vehicle

parked at his residence. *Id.* On the evening of June 3 the process server gave the subpoena to a woman who identified herself as Rodriguez's wife, and who informed the process server that Rodriguez "works nights and that he wouldn't be back until tomorrow." CP 1464-66. So Rodriguez would not have received the subpoena until sometime on June 4, in any event. Wrought's post-trial motion contains no explanation for Wrought's failure to offer the declarations during trial.

The court denied the motion, noting that "there was no evidence presented that allowed the court to find that Mr. Rodriguez refused to appear and *defense counsel did not advise the court that such was the case.*" CP 1490 (emphasis added).

### **III. SUMMARY OF ARGUMENT**

The trial court did not abuse its discretion when it denied Wrought's eleventh-hour request to read four misleading lines from Rodriguez's deposition. Wrought did not exercise due diligence in attempting to procure Rodriguez's attendance at trial, did not present evidence that Rodriguez was in fact unavailable, and conceded that the lines it wanted to read might not be "helpful."

The trial court likewise did not abuse its discretion when it allowed Wrought to argue comparative fault but did not allow Wrought's expert to testify that Interiano had an affirmative duty – just like the general

contractor's -- to ensure that the barrier at the elevator shaft opening met safety regulations. Such testimony would have been inconsistent with settled Washington law on the limited responsibility of a subcontractor, to protect against hazards it creates or that are under its control.

The trial court did not err when it refused to give Wrought's proposed jury instruction, which was not "legally correct" in multiple respects, including in its failure to acknowledge the distinction between a general contractor's duties and a subcontractor's duties to comply with safety regulations on a construction site.

Finally, the trial court did not abuse its discretion in denying the post-trial "motion for reconsideration," which raised no new issues and which relied on evidence that was available to Wrought *during trial* but which Wrought chose not to share with the court until after judgment was entered against it.

#### IV. ARGUMENT

##### **A. The Trial Court Did Not Abuse Its Discretion When It Refused To Allow Wrought To Read Rodriguez's Deposition Testimony.**

Orders admitting or excluding evidence at trial are reviewed for an abuse of discretion. As this Court described this standard of review in *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 719 P.2d 569, *rev. denied*, 106 Wn.2d 1009 (1986):

[T]he admissibility of . . . evidence is largely within the discretion of the trial court, and should not be disturbed on appeal absent a showing of abuse. . . . Abuse occurs only where discretion is exercised on untenable grounds or for untenable reasons. . . . Moreover, the trial court’s decision is given particular deference where there are fair arguments to be made both for and against admission. . . .

43 Wn. App. at 572, 719 P.2d at 571. *See also* 5 K. Tegland, *Evidence Law & Practice* §103.23 at 98 (2007).<sup>5</sup>

The trial court did not abuse its discretion in concluding that Wrought failed to show that Rodriguez was unavailable under ER 804(a)(5) and CR 32(a)(3)(D), that Wrought failed to show that it exercised “due diligence” in “attempting to procure the attendance of the witness at trial,” *Sutton v. Shufelberger*, 31 Wn. App. 579, 585, 643 P.2d 920 (1982), or that the deposition excerpts were incomplete and would have been misleading.

**1. Wrought Failed To Satisfy The Requirements Of ER 804(a)(5).**

A party may read deposition testimony only when the witness is “unavailable.” According to Tegland,

A declarant who can be reached by subpoena to testify at trial is normally considered available for purposes of Rule 804. But the mere issuance of a subpoena, and the declarant’s failure to respond

---

<sup>5</sup> As Tegland states of this deferential standard, “[t]he practitioner hoping to reverse an evidentiary ruling on appeal will find little encouragement in the reported decisions. Evidentiary issues are usually won or lost at the trial level. . . . The appellate courts simply regard the rules of evidence as rules that are best administered during trial.”

to it, is not a sufficient foundation showing to trigger the hearsay exceptions in Rule 804.

5C K. Tegland, *Evidence Law & Practice*, §804.8 at 175-76 (2007).

Wrought made *no* showing at trial that Rodriguez was “unavailable” under ER 804. Wrought did not show that a process server had effected service on Rodriguez nor did it show or even assert that Rodriguez had failed to respond to a properly served subpoena or was avoiding service. To the contrary, counsel’s comments on the next to last afternoon of trial suggested that Rodriguez may have been available.

Here is what Wrought’s counsel stated: “I have attempted to locate and to serve Rodriguez who is an individual whose testimony I wanted to offer into evidence. And I have not yet been able to do so. . . . I don’t believe that he’s available,” VRP 6/3/09 p.m., 16:25-17:2, and “I actually have a process server that went to a residence that we believed to be where he lived. We found that information out today.” *Id.*, at 23:13-15. Counsel did not state that service had been effected on Rodriguez, nor state or suggest that Rodriguez could not be served or would not appear at trial if served. These statements show only that Rodriguez’s residence was apparently within the Court’s subpoena power, and that counsel believed Rodriguez could be subpoenaed. This is not a showing of

unavailability under ER 804, and the trial court did not abuse its discretion in refusing to allow the deposition excerpt to be read.

**2. Wrought Failed to Show That It Had Exercised “Due Diligence” In Attempting To Procure Rodriguez’s Attendance At Trial.**

Wrought also failed to meet its burden of showing that it exercised “due diligence” in attempting to obtain Rodriguez’s attendance at trial. Under CR 32(a)(3)(D) a party may not read a deposition of a witness unless “the party offering the deposition has been unable to procure the attendance of the witness by subpoena.” Interpreting this rule, this Court has held that

A party seeking to introduce the deposition of a witness is required to make a showing that due diligence was exercised in attempting to procure the attendance of the witness at trial. *See Palfy v. Rice*, 473 P.2d 606 (Alaska 1970); 8 C. Wright & A. Miller, Federal Practice SS 2146 (1970). In the absence of such a showing the refusal to permit the introduction of the deposition *is not an abuse of discretion*.

*Sutton v. Shufelberger*, 31 Wn. App. 579, 585, 643 P.2d 920, 9224-25 (1982) (emphasis added). ER 804 (a)(5) contains language almost identical to that in CR 32 regarding proof of “unavailability”: “the proponent of the statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means.” Thus, the *Shufelberger* “due diligence” standard should apply equally under CR 32(a)(3)(D) and ER 804(a)(5).

The facts here are astonishingly similar to those that this Court held did not show due diligence in *Shufelberger*:

Here, the trial commenced on March 19, 1980, however, it was not until 6:05 p.m. on March 24, 1980, that the defendants attempted service of a subpoena on Dr. Peterson by serving it on his wife at their residence. The defendants knew or should have known that they intended to call Dr. Peterson as a witness and they had a duty to exercise due diligence in serving the subpoena *prior to the next to the last day of trial*. Under these circumstances, the trial court did not abuse its discretion in refusing to admit the deposition.

31 Wn. App. at 585, 643 P.2d at 925 (emphasis added). Likewise here, Wrought “knew or should have known that it intended to call [Rodriguez]” – after all, Wrought knew what his deposition testimony had been and had included him on its witness list -- and Wrought “attempted serving [the subpoena] on his wife at their residence . . . the next to the last day of trial.” As Judge Yu stated, when Wrought first raised the issue in the waning hours of the second-to-last day of trial:

[Y]ou have to have been in trial long enough to know that this happens a lot where the defense doesn’t name somebody as a witness, relying on that the plaintiffs will call them and they don’t, which is why generally the defense ends up having their own witness list, their own requirements that they meet, because this happens all of the time. And that’s just part of what we do in trial.

VRP 6/3/09 p.m., 22:19-23:2.

Wrought mentions that it had initiated efforts to subpoena Rodriguez before trial. But it fails to disclose that it changed strategies eight days *before* trial and *dropped* its decision to subpoena Rodriguez,

choosing instead to cross-examine him *only* if plaintiff called him in his case. On May 22, the Friday before trial began, plaintiff's counsel informed Wrought that he did not plan to call Rodriguez. VRP 6/3/09 p.m., 24:19-25:13 (reviewing Wrought's email, sent on 5/18/09, advising that it intended "only to cross-examine [Rodriguez and others] after you call them to the stand."). Despite this new information, Wrought did nothing to secure Rodriguez's presence at trial until June 3, the day before final witnesses and closing arguments. Under *Sutton*, this is not the "due diligence" that a party must exercise before it may read deposition testimony in lieu of calling a witness live.<sup>6</sup>

Wrought argues that since Wrought's investigator twice left a subpoena at Rodriguez's abode on June 3, directing him to appear in the courtroom on June 4, and that he failed to appear, the Court erred in denying Wrought's request to read Rodriguez's deposition testimony. Appellant's Mem. at 17. Again, Wrought's account of the facts is less

---

<sup>6</sup> As noted, plaintiff offered to and did assist Wrought in attempting to serve Rodriguez prior to trial. See CP 1446 (emails between paralegals documenting the miscommunication about the Starbucks at which the service was supposed to take place and noting that Rodriguez and the process server both waited "for over an hour" for each other.) Had Wrought requested plaintiff's help again prior to the 11<sup>th</sup> hour of trial – such as on or soon after May 22, when plaintiff's counsel told Wrought that they would not be calling Rodriguez in their case, counsel would have helped again.

than complete. Wrought fails to mention that none of these details -- that a process server left a subpoena at Rodriguez's abode two times on June 3 -- were shared with the Court until *over a month after trial ended* in a post-trial motion. *See* CP 1459-1466. The trial court's decision must be reviewed in light of the information she had at the time -- not four weeks later after the verdict was returned in plaintiff's favor.

But even if these additional details had been shared with the Court before the case went to the jury, they fall well short of demonstrating the due diligence that is required before a party may read deposition testimony. *Sutton v. Shufelberger*, 31 Wn. App. at 584-85, 643 P.2d 920.

**3. The Proposed Deposition Testimony Was Incomplete And Misleading.**

The trial court also did not abuse its discretion in excluding the deposition excerpts because that testimony would have been misleading. *See* ER 403. As noted above, Wrought wanted to read the deposition testimony because Rodriguez referenced "doors" in response to a question about "scope of work" on November 17, 2005. Wrought's intent, apparently, was to try to impeach Interiano and to insinuate that Interiano and Rodriguez were to be working on the *elevator* doors. But defense counsel was operating under the misapprehension that Rodriguez's reference to "doors" was inconsistent with Interiano's testimony. He told

the Court, “The problem is that Mr. Interiano was the one that has testified to date about what they were doing, and *he didn’t mention doors. He didn’t mention sliding glass doors.*” VRP 6/3/09 p.m., 31:6-9. Counsel’s memory of Interiano’s testimony was incorrect. Here is what Interiano actually testified regarding his plans for November 17: to “finish some window trim, and I believe it was some *window doors, like for a patio,*” on the third floor. VRP 6/2/09, 43:21-44:1 (emphasis added). Clearly, Interiano (a native Spanish speaker) was referring to sliding glass doors.<sup>7</sup>

Moreover, Wrought’s claim that Rodriguez’s reference to “doors” meant that Interiano was working on the elevator shaft doors has no basis in reality. As of November 17 the elevator shaft was not even ready for the elevator since the shaft had to be reconstructed to the correct specifications. VRP 6/2/09, 41:9-22, 95:23-96:13. The photos of the shaft, taken eight days *after* Interiano’s fall, show its raw and unfinished condition. Even if it did not require reframing, Interiano and Rodriguez were not going to be doing the *finish work* – installing the outside,

---

<sup>7</sup> Despite having the benefit of the trial transcript, Wrought in its appeal brief repeats trial counsel’s error, claiming that Rodriguez’s “deposition testimony directly contradicted Mr. Interiano’s own testimony regarding the work he and his employee were to perform on the day of the accident..” Appellant’s Br., at 17. As discussed above, this statement is incorrect.

decorative elevator door and frame, or trim – on November 17 or any time soon after that.

Judge Yu found that reading the Rodriguez deposition excerpts would be misleading and unfair. In ruling on Wrought's request, she stated:

Mr. Jones, we know the facts of this case. You know this case now because you've deposed people, you've talked to people, you know it from your clients. . . . I would think that there's some knowledge now among everybody in this room about what doors would have been there, not there, and what they were there to do or not.

So I have to ask you: Would that be really misleading material that you're going to present to the jury, because the issue really would have been sliding doors and not doors that somehow give you the opportunity to argue something that really doesn't have any evidentiary basis? You should know this case.

VRP 6/3/09 p.m., 28:18-29:7. The Court then ruled:

Mr. Jones, unless you give me something else, I'm really – I can't – I really believe that as much as this is an adversarial process, these is an overall pall that covers what we do in trial; and, that is, an attempt to really be faithful to the facts viewed in the light from one another's side. And that is so misleading. . . .

I'm going to . . . give you more time in the sense that you have today and you have tomorrow to secure this individual in terms of his testimony live in court. I'm not going to allow you to utilize that deposition because of whatever language barriers there may be, because of the limited record of a deposition, because of the possible misrepresentation that can't be corrected once we just simply rely on a deposition. I can't do that, and I won't allow it. You can try to secure this individual.

So if you can get him here, he will testify. Otherwise, I'm not allowing use of the deposition.

VRP 6/3/09 p.m., 30:20-31:4, 9-11.

The trial court's order allowing Wrought to call Rodriguez live but refusing to allow Wrought to read "four lines" from his deposition was not an abuse of discretion.

**B. The Trial Court Did Not Err By Refusing To Allow Wrought's Safety Expert To Testify To An Expanded Subcontractor Duty Or To Reject Wrought's Proposed Instruction Expanding The Subcontractor's Duty.**

Wrought tried to put on expert testimony and to obtain an instruction that Interiano, a specialty subcontractor, had same affirmative duty as the general contractor to ensure compliance with all WISHA regulations throughout the jobsite, including regulations in areas that Interiano did not control and for hazards he did not create. The trial court correctly refused the testimony and the proposed instruction, which contravened the holdings of *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990) as well as *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *rev. denied*, 104 Wn.2d 1004 (1985), and deviated far from the language of the statute and regulations.

**1. The General Contractor Has A Non-Delegable Duty To All Workers On The Jobsite To Ensure Compliance With All WISHA Regulations.**

It is settled law in Washington that the general contractor on a construction site owes a non-delegable duty to *all* workers, including subcontractors and their employees, to ensure compliance with all WISHA regulations. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d at 457, 788 P.2d 545. This requirement arises because the general contractor has “innate supervisory authority” over the entire worksite, and this “constitutes sufficient control over the workplace.” 114 Wn.2d at 464. The general contractor’s duty to comply with all WISHA regulations is set forth in the second paragraph of RCW 49.17.060 (the “specific duty clause”). The entire statute reads:

Employer — General safety standard — Compliance.

Each employer:

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

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

RCW 49.17.060. WAC 296-155-040 mirrors the RCW.

The Supreme Court in *Stute* clarified that the general contractor has “*primary responsibility for compliance with safety regulations*” because of its “control over the workplace”. 114 Wn.2d at 464 (emphasis added). This important duty of the general contractor is nondelegable. *Id.*, at 463-64, 788 P.2d at 550.<sup>8</sup>

**2. The Subcontractor’s Duty Is Limited To Complying With Those WISHA Regulations In Areas Of The Job That Are Within The Control Of The Subcontractor Or As To Hazards That The Sub Creates.**

The duty of subcontractors to comply with WISHA regulations is far more limited. A subcontractor owes the specific duty to comply with WISHA regulations *only* where the subcontractor actually “*created the dangerous condition*” or “*had control over the dangerous area.*” *Ward v. Ceco Corp.*, 40 Wn. App. at 627, 699 P.2d 814 (emphasis added).

The facts of *Ward* help explain the holding. There, a subcontractor was hired to build wooden platforms for pouring of concrete in a parking garage project on which Sellen Corporation was the general contractor.

---

<sup>8</sup> A general contractor also owes a *common law* duty of reasonable care to protect all employees on the worksite from dangers not specifically addressed in WISHA, to the extent such dangers are within the scope of the contractor’s control. *See, e.g., Kelley v. Howard S. Wright Construction*, 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978); *Phillips v. Kaiser Aluminum*, 74 Wn. App. 741, 750-51, 875 P.2d 1228 (1994) (discussing dual duties, under WISHA and under common law). Since there was a WISHA regulation directly applicable in this case, Wrought’s common law duty was not the focus of plaintiff’s claims.

The subcontractor built an elevated platform, sprayed it with an oily substance, and then left the site without erecting a handrail around the leading edge of the platform, in violation of WISHA. Four days later a Sellen foreman walked onto the slick platform, slipped and fell from the platform. The appeals court affirmed a verdict against Ceco Corp., noting that Ceco *created* the “zone of danger” – the slippery, unguarded platform. 40 Wn. App. at 629. Under this circumstance, within this narrow zone of the subcontractor’s actual control, the court of appeals held that the subcontractor had a duty to comply with WISHA regulations involving railings on platforms.

Any broader rule expanding a subcontractor’s duty on a jobsite would undermine the nondelegable duty of the general contractor to ensure compliance with all WISHA requirements, and would create an impossible standard for subcontractors to work under.

**3. Wrought’s Proposed Expert Testimony And Instruction Was Contrary To *Stute* and *Ward v. Ceco Corp.*, and Was Inconsistent With The Evidence.**

Wrought acknowledges that *Ward* is the leading case addressing the scope of a subcontractor’s duty to comply with safety requirements on a jobsite. *See* Appellant’s Br., at 21. Wrought asserts, though, that the “the evidence established the area around the elevator shaft was within Interiano’s scope of work and control,” *id.*, and so the court’s rulings

limiting its expert's testimony and rejecting its proposed instruction were error.

Wrought's assertion is both an overbroad statement of the subcontractor's duty and an incorrect statement of the evidence. The legal test for imposing the duty on a subcontractor is not the sub's "scope of work" but whether it "created the dangerous condition" or "had control over the dangerous area." But even if Wrought correctly stated the law, Interiano's "scope of work and control" simply did not include the elevator shaft opening.

Wrought claims, first, that Interiano "was responsible for painting the wall where the shaft was located." Appellant's Br. at 22. But, as Roten conceded on cross-examination, *all* interior painting done before November 17 was concluded by *mid-October 2005*. VRP a.m., 6/3/09, 96:10-16. It was undisputed that neither Interiano nor anyone else had done any painting anywhere in the house, let alone by the third-floor elevator shaft, for weeks before Interiano's fall.

Wrought's other "evidence" of Interiano's "scope of work and control" over the elevator shaft was the excluded four lines of Rodriguez's deposition testimony regarding "doors." According to Wrought, this testimony would have "support[ed] the conclusion that Interiano was going to install elevator doors, and therefore had a duty to keep the area

around the elevator shaft safe.” Appellant’s Br. at 22. This statement cannot be reconciled with the facts. First, not even Shawn Roten testified that Interiano was to be installing the elevator door (the finished door covering up the doorway) on November 17, 2006. Second, the photographs – which Wrought failed to designate in its Clerk’s Papers – refute the idea that Interiano was going to be doing finish work at the elevator shaft opening. On November 17, 2005 the elevator shaft opening was far from being ready for any trim or finish work. The shaft itself was unfinished. The elevator had yet to be installed, and in fact, had to be rebuilt after Interiano was hurt because it was the wrong dimensions. VRP 6/2/09, 41:9-22 (Interiano: “Shawn, he mentioned that the opening of the inside . . . was too big, and they were going to have to make it smaller to fit the elevator”), 95:23-96:13. No one was going to be putting up trim or installing a finished door across that opening under these circumstances. *See also* Supplemental CP Exs. 30F, 30G, 54, and 55 (photos). The four lines from Rodriguez’s deposition about “doors” would not have come close to “supporting the conclusion” that Interiano’s work at that time constituted control over the elevator shaft opening. As Interiano testified, he was going to be doing trim work around the *patio doors*, which had already been installed. VRP 6/2/09, 43:23-25-44:1.

In fact, there was no evidence – admitted or excluded -- that Interiano’s work assignment on November 17, 2005, or for weeks before or after that had anything to do with the elevator shaft or the elevator shaft opening.<sup>9</sup> Interiano did not “*create* the dangerous condition” nor did he have “control over the dangerous area.” Under *Ward v. Ceco Corp.*, he did not have a legal duty, as subcontractor, to ensure that the barrier across the opening complied with safety regulations.

**4. The Court’s Rulings On The Safety Expert’s Testimony And Wrought’s Proposed Instruction Were Not Error.**

Since there was no evidence that Interiano “created” the hazard posed by the unguarded elevator shaft opening or that his job placed him in “control” of the opening, the trial court properly refused to allow Wrought’s safety expert to testify that Interiano had the same responsibility as the general contractor to ensure that the barrier met WISHA standard. As the court explained, “I have not heard any facts that would support that on the day in question this individual bore primary

---

<sup>9</sup> The instruction also departed from Washington law by merging the separate and distinct duties set forth in Sections (1) and (2) of RCW 49.17.060, thus improperly extending the reach of the Section (1) duty to *all* workers on a jobsite. RCW 49.17.060(1) actually says, “Each employer (1) Shall furnish to each of *its employees* a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.” Wrought appended to this sentence the words “or to other employees on the jobsite.” It is unclear why Wrought sought this modification to the legal standard in its proposed instruction.

responsibility or had a legal duty for that barrier.” VRP 6/3/09 p.m., 39:19-21. She rejected Wrought’s position that simply “by utilizing” the elevator shaft “to prepare for his work”, Interiano had the kind of “control” that *Ward* requires before a sub can be held responsible for WISHA compliance. The court stated:

The logic of that argument would turn *Stute*, and some other cases, on its head, because I think when you look at the policy as you’ve described and you look at the fact of a construction site, that would say that then any time a sub comes into a construction zone that that contractor, whether it’s a first, second or third tiered level, becomes responsible for working in an area.

A painter who is painting walks up the stairs, thinks the railing is affixed, holds onto the railing, and, in fact, it’s not affixed to the wall and he falls off . . . The logic of your argument is that that painter, because that’s the zone of where he’s working, is responsible now somehow for ensuring the safety that that rail is attached to the wall before the steps are used. . . . It’s until the sub controls the zone in terms of what they’re doing, how they’re doing it, that then they need to secure it before they work on it.

. . . I haven’t heard any testimony that we have put that within the scope of Mario’s zone of which he then becomes responsible to secure the safety.

VRP 6/3/09 p.m., 43:1-25. Accordingly, the trial court ruled that Lawless could not testify “based on these facts that duty transferred to Interiano because he happened to be unraveling his hose there. Because that’s incorrect.” *Id.*, 44:15-18.

Likewise, the Court correctly rejected Wrought's proposed jury instruction regarding the subcontractor's duty. The jury instruction Wrought proposed went even beyond the expansive duty that Wrought is now arguing applies to subcontractors, and would have held subcontractors to the *exact same standard* as general contractors.

Wrought's proposed instruction stated:

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

RCW 49.17.060 (modified).

CP 765 (proposed *annotated* instruction) (emphases highlight the ways in which the proposed instruction deviated from the statute).

The instruction makes no distinction between the duties of a general contractor and the duties of a subcontractor. It would have allowed Wrought to argue that subcontractors have the exact same obligations as general contractors for worksite safety *throughout* the jobsite, regardless of the subcontractor's responsibility or area of control. This is a blatantly erroneous statement of the law in Washington. As discussed above, subcontractors do *not* have to be familiar with or ensure

compliance with all WISHA regulations on a jobsite; even Wrought, on appeal, concedes as much.

The trial court correctly rejected this instruction, and instead gave the pattern instructions on negligence and contributory negligence, as well as the following:

No. 13

A general contractor has a duty to comply with specific rules and regulations of the Washington Industrial Safety and Health Act, known as WISHA. This duty extends to all workers on the job site, including subcontractors and their employees.

A general contractor also has a duty to protect all workers from unreasonably dangerous conditions on the jobsite.

CP 1356. *See also* CP 1352 (negligence) and CP 1354 (comparative negligence).

It is not an abuse of discretion to refuse to give an instruction that does not state the law accurately. As the Supreme Court has stated, “a trial court need never give a requested instruction that is erroneous in any respect.” *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 503, 419 P.2d 141 (1966).” *Crossen v. Skagit County*, 100 Wn.2d 355, 360-61, 669 P.2d 1244, 1248 (1983). *Accord Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 967, 904 P.2d 767, 772 (1995), *rev. denied*, 128 Wn.2d 1017, 911 P.2d 1342 (1996) (if a proposed instruction “is not legally correct in every

respect, then the party cannot complain about the court's failure to give it").

The trial court did not err in refusing to give Wrought's instruction, which was contrary to the central holdings of *Stute v. P.B.M.C.* and *Ward v. Ceco Corp.*

**C. The Trial Court Did Not Abuse Its Discretion When It Denied Wrought's Post-Trial Motion For Reconsideration.**

An order denying a motion for reconsideration is reviewed for abuse of discretion. *Aluminum Co. of America v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). Wrought's post-trial motion for reconsideration raised the same issues that Wrought raises on appeal. Since the trial court did not abuse her discretion or commit other error in her rulings on the Rodriguez deposition, the Lawless testimony, or the jury instructions, she did not abuse her discretion in denying Wrought's post-trial motion to revisit those rulings and order a new trial.

On appeal, Wrought focuses on the court's order regarding the request to read excerpts of the Rodriguez deposition. *See* Appellant's Br. at 24-26. Wrought argues that the trial court abused its discretion in part by failing to consider "new evidence" regarding the process server's efforts to effect service on June 3, 2009. According to Wrought, the process server's declarations "established that service of the subpoena was

actually effected on Mr. Rodriguez by leaving a copy of the subpoena at his place of residence at two separate times on June 2, 2009 [*sic*]. . . .” Appellant’s Br. at 25 (actually, the declarations state that she visited his residence only on June 3<sup>rd</sup>. CP 1460-62, 1464-66).

But Wrought fails to acknowledge that this “new evidence” was available to Wrought before the trial ended on June 4. Both declarations of the process server were *dated* June 3, and refer entirely to events of that date. *See id.*

It is well settled that it is not an abuse of discretion to ignore “new evidence” in a post-trial motion if that evidence, *inter alia*, was known or could have been discovered “in the exercise of due diligence” before the trial ended. *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 88-89, 60 P.3d 1245, 1253 (2003); *Graves v. Dept. of Game*, 76 Wn. App. 705, 718-19, 887 P.2d 424, 431 (1994). On its face, Wrought’s “new evidence” that it complains the trial judge ignored fails this test. All of it was available to Wrought by the evening of June 3, *before* trial ended.

If Wrought had really wanted to call Rodriguez – live or by deposition – its counsel could have alerted the trial court the morning of June 4 that Rodriguez’s wife had been served the night before. If Rodriguez did not appear that morning, Wrought could have asked again to read the deposition excerpts, or could have requested a short

continuance to secure Rodriguez's appearance in court. But Wrought did neither of these things and indeed, did not bring up the issue at any time on June 4. Wrought offers no explanation for waiting four weeks – rather than one day – to seek reconsideration of the June 3 ruling. The transcript attests to the fact that when it wanted to, Wrought was capable of asking the trial court to revisit rulings *during trial*. But Wrought chose not to raise the issue of the Rodriguez testimony again before trial ended. If Wrought were correct – that a party can obtain a new trial by introducing evidence post-trial that it had in hand before the conclusion of trial – cases would never end and there would be no finality to trials. This is not the law.

But equally importantly, even if the trial court had considered Wrought's "new evidence," Wrought still failed to meet the requirements for reading the Rodriguez deposition under CR 32(a)(3)(D), ER 804(a)(5) and *Sutton v. Shufelberger*. As discussed above, Wrought's attempt to subpoena Rodriguez on the next-to-last day of trial – a witness that was known to Wrought, was on its witness list, and who could have been subpoenaed earlier – does not constitute the "due diligence" that is required before the hearsay rule is suspended and prior testimony can be read at trial.

The trial court did not abuse its discretion when it denied Wrought's motion for reconsideration. The motion supplied no basis for taking away the verdict and ordering a new trial.

#### V. CONCLUSION

For the above stated reasons, Mario Interiano request that the Court affirm the judgment of the trial court.

Respectfully submitted this 30<sup>th</sup> day of June, 2010.

CORRIE J. YACKULIC LAW FIRM, PLLC

  
CORRIE J. YACKULIC, WSBA #16063  
CORRIE J. YACKULIC LAW FIRM, PLLC  
315 Fifth Avenue S., Suite 1000  
Seattle, Washington 98104  
(206) 787-1915  
Attorney for Respondent

Jeffery Robinson, WSBA #11950  
SCHROETER GOLDMARK & BENDER  
810 Third Avenue, Suite 500  
Seattle, WA 98104  
(206) 622-8000  
Counsel for Respondent Mario Interiano

CERTIFICATE OF SERVICE

I hereby certify that I served by legal messenger, a copy of the foregoing Brief of Respondent Mario Interiano on this 30<sup>th</sup> day of June, 2010, to the following counsel of record at the following addresses:

David M. Jacobi  
Shawnmarie Stanton  
Wilson Smith Cochran Dickerson  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161

DATED THIS 30<sup>th</sup> day of June, 2010.

Dianna L. Sheets  
Dianna L. Sheets

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIV. #1  
2010 JUN 30 PM 3:23