

67502-8

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THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
NO. 67502-8-I

KING CUSTOM FRAMING, INC., PAUL KING
and ANGELOUQUE KING,

Appellants/Defendants,

v.

JACOB L. BEGIS,

Respondent/Plaintiff.

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BRIEF OF APPELLANTS

Douglas J. Green, WSBA #8364
Natalya P. Markovich, WSBA #43099
GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, Washington 98101-4087
(206) 622-1400
djg@gyseattle.com
npm@gyseattle.com

Counsel for Appellants/Defendants

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BRIEF OF APPELLANT KING

A. Introduction

The Appellant's defense of this construction jobsite injury case was prejudiced by the trial judge's rulings on two jury instructions.

Appellant Paul King, who was the defendant below, was a subcontractor on the construction project. Respondent Jacob Begis was the general contractor. Begis was injured when he fell off a deck at the project while the deck was under construction. Begis sued King. The jury awarded Begis \$683,400.00.

The Snohomish County Superior Court judge erred when he agreed to give Plaintiff's Instruction No. 21 and erred when he declined to give Defendant's proffered Instruction No. 11.

Plaintiff's Instruction No. 21 was erroneously given. The instruction was based on inapplicable law. For all appearances, the instruction was a Washington Administrative Code provision; but it was actually an edited Code provision that was missing portions that gave the provision context. For these reasons, Instruction No. 21 was misleading and prejudiced King's defense.

Defendant's Instruction No. 11 should have been given. As a general contractor and an employer, Begis had a duty to "provide and use safety devices and safeguards" under the Washington Administra-

tive Code provision on which proposed Instruction No. 11 was based. The omission of Instruction No. 11 prejudiced King because the subject matter of Instruction No. 11 was not adequately covered elsewhere in the instructions. As a result, the jury could not know the specific safe place standards for which Begis, as an employer on a construction site, was responsible. Because of this, King did not have a satisfactory opportunity to present his theory of the case and was prejudiced.

B. Assignments of Error

1. The Superior Court committed reversible error when it erroneously gave Plaintiff's Instruction No. 21 which was misleading and inapplicable.

2. The Superior Court committed reversible error when it declined to give Defendant's proposed Instruction No. 11 because, absent this instruction, King did not have a satisfactory opportunity to present his theory of the case.

C. Issues Pertaining to the Assignments of Error

1. Plaintiff Begis fell from a deck, not a sloped roof. The court gave Plaintiff's Instruction No. 21 that quoted portions of WAC 296-155-24515. That Code provision governs sloped roofs and has nothing to do with flat surfaces such as decks. Did the trial court

commit reversible error when it improperly gave Plaintiff's Instruction No. 21? (Assignment of Error 1.)

2. Jacob Begis was an employer and a general contractor. King's proposed Instruction No. 11 addressed the safety standards applicable to Begis as an employer on a jobsite. Did the trial court commit reversible error when it declined to give Instruction No. 11? (Assignment of Error 2.)

D. Statement of the Case

Jacob Begis was a general contractor working for himself under the name Begis Homes, LLC. RP 23, 50, 191, 205. King Custom Framing, Inc. performed the framing work on Begis' project. RP 25. While inspecting the deck, Begis fell and was injured. CP 44-45; RP 27-29.

The central issue at trial involved the respective duties and responsibilities of Begis, as the general contractor/employer, and of King, as the subcontractor. Begis argued that as the general contractor, his only responsibility was to inspect the property and that he did this properly, without violating any safety codes. RP 39. King argued that it was the general contractor's duty to have a proper safety plan and fall protection plan and that Begis did not have a proper understanding of safety on the jobsite. RP 412. King also argued that

Begis had the duty to comply with safety regulations in the oversight of all employees, not just his own employees. RP 374.

King raised two objections regarding jury instructions. RP 358. King objected to Begis' Instruction No. 21 regarding warning line systems on low pitched roofs. RP 358. The court gave the instruction despite the objection. RP 361. King also objected to the court's failure to give his Instruction No. 11 which described the scope of an employer's duty on a jobsite. RP 358.

The jury rendered its verdict on June 22, 2011 against King in the sum of \$683,400.00 (\$804,000.00 reduced by 15 percent contributory negligence to Begis). CP 4. The verdict was entered on July 1, 2011. CP 3-6.

King timely appealed on August 1, 2011. CP 1. Green & Yalowitz, as new counsel for King, was granted an extension to file Appellant's brief.

E. Argument

1. The Superior Court Committed Reversible Error When It Erroneously Gave Plaintiff's Instruction No. 21 Which Was Misleading and Inapplicable.

a. Plaintiff's Instruction No. 21 was prejudicial because it was misleading.

Jury instructions that set forth the language of a statute may be used "only if the statute is applicable, reasonably clear, and not

misleading.” Bell v. State, 147 Wn.2d 166, 177, 52 P.3d 503 (2002). When a misleading instruction affects the outcome of trial, the error is reversible. See Chunyk & Conley/Quad-C v. Bray, 156 Wn. App. 246, 232 P.3d 564, as amended (June 2, 2010), review denied, 169 Wn. 2d 1031, 241 P.3d 786 (2010).

Instruction No. 21 was not “reasonably clear” and did not properly state the law. It was misleading and prejudiced King’s defense. Over King’s objection, the court gave the following edited version of WAC 296-155-24515 as Plaintiff’s Instruction No. 21:

INSTRUCTION NO. 21

WAC 296-155-24515, "Guarding of low pitched roof perimeters," provides that:

"Warning line systems:

- (a) Warning lines shall be erected around all sides of the work area.**
 - (i) When mechanical equipment is not being used, the warning line shall be erected not less than six feet (1.8 meters) from the edge of the roof. ..**
- (b) The warning line shall consist of a rope, wire, or chain and supporting stanchions erected as follows:**
 - (ii) After being erected, with the rope, wire or chain attached, stanchions shall be capable of resisting, without tipping over, a force of at least 16 pounds (71 Newtons) applied horizontally against the stanchion, 30 inches (0.76 meters) above the roof surface, perpendicular to the warning line, and in the direction of the roof edge."**
 - (iii) The rope, wire, or chain shall have a minimum tensile strength of 200 pounds (90 kilograms), and after being attached to the stanchions, shall be capable of supporting, without breaking, the loads applied to the stanchions."**

CP 29.

The instruction was misleading in multiple respects. A juror would have no reason to believe that Instruction No. 21 was not the complete Washington Administrative Code provision. For all appearances, the Instruction is the entire Code provision. Begis strategically chose to use "provides that" instead of "provides in part" as the

introductory language, misleading the jurors into believing that this instruction encompassed the complete Washington Administrative Code provision when it did not.

Begis also strategically left out large portions of the Washington Administrative Code provision. This was likewise misleading. Among other parts that were omitted, Begis left out Section (1) of the regulation.

Section (1) states as follows:

(1) General provisions. During the performance of work on low pitched roofs with a potential fall hazard greater than ten feet, the employer shall ensure that employees engaged in such work be protected from falling from all unprotected sides and edges of the roof as follows:

(a) By the use of a fall restraint or fall arrest systems, as defined in WAC 296-155-24510; or

(b) By the use of a warning line system erected and maintained as provided in subsection (3) of this section and supplemented for employees working between the warning line and the roof edge by the use of a safety monitor system as described in WAC296-155-24521.

(c) Mechanical equipment shall be used or stored only in areas where employees are protected by a warning line system, or fall restraint, or fall arrest systems as described in WAC 296 155-24510. Mechanical equipment may not be used or stored where the only protection is provided by the use of a safety monitor.

WAC 296-155-24515 (emphasis added).

Section (1) states that the Washington Administrative Code provision applies to performance of work on low pitched roofs and that it is the employer's duty to ensure that "employees engaged in such work" be protected. This section was not included in Plaintiff's Instruction No. 21. The Washington Administrative Code provision upon which Instruction No. 21 was based was not applicable to the case or the facts. It was also edited to the point that any lay juror would never be able to tell that the instruction was an incomplete Washington Administrative Code provision. Under Washington law, both of these factors resulted in a misleading instruction that was prejudicial to King.

b. Plaintiff's Instruction No. 21 was prejudicial because it erroneously stated the applicable law.

The purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663, 665 (2005). Civil jury instructions are reviewed *de novo* on appeal. An instruction which erroneously states the applicable law constitutes reversible error if a party is prejudiced. An error is prejudicial where the outcome at trial is affected. Hoddevik v. Arctic Alaska Fisheries Corp., 94 Wn. App. 268, 276-77, 970 P.2d 828, 832 (1999) amended, 975 P.2d 563 (1999).

Begis' Instruction No. 21 had no application to the facts of this case. Instruction No. 21 is a portion of WAC 296-155-24515 that applies to warning line systems on pitched roofs. Begis fell off a flat deck, not a pitched roof. Instruction No. 21 is based on an inapplicable regulation and should not have been given.

In Hemmingson v. Carbon Hill Coal Co., 62 Wn. 28, 112 P. 1111 (1911), the Washington Supreme Court reversed the trial court because a jury instruction was based on a statute that was inapplicable to the facts of that case and was submitted on the wrong theory of law. 62 Wn. at 31. Hemmingson was employed by the Carbon Hill Coal Company, the owner of a coal mine. Hemmingson was injured by a rock that fell from a roof while he was performing work in a rock tunnel. One of Hemmingson's allegations was that the owner failed to supply sufficient or proper timbers for temporary support of the roof, so as to make the place safe while permanent timbers were being put in. Hemmingson, 62 Wn. at 30-31.

The trial court gave jury instructions based on a statute from the coal-mine act even though no mine was being operated or worked on. Hemmingson, 62 Wn. at 32. The Supreme Court reversed and remanded the case for a new trial:

There being enough evidence to carry the case to the jury upon the common-law liability of the appellant, but that evidence being conflicting, we cannot say that the jury found with respondent upon the main issues and against him upon the statute, or with him upon the statute and against him on the common counts. The submission of the case upon the coal-mine act was therefore error calling for a new trial.

Hemmingson, 62 Wn. at 34.

As in Hemmingson, where the trial court improperly applied the coal-mine act to a rock tunnel, the trial court in our case improperly applied a Washington Administrative Code provision regarding sloped roofs to an injury occurring on a flat deck.

Over King's objection, the trial judge allowed Instruction No. 21, stating as follows: "[t]he court is not giving an instruction saying that this necessarily is the applicable WAC, rather, indicating that there is a WAC of this nature that exists and certainly allowing each side to use their own arguments." RP 361. This is reversible error under Hemmingson.

As the Supreme Court in Hemmingson acknowledged that it had no way of knowing whether the jury made its decision based on the in applicable statute or based on other issues in the case, likewise, there is no way of knowing here whether the jury found King 85 percent liable based on the inapplicable Washington Administrative Code provision or based on other issues presented. The trial judge allowed the instruction despite acknowledging that the specific

Washington Administrative Code provision may not be applicable. RP 361. This was reversible error. If a regulation does not apply, the instruction based upon the regulation cannot be given. The risk of prejudice is too high if a jury takes an inapplicable Code provision into account. This Court should reverse and remand for a new trial.

2. The Superior Court Committed Reversible Error When It Declined to Give Defendant's Proposed Instruction No. 11 Because, Absent This Instruction, the Defendant Did Not Have a Satisfactory Opportunity to Present His Theory of the Case.

King's proposed Instruction No. 11 was based on WAC 296-155-040. The instruction was not given. Through King's proposed Instruction No. 11 he desired to educate the jury on the specific "Safe Place Standards" applicable to an employer on a jobsite. If given, the instruction would have informed the jury that the Washington Administrative Code requires the following: "[n]o employer shall fail or neglect to provide and use safety devices and safeguards or adopt and use methods and processes reasonably adequate to render the employment and place of employment safe." CP 62. This instruction would have allowed King to argue that, as an employer, Begis had a duty to assure that each employee — including himself — used a safety device while on the deck during the construction process.

In denying King's proposed Instruction No. 11, the trial judge stated: "I have given the instruction that is broad enough that it

allows the defense to argue that the general contractor does have a duty. I think to go beyond that would be overstating the case." RP 360.

The "broad enough" instruction that the judge was referring to was Instruction No. 14, which stated as follows:

A general contractor at a construction site has a duty to comply with Washington State Safety Regulations in its oversight of all employees, not just its own employees.

CP 22.

The judge apparently decided that Instruction No. 14 was enough to inform the jury of a general contractor's duty to comply with WAC regulations; however, the jury did not know what specific duties that Begis, as an employer, was bound to follow on the jobsite. These duties included those specified in King's proposed Instruction No. 11, which was never given. As a result, King did not have a satisfactory opportunity to argue his case, resulting in prejudice at trial. This constitutes reversible error.

In determining whether the instruction furnish a framework form which a party's theory of the case may be argued, "instructions are to be read and understood as a whole, not singly and disconnectedly, as if each stood alone." State v. Jackson, 1 Wn. App. 90, 92, 459 P.2d 414, 415 (1969) citing State v. Jamerson, 74 Wn.2d 146, 443 P.2d 654 (1968). The test for sufficiency of instructions is

whether the court's instructions afforded counsel a satisfactory opportunity to argue his theory to the jury. State v. Hackett, 64 Wn. App. 780, 787, 827 P.2d 1013, 1016 (1992).

State v. Hackett, supra, is instructive. In that case, the central issue was whether the defendant had the requisite intent to inflict great bodily harm on a police officer. 64 Wn. at 784. The trial court refused to give an intoxication instruction because it believed that the instruction applied only to alcohol intoxication, and there was no evidence that the defendant had any alcohol in his blood at the time of the incident, although there was evidence of narcotics. Id. This Court of Appeals held that the erroneous refusal to give the voluntary intoxication instruction was reversible error. "The subject matter of the proposed instruction on voluntary intoxication was not adequately covered elsewhere in the instructions. None of the instructions discussed intoxication or its relationship to the element of intent." Hackett, 64 Wn. App. at 785-786. "The general instructions regarding the element of intent were not sufficient, by themselves, to allow Hackett to argue his intoxication theory." Hackett, 64 Wn. App. 780 at 785.

The same reasoning applies to our case. The instruction regarding a general contractor's duty (Instruction No. 14) was not sufficient to allow King to argue his theory of the case. While Instruc-

tion No. 14 allowed the jury to consider that the general contractor had a duty to comply with Washington State Safety Regulations, it did not inform the jury about the specific jobsite safety duties that were binding on Begis as general contractor or, to the point, as an employer.

An error in instructions is harmless only if it has no effect on the final outcome of the case. State v. Rice, 102 Wn. 2d 120, 123, 683 P.2d 199, 201 (1984). The Hackett court held that “the jury could well have returned a different verdict had it been instructed on voluntary intoxication; therefore, the error was not harmless.” Hackett, 64 Wn. App. 780 at 786. The same reasoning applies here. Had the jury been instructed as to the duties imposed on an employer by the Washington Administrative Code, it could well have determined that Begis had a duty to use safety equipment while on the deck and that, because he did not do so, he breached that particular duty. Instead, the jury only had a general instruction that Begis, as the general contractor, had a duty to “comply with Washington State Safety Regulations.” CP 22. As in Hackett, this general instruction in our case was not satisfactory. The court’s refusal to give King’s specific Instruction No. 11 was reversible error.

F. Conclusion

The purpose of jury instructions is to educate and explain the law and to focus the jury on the issues at trial. An instruction based on inapplicable law or on an immaterial point can mislead the jury and may result in an uninformed or erroneously informed verdict. The parties are entitled to submission of the case without inapplicable or extraneous material that may distract the jury from a fair and impartial consideration of the case.

Instruction No. 21 was prejudicial because it was misleading and based on an inapplicable Washington Administrative Code provision. King has no way of determining the role that this instruction played in the outcome of the case. Declining to give Instruction No. 11 was prejudicial because the jury did not have specific criteria to evaluate an employer/general contractor's duty. Therefore, King could not sufficiently present his theory of the case.

By allowing Instruction No. 21 and declining Instruction No. 11, the prejudicial effect on King's defense was further compounded. This case should be remanded so that a new jury has the proper tools to evaluate the respective scope of Begis' duty as both a general contractor and an employer using only the applicable law.

Respectfully submitted this 13th day of April, 2012.

A handwritten signature in black ink, appearing to read "D. Green", written over a horizontal line.

Douglas J. Green, WSBA #8364
Natalya P. Markovich, WSBA #43099
GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, Washington 98101-4087
(206) 622-1400
djg@gyseattle.com
npm@gyseattle.com

Counsel for Appellant/Defendant King

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CERTIFICATE OF SERVICE

Douglas J. Green, WSBA #8364
Natalya P. Markovich, WSBA #43099
GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, Washington 98101-4087
(206) 622-1400
djg@gyseattle.com
npm@gyseattle.com

Counsel for Appellants/Defendants

I, Laura Wilkinson, hereby declare under penalty of perjury and in accordance with the laws of the State of Washington as follows:

1. I am a citizen of the United States, over the age of 18 years, and am not a party to the within cause;

2. I am employed by the law firm of Green & Yalowitz, PLLC. My business mailing address is 1420 Fifth Avenue, Suite 2010, Seattle, Washington 98101.

3. I caused to be served via legal messenger service no later than April 13, 2012, true and correct copies of Brief of Appellants and Certificate of Service, on the following:

Attorneys for Respondent Jacob L. Begis

Michael Withey, Esq.
LAW OFFICES OF MICHAEL WITHEY
Two Union Square
601 Union Street, Suite 4200
Seattle, WA 98101

DATED this 13th day of April, 2012, in Seattle, Washington.



Laura Wilkinson

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