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72824-5

NO. 72824-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JENNIFER B. DONNELLY, as Guardian for MARSHALL S.
DONNELLY; JENNIFER B. DONNELLY; and KEITH KESSLER,
as Guardian ad Litem for LINLEY GRACE DONNELLY, a minor child,

Appellants,

v.

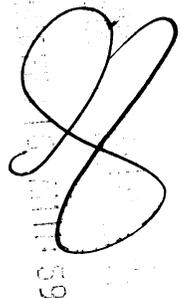
HDR ARCHITECTURE, INC., TURNER CONSTRUCTION
COMPANY, a foreign corporation, NOISE CONTROL OF
WASHINGTON, INC., a Washington Corporation; JANE and JOHN
DOES, 1-20

**APPELLANTS' REPLY ON APPEAL
AND RESPONSE TO TURNER CROSS-APPEAL**

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ORIGINAL

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I. INTRODUCTION

The plain language of Jury Instruction 14 prohibited the jury, when evaluating plaintiffs' negligence claim under *Davis v. Baugh*,¹ from even *considering* the HDR/Turner contract with the State, that contract's language, or whether defendants breached that contract. The record shows that the trial court, accepting the specific defense argument that the contract "is not evidence of the standard of care," clearly confirmed this purpose of Jury Instruction 14, unequivocally precluding the jury from considering the contract for any purpose related to negligence.

The transcript of plaintiffs' counsel's closing argument shows that he could not and did not argue plaintiffs' *negligence* theory to the jury: that the contract between HDR/Turner and the State establishes the standard of care HDR/Turner was required to follow when constructing the North Close Project and their corresponding tort duty to Marshall Donnelly under *Davis*.

Plaintiffs preserved their objection to HDR's proposed "contract instruction" and to what became the trial court's Jury Instruction 14 by timely filing a brief opposing the instruction that thoroughly apprised the trial court of the legal basis for plaintiffs' objection before any oral argument concerning jury instructions occurred. CP 528, 529. Despite

¹ 159 Wn.2d 413, 150 P.3d 545 (2007).

multiple, egregious defense omissions and misrepresentations of this trial court record, the record shows that the trial court prohibited plaintiffs from arguing their theory of negligence and that plaintiffs clearly preserved their objection to the trial court's erroneous instruction.

It is undisputed that the building owner, Marshall Donnelly's employer, had no knowledge that walking on the heavy-duty, metal "Lockdown" security ceilings would void all warranties and was unsafe. It is undisputed that defendants learned of this performance limitation during construction. This is exactly the type of building material, the type of latent hazard, and the type of information a building owner requires that was the very basis of the *Davis* decision. The HDR/Turner contract with the State defines the "work," that work indisputably includes providing the State with this critical performance, safety and warranty information in the building Operations and Maintenance Manual (OMM) *Davis* allows liability to third persons for negligent "work" even after project completion and the trial judge in this case should have allowed the jury to assess the only source of information defining the "work" and whether defendants performed that work negligently: the contract.

This Reply will focus primarily on the trial court's instructional error, which requires reversal. Plaintiffs in a separate section below will respond to defendant Turner's cross appeal.

II. REPLY STATEMENT OF FACTS

A. What Jury Instruction 14 said.

It is undisputed that the trial court admitted as evidence the contract between HDR/Turner and the State of Washington without objection and that no party during trial ever questioned its relevance to determining the standard of care for a construction contractor in Washington in this claim under *Davis*. It remains undisputed that every key defense liability witness conceded in their testimony the contract's relevance to the issue of negligence. For instance: (1) HDR Vice President and project architect Larry Hartman, (2) HDR/Turner Project Manager Eric Wildt, and (3) defense construction expert Daniel Hobbs all admitted that a reasonably prudent contractor should follow the requirements of HDR/Turner's contract with the State of Washington in preparing the building's Operations and Maintenance Manual (OMM) and in determining what HDR/Turner must include in the OMM. RP 2458-59 (10-6-14pm), RP 2589 (10-7-14am), RP 2107-08 (10-2-14am)).

Every defendant acknowledges on appeal that the language and requirements of that contract were a central focus of all parties and the evidence at trial. Nonetheless, the trial court gave Jury Instruction 14:

You have heard testimony about the language in the contract relating to maintenance and warranty information. You are instructed that there are no breach of contract

claims against the defendants in this case and you may not consider whether the contract was breached in considering whether the defendants were negligent. This evidence may be considered on the issue of causation.

CP 542, p. 8905; RP 2959 (10-9-14am).

The trial court did not define “breach” or “breach of contract” or “breach of contract claim” for the jury. The trial court instructed the jury that “it is important for you to remember that the lawyers’ remarks, statements, and arguments are not evidence” and that “[y]ou should disregard any remark, statement or argument that is not supported by the evidence or the law as I have explained it to you.” CP 542 (Jury Instruction 1) (emphasis supplied); RP 2952 (10-9-2014am).

B. What the trial court said about Jury Instruction 14.

It is also undisputed that plaintiffs subsequently attempted, unsuccessfully, to mitigate the impact of Jury Instruction 14 by proposing an additional sentence to the instruction that would have read: “You may consider the language of the contract on the issue of causation and as evidence of the standards and specifications that apply to the defendants.” RP 2913-14 (10-8-14pm); CP 535A (emphasis supplied). Defense counsel at trial argued that the trial judge had “already found that this is not evidence of the standard of care * * *.” RP 2914-15. Accepting this defense argument – that the *language of the contract is not evidence of the*

standard of care -- the trial judge rejected plaintiffs' proposed amended instruction and thereby rejected plaintiffs' attempt to mitigate the prohibition on plaintiffs' ability to argue their liability theory: that the contract between HDR/Turner and the state is critical evidence of the standard of care this contractor was required to follow and, therefore, the *tort* duty of reasonable care it owed to third parties, even after project completion under *Davis*. RP 2917 (10-8-14pm).

In addition to omitting key portions of the record, defendants' appellate arguments rely on incomplete and out-of-context quotations that inaccurately represent the record. For instance, defendants cite one sentence spoken by the trial judge taken grossly out of context from a two-day argument over jury instructions to support their claim that the trial court allowed plaintiffs to argue their theory of *negligence* despite the plain language of Jury Instruction 14 prohibiting it. *See* Turner Brief at 22 (citing RP 2917 (10-8-14pm)) (quoting the trial judge as saying "You can put the standards [of the contract] up there and talk about this is what they were supposed to do under the contract, but you can't argue that -- the breach provides a breach for determining liability....") (brackets supplied by Turner's appellate counsel)).

Instead, the full quotation, in context, shows that the trial judge, at the insistence of defense counsel Lindsey Pflugrath, unequivocally

intended Jury Instruction 14 to do exactly what it says - prevent plaintiffs' counsel from connecting the language of the contract to negligence:

MR. GARDNER: * * * I attempted to modify – **I still don't like the instruction at all, that contract instruction that was submitted by HDR.** But I have added a clause, based upon both our conversation this morning and this afternoon when we talked about what do we do with things like the fact that these guys do have to follow the contract. I mean, I don't have a case without it.

And that clause would say, "You may consider the language of the contract on the issues of causation and as evidence of the standards and specifications that apply to the defendants." I have to have that, or I can't make an argument on any of them.

MS. PFLUGRATH:² **Your Honor, we strongly disagree. That's been the subject of argument for hours today.**

MR. GARDNER: Let me hand you my proposal.

THE COURT: Let me look and see what he has got.

MR. GARDNER: Because we -- this afternoon -- I will let you read it.

THE COURT: Now, the instruction that I had done so far has this first part, "You may consider the language of the contract on issues of causation" and ends there. **And what Mr. Gardner's proposing to add is "and as evidence of standards and specifications applied to the defendants."**

MS. PFLUGRATH: **Which is exactly what we argued about all morning and what your Honor has already found that this is not evidence of the standard of care, that it goes to causation.**

² Ms. Pflugrath was co-counsel with Mr. Scanlan for defendant HDR at trial.

MR. GARDNER: But it is -- for example, the specifications, the standards they -- that's what they have to follow in order to build the building, in order to follow the - in order to deliver the product to the owner. **I don't know how I can show what the standard is for what they're supposed to do if I can't reference the contract as providing those standards.**

It's -- you know, a defendant can say, look, standard of care is X, Y and Z. Now, standard of care is going to include, for example, like Mr. Cramer said, following the manufacturer's installation instructions, which are what are adopted by the specifications of the contract.

I mean, we put up the contract document to show the specifications. I don't know how to even make the argument without saying the contract impacts what the standard is that they have to follow. They get the part here that says breach of contract, breach of contract. You know, that doesn't establish liability.

But it does help inform what the standards are defendants have to follow in complying -- in doing this project.

MS. PFLUGRATH: **This is exactly what we have been talking about, and that is going to the standard of care, which is inappropriate here. Your Honor has already ruled.**

Now, I understand that Mr. Gardner wants to be able to show the specifications. They have been made an exhibit. They certainly can be shown, and the jury can read those. **But to imply that there is a breach of those specifications and, therefore, they have breached the standard of care is what we have argued about all day and your Honor has correctly ruled.**

This is just an attempt to get you to modify your ruling again. "You may consider the language of the contract on

the issue of causation." As you have said, Mr. Gardner can put the specification language up there, and he can say, "This is what was supposed to be given under the contract, and because it wasn't, then Mr. Donnelly went up there."

That's causation.

MR. GARDNER: And this afternoon we talked about this, and brought up the problem with Noise Control, and you recognized the dilemma. Wait a minute here. How can we write the contract out in terms of what it is they are supposed to do?

And that's -- it provides evidence of breach of it -- it's not if they breach it, they're done. But it does provide some evidence of what standards they've got to follow. I don't know how else to do it.

THE COURT: Mr. Rankin, do you want to get a word in here?

MR. RANKIN:³ I mean, I don't really have anything to add to what Ms. Pflugrath said. I think she said it very well. I just disagree with Mr. Gardner's approach.

THE COURT: Okay. Mr. Cottnair?

MR. COTTNAIR:⁴ The same, your Honor.

THE COURT: **I am going to leave it the way we had it before, Mr. Gardner, which is that it ends at causation.**
MR. GARDNER: So how do I argue my case, your Honor?

THE COURT: You can put the standards up there and talk about this is what they were supposed to do under the contract, but you can't argue that that -- the breach provides a basis for determining liability. It simply -- this is how you can determine, you know, what --

³ Mr. Rankin was lead counsel for defendant Turner at trial.

⁴ Mr. Cottnair was co-counsel with Mr. Merrick for defendant Noise Control at trial.

MR. GARDNER: **And why doesn't it -- when it just says "issue of causation," it is evidence of what it is they are supposed to do. I mean, you just said it. And you said it after lunch. This, then, basically is telling them you can't consider what they are supposed to do on the contract as to whether they have done anything wrong.**

MS. PFLUGRATH: **Exactly. I mean, can we stop?**

THE COURT: **We are done. I don't want to keep going back to this issue.**

RP 2913-2918 (10-8-2014) (emphasis supplied).

C. What the plaintiffs' lawyer said: plaintiffs' closing argument followed the trial judge's clear prohibition against arguing that the language of the contract should be considered by the jury on the issue of negligence.

The appellate record shows that plaintiffs' counsel, having no choice, followed the trial court's 11th hour prohibition on the use of contract language and contract breach on the issue of *negligence*. Plaintiffs' counsel's closing argument began on the morning of October 9, 2014. RP 2947, 2969 (10-9-14am). The transcript shows that plaintiffs' counsel organized his argument clearly in three parts:

- (1) negligence (RP 2969-2988 (10-9-14am));
- (2) proximate cause (RP 2988-3009 (10-9-14am)), and
- (3) damages (RP 3009-3029 (10-9-14pm)).

Consistent with the trial court's prohibitions on his closing argument, plaintiffs' counsel made no reference to Jury Instruction 14 in

his argument to the jury on negligence. *See* RP 2969-2988.⁵ Plaintiffs' counsel could not and did not argue that the contract or the contract language was relevant to or established the standard of care, the defendants' duty of reasonable care, or negligence. *See* RP 2969-2988.⁶ The record of that argument defeats entirely the defendants' claim that plaintiffs were able to argue their theory of *negligence* despite the trial court's erroneous Jury Instruction 14.

The defense reliance on out-of-context quotes is profound. Turner's brief, adopted by the other defendants, first relies on an October 8, 2014 quote ("this is what they were supposed to do under the contract") at RP 2917 (10-8-14pm). Turner Brief at 22. This quote is from arguments over the jury instructions and not from closing arguments. Closing arguments did not occur until the next day, October 9. *See* RP 2947, 2969 (10-9-14am).

The defense then relies on quotes concerning the May 23, 2006 letter and evidence showing that the letter should have been included in the OMM. Turner Brief at 23 (citing RP 2995 (10-9-14am); Noise

⁵ At RP 2977, Ins. 1-3, plaintiffs' counsel states "[s]o now we look at jury instruction ten, number 14 in your packet there, Connie * * *." The reference to "number 14" is a comment to plaintiffs' trial paralegal, Connie Grenley, whose audio-visual index was numbered differently than the Court's final jury instructions. "Number 14" is a reference to Jury Instruction 10, not to Jury Instruction 14.

⁶ This is in contrast to the Turner closing argument, which began with a reference to the contract – the RFP – to argue what Turner was and was not required to build in this case. *See* RP 3061-3062.

Control Brief at 7 (citing RP 2995-96 (10-9-14am)). These portions of plaintiffs' closing argument clearly and exclusively concerned proximate cause. *See* RP 2988-3009 (10-9-14am)). Plaintiffs' proximate cause argument began at page 2988 of the transcript: "Now let's look at the next issue, question two on the verdict form, is proximate cause * * *."

RP 2988 (10-9-14am). Defendants' quote also intentionally omits the very next sentence, critical to its context: "* * * this is another way that shows **that the cause, the cause of this disaster**, is the failure of HDR/Turner to put this information in the OMM." RP 2995-96 (10-9-14am) (emphasis supplied).

Similarly, the defense then relies on a quote from plaintiffs' rebuttal argument. Turner Brief at 23; Noise Control Brief at 7 (both citing RP 3118 (10-9-14pm)). Again, defendants omit the critical, very next sentence: "They don't send it in, **so it's not there when Mr. Howerton is going through the OMM looking for warranty information.**" RP 3118 (10-9-14pm) (emphasis supplied). This is obviously a proximate cause argument.

Turner then argues that plaintiffs' counsel "repeated the language or its paraphrase at least 28 times more in front of the jury." Turner Brief at 24. However, not one of Turner's citations to the record is a citation to any portion of plaintiffs' closing argument; every citation is to events in

the record that occurred before closing argument and before the trial court granted the defense request for what became Jury Instruction 14. *Id.*⁷

The HDR brief is equally egregious: of its 30 citations to the trial court record buried in its footnotes, only three are to closing argument (RP 2974-75, 2995, 3028) and each of those either involve plaintiffs' proximate cause argument or do not support HDR's position on appeal. *See* HDR Brief at 14 (footnotes 1 & 2). All this establishes is that the central focus throughout trial of the contract's unchallenged relevance on the issue of negligence, subsequently removed from the jury's consideration by the trial judge after all parties rested.

D. Plaintiffs immediately filed a brief fully apprising the trial court of the legal basis for plaintiffs' objection to defendant HDR's supplemental proposed "contract instruction" and to what became the trial court's Jury Instruction 14, preserving this error completely.

Prior to trial the parties submitted proposed jury instructions on August 29, 2014. No party initially proposed an instruction similar to Jury Instruction 14.⁸ On October 7, 2014, HDR then proposed a "contract

⁷ Similarly, the defense claims that plaintiffs' counsel "referred to the contractual language or a paraphrase thereof at least five times" but cites only portions of the record where plaintiffs' counsel was simply describing the testimony of witnesses or making plaintiffs' proximate cause argument. *See* Turner Brief at 24; *cf.* plaintiffs' negligence argument (RP 2969-2988 (10-9-14am) and proximate cause argument (RP 2988-3009 (10-9-14am)).

⁸ *Compare* CP 400C (Noise Control's August 29, 2014 Proposed Jury Instructions), CP 400H (HDR's August 29, 2014 Proposed Jury Instructions), CP 411 (Plaintiffs' August 29, 2014 Proposed Jury Instructions), CP 609 (Turner's August 29, 2014 Proposed Jury Instructions) with CP 452 (the trial court's October 10, 2014 Jury Instructions).

instruction,” which became Jury Instruction 14, in a supplemental brief filed at the very end of trial after all parties rested. CP 524A (“HDR Architecture’s Request for Instruction Regarding the Contract”).

In arguing that plaintiffs somehow waived their objection to Jury Instruction 14, defendants omit that plaintiffs immediately drafted and filed a response and objection to the HDR proposed contract instruction on the morning of October 8, 2014, before any oral argument on jury instructions occurred. CP 528, 529.⁹ This is a critical omission from the record because in that trial court briefing plaintiffs made the same arguments and cited the same authority opposing the instruction as they do here.¹⁰ CP 528. Plaintiffs therefore timely and thoroughly apprised the trial court of the basis of their objection to the HDR proposed contract instruction and to what became the trial court’s Jury Instruction 14. CP 528.

All other communication on the record concerning HDR’s proposed contract instruction and the trial court’s Jury Instruction 14 followed and was in the context of plaintiffs’ clear, written objection to the trial court giving such an instruction at all. Every single out-of-context

⁹ “Plaintiffs’ Response to Defendant HDR’s Request for Instruction Regarding the Contract” (see **Appendix B** hereto) and “Declaration of Peter E. Meyers in Support of Plaintiffs’ Response to HDR’s Request for Instruction Regarding the Contract.”

¹⁰ In addition, plaintiffs argued that HDR proposed “breach of contract” instruction was an impermissible comment on the evidence. See CP 528.

quote the defendants use to support their appellate argument occurred after plaintiffs' filed their written objection fully apprising the trial judge of reasons plaintiffs opposed the instruction.

III. ARGUMENT IN REPLY

A. **Jury Instruction 14 was a clear, prejudicial misstatement of law requiring a new trial.**

1. **Jury Instruction 14 is a misstatement of law because jurors must be able to consider contract language and whether a contract was breached in order to determine negligence under *Davis* in this case.**

No defendant cites any legal authority on appeal to support the proposition that Jury Instruction 14 “properly told the jury they could not consider breach of contract to determine whether defendants were negligent.” Turner Brief at 20.¹¹ As they did below, defendants simply argue that Marshall Donnelly was not a party to the HDR/Turner contract with the State and that the contract does not obligate HDR/Turner to provide for the safety of WSP personnel after project completion. Turner Brief at 19-20. Neither point is relevant here.

The defense, like the trial court below, remains mistakenly fixated on the “boundary” between tort law and contract law. *See, e.g.,* Noise

¹¹ *See* RAP 10.3(a)(6) (parties are required to support their arguments with citations to legal authority and references to relevant parts of the record); *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (“[w]e will not consider an inadequately briefed argument.”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by legal authority or citation to the record need not be considered).

Control Brief at 5. This boundary is a factor only where there is a “purely commercial dispute” between two contracting parties because “tort law is a superfluous and inapt tool for resolving purely commercial disputes.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 451-52, 243 P.3d 521 (2010) (citation omitted). Neither *Davis* nor this case involve a commercial dispute.

In the absence of a purely commercial dispute, Washington law often allows evidence of a breach of contract to determine tort liability. The independent duty doctrine is an example, allowing both contract and tort remedies if a breach of contract is simultaneously a “breach of a tort duty arising independently of the terms of the contract.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). However, “[t]he analytical framework provided by the independent duty doctrine is only applicable when the terms of the contract are established by the record. To determine whether a duty arises *independently* of the contract, we must first know what duties have been assumed by the parties *within* the contract.” *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 92, 312 P.3d 620 (2013) (emphasis in original).

No defendant meaningfully distinguishes the cases plaintiffs cite in their Opening Brief that establish the need for a fact finder to use a contract between two parties to determine the nature and scope of a tort

duty to a third party. The defense argues only that the cases plaintiffs cite involved contractual obligations for the “safety of workers” during construction. Turner Brief at 19. This misses the point entirely.

Instead, each of the cases plaintiffs cite show that a contract is both relevant and necessary for the jury to consider in a tort claim by a third party: *Caulfield v. Kitsap County*, 108 Wn. App. 242, 257, 29 P.3d 738 (2001) (in a tort claim by a disabled third party patient against a county for caseworker negligence, the county’s contract with the State provides “evidence of the reasonable standard of care for caseworkers managing COPES in-home care placements”); *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 334 582 P.2d 500 (1978) (“an affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them”); *Larson v. Heintz Construction Co.*, 219 Or. 25, 52-54, 345 P.2d 835 (1959) (in a tort claim against a highway contractor, the contractor’s “reasonableness depends on the circumstances, and here the contract was a circumstance. It is evidence of what the contractor conceived the measure of his duty to be. * * * The contractor undertook the work knowing what was expected of him, and it is fair to let the contract enter into the jury’s consideration of what was reasonable under the circumstances”); *Dornack v. Barton Construction Co.*, 272 Minn. 307,

317-18, 137 N.W.2d 536, 544 (1965) (in a third party tort claim against a construction company working under contract with the State of Minnesota, “the provisions in that contract are proper for jury consideration in determining whether the construction company complied with its general duty of due care”); *Wells v. Tanner Bros. Contracting Co.*, 103 Ariz. 217, 222, 439 P.2d 489 (1968) (in a third party tort case against a construction company working under contract with the State of Arizona, “the jury was properly instructed that the standard of care to be used in measuring [the construction company’s] conduct was that of ordinary care under the circumstances * * * one of the circumstances which the jury might have considered was the existence and contents of [the construction company’s] contract with the State”).

Davis unequivocally extends contractor tort liability to third persons after project completion. As in *Caulfield*, *Kelley*, *Larson*, *Dornack* and *Wells*, a jury must necessarily consider the contract between HDR/Turner and the State – its language and whether HDR/Turner breached it -- to determine whether defendants were negligent in this case.

2. The focus of witness testimony at trial was whether the defendants negligently failed to meet their duties as set forth in the contract specifications.

No defendant in the case at bar argued at trial or seriously argues now that the contract between HDR/Turner and the State was not relevant

to the issue of negligence. No defendant objected to admission of the contract as evidence at trial. No defendant objected to questions posed to their employees and experts that elicited testimony linking contractual obligations to the defendants' standard of care or to the tort duties of a reasonable building construction contractor. Turner's closing argument in fact began with a reference to the contract's relevance to determining duty in this case – to argue what Turner was allegedly *not* required to do in constructing the North Close Project. RFP 3061-62 (10-9-14pm).

The defendants cannot overcome this simple point: In some cases, like this one, the terms of a contract between two parties are the only source of information to determine the tort duty owed to a third party. Here, the jury needed to determine what defendants agreed to do in order to determine what tort duties they owed to Marshall Donnelly under *Davis*. The only evidence of that is in the contract HDR/Turner voluntarily entered into to build the North Close Project. To show that the defendants were negligent under *Davis* by failing to provide critical metal security ceiling performance information in the OMM to the State, the plaintiffs must be able to point to the language and terms of the contract and the obligations defendants agreed to undertake, so the jury may consider whether defendants negligently failed to meet those obligations in building the North Close Project.

The trial judge unexpectedly and without legal authority prohibited this inquiry by the jury at the very end of a five-week trial during which the central focus of all parties was those very contract obligations and whether defendants performed them. This was an error of law, it was highly prejudicial, and it requires reversal and a new trial.

3. Use of the contract to establish tort liability standards of performance for a construction contractor is fair.

Defendants can hardly argue it is unfair for the terms of their contract with the State to be used to establish a tort standard of care. They carefully negotiated those terms and were paid to perform the obligations they voluntarily undertook when they signed the contract. They should not be heard to complain now when they are held to the very same standard of conduct in a tort claim by a third party under *Davis*. Indeed, the specific requirements of the contract provide the clearest possible standard for a jury to apply in a case like this one.

4. The meaning of *Davis* is not limited to “physical construction.”

This Court is bound by controlling precedent of the Supreme Court and prior appellate court decisions. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 673, 230 P.3d 625 (2010); *Union Bank, N.A. v. Vanderhoek Associates, LLC*, 46565-5-II, 2015 WL 8950010, at *6 (Wash. Ct. App. Dec. 15, 2015).

Defendant HDR makes the unsupported claim that *Davis* “exclusively addressed physical construction” and argues that “all the *Davis* decision is about” is “the physical limitations on an owner’s ability to meaningfully inspect modern-day constructed facilities.” HDR Brief at 31.

This argument fails first because the *Davis* opinion does not limit its holding to “physical construction.” See HDR Brief at 30. The *Davis* opinion never uses that term. No subsequent appellate decision limits or narrows *Davis* in any way. This Court should not do so absent Supreme Court authority.

Second, the unwarranted limitation of *Davis* HDR proposes here makes no sense. HDR admits that the *Davis* opinion was concerned with latent defects and hazards and the “realities that ‘modern’ materials may not be readily susceptible to visual inspection.” HDR Brief at 30, 31. On this point, HDR is correct:

*** * * Today, wood and metal have been replaced with laminates, composites, and aggregates. Glue has been replaced with molecularly altered adhesives. **Wiring, plumbing, and other mechanical components are increasingly concealed in conduits or buried under the earth. In short, construction has become highly scientific and complex. Landowners increasingly hire contractors for their expertise and a nonexpert landowner is often incapable of recognizing substandard performance.****

Davis, 159 Wn.2d at 419 (citations omitted; emphasis supplied).

This is *exactly* plaintiffs’ claim in this case: defendants failed to follow their contractual obligations to provide the building owner with critical information in the OMM that would have alerted the State to performance limitations that even defendants were unaware of until midway through construction – that workers cannot enter through the “MEP Access” panel and safely walk on these heavy-duty metal security ceilings.¹² HDR/Turner voluntarily contracted to provide this information and doing so – by contract – was part of their work in this case just as proper installation of a drain pipe was part of the work the contractor in *Davis* voluntarily contracted to perform.

Lockdown is a modern, unique, heavy-duty, metal security ceiling product, intended for a unique purpose. RP 618 (9-22-14am). It is undisputed that WSP employees had no experience with it and that it had never been used in a WSP building before the North Close Project.¹³ It is undisputed HDR/Turner and even Noise Control, the installer, did not know whether a worker could safely walk on it. It is undisputed that defendants never passed this information on to the State in any manner. RP 1738 (9-30-14am).

¹² See **Appendix A** (Exh. 74-237 (plenum space photo), Exh. 71-003 (MEP access panel); Exh. 71-029 (MEP access panel label)).

¹³ See RP 294-95, 297, 316-17 (9-17-14); RP 432-33, 537 (9-18-14); RP 701, 704 (9-22-14am); RP 846-48, 915-16 (9-23-14am); RP 1740-41 (9-30-14am); RP 2464-65 (10-6-14pm); RP 2534, 2578-2581 (10-7-14am).

This is exactly the type of building material, the type of latent hazard, and the type of information a building owner requires that was the very basis of the *Davis* decision. The HDR/Turner contract with the State defines the “work,” *Davis* allows liability to third persons for negligent “work” even after project completion, and the jury in this case should have been allowed by the trial judge to assess the only source of information defining the “work” and whether defendants performed that work negligently: the contract.

Third, HDR’s argument fails also because it does not account for the treatment of buildings as “chattels” in Section 385 of the Restatement (Second) of Torts (1965)¹⁴ as adopted by *Davis*, which provides:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, **under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.**

Davis, 159 Wn.2d at 417 (quoting Restatement (Second) of Torts, § 385 (1965)) (emphasis supplied). The *Davis* opinion also cites Restatement (Second) of Torts sections 394 and 396 – both involving “liability of persons supplying chattels for the use of others.” *Davis*, 159 Wn.2d at

¹⁴ “Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted.”

417. This alone defeats the HDR claim that “all the *Davis* decision is about” is “the physical limitations on an owner’s ability to meaningfully inspect modern-day constructed facilities.” HDR Brief at 31.

Davis adopted sections 585, 594 and 596 of the Restatement (Second) of Torts and “**the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others,**” because it was concerned with negligent work resulting in latent circumstances that made injury to a third person reasonably foreseeable. *See Davis*, 159 Wn.2d at 417 (citing Restatement (Second) of Torts §§ 385, 394, 396 (1965)).

Negligent work may be based upon a negligent failure to provide important warranty, safety or performance information. This concern expressed in *Davis* is no different than in product liability cases such as *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 818 P.2d 1337 (1991). There, the parents of a 15-month-old baby brought a product liability action against the manufacturer of baby oil after the baby swallowed the oil and suffered brain damage from aspiration. The Supreme Court concluded the parents had presented sufficient evidence of the inadequacy of the warnings on the purchased bottle of baby oil to support the jury's verdict in their favor. *Ayers*, 117 Wn.2d at 750. The evidence supported the jury's conclusion that the baby oil was not reasonably safe in the

absence of warnings because “the ordinary consumer is unaware of the danger presented by the inhalation of baby oil.” *Ayers*, 117 Wn.2d at 765.

Finally, this Court’s own application of the *Davis* decision in *Jackson v. City of Seattle*, 158 Wn. App. 647, 656-57, 244 P.3d 425 (Div. I, 2010), refutes HDR’s attempt to narrow *Davis*’ scope. *Jackson* involved a homeowner suit against construction contractors, alleging that they negligently installed a waterline for the previous owner, which caused a landslide that damaged home and landscaping. The waterline did not cause the problem in *Jackson*; instead, the homeowners claimed that the contractor did not properly compact the soil, backfill the trench or properly coordinate with each other and the municipality. *Jackson*, 158 Wn. App. at 651. The *Jackson* court held that *Davis* and the Restatement (Second) of Torts Section 385 created construction contractor liability to a homeowner even where the “thing built” was functional.

Finding that the “waterline itself worked as anticipated,” *id.* at 660, the *Jackson* court applied *Davis* nonetheless:

Similarly here, the deterrent effect of tort law on negligent construction would be diminished by absolving contractors of tort liability so long as they deliver a functional system and do not cause bodily injury. Contractors who install a waterline on a steep slope have to be concerned about the condition in which they leave the slope, not just the condition of the waterline.

Jackson, 158 Wn. App. at 656-57. The *Jackson* court's analysis shows that *Davis* is about more than the "thing built."

The case at bar fits squarely within the scope and policy of *Davis*. Lockdown metal security ceilings were a unique product and the undisputed evidence showed that even HDR/Turner and their ceiling installer, Noise Control, did not know whether they were "walkable ceilings." Defendants obtained this information midway through construction from the Lockdown manufacturer yet did not pass it along in any form to the building owner. The contract between HDR/Turner and the State required defendants to provide all ceiling warranty information in the OMM and it is without question that the information HDR/Turner received during construction was warranty information: the May 26, 2006 letter advised HDR/Turner their security ceilings should not be walked on and doing so "would void all warranties." Exh. 38, p.1 (emphasis in original).

Providing this information was part of the "work" under *Davis* and certainly among the building construction tasks HDR and Turner voluntarily agreed to perform when they signed the contract and accepted payment for the project. Here, the building owner obviously did not have knowledge of the performance limitations of these ceilings and the

defendants did not fulfill their contractual obligation to provide this critical information.

B. The trial court's error prevented plaintiffs from arguing their theory of liability.

Defendants argue that Jury Instruction 14 only “told the jury not to consider any *breach of contract*” and that it “did not tell the jury not to consider the *contract provisions*” on the issue of negligence. Turner Brief at 22 (emphasis in original).¹⁵ The record – both the instruction itself and the trial court’s discussion of it -- shows that this is simply not true.

Appellate courts presume the jury follows the instructions of the court. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). The standard for clarity in jury instructions is higher than that for a statute because although courts may use statutory construction, juries lack these same interpretive tools. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *overruled on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Accordingly, in order to be valid, the instructions must be manifestly apparent to the average juror. *Id.*; *State v. Irons*, 101 Wn. App. 544, 550, 4 P.3d 174 (2000). Jury instructions must be interpreted “in the same manner as a reasonable juror could have.” *State v. Hanna*, 123 Wn.2d 704, 719, 871 P.2d 135, *cert.*

¹⁵ HDR “adopts” this argument, *see* HDR Brief at pp. 35, and Noise Control makes essentially the same argument, *see* Noise Control Brief at 9.

denied, 513 U.S. 919 (1994). Washington courts presume that the jury understands a jury instruction's words in their ordinary meaning.

Strandberg v. N. Pac. Ry. Co., 59 Wn.2d 259, 263, 367 P.2d 137 (1961).

A jury is to presume that each instruction has meaning. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). While words which have ordinary and accepted meanings are not subject to clarification, a trial court is required to define technical rules or expressions. *State v. Young*, 48 Wn. App. 406, 415-16, 739 P.2d 1170 (1987).¹⁶

The defense argument on appeal ignores the critical first sentence of Jury Instruction 14: "You have heard testimony about the *language in the contract* relating to maintenance and warranty information." CP 542, p. 8905 (emphasis supplied); RP 2959 (10-9-14am). This tells the jury what the instruction is about. The last sentence in the instruction tells the jury what they are allowed to do with "this evidence" (the *language of the*

¹⁶ While these common-sense standards for jury instruction clarity and interpretation have mostly been the product of criminal appeals in Washington to date, there is no authority and no reason to limit these principles to criminal law. Other states apply similar standards in civil cases. See, e.g. *Brimbau v. Ausdale Equip. Rental Corp.*, 440 A.2d 1292, 1298 (R.I. 1982) (a civil personal injury case quoting a criminal case, *State v. Reid*, 101 R.I. 363, 366, 223 A.2d 444, 446 (1966)) ("[i]t is our function to consider the manner in which the instruction 'would be interpreted by a jury composed of ordinarily intelligent lay persons listening to it at the close of the trial'"); *Armstrong v. Polaski*, 117 R.I. 565, 568, 369 A.2d 249, 251 (1977) (holding, in civil case, that "[i]t is, of course, axiomatic that the trial justice was obliged to instruct the jury with precision and clarity with respect to the rules of law applicable to the issues raised at trial"); *Roberts & Co., Inc. v. Sergio*, 22 Ark. App. 58, 60, 733 S.W.2d 420, 421 (1987) (each party to the proceeding has the right to have the jury instructed upon the law of the case with clarity and in such a manner as to leave no ground for misrepresentation or mistake).

contract): “This evidence may be considered on the *issue of causation*.” CP 542, p. 8905 (emphasis supplied); RP 2959 (10-9-14am). This last sentence would be unnecessary and superfluous under both the “average juror” test and under the rules of statutory construction unless it limited the juror’s consideration of the “language of the contract” to the “issue of causation.” These two sentences of the instruction, alone, would lead a reasonable juror to conclude that the only purpose for which they can consider “this evidence” -- the *language of the contract* -- is on the issue of causation.

The middle sentence of Jury Instruction 14 and specifically the phrase “you may not consider” followed by the undefined term “whether the contract was breached” leaves no question of the instruction’s meaning and the likely interpretation by jurors. To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). The ordinary meaning of “breach” is an “infraction or violation of law, obligation, tie, or standard.” Merriam Webster Dictionary, 2012 (emphasis supplied). Read as a whole, the instruction’s plain language and the ordinary meaning of its terms lead to only one reasonable conclusion: the trial court instructed the jury not consider the language of the contract or whether defendants followed the contract for

any purpose on the issue of negligence. This Court presumes the jurors followed that instruction, the instruction was an incorrect statement of the law, and the instruction is presumptively prejudicial.

The intent and impact of this instruction does not require speculation by this Court because the trial court, with assistance from trial defense counsel, left no doubt about its prohibition on plaintiffs' ability to argue their theory of liability. First, the trial judge *denied* plaintiffs' request to add a phrase to this instruction that would have allowed the jury to "consider the language of the contract on the issue of causation and as evidence of the standards and specifications that apply to the defendants." RP 2913-14 (10-8-14pm) (emphasis supplied); CP 535A. Second, in denying plaintiffs' request for that language, the trial court accepted a defense argument that it had "already found that this is not evidence of the standard of care." RP 2914-15 (10-8-14pm). The trial court agreed: "I am going to leave it the way we had it before, Mr. Gardner, which is that it ends at causation." RP 2917 (10-8-14pm).

The defense appellate briefing tries to confuse the actual record of plaintiffs' closing argument. No defendant cites any part of plaintiffs' counsel's closing argument where he argues that the contract language establishes the "standard of care" or that failure to follow the contract language is evidence of a breach of that standard of care or is evidence of

negligence. Plaintiffs' counsel did not make any such argument because the trial judge and Jury Instruction 14 prohibited plaintiffs' counsel from doing so.

The fact that plaintiffs' counsel *mentioned* the contract in closing is not the point and makes no difference here. The trial court allowed it on the issue of causation which, of course, makes little sense now and would have made less sense to the jury if they had reached that issue. Instead, the fact that plaintiffs' counsel was not allowed to connect the contract to negligence despite repeated, key defense witness admissions that it directly related to standard of care, and therefore negligence, is the critical error that requires reversal and a new trial.

The defense argument that the "part of the instruction that said '[t]his evidence [of breach of contract] may be considered on the issue of causation' could not have been prejudicial, because the jury never reached causation" (Turner Brief at 26) both misrepresents the language of the instruction ("this evidence" refers to the "language of the contract" in the Instruction's first sentence) and is irrelevant (the issue here is the court's prohibition of the jury's consideration of the contract language on the negligence issue).

More fundamentally, the defense argument relies on the assumption that the jury did not follow the trial court's instructions.

However, the presumption that a jury will follow the jury instructions “will prevail until it is overcome by a showing otherwise.” *Tennant v. Roys*, 44 Wn. App. 305, 315-16, 722 P.2d 848 (1986) (citing *In re Municipality of Metropolitan Seattle v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 930–31, 410 P.2d 790 (1966)). This strong presumption applies to the trial court’s instruction to disregard any “remark, statement, or argument that is not supported by the evidence or the law,” *State v. Corbett*, 158 Wn. App. 576, 596, 242 P.3d 52 (2010), to instructions that “counsel’s arguments are not evidence,” *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008), to instructions to disregard evidence referenced and testimony elicited in violation of an order *in limine* excluding it, *State v. Thompson*, 90 Wn. App. 41, 47, 950 P.2d 977 (1998), to limiting instructions concerning prior criminal misconduct offered under ER 404(b), *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995), to instructions to disregard a judge’s improper comment on the evidence, *State v. Malicoat*, 126 Wn. App. 612, 617, 106 P.3d 813 (2005), to instructions to disregard a prosecutor’s improper remark, *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976), to instructions to disregard improper evidence, *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), to curative instructions, *Storey v. Storey*, 21 Wn. App. 370, 374, 585 P.2d 183 (1978), and to instructions to disregard a closing argument

that deterrence is a permissible basis for damages in a tort case, *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 709-10, 359 P.3d 841 (2015).

There is no evidence in this record suggesting that the jurors did not follow the trial court's instructions and, specifically, that they did not follow Jury Instruction 14. Because the jurors did not get past negligence in their deliberations and never got to the issue of proximate cause, this Court must presume the jurors in this case did not consider the contract between HDR/Turner and the State for any purpose, regardless of any reference to the contract in plaintiffs' closing argument.

An attorney in closing argument applies the law to the facts. The attorney should not be required to persuade the jury what the law is. Here, Jury Instruction 14 was not simply an incomplete statement of the law; it was an incorrect statement of the law. Under *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012), prejudice is presumed and reversal is required.

C. **Plaintiffs did not waive any objection to Jury Instruction 14 because (1) they filed a brief fully apprising the trial court of the basis for their objections to HDR's proposed "contract instruction" and (2) all subsequent discussions concerning what became Jury Instruction 14 followed that objection and were in the context of plaintiffs' unsuccessful efforts to mitigate the impact of the trial court's obvious instructional error.**

Each defendant’s primary argument is that the plaintiffs somehow “acquiesced” to what became Jury Instruction 14. Turner Brief at 18; HDR Brief at 36; Noise Control Brief at 5. The record demonstrates this is false.

CR 51(f) requires only that a party objecting to a jury instruction “state distinctly the matter to which he objects and the grounds of his objection.” An objection’s purpose is simply to allow the trial court to remedy error before instructing the jury, avoiding the need for a retrial. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 746, 310 P.3d 1275 (2013). “The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Washburn*, 178 Wn.2d at 747 (quoting *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)). “So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review.” *Washburn*, 178 Wn.2d at 747.

Crossen v. Skagit County involved a suit against Skagit County over allegations that the county had negligently failed to warn motorists about a dangerous stretch of road. *Crossen*, 100 Wn.2d at 357. At trial, Crossen asked for three jury instructions with citations to a uniform traffic control manual. *Crossen*, 33 Wn. App. at 245–46. The trial court refused, and Crossen objected. *Id.* The jury returned a verdict for the county. *Id.*

at 245. The Court of Appeals refused to reach the merits of Crossen's appeal, holding that her failure to present argument as to why the instructions were necessary precluded review. *Id.* at 246. The Washington Supreme Court reversed, holding that a party preserves an allegation of instructional error for review if they object and the trial court understands the substance of the objection. *Id.* at 359. The Supreme Court reviewed the trial record, found “extended discussions” about the jury instructions, and determined that the trial court understood the nature of Crossen's objection. *Id.*; *see also Washburn*, 178 Wn.2d at 746-47.

Similarly, a party's objection to a trial court's failure to give its competing instructions will preserve any objection to the instruction actually given. *Washburn*, 178 Wn.2d at 747. *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989), involved a product liability claim against an asbestos manufacturer. *Falk*, 113 Wn.2d at 646. The Falks objected to the trial court's refusal to instruct the jury that it should determine the manufacturer's liability using principles of strict liability. *Id.* at 647. After overruling the Falks' objection, the trial court instructed the jury that it should use principles of negligence to determine the existence of a design defect, and the Falks did not object to this instruction. *Id.* at 646–47. The Washington Supreme Court held that although the Falks had not objected specifically to the instruction given by

the trial court, they had objected to the failure to give their proposed design defect instruction and therefore had apprised the trial court of their objection to the design instruction given. *Id.* at 658. By doing so, the Falks preserved their claim of instructional error for review. *Id.*, see also *Washburn*, 178 Wn.2d at 747.

In *Washburn*, *supra*, involved an instruction that “[a] city police department has a duty to exercise ordinary care in the service and enforcement of court orders.” *Washburn*, 169 Wn. App. 588, 602, 283 P.2d 567 (2012). The Court of Appeals, citing CR 51(f), determined that the City objected only to the wording of the instruction rather than its substance, found that the instruction was therefore the law of the case, and affirmed the verdict. *Washburn*, 169 Wn. App. at 602-04. The Supreme Court reversed, finding that “the trial court manifested an understanding of the City's position during the conference to discuss jury instructions” and noting that “the trial court recognized that the City's issues with the duty of ordinary care instruction arose from the substance of the instruction, not its wording.” *Washburn*, 178 Wn.2d at 748. Further, the Supreme Court in *Washburn* declined to require that a party propose an alternate instruction containing a correct statement of the law: “We do not necessarily require a correct alternate instruction to preserve an objection.”

Washburn, 178 Wn.2d at 748 (citing *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 325, 119 P.3d 825 (2005)).

Bennett v. Maloney, 63 Wn. App. 180, 817 P.2d 868 (1991) review denied, 118 Wn.2d 1011, 824 P.2d 490 (1992) involved a jury instruction on the measure of damages in a suit by a lender against an escrow agent. On appeal, the lender argued that the appellant escrow agent waived any error by failing to except to the trial court's refusal to give his instruction. The Court of Appeals disagreed and reversed, finding that after the trial court ruled against the escrow agent on the measure of damages in the context of his motion for a directed verdict, the escrow agent's trial counsel stated during a discussion of the jury instructions "we did not see an instruction regarding the measure of damages for inadequate collateral, which is the plaintiff's claim." *Bennett*, 63 Wn. App. at 186. The trial court refused to give the escrow agent's proposed instruction on the measure of damages, commenting that based on its previous ruling the damage, if any, was the amount of the note. The Court of Appeals concluded: "That [the escrow agent] later failed to except to the lack of his proposed instruction when the court invited his exceptions is insufficient to constitute a waiver of this issue given the extensive discussion of the issue already on the record." *Id.*

Here, no party initially proposed a jury instruction similar to Jury Instruction 14. Instead, HDR proposed what became Jury Instruction 14 in a brief filed late on October 7, 2014 at the very end of trial after all parties rested. Plaintiffs immediately drafted and filed a response and objection to the HDR instruction on the morning of October 8, 2014, before any oral argument on the issue.¹⁷ All other communication on the record concerning this jury instruction was in the context of plaintiffs' clear and thorough objection to the trial court giving such an instruction at all.¹⁸

This was clearly sufficient to preserve the error. Turner, in an argument joined by the other respondents, relies on one sentence from the day-long, October 8, 2014 trial transcript that it cites grossly out of context. *See* Turner Brief at 18 (*citing* 10/8/2014 RP 2853). Argument over the jury instructions took all day. *See* RP 2768-2918 (10-8-14). The specific quote defendants rely on occurred in the afternoon session on October 8, 2014 and in the context of plaintiffs' counsel attempting to mitigate the damage the trial court was about to cause when it was apparent the trial judge intended to give HDR's proposed instruction or

¹⁷ *See* **Appendix B** ("Plaintiff's Response to Defendant HDR's Request for Instruction Regarding the Contract" and "Declaration of Peter E. Meyers in Support of Plaintiffs' Response to HDR's Request for Instruction Regarding the Contract"), CP 528, 529.

¹⁸ In addition, counsel orally expressed plaintiffs' ongoing objection to Jury Instruction 14: "I still don't like the instruction at all, that contract instruction that was submitted by HDR." RP 2913 (10-8-14pm).

something similar to it. RP 2853, 2855-56, 2913-17 (10-8-14pm); CP 535A; *see also* Appellants' Opening Brief at 16-19. Under *Crossen, Washburn, Falk and Bennett* the plaintiffs' trial court briefing and arguments on the record concerning this instruction preserved the error. Plaintiffs have every right to try to mitigate the error, and plaintiffs' unsuccessful attempt to mitigate the error cannot now be used by respondents to avoid the merits of plaintiffs' appeal.¹⁹

D. Judge North expressly admitted that he should not have admonished plaintiffs' counsel.

Remarkably, defendants on appeal persist with the allegation that there was an "informal agreement" between counsel concerning deposition transcript use at trial. The falsity of this allegation is beyond dispute because the record contains absolutely no evidence of such an agreement and because the trial judge, after trial, admitted there was no agreement and that his admonishment of plaintiffs' in the middle of plaintiffs' closing argument was error.

Judge North, after having had the opportunity to read the transcript of the discussion of this issue that took place on September 8, 2014, admitted in his Order Denying Plaintiffs' Motion for a New Trial: "The

¹⁹ This is no different, for instance, from the situation where a party mentions objectionable evidence "first" at trial after losing a motion in limine seeking to exclude that evidence. *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 641, 806 P.2d 766 (1991) ("[a] party is entitled to try to minimize the adverse effect of a decision by raising the damaging testimony first").

court incorrectly admonished plaintiffs' counsel during closing argument." CP 9691. Quite simply, there was no agreement, formal or informal, to provide notice to opposing counsel of the portions of the trial transcript that would be shown to the jury during closing argument. CP 547, pp. 9235-43 (*see Appendix D*).

Despite this, Turner and HDR continue to argue that Judge North's conclusion is wrong. Turner and HDR still assert, through more out-of-context, selective quotations of the record, that such an agreement had been reached between counsel and violated by counsel for the plaintiffs during closing argument. Turner's Brief at 31; HDR's Brief at 42. This Court can review the colloquy that discusses this issue and reach the same conclusion reached, after trial, by Judge North: There was no such agreement, the admonishment was improper and without any basis in law or fact. CP 547, pp. 9235-43 (*see Appendix D*).

The fact that respondents defendants find it necessary to continue to try and claim that there was an agreement undermines their argument that it had no impact on the jury. If the admonishment was genuinely insignificant and had no impact on the jurors' perception of the integrity of plaintiffs' counsel, why take issue with Judge North's admission? Without question, an admonishment of an attorney for failing to abide by an agreement in the middle of closing argument, hours before the jury is to

commence deliberations, is prejudicial. Why should a jury place any weight on the statements of an attorney who, according to the judge, cannot keep his word?

E. Conclusion in Reply

The trial court’s instructional error in this case was highly prejudicial to the Donnelly family and resulted in a profound miscarriage of justice. Plaintiffs preserved their objection completely and then made every possible effort to mitigate the trial court’s error. This Court must reverse.

IV. RESPONSE TO TURNER’S CROSS-APPEAL

A. Introduction and Statement of Facts in Response to Turner’s Cross-Appeal.

Defendant Turner assigns error on cross-appeal to the “trial court’s refusal to list Environmental Interiors, the manufacturer of the Lockdown security ceiling, on the special verdict form as an ‘empty chair’ to which the jury could allocate fault, if any.” Turner Brief at 46. This is Turner’s only assignment of error. No other defendant assigns error.²⁰

The relevant facts include defendants’ stated affirmative defenses, the trial court’s summary judgment ruling dismissing various claims against former defendant Environmental Interiors (EI) (not appealed here),

²⁰ For this reason, HDR and Noise Control are not entitled to any “reply” brief, and Turner’s reply is limited to the substance of plaintiffs’ Response to their cross-appeal. RAP 10.1.

the trial court's decision near the end of trial granting a directed verdict in favor of plaintiffs and against defendants on the issue of EI's fault (not appealed here), and the complete absence of any evidence in the record presented by any defendant to prove EI's fault. Consistent with their incomplete and misleading citations to this trial record identified above, Turner's cross-appeal *does not even mention* the directed verdict granted by the trial court on this issue in this case. CP 525, 526; RP 2745-2768 (10-8-14am) (*see Appendix C*); *cf.* Turner Brief at 46-52.

No defendant pleaded EI fault as an affirmative defense or asserted counterclaims or cross claims.²¹ In their respective answers, every defendant *denied* that the Lockdown ceilings were unreasonably safe due to lack of manufacturer warnings and each of them specifically *denied* every element of a Washington Product Liability Act (WPLA) failure to warn claim. CP 84, 85, 90.

Before trial, EI moved for summary judgment on all claims against it, including the WPLA failure to warn claim. HDR and Turner did not oppose the EI summary judgment motion, and Noise Control "joined" in the motion. *See* CP 120; 525; 526. The trial court granted EI's motion in

²¹ CP 526; CP 74 (Plaintiffs' Second Amended Complaint for Personal Injuries dated April 10, 2013); CP 84 (Defendant Turner Construction Company's Answer to Second Amended Complaint for Personal Injuries dated May 14, 2013); CP 85 (Defendant Noise Control of Washington's Answer to Plaintiffs' Second Amended Complaint for Personal Injuries dated May 21, 2013); CP 90 (HDR Entities' Answer to Plaintiffs' Second Amended Complaint for Personal Injuries and Affirmative Defenses dated June 4, 2013);

part dismissing *all negligence claims* against EI, as well as all warranty claims, all WPLA defective manufacturing claims, and all WPLA defective design claims. CP 119; 149; 163. The Court's summary judgment ruling left only one claim -- a failure to warn claim under the WPLA -- primarily because the plaintiffs submitted an expert's declaration in opposition to EI's motion on the failure to warn issue. CP 119. Plaintiffs did not call this expert at trial and there is no such testimony in the trial record. *See* CP 525, 526.

At trial, no remaining defendant made any allegation in opening statement or during the rest of the trial concerning EI fault. Indeed, there was hardly any mention of EI at trial. *See* CP 525, 526. The defense claimed that this type of accident "has never happened before"; that "this type of ceiling product is installed in prisons and jails and also in hospitals and pharmacies and airports across the country, and it has been for decades, and nothing like this has ever happened before." RP 112, lns. 24-25; RP 113, lns. 1-9 (09-16-14); RP 134, lns. 22-25; RP 135, ln. 1 ((09-16-14); RP 2068, lns. 12-18; RP 2068, lns. 1-4 (10-2-14am).

Instead, the defense (and only the defense) consistently argued that it was "obvious" that workers could not walk on these metal security ceilings and, therefore, no warning was necessary. RP 113, lns. 8-9; RP 127, lns. 7-11 (09-16-14); *see also* CP 525, 526. Consistent with that

argument, no defendant presented any lay witness or expert witness testimony or any other evidence for the purpose of establishing EI fault on a WPLA failure to warn claim.

Ceiling installation subcontractor Noise Control was EI's "customer" for this product. RP 619, Ins. 16-18 (9-22-14am). The only evidence in this record on any WPLA warning issue is that EI, in May of 2006, provided its customer, Noise Control, with a clear warning that both Celine and Lockdown were not designed to be walked on. EI National Sales Manager Robert Garside testified that he warned Noise Control President Scott Cramer against walking on the ceilings, that his warning applied to both Celine and Lockdown, and that he had seen the May 23, 2006 letter from Mr. Cramer to Turner Construction and that letter accurately conveyed the warning he gave Cramer. RP 616, Ins. 6-14 (9-22-14am); RP 617, Ins. 9-25; RP 618, Ins. 1-13; RP 642, Ins. 3-20 (9-22-14am). No defendant disputed this at trial. *See* CP 525, 526.

When trial commenced, plaintiffs moved *in limine* to strike any affirmative defense that EI was an "at fault entity." CP 402, pp. 5679-80. The trial court reserved ruling on that motion. CP 459A, p. 7408. At the conclusion of trial plaintiffs moved for a directed verdict on the EI at-fault entity affirmative defense. CP 525, 526; RP 2745-2768 (10-8-14am). The trial court made a finding that "there simply wasn't evidence introduced

from which a jury could find that the test under the [proposed jury] instruction is met, and so there's simply no basis on which to assume any fault to Environmental Interiors, so we should pull that from the – that instruction. I think there's also one dealing with burden of proof relating to Environmental Interiors, too, and so that one should also come out.” RP 2767-68. (10-8-14am). The trial court granted plaintiffs' directed verdict motion and removed EI from the verdict form accordingly.

RP 2767.²²

B. Legal authority and argument.

1. Failure to assign error; standard of review; directed verdict standard.

Generally, this Court will not address issues that a party does not raise appropriately. *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 392, 321 P.3d 1261 (2014). RAP 10.3(g) provides that an “appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” A trial court's findings of fact are verities on appeal where an appellant does not assign error to those findings. *In re Marriage of Petrie*, 105 Wn. App. 268, 275, 19 P.3d 443 (2001). Turner does not assign error to the trial court's findings, to its ruling granting summary judgment, or to

²² No defendant filed any trial court pleading responsive to Plaintiffs' Motion for Directed Verdict.

its ruling granting plaintiffs' directed verdict motion on this issue.

Turner's cross-appeal fails for this reason alone.

2. Defendants' failure to properly plead any affirmative defense alleging fault of nonparty EI resolves this issue against Turner on appeal.

A defendant has the burden to prove an affirmative defense.

Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.3d 408 (2000).

Nonparty fault is an affirmative defense. CR 8(c), 12(i); *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 860-61, 313 P.3d 431 (2013); *Henderson v. Tyrrell*, 80 Wn. App. 592, 623-24, 910 P.2d 522 (1996). Further, "[a] defendant must properly invoke RCW 4.22.070(1)'s fault allocation procedure because it 'is not self-executing' and 'does not automatically apply to each case where more than one entity could theoretically be at fault.'"

Dormaier, 177 Wn. App. at 858 (quoting *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25-26, 864 P.2d 921 (1993)).

CR 8(c) includes "fault of a nonparty" as one of the affirmative defenses that a party is required to set forth in a responsive pleading.

Also, CR 12(i) provides:

Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The

identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

An affirmative defense is generally considered waived and may not be considered a triable issue unless it is (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976). No defendant, including Turner, asserted an affirmative defense alleging EI fault as required by CR 8(c) and CR 12(i). Turner waived this defense at trial and this fact bars Turner's cross-appeal.

3. Defendants did not prove EI fault at trial.

It is undisputed that the trial court dismissed pretrial every possible claim against EI except a failure to warn claim under the WPLA. If defendants wanted EI on the verdict form, they needed to produce evidence and meet their burden of proof on this affirmative defense. Even if Turner had properly asserted the affirmative defense and properly assigned error to the trial court's findings or its ruling granting summary judgment or its ruling granting the directed verdict on this issue, Turner's cross-appeal fails because no defendant presented any evidence of EI liability under the WPLA.

In determining whether a trial court has erred in denying a directed verdict, the appellate court uses the same standard of review as is used by the trial court. *Peterson v. Littlejohn*, 56 Wn. App. 1, 8, 781 P.2d 1329 (1989). On review of a ruling on a motion for a directed verdict, the appellate court applies the same standard as the trial court. A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013) (citations omitted); CR 50. “Substantial evidence” means evidence “sufficient * * * to persuade a fair-minded, rational person of the truth of a declared premise.” *Helman v. Sacred Heart Hosp .*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963).

Under the WPLA a product is not reasonably safe if it lacks adequate warnings at the time of manufacture. RCW 7.72.030; *see also* 16 Wash. Prac., *Tort Law and Practice*, section 16.15 (3rd Edition). RCW 7.72.030(1) states:

A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

RCW 7.72.030(1). The definition of “not reasonably safe” for purposes of a WPLA failure to warn claim is contained in subsection (b) of RCW 7.72.030(1):

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

RCW 7.72.030(1)(b).

Further, it was undisputed at trial that EI had no prior knowledge of a similar accident before December 29, 2009. RP 630, Ins. 17-22 (9-22-14am). This therefore limits Turner’s argument to only a post-manufacture WPLA claim. RCWA 7.72.030(1)(b). *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 935, 15 P.3d 188 (2000). Whether a manufacturer has a duty to warn is a question of law for the court. *Esparza*, 103 Wn. App. at 935.

Here, it is undisputed that EI, in May of 2006, in fact warned Noise Control immediately of all Noise Control, Turner and HDR needed to

know: the ceilings were not designed to be walked on. It is undisputed that Noise Control received this warning during construction and long before this December 29, 2009 accident. It is undisputed that Noise Control understood this warning and conveyed this warning to Turner, in writing, with the appropriate grammatical emphasis. Turner simply cannot get past the fact that they were warned by Environmental Interiors, Inc. *See* CP 525, 526.

The record here shows a complete lack of evidence to support a WPLA failure to warn claim. Indeed, Turner's explanation for not providing the EI warning to the WSP was to argue that warnings are not required.²³ How can defendants now argue that the hazard of walking on the metal security ceilings are so obvious that they did not need to warn the WSP not to walk on them and, at the same time, argue that the metal security ceilings are unreasonably dangerous as designed for lack of a warning?

The trial court properly granted a directed verdict and Turner does not assign error to that ruling. This Court should affirm on this issue.

²³ *See, e.g.*, RP 3061 (10-9-14pm).

C. Conclusion in Response to Turner's Cross-Appeal

Turner waived its opportunity to prove EI fault at trial, failed to properly assign error to the real issues on appeal, and cannot prevail regardless because of an absolute absence of any evidence of EI fault in this record. Turner's appeal should be rejected and the trial court affirmed on this issue.

Dated: February 16, 2016

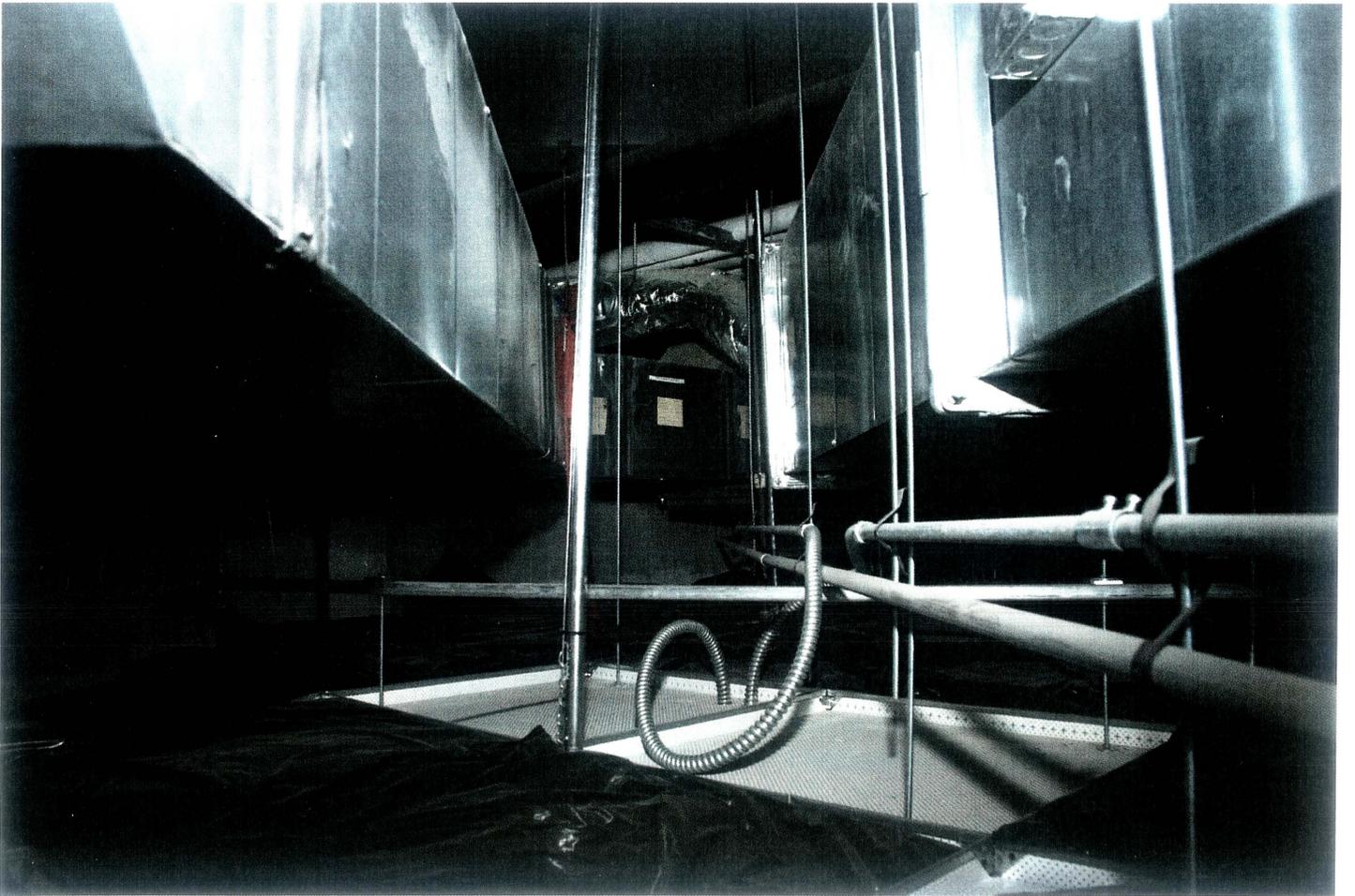
SWANSON GARDNER MEYERS, PLLC

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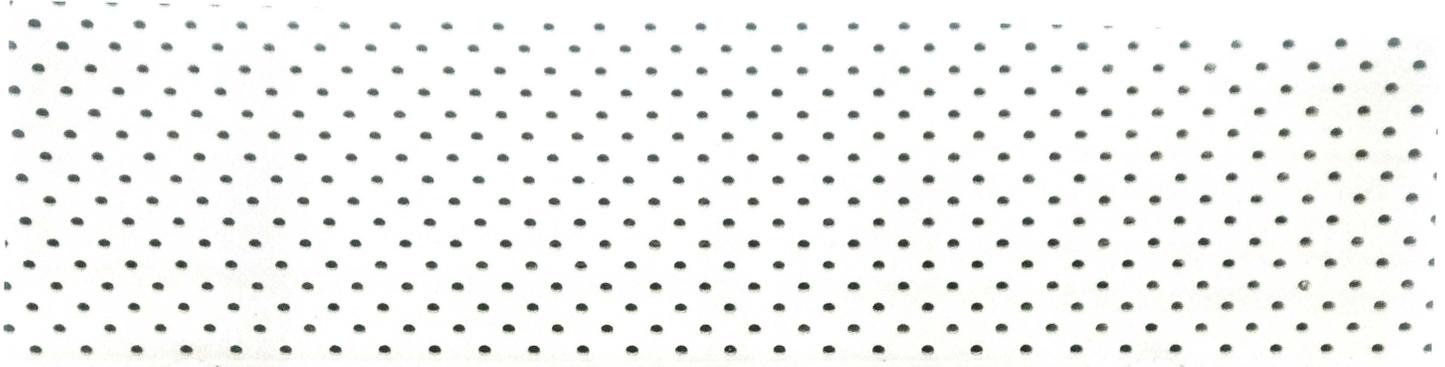
Todd W. Gardner, WSBA#11034
Peter E. Meyers, WSBA#23438

APPENDIX A
TO APPELLANTS' REPLY BRIEF

ORIGINAL







MEP ACCESS



APPENDIX B
TO APPELLANTS' REPLY BRIEF

FILED

14 OCT 08 AM 9:00

The Honorable Judge Douglass A. North
KING COUNTY
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 11-2-37290-1 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S.
DONNELLY; JENNIFER B. DONNELLY; and KEITH
KESSLER, as Guardian ad Litem for LINLEY GRACE
DONNELLY, a minor child

Plaintiffs,

vs.

HDR ARCHITECTURE, INC., a foreign corporation;
TURNER CONSTRUCTION COMPANY, a foreign
corporation, NOISE CONTROL OF WASHINGTON, INC., a
Washington corporation; "JANE and JOHN DOES, 1-20,"

Defendants.

NO. 11-2-37290-1 SEA

PLAINTIFFS' RESPONSE TO
DEFENDANT HDR'S
REQUEST FOR
INSTRUCTION REGARDING
THE CONTRACT

I. RELIEF REQUESTED

Plaintiffs object to any jury instruction concerning contract interpretation, breach of contract, or contract language and respectfully request that the Court deny HDR's request for such an instruction.

II. RELEVANT FACTS

Plaintiffs rely on the facts in the record to date and on the Declaration of Peter E. Meyers in Support of Plaintiffs' Response to HDR's Request for Instruction on the Contract dated October 7, 2014 and all exhibits thereto.

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III. LEGAL AUTHORITY AND ARGUMENT

A. Any proposed instructions on contract interpretation, breach of contract, or contract language would be a severe comment on the evidence and reversible error.

HDR seeks a jury instruction which, if given, by its plain language is nothing more than a comment on the evidence. Certainly, plaintiffs would prefer similar instructions benefitting their own case but for the Court to give them would be equally error.

It is axiomatic that jury instructions must accurately state the law. Parties are entitled to jury instructions that accurately state the law.¹ Jury instructions are sufficient when they allow counsel to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied.² However, “[a]n instruction may be legally accurate yet not given because it is misleading.”³ On the other hand, a clear misstatement of the law in jury instructions is presumed prejudicial.⁴

Further, Article 4, section 16 of the Washington Constitution states: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” It prohibits judges from charging juries with respect to matters of fact, or commenting thereon, and mandates that they declare the law.⁵ The prohibition prevents the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted.⁶

A constitutionally prohibited comment on the evidence allows the jury to infer from what the

¹ *Thola v. Henschell*, 140 Wn. App. 70, 84, 164 P.3d 524, 531 (2007) (citing *Eagle Group, Inc. v. Pullen*, 114 Wash.App. 409, 420, 58 P.3d 292 (2002), review denied, 149 Wn.2d 1034, 75 P.3d 968 (2003)).

² *Thola*, 140 Wn. App. at 84 (citing *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004)).

³ *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 90, 18 P.3d 558, 563 (2001).

⁴ *Thola*, 140 Wn. App. at 84 (citing *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005)).

⁵ *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646, 657 (1992).

⁶ *Hizey*, 119 Wn.2d at 271.

1 judge said or did not say that he personally believed or disbelieved the testimony in question.⁷ A
2 statement constitutes a comment on the evidence "if the court's attitude toward the merits of the
3 case or the court's evaluation relative to the disputed issue is inferable from the statement."⁸ The
4 purpose of prohibiting such comments is to prevent the judge's opinion from influencing the
5 jury's verdict.⁹

6 An instruction that instructs the jury on what weight to give certain evidence is
7 impermissible and constitutes reversible error.¹⁰ It is prejudicial error to give an instruction
8 which assumes as true the existence or nonexistence of any material fact in issue in respect of
9 which the evidence is conflicting.¹¹

10 Here, there are multiple, significant sources of error with jury instruction HDR proposes.
11 First, it is unnecessary and in its absence HDR and Turner will be able to state their case
12 assuming their argument to the jury follows Washington law.

13 Second, it constitutes an impermissible comment on the evidence on multiple levels. For
14 instance, it uses first a reference to "Request for Proposal" and second a reference to "breach of
15 contract" as if the RFP was not part of the contract. This, as the Court is well aware, is HDR's
16 continuing theory of contract interpretation. HDR may want to continue to argue this
17 interpretation of the facts but the Court cannot give its approval of this interpretation in a jury
18 instruction. These contracts speak for themselves, the jury may consider them and the arguments
19 of the parties related to them, but the Court should not comment on the evidence related to them.

20
21 ⁷ *Hizey*, 119 Wn.2d at 271 (citing *State v. Hawkins*, 53 Wn. App. 598, 604, 769 P.2d 856, review denied, 113 Wn.2d 1004, 777 P.2d 1052 (1989)); see also *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 139, 606 P.2d 1214 (1980).

22 ⁸ *In re W.R.G.*, 110 Wn. App. 318, 326, 40 P.3d 1177, 1181 (2002) (citing *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990).

23 ⁹ *In re W.R.G.*, 110 Wn. App. 318, 326, 40 P.3d 1177, 1181 (2002) (citing *Lane*, 125 Wn.2d at 838, 889 P.2d 929).

24 ¹⁰ See, e.g., *In re Det. of R.W.*, 98 Wn. App. 140, 145, 988 P.2d 1034, 1038 (1999) ("The instruction was an impermissible comment on the evidence because it instructed the jury on the weight to give certain evidence").

¹¹ *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 533, 452 P.2d 729, 735 (1969) (citing *Ashley v. Ensley*, 44 Wn.2d 74, 265 P.2d 829 (1954)).

1 Further, the jury does not need to have the nature of the claims further explained to them in this
2 case; the nature of the claim are apparent in the existing instructions and the fact that there are no
3 "breach of contract claims" is equally apparent.

4 Third, the claim that the jury "may not consider whether the contract was breached" is a
5 misstatement of the law for the reasons set forth below. Clearly the terms of the contracts, the
6 obligations under the contracts, and the very nature of the contracts are relevant. This
7 information has been presented to the jury because it is relevant. This is nothing more than an
8 attempt by HDR to have Court comment on the weight to be given to this evidence.

9 **B. Contract terms are relevant and admissible to prove breach of a tort duty of**
10 **reasonable care; the Court has properly admitted such evidence for this purpose,**
11 **and the jury may consider such evidence to determine whether defendants breached**
12 **their tort duty of reasonable care owed directly to plaintiff Marshall Donnelly under**
13 **Davis v. Baugh.**

14 This Court has now admitted as exhibits at trial all three of the contracts at issue in this
15 case: the Design-Build Agreement, the Joint Venture Agreement and the subcontract between
16 HDR/Turner and Noise Control. Whether Marshall Donnelly was a third party beneficiary to the
17 contracts involved in this case is not the issue. Instead, the jury may properly consider the
18 language, requirements, obligations and terms in the contracts to evaluate defendants' respective
19 tort duties of reasonable care and whether they breached the applicable standard of care owed to
20 Marshall Donnelly.

21 The "construction complexity" rationale behind *Davis* certainly applies to this complex
22 design-build project and each of these three defendants:

23 Today, wood and metal have been replaced with laminates, composites, and
24 aggregates. Glue has been replaced with molecularly altered adhesives. Wiring,
plumbing, and other mechanical components are increasingly concealed in
conduits or buried under the earth. In short, construction has become highly
scientific and complex. Landowners increasingly hire contractors for their

1 expertise and a nonexpert landowner is often incapable of recognizing
2 substandard performance.¹²

3 The contract language, requirements, obligations and terms help define what is "reasonable" care
4 and what the standard of care is *in this case*. The contracts help establish the circumstances and
5 nature of this project and thereby help define the *tort* duties owed to Marshall Donnelly under
6 *Davis* in this case.

7 An Oregon case, *Larson v. Heintz Const. Co.*,¹³ is directly on point. *Larson* involved a
8 personal injury tort claim where the plaintiff was injured in an automobile accident. The
9 defendants were construction contractors engaged in building a highway pursuant to a contract
10 with the State of Oregon. Plaintiff, a passenger in a vehicle driven by her husband, was not a
11 party to the contract between the defendants and the State. The Oregon Supreme Court held that
12 a breach of contractual duties can be probative of negligence and held that a construction
13 contract between the state and certain contractors was admissible to show what the contractor
14 "conceived the measure of his duty to be"—in that case, to install a warning signal at an access
15 road.¹⁴ As the *Larson* court explained:

16 In spite of the lack of local precedent we think that a construction contract
17 which requires the use of warning signals is, by the weight of reason and
18 authority, admissible in evidence against the contractor. We prefer not to ground
19 our decision on a ruling that we have here a third-party beneficiary contract and
20 that the standard of care imposed by the contract supersedes that required by the
21 common law. This is an action for damages arising out of negligence, and the
22 contractor's duty even in the face of such a contract as this remains a duty to use
23 reasonable care. **But reasonableness depends on the circumstances, and here
24 the contract was a circumstance. It is evidence of what the contractor
conceived the measure of his duty to be. Of course, the fact that one sets for
himself exacting standards of conduct higher than the law requires will not in the
ordinary case expose him to the danger of liability at the suit of one injured by
non-observance of those exacting standards. But set in the context of this
litigation, simply as a matter of common sense it is not unfair to let the jury**

¹² *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419, 150 P.3d 545 (2007) (emphasis supplied).

¹³ *Larson v. Heintz Const. Co. et al.*, 219 Or. 25, 345 P.2d 835 (1959).

¹⁴ *Larson*. 219 Or. at 53.

1 consider the contract * * * The contractor undertook the work knowing that
2 was expected of him, and it is fair to let the contract enter into the jury's
3 consideration of what was reasonable under the circumstances.¹⁵

4 In a similar case, again involving a personal injury tort claim by a plaintiff not a party to
5 a contract between a construction company and the State, the Supreme Court of Minnesota ruled
6 similarly, as follows:

7 The standard of care owed by the Barton Construction Company to the traveling
8 public is not fixed by the terms of its contract with the State of Minnesota. But
9 the provisions in that contract are proper for jury consideration in
10 determining whether the construction company complied with its general
11 duty of due care as defined by the trial court in the instructions given by it *
12 * * *¹⁶

13 * * *

14 * * * We think that, whatever the reasoning may be, the better rule, and that now
15 followed by the weight of authority, is that such contract provisions should be
16 admitted for the jury's consideration, together with all other evidence, in
17 determining the question of defendant's negligence.¹⁷

18 In another personal injury case involving a construction contractor defendant in a state
19 contract, where the construction company's contract with the state was admitted as evidence, the
20 Arizona Supreme Court commented "the jury was properly instructed that the standard of care to
21 be used in measuring [the construction company's] conduct was that of ordinary care under the
22 circumstances. In this case one of the circumstances which the jury might have considered was
23 the existence and contents of [the construction company's] contract with the State."¹⁸

24 In a Washington construction site safety case, *Kelley v. Howard S. Wright Const. Co.*,¹⁹ it
was clear that the Washington Supreme Court considered the terms of a contract between a

¹⁵ *Larson*, 219 Or. at 52-54 (emphasis supplied).

¹⁶ *Dornack v. Barton Const. Co.*, 272 Minn. 307, 317-18, 137 N.W.2d 536, 544 (1965) (emphasis supplied).

¹⁷ *Dornack*, 272 Minn. at 318 n. 8 (quoting *Foster v. Herbison Const. Co.*, 263 Minn. 63, 69 115 N.W.2d 915 (1962)).

¹⁸ *Wells v. Tanner Bros. Contracting Co.*, 103 Ariz. 217, 222, 439 P.2d 489, 494 (1968).

¹⁹ *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500, 507 (1978).

1 construction contractor and a building owner in the context of a tort claim by a plaintiff not a
2 party to the contract:

3 Although this court has not previously ruled on this question, our past decisions
4 support the proposition that an affirmative duty assumed by contract may create a
5 liability to persons not party to the contract, where failure to properly perform the
6 duty results in injury to them. * * *

7 In summary, then, we hold appellant Wright had a duty to provide a reasonably
8 safe place of work and reasonable safety equipment under the principles of the
9 common law of tort, under RCW 49.16.030, and under Wright's contract with the
10 owners. Failure to comply with this duty is the basis of appellant's liability to
11 respondent Kelley.²⁰

12 In the present case, multiple *defense* witnesses have admitted that following the contract
13 terms in a project like this one is relevant to the standard of care a jury must consider. Hartman,
14 Wildt and Hobbs are three such witnesses. HDR's CR 30(b)(6) designee, Mr. Hartmann, for
15 instance, testified that a "reasonably prudent design-build team should follow the project
16 closeout requirement in the contract it signs."²¹ Mr. Hobbs, the defendants' own expert, said the
17 same thing.²²

18 The contract terms and contract requirements are clearly relevant for the jury to consider
19 whether defendants' conduct was reasonable. It is relevant for the jury to consider whether there
20 was a breach of the standard of care. It is relevant, in the context of this complex design-build
21 project, to determine how the ceiling was required to be built (i.e., according to the
22 manufacturer's specifications) and what information each of these defendants was required to
23 provide to the owner. *Davis* establishes the tort duty and the contracts are necessary for the jury

24 ²⁰ *Kelley*, 90 Wn.2d at 334.

²¹ Declaration of Peter E. Meyers in Support of Plaintiffs' Response to HDR's Request for Instruction on the Contract dated October 7, 2014, **Exhibit B** (Verbatim Transcripts of Proceedings for October 6, 2014, Afternoon Session, at pp. 81-82 (Hartman Testimony)).

²² Declaration of Peter E. Meyers in Support of Plaintiffs' Response to HDR's Request for Instruction on the Contract dated October 7, 2014, **Exhibit A** (Verbatim Transcripts of Proceedings for October 2, 2014, Morning Session, at pp. 74-75 (Hobbs Testimony)).

1 to consider in “determining the question of defendant’s negligence.” This is not complicated and
2 there is no “confusion” of contract and tort theories here as defendants argue.

3 **C. HDR’s case citations do not support its position.**

4 HDR cites for authority and unpublished case, *Weitz v. Alaska Airlines, Inc.*²³ GR 14.1²⁴
5 prohibits citing unpublished opinions as authority and, under RCW 2.06.040, they lack
6 precedential value. Washington courts have imposed sanctions for violating the rule.²⁵
7 Nonetheless, the case does not support HDR’s argument because, in HDR’s own brief, they
8 admit that the *Weitz* court found the contract “useful” on standard of care issues.

9 HDR next cites *Walker v. King County Metro*,²⁶ a case from this Court and one the Court
10 is well familiar with. *Walker* did not preclude a transit company policy rulebook as evidence of
11 standard of care; it simply found that the plaintiff in that case did not present facts sufficient to
12 bring her within the relevant rule in that book:

13 A Metro policy provides that when a passenger is “visibly laden”, the operator
14 should wait for the passenger to be seated before leaving a bus stop. The driver
15 was asked during his deposition whether Metro had any rules addressing what to
16 do when someone boarded a bus carrying “bags or bundles”.⁵ He did not have the
17 rulebook with him and responded there is “something about that; if they come on
and they have bags in their hands, that we should allow them time to seat.”⁶ After
the deposition, the driver read the rulebook and clarified that the policy applied to
situations when a passenger is “visibly laden” with bags or packages.

18 To the extent that the Metro rulebook—very little of which is in the record—may
19 establish the standard of care, no reasonable juror would conclude that Walker,
20 with a purse and tote bag, was “visibly laden” to the extent that would require
special consideration in seating. There is no evidence that her purse and tote bag
were unusually bulky or cumbersome. That she had only one hand free to grip the

21 ²³ 134 Wn. App. 1019 (2006) (unpublished).

22 ²⁴ General Rule 14.1 – Citation to Unpublished Opinions

23 (a) Washington Court of Appeals. A party may not cite as an authority an unpublished opinion
of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not
published in the Washington Appellate Reports.

24 ²⁵ *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548–49, 13 P.3d 240 (2000).

²⁶ *Walker v. King County Metro*, 126 Wn. App. 904, 906, 109 P.3d 836, 837 (2005).

1 seats or the poles as she moved along would not have been perceived by a driver,
2 in the exercise of appropriate care, as an unusual and onerous physical
3 condition.²⁷

4 *Walker* is not relevant here. Defendants own witnesses – Hartman, Hobbs and Wildt, for
5 instance – establish by their own testimony the relevance of the contract language in this case.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court should deny the defense request for the proposed
8 jury instruction on “contracts.”

9 Dated: October 7, 2014

SWANSON ♦ GARDNER, P.L.L.C.

10 By: 

Todd W. Gardner, WSBA#11034
Peter E. Meyers, WSBA#23438
Attorneys for Plaintiffs

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24 ²⁷ *Walker*, 126 Wn. App. at 910-11.

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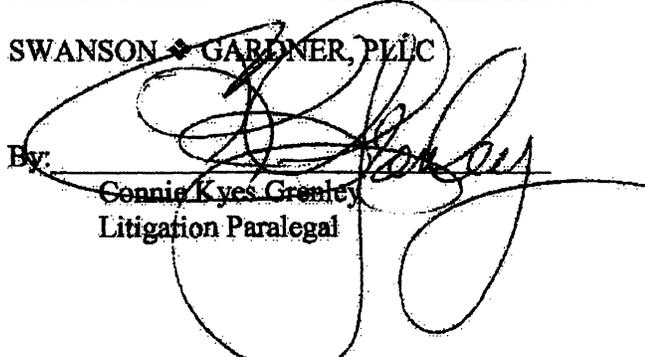
CERTIFICATE OF SERVICE

I, Connie Kyes Grenley, declare I am over the age of eighteen. I caused this document to be served on the following person(s) and/or entities in the manner stated below on the date stated below:

John W. Rankin, Jr. WSBA#6357 Reed McClure - Financial Center 1215 Fourth Avenue, Suite 1700 Seattle, WA 98161	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U. S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Messenger (ACTION)
Terence J. Scanlan, WSBA#19498 Skellenger Bender COMMERCIAL LAW GROUP 1301 Fifth Ave., Suite 3401 Seattle, WA 98101	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U. S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Messenger (ACTION)
Thomas R. Merrick, WSBA#10945 Merrick, Hofstedt & Lindsey, P. S. 3101 Western Avenue - Suite 200 Seattle, WA 98121	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U. S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Messenger (ACTION)

Dated: October 7, 2014

SWANSON ♦ GARDNER, PLLC

By: 
Connie Kyes Grenley
Litigation Paralegal

Page 8796

APPENDIX C
TO APPELLANTS' REPLY BRIEF

FILED

14 OCT 08 AM 9:00

The Honorable Judge Douglas A. North
KING COUNTY
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 11-2-37290-1 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S.
DONNELLY; JENNIFER B. DONNELLY; and KEITH
KESSLER, as Guardian ad Litem for LINLEY GRACE
DONNELLY, a minor child

Plaintiffs,

vs.

HDR ARCHITECTURE, INC., a foreign corporation;
TURNER CONSTRUCTION COMPANY, a foreign
corporation, NOISE CONTROL OF WASHINGTON, INC., a
Washington corporation; "JANE and JOHN DOES, 1-20,"

Defendants.

NO. 11-2-37290-1 SEA

PLAINTIFFS' MOTION
FOR DIRECTED VERDICT
ON DEFENDANTS'
AFFIRMATIVE DEFENSE
ALLEGING
ENVIRONMENTAL
INTERIORS, INC. AS AN AT
FAULT ENTITY

I. RELIEF REQUESTED

Plaintiffs respectfully request that the Court issue and Order Granting Directed Verdict in favor of the plaintiffs that dismisses all defense claims alleging Environmental Interiors, Inc. ("EI") as an at fault entity.

II. RELEVANT FACTS

The Court is familiar with the facts in the trial record. The relevant facts here focus on the present defendants' stated affirmative defenses, the Court's pretrial summary judgment ruling dismissing various claims against former defendant EI and the complete absence of any evidence in the record presented by any defendant on the issue of EI fault.

1 No defendant properly pleaded fault of EI as an affirmative defense and there are no
2 counterclaims or cross claims asserted. HDR's most recent Answer in this lawsuit does not
3 include an affirmative defense alleging fault on the part of EI.¹ Turner's Answer asserts no
4 affirmative defense alleging fault on the part of EI.² Similarly, Noise Control failed to assert any
5 affirmative defense alleging EI was at fault.³ Further, in their respective answers to Plaintiffs'
6 Second Amended Complaint, HDR, Turner and Noise Control each *deny* that the Lockdown
7 ceilings were unreasonably safe due to lack of manufacturer warnings and each of them
8 specifically *deny* every element of a Washington Products Liability Act (WPLA) failure to warn
9 claim.⁴

10 Before trial, EI moved for summary judgment on all claims against it, including the
11 WPLA failure to warn claim. HDR and Turner did not oppose the EI summary judgment
12 motion, and Noise Control "joined" in the motion.⁵ The Court granted the motion in part,⁶
13 dismissing *all negligence claims* against EI, as well as all warranty claims, all WPLA defective
14

15 ¹ See Declaration of Peter E. Meyers in Support of Plaintiffs' Motion for a Directed Verdict dated October 7, 2014
16 (Meyers 10-07-2014 Directed Verdict Declaration), **Exhibit A** (Plaintiffs' Second Amended Complaint for Personal
17 Injuries dated April 10, 2013); **Exhibit B** (HDR Entities' Answer to Plaintiffs' Second Amended Complaint for
18 Personal Injuries and Affirmative Defenses dated June 4, 2013). In HDR's Answer, there is at paragraph 8.3 an
19 "intervening acts" affirmative defense stated, but HDR has acknowledged in the court of the July, 2014 summary
20 judgment proceedings and in its recent motion for a "superseding / intervening acts" instruction that the intervening
21 acts allegation concerns the State of Washington.

22 ² See Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit C** (Defendant Turner Construction Company's
23 Answer to Second Amended Complaint for Personal Injuries dated May 14, 2013). Turner, in its Fourth Affirmative
24 Defense, alleges only that Noise Control was at fault for negligence installation of the ceiling.

³ See Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit D** (Defendant Noise Control of Washington's
Answer to Plaintiffs' Second Amended Complaint for Personal Injuries dated May 21, 2013). Noise Control does
seek allocation pursuant to RCW 4.22.070 but does not allege EI fault; instead, Noise Control alleges only fault by
the State of Washington.

⁴ See each defendants' Answer in response to paragraphs 3.4, 3.8, 3.9 and 3.10 (denying all elements of a WPLA
failure to warn claim against EI. Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit B**, **Exhibit C** and
Exhibit D.

⁵ See Defendant Noise Control of Washington, Inc.'s Limited Joinder in Defendant EI's CR 56 Motion for Summary
Judgment dated December 27, 2013.

⁶ See Defendant EI's CR 56 Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment dated
December 26, 2013; Declaration of Patrick N. Rothwell in Support of Defendant EI's CR CR 56 Motion for
Summary Judgment or, in the Alternative, Partial Summary Judgment dated December 26, 2014; Defendant EI's
Reply on CR 56 Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment dated January 16,
2014.

1 manufacturing claims, and all WPLA defective design claims.⁷ The Court's summary judgment
2 ruling left only one claim -- a failure to warn claim under the WPLA -- primarily because the
3 plaintiffs submitted an expert's declaration in opposition to EI's motion. There is no such
4 testimony in the trial record.

5 At trial, no defendant has made any allegation in opening statement or during
6 presentation of evidence concerning the fault of EI. Indeed, there has hardly been any mention
7 of EI. The defense admitted that this type of accident "has never happened before"; that "this
8 type of ceiling product is installed in prisons and jails and also in hospitals and pharmacies and
9 airports across the country, and it has been for decades, and nothing like this has ever happened
10 before."⁸

11 Instead, the defense (and only the defense) has consistently argued that it was "obvious"
12 that workers could not walk on these metal security ceilings and, therefore, no warning was
13 necessary.⁹ Consistent with that defense, to date no defendant has presented any lay witness or
14 expert witness testimony or any other evidence for the purpose of establishing fault on a WPLA
15 failure to warn claim against EI.

16 Robert Garside testified at the request of both the plaintiffs and the defendants. He was
17 the EI National Sales Manager¹⁰ who was involved in the sale of the Lockdown ceiling product
18

19 ⁷ See Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit E** (Order Granting in Part and Denying [in] Part
20 Defendant EI's CR 56 Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment dated
January 24, 2014).

21 ⁸ Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit F** (Verbatim Transcript of Proceedings, September 16,
2014, Opening Statement, (Opening Statement of Lindsey Pflugrath on behalf of HDR) at p. 51, lns. 24-25; p. 52,
lns. 1-9); **Exhibit G** ((Verbatim Transcript of Proceedings, September 16, 2014, Opening Statement, (Opening
22 Statement of Jack Rankin on behalf of Turner) at p. 73, lns. 22-25; p. 74, ln. 1); **Exhibit I** (Verbatim Transcript of
Proceedings, October 2, 2014 (Testimony of Defense Expert Dan Hobbs) at p. 35, lns. 12-18, 24-25; p. 36, lns. 1-4).

23 ⁹ Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit F** (Verbatim Transcript of Proceedings, September 16,
2014, Opening Statement, (Opening Statement of Lindsey Pflugrath on behalf of HDR) at p. 52, lns. 8-9; p. 66, lns.
7-11).

24 ¹⁰ Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit H** (Verbatim Transcript of Proceedings, September 22,
2014, Morning Session, (testimony of Robert Garside) at p. 22, lns. 6-14).

1 to Noise Control of Washington, Inc. in this case.¹¹ Mr. Garside testified that EI did not provide
2 a warning against walking on metal security ceilings in their product because it “was always
3 assumed that no one walked on it.”¹² He testified that, in his experience, architects who selected
4 the Lockdown ceilings for use in a project would know the performance limitations of the
5 ceilings and, specifically, in his experience such architects knew the ceilings were not designed
6 to be walked on.¹³

7 Noise Control was EI’s “customer” for this product.¹⁴ The only evidence in this record
8 on any WPLA warning issue is that EI, in this case in May of 2006, provided its customer, Noise
9 Control, with a clear warning that both Celine and Lockdown were not designed to be walked
10 on. Mr. Garside testified that, when asked by Scott Cramer, he (Garside) did warn against
11 walking on the ceilings, his warning applied to both Celine and Lockdown, and he had seen the
12 May 23, 2006 letter from Mr. Cramer to Turner Construction and that letter accurately conveyed
13 the warning he gave.¹⁵ No defendant disputes this.

14 III. EVIDENCE RELIED UPON

15 Plaintiffs rely for support their position on the records and files herein and on the
16 Declaration of Peter E. Meyers in Support of Plaintiffs’ Motion for a Directed Verdict dated
17 October 7, 2014 and the exhibits thereto.

18 ///

19
20 ¹¹ Noise Control was the “customer” for this product. Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit H**
21 (Verbatim Transcript of Proceedings, September 22, 2014, Morning Session, (testimony of Robert Garside) at p. 25,
Ins. 16-18).

22 ¹² Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit H** (Verbatim Transcript of Proceedings, September 22,
2014, Morning Session, (testimony of Robert Garside) at p. 36, Ins. 17-22).

23 ¹³ Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit H** (Verbatim Transcript of Proceedings, September 22,
2014, Morning Session, (testimony of Robert Garside) at p. 26, Ins. 11-14).

24 ¹⁴ Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit H** (Verbatim Transcript of Proceedings, September 22,
2014, Morning Session, (testimony of Robert Garside) at p. 25, Ins. 16-18).

¹⁵ Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit H** (Verbatim Transcript of Proceedings, September 22,
2014, Morning Session, (testimony of Robert Garside) at p. 23, Ins. 9-25; p. 24, Ins. 1-13; p. 48, Ins. 3-20).

1 IV. LEGAL AUTHORITY AND ARGUMENT

2 A. Directed Verdict Standard.

3 Civil Rule 50 provides, in pertinent part:

4 (a) Judgment as a Matter of Law.

5 (1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully
6 heard with respect to an issue and there is no legally sufficient evidentiary basis
7 for a reasonable jury to find or have found for that party with respect to that issue,
8 the court may grant a motion for judgment as a matter of law against the party on
9 any claim, counterclaim, cross claim, or third party claim that cannot under the
10 controlling law be maintained without a favorable finding on that issue. Such a
11 motion shall specify the judgment sought and the law and the facts on which the
12 moving party is entitled to the judgment. A motion for judgment as a matter of
13 law which is not granted is not a waiver of trial by jury even though all parties to
14 the action have moved for judgment as a matter of law.

15 (2) *When Made.* A motion for judgment as a matter of law may be made at any
16 time before submission of the case to the jury.¹⁶

17 A CR 50 motion should be granted when it is clear that the evidence and the reasonable
18 inferences, viewed in the light most favorable to the nonmoving party, are insufficient to sustain
19 a verdict for the nonmoving party.¹⁷ "A motion for judgment as a matter of law must be granted
20 'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a
21 matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the
22 nonmoving party.'¹⁸ Substantial evidence means evidence "'sufficient * * * to persuade a fair-
23 minded, rational person of the truth of a declared premise.'¹⁹

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¹⁶ CR 50.

¹⁷ *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

¹⁸ *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126, 131 (2003) (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

¹⁹ *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

1 **B. No defendant has properly pleaded any affirmative defense alleging fault of**
2 **nonparty EI**

3 A defendant has the burden to prove an affirmative defense.²⁰ Nonparty fault is an
4 affirmative defense.²¹ Further, “[a] defendant must properly invoke RCW 4.22.070(1)'s fault
5 allocation procedure because it ‘is not self-executing’ and ‘does not automatically apply to each
6 case where more than one entity could theoretically be at fault.’”²²

7 CR 8(c) includes “fault of a nonparty” as one of the affirmative defenses that a party is
8 required to set forth in a responsive pleading. Also, CR 12(i) provides:

9 Whenever a defendant or a third party defendant intends to claim for purposes of
10 RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense
11 which shall be affirmatively pleaded by the party making the claim. The identity
12 of any nonparty claimed to be at fault, if known to the party making the claim,
13 shall also be affirmatively pleaded.

14 As an initial matter, no defendant in this case pled an affirmative defense alleging EI as required
15 by CR 8(c) and CR 12(i). Such an affirmative defense is generally considered waived and may
16 not be considered a triable issue unless it is (1) affirmatively pleaded, (2) asserted in a motion
17 under CR 12(b), or (3) tried by the express or implied consent of the parties.²³

18 Further, the *only* way any present defendant in this case can allege fault against EI is by
19 proving an affirmative defense of “failure to warn” *under the WPLA*. All other claims against
20 this manufacturer have been dismissed in this lawsuit, including negligence claims, warranty

21 ²⁰ *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000).

22 ²¹ CR 8(c), 12(i); *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828,
860-61, 313 P.3d 431, 446 (2013); *Henderson v. Tyrrell*, 80 Wn. App. 592, 623-24, 910 P.2d 522 (1996).

23 ²² *Dormaier*, 177 Wn. App. at 858 (quoting *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25-
26, 864 P.2d 921 (1993)).

24 ²³ *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976). Even if properly pleaded, a defendant may waive
such affirmative defenses where they are inconsistent with the manner in which the case has been defended or where
defendants are dilatory in asserting the defense. See *Dormaier*, 177 Wn. App. at 858 (citing *King v. Snohomish
Cnty.*, 146 Wn.2d 420, 424-25, 47 P.3d 563 (2002); *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124
(2000); 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 12:17, at 489 (2d ed.2009)).

1 claims, WPLA defective manufacturing claims, and WPLA defective design claims.²⁴

2 Therefore, this Court must assess the evidence in the record in the context of the only remaining
3 possibility – a WPLA failure to warn claim – and determine whether there is any support at all
4 for such a claim. Clearly there is not and, therefore, this affirmative defense cannot go forward
5 even had it been properly pleaded.

6 **C. Defendants have the burden of proving a WPLA failure to warn claim.**

7 If, at this stage in the pleadings, plaintiffs were still pursuing a WPLA claim against EI,
8 all parties (including plaintiffs) would expect this Court to dismiss it for lack of proof. The fact
9 that only defendants now assert this claim, as an affirmative defense, does not change the
10 analysis. If defendants wanted EI on the verdict form, they needed to produce evidence and meet
11 their burden of proof on this affirmative defense. Their failure to properly plead this affirmative
12 defense aside, it cannot be disputed that defendants have the burden of proof here²⁵ and that the
13 only possible remaining claim against EI is under the WPLA.

14 The WPLA, enacted in 1981, created a single cause of action to provide relief for “harm
15 caused by the manufacture, production, making, construction, fabrication, design, formula,
16 preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage
17
18

19 ²⁴ See Meyers 10-07-2014 Directed Verdict Declaration, **Exhibit E** (Order Granting in Part and Denying [in] Part
20 Defendant EI’s CR 56 Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment dated
January 24, 2014).

21 ²⁵ See *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 433, 886 P.2d 172, 183 (1994) (The “burden of
22 proof” as used by courts and commentators may refer to any one of, or a combination of, the burden of pleading, the
burden of producing evidence, and the burden of persuasion. The burden of pleading and producing evidence are
usually encompassed within the term the “burden of production”. This burden is to “produc[e] evidence, satisfactory
23 to the judge, of a particular fact in issue.” Edward M. Cleary, *McCormick on Evidence* § 336, at 947 (3d ed. 1984).
“The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or
24 directed verdict) if evidence on the issue has not been produced.” *McCormick on Evidence*, at 947. The burden of
persuasion is “the burden of persuading the trier of fact that the alleged fact is true”. *McCormick on Evidence*, at
947. It comes into play “only if the parties have sustained their burdens of producing evidence and only when all of
the evidence has been introduced”. *McCormick on Evidence*, at 947).

1 or labeling of [a] product.”²⁶ The WPLA was part of the products liability and tort reforms
2 enacted by the legislature in 1981.²⁷ The WPLA preempts tort-based common-law product
3 liability remedies occurring after its enactment.²⁸ Despite the absence of an “express preemption
4 clause,” Washington courts have found “no doubt about the WPLA’s preemptive purpose”²⁹ and
5 that the WPLA is the “exclusive remedy” for product liability claims in Washington.³⁰

6 Under the WPLA a product is not reasonably safe if it lacks adequate warnings at the
7 time of manufacture.³¹ RCW 7.72.030(1) states:

8 “A product manufacturer is subject to liability to a claimant if the claimant’s
9 harm was proximately caused by the negligence of the manufacturer in that the
10 product was not reasonably safe as designed or not reasonably safe because
adequate warnings or instructions were not provided.”³²

11 The definition of “not reasonably safe” for purposes of a WPLA failure to warn claim is
12 contained in subsection (b) of RCW 7.72.030(1):

13 “A product is not reasonably safe because adequate warnings or instructions were
14 not provided with the product, if, at the time of manufacture, the likelihood that
15 the product would cause the claimant’s harm or similar harms, and the seriousness
16 of those harms, rendered the warnings or instructions of the manufacturer
17 inadequate and the manufacturer could have provided the warnings or instructions
18 which the claimant alleges would have been adequate.”³³

19 ²⁶ *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 559, 293 P.3d 1168, 1170 (2013) (citing RCW 7.72.010(4); *Wash.*
Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 853–56, 860, 774 P.2d 1199, 779 P.2d 697 (1989)).

20 ²⁷ The WPLA was effective July 26, 1981.

²⁸ *Washington Water Power Company v. Graybar Electric Company*, 112 Wn.2d 847, 853, 774 P.2d 1199 (1989).

²⁹ *Graybar*, 112 Wn.2d at 853.

³⁰ *Graybar*, 112 Wn.2d at 853. Products liability claims based on pre-WPLA facts are analyzed under the common
21 law of strict liability and negligence. See *Simonetta v. Viad Corporation*, 165 Wn.2d 341, 348, 197 P.3d 127 (2008).

³¹ RCW 7.72.030; see also 16 Wash. Prac., *Tort Law and Practice*, section 16.15 (3rd Edition).

³² RCW 7.72.030(1). Failure to warn was a basis for liability at common law and the Restatement (Second) of
22 Torts, section 402A provides that a manufacturer may be held strictly liable for failure to give adequate warnings.
See Restatement (Second) of Torts, section 402A (1966); see also Restatement (Second) of Torts section 388
23 (1965); *Novak v. Piggly Wiggly Puget Sound Co.*, 22 Wn. App. 407, 412, 591 P.2d 791 (1979); *Haysom v. Coleman*
Lantern Co., 89 Wn.2d 149, 474, 573 P.2d 785 (1978); *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 153-54
24 (1977); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wn. App 379, 550 P.2d 71 (1976).

³³ RCW 7.72.030(1)(b)

1 This "Risk Utility Test"³⁴ in RCW 7.72.030(1)(b) balances the likelihood that the product at the
2 time of manufacture would cause the claimant's harm or similar harms and the seriousness of
3 those harms against the adequacy of the warnings provided and the cost to the manufacturer to
4 provide warnings.

5 A claimant may also use the "Consumer Expectations Test" contained in RCW
6 7.72.030(3): "In determining whether a product was not reasonably safe under this section, the
7 trier of fact shall consider whether the product was unsafe to an extent beyond that which would
8 be contemplated by the ordinary consumer."³⁵ This test requires the defendants here to show that
9 the product was "unsafe to an extent beyond that which would be contemplated by the ordinary
10 consumer."³⁶ However, "[u]nder this test, a manufacturer may not be held liable merely because
11 a product causes harm; rather it must be shown that the product causing the harm was not
12 reasonably safe."³⁷

13 Under RCW 7.72.030(1), the defendants must show that the absence of a warning of
14 possible dangers from specific product usage was the proximate cause of the plaintiff's injuries.³⁸
15

16 ³⁴ *Hiner v. Bridgestone / Firestone, Inc.*, 138 Wn.2d 248, 258 n. 51, 978 P.2d 505 (1999) (citing *Soproni v. Polygon*
Apartment Partners, 137 Wn.2d319, 971 P.2d 500, 505 (1999)).

17 ³⁵ RCW 7.72.030(1); see also *Ayers v. Johnson & Johnson Baby Products Co.* 117 Wn.2d 747, 759, 818 P.2d 1337
(1991).

18 ³⁶ *Hiner*, 138 Wn.2d at 258 n. 51 (citing *Soproni v. Polygon Apartment Partners*, 137 Wn.2d319, 971 P.2d 500, 505
(1999) (quoting *Falk v. Keene Corp.*, 113 Wn.2d645, 654, 782 P.2d 974 (1989)). The "Risk Utility Test" and
19 "Consumer Expectation Test" in the warnings context is similar to the same WPLA tests in the design defect
context. See *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 828, 99 P.3d 421 (2004): "The risk-utility test
requires a showing that the likelihood and seriousness of a harm outweigh the burden on the manufacturer to design
20 a product that would have prevented that harm and would not have impaired the product's usefulness. RCW
7.72.030(1)(a). The consumer-expectation test requires a showing that the product is more dangerous than the
ordinary consumer would expect. RCW 7.72.030(3); see *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn. App. 28, 36,
21 991 P.2d 728 (2000). This test focuses on the reasonable expectation of the consumer. *Soproni v. Polygon*
Apartment Partners, 137 Wn.2d319, 326-27, 971 P.2d 500 (1999). A number of factors influence this determination
including the intrinsic nature of the product, its relative cost, the severity of the potential harm from the claimed
22 defect, and the cost and feasibility of minimizing the risk. *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d145, 154,
542 P.2d 774 (1975)."

23 ³⁷ *Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 305, 71 P.3d 214, 218 (2003) (citing *Baughn*
v. Honda Motor Co., Ltd., 107 Wn.2d 127, 134, 727 P.2d 655 (1986)).

24 ³⁸ *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 838, 906 P.2d 336 (1995) (citing *Lunt v. Mt. Spokane Skiing Corp.*, 62
Wn. App. 353, 362, 814 P.2d 1189, review denied, 118 Wn.2d1007, 822 P.2d 288 (1991)).

1 Proximate causation includes both cause in fact and legal causation.³⁹ A WPLA claimant must
2 prove both components.⁴⁰

3 How can defendants argue that the hazard of walking on the metal security ceilings are so
4 obvious that they did not need to warn the WSP not to walk on them and, at the same time, argue
5 that the metal security ceilings are unreasonably dangerous as designed for lack of a warning?⁴¹
6 The defense cannot even argue that there was no warning in this case, because the evidence is
7 clear and undisputed that EI did provide a warning to its customer, Noise Control, and Noise
8 Control in turn provided that warning (in writing) to Turner which, in turn, failed to provide the
9 warning to the WSP. The defense explanation for not providing the EI warning to the WSP is to
10 argue that warnings are not required.

11 RCW 7.72.050(1) allows the trier of fact to consider, in the context of warnings, evidence
12 of industry custom and technological feasibility, and evidence of whether or not the product was
13 in compliance with nongovernmental standards or with legislative or administrative regulatory
14 standards.⁴² The defense has provided absolutely no evidence whatsoever on these subjects.

15 As with all affirmative defenses, the defense carries the burden of proof on this WPLA
16 failure to warn claim.⁴³ The defense in this case has repeatedly admitted in both opening
17 statements and through their own witnesses that there is no evidence of any prior accident
18 involving workers like Marshall Donnelly walking on Lockdown metal security ceilings (or, for
19 that matter, any type of metal security ceilings). There has been no evidence presented that EI

20 _____
21 ³⁹ *Hiner*, 138 Wn.2d at 256 (citing *Ayers v. Johnson & Johnson Baby Products Co.* 117 Wn.2d 747, 752, 753, 761,
818 P.2d 1337 (1991); see also *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 838, 906 P.2d 336 (1995).

22 ⁴⁰ *Id.*

23 ⁴¹ Only the defense argues that the hazards were obvious. However, their argument defeats their WPLA warning
claim. Under the WPLA, a manufacturer has no duty to warn of obvious or known dangers. See, e.g., *Anderson*, 79
Wn. App. at 839; *Davis v. Glob Mach. Mfg., Inc.* 102 Wn.2d 68, 684 P.2d 692 (1984).

24 ⁴² RCW 7.72.050(1); *Falk v. Keen Corporation*, 113 Wn.2d 645, 654, 782 P.2d 974 (1989).

⁴³ See, e.g., WPI 21.05 Burden of Proof on the Issues – Affirmative Defenses Other Than Contributory Negligence /
Assumption of the Risk; WPI 110.03 Manufacturer's Duty to Provide Warnings or Instructions With Product (6
Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 110.03 (6th ed.)).

1 ever had knowledge of a similar accident before December 29, 2009.⁴⁴ **This is significant,**
2 **because it narrows this Court's focus to a post-manufacture WPLA claim.** Under
3 subsection (b) of RCW 7.72.030(1):

4 A product is not reasonably safe because adequate warnings or instructions were
5 not provided after the product was manufactured where a manufacturer learned or
6 where a reasonably prudent manufacturer should have learned about a danger
7 connected with the product after it was manufactured. In such a case, the
8 manufacturer is under a duty to act with regard to issuing warnings or instructions
concerning the danger in the manner that a reasonably prudent manufacturer
would act in the same or similar circumstances. This duty is satisfied if the
manufacturer exercises reasonable care to inform product users.⁴⁵

9 The general rule is that a manufacturer has a post-sale duty to warn only if it has sufficient notice
10 about a specific danger associated with the product.⁴⁶ "The most convincing proof that a
11 manufacturer knew of a dangerous condition associated with its product is that the manufacturer
12 knew about previous substantially similar accidents involving the product."⁴⁷ Whether a
13 manufacturer has a duty to warn is a question of law for the court.⁴⁸ In this analysis a court will
14 consider the probability of the danger occurring, the seriousness of the harm posed, and the
15 ability of the manufacturer to identify users to notify of the danger.⁴⁹

16
17
18 ⁴⁴ Under some circumstances, this failure during the defense opening statement is sufficient in Washington for
dismissal of an affirmative defense. The right to enter judgment at the opening statement stage of a trial is based on
the rationale that to do so prevents the unnecessary expenditure of time and money to both litigants and courts.
19 *Hallum v. Mullins*, 16 Wn. App. 511, 515-16, 557 P.2d 864, 868 (1976) (citing *Scott v. Rainbow Ambulance Serv.,*
Inc., 75 Wn.2d 494, 496, 452 P.2d 220 (1969)). Dismissal on an opening statement can be granted "when such
20 statement shows affirmatively that there is no cause of action, or that there is a full and complete defense thereto, or
when it is expressly admitted that the facts stated are the only facts which the party expects or intends to prove, that
the court is warranted in acting upon it." *Hallum v. Mullins*, 16 Wn. App. 511, 515-16, 557 P.2d 864, 868 (1976)
21 (quoting *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642, 644-45, 79 P. 308, 309 (1905) and citing *Bank*
of the West v. Wes-Con Dev. Co., 15 Wn. App. 238, 240, 548 P.2d 563 (1976); *Loger v. Washington Timber Prods.*
Inc., 8 Wn. App. 921, 923, 509 P.2d 1009 (1973)).

22 ⁴⁵ RCWA 7.72.030(1)(b).

23 ⁴⁶ *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 935, 15 P.3d 188 (2000).

24 ⁴⁷ *Esparza*, 103 Wn. App. at 935.

⁴⁸ *Esparza*, 103 Wn. App. at 935.

⁴⁹ See *Esparza*, 103 Wn. App. at 935-36 ("[w]ith only 420 [products] in the field, notifying the customers * * *
would seem to have been relatively simple").

1 Here, it is undisputed that EI, in May of 2006, in fact warned Noise Control immediately
2 of all Noise Control, Turner and HDR needed to know – the ceilings were not designed to be
3 walked on. It is undisputed that Noise Control received this warning during construction and
4 long before this December 29, 2009 accident. It is undisputed that Noise Control understood this
5 warning and conveyed this warning to Turner, in writing, with the appropriate grammatical
6 emphasis. The present defendants, even if they had pleaded a WPLA failure to warn affirmative
7 defense and even if they had presented evidence to support such a defense, simply cannot get
8 past the fact that they were, indeed, warned by Environmental Interiors, Inc.

9 The bottom line is simple here: if EI was still a defendant, and plaintiffs still claimed
10 damages under only a WPLA failure to warn theory, the Court would have no choice but to
11 dismiss that claim with the evidence in this record. After the defense cases, there remains no
12 evidence in the record that would justify a verdict finding EI at fault. The defense has produced
13 nothing and, as a matter of law, the jury has nothing upon which to base a finding of fault against
14 EI. The defendants have not proven their affirmative defense and it must not be allowed to go to
15 the jury.

16 Permitting this unsupported affirmative defense only invites a jury to speculate. This is a
17 jury's only recourse when no evidence is provided by a party bearing the burden of production
18 and the burden of proof, as defendants do on this issue.

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V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Directed Verdict should be granted, and there should be no line on the verdict form allowing the jury to apportion fault to EI

Dated: October 7, 2014

SWANSON ❖ GARDNER, P.L.L.C.

By: 

Todd W. Gardner, WSBA#11034
Peter E. Meyers, WSBA#23438
Attorneys for Plaintiffs

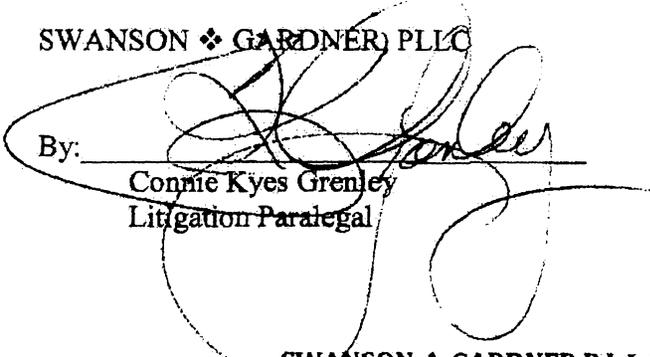
CERTIFICATE OF SERVICE

I, Connie Kyes Grenley, declare I am over the age of eighteen. I caused this document to be served on the following person(s) and/or entities in the manner stated below on the date stated below:

John W. Rankin, Jr. WSBA#6357 Reed McClure - Financial Center 1215 Fourth Avenue, Suite 1700 Seattle, WA 98161	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U. S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Messenger (ACTION)
Terence J. Scanlan, WSBA#19498 Skellenger Bender COMMERCIAL LAW GROUP 1301 Fifth Ave., Suite 3401 Seattle, WA 98101	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U. S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Messenger (ACTION)
Thomas R. Merrick, WSBA#10945 Merrick, Hofstedt & Lindsey, P. S. 3101 Western Avenue - Suite 200 Seattle, WA 98121	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U. S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Messenger (ACTION)

Dated: October 7, 2014

SWANSON ❖ GARDNER, PLLC

By: 

Connie Kyes Grenley
Litigation Paralegal

SWANSON ❖ GARDNER P.L.L.C.

4512 TALBOT ROAD SOUTH
RENTON, WASHINGTON 98055
Tel: 425.226.7920 Fax: 425.226.5168

FILED

14 OCT 08 AM 9:00

The Honorable Judge Douglas A. North
KING COUNTY
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 11-2-37290-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for MARSHALL S.
DONNELLY; JENNIFER B. DONNELLY; and KEITH
KESSLER, as Guardian ad Litem for LINLEY GRACE
DONNELLY, a minor child

Plaintiffs,

vs.

HDR ARCHITECTURE, INC., a foreign corporation;
TURNER CONSTRUCTION COMPANY, a foreign
corporation, NOISE CONTROL OF WASHINGTON, INC., a
Washington corporation; "JANE and JOHN DOES, 1-20,"

Defendants.

NO. 11-2-37290-1 SEA

DECLARATION OF PETER E.
MEYERS IN SUPPORT OF
PLAINTIFFS' MOTION
FOR DIRECTED VERDICT

1. I am an attorney with Swanson ❖ Gardner, PLLC, attorneys of record for plaintiffs in the above captioned action. I am over the age of 18 and competent to testify on my own behalf. All of the information set forth in this declaration is based upon my own personal knowledge.

2. Attached are true and correct copies of the following Exhibits:

Exhibit A: Plaintiffs' Second Amended Complaint for Personal Injuries dated April 10, 2013;

Exhibit B: HDR Entities' Answer to Plaintiffs' Second Amended Complaint for Personal Injuries and Affirmative Defenses dated June 4, 2013;

1 **Exhibit C:** Defendant Turner Construction Company's Answer to Second Amended
2 Complaint for Personal Injuries dated May 14, 2013;

3 **Exhibit D:** Defendant Noise Control of Washington's Answer to Plaintiffs' Second
4 Amended Complaint for Personal Injuries dated May 21, 2013;

5 **Exhibit E:** Order Granting in Part and Denying [in] Part Defendant EI's CR 56
6 Motion for Summary Judgment, or, in the Alternative, Partial Summary
7 Judgment dated January 24, 2014;

8 **Exhibit F:** Verbatim Transcript of Proceedings, September 16, 2014, Opening
9 Statement, (Opening Statement of Lindsey Pflugrath on behalf of HDR)
10 (selected pages);

11 **Exhibit G:** Verbatim Transcript of Proceedings, September 16, 2014, Opening
12 Statement, (Opening Statement of Jack Rankin on behalf of Turner)
13 (selected pages);

14 **Exhibit H:** Verbatim Transcript of Proceedings, September 22, 2014, Morning
15 Session, (testimony of Robert Garside) (selected pages);

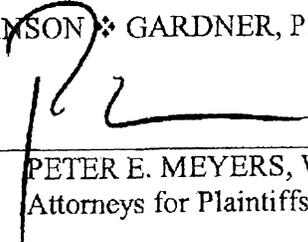
16 **Exhibit I:** Verbatim Transcript of Proceedings, October 2, 2014 (Testimony of
17 Defense Expert Dan Hobbs) (selected pages).

18 3. To the extent they are not specifically addressed herein, all facts stated in
19 Plaintiffs' Motion for Directed Verdict on Defendants' Affirmative Defense Alleging
20 Environmental Interiors, Inc. as an At Fault Entity are true and accurate to the best of my
21 knowledge.

22 I declare under penalty of perjury of the laws of the State Of Washington that the
23 foregoing is true and correct to the best of my knowledge and belief.

24 Dated: October 7, 2014

SWANSON ❖ GARDNER, PLLC

By: 

PETER E. MEYERS, WSBA #23438
Attorneys for Plaintiffs

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Dated: October 7, 2014

SWANSON ❖ GARDNER, PLLC

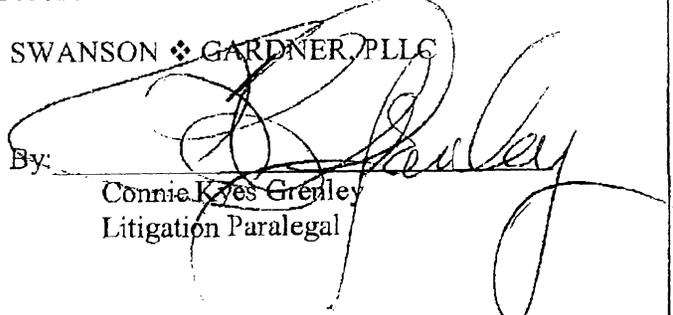
By: 
 Connie Kyes Grenley
 Litigation Paralegal

EXHIBIT A

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THE HONORABLE JOAN DuBUQUE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for
MARSHALL S. DONNELLY; JENNIFER B.
DONNELLY; and KEITH KESSLER, as Guardian ad
Litem for LINLEY GRACE DONNELLY, a minor child

Plaintiffs,

vs.

ENVIRONMENTAL INTERIORS, INC., a foreign
corporation; HDR ARCHITECTURE, INC., a foreign
corporation; HDR CONSTRUCTORS, INC., formerly
known as HDR DESIGN-BUILD, INC., a foreign
corporation; TURNER CONSTRUCTION COMPANY, a
foreign corporation, NOISE CONTROL OF
WASHINGTON, INC., a Washington corporation; "JANE
and JOHN DOES, 1-20,"

Defendants.

NO. 11-2-37290-1 SEA

SECOND AMENDED
COMPLAINT FOR PERSONAL
INJURIES

COME NOW THE PLAINTIFFS, by and through undersigned counsel, and complain
and allege as follows:

I. PARTIES, JURISDICTION AND VENUE

1.1 At all times material hereto plaintiff Jennifer B. Donnelly was over the age of 18,
a resident of Walla Walla County, Washington, and married to Marshall S. Donnelly.

1 1.2 On May 27, 2010 plaintiff Jennifer B. Donnelly was appointed as the Guardian
2 for her husband, disabled plaintiff Marshall S. Donnelly.

3 1.3 At all times material hereto minor plaintiff Linley Grace Donnelly, whose date of
4 birth is October 18, 2009, was a resident of Walla Walla County, Washington and is the daughter
5 of Jennifer B. Donnelly and Marshall S. Donnelly.

6 1.4 Plaintiff Keith Kessler is the court-appointed Guardian ad Litem of minor Linley
7 Grace Donnelly and at all times material hereto was and is an attorney licensed to practice law in
8 the State of Washington.

9 1.5 At all times material hereto defendant Environmental Interiors, Inc. has been a
10 foreign corporation doing business in King County, Washington.

11 1.6 At all times material hereto defendant HDR Architecture, Inc. has been a foreign
12 corporation doing business in King County, Washington.

13 1.7 At all times material hereto defendant Turner Construction Company has been a
14 foreign corporation doing business in King County, Washington.

15 1.8 At all times material hereto defendant Noise Control of Washington, Inc. has been
16 a Washington State corporation doing business in King County, Washington.

17 1.9 At all times material hereto defendant HDR Constructors, Inc., formerly known as
18 HDR Design-Build, Inc., has been a foreign corporation doing business in King County,
19 Washington.

20 1.10 Defendants "Jane and John Does 1-20" are individuals and/or entities, presently
21 unknown to plaintiffs, including but not limited to other subsidiaries, successors in interest,
22 and/or subcontractors to the defendants presently named herein and who will be identified
23 through discovery and added as necessary by amended complaint at a later time.
24

1 1.11 Jurisdiction is proper in King County Superior Court.

2 1.12. Venue is proper in King County Superior Court, at the Seattle courthouse.

3 **II. FACTS**

4 2.1 Plaintiffs re-allege and incorporate by reference all preceding paragraphs in this
5 Complaint as if fully set forth herein.

6 2.2 In December of 2009 the State of Washington Department of Corrections
7 employed Marshall S. Donnelly as an electrician at the Washington State Penitentiary in Walla
8 Walla, Washington (hereinafter referred to as the "Washington State Penitentiary").

9 2.3 On or about December 29, 2009, Marshall S. Donnelly was assigned to a project
10 at the Washington State Penitentiary which required drilling a hole for conduit in a wall near the
11 IMU South inmate visiting hallway, in the plenum space above a metal security ceiling.

12 2.4 The metal security ceiling installed at this location in the Washington State
13 Penitentiary is a product called "Lockdown" that was designed, manufactured, assembled,
14 marketed, sold and distributed by defendant Environmental Interiors, Inc. and/or defendant Noise
15 Control of Washington, Inc. Lockdown is a high-security, metal, suspended ceiling system
16 which was marketed, sold and/or distributed by defendant Environmental Interiors, Inc. and/or
17 defendant Noise Control of Washington, Inc. for use in jails, prisons and other secure facilities.

18 2.5 To accomplish his assigned task on or about December 29, 2009, Marshall S.
19 Donnelly was required to enter the plenum space above the IMU South inmate visiting hallway
20 (hereinafter referred to as the "hallway") and walk on the metal security ceiling to get to the
21 location of his work. He entered through a specially designed access panel in the Lockdown
22 metal security ceiling. Prior to December 29, 2009, during the design and construction of the
23

1 North Close Security Compound project, defendants had applied to this access panel a red label
2 stating "MEP Access," meaning "Mechanical, Electrical and Plumbing Access."

3 2.6 Shortly after entering the plenum space above the metal security ceiling for the
4 hallway, the ceiling collapsed, causing Marshall S. Donnelly to fall approximately 15 feet to the
5 concrete floor below, resulting in severe and permanent injuries.

6 2.7 Defendants HDR Architecture, Inc. and Turner Construction Company,
7 independently and/or through a joint venture partnership called "HDR/Turner" and/or
8 "Turner/HDR," defendant HDR Constructors, Inc., (formerly known as HDR Design-Build,
9 Inc.), defendant Noise Control of Washington Inc., and defendant Environmental Interiors, Inc.
10 designed and constructed the building and fixtures at the location in the Washington State
11 Penitentiary where Marshall S. Donnelly was injured, including the specific design, selection and
12 installation of the Lockdown metal security ceiling product at the location of this accident.

13 2.8 This was a design-build project, referred to as the "North Close Security
14 Compound," and included the IMU South inmate visiting hallway where this subject accident
15 occurred on or about December 29, 2009. The North Close Security Compound project was
16 substantially completed in March of 2008.

17 2.9 The plans and specifications for the metal security ceiling at the location of this
18 subject accident originally called for a "Celline" metal security ceiling. Celline is a product that
19 is stronger, has a higher load bearing capacity, and is more capable of carrying live loads than the
20 Lockdown metal security ceiling. Celline is also designed, manufactured, assembled, marketed,
21 sold and distributed by defendant Environmental Interiors, Inc. Despite the original building
22 plans and specifications, during construction one or more of the defendants chose to use
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24
25

1 Lockdown rather than Celline at the IMU South inmate visiting hallway location.

2 2.10 Entry through the MEP Access panel into the plenum space above this subject
3 Lockdown metal security ceiling and similar ceilings, and walking upon such ceilings, was a
4 common and accepted practice at the Washington State Penitentiary and other Washington State
5 Department of Corrections facilities before, during and after the design and construction of the
6 IMU South building at the Washington State Penitentiary. Defendants knew or reasonably
7 should have known of this practice at the Washington State Penitentiary and other Washington
8 State Department of Corrections facilities prior to the design and construction of the North Close
9 Security Compound project.

10 2.11 Entry through the MEP Access panel into the plenum space above this subject
11 Lockdown metal security ceiling and similar ceilings at the Washington State Penitentiary was
12 and is necessary to access heating, air conditioning, ventilation, electrical, mechanical, plumbing,
13 and other systems in the plenum space. Defendants knew or reasonably should have known of
14 this necessity at the Washington State Penitentiary and other Washington State Department of
15 Corrections facilities prior to the design and construction of the North Close Security Compound
16 project.

17 2.12 Entry through the MEP Access panel into the plenum space above this subject
18 Lockdown metal security ceiling and similar ceilings at the Washington State Penitentiary was
19 and is necessary for maintenance, repairs, installation of additional fixtures, installation of
20 additional systems, and other reasonably foreseeable purposes. Defendants knew or reasonably
21 should have known of this necessity at the Washington State Penitentiary and other Washington
22

1 State Department of Corrections facilities prior to the design and construction of the North Close
2 Security Compound project.

3 **III. FIRST CAUSE OF ACTION: PRODUCTS LIABILITY – STRICT LIABILITY**

4 3.1 Plaintiffs re-allege and incorporate by reference all preceding paragraphs in this
5 Second Amended Complaint as if fully set forth herein.

6 3.2 Defendant Environmental Interiors, Inc., and/or defendant Noise Control of
7 Washington, Inc. designed, manufactured, assembled, marketed, sold and distributed the
8 Lockdown and Celline metal security ceiling products installed at the Washington State
9 Penitentiary as part of the North Close Security Compound project, including the metal security
10 ceiling product installed at the location of this accident that occurred on or about December 29,
11 2009 at the Washington State Penitentiary.

12 3.3 Defendant Environmental Interiors, Inc. and/or defendant Noise Control of
13 Washington, Inc. are product “sellers” and “manufacturers” as defined by RCW 7.72.010 of the
14 Lockdown metal security ceiling product that collapsed on or about December 29, 2009 as
15 alleged herein.

16 3.4 The subject Lockdown metal security ceiling product was not and is not
17 reasonably safe as designed.

18 3.5 The subject Lockdown metal security ceiling product was not and is not
19 reasonably safe because, as designed, there was inadequate access to heating, air conditioning,
20 ventilation, electrical, mechanical, plumbing, and other systems in the plenum space.

21 3.6 The subject Lockdown metal security ceiling product was not and is not
22 reasonably safe because, as designed, there was inadequate access for other reasonably
23

1 foreseeable maintenance, repairs, installation of additional fixtures, installation of additional
2 systems, and other reasonably foreseeable purposes.

3 3.7 The subject Lockdown metal security ceiling product was not and is not
4 reasonably safe because the design would lead a reasonable user to believe he or she could safely
5 enter the plenum space above the metal security ceiling through the designated "access" panels
6 and walk on the metal security ceiling.

7 3.8 The subject Lockdown metal security ceiling product was not and is not
8 reasonably safe because defendant Environmental Interiors, Inc. and/or defendant Noise Control
9 of Washington, Inc. failed to provide adequate warnings or instructions with the Lockdown
10 product at any meaningful time.

11 3.9 The subject Lockdown metal security ceiling product was not and is not
12 reasonably safe because, at the time of manufacture, the likelihood that the product would cause
13 the plaintiffs' injuries, or similar harm, rendered the warnings or instructions of the manufacturer
14 inadequate and the manufacturer could have provided adequate warnings or instructions.

15 3.10 The subject Lockdown metal security ceiling product was not and is not
16 reasonably safe because, absent adequate warnings or instructions of the manufacturer, the
17 product was unsafe to an extent beyond that which would be contemplated by the ordinary
18 consumer.

19 3.11 The subject Lockdown metal security ceiling product was not and is not
20 reasonably safe because it did not conform to defendants' express warranties or to the implied
21 warranties under RCW Title 62A.
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1 3.12 Defendant Environmental Interiors, Inc.'s and/or defendant Noise Control of
2 Washington, Inc.'s negligent design as alleged herein was a direct and proximate cause Marshall
3 S. Donnelly's injuries in this case and the plaintiffs' damages.

4 3.13 Defendant Environmental Interiors, Inc.'s and/or defendant Noise Control of
5 Washington, Inc.'s failure to warn as alleged herein was a direct and proximate cause of Marshall
6 S. Donnelly's injuries in this case and the plaintiffs' damages.

7 3.14 Defendant Environmental Interiors, Inc., and its subsidiaries and/or successors in
8 interest, were negligent and are strictly liable to plaintiffs, jointly and severally, under the
9 Washington Products Liability Act, RCW 7.72 et seq., and Washington common law.

10 3.15 Defendant Noise Control of Washington, Inc. and its subsidiaries and/or successors
11 in interest, were negligent and are strictly liable to plaintiffs, jointly and severally, under the
12 Washington Products Liability Act, RCW 7.72 et seq., and Washington common law.

13 **IV. SECOND CAUSE OF ACTION: NEGLIGENCE**

14 4.1 Plaintiffs re-allege and incorporate by reference all preceding paragraphs in this
15 Second Amended Complaint as if fully set forth herein.

16 4.2 Defendants, and each of them, were negligent in their design and construction of
17 the IMU South building at the Washington State Penitentiary, including their selection, design,
18 construction, installation and assembly of the Lockdown metal security ceiling product at the
19 location of the accident that occurred on or about December 29, 2009.

20 4.3 Defendants, and each of them, were negligent in their failure to provide
21 adequate or accurate information, warnings, training and/or instructions to the State of
22 Washington with regard to the safe and proper access of mechanical, electrical and plumbing
23

1 systems installed in plenum spaces above metal security ceilings.

2 4.4 Defendants, and each of them, were negligent in their failure to provide adequate
3 or accurate information, warnings, training and/or instructions to the State of Washington with
4 regard to the load bearing and live load capacity of said metal security ceilings,

5 4.5 Defendants, and each of them, were negligent in their failure to provide adequate
6 or accurate information, warnings, training and/or instructions to the State of Washington with
7 regard to whether individuals could safely walk on said metal security ceilings.

8 4.6 Defendants, and each of them, were negligent in their failure to properly and
9 reasonably locate and label the access panels installed with the subject Lockdown metal security
10 ceiling system in the hallway where the subject accident occurred.

11 4.7 Defendants, and each of them, negligently spaced, located and labeled the access
12 panels that are part of the Lockdown metal security ceiling at the location of the accident such
13 that individuals accessing the plenum space above the metal security ceiling for access to
14 heating, air conditioning, ventilation, electrical, mechanical, plumbing, and other systems in the
15 plenum space, or for reasonably foreseeable maintenance, repairs, installation of additional
16 fixtures, installation of additional systems, and other reasonably foreseeable purposes, would not
17 be able to do so after using the designated access panels without walking on the metal security
18 ceiling.

19 4.8 Defendants, and each of them, negligently spaced, located and labeled the access
20 panels that are part of the Lockdown metal security ceiling at the location of the accident in a
21 manner that would lead a user of said ceiling systems to reasonably believe that he or she could
22 safely walk on the metal security ceiling.
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1 4.9 Defendants, and each of them, negligently selected, designed, constructed,
2 installed and/or assembled the subject Lockdown metal security ceiling in such a manner that it
3 provided inadequate access to heating, air conditioning, ventilation, electrical, mechanical,
4 plumbing, and other systems in the plenum space.

5 4.10 Defendants, and each of them, negligently selected, designed, constructed,
6 installed and/or assembled the subject Lockdown metal security ceiling in such a manner that it
7 provided inadequate access for other reasonably foreseeable maintenance, repairs, installation of
8 additional fixtures, installation of additional systems, and other reasonably foreseeable purposes.

9 4.11 Defendants, and each of them, failed to communicate to the State of Washington
10 complete warranty information concerning the subject Lockdown product.

11 4.12 Defendants, and each of them, failed to communicate to the State of Washington
12 complete warranty information concerning the subject Celline product.

13 4.13 Defendants, and each of them, failed to communicate to the State of Washington
14 any warnings, load bearing capacity information, live load capacity information, or other critical
15 and necessary information concerning the subject Lockdown product installed in the IMU South
16 inmate visiting hallway where this December 29, 2009 incident occurred.

17 4.14 Defendants, and each of them, failed to communicate to the State of Washington
18 information concerning the proper use of access panels installed with the subject Lockdown
19 product in the IMU South inmate visiting hallway where this December 29, 2009 incident
20 occurred.

21 4.15 Defendants, and each of them, failed to communicate to the State of Washington
22 information concerning the proper and safe methods for accessing the plenum space and
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1 accessing heating, air conditioning, ventilation, electrical, mechanical, plumbing, and other
2 systems in the plenum space, above the subject Lockdown product installed in the IMU South
3 inmate visiting hallway where this December 29, 2009 incident occurred.

4 4.16 Defendants, and each of them, negligently labeled the metal security ceiling
5 access panels "MEP Access" without including any language or symbols warning individuals
6 removing the MEP Access panels not to walk on the metal security ceilings and/or that the metal
7 security ceilings are not designed for a live load.

8 4.17 Defendants, and each of them, negligently advised the State of Washington that it
9 could access the plenum areas above metal security ceilings for maintenance, repair and
10 modification by walking on the hard metal security ceilings, and failed to warn/instruct/train the
11 State of Washington not to walk on the hard metal security ceilings, creating a danger that was
12 reasonably foreseeable to the defendant; namely, that individuals accessing the plenum space
13 above the metal security ceilings may walk on those ceilings and suffer severe personal injuries
14 if and when the ceiling collapsed.

15 4.18 Defendants, and each of them, negligently failed to pass on to the State of
16 Washington information it received from defendant manufacturer, Environmental Interiors Inc.,
17 that walking on the metal security ceilings would violate all warranties.

18 4.19 Defendants, and each of them, negligently failed to warn/instruct/train the State of
19 Washington how to access or modify mechanical, electrical and plumbing systems in plenum
20 spaces, without walking on the metal security ceilings. Without such
21 warning/construction/training, it was reasonably foreseeable to defendants, and each of them,
22 that individuals would walk on the hard metal security ceilings in order to perform maintenance,
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1 repairs or modifications to mechanical, electrical, plumbing systems in plenum spaces above said
2 ceilings and could suffer injury as a result of the failure of the metal security ceiling.

3 4.20 Defendants, and each of them, negligently installed and/or constructed the
4 Lockdown metal security ceiling at the location where the plaintiff fell through the ceiling to the
5 floor below, such that it was materially weaker than it would have been had it been installed
6 and/or constructed in accordance with the manufacturer's installation instructions and negligently
7 failed to supervise said construction installation or inspect this area in a manner sufficient to
8 identify and remedy the improper installation.

9 4.21 The negligence of defendants and their respective subsidiaries and successors in
10 interest was a direct and proximate cause of Marshall S. Donnelly's injuries in this case and the
11 plaintiffs' damages.

12 4.22 As partners, defendants HDR Architecture, Inc. and Turner Construction
13 Company are each liable to plaintiffs, jointly and severally, for the acts and failures to act of the
14 other.

15 4.23 As members of a joint venture, defendants HDR Architecture, Inc. and Turner
16 Construction Company are each liable to plaintiffs, jointly and severally, for the acts and failures
17 to act of the other.

18
19 **V. THIRD CAUSE OF ACTION: BREACH OF WARRANTY**

20 5.1 Plaintiffs re-allege and incorporate by reference all preceding paragraphs in this
21 Second Amended Complaint as if fully set forth herein.

22 5.2 The subject Lockdown metal security ceiling product was not and is not
23 reasonably safe because it did not conform to defendants' express warranties or to the implied
24 warranties under RCW Title 62A.

1 6.5 Plaintiffs are entitled to attorney fees in an amount to be proven at trial.

2 6.6 Plaintiffs are entitled to prejudgment interest on all medical and out-of-pocket
3 expenses and any other liquidated damages in an amount to be proven at trial.

4 6.7 Plaintiffs are entitled to costs and disbursements herein compensated therefore in
5 an amount to be proven at trial.

6 **VII. LIMITED WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE**

7 Jennifer Donnelly, as Guardian for Marshall S. Donnelly, pursuant to RCW 5.60.060,
8 hereby waives the physician-patient privilege only to the extent required by said statute, as
9 limited by the plaintiffs' constitutional rights of privacy, contractual rights of privacy, and the
10 ethical obligations of physicians and attorneys not to engage in ex parte contact between the
11 treating physician or health care provider and a patient's legal adversaries.

12 **VIII. RELIEF SOUGHT**

13 WHEREFORE, plaintiffs pray for judgment against all defendants, jointly and severally,
14 in an amount that will fairly compensate the plaintiffs for all damages sustained, including but
15 not limited to the following:

16 8.1 For all economic and noneconomic damages to Jennifer Donnelly, as Guardian
17 for Marshall S. Donnelly, in an amount to be proven at trial;

18 8.2 For all economic and noneconomic damages to Jennifer Donnelly in an amount to
19 be proven at trial;

20 8.3 For all economic and noneconomic damages to Keith Kessler, as Guardian ad
21 Litem for Linley Grace Donnelly, in an amount to be proven at trial;

22 8.4 For an award of the plaintiffs' attorney fees herein in an amount to be proven
23 at trial;

1 8.5 For an award of prejudgment interest on all liquidated damages, in an amount to
2 be proven at trial;

3 8.6 For an award of damages compensating plaintiffs for their costs and dis-
4 bursements herein in an amount to be proven at trial;

5 8.7 For such other and further relief as the Court deems just and equitable.

6 DATED: April 10, 2013

SWANSON ❖ GARDNER, P.L.L.C.

7
8 By: _____

TODD W. GARDNER, WSBA #11034
PETER E. MEYERS, WSBA #23438
Attorneys for Plaintiffs

EXHIBIT B

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The Honorable Joan DuBuque

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for
MARSHALL S. DONNELLY; JENNIFER B.
DONNELLY; and KEITH KESSLER as
Guardian ad Litem for LINLEY GRACE
DONNELLY, a minor child,

Plaintiffs,

v.

ENVIRONMENTAL INTERIORS, INC., a
foreign corporation; HDR ARCHITECTURE,
INC., a foreign corporation; HDR
CONSTRUCTORS, INC., formerly known as
HDR Design-Building, Inc., a foreign
corporation; TURNER CONSTRUCTION
COMPANY, a foreign corporation; NOISE
CONTROL OF WASHINGTON, INC., a
Washington corporation; and "JANE and JOHN
DOES, 1-20,"

Defendants.

NO. 11-2-37290-1 SEA

HDR ENTITIES' ANSWER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT FOR PERSONAL
INJURIES AND AFFIRMATIVE
DEFENSES

Come now defendants HDR Architecture, Inc., and HDR Constructors, Inc., formerly
known as HDR Design-Build, Inc. (collectively known as "HDR Entities"), by and through
their attorneys, Terence J. Scanlan and Lindsey M. Pflugrath of Skellenger Bender, P.S., and
answer the Plaintiffs' First Amended Complaint for Personal Injuries as follows:

I. PARTIES, JURISDICTION AND VENUE

1.1 The HDR Entities are without knowledge or information sufficient to form a
belief as to the truth of the allegations contained in Paragraph 1.1 and, therefore, deny them.

HDR ENTITIES' ANSWER TO PLAINTIFFS' SECOND AMENDED
COMPLAINT & AFFIRMATIVE DEFENSES
PAGE - 1

skellengerbender

1301 - Fifth Avenue, Suite 3401
Seattle, Washington 98101-2605
(206) 623-6501

1 2.2 The HDR Entities are without knowledge or information sufficient to form a
2 belief as to the truth of the allegations contained in Paragraph 2.2 and, therefore, deny them.

3 2.3 The HDR Entities are without knowledge or information sufficient to form a
4 belief as to the truth of the allegations contained in Paragraph 2.3 and, therefore, deny them.

5 2.4 Upon information and belief, a product called "Lockdown" was installed in
6 certain locations during construction at WSP. The HDR Entities are without knowledge or
7 information sufficient to form a belief as to the truth of any other allegations contained in
8 Paragraph 2.4 and, therefore, deny them.

9 2.5 The HDR Entities deny that Mr. Marshall was required to walk on the metal
10 security ceiling to "get to the location of his work." The HDR Entities are without knowledge
11 or information sufficient to form a belief as to the truth of the other allegations contained in
12 Paragraph 2.5 and, therefore, deny them.

13 2.6 The HDR Entities admit that Marshall S. Donnelly fell while performing work
14 in the course of his employment at WSP. Except as specifically admitted herein, the HDR
15 Entities are without knowledge or information sufficient to form a belief as to the truth of the
16 other allegations contained in Paragraph 2.6 and, therefore, denies them.

17 2.7 The HDR Entities admit that HDR Architecture, Inc. was a party in a joint
18 venture agreement with Turner Construction Company relating to design and construction of
19 certain buildings at the WSP. The HDR Entities admit that a security ceiling product called
20 "Lockdown" was installed during construction and that Marshall S. Donnelly was injured.
21 Except as specifically admitted herein, the HDR Entities are without knowledge or
22 information sufficient to form a belief as to the truth of the other allegations contained in
23 Paragraph 2.7 and, therefore, deny them.

24 2.8 Upon information and belief, the HDR Entities admit that an accident occurred
25 in an area referred to as the IMU South inmate visiting hallway on December 29, 2009.
26 Except as specifically admitted herein, the HDR Entities are without knowledge or

1 information sufficient to form a belief as to the truth of the other allegations contained in
2 Paragraph 2.8 and, therefore, deny them.

3 2.9 The HDR Entities admit that Celline was a product manufactured by
4 Environmental Interiors, Inc. Upon information and belief, the HDR Entities admit that a
5 product called "Lockdown" was installed during construction in the area where the accident
6 occurred. Except as specifically admitted herein, all other allegations contained in Paragraph
7 2.9 are denied.

8 2.10 The HDR Entities are without knowledge or information sufficient to form a
9 belief as to the "common and accepted" practices at WSP, as well as what is meant by
10 "entry," and, therefore, deny the allegations contained in Paragraph 2.10. The HDR Entities
11 specifically deny that they know or should have known that walking upon metal security
12 ceilings was a common and accepted practice at the Washington State Penitentiary and other
13 Washington State Department of Corrections facilities.

14 2.11 The HDR Entities are without knowledge or information sufficient to form a
15 belief as to the truth of the allegations contained in Paragraph 2.11, including specifically
16 what is meant by "entry," and, therefore, deny them. The HDR Entities specifically deny that
17 they knew or should have known that persons would walk upon the metal security ceilings.
18 The HDR Entities also specifically deny that walking upon the metal security ceilings was
19 necessary to gain access heating, air conditioning, ventilation, electrical, mechanical,
20 plumbing, and other systems in the plenum space.

21 2.12 The HDR Entities are without knowledge or information sufficient to form a
22 belief as to the truth of the allegations contained in Paragraph 2.12, including specifically
23 what is meant by "entry," and, therefore, deny the same. The HDR Entities specifically deny
24 that "installation of additional fixtures" and/or "installation of additional systems" are
25 "reasonably foreseeable purposes." The HDR Entities specifically deny that they know or
26 should have known that persons would walk upon the metal security ceilings. The HDR

1 Entities specifically deny that walking upon the metal security ceilings was necessary for
2 maintenance, repairs, installation of additional fixtures, and installation of additional systems.

3 **III. FIRST CAUSE OF ACTION:**
4 **PRODUCTS LIABILITY – STRICT LIABILITY**

5 3.1 The HDR Entities incorporate by reference all their answers in the preceding
6 paragraphs as if fully set forth herein.

7 3.2 The HDR Entities do not believe the allegations contained in Paragraph 3.2 are
8 directed at them. The HDR Entities are without knowledge or information sufficient to form
9 a belief as to the truth of those allegations and, therefore, deny them.

10 3.3 The HDR Entities do not believe the allegations contained in Paragraph 3.3 are
11 directed at them. The HDR Entities are without knowledge or information sufficient to form
12 a belief as to the truth of those allegations and, therefore, deny them.

13 3.4 The HDR Entities are without knowledge or information sufficient to form a
14 belief as to the truth of the allegations contained in Paragraph 3.4 and, therefore, deny them.

15 3.5 The HDR Entities are without knowledge or information sufficient to form a
16 belief as to the truth of the allegations contained in Paragraph 3.5 and, therefore, deny them.

17 3.6 The HDR Entities are without knowledge or information sufficient to form a
18 belief as to the truth of the allegations contained in Paragraph 3.6 and, therefore, deny them.

19 3.7 The HDR Entities are without knowledge or information sufficient to form a
20 belief as to the truth of the allegations contained in Paragraph 3.7 and, therefore, deny them.

21 3.8 The HDR Entities are without knowledge or information sufficient to form a
22 belief as to the truth of the allegations contained in Paragraph 3.8 and, therefore, deny them.

23 3.9 The HDR Entities are without knowledge or information sufficient to form a
24 belief as to the truth of the allegations contained in Paragraph 3.9 and, therefore, deny them.

25 3.10 The HDR Entities are without knowledge or information sufficient to form a
26 belief as to the truth of the allegations contained in Paragraph 3.10 and, therefore, deny them.

1 3.11 The HDR Entities are without knowledge or information sufficient to form a
2 belief as to the truth of the allegations contained in Paragraph 3.11 and, therefore, deny them.

3 3.12 The HDR Entities do not believe the allegations contained in Paragraph 3.12
4 are directed at them. The HDR Entities are without knowledge or information sufficient to
5 form a belief as to the truth of those allegations and, therefore, deny them.

6 3.13 The HDR Entities do not believe the allegations contained in Paragraph 3.13
7 are directed at them. The HDR Entities are without knowledge or information sufficient to
8 form a belief as to the truth of those allegations and, therefore, deny them.

9 3.14 The HDR Entities do not believe the allegations contained in Paragraph 3.14
10 are directed at them. The HDR Entities are without knowledge or information sufficient to
11 form a belief as to the truth of those allegations and, therefore, deny them.

12 3.15 The HDR Entities do not believe the allegations contained in Paragraph 3.15
13 are directed at them. The HDR Entities are without knowledge or information sufficient to
14 form a belief as to the truth of those allegations and, therefore, deny them.

15 **IV. SECOND CAUSE OF ACTION:**
16 **NEGLIGENT DESIGN AND CONSTRUCTION**

17 4.1 The HDR Entities incorporate by reference all their answers in the preceding
18 paragraphs as if fully set forth herein.

19 4.2 The HDR Entities deny the allegations contained in Paragraph 4.2.
20 Specifically, the HDR Entities deny that they were negligent in their design or selection of
21 materials at the IMU South Building at the WSP. To the extent that the allegations contained
22 in Paragraph 4.2 are directed at other defendants in this lawsuit, and not the HDR Entities, the
23 HDR Entities are without knowledge or information sufficient to form a belief as to the truth
24 of those allegations and, therefore, deny them.

25 4.3 The HDR Entities deny the allegations contained in Paragraph 4.3.
26 Specifically, the HDR Entities deny that they were negligent in failing to provide adequate or
accurate information, warnings, training and/or instructions to the State of Washington as to

1 the safe and proper access of mechanical, electrical and plumbing systems installed in the
2 plenum spaces above metal security ceilings. To the extent that the allegations contained in
3 Paragraph 4.3 are directed at other defendants in this lawsuit, and not the HDR Entities, the
4 HDR Entities are without knowledge or information sufficient to form a belief as to the truth
5 of those allegations and, therefore, deny them.

6 4.4 The HDR Entities deny the allegations contained in Paragraph 4.4.
7 Specifically, the HDR Entities deny that they were negligent in failing to provide adequate or
8 accurate information, warnings, training and/or instructions to the State of Washington with
9 regard to the load bearing and live load capacity of said metal security ceilings. To the extent
10 that the allegations contained in Paragraph 4.4 are directed at other defendants in this lawsuit,
11 and not the HDR Entities, the HDR Entities are without knowledge or information sufficient
12 to form a belief as to the truth of those allegations and, therefore, deny them.

13 4.5 The HDR Entities deny the allegations contained in Paragraph 4.5.
14 Specifically, the HDR Entities deny that they were negligent in failing to provide adequate or
15 accurate information, warnings, training and/or instructions to the State of Washington with
16 regard to whether individuals could safely walk on said metal security ceilings. To the extent
17 that the allegations contained in Paragraph 4.5 are directed at other defendants in this lawsuit,
18 and not the HDR Entities, the HDR Entities are without knowledge or information sufficient
19 to form a belief as to the truth of those allegations and, therefore, deny them.

20 4.6 The HDR Entities deny the allegations contained in Paragraph 4.6.
21 Specifically, the HDR Entities deny that they were negligent in failing to properly and
22 reasonably locate and label the access panels installed with the metal security ceiling system.
23 To the extent that the allegations contained in Paragraph 4.6 are directed at other defendants
24 in this lawsuit, and not the HDR Entities, the HDR Entities are without knowledge or
25 information sufficient to form a belief as to the truth of those allegations and, therefore, deny
26 them.

1 4.7 The HDR Entities deny the allegations contained in Paragraph 4.7.
2 Specifically, the HDR Entities deny that they were negligent in spacing, locating and labeling
3 the access panels that are part of the metal security ceiling system. The HDR Entities also
4 specifically deny that performance of maintenance, repairs, installation of additional fixtures,
5 and installation of additional systems necessitated or required the person performing the
6 maintenance, repairs or installation to walk on the metal security ceilings. To the extent that
7 the allegations contained in Paragraph 4.7 are directed at other defendants in this lawsuit, and
8 not the HDR Entities, the HDR Entities are without knowledge or information sufficient to
9 form a belief as to the truth of those allegations and, therefore, deny them.

10 4.8 The HDR Entities deny the allegations contained in Paragraph 4.8.
11 Specifically, the HDR Entities deny that they were negligent in spacing, locating and labeling
12 the access panels that are part of the metal security ceiling system, and deny that anything
13 about the way the system was installed would lead a person to reasonably believe he could
14 safely walk on the metal security system. To the extent that the allegations contained in
15 Paragraph 4.8 are directed at other defendants in this lawsuit, and not the HDR Entities, the
16 HDR Entities are without knowledge or information sufficient to form a belief as to the truth
17 of those allegations and, therefore, deny them.

18 4.9 The HDR Entities deny the allegations contained in Paragraph 4.9.
19 Specifically, the HDR Entities deny that they were negligent in selecting or designing the
20 metal security ceiling system, and deny that the system as designed provided inadequate
21 access to systems in the plenum. To the extent that the allegations contained in Paragraph 4.9
22 are directed at other defendants in this lawsuit, and not the HDR Entities, the HDR Entities
23 are without knowledge or information sufficient to form a belief as to the truth of those
24 allegations and, therefore, deny them.

25 4.10 The HDR Entities deny the allegations contained in Paragraph 4.10.
26 Specifically, the HDR Entities deny that they were negligent in selecting or designing the

1 metal security ceiling system and that the system as designed provided inadequate access for
2 reasonably foreseeable maintenance and repairs. To the extent that the allegations contained
3 in Paragraph 4.10 are directed at other defendants in this lawsuit, and not the HDR Entities,
4 the HDR Entities are without knowledge or information sufficient to form a belief as to the
5 truth of those allegations and, therefore, deny them.

6 4.11 The HDR Entities deny the allegations contained in Paragraph 4.11. To the
7 extent that the allegations contained in Paragraph 4.11 are directed at other defendants in this
8 lawsuit, and not the HDR Entities, the HDR Entities are without knowledge or information
9 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

10 4.12 The HDR Entities deny the allegations contained in Paragraph 4.12. To the
11 extent that the allegations contained in Paragraph 4.12 are directed at other defendants in this
12 lawsuit, and not the HDR Entities, the HDR Entities are without knowledge or information
13 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

14 4.13 The HDR Entities deny the allegations contained in Paragraph 4.13. To the
15 extent that the allegations contained in Paragraph 4.13 are directed at other defendants in this
16 lawsuit, and not the HDR Entities, the HDR Entities are without knowledge or information
17 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

18 4.14 The HDR Entities deny the allegations contained in Paragraph 4.14. To the
19 extent that the allegations contained in Paragraph 4.14 are directed at other defendants in this
20 lawsuit, and not the HDR Entities, the HDR Entities are without knowledge or information
21 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

22 4.15 The HDR Entities deny the allegations contained in Paragraph 4.15. To the
23 extent that the allegations contained in Paragraph 4.15 are directed at other defendants in this
24 lawsuit and not the HDR Entities, the HDR Entities are without knowledge or information
25 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.
26

1 4.16 The HDR Entities deny the allegations contained in Paragraph 4.16.
2 Specifically, the HDR Entities had no involvement in labeling the access panels with the
3 labels that read "MEP Access." To the extent that the allegations contained in Paragraph 4.16
4 are directed at other defendants in this lawsuit and not the HDR Entities, the HDR Entities are
5 without knowledge or information sufficient to form a belief as to the truth of those
6 allegations and, therefore, deny them.

7 4.17 The HDR Entities deny the allegations contained in Paragraph 4.17. To the
8 extent that the allegations contained in Paragraph 4.17 are directed at other defendants in this
9 lawsuit and not the HDR Entities, the HDR Entities are without knowledge or information
10 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

11 4.18 The HDR Entities deny the allegations contained in Paragraph 4.18. To the
12 extent that the allegations contained in Paragraph 4.18 are directed at other defendants in this
13 lawsuit and not the HDR Entities, the HDR Entities are without knowledge or information
14 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

15 4.19 The HDR Entities deny the allegations contained in Paragraph 4.19. To the
16 extent that the allegations contained in Paragraph 4.19 are directed at other defendants in this
17 lawsuit and not the HDR Entities, the HDR Entities are without knowledge or information
18 sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

19 4.20 The HDR Entities deny the allegations contained in Paragraph 4.16.
20 Specifically, the HDR Entities had no duty or involvement in the installation, construction or
21 inspection of the ceiling in the referenced location. To the extent that the allegations
22 contained in Paragraph 4.16 are directed at other defendants in this lawsuit and not the HDR
23 Entities, the HDR Entities are without knowledge or information sufficient to form a belief as
24 to the truth of those allegations and, therefore, deny them.

25 4.21 The HDR Entities deny the allegations contained in Paragraph 4.21.
26 Specifically, the HDR Entities deny that they were negligent, that they are liable to the

1 plaintiffs or that they caused the plaintiffs' injuries and/or damages. To the extent that the
2 allegations contained in Paragraph 4.21 are directed at other defendants in this lawsuit, and
3 not the HDR Entities, the HDR Entities are without knowledge or information sufficient to
4 form a belief as to the truth of those allegations and, therefore, deny them.

5 4.22 The HDR Entities deny the allegations contained in Paragraph 4.22.
6 Specifically, the HDR Entities deny that they are liable to the plaintiffs. To the extent that the
7 allegations contained in Paragraph 4.22 are directed at other defendants in this lawsuit, and
8 not the HDR Entities, the HDR Entities are without knowledge or information sufficient to
9 form a belief as to the truth of those allegations and, therefore, deny them.

10 4.23 The HDR Entities deny the allegations contained in Paragraph 4.23.
11 Specifically, the HDR Entities deny that they are liable to the plaintiffs. To the extent that the
12 allegations contained in Paragraph 4.23 are directed at other defendants in this lawsuit, and
13 not the HDR Entities, the HDR Entities are without knowledge or information sufficient to
14 form a belief as to the truth of those allegations and, therefore, deny them.

15 **V. THIRD CAUSE OF ACTION:**
16 **BREACH OF WARRANTY**

17 5.1 The HDR Entities incorporate by reference all their answers in the preceding
18 paragraphs as if fully set forth herein.

19 5.2 The HDR Entities do not believe the allegations contained in Paragraph 5.2 are
20 directed at them. The HDR Entities are without knowledge or information sufficient to form
21 a belief as to the truth of those allegations contained in Paragraph 5.2 and, therefore, deny
22 them.

23 5.3 The HDR Entities do not believe the allegations contained in Paragraph 5.3 are
24 directed at them. The HDR Entities are without knowledge or information sufficient to form
25 a belief as to the truth of those allegations contained in Paragraph 5.3 and, therefore, deny
26 them.

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VI. DAMAGES

6.1 The HDR Entities incorporate by reference all their answers in the preceding paragraphs as if fully set forth herein.

6.2 The HDR Entities deny that they caused any injuries or damages to the Plaintiffs. The HDR Entities are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 6.2 and, therefore, deny them.

6.3 The HDR Entities deny that they caused any injuries or damages to the Plaintiffs. The HDR Entities are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 6.3 and, therefore, deny them.

6.4 The HDR Entities deny that they caused any injuries or damages to the Plaintiffs. The HDR Entities are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 6.4 and, therefore, deny them.

6.5 The HDR Entities deny that they caused any injuries or damages to the Plaintiffs or that they owe Plaintiffs' attorney fees.

6.6 The HDR Entities deny that they caused any injuries or damages to the Plaintiffs or that they owe Plaintiffs' damages or prejudgment interest on those damages.

6.7 The HDR Entities deny that they caused any injuries or damages to the Plaintiffs or that they owe Plaintiffs' costs and/or disbursements.

VII. LIMITED WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE

No response is required by the HDR Entities to this paragraph.

AND BY WAY OF FURTHER ANSWER, DEFENDANT HDR MAKES THE FOLLOWING

VIII. AFFIRMATIVE DEFENSES

8.1 Plaintiffs' complaint fails to state a claim against the HDR Entities upon which relief may be granted.

1 8.2 Any and all damages sustained by the Plaintiffs, which are not herein admitted
2 but are specifically denied, were and are the proximate result of an unavoidable accident due
3 to unforeseen circumstances over which the HDR Entities had no control and for which no
4 claims lay against the HDR Entities.

5 8.3 That at all times herein mentioned, any and all damages sustained by the
6 Plaintiffs, which are not herein admitted but are expressly denied, were and are the proximate
7 result of the acts, omissions and/or negligence of third persons, which acts omissions and/or
8 negligence were not reasonably foreseeable by the HDR Entities, and which intervening acts,
9 omissions and/or negligence bar any and all recovery against the HDR Entities.

10 8.4 That at all times herein mentioned, any and all damages sustained by the
11 Plaintiffs, which are not herein admitted but are expressly denied, shall be apportioned
12 between all responsible persons or entities, whether party defendants or not.

13 8.5 That the individual Plaintiffs may have failed to minimize and mitigate their
14 injuries and damages, and the claims of those plaintiffs are thereby barred.

15 8.6 That such injuries and damage as individual Plaintiffs may have sustained were
16 proximately caused and contributed to by the individual Plaintiff's own negligence.

17 8.7 That the Plaintiffs may have voluntarily and knowingly assumed the risk of
18 sustaining the injuries and damages of which the Plaintiffs complain.

19 The HDR Entities reserve the right to add additional affirmative defenses and/or party
20 defendants as discovery may warrant.

21 **IX. RELIEF REQUESTED**

22 WHEREFORE, the HDR Entities request the following relief:

23 9.1.1 That judgment be entered in favor of the HDR Entities against Plaintiffs, and
24 that Plaintiffs take nothing.

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9.1.2 That the Court award such other and further relief as is just and equitable.

DATED this 4th day of June, 2013.

s/Lindsey M. Pflugrath
Terence J. Scanlan, WSBA No. 19498
Lindsey M. Pflugrath, WSBA No. 36964
SKELLENGER BENDER, P.S.
1301 – 5th Avenue, #3401
Seattle, WA 98101-2605
Telephone: 206-623-6501
Fax: 206-447-1973
E-mail: tscanlan@skellengerbender.com
E-mail: lpflugrath@skellengerbender.com
Attorneys for HDR Architecture, Inc., and HDR
Constructors, Inc.

EXHIBIT C

THE HONORABLE JOAN DuBUQUE

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

JENNIFER B. DONNELLY, as Guardian for
MARSHALL S. DONNELLY; JENNIFER B.
DONNELLY; and KEITH KESSLER, as
Guardian ad Litem for LINLEY GRACE
DONNELLY, a minor child,

Plaintiffs,

vs.

ENVIRONMENTAL INTERIORS, INC., a
foreign corporation; HDR ARCHITECTURE,
INC., a foreign corporation; HDR
CONSTRUCTORS, INC., formerly known as
HDR DESIGN-BUILD, INC., a foreign
corporation; TURNER CONSTRUCTION
COMPANY, a foreign corporation; NOISE
CONTROL OF WASHINGTON, INC., a
Washington corporation; "JANE and JOHN
DOES, 1-20",

Defendants.

NO. 11-2-37290-1 SEA

DEFENDANT TURNER
CONSTRUCTION COMPANY'S
ANSWER TO SECOND
AMENDED COMPLAINT FOR
PERSONAL INJURIES

COMES NOW defendant Turner Construction Company and answers the plaintiffs'

Second Amended Complaint for Personal Injuries herein as follows:

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ANSWER TO SECOND AMENDED COMPLAINT - 1

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I. PARTIES, JURISDICTION AND VENUE

1.1. Answering paragraph 1.1, this defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

1.2. Answering paragraph 1.2, this defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

1.3. Answering paragraph 1.3, this defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

1.4. Answering paragraph 1.4, this defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

1.5. Answering paragraph 1.5, this defendant admits that defendant Environmental Interiors, Inc. is a foreign corporation, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein, and therefore denies the same.

1.6. Admitted.

1.7. Admitted.

1.8. Answering paragraph 1.8, this defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

1.9. Admitted.

1 security ceiling. This defendant lacks knowledge or information sufficient to form a belief as
2 to the truth of the remaining allegations contained therein, and therefore denies the same.

3 2.6 Answering paragraph 2.6, it is admitted that at the place alleged, Marshall
4 Donnelly fell through the security ceiling to the floor below, but the remaining allegations of
5 this paragraph are denied.

6 2.7 Answering paragraph 2.7, it is admitted that HDR Design Build, Inc. and
7 Turner Construction Company formed a joint venture to contract with the Department of
8 Corrections for the design and construction of the North Close Security Compound at the
9 Washington State Penitentiary, which project included the location of Marshall Donnelly's
10 accident, and that defendant Noise Control of Washington, Inc. was a subcontractor to the
11 joint venture which installed a Lockdown security ceiling system manufactured by defendant
12 Environmental Interiors, Inc. at the location of the accident, and it is further admitted that the
13 subject contracts speak for themselves regarding the details of said project. Except as
14 specifically admitted herein, this defendant is without knowledge or information sufficient to
15 form a belief as to the truth of the remaining allegations contained therein, and therefore
16 denies the same.

17 2.8 Answering paragraph 2.8, upon information and belief, this defendant admits
18 that the North Close Security Compound project was a design-build project, that the project
19 was substantially completed at the time alleged, and that an accident occurred in an area
20 referred to as the IMU South inmate visiting hallway on December 29, 2009. Except as
21 specifically admitted herein, this defendant is without knowledge or information sufficient to
22 form a belief as to the truth of the remaining allegations contained therein, and therefore
23 denies the same.

24 2.9 Answering paragraph 2.9, it is admitted that the Celine security ceiling
25 product was at the relevant times sold by defendant Environmental Interiors, and it is further

1 admitted that at one time during the project the subject room was designated to have a
2 Celline ceiling, but the remaining allegations of this paragraph are denied.

3 2.10 Answering paragraph 2.10, this defendant lacks knowledge or information
4 sufficient to form a belief as to the truth of the allegations contained therein, and therefore
5 denies the same.

6 2.11 Denied.

7 2.12 Denied.

8 **III. FIRST CAUSE OF ACTION: PRODUCTS LIABILITY - STRICT LIABILITY**

9 3.1 Paragraph 3.1 simply re-alleges previously stated allegations, and all such
10 allegations are answered as previously set forth herein.

11 3.2 Answering paragraph 3.2, on information and belief it is admitted that a metal
12 security ceiling sold by Environmental Interiors, Inc., and known as "Lockdown" was
13 installed by defendant Noise Control of Washington, Inc. in the alleged location, but this
14 defendant lacks knowledge or information sufficient to form a belief as to the truth of the
15 remaining allegations contained therein, and therefore denies the same.

16 3.3 The allegations of paragraph 3.3 are not directed to defendant Turner, and
17 therefore are neither admitted nor denied.

18 3.4 Denied.

19 3.5 Denied.

20 3.6 Denied

21 3.7 Denied.

22 3.8 Denied.

23 3.9 Denied.

24 3.10 Denied.

25 3.11 Denied.

1 3.12 The allegations of paragraph 3.12 are not directed to defendant Turner, and
2 therefore are neither admitted nor denied.

3 3.13 The allegations of paragraph 3.13 are not directed to defendant Turner, and
4 therefore are neither admitted nor denied.

5 3.14 The allegations of paragraph 3.14 are not directed to defendant Turner, and
6 therefore are neither admitted nor denied.

7 3.15 The allegations of paragraph 3.15 are not directed to defendant Turner, and
8 therefore are neither admitted nor denied.

9 **IV. SECOND CAUSE OF ACTION: NEGLIGENCE**

10 4.1 Paragraph 4.1 simply re-alleges previously stated allegations, and all such
11 allegations are answered as previously set forth herein.

12 4.2 Denied

13 4.3 Denied.

14 4.4 Denied.

15 4.5 Denied.

16 4.6 Denied.

17 4.7 Denied.

18 4.8 Denied.

19 4.9 Denied.

20 4.10 Denied.

21 4.11 Denied.

22 4.12 Denied.

23 4.13 Denied.

24 4.14 Denied.

25 4.15 Denied.

ANSWER TO SECOND AMENDED COMPLAINT - 6

065295.099294#401050.doc

- 1 4.16 Denied.
- 2 4.17 Denied.
- 3 4.18 Denied.
- 4 4.19 Denied.
- 5 4.20 Denied.
- 6 4.21 Denied.
- 7 4.22 Denied.
- 8 4.23 Denied.

9 **V. THIRD CAUSE OF ACTION: BREACH OF WARRANTY**

10 5.1 Paragraph 5.1 simply re-alleges previously stated allegations, and all such
11 allegations are answered as previously set forth herein.

- 12 5.2 Denied.
- 13 5.3 Denied.

14 **VI. DAMAGES**

15 6.1 Paragraph 6.1 simply re-alleges previously stated allegations, and all such
16 allegations are answered as previously set forth herein.

- 17 6.2 Denied.
- 18 6.3 Denied.
- 19 6.4 Denied.
- 20 6.5 Denied.
- 21 6.6 Denied.
- 22 6.7 Denied.

23 **VII. LIMITED WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE**

24 No response is required by defendant Turner to this paragraph.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2013, copies of the following documents:

- 1. DEFENDANT TURNER CONSTRUCTION COMPANY'S ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT; AND THIS
- 2. CERTIFICATE OF SERVICE

were served on counsel at the following addresses and by the method(s) indicated below:

Todd W. Gardner U.S. Mail
 Peter E. Meyers Fax
 Swanson Gardner, P.L.L.C., Attorneys at Law Legal messenger
 4512 Talbot Road South Email
 Renton, WA 98055
Attys for Pltfs

Terence J. Scanlan U.S. Mail
 Skellenger Bender, PS Fax
 1301 Fifth Avenue, #3401 Legal messenger
 Seattle, WA 98101-2605 Email
Attys for HDR Architecture

Patrick N. Rothwell U.S. Mail
 Davis Rothwell Earle & Xochihua PC Fax
 701 5th Ave Ste 5500 Legal messenger
 Seattle, WA 98104-7096 Email
Attys for Environmental Int.

Thomas R. Merrick U.S. Mail
 Rossi F. Maddalena Fax
 Merrick, Hofstedt & Lindsey, P.S. Legal messenger
 3101 Western Avenue, Suite 200 Email
 Seattle, WA 98121
Attys for Noise Control of WA

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1 I declare under penalty of perjury under the laws of the state of Washington that the
2 foregoing is true and correct.

3 Dated this 14th day of May, 2013, at Seattle, Washington.

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5 _____
6 REBECCA C. BARRETT

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EXHIBIT D

The Honorable Mariane C. Spearman

Received

MAY 22 2013

Law Office of
Swanson & Gardner

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

JENNIFER B. DONNELLY, as Guardian for)
MARSHALL S. DONNELLY; JENNIFER B.)
DONNELLY; and KEITH KESSLER, as)
Guardian ad Litem for LINLEY GRACE)
DONNELLY, a minor child,)

NO. 11-2-37290-1SEA

Plaintiffs,)

DEFENDANT NOISE CONTROL OF
WASHINGTON'S ANSWER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT FOR PERSONAL
INJURIES

v.)

ENVIRONMENTAL INTERIORS, INC., a)
foreign corporation; HDR ARCHITECTURE,)
INC., a foreign corporation; HDR)
CONSTRUCTORS, INC., formerly known as)
HDR DESIGN-BUILD, INC., a foreign)
corporation, TURNER CONSTRUCTION)
COMPANY, a foreign corporation, NOISE)
CONTROL OF WASHINGTON, INC., a)
Washington corporation; "JANE and JOHN)
DOES, 1-20",)

Defendants.)

COMES NOW Defendant Noise Control of Washington, Inc. ("Noise Control"), by and through the undersigned counsel of record, and as answer to Plaintiffs' Second Amended Complaint for Personal Injuries ("Complaint"), answers, avers and alleges as follows:

I. PARTIES, JURISDICTION AND VENUE

1.1 Noise Control admits the allegations in paragraph 1.1 of the Complaint.

1.2 Noise Control admits the allegations in paragraph 1.2 of the Complaint based upon information and belief.

NOISE CONTROL OF WASHINGTON'S ANSWER TO PLAINTIFFS'
SECOND AMENDED COMPLAINT FOR PERSONAL INJURIES - 1

MERRICK, HOFSTERT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 802-0610

1 2.9 Noise Control admits that Celline was sold by defendant Environmental Interiors.
2 Noise Control further admits that HDR/Turner in concurrence with the owner, Department of
3 Corrections, State of Washington, changed the specifications of the security ceiling material
4 from Celline to Lockdown during the construction process and prior to Noise Control installing
5 the Lockdown product in the area where Mr. Donnelly fell. Except as expressly admitted herein,
6 the remaining allegations of Paragraph 2.9 are denied.

7 2.10 – 2.12 Noise Control denies the allegations in paragraphs 2.10, 2.11 and 2.12 of
8 the Complaint.

9 **III. FIRST CAUSE OF ACTION: PRODUCTS LIABILITY – STRICT LIABILITY**

10 3.1 Noise Control re-asserts and incorporates by reference all preceding prior
11 responses as if fully set forth herein.

12 3.2 Noise Control denies it designed, manufactured, marketed, sold and/or distributed
13 the Lockdown ceiling. Further Noise Control performed only minor assembly associated with
14 installation which was done compliant with industry standards and manufacturer's specifications
15 for the Lockdown product. The remaining allegations are directed to another defendant and no
16 further response is required. Unless admitted herein the remaining allegations against Noise
17 Control are denied.

18 3.3 The allegations in paragraph 3.3 of the Complaint contain legal conclusions and
19 questions of law to which no response is required. To the extent a responses is required, Noise
20 Control denies it was a "seller" and/or "manufacturer" as defied under RCW 7.72.010 or any
21 other aspect of Washington law. The remaining allegations are directed to another defendant and
22 no further response is required. Unless admitted herein the remaining allegations against Noise
23 Control are denied.

24 3.4 – 3.15 Noise Control denies the allegations in paragraphs 3.4-3.1 of the
25 Complaint.

1 **IV. SECOND CAUSE OF ACTION: NEGLIGENCE**

2 4.1 Noise Control re-asserts and incorporates by reference all preceding prior
3 responses as if fully set forth herein.

4 4.2 – 4.21 Noise Control denies the allegations directed to it in paragraphs 4.2-4.21
5 of the Complaint.

6 4.22 – 4.23 The allegations in paragraphs 4.22-4.23 of the Complaint are directed to
7 other co-defendants and no response is required from Noise Control.

8 **V. THIRD CAUSE OF ACTION: BREACH OF WARRANTY**

9 5.1 Noise Control re-asserts and incorporates by reference all preceding prior
10 responses as if fully set forth herein.

11 5.2 – 5.3 Noise Control denies the allegations set forth in paragraphs 5.2-5.3 of the
12 Complaint.

13 **VI. DAMAGES**

14 6.1 Noise Control re-asserts and incorporates by reference all preceding prior
15 responses as if fully set forth herein.

16 6.2 – 6.7 Noise Control denies the allegations set forth in paragraphs 6.2-6.7 of the
17 Complaint.

18 **VII. WAIVER OF PHYSICIAN-PATIENT PRIVILEGE**

19 7.1 Noise Control acknowledges plaintiffs' waiver of the physician-patient privilege.

20 **VIII. RELIEF SOUGHT**

21 Noise Control denies paragraphs 8.1-8.7, including all subparts.

22 **IX. AFFIRMATIVE DEFENSES**

23 By way of further answer and as affirmative defenses to the allegations made in
24 Plaintiff's Second Amended Complaint, Noise Control asserts as follows:

25 A. Noise Control is entitled to allocation of fault pursuant to RCW 4.22.070 to all
26 parties and nonparties, including to plaintiffs and co-defendants.

1 B. Plaintiffs claims are barred or reduced proportionate to his own course of conduct,
2 failure to exercise reasonable care for his own safety and/or fault in causing his own injuries.

3 C. To the extend Plaintiffs have failed to mitigate their damages, their claims are
4 barred.

5 D. Plaintiffs' claims, in part, fail to state a claim upon which relief can be granted.

6 E. Plaintiff Marshal Donnelly assumed the risk of injury by his conduct and actions.

7 F. Noise Control complied with manufacturer's installation, and further instruction
8 from co-defendants Turner Construction, HDR Architecture and Environmental Interiors as to
9 choice of product, placement and installation.

10 G. Plaintiffs' injuries were caused in whole or part by entities not under the control
11 of Noise Control including that of the Department of Corrections, State of Washington, and that
12 plaintiffs' recovery, if any, be reduced or barred proportionally.

13 H. Plaintiffs' claims are barred in whole or in part because the Washington Product
14 Liability Act does not apply as to Noise Control in this matter.

15 I. Plaintiffs' claims are barred in whole or in part because RCW Title 62A does not
16 apply to defendant Noise Control in this matter.

17 Noise Control reserves its rights to amend, add and/or modify its answer and affirmative
18 defenses as is warranted by discovery in this matter.

19 **X. PRAYER FOR RELIEF**

20 WHEREFORE, having fully answered Plaintiffs' Second Amended Complaint, and
21 having set forth its affirmative defenses, Defendant Noise Control of Washington, Inc. prays:

22 1. That Plaintiffs take nothing herein and that Plaintiffs' Second Amended
23 Complaint be dismissed with prejudice;

24 2. That the trier of fact apportion fault as to all named parties pursuant to RCW
25 4.22.070.

26
NOISE CONTROL OF WASHINGTON'S ANSWER TO PLAINTIFFS'
SECOND AMENDED COMPLAINT FOR PERSONAL INJURIES - 5

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

EXHIBIT E

FILED
KING COUNTY, WASHINGTON

JAN 24 2014

**SUPERIOR COURT CLERK
BY PHILLIP HENNINGS
DEPUTY**

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

JENNIFER B. DONNELLY, as Guardian for
MARSHALL S. DONNELLY; JENNIFER B.
DONNELLY; and KEITH KESSLER, as
Guardian ad Litem for LINLEY GRACE
DONNELLY, a minor child,

Plaintiffs,

v.

ENVIRONMENTAL INTERIORS, INC., a
foreign corporation; HDR ARCHITECTURE,
INC., a foreign corporation; TURNER
CONSTRUCTION COMPANY, a foreign
corporation; NOISE CONTROL OF
WASHINGTON, INC., a Washington
corporation; "JANE and JOHN DOES, 1-20",

Defendants.

NO. 11-2-37290-1 SEA

~~PROPOSED~~

ORDER GRANTING IN PART
AND DENYING PART
DEFENDANT
ENVIRONMENTAL
INTERIORS, INC.'S CR 56
MOTION FOR SUMMARY
JUDGMENT, OR, IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT

~~CLERK'S ACTION REQUIRED~~

This matter came before the Court on January 24, 2014 on Defendant Environmental Interiors' Motion for Summary Judgment. The Court has heard oral argument of plaintiffs' and defense counsel. The Court has considered the pleadings filed in this action and the following:

1. Environmental Interiors' Motion for Summary and Declaration of Patrick N. Rothwell, with deposition excerpts and exhibits;
2. Plaintiffs' Response Opposing Environmental Interiors' Motion for Summary, Declaration of Todd Gardner, and Exhibits 1-15;

PROPOSED ORDER GRANTING IN PART ENVIRONMENTAL
INTERIORS' MOTION FOR SUMMARY JUDGMENT- 1
K:\71 - OneBeacon\Donnelly\FID\MSJ Order 1.21.14.doc

DAVIS ROTHWELL
EARLE & KOCHIHUA P.C.
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 5500
SEATTLE, WA 98104-7047
(206) 622-2295

1 3. Environmental Interiors' Reply on Motion for Summary Judgment, as well as
2 Environmental Interiors' Motion to Strike Richard Gleason's Opinions Regarding
3 Environmental Interior's Failure to Warn;

4 Based on argument and submissions, the Court GRANTS Environmental Interiors'
5 Motion for Summary Judgment in part, and DENIES in part, as follows:

6 1. Plaintiffs' second cause of action for negligence is dismissed as against
7 Environmental Interiors.

8 2. Plaintiffs' third cause of action for breach of warranty is dismissed as against
9 Environmental Interiors.

10 3. Under plaintiffs' first cause of action for product liability, all claims based
11 upon any defective manufacturing or defective design of the Lockdown metal security ceiling
12 system are dismissed as against Environmental Interiors. All claims under the product
13 liability cause of action relating to the number or the placement of Access Panels are
14 dismissed, as against Environmental Interiors.

15 4. Under plaintiffs' first cause of action for product liability, all claims based on
16 alleged breach of warranty are dismissed, as against Environmental Interiors.

17 5. ~~Under plaintiffs' first cause of action for product liability, all claims based~~
18 ~~upon any inadequate warning contained in the product literature, or contained in the~~
19 ~~Operations and Maintenance manual are dismissed, as against Environmental Interiors.~~

20 6. Under plaintiffs' first cause of action for product liability, the only claim
21 remaining against Environmental Interiors is a claim based on failure to warn. ~~The only~~
22 ~~failure to warn claim remaining, as against Environmental Interiors, is the claim that a "Do~~
23 ~~Not Walk" warning should have been imprinted on the side flanges of the Access Panels sold~~
24 ~~by Environmental Interiors. There is no claim that such a "Do Not Walk" warning should~~
25 ~~have been imprinted on the side flanges of the regular Lockdown non-access panels sold by~~
26 ~~Environmental Interiors.~~

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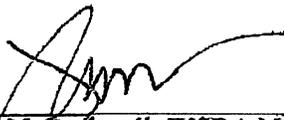
DATED this 24 day of January, 2014.



JUDGE MARIANE C. SPEARMAN

Presented by:

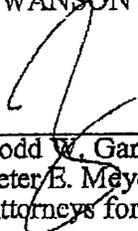
DAVIS ROTHWELL
EARLE & KOCHIHUA, PC



Patrick N. Rothwell, WSBA No. 23878
Suzanne Pierce, WSBA No. 22733
John E. Moore, WSBA No. 45558
Attorneys for Defendant Environmental Interiors

Agreed as to form,
Notice of presentation waived:

SWANSON & GARDNER, PLLC



Todd W. Gardner, WSBA No. 11034
Peter B. Meyers, WSBA No. 23438
Attorneys for Plaintiffs

EXHIBIT F

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----

4 JENNIFER B. DONNELLY, as Guardian for)
 MARSHALL S. DONNELLY, et al.,)
 5) No. 11-2-37290-1 SEA
 Plaintiff,)
 6 vs.)
 7 ENVIRONMENTAL INTERIORS, INC., a) 9-16-14
 foreign corporation, et al.,)
 8) **OPENING STATEMENT**
 Defendants.)

10 -----

11 VERBATIM TRANSCRIPT OF PROCEEDINGS

12 -----

13 Heard before the Honorable Judge Douglass A. North, at King County
 14 Courthouse, 516 Third Avenue, Dept. 30, Seattle, Washington

15 APPEARANCES:

16
 17 TODD W. GARDNER, PETER E. MEYERS, representing the
 18 Plaintiffs;

19 THOMAS R. MERRICK, representing the
 20 Defendant, Noise Control;

21 JOHN W. RANKIN, JR., representing the
 22 Defendant, Turner

23 TERENCE J. SCANLON, LINDSEY PFLUGRATH, representing the
 24 Defendant, HDR Architecture, Inc.

25 REPORTED BY: Kevin Moll, RMR, CRR, CCP

Kevin Moll, RMR, CRR, CCP
 King County Courthouse, Rm. C-912, (206) 296-9709
 Seattle, WA 98104

1 judgment until you've heard all of the evidence.

2 It's also going to be your job to hold me to the
3 promises that I make to you about what the evidence is
4 going to show, and to hold all counsel to that same
5 standard.

6 So as you listen carefully and you use your common
7 sense, you make sure that what we promise to you about
8 the evidence is true.

9 Now, this is a very serious case. You're going to be
10 given a lot of information. But, as I said before, this
11 boils down to some very simple issues.

12 The first is about the Department of Corrections, or
13 you may hear us refer to them as the DOC. Now, the DOC
14 is a statewide government agency, and they own and manage
15 all of the prisons. This is what they do for a living.

16 You're going to hear testimony that they have
17 employees where their sole job is to manage the
18 construction and remodel and alterations to prisons.

19 And so the DOC is a very knowledgeable owner, and they
20 were in charge here. They hired HDR architecture and
21 they hired Turner Construction, and they told them
22 exactly what they wanted designed and built, and that's
23 what HDR designed and that's what Turner built.

24 Now, the second issue that you're going to hear
25 evidence about is that this has never happened before.

1 This type of ceiling product is installed in prisons and
2 jails and also in hospitals and pharmacies and airports
3 across the country, and it has been for decades, and
4 nothing like this has ever happened before.

5 And you're going to hear from our experts that when
6 they did their research, the prisons and jails that they
7 were able to contact are not sending their employees up
8 into these ceilings, not because they have a warning that
9 they shouldn't do so, but because the danger is obvious.

10 Finally, you're going to hear a lot of testimony from
11 experts and see a lot of evidence that will show you that
12 Marshall Donnelly never should have been up in that
13 ceiling.

14 His partner, Justin Griffith, who you saw in that
15 video, knew he should not be up in that ceiling. You're
16 going to hear testimony from Mr. Griffith that he knew
17 that you never put your foot on one of those panels,
18 because you might fall through.

19 And yet on that day, when they were doing that work,
20 Mr. Griffith let his partner go up and walk around on a
21 ceiling that he knew wasn't safe. You're going to hear
22 evidence that Mr. Donnelly's employer, the DOC, should
23 have known that he shouldn't be up in that ceiling,
24 walking around.

25 And the reason they should have known is because that

1 had any questions about whether its employee should have
2 been walking up in that ceiling.

3 And you also heard the testimony of Mr. Hartman.
4 Mr. Hartman was the project architect. He is an employee
5 of HDR. And you heard some very small pieces of his
6 testimony.

7 We're going to bring Mr. Hartman in to testify to you
8 live, so that he can explain to you that it never
9 occurred to him that anyone would ever walk up in that
10 ceiling, because it's not designed to be walked upon.
11 And when you look at those pictures, it's obvious.

12 Finally, you're going to hear about a meeting. Mr.
13 Gardner didn't talk about that meeting very much, but
14 it's been a big focus in this case, and we expect you're
15 going to hear testimony about it.

16 That meeting took place August 17th of 2005, and it
17 was one of 98 meetings that the Department of Corrections
18 participated in. And in that meeting -- it happened very
19 early in the project -- evidence is going to show --
20 there's the meeting that early in the progression of the
21 project.

22 The evidence is going to show, Mr. Hartman's going to
23 tell you, he said that the panel can't support a person's
24 weight. He told the DOC, "It's not going to support you,
25 if you try to walk up there."

1 C E R T I F I C A T E

2 STATE OF WASHINGTON)
3) ss.
4 COUNTY OF KING)

5 I, Kevin Moll, Certified Court Reporter, in and
6 for the State of Washington, do hereby certify:

7 That to the best of my ability, the foregoing is
8 a true and correct transcription of my shorthand notes
9 as taken in the cause of Jennifer B. Donnelly, et al. v.
10 Environmental Interiors, Inc., et al., on the date and
11 at the time and place as shown on page one hereto;

12 That I am not a relative or employee or attorney
13 or counsel of any of the parties to said action, or a
14 relative or employee of any such attorney of counsel,
15 and that I am not financially interested in said action
16 or the outcome thereof;

17
18 Dated this 16th day of September 2014.
19
20

21 _____
22 KEVIN MOLL,
23 King County Official Court Reporter
24
25

EXHIBIT G

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----

4 JENNIFER B. DONNELLY, as Guardian for)
 MARSHALL S. DONNELLY, et al.,)
 5) No. 11-2-37290-1 SEA
 Plaintiff,)
 6 vs.)
 7 ENVIRONMENTAL INTERIORS, INC., a) 9-16-14
 foreign corporation, et al.,)
 8) **OPENING STATEMENT**
 Defendants.)
)

10 -----

11 VERBATIM TRANSCRIPT OF PROCEEDINGS

12 -----

13 Heard before the Honorable Judge Douglass A. North, at King County
 14 Courthouse, 516 Third Avenue, Dept. 30, Seattle, Washington

15
16 APPEARANCES:

17 TODD W. GARDNER, PETER E. MEYERS, representing the
 18 Plaintiffs;

19 THOMAS R. MERRICK, representing the
 20 Defendant, Noise Control;

21 JOHN W. RANKIN, JR., representing the
 22 Defendant, Turner

23 TERENCE J. SCANLON, LINDSEY PFLUGRATH, representing the
 24 Defendant, HDR Architecture, Inc.

25 REPORTED BY: Kevin Moll, RMR, CRR, CCP

Kevin Moll, RMR, CRR, CCP
 King County Courthouse, Rm. C-912, (206) 296-9709
 Seattle, WA 98104

1 have to be kept out of that plenum so that they can't
2 hide stuff up there, weapons, for instance, they can't
3 reach the equipment or commit, God knows, what other kind
4 of mayhem up in that plenum.

5 So prison ceilings have to be built differently than
6 the ones we usually see, like the one above us. They've
7 got to prevent people from pushing up from below.
8 Concrete works really well for that, but it's a budget
9 buster.

10 So Mr. Buursma, DOC's architectural consultant, is
11 going to tell you that the solution used for this problem
12 throughout the country is to use metal security ceilings
13 in prisons.

14 And our expert, we're bringing in a gentleman who used
15 to be -- by the name of Dan Hobbs, who used to be
16 employed by the Federal Bureau of Prisons for over
17 20 years, has been the warden of two prisons himself and
18 has served as a prison consultant since he left the
19 bureau, he's going to tell you the same thing. That's
20 the state of the art, if you will, in prison construction
21 for ceilings.

22 He's seen over 200 prisons in his career, and most of
23 them use these ceilings. And in over 20 years and in the
24 hundreds of prisons he's become familiar with, Mr. Hobbs
25 will tell you he has never heard of an accident like this

1 happening.

2 Now, Mr. Gardner has said that the prison employees
3 assumed that the metal security ceilings were safe to
4 walk on.

5 The plaintiffs claim that since not all areas of the
6 ceiling can be reached through the access panels by a
7 person standing on a ladder, the prison employees had to
8 climb up on the ceiling and walk on it. The evidence is
9 going to show that's false.

10 It was an excuse for the reckless disregard for safety
11 by the Department of Corrections at the prison. The
12 Department of Corrections and its consultant didn't ask
13 for walkable ceilings in the request for proposal,
14 because they're expensive, compared to the metal security
15 ceilings.

16 The DOC and its consultant decided they didn't need
17 walkable ceilings in the prison, in their judgment, and
18 that's why the RFP and HDR's design requirements required
19 access panels for all of the above-ceiling equipment that
20 needed to be reached.

21 You've already seen the -- this is the RFP regarding
22 the access panels, and you've got to provide access
23 doors, panels, walls, ceilings, and floors, as required,
24 for access to mechanical or electrical components.

25 That was what the Department of Corrections RFP

1 C E R T I F I C A T E

2 STATE OF WASHINGTON)
3) ss.
4 COUNTY OF KING)

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13 or counsel of any of the parties to said action, or a
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15 and that I am not financially interested in said action
16 or the outcome thereof;

17
18 Dated this 16th day of September 2014.
19
20

21 _____
22 KEVIN MOLL,
23 King County Official Court Reporter
24
25

EXHIBIT H

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----

4 JENNIFER B. DONNELLY, as Guardian for)
 MARSHALL S. DONNELLY, et al.,)
 5) No. 11-2-37290-1 SEA
 Plaintiff,)
 6 vs.)
 7 ENVIRONMENTAL INTERIORS, INC., a) 9-22-14
 foreign corporation, et al.,)
 8) TRIAL-AM SESSION
 Defendants.)
)

10 -----

11 VERBATIM TRANSCRIPT OF PROCEEDINGS

12 -----

13 Heard before the Honorable Judge Douglass A. North, at King County
 14 Courthouse, 516 Third Avenue, Dept. 30, Seattle, Washington.

15 APPEARANCES:

16 TODD W. GARDNER and PETER MEYERS, representing the
 17 Plaintiffs;

18 THOMAS R. MERRICK and DAVID S. COTTNAIR, representing the
 19 Defendant, Noise Control;

20 JACK RANKIN, representing the
 21 Defendant, Turner

22 TERENCE J. SCANLON and LINDSEY PFLUGRATH, representing the
 23 Defendant, HDR

24
25 REPORTED BY: Kevin Moll, RMR, CRR, CCP

Kevin Moll, RMR, CRR, CCP
 King County Courthouse, Rm. C-912, (206) 296-9141
 Seattle, WA 98104

1 Q. What do you do for a living?

2 A. I am a project manager for a general contractor.

3 Q. Could you go through your work history for us after high
4 school, so the jury has some sense of your occupational
5 history?

6 A. I have been in construction all my life. I have my own
7 ceiling company, followed by working for an interior
8 contractor. Spent ten years working for a general
9 contractor, was a project manager.

10 I was employed by Environmental Interiors, the company
11 who sold the products on this job. I was -- I worked my
12 way to national sales manager, and then after
13 Environmental Interiors, went back to work for a general
14 contractor for the last eight years.

15 Q. What years did you work for Environmental Interiors?

16 A. I believe it was '98 to 2008.

17 Q. Are you here today as a fact witness?

18 A. Yes sir.

19 Q. Not as an expert witness?

20 A. I am not an expert witness.

21 Q. You understand you've talked to counsel for Noise Control
22 as well as to me; is that right?

23 A. Yes, sir.

24 Q. Both counsel wanted you here to answer some questions.

25 Is that your understanding?

1 A. That is my understanding.

2 Q. You also know you only have to come here once, we all get
3 to ask you questions at one time?

4 A. It's a one shot deal. Yes, sir.

5 Q. Okay. What was your role in the sale of the Cel-Line and
6 Lockdown metal security ceilings to Noise Control?

7 A. I was a national sales manager or the sales manager at
8 the time at Environmental. I was involved in the sale.

9 Q. Do you recall Environmental Interiors receiving a
10 telephone call from Scott Cramer back in, roughly, May of
11 2006, asking if workers could walk on the security plank
12 ceilings?

13 A. Yes, sir.

14 MR. MERRICK: Objection, vague.

15 THE COURT: Overruled.

16 BY MR. GARDNER:

17 Q. Tell us your recollection of that call.

18 A. I believe the question came through, whether it was
19 permissible to walk on the plank ceiling system.

20 Q. That's one of the two metal --

21 A. That's the Cel-Line system.

22 Q. Got it. And that's one of the two that was part of this
23 project at the Washington State Penitentiary?

24 A. Yes, sir.

25 Q. What do you recall about the response from Environmental

1 Interiors?

2 A. The standard response was it would void warranty.

3 Q. Did you tell them, no, you can't walk on it?

4 A. Yes.

5 Q. If I asked you to assume that Mr. Cramer believed that
6 once you knew you couldn't walk on Cel-Line, you also
7 cannot walk on Lockdown; is that a fair assumption?

8 A. Yes. Lockdown very rarely came up as a question.

9 Q. Okay. So both of those, the Cel-Line, is the more robust
10 of the two; is that fair to say?

11 A. Yes, sir.

12 Q. Are either one of them supposed to be walked on?

13 A. No.

14 Q. Why can't you walk on it? From Environmental Interior's
15 perspective, why can't you walk on either the Cel-Line or
16 the Lockdown metal system?

17 A. The system was designed to provide contraband and -- the
18 system was designed to be able to stop people from
19 getting up to -- up through them. There was never a
20 design to be walked upon by someone up above. If someone
21 is above your ceiling, that means they're an inmate,
22 breaking up.

23 Q. Got it. So in order to be walked upon, from an
24 engineering standpoint, from the Environmental Interior
25 standpoint, would you need a safety factor in order to

KEVIN MOLL, CSR (206) 296-9709

1 say you can walk on this?

2 A. You would need to have it engineered by an engineer with
3 -- I'm assuming they would have some type of -- they
4 would apply some type of safety factor to it.

5 Q. Well, would walking on, either, the Cel-Line or the
6 Lockdown void the manufacturer's warranty on that
7 product?

8 A. Yes.

9 Q. Why is that?

10 A. Because they're not designed to be walked on.

11 Q. Would walking on them be considered a misuse by
12 Environmental Interiors?

13 A. Yes.

14 Q. Would it be considered a safety issue?

15 A. Yes.

16 Q. Who was Environmental Interior's client or customer in
17 the sale of the metal security ceilings for this project?

18 A. Noise Control.

19 Q. Are you aware of any contact between Environmental
20 Interiors, either yourself or anyone, and with the
21 Washington State Penitentiary or State of Washington DOC
22 people?

23 A. I am not aware of anything.

24 Q. Based on your experience in the industry, would you
25 expect the architect who selected Cel-Line and Lockdown

1 for a project to know that you can't walk on it?

2 MR. MERRICK: Objection, hearsay. Also, speculation.

3 THE COURT: I'll sustain the objection.

4 BY MR. GARDNER:

5 Q. Have you talked to architects before, as part of selling
6 products?

7 A. Yes.

8 Q. When you talked to them, was it your understanding that
9 they know you can't walk on them?

10 A. The system was never designed to be walkable.

11 Q. I get that, but when you talk to the architects who pick
12 these things, it's your understanding they're aware of
13 that? They know that?

14 A. Yes.

15 Q. Okay. Is the thickness or size of the grid used for the
16 Lockdown metal security ceiling the same as any office,
17 pediatrician, acoustical fiberboard panel?

18 A. The profile is the same. It is made out of a heavier
19 metal.

20 Q. It's a little different, in terms of thickness or
21 heaviness; is that fair to say?

22 A. Yes.

23 Q. Are you familiar with Environmental Interiors'
24 installation directions for the Lockdown metal ceiling?

25 A. Yes.

1 whether it would hold weight, that is the plank system?

2 A. Yes, sir.

3 Q. What about the Lockdown? What about the --

4 A. Not that I can recall.

5 Q. Now, Lockdown in this situation was the manufacturer,
6 that is you put together the components and manufactured
7 some of the components and then sold them through Noise
8 Control, which, in turn, was installed for Turner; was
9 that your understanding?

10 A. Yes, sir.

11 Q. In the Lockdown materials that are provided as part of
12 the closeout, this is at the end of the project, when
13 Noise Control turns over the materials to Turner that
14 goes into an O & M manual, in that is contained a
15 Lockdown brochure, and you're familiar with that?

16 A. Yes, sir.

17 Q. There are no warnings in the Lockdown brochure by the
18 manufacturer, that is "Do not walk"; is that correct?

19 A. That is correct.

20 Q. Why not?

21 A. It was always assumed that no one walked on it. It
22 wasn't made to be walkable.

23 Q. All right.

24 A. The system was designed to provide concealment and
25 penetration from down below.

1 walking on it?

2 A. No, sir.

3 Q. You did -- EI did provide a warning through that
4 telephone call with Mr. Cramer, didn't it, not to walk on
5 these systems; is that fair to say?

6 A. Yes.

7 Q. And that warning was put -- you've seen the letter, that
8 warning was put in a letter that then went to HDR/Turner,
9 right?

10 MR. MERRICK: Objection, hearsay.

11 BY MR. GARDNER:

12 Q. Have you seen the letter?

13 A. I've seen the letter.

14 Q. As directed to Turner?

15 A. I can't recall, but if it has Turner's address on it, it
16 would be directed to Turner.

17 Q. Did it accurately provide the information you had
18 provided to Mr. Cramer that, "No, don't walk on these
19 ceilings and it would violate the warranty"?

20 A. Yes.

21 Q. You just don't know, one way or the other, do you,
22 whether they ever passed that on to the State, either
23 directly or through the maintenance manual?

24 A. I do not know whether he passed that on to the State and
25 cannot speak to that.

1 C E R T I F I C A T E

2 STATE OF WASHINGTON)
) ss.
3 COUNTY OF KING)

4
5 I, Kevin Moll, Certified Court Reporter, in and
6 for the State of Washington, do hereby certify:

7 That to the best of my ability, the foregoing is
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9 as taken in the cause of Jennifer Donnelly, et al. v.
10 HDR, et al., on the date and at the time and place as
11 shown on page one hereto;

12 That I am not a relative or employee or attorney
13 or counsel of any of the parties to said action, or a
14 relative or employee of any such attorney of counsel,
15 and that I am not financially interested in said action
16 or the outcome thereof;

17
18 Dated this 22nd day of September 2014.
19
20
21

22 -----
23 KEVIN MOLL,
24 King County Official Court Reporter
25

EXHIBIT I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

JENNIFER B. DONNELLY, as Guardian for MARSHAL J. S. DONNELLY, et al.,)	
)	No. 11-2-37290-1 SEA
Plaintiff,)	
vs.)	
ENVIRONMENTAL INTERIORS, INC., a foreign corporation, et al.,)	<u>10-2-14</u>
)	TRIAL-A.M. SESSION
Defendants.)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Douglass A. North, at King County Courthouse, 516 Third Avenue, Dept. 30, Seattle, Washington.

APPEARANCES:

TODD W. GARDNER and PETER MEYERS, representing the Plaintiffs;

THOMAS R. MERRICK and DAVID S. COTTNAIR, representing the Defendant, Noise Control;

JACK RANKIN, representing the Defendant, Turner

TERENCE J. SCANLON and LINDSEY PFLUGRATH, representing the Defendant, HDR

REPORTED BY: Kevin Moll, RMR, CRR, CCP

Kevin Moll, RMR, CRR, CCP
King County Courthouse, Rm. C-912, (206) 296-9141
Seattle, WA 98104

1 you cost out your facility, you have to weigh out your
2 security. You want a safe and secure facility at all
3 means, but there are a lot of avenues to save money. I
4 think you owe that to taxpayers, to build a facility as
5 frugally as you can.

6 It would make no sense to me to build a solid concrete
7 top in any of these areas that we're talking about, when
8 you have a product like this that works very well.

9 I don't know of any facilities that have had any real
10 trouble with metal security ceilings. It's a product
11 that works, and it works in hundreds of facilities.

12 Q. Have you, in all of the facilities you've visited, and
13 you've discussed ceilings and so forth with other prison
14 experts like yourself over the course of your career,
15 have you ever heard of an accident like this one, like
16 what happened with Mr. Donnelly, where somebody fell
17 through a security ceiling?

18 A. I have not. I took the opportunity to talk with our
19 national safety administrator, who would --

20 MR. GARDNER: Object, hearsay, your Honor.

21 THE COURT: Sustained.

22 MR. GARDNER: Thank you.

23 BY MR. RANKIN:

24 Q. You can't tell us what he said, but was it your
25 understanding that there were -- in all your -- all the

1 time that you've been in the prison industry and in
2 preparing for this case, have you ever heard of anyone
3 having an accident like this?

4 A. No.

5 Q. In using or putting -- installing the metal security
6 ceilings in a prison system, as you did in many prisons,
7 is it typical to provide access through access panels?

8 A. Yes.

9 Q. All right. And what is the purpose of the access panels?
10 Why are they placed where they're placed?

11 A. Well, ideally, those access panels are located where you
12 may have a switch or a damper or some kind of a
13 maintenance need that you can have easy access to.

14 Q. Was -- in the prisons that you were involved with and in
15 your service in the bureau, was anybody allowed to -- any
16 workers allowed to get up and walk on those metal
17 security ceilings for maintenance or for any purpose?

18 A. No.

19 Q. Was that a bureau-wide rule?

20 A. Yes.

21 Q. All right. So what would happen then if there was a need
22 to get to a portion above the ceiling that you couldn't
23 reach from an access panel? What would the maintenance
24 people do?

25 A. Well, you'd simply disassemble that part. You need

1 THE COURT: I'll overrule the objection. I think
2 those are all ripe for cross-examination, but they're not

3 --

4 MR. GARDNER: Thanks, your Honor.

5 THE COURT: So would you get the jury then, please?

6 MR. MERRICK: Jon, you have 736?

7 THE CLERK: Yes. There were two parts of it?

8 MR. GARDNER: That's illustrative only, right?

9 THE COURT: It's an illustrative, and there's only one
10 exhibit, right?

11 MR. MERRICK: All are an illustrative exhibit.

12 THE CLERK: They've been offered and admitted?

13 THE COURT: He'll probably do it in front of the jury.

14 (Jury in)

15 THE COURT: Please be seated. Okay, Mr. Gardner.

16 MR. GARDNER: Thanks, your Honor.

17
18 CROSS-EXAMINATION

19 BY MR. GARDNER:

20 Q. Good morning, Mr. Hobbs.

21 A. Good morning.

22 Q. Mr. Hobbs, would you agree with me that the Washington
23 State Penitentiary personnel, and operations and
24 maintenance, needed to know the answer to the question,
25 "Can the tradesmen walk on these metal security

1 ceilings"?

2 A. Sure, yes.

3 Q. Would you agree that at least by May 23, 2006, -- we'll
4 put Exhibit 38 up, please -- the design-build team,
5 HDR/Turner, they absolutely knew the answer, at that
6 point they knew you can't walk on these metal security
7 ceilings, correct?

8 MR. RANKIN: Objection, your Honor, lacks foundation.
9 He's conflating the systems.

10 THE COURT: I'm sorry, what was that?

11 MR. RANKIN: He's conflating the systems. He's
12 generalizing.

13 THE COURT: Overruled.

14 MR. GARDNER: Thank you.

15 BY MR. GARDNER:

16 Q. Would you agree that by May 23, '06, they knew,
17 absolutely, you can't walk on the metal security
18 ceilings?

19 A. Are you talking about WSP staff?

20 Q. No, I'm talking about HDR/Turner. They're the ones that
21 got this letter that said, "Can other trades walk on the
22 ceilings?" "No, it would void all warranties."

23 MR. SCANLAN: Object to the form of the question to
24 the extent that it refers to HDR. It is not addressed to
25 HDR, and there's no evidence to the court that it was

1 ever delivered to HDR.

2 THE COURT: He can ask his question however he wants,
3 but there is a distinction to be made there.

4 BY MR. GARDNER:

5 Q. HDR and Turner are a joint venture in this matter, do you
6 understand that?

7 A. Yes.

8 Q. They signed as one entity with the State.

9 You saw that in the contract?

10 A. Yes.

11 Q. They're referred to throughout, even by their own note
12 takers at meetings, it's HDR/Turner?

13 A. Uh-huh.

14 Q. You're okay with me using that term, "HDR/Turner," when
15 we refer to the design-build team or the general
16 contractor in this matter?

17 A. Sure.

18 Q. Okay, thank you.

19 So would you agree that at least by May 23, 2006,
20 HDR/Turner absolutely knew the answer?

21 MR. SCANLAN: Repeat the objection. Counsel's
22 misconstruing the evidence.

23 THE COURT: I think it's something you can develop on
24 redirect then.

25 MR. SCANLAN: I will then. Thank you, your Honor.

1 BY MR. GARDNER:

2 Q. Just so I can ask my question, let me just change it a
3 little bit so that Mr. Scanlan will be happy with me.

4 Would you agree that at least by May 23, 2006, Turner,
5 part of the design-build team, knew the answer to the
6 question that metal security ceilings, the ones they
7 picked, were not designed to be walked on, and walking on
8 them would void the warranties?

9 A. Yes.

10 Q. Would you expect that this information about the
11 capabilities of these metal security ceilings would be
12 communicated by a reasonably prudent design-build team to
13 the people at the prison?

14 A. Not necessarily.

15 Q. Okay. Do you remember your deposition, do you,
16 Mr. Hobbs?

17 A. Yes.

18 MR. GARDNER: Move to publish the deposition of Dan
19 Hobbs, taken January 17, 2014.

20 THE COURT: The deposition's published.

21 BY MR. GARDNER:

22 Q. When I hand it to you, Mr. Hobbs, I'm going to ask you to
23 look at page 75, line 25 through 76, line 17.

24 You were under oath, I assume, at that time?

25 A. Yes.

1 Q. You had an opportunity to meet with counsel for Turner
2 before the deposition?

3 A. Yes.

4 Q. You've given depositions before, so you know what the
5 process is?

6 A. Yes.

7 Q. Thank you. Let me hand this to you. If you'd get to
8 page 75 again, sir.

9 Do you remember we videotaped your deposition, sir?

10 A. Yes.

11 Q. Once you get there, just kind of read it through silently
12 to yourself, then we'll play it for the jury.

13 MR. RANKIN: What lines are you talking about?

14 MR. GARDNER: Starting at 75, line 25. It goes
15 through the mid part of the next page.

16 BY MR. GARDNER:

17 Q. Have you had a chance to read through that, Mr. Hobbs?

18 A. Uh-huh.

19 MR. GARDNER: Connie, can you play that, please?

20 (Audiovisual played)

21 BY MR. GARDNER:

22 Q. So Mr. Hobbs, as I understand it, what you told me in
23 January was that manufacturers should know the most, but
24 then the next would be the architect and engineering
25 group, the design-build team in this case, right?

1 A. Uh-huh.

2 Q. Then after that would be the State prison people, because
3 they don't have any experience with this, right?

4 A. Uh-huh.

5 Q. And you would expect that this information would be
6 conveyed to that prison staff, correct? That's what you
7 just told us in the deposition?

8 A. Well, certainly the information should be conveyed.

9 Q. Okay. Well, the --

10 MR. RANKIN: Objection. He's not finished his answer.

11 THE COURT: He's not finished his answer.

12 BY MR. GARDNER:

13 Q. Go ahead, sir.

14 A. And if the facility has a question about that
15 information, they can get that information conveyed to
16 them in a lot of avenues. The one we mentioned,
17 primarily, was to call the manufacturer.

18 Q. I get that. One of those avenues certainly would be for
19 the design-build team to tell them to provide them with
20 the information they've learned in May of 2006.

21 Would you agree with that?

22 A. It's a possibility. My answer earlier was not
23 necessarily. It's possible some bits and pieces of
24 those, that paperwork and documentation, would be
25 forwarded on down. In my experience, it's usually not.

1 It stays in the construction document package.

2 Q. Well, we'll get to that when we get to commission.

3 A. Okay.

4 Q. Let me ask you, is there any evidence that this
5 information that Turner had, at least as of May 23, '06,
6 was ever communicated by HDR/Turner, Noise Control,
7 anyone in that construction team, to the State?

8 A. Not to my knowledge.

9 Q. And you've reviewed the RFP, correct?

10 A. Yes.

11 Q. That's an important document, isn't it?

12 A. Yes, it is.

13 Q. Part of the contract, correct?

14 A. Yes.

15 Q. Is there anything -- you reviewed parts of the operation
16 and maintenance manual; is that true?

17 A. Yes.

18 Q. Is there anything in the operation and maintenance manual
19 that informs the State that you can't walk on the metal
20 security ceilings?

21 A. Not that I saw.

22 Q. So in your opinion, in the exercise of reasonable care,
23 should HDR/Turner have provided a copy of the May 23, '06
24 letter, or at least the information in the first
25 paragraph of that letter, to the WSP?

1 A. Not necessarily.

2 Q. Well, let's talk about that then.

3 Would that depend, in part, upon what the contract
4 says at the time of commissioning, what information
5 should be provided to the State of Washington?

6 A. Specifically?

7 Q. Yeah. Well, specifically, you talked about
8 commissioning, and that's closeout, correct?

9 A. Yes.

10 Q. And you said this is when information about the buildings
11 goes from the design-build team to the owner, right?

12 A. Yes.

13 Q. And you're familiar with these contract provisions,
14 aren't you?

15 A. Yes.

16 Q. And did HDR/Turner provide you with the closeout
17 provisions from this contract to review?

18 A. You're talking about the documents that the contractor
19 turns over to the owner?

20 Q. No, I'm talking about -- well, kind of. But what I'm
21 talking about is the part of the contract that lists the
22 very types of documents that are supposed to be turned
23 over to them?

24 A. That's listed in the RFP.

25 Q. Yeah, okay.

1 Have you reviewed that?

2 A. Yes.

3 Q. Okay. So would you agree that the reasonably prudent
4 design-build team should turn over the documents that are
5 listed in those closeout provisions to the State as part
6 of the OMM?

7 A. Yes.

8 Q. Okay. Well, I think that's important. Let's get to
9 that.

10 A. Excuse me, but not necessarily agreeing that this letter
11 is one of those documents.

12 Q. I understand that. Let's see what you think about that.

13 I'm going to hand you what's been marked as
14 Exhibit 204. This is an HDR exhibit, and this is the
15 conformed copy of the RFP, and let's turn to page 116.
16 This describes closeout committal maintenance manual.

17 Do you see that, sir? Is that the category there?

18 A. Yes.

19 Q. Have you reviewed that before?

20 A. Yes, I think so.

21 Q. Well, first let's confirm that the RFP is, in fact, part
22 of the contract between the State and HDR/Turner.

23 If we could go to Exhibit 3, page 17, please. Let's
24 see. That top mark, Connie, that lists everything under
25 1.1.

1 So documents include -- this is the very first part of
2 that contract. I assume you saw the contract between the
3 State and HDR/Turner?

4 A. Okay.

5 Q. And it lists things that are specifically made part of
6 the contract, and it lists RFP documents in that first
7 line, correct?

8 A. Yes.

9 Q. If we go to the second page -- the bottom of this page,
10 Connic. Okay.

11 You're familiar with these kinds of provisions that
12 say when there's multiple documents included as part of a
13 contract, you've got to figure out which is more
14 important than the other, what takes precedence?

15 A. Yes.

16 Q. Go to the second page of that document. Just the top
17 part of that, top three or four lines would be fine.

18 Annex A was the RFP, right? Remember that from the
19 page before?

20 A. Uh-huh.

21 Q. And so annex A would be considered to have precedence
22 over construction documents.

23 Is that how you read that?

24 A. Okay.

25 Q. Okay. So let's go to the closeout part of the contract.

1 I want you to take a look, thumb through that, and does
2 that provide a list of the documents required by the
3 contract to be sent by HDR/Turner with the OMM to the
4 State?

5 A. It does. There may be -- yes.

6 Q. Why don't you turn three pages, to page 119, and we'll
7 look at V, which is -- it's the same as we have as
8 Exhibit 44, so if we could put up 44, 6, Connie.

9 I'd like you to look at V, as in Victor. Enlarge
10 that. I want you to read that for us, please.

11 Can you read that out loud for us, please, sir, V?

12 A. Me? I'm sorry.

13 Q. Yes, just V, as in Victor, could you read that out loud
14 for me, please?

15 A. Yes. "Warranties and bonds, include copies of warranties
16 and bonds and lists of circumstances and conditions that
17 would affect validity of warranties or bonds."

18 Q. Mr. Hobbs, does that mean that if the contractor's aware
19 of certain actions, circumstances, or conditions that
20 could impact the validity of a warranty, they're required
21 to include that in the OMM; is that fair to say?

22 A. That's a direction, yes.

23 Q. And that's what the reasonably prudent contractor should
24 do, is follow what they've agreed to, in terms of what
25 information to turn over at the time of commission or

1 closeout.

2 Agree with that?

3 A. Yes.

4 Q. Okay. Well, let's look then at the language of
5 Exhibit 38, please. That first paragraph.

6 It says, "To answer your question, 'Can other trades
7 walk on the ceilings,' we asked Environmental Interiors,
8 the answer was, 'No, it would void all warranties.'"

9 Now, is it fair to read that as that walking on the
10 ceiling would be a circumstance or condition that would
11 impact the validity of the warranty?

12 A. You know, again, and we've had this discussion earlier,
13 there are different sets of documents involved in this
14 whole exercise, that's a construction document. The
15 manufacturers that are responsible for the warranties
16 have warranty information that they give to the owner.
17 Sometimes those are very there, and sometimes there's not
18 a lot of information there about information that voids a
19 particular warranty.

20 MR. GARDNER: I appreciate your answer, but it wasn't
21 an answer to my question.

22 MR. RANKIN: Your Honor, he's not finished with his
23 answer, sir.

24 THE COURT: Are you finished sir?

25 THE WITNESS: Yes.

1 BY MR. GARDNER:

2 Q. I appreciate that, but that really didn't answer my
3 question.

4 What I asked was, very simply, does this letter tell
5 Turner, give Turner information that walking on the
6 ceilings would void the warranties?

7 A. As part of the warranty process.

8 Q. I'm just asking, I mean, this letter, it's not that --
9 this is not that difficult.

10 Does this tell Turner about a circumstance or
11 condition that would impact the validity of the warranty?

12 A. Yes.

13 Q. Okay. And doesn't the contract require -- and you agreed
14 with me that the reasonably prudent design-build team
15 would follow that language -- doesn't the contract
16 require that a list of conditions or circumstances that
17 would affect the validity of the warranty be included at
18 commissioning, at the time you turn over information to
19 the State, and the OMM?

20 A. If the question or the clarification we're trying to make
21 is is this document that should have been included in the
22 warranty package that went to the owner, my answer is,
23 no, not necessarily. Could have been, but it's not part
24 of that package that the contract is calling for.

25 Q. Well, the contract calls -- you know, I don't mean to

1 beat a dead horse here, but we're going to have to get
2 down to the bottom of this, Mr. Hobbs.

3 The contract requires that HDR/Turner provide the
4 State with a list of circumstances and conditions that
5 would impact warranties.

6 You agree with that?

7 A. Yes.

8 Q. And walking on the ceiling is a condition that would
9 impact the warranty, correct? Would you agree with that?

10 A. But how that --

11 Q. Hang on. I do need an answer to the question.

12 Is walking on the ceiling a condition that would
13 impact the warranty on these ceilings?

14 A. Yes, yes.

15 Q. And Turner knows this now, don't they? As of May 23,
16 '06, they know this?

17 A. Yes.

18 Q. Did they provide you with the deposition testimony or the
19 trial testimony of Jeremy McMullin, the Turner employee
20 responsible for putting together the OMM?

21 A. Yes, I think so.

22 Q. Didn't he say that he agreed that this letter should have
23 been included in the OMM, because of, both, safety and
24 warranty concerns? He did, didn't he?

25 A. My response would be there are probably a dozen things

1 that void the warranty.

2 Q. You know, I didn't --

3 A. So why are we --

4 MR. GARDNER: Your Honor, I do need to have him answer
5 my question, please.

6 THE COURT: If you could answer his question.

7 THE WITNESS: Okay.

8 BY MR. GARDNER:

9 Q. Didn't Jeremy McMullin, the person in charge of putting
10 together the OMM, say that this letter should have gone
11 in the OMM for, both, safety and warranty reasons?

12 A. I honestly don't remember that.

13 Q. Okay, so we'll go back to that testimony in front of the
14 jury, but I'll just ask you to -- you did read his dep,
15 though, didn't you?

16 A. Yes.

17 Q. Didn't he say that in his deposition?

18 A. I'd like you to show it to me. Probably so. I'm not
19 telling you it wasn't there.

20 Q. Okay. Let me just read you some questions and answers
21 from Mr. McMullin's trial testimony.

22 "At the time you prepared the operation and
23 maintenance manual, if you had recalled that May 23, '06
24 letter, would you have put it in there?

25 "ANSWER: I probably would have brought up a question.

1 I don't know if I would have put it in there,
2 specifically.

3 "QUESTION: Once you assembled the operation and
4 maintenance manual, what did you do with them?

5 "ANSWER: I delivered them to the Department of
6 Corrections."

7 And then -- and I'll find it at a break, so I don't
8 waste more of the jury's time.

9 Do you recall reading his deposition?

10 A. Yes. But what you read there --

11 Q. I agree with you. I haven't found the right spot yet,
12 and I will later, I promise you, if not with you, with
13 one of their other witnesses.

14 Fair enough?

15 A. Sure.

16 Q. Now, you also, I think earlier, agreed that the
17 Washington State Penitentiary, they needed this
18 information about the metal security ceilings, correct?

19 A. Yes.

20 Q. And by contract, the reasonably prudent design-build team
21 would have included what they had, information that they
22 knew that walking on these things voids the warranties,
23 right?

24 A. Well, I think we're further discussing the same issue.

25 Q. You'd agree with me, wouldn't you?

1 A. That they needed the information? Absolutely.

2 Q. And that the design-build team had an obligation by
3 contract to provide it?

4 A. They had an obligation to provide warranty information.
5 Again, the different manufacturers, some are very in
6 depth, some are -- will hardly list anything.

7 If I could just add, one of the reasons, I think, that
8 some of the product manufacturers don't list everything
9 in the warranty is it's so easy to leave something out,
10 if you start listing individual things that void your
11 warranty.

12 Q. This wouldn't have been too hard to list, would it?

13 "Just don't walk on it"? "Don't walk on it." That would
14 have been easy, right?

15 A. Well, would you list that one, without adding the other
16 things that would void the warranty?

17 Q. What other things did they know about the metal security
18 ceilings that would void it, that they hadn't passed on?
19 Is there more?

20 A. That would void, yes, there's quite a few.

21 Q. But did they know about -- Turner knew about this one,
22 right? Turner specifically knew about this one?

23 A. I'm sure Turner knew about all of the conditions that
24 would void the warranty.

25 Q. And, in fact, what happened was they were getting

1 questions from subs who didn't know whether you could
2 walk on these metal security ceilings, right?

3 A. Sure.

4 Q. And that's because you can't necessarily assume that a
5 worker is going to know more than the architects and
6 engineers on the project, can you?

7 A. But in the course of the project, they could have gotten
8 a request, "Can we relocate one of the hanging wires or
9 can we move a strut to put our conduit through?" Those
10 are all things that come up in the construction project
11 that are addressing -- addressed on the construction
12 project.

13 Q. Well, I understand your point, but Mr. McMullin didn't
14 offer up any of those excuses, did he, in his deposition?
15 He just said it should have been included?

16 MR. SCANTAN: Object to the argumentative form of the
17 question.

18 THE COURT: Sustained.

19 BY MR. GARDNER:

20 Q. Let's get to the conduct of Marshall Donnelly, because
21 you're critical of my client.

22 Were there any rules at the Washington State
23 Penitentiary that prohibited Marshall from walking on
24 these ceilings on the date he was walking on them? Was
25 he violating any rules prohibiting him from being up

1 there?

2 A. Well, you know, he was certainly entering an unsafe work
3 environment.

4 Q. You know, this is my chance to ask you questions. I need
5 an answer to that question.

6 Were there any rules that said, "Don't walk on the
7 metal security ceilings," or any of the security
8 ceilings, at the time he went up there?

9 A. You know, I don't know the answer to that. I would have
10 to dig more deeply into the -- into the safety
11 regulations. I'm sure that OSHA or WISHA and other
12 places have the regulations that prohibit that, so the
13 answer probably is yes.

14 Q. Now, have you seen any rule or regulation that says,
15 "Don't walk on metal security ceilings"?

16 A. No, but it says, "Don't walk on an unsafe work platform."

17 Q. They need to know it's unsafe to know not to walk on it;
18 isn't that true?

19 A. And there's a way you make that determination.

20 Q. There are lots of ways, but is the State of Washington a
21 defendant here?

22 A. No.

23 Q. Is there going to be any questions that the jury has to
24 answer about the State of Washington, that you know of?

25 MR. SCANLAN: Your Honor, I'd request a sidebar.

1 THE COURT: Okay.

2 MR. GARDNER: I'll just move on.

3 THE COURT: Let's move on.

4 MR. SCANLAN: I'd still request a sidebar, your Honor.

5 THE COURT: All right.

6 (Bench conference)

7 THE COURT: Do you want to go ahead, Mr. Gardner.

8 MR. GARDNER: Thanks, your Honor. Let me ask that
9 question again.

10 BY MR. GARDNER:

11 Q. Is there any rule -- was there any rule, before Marshall
12 got hurt, at the WSP that prohibited electricians or any
13 of the other trades from walking on metal security
14 ceilings or any security ceilings, for that matter?

15 A. Well, it would have been worded as an unsafe work
16 platform.

17 Q. Did you see a rule that had defined metal security
18 ceilings specifically as an unsafe work platform,
19 something that, you know, was a rule out there that
20 Marshall will be looking at and go, "This says don't walk
21 on these metal security ceilings"?

22 A. But I don't think the rule would have been specific on
23 ceilings, because there are a lot of unsafe work
24 platforms.

25 Q. They did have specific rules after Marshall got hurt,

1 correct?

2 A. Yes, sir.

3 Q. And that was appropriate?

4 A. Yes.

5 Q. Would you expect Marshall Donnelly to know more about the
6 capabilities and limitations of metal security ceilings
7 than the architect and engineer on the design-build team?

8 A. No.

9 Q. Well, did you read -- you read, both, Mr. Machinski's
10 deposition --

11 A. Yes.

12 Q. -- and Mr. Hartman's deposition, correct?

13 A. Yes.

14 Q. And didn't Mr. Machinski testify that he didn't know
15 whether you could or could not walk on metal security
16 ceilings?

17 A. I think so.

18 Q. He's the engineer, right? You wouldn't expect Marshall
19 to know more than him, would you?

20 A. The specific load-bearing capabilities --

21 Q. Whether or not he could walk on them?

22 A. Those factors, probably not. The fact that this is
23 possibly an unsafe work platform, yes. Both of them.

24 Q. Both of them.

25 Now, you expect that Mr. Hartman would not know you

1 could walk on these things? He's the architect, do you
2 recall that?

3 A. Yes.

4 Q. Again, so you're holding Marshall -- as I get it, you're
5 holding Marshall to a higher standard, in terms of
6 understanding whether you can or cannot walk on these
7 things, than the architect and the engineer who actually
8 picked these ceilings?

9 MR. RANKIN: Objection, argumentative, your Honor.

10 MR. GARDNER: It's cross.

11 THE COURT: Overruled.

12 A. As I recall, Mr. Hartman was talking more about the plank
13 system than the Lockdown system.

14 Was that not the basis in his deposition?

15 BY MR. GARDNER:

16 Q. I don't think it is true, but we can get to that later.
17 I think he talked about both of them.

18 You're not supposed to walk on either one of them,
19 right?

20 A. Right.

21 Q. And if you know you're not supposed to -- strike that.
22 I'll move to a different topic here.

23 So let's talk again about what Marshall Donnelly did.

24 Would you agree, Mr. Hobbs, that if the Lockdown
25 ceiling is properly attached to the walls, properly

1 installed, that it would hold the weight of a worker?

2 MR. MERRICK: Objection, lacks foundation.

3 MR. RANKIN: Beyond the scope.

4 THE COURT: Sustained.

5 MR. GARDNER: But it has to do with his conduct,
6 Marshall's conduct.

7 THE COURT: It's not the area of expertise of this
8 witness.

9 BY MR. GARDNER:

10 Q. Well, would you believe that if it had held Marshall for
11 metal security ceilings, Marshall and Justin, for over
12 ten times, would you agree that at least it held him
13 those times, correct?

14 MR. MERRICK: Objection, mischaracterizes the
15 evidence.

16 THE COURT: Sustained.

17 MR. GARDNER: It's hard for me to get to his objection
18 as a criticism of Marshall without getting into this. He
19 had opinions about this before.

20 THE COURT: You can't go that way. You're going to
21 have to find another way to do it.

22 MR. GARDNER: Okay.

23 BY MR. GARDNER:

24 Q. You looked at this ceiling, right?

25 A. Yes.

1 Q. You know a lot more about metal security ceilings than
2 Marshall Donnelly, right?

3 A. I don't know.

4 Q. Well, presumably you would. I mean, look at your
5 background.

6 Would you agree -- you looked at Marshall's
7 deposition, his background, you looked at everything,
8 right?

9 A. Yes.

10 Q. So would you agree you know more about Lockdown metal
11 security ceilings than Marshall?

12 A. I believe so.

13 Q. When you looked at it yourself, you reached the
14 conclusion that, from looking at it, if properly attached
15 to walls and installed, it would probably hold the weight
16 of a worker? That's how it would appear to an individual
17 looking at it?

18 MR. RANKIN: Objection, lacks foundation.

19 THE COURT: There isn't a foundation, unless he said
20 that when you deposed him. I don't know what happened in
21 his deposition.

22 MR. GARDNER: Oh, yeah, there is. I'm happy to play
23 that.

24 If you could turn to page 80 of your deposition there,
25 sir, and I'll get this out of your way. And I'm looking

1 at line 23. I'll give you a chance to get there. And
2 that runs through page 81, line six.

3 BY MR. GARDNER:

4 Q. Do you see that, sir?

5 A. Yes.

6 MR. GARDNER: Your Honor, would you like to read that
7 before I play it and be satisfied that it --

8 MR. RANKIN: Where are you, Counsel? Page 80, what?

9 MR. GARDNER: 80, line 23, to 81, line -- I lost my
10 page here. 81, line six.

11 THE WITNESS: Line four.

12 MR. GARDNER: Through six, actually. This is cross.
13 Do you want to take a look at it?

14 THE COURT: I'll take a look at it then.

15 MR. GARDNER: It's the prior page 80, line 23, 81,
16 line six.

17 THE COURT: Okay. I think you can cross-examine him
18 on that.

19 MR. GARDNER: Thank you.

20 MR. RANKIN: I'm going to object, for the record, your
21 Honor. There's no foundation as given in the answer.

22 THE COURT: Your objection's noted.

23 MR. GARDNER: Okay, Connie, that would be clip 1080.

24 (Audiovisual played)

25 BY MR. GARDNER:

1 Q. So in looking at what Mr. Donnelly did, right or wrong,
2 his assessment, in looking at this ceiling, that it will
3 hold his weight, you would agree is correct, so long as
4 it's well attached, or well installed?

5 A. Well, they --

6 MR. MERRICK: Object, assumes facts, mischaracterizes,
7 lacks foundation.

8 THE COURT: Overruled. You can clarify in redirect.

9 A. The workers were up there several times, so obviously it
10 could carry weight. I hope I didn't say anything to
11 contradict what I said there.

12 BY MR. GARDNER:

13 Q. I appreciate that. In fact, that might be --

14 MR. SCANLAN: Your Honor, ask that he be allowed to
15 finish his answers.

16 MR. GARDNER: I did jump in. I apologize, Mr. Hobbs.

17 A. You know, and it certainly is a well-engineered,
18 well-hung system. It has to be. It has to meet a lot of
19 testing standards, but it's obviously not designed or
20 expected to be a work platform to carry a human being.

21 BY MR. GARDNER:

22 Q. The whole key is just how Marshall's supposed to get that
23 information, correct?

24 MR. RANKIN: Objection, argumentative.

25 THE COURT: Overruled.

1 BY MR. GARDNER:

2 Q. You'd agree with that?

3 A. Yes, and I have clear comments on how I think that should
4 have happened.

5 Q. I understand that. And the fact that it will hold the
6 weight of a worker when properly attached, as you put it

7 --

8 MR. MERRICK: Objection, mischaracterizes, assumes
9 facts, lacks foundation.

10 THE COURT: Overruled.

11 BY MR. GARDNER:

12 Q. Let me start over.

13 Mr. Hobbs, given the fact you agree that properly
14 attached, it probably would hold the weight of a worker,
15 could this explain why you haven't heard about other
16 workers falling through metal security ceilings like this
17 prior to Marshall's accident?

18 MR. MERRICK: Same objection.

19 MR. RANKIN: And speculation.

20 THE COURT: Overruled.

21 BY MR. GARDNER:

22 Q. Go ahead, sir.

23 A. Well, that's certainly a possibility, but it's more
24 likely that we haven't heard of those accidents because
25 it's pretty well accepted in the industry that you don't

1 walk on those ceilings.

2 Q. Well, you've been in this industry for a long time,
3 though, haven't you?

4 A. Yes.

5 Q. Do you think an electrician would realize that the poles
6 -- and if we could put up 73, 88, that these poles are
7 compression struts rather than support poles for the
8 system? Do you think the average electrician walking up
9 into that environment would know that?

10 A. I don't know.

11 Q. And if we look at 73, 101, even with the insulation moved
12 out of the way, they're still notched and right in, on
13 top of the grid; isn't that correct?

14 A. Yes.

15 Q. In order for an electrician to figure out that, gee,
16 they're not holding up the ceiling, they're pushing it
17 down, they would have to get down and actually inspect
18 the base of that, right?

19 A. Probably so, yes.

20 Q. Now, you're aware of Mr. Garside's testimony during
21 trial?

22 A. Can you tell me more?

23 Q. Do you know who Mr. Garside is?

24 A. Well, I'm asking you to help me with that.

25 Q. Then I will. There's a lot of people you viewed?

1 A. 900 pages of it.

2 Q. I know, buried in paper. I do know that. I think the
3 deposition of the Environmental Interiors's
4 representative, Anthony Serrano --

5 A. Yes.

6 Q. Mr. Garside's also from Environmental Interiors at the
7 time, and he was the person kind of spearheading this
8 project for EI?

9 A. Yes.

10 Q. And he testified in trial.

11 Would you agree that the grid used for the metal
12 security ceiling is beefier or heavy than the grid for a
13 regular acoustical ceiling?

14 A. Absolutely.

15 Q. So any statements by other people saying that, "Oh, these
16 grids are identical, this ceiling, the grid's identical,"
17 that's not true, is it?

18 A. No.

19 MR. RANKIN: Objection, your Honor. He's asking the
20 witness to speculate about others' testimony.

21 THE COURT: Well, I'll overrule. I think that it's
22 reasonable grounds for cross. You can clarify on
23 redirect.

24 MR. GARDNER: Thank you.

25 BY MR. GARDNER:

1 Q. Mr. Hartman, I believe you asked me where Mr. Hartman
2 testified about ceilings.

3 You reviewed his depositions; is that correct?

4 A. Yes.

5 Q. Did he have any knowledge that anybody at Turner knew
6 anything about these metal security ceilings? Do you
7 remember that at all?

8 MR. SCANLAN: Can you identify what you're referring
9 to, Counsel?

10 MR. GARDNER: Yes. 918, page 61 --

11 MR. SCANLAN: I'm sorry, I can't hear you.

12 MR. GARDNER: 918, page 61, line 20, I believe.

13 THE WITNESS: Okay.

14 BY MR. GARDNER:

15 Q. Did Mr. Hartman have any knowledge about whether you
16 could walk on these metal security ceilings?

17 A. Probably not.

18 Q. Now, again, he is the architect who is in charge of this
19 project; is that right?

20 THE COURT: If you could answer out loud, please, sir.

21 A. Yes.

22 BY MR. GARDNER:

23 Q. We also -- you already recognized that Mr. Machinski, the
24 engineer in charge of the project, he testified in his
25 deposition that he didn't know you couldn't walk on these

1 things, right?

2 A. Okay.

3 Q. Do you agree with that?

4 A. Yes.

5 Q. And are you aware that Ms. Ayala testified and said
6 Mr. Machinski was usually the person who moderated these
7 progress meetings?

8 MR. MERRICK: Objection, hearsay.

9 THE COURT: Overruled.

10 A. Okay.

11 BY MR. GARDNER:

12 Q. Are you aware he testified on page 26 of his deposition
13 that he was the liaison with the State? He was the
14 person who was supposed to be answering their questions?

15 A. Okay.

16 Q. Well, he doesn't even know the answer, and he's the guy
17 who is the engineer in charge of the project.

18 Why would you expect Marshall Donnelly to figure it
19 out on his own?

20 MR. SCANLAN: Object to the argumentative form of the
21 question.

22 THE COURT: Sustained.

23 BY MR. GARDNER:

24 Q. In your opinion, Mr. Hobbs, would it have been dangerous
25 or misleading for anyone at HDR/Turner to suggest or tell

1 a Washington State Penitentiary representative that you
2 can walk on these metal security ceilings?

3 A. Yes.

4 Q. And you read the testimony of Chris Bowman, correct?

5 A. Yes.

6 Q. And didn't he say that Rod Jensen told him you can walk
7 on these things?

8 A. Well, yes, I read that deposition very closely. There's
9 a lot of vagueness about who said what and where.
10 Certainly reinforces what we were talking about earlier,
11 that there's a lot of information at those meetings
12 that's thrown out. Sometimes you don't even know who
13 asked the question, sometimes you don't know who
14 answered.

15 Q. Go ahead. I'm sorry.

16 MR. RANKIN: Let him finish.

17 MR. GARDNER: I'm trying, Jack. I didn't mean to step
18 on you here.

19 BY MR. GARDNER:

20 Q. Who was Rod Jensen? How high up in the hierarchy was he
21 at the time, when he was working there?

22 A. I'm not sure. I'm not sure what his role was at that
23 particular meeting.

24 Q. Well, wasn't he the man completely in charge of the
25 project for HDR/Turner? Wasn't he the lead guy?

1 A. We'll concede that, if that's what you're telling me.

2 Q. If you can't rely on the lead guy from HDR/Turner, who
3 can you rely on?

4 MR. RANKIN: Object, argumentative.

5 THE COURT: Sustained.

6 MR. GARDNER: Please go ahead.

7 A. If we're going to all agree that there was some confusion
8 about walking on the ceilings, we're all there.

9 BY MR. GARDNER:

10 Q. But you also told me -- and I think you just agreed to
11 it -- that it would be dangerous or misleading for
12 HDR/Turner to tell somebody from the State you can walk
13 on these things, right?

14 A. Yes, and certainly I never saw that in any depositions.

15 Q. Well, you saw that in Mr. Bowman's deposition?

16 A. No, sir.

17 Q. He was told you can walk on these things. He testified
18 in court to that?

19 A. Well, that was a -- that was very vague, that whole
20 conversation, and if you have the specifics of it, where
21 he said that and he knew who said it and he knew the
22 answer, then I overlooked it. I haven't seen that.

23 MR. GARDNER: I'm going to ask you to assume that it's
24 in his deposition, he said it in court, if he hadn't said
25 it in his deposition, we certainly would have heard it on

1 cross.

2 You read his deposition, right?

3 A. Yes.

4 Q. That's going to be an important thing for you to
5 consider, isn't it? Wouldn't you read that in some
6 detail?

7 A. Certainly.

8 Q. Now, Mr. Jensen, are you aware that he was let go by
9 Turner?

10 A. I think I recall that, yes.

11 Q. Do you recall that Mr. Machinski said it was for
12 performance reasons?

13 A. Yes.

14 Q. Now, is it your opinion that what the workers should do,
15 if they can't reach something they need to reach through
16 an access panel, is disassemble or take apart this
17 ceiling?

18 A. Yes.

19 Q. You're an expert in metal security ceilings, right,
20 including these EI ceilings, these Environmental
21 Interiors ceilings?

22 A. I'm very familiar with them.

23 Q. You certainly, I assume, are aware that Environmental
24 Interiors's position is that you're not supposed to take
25 them apart? You're aware of that?

1 A. Yes.

2 MR. SCANLAN: Objection, mischaracterizes testimony.

3 THE COURT: I think it's within reasonable bounds of
4 cross. You can clarify on redirect.

5 MR. SCANLAN: Your Honor, he's flat out
6 misrepresenting what Mr. Garside said.

7 MR. GARDNER: Well, let's turn to Mr. Garside's
8 testimony. That's page 34. Let me take a picture and
9 let's find it here.

10 MR. GARDNER: 32, line 17, testified to this in court.
11 "Are the Lockdown panels, regulars ones, meant to be
12 removable.

13 "ANSWER: No.

14 "QUESTION: Are they meant to be permanent?

15 "ANSWER: Yes."

16 Is that your understanding of what the manufacturer
17 says about these products?

18 A. Yes.

19 Q. And if they're disassembled, if someone has to take one
20 out for whatever reason, that could damage it, you
21 understand that?

22 A. The system is interlocked, where it meets all the testing
23 requirements and seismic requirements, and, yes, if you
24 have to disassemble some of it, you jeopardize the
25 warranty. You can still do that. If you damage one of

1 the panels, you replace it with a new one. So it's
2 common to access those ceilings through the panels.

3 Q. Did anyone tell the State about that? Do you see any
4 information in the OMM or anywhere else explaining to the
5 State, if you take these apart, you may damage them, void
6 warranty, see any information about that?

7 A. No, sometimes the information is available. Sometimes,
8 with some research, it will help you address work
9 projects.

10 Q. Okay. You had some comments about not having seen
11 security levels A and B.

12 Do you recall that, sir?

13 A. Yes.

14 Q. There are security levels 1 and 2, correct?

15 A. Yes.

16 Q. Okay. And aren't they very, very consistent on that ASTM
17 2322, as the State understood security level A and B?

18 A. The security level rating system that I've been familiar
19 with most of my career is a little different than the
20 State.

21 Our security levels were minimum, low, medium, and
22 high, max. The State uses a little bit different. I
23 don't know how that relates to technical aspects of
24 security products.

25 Q. Well, you understood that the State understood security

1 level A and B to mean it could withstand a blow with a
2 sledgehammer for 60 minutes on A, and 30 minutes for B,
3 correct?

4 A. Yeah, and may I ask you where that standard came from?
5 Was that a standard that the State developed?

6 Q. Well, let's look at --

7 A. Or was that a testing agency?

8 Q. Well, let's look at ASTM 1 and 2. I realize it doesn't
9 say A and B, but it does say 1 and 2?

10 A. I understand about the 1 and 2. I'm just -- had
11 questions about the criteria for ratings, the
12 sledgehammer activity.

13 Q. Well, let's take a look. I recognize that it's not a
14 sledge they use with a member of a seal team or a
15 prisoner, but it's a similar scientific basis, I think.

16 If you can look at -- it's, for illustrative purposes,
17 Exhibit 276. Do I have that right? No, 286. I'm sorry.

18 MR. RANKIN: What's the number?

19 MR. GARDNER: 286.

20 BY MR. GARDNER:

21 Q. Is that the ASTM standard we're talking about there, sir?

22 A. Mr. Gardner, where exactly are you?

23 Q. Look at the table, looking at how they define 1 and 2, so
24 we can compare it and see how close it is to A and B.

25 So what is security level one?

1 A. For grade number 1, 60 minutes.

2 Q. Okay. That's with a metal ram that sort of replicates a
3 sledgehammer, basically? Is that your understanding of
4 the test?

5 A. Well, I was looking for that. I would like to see that.

6 Q. I'll find it for you here, but let's go to -- what is
7 level 2 under the ASTM?

8 A. Level 2 is 40 minutes.

9 Q. And then after that it says, like for 60, it's 600 blows,
10 and then the test --

11 A. Yes.

12 Q. And it's like a metal ram type, something with swinging
13 to it, right? Were you familiar with those?

14 A. Yes, I would imagine it would be some kind of a ram with
15 measurable impact.

16 Q. So security level 1 and 2, would you agree, is quite
17 consistent with how the State calls them A and B?

18 A. Sure.

19 Q. Fair enough.

20 You said that you didn't think either one of those
21 ceilings could withstand a beating with a sledge for 30
22 or 60 minutes, right?

23 A. No.

24 Q. Are you aware of whether there's been any testing done
25 on, either, Cel-Line or Lockdown?

1 A. No. No, that's purely an opinion.

2 Q. But you're pretty confident that they couldn't withstand
3 that, right?

4 A. That's right.

5 MR. GARDNER: Sir, I've got no other questions. Thank
6 you very much for your patience and your time.

7 THE COURT: Mr. Rankin.

8

9

REDIRECT EXAMINATION

10 BY MR. RANKIN:

11 Q. You were asked, Mr. Hobbs, about whether there was a rule
12 at the State penitentiary that would prohibit the
13 electricians from going into the metal security ceilings.

14 Do you recall that line of questioning?

15 A. Yes.

16 Q. In your opinion, should the management of the prison have
17 determined the capacity of that ceiling and instituted
18 such a rule before this accident occurred?

19 A. Yes.

20 Q. You were also asked whether the letter from May 23rd,
21 2006, should have been passed on or there should have
22 been information passed on to the penitentiary about
23 walking on the ceilings voiding warranties.

24 Do you recall that line of questioning?

25 A. Yes.

APPENDIX D
TO APPELLANTS' REPLY BRIEF

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

JENNIFER B. DONNELLY, as)	No. 11-2-37290-1 SEA
Guardian for MARSHALL S.)	
DONNELLY, as Guardian ad)	
Liteam for LINLEY GRACE)	
DONNELLY, a minor child,)	
)	
Plaintiff,)	
)	
vs.)	
)	
ENVIRONMENTAL INTERIORS,)	PRETRIAL MOTIONS
INC., a foreign corporation;)	
HDR ARCHITECTURE, INC., a)	
foreign corporation; HDR)	
CONSTRUCTORS, INC., formerly)	
known as HDR DESIGN-BUILD,)	
INC., a foreign corporation;)	
TURNER CONSTRUCTION COMPANY,)	
a foreign corporation, NOISE)	
CONTROL OF WASHINGTON, INC.,)	
a Washington corporation;)	
"JANE and JOHN DOES, 1-20,")	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE DOULASS NORTH

September 8, 2014
King County Courthouse
Seattle, Washington

1 know, friendly amendment we would make to that request
2 is that in the event either side is using a particular
3 exhibit during direct examination, when the opposing
4 side gets up on cross, that same exhibit ought to be
5 available.

6 THE COURT: Yeah. And I think that's reasonable.
7 I mean, obviously, if it's been used on direct, then you
8 ought to be able to use it on cross as well.

9 THE COURT: Okay.

10 MR. GARDNER: Okay. Fair enough.

11 This is one where I just want guidance because
12 it's a big cost item. If we're going to have a
13 transcript, or in closing, you know, where everybody's
14 saying, well, I've got it right here, and this witness
15 said exactly this, fine, but then what happens of course
16 is that everybody ends up having to order just about
17 every transcript.

18 Certainly, if the other side orders one, you got
19 to order one. If they order one and you have your
20 counterveiling witness, then you feel like you got to
21 order that one. And this is breaking Bridget's heart, I
22 know, because this is important to a court reporter. I
23 know it's important to Kevin.

24 THE COURT: We can probably have full employment
25 for court reporters here if we do this, and we will

1 alternate court reporters every day so they can prepare
2 all the transcripts. And, yes, it can be pricey.

3 MR. GARDNER: It gets very pricey. And so if
4 it's going to be okay, we know, that's okay; we'll deal
5 with it. It's not like we haven't put in a bunch of
6 money and costs already. It's not that big a deal.

7 But if it's not, then we also know that we'll
8 only get trial transcripts if we're confused about what
9 a witness said, and we didn't want to, in argument,
10 misrepresent it. But we wouldn't be quoting it or be
11 putting it up on a screen.

12 I was in a case where a whole closing argument of
13 defense counsel was based upon on-screen trial
14 transcripts, and the Court was uncomfortable stopping
15 counsel in the middle of closing and saying, you can't
16 do that, recognizing the attorney's entire power point
17 for closing was based upon this approach.

18 And I thought, well, we better find out before
19 trial starts. Then we'll know if we're going to be in a
20 transcript war or not. Either way is fine. Whatever
21 you want.

22 THE COURT: Okay.

23 MR. SCANLAN: Yeah. Your Honor, again, I don't
24 think there's any disagreement. But a friendly
25 amendment that we might suggest is that -- and we read

1 the motion mostly just about the use of, as he framed
2 it, trial transcripts during closing, that either party
3 or all parties should have to give, and we arbitrarily
4 came up with 24 hours notice of the intent to do so, so
5 that the parties aren't unfairly surprised. And if Your
6 Honor wants to make it more than 24 hours, we're fine
7 with that.

8 MR. GARDNER: You know --

9 THE COURT: I think that probably makes sense.

10 MR. GARDNER: No, because you're often talking
11 about the old analogy, I'm showing my age, of being a
12 Manhattan phone book. I mean, transcripts of -- it's a
13 lot, and so 24 hours, gee, we are going to use
14 transcripts in closing.

15 If transcripts are going to be used in closing, I
16 just need to know, and then when say ordering from the
17 court reporter, we'll get a copy at the same time. It's
18 the only way you can realistically hope to get through
19 things to be able to respond to that approach. And if
20 that's it, that's fine, too.

21 MR. SCANLAN: That's fine, Your Honor.

22 THE COURT: Okay. I mean, I don't know if you
23 folks feel like you can agree that you're not going to
24 use transcripts in closing, but if some reason comes up
25 that you're going to want to use a transcript for some

1 other purpose, that you'll notify the other side that
2 you're going to get a transcript for some purpose, or
3 eye don't know.

4 MR. SCANLAN: Actually, Your Honor, because the
5 concern that Mr. Gardner's raising is, it's actually a
6 good one, it's just one that hadn't occurred to us.

7 As far as it goes, we just thinking, you know,
8 not wanting to ambush someone at the last minute. I
9 think it's reasonable to at any point in the trial, if
10 anybody orders a transcript, we ought to notify
11 everybody so that they have the right to get it, and
12 then they can decide well then I want to gets this other
13 transcript as well.

14 We were just looking to the narrowed question as
15 they framed the motion in limine, which is about using
16 it in closing, and I hadn't thought it through, I guess
17 I haven't had the horrible experiences Mr. Gardner has,
18 with Opposing Counsel.

19 But we're fine with some kinds of advanced notice
20 to make sure that there's no prejudice to either party
21 about the use of specific use of transcripts in closing.

22 MR. MERRICK: Your Honor.

23 MR. GARDNER: Are we using transcripts or not.
24 If we are, fine.

25 THE COURT: Okay. There are's two separate

1 things going on here as I understand it. Mr. Gardner's
2 motion I think is to say, no use of transcripts in
3 closing at all, period.

4 MR. GARDNER: Mm-hm (affirmative).

5 THE COURT: But then there's a separate issue
6 that we're starting to talk about of whether anybody's
7 going to use a transcript for any other purpose at some
8 point during the trial.

9 And I think we need to talk about those two
10 things separately. And so I mean, my understanding is
11 that Mr. Gardner's motion is that we're not going to use
12 transcripts in closing at all, period.

13 MR. GARDNER: Correct.

14 THE COURT: And are you guys in agreement with
15 this or do you disagree with that.

16 MR. SCANLAN: We're in disagreement.

17 MR. MERRICK: We're in disagreement, Your Honor,
18 as I understand it, and I thought we had to go with
19 displaying the transcripts to the jury.

20 THE COURT: Uh-huh (affirmative).

21 MR. MERRICK: However, there may be precise
22 testimony that we want to remind the jury of, and we can
23 make use of the transcript in doing so.

24 MR. GARDNER: That's fine. As long as I know.
25 You know, if your's concerned about it I don't want it

1 granted, if it's not in agreement, we'll just put down
2 denied and we know we've got a stipulate on that.

3 That's okay.

4 THE COURT: Okay.

5 MR. GARDNER: I don't know they're allowed to do
6 because I've had courts say we're just not going to do
7 it, the jury's got notes they're supposed to remember
8 what was said. Others is said, no, why not? It's a
9 word for word.

10 THE COURT: You know, I don't know that I feel
11 comfortable prohibiting Counsel from doing it. I mean,
12 if you guys want to agree not to do it, that's fine.
13 But otherwise, I don't know that I would. In this case
14 I will deny it.

15 MR. GARDNER: Okay.

16 THE COURT: Okay. So, let's see, I think that
17 brings us to 51 then.

18 MR. GARDNER: Yes. It's fairly routine, but
19 being able to see what's coming in opening before it's
20 coming in opening, so we know if it's something that is
21 thought to be inadmissible or objectionable as a visual
22 aid.

23 It kind of a goes along with 52, that then what
24 you have shown them should be produced because this is
25 what you've told them the evidence will show, and it's

1 valid to say at closing Defense Counsel said the
2 evidence would show X, Y and Z, and they did not, or
3 vice versa.

4 So it's a twofold thing. One is, this is what
5 we're going to show them. Is there a problem? And the
6 flip side is, then once it's shown, people should be
7 able to, you know, because it's a big board -- in the
8 olden days, it was all bid boards, and everybody could
9 look at it and show it later on. Now we often have
10 power points, and I just wanted a printout so that, you
11 know, you can see what it was that they were promised
12 the evidence would show.

13 MR. SCANLAN: I don't think there's any problem
14 sharing, exchanging opening exhibits, or printouts of
15 power points, and so forth.

16 THE COURT: Okay.

17 MR. RANKIN: Your Honor, I'm sorry. The only
18 question that came up, and I guess a point of
19 clarification: Counsel was asked for a usable digital
20 copy of such information. Maybe I'm a little
21 old-fashioned, but I don't know what that means exactly.

22 MR. GARDNER: Well, then you're in violation of
23 the order right now.

24 MR. RANKIN: I don't doubt it. I don't doubt it.
25 But I don't know whether he just wants the printouts or

1 whether he wants something he can take and manipulate.
2 That's my concern.

3 THE COURT: Yeah. You're asking for something
4 like on a thumb drive or something like that?

5 MR. GARDNER: What are we asking for? I can live
6 with either, Your Honor. I'm okay. As long as I can
7 read it.

8 THE COURT: I'm with Mr. Rankin, back in the mid
9 20th century. But, anyway, that's okay.

10 MR. GARDNER: So a printout is fine. As long as
11 it's readable. Sometimes they're so small that you
12 cannot even read them. If they're readable, that's
13 fine. Okay.

14 So we're at 53.

15 THE COURT: Fifty-three.

16 MR. GARDNER: ER documents not objected to should
17 be admitted pretrial. That's kind of the rule.

18 MR. SCANLAN: No objection.

19 THE COURT: Okay. No objection to that? Okay.
20 So that's granted.

21 MR. GARDNER: So let's see. Fifty-four.

22 Oh, yeah. Talking about Plaintiff's complaint
23 amendments.

24 MR. SCANLAN: No objection.

25 MR. GARDNER: Yeah. Okay.