IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ENOS DON FERGUSON, Appellant, v. KING COUNTY, a governmental entity, Defendant/Cross Respondent, THE LAKESIDE GROUP, LLC, a legal entity, Defendant, TYSSENKRUPP SAFWAY, INC. fka SAFWAY SERVICES, INC., a corporation, Respondent/Cross Appellant, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 15, an international union, Respondent.	)	No. 65092-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 19, 2012

Grosse, J. — When there is no legally sufficient basis on which to find for the party with respect to an issue, the trial court may grant a motion to dismiss as a matter of law. Here, the fact that a clamp was frozen or defective at the time of trial, several years after the accident, is not sufficient in and of itself to infer that the clamp was frozen at the time of the accident, particularly here, where testimony indicated that the clamp was movable at the time of the accident. Further, an action for vicarious liability will not lie where the tortfeaser is a coworker and therefore immune from liability under the Industrial Insurance

Act, Title 51 RCW. Accordingly, we affirm the trial court.

FACTS

Enos Ferguson was injured on June 19, 2005, while working as a spotlight operator for a theatrical event at Marymoor Park. Ferguson's complaint alleges that his "injuries were caused by the unsafe condition and improper installation of the ladder, scaffolding and other equipment used in the spot tower" at the event. The event was sponsored by both King County Parks Department (County) and The Lakeside Group, LLC (Lakeside) under a special use permit. The County rented the scaffolding from Safway Services, Inc. (Safway) for this event just as they had done in 2003 and 2004 for similar events.

In its capacity as a labor organization, defined under § 2(5) of the National Labor Management Relations Act (NLRA), 29 U.S.C. § 185, the International Alliance of Theatrical Stage Employees, Local 15 (Union) operates a hiring hall and dispatches workers to the jobsites of employers with whom the Union has entered into collective bargaining agreements. Lakeside hired Union members to work at the event. On June 19, 2005, the Union dispatched a crew of workers.

The crew erected the spot tower, but work came to a standstill when it was discovered that Safway had sent the wrong scaffolding cross bars for installation. These cross bars are usually installed prior to installing the ladder. When the time limit set for work was reached, John Poulson, as the lead,

released the workers, stating that he would install the ladder himself. Poulson contacted Larry Huffines, the production manager for Lakeside, but since it was a Saturday, they were unable to get replacement cross bars. Safway is closed on the weekend, but does have a messaging service. Without these cross bars, the scaffolding structure was more wobbly, but was still structurally sound. Poulson, together with Huffines, checked the spotlight and determined that its function as a spot light tower was not affected by the increased wobble. Poulson then installed the ladder, which came in three segments. The lowest segment was attached with two clamps and the second and third segments with one clamp.

Poulson installed the ladder attaching the clamps to the horizontal bars of the scaffolding. He climbed up and down at least three times. Another worker climbed the ladder about three or four times with no problems. Ferguson, a member of the Union, arrived at work later and climbed the ladder to the spotlight platform with no incident. At intermission, he went to exit the platform and the third section of the ladder pulled away from the structure, causing Ferguson's fall and resulting injuries.

Ferguson sued King County, Lakeside, the Union, and Safway for damages as a result of the accident. Safway cross appealed against King County, contending the County failed to defend Safway under the indemnification clause contained in a rental agreement, which Safway alleges was incorporated into the quotation for scaffolding. The trial court dismissed

both the Union and Lakeside on summary judgment. A jury trial was held on the damage/liability issues. The jury found Safway negligent, but also found that Safway's negligence was not the proximate cause of the accident. The court then held a bench trial on Safway's cross appeal. The trial court found that the rental agreement was not incorporated into the contract and dismissed Safway's cross claim for indemnification.

Ferguson appeals the dismissal of the Union, arguing that it is vicariously liable for his injuries because of the Union steward's negligence. Ferguson also appeals trial court rulings at the jury trial. Specifically, he contends the trial court erred in granting a CR 50 judgment as a matter of law dismissing his negligence and product liability claims based on a faulty clamp resulting in improper placement and/or tightening. Ferguson also contends the trial court commented on the evidence and erroneously instructed the jury that Safway's failure to furnish a guardrail gate was not relevant or material to the issues before the jury.

Safway cross appeals, contending that the County was required to indemnify Safway.

ANALYSIS

Vicarious Liability of the Union

The trial court granted the Union's motion for summary judgment dismissing Ferguson's claims.[1] Ferguson argues that the Union is vicariously liable because Poulson, the shop steward, was negligent in placing the bolt on

[1] The Union had originally brought a CR 12(b)(6) motion for failure to state a claim, which was denied by the court. The court also issued a summary judgment dismissing Lakeside as a party, but that is not at issue in this appeal.

the ladder horizontally instead of vertically and/or did not tighten the bolt. His theory hinges on the fact that Poulson dismissed the crew and installed, by himself, the ladder which gave way—thus preventing any safety check by another installer who would have discovered if the bolt was loose. Since Poulson was the shop steward, Ferguson argues, he was responsible for the safety of the crew, and dismissing that crew before installation was complete resulted in faulty installation of the ladder.

An employer is vicariously liable for injuries caused by the negligence of its employee under the principle of respondeat superior.[2] To apply respondeat superior, (1) the relationship must be that of employer-employee; and (2) the tort must be committed within the scope of employment and in furtherance of the employer's interest.[3] The underlying policy is that the employer is in the best position to control the conduct of its employees and to compensate injured parties.[4]

Ferguson confuses Poulson's role. When Poulson was working on the scaffolding he was not functioning in his role as a Union steward. Poulson was paid by Lakeside, was under Lakeside's control, and was performing a function for the benefit of Lakeside. Poulson was nothing more than a coworker and as such is exempt from liability under the Industrial Insurance Act, Title 51 RCW. A

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[2] Brown v. Labor Ready N.W., Inc., 113 Wn. App. 643, 646, 54 P.3d 166 (2002).
[3] Breedlove v. Stout, 104 Wn. App. 67, 70, 14 P.3d 897 (2001) (quoting Dickinson v. Edwards, 105 Wn.2d 457, 467, 716 P.2d 841 (1986)).
[4] Rahman v. State, 170 Wn.2d 810, 818-19, 246 P.3d 182 (2011) (policy supporting vicarious liability is that employer is in position to impose workplace rules and standards).

union cannot be vicariously liable for the negligence of a plaintiff's coworker where the coworker is immune from suit. Brown v. Labor Ready Northwest, Inc.[5] is dispositive.

Brown was a permanent employee of CMI Northwest, a lumber distribution center.[6] She was injured in an accident at CMI caused by a forklift operated by Henson, an employee of a labor agency, Labor Ready.[7] Brown sued Labor Ready and Henson for Henson's negligence. The trial court granted Labor Ready's motion for summary judgment and this court affirmed. The threshold question there, as here, was the relationship between the two employees. If Brown and Henson were coworkers, Brown's negligence claim against Henson and his vicarious liability claim against Labor Ready were barred because Brown was limited to the remedies provided by Washington's workers' compensation system.[8] RCW 51.04.010; RCW 51.32.010. Likewise, Poulson was a coworker, and Ferguson's remedies are also limited.

Vicarious liability is a derivative and depends on the liability of the negligent agent to the injured plaintiff. "[I]f a plaintiff is barred from suit against the negligent employee, [he or] she cannot sue the employer on a theory of vicarious liability."[9] As noted in Brown, "the sole concern for vicarious liability (as opposed to workers' compensation immunity) is whether the master accepted

[5] 113 Wn. App. 643, 54 P.3d 166 (2002).
[6] Brown, 113 Wn. App. at 645.
[7] Brown, 113 Wn. App. at 646.
[8] Brown, 113 Wn. App. at 655.
[9] Brown, 113 Wn. App. at 646-47.

and controlled the service that led to the injury."[10] Here, the evidence is clear that Lakeside controlled the service that led to the injury.

Despite the evidence that Lakeside had control over the worksite, was responsible for the safety of the workers, and paid the employees, Ferguson nonetheless contends that Poulson was acting as an agent of the Union responsible for the safety of the workers. An agency relationship may arise when one engages another to perform a task for the former's benefit.[11] Consent between the parties and control are the essential elements of an agency relationship.[12] "'It is the existence of the right of control, not its exercise that is decisive.'"[13]

Ferguson argues that it was Poulson who determined the number of Union workers on the jobsite and acted as their supervisor and administrator. In the capacity of administrator, Poulson kept track of time, meal breaks, and the payroll time sheets. As the supervisor, he found out what the show needed and assigned the crew in that manner. But it was Lakeside, as the employer, who was in control of the worksite and had ultimate responsibility for safety. Poulson's role was "to make sure that the work occurred in a safe manner." In that capacity he acted as a foreman of a jobsite.

Ferguson's reliance on Woods v. Graphic Communications[14] is

[10] Brown, 113 Wn. App. at 649.
[11] O'Brien v. Hafer, 122 Wn. App. 279, 281, 93 P.3d 930 (2004).
[12] Barker v. Skagit Speedway, Inc., 119 Wn. App. 807, 814, 82 P.3d 244 (2003).
[13] O'Brien 122 Wn. App. at 281 (quoting Pagarigan v. Phillips Petroleum Co., 16 Wn. App. 34, 37, 552 P.2d 1065 (1976) (internal quotation marks omitted).
[14] Woods v. Graphic Commc'ns, 925 F.2d 1195 (9th Cir. 1991).

misplaced. Woods brought a 42 U.S.C. § 1981 action against both his employer and the union alleging racial harassment that interfered with his ability to enforce his labor contract. Woods was subject to racial epithets and a hostile work environment. At least three times he asked the union through its steward to file a grievance concerning racial atmosphere at work. The union never filed a formal grievance. The steward was entrusted with implementing the grievance process, and failure to process the claims constituted racial harassment. Here, Poulson was acting in his capacity as a lead worker for Lakeside, not as a steward for the Union.

Clamp

At the conclusion of Ferguson's case, Safway moved to dismiss Ferguson's claim that Safway was negligent and proximately caused the injury. The court granted the CR 50 motion on the issue of whether the clamp supplied was immovable. CR 50 provides:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law.

A motion to dismiss as a matter of law should be granted when, in viewing the evidence most favorable to the nonmoving party, the court can say as a matter of law that there is no substantial evidence or reasonable inference to sustain a verdict on the claim of the nonmoving party.[15] "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the

[15] Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

declared premise."[16] An appellate court reviews the trial court's decision de novo and applies the same standard as the trial court.[17]

Evidence at trial demonstrated that the clamp before the jury was frozen and difficult to move. However, Poulson's testimony at trial indicated that the clamp which attached the ladder brackets was movable.

> Q. Now, one of the things that you have to do when the ladder comes to you is you have to -- especially if you're going to put it on the horizontal, you need to get these brackets on the right level?
> A. Even if it's going on a vertical, sometimes you have to move those.
> Q. Because you have to get around the ring sets so you're in the right spot where this will attach; fair?
> A. Yes.
> Q. You're going to have to move this bracket?
> A. Yes.
> Q. And chances of it being in the right spot for your particular location is almost nil; right?
> A. Correct.
> Q. Not nil. What are the odds, right, that your horizontal member would be right here? So you're going to have to put a wrench on this thing and you're going to have to loosen it up and move it around; fair?
> A. Correct.
> Q. All right. Regardless of the condition that the ladder was delivered in, you were going to have to make some modifications in order to make it work?
> A. Yes, some adjustments.
> ****
>
> Q. And on the actual clamp that was on the very top section, the one that Mr. Ferguson fell from, that's this one here, if there had been any defect in the -- you inspect these before you put them; right? I mean, you have to look at them and make sure --
> A. You have to because sometimes the threads are full of cement, you can't use it.
> Q. They could get fouled in some way or they can get dinged up or nicked in the process?
> A. Yes.
> Q. Or paint or something like that. But if there were any fouling or dining up of the threads that made this clamp difficult or unusuable,

[16] Guijosa, 144 Wn.2d at 915.
[17] Guijosa, 144 Wn.2d at 915.

you wouldn't have used it; is that correct.
A. That is correct.

Poulson further testified that whether or not the clamp was difficult to turn played no role in his decision on how to attach the ladder to the scaffold. Significantly, this testimony suggested that his decisions on where to locate the clamp and his efforts in installation were in no way determined by a defect in the clamp.

When Ferguson asked his engineering expert, Dr. Richard Gill, whether Safway supplied the clamp in a condition contrary to its installation standards, Safway's counsel objected as to foundation. Outside the jury, the following colloquy took place:

THE COURT: Let me tell you the problem I'm having with your foundation question. I don't know if this clamp is in the same condition it was on the day of the accident, either before the accident or after the accident.

MR. BUDLONG: I can ask him.

THE COURT: I don't know when Cook's deposition was taken.

MR. BUDLONG: Decmeber 10th

THE COURT: Of this year --

MR. BUDLONG: Of last year.

THE COURT: Of 2009.

MR. BUDLONG: Correct.

THE COURT: I don't know where the ladder was between the time of the accident and Cook's deposition.

MR. BUDLONG: Mr. Lindemer had it. He's already testified.

THE COURT: I understand. But I don't know if it was out in a yard somewhere, whether it was in a secure area or not, and so your question is assuming that it was in this condition at the time of the accident. Was it --

MR. BUDLONG: Fair enough, Your Honor. Thank you.

THE COURT: That's the problem I have.

MR. BUDLONG: I'll do that. I'll ask the question that way and then we can follow-up with Mr. Lindemer.

MR. EDEN: More precisely, Your Honor, I believe the question is, if the ladder was delivered on June 14th of 2005 in this condition, because there is going to be evidence, as there has been already, that these components sat out in a public park for five days unattended, they were assembled and disassembled and other things. So the primary point in time is the point of delivery.

MR. BUDLONG: I'll just ask the question your way, assuming that they were in this condition --

THE COURT: When they were delivered.

MR. BUDLONG: Yeah. Great. Thank you, Your Honor.

THE COURT: Okay.

Dr. Gill's testimony that "this clamp is defective" refers only to the state of the clamp at the time of trial. The condition of the clamp in the courtroom was not germane to the issue of whether it was defective when delivered. Dr. Gill's testimony regarding the clamp and its impact was based on nothing more than an assumption that the clamp was likewise defective at the time of the accident. After the colloquy with the court, but before Ferguson rested, there was no follow-up testimony from Mr. Lindemer about the condition of the clamp at the time of the accident.

A supplier owes a duty of reasonable care when it delivers a product for use by another. The alleged breach of duty was that the clamp was defective or frozen at the time of the accident. Dr. Gill merely assumed that fact. Poulson

testified that he did not notice any defects in the bracket and the condition of the bracket did not influence his assembly of the ladder. The court correctly ruled that there was no substantial evidence to indicate that the clamp was defective when the scaffolding and ladder were delivered. We do not believe allowing an inference for purposes of CR 50 that the bracket was immovable at the time of the incident is proper. However, even allowing such an inference to create a question of fact does not alter the result. Poulson's uncontradicted testimony, which implicate his negligence, establishes that the bracket itself was not the cause of how the ladder was attached or of the resulting accident. The court properly granted Safway's motion because the evidence did not establish that the clamp was frozen or defective at the time of the accident and established it was not the cause of the design or accident.

Guardrail

Ferguson contends that the trial court commented on the evidence and erroneously instructed the jury that Safway's failure to furnish a guardrail gate was not relevant to the jury's determination of negligence. At trial, the jury was shown a video clip of a Safway ladder and installation instructions for tube and clamp scaffolding. The instructions state that one should "[i]nstall guardrail gates at all platform levels. When erecting the scaffold higher, use a ladder to access the scaffold." The jury next heard the testimony from Edward Dupras who was involved in building the scaffold at Marymoor. Ferguson's counsel posed the following questions:

Q. Let me ask you this. Did Safway provide a gate as part of this scaffold

> to step out around get on the ladder, do you recall?
> A. I don't recall if we had a gate for that. Normally we had always just had to swing our leg up over the rail.
> Q. All right. That was the standard way that --
> A. It had been and I do know the last time I worked out there after the accident, I was working follow spot and there was a gate.
> Q. That was after the accident?
> A. Yes
> Q. But not before?
> A. Not that I recall before the accident.

There was no further testimony regarding the guardrail gate. Juror No. 9 submitted the following question:

> Is there any industry standard height that requires a guardrail gate? If not, is [it] the customer who determines whether or not this is included in the setup materials?

After reading the juror's question, the court stated it was inclined to read the question to the jury and inform them it was not relevant or material to the issues before it. The court asked counsel if they had any objections. When Ferguson's counsel hesitated, the court noted that there was no claim that there had to be a guardrail. Ferguson's counsel responded:

> MR. BUDLONG: Well, there is an issue, though, Your Honor, because Mr. Eden got up there and implied that [Enos] Don Ferguson was negligent for having to lift this leg all the way over the second rail of the ladder. And so I think that it is in the case, and I think that the question ought to be answered and I shouldn't -- I don't think --
>
> THE COURT: No, I'm not going to ask the question. Mr. Eden has indicated in opening argument that he does not have any sort of contributory or comparative negligence claim against Mr. Ferguson. And if in closing argument or anywhere else there is any suggestion of that, I will certainly take whatever measures are necessary.
>
> But to me, to ask this question without some explanation, allows the jury to start speculating that there could be all these other problems and nobody has identified the lack of a gate as a problem. The only problem is that clamp, as far as I can see it, whether it should have been hooked

> to a vertical or whether it should have been in an up or down swivel position, and to interject these other things, to me, is just irrelevant, immaterial, and is confusing to the jury.
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> MR. BUDLONG: I understand your ruling.
>
> THE COURT: And again, if you believe at any point that Mr. Eden is going in a different direction, I'll be sure and sustain whatever you want.

This colloquy occurred shortly after noon on January 21, 2010, which was a Thursday. The court read the question to the jury and informed them it was not relevant to the case. After the ruling, John Poulson, the employee who attached the ladder to the structure, testified. Ferguson then called two more witnesses, Keith Crandall, the operations manager for Safway, and Scott Rowden, the sales representative for Safway.

On Monday, January 25, 2010, the next day of trial, Ferguson moved for a curative instruction, arguing that the issue of whether there was a guardrail gate was germane. Ferguson contends that had a gate been there, he would have accessed the ladder in the middle section which was firmly attached to the scaffolding. Thus, he argues, the lack of a gate was the proximate cause of the fall. When the court inquired whether this was a theory that was initially relied on, counsel responded:

> MR. BUDLONG: It was -- well, we've always said that the -- I'm sorry, we have always said that the products that were supplied were not in a safe condition. We had not specifically stated this about the gate, but that's not our fault, Your Honor, and let me explain why.
>
> We asked for all of the instructions and videos concerning installation of ladders and so forth in February of 2008. We never got any. And so I asked Mr. Lindemer, who is present in the courtroom, at his deposition on November 10th, do you have any

> videos or instructions? And for the first time we were informed that they existed.
>
> And then the defendants waited until after Dr. Gill was deposed on December 4th and after Mr. Cook was deposed on December 10th, and only disclosed the 1994 instructions and the videos on December 11th after our experts had been deposed. And so it was not through any fault of ours that this occurred. It was deliberate delay in producing them, and I'm not claiming any prejudice.

Ferguson submitted an offer of proof through Dr. Gill's testimony. Dr. Gill testified that the lack of an access gate caused the accident because a gate would have required Ferguson to step down on the third rung of the middle ladder, thus bypassing the top ladder. The middle ladder would have withstood Ferguson's weight since that section held fast even with the extreme load of the top section with Ferguson falling back on it. If Ferguson had stepped onto the middle section of the ladder the weight on the upper section would be nothing more than a stabilizing force. Since the top section of the ladder had been climbed upon several times prior to Ferguson scaling it, the section would not have failed if it only provided a means of stepping onto the stable middle section.

On cross-examination, Dr. Gill admitted that in his deposition on December 4, 2009, he advanced five theories for the cause of the fall, none of which encompassed the absence of an access gate. Gill testified that he had not had the information about the guardrail gate, even though he testified that a gate was the industry standard on scaffolding higher than six feet. Gill testified that he received Safway's video and safety instructions sometime during the

holiday season and had discussions with Ferguson's counsel as things unfolded. Gill's interrogatory responses were not amended. Neither did counsel move to supplement his deposition.

After the offer of proof, the trial court adhered to its previous ruling on the basis that "the theory of the gate was not a theory that was previously advanced, either in terms of communication between the parties, nor was it advanced at the outset of this trial in terms of the instructions that were given to the jury with the agreement of counsel, and at this point in time it will be tantamount to essentially allowing the plaintiff to reopen and reintroduce another theory with all of the attendant problems of witnesses, et cetera."

Ferguson's arguments to the contrary are without merit. Ferguson argues that Safway implied that Ferguson was "responsible" for causing the ladder to collapse. He relies on a question posed by Safway's counsel where he asked a witness who had observed the fall, how Ferguson got on the ladder:

> What I'm most curious about is how did Mr. Ferguson manage to get from inside here -- there was no gate or any other device to get around or through the top rail; correct?

This question is insufficient to attribute negligence to Ferguson. Further, Safway specifically told the jury that Ferguson was not at fault or in any way to blame for the accident in its opening argument.

Ferguson's argument that the judge commented on the evidence when he ruled that the issue of whether or not there was a gate was not an issue before the jury is without merit. The court did not comment on the evidence; rather, it

ruled that the issue was precluded because it had not previously been raised and thus it was not relevant to the jury's decision.

Ferguson's request for a curative instruction is likewise without merit. There is no dispute that Ferguson failed to supplement answers to interrogatories. A party must seasonably update a response to an interrogatory asking about the substance of the testimony an expert witness is expected to give. CR 26(e).[18] The duty arises when a party obtains information upon the basis of which a party "knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." CR 26(e)(2)(B). Exclusion of evidence, though a harsh remedy, is not an abuse of discretion if the violation substantially prejudices the opponent's ability to prepare for trial.[19]

Dr. Gill testified that he had received the additional information about the guardrail gate during the holidays and that he had discussed it with Ferguson's attorneys "as things unfolded, but it's not up to [him] to file legal papers." Not advancing the theory of the gate placed Safway in an untenable position having to defend when the majority of the witnesses had already testified.

Ferguson failed to raise the guardrail gate issue. The instructions issued permitted Ferguson to argue his theory of the case. None of his theories of

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[18] CR 26(e)(1) provides:

> A party is under a duty seasonably to supplement his response with respect to any questions directly addressed to . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

[19] Hampson v. Ramer, 47 Wn. App. 806, 812-13, 737 P.2d 298 (1987).

negligence included the gate until a juror asked the question and many of his witnesses had already testified. The cases cited by Ferguson that "facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant evidence" are not pertinent.[20] Those cases all support the admission of relevant evidence to support a theory presented to the jury. Here, the theory of the missing guardrail was not before the jury. The trial court did not abuse its discretion in ruling the evidence not relevant.

Because we affirm the trial court, and uphold the dismissal of claims, we need not address Safway's assignment of error to the court's order dismissing the fault apportionment defenses.

Cross Appeal

Safway sought indemnification from King County per its scaffolding rental agreement. The cross claim was severed from the jury trial. After the jury trial concluded, the trial court conducted a bench trial. The trial court found the indemnification provisions were not incorporated by reference, dismissed Safway's cross claims, and awarded attorney fees to the County. Safway appeals.

Safway argues that the County owed a duty to defend and indemnify it from Ferguson's claims. Safway bases its claim on an indemnification provision contained in its rental agreement, which requires the County to defend and indemnify it against all claims except those that are solely caused by Safway. Safway's tender of its defense to Ferguson's lawsuit was rejected by King

[20] Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978).

County and Safway filed this cross claim against the County.

A bench trial was held on May 5 and 6, 2010. The court found that the rental agreement was not incorporated into the cost quotation negotiations between Safway and the County, and dismissed Safway's cross claim against the County.

Safway argues that de novo review is proper here. Where a record at trial consists entirely of written documents and there were no credibility issues, the review is de novo. Here, however, the court heard testimony from witnesses regarding the transaction and entered findings of fact and conclusions of law. Thus, the substantial evidence standard applies.[21]

David Sizemore, an engineer employed by the County, negotiated with Phil Stephens from Safway to obtain scaffolding for the event at Marymoor Park. Sizemore received a quote from Stephens. Sizemore had solicited a proposal from Safway to provide scaffolding previously in 2003 and 2004. Safway sent a rental quotation in each instance that contained language that all quotes were subject to the terms and conditions referred to in a Safway rental agreement.

Sizemore faxed the prior year's quotation to Safway and spoke with Stephens on the telephone to refine what was needed for the concert. Stephens returned a price quote which Sizemore then signed. He did not alter the document. Sizemore did not ask for any clarification of the language referring to the rental agreement. Sizemore never saw or signed the rental agreement referenced by Safway.

[21] Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011).

Safway delivered the scaffolding to Marymoor Park where a County employee signed the delivery slip. The employee did not sign on the signature line provided to indicate acquiescence to the terms of the Safway rental agreement. That portion of the contract was signed by Safway, but a blank signature line appeared where the County would have signed. The trial court found the County employee only had authority to accept delivery and did not have authority to sign the rental agreement and further that no one authorized by the County had approved or signed the rental agreement.

Safway argues that the quotation signed and faxed by Sizemore incorporated the rental agreement's terms and conditions. But neither Sizemore nor Stephens believed that their negotiations and quotation were anything more than an agreement to a price for parts ordered. As noted in Mattingly v. Palmer Ridge Homes, LLC, "[a]lthough 'parties have a duty to read the contracts they sign,' documents incorporated by reference usually must be reasonably available, at the least, so that the essentials of the contract can be discerned by the signer."[22] Sizemore had not seen the rental agreement.

To effectively incorporate a document by reference, it must be clear that the parties to the contract had knowledge of and assented to the incorporated terms.[23] Here, there is no evidence that King County had knowledge of the

[22] Mattingly v. Palmer Ridge Homes, LLC, 157 Wn. App. 376, 391-92, 238 P.3d 505 (2010) (quoting Del Rosario v. Del Rosario, 152 Wn.2d 375, 385, 97 P.3d 11 (2004)).

[23] W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 494-95, 7 P.3d 861 (2000) (citing 11 Samuel Williston, The Law of Contracts § 30:25, at 234 (4th ed. 1999)).

terms of the rental agreement.

The evidence was substantial to support the trial court's finding that the terms which Safway sought to incorporate are not normally contained in a rental quotation. The evidence showed that the County neither knew nor assented to the incorporated terms as they were never discussed between Stephens and Sizemore. Nor did Safway provide a copy of said agreement to Sizemore.

The court's conclusion that there was no meeting of the minds on the indemnity clause is supported by substantial evidence. Neither Sizemore nor Safway's representative had any knowledge of the incorporated terms. That there was no agreement is further evidenced by the delivery slip, which contained a further reference to the rental agreement and its terms, but was only signed by Safway. The signature line for King County was blank.

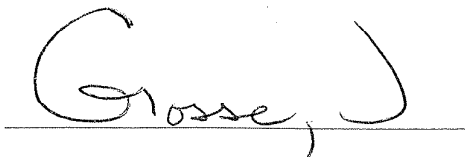
Additionally, there was no evidence to support Safway's contention that the County ratified the terms when it paid for the scaffolding. The parties negotiating for the price testified that they both were dealing with the price for the parts ordered, nothing more.

The County is entitled to attorney fees under RCW 4.84.330 under the reasoning set forth in Herzog Aluminum, Inc. v. General American Window Corp.[24] As discussed in Herzog, the mutuality of remedy intended by the statute supports an award of attorney fees to a prevailing party under a contractual provision if the party-opponent would have been entitled to attorney fees under that same provision had that opponent prevailed, even when the contract itself is

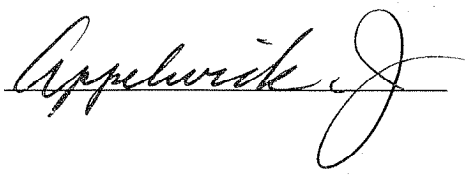
[24] 39 Wn. App. 188, 692 P.2d 867 (1984).

found invalid.[25]

Accordingly, we affirm.



WE CONCUR:



[25] Herzog, 39 Wn. App. at 195-97.