No. 32935-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ZURIEL, INC., a Washington corporation;
EDWARD D. OCHOA, Jr.,

Plaintiffs/Respondents,

v.

DAN GALBREATH and JANE DOE GALBREATH, husband and wife; DOUBLE UP RANCH, INC., a Washington corporation; GREG GALBREATH and JANE DOE GALBREATH, husband and wife; 82 FARMS, INC., a Washington corporation,

Defendants/Appellants.

BRIEF OF APPELLANTS

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2. The trial court erred in directing a verdict on duty.
3. The trial court erred in directing a verdict on breach of duty.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Defendant Double Up able to argue its theory of the case after the trial court refused to instruct that Federal law prohibits the introduction of potatoes into commerce if there are residues of Picloram and Triclopyr, pesticides never applied by Defendants?
2. Was a question of fact presented as to duty?
3. Was a question of fact presented as to breach of duty when evidence was submitted that any Widematch left from the

2011 application would have caused no damage to the plants and the damage was caused by other pesticides from other sources.

C. STATEMENT OF THE CASE

This case arises from a sublease of agricultural ground for a potato crop in 2012. (PR 238) Defendants Galbreath, Double Up Ranch and 82 Farms (collectively "Double Up") leased ground from the Ahren family trust (RP 320), and then subleased ground to Plaintiff Zuriel, Inc., which is owned by Plaintiff Ochoa (both hereinafter "Zuriel"). (RP 328)

The potato crop grew normally until symptoms appeared on July 11, 2012, a few days after Zuriel had a fungicide applied to the field, and then shortly spread throughout the field. By July 23, 2012 the symptoms were widespread, uniform, and "omnipresent". (RP 213; 535-6)

The Washington State Department of Agriculture (WSDA) found four herbicides in the potatoes and other samples from the field, Clopyralid, Picloram, Triclopyr, and 2,4-D (RP 161-64). There is no evidence that three of those pesticides were ever applied by any defendant. The crop was ordered held from market by WSDA based on the presence of Clopyralid, though there is no dispute that federal law makes it a crime to introduce of potatoes into commerce if they have residues of Picloram or Triclopyr.

The lease and lease negotiations between the parties were completely oral. (RP 523) Dan Galbreath and Eddie Ochoa negotiated the lease in the September, 2011. (RP 523-5; Exhibit 26, page 2) During the lease negotiations, Ochoa did not ask for a complete history of the chemicals or pesticides[1] applied to the property. (RP 523-4) Ochoa knew

[1] "Pesticide" is used herein as defined in FIFRA (the Federal Insecticide, Fungicide and Rodenticide Act), to mean: "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any

that Dan Galbreath farmed "well over 4,000 to 5,000 acres," but he just assumed that Dan would remember that the pesticide "Widematch" had been applied by his cousin Greg to one of the circles in 2011, and would remember the recommended plant back period before potatoes. (RP 529) Galbreath did not remember the Widematch application at the time of the negotiations. (RP 340)

If Ochoa had asked for a chemical history as a condition of the lease, Galbreath would have obtained the application records and provided them to Ochoa. (RP 340; 530) Those records would have revealed the May 11, 2011 Widematch application. (RP 340; 530)

Widematch includes the chemical Clopyralid, and the Widematch label recommends (but does not mandate) an eighteen month period between application and planting of potatoes due to risk of carryover. (RP 166; Exhibit 23)

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nitrogen stabilizer, except that the term "pesticide" shall not include any article that is a "new animal drug . . . ." 7 U.S.C.A. § 136(u).

Ochoa's potatoes were planted 11 months after the application. (RP 167)

Until July 11, 2011, the potatoes looked absolutely normal. (RP 535-6) Ochoa told the WSDA he had first notified his field man of the symptoms on July 16, 2012. (Ibid; Exhibit 55). The symptoms appeared a few days after an aerial pesticide application made by agents of Zuriel. (RP 573)

The WSDA was called and took various samples on July 23, 2012. (RP 195-6) The WSDA found four herbicide residues in the field and in the potatoes: Clopyralid, Picloram, Triclopyr, and 2,4-D. (RP 161-4) Picloram and Triclopyr can stay present in the soil for several years according to the WSDA investigator, so that investigator did not attempt to find who or how those got into the field (RP 163). Only one of the one of the pesticides found, Clopyralid, is present in Widematch. (RP 165). The presence of 2,4-D was especially

mystifying because that herbicide degrades quickly and would not be detectable after five to six weeks. (CP 1123-24). Based on the finding of 2,4-D in the July 23 samples, it is therefore established that 2,4-D was introduced into Ochoa's potato field approximately the middle of June, 2012. (RP 289)

There is no evidence at all that Double Up ever applied Picloram, Triclopyr or 2,4-D to the field or knew or should have known who had applied or drifted those pesticides onto the field, or when those pesticides had been applied or drifted.

The severity, uniformity, and timing of appearance of the symptoms led defense expert Agronomist Stuart Turner to hypothesize that carryover from the 2011 Widematch application probably was NOT the source of the damage to the plants. (RP 1052; 1103-4) To test this hypothesis, Turner and co-investigator Bob Callihan, Ph.D. engaged in large scale test plots to determine whether the Clopyralid found in Ochoa's 2012 potatoes could have come from the 2011 Widematch

application, and to determine what symptoms were consistent with those reported from the Ochoa field. (RP 1053; 1103-4) The test plots showed almost no symptoms of herbicide damage where Clopyralid had been applied the year before – less than 1% of the plants had light symptoms. (RP 1106). Even where Chlopyralid had been double applied the year before (a "2X" application), only 2% of the plants showed light symptoms. (RP 1106). Dr. Callihan testified that there were no symptoms in the test plot that were remotely similar to those reported in the Ochoa field (RP 1368).

Turner and Dr. Callihan concluded and testified that the 2011 Widematch application was not the primary source of the damage symptoms observed or of the comparatively high Clopyralid residues found in 2012 in the Ochoa field. (RP 1124). They reached this conclusion for multiple reasons, including the fact that any carryover from 2011 would have been a fraction of what was found in Ochoa's 2012 field,

damage from carryover would have been noted immediately upon the emergence of Ochoa's potato plants, and damage from carryover would not have been uniform across the field. (RP 1176; 1390) Turner and Callihan demonstrated that the only way to mimic the symptoms observed in Ochoa's field was to add additional pesticides to the leaves of the plants. They concluded also that there must have been an additional source, or sources, of Clopyralid. as well as Triclopyr and Picloram. (RP 1243-44) Dr. Callihan testified that the levels in the Ochoa potatoes were three times higher than what was found in the test plots. (RP 1371)

Since the potatoes would have been rejected regardless of the 2011 Widematch application, Turner and Callihan concluded that application is not the cause of Ochoa's damages. (RP 1124)

The Ochoa witnesses (including WSDA representation) speculated wholly without evidence that the Picloram found

might have been from a spot treatment, even though they admit not having investigated the source, and even though Picloram is used in grain production. (RP 162). As to Triclopyr, they did not even speculate about the source in the Ochoa field, though they noted it is used for grain production and right of ways. (RP 163). Picloram last two to four times longer in the soil than Clopyralid. (RP 1173

Further, Ochoa's witnesses admitted that Picloram and Triclopyr had higher analytical testing detection levels compared to the Clopyralid which means that there could well be more Picloram than Clopyralid in the potatoes, and more Triclopyr in the potatoes Clopyralid. (RP 255-56).

Double Up proposed three instructions regarding federal law as follows:

Instruction No. 21

> Federal law prohibits anyone from putting potatoes into the stream of commerce if any trace

of the herbicide Clopyralid is found in the potatoes.

(CP 53)

Instruction No. 22

Federal law prohibits anyone from putting potatoes into the stream of commerce if any trace of the herbicide Picloram is found in the potatoes.

(CP 54)

Instruction No. 23

Federal law prohibits anyone from putting potatoes into the stream of commerce if any trace of the herbicide Triclopyr is found in the potatoes.

(CP 55)

The WSDA Food Safety Office testified and admitted that Federal Law controls the issues as to whether the potatoes could be put into commerce:

> Q: But if the Feds say zero tolerance, the State can't say we're going to tolerate it and allow you to put it into commerce; correct?
>
> A I believe that's the case.

The Court refused to give the proposed instructions on federal law, and Double Up took exception to that refusal. (RP 1684-1685)

D. ARGUMENT

1. Summary of Argument

The Federal Food, Drug, and Cosmetic Act (FDCA), prohibits precludes the marketing of potatoes with Picloram, Triclopyr or Chlopyralid residues. The trial court refused to give jury instructions stating that federal law prohibits putting potatoes into commerce if they have residues of Picloram or Triclopyr. The failure to include such an instruction prevented Double Up from arguing its theory of the case that there could be no causation of damages because the potatoes were rendered legally unmarketable for reasons in addition to the Widematch application.

The court directed a verdict on duty even though Washington still follows the rule of *caveat emptor* as to open

agricultural land, and directed a verdict on breach of duty there was no evidence to support the existence of a quasi-fiduciary special relationship other than the unsupported, self-serving claim of the plaintiff, who admitted he had never discussed the supposed quasi-partnership with Double Up. If Double Up's evidence were accepted, as required on a motion for directed verdict, the 2011 Widematch application did not cause the damages, and therefore duty was not breached.

For the same reasons, the Court erred in rejecting Double Up's verdict form.

2. Standards of Review.

a. Review of Jury Instructions.

The applicable standards of review for refusal to give jury instructions are stated in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn. 2d 259, 266-67, 96 P.3d 386, 389 (2004) as follows:

> This court reviews de novo the alleged errors of law in a trial court's instructions to the jury. *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Bell v. State,* 147 Wash.2d 166, 176, 52 P.3d 503 (2002). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *State v. Williams,* 132 Wash.2d 248, 259–60, 937 P.2d 1052 (1997) (citing *State v. Griffin,* 100 Wash.2d 417, 420, 670 P.2d 265 (1983)). As with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be "reversible error where it prejudices a party." *Hue,* 127 Wash.2d at 92, 896 P.2d 682. If a party proposes an instruction setting forth the language of a statute, the instruction will be "appropriate only if the statute is applicable, reasonably clear, and not misleading." *Bell,* 147 Wash.2d at 177, 52 P.3d 503.

The same standards apply to review of verdict forms.

See *Capers v. Bon Marche*, 91 Wash.App. 138, 955

P.2d 822 (1998), *review denied*, 137 Wash.2d 1002, 972 P.2d 464 (1999).

b. Review of Directed Verdict.

The granting of a directed verdict is reviewed *de novo*. *Ramey v. Knorr*, 130 Wn. App. 672, 676, 124 P.3d 314, 317 (2005). The appellate court applies the same standard as the trial court, as described in *Chaney v. Providence Health Care*, 176 Wn. 2d 727, 732, 295 P.3d 728, 731 (2013) held:

> On review of a ruling on a motion for a directed verdict, the appellate court applies the same standard as the trial court. *Hizey v. Carpenter,* 119 Wash.2d 251, 272, 830 P.2d 646 (1992) (quoting *Indus. Indem. Co. of Nw. v. Kallevig,* 114 Wash.2d 907, 915–16, 792 P.2d 520 (1990)). 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. *Harris v. Drake,* 152 Wash.2d 480, 493, 99 P.3d 872 (2004) (citing *Moe v. Wise,* 97 Wash.App. 950, 956, 989 P.2d 1148 (1999)).

As stated in *Hizey v. Carpenter*, cited in *Chaney:*

> " 'A directed verdict or judgment n.o.v. is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.'" *Hizey,* 119 Wn.2d at 271–72.
>
> The moving party must prove that there is no substantial evidence, or reasonable inference from that evidence, which, viewed in a light most favorable to the prevailing party, supports the decision made by the jury.
>
> *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

3. The Federal Food Drug And Cosmetic Act Prohibits The Sale Of Potatoes That Have Detectable Residues Of Picloram Or Triclopyr.

Plaintiffs' potatoes tested positive for a number of chemicals in addition to the Clopyralid. Two of those chemicals were Picloram and Triclopyr. Though WSDA Food Safety cited only the Clopyralid as the reason it barred

Ochoa's potatoes from market, the potatoes could not legally have been sold due to the presence of either Picloram or Triclopyr.

The Federal Food, Drug, and Cosmetic Act (FDCA) prohibits the introduction or delivery of "adulterated food" into interstate commerce:

> The following acts and the causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

21 U.S.C.A. § 331 (Underlining added.)

It is a crime punishable by up to a year in prison to violate § 331 by selling adulterated food.

> (a) Violation of section 331 of this title; second violation; intent to defraud or mislead
>
> > (1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

21 U.S.C.A. § 333 (Underlining added.)

21 U.S.C.A. § 342 states that a food is deemed to be adulterated if it contains a pesticide chemical residue that is "unsafe:"

> A food shall be deemed to be adulterated--
>
> (a) Poisonous, insanitary, etc., ingredients
>
> * * *
>
> (2)(A) if it bears or contains any added poisonous or added deleterious substance (other than a substance that is a pesticide chemical residue in or on a raw agricultural commodity or processed food, a food additive, a color additive, or a new animal drug) that is unsafe within the meaning of section 346 of this title; or (B) if it bears or contains a pesticide chemical residue that is unsafe within the meaning of section 346a(a) of this title;

(Underlining added.)

21 U.S.C. § 346a, entitled "Tolerances and exemptions for pesticide," defines what pesticide chemicals are considered "unsafe" for purposes of the act by generally prohibiting any

sale of a food product with residues unless there is a FDA regulation that exempts or authorizes the sale, as follows:

> (a) Requirement for tolerance or exemption
>
> (1) General rule
>
> Except as provided in paragraph (2) or (3), any pesticide chemical residue in or on a food shall be deemed unsafe for the purpose of section 342(a)(2)(B) of this title ***unless***--
>
> (A) a tolerance for such pesticide chemical residue in or on such food is in effect under this section and the quantity of the residue is within the limits of the tolerance; or
>
> (B) an exemption from the requirement of a tolerance is in effect under this section for the pesticide chemical residue.
>
> (Emphasis added.)

Paragraph (2) of § 346a governs "processed foods," and therefore does not apply to Ochoa's potatoes. Paragraph (3) of § 346a governs "Residues of degradation products" and therefore does not apply to the Clopyralid, Picloram, or

FIFRA defines "pesticide" to include anything that is intended to destroy a "pest," and defines "pest" to include weeds. 7 U.S.C.A. § 136 provides:

> (t) Pest
>
> The term "pest" means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 136w(c)(1) of this title.
>
> (u) Pesticide
>
> The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator . . ..

7 U.S.C.A. § 136 (Underlining added.)

No exemption from the statute is found for any of the three herbicides at issue here.

Triclopyr at issue in this case because those are the actual herbicides, not the degradation products of herbicides.

FIFRA Herbicides are "pesticide chemical" within the meaning of the statute. 21 U.S.C.A. § 321(q) defines the term by reference to:

> (q)(1)(A) Except as provided in clause (B), the term "pesticide chemical" means any substance that is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA, codified at 7 U.S.C.A. § 136 et seq.], including all active and inert ingredients of such pesticide. Notwithstanding any other provision of law, the term "pesticide" within such meaning includes ethylene oxide and propylene oxide when such substances are applied on food.
>
> (B) In the case of the use, with respect to food, of a substance described in clause (A) to prevent, destroy, repel, or mitigate microorganisms (including bacteria, viruses, fungi, protozoa, algae, and slime)
>
> (Underlining added.)

40 C.F.R. § 180.431 is the regulation that provides tolerances for Clopyralid pursuant to that statute, and there is no (zero) allowable food tolerance for Clopyralid in potatoes.

40 C.F.R. § 180.292 is the regulation that provides tolerances for Picloram pursuant to that statute, and there is no (zero) allowable food tolerance for Picloram in potatoes.

40 C.F.R. § 180.417 is the regulation that provides tolerances for Triclopyr pursuant to the statute, and there is no (zero) allowable food tolerance for in potatoes.

There are no exemptions for any of the three herbicides. See 40 C.F.R. § 180.905 *et seq*.

Therefore the potatoes could not legally be sold into commerce because Picloram residues existed in them, and because Triclopyr residues existed in them. It would have been illegal for Zuriel to sell the potatoes regardless of WSDA's action once it knew that all three chemicals were present in the potatoes. The fact that WSDA relied on the

easier-to-find Chlopyralid finding does not excuse Zuriel from following the law on Picloram and Triclopyr.

This was a primary defense theory of the case: The potatoes could not have been marketed whether or not residues from Double Up's Widematch application were in the potatoes because federal law precluded the marketing of the potatoes due to the Picloram and Triclopyr residues found in the potatoes, as well as the Chlopyralid from some unknown source. Indeed, it is precisely the same law – the Federal Food, Drug, and Cosmetic Act (FDCA) that precluded the marketing of the potatoes because of the residues of all three pesticides.

Without a jury instruction telling the jury that was the law, however, Double Up could not make that argument because the jury did not know what the federal law prohibited.

The failure to give the instruction is particularly frustrating to Double Up because Double Up raised this

precise issue with the trial court and advised the trial court about the importance of this issue before the testimony began:

> . . . Of course, as we've argued before on our motions in limine and as we put forth in more detail in our supplemental trial brief just submitted, it's against federal law, it's a crime under federal law to sell potatoes into commerce if they have Picloram or Triclopyr or Clopyralid. That's the key dispute in this case.
>
> * * *
>
> MR. ILLER: One other issue I just want to mention so the court's aware of it, we're going to be objecting to opinions of the law by the WSDA people, particularly opinions of federal law. The WSDA can't get up there and say federal law doesn't say what it says. As we've argued previously and is stated in more detail in the supplemental trial memorandum, federal law bars the entry of these potatoes into commerce. It doesn't matter what the WSDA people say. So that's obviously going to be the subject of additional –
>
> MR. SCHULTZ: They're going to go into great detail. If they had found what he's complaining about, they would have marked them out, moved a few plants maybe. Nobody would have condemned this entire field because the source of those chemicals was spot treatment

> Whether the defendant owes a duty of care is usually a question of law for the court. *Schaaf v. Highfield*, 127 Wn.2d 17, 21–22, 896 P.2d 665 (1995); *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 394, 241 P.3d 1256 (2010); *Austin v. Ettl*, 171 Wn.App. 82, 89, 286 P.3d 85 (2012) (concluding in the context of a CR 12(b)(6) motion that no duty existed). Sometimes, however, cases will arise in which the plaintiff and the defendant present conflicting evidence concerning the facts that would give rise to a duty of care. For such cases, the pattern instruction can be used to submit the factual issue to the jury.
>
> The accompanying special verdict form, WPI 165.03.02, can be used to record the jury's answer and to inform jurors about the next step in their deliberations — in routine cases, jurors would be told that a "yes" answer means that they are to next consider the remaining elements of the negligent misrepresentation claim, and that a "no" answer means that their deliberations on that claim are completed.

Commercial leases of farm land are subject to the traditional common law rules. Those common law rules regarding the condition of leased premises were stated in *Teglo v. Porter*, 65 Wn.2d 772, 773-74, 399 P.2d 519, 520 (1965) as follows:

> for weeks, probably I the week – it was a minor thing.
>
> THE COURT: And I certainly think they can testify as to what they would have done if they would have found such amounts of those chemicals; but again, it's up to the court to direct the jury on the law. And what they would have done based on their practice, that certainly is relevant; but I guess for them to testify as to what the federal law states, I guess I do have some concern about that, and perhaps we will address that further.

(RP 18-21; Underlining added)

In the event, plaintiff's witnesses did not testify that they could override federal law, but the jury was never told what that federal law was. That prevented Double Up from arguing its theory of the case on causation.

4. The Trial Court Erred in Determining that A Duty of Disclosure Existed.

The basis for a duty of care in a negligent misrepresentation or negligent nondisclosure case is described in the comment to 6A *Wash. Prac., Wash. Pattern Jury Instr. Civ.* WPI 165.03.01 (Westlaw 6th ed.) as follows:

It is the general rule, as between landlord and tenant, that, absent agreement to the contrary or a fraudulent concealment of obscure defects, the maxim *Caveat emptor* applies, and the tenant takes the demised premises as he finds them. There is no implied warranty or covenant on the landlord's part that the premises are safe or fit for the purpose intended. *Hughes v. Chehails School Dist.*, 61 Wash.2d 222, 377 P.2d 642 (1963); *Flannery v. Nelson*, 59 Wash.2d 120, 366 P.2d 329 (1961); *Bidlake v. Youell, Inc.*, 51 Wash.2d 59, 315 P.2d 644 (1957); *Conradi v. Arnold*, 34 Wash.2d 730, 209 P.2d 491 (1949); *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 P. 927, 52 L.R.A.,N.S., 578 (1913).

To this general rule certain modifications have developed. See *Prosser on Torts* (3d ed.) s 63, p. 411, et seq.; 39 *Wash.L.Rev.* 352, et seq.

The particular modification, upon which plaintiff relies in the instant case, is to the effect that where there is a covenant or agreement entered into, contemporaneously with commencement of the tenancy, whereby the landlord is to keep and maintain the premises in repair and the landlord acquires knowledge or notice of a condition, existing either before or arising during the tenancy, rendering the premises unsafe, and the tenant, a member of his family, or a guest, suffer personal injury therefrom, after a reasonable time for making the premises safe has elapsed from the time of the landlord's notice,

> then the landlord is liable in tort for the injuries sustained, absent contributory negligence. *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092, 48 L.R.A.,N.S., 917 (1913); *Lowe v. O'Brien*, 77 Wash. 677, 138 P. 295 (1914); *Fletcher v. Sunel*, 19 Wash.2d 596, 143 P.2d 538 (1943); *Restatement*, Torts s 357; *Prosser on Torts* (3d ed.) s 63, pp. 421, 422, 423.

Teglo is still good law in Washington. No negative treatment (distinguishing or overruling) is reported by WestCite, and it was most recently cited and followed in *Monohon v. Antilla*, 130 Wn. App. 1010, at p. 3 (2005).

In the context of a lease of open agricultural ground, the rule of *caveat emptor* applies and Zuriel was required to prove that Double Up had actual, subjective knowledge of the alleged defect at the time the lease was being negotiated. *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 698, 106 P.3d 258, 266 (2005), citing *Nauroth*, held as follows:

> At trial, Mr. Burbo must show that Douglass had actual, subjective knowledge of the defects. *Thornton,* 76 Wash.2d at 433, 457 P.2d 199. Proof that Douglass "knew or should have

> known" is not enough. *Atherton,* 115 Wash.2d at 532–33, 799 P.2d 250. But actual knowledge can be proved by circumstantial evidence. *Nauroth v. Spokane County,* 121 Wash.App. 389, 393, 88 P.3d 996 (2004). Actual knowledge of a defect does not necessarily mean actual knowledge that injury will result. *See, e.g., Howland v. Grout,* 123 Wash.App. 6, 11, 94 P.3d 332 (2004) (Department of Labor and Industries private action exception).

Even if the rule of *caveat emptor* did not apply (though it does), the only means by which Plaintiff could establish a duty to disclose is stated in WPI 165.04 as follows:

> WPI 165.04 Negligent Misrepresentation—Failure To Disclose Information—Fiduciary Relationship—Relationship of Trust And Confidence—Definitions
>
> [A fiduciary relationship exists when one person has a duty to act primarily for the benefit of another. [A fiduciary relationship existed between (name of party) and (name of other party).] [(Name of party) and (name of other party) had a fiduciary relationship if you find that (insert facts that are in dispute).]]
>
> [A relationship of trust and confidence exists when one person has gained the trust and

belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). In other words, the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party. For example, a plaintiff's lack of business expertise, and a defendant's undertaking the responsibility of providing financial advice to a close friend or family member, may indicate a fiduciary relationship. *McGowan v. Pillsbury Co.*, 723 F.Supp. 530, 536 (W.D.Wash.1989).

See also Cummings v. Guardianship Servs. of Seattle, 128 Wn.App. 742, 755 fn.33, 110 P.3d 796 (2005) (a "fiduciary is a person with a duty to act primarily for the benefit of another"); *Guarino v. Interactive Objects, Inc.*, 122 Wn.App. 95, 128, 86 P.3d 1175 (2004) (same holding as in *Cummings*); *In re Jones*, 170 Wn.App. 594, 606, 287 P.3d 610 (2012) (a "confidential relationship exists when one person has gained the confidence of the other and purports to act or advise with the other's interest in mind"); *Endicott v. Saul*, 142 Wn.App. 899, 923, 176 P.3d 560 (2008) (same holding as in *Jones*).

Washington case law sometimes refers to the relationship of trust and confidence as a quasi-fiduciary relationship. See, e.g., *Colonial*

> confidence of the other and purports to act or advise with the other's interest in mind.]

The necessary proof becomes clear from the comment to that WPI:

> A good summary of this area of the law is set forth in *Goodyear Rubber & Tire Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 741–42, 935 P.2d 628 (1997):
>
> > Fiduciary relationships include those historically regarded as fiduciary, and also may arise in circumstances in which "any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former." *Liebergesell v. Evans*, 93 Wash.2d 881, 890–91, 613 P.2d 1170 (1980). In general, "[a] fiduciary relationship imparts a position of *peculiar confidence placed by one individual in another.* A fiduciary is a person with a duty to act *primarily for the benefit of another.*" *Denison State Bank v. Madeira*, 230 Kan. 684, 230 Kan. 815, 640 P.2d 1235, 1241 (1982).
>
> "The facts and circumstances must indicate that the one reposing the trust has foundation for his

> *Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993) (quoting *Favors v. Matzke*, 53 Wn.App. 789, 796, 770 P.2d 686 (1989)).

6A *Wash. Prac., Wash. Pattern Jury Instr. Civ.* (WPI) 165.04 (6th ed.)

Plaintiff's evidence provided no basis whatsoever to conclude that there was a fiduciary or quasi-fiduciary duty. The parties had no relationship other than landlord and tenant. Plaintiff's conclusory testimony that he believed there was a relationship of "almost a partner" is insufficient to establish such a relationship. Reasonable minds could differ as to whether or not to believe that claim, especially when Ochoa admitted he had never shared this supposed belief with Galbreath:

> Q Let's talk about that working relationship. On direct you testified that you thought of Dan almost as a partner, do you recall that testimony?
>
> A I do. I believe –

Q You didn't tell Dan you thought of him as almost a partner; right?

A. No, I never specifically said, hey, Dan, we're partners in this. That's how I felt in our working relationship to describe it to the jury.

Q Of course, almost is the key work. You were not partners with Dan –

A That's correct.

Q -- on this field in any way, shape or farm, were you?

A No.

(RP 525)

Reasonable minds could differ as to whether the parties had such a relationship to create a duty to disclose. Accordingly, the trial court erred in concluding that a duty existed as a matter of law.

5. <u>The Court Improperly Granted a Directed Verdict on Breach of Duty Because Reasonable Inferences Existed in Double Up's Favor on That Issue</u>.

The plaintiff's theory of liability was the subject of enormous dispute before and even during the trial. However, the trial court correctly concluded that the only potential theory under which Defendants' could be liable was for negligent misrepresentation/ negligent failure to disclose. The Washington Pattern Jury Instruction – Civil (WPI) for Negligent Misrepresentation states the elements of that claim as follows:

> WPI 165.02 Negligent Misrepresentation—Failure To Disclose Information—Burden of Proof On The Issues
>
> (Name of plaintiff) has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:
>
> (1) that the defendant had a duty to disclose to (name of plaintiff) the following information: (describe the information at issue);
>
> (2) that (name of defendant) did not disclose this information to (name of plaintiff);

(3) that (name of defendant) was negligent in failing to disclose this information;

[(4) that the disclosure of this information would have caused (name of plaintiff) to act differently;] and

[(4)] [(5)] that (name of plaintiff) was damaged by the failure to disclose this information.

Double Up's proposed Jury instructions included an instruction setting forth these elements in Double Up's Proposed Instruction No. 10, as follows:

Ochoa has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation by affirmative statement:

(1) That Galbreaths supplied information for the guidance of others in their business transactions that was false;

(2) That Galbreaths knew or should have known that the information was supplied to guide Edward Ochoa in business transactions;

(3) That Galbreaths were negligent in obtaining or communicating the false information;

(4) That Ochoa relied on the false information;

(5) That Ochoa's reliance on the false information was reasonable; and

(6) That the false information proximately caused damages to Ochoa.

If you find from your consideration of all the evidence that each of these elements has been proved, your verdict should be for Zuriel, Inc. and Edward Ochoa on this claim. On the other hand, if any of these elements has not been proved, your verdict should be for defendants Galbreath on this claim.

(CP 44)

Double Up proposed instruction No. 11 based on this WPI:

Ochoa has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation by failing to disclose information to Ochoa;

(l) That the Galbreaths had a duty to disclose to Ochoa that a
Widematch application had been made in May, 2011 and that the
Widematch label recommended that potatoes not be planted for 18 months after a Widematch application;

(2) That Galbreaths were negligent in failing to disclose this information;

And

(4) [sic] That the failure to disclose this information was the proximate cause of damage to Ochoa.

(CP 43)

Double Up proposed Instruction No. 12, based on WPI 165.03.01, describes what must be found to establish a duty to disclose, as follows:

> Ochoa has the burden of proving that Galbreaths owed a duty to disclose information to Ochoa. Galbreaths only had a duty to disclose obscure facts not know to Ochoa if Galbreaths had actual knowledge or should have known those facts at the time the lease was being negotiated with Ochoa.
>
> In deciding whether this burden of proving a duty to disclose has been met, you are to decide whether the following fact has been proved:
>
> > That Galbreaths at the time the lease was being negotiated with Ochoa actually knew or should have known that Widematch had been applied to the leased circle in May,

> 2011 and that the Widematch label recommended that potatoes not be planted for eighteen months after a Widematch application.
>
> You have been given a special verdict form that asks you whether this fact has been proved. Fill in the special verdict form according to your answer.
>
> Follow the directions on the special verdict form for what to do next.

In directing the verdict on breach of duty, the Judge necessarily concluded that defendant knew or should have known (remembered) the Widematch application and plant back restriction even though Dan Galbreath, the person negotiating the lease, farmed 4,000 to 5,000 acres and it was his cousin who applied the Widematch application to the ground some six months before.

Further, what Galbreath did tell Zuriel was that "Everything should be good for spuds." (RP 524)

The jury should decide whether or not the duty was breached (though no duty existed). Reasonable minds could differ as to whether Double Up knew or should have known (remembered) the Widematch application made six months before, and knew or should have known (remembered) the recommended plant back period when Zuriel did not even ask for a chemical history for the property. A reasonable person could conclude that a person who farms thousands of acres cannot reasonably be expected to remember every pesticide application and every recommended plant back period.

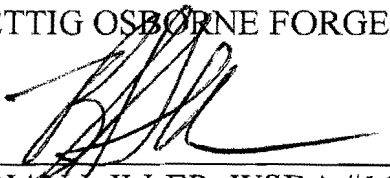
Further, the court must accept Dr. Callihan's testimony that the test plots established that no damage would have occurred to the plants without additional Clopyralid and other additional pesticides being added to the field in 2012. (RP 1370; 1386-89) If that is accepted, then the ground was in fact "good for spuds" and no false representation was made.

E. CONCLUSION

The judgment must be reversed and the case remanded for a retrial with appropriate instructions, and the questions duty and breach of duty must be left to the jury.

RESPECTFULLY SUBMITTED this 22nd day of June, 2015.

RETTIG OSBORNE FORGETTE, LLP



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