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.

REPLY BRIEF OF APPELLANTS

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I. RESPONSE TO ZURIEL'S STATEMENT OF THE CASE

A. Undisputed Evidence Showed That Crop In At Least One Area Had More Picloram Than Clopyralid.

The key positive findings of pesticides were as follows:

Sample Detail - Sample # JKZ-0015-12[illegible]

Sample Date:	6/18/2012 1:31:00 PM
Sample Description:	R.Burbank potato tubers from affected portion of Ochoa field
Type (soil, water):	tubers
Collected By:	Jeff Zelle
Location:	Ochoa's field then Spokane office
GPS Coordinates:	Latitude: 47.226481 Longitude: -118.867147
Rush?	Y
Inv. Comments:	Sample [illegible] in container, wash tubers before analysis.
Lab Comments:	
Diagrams:	
Chain of Custody:	

Sample Transmittal History:

Date Transferred	From	To	Method
6/23/2012 10:11:00 AM	Jeff Zelle	WSDA Lab - Yakima (lab)	US Postal Service

Date Transmitted to Lab	Physical Sample Received at Lab
	6/24/2012

Tests requested:

Test Name
phenoxy scan emph. clopyralid & 2,4-D

Results:

Test Group: ENV 2012 Phenoxy Acid Herbicide Screen

Test Name	Result	MDL	LOQ	Units	Notes
Picloram	0.009	0.0013	0.0035	ppm	
Clopyralid	0.056	0.032	0.064	ppm	
MCPB	ND	0.0002	0.0005	ppm	
Dicamba	ND	0.0006	0.0024	ppm	
Bromoxynil	ND	0.0006	0.0025	ppm	
MCPE	ND	0.0003	0.0006	ppm	
2,4-DB	ND	0.0001	0.0005	ppm	
Triclopyr	0.004	0.0005	0.0014	ppm	
2,4-D	0.004	0.0004	0.0011	ppm	
2,4-DP	ND	0.0003	0.0008	ppm	
MCPA	ND	0.0004	0.0011	ppm	
Aciflurfen	ND	0.0005	0.001	ppm	
Aminopyralid	ND	0.0057	0.026	ppm	

Key to Units of Measure:
ND = None Detected
MDL = Minimum Detection Limit
ppm = Parts Per Million
ug = micrograms
ug/ml = micrograms per millilitre
ppb = Parts Per Billion
C = Below Quantitation Limit
M = Parts Per Million
LOQ = Limit of Quantitation
B = Parts Per Billion

(Exhibit 31, Test 007, reduced to fit; highlighting added)

Test Group: ENV 2012 Phenoxy Acid Herbicide Screen					
Test Name	Result	MDL	LOQ	Units	Notes
Clopyralid	0.056	0.0012	0.0035	ppm	
Picloram	Q	0.032	0.064	ppm	
MCPP	ND	0.0002	0.0006	ppm	
Dicamba	ND	0.0008	0.0024	ppm	
Bromoxynil	ND	0.0008	0.0023	ppm	
MCPA	ND	0.0003	0.0008	ppm	
2,4-DB	ND	0.0003	0.0009	ppm	
Triclopyr	ND	0.0005	0.0014	ppm	
2,4-D	0.005	0.0004	0.0011	ppm	
2,4-DP	ND	0.0005	0.0008	ppm	

(Exhibit 31, test 009, reduced to fit; highlighting added)

The "Q" Result for Picloram means that Picloram was detected above the Minimum Detection Level (MDL) of .032 ppm but below the Level of Quantitation (LOQ) of .064, as shown by the legend to the test results in Exhibit 31:

Key to Units of Measure:
ND = None Detected
MDL = Minimum Detection Limit
ppm = Parts Per Million
ug = micrograms
ug/ml = micrograms per milliliter
ppb = Parts Per Billion
Q = Below Quantitation Limit
M = Parts Per Million
LOQ = Limit of Quantitation
B = Parts Per Billion

Accordingly, there was more Picloram than Clopyralid in test 007 and may have been more Picloram than Clopyralid in test

009.

B. Defense Experts' Testimony Shows that Any Clopyralid Left From Double Up's 2011 Application Never Would Have Been Detected Because It Would Have Produced No Symptoms.

Zuriel ignores Turner and Callahan's testimony that any carryover from the 2011 Widematch application would have produced no noticeable symptoms on the potatoes – less than 1% of the potatoes showed any symptoms at all. (RP 1106; 1368) As demonstrated through test plots, the only potatoes that showed symptoms similar to those reported on the Zuriel 2012 field were exposed to a combination of Clopyralid and Triclopyr and Picloram. (RP 1243-44).

C. Zuriel Mischaracterizes the State Investigator's Testimony and Findings.

The WSDA investigator did not determine that the only source of Clopyralid in Zuriel's potatoes was from the 2011 Double Up application. The actual written finding states: "The only

source of Clopyralid to be determined was the use of Widematch herbicide" by Double Up. (Exhibit 26, p. 11) That is not a finding that no other source existed. It is only a statement that one source had been determined, and that is only one investigator's opinion. It does not rule out the existence of other sources, and it was clear from the defense experts' test plots that there had to be another source of Clopyralid. Further, it says nothing about the sources of Picloram, Triclopyr or 2,4-D found in the potatoes, none of which were applied by Double Up.

D. Picloram And Triclopyr Were Not Limited To A Five Foot By Five Foot Area In The Field.

Zuriel argues that the Picloram and Triclopyr were limited to a five foot by five foot area in the field. See "Respondent's Reply Brief" (hereinafter referred to as Brief of Respondent), at p. 25:

> Picloram and Triclopyr were found in just two

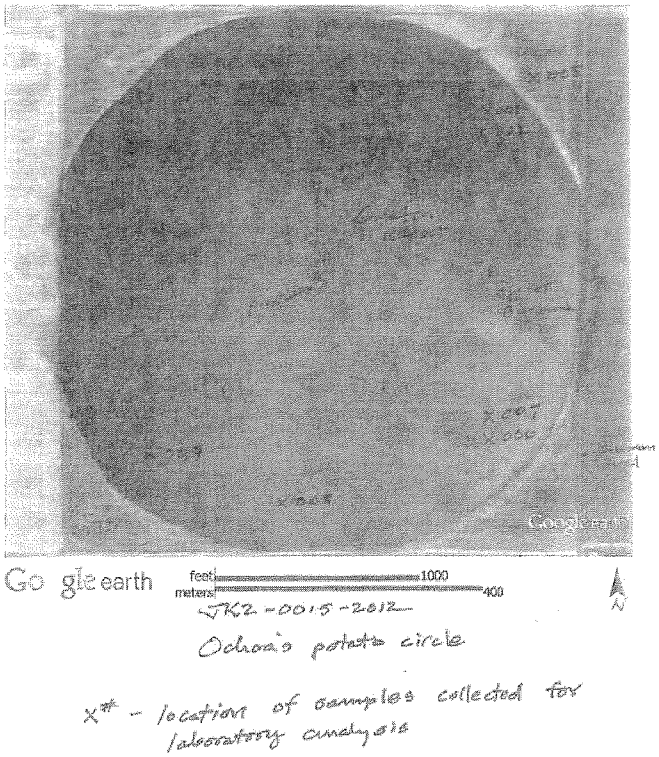
> spots and would have been isolated from the rest of the crop. (RP 308-309) This isolation would have been as small as a five by five foot area . . .

There is no evidentiary report for this "five by five" claim. The cited portion of the record is a question to WSDA food safety manager Gena Reich about other cases, not about Zuriel's crop:

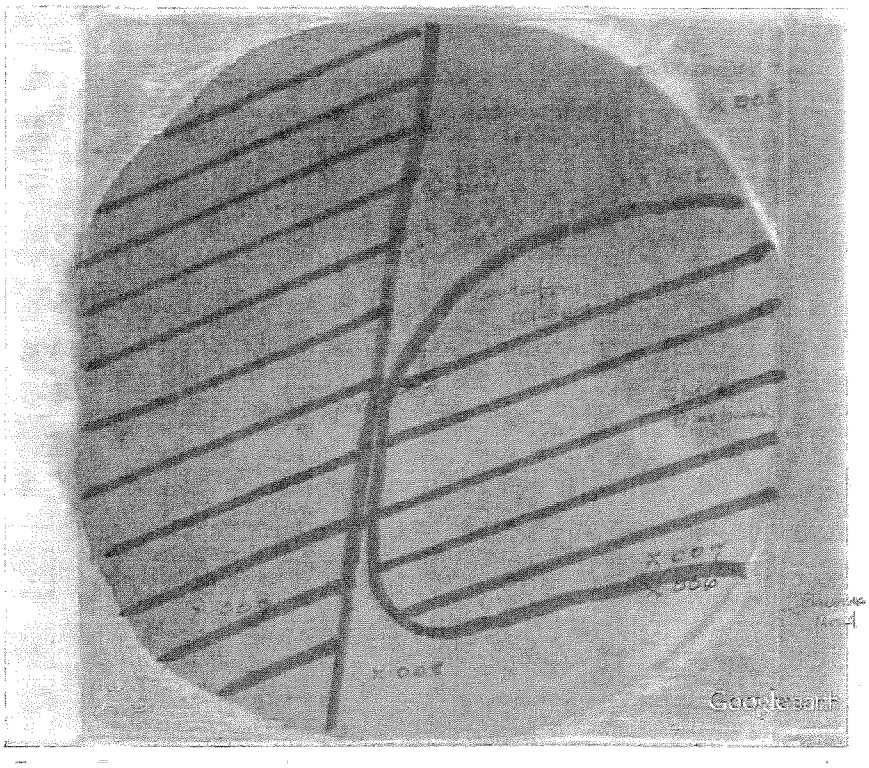
> Q. In your experience, how small can that portion be that is isolated?
>
> A. As small as the samples around it support.
>
> Q. Could that be a five by five—five foot by five foot section?
>
> A. It could be if there were samples, negative samples, around that space.

(RP 309; quoted at p. 23 of Brief of Respondent)

In fact, however, Picloram and Triclopyr were found in two samples in two different quarters of the field. Sample 009 was taken in the Southwest quadrant of the field and Sample 007 was taken in the Southeast quadrant of the field. This is demonstrated by Exhibit 4, page 35



(Resized to fit page – full size copy in Appendix 1) This Exhibit shows that a majority of the field was unmarketable due to Picloram and/or Triclopyr under the WSDA's reasoning that that harvest can be segregated to exclude the potatoes to the next negative test for Picloram and Triclopyr. Applying the WSDA methodology to the WSDA Picloram and Triclopyr test results on the map shows:



(Resized to fit screen; Red lines added to show areas where to next negative sample results)

E. Agreement on Key Facts.

Zuriel does not dispute and therefore agrees:

1. It is illegal to sell potatoes into commerce if the potatoes have detectable Picloram or Triclopyr.

2. Picloram and Triclopyr were found in at least some of Zuriel's potatoes.
3. The pesticide 2,4-D was also found in the potatoes.
4. There was no evidence whatsoever that Double Up applied Picloram, Triclopyr, or 2,4-D.
5. Double Up requested and was denied instructions that would have told the jury that it was illegal to sell potatoes that had detected Picloram, Triclopyr or Clopyralid.
6. Zuriel argues and therefore agrees that the areas with Picloram and Triclopyr in the potatoes could have been segregated.

II. ARGUMENT

A. Double Up Was Prevented From Making Its Causation Argument By the Denial of the Federal Law Instructions Regarding Picloram Or Triclopyr ***Because The Jury Was Instructed To Disregard Any Such Argument***.

Judges tell juries what the law is, not witnesses or attorneys. Even expert witnesses are not allowed to state opinions of domestic

law. In *Orion Corp. v. State*, 103 Wn. 2d 441, 461, 693 P.2d 1369, 1381 (1985), the Washington Supreme Court bluntly stated bluntly:

> . . . Experts are not to state opinions of law. Comment, ER 704.

The referenced comment stated in relevant part:

> Except for testimony concerning foreign law, experts are not to state opinions of law or mixed fact and law. . . .

5B Wash. Prac., Evidence Law and Practice § 704.1 (5th ed.)

Accordingly, if Double Up had argued federal law based on the witness testimony in the absence of federal law instructions, a defense verdict could not have been upheld anyway.

More importantly, however, the jury was specifically instructed to disregard any argument that was not supported by the stated in the instructions. Instruction No. 1 given by the trial court states, in relevant part:

> It also is your duty to accept the law as I explain it to you . . .. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.
>
> * * *

> As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements and arguments are not evidence. You 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 287 and 288; Underlining added)

So, the very first instruction the jury was given requires the jury to "disregard any . . . argument that is not supported by . . . the law as I have explained it to you."

In the face of this directive, an attorney who would choose to argue a federal law that was not contained in the instructions would likely alienate the jury for so blatantly ignoring the Court's Instructions. That alienation would undercut all other arguments that the attorney would make.

There are fundamental problems with Zuriel's other arguments seeking to avoid the trial court's erroneous failure to instruct on the applicable federal law.

1. There Was No General Instruction On Federal Law.

Zuriel's reliance on *State v. Hathaway*, 161 Wash.App. 634, 251 P.3d 253 (2011) is mistaken because *Hathaway* is based on the existence of a general instruction covering the issue to be argued. This is shown by the part of the material quoted in Zuriel's Brief of Respondent:

> . . . But it is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law . . .
>
> 161 Wash.App. 634.

In the present case, there was no general instruction on federal law or on the Federal Food, Drug, and Cosmetic Act (FDCA). Indeed, there was nothing that even mentioned the applicable federal law upon which the WSDA's action rested and which was the centerpiece of Double Up's causation argument. There was nothing in the instructions that addressed the legal impact of federal law on the marketability of the potatoes. There was no instruction to which Double Up could refer to support an argument that "These potatoes could not be sold with or without the Clopyralid

from the 2011 Widematch application because of federal law." Accordingly, this is not a case where the trial court's refusal to instruct on the three pesticides can be excused by the existence of an applicable general instruction.

2. The Absence Of The Federal Law Instructions Prejudiced Double Up.

Zuriel's reliance on *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004) is similarly misplaced. How much more prejudice could exist than eliminating the legal basis for Double Up's primary causation defense?

Double Up was prevented from arguing that federal law made the potatoes unmarketable with or without the Clopyralid from the 2011 Widematch application. Double Up could not make that "no causation" argument without being in violation of Instruction No. 1. Instead, Double Up was limited to arguing that the other pesticides sprayed by some unknown person were the only proximate cause of the damage to the potatoes. It is obvious from just stating the two

arguments how different they are in impact. That is precisely the type of prejudice that requires a new trial.

3. The Proposed Federal Law Instructions Accurately Stated the Law, Were Not Misleading, And Were Necessary to Correct Zuriel's Mischaracterization of the Law.

Zuriel did not argue at trial, and even now on appeal does not argue, that the wording of the instructions somehow misstates the terms of the FDCA. (See RP 1654-1660; 1680-1685) Of course, the instructions were perfectly accurate based on the statutes and regulations cited in the Brief of Appellant.

Instead, Zuriel argument that the instructions were misleading or confusing really boils down to arguing that the WSDA did not rely on the Picloram and Triclopyr findings to embargo the crop. That is a factual argument, not a legal argument.

Indeed, given the fact that Zuriel's entire case is based on the fact that the WSDA did not cite the presence of Picloram and Clopyralid in its embargo order, the federal law FDCA instructions were necessary to avoid jury confusion created by Zuriel and WSDA.

Without the FDCA instructions, the jury was free to accept Zuriel's argument that the WSDA findings somehow make federal law irrelevant. Without those instructions, there was nothing to prevent the jury from being misled into concluding that all of the potatoes were unmarketable SOLELY due to the Clopyralid applied by Double Up the year before. There is no possible doubt that ***some*** if not all of the potatoes were rendered unmarketable under federal law because of the Picloram and Triclopyr even under the WSDA's methodology regarding segregating harvests. However, the jury was kept ignorant of that law by the decision to reject Double Up's proposed FDCA instructions.

B. The Joint And Several Liability Rule Does Not Apply Because Double Up Was Not A Tortfeasor If Its 2011 Widematch Application Was Not A Proximate Cause Of Damages.

Zuriel's reliance on rules regarding concurrent tortfeasors and joint and several liability of tortfeasor put the cart before the horse because it assumes Double Up was a tortfeasor. Double Up was not a tortfeasor if the same damages would have been suffered with or without the 2011 Widematch application. To be a tortfeasor, one's

breach of duty must be the proximate cause of damages to the plaintiff:

> The standard formulation for proving proximate causation in tort cases requires, "first, a showing that the breach of duty was a cause in fact of the injury, and, second, a showing that as a matter of law liability should attach." *Harbeson v. Parke–Davis, Inc.*, 98 Wash.2d 460, 475–76, 656 P.2d 483 (1983).

Mohr v. Grantham, 172 Wn. 2d 844, 850, 262 P.3d 490, 493 (2011) (footnote omitted).

The meaning of "cause in fact" was discussed in detail in *Guerin v. Thompson*, 53 Wn. 2d 515, 519, 335 P.2d 36, 38 (1959):

> If the 'but for' test was the only criterion used by the court in determining that the appellant's violation was a proximate cause of the accident, the test was contrary to our holding in *Eckerson v. Ford's Prairie School District No. 11*, 1940, 3 Wash.2d 475, 482, 101 P.2d 345, 349, wherein we said:
>
> > 'There is, of course, a distinction between an actual cause, or cause in fact, and a proximate, or legal, cause.
> >
> > 'An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would

> not have resulted 'but for' the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, . . .

(Underlining added.)

In this case, the "consequences for which recover is sought" is that the potatoes were unmarketable. However, the only basis for unmarketability attributable to Double Up is if the potatoes were unmarketable due to Clopyralid from the 2011 Widematch application. However, it was also illegal to sell the potatoes because of the presence of Picloram and Triclopyr, chemicals never applied by Double Up. There can be no "but for" causation flowing from the 2011 Widematch application to the extent the potatoes could not be sold due to Picloram and Triclopyr – the same damage would have been suffered with or without the 2011 Widematch application.

Double Up was prevented from arguing that key proximate cause argument by the trial court's refusal to instruct on federal law. Therefore, a new trial is required before Double Up's alleged status as a "concurrent tortfeasor" can provide a basis to uphold the

judgement. In other words, the potatoes were unmarketable anyway, with or without the 2011 Widematch application or the failure to disclose that application. As stated in other jurisdictions:

> . . . If the accident would have happened anyway, whether the defendant was negligent or not, then his negligence was not a cause in fact, and of course cannot be the legal or responsible cause. . . .

Sandoval v. Bank of Am., 94 Cal. App. 4th 1378, 1384, 115 Cal. Rptr. 2d 128, 132 (2002).

If the jury had been instructed on federal law as to Picloram and Triclopyr, the jury could easily have rejected Zuriel's causation argument. Zuriel's causation argument was based entirely on the WSDA officials' action in citing only Clopyralid in barring the potatoes from market. That may be fine for WSDA purposes – WSDA certainly can take the easy way out and point to the presence of Clopyralid as making the potatoes unmarketable. That is exactly what it did.

However, a plaintiff asking for three quarters of a million dollars has the burden of proving cause in fact and cannot just ignore

the presence of these other pesticides not applied by the defendant, and cannot just ignore the federal law that makes it illegal to market potatoes containing those pesticides. By failing to instruct on federal law, the trial court in essence agreed with plaintiff and the WSDA that federal law is meaningless as to causation. That was error, and the case must be reversed and retried to a jury that is properly instructed on federal law and can decide the causation issue in light of that federal law.

C. Joint and Several Liability Does Not Apply Because Even Zuriel Admits and Argues That the Harm Was ***Not*** Indivisible

Zuriel argues at page 32 of Brief of Respondent:

> Even without the presence of Clopyralid, the two areas that contained Picloram and Triclopyr would have been isolated and Ochoa's crop would have been harvested.

Similarly, at p. 23 of its Brief, Zuriel quotes the testimony of WSDA's Gena Reich that it was permissible for a farmer to harvest around an area with contaminated potatoes to an area where the potatoes were not contaminated. As discussed above, applying this reasoning to the available test results, over half the circle could not

have been harvested and sold due to the presence of Picloram and Triclopyr.

This testimony further establishes beyond doubt that the harm – unmarketability -- is divisible, not indivisible. That means that joint and several liability does not apply.

> Joint and several liability is premised upon causation and the indivisibility of the Harm caused.

Seattle-First Nat. Bank v. Shoreline Concrete Co., 91 Wn. 2d 230, 237, 588 P.2d 1308, 1313 (1978).

The requirement of an "indivisible" harm for joint liability was discussed in more detail in *Cox v. Spangler*, 141 Wn. 2d 431, 445-46, 5 P.3d 1265, 1272 (2000) *opinion corrected,* 22 P.3d 791 (Wash. 2001) in distinguishing the earlier case of *Smith v. Rodene*, 69 Wash.2d 482, 418 P.2d 741, 423 P.2d 934 (1966):

> . . . The *Rodene* court stated that "[t]here was neither concert of action *nor independent torts uniting to cause a single injury.*" *Id.* at 484 (emphasis added). The court in *Phennah* [Phennah v. Whalen, 28 Wash.App. 19, 621 P.2d 1304 (1980)] thus properly distinguished the *Phennah* situation from the Michigan case and annotation cited in *Rodene,* in which joint liability was imposed for indivisible injuries caused by

> multiple negligent tort-feasors.[4] In those cases, liability was joint and several where the injuries were not segregable. Since the injuries in *Rodene* did not amount to a "single injury," liability was not "joint." Thus, as the *Phennah* court points out, the *Rodene* court "began on the premise of several liability." 28 Wash.App. at 27, 621 P.2d 1304.

(Footnote omitted; Underlining added)

Accordingly, Zuriel's evidence and argument just establishes that the harm from the Picloram and Triclopyr was divisible from the harm from the 2011 Widematch application because it was "segregable" by simply going to the next area that had a negative test result. Since two of the four samples that from the field tested positive for Clopyralid, and Zuriel admits that those portions of the field could be segregated, there is no joint and several liability.

Indeed, as noted in *Spangler, supra*, the Rodene court held that the burden was on the plaintiff to segregate the damages when the damages are segregable. Accordingly, Zuriel has by its own argument admitted that the failure to instruct on the federal law making the potatoes unmarketable due to Picloram and Triclopyr prejudiced Double Up by allowing Zuriel to argue that the presence

of Picloram and Triclopyr was irrelevant and thereby avoided its burden of segregating damages.

Zuriel seems to understand this defect in its argument because it concludes that argument by relying on Reich's answer to a hypothetical about a five by five foot area that could have been excluded from harvest. There is no basis at all in the evidence that shows that the Picloram or Triclopyr were present only in a five by five area. In fact, Picloram was found in two widely separated test locations, one in the Southeast quadrant of the field and one in the Southwest quadrant of the field, and applying the WSDA's methodology would result in segregation of over half the field as being unmarketable for pesticides never applied by Double Up. (See Exhibit 4, page 35) and discussion above at pp. 6-7.

D. No Case Has Ever Held That Caveat Emptor Does Not Apply to Leases of Open Farmland.

Zuriel cites no case which holds that the doctrine of caveat emptor does not apply in a lease of open farmland. The law was accurately stated in *Teglo v. Porter*, 65 Wn.2d 772, 773-74, 399

P.2d 519, 520 (1965) and other authorities cited in Appellant's Brief, pp. 24 - 28.

Zuriel provides no Washington Supreme Court authority on point as to open agricultural ground. Zuriel only cites and quotes criticisms and rejection of *caveat emptor* in other types of transactions and/or by courts in other jurisdictions. However, *Teglo* has not been overruled by the Washington Supreme Court and therefore is binding precedent on this Court. Zuriel therefore should have been required to prove that Double Up had actual subjective knowledge of the alleged defect at the time of the negotiation. They did not do so. The court's directed verdict was therefore improper.

III. CONCLUSION

For the reasons set forth above, the judgment must be reversed and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 3rd day of September, 2015.

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Defendants/Appellants.

AFFIDAVIT OF SERVICE

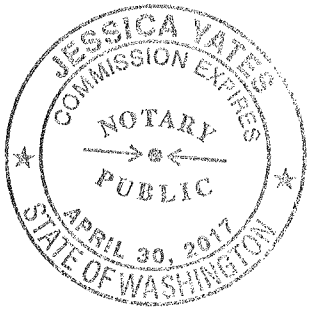
STATE OF WASHINGTON)
) ss.
COUNTY OF BENTON)

I, CAROLINE FERGEN, being first duly sworn upon oath, depose and state:

That I am over the age of 18 years; that on the 3rd day of September, 2015, I served a true and correct copy of Reply Brief of Appellants upon John G. Schultz, attorney for plaintiffs/respondents, at LEAVY, SCHULTZ, DAVIS & RUFF, P.S., 2415 West Falls Avenue, Kennewick, WA 99336, by hand delivery via office courier.

Caroline Fergen
CAROLINE FERGEN

SUBSCRIBED AND SWORN to before me this 3rd day of September, 2015.



NOTARY PUBLIC, in and for the State of Washington, residing at: Kennewick
My Commission Expires: 4-30-17