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.

RESPONDENT'S REPLY BRIEF

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I. Introduction

This case arises from the negligent misrepresentation by Appellants during the negotiations for the subleasing of farmland for the purpose of growing potatoes by Respondent (hereinafter "Ochoa"). Appellants (collectively "Galbreaths") subleased one hundred thirty (130) acres of farmland to Ochoa for the use of farming potatoes in 2012 for the rental price of $107,000. (RP 328; 333) Dan Galbreath is a licensed pesticide applicator and crop consultant. (RP 334-35) Galbreaths applied WideMatch to the field subleased to Ochoa the year prior in 2011, which has an 18-month crop rotation interval label for potatoes because it contains the chemical Clopyralid. (RP 337) Galbreaths did not inform Ochoa of the application of WideMatch during negotiations for subleasing the farmland, despite knowing that Ochoa would be planting potatoes. (RP 338) Instead, Dan Galbreath specifically told Ochoa that the field being subleased was "good for spuds," when in fact the potatoes to be planted in this field would later be rendered unfit for human consumption by the Washington State Department of

Agriculture due to the carryover effect of the WideMatch application containing Clopyralid. (RP 313; 340) Dan Galbreath testified that if he had remembered that they had applied WideMatch the year before, and wishes he would have, he would have told Ochoa and absolutely would not have rented the land to him. (RP 340) The only known source of Clopyralid in the field at issue was the WideMatch application by Galbreaths in 2011. (RP 343) The damage to Ochoa's crop caused by the carryover from Galbreaths' application of WideMatch totaled $584,558.94. (RP 513)

II. STATEMENT OF THE CASE

On May 11, 2011, Galbreaths applied the herbicide WideMatch to an irrigated circle containing a wheat crop. (RP 342) This same irrigated was subsequently subleased to Ochoa in which, potatoes were planted in mid-April 2012. (RP 344) This was approximately eleven (11) months after the application of WideMatch by Galbreaths. (RP 344) WideMatch has an 18-month crop rotation interval label for potatoes because it contains the chemical Clopyralid. (RP 337)

There is no tolerance for human or animal consumption for potatoes that have Clopyralid in them at any level. (RP 158)

During negotiations between Ochoa and Galbreaths concerning the chemical history, Dan Galbreath told Ochoa that "everything should be good for spuds." (RP 524) Ochoa did not have any reason to doubt the assertion made by Dan Galbreath because Dan is a licensed pesticide applicator and crop consultant, which gave his representation of the field more weight as to the truth of the statement. (RP 334-35; 405) Furthermore, the Galbreaths and Ochoa family have had a longstanding relationship in regards to renting land for potato farming. (RP 327) Galbreaths had rented the same land in dispute in this case to Ochoa's father Edward Ochoa, Sr. in 2003, and then to Edward Ochoa, Jr. (Respondent) in 2009 and 2012. (RP 327) All of these contractual relationships between Ochoa, his father, and the Galbreaths were done as "handshake" deals. (RP 327) The relationship between Ochoa and the Galbreaths further solidified Dan Galbreath's representation of the field that it was "good for spuds."

Based on Galbreaths' representation of the field, Ochoa decided to rent the field in order to grow potatoes. (RP 406) The lease and lease negotiations between the parties were done completely verbal in September 2011, a mere four (4) months after Galbreaths' WideMatch application, with rent to be paid by Ochoa in two lump-sum payments. (RP 406)

Ochoa planted potatoes in the field in mid-April, 2012, which continued to look like a very healthy and vibrant crop until he noticed symptoms of damage on July 11, 2012. (RP 425) Concerned, Ochoa looked through his potato grower's handbook to determine the source of the symptoms. (RP 427) Ochoa had a suspicion that the source of the symptoms might be Banvil, which is an herbicide that works on all types of grasses and kills broadleaves. (RP 427) To test this theory, Ochoa called Richard Garza, his crop advisor, to come down to the field and take foliage samples. (RP 428) The foliage samples were sent to the lab to be tested. (RP 428) The foliage samples came back from the lab negative for any chemical that would have caused the symptoms displayed in Ochoa's field. (RP 449) Therefore, Garza concluded that the harmful chemical

was not introduced into Ochoa's field through the air and had to have come from the soil. (RP 449) Garza told Ochoa that he should contact the Washington State Department of Agriculture (hereinafter "WSDA") and have them investigate the cause of the symptoms. (RP 428) Ochoa called Jeffrey Zeller (hereinafter "Zeller"), a WSDA pesticide investigator, to come to the field in order to determine the source of the symptoms exhibited by his potatoes. (RP 107)

On July 23, 2012, Zeller went to investigate the symptoms in Ochoa's field. (RP 116) Upon his investigation, he discovered the chemical Clopyralid in the soil samples he had taken, which surprised him because there is no tolerance for human or animal consumption of potatoes that have Clopyralid in them at any level. (RP 157-58) Without jumping to any conclusions, Zeller returned to Ochoa's field on August 16, 2012, for further investigation to find the source of the Clopyralid. (RP 159) After additional testing of the soil, Clopyralid continued to appear in the test results. (RP 164) Zeller then spoke to Dan Galbreath who admitted that he and his partner Greg Galbreath had applied the herbicide

WideMatch (containing Clopyralid) on his wheat crop the year before. (RP 165) Galbreaths' application records confirmed Dan's statement. (RP 167)

This discovery gave weight to Zeller's theory that the Clopyralid was a result of carryover rather than a seed or drift problem. (RP 168) However, Zeller further investigated in order to make a more thorough finding of Ochoa's potato symptoms. (RP 168) After investigating surrounding sources for potential drift and additional sources of Clopyralid, Zeller concluded that the damage to Ochoa's potatoes was caused by carryover from Galbreaths' WideMatch application the prior year. (RP 173) The effect on the potato plants was evident throughout Ochoa's entire field and omnipresent on the affected plants. (RP 215) At the end of Zeller's investigation, he determined that there were no other possible sources of chemicals and wrote his report accordingly. (Ex. 26) Zeller testified that "I investigated what would be reasonable to ascertain what I put in the report, and I felt that to go on beyond it would approach absurdity." (RP 194)

Concluding the investigation, Zeller submitted his report to his supervisor Scott Neilson. (RP 190-91) On August 27, 2012, Scott Neilson, from the WSDA pesticide division alerted Gena Reich from WSDA Food and Safety of Zeller's report that the chemical Clopyralid had been found throughout Ochoa's field. (RP 309) Gena Reich is the Eastern Washington regional manager for WSDA Food and Safety and former agricultural chemical investigator. (RP 309) Ms. Reich testified that she waits as long as possible before reaching a conclusion on whether to condemn an entire crop for chemical contamination in hopes the chemical will dissipate. (RP 310) Therefore, WSDA contacted Ochoa and found out when harvest was expected, and then waited three or four weeks, taking test samples in early October. (RP 311) Rod Eastman and David Erho from WSDA went to take those additional test samples. (RP 311) The test samples showed Clopyralid throughout the field in five (5) out of six (6) samples. (RP 313, Ex. 35) Ochoa was contacted about the test results and that his field was restricted from entering the food chain because of the presence of Clopyralid. (RP 313)

With the prospect of litigation looming, the Galbreaths hired Stuart Turner (hereinafter "Turner"), an agricultural investigator and the defense's primary expert witness at trial. (RP 1268-70) Turner was hired to take test samples of Ochoa's field after it had been condemned in an attempt to overcome the State order to embargo Ochoa's entire field. (RP 1267) Turner never tested for either Picloram or Triclopyr during his initial investigation of Ochoa's field. (RP 1268-70) Turner took more than twelve (12) test samples of Ochoa's field, testing only for Clopyralid. (RP 1270-71)

Upon the conclusion of Mr. Turner's investigation of the Ochoa field, the WSDA's investigation of the Ochoa field, and WSDA Food and Safety's embargo of Ochoa's potatoes, Mr. Turner was hired on behalf of the Galbreaths to conduct a test plot in 2013 to refute the WSDA's report. (RP 1054) Mr. Turner's purpose for conducting the test plot was to prove that the Clopyralid found in Ochoa's field was a result of some other source other than the WideMatch applied by the Galbreaths. (RP 654) The test plot was funded by an

undisclosed source for approximately $30,000. (RP 1277) An Experimental Use Permit was required by WSDA in order to conduct this particular test plot, but no such permit was ever received by Mr. Turner. (RP 1362) Furthermore, Gil Cook, former president of the Western Society for Weed Science and the Washington State Weed Association, testified that Mr. Turner's test plot was inadequate and not comparable to the disaster that occurred to Ochoa's potatoes. (RP 1570-74)

III. ARGUMENT

A. Summary of Argument

Galbreaths proposed jury instructions regarding the Federal Food, Drug, and Cosmetic Act (FDCA), which prohibits the marketing of potatoes containing Clopyralid, Picloram or Triclopyr residues. The trial court correctly refused to give such jury instructions stating that federal law prohibits putting potatoes into commerce if they have residues of Picloram or Triclopyr.

The Washington State Department of Agriculture rendered the potatoes as unsuitable for human or animal

consumption because the potatoes contained Clopyralid, which was found throughout Respondent's field as a result of Galbreaths' WideMatch application the year prior. Traces of Triclopyr and Picloram were also found within the field. However, the WSDA determined that these results were outliers and were not of significance because these areas in which these chemicals were found would not have condemned Ochoa's entire field. Therefore, to give specific instructions regarding federal law prohibiting Picloram and Triclopyr would only confuse the jury by misstating the applicable law, as stated by Judge Mitchell.

Furthermore, Galbreaths were allowed the opportunity to argue their theory of the case without the need of the proposed jury instructions. Both parties' witnesses testified to the zero tolerance of Clopyralid, Picloram, and Triclopyr in potatoes. Therefore, the jury instructions were not required and the general instruction (Jury Instruction 11) was sufficient for the Galbreaths to argue their theory of the case.

In addition, Galbreaths are held jointly and severally liable for the damage caused to Ochoa's field and the

introduction of such jury instructions would not have indemnified Galbreaths, rendering the issue moot.

The trial court correctly directed a verdict on duty and breach. The trial court determined that there was no substantial evidence or reasonable inferences therefrom to support a verdict for the Galbreaths on duty and breach. The evidence was clear, cogent and convincing that Ochoa was not at fault and Galbreaths had negligently misrepresented to Ochoa that the field was "good for spuds" prior to the sub-leasing of the field at issue. Dan Galbreath testified to the foregoing:

> Q. If you had remembered that you had put WideMatch on, you would have never rented this –
>
> A. Absolutely.
>
> Q. -- you didn't do this on purpose.
>
> A. No.
>
> Q. Huh? This was just absolutely an oversight or mistake by you.
>
> A. Yeah. If I'd have remembered, I wished I would have. My cousin and I would have recalled. We would have told him and – absolutely would never rented to him.

(RP 340)

Q. Okay. I'll show you the deposition and ask you – and I hope that – can you see the deposition?

A. Yes.

Q. The question I asked you: The only source of Clopyralid in Eddie's field was the application the year before by your cousin of WideMatch.

A. Yes, that's correct.

Q. Your answer then was yes.

A. Yeah.

Q. Is that your answer today?

A. The only source of the Clopyralid in the field that was applied the year before was by my cousin with the WideMatch?

Q. Yes.

A. Yes.

(RP 343)

Furthermore, the doctrine of caveat emptor has long been disapproved by Washington State courts and is not an applicable defense in this case. The evidence is clear that Galbreaths made a negligent misrepresentation to Ochoa

regarding the field in question, and therefore, the trial court correctly directed a verdict on duty and breach of duty.

B. Standards of Review

1. Review of Jury Instructions

A trial court's choice of jury instructions is reviewed for an abuse of discretion.

> [W]e review a trial court's choice of jury instructions for an abuse of discretion. *State v. Douglas,* 128 Wash.App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing,* 147 Wash.2d 620, 626, 56 P.3d 550 (2002). It is reversible error to refuse to give a proposed instruction only if the instruction properly states the law and the evidence supports it. *State v. Ager,* 128 Wash.2d 85, 93, 904 P.2d 715 (1995); *see Staley,* 123 Wash.2d at 803, 872 P.2d 502. But it is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory. *State v. Portrey,* 102 Wash.App. 898, 902, 10 P.3d 481 (2000); *State v. Castle,* 86 Wash.App. 48, 62, 935 P.2d 656, *review denied,* 133 Wash.2d 1014, 946 P.2d 402 (1997).

State v. Hathaway, 161 Wash. App. 634, 647, 251 P.3d 253, 261 (2011). "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state

the law, and are not misleading." *Duran v. City of Maywood,* 221 F.3d 1127, 1130 (9th Cir. 2000) quoting *Gilbrook v. City of Westminster,* 177 F.3d 839, 860 (9th Cir.) quoting *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir.1996)).

2. Review of Directed Verdict

The granting of a directed verdict is reviewed *de novo. Ramey v. Knorr*, 130 Wash. App. 672, 676, 124 P.3d 314, 317 (2005). Motions for directed verdicts or judgment as a matter of law are appropriate if, after viewing the evidence in the light most favorable to the nonmoving party, the trial court determines there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party. *Goodman v. Goodman,* 128 Wash.2d 366, 371, 907 P.2d 290 (1995). The court in *Caulfield v. Kitsap County* described the review of a denial of a motion for judgment as a matter of law as being "confined to whether the evidence presented was sufficient to sustain the jury's verdict." 108 Wash. App. 242, 250, 29 P.3d 738, 742 (2001) citing *Wright v. Engum,* 124 Wash.2d 343, 356, 878 P.2d 1198 (1994)). "We will not

overturn a verdict as long as the record contains enough evidence to persuade a rational, fair-minded person of the truth of the matter in question." *Id.* citing *Wlasiuk v. Whirlpool Corp.*, 81 Wash.App. 163, 170, 914 P.2d 102 (1996), 932 P.2d 1266 (1997).

C. The Trial Court Properly Excluded Proposed Jury Instructions Regarding Federal Law Prohibiting the Sale of Potatoes That Have Detectable Residues of Picloram or Triclopyr

A trial court's choice of jury instructions are reviewed for an abuse of discretion. *State v. Douglas*, 128 Wash.App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. *State v. Hathaway*, 161 Wash. App. 634, 647, 251 P.3d 253, 261 (2011) citing *State v. Clausing*, 147 Wash.2d 620, 626, 56 P.3d 550 (2002). "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Duran v. City of Maywood*, 221

F.3d 1127, 1130 (9th Cir. 2000) quoting *Gilbrook v. City of Westminster,* 177 F.3d 839, 860 (9th Cir.) quoting *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir.1996)).

1. The Galbreaths Were Allowed to Argue Their Theory of the Case Without the Proposed Jury Instructions

It is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory. *State v. Hathaway*, 161 Wash. App. 634, 647, 251 P.3d 253, 261 (2011) citing *State v. Portrey*, 102 Wash.App. 898, 902, 10 P.3d 481 (2000); *State v. Castle*, 86 Wash.App. 48, 62, 935 P.2d 656, review denied, 133 Wash.2d 1014, 946 P.2d 402 (1997).

The trial court gave the jury a general instruction that adequately explained the law in this case and allowed both parties to argue its case theories. Jury instruction 11 states:

> There may be more than one proximate cause of the same injury or event. If you find that Galbreaths' 2011 WideMatch application was a proximate cause of damages to Ochoa, it is not a defense that some other force, some other cause, or the act of some other person who is not a party to this lawsuit may also have been a proximate cause.
>
> However, if you find that the sole proximate cause of injury or damage to the plaintiff was some other force, some other cause, or the act of some

other person who is not a party to this lawsuit, then your verdict should be for the defendant.

This instruction allowed the Galbreaths to argue their theory of the case that some "unknown force" or some other person not a party to the lawsuit was at fault for the damage to Ochoa's crop. A specific instruction regarding federal law prohibiting Picloram or Triclopyr would only have confused the jury and misstated the applicable law in this case. Furthermore, the jury instruction regarding federal law prohibiting Clopyralid was also excluded from the jury. Both parties had the same opportunity to present their theory of the case without the need of specific instructions.

Throughout the trial, the tolerance for Picloram, Triclopyr, and Clopyralid was revealed to the jury via testimony from expert witnesses by both parties. On cross-examination, expert witness William Cobb testified as follows:

Q. Now did you also know that there was a zero tolerance for Clopyralid in potatoes?

A. Yes.

Q. And at that time on October 15, 2012, did you know there was a zero tolerance for Picloram in potatoes?

A. Yes.

Q. And at that time on October 15, 2012, you knew there was a zero tolerance for Triclopyr; right?

A. Yes, sir.

(RP 781-82)

Furthermore, the Galbreaths' primary expert witness Stuart Turner testified in reference to the chemicals Clopyralid, Picloram, and Triclopyr saying that "[w]e wanted to independently verify and be certain of it because the gravity of the situation is the food tolerance for all of these chemicals in potatoes is zero," although Turner never tested for Picloram or Triclopyr in his initial investigation of Ochoa's field (RP 1041, (RP 1270-71)

After careful consideration of the evidence and testimony provided throughout the trial, Honorable Judge Cameron Mitchell stated as follows:

> There was discussion regarding the plaintiff's request that the court include an instruction regarding—indicating that federal law prohibits the application or the presence of Picloram and Triclopyr in potatoes. And certainly there has been evidence presented that indicated

> that Triclopyr and I believe—excuse me, Picloram and I believe also the Triclopyr that there is zero tolerance for those chemicals. And the argument has been made that for that reason the court should give that instruction.
>
> And during the course of the testimony, as I recall it, the experts indicated that there was a zero tolerance, as I said, and I think it was indicated that that would show—the presence of those chemicals would show that there had to have been—arguable that there had to have been an additional application.
>
> I think the defense experts indicated that the presence of those chemicals were not applied as part of the WideMatch, indicated there had to be another application. I think it's certainly relevant to that issue. But I don't—after considering it, I don't think that its proper for the court to give the instruction that Picloram and/or Triclopyr are not—are federally prohibited substances. I think that confuses—can confuse the issues in this matter, and I also think that the defense can certainly argue their theory of the case without the court giving that instruction.

(RP 1679-80)

Therefore, the Galbreaths were allowed to argue their theory of the case without the proposed jury instructions. The evidence and testimony provided at trial from both parties revealed that Clopyralid, Picloram, and Triclopyr all have a zero tolerance level in potatoes. Judge Mitchell provided a more general instruction that catered to the Galbreaths' theory of the

case. It is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law. *State v. Hathaway*, 161 Wash. App. 634, 647, 251 P.3d 253, 261 (2011) citing *State v. Portrey*, 102 Wash.App. 898, 902, 10 P.3d 481 (2000); *State v. Castle*, 86 Wash.App. 48, 62, 935 P.2d 656, review denied, 133 Wash.2d 1014, 946 P.2d 402 (1997).

2. Galbreaths' Proposed Jury Instructions Would Be Misleading and Misstate the Law Because Both Picloram and Triclopyr Were Found to be Outliers by WSDA and Would Not Have Condemned Ochoa's Entire Field

"Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) quoting *Gilbrook v. City of Westminster,* 177 F.3d 839, 860 (9th Cir.) quoting *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir.1996)).

The proposed jury instructions would misstate the applicable law and mislead the jury because the residues of Picloram and Triclopyr found in just two samples were not pertinent to the ultimate fate of Ochoa's crop. (RP 240) Ochoa

would have been able to isolate damaged portions of his field by removing potatoes in small areas, possibly as small as a five foot by five foot section. (RP 309) The presence of such chemicals would not have condemned the entire field as did the Clopyralid, in which Galbreaths conceded as being responsible for. (RP 343) To inform the jury otherwise with such instructions would only lead to confusion.

Jeffrey Zeller, the WSDA pesticide investigator that investigated Ochoa's field for possible sources of contaminants testified as follows:

> Q. Now let's be absolutely honest here, Mr. Zeller, it appears to this test you found two other chemicals, Picloram and Triclopyr.
>
> A. That's correct.
>
> Q. Now what's Picloram?
>
> A. Picloram is a herbicide.
>
> Q. What's Picloram commonly used for?
>
> A. It's used as a herbicide in grain production usually as a spot treat for large perennial weeds such as Canada Thistle.
>
> Q. So you say it's in grain production to treat a weed like a thistle. Would that be like going into a wheat field and spraying a thistle?

A. Or a number of them growing together, yes, in a patch.

Q. And tell me about Triclopyr. Because we find Triclopyr here. Let's now identify the eight ball. What's Triclopyr?

A. That's another herbicide.

Q. What Triclopyr commonly used for?

A. It can be used in grain production. It also can be used in right-of-way use.

(RP 162-63)

On cross-examination, Zeller further testified on the finding of Picloram and Triclopyr as follows:

Q. Wasn't the short version, Mr. Zeller, you didn't try to determine the source of those herbicides?

A. Well, there was only one area and they were not pertinent to the ultimate fate of Mr. Ochoa's crop.

Q. Excuse me, Picloram was found in two areas; correct?

A. The one for certain and then there was another Q.

Q. And what's your testimony that Q means?

A. It means it's not—it may be there they cannot quantify the amount.

(RP 240)

Gena Reich, the Eastern Washington regional manager for WSDA Food and Safety testified as follows:

Q. Can a grower isolate the problem and maybe harvest around a particular contaminant?

A. That's quite common.

Q. How do they do that then? How do they isolate the problem?

A. Through the sample results. They'll show where it is and where it isn't.

Q. Will they test around where that result was?

A. Yes, they will if they're trying to narrow it even further.

Q. Uh-huh. Do you have experience with isolating areas that have contaminants?

A. Yes, it's very common, especially in a drift-type situation where it may only have drifted across a portion of the field. We'll narrow it and only the part that's contaminated doesn't get harvested, the rest is fine.

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 308-09)

Residues of Picloram and Triclopyr were not found to be pertinent to the ultimate condemnation of Ochoa's field by WSDA investigator Jeffrey Zeller. Based on the evidence and testimony provided, residues of such chemicals would be caused by spot treatments for various types of weeds and any potatoes affected would be isolated from the rest of the field. (RP 162-63; 308-09) The residues of both Picloram and Triclopyr were not cause for concern during the WSDA's investigation of Ochoa's field because Clopyralid was found uniform throughout the field as a result of Galbreaths' WideMatch application. Clopyralid was deemed to be the only source that restricted Ochoa's potatoes from entering the food chain. (RP 313) To allow Galbreaths' proposed jury instructions would mislead the jury and misstate the applicable law because such instructions would render an interpretation that any trace of Picloram or Triclopyr would condemn the entire field, which not a true and accurate statement according the evidence and testimony provided.

3. No Substantial Evidence Supported the Galbreaths' Proposed Jury Instructions Because the Potatoes Were Embargoed Only Because Of Clopyralid, Which Was Found Widespread and Uniform Throughout the Field

"Jury instructions are sufficient if substantial evidence supports them..." *State v. Clausing,* 147 Wash.2d 620, 626, 56 P.3d 550 (2002). Galbreaths contend that proposed jury instructions regarding Federal Law prohibiting the sale of potatoes that have detectable residues of Picloram and Triclopyr should have been given to the jury. However, these instructions are not support by any substantial evidence because WSDA Food and Safety cited only Clopyralid as the reason it barred Ochoa's potatoes from market. (RP 313) 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, unlike Clopyralid which resulted 130 acres being condemned. (RP 308-309) The presence of such chemical residue would not have embargoed the entire field as did the Clopyralid. Gena Reich, the Eastern Washington regional manager for WSDA Food and Safety testified as follows:

Q: After you found Clopyralid throughout the field, what then did you do?

A: The – Dave and Rob contacted the grower and let him know the results. The results that we found were, we took six samples and – I know Dave's going to talk to you later, so he should go into this a little bit more. But, there was one sample where it was not detected. It was found in five out of six of the samples.

Q. All right. And was Mr. Ochoa's field restricted from entering the food chain?

A. It was.

Q. And why was it restricted from entering the food chain?

A. Because of the presence of Clopyralid.

(RP 313)

Clopyralid was widespread and uniform throughout Ochoa's field. (RP 215) Furthermore, Galbreaths affirmed the fact that they had applied the herbicide WideMatch containing Clopyralid the year prior and that application was the only source of Clopyralid within the field. (RP 343) Dan Galbreath testified as follows:

Q. Okay. I'll show you the deposition and ask you – and I hope that – can you see the deposition?

A. Yes.

Q. The question I asked you: The only source of Clopyralid in Eddie's field was the application the year before by your cousin of WideMatch.

A. Yes, that's correct.

Q. Your answer then was yes.

A. Yeah.

Q. Is that your answer today?

A. The only source of the Clopyralid in the field that was applied the year before was by my cousin with the WideMatch?

Q. Yes.

A. Yes.

(RP 343)

Galbreaths were fully responsible for the Clopyralid found in Ochoa's field and the field was condemned by WSDA Food and Safety because of the zero tolerance for Clopyralid, not Picloram or Triclopyr.

D. Exclusion of Jury Instructions is a Moot Issue Because Galbreaths Cannot Escape Liability as a Matter of Law

1. Even if Another Source was a Proximate Cause, Galbreaths Would Be a Concurrent Cause and are Not Exempt from Liability Based on Contributing Factors

There may be more than one proximate cause of an injury. *State v. Jacobsen*, 74 Wash.2d 36, 37, 442 P.2d 629 (1968). And the concurrent negligence of a third party does not break the chain of causation between original negligence and the injury. *Id.* If the defendant's original negligence continues and contributes to the injury, the intervening negligence of another is an additional cause. It is not a superseding cause and does not relieve the defendant of liability. *Doyle v. Nor–West Pac. Co.,* 23 Wash.App. 1, 6, 594 P.2d 938 (1979); *Eckerson,* 3 Wash.2d 475, 101 P.2d 345. As stated in *Travis v. Bohannon*:

> The rule is found in *Restatement (Second) of Torts* § 439: "If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability."

128 Wash. App. 231, 242-43, 115 P.3d 342, 348 (2005).

Ochoa's potatoes were barred by the WSDA from commerce because of the presence of Clopyralid found uniformly throughout the field. Even Galbreaths' primary expert witness, Stuart Turner, conceded that Galbreaths were

the cause of the Clopyralid within Ochoa's field. His testimony is as follows:

> Q. Now I want to ask you about the fundamental conclusions you've reached here before we go into them and go into how you reached them.
>
> You've done a lot of research, including a planting 25 miles away, and did you conclude that possibly as much as a quarter or a third of the amount of the Clopyralid found in this field came from the WideMatch application the year before?
>
> A. That is correct. That's my calculation. Depends on exactly which set of numbers you use, that's the range, yes.
>
> Q. You are not saying that there was no Clopyralid in this field from the year before.
>
> A. No, sir, I'm not saying that.

(RP 1263-64)

Potatoes have a zero tolerance for Clopyralid, so any detectable residue would render them unfit for human consumption. Even if the jury instructions were given to include Federal Law prohibiting potatoes containing Picloram and Triclopyr from commerce, the presence of such chemicals would have been a concurrent cause of condemnation for which the Galbreaths would still be held liable.

2. Galbreaths are Jointly and Severally Liable for Damages Caused to Respondent's Field Pursuant to RCW 4.22.070(1)(b)

Pursuant to RCW 4.22.070(1)(b), the Galbreaths are jointly and severally liable for 100% of the damages caused to Ochoa's crop. The effect of joint and several liability is that each tortfeasor is liable for the entire harm. See e.g. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.,* 91 Wn.2d 230, 588 P.2d 1308 (1978). Joint and several liability requires each tortfeasor to be liable for the entire harm, and the plaintiff can sue one or all of the tortfeasors to obtain full recovery. *Id.* at 234-35.

"Except as otherwise provided in RCW 4.22.070, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several." RCW 4.22.030.

RCW 4.22.070(1) states that

> In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The

> entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants...The liability of each defendant shall be several only and shall not be joint except if:
>
> (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

Thus, RCW 4.22.070 provides that in actions involving a fault-free plaintiff and damages caused by both at-fault entities, the at-fault defendants are jointly and severally liable for the sum of their proportionate shares of the claimant's total damages. *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wash. 2d 102, 114, 75 P.3d 497, 502 (2003).

Under the plain language of RCW 4.22.070(1)(b), joint and several liability is invoked if the trier of fact concludes the claimant or the party incurring property damages is fault-free.

In our case, Galbreaths are claiming that they should be relieved of liability for the damages they caused to Ochoa's potatoes because of the presence of other chemicals besides Clopyralid (namely Triclopyr and Picloram), which were found

in two remote areas of the field at extremely low levels. Triclopyr was found in one spot at a level of 0.002 while Picloram was found in one spot at a level of 0.098 and another at a detection level Q, meaning it was detected at a level that is below the quantitation limit. (See Ex. 31, Ex. 26)

This claim is moot because the Galbreaths are joint and severally liable for the damages incurred by Ochoa under RCW 4.22.070(1)(b). The evidence is clear that Galbreaths applied the herbicide WideMatch, which contained the chemical Clopyralid, the year prior to Ochoa planting potatoes. The potatoes were rendered unfit for human consumption by WSDA because Clopyralid was found to be throughout the field. Regardless of whether small amounts of additional chemicals were found, which WSDA deemed to be outliers, Ochoa's potatoes would have been embargoed because of the Clopyralid applied by the Galbreaths was found widespread throughout Ochoa's field. 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.

Furthermore, the trier of fact and Galbreaths concluded that the evidence was clear and convincing that Ochoa was fault-free and had no part in the embargo of the potatoes. Judgment was entered against Galbreaths, and even if the jury instructions regarding Federal Law prohibiting Picloram and Triclopyr was given (for the sole purpose of shifting partial fault on a non-existing party), Galbreaths are held jointly and severally liable for the damages incurred by Ochoa, which would render the proposed jury instructions moot. Therefore, Federal Law prohibiting the sale of potatoes that have detectable residues of Picloram or Triclopyr is moot because Galbreaths are held jointly and severally liable.

D. The Trial Court Correctly Directed a Verdict on Duty and Breach of Duty Because There was No Substantial Evidence or Reasonable Inferences Therefrom to Support a Verdict for the Galbreaths on Such Claims

1. Negligent misrepresentation was proven by clear, cogent, and convincing evidence

Washington law recognizes the tort of negligent misrepresentation. *Haberman v. Wash. Pub. Power Supply*

Sys., 109 Wash.2d 107, 161–62, 744 P.2d 1032, 750 P.2d 254 (1987). Washington courts have adopted these elements of negligent misrepresentation:

> A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Ross v. Kirner,* 162 Wash.2d 493, 499, 172 P.3d 701 (2007).

Austin v. Ettl, 171 Wash. App. 82, 87-88, 286 P.3d 85, 88-89 (2012).

To establish a claim for negligent misrepresentation, a plaintiff must show that the defendant negligently supplied false information the defendant knew, or should have known, would guide the plaintiff in making a business decision, and that the plaintiff justifiably relied on the false information. In addition, the plaintiff must show that the false information was the proximate cause of the claimed damages. *Van Dinter v. Orr*,

157 Wash. 2d 329, 332-33, 138 P.3d 608, 609 (2006) citing *Lawyers Title Ins. Corp. v. Baik,* 147 Wash.2d 536, 545, 55 P.3d 619 (2002).

Negligent misrepresentation under Restatement (Second) of Torts § 551—Liability for Nondisclosure invokes the duty to disclose only in terms of a business transaction. *Richland Sch. Dist. v. Mabton Sch. Dist.,* 111 Wash. App. 377, 386, 45 P.3d 580, 586 (2002) citing *Colonial Imports,* 121 Wash.2d at 732, 853 P.2d 913. Liability is further limited by Section 551(2) to those situations where business advice is given by one who proclaims expertise or who has a financial stake in the matter under consideration. *Id.* at 732–33, 853 P.2d 913. The duty to disclose arises in a quasi-fiduciary relationship, when (1) a special relationship of trust and confidence exists between the parties; (2) one party relies upon the superior specialized knowledge and experience of the other; (3) the seller has knowledge of a material fact unknown to the buyer; and (4) there exists a statutory duty to disclose. *Id* at 732, 853 P.2d 913.

The trial court correctly directed a verdict on duty and breach of duty against Galbreaths on liability for negligent

misrepresentation/negligent failure to disclose. In our case, the trial court found the evidence to be clear, cogent, and convincing that Galbreaths had a duty to disclose the application of the herbicide WideMatch (containing Clopyralid) during the negotiations between Ochoa and Galbreaths. Dan Galbreath was a licensed pesticide applicator, pesticide consultant, and long-time farmer. He testified to the fact that he knows the detrimental effect on potatoes caused by Clopyralid and would not have subleased the field to Ochoa if he had remembered the application from the prior year. He had a duty to disclose this information to Ochoa before subleasing the field to him and did not do so. The disclosure of such information would have prevented Ochoa from renting the field and the potatoes yielded therefrom would not have been embargoed by the WSDA.

Furthermore, Dan Galbreath supplied information for the guidance of Ochoa in their business transaction that was false. During negotiations with Ochoa for the subleasing of the field, Galbreath stated that the field was "good for spuds." Galbreath knew that his statement guided Ochoa in the renting and

farming of potatoes in the field and had a financial interest in the amount of $107,000 of rent to be paid by Ochoa. Galbreath was negligent in communicating this false statement by negligently misrepresenting the condition of this field in regards to growing healthy potatoes. Dan Galbreath testified that if he had remembered the application of WideMatch he would not have subleased the field to Ochoa. Ochoa relied on Galbreaths' statement as being truthful based on prior knowledge of Galbreaths' extensive knowledge of farming and chemical application, and similarly, an extensive working relationship between the Galbreaths and Ochoa stemming all the way back to 2003. Ochoa's reliance on this false information was reasonable based on such factors. Without the statement and assurance by Galbreath, Ochoa never would have paid $107,000 to rent this field to grow potatoes and his potatoes would not have been embargoed by the WSDA.

2. Washington Courts Have Long Disapproved of the Doctrine of Caveat Emptor

Caveat emptor, Latin for "Let the Buyer Beware," "means nothing more than saying that the risks of latent

defects... ought to fall on the purchaser rather than the vendor where those defects are unknown to the vendor." *Hughes v. Stusser*, 68 Wash.2d 707, 712 (1966).

The general rule is that a tenant takes the premises as he finds them and that there is no implied warranty on the landlord's part that they are safe or even fit for the purpose for which they are rented unless there is an express contract covering the matter. *Penney v. Pederson*, 146 Wash. 31, 33-34 (1927). One of the exceptions to this rule is that even though the subject-matter of the sale or lease is at hand, if the false representations relate to facts peculiarly within the knowledge of one of the parties and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation, the rule of caveat emptor does not apply. *Id.*

Caveat emptor is "no longer rigidly applied to the complete exclusion of any moral and legal obligation to disclose material facts not readily observable upon reasonable inspection by the purchaser." *Hughes v. Stusser*, at 711. The rule requiring diligence on part of party injured by fraud and

similar rules, such as caveat emptor, must be restricted rather than extended. *Weir v. School Dist. No. 201, Klickitat County*, 200 Wash. 172 (1939).

The doctrine of caveat emptor has been disapproved by the Washington Supreme Court. The Washington Supreme Court reasoned with the Ninth Circuit Court of Appeals by quoting *Byrnes v. Mutual Life Ins. Co.*, 9 Cir., 217 F.2d 497, 502 (1954),

> In the olden days, under the doctrine of caveat emptor, courts were inclined to think that a man dealt with another at his peril and that he should be on the lookout for possible deception, failing which, he would be penalized as negligent in failing to discover the fraud that was being perpetrated on him. The modern rule is against such an attitude. A man who deals with another in a business transaction has a right to rely upon representations of fact as truth.

Scroggin v. Worthy, 51 Wash. 2d 119, 124 (1957). Furthermore, quoting the Supreme Court of Vermont, the Washington Supreme Court reasoned that "[n]o rogue should enjoy his illgotten plunder for the simple reason that his victim is by chance a fool." *Chamberlin v. Fuller*, 59 Vt. 247, 256 (1887).

In *Obde v. Schlemeyer*, the Court again declined to apply the doctrine of caveat emptor and imposed upon the vendor, in certain situations, a duty to speak. 56 Wash.2d 449 (1960). In *Obde*, the vendors sold a residence which was infested with termites. Although the vendors knew there was widespread termite infestation in the residence, the purchasers did not. The vendors argued that they had no duty to inform the purchasers of the termite condition because the purchasers had not so inquired. This court, however, held that such a duty existed. *Id* at 453. Relying on *Perkins v. Marsh*, a landlord-tenant case, the court stated:

> Where there are concealed defects in demised premises, dangerous to the property, health or life of the tenant, which defects are known to the landlord when the lease is made, but unknown to the tenant, and which a careful examination on his part would not disclose, it is the landlord's duty to disclose them to the tenant before leasing, and his failure to do so amounts to a fraud.

Obde, at 452 (quoting *Perkins*, 179 Wash. at 365, 37 P.2d 689). The Court in *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, deemed this rule to be equally

applicable to the vendor-purchaser relationship. 115 Wash. 2d 506, 524 (1990).

Similar to *Obde*, where the vendors sold a residence which was infested with termites and failed to disclose such defects to the unknowing tenant, here, Galbreaths subleased land to Ochoa and failed to disclose that Widematch, containing a hazardous chemical for growing potatoes, was applied to the field the prior year. Like in *Obde*, where the vendors argued that they had no duty to inform the purchasers of the termite condition because the purchasers had not so inquired, here, Galbreaths argue that they had no duty to disclose the chemical history of the land because Ochoa had not specifically asked for a chemical report. The Court in *Obde* held that such a duty to disclose exists, even if the defects have not been inquired into. However, in our case, Ochoa did inquire into whether the field would be ready to grow potatoes and Dan Galbreath told him that the field was "good for spuds."

The Washington Supreme Court has disapproved of the doctrine of caveat emptor, and instead has provided another a standard, one which imposes a duty on the landlord to disclose

all defects that are known or should be known to the landlord when the lease is made. Galbreaths failed to disclose the hazardous chemical Clopyralid in WideMatch had been applied to the land the prior year, which prevented the healthy growth of potatoes for 18 months. Instead, Galbreaths told Ochoa that the land was "good for spuds." A man who deals with another in a business transaction has a right to rely upon representations of fact as truth. *Scroggin*, 51 Wash. 2d at 124. Ochoa relied on this statement by Galbreath (a licensed pesticide applicator and consultant), rented the land, and planted potatoes pursuant to that statement.

Galbreaths had a duty to disclose the WideMatch application to the field before subleasing it to Ochoa. Ochoa had no duty to inquire into the chemical history regarding hazardous chemicals to potatoes because Galbreaths affirmatively stated that the land was "good for spuds." Therefore, Mr. Ochoa had a right to rely upon such representations of fact as truth.

IV. CONCLUSION

The trial court properly chose to exclude proposed jury instructions regarding federal law prohibiting the sale of potatoes that have detectable residues of Picloram or Triclopyr. During the course of testimony, experts from both sides indicated that there was zero tolerance for such chemicals. The trial court did not find it proper to give the instructions because it would confuse the issues in the case and each party could argue their theory of the case without such instructions.

Furthermore, the proposed jury instructions would only mislead and misstate the applicable law in the case because Washington State Department of Agriculture Food and Safety embargoed Ochoa's potatoes only because of Clopyralid, which was found widespread and uniform throughout the field. Both Picloram and Triclopyr were found to be outliers by WSDA and would not have condemned Ochoa's entire field as did the Clopyralid. Gena Reich from WSDA Food and Safety stated that its common practice for small contaminated areas to be isolated, allowing the rest of the field to be harvested.

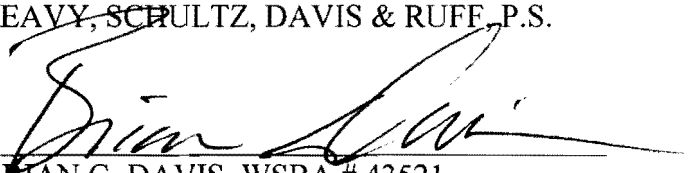
In addition, even if another source was a proximate cause, the Galbreaths would still be a concurrent cause of the damage to Ochoa's field and be held jointly and severally liable. Dan Galbreath testified to being responsible for the WideMatch application the prior year and affirmed that the only known source of Clopyralid within Ochoa's field was from that application.

Finally, the trial court correctly directed a verdict on duty and breach of duty because there was no substantial evidence or reasonable inferences therefrom to support a verdict for the Galbreaths on such claims. The Galbreaths knew or should have known about the WideMatch application based on their extensive knowledge of chemical applications. Dan Galbreath testified that he would have told Ochoa if he had remembered and that he never would have rented the field to him. Based on the Galbreaths extensive knowledge and the parties longstanding working relationship, Ochoa relied on the assertion made by Dan Galbreath that the field was "good for spuds" when he decided to rent the field at a premium price.

Based on the foregoing, the judgment should be affirmed.

Respectfully submitted this 21st day of July, 2015.

LEAVY, SCHULTZ, DAVIS & RUFF, P.S.



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