No. 99102-2

[Court of Appeals No. 79933-9-I]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

Justin Helmbreck

Petitioner,

v.

Paula McPhee and John Doe McPhee, Laura Elliott and John Doe Elliott, City of Des Moines, Washington.

Respondents.

RESPONDENT PAULA MCPHEE'S ANSWER TO PETITION FOR REVIEW

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II. INTRODUCTION

Respondent Paula McPhee ("McPhee") opposes the petition of Appellant Justin Helmbreck ("Helmbreck") for discretionary review of the unpublished decision of Division One of the Court of Appeals' in Helmbreck v. McPhee et al., No. 79933-9-I.

This Court should decline review because no grounds for review exist under RAP 13.4(b). The Division One decision does not conflict with any decision of this Court nor does it conflict with any published decision of the Court of Appeals. The mitigation instruction given by the trial court was not misleading, allowed Helmbreck to argue his theory of the case, and did not affect the ultimate outcome as it relates to Ms. McPhee because the jury found her not at fault for the collision.

The Superior Court and Court of Appeals correctly applied the applicable duty for homeowners in maintaining their property in a reasonably safe condition for travelers on public ways, as stated in WPI 135.01 This straightforward application of law should not be revisited by this Court.

III. NO ISSUES PRESENTED FOR REVIEW BY RESPONDENT

There is no merit for review in this case. Respondent McPhee does not present any additional issues for review.

IV. COUNTERSTATEMENT OF CASE

A. Procedural History

This personal injury case arises from a two-vehicle accident that occurred at an uncontrolled intersection on June 7, 2015 when Petitioner (hereinafter "Helmbreck") failed to yield the right of way. 3 CP 694, 700; 1 CP 1-5. On February 1, 2018, Helmbreck filed suit and amended his complaint on June 13, 2018. *Id.* He brought suit against Respondents McPhee, Elliott, and the City of Des Moines. *Id.* On December 4, 2018, the trial court granted the City's motion for summary judgment and dismissed it from the case. 1 CP 234. The trial court affirmed its ruling over Helmbreck's Motion for Reconsideration. 1 CP 302-305.

On February 13, 2019, the case proceeded to trial against Respondents McPhee and Elliott, and the jury ultimately returned a verdict in favor of Defendant McPhee on March 1, 2019. Respondents' RP vol. 1, 1; 5 CP 2027-2029. The jury found McPhee not negligent, Respondent Elliott 15% liable, and Helmbreck 85% liable. *Id.*

B. Facts

On June 15, 2015 at approximately 1:00 p.m., Helmbreck was driving his 1997 Toyota pickup eastbound on South 212th Street uphill, approaching the intersection of 1st Place South in Des Moines, Washington.

3 CP 694. Respondent Elliott was driving her 2003 Lexus RX 300, traveling northbound on 1st Place South. *Id.* The vehicles approached the uncontrolled intersection at approximately the same, with Helmbreck being the disfavored driver. *Id.* Helmbreck failed to yield the right of way and the cars collided.

Respondent McPhee owns the residence situated on the southwest corner of 1st Place South and South 212th Street. 3 CP 695. At trial, Helmbreck alleged foliage growing along the northeast corner of McPhee's yard blocked his vision of the intersection causing the accident. 1 CP 327-329.

McPhee regularly maintained the foliage along the northeast corner of her property. 4 CP 1385-1386, 1392, 1394-1396, 1399. She was never put on notice that the foliage presented any visual obstacle to passing drivers, and Helmbreck presented no evidence that McPhee had reason to know the foliage could obstruct the line of sight for passing drivers. 4 CP 1393:18-20, 1415-1416.

V. ARGUMENT

Helmbreck seeks review under RAP 13.4(b), which provides:

> "[a] petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
(3) If a significant portion of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Helmbreck does not offer any argument explaining why this Court should accept review under the foregoing standards. For this reason alone, review should be denied. However, the following argument is offered to explain why, even if Helmbreck did apply the governing standard, review should be denied.

1. DIVISION ONE'S FINDING OF NO ABUSE OF DISCRETION BY THE TRIAL COURT IN GIVING THE WPI 33.01 MITIGATION INSTRUCTION DOES NOT CONFLICT WITH ANY SUPREME COURT DECISION OR ANY PUBLISHED DECISION OF THE COURT OF APPEALS.

Helmbreck fails to make the necessary showing that Division One's decision conflicts with a Supreme Court decision or a published decision of the Court of Appeals, as required by RAP 13.4(b)(1) or (2). (Note that neither subsection (3) nor (4) were ever raised in this case at the trial court or Court of Appeals, so they will not be addressed here.) Indeed, Helmbreck fails to cite to any Supreme Court decision or published decision of the Court of Appeals that is contrary to, or in conflict with, Division One's

opinion in this case regarding WPI 33.01. He merely contends the trial court abused its discretion in giving the mitigation instruction arguing there was not enough supporting evidence.

When reviewing an appellant's challenge to jury instructions, the inquiry for the appellate court is "whether the trial court abused its discretion by giving or refusing to give certain instructions." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995), *amended* (Sept. 26, 1995); *see also Fox v. Evans*, 127 Wn. App. 300, 304, 111 P.3d 267 (2005). There is no error if the jury instructions allow each party to argue the theory of the case, are not misleading, and when read as a whole, inform the jury of the applicable law. *Goodman*, 75 Wn. App. at 68 (citing *Judd v. Dep't of Labor and Indus.*, 63 Wn. App. 471, 820 P.2d 62 (1991)). "Even if an instruction is misleading…it will not require reversal unless prejudice is shown." *Id.* (citing *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)). There is no prejudice unless the misleading instruction affects the ultimate outcome of the trial. *Id.*

In this case, Division One stated in its decision:

> Helmbreck does not argue that the court should have given the instruction in WPI 33.02 over the instruction in WPI 33.01. Rather, he argues that there was no evidence to support the WPI 33.01 instruction. Because his argument does not involve a legal error in the instruction, we review the giving of the instruction

> for an abuse of discretion. The question is whether there was substantial evidence to support giving the instruction in WPI 33.01.

Ct. of App. Div. 1. Unpublished Opinion, No. 79933-9I, Sept. 14, 2020 at pg. 18. Accordingly, Helmbreck does not argue there was any legal error or that Division One's decision is contrary to Washington precedent. He therefore fails to make the necessary showing under RAP 13.4(b)(1).

Further, Division One correctly found enough evidence supporting the trial court's decision to give the mitigation instruction. Here, the Court of Appeals properly found there was no prejudice in giving the mitigation instruction. It explained that Helmbreck relied on *Fox v. Evans*, 127 Wn. App. 300, 111 P.3d 267 (2005) and *Hawkins v. Marshall*, 92 Wn. App. 38, 962 P.2d 834 (1998), where WPI 33.02 was the instruction at issue. *Ct. of App. Div. 1. Unpublished Opinion, No. 79933-9I, Sept. 14, 2020* at pg. 16-17. The Court of Appeals further explained that the trial court's mitigation instruction did not track the language of WPI 33.02, but instead, WPI 33.01. *Id.* at 17. The Court of Appeals stated that the mitigation instruction from WPI 33.01 should be given whenever substantial evidence is presented creating an issue for the jury as to the injured person's duty to mitigate. *Id.* at 18.

The Court of Appeals found there was substantial evidence supporting the instruction because medical testimony by Helmbreck's

surgeon, Dr. Farrohki, combined with Helmbreck's testimony could allow a jury to conclude that Helmbreck's injury was aggravated by his subsequent actions. *Id.* at 21. Among all the evidence supporting the mitigation instruction, there is Helmbreck's own testimony that he tried to "tough it out," play basketball, lift weights and go to the gym about three times a week beginning ten days following the accident. *Id.* at 18. Two months after the accident, Helmbreck developed a pain that ran down his leg at all times and had an MRI showing damage to his disc and inflammation. *Id.* at 18-19. A couple of months later, Helmbreck played intramural sports and experienced pain when he jumped or ran. *Id.* at 19. In 2016, he had a second MRI of his back that showed a bulge sticking out of his lower vertebrae. *Id.*

Helmbreck's physical therapist advised him to not work out his lower body, including squats or anything putting weight on his back. *Id.* "Helmbreck testified that he continued playing basketball because he did not believe it put 'a load' on his back." *Id.* But he also testified, playing basketball felt like a "baseball bat" hitting his back. *Id.* Helmbreck ultimately underwent surgery on his back, performed by Dr. Farrohki. Dr. Farrohki testified at a deposition that squats, weightlifting, dead lifts, box jumps, basketball, and running can all cause disc herniations. *Id.* at 20.

Accordingly, Division One properly affirmed the trial court's decision to give the mitigation instruction because, as Division Once cited, there was substantial evidence creating an issue for the jury as to whether Mr. Helmbreck's actions aggravated his injuries. Finally, and importantly, there was no prejudice because the instruction did not affect the ultimate outcome of the trial as it relates to Ms. McPhee; the jury found her to be not liable for the subject accident.

2. DIVISION ONE'S CONCLUSION THAT THE JURY'S DETERMINATION OF DAMAGES WAS NOT INADEQUATE AS A MATTER OF LAW DOES NOT CONFLICT WITH ANY SUPREME COURT DECISION OR PUBLISHED COURT OF APPEALS DECISION.

Again, Helmbreck fails to make the necessary showing under RAP 13.4(b). He reiterates his arguments set forth in his appellate brief, that the jury was confused by the mitigation instruction. McPhee further raises the new issue for the first time here, that the jury's award was inadequate as a result of the instruction given. Of course, this is precluded by the RAPs. "Issues not raised in the trial court will not be considered for the first time on appeal." *Ruddach v. Don Johnston Ford, Inc.*, 97 Wn.2d 277, 281, 644 P.2d 671 (1982) (citing *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980). RAP 10.3(g) states in pertinent part: …"The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP

10.3(g). Further, "This court will not consider issues that were not raised in the Court of Appeals." *In re Tobin*, 165 Wn.2d 172, 175 n. 1, 196 P.3d 670 (2008).

Even so, this is not a basis for discretionary review under RAP 13.4(b) unless there was an error in giving the mitigation instruction. *See Goodman*, 75 Wn. App. at 68. There is no error if the jury instructions "(1) Permit each party to argue the theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." *Id*. "Even if an instruction is misleading…it will not require reversal unless prejudice is shown." *Id.* There is no prejudice unless the misleading instruction affects the ultimate outcome of the trial. *Id.*

At trial, the jury submitted the following question: "Does the term 'negligence' refer only to the cause of the collision, or does it apply to behavior after the collision that may have contributed to any injuries? (Or both?)." *Ct. of App. Div. 1. Unpublished Opinion, No. 79933-9I, Sept. 14, 2020* at pg. 21. The court responded: "Please see the instructions. Per Instruction No. 1. You must consider the instructions as a whole." *Id.*

The trial court also instructed the jury that "[c]ontributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed." *Id.* at 22. Finally, the trial court instructed the jury:

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Id. The Court of Appeals reviewed Helmbreck's closing argument when his counsel referred to the instructions and explained how damages would be apportioned:

> You're going to be asked in these instructions to assign percentages of fault amongst the three parties. I want you to understand how that percentage works in a legal setting and with compensation. So if you deliberate and you decide [Helmbreck] is 10 percent at fault or 40 percent at fault, or whatever percentage you come up with, the judge will take that percentage, he will multiply it times whatever compensation you come up with. And so what [Helmbreck] would receive is the compensation minus his percentage of contributory fault.

Id.

On the verdict form, the jury was instructed *not* to consider the issue of contributory negligence when calculating Helmbreck's damages. *Id.* Indeed, *before the jury allocated fault* on the verdict form, it found Helmbreck's damages to be $29,000. *Id.* at 23. The Court of Appeals found the testimony of Dr. Farrokhi and Helmbreck allowed the jury to conclude Helmbreck's injury from the accident was less severe than the injury for which he had surgery. *Id.* Accordingly, the Court of Appeals determined

that the amount of damages was not inadequate as a matter of law. *Ct. of App. Div. 1. Unpublished Opinion, No. 79933-9I, Sept. 14, 2020* at pg. 23.

The jury instructions read as a whole, allowed Helmbreck to argue his theory of the case: that any actions of Helmbreck following the collision did not have any bearing on the cause of the collision. The jury was instructed to determine damages *before* allocating fault for the collision and Helmbreck argued in closing that the percentage of fault would be multiplied by the amount of damages determined by the jury. The mitigation instruction was not misleading, and even assuming, *arguendo*, that it was, when read with the other instructions and the special verdict form, it properly informed the jury of the applicable law. Most importantly, again, the mitigation instruction has no effect on the ultimate outcome as it relates to Ms. McPhee because the jury found her not at fault for the collision.

3. DIVISON ONE'S AFFIRMING OF THE TRIAL COURT'S INSTRUCTION ON A PROPERTY OWNER'S DUTY WAS IN ACCORDANCE WITH SUPREME COURT AND PUBLISHED COURT OF APPEALS DECISIONS.

Helmbreck argues the instruction given to the jury regarding a property owner's duty did not allow him to argue his theory of the case. *See Helmbreck's Petition for Review*, pg. 17. Specifically, he argues "The jury instruction…did not allow Helmbreck to argue…that a property owner has

a duty to maintain the property so it does not create hazardous conditions on adjacent roadways." *Id.* 17-18.

The trial court gave the following instruction, which tracked the language in WPI 135.01:

> An owner of property adjacent to a public road has a duty to exercise ordinary care in connection with the use of the property so as not to make, or create conditions that make, the adjacent way unsafe for ordinary travel or to cause injury to persons using the public road.

Ct. of App. Div. 1. Unpublished Opinion, No. 79933-9I, Sept. 14, 2020 at pg. 25. This instruction specifically states that a property owner has a duty to maintain their property so it does not create unsafe conditions on adjacent roadways, the same argument Helmbreck contends he was prevented from making.

Helmbreck proposed additional language to the instruction to also include a property owner's "duty to inspect" for dangerous conditions:

> …The owner of the property must inspect the property for dangerous conditions on the property and make such repair or maintenance or provide such warnings as may be reasonably necessary for the persons traveling on adjacent streets. The duty of reasonable care includes an affirmative duty to discover and remove dangerous conditions.

Id. at 24. Although there is no legal authority supporting a private landowner has an affirmative duty to inspect their property, Helmbreck was still allowed to argue this theory in his closing argument:

> The evidence…has shown that the McPhee landscaping blocked the views of drivers on both adjacent streets. The rule and the law that the judge just gave you is that a property owner has a duty to exercise care so as to not allow any condition on her property that makes the adjoining street unsafe. Again, this is in your instructions, but what it says is a property owner…has a duty to exercise care, **which is an affirmative duty**. **[It] doesn't mean you can just sit back and ignore something or not actually exercise care to try to eliminate a hazard.** [She] has a duty not to allow a condition on her property that makes the adjoining streets unsafe.

Id. at 26 (emphasis added).

Washington law is clear: a private landowner does not have a duty to inspect her property for potentially dangerous conditions for adjacent roads. *See* WPI 135.01; *see also Lewis v. Krussel*, 101 Wn. App. 178, 187, 2 P.3d 486 (2000). The instruction given to the jury regarding a landowner's duty to maintain their property was taken verbatim from WPI 135.01, which states:

> Duty of Owner of Occupier of Property Adjacent to a Public Way
>
> An owner/occupier of property adjacent to a public road/street/sidewalk has a duty to exercise ordinary care in connection with the use of the property so as not to make, or create conditions that make, the adjacent way unsafe for ordinary travel or to cause injury to persons using the public road/street/sidewalk.

WPI 135.01.

"The Washington Pattern Jury Instructions are an immense aid to the bench and bar in selecting appropriate jury instructions." *Bradley v. Maurer*, 17 Wn. App. 24, 28, 560 P.2d 719 (1977). And "[a]lthough not

absolutely required, Washington Pattern Instructions are to be used in preference to individually drafted instructions." *Sutton v. Shufelberger*, 31 Wn. App. 579, 582, 643 P.2d 920 (1982).

In Washington, a landowner owes a common law duty to prevent artificial conditions on her land from being unreasonably dangerous to highway travelers. *Rosengren v. City of Seattle*, 149 Wn. App. 565, 573, 205 P.3d 909 (2009); *see also* WPI 135.01. A "landowner may [only] be liable if he [or she] has actual or constructive notice that an alteration to a natural condition creates a hazard to persons on adjacent property." *Krussel*, 101 Wn. App. at 186.

"The seminal case on landowner liability for injuries to persons occurring outside the land is *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745, 375 P.2d 487 (1962)." *Rosengren v. City of Seattle*, 149 Wn. App. 565, 571, 205 P.3d 909 (2009). "Albin supports the proposition that a…landowner may [only] be liable if he [or she] has actual or constructive notice that an alteration to a natural condition creates a hazard to persons on adjacent [streets]." *Krussel*, 101 Wn. App. at 186 (citing *Albin*, 60 Wn.2d at 752).

"Actual or constructive notice of a 'patent danger' is an essential component of the duty of reasonable care." *Id.* "Absent such notice, **the landowner is under no duty to constantly check for defects.**" *Id.* at 187

(emphasis added). "The alleged defect must be 'readily observable' so that a landowner can take appropriate measures to abate the threat." *Id.* "Conversely, absent such knowledge, an owner/possessor does not have a duty" to act. *Id.*

Helmbreck fails to cite to any legal precedent supporting a private landowner has a duty to inspect her property, absent notice. No such authority exists in Washington.

Helmbreck cited to *Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P.2d 118 (1933) and *Re v. Tenney*, 56 Wn. App. 394, 783 P.2d 632 (1989). These cases are inapplicable and do not stand for the proposition that a landowner has a duty to inspect her property. Neither case mentions or even implies a landowner has such a duty.

Tenney is a special use doctrine case for a private landowner using a public way for a special use. *Tenney*, 56 Wn. App. 394. At trial, there was no evidence or argument that Ms. McPhee's landscaping was a special use of a public way, or that her landscaping was located in a public right of way.

Collais is a premises liability case involving a pedestrian slipping on oil and falling. *Collais*, 175 Wash 263. In *Collais*, the court discussed whether the oil came from the premises of an oil company and applied premises liability standards including a duty to warn. *Id.* at 269. This is not a premises liability case and *Collais* is inapplicable.

Helmbreck fails to show how Division One's opinion in this case is contrary to any Washington legal precedent and review should be denied.

VI. CONCLUSION

For the reasons set forth above, Defendant Paula McPhee respectfully requests this Court deny discretionary review.

DATED this 5th day of November, 2020.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on November 5, 2020, Respondent McPhee's Answer to Petition for Review was served on counsel via the Court's electronic filing system and email per agreement to the below named individuals:

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

DATED this 5th day of November, 2020, at Seattle, Washington.

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