

FILED
COURT OF APPEALS
DIVISION II

2014 DEC -1 PM 3: 34

NO. 46358-0-II

STATE OF WASHINGTON

Kitsap County Cause No. 11-2-00952-3

BY: 
DEPUTY

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

SUZETTE GOULD and JAMES GOULD,
wife and husband,

Respondent,

v.

NORTH KITSAP BUSINESS PARK MANAGEMENT, LLC,
a Washington corporation,

Petitioner.

AMENDED BRIEF OF APPELLANT

COLE | WATHEN | LEID | HALL P.C.
Rory W. Leid III, WSBA #25075
Jennifer P. Dinning, WSBA #38236
Attorneys for Petitioner
North Kitsap Business Park Management, LLC
303 Battery Street
Seattle, WA 98121-1419
Telephone: (206) 622-0494

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	1
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR.....	2
IV.	STATEMENT OF THE CASE	3
	A. Facts of Incident	4
	B. Parking Lot Code Compliance.....	6
	C. Ms. Gould’s Awareness of Wheel Stops.....	7
V.	ARGUMENT AND AUTHORITY.....	9
	A. Conclusions of Law.....	9
	1. Standard of Review	9
	2. Court’s Legal Conclusion Regarding Breach of Duty by North Kitsap.....	9
	a. Washington Law Regarding Premises Liability.....	9
	b. No Liability Exists Because of Gould’s Actual Knowledge.....	10
	c. No Liability Exists Because Wheel Stops are Not a Hazard.....	12
	d. No Liability Exists Because the Wheel Stop Did Not Cause Ms. Gould’s Fall.....	14
	3. The Court Improperly Found Ms. Gould’s Status to be an Invitee Rather Than a Licensee.....	14
	a. Standard Applicable to Licensee.....	14

b.	Standard Applicable to Business Invitee.....	15
c.	Ms. Gould is Properly Classified as a Licensee.....	16
d.	North Kitsap Did Not Violate Duty Owed to Licensees.....	19
e.	North Kitsap Did Not Violate Duty Owed to Business Invitees.....	20
4.	The Court Incorrectly Concluded that Ms. Gould Had No Duty to Look Where She Was Walking.....	21
a.	Duty of Seeing.....	21
5.	The Court’s Legal Conclusion of No Comparative Fault as a Matter of Law	23
B.	Findings of Fact	26
1.	Standard of Review	26
2.	No Evidence of “Notice”.....	27
a.	Mr. Gould’s Testimony is Not Substantial Evidence...	28
b.	The Court’s Finding on Notice is Directly Contradicted by the Certificate of Occupancy	29
3.	The Court’s Findings of Fact that Ms. Gould was “Directed” to see Paul Marshall.....	31
4.	The Court’s Inclusion in Findings of Fact a Conclusion that it is Unnecessary to Consider Evidence of Defendants’ Compliance with Kitsap County Building Codes.....	31
5.	The Court’s Contradictory Findings of Fact that Ms. Gould was Looking at the Door of Suite D and Not Where she was walking (paragraph 14), but that Ms. Gould did not see the Wheel Stop near Suite D because it was Not Visible (paragraph 23)	32

C.	Expert Testimony	33
1.	The Trial Court Abused its Discretion By Considering the Testimony of Stan Mitchell	34
a.	Stan Mitchell’s Opinions Are Not Based on Specific Building Codes or Accepted Industry standards.....	35
b.	Stan Mitchell’s Opinions Exceed the Scope of his Expertise	36
c.	Stan Mitchell’s Opinions are Based on Theoretical Speculation and Not Helpful to the Finder of Fact.....	38
D.	Motion for Jury Trial	38
E.	The Court Erred in its Determination on Plaintiff’s Motion to Exclude and Motions in Limine that Defense Expert Uchimura was Not Properly Disclosed and Requiring Defendant to pay for Plaintiff Deposition of Uchimura...	40
1.	Experts were Disclosed	44
2.	The Burnet Three Factor Test.....	45
3.	Failure to Make the Experts Available.....	47
VI.	CONCLUSION	48

TABLE OF CASES AND AUTHORITIES

Washington Cases:

<i>Beebe v. Moses</i> , 113 Wn. App. 464, 467-468, 54 P.3d 188, 189 (2002).....	17
<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38, 50-51, 738 P.2d 665 (1987).....	35
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997)...	45
<i>Brant v. Mkt. Basket Stores</i> , 72 Wn.2d 446, 448, 433 P.2d 863, 865 (1967).....	27
<i>City of Tacoma v. State</i> , 117 Wn.2d 348, 361, 816 P.2d 7 (1991).....	26
<i>Davis v. Bader</i> , 57 Wn.2d 871, 360 P.2d 352 (1961).....	22
<i>Davis v. Marathon Oil Co.</i> , 528 F.2d 395, 404 (6th Cir. 1975).....	44
<i>Davidson v. Municipality of Metro Seattle</i> , 43 Wn. App. 569, 575, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986).....	35
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn.2d 43, 49, 914 P.2d 728 (1996).....	10
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	20
<i>Dickinson v. Tesia</i> , 2 Wn. App. 262, 264, 467 P.2d 356 (1970).....	10, 11
<i>Dotson v. Haddock</i> , 46 Wn.2d 52, 54, 278 P.2d 338 (1955)	10,15,16,17
<i>Dunn v. Kemp & Hebert</i> , 36 Wash. 183, 78 P. 782 (1904).....	25
<i>Enersen v. Anderson</i> , 55 Wn.2d 486, 348 P.2d 401 (1960).....	20,21
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 706, 732 P.2d 974 (1987).....	44

<i>Hanson v. Lincoln First Fed. Sav. & Loan Ass'n</i> , 45 Wn.2d 577, 277 P.2d 344 (1954).....	27
<i>Harris v. Groth, M.D., Inc.</i> , 99 Wn.2d 438, 450, 663 P.2d 113 (1983)...	35
<i>Hooser v. Loyal Order of Moose, Inc.</i> , 69 Wn.2d 1, 416 P.2d 462 (1966)	27
<i>Huston v. First Church of God</i> , 46 Wn. App. 740, 746-747, 732 P.2d 173 (1987).....	24
<i>In re Wash. Builders Benefit Trust</i> , 173 Wn. App. 34, 65, 293 P.3d 1206, 1222-1223 (2013).....	26, 27
<i>In re Young</i> , 122 Wn.2d 1, 57, 857 P.2d 989 (1993).....	34
<i>Iwai v. State</i> , 129 Wn.2d 84, 96, 915 P.2d 1089, 74 A.L.R.5th 711 (1996)	10,14
<i>Jones v. City of Seattle</i> , 314 P.3d 380, (2013).....	45
<i>Lampard v. Roth</i> , 38 Wn. App. 198, 201 (Wash. Ct. App. 1984).....	44
<i>Lundberg v. All-Pure Chem. Co.</i> , 55 Wn. App. 181, 777 P.2d 15, review denied, 113 Wn.2d 1030, 784 P.2d 530 (1989).....	24
<i>McBroom v. Orner</i> , 64 Wn.2d 887, 889, 395 P.2d 95 (1964).....	35
<i>McCully v. Fuller Brucksh Co.</i> , 68 Wn. 2d 675, 415 P.2d 7 (1966).....	25
<i>Memel v. Reimer</i> , 85 Wn.2d 685, 689, 538 P.2d 517 (1975).....	10,13,19
<i>Miller v. Likins</i> , 109 Wn. App. 140, 148, 34 P.3d 835 (2001).....	35
<i>Miniken v. Carr</i> , 71 Wn.2d 325, 428 P.2d 716 (1967).....	20
<i>Mt. Vernon Dodge, Inc. v. Seattle-First Nat'l Bank</i> , 18 Wn. App. 569, 581, 570 P.2d 702 (1977).....	38
<i>Pement v. F. W. Woolworth Co.</i> , 53 Wn.2d 768, 337 P.2d 30 (1959)	27,28

<i>Robel v. Roundup Corp.</i> ,148 Wn.2d 35, 42-43,59 P.3d 611, 615 (2002).....	9
<i>Rosendahl v. Lesourd Methodist Church</i> , 68 Wn.2d 180, 182, 412 P.2d 109 (1966).....	24
<i>Sackett v. Santilli</i> , 101 Wn. App. 128 at 133 (1999).....	39
<i>Sehlin v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.</i> , 38 Wn. App. 125, 132-33, 686 P.2d 492, review denied, 102 Wn.2d 1022 (1984).....	35
<i>Smith v. Manning's, Inc.</i> , 13 Wn.2d 573, 126 P.2d 44 (1942).....	22, 27
<i>Smith v. Sturm, Ruger & Co.</i> , 39 Wn. App. 740, 750, 695 P.2d 600, review denied, 103 Wn.2d 1041 (1985)).....	44, 45
<i>Sorensen v. W. Hotels</i> , 55 Wn.2d 625,349 P.2d 232 (1960).....	36
<i>Stark v. Allis-Chalmers</i> , 2 Wn. App. 399, 404, 467 P.2d 854 (1970).....	44
<i>Stone v. Smith-Premier Typewriter Co.</i> , 48 Wash. 204, 93 P. 209 (1908)	25
<i>State v. Black</i> , 109 Wn.2d 336, 341, 745 P.2d 12 (1987).....	34
<i>State v. Johnson</i> , 128 Wn.2d 431, 443, 909 P.2d 293 (1996).....	9
<i>State v. McCarthy</i> , 178 Wn. App. 90, 103,312 P.3d 1027, 1034 (2013)	33
<i>State v. Willis</i> , 151 Wn.2d 255, 262, 87 P.3d 1164 (2004).....	33
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 879, 73 P.3d 369 (2003).....	27
<i>Swanson v. McKain</i> , 59 Wn. App. 303, 308-09, 796 P.2d 1291, 59 Wn. App. 303, 796 P.2d 1291 (1990), review denied,116 Wn.2d 1007, 805 P.2d 813 (1991).....	17

<i>Thompson v. Katzer</i> , 86 Wn. App. 280, 286, 936 P.2d 421, review denied, 133 Wn.2d 1020 (1997).....	10,15,17
<i>Watson v. Zimmerman</i> , 175 Wash. 410, 27 P.2d 707 (1933).....	25
<i>Wilson v. Olivetti North America Inc.</i> , 85 Wn. App. 804, 808, 934 P.2d 1231 (1997).....	39,40,41
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 667, 724 P.2d 991 (1986)...	10,13,19
<i>Zenkina v. Sisters of Providence in Wash, Inc.</i> , 83 Wn. App. 556, 566, 922 P.2d 171 (1996).....	10,11,15

Cases from Other Jurisdictions:

<i>Bennett v. Cole</i> , 426 So. 2d 829, 831 (Ala. Civ. App. 1981).....	13
<i>Cardia v. Willchester Holdings, LLC</i> , 35 A.D.3d 336, 336-337 (N.Y. App. Div. 2d Dep't 2006).....	13
<i>Plessias v. Scalia Home for Funerals</i> , 271 A.D.2d 423, 423-424, 706 N.Y.S.2d 131 (2d Dep't 2000)	12
<i>Price v. Roadhouse Grill, Inc.</i> , 512 F. Supp. 2d 511, 519 (W.D. La. 2007).....	12
<i>Ramsey v. Home Depot U.S.A., Inc.</i> , 124 So. 3d 415, 417-418 (Fla. Dist. Ct. App. 1st Dist. 2013)	13
<i>Robbillard v. Tillotson</i> , 118 Vt. 294, 108 A.2d 524 (1954).....	18

Washington Statutes:

RCW 4.22.005.....	24
-------------------	----

Building Code:

17.100.020, Zoning Code for Kitsap County.....	30
Title 17 Zoning Code for Kitsap County.....	6,12,21

Secondary Sources:

5A Karl B. Tegland, Wash. Prac., *Evidence* § 288 (3d ed. 1989).....34

5A Karl B. Tegland, Wash. Prac., *Evidence* § 304 (3d ed. 1989)
.....35

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.05 (6th ed.)
.....16

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.08 (6th ed.)....15

Restatement (Second) of Torts § 342 (1965)10,13,19,20

6 WAPRAC WPI 12.06.....22

Rules:

ER 701.....36,37,38

ER 702.....33,36,37,38

ER 703.....35,36,37

I. INTRODUCTION

Appellant, North Kitsap, brings this appeal from a bench trial in the Kitsap County Superior Court. Judgment was entered in favor of Appellees Suzette and James Gould, a husband and wife.

II. ASSIGNMENTS OF ERROR

1. The Court improperly found Ms. Gould's status to be an invitee rather than a licensee.
2. The Court incorrectly concluded that North Kitsap breached a duty to Ms. Gould.
3. The Court incorrectly concluded that the wheel stops are hazardous.
4. The Court incorrectly concluded that North Kitsap was on notice of a hazardous condition.
5. The Court incorrectly concluded that Ms. Gould had no duty to look where she was walking.
6. The Court incorrectly concluded that there was no comparative fault as a matter of law.
7. The Court improperly found that Ms. Gould was "directed" to see Paul Marshall.
8. The Court improperly concluded that it is unnecessary to consider evidence of Defendants' compliance with Kitsap County building codes.
9. The Court's contradictory findings of fact that Ms. Gould was looking at the door of Suite D and not where she was walking

(paragraph 14), but that Ms. Gould did not see the wheel stop near Suit D because it was not visible (paragraph 23).

10. The Trial Court Abused its Discretion By Considering the Testimony of Stan Mitchel.
11. The Trial Court Abused its Discretion By Denying North Kitsap's Motion for Jury Trial.
12. The Court Erred in its Determination on Plaintiff's Motion to Exclude and Motions in Limine that Defense Expert Uchimura was not properly disclosed and requiring Defendant to pay for Plaintiff Deposition of Uchimura.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the Court improperly apply Washington law on an entrant's status?
2. Did the Court improperly apply Washington law on a landowner's duty to an entrant?
3. Did the Court incorrectly conclude that the wheel stops are hazardous?
4. Did the Court improperly apply Washington law on notice of a hazardous condition?
5. Did the Court improperly apply Washington law on duty to look?
6. Did the Court improperly apply Washington law on comparative fault?

7. Did the Court improperly fail to consider evidence of Defendants' compliance with Kitsap County building codes?
9. Did the Court err in its findings of fact?
10. Did the Trial Court abuse its discretion by considering the testimony of Stan Mitchell?
11. Did the Trial Court abuse its discretion by denying North Kitsap's Motion for Jury Trial?
12. Did the Court Err in its determination on Plaintiff's Motion to Exclude and Motions in Limine that Defense Expert Uchimura was not properly disclosed and in requiring Defendant to pay for Plaintiff Deposition of Uchimura?

IV. STATEMENT OF THE CASE

This is a matter involving a trip-and-fall accident where Ms. Gould, by her own admission, fell because she was not looking where she was going. At the time of the fall, Ms. Gould was walking through the parking lot of the North Kitsap Business Park in Poulsbo, Washington. She did not observe her path as she walked, and tripped over a wheel stop, placed at the end of a parking space.

The trial court in this matter made multiple reversible errors, including, but not limited to, ruling as a matter of law: 1) that wheel stops are dangerous, 2) that the Marshall's had notice of a dangerous condition in the parking lot, 3) Ms. Gould had no notice of the wheel stop, and 4) Ms. Gould had no duty to look where she was walking.

North Kitsap respectfully requests that this Court reverse the decision of the trial court and provide the following relief:

1. That this Court rule and enter an order holding that North Kitsap has no liability to Ms. Gould as a matter of law, or, in the alternative;
2. That this case be remanded for a jury trial;
3. That an order be entered excluding testimony and evidence by Stan Mitchell; and
4. That an order be entered holding that Ms. Gould is a licensee as a matter of law.

A. Facts of Incident

In 2009, Suzette Gould was working as a banker with Frontier Bank. VRP Vol. II, p. 168, ll. 5-18. On December 23, 2009, she drove to the North Kitsap Business Park in Poulsbo, Washington, to drop off a Christmas card to her personal Frontier Bank Customers, Paul and Susan Marshall. VRP Vol. II, p. 216, l. 11 – p. 218, l. 11. The Marshalls owned two businesses at the North Kitsap Business Park, DSC and Road Rider. *Id. See also*, CP 623-626.

Ms. Gould pulled into the parking lot in front of DSC. Her vehicle was stopped directly in front of a wheel stop. VRP Vol. II, p. 232, l. 22 – p. 233, l. 4. She parked her vehicle, walked in and dropped off the card with Ms. Marshall. VRP Vol. II, p. 177, l. 23 – p. 178, ll. 10. Paul Marshall was not in DSC at the time. *Id.* Ms. Gould asked where Mr. Marshall could be found, and Ms. Marshall informed her that he was next

door at the Road Rider Business. VRP Vol. II, p. 181, ll. 21-25. Plaintiff then walked out the front door of DSC, walked to the right and went around a series of shrubs to access the parking area for Road Rider. VRP Vol. II, p. 182, ll. 4-10; CP 609-614.

Ms. Gould was not looking where she was walking, but was instead looking at the door of the Road Rider, when she fell. *Id.* She testified:

A. I exited the building through the same door that I came in. Went around the plant partition, and I viewed the suite where it was. Saw the awning and the side of the building and the -- and the signage on the garage door and recognized that that was where I was to go. Made a straight line or, as I said, a beeline to the front door.

Id.

Plaintiff was not looking at the path in front of her, and walked directly into a wheel stop. *Id.*; see also CP 605-608. At the time the accident occurred, Ms. Gould told the Marshalls that she was not paying attention, and had caused the accident. VRP Vol. III, p. 271, l. 13- p. 272, l. 19.

Ms. Gould testified that it was a cloudy and overcast day. VRP Vol. II, p. 182, l. 14-18. The sun was not in her eyes. Rather, Ms. Gould admitted that she was not looking at the path in front of her as she walked, and caused the accident. VRP Vol. III, p. 271, l. 13- p. 272, l. 19.

Q. So after you hear the thud and you come to the -- your front door at Road Rider, what happens next?

A. I go out the door. I found Suzette laying -- or actually kind of propped up against the building. You know, what happened? And she said she fell. She said, I wasn't paying attention where I was --

I was looking at the awning, and I tripped. I'm so embarrassed. And I'm -- are you okay? And she says, no, my arm hurts. And I said, is it really bad? And she said, yeah. I said, we've got to get you to the doctor. So I got on the cell phone to call my wife and told her, we need to take Suzette to the doctor. She's hurt her arm. Sue came up and talked to Suzette and said, no, we aren't taking her to the doctor. We're calling 911. And that's when we dialed 911 and got the fire department to come up.

Q. And during the time period that you spent with Ms. Gould, before she went to the hospital, did she say anything else to you about how she fell or the circumstances of her fall?

A. She said numerous times that she tripped over the curb. She wasn't paying attention. She was looking up and tripped.

Id.

Ms. Gould's inattentiveness and negligence were the cause of the accident.

B. Parking Lot Code Compliance

The North Kitsap parking lot is in compliance with the applicable Kitsap County code. Title 17 of the Zoning Code for Kitsap County requires parking spaces to be contained by a curb or bumper rail, such as a wheel stop, to prevent a motor vehicle from extending over a pedestrian walkway. VRP Vol. III, p. 299, l. 18 – p. 300, l. 9. This Code, applicable to the North Kitsap's property, actually requires the wheel stops asserted to be hazardous by the Plaintiff. *Id.*

The existing configuration and wheel stop placement on Defendant's property conformed to the Kitsap County Code and Zoning requirements. VRP Vol. III, p. 271, l. 13- p. 272, l. 20. This was shown both through the certificates of occupancy, and by the expert testimony of

Mark Uchimura. *Id* & CP 627-630. The Certificate of Occupancy for DSC, issued in 1995, states:

This Certificate issued pursuant to the requirements of Section 307 of the Uniform Building Code certifying that at the time of issuance this structure was in compliance with the various ordinances regulating building construction or use.

CP 629-630.

The Certificate of Occupancy for Road Rider, issued in December of 2008, approximately one year prior to the incident, states:

This Certificate is issued pursuant to the requirements of Section 110 of the International Building Code certifying that at the time of issuance this structure was in compliance with the various ordinances regulating building construction or use.

CP 627-628. Further, Mark Uchimura, a licensed civil engineer, examined the property. VRP Vol. III, p. 285, ll. 21-24, p. 288, l. 21 – p. 289, l. 2. Mr. Uchimura testified that the wheel stops were evenly spaced, of equal size, and in good condition. VRP Vol. III, p. 304, l. 5 – p. 305, l. 1. Mr. Uchimura testified that the wheel stops had been well maintained. *Id.* Plaintiff's expert, Mr. Mitchell, also testified to the excellent condition of the parking lot. VRP Vol. I, p. 94, l. 16-24. Mr. Uchimura further testified that wheel stops are common in Washington. VRP Vol. III, p. 305, l. 2-4.

C. Ms. Gould's Awareness of Wheel Stops

Ms. Gould testified that she has knowledge of wheel stops and their use in parking lots. Ms. Gould has been aware of wheel stops for as long as she has been a driver.

Q. Okay. You are familiar with wheel stops, Ms. Gould?

A. Yes.

Q. Probably since the days of learning to drive you've encountered wheel stops throughout your adult life?

A. Yes.

Q. And you're fairly familiar that wheel stops are generally going to be in parking areas?

A. Yes.

Q. And generally speaking, wheel stops are going to be found where a parking spot would terminate?

A. Mostly, yeah. Sometimes they're not there. They're not always there.

VRP Vol. III, p. 239, l. 1 – p. 240, l. 12.

Ms. Gould also testified that she navigated the parking lot of her own workplace, which includes wheel stops, regularly. VRP Vol. II, p 223, l. 2-24.

Mrs. Gould further testified that she could see the wheel stops at DSC, but not at Road Rider. VRP Vol. II, p 224, l. 2-24. Mrs. Gould asserted that the wheel stops at Road Rider were not painted, and this is why she could not see them. The wheel stops had the same appearance as those at Road Rider. CP 623-626.

In fact, Ms. Gould was aware of the wheel stops and their location at North Kitsap before the incident, because she had been to the property previously.

Q. Suzette, had you ever been to North Kitsap Business Park before December 23, 2009?

A. Yes, I had.

VRP Vol. II, p 184, l. 1-3.

Ms. Gould was fully aware of the wheel stops at North Kitsap prior to the incident in question. Ms. Gould's inattentiveness and negligence, not the existence of wheel stops at the parking lot, caused her fall.

V. ARGUMENT AND AUTHORITY

A. Conclusions of Law

1. Standard of Review

A trial court's conclusions of law are reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611, 615 (2002); citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

2. Court's Legal Conclusion Regarding Breach of Duty by North Kitsap

This matter revolves around the assertion by Ms. Gould that 1) a wheel stop on the North Kitsap property was a hazardous condition, and 2) that North Kitsap therefore had a duty to warn her of the hazardous condition. The parties dispute whether Ms. Gould is properly classified as a licensee or a business invitee. However, regardless of classification, there is no liability as a matter of law because 1) there was no hazardous condition, and 2) Ms. Gould knew about the wheel stops; therefore, North Kitsap had no duty to warn her of them as a matter of law.

a. Washington Law Regarding Premises Liability

To establish an action for negligence, a plaintiff must present evidence that shows: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) resulting injury, and (4) a proximate cause

between the breach and the injury. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089, 74 A.L.R.5th 711 (1996). In premises liability cases, the scope of the legal duty owed by a landowner to a person entering the premises depends on whether that person falls under the common law category of a trespasser, licensee, or invitee. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996).

b. No Liability Exists Because of Gould's Actual Knowledge

Ms. Gould was a licensee. As such, North Kitsap would only have a duty to warn Ms. Gould if it knew or had reason to know of a hazardous condition on the property, a lower standard of care than that for a business invitee. *Restatement (Second) of Torts* § 342 (1965), quoted in *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975), *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986); *Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421, review denied, 133 Wn.2d 1020 (1997); *Dotson v. Haddock*, 46 Wn.2d 52, 54, 278 P.2d 338 (1955). *Zenkina v. Sisters of Providence in Washington, Inc.*, 83 Wn. App. 556, 560-561, 922 P.2d 171 (1996). However, even if Ms. Gould were considered a business invitee, North Kitsap did not breach any duty to Ms. Gould based on the undisputed facts. Washington courts have long held that there is no duty to warn a business invitee about conditions of which the invitee has actual knowledge. *Dickinson v. Tesia*, 2 Wn. App. 262, 264, 467 P.2d 356 (1970). *See also Zenkina v. Sisters of Providence in Wash, Inc.*, 83 Wn. App. 556, 566, 922 P.2d 171 (1996) (finding no duty to require hospitals

to warn that a person in an emergency room might faint at the sight of some procedures).

Ms. Gould was aware of the wheel stops and their location at North Kitsap before the incident, because she had been to the property previously. VRP Vol. II, p 184, l. 1-3. Ms. Gould also testified that she had significant general knowledge of wheel stops and their use in parking lots, and had encountered them many times throughout her life before the incident. VRP Vol. III, p. 239, l. 1 – p. 240, l. 12; VRP Vol. II, p 223, l. 2 – p. 224, l. 5. Ms. Gould also testified that she regularly navigated the parking lot of her own workplace, which includes wheel stops. VRP Vol. II, p 223, l. 2-24.

Ms. Gould had actual knowledge of the wheel stops. Accordingly, the Court need not determine, 1) her status as an entrant onto the property, 2) whether the wheel stops were dangerous, or, 3) any other aspect of this matter. Based on Ms. Gould's testimony, she was aware of the wheel stops. North Kitsap had no duty to warn her of them as a matter of law. *Dickinson v. Tesia*, 2 Wn. App. 262, 264, 467 P.2d 356 (1970). *See also Zenkina v. Sisters of Providence in Wash, Inc.*, 83 Wn. App. 556, 566, 922 P.2d 171 (1996). Accordingly, North Kitsap owed no duty to Ms. Gould regarding the wheel stops, and verdict should be entered for North Kitsap as a matter of law.

c. No Liability Exists Because Wheel Stops are Not a Hazard

The wheel stops do not constitute a “hazard” in this case. First, the wheel stops were open and obvious and should have been noticed by Ms. Gould. Second, Title 17 of the Zoning Code for Kitsap County requires parking spaces to be contained by a curb or bumper rail, such as a wheel stop, to prevent a motor vehicle from extending over a pedestrian walkway. VRP Vol. III, p. 299, l. 18 – p. 300, l. 9. Third, it has been held by other jurisdictions that wheel stops are not unreasonably risky. In fact, other courts have upheld that the benefits of wheel stops¹ outweighs any risk they pose to pedestrians.

No Washington Court has directly addressed this issue; however, other Courts have dealt directly with the issue of wheel stops. The Western District of Louisiana held that the utility of the car stop outweighs any risk as a possible tripping hazard. *Price v. Roadhouse Grill, Inc.*, 512 F. Supp. 2d 511, 519 (W.D. La. 2007). The court noted that car stops prevent, or at least significantly decrease, the risk of bumping into a pedestrian and/or encroaching on the walk way in front of the restaurant. *Id.* The court also found that the car stops are “obvious, universally known and easily avoidable”. Accordingly, the court found that the risk they pose not unreasonable. *See also Plessias v. Scalia Home for Funerals*, 271 A.D.2d 423, 423-424, 706 N.Y.S.2d 131 (2d Dep't 2000) (“[a] concrete

¹ The concrete bumpers in the parking lot are referred to as “wheel stops” in this brief. In other jurisdictions they are sometimes referred to as “car stops”, “deadmen”, or “parking bumpers”.

parking lot divider which is clearly visible presents no unreasonable risk of harm"), *Cardia v. Willchester Holdings, LLC*, 35 A.D.3d 336, 336-337 (N.Y. App. Div. 2d Dep't 2006), ("A wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm.).

The Alabama Court of Appeals has similarly held that such "car stop" posed no more a risk than the curb of a sidewalk. *Bennett v. Cole*, 426 So. 2d 829, 831 (Ala. Civ. App. 1981) ("[t]here is no evidence indicating that the car stops were materially different from those used in other parking lots; that their use was in any way unusual; or that the danger they presented was in any way different than that presented by standard sidewalk curbing").

Likewise, the Court of Appeals in Florida has held that the fact that a plaintiff does not see the car stop, does not make it dangerous. *Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415, 417-418 (Fla. Dist. Ct. App. 1st Dist. 2013).

It is against public policy to hold North Kitsap liable for the presence of a required safety feature on their property. Such a result undermines the very purpose of the Kitsap Building Code.

Regardless of Ms. Gould's status as an entrant onto the property, a hazardous condition must exist before any duty to warn is triggered. *Restatement (Second) of Torts* § 342 (1965), quoted in *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975), *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). The wheel stops do not pose more risk than a sidewalk curb, and are included in the Kitsap County building code.

Accordingly, because no hazardous condition existed, North Kitsap owed no duty to Ms. Gould regarding the wheel stops, and verdict should be entered for North Kitsap as a matter of law.

d. No Liability Exists Because the Wheel Stop Did Not Cause Ms. Gould's Fall

For Ms. Gould to maintain a negligence action, she must show that a proximate cause between the alleged breach of a duty owed to her and the injury she asserts. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089, 74 A.L.R.5th 711 (1996). However, Ms. Gould testified that, in fact, she was not looking where she was going as she walked towards Road Rider in the North Kitsap parking lot. VRP Vol. II, p. 182, ll. 4-10. Ms. Gould also admitted this at the time of the accident. VRP Vol. III, p. 271, l. 13- p. 272, l. 19.

By her own testimony, Ms. Gould was not looking in front of her as she walked. Accordingly, Ms. Gould would not have seen the wheel stop regardless of its color or condition or specific placement. The wheel stop was not the cause of Ms. Gould's fall. Accordingly, because no causation exists to support Ms. Gould's allegations of negligence, verdict should be entered for North Kitsap as a matter of law

3. The Court Improperly Found Ms. Gould's Status to be an Invitee Rather Than a Licensee

a. Standard Applicable to Licensee

A licensee has been defined by Washington Courts as one who goes upon the premises of another, either without any invitation, express

or implied, or else for some purpose not connected with the business conducted on the land, but with the permission or at the toleration of the owner. *Dotson v. Haddock*, 46 Wn.2d 52, 55, 278 P.2d 338 (1955).

The Washington Pattern Jury Instructions define a licensee as follows:

WPI 120.08 Licensee—Definition

A licensee is a person who goes upon the premises of another, with the permission or tolerance of the [owner] [occupier], but either without any invitation, express or implied, or for some purpose not connected with any business interest or business benefit to the [owner] [occupier].

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.08 (6th ed.)

b. Standard Applicable to Business Invitee

To determine if an entrant is a business invitee, courts consider whether the entrant bestowed an economic benefit upon the possessor of the land and whether there is a mutuality of interest in the subject in which the entrant's purpose relates. *Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421, review denied, 133 Wn.2d 1020 (1997); *Dotson v. Haddock*, 46 Wn.2d 52, 54, 278 P.2d 338 (1955). *Zenkina v. Sisters of Providence in Washington, Inc.*, 83 Wn. App. 556, 560-561, 922 P.2d 171 (1996).

An invitee's status turns on the existence of a purpose related to the business and a potential pecuniary benefit to the business owner. The

Washington Pattern Jury Instructions defines a “Business Invitee” as follows:

WPI 120.05 Business or Public Invitee—Definition

A [business] [or] [public] invitee is a person who is either expressly or impliedly invited onto the premises of another [for some purpose connected with a business interest or business benefit to the [owner] [occupier]] [or] [for some purpose for which the premises are held open to the public].

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.05 (6th ed.).

c. Ms. Gould is Properly Classified as a Licensee

In the present case, it is undisputed that Ms. Gould came to the DSC for the sole purpose of marketing the bank to her clients. Although Ms. Gould testified that she noticed and purchased a “kind of a level thingy” at DSC Industrial Supply, this was not her stated purpose for going to DSC Industrial Supply. VRP Vol. II, p. 179, l. 9.

Ms. Gould was at the Defendants’ places of business in her capacity as a commercial lender for Frontier Bank and for the benefit of her employer. She was not on the property to “bestow an economic benefit” to the Defendants and her visit was unrelated to the good and services provided at either Road Rider Supply or DSC Industrial Supply. Accordingly, the Plaintiff should be classified as a licensee.

In *Dotson v. Haddock*, 46 Wn.2d 52, 54, 278 P.2d 338 (1955), the Appellants argued that since the meeting was held at the home of the Respondent, they received a pecuniary benefit in that they did not have to

hire a baby sitter. The Court rejected this argument and held that such incidental benefits do not characterize the visitor as an invitee. *Dotson* at 55. Likewise, the Plaintiff had never been a customer of the Defendants' businesses in the past, and if she planned to peruse their shops incidental to her visit on behalf of her employer, this is incidental and not sufficient to alter her status as a licensee.

In the matter of *Beebe v. Moses*, 113 Wn. App. 464, 467-468, 54 P.3d 188, 189 (2002), the Court stated the difference between a business invitee and a social guest.

The only issue is whether the trial court erred by determining as a matter of law that Mr. Beebe was a social guest. To decide an entrant's status, "[t]he ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either **(a) benefits only the entrant** or (b) is primarily familial or social." *Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997); *see Swanson v. McKain*, 59 Wn. App. 303, 308-09, 796 P.2d 1291, 59 Wn. App. 303, 796 P.2d 1291 (1990), *review denied*, 116 Wn.2d 1007, 805 P.2d 813 (1991).

Id, *emphasis added*.

Ms. Gould was at the North Kitsap property for a purpose that benefited solely herself – namely to cultivate her business relationship with her clients.

Further, although Ms. Gould made an unplanned purchase at DSC, and even if she was considered more than a licensee on that basis, she

returned to licensee status when her business at DSC was complete. For example, in the matter of *Robbillard v. Tillotson*, 118 Vt. 294, 108 A.2d 524 (1954), the plaintiff and her husband were shopping with their eldest daughter. The Husband dropped his wife and daughter off at one store, while he went to defendant's service station to purchase a lottery ticket. After purchasing the ticket, the husband waited for his wife in the parking lot of the service station. When his wife was done shopping, the husband called to her from their vehicle. The wife walked through the parking lot, where she fell in a hole and was injured.

The Court found that the husband was in fact a business invitee when he purchased the lottery ticket, but that he did not retain that status while he used the defendant's property for a purpose that was not of benefit to the defendant.

[Husband's] business for which he entered the premises had been completed. He had only to proceed to his auto, leave the premises and pick up the plaintiff at the dress shop as agreed. His use of the premises in waiting and watching for the plaintiff to come from the dress shop was other than the purpose for which he was on the premises as a business visitor. The defendant owed him no duty to provide a place for that additional purpose and he became, at most, a mere licensee. The rights of the plaintiff stemming from his invitation were no greater than his rights.

Robbillard v. Tillotson, 118 Vt. 294, 300, 1954.

Similarly, Ms. Gould had fully completed any business purpose she had at DSC prior to walking to Road Rider. Ms. Gould had no purpose

for her visit to Road Rider that would provide pecuniary benefit to Road Rider.

Ms. Gould went to the Road Rider for the sole purpose of delivering the Christmas card. She had no intention of making a purchase at Road Rider. There is no basis for the assertion that Ms. Gould's visit to Road Rider provided Road Rider with a pecuniary benefit. Ms. Gould was a licensee. Accordingly, North Kitsap only owed Ms. Gould the standard of care required for licensees, which they did not breach.

d. North Kitsap Did Not Violate Duty Owed to Licensees

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if:

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he [or she] fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts § 342 (1965), quoted in *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975), *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

As briefed in section III.A.2.a.i & ii. above, Ms. Gould knew about the wheel stop, and the wheel stop was not a hazardous condition. As briefed in section III.B.2.a. & b., below, there was no basis for a finding that North Kitsap was aware of a hazardous condition. The property had received a Certificate of Occupancy, stating the property's safety approximately one year prior to the incident. CP 627-628. Further, Plaintiff's own expert testified to the excellent condition and maintenance of the parking lot premises. VRP Vol. I, p. 94, l. 16-24. No evidence was presented to indicate that the parking lot was not in the same condition as it was when it received the Certificate of Occupancy. None of the prongs of *Restatement (Second) of Torts* § 342 (1965) are met. North Kitsap did not breach a duty to Ms. Gould, and a verdict for North Kitsap as a matter of law should be entered.

e. North Kitsap Did Not Violate Duty Owed to Business Invitees

Although Ms. Gould is property classified a licensee, even if she were a business invitee, no duty was breached. A business owner of premises owes to a business invitee a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use. *Miniken v. Carr*, 71 Wn.2d 325, 428 P.2d 716 (1967); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 372 P.2d 193 (1962); *Enersen v. Anderson*, 55 Wn.2d 486, 348 P.2d 401 (1960).

Title 17 of the Zoning Code for Kitsap County requires parking spaces to be contained by a curb or bumper rail, such as a wheel stop, to prevent a motor vehicle from extending over a pedestrian walkway. VRP Vol. III, p. 299, l. 18 – p. 300, l. 9. The inclusion of wheel stops were a part of proper compliance with applicable zoning regulations. *Id.* It is also undisputed that there are no regulations mandating that Defendant's parking lot area should be designed any differently than it is already constructed.

The North Kitsap property is in compliance with building codes. The wheel stops that Ms. Gould asserts are a hazardous condition are code compliant safety features. Ms. Gould's own expert also testified that the parking lot was in excellent condition and well maintained. VRP Vol. I, p. 94, l. 16-24. There is no evidence that North Kitsap failed to exercise ordinary care to maintain its premises in a reasonably safe condition. North Kitsap did not breach a duty to Ms. Gould, and a verdict for North Kitsap as a matter of law should be entered.

4. The Court Incorrectly Concluded that Ms. Gould Had No Duty to Look Where She Was Walking

A pedestrian has a "duty of seeing" as reflected in WPI 12.06, which states:

a. Duty of Seeing

Every person has a duty to see what would be seen by a person exercising ordinary care. 6 WAPRAC WPI 12.06²

Although the failure to look is not automatically negligence, failure to look is negligence if it is unreasonable. It is a question for the jury to determine whether, despite the failure to look, the party's conduct was still reasonable under the circumstances. *Davis v. Bader*, 57 Wn.2d 871, 360 P.2d 352 (1961). Washington Courts have held that the Plaintiff has a positive duty to look. In *Davis*, the court stated, “such an instruction will be upheld where the hazard is apparent, as where a party testifies that he looked to his right and did not see a car approaching when the car was, in fact, only a short distance away...” *Id.* at 874. *See also Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942)(Customer was in the store's cafeteria when she slipped on a pickle, fell, and fractured her anklebone. The court held that the customer did not have an absolute, unqualified right to assume that the store's floors were in a reasonably safe condition to walk upon. The court concluded that it was a question of fact for the jury of whether the customer was negligent in failing to see the

² This instruction is properly given when it does not overly emphasize one party's theory of the case. For example, in *Hammel v. Rife*, 37 Wn.App. 577, 682 P.2d 949 (1984), the giving of this instruction did not overly emphasize one party's theory of the case. *Hammel* found no error in giving WPI 12.06 with WPI 70.01, General Duty—Driver or Pedestrian, and WPI 70.06, Right to Assume Others Will Obey Law—Street or Highways. The court noted that each instruction correctly stated the law and that the instructions together did not grossly overweigh in favor of one party since each instruction covered “a somewhat different legal facet of the case.” *See also Humes v. Fritz Companies, Inc.*, 125 Wn. App. 477, 105 P.3d 1000 (2005) (affirmed the giving of WPI 12.06 where it did not over-emphasize one party's theory of the case); *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997) (the giving of WPI12.06, WPI70.01, and WPI70.06 70.06 was not error as the instructions merely described various facets of the duty plaintiff owed to exercise reasonable care for her own safety).

floor's dangerous condition); *Kuhnhausen v. Woodbeck*, 2 Wn.2d 338, 97 P.2d 1099 (1940)(Pedestrian required to exercise the care of an ordinarily prudent person, under the circumstances, taking into consideration her opportunity to receive warning of a car's approach.); *Humes v. Fritz Cos.*, 125 Wn. App. 477, 105 P.3d 1000 (2005)(Jury instructions on contributory negligence and "duty to see" instruction appropriate, even where plaintiff was injured escaping from an emergency situation).

The Trial Court's decision is in direct opposition to the established Washington law that Ms. Gould had no duty, as a pedestrian, to see what was there to be seen, was in error.

The Plaintiff admitted that she was aware that the wheel stops were present in the parking lot. She further admitted that she was not looking where she was walking when she fell. The Plaintiff had a positive duty to look and be aware of the wheel stops in the parking lot. The Plaintiff failed to keep a proper lookout and her fall and subsequent injuries were the direct result of her failure to use due care.

Plaintiff's own negligence and inattention were the proximate cause of her injuries.

5. The Court's Legal Conclusion of No Comparative Fault as a Matter of Law

The Plaintiff's negligence was the sole cause of her asserted injuries. However, even if both parties were negligent, comparative liability should have been applied by the Trial Court.

The Revised Code of Washington (hereinafter "RCW") states in relevant part:

RCW 4.22.005

Effect of contributory fault.

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

The comparative fault doctrine applies to all actions based on "fault," including strict liability and product liability claims. *Lundberg v. All-Pure Chem. Co.*, 55 Wn. App. 181, 777 P.2d 15, review denied, 113 Wn.2d 1030, 784 P.2d 530 (1989). Accordingly, it applies in this present matter.

In determining whether a person was contributorily negligent, "[T]he inquiry is whether or not he exercised that reasonable care for his own safety which a reasonable man would have used under the existing facts and circumstances, and, if not, was his conduct a legally contributing cause of his injury." *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 182, 412 P.2d 109 (1966); *Huston v. First Church of God*, 46 Wn. App. 740, 746-747, 732 P.2d 173 (1987). Stated another way, in order for a person to contribute to his own injury by negligence, he must have been

aware, or should have been aware, of a condition from which the injury ultimately resulted. A person cannot negligently contribute to his own injury when he has no way of reasonably ascertaining the risk of injury exists. *McCully v. Fuller Brucksh Co.*, 68 Wn. 2d 675, 415 P.2d 7 (1966).

Washington Courts have held that an entrant onto land may be contributory negligent where she fails to exercise ordinary care for her safety. *Watson v. Zimmerman*, 175 Wash. 410, 27 P.2d 707 (1933)(Question of contributory negligence exists where store patron navigated recently oiled floors without incident until she was exiting the store). This long-standing Washington law. *Stone v. Smith-Premier Typewriter Co.*, 48 Wash. 204, 93 P. 209, (1908)(Question of contributory negligence exists where store patron fell down trap door in shop she had previously visited). Negligence on the part of the entrant onto land may be determined as a matter of law. *Dunn v. Kemp & Hebert*, 36 Wash. 183, 78 P. 782 (1904)(Directed verdict in favor of property owner upheld where plaintiff fell down stairway. The Court determined that there was nothing unusual or dangerous about the stairway or its construction and that no one exercising ordinary care would expect that a person would fall down it in the daytime.).

North Kitsap is not the insurer of the personal safety of Ms. Gould and everyone who walks across the parking lot. North Kitsap owes no duty to Ms. Gould to keep the parking lot in such a condition that accidents cannot possibly happen. Furthermore, North Kitsap does not

have the duty to protect the Plaintiff from parking lot features required by the Kitsap Building Code.

Ms. Gould, by her own testimony, was not looking in front of her as she walked. Ms. Gould has a duty to see what is there to be seen, and simply failed to exercise reasonable care as a pedestrian. Further, even though Ms. Gould was aware of the wheel stops before her December 2009 visit, she failed to exercise basic care in looking where she was walking. Even if this Court finds that North Kitsap breached a duty to Ms. Gould, Ms. Gould is contributorily negligent, as established by her own testimony.

B. Findings of Fact

The Trial Court in this matter made which were not supported by the evidence, and findings of fact which directly contradict one another. The Trial Court made reversible error regarding several important findings of fact.

1. Standard of Review

On an appeal from a bench trial, trial court's findings of fact are reviewed to determining whether substantial evidence supports them and, if so, whether the findings support the trial court's conclusions of law. *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 65,293 P.3d 1206, 1222-1223 (2013); citing *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is “a quantum of evidence

sufficient to persuade a rational fair-minded person the premise is true.” *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 65,293 P.3d 1206, 1222-1223 (2013); citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

2. No Evidence of “Notice”

A property owner is not liable to a business invitee for an unsafe condition of the land unless the owner has have actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). A plaintiff must also establish that the property owner had, or should have had, knowledge of the danger in time to remedy the situation before the injury or to warn the plaintiff of the danger. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 451-52, 433 P.2d 863 (1967).

It is well established in the decisional law of this state that something more than a slip and a fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the floor.

Brant v. Mkt. Basket Stores, 72 Wn.2d 446, 448, 433 P.2d 863, 865 (1967); citing *Hooser v. Loyal Order of Moose, Inc.*, 69 Wn.2d 1, 416 P.2d 462 (1966); *Hanson v. Lincoln First Fed. Sav. & Loan Ass'n*, 45 Wn.2d 577, 277 P.2d 344 (1954); *Pement v. F. W. Woolworth Co.*, 53 Wn.2d 768, 337 P.2d 30 (1959).

The fact that an accident occurred is not, in itself, evidence of notice on the part of a property owner.

a. Mr. Gould's Testimony is Not Substantial Evidence

The court determined that North Kitsap was aware of a hazardous condition, based on Mr. Gould's testimony that Mrs. Marshall had told him that either Mr. or Mrs. Marshall had tripped over a wheel stop in the parking lot previously. VRP, Vol. I, p. 135, ll. 11-24. Mr. Gould did not identify which wheel stop was involved in the alleged trip. *Id.* Mr. Gould did not specify that the alleged wheel stop was in front of Road Rider. *Id.* Mr. Gould could not positively identify who allegedly tripped over a wheel stop. *Id.* Mr. Gould did not provide testimony as to when this person allegedly tripped over a wheel stop. *Id.* Mr. Gould did not provide testimony as to why this person allegedly tripped over a wheel stop. *Id.* Mr. Gould did not provide testimony as to the conditions present when this person allegedly tripped over a wheel stop. *Id.*

Both Mr. Marshall and Mrs. Marshall testified that they did not make such a statement to Mr. Gould, nor have either of them tripped over a wheel stop at the North Kitsap property in the past. *Id.* and VRP Vol. III, p. 279, ll. 5-25, p. 360, l. 18 – p. 362, l. 17. The Court made no specific finding regarding credibility, nor did the Court explain how it came to the conclusion that Mrs. Marshall had told Mr. Gould she had tripped over a wheel stop. The only testimony supporting that conclusion was Mr. Goulds, and he was uncertain who he believed made this statement to him. The Court's finding is not supported by evidence.

Mr. Gould's testimony is unclear regarding 1) which wheel stop one of the Marshalls allegedly tripped over, 2) where the wheel stop one of the Marshalls allegedly tripped over was located, 3) when one of the Marshalls allegedly tripped over a wheel stop, and 4) *why* one of the Marshalls allegedly tripped over a wheel stop. Mr. Gould's testimony is meaningless. Mr. Gould's testimony does not show that the Marshalls knew or had reason to know of any danger posed by any particular wheel stop at the property. For example, Mr. Gould's testimony does not assert a reason why one of the Marshall's allegedly tripped on a wheel stop. Based on Mr. Gould's testimony, the cause could be a blocked path of vision or carelessness. Mr. Gould's testimony does not, for example, foreclose the possibility that one of the Marshall's may have tripped over a wheel stop because she was pushed, or due to icy conditions. Mr. Gould's testimony is so vague and non-specific as to have no meaning. The Court erred in finding that North Kitsap was on notice of a dangerous condition based on this testimony, which is the sole asserted basis for the Court's finding of notice to North Kitsap.

b. The Court's Finding on Notice is Directly Contradicted by the Certificate of Occupancy

The North Kitsap building code required a curb or barrier such as wheel stops. The Certificates of Occupancy show that the property complies with building codes and is safe for use. The Kitsap County Building Code is intended to provide safety standards, as well as certainty

to persons and entities following the code. Section 17.100.020 states, in pertinent part:

17.100.020 Purpose and scope.

The text and zoning maps constitute the Zoning Ordinance. The Zoning Ordinance classifies, designates, and regulates the development of land for agriculture, forest, mineral resource extraction, residential, commercial, industrial, and public land uses for the unincorporated area of Kitsap County. **Further, it is the purpose of this title to provide for predictable, judicious, efficient, timely, and reasonable administration respecting due process set forth in this title and other applicable laws; and to protect and promote the public health, safety and general welfare.**

17.100.020, Zoning Code for Kitsap County, emphasis added.

Further, as briefed in section III.A.2.a.ii., above, jurisdictions have held that wheel stops are not dangerous as a matter of law. The evidence presented does not support the finding that North Kitsap was on notice of a dangerous condition, where the condition in question is required as a safety measure, and the condition is generally recognized as a safety measure, not a hazard.

Road Rider received a Certificate of Occupancy in 2008, approximately a year before the incident. There is no reasonable basis for North Kitsap to expect that features of its parking lot are flawed and hazardous when they have received the Certificate of Occupancy, stating the property's safety. CP 627-628. Further, Plaintiff's own expert testified to the excellent condition and maintenance of the parking lot premises. VRP Vol. I, p. 94, l. 16-24. No evidence was presented to indicate that the

parking lot was not in the same condition as it was when it received the Certificate of Occupancy. The Court's finding that North Kitsap was on notice that the wheel stop was a hazard is directly contradicted by the evidence and should be stricken. This is reversible error, and a new trial should be awarded.

3. The Court's Findings of Fact That Ms. Gould Was "Directed" to See Paul Marshall

The Court's finding that Ms. Marshall "directed" Ms. Gould to see Paul Marshall is not supported by the testimony in this case. To state that Ms. Gould was directed to see Mr. Marshall indicates that Ms. Gould went to see Mr. Marshall at the behest of Mrs. Marshall. However, this is not the case, and not what Ms. Gould testified to.

A. I asked Suzanne if Paul was around. And she said that he was; that he was in the neighboring suite over at Road Rider and that I was welcome to go over there and say hi.

VRP, Vol. II, p.181, ll. 22-25. Ms. Gould testified that she specifically asked about Paul Marshall, and that Mrs. Marshall told her where he was. There is no basis in the record for the Court's conclusion that Ms. Gould was directed to see Paul Marshall at Road Rider. Accordingly, this finding should be stricken, and a new trial awarded.

4. The Court's Inclusion In Findings of Fact a Conclusion That it is Unnecessary To Consider Evidence of Defendants' Compliance With Kitsap County Building Codes

The Court's determination that the Kitsap County Building Code is immaterial is not properly a finding of fact. There was no dispute that the Kitsap County Building Code applied to the parking lot in question, and that no other code applied. No issue of fact was presented regarding the applicability of the Kitsap County Building Code, and the Court erred in making a determination in its findings of fact that it should not be considered.

As briefed above, it is also in error as a conclusion of law. Accordingly, this finding should be stricken, and a new trial awarded.

5. The Court's Contradictory Findings of Fact That Ms. Gould Was Looking at the Door of Suite D and Not Where She Was Walking (Paragraph 14), But That Ms. Gould Did Not See the Wheel Stop Near Suit D Because it Was Not Visible (Paragraph 23).

The Trial Court entered the following, directly contradictory findings of fact:

14. Suzette Gould was looking at the door of Suite D as she approached, when she tripped over the wheel stop in front of the door. Her body fell forward into the door and the impact with the front door made a loud noise.

* * *

23. Suzette Gould's fall was due to tripping over the wheel stop that was not clearly visible and was somewhat camouflaged.

CP 256-263.

The Court's findings of fact are not only contradictory, but, taken alone, can lead to opposite liability outcomes. If Ms. Gould was looking at the door of Suite D as she walked, as she testified, then she was not looking at the wheel stop and could not have seen it regardless of its color. Based on the Court's finding of fact 14, there can be no liability on behalf of North Kitsap.

Finding of fact 23 does necessarily lead to the conclusion that North Kitsap bears liability for Ms. Gould's accident, but it does not foreclose the possibility, as does Finding 14.

These directly contradictory findings of fact have a material bearing on the ultimate outcome of the matter and a new trial should be granted.

C. Expert Testimony

The appellate court reviews a trial court's decision on the admissibility of expert testimony for abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). ER 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under ER 702, an expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact. *State v. McCarthy*, 178 Wn. App. 90,

103,312 P.3d 1027, 1034 (2013); citing *State v. Black*, 109 Wn.2d 336, 341, 745 P.2d 12 (1987).

1. The Trial Court Abused its Discretion By Considering the Testimony of Stan Mitchell

North Kitsap moved to exclude the testimony of architect Stan Mitchell, because his opinions are not supported by citation to specific uniform building code provisions, Washington Building Code, or Kitsap County Building and Fire Code. He does not demonstrate that any *accepted* industry standards or *applicable* codes were violated. Furthermore, he does not testify that the building did not pass inspection or have a proper occupancy permit.

Stan Mitchell's testimony also exceeds his area of expertise. Mr. Mitchell opines whether the alleged code violations caused the Plaintiff to trip and fall. Mr. Mitchell is an architect and such causation analysis is inappropriate, based on his expertise. In addition, Mr. Mitchell comments regarding the Plaintiff's biomechanical reactions are beyond the scope of an architect's expertise.

The admissibility of expert testimony is governed by Evidence Rules (ER) 702 and 703. "The admissibility of expert testimony under Rule 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact." 5A Karl B. Tegland, Wash. Prac., *Evidence* § 288, at 380 (3d ed. 1989); *see In re Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993). "Trial courts retain broad discretion in determining whether an expert is qualified and will be

reversed only for manifest abuse." *Harris v. Groth, M.D., Inc.*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983). Conclusory or speculative expert opinions lacking an adequate foundation will not be admitted. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

An expert must stay within the area of his expertise. *See, McBroom v. Orner*, 64 Wn.2d 887, 889, 395 P.2d 95 (1964); *Sehlin v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 38 Wn. App. 125, 132-33, 686 P.2d 492 (trial court did not err by refusing to allow railroad worker to testify as expert where no effort was made to lay sufficient foundation to qualify the witness as to proper methods of rerailing railroad cars), *review denied*, 102 Wn.2d 1022 (1984); cf. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50-51, 738 P.2d 665 (1987) (court did not err in excluding testimony of engineer who had almost no experience with reverse engineering of the type needed).

In addition, while ER 703 is intended to broaden the acceptable bases for expert opinion, there is no value in an opinion that is wholly lacking some factual basis. *5A Teglund* § 304, at 451; *see Davidson v. Municipality of Metro Seattle*, 43 Wn. App. 569, 575, 719 P.2d 569, *review denied*, 106 Wn.2d 1009 (1986). Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.

a. Stan Mitchell's Opinions Are Not Based on Specific Building Codes or Accepted Industry Standards

Mr. Mitchell did not testify that the parking lot and wheel stops at North Kitsap were in violation of any applicable building code. Mr. Mitchell asserted that the Kitsap parking lot is in violation of the American Society of Testing Methods (ASTM) code that has not been adopted and is not part of the Kitsap building code. VRP Vol. 1, pp. 29-30. In fact, Mr. Mitchell specifically testified that the ASTM guideline is that wheel stops should not be used. VRP Vol. 1, p. 29, ll 20 – p 30, ll. 1. This is in direct contradiction of the code that is actually applicable to this parking lot, the Kitsap County Building Code, which requires a curb or barrier such as a wheel stop. VRP Vol. III, p. 299, l. 18 – p. 300, l. 9. Presentation of a building code that is not applicable for consideration as evidence of negligence is reversible error. *Sorensen v. W. Hotels*, 55 Wn.2d 625, 349 P.2d 232 (1960)(finding that jury instruction implying that later version of building code was applicable at the time entry ramp was constructed required remand for new trial).

Mr. Mitchell failed to cite to any industry accepted standard or applicable building code in support of his opinions. In fact, Mr. Mitchell testified regarding a standard that not only has not been adopted by Kitsap County and does not apply, but which directly contradicts the standards that do apply. Mr. Mitchell's testimony does not meet the requirements of ER 701-703.

b. Stan Mitchell's Opinions Exceed The Scope Of His Expertise

Stan Mitchell has testified that he is a licensed architect in the state

of Washington, as well as a licensed home inspector. VRP Vol. 1, p. 6, ll. 17-22. Mr. Mitchell does not possess an engineering degree or any engineering qualifications. *Id.* Mr. Mitchell testified that he was in the Army Corp. of Engineers while he was in the army between 1968 and 1973. VRP Vol. 1, p. 4. This tenure in the army does not qualify Mr. Mitchell to testify as an expert with regard to angles of the sun, or the Plaintiff's "cone of vision". However, Mr. Mitchell was allowed to testify regarding Ms. Gould's "cone of vision" and the effect of the angle of the sun on her fall. VRP Vol. 1, p. 12-16. In fact, Mr. Mitchell was allowed to present testimony that the sun was in Ms. Gould's eyes when she fell, in spite of her own direct testimony that it was a cloudy day. VRP Vol. 1, p 17, ll. 19-24.

Mr. Mitchell is not a licensed engineer and does not possess an engineering degree or any engineering qualifications. VRP Vol. 1, p. 6, ll. 17-22. Mr. Mitchell should not have been permitted to testify beyond his expertise as an architect regarding issues beyond his qualifications.

Further, Mr. Mitchell did not testify to any training as a biomechanical engineer. Despite a lack of training, he testified in detail that lighting conditions, the cone of vision, and the presence of Road Rider's sign were factors that caused her to fall. VRP Vol. 1, p 25-26. Mr. Mitchell's opinions go well beyond how the parking lot was designed, and are outside the scope of an architect.

An expert witness may not testify as an expert to issues that are outside the scope of his expertise. See ER 701-703. Mr. Mitchell's

testimony goes beyond that of an architect, and should be excluded.

c. Stan Mitchell's Opinions Are Based On Theoretical Speculation And Not Helpful To The Finder Of Fact.

Mr. Mitchell's opinions regarding the alleged defects of the parking area are not based on established industry standards or actual building codes. Likewise, many of his other opinions are far outside his area of expertise as an architect. These opinions are based on theoretical speculation that is not helpful to the Court in this case. For example, Mr. Mitchell was allowed to testify that the sun would have been in Ms. Gould's eyes when she walked towards Road Rider, but Ms. Gould herself testified that it was overcast on the day of her visit. Mr. Mitchell's opinions are no more than lay opinions based on speculation. These opinions are not helpful and the Court may come to its own conclusions on these issues without the help of this witness.

Mr. Mitchell was allowed to present testimony that was not based on recognized building codes or industry standards, that was beyond his qualifications and expertise, and which were speculative and not founded in fact. As briefed above, these unqualified opinions were the basis for several of the errors made by the Court in findings of fact and conclusions of law. The Trial Court abused its discretion by allowing this expert testimony, which did not meet the minimum standards of ER 701-ER 702.

D. Motion for Jury Trial

The Court of Appeals reviews the trial court's decision to deny a jury demand for abuse of discretion. *Mt. Vernon Dodge, Inc. v. Seattle-*

First Nat'l Bank, 18 Wn. App. 569, 581, 570 P.2d 702 (1977).

Jury trials are generally favored. The Court may order a jury trial at its discretion, even where a party fails to file a jury demand according to court rules. *Sackett v. Santilli*, 101 Wn. App. 128 at 133 (1999) citing *Wilson v. Olivetti North America Inc.*, 85 Wn. App 804, 808, 934 P.2d 1231 (1997).

In the case of *Wilson v. Olivetti North America Inc.*, 85 Wn. App 804, 808, 934 P.2d 1231 (1997), Wilson failed to deliver a jury demand to the opposing party. Wilson otherwise expressed the request for a jury trial in pleadings. *Id.* The trial court denied Wilson's request for jury trial for failure to strictly comply with the rules of civil procedure. *Id.* The Court of Appeals found, consistent with other Washington decisions, that "substantial compliance may be sufficient to satisfy procedural notice requirements if the other party has actual notice or if the service was reasonably calculated to give notice to the other party." *Id at 814.*

Aware of the demand at least at the time of the joint status report more than a year before the trial, a simple inquiry of plaintiff's counsel would have clarified any confusion. Olivetti's insistence on strict compliance with the local rule, despite its actual knowledge of the jury trial demand, exalts form over substance. Ms. Wilson substantially complied with the procedural requirements, and Olivetti was not prejudiced significantly by the violation because it had actual knowledge of the jury trial demand. The trial court abused its **discretion** in refusing the **jury trial**.

Wilson v. Olivetti N. Am., Inc., 85 Wn. App. 804, 810, 934 P.2d 1231, 1235 (1997).

As soon as North Kitsap realized that it had failed to file a timely jury demand, it made a motion to request a jury trial. Plaintiff made an allegation, unsupported by law or testimony, that a jury trial would require more costly expert testimony than a bench trial, but alleged no actual prejudice. Plaintiff did not allege that she had relied in any way on the assumption that the trial would be a bench trial. Further, North Kitsap moved for jury trial in March of 2013, more than six months before the then- scheduled trial date of October 7, 2013. Trial did not actually occur until over a year later, in February 2014.

As in *Wilson v. Olivetti*, Plaintiff knew of North Kitsap's request for jury trial for six months prior to the scheduled trial date, and for over a year prior to the actual trial. As in *Wilson v. Olivetti*, Plaintiff had actual notice of North Kitsap's request for a jury trial. Further, in this case, Plaintiff did not even allege actual prejudice. As in *Wilson v. Olivetti*, the Trial Court in this matter abused its discretion and failed to consider Washington's preference for jury trials by denying North Kitsap's motion for jury trial under these circumstances.

E. The Court Erred in its Determination on Plaintiff's Motion to Exclude and Motions in Limine that Defense Expert Uchimura was not Properly Disclosed and Requiring Defendant to Pay for Plaintiff's Deposition of Uchimura.

The Defendants fully disclosed expert Mark Uchimura and presented the Plaintiffs' with copies of his reports well in advance of the end of discovery in this matter. Mr. Uchimura and Mr. Sandberg were co-

authors of the expert report. Mr. Sandberg is an architectural designer and Mr. Uchimura is an engineer. Both were employed by Pacific Engineering Technologies at the time the report was drafted. (Declaration of Jennifer Aragon, Exhibit A, Pacific Engineering Technologies Report.)

On November 1, 2012, the Defendants filed a Motion for Summary Judgment. (Aragon Dec. Exhibit B, Motion for Summary Judgment) In support of that Motion for Summary Judgment, the Plaintiffs were provided with a copy of the report of Mark Uchimura and Andrew Sandberg. *Id.*

In the Motion for Summary Judgment, North Kitsap outlined Mr. Uchimura's investigation and opinions, and provided Plaintiffs' a copy of that report. North Kitsap stated in the Motion for Summary Judgment:

Mr. Uchimura concluded in his report that the zoning code requires parking spaces to be contained by a curb or bumper rail to prevent a motor vehicle from extending over a pedestrian walkway," confirming that the applicable code actually necessitates the wheel stops on North Kitsap's property. *Id.* at p.2. Additionally, Mr. Uchimura concluded that any ASTM guidelines that may refer to wheel stops are not referenced by nor incorporated into the Kitsap County Code requirements for parking lots, making them inapplicable as to properties subject to the Kitsap County Code.

As a result of his investigation and inspection, Mr. Uchimura concluded that the existing configuration and wheel stop placement on Defendant's property conformed with the Kitsap County Code and Zoning requirements. Hartmann Decl., **Exhibit B**, p.2. Defendant did not breach any duty by complying with applicable zoning codes."

CP 60-73, at CP 61; CP 74-100 at 85-86.

North Kitsap went on to apply the expert's findings to the liability analysis:

Defendant is in compliance with the parking lot requirements set forth by the Kitsap County Code and Zoning regulations, including wheel stops. There was no dangerous condition that existed on North Kitsap's property that harmed the Plaintiff and North Kitsap certainly did not breach any duty of reasonable care with regard to the code-compliant wheel stops. There is undisputedly no violation of applicable regulations by the Defendant. There is no breach of duty to Plaintiff and there can be no negligence by the Defendant as a matter of law."

CP 60-73, at CP 61; CP 74-100 at 86.

On August 27, 2013, the Defendants drafted a comprehensive mediation letter to the Kitsap County Settlement Judge and to Plaintiffs' counsel. That letter laid out the Defendants' position in its entirety. That letter contained a copy of Mr. Uchimura's report and explained his opinions and position regarding liability:

C. DEFENSE EXPERT UNCHIMURA OPINIONS ON SAFETY OF PARKING LOT

Mark Uchimura, a certified Professional Engineer with Pacific Engineering Technologies, Inc., thoroughly inspected Defendant's property and drafted a report based on his findings. Mr. Uchimura inspected the parking stalls, curbs and pedestrian circulation in front of the subject business in this matter. Mr. Uchimura concluded in his report that the zoning code requires parking spaces to be contained by a curb or bumper rail to prevent a motor vehicle from extending over a pedestrian walkway," confirming that the applicable code actually necessitates the wheel stops on North Kitsap's property. Additionally, Mr. Uchimura concluded that any ASTM guideline that

may refer to wheel stops are not referenced by, nor incorporated into, the Kitsap County Code requirements for parking lots, making them inapplicable as to properties subject to the Kitsap County Code.

As a result of his investigation and inspection, Mr. Uchimura concluded that the existing configuration and wheel stop placement on Defendant's property conformed with the Kitsap County Code and Zoning requirements."

CP 60-73, at CP 63.

Again, the Plaintiffs' had ample opportunity to set a deposition for Mr. Uchimura following the unsuccessful settlement conference. The Plaintiffs failed to do so.

The report of Mark Uchimura and Andrew Sandberg was included in the Defendants' ER 904 Disclosures. The Plaintiffs' objections to the report acknowledge that the Plaintiffs understood that Mark Uchimura would be testifying at trial. The first ER 904 disclosure was date September 6, 2013. The Plaintiffs' opposition to Defendants' ER 904 states in relevant part:

1. **Expert Report of Mark Uchimura of Pacific Engineering Technologies:**

Objection. This report is from an expert, and is not properly included within documents subject to ER 904. Further, the report and opinions contained therein lack foundation. Further, it is expected that Mr. Uchimura will be testifying for the defense and his report is therefore redundant.

CP 60-73, at CP 63; CP 74-100 at 94-95.

And finally, in an attempt to fully disclose all experts and evidence, Defense counsel contacted Bill McGonagle's office on January 22, 2014 and January 24, 2014 CP 96-99. Defense counsel requested that Mr. McGonagle's office agree to voluntarily exchange exhibit and witness lists. Mr. McGonagle indicated he would not do so. It seems unlikely Plaintiffs' counsel was in the dark as to who the Defendants' intended to call and what they would testify to, given this flat refusal to cooperate.

1. Experts were Disclosed

The Washington Supreme Court has explained that the purposes of interrogatories are, in part, to enable the opposing party to prepare for trial and to avoid surprise. *Stark v. Allis-Chalmers*, 2 Wn. App. 399, 404, 467 P.2d 854 (1970). If witnesses are not disclosed until after the trial begins, the surprised party is put at a serious disadvantage. *Lampard v. Roth*, 38 Wn. App. 198, 201 (Wash. Ct. App. 1984) (Citing *Davis v. Marathon Oil Co.*, 528 F.2d 395, 404 (6th Cir. 1975) (disclosing witnesses 3 days prior to trial caused unfair surprise).

While CR 26 (e) places a duty on a party to seasonably supplement interrogatory responses, our courts have been clear that, "it is an abuse of discretion to exclude testimony as a sanction absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987), (quoting *Smith v.*

Sturm, Ruger & Co., 39 Wn. App. 740, 750, 695 P.2d 600, review denied, 103 Wn.2d 1041 (1985)).

2. The Burnet Three Factor Test

The Plaintiffs' cited to *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), in support their Motion to Exclude the Testimony of Uchimura and Sandberg. The Supreme Court recently explained *Burnet* in *Jones v. City of Seattle*, 314 P.3d 380, (2013). The Court stated that *Burnet* applies to witness exclusion: when imposing a severe sanction such as witness exclusion, "the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." *Id.* at 388. A trial court must explicitly consider "whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." *Burnet*, 131 Wn.2d at 494.

It was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated defendant for the effects of the plaintiffs' discovery failings. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

As the record reflects that the Plaintiffs were aware of the experts' report as early as November 2012. They cannot claim to be surprised by the contents of the report. On at least two separate occasions (the motion for summary judgment and judicial settlement conference) the Defendants provided copies of the experts' reports to the Plaintiffs. In the case of the judicial settlement conference, the Defendants neatly laid out their entire case on liability for the Plaintiffs, including a summary of the experts' opinions and how the Defense believed they supported a finding of no liability. Defendants' disclosure and liability analysis was the same as it was a year prior when Mr. Uchimura and his report were provided to the Plaintiffs in the motion for summary judgment.

The Plaintiffs claimed that, "[H]ere, trial is upon us, and Defendants failed to disclose any expert until trial and will attempt to offer surprise testimony." The Plaintiffs' responses to the Defendants' ER 904 submissions clearly indicate that not only were they aware of Mr. Uchimura's report, but that they expected him to testify at trial. The Plaintiffs cannot claim they were surprised.

The Plaintiffs were aware of Mr. Uchimura and despite being advised of the existence of the experts in November of 2012 (Motion for Summary Judgment), the Plaintiffs failed to note the depositions of Mr. Uchimura or Mr. Sandberg. The Plaintiffs' Motion to Exclude supports this as well. The Plaintiffs reference an email sent to Defense counsel on November 26, 2012 inquiring as to whether it would be Mr. Sandberg or

Mr. Uchimura that would be testifying.³ The Plaintiffs acknowledge they are aware one or both of the drafters of the expert report would testify. They could have noted the deposition of both of the experts at that time.

The Defendants believed they had adequately disclosed the existence of their expert witness to the Plaintiffs, provided a copy of his report, and adequately disclosed his findings and opinions and a result of his investigation. Plaintiffs offered no evidence that there was willful misconduct on the part of the Defendants, nor have the Plaintiffs offered evidence that the Defendants attempted to hide their expert, bar them from deposing him, or surprise the Plaintiffs.

Additionally, the Plaintiffs fail to show any actual prejudice as a result of the purported failed to disclose Mr. Uchimura. The Plaintiffs' own evidence shows that the Plaintiffs' were not only aware of Mr. Uchimura's report and opinions, but expected him to testify at trial.

3. Failure to Make the Experts Available

Plaintiffs argued that the Defendants or their counsel in some way failed to "make available" Mark Uchimura and Andrew Sandberg. The Plaintiffs offered no case law to suggest that it is the responsibility of the Defendant to coordinate and schedule deposition on behalf of witnesses.

There is no dispute that Mr. Uchimura and Mr. Sandberg are not represented by defense counsel in this matter. There was nothing to prevent Mr. McGonagle and his clients from setting the depositions of

³ Plaintiffs' Motion to Exclude, pgs. 3-4.

both witnesses with or without the blessing of the Defendants. It is not the Defendants' obligation to conduct discovery on behalf of the Plaintiffs. The Plaintiffs were aware of the experts' report and were aware of the Plaintiffs' theory of liability as early as November 2012. Had the Plaintiffs wanted to depose either or both Mr. Uchimura and Mr. Sandberg, they could have noted their depositions at any time. The Plaintiffs' expert and witness depositions were noted by the Defendants pursuant to a subpoena and without the leave of Plaintiffs or their counsel.

The Trial Court erred in requiring Defendants to pay for the costs of Plaintiff's depositions of Mr. Uchimura and Mr. Sandberg.

VI. CONCLUSION

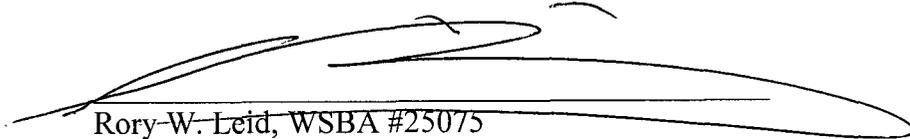
For the reasons stated above, North Kitsap respectfully requests that:

1. This Court rule and enter an order holding that North Kitsap has no liability to Ms. Gould as a matter of law, or, in the alternative:
2. That this case be remanded for a jury trial;
3. That an order be entered excluding testimony and evidence by Stan Mitchell;
4. That an order be entered holding that Ms. Gould is a licensee as a matter of law;
5. That an order be entered holding that no hazardous condition existed at the North Kitsap parking lot as a matter of law;

6. That an order be entered holding that North Kitsap had no notice of a hazardous condition at the North Kitsap parking lot as a matter of law; and
7. That an order be entered holding that the Trial Court erred in requiring North Kitsap to pay for Ms. Gould deposition of Mark Uchimura, and requiring Ms. Gould to reimburse North Kitsap for those expenses.

Dated this 1ST day of December, 2014, at Seattle, Washington.

COLE | WATHEN | LEID | HALL P.C.



Rory W. Leid, WSBA #25075
Jennifer P. Dinning, WSBA #38236
Attorneys for Appellant
303 Battery Street
Seattle, WA 98121-1419
T: (206) 622-0494 | F: (206) 587-2476
rleid@cwllhaw.com | j.dinning@cwllhlaw.com

FILED
COURT OF APPEALS
DIVISION II

2014 DEC -1 PM 3:35

STATE OF WASHINGTON

BY: 
DEPUTY

No.: 46358-0-II

Kitsap County Superior Court 11-2-00952-3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NORTH KITSAP BUSINESS PARK, INC,

Appellant,

v.

SUZETTE GOULD AND JAMES GOULD,

Respondents.

PROOF OF SERVICE
(Amended Brief of Appellant)

Rory W. Leid, WSBA #25075
Jennifer P. Dinning, #38236
Attorneys for Appellant
Cole | Wathen | Leid | Hall, PC
303 Battery Street
Seattle, WA 98121
206.622.0494
206.587.2476

ORIGINAL

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

DATED this 1st day of December, 2014, at Seattle, Washington.



Rose Behbahani, Legal Assistant