

No. 46358-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SUZETTE GOULD and JAMES GOULD, wife and husband,

Respondents,

v.

NORTH KITSAP BUSINESS PARK, INC., a Washington
corporation, and NORTH KITSAP BUSINESS PARK
MANAGEMENT, LLC., a Washington corporation,

Appellants.

AMENDED BRIEF OF RESPONDENTS

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Respondent

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	2
A. Suzette Gould tripped and fell over a wheel stop in the NKBP parking lot, while leaving DSC to visit Paul Marshall at Road Rider Supply.....	2
B. Suzette broke her left arm and dislocated her left elbow.....	4
C. The wheel stop that injured Suzette blended-in with the asphalt, creating a hidden danger.	5
D. Suzanne Marshall admitted that she had previously tripped over the same wheel stop.	7
E. There is no indication that Suzette was previously aware of the dangerous wheel stop that caused her fall.	7
F. Experts disputed whether the wheel stop complied with Kitsap County zoning codes, and the trial court did not resolve the issue, concluding instead that the wheel stop was camouflaged and was not readily visible.	8
ARGUMENT	10
A. Standards of review.	10
B. The trial courts findings are amply supported by the evidence.....	11
1. James Gould's testimony that Suzanne Marshall admitted having tripped over the wheel stop is sufficient evidence to support the finding that the Marshalls had prior knowledge of the hazardous condition.	12
2. NKBP's certificate of occupancy does not obviate the Marshalls' knowledge of the dangerous wheel stop.	14
3. The trial court correctly found that Suzanne Marshall "directed" Suzette to find Paul Marshall at Road Rider.....	16

4.	NKBP is not entitled to a new trial because the trial court entered a finding of fact that NKBP argues is a conclusion of law.....	17
5.	The trial court's findings are not contradictory.....	18
C.	The trial court's conclusions of law properly following from its correct findings of fact.....	19
1.	Suzette had no prior knowledge that the camouflaged wheel stop was a dangerous condition.....	19
2.	The wheel stop that injured Suzette was camouflaged, zoning codes do not permit hidden dangers, and the foreign cases NKBP cites contradict its claims.....	22
3.	The camouflaged wheel stop caused Suzette's fall.....	26
4.	The trial court correctly found that Suzette was an invitee.....	26
5.	Even if Suzette is a licensee, this Court can affirm on the ground that NKBP has a duty to warn licensees of a hidden danger.....	29
6.	The trial court correctly concluded that Suzette had no duty to keep her eyes affixed on the ground as she was walking.....	30
7.	The trial court correctly concluded that Suzette was not at fault as a matter of law.....	32
D.	The trial court was well within its broad discretion in considering expert Mitchell's testimony.....	34
E.	The trial court was well within its discretion in denying NKBP's untimely "motion" for a jury trial.....	38
F.	The trial court was well within its broad discretion in ordering NKBP to pay the costs associated with deposing its late-disclosed expert.....	40
	CONCLUSION.....	44

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Burnet v. Spokane Ambulance,</i> 131 Wn.2d 484, 933 P.2d 1036 (1997).....	11, 43, 44
<i>Burnside v. Simpson Paper Co.,</i> 123 Wn.2d 93, 864 P.2d 937 (1994).....	10
<i>Camicia v. Howard S. Wright Constr. Co.,</i> 179 Wn.2d 684, 317 P.3d 1987 (2014).....	15, 16, 27
<i>Cardia v. Willchester Holdings, LLC,</i> 35 A.D.3d 336, 825 N.Y.S. 2d 269 (2d Dep't 2006).....	25
<i>Dickinson v. Tesia,</i> 2 Wn. App. 262, 467 P.2d 356 (1970)	21, 22
<i>Dunn v. Kemp & Herbert</i> 36 Wash. 183, 78 P. 782 (1904).....	33, 34
<i>Fuentes v. Port of Seattle,</i> 119 Wn. App. 864, 82 P.3d 1175 (2003)	26, 27, 28, 29
<i>McCully v. Fuller Brush Co.,</i> 68 Wn.2d 675, 415 P.2d 7 (1966).....	32
<i>McKinnon v. Wash. Fed. Sav. & Loan Ass'n,</i> 68 Wn.2d 644, 414 P.2d 773 (1966).....	27
<i>Morse v. Antonellis,</i> 149 Wn.2d 572, 70 P.3d 125 (2003).....	10, 12, 14, 15
<i>Mt. Vernon Dodge, Inc. v. Seattle-First Nat'l Bank,</i> 18 Wn. App. 569, 570 P.2d 702 (1977)	11
<i>Nguyen v. City of Seattle,</i> 179 Wn. App. 155, 317 P.3d 518 (2014)	17

<i>Para-Med. Leasing, Inc. v. Hangen,</i> 48 Wn. App. 389, 739 P.2d 717 (1987)	17
<i>Plessias v. John Vincent Scalia Home for Funerals, Inc.,</i> 271 A.D.2d 423, 706 N.Y.S.2d 131 (2d Dep't 2000)	25
<i>Satomi Owners Ass'n v. Satomi, LLC,</i> 167 Wn.2d 781, 225 P.3d 231 (2009).....	18, 19, 20
<i>Saunders v. Lloyd's of London,</i> 113 Wn.2d 330, 779 P.2d 249 (1989).....	18
<i>Schmidt v. Coogan,</i> 181 Wn.2d 661, 335 P.3d 424 (2014).....	15
<i>Schmidt v. Cornerstone Invs., Inc.,</i> 115 Wn.2d 148, 795 P.2d 1143 (1990).....	18
<i>Sorenson v. W. Hotels, Inc.</i> 55 Wn.2d 625, 349 P.2d 232 (1960).....	37, 38
<i>State v. Camarillo,</i> 115 Wn.2d 60, 794 P.2d 850 (1990).....	11
<i>State v. Willis,</i> 151 Wn.2d 255, 87 P.3d 1164 (2004).....	11
<i>Stone v. Smith-Premier Typewriter, Co.</i> 48 Wash. 204, 93 P. 209 (1908).....	33
<i>Sunnyside Valley Irrigation Dist. v. Dickie,</i> 149 Wn.2d 873, 73 P.3d 369 (2003).....	10
<i>Tincani v. Inland Empire Zoological Soc'y,</i> 124 Wn.2d 121, 875 P.2d 621 (1994).....	29, 30
<i>Todd v. Harr, Inc.,</i> 69 Wn.2d 166, 417 P.2d 945 (1966).....	31, 32, 33

<i>In re Wash. Builders Benefit Trust,</i> 173 Wn. App. 34, 293 P.3d 1206, <i>rev. denied</i> , 177 Wn.2d 1018 (2013).....	10, 11, 13
<i>Watson v. Zimmerman</i> 175 Wash. 410, 27 P.2d 707 (1933).....	33
<i>Wilson v. Olivetti N. Am., Inc.</i> 85 Wn. App. at 804, 808, 934 P.2d 1231 (1997)	39
<i>Younce v. Ferguson,</i> 106 Wn.2d 658, 724 P.2d 991 (1986).....	27
<i>Zenkina v. Sisters of Providence in Wash., Inc</i> 83 Wn. App. 556, 922 P.2d 171 (1996).	22
Rules	
RAP 2.5(a)	18
RAP 10.3(a)(6).....	18
CR 26.....	41, 42
CR 37(b)	43
CR 38(b)	39, 40, 41
Other Authority	
RESTATEMENT (SECOND) OF TORTS § 332 (1965)	27
RESTATEMENT (SECOND) OF TORTS § 342 (1965)	29

INTRODUCTION

In December 2009, Suzette Gould, a loan officer for Frontier Bank, visited Paul and Suzanne Marshalls' businesses, DSC and Road Rider Supply, to show the Bank's appreciation for their banking business. When leaving DSC to visit Road Rider, Suzette tripped over a wheel stop in her path, breaking her arm and dislocating her elbow. There was copious credible evidence that the wheel stop should not have been placed in a pedestrian pathway and that it blended into the pavement, so was not clearly visible.

Indeed, Suzanne Marshall admitted that the Marshalls had considered painting the wheel stop, where she had previously tripped over it despite knowing its precise location. Suzette had never before been in the Road Rider parking lot where the wheel stop was hidden.

The Marshalls raise twelve issues challenging the trial court's decision, in a bench trial, that they were negligent. These issues include many challenges to findings and other highly discretionary rulings. All are without merit.

The Marshalls knew their wheel stop was dangerous, but failed to warn Suzette or keep her safe. Thus, they are plainly liable for Suzette's injuries. This Court should affirm.

STATEMENT OF THE CASE

A. Suzette Gould tripped and fell over a wheel stop in the NKBP parking lot, while leaving DSC to visit Paul Marshall at Road Rider Supply.

Suzette Gould was a Commercial Loan Officer Vice President at Frontier Bank. RP 169¹. Paul and Suzanne Marshall are Frontier Bank customers, and Suzette was their loan officer in December 2009, when she came to visit the Marshalls' businesses, DSC and Road Rider Supply. RP 177. Suzette was delivering a Christmas card to the Marshalls as part of Frontier Bank's customer service. RP 177-78. She chatted with Suzanne, whom she had not previously met. *Id.* Suzanne gave Suzette a brief tour of the building and helped her select a tool for her husband, James Gould's, stocking. RP 178-79.

After making her purchase, Suzette asked if Paul was around. RP 181. Suzanne said he was at Road Rider and that Suzette was welcome to go over there and say hello. *Id.* She told Suzette that Road Rider was next door. RP 182.

Suzette left DSC through the same door she had come in. RP 182. She went around a plant partition, and saw Road Rider's awning and signage. *Id.* She headed for the front door, but just as

¹ First names are used to avoid confusion. No disrespect is intended.

she got there, she “wound up on the ground,” hitting her head against the door on the way down. RP 182-83. She had not seen any obstruction in her path. RP 182.

Suzette was in “agony” the instant she fell. *Id.* She was really upset and embarrassed, wondering what could have happened. RP 182-83. Once she got her bearings, Suzette tried to get up, but could not. RP 183. There was no one around and she laid there, seemingly forever, waiting for help. *Id.* She finally got the strength to yell for help. *Id.*

Paul heard Suzette, and came out of Road Rider, then went back inside to call Suzanne. *Id.* Suzanne got Suzette her purse so that she could call James. *Id.* James arrived at the scene and Suzette was then transported to Harrison Hospital in an EMT truck. RP 184-85.

NKPB repeatedly argues, in its fact section, that Suzette caused the fall by looking up at Road Rider’s awning, not down at her path. BA 3-5. This argument is addressed fully in the argument section. Argument §§ C. 6, 7. Briefly, Suzette testified that she walked “straight” toward Road Rider after seeing its awning and signage. RP 182. This does not indicate, as NKBP suggests, that

Suzette kept her eyes locked on the building, never looking down at her path. *Compare* BA 3-5 *with* RP 182.

But in any event, Suzette did not have a duty to stare at the ground while she was walking, nor is that human nature. *Infra*, Argument §§ C. 6, 7. Indeed, pedestrians tend to look ahead in their intended direction. *Id.*

B. Suzette broke her left arm and dislocated her left elbow.

When Suzette was admitted to Harrison Hospital, the immediate task was get her pain under control. RP 185. Suzette had broken her left arm and dislocated her left elbow. RP 185-86; CP 260 FF 24. She was in tremendous pain, and went without any food and water for hours, waiting to see whether she would have surgery. *Id.*

Suzette had surgery to set the break the following afternoon – Christmas Eve. RP 185. She was not released until the afternoon of Christmas Day, still in considerable pain. RP 133-34.

After a painful initial recovery, the “hardware” that had been surgically implanted in Suzette’s elbow remained sensitive and painful. RP 137, 189, 191; CP 260 FF 24, 26. Work was difficult and her condition did not improve. RP 137-38, 189.

In January 2011, Suzette underwent a second surgery to remove the hardware because of the pain and sensitivity it was causing. RP 139, 191. This relieved some pain and sensitivity, and Suzette plateaued around May to June 2011. RP 192. She still has some pain and a significant disfiguring scar. RP 143, 196, 198-99; CP 260, FF 28.

C. The wheel stop that injured Suzette blended-in with the asphalt, creating a hidden danger.

Suzette could not see the wheel stops at Road Rider because they were not painted, so “blended in with the pavement.” RP 224. They “were not evident to [her]” and she “did not see them.” *Id.* When shown a picture of the wheel stops, Suzette testified, “They’re hard to see. . . . Some people can identify them. Some people can’t.” *Id.* When counsel pressed harder, inquiring whether Suzette was suggesting that some people “would never see these wheel stops,” Suzette responded, “Yes. That’s what I’m saying. . . . I’ve had friends look at those pictures, and they didn’t see them.” RP 224-25.

Expert Stan Mitchell explained that as the unpainted concrete wheel stop aged over time, it blended-in with the asphalt. RP 19-21. When concrete is new, it is “bright gray,” but when asphalt is new, it

is "quite black," creating "a bit of contrast." RP 21. As the concrete ages, it becomes darker, and as asphalt ages, it becomes lighter. *Id.* Thus, over time, the wheel stop and the asphalt "blend together." *Id.*

Additionally, the wheel stop that injured Suzette was below the vertical siding, so "did not stand out at all, visually." RP 20; Exs 15, 16, 21, 25, 28. Given the configuration of other wheel stops at NKBP, a reasonable person would not have expected a wheel stop to be in front of the Road Rider entrance. RP 27. And with the sun and shadows, "it was very difficult . . . to perceive the wheel stops" from the path Suzette took to Road Rider. RP 20.

Based on the above evidence, the trial court found as follows: "Stanley Mitchell concluded that the concrete wheel stop in front of the door of Suite D blended in color with the surrounding weathered pavement. That testimony was corroborated by Exhibits 15, 16, 21 through 25, and 28, and particularly by Exhibits 16, 21, 22 and 23, which showed that the wheel stop was not clearly visible due to its configuration and discoloration, making the wheel stop the same color as or somewhat camouflaged by the aged asphalt." CP 258-59, FF 17. The court continued: "Suzette Gould tripped over the wheel stop because she did not see it." CP 259, FF 22. "Suzette

Gould's fall was due to tripping over the wheel stop that was not clearly visible and was somewhat camouflaged." CP 259, FF 23.

D. Suzanne Marshall admitted that she had previously tripped over the same wheel stop.

During a casual conversation when James, a UPS courier, made a delivery to Suzanne, James asked Suzanne if she and Paul had ever thought about painting the wheel stop Suzette tripped over. RP 135. Suzanne admitted that they had thought about painting it because she, and/or both she and Paul, had previously tripped over the wheel stop. *Id.* James was "dumbfounded" – Suzanne had admitted the Marshalls' prior awareness of the hazardous condition. RP 135-36. The admission stood out particularly because Suzanne "looked right at [him], and then she had that look of, like, oh, crap, and turned and walked away without even saying goodbye." RP 135.

E. There is no indication that Suzette was previously aware of the dangerous wheel stop that caused her fall.

NKBP claims that Suzette was "aware of the wheel stops and their location at North Kitsap before the incident, because she had been to the property previously." BA 8. NKBP fails to identify any testimony in which Suzette supposedly admitted prior knowledge of the specific wheel stop that caused her injury. *Id.* There is none.

And although Suzette had been to DSC before, she had never been to Road Rider before she was injured. RP 184. Suzette had been to DSC only once, for a very brief visit, approximately one year before her injury. *Id.*

F. Experts disputed whether the wheel stop complied with Kitsap County zoning codes, and the trial court did not resolve the issue, concluding instead that the wheel stop was camouflaged and was not readily visible.

In its fact section, NKBP argues that its wheel stops are compliant with applicable Kitsap County zoning codes. BA 6-7. Notably, NKBP does not specifically address the wheel stop that injured Suzette, but speaks generally about all of the wheel stops. *Id.* But in any event, code compliance or noncompliance is not a fact – it is a legal issue that was heavily contested by the parties’ experts. The Goulds address this issue in the argument section below. Argument § C. 2.

In brief here, NKBP omits that the Gould’s expert Stan Mitchell testified at length that the wheel stop that injured Suzette was not compliant with zoning codes or industry safety standards. RP 32, 35; *Infra*, Argument § C. 2. And NKBP falsely claims that Mitchell testified “to the excellent condition of the parking lot.” BA 7. Mitchell

testified only that there was “nothing to avoid” about the “asphalt” “up to the wheel stop”:

Q. The asphalt was in great condition?

A. Yeah. There was nothing to avoid up to the wheel stop.

Compare RP 93 with BA 7 (citing RP 94). Again, Mitchell was abundantly clear that the wheel stop was not painted, blended in with the asphalt, and “did not stand out at all, visually.” RP 19-21.

NKBP also argues at length that its certificate of occupancy proves that the wheel stops were code-compliant. BA 6-7. The certificate of occupancy states “at the time of issuance this structure was in compliance with various ordinances regulating building construction or use.” CP 627-28, 629-30. Thus, by its plain language, the certificate of occupancy says only that the “structure” was compliant “at the time of issuance,” not a year later. *Id.*

But in any event, NKBP overstates the significance of the certificate. BA 6-7. Occupancy permits are often “rubber stamp[ed],” without anyone from the County even visiting the site. RP 104-05. Indeed is “very common,” particularly in the final inspection, that the site will be approved “without anybody looking at things.” RP 105. The County had no record or a 2008 certificate of occupancy for

Road Rider. RP 104-05. Mitchell could not find approval for the parking lot in particular. *Id.*

ARGUMENT

A. Standards of review.

On an appeal from a bench trial, the appellate court reviews the trial court's findings to determine whether they are supported by substantial evidence. *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 65, 293 P.3d 1206, *rev. denied*, 177 Wn.2d 1018 (2013). "Substantial evidence" is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Wash. Builders*, 173 Wn. App. at 65 (quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). Unchallenged findings of fact are verities on appeal. *Wash. Builders*, 173 Wn. App. at 65.

The Court then considers whether the trial court's findings of fact support its conclusions of law. 173 Wn. App. at 65. The Court reviews conclusions of law *de novo*. *Id.*

This Court defers to the trial court "regarding witness credibility and the weight of conflicting evidence." *Id.* (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994)). This Court will not review credibility determinations. *Morse*

v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) (citing **State v. Camarillo**, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

This Court reviews NKBP's remaining issues for an abuse of discretion. **State v. Willis**, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004) (the trial court's decisions regarding the admissibility of expert testimony); **Mt. Vernon Dodge, Inc. v. Seattle-First Nat'l Bank**, 18 Wn. App. 569, 581, 570 P.2d 702 (1977) (the court's denial of NKBP's motion for a jury trial); and **Burnet v. Spokane Ambulance**, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (the court's order requiring NKBP to pay for the deposition of late-disclosed expert Uchimura).

B. The trial courts findings are amply supported by the evidence.

NKBP challenges a number of the trial court's findings of fact, all of which are supported by substantial evidence.² This Court should affirm.

² Although NKBP address the conclusions of law first, the Goulds address the findings first, since this Court's inquiry is whether the conclusion of law follow from the findings of fact. **Wash. Builders**, 173 Wn. App. at 65.

1. James Gould's testimony that Suzanne Marshall admitted having tripped over the wheel stop is sufficient evidence to support the finding that the Marshalls had prior knowledge of the hazardous condition.

NKBP argues that James Gould's testimony is not substantial evidence supporting the trial court's finding that NKBP had notice that the wheel stop that Suzette tripped over presented a risk of injury. BA 28-29. James unequivocally testified that Suzanne Marshall admitted that either she or Paul Marshall had previously tripped over the wheel stop that caused Suzette's fall. RP 135. The trial court found James' testimony credible. CP 259, FF 19. This Court will not review this determination. *Morse*, 149 Wn.2d at 574. James' testimony is more than sufficient to support the court's finding that the Marshalls had notice that the wheel stop was a dangerous condition.

NKBT alleges a series of shortcomings with this testimony, including that James could not recall whether Suzanne or Paul had tripped, and did not specify which wheel stop he/she tripped over. BA 28. James' testimony directly contradicts NKBP's assertions.

James unequivocally testified that Suzanne admitted that she, and/or both she and Paul had previously tripped over the wheel stop that injured Suzette. RP 135. Suzanne's admission stood out, where

she had admitted the Marshalls' awareness of the dangerous condition that injured Suzette. RP 135-36. James' testimony is sufficient to convince a rational fair-minded person that the Marshalls knew that the wheel stop was a dangerous condition. **Wash. Builders**, 173 Wn. App. at 65.

NKBP's attempts to discredit James' testimony are unavailing. BA 28. James plainly testified about the wheel stop that injured Suzette, despite NKBP's argument to the contrary. RP 135-36. James asked whether the Marshalls had thought "about painting the blocks, you know, or moving or painting the block." RP 135 (emphasis added). Suzanne admitted that they had "thought about it" because one or both of them "had tripped over the block too." *Id.* In context, the references to "the block" plainly refer to the block that injured Suzette. *Id.* But again, this Court defers to the trial court's determinations "regarding witness credibility and the weight of conflicting evidence." 173 Wn. App. at 65.

It is irrelevant that James may not have recalled which of the Marshalls had tripped. BA 28. He specifically recalled Suzanne's admission and the court found his testimony credible. RP 135; CP 259, FF 19.

NKBP falsely argues that the court made no credibility determination on this point. BA 28. The court specifically found “credible James Gould’s testimony that Ms. Marshall admitted to him that she had tripped over the wheel stop in the past. Therefore, Ms. Marshall was aware of the hazardous condition.” CP 259, FF 19. This Court will not review this credibility determination. *Morse*, 149 Wn.2d at 574.

2. NKBP’s certificate of occupancy does not obviate the Marshalls’ knowledge of the dangerous wheel stop.

NKBP argues that the certificate of occupancy, received one year before the injury, establishes that “[t]here is no reasonable basis for North Kitsap to expect that features of its parking lot are flawed and hazardous when they have received their Certificate of Occupancy.” BA 30. NKBP then argues that the Goulds failed to show that the parking lot was in a different condition when Suzette fell than it was in a year earlier when NKBP received the certificate of occupancy. BA 30-31. NKBP ignores the evidence and the law.

Expert Mitchell unequivocally opined that as the concrete wheel stop aged over time, it blended in with the asphalt. RP 20-21. Mitchell explained when concrete is new, it is “bright gray.” RP 21. New asphalt, however, it is “quite black.” *Id.* The bright gray wheel

stop on the quite black asphalt provides “a bit of contrast.” *Id.* But as the concrete ages, it becomes darker. *Id.* As asphalt ages, it becomes lighter. *Id.* Thus, over time, the wheel stop and the asphalt “blend together.” *Id.*

NKBP also misstates the burden of proof. *Id.* NKBP has the burden of proving affirmative defenses. ***Schmidt v. Coogan***, 181 Wn.2d 661, 669, 335 P.3d 424 (2014); ***Camicia v. Howard S. Wright Constr. Co.***, 179 Wn.2d 684, 693, 317 P.3d 1987 (2014). Thus, the Goulds would not have the burden to show that the wheel stop’s condition had changed. BA 30-31. Rather, NKBP would have to establish that the wheel stop looked exactly the same as it did when the certificate of occupancy was issued. Mitchell’s testimony plainly contradicts that assertion. RP 19-21.

But in any event, there is no support for NKBP’s suggestion that the certificate of occupancy means that the wheel stop was non-negligent. BA 30-31. The most obvious flaw in this argument is that the certificate was awarded one year before the injury, so says nothing about the condition of the wheel stop a year later. And again, NKBP had prior knowledge that the wheel stop was dangerous. CP 259, FF 19. The certificate of occupancy cannot affect what the Marshalls knew from experience.

Finally, it appears that NKBP did not rely on the certificate of occupancy before the trial court, instead asserting for the first time on appeal that it is conclusive evidence that the parking lot was safe. BA 30-31. Again, the Goulds do not disagree that wheel stops, generally speaking, can be a reasonable safety measure. BA 30. But as discussed below, they are safe only if they are clearly visible. Argument § C. 1. The wheel stop that injured Suzette was not.

3. The trial court correctly found that Suzanne Marshall “directed” Suzette to find Paul Marshall at Road Rider.

NKBP next challenges the finding that Suzette “was directed to see Paul Marshall at Road Rider.” BA 31; CP 258, FF 12. The basis of this argument is that Suzanne told Suzette that Paul was at Road Rider, and welcomed Suzette to “go over there and say hi,” but did not “direct” her to go see him. BA 31. The Marshalls misread this finding and read too much into the word “directed.” *Id.* When Suzette asked if Paul was around, Suzanne told her she could find Paul at the neighboring suite. RP 181. This amply supports the finding that Suzette was “directed to Suite D next door to see Paul Marshall.” CP 258, FF 12.

4. NKBP is not entitled to a new trial because the trial court entered a finding of fact that NKBP argues is a conclusion of law.

NKBP argues that the trial court erroneously made a finding of fact that it need not consider Kitsap County zoning codes since the wheel stop was not clearly visible. BA 31-32; CP 259, FF 18. NKBP argues that this is really a conclusion of law, not a finding of fact. BA 31-32. There is no error here – this Court will treat findings as finding and conclusions as conclusions, regardless of how they are labeled. *Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014) (quoting *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987) (“The label applied to a finding or conclusion is not determinative; we ‘will treat it for what it really is’”).

NKBP also argues that the trial court’s determination that it need not consider code-compliance would be erroneous, even if properly labeled a conclusion of law. BA 32. But NKBP makes no substantive argument, referring the court to its “above” argument on this point. BA 32. There is no such argument: NKBP never argues that the trial court had to resolve code compliance. BA 9-26. Nor did it raise this argument before the trial court. This Court should decline to consider this issue, where NKBP failed to preserve it, and

fails to provide any argument or citation to authority. RAP 2.5(a); RAP 10.3(a)(6); **Satomi Owners Ass'n v. Satomi, LLC**, 167 Wn.2d 781, 808, 225 P.3d 231 (2009) (quoting **Schmidt v. Cornerstone Invs., Inc.**, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990) (citing **Saunders v. Lloyd's of London**, 113 Wn.2d 330, 334, 779 P.2d 249 (1989)) (“Without adequate, cogent argument and briefing, this court should not consider an issue on appeal”)).

In any event, the trial court heard considerable evidence, which she expressly found to be credible, that the wheel stop that injured Suzette was not clearly visible and that the Marshalls were aware of this hazard. CP 258, FF 16; CP 259, FF 19. She certainly had the discretion to determine that she did not need to decide code compliance to find the Marshalls negligent for a hidden hazard they knew about. CP 259, FF 18.

5. The trial court's findings are not contradictory.

Finally, NKBP claims that it is contradictory for the trial court to have found (1) that Suzette was “looking at the door of Suite D as she approached”; and (2) that her “fall was due to tripping over the wheel stop that was not clearly visible and was somewhat

camouflaged.”³ BA 32-33; CP 258, FF 14; CP 259, FF 23. NKBP argues that since Suzette was “looking at the door,” she “could not have seen [the wheel stop] regardless of its color.” BA 32.

These findings are not contradictory. Finding that Suzette was looking at Suite D while she approached does not remotely suggest that her eyes were so transfixed on the door that they would not have been diverted by a wheel stop that was clearly visible. BA 32-33. Indeed, finding that Suzette was looking at the door does not even suggest that she never looked down at her path. *Id.* NKBP makes improper and unjustified inferences.

C. The trial court’s conclusions of law properly following from its correct findings of fact.

1. Suzette had no prior knowledge that the camouflaged wheel stop was a dangerous condition.

NKBP argues that regardless of whether Suzette was a licensee or invitee, NKBP did not owe Suzette any duty where: (1) Suzette had actual knowledge of the wheel stop; and (2) the wheel stops in general were not a dangerous condition. Quickly visiting an adjacent parking lot one year before her injury is not actual notice of

³ NKBP's argument about this finding reiterates its argument that Suzette had a duty to look down and see the wheel stop. BA 21-26. This is addressed below in response to NKBP's related arguments on the conclusions of law. *Infra*, Argument § C 6.

a dangerous condition. And a wheel stop in a pedestrian pathway that blends into the ground is a dangerous condition, as evidenced by the fact that Suzanne Marshall previously tripped over it, despite being very familiar with its location. This Court should affirm.

NKBP argues that Suzette “was aware of the wheel stops and their location at North Kitsap before the incident, because she had been to the property previously.” BA 11. NKBP continues that Suzette has “significant general knowledge of wheel stops,” and “regularly” encountered them in her office parking lot. *Id.*

NKBP greatly overstates Suzette’s familiarity with its parking lot. BA 10-11. At most, NKBP can place Gould in the DSC parking lot for a brief visit one year before her injury. RP 184. She had never been in the Road Rider parking lot, where she was injured. *Id.* Nor did she convey any familiarity with the parking lot, its layout, or its wheel stops. RP 184. A brief visit to an adjacent parking lot one year earlier does not give Suzette actual knowledge “of the wheel stops and their location.” BA 10.

And Suzette’s “general knowledge” of wheel stops does not give her “actual knowledge” of the wheel stop that caused her injury. BA 10-11. It is irrelevant that Suzette knows what wheel stops are, or that she has encountered them in other parking lots. *Id.* The issue

is not whether wheel stops are dangerous as a general matter, but whether this particular wheel stop was dangerous because it blended in with the asphalt, so was not clearly visible. RP 19-21; CP 133-34; CP 258-59, FFs 16-18. The trial court so found. CP 259, FF 18.

But in any event, NKBP's argument evades the issue. NKBP had a duty to warn Suzette of any "dangerous conditions which it knew of, or could have discovered with reasonable inspection . . ." that Suzette did not know about or could not have reasonably discovered. *Dickinson v. Tesia*, 2 Wn. App. 262, 263, 467 P.2d 356 (1970) (emphasis omitted) (cited at BA 11). Thus, it is not enough that Suzette has general knowledge of wheel stops, or even that she had been to the DSC (but not the Road Rider) parking lot a year earlier. BA 11. NKBP has no evidence that Suzette was aware that the wheel stop that caused her injury was a "dangerous condition." *Dickinson*, 2 Wn. App. at 263.

Dickinson, upon which NKBP relies, is easily distinguishable. BA 11. There, defendants invited plaintiffs to a park they owned for a picnic. 2 Wn. App. at 262. Upon arriving, plaintiffs realized that the park was barely more than a small clearing. *Id.* at 262-63. "The ground was rough, and facilities were meager." *Id.* at 263. The wife warned her husband, who was on crutches, to be careful, but

attempting to leave the park without assistance, the husband was hit by someone running past, lost his balance, and fell, reinjuring his previously injured leg. *Id.*

No one warned Suzette. She did not, upon arriving at DSC, immediately recognize a hazard. *Dickinson* is nothing like this case.

Zenkina v. Sisters of Providence in Wash., Inc., is also easily distinguishable. BA 11 (citing 83 Wn. App. 556, 922 P.2d 171 (1996)). There, the appellate court held that a hospital has no duty to warn that witnessing a patient receive stitches might cause an onlooker to faint. *Zenkina*, 83 Wn. App. at 562. But there, the plaintiff chose to be in the emergency room while her nephew received medical care. 83 Wn. App. at 559. Thus, it was readily apparent that she might witness him receive stitches. *Id.* By contrast – the wheel stop was not apparent – it was hidden. CP 259, FF 18.

2. The wheel stop that injured Suzette was camouflaged, zoning codes do not permit hidden dangers, and the foreign cases NKBP cites contradict its claims.

NKBP makes the following three claims to support its argument that the wheel stop that injured Suzette was not a dangerous condition: (1) the wheel stops were “open and obvious”; (2) Title 17 of the Kitsap County Zoning Code requires parking spots to be contained by a curb or bumper rail, such as a wheel stop; and

(3) other jurisdictions have held that the benefits of wheel stops outweigh their risk to pedestrians. BA 12. Each of these claims is false, misleading, and/or irrelevant. This Court should affirm.

The wheel stop that caused Suzette to trip and fall was not “open and obvious.” BA 12. Rather, the trial court found that “The wheel stop was not clearly visible due to its configuration and discoloration, making the wheel stop the same color as or somewhat camouflaged by the asphalt.” CP 258-59, FF 17 (citing Mitchell’s testimony and exhibits 15, 16, 21-25, 28). As addressed above, this finding is plainly supported by Suzette’s testimony that she could not see the wheel stop, by James’ testimony that Suzanne Marshall had previously tripped over the wheel stop despite being aware of its location, and by Mitchell’s testimony that the wheel stop blended into the asphalt. *Supra*, Statement of the Case §§ C, D, F.

NKBP next argues, without elaboration, that “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.” BA 12. This argument misses the point. Suzette does not argue that using wheel stops is unreasonable or that they generally are not safe. CP 133. Rather, the issue is the dangerous condition of the specific wheel stop that injured Suzette. CP 133-34. That wheel stop was

“dangerous” because it was placed in the pedestrian pathway and was inconspicuous against the pavement. *Id.*

But in any event, NKBP’s cursory argument wrongly assumes code compliance, a heavily contested point the trial court did not resolve. BA 12-13. NKBP neglects to mention that Mitchell unequivocally opined that the provisions of the Kitsap County zoning codes NKBP relied on below and here – 17.354.110, Section B, and 17.435.020 – do not require the wheel stop that injured Suzette. RP 30-34, 38-39. He opined that KCC 17.354.110 Section B did not apply at all and that KCC 17.435.020 required the use of a curb or bumper rail, not a wheel stop. RP 33-35. Thus, the wheel stop that injured Suzette did not comply with either of these codes. RP 31, 35.

NKBP continues to misstate the issue in arguing that other jurisdictions have “upheld that the benefits of wheel stops outweighs any risk they pose to pedestrians.” BA 12 (footnote omitted). Again, the Goulds do not argue that wheel stops in general pose an unreasonable risk, such that their use in and of itself would be negligent. *Compare* BA 12 *with* CP 133. Indeed, expert Mitchell acknowledged that wheel stops are widely used and can be safe. CP 133. *This* particular wheel stop, however, was dangerous

because it was placed in the pedestrian pathway and was camouflaged against the pavement. CP 133-34; RP 73.

Further, the cases NKBP cites do not support its assertion that any wheel stop is so beneficial that its utility outweighs any risk of injury. BA 12-13 (citing *Plessias v. John Vincent Scalia Home for Funerals, Inc.*, 271 A.D.2d 423, 423-24, 706 N.Y.S.2d 131 (2d Dep't 2000); *Cardia v. Willchester Holdings, LLC*, 35 A.D.3d 336, 336-37, 825 N.Y.S. 2d 269 (2d Dep't 2006)). Rather, these cases both hold that a wheel stop or other barrier that is "clearly visible presents no unreasonable risk of harm." *Plessias*, 271 A.D.2d at 423-24; *Cardia*, 35 A.D.3d at 336-37. Gould does not disagree.

And NKBP ignores that the trial court found that the very cases upon which NKBP relies hold that "a wheel stop that is clearly visible does not pose an unreasonable risk." CP 259, FF 20. These cases do not suggest, as NKBP claims, that wheel stops are safe regardless of whether they can be seen. BA 12-13.

Finally, NKBP summarily concludes that wheel stops are no more dangerous than a curb, so NKBP cannot be liable. BA 13-14. This argument assumes that the particular wheel stop at issue was safe, just because wheel stops in general can be safe. *Id.* That is an improper and unsupported inference.

3. The camouflaged wheel stop caused Suzette's fall.

NKBP argues that the wheel stop did not cause Suzette's fall, where Suzette was not looking down at the ground, but toward the Road Rider entrance. BA 14. As discussed above, Suzette's testimony that she walked "straight" toward Road Rider after identifying its location, does not mean, as NKBP suggests, that she never looked down at the ground. *Supra*, Argument § B. 5, C. 6. And as discussed below, Suzette has no duty to stare at the ground while she is walking, nor is that human nature. *Infra*, Argument § C. 6.

4. The trial court correctly found that Suzette was an invitee.

The trial court correctly concluded that Suzette was an invitee, where she was the loan officer assigned to the Marshalls' business accounts, and came to deliver a Christmas card to express the bank's appreciation for the Marshalls' business. CP 257, FF 8; CP 258, FF 10; and CP 261, CL 1. This Court should affirm.

The parties do not dispute the duties owed to an invitee or a licensee. The only dispute is which classification Suzette falls into.

A business invitee is a person ""invited to enter or remain on land for [the] purpose directly or indirectly connected with business dealings with the possessor of the land."" ***Fuentes v. Port of Seattle***, 119 Wn. App. 864, 869, 82 P.3d 1175 (2003) (quoting

Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965))). In 1966, our Supreme Court broadened the invitee classification to include the public invitee, defined as one “invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.” **Camicia**, 179 Wn.2d at 694-95 (quoting **McKinnon v. Wash. Fed. Sav. & Loan Ass’n**, 68 Wn.2d 644, 650-51, 414 P.2d 773 (1966)). “The duty owed to an invitee is that of reasonable care for the invitee’s personal safety.” **Fuentes**, 119 Wn. App. at 869.

Thus, the question here is whether Suzette was invited to be at the Marshalls’ businesses either for a “purpose directly or indirectly connected with [their] business dealings,” or as a member of the public for a public purpose. 119 Wn. App. at 869; **Camicia**, 179 Wn.2d at 694-95. She plainly was. Suzette came DSC and Road Rider to express her employer’s appreciation for the Marshalls’ banking business. RP 177-78; CP 258, FF 10. Thus, her purpose for being there was plainly connected to the Marshalls’ business.

In **Fuentes**, for example, the plaintiff was at the airport to pick up passengers disembarking from an airplane, when she was the victim of an attempted carjacking. 119 Wn. App. at 869. While she herself was not a passenger, her purpose for being at the airport

“was connected to airport business.” 119 Wn. App. at 869. Thus, Fuentes was an invitee. *Id.*

NKBP’s arguments that Suzette was not an invitee, but a licensee, are unpersuasive. BA 15-19. NKBP acknowledges, as it must, that a licensee enters upon the premises “for some purpose not connected with any business interest or business benefit to the [owner] [occupier].” BA 15 (quoting 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.08 (6th ed.)). NKBP argues that Suzette is a licensee because she was present at DSC and Road Rider to benefit her employer, not those businesses. BA 16-18.

NKBP incorrectly suggests that customer service on the Marshalls’ business accounts does not benefit their businesses. BA 16-18. But in any event, that is not the proper test. One is a licensee only if her presence is “not connected with any business interest” of the owner. BA 15 (quoting 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.08 (6th ed.)). The Marshalls’ commercial loans are quite plainly “connected” to their business.

NKBP next argues that even if Suzette was an invitee at DSC because she made a purchase there, she lost that status when she left DSC for the purpose of going to Road Rider to benefit her employer. BA 18-19. Again, the test is not whether Suzette

financially benefited the Marshalls, but whether her visit was “connected” to their business, even if only indirectly. BA 15 (quoting 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.08 (6th ed.)); **Fuentes**, 119 Wn. App. at 869. It was.

In short, visiting the Marshalls in relation to their commercial loans is plainly “connected” to their business. Thus, Suzette was an invitee.

5. Even if Suzette is a licensee, this Court can affirm on the ground that NKBP has a duty to warn licensees of a hidden danger.

In the alternative, this Court can affirm on the ground that even if Suzette was a licensee, NKBP owed her a duty, where: (1) NKBP knew of the dangerous condition; (2) NKBP failed to warn Suzette or make the wheel stop safe; and (3) Suzette did not know or have reason to know of the wheel stop or that it was dangerous. **Tincani v. Inland Empire Zoological Soc’y**, 124 Wn.2d 121, 133, 875 P.2d 621 (1994) (quoting RESTATEMENT (SECOND) OF TORTS § 342 (1965)); BA 19-20.

Although the trial court did not resolve the issue, its findings support the conclusion that NKPB owed Suzette a duty even if she were a licensee. The trial court found the Marshalls were aware that the wheel stop was dangerous, where Suzanne Marshall had

previously admitted tripping over the same wheel stop that injured Suzette. CP 259, FF 19; *Supra*, Argument § B. 1. It is undisputed that the Marshalls did not to warn or make the wheel stop safe. And Suzette had no prior notice of the camouflaged wheel stop and could not have known that it was dangerous. *Supra*, Argument § C. 1.

In short, Suzette was plainly an invitee, but even if she were a licensee, the Marshalls had a duty to warn her of the hidden danger they knew about.

6. The trial court correctly concluded that Suzette had no duty to keep her eyes affixed on the ground as she was walking.

NKBP argues that the trial court, presiding over a bench trial, erroneously declined to consider Washington Pattern Jury Instruction 12.6, providing that “[e]very person has a duty to see what would be seen by a person exercising ordinary care.” BA 21-22 (WPI 12.6). In essence, NKBP argues that Suzette had a duty to stare down at the ground while she was walking. *Id.* There is no such duty. This Court should affirm.

By its plain language, WPI 12.6 applies only when the object that supposedly should have been seen – here the wheel stop – would have been seen by a person exercising ordinary care. Again, however, the unpainted wheel stop blended in with the asphalt, so

was not readily visible. *Supra*, Statement of the Case § C; CP 258-59, FF 17. Suzanne Marshall tripped over it, and she knew it was there. RP 135-36. This wheel stop would not have been seen by the ordinary person.

And Suzette was exercising ordinary care. WPI 12.6. The law does not require pedestrians to keep their eyes affixed on their path, unless a danger is open and obvious. *Todd v. Harr, Inc.*, 69 Wn.2d 166, 170-71, 417 P.2d 945 (1966). Instead, the law requires only that one will intermittently glance at her path to anticipate any obstacles:

Prudent care for one's own safety should not and does not entail rigid fixation of one's eyes on the pathway . . . in the sense that one need keep a constant watch for any danger that might lurk in the next step. Where no danger is apparent, it is a matter of common experience . . . that one who keeps a reasonable watch for his own safety will simply engage in intermittent glances at the path ahead in order to anticipate protruding obstacles The law requires no higher duty of care, and certainly does not require one to keep his or her eyes fixed on the floor immediately ahead.

Todd, 69 Wn.2d at 170-71. Suzette did not have to stare at the ground, keeping a constant watch for a hidden danger. 69 Wn.2d at 170-71.

Moreover, Suzette was not distracted. She was not on her cell phone, looking at something in her hands, or fumbling in her

purse. She was looking toward the building she was walking to. RP 182. That is not only reasonable, it is human nature. *Todd*, 69 Wn.2d at 170-71; CP 182; RP 22.

7. The trial court correctly concluded that Suzette was not at fault as a matter of law.

Finally, NKBP argues that the trial court erroneously determined that Suzette was not at fault as a matter of law. BA 23-26. This argument repeats NKBP's claims that Suzette was looking ahead, not down, and that she had previously been to DSC. BA 26. As explained above, neither argument has merit. *Supra*, Argument § C. 1 & 6.

NKBP acknowledges, as it must, that to be at fault, Suzette must have been aware, or should have been aware, that the wheel stop was a dangerous condition. BA 24-25. In other words, Suzette "cannot negligently contribute to [her] own injury when [she] has no way of reasonably ascertaining the risk of injury exists." BA 25 (citing *McCully v. Fuller Brush Co.*, 68 Wn.2d 675, 415 P.2d 7 (1966)).

Again, Suzette had no reasonable way of ascertaining that there was a hidden danger in her path. No reasonable person would expect a wheel stop in front of the Road Rider entrance. RP 27. The wheel stop did nothing to stand out, but blended into the asphalt.

Supra, Statement of the Case § C. And having been at DSC for a short visit, one time, one year before her injury, does not indicate that Suzette had prior notice of a dangerous condition. *Supra*, Argument § C. 1.

Since the dangerous wheel stop was hidden, Suzette had no duty to stare at the ground looking for it. **Todd**, 69 Wn.2d at 170-71. Human nature is to look ahead at one's destination. CP 182; RP 22. The law requires only that a pedestrian intermittently looks down at her path. **Todd**, 69 Wn.2d at 170-71.

Finally, the cases upon which NKBP relies are easily distinguishable. BA 25. Unlike the injured party in **Watson v. Zimmerman**, Suzette had not "previously navigated" the Road Rider parking lot "without incident." *Compare* BA 25 (citing 175 Wash. 410, 27 P.2d 707 (1933)) *with* RP 184. Suzette had never even been to Road Rider's parking lot. RP 184.

Unlike the injured party in **Stone v. Smith-Premier Typewriter, Co.**, Suzette had not previously visited the Road Rider parking lot. *Compare* BA 25 (citing 48 Wash. 204, 93 P. 209 (1908)) *with* RP 184. Again, she had never been there. RP 184.

And unlike the allegedly dangerous stairway in **Dunn v. Kemp & Herbert**, it cannot here be said that there was "nothing unusual or

dangerous about the [wheel stop].” *Compare* BA 25 (citing 36 Wash. 183, 78 P. 782 (1904)) *with supra*, Statement of the Case § C. The wheel stop was hidden and blocked a pedestrian pathway. *Supra*, Statement of the Case § C. While the **Dunn** defendants could not reasonably have anticipated that someone would fall down the stairway in broad daylight, it was entirely foreseeable that someone would trip over the wheel stop, where Suzanne Marshall had before. *Compare Dunn*, 36 Wash. at 185 *with* RP 135.

In short, Suzette did exactly what any reasonable pedestrian would do – detecting no danger, she walked toward her destination. That is not negligent as a matter of law.

D. The trial court was well within its broad discretion in considering expert Mitchell’s testimony.

NKBP argues that the trial court abused its discretion in considering testimony from expert Mitchell, claiming that Mitchell failed to “demonstrate that any *accepted* industry standards or *applicable* codes were violated.” BA 34 (emphasis in original). That is false. Mitchell plainly testified to various code and industry-standard violations. RP 30-39. This Court should affirm the trial court’s highly discretionary decision to allow Mitchell’s testimony.

Mitchell, an architect, founded Architectural Building Inspection, Inc. (ABI) which provides pre-purchase inspections of buildings. CP 129. Mitchell has inspected over 15,000 properties, including commercial parking facilities. *Id.* And Mitchell has been an architect on commercial projects involving planning and design of adjacent parking spaces. CP 128-29. He has testified as an expert over 1000 times. RP 60. Mitchell was plainly qualified to testify as an expert.

NKBP begins its critique of Mitchell's testimony with the false statement that "Mitchell did not testify that the parking lot and wheel stops at North Kitsap were in violation of any applicable building code." BA 36. NKBP then claims, also falsely, that the code "applicable to this parking lot . . . requires a curb or barrier such as a wheel stop." *Id.*

But as discussed above, Mitchell unequivocally opined that the Kitsap County zoning codes NKBP relies on do not require a wheel stop and that the wheel stop that injured Suzette did not comply with the codes in any event. *Supra*, Argument § C. 2. Mitchell also opined that NKBP failed to comply with Uniform Building Codes, adopted by Kitsap County. RP 30-31. UBC 1997, section 49.4 provides, for example, that there can be no obstructions in

pedestrian walkways. RP 30. Section 49.7 provides, for example, that there can be no obstructions in the doorway or pathway providing egress from a building. RP 30-31. Mitchell testified to other code violations as well. RP 31.

NKBP also ignores Mitchell's declaration addressing the same allegations raised here – that Mitchell failed to demonstrate that applicable codes or industry standards were violated. CP 129-32. Mitchell filed a responsive declaration, referring back to previous declarations and deposition testimony discussing violations of codes and industry standards. CP 129-31. He even listed these various violations. CP 130-31.

And Mitchell also opined that the wheel stop that injured Suzette did not comply with standards determined by the American Society of Testing Methods (“ASTM”), providing among other things (1) that wheel stops should not be used; (2) that if used, they should not be placed in a pedestrian pathway; and (3) that if used, their color should contrast with their surrounding environment. RP 29-30. The ASTM are a set of industry standards developed by practicing professionals who are architects, engineers, and in the case of floor surfaces, professionals in the flooring industry. RP 55-56.

Mitchell's agreement that Kitsap County codes did not adopt the ASTM guidelines, does not, as NKBP argues, mean that discussing the ASTM was "reversible error." BA 36. Mitchell opined that every building professional knows or should know about the ASTM, which set accepted standards for safety and construction. CP 131; RP 9-10, 55-56. Even assuming code-compliance, design still must be safe. RP 31-32. The wheel-stop design was not safe. *Id.*

Sorenson v. W. Hotels, Inc., upon which NKBP relies, is easily distinguishable. BA 36 (citing 55 Wn.2d 625, 349 P.2d 232 (1960)). There, the trial court admitted the 1953 Bellingham Building Code into evidence, instructing the jury (1) that the code was applicable; (2) that any code violation was *per se* negligence; and (3) that the code had been violated, constituting negligence. ***Sorenson***, 55 Wn.2d at 636. But the 1953 code did not apply at all, where the property at issue had not been built or remodeled since the code was enacted. 55 Wn.2d at 635-36.

Here, by contrast, Mitchell opined that the ASTM applies, and NKBP did not convincingly argue otherwise. RP 9-10, 29-30. But in any event, the trial court did not resolve this issue, much less

incorrectly instruct the fact finder to follow the wrong code.

Sorenson is inapposite.

NKBP also argues that Mitchell's testimony regarding lighting and Suzette's cone of vision exceeded the scope of his expertise. BA 36-38. This argument also misses the mark.

As below, NKBP mischaracterizes this issue as one of bio-mechanics. *Id.*; CP 132. Lighting and perception are not biomechanical, but are within the scope of human factors, of which architects are well aware. CP 133. Indeed, the effect of lighting and cone of vision are integral to an architect's work. *Id.* An architect must take into account how humans interact with a particular environment, and the effects of the design, including lighting, on the user. *Id.* Testimony about lighting and Suzette's cone of vision was well within Mitchell's expertise. *Id.*⁴

E. The trial court was well within its discretion in denying NKBP's untimely "motion" for a jury trial.

Although NKBP admits that it did not timely demand a jury trial, it fails to address just how untimely its request was. BA 39. The Goulds filed their complaint in April 2011, and NKBP answered in

⁴ NKBP's argument that Mitchell's testimony was speculative is nothing more than a repeat of its prior arguments regarding Mitchells' testimony. BA 38. This Court should reject it for the same reasons articulated above. *Supra*, Argument § D.

June. CP 7. The matter was originally noted for trial setting in February 2012, and later renoted to May 2012. *Id.* NKBP did not file or serve a jury demand or pay a jury fee, as required by CR 38(b). *Id.* On May 24, 2012, the trial court entered an order setting trial for October 7, 2013. *Id.* NKBP first moved for a jury trial 11 months later. CP 9.

NKBP appears to claim, if only implicitly, that it nonetheless substantially complied with CR 38(b), comparing this matter to ***Wilson v. Olivetti N. Am., Inc.***, in which the defense timely filed a jury demand, but failed to deliver it to plaintiff's counsel. BA 39 (citing 85 Wn. App. at 804, 808, 934 P.2d 1231 (1997)). There, however, plaintiff's counsel was aware that the defense had timely filed a jury demand, where the defense repeatedly referenced it in pleadings. ***Wilson***, 85 Wn. App. at 808-09. The appellate court reversed the trial court's order denying a jury trial, holding that the defense had substantially complied with CR 38(b). *Id.* at 810.

Wilson is easily distinguishable, where a jury trial was timely filed and plaintiff's counsel had actual notice. Neither happened here. This matter is not about substantial compliance, but non-compliance. NKBP never filed a jury demand, never paid the required fee, and very late "moved" for a jury trial. CP 10.

Finally, NKBP falsely claims that the Goulds alleged no “actual prejudice.” BA 40. The Goulds argued at length that they were preparing their case for a bench trial, not a jury trial. CP 10-13. The Goulds explained that preparation for a bench trial is different than for a jury trial and that jury trials cost more, as they are slower and less efficient than bench trials. *Id.*

In short, NKBP failed to substantially comply with CR 38(b). This Court should affirm.

F. The trial court was well within its broad discretion in ordering NKBP to pay the costs associated with deposing its late-disclosed expert.

NKBP argues that the trial court erroneously required NKBP to pay costs associated with the Gould’s deposition of defense expert Mark Uchimura. BA 40-48. NKBP principally argues that the Goulds had Uchimura’s report, co-authored with Andrew Sandberg, but ignores that it failed to timely disclose Uchimura or Sandberg, and repeatedly refused to clarify which would testify. *Id.*; CP 32-33, 37. The trial court was well within its broad discretion in requiring NKBP to bear the cost of deposing Uchimura, when NKBP finally clarified that he would testify. CP 571. This Court should affirm.

On May 10, 2012, Uchimura and Sandberg sent their co-authored report to defense counsel. CP 33. NKBP did not notify the

Goulds that it had this report or even that it had retained Uchimura and Sandberg. CP 32-33. Rather, it was not until early November 2012, six months later, that NKBP first referenced these experts and disclosed their report along with a summary judgment motion. *Id.*

Within days, the Goulds contacted NKBP, stating that there had been no CR 26 disclosure of these experts, notifying NKBP that the Goulds wanted to depose whichever expert would be called to testify, and asking NKBP to update its interrogatory responses. CP 33. The next day, NKBP “apologize[d] for the error regarding our expert’s report,” and claimed that it would update its discovery responses. CP 33, 35. NKBP also claimed that it would “allow the deposition of our expert,” and would “contact our expert regarding availability for deposition.” CP 35. NKBP did not identify which expert it was referring to. *Id.* The Goulds heard nothing more from NKBP. CP 32, 37.

One week later, the Goulds again contacted NKBP, stating very plainly that they needed to schedule a deposition for Uchimura or Sandberg – whichever one NKBP would call to testify:

Before we can schedule the deposition of the defense expert, we need to know which person is being called by the defense. Is it Andrew Sandberg or Mark Uchimura that would be called to testify? Whichever one is being called to testify is the one we need to depose . . .

CP 37. The Goulds got no response. *Id.* The Goulds followed up 10 days later, again making abundantly clear that they were “anxious” to know which expert NKBP would call so that they could schedule a deposition and order the transcript in time to respond to NKBP’s summary judgment motion, which relied heavily on the coauthored report. *Id.*

On November 26, 2012, NKBP responded only that it was “working on this.” CP 37. The Goulds never heard anything else from NKBP, and NKBP never updated its discovery responses. CP 32, 37. Sixteen months later, the trial court ordered Uchimura’s deposition and ordered NKBP to bear the costs. CP 571.

NKBP faults the Goulds for “fail[ing] to note the depositions of Mr. Uchimura or Mr. Sandberg.” BA 46. That ignores reality – the Goulds repeatedly asked NKBP which expert would testify, explaining that they needed to depose the witness – not his coauthor. *Compare* BA 46-47 *with* CP 32-33, 37. NKBP stonewalled, never disclosing who would testify. *Id.*

NKBP also argues that the Goulds had the Sandberg/Uchimura report. BA 42-44. That is beside the point – the Goulds have the right to test that report. The Goulds repeatedly asked NKBP to update its discovery responses, to disclose which

expert would testify, and to allow the deposition of that expert. CP 32-33, 36-37. NKBP never substantively responded, stating only that it was “working on this.” CP 37.

This stonewalling cannot be excused with the unsupported assertion that NKBP is not obligated to coordinate witness depositions. BA 47-48. NKBP persistently refused to disclose which expert witness it intended to call. CP 32, 36-37. And NKBP affirmatively stated that it would “contact our expert regarding availability for deposition.” CP 35.

NKBP’s remaining arguments are that the Goulds were not prejudiced, where NKBP produced the coauthored Sandberg/Uchimura report in 2012. BA 46-47. NKBP again misses the point. The Goulds did not have to accept an expert report at face value. They had the right to depose NKBP’s expert witness, and NKBP successfully prevented them from doing so until the trial court ordered Uchimura’s deposition. CP 32-33, 36-37, 571.

Finally, ordering NKBP to bear the costs of Uchimura’s deposition is not the type of sanction governed by the three-part *Burnet* test, which applies only when “the trial court ‘chooses one of the harsher remedies allowable under CR 37(b),’” such as witness

exclusion. BA 45-46 (discussing **Burnet**, 131 Wn.2d at 494).
Burnet and its progeny are inapplicable.

The trial court had very broad discretion to address NKBP's failure to timely disclose its expert, failure to update its discovery, and failure to make good on its assertion that it was "working on" telling the Goulds who it intended to call, and would contact its expert to set up a deposition. **Burnet**, 131 Wn.2d at 494. In short, NKBP stonewalled for well over a year. Requiring it to bear the costs of Uchimura's deposition was well within the trial court's discretion.

CONCLUSION

This Court should affirm on all grounds.

RESPECTFULLY SUBMITTED this 2nd day of February,
2015.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **AMENDED BRIEF OF RESPONDENTS**, postage prepaid, via U.S. mail on the 3rd day of February, 2015, to the following counsel of record at the following addresses:

Counsel for Appellant

Rory W. Lied
Jennifer P. Dinning
Jennifer E. Aragon
Cole Wathen Lied Hall, P.C.
303 Battery Street
Seattle, WA 98121

U.S. Mail
 E-Mail
 Facsimile

Co-Counsel for Respondents

William S. McGonagle
Sherrard McGonagle Tizzano, P.S.
241 Madison Avenue North
Bainbridge Island, WA 98110

U.S. Mail
 E-Mail
 Facsimile
 Hand delivery


Shelby R. Frost Lemmel, WSBA 33099

MASTERS LAW GROUP

February 03, 2015 - 2:22 PM

Transmittal Letter

Document Uploaded: 3-463580-Other Brief.pdf

Case Name: Gould v. North Kitsap Business Park

Court of Appeals Case Number: 46358-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Other

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Cheryl Fox - Email: cheryl@appeal-law.com