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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34449-5

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

JOHN and LORI EDWARDS, a marital
community,

Appellants/Plaintiffs

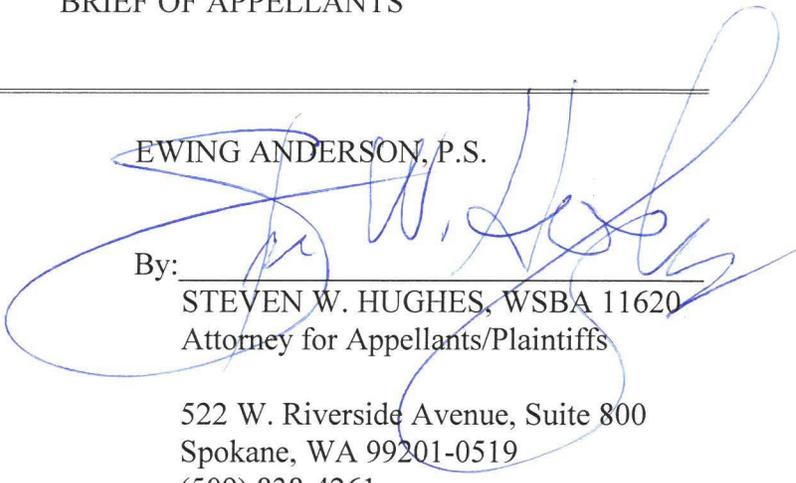
vs.

COLVILLE MOTOR SPORTS, INC., a
Washington corporation

Respondent/Defendant

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case arises out of catastrophic and permanent personal injuries suffered by Plaintiff John Edwards on May 31, 2011, on the business property occupied by Defendant Colville Motor Sports, Inc. (“CMS”) in Colville, Washington. John Edwards was injured when his 800-pound all-terrain vehicle (“ATV”) flipped over backwards, landing on top of him, while being loaded on his pickup truck. The CMS dealership facility sits on a hillside and includes a retail/maintenance/garage facility and a large paved customer parking lot which is uneven and slopes downhill. CMS, which sells, services, and repairs ATVs has no loading ramp or dock and no alternative to load and unload ATVs in front of their facility on the unlevel parking lot.

John Edwards was called to come to CMS to pick up his ATV following its first inspection and service. Mr. Edwards, who had never loaded or unloaded his ATV at CMS, parked his pickup truck in the space provided in front of CMS, and Mr. Harris, a CMS employee, drove the ATV out. John Edwards asked whether or not they should turn their pickup around to face downhill, but the CMS employee replied, “No, we do this all the time. I don’t think it makes any difference.” The CMS

employee refused to load the ATV for the Edwards, even though he was asked to do so and was told that John Edwards did not have any experience loading.

John Edwards attempted to drive the ATV up the ramp, when it flipped over backwards landing on him, crushing his face and chest, leaving him with permanent injuries. It was learned afterwards that the ramp at the loading spot on the CMS parking lot presented an incline of 69.5 percent, or 35 degrees, which exceeded by 40 percent the maximum incline specified by the ATV manual. It was also learned that Mr. Harris and fellow CMS employees knew that one is required to lean one's body out over the handlebars in order to safely load an ATV at the location but failed to inform John Edwards.

Mr. Edwards filed suit against CMS based upon general negligence and premises liability. This matter was tried to a jury. The trial court struck the Plaintiffs' claim for general negligence by directed verdict and instructed the jury on implied primary assumption of risk, an "all or nothing" doctrine of recovery.

The jury, in its special verdict form, answered "yes" to Question 1: "Did the Defendant, as owner, breach its duties to the Plaintiffs, its

invitees?” The jury answered “yes” to Question 2: “Was the Defendant’s negligence a proximate cause of injury or damage to the Plaintiffs?” The jury further answered “yes” to Question 3: “Did Mr. Edwards impliedly assume the risk of loading the ATV on the back of his truck?” The trial court then entered judgment for the Defendant.

II. ASSIGNMENTS OF ERROR

This case presents six errors and issues for review:

- (1) Did the Court below err by allowing the Defendant to discuss in opening statement and to question witnesses in violation of the Plaintiffs’ granted motion in limine, excluding any testimony or evidence regarding the use of a helmet by John Edwards. This despite the fact that the Defendant failed to identify or produce any evidence or witness that Mr. Edwards’ injuries were enhanced by his lack of a helmet?
- (2) Did the Court below err by granting the Defendant’s motion for directed verdict dismissing Plaintiffs’ general negligence claim?
- (3) Did the Court below err by giving an instruction on the defense theory of implied primary assumption of risk?
- (4) Did the Court below err by giving to the jury an inconsistent and confusing special verdict form which allowed the jury to find both

negligence on behalf of the Defendant, proximate cause of the Plaintiffs' injuries by the Defendant's negligence, and also that the Plaintiffs impliedly assumed all risk of loading the ATV?

(5) Did the Court below commit error by granting judgment on the jury verdict for the Defendant, dismissing the Plaintiffs' case?

(6) Did the Court below commit error by denying the Plaintiffs' motion for a new trial on damages?

III. STATEMENT OF THE CASE

John Edwards purchased a 2011 Polaris Sportsman 400 ATV from CMS for his wife Lori for Christmas 2010. Ex. P38, Bill of Sale. The ATV was transported by CMS to the Edwards' home and it was unloaded from the truck by a CMS employee. Transcript Vol. III, p. 450, lns. 2-10. The Edwards also purchased a "tri-fold" folding metal 6-foot ramp from CMS for the purpose of loading and unloading the ATV into a truck for transport. Transcript Vol. III, p. 455, lns. 3-17.

John Edwards estimates that he rode the ATV four or five times to and from the mailbox at the end of his driveway in the five months he owned it. Transcript Vol. III, p. 452-53. He had no prior experience operating an ATV. Transcript Vol. III, p. 449, lns. 2-5.

The CMS dealership sits on a hillside and includes a retail/maintenance/garage facility, a fenced-in area for storage, and a large customer parking lot which slopes in a lateral and downhill direction. Ex. P37. The CMS customer parking lot has several parking spaces marked by yellow lines angled in a roughly north-south direction. Ex. P37. CMS, which sells, services, and repairs ATVs at their dealership, has no loading ramp or dock and no alternative to load and unload ATVs in front of their facility on the unlevel parking lot. Transcript Vol. III, pp. 550-51.

In May 2011, John Edwards loaded the Polaris ATV onto his Dodge Ram pickup truck at home on a level surface. Transcript Vol. III, p. 456. This was the only time he had ever loaded an ATV. Transcript Vol. III, p. 463, lns. 1-3. He utilized the metal tri-fold ramp, which he purchased from CMS. Transcript Vol. III, p. 455. The next day John dropped off the ATV at CMS on his way to work. Transcript Vol. III, pp. 456-57. An unnamed CMS employee unloaded the Edwards' ATV from the Edwards' truck at the CMS parking lot for its first scheduled maintenance. Id.

CMS contacted the Edwards indicating that the maintenance had been performed and the ATV was ready to pick up. Transcript Vol. III, pp. 458-459. On the morning of the incident, May 31, 2011, John and Lori

Edwards drove their Dodge Ram pickup truck to CMS on their way home after fishing. Transcript Vol. III, p. 459, lns. 2-14. They parked on the CMS parking lot in one of the marked spots provided in front of the building. Their truck was pointed uphill toward the building. Transcript Vol. III, pp. 460-61.

John Edwards paid for the service and anticipated that the ATV would again be loaded for him. Transcript Vol. III, p. 460, lns. 20-24. The CMS employee, William Harris, drove the Edwards' Polaris ATV from the maintenance area and parked the ATV behind the Edwards' truck. Transcript Vol. II, p. 362, lns. 15-19. Mr. Harris, the CMS employee, was not wearing a helmet and did not offer one to John Edwards. Transcript Vol. II, p. 371, lns. 1-10. Mr. Harris assisted John Edwards in hooking up the tri-fold ramp to his pickup truck. Transcript Vol. II, p. 358, lns. 12-19. When asked whether any warnings were given to Mr. Edwards, Mr. Harris testified, "No, I really didn't." Transcript Vol. II, p. 356, lns. 12-15, p. 357 lns. 6-10, and p. 383 lns. 9-18.

Mr. Harris got off the ATV, expecting Mr. Edwards to drive it up the ramp and on to his truck. Transcript Vol. II, p. 364 lns. 6-13. Mr. Edwards was surprised at being asked to load it himself. Transcript Vol. III, p. 460,

Ins. 20-23. Lori Edwards, who was standing next to the truck, said to her husband John, “Hon, I don’t think this looks safe.” Transcript Vol. I, p. 185, Ins. 5-6. John Edwards then asked the CMS employee William Harris, “Should I turn my truck around?” (to point it in the downhill direction). Transcript Vol. III, p. 463, Ins. 12-24. Mr. Harris replied “No. We do this all the time. I don’t think it makes much difference.” Transcript Vol. III, p. 464, Ins. 1-2; Transcript Vol. II, p. 362, Ins. 11-13.

Mr. Harris testified that ATVs are routinely loaded and unloaded by employees of CMS using portable ramps right out in front of the door where Mr. Edwards’ truck was parked on the day in question. Transcript Vol. II, pp. 354-55. He said it happens all the time, and he personally loads ATVs at that very spot on to pickup trucks using the types of ramps sold to and utilized by John Edwards. Id. Mr. Harris was asked if it was the policy for CMS to ask customers if they wanted someone else to load their ATV, and he indicated “it is not. It is just whatever the customer wants.” Transcript Vol. II, p. 355, Ins. 16-20. Yet, Mr. Harris admitted that Lori Edwards asked him (Mr. Harris) to load the ATV. Transcript Vol. II, p. 364 Ins. 10-13. He replied that he had very little experience. Id. Lori told Mr. Harris, “Well, you know, he (John) doesn’t really have any

experience.” Transcript Vol. II, p. 363 lns. 16-23. Mr. Harris replied, “Well, I probably have less.” That was untrue. Id.

The Polaris ATV Safety Manual provided to John Edwards by CMS upon purchase warns riders to avoid steep hills exceeding a 25-degree grade. Ex. P42, Atty Bates No. 02858. When asked if Mr. Harris could look at a hill and tell if it exceeded 25 degree grade, he responded, “No, I could not....” Transcript Vol. II, p. 366, lns. 2-5. He testified that he did not know the degree of slope on the CMS parking lot. Transcript Vol. II, pp. 356-57. CMS owner, Steve Fogle, admitted in questioning that he did not know the degree of slope at CMS and had never checked it. Transcript Vol. III, p. 551 lns. 4-14.

There is no level spot on the parking lot and CMS has no loading dock. Transcript Vol. II, p. 350 lns. 3-9. There are no warning signs at CMS. Transcript Vol. III, p. 550 lns. 5-7. Ex. P37

Mr. Harris testified that if he, as a CMS employee, felt uncomfortable loading an ATV onto a truck he would go inside and get another employee more experienced than he to load it. Transcript Vol. II, pp. 354-55. He did not offer to do the same for John Edwards or suggest it.

After Mr. Harris's refusal to load the ATV, John Edwards started driving it up the 6-foot ramp with Lori, his wife, and Harris standing next to him. Transcript Vol. III, p. 465 Ins. 4-13. She testified that John "maintained a steady throttle ...and when he got to the top he stood up and gravity pulled it back on him." Transcript Vol. I, p. 187, Ins. 6-12. She witnessed her husband's horrible injury. Id. John received a Life Flight to Sacred Heart Hospital in Spokane. Transcript Vol. I, pp. 189-90.

The Plaintiffs employed forensic engineer, William Skelton, who examined and analyzed the CMS parking lot, the ramps, and pickup truck involved in this incident. He testified that slope of the ramp on the CMS parking lot was 69.5 percent, which equals 35 degrees. Transcript Vol. II, p. 275, Ins. 10-15. This exceeded the maximum slope specified by the Polaris manual by 40 percent. Id.

Mr. Skelton's investigation determined that if John Edwards' pickup truck had in fact been turned around to point downhill, the ramp would have presented only a 26-degree incline. Transcript Vol. II, p. 275, Ins. 10-15. This would be only one degree above the 25-degree maximum allowed by Polaris. Ex. P42.

Mr. Skelton testified that based on his professional opinion and his examination of the location, the loading spot provided by CMS was unreasonably dangerous for any inexperienced ATV rider like John Edwards. Transcript Vol. II, p. 284 ln 3-17. Mr. Skelton testified, “That parking lot is definitely not safe for an inexperienced driver to load an ATV using a 6-foot ramp into the back of the pickup truck the way this one was situated.” Id. Mr. Skelton testified that CMS should have warned Mr. Edwards regarding the dangerous situation, and further testified that CMS employees themselves who are experienced should load and unload ATVs for any inexperienced driver like John Edwards. Transcript Vol. II, p. 290-91.

As a result of his injuries, John Edwards was placed in a medically-induced coma for over five days; suffered a punctured lung, fractured eye socket, broken shoulder, and six broken ribs; and his face was crushed. See Transcript Vol. III, pp. 467-68. He underwent ten surgical procedures to repair his shattered jaw; he lost teeth, which are still being replaced with implants five years later; half his tongue is numb, with absolutely no feeling due to nerve damage, causing great difficulty during eating. His lip is without feeling as well, causing him to drool. His jaw was wired for

over two months, and he had to carry wire cutters in case he were to throw up from the medication he was taking, which could have caused him to choke to death. Transcript Vol. III, pp. 471-72. He is a choke risk to this day, and had to attend “swallow school.” Transcript Vol. III, p. 473. He had to attend speech therapy to avoid spitting while he talks, but his speech is grossly affected still. Transcript Vol. III, p. 476. He lost the ability to taste food. His medical bills exceed \$350,000 and are continuing.

IV. LEGAL ARGUMENT

A. ASSIGNMENT OF ERROR 1

- **The Trial Court Erred By Allowing Defendant To Discuss And Question Witnesses Regarding The Use Of A Helmet By John Edwards In Violation Of Plaintiffs’ Granted Motion In Limine Excluding Such Testimony. This Despite The Fact That Defendant Failed To Identify Or Produce Any Evidence Or Witness That Mr. Edwards’ Injuries Were At All Affected By His Lack Of A Helmet**

The Plaintiffs, before trial, filed a motion in limine and memorandum in support requesting the Court to exclude as inadmissible and unduly prejudicial any evidence regarding the Plaintiff John Edwards lack of a helmet while loading the ATV at CMS. A motion in limine should be granted when evidence sought to be excluded is shown to be

inadmissible or unduly prejudicial. See Fenimore v. Donald M. Drake Const., 87 Wn.2d 85, 91, 549 P.2d 843 (1976).

Evidence may be unduly prejudicial and should be excluded when it is likely to skew the truth-finding process or suggests an improper basis for decision making. See State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000). By excluding prejudicial evidence, a “moving party [is] spared the necessity of calling attention to it by objecting when it is offered during the trial.” Fenimore, 87 Wn.2d at 91.

An analogous situation to the use of a helmet is the use of a seatbelt. Washington courts have consistently held, even before codification by statute, that it is not fair to shift the burden to the plaintiff to prove that the lack of a seatbelt did not contribute to his injuries. The existence of negligence and whether it proximately caused the accident is generally a question of fact. Young v. Caravan Corp., 99 Wn.2d 655, 663 P.2d 834, modified, 672 P.2d 1267 (1983). Two distinct elements compose proximate cause: (1) cause in fact, and (2) legal cause. Baughn v. Honda Motor Co., 107 Wn.2d 127, 142, 727 P.2d 655 (1986). A party asserting negligence must prove both elements. To establish cause in fact, the party asserting negligence must show that “but for” the other party’s conduct,

the injury would not have occurred. See Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (“cause in fact refers to the ‘but for’ consequence of an act—the physical connection between an act and an injury”).

Historically, failure to wear a helmet and other protective devices (e.g., a seatbelt) that do not increase the risk of the accident’s occurrence do not meet the cause in fact requirement of proximate cause. See Clark v. Payne, 61 Wn.App. 189, 810 P.2d 931 (1991). The argument has been often made by defendants that the trial court should impose comparative negligence because of the plaintiff’s failure to wear a seatbelt. Amend v. Bell, 89 Wn.2d 124, 132-33, 570 P.2d 138 (1977), and Clark cited above. Washington courts have rejected the defendants’ contention, and generally held that defendants should not diminish the consequences of their own negligence by the failure of the plaintiff to anticipate the defendant’s negligence in causing the accident itself. Id. Similarly, the courts concluded it would be unfair to reduce plaintiff’s damages in an accident for which he or she was in no way responsible. Id.

In the present case, Mr. Edwards’ failure to wear a helmet does not meet the cause in fact element of proximate cause. Simply put, his lack of a helmet was not a “but for” cause of the accident. Moreover, and just as

importantly, Defendant CMS neither disclosed, identified, or produced any competent medical or scientific testimony that Mr. Edwards would have suffered less damage by virtue of being crushed by an 800-pound ATV had he worn a helmet. Defendant's counsel even invited witnesses to speculate on the type of helmet that "might" have prevented injuries.

The trial judge, beginning on page 17 at line 21, Volume I of Trial Transcript, declared the following:

Alright. Well, counsel, the court will grant the motion in limine here as to causation, cause in fact of the absence of the helmet, but will admit the absence of a helmet to the extent it has bearing on injuries, but subject to further examination of this point that the absence of a helmet has to somehow be shown to have resulted in injuries or more severe injuries than otherwise. [Emphasis added]

Despite the granting of the Plaintiffs' motion in limine on the matter of the helmet, defendant's counsel, on page 169 in the defense's opening statement beginning at line 4 of Volume 1 of Trial Transcript as follows:

Mr. Edwards was hurt, and I'll talk a lot more about that over the next couple of days, we'll also talk about the specifics of his recovery, and, unfortunately, as I mentioned before, he was not wearing a helmet when this accident happened. The helmet that he owned had a faceguard, which would protect him from any of the injuries that, that we're going to talk about during the time of the trial. He did not ask to use a helmet; he chose not to wear a helmet when he loaded the ATV. [Emphasis added]

The defense went on to question every witness regarding the use of a helmet, including Plaintiff John Edwards. The defense argued that a helmet with a chin or faceguard would have prevented the injuries when there was absolutely no competent testimony that such proposition was true. The trial court allowed the defense to violate the order on the motion in limine, and ultimately declared that the “plaintiff opened the door” to this evidence. This was error and just as prejudicial as discussing the lack of a seatbelt, particularly in light of the Court’s invalid decision to give the implied primary assumption of risk instruction to the jury.

State v. Evans, 96 Wn.2d 119, 634 P.2d 845 (1981), involved a jury award to a landowner for the State’s condemnation of land. Prior to trial, the State successfully moved, through a motion in limine, to limit the damage issue as to the value of the property before the taking, minus the market value of the property remaining after the acquisition. However, the trial court failed to enforce its own order over objection, and allowed an appraiser to testify as to the value of adjacent property to that which was condemned.

The Supreme Court in Evans, beginning at page 122, declared the following:

The trial judge should have stricken the testimony of (the appraiser). Both were in violation of the court's order that the valuations must be based on the market value of the property before the taking, minus the value of the remainder after the taking, and not on valuations of personal property.

The court determined that the trial judge committed "prejudicial error." Id.

In the present case, the trial judge granted the Plaintiffs' motion in limine to exclude any testimony regarding the lack of use of a helmet by Plaintiff John Edwards subject to the defense offering competent evidence to show that the lack of the use of helmet increased the Plaintiff's injuries. The defense listed and produced no such evidence, but referenced the helmet numerous times in opening, and even asked witnesses to speculate on a certain type of helmet that might have reduced injuries. This was prejudicial error. The jury was invited to consider that inadmissible evidence which suggested by inference that John Edwards was responsible for his own injuries by not wearing a helmet.

B. ASSIGNMENT OF ERROR 2

- **The Trial Court Erred By Granting Defendant's Motion For A Directed Verdict Dismissing Plaintiffs' General Negligence Claim**

The standard of review of the granting of a judgment as a matter of law is de novo. Weber Const., Inc. v. County of Spokane, 124 Wn.App.

29, 98 P.3d 60 (Div. III 2004); see also, Mega v. Whitworth College, 136 Wn.App. 661, 668, 158 P.3d 1211 (2007). A directed verdict will be overturned on review when the trial court, in directing the verdict, errs in interpreting the substantive law. Gibson v. City of Tacoma, 60 Wn.App. 26, 803 P.2d 1 (Div. II 1990). The trial court in the present case misconstrued the law by deciding that the Defendant could have no duties other than that of an owner or occupier of land, and that premises liability excluded duties not to misinform or to deceive, which would support claims of general negligence.

John and Lori Edwards filed suit against CMS for damages based specifically on negligence and premises liability. The undisputed evidence elicited at trial from the CMS employee, William Harris, include the following:

1. Mr. Harris testified that he did not provide any warnings to John Edwards before Mr. Edwards attempted to load his ATV, and conceded there were no warning signs anywhere. Mr. Harris also testified that he knew that in order to safely load an ATV using the ramps in question at the very spot where the incident occurred, one must stand and lean one's body out over the handlebars of the ATV.

Mr. Harris did not inform or warn the Plaintiffs of this “technique,” and it is not referenced in the Polaris owner’s manual. Transcript Vol. III, pp. 550, 368-369.

2. John Edwards specifically asked Mr. Harris if it would be better for the truck to be pointed downhill instead of uphill. Mr. Harris responded, “No, we do this all the time, I don’t think it makes much difference.” In fact, it would have made a lot of difference. William Skelton, the Plaintiffs’ forensic engineer who examined the scene of the incident, indicated that the incline of the ramp with the pickup truck pointing uphill as it was at the time of the injury, was 35 degrees, which is 10 degrees steeper than the allowable incline of the manufacturer. That’s a 40 percent excess incline. Mr. Skelton, however, testified that if the pickup was turned around so that it was facing downhill, the ramp would be 26 degrees, which would only be 1 degree in excess of the manufacturer’s limit. It would have made a huge difference for the pickup to be facing downhill. Mr. Harris misled John Edwards. Transcript Vol. III, p. 275.

3. William Skelton, the Plaintiffs' forensic engineer, testified that in order to safely drive the ATV up the ramp and on to the truck it would have been necessary to park the ATV much further back behind the ramps to allow the ATV to gain enough momentum. Mr. Harris, however, drove the ATV out of the maintenance area and parked it directly behind the Edwards' pickup. After the ramps were attached, there was merely one or two feet between the front wheels of the ATV and the bottom of the ramp. Transcript Vol. III, p. 282.

At trial, the Defendant produced a video of a Mr. Uhl, who is a "motorcycle racer" who demonstrated loading an ATV on the back of a pickup truck. He started his motion at least 25 or 30 feet from the ramp. No one warned John Edwards that such distance was necessary at that location to make it up the ramp safely. Ex. D-117

At the end of the Plaintiffs' case in chief, Defendant CMS filed a Motion for Judgment as a matter of law on the Plaintiffs' claim of general negligence. The Defendant argued to the Court on page 74 the following:

The WPI, I can't point to it on the tip of my fingers, but that's what it says is that you have to prove that the injury or event was caused by the negligent act. And, so, what we have here is the negligent act allegedly being the defective parking lot....

The Defendant argued that CMS only had a premises liability duty, and any acts of the Defendant's employees are subsumed under the premises liability and not general negligence.

Following argument, Judge Nielsen stated on page 755 the following:

Well, as, as you know, I said yesterday that I wouldn't give negligence; I came back this morning and said I thought it through and decided I would. Now, part of that was based on the fact that there's not been a motion, pretrial or at any point here, for dismissal of the general negligence, now there is.... (Emphasis added)

Judge Nielsen went on to state the following:

Well, you know, I guess I could say I think it's clear that Mr. Harris, if he just was not an employee and he was standing there and, and he saw what was about to happen, would he have any obligation, duty to do anything, and he would not. He could just stand there and watch and, and....

Based on that faulty reasoning, Judge Nielsen granted the Defendant's motion to dismiss the Plaintiffs' general negligence claim as a matter of law.

The case of Tincani v. Inland Empire Zoological Society, decided by the Supreme Court of Washington at 124 Wn.2d 121, 875 P.2d 621 (1994), involved a student who sued a zoo for personal injuries sustained

when the student fell off a rock on a school field trip. The court in Tincani ruled that the threshold determination of whether the defendant owes a duty to the plaintiff is a question of law. In premises liability actions, a person's status as invitee, licensee, or trespasser based on common law classifications of persons entering upon real property, determines the scope of duty of care owed by the possessor of that property. Id. at 128.

The Tincani court declared:

A landowner must follow a separate set of duties for invitees. Under Restatement (Second) of Torts § 343 (1965),

[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, [the possessor]

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

In contrast to what a licensee may expect, an invitee "is...entitled to expect that the possessor will exercise reasonable care to make the land safe for his [or her] entry". Restatement (Second) of Torts § 343, comment *b*. Reasonable care requires the landowner to inspect for dangerous conditions, "followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's]

protection under the circumstances.” Restatement (Second) of Torts § 343, comment *b.* Id. at 138, 139

John and Lori Edwards were business invitees, which is defined as one who’s invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. See Smith v. Stockdale, 166 Wn.App. 557, 271 P.3d 917 (Div. 3 2012). Pursuant to the Restatement and the Tincani case above, the Edwards were entitled to expect that CMS would exercise reasonable care to make the land safe for their entry, which would require CMS to inspect for dangerous conditions and to effect such repair, safeguards, or warning that may be reasonably necessary for the Edwards’ protection under the circumstances.

CMS failed in all respects. There were no warnings; CMS was not even aware of the degree of dangerous incline of its parking lot; CMS failed to inform John Edwards that it was necessary to lean one’s body over the handlebars to avoid flipping over; and that the ATV needed much more distance to gain the momentum needed to ascend the ramp at the location where the Edwards’ truck was parked. CMS violated its duties to the Edwards under premises liability.

However, there are additional duties owed to an invitee by an owner/occupier beyond those delineated as premises liability. The court in Dorr v. Big Creek Wood Products, Inc., 84 Wn.App. 420, 927 P.2d 1148 (1996), discusses one additional duty. In that case both the plaintiff and the defendant were experienced loggers. The plaintiff arrived at the defendant's logging location and he "stopped at the stump of a tree that had just fallen." Id. at 423. The plaintiff looked around for widow-makers and saw none. Id. The plaintiff then "walked on the log only after [defendant] gave him a hand signal indicating that it was safe." Id. at 429. Acting upon the defendant's hand signal, plaintiff proceeded and was struck by a widow-maker, causing severe injuries. Id.

The court in Dorr noted that the plaintiff did not base his entire claim under a premises liability theory. Id. at 429. The plaintiff claimed in part that the defendant negligently directed him into the hazards. Id. "The specific duty at issue in that claim was a duty to avoid giving misleading instructions. Id.

In the present case, the Plaintiffs' Complaint alleges both negligence and premises liability. The undisputed testimony at the time of trial demonstrated negligent conduct by the CMS employees that was separate

and apart from the dangerous condition on the CMS premises. Mr. Harris gave false assurances of safety to the Edwards (We do this all the time), and dissuaded them from taking the only step they could to enhance safety, which was to turn the truck around. Mr. Harris's conduct violated the duty not to give misleading instructions.

CR 50 entitled "Judgment as a Matter of Law in a Jury Trial," (a)(1) reads in pertinent part as follows:

Nature and Effect of Motion. If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

A motion for judgment as a matter of law admits the truth of the opponent's evidence and all inferences that can be drawn from it. Mega v. Whitworth College, 136 Wn.App. 661, 668, 158 P.3d 1211 (2007).

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the non-moving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.

Id. If any admissible evidence exists on which reasonable minds might reach conclusions consistent with the claim, the issue is for the jury. Id.

The Edwards' negligence claim was separate and apart from the premises liability theory and focused on the negligent conduct of CMS, not just the dangerous condition of the land. A party is entitled to have the court instruct the jury on his theory of the case when there is substantial evidence to support it. Woods v. Goodson, 55 Wn.2d 687, 349 P.2d 731 (1960). Over Plaintiffs' objection, the Court directed verdict in favor of the Defendant, and refused to allow Plaintiffs to argue that the Defendant was negligent. This was reversible error.

C. ASSIGNMENT OF ERROR 3

• The Trial Court Should Not Have Instructed The Jury On Implied Primary Assumption Of Risk

A trial court's ruling on whether to give a jury instruction is reviewed *de novo* to determine whether the instruction is erroneous, and whether the error prejudiced a party. Stevens v. Gordon, 118 Wn.App. 43, 74 P.3d 653 (Div. 3. 2003).

Washington recognizes four categories of assumption of the risk, "(1) express, (2) implied primary, (3) implied reasonable, and (4) implied

unreasonable.” Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 143, 875 P.2d 621, 633 (1994). The first two categories – express and implied primary, continue to act as a complete bar to recovery. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Implied unreasonable and implied reasonable, on the other hand, have been subsumed into contributory negligence and merely reduce plaintiff’s recoverable damages based on comparative fault. Gleason v. Cohen, 192 Wn.App. 788, 795, 368 P.3d 531 (2016) (citing Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 497, 834 P.2d 6 (1992)).

Distinguishing between implied primary assumption of risk and implied unreasonable assumption of risk has proven difficult. Gleason, 192 Wn.App. at 795 (citing Barrett v. Lowe’s Home Centers, Inc., 179 Wn.App. 1, 6, 324 P.3d 688 (2013)). The court in Dorr v. Big Creek Wood Prods. Inc., 84 Wn.App. 420, 425-26, 927 P.2d 1148 (1996), recognized the difficulty and warned that courts must carefully distinguish between the two types of assumption of risk. The Dorr court explained:

Trial courts are rightfully wary of requests to instruct the jury on implied primary assumption of the risk. That doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence.

Id. at 425-26. The confusion and difficulty surrounding the types of implied assumption of risk came to fruition during the trial of this case.

Over Plaintiffs' objections, the Court instructed the jury on implied primary assumption of risk. Transcript Vol. III, p. 597; Transcript Vol. IV, pp. 758-60. This was error, and it was compounded by the Court's refusal in allowing Plaintiffs to present their general negligence theory to the jury. Transcript Vol. IV, pp. 754-56. In attempts to cure its error, the Court modified the WPI implied primary instruction with an incorrect statement of the law – only making its error that much worse. CP 349. As discussed below, the trial court should have simply applied the comparative fault standard under implied unreasonable assumption of risk, and the Court's attempt to cure the implied primary assumption or risk instruction did not alleviate its error.

1. **The Trial Court Used the Wrong Assumption of Risk Doctrine, and Should Have Found There was Possible Contributory Negligence by Plaintiff, but not a Complete Bar to His Claims**

The doctrine of implied primary assumption of risk is construed narrowly because it is a complete bar to recovery. Lascheid v. City of Kennewick, 137 Wn.App. 633, 641, 154 P.3d 307 (Div. 3 2007) (citing

Dorr v. Big Creek Wood Prods., Inc., 84 Wn.App. 420, 425, 927 P.2d 1148 (1996)). It is based on the notion that plaintiff impliedly agrees that the defendant owes *no duty* to the plaintiff regarding certain risks. Gleason, 192 Wn.App. at 795; Kirk, 109 Wn.2d 448, 453, 746 P.2d 285, 288 (1987).

Implied primary assumption of the risk requires proof that, “the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” Kirk v. Washington State Univ., 109 Wn.2d at 453. “Put another way, the plaintiff ‘must have knowledge of the specific risk, appreciate and understand its nature, and voluntarily choose to incur it.’” Id. To prove implied primary assumption requires the defendant to show plaintiff *knew of the precise hazard* when he made the decision to accept the risk. Lascheid, 137 Wn.App. at 642. The Washington Supreme Court in Scott made it clear that implied primary assumption of risk means that “the plaintiff assumes the dangers that are inherent in and necessary to” a particular activity. 119 Wn.2d at 500-01. Importantly, *implied primary assumption of risk does not apply if the defendant engages in negligent*

acts that increase the inherent risks of an activity. Gleason, 192 Wn.App. at 798.

By contrast, implied unreasonable assumption of risk (comparative fault) does not involve plaintiff's consent to relieve defendant of a duty. Gleason, 192 Wn.App. at 796. For implied unreasonable assumption of risk, the defendant has breached a duty that creates a risk of harm, and the plaintiff chooses to encounter that risk. Id. Implied unreasonable assumption of risk involves the plaintiff's voluntary choice to encounter a risk that was *created or enhanced by the negligence of the defendants.* Id. (citing Scott, 119 Wn.2d at 497). As the Supreme Court in Scott explained:

Implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.

119 Wn.2d at 499 (citing Leyendecker v. Cousins, 53 Wn.App. 769, 774, 770 P.2d 675 (1989)).

Division II of the Washington Court of Appeals has recently decided two cases specifically addressing the difference between implied primary assumption of risk and implied unreasonable assumption of risk. See Gleason, 192 Wn.App. 788, 368 P.3d 531 (2016); See also O'Neill v. City of Port Orchard, 194 Wn.App. 759, 375 P.3d 709 (2016).

The facts in Gleason are analogous, if not more extreme, than the facts in the present case.¹ Plaintiff Leo Gleason was injured while cutting down a tree on defendant Cohen's property. Gleason, 192 Wn.App. at 791. Gleason was not a professional logger, but he had substantial experience cutting trees and had been exposed to cutting trees his whole life. Id. He knew that logging and cutting down trees was dangerous. Id.

Gleason was in the business of selling firewood, and was contacted by Cohen to trade firewood for the trees on Cohen's property. Id. at 792. The parties agreed to the trade. Id. Cohen had two men cutting down trees on his property when Gleason and three friends arrived at Cohen's property. Id. Gleason was under the impression that he would simply be

¹ The plaintiff in Gleason was an experienced logger who was aware of the risks inherent in cutting trees. In the present case, Plaintiff John Edwards had very little experience riding ATVs, and virtually no experience loading ATVs.

loading the downed trees into his truck. Id. At some point, Cohen asked Gleason if he could help cut down a few trees. Id. Cohen offered Gleason \$100 for each tree he cut down. Id.

Gleason claimed he never wanted to cut the tree that ended up falling on him and injuring him because he did not feel safe cutting it that close to Cohen's house. Id. Gleason also thought Cohen's workers had prepped the tree improperly by placing the choker in the wrong place. Id. Gleason asked the workers to adjust the choker, but they responded by claiming "the choker was hooked up correctly and that he [Gleason] would be safe." Id. at 792. Eventually, Gleason cut the tree, which fell onto Gleason and seriously injured him. Id. at 792-93.

Cohen moved for summary judgment on the theory of implied primary assumption of risk. Id. at 793. The trial court granted summary judgment, ruling that Gleason assumed the risk of injury. Id. Division II reversed and remanded, explaining that Gleason did not assume the risk of Cohen and his workers negligence. The court reasoned that "[t]here is no question that implied primary assumption of risk applies to the dangers inherent in cutting down trees." Id. at 800. The court went on however, and explained:

Gleason claims that Cohen and his workers engaged in additional conduct that *increased the risk* of being injured while cutting down trees. Gleason alleges that Cohen was negligent in requesting that he cut down that particular tree that injured him because of its location. Gleason also alleges that Cohen's workers were negligent in placing the choker chains on the tree that injured him. Washington law is clear that implied primary assumption of risk does not apply to this additional negligence.

Gleason, 192 Wn.App. at 800. The court held that Gleason's acts fit squarely within the definition of implied unreasonable assumption of risk because he made a voluntary choice to encounter a risk created by defendant's negligence. Id. (citing Scott, 119 Wn.2d at 497, 834 P.2d 6).

The Court in O'Neill, 194 Wn.App 759, similarly found that a bicyclist necessarily assumed the risk inherent in cycling to work, including falling off and hurting herself. Plaintiff did not, however, "assume the enhanced risks associated with the City's failure to repair an alleged defective roadway of which the City allegedly had constructive notice." O'Neill, 194 Wn.App. at 776. Citing a long line of Washington case law, Division II explained that implied primary assumption of risk generally arises in "sport-related cases where the plaintiff, a participant in the sport, assumes the dangers that are *inherent in* and *necessary to* the particular sport or activity." Id. at 775 *internal citations excluded*. Implied

primary does not apply when defendant creates some additional risk and plaintiff encounters that risk. Id. at 776. Emphasis added.

In this case, the Court's error in giving the modified implied primary assumption of risk instruction is obvious when considering the jury found Defendant was negligent, and that negligence was a proximate cause of plaintiff's injuries. CP 360. By definition, implied primary of risk does not apply when defendant's negligence creates additional risks no inherent in the activity. That is exactly what happened in this case.

The uncontested evidence at trial showed that Defendant's parking lot created a dangerous condition not inherent in the normal act of loading an ATV, and the acts of Defendants employees were negligent and created additional risks not inherent in loading the ATV. The evidence at trial was as follows:

- The Polaris Manual included with Plaintiffs' ATV purchase indicated the maximum incline when traveling uphill is 25 degrees. Ex. P42, Polaris Owner's Manual, Atty Bates No. 02858.
- The Defendant's parking lot is sloped at an angle running away from the building. Ex. P37, Atty Bates No. 02776 – 02784.

- The parking lot is where Defendant's customers load their ATV's, motorcycles and snowmobiles. Transcript Vol. II, pp. 349-350.
- Plaintiffs parked in one of the angled parking stalls with the front of their truck facing Defendant's building. Transcript Vol. I, p. 181, ln. 6-11; Vol. II, p. 265, ln. 15-19.
- The parked truck was slopped at an angle, increasing the angle of the loading ramp attached to Plaintiffs' truck. Transcript Vol. II, p. 275, ln. 10-15.
- The removable loading ramp at the time Plaintiffs attempted to load the ATV was 35 degrees, exceeding the manufacturer maximum by 10 degrees (or 40 percent). Transcript Vol. II, p. 275, ln. 10-15.
- Defendant's employee William Harris drove Plaintiffs' ATV from the back shop to behind Plaintiff's truck and loading ramp, and parked it "maybe two, three feet from the back of the ramps." Transcript Vol. II, pg. 362 ln. 15-19.
- Defendant's expert, Bill Uhl, testified that two to three feet of room is not sufficient space to load the ATV on the truck. Transcript Vol. IV, p. 725, ln. 10-18.

- Defendant's expert, Bill Uhl, testified that when he recreated the loading conditions, he started the ATV further back from the ramps "because momentum is key that allows you to go across the threshold under control." Transcript Vol. IV, p. 686, lns. 11-24.
- Prior to Plaintiff John Edwards loading the ATV, Plaintiff Lori Edwards said "Honey, this doesn't look safe." Transcript Vol. I, p. 185, lns. 5-6.
- Plaintiff Lori Edwards asked William Harris if he would load the ATV and he said no, "I'm not comfortable loading," because he did not have experience. Transcript Vol. II p. 364, lns. 10-11.
- John Edwards then asked if they should turn the truck around, thinking a downward facing truck would reduce the angle of the ramp. Transcript Vol. III, p. 463, lns. 20-24.
- Defendant's employee, Will Harris, responded by saying "No, nah, we, we do this all the time." Transcript Vol. III, p. 464 lns. 1-2. Mr. Harris continued "I don't think it [turning the truck around] makes much difference." Transcript Vol. II, p. 362, lns. 8-14.

- But in fact, turning the truck around would have made a 40 percent difference in the angle of the ramp. Transcript Vol. II, p. 275, lns. 10-15.
- Bill Skelton and Bill Uhl both testified that the steeper the angle of the incline, the greater the risk of turn-over. Transcript Vol. II, p. 274, lns. 6-11.

These facts, testified to at trial, show that Defendant's parking lot created an unreasonably dangerous condition that Defendant's employee, Will Harris misled Plaintiffs into believing was safe. This was negligent, and this negligence increased the risk of harm to Plaintiffs – a risk that could not be assumed through implied primary assumption of risk. The Court erred in giving the instruction, and the error prejudiced Plaintiffs because it acted as a complete bar to recovery.

2. The Trial Courts Attempt To Cure The Implied Primary Assumption Of Risk Instruction By Modifying The WPI Was Err That Only Exacerbated The Problem

The Trial Court in this case realized the facts did not fit the definition of implied primary assumption of risk, but instead of applying the correct implied unreasonable assumption of risk [comparative fault]

analysis, the Court attempted to modify WPI 13.03. The Court's Jury

Instruction No. 21 stated:

It is a defense to an action for personal injury that the person injured impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm if that person knows of the specific risk associated with a course of conduct, understands its nature, and voluntarily consents to accept the risk by engaging in that conduct, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct to avoid the harm because the defendant's negligence.

A person's implied assumption of a specific risk is not knowing if you find the person was given misleading information or a misleading assurance of safety.

CP 349. Emphasis added. The italicized portion was added by the Court on its own initiative and it represents an incorrect statement of the law.

Additional risks not inherent in an activity, created by misleading information or misleading instructions, do not fall within implied primary assumption of risk. Gleason, 192 Wn.App. at 798; Scott, 119 Wn.2d at 501. Implied primary assumption of risk *only applies to risks inherent in the activity*. Scott, 119 Wn.2d at 498. By instructing the jury that

additional risks created by Defendants negligence simply goes to the knowledge requirement, exemplifies the Courts misunderstanding between the two types of implied assumption of risk.

Both implied primary and implied unreasonable assumption of risk include the element of voluntarily choosing to encounter a known risk. Gleason, 192 Wn.App. at 797. Therefore, the mere fact a plaintiff has knowledge of a risk and voluntarily encounters it does not determine whether implied primary assumption of risk applies. Id. The determining factor is whether the plaintiff has been injured by an inherent risk in the activity, or whether defendant's negligent acts increase the risks inherent in an activity. Id. The present case is a prime example of the latter.

Because the Court incorrectly injected a knowledge requirement on defendant's negligent conduct, it misled the jury into believing implied primary assumption of risk could still apply even with defendant's negligence increasing the risks inherent in loading the ATV. That is simply not a correct statement of the law, and it was confusing and misleading to the jury.

D. ASSIGNMENTS OF ERROR 4, 5, and 6

- **The Trial Court Erred By Giving To The Jury An Inconsistent And Confusing Special Verdict Form ,Which Allowed The Jury To Find Both Negligence On Behalf Of Defendant, Proximate Cause Of Plaintiffs' Injuries By Defendant's Negligence, And Also That Plaintiffs Impliedly Assumed All Risk Of Loading The ATV**
- **The Trial Court Erred By Granting Judgment On The Jury Verdict For Defendants, Dismissing Plaintiffs' Case**
- **The Trial Court Erred By Denying Plaintiffs' Motion For A New Trial On Damages**

CR 49(a) provides that “the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.” As in the present case where there are multiple claims, there is always the possibility that the jury may reach inconsistent special verdicts. If an inconsistent special verdict is reached, at least one court decided that the court may send the jury back for further deliberations to resolve the inconsistency. See Haney v. Cheatham, 8 Wn.2d 310, 111 P.2d 1003 23 (1941). In the present case, however, the jury was discharged and the only avenue open to correct the inconsistency was to conduct a new trial.

Plaintiffs John Edwards and wife Lori Edwards alleged that Defendant CMS violated its duties as owner and occupier of a business

premises, resulting in damages to the Plaintiff. The Plaintiffs further alleged general damages against Defendant CMS for the conduct of its employee which misled and misdirected the Plaintiff, resulting in damages. The Defendant argued over strong objections of the Plaintiff that it was entitled to an instruction on the implied primary assumption of risk doctrine, and the Court gave such an instruction. This resulted in an inconsistent verdict by the jury.

As noted above, assumption of risk--implied primary--is a complete defense to an action for personal injuries that the injured person impliedly assumed a specific risk of harm. WPI 13.03.

The basis of this form of assumption of risk is simply that the plaintiff consents "to the negation of a duty by the defendant with regard to those risks assumed." Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992). Thus, the defense of implied primary assumption of risk bars recovery of damages arising from the specific risk assumed, because it "is in reality the principle of no duty--hence no breach and no underlying cause of action." Codd v. Stevens Pass, Inc., 45 Wn.App. 393, 402, 725 P.2d 1008 (1986).

In the present case, the jury was presented with the following specific questions and gave the following specific answers:

QUESTION 1: Did the defendant, as owner, breach its duties to the plaintiffs, its invitees?

ANSWER: YES NO

QUESTION 2: Was the defendant's negligence a proximate cause of injury or damage to the plaintiffs?

ANSWER: YES NO

QUESTION 3: Did Mr. Edwards impliedly assume the risk of loading the ATV on the back of his truck?

ANSWER: YES NO

The jury found that CMS breached its duties, and that said breach was a proximate cause. To then find that there was no duty and, therefore, no proximate cause of injuries by finding that Mr. Edwards impliedly assumed the risk is totally inconsistent.

The Plaintiff offered a Special Verdict Form which would have allowed the jury to assess comparative fault and to apportion liability and damages between the Plaintiffs and Defendant. The Court rejected this proper Special Verdict form.

Washington courts have held that a new trial is required where a jury renders a special verdict (or interrogatories issued with a general verdict) that are irreconcilably inconsistent. Blue Chelan, Inc. v. Dept. of Labor and Industries, 102 Wn.2d 512, 681 P.2d 233 (1984), involved a Labor and Industries claim. In that case, the jury answered “No” to two questions. The first was whether the plaintiff was capable of performing gainful employment on a reasonably continuous basis. This was the definition of “permanent total disability”. The jury, however, also answered “No” to the question which asked if the plaintiff was totally and permanently disabled. The court found that the jury’s answers were, therefore, irreconcilably inconsistent, requiring a new trial.

In Myhres v. McDougall, 42 Wn.App. 276, 711 P.2d 1037 (1985), the facts involved a collision of two motorists who brought suit against each other for damages. The case was tried to a jury and the court gave one special verdict form. The jury specifically found that the defendant was negligent, but that his negligence was not a proximate cause of injury or damage to the plaintiff. The jury also found that the plaintiff was negligent, but that the plaintiff’s negligence was not the proximate cause of the defendant’s damages. The court held that the verdict was

inconsistent since the jury could not logically have found that one motorist's negligence was the proximate cause of his own injuries, without finding that it was the cause of the other's damages as well.

Tincani v. Inland Empire Zoological Society involved a student who sued a zoo for personal injuries sustained when the student fell off a rock on a school trip. The plaintiff couched his claim for damages in both premises liability and negligence.

In the special verdict form the jury determined that the plaintiff Tincani was a licensee and the jury answered "Yes" to the question of whether the defendant Zoo was negligent. It also answered "Yes" in the verdict form to the question "was such negligence a proximate cause of injury to the plaintiff?" Finally, the jury also answered "Yes" to the question "was the plaintiff, Richard Tincani, negligent, or did he assume the risk of injury?" The court found that the verdict was inconsistent and declared on page 131 "if the jury's answers to special interrogatories (the questions which constitute the special verdict) conflict, the court must attempt to harmonize the answers. However, if the court cannot reconcile the answers, "neither a trial court nor an appellate court may substitute its judgment for that which is within the providence of the jury....The only

proper recourse is to remand the cause for a new trial.” Citing Blue Chelan above.

CR 59(a) reads in pertinent part as follows:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and **on all issues, or on some of the issues** when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

...

- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict...or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application;

As argued herein, the trial court allowed the Defendants to introduce evidence of the Plaintiff’s failure to wear a helmet despite the Court’s ruling that the helmet could only be discussed after the Defendant laid a proper foundation based on expert testimony. The Defendant laid no such foundation, nor even attempted to. This subjected the jury to speculation and conjecture warranting a new trial. See Dickerson cited above.

The Court erred in refusing to allow the Plaintiffs to argue a general duty of care owed by the Defendants to avoid giving misleading instructions to their invitee (conduct), in addition to the duties under owner and occupier liability principles. Plaintiffs were not allowed to argue this general negligence claim, despite the presence of ample factual basis at trial. This error warrants a new trial on damages.

The primary error committed by the Trial Court in the present case occurred in giving the implied primary assumption of risk instruction to the jury in light of the undisputed evidence that the Defendant was negligent. This fundamental error warrants the vacation of the jury verdict and a new trial on damages.

The jury was confused by the Court's instruction and, therefore, the resulting special verdict form entered by the jury was inconsistent and contrary to applicable law.

The Division III case of Storey v. Storey, 21 Wn.App. 370, 585 P.2d 183 (1978), stands for the principle that:

The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not.

Storey at 374.

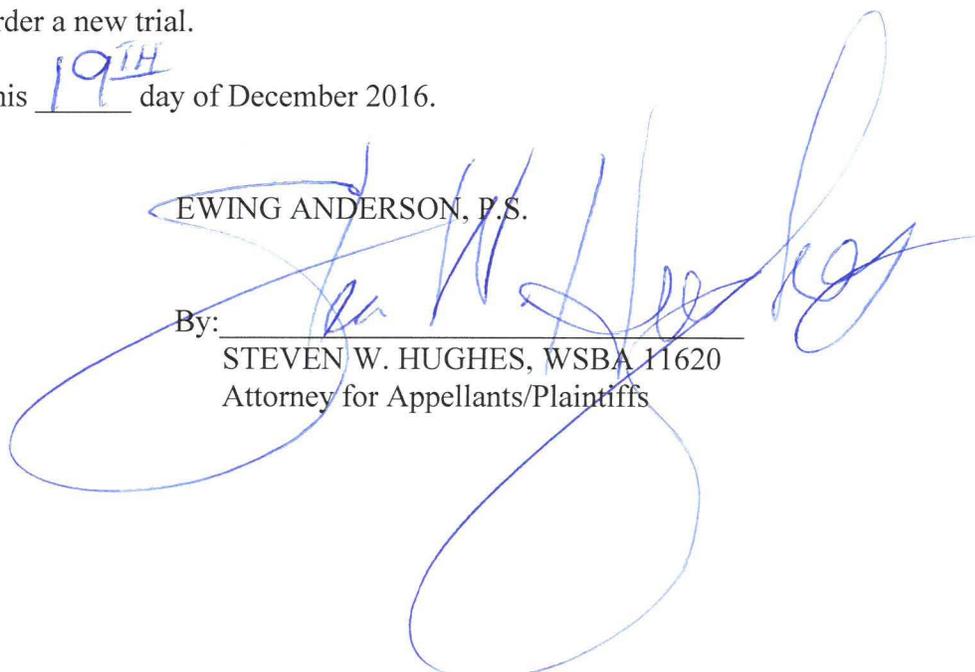
V. CONCLUSION

The Court committed substantial and prejudicial errors in failing to enforce its own order on Plaintiffs' motion in limine; by directing the verdict in favor of Defendant; prohibiting Plaintiffs from arguing general negligence; by instructing the jury on the implied primary assumption of risk; and by giving the jury an inconsistent and confusing special verdict form. The Court's actions in this matter denied John and Lori Edwards a fair trial and fair compensation for their life-altering injuries.

This Court is respectfully requested to reverse the Trial Court's judgment and order a new trial.

DATED this 19TH day of December 2016.

EWING ANDERSON, P.S.

By: 
STEVEN W. HUGHES, WSBA 11620
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on December 19th, 2016, the foregoing was delivered to the following persons in manner indicated

Mark Louvier Evans, Craven & Lackie, P.S. 818 West Riverside, Suite 250 Spokane WA 99201	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivery/Messenger <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Fax: <input type="checkbox"/> Email:
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VICKY L. FLORES