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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 34449-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JOHN and LORI EDWARDS, a marital community,

Appellants,

v.

COLVILLE MOTOR SPORTS, INC., Washington Corporation,

Respondent.

BRIEF OF RESPONDENT COLVILLE MOTOR SPORTS, INC.

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I. COUNTERSTATEMENT OF CASE

A. Introduction

After it had undergone routine service, John Edwards went to Colville Motor Sports (CMS) to pick up his Polaris ATV. As he was driving it up ramps into the back of his pickup truck, it flipped over backwards, causing him serious injury. He and his wife, Lori,¹ (the Edwards) sued CMS, claiming the accident was the result of CMS's negligence. After a four-day trial, the jury found CMS was negligent, but that the Edwards' claim was barred by implied primary assumption of risk. The Edwards' motion for a new trial was denied, and this appeal followed.

B. Pertinent Facts

John bought the Polaris ATV from CMS in December 2010 as a gift for Lori. RP 448-450. At the time of purchase, John received an owner's manual, contract paperwork, and a Polaris-produced video, which was essentially the operator's manual in video format. He and Lori read the manual and watched the video together. RP 453-454.

One of the contract documents stated, in part:

Hill climbing is dangerous and should be attempted only by experienced operators. Start on shallow slopes and practice procedures described in the owner's manual before trying steeper terrain. Some hills are too steep to safely stop or recover from an unsuccessful climbing attempt. If the

¹ To avoid confusion, John and Lori are referenced by their first names, with no disrespect intended.

vehicle slides backwards downhill, apply brakes with a gradual even pressure to avoid flipover. Sudden or over-aggressive use of brakes going forward downhill could cause a forward flipover.

Exhibit 103, RP 499.

The owner's manual instructed that failure to read the warnings in the manual "could result in severe injury or death." RP 502. It also stated a "collision or rollover could occur quickly, even during routine maneuvers like turning or riding up hills if the rider failed to take property precautions." *Id.* In a section entitled, "Improper Hill Climbing," the manual stated that "improper hill climbing can cause loss of control or overturn. Always follow proper procedures for climbing hills as described in the owner's manual." RP 502-03. Under the heading, "Safety Warnings, Stalling While Climbing a Hill," the manual stated "stalling, rolling backwards or improperly dismounting while climbing a hill can cause an overturn. Always maintain a steady speed when climbing a hill." RP 503-04. The manual went on to state "if all forward speed is lost, keep your body weight uphill, apply the brakes, lock the parking brake when fully stopped." RP 501, 503-04.

Under the heading "Driving Uphill" the manual stated:

Proceed at a steady rate of speed and throttle opening. Opening the throttle suddenly could cause the ATV to flip backwards.

RP 504-505.

In mid-May 2011, John took the ATV to CMS for its first scheduled service. RP 454. At home, without assistance, he attached loading ramps he purchased shortly after buying the ATV to the tailgate of his 1995 full-size Dodge pickup truck and rode the ATV up the ramps and into the truck bed, without incident. RP 454-55. John then drove to Colville and dropped the ATV off at CMS. RP 456.

Ten days to two weeks later, John received a call from CMS notifying him the ATV was ready. RP 458-59. On May 31, 2011, after a fishing trip to a lake northeast of Colville, John and Lori decided to drop by CMS to pick up the ATV on their way home. RP 459.

When John and Lori arrived at CMS, they drove their pickup into the parking lot and parked in a marked stall next to the building's front door, with the truck facing the building. RP 179. In that area the CMS parking lot slopes away from the building at 5.5 degrees.² RP 265. John went inside and indicated he wanted to pay and take his ATV home. RP 460. After paying, John went back out to his truck, removed his loading ramps from the truck bed and began positioning them. RP 462. Meanwhile, William Harris (Harris), a CMS shop assistant, drove the ATV out from the back of

² Multiple witnesses testified that, although an observer would not be able to assess the slope of the parking lot in degrees simply by observing it, the slope itself was obvious. RP 315, 514-18.

the building and parked it behind the truck. RP 346-47. Harris then helped John finish attaching the ramps to the truck tailgate. RP 463.

The great majority—approximately 80 percent—of CMS customers load and unload their own vehicles when dropping them off or picking them up for service. While experienced employees of CMS would load or unload an ATV for a customer if asked, it was generally up to the customer whether to load or unload his own ATV. RP 546, 548-49; RP 554-55.

The area just outside CMS' front door was used to load ATVs "all the time." RP 354. Steve Fogle (Fogle), the owner of CMS, indicated that since buying the business in 2006 he was unaware of anyone (other than John) having an ATV flip over them in the CMS parking lot. Likewise, Fogle's predecessor, Paul Gourlie, who had owned the business for 21 years, testified that during his ownership he never had anyone roll an ATV in the parking lot. RP 559-560; RP 562-63.

As of May 31, 2011, John had read the purchase documents and owner's manual and thus understood that ascending or descending a hill on an ATV was dangerous and should only be attempted by experienced riders. RP 500. He also understood that ascending or descending a hill unsuccessfully could result in a flipover. *Id.* He understood that stalling or rolling backwards or improperly dismounting while climbing a hill could cause an overturn, and that it was necessary to maintain a steady speed when

climbing a hill. RP 503. He also understood that if forward speed was lost when riding up a hill, it was important to keep his body weight uphill, apply the brakes, and lock the parking brake when fully stopped. RP 504. He also understood that when riding uphill, it was necessary to proceed at a steady rate of speed and throttle opening, and that opening the throttle suddenly could cause the ATV to flip backwards. RP 505. He also understood the importance of maintaining momentum when riding the ATV up loading ramps. RP 537-38. He also realized that the parking lot in the area where he parked his truck was sloped, and agreed that feature of the lot was “obvious to him.” RP 517-18.

At the back of the truck, Lori asked Harris if the truck should be turned around, and Harris stated he had seen customers load ATVs both ways [with the truck pointing toward the building and away from the building], that he did not think it made much difference and that ATVs were loaded with the truck positioned like the Edwards’ “all the time.” RP 185. RP 361-62. Lori then asked Harris if he would load the ATV and Harris replied he was not comfortable doing so because of his lack of experience. Lori responded that John probably had less.³ RP 363. Hearing this, John

³ Lori and John also testified that, after the ramps were in place, Lori remarked to John in Harris’ presence that the situation looked dangerous or unsafe. RP 183, 185, 463, 518. Harris denied such a remark was made in his presence. RP 380. At her deposition, Lori testified she had no discussion or conversation with Harris, and this discrepancy in her testimony was brought to the attention of the jury at trial. RP 221-22. Consistent with Lori’s

stated he could do it because he had done it several times before. RP 364-65. According to Harris, John was “adamant about being able to load his own machine.” RP 364-65. During his conversation with John and Lori about loading the ATV, Harris recalls John saying he was fine loading the ATV, would take care of it himself, and did not need any help. RP 376. John said that at the beginning of the discussion, and then again after Lori asked about getting help. *Id.*

Harris sometimes participated in loading ATVs onto trucks. RP 374-75. He would only do so if he was comfortable, however, and if he was not, he would find a CMS employee who was more experienced. RP 375. If John had said he was uncomfortable loading his ATV, Harris would have gone inside and got an experienced employee to come out and do it. RP 376. But Harris had no reason to disbelieve John’s claim that he could do it, and he was not going to “question somebody’s manhood in front of them” and tell him he did not think he could load his own machine. RP 376-77. “It’s their machine and they are entitled to do with it what they want.” *Id.* Harris never offered to get someone else to do it because John was confident in his ability to load his own machine. RP 378.

trial testimony, John testified that he agreed with Lori that the situation looked unsafe because of the steepness of the ramps. RP 518.

John acknowledged he could have asked Harris or some other CMS employee to load the ATV for him but did not. RP 524. He also acknowledged he did not make anyone aware of his lack of experience when at CMS that day. RP 523.

As John rode the ATV up the ramps, he lost momentum toward the top of the ramps and hit the accelerator. RP 307-308. This caused the front end of the ATV to come up, moving the center of gravity behind the rear wheels. RP 308-09. When that happened, the ATV flipped on top of John. RP 308-09.

When the ATV flipped, one of the handlebars penetrated John's cheek, causing serious injuries. RP 289. A full face helmet covers the cheek. RP 290. At the time of the accident, John owned a full face helmet, but did not have it with him. RP 229-30, 513-14.

At trial, the Edwards contended CMS's premises were unsafe for loading ATVs because the parking lot was sloped. According to Edwards' expert, William Skelton, the degree of incline of the ramps with the pickup facing the building (the manner in which it was parked at the time of the accident), was 35 degrees. RP 271. Skelton further testified that the degree of incline of the ramps with the pickup facing away from the building was 26 degrees. RP 271-72. Skelton also testified, however, that an ATV can be safely operated on a slope of 35 or 36 degrees if the operator has enough

experience. RP 305. And Skelton further testified he could not say whether the accident would not have happened if the incline of the ramp was 25 degrees, or even 20 or 15 degrees, because “there are too many variables that cannot be established.” RP 303-04.

II. ARGUMENT AND AUTHORITIES

A. **The Trial Court Did Not Commit Prejudicial Error By Allowing Testimony On John Edwards’ Lack Of A Full Face Helmet**

1. **Standard of Review**

Admission of evidence lies within the trial court’s discretion, and such discretion is abused only when it is exercised in a manifestly unreasonable manner, or based on untenable grounds or reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994).

2. **The Trial Court Did Not Abuse Its Discretion By Allowing Testimony On John’s Lack Of A Full Face Helmet Because Such Testimony Was Relevant On The Issues Of Comparative Negligence and The Cause Of John’s Injuries, and Specific Expert Testimony On The Exact Injuries That Would Have Been Prevented By A Full Face Helmet Was Unnecessary.**

Expert testimony on causation is necessary only where an “injury involves obscure medical factors which are beyond an ordinary lay person’s knowledge, necessitating speculation in making a finding . . .” *Riggins v. Bechtel Power Corp.*, 77 Wn. App. 244, 254, 722 P.2d 819, 824 (1986), citing, *Bennett v. Dept. of Labor & Industries*, 95 Wn.2d 531, 533, 627 P.2d

104 (1981). “[W]hen the results of an alleged act of negligence are within the experience and observation of an ordinary lay person, the trier of fact can draw a conclusion as to the causal link without resort to medical testimony.” *Id.*, citing *Sacred Heart Medical Center v. Carrado*, 92 Wn.2d 631, 600 P.2d 1015 (1979).

Here, the Edwards’ expert, Dr. Neal Curtis, testified that John sustained injuries to his neck and jaw region on the left side. CP 220. More specifically, Dr. Curtis testified it was a penetrating injury from the ATV handlebar which caused injury to John’s face, jaw, tongue, teeth and lip. *Id.* And John testified he owned a full face helmet at the time of the incident that covered the areas of his face that were injured. RP 513-515. Thus, the trial court properly allowed this testimony as bearing on the issues of contributory negligence and causation.

Edwards argues, or at least suggests, it was inappropriate for the trial court to allow this evidence because no expert witness testified as to exactly what injuries would have been avoided had John been wearing a full face helmet. But such testimony was not necessary, given the areas of injuries described by Dr. Curtis and John’s testimony regarding the areas of his face covered by his full face helmet. And, in any event, such precise testimony on the nature and extent of injuries/damages is not required. *See, e.g., Christian v. Tohmeh*, 191 Wn. App. 709, 734-35, 366 P.3d 16 (2015).

3. Even If It Was Error To Allow This Evidence, It Was Harmless.

Trial court error that is without prejudice is not grounds for reversal. *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61 (2016) (an error “will be considered harmless unless it affects the outcome of the case.”) *Id.* citing *State v. Jackson*, 103 Wn.2d 689, 695, 689 P.2d 76 (1984). A harmless error “is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Id.*, citing *Anfinson v. FedEx Ground Package Systems, Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010), *aff’d*, 174 Wn.2d 851, 281 P.3d 289 (2012). “Error will be considered prejudicial if it presumptively affects the outcome of the trial.” *Id.*, citing *James S. Black and Co. v. P. & R. Co.*, 12 Wn. App. 533, 537, 530 P.2d 22 (1975).

Here, admission of evidence regarding John’s lack of a helmet was, if error, harmless for several reasons. Fundamentally, there was no prejudice because the jury did not reach the issue of damages. And on the only related question put to it—proximate cause—the jury specifically found that the conduct of CMS did cause injury or damage to John.

On this point *Crippen v. Pulliam*, 61 Wn.2d 725, 734-35, 380 P.2d 475, 480 (1963) and *Peterson v. Gilmore*, 5 Wn. App. 55, 57-58, 485 P.2d

622, 623-34 (1971) are instructive. In *Crippen*, the plaintiff, after a defense verdict, sought a new trial of her medical malpractice claims because, among other things, (1) the defense lawyer had previously been assigned as a guardian ad litem in a mental illness hearing (and thus had intimate knowledge of her mental condition), and (2) defense counsel argued, without foundation, that someone had purposely painted the plaintiff's eyebrows in such a manner as to feign or exaggerate the paralysis of her face, an injury she attributed to the defendant's allegedly negligent surgery. Both the trial court and court of appeals rejected this as grounds for a new trial, concluding that the conduct would only go to the issue of damages and would not bear on the issue of negligence. Since the jury found no negligence on the part of the defendant, there was no cause for a new trial. 61 Wn.2d at 734.

Similarly, in *Peterson*, a personal injury case, defense counsel made improper remarks about a supposed "rule of thumb" used by lawyers concerning the amount of damages. The jury returned a defense verdict. The plaintiff appealed, arguing that the statement by defense counsel to the jury so prejudiced the case that as a matter of law, without regard to the evidence presented during the trial, a mistrial or new trial should have been granted. 5 Wn. App. at 57. The court of appeals held that *Crippen* was determinative of the issue, and because the jury did not reach the issue of damages, the

Court of Appeals affirmed the trial court's refusal to grant a mistrial or new trial. 5 Wn. App. At 57.

In the instant case the jury did not reach the issue of damages, and found for the Edwards on the issues of negligence and proximate cause. Thus, evidence of John's failure to wear a helmet did not affect the verdict.

Moreover, given the overall nature of the testimony and argument on the subject of helmet use, it is highly unlikely the jury decided any issue against the Edwards based on John's failure to wear a helmet. There was testimony that CMS employees did not wear helmets when they loaded ATVs for customers. RP 352. Moreover, an appellate court may consider a party's closing argument in passing on the use of harmless error, (*see, Driggs v. Howlett, supra* at 908) and during closing CMS' counsel made no mention of John's lack of a helmet. RP 821-841.

B. The Trial Court Did Not Err By Dismissing Plaintiffs' General Negligence Claim.

1. Standard of Review

A trial court's judgment as a matter of law in a jury trial under CR 50 is subject to *de novo* review, with the appellate court engaging in the same inquiry as the trial court. *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3d 795 (2013).

2. The Trial Court Did Not Err By Dismissing and Refusing To Instruct Upon a General Negligence Theory or Claim.

While the court gave instructions on premises liability, it declined to give a separate general negligence instruction.⁴ For the reasons set forth below, that was not error.

Recently, the Washington Supreme Court confirmed its adherence in premises cases to liability standards based on the traditional classifications of invitee, licensee and trespasser. In *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015), the court stated:

In answer to the first certified question, we reiterate that Restatement (Second) of Torts §344 is generally consistent with Washington law, and that comments d and f generally describe the contours of the duty owed. *See, Nivens*, 133 Wn.2d at 204-05, 943 P.2d 286. However, this court has followed a careful course when considering imposing liability on landowners or possessors in general. In 1986, the court was asked to abandon traditional premises liability standards of care owed by owners or occupiers of land in favor of a ‘standard of reasonable care under all the circumstances.’ *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986). We decline to abandon the traditional classifications in favor of ‘a standard with no contours.’ *Id.* at 666, 724 P.2d 991. The reasons for adhering to the traditional standards, including stability and predictability of the law, disinclination to delegate complex policy decisions

⁴ The Edwards’ position on whether they were making a negligence claim separate and apart from a premises liability claim shifted over time. Premises liability was the only negligence theory discussed in the Edwards’ trial brief. CP 0015-0027. Their initial proposed instructions included only premises liability instructions. CP 0341, 0342, and Edwards’ counsel agreed to a statement of the case to the jury couched in terms of premises liability. RP 73. It was only in response to CMS’ motion for dismissal and in discussions with the Court regarding instructions that the Edwards asserted a general negligence theory and claimed a general negligence instruction was appropriate. RP 617-18, RP 745.

to a jury, and the danger that ‘the landowner could be subjected to unlimited liability.’ *Id.* Thus, ‘a possessor of land has no duty as to all others under a generalized standard of reasonable care under all the circumstances.’ *Hutchins*, 116 Wn.2d at 221, 802 P.2d 1360.

182 Wn.2d at 765.

Here, the Edwards’ request for a general negligence instruction was essentially a proposal that a possessor of land has a duty to all under a generalized standard of reasonable care. But, as emphasized by *McKown*, no such duty exists.

Also, the Edwards’ argument for a general negligence instruction was based solely on the alleged statements made by, and conduct of, Harris, the CMS shop assistant. More specifically, Edwards claimed Harris, by his comments at the back of the truck, gave John misleading instructions. But the only legal theory that might possibly embrace that aspect of the Edwards’ case would be assumed duty, *see, e.g., Mita v. Guardsmark*, 182 Wn. App. 76, 328 P.3d 982 (2014) and the Edwards never argued or proposed any jury instructions on this theory. Where a party fails to offer a jury instruction or argument on a particular theory, the party cannot, after an adverse decision or verdict, raise the theory for the first time. *See, Vaughn v. Vaughn*, 23 Wn. App. 527, 531, 597 P.2d 932 (1979) (“[T]he post-trial discovery of a new theory of recovery is not sufficient reason to either grant a new trial or reconsider a previously entered judgment pursuant

[to] CR 59”); *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (“The burden is on the party to a lawsuit to propose jury instructions involving their respective theories. A party is bound by the legal theories pleaded and argued before the jury renders a verdict”).

As legal authority, the Edwards base their additional duty argument solely on *Dorr v. Big Creek Wood Products, Inc.*, 84 Wn. App. 420, 927 P.2d 1148 (1996). *See*, Brief of Appellant, page 23. *Dorr* does not support Edwards on this issue, however, for at least two reasons.

First, and fundamentally, *Dorr* was decided before *McKown*, and the *Dorr* court did not consider the nature and extent of the defendant’s premises liability duty, particularly whether the defendant owed the plaintiff a duty separate and apart from the well-recognized duty(s) owed by a landowner depending on the plaintiff’s classification. While the trial court, in addition to instructing the jury on the duty of a possessor of land to a licensee, “also gave standard instructions on negligence and contributory negligence,” 84 Wn. App. at 423-24, the giving of the standard negligence instruction was not disputed on appeal.

Second, *Dorr* actually supports CMS in that the court held the plaintiffs’ misleading directions theory was covered by the premises liability instruction (Instruction No. 10), which described the duty owed by a premises owner to a licensee. On this point, the court stated:

If the jury believed Knecht did nothing to encourage Dorr to leave the safe area, instruction 10 permitted them to conclude that no duty ever arose. But if the jury believed Knecht waved to Dorr to come forward, instruction 10 permitted them to consider the limited duty owed by a possessor of land to a licensee. Applying instruction 10 to the testimony, the jury could conclude that Knecht should not have expected Dorr to realize the hand signal put him in danger, and that Dorr in fact did not know, or have reason to know, that the signal was dangerously misleading. They could conclude that the duty to avoid giving misleading directions was within the limited duty Knecht owed to his licensee, and that Knecht breached it by indicating to Dorr the way was clear when in fact a widowmaker hung poised over his path. (Emphasis added.)

84 Wn. App. at 430.

In the instant case, a separate instruction on general negligence was not only inappropriate, it was unnecessary given that the Edwards' theory and arguments on Harris' alleged misleading directions or instructions were covered by the court's premises liability instructions. Of particular import was the breadth of Instruction No. 14, which stated:

An owner of premises owes to a business invitee a duty to exercise ordinary care. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use. (Emphasis added.)

CP 0341.

Jury instructions are proper if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole,

properly inform the jury of the applicable law. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Here, the Court's instructions properly informed the jury of the applicable law on negligence, were not misleading, and, most significantly, allowed the Edwards to present all of their negligence theories to the jury, including those based on the conduct and comments of Harris.

3. Notwithstanding The Above, Failing To Instruct The Jury On A General Negligence Theory Was Harmless Error

Pursuant to the court's premises liability instructions and definition of ordinary care, the jury found that CMS was negligent and that its negligence was a proximate cause of injury/damage to the plaintiff. Thus, it cannot be said that the court's not issuing a general negligence instruction was prejudicial error. In addition, the outcome would have been the same here because the jury's finding of implied primary assumption of risk (discussed below) vitiated the duty owed to John, and thus no damages would have been awarded in any event. *See, Scott by and through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 498, 834 P.2d 6 (1992) ("Since implied primary assumption of the risk negates duty, it acts as a bar to recovery when the injury results from one of the risks assumed").

C. Trial Court Properly Instructed The Jury On Implied Primary Assumption Of Risk

Jury instructions are proper if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of the applicable law. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). An appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Washington recognizes four categories of assumption of risk: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Hvolboll v. Wolff Co.*, 187 Wn. App. 37, 47, 347 P.3d 476 (2015). The last two types are alternative names for contributory negligence, and work to allocate a degree of fault to the plaintiff, serving as damage-reducing factors. *Id.*, citing *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 719, 965 P.2d 1112 (1998). On the other hand, express assumption of risk and implied primary assumption of risk “arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding specific known risks.” *Id.*, quoting *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). “With express assumption of risk, the plaintiff states in so many words that he or she consents to relieve the defendant of a duty the defendant would

otherwise have. With implied primary assumption of risk, the plaintiff engages in other kinds of conduct, from which consent is then implied.” *Id.*, quoting *Erie v. White*, 92 Wn. App. 297, 303, 966 P.2d 342 (1998) and *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). Express and implied primary assumption of risk have the same elements of proof: “The evidence must show 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.” *Hvolboll* at 48, quoting *Kirk*, 209 Wn.2d at 453, 746 P.2d 285.

To establish the defense of implied primary assumption of risk, the defendant must show that at the time of the accident 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. *Jessee v. City Council of Dayton*, 173 Wn. App. 410, 414, 293 P.3d 1290 (2013). “The knowledge and voluntariness that established the plaintiff’s consent are questions of fact for the jury, ‘except when the evidence is such that reasonable minds could not differ.’” *Alston v. Blythe*, 88 Wn. App. 26, 33-34, 943 P.2d 692 (1997).

While the test for knowledge is a subjective one, the facts that should be known are objectively determined. A plaintiff has knowledge if, “at the time of the decision, [he or she] actually and subjectively knew . . . all facts

that a reasonable person in the plaintiff's shoes would want to know and consider." *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 720, 965 P.2d 1112 (1998).

"Whether a plaintiff decides voluntarily to encounter a risk depends on whether he or she elects to encounter it despite knowing of a reasonable alternative course of action." *Home*, 92 Wn. App. at 721, 965 P.2d 1112; *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923 (1973). While the defense of implied primary assumption of risk requires more than a generalized feeling that there may be some hazard involved, the required knowledge is of a particular type of hazard, not knowledge of every variable that might affect the likelihood of harm. *See, Simpson v. May*, 5 Wn. App. 214, 218, 486 P.2d 336 (1971).

For implied primary assumption of risk to apply, it is not necessary that the plaintiff articulate his subjective appreciation or understanding of the risk. Like any subjective mental state, knowledge or understanding can be proven through circumstantial evidence. *See, e.g., State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015) (requirement of actual knowledge that the defendant is promoting or facilitating a crime for purposes of accomplice liability may be shown with circumstantial evidence); *Burbo v. Harley C. Douglas, Inc.*, 125 Wn. App. 684, 106 P.3d 258 (2005) (seller's actual

knowledge of defects for purposes of a claim of fraudulent concealment can be shown by circumstantial evidence).

In the instant case, there was abundant evidence that John had a full subjective understanding of the presence and nature of the specific risk—rollover while riding an ATV up a loading ramp—and voluntarily chose to encounter it. John received and signed a receipt when he purchased the ATV that clearly set forth the dangers associated with riding up an incline. He knew that if an ATV flipped over while ascending or descending a hill, it could be very dangerous, and could cause severe injury, including, but not limited to, death. John read the owner’s manual for the ATV, which explained the risk of rollover when riding up a hill or incline, and the manual emphasized that failing to abide by the warnings in the manual could cause severe injury or death. John knew the CMS parking lot was sloped, and agreed the slope was “obvious.” He understood the need to maintain a steady speed when ascending a ramp. After the ramps were set up, John heard his wife say that they did not look safe, and John agreed. To John’s naked eye, the slope of the ramp “looked really steep” and he was concerned as to whether he had the skill to successfully navigate the ATV up the ramp. For that reason, John inquired about turning his truck around so it would point downhill, knowing the ramp would be less steep that way. But John,

with his wife, Lori, standing nearby was nevertheless adamant he could load the ATV by himself.

The Edwards argue that John did not appreciate the risk because he was unaware that the slope of the ramp exceeded the 25 degrees mentioned in the Polaris manual. But it was not necessary that Edwards appreciate the risk with such acuity. *See, Simpson, supra*, and *Jessee, supra*. And, as emphasized by the Edwards' expert, Mr. Skelton, the precise degree of incline was immaterial, because the ultimate cause of the accident was John's lack of skill and training and failing to maintain momentum as he ascended the ramps.

The Edwards insist John could not have had a full subjective understanding of the risk because he was deceived by allegedly misleading instructions from Harris. This argument should be rejected, however, for several reasons. First, the exact nature of Harris' remarks and whether they were misleading was contested at trial. One version of Harris' testimony was that they did not think turning around the truck made any difference, while another was that CMS did "this" (loading ATVs on the back of trucks in the parking lot) all the time." Both statements were categorically true and it was for the jury to determine whether in context the statements were misleading.

Second, in deference to *Dorr v. Big Creek Wood Products Inc.*, 84 Wn. App. 420, 927 P.2d 1148 (1996), the WPI on implied primary assumption of risk was modified to state that, if the jury found John received misleading instructions, they should not find assumption of risk. This allowed the Edwards to argue their theory to the jury.

Third, the jury could easily have concluded that John's self-serving testimony about his appreciation of the risk and reliance on Harris' alleged comments was not believable. John had loaded the ATV using the ramps before, had read a 137-page instruction manual describing the dangers associated with ascending slopes and the importance of maintaining momentum while ascending a hill or ramp, saw the slope of the parking lot and the ramps, and felt it was unsafe. Yet he elected to proceed. Based on the testimony presented, the jury could easily have concluded that John had a full, subjective understanding of the risk but chose to proceed anyway because he did not want to lose face in front of his wife.

The Edwards cite *Gleason v. Cohen*, 192 Wn.App. 788, 368 P.3d 531 (2016) and *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 375 P.3d 709 (2016). Their reliance on these cases, however is misplaced.

In *Gleason*, the Plaintiff was injured by a falling tree while helping the Defendant, Cohen, cut down trees on Cohen's property. The trial court granted summary judgment in favor of Cohen, concluding that Gleason's

claim was barred by the doctrine of implied primary assumption of risk. The Court of Appeals reversed, not because it held implied primary assumption of risk did not apply, but rather because it concluded an issue of fact existed as to "whether Gleason was injured by the negligence of Cohen and his workers rather than by risk inherent in cutting down trees." 192 Wn.App. at 791.

Here, an instruction on implied primary assumption of risk was supported by the evidence, and the jury was entitled to conclude that John had a full subjective understanding of the risk of riding his ATV up the loading ramp, and voluntarily chose to encounter that risk.

Gleason is also inapposite because there was evidence on summary judgment that the Defendant was engaged in active negligence at the time of the accident, creating a risk that Gleason did not appreciate or agree to encounter. More specifically, while Gleason was cutting the tree from the backside, the Defendant's workers were applying pressure to the tree using a choker and winch and, after the tree slid off the stump and hung up in the branches of some nearby trees, the Defendant's workers pushed on the tree, trying to dislodge it from the other branches. The falling tree then struck and seriously injured Gleason. These facts caused the court to conclude that Gleason did not necessarily encounter and assume a dangerous risk that was inherent in and necessary to the particular activity of cutting down a tree.

Finally, the reasoning of *Gleason* is questionable in that the Court held implied primary assumption of risk is inapplicable when the Plaintiff knowingly encounters a risk created by the Defendant. In so concluding, the court acknowledged but rejected the Division III cases of *Jessee v. City Council of Dayton*, 173 Wn. App. 410, 293 P.3d 1290 (2013) and *Hvolboll v. Wolff Company*, 187 Wn. App. 37, 347 P.3d 476 (2015). While the rule announced in *Gleason* may be the law in Division II, it is inconsistent with the approach this court has taken to applied primary assumption of risk.

As for *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 375 P.3d 709 (2016) that case, like *Gleason*, involved an appeal from summary judgment in favor of the Defendant. The Plaintiff was injured in a fall from a bicycle while riding along a rough and uneven city street. In granting summary judgment in favor of the City, the trial court relied, in part, on implied primary assumption of risk.

In reversing, Division II of the Court of Appeals first emphasized that "implied primary assumption of risk occurs 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." 194 Wn.App. at 775. The court then, citing its opinion in *Gleason*, concluded that "implied primary assumption of risk does not apply when the Defendant

creates some additional risk and the Plaintiff encounters that risk." 194 Wn. App. at 776.

Contrary to Division II's reasoning in *Gleason* and *O'Neill*, implied primary assumption of risk is not limited to "sport-related cases", nor is it inapplicable when the risk, although fully understood and voluntarily encountered, happened to have been created by Defendant. See *Jessee, supra*; *Hvoldoll, supra*. See also, *Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116 (1985).

In sum, the court's instruction on implied primary assumption of risk (Instruction 21—CP 0349) was a correct statement of the law, was amply supported by the evidence, and allowed both sides to argue their respective theories of the case. Of particular significance is that the court, based on *Dorr, supra*, and over CMS' objection modified the WPI to state that "[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." RP 646-47; RP 756-58, 762-63. After the court decided it would instruct on implied primary assumption of risk, the Edwards agreed that it was appropriate to include the *Dorr* qualifier. See RP 760.

D. The Trial Court’s Special Verdict Form Was Appropriate And The Jury’s Answers To The Questions Therein Were Consistent.

The Edwards claim the jury verdict was inconsistent. Specifically, they claim the jury could not find the defendant liable under a premises liability theory and then also find that CMS satisfied its burden of proof concerning implied primary assumption of risk. This argument should be rejected for two reasons: First, the Edwards waived their objection to the alleged inconsistency; second, the jury’s answers to the questions on the special verdict form were entirely consistent and plainly reconcilable.

1. The Edwards Waived Any Argument Concerning An Alleged Inconsistency In The Answers On The Special Verdict Form.

In *Gjerde v. Fritzsche*, 55 Wash.App. 387, 777 P.2d 1072 (Div.1, 1989), *review denied*, 113 Wash.2d 1038, 785 P.2d 826 (1990) the Plaintiff moved for a new trial based upon allegedly inconsistent responses on a special verdict form. The court of appeals declined to consider the inconsistency challenge: “[B]ecause [Plaintiff] waived the issue below by failing to bring the inconsistency in the answers to the interrogatories to the attention of the court at the time the jury was polled.” *Gjerde*, 55 Wash.App. at 393. In *Gjerde* the court noted the language of CR 49(b), which states: “When the answers [to the jury interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict,

judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.” While no previous Washington case had determined whether the failure to object to inconsistencies in interrogatories constituted waiver, the *Gjerde* court found that it did. The Court noted “The majority of Federal courts analyzing the identical provision of Fed.R.Civ.P. 49(b) have held that the failure to object to inconsistencies in the verdict before the discharge of the jury waives any objection on appeal.” *Id. at 393*.

More recently, in *Minger v. Reinhard Distrib. Co.*, 87 Wash.App. 941, 943 P.2d 400 (Div.3, 1997), the trial court found “The employees waived any objection to the verdict based on the alleged inconsistency by failing to bring it to the attention of the trial court at the time the jury was polled and before the jury were discharged.” *Id.* “The jury poll cured any procedural irregularities, including claimed mistakes in understanding the instructions.” *Id.*, citing, *Ayers v. Johnson & Johnson*, 117 Wash.2d 747, 768-769, 818 P.2d 1337 (1991).

Here, as in *Gjerde* and *Minger*, the jury was polled at the request of the Edwards’ counsel. Despite what the Edwards perceive to be an inconsistent verdict form, no request was made to send the jury back into deliberations to resolve the alleged inconsistency. The policy underlying waiver is that a party must timely raise a concern to allow the trial court a

reasonable opportunity to cure it. *State v. Scott*, 110 Wash.2d 682, 685, 757 P.2d 492 (1988); *State v. Bertrand*, 110 Wash.App. 393, 400, 267 P.3d 511 (2011). As set forth in *Gjerde*, and *Minger*, the trial court could have sent the jury back to resume deliberations if it agreed with the Edwards' argument. Failing to request that relief before discharge the jury resulted in a waiver. Further, any procedural irregularities including claimed mistakes in understanding the instructions were waived where the jury was polled concerning their verdicts.

Further, the Edwards took no exception to the special verdict form. The only objection by Edwards to the verdict form concerned whether the Court should give an implied primary assumption of risk instruction at all. There was no objection to the order of the questions, or any complaint that the verdict form was confusing or misleading. As such, any arguments concerning the verdict form itself were waived by the doctrine of invited error. *See, Nania v. Pac. Nw. Bell Tel. Co.*, 60 Wash. App. 706, 709-10, 806 P.2d 787, 789 (1991) (All counsel, however, reviewed the revised special verdict form before it was submitted to the jury and there were no objections...PNB cannot now claim error, having invited it), *citing, State v. Boyer*, 91 Wash.2d 342, 345, 588 P.2d 1151 (1979).

2. The Jury's Verdict Was Consistent and Reconcilable.

“It is the rule in this state that answers to special interrogatories should, if possible, be read harmoniously to support a judgment.” *Department of Highways v. Evans Engine Co.*, 22 Wash.App. 202, 204, 589 P.2d 290 (1978), *review denied*, 92 Wash.2d 1010 (1979). “A court liberally construes a verdict so as to discern and implement the jury's intent, if consistent with the law.” *Espinoza v. Am. Commerce Ins. Co.*, 184 Wash. App. 176, 197, 336 P.3d 115, 125-26 (2014), *citing*, *Wright v. Safeway Stores, Inc.*, 7 Wash.2d 341, 344, 109 P.2d 542 (1941).

Courts must attempt to reconcile the jury's response to special verdict interrogatories. *Myhres v. McDougall*, 42 Wash.App. 276, 278, 711 P.2d 1037 (1985). A new trial is appropriate only if the verdict “contains contradictory answers to interrogatories making the jury's resolution of the ultimate issue impossible to determine...” *Alvarez v. Keyes*, 76 Wash. App. 741, 743, 887 P.2d 496, 497 (Div.2, 1995). Otherwise, courts “may not substitute [their] judgment for that which is within the province of the jury.” *Id.*, *citing*, *Myhres*, at 278, 711 P.2d 1037; *Blue Chelan, Inc. v. Department of Labor & Indus.*, 101 Wash.2d 512, 514-515, 681 P.2d 233 (1984). Courts in the State of Washington are required to reconcile the jury's special verdict responses with the general verdict whenever possible:

On a motion for a judgment on the answers to interrogatories notwithstanding the general verdict, every reasonable presumption will be indulged in favor of the general verdict, and if by any reasonable hypothesis the answers can be reconciled with the general verdict the latter must stand. They override the general verdict only when both cannot stand together, the antagonism being such upon the face of the record as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the cause.

Mercier v. Travelers' Ins. Co. of Hartford, Conn, 24 Wash. 147, 157-58, 64 P. 158, 161-62 (1901), *quoting*, *Railroad Co. v. Lewis*, 119 Ind. 218, 21 N. E. 660 (1989).

The Edwards' argument concerning inconsistency is not entirely clear. They simply claim that the jury's finding in their favor on their premises liability claim and in CMS's favor on implied primary assumption of risk is inconsistent. In view of the instructions, the jury's verdict can be easily reconciled. The premises liability instruction (No. 14) reads as follows:

An *owner of premises* is liable for any physical injuries sustained to its business invitees caused by a condition on the premises **if the owner**:

- (a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such *business invitees*;
- (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 ordinary care to protect them against the danger.

CP 0341.

The Implied Primary Assumption of Risk Instruction (No. 21) reads as follows:

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 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 of defendant's negligence.

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

CP 0349.

The jury's verdict form responses were entirely consistent because the premises instruction focused on the knowledge and activities of CMS, while the implied primary assumption of risk instruction focused on John's knowledge and understanding. To accept the Edwards' argument would mean that implied primary assumption of risk could never be applied in a

premises case, because the jury should never be permitted to consider the question if it found premises liability. That is not the law.

The jury in this case apparently found that CMS knew of a “dangerous condition,” realized that it involved an unreasonable risk of harm to patrons, “should have” expected that invitees would not realize the danger or would protect themselves against it, and CMS failed to exercise ordinary care to protect its patrons. However, those findings are entirely consistent with assumption of risk, where the jury shifted its focus to John’s knowledge or understanding of the risk. That is, he recognized the risk, understood its nature, and voluntarily chose to engage in the specific risk. Again, the evidence in this case showed that John was aware that the parking lot was sloped. He was aware, by virtue of the owner’s manual and common sense, that the greater the slope, the greater the likelihood that an accident would occur. He knew that the consequences of an accident included death and every physical injury short of death. He further knew that turning his vehicle around, with the nose pointed away from the CMS building (i.e., downhill) would have reduced the risk of the accident. He also knew that he was inexperienced and untrained and that the situation looked dangerous.

The Edwards argue, at length, that *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121, 875 P.2d 621 (1994) provides support

for their inconsistent verdict argument. However, the discrepancy on the verdict form in *Tincani* was quite simple. The jury was asked to determine the plaintiff's status for purposes of landowner liability. The jury determined that the plaintiff was a licensee. As such, the landowner/defendant did **not** owe a duty to the plaintiff for conditions of the land that were open and obvious. If the plaintiff had been a licensee, the landowner would have owed him a duty to **warn** him of the dangerous condition. Again, the jury found that the plaintiff was a licensee, but then found the zoo to be negligent. The condition of the land was open and obvious, and thus, it was impossible for the zoo to have been found negligent, as it had no duty to warn the plaintiff of an obvious defect.

The other cases cited by the Edwards are likewise of no assistance. In *Myhres v. McDougall*, 42 Wash.App. 276, 711 P.2d 1037 (1985), the jury reached a puzzling verdict. It found that both parties negligently caused a two-car collision. Yet, the jury found that neither party proximately caused the other party's injuries. There was no way to reconcile the verdict. Similarly, in *Blue Chelan v. Dep't v. L&I*, 102 Wash.2d 512 (1984) the jury found that the plaintiff was not capable of performing gainful employment. Despite having the very same definition, the jury found that the plaintiff was not totally and permanently disabled.

Implicit in the Edwards' inconsistency argument is that implied primary assumption of risk can never apply in a case where the defendant is negligent, and that negligence proximately caused injury or damage to the plaintiff. That is simply incorrect. While there is certainly language in cases such as *Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116 (1985), *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987), and *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992), from which such a broad rule could be inferred, a close reading of those cases shows that, to the extent the court commented on express or implied primary assumption of the risk not barring injury or damage caused by a defendant's negligence, the court made the statement because, at the time the risk was allegedly assumed, the plaintiff was either unaware of the defendant's negligent conduct, because it had not happened yet, or the plaintiff was unaware of the acts, omissions or features of the premises which the plaintiff attributed to the negligence of the defendant. In *Shorter, supra*, the plaintiff could not be said to have expressly assumed the risk of injury caused by the defendant's negligence during surgery because, at the time the risk was allegedly expressly assumed, the surgery had not yet occurred. In *Kirk*, the facts did not support an instruction on implied primary assumption of risk because there was no evidence that the plaintiff knew of the specific features of the practice surface (astroturf) which caused her injuries, or that she was

aware of changes recently made in cheerleading techniques and the school's degree of supervision over the program. Finally, in *Scott*, summary judgment in favor of the ski resort based on implied primary assumption of risk was reversed because there was no evidence that the plaintiff, a minor participant in a ski race, was aware of the specific features of the course that allegedly caused his injuries.

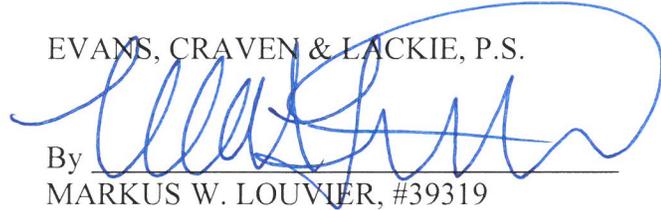
In stark contrast, in the instant case, the instruction on implied primary assumption of risk was appropriate because, at the time John ascended the loading ramps on his ATV, there was evidence that he had a full subjective understanding of features of the CMS property, the steepness of the ramps, Harris' comments, and the risk of flipping the ATV. And there was no subsequent conduct by CMS of which John, by definition, was unaware, and which caused his injuries. It was not inconsistent for the jury to find that CMS was negligent, and that its negligence proximately caused the accident, but, at the same time, conclude John assumed the risk of injury because the acts/omissions on the part of CMS which the jury found to have been negligent, and the risks those acts/omissions created, were fully known to and assumed by John.

III. CONCLUSION

Based on the foregoing argument and authorities, CMS respectfully requests that the trial court's denial of the Edwards' motion for new trial be affirmed.

DATED this 17th day of February, 2017.

EVANS, CRAVEN & LACKIE, P.S.

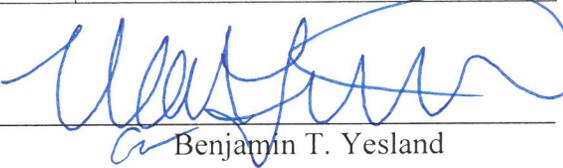
A large, stylized handwritten signature in blue ink, written over a horizontal line. The signature is cursive and appears to be the name of one of the attorneys listed below.

By
MARKUS W. LOUVIER, #39319
CHRISTOPHER J. KERLEY, #16489
Attorneys for Respondent

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 the 17th day of February, 2017, a copy of the BRIEF OF RESPONDENT COLVILLE MOTOR SPORTS, INC. was delivered to the following persons in the manner indicated:

Steven W. Hughes Ewing Anderson, P.S. 522 W. Riverside Ave., Ste. 800 Spokane, WA 99201 <i>Attorney for Appellant</i>	VIA REGULAR MAIL [] VIA CERTIFIED MAIL [] VIA FACSIMILE [] HAND DELIVERED <input checked="" type="checkbox"/> VIA EMAIL []
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2-17-17 / Spokane, WA 
(Date/Place) Benjamin T. Yesland