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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 34457-6
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICHARD L. MOORE, JR. AND MICHAELENE L. MOORE,

Appellants,

v.

RANDALL K. POLTZ AND KATHYRN POLTZ,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case arose from a crippling injury suffered by Appellant, Richard Moore, when he was doing carpentry work for hire at the home of Respondents, Randall and Kathryn Poltz. Mr. Poltz had chosen a defective ladder and set it up on slippery rugs to protect his polished hardwood floor; the ladder swiveled around as soon as Mr. Moore began work and dumped him 12 feet down, smashing his heel and ankle. Mr. Poltz admitted at trial that he had mis-set the ladder and should not have done so, but before and after the case went to the jury, the trial court refused to find negligence as a matter of law.

II. ASSIGNMENTS OF ERROR

Appellants assign the following errors:

1. The trial court erred by denying Appellants' motion and renewed motion for judgment as a matter of law on negligence, where fault was admitted.

Issue: Should a defendant be held to his admission of fault?

2. The trial court erred by failing to instruct the jury that a premises owner is liable for conditions he creates, knows of, or should know of on his property.

Issue: Should the jury on these facts have been instructed more fully on the duty of a premises owner to a business invitee?

III. STATEMENT OF THE CASE¹

A. Respondent Admitted at Trial That He Mis-Set the Ladder and should Not have Done So.

Before November 18, 2005, Appellant Richard Moore was a highly-skilled, hard-working carpenter with a steady job and major projects lined up. CP 180. In particular, the Respondents, his sister Kathy Poltz and his brother-in-law Randall Poltz were hiring him as site manager for the construction of their new home. *Id.* First, they had to sell their current house. *Id.* They called in Mr. Moore that day to help prepare it for sale by caulking the top of a 16-foot wall in their foyer. *Id.*

Mr. Poltz obtained a 14-foot orchard ladder for Mr. Moore's use. CP 180. But he failed to notice that it had a twisted right foot. *Id.* And he set it up on area rugs which hid the twisted foot, and which lacked non-slip bottoms, on top of a polished hardwood floor. *Id.*

Moments after Mr. Moore climbed to the top of the ladder and reached over to the wall on the right side to begin caulking, the ladder slewed around counterclockwise, to the left, pivoting on the damaged

¹ Although resources were lacking for a verbatim report of proceedings, the facts shown at trial which are essential to this appeal were set forth in Plaintiffs' post-judgment motion for judgment as a matter of law and new trial, which also expressly asked if there was any dispute as to the facts, and the facts were not disputed by Defendants. CP 179-80 n.1.

right foot and sliding on the slippery rugs and smooth floor. CP 180. Mr. Moore had to jump off to avoid crashing through a heavy glass chandelier. *Id.* When he landed, he shattered bones in his ankle and foot. *Id.*

Mr. Moore brought suit against the Poltzes for negligence. CP 10–13. The matter was tried to a jury. CP 177.

At trial, Mr. Moore, who, as opposing counsel reminded the jury in closing, had great experience setting up ladders indoors on different surfaces, testified on cross-examination that the ladder was set up wrong in that the rugs lacked non-slip backing. CP 180. What is critical to this case, is that **Respondents agreed** with Mr. Moore’s assessment. When called as a witness at trial, Mr. Poltz adopted a part of his deposition testimony: “**I mis-set the ladder.**” *Id.* No attempt was made to explain, qualify, or rehabilitate this testimony, or to offer any contrary evidence. *Id.* Mr. Poltz testified that he had climbed up to the fifth or sixth rung and jumped up and down hard on the rung, and another witness testified that he generally shook a ladder to test it before use, but there was no evidence that this was a widely-used or effective safety test, especially where the work at hand required the user to lean to the side, or that Mr. Poltz had given any thought to it. *Id.* At closing, Respondents’ counsel

conceded that when Mr. Poltz admitted that he “mis-set the ladder,” he meant that, in hindsight, “I shouldn’t have done it” that way. CP 181.

B. The Trial Court Rejected Proposed Instructions and Denied Appellants’ Motions for Judgment and for New Trial.

At the close of evidence, before the case was given to the jury, Appellants moved for judgment as a matter of law under CR 50 on liability, including the issues of negligence, proximate cause, and contributory negligence, based on Respondents’ unqualified admission of fault. CP 181. The trial court denied the motion. *Id.*

The trial court instructed the jury on the difference between a social guest and a business invitee, but rejected two instructions proposed by the Appellants that would have explained the enhanced duty to a business invitee. CP 183. Proposed Instruction No. 12, WPI 12.07:

An owner of premises is liable for any physical injuries 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.

; and Proposed Instruction No. 11, WPI 12.06.02:

An owner of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner, and that was not caused by negligence on the part of the owner, if the condition was either brought to the actual attention of the owner or existed for a sufficient length of time and under such circumstances that the owner should have discovered it in the exercise of ordinary care.

CP 183–84.

The jury returned a special verdict that Mr. Moore was a business invitee, but that Mr. Poltz had not been negligent, and judgment was entered thereon for defendants. CP 174–76, 177–78, 181.

Appellants renewed their motion for judgment as a matter of law in part, as to negligence only, and further moved for a new trial on the issues of causation, comparative fault, and damages, which the jury had not reached. CP 177–86. The motion was denied. CP 200–01. This appeal timely followed.

IV. ARGUMENT

A. Standard of Review.

This Court reviews the trial court's denial of a motion for judgment as a matter of law de novo, and asks whether there was competent and substantial evidence to support a verdict. *Faust v.*

Albertson, 167 Wn.2d 531, 537, 222 P.3d 1208, 1212 (2009), *as amended* (Aug. 6, 2009). The motion for new trial is reviewed for abuse of discretion. *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012). Whether jury instructions were accurate and sufficient to allow the parties to argue their theory of the case, is reviewed as a matter of law; if they were, then the trial judge's choice of words is reviewed for abuse of discretion. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145, 156 (2009).

B. Judgment as a Matter of Law should have Been Granted as to Negligence, where the Defendants Admitted Fault.

A court may enter judgment as a matter of law on any issue, when, viewing the evidence in the light most favorable to the nonmoving party, the court can say there is no substantial evidence or reasonable inference to support the nonmoving party's position. CR 50(a); *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 729, 75 P.3d 533, 539 (2003). A motion made under CR 50(a) may be renewed timely after entry of judgment and join a motion for new trial under CR 59. CR 50(b). A verdict may be vacated and a new trial ordered on some or all issues when there is no evidence or reasonable inference from the evidence to justify the verdict, or substantial justice has not been done. CR 59(a)(7),(8).

Here, Defendants and their counsel admitted the only ultimate fact issue which the jury found in their favor: negligence. With consideration, fully advised, under oath, Mr. Poltz agreed, "I mis-set the ladder." His counsel explained that this meant, "I shouldn't have done it." But that is the definition of negligence: the word "should" connotes obligation or duty. Webster's II New Riverside Dictionary (Office edition, 1984) at 640 ("should [shood] v. *p.t. of* shall. Used to express duty, obligation, necessity, probability, expectation, or contingency.") Mr. Poltz and his counsel told the jury that Mr. Poltz did it wrong in violation of his duty. That is negligence.

When there is no dispute on an issue, a party "will be bound by the testimony of his own witnesses as to how an accident causing injury occurred." *Kemalyan v. Henderson*, 45 Wn.2d 693, 704, 277 P.2d 372, 377-78 (1954). This is particularly so where the facts are "peculiarly within the knowledge" of the party. *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. 1955) (party bound by his testimony that driver stayed in lane). This rule is found as well in learned treatises and other states' jurisprudence: "A party may not ... rely on a defense, which he has directly or in effect repudiated by his own testimony, at least where there is nothing in the record to indicate that he was confused or uncertain in testifying." *Cogdill v. Scates*, 26 N.C. App. 382, 385, 216 S.E.2d 428, 430 (1975) *aff'd*, 290 N.C. 31, 224 S.E.2d 604 (1976) (quoting 32A C.J.S. Evidence s 1040(3), p. 778.); *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005) ("Undisputed contrary

evidence may also become conclusive when a party admits it is true.”) A party may, of course, try to explain away or repudiate testimony, and thereby raise a jury issue, but “[i]t is well-settled that a party is bound by his own testimony which is not corrected or explained.” *Ewanchuk v. Mitchell*, 154 S.W.3d 476, 481 (Mo. Ct. App. 2005). Mr. Poltz was candid and straightforward—he did not duck the facts or qualify, deny, or try to explain away his admission. Respondents straightforwardly confessed that Mr. Poltz set up the ladder unsafely when he shouldn’t have. With that fact no longer in dispute, the jury had no basis on which to find otherwise. *See City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005) (“proper review also prevents jurors from substituting their opinions for undisputed truth. When evidence contrary to a verdict is conclusive, it cannot be disregarded.”)

To the extent that, as Respondents argued below, fault is a matter of opinion, “opinions” and “central fact[s]” can be “conclusively established” by admissions. CR 36. There is no reason to treat a party’s unequivocal admissions under oath any less seriously, than his or her admissions in discovery.

Therefore, the trial court should have granted the motion, establishing as a matter of law that the defendant was negligent. The jury never had the chance to reach the other issues of liability and damages due to the flow-chart-like structure of the special verdict form, so a new trial would have been necessary to determine those questions.

C. The Jury Instructions Misleadingly Stated the Nature of Respondents' Duty to their Invitee.

If the issues should have been submitted to the jury at all, it should have come with full instructions appropriate to the facts. The jury properly found that Mr. Moore, who was at the Poltzes' home to do work for hire in connection with a larger business deal, was a business invitee. They should have been fully instructed on the heavy burden of care this placed on the Poltzes. The instruction they received, however, that a premises owner is responsible to maintain "the portions of the premises" used by the invitee, did not really address the facts. There was no defect of the house itself, such as a hole, broken step, or even a spill; the problem was that Mr. Poltz had set up a ladder in an unstable, unsafe way. The appropriate pattern instruction for that situation was WPI 12.07, which holds the owner liable for injuries caused by a "condition on the premises," of which the owner knew or should have known. Mr. Poltz mis-set the ladder, he knew of the condition of the ladder and the slippery rugs "on the premises" (because he put them there), he brought Mr. Moore to the ladder, required him to go up it, and did not tell him of the problem. Appellants' other proposed instruction, WPI 12.06.02, would have informed the jury that Mr. Poltz was liable if the jury found that the defective foot of the ladder was in his home long enough that he should

have noticed it. The plaintiff should not have been given the additional burden of having to convince the jury by reasoned argument that a specific duty should exist, which the law has already determined does exist.

V. CONCLUSION

For the reasons set forth above, the judgment should be vacated, negligence established by ruling, and the case remanded for a new trial.

DATED this 16th day of November, 2016,



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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On November 16, 2016, I served or caused to be served a copy of the foregoing document upon counsel for Respondents by hand and email at

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SIGNED this 16th day of November, 2016,


Emanuel Jacobowitz