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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 34457-6

STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

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RICHARD L. MOORE, JR. and MICHAELENE L. MOORE,  
Appellants,

vs.

RANDALL K. POLTZ and KATHRYN POLTZ,  
Respondents.

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RESPONSE BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

This appeal centers on two distinct issues. The first issue is whether there was sufficient evidence for a jury to find that Respondent Randall Poltz was not liable for Appellant Richard Moore's injuries. The answer to this question is in the affirmative, as there was substantial evidence presented at trial to support the jury's verdict.

The second question is whether the trial judge provided the jury with the proper jury instructions. This question must also be answered in the affirmative, as: (1) Appellants failed to provide this Court with an adequate record to review the issue; (2) Appellants failed to preserve his objections concerning jury instructions; and (3) the Court was correct in providing the jury with WPI 120.06.

## **II. STATEMENT OF THE CASE**

### **A. Facts Concerning The Accident**

The appeal before the bar had its genesis in an accident that occurred on November 18, 2005, at the then residence of Respondents Randall and Kathryn Poltz. On that day, Appellant Richard Moore agreed to caulk a ceiling at Randall and Kathryn's home in the home's entryway. Vol. I, p. 56. Randall set up an orchard ladder prior to Richard arriving at the

residence so Richard could reach the area to be caulked. Vol. III, p. 479. According to Randall, he set the ladder up and then “tested it” by climbing 6 feet and jumping up and down. Vol. III, p. 480. Randall further testified at trial that the ladder did not move when he tested it and that he felt it was secure. Vol. III, p. 480.

After dinner, Richard Moore went into the entryway to begin caulking. He did not notice anything wrong with how the ladder was set up. Vol. I, pp. 128-130. Indeed, Richard did not test the ladder’s stability prior to using it. Vol. I, pp. 128-130. Richard proceeded to climb up the ladder to begin caulking the ceiling. Vol. I, p. 67. The ladder then gave way, which resulted in Richard falling to the ground. Vol I, pp. 67-68. As a result, Richard suffered personal injuries. Vol. I, pp. 70-71. Neither Randall nor Kathryn were present at the time Richard fell to the ground. Vol. III, p. 482.

**B. Trial Testimony**

The bulk of Appellants’ appeal centers on Randall’s alleged admission at trial that he “miss-set” the ladder. The following exchange occurred at trial between Randall and counsel for Appellants:

Q. Now, sir, “yes” or “no,” did you previously testify under oath—the same oath that was just administered to you—at your deposition, that you miss-set the ladder?

A. Yes, I said that.

Mr. Arnold: No more questions, Your Honor.

Vol. III, p. 474, lns. 17-22. However, on cross-examination Randall testified that he felt, at the time, that he had set up the ladder correctly.

Vol. III, p. 479, lns. 11-13. He further testified that he tested the ladder by

bouncing on it. Vol. III, p. 480, lns. 11-16. After he bounced on the ladder,

Randall testified that the ladder did not budge. Vol. III, p. 480, lns. 11-12.

Randall was satisfied that the ladder was secure after he set it up:

Q. Did the ladder give you any concern, after your testing, of any stability issues?

A. No.

Vol. III, p. 480, lns. 17-19. Randall stated that he would have reset the

ladder if he had realized the ladder was miss-set in any way. Vol. III,

pp. 480-481.

**C. Trial Motions And Closing Argument**

After the close of the case, Appellants filed a CR 50 motion, arguing that the trial court should hold, as a matter of law, that Randall admitted to acting negligently and, therefore, only the damage portion of the case

should be submitted to the jury. Vol. III, pp. 486-492. Appellants' only support for this contention was Randall's testimony in a deposition that he had said he miss-set the ladder. The trial court rejected Appellants' argument, stating:

And there's evidence that he stated that he miss-set the ladder. There's also evidence that he set it up and tested it, and it didn't move, when he jumped on it.

I think that's going to be for the jury to establish, what a reasonable person would have done, under the circumstances.

Vol. III, p. 511, lns. 5-10.

In closing argument, defense counsel for Randall argued that hindsight is not the appropriate test to use to evaluate Randall's testimony; rather, the question was whether Randall used reasonable care *at the time* he set the ladder:

Now, they want to—they want to—they want to use [Randall's] hindsight against him. As he sits here, in trial, today. And he said, honestly, Yeah, I—I think I miss-set the ladder.

Okay. That's looking at hindsight. He's not saying that, at the time I set up the ladder, I thought I miss-set it.

He's saying, today, after everything's said and done, basically, I wish I—I wish I would have done something different. That doesn't create liability.

....

You have to look at it from the circumstances that presented to him, at the time he did it.

Vol. III, p. 569, lns. 22-25; Vol. III, p. 570, lns. 1-10.

**D. Objections To Jury Instructions**

Appellants provide little information to this Court concerning their proposed jury instructions. The trial transcripts reveal that when it came time to lodge objections and exceptions to the Court's proposed jury instructions, counsel for Appellants objected only to Jury Instructions Nos. 10 and 11. The basis for this objection is that Appellants were concerned there would be confusion as to the duty of a landowner to a business invitee.

Starting with the plaintiffs, are there any exceptions or objections to the Court's instructions, or lack thereof?

Mr. Jacobowitz: Your Honor, we do -- we do take an exception and object to the instructions now numbered -- No. 10 and 11, No. 17, and the portion of the Special Verdict Form which is Question 1.

The Court: Question what?

Mr. Jacobowitz: Question 1 of the directed verdict -- Special Verdict Form.

The Court: Okay.

Mr. Jacobowitz: Now, may I state the reasons, for the record?

The Court: Please do, or you won't have a record.

Mr. Jacobowitz: Thank you, Your Honor. The social guest instruction requires evidence that there -- that the party was a social guest, under the Tincani case.

The important issue is simply what the person --what status the person had, at the time of the injury – or the accident that caused the injury.

And the undisputed evidence, in the record, we believe, is that, at that time, he was there to do a -- Mr. Moore, the plaintiff, was there, at the invitation of the defendant, to do a job of work, for pay, as part of a larger business deal.

We believe that's undisputed, and been admitted and -- by the defendants, in fact, and that, therefore, social guest instructions are inappropriate.

The Court: So that covers 10 and 11.

Mr. Jacobowitz: Ten and 11. And I'm not dead sure that the -- that the phrasing of 10 doesn't somewhat contradict or confuse, with respect to -- in combination with, I think, the phrasing of Instruction No. 12. That the -- I suppose the jury could find that someone was both, under these instructions as, exactly they're written, and I just have noticed that, for the first time.

The Court: Well, let me just comment on that, while you're looking through your papers, for your next issue.

The Court believes there was evidence from which the defense could argue that Mr. Moore was there as a social guest. So that's the reason the Court's giving the instruction.

The record will speak for itself, in terms of what that evidence is.

But, then, in terms of the actual instruction -- I'm looking at the wrong book -- I believe that the language used, whether you find that it may be confusing, or not, is, in fact, a WPI, 120.08.01.

Mr. Jacobowitz: I believe it is, Your Honor.

The Court: Okay. Carry on.

Mr. Jacobowitz: Instruction No. 17.

The Court: Is it basically the mitigation instruction?

Mr. Jacobowitz: Mitigation instruction. As I understand it, defendants' sole basis to argue mitigation is that the plaintiff may have led to his pain and suffering, from his 2007 operation, by not quitting smoking, after the first several operations.

And we believe that -- well -- we believe that -- on the record, the only medical testimony -- only testimonial evidence, of an expert, is that it was merely a possibility.

There's no more-probable-than-not sworn evidence. And that, therefore, we don't believe it rises to the level of -- under the Cox case --

The Court: All right. And for --

Mr. Jacobowitz: -- to be able to do that.

The Court: And for the record, the Court is giving Instruction No. 17, because the plaintiff submitted medical records, including statements by Dr. Dahl, who was the surgeon performing surgeries on Mr. Moore, that the nonunion, after the first -- what I'll say major surgery; not the emergency room visit -- was probably largely secondary to Mr. Moore failing to stop smoking.

And the Court -- you're drawing a distinction between testimonial evidence, by -- by who came to court versus the medical records, that the plaintiff has presented. And there was certainly no limiting instruction being asked for or given that says the jury has to limit the purposes for which they consider the medical record.

So, in the Court's view, that is evidence before the Court, just like Dr. Brown's testimony.

And, based on that, the Court has allowed Mr. Kottkamp to argue mitigation with respect to having to undergo the second surgery -

- the second major surgery -- and the pain and suffering there associated, with that particular surgery.

Okay. What else?

Mr. Jacobowitz: On the Special Verdict Form on Question 1, for the same reason as our objection and exception to Instructions 10 and 11. We object to that question.

Also, because it does not go to any ultimate question of fact. And, therefore, seems inappropriate, and, possibly, confusing to the jury.

The Court: Okay. And the Court elected to give that question, which was closely modeled after the Question No. 1, in the Tincani case, which has been referenced here, by you, earlier.

And I know, off the record, all counsel and the Court discussed it. So, sort of, taking my lead from the Tincani decision, which there was not found to be anything wrong with that instruction, on appeal.

And more importantly, the Court thinks, rather than being confusing to the jury, it will actually assist the jury, in realizing that, before they proceed, to analyze negligence, they need to decide what the appropriate standard of care is.

And the instructions have been proposed, that set the standard of care for both a social guest and a business invitee.

And I understand that you disagree that there's sufficient evidence of the social guest, but I've already --

Mr. Jacobowitz: And I understand.

The Court: -- explained that I disagree with that.

But that's, from the Court's standpoint, the reason that that is -- Question No. 1 is included in the Special Verdict Form.

All right. Anything further –

Mr. Jacobowitz: Thank you, Your Honor.

The Court: -- from plaintiff?

Mr. Jacobowitz: That is all.

The Court: All right. Mr. Kottkamp, from defense?

Mr. Kottkamp: Just a few, Your Honor.

The Court: All right.

Mr. Kottkamp: So we will take objection to Exhibit No. 5, by failing to reference and apply primary assumption of risk.

The Court: Instruction No. 5?

Mr. Kottkamp: Your instruction – the Court's Instruction No. 5.

The Court: Oh, that I failed to give assumption of risk instruction.

Mr. Kottkamp: Right. You've already ruled on that, but I want to make the record that that doesn't include a defense of implied primary assumption of risk.

And we would take objection to the Court's Instructions No. 12 and 13, those dealing with the business invitee.

First of all, we don't think that there's sufficient evidence to give those instructions. But, more importantly, we believe that exhibit -- or not exhibit -- Instruction 13 sets forth the wrong duty, for a condition of a -- the premises owner's duty to a business invitee, for a condition on the property.

The Court: So, I'm curious about that. Let me look at what number -- the source for Number 13.

Oh. Let's see.

Oh. Wait a minute. What was its original number?

Mr. Kottkamp: It was a plaintiff's exhibit, which I don't have his -- a plaintiff's instruction, which I don't have, in front of me.

The Court: Oh, okay. It's originally Plaintiff's 10, which is a WPI, 120.06. So, if it's a wrong statement of the duty owed to a business invitee, then we better contact the pattern instructions committee.

Mr. Kottkamp: You've misunderstood.

The Court: I did.

Mr. Kottkamp: We -- it will be on exception that I have, that you failed to give Defense 15, which is 120.07, another standard instruction.

Vol. III, pp. 516-522.

### **III. ARGUMENT**

#### **A. Standard Of Review**

##### **1. Appellate Court Strongly Presumes a Jury Verdict is Correct**

An appellate court cannot substitute its judgment for that of a jury. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). A jury verdict cannot be overturned unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict. Id. When considering a jury verdict for substantial evidence, the

appellate court must consider all evidence and draw all reasonable inference in the light most favorable to the verdict. Ketchum v. Wood, 73 Wn.2d 335, 336, 438 P.2d 596 (1968). Furthermore, an appellate court will presume that a jury fairly and objectively considered the evidence. Phelps v. Wescott, 68 Wn.2d 11, 410 P.2d 611 (1966).

**2. The Adequacy of Jury Instructions are Reviewed *De Novo***

The adequacy of jury instructions are reviewed *de novo*. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). The test for sufficiency of instructions involves three determinations: (1) the instructions permit the party to argue that party's theory of the case; (2) the instructions are not misleading; and (3) when read as a whole, all the instructions properly inform the trier of fact on the applicable law. Douglas v. Freeman, 117 Wn.2d 242, 256-57, 814 P.2d 1160, 1168 (1991). "No more is required." Id.

"Prejudice is presumed if the instruction contains a clear misstatement of law; *prejudice must be demonstrated if the instruction is merely misleading.*" Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 860, 281 P.3d 289, 294 (2012) (Emphasis added).

**B. In A Negligence Action, The Proper Standard Is That Of A Reasonable Person; Not Hindsight**

In every negligence action, the standard that the jury must apply is that of a reasonable person. A defendant is only negligent if a jury finds, on a more probable than not basis, that the defendant failed to use the care of a reasonably careful person under the same or similar circumstances. Mathis v. Ammons, 84 Wn.App. 411, 416, 928 P.2d 431, 434 (1996). “Reasonable care is an external standard, based upon what society demands of an individual rather than upon the individual’s own notions of what is proper conduct.” *16 Wash. Prac. Tort Law and Practice 2:29* (4th Ed.). The mere occurrence of an accident and an injury does not lead to an inference of negligence. Marshall v. Bally’s Pacwest, Inc., 94 Wn.App. 372, 378, 972 P.2d 475, 478 (1999).

Whether a person breached a standard of care is evaluated by foresight and not 20/20 hindsight. As stated by the Washington Supreme Court in Winsor v. Smart’s Auto Freight Co.:

Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated.

25 Wn.2d. 383, 387, 171 P.2d 251, 253 (1946). In Vasquez v. Markin, Division 3 noted that, “[i]n Washington negligence is not a matter to be judged after the occurrence.” 46 Wn.App. 480, 489, 731 P.2d 510, 517 (1986).

Turning to the facts at hand, there was sufficient evidence presented to the jury that Randall acted with reasonable care. He tested the ladder and found it stable. Vol. III, p. 480. Randall confirmed that he would have reset the ladder had it moved when he tested it. Vol. III, p. 480. Randall testified that he felt he had appropriately set the ladder prior to the accident. Vol. III, p. 479-480.

Q. And when you set it up, did you think you had done it properly?

A. Yes.

Vol. III, p. 479, lns. 11-13.

In their appeal brief, Appellants hyper-focused on Randall’s testimony that he “miss-set” the ladder. However, as argued by defense counsel, this was hindsight informed by the fact an accident had in fact occurred. It was up to the jury to determine if Randall failed to use the care of a reasonably careful person under the same or similar circumstances.

There was sufficient evidence presented to the jury for them to find that Randall had in fact used reasonable care.

In addition, Appellants assert Randall's one statement at trial qualified as a binding admission. But, Appellant failed to provide the jury with any context for which to evaluate Randall's statement that he miss-set the ladder. In cross-examination, the jury was given the facts of the story that Appellants obviously wanted to keep from the jury, specifically, the fact Randall thought he set the ladder properly at the time, and actually tested the ladder to ensure it was stable. Words and statements must be evaluated in the context for which they are provided. Appellants failed to elicit any real testimony from Randall other than a confirmation he testified in his deposition. In light of *all the evidence* presented, there was sufficient evidence for the jury to conclude that Randall was not negligent in setting the ladder.

Thus, the jury verdict must be affirmed by this Court.

C. **Appellants Have Not Provided An Adequate Record To This Court To Determine Whether The Trial Court Erred By Not Giving Appellants' Proposed Jury Instruction**

Appellants contend that the trial judge should have given WPI 120.07 and WPI 120.06.02 instead of WPI 120.06.02. However,

Appellants did not include in their clerk's papers their proposed instruction based on WPI 120.07 for this Court to review. Therefore, their argument on this point should be outright rejected. See Story v. Shelter Bay Co., 52 Wn.App. 334, 345, 760 P.2d 368, 375 (1988) (party who assigns error to trial court decision has burden of providing an adequate record on appeal).

**D. Appellants Failed To Preserve Their Objection Concerning Jury Instructions**

Washington Civil Rules provide the following:

Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state *distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.*

CR 51(f) (emphasis added). To preserve an objection on appeal concerning jury instructions, “[t]he trial court must have been sufficiently apprised of any alleged error to have been afforded an opportunity to correct the matter if that was necessary.” Estate of Ryder v. Kelly-Springfield Tire Co., 91 Wn.2d 111, 114, 587 P.2d 160 (1978). Although an appeal court

may dispose of a jury instruction issue by applying a theory which was not precisely raised at the trial level, it can only do so if the trial court was adequately apprised of the party's position. Van Hout v. Celotex Corp., 121 Wn.2d 697, 702, 853 P.2d 908, 911 (1993).

Here, Appellants assert that the court should have given their proposed instruction numbers 10 and 11 because Appellants wanted the jury to consider "conditions on the property" that would include a defective ladder. See Appellants' Brief, p. 9. However, at the trial level Appellants *never took exception to the trial court not giving their proposed jury instructions*. Instead, Appellants only objected to the court's instruction numbers 10, 11, and 17. See Vol. III, pp. 516-533. Therefore, Appellants waived their argument that the trial court should have given their proposed instructions.

It is anticipated that Appellants will assert that their objection to the court's instructions was sufficient to preserve their objections. However, Appellants' objections at trial centered on the duty of a landowner to a social guest versus a duty to a business invitee. Vol III, pp. 516-522. Nowhere do Appellants assert that the failure to provide their proposed instructions foreclosed them from arguing additional theories of

negligence. In fact, even Appellants' own trial memorandum makes no mention of their theory that a defective ladder would qualify as a "condition on the property." CP 99-103.

Thus, this Court must reject Appellants' assertion that the trial court failed to provide proper instructions to the jury because Appellants waived said rights.

**E. The Trial Judge Was Correct To Give The Jury WPI 120.06.02**

Based on WPI 120.06, the trial judge in this case gave the following jury instruction:

An owner of premises owes to a business invitee a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonable safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use.

CP 0-161. Assuming Appellants have brought enough to the table to proceed on the jury instructions, their argument that the court should have given an instruction based on WPI 120.07 instead of WPI 120.06 is without merit. The commentary under WPI 120.06 indicates that WPI 120.07 should be used when the plaintiff alleges that the dangerous condition *was not caused by the owner/occupier*. Here, Appellants alleged

that the reason Richard fell from the ladder was due to Randall's negligence, i.e., setting up the ladder. Appellants' Complaint stated:

The injuries sustained by plaintiff are the direct and proximate result of the carelessness and negligence of the defendant in...negligently setting up the ladder, including but not by way of limitation, by placing said ladder wholly or partially on top of area rugs and floor coverings, causing said ladder to slide or slip...

CP 0-011. WPI 120.07 on the other hand applies to situations where the dangerous condition was *not caused* by defendant, but the allegation is the defendant failed to (a) discover the danger, and (b) take steps to guard against the danger. See e.g., Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 875 P.2d 621 (1994).

The heart of Appellants' entire case was an assertion that Randall negligently set up a ladder at his house. Hence, Appellants asserted it was affirmative conduct of Randall that cause Richard's injuries. Therefore, a jury instruction based on WPI 120.06 was appropriate. <sup>1</sup>

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<sup>1</sup> Plaintiff cites to WPI 120.06.02 in passing, but provides no analysis. WPI 120.06.02 is also inappropriate because, like WPI 120.07, it applies to situations where the owner did not cause or create the dangerous condition. See WPI 120.06.02.

**IV. CONCLUSION**

This Court should affirm the jury verdict as there is sufficient evidence to justify the jury's verdict that Respondents did not breach a duty of care to Appellants. Further, this Court should affirm the trial court's decision to issue a jury instruction based on WPI 120.06.

DATED this 7<sup>th</sup> day of March 2017.

EWING ANDERSON, P.S.

By: 

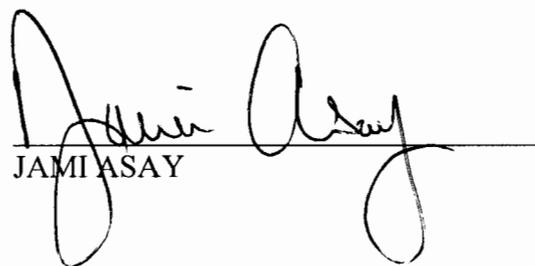
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CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>TH</sup> day of March 2017, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

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