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MAY 17 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 35589-6-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

DONALD D. IVERSON, JR, et al,

Appellants

v.

DUANE MUNN, et ux; et al,

Respondents

REPLY BRIEF OF APPELLANT

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III. REBUTTAL

The Appellants agree with the Respondents that whether or not to give a particular instruction to a jury is a matter within the discretion of the trial court. *Clark County v. McManus*, 185 Wn.2d 466, 470, 372 P.3d 764 (2016). What the Respondents' brief failed to mention though is that the trial court is *required* to submit instructions to the jury on a theory of the case where it is supported by substantial evidence. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996) (footnotes omitted). "The supporting facts for a theory and instruction must consist of more than speculation and conjecture." *Savage v. State*, 127 Wn.2d 434, 448–49, 899 P.2d 1270, 1277 (1995), citing *Board of Regents of UW v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978). It is because *both* parties presented evidence that the regulations contained in the Plaintiffs' proposed jury instructions #12 and 14 were violated that it was an abuse of the trial court's discretion to decline to include the instructions in its charge to the jury. (See RP 37-47, 147-154, 233-236) The fact that the stairs in shed #4 were not safe is the major component of the Appellants' theory of the case.

A. Plaintiffs' Proposed Instructions #12 and 14

The Iversons' expert witness, Ms. Gill, testified at trial that the stairs and handrails in shed #4 not did not meet the applicable state laws in terms of what is required for safety in their use. In fact, as noted above there is no dispute that the two regulations set forth in proposed jury instructions #12 and #14 apply to the staircase in shed #4. The proposed jury instructions were sought to be introduced for the sole purpose of clarifying Ms. Gill's testimony about the condition of the stairs on the night in question. She measured how high the steps were, how deep the treads were, how high the handrail was, the slope of the overall stairway and her general impressions of the condition of the metal out of which the stairs were constructed. She concluded the stairs in shed #4 were hazardous and created an unreasonable risk of harm for anyone using them. (RP 246-272) Even though in its prior ruling the court said it would allow the parties "to address the issues regarding regulations that apply to these particular stairs[,] which include[ed] the WAC provisions," (RP 236) later, when it came time to charge the jury the court determined they would be confused if they were allowed to read the verbatim content of the two regulations set forth in jury instructions #12 and #14. The

Respondent was unable to explain just *how* the jury would be confused by knowing what the WACs said and the court neglected to elaborate as well. Without knowing what the allegedly violated regulation said the jury had a big chunk of information missing when it was told about the shed and the size, shape and dimensions of the staircase and handrail and how it violated two sections of the code. Allowing the jury to read the two sections of the code and apply the law (or find it inapplicable as the case may be) to the facts they heard does *not* turn this into a WISHA case as Respondent argued because that was not Mr. Iverson's theory of the case. Contrary to Respondent's argument, by *excluding* proposed jury instructions #12 and #14, the jury instructions as charged are confusing, incomplete and did not allow Mr. Iverson to argue his theory of the case because it is not likely a jury of one's peers understands the nuances of how and why a staircase provides safety to a user. Yet to take away the jury's ability to even *read* the regulations because it will "be too confusing" is paternalistic and an abuse of the court's discretion. The jury was free to do what it deemed best after hearing *all* the evidence and reading the jury instructions in their entirety, including proposed instructions #12 and #14, which were part of Mr. Iverson's theory of the case. Under the circumstances presented here the jury was left

to make critical decisions regarding Mr. Iverson's theory of liability without full knowledge of the facts and circumstances in play on the evening he was injured. Refusing to allow a jury instruction that is supported by the evidence is, unquestionably, an abuse of the court's discretion.

The Respondents assert the court properly refused to give the Plaintiffs' proposed jury instructions regarding the specific WISHA regulation violations due to the confusion it would cause the jury as to the appropriate standard of care they were to apply to the facts. The Respondents argue that because the Iversons were permitted to introduce *general* information about how the stairs were hazardous through Ms. Gill, they had competently argued their theory of the case because the jury was given an instruction that a WISHA violation may be considered evidence of negligence. That logic is non-sensical. That is like asking a jury in a criminal case to find the defendant guilty of theft in the first degree, based on contrary evidence, without informing the jury of the elements of first degree theft.

At trial Ms. Gill, the Iversons' expert, discussed her opinion as to whether the stairs in shed #4 comported with industry standards. Yet, after her testimony, at least three jury members had more

questions about the regulations that applied to stairway safety. (CP at 489-491) The jury questions could not be answered by Ms. Gill as the attorneys agreed they called for legal conclusions, but the questions themselves factually demonstrate the jury did not understand the purpose of Ms. Gill's testimony. The specifics of legal regulations as applied to a set of stairs are outside the knowledge and expertise of most lay persons. This jury could have benefitted from the information contained in the wording of the regulations at issue. Failing to give the jury the Iversons' proposed instructions #12 and #14 was an abuse of the court's discretion.

Was the error harmless? No, it wasn't, for two reasons. First, the exclusion of the WAC provisions found in the Iversons' proposed jury instructions #12 and #14 prevented them from comprehensively arguing their theory of the case to the jury. Second, because the ultimate jury verdict was returned in favor of the Respondents it creates a presumption that the court's erroneous rulings affected (or presumptively affected) the jury's verdict. The error was not harmless; thus, reversal is required. See, *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

B. Court's Instruction #12 (Respondent's Proposed Instruction #17)

The Respondents also claim the court properly allowed their proposed jury instruction #17 regarding the open and obvious hazard standard of care. As an initial matter, the Respondents maintain the Iversons did not preserve the issue for appeal. The parties went back and forth arguing this jury instruction on the last day of trial. It is not understood why the Respondents would say the issue was not preserved for appeal. (RP 656-658).

The Iversons repeat their argument from their Appellants' brief regarding the applicable standard of care to business invitees, which the parties agree Mr. Iverson was on the night he was injured. (App. Br. 11-14) The Respondents found this part of the brief confusing, so a bit of clarification may be needed. Even if one assumes, without conceding, evidence presented at trial supports the above quoted section of the Restatement, the defendants' proposed jury instruction #17 merely informs the jury of *a portion of an applicable law*, it clearly does not include *the entire text* of the applicable law. In *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 72 P.3d 1097 (2003), a case on which the court and parties heavily relied, the court held:

. . . the WPI drafters, citing *Tincani*, 124 Wn.2d at 139, 875 P.2d 621, commented that in "cases involving invitees and

known or obvious dangers, *the jury should be instructed in accordance with both Sections 343 and 343A of the Restatement*. 6A Washington Pattern Jury Instructions: Civil, at 26 (4th ed.2002).

Id. at 830. Section 343 states:

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

(a) knows or by the exercise of reasonable care would discover the condition, *and should realize* that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) *fails to exercise reasonable care to protect them against the danger.*

Restatement, *supra*, § 343. Although the *Suriano* court did not hold it was an abuse of discretion not to include both sections in a jury instruction it did say it was the better practice. *Suriano*, 117 Wn. App. at 830–31. *Tincani, supra* was a Division III case that was eventually settled by the supreme court, making it mandatory authority. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994). In citing this case the Iversons were attempting to demonstrate the *Tincani* case set forth a 2-part test when the case

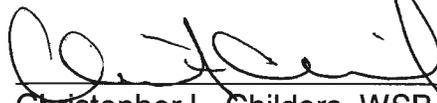
before the court involves invitees and known or obvious dangers. See 6A Washington Pattern Jury Instructions: Civil, at 26 (4th ed.2002). It is conceded it was inartfully worded in the Appellant's brief. It is not the Defendants' proposed instruction #17 that caused the court to abuse its discretion, it is that the court failed to give the entire instruction i.e., Section 343 of the Restatement of Torts (Second), which states: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (c) *fails to exercise reasonable care to protect [an invitee] against the danger.*" It is this error, coupled with the court's refusal to instruct the jury on the specific WAC violations set forth in plaintiff's jury instructions #12 and #14 that rendered the Iversons unable to argue their theory of the case. The jury heard a portion of an applicable defense to premises liability but was not afforded the opportunity to hear the law governing the Iversons' theory of the case regarding what makes a stairway safe. By including defendants' proposed jury instruction #17, undue weight is placed on one small incomplete section of the Restatement, which was misleading to the jury. It was an abuse of discretion to allow the defendants' proposed jury instruction #17 made even more egregious by the court's refusal to grant two of the Iversons' jury instructions, which would have

clarified their theory of the case. Because the trial outcome was not favorable the presumption of prejudice applies.

IV. CONCLUSION

Based on the arguments set forth above, the Iversons respectfully request this court determine the trial court abused its discretion in failing to instruct the jury with their proposed instructions #12 and #14. Likewise, its inclusion of jury instruction #12 (Respondent's proposed instruction # 17) was also an abuse of discretion. The exclusion of the Iversons' proposed instructions #12 and #14 and the inclusion of jury instruction #12 constitute reversible error. For this reason, the Iversons request their case be reversed and remanded back to the Benton County Superior Court for retrial.

Respectfully submitted this 15th day of May, 2018



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CERTIFICATE OF SERVICE

I certify that on the 16th day of May, 2018, I caused a true and correct copy of Reply Brief of Appellant to be served on the following individuals in the manner indicated below:

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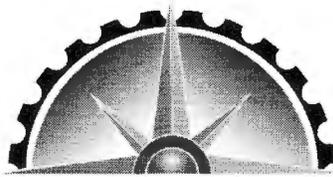
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May 16, 2018

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Re: Case # 35589-6 III

Dear Ms. Townsley:

Enclosed please the original and a copy of the Reply Brief of Appellant.

Thank you for your courtesies.

Sincerely,

A handwritten signature in cursive script, appearing to read "Teresa Esquivel-Salas".

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Enclosure as noted

cc. Daniel Hasson