

**FILED**

FEB 20 2018

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

NO 35589-6-III

Superior Court No. 15-2-02620-5

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

---

BRIEF OF APPELLANT

---

Christopher L. Childers  
WSBA No. 34077  
Smart Law Offices P.S.  
309 North Delaware Street, PO Box 7284  
Kennewick, WA 99336  
509-735-5555  
Attorneys for Appellant

**I. TABLE OF CONTENTS**

I. TABLE OF CONTENTS ..... i

II. TABLE OF AUTHORITIES..... ii

III. INTRODUCTION..... 1

IV. ASSIGNMENTS OF ERROR..... 1

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

VI. STATEMENT OF THE CASE ..... 3

VII. ARGUMENT ..... 5

    A. SUMMARY ..... 5

    B. STANDARD OF REVIEW..... 6

    C. ANALYSIS..... 7

        1. Plaintiffs' Proposed Jury Instructions #12 and #14 ..... 7

## II. TABLE OF AUTHORITIES

### Cases

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012) .....	6, 12
<i>Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 160</i> , 151 Wn.2d 203, 87 P.3d 757 (2004).....	14
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996).....	6, 11
<i>Hamilton v. Dep't of Labor &amp; Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988) .....	7
<i>Herring v. Dep't of Soc. &amp; Health Servs.</i> , 81 Wn. App. 1, 914 P.2d 67 (1996).....	6
<i>Intalco Aluminum Co. v. Dep't of Labor &amp; Indus.</i> , 66 Wn. App. 644, 663, 833 P.2d 390 (1992) .....	7
<i>State v. Britton</i> , 27 Wn.2d 336, 341, 178 P.2d 341 (1947).....	14
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	15

*Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 72 P.3d 1097  
(2003), ..... 12, 13

*Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)... 6, 10

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122  
Wn.2d 299, 339, 858 P.2d 1054 (1993). ..... 6

**Statutes**

RCW 4.84.010..... 16

**Other Authorities**

Restatement (Second) of Torts, § 343A(1)(1965) ..... 11, 12, 13

**Rules**

RAP 18.1..... 16

### III. INTRODUCTION

This appeal concerns a personal injury action Mr. Duane D. Iverson and his wife filed against the defendants who were owner/operators of an onion storage building with a defective staircase that caused him to fall, resulting in serious bodily injuries. After a jury trial it was determined that the defendants were not negligent in maintaining the staircase. Mr. Iverson contends the trial court gave erroneous jury instructions that prejudiced his right to a fair and impartial trial.

### IV. ASSIGNMENTS OF ERROR

*(A) The trial court committed reversible error when it refused to give the plaintiffs' jury instruction # 12, which stated:*

An administrative rule provides that on fixed industrial stairs:  
When risers are used, each tread and the top landing of a stairway should have a nose extending ½ to one inch beyond the face of the lower riser.

Noses should have an even leading edge.

All treads must be reasonably slip resistant and the nosing must be of nonslip finish. Welded bar grating treads without nosings are acceptable if the leading edge can easily be identified by employees descending the stairway and the tread is serrated or is nonslip.

Rise height and tread width must be uniform throughout any flight of stairs including any foundation structure used as one or more treads of the stairs.

CP at 102

*(B) The trial court committed reversible error when it refused to give the plaintiffs' proposed jury instruction # 14, which stated:*

An administrative rule provides that on stairway railings:  
A standard railing must meet the following requirements:  
(1) The railing has a top rail, intermediate rail, and posts.  
(2) The railing height is between thirty-six and forty-two inches nominal from the upper surface of the top rail to the floor, platform, runway or ramp level.  
(3) The top rail is smooth.  
(4) The intermediate rail is approximately halfway between the top rail and the floor, platform, runway or ramp.

CP at 104.

*(C) The trial court committed reversible error when it included in its charge to the jury, instruction #12 (CP at 512), which was the Defendants' Proposed Jury Instruction #17 stating:*

An owner of premises is not liable to its business invitees for physical harm caused to the business invitees by an activity or condition of the premises whose danger is known or obvious to the business invitees, unless the owner should anticipate the harm despite such knowledge or obviousness.

CP at 56.

*(D) The cumulative error doctrine may apply due to the trial court's errors.*

## **V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

*(A) Because the evidence supports the plaintiffs' proposed jury instructions #12 and #14 regarding the defendants' alleged violation of specific administrative regulations, did the trial court's refusal to include the two proposed instructions in its charge to the jury prejudice the plaintiffs chance for a fair trial such that reversal is required?*

*(B) Was the court's inclusion of defendants' proposed jury instruction #17 in its charge to the jury (as instruction #12) erroneous and prejudicial such that reversal is required?*

*(C) Does the cumulative error doctrine apply under the specific facts of this case?*

## **VI. STATEMENT OF THE CASE**

There is no disagreement between the parties regarding the facts that led up to Mr. Iverson's presence in the building owned by the defendants. Mr. Iverson had been an employee of Sun Heaven Farms (Sun Heaven) from 2007 through 2015. Sun Heaven is owned in part by the defendants and four other farmers and farming

entities. Sun Heaven exists to provide operational services and administrative support to its five owners. Mr. Iverson's primary responsibility at Sun Heaven was the *essential* duty of maintaining the refrigeration, burner and air systems in the onion sheds for the owners, including the defendant's onion sheds. Onions being stored are very sensitive to temperature fluctuations and as such, must be constantly monitored and calibrated. CP at 59, 416, 422; Report of Proceedings (RP)<sup>1</sup>, Vol. I at 163-164.

On September 15, 2013, a violent storm passed through the area causing the loss of electrical power to the onion sheds. At approximately 9:00 p.m. Mr. Iverson was called into work to check the sheds to ensure all the equipment was properly operating. He had to check each shed's equipment separately. The cooling and electrical systems in shed #4 are located below ground; access is gained through an indoor staircase. On the night in question, as Mr. Iverson descended the stairs in shed #4 his foot slid out from under him and he fell the rest of the way down the stairs, sustaining severe injuries. CP at 17, 59-60, 427-433.

---

<sup>1</sup> The RP consists of three volumes numbered sequentially and divided into three volumes (I, II and III). All citations to the RP in this brief refers first to the volume number and then the page number.

On November 16, 2015, the plaintiffs filed this lawsuit alleging breach of duty to maintain the staircase in shed #4 in a safe condition and/or failing to place warnings in the vicinity regarding the dangerousness of the staircase. CP at 1-4, 16-19. At the conclusion of a 12-person jury trial the defendants were exonerated of any liability. CP at 537-550.

## **VII. ARGUMENT**

### **A. SUMMARY**

In his complaint the plaintiffs pled a general premises liability theory based on the alleged negligence of the defendants. Specifically, that the defendants' failure to maintain the stairway in onion shed #4 in a reasonably safe manner and/or whether warnings and other safety measures should have been utilized to protect those who used the stairs from unreasonable harm. The jury determined the defendants were not negligent. Mr. and Mrs. Iverson appeal the trial court's erroneous and prejudicial decision to refuse to give two of his proposed jury instructions as well as its decision to include the defendant's instruction regarding an express definition of premises liability. The errors are prejudicial, thus reversible.

## B. STANDARD OF REVIEW

The court's decision on whether to give a particular instruction is reviewed for abuse of discretion. *Fergen v. Sestero*, 182 Wn.2d at 802-803. A trial court abuses its discretion in refusing to give a jury instruction if it bases its ruling on an erroneous view of the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Jury instructions are generally sufficient if they are: (1) supported by the evidence; (2) allow each party to argue its theory of the case; and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). If any of these elements are absent, the instruction is erroneous. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289, 294 (2012)(citation omitted). "An erroneous instruction is reversible error only if it prejudices a party." *Anfinson*, 174 Wn.2d at 860. "An error is prejudicial if it affects or presumably affects the outcome of the trial." *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23, 914 P.2d 67 (1996)(citing *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)). When establishing whether a jury

instruction could have confused or misled the jury, the reviewing court examines the instructions in their entirety.” *Intalco Aluminum Co. v. Dep’t of Labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992) citing *Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 573, 761 P.2d 618 (1988).

### C. ANALYSIS

#### 1. Plaintiffs’ Proposed Jury Instructions #12 and #14

The issue the Iversons’ proposed jury instructions #12 and #14 speak to had its genesis on the first morning of trial, August 21, 2017. RP Vol. I at 29-35. At that time the defendants’ argued a motion in limine asking the court to limit plaintiffs’ witness, Ms. Joellen Gill’s, testimony regarding evidence of WAC violations due to the condition of the handrail and stairs in onion shed #4 as set forth in her report. The court initially granted the defendants’ motion determining the potential for confusion regarding the liability issues outweighed any relevance the WISHA violations would reveal since according to the court, “Clearly this is not a WISHA case.” RP Vol. I at 48-49. However, after the testimony of Duane Munn (one of the defendants), the plaintiffs asked the court to reconsider its earlier ruling prohibiting any mention of WAC

regulation violations because Mr. Munn raised the issue of worker safety in relation to the regulations he was required to follow on more than one occasion during his testimony. The court determined that because Mr. Munn "opened the door" to testimony regarding the WAC regulations the parties, including the plaintiffs,<sup>2</sup> should be allowed to address the regulations that applied to the stairway in onion shed #4. Vol. II RP at 220-222. For this reason, the plaintiffs' expert, Ms. Gill, testified in detail about what she found were serious stair and handrail defects in onion shed #4 that violated two specific provisions of the administrative code. Vol. II RP at 242-244, 260-261, 269-270. Based on Ms. Gill testimony the Iversons proposed jury instructions #12 and #14, which merely quoted the law as it relates to stair and handrail safety on the work site. The instructions make no reference to or implication as to whether the defendants' violated the regulations. The simple, factual proposed instructions did nothing to take away the final decision regarding liability from the jury. Yet the defendants argued: "counsel can argue about the [WAC] standards, but actually having them published as instructions to the jury, basically,

---

<sup>2</sup> The court misspoke when it said, "And I think, based on the testimony as it came out, that the *defense* [sic] should be allowed to address the regulations that apply to the stairs." Read in context, there can be no doubt the court was referring to the plaintiffs.

tells the jury they apply [as a matter of law]. And our position is that they do not.” The Iversons argued the jury was entitled to know what the actual regulation said to be able to determine whether the evidence was sufficient to establish negligence. The court determined the plaintiffs’ proposed instructions #12 and #14 were not appropriate because: “I think the plaintiffs can still argue their theory of the case [without them]. But I think those instructions [#12 and #14] would give undue weight to the particular codes.” Vol. III 494-501.

The court abused its discretion in failing to charge the jury with the Iversons’ proposed jury instructions #12 and #14. Both are correct statements of the law and are supported directly by Ms. Gill’s testimony. The exclusion of the proposed instructions, in essence, barred the Iversons from arguing to the jury their theory of defendants’ ultimate liability for Mr. Iverson’s injuries. As noted above, on *the first day of trial* the court ruled Ms. Gill could testify about specific WACs that had been violated regarding since defendants’ witness Munn “opened that door.” That being the case it is an abuse of discretion to then prohibit the jury from seeing and understanding what the two allegedly violated “administrative rules provide.” CP at 102, 104. That knowledge would have given the

jury a greater understanding of Ms. Gill's testimony in comparison to the defendants' witnesses. Her testimony discussed her opinion as to whether the defendants' conduct 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 questions could not be answered by Ms. Gill as the attorneys agreed they called for legal conclusions, but the circumstances factually demonstrate the jury did not quite understand her testimony. Legal regulations 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? The Iversons assert it was not for two reasons. First, they were prohibited from comprehensively clarifying their theory of the case and second, the jury verdict was returned in favor of the defendants. As such the court's erroneous decision affected or presumptively affected the result of the case. The error was not harmless; thus, reversal is required. See, *Thomas v. French*, 99 Wn.2d at 104, *supra*.

## 2. Defendants' Proposed Jury Instruction #17

In this case, at least during the opening statements and witness testimony, there was no direct mention of the alleged liability of either party, which is proper since that decision is for the jury. However, during arguments on proposed jury instructions the defendants successfully argued for the inclusion of its proposed instruction #17 that begins "An owner of premises *is not liable to its business invitees . . .*"<sup>3</sup> CP at 56. The defendants' proposed jury instruction is a modified form of the Restatement (Second) of Torts, § 343A(1)(1965), which states:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Defendants' proposed jury instruction #17 is a correct statement of the law but that's all it is. It does not satisfy the rule of law from the *Bodin* case, which held that jury instructions are sufficient if they: (1) are supported by the evidence; (2) allow each party to argue its theory of the case; and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Bodin*, 130

---

<sup>3</sup> The full text of the proposed instruction is set forth above under section II. Assignments of Error.

Wn.2d at 732. If any of these elements are absent, the instruction is erroneous. *Anfinson*, 174 Wn.2d at 860. Even if one assumes, without conceding, evidence presented at trial supports the above quoted section of the Restatement, defendants' proposed jury instruction #17 merely informs the jury of a *portion of an applicable law*, it clearly does not include *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. Perhaps most importantly the court abused its discretion in allowing proposed jury instruction #17 because doing so completely prohibited the Iversons from arguing their theory of the case since the jury was not allowed to receive an instruction on what legally makes a stairway safe even though they were informed of the defense to any defendant liability. Additionally, when reading the court's jury instructions as a whole, wouldn't the court's rationale for denying the Iversons' proposed instructions #12 and #14, i.e., that it "thinks the plaintiffs can still argue their theory of the case [without them] and that including "those instructions [#12 and #14] would give undue weight to the particular codes" apply without difficulty to the *defendants'* proposed jury instruction #17, which places undue weight on one small incomplete section of the Restatement? 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 similar instructions for the Iversons.

Because the court's error was an abuse of discretion the issue now becomes whether the error was harmless. An erroneous jury instruction is harmless if it does not prejudice the substantial rights of the part[ies] ..., and under no circumstances affected the final outcome of the case. *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). On the other hand, a prejudicial error affects or presumptively affects the results of a case and is prejudicial to a substantial right. *Id.* When considering an erroneous instruction, the court of appeals *presumes prejudice*, subject to a comprehensive examination of the record:

When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, [here, the defendants] the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. However, it becomes our duty, whenever such a question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial.

*Id.* at 341 (citation omitted). See *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, Dist. No. 160, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). Here, the court's error was not harmless, and reversal is required.

### 3. Cumulative Error Doctrine

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). If this court disagrees the above erroneous decisions, taken alone, were not so prejudicial as to warrant reversal, the Iversons contend the cumulative error doctrine applies. First, failing to instruct the jury about the law that applied to stairwells on a work site left them with incomplete information even though they were asked to make a legal liability determination utilizing the same regulations with which the court refused to instruct them. As such, their verdict cannot be considered reliable. Second, as explained above, the trial court's decision to give defendants' proposed jury instruction #17 (as the court's instruction #12) not harmless error. Third, the combination of errors, where the Iversons were not permitted to present their theory of liability yet the defendants were allowed a specific *liability defense* instruction is completely one sided and an abuse of discretion. This cannot under any circumstances be said is harmless error. The Iversons view the errors regarding the jury instructions explained in sections (1) and (2) above as warranting reversal on their own merits. If this court disagrees, they argue that

due to the cumulative error doctrine they were denied a fair trial and reversal is required.

### VIII. ATTORNEY FEES

If successful in their appeal, the Iversons request an award of attorney fees as allowed under RAP 18.1 and RCW 4.84.010.

### IX. CONCLUSION

Under the specific facts of this case the trial court committed reversible error in instructing the jury, both as to an instruction given and the two proposed by the Iversons that it failed to give. If this court disagrees, the Iversons suggest without conceding the cumulative error doctrine applies such that a new trial is warranted.

Respectfully submitted this <sup>8<sup>th</sup></sup> day of February 2018.



Christopher L. Childers, WSBA #34077  
Smart, Connell, Childers & Verhulp P.S.  
309 N. Delaware Street/PO Box 7284  
Kennewick, WA 99336  
(509) 735-5555

2<sup>nd</sup> AMENDED CERTIFICATE OF SERVICE

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

Counsel for: Respondent, Duane Munn, et ux, et al

(X) U.S. Mail

Name: Daniel Hasson

Address: Davis, Rothwell, Earle, & Xochihua

200 SW Market Street, Ste. 1800

Portland, OR 97201

(X) U.S. Mail

Clerk of the Court of Appeals

Renee S. Townsley

500 North Cedar Street

Spokane, WA 99201

(X) U.S. Mail

By:  \_\_\_\_\_  
Allison DeWald, Legal Assistant