

FILED
Court of Appeals
Division III
State of Washington
4/17/2018 2:22 PM

NO. 355896

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DONALD DUANE IVERSON JR. and LIBRA JEAN IVERSON,
Individually,

Appellants,

v.

DUANE MUNN and JANE DOE MUNN, individually and as a marital
community, and DUANE MUNN & SONS FARMS, LLC., a Washington
corporation doing business in the State of Washington,

Appellees

RESPONSE BRIEF OF APPELLEES

Daniel S. Hasson
WSBA No. 42206
DAVIS ROTHWELL
EARLE & XÓCHIHUA P.C.
Attorney for Defendants Duane Munn, Jane
Doe Munn, and Duane Munn & Sons
Farms, LLC
200 SW Market Street, Suite 1800
Portland, OR 97201
Phone: (503) 222-4422
Email: dhasson@davisrothwell.com

Contents

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	2
III.	SUMMARY OF RESPONDENT’S ARGUMENTS	2
IV.	RESPONSE TO FIRST TWO ASSIGNMENTS OF ERROR.....	4
	A. Standard of Review.....	5
	B. Argument	6
V.	RESPONSE TO THIRD ASSIGNMENT OF ERROR.....	12
	A. Standard of Review.....	13
	B. Preservation.....	14
	C. Argument	16
VI.	ATTORNEY FEES.....	19
VII.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Boeing v. Harker-Lott</i> , 93 Wn. App. 181, 968 P.2d 14 (1998).....	5
<i>Crossen v. Skagit County</i> , 100 Wn.2d 355, 669 P.2d 1244 (1983)	15
<i>Estate of Ryder v. Kelly-Springfield Tire Co.</i> , 91 Wn.2d 111, 587 P.2d 160, 16 A.L.R.4th 129 (1978)	15
<i>Fergen v. Sestero</i> , 182 Wn.2d 794, 810, 346 P.3d 708 (2015).....	passim
<i>Galvan v. Prosser Packers, Inc.</i> , 83 Wn.2d 690, 521 P.2d 929 (1974).....	15
<i>Gammon v. Clark Equip.</i> , 104 Wn.2d 613, 707 P.2d 685 (1985).....	6
<i>H.B.H. v. State</i> , 197 Wn App 77, 387 P3d 1093 (2016).....	19
<i>In re Det. of Taylor-Rose</i> , 199 Wn. App. 866, 401 P.3d 357 (2017).....	5
<i>In re Pers. Restraint of Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	18, 19
<i>Kave v. McIntosh Ridge Primary Rd. Ass’n</i> , 198 Wn App 812, 394 P3d 446 (2017).....	19
<i>Koker v. Armstrong Clark</i> , 60 Wn. App. 466, 804 P.2d 659 (1991)	11
<i>Millies v. LandAmerica Transnation</i> , 185 Wn.2d 302, 372 P.3d 111 (2016).....	14
<i>Minert v. Harsco Corp.</i> , 26 Wn. App. 867, 614 P.2d 686 (1980)	15
<i>Nelson v. Mueller</i> , 85 Wn.2d 234, 533 P.2d 383 (1975)	15
<i>Roumel v. Fude</i> , 62 Wn.2d 397, 383 P.2d 283 (1963).....	15
<i>Sargent v. Safeway Stores</i> , 67 Wn.2d 941, 410 P.2d 918 (1966)	11
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	19
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	14
<i>State v. Walters</i> , 162 Wn. App. 74, 255 P.3d 835 (2011).....	14
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996)	5, 6
<i>Terrell v. Hamilton</i> , 190 Wn. App. 489, 358 P.3d 453 (2015).....	5, 13
<i>Van Hout v. Celotex Corp.</i> , 121 Wash 2d 697, 853 P2d 908 (1993).....	15

Washburn v. City of Fed. Way, 178 Wn.2d 732, 310 P.3d 1275
(2013).....15

Rules

CR 51(f) 14, 15
RAP 18.1..... 19
RAP 2.5(a) 14
RCW 4.84.010 19

I. INTRODUCTION

This is a personal injury action that arose out of on-the-job injuries plaintiff Donald Iverson sustained when he fell down a set of stairs in defendants' onion storage shed. Plaintiffs brought a common law negligence claim based on premises liability. They alleged the stairs were hazardous, and that defendants should have warned plaintiff of the danger in using the stairs. Defendants responded that they were not negligent, and that to the extent that the stairs were somehow hazardous, the hazard was open and obvious to Mr. Iverson because he had used those stairs many times before.

At trial, plaintiffs were permitted to introduce the opinion of an expert that defendants violated certain WISHA regulations governing stairs and handrails. The trial court instructed the jury that it could consider violations of the regulations as some evidence of negligence. And plaintiffs were permitted to argue to the jury that defendants' alleged violations of the WISHA regulations evidenced negligence. But the trial court refused to provide the specific wording of the WISHA regulations as jury instructions on the grounds that it may confuse the jury on the appropriate standard of care.

Defendants argued that Mr. Iverson fell because he was in a hurry, and that to the extent that the stairs were hazardous at all, the hazard was

“open and obvious” to Mr. Iverson because he had used the stairs so many times before. The trial court properly instructed the jury regarding Washington law as it relates to open and obvious hazards.

The jury returned a unanimous verdict in favor of defendants. Plaintiffs appeal, assigning error to the trial court’s refusal to give the specific wording of the WISHA regulations as jury instructions. They also assign error to the trial court’s decision to give defendant’s proposed instruction relating to open and obvious hazards. All three assignments of error are subject to the abuse of discretion standard. To prevail, plaintiffs must establish not only that the trial court abused its discretion, but also that plaintiffs were prejudiced. The trial court did not abuse its discretion, and plaintiffs were not prejudiced, so this Court should affirm the judgment below.

II. STATEMENT OF THE CASE

Defendants do not dispute plaintiffs’ statement of the case.

III. SUMMARY OF RESPONDENT’S ARGUMENTS

There are two issues in this case, and both are related and straightforward. After a jury found in favor of defendants, plaintiffs appealed, assigning error to the trial court’s refusal to give two jury instructions plaintiffs had proposed, as well as assigning error to the trial court’s decision to give a jury instruction that defendant had proposed.

The issue relating to the two jury instructions that plaintiffs proposed, and which the trial court refused to give, may be analyzed together. They are closely related, and the trial court refused both instructions for the same reason, and in the same decision. Plaintiffs proposed instructing the jury regarding the specific language of certain WISHA regulations relating the stairs and handrails. Defendants objected to the instructions on the grounds that this is not a WISHA case, and that the instructions would likely inject confusion into jury deliberations. This was a common law negligence claim based on premises liability. Plaintiffs were permitted to put on evidence of violations of the regulations. The trial court instructed the jury that violation of a regulation is some evidence of negligence. And plaintiffs were allowed to argue their theory of the case, including presenting arguments to the jury that defendants violated the WISHA regulations, and that evidence of such violations was evidence of negligence. The trial court did not abuse its discretion when it refused to give the instructions because plaintiffs were allowed to argue their theory of the case without the instructions.

Plaintiffs also assign error to the trial court's decision to give a jury instruction that accurately stated Washington law regarding premises liability. Not only do plaintiffs agree that it is an accurate statement of the law, but they failed to present the objections to the instruction that they

now make on appeal, so they failed to preserve their arguments. At any rate, because the instruction was a correct statement of the law, this Court reviews the decision to give the instruction for an abuse of discretion. The instruction given related to the “open and obvious” defense to a claim for premises liability, which was one of defendants’ primary liability defenses. Because it is reversible error for a trial court to fail to instruct the jury on an applicable defense theory that is supported by substantial evidence, *Fergen v. Sestero*, 182 Wn.2d 794, 810, 346 P.3d 708 (2015), the trial court would have committed reversible error if it *did not* give the requested instruction. It follows, then, that the trial court did not abuse its discretion by giving the instruction.

Finally, the cumulative error doctrine does not apply here because even if it applied in civil cases—which appears to still be an open question in Washington—the trial court did not commit several errors in this case, depriving plaintiffs of a fair trial. Indeed, the trial court did not commit any error, and plaintiffs were not deprived of a fair trial simply because the jury decided in favor of defendants.

IV. RESPONSE TO FIRST TWO ASSIGNMENTS OF ERROR

Plaintiffs present three assignments of error on appeal. All relate to jury instructions. The first two are so closely related that they may be

////

analyzed together. The third assignment of error is slightly different than the other two, so it may be analyzed separately.

In their first two assignments of error, plaintiffs argue that the trial court erred by refusing to provide the jury with the specific wording of two WISHA regulations. *See* Plaintiffs' Proposed Instructions, Nos. 12 and 14, at CP 102 and 104.

A. Standard of Review

“Whether to give a particular instruction to the jury is a matter within the discretion of the trial court.” *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Thus, a trial court’s refusal to give a requested instruction is reviewed “only for abuse of discretion.” *Stiley*, 130 Wn.2d at 498. “[T]rial courts retain broad discretion regarding whether to give a particular instruction.” *Terrell v. Hamilton*, 190 Wn. App. 489, 505, 358 P.3d 453 (2015); *In re Det. of Taylor-Rose*, 199 Wn. App. 866, 880, 401 P.3d 357 (2017) (same).

“Refusal to give a particular instruction is an abuse of discretion only if the decision was ‘manifestly unreasonable, or [the court’s] discretion was exercised on untenable grounds, or for untenable reasons.’” *Anfinson v. FedEx Ground Package Sys, Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010) (quoting *Boeing v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998)). “Jury instructions are sufficient if they are supported

by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the jury of the applicable law.” *Fergen v. Sestero*, 182 Wn.2d 794, 803 346 P.3d 708 (2015). “No more is required.” *Anfinson*, 159 Wn. App. at 44. Thus, “[i]f a party’s theory of the case can be argued under the instructions given as a whole, then a trial court’s refusal to give a requested instruction is not reversible error.” *Anfinson*, 159 Wn. App. at 45. The discretion afforded the trial court in the wording of instructions means that it need not give additional instructions, even when they are correct, if the court’s other instructions are sufficient. *Gammon v. Clark Equip.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

Moreover, “[t]rial court error on jury instructions is not a ground for reversal unless it is prejudicial. An error is prejudicial if it affects the outcome of the trial.” *Stiley*, 130 Wn.2d at 498-99. The party challenging the jury instruction bears the burden to demonstrate prejudice. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

B. Argument

Under the standard of review recited above, plaintiffs’ first two assignments of error should be rejected. Plaintiffs were permitted to argue their case without the requested instructions. Plaintiffs agreed that their claim was not a WISHA or negligence *per se* claim. RP 32:15-17; 498:25-499:1. The trial court agreed that it was not a WISHA case. RP 48:21-23.

The trial court was concerned that instructing the jury on the specific language of the WISHA regulations would inject confusion into the deliberations because it may have caused the jury to conclude that a violation of a regulation equated to negligence, when the parties and court agreed that Washington law provides only that violation of a regulation is some evidence that may be considered when determining negligence. RP 49:3-12; 501:7-11.

Refusal to give a particular instruction is an abuse of discretion only if the decision was ‘manifestly unreasonable, or [the court’s] discretion was exercised on untenable grounds, or for untenable reasons.’” *Anfinson v. FedEx Ground Package Sys, Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010). The trial court’s decision was not manifestly unreasonable. It was attempting to avoid injecting confusion into the jury’s deliberations. This was perfectly reasonable, especially in light of the fact that the trial court permitted plaintiffs to argue their theory of the case.

Plaintiffs were permitted to introduce expert opinion testimony regarding purported violations of the WISHA regulations. RP 243:9-20. The trial court gave instruction No. 11 to the jury, a WPIC instruction, at plaintiffs’ request, which read: “The violation, if any, of an administrative rule is not necessarily negligence, but may be considered by you as

evidence in determining negligence.” RP 578:17-20. Plaintiffs were then permitted to argue to the jury that defendants violated the WISHA regulations, and that this was evidence of negligence. RP 586:21- 588:2; 628:24-629:4.

Looking at the jury instructions as a whole, it is clear that they were sufficient for this case. There were 18 instructions in all.

- Instruction No. 1 instructed the jury of its role as a factfinder. RP 571:1-573:18.
- Instruction No. 2 instructed the jury regarding the fact that all parties are equal before the law. RP 573:19-23.
- Instruction No. 3 instructed the jury regarding the liability of corporations. RP 573:24-574:2.
- Instruction No. 4. instructed the jury regarding circumstantial evidence. RP 574:3-13.
- Instruction No. 5 instructed the jury regarding expert opinion. RP 574: 14-575:1.
- Instruction No. 6 instructed the jury regarding nature of the claim—premised liability relating to a set of stairs—and the nature of the defense—comparative fault and open and obvious hazard. RP 575:2-24.

////

- Instruction No. 7 instructed the jury regarding the burden of proof for each party. RP 575:25-576:17.
- Instruction No. 8 instructed the jury regarding the preponderance of the evidence, proximate cause, negligence, and ordinary care. RP 576:18-577:14.
- Instruction No. 9 instructed the jury regarding contributory negligence. RP 577:15-578:3.
- Instruction No. 10 instructed the jury regarding Washington law regarding premises liability relating to business invitees. RP 578:4-16.
- Instruction No. 11 instructed the jury that a violation of an administrative may be considered as evidence when determining negligence. RP 578:17-20.
- Instruction No. 12 instructed the jury regarding defendants' open and obvious defense. RP 578:21-579:2.
- Instruction No. 13 instructed the jury regarding the measure of damages. RP 579:3-580:23.
- Instruction No. 14 instructed the jury regarding facts admitted by defendant. RP 580:24-581:4.
- Instruction No. 15 instructed the jury regarding the average life expectancy of someone like plaintiff. RP 581:5-12.

- Instruction No. 16 instructed the jury regarding preexisting conditions. RP 581:13-582:3.
- Instruction No. 17 instructed the jury to disregard insurance when making its decision. RP 582:4-21.
- Instruction No. 18 instructed the jury regarding the selection of a foreman and deliberations. RP 582:22-583:19.

Looking at the instructions as a whole, it is clear that plaintiffs were afforded an opportunity to fairly present their case. Indeed, when the trial court asked plaintiffs' counsel whether they would be deprived of arguing their theory of the case if their two WISHA regulation jury instructions were not given, they conceded that they would be able to argue their case:

The Court: Question. Could the plaintiff not argue, based on the testimony, that—their theory of the case regarding violation of the WAC codes?

Ms. Wagar: They could - - we could.

RP 499:17-21.

“If a party’s theory of the case can be argued under the instructions given as a whole, then a trial court’s refusal to give a requested instruction is not reversible error.” *Anfinson*, 159 Wn. App. at 45. A party is only deprived of its theory of the case if the court’s instructions do not allow it

to argue the theory. *Fergen*, 182 Wn.2d at 803. Plaintiffs have failed to establish that their two proposed instructions—consisting of the language of two specific WISHA regulations—were necessary in the sense that they could not argue their theory of the case without them. The trial court’s instructions allowed plaintiffs to argue their case, as they readily admitted.

When a jury instruction is sufficiently broad to allow plaintiffs to adequately argue their theory of negligence to the jury, it is not error for the court to fail to give a more specific instruction. *See, e.g., Sargent v. Safeway Stores*, 67 Wn.2d 941, 944, 410 P.2d 918 (1966) (finding no error in negligence case where broad instruction regarding storekeeper’s duty to maintain the premises in a reasonably safe condition was issued but specific instruction regarding floor wax was not issued). The trial court has the discretion on what instructions should be issued, provided that each party is permitted to argue its theory of the case. *Koker v. Armstrong Clark*, 60 Wn. App. 466, 481, 804 P.2d 659 (1991) (finding no error where trial court rejected proposed additional instruction on defendant’s duty, although correct, when jury had already been instructed on the common law duty of ordinary care and the defendant was otherwise still able to argue its theory of the case). The trial court did not abuse its discretion when it refused to give the additional instructions.

////

Next, reversal is only appropriate if the court committed instructional error—which it did not—and that instructional error prejudiced plaintiffs. Plaintiffs have the burden of establishing prejudice. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Not only did the trial court not abuse its discretion by refusing to inject confusion into the jury deliberations, but plaintiffs have failed to establish any prejudice.

As noted above, plaintiffs were permitted to introduce testimony regarding the alleged violations of WISHA regulations. The trial court instructed the jury that it could consider this evidence when determining negligence, and plaintiffs got to argue to the jury that the evidence of code violations amounted to negligence. Plaintiffs have fallen far short of demonstrating that the refusal to provide the jury with the specific wording of the WISHA regulations changed the outcome of the trial.

V. RESPONSE TO THIRD ASSIGNMENT OF ERROR

In plaintiffs' third assignment of error, they challenge the trial court's decision to give jury instruction No. 12 relating to defendant's "open and obvious" defense. That instruction read:

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 invitee,

////

unless the owner should anticipate the harm despite such knowledge or obviousness.

RP 578:21-579:2.

Plaintiffs did not preserve the arguments they now raise on appeal, so this Court should not consider the arguments. Even if it does consider plaintiffs' arguments, the trial court did not abuse its discretion when it gave this instruction. Indeed, it would have abused its discretion if it refused to give this instruction because the instruction related to defendants' "open and obvious" defense, and was supported by evidence introduced at trial.

A. Standard of Review

"Jury instructions are sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the jury of the applicable law." *Fergen v. Sestero*, 182 Wn.2d 794, 803 346 P.3d 708 (2015). It is reversible error for a trial court to fail to instruct the jury on an applicable defense theory that is supported by substantial evidence. *Id.* at 810.

When a party challenges a jury instruction that is a correct statement of the law, the trial court's decision is reviewed for abuse of discretion. *Terrell v. Hamilton*, 190 Wn. App. 489, 498, 358 P.3d 453 (2015). A trial court has broad discretion in determining the wording of jury instructions.

State v. Walters, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). Plaintiffs concede that jury instruction No. 12 is a correct statement of the law. See Appellant’s Brief, page 11 (“Defendant’s proposed jury instruction # 17 (instruction No. 12) is a correct statement of the law, but that’s all it is.”). Accordingly, the trial court decision to give the instruction is subject to an abuse of discretion standard.

B. Preservation

Typically, the failure to object to a jury instruction waives any challenge to the instruction. *State v. Scott*, 110 Wn.2d 682, 685-686, 757 P.2d 492 (1988). In order to preserve jury instruction challenges, a party must give “timely and well stated objections” so that a trial court can correct error. *Id.* at 685-686. This is consistent with the general rule in Washington that an appellate court will not consider an issue on appeal that was not first presented to the trial court. RAP 2.5(a).

In order to preserve a challenge to a jury instruction for review, a party must make a proper objection. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016). CR 51(f) requires a party objecting to a jury instruction to “state distinctly the matter to which counsel objects and the grounds of counsel’s objection.” On appeal, the inquiry is “whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Washburn v. City of Fed. Way*, 178

Wn.2d 732, 746, 310 P.3d 1275 (2013) (quoting *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)).

An appellate court may consider a claimed error in a jury instruction only if the appellant raised the specific issue by exception at trial. *Galvan v. Prosser Packers, Inc.*, 83 Wn.2d 690, 692, 521 P.2d 929 (1974); *Minert v. Harsco Corp.*, 26 Wn. App. 867, 872, 614 P.2d 686 (1980).

As we stated in *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160, 16 A.L.R.4th 129 (1978): The cognizance we take on appeal of alleged erroneous instruction in the trial court depends upon the action appellant took in that court. The 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. CR 51(f). In *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975), we quoted from *Roumel v. Fude*, 62 Wn.2d 397, 399-400, 383 P.2d 283 (1963), as follows: Our rules require that exceptions to instructions shall specify the paragraphs or particular parts of the charge excepted to and shall be sufficiently specific to apprise the trial judge of the points of law or question of fact in dispute. The purpose is to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.

Van Hout v. Celotex Corp., 121 Wash 2d 697, 702-03, 853 P2d 908 (1993).

Plaintiffs' objection to this instruction is found at RP 507:13-508:24. The objection to the instruction was narrow, and limited to what constitutes open and obvious. Plaintiffs' counsel argued that the rule only applies to "things that can be seen ahead of time and the person still trips

over it,” (RP 508:6-7), and that this case did not involve a situation like that. Instead, plaintiffs’ counsel argued, the dangerous condition here was not obvious because they were conditions that an expert had to identify. RP 508:10-21. That was plaintiffs’ sole objection to this instruction.

When the trial court rejected that single objection to the instruction, and asked plaintiffs’ counsel if there were any other objections to the instruction, plaintiffs’ counsel responded no:

Court: So the Court is going to give the – Instruction No. 17. It’s my understanding there’s no other objections or exceptions to the defendants’ proposed—I know some of these are identical.

Ms. Wagar: No, your honor.

RP 568:4-9.

Now, on appeal, plaintiffs raise new arguments to challenge the instruction. Plaintiffs’ arguments are unpreserved, and should not be considered by this Court because neither defendants, nor the trial court, had an opportunity to address such arguments below.

C. Argument

Plaintiffs concede, as they must, that the instruction is a correct statement of the law. Appellants’ Brief, page 11. The instruction was supported by substantial evidence. The evidence established that plaintiff Donald Iverson had used the stairs many times over the course of the

approximately six years he worked on the premises. RP 313:8. To the extent that the stairs were somehow hazardous, the hazard or hazards were open and obvious to Mr. Iverson, because he had used the stairs so many times before. It would have constituted reversible error if the trial court did not give this instruction, because it related to one of defendants' defense theories—that any hazard associated with the stairs was “open and obvious” to Mr. Iverson—and it was supported by substantial evidence. *Fergen v. Sestero*, 182 Wn.2d 794, 810, 346 P.3d 708 (2015) (stating that it is reversible error for a trial court to fail to instruct the jury on an applicable defense theory that is supported by substantial evidence). The trial court did not abuse its discretion when it gave the instruction to the jury.

The rest of plaintiffs' arguments regarding this instruction are confusing. They argue that an additional instruction should have been given with this instruction. Appellant's Brief, page 12. But they did not request that any additional instruction be given on this point, so that argument is not preserved. They argue that inclusion of this instruction prevented *plaintiffs* from arguing their theory of the case. This argument does not make sense. How does a defense instruction prevent a plaintiff from arguing plaintiff's theory of the case? Plaintiffs then appear to argue that it was not fair that the trial court gave this instruction, but it did not

give plaintiffs' two WISHA regulation instructions. Again, this does not make sense. The instructions cover completely different subjects. The trial court's decision to give the open and obvious instruction is unrelated to its decision not to give the instructions regarding specific WISHA regulation language. As explained above, the trial court did not abuse its discretion when it refused to give the jury the specific wording of two WISHA regulations.

Finally, plaintiffs suggest that prejudice should be presumed, relying on case law that holds that erroneous instructions are presumptively prejudicial. Appellant's Brief, page 14. This also does not make sense because plaintiffs concede that the instruction did not misstate the law. The trial court did not abuse its discretion by giving the instruction. It was required to give the instruction.

VI. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY HERE

Plaintiffs' final argument is that this Court should reverse and remand based on the cumulative error doctrine. This is a doctrine that is sometimes applied in criminal cases where cumulative error may warrant reversal even where the trial court's individual errors were harmless. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). This is the case "when there have been several trial errors that standing alone

may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). “The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” *Cross*, 180 Wn.2d at 690.

First, it is not even clear whether this doctrine applies to civil cases. *See, e.g., H.B.H. v. State*, 197 Wn App 77, 95, 387 P3d 1093 (2016) (questioning whether doctrine applied in civil cases); *Kave v. McIntosh Ridge Primary Rd. Ass’n*, 198 Wn App 812, 827, 394 P3d 446, 453 (2017) (same).

Second, for the doctrine to apply, the trial court must have committed several errors that have the cumulative effect of depriving the plaintiffs of a fair trial. Here, the trial court did not commit any errors, so the doctrine does not apply.

VI. ATTORNEY FEES

Plaintiffs request attorney fees in their brief. See Appellant’s Brief, page 16, Section VIII. In support of their request, they cite RAP 18.1 and RCW 4.84.010. Neither of these sources provides a substantive entitlement to fees. Plaintiffs are not entitled to attorney fees, even if they prevail in this appeal.

VII. CONCLUSION

The trial court is afforded broad discretion when determining whether to give particular instructions. So long as the instructions permit the party to argue its theory of the case, the trial court does not err. Here, plaintiffs were able to argue their theory of the case, even without the two instructions regarding WISHA regulations, as they readily conceded to the trial court when asked. The trial court did not abuse its discretion by refusing to inject confusion into the jury deliberations by instructing the jury regarding the language of two WISHA regulations. The trial court also did not abuse its discretion when it gave the open and obvious instruction because it was required to give that instruction. Finally, the cumulative error doctrine does not apply here. This Court should affirm the trial court judgment.

RESPECTFULLY SUBMITTED this 17th day of April, 2018.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC

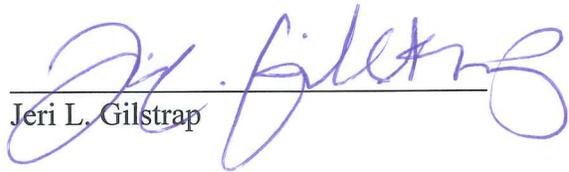


Daniel S. Hasson,
WA State Bar. No. 42206

DECLARATION OF SERVICE

I, Jeri L. Gilstrap, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of RESPONSE BRIEF OF APPELLEES via email, to all counsel of record.

DATED at Portland, Oregon, on this 17 of April, 2018.



Jeri L. Gilstrap

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONSE BRIEF OF APPELLEES on the following attorney by mailing a true copy thereof, certified as such, contained in a sealed envelope, with postage paid, addressed to:

Christopher L. Childers, WSBA No. 34077
Smart Law Offices, P.S.
309 North Delaware, PO Box 7284
Kennewick, WA 99336
Fax: 509-735-2073
Email: cchilders@smartlawoffices.com
Attorney for Plaintiff

and deposited in the post office at Portland, Oregon on this 17 day of April, 2018.



Jeri L. Gilstrap

DAVIS ROTHWELL EARLE & XOCHIHUA PC

April 17, 2018 - 2:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35589-6
Appellate Court Case Title: Donald D. Iverson, Jr., et al v. Duane Munn, et ux, et al
Superior Court Case Number: 15-2-02620-5

The following documents have been uploaded:

- 355896_Briefs_20180417142051D3692194_4427.pdf
This File Contains:
Briefs - Respondents
The Original File Name was RESPONSE.BRIEF.pdf

A copy of the uploaded files will be sent to:

- cchilders@smartandconnell.com
- cchilders@smartlawoffices.com
- esprouse@davisrothwell.com
- jhenderson@davisrothwell.com
- mwagar@smartlawoffices.com

Comments:

Sender Name: Jeri Gilstrap - Email: jgilstrap@davisrothwell.com

Filing on Behalf of: Daniel Sheldon Trave Hasson - Email: dhasson@davisrothwell.com (Alternate Email: docketing@davisrothwell.com)

Address:
200 SW Market St., Suite 1800
Portland, OR, 97201
Phone: (503) 222-4422

Note: The Filing Id is 20180417142051D3692194