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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 359778

(Spokane County Superior Court No. 14-02-02608-5)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

KEVIN SCHIBEL and TERRI SCHIBEL, Appellants.

vs.

SPOKANE TEACHERS CREDIT UNION, Respondents,

APPELLANT REPLY BRIEF

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REPLY BRIEF OF PETITIONER

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I. REPLY LEGAL ARGUMENT

1. Summary Judgment Should Have Been Granted Based on the Undisputed Facts Before the Trial Court

Summary judgment orders are reviewed *de novo*. *Def. Resp. at 14*. This Court "takes the position of the trial court" by "examining the pleadings, affidavits, and depositions before the trial court" during summary judgment, and decides whether the same decision would have been rendered.[1]

The record before the trial court at the summary judgment hearing establishes there was no genuine dispute as to any material facts.[2] Both sides agreed the record was complete. The uncontested facts were (1) "the general public was allowed to utilize the parking lot 'in the chance that they might be a member one day' because the Defendants 'look at everybody as either members of or potential members and don't want to fuss anybody over somebody parking in the parking lot'" and (2) "Plaintiff Kevin Schibel was not aware who owned the parking lot, and nothing identified the parking lot as a closed private lot."[3] The Defense did not rebut Schibel's statement of facts.[4] The Defense admitted the facts presented were true, stating "The

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[1] *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn. 2d 780 (2005)
[2] RP 15
[3] CP 66
[4] *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn. 2d 16 (2005) ("The nonmoving party must present evidence that demonstrates that material facts are in dispute. If the nonmoving party fails to do so, then summary judgment is proper.")

parties are correct, Your Honor, that there's no facts in dispute, and this is a decision that's a matter of law for you today and not for the jury."[5]

Although the Defense agreed that because no facts were in dispute the legal duty owed by the Defendants was purely a matter of law,[6] for the first time on appeal the Defense argues that Schibel failed to meet "the burden of establishing the absence of any issue of material fact." *Def. Resp. at 16-17*. The Defense argues there was a "genuine issue of material fact prohibited a finding Schibel was a business or public invitee as a matter of law," because "the trial court obviously had different thoughts." *Def. Resp. at 15-16.* However, "where the facts attending a complainant's entry upon property are uncontested, as is the case here, the legal status of the entrant as invitee, licensee, or trespasser is a question of law."[7] The question is whether summary judgment should have been granted based on the undisputed facts before the trial court.

At summary judgment, the Defense argued Schibel was a licensee as a matter of law. To support their position the Defense cites *McKinnon* and *Younce* which do not support their arguments.

The Defense cites *McKinnon* for the legal proposition that "posting a sign" was the linchpin for the bank property to be considered "held open to

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[5] RP 15
[6] *Beebe v. Moses*, 113 Wn. App. 464 (2002).
[7] *Beebe* at 479

the public." *Def. Resp. at 12.* In *McKinnon*, a bank displayed a sign for "3 days" from March 5, 1962, to March 7, 1962, and then took it down.[8] The plaintiff was injured at the bank over two years later while attending a regular meeting for the Girl Scouts.[9] The *McKinnon* court held invitee status existed as a matter of law despite the fact plaintiff's visit "was not commercial or contractual in nature nor was it of any material or pecuniary benefit, actual or potential to the defendant."[10] The undisputed facts showed that the continuing conduct of the bank made it incumbent upon the defendant to "make the premises safe for purposes for which they had been held open."[11] Like *McKinnon*, here Defendants' continuing conduct, allowing their parking lot to be used by the general public to visit Chairs Coffee, for years led the general public to believe the parking lot was held open for parking and visiting the adjacent building. The parking lot was full of Chairs Coffee patrons on the night of the incident. Schibel was merely using the Defendants' parking lot for a purpose that it was held open to the general public.

The Defense cites *Younce* for the legal proposition that an owner must specifically "desire" the presence of a specific plaintiff to be considered

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[8] *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn. 2d 644 (1966).
[9] *Id.* at 645 ("In the evening of March 19, 1964")
[10] *Id.* at 645
[11] *Id.* at 651

"invited." *Def. Resp. at 12*. This conclusion is both legally incorrect and factually distinguishable. In *Younce*, the defendants had eight parcels of land for dairy farming purposes,[12] and their children planned a school kegger on one of the parcels without the defendants' knowledge.[13] For years, the parcels had been used for dairy farming and did not have a continuing history of hosting kegger parties for high school students.[14] When the father became suspicious of a possible party he decided to drive "4 parcels within 1 mile of the family residence to see if there was a party, testifying he would have run the kids off the property if he had found them. He did not, however, check the 109th Avenue property," which was the largest parcel 6 miles away.[15] The *Younce* court found that, unlike *McKinnon*, the defendant had not "by his <u>arrangement of the premises or other conduct</u>, led the entrant to believe that the premises were intended to be used by visitors, as members of the public, for the purpose which the entrant was pursuing."[16] Unlike *Younce*, here Defendants' knew and expected, by their arrangement of the premises and continuing conduct, that the general public believed their lot was open and decided to meet the interests of those needing a parking space in hopes those parking on their

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[12] *Younce v. Ferguson*, 106 Wn. 2d 658 (1986).
[13] *Id.* at 660
[14] *Id.* at 660
[15] *Id.* at 660
[16] *Id.* at 668 (emphasis added)

lot "might be a member one day."[17] Defendants admitted their parking lot was held open for years to the "general public" to park and visit the adjacent buildings..[18] Defendants were interested – they desired – to entice the future business of "potential members" when holding their lot open.[19]

The Defense conceded these facts and has no evidence to dispute them. This Court is aware that the question is whether the "arrangement of the premises or other conduct, led the entrant to believe that the premises were intended to be used by visitors, as members of the public, for the purpose which the entrant was pursuing."[20] And on that point there is no dispute. The Defense offers only red-herrings, asking this Court to focus specifically on whether a sign informed Schibel of who owned the parking lot, or whether Schibel's use of the parking lot was specifically desired. *Def. Resp. at 12-13*. Based on the undisputed facts before the trial court at summary judgment, Schibel was an invitee as a matter of law.

2. Plaintiffs Did Not Waive the Right to Appeal the Licensee Jury Instruction

If there was anything in this trial the parties contested, and the trial court was advised of, it was the legal duties corresponding to invitees and licensees. The Defense argued Schibel was not an invitee as a matter of law,

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[17] CP 66
[18] CP 66
[19] CP 66
[20] *Younce* at 668.

and proposed their licensee instruction to the trial court. Both the trial court and the Defense knew that "Schibel objected *strenuously* to submission of the licensee status instruction to the jury." *Def. Resp. at 8.* "Schibel's counsel at all times in this matter (i.e. summary judgment, trial briefing, and jury instruction conference) objected" to the licensee instruction specifically for the purpose of preserving Schibel's right to appeal. *Def. Resp. at 26.*[21]

Schibel, as the objecting party, was required to apprise the trial court of his objection and cite authorities in support.[22] To comply with the rule, Schibel was not required to "predict the exact way" in which he would be prejudiced by the court's decision to provide the instruction.[23]

The record shows the trial judge was apprised of the nature and substance of Schibel's objections to defendant's proposed licensee Jury Instruction No. 14:

> "Plaintiffs, Kevin and Terri Schibel, come forward and object to the following proposed Defense Jury Instructions, based upon the following facts and authority… A defendant should not diminish the consequences

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[21] *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306 (2004) (Typically, the doctrine of waiver "involves a party's acquiescence to a trial court ruling.")

[22] Under CR 51(f), "the pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection. So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review." *Washburn v. City of Fed. Way*, 178 Wn. 2d 732 (2013).

[23] *Griffin v. West RS, Inc.*, 97 Wn. App. 557 (1999).

of his negligence by the failure of the plaintiff to anticipate the defendant's negligence in causing the accident itself... Mr. Schibel cannot be said to have voluntarily or impliedly assumed a risk he was not aware of... That doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative fault... **giving a licensee/social guest instruction could constitute reversible error.**"

CP 313-325 (citations omitted).[24]

"When we're discussing trip hazards, plaintiffs do not have an affirmative duty to keep their eyes cast on their feet while they're walking. Specifically the case of Amend v. Bell, which was decided in 1977 says that the defendant should not diminish the consequences of his negligence by the failure of the plaintiff to anticipate the defendant's negligence in causing the accident itself... So, to impose this affirmative duty we feel is inappropriate, and we object to that... we do object to the inclusion of "licensee" as an instruction in this case. **We preserve our right to appeal the issue of licensee on those grounds. I -- and I believe we've had a sufficient discussion for weeks about this issue. The plaintiff submits their continuing objection based upon all of the previous motions and citations and argument that we've had in this trial.**"

RP 480-483.[25]

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[24] *Sorensen v. W. Hotels, Inc.*, 55 Wn. 2d 625 (1960) ("adequate exception to one of two or more instructions subject to the same error is sufficient to challenge the consideration of the trial court, which is the purpose of the exception, and to bring the question here for review.")

[25] *Millies v. LandAmerica Transnation*, 185 Wn. 2d 302 (2016) (citing *Falk v. Keene Corp.*, 113 Wn. 2d 645 (1989) ("We have found 'extended discussions' on the record about a particular jury instruction sufficient to preserve the objection... sufficient to apprise the trial court of 'the point of law in dispute, i.e., whether an instruction in the 'negligence' language of the statute misstated the law.'"); *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn. 2d 12 (1972) ("defendant preserved its record of claimed error by taking lucid and cogent exceptions to the giving of any instruction whatever on the subject in general, and to the one given by the court in particular.)

The Defense claims Schibel automatically waived the right to appeal because he failed to "propose an appropriate instruction supporting the theory he advocates." *Def. Resp. at 25, 28.* This conclusion is both factually and legally incorrect. First, Schibel did propose the appropriate instruction – the duty of care owed to an invitee – while strenuously objecting to the Defendant's proposed licensee instruction. The trial court made clear it understood the objections, and that despite Washington's adoption of Restatement (Second) of Torts § 342 and Washington's doctrine of pure comparative fault, it believed its licensee Jury Instruction No. 14 was "an accurate statement of the law."[26] Second, Washington courts "do not necessarily require a correct, alternate instruction to preserve an objection,"[27] and "a party may not request a particular instruction and later complain on appeal that the requested instruction was given."[28] "The invited error doctrine is strictly enforced to prevent parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally."[29] If Schibel would have proposed a licensee instruction, he would have waived the right to appeal his invitee status. Third, if the

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[26] RP 491 ("I do understand the objections… I think we have appropriate instructions for which the jury can use the law.")
[27] *Washburn v. City of Fed. Way*, 178 Wn. 2d 732 (2013).
[28] *State v. Hood*, 196 Wn. App. 127 (2016).
[29] *State v. Ortiz-Triana*, 193 Wn. App. 769 (2016).

Defense argument was adopted by this Court as a wooden[30] or hyper-technical rule,[31] attorneys would be required to propose an alternate jury instruction to the trial judge while at the same time objecting that the instruction they propose constitutes error. It would be an absurd standard requiring mental gymnastics for the trial and appellate courts: "Your Honor, if you are going to make an error, please make the error this way instead." The Defense overlooks their burden to propose instructions that accurately state the applicable law under their theory of the case.[32]

Finally, the Defense cites an unpublished case for the legal proposition that Schibel automatically waived the right to appeal by "failing to assign error to the special verdict form." *Def. Resp. at 22.* The Defense is mistaken. When a trial court gives a special verdict form pursuant to CR49(a), the "accompanying instructions"[33] must "properly inform the jury of the applicable law."[34] Fundamentally, the jury must be properly

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[30] *United States v. Capati*, 980 F. Supp. 1114, (S.D. Cal. 1997), *aff'd*, 162 F.3d 1170 (9th Cir. 1998) ("The requirement of a specific objection should not be employed woodenly.")

[31] *Millies v. LandAmerica Transnation*, 185 Wn. 2d 302 (2016) ("Hypertechnicality is not required.")

[32] CP 409; Cf. *Bartlett v. Hantover*, 9 Wn. App. 614 (1973), *rev'd on other grounds*, 84 Wn. 2d 426 (1974) ("The burden is on each party to propose such instructions as state the law applicable to his theory of the case.")

[33] ("the court *shall* give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.")

[34] *Hue v. Farmboy Spray Co.*, 127 Wn. 2d 67 (1995); See also *City of Bellevue v. Raum*, 171 Wn. App. 124 (2012); *Mullen v. Dep't of Labor &*

instructed about the law regarding Defendants' legal duty before they can determine whether a breach occurred. The error committed was not the form of trial court's special verdict form, it was the trial court's accompanying licensee Jury Instruction No. 14.

Schibel proposed the appropriate instruction supporting the theory he advocated. Schibel strenuously objected to the licensee instruction at all times apprising the trial court and citing authorities to support the objection, without inviting error by proposing an alternate licensee instruction and properly preserved the right to appeal.

3. The Trial Court's Licensee Jury Instruction Was A Misstatement of Law

"Jury instructions are reviewed *de novo* for errors of law. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, <u>and</u> when read as a whole properly inform the trier of fact of the applicable law. If <u>any</u> of these elements are absent, the instruction is erroneous."[35]

The Defense misstates the standard of review as an "either/or" test, claiming "Instruction 14 can be upheld if it is *either* a correct statement of

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Indus., 93 Wn. App. 1058 (1999); *Capers v. Bon Marche, Div. of Allied Stores,* 91 Wn. App. 138 (1998).

[35] *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn. 2d 851 (2012) (emphasis added).

the law, *or* if it allowed Schibel to argue his theory of the case." *Def. Resp. at 28.*

A licensee is "entitled to expect" that "he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor."[36] The exception to this rule is that "if he discovers them for himself without such warning, and fully understands and appreciates the risk, he is in a position to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining."[37] Succinctly, the Restatement calls this the "reason to know" test.

Landowners owe a duty to foresee – they are expected to consider the risk of harm to others.[38] A landowner "should realize" when a condition "involves an unreasonable risk of harm" and "should expect" that licensees "will not discover or realize the danger." Succinctly, the Restatement calls this "foreseeable risk." Reasonable care requires landowners "to make the condition safe, or to warn the licenses of the condition and the risk involved."

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[36] Restatement (Second) of Torts § 343 cmt. b (1965).
[37] Restatement (Second) of Torts § 342 cmt. l (1965).
[38] *Memel v. Reimer*, 85 Wn. 2d 685 (1975) ("What we do impose is a duty to exercise reasonable care where there is a known dangerous condition on the property and the occupier can reasonably anticipate that his licensee will not discover or realize the risks.")

The Defense claims that an instruction stating the legal duty owed by a Defendant is "harmless," "superfluous," and "irrelevant." *Def. Resp. at 30, 33*. But the Defense clearly found it relevant during closing argument when claiming the licensee instruction was crucial to the case.[39] Defense counsel admonished the jury that "if he is a licensee, it's not a duty of reasonable care any longer,"[40] and that "unless you can say he cannot have *any* expectation of it, your verdict must be for STCU."[41] The Defense even makes clear that the instruction "allowed the jury to make this determination." *Def. Resp. at 32*. Because Jury Instruction No. 14 allowed the jury to decide the case on this basis, unless the Defense can defend these statements as correct statements under the law, the prejudicial harm is evident and presumed.[42]

The Defense cites to *Thompson v. Katzer*[43] vigorously arguing the case stands as reason to expect licensees to anticipate unknown hazards. In *Thompson v. Katzer*, the defendants' private driveway was covered with ice and snow while they were on vacation.[44] Their house-sitter did not shovel the driveway and asked the plaintiff to bring his car to the defendants'

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[39] RP 548
[40] RP 547
[41] RP 550
[42] See *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn. 2d 842 (2015).
[43] *Thompson v. Katzer*, 86 Wn. App. 280 (1997).
[44] *Id.* at 282

home.[45] The *Thompson v. Katzer* court "correctly ruled that Thompson was a licensee" because "the Katzers' land was not held open to the public."[46] The *Thompson v Katzer* court also considered whether Thompson "had reason to know."[47] The plaintiff testified that "he knew, from driving up the driveway, that the ground was slick."[48] The plaintiff testified that when he exited his car "the driveway was solid snow then, solid totally, and I went up-I went on ahead up, and I knew it was getting pretty bad."[49] The plaintiff testified he had actually seen the hazard, appreciated the risks, and chose to continue ahead:

> Q: Excuse me, Mr. Thompson. I don't want you to speculate. I am asking you what you knew. Did you know when you stepped out of the car it was real slick?
> A: I knew it was slick.
> ....
> Q: Real slick?
> A: Yeah, real slick.
> Q: Really slick?
> A: Yeah, that's what I said.[50]

After considering this evidence in a light most favorable to the nonmoving party, the *Thompson v Katzer* court determined that <u>no reasonable factfinder</u> would conclude Thompson did not "discover that

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[45] *Id.* at 283
[46] *Id.* at 286
[47] *Id.* at 288 (noting the Supreme Court had recently adopted Restatement (Second) of Torts in *Memel v. Reimer*, 85 Wn. 2d 685 (1975)).
[48] *Id.* at 284
[49] *Id.* at 283
[50] *Id.* at 290

there was snow and ice in the Katzers' driveway"[51] and that no reasonable factfinder would conclude Thompson did "not perceive the risk arising from it."[52] "Thompson actually did, according to his own testimony."[53] The *Thompson v. Katzer* court properly applied Restatement (Second) of Torts § 342's "reason to know" test, which means that a licensee "fully understood and appreciated the risk," and chose to enter or remain on a property.[54]

Unlike *Thompson v Katzer* the Defense must concede "the fact that Schibel did not see it before he tripped." *Def. Resp. at 30.* The trial court found as a matter of law that Schibel did not know, impliedly consent, or voluntarily assume any risk that would relieve the Defendants of any duty.[55]

The Defense contradicts *Thompson v Katzer* when it argues the "primary factor" a jury must consider is whether Schibel can be "expected to discover the allegedly dangerous condition." *Def. Resp. at 32.* Frankly,

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[51] *Id.* at 289
[52] *Id.* at 289
[53] *Id.* at 289
[54] Restatement (Second) of Torts § 342 cmt. l (1965).
[55] RP 464 ("There's been no evidence in this case that Mr. Schibel ever intended to relieve STCU of any duty. I don't think there is any evidence in that regard and that's what necessary to have assumption of the risk that is different than our contributory negligence scheme."); RP 473-474 ("Mr. Schibel would have had to impliedly consent to relieve defendant from its duties owed in relation to a specific risk… That language isn't included anywhere and… I don't find evidence in this case warrants that instruction.")

whether the *Thompson v Katzer* court used the word "expected" when applying summary judgment standards is mere dicta[56] and does not change the fact that Washington adopts Restatement (Second) of Torts § 342.[57] *Thompson v Katzer* did not establish a new rule of law contradicting Restatement (Second) of Torts § 342, and Washington courts have continued to apply Restatement (Second) of Torts § 342 to this day.[58]

What this boils down to is the Defense believes licensees should have an affirmative duty under the law to anticipate unknown hazards. The Defense claims their position is an accurate statement of the law arguing that a licensee should be "expected to discover the allegedly dangerous condition." *Def. Resp. at 32*, that "an owner cannot be held liable to a licensee if a reasonable person should have expected" the danger, *Def. Resp. at 36*, and that a licensee can always be expected to "recognize the presence of" a dangerous condition. *Def. Resp. at 32*. Our Courts have addressed these issues before, and the law is good:

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[56] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35 (2010), *aff'd*, 174 Wn. 2d 851 (2012) ("The fact that a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily make it a proper jury instruction.")

[57] The *Thompson v. Katzer* court even notes the Supreme Court had recently adopted Restatement (Second) of Torts, citing *Memel v. Reimer*, 85 Wn. 2d 685 (1975).

[58] See *Tincani v. Inland Empire Zoological Soc.*, 124 Wn. 2d 121 (1994) ("In *Memel v. Reimer* we adopted the Restatement (Second) of Torts § 342 to define a landowner's responsibility to licensees for dangerous conditions on the land.")

> "The defendant should not diminish the consequences of his negligence by the failure of the plaintiff to anticipate the defendant's negligence in causing the accident itself... the plaintiff need not predict the negligence of the defendant."[59]
>
> "Assumption of the risk may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. To the extent a plaintiff's injuries resulted from other risks, created by the defendant, the defendant remains liable for that portion."[60]
>
> "[A]ssumption of risk in this form is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action. Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff... That doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence."[61]

Jury instruction No. 14 when strictly followed and logically applied in this case, virtually required a finding by the jury that the Defendants owed no duty if Schibel "could be expected" to see an unpainted wheel stop in the dark with surrounding lighting. The effect of licensee instruction No. 14 was to shift the burden from the landowner's expectation to consider the foreseeable risks, to an expectation upon licensees to discover a dangerous condition themselves. Washington law and the Restatement (Second) of Torts § 342 hold otherwise. The trial court's licensee Jury Instruction No.

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[59] *Amend v. Bell*, 89 Wn.2d 124 (1977).
[60] *Kirk v. Washington State Univ.*, 109 Wn. 2d 448 (1987).
[61] *Dorr v. Big Creek Wood Prod., Inc.*, 84 Wn. App. 420 (1996).

14 was misleading and did not properly inform the jury of the applicable law.

4. The Trial Court's Licensee Jury Instruction Was Not Harmless. Defense Counsel Took Advantage of the Court's Misstatement of Law Resulting in Clear Prejudice

"Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading."[62] An instruction is a clear misstatement of the law if it "allows a jury to premise a duty on the absence of negligence by the plaintiff."[63] The Defense has already made clear that the instruction "allowed the jury to make this determination." *Def. Resp. at 32.*

> "When the record discloses an *error in an instruction* given on behalf of the party in whose favor the verdict was returned, the error is *presumed to have been prejudicial…*"

The Defense argues "since the jury may have found Schibel to be an invitee, any error claimed by Schibel *may well* be harmless." *Def. Resp. at 34.* Our Courts have held this is not sufficient to overcome presumptive prejudice. Even when "it is unclear whether the jury would have reached a different conclusion had it been properly instructed, to the extent that the instruction misstated the law, it is presumed to be prejudicial."[64] Had the trial court issued a licensee jury instruction that properly instructed the jury

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[62] *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn. 2d 842 (2015).
[63] *Keller v. City of Spokane*, 146 Wn. 2d 237 (2002).
[64] *Id.*

regarding a landowner's expectation to consider the foreseeable risk, rather than placing an expectation upon licensees to discover a dangerous condition themselves, the jury very well might have found in favor of Schibel. Being unable to show otherwise, the error is presumed prejudicial and supplies grounds for reversal.

An instruction is misleading if it is "ambiguous, permitting both an interpretation that was, arguably, a correct statement of the law and an interpretation that was an incorrect statement of the law."[65] Prejudice is demonstrated where it is shown that "argument took what had been a mere latent possibility of misunderstanding and actively encouraged the jury to apply an erroneous legal standard." Prejudice occurs where counsel urges "the jury to rely on an incorrect statement of the law—an incorrect interpretation permitted by instruction."[66] "No greater showing of prejudice from a misleading jury instruction is possible" than by "showing that the incorrect statement was actively urged upon the jury during closing argument."[67]

In this case, Defense counsel took the licensee jury instruction issued by the trial court and repeatedly urged the jury to apply an incorrect statement of the law and essentially argued that Schibel voluntarily assumed the risk.

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[65] *Anfinson v. FedEx Ground Package Sys., Inc.,* 174 Wn. 2d 851 (2012).
[66] *Id.* at 876
[67] *Id.* at 876

Defense counsel admonished the jury that "if he is a licensee, it's not a duty of reasonable care any longer,"[68] and that "under the law that the judge has given you, you can only find STCU liable if you find that it is a dangerous condition and that Schibel cannot be expected to have knowledge of it. And we all have knowledge of wheel stops. They're all over the place in parking lots."[69] "Mr. Schibel didn't say it's invisible. So he can be expected to see it and have knowledge of it."[70] Defense counsel concluded to the jury "unless you can say he cannot have *any* expectation of it, your verdict must be for STCU."[71]

Our Courts have found that after a judge issues his instructions stating what he believes to be the proper law in the case "it is no answer that [Plaintiff] remained free to argue the alternative... Nor [does Plaintiff] waive any error by failing to object to the closing argument. The closing argument was not the *error*, it was the source of *prejudice*."[72] The error in instruction No. 14 permitted the Defense to argue an incorrect interpretation of the law. Jury instruction No. 14 was the error, and once issued could not

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[68] RP 547
[69] RP 550
[70] RP 548
[71] RP 550
[72] *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn. 2d 851 (2012) (emphasis in original).

be remedied by an objection to closing argument, or even a deep-throated rebuttal that the Defense has misinterpreted the law. *Def. Resp. at 38.*

5. The Majority of Pure Comparative Fault States Have Abandoned Invitee-Licensee Distinctions

Washington is a pure comparative fault jurisdiction by statute. RCW 4.22.005. Pure comparative fault was adopted because the former system came to be viewed as unreasonable and unfair. Washington Courts have never been asked to square our comparative fault statute with the Restatement (Second) of Torts § 342.

Washington's adherence to the invitee-licensee classifications is particularly strange considering the legislature's adoption of pure comparative fault. By forcing entrants to prove they 'did not know or have reason to know of the condition and the risk involved' the licensee distinction "improperly shifts the burden of proof from the defendant to the plaintiff ... Such an instruction is a holdover from the bygone era of contributory negligence, and directly contradictory to the requested instruction on comparative fault."[73] Holding the landowner to the standard of a reasonable person in like circumstances would better allocate fault between the defendant-landowner and the plaintiff-entrant.[74]

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[73] *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009).
[74] *Keller v. City of Spokane*, 146 Wn.2d 237, 250, 44 P.3d 845, 852 (2002).

The majority of states with pure comparative fault systems have abandoned the distinction between licensees and invitees. According to the tables prepared by the Defense, there are 11 other states with a pure comparative fault system. Of those, 8 have abandoned the distinction between licensees and invitees [75]

The tables prepared by the Defense regarding modified comparative fault jurisdictions are inaccurate. *Def Resp. Appendix*. Specifically, the Defense incorrectly asserts that Illinois,[76] Iowa,[77] Kansas,[78] Montana,[79] and Wyoming[80] have retained the common-law distinctions.[81] "In total, the

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[75] See *Def. Resp. Appendix* (citing cases in Alaska, California, Florida, Kentucky, Louisiana, New Mexico, New York, and Rhode Island.)
[76] *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill. 2d 213 (1996) ("The Premises Liability Act abolished the common law distinction between the duties owed by a landowner to an invitee and a licensee")
[77] *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009) ("our holding abandoning the distinction between invitees and licensees in premises liability cases.")
[78] *Jones v. Hansen*, 254 Kan. 499 (1994) ("We hold that in Kansas, the duty owed by an occupier of land to licensees shall no longer be dependent upon the status of the entrant on the land; the common-law classification and duty arising from the classification of licensees shall no longer be applied.")
[79] *Limberhand v. Big Ditch Co.*, 218 Mont. 132 (1985) ("test is always not the status of the injured party but the exercise of ordinary care in the circumstances by the landowner.")
[80] *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993) ("We reverse, remand, and abandon a portion of the common-law rule which distinguishes between tort claimants on the basis of whether their status is licensee or invitee.")
[81] Of the 33 states that have a modified comparative fault system, 17 have abandoned the distinction between licensees and invitees.

jurisdictions are now split, with a majority of states departing from the common-law classifications in some manner, and a substantial minority either rejecting abolition or not taking a recent position."[82]

Plaintiffs do not ignore Washington's 1986 decision in *Younce v. Ferguson* to maintain the common law distinctions. When *Younce* was decided "the majority of jurisdictions had not rejected the classifications."[83] The trend toward the abolition of status distinctions and the adoption of the single duty of reasonable care under the circumstances began with the 1959 decision of *Kermarec v. Compagnie Generale Transatlantique*,[84] and extends from the 1968 decision of *Rowland v. Christian*[85] to the 2009 decision of *Koenig v. Koenig.*[86] Even the Kansas courts upon which *Younce* relied have abandoned the invitee-licensee distinctions, and they did so over

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[82] *Koenig v. Koenig,* 766 N.W.2d 635 (Iowa 2009).
[83] See *Younce* at 664-665
[84] 358 U.S. 625 (1959)
[85] 69 Cal. 2d 108 (1968)
[86] For a comprehensive discussion on the history and basis of the distinctions, and the trend toward the abolition of status distinctions in the common law and the adoption of the single duty of reasonable care under the circumstances, see *Hall v. Cagle*, 773 So.2d 928 (Miss.2000) (McRae, J., concurring).

two decades ago.[87] When the reason for the rule ceases, so should the rule itself. [88]

Critics of imposing the general duty of reasonable care on landowners assert that the duty is nebulous and subjects landowners to unlimited liability, however those concerns have proven "to be inflated."[89] It "has not resulted in catastrophic liability."[90] What those arguments failed to recognize is that civil juries have been applying negligence principles for hundreds of years. There is nothing to fear about jury involvement. Other states abandoning the distinctions have experienced little difficulty in similarly adhering to a simpler and more just standard.

The primary advantage of abolishing the invitee-licensee distinction is to avoid confusion. Judicial predictability has not been a hallmark of the classification system as Washington caselaw involving invitees, licensees, and trespassers is riddled with exceptions to rigid readings of the classifications. Not only does this confusion often lead to appeal, it also prevents the development of an easily applicable standard for future cases.

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[87] See *Younce* at 666 ("As noted by the Kansas court...); Cf. *Jones v. Hansen*, 254 Kan. 499 (1994).
[88] Even in England where the distinction originated, the common statuses have long been abolished. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957)
[89] *Vega by Muniz v. Piedilato*, 154 N.J. 496 (1998) ((Handler, J., concurring).
[90] *Maher v. United States*, 56 F.3d 1039, 1048 (9th Cir. 1995)

As a result, retention of the common-law system has not fulfilled its goal of predictability, but rather has "produced confusion and conflict."[91]

The difficulty in distinguishing between invitees and licensees underscores another disadvantage of the classification—people do not alter their behavior based on an entrant's status as an invitee or licensee. Many courts have illustrated this distinction's divorce from reality. The fungible and unpredictable nature of the classifications makes it impossible for landowners to conform their behavior to current community standards. It also makes it impossible for entrants to understand to what level of danger or risk they are being exposed.

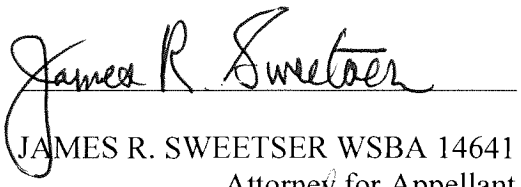
Finally, abandonment of this common-law distinction recognizes a higher valuation of public safety over property rights. Under the modern rules a trespasser remains a trespasser, but a landowner is required to keep his premises reasonably safe for those he allows onto his land, or to provide ample warnings otherwise. He is not allowed to escape liability by classifying the person as a licensee or an invitee. As *Rowland* stated, a man's life or limb should not differ based on whether he is on the property for business or for a social visit. The landowner should be held to the same standard of care, to act as a reasonable person would.

II. CONCLUSION

[91] *Kermarec* at 631

Under the law, landowners are expected to foresee risk of harm to people invited or licensed to enter their land, and owe a duty to warn or make safe. Licensees are not expected to anticipate unknown dangers. This Court should find Schibel was an invitee as a matter of law based upon the undisputed facts presented at summary judgment, the licensee instruction was an inaccurate and/or misleading statement of the correct law, the Plaintiff did not invite error or waive the right to challenge the licensee instruction, and Defendants' closing argument improperly and prejudicially shifted the burden to Plaintiff to anticipate unknown hazards as a complete defense to any duty owed to Schibel. Remand the case back to the trial court for a new trial on the merits.

RESPECTFULLY SUBMITTED THIS 31st day of October, 2018.



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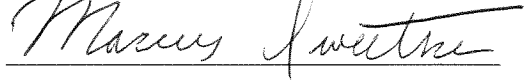

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that on the 1st day of November, 2018, I caused to be served a true and correct copy of the foregoing document on the following:

Counsel for Defendant/Respondent:	SENT VIA:
Brad E. Smith, WSBA 16435 Feltman Ewing, P.S. 421 W. Riverside Ave., Ste. 1400 Spokane, WA 99201	X HAND DELIVERY - Legal Messenger ____ US MAIL ____ FACSIMILE ____ E-MAIL

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