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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 BRIEF

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TABLE OF CONTENTS

	Page #
I. Introduction	6
II. Assignments of Error	8
III. Statement of the Case	9
IV. Argument	16
A. The court erred when denying Plaintiff’s motion for summary judgment where the Defense conceded “there are no facts in dispute and this is a decision that’s a matter of law for the court.”	16
a. The Court Erred by Denying Summary Judgment Because the Undisputed Facts Established Schibel As an Invitee as A Matter of Law.....	17
b. The Court Erred by Issuing Both an Invitee and Licensee Jury Instruction Thereby Erroneously Asking the Jury to Determine the Defendants’ Legal Duty	22
B. The court erred by instructing the jury that a licensee is owed no duty unless the licensee “cannot be expected” to have knowledge of the dangerous conditions of the premises	23
a. Washington Has Adopted Restatement (Second) Of Torts § 332 (1965) Which Does Not Support the Language in The Licensee Instruction Provided by The Trial Court	24
b. The “Expectation” Test Is Applied to The <i>Possessor</i> While The “Reason to Know” Test Is Applied to The <i>Entrant</i> ..	25
C. In closing argument, Defense counsel prejudicially misled the jury by actively encouraging them to apply an erroneous legal standard	31
D. This Court, upon review, should adopt <i>Rowland v. Christian</i> because the advent of Washington’s comparative fault statute is more appropriately addressed by the modern tort standards advocated by Justice Sweeney’s concurrence in <i>Beebe v. Moses</i>	35
V. Conclusion	40
VI. Appendix	43
A-1 ASTM F1637	43

Table of Authorities

TABLE OF WASHINGTON STATE CASES

Amend v. Bell, 89 Wn.2d 124, (1977).....30

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, (2012).....
.....24, 31

Beebe v. Moses, 113 Wn.App. 464, (2002).2, 8, 23, 35, 37

Berglund v. Spokane Cty., 4 Wn.2d 309, (1940).33

Bodin v. City of Stanwood, 130 Wn.2d 726, (1996)24

Camicia v. Howard S. Wright Const. Co., 179 Wn.2d 684 (2014)17

Clevenger v. City of Seattle, 29 Wn.2d 167, (1947)31

Dotson v. Haddock, 46 Wn.2d 52, (1955)17

Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, (1980).....19

Fergen v. Sestero, 182 Wn.2d 794, (2015).....24

Gleason v. Cohen, 192 Wn. App. 788, (2016).....26

Griffin v. Cascade Theatres Corp., 10 Wn.2d 574, (1941)33

Hanson v. Spokane Valley Land & Water Co., 58 Wash. 6, (1910).....17

Hendrickson v. Moses Lake Sch. Dist., 199 Wn. App. 244, (2017)24

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, (2012).....32

Keller v. City of Spokane, 146 Wn.2d 237, (2002).....23, 31, 37

Kirk v. Washington State Univ., 109 Wn.2d 448, (1987)26

Margola Assocs. v. City of Seattle, 121 Wn.2d 625, (1993).....20

<i>McKinnon v. Washington Fed. Sav. & Loan Ass'n</i> , 68 Wn.2d 644 (1966).....	17, 19
<i>McLeod v. Grant County School Dist.</i> , 42 Wn.2d 316, (1953)	23
<i>Memel v. Reimer</i> , 85 Wn.2d 685, (1975).....	25
<i>Owen v. Burlington N. & Santa Fe R.R. Co.</i> , 153 Wn.2d 780, (2005).....	16
<i>State v. Allen</i> , 182 Wn.2d 364, (2015)	32
<i>State v. Anderson</i> , 153 Wn. App. 417, (2009)	32
<i>State v. Bennett</i> , 161 Wn.2d 303, (2007)	24
<i>State v. Warren</i> , 165 Wn.2d 17, (2008)	32
<i>Stone v. City of Seattle</i> , 64 Wn.2d 166, (1964).....	31
<i>Wells v. Vancouver</i> , 77 Wn.2d 800, (1970)	23
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, (1986)	19

TABLE OF OTHER CASES

<i>Rowland v. Christian</i> , 69 Cal.2d 108, 443 P.2d 561, (1968).....	8, 35, 38, 39
--	---------------

STATUTES

RCW 4.22.005	36, 37
RCW 4.22.015	37

REGULATIONS AND RULES

R.A.P. 12.2.....	36
R.A.P. 13.4(b).....	35

OTHER AUTHORITIES

Restatement (Second) of Torts § 330 (1965).....20, 21, 22

Restatement (Second) of Torts § 332 (1965).....17, 18, 19, 20, 22, 24, 25

Restatement (Second) of Torts § 342 (1965).....27, 28

Restatement (Second) of Torts § 343 (1965).....28

Black's Law Dictionary (10th ed. 2014)26, 33

Guido Calabresi, *A Common Law For The Age Of Statutes* 10 (1982)39

Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D.
L. REV. 66, 89 (1987/1988)39, 40

I. Introduction

What we have before the Court today is a commercial bank that knew about safety standards for safe walking surfaces for years, but chose not to follow the safety standards for wheel stops. The Plaintiff, Kevin Schibel, parked in the bank's parking lot not knowing about the Defendant's decision not to follow the safety standards for wheel stops. Mr. Schibel tripped over the Defendant's wheel stop that violated the safety standards, but at trial, was blamed for not expecting a trip hazard to be in his path.

Prior to trial, Plaintiff moved for summary judgment on the issue of whether Mr. Schibel was an invitee as a matter of law. Both sides conceded that there were no material issues of fact in dispute. Mr. Schibel had parked in the bank's parking lot to attend a meeting at Chairs Coffee House when the incident occurred. Plaintiff submitted he was an invitee because the bank arranged their parking lot stalls and held them open to Chairs Coffee customers because it "saw everyone as a potential customer." For years, the bank had known about patrons using their parking lot to frequent the Chairs Coffee House and the bank. The bank chose not to restrict the use of their parking lot.

The Defendant claimed Plaintiff was not an invitee because he was not a patron of the bank, and the bank did not receive a direct economic benefit from Mr. Schibel using the parking lot. The Court denied Plaintiff's

motion for Summary Judgment, but did not rule on Plaintiff's legal status or Defendant's legal duty.

At trial, after the close of all evidence, Plaintiff proposed an invitee instruction. Defendant proposed a licensee instruction. Plaintiff objected to Defendant's licensee instruction. Defendant objected to Plaintiff's invitee instruction. In Plaintiff's motions, written objections to defendant's proposed jury instructions, and oral exception to the licensee instruction, the trial court was informed Washington State had adopted the Second Restatement of Torts position for invitees and licensees.

The trial court chose to give both Plaintiff's proposed invitee instruction and the Defendant's proposed licensee instruction. The WPIC licensee instruction adopted by the trial court did not conform to Second Restatement of Torts adopted by Washington law.

The licensee instruction allowed Defense counsel to argue that no duty of reasonable care applied if there were any expectation for the Plaintiff to see the wheel stops. It allowed Defense counsel to argue that no legal duty applied because a Plaintiff can always "be expected to see" a wheel stop in a parking lot because it is "not invisible." The instruction allowed Defense counsel to actively encourage the legal conclusion that "any expectation" that a Plaintiff should anticipate a trip hazard abrogates the bank's legal duty of ordinary and reasonable care.

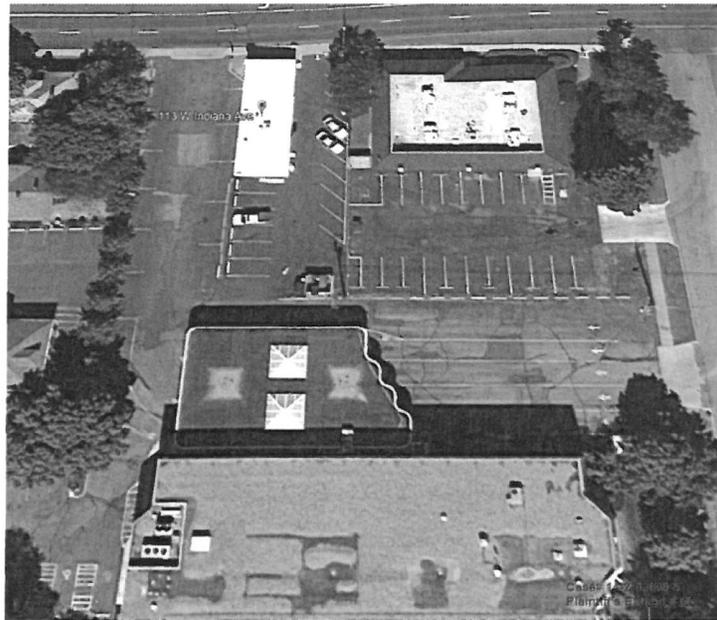
Finally, Plaintiff argues that with the advent of comparative fault the distinctions between invitee, licensee, and trespasser are outdated, and Washington Courts should follow the majority of States with comparative fault statutes. Plaintiff argues that as a matter of public policy and evolving standards of safety, inadequate legal classifications of invitee, licensee, and trespasser should be abolished in favor of a duty of reasonable care owed under the circumstances and an apportionment of comparative fault to each side.

II. Assignments of Error

- A. The court erred when denying Plaintiff's motion for summary judgment where the Defense conceded "there are no facts in dispute and this is a decision that's a matter of law for the court."
- B. The court erred by instructing the jury that a licensee is owed no duty unless the licensee "cannot be expected" to have knowledge of the dangerous conditions of the premises
- C. In closing argument, Defense counsel prejudicially misled the jury by actively encouraging them to apply an erroneous legal standard
- D. This Court, upon review, should adopt *Rowland v. Christian* because the advent of Washington's comparative fault statute is more appropriately addressed by the modern tort standards advocated by Justice Sweeney's concurrence in *Beebe v. Moses*

III. Statement of the Case

Defendants, Spokane Teachers Credit Union (hereinafter STCU), owned a piece of property near Indiana and Division in Spokane Washington.¹ STCU built a bank branch on the property.² The property also contained a small building.³ The Defendants divided the parking lot and sold the small building (located at 113 W Indiana, below), which was occupied by Chairs Coffee at the time of the incident.⁴



The new owners of the small building re-surfaced their portion of the parking lot and painted the concrete wheel stops caution yellow to

¹ RP 69; RP 95-96

² RP 85

³ Ex. P-66

⁴ RP 69; RP 97-98.

comply with safety standards.⁵ The wheel stops were placed directly in front of car parking stalls. The Defendant placed their wheel stops end-to-end in a line for parallel parking stalls adjacent to the Chairs Coffee parking lot but chose to paint merely one (1) of their concrete wheel stops yellow. The remaining wheel stops in the bank's lot were left unpainted.⁶



Both sections of the parking lot were left open for patrons of either business - the bank or Chairs Coffee. The Defendants admitted prior knowledge that people, including their own employees, would frequently walk across the parking lots between Chairs Coffee and STCU.⁷ The Defendants knew that customers of Chairs Coffee were using the

⁵ Ex P-66

⁶ RP 78.

⁷RP 73.

Defendants' parking lot in the evenings.⁸ Both the CR 30(b)(6) deponent and Jack Caddy, who was the person responsible for parking lot maintenance and repair, testified that STCU saw all people using the parking lot as potential customers, and they wanted to be good neighbors by keeping their lot open.⁹ The businesses did not restrict access to "customer's only" in their respective lots, nor did either business tow noncustomer vehicles.¹⁰ Patrons of both the Defendants' bank and the Chairs Coffee House were allowed to use either parking lot.¹¹

The Defendants admitted they knew wheel stops were a trip and fall hazard.¹² The Defendants acknowledged it was foreseeable that people must walk between vehicles to enter and exit their cars, and knew that people typically expected a flat surface when walking across a parking lot.¹³ The Defendants admitted having prior knowledge of the ASTM standards for safe walking surfaces, including safety standards applicable to wheel stops in parking lots.¹⁴ ASTM F1637 emphasizes that wheel stops are recognized as trip hazards if not placed in the middle of the parking stall, if placed in a location that intrudes into a pedestrian

⁸ RP 73

⁹ RP 103.

¹⁰ RP 72

¹¹ RP 103.

¹² RP 67.

¹³ RP 72; RP 91.

¹⁴ RP 96.

walkway, or if left without sufficient contrast to their surroundings.¹⁵ The Defendants' 30(b)(6) witness testified that all corporations should consider ASTM safety standards, and that wheel stops should not impede a foreseeable pathway.¹⁶ Although the Defendants' parking lot manager said he simply could not "imagine an unsafe use of a wheel stop,"¹⁷ he conceded that he had access to ASTM standards for wheel stops prior to Schibel's fall.¹⁸

The Defendants admitted that in October 2011, Plaintiff Kevin Schibel tripped over an unpainted wheel stop in their parking lot.¹⁹ Schibel was a local musician attending a Songwriters meeting hosted at Chairs Coffee.²⁰ Schibel had been to Chairs Coffee on one previous occasion and was not familiar with how the parking lots were designed or of the previous sale that divided ownership of the parking lot.²¹ Both the Defendants and Chairs Coffee House parking lots were nearly full when Schibel arrived.²² Schibel drove around the Chairs Coffee building and located an available parking spot.²³ Schibel parked in the Defendants'

¹⁵ RP 146-147; *See also* App. A-1

¹⁶ RP 73

¹⁷ RP 100

¹⁸ RP 99

¹⁹ RP 70; RP 78-79

²⁰ RP 202

²¹ RP 205

²² RP 203-205

²³ RP 203-205

parking lot just as other participants at the songwriters' meeting were doing that night. Schibel saw other patrons using the parking lot's marked parking stalls to attend Chairs Coffee and pulled into one of the last parking spots available.²⁴

Schibel walked the north sidewalk to the side entrance to Chairs Coffee House.²⁵ Schibel attempted to sign up to play music. He was told there were no openings to play music that night.²⁶ Schibel exited the same door he came in. He walked the same route along the sidewalk to his vehicle. He placed his guitar in his vehicle.²⁷ He walked back along the sidewalk to re-enter the side entrance to Chairs Coffee House.²⁸

Schibel left the meeting at approximately 8:30 pm. He exited the main entrance in the middle of the Chairs Coffee building.²⁹ He did not walk back to the sidewalk. Instead he walked around the south end of the Chairs Coffee building to get to his car. He believed this was the shorter distance to his car.³⁰ Schibel had never walked around the south side of the building and was unfamiliar with the parking lot layout or prior use of wheel stops in the area.

²⁴ RP 205.

²⁵ RP 206; *See also* Ex. P-66

²⁶ RP 206.

²⁷ RP 206.

²⁸ RP 206.

²⁹ RP 206-207

³⁰ RP 207; RP 217.

When he reached the back of the Chairs Coffee building, he saw bright yellow parking lines and yellow wheel stops in the Chairs Coffee parking lot in front of parked cars.³¹ He walked between two parked cars along the yellow lines. He did not see the Defendants' uncolored wheel stops in his path.³²



Schibel tripped over the Defendants' unpainted concrete wheel stop. He was propelled forward. He bounced off a parked car in the bank parking lot. He landed on his left kneecap.³³ His kneecap shattered into pieces. As a result, he had several surgeries and developed a severe

³¹ RP 207

³² RP 207; RP 209-210.

³³ RP 209-210

medical complication known as Complex Regional Pain Syndrome.³⁴

Prior to trial, Plaintiff moved for summary judgment that Plaintiff was an invitee as a matter of law.³⁵ The Plaintiff and Defendant agreed that no material issues of fact in dispute existed.³⁶ The Defendant and Plaintiff conceded that the lot was open for the public to park, that Defendants were aware of people parking in the lot and patronizing Chairs, and that STCU viewed all people that parked in their lot as potential customers.³⁷ The Defendants' invited the public to park on their lot in hopes of attracting new business.³⁸ Use of the parking lot was not limited to STCU employees only.³⁹ The court denied Plaintiff's motion.⁴⁰

At trial, after the conclusion of all evidence, Plaintiff again asked the trial court to rule that Plaintiff was an invitee as a matter of law, and to reject the WPIC licensee instruction.⁴¹ Plaintiff objected to the licensee

³⁴ RP 210.

³⁵ CP 12-50 (Pl.'s Mot. Summ. J.); RP 5-20.

³⁶ RP 15-16 (Defense Counsel: "The 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.").

³⁷ RP 18 ("Mr. Smith indicates to the court that there are no disputes of fact, and it is a fact in this case that the representative of the defendant has indicated, yes, we do invite the public; yes, we do permit the public to shop – to park here, and we do so as a member of the community, in hopes of attracting new business.")

³⁸ RP 18.

³⁹ RP 18.

⁴⁰ CP 55 (Order Denying Mot. Summ. J.)

⁴¹ CP 313-325 (Pl's Opp'n to Def's Proposed Jury Instructions)

jury instruction citing the Restatement Second of Torts, Washington case law, and the doctrine of comparative fault.⁴² The court decided to give both an invitee and licensee instruction to the jury.⁴³

During closing, Defense counsel told jurors that the licensee instruction was crucial to the case.⁴⁴ Defense counsel admonished the jury that “if he is a licensee, it's not a duty of reasonable care any longer,”⁴⁵ 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.”⁴⁶ “Mr. Schibel didn't say it's invisible. So he can be expected to see it and have knowledge of it.”⁴⁷ Defense counsel concluded to the jury “unless you can say he cannot have *any* expectation of it, your verdict must be for STCU.”⁴⁸ The jury returned a verdict exculpating the Defendants.

Plaintiff filed a motion for reconsideration and a new trial.⁴⁹

Plaintiff argued the licensee jury instruction was a misstatement of law,

⁴² CP 313-325 (Pl's Opp'n to Def's Proposed Jury Instructions)

⁴³ CP 424-428 (Jury Instr. 11, 12, 13, 14)

⁴⁴ RP 548.

⁴⁵ RP 547

⁴⁶ RP 550.

⁴⁷ RP 548.

⁴⁸ RP 550.

⁴⁹ CP 454.

and giving the instruction constituted reversible error. Plaintiff argued Defense counsel had committed misconduct by actively encouraged the jury to apply an erroneous legal standard.⁵⁰ The court denied Plaintiff's motion for reconsideration, holding that Jury Instruction No. 14 was "an accurate statement of the law,"⁵¹ and denied Plaintiff's motion for a new trial holding that Defense counsel had "argued appropriately and accurately the law in the state of Washington with regard to a landowner's obligation."⁵² Plaintiff filed for appeal.

IV. Argument

A. **The court erred when denying Plaintiff's motion for summary judgment where the Defense conceded "there are no facts in dispute and this is a decision that's a matter of law for the court."**

This Court "reviews summary judgment orders de novo and performs the same inquiry as the trial court."⁵³ During briefing and oral argument, the trial court acknowledged "there are no disputes of fact" and "the representative of defendant has indicated, yes, we do invite the public; yes, we do permit the public to shop -- to park here, and we do so

⁵⁰ RP 568-569.

⁵¹ RP 618.

⁵² RP 618.

⁵³ *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220, 1223 (2005).

as a member of the community, in hopes of attracting new business.”⁵⁴ However, the trial court denied summary judgment.⁵⁵ The court did not define the Defendants’ duty based on the undisputed facts, but declined to rule as to whether Schibel was an invitee or a licensee.⁵⁶

1. The Court Erred by Denying Summary Judgment Because the Undisputed Facts Established Schibel As an Invitee as A Matter of Law

The court erred in denying summary judgment that Schibel was an invitee as a matter of law. Washington has defined “invitee” broadly for more than half a century.⁵⁷ In 1966, Washington adopted Restatement (Second) of Torts § 332 (1965).⁵⁸ Washington’s invitee classification

⁵⁴ RP 18.

⁵⁵ CP 55 (Order Denying Mot. Summ. J.)

⁵⁶ CP 55 (Order Denying Mot. Summ. J.)

⁵⁷ See, i.e., *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 10, 107 P. 863, 865 (1910) (“Where the public has been accustomed to use a private way, it is negligence for the owner to make an unguarded excavation therein, or otherwise dangerously obstruct it, or to conduct his business in a manner dangerous to those passing, or to fail to keep it in repair.”); *Dotson v. Haddock*, 46 Wn.2d 52, 56, 278 P.2d 338, 340 (1955) (“[I]f the possessor of land maintains a private way over his land, under such circumstances as to induce a reasonable belief by those who use it that it is public in character, he is under a duty to exercise reasonable care to maintain it in a reasonably safe condition for travel.”)

⁵⁸ *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 773, 777 (1966).

broadly applies to both “business visitors” and “public invitees.”⁵⁹

Express invitation⁶⁰ from the landowner is not required:

“A common form of invitation is preparation of the land for the obvious purpose of receiving the visitor, and holding it open for that purpose.... The nature of the use to which the possessor puts his land is often sufficient to express to the reasonable understanding of the public, or classes or members of it, a willingness or unwillingness to receive them. Thus the fact that a building is used as a shop gives the public reason to believe that the shopkeeper desires them to enter or is willing to permit their entrance, not only for the purpose of buying, but also for the purpose of looking at the goods displayed therein or even for the purpose of passing through the shop. This is true because shopkeepers as a class regard the presence of the public for any of these purposes as tending to increase their business.”⁶¹

A “business visitor” is “a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business

⁵⁹ *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684 (2014) (*Comparing* RESTATEMENT OF TORTS § 332 (1934) (defining invitee only in terms of a business visitor), *with* RESTATEMENT (SECOND) OF TORTS § 332 (adding the classification “public invitee.”) (“In broadening the category of invitee in 1966, we followed a national trend of courts providing greater protection to the public when welcomed onto another's land.”)

⁶⁰ *E.g.*, CP 57-64 (Def’s Opp’n to Pl’s Mot. Summ. J. arguing invitee status cannot exist unless Plaintiff has “knowledge that they are on the property of the property owner who supposedly gave the invite.”)

⁶¹ Restatement (Second) of Torts § 332 cmts. b-c (1965).

dealings with the possessor of the land.”⁶² Direct economic benefit⁶³ to the possessor is not required:

“It is not necessary that the visitor's purpose be to enter into immediate business dealings with the possessor. The benefit to the possessor may be indirect and in the future. Thus, those who enter a shop with no present purpose of buying but merely to look at the goods displayed, are business visitors of the shop, and one who comes to a residence merely to inquire about an automobile advertised for sale is a business visitor of the possessor. It is not necessary that the particular visit shall offer the possibility of business dealings, or of benefit to the possessor. It is enough that it has reasonable connection with another visit which does.”⁶⁴

Public invitee status is based “upon the fact that the occupier, by his arrangement of the premises or other conduct, has 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, and that reasonable care was taken to make the place safe for those who enter for that purpose.”⁶⁵ Liability to public invitees exists because “an owner or occupier of land who fails to make a reasonable effort to apprise an invitee

⁶² Restatement Section (Second) of Torts § 332(3) (1965).

⁶³ *E.g.*, CP 57-64 (Def’s Opp’n to Pl’s Mot. Summ. J. arguing invitee status cannot exist because “STCU did not benefit from Mr. Schibel’s entrance.”)

⁶⁴ Restatement (Second) of Torts § 332 cmt. f (1965); *See also McKinnon v. Washington Fed. Sav. & Loan Ass’n*, 68 Wn.2d 644 (1966); *Younce v. Ferguson*, 106 Wn.2d 658 at 668 (1986) (“restricting the class of invitees to only those who meet the economic benefit test is ‘out of line’”)

⁶⁵ *McKinnon v. Washington Fed. Sav. & Loan Ass’n*, 68 Wn.2d 644 (1966); *Younce v. Ferguson*, 106 Wn.2d 658 at 668 (1986).

of the limits of the invitation becomes responsible for maintaining all the ‘apparently public’ sections of the premises in a non-negligent manner.”⁶⁶

Placing a public parking sign or pay-to-park box⁶⁷ on the property is not required:

“Where land is held open to the public, there is an invitation to the public to enter for the purpose for which it is held open. Any member of the public who enters for that purpose is an invitee...Where land is held open to the public, it is immaterial that the visitor does not pay for his admission, or that the possessor's purpose in so opening the land is not a business purpose, and the visitor's presence is in no way related to business dealings with the possessor, or to any possibility of benefit or advantage, present or prospective, pecuniary or otherwise, to the possessor.

...

Where it is customary that customers or patrons shall be free to go to certain parts of the premises, they are invitees there unless the possessor notifies them that the area of invitation is more narrowly restricted... An invitation usually includes the use of such parts of the premises as the visitor reasonably believes are held open to him as a means of access to or egress from the place where his purpose is to be carried out. If the possessor has intentionally or negligently misled him into the reasonable belief that a particular passageway or door is an appropriate means of reaching the area of his invitation, the visitor is entitled to the protection of an invitee when he makes use of it. Likewise, if the possessor should realize that either one of two doors might be taken by the visitor to be the door to the area of invitation; the visitor may be entitled to the status of an invitee even though by mistake he enters the wrong door. In such a case the possessor,

⁶⁶ *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127 (1980).

⁶⁷ *E.g.*, CP 57-64 (Def’s Opp’n to Pl’s Mot. Summ. J. arguing public invitee status cannot exist because there was no ‘public parking’ sign or ‘pay-to-park box.’)

knowing the likelihood of a mistake, must take the risk incident to his failure to indicate the proper door.”⁶⁸

On the other hand, a “license” is generally defined as a right granted by some authority to do an act which, without license, would be unlawful.⁶⁹ “Licensee” is limited to “those who enter only by virtue of the consent of the possessor, without more.”⁷⁰ It is “one whose presence upon the land is solely for his own purposes, in which the possessor has *no interest*.”⁷¹

Here, the facts were undisputed. Neither the Plaintiff nor the Defendant disputed that the Defendants’ parking lot management personnel knew members of the public were regularly parking their vehicles and traversing the Defendants’ parking lot, as both customers of the bank and customers of the adjacent Chairs Coffee House. The parking lot had “been prepared for the public’s reception.”⁷² The Defendants’ parking lot was painted with yellow directional arrows for vehicles to follow and painted with yellow parking stalls for people to park their vehicles. The public used the parking lot as it was open for the public to park and shop at either the Defendants’ bank or the adjacent Chairs Coffee

⁶⁸ Restatement (Second) of Torts § 332 cmts. d, 1 (1965)

⁶⁹ *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993).

⁷⁰ Restatement (Second) of Torts § 330 (1965).

⁷¹ Restatement (Second) of Torts § 330 cmt. h (1965) (emphasis added).

⁷² See Restatement (Second) of Torts § 330 cmt h (1965).

House. The Defendants' parking lot was held open in this fashion for all members of the public, day in and day out, for multiple years. The Defendants' own employees would walk from the bank to the adjacent Chairs Coffee House throughout the day. Schibel was not aware of who owned the parking lot, only that other Chairs Coffee patrons were filling the lot to attend the songwriters meeting on the night of the incident. Schibel was not the only member of the public parking in the lot to attend Chairs Coffee House, as the public regularly filled the parking lot to visit either the Coffee House or the bank.

Defendants' parking lot was held open in this fashion for a specific purpose: to attract business customers. The Defendants' binding 30(b)(6) testimony established that Chairs Coffee patrons, and the public at large, were welcomed in the parking lot in the hopes of attracting future business for the Defendants. Whether the Defendants' interest in attracting new members to their business resulted in an actual economic benefit, or was merely supposed, is immaterial.⁷³ Under these undisputed facts, Schibel was an invitee as a matter of law.

2. The Court Erred by Issuing Both an Invitee and Licensee Jury Instruction Thereby Erroneously Asking the Jury to Determine the Defendants' Legal Duty

⁷³ See Restatement (Second) of Torts § 332 cmt. d (1965).

The existence of a duty was a question of law. The court refused to rule on undisputed facts and as a result the court erred by issuing both an invitee and a licensee jury instruction. When facts are undisputed, the court's role (not the jury) is to define the legal duty owed, not to ask the jury to determine the law to be applied to the facts. It is the court's function, "[w]hen the facts regarding a visitor's entry onto property are undisputed, the visitor's legal status as invitee, licensee, or trespasser is a question of law."⁷⁴ "In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed."⁷⁵ A jury (when the trier of fact) then determines whether the duty is breached under the particular facts.⁷⁶

Here, the facts were undisputed. Both parties came before the trial court seeking a legal ruling as to the duty Defendants' owed under the undisputed facts. Rather than rule as a matter of law, the trial court decided to issue both an invitee and a licensee jury instruction.⁷⁷ It was

⁷⁴ *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188, 189 (2002).

⁷⁵ *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845, 848 (2002).

⁷⁶ *Wells v. Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970); *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 322-23, 255 P.2d 360 (1953).

⁷⁷ CP 424-428 (Jury Instr. 11, 12, 13, 14)

improper to place the jury in the role of determining the applicable law, rather than the role of applying the law to the particular facts.

B. The court erred by instructing the jury that a licensee is owed no duty unless the licensee “cannot be expected” to have knowledge of the dangerous conditions of the premises.

Plaintiff lodged a multitude of objections and briefs before the trial court issued its jury instructions. At trial, Plaintiff unequivocally and timely objected to the Defense licensee instruction.⁷⁸ Plaintiff incorporated past filings throughout litigation and trial specifically for the purpose of preserving a right to appeal.⁷⁹ The trial court was aware of the Plaintiff’s positions and legal authority forming the basis of its positions. Yet, Plaintiff’s efforts proved futile.

“Legal errors in jury instructions are reviewed de novo.”⁸⁰ The jury should not be misinformed on the applicable law.⁸¹ Jury instructions are insufficient and erroneous if they misstate the law or mislead the jury.⁸² “Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by

⁷⁸ CP 313-325 (Pl’s Opp’n to Def’s Proposed Jury Instructions, “giving a licensee/social guest instruction could constitute reversible error.”)

⁷⁹ RP 482-483.

⁸⁰ *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708, 713 (2015).

⁸¹ *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240, 244 (1996).

⁸² *Anfinson v. FedEx Ground PackageSystem, Inc.*, 281 P.3d 289 (Wash. 2012).

[the Supreme] Court.”⁸³ “If an instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless.”⁸⁴

a. Washington has adopted Restatement (Second) of Torts § 332 (1965) which does not support the language in the licensee instruction provided by the trial court

Under Washington law, a possessor is subject to liability where:

(a) *the possessor* knows or has reason to know of the condition and *should realize* that it involves an unreasonable risk of harm to such licensees, and *should expect* that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) *the licensees do not know or have reason to know* of the condition and the risk involved.⁸⁵

The trial court issued the WPIC licensee instruction:

An owner of premises owes to a licensee a duty of ordinary care in connection with dangerous conditions of the premises of which the owner has knowledge or should have knowledge *and of which the licensee cannot be expected to have knowledge*. This duty includes a duty to warn the licensee of such dangerous conditions.⁸⁶

⁸³ *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

⁸⁴ *Hendrickson v. Moses Lake Sch. Dist.*, 199 Wash. App. 244, 249, 398 P.3d 1199, 1202 (2017).

⁸⁵ *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517, 519 (1975) (*citing* Restatement (Second) of Torts § 332 (1965)) (emphasis added).

⁸⁶ CP 428 (Jury Instr. 14) (emphasis added).

b. The WPIC licensee instruction is a misstatement of law. Under Washington law, the “expectation” test applies to the possessor, not to the entrant.

Foreseeable “expectations” are applied to the *possessor* while the “reason to know” test is applied to the *entrant*. The Restatement specifically uses the terms “should realize” and “should expect” for *possessors*.⁸⁷ It does not use “should realize” or “should expect” for *entrants*.

Inclusio unius est exclusio alterius. If it was intended that licensees “should realize” or should “be expected” to foresee or anticipate perils, authors of the Restatement would have applied the phrases “should know,” “should realize,” or “should expect” to entrants. The Restatement plainly applies different language, a “reason to know” test, for entrants.

A “reason to know” is substantively different from whether a person can have an “expectation” to know. Black’s Law Dictionary defines a “reason to know” as information from which a person of ordinary intelligence would infer that the fact in question exists.⁸⁸ An “expectation,” on the other hand, arises from a forward-looking belief or

⁸⁷ *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517, 519 (1975) (“*the occupier can reasonably anticipate that his licensee will not discover or realize the risks. Under these circumstances, the landowner can fulfill his duty by either making the condition safe or by warning his licensee of the condition and its inherent risks.*”)

⁸⁸ REASON TO KNOW, Black's Law Dictionary (10th ed. 2014).

anticipation without requiring facts or information to make a person fully aware of a specific risk.⁸⁹

The Restatement explains that a “reason to know” requires an entrant to fully understand and appreciate a risk so that he can choose whether to enter or remain on a property. “[I]f 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. Therefore, even though a dangerous condition is concealed and not obvious, and the possessor has given the licensee no warning, if the licensee is in fact fully aware of the condition and the risk, there is no liability to him.”⁹⁰ Otherwise, a licensee is “entitled to ... knowledge of the conditions and dangers which he will encounter *if* he comes.”⁹¹

Nowhere does the Restatement so broadly say that a possessor’s duty is attached only if “the licensee cannot be *expected* to have

⁸⁹ *Gleason v. Cohen*, 192 Wash. App. 788 (2016); *Kirk v. Washington State Univ.*, 109 Wn.2d 448 (1987) (holding that assumption of the risk cannot operate as a complete bar to recovery unless the plaintiff has a “(1) full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk”)

⁹⁰ Restatement (Second) of Torts § 342 cmt. 1 (1965).

⁹¹ Restatement (Second) of Torts § 342 cmt. 1 (1965).

knowledge.”⁹² To the contrary, what a licensee is “entitled to expect” is 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.”⁹³ The Restatement provides an illustration of this principle:

“A invites a friend, B, to take dinner with him at his country place at eight o’clock on a winter evening. A knows that a bridge in his driveway over which B must pass to reach A’s house is in a dangerous condition which is not observable in the dark. A does not tell B of this fact. The bridge gives way under B’s car, causing B serious harm. A is subject to liability to B.”⁹⁴

Like the Restatement’s illustration above, Schibel’s testimony represents the epitome of why a possessor’s duty is to “expect” while a licensee must have “reason to know” in order to abrogate such duty:

“(By Mr. Sweetser) Q. And which door do you walk out of?

A. When I left I went out the front doors right here.

Q. Okay. And you turned to your right or to your left?

A. I turned to my right.

Q. And had you ever walked that route in the past?

A. I had not.

...

Q. How did you walk?

A. ... I walked right between those two cars, and I could see the [yellow] wheel stops here. But it looked flat the rest of the way. I was heading towards my car which was over there, and I – I couldn’t see those [unpainted wheel stops].

...

Q. And were you taken by complete surprise?

⁹² CP 428 (Jury Instr. 14.)

⁹³ Restatement (Second) of Torts § 343 cmt. b (1965).

⁹⁴ Restatement (Second) of Torts § 342 cmt. d (1965).

A. Completely.

Q. And did – how did you fall?

A. I – when I caught it with my toe, I tried to kind of hop to get myself some – a little air maybe compose myself and – and at least land safely. But I kind of bounced off of the trunk of the car that was sitting right here that was parked there. And that threw me off balance, and I ended up going right down on my left knee on the asphalt.

Q. Did you think you had a clear path to walk to your car between the two parked cars?

A. I did. It looked flat.

Q. Did you expect there to be unpainted wheel stops in your path?

A. I did not.

...

Q. Now, Kevin, are you willing to accept any responsibility for not seeing the wheel stop where you fell? I bet you've thought about it.

A. I've thought about this a lot, and we – I firmly believe we all have a responsibility to try to keep ourselves safe, you're walking – walking safely. That being said, that night I wasn't doing anything out of the ordinary, but I didn't see it. So, I – I – I would accept at least, you know, 10 percent that I did not see the wheel stop. If I had seen it, I'd have been happy to have stepped over it.

...

THE COURT: Did you assume when you saw the yellow wheel stop that the remainder of the path was clear?

THE WITNESS: Yes. As far as I could see, it looked – it looked flat going through there. I could see the yellow lines as I'm walking past. And granted, there was a lot of shadows from the cars all parked around, but it looked flat where I was walking through."⁹⁵

The appropriate test for the entrant on land is “reason to know” of the specific risk involved. Since Plaintiff had never walked in the area before, he did not have reason to know wheel stops would be used in a

⁹⁵ RP 546-550

dangerous manner. However, the court's licensee instruction allowed the jury to conclude that the Defendant owed no duty if Plaintiff could "be expected" to have knowledge of the trip hazard.

Placing the duty of "expectation" upon the licensee creates absurd results. It is not entrants that "should realize" and "should expect" unreasonably dangerous trip hazards will be placed in their pathways. The owner of a property cannot create a hazard in an open public parking lot and then claim no duty exists based upon what they expected the injured to anticipate.

Whether Mr. Schibel was a licensee or an invitee, the same danger existed. The Defendant is not entitled to a free pass merely because they believe a licensee should be expected to anticipate the trip hazard they created in their parking lot. The duty to foresee is imposed upon the owner to take care that licensees are either warned or that defects are made safe before people are allowed on the property.

The effect of the WPIC and trial court's licensee instruction was to shift the burden from the bank's expectation to know people on their land will not discover a hazard, to an expectation upon the Plaintiff to discover it for himself. "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.”⁹⁶ “[T]he fact that there is something in a pedestrian's path which he could see if he looked and which he does not see because he does not look, does not constitute contributory negligence as a matter of law unless there is a duty to look for that particular thing.”⁹⁷ “If the rule contended for by the respondent should be enforced, one would not dare to turn his head to the right or to the left in traveling a street” or walking across a parking lot.⁹⁸

To the extent the trial court’s licensee jury instruction “allowed the jury to premise the Defendant’s duty on Plaintiff’s negligence, it was misleading and legally erroneous... To the extent that the instruction misstated the law, it is presumed to be prejudicial.”⁹⁹

C. In closing argument, Defense counsel prejudicially misled the jury by actively encouraging them to apply an erroneous legal standard

“In order to be reversible, a misleading jury instruction must also be prejudicial.”¹⁰⁰ Prejudice exists where counsel urges “the jury to rely on an incorrect statement of the law—an incorrect interpretation permitted by

⁹⁶ *Amend v. Bell*, 89 Wn.2d 124, 132, 570 P.2d 138 (1977).

⁹⁷ *Stone v. City of Seattle*, 64 Wn.2d 166, 171, 391 P.2d 179, 182 (1964).

⁹⁸ *Clevenger v. City of Seattle*, 29 Wn.2d 167, 169, 186 P.2d 87, 88 (1947).

⁹⁹ *Keller v. City of Spokane*, 146 Wn.2d 237, 250, 44 P.3d 845, 852 (2002).

¹⁰⁰ *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876, 281 P.3d 289, 301 (2012) (citing *Keller*, supra, 146 Wn.2d at 249, 44 P.3d 845.).

instruction.”¹⁰¹ “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.”¹⁰² During closing argument, where counsel takes “what had been a mere latent possibility of misunderstanding and actively encouraged the jury to apply an erroneous legal standard. It is no answer that [opposing counsel] remained free to argue the alternative.”¹⁰³ Nor does it “waive any error by failing to object to the closing argument. The closing argument was not the *error*, it was the source of *prejudice*.”¹⁰⁴ The jury should not be misled to believe erroneous interpretations of the law by officers of the court.

An “attorney commits misconduct by misstating the law.”¹⁰⁵ “Misstating the basis on which a jury can acquit insidiously shifts” the burden of proof.¹⁰⁶ “Repetitive misconduct can have a ‘cumulative effect.’”¹⁰⁷ The licensee jury instruction issued by the trial court resulted

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (emphasis in original).

¹⁰⁵ *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268, 273 (2015) (citing *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)).

¹⁰⁶ *State v. Anderson*, 153 Wash. App. 417, 433, 220 P.3d 1273, 1282 (2009).

¹⁰⁷ *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268, 274 (2015) (citing *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012)).

in Defense counsel repeatedly misleading the jury and prejudicing the Plaintiff.

During closing argument, the Defense introduced the licensee jury instruction by stating that a property owner owes no duty of reasonable care to licensees:

“If he's not an invitee, he's a licensee. It's a term of art, and I'll explain. But it's a person who goes on the premises of the other with the permission or tolerance of the owner but without any invitation or for some purpose not connected with any business interest or business benefit to the owner... *Totally different standard. May sound strange again, but if he is a licensee, it's not a duty of reasonable care any longer. It's a duty of ordinary care in connection with dangerous conditions.*”¹⁰⁸

Defense counsel belongs to a highly trained and experienced tort law firm. It is a virtual certainty that he understood that ‘reasonable care’ and ‘ordinary care’ are the same. Black’s Law Dictionary defines “ordinary care” by stating “see reasonable care.”¹⁰⁹ Both are “frequently expressed” by Washington Courts as synonymous.¹¹⁰ Both “‘ordinary or reasonable’ care has been defined by this court as that care which a reasonably prudent person would have exercised under the same or similar

¹⁰⁸ RP 547

¹⁰⁹ ORDINARY CARE, Black's Law Dictionary (10th ed. 2014).

¹¹⁰ *Berglund v. Spokane Cty.*, 4 Wn.2d 309, 315, 103 P.2d 355, 359 (1940).

circumstances.”¹¹¹ By misleading the jury that the licensee jury instruction imposed a lower standard than “reasonable care,” Defense counsel improperly lowered the burden imposed upon premises owners.

The Defense applied the expectation test to the Plaintiff rather than the expectation test to the possessor of land. During closing argument, Defense counsel circled and underlined the licensee jury instruction. He stated the jury was “required” to find that the Defendant had no duty of care if there could be “any expectation” of knowledge attributed to the Plaintiff.¹¹² Defense counsel stated, “unless you can say he cannot have any expectation of it, your verdict must be for STCU.”¹¹³

“I circled it, because the "and" shows it is required. You have to have both a dangerous condition and of which the licensee, who's Mr. Schibel, cannot be expected to have knowledge. That's the crucial point here ladies and gentlemen of the jury. It does not say it has to be a condition which he may not have notice. It does not say a condition of which, well, maybe depending upon vision acuity science, maybe he didn't notice it, maybe he didn't see it in the exercise of ordinary care. No. The standard is which the licensee cannot be expected to have knowledge.

...

He could have seen it. Ms. Gill says, yes, it's not invisible. Mr. Schibel didn't say it's invisible. So he can be expected to see it and have knowledge of it.

...

¹¹¹ *Griffin v. Cascade Theatres Corp.*, 10 Wn.2d 574, 581, 117 P.2d 651, 654 (1941).

¹¹² RP 550

¹¹³ RP 550

Unless he cannot be expected to have knowledge, you cannot find that the violation -- the duty has been violated in this case.

...

Why be focused on what they expect to have knowledge of because it's only for those totally unexpected type of conditions that we can impose liability on a company like STCU when they're dealing with a licensee.

...

But the standard which you have to adopt, which has not been talked about today until now, and we've been waiting for this entire two-week trial, is it has to be a dangerous condition of which Mr. Schibel cannot be expected to have knowledge.

...

And 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 Mr. 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, sometimes in the middle of the parking lots, sometimes on the curbs of parking lots or the edges. But *unless you can say he cannot have any expectation of it, your verdict must be for STCU.*"¹¹⁴

Defense counsel prejudicially mislead the jury by actively encouraging an interpretation of the licensee jury instruction as an abrogation of any duty owed by the bank, regardless of whether the bank knew or should have known a person would not see the wheel stop or realize the danger of the trip hazard, because a licensee "can be expected to see" that which is "not invisible." Defense counsel stated that if the jury could form "any expectation" that the Plaintiff was personally responsible for his own safety, then the Defendants owed no duty.

¹¹⁴ RP 548-550 (emphasis added)

D. This Court, upon review, should adopt *Rowland v. Christian* because the advent of Washington’s comparative fault statute is more appropriately addressed by the modern tort standards advocated by Justice Sweeney’s concurrence in *Beebe v. Moses*.

This Court’s ruling is of “substantial public interest,”¹¹⁵ and Washington Appellate Courts may take any “action as the merits of the case and the interest of justice may require.”¹¹⁶ The WPIC’s licensee instruction is not consistent with Washington law as set forth above.

In this case, Defense counsel argued that the Defendant owed no duty in spite of Defendants’ knowledge that wheel stops were trip hazards, because Schibel was negligent in failing to exercise ordinary care for his own personal safety. Defense counsel argued that if Mr. Schibel could have expected wheel stops to be in a parking lot, it is a complete defense. However, this principle of contributory negligence as an absolute defense was expressly rejected by the Washington State Legislature in 1974 and was replaced by a comparative negligence system. RCW 4.22.005.

Under the doctrine of comparative fault, the plaintiff’s own negligence is only to be considered in determining causation and damages, not whether a duty exists. RCW 4.22.005 states:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory

¹¹⁵ Wash. R. App. P. 13.4(b)

¹¹⁶ Wash. R. App. P. 12.2

damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines such as last clear chance.¹¹⁷

The comparative fault doctrine applies to all actions based on “fault.” That fault includes all acts or omissions “that are in any measure negligent or reckless toward the person or property of the actor or others.”¹¹⁸ The licensee instruction provided here removed the mandate that the fact finder shall determine and proportionately compare the fault of each party. The instruction allowed the jury to premise the Defendants duty of care on the fault of the Plaintiff.¹¹⁹ To make a Plaintiff's negligence part of the Defendants' duty, in effect, bars the Plaintiff's recovery before determining whether the Defendant breached its duty. The licensee jury instruction given by the trial court thereby reintroduced contributory negligence and/or assumption of risk as a complete bar to recovery. This concept of contributory fault was abolished in Washington in 1981.¹²⁰

¹¹⁷ RCW 4.22.005

¹¹⁸ RCW 4.22.015.

¹¹⁹ *E.g.*, RP 611 (Defense counsel arguing to the trial court Schibel's comparative negligence, by itself, was grounds to abrogate the Defendant's duty)

¹²⁰ RCW 4.22.005; *Keller v. City of Spokane*, 146 Wn.2d 237, 250, 44 P.3d 845, 852 (2002).

When applying RCW 4.22.005 to premise liability classifications, Washington Courts should follow the majority states with similar comparative fault statutes. Modern tort standards have abolished the inadequate legal classifications of invitee and licensee in favor of the standards adopted in *Rowland v. Christian*, and an apportionment of comparative fault to each side.

In *Beebe v. Moses*, 113 Wash. App. 464, 469, 54 P.3d 188, 190 (2002), Justice Sweeney, in his concurrence, explained:

“[I]n my judgment the law of premises liability is anachronistic and out of step with modern social and legal thought, and is therefore just plain wrong. Traditional premises liability law relies on the status of the injured person rather than the propriety of his or her conduct. It does so because traditional premises liability law is largely the product of a legal system that did not include negligence...

The lawyers here spend their time and talent arguing over whether ‘a little bowl’ and a \$15 credit toward Tupperware products is enough to move the injured plaintiff’s status from that of a social invitee to that of a business invitee with all the protections that would go along with a business invitee.

The debate ought to be over whether these stairs were properly maintained in the first place, considering all the factors which would bear upon that question, like who could be expected to use them, when, and under what conditions, and whether the injured person should have been paying more attention to what he was doing when he fell. In other words, factually is the conduct of either or both of these litigants reasonable under all the circumstances. And, if not, then by what percentage did the negligence of each contribute to this injury...

In Washington, the duty of care owed by a landowner to those coming on the property turns on the status of the person entering-trespasser, licensee, or invitee. But this traditional rule has been under attack by both thoughtful commentators and jurists for a long time. In the landmark case of *Rowland v. Christian*, the California court observed that

Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules-they are all too easy to apply in their original formulation-but is due to the attempts to apply just rules in our modern society within the ancient terminology.

Rowland v. Christian, 69 Cal.2d 108, 117, 443 P.2d 561, 70 Cal.Rptr. 97 (1968). The reason for this was that

[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending on such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Id. at 118, 70 Cal.Rptr. 97, 443 P.2d 561.

And, indeed, common law rules do obscure proper considerations. No less a legal scholar than Guido Calabresi in his epic work *A Common Law for the Age of Statutes* notes the importance of *Rowland*:

Faced with the time-honored, but also time-worn, common law distinction between a landowner's liability to guests and

to business visitors, the California court in traditional common law fashion moved to abolish the difference. In what has become a much followed and praised opinion it said that the distinction made no sense under modern conditions.

GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 10 (1982).

The common law premises liability classification scheme, which graduates the duty of care owed by a land occupier to an entrant according to the entrant's status of "trespasser," "licensee" or "invitee," has outlived its useful purpose. Changes in social mores, humanitarian values and societal living arrangements warrant abrogation in South Dakota of the traditional status distinctions as determinative of the scope of duty of care owed by occupiers to entrants....

Mark. J. Welter, Comment, Premises Liability: A Proposal to Abrogate the Status Distinctions of "Trespasser," "Licensee" and "Invitee" as Determinative of a Land Occupier's Duty of Care Owed to an Entrant, 33 S.D. L.REV. 66, 89 (1987/1988). Even England, the country generating this doctrine, has abandoned it."

V. Conclusion

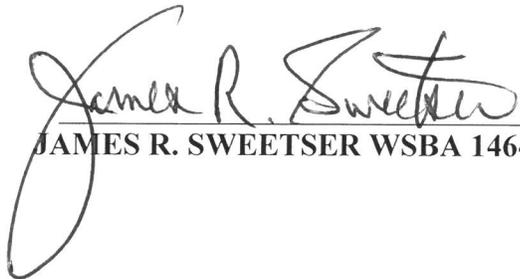
The trial court erred when it denying Plaintiff's motion for summary judgment because Plaintiff Kevin Schibel was an invitee as a matter of law. The trial court refused to determine the legal status and corresponding duty owed when there were no material facts in dispute. It was further error when the trial court instructed the jury that a premises owner owes no duty unless a licensee "cannot be expected" to have knowledge of the dangerous conditions of the premises.

The licensee jury instruction was out-of-step with the Restatement

Second of Torts and the doctrine of comparative fault. Defense counsel prejudicially misled the jury by actively encouraging an interpretation of the licensee jury instruction as an abrogation of any duty owed. Appellant respectfully asks this Court to reverse and remand this case back to the trial court for a new trial on the merits.

RESPECTFULLY SUBMITTED THIS 29th day of August, 2018.


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VI. APPENDIX A-1 ASTM F1637



Designation: F 1637 – 07

An American National Standard

Standard Practice for Safe Walking Surfaces¹

This standard is issued under the fixed designation F 1637; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reappraisal. A superscript epsilon (ϵ) indicates an editorial change since the last revision or reappraisal.

1. Scope

1.1 This practice covers design and construction guidelines and minimum maintenance criteria for new and existing buildings and structures. This practice is intended to provide reasonably safe walking surfaces for pedestrians wearing ordinary footwear. These guidelines may not be adequate for those with certain mobility impairments.

1.2 Conformance with this practice will not alleviate all hazards; however, conformance will reduce certain pedestrian risks.

1.3 The values stated in inch-pound units are to be regarded as the standard. The SI units given in parentheses are for information only.

1.4 *This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.*

2. Referenced Documents

2.1 *ASTM Standards:*²

F 1646 Terminology Relating to Safety and Traction for Footwear

2.2 *ANSI Standard:*

ANSI-Z535.1 Safety Color Coding³

3. Terminology

3.1 See Terminology F 1646 for the following terms used in this practice:

3.1.1 Bollard,

3.1.2 Carpet,

3.1.3 Cross slope,

3.1.4 Element,

3.1.5 Fair,

3.1.6 Foreseeable pedestrian path.

3.1.7 Footwear,

3.1.8 Planar,

3.1.9 Ramp,

3.1.10 Sidewalk,

3.1.11 Slip resistance,

3.1.12 Slip resistant,

3.1.13 Walkway surface hardware, and

3.1.14 Walkway.

4. Significance and Use

4.1 This practice addresses elements along and in walkways including floors and walkway surfaces, sidewalks, short flight stairs, gratings, wheel stops, and speed bumps. Swimming pools, bath tubs, showers, natural walks, and unimproved paths are beyond the scope of this practice.

5. Walkway Surfaces

5.1 *General:*

5.1.1 Walkways shall be stable, planar, flush, and even to the extent possible. Where walkways cannot be made flush and even, they shall conform to the requirements of 5.2 and 5.3.

5.1.2 Walkway surfaces for pedestrians shall be capable of safely sustaining intended loads.

5.1.3 Walkway surfaces shall be slip resistant under expected environmental conditions and use. Painted walkways shall contain an abrasive additive, cross cut grooving, texturing or other appropriate means to render the surface slip resistant where wet conditions may be reasonably foreseeable.

5.1.4 Interior walkways that are not slip resistant when wet shall be maintained dry during periods of pedestrian use.

5.2 *Walkway Changes in Level:*

5.2.1 Adjoining walkway surfaces shall be made flush and fair, whenever possible and for new construction and existing facilities to the extent practicable.

5.2.2 Changes in levels of less than $\frac{1}{4}$ in. (6 mm) in height may be without edge treatment. (See Fig. 1.)

5.2.3 Changes in levels between $\frac{1}{4}$ and $\frac{1}{2}$ in. (6 and 12 mm) shall be beveled with a slope no greater than 1:2 (rise:run).

5.2.4 Changes in levels greater than $\frac{1}{2}$ in. (12 mm) shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards, or ordinances, or all of these.

¹ This practice is under the jurisdiction of ASTM Committee F13 on Pedestrian/Walkway Safety and Footwear and is the direct responsibility of Subcommittee F13.50 on Walkway Surfaces.

Current edition approved Dec. 1, 2007. Published December 2007. Originally approved in 1995. Last previous edition approved in 2002 as F 1637 – 02¹.

² For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

³ Available from American National Standards Institute (ANSI), 25 W. 43rd St., 4th Floor, New York, NY 10036.

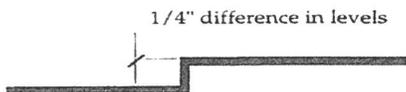


FIG. 1 Changes in Levels of Less Than 1/4 in. (6 mm)

5.3 Carpet:

5.3.1 Carpet shall be maintained so as not to create pedestrian hazard. Carpet shall be firmly secured and seams tightly maintained. Carpet shall not have loose or frayed edges, unsecured seams, worn areas, holes, wrinkles or other hazards that may cause trip occurrence.

5.3.2 Carpet on floor surfaces shall be routinely inspected. Periodic restretching may become necessary. Periodic inspection is particularly important at step nosing edges.

5.3.3 Carpet and carpet trim (as measured when compressed) shall meet the transition requirements of 5.2.

5.3.4 Shag-type carpet shall not be used on stair treads. Carpeting should be firmly secured onto the tread and around the nosing.

5.4 Mats and Runners:

5.4.1 Mats, runners, or other means of ensuring that building entrances and interior walkways are kept dry shall be provided, as needed, during inclement weather. Replacement of mats or runners may be necessary when they become saturated.

5.4.2 Building entrances shall be provided with mats or runners, or other means to help remove foreign particles and other contaminants from the bottom of pedestrian footwear. Mats should be provided to minimize foreign particles, that may become dangerous to pedestrians particularly on hard smooth floors, from being tracked on floors.

5.4.3 Mats or runners should be provided at other wet or contaminated locations, particularly at known transitions from dry locations. Mats at building entrances also may be used to control the spread of precipitation onto floor surfaces, reducing the likelihood of the floors becoming slippery.

5.4.4 Mats shall be of sufficient design, area, and placement to control tracking of contaminants into buildings. Safe practice requires that mats be installed and maintained to avoid tracking water off the last mat onto floor surfaces.

5.4.5 Mats, runners, and area rugs shall be provided with safe transition from adjacent surfaces and shall be fixed in place or provided with slip resistant backing.

5.5 Illumination:

5.5.1 Minimum walkway illumination shall be governed by the requirements of local codes and ordinances or, in their absence, by the recommendations set forth by the Illuminating Engineering Society of North America (IES) (Application and Reference Volumes).

5.5.2 Illumination shall be designed to be glare free.

5.5.3 Illumination shall be designed to avoid casting of obscuring shadows on walkways, including shadows on stairs that may be cast by users.

5.5.4 Interior and exterior pedestrian use areas, including parking lots, shall be properly illuminated during periods when pedestrians may be present.

5.6 Headroom—A minimum headroom clearance of 6 ft 8 in. (2.03 m), measured from the walkway surface, shall be

provided above all parts of the walkway. Where such clearance is not provided in existing structures, the low clearance portions of the walkway shall be safely padded, marked with safety contrast color coding (for example, see ANSI-Z535.1) and posted with appropriate warning signs.

5.7 Exterior Walkways:

5.7.1 Exterior walkways shall be maintained so as to provide safe walking conditions.

5.7.1.1 Exterior walkways shall be slip resistant.

5.7.1.2 Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven, or cracked to the extent that pieces may be readily removed.

5.7.2 Exterior walkways shall be repaired or replaced where there is an abrupt variation in elevation between surfaces. Vertical displacements in exterior walkways shall be transitioned in accordance with 5.2.

5.7.3 Edges of sidewalk joints shall be rounded.

6. Walking Surface Hardware

6.1 Walking surface hardware within foreseeable pedestrian paths shall be maintained flush with the surrounding surfaces; variances between levels shall be transitioned in accordance with 5.2.

6.2 Walking surface hardware within foreseeable pedestrian paths shall be maintained slip resistant.

6.3 Walking surface hardware shall be installed and maintained so as to be stable under reasonable foreseeable loading.

7. Stairs

7.1 General:

7.1.1 Stairways with “distracting” forward or side views shall be avoided. A “distracting” view is one which can attract the stair user’s attention, (for example, advertisements, store displays), thus distracting the stair user.

7.1.2 Step nosings shall be readily discernible, slip resistant, and adequately demarcated. Random, pictorial, floral, or geometric designs are examples of design elements that can camouflage a step nosing.

7.1.3 Doors shall not open over stairs.

7.1.4 Structure (reserved).

7.2 Short Flight Stairs (Three or Fewer Risers):

7.2.1 Short flight stairs shall be avoided where possible.

7.2.2 In situations where a short flight stair or single step transition exists or cannot be avoided, obvious visual cues shall be provided to facilitate improved step identification. Handrails, delineated nosing edges, tactile cues, warning signs, contrast in surface colors, and accent lighting are examples of some appropriate warning cues.

8. Speed Bumps

8.1 Design to avoid the use of speed bumps.

8.2 All speed bumps which are in foreseeable pedestrian paths shall comply with 5.2 (walkway changes in level).

8.3 Existing speed bumps, that do not conform to 5.2, shall be clearly marked with safety color coding to contrast with surroundings in accordance with ANSI-Z535.1. Painted speed bumps shall be slip resistant. Pedestrian CAUTION signs are recommended.

9. Wheel Stops

9.1 Parking lots should be designed to avoid the use of wheel stops.

9.2 Wheel stops shall not be placed in pedestrian walkways or foreseeable pedestrian paths.

9.3 Wheel stops shall be in contrast with their surroundings.

9.4 Wheel stops shall be no longer than 6 ft (1.83 m) and shall be placed in the center of parking stalls. The minimum width of pedestrian passage between wheel stops shall be 3 ft (0.91 m).

9.5 The top of wheel stops shall not exceed 6.5 in. (165 mm) in height above the parking lot surface.

9.6 Adequate illumination shall be maintained at wheel stops as governed by the requirements of local codes and ordinances or, in their absence, by the recommendations set forth by the Illuminating Engineering Society of North America (IES-Application and Reference Volumes).

9.7 Bollards, not less than 3 ft 6 in. (1.07 m) height, may be placed in the center of parking stalls as an alternative to wheel stops. Bollards should be appropriately marked to enhance visibility in accordance with ANSI-Z535.1.

10. Gratings

10.1 Gratings used in public areas should be located outside of pedestrian walkways.

10.2 Gratings located in foreseeable pedestrian walkways shall not have openings wider than ½ in. (13 mm) in the direction of predominant travel.

10.2.1 *Exemption*—The requirements of 10.2 do not apply in areas where footwear worn is controlled (for example, industrial areas).

10.3 Gratings with elongated openings shall be placed with the long dimension perpendicular to the direction of predominant travel.

10.4 Gratings shall be maintained slip resistant.

11. Warnings

11.1 The use of visual cues such as warnings, accent lighting, handrails, contrast painting, and other cues to improve the safety of walkway transitions are recognized as effective controls in some applications. However, such cues or warnings do not necessarily negate the need for safe design and construction.

12. Keywords

12.1 carpet; floors; gratings; mats; runners; sidewalks; short flight stairs; slip resistance; speed bump; stairs; walkway; wheel stop

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I HEREBY CERTIFY, under penalty of perjury, that on the 27th day of August, 2018, I caused to be served a true and correct copy of the foregoing document on the following:

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