

FILED

MAR 29 2019

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

NO. 359778

STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

---

---

KEVIN SCHIBEL and TERRI SCHIBEL,

Appellants,

vs.

SPOKANE TEACHERS CREDIT UNION,

Respondent.

---

---

RESPONDENT'S SUPPLEMENTAL BRIEF

---

---

FELTMAN EWING, P.S.

By: 

BRAD E. SMITH

Attorney for Respondent

421 W. Riverside Avenue, Suite 1600  
Spokane, WA 99201  
(509) 838-6800

TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT .....	1
II. CONCLUSION.....	4

TABLE OF AUTHORITIES

Page

TABLE OF CASES

<i>Evans v. Jensen</i> 103 Idaho 937, 655 P.2d 454, 459 (1982).....	2
<i>Johnson v. Rothstein</i> 52 Wn. App. 303, 759 P.2d 471 (1988).....	1, 2, 3, 4

Respondent Spokane Teacher's Credit Union (hereinafter "STCU"), by and through its attorney of record, Brad E. Smith of Feltman Ewing, P.S., herein submits this supplemental briefing as requested by the Court in its letter of March 8, 2019, on the issue of whether this Court can review the order denying Plaintiff's motion for partial summary judgment.

### **I. ARGUMENT**

The Court should decline to consider this issue, both on the basis of *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988), and as the issue is in fact subsumed in Appellant's argument that the trial court incorrectly instructed the jury as to the law in premises liability cases.

In *Johnson v. Rothstein*, the court stated:

We join the vast majority of other jurisdictions which have ruled that an order denying summary judgment, based upon the presence of material, disputed facts, will not be reviewed when raised after a trial on the merits.

*Id.* at 306. The *Johnson* court identified two independent grounds for this ruling. The first is based on policy considerations, finding that:

The final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting the final judgment can be reviewed at that time in light of the full record. This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weaknesses of the litigants at that earlier stage. Were we to hold otherwise, one who had sustained his position after a fair hearing of the whole

case might nevertheless lose, because he had failed to prove his case fully on an interlocutory motion.

*Johnson* at 306-07, citing *Evans v. Jensen*, 103 Idaho 937, 655 P.2d 454, 459 (1982).

The rationale for this is based on fairness—to grant review of a denied motion for summary judgment would be unjust to the party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and apprised. *Johnson, supra* at 307.

The second ground stated for refusing review is related to the purpose and nature of summary judgment proceedings. The primary purpose of the summary judgment procedure is to avoid a useless trial. *Johnson, supra* at 307.

Once a trial on the merits is had, review of a denial of a motion for summary judgment would do nothing to further this purpose. Moreover, the nature of a summary judgment is such that once the issues have been tried to a finder of fact, the summary judgment procedure to determine the presence of genuine, material issues of fact has no further relevance.... This same ground is sometimes expressed in terms of merger or mootness.

*Id.* at 307.

It is indisputable that the issue at summary judgment below was exactly the issue that was considered by the trial court in determining whether to instruct the jury on licensee and/or invitee status. After all the evidence was submitted to the jury, the trial court made the determination

that factual issues regarding the extent of any invitation granted by STCU to Appellant was for the jury to decide. This made the earlier, identical decision on summary judgment moot, or merged, into the ultimate submission of the case to the jury.

Although subsequent decisions have distinguished *Johnson v. Rothstein*, where the issue on summary judgment turned on a “substantive legal issue,” this is not the case here. The legal issues involved in the summary judgment ruling were identical to those determined by the court in instructing the jury. Furthermore, it is clear from the record that although the final order denying summary judgment indicated it was being made “as a matter of law,” the court did so on the basis that material facts were in dispute and needed to be decided by the trier of fact. RP 19, 492. *Johnson v. Rothstein* allows this Court to look beyond the language of the summary judgment order and review the record to determine whether disputed material facts were considered by the court as the grounds for its denial of summary judgment:

Although the trial court in the instant case did not expressly ground its partial denial of Rothstein’s motion on the presence of material, disputed facts, it is apparent from the record and Rothstein’s arguments on appeal that this was the basis of the trial court’s ruling.

*Id.*, n.2. In his ruling during the jury instruction phase of the trial proceeding, Judge Fennessy stated:

And I do understand the objections both parties have to the flip side of the invitee/licensee status. I would cite you both to WPI, particularly the 120.05, the note on use indicates that if there are factual questions as to the status of a visitor as an invitee, licensee, social guest or trespasser, the jury will need to be instructed on each relevant status and duty.

So I think it's appropriate, as I indicated during the summary judgment argument, it's important for the court to wait and see what evidence comes in.

And in this case, the 30(b)(6) designee indicated that people were tolerated, that the public was tolerated, and I think that we have appropriate instructions for which the jury can use the law and apply it to the facts as they determine, and they'll have to determine whether or not there was an invitation, whether or not Mr. Schibel was aware of an invitation, whether or not he even knew at all who owned this property to determine whether he was invited by that entity or by someone else.

And, likewise, I think that there's sufficient information or facts from which the jury could conclude that he was a licensee by the toleration of STCU and owed those duties. So I think we appropriately instruct them as to both. I think that's the proper use of the WPI in this circumstance.

RP 492.

## **II. CONCLUSION**

For these reasons, it is respectfully requested that the Court follow the holding of *Johnson v. Rothstein* and deny to review the court's pretrial order denying summary judgment. Appellant will not be disadvantaged by this exercise of judicial economy, as the issue resolved by summary

judgment was identical to that guiding the court's instruction to the jury on premises liability standards.

DATED this 29<sup>th</sup> day of March 2019.

FELTMAN EWING, P.S.

By: 

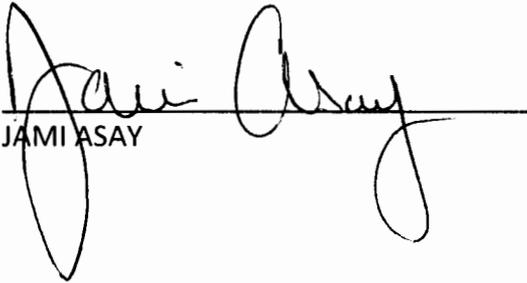
BRAD E. SMITH, WSBA 16435  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of March 2019, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

James R. Sweetser  
Marcus Sweetser  
Sweetser Law Office  
1020 N Washington  
Spokane, WA 99201

U.S. Mail  
 Hand Delivery  
 Overnight Courier  
 Fax  
 Email:  
[jsweets@earthlink.net](mailto:jsweets@earthlink.net)  
[MSweetser@sweetserlawoffice.com](mailto:MSweetser@sweetserlawoffice.com)

  
JAMI ASAY