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NO. 359778

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

KEVIN SCHIBEL and TERRI SCHIBEL,

Appellants

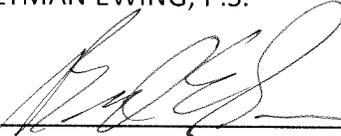
vs.

SPOKANE TEACHERS CREDIT UNION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a premises liability case. Appellant Kevin Schibel alleges he tripped over a concrete curb/wheel stop located in STCU's parking lot in north Spokane. Schibel alleges he was an invitee, regardless of the fact he was not a customer of STCU, did not come on to STCU's parking lot for any purpose related to STCU, and did not even know STCU owned the lot where he parked. Rather, he was a customer that evening of Chairs Coffee, whose building and parking lot is located adjacent to STCU's property.

Schibel tripped over the concrete curb/wheel stop, regardless of the fact it was in an area lit well above the minimum level required by any code or safety standards, as admitted by Schibel's own forensic expert. He tripped on the curb/wheel stop even though his own expert admitted it was visible to anyone looking at it, notwithstanding the fact the accident occurred at night.

STCU argued Schibel was a licensee at the time of his fall. The court rejected both arguments, and instructed the jury on both invitee and licensee status. The instructions conformed in every way to the Washington Pattern Instructions for premises liability.

Although Schibel's counsel objected to instructing the jury on the licensee standard, they did not specifically object to the language of the licensee-duty instruction given to the jury, nor propose an alternate

instruction based on the *Restatement of Torts*, § 332. They did not object to the language or questions of the Special Verdict Form concerning any finding of negligence, nor propose their own Special Verdict Form, which specifically asked the jury to identify whether it found Schibel to be an invitee or a licensee.

Both parties having every opportunity to argue their theory of the case, after deliberations the jury came back with a verdict that STCU was not negligent. After Schibel's motion for reconsideration/new trial was denied, he filed this appeal.

II. RESPONSE TO SCHIBEL'S ASSIGNMENTS OF ERROR

A. The trial court did not err in denying Plaintiff's motion for summary judgment and instructing the jury on both invitee/licensee status, where it found there were questions of fact on the extent of the invitation made by STCU, requiring this issue to be decided by the jury.

B. The trial court properly instructed the jury on the issues of licensee and duty, utilizing language verbatim from Washington's Pattern Instructions that allowed both parties to argue their theories of the case to the jury.

C. The trial court properly ruled there was no misconduct by Defendant's counsel in closing argument.

D. This Court should follow the precedent of the Washington Supreme Court, preserving the premises liability distinctions of invitee, licensee, and trespasser.

III. STATEMENT OF THE CASE

A. Facts of Accident

On December 1, 2011, Appellant Kevin Schibel (hereinafter "Schibel") went to Chairs Coffee on Indiana Avenue in North Spokane to attend a Spokane Songwriters Association meeting. His stated purpose for attending the meeting was to make contacts to benefit his musical group, Union Street. RP 287. Schibel had been to Chairs Coffee on one previous occasion, approximately one month before, for a prior Association meeting. RP 205. He arrived at Chairs Coffee at approximately 6:45 pm, when it was already dark. RP 203.

Chairs Coffee, and its parking lot, is located immediately adjacent to a parking lot owned and maintained by Spokane Teachers Credit Union (hereinafter "STCU"). Ex. P-66, CP 446.

Schibel pulled into the Chairs parking lot and passed through it, noting all of the parking stalls were full. RP 203. He then proceeded to drive into the STCU lot, located to the west of Chairs' parking lot. He looked back towards Indiana through the STCU lot and noted an open parking stall close to Indiana. RP 288. He therefore drove further west through another portion of STCU's parking lot, exited on Normandie

Street (P-66), and drove back to Indiana. He then drove east on Indiana and turned right into STCU's parking lot, and pulled into the remaining parking stall he had seen before. RP 288.

In so doing, Schibel noted that the parking stalls in STCU's lot were parallel to the alley in that lot, and that those parallel-parked vehicles were actually perpendicular to the vehicles in the adjacent Chairs parking lot. RP 288.

Schibel did not have any business with STCU on the night of the accident. RP 287. He was not a member of STCU. RP 287. In fact, he did not even know the lot where he parked was owned by STCU. RP 205.

Schibel left his vehicle and entered Chairs Coffee at the entrance located on the northeast corner of the building off Indiana. In so doing, he traversed along the city sidewalk on the south side of Indiana, which was illuminated by a nearby streetlight. RP 289. Schibel testified that he immediately returned to his vehicle to return his guitar and went back into Chairs Coffee, both times traversing the lit sidewalk along Indiana. RP 289.

At approximately 8:30 pm, Schibel left Chairs Coffee, and instead of walking towards Indiana and traversing the lit sidewalk with which he was familiar, he turned towards the south side of the Chairs building. RP 290. Rather than turn right immediately at the corner of the building, which was lit by two floodlights, as well as light illuminating from the

windows on the south side of the Chairs building (RP 291), Schibel walked further south and turned right between two parked vehicles in the Chairs lot. He proceeded through the alley formed by those vehicles, intending to cross into the adjacent STCU lot. His goal was to pass between two parallel-parked vehicles in the STCU lot, when he tripped on a grey curb/wheel stop near the border between the two adjoining lots. RP 291.

Although the concrete curb/wheel stop in STCU's lot was not painted yellow, its concrete composition contrasted with the dark asphalt of STCU's parking lot. RP 393.

The area of this curb/wheel stop was also illuminated by an overhead light located on the opposite side of STCU's lot. RP 295. Schibel's own forensic expert, Joellen Gill, took measurements of the lighting under similar ambient conditions when she inspected the lot. RP 172,3. She measured the lighting at between .2 and .4 foot-candles (RP 173), while admitting that the lighting at the time of Schibel's fall was likely greater, due to the presence of the floodlights and ambient lighting from the building. RP 176. Ms. Gill admitted that the lighting she measured was greater than, and likely double that, of the minimum lighting requirements of Spokane Municipal Code and the Illuminating Society standards. RP 176.

Schibel's fall occurred after STCU's banking hours were over and the facility was closed. RP 72. STCU's parking lots were not gated. There were no signs posted on the property inviting the public to park in the lot after banking hours. RP 90. The parking stalls were not numbered, and there was no "box" for public users of the lot to pay for parking in the STCU parking areas. RP 90. There was no invitation by STCU to the public to park in its lot. RP 102. However, as STCU saw all individuals as "potential future STCU customers," it tolerated their presence during banking hours and did not have a policy of towing vehicles of non-customers, either during banking hours or at night. RP 72, 102.

B. Court Proceedings

Schibel filed suit against STCU on July 10, 2014, alleging STCU was negligent in not protecting him from his fall. On November 9, 2017, approximately two months before trial, Schibel moved for partial summary judgment on the issue of whether he was a business invitee as a matter of law. CP 12. After oral argument, Judge Timothy Fennessy denied plaintiff's motion. CP 85, 193-4.

A jury trial commenced on January 16, 2018. Both sides called premises liability experts, as well as medical experts which are not relevant to this appeal. Schibel also called two STCU representatives in his case in chief, Jack Cady, who was the STCU Facilities Manager at the time of the fall, and Richard Breitenberg, the current Facilities Manager

and STCU's CR 30(b)(6) representative. After evidence and testimony had been submitted to the jury, Judge Fennessy considered the jury instructions submitted by the parties and heard argument concerning those instructions. RP 440-478. The court then heard specific exceptions and objections to the court's proposed jury instructions. RP 478-495. Judge Fennessy specifically decided to submit to the jury the question of whether Schibel was an invitee or a licensee, finding that issues of fact existed as to the extent of the invitation made by STCU to Schibel. RP 491-2. The court also decided not to submit a Special Verdict Form question which asked the jury to first determine whether Schibel was an invitee or a licensee. The court gave an instruction to the jury on the duty owed to a licensee that was verbatim from Washington Pattern Instruction 120.02.01. Instruction 14, CP 428.

Although Schibel's counsel objected to instructing the jury on any standard other than invitee, counsel made no specific objection to the language used in Instruction 14 pertaining to the licensee duty, nor did Schibel's counsel propose an alternate instruction based on the *Restatement of Torts*, § 332. Schibel's counsel made no objection to the Special Verdict Form (except regarding the court's refusal to itemize specific elements of damages), and did not propose its own Special Verdict Form which added a separate question whereby the jury would designate whether Schibel was an invitee or a licensee.

IV. LEGAL ARGUMENT

A. The Trial Court Correctly Denied Summary Judgment And Instructed The Jury On Both Invitee And Licensee Status, Thus Allowing Both Parties To Argue Their Theory Of The Case

Schibel's first assignment of error, and the corresponding argument in part IV.A of his brief¹, are not a model of clarity. Schibel argues the court incorrectly denied Schibel's motion for summary judgment, contending that Schibel was an invitee as a matter of law. Schibel also appears to be arguing, after the evidence was submitted to the jury, that the court similarly erred in again not instructing the jury solely on the basis of Schibel being an invitee. In order to be understood, however, this second argument needs to be addressed in two parts: (1) Did the court err in instructing the jury on licensee status (during the instruction phase Schibel objected strenuously to submission of the licensee status instruction to the jury (CP 313-25)); and (2) did the court make a legal error in instructing the jury on both invitee and licensee status, thus, in Schibel's words, "erroneously asking the jury to determine the defendant's legal duty."

¹ Although Schibel identifies assignments of error, he does not, contrary to RAP 10.3(A)(4), identify issues pertaining to his assignments of error.

These issues must be addressed in turn, as the standard for review, as well as the facts and law for each, are different and require separate analysis.

1. Washington Law Governing Invitee/Licensee Status

Resolution of all three issues identified above requires a clear understanding of Washington precedent concerning whether a person injured due to a condition of the land is an invitee or licensee.

The Washington court in *Thompson v. Katzer*, 86 Wn.App. 280, 936 P.2d 421 (1997), citing the *Restatement* definitions, succinctly stated the scope of these terms:

An invitee is either a public invitee or a business visitor². A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

In contrast, a licensee enters the occupier's premises with the occupier's permission or tolerance, either (a) without an invitation or (b) with an invitation but for a purpose unrelated to any business dealings between the two. The term licensee

² It should be pointed out that Schibel's motion for summary judgment was, by its very title, limited to the issue of whether he was a "business invitee" as a matter of law. Schibel later, in his reply memorandum on summary judgment, broadened the scope of his motion to argue he was a public invitee. (CP 65-72) The court's order, however, was based solely on business invitee status. (CP 193). It appears clear from their Appellant Brief, however, that Schibel continues to argue he meets both invitee statuses.

includes, at a minimum, (1) persons who come on the land solely for purposes of their own....

Thompson, supra at 284-85. (Emphasis added). Citing *McKinnon v. Washington Federal Savings & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 733 (1966); *Dotson v. Haddock*, 46 Wn.2d 52, 55, 278 P.2d 338 (1955); *Steele v. Thorne*, 72 Wn.2d 714, 716, 435 P.2d 544 (1967).

On appeal, Schibel continues to compound the errors made below by focusing solely on the definition of "invitee," while virtually ignoring the definition and elements of what makes one a "licensee." It is clear to be an invitee, one still must be invited, and that a person is more properly denominated as a licensee if their presence is permitted or tolerated. *Thompson, supra*, at 285.

According to the *Restatement of Torts*, § 332, comment f (1965), the absence of an invitation prohibits a party from claiming invitee status:

Although invitation does not in itself establish the status of an invitee, it is essential to it. An invitation differs from mere permission in this: An invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so....Mere permission, as distinguished from invitation, is sufficient to make the visitor a licensee...but it does not make him an invitee, even where his purpose in entering concerns the business of the possessor. (Emphasis added)

An invitation can be extended through the land occupier's words or conduct. *Younce v. Ferguson*, 106 Wn.2d 658, 668, 724 P.2d 991 (1986). It is undisputed that STCU made no express invitation to Schibel that he could park in their lot. In fact, Schibel did not even know he was parking in STCU's lot the night of the incident. RP 205. Schibel's entire argument is that STCU's "conduct" was such that the arrangement / condition of the premises somehow indicated to Schibel that it was open to the public or visitors to park their. This might possibly constitute permission, but not an invitation. According to the *Restatement* comment above, permission only gives an individual like Schibel licensee status – his presence was tolerated – it was not desired.

Schibel's entire argument is based upon comments to the *Restatement of Torts*, (albeit ignoring the comment quoted above) as well as heavy reliance upon the *McKinnon* and *Younce* decisions. This reliance, however, is misplaced.

In *McKinnon*, the owner of the premises where the injured plaintiff was visiting the night of her accident had previously held an open house where a sign was displayed informing attendees that the room and facilities were available for free use by local clubs and organized groups for meetings and conferences. *McKinnon, supra* at 645. Mrs. McKinnon and her Girl Scout troop had taken the defendant up on this offer and had met there three times a month for approximately two years. *Id.* at

646. She was injured when she fell at one of these meetings. When the defendant attempted to avoid invitee status by arguing Mrs. McKinnon had not received a specific invitation and conferred no economic benefit to the defendant, the Supreme Court had little difficulty in determining that the defendant had “held the property open to the public” through its posting of the sign **inviting** public use, and allowing the space to be used for public meetings. *Id.* at 651

In *Younce*, the Supreme Court held that a young woman injured on property where the defendants were holding a kegger was not an “invitee,” even though admission for the kegger was charged, as she was only privileged to enter and remain on the land by the virtue of the owner’s consent. *Id.* at 669. Her presence was permitted – she was not invited or desired by the owner.

This case is distinguishable from both *McKinnon* and *Younce*, and the trial court’s instruction on licensee status was clearly supportable. Unlike the situation in *McKinnon*, there was absolutely no “invitation” made by STCU to Schibel. For example, STCU did not sanction a sign to be placed in the Chairs Coffee establishment welcoming those patrons to park in STCU’s lot during evening hours when the bank was not open. It posted no sign in its lot informing individuals like Schibel that it was permissible to park there after banking hours. At best, STCU’s “non-

action” evidenced its “toleration” of individuals like Schibel – a clear indication of his licensee status under Washington law.

Again, this Court is referred to the excellent analysis of the court in *Thompson v. Katzer*, where the court succinctly summarized Washington case law (including *McKinnon* and *Younce*) on the distinctions between an invitee and a licensee:

Thompson’s argument rests on the assertion that *whenever* an entrant bestows an economic benefit on the occupier, the entrant *automatically* a business visitor. We agree that the bestowing of an economic benefit is an important factor to consider when deciding whether an entrant is an invitee or licensee, and that one who bestows such benefit *may* be a business visitor. It does not follow, however, that the bestowing of an economic benefit is dispositive, or that one who bestows such benefit is *always* a business visitor. **The ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social. Accordingly, an entrant will not be a “business visitor” even when he or she confers an economic benefit, if there is no “real or supposed mutuality of interest in the subject to which the visitor’s business or purpose relates” or if the benefit is merely incidental to an entry that is primarily familial or social.**

Thompson, supra, at 286. While Schibel is correct that an economic benefit is not a prerequisite to invitee status, *Thompson* still reiterates that it is an important factor to consider when deciding whether an entrant is an invitee or licensee. *Thompson* also speaks to the importance

of a “mutuality of interest” in the subject to which the visitor’s business or purpose relates. There was clearly no mutual interest in Schibel’s situation – he did not even know he was on STCU property! Furthermore, both Washington law and the *Restatement* require that an invitation of some kind is required for invitee status, and where a person’s presence on another’s property is permissive, or merely tolerated, then their status is more properly that of a licensee.

While STCU argued below that Schibel was a licensee, Schibel’s appeal involves the issue of the trial court’s refusal to rule he was *an invitee* as a matter of law.

2. The Trial Court Properly Denied Schibel’s Motion for Partial Summary Judgment re Business Invitee Status

Schibel in his Appellant Brief correctly identifies the standard of review on appeal. The appellate court reviews summary judgment orders *de novo* and performs the same inquiry as the trial court. *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Schibel then misrepresents what the trial court did or presumed in denying the motion for summary judgment, and fails to inform this Court as to the legal principles governing its *de novo* review of the denial of summary judgment.

In its brief, Schibel states, “During briefing and oral argument, the trial court acknowledged ‘there are no disputes of fact.’” Respondent’s

Brief, p. 17. Schibel's argument is that the trial court erred by ignoring summary judgment standards and not ruling as a matter of law.

This is a blatant misstatement of the record. The trial judge actually stated:

However, in this circumstance, Mr. Smith [STCU's counsel] indicates to the court that there are no disputes of fact...

RP 18. While STCU's counsel did argue there were no disputed facts, the trial court obviously had different thoughts. This is evident from Judge Fennessy taking the matter under advisement, where he stated:

So, I am going to read the cases more carefully. I was prepared, I'll tell you, when I walked out here to deny the motion and state that there were, you know, still remaining issues of fact.

RP 19.

Although the court's written letter ruling (CP 85) did not expressly state the basis for his denial of Schibel's motion, later, during the jury instruction conference, he articulated his reasoning:

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 [regarding scope of invitation].

RP 492.³

³ As later argued during part IV.A.3. below, the court indicated that it found disputed issues of fact concerning the extent of the "invitation" given by STCU to Schibel and others to park in their lot. RP 492.

A party seeking summary judgment has the burden of establishing the absence of any issue of material fact. *Safeco Ins. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). A summary judgment is appropriate if reasonable persons could reach only one conclusion from all of the evidence, together with all the reasonable inferences therefrom, viewed most favorably toward the non-moving party. *Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992).

Schibel's motion for partial summary judgment below was based upon STCU's representative's admissions that, during non-business hours, they tolerated the presence of Chairs Coffee customers like Schibel, because they saw all individuals as potential STCU members, and did not have a habit of towing such individuals. CP 12-14. In response to this argument, STCU cited the above-referenced Washington law concerning the definition of "licensee," wherein plaintiffs such as Schibel enter the occupier's premises with the occupier's permission or tolerance. In addition, STCU submitted Schibel's own deposition testimony that he went to Chairs Coffee that evening for no purpose related to STCU but to advance the interest of his performing group, Union Street. CP 57-59. STCU also argued Schibel had no knowledge he was even parking in STCU's parking lot, and that there was no direct or indirect "invitation" by STCU, including no notice within Chairs Coffee that it was permissible to park in STCU's lot during the evening. CP 57-59.

Although both parties argued there was no dispute as to the basic facts, the trial court obviously felt those facts, and the inferences therefrom, raised an issue as to the extent of the “invitation” made by STCU, and therefore genuine issues of material fact prohibited finding Schibel was a business (or public) invitee as a matter of law.

3. The Trial Court Correctly Instructed the Jury on Both Invitee and Licensee Status

Both parties argued, after the evidence had been presented, that the jury should be instructed on only one common law status—Schibel, arguing that only the invitee instruction should be given, and STCU arguing for the licensee instruction alone.

The court rejected both parties’ positions and instructed the jury on both invitee and licensee status. Instructions 11 and 13. CP 425, 427. Not only did this allow both parties to argue their theory of the case to the jury, it was totally supportable based on the evidence.

The parties did not dispute the law concerning what constituted an invitee versus a licensee. Rather, they argued that the facts supported the giving of one instruction over the other. A trial court’s decision to give a jury instruction is reviewed for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286, 288 (2009).

In addition to the factors considered by the court in denying Schibel's motion for partial summary judgment, testimony at trial clearly supported the trial court's discretionary decision to instruct the jury on both invitee and licensee status. In particular, Richard Breitenberg, STCU's facilities manager (and CR 36(b) representative), testified that:

Q: Did STCU expect Kevin Schibel to know that the parking lot that he parked in was the property of STCU?

A: I—I don't know if I could—I don't know. No.

Q: He had permission to park in that lot?

A: Not from STCU.

...

Q: STCU felt that, if people were allowed to park in that lot, that they may, at some time, become potential customers—potential members?

A: I guess, if I may, I—I think what STCU did, is they tolerated people's parking in our parking lot, after our business hours, at the potential of them becoming a member.

RP 72. Later in the trial, Jack Cady, STCU's former facilities director, testified as follows:

Q: And you knew that Chairs was using—sometimes Chairs' members would use, during certain gatherings, the STCU parking lot?

A: That's hearsay to me. I was told that there was some parking by Chairs, either employees or customers, in that area.

Q: And that was allowed, was it not?

A: It wasn't allowed or encouraged, no. It was—the signs around the parking lots in general say “Member and”—“Staff and Member Parking.”...

Q: Was he doing—the question is really, really basic. Was he doing anything wrong by parking in STCU's parking lot, in your view?

...

A: He'll probably come in here, but I spoke with the tenant or owner—I'm not sure which he was—of Chairs and told them that there was a complaint about using that parking lot and asked them not to do so.

Q: Ok. And did you put up any signs?

A: No additional signs to the ones that were there.

Q: And isn't it true that parking was a—if people parked there, they were viewed as potential STCU customers?

A: STCU likes to think of everybody in the community as either members or potential members.

RP 101-103. Based upon all of the testimony submitted by the parties, the trial court stated as follows:

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....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, where 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. Based on the facts and the court's consideration of the same, the trial judge properly exercised his discretion in instructing the jury on both common law statuses of invitee and licensee.

4. **The Court Instructing the Jury on Both Invitee and Licensee Status Did Not "Erroneously" Ask the Jury to Determine STCU's Legal Duty**

Schibel argues in part A.2 of his Appellant Brief that the court, by instructing the jury as to both statuses, somehow improperly abrogated the court's role in determining the legal duty owed by STCU. Again, Schibel both misstates the facts and the law on this relatively simple matter.

As stated above, the court properly exercised its discretion to instruct the jury on both duties. He did so utilizing WPIs 120.05 and 120.08, as the court's Instructions 11 and 13 to the jury.

The jury was then instructed on the legal duties that would be owed to either status. The court did so utilizing WPIs 120.07 and 120.02.01, as the court's Instructions 12 and 14. The jury was therefore properly instructed that, after determining whether Schibel was an

invitee or licensee, of the legal duty that was owed by STCU to both. The instructions clearly informed the jury of the legal duties, and the jury is presumed to follow the law as directed by the court.

5. **Schibel Did Not Object to the Court's Special Verdict Form, and Therefore Waived any Argument that the Jury was Properly Instructed as to Both Invitee and Licensee Status**

The first special verdict question, following the form of WPI 45.22, simply asked, "Was the Defendant negligent?" CP 444. To answer this question, the jury had to decide whether Schibel was an invitee or licensee (Instructions 11 and 13) and apply the proper legal duty to that status. We do not know whether the jury found Schibel to be an invitee or licensee. We only know they answered Question No. 1 in the negative, and found no evidence that STCU was negligent.

The court's proposed Special Verdict Form was one based on language submitted by both parties. RP 465. With respect to the fact that the Special Verdict Form did not separately ask the jury to determine invitee versus licensee status, only STCU's counsel raised an issue during the jury instruction conference on this point. RP 465. In response to STCU's counsel's concern, the court stated:

Okay, that's not important for the court's purposes. If you think it is important, Mr. Doll, then you'll have to recommend an instruction. I don't have one....

A special verdict form that includes that, and frankly, I'm concerned. I think that the Washington Pattern Jury Instruction committees have considered that, I'm not certain

that it needs to be included. I think that the question for the jury is was the defendant negligent. That will be determined by whether or not they are applying the obligation owed to an invitee or the obligation imposed to a licensee. I think by getting too detailed on the verdict forms, we run the risk of inviting contradictory decisions by the jury. That said, if you have something to propose, the court will consider it, but I don't have it at this point. RP 465-66.

Neither party proposed an alternate Special Verdict Form that broke out the invitee/licensee question. Neither party, including Schibel's counsel, took exception to the court's Special Verdict Form as ultimately given to the jury (at least with respect to the first question).

Where a party fails to assign error to a special verdict form, or to object to the special verdict form at trial, or propose an alternative special verdict form, they have waived any right to object and the appellate court will not address any such argument on appeal. *Chandler, as Personal Representative for Estate of Marshall v. State of Washington*, 2018 WL 4214329 at 5, citing *Lahmann v. Sisters of St. Francis of Philadelphia*, 55 Wn.App. 716, 723, 780 P.2d 868 (1989).

Schibel's first assignment of error must be rejected by this Court. The trial court properly denied summary judgment, properly exercised its discretion in instructing the jury on both invitee and licensee status, and properly submitted the issue (without objection) to the jury on a WPI-approved Special Verdict Form.

B. The Trial Court's Instruction On Licensee Duty Of Care Was A Correct Statement Of The Law

The trial court gave Instruction 14 to the jury regarding the duty of care owed by a landowner to a licensee:

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.

CP 428. Instruction 14 was a verbatim use of Washington Pattern Instruction 120.02.01. Schibel's assignment of error to the trial court giving this instruction, as opposed to one based on *Restatement of Torts*, § 332, is without merit and should be dismissed.

When a trial court's decision on instructing the jury is based on a matter of law, it will be reviewed *de novo*. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 833 (1998). This Court must determine whether the instruction either misstated the law or did not allow a party to argue its theory of the case. *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 491, 205 P.3d 145 (2009). Once those threshold requirements are met, the judge's wording, choice, or number of instructions is reviewed for abuse of discretion. *Id.* The question is not whether the trial judge could have given other instructions, but whether the instruction given was an accurate statement of law and allowed the parties to argue their theories

of the case. *Hough v. Stockbridge*, 152 Wn.App. 328, 342, 216 P.3d 1077 (2009).

1. **WPI 120.02.01 is an Approved Pattern Instruction for use in the State of Washington**

Schibel cites to the case of *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007), for the proposition that, “just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court.” Appellant Brief, p. 25-26. However, Schibel should have more completely quoted the Supreme Court’s statement in *Bennett*:

Washington has adopted pattern jury instructions to assist trial courts. Our pattern instructions are drafted and approved by a committee that includes judges, law professors, and practicing attorneys. Just because an instruction is approved by the Washington Pattern Jury Instruction’s Committee does not necessarily mean that it is approved by this court. (Citation omitted)

However, pattern instructions generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state.

Id. at 307, 8. (Emphasis added). The WPJI Committee operates under the auspices of the Washington Supreme Court, which appoints committee members from nominees submitted by virtually every legal association and law school in the state of Washington. See, Preface to 6A Washington Practice Series, Washington Pattern Jury Instructions—Civil

(5th Ed.). The current version of WPI 120.02.01 has been in use since at least 2002 (i.e., WPI 4th Ed.).

Although there has been no reported decision since 2002 specifically referencing the correctness of WPI 120.02.01 as a statement of law, it has also not been criticized or invalidated by any court since that time. The trial judge was fully empowered and authorized to utilize it in instructing the jury.

2. Schibel Waived His Right to Object to Instruction 14

Regardless of the correctness of Instruction 14 as a statement of the legal duty owed to a licensee, this court is not obligated to consider Schibel's argument on this point. Schibel waived his argument that WPI 120.02.01 contained a misstatement of law, as he failed to object to the instruction at the appropriate time. CR 51(f) states:

Objections to Instruction. Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

If a party is not satisfied with an instruction, it has a duty to propose an appropriate instruction. *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn.App. 609, 614, 1 P.3d 579 (2000). Simply

making a blanket objection to an instruction is insufficient to satisfy CR 51(f). See, *Kilse v. City of Seattle*, 52 Wn.2d 412, 413, 325 P.2d 888 (1958) (merely taking exception to jury instruction does not apprise the court of specific points of law at issue). Indeed, “a general objection or exception is unavailing to raise any issue if any part of the instruction is valid.” *Bitzan v. Parisi*, 88 Wn.2d 116, 124, 558 P.2d 775 (1977).

Although Schibel’s counsel at all times in this matter (i.e., summary judgment, trial briefing, and jury instruction conference) objected to any instruction of the jury on licensee grounds, the record is devoid of any specific objection to the language of either Instruction 13 (definition of licensee) or Instruction 14 (duty owed to licensee). Before the jury was instructed, when Schibel’s counsel had the opportunity on the record to comply with CR 51(f), Schibel’s counsel stated only:

The final objection, for the record, Your Honor, 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. 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 482. This is the extent of Schibel’s counsel’s “specific” objection to either Instruction 13 or 14. Schibel did not even distinguish for the record which instruction he was referring to. Nor did Schibel mention the

specific language of Instruction 14, or the fact that it differed from *Restatement of Torts*, Section 332.

Although Schibel's counsel referred to prior motions and arguments, those were similarly lacking in specificity. For example, in their written objections to Defendant's proposed jury instructions (CP 313-25), while they objected to STCU's proposed licensee definition and duty to licensee or social guest for condition of premises instructions (CP 326-368), they nowhere objected to the specific language of STCU's proposed instruction 14, based on the language of WPI 120.02.01.

In addition to failing to give a specific objection to the language of Instruction 14, Schibel's counsel failed to give a proposed instruction which they believed more correctly stated Washington law on the duty owed to a licensee. They never proposed, either in their original instruction packet or before the jury was instructed, an instruction based on the *Restatement of Torts*, § 332.

As the Supreme Court stated in *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 606 P.2d 1214 (1980), flawed instructions to which inadequate exceptions are taken will not be considered on appeal and, thus, cannot be the basis on which to grant a new trial. *Id.* at 134. The *Egede-Nissen* case is instructive in analyzing the errors made by Schibel in failing to preserve his right to appeal the court's instruction to the jury on duty of care. In *Egede-Nissen*, defendant Crystal Mountain objected

to a particular instruction on the ground it failed to label the plaintiff as a trespasser. On appeal, it argued the instruction was improper as it “confuses the questions of the scope of the invitation and the existence of a breach of the applicable duty.” In refusing Crystal Mountain’s appellate argument on the incorrect statement of law, the court found that Crystal Mountain’s trial objection was inadequate, as it did not apprise the trial court of the specific defect in the Instruction. Furthermore, the court held, “A proponent, however, must provide the court with appropriate forms of instructions correctly stating the law supporting the theory he advocates. CR 51.” Citing *McGarvey v. Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963).

Schibel waived his right to assign error to the court’s giving of Instruction 14 by failing to give a specific objection that satisfied the requirement of CR 51(f), and also by failing to provide a proposed instruction based on the *Restatement of Torts*, § 332.

3. Instruction 14 was Properly Submitted to the Jury

The trial court’s giving of Instruction 14 can be upheld if it is either a correct statement of the law, or if it allowed Schibel to argue his theory of the case. *Burchfiel, supra* at 491. Instruction 14 satisfied both these requirements.

a. Instruction 14 Correctly Stated the Law

In his brief, Schibel presents a confusing and mind-numbing analysis of “expectations” versus “reason to know,” the *Restatement’s* specific use of terms “should realize” and “should expect,” and whether those terms should be applied to possessors versus entrants. Notwithstanding the WPI Committee’s difference in phrasing, WPI 120.02.01 embodies the primary elements of the *Restatement of Torts*, § 332, and Schibel’s argument is therefore without merit.

This is best illustrated by comparing the two “instructions” side by side:

Restatement (Second) of Torts, § 332	WPI 120.02.01
<p>A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,⁴</p> <p>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 discovery or realize the danger, and</p> <p>b. the possessor is negligent in failing to discover or realize the danger, or in failing to exercise reasonable care to make the land safe, or to warn the licensee of the danger, and</p>	<p>An owner of premises owes to a licensee a</p> <p>in connection with the 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 the licensee of such dangerous conditions.</p>

⁴ Schibel, in his Brief, does not cite the entire preamble language of § 332, which is stated in its verbatim form herein.

Restatement (Second) of Torts, § 332	WPI 120.02.01
c. the licensees do not know or have reason to know of the condition and the risk involved.	

STCU has highlighted corresponding language in different colors from the above two quotations to illustrate that the WPI obviously incorporates virtually all of the *Restatement*, but simply puts it in more succinct, understandable language, obviously as preferred by the WPI Committee. Although Schibel focuses upon the *Restatement*, Section 332(c) “reason to know” language in his brief, that particular language is actually superfluous or irrelevant to this case.⁵

The following are the primary elements of both the *Restatement* and WPI 120.02.01:

- (1) There must be a dangerous condition/unreasonable risk of harm (red);
- (2) The owner possessor either knows or should know of the dangerous condition (blue);
- (3) The owner possessor (or a reasonable person standing in their position) should expect the licensee will not discover or have knowledge of the danger (green);
- (4) The owner possessor fails to exercise reasonable care or warn of the risk involved ().

⁵ At trial, Schibel testified that he did not see the wheel stop/curb on STCU’s property, and although there was testimony that it was visible if he had looked at it, there was no testimony contradicting the fact he did not see it before he tripped on it.

Under both instructions, with respect to the licensee's "expectation" of the danger, the language is virtually the same. Under the *Restatement*, the owner "should expect" the licensee will not discover or realize the danger. Under the WPI, the licensee "cannot be expected" to have knowledge of the danger. Since the owner is to be governed under the ordinary care standard (based on what a reasonably careful person would do or expect under these same circumstances), even under the *Restatement* the owner's "expectation" of whether the licensee will discover or realize the danger is to be considered under the reasonable person standard.

In essence, Instruction 14 as given and as Schibel now proposes on appeal are virtually the same. Arguably, the WPI omits subpart C of the *Restatement*, but this actually benefits Schibel by not having been given, as the *Restatement* requires all three elements to be met for liability to attach to an owner/possessor of land.

The above analysis is clearly supported by Washington law. In *Thompson v. Kratzer*, the plaintiff slipped and fell on an icy driveway. After noting that the Supreme Court had adopted *Restatement of Torts*, § 332, the court stated:

When a person is a licensee, the occupier of land owes a duty of ordinary care...the occupier should realize that the condition involves an unreasonable risk of harm to the licensee; and the occupier should expect that the licensee will

not discover the condition or, upon discovering it, will not perceive the risk arising from it. In this case, **every reasonable person would have expected** Thompson to discover that there was snow and ice in the Kratzers' driveway—as Thompson actually did, according to his own testimony. Moreover, **every reasonable person would have expected** such snow and ice to be slippery. Thus, even when Thompson's evidence is viewed in the light most favorable to him, it fails to show a breach of the standard of care owed to licensees, and the trial court did not err by granting summary judgment. (Emphasis added).

Id. at 289-90. It is therefore clear that the trial court's Instruction 14 was a correct statement of Washington law, even judged against the language of the *Restatement of Torts*, § 332. The primary and relevant factor in this case is that the jury was instructed, and was entitled to find, that a reasonable person in Schibel's position should have recognized the presence of the curb/wheel stop (based upon the adequate lighting, contrasting materials, and lack of obstructions), and that STCU, on a reasonable-person standard, should have expected Schibel to discover the allegedly dangerous condition. WPI 120.02.01 allowed the jury to make this determination (even presuming they determined that Schibel was a licensee and not an invitee), and it should be upheld as a correct statement of law.⁶

⁶ Schibel evidently recognized the importance of what he knew or could expect about the allegedly dangerous condition, as he testified that he accepted 10% of the fault for his accident. RP 218-19.

b. The Court's Instructions Allowed the Parties to Argue Their Theories to the Jury

Not only was Instruction 14 an accurate statement of the law, but it did not prejudice Schibel, as he was fully allowed to argue his invitee theory to the jury. Considering Schibel's counsel in closing argument virtually ignored any reference to licensee status and duty of care (RP 495-515), their complaint that the licensee instruction given to the jury was an incorrect statement of law seems disingenuous. Schibel was able to argue to the jury that he was an invitee and not a licensee. Schibel only argued to the jury that the invitee duty of care should be followed, and again virtually ignored the licensee duty of care standard. Therefore, even if the licensee duty of care instruction was incorrect (which it was not), it did not impact Schibel's ability to argue his invitee theory to the jury.

c. Any Error in Instructing the Jury was Harmless, as the Jury May Have Determined Schibel Was an Invitee

All of Schibel's arguments concerning alleged error by the court in instructing the jury on both common law statuses (part IV.A.3. above), as well as his argument that the court's licensee duty instruction was improper (part IV.B herein) are moot and constitute harmless error. This is because the jury may well have decided Schibel was an invitee, applied the invitee duty of care to STCU's conduct, and still found STCU to not be negligent as it had met its duty of reasonable care. The Special Verdict

Form submitted to the jury did not first ask the jury to determine whether Schibel was an invitee or licensee – and as stated above, Schibel’s counsel did not object to the special verdict form or propose an alternative.

Since the jury may have found Schibel to be an invitee, any error claimed by Schibel may well be harmless. An erroneous jury instruction is harmless if it is “not prejudicial to the substantial rights of the part[ies]..., and in no way affected the final outcome of the case.” *State v. Britton*, 27 Wash.2d 336, 341, 178 P.2d 341 (1947); *Blaney v. Int’l Association of Machinists & Aerospace Workers*, Dist. No. 160, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). Schibel had the full opportunity, based on the trial court’s instructions, to argue his invitee theory of the case to the jury. Since the jury may have determined he was an invitee, based on instructions and a verdict form submitted by Schibel himself (or not objected to), any error concerning the licensee duty instruction can be considered harmless and not the cause of any prejudice to him at trial.

C. The Trial Court Properly Denied Schibel’s Motion For New Trial As STCU’s Counsel Did Not Commit Misconduct During Closing Argument, Nor Was The Jury Prejudiced In Any Way

Schibel argues that STCU’s counsel, during closing argument, committed misconduct by both misstating the law regarding a property owner’s duty to a licensee, and also by confusing the jury regarding reasonable versus ordinary care. The trial court properly denied Schibel’s

motion for reconsideration/new trial, as he found no misconduct occurred on any such point.

A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *Aluminum Co. of America v. Aetna Casualty and Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). *Gilmore v. Jefferson County Public Transportation Benefit Area*, 190 Wn.2d 483, 415 P.3d 212 (2018). The trial court's decision will not be disturbed unless "such a feeling of prejudice has been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial." *Aluminum Co. of America*, 140 Wn.2d at 537; *Gilmore*, 197 Wn.2d at 495.

With respect to the licensee duty instruction, STCU largely incorporates its argument previously made in part IV.B. above. Instruction 14, defining the duty to a licensee, was a correct statement of the law. The Instruction provides, and STCU's counsel argued, that knowledge of both parties is relevant. It requires a dangerous condition "of which the owner has knowledge or should have knowledge," and a dangerous condition "of which the licensee cannot be expected to have knowledge." STCU's counsel's argument addressed both points and did not improperly state the law or ask the jury to disregard the law. Both the owners and licensee's expectation or appreciation of the danger is determined by the reasonable person standard, and therefore the

argument that an owner cannot be held liable to a licensee if a reasonable person should have expected or appreciated the danger is a correct statement of Washington law. See, *Thompson, supra*.

With respect to the issue of reasonable versus ordinary care, any such claim error by Schibel is clearly harmless and can be disregarded, as it could not have been a source of prejudice to the jury. Both Instruction 12, regarding the duty owed to an invitee, and Instruction 14, regarding the duty owed to a licensee, both impose upon the owner of land, “a duty to exercise ordinary care.” And, as the duty owed to a licensee is clearly different and less onerous than the duty owed to an invitee, there was no misconduct by STCU’s counsel in pointing out this different level of duty/conduct to the jury.

The trial court in its oral ruling was clear that no misconduct by STCU’s counsel occurred. RP 616. The trial court determined that the instruction and the parties’ arguments allowed both sides to argue their theories to the jury (RP 616-17), and that STCU’s counsel appropriately argued both the differences between the common law classifications and the duty owed by landowners to each. *Id.* The trial court considered and ruled that STCU’s counsel’s argument was an accurate statement of the law concerning the existence of a dangerous condition and Schibel’s expectation thereof. RP 617-18. He also made a finding that the jury was

not unfairly unprejudiced by counsel's arguments. RP 618. His denial of a new trial was not an abuse of discretion.

The Washington Supreme Court recently addressed the issue of alleged attorney misconduct during closing arguments in *Gilmore*. After closing arguments, a jury's verdict for the plaintiff, and a subsequent motion for new trial by the defendant, the trial court found:

This was a hard-fought case characterized by aggressive advocacy, but the court does not find, in the context of the entire record, that there was any event, misconduct, or discovery violations sufficient to justify a new trial or a remittitur.

Gilmore, supra at 503. The Supreme Court in *Gilmore* upheld the trial court's denial of a motion for new trial, finding that unless some prejudicial effect is clear from the record, it must defer to the trial court. *Id.* at 503, citing *Clark v. Teng*, 195 Wn.App. 482, 492, 380 P.3d 73 (2016). This follows Washington law that prejudice in such cases is not presumed. *Anfinson v. Fed Ex Ground Package System*, 174 Wn.2d 851, 876, 281 P.3d 289 (2012).

The *Gilmore* court found nothing in the record to suggest that Gilmore's counsel's closing argument was incurably prejudicial. The *Gilmore* court also found:

We have held that the lack of a clear and prompt objection is strong evidence that counsel perceived no error. *In re Detention of Black*, 187 Wn.2d 148, 154, 385 P.3d 765 (2016), rev. granted, 189 Wn.2d 1015, 404 P.3d 480 (2017). In other words, this rule is meant to prevent parties from "waiting and

gambling on a favorable verdict” before claiming error. *Teter v. Deck*, 174 Wn.2d 207, 225, 274 P.3d 336 (2012) (quoting *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958)). Here, after closing arguments but before the jury delivered the verdict, the trial judge gave Jefferson Transit a final opportunity to object. The trial judge asked, “Is there anything we need to put on the record or do? Anything else?” VRP at 1036-37. Jefferson Transit’s counsel responded “no” both times.

Gilmore, supra at 503,4.⁷

In this case, the trial court gave a proper instruction on licensee duty. STCU’s counsel argued correctly regarding the law and plaintiff’s counsel did not object during closing (or even raise the issue in their reply argument to the jury). The trial court did not abuse its discretion in finding that no misconduct occurred, and that a motion for new trial was not required as the jury was not prejudiced.

D. Washington Courts Have Consistently Rejected The California Case Of Rowland v. Christian

Schibel urges this Court to reject over 50 years of established Washington court precedent, which has recognized the common law distinctions regarding a premises owner’s duty of care, depending upon the plaintiff’s status as an invitee, licensee, or trespasser. Schibel

⁷ The *Gilmore* court also disapproved of the Court of Appeals ruling that despite Jefferson Transit’s failure to object to those remarks, the issue could still be raised on appeal. The Supreme Court declined to reach what appeared to be Jefferson Transit’s independent argument based on attorney misconduct, since those remarks were raised in the motion for new trial, and they found the trial court did not abuse its discretion in denying a new trial. *Id.* at 503, Fn.4.

implores this Court to adopt the reasoning of the California court in *Rowland v. Christian*, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

Schibel's argument ignores the fact that the Washington Supreme Court expressly rejected the invitation to disregard the classifications and adopt the *Rowland v. Christian* holding in *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986). The Washington Supreme Court had previously confirmed its approval of the common law definitions and corresponding duties outlined in the *Restatement of Torts* in the case of *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 131-32, 606 P.2d 1214 (1980).

In *Younce*, the Supreme Court conducted a detailed analysis of the *Rowland v. Christian* case, and conducted an in-depth analysis of those states which had adopted *Rowland's* reasoning, and those that have rejected it. In rejecting the minority rule of states that had adopted *Rowland*, the Supreme Court stated:

However, the majority of jurisdictions have not rejected the classifications. (Citations omitted).....

The reasons proffered for continuing the distinctions include that the distinctions have been adopted and developed over the years, offering a degree of stability and predictability, and that a unitary standard would not lessen the confusion. Further, a slow, piecemeal development rather than a wholesale change has been advocated. Some courts fear a wholesale change will delegate social policy decisions to the jury with minimal guidance from the court. (Citation omitted.) Also, it is feared that the landowner could be subjected to unlimited liability.

We find these reasons to be compelling. As noted by the Kansas court in *Gerchberg*, 223 Kans. at pp. 450-51, 576 P.2d 593: “The traditional classifications were worked out and the exceptions were spelled out with much thought, sweat and even tears.” We are not ready to abandon them for a standard of no contours. It has been argued that jury instructions can provide adequate guidance....These factors are similar to the concerns being addressed by the current Restatement rules and case law. We do not choose to erase our developed juris prudence for a blank slate. Common law classifications continue to determine the duty owed by an owner or occupier of land in Washington.

Younce, *supra* at 665-66. Since the Supreme Court’s sound rejection of *Rowland v. Christian* in *Younce*, it has continued to uphold and utilize the common law distinctions in premises liability cases. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994). The common law classifications have been continued to be upheld in enumerable Court of Appeal’s decisions, including Division 3 in *Tincani*, 66 Wn.App. 852, 837 P.2d. 640 (1992) and *Beebe v. Moses*, 113 Wash. App. 464, 54 P.3d 188 (2012).

This Court has recently chosen to recognize and uphold the common law classifications in *Bethay v. Parker*, Div. III, No. 35541-1 (filed 10/2/18). After citing both the Restatement (Second) of Torts and Washington law for the elements and duties owed to invitees and licensees, the court rejected the plaintiff’s argument that Parker owed Bethay the same duties as an invitee, even though she was only a licensee, and stated:

There is also no basis for extending the same duty owed to an invitee to one who is merely a licensee and thereby abolish the distinction between the two classes of permissive users of property.

Bethay, supra, pg. 9. This recent re-affirmation of the common law distinctions should foreclose further argument on this point.

Schibel cites to RAP 13.4(b), expressing that this Court's decision will be of "substantial public interest." This is actually a misuse of this rule, as RAP 13.4 involves petitions to the Supreme Court from decisions of the Court of Appeals—Schibel's argument is therefore premature. Likewise, Schibel's citation to RAP 12.2, that appellate courts may take any "action as the merits of the case and the interest of justice may require" is inappropriate. It is respectfully submitted that this rule cannot support an argument that a court of appeals can ignore and reject specific precedent from the Washington Supreme Court upholding the common law distinctions and rejecting the foundation of Schibel's argument.

Schibel seems to argue that the *Rowland v. Christian* rejection of the common law characteristics have been more readily adopted in states that have adopted comparative fault principles. Appellant's Trial Brief, p. 39. They argue, "Washington courts should follow the majority states [sic] with similar comparative fault statutes." Not only does Schibel fail to cite any authority for this conclusion, it may not in fact even be correct. According to tables prepared by STCU's counsel (see

appendix) analyzing a state-by-state breakdown of those who have adopted *Rowland*, or rejected it, of those jurisdictions that have adopted comparative fault principles (both pure comparative fault and modified comparative fault)⁸ 25 have retained the common law distinctions, while only 19 have rejected them. The *Younce* decision, retaining the common law distinctions, is still the majority view throughout the United States.⁹

Virtually all Schibel's argument rests upon the concurrence of Justice Sweeney in *Beebe v. Moses. Beebe, supra* at 469. Notwithstanding Judge Sweeney's thoughtful analysis, his concurring opinion is still the minority rule, and has continually been rejected by the Washington Supreme Court, as well as this division of the Court of Appeals.

This Court should do likewise, and continue to honor the long-standing precedent of Washington court decisions in retaining the common law distinctions.

⁸ Washington has a "pure" comparative fault system. Some states have a "modified" comparative fault system, which still requires a plaintiff to establish 50 percent or more fault on the tortfeasor in order to recover. Schibel certainly explains no basis for rejecting the common law rules merely based on the pure versus modified comparative fault systems.

⁹ According to tables (appendix) 22 jurisdictions have abolished the distinctions, while 29 (including the District of Columbia) have retained those distinctions.

V. CONCLUSION

Before, during, and after the trial, Schibel argued he should be considered an invitee when he parked on STCU property, while visiting an adjoining property coffee house for a purpose unrelated to STCU's business. STCU was equally insistent that Schibel was at best a licensee, since he had not been invited in any way to park in its lot, but was merely tolerated. The trial court, finding questions of fact existed on whether Schibel had been "invited" onto STCU's property, submitted the matter to the jury. The trial court did so utilizing verbatim instructions on status and duty drafted by the Washington Pattern Jury Instruction Committee. The instructions correctly laid out the law in Washington, and the parties each had the opportunity to argue their theories of liability to the jury.

After hearing all the evidence and being properly instructed, the jury returned a verdict that STCU was not negligent.

Schibel, after having an opportunity to argue his invitee theory to the jury, now seeks a new trial, notwithstanding the fact that he failed to object to either the licensee duty instruction, or propose his own instruction based on what he believed was the correct law, and where he never even pointed out to the trial judge that the duty instruction was an incorrect statement of law until after the verdict. He argues that the duty instruction and STCU's counsel's closing argument thereon was incorrect,

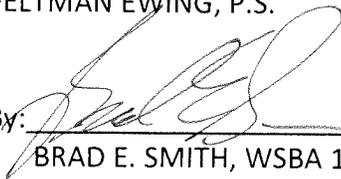
notwithstanding his failure to object to the trial court giving the specific instruction, or during closing argument. His counsel even failed to argue that STCU's closing argument was incorrect, minutes later during his chance at rebuttal.

Schibel received a fair trial, based on correct evidentiary rulings and legal instructions, and he had the full opportunity to argue his theory of the case to the jury. The jury simply found that STCU was not negligent, a decision which Schibel cannot accept.

This Court is respectfully requested to affirm the verdict of the jury and the judgment entered by the trial court dismissing Schibel's complaint against STCU.

DATED this 4th day of October 2018.

FELTMAN EWING, P.S.

By: 

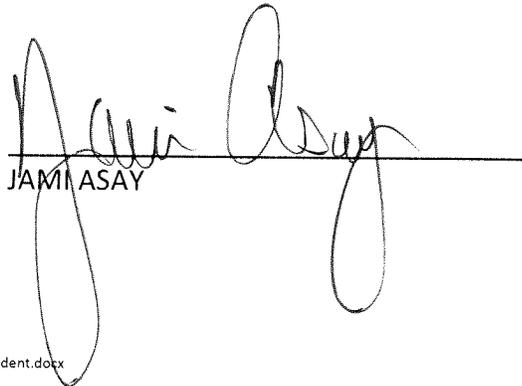
BRAD E. SMITH, WSBA 16435
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October 2018, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

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APPENDIX 1

State	Follows Rowland	Case or statutory Authority	Comparative Fault?
Alaska	Yes Cites to Rowland? Yes	<i>Webb v. Sitka</i> , 561 P2d 731	Pure Comparative Fault by Statute
District of Columbia	Yes Cites to Rowland? Yes, in footnotes.	<i>Smith v. Arbaugh's Restaurant, Inc.</i> , 152 App DC 86, 469 F2d 97 (1972)	Pure Contributory Negligence as stated in <i>Maalouf v. Swiss Confederation</i> , 208 F. Supp. 2d 31, 42 (D.D.C. 2002)
Florida	Yes Cites to Rowland? Yes.	<i>Wood v. Camp</i> , 284 So. 2d 691, 696 (Fla. 1973)	Pure comparative fault by statute.
Hawaii	Yes Cites to Rowland? Yes	<i>Pickard v. City & Cty. of Honolulu</i> , 51 Haw. 134, 136, 452 P.2d 445, 446 (1969)	Modified Comparative Fault – 51 percent bar rule by statute
Kentucky	Yes Cites to Rowland? No	<i>Carney v. Galt</i> , 517 S.W.3d 507 (Ky. Ct. App. 2017)	Pure Comparative Fault by statute.
Louisiana	Yes. Cites to Rowland? Yes	<i>Cates v. Beauregard Elec. Co-op., Inc.</i> , 328 So. 2d 367, 371 (La. 1976)	Pure Comparative Fault by statute
Maine	Yes. Cites to Rowland? Yes	<i>Poulin v. Colby Coll.</i> , 402 A.2d 846, 851 (Me. 1979)	Modified comparative fault - 50 percent bar rule by statute.

Massachusetts	Yes Cites to Rowland? Yes	<i>Mounsey v. Ellard</i> , 363 Mass. 693, 709 297 N.E.2d 43, 53 (1973)	Modified comparative fault – 51 percent bar rule by statute.
Minnesota	Yes. Cites to Rowland? Yes	<i>Peterson v. Balach</i> , 294 Minn. 161, 173– 74, 199 N.W.2d 639, 647 (1972)	Modified comparative fault – 51 percent bar rule by statute
Nebraska	Yes Cites to Rowland? Yes	<i>Heins v. Webster Cty.</i> , 250 Neb. 750, 761–62, 552 N.W.2d 51, 57 (1996)	Modified comparative fault – 50 percent bar rule by statute.
Nevada	Yes Cites to Rowland? No	<i>Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund</i> , 112 Nev. 1161, 925 P.2d 496 (1996)	Modified comparative fault – 51 percent bar rule by statute.
New Hampshire	Yes Cites to Rowland? Yes	<i>Ouellette v. Blanchard</i> , 116 N.H. 552, 557, 364 A.2d 631, 634 (1976)	Modified Comparative Fault – 51 percent bar rule by statute
New Mexico	Yes Cites to Rowland? Yes	<i>Ford v. Bd. of Cty. Comm'rs of Cty. of Dona Ana</i> , 118 N.M. 134, 139, 879 P.2d 766, 771 (1994)	Pure Comparative fault by case law.
New York	Yes Cites to Rowland? Yes	<i>Basso v. Miller</i> , 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976)	Pure Comparative Fault by statute

North Carolina	Yes Cites to Rowland? Yes	<i>Nelson v. Freeland</i> , 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998)	Pure contributory negligence by case law.
North Dakota	Yes Cites to Rowland? Yes (mentions)	<i>O'Leary v. Coenen</i> , 251 N.W.2d 746, 751 (N.D. 1977)	Modified comparative fault – 50 percent bar rule by statute
Rhode Island	Yes Cites to Rowland? Yes	<i>Mariorenzi v. Joseph DiPonte, Inc.</i> , 114 R.I. 294, 307, 333 A.2d 127, 133 (1975) See <i>Tantimonico v. Allendale Mutual Insurance Co.</i> , 637 A.2d 1056, 1060	Pure Comparative Fault by Statute
Tennessee	Yes Cites to Rowland? Yes	<i>Hudson v. Gaitan</i> , 675 S.W.2d 699 (Tenn. 1984), <i>abrogated on different grounds by McIntyre v. Balentine</i> , 833 S.W.2d 52 (Tenn. 1992)	Modified comparative fault – 50 percent bar rule by case law.
Vermont	Yes Cites to Rowland? Yes.	<i>Demag v. Better Power Equip., Inc.</i> , 197 Vt. 176, 186, 102 A.3d 1101, 1110 (2014)	Modified comparative fault – 51 percent bar rule by statute
West Virginia	Yes Cites to Rowland? Yes	<i>Mallet v. Pickens</i> , 206 W. Va. 145, 522 S.E.2d 436 (1999)	Modified comparative fault – 51 percent bar rule by statute
Wisconsin	Yes Cites to Rowland?	<i>Antoniewicz v. Reszcynski</i> , 70 Wis.	Modified comparative fault –

	Yes	2d 836, 856, 236 N.W.2d 1, 11 (1975)	51 percent bar rule by statute
Alabama	No Cites to Rowland? Yes	<i>McMullan v. Butler</i> , 346 So. 2d 950, 951 (Ala. 1977)	Pure Contributory Negligence by case law.
Arizona	No Cites to Rowland? Yes	<i>Robles v. Severyn</i> , 19 Ariz. App. 61, 63, 504 P.2d 1284, 1286 (1973)	Pure comparative fault by statute .
Arkansas	No Cites to Rowland? Yes.	<i>Kay v. Kay</i> , 306 Ark. 322, 326, 812 S.W.2d 685, 687 (1991)	Modified comparative fault – 50 percent bar by statute
Colorado	No Cites to Rowland? Previous cases did and followed Rowland. However, they were superseded by statute.	Colo. Rev. Stat. Ann. § 13-21-115 (West)	Modified Comparative Fault - 50 Percent Bar Rule by statute
Connecticut	No. Cites to Rowland? No	<i>Morin v. Bell Court Condo. Ass'n, Inc.</i> , 223 Conn. 323, 327, 612 A.2d 1197, 1199 (1992)	Modified comparative fault – 51 percent bar.
Delaware	No Cites to Rowland? Yes	<i>Bailey v. Pennington</i> , 406 A.2d 44, 47–48 (Del. 1979)	Modified comparative fault – 51 percent bar rule by statute.
Georgia	No Cites to Rowland? No	<i>Meyberg v. Dodson</i> , 136 Ga. App. 324, 221 S.E.2d 200 (1975)	Modified comparative fault – 50 percent bar rule by statute.
Idaho	No	<i>Huyck v. Hecla Min. Co.</i> , 101 Idaho 299,	Modified comparative fault –

	Cites To Rowland? Yes	301, 612 P.2d 142, 144 (1980)	50 percent bar rule by statute
Illinois	No. Cites to Rowland? Yes	<i>Hessler v. Cole</i> , 7 Ill. App. 3d 902, 905, 289 N.E.2d 204, 206 (Ill. App. Ct. 1972)	Modified comparative fault – 51 percent bar rule by statute.
Indiana	No Cites to Rowland? Yes.	<i>Slusher v. State</i> , 437 N.E.2d 97, 109 (Ind. Ct. App. 1982)	Modified comparative fault – 51 percent bar rule by statute.
Iowa	No Cites to Rowland? Yes.	<i>Rosenau v. City of Estherville</i> , 199 N.W.2d 125, 135 (Iowa 1972)	Modified comparative fault – 51 percent bar rule by statute.
Kansas	No Cites to Rowland? Yes.	<i>Frazer v. St. Louis-San Francisco Ry. Co.</i> , 219 Kan. 661, 667, 549 P.2d 561, 565 (1976)	Modified comparative fault – 50 percent bar rule by statute.
Maryland	No Cites to Rowland? No	<i>Bramble v. Thompson</i> , 264 Md. 518, 287 A.2d 265 (1972)	Pure contributory negligence by case law.
Michigan	No Cites to Rowland? No	<i>Stitt v. Holland Abundant Life Fellowship</i> , 462 Mich. 591, 614 N.W.2d 88 (2000), <i>as amended</i> (Sept. 19, 2000)	Modified Comparative Fault – 51 percent bar rule by statute.
Mississippi	No Cites to Rowland? No.	<i>Astleford v. Milner Enterprises, Inc.</i> , 233 So. 2d 524, 525 (Miss. 1970)	Pure comparative fault by statute.

Missouri	No Cites to Rowland? Yes (in footnotes)	<i>Carter v. Kinney</i> , 896 S.W.2d 926, 929–30 (Mo. 1995).	Pure comparative fault by case law.
Montana	No. Cited to Rowland? No.	<i>Steen v. Grenz</i> , 167 Mont. 279, 281, 538 P.2d 16, 17 (1975)	Modified comparative fault – 51 percent bar rule by statute.
New Jersey	No Cites to Rowland? Yes (mentioned by)	<i>Caroff v. Liberty Lumber Co.</i> , 146 N.J. Super. 353, 358, 369 A.2d 983, 985–86 (N.J. Super. Ct. App. Div. 1977)	Modified comparative fault – 51 percent bar rule by statute
Ohio	No Cites to Rowland? Yes	<i>Di Gildo v. Caponi</i> , 18 Ohio St. 2d 125, 128–29, 247 N.E.2d 732, 735 (1969)	Modified comparative fault – 51 percent bar rule by statute
Oklahoma	No Cites to Rowland? No.	<i>Sutherland v. Saint Francis Hosp., Inc.</i> , 595 P.2d 780, 782 (Okla. 1979)	Modified comparative fault – 51 percent bar rule by statute
Oregon	No Cites to Rowland? No	<i>Taylor v. Baker</i> , 279 Or. 139, 566 P.2d 884 (1977)	Modified comparative fault – 51 percent bar rule by statute
Pennsylvania	No Cites to Rowland?	<i>Crotty v. Reading Indus., Inc.</i> , 237 Pa. Super. 1, 8, 345 A.2d 259, 262 (1975)	Modified comparative fault – 51 percent bar rule by statute

	Yes		
South Carolina	No Cites to Rowland? No	<i>Vogt v. Murraywood Swim & Racquet Club</i> , 357 S.C. 506, 510, 593 S.E.2d 617, 619 (S.C. Ct. App. 2004)	Modified comparative fault -51 percent bar rule by case.
South Dakota	No Cites to Rowland? Yes	<i>Andrushehenko v. Silchuk</i> , 744 N.W.2d 850 (2008)	Slight/Gross Negligence Comparative by statute.
Texas	No Cites to Rowland? Yes	<i>Buchholz v. Steitz</i> , 463 S.W.2d 451, 454 (Tex. Civ. App. 1971), <i>writ refused NRE</i> (June 16, 1971)	Modified comparative fault – 51 percent bar rule by statute
Utah	No Cites to Rowland? Yes (footnote).	<i>Kessler v. Mortenson</i> , 16 P.3d 1225, 1230 (Utah 2000)	Modified comparative fault – 50 percent bar rule by statute
Virginia	No Cites to Rowland? Yes (footnote)	<i>Tate v. Rice</i> , 227 Va. 341, 347, 315 S.E.2d 385, 389 (1984)	Pure contributory negligence by case law.
Washington	No Cites to Rowland? Yes	<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 724 P.2d 991 (1986)	Pure comparative fault by statute
Wyoming	No Cites to Rowland? Yes	<i>Yalowizer v. Husky Oil Co.</i> , 629 P.2d 465 (Wyo. 1981)	Modified comparative fault – 51 percent bar rule by statute.

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APPENDIX 2

Comparative fault/modified comparative fault/retained negligence breakdown

STATE	Pure Comparative Fault	Modified Comparative Fault	Contributory Negligence/Slight Gross Negligence	Follows Rowland or Retains distinctions?
Alaska	Pure comparative fault by statute			Follows Rowland
Arizona	Pure comparative fault by statute			Retains distinctions
Florida	Pure comparative fault by statute			Follows Rowland
Kentucky	Pure comparative fault by statute			Follows Rowland
Louisiana	Pure comparative fault by statute			Follows Rowland
Mississippi	Pure comparative fault by statute			Retains distinctions
Missouri	Pure comparative fault by case law			Retains distinctions
New Mexico	Pure comparative fault by case law			Follows Rowland
New York	Pure comparative fault by statute			Follows Rowland
Rhode Island	Pure comparative fault by statute			Follows Rowland
Washington	Pure comparative fault by statute			Retains distinctions
Arkansas		Modified comparative fault – 50 percent bar by statute		Retains distinctions

Colorado		Modified comparative fault - 50 percent bar rule by statute		Retains distinctions
Connecticut		Modified comparative fault – 51 percent bar.		Retains distinctions
Delaware		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions
Georgia		Modified comparative fault – 50 percent bar rule by statute.		Retains distinctions
Hawaii		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland
Idaho		Modified comparative fault – 50 percent bar rule by statute		Retains distinctions
Illinois		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions
Indiana		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions
Iowa		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions

Kansas		Modified comparative fault – 50 percent bar rule by statute.		Retains distinctions
Maine		Modified comparative fault - 50 percent bar rule by statute.		Follows Rowland
Massachusetts		Modified comparative fault – 51 percent bar rule by statute.		Follows Rowland
Michigan		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions
Minnesota		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland
Montana		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions
Nebraska		Modified comparative fault – 50 percent bar rule by statute.		Follows Rowland
Nevada		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland
New Hampshire		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland

New Jersey		Modified comparative fault – 51 percent bar rule by statute		Retains distinctions
North Dakota		Modified comparative fault – 50 percent bar rule by statute		Follows Rowland
Ohio		Modified comparative fault – 51 percent bar rule by statute		Retains distinctions
Oklahoma		Modified comparative fault – 51 percent bar rule by statute		Retains distinctions
Oregon		Modified comparative fault – 51 percent bar rule by statute		Retains distinctions
Pennsylvania		Modified comparative fault – 51 percent bar rule by statute		Retains distinctions
South Carolina		Modified comparative fault -51 percent bar rule by case.		Retains distinctions
Tennessee		Modified comparative fault – 50 percent bar rule by case law.		Follows Rowland
Texas		Modified comparative fault – 51 percent bar rule by statute		Retains distinctions
Utah		Modified comparative		Retains distinctions

		fault – 50 percent bar rule by statute		
Vermont		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland
West Virginia		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland
Wisconsin		Modified comparative fault – 51 percent bar rule by statute		Follows Rowland
Wyoming		Modified comparative fault – 51 percent bar rule by statute.		Retains distinctions
Alabama			Pure Contributory Negligence by case law.	Retains distinctions
District of Columbia			Pure Contributory Negligence as stated in <i>Maalouf v. Swiss Confederation</i> , 208 F. Supp. 2d 31, 42 (D.D.C. 2002)	Follows Rowland
Maryland			Pure contributory negligence by case law.	Retains distinctions
North Carolina			Pure contributory negligence by case law.	Follows Rowland
South Dakota			Slight/Gross Negligence Comparative by statute	Retains distinctions

Virginia			Pure contributory negligence by case law	Retains distinctions
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