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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 17 PM 4:35

NO. 62543-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JESSE WANDA HALVERSON,

Plaintiff-Appellant,

v.

LOUGHNEY PROPERTIES, INC./ROYAL FORK, a Washington
corporation,

Defendant-Appellee.

ON APPEAL FROM SKAGIT COUNTY SUPERIOR COURT
(Hon. Michael E. Rickert)

REPLY BRIEF OF APPELLANT AND OPPOSITION TO
RESPONDENT'S CROSS APPEAL

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I. ARGUMENT IN REPLY

A. Mrs. Halverson's Motion For Relief From Judgment And/Or A New Trial Challenged The Trial Court's Denial Of Her Motion For A Directed Verdict And The Jury's Verdict; Both Issues Have Been Preserved On Appeal.

Jesse Halverson filed a Motion for Relief from Judgment and/or a New Trial because the trial court denied her motion for a directed verdict on the question of the Royal Fork's liability and instead submitted the issue to the jury. Opening Brief at 1-2, 16; CP 37-44. Mrs. Halverson's post-trial motion is considered a renewal of her motion for directed verdict under CR 50. Mrs. Halverson also argued in her post-trial motion that the jury's verdict was not supported by substantial evidence and should therefore have been overturned. *Id.*

Mrs. Halverson's post-trial motion was denied, and she specifically appealed that ruling. CP 71. As both issues were submitted to the trial court in a single motion and denied in a single order, both issues are preserved by Assignment of Error No. 1. RAP 2.4(c). To ensure that there was no ambiguity regarding the scope of her appeal, Mrs. Halverson specifically identified as one of the issues flowing from the assignment of error whether or not the trial court properly denied her motion for a directed verdict. Opening Brief at 2. The Royal Fork's contention that Mrs. Halverson did not adequately preserve for appeal the appropriateness

of the trial court's denying her motion for a directed verdict (Opposition Brief at 25) is without any merit.

B. The Royal Fork's Opposition Brief Confirms That Its Admissions At Trial Establish Its Liability As A Matter Of Law.

Mrs. Halverson moved for a directed verdict and later a new trial because the only substantial evidence at trial established the Royal Fork's liability, and because there was "no evidence or reasonable inference from the evidence to justify the verdict..." CR 59(a)(7). The Royal Fork simply cannot avoid the admissions of liability made by the Royal Fork's owner, Matt Loughney, and by its expert, Vern Goodwin. For example, the Royal Fork's owner, Matt Loughney testified as follows:

Q. After hearing the engineers and architect, are you going to do something about that ramp?

A. Yeah, I am going to get rid of it and put in a curb cut.

Q. Are you telling the jury you're going to do that; you think it's your fault?

A. I don't want to go through this again. I understand something I didn't understand before so.

RP(I) at 101:4-10.

Q. You now realize, based on the testimony not only of our expert, but your expert, that's really not safe; is that right?

A. I'm in a position to make—I'm in a position to eliminate that hazard, whatever that is, bring it up to the legal code, I guess.

RP(I) at 101:25-102:5.

Q. At the time that this accident happened these side flares were not painted; is that correct?

A. That's correct.

RP(I) at 10:21-23.

Q. So what this document [Trial Exhibit 12—an incident report for a prior fall on the ramp] tells us is on March 7th, 2002, this lady name Shirley Dale fell to the ground in a handicapped spot; is that correct?

A. That's correct.

Q. She said she was trying to be careful as always so as not to fall; do you see that?

A. Uh-huh.

Q. So you were on notice as of March. When I say "you" here I mean your company was on notice as of March of 2002 that someone had fallen on or near that handicap ramp; is that correct?

A. That's correct.

* * * *

Q. And were you able to determine where it happened?

A. Well, essentially adjacent to the handicapped ramp.

* * * *

Q. And at this point in time that is when you first had notice of the Shirley Dale accident. So did you hire an architect to come out and look at the parking lot?

A. I did not.

Q. Did you hire an engineer to come out and look at the parking lot?

A. No. I turned this into my insurance agent, who I relied on and he gave me no instructions about—

Q. I'm going to come to all of that. Let's find out what you didn't do. First, no architect, no engineer, you personally, your company didn't hire anyone to come out and look at that space; is that correct?

A. That's correct, that's correct.

* * * *

Q. Alright. So you relied on your insurance carrier that provided coverage to you for this parking lot that they didn't think you needed to make changes; is that what you're telling us?

A. They didn't mention anything to me. I don't know what they thought, but they didn't mention anything.

RP(I) 21:18-23:24.

The Royal Fork's expert, Vern Goodwin testified in part as follows:

Q. Okay. And if I understood your testimony, just a couple minutes ago you would recommend in order to make this ramp reasonably safe that at least the side flares be painted bright yellow; is that correct.

A. I think, yes, that's what I recommend at this point.

RP(I) 50: 20-24.

Q. If he [Mr. Loughney] had said to you at that time [June of 2003 before the accident] what do you think of this ramp would you have told him what you just told me that you thought it would be far better if it was painted bright yellow on the side flares?

A. Yes. Well, actually I probably would have told him that my recommendation would be to replace it.

RP(I) 53:6-11.

Q....And you say this ramp doesn't comply with the ANSI requirement, right?

A. Correct.

RP(I) 82 1-3.

The Trial Court erred in failing to grant Mrs. Halverson a directed verdict on liability, because the uncontroverted evidence at trial, including admissions of fault by the Royal Fork established liability. As the Royal Fork conceded in its appellate brief, “[a] directed verdict is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.” Opposition Brief at 23 (citing *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 915-16 (1990)).

It is also true that “[a] challenge to the sufficiency of the evidence for nonsuit, dismissal, directed verdict, new trial, or judgment notwithstanding the verdict admits the truth of the opponents evidence and all inferences that can be reasonably drawn therefrom.” *Id.* (citing *Faust v. Albertson*, 143 Wn. App. 272, 278-79, 178 P.3d 358 (2008)). The trial court erred under these standards in failing to grant a directed verdict because, even if Mrs. Halverson’s evidence were disregarded, the only remaining evidence, which included admissions by the defendant, established liability.

Similarly, the trial court erred in failing to set aside the jury verdict for the Royal Fork for essentially the same reason. The Royal Fork agrees with Mrs. Halverson that overturning a jury verdict is appropriate “when the verdict is clearly unsupported by substantial evidence.” Opening Brief at 22; Opposition Brief at 21 (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-108, 864 P.2d 937 (1994)).

While the evidence must be viewed in the light most favorable to the Royal Fork, CR 59(a)(7) permits a new trial when “there is no evidence or reasonable inference from the evidence to justify the verdict.” *Sommer v. DSHS*, 104 Wn. App. 160, 172, 15 P.3d 664 (2001). As the Court in *Sommer* explained:

It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. (citation omitted) When the proponent of a new trial argues that the verdict was not based on the evidence, the appellate court review the record to determine whether there was sufficient evidence to support the verdict. (citation omitted) All evidence must be viewed in the light most favorable to the party against whom the motion is made. (citation omitted) There must be “substantial evidence” as distinguished from a “mere scintilla” of evidence, to support the verdict, *i.e.*, evidence of a character “which would convince an unprejudiced, thinking mind of the truth of the facts to which the evidence is directed. (citation omitted) A verdict cannot be founded on mere theory or speculation. (citation omitted)

Sommer v. DSHS, 104 Wn. App. at 172.

The Royal Fork has failed in this appeal to demonstrate the existence of any substantial evidence supporting the trial court’s denial of

a directed verdict. By the same token, the Royal Fork has failed in this appeal to show the court any substantial evidence in the record which would “justify the verdict.” CR 59(a)(7).

The Royal Fork did not—and could not—challenge the trial court’s instruction that the verdict had to be based solely upon the evidence presented at trial. CP 8 (Instruction No. 1). In other words, the jury could not disregard *all* of the evidence and decide against Mrs. Halverson on the basis of prejudice or speculation. *Sommers*, 104 Wn. App. at 172. But that is exactly what the jury did, and the trial court erred in failing to set aside the verdict.

While the Royal Fork makes many arguments in its brief, the Royal Fork never deals squarely with the issue presented on appeal—whether the Royal Fork can show this Court substantial evidence to justify either the denial of the directed verdict motion or the motion to set aside the verdict. As will be discussed in Section C below, Mrs. Halverson offered substantial evidence of the Royal Fork’s negligence and that the Royal Fork’s negligence was a proximate cause of her injury. But even if Mrs. Halverson’s liability evidence is entirely disregarded, as shown in Mrs. Halverson’s Opening Brief, the testimony of the only two witnesses who testified on behalf of the Royal Fork, Matt Loughney (the owner) and

Vernon Goodwin (the expert) offered testimony regarding the safety of the ramp which established liability.

1. Mr. Loughney's Admissions At Trial Establish The Royal Fork's Liability.

The Royal Fork's Opposition Brief does not respond to any of the following admissions of liability made by Mr. Loughney:

- That had they been painted, the side flairs would have been more visible to a patron who had to stand on the handicapped access ramp to get into their car. RP(I) at 28:5-6.
- That he had no basis to challenge the opinions or expertise of the experts retained by both parties. RP(I) at 31:4-9.
- That before Mrs. Halverson was injured he knew where to go to get answers to questions about the safety of his parking lot, and in particular, the handicapped access ramp. RP(I) at 5:1-12.
- That he did not use *common sense* when he failed to contact an engineer or an architect to determine whether the Royal Fork's handicapped access ramp was safe. RP(I) at 27:13-21.
- That, having finally consulted with an engineer as a result of the litigation, he understood that the ramp from which Mrs. Halverson fell was not reasonably safe and was a hazard *at the time of her fall*. RP(I) at 101:24-102:15.

The Royal Fork concedes these admissions. Instead, the Royal Fork argues myopically that an earlier slip and fall on the same ramp involving a Ms. Shirley Dale did not put it on notice that the ramp was not

reasonably safe Opposition Brief at 16. But Mr. Loughney's testimony speaks for itself:

Q. Now, as of the time your company received this letter were you on direct actual notice that at least there was an attorney out there who thought he had an injured client due to your ramp not being safe; is that correct?

A. Right.

Q. Now, after receiving Exhibit 12, did you hire an architect to go out and look at the parking lot?

A. I did not.

Q. Did you hire an engineer to go out and look at the parking lot?

A. I did not.

RP(I) at 25:14-24.

The Royal Fork also argues that the Dale incident was not notice to the Royal Fork because it was mere speculation that Ms. Dale fell as a result of the handicapped access ramp and that the parties do not know *exactly* where on or next to ramp Ms. Dale was when she fell. Opposition Brief at 15-16 (citing Harris' testimony, RP(II) at 139:12-17). But this argument fails for two reasons. To begin with, it is undisputed that the Royal Fork has only one handicapped access ramp, and Ms. Dale's injury was alleged to have been caused by the negligent design and construction of that ramp. RP(II) at 146:13-19 (Mr. Harris' complete answer) and Trial Exhibit 13.

More important, the Royal Fork's argument is also legally irrelevant, as Mrs. Halverson was not required to prove exactly where or how Ms. Dale fell. Rather, Ms. Dale's falling long before Mrs. Halverson's fall created a duty for the Royal Fork to *investigate* the safety of the handicapped access ramp (CP 16, Instruction 8) and make any necessary changes.¹ Here, Mr. Loughney did nothing to investigate the ramp's safety, other than turn the issue over to his insurance company. RP(I) at 26:7-27:6. As he later testified, his failure to investigate the ramp for safety after having been placed on notice as a result of the Dale incident was a failure to use "common sense." RP(I) at 27:16-21 ("...And I just I didn't have common sense, I guess, to revisit that issue...")

The Royal Fork also repeatedly states that "no independent person ever told Mr. Loughney that his parking lot was unsafe." Opposition Brief at 30; see also *id.* at 26, 27, and 29. But again, the Royal Fork's argument begs the real question, which is why the Royal Fork failed to conduct any

¹ The Royal Fork contends that the Court "must follow Washington law, not jury instructions, in considering a motion for a judgment as a matter of law or for a directed verdict." Opposition Brief at 23. To begin with, there is no suggestion that the trial court's instructions do not accurately describe Washington law. Nor could it, as Instruction No. 8 was derived from WPI 120.07. In any event, the Royal Fork never challenged any of the trial court's instructions, so they are considered that law of the case. RAP 10.3(g). *See also State v. Perez-Cervantes*, 141 Wash.2d 468, 476 n. 1, 6 P.3d 1160 (2000) (jury instruction that is unchallenged on appeal becomes the law of the case); *In re Estate of Campbell*, 87 Wash. App. 506, 512 n. 1, 942 P.2d 1008 (1997) (trial court's ruling to which no error is assigned is the law of the case).

inquiry to determine the safety of the ramp after the Dale incident. The undisputed evidence at trial was that Mr. Loughney never contacted an architect or an engineer to help him figure out whether or not the ramp was safe after Ms. Dale fell and before Mrs. Halverson fell. RP(I) at 25:19-24. But the Royal Fork did contact an engineer as an expert in connection with this litigation. And that witness, Vern Goodwin, was unequivocal that had he been contacted *before* Mrs. Halverson fell, he would have recommended to Mr. Loughney that the entire ramp be removed from the parking lot, thus eliminating the hazard altogether. RP(I) at 47:3-15.²

Regardless of whether Mr. Loughney believed Ms. Dale's and her attorney's contentions about how and why she fell, his own testimony at trial concedes that the handicapped access ramp was not reasonably safe at the time of Mrs. Halverson's fall. Indeed, Mr. Loughney admitted that he failed to use *common sense* in dealing with the Shirley Dale incident (RP(I) at 27:13-21) and that the handicapped access ramp was *not safe* at the time of Mrs. Halverson's fall (RP(I) at 101:24-102:15). The Royal Fork, through Mr. Loughney's testimony, went so far as to tell the jury that after the trial was over, he was going to remove the existing ramp and

² Incidentally, that is the same advice he would have gotten from Mrs. Halverson's expert, Jeffrey Harris, had Mr. Loughney chosen to call him before
(...continued)

replace it with one that was safe and complied with *the legal code*.
(RP(I)) at 101:3-102:15.

**2. The Royal Fork's Expert, Vern Goodwin's Admissions
At Trial Confirm The Royal Fork's Liability.**

When discussing Mr. Goodwin's testimony, the Royal Fork points out that he disagreed with Mrs. Halverson's expert, Jeffrey Harris, on whether the Royal Fork's handicapped access ramp violated the 1988 Uniform Building Code (UBC) because its slide flares were too steep. Opposition Brief at 12. Mr. Goodwin also testified that he did not believe that the handicapped access ramp represented a barrier such that its removal was mandated by the Americans with Disabilities Act ("ADA"). Id. at 14.

But, again, the Royal Fork ignores the applicable legal standard. In determining whether Mrs. Halverson was entitled to a directed verdict on liability, the trial court was permitted to reject Mr. Harris' opinion that the ramp violated the applicable UBC and the ADA. But, the trial court erred because the Royal Fork's liability was not based upon its violation of the UBC or the ADA. Rather, under Washington law noncompliance with

(...continued)
Mrs. Halverson fell. RP(II) at 58:7-16.

a statute or regulation is only evidence of negligence, it is not dispositive. CP 19 (Instruction No. 11, derived from WPI 60.03 and RCW 5.40.050).

Instead, the Royal Fork's liability was based upon its failure to maintain the handicapped access ramp in a reasonably safe condition. CP 14 (Instruction No. 6, derived from WPI 120.06.01). The Royal Fork has not disputed or pointed out any clarifying testimony in response to any of the following admissions of liability made by Mr. Goodwin:

- That had he been contacted *before* Mrs. Halverson fell, perhaps in response to Ms. Dale's injury, he would have recommended that the ramp be removed altogether. RP(I) at 47:3-15 and 53:2-11.
- That the handicapped access ramp failed to meet *ANSI safety standards that were in place for five years before the Royal Fork opened* because its side flares were too steep and that the Royal Fork failed to warn its patrons about the side flares' steepness. RP(I) at 45:9-46:3; 65:15-66:4; 67:9-11.
- That the ramp was not reasonably safe *at the time of Mrs. Halverson's fall* because the side flares were not painted so their steepness was less visible to its patrons like Mrs. Halverson. RP(I) at 49:10-22, 50:20-51:3 and 53:21-24.

Therefore, regardless of whether or not Mr. Goodwin believed that the handicapped access ramp violated the UBC or the ADA, his testimony confirmed that the ramp was not reasonably safe at the time of Mrs. Halverson's fall. Mr. Goodwin's testimony standing alone, or in

combination with the admissions of Mr. Loughney established the Royal Fork's liability.

3. The Royal Fork's Admission That Mrs. Halverson Fell Off The Steep Side Of The Handicapped Access Ramp Establishes That Its Negligence Was A Proximate Cause Of Mrs. Halverson's Injury, As A Matter Of Law.

Washington law is clear that Mrs. Halverson was required to prove only that the Royal Fork's negligence was *a* proximate cause of her injury. CP 25 (Instruction No. 17, derived from WPI 15.01.01). It is equally clear that there may be more than one proximate cause of an event. *Id.* The trial court was permitted to disregard Mrs. Halverson's witnesses' testimony on proximate cause when considering whether she was entitled to a directed verdict. But again, neither the trial court nor the jury could disregard all of the evidence presented at trial.

The Royal Fork's difficulty on causation is that in its Answer to Mrs. Halverson's Complaint, the Royal Fork admitted that as Mrs. Halverson "was walking down the handicap ramp into the parking lot, Mrs. Halverson fell off the steep side of the ramp, and landed on her right shoulder." CP 2 (¶ 3.9), 5 (emphasis added) This admission was enumerated in Jury Instruction No. 4 without objection. CP 12. In substance, the trial court directed a verdict on causation based on the Royal Fork's admission in its Answer.

Recognizing the import of this admission, the Royal Fork contends that the “instruction simply states that Mrs. Halverson ‘fell off the steep side of the ramp’; it does not state that the sides of the ramp were inappropriately steep or that the ramp was the proximate cause of her fall.” Opposition Brief at 28-29. This argument might make sense if considered in isolation. But this admission, coupled with Mr. Goodwin’s testimony that the Royal Fork failed to warn its patrons about the side flares’ steepness (RP(I) at 65:15-66:4 and 67:9-11), that the ramp should have been removed before Mrs. Halverson fell (RP(I) at 47:3-15 and 53:2-11), and that the side flares were too steep according to ANSI safety standards in place long before the ramp was constructed (RP(I) at 45:9-46:3), proves that the Royal Fork’s negligence was a proximate cause of Mrs. Halverson’s injury as a matter of law. She was therefore entitled to a directed verdict on liability. And again, there was no substantial evidence to the contrary which would “justify” a different outcome.

C. Mrs. Halverson’s Liability Evidence Showed That The Handicapped Access Ramp Was Not Reasonably Safe Because Its Side Flares Were Too Steep And That She Fell Off Of The Ramp Because It Was Too Steep.

The Royal Fork makes the perplexing argument that there was substantial evidence to support the jury’s verdict because Mrs. Halverson’s liability evidence was not sufficient to support a verdict in her

favor. Opposition Brief at 27-28. The Royal Fork is wrong for two reasons. First, even if Mrs. Halverson's liability evidence is entirely disregarded, the only remaining substantial evidence consists of the admissions of the Royal Fork and its expert, conceding liability. The Royal Fork failed to provide even a scintilla of evidence that the ramp was reasonably safe. Second, the Royal Fork's attempt to characterize Mrs. Halverson's liability evidence as insufficient is simply refuted by an examination of that evidence. Again, the only substantial evidence in the entire record was that the ramp was not reasonably safe.

1. Mrs. Halverson's Safety Expert, Jeffrey Harris, Testified As Did Mr. Goodwin That The Royal Fork's Handicapped Access Ramp Was Not Reasonably Safe.

Mrs. Halverson offered the expert testimony of Jeffrey Harris, an architect who has been designing and evaluating parking lots for many years. RP(II) at 90:8-16. He explained why the Royal Fork's handicapped access ramp was not reasonably safe:

Q. Could you tell us what it is specifically -- what it is that you find about this ramp to be not safe?

A. Well, there are three things that are unsafe about it. The first one is its location. The ramp is located between two parking stalls in an area that is supposed to be flat. The handicap parking stalls are required by design to be on a level surface. And it's very important to be able to get in and out of the car on a level surface. So this is aisle that is supposed to be flat, not pitched, you know, ramped in two directions. The second one is the steepness of the side ramps or flair ramps on the side. They are very steep. And it's very difficult to get a footing on them, compounding

those physical differences in this condition, particularly in Exhibit No. 4 -- oh, it's Exhibit No. 1, it's very difficult to see where the ramp begins and where the ramp edges, where the ramp ends, particularly if your view of it is partially blocked, if you're fiddling with the car door or just looking out of a partially opened door. It's not easy to see - - it might not be easy to see what the car is parked next to. So for those three reasons those things are hazardous.

RP(II) at 98:14-99:10. In addition, Mr. Harris explained that while the ramp was unsafe for anyone, it was particularly dangerous for those with limited mobility, the very people for whom the ramp was designed. RP(II) at 103:18-104:3.

As the Royal Fork admits in its Opposition Brief, Mr. Harris also testified that the handicapped access ramp's side flares violated the 1988 UBC, finding them to be to be nearly three times steeper than the UBC permitted. RP(II) at 104:3-8, 106:19-23, and 148:14-149:9. While Mr. Goodwin disagreed that the UBC was implicated, he actually found the side flares to be *steeper* than did Mr. Harris. RP(I) at 55:16-56:8.

The Royal Fork contends that Mr. Harris testified that "the ADA does not require existing buildings to meet ADA standards." Opposition Brief at 13. That is wrong; his testimony was exactly the opposite:

Q. Now, sir, there is an argument that's been advanced by the defense in this case that because this building was constructed prior to the enactment of the ADA that those requirements don't apply to this parking structure; is that how the ADA works?

A. No. The ADA is not a building code in the sense that the Uniform Building Code is. The Americans with

Disabilities Act is civil rights law. And what it requires, among other things, was that after its passage, buildings that were public accommodations such as restaurants, hotels, places that serve the public were required to take an inventory of architectural barriers of everything that would get in the way of a handicapped person getting access to that space. And they were required to make reasonable repairs, readily achievable removal of barriers. And that was dependent on cost and whether it was easy to do with space that was available and so on. But if there was a requirement, if the cost was reasonable, it was fairly easy to do to go ahead and make those. Take an inventory and determine what was there. Set up a list of priorities, get rid of barriers that could be remedied easily.

RP(II) at 109:24-110:19. Mr. Harris used an illustration from the US Justice Department to explain how and why the handicapped access ramp is a barrier that the Royal Fork was required to remove. RP(II) at 115:16-116:15; Ex. 21 (the illustration goes through a hypothetical that is strikingly similar to the situation presented here and explains that a ramp like the Royal Fork's is a barrier that was required to be removed).

The Royal Fork also attempts to make something of the fact that even though Mr. Harris offered the opinion that the ramp's steepness was associated with her fall (RP(II) at 141:1-15), he did not know *exactly* where Mrs. Halverson was on the ramp when she fell. Opposition Brief at 15-16 and 18. But this argument too is not helpful to the Royal Fork's cause.

First, Washington law did not require Mrs. Halverson to prove *exactly* where she was when she fell off the ramp. CP 14 (Instruction 6),

16 (Instruction 8), and 24 (Instruction No. 16, which was derived from WPI 21.02 and expressly describes the three elements Mrs. Halverson was required to prove). Second, the burden of proof in this case was the preponderance standard. CP 23 (Instruction No. 15, derived from WPI 21.01). Mrs. Halverson was therefore only required to prove that the handicap ramp's too-steep side flare was more probably than not a proximate cause of her injury. The Royal Fork's contention that Mrs. Halverson had to prove exactly where she was when she fell is contrary to Washington law and should therefore be rejected. Third, Mr. Harris' testimony was not necessary on this point, as the Royal Fork *stipulated and admitted* that Mrs. Halverson fell off of the steep side of the handicapped access ramp. CP 2, 5, and 12 (Instruction No. 4).

2. Even Though The Royal Fork's Admission Was Sufficient To Establish Proximate Cause, Mrs. Halverson's Testimony Independently Established Proximate Cause.

The Royal Fork also attempts to justify the trial court's denying the motion for a directed verdict and the Motion for Relief from Judgment by suggesting that Mrs. Halverson did not know how or why she fell. Opposition Brief at 18-19 and 30. Again, the Royal Fork is wrong. Mrs. Halverson knew and explained to the jury how and why she fell.

Q. Could you please tell us how you came to fall at the Royal Fork Restaurant on that day?

A. We had finished eating and we were going to leave and go down to the park a little ways from where the Royal Fork is. We all headed out to get in our cars, and Jan Bogart, the one that was here yesterday, she was just a little in front of me. And I got to the ramp to go down and she was getting in the car already. I started walking down the ramp. And I got to where the car door was, and I started walking towards it. And I had my hand out to open the door. And I had to step down on that slope to open the door.

Q. What happened when you stepped onto the slope?

A. At that time I slipped and down I went.

RP(II) at 152:18-153:11. Mrs. Halverson also explained where she was right before she fell. Referring to Trial Exhibit 1, Mrs. Halverson testified that the car door was adjacent to the handicapped access ramp (RP(II) at 153:21-154:5) and that there was no way for her to get into her car without stepping on the downward too-steep side flare. RP(II) at 154:21-23 and 155:17-156:3.

The Royal Fork's attorney tried very hard to confuse Mrs. Halverson, who is elderly, and/or to get her to change her testimony about *how and why* she fell, but she never waived from the central point that she fell when she stepped onto the side flare to get into her car. RP(II) at 190:16-191:20. And, despite the Royal Fork's attempts to suggest that Mrs. Halverson did not know *where* she was when she fell, Mrs. Halverson explained *on cross examination* where she was when she fell. See RP(II) at 190:25-191:5.

As explained above, in considering this appeal, Mr. Harris' and Mrs. Halverson's testimony arguably could be disregarded by the jury. But this case had to be decided based on the evidence presented at trial, and could not be decided based prejudice or speculation. The Royal Fork's admissions of liability could not be disregarded. Those admissions, in-and-of-themselves or in combination with Mrs. Halverson's liability evidence, establish the Royal Fork's liability as a matter of law, and prove that the jury's verdict against Mrs. Halverson could not have been based upon substantial evidence. In other words, as per CR 59(a)(7) there was "no evidence or reasonable inference from the evidence to justify the verdict." For these reasons, the jury's verdict should be overturned, and Mrs. Halverson is entitled to a liability judgment as a matter of law.

II. OPPOSITION TO RESPONDENT'S CROSS APPEAL

Mrs. Halverson's Motion for Relief from Judgment and/or A New Trial contended that she was entitled to a judgment as a matter of law even if all of her testimony was disregarded. CP 37-44. Her notice of appeal specifically referred to the trial court's denying that motion. CP 71. Thus, despite its protestations here, the Royal Fork could not reasonably have had any question about the issue or bases for Mrs. Halverson's appeal.

Considering the bases for her motion and this appeal, Mrs. Halverson ordered and relied solely upon the Royal Fork's evidence in

prosecuting the appeal. Even though she had no intention of relying on her own testimony or that of Mr. Harris, Mrs. Halverson offered to evenly split the approximately \$1,000 charge for ordering the remaining portions of the trial transcript with the Royal Fork. CP 280-282. Instead of accepting that offer, the Royal Fork brought a motion under RAP 9.2(c) and devoted more than ten of its 37-page appeal brief to attempting to force Mrs. Halverson into paying the full \$1,000.

The Royal Fork contends that this Court could not have considered Mrs. Halverson's appeal without the remaining portions of the trial transcript. Opposition Brief at 32-33. That is wrong, and this is confirmed by the fact that it never brought a motion on the merits or moved to dismiss Mrs. Halverson's appeal because she did not order the entire trial transcript.

Indeed, despite its claim that it was prejudiced by Mrs. Halverson's not ordering the entire trial transcript, those portions actually reinforce the Royal Fork's liability. The additional transcripts submitted do no more than show that Mr. Harris agreed with Mr. Goodwin that the handicapped access ramp's side flares are too steep to be safe and concluded that the ramps also failed to meet applicable UBC and the ADA. Mrs. Halverson's testimony proved that she fell off the handicapped access ramp because it

was too steep.³ The Royal Fork's contention that it was prejudiced by Mrs. Halverson's not ordering this testimony has no merit.

Based on the nature of Mrs. Halverson's appeal, the trial court acted well within its discretion when it denied the Royal Fork's motion to force her to order and pay for the remaining portions of the trial transcript. The Royal Fork's motion was properly denied; its appeal is without any merit, and should be denied.

III. CONCLUSION

At trial, the Royal Fork's only witnesses admitted fault and the Royal Fork conceded in its answer that Mrs. Halverson fell from the steep side of the ramp. Despite these admissions, the trial court improperly denied Mrs. Halverson's motion for a directed verdict, and the jury found for the defense, even though there was no substantial evidence to support such a finding. The Royal Fork has failed in this appeal to demonstrate that there is any substantial evidence that would "justify" the verdict. The trial court erred both in denying the motion for a directed verdict, and later in failing to set aside the jury verdict.

The Royal Fork does not challenge any of its admissions of liability, and instead cross-appealed the trial court's denying its motion to

³ Ms. Bogart's testimony is not relevant to the liability issue, as she undisputedly did not see Mrs. Halverson fall. RP(II) at 188:8-189:19. Her testimony was only
(...continued)

force Mrs. Halverson pay for the portions of the trial testimony she did not order or rely upon in her Opening Brief. While the Royal Fork claims that it was prejudiced by Mrs. Halverson's not ordering that testimony, it actually supports Mrs. Halverson's appeal.

For these reasons, and as explained in Mrs. Halverson's Opening Brief and above, Mrs. Halverson is entitled to a judgment on liability as a matter of law. The jury verdict should be overturned, a judgment should be entered in Mrs. Halverson's favor, and the Court should remand solely on the issue of Mrs. Halverson's damages. The Royal Fork's appeal, having no basis in law and being contrary to the record, should be denied and dismissed.

DATED this 17 day of June, 2009.

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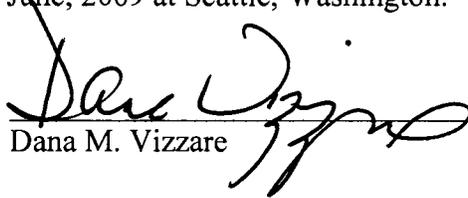
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relevant to damages.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 17th day of June, 2009, I caused a true and correct copy of the foregoing document "Reply Brief of Appellant", to be delivered by legal messenger to the following counsel of record:

Counsel for Respondent:
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Dated this 17th day of June, 2009 at Seattle, Washington.



Dana M. Vizzare

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