

TABLE OF CONTENTS

I.	ARGUMENT AND AUTHORITY.....	1
A.	Conclusions of Law.....	1
1.	Court’s Legal Conclusion Regarding Breach of Duty by North Kitsap.....	1
a.	No Liability Exists Because Wheel Stops are Not a Hazard.....	1
i.	Certificates of Occupancy	2
ii.	Kitsap Building Code.....	2
iii.	Wheel Stops Were in Plain View.....	3
iv.	There is no Duty to Warn Where there is No Hazardous Condition.....	4
b.	No Liability Exists Because the Wheel Stop Did Not Cause Ms. Gould’s Fall.....	5
c.	No Liability Exists Because of Gould’s Actual Knowledge.....	6
2.	The Court Improperly Found Ms. Gould’s Status to be an Invitee Rather Than a Licensee.....	8
a.	Ms. Gould is Properly Classified as a Licensee.....	8
3.	The Court Incorrectly Concluded that There Was No Comparative Fault as a Matter of Law and That Ms. Gould Had No Duty to Look Where She Was Walking	11
B.	Findings of Fact	14
1.	No Evidence of “Notice”.....	14
a.	The Court’s Finding on Notice is Directly Contradicted by the Certificate of Occupancy	15

b.	Law Regarding Notice.....	16
c.	Mr. Gould’s Testimony is Not Substantial Evidence...18	
2.	The Court Improperly Found That Ms. Gould was “Directed” to see Paul Marshall.....	20
3.	The Court’s Improper Determination That it is Unnecessary To Consider Evidence of Compliance With Kitsap County Building Codes.....	21
4.	The Court’s Contradictory Findings of Fact that Ms. Gould was Looking at the Door of Suite D and Not Where she was walking (paragraph 14), but that Ms. Gould did not see the Wheel Stop near Suite D because it was Not Visible (paragraph 23).....	22
C.	Motion for Jury Trial.....	22
II.	CONCLUSION.....	24

TABLE OF CASES AND AUTHORITIES

Washington Cases:

<i>Beebe v. Moses</i> , 113 Wn. App. 464, 467-468, 54 P.3d 188, 189 (2002).....	10
<i>Brant v. Mkt. Basket Stores</i> , 72 Wn.2d 446, 448, 433 P.2d 863, 865 (1967)	17
<i>Davis v. Bader</i> , 57 Wn.2d 871, 360 P.2d 352 (1961).....	12, 13, 14
<i>Dickinson v. Tesia</i> , 2 Wn. App. 262, 264, 467 P.2d 356 (1970).....	6, 7
<i>Dotson v. Haddock</i> , 46 Wn.2d 52, 54, 278 P.2d 338 (1955).....	9, 10
<i>Dunn v. Kemp & Hebert</i> , 36 Wash. 183, 78 P. 782 (1904).....	14
<i>Fuentes v. Port of Seattle</i> , 119 Wn. App. 864, 82 P.3d 1175 (2003).....	9, 10
<i>Hanson v. Lincoln First Fed. Sav. & Loan Ass'n</i> , 45 Wn.2d 577, 277 P.2d 344 (1954).....	17
<i>Hoglund v. Meeks</i> , 139 Wn. App. 854, 170 P.3d 37 (2007).....	18
<i>Holman v. Coie</i> , 11 Wn. App. 195, 215, 522 P.2d 515, 526-527, (1974)	18, 19, 20
<i>Hooser v. Loyal Order of Moose, Inc.</i> , 69 Wn.2d 1, 416 P.2d 462 (1966)	17
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	3
<i>Hume v. Am. Disposal Co.</i> , 124 Wn.2d 656, 667, 880 P.2d 988, 994 (1994).....	16, 18
<i>Humes v. Fritz Cos.</i> , 125 Wn.App. 447, 105 P.3d 1000 (2005)....	12, 13, 14
<i>Iwai v. State</i> , 129 Wn.2d 84, 915 P.2d 1089 (1996).....	2, 5, 15

<i>Kuhnhausen v. Woodbeck</i> , 2 Wn.2d 338, 97 P.2d 1099 (1940).....	12, 13, 14
<i>Memel v. Reimer</i> , 85 Wn.2d 685, 689, 538 P.2d 517 (1975).....	4, 11
<i>Pement v. F. W. Woolworth Co.</i> , 53 Wn.2d 768, 337 P.2d 30 (1959).....	17
<i>Refrigeration Eng'g Co. v. McKay</i> , 4 Wn. App. 963, 486 P.2d 304 (1971).....	18
<i>Sackett v. Santilli</i> , 101 Wn. App. 128 at 133 (1999).....	22
<i>Smith v. Manning's, Inc.</i> , 13 Wn.2d 573, 126 P.2d 44 (1942).....	12, 13, 14
<i>Sortland v. Sandwick</i> , 63 Wn.2d 207, 386 P. 2d 130 (1963).....	19, 20
<i>Stone v. Smith-Premier Typewriter Co.</i> , 48 Wash. 204, 93 P. 209 (1908)	13
<i>Todd v. Harr, Inc.</i> , 69 Wn.2d 166, 417 P.2d 945 (1966).....	12, 13
<i>Watson v. Zimmerman</i> , 175 Wash. 410, 27 P.2d 707 (1933).....	13
<i>Wilson v. Olivetti North America Inc.</i> , 85 Wn. App. 804, 808, 934 P.2d 1231 (1997).....	23, 24
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 724 P.2d 991 (1986).....	4, 11
<i>Zenkina v. Sisters of Providence in Wash, Inc.</i> , 83 Wn. App. 556, 566, 922 P.2d 171 (1996).....	7, 8, 9

Cases from Other Jurisdictions:

<i>Bennett v. Cole</i> , 426 So. 2d 829, 831 (Ala. Civ. App. 1981).....	4
<i>Price v. Roadhouse Grill, Inc.</i> , 512 F. Supp. 2d 511 (W.D. La. 2007).....	4
<i>Ramsey v. Home Depot U.S.A., Inc.</i> , 124 So. 3d 415 (Fla. Dist. Ct. App. 1st Dist. 2013).....	4
<i>Robbillard v. Tillotson</i> , 118 Vt. 294, 108 A.2d 524 (1954).....	6, 10

Rodriguez v. E & P Assoc., 20 Misc. 3d 1129(A), 872 N.Y.S.2d 693
(2008).....21

Secondary Sources:

Restatement (Second) of Torts § 342 (1965).....4, 11

WPI 12.06.....13

I. ARGUMENT AND AUTHORITY

The parties dispute whether Ms. Gould is properly classified as a licensee or a business invitee. However, regardless of classification, there is no liability as a matter of law because 1) there was no hazardous condition, 2) the wheel stops did not cause Ms. Gould's fall, and 3) Ms. Gould knew about the wheel stops; therefore, North Kitsap had no duty to warn her of them as a matter of law. This Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law. In the alternative, this Court should grant a new trial.

A. Conclusions of Law

1. Court's Improper Legal Conclusion Regarding Breach of Duty by North Kitsap

The Court erred in its finding that North Kitsap breached a duty to Ms. Gould. The Court's finding was incorrect because 1) there was no hazardous condition, 2) the wheel stops did not cause Ms. Gould's fall, and 3) Ms. Gould knew about the wheel stops; therefore, North Kitsap had no duty to warn her of them as a matter of law. This Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law.

a. No Liability Exists Because Wheel Stops are Not a Hazard

The wheel stops at the North Kitsap parking lot were placed at the end of every parking space, and were not hidden. *See* CP 605-608. Ms.

Gould admits that wheel stops are widely used and generally safe. Brief of Respondent, p. 25. It is the burden of Ms. Gould to show that this wheel stop poses some special or extra-ordinary hazard beyond that of a regular wheel stop. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). Ms. Gould fails to meet this burden because Kitsap County has already found the property safe for use and the property complied with the Kitsap Building Code.

i. Certificate of Occupancy

Both of the Certificates of Occupancy were admitted as a trial exhibits. RP, Vol. III, 260, l. 21 – p. 264, l. 4, p. 300, l. 25 – p.303, l. 17. The Certificates of Occupancy would not be issued if the North Kitsap property were not safe for use by the public. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17. Mr. Uchimura also testified regarding the significance of the certificate of occupancy as an approval of the configuration and condition of the parking lot at North Kitsap. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17. There is no dispute that the subject wheel stop was in place when the certificates of occupancy were issued. The Certificates of Occupancy issued to North Kitsap show definitively that the wheel stops are not a hazardous condition. This Court should find that the wheel stops are not hazardous as a matter of law.

ii. Kitsap Building Code

Ms. Gould argues that the Court did not resolve the issue of code compliance with Title 17 of the Zoning Code for Kitsap County, and asserts that this is therefore not a point on which North Kitsap can rely.

Brief of Respondent, p. 24. North Kitsap assigned error to this failure, which Ms. Gould has disputed. *See Section B.3.*

Mr. Uchimura testified that the parking lot was compliant with Title 17 of the Zoning Code for Kitsap County. VRP, Vol. III, p. 300, ll. 15-20. Further, as is discussed further below, although Mr. Mitchell did not raise any actual code violations in his testimony. *See VRP, Vol. III, p. 289, l. 23 – p. 290, l. 14.* The North Kitsap parking lot was code compliant. The subject wheel stop was not a hazardous condition and North Kitsap had no duty to warn Ms. Gould of it.

Compliance with the Kitsap Building Code proves that the conditions at the North Kitsap parking lot were not hazardous. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17. Additionally, it is against public policy to hold North Kitsap liable for the presence of a required safety feature on their property. *Hubbard v. Spokane County*, 146 Wn.2d 699, 710, 50 P.3d 602, 608 (2002)(“[W]e conclude that enforcement of the zoning code to ensure uniform planning and the general safety and welfare of the county creates a valid public policy...”). Such a result undermines the very purpose of the Kitsap Building Code. This Court should find that the conditions at the North Kitsap parking lot were not hazardous as a matter of law.

iii. Wheel Stops Were in Plain View

Ms. Gould’s asserts that all the law cited by North Kitsap supports her position, based on the position that the wheel stop was hidden from view. This is not the case. The wheel stops at the North Kitsap parking lot

were placed at the end of every parking space in plain view. Further, Ms. Gould does not address the cited cases *Price v. Roadhouse Grill, Inc.*, 512 F. Supp. 2d 511, 519 (W.D. La. 2007); *Bennett v. Cole*, 426 So. 2d 829, 831 (Ala. Civ. App. 1981) (“[t]here is no evidence indicating that the car stops were materially different from those used in other parking lots; that their use was in any way unusual; or that the danger they presented was in any way different than that presented by standard sidewalk curbing”); *Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415, 417-418 (Fla. Dist. Ct. App. 1st Dist. 2013)(Finding that the fact that a plaintiff does not see the car stop, does not make it dangerous). Accordingly, this Court should find that North Kitsap did not breach a duty to Ms. Gould as a matter of law.

iv. There is No Duty to Warn Where There is No Hazardous Condition

Regardless of Ms. Gould’s status as an entrant onto the property, a hazardous condition must exist before any duty to warn is triggered. *Restatement (Second) of Torts* § 342 (1965), quoted in *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975), *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). The wheel stops do not pose more risk than a sidewalk curb, and are included in the Kitsap County building code. Accordingly, because no hazardous condition existed, North Kitsap owed no duty to Ms. Gould regarding the wheel stops, and verdict should be entered for North Kitsap as a matter of law.

b. No Liability Exists Because the Wheel Stop Did Not Cause Ms. Gould's Fall

For Ms. Gould to maintain a negligence action, she must show that a proximate cause between the alleged breach of a duty owed to her and the injury she asserts. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). Ms. Gould's own testimony shows that the wheel stop was not the proximate cause of her fall – her lack of attention was.

Ms. Gould testified that she was not looking where she was going as she walked toward the Road Rider business. VRP Vol. II, p. 182, ll. 4-22. Ms. Gould also admitted that she was not paying attention at the time of the accident. VRP Vol. III, p. 271, l. 13- p. 272, l. 19. At best, Ms. Gould was looking at the Road Rider sign, which is located above the door and window of the Road Rider suite. *See* CP 609-614; CP 623-626. Therefore, she cannot also be looking down at the path in front of her. *See* CP 609-614; CP 623-626. Further, Ms. Gould was aware that there was a wheel stop at the end of every parking space, Ms. Gould only had to observe that there was a parking space in front of her to know that there was a wheel stop. *Id.* Ms. Gould asserted liability based on the theory that the wheel stop was too similar in color to the asphalt parking lot, and that she therefore could not see it. However, Ms. Gould would not have seen the wheel stop regardless of its color, or condition, or specific placement, because she was not looking where she was going. VRP Vol. II, p. 182, ll. 4-22. The wheel stop was not the cause of Ms. Gould's fall – her inattentiveness was. Accordingly, because no causation exists to support

Ms. Gould's allegations of negligence, verdict should be entered for North Kitsap as a matter of law.

c. No Liability Exists Because of Gould's Actual Knowledge

Ms. Gould argues that she did not have actual knowledge because she did not visit the Road Rider parking lot prior to her accident, but only the DSC parking lot. *Brief of Respondent*, p. 19-20. The North Kitsap property has only one parking lot.¹ CP 623-626. Further, Ms. Gould's assertion that she visited only the DSC portion of the parking lot does not support the contention that she is not aware of the wheel stops at the parking lot. There is a wheel stop located at the end of every parking space in the North Kitsap parking lot. CP 609-614; CP 623-626.

Ms. Gould asserts that her general knowledge regarding wheel stops is also not relevant because she was not aware of the specific wheel stop. *Brief of Respondent*, p. 21. Ms. Gould cites *Dickinson v. Tesia*, 2 Wn. App. 262, 467 P.2d 356 (1970), for the general principle that North Kitsap had a duty to warn of any "dangerous conditions which it knew of, or could have discovered with reasonable inspection..." that Suzette did not know about or could not have reasonably discovered. *Brief of Respondent*, p. 21, emphasis added. This general principle does not

¹ As briefed below, Ms. Gould does not dispute that she lost any invitee status she may have had based her incidental purchase at DSC Industrial Supply (see VRP Vol. II, p. 179, l. 9) when she left DSC to go to Road Rider. *See also Robbillard v. Tillotson*, 118 Vt. 294, 108 A.2d 524 (1954)(holding that invitee status dissipates when a party completes their purchase but remains on the property of the landowner).

operate in Ms. Gould's favor. Suzette Gould could have discovered the wheel stop simply by looking at the path in front of her.

However, Ms. Gould then goes on to attempt to distinguish the facts of that case from the present matter. Ms. Gould's attempt to distinguish *Dickinson* is inapposite because Ms. Gould did, in fact, have knowledge of the condition. In *Dickinson*, plaintiff was invited to a private park for a picnic. *Dickinson v. Tesia*, 2 Wn. App. 262, 262-263, 467 P.2d 356, 357 (1970). The ground at the park was rough and uneven, there was ongoing construction, and the other guests were somewhat rowdy. *Id.* Plaintiff, who was moving with the assistance of crutches, decided to return to his car due to the rowdy guests. *Id.* On the way back to his car, a child or other guest knocked one of the crutches out of his hand. *Id.* He attempted to hold himself up with the remaining crutch, but it slipped due to the uneven ground, and he fell. *Id.* His leg was amputated due to the injury. *Id.* The Court found that there was no duty to warn the plaintiff because he observed the condition of the grounds before he fell. *Id.* at 263-264. Ms. Gould had visited the North Kitsap lot before and was aware that there was a wheel stop at the end of every parking space. VRP Vol. II, p 184, l. 1-3. *Dickinson* applies.

Ms. Gould's attempt to distinguish *Zenkina v. Sisters of Providence in Wash, Inc.*, 83 Wn. App. 556, 566, 922 P.2d 171 (1996) is also inapposite. The *Zenkina* Court found that there was no duty requiring a hospital to warn individuals choosing to be at the hospital that they might faint at the sight of some procedures. *Id.* It is reasonable to expect

that these types of sites and experiences will be present at the hospital. *Zenkina* is analogous to the present matter. As in *Zenkina*, Ms. Gould chose to be in the North Kitsap parking lot, and encountered an expected feature of parking lots – wheel stops. *See* Brief of Respondent p. 25 & 27.

Ms. Gould chose to be in the North Kitsap parking lot, and was aware that wheel stops were located at the end of each parking space. VRP Vol. II, p 184, l. 1-3. Ms. Gould has admitted that it is reasonable to expect wheel stops to be located at the end of each parking space. Brief of Respondent p. 25. Further, the wheel stops at the parking lot were not hidden. CP 609-614; CP 623-626. Ms. Gould testified that she was not looking at the path in front of her. VRP Vol. II, p. 182, ll. 4-22; VRP Vol. III, p. 271, l. 13- p. 272, l. 19. Ms. Gould did not see the wheel stop not because it was hidden but because she was not looking. *Zenkina* applies, and North Kitsap had no duty to warn Ms. Gould of the subject wheel stop. This Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law.

2. The Court Improperly Found Ms. Gould’s Status to be an Invitee Rather Than a Licensee

a. Ms. Gould is Properly Classified as a Licensee

Ms. Gould identifies the relevant analysis as “whether Suzette was invited to be at the Marshall’s business either for a “purpose directly or indirectly connected with [their] business dealings,” or as a member of the public for a public purpose.” *Brief of Respondent*, p. 27. Under Ms. Gould’s own analysis, this argument fails. Ms. Gould testified that she

went to the Marshall's business, not on their behalf, but on behalf of Ms. Gould's employer. *Id, see also* VRP VOL II, p. 177-78. Ms. Gould was, in fact, not invited at all. Ms. Gould came to the DSC for the sole purpose of marketing the bank to her clients. *Id.*

For example, in *Dotson v. Haddock*, 46 Wn.2d 52, 54, 278 P.2d 338 (1955), cited by North Kitsap and not addressed by Ms. Gould, the Appellant was injured at Respondents' home, where a club meeting was being held. Appellants argued that, since the meeting was held at the home of the Respondents, Respondents received a pecuniary benefit in that they did not have to hire a baby sitter. The Court rejected this argument and held that such incidental benefits do not characterize the visitor as an invitee. *Dotson* at 55. The facts are the same here. Ms. Gould never been a customer of Road Rider or DSC businesses in the past, and if she planned to peruse their shops incidental to her visit on behalf of her employer, this is incidental and not sufficient to alter her status as a licensee.

Fuentes v. Port of Seattle, 119 Wn. App. 864, 82 P.3d 1175 (2003), cited by Ms. Gould, is readily distinguished from the present matter. In *Fuentes*, a person at an airport for the purpose of picking up others who had used the services of the airport was held to be an invitee. But Ms. Gould was at the North Kitsap property not to avail herself of any services. Rather, she was there for the purposes of her own employer, Frontier Bank.

Ms. Gould does not dispute that she lost any invitee status she may have had based her incidental purchase at DSC Industrial Supply (see VRP Vol. II, p. 179, l. 9) when she left DSC to go to Road Rider, but instead argues that this loss of status is inconsequential. *Brief of Respondent*, p. 28-29. Ms. Gould does not dispute that she lost any invitee status conferred by her purchase at DSC after she left DSC. *Id.* Accordingly, Ms. Gould cannot be deemed an invitee based on this purchase.

Ms. Gould does not address the cases of *Dotson v. Haddock*, 46 Wn.2d 52, 54, 278 P.2d 338 (1955), *Beebe v. Moses*, 113 Wn. App. 464, 467-468, 54 P.3d 188, 189 (2002), and *Robbillard v. Tillotson*, 118 Vt. 294, 108 A.2d 524 (1954), cited by North Kitsap. These cases illustrate that Ms. Gould is a licensee. For example, in the matter of *Beebe v. Moses*, 113 Wn. App. 464, 467-468, 54 P.3d 188, 189 (2002), the Court identified the difference between a business invitee and a licensee. A licensee enters the property for a purposes that benefits themselves. *Id.* That is exactly the case here.

Ms. Gould was at the Defendants' places of business in her capacity as a commercial lender for Frontier Bank and for the benefit of herself and employer. Ms. Gould was a licensee. Accordingly, North Kitsap only owed Ms. Gould the standard of care required for licensees, which they did not breach.

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land only if 1) there is a hazardous

condition and the possessor knows or has reason to know of it, 2) the possessor fails to take care to warn the licensees, and 3) the licensees do not know or have reason to know of the condition and the risk involved. *Restatement (Second) of Torts* § 342 (1965), quoted in *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975), *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). As briefed above, the conditions at the North Kitsap parking lot were not hazardous and Ms. Gould was aware of the conditions at the parking lot. North Kitsap did not breach a duty to Ms. Gould. This Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law.

3. The Court Incorrectly Concluded That There Was No Comparative Fault as a Matter of Law as a Matter of Law and That Ms. Gould Had No Duty to Look Where She Was Walking

Ms. Gould asserts that comparative fault does not apply because she “had no reasonable way of ascertaining that there as a hidden danger in her path.” *Brief of Respondent*, p. 32. However, Ms. Gould simply had to look in front of her and note the wheel stop, which was open and obvious, or even just note the existence of a parking space in front of her. VRP Vol. II, p. 182, ll. 4-22; VRP Vol. III, p. 271, l. 13- p. 272, l. 19; VRP Vol. II, p 184, l. 1-3; CP 609-614; CP 623-626.

Ms. Gould admits that she has a duty of ordinary care as a pedestrian, but asserts that she was exercising the same at the North Kitsap

parking lot. *Brief of Respondent*, p. 31. Ms. Gould incorrectly asserts that North Kitsap's position is that she was required to walk with her eyes affixed to the ground in order to meet the duty of ordinary care. *Brief of Respondent*, p. 19. This is not the case. Ms. Gould had a positive duty to look where she was going. *Davis v. Bader*, 57 Wn.2d 871, 360 P.2d 352 (1961); *See also Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942); *Kuhnhausen v. Woodbeck*, 2 Wn.2d 338, 97 P.2d 1099 (1940)(Pedestrian required to exercise the care of an ordinarily prudent person, under the circumstances, taking into consideration her opportunity to receive warning of a car's approach.); *Humes v. Fritz Cos.*, 125 Wn. App. 477, 105 P.3d 1000 (2005)(Jury instructions on contributory negligence and "duty to see" instruction appropriate, even where plaintiff was injured escaping from an emergency situation). Ms. Gould's testimony is clear that she was not looking at the path in front of her, at all. VRP Vol. II, p. 182, ll. 4-22; VRP Vol. III, p. 271, l. 13- p. 272, l. 19. She did not exercise the care of an ordinarily prudent person.

Ms. Gould's reliance on *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966), is misplaced. Ms. Gould did not exercise the standard of care expressed in *Todd*. Ms. Gould testified that she was not looking where she was going as she walked toward Road Rider in the North Kitsap parking lot. VRP Vol. II, p. 182, ll. 4-22. Ms. Gould also admitted to the Marshalls that she was not looking where she was going immediately after her fall. VRP Vol. III, p. 271, l. 13- p. 272, l. 19. If Ms. Gould was looking at the Road Rider sign then she cannot also be looking at the path in front

of her. CP 609-614; CP 623-626. Further, as Ms. Gould was aware that there was a wheel stop at the end of every parking space, Ms. Gould only needed to observe that there was a parking space in front of her to know that there was a wheel stop. *Id.*

Ms. Gould had a positive duty to look where she was going. *Davis v. Bader*, 57 Wn.2d 871, 360 P.2d 352 (1961); *See also Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942); *Kuhnhausen v. Woodbeck*, 2 Wn.2d 338, 97 P.2d 1099 (1940); and *Humes v. Fritz Cos.*, 125 Wn. App. 477, 105 P.3d 1000 (2005). The Trial Court should have applied the normal, ordinary care standard for the “duty of seeing” as reflected in WPI 12.06. Ms. Gould did not meet this standard. The Trial Court’s decision is in direct opposition to the established Washington law that Ms. Gould had a duty, as a pedestrian, to see what was there to be seen.

Ms. Gould assertion that comparative fault does not apply relies on this misapplication of the duty of ordinary care, and the false implication that she had no awareness of the conditions at the North Kitsap parking lot. Ms. Gould’s attempt to distinguish *Watson v. Zimmerman*, 175 Wash. 410, 27 P.2d 707 (1933) and *Stone v. Smith-Premier Typewriter Co.*, 48 Wash. 204, 93 P. 209, (1908) is misplaced. As briefed above, Ms. Gould admits that she has visited the North Kitsap parking lot prior to the incident in question, but asserts that she did not have knowledge of the Road Rider parking because she only visited the DSC parking lot. *Brief of Respondent*, p. 19-20. The North Kitsap property has only one parking lot.

CP 623-626. Ms. Gould had previously navigated the North Kitsap parking lot without difficulty.

Further, Ms. Gould's attempt to distinguish *Dunn v. Kemp & Hebert*, 36 Wash. 183, 78 P. 782 (1904) is misplaced. Ms. Gould relies on the position that this wheel stop is uniquely dangerous. As briefed above, Ms. Gould did not show that this wheel stop was uniquely dangerous, and the facts on the record show the opposite – the wheel stop was ordinary and not dangerous.

North Kitsap owes no duty to Ms. Gould to keep the parking lot in such a condition that accidents cannot possibly happen. Ms. Gould had a positive duty to look where she was going. *Davis v. Bader*, 57 Wn.2d 871, 360 P.2d 352 (1961); *See also Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942); *Kuhnhausen v. Woodbeck*, 2 Wn.2d 338, 97 P.2d 1099 (1940); and *Humes v. Fritz Cos.*, 125 Wn. App. 477, 105 P.3d 1000 (2005). Even though Ms. Gould was aware of the wheel stops before her December 2009 visit, she failed to exercise basic care in looking where she was walking. Even if this Court finds that North Kitsap breached a duty to Ms. Gould, Ms. Gould is contributorily negligent, as established by her own testimony.

Accordingly, this Court should reverse the decision of the trial court and order a new trial.

B. Findings of Fact

1. No Evidence of "Notice"

a. The Court's Finding on Notice is Directly Contradicted by the Certificate of Occupancy

North Kitsap notes at the outset that Ms. Gould's contention that North Kitsap did not rely on the Certificate of Occupancy at trial is incorrect. Both of the Certificates of Occupancy were admitted as a trial exhibits over the objection of Ms. Gould. VRP, Vol. III, 260, l. 21 – p. 264, l. 4, p. 300, l. 25 – p.303, l. 17. Ms. Gould did not appeal the Trial Court's ruling entering the Certificates of Occupancy. *See Docket on Appeal*. Accordingly, that decision is not before the Court on appeal.

North Kitsap also notes that Ms. Gould improperly characterizes this issue as an affirmative defense, and its assertion that North Kitsap has misstated the burden of proof on this issue is incorrect. It is Ms. Gould's burden to show that the subject wheel stop was a hazard. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996).

As briefed above, the Certificates of Occupancy would not be issued if the North Kitsap property was not safe for use by the public. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17. Mr. Uchimura also testified regarding the significance of the certificate of occupancy as an approval of the configuration and condition of the parking lot at North Kitsap. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17. There is no dispute that the subject wheel stop was in place when the certificates of occupancy were issued.

Ms. Gould ignores the Certificates of Occupancy and relies instead on the testimony of Mr. Mitchell. However, Mr. Mitchell testified that asphalt and concrete change color over a long period of time. VRP 20-21.

The asphalt parking lot was approximately 14 years old at the time of Ms. Gould's accident. VRP, Vol. III, p. 253, l. 24 – p. 254, l. 14. There is no basis to conclude from Mr. Mitchell's testimony that the concrete wheel stop and the asphalt changed color so dramatically in the year prior to Ms. Gould's fall that it would cause a hazard such that would require that a certificate of occupancy not be re-issued when it had not done so over the prior 13 years. Mr. Mitchell's testimony does not rise to the level of substantial evidence required to support the trial Court's finding. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 667, 880 P.2d 988, 994 (1994).

In fact, Mr. Mitchell testified to the excellent condition and maintenance of the parking lot premises. VRP Vol. I, p. 94, l. 16-24. No evidence was presented to indicate that the parking lot was not in the same condition as it was when it received the Certificates of Occupancy. The Certificates of Occupancy are in direct conflict with the testimony of Mr. Mitchell. The Court's finding that North Kitsap was on notice that the wheel stop was a hazard is directly contradicted by the evidence and should be stricken. This is reversible error, and a new trial should be awarded.

b. Law Regarding Notice

Ms. Gould does not address the case law cited by North Kitsap regarding notice. The only evidence presented that North Kitsap was on

notice was the assertion that one of the Marshalls had previously tripped over a wheel stop. However:

It is well established in the decisional law of this state that **something more than a slip and a fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists** on the part of the owner or the person in control of the floor.

Brant v. Mkt. Basket Stores, 72 Wn.2d 446, 448, 433 P.2d 863, 865 (1967)(emphasis added); citing *Hooser v. Loyal Order of Moose, Inc.*, 69 Wn.2d 1, 416 P.2d 462 (1966); *Hanson v. Lincoln First Fed. Sav. & Loan Ass'n*, 45 Wn.2d 577, 277 P.2d 344 (1954); and *Pement v. F. W. Woolworth Co.*, 53 Wn.2d 768, 337 P.2d 30 (1959).

In *Brant*, water gathered on a grocery store floor, believed to have been tracked in as snow on the shoes of customers that later melted. *Brant* at 447. The evidence showed that the plaintiff slipped on the water, and that her clothes were noticeably damp after her fall. *Id.* The Court found that neither the presence of water on the floor, nor the fact that Plaintiff slipped on it was evidence sufficient to show a dangerous condition. *Id.* at 448.

The fact that an accident occurred is not, in itself, evidence of notice on the part of a property owner. Ms. Gould did not address this established Washington law. Accordingly, even if this Court finds that Mr. Gould's testimony is more than vague conjecture, which North Kitsap disputes, as briefed below, Mr. Gould's testimony is not evidence of notice of a hazardous condition as a matter of law. Ms. Gould did not meet

her burden of proof regarding notice. This Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law.

c. Mr. Gould's Testimony is Not Substantial Evidence

Ms. Gould asserts that the Court made a finding of credibility regarding the testimony of James Gould, and that the issue of Mr. Gould's testimony cannot be reviewed. This is incorrect. This Court can review whether Mr. Gould's testimony rises to the level of sufficient evidence to support the Court's finding that Mrs. Marshall had told him that either Mr. or Mrs. Marshall had tripped over a wheel stop in the parking lot previously. *See Hogle v. Meeks*, 139 Wn. App. 854, 170 P.3d 37 (2007); *Refrigeration Eng'g Co. v. McKay*, 4 Wn. App. 963, 970, 486 P.2d 304, 310 (1971); *See VRP*, Vol. I, p. 135, ll. 11-24.

"To question the sufficiency of the evidence is to question whether the burden of production has been met, and when this burden has been met, the evidence is sufficient." *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 667, 880 P.2d 988, 994 (1994). Suspicion, assumption, or conjecture does not meet the standard of sufficient evidence. *Holman v. Coie*, 11 Wn. App. 195, 215, 522 P.2d 515, 526-527, (1974). Mr. Gould's testimony is vague conjecture and does not meet the standard of sufficient evidence.

Mr. Gould did not identify which wheel stop was involved in the alleged trip. *VRP*, Vol. I, p. 135, ll. 11-24. Mr. Gould did not specify that the alleged wheel stop was in front of Road Rider. *Id.* Mr. Gould could not

positively identify who allegedly tripped over a wheel stop. *Id.* Mr. Gould did not provide testimony as to when this person allegedly tripped over a wheel stop. *Id.* Mr. Gould did not provide testimony as to why this person allegedly tripped over a wheel stop. *Id.* Mr. Gould did not provide testimony as to the conditions present when this person allegedly tripped over a wheel stop or whether this person stated that the wheel stop was the cause of tripping. *Id.*

The only testimony supporting the Court's conclusion that the Marshalls were aware that the wheel stop near Road Rider was a hazard was the testimony of Mr. Gould. Mr. Gould's testimony was uncertain regarding who he believed made this statement to him, and did not testify that the person stated that the wheel stop was the cause of tripping or a fall. The Court's finding is not supported by substantial evidence and should be reversed.

In the case of *Sortland v. Sandwick*, 63 Wn.2d 207, 210, 386 P.2d 130, 132 (1963), the trial court addressed a motor vehicle accident involving three drivers. Driver Sandwick rear-ended driver Swan, who was pushed forward into Driver Wayson's vehicle. Driver Sandwick sought to present a theory that driver Swan hit plaintiff's vehicle before being rear-ended by Driver Sandwick – a two impact theory. The trial court determined that:

"The physical damage to the Swan and Sandwick vehicles taken alone or taken into consideration with the testimony of Wayson that he felt two impacts does not give rise to any reasonable inference that there were in fact two impacts,

the first of which was initiated by the force of the Swan vehicle. . . ."

Id at 210.

The Court of Appeals affirmed the determination of the trial court that the two impact theory could not be presented to the jury and also held that there was not sufficient evidence for a jury finding of liability on the part of Driver Swan. *Id.*

The evidence presented in the present matter is even less sufficient than the evidence in *Sandwick*. Mr. Gould was unable to testify as to basic details of the conversation he asserted he had. Mr. Gould's testimony is no more than or conjecture and does not meet the standard of sufficient evidence. *See Holman v. Coie*, 11 Wn. App. 195, 215, 522 P.2d 515, 526-527, (1974). As the trial court's finding that North Kitsap had knowledge of a dangerous condition on its property is based solely on this conjecture from Mr. Gould, this is manifest error and this Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law.

2. The Court Improperly Found That Ms. Gould Was "Directed" to See Paul Marshall

Despite asserting that the finding of fact that Ms. Gould was "directed" to see Paul Marshall should be stricken, Ms. Gould does not dispute the position of North Kitsap that Ms. Gould did not see Mr. Marshall at the behest of Mrs. Marshall. Ms. Gould does not dispute any of the evidence presented by North Kitsap in support of North Kitsap's position. Ms. Gould simply asserts that it is not necessary for the finding

to be stricken, because she believes it is not impactful. Ms. Gould agrees that she did not see Mr. Marshall at the behest of Mrs. Marshall. Accordingly, this finding should be stricken.

Moreover, the Court's finding supports its erroneous determination, briefed above, that Ms. Gould was an invitee. As this vital legal conclusion was based on this improper finding, and this Court should reverse the decision of the trial court and find that North Kitsap did not breach a duty owed to Ms. Gould as a matter of law.

3. The Court's Improper Determination that it is Unnecessary to Consider Evidence of Compliance with Kitsap County Building Codes

Mark Uchimura expressly testified that the Kitsap County Building Code applied to the parking lot. VRP Vol. III, p. 299, l. 18 – p. 300, l. 9. The Trial Court ignored the applicable building code, and instead expressly relied on the testimony of Stan Mitchell regarding inapplicable building codes which contradict the applicable Kitsap County Building Code. VRP Vol. 1, p. 29, ll 20 – p 30, ll. 1; VRP Vol. III, p. 299, l. 18 – p. 300, l. 9.

The applicable building code is a question of law. *See Rodriguez v. E & P Assoc.*, 20 Misc. 3d 1129(A), 872 N.Y.S.2d 693 (2008). As briefed above, the Certificates of Occupancy prove that the North Kitsap property meets the Kitsap County Building code, and that it is not dangerous. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17. The certificate of occupancy as an

approval of the configuration and condition of the parking lot at North Kitsap. VRP, Vol. III, p. 300, l. 25 – p.303, l. 17

Because the Kitsap County Building Code requires a barrier like a wheel stop at the end of each parking space, this is a material error, whether characterized as a finding of fact or a conclusion of law. Accordingly, this finding should be stricken, and a new trial awarded.

4. The Court's Contradictory Findings of Fact That Ms. Gould Was Looking at the Door of Suite D and Not Where She Was Walking (Paragraph 14), But That Ms. Gould Did Not See the Wheel Stop Near Suit D Because it Was Not Visible (Paragraph 23).

The Trial Court's findings of fact are contradictory. If Ms. Gould was looking at the Road Rider sign, located above eye-level height for any person, then she cannot also be looking down at the path in front of her. CP 609-614; CP 623-626.

These directly contradictory findings of fact have a material bearing on the ultimate outcome of the matter, as they speak to whether Ms. Gould followed the duty of ordinary care, and whether she has comparative fault. The trial court's determinations on these issues are suspect when the supporting findings of fact are contradictory, and a new trial should be granted.

C. Motion for Jury Trial

Jury trials are generally favored. The Court may order a jury trial at its discretion, even where a party fails to file a jury demand according to court rules. *Sackett v. Santilli*, 101 Wn. App. 128 at 133 (1999) citing

Wilson v. Olivetti North America Inc., 85 Wn. App 804, 808, 934 P.2d 1231 (1997).

As soon as North Kitsap realized that it had failed to file a timely jury demand, it made a motion to request a jury trial. Plaintiff made an allegation, unsupported by law or testimony, that a jury trial would require more costly expert testimony than a bench trial, but alleged no actual prejudice. Plaintiff did not allege that she had relied in any way on the assumption that the trial would be a bench trial. On appeal, Ms. Gould alleges it would be prejudiced in spending time preparing for a bench trial rather than a jury trial, Ms. Gould does not assert that any different testimony or witnesses would be required. *Brief of Respondent*, p. 38-39. Ms. Gould does not assert that different evidence would be presented. *Id.* Further, Ms. Gould does not dispute that she knew of North Kitsap's request for jury trial for six months prior to the scheduled trial date, and for over a year prior to the actual trial well in advance of the actual trial date. Accordingly, Ms. Gould's assertion that *Wilson v. Olivetti North America Inc.*, 85 Wn. App. 804, 808, 934 P.2d 1231 (1997), does not apply is incorrect.

In the case of *Wilson v. Olivetti North America Inc.*, 85 Wn. App 804, 808, 934 P.2d 1231 (1997), Wilson failed to deliver a jury demand to the opposing party. The Court of Appeals found, consistent with other Washington decisions, that "substantial compliance may be sufficient to satisfy procedural notice requirements if the other party has actual notice or if the service was reasonably calculated to give notice to the other

party.” *Id at 814.*

Of import in *Wilson v. Olivetti* is that Olivetti had notice of Wilson’s request for a jury trial more than one year before the actual trial. *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 810, 934 P.2d 1231, 1235 (1997). The same is the case here.

As in *Wilson v. Olivetti*, Plaintiff had actual notice of North Kitsap’s request for a jury trial. As in *Wilson v. Olivetti*, the Trial Court in this matter abused its discretion and failed to consider Washington’s preference for jury trials by denying North Kitsap’s motion for jury trial under these circumstances.

II. CONCLUSION

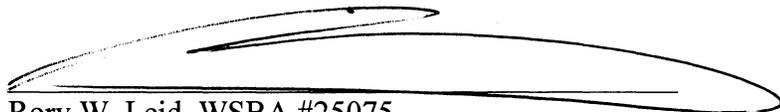
For the reasons stated above, and in the Amended Brief of Appellant, North Kitsap respectfully requests that:

1. This Court rule and enter an order holding that North Kitsap has no liability to Ms. Gould as a matter of law, or, in the alternative:
2. That this case be remanded for a jury trial;
3. That an order be entered excluding testimony and evidence by Stan Mitchell;
4. That an order be entered holding that Ms. Gould is a licensee as a matter of law;
5. That an order be entered holding that no hazardous condition existed at the North Kitsap parking lot as a matter of law;

6. That an order be entered holding that North Kitsap had no notice of a hazardous condition at the North Kitsap parking lot as a matter of law; and
7. That an order be entered holding that the Trial Court erred in requiring North Kitsap to pay for Ms. Gould deposition of Mark Uchimura, and requiring Ms. Gould to reimburse North Kitsap for those expenses.

Dated this 14th day of April, 2015, at Seattle, Washington.

COLE | WATHEN | LEID | HALL P.C.



Rory W. Leid, WSBA #25075
Jennifer P. Dinning, WSBA #38236
Attorneys for Appellant
303 Battery Street
Seattle, WA 98121-1419
T: (206) 622-0494 | F: (206) 587-2476
rleid@cwlhaw.com | j.dinning@cwlhlaw.com

FILED
COURT OF APPEALS
DIVISION II

2015 APR 15 PM 1:17

STATE OF WASHINGTON

BY _____
DEPUTY

No.: 46358-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NORTH KITSAP BUSINESS PARK, INC,

Appellant,

v.

SUZETTE GOULD AND JAMES GOULD,

Respondents.

PROOF OF SERVICE
(Reply Brief of Appellant)

Rory W. Leid, WSBA #25075
Jennifer P. Dinning, #38236
Attorneys for Appellant

Cole I Wathen I Leid I Hall, PC
303 Battery Street
Seattle, WA 98121
206.622.0494
206.587.2476

ORIGINAL

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of April, 2015, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Rose Behbahani". The signature is written in a cursive style with a large initial "R" and "B".

Rose Behbahani, Legal Assistant