

FILED

JAN 14 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 308871
Benton County Superior Court Cause No. 10-2-01061-8

WASHINGTON STATE COURT OF APPEALS
DIVISION III

JERELYN BIORN,

Appellant/

vs.

KENNEWICK SCHOOL DISTRICT NO. 17

'Respondent.

APPEAL BRIEF OF APPELLANT.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
A. THE TRIAL COURT ERRED IN DENYING MS. BIORN'S MOTION FOR A JUDGMENT S A MATTER OF LAW BECAUSE KSD FAILED TO INSPECT THE STAFF PARKING LOT AT CANYON VIEW ELEMENTARY FOR A DANGEROUS ACCUMULATION OF ICE AND SNOW	1
B. THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY ON CONSTRUCTIVE NOTICE BECAUSE IT PREVENTED MS. BIORN FROM ADEQUATELY ARGUING AN ESSENTIAL ELEMENT OF HER CLAIM	1
III. STATEMENT OF THE CASE	1
A. KSD SNOW REMOVAL POLICY AND PROTOCOL ...	1
B. JANUARY 5, 2009	3
C. PROCEDURAL HISTORY	5
1. <u>Judgment as a Matter of Law</u>	5
2. <u>Jury Instructions</u>	6
IV. ARGUMENT	8
A. MS. BIORN WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW BECAUSE KSD HAD AN AFFIRMATIVE DUTY TO INSPECT FOR HAZARDOUS ACCUMULATIONS OF SNOW AND ICE	8
1. <u>Standard of Review</u>	8
2. <u>Mr. Adams Had Actual Knowledge of HazardouS Accumulation of Snow and Ice</u>	13
3. <u>Mr. Adams and Other KSD Employees Had Constructive Knowledge of Hazardous Accumulation of Snow and Ice</u>	14

4.	<u>KSD's Duty to Inspect and Discover is Not Abrogated by the Inherent Danger Posed by Snow and Ice</u>	15
B.	THE TRIAL COURT ERRED IN DENYING MS. BIORN'S MOTION TO INCLUDE A JURY INSTRUCTION FOR CONSTRUCTIVE NOTICE	15
1.	<u>Denial of Jury Instruction of Constructive Notice Prohibited the Plaintiff from Arguing her Theory of the Case</u>	16
2.	<u>The Absence of Any Jury Instruction Addressing Constructive Knowledge Failed to Adequately Inform the Jury of the Applicable Law</u>	18
V.	CONCLUSION	19

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES:

<i>Brant v. Market Basket Stores, Inc.,</i>	
72 Wash.2d 446, 452, 433 P.2d 863 (1967).....	12
<i>Brown v. Superior Underwriters,</i>	
30 Wn. App. 303, 306, 632 P.2d 887 (1980).....	9
<i>Guijosa v. Wal-Mart Stores, Inc.,</i>	
144 Wn.2d 907, 915, 32 P.3d 250 (2001).....	9, 10
<i>Ingersoll v. DeBartolo, Inc.,</i>	
123 Wn.2d 649, 652, 869 P.2d 1014 (1994).....	10, 17
<i>Iwai v. State,</i>	
129 Wn.2d 84, 915 P.2d 1089 (1996).....	5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19
<i>Merrick v. Sears, Roebuck & Co.,</i>	
67 Wash.2d 426, 429, 407 P.2d 960 (1965).....	12
<i>Pimental v. Roundup Co.,</i>	
100 Wn.2d 39, 44, 666 P.2d 888 (1983).....	10, 17
<i>Sing v. John L. Scott, Inc.,</i>	
134 Wn.2d 24, 29, 948 P.2d 816 (1997).....	9
<i>Stiley v. Block,</i>	
130 Wn.2d 486, 498, 925 P.2d 194 (1996).....	16
<i>Thomas v. French,</i>	
99 Wn.2d 95, 104, 659 P.2d 1097 (1983).....	16
<i>Tincani v. Inland Empire Zoological Soc,y,</i>	
124 Wn.2d 121, 139, 875 P.2d 621 (1994).....	10
<i>Wiltse v. Albertson's, Inc.,</i>	
116 Wash.2d at 458, 805 P.2d 793 (1991).....	12

WASHINGTON APPELLATE COURT CASES:

Herring v. Department of Social and Health Services,
81 Wn. App. 1, 22-23, 914 P.2d 67 (1996).....16

Weber Const., Inc. v. County of Spokane,
124 Wn. App. 29, 33, 98 P.3d 60 (2004).....8

CIVIL RULES:

CR 50.....9

CR 50(a).....9

SECONDARY SOURCES:

Restatement Second of Torts § 343.....10

Restatement Second of Torts § 343A cmt. F (1965).....15

I. INTRODUCTION

COMES NOW, the Appellant, Jerelyn Biorn (“Ms. Biorn”), and hereby files Brief of Appellant.

II. ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT ERRED IN DENYING MS. BIORN’S MOTION FOR A JUDGMENT AS A MATTER OF LAW BECAUSE KSD FAILED TO INSPECT THE STAFF PARKING LOT AT CANYON VIEW ELEMENTARY FOR A DANGEROUS ACCUMULATION OF ICE AND SNOW.
- B. THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY ON CONSTRUCTIVE NOTICE BECAUSE IT PREVENTED MS. BIORN FROM ADEQUATELY ARGUING AN ESSENTIAL ELEMENT OF HER CLAIM.

III. STATEMENT OF THE CASE

This is a slip and fall case involving the natural accumulation of ice and snow. CP 2, 8.¹ Ms. Biorn slipped and fell on snow and ice that accumulated in the staff parking lot of Canyon View Elementary School (“Canyon View”). *Id.* Canyon View is maintained by the Defendant/Appellee, Kennewick School District No. 17 (“KSD”). CP 4, 10.

A. KSD SNOW REMOVAL POLICY AND PROTOCOL.

KSD had a written snow removal policy. RP 16-17; 68-69.² The snow removal policy stated, in pertinent part:

¹ “CP” refers to clerk’s papers.

² “RP” refers to Verbatim Report of Proceeding.

The grounds crew will start at 5:00 a.m. on school days and clear walkways to bus zones, sidewalks between entrances, staff parking lots and sidewalks around the buildings.

RP 25; 69-70. Admittedly, staff parking lots received minimal attention.

RP 28. Snow removal in staff parking lots consisted of a cursory sweep with a sweeper and sanding machine. RP 76-77. Ground crews rarely, if ever, conducted an inspection for ice. RP 79; 93-94. It was not part of the snow removal policy and protocol. *Id.*

KSD divided ground crew members into small crews for snow removal. RP 25. Each subsection was assigned a specific geographical region to perform snow removal duties. *See* RP 26.

Kevin Lucke (“Mr. Lucke”), Marty Emerson (“Mr. Emerson”), and David Willert (“Mr. Willert”) were all KSD grounds crew members assigned to Canyon View. This crew also cleared snow and ice from Kennewick High School and Amistad, Eastgate, and Washington Elementary schools. RP 26. Typically, Canyon View was the last school cleared. RP 26. Ground crews would not arrive at Canyon View until nearly noon. RP 28.

The staff parking lot at Canyon View was known for being “colder” than other parking lots. RP 19-20. A row of bushes and trees lined the parking lot and prevented the ice from melting naturally. RP 20. As a result, portions of the parking lot would stay icy for a prolonged

period of time. RP 20.

Dwain Adams (“Mr. Adams”), the custodian at Canyon View, performed initial snow removal duties. RP 84. Mr. Adam’s cleared sidewalks and walkways to the building entrances to the building prior to the arrival of students and staff. RP 85. He would begin his duties at 7 a.m., when he arrived at work, well in advance of the KSD ground crew’s arrival. RP 85. Mr. Adams was usually the first person to arrive at Canyon View in the morning. RP 85. Mr. Adams did not clear or inspect the staff parking lot for ice and snow unless he received a specific complaint. RP 86. There is no other KSD employee that conducted or would conduct an inspection after a snowfall. RP 86.

B. JANUARY 5, 2009.

At 2 a.m. on January 5, 2009, it began to rain in Kennewick. RP 48. Rain was followed by light snowfall. RP 48, 54-55. Freezing temperatures created a layer of black ice under the snow that was present, but not visible. RP 57-58.

Mr. Adams arrived for work at 7 a.m. RP 88. He parked in the spot closest to the building and did not walk through the staff parking lot. RP 88. Mr. Adams testified that he did not receive any reports of “slippery” areas in the staff parking lot, and did not do an inspection. *See* RP 86-87.

Ms. Biorn arrived at Canyon View Elementary for work at approximately 10:30 a.m.. RP 115. Ms. Biorn was employed by KSD as a part time para-educator. RP 111-112. As a part time employee she worked three hours per day, Monday through Friday. RP 113. Ms. Biorn generally reported to work at 10:30 a.m., and was frequently the last employee to arrive. RP 113-114; 118. This particular day was the first day back from Christmas break. RP 48.

Ms. Biorn noticed the snow that morning. RP 115-116. She dressed appropriately in winter clothing, including heavy duty snow boots. RP 116. When she pulled into the staff parking lot, it appeared to be covered white with snow. RP 118. Ms. Biorn pulled into a parking spot at the back of the lot, grabbed her lunch and her purse and took only four steps from the car when she slipped and fell on the ice without warning, suffering serious injuries. RP 118-119.

KSD ground crews had not arrived at Canyon View prior to Ms. Biorn's fall.

Mollie Lutz ("Ms. Lutz"), a risk management employee arrived at Canyon View, after Ms. Biorn's fall. According to Ms. Lutz, black ice was present under the fresh morning snow. RP 57. It was so slippery out that Ms. Lutz was "extra careful" walking to from her car in the staff parking lot into the building. RP 58. The snow and ice was an obvious hazard she notice immediately upon her arrival. RP 58.

C. PROCEDURAL HISTORY.

Ms. Biorn filed a negligence claim against KSD on April 23, 2010.

CP 1-2. The matter proceeded to trial on March 12, 2012.

1. Judgment as a Matter of Law.

At the close of all the evidence, Ms. Biorn brought a motion for a Judgment as a Matter of Law on the issue of liability. RP 160-167. Ms. Biorn argued that, as an invitee, KSD owed her an affirmative duty of care to inspect the accumulation of ice and snow in the staff parking lot and remove the danger. RP 160. Additionally, KSD owed Ms. Biorn a duty because KSD employee had actual and constructive knowledge of the ice and snow. KSD's failure to perform an inspection was the direct and proximate result of her injuries. *See* RP 162. This motion was based on the Washington Supreme Court case of *Iwai v. State*. 129 Wn.2d 84, 915 P.2d 1089 (1996)).

In defense of Ms. Biorn's motion, KSD contended that it had no duty to inspect the Canyon View premises for snow and ice. RP 163-164.³ KSD argued that it had no affirmative duty to inspect for ice because no other employee had slipped and fell in the parking lot, and therefore, KSD employee did not have knowledge of the dangerous condition. RP 163.

³ Counsel for KSD argued "there isn't any duty to go out and prod through snow to look for ice." RP 163.

The trial court denied Ms. Biorn's motion, holding that KSD had no duty to inspect. RP 166-167. In citing the proposed jury instructions, the trial court concluded that KSD had a duty to "discover," which is distinct from a duty to "inspect." RP 166. The jury returned a defense verdict. CP 111.

2. Jury Instructions.

Ms. Biorn proposed three Amended Jury Instructions, all of which contained rules of law directly from *Iwai*. 129 Wn.2d at 93-95; CP 33-35. The first instruction stated:

Invitee's awareness of a particular dangerous condition does not necessarily preclude land owner liability.

Iwai, 129 Wn.2d at 94; CP 33. The second proposed jury instruction addressed a land owner's duty:

A landowner must keep its premises in safe condition for invitees regardless of whether unsafe condition is caused by natural snowfall.

Id. at 95; CP 34. The third and final proposed jury instruction addressed constructive notice:

To demonstrate constructive notice of an unsafe condition, the invitee must show that the specific unsafe condition had existed for such time as would have afforded defendant sufficient opportunity, and exercise of ordinary care, to have made proper inspection of premises and to have removed danger.

Id. at 96; CP 35. The trial court denied all of Ms. Biorn’s proposed jury instructions:

Okay. All right. Well, I’m not going to give those because I believe—for a couple of reasons. One, they’re adequately covered by all of the other jury instructions that the court is giving. So, for example you don’t need to call out that natural snowfall is an unsafe condition.

* * *

The instructions are replete with indications that the place needs to be reasonably safe, and you’re certainly entitled to argue that this ice that’s covered by snow, you know being the combination of something that’s slippery this is obscured, that is unsafe. It would unduly emphasize your case, I think, to give the instruction that you request regarding the snowfall.

* * *

Now, as it relates to the instruction regarding constructive notice, constructive notice is a term we as lawyers use, but it doesn’t appear anywhere else in the instructions. I’m afraid it would confuse the jury to inject that in the way you have, and I would also suggest that the instruction that sets for the elements that have to be proven, and specifically the first element that you have to show that the Kennewick School District knows of the condition or fails to exercise ordinary care to discover the condition, sufficiently covers that. This whole concept of exercising due care to discover the conditions is covered by that.

CP 168-169. The trial court opted to give the standard Washington Pattern Instructions (“WPI”), which did not include any reference to a land owner’s duty to inspect or constructive notice. RP 167-68; *See* CP

91-110. Ms. Biorn took exception to the denial of each jury instruction.
RP 171.

IV. ARGUMENT

A. MS. BIORN WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW BECAUSE KSD HAD AN AFFIRMATIVE DUTY TO INSPECT FOR HAZARDOUS ACCUMULATIONS OF SNOW AND ICE.

This Court should reverse the denial of Ms. Biorn's Motion for Judgment as a Matter of Law and grant judgment in her favor. This matter should be remanded back to the trial court for the sole purpose of establishing damages.

Pursuant to *Iwai*, KSD had an affirmative duty to inspect the staff parking lot based on actual and constructive knowledge. *Iwai*, 129 Wn.2d at 96. The uncontroverted evidence showed that KSD had knowledge of the dangerous condition beginning by 7.am., at the very latest. RP 88. Despite this knowledge, KSD failed to make an inspection and Ms. Biorn suffered substantial injuries as a result. Thus, the trial court erroneously applied the law as outlined in *Iwai* and Ms. Biorn was entitled to a judgment as a matter of law.

1. Standard of review.

Denial of a judgment as a matter of law is reviewed de novo. *Weber Const., Inc. v. County of Spokane*, 124 Wn. App. 29, 33, 98 P.3d 60 (2004). An appellate court applies the same standard of review as the trial

court. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

Under CR 50, a trial court has full authority to enter a judgment as a matter of law when, based on all the evidence produced at trial, a verdict cannot be supported by law. The rule states:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

CR 50(a). “Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence in the light most favorable to the non-moving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the non-moving party.” *Sing*, 134 Wn.2d at 29; *Guijosa v. Wal-mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). “Substantial evidence” exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* at 915 (citing *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)).

To succeed on an action for negligence, a plaintiff must prove (1) the existence of a duty owed by the defendant, (2) breach of that duty, (3)

a resulting injury, and (4) a proximate cause between the breach and the injury. *Id.* at 96. In premises liability cases involving the natural accumulation of snow and ice, a land lord's duty attaches if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves unreasonable risk. *Id.* at 96 (citing Restatement Second of Torts § 343). "Reasonable care" imposes a duty upon a land owner to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for the invitee's protection under the circumstances. *Id.* at 96 (citing *Tincani v. Inland Empire Zoological Soc,y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994)).

In applying the knowledge requirement, Washington law requires that a plaintiff to show the landowner had actual or constructive notice of the unsafe condition. *Id.* (citing *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994)). Constructive knowledge requires a plaintiff to establish the unsafe condition existed for such time as would have afforded the defendant sufficient opportunity, in the exercise of due care, to have made a proper inspection of the premises and have removed the danger. *Id.* (citing *Pimental v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983)). The notice requirement insures that land owner's will only be liable for an unsafe condition once they have become or should have become aware of a dangerous situation. *Id.* at 96-97.

Iwai v. State is illustrative on the quantum of evidence necessary to establish constructive notice. In *Iwai*, the plaintiff (“Iwai”) presented a National Weather Report evidencing the general temperature and precipitation conditions on the day of the fall. *Id.* at 88. The deposition of John Lester, the person in charge of maintenance for the parking lot, was presented, but he had no recollection of the specific lot conditions. *Id.* Besides Lester, Iwai submitted the affidavit of a traffic engineer who inspected the lot three years after the fall. *Id.* at 89. According to the engineer, persons and cars “*would more probably than not*” be expected to slip without special standing or de-icing because of the steep slope of the lot. *Id.* (emphasis included). The affidavit did not report as to the effect the slope would have in conjunction with the conditions of the parking lot at the time Ms. Iwai fell. *Id.* The Supreme Court found this evidence wanting.

The Supreme Court held that Iwai failed to meet her burden and establish constructive notice:

Plaintiffs, relying on the submitted affidavit of a traffic engineer, claim the parking lot, because of the steep slope, was inherently dangerous. However, the alleged icy condition of Employment Security's parking lot on November 29, 1984, was not a continuous condition such that Defendants necessarily knew, or by the exercise of reasonable care should have known, of the danger's existence. The parking lot was sloped, so it could become dangerous when some amount of snow or ice accumulated on it. The parking lot did have a

history of wintertime problems. However, the specific icy patch allegedly causing Plaintiff's fall was a temporary condition, and under the traditional position, Plaintiffs must show the specific and particular condition had existed long enough for Defendants to have become aware of it.

Defendants argue their [the defendant's] general knowledge of the parking lot's tendency to get slippery in the wintertime does not constitute constructive notice of the existence of a specific and unreasonably dangerous condition on the day Iwai slipped. Defendants' argument holds some merit. There is no evidence giving any indication of how long the particular icy condition had existed. There is no corroborating evidence of how much snow or ice was on the ground when Iwai fell. The weather report is the only solid evidence submitted by Plaintiffs having any relevance to the conditions on the day of the accident. The sole fact of the temperature being around freezing at the time of Iwai's fall does not sufficiently demonstrate Employment Security "knew or should have known that a dangerous condition existed." *Brant v. Market Basket Stores, Inc.*, 72 Wash.2d 446, 452, 433 P.2d 863 (1967). Plaintiffs failed "to establish how long the specific dangerous condition existed.... Under the traditional rule, the lack of such evidence precludes recovery." *Wiltse*, 116 Wash.2d at 458, 805 P.2d 793, (citing *Brant*, 72 Wash.2d at 451-52, 433 P.2d 863; *Merrick v. Sears, Roebuck & Co.*, 67 Wash.2d 426, 429, 407 P.2d 960 (1965)). In this particular case, the lack of such evidence would normally support the trial court's grant of summary judgment for Defendants.

Id. 97-98. The Supreme Court's decision demonstrates that constructive notice must involve *some* kind of knowledge beyond general knowledge of temperature and precipitation. *See Id.* at 97-98 (emphasis added). Substantial weight was given to the fact that Iwai failed to demonstrate

how long the particular condition existed.

Iwai is critically different from the present case. Ms. Biorn produced evidence far and beyond that provided by *Iwai*. The evidence clearly demonstrated that Mr. Adams had actual and constructive knowledge of the dangerous condition of ice and snow.

2. Mr. Adams Had Actual Knowledge of Hazardous Accumulation of Snow and Ice.

Unlike *Iwai*, Ms. Biorn produced substantial and definite evidence that Mr. Adams, a KSD employee, had actual knowledge of the dangerous accumulation of ice and snow. Mr. Adams observed the accumulation of the snow and ice when he arrived for work at 7 a.m.. RP 84; 87. In fact, he parked in the Canyon View staff parking lot and directly witnessed the snow covered lot. RP 88. Mr. Adams' recognition of this danger prompted him to initiate his usual snow removal duties by clearing the ice and snow from the sidewalks and walkways. RP 84-88. Ms. Lutz witnessed firsthand the black ice when further she arrived at the Canyon View to assess Ms. Biorn's injury. RP 57-58. There can be no more clear demonstration of actual knowledge.

Mr. Adam's actual knowledge created a duty, of behalf of KSD, to exercise due care and conduct an inspection of the staff parking lot. *Iwai*, 129 Wn.2d at 96. KSD breached this duty by failing to conduct any inspection whatsoever and Ms. Biorn was injured as a direct and

proximate result. Thus, Ms. Biorn is entitled to a judgment as a matter of law on the issue of liability.

3. Mr. Adams and Other KSD Employees Had Constructive Knowledge of Hazardous Accumulation of Snow and Ice.

Considering *arguendo* that this Court does not find that KSD had actual knowledge, Ms. Biorn presented substantial evidence establishing constructive knowledge.

Ms. Biorn established the key piece of evidence lacking in *Iwai*. She produced substantial evidence showing that the ice and snow had existed for a period of time that allowed KSD to conduct an inspection. *Id.* at 97. Ms. Lutz had knowledge of the rain and snow at 2 a.m.. RP 48; 53-54. Mr. Adams observed the ice and snow at 7 a.m.. RP 88. Ms. Biorn did not arrive to work until 10:30 a.m.. RP 115. Construing the evidence in the light most favorable to KSD, this means KSD learned of the dangerous condition at 7 a.m.. RP 88. KSD had over three hours to conduct an investigation before Ms. Biorn arrived at work.

KSD's constructive knowledge attached a duty to exercise reasonable care and conduct an inspection of the staff parking lot. *Iwai*, 129 Wn.2d at 96. KSD breached this duty by failing to conduct any inspection whatsoever and Ms. Biorn was injured as a direct and proximate result. Thus, Ms. Biorn is entitled to a judgment as a matter of law.

4. KSD's Duty to Inspect and Discover is Not Abrogated by the Inherent Danger Posed by Snow and Ice.

It is anticipated that that KSD will argue that their duty to inspect the staff parking lot is abrogated, in whole or in part, by the inherent or obvious danger posed by the natural accumulation of snow or ice. *Iwai* quickly disposes of any such argument. *See* 129 Wn.2d at 94.

A land owner's duty to inspect is not abrogated by an invitee's knowledge of the presence of snow and ice. *Id.* at 94. The land owner's duty remains if the possessor could and should have anticipated that the dangerous condition would cause physical harm to the invitee notwithstanding its known or obvious dangers. *Id.* (citing Restatement Second of Torts § 343A cmt. f (1965)). Such anticipation may be found where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable person in that position the advantages of encountering the risk outweigh the apparent risk. *Id.*

KSD could and should have anticipated that Canyon View Elementary staff would proceed to through the parking lot, despite the ice and snow. It is reasonable to expect that a person would brave a snow and ice covered parking lot to attend work. Thus, KSD is precluded from arguing that KSD duty is in any way offset by Ms. Biorn's knowledge of the snow and ice.

B. THE TRIAL COURT ERRED IN DENYING MS. BIORN'S MOTION TO INCLUDE A JURY INSTRUCTION FOR CONSTRUCTIVE NOTICE.

Alternatively, if this Court does not grant a judgment in favor of Ms. Biorn, Ms. Biorn requests that this matter be remanded for a new trial. The trial court erred by refusing to properly inform the jury on constructive notice pursuant to *Iwai*. This error prevented Ms. Biorn from arguing an essential element of her claim.

An Appellate Court reviews the refusal to give jury instructions for an abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). A trial court abuses its discretion when the instructions: (1) do not permit each party to argue its theory of the case; (2) are misleading; and (3) when, read as a whole, do not properly inform the trier of fact of the applicable law. *Cf Herring v. Department of Social and Health Services*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). "Even when the instruction given is misleading and therefore erroneous, reversal is not required unless prejudice can be shown and such error is not prejudicial unless it affects or presumably affects the outcome of the trial." *Id.* at 23 (citing *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)).

1. Denial of Jury Instruction of Constructive Notice Prohibited the Plaintiff from Arguing her Theory Of The Case.

Washington law requires that a land owner have actual or constructive knowledge of the unsafe condition for liability to attach.

Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). In order to prove constructive notice, a plaintiff must present sufficient evidence that the unsafe condition existed for a long enough period of time to give the defendants sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises to have removed the danger. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983); *Iwai*, 129 Wn.2d at 96. Accordingly, constructive knowledge is an essential element of the action and the Plaintiff must be allowed to argue evidence of constructive knowledge to the jury.

By failing to properly instruct the jury on constructive knowledge, the Plaintiff was prevented from properly arguing her theory of the case. The only instruction addressing knowledge read:

A person is liable for physical harm caused to public invitees by a condition of the premises if the person:

- a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such public invitees;
- b) should expect that they will not discover or realize the danger or will fail to protect themselves against it; and
- c) fails to exercise reasonable care to protect them against danger.

CP 99. This instruction failed to instruct the jury that liability could be established by showing constructive knowledge. The failure to include such instruction prevented the Plaintiff from adequately arguing

constructive knowledge, a focal point of her case. The Plaintiff's reliance on the proper instruction being given is evidenced in the substantial evidence adduced to prove this element. Thus, the Plaintiff was extremely prejudiced by not being allowed to adequately argue her theory of the case and a new trial is appropriate. This is an abuse of discretion.

2. The Absence Of Any Jury Instruction Addressing Constructive Knowledge Failed to Adequately Inform the Jury of The Applicable Law.

The only instruction that appears to address constructive knowledge reads:

A person is liable for physical harm caused to public invitees by a condition of the premises if the person:

- a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such public invitees.

CP 99. Although this is an accurate representation of the liability standard, it did not adequately inform the jury that liability could be established by showing constructive knowledge. The jury was merely left to decipher the term "knows or by the exercise of reasonable care would discover the condition." This is not accurate representation of the applicable law.

The Supreme Court's decision in *Iwai* illustrates the proper legal standard for establishing liability. In *Iwai*, the Court held that constructive

knowledge may be established if the specific unsafe condition had existed for such time as would have afforded defendant sufficient opportunity, and exercise of ordinary care, to have made proper inspection of premises and to have removed the danger. 129 Wn.2d at 98. Without an instruction alerting the jury as to the applicable law the Plaintiff was prejudiced. Thus, a new trial is appropriate.

V. CONCLUSION

Based on the foregoing analysis, the trial court's denial of Ms. Biorn's Motion as a Matter of Law should be reversed. Judgment should be granted in Ms. Biorn's favor and this matter should be remanded back to the trial court for a trial on the damages. The trial court erroneously applied Washington premises liability law as delineated in *Iwai v. State*.

Alternatively, should the trial court not reverse and remand, this matter should be remanded for a new trial based on the failure to properly instruct the jury on constructive notice. Ms. Biorn was prejudiced by not being allowed to argue an essential element of her claim. The trial court abused its discretion by failing to give such instruction.

SUBMITTED THIS 9 day of January, 2013.

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By: 

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