

66677-1

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NO. 66677-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FRANCESCA GIUSTI,

Appellant,

v.

CSK AUTO, INC., an Arizona Corporation doing business in Washington
as SCHUCK'S AUTO SUPPLY, and KEY BANK NATIONAL
ASSOCIATION, a bank incorporated in the District of Columbia,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

On March 14, 2006, the appellant, Francesca Giusti, using a walkway in front, entered Respondent's store in Ballard. CP 4. When exiting the store, Appellant used the same walkway but took a misstep and fell. CP 4. Appellant alleged in her Complaint that a cross cut at the end of the walkway was an unsafe condition and that it caused the fall. CP 5.

Respondent maintained that the walkway was reasonably safe. *See, e.g.*, CP 14-15. Respondent further maintained that Appellant could not recall where on the walkway she was when she fell and it was therefore speculative to assume she fell on the allegedly dangerous portion of the walkway. *See, e.g.*, CP 15-19, 455; RP 136-137.

As is discussed in depth below, Respondent argued at trial that Appellant should not be able to introduce testimony or other evidence that the walkway violated any building code that the trial court had not determined applied to the walkway. CP 235-236. The building was built in 1951 and it was Respondent's position that the walkway was built that year. CP 320, 326. Appellant conceded to the trial court that the walkway was built before 1979. CP 320, RP 11. Appellant sought to introduce provisions of the Uniform Building Code ("UBC" or "Uniform Building Code") from the 1940s, 1950s, and 1970s; however, the UBC was not adopted by Seattle until 1983. CP 46-47, 58, 326-27, 437. Appellant also

sought to introduce the 2006 Seattle Building Code. The trial court, however, determined that the 2006 Seattle Building Code was not retroactive. RP 5-7. Appellant argued that these provisions were nonetheless relevant and admissible because they constituted “safety standards.” CP 320, RP 9-10, 12. Respondent argued that to allow testimony that the walkway violated building codes that did not apply to the walkway would be prejudicial and essentially allow retroactive application. RP 10, 12. The trial court allowed Appellant’s expert to testify to the provisions of the UBC and Seattle Building Code but required that she refer to them as safety standards rather than by the specific provision of the building code. RP 12-17. Appellant has not provided the trial testimony of her expert so it is not possible for this Court to analyze what the trial court actually allowed at trial.

Trial lasted approximately 7 days. RP 1; CP 474-475. The jury began deliberating on December 16, 2010. It returned a verdict that day finding that Respondent was not negligent. CP 474-475.

II. ARGUMENT

1. Appellant’s Statement Of The Case Is Argumentative And Not Supported By References To The Record

The Statement of the Case must include “[a] fair statement of the facts and procedure relevant to the issues presented for review, without

argument. Reference to the record must be included for each factual statement.” RAP 10.3(a)(5); *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (Div. I 1990) (“The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.”). “Matters referred to in an appellate brief but not included in the record cannot be considered on appeal.” *State v. Dunaway*, 109 Wn.2d 207, 220-221, 743 P.2d 1237 (1987).

Numerous of the averments in Appellant’s brief do not cite to the record. *See, e.g.*, Opening Brief at 3, ¶ 1 and 4, ¶ 1. In Appellant’s Argument section, she similarly makes unsupported factual assertions. *See, e.g.*, Opening Brief at 25.¹

In addition, several of the citations are improper. Most of Appellant’s citations in her Statement of the Case are to Respondent’s motion for summary judgment, Appellant’s opposition to that motion, and the documents filed in support of those pleadings rather than the evidence

¹ On page 25 of Appellant’s Opening Brief she states: “Nor did the employees take injuries seriously. Even though Appellant was injured in front of an employee, no report was made until she called the manager the day after. CP 178.” CP 178 refers to the Injury Report completed by CSK which plaintiff included as an exhibit in opposition to defendant’s motion for summary judgment. There is no indication in the record before this Court that this report was offered or admitted as an exhibit at trial. Paul Masterson, who prepared the report, and Brian Hunting, the former employee present at the time of the incident, both testified at trial but their testimony regarding creation of the incident report has not been provided. (CP 468-469).

presented at trial. Opening Brief at 2-4.² Pleadings are not evidence. *See, e.g., Joseph v. Schwartz*, 128 Wn. 634, 636, 224 P. 5 (1924). Appellant also inappropriately cites to websites for factual support. Opening Brief at 2, ¶ 2 and 21, ¶ 1. Such hearsay is not a part of the record on Appeal. Appellant’s unsupported statements should not be considered by this Court.

2. Motion In Limine No. 6

Before trial, Respondent filed its motions in limine, including Motion in Limine No. 6 which moved to exclude references to building codes that Appellant had not established applied to the walkway at issue.

² For example, Appellant states in her Opening Brief that she fell “[n]ear the bottom of the ramp.” Opening Brief at 3. However, it was an issue at summary judgment and at trial whether Appellant was at the allegedly dangerous part of the walkway when she fell. *See, e.g.,* CP 15-17, 455; RP 136-137. Also, she asserts: “[a]s she left, following the employee, she walked out the door of the store and down the 16 foot long concrete ramp. CP 92, 131.” Opening Brief at 2. CP 92 is page 4 of Plaintiff’s Response to Defendant’s Motion for Summary judgment regarding Liability. CP 131 is a declaration of Tom Baird in support of Appellant’s opposition. Appellant initially identified Tom Baird as a witness at trial (CP 216-19), but ultimately did not call him (CP 468-69). Francesca Giusti and Brian Hunting testified at trial regarding their relative positions walking down the walkway; however, this portion of the record of proceedings has not been included in the Report of Proceedings. *See* CP 468-69. The pleadings from before trial show there was a question of fact as to whether Ms. Giusti followed Mr. Hunting out of the store (CP 92, 131) or whether he followed Ms. Giusti (CP 456).

CP 235-236. Respondent argued that such testimony was improper because it was irrelevant and pure legal opinion. CP 235-236.

Appellant filed an Opposition that argued that the various standards and codes that have been in effect through the life of the ramp constitute evidence of negligence and are relevant as safety standards. CP 319-22. Respondent argued in its Reply that Appellant did not cite to any provision that applied to the walkway when it was built. CP 325-26. Respondent also averred that pursuant to *Sorenson v. Western Hotels, Inc.*, 55 Wn.2d 625, 628-29, 634-36, 349 P.2d 232 (1960), and industry standards, evidence of violation of a building code not in effect at the time of the building's construction is evidence of negligence only if the code clearly indicates that the Legislature intended the section to apply retroactively. CP 325-326.

a. Standard Of Review

The granting or denial of a motion in limine and the admissibility and scope of expert testimony are within the trial court's discretion and will be overturned only for an abuse of that discretion. *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994) (admissibility and scope of expert testimony); *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 286, 686 P.2d 1102 (Div. I 1984) (motions in limine). A court abuses

its discretion when it rules unreasonably or on untenable grounds. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The trial court must admit evidence that makes the existence of a material fact more or less probable. *Midcalf v. Dep't of Licensing*, 83 Wn. App. 8, 16, 920 P.2d 228 (1996), *aff'd*, 133 Wn.2d 290, 944 P.2d 1014 (1997); *see also* ER 401, 402. “The trial court must exclude evidence, however, when its probative value is outweighed by the potential that the evidence will unduly prejudice the other party or confuse the jury.” *Midcalf*, 83 Wn. App. at 16-17; *see also* ER 403. A motion in limine should be granted “if (1) it describes the evidence objected to with sufficient specificity to enable the trial court to determine that it is clearly inadmissible; (2) the evidence is so prejudicial that the movant should be spared the necessity of calling attention to it by objecting when it is offered; and (3) the trial court is given a memorandum of authorities showing that the evidence is inadmissible.” *Gammon*, 38 Wn. App. at 286-87.

“An evidentiary error requires reversal only if it results in prejudice – only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred.” *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 905, 151 P.3d 219 (Div. II 2007),

rev. denied, 162 Wn.2d 1009 (2008); *see also Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

b. Appellant Has Not Put Forth An Adequate Record

“The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.” *Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 472, 712 P.2d 306 (Div. I 1985), *rev. denied*, 105 Wn.2d 1014 (1986) (citing RAP 9.2(b) and *State v. Jackson*, 36 Wn. App. 510, 516 (1984)).

Appellant asks this Court to overrule the trial court’s discretionary ruling on Motion in Limine No. 6 in which the trial court excluded testimony that the subject walkway violated building codes that the trial court determined did not apply to the walkway. Appellant, however, asks this Court to do so without the benefit of the entire trial record. In ruling on Motion in Limine No. 6 the trial court had the benefit of the memoranda and authorities as well as the argument of the parties. Appellant has not designated the parties’ argument on Motion in Limine No. 6 from the morning of December 6, 2010. This Court does not have the benefit of that argument, which in this case is important because Appellant filed her Opposition late such that Respondent had less than four hours instead of the usual twenty-four hours to prepare its Reply. CP 325. Appellant also has not designated the trial testimony of her expert

Joellen Gill. As a result, this Court is unable to review the testimony actually allowed by the trial court.

Further, Appellant argues on appeal that the subject walkway violated Seattle Building Codes from the 1950's, 1970's, 2003 and 2006. Opening Brief at 14-20. However, as is discussed in the next section, she has not provided this Court with any part of the record indicating that the admissibility of Seattle Building Codes from the 1950's and 1970's was before the trial court.

Should Appellant seek to introduce additional parts of the record in her reply, it is too late and should not be considered. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

c. The Seattle Building Code From The 1950s And The 1970s Were Never Before The Trial Court

In her Opening Brief, Appellant argues that the Seattle Building Codes from the 1950s and 1970s applied to the walkway and that she should have been able to present evidence of their violation to the jury. Opening Brief at 14-16, 18-20. However, Appellant did not offer evidence regarding the Seattle Building Codes from the 1950s and 1970s at trial.

Pursuant to Rule 2.5(a) of the Rules of Appellate Procedure, appellate courts will generally not consider issues raised for the first time on appeal. *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). Appellant has not provided this Court any part of the trial record indicating that the admissibility of Seattle Building Codes from the 1950's and 1970's was before the trial court. The Seattle Building Code from the 1950's and 1970's was not mentioned in the memoranda and authorities on Motion in Limine No. 6 or in the argument. To the contrary, in the record designated by Appellant, the only reference to the 1950 City of Seattle Building Code was a citation by Respondent in its motion for summary judgment to Appellant's expert's deposition testimony that section 617 of the 1950 Seattle Building Code does not apply in this case. CP 21. The chart Appellant sought to introduce included provisions from the UBC, IBC and IRC, but not the Seattle Building Code. CP 437.

Furthermore, Appellant inappropriately equates the Seattle Building Code with the Uniform Building Code. Under the heading "a. Seattle Building Code 1950s," Appellant cites to the 1940 UBC's degree requirements for ramps but not to the 1950s Seattle Building Code requirements. Opening Brief at 14, 16. Under the heading "b. Seattle Building Code 1970s," Appellant again cites the specifications for slope from the UBC but not from the Seattle Building Code. Opening Brief at

16-17. The evidence before the trial court was that the Uniform Building Code was not adopted by the State of Washington or City of Seattle until 1985.³ CP 326-327; Appendix A-1-A-4 (Supplemental CP ___).⁴ Appellant concedes that the walkway was built by 1979 at the latest. CP 320; RP 11. “[T]he general rule is that a statute (or ordinance) will be presumed to operate prospectively only, and that it will not be held to apply retroactively in the absence of language clearly indicating such legislative intent.” *Sorenson*, 55 Wn.2d at 635. Because the UBC was not adopted by the City of Seattle until after the walkway was built, it would only apply to the walkway if Appellant established that the Legislature intended it to be retroactive.

³ Although neither party cited this to the trial court, it appears that the Seattle Municipal Code incorporated the 1982 UBC into the Seattle Building Code in 1983. *See Pettit v. Dwoskin*, 116 Wn. App. 466, 470 n.4, 68 P.3d 1088 (Div. I 2003). The fact of adoption in 1983 instead of 1985 is inapposite because appellant conceded that the walkway was built by 1979 at the very latest. CP 320 and RP 11.

⁴ Appellant did not designate some of the documents that were before the trial court in support of Motion in Limine No. 6. Those exhibits, and the attorney declaration to which they were attached, were designated by Respondent in its Supplemental Designation of Clerk’s Papers filed on August 26, 2011. The text from the West’s 1985 Washington Legislative Service which is in that designation is also provided in Respondent’s Appendix pursuant to RAP 10.4(c).

d. The Trial Court Did Not Abuse Its Discretion In Excluding Testimony Regarding The UBC And Seattle Building Codes From 1998 And 2003 Because The Court Determined They Were Not Retroactively Applicable And The Evidence Before The Court Was That The Walkway Was Built By 1979 At The Latest

At her pre-trial deposition, Ms. Gill testified regarding a chart she prepared showing the slope provisions of the UBC from 1940, 1958, 1973, and 1979, the IBC from 2000 and the IRC from 2003. CP 437. She testified at her pre-trial deposition that she “assum[ed]” the UBC provisions applied to the walkway. CP 392-394, 437. She further testified that she was not familiar with the Seattle Building Code. CP 394.

“It is the established and unquestioned rule that it is in the province of the court, and not the jury, to interpret a statute or ordinance and to determine whether it applies to the conduct of a party.” *Ball v. Smith*, 87 Wn.2d 717, 722, 556 P.2d 936 (1976). The evidence before the trial court was that the walkway was built by 1979 at the very latest and that the UBC was not adopted in Seattle until 1985. *See* CP 319-22, 325-27. Appellant did not argue that the UBC, the 2000 IBC or the 2003 IRC were retroactive such that they would apply to the walkway. *See* CP 319-22, RP 3-18. Rather, she argued only that the 2006 Seattle Building Code was retroactive. CP 319-22, RP 3-8. However, the trial court found that the 2006 Seattle Building Code did not apply retroactively. RP 5-8. “[T]he

general rule is that a statute (or ordinance) will be presumed to operate prospectively only, and that it will not be held to apply retroactively in the absence of language clearly indicating such legislative intent.” *Sorenson*, 55 Wn.2d at 635. The evidence before the trial court indicated that none of the building codes cited by plaintiff was in effect in the City of Seattle when Respondent avers the walkway was built (1951) or by the latest date that the Appellant acknowledges the walkway was built (1979). Accordingly, the trial court did not err in excluding such testimony or evidence.

None of the cases cited by Appellant to the trial court or to this Court support her contention that building codes and ordinances are relevant throughout the life of the building, i.e., that violation of a subsequently enacted building code is evidence of common law negligence. CP 320. For example, Appellant cites *Pettit v. Dwoskin*, 116 Wn. App. 466, 68 P.3d 1088 (Div. I 2003). Opening Brief at 13. In *Pettit*, this Court noted “the doctrine of negligence per se is no longer viable in Washington. Rather, violation of a legal requirement is evidence of negligence.” *Id.* at 472. However, a building code that is not in effect or does not apply to a structure when it is built does not create a legal requirement. *See Sorenson*, 55 Wn.2d at 629 (“[L]egislative acts will generally be given prospective, and not retroactive, effect” except that “a

legislative act will be given retroactive effect when that intention is expressed or clearly implied”).

Appellant also cites Restatement (Second) of Torts, § 286. Section 286 discusses when a legal requirement, such as a statute or ordinance, may be adopted as the standard of conduct of a reasonable person. *See* Restatement (Second) of Torts § 286. Section 286 does not allow an ordinance or code that does not apply to a structure to form the standard of care. For example, in *Jackson v. City of Seattle*, 158 Wn. App. 647, 652-53, 244 P.3d 425 (Div. I 2010), cited by Appellant, this Court analyzed whether Restatement (Second) of Torts § 286 applied to “[t]he version of the stormwater code in effect at the time the contractors began their work.”

Importantly, in *Jackson*, this Court also noted that “[b]uilding codes and other similar municipal codes do not typically serve as a basis for tort liability because they are enacted merely for purposes of public safety or for the general welfare.” *Id.* at 654 (citing *Halvorson v. Dahl*, 89 Wn.2d 673, 677, 574 P.2d 1190 (1978)). In her Opening Brief, Appellant avers that the stated purpose of the City of Seattle Building Code has remained unchanged for decades. Opening Brief at 15. Section 101.5 (“Purpose”) of the 2006 Seattle Building Code reads, in part: “The purpose of this code is to provide for and promote the health, safety and

welfare of the general public, and not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this code.” CP 320-21. In *Jackson*, citing similar language, this Court found that the existence of a duty did not arise from the code. *Jackson*, 158 Wn. App. at 655. Appellant does not cite to any specific provision that would suggest that any building code she cited should be adopted as the standard of care.

Respondent argued at trial that building codes not applicable to the walkway were not relevant and that allowing evidence or testimony regarding building codes that did not apply to the walkway would be misleading and confusing to the jury. *See* CP 326, RP 8-10, 14-15; ER 401-403. Respondent further argued that such evidence or testimony would be prejudicial because it would allow the jury to retroactively apply building codes that the Court and the Legislature had determined do not apply to the subject walkway. *See id.* Given the lack of support put forth by Appellant, the lack of relevance, and the great possibility of jury confusion and prejudice to Respondent, the trial court did not abuse its discretion in excluding evidence and testimony of building codes that the trial court had determined do not apply to the walkway at issue.

e. Appellant Did Not Argue At Trial That The Americans With Disabilities Act Applied To The Walkway

Appellant argues that the Americans with Disabilities Act (“ADA”) regulations apply to the walkway at issue and that the walkway did not comply with those regulations. Opening Brief at 21-23. However, there is nothing in the record to indicate that the issue of whether the ADA applied to the walkway was before the trial court. In fact, to the contrary, during argument on Motion in Limine No. 6, the Court stated that building codes and safety standards “continue[] to evolve with ADA and whatnot.”

RP 12. To which Appellant’s counsel responded:

That is true. That is true. But we won’t be involving the ADA.

RP 12.

Appellant’s expert’s trial testimony has not been provided in the report of proceedings. However, the testimony of Respondent’s expert, Mark Lawless is before the Court. During cross-examination at trial, Appellant’s counsel asked Mr. Lawless:

Q Okay. Would it surprise you that Ms. Gill has never testified that the ADA applied to this? Neither here or at her deposition?

A There was testimony that she didn’t consider the walkway to be an accessible route of travel, that is correct.

Q So it is not an issue in this case. And she did not make it an issue, isn't that true?

RP 77.

In short, the evidence in the record is that Appellant did not intend to argue at trial that the ADA applied to the walkway. Pursuant to Rule 2.5(a) of the Rules of Appellate Procedure, appellate courts will generally not consider issues raised for the first time on appeal. *Heg*, 157 Wn.2d at 162. As such, this issue should not be considered on appeal.

Regardless, Appellant was not disabled at the time of her fall and therefore was not within the class of persons that the ADA is designed to protect. *See* Opening Brief at 21; RP 35-36; Restatement (Second) of Torts § 286. The ADA also did not apply to the walkway because there was a different accessible route of travel. *See* RP 35.

f. Any Error Was Invited By Appellant

Even if the trial court abused its discretion in ruling that the experts could not testify about specific building codes, such error is not reversible because Appellant invited the error. “The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal.” *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied sub nom. Tortorelli v. Washington*, 540 U.S. 875, 124 S. Ct. 223, 157 L. Ed. 2d 137 (2003). “This doctrine applies when a party

takes an affirmative and voluntary action that induces the trial court to take an action that a party later challenges on appeal.” *Casper v. Esteb Enters.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (Div. II 2004).

Instead of seeking to establish that each of the building codes cited by Joellen Gill was applicable to the walkway, Appellant argued at trial that the building codes were relevant as safety standards. In her Response to Defendants’ Motions in Limine, Appellant argued: “Safety is not dictated by building codes alone. Building codes are a bare minimum for reasons of safety.” CP 320. She also stated “Plaintiff’s expert should be able to testify as to the standards and the purpose of the standards.” CP 321.

In addition, at oral argument, Appellant argued that the building codes were relevant as safety standards. During argument Appellant’s counsel stated, for example:

I believe that it was Mr. Baird’s or Ms. Gill’s testimony deposition [sic], whatever she opined we will discuss today, is simply what is, what information is out there. What has evolved since – we don’t know when this ramp was built – let’s say the last 30 years. . . . But we think it is important information. And it certainly has been out there for decades. And it is an issue, it is a safety standard. It is not necessarily a building code. But it is an issue of safety standards.

RP 9. In response, Respondent's counsel argued:

To allow testimony regarding the current slope requirements of the walkway would again be misleading and . . . evidence of the walkway not complying with the current standards would essentially be retroactive application of the current building code.

RP 10. Appellant's counsel then stated:

It is simply [a] matter [of] safety standards. Information and – safety standards like everything else has evolved. . . . It goes to – just information as far as safety standards are concerned is what this is about.

RP 10. The trial court noted that if Appellant had evidence of noncompliance with the 1940 standards then there would be no need to get into the issue of which, if any, of the current codes apply. RP 10-11. Instead of arguing that any of the codes from before 1979 apply to the walkway, Appellant's counsel began to discuss the evolution of human factors and safety standards. RP 11-12.

Further, when Respondent's counsel argued "there is no contention the walkway was built in or after 2006, in or after 2003, or any of these later dates," Appellant's counsel stated: "It goes to safety standards, Your Honor." RP 12. She also argued: "I believe it is relevant for her to talk about what are codes, at least generally, because those do go to safety."

RP 14. The trial court ruled in accordance with Appellant's counsel's argument. The trial court ruled:

Her testimony can be these are the factors she considers when she tries to determine if a certain situation is safe or not safe. If one of those is the standards in the building codes International or Uniform, so be it.

But that does not mean she can testify that this ramp violates a building code. She can simply say these are the safety standards and you can say, is this ramp, in your opinion, is this ramp safe. She can say yes or no.

You may then ask her, if you think the building code question is going to be lingering in the mind of jury, which it very well might, would today's building code apply to a building built before 1970.

RP 16.

Appellant was allowed to argue and her expert was permitted to testify that she considered the building codes, and that safety standards required that the ramp not exceed 3.8 degrees; that the cross-cut was over three times the maximum permissible value because it was 12 degrees; and as such it created an unreasonably dangerous condition. *See* Opening Brief at 12. However, because Appellant has not provided Ms. Gill's testimony in the Report of Proceedings, the effect of the trial court's ruling on her testimony cannot be evaluated.

In short, Appellant sought to introduce testimony regarding building codes that were not retroactive and did not apply to the walkway. Respondent argued such evidence and testimony was not relevant, was confusing, and would prejudice Respondent by essentially allowing

Appellant's expert to apply to the walkway building code provisions that the trial court and Legislature had determined do not apply. Nonetheless, Appellant argued it was relevant to safety standards. The trial court allowed her expert to testify to the building codes as safety standards. To the extent that the trial court erred in its ruling on Motion in Limine No. 6, the error was invited by Appellant and should not be reversed.

g. Appellant Has Not Shown Prejudice

“An evidentiary error requires reversal only if it results in prejudice – only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred.” *Lutz Tile, Inc.*, 136 Wn. App. at 905; *see also Brown*, 100 Wn.2d at 196. Even if the trial court erred in her ruling on Motion in Limine No. 6, Appellant has not argued or demonstrated that she suffered prejudice as a result of the trial court's ruling.

The only statements by Appellant in her Opening Brief that appear to suggest possible prejudice are the following: “Through her experts, Appellant presented evidence as to general industry standards and the purpose of the standards. However, missing was the crucial and applicable City of Seattle Building Codes which were requested repeatedly by the jury.” Opening Brief at 20. Also, “the absence of the applicable building codes invited the jury to speculate.” Opening Brief at

26. Appellant does not argue that she was prejudiced by the trial court's ruling on Motion in Limine No. 6 or how she was prejudiced. Appellant also has not included in the Report of Proceedings the testimony of her expert or other witnesses called at trial such that this Court can examine the evidence she was able to present and whether the Court's ruling prejudiced her in any way. "The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue." *Allemeier*, 42 Wn. App. at 472; RAP 9.2(b). As such, even if Appellant could show error, the required prejudice element is lacking.

Appellant seems to suggest that the jury asking questions about what codes applied to the walkway somehow demonstrates prejudice. However, such an inference is not appropriate in this case. Appellant was not prejudiced because she did not seek to introduce evidence or testimony of a building code that actually applied to the walkway. Further, the jury's questions suggest that had the trial court allowed testimony that the walkway violated, for example, the 2006 Seattle Building Code, the jury might have applied it to the walkway despite the Legislature's intent and the trial court's finding that the 2006 Seattle Building Code is not retroactive.

In addition, it is equally likely that the jury took the lack of testimony on building codes to mean that the walkway violated an applicable building code as that it did not violate an applicable building code. This is particularly the case here because Ms. Gill was permitted under the trial court's ruling to testify that she considered the building codes and that she concluded the walkway was unsafe.

Furthermore, the issue at trial was whether or not the walkway was reasonably safe, not whether the walkway violated any building codes. *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980) (noting that a landowner's duty to public invitees is to maintain its premises in a reasonably safe condition); *see also Jackson*, 158 Wn. App. at 652-655 (stating that building codes and other similar municipal codes do not typically serve as a basis for tort liability). Building codes may be enacted pursuant to factors other than pedestrian safety – for example, public policy, economic or environmental considerations. As such, violation of a building code may have nothing to do with whether a structure is safe. The key to a finding of negligence in a case such as this is testimony that the walkway was not reasonably safe. As is discussed above, Appellant was permitted under the trial court's ruling to offer such testimony through her expert Ms. Gill.

3. Jury Instruction No. 11

a. *Standard And Scope Of Review*

Alleged errors of law pertaining to jury instructions are reviewed *de novo*. *Caldwell v. Dep't of Transp.*, 123 Wn. App. 693, 696, 96 P.3d 407 (2004). “[J]ury instructions are sufficient ‘if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.’” *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000) (citation omitted). An erroneous statement of the applicable law is reversible error only where it prejudices a party. *Id.* “Whether prejudice exists must be considered in light of all the instructions given.” *Balandzich v. Demeroto*, 10 Wn. App. 718, 723, 519 P.2d 994 (Div. I 1974). An error is not prejudicial if the proponent’s theory can be adequately argued under the other instructions that are given. *Id.*

The Civil Rules provide that a party objecting to the giving of any instruction or the refusal to give an instruction “shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.” CR 51(f). “One purpose of CR 51(f) is to clarify . . . the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction.

. . . Another purpose is to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.” *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 338-339, 878 P.2d 1208 (1994) (internal citations and quotations omitted) (emphasis omitted). If an alleged instructional defect is not brought to the attention of the trial court or if an objection is inadequate to apprise the judge of certain points of law, then those issues will not be considered on appeal. *Id.* at 339.

The Civil Rules also provide that “[w]here the refusal to give a requested instruction is an asserted error on review, a copy of the requested instruction shall be placed in the record on review.” CR 51(d)(2); *see also* RAP 10.4(c). Furthermore, “[t]he party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.” *Allemeier*, 42 Wn. App. at 472; *see also* RAP 9.2(b) (“If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party’s objections to the instructions given, and the court’s ruling on the objections.”). In addition, RAP 10.3(a)(5) requires that reference to the record be included for each factual statement.

b. Appellant Has Failed To Include Plaintiff's Proposed Jury Instruction No. 11 In The Record And Puts Forth No Basis For Reversal

The record before this Court does not include a copy of Jury Instruction No. 11 as is required by RAP 10.4(c) or any objection specific to the Court's exclusion of Jury Instruction No. 11 as is required by RAP 9.2(b). To the limited extent Appellant's Opening Brief discusses Jury Instruction No. 11, it does not include authority to support reversal.

Appellant identifies "Denial of Plaintiff's Proposed Jury Instruction No 11 regarding violation of Building Codes or Ordinances as evidence of negligence" as an issue in her Assignment of Errors. Opening Brief at 1. However, there is no other mention of Jury Instruction No. 11. During argument on the motions in limine, Appellant's counsel stated: "If I am understanding you correctly there will be no jury instruction. I think that is what it is coming down to is a jury instruction – you are denying our request for like a jury instruction saying there was a violation of the building code. Am I correct, Your Honor?" The Court responded, "yes." Opening Brief at 7 (citing RP 16). Appellant's Opening Brief does not support her assertion of error with any legal authority. As such, there is no basis for reversal. *See Electric Lightwave, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 530, 545, 869 P.2d 1045 (1994) ("An appellate court

need not decide a contention not supported by a citation to authority.”); *see also* RAP 10.3(a)(6).

Furthermore, Appellant’s sole objection on the record did not specify the jury instruction. Because she failed to make Jury Instruction No. 11 a part of the record, it is not clear from the record that Appellant’s proposed Jury Instruction No. 11 was as she described in oral argument (“you are denying our request for like a jury instruction saying there was a violation of the building code.”). Given Appellant’s failure to put forth the proposed jury instruction and because an issue cannot be raised and argued for the first time in a reply brief, Appellant’s second assignment of error should not be considered by the Court of Appeals. RAP 10.4(c); *see also Cowiche Canyon Conservancy*, 118 Wn.2d at 809 (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

Regardless, there is no basis for reversal. “[A] party is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it.” *Egede-Nissen*, 93 Wn.2d at 135. “A proponent [] must provide the court with appropriate forms of instructions correctly stating the law supporting the theory he advocates.” *Id.* (citations omitted). A building code that does not apply to a structure is not relevant and does not constitute evidence of negligence. Here, as is discussed

above, the trial court appropriately determined that the building codes Appellant sought to introduce at trial did not apply to the walkway. As such, there is not substantial evidence to support plaintiff's theory regarding violation of a building code and it was not error to exclude Jury Instruction No. 11.

Appellant may also be arguing regarding the Court's failure to include a second unidentified jury instruction. Appellant states on page 25 of her Opening Brief: "Appellant was also entitled to a jury instruction that Respondents had constructive notice of the hidden safety hazard of the ramp." This issue should also not be considered. Appellant did not include this in her Assignments of Error. RAP 10.3(g); *see also Cowiche Canyon Conservancy*, 118 Wn.2d at 809 (an assignment of error is waived if no argument is presented in the appellant's opening brief). There is also nothing in the Report of Proceedings or Clerk's Papers before this Court indicating Appellant requested such an instruction at trial or, assuming such instruction was requested, that Appellant objected to its exclusion at trial. CR 51(d)(2); *Allemeier*, 42 Wn. App. at 472 ("The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.") (citations omitted); RAP 9.2(b) and 10.3(a)(5). Finally, Appellant does not support this assertion with any legal authority. *See Electric Lightwave, Inc.*, 123 Wn.2d at 545

(“An appellate court need not decide a contention not supported by a citation to authority.”); *see also* RAP 10.3(a)(6).

c. Appellant Has Not Alleged That She Could Not Adequately Argue Her Theory Of The Case Under The Instructions As Given

Appellant discusses the standard of review applicable to an appellate court reviewing a court’s exclusion of a jury instruction. Appellant, however, does not otherwise put forth any authority or argument pertaining to the trial court’s exclusion of Jury Instruction No. 11 in this case. *See Electric Lightwave, Inc.*, 123 Wn.2d at 545. Appellant also does not aver how she was prejudiced by the trial court’s exclusion of Jury Instruction No. 11. *See Cox v. Spangler*, 141 Wn.2d 431, 442.

The instructions given to the jury included an instruction stating:

An owner or occupier owes to a business invitee a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that its customers as business invitees are expressly or impliedly invited to use or might reasonably be expected to use.

CP 481 (Instruction No. 17); WPI 120.06. As such, the jury instructions as provided allowed Appellant to argue her theory of the case.

III. CONCLUSION

For the reasons stated above, CSK Auto, Inc. respectfully requests that the Court affirm Judge Suzanne M. Barnett's rulings and the verdict of the jury.

RESPECTFULLY SUBMITTED this 31 day of August, 2011.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 
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APPENDIX

West's
WASHINGTON
LEGISLATIVE SERVICE
1985

Forty-Ninth Legislature
1985 Regular Session
Convened January 14, 1985
Adjourned Sine Die April 28, 1985

Chapters 349 to 390

ST. PAUL, MINN.
WEST PUBLISHING CO.

Ch. 359

REGULAR SESSION

NEW SECTION. Sec. 2. A new section is added to chapter 42.17 RCW to read as follows:

Any lobbyist registered under RCW 42.17.150, any person who lobbies, and any lobbyist's employer making a contribution that exceeds five hundred dollars shall file a special report in the manner provided under RCW 42.17.105 if the contribution is made before a primary or general election and: (1) After the period covered by the last report required by RCW 42.17.080 and 42.17.090 to be filed before that primary; or (2) within twenty-one days preceding that general election.

Approved May 20, 1985.
Effective July 28, 1985, 90 days after date of adjournment.

STATE BUILDING CODE

CHAPTER 360

SENATE BILL NO. 3261

AN ACT Relating to building codes; amending RCW 19.27.020, 19.27.030, 19.27.050, 19.27.060, 19.27.070, 19.27.075, 19.27.120, 19.27.300, 19.27.420, 19.27.450, and 19.27.460; reenacting and amending RCW 19.27.040; adding new sections to chapter 19.27 RCW; creating a new section; and recodifying RCW 19.27.030, 19.27.075, 19.27.130, 19.27.200, 19.27.210, 19.27.220, 19.27.230, 19.27.240, 19.27.250, 19.27.260, 19.27.270, 19.27.280, 19.27.290, 19.27.300, 19.27.310, 19.27.320, 19.27.410, 19.27.420, 19.27.430, 19.27.440, 19.27.450, 19.27.460, and 19.27.905.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. A new section is added to chapter 19.27 RCW to read as follows:

As used in this chapter:

(1) "City" means a city or town; and

Additions in text are indicated by underling; deletions by ~~strikeouts~~

the extent, if any, to which such discretionary requirements are based upon (a) the requirements of the state building code or (b) city or county amendments to the state building code.

NEW SECTION. Sec. 4. (1) There is hereby created the building code council account in the state treasury. Moneys deposited into the account shall be used by the building code council, after appropriation, to perform the purposes of the council.

(2) All moneys collected under subsection (3) of this section shall be deposited into the building code council account. Every four years the state treasurer shall report to the legislature on the balances in the account so that the legislature may adjust the charges imposed under subsection (3) of this section.

(3) There is imposed a fee of one dollar and fifty cents on each building permit issued by a county or a city. Quarterly each county and city shall remit moneys collected under this section to the state treasury; however, no remittance is required until a minimum of fifty dollars has accumulated pursuant to this subsection.

NEW SECTION. Sec. 5. A new section is added to chapter 19.27 RCW to read as follows:

Except as otherwise provided in this chapter, there shall be in effect in all counties and cities the state building code which shall consist of the following codes which are hereby adopted by reference:

(1) Uniform Building Code and Uniform Building Code Standards, 1982 edition, published by the International Conference of Building Officials;

(2) Uniform Mechanical Code, 1982 edition, including Chapter 22, Fuel Gas Piping, Appendix B, published by the International Conference of Building Officials;

(3) The Uniform Fire Code and Uniform Fire Code Standards, 1982 edition, published by the International Conference of Building Officials and the Western Fire Chiefs Association: PROVIDED, That,

Additions in text are indicated by underlines; deletions by ~~strikeouts~~

Ch. 360

REGULAR SESSION

notwithstanding any wording in this code, participants in religious ceremonies shall not be precluded from carrying hand-held candles;

(4) The Uniform Plumbing Code and Uniform Plumbing Code Standards, 1982 edition, published by the International Association of Plumbing and Mechanical Officials: PROVIDED, That chapters 11 and 12 of such code are not adopted; and

(5) The rules and regulations adopted by the council establishing standards for making buildings and facilities accessible to and usable by the physically handicapped or elderly persons as provided in RCW 70.92.100 through 70.92.160.

In case of conflict among the codes enumerated in subsections (1), (2), (3), and (4) of this section, the first named code shall govern over those following.

The council may issue opinions relating to the codes at the request of a local building official.

Sec. 6. Section 2, chapter 96, Laws of 1974 ex. sess. and RCW 19.27.020 are each amended to read as follows:

The purpose of this chapter is to ~~((provide building codes throughout the state--this chapter is--designed--to--effectuate--the following purposes, objectives and standards:~~

~~((3))~~ promote the health, safety and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state. Accordingly, this chapter is designed to effectuate the following purposes, objectives, and standards:

~~((4))~~ (1) To require minimum performance standards and requirements for construction and construction materials, consistent with accepted standards of engineering, fire and life safety.

~~((3))~~ (2) To require standards and requirements in terms of performance and nationally accepted standards.

~~((4))~~ (3) To permit the use of modern technical methods, devices and improvements.

Additions in text are indicated by underlining; deletions by ~~strikethroughs~~

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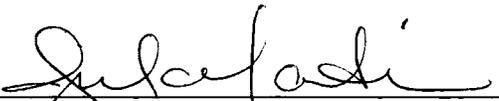
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COURT OF APPEALS, DIVISION I
OF THE STATE WASHINGTON

FRANCESCA GIUSTI,)
)
Appellant,) No. 66677-1-I
)
v.) CERTIFICATE OF SERVICE
)
CSK AUTO, INC., an Arizona)
Corporation doing business in)
Washington as SCHUCK'S AUTO)
SUPPLY, and KEY BANK)
NATIONAL ASSOCIATION, a)
bank incorporated in the District of)
Columbia,)
)
Respondents.)
_____)

I hereby certify that on this 31st day of August, 2011, I served the
foregoing Respondent's Brief via legal messenger to:

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By 
Jill C. Martin, Legal Assistant to
Michelle A. Alig, WSBA#40019

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