**SUPREME COURT No. 1036833**

**APPEALS COURT NO. 86222-7**

**SUPREME COURT**

**OF THE STATE OF WASHINGTON**

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**MESHAL EL GAMIA**

**Petitioner**

**vs.**

**MICHAEL J. ROMOSER AND TRACY A. ROMOSER, husband and wife and the martial community composed therefore; and JOHN DOES 1-6**

**Respondents**

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# PETITION FOR DISCRETIONARY REVIEW

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**SUPREME COURT No. 1036833**

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## OTHER AUTHORITIES

## 1. IDENTITY OF PETITIONER

Meshal El Gamia, Petitioner on appeal, asking this Court to Grant Review of the Appeals Court decision, Division 1, filed on November 25, 2024.

**2. Court Of Appeals Decision** (unpublished, No. 86222-7: (11/25/2024).

Petitioner concedes that under the existing law, the Appeals Court application of law in this case was properly applied. He acknowledges his invitee status under controlling law was properly reviewed and applied. Nevertheless, Petitioner believes existing law is inherited from a culture deeply rooted in feudalism and should be abandoned; that which a majority of jurisdictions in this nation has accomplished. See Majority Opinion *Appendix A.*, J. Feldman Concurring Opinion *Appendix B*

## 3. Issues Present for Review

Whether Common Law Classifications of Entrant as Invitees, Licensees, or Trespassers Should Continue to Be the Determinate Standard of Care Owed By an Owner or Occupier of Land, or Whether Such Distinctions Be Replaced By A Negligence Standard of Reasonable Care Under All Circumstances?

## 4. Statement Of the Case

On September 19, 2019, the plaintiff was working for Delivery Force. Delivery Force is a subcontractor of Amazon. He was in possession of an envelope and a small package that he needed to deliver to the Defendants' residence in Seattle, Washington. After

arriving at the Defendants' residence, he got out of his vehicle and walked up two flights of stairs in order to deliver the envelope and small package. After plaintiff placed the items on the porch, three dogs came out of the front door of the Defendant residence through an unsecured screen door. As the plaintiff tried to get away from the dogs, he stepped backward and fell down the stairs onto his back.

After the plaintiff fell, Defendant Michael Romoser came outside to gather the dogs. He apologized to the plaintiff and told him that one of his children must have left the screen door ajar. At the time, the plaintiff was standing on two feet and did not appear to be injured.

No police or emergency medical personnel were summoned on the scene. Later that day, the plaintiff sought health care treatment at the Swedish Mill Creek Emergency room where he was assessed multiple contusions, a muscle strain and a closed displaced fracture of fifth metatarsal bone in his right foot.

Just prior to the expiration of the applicable statute of limitation, the plaintiff's

first lawyer, Omar Nur filed this lawsuit on July 22, 2022. Since the time he has been represented by three additional lawyers. Dan Whitmore, Steven E. Knapp. And Mr. Joey Reibel. Each withdrew. The Petitioner last lawyer, Mr. Reibel withdrew as counsel for Petitioner on November 9, 2023. The Petitioner is now Pro Se.

In Defendants' Motion for Summary Judgment, they urged:

"In Washington State, a landowner's duty of care to person on the land is governed by the entrant's common law status as an invitee, licensee or trespasser. *Tincani v, Inland Zoological Society,* 124 Wn. 2d 121, 127-28, 875 P.2d 621 (1994). A invitee for premises liability purposes include a business invitee, who "is a person who is invited to enter or remain on the land for a purpose directly or indirectly connected with business dealing with the possessor of the land. "RESTATEMENT (SECOND) OF TORTS _ §_ fil _Q _ 1. (A.M. L. INST. 1995; and Afoa v. Port of Seattle, 176 Wn.2d 460,467, 296 P.3d 800 (2013).

For business invites, courts apply the liability standard stated in § 343 of the *Restatement (Second) of Torts. Johnson v. Wash. State Liquor & Cannabis*

*Bd.* 197 Wn.2d 606, 612, 486 P.3d 125 (2021) Section 343 states:

A possessor of land is subject to liability for physical harm caused to his invitee *by a condition on the land* if, but only if, he

Know or by the exercise of reasonable care would discover the condition, and should realize that it involves a reasonable risk of harm to such invitees, and

Should expert that they will not discover or realize the danger, or will fail to protect themselves against it, and

fails to exercise reasonable care to protect them against the danger.

Restatement § 343will exercise. Under this standard, an invitee "is ... entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry which includes inspecting ***dangers conditions***, "followed by such

repairs, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances. "id. cmt. b;

*Tincani v. Inland Empire Zoological Soc'y,* 124 Wash. 2d 121, 138-39, 875 P.2d 621 (1994)'"

*Mihaila v. Troth,* 21 Wn. App. 2d 227a233, 505 P.3d 163, 166 (2022) emphasis added).

In light of plaintiff's "invitee" status, the Defendants were subject to liability for plaintiff's injuries only if a condition on the property causes the injuries"

On January 5, 2024, the Superior Court Granted Defendants motion for summary Judgment.

The Court of Appeals for Division 1 of Washington State affirmed the Superior Court's dismissal of Petitioner's negligence claim under common liability. See *Appendix A*. There, concurring with the Majority's common law review of Petitioner's claim, the Honorable J. Feldman made several observations where one in particular Petitioner believes deserves this Court's attention. *Appendix B.*

Your Honor pointed out, among other things, that the majority of states Jurisdictions has abandoned the traditional common law approach to landowners liability that requires distinguishing between invitees and licensees and have instead adopted a single duty of reasonable care that courts abandoning the common law classification have in fact adopted the generally applicable duty of ordinary care, something which is set forth in Washington State pattern jury instructions. He

further pointed out that the Superior Court, when dismissing Petitioner's claim, failed to apply the duty of ordinary care; something which he mentioned could be outcome-determinative in the present case. *[Appendix B.,* J. Feldman concurring opinion]

**5. Summary of the Argument**

In explaining its unreadiness to move away from the trichotomy, the Court reasoned that retaining the scheme was necessary to ensure a sense of stability, predictability; finding that a unitary standard would not lessen confusion. The Court urged a slow piecemeal development rather than a wholesale change as proffered by the defenders of these distinctions, fearing such change would delegate social policy decisions to the juries with minimal guidance from the court. Also, the Court cautioned that landowners could be subject to unlimited liability. *Younce v. Fergueson,* 106 Wn.2d. at 665-67, 724 P.2d 991 (1986).

The Court should review this case for three (3) reasons; **(a)** *The judicially determined status distinctions of invitee and licensee as the sole determinants of standard of care owed by an occupier or owner of land to an entrant on the land no longer retain their viability under modern conditions*; **(b),** *a piecemeal development rather than a wholesale change in common law liability has occurred offering more than a degree of stability, predictability and a standard of less confusion, and* **(c),** *the majority of state jurisdictions has abandoned classification status finding that change in our premises liability laws are warranted and more reflective of our social mores and a more reasonable method of fault determination in our society.*

## 6. Argument

***(a)*** *judicially determined status distinctions of invitee and licensee as the sole determinants of the standard of care owed by an occupier or owner of land to an entrant on the land no longer retain their viability under modern law.*

Upon retaining classi*fication status in Younce v. Ferguson, 106 Wn.2d at 665,* this Court expressly embraced *Gerchberg v. Loney*, 223 Kan 446, 450-51, 576 P.2d 593 (1978), reiterating the majority comments there, that "the traditional classfications were worked out and the exceptions were spelled out with much thought, sweat and even tears." We are not ready to abandon them with no contours. See *Younce. Id* at 663.

Notably, here, in 1994 the Kansas Court made a thoughtful change. See, *Jones v. Hansen,* 254 Kan 499, 510-11, 867 P.2d 303."We hold that in Kansas, the duty owed by an occupier of land to licensee shall no longer be dependent upon the status of the entrant of the land; the common-law classification and duty arising from classification of licenses shall no longer be applied. The duty owed by an occupier of land to invitee and licensees alike is one of *reasonable care under all circumstances." Jones v, Hansen*, 254 Kan at 509-10 supra.

But the Court did not stop there. It went on to explain in some detail what reasonable care entailed under all circumstances, when and how such care should be applied, recognizing some of limits to reasonable care under Kansas laws. *Id.* at 510=511

The Court made note that these classifications were created at a time when the principles of negligence were not in existence. "Indeed, when English Common law was articulating the trichotomy, the principle that a man should be held responsible for foreseeable damage was only hesitatingly recognized in a limited number of cases." *Id.* *Norm S. Marsh, The History and Comparative Law of Invitees, Licensees and Trespasser, 69 Law. Q. Rev. 182-184 (1953};* also see, *Nelson v. Freeland,* 507 SE 2d 882, 887 (1998).

Thus, the trichotomy was enacted at a time when modern tenet and pillar of tort law-legal concept of negligence-was unrecognized. To be sure, "It was not until the beginning of this country's industrial revolution that the community and judiciary took greater acceptance of fault-based liability which led to the creation of our modern law of negligence." *Ketchum, Missouri Declines, 64 UMKC L. Rev. at 397. Nelson v. Freeland* 507 SE 2d at 887.

Finally, the North Carlonia Court held that "given that we are convinced that the common-law trichotomy is no longer viable, *we should put it to rest.* By doing so, we align North Carolina premise-liability law with all other aspects of tort law by basing liability on the pillar of modern tort theory: Negligence. Moreover, we now join twenty-other jurisdictions which have carefully examined and analyzed the issue, ultimately determining that the trichotomy is no longer applicable in the modern world." *Id.*at 893-894. Respectfully, Petitioner urges that the shaping of clear legal contours has been perfected and set for the abrogation of premises liability classifications.

***(b)*** *A piecemeal development rather than a wholesale change in common law liability has occurred offering more than a degree of stability predictability and a standard of less confusion*

While maintaining the scheme, the Court listed concerns surrounding stability, predictability and less confusion as predicates for retention. *Younce v. Ferguson.*106 Wn.2d at 666-67. *Hawkins Premises Liability After Repudiation of States Categories Allocation of Judge and Jury Functions, 1981 Utah L. Rev. 15; see also Britt v. Allen County Community College* 230 Kan. 502, 505-506, 638 F.2d 914 (1982).

It is important to note that *Britt v Allen County Community College*, is a child of *Gerchberg v. Loney,* 223 Kan 446, 450-51. In both cases, Kansas retained classifications before abolishing them In *Jones v. Hansen,* 254 Kan 499, supra,. There, in reviewing the dissent in *Britt* regarding Professor Hawkin's observations concerning wholesale abandonment in premises liability cases to jury caprice, the Court found that.

"The point Professor Hawkins is not that the abolition of classifications has resulted in uncontrolled findings of liability on the part of property owners, because, in applying the reasonable man standard, the courts have applied the usual protections and safeguards customarily applied in other types of negligence cases." See *Britt. Id.* at 510-512; J. Prager dissenting; see also *Hansen v. Jones,* Id. at 507-508, (Reversing *Britt* and abrogating classification status.)

With all due respect, this Court fears that change in the status quo would delegate social policy decisions to juries with minimal guidance for the court, causing more confusion, instability and unpredictability has simply not been the case where courts has abolished classifications. In its stead, Petitioner maintains that there has been, as the Supreme Court predicted some 60 years ago in *Kermarce v. Compagnie Generale Transatlantique,* 358 US 625, 630-31, S. Ct 406, a movement toward abolishing classifications in state jurisdictions.

What is more, even in *Britt*, the majority noted Professor Hawkins conclusion that, "in the majority of cases surveyed the outcome would probably be the same as if the status rules had been applied.' *Utah L. Rev. at 56. Id. 230 Kan at 507*." The Professor has simply not referenced and perceived instability, unpredictability or confusion. Moreover, jurisdictions abrogating classifications have not recorded, to Petitioner limited knowledge, any such concerns. However, that is not to say the Court's concerns 38- years ago upon hearing *Younce v. Ferguson,* 106 Wn. 665-67 were not valid concerns. But today, they have all been put to rest, as should classifications.

***(c)*** *A majority of states' jurisdictions has now abandoned classification status finding that change in our premises liability laws are warranted and more reflective of our mores and a more reasonable method of fault determination in our society.*

In *Younce v. Ferguson,* 106 Wn.2d at 663-64, the Court referenced that most jurisdictions continued to apply classifications status in premises liability cases involving negligence. *Id*. Today, however, a majority of state jurisdictions has decided to follow the Supreme Court's Mandate in *Kermarce,* abolishing these feudal concepts and employing a standard of *"reasonable care in all the circumstance" Id.*at 630-31, S. Ct.406; see also, *Demag v. Better Power Equipment, Inc; Id.* at 1110-1111, "the standard of reasonable care in all circumstances" will better reflect our command expectation of the duty of care owed by landowners and occupiers to all lawful entrants. All other reform courts have adopted reasonable care as the standard for property owners toward entrants."' 1110. See, e.g., *Mounsey v. Ellard*, 297 N.E. 43, 49-50 (1973) (explaining the application of the long-established reasonable care standard to the context or premises liability)

Clearly, classifications confers upon owners and occupiers of land a special privilege to be careless which is quite out of keeping with the development of accidental law generally and is no more justifiable here than it would be in the case of any other similar activity. See *2 Haper & James,* § 27.3 at 1440. Thus, the underlying question is whether it is better to let landowners and occupiers of land arrange their premises in total disregard of entrants legally upon the land, or require them to take such precautions as a normal person would take when hazardous and dangerous conditions lurks or may lurk upon their premises. As shown herein, the majority of jurisdictions and reform courts has answered this question in the affirmative. See *Appendix 2,* J. Feldman, concurring.

Moreover, Petitioner truly believes that preventing a jury from applying changing community standards to a landowner's duties is a harshness which is inappropriate in our modern legal system. See *Mile High Fence Co. v. Radovich,* 489 P.2d 308, 311-12 (1971). Even when cases reach a fact finder, it is often for consideration of the plaintiff's status rather than for the more fundamental question of whether the defendant has acted careless. See *Smith v. Arbaugh's Restaurant, Inc,* 469 F.2d 97, n. 32 (DC Cir. 1971).

In Washington State, under classifications, the status of a person who is legally upon the property of a landowner is determinative of the landowner/occupier's responsibility or degree of care which he owes to that person. This, Petitioner complains, is something truly feudal. Under this concept, the owner/occupier of the premises has little of no incentive to act as a reasonable person in view of the probability or foreseeability of injury to others. See *Rowland v. Christian,* 69 Cal 2d 108, 70 Cal Rptr 97, 443 P.2d 561 (1970).

Petitioners argue that imposing responsibility would be more apt to make the occupants/landowners more careful than allowing the occupants to use the entrants class as a determinative factor regarding liability. Reform courts has not imposed unreasonable burdens on property owners and Petitioner is certainly not asking this Court to do so.. However, he is requesting the court to hold that the status of an entrant onto the property of another should not be solely determinative of the duty of care owed to that entrant.

Petitioners believe that it is below 21st Century standards that the status of a human upon land should exclusively define the duty of care owed to him/her by owner/occupier of said land. The standard of reasonable care under all circumstances should be employed to determined whether the landowner exercised such care under the given circumstances.

"It is time to abandon these feudal based-common law distinctions and pass upon these premises liability questions based on the reasonableness of the conduct of the injured party and owner/occupier of the land."

See *Beebe v. Moses*, 113 Wn App. 464 (Wash. Ct. App. (2002); Kurtz, J., Concurs, Sweeney, J. (Concurring).

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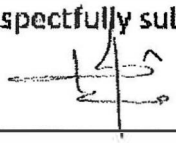
## Conclusion

The petitioners respectfully ask this Court to grant review and reverse the Court of Appeals' decision.

Respectfully submitted by



Meshal El Gamla

## Certificate of Service

Petitioner do hereby certify that a true and correct of the foregoing Petition was placed in the United States mail depository with sufficient postage attached and mail to:

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On this 07 day of January 2025

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**IN THE SUPREME COURT**

**OF THE STATE OF WASHINGTON**

**SUPREME COURT No. 1036833**

**COURT OF APPEALS No. 86222-7**

**MESHEAL EL GAMIA**

**Petitioner/Appellant,**

**vs.**

**MICHAEL J. ROMOSER, et al**

**Defendants/Respondents**

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# PETITIONER'S APPENDIX FOR DISCRETIONARY REVIEW

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# APPENDICIES

# APPENDIX 1.

# APPEALS COURT MAJORITY OPINION

FILED
11/25/2024
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | |
|---|---|
| MESHAL Y. EL GAMAI, a married man,<br><br>Appellant,<br><br>v.<br><br>MICHAEL J. ROMOSER AND TRACY A. ROMOSER, husband and wife and the marital community composed thereof; and JOHN DOES 1-5,<br><br>Respondents. | No. 86222-7-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

MANN, J. — Meshal El Gamai sued Tracy and Michael Romoser for negligence after he sustained injuries when delivering a package to the Romosers' home. El Gamai appeals the trial court's dismissal on summary judgment and argues that there were issues of material of fact over liability. We affirm.

I

On September 8, 2019, El Gamai was working for Delivery Force, a subcontractor of Amazon, when he was delivering a package for the Romosers at their residence. El Gamai walked up a set of stairs to the front door and he noticed the door was partly open. He claims that three dogs came out of the door and tried to attack him. El Gamai stated that the largest of the dogs tried to bite him. El Gamai explained

that he tried to back away from the dogs and he fell down the stairs. El Gamai alleged that he sustained injuries to his foot, back, and neck.

El Gamai sued the Romosers alleging common law negligence and strict liability under RCW 16.08.040. The Romosers conceded that El Gamai would be considered a business invitee but otherwise denied the allegations.

On December 1, 2023, the Romosers moved for summary judgment. The Romosers argued that there is no liability because a dog is not a dangerous condition on land. The Romosers stated that if the dog had actually bitten El Gamai, liability may attach but because El Gamai admitted in his deposition that no dog bit him, there is no liability.

El Gamai failed to appear at the January 5, 2024 hearing on the Romosers' motion for summary judgment. The trial court granted the Romosers' motion for summary judgment and dismissed El Gamai's lawsuit with prejudice.

El Gamai appeals.

II

We review summary judgment orders de novo, considering the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate "if the pleadings, affidavits, and depositions before the trial court establish that there is no genuine issue of material fact and that as a matter of law the moving party is entitled to judgment." Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); CR 56(c). The burden is on the moving party to demonstrate there is no genuine issue of material fact. Woodward v. Lopez, 174 Wn. App. 460, 468, 300 P.3d 417 (2013). On

summary judgment, questions of fact may be determined as a matter of law "when reasonable minds could reach but one conclusion." Ruff, 125 Wn.2d at 703-04 (quoting Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

"'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" Woodward, 174 Wn. App. at 468 (quoting Visser v. Craig, 139 Wn. App. 152, 158, 159 P.3d 453 (2007)). But "a nonmoving party 'may not rely on speculation [or on] argumentative assertions that unresolved factual issues remain.'" Woodward, 174 Wn. App. at 468 (quoting Visser, 139 Wn. App. at 158).

A

El Gamai argues that the trial court erred in granting summary judgment because the Romosers breached their duty to him as a business invitee. We disagree.

A negligence action requires proving (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). In a premise liability action, a landowner's duty of care is governed by the entrant's common law status as an invitee, a licensee, or a trespasser. Tavai v. Walmart Stores, Inc., 176 Wn. App. 122, 127-28, 307 P.3d 811 (2013). The parties agree that El Gamai was an invitee.

Washington has adopted the Restatement (Second) of Torts § 343 (Am. L. Inst. 1965) to define a landowner's duty to an invitee. Eylander v. Prologis Targeted U.S. Logistics Fund, LP, 2 Wn.3d 401, 408, 539 P.3d 376 (2023). Under § 343, a

landowner is only liable for physical harm to their invitees caused by a "condition on land" if the owner:

> (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 invitees, and
>
> (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 the danger.

Eylander, 2 Wn.3d at 408.

Here, the Romosers contend that dogs are not a condition on land, citing Saralegui Blanco v. Gonzalez Sandoval, 197 Wn.2d 553, 485 P.3d 326 (2021). In Saralegui Blanco, our Supreme Court concluded that a dog was not a dangerous "condition" on land. Saralegui Blanco, 197 Wn.2d at 563. The court reasoned that "conditions generally associated with premise liability duties involve physical features of the property." Saralegui Blanco, 197 Wn.2d at 563. Thus, based on Saralegui Blanco, we agree with the Romosers that the dog is not a dangerous condition on land.[1] The trial court correctly granted summary judgment for the Romosers as a matter of law on the premise liability claim.

B

El Gamai argues that there is a question of material fact over whether he established prima facie case for common law liability for injuries caused by vicious or dangerous animals. We disagree.

[1] El Gamai argues that this case can be distinguished from Saralegui Blanco because the defendants here are not landlords. But this distinction is immaterial in this context.

At common law, an owner of a dog, who knows or reasonably should know the dog has vicious or dangerous propensities likely to cause the injury complained of, is liable for such injury regardless of any negligence. Beeler v. Hickman, 50 Wn. App. 746, 751, 750 P.2d 1282 (1988).

Here, Michael Romoser asserted in his declaration in support of the motion for summary judgment that the three dogs that lived in the house at the time had never bit or harmed anyone. In response, El Gamai provided no evidence to the trial court to the contrary. El Gamai contends on appeal that the Romosers may have typically had their front door shut because they knew their dogs were dangerous. But there is no evidence in the record to support this contention and mere speculation insufficient. See Seven Gables Corp. v. MGM/UA Ent. Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) ("A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.").

Because El Gamai fails to show the Romosers knew of any dangerous propensity, the trial court did not err when it granted the Romosers summary judgment on common law liability.[2]

We affirm.

[2] While not argued on appeal, El Gamai's claim below for liability under Washington's dog bite statute, RCW 16.08.040, failed as a matter of law because El Gamai testified in his deposition that no dog actually bit him.

Mann, J.

I CONCUR:

Coburn, J.

# APPENDIX 2

# JUDGE FELDMAN

# CONCURRING OPNION

FELDMAN, J. (concurring) — While I agree with the reasoning and holding of the majority opinion, I write separately to address two points regarding the proper explication of applicable legal principles.

First, consistent with Washington precedent, the majority states that a negligence claim has four elements: duty, breach, proximate cause, and resulting injury. I believe a more precise formulation would identify five elements: duty, breach, cause in fact (also referred to as factual causation), legal causation (also referred to as proximate cause or scope of liability), and harm (also referred to as injury or damages). As explained in my concurring opinion in *Zorchenko v. City of Federal Way*, 31 Wn. App. 2d 390, 401-04, 549 P.3d 743 (2024), such a formulation is more consistent with general tort principles and would eliminate a recognized source of confusion in Washington judicial opinions and jury instructions addressing causation issues.

Second, also consistent with Washington precedent, the majority applies the traditional common law approach to landowner liability in determining the applicable duty of care based on El Gamai's status as a "business invitee" on the Romosers' property. Many other states have abandoned this approach, which requires distinguishing between invitees (those who enter for the purpose of business dealings with the landowner) and licensees (those who merely enter and remain on land with the landowner's consent, such as social guests), and have instead adopted a single duty of reasonable care in all cases involving such lawful land entrants. *See generally Demag v. Better Power Equipment, Inc.*, 197 Vt. 176,

102 A.3d 1101 (2014) (noting that "a slight majority of state courts have now abolished the distinction between licensees and invitees"). In *Demag*, one of the more recent cases addressing this issue, the Vermont Supreme Court noted that the invitee-licensee distinction "is firmly rooted in landowner privilege," is arbitrary, rigid, and confusing, is "contrary to our modern social mores and humanitarian values," and ultimately fails to recognize that a "visitor's safety does not become less worthy of protection by the law because [they are] a social guest and not a business invitee." *Id.* at 182, 184 (internal quotation marks omitted).

Our Supreme Court has not squarely considered this issue since 1986, when it reaffirmed that "[c]ommon law classifications continue to determine the duty owed by an owner or occupier of land in Washington." *Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991 (1986). Relevant here, the court noted in *Younce* that "the majority of jurisdictions" had not rejected the classifications and that it was "not ready to abandon them for a standard with no contours." *Id.* at 665-66. Because a slight majority of state courts have now abolished the distinction between licensees and invitees, the former point is no longer true and there is now a substantial body of law in other jurisdictions to draw upon. See *Demag*, 197 Vt. at 182 (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51, Reporter's Note, cmt. a, tbl. (Am. L. Inst. 2012) (listing state practices and citing cases for each state)). Additionally, courts that have abandoned the common law classification have adopted the generally applicable duty of ordinary care, which in Washington is set forth in our pattern jury instructions regarding negligence. *See* WPI Chapter 10. As such, the alternative test is now well-defined.

Lastly, while the trial court below did not apply the generally applicable duty of ordinary care, the difference between the applicable legal standards may be outcome-determinative here. Our pattern jury instructions define negligence as "the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances." Negligence—Adult—Definition, 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.01 at 126 (7th ed. 2019). Here, for example, El Gamai could potentially argue that a reasonably careful person in the same or similar circumstances would take precautions (such as closing the door) to protect property entrants from being rushed by large pets. Whether to adopt such a test in place of the traditional common law duties owed by an owner or occupier of land is an issue that should be determined by our Supreme Court.

With these observations, I respectfully concur.

Feldman, J.