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The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: <https://www.lexisnexis.com/clients/wareports>.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON December 28, 2022

DIVISION II

WILLIAM TISDALE,

Respondent,

v.

APRO LLC, a Delaware Limited Liability
Corporation and JOHN DOES 1-10,

Appellants.

No. 56067-4-II

PART PUBLISHED OPINION

GLASGOW, C.J.—Terrence Sablan entered a convenience store owned by APRO LLC and attempted to rob the store. William Tisdale entered the store in the midst of the robbery, and the clerk asked Tisdale to call 911. When Sablan left the store, he began rummaging through Tisdale’s unlocked car in the parking lot. Tisdale confronted Sablan in the parking lot, and Sablan repeatedly struck Tisdale with an aluminum baseball bat, fracturing his skull and requiring hospitalization. After the assault, Tisdale began having seizures and he experienced cognitive and other related symptoms of brain injury.

Tisdale sued APRO for negligence based on its failure to ensure customer safety in compliance with industry standards. Sablan was not named as a defendant.

The trial court refused to instruct the jury to segregate damages caused solely by Sablan’s intentional conduct and not proximately caused by APRO’s negligence, even though both parties sought such an instruction. When APRO told the jury in closing argument that Washington law required it to segregate damages caused by intentional tortfeasors, the trial court sustained an

No. 56067-4-II

objection to the argument as a misstatement of law. Furthermore, the special verdict form did not allow the jury to segregate damages attributable to Sablan.

The jury found that APRO was negligent and that Tisdale was contributorily negligent and responsible for 10 percent of his own damages. After deducting Tisdale's contributory portion, the jury awarded Tisdale \$81.9 million in damages. The trial court then denied APRO's motion for remittitur or a new trial.

APRO appeals. It argues the trial court erred by refusing to issue the proposed jury instruction on segregation of damages. APRO asks this court to reverse the damage award and remand for a new trial.

In the published portion of this opinion, we hold that the trial court erred when it failed to instruct the jury to segregate damages proximately caused by APRO's negligence from damages caused solely by Sablan's intentional conduct. When combined with the special verdict form and the sustained objection at closing argument, this lack of instruction was a misstatement of law, misleading, and prejudicial.

We remand for retrial on damages only. The fact finder must first determine the total amount of damages and then segregate the portion of the total damages, if any, caused solely by Sablan's intentional conduct. The jury's determination that Tisdale is 10 percent contributorily negligent need not be relitigated, so the trial court must then apportion to Tisdale 10 percent of the remainder after segregation, and APRO will be responsible for 90 percent of the remainder after segregation.

We resolve the remaining issues APRO has raised on appeal in the unpublished portion of this opinion.

No. 56067-4-II

FACTS

I. BACKGROUND

One night in November 2015, Sablan entered a convenience store that APRO owned and asked the clerk to call the police because he was being followed. After a few moments he changed his mind and left the store. Several minutes later, Sablan returned to the store and removed cigarettes from a rack near the cash register, indicating that he intended to leave without paying for them. The clerk took the cigarettes out of Sablan's hand and pointed to the store's security cameras. Sablan then threatened the clerk with a baseball bat and ordered the clerk to open the store's safe. Tisdale entered the store, and the clerk asked Tisdale to call the police. Sablan then left the store. The clerk called 911.

Tisdale's unlocked car was in the parking lot near the store's door. Sablan began to rifle through Tisdale's car. While the clerk was on the phone with emergency services, Tisdale left the store and confronted Sablan in the parking lot. Sablan struck Tisdale multiple times in the head with the baseball bat. Sablan then took Tisdale's keys and drove away in Tisdale's car.

When he was taken to a hospital, imaging showed that Tisdale had multiple skull fractures, bleeding inside his brain, and damage to his brain's frontal and temporal lobes. After the incident, Tisdale began having seizures, vision problems, and tinnitus. He reported depression, anxiety, and post-traumatic stress disorder. A MRI in 2019 showed that part of Tisdale's brain had atrophied and would not recover. Cognitive problems limited his ability to live alone or retain jobs requiring complex tasks.

No. 56067-4-II

II. PRETRIAL

In 2019, Tisdale sued APRO, alleging that APRO “negligently failed to adopt, implement[,] and enforce industry standards or policies and procedures to ensure customer safety and security,” causing his injuries. Clerk’s Papers (CP) at 11. He also alleged that the clerk, as APRO’s employee, negligently failed to comply with industry standards and APRO’s policies to ensure Tisdale’s safety as a business invitee. Tisdale sought damages for his physical injuries, past and future medical expenses, pain and suffering, mental and emotional distress, loss of enjoyment of life, and loss of earning potential. Tisdale later expressly abandoned his claims for lost wages and past medical expenses.

APRO alleged in its answer that Tisdale was partially responsible for his own injuries and that Sablan’s and Tisdale’s actions were the proximate cause of Tisdale’s injuries. Relying on *Tegman v. Accident & Medical Investigations, Inc.*,¹ APRO asserted that damages from Sablan’s intentional acts “must be segregated from” any damages assigned to APRO. CP at 23.

During motions in limine, Tisdale moved to exclude any testimony or argument that would allow the jury “to apportion fault to a non-party intentional tortfeasor” such as Sablan. CP at 145. Tisdale argued that under *Welch v. Southland Corp.*,² a case that predated *Tegman*, a negligent defendant “was not allowed to segregate damages to [an intentional tortfeasor].” CP at 146. In return, APRO moved to exclude testimony and argument that sought damages from APRO that were solely attributable to Sablan’s intentional conduct or Tisdale’s own conduct, relying on

¹ 150 Wn.2d 102, 75 P.3d 497 (2003).

² 134 Wn.2d 629, 952 P.2d 162 (1998).

No. 56067-4-II

Tegman and Division One’s more recent decision in *Rollins v. King County Metro Transit*.³ APRO argued that a negligent defendant cannot be forced to pay damages stemming *solely* from the intentional tort of a nonparty, here Sablan.

The trial court disagreed. Citing *Welch*, the trial court reasoned that “a defendant is not entitled to apportion liability to an intentional tortfeasor.” CP at 589. The trial court denied APRO’s motion and granted Tisdale’s motion.

III. JURY INSTRUCTIONS AND VERDICT

A. Instruction on Segregating Damages

APRO proposed a jury instruction that would have told the jury to segregate damages caused by APRO’s negligence from damages caused solely by Sablan’s intentional torts, consistent with the instruction given in *Rollins*:

In calculating a damage award, you must not include any damages that were caused by intentional act[s] of a non-party and not proximately caused by negligence of the defendant. Any damages proximately caused by the intentional act[s] of a non-party and not proximately caused by negligence of the defendant must be segregated from and not made a part of any damage award against the defendant.

CP at 629 (alterations in original). Tisdale proposed a similar instruction. The first sentence was functionally identical, while Tisdale’s second sentence read, “Any damages caused solely by Terrence Sablan and not proximately caused by the negligence of APRO, LLC, must be segregated from and not made a part of any damages award against APRO.” CP at 993. The trial court’s instructions to the jury did not include either party’s proposed language on segregation.

³ 148 Wn. App. 370, 199 P.3d 499 (2009).

No. 56067-4-II

Instead, the trial court's instruction 15 closely tracked Washington Pattern Instruction 15.04 to explain that injuries can have multiple proximate causes and that the jury should find for APRO "if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit." CP at 1352; *see* 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL 15.04, at 203 (7th ed.) (WPI). APRO did not contend instruction 15 was incorrect, only that the trial court should also have given an instruction on segregation of damages.

Instruction 23 addressed contributory negligence, but not segregation of damages caused solely by intentional torts. It instructed that if the jury ruled for Tisdale, "then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of [APRO], apart from any consideration of contributory negligence." CP at 1360.

APRO objected to instruction 23, seeking "a separate *Rollins* instruction that tracks the actual language from the case. It should be a standalone . . . or independent instruction." 10 Verbatim Report of Proceedings (VRP) at 1944-45. A *Rollins* instruction would have told the jury that the damage award against APRO must not include any damages caused by Sablan's intentional acts that were not proximately caused by APRO's negligence. 148 Wn. App. at 379.

APRO also proposed a special verdict form that asked if Sablan acted intentionally, and if that intentional conduct was a proximate cause of Tisdale's injury. It then asked, "Was Terrence Sablan's intentional conduct the sole proximate cause of a portion of injury to Plaintiff?" and, "What percentage of injury to Plaintiff was proximately caused by Terrence Sablan's intentional conduct?" CP at 983. It included a direction: "You must segregate the damages attributable to

No. 56067-4-II

Terrence Sablan's intentional conduct that proximately caused injury to Plaintiff and not include them as part of any damage award [for negligence]." CP at 983 (emphasis omitted).

The trial court declined to give the jury APRO's special verdict form. The special verdict form that the trial court instead adopted asked the jury to determine if APRO was negligent and whether that negligence was a proximate cause of Tisdale's injury. The form then asked, "What do you find to be the plaintiff's amount of total damages? Do not consider the issue of contributory negligence, if any, in your answer." CP at 1333 (boldface omitted). The verdict form also asked the jury to determine if Tisdale was negligent and if his negligence was a proximate cause of his own injury. The verdict form then read, "Assume that 100% represents the total combined fault that proximately caused the plaintiff's injuries. What percentage of this 100% is attributable to the negligence of APRO LLC [and] what percentage of this 100% is attributable to the plaintiff's negligence? Your total must equal 100%." CP at 1334. The verdict form allowed the jury to divide the 100 percent of fault only between APRO and Tisdale. Nothing in the instructions or special verdict form explained any difference between apportioning fault or liability on one hand and segregating damages on the other hand.

APRO objected to the special verdict form because it "does not provide the jury the opportunity to segregate what portion of plaintiff's damages were caused by Sablan's intentional conduct It's only reasonable for the jury to show that the jury actually did that in the verdict form." 10 VRP at 1945. The trial court did not modify any of the instructions or the verdict form as a result of APRO's objections.

No. 56067-4-II

B. Closing Argument and Verdict

APRO returned to the issue of segregating damages during its closing argument: “[I]n Washington, the law states that the jury must segregate damages caused by intentional tortfeasors. That would be Mr. Sablan.” 11 VRP at 2013. Tisdale objected, arguing that the comment was a misstatement of the law, and the trial court sustained the objection.

The jury asked a question during deliberations, seeking “clarification” on instruction 15, which explained proximate cause and told the jury it should return a verdict for APRO if it found that a nonparty was the sole proximate cause of Tisdale’s injuries. 12 VRP at 2033. The trial court instructed the jury to “reread the instructions as a whole.” *Id.* at 2034.

The jury found APRO negligent and that APRO’s negligence proximately caused Tisdale’s injuries, and the jury concluded Tisdale was entitled to \$91 million in damages. The jury found that Tisdale was contributorily negligent and responsible for 10 percent of his damages, leaving APRO responsible for 90 percent of the damages, or an award of \$81.9 million.

Reiterating many of the arguments recited above, APRO moved for a new trial, and the trial court denied the motion. APRO timely appealed.

ANALYSIS

I. SEGREGATION OF DAMAGES INSTRUCTION

APRO argues that the trial court erred by refusing to instruct the jury to segregate the damages caused by APRO’s negligence from the damages caused solely by Sablan’s intentional conduct. APRO contends that the verdict form compounded the instructional error by not allowing the jury to segregate damages between those arising from Sablan’s intentional conduct from APRO’s negligence. And APRO argues that it was prejudiced when the trial court refused its

No. 56067-4-II

proposed instruction and when the trial court sustained an objection to APRO's closing argument about segregating damages. We agree and remand for a new trial solely on the issue of damages.

We review the language and wording of jury instructions for abuse of discretion. *In re Det. of Taylor-Rose*, 199 Wn. App. 866, 880, 401 P.3d 357 (2017). We also review a decision to not issue a jury instruction for abuse of discretion. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Taylor-Rose*, 199 Wn. App. at 880. But claims of legal error in jury instructions are reviewed de novo. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015).

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). "If any of these elements are absent, the instruction is erroneous." *Id.* An erroneous instruction that prejudices a party is reversible error. *Id.* "Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading." *Id.* Misleading closing argument can contribute to prejudice. *Id.* at 876.

A. Segregation of Damages

RCW 4.22.070(1) provides, "In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages." The entities whose percentage of fault the trier of fact should determine include the plaintiff, "defendants, third-party defendants, entities released by the

No. 56067-4-II

claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant.” RCW 4.22.070(1). The definition of “fault” in chapter 4.22 RCW does *not* include intentional torts. RCW 4.22.015.

In *Welch*, a convenience store patron was robbed and shot by another patron who was never found. 134 Wn.2d at 631. Welch sued the store for failing to maintain a safe premises for business invitees, and the store argued as an affirmative defense that any *fault* should be apportioned with the intentional acts of the robber and Welch’s own negligence. *Id.* Welch moved for partial summary judgment to strike the apportionment defense, which the trial court denied. *Id.* The Supreme Court then reversed, holding, “Intentional acts are not included in the statutory definition of ‘fault,’ and a defendant is not entitled to apportion *liability* to an intentional tort-feasor.” 134 Wn.2d at 630 (emphasis added) (citing RCW 4.22.015).

Several years later, in *Tegman*, the Supreme Court addressed joint and several liability for negligent tortfeasors, but also discussed segregation of *damages* where there are both intentional and negligent tortfeasors. 150 Wn.2d at 115. Tegman sued a law firm and several of the firm’s staff and attorneys for negligence and an array of intentional torts. *Id.* at 106-07. A nonlawyer in the firm had forged Tegman’s signature on a settlement agreement without telling Tegman about it and retained the resulting settlement money in a nontrust account. *Id.* at 106. A jury found two attorneys and a paralegal liable for negligence and legal malpractice and held them jointly and severally liable for all of the damages awarded. *Id.* at 107. One of the attorneys who was solely negligent appealed, arguing that she should not be jointly and severally liable with intentional tortfeasors. *Id.* She asserted the “damages due to intentional torts must be segregated, and that

No. 56067-4-II

under RCW 4.22.070(1)(b) she [was] jointly and severally liable only for . . . that portion of the damages resulting from negligent acts.” *Id.* at 107-08.

The Supreme Court agreed and held that “the damages resulting from negligence must be segregated from those resulting from intentional acts” and that once the intentional damages had been segregated, the defendants who were negligently at fault within the meaning of RCW 4.22.070(1) were jointly and severally liable “as to all remaining damages.” *Id.* at 105, 115. Thus, the attorney who was only negligent was not liable for any of Tegman’s damages that resulted from intentional torts. *Id.* at 119. The Supreme Court remanded for segregation of damages. *Id.* at 119-20.

The Supreme Court also explained that this segregation should occur even in cases where the harm is indivisible, like in *Tegman* where negligent parties failed to protect the plaintiff from others who intentionally inflicted harm. *See id.* at 116-18. The court reasoned, ““It does not follow that simply because the harm is indivisible that there is no basis for apportionment. It is the responsibility for causing the harm that should be the focus of the inquiry.”” *Id.* at 117 (internal quotation marks omitted) (quoting Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 41 (1992)).

The *Tegman* dissent explained that the majority opinion significantly changed the law. First, the majority disrupted the prior common law rule that “negligent actors could not reduce their liability by comparing fault to intentional actors, though they could [under *Welch*] reduce their liability by the fault of negligent parties.” *Id.* at 123 (Chambers, J., dissenting). Similarly, the majority’s holding did away with the prior rule that, when one actor’s negligence allowed another

No. 56067-4-II

actor to commit an intentional tort, “the negligent tortfeasor could not expect any reduction of liability.” *Id.* at 127 (Chambers, J., dissenting). Nevertheless, the majority maintained that damages arising from intentional torts had to be segregated and that segregation of negligent and intentional damages was feasible even in cases involving indivisible harm. *Id.* at 117.

Then in *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, plaintiffs who were sexually abused by their stepfather sued both their stepfather and the church for intentional infliction of emotional distress, and they included a claim of negligence against the church for failure to protect. 141 Wn. App. 407, 414, 167 P.3d 1193 (2007). Division One interpreted *Tegman* to hold that it was appropriate for the trial court to instruct the jury “to segregate damages resulting from negligence from those resulting from intentional acts.” *Id.* at 438. The *Doe* court emphasized the Supreme Court’s reasoning that an indivisible harm does not prevent the segregation of damages between negligent and intentional tortfeasors. *Id.* at 440.

Division One reaffirmed that interpretation two years later in *Rollins*. Rollins and others were attacked by a group of unknown teenagers on a King County Metro bus. 148 Wn. App. at 373-75. The plaintiffs sued only King County Metro for negligence and not any of the assailants. *Id.* at 372-73. The trial court specifically instructed the jury to segregate damages:

“In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County.”

Id. at 379 (quoting record). King County Metro argued that the trial court should have been required to issue additional instructions placing the burden on the plaintiffs to establish the percentage of damages resulting from negligent versus intentional conduct. *Id.* at 380. Division

No. 56067-4-II

One disagreed, explaining, “How to instruct on damages will often depend upon the circumstances of the case, which is one reason for the discretion invested in the trial judge. Here, the practical question was how to focus the jury upon the damages caused by the negligent defendant.” *Id.* at 382 (footnote omitted). “The instructions accomplished that and properly stated the law.” *Id.* Thus, the *Rollins* court relied in part on the jury instruction to affirm in that case, where the intentional tortfeasors were not defendants and where the harm was arguably indivisible because the claim against King County Metro involved a failure to protect against violence from other riders. *Id.* at 373, 382.

In sum, the *Tegman* court held that damages must be segregated among named defendants between intentional and negligent tortfeasors, even when the harm is indivisible. 150 Wn.2d at 117. And Division One has applied *Tegman* to uphold the initial segregation of damages between *nonparty* intentional tortfeasors and negligent defendants. *Rollins*, 148 Wn. App. at 382.

We agree with Division One and further conclude that where an intentional tortfeasor is not a party, the trial court must give a *Rollins* instruction to the jury. In cases with both allegedly negligent defendants and *nonparty* intentional tortfeasors, the trial court must include an instruction ensuring the jury understands that any damages caused solely by the intentional tortfeasor and not proximately caused by negligence of the defendant must be segregated from and not made a part of any damage award against the negligent defendant. *See id.*

B. Instructions in the Present Case

Both Tisdale and APRO proposed instructions that were similar to the one that Division One found to be sufficient in *Rollins*, but the trial court did not give either instruction to the jury. *See Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 655, 794 P.2d 554 (1990). Instead, the trial

No. 56067-4-II

court gave instruction 15, modeled on WPI 15.04, explaining that injuries can have multiple proximate causes and that the jury should find for APRO “if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit.” CP at 1352. The trial court also gave instruction 23, which APRO objected to, telling the jury that if it found for Tisdale, it had to “first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of [APRO], apart from any consideration of contributory negligence.” CP at 1360.

APRO also objected to the special verdict form, which allowed the jury to apportion 100 percent of the “total combined fault” between APRO and Tisdale alone, and the form required the responsibility of these two parties to add up to 100 percent. CP at 1334. Nothing in the special verdict form or in the jury instructions distinguished between apportioning fault and segregating damages. The special verdict form did not allow the jury to find Sablan responsible for any portion of Tisdale’s damages.

The trial court was correct that *Tegman* addressed the joint and several liability of at-fault defendants when the plaintiff is not at fault. 150 Wn.2d at 118-19. But the *Tegman* court also held that at-fault defendants “are not jointly and severally liable for the intentionally caused damages” that their conduct did not proximately cause. *Id.* at 119.

Here, the trial court’s instructions and the verdict form required the jury to “*first* determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you *find were proximately caused by the negligence of [APRO]*,” but the instructions identified only contributory negligence as a possible limiting factor. CP at 1360.

No. 56067-4-II

Unlike in *Rollins*, the instructions did not expressly tell the jury that it should segregate damages caused solely by Sablan from damages caused by APRO and Tisdale. The jury should have been instructed to segregate the damages that were solely caused by Sablan's intentional acts from those that were proximately caused by APRO's and Tisdale's negligence, because damages caused solely by Sablan's intentional acts do not fall within the "total fault" contemplated by RCW 4.22.070(1). And even in cases involving a failure to protect, it is "appropriate to segregate damages resulting from negligence from those resulting from intentional acts." *Doe*, 141 Wn. App. at 438. Once the amount of damages attributable solely to negligent at-fault entities has been determined, that amount can be divided between a contributorily negligent plaintiff and the negligent defendant or defendants. *See Tegman*, 150 Wn.2d at 115. Only Tisdale's contributory negligence would be subtracted from APRO's liability at that stage. *See* RCW 4.22.070(1) (including plaintiff's negligence within the definition of "fault").

Given that there was substantial evidence that Sablan's intentional tort and APRO's negligence were both causes of Tisdale's injury, APRO was entitled to a *Rollins* instruction that explained the jury should segregate the damages that were caused solely by Sablan's intentional conduct and not proximately caused by APRO's negligence. *See Cooper v. Dep't of Lab. & Indus.*, 188 Wn. App. 641, 647-48, 532 P.3d 189 (2015). Without a *Rollins* instruction, the jury instructions did not correctly state the applicable law. Both the Supreme Court and Division One have emphasized that even where causes are concurrent or a harm is indivisible, a jury can segregate damages between intentional and negligent tortfeasors. *Tegman*, 150 Wn.2d at 117; *Rollins*, 148 Wn. App. at 382. And even though both parties in this case requested instructions similar to the one given in *Rollins*, the trial court gave neither. *Crittenden*, 58 Wn. App. at 655.

No. 56067-4-II

The jury instructions addressed only contributory negligence as a limiting factor on APRO's damages, not the segregation of intentional damages from fault-based damages resulting from negligence. It would have been proper to tell the jury to differentiate between damages proximately caused by APRO's negligence and those caused solely by Sablan's intentional conduct, but the instructions do not discuss segregation at all. Without the required segregation of damages instruction, the jury may have believed that it could hold APRO liable for *all* of Tisdale's damages, even those that it may have found were caused solely by Sablan.

Tisdale contends that an explicit *Rollins* segregation instruction was not necessary because instruction 23 told the jury that it had to start with damages proximately caused by APRO, so all of the jury's consideration of liability and damages would have naturally excluded any damages caused solely by Sablan. Although instruction 23 was true and correct as far as it went, the lack of an explicit *Rollins* instruction explaining the jury had to segregate damages caused solely by Sablan, when combined with the language in the special verdict form, did not give the jury an accurate statement of the law overall.

Moreover, the absence of a *Rollins* instruction combined with the special verdict form was misleading. Despite the presence of an intentional tortfeasor, the pattern verdict form that the trial court gave the jury considered liability and damages for only negligent conduct. But even indivisible harms may have concurrent causes with overlapping responsibility for the plaintiff's damages. *Tegman*, 150 Wn.2d at 117; *Rollins*, 148 Wn. App. at 382. The special verdict form here required the jury to determine Tisdale's "total damages" and then it used language that required apportionment between APRO and Tisdale alone, requiring their percentages to equal 100 percent. CP at 1333. Even if the jury thought that Sablan was solely responsible for a portion of Tisdale's

No. 56067-4-II

“total damages,” there was no ability to reflect that determination in the verdict form. *Id.* Although the trial court reasoned that it did not need to affirmatively mention segregation of damages caused solely by Sablan so long as it otherwise correctly stated the law, this reasoning fails to account for the impact of the reference to “total damages” and segregation between only APRO and Tisdale in the verdict form.

As a result, the trial court’s instructions, without a *Rollins* instruction, and the special verdict form did not adequately inform the jury of the applicable law. *Anfinson*, 174 Wn.2d at 860. This error was also misleading because the jury was not specifically instructed to take care to avoid penalizing APRO for damages stemming solely from Sablan’s conduct that were not proximately caused by APRO’s negligence. *Id.*

And even if we assume prejudice is required, APRO suffered prejudice from the misleading instructions and verdict form. During closing argument, when APRO attempted to inform the jury that it “must segregate damages caused by intentional tortfeasors,” Tisdale objected to the argument as a misstatement of the law, and the trial court sustained the objection. 11 VRP at 2013. On one hand, a truly correct statement of the law would be that the jury must segregate damages caused *solely* by intentional tortfeasors and *not* proximately caused by the defendant’s negligence. Nevertheless, the trial court’s refusal to allow APRO to argue about segregation of damages arising solely from Sablan’s intentional tort undermines Tisdale’s argument on appeal that the trial court’s instructions as given allowed APRO to fully argue just that.

The verdict form gave the jury no indication that it could segregate damages caused solely by Sablan’s intentional conduct. Even if this case presents concurrent causes of indivisible harm, the Supreme Court and Division One have held that an indivisible harm can still lead to damages

No. 56067-4-II

that are segregable between intentional and negligent tortfeasors. *Tegman*, 150 Wn.2d at 117; *Doe*, 141 Wn. App. at 438. Thus, the lack of a *Rollins* instruction and the language of the verdict form prejudiced APRO.

CONCLUSION

It was legal error for the trial court to decline to give a *Rollins* instruction on segregating damages when the case involved a negligent defendant and a nonparty intentional tortfeasor. And collectively, the lack of a *Rollins* instruction, the sustained objection regarding segregation during closing, and the special verdict form were both misleading and prejudicial.⁴

Because of the way the instructions and special verdict form were presented to the jury, we cannot be certain whether the \$91 million verdict represented the total amount of damages caused by intentional tortfeasors and negligent parties or only the amount caused by negligent parties. Therefore, we must remand for retrial on damages. After calculating Tisdale's total damages, the fact finder must segregate the portion of the total damages, if any, solely caused by Sablan's intentional conduct. The jury's determination that Tisdale is 10 percent contributorily negligent need not be relitigated, so the trial court must then apportion to Tisdale 10 percent of the remainder after segregation, and APRO will be responsible for 90 percent of the remainder after segregation.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

⁴ For the same reasons, the trial court erred in not recognizing this error posttrial when APRO brought a motion for a new trial under CR 59. In light of the error of law in the jury instructions and verdict form, the trial court should have granted a partial new trial on damages. CR 59(a)(8).

No. 56067-4-II

UNPUBLISHED TEXT

After trial began, APRO moved to compel Tisdale to attend trial. The trial court denied APRO's motion because of APRO's failure to provide timely notice requiring Tisdale's attendance under CR 43. The trial court allowed the jury to watch a recording of Tisdale's deposition but denied APRO's motion to admit a recent surveillance video of Tisdale as an alternative to compelling his appearance. The trial court also declined to instruct the jury on the definition of a "business licensee" in contrast to a "business invitee."

APRO argues the trial court erred when it denied its request that the trial court instruct the jury on the definition of a "business licensee," denied its motion to compel Tisdale to attend trial, and excluded the surveillance video. APRO also contends that the trial court erred by denying its posttrial motion for remittitur.

We hold the trial court did not abuse its discretion when it declined to instruct the jury on the definition of a "business licensee," denied the motion to compel Tisdale to appear at trial, and excluded the surveillance video. We need not address the motion for remittitur.

ADDITIONAL FACTS

I. TRIAL

A week before trial, both APRO and Tisdale submitted witness lists naming Tisdale as a potential witness. Tisdale, along with over 100 others, was also listed as a possible witness in the joint statement of evidence. APRO did not send Tisdale's counsel a CR 43 notice before trial to compel Tisdale's attendance and testimony as an adverse party witness.

Trial began on June 2, 2021. Before opening statements, Tisdale's counsel stated that Tisdale would not be attending the trial. The next day, APRO moved to require Tisdale to attend

No. 56067-4-II

the trial, arguing that Tisdale was “listed as a witness in both parties’ cases, and he hasn’t been here the entire time.” 4 VRP at 632. Tisdale responded that APRO had not followed the procedure for compelling attendance of an adverse party under CR 43(f)(1), which required 10 days notice before trial. When the trial court asked whether Tisdale would be testifying, Tisdale’s counsel said, “I don’t know. I can’t answer that question, I really can’t.” *Id.* at 633. APRO continued to protest: “We’re happy to bring a motion of a notice to attend trial and on a motion to shorten time if we need to do that, but it’s our position that they’re just keeping him away from the jury at this point in time.” *Id.* The trial court reasoned that “in the absence of a motion or a notice,” there is no “requirement that a party actually attend their trial.” *Id.* The trial court denied the motion.

Tisdale’s doctor testified that watching videos of the assault or attending the trial would likely aggravate Tisdale’s post-traumatic stress disorder. Watching a video of the assault during his deposition had triggered a panic attack.

The following day, APRO filed a written motion to compel Tisdale to attend the trial under CR 43 and to shorten the time for serving a notice to appear at trial under CR 6. In response, Tisdale again pointed out that APRO had not timely served Tisdale with a notice to testify in compliance with CR 43(f). APRO’s counsel orally raised the motion again a few days later, explaining that he believed Tisdale’s counsel was “concealing” Tisdale from the jury. 5 VRP at 812. The trial court disagreed, explaining, “First, there’s no requirement that a party attend trial. Second, the fact that somebody puts anybody on their witness list, including their own client, doesn’t require them to produce them at trial.” *Id.* at 1033. Because APRO had failed to follow the CR 43(f) procedures for compelling Tisdale’s attendance, the trial court denied the motion.

No. 56067-4-II

In light of the ruling, APRO moved to admit Tisdale's videotaped deposition under CR 32, which allows the use of a witness's deposition when the witness is unable to testify. Tisdale opposed the use of the deposition, again arguing that there had not been sufficient notice. The trial court allowed APRO to play Tisdale's deposition on the basis that APRO had relied on Tisdale testifying at trial, explaining, "[I]f you're not going to produce Mr. Tisdale live, I think that the defense is well within the rules to play the deposition." 7 VRP at 1406.

APRO also moved to admit a surveillance video of Tisdale recorded by private investigators during the trial, which showed Tisdale driving. It also showed him walking with another person who was carrying alcohol. Tisdale's counsel stated that Tisdale's reason for not attending the trial was because he suffered post-traumatic stress disorder, not because he was incapable of running errands or driving. The trial court denied the motion, reasoning that APRO could have compelled Tisdale's appearance if they had followed CR 43 procedures and that the surveillance video was not a substitute for appearance.

APRO then argued that the video was admissible as impeachment evidence to undercut Tisdale's claim for damages and to raise questions in the jury's mind about Tisdale's failure to attend the trial. "They are claiming that he has complete disability and . . . can't manage his own daily affairs. He no longer consumes alcohol and he cannot drive. The surveillance video clearly contradicts that testimony." 9 VRP at 1643. The trial court declined to change its ruling.

Throughout the trial several witnesses testified about the extent of Tisdale's injuries, their effect on his daily living, and the services he would need going forward. For example, Tisdale, who was a former professional dancer, briefly worked at a cannabis dispensary after the assault. His supervisor from the dispensary testified that, while Tisdale could perform his duties as a

No. 56067-4-II

cashier, when he was promoted to assistant manager, he could not perform necessary tasks such as tracking cash deposits and scheduling, and he was fired.

A neurosurgeon testified that a 2019 MRI of Tisdale's brain showed that part of Tisdale's brain tissue had died, leaving scar tissue that "often serve[s] as a focus for seizures." 5 VRP at 864. The neurosurgeon stated that because of the damage to his brain, Tisdale was at high risk for depression, memory problems, and loss of executive function. He also had an increased risk of dementia from the brain damage and a reduced life expectancy because of his seizures.

Tisdale's primary doctor testified that Tisdale "had several episodes of multiple seizures" in the years since the assault. 4 VRP at 763. Tisdale's doctor also testified that Tisdale suffered from memory and concentration issues that caused him to frequently forget to take the medication for his seizures. Tisdale would benefit from a home care companion to help him remember to take his medications and attend appointments. A life planner testified that the annual cost of a home care companion was approximately \$215,000 per year, with a total cost of roughly \$7,670,000 to \$9,250,000 over Tisdale's projected lifespan.

After Tisdale rested, APRO moved for a directed verdict under CR 50 that Tisdale lost his status as a business invitee and became a business licensee, when he left the store to confront Sablan. If Tisdale were a licensee instead of an invitee, then APRO would have had a lesser duty to protect him from dangerous conditions on APRO's property. *See* RESTATEMENT (SECOND) OF TORTS §§ 342, 344 (AM. L. INST. 1965). The trial court denied the motion, explaining that Tisdale had not left APRO's property when he pursued Sablan into the store's parking lot, so he had retained his business invitee status throughout the incident.

No. 56067-4-II

APRO played Tisdale's deposition during the presentation of its case. The deposition had been taken approximately seven months before the trial. In the deposition, Tisdale acknowledged that he had continued to consume alcohol after the assault despite his health care providers' recommendations not to. He denied currently consuming alcohol. He also stated that he had instructions to not operate vehicles for six months after a seizure, although he had continued to do so. Tisdale admitted that his driver's license was currently suspended, although he was not sure why.

II. ADDITIONAL JURY INSTRUCTIONS AND CLOSING ARGUMENT

Instruction 11 defined a "business invitee" as "a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest or business benefit." CP at 1348. APRO proposed additional jury instructions defining a "business licensee," the duty of care owed to a business licensee, and how a business invitee becomes a licensee by exceeding the scope of their invitation. When the trial court declined to give APRO's proposed instructions to the jury, APRO objected, arguing that Tisdale "strayed from the store and went from a passive bystander to a proactive party by charging Sablan. His status [had] changed from a business invitee to a licensee, so . . . we think it would have been appropriate to provide the definition of a [']licensee.[']" 10 VRP at 1944.

Instead, the trial court's instruction 10 explained to the jury that an owner of a business owed a duty of care "to a person who has an express or implied invitation to come upon the premises," and the duty was "to exercise ordinary care to protect the person from criminal harm that the operator knows or has reason to know is occurring or about to occur and reasonably foreseeable criminal conduct by third persons." CP at 1347.

No. 56067-4-II

Instruction 23 informed the jury, “The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.” CP at 1361.

During closing argument, Tisdale reminded the jury that he had lost the use of brain tissue, which affected his memory, attention, and moods. He referenced the expert testimony from multiple doctors agreeing that Tisdale’s seizure disorder was permanent. Tisdale drew a comparison to the salaries of professional athletes and corporate executives to argue that if other corporations “are valuing their assets at hundreds of millions of dollars, then APRO should be valuing their assets and their customers who are coming in and buying their products.” 11 VRP at 1979. He contended that the value of his damages was \$91 million. APRO did not object to Tisdale’s closing argument.

III. MOTION FOR NEW TRIAL OR REMITTITUR

After the jury’s verdict, APRO moved for a new trial or in the alternative, remittitur of the verdict to \$15 million, reiterating many of the arguments recited above.

The trial court rejected APRO’s reiterated legal arguments and found that substantial evidence supported the jury verdict and damage award. It reasoned that there was conflicting testimony from multiple experts at trial regarding the extent and lifetime consequences of Tisdale’s injuries. The trial court reasoned that the jury had found some expert testimony more compelling than others and denied the motion for new trial or remittitur. APRO then appealed the denial of the motion.

No. 56067-4-II

ANALYSIS

I. BUSINESS LICENSEE INSTRUCTION

APRO argues that the trial court erred by declining to instruct the jury on the definition of a “business licensee,” and had the jury found Tisdale was merely a licensee at the time of the assault, that would have reduced APRO’s duty of care. APRO contends the jury should have been asked to determine as a factual matter whether Tisdale became a licensee when he left APRO’s store to confront Sablan in the parking lot. APRO claims the instructions instead told “the jury that Tisdale was an invitee as a matter of law.” Am. Br. of Appellant at 41. We disagree.

When the possessor of land allows public entry for business purposes, they may be liable “to members of the public . . . for physical harm caused by . . . intentionally harmful acts of third persons” and for the failure of the possessor to discover the danger and warn visitors or otherwise protect against it. RESTATEMENT, *supra*, § 344. The fact that a danger is generally known to the person injured does not necessarily insulate the possessor of the land from liability. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 770, 840 P.2d 198 (1992).

In contrast, a possessor of land is liable for harm to licensees caused by conditions on their land if the possessor “knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger,” “fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk,” and “the licensees do not know or have reason to know of the condition and the risk involved.” RESTATEMENT, *supra*, § 342.

We note that the denial of a CR 50 motion for a directed verdict does not constitute a ruling as a matter of law. *See Morton v. Lee*, 75 Wn.2d 393, 397-98, 450 P.2d 957 (1969) (affirming

No. 56067-4-II

the denial of a motion for a directed verdict because reasonable minds could differ on the factual issue, which was a question for the jury).⁵ When there is conflicting evidence about a plaintiff's status as a licensee or invitee, it is proper to submit the question to the jury. *Adkins v. Alum. Co. of Am.*, 110 Wn.2d 128, 149-50, 750 P.2d 1257 (1988). However, when the facts regarding a plaintiff's entry onto a property are uncontested, "the legal status of the entrant as invitee, licensee, or trespasser is a question of law." *Ford*, 67 Wn. App. at 769.

Here, it was undisputed that the convenience store was open to the public, that the parking lot was a part of APRO's property, and that Tisdale entered the property for a business purpose as a customer of the convenience store. Accordingly, Tisdale was a business invitee.

In *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997), the Supreme Court expressly adopted *Restatement* § 344 to hold that "a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons. The business owner must take reasonable steps to prevent such harm in order to satisfy the duty." There is no duty "unless the harm to the invitee by third persons is foreseeable," which "is ordinarily a fact question" for the jury. *Id.*; see also *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 768, 344 P.3d 661 (2015) (explaining that with regard to *Restatement* § 344, "foreseeability is not merely used to determine the scope of a duty already owed, it is a factor in determining whether the duty is owed in the first place"). While foreseeability is generally

⁵ "A trial court may grant a motion for a directed verdict only if there is no evidence or reasonable inference which would support a jury verdict in favor of the nonmoving party." *Bays v. St. Lukes Hosp.*, 63 Wn. App. 876, 880, 825 P.2d 319 (1992). "Likewise, the denial of a motion for a directed verdict should be reversed only if no evidence or reasonable inference exists which would be sufficient to sustain a verdict for the nonmoving party." *Id.*

No. 56067-4-II

determined by a trier of fact, it ““will be decided as a matter of law only where reasonable minds cannot differ.”” *Mortensen v. Moravec*, 1 Wn. App. 2d 608, 616, 406 P.3d 1178 (2017) (quoting *Schooley v. Pinch’s Deli Mkt., Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998)).

The jury instructions in this case explained that a business owed a duty of care “to a person who has an express or implied invitation to come upon the premises.” CP at 1347. That duty entailed exercising “ordinary care to protect the person from criminal harm that the operator knows or has reason to know is occurring or about to occur and reasonably foreseeable criminal conduct by third persons.” *Id.* 1347. And the instructions defined a “business invitee” as “a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest or business benefit.” CP at 1348. These instructions were consistent with *Restatement* § 344, which the Supreme Court has adopted.

APRO relies on *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994), to argue that Tisdale forfeited his status as a business invitee by leaving the store to protect his own personal property and confronting Sablan in the parking lot. In *Tincani*, a zoo visitor was injured when he fell off a rock after wandering off of the marked trails. 124 Wn.2d at 125-26. *Tincani* is distinguishable because Tisdale stayed on the public portions of the APRO property, the store and the parking lot.

APRO argues that another way to exceed the scope of a business invitation is to engage in conduct unconnected to the purpose of the invitation. APRO relies on *Adkins* and *Beebe v. Moses*, 113 Wn. App. 464, 54 P.3d 188 (2002), to argue that Tisdale lost his business invitee status when he left the store to confront Sablan because confronting Sablan was not a business purpose that had economic benefit for APRO or Tisdale. In *Adkins*, a roofer was injured when he reached into

No. 56067-4-II

an exhaust vent to retrieve a fallen tube of caulk. 110 Wn.2d at 131. But there, the scope of the business invitation was governed by a roofing contract that stated what Adkins was invited to do on the property. *Id.* at 150. No such written limitations existed here. And in *Beebe*, the plaintiff was injured at a family member's home, and there were facts supporting a conclusion that the plaintiff was making a social visit when he was injured, rather than visiting the property for a business purpose. 113 Wn. App. at 468.

Here, APRO's property was open to the public, and while some conduct or activity could exceed the scope of an implied invitation to the public for business purposes, it seems clear that customers were invited to park their cars in APRO's parking lot. And it is eminently foreseeable that invitees would interact with others in the parking lot, especially if they thought their cars were being broken into. The cases APRO cites do not suggest that these facts supported a licensee instruction. Moreover, the instructions provided the jury with the definition of a "business invitee," but they left it for the jury to determine whether Tisdale met that definition. The trial court did not commit legal error, nor did it abuse its discretion when it declined to give a business licensee instruction in this case.

II. EVIDENTIARY ISSUES

APRO argues that the trial court erred by denying APRO's motion to compel Tisdale's attendance at trial. APRO contends that it "reasonably relied on Tisdale's representation in his witness list and the Joint Statement of Evidence that he would testify at trial, and thus a notice to attend trial under CR 43 was unnecessary." Am. Br. of Appellant at 58. And APRO asserts that declining to require Tisdale to testify at trial prejudiced APRO.

No. 56067-4-II

APRO also argues that the trial court erred by excluding a video of Tisdale filmed by private investigators during the trial without addressing the *Burnet v. Spokane Ambulance*⁶ factors. APRO insists that the video was admissible under the evidence rules related to relevance, including ER 403, and that the trial court erred by finding the video irrelevant and cumulative. APRO contends, “The exclusion of the video, combined with the failure to direct Tisdale to appear at trial, deprived the jury of the opportunity to fully assess Tisdale’s damages.” Am. Br. of Appellant at 62. We disagree.

Burnet addressed a trial court order limiting discovery and precluding expert testimony as a sanction for a violation of a discovery order under CR 37. 131 Wn.2d at 492. Trial courts must consider the factors from *Burnet* “before excluding untimely disclosed evidence” because excluding such evidence “amounts to a severe sanction.” *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015); *see also Petters v. Williamson & Assocs., Inc.*, 151 Wn. App. 154, 171, 210 P.3d 1048 (2009) (stating that *Burnet* applies only to CR 37(b)(2) sanctions).

This case does not involve a discovery violation under CR 37, and APRO does not show that *Burnet* has been extended to apply to evidentiary rulings related to relevance or failure to comply with CR 43. Thus, *Burnet* is not the correct lens to analyze APRO’s claim of error. Here, the trial court ruled that APRO had not followed the proper procedures for securing Tisdale’s appearance at trial under CR 43(f). And the trial court allowed APRO to play Tisdale’s video deposition as a substitute for live testimony so that the jury could assess his credibility.

⁶ 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Before excluding evidence as a sanction for a discovery violation, a court must consider whether the “refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial” and whether a lesser sanction would be an adequate remedy. *Id.*

No. 56067-4-II

Further, we review a trial court's evidentiary decisions, including those based on relevance, for abuse of discretion. *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). APRO's purpose of presenting the surveillance video was for impeachment, but the video was not admissible for impeachment purposes. "Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). APRO offered the video to impeach Tisdale's assertions about the scope of his injuries and damages. But Tisdale's claims for damages were based on expert testimony from doctors who explained that Tisdale would endure seizures and an array of cognitive and mental health problems for the remainder of his life. Tisdale did not argue that he was unable to drive or walk around town, so the video was not properly offered for impeachment purposes.

Finally, even if relevant for impeachment purposes, the video was cumulative under ER 403, which allows for exclusion of relevant evidence "if its probative value is substantially outweighed" by considerations such as "needless presentation of cumulative evidence." At least one of Tisdale's own witnesses had referred to his continued alcohol consumption as evidence of lasting brain damage that interfered with his ability to follow recommendations from doctors. And Tisdale admitted to driving and drinking alcohol even when his doctors recommended against these things. Thus, the video was cumulative.

In sum, the trial court's decisions were evidentiary rulings, not discovery sanctions. The trial court did not exclude all testimony on Tisdale's alcohol consumption or continued driving, and it allowed APRO to play Tisdale's two-hour-long deposition for the jury. Although it would not have been unreasonable for the trial court to compel Tisdale's appearance, it was also not an

No. 56067-4-II

abuse of discretion under these circumstances to decline to do so but allow the jury to see his deposition testimony. And APRO has not shown what information the surveillance video would have provided that was not duplicative of Tisdale's deposition or other testimony. We hold that the trial court did not abuse its discretion by refusing to compel Tisdale to attend trial or by excluding the surveillance video.

For the same reasons, the trial court properly denied APRO's motion for a new trial based on the same arguments. And because we remand for a new trial on damages, we need not address the challenge to the trial court's denial of remittitur.

CONCLUSION

We remand for a new trial solely on the issue of damages. After calculating Tisdale's total damages, the fact finder must segregate the portion of the total damages, if any, solely caused by Sablan's intentional conduct. The jury's determination that Tisdale is 10 percent contributorily negligent need not be relitigated, so the trial court must then apportion to Tisdale 10 percent of the

No. 56067-4-II

remainder after segregation, and APRO will be responsible for 90 percent of the remainder after segregation. We otherwise affirm.

Glasgow, CJ
Glasgow, C.J.

We concur:

J, J
Lee, J.

Veljaci, J.
Veljaci, J.