3-19-2008

# Chapman v. Chapman Appellant's Brief Dckt. 34614

IN THE SUPREME COURT OF THE STATE OF IDAHO

KAY CHAPMAN, an individual,

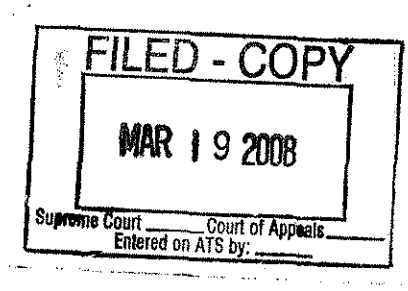
Plaintiff/Appellant,

v.

VONDEL and BECKY CHAPMAN, husband and wife,

Defendants/Respondents.

Supreme Court No. 34614




**APPELLANT'S BRIEF**

Appealed from the District Court of the Seventh Judicial

District of the Seventh Judicial District, in and for the County of Bingham,

Honorable Darren B. Simpson, District Judge, presiding.

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TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

## II. STATEMENT OF THE CASE

### A. NATURE OF THE CASE

The instant case is a claim for relief brought by the appellant (plaintiff below) to recover for injuries sustained by the appellant while on the premises of the respondents (defendants below).

This area of the law is usually labeled as "premises liability." This is an area of the law where legal distinctions and limitations are drawn based upon the status of the person coming on the premises of another. However, the usual elements of negligence such as proof of breach, actual cause and legal cause are all applicable once the appropriate duty has been "found."

In the instant case the appellant (plaintiff below) had the status (at the time of the event) of being a licensee inasmuch as she was a social guest of the respondents at the time of the event in question.

### B. COURSE OF THE PROCEEDINGS BELOW

This instant case was initiated by the appellant filing a Verified Complaint and Demand for Jury Trial on February 1, 2006. (R. p. 6). The complaint generally alleges a negligent failure to warn on the part of the respondents in failing to warn the appellant of the dangers and unsafe conditions existing on and in their premises and a failure to maintain their premises in a safe and reasonable manner together with an allegation that one of the respondents was negligent in her negligent attempt to "set" the right arm in the shoulder socket of the appellant after the appellant sustained a dislocated shoulder. The verified c complaint also sets forth a claim of negligent design of the respondents' premises including

the negligent placement of a rug on a tile floor within the premises. The complaint set forth the injuries sustained by the appellant as a result of the fall that she sustained while in and on the respondents' premises. The complaint of the appellant was answered by the defendants on or about July 27, 2006. (R., page 14).

The respondents moved the trial court to exclude the expert testimony of the appellant's biomechanical expert, Matthew Meacham. The court entered a Memorandum Opinion and Order granting in part, denying in part, the defendants' Motion to Exclude Expert Witness on or about May 18, 2007. (R. p. 20). The court concluded that the plaintiff's expert, Matthew Meacham, could not testify that the bathroom created a dangerous condition and offered as rationale for this conclusion "that the probity value of Mecham's conclusion as to the dangerousness of the bathroom is outweighed by its prejudicial effect". . . and that thee ultimate conclusion that Mecham draws does not aid the trier of fact to understand the evidence." (R. p. 25).

The court ruled that the expert witness, Matthew Mecham, could provide to the jury the scientific data he had collected; his measurements, the photographs taken, and his examination of the rug and its backing and "any testimony relating to the flooring conditions and their effect upon the rug." But, "the ultimate conclusion, however, is squarely within the competence of the average juror." (R. p. 25). This ruling of the court resulted in the final investigative report of Matthew Meacham being modified. The modification was the excision from Matthew Mecham's report that the bathroom and the bathroom rug of the respondents constituted a dangerous and hazardous condition. (R. p. 34, Exhibit K). The

other result of this ruling by the court was that Matthew Meacham did not testify to the jury as to the hazardous and dangerous condition of the bathroom and of the bathroom rug at time of trial. (*See* Tr. pp. 61-79).

The appellant did make an offer of proof of Matthew Meacham's intended testimony to the court. (Tr. pp. 61-78). This offer of proof was refused by the court. (Tr. pp. 77-78).

It should be noted that the initial attempt at trial was thwarted by a mistrial occurring based upon the inappropriate introduction into *voir dire* of the question of insurance coverage. The respondents' attorney moved for a mistrial which motion was granted by the court. (R. p. 32).

The second attempt at trial was on August 8, 2007. As noted in the Minute Entry, the trial proceeded from August 8 to August 10, 2007. The jury returned a verdict (on special verdict) including that the respondents (defendants below) were not negligent, or if negligent, that their negligence was not the proximate cause of the plaintiff's injuries. (R. p. 37). The court then entered a judgment on special verdict dated August 10, 2007. (R. p. 40).

The appellant then filed a Notice of Appeal on September 20, 2007, and later filed an amended Notice of Appeal. (R. pp. 53-57).

## C. STATEMENT OF THE FACTS

At the time of the incident, the appellant (hereinafter Kay) was fifty-three (53) years of age, (Tr., p. 109, ll. 23-25), and was a longtime resident of Idaho Falls, Idaho. (Tr., p. 108, ll. 19-23). She was a registered nurse (Tr., p. 110, ll. 1-2) and had been for eighteen years. (Tr., p. 110, ll. 3-5).

Kay entered the residence of the respondents (hereinafter, Vondel and Becky) on

March 19, 2005. Vondel and Becky's residence is located in Firth, Idaho. (Tr., p. 112, ll. 15-18; l. 20). Kay had been invited to the premises by reason of a surprise birthday party which was to be given for a mutual friend, Chad Williams. (Tr., p. 112, ll. 21-25). Previous to the party, Kay had received a written invitation and had also received oral notice of the surprise birthday party. (Tr., p.113, ll. 1-9). Kay had read the written invitation to the surprise birthday party for Chad Williams. The written invitation had specifically instructed that this was a "bring your own bottle" party, and if necessary, the invitees should bring sleeping bags, blankets and pillows for a "sleep over" if you were not able to drive home safely. (Tr., p. 113, ll. 15-20)

In preparation for the surprise birthday party, Kay procured a pedicure and a manicure, and had bought fruit for a "fruit bowl" to take to the surprise birthday party. (Tr., p. 114, ll. 5-17). Prior to leaving for the surprise birthday party, Kay had visited with a family friend, Greg Mickelsen, at her home. (Tr., p. 116, l. 18 – p. 117, l. 10). Mr. Mickelsen testified that Kay was not under the influence of alcohol before she went to the birthday party. (Tr., p. 227, ll. 1-9).

For the occasion, Kay had selected some shoes that had three inch heels. Kay had worn the shoes before and had no problem wearing them and testified that the shoes were not "unstable." (Tr., p. 117, ll. 23-24 – p. 118, l. 6).

Kay arrived at Vondel and Becky's residence at approximately 4:15 p.m.-4:20 p.m. (Tr., p. 118). Vondel saw and observed Kay arrive at his house. (Tr., p. 119, ll. 19-24). Kay denies drinking prior to coming to the party. (Tr., p. 121, ll. 7-11). While at the party, Kay d did have "two or three swallows of an alcoholic drink", (Tr., p. 121, l. 15 – p. 122, l. 7) and

observed at least three other people drinking at the party. (Tr., p. 123, ll. 19-22).

Kay then found it necessary to locate a bathroom. Kay cannot remember having entered this bathroom before March 19, 2005, the date of the event (Tr., p. 124, l. 25 – p. 125, l. 2) and noted that it was the "most unusual bathroom I've ever seen." (Tr., p. 179, l. 24 – p. 180, l.1). It was necessary for Kay to be directed to the bathroom by Becky. (Tr., p. 125, ll. 3-11). Before Kay entered the bathroom, Becky did not supply any instructions or warnings regarding the bathroom. (Tr., p. 125, ll. 12-18). Specifically, Becky did not say anything about the new rug that had been placed in the bathroom for the party. (Tr., p. 125, ll. 19-23). Becky did not tell or instruct Kay how to use the bathroom. (Tr., p. 125, l. 24 – p. 126, l. 1).

Kay testified to the jury that upon entering the bathroom her attention was on the toilet and nothing else. (Tr., p. 126, ll. 15-21). Kay testified that she did what she would normally do in this situation and did nothing wrong. (Tr., p. 127, ll. 1-21). Kay testified upon cross-examination that she did not notice the rug and did not know whether the rug was attached to the floor or not attached to the floor and did not know anything about the backing on the rug. (Tr., p. 151, ll. 13-22). Kay assumed that she was safe in the bathroom. (Tr., p. 189, ll. 1-3). Kay stated at the time of her trial testimony that she would have been more cautious if she had known about the situation of the slick floor and the rug, (Tr., p. 188) and noted that the rug slid out from under her and that she was then pitched forward into the recessed shower. (Tr., pp. 176-177).

Kay did not know of the recessed shower until using the facilities and directly facing the recessed shower. (Tr., p. 191, ll. 7-9) (*See also* Tr., p. 152, ll. 6-9).

As a result of the rug slipping out from under her and her pitching forward, Kay fell into the recessed shower and struck her body which resulted in severe and painful injuries, most notably to her right shoulder. (Tr., p. 135, ll. 1-4). A couple of days after the event, photographs were taken by Mr. Mickelsen of Kay which depicted the injuries that she had sustained in Vondel and Becky's residence. (See Exhibit C; Tr. p. 137, ll. 10-13). The injuries also included bruising and abrasions to her knees, legs and right wrist. (*See* Tr., pp. 138-139). The shoulder injuries resulting from the fall required surgery by an orthopedic surgeon at Mountain View Hospital on March 30, 2005. (Tr., p. 140, ll. 6-19). Kay underwent physical therapy for a period of eleven weeks as a result of the injuries she sustained and the subsequent surgery and was unable to work for a period of nine to eleven weeks. (Tr., p. 141, ll. 10-15 – p. 144, ll. 9-11). Kay required help in her daily routine for six (6) weeks after the fall into the shower (Tr., p. 150 – p. 151). Kay's medical expenses were $21,425.93 as a result of her fall into the shower (Supplemental R. P. 54). Prior to her fall into the recessed shower, Kay had not sustained any previous injury to her right arm or shoulder. (Tr., p. 151, ll. 9-10).

At trial, Kay's expert witness, Matthew Mecham, testified that he was a forensic engineer that specialized in accident reconstruction and biomechanical evaluations. (Tr., p. 25, ll. 10-13). Mr. Mecham has also had extensive experience in shoulder and knee injuries. (Tr., p. 26, ll. 6-21). Mr. Mecham testified as to his extensive educational background and credentials, (Tr., p. 26-30) which qualified him to testify in the instant case. Some of Mr. Mecham's credentials that especially qualified him to testify in Kay's trial were being an accredited accident reconstructionist, a certified medical investigator and his background and

abilities in safety inspections and evaluations particularly in slip and fall and trip and fall analysis. (Tr., pp. 28-30). Mr. Mecham reviewed with the jury the information and data that he relied upon in giving his testimony and opinions. These included interrogatories, request for productions, deposition transcripts of the principals, and his actual visit to the accident location where he took measurements and photographs. (Tr., pp. 34-36).

Based upon Mr. Mecham's examination of the premises, he established that there was no shower door in the bathroom, that the distance from the lip of the toilet to the recessed shower was 24 inches. (Tr., p. 35). Mr. Mecham also established that the distance from the toilet floor level to the bottom of the shower recess was 14 inches. (Tr., pp. 43-46).

In re-creating the conditions at the time of the event, Mr. Mecham opined that when Kay was seated on the toilet, it was approximately 8 – 8 1/4 inches from the tip of Kay's shoe to the drop-off into the shower. (Tr., p. 44, ll. 15-19). Mr. Mecham noted that there was no barrier or edge protection between the toilet area and the shower area. (Tr., p. 46, ll. 1-12). Mr. Mecham noted upon cross-examination that Kay's position that lead to the fall, or drop off into the recessed shower, could not have been replicated if there had been a door or a wall between the toilet area and the recessed shower. (Tr., p. 83).

Critically, Mr. Mecham observed and opined that a person upon entering the bathroom would not be aware of the recessed shower area. (Tr., p. 47, ll. 10-15; p. 103, ll. 16-19).

Mr. Mecham observed that there was tile in the toilet area (Tr., p. 47, l. 20) and established that the rug that he examined was the same rug that was on the bathroom floor on March 19, 2005, and had been inspected by Mr. Mecham previously. (Tr., p. 48, ll. 10-15)

Mr. Mecham stated to the jury that the rug would increase the probability of a fall, and that this rug did contribute to the fall in this instance. (Tr., pp. 49 – 50, l. 16).

Mr. Meacham's observations of the rug indicated to him that the rug was light weight and that the backing of the rug was of a nylon type, and it was not a non-slip backing. Mr. Meacham also observed that the rug was not attached to the floor. (*See* Tr., p. 49, l. 17 – p. 50, l. 19). The rug's fiber itself was 2 inches in length and would be of the type that would wrap around shoes and become snagged on a part of the clothing. (Tr., p. 50, l. 22 – p. 51, ll. 5-10).

Mr. Mecham observed and opined that the shoes that were worn by Kay on the day of the event were not defective and did not increase the potential for the fall. (Tr., p. 52, ll. 23 – p. 53, l. 1).

Mr. Mecham opined that the contributing factors to the fall were as follows:

1. A sudden drop-off;
2. The rug;
3. There was no edge protection; nothing to stop a person from pitching forward; and
4. The close proximity of the drop-off and the toilet. (*See* Tr., p. 53, ll. 2-9).

Mr. Mecham told the jury that the solution to fix the bathroom was to either fill in the shower or run a wall or door between the toilet and the shower area. (Tr., p. 54, ll. 10-23). The monies that would be needed to cure or remedy the defective condition of the bathroom would be in the area of $500. (Tr., p. 55, ll.1-12).

Mr. Mecham stated to the jury that Kay's injuries were consistent with Kay's explanation of the fall (Tr., p. 57 - 58) and that the photographs taken of Kay two days after the fall collaborated this conclusion. (See Exhibit C).

Mr. Mecham testified that if the area that Kay had fallen onto (or into) had been level, her injuries would have been less severe. (Tr., p. 60, ll.17-24). Mr. Mecham stated that all of his opinions were, to a reasonable degree, of scientific and biomechanical probability. (Tr., p. 61, ll. 1-6).

After Mr. Mecham delivered his testimony that conformed to the boundaries established by the court's pre-trial order excluding portions of his opinions, the plaintiff made an offer of proof that the bathroom configuration, the bathroom floor and the bathroom rug, were a significant factor in Kay's fall and that these items formed a hazardous condition "that was a proximate or contributing factor to the cause of her fall and the severity of Kay Chapman's injuries." (This offer of proof is found in the transcript at pages 61-63.) Mr. Mecham stated that these opinions were based upon a reasonable degree of scientific and biomechanical probability. (Tr., p. 63, ll. 8-11). The court refused this offer. (Tr., p. 77-78).

### D. COURSE OF THE PROCEEDINGS ON APPEAL

As noted in the course of proceedings below, the appellant (Kay) filed a Notice of Appeal and an Amended Appeal from the jury's and the lower court's verdict and order on verdict.

## III. ISSUES PRESENTED ON APPEAL

A. DID THE COURT ERR IN EXCLUDING MATTHEW MECHAM'S OFFER OF PROOF ?

B. DID THE COURT ERR IN REFUSING TO INSTRUCT THE JURY WITH PLAINTIFF'S PROPOSED INSTRUCTIONS NUMBERED 18, 20 AND 24 ?

C. DID THE COURT ERR IN REFUSING TO INSTRUCT THE JURY WITH PLAINTIFF'S PROPOSED INSTRUCTIONS NUMBERED 14 AND 15?

D. WAS THE JURY VERDICT CONSISTENT WITH THE EVIDENCE PRESENTED AT TIME OF TRIAL ?

## IV. ARGUMENT

### A. THE COURT ERRED IN EXCLUDING THE EXPERT WITNESS CONCLUSION OF MATTHEW MECHAM.

As indicated, *supra*, Matthew Mecham was qualified as an expert in the areas of forensic engineering and of biomechanical engineering. Matthew Mecham, by reason of his credentials, his inspection of the bathroom, and of the rug, was competent to testify in this matter in regard to accident reconstruction and to biomechanical evaluations including safety inspections. (*See* Tr., pp. 23-30). Mr. Mecham complied with Rule 703 of the Idaho Rules of Evidence in that the facts or data upon which he relied in order to render opinions were exhaustively explained by Mr. Mecham. (See Tr., pp. 39-45). It can be fairly concluded that from a review of the Trial Transcript that there was no objection to the knowledge, experience or expertise of Mr. Mecham in these identified areas.

The standard of review for this court in deciding this issue is whether the trial court abused his discretion in excluding Mr. Mecham's testimony. *See* e.g., Kolln v. St. Luke's Regional Medical Center, 130 Idaho 323, 327; 940 P.2d 1142, 1146, (Idaho 1997).

What were the opinions that were excluded by the court? The opinions as to the bathroom configuration, the bathroom floor and the bathroom rug, were, as delivered by Mr.

Mecham during his offer of proof as follows:

> My opinion is that it was a hazardous condition, and it did – it was a proximate or contributing factor to the cause of her fall.
> (Tr., p. 62, ll. 19-21).

Further, Mr. Mecham refined that opinion in stating:

> I believe that it did pose a danger and a hazard, and it was a contributing factor to not only the fall, but the severity of Kay Chapman's injuries. (Tr., p. 63, ll. 5-7).

Mr. Mecham also posited that his opinions were based upon a reasonable degree of scientific and biomechanical probability. (Tr., p. 63, ll. 8-11). The exclusion of Mr. Mecham's testimony as outlined, *supra*, was fatal to the Kay's case at the time of trial. There are multiple reasons upon which this statement may be made. A review of the jury instructions that were given or refused would emphasize the glaring absence of the opinion of the case expert.

For example, Plaintiff's Requested Instruction No. 12 and the Court's Instruction No. 13 stated to the jury the following:

> A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such an opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

The instruction cautions the jury that they are not bound by "such opinion." This would blunt any prejudice. If the jury disagreed with Mr. Mecham, they are advised that they have the right to do so.

There was only one expert that testified at the time of trial. Opposing counsel argued the fact that Kay's expert did not conclude that the bathroom was dangerous or hazardous. You therefore have the situation where the court excludes "the ultimate conclusion" that the

bathroom is dangerous and then allows the opposing counsel to comment to the jury that there must be some glaring problem with Kay's case in as much as her own expert did not conclude that the bathroom was dangerous or hazardous.

The court's instructions numbered 10, 22, 23 and 24 "speak" in terms of unreasonable risks of harm, dangerous or defective conditions or of dangerous or existing hazards. Not to allow the single qualified expert, and the linch pin of Kay's case, to testify in regard to these very conditions that must be found by the jury, was a mortal blow to Kay's case. The judge advised the jury that they must conclude that these conditions exist for Kay to prevail but then prohibits Kay's expert from testifying to the jury that these conditions, based upon his expertise, knowledge and experience, do exist and did exist on March 19, 2005.

The rules of evidence that exist in Idaho would not prohibit or exclude the testimony of Mr. Mecham. Rule 702 states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Rule 702, IRE).

Rule 704 also does away with the archaic prohibition in regard to rendering an opinion on the ultimate fact or issue of a case. Rule 704 states as follows:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Rule 704, IRE).

On the "liberal change" as evidenced by the promulgation of Rules 702 and 704, a commentator has stated thusly:

> This change in viewpoint concerning "ultimate fact" opinion resulted from the realization that the rule excluding opinion on ultimate facts is unduly restrictive, and can pose many close questions of application. The rule can

> unfairly obstruct the presentation of a party's case, to say nothing of the illogic of the notion that opinions on ultimate facts usurp the jury's function. In jurisdictions where the traditional prohibition survives, there can be time-consuming arguments over whether an opinion concerns an ultimate fact. 1 McCormick on Evidence, §12 (6 Ed.) (*See* FN 16) (emphasis added).

As to the trial court's decision that the opinions that were being offered by Mr. Mecham were in the common province of the jury, the following extracts from treatises and from cases cast light on the purposes and philosophies of Rule 702 and Rule 704. In Carroll v. Otis Elevator Company, 896 F.2d 210, 211 (7th Circuit 1999), in an action for personal injuries arising out of a fall on an escalator after an unidentified child pushed a red emergency stop button, the trial court acted within its discretion to permit the plaintiff's expert psychologist to testify that the button's color made it more attractive to children; it was stated:

> While it is true that one needn't be B. F. Skinner to know that brightly colored objects are attractive to small children, and that covered buttons or those with significant resistance are more difficult to actuate by little hands, given our liberal federal standard, the trial court was not 'manifestly erroneous' in admitting this testimony.

Or, as stated by Wigmore:

> The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. 7 Wigmore Evidence, Chadbourn Rev., (1978) § 1923, pp. 31-32.

In Kopf v. Skyrm, 993 F.2d 374, 377 (4th Cir 1993) a civil rights actions arising out of alleged improper use of force by police, the trial court erred in precluding experts who were testifying that defendants' actions were brutal and excessive. The appellant court stated:

> The subject matter of Rule 702 testimony need not be arcane or even especially difficult to comprehend. If, again in the disjunctive, the proposed testimony will recount or employ "scientific, technical, or other specialized knowledge, it is a proper subject. There is no gap between the "specialized knowledge" that is admissible under the rule and the "common knowledge" that is not. The boundary between the two is defined by helpfulness.
>
> The authors of Federal Practice and Procedure have observed:
>
> Expert testimony is often received on the subject of causation, Thus, courts commonly admit expert testimony based on the evaluation of physical evidence at an accident scene to determine the likely cause of death or injury. Similarly, courts have permitted experts to testify as to whether a product or piece of machinery involved in an accident was the cause of that accident or had a design defect that rendered it unsafe. Federal Practice and Procedure, 29 Fed. Prac. & Proc., § 6264 (2007) (*See* FN 60).

It appears that the trial judge concluded that since the jury with their collective common sense could determine whether the bathroom configuration in conjunction with the slick tile floor and the rug constituted a hazard or dangerous condition that the expert opinion of Mr. Mecham was not helpful or would not assist the jury. This conclusion frustrated Kay in her efforts to meet the burden of proof provided to the jury in the court's instructions. This error was compounded by the court's refusal to allow the jury a view of the premises as established by the court's refusal to give the plaintiff's requested Instructions numbered 10 and 11. (Supplemental Record, pp. 13-14).

To recapitulate: the court gave instructions directing the jury to determine whether there was a dangerous or hazardous condition existing on Vondel and Becky's premise, and yet, the court removed from Kay's case the exact testimony that met that burden from a qualified source, Matthew Mecham. As already stated, the court compounded the problem by allowing the defense attorney to comment on the absence of these opinions from Kay's

expert and refused the jury the opportunity to exercise its collective "common sense" and observe first-hand the bizarre configuration and physical surroundings that gave birth to the complaint of injury. In the end, the trial judge sacrificed admissibility for some misplaced fixation (worship) of a nonexistent prejudice. Mr. Mecham's opinion was unequivocal evidence on an essential element of Kay's case.

Another way to state or to clarify the error committed by the trial court is that the evidence proffered by Mr. Mecham would have assisted or helped the jury understand the evidence of his observations; his measurements of distances and depths; his testimony of Kay's positions before and at the time of the fall; and his evidence of how to rectify or fix the dangerous or hazardous condition. (*See* Court's Instruction No. 23: The owner owes a duty to fix or warn of any dangerous or defective condition known to the owner, or which, in the exercise of ordinary care should have been discovered.) (emphasis supplied) (Supplemental Record, p. 64). While it is true that some jurors may have fathomed the interplay of the distances and depths expressed by Mr. Mecham's measurements, and his observations regarding the tile floor and the rug through his photographs, they may not have been able to put together the ultimate conclusions of danger and the fact that the defendants should have discovered it.

In the absence of Mr. Mecham's prohibited testimony and in the absence of the jury's ability to view the bathroom scene, this is the most probable determination. To paraphrase one of the quoted cases, cited *supra*, one may not have to be a biomechanical engineer to understand the danger or hazard posed by the tile floor, the rug and the distances and depths expressed by Mr. Mecham; but certainly, it would have been helpful to the jury, and less

confusing to the jury, to allow Mr. Mecham to testify (based upon his review and inspection and based upon all of those measurements and photographs and upon his knowledge, experience and expertise) that the bathroom and rug did pose a danger or hazard. This information would have been "helpful" to the jury by having someone tie together the inspections, the measurements, conclusions and photographs. This point is especially important in as much as the introduction of the rug without a rubber backing (non-slip) was introduced into the factual and legal scenario by Vondel and Becky on the day of the incident. (When was it reasonable for the defendants to discover the hazard or the danger?)

The absence of Mr. Mecham's opinion is especially troublesome given two factors at trial that were evidently missed by the trial court. The first is that Mr. Mecham, as previously explored, testified that a person, upon entering the bathroom would not be aware of the recessed shower area. (*See* Tr., pp. 47, and 103). (The Court: Well, I didn't see – I didn't hear him testify to that.) (Tr., p. 79. ll.10-11). This point was emphasized by Kay in her testimony as already explored, *supra*. (See Tr., pp. 126, 152 and 191). The other factor is the underlying inference from the defendants through testimony that somehow Kay was responsible for the fall, either by her actions, inaction or by her drinking prior to going into the bathroom. Mr. Mecham's testimony would have made it crystal clear to the jury that regardless of drink, and to a large part, regardless of the mechanics employed by someone using the toilet, this bathroom was a hazard and a dangerous condition, and most importantly, the physical facts that existed at the time and place of Kay's event were a hazard and a danger to her. This excluded testimony would have highlighted and emphasized the negligence of Vondel and Becky in failing to warn Kay, failing to give Kay instructions, and

failing to point out or warn of the new rug and a caution to her in regard to using the toilet in the bathroom.

It is respectfully submitted that the exclusion by the court of Mr. Mecham's testimony was manifest and reversible error in this case.

**B. THE COURT ERRED IN REFUSING THE PLAINTIFF'S REQUESTED INSTRUCTIONS NUMBERED 18, 20, AND 24.**

As part of the Plaintiff's Requested Jury Instructions, the plaintiff included IDJI Instructions 3.17 (Supplemental Record, p. 21), IDJI No. 3.11 and IDJI No. 3.01. (Supplemental Record, pp. 21, 23 and 27).

The standard on review of whether a jury instruction should or should not have been given is whether there is evidence at trial to support the instruction. Holzheimer v. Johannesen, 125 Idaho 397, 401; 871 P.2d 814, 818 (Idaho 1994); S*ee also*, Watson v. Navistar International Transportation Corporation, 121 Idaho 643, 666, 827 P.2d 656, 679 (Idaho 1992).

In the instant case, the standard enunciated by Holzheimer v. Johannesen, cited *supra*, was met at trial.

In the instant case, the landowners, Vondel and Becky knew of the proximity of the toilet to the recessed shower area. (*See* Tr., p. 304). Becky was in possession of knowledge that she had purchased a new rug probably within a day or two of the party, and that the rug did not have anti-slip backing. Becky anticipated that the guests would be drinking and that she might have overnight guests. (Tr., pp. 202-203). Vondel and Becky also knew that previously at least one person, Grant Reed, had fallen in the bathroom. (Tr., p. 210). Becky

was aware that Kay was entering the bathroom to use the bathroom's toilet. (Tr., p. 204). Becky never cautioned Kay about the bathroom. (Tr., p. 204). Kay was never advised about the drop-off in the bathroom. (Tr., p. 204). Kay was never cautioned about the new rug without the anti-slip backing that was in the bathroom. (Tr., p. 205). There is no question that after the event that Becky found Kay in the bottom of the recessed shower area and attempted to reset Kay's shoulder. (Tr., pp. 207-209). According to Kay, Becky specifically directed Kay to the bathroom in question. (Tr., p. 125).

Given this factual foundation, the court had a basis and should have instructed the jury in regard to IDJI No. 3.17. (Once an owner discovers a visitor of any status proceeding on a course, which probably will result in harm because of a dangerous condition of the premises, which is known to the owner but not known to the visitor, the owner owes a duty to use reasonable means to warn the visitor of the dangerous condition. The failure to do so amounts to reckless conduct). (emphasis supplied) At least one of the landowners, Becky, knew that Kay had had some consumed alcohol and was about to enter an area which posed a danger to her visitor. Becky had a duty to warn Kay as to the potential dangerous condition confronting Kay within the bathroom. This is evidenced by Becky's spontaneous declaration to Kay while driving to the hospital that "you probably slipped on that damn rug." And those were her exact words. (Tr., p. 132, ll. 2-3).

To recapitulate: Vondel and Becky knew the configuration of the bathroom. The bathroom had not changed since the time of its construction from 1962—1963. (Tr., p. 197). Kay had testified that she was unfamiliar with this particular bathroom. The purchase of the rug introduced a "new" factor to the bathroom for the purpose of the birthday party. Both

Kay and Becky agreed that no warning with regard to bathroom, its configuration or the fact of the new rug on the tile floor was communicated to Kay by Becky. Both Kay and Becky agree that Kay had had some alcoholic intake prior to her use of the bathroom. It would appear that all of the elements of the instruction have an evidentiary base and the requested jury instructions should have been given by the court.

The same can be said for IDJI No. 3.11. (Plaintiff's Requested Instruction No. 20) (Supplemental Record, p. 23). (The owner owes a duty to exercise ordinary care in the inspection of the premises for the purpose of discovering dangerous conditions.) In the instant case, Vondel and Becky were having a birthday party with numerous invited guests. There is no question that "drinking" was to take place at the time and the place of the party. Given the bizarre configuration of the bathroom and the introduction into that bathroom of a new rug on a tile floor that did not have an anti-slip backing, it was incumbent upon Vondel and Becky to conduct an inspection of the bathroom for the safeguarding of their invited guests. Contrast this instruction to Vondel's approach to safety: (1) Not aware of the rug (Tr., p. 292) and (2) not caring about the presence of the rug (Tr., p. 293). This is evidenced by Becky's admission that after the party there was a joke in regard to this bathroom that you should enter at your own risk, (Tr., p. 213) and her statement cited *supra* regarding Kay slipping on the rug.

The rationale in regard to the rug is expressed in the following cases. For example, in Patterson v. Thomas, 118 Ga. App. 326; 163 S.E.2d 331 (Ga. Ct App. 1968) it was stated:

> The evidence fails to establish that there were no genuine issues for consideration by the jury, whether the defendant knew or should have realized that the rug placed on the slippery floor created an unreasonable risk of harm

> to the plaintiff as a social guest, and should have expected that the plaintiff would not realize the danger, and whether the plaintiff had reason to know of the danger. We cannot say as a matter of law, therefore, that the evidence shows that there was no breach of the defendant's duty to the plaintiff as a social guest. The trial court did not err in denying the defendant's motion for summary judgment.
> It is of interest that in Patterson v. Thomas, the Restatement of Law of Torts (2d) § 342 was cited by the court to outline the duty of the landowner to the licensee. Idaho, in its case law, has adopted this same standard to outline the duty of a landowner to a licensee. Evans v. Park, 112 Idaho 400, 401, 732 P.2d 369, 370 (Idaho App. 1987).

Based upon the foregoing it is Kay's contention that IDJI No. 3.01 (Supplemental Record, p. 27) (an owner owes a duty not to cause intentional or reckless harm to persons or property on the premises) should have been given to the jury. The basis for this contention is found in IDJI No. 3.17. As illustrated, *supra*, there was an evidentiary basis upon which to allow the instruction of IDJI No. 3.17 to the jury. IDJI No. 3.17 clearly states that if there has been a breach of the duty owed that "the failure to do so amounts to reckless conduct." Given that IDJI No. 3.17 should have been placed with the jury, IDJI No. 3.01 should have been given in as much as the failure to warn under the circumstance allowed under IDJI No. 3.17 would be the basis to conclude that Vondel and Becky's conduct was "reckless" in regard to Kay.

Based upon the foregoing, it is respectfully forwarded to this court that the court erred in its failure to instruct the jury on Plaintiff's Requested Jury Instructions Nos. 18, 20 and 24.

**C. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY PURSUANT TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NUMBERED 14 AND 15.**

The court below was presented with two jury instructions regarding proximate cause

in the plaintiff's proposed jury instructions. These instructions were identified as Plaintiff's Proposed Jury Instructions Nos. 14 and 15. (*See* Supplemental Record, pp. 17 and 18).

The proposed instructions read as follows:

**INSTRUCTION NO. 14**

> When I use the expression "proximate case," I mean a cause which, in natural or probable sequence, produced the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor concurring with some other cause acting at the same time, which in combination with it, causes the damage.

**INSTRUCTION NO. 15**

> A cause can be a substantial contributing cause even though the injury, damage or loss would likely have occurred anyway without that contributing cause. A substantial cause need not be the sole factor, or even the primary factor in causing the plaintiff's injuries, but merely a substantial factor therein.

The court refused these instructions and instructed the jury on proximate cause through its instruction numbered 21. (*See* Supplemental Record, p. 62). The standard regarding an erroneous jury instruction is stated as follows: An erroneous instruction is prejudicial and thus constitutes reversible error when it could have affected or did affect the outcome of the trial. Garcia v. Windley, 144 Idaho 539, 164 P3d 819, 823 (Idaho 2007) (emphasis supplied). It is understood that the appellant has the burden to clearly show prejudicial error from an erroneous jury instruction. *Id.*

The instructions tendered to the court by the plaintiff in instructions numbered 14 and 15 are identical to those that were presented to the high court in the case of Newberry v. Martens, 142 Idaho 284, 127 P.3d 187 (Idaho 2005).

While the first paragraph of the Court's Instruction No. 21 is a mirror of the Plaintiffs

Proposed Jury Instruction No. 14, the second paragraph of the Court's Instruction No. 21 is confusing and deviates from the definition of "substantial cause." The plaintiff's proposed instructions Nos. 14 and 15, are complimentary and internally consistent. The second paragraph of the Court's Instruction No. 21 does not bring to the jury's attention the further definitional attributes found in Plaintiff's Proposed Instruction No. 15, especially in regard to a working definition of a substantial contributing cause. In Plaintiff's Proposed Instruction No. 15, it is made clear that a cause can be a substantial contributing cause even though the injury, damage or loss would likely occurred anyway without that "contributing cause." Likewise, it states that a substantial cause need not be the sole factor, or even the primary factor but merely a substantial factor.

The court's attempt at defining a substantial factor rather than cause is confusing and misleading as to "one or more proximate causes of an injury", and then defining the conduct of two or more persons or entities contributing concurrently as substantial "factors" in bringing about an injury. The court's instruction ignores the legal determination that a "cause" can be a substantial and contributing factor even though the injury damage or loss would have occurred anyway, and that a substantial cause need not be sole factor or even the primary factor in the causation.

These distinctions are especially critical in the instant case where Kay in her testimony to the jury stated that her fall would have occurred anyway due to the characteristics of the rug and of the tile floor, but that the "severity" of the fall was increased based upon the recessed shower area. (Tr., page 192, ll. 4-10). This becomes important when one considers the discussion in Newberry v. Martens regarding the difference between the

cause of an accident and the causes of an injury. This distinction is important in the instant case for the reasons explained by Kay in her testimony to the court. The causes of the fall were the rug which did not have a non-slip backing which was placed on a slippery tile floor and the lack of an edge protector, (or a wall or door). Contributing also were the fact of the fibers of the rug as described by Matthew Mecham that would easily entangle themselves around a heel and snag items of clothing. There was no substantive evidence presented to the jury that indicated that Kay did anything wrong in her encounter with the bathroom configuration, the rug and the shower. There was, as already stated, significant testimony and evidence presented to the court that the severity of the injuries sustained by Kay were increased by the fact of the recessed shower and the lack of an edge protector. (See Tr., p. 53, ll. 2-19; Tr., 60, ll. 17-24).

The point or import of the court's given instruction, with the emphasis that is placed in the second paragraph of the court's instruction, would lead to confusion on the part of the jury in trying to interpret the meaning of Instruction No. 21 when dealing with multiple causes of an injury as opposed to multiple persons contributing to the causation of the injury. It is respectfully submitted by the appellant that she has met her burden in this matter by demonstrating that the proximate cause instruction issued by the court as Instruction No. 21 (Supplemental Record, p. 62) falls into the category of jury instructions that could have affected the outcome of the trial. Garcia v. Windley, 144 Idaho 539, 164 P.3d 819 (Idaho 2007).

**D. THE JURY VERDICT WAS NOT CONSISTENT WITH APPLICABLE LAW NOR SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.**

A review of the trial transcript as reviewed herein, and of the record herein, indicates

that plaintiff met her burden of proof in the instant matter. An application of Idaho law to the facts of the instant case leaves no doubt that the defendants should have been found liable for their failure to warn the plaintiff of the dangerous condition of the bathroom and of the rug in the bathroom. The defendants knew, or should have known, of the condition as Kay did not, and the defendants, based upon their experience in the house, and of at least one previous fall, was charged with the knowledge of the peril to the plaintiff if she used the bathroom as she was directed by one of the defendants. The evidence is conclusive that if the defendants did not know of the dangerous condition of the bathroom, they should have known of the dangerous condition and in the exercise of reasonable care, should have warned Kay of the condition and the risks involved or should have made the conditions safe by the removal of the rug or providing a non-slip backing to the rug. As an alternative, the defendants could have fixed the condition with an easily obtainable remedy that could have been achieved by the expenditure of $500.00 as explained by Mr. Mecham. (*See*, e.g., Holzheimer v. Johannesen, 125 Idaho 397, 871 P.2d 814 (Idaho 1994); Springer v. Pearson, 96 Idaho 477, 531 P.2d 567 (Idaho 1975); Mooney v. Robinson, 93 Idaho 676, 471 P.2d 63 (Idaho 1970); Evans v. Park, 112 Idaho 400, 732 P.2d 369 (Idaho App. 1987).

## IV. CONCLUSION

Based upon the foregoing, the appellant, Kay Chapman, would respectfully request that this court issue an order reversing the verdict entered herein and remanding the matter to the lower court for a new trial. In addition, the appellant Kay Chapman would respectfully request that: (1) Mr. Mecham be allowed to fully testify as described herein and (2) that the court direct that Plaintiff's Proposed Instructions 14, 15, 18, 20 and 24 be given to the jury in the new trial of this matter.

DATED this 18th day of March, 2008.

ANDERSON NELSON HALL SMITH

Marvin M. Smith