NO. 98726-2

SUPREME COURT OF THE STATE OF WASHINGTON

DARCY L. JOHNSON, a single woman,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LIQUOR CONTROL BOARD,

Respondent.

STATE RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Washington business owners are liable for unsafe conditions upon their premises only if they have prior notice of such conditions. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983) (citing *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)). Applying this long-established rule, the Court of Appeals held Petitioner Darcy Johnson failed to meet her burden of establishing that the Washington State Liquor and Cannabis Board had notice of the water she alleges she slipped on. *Johnson v. State Liquor & Cannabis Bd.*, 10 Wn. App. 2d 1011 at *4 (2019) (unpublished).

Johnson asks this Court to accept review, arguing she presented sufficient evidence of notice under *Iwai v. State Emp't Sec. Dep't*, 129 Wn.2d 84, 915 P.2d 1089 (1996). Petitioner's Brief (Pet. Br.) at 11-13. Alternatively, she asks the Court to adopt Justice Dolliver's opinion in *Iwai* and discard the notice requirement whenever an injury-causing condition is "reasonably foreseeable." Pet. Br. at 15-18. Finally, Johnson asks the Court to reverse the trial court's exclusion of her liability expert. Pet. Br. at 18-19.

Johnson fails to identify any valid basis for review under RAP 13.4(b). As the Court of Appeals correctly determined, Johnson did not offer sufficient evidence of constructive notice. Because she neither proposed an instruction based on *Iwai* to the trial court nor argued in the

Court of Appeals that *Iwai* required submission of her case to the jury, Johnson has not preserved any argument pertaining to *Iwai* or her request to adopt Justice Dolliver's plurality therein. Likewise, since she failed to cross appeal the exclusion of her expert, Johnson has waived any argument regarding the trial court's evidentiary rulings. This Court should therefore deny review.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly determine that Johnson failed to offer sufficient evidence of constructive notice to establish liability?

2. Should the Court adopt the plurality opinion in *Iwai* and eliminate the self-service requirement to the notice exception, thereby imposing liability whenever an injury is "reasonably foreseeable?"

3. Should this Court reverse the trial court's exclusion of Johnson's expert despite Johnson's failure to cross appeal on that issue?

III. STATEMENT OF THE CASE

A. Factual Background

On a rainy day in 2011, Darcy Johnson fell in the entryway of a State-owned liquor store.[1] CP 1-2. Since Johnson and her companion Steve

[1] Prior to the passage of Initiative 1183 in November 2011 which privatized the sale of liquor, the State owned and operated all liquor stores in Washington. *See* former RCW 66.16.010 (2005).

Pallas had visited eight to ten garage sales that morning, their shoes were wet as they drove to the store. RP 170-72, 441. It was still raining when they arrived, and the ground outside was soaked as they parked and walked inside. RP 442-43. Johnson's shoes were wet as she entered the store directly behind Pallas. RP 444.

Pallas and Johnson crossed two rubber mats and two carpeted mats that had been placed in the entryway. RP 104-05. Neither felt the mats were saturated or heard them squish as they entered. RP 173, 445. Stepping off the mats, Pallas felt his foot slip and turned to warn Johnson. RP 148. Before he could do so, Johnson stepped off the mat, slipped, and fell. RP 148.

Pallas did not hear Johnson's shoes squeak as she fell, nor did he see water on the floor. RP 174. Johnson also did not see water on the floor before or after she fell; she merely testified she felt her pant leg was wet and "assumed" that it was from water that had been on the floor. RP 385. But Johnson admitted she had "no idea" if any water was on the floor before she fell, and she acknowledged it was possible the water "came in on her own shoes" or those of Pallas, who entered directly in front of her. RP 446-48.

The clerk, Jay Smiley, saw no water on the floor when he opened the store at 9:00 that morning, nor had anyone complained of water or any foreign matter on the floor prior to Johnson's fall. RP 96. Thus, while he

was aware that it was raining outside, Smiley was unaware of any water having been tracked into the store before Johnson entered. RP 97.

Immediately after Johnson fell, Smiley inspected the area and again found no water on the floor. RP 99. While it was his practice to put out a warning sign whenever it rained, Smiley testified he was not aware of any condition inside the store that necessitated the placement of such a sign prior to Johnson's fall, nor was he aware of any condition that would have made the floor dangerously slippery. RP 96-98. There was no evidence that anyone had ever previously fallen in the store. RP 106.

B. Procedural History

Prior to trial, the State moved to exclude Johnson's human factors expert on the basis that despite accepted tools and testing methods mandated by his profession, he formed his opinions without performing any testing. CP 294-97, 311-14. Instead, as he admitted, he formed his opinions based solely on his interview of Johnson and his review of photos and video. CP 312-13. Johnson opposed the motion, arguing these deficiencies went to the weight rather than the admissibility of her expert's opinion. RP 24-26. She also argued that her expert cured these deficiencies by visiting the store and taking measurements to confirm his opinion after the deficiencies came to light in his deposition. RP 24-26. Noting that Johnson's expert did not test the floor until five years after Johnson fell – by which time the store had

been sold, and the floors and store layout had been changed – the trial court excluded the testimony of Johnson's expert, finding his opinions lacked sufficient factual and scientific foundation. RP 24-26, 35-36.

The case proceeded to trial. At the conclusion of Johnson's case, the State moved for judgment as a matter of law, arguing Johnson presented no evidence the store had notice that the floor was wet, or that the floor was unreasonably dangerous even if it was wet. RP 472-79. Johnson argued Smiley's testimony that he normally put out a caution sign whenever it rained created an issue of fact because Smiley was aware that rain outside could potentially cause a dangerous condition inside. RP 479-83. The trial court denied the motion. RP 484-85. The jury returned a verdict in favor of Johnson, and the State appealed. Johnson did not cross appeal the exclusion of her expert's testimony.

The Court of Appeals reversed, finding Johnson "did not present any evidence that the store had actual[2] or constructive notice of a dangerous condition." *Johnson*, 10 Wn. App. 2d 1011 at *3 (2019) (unpublished). The court noted that Johnson presented no evidence to contradict Smiley's testimony that he neither saw any water on the floor before Johnson fell, nor had any customers informed him of water on the floor or complained that

[2] Johnson does not challenge the Court of Appeals' finding that she offered no evidence of actual notice. Johnson's case therefore hinges wholly on constructive notice.

the floor was slippery. *Id*. The court also noted that "there was no evidence that water was even on the floor before Johnson entered or evidence establishing how long any water on the floor may have been there." *Id*.

The court also rejected the argument that the store had constructive notice based on the amount of time it had rained or Smiley's testimony that he typically put out a "slippery when wet sign" whenever it rained, finding:

> [T]his does not establish that Smiley had constructive notice of an unreasonably dangerous condition in the store. At best, Johnson has established that, because it was raining, Smiley was aware of the *possibility* that water could be tracked into the store making the floor wet. But without any evidence that there actually was water on the floor or how long water had been on the floor, Johnson cannot establish that Smiley had constructive notice of an unreasonably dangerous condition inside the liquor store.

Johnson, 10 Wn. App. 2d 1011 at *3 (emphasis in original). The court went on to note that Smiley had been unaware of any prior slip and fall incidents in the store whether it was raining or not and held "the precaution of placing a 'slippery when wet' sign out when it rains does not establish constructive notice of an unreasonably dangerous condition." *Id*. Finally, the court rejected Johnson's request to adopt the plurality opinion from *Iwai*, thereby extending the "self-service" exception articulated in *Pimentel*, noting that the *Iwai* plurality "has no binding effect." *Id*. at *7 (citing *Charlton v. Toys R Us*, 158 Wn. App. 906, 917-18, 246 P.3d 199 (2010)); *Fredrickson v.*

Bertolino's Tacoma, Inc., 131 Wn. App. 183, 192-93, 127 P.3d 5 (2005)). Johnson now seeks review.

IV. ARGUMENT

A. The Court of Appeals' Decision Does Not Conflict with *Iwai*

Johnson does not identify a conflict between the Court of Appeals' decision and *Iwai* meriting review under RAP 13.4(b)(1). While she argues the facts she presented regarding constructive notice compare favorably to the facts this Court held were sufficient to submit to a jury in *Iwai*, Johnson made no argument in the Court of Appeals that *Iwai* required submission of her case to the jury, choosing instead to confine her argument below to urging the Court of Appeals to adopt the plurality opinion from *Iwai* and relieve her of the burden of establishing notice altogether. Johnson has therefore not preserved any issue regarding *Iwai*. *See, e.g., State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) (noting "[a]n issue not raised or briefed in the Court of Appeals will not be considered by this Court"); *Peoples Nat'l Bank of Wash. v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973) (declining to review "issues and theories not appropriately raised in the Court of Appeals, particularly . . . when such issues and theories were not presented in either the trial court or the Court of Appeals").

Judgment as a matter of law sought with a CR 50(a) motion is governed by the applicable substantive law, not the trial court's instructions

to the jury. *Kim v. Dean*, 133 Wn. App. 338, 349, 135 P.3d 978 (2006). Nonetheless, Johnson repeatedly argued to the court of appeals that review was controlled and limited by the "law of the case doctrine," including Instruction Thirteen; an Instruction that required constructive notice. *See*, Resp. Br. at 23-25. Accordingly, she should not now be heard to argue to the contrary. *Id*. *See* Jury Instr. 13, App. A, CP 520.

Regardless, even if the Court indulges Johnson's attempt to compare her case *Iwai*, Johnson fares no better. *Iwai* involved a fall on an icy parking lot where there was no dispute that the owner had notice of the icy conditions. 129 Wn.2d at 87. In *Iwai*, there was historical evidence of numerous complaints of cars spinning out in the parking lot where the plaintiff fell, as well as expert testimony that "persons and cars '*would more probably than not*' be expected to slip without special sanding or de-icing due to the steep nature of the [parking lot's] slope." *Iwai*, 129 Wn.2d at 88-89 (Dolliver, J.) (emphasis in original). By contrast, in the case at bar, there was no evidence that anyone had ever previously fallen in the store (RP 106), there was no expert testimony, and the floor was level.

More importantly, unlike the plaintiff in *Iwai*, Johnson attempted to establish constructive notice of a hazardous condition *inside* the store based the clerk's knowledge of the prevailing weather conditions *outside* the store. *Johnson*, 10 Wn. App. 2d 1011 at *3. This was insufficient, since Johnson

offered no evidence as to how long the water she alleged she slipped on had been inside the store. *See, e.g., Kangley v United States*, 788 F.2d 533, 535 (9th Cir. 1986) (notice "that it is wet outside" is "not enough to establish that an owner or occupier knows the floor might be dangerous" inside); *Charlton*, 158 Wn. App. at 915 (same); *Cooper v. Ross Dress for Less, Inc.*, 2014 WL 637644 (W.D. Wash. Feb. 18, 2014) ("In the absence of any evidence regarding the length of time the condition was present, the jury will not be given the opportunity to draw inferences that are based on nothing but speculation.") (unpublished decision); *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 220, 853 P.2d 473 (1993) ("[W]here circumstantial evidence leads only to speculation, a verdict cannot be based on inferences drawn from the evidence"). As the Court of Appeals aptly noted, "without any evidence that there was actually water on the floor or how long water had been on the floor, Johnson cannot establish that Smiley had constructive notice of an unreasonably dangerous condition inside the liquor store." *Johnson*, 10 Wn. App. 2d 1011 at *3.

Johnson points to circumstantial evidence surrounding the length of time it had been raining, the busy morning at the store, and Smiley's testimony regarding the proclivity of rainy days to "bring muddy footprints." Pet. Br. at 7-8. None of these, however, provided evidence as

to how long the water Johnson alleges she slipped on had been on the floor.[3] *See Iwai*, 129 Wn.2d at 97 (noting "the specific icy patch allegedly causing Plaintiff's fall was a temporary condition, and under the traditional position, Plaintiffs must show the specific and particular condition had existed long enough for Defendants to become aware of it"). As Justice Dolliver's plurality acknowledged, "[u]nder the traditional rule, the lack of such evidence precludes recovery." *Iwai*, 129 Wn.2d at 97-98 (citing *Wiltse*, 116 Wn.2d at 458; *Brandt*, 72 Wn.2d at 451-52; *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 429, 407 P.2d 960 (1965)). Having failed to garner a majority, Justice Dolliver's opinion did not change that. *See, e.g., Charlton*, 158 Wn. App. at 918 ("[I]n the absence of a majority, the *Iwai* opinion is not binding precedent and, so far, no other Washington court has extended *Pimentel* beyond the self-service setting."); *Fredrickson*, 131 Wn. App. at 192 (same).

Here, the clerk had no constructive notice of an unreasonably dangerous condition inside the store, and the case was tried under a liability

[3] Johnson also cites Smiley's testimony that a warning sign was "needed" when it rained as evidence purportedly establishing knowledge. Pet. Br. at 7. At the jury's request, however, Smiley clarified it was his practice to put out a sign whenever it rained, whether the floor was wet or not. RP 109. Such prophylactic measures are not evidence of dangerousness because they are not triggered by, and exist independently of, an actual specific danger. *See Charlton*, 158 Wn. App. at 911-15 (holding plaintiff failed to offer evidence of dangerousness despite the placement of two large yellow cones stating "Caution, Wet Floor"). In any case, as the Court of Appeals held, Smiley's failure to place out such a caution sign is evidence of neither knowledge of dangerousness nor of notice that water was on the floor. *Johnson*, 10 Wn. App. 2d 1011 at *7 (2019) (unpublished).

theory that required constructive notice. *Johnson*, 10 Wn. App. 2d 1011 at *3. CP 520; RP 921. Well-established case law recognizes that such evidence is insufficient as a matter of law to establish a prima facie case of negligence in Washington. *See, e.g., Knopp v. Kemp & Hebert*, 193 Wash. 160, 164, 74 P.2d 924 (1938); *Iwai*, 129 Wn.2d at 97-98; *Kangley*, 788 F.2d. at 535; *Charlton*, 158 Wn. App. at 915. Absent a conflict with a majority opinion of this Court, Johnson fails to demonstrate grounds for review under RAP 13.4(b)(1). This Court should therefore deny the Petition for Review.

B. Johnson's Invitation to Adopt the *Iwai* Plurality Does Not Represent An Issue of Substantial Public Interest

Lacking sufficient evidence of notice, Johnson urges the Court to relieve her of that burden by adopting Justice Dolliver's plurality opinion in *Iwai*. Pet. Br. at 15-18. There, Justice Dolliver advocated dispensing with the self-service requirement to the notice exception altogether and instead impose liability any time "the nature of the proprietor's business and [its] methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." *Iwai*, 129 Wn.2d at 100.

Johnson did not preserve this argument, and the Court should not consider it. Even if it did, however, the Court should decline Johnson's invitation to fundamentally change premises liability in Washington.

1. Johnson has not preserved any argument that this Court should adopt the *Iwai* plurality

Johnson never asked the trial court to relieve her of the burden of establishing constructive notice by requesting a jury instruction based on Justice Dolliver's plurality opinion in *Iwai*. Having failed do so, Johnson should not be heard to advocate adoption of a standard the trial court was never given an opportunity to consider. *See Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978) (citing *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975)).

2. The *Iwai* plurality has been repeatedly rejected, and its proposed adoption does not represent an issue of substantial public interest

In *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994), eight members of this Court held that "a relation between the hazardous condition and [a] self-service mode of operation of [a] business" is required for the notice exception to apply. Johnson asks the Court to eliminate the self-service requirement to the notice exception by adopting the analysis from Justice Dolliver's plurality in *Iwai*. Pet. Br. at 15-18. She argues that extending the self-service exception to the notice requirement to all cases by imposing liability whenever an injury-causing condition is "reasonably foreseeable" removes the "incentive for businesses to stick their heads in the sand to avoid discovering and remedying dangerous

conditions" and is more consistent with the duty of reasonable care to invitees. Pet. Br. at 16 (citing *Iwai*, 129 Wn.2d at 101).

Setting aside the dubiousness of Johnson's assumption that the current standard incentivizes willful blindness on the part of businesses, a majority of this Court rejected Justice Dolliver's proposed expansion of the self-service exception in *Iwai*, agreeing instead that the existing notice requirement under the *Restatement (Second) of Torts* §§ 343 and § 343A "provide[s] adequate protection to invitees already"). *Iwai*, 129 Wn.2d at 102-03 (Alexander, J. concurring); *Id*. at 103-04 (Guy, J. dissenting) (rejecting "the portion of the opinion that holds a landlord liable without actual or constructive notice of a dangerous condition and a reasonable time for repair"). No issue of substantial public interest is raised by a party who merely entreats the Court to reconsider its prior majority rulings.

Washington courts have consistently applied the Restatement's notice requirement, recognizing that the *Iwai* plurality is "not binding precedent." *Charlton*, 158 Wn. App. at 918; *Fredrickson*, 131 Wn. App. at 192. So have the federal courts. *Kangley*, 788 F.2d at 535 (holding the fact that it is wet outside is "not enough to establish that an owner or occupier knows the floor might be dangerous"). The Restatement standard remains sound, and nothing has changed in the fourteen years since this Court last declined to accept review of this issue. *See Fredrickson*, 157 Wn.2d 1026,

142 P.3d 608 (2006). Johnson's mere repetition of a 24-year-old argument that a majority of this Court has rejected does not represent an issue of substantial public interest.[4] This Court should therefore deny her Petition for Review.

C. The Exclusion of Johnson's Expert Does Not Merit Review

Johnson also asks this Court to review the exclusion of her expert, arguing the Court of Appeals' failure to consider that issue conflicts with other Courts of Appeals' decisions. Pet. Br. at 18-19. But Johnson failed to preserve this argument by not cross appealing that issue, and she cites no case law holding that RAP 2.4(a) requires appellate consideration of an issue on which a party has not cross appealed. The Court of Appeals opinion in this case is consistent with the decisions of this Court and of the Courts of Appeals. This Court should therefore deny the Petition for Review.

Johnson argues the Court of Appeals was obligated to consider the trial court's exclusion of her expert because she assigned error to it under

[4] Johnson also argues that this Court later endorsed Justice Dolliver's opinion in *Iwai*, citing dicta from *Musci v. Graoch Assoc. Ltd. P'ship No. 12*, 144 Wn.2d 847, 859, 31 P.3d 684 (2001). Pet. Br. at 17. But *Musci* did not sanction imposing liability based solely on foreseeability whenever a plaintiff is unable to establish actual or constructive notice. *Musci* again recognized that to prevail in a premises liability action, a plaintiff "must prove (1) the landowner had actual or constructive notice of the danger, and (2) the landowner failed within a reasonable time to exercise sensible care in alleviating the situation." *Musci*, 144 Wn.2d at 859 (citing *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975)). Thus, *Musci* applied the Restatement just as the Court did in *Iwai*. *Id*. at 863.

RAP 2.4(a) in responding to the State's appeal. Pet. Br. at 18-19. That rule provides, in pertinent part:

> The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to the respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

"While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court." *State v. Sims*, 171 Wn.2d 436, 443, 256 P.3d 285 (2011) (citing *In re Arbitration of Doyle*, 93 Wn. App. 120, 127, 966 P.2d 1279 (1998)). Thus, where a respondent seeks affirmative relief rather than merely urging additional grounds for affirmance, "notice of cross review is essential." *Robinson v. Khan*, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998) (citing *Phillips Building Co. v. An*, 81 Wn. App. 696, 700, n.3, 915 P.2d 1146 (1996)).

Asking the Court of Appeals to reverse a trial court's evidentiary ruling does not merely urge another ground for affirmance, it seeks affirmative relief. *See Bolson v. Williams*, 181 Wn. App. 1016 at *10 (May 27, 2014) (unpublished) (refusing to reverse the trial court's exclusion of L&I records absent a cross-appeal). Johnson's request that the Court of Appeals reverse the exclusion of her expert was therefore barred unless it was "demanded by the

necessities of the case." RAP 2.4(a)(2). As before the Court of Appeals, however, she offers no explanation for why the necessities of this case require this Court to review the trial court's evidentiary ruling, nor for her failure to cross-appeal. Johnson also cites no case law requiring the Court of Appeals to consider, under RAP 2.4(a), an issue on which she failed to cross appeal; particularly where the appellate disposition was reversal, not remand. Absent such case law, review is not warranted under RAP 13.4(b)(2).

V. CONCLUSION

In this case, the only evidence Johnson offered was that she slipped in a store on a rainy day and that the clerk was aware it was raining. RP 97. Such evidence is insufficient to establish liability in Washington. *See, e.g.*, *Knopp*, 193 Wash. at 164; *Iwai*, 129 Wn.2d at 97-98; *Kangley*, 788 F.2d. at 535; *Charlton*, 158 Wn. App. at 915. The Court of Appeals' decision is consistent with these precedents, and Johnson provides no valid basis for review. The State therefore asks the Court to deny the petition for review.

RESPECTFULLY SUBMITTED this 23rd day of October 2020.

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DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding "STATE RESPONDENT'S ANSWER TO PETITION FOR REVIEW" was filed in the Supreme Court of the State of Washington, and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

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DATED this 23rd day of October 2020, at Toledo, Washington.

s/ Stefany Fladeland
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APPENDIX

Darcy Johnson v. LCB
Supreme Ct. No. 98726-2

Jury Instruction No. 13
(CP 520)

Jury Instruction No. 13

The presence of water on the floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or the store.

The plaintiff must prove that water makes the floor dangerously slippery and that the defendant knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped.

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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Comments:

This is the Appendix that goes with the State's Answer to Petition for Review.

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