Supreme Court No. 98726-2
Court of Appeals No. 51414-1-II
Lewis Co. Superior Court Cause No. 14-2-00917-6

THE SUPREME COURT OF WASHINGTON

DARCY L. JOHNSON, a single woman,

Petitioner,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LIQUOR CONTROL BOARD,

Respondent.

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

Darcy Johnson ("Johnson") seeks review of the decision of the Court of Appeals designated below.

CITATION TO COURT OF APPEALS DECISION

The Court of Appeals reversed the superior court and vacated the jury's verdict finding the Washington State Liquor and Cannabis Board ("WSLCB") liable to Johnson. *See Johnson v. State*, *noted at* 10 Wn. App. 2d 1011, 2019 WL 4187744 (Div. 2, Sept. 4, 2019). A copy of the decision is reproduced in the Appendix beginning at A-1. The appellate court denied Johnson's motion for reconsideration on March 26, 2020, and denied Johnson's motion to publish on June 5, 2020. Copies of these orders are reproduced in the Appendix beginning at A-25 & A-34.

ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision below conflict with the holding of this Court in *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), regarding the sufficiency of evidence to support a *constructive notice* standard of premises liability to business invitees?

2. Should this Court reinstate the jury's verdict and apply the *reasonably foreseeable* standard for premises liability to business invitees, as urged by the 4-Justice plurality of the Court in *Iwai*?

3. If the jury's verdict is not reinstated, is Johnson entitled to reversal and remand with instructions to admit the testimony of her human factors engineering expert regarding liability, causation and damages?

STATEMENT OF THE CASE

A. Liability of WSLCB.

Darcy Johnson was injured at a WSLCB store on June 18, 2011. She and her then-boyfriend, now-husband, Steve Pallas ("Pallas"), stopped by the store to purchase a gift for a friend who had done a favor for Johnson's father. It had been raining continuously ever since they got up that morning, between 6 and 7 a.m. RP 148:3-4, 178:12-20, 381:1-382:1 & 383:24-25. They arrived at the store approximately 5 ½ hours later, between 11:30 and 11:45 a.m. RP 383:21-24. Pallas was walking in front of Johnson, and as soon as he stepped off a mat in the doorway, he slipped. RP 148:12-14 & 173:15-18. He turned around to warn Johnson to be careful, but before he could say anything she fell down. RP 148:14-16.

The WSLCB store manager, Jay Smiley, saw Johnson fall out of the corner of his eye. The store opened at 10 a.m., and Smiley arrived around 9:30 a.m., ½ hour before opening. RP 89:6-19. The store had been open for approximately 1 ½ hours before Johnson and Pallas came in. The store was busy because it was a Saturday. RP 91:8-11. Normally, the store had 700-800 customers on Saturdays. RP 95:8-10.

In his deposition, Smiley testified that it had started raining about 15 minutes before Johnson fell, but at trial he testified that he did not remember and acknowledged that it could have been raining when he arrived for work. RP 89:25-90:9. Smiley acknowledged that "[r]ainy days ***always*** bring muddy footprints." RP 97:11 (brackets & emphasis added). It was common for customers to enter the store with wet feet anytime it was wet outside. RP 105:24-106:3. Due to the lack of an awning on the outside of the building, customers' "feet get wet and it comes in the store." RP 108:7-12. "The water would come in with them." RP 109:15-16.

One of Smiley's job duties was to put out a highly visible yellow sign warning customers that the floor of the store is "slippery when wet" whenever it rains:

> Q. [Counsel for Johnson] As part of your duties to—is to put out a very visible yellow sign that says, "slippery when wet"?
>
> A. [Smiley] Yes.
>
> Q. Right?
>
> A. Yes.
>
> Q. Is that your duty to do that?
>
> A. Yes.
>
> Q. Okay. And you told me, did you not, in your deposition that what—***I asked you what triggers that responsibility, that need to put it out. And you told me what?***
>
> A. ***When it rains.***

RP 90:15-91:2 (brackets & emphasis added).

> Q. [Counsel for Johnson] And the purpose of putting that sign out is to prevent people from falling; isn't that correct?
>
> A. [Smiley] It's a warning sign, yes, sir.
>
> Q. Okay. And it doesn't say, "wet floor." It says "floor slippery when wet"?
>
> A. Correct.
>
> Q. ***And that is put out when you have a need, and that need is when it rains?***
>
> A. ***Yes, sir.***

RP 108:13-21 (brackets & emphasis added). The warning sign was needed "[j]ust as soon as it started raining." RP 110:7-10 (brackets added).

On the day Johnson was injured, Smiley acknowledged that he failed to put out the warning sign, even though it had been raining. RP 91:3-7 & 108:19-23. He did not take the time to do so because he was the only person in the store and he was busy helping other customers. RP 91:8-11 & 95:17-19.

After Johnson rested, WSLCB moved the superior court for judgment as a matter of law, arguing there was insufficient evidence of liability, particular insufficient evidence of constructive notice that the floor was slippery. RP 472:25-479:10. The superior court denied the motion, reasoning as follows:

> I am denying the state's motion. When reviewing the facts in a light most favorable to the plaintiff, there is sufficient evidentiary basis for a reasonable jury to find the defendant liable. I understand that the state is arguing that Mr. Smiley was not put on notice because nobody knows whether or not there was water on the floor. However, there was some testimony from the plaintiff that her pants were wet. There could be a reasonable inference that there was water on the floor from the jury. And I think also the fact that Mr. Smiley did testify that when Mr. Mano asked him, when does the danger start? The danger starts when it rains. And so when it rains, he said that it's their -- not duty, but he said it was their policy and practice to put the sign out when it rains. He said he saw it raining. About 15 minutes later, he was helping customers, and he didn't have the opportunity to put it out. I think based on that testimony there could be a reasonable inference from the jury that Mr. Smiley knew or should have known of the dangers there.

RP 484:15-485:10.

After the close of evidence, the superior court instructed the jury regarding WSLCB's liability, using instructions adapted from the Washington Pattern Instructions, all of which were either proposed or agreed-to by WSLCB. CP 512, 515, 517-20. These instructions required Johnson to prove constructive notice of the slippery floor. *Id.* Under these instructions, the jury found that WSLCB was negligent and returned a verdict in Johnson's favor. CP 527.

Post-trial, WSLCB filed another motion for judgment as a matter of law, again arguing that there was insufficient evidence of constructive notice of the slippery condition of the floor. CP 546-51. The superior court again denied WSLCB's motion and explained:

> The court is going to deny the state's motion for a judgment notwithstanding the verdict. The first issue in regards to whether or not the plaintiff met the burden of establishing notice, as Mr. Mano pointed out, this has been argued multiple times now by different judges or to different judges. There was sufficient evidence for the trier of fact to infer notice based on smiley's testimony that it was store practice to put the sign up upon rain. That was his testimony. I have gone through his transcript several times and his testimony is that when it rained, it was store practice that the sign went out. He admitted in this particular situation that he waited 15 minutes after knowing that it was raining. He said that he knew it was raining, he waited 15 minutes. He didn't put the sign out. He admitted in his testimony that he should have put the sign out as soon as it started raining but that he didn't. There was also testimony from the plaintiff that there was water on the floor. There was testimony from Mr. Pallas that he had slipped when he entered as well. And furthermore, the fact that it was store practice to put out the sign, the jury could logically infer from that that the state had knowledge that the rain presented a hazard. So obviously if it's their practice to put out a sign when it's raining, they obviously had some kind of knowledge that the rain and the slip -- the floor would present a hazard that they were aware of. And I think it's very obvious that the jury could infer all of this, given the jury's verdict, as Mr. Mano pointed out, it was a unanimous verdict. All 12 agreed. So I think that that also goes to the fact that it was easily inferred that there was notice.

RP 1043:24-1045:8.

WSLCB appealed the judgment entered on the jury's verdict. CP 638-46. In response, Johnson argued that there was ample evidence of constructive notice to establish liability, and also that the appellate court should follow the reasonably foreseeable standard for premises liability toward business invitees urged by a 4-Justice plurality of this Court in *Iwai*. Resp. Br., at 32-33.

The Court of Appeals reversed on grounds that there was insufficient evidence of constructive notice, and stated its reasoning as follows:

> Johnson relies on Smiley's testimony that the store put out the "slippery when wet" sign if it was raining to establish constructive notice. However, this 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 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. Moreover, Smiley testified that he was unaware of any other slip and fall incidents on the liquor store floor, whether it was raining or not. Therefore, the precaution of placing a "slippery when wet" sign out when it rains does not establish constructive notice of an unreasonably dangerous condition.

Johnson, 2019 WL 4187744, at *3. The appellate court also rejected Johnson's request to follow the *Iwai* plurality. *Id.* at *4.

In its decision, the appellate court did not acknowledge testimony from the store clerk that the slippery-when-wet sign was ***needed*** whenever it rained, not just placed as a precaution. RP 90:15-91:2 & 108:19-21.

The appellate court did not acknowledge the length of time it had been raining, i.e., approximately 5 ½ hours, according to the testimony of Johnson and Pallas. RP 148:3-4, 178:12-20, 381:1-382:1 & 383:24-25. Instead, the Court relied on Smiley's contrary testimony that he "did not remember the ground being wet when he arrived at the store, and he testified

that he believed it began raining approximately 15 minutes before Johnson entered the store." *Johnson,* 2019 WL 4187744, at *1.

While the appellate court noted that it had been a busy morning at the store, *id.* at *1; the court did not acknowledge that "[r]ainy days ***always*** bring muddy footprints." RP 97:11 (brackets & emphasis added); because there was no awning outside of the building, RP 108:7-12.

Lastly, the appellate court did not acknowledge that the store had been open for approximately 1 ½ hours on this rainy, busy morning before Johnson was injured. RP 89:9-10

B. Exclusion of Johnson's expert.

Johnson retained Dan Johnson, PhD (no relation), as an expert to testify regarding the circumstances of her injury. Dr. Johnson has his PhD in experimental psychology and is a Certified Professional Ergonomist. Ergonomics, also called Human Factors, relates knowledge of human capabilities, limitations and characteristics to design of tools, machines, and environments to ensure safe use. CP 350.

Dr. Johnson interviewed Johnson and reviewed video footage and photographs of the WSLCB store where she was injured. CP 351. He also reviewed medical records, CP 351, and the shoes Johnson was wearing when she was injured, CP 360, and tested the slip resistance of the floor where she was injured, CP 362.

Dr. Johnson explained how water on the floor of the WSLCB store created a dangerous condition:

> Water, acting as a lubricant between the shoe and the floor, can reduce the slip resistance of the surface (NSC, 1986). This is true even when the floors have polish films which may increase the slip resistance between a dry floor and a person's footwear. Braun and Roemer (1974, p. 70) state: "Moistened polish films exhibit a completely different behavior towards friction than dry ones, since water forms a lubricating film which leads to a different kind of mechanism." Templer reports that only selected combinations of wet shoes and surfaces result in a slip resistance value greater than 0.4 (Templer, 1992, V. 2, pp. 51-53). For example, while the slip resistance of carpet is high when dry (more than 0.75) it is lower when wet though still in what might be considered a safe range (0.4 up to 0.75). But, he reports, many other surfaces (e.g., linoleum, concrete, granolithic, clay tiles and terrazzo) which are slip resistant when dry lose slip resistance when wet and exhibit values between 0.2 to less than 0.4 (Ibid, Table 3.5, p. 52). In other words, a person stepping onto a surface covered with a layer of water may experience only half, or less, of the slip resistance that surface would have provided when dry.

CP 353-54. A wet linoleum floor violates applicable safety standards for the slip-resistance of walking surfaces, as confirmed by later testing. CP 354-55 & 362.

On the basis of his expertise and review of this case, Dr. Johnson concluded:

> 1) Ms. Johnson had no physical condition that contributed to her fall. She was properly dressed and was wearing footwear the soles and heels of which are known to decrease the chance of a slip and fall. She was behaving in an expected and predictable manner.
>
> 2) If the floor had been slip resistant when wet, as required by Code, then, on a more probable than not basis, this fall would have been prevented.

> 3) If carpet mats had been arranged so that entering customers would have to walk on them after entering the store, and if any saturated mats had been replaced, then on a more probable than not basis this fall would have been averted.
>
> 4) If a warning had been placed so that entering customers could see them in time to alter their gait before stepping onto the wet floor, then, on a more probable than not basis, the chance of this fall occurring would have been reduced.

CP 357-58.

WSLCB filed a motion in limine to preclude Dr. Johnson from testifying. CP 294-97. The superior court granted the motion. RP 17:22-26:23 (argument and oral ruling); CP 439-41 (written order). The court justified its decision on grounds that Dr. Johnson's testing of the floor was performed too long after Johnson was injured and the rest of his opinions were matters of common knowledge. RP 26:5-16 & 35:20-24.

Johnson sought review of this decision under RAP 2.4(a) and CR 50(d). Resp. Br., at 2 (RAP 2.4(a) assignment of error); *id.* at 14-16 (statement of the case); *id.* at 44-45 (citing CR 50(d); *id.* at 46-47 (conclusion). Johnson argued that the time between her injury and the testing performed by the expert goes to the weight of the evidence rather than its admissibility. *Id.* at 45-46 (argument). She also argued that the expert testimony She asked the court to reverse the exclusion would assist the jury in evaluating multiple issues related to liability, causation and damages, including the dangerous nature of the condition created by the

lubricating effect of water on the floor, the mechanics of injury, and applicable standards regarding slip resistance, floor mats, and warning signs. *Id.* However, the Court of Appeals declined to address the issue without explanation.

ARGUMENT

A. The Court of Appeals decision below conflicts with the holding of *Iwai* regarding sufficiency of the evidence to go to the jury, justifying review under RAP 13.4(b)(1).

RAP 13.4(b)(1) authorizes review "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." (Brackets added.) In this case, the decision of the Court of Appeals conflicts with the holding of the Court in *Iwai*. "When dealing with a plurality opinion, the holding of the court is the position of the justice(s) concurring on the narrowest grounds." *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 152 Wn. App. 190, 197, 217 P.3d 365 (2009), *rev. granted & cause remanded*, 168 Wn.2d 1031, 231 P.3d 166 (2010); *accord In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 61, 109 P.3d 405, 410 (2005).

The concurring opinion by Justice Alexander represents the narrowest grounds for the decision in *Iwai*. The lead opinion by Justice Dolliver stated that the plaintiff should be entitled to present her evidence to the jury under the reasonably foreseeable standard for premises liability

toward business invitees, rather than the constructive notice standard. *See* 129 Wn.2d at 87-102. The dissenting opinion by Justice Guy would limit the reasonably foreseeable standard to certain types of self-service stores, and stated that the plaintiff should not be entitled to present her evidence to the jury under the constructive notice standard. *Id.* at 103-04. The concurring opinion by Justice Alexander agreed with the dissent, that the reasonably foreseeable standard should be limited and that the constructive notice standard should be applied, but agreed with the lead opinion that the plaintiff should be entitled to present her evidence to the jury. *Id.* at 102-03. Because Justice Alexander's concurrence rests upon the narrowest grounds, it constitutes the holding of the Court regarding the sufficiency of the evidence to go to the jury in a case of premises liability toward business invitees.

The facts held to be sufficient to go to the jury were described in the lead opinion as follows:

> Plaintiffs offered very little evidence to support their negligence claim. Plaintiffs argued there was no sand, gravel, or railings available in the parking lot at the time of Iwai's fall, a claim which Defendants did not refute. However, the absence of those aids does not in itself constitute negligence. The only solid piece of evidence regarding the actual and specific parking lot conditions on the day Iwai slipped is temperature and precipitation information from the National Weather Reports. All other details rest entirely on Iwai's own uncorroborated statements in her deposition and in the complaint. Iwai's deposition offers only the vague and general description of there being ice, covered by a trace amount of snow.

Employment Security did not have the opportunity to document the parking lot conditions on November 29th because Plaintiff did not notify Employment Security of the accident until the following week. Defendants dispute that they had any notice of the accident prior to the lawsuit being filed on July 23, 1986.

In the attempt to show that Defendants had notice of the dangerous condition, Plaintiffs deposed John Lester, who was in charge of maintenance for Employment Security's parking lots at the time of Iwai's fall. With the deposition taking place almost five years after the accident, Lester had no specific recollection of the conditions during the month that Iwai fell. Nonetheless, he was questioned in detail about the parking lot.

Lester admits he often received complaints about the condition of the parking lot in the wintertime, and "it wasn't unusual" for cars to spin out and slide towards the office building from the inclined strip of parking where Plaintiff allegedly slipped. Clerk's Papers at 399. It was difficult to maintain that particular strip of parking because cars would fill up all of the parking spaces early in the morning, making it impossible for snow removal equipment to clear the section; and, even after being plowed, ice and snow would fall off of parked cars and build up on the ground. A fire hydrant at the bottom of the inclined section had been hit several times, and knocked off at least twice by sliding cars, eventually leading to the installation of four steel posts to protect the hydrant. Lester "had the most problems trying to keep [that sloped area] de-iced." Clerk's Papers at 398. Lester remembered only two separate incidents of persons slipping and falling anywhere in the parking lot during his employment as operations manager.

Besides deposing Lester, Plaintiffs submitted the affidavit of a traffic engineer who inspected the lot on April 17, 1987, over two years after the alleged accident. According to the engineer, persons and cars "*would more probably than not*" be expected to slip without special sanding or de-icing because of the steep nature of the slope. Clerk's Papers at 21. The analysis concludes the parking lot was negligently designed. The affidavit, however, does not say how much ice or snow must be present before the condition "become[s] extremely dangerous," nor does the affidavit claim to have any knowledge of the specific conditions on the day that Iwai slipped. Clerk's Papers at 21. The Defendants strongly challenge the

> relevance of the engineer's affidavit in their petition for review, but these objections were not raised in the trial court as far as the record reveals.

Iwai, 129 Wn.2d at 88-89 (Dolliver, J.)

Given the fact that the foregoing facts in *Iwai* were sufficient to go to the jury, the facts in this case are more than sufficient to support the jury's verdict in favor of Johnson in this case. *Iwai* lacked evidence comparable to that presented by Johnson that the slippery-when-wet sign was ***needed*** whenever it rained, not just placed as a precaution, RP 90:15-91:2 & 108:19-21; and that "[r]ainy days ***always*** bring muddy footprints" into the store, RP 97:11 (brackets & emphasis added). *Iwai* also lacked evidence regarding the time that the dangerous condition existed, which is the touchstone for liability based on constructive notice,[1] whereas in this case there was evidence that it had been raining for approximately 5 ½ hours, RP 148:3-4, 178:12-20, 381:1-382:1 & 383:24-25; and that the store had already been open approximately 1 ½ hours on the busy morning when Johnson was injured, RP 89:9-10. The Court should grant review to resolve the conflict.

[1] *See Iwai*, 129 Wn.2d at 96 ("To prove constructive notice, Plaintiffs carry the burden of showing the specific unsafe condition had 'existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger'"); *accord* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.06.02 (7th ed.).

The decision below concludes that 12 jurors, who were admittedly properly instructed regarding the constructive notice standard and are presumed to follow the instructions, got it wrong. The decision below also concludes that the superior court judge, who also heard the evidence and denied WSLCB's half-time and post-trial motions, got it wrong. This points to a larger problem with the constructive notice standard, a problem that is evident in the concurring and dissenting opinions in *Iwai*, which do not agree on whether the plaintiff should be entitled to present her evidence to a jury under the constructive notice standard.

B. Whether this Court should apply the "reasonably foreseeable" standard for premises liability toward business invitees such as Johnson is an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

RAP 13.4(b)(1) authorizes review "[i]f the petition involves an issue of substantial public interest that should be determined by [this Court]." (Brackets added.) The standard of premises liability toward business invitees presents just such an issue.

The lead opinion in *Iwai* urged that it should not be necessary to establish actual or constructive notice of the specific dangerous condition, as long as the injury-causing condition was "reasonably foreseeable." 129 Wn.2d at 98-102. The lead opinion in *Iwai* noted that the reasonably foreseeable standard originally developed as an "exception" to the

constructive notice standard in the context of self-service businesses. *See* 129 Wn.2d at 98-100. However, the lead opinion also noted that a majority of the Court previously ruled that "'self-service' is not the key to the exception. Rather, the question is whether 'the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.'" *Id.* at 100 (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994)). "The reasonably foreseeable exception to the notice requirement should be applied to any situation, whether or not the mode of business involves self-service, where the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." *Id.* at 100 (quotation omitted).

The reasonably foreseeable approach is consistent with the duty of businesses to use reasonable care to discover dangerous conditions. *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn. 2d 127, 132, 606 P.2d 1214, 1218 (1980) (noting "affirmative duty to discover dangerous conditions"). This approach also eliminates the incentive for businesses to stick their head in the sand to avoid discovering and remedying dangerous conditions. *See Iwai*, 129 Wn. 2d at 101 (stating "[a] strict application of the notice requirement would unfairly allow [defendant] to plead ignorance about [the dangerous condition], despite its general knowledge of the

situation"; brackets added); *see also Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007) (noting purpose of tort law to deter negligence).

Following *Iwai*, this Court has appeared to endorse application of the reasonably foreseeable standard without limiting it to the self-service context. In *Mucsi v. Graoch Associates Ltd. P'ship No. 12*, 144 Wn.2d 847, 859, 31 P.3d 684 (2001), the Court stated:

> To prove constructive notice, the plaintiff must prove the specific unsafe condition had "'existed for such time as would have afforded [the landowner] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.'" *Iwai*, 129 Wash.2d at 96, 915 P.2d 1089 (quoting *Smith v. Manning's, Inc.*, 13 Wash.2d 573, 580, 126 P.2d 44 (1942)). This notice requirement insures liability attaches once the landowners have become or should have become aware of a dangerous situation. *Id.* at 96–97, 915 P.2d 1089. ***Continuing its analysis in* Iwai*, this Court also determined, where the plaintiff is unable to establish actual or constructive notice, the plaintiff may present evidence to establish the unsafe condition was reasonably foreseeable.* Id. *at 100–01, 915 P.2d 1089***.

(Emphasis added.) In the highlighted language, the Court cites the lead opinion in *Iwai* with approval and suggests that the reasonably foreseeable standard is generally applicable. Two other courts have recognized that *Mucsi* endorsed the lead opinion in *Iwai*. *See Sundquist v. BRE Properties, Inc.*, 2012 WL 750537, at *3 (W.D. Wash. Mar. 8, 2012) (stating "the Washington Supreme Court has subsequently referenced *Iwai* and indicated that 'actual or constructive notice *or forseeability*' of the unsafe condition

will suffice to support a landowner negligence claim," citing *Mucsi*; emphasis in orig.); *Cooper v. Ross Dress For Less, Inc.*, 2014 WL 637644, at *2 n.5 (W.D. Wash. Feb. 18, 2014). However, the Court of Appeals has declined to follow the *Iwai* plurality, without acknowledging *Mucsi's* endorsement of the lead opinion in *Iwai*. *See Charlton v. Toys R Us--Delaware, Inc.*, 158 Wn. App. 906, 918, 246 P.3d 199, 204 (2010); *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 192, 127 P.3d 5, 10 (2005), *rev. denied*, 157 Wn.2d 1026 (2006); *Johnson*, 2019 WL 4187744, at *4.

The Court should grant review and apply the reasonably foreseeable standard of premises liability in this case and clarify that the *Iwai* plurality represents the state of premises liability law in Washington.

C. The Court of Appeals' refusal to consider Johnson's RAP 2.4(a) assignment of error conflicts with other Court of Appeals decisions, warranting review under RAP 13.4(b)(2).

If a motion for judgment as a matter of law is denied by the superior court, as it was in this case, "the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment." CR 50(d). "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 respondent." RAP 2.4(a). Use

of the word "will" indicates that the obligation to review issues raised under RAP 2.4(a) is mandatory. The Court of Appeals has interpreted the word "will" as it appears in the *Rules of Appellate Procedure* as creating a mandatory obligation. *See State v. Obert*, 50 Wn. App. 139, 143, 747 P.2d 502 (1987) ("will" in RAP 14.2 held to be mandatory); *see also State v. Stivason*, 134 Wn. App. 648, 656, 142 P.3d 189 (2006), *rev. denied*, 160 Wn.2d 1016 (2007) (stating "[i]n construing statutes and court rules, the words 'will' and 'shall' are mandatory, while words like 'may' are permissive and discretionary"; construing RAP 2.5(a); brackets added). The appellate court's refusal to consider the exclusion of Johnson's expert under RAP 2.4(a) conflicts with these cases, and should be reviewed pursuant to RAP 13.4(b)(2).

CONCLUSION

Based on the foregoing, Johnson asks the Court to grant review, reverse the Court of Appeals, and reinstate the jury's verdict in her favor.

Respectfully submitted this 6th day of July, 2020.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date indicated below, I served the document to which this is annexed, in the following indicated manner:

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Signed at Moses Lake, Washington on July 6, 2020.

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

September 4, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DARCY L. JOHNSON, Respondent, v. STATE OF WASHINGTON LIQUOR AND CANNABIS BOARD, Appellant.	No. 51414-1-II UNPUBLISHED OPINION

LEE, J. — a jury found the State liable for damages that Darcy L. Johnson suffered after she slipped and fell in a Washington State Liquor Store. The State appeals and argues that the trial court erred by denying its motion for judgment as a matter of law. We agree. Accordingly, we reverse the judgment, and remand to vacate the verdict and dismiss.

FACTS

Johnson filed a complaint for damages against the State alleging that, on June 18, 2011, she was injured after slipping and falling when she entered a state-owned liquor store. The State filed a motion for summary judgment, arguing that there was no genuine issue of material fact as to notice and, therefore, the State was entitled to judgment as a matter of law. The trial court denied the State's motion for summary judgment.

The case proceeded to a jury trial. At trial, Jay Smiley, Steve Pallas, and Johnson testified regarding the events surrounding Johnson's slip and fall.

Smiley was the lead clerk of the liquor store. Smiley had worked at the liquor store for approximately three years. On the morning of June 18, 2011, Smiley opened the liquor store between 9:00 and 10:00 AM. Jay did not remember the ground being wet when he arrived at the store, and he testified that he believed it began raining approximately 15 minutes before Johnson entered the store. As a store employee, Smiley was supposed to put out a "slippery when wet" sign when it begins raining. Verbatim Report of Proceedings (VRP) (Sep. 18, 2017) at 90. However, he had not put it out yet because he was busy with other customers at the store.

Smiley was at the register when Johnson entered the store. He described the incident as follows:

> It was out of the corner of my eye kind of thing. I noticed a couple come in. I was helping somebody else at the register, and then it was kind of one of those things you just kind of catch, and then turn your head and she was on the ground.

VRP (Sep. 18, 2017) at 91.

After Johnson fell, Smiley placed the "slippery when wet" sign on the floor, but did not see any water on the floor. Smiley also did not have to mop the floor.

Smiley was not aware of any condition inside the store that would necessitate placing the warning sign. And before Johnson fell no other customers reported water on the floor, complained about the floor being slippery, or slipped inside the store. Smiley did not personally observe any water on the entryway floor. The following exchange also took place during Smiley's testimony,

> [State:] Did you have any knowledge that there was anything unusual about the floors in this particular store that made them especially slippery when wet?
>
> [Smiley:] No.

> [State:] To your knowledge was there anything special about the condition of the floors in this store as of June 18, 2011, that made them especially slippery when wet?
>
> [Smiley:] It was just another day.
>
> [State:] Nothing about the maintenance schedule or anything to put you on notice?
>
> [Smiley:] Not that I'm aware of, no.

VRP (Sep. 18, 2017) at 98. Prior to Johnson's fall, nobody else had fallen in the store.

Pallas was Johnson's boyfriend at the time of the fall. On the morning of June 18, after going to some garage sales, Pallas and Johnson went to the liquor store. It was approximately 11:30 AM. Pallas remembered that it had been raining all morning.

Pallas parked in front of the liquor store, and he and Johnson entered the store. Pallas testified,

> I remember walking in the store, across the mat. And I remember taking one step, with my first foot off the mat, I went to slip. And I turned around to tell her to be care—and I didn't even get the full word "careful" out, and [Johnson] went down.

VRP (Sep. 18, 2017) at 148. Pallas also testified that both the parking lot and the sidewalk were wet when they walked up to the liquor store. Pallas did not observe any water on the floor where Johnson fell. Pallas also testified that Smiley told him the floors had been polished the night before.

Johnson also testified that it was raining the morning of June 18. Johnson remembered it being wet at all the garage sales she and Pallas went to that morning. Around 11:30 that morning, Johnson and Pallas stopped at the liquor store. Johnson described her fall,

> We got out of the truck and walked across the front entrance of the store, walked into the store. [Pallas] was in front of me not—just like a normal length you would walk behind somebody. I was just looking straight ahead. [Pallas] turned, and by that time, I had fallen down. I was on the ground already. He helped me up a little bit later.

VRP (Sep. 20, 2017) at 384. Johnson stated that the outside of her pant leg, which was on the ground, was wet. Johnson did not notice any water on the floor prior to her falling. After she fell, Johnson saw some water on the floor, and she assumed that the water had been tracked in from outside. Johnson had no idea how long there had been water on the floor. And Johnson admitted the water could have come from her own shoes or Pallas's shoes.

After Johnson concluded the presentation of her case, the State moved for judgment as a matter of law. The State argued that it was entitled to judgment as a matter of law because Johnson had not presented any evidence that the State had actual or constructive notice of water on the floor or any dangerous condition inside the store. Johnson argued that Smiley's testimony that the "slippery when wet" sign was put out when it was raining was sufficient to survive a motion for judgment as a matter of law. The trial court agreed with Johnson and denied the State's motion for judgment as a matter of law.

The jury found that the State was negligent and that the State's negligence was the proximate cause of Johnson's injuries and damages. The jury found that Johnson's damages were $2,305,000. The State filed a motion for judgment notwithstanding the verdict. As one of the grounds for its motion, the State asserted, "The failure to grant judgment as a matter of law." CP at 541. The trial court denied the motion for judgment notwithstanding the verdict.

The trial court entered judgment in favor of Johnson. The State appeals.

ANALYSIS

The State argues that the trial court erred by denying its motion for judgment as a matter of law.[1] We agree.

We review a trial court's denial of a motion for judgment as a matter of law de novo. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530–31, 70 P.3d 126 (2003). "A motion for judgment as a matter of law must be granted 'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" *Id.* at 531 (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). Substantial evidence is evidence that is sufficient "'to persuade a fair-minded, rational person of the truth of a declared premise.'" *Id.* (quoting *Hellman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

To establish the State's liability for her injury, Johnson was required to show that (1) an unreasonably dangerous condition existed in the liquor store, and (2) the liquor store had actual or constructive notice of the dangerous condition. *Charlton v. Toys R Us—Delaware, Inc.*, 158 Wn. App. 906, 912-13, 246 P.3d 199 (2010). Regardless of whether the floor was an unreasonably

[1] Johnson argues that the State has waived review of the trial court's decision denying its CR 50 motion by presenting evidence and failing to renew the motion post-verdict. This is incorrect. To support her position, Johnson relies on summary judgment cases, which are inapplicable because a motion for summary judgment is determined based on pleadings, rather than after evidence has been presented and tested. And a party is not required to renew a CR 50(a) motion (made during trial) with a CR 50(b) motion (made after trial) in order to preserve review of the CR 50 motion on appeal. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 751-52, 310 P.3d 1275 (2013). Therefore, we reject Johnson's argument.

dangerous condition if it was wet, Johnson did not present any evidence that the store had actual or constructive notice of a dangerous condition.

Johnson was required to prove that the liquor store had actual or constructive notice of the unreasonably dangerous condition. *Id*. at 916. "A plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to warn the plaintiff of the danger." *Id*. at 915. When the plaintiff has not established actual notice, the plaintiff must show that the dangerous condition "'has existed for such time as would have afforded [defendant] sufficient opportunity, in the exercise of ordinary care, to have made proper inspection of the premises and to have removed the danger.'" *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991) (quoting *Smith v. Manning's Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)). "[T]he lack of such evidence precludes recovery." *Id*.

Here, Smiley testified that he did not see any water on the floor before Johnson fell. He also testified that no customers informed him of water on the floor or complained that the floor was slippery. Johnson presented no evidence to contradict these assertions. And she did not present any evidence that would establish Smiley had actual notice that the floor was wet. Further, 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. And Johnson even admitted that the water could have been tracked in on her or Pallas's shoes. Therefore, in the absence of any evidence that would establish actual notice of an unreasonably dangerous condition in the liquor store, Johnson was required to establish constructive notice that the floor was wet.

Johnson relies on Smiley's testimony that the store put out the "slippery when wet" sign if it was raining to establish constructive notice. However, this 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 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. Moreover, Smiley testified that he was unaware of any other slip and fall incidents on the liquor store floor, whether it was raining or not. Therefore, the precaution of placing a "slippery when wet" sign out when it rains does not establish constructive notice of an unreasonably dangerous condition.

Johnson urges us to adopt the plurality opinion from *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), which would expand the application of the "self-service" exception to notice articulated in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983). However, as has been pointed out both in *Charlton* and in an opinion from this court, the plurality opinion in *Iwai* has no binding effect and, therefore, does not expand the application of the "self-service" exception to notice. 158 Wn. App. at 917-18; *Fredrickson v. Bertolino's Tacoma Inc.*, 131 Wn. App. 183, 192-93, 127 P.3d 5 (2005). No court since *Iwai* has adopted the position taken by the plurality.

CONCLUSION

In the absence of any evidence to establish constructive notice, the State was entitled to judgment as a matter of law. Therefore, the trial court erred by denying the State's motion as a

matter of law. Accordingly, we reverse and remand for the trial court to vacate the verdict and dismiss.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Cruser, J.

Court of Appeals No. 51414-1-II
Lewis Co. Superior Court Cause No. 14-2-00917-6

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

DARCY L. JOHNSON, a single woman,

Plaintiff-Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LIQUOR CONTROL BOARD,

Defendant-Appellant.

RESPONDENT'S MOTION FOR RECONSIDERATION

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Statutes and Rules

I. IDENTITY OF MOVING PARTY

This motion is filed on behalf of Plaintiff-Respondent Darcy L. Johnson, through undersigned counsel.

II. RELIEF REQUESTED

Pursuant to RAP 12.4, Johnson moves the Court for reconsideration of its unpublished decision, issued September 4, 2019, because: (1) the Court has misapprehended the standard of review and viewed the facts in the light most favorable to the Defendant-Appellant State of Washington ("State") rather than Johnson; and (2) the Court overlooked Johnson's RAP 2.4(a) appeal of the superior court's order in limine excluding her expert witness at trial.

III. REFERENCE TO RECORD

A. References to record regarding evidence of constructive notice.

In her response brief, Johnson noted the following facts regarding the State's negligence, with citations to the record:

> Darcy Johnson was injured at the WSLCB store on June 18, 2011. She and her then-boyfriend, now-husband, Steve Pallas ("Pallas") stopped by the store to purchase a gift for a friend who had done a favor for Johnson's father. It had been raining continuously ever since they got up that morning, between 6 and 7 a.m. RP 148:4, 178:12-20, 381:1-382:2 & 383:24-25. They arrived at the store between 11:30 and 11:45 a.m. RP 383:21-24. Pallas was walking in front of Johnson, and as soon as he stepped off a mat in the doorway, he slipped. RP 148:13-14 & 173:15-18. He turned around to warn Johnson to be careful, but before he could say anything she fell down. RP 148:14-16.

The WSLCB store manager, Jay Smiley, saw Johnson fall out of the corner of his eye. The store opened at 9 a.m., and Smiley arrived ½ hour before opening. RP 89:6-19. The store had been open for approximately 2 ½ hours before Johnson and Pallas came in. The store was busy because it was a Saturday. RP 91:8-11. Normally, the store had 700-800 customers on Saturdays. RP 95:8-10.

In his deposition, Smiley testified that it had started raining about 15 minutes before Johnson fell, but at trial he testified that he did not remember and acknowledged that it could have been raining when he arrived for work. RP 89:25-90:9. Smiley acknowledged that "[r]ainy days ***always*** bring muddy footprints." RP 97:11 (brackets & emphasis added). It was common for customers to enter the store with wet feet anytime it was wet outside. RP 105:24-106:3. Due to the lack of an awning on the outside of the building, customers' "feet get wet and it comes in the store." RP 108:7-12. "The water would come in with them." RP 109:15-16.

One of Smiley's job duties was to put out a highly visible yellow sign warning customers that the floor of the store is "slippery when wet" whenever it rains. Specifically, he testified that the sign is needed whenever it rains:

> Q. [Counsel for Johnson] As part of your duties to—is to put out a very visible yellow sign that says, "slippery when wet"?
>
> A. [Smiley] Yes.
>
> Q. Right?
>
> A. Yes.
>
> Q. Is that your duty to do that?
>
> A. Yes.
>
> Q. Okay. And you told me, did you not, in your deposition that what—***I asked you what triggers that responsibility, that need to put it out. And you told me what?***
>
> A. ***When it rains.***

RP 90:15-91:2 (brackets & emphasis added).

> Q. [Counsel for Johnson] And the purpose of putting that sign out is to prevent people from falling; isn't that correct?
>
> A. [Smiley] It's a warning sign, yes, sir.
>
> Q. Okay. And it doesn't say, "wet floor." It says "floor slippery when wet"?
>
> A. Correct.
>
> Q. ***And that is put out when you have a need, and that need is when it rains?***
>
> A. ***Yes, sir.***

RP 108:13-21 (brackets & emphasis added). The warning sign was needed "[j]ust as soon as it started raining." RP 110:7-10 (brackets added).

On the day Johnson was injured, Smiley acknowledged that he failed to put out the warning sign, even though it had been raining. RP 91:3-7 & 108:19-23. He did not take the time to do so because he was the only person in the store and he was busy helping other customers. RP 91:8-11 & 95:17-19. In light of this evidence, the jury determined that WSLCB was negligent. CP 527.

Johnson Resp. Br., at 6-9 (formatting & citations in original).

Based on the foregoing facts, Johnson argued that the jury could reasonably infer constructive notice as follows:

> Reasonable jurors could conclude that "water makes the floor dangerously slippery" and that WSLCB knew or should have known "that water would make the floor slippery" based on their common experience. The superior court made the exact same point when explaining the grounds for exclusion of Johnson's expert witness. RP 26:5-10 & 35:20-24. In addition, WSLCB personnel placed a highly visible yellow warning sign out whenever it rained, stating that the floor where Johnson was injured is "slippery when

> wet." RP 90:15-91:2 & 108:16-18. This is tantamount to an admission that water makes the floor slippery.
>
> Reasonable jurors could also conclude that WSLCB knew or should have known that "there was water on the floor at the time [Johnson] slipped" based on: (1) the length of time it had been raining, i.e., at least 5 ½ hours; (2) the length of time the store had been open, i.e., approximately 2 ½ hours; (3) the fact that there were a lot of customers and the store was busy; and (4) the admissions by the store manager that: (a) "[r]ainy days ***always*** bring muddy footprints," RP 97:11 (brackets & emphasis added); (b) customers track water into the store due to the lack of awnings outside, RP 105:24-106:3 & 108:7-12; and (c) the slippery-when-wet sign is ***needed*** whenever it rains, RP 90:15-91:2 & 108:19-21. This is sufficient evidence to support the jury's verdict under the instructions.

Johnson Resp. Br., at 27-28 (formatting & citations in original).

In its opinion, the Court held that there was insufficient evidence of constructive notice, reasoning as follows:

> Johnson relies on Smiley's testimony that the store put out the "slippery when wet" sign if it was raining to establish constructive notice. However, this 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 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. Moreover, Smiley testified that he was unaware of any other slip and fall incidents on the liquor store floor, whether it was raining or not. Therefore, the precaution of placing a "slippery when wet" sign out when it rains does not establish constructive notice of an unreasonably dangerous condition.

Slip Op., at 6-7.

The Court did not acknowledge testimony from the store clerk that the slippery-when-wet sign was "needed" whenever it rained, not just placed as a precaution. RP 90:15-91:2 & 108:19-21.

The Court did not acknowledge the length of time it had been raining, i.e., 5 ½ hours, according to the testimony of Johnson and her boyfriend. RP 148:4, 178:12-20, 381:1-382:2 & 383:24-25. Instead, the Court noted that Smiley testified it had only been raining for 15 minutes. Slip Op., at 2.

And, while the Court noted that it had been a busy morning at the store, Slip Op., at 2, it did not acknowledge that "[r]ainy days ***always*** bring muddy footprints," RP 97:11 (brackets & emphasis added); because there was no awning outside of the building, RP 108:7-12 & 109:15-16.

B. References to record regarding exclusion of Johnson's expert witness.

In her response brief, Johnson assigned error regarding the superior court's exclusion of her expert witness as follows:

> **III. RAP 2.4(a) ASSIGNMENT OF ERROR**
>
> The following error should be addressed by this Court only in the event of reversal:
>
> > The superior court erred in granting WSLCB's motion in limine to exclude the testimony of Johnson's Human Factors engineer, Dan Johnson. CP 441.

Johnson Resp. Br., at 2 (formatting & citation in original).

Johnson recounted the facts regarding exclusion of her expert witness as follows:

> **2. The superior court granted WSLCB's motion in limine to exclude testimony from Johnson's Human Factors expert, Dan Johnson.**
>
> Johnson retained a Human Factors expert, Dan Johnson, PhD (no relation), to testify regarding the circumstances of her injury. Dr. Johnson has his PhD in experimental psychology and is a Certified Professional Ergonomist. Ergonomics, also called Human Factors, relates knowledge of human capabilities, limitations and characteristics to design of tools, machines, and environments to ensure safe use. CP 350.
>
> Dr. Johnson interviewed Johnson and reviewed video footage and photographs of the WSLCB store where she was injured. CP 351. He also reviewed medical records, CP 351, and the shoes Johnson was wearing when she was injured, CP 360, and tested the slip resistance of the floor where she was injured, CP 362.
>
> Dr. Johnson explained how water on the floor of the WSLCB store created a dangerous condition:
>
> > Water, acting as a lubricant between the shoe and the floor, can reduce the slip resistance of the surface (NSC, 1986). This is true even when the floors have polish films which may increase the slip resistance between a dry floor and a person's footwear. Braun and Roemer (1974, p. 70) state: "Moistened polish films exhibit a completely different behavior towards friction than dry ones, since water forms a lubricating film which leads to a different kind of mechanism." Templer reports that only selected combinations of wet shoes and surfaces result in a slip resistance value greater than 0.4 (Templer, 1992, V. 2, pp. 51-53). For example, while the slip resistance of carpet is high when dry (more than 0.75) it is lower when wet though still in what might be considered a safe range (0.4 up to 0.75). But, he reports, many other surfaces (e.g., linoleum, concrete, granolithic, clay tiles and terrazzo) which are slip resistant when dry lose slip resistance when wet and exhibit

> values between 0.2 to less than 0.4 (Ibid, Table 3.5, p. 52). In other words, a person stepping onto a surface covered with a layer of water may experience only half, or less, of the slip resistance that surface would have provided when dry.

CP 353-54. A wet linoleum floor violates applicable safety standards for the slip-resistance of walking surfaces, as confirmed by later testing. CP 354 & 362.

On the basis of his expertise and review of this case, Dr. Johnson concluded:

> 1) Ms. Johnson had no physical condition that contributed to her fall. She was properly dressed and was wearing footwear the soles and heels of which are known to decrease the chance of a slip and fall. She was behaving in an expected and predictable manner.
>
> 2) If the floor had been slip resistant when wet, as required by Code, then, on a more probable than not basis, this fall would have been prevented.
>
> 3) If carpet mats had been arranged so that entering customers would have to walk on them after entering the store, and if any saturated mats had been replaced, then on a more probable than not basis this fall would have been averted.
>
> 4) If a warning had been placed so that entering customers could see them in time to alter their gait before stepping onto the wet floor, then, on a more probable than not basis, the chance of this fall occurring would have been reduced.

CP 357-58.

WSLCB filed a motion in limine to preclude Dr. Johnson from testifying. CP 294-97. The superior court granted the motion. RP 17:22-26:23 (argument and oral ruling); CP 439-40 (written order). The court justified its decision on grounds that Dr. Johnson's testing of the floor was performed too long after Johnson fell and

> the rest of his opinions were matters of common knowledge. RP 26:5-10 & 35:20-24.

Johnson Resp. Br., at 14-16 (formatting & citations in original).

Johnson included a copy of her expert's report, CP 349-60, a follow up letter regarding his testing of the slip resistance of the floor where Johnson was injured, CP 362, and an offer of proof regarding his testimony, CP 659 to 664, in the Appendix to her brief.

Johnson argued that the superior court erred in excluding her expert witness as follows:

> **A. The superior court abused its discretion in excluding the testimony of Johnson's Human Factors expert.**
>
> "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 respondent." RAP 2.4(a). In addition, if a motion for judgment of law is denied, "the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment." CR 50(d). "If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." *Id.* If this Court reverses the superior court, then it should review the lower court's exclusion of Johnson's Human Factors expert and remand for a new trial with instructions to admit the testimony.
>
> Opinion testimony from a qualified witness that will "assist the trier of fact to understand the evidence or to determine a fact in issue" is admissible under ER 702. There is no question that Dr. Johnson is well qualified. He reviewed sufficient materials to render his opinions. He provided opinions that would be helpful to the jury in understanding the cause of Johnson's injuries, including the dangerous nature of the condition created by the lubricating effect

> of water on the floor, the mechanics of injury, and applicable standards regarding slip resistance, floor mats, and warning signs.
>
> The superior court abused its discretion in excluding Dr. Johnson's testimony on grounds that too much time had elapsed between Johnson's injury and his testing of the floor where she was injured. Delay in testing does not render such evidence inadmissible "in the absence of proof that the subsequent condition does not truly reflect the actual circumstances obtaining at the time of the accident." *F.W. Woolworth Co. v. Seckinger*, 125 F.2d 97, 98 (5th Cir. 1942). The delay goes to the weight of the evidence rather than its admissibility. *Id.*; *see also Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1284-85 (11th Cir. 2015) (finding abuse of discretion in excluding expert based on 520-day delay in testing slip resistance of surface where plaintiff fell; relying on *F.W. Woolworth*). Just as importantly, the superior court's reasoning is limited to Dr. Johnson's measurement of slip resistance and does not undercut the admissibility of his other opinions. If this Court reverses, Johnson should be entitled to a retrial with the benefit of her Human Factors expert's testimony.

Johnson Resp. Br., at 45-46 (formatting & citations in original; footnote omitted).

In her conclusion, Johnson's request for relief included the following:

> If, and only if, the Court reverses, the Court should grant Johnson a new trial with instructions directing the superior court to allow her to present testimony from her Human Factors expert, Dr. Johnson.

Johnson Resp. Br., at 46-47.

IV. GROUNDS FOR RELIEF REQUESTED

Reconsideration is warranted when points of law or fact have been misapprehended or overlooked. *See* RAP 12.4(c). In this case, the Court has

misapprehended the correct standard of review and overlooked Johnson's RAP 2.4(a) appeal.

While the Court correctly noted that the standard of review requires it to view the evidence presented at trial in the light most favorable to Johnson, Slip Op., at 5, the Court failed to properly apply the standard on the issue of constructive notice. The Court's analysis of constructive notice failed to acknowledge key facts that support the jury's verdict. The slippery-when-wet sign was "needed" at the store where Johnson fell whenever it rained, not just placed as a precaution. RP 90:15-91:2 & 108:19-21. It had been raining 5 ½ hours before Johnson fell, RP 148:4, 178:12-20, 381:1-382:2 & 383:24-25; not 15 minutes, Slip Op., at 2. It had been a busy morning and "[r]ainy days ***always*** bring muddy footprints," RP 97:11 (brackets & emphasis added); because there was no awning outside of the building, RP 108:7-12 & 109:15-16. Under these facts, the jury was justified in inferring constructive notice, and the verdict should be upheld.

In addition, the Court failed to address Johnson's appeal of the superior court's order excluding her expert witness. Such an appeal is authorized by RAP 2.4(a), which provides in pertinent part: "[t]he 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 respondent." (Brackets added.) Consideration of such an

appeal is doubly warranted in a case such as this one, involving review of the denial of a CR 50 motion. "[T]he party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment." CR 50(d). "If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." *Id*. The expert's testimony establishes that the State was negligent and caused Johnson's fall, and if the Court does not grant reconsideration regarding the standard of review, the case should be remanded so this evidence can be presented to a jury.

Respectfully submitted this 23rd day of September, 2019.

s/George M. Ahrend_____
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The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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Washington State
Court of Appeals
Division Two

March 26, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DARCY L JOHNSON, Respondent, v. STATE OF WASHINGTON LIQUOR AND CANNABIS BOARD, Appellant.	No. 51414-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, Darcy L. Johnson, filed a motion for reconsideration of this court's unpublished opinion filed on September 4, 2019. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Maxa, Lee, Cruser

LEE, J.

Court of Appeals No. 51414-1-II
Lewis Co. Superior Court Cause No. 14-2-00917-6

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

DARCY L. JOHNSON, a single woman,

Plaintiff-Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LIQUOR CONTROL BOARD,

Defendant-Appellant.

RESPONDENT'S MOTION TO PUBLISH

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Co-Counsel for Respondent

I. IDENTITY OF MOVING PARTY

This motion is filed on behalf of Respondent Darcy L. Johnson ("Johnson"), through undersigned counsel.

II. RELIEF REQUESTED

Pursuant to RAP 12.3(e), Johnson asks the Court to publish its decision in this case.

III. REFERENCE TO RECORD

The Court issued an unpublished decision on September 4, 2019. *See Johnson v. WSLCB, noted at* 10 Wn.App.2d 1011, 2019 WL 4187744 (Div. 2, Sept. 4, 2019). The Court denied a timely motion for reconsideration on March 26, 2020.

Johnson asked this Court to adopt the standard for premises liability set forth in the plurality opinion of the Washington Supreme Court in *Iwai v. State,* 129 Wn.2d 84, 915 P.2d 471, as an alternate ground to affirm. *See* App. Br., at 32-33. The *Iwai* plurality provides that it is not necessary to establish actual or constructive notice of the specific dangerous condition in a premises liability case as long as the risk of harm is foreseeable. *See* 129 Wn.2d at 100 ("the question is whether 'the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable'"; quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994)). The Supreme

Court noted that this approach "has also been applied in cases involving slips caused by tracked in rain or snow." 129 Wn.2d at 101. In such cases, the injured plaintiff does "not have to show the defendant knew of the specific puddle that caused the accident; rather, defendant's knowledge of the floor's tendency to get slippery when wet, coupled with the knowledge of the wet weather conditions on the day of the fall, made the specific condition reasonably foreseeable." *Id.* at 101.

In its opinion, the Court declined Johnson's request to adopt the *Iwai* plurality, stating:

> Johnson urges us to adopt the plurality opinion from *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), which would expand the application of the "self-service" exception to notice articulated in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983). However, as has been pointed out both in *Charlton* and in an opinion from this court, the plurality opinion in *Iwai* has no binding effect and, therefore, does not expand the application of the "self-service" exception to notice. 158 Wn. App. at 917-18; *Fredrickson v. Bertolino's Tacoma Inc.*, 131 Wn. App. 183, 192-93, 127 P.3d 5 (2005). No court since *Iwai* has adopted the position taken by the plurality.

Johnson, 2019 WL 4187744, at *4.

IV. GROUNDS FOR RELIEF REQUESTED

RAP 12.3(e) provides in pertinent part:

> A motion requesting the Court of Appeals to publish an opinion that had been ordered filed for public record should be served and filed within 20 days after the opinion has been filed. The motion must be supported by addressing the following criteria: (1) if not a party, the applicant's interest and the person or group applicant represents; (2)

> applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or (6) whether the decision is in conflict with a prior opinion of the Court of Appeals.

Publication is warranted under this rule because the applicability of *Iwai* is unsettled (criterion #3) and involves a decision of general public interest and importance (criterion #5).

In *Mucsi v. Graoch Associates Ltd. P'ship No. 12*, 144 Wn.2d 847, 859, 31 P.3d 684, 689 (2001), a case involving a slip and fall on ice outside an apartment complex clubhouse, a 7-Justice majority of the Supreme Court cited *Iwai,* 129 Wn.2d at 100-01, with approval for the proposition that "this Court also determined, where the plaintiff is unable to establish actual or constructive notice, the plaintiff may present evidence to establish the unsafe condition was reasonably foreseeable." The Supreme Court majority further stated "[t]here must be evidence of actual or constructive notice *or foreseeability*" of an unsafe condition to support a premises liability claim. *Mucsi*, 144 Wn.2d at 863 (brackets & emphasis added).

Based on *Mucsi,* the U.S. District Court for the Western District of Washington followed the *Iwai* plurality, stating:

> While the *Iwai* decision was a plurality opinion and thus does not constitute binding precedent, the Washington Supreme Court has subsequently referenced *Iwai* and indicated that "actual or

> constructive notice *or forseeability"* of the unsafe condition will suffice to support a landowner negligence claim. *Musci,* 31 P.3d at 691 (emphasis added). For this reason, this Court believes that, if confronted with the issue in the future, the Washington Supreme Court would most likely affirm *Iwai'* s liberal treatment of the notice requirement with respect to landowner negligence claims. Therefore, applying the *Iwai* principle, the Court holds that Plaintiff may prevail on her negligence claim in this case by showing *either* actual or constructive notice of the unsafe condition *or* that the unsafe condition was reasonably forseeable.

Sundquist v. BRE Properties, Inc., 2012 WL 750537, at *3 (W.D. Wash., Mar. 8, 2012); *see also Cooper v. Ross Dress For Less, Inc.*, 2014 WL 637644, at *2 n.5 (W.D. Wash., Feb. 18, 2014) (applying the *Iwai* plurality but finding it inapplicable to the facts before the court).

Until the decision below, the Courts of Appeals have not yet adopted the *Iwai* plurality, although they have not addressed the Supreme Court's favorable citation in *Mucsi*. A panel from Division 3 declined to follow the *Iwai* plurality without referencing *Mucsi* in *Charlton v. Toys R Us-Delaware, Inc.*, 158 Wn. App. 906, 246 P.3d 199 (2010). A panel from Division 2 also declined to follow the *Iwai* plurality, again without referencing *Musci,* in *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 192-93, 127 P.3d 5 (2005), *rev. denied,* 157 Wn.2d 1026 (2006). *See also Haubrich v. Pizza Specialists Inc., noted at* 1 Wn.App.2d 1052, 2017 WL 6493306, at *6 n.6 (Div. 2, Dec. 19, 2017) (unpublished opinion following *Fredrickson*); *Schweikart v. Franciscan Health System-West,*

noted at 176 Wn. App. 1037, 2013 WL 5435821, at *7-8 (Div. 2, Sept. 24, 2013) (Bjorgen, J., concurring, writing separately to emphasize that the *Iwai* plurality is sound and should be adopted by the Supreme Court). Division 1 does not appear to have addressed the issue.

This Court should publish its decision in light of the disagreement between state and federal courts regarding the *Iwai* plurality, and the public importance of the standard for premises liability.

Respectfully submitted this 15th day of April, 2020.

s/George M. Ahrend_____
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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date indicated below, I served the document to which this is annexed, in the following indicated manner:

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Signed at Moses Lake, Washington on April 15, 2020.

Shari M. Canet

Shari M. Canet, Paralegal

AHREND LAW FIRM PLLC

April 15, 2020 - 4:30 PM

Transmittal Information

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Appellate Court Case Title:	Darcy L. Johnson, Respondent v. State of WA, Liquor & Cannabis Board, Appellant
Superior Court Case Number:	14-2-00917-6

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Division Two

June 5, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DARCY L JOHNSON, Respondent, v. STATE OF WASHINGTON LIQUOR AND CANNABIS BOARD, Appellant.	No. 51414-1-II ORDER DENYING MOTION TO PUBLISH

Respondent, Darcy L. Johnson, filed a motion to publish this court's unpublished opinion filed on September 4, 2019. After consideration, it is hereby

ORDERED that the motion to publish is denied.

FOR THE COURT: Jj. Maxa, Lee, Cruser

, C.J.

LEE, CHIEF JUDGE

AHREND LAW FIRM PLLC

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Transmittal Information

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