

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/18/2021 3:21 PM  
BY ERIN L. LENNON  
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No. 100225-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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REBECCA WEST, an individual,

*Respondent,*

v.

RIDE THE DUCKS INTERNATIONAL, LLC, a  
foreign company; RIDE THE DUCKS OF  
SEATTLE, LLC, a Washington company,

*Petitioners.*

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**PETITIONER RIDE THE DUCKS INTERNATIONAL,  
LLC'S ANSWER TO PETITION FOR REVIEW OF RIDE  
THE DUCKS OF SEATTLE, LLC**

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## I. INTRODUCTION

Ride the Ducks International, LLC (RTDI) fully joins in the petition for review filed by Ride the Ducks of Seattle, LLC (RTDS). RTDS correctly argues that review is warranted because the Court of Appeals' decision conflicts with decisions of this Court on harmless error. Under this Court's precedents, erroneously admitted or excluded evidence is cumulative if it is "in substance the same" as evidence that was properly admitted.<sup>1</sup> Yet the Court of Appeals in effect adopted a more lenient standard and held that evidence is cumulative if it generally relates to the same subject matter as other evidence. Because of this conflict, review is warranted under RAP 13.4(b)(1).

## II. STATEMENT OF THE CASE

For purposes of this answer, RTDI adopts the statement of the case in RTDS's petition.

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<sup>1</sup> *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169–70, 876 P.2d 435 (1994).

### III. ANSWERING ARGUMENT

**A. Under this Court’s precedents, erroneously admitted or excluded evidence is cumulative if it is “in substance the same” as evidence that was properly admitted.**

Error must be deemed prejudicial, requiring reversal, if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).<sup>2</sup> Conversely, evidentiary error generally is harmless if the erroneously admitted or excluded evidence was “cumulative.” *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169–70, 876 P.2d 435 (1994).

This Court has narrowly defined the concept of cumulative evidence for purposes of a harmless-error analysis. To be deemed cumulative, erroneously admitted or excluded evidence need not be “identical” to evidence that was properly admitted,

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<sup>2</sup> See also *State v. Bashaw*, 169 Wn.2d 133, 143–44, 234 P.3d 195 (2010) (vacating a conviction of one count of delivery of a controlled substance within 1,000 feet of a school bus stop because there was “a reasonable possibility that the jury would have reached a different conclusion” if improperly admitted evidence had been excluded), *overruled on other grounds by State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012).

but it must be “*in substance, the same.*” *Havens*, 124 Wn.2d at 169–70 (emphasis added) (concluding that the erroneous exclusion of diary entries offered to show that the plaintiff was fired for just cause was harmless because “the substance of” the entries was admitted through the testimony of multiple witnesses).<sup>3</sup>

In other words, “[c]umulative evidence is additional evidence of the same kind to the same point.” *State v. Williams*, 96 Wn.2d 215, 223–24, 634 P.2d 868 (1981) (quoting *Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918)) (emphasis added). The evidence should not differ “*in any material respect*” from the properly admitted evidence. *Mason v. Bon Marche*

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<sup>3</sup> See also *Moore v. Smith*, 89 Wn.2d 932, 941–42, 578 P.2d 26 (1978) (concluding that any error in excluding a statement implicating the plaintiff in criminal activity, offered to show lack of damage to reputation from alleged defamation, was harmless because “the substance of” the allegation came in through testimony); *McDaniel v. City of Seattle*, 65 Wn. App. 360, 368, 828 P.2d 81 (1992) (holding that the trial court did not abuse its discretion in excluding a police report where “the evidence contained in the report was presented through the officers who testified at the trial.”).

*Corp.*, 64 Wn.2d 177, 179, 390 P.2d 997 (1964) (emphasis added) (concluding that any error in excluding testimony from one witness was harmless because there was no showing that the testimony would have differed “in any material respect” from similar testimony from other witnesses that was properly admitted).

**B. In conflict with precedent, the Court of Appeals held that evidence is cumulative if it generally relates to the same subject matter as other evidence.**

The Court of Appeals determined that the trial court abused its discretion in admitting West’s testimony that she was wearing a medical boot at trial because she had a deep tissue infection in her foot, caused by tissue from an infected seroma on her hip that traveled down her leg and into her foot. *Slip Op.* at 48–51. The court held that such testimony from a lay person was inadmissible under ER 701. *Id.*

That determination should have resulted in reversal of the judgment and remand for a new trial on damages. But the court held that the error was harmless, and thus did not warrant



reversal, because the erroneously admitted testimony was “largely cumulative of testimony from other witnesses that she continued and would continue to experience problems with ambulation.” *Slip Op.* at 55; *see generally id.* at 52–55.

Testimony that West had needed to wear a boot because of an infection in her foot was not “in substance the same” as testimony that she generally had ongoing problems with ambulation. No medical expert testified about the condition of West’s foot at the time of trial, including that her foot was infected or that she needed to wear a boot for any reason. There was no evidence that West’s previous ankle injury had anything to do with the foot infection she testified about.

In holding that West’s erroneously admitted testimony was cumulative of testimony that was properly admitted, the Court of Appeals in effect adopted a new, more lenient standard for evaluating whether erroneously admitted or excluded evidence is cumulative. Under that new standard, evidence is cumulative if it generally relates to the same subject matter as

other evidence. The Court of Appeals' holding conflicts with the decisions of this Court cited above, including *Havens*. Review is thus warranted under RAP 13.4(b)(1).

Not only does the Court of Appeals' decision conflict with precedent, it undermines the central purpose of the harmless-error test: to preserve the jury's constitutional role as factfinder. *See* WASH. CONST. art. 1, § 21. This Court preserves that role by requiring that a new trial be ordered when there is no way to know what value the jury placed upon improperly admitted evidence. *See Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983). An overly broad definition of what constitutes cumulative evidence risks invading the jury's sacred province.

#### **IV. CONCLUSION**

The Court of Appeals' decision about the nature of cumulative evidence for purposes of a harmless-error analysis conflicts with *Havens* and other decisions of this Court. This Court should grant review under RAP 13.4(b)(1).

This document contains 1,054 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 18th day of October, 2021.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 18th day of October, 2021.

/s/ Patti Saiden

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October 18, 2021 - 3:21 PM

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