Supreme Court No. 101412-1
Court of Appeals No. 51414-1-II
Lewis County Superior Court No. 14-2-00917-6

THE SUPREME COURT OF WASHINGTON

DARCY L. JOHNSON,

Petitioner,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LIQUOR CONTROL BOARD,

Respondent.

PETITION FOR REVIEW

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PETITIONER AND COURT OF APPEALS DECISION

Petitioner Darcy L. Johnson asks this Court to accept review of the decision terminating review in *Johnson v. Liquor & Cannabis Board*, 21 Wn. App. 2d 1041, 2022 WL 910180, at *1 (Div. II, Mar. 29, 2022), because Division II failed to heed the Court's direction in her first appeal and misapplied this Court's clear precedent regarding both the standard for what constitutes an unreasonably dangerous condition and the standard for review of the jury's verdict.

In Johnson's first appeal, this Court unanimously held that the trial court "properly denied the State's motion for judgment as a matter of law because Johnson presented evidence of the reasonable foreseeability of an unreasonably dangerous condition," and "reverse[d] and remand[ed] to the Court of Appeals for further proceedings[.]" *Johnson v. Liquor & Cannabis Board*, 197 Wn.2d 605, 622, 486 P.3d 125 (2021) (brackets added). On remand, Division II held that the trial court "erred by denying the State's motion for judgment as a matter of

law" on grounds that "there is no evidence that an unreasonably dangerous condition actually existed," and overturned the jury's verdict. *Johnson*, 2022 WL 910180, at *1. Johnson filed a timely motion to publish on April 15, 2022, and the appellate court denied the motion on September 28, 2022. Division II's decision and its order denying publication are reproduced in the Appendix.

ISSUES PRESENTED

1. ***Did Division II misconstrue this Court's clear precedent regarding an unreasonably dangerous condition created by water on the floor of a business establishment?***

   This Court has "long indicated that a floor must have more than an ordinary amount of water on the floor to constitute an unreasonably dangerous condition." *Johnson*, 197 Wn.2d at 622 (citing *Brant v. Mkt. Basket Stores,* 72 Wn.2d 446, 448-49, 433 P.2d 863 (1967)). However, Division II misconstrued this requirement as referring to the ***quantity*** of water on the floor, rather than the ***dangerousness*** of the condition created by the water on the floor. *Johnson,* 2022 WL 910180, at *3-4. The resulting conflict warrants review under RAP 13.4(b)(1).

2. ***Did Division II ignore this Court's clear precedent regarding the relevance and sufficiency of a prior slip and near-fall to prove unreasonable danger?***

This Court has repeatedly and consistently held that prior slips and falls or near-falls involving other persons at or near the time and place of the plaintiff's injury are sufficient to prove that a condition is unreasonably dangerous, as the State properly conceded during oral argument in the first appeal. *Bussard v. Fireman's Fund Indem. Co*., 44 Wn.2d 417, 420, 267 P.2d 1062 (1954); *O'Dell v. Chicago, M., St. P. & P. R. Co.*, 6 Wn. App. 817, 826, 496 P.2d 519 (1972); *Turner v. City of Tacoma*, 72 Wn.2d 1029, 1036, 435 P.2d 927 (1967). Prior slips and falls or near-falls are the classic evidence of dangerousness in premises liability cases. However, Division II disregarded testimony from Johnson's husband Steve Pallas that he slipped on the same spot right before Johnson was injured on grounds that it "does not establish anything about the floor or its properties." *Johnson*, 2022 WL 910180, at *4. The resulting conflict warrants review under RAP 13.4(b)(1).

3. ***Did Division II violate this Court's clear precedent regarding the nature and limits on reviewing the evidence supporting a jury's verdict?***

While the nature and limits of substantial evidence review are well established, it is occasionally necessary for this Court to provide a reminder and corrective to lower courts that succumb to the temptation to re-weigh the evidence, despite the limitations on an appellate court's authority and competence to perform such re-weighing. The Court recently had to provide such correction in reinstating a jury's damage verdict. *Coogan v. Borg-Warner Morse Tec*

Inc., 197 Wn.2d 790, 819, 490 P.3d 200 (2021). In this case, the Court is called upon to fulfill this obligation in connection with a jury's liability verdict to honor the constitutional limits on appellate jurisdiction, Wash. Const. Art. IV, § 4, and protect the right to trial by jury, *id.* Art. I, § 21. Yet Division II improperly re-weighed the evidence in this case, and its decision to overturn the jury's verdict and remand for dismissal conflicts with decisions of this Court and presents an issue of substantial public interest that warrants review under RAP 13.4(b)(1) & (4).

STATEMENT OF THE CASE

Johnson was injured at a State liquor store on June 18, 2011. She and her husband, Steve Pallas, stopped by the store to purchase a gift for a friend who had done a favor for Johnson's father. RP 145:16-146:14. 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 5½ hours later, around 11:30 or 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. After

she fell, Johnson's pants were wet from water on the floor. RP 384:23-385:5 & 452:17-23. Both Pallas and Johnson were wearing Georgia "Romeo" shoes with grippy rubber soles. RP 146:17-147:22 & Ex. 4. The floor was waxed linoleum that had been polished the night before. RP 92:20-93:5, 175:22-176:1 & 562:3-565:12.

The store manager, Jay Smiley, saw Johnson fall out of the corner of his eye. RP 91:14-18. The store opened around 9 or 10 a.m., and Smiley arrived ½ hour before opening. RP 89:6-19. The store had been open for approximately 1½ to 2½ hours before Johnson and Pallas came in. The store was busy because it was a Saturday. RP 91:8-11 & 95:11-16. Normally, the store had 700-800 customers on Saturdays. RP 95:8-10.

Smiley testified that he did not remember how long it had been raining and acknowledged that it could have been raining when he arrived for work, which was approximately 2-3 hours before Johnson fell. RP 89:25-90:9. Smiley admitted there might have been mud, sand, dirt, or even gravel on the floor because

"[r]ainy days ***always*** bring muddy footprints." RP 97:9-13 (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 over the sidewalks leading to the entrance 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] 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] 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 working in the store and he was busy helping other customers. RP 91:8-11 & 95:17-19.

After Johnson rested, the State moved the trial court for judgment as a matter of law, arguing there was insufficient evidence of negligence. RP 472:25-479:10. The trial court denied the motion, reasoning as follows:

> 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 484:17-485:10 (emphasis added).

After the close of evidence, the trial court instructed the jury regarding the State's liability, using instructions adapted from the Washington Pattern Instructions, all of which were either proposed or agreed-to by the State. CP 512, 515, 517-20. Under these instructions, the jury found that the State was negligent and returned a verdict in Johnson's favor. CP 527. The jury rejected the State's defense that Johnson was contributorily negligent. CP 528.

Post-trial, the State filed another motion for judgment as a matter of law, arguing that there was insufficient evidence of

constructive notice of the slippery condition of the floor. CP 546-51. Among other things, Johnson urged the court to apply the reasonably foreseeable standard of liability for business customers as urged by a 4-Justice plurality of this Court in *Iwai*. CP 625; RP 1023:21-1026:9. The trial court again denied the State's motion and explained:

> 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 1044:5-1045:8 (emphasis added).

The State appealed the judgment entered on the jury's verdict. CP 638-46. Division II initially reversed the trial court on grounds that there was insufficient evidence of constructive notice of the dangerous condition resulting from water on the floor. *Johnson*, 2019 WL 4187744, at *3. However, this Court reversed Division II "because Johnson presented evidence of the reasonable foreseeability of an unreasonably dangerous condition." *Johnson*, 197 Wn.2d at 622. On remand, Division II ruled that "there is ***no evidence*** that an unreasonably dangerous condition actually existed" and overturned the jury's verdict. *Johnson*, 2022 WL 910180, at *1 (emphasis added).

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Division II ignored clear precedent from this Court regarding both the standard for proof of dangerousness and the standard for conducting substantial evidence review. The State admittedly owed a duty to exercise reasonable care to protect

customers like Johnson from dangerous conditions because, as a store owner, the State has given an "implied assurance" that the premises are safe. *McKinnon v. Washington Fed. Sav. & Loan Ass'n,* 68 Wn.2d 644, 649, 414 P.2d 773 (1966). The State admits that the jury was properly instructed regarding this duty, including a special instruction that "[t]he presence of water on the floor where the plaintiff slipped is not enough to prove negligence …. The plaintiff must prove that water makes the floor dangerously slippery[.]" CP 520 (ellipsis & brackets added). Under these instructions the jury determined that the condition created by water on the floor of the State's store was "dangerously slippery," and there is ample evidence in the record to support the jury's verdict. The Court should grant review under RAP 13.4(b)(1) & (4).

A. Division II's decision conflicts with decisions of this Court regarding proof of dangerousness, warranting review under RAP 13.4(b)(1).

1. Division II improperly focused on the *quantity* of water rather than the *dangerousness* of the condition created by water on the floor.

In its prior decision in this case, the Court noted "that a floor must have more than an ordinary amount of water on the floor to constitute an unreasonably dangerous condition." *Johnson*, 197 Wn.2d at 622 (citing *Brant,* 72 Wn.2d at 448-49). While an extraordinary amount of water on the floor may suffice to prove dangerousness, dangerousness does not hinge on the quantity of water. As stated in *Brant*:

> The defendant owed to its invitees in its place of business the duty of maintaining its store in a reasonably safe condition. What is a reasonably safe condition depends upon the nature of the business conducted and the circumstances surrounding the particular situation ....
>
> The plaintiff in this case has proven no more than that she slipped and fell on a wet floor and sustained certain injuries in consequence thereof. ***Our cases indicate that something more must be proved to establish that the defendant had permitted a situation dangerous to its invitees to exist***.

72 Wn.2d at 451 (ellipsis & emphasis added); *see also id.* at 448 (acknowledging evidence of the amount of water but distinguishing it from evidence that water made the floor slippery or dangerous); *id.* at 451 (noting that the missing evidence on dangerousness related to "the type of floor and the effect of water on it"). It is not the case that water is never a dangerous condition, nor is it the case that water is always a dangerous condition. *Charlton v. Toys R Us,* 158 Wn. App. 906, 915, 246 P.3d 199 (2010). The plaintiff is simply obligated to submit proof of dangerousness beyond the bare fact that the floor was wet. *Id.*, 158 Wn. App. at 915.

Dangerousness may be established by direct or circumstantial evidence. Circumstantial evidence refers to evidence that supports an inference based on common sense and experience. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.03 (7th ed.). "The law makes no distinction between the weight to be given to either direct or circumstantial evidence" and "[o]ne is not necessarily more or less valuable than the

other." *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 269, 744 P.2d 605 (1987).

In this case, Johnson satisfied her burden of proving dangerousness based on the following facts:

- the State's admitted need to put out a "slippery when wet" warning sign whenever it rained;
- the content of the warning sign confirming that the floor was indeed slippery when wet;
- Pallas slipped and nearly fell immediately before Johnson slipped and fell;
- evidence establishing the existence and amount of water and mud on the floor when Johnson slipped and fell;
- both Pallas and Johnson were wearing grippy rubber soled shoes when they slipped; and
- the store's waxed linoleum floor had been polished the night before.

In combination, if not alone, these facts are more than sufficient to support the jury's verdict.

The State's store manager, Jay Smiley, conceded that a warning sign needed to be put out whenever it rained. RP 108:19-21. Rain triggers the ***need*** to put the sign out. RP 90:24-91:2. The

need arises "[j]ust as soon as it started raining." RP 110:7-10 (brackets added). This testimony supports an inference that the warning sign was placed in recognition of the danger resulting from rainwater on the floor, rather than as a mere precaution. The trial court judge who presided at trial interpreted the testimony this way and relied on it in denying the State's motion for judgment as a matter of law: "Mr. Smiley did testify that when Mr. Mano asked him, when does the danger start? The danger starts when it rains." RP 484:24-485:2. This is sufficient evidence of dangerousness to support the jury's verdict.

Apart from the State's acknowledgment that the sign needed to be put out whenever it rained, the ***content*** of the warning sign confirms the existence of the danger resulting from rainwater on the floor. The sign states "***floor slippery when wet***." RP 108:16-18 (emphasis added). It does not merely state "wet floor." *Id.* The ordinary meaning of "slippery" is "causing one to slide or fall down." *Webster's Third New Int'l Dictionary, s.v.* "slippery" (2002). The content of the sign is tantamount to an

admission that water makes the floor where Johnson fell dangerous and further supports the jury's verdict.

The fact that Pallas also slipped as he entered the State's store confirms that the floor was dangerous. Pallas was walking in front of Johnson and, as soon as he stepped off a mat in the doorway, he slipped. RP 148:11-16. He turned around to warn Johnson to be careful, but before he could say anything she fell down. *Id.* As noted below, this is classic evidence of dangerousness supporting the jury's verdict.

Finally, Johnson presented evidence regarding both the existence and amount of water and mud on the floor where Johnson fell. It started raining between 6 and 7 a.m. that morning. RP 148:3-4, 178:12-20, 381:1-382:1 & 383:24-25. Johnson and Pallas arrived at the State store approximately 5½ hours later, around 11:30 or 11:45 a.m. RP 383:21-24. The store had had already been open for 1½ to 2½ hours before they arrived. RP 89:6-19. The store was busy because it was a Saturday, when it normally had 700 to 800 customers. RP 91:8-11 & 95:8-16.

"Rainy days ***always*** bring muddy footprints" into the store. RP 97:11 (emphasis added). Due to the lack of an awning over the sidewalks leading to the entrance of the building, customers' "feet get wet and it comes in the store." RP 108:7-12. "[W]henever it was wet out .... [t]he water would come in with them." RP 109:15-16 (ellipsis & brackets added). This occurred "any time it was wet outside." RP 105:24-106:3. After she fell, Johnson's pants absorbed water from the floor. RP 384:23-385:5 & 452:17-23.

The length of time it had been raining, the length of time the store had been open, the amount of customer traffic, the fact that customers always brought water and mud into the store when it rained, and the fact that Johnson's pants were wet after she fell, combine to support an inference that there was a dangerous amount of water on the floor, adding to the other evidence of dangerousness before the jury. *Cf. Vanderwoude v. Safeway Inc.*, 2022 WL 59719, at *2 (W.D. Wash. Jan. 6, 2022) (interpreting this Court's decision in *Johnson* as "suggesting that water

tracked into a store by customers could, if proven, constitute an unreasonably dangerous condition").

However, Division II's decision below focused on the ***quantity*** rather than the dangerousness of the water on the floor. *Johnson*, 2022 WL 910180, at *3 (referring to "evidence of a more than ordinary amount of water on the floor"); *id.* at *4 ("there is absolutely no evidence that there was ***any*** water on the floor when Johnson fell, let alone that there was an extraordinary, uncommon, or unreasonable amount of water on the floor"; emphasis in original); *id.* at *4 ("Johnson has not shown that there was any water on the floor when she fell; thus, there is no evidence to show that there was any, let alone an extraordinary amount of, water on the floor"); *id.* at *4 ("she has failed to establish that there was an extraordinary or uncommon amount of water on the floor that would create an unreasonably dangerous condition").

Division II disregarded the other evidence of dangerousness in the record based on the perceived quantity of

water on the floor. *Id.* at *4 ("Pallas' testimony does not establish that the floor was even wet before Johnson fell in store because he did not see any water on the floor"); *id.* at *4 (noting the store manager, Pallas, and Johnson did not see water before Johnson fell).

Division II's perception of the quantity of water on the floor is contrary to the record—given the length of time it had been raining, the length of time the store had been open, the amount of customer traffic, the fact that customers always brought water and mud into the store when it rained, and the fact that Johnson's pants were wet after she fell—discussed in more detail in part B below.

Just as importantly, Division II's focus on the quantity of water on the floor as the measure of dangerousness is also contrary to this Court's prior decision in this case as well as *Brant*, justifying review under RAP 13.4(b)(1).

2. Division II improperly discounted the relevance and sufficiency of a prior slip and near-fall as evidence of dangerousness.

This Court has repeatedly and consistently held that prior slips and falls or near-falls involving other persons constitute evidence of dangerousness. *Bussard*, 44 Wn.2d at 420 (holding "dangerous condition could be shown by evidence of the slipping of persons other than the deceased" at the same location under similar conditions); *O'Dell*, 6 Wn. App. at 826 (holding evidence of "near-accidents" at the same location under similar circumstances admissible to prove dangerous condition); *Turner*, 72 Wn.2d at 1036 (holding evidence of prior accidents under substantially similar circumstances admissible to prove dangerous condition); *cf. Knopp v. Kemp & Hebert*, 193 Wash. 160, 164, 74 P.2d 924 (1938) (quoting with approval Ohio case finding insufficient evidence of dangerousness when "[t]wo of [plaintiff's] companions who preceded her crossed the same wet spot as she did, and did not fall, and the one of them who testified in the case said that he did not turn and warn her about the wet

spot, as there was nothing about it to indicate to him that it presented any danger"). This is classic evidence of dangerousness in a premises liability case. The State acknowledged as much in oral argument before the Court. Oral Argument (timestamp 10:52:12), *Johnson v. Liquor & Cannabis Board*, No. 987262 (Mar. 9, 2021) (stating "it would be a different situation if there had been other people who had fallen on this floor before," but failing to acknowledge that Pallas slipped and nearly fell).

At trial, Johnson presented undisputed evidence that Pallas slipped and nearly fell as he entered the State's store. RP 148:11-16. He was walking in front of Johnson and, as soon as he stepped off a mat in the doorway, he slipped. *Id.* He turned around to warn Johnson to be careful, but before he could say anything she fell down. *Id.* This evidence of dangerousness immediately before Johnson fell is far stronger than many premises liability cases, which involve prior slips and falls or near-falls the hour before, the day before, the week before, or at some other time

preceding the plaintiff's injury. However, Division II improperly brushed aside this evidence, flatly stating that it "does not establish anything about the floor or its properties." *Johnson*, 2022 WL 910180, at *4. This is a clear conflict with this Court's prior decisions that calls for review under RAP 13.4(b)(1).

B. Division II's decision conflicts with decisions of this Court regarding the nature and limits of substantial evidence review, warranting review under RAP 13.4(b)(1) & (4).

"Negligence is generally a question of fact for the jury, and should be decided as a matter of law only 'in the clearest of cases and when reasonable minds could not have differed in their interpretation' of the facts." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 Wn.2d 726 (1996). As a result, "[c]ourts are appropriately hesitant to take cases away from juries." *H.B.H. v. State*, 192 Wn.2d 154, 162, 429 P.3d 484 (2018). The evidence and all reasonable inferences from the evidence must be viewed in the light most favorable to the jury's verdict in favor of Johnson. *Id.*, 192 Wn.2d at 162. Contrary evidence and

inferences supporting the State should be disregarded. *Coogan*, 197 Wn.2d at 812.

These limits on substantial evidence review represent more than just prudential concerns about the institutional competence of appellate courts. They inhere in the nature of appellate jurisdiction under Wash. Const. Art. IV, § 4. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959) ("If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court"). These limits are also essential to protect the "inviolate" right to trial by jury under Wash. Const. Art. I, § 21. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) ("To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts," including but not limited to damages).

Appellate courts may not, therefore, re-weigh the evidence or second-guess a jury's verdict supported by substantial

evidence, yet this is exactly what Division II did in this case. The court did not view the evidence and inferences in the light most favorable to the jury's verdict in multiple respects. The court improperly disregarded the evidence of a prior slip and near-fall by Johnson's husband as irrelevant, stating that it "does not establishing anything about the floor or its properties," contrary to this Court's precedent discussed above. *Johnson*, 2022 WL 910180, at *4.

The court dismissed the State's acknowledged ***need*** to place a slippery-when-wet warning sign in this particular store ***whenever*** it rained because, in the abstract, "wet floors are a common condition" and "[i]t is common knowledge that wet floors are slippery." *Johnson*, 2022 WL 910180, at *3. The court did not separately address the ***content*** of the sign, which is tantamount to an admission that the floors in this particular store were, in fact, slippery when wet.

The court disbelieved the evidence that there was any amount of water on the floor—despite the length of time it had

been raining, the length of time the store had been open, the amount of customer traffic, the fact that customers ***always*** brought mud and water into the store when it rained, and the fact that Johnson's pants were wet after she fell—simply because no one testified to seeing the water before Johnson fell. *Id.* at *4.

In each of these ways, Division II's decision reflects an egregious departure from the nature and limits of substantial evidence review. The court has ignored abundant evidence that supports the jury's verdict, drawn inferences contrary to those the jury was entitled to draw, overstepped its constitutional bounds, and infringed on Johnson's constitutional right to trial by jury. This is not only in conflict with settled precedent regarding substantial evidence review, it also presents an issue of substantial public interest that should be reviewed by this Court. RAP 13.4(b)(1) & (4).

CONCLUSION

The Court should accept review, reverse Division II, and reinstate the jury's verdict.

RAP 18.17 CERTIFICATE

This petition contains 4,750 words, excluding the parts of the document exempted from the word count, which is within 5,000-word limit established by RAP 18.17(c)(10).

Respectfully submitted this 27th day of October, 2022.

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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 set forth below, I electronically filed the foregoing with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of this document to all counsel of record:

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APPENDIX

21 Wash.App.2d 1041

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

Darcy L. JOHNSON, Respondent,

v.

State of Washington LIQUOR AND CANNABIS BOARD, Appellant.

No. 51414-1-II

|

Filed March 29, 2022

Appeal from Lewis County Superior Court, Docket No: 14-2-00917-6, Honorable Joely A. O'rourke, Judge

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UNPUBLISHED OPINION ON REMAND

Lee, C.J.

***1** This case is before us on remand from our Supreme Court. After holding that the reasonable foreseeability exception to the notice requirement for premises liability applied in this case, our Supreme Court remanded for consideration of remaining issues including "whether the judgment as a matter of law should have been granted on the ground that Johnson failed to provide evidence of an unreasonably dangerous condition." *Johnson v. Liquor and Cannabis Board*, 197 Wn.2d 605, 621-22, 486 P.3d 125 (2021). Because there is no evidence that an unreasonably dangerous condition actually existed, we hold that the trial court erred by denying the State's motion for judgment as a matter of law. Therefore, we reverse and remand the case to the trial court to be dismissed.

FACTS

On August 20, 2014, Johnson filed a complaint for damages against the State. Johnson's complaint alleged that, on June 18, 2011, she was injured after slipping and falling on an allegedly wet floor when she entered a state-owner liquor store. The State filed an answer to Johnson's complaint.

Johnson's jury trial began on September 18, 2017. At trial, Jay Smiley, Steve Pallas, and Johnson testified regarding the events surrounding Johnson's slip and fall.

On June 18, 2011, 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, Smiley opened the liquor store between 9:00 and 10:00 AM. Smiley 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) (Sept. 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, and 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 (Sept. 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. 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, 2011, 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.

***2** 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 (Sept. 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, but he "never personally saw water on the floor" where Johnson fell. VRP (Sept. 19, 2017) at 174.

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 (Sept. 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. The trial court 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 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." Clerk's Papers at 541. The trial court denied the motion for judgment notwithstanding the verdict.

The trial court entered judgment in favor of Johnson, awarding Johnson $2,305,000.00 based on the jury's verdict. The trial court also awarded Johnson statutory attorney fees and costs.

The State appealed. In an unpublished opinion, this court held that the trial court erred by denying the State's motion for judgment as a matter of law because there was no evidence of actual or constructive notice of an unreasonably dangerous condition in the store. *Johnson v. Liquor and -Cannabis Board*, No. 51414-1-II, slip op. at 7-8 (Wash. Ct. App. Sept. 4, 2019) (unpublished),[1] *reversed by Johnson*, 197 Wn.2d at 622. This court also rejected expansion of the "self-service" exception to notice. *Id.* at 7.

1 https://www.courts.wa.gov/opinions/pdf/D2%2051414-1-II%20Unpublished%20Opinion.pdf

***3** Our Supreme Court reversed, holding that the self-service exception to the traditional notice requirement was no longer limited to self-service areas of a store. *Johnson*, 197 Wn.2d at 618. Instead, the Supreme Court explained, "Our precedent has made the exception from *Pimentel* into a general rule that an invitee may prove notice with evidence that 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.* (quoting *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983)). The Supreme Court also held that tracking water into the entryway of a store is "inherent in a store's mode of operation," and, therefore, the existence of a potentially unsafe condition was reasonably foreseeable. *Id.* at 621.

However, the court explained:

> This conclusion does not end the case. As noted above, the Court of Appeals did not resolve all the State's assignments of error. Indeed, the Court of Appeals did not reach the issue of whether the judgment as a matter of law should have been granted on the ground that Johnson failed to provide evidence of an unreasonably dangerous condition. *Johnson*, No. 51414-1-II, slip op. at 5-6. These issues may be taken up again at the Court of Appeals upon remand.

Id. at 621-22. Following remand from our Supreme Court, we ordered the parties to file supplemental briefing on the issue of whether there was evidence of an unreasonably dangerous condition.

ANALYSIS

Johnson argues that there was evidence of an unreasonably dangerous condition in the store because a "slippery when wet" warning sign had to be put out when it was raining, Pallas slipped when he entered the store, and there was circumstantial evidence of a more than ordinary amount of water on the floor. We disagree.

In *Charlton v. Toys "R" Us—Delaware, Inc.*, Division Three of this court outlined over 70 years of case law establishing that a wet floor is not, without more, an unreasonably dangerous condition. 158 Wn. App. 906, 913-14, 246 P.3d 199 (2010). Instead, to establish negligence, the plaintiff must prove that the floor presents an unreasonable risk of harm when wet. *Id.* at 915. The court explained:

> Ms. Charlton complains that in dismissing her claim, the trial court erroneously held that a wet floor is never a dangerous condition, as a matter of law, and contends that this position is "absurd." Br. of Appellant at 7, 9. But Ms. Charlton has it backwards—the trial court did not hold that water on a floor is *never* a dangerous condition; it rejected her position that a wet floor is *always* a dangerous condition, and that she was therefore excused from presenting evidence of an unreasonable risk created by this particular wet floor. She failed to present any evidence that the floor in the entryway of the Toys R Us store presented an unreasonable risk of harm when wet. For that reason alone, summary judgment was proper.

Charlton, 158 Wn. App. at 915 (emphasis in original).

Further, in *Brant v. Market Basket Stores, Inc.*, our supreme court reiterated, " 'A wet cement surface does not create a condition dangerous to pedestrians. It is a most common condition, and one readily noticed by the most casual glance.' " 72 Wn.2d 446, 450, 433 P.2d 863 (1967) (quoting *Shumaker v. Charada Investment Co.*, 183 Wash. 521, 530-31, 49 P.2d 44 (1935)). Something more must be shown to establish that the floor is dangerously slippery. *Id.* at 448-49, 451.

Here, the "slippery when wet" sign is not evidence of an unreasonably dangerous condition. As *Brant* recognizes, wet floors are a common condition. *Id.* at 450. It is common knowledge that wet floors are slippery. Rain may cause pedestrians to track in water causing the floor to become wet and slippery, but this does not prove that the wet floor was so slippery that it created an unreasonably dangerous condition. Nor does it prove that the floor actually was wet and slippery when Johnson entered the liquor store and fell.

***4** Further, the fact that Pallas slipped does not establish that the floor posed an unreasonably dangerous condition. Although Pallas testified that he slipped, he testified that he "never personally saw water on the floor" when he entered. VRP (Sept. 19, 2017) at 174. Pallas' testimony does not establish that the floor was even wet before Johnson fell in store because he did not see any water on the floor. And Pallas' testimony does not establish anything about the floor or its properties that would establish that the floor was unreasonably slippery when it was wet.

Finally, there is absolutely no evidence that there was *any* water on the floor when Johnson fell, let alone that there was an extraordinary, uncommon, or unreasonable amount of water on the floor. Smiley did not see any water on the entryway floor. Pallas never saw any water on the floor when he entered. Johnson did not see any water on the floor before she fell; she only saw water on the floor after she fell, and she admitted that the water may have come from her shoes or Pallas' shoes. Johnson has not shown that there was any water on the floor when she fell; thus, there is no evidence to show that there was any, let alone an extraordinary amount of, water on the floor.

Here, Johnson has shown, at best, that it was raining when she entered the liquor store and she slipped and fell. She has provided no evidence that there was actually water on the floor when she fell. She has presented no evidence establishing there was anything about the floor that would cause it to be unreasonably dangerous when it was wet. And she has failed to establish that there was an extraordinary or uncommon amount of water on the floor that would create an unreasonably dangerous condition. As the courts have repeatedly stated, a wet floor alone is not an unreasonably dangerous condition. *See Charlton*, 158 Wn. App. at 913-14. Johnson has proven nothing more than she slipped on a floor. She has not proven that an unreasonably dangerous condition existed. Therefore, the trial court erred by denying the State's motion for judgment as a matter of law. Accordingly, we reverse the trial court's judgment in favor of Johnson, and we remand the case to the trial court to dismiss the case.

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.

We concur:

Maxa, J.

Cruser, J.

All Citations

Not Reported in Pac. Rptr., 21 Wash.App.2d 1041, 2022 WL 910180

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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 March 29, 2022. After consideration, it is hereby

ORDERED that the motion to publish is denied.

FOR THE COURT: Jj. Maxa, Lee, Cruser

LEE, JUDGE

LUVERA LAW FIRM

October 27, 2022 - 4:15 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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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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