No. 1020350

THE SUPREME COURT OF WASHINGTON

Court of Appeals Division III No. 384381

Spokane Superior Court No. 19-2-05084-32

TAMERA SWAGER and MARTY SWAGER

Plaintiffs and Appellants,

v.

INLAND LAWN, INC.
a Washington Profit Corporation,

Defendant and Respondent.

RESPONDENT'S RESPONSE TO APPELLANTS' PETITION TO SUPREME COURT FOR REVIEW OF AN ORDER BY THE COURT OF APPEAL

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I. IDENTITY OF RESPONDENT

Inland Lawn, Inc. ("Inland Lawn") is the Defendant in the underlying trial and is the Respondent for this appeal.

II. STATEMENT OF FACTS

This case solely arises out of a slip-and-fall incident that occurred on January 4, 2017, at a commercial retail property in Spokane, Washington.

A. The Parties

Defendant CCM Holdings, Inc. ("CCM") is the owner of real property located at 708 W. Boone Avenue, Spokane, WA (the "Boone Property"). CP 29. CCM leased the Boone Property to Defendant TVI, Inc. ("TVI"), which operates a Value Village thrift store out of said property. CP 29. During the period in question, CCM contracted with Respondent, Inland Lawn, to provide certain winter services (e.g., snow plowing and deicing) at the Boone Property. CP 31; RP 434. The contract between CCM and Inland Lawn had been in place for over ten years. RP 432, 438, 443. Appellants, Marty and Tamera Swager

(collectively the "Swagers") were patrons of Value Village on January 4, 2017.

B. The Slip-and-Fall

On January 4, 2017, the Swagers had an appointment at a local law firm next to Value Village. RP 887-88. The Swagers were driven to the appointment by their friend, Scott Mankin. RP 465-66. Following the meeting with their attorney, the Swagers decided to shop at Value Village, conveniently located in the adjacent parking lot. RP 887-88. The Swagers proceeded through the law firm's parking lot, down the sidewalk along Boone Avenue, and into the Value Village parking lot. RP 1105,1150. While walking across the Value Village parking lot, Mrs. Swager slipped and fell on ice, sustaining an injury to her right foot and ankle.

C. The Trial

On December 9, 2019, the Swagers filed a lawsuit against CCM, TVI, and Inland Lawn for Mrs. Swager's injuries. CP 28. Ultimately, the case was tried in July of 2021. Unsurprisingly,

the jury was presented with extensive testimony regarding the facts, opinions, and impressions surrounding Mrs. Swager's fall.

From the onset, it was established that the Swagers resided in the Spokane area for more than 25 years prior to the incident. RP 883. Consequently, they experienced many Spokane winters and understood the hazard icy conditions can pose. RP 883, 918, 919, 1101, 1150. Mrs. Swager testified that as she entered the Value Village parking lot, she observed "mounds and mounds" of "compact snow and ice," describing it as "large volumes of ice." RP 1151, 1161. From Mrs. Swager's perspective, she believed that the ice in the lot was 7 inches thick in some areas. RP 1160. She informed the jury that before walking across the parking lot, she had an unobstructed view of the parking lot and thought that the lot had not been plowed. *Id.*; RP 920, 1151. Mrs. Swager explained that she "probably" changed her gait in response to seeing the parking lot had compact snow and ice. RP 1181.

Mrs. Swager also testified that she did not observe her husband, Mr. Swager, having any difficulty navigating across the parking lot that she perceived to be replete with ice. RP 1160. Upon further cross examination, Mrs. Swager was asked "[i]f the parking lot was so icy … didn't you stop to think maybe you wanted to hold onto your husband's arm as you walked through the parking lot?" RP 1161. She answered, "[n]o, I didn't because I felt there was probably the correct traction material down that I didn't—I did not feel like I was in fear of falling." RP 1161-62.

Consistent with Mrs. Swager's impressions, her friend, Mr. Mankin, testified that when he arrived at the parking lot after Mrs. Swager's fall, he observed that lot was:

> Super icy and very slick and the closer I got to the ambulance, the slicker it got. And then as I looked toward the street, you could see where it was rutty, bumpy, where people, maybe, driven and droven (sic) through it, and then it froze and got pretty treacherous from the sidewalk in...

RP 469. He proceeded to tell the jury that there were ruts of ice six or seven inches deep in some spots and that the icy lot was an "open and obvious condition." RP 470-75.

Ultimately, the jury returned finding CCM 7.5% at fault, TVI 22.5% at fault, Inland Lawn 0% at fault, and Ms. Swager 70% comparatively at fault. CP 1957-1960. Following the verdict, Judgments were entered against the three defendants as follows: TVI - $155,279.42; CCM - $52,009.94; and Inland Lawn - dismissal. *See* CP 1939-1946. The judgments against TVI and CCM have been paid in full and both Defendants have been dismissed with prejudice. CP 1947-48, *Appendix A* to Respondent's Supplemental Brief to Address the Panel's Questions.

D. The Appeal

On or around September 16, 2021, Appellants filed their Notice of Appeal asking the Division III Court of Appeals to reverse and remand based on four claimed errors of law: (1) a failure to instruct the jury regarding Inland's duty of care; (2) the

exclusion of plaintiff's expert Lisa Rose; (3) the exclusion of post-incident emails between the parties; and (4) the giving of an instruction to the jury regarding plaintiffs' contributory negligence (and refusal to grant plaintiffs' CR 50 motion on that issue).

Following the submission of their respective briefs, the court heard oral argument on December 1, 2022. On February 2, 2023, the court sent a letter to the parties requesting them to address and brief five questions raised by the panel. The letter asked the parties to assume the case would be reversed on an evidentiary error but affirmed the finding of comparative fault against Ms. Swager. The five questions were as follows:

> 1. Are appellants bound by the earlier jury's allocation of fault to Tamera Swager?
>
> 2. How does the jury allocate fault among Tamera Swager and Inland Lawn when the previous jury never included any fault on the part of Inland Lawn in the calculation of fault among the parties?
>
> 3. May the jury allocate to Inland Lawn a portion of fault that was allocated to Value Village and CCM Holdings in the earlier verdict?

4. Conversely, are appellants limited to only transferring some of Tamera Swager's allocated fault to Inland Lawn?

5. Do appellants receive a new trial on damages?

Appellants and Respondent filed Supplemental briefs addressing each question. Having considered all briefing and oral argument, the Court of Appeals issued its unpublished opinion on April 27, 2023 (the "Opinion"). The Opinion found that the trial court committed reversible error by excluding Appellants' expert, Lisa Rose. Opinion, at 43. As a result, the case was remanded back to trial. The opinion also affirmed Ms. Swager's finding of comparative fault and instructed the trial court to provide Inland Lawn with an offset for the judgments rendered against CCM and TVI, totaling $207,289.36, which were both fully satisfied. *Id.* at 56,65-66.

III. ARGUMENT

Appellants' Petition is based on a cherry-picked rendition of the Opinion and attempts to expand this case into something it is not. As such, this court should not grant review because the

Opinion does not conflict with a decision from the Supreme Court nor the Court of Appeals, does not relate to a Constitutional violation, and does not involve an issue of substantial public interest. This case concerns a slip-and-fall incident that occurred in an icy parking lot.

A. Standard of Review

While not specifically cited in the Petition, it appears Appellants are seeking review pursuant to RAP 13.4(b). The rule provides, in pertinent part:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

B. The Court of Appeals' Decision Regarding Comparative Fault is Consistent With Washington Law

Appellants continue to argue there was insufficient evidence of Mrs. Swager's comparative fault to submit the issue to the jury. Not only does this contention contradict the jury's own verdict (finding that Mrs. Swager was the most culpable party), but Appellants' reasoning conflates and mischaracterizes the Opinion and the facts of this case.

Contributory negligence considers whether the plaintiff exercised reasonable care for her own safety which a reasonable person would have used under the existing facts and circumstances, and, if not, whether her conduct was a legally contributing cause of the injury. *Rosendahl v. Lesourd Methodist Church*, 68 Wash.2d 180, 412 P.2d 109 (1966). Contributory negligence is a factual question to be determined by the jury. *Baughn v. Malone*, 33 Wash.App. 592, 598, 656 P.2d 1118 (1983).

1. The Opinion Does Not Hold That the Act of Falling is in and of Itself Comparative Fault.

Appellants proclaim to this Court that the Opinion holds that "a fall on ice is evidence of not using reasonable care." Petition for Review at p. 11. At best, this is a misinterpretation of the Opinion.[1] As stated by the Court of Appeals, a "claimant is comparatively at fault or contributorily negligent when she fails to exercise reasonable care for her own safety that a reasonable person would have used under the existing facts and circumstances and her conduct legally contributed to her injury." Opinion, at p. 46 (quoting *Heinlen v. Martin Miller Orchards*, 40 Wn.2d 356, 360, 242 P.2d 1054 (1952)).

In affirming the trial court's decision to deny the Swagers motion to dismiss the affirmative defense of comparative fault, the Court of Appeals found that "the testimony given by Mrs.

[1] Appellants claim that the Court of Appeals reached this holding at page 20 of the Opinion. Not only does the Court never render this holding, but page 20 of the Opinion only contains quotes from the trial regarding Lisa Rose.

Swager and Scott Mankin sufficed to create a question of fact as to comparative fault." *See* Opinion, at p. 46. The court pointed to various facts to support its decision, including: Mrs. Swager having previous winter experience in Spokane and walking across ice, Mrs. Swager observing compact snow in the parking lot before entering it, failing to look down once entering the lot and Mr. Mankin's testimony that he readily observed ice stating it was an open and obvious hazard. *Id.* at 46-47. Based upon *all* the facts in the record, a reasonable jury could conclude that Mrs. Swager failed to exercise proper care when walking across the parking lot.

Nowhere in the Opinion does the court hold that the mere act of falling on ice establishes a failure to exercise reasonable care. The court cited five out-of-state decisions[2] to support its

[2] Notwithstanding that the Opinion doesn't state the act of falling is evidence of comparative fault, the five out-of-state opinions also don't stand for Appellants' misguided interpretation. *See Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015) (finding that an open-and-obvious nature of a hazard is simply a circumstance for the trier of fact to assess fault of any party and

interpretation that "[r]eported decisions narrate varying circumstances, including differences in the size of ice on a walkway and the open nature of the ice. Nevertheless [,] many cases hold that the fault of the plaintiff when slipping on ice constitutes a question for the jury." *See* Opinion, at p. 47. This is correct. Under Washington law, and based on the testimony provided at trial, there was sufficient evidence to submit the issue of comparative fault to the jury for their determination. This standard is consistent across numerous jurisdictions.

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does not, by itself, obviate a landowner's duty of reasonable care); *Gibbs v. Speedway LLC*, 15 N.E.3d 444 (Ohio App. 2014) (holding that whether a danger is open and obvious depends on the particular facts of the case and must be resolved by the trier of fact); *Dukat v. Leiserv, Inc.*, 6 Neb. App. 905, 578 N.W.2d 486 (Neb. App. 1998)(finding that where different minds may reasonably draw different conclusions or inferences from the evidence related to contributory negligence, such issues must be submitted to the jury); *McCabe v. Easter*, 128 A.D.2d 257, 516 N.Y.S.2d 515 (N.Y. App. Div. 1987)(holding that evidence related to a fall on ice supports a charge of contributory negligence but not a claim of implied assumption of risk); *Rossow v. Jones*, 404 N.E.2d 12 (Ind. Ct. App. 1980)(finding that evidence related to the plaintiff's knowledge of ice were sufficient for a fact finder to determine contributory negligence).

2. A Straightforward Slip-and-Fall Lawsuit Does Not Extend the Holding in *Henderson v. Thompson.*

For the first time, Appellants claim that this case concerns an issue of benevolent sexism despite there being no prior mention or allegation of such. Certainly, no effort was made to preserve any such issue at trial.

"As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Washington Fed. Sav. v. Klein*, 177 Wash. App. 22, 29, 311 P.3d 53, 56 (2013); RAP 2.5(a). Likewise, admission of improper questions or testimony is precluded from review when not objected to in a timely manner. *Seth v. Dep't of Labor & Indus.*, 21 Wash.2d 691, 693, 152 P.2d 976 (1944) (citing 8 Bancroft's Code Practice & Remedies § 6446, at 8496 (1927)). The underlying basis for this prohibition is to allow the opposing party to cure the error or have the trial court rule on the issue prior to "submitting the case to the jury." *Id.*

At trial, Appellants never objected to the questioning regarding whether Mrs. Swager held onto Mr. Swager's arm as she walked through the parking lot. RP 1161. Similarly, Appellants did not object during Mr. Hammond's closing argument where he reiterated to the jury that despite observing icy conditions, Mrs. Swager did not seek any additional human support to walk across the icy parking lot. RP 1389. Further, the issue of "benevolent sexism" never appeared before the Court of Appeals. As such, this argument should be rejected on its face because it is being raised for the first time to this Court. *See* RAP 2.5(a); *Klein*, 177 Wash. App. at 29.

Second, this case is not analogous to *Henderson* in any aspect. As this Court is aware, *Henderson v. Thompson,* 200 Wn.2d 417, 518 P.3d 1011 (2022), focused solely on the issue of racial bias in the judicial system. The opinion provides a thorough and historical analysis of how racial bias may affect juries and verdicts. *See id.* This Court set forth a new standard establishing that: "[a] trial court *must* hold a hearing on a new

trial motion when the proponent makes a prima facie showing that this objective observer could view race as a factor in the verdict, regardless of whether intentional misconduct has been shown or the court believes there is another explanation. *Id.* at 422-23. The opinion further elaborated that: "[c]oded 'dog whistle' language impermissibly allows the speaker to appeal to racial bias and then excuse that behavior by arguing they did not intend to say anything racist." *Id.* at 432-33.

Appellants attempt to extend *Henderson* to apply to a slip-and-fall case under the guise that the underlying trial was unfair and prejudicial to Mrs. Swager as a woman. Petition for Review at p. 17. To support their argument, Appellants identify one question on cross examination where Mrs. Swager was asked if she thought to hold onto Mr. Swager for assistance. *Id.* at 15. Appellants conveniently omit, however, other lines of questioning showing that Mrs. Swager did not act as a reasonably prudent person under the circumstances. For instance, Mrs. Swager testified that she did not observe Mr. Swager having any

difficulty navigating the parking lot, just seven questions prior to the one at issue. RP 1160. Therefore, it is understandable counsel would raise this line of questioning to conduct a thorough cross examination.

This is not a matter of whether men or women are better equipped to navigate snow and ice. Rather, it is an issue of evaluating the steps Mrs. Swager took to protect herself against falling. Contrary to Appellants' allegations, the Court of Appeals did not adopt "the sexist appeal that Mrs. Swager should have held her husband's arm to be reasonably safe." Petition for Review at p. 17. The Court of Appeals simply referenced all the factors that could lead a reasonable jury to conclude Mrs. Swager was contributorily negligent. Opinion, at p. 46-47.

Again, this Court should not consider Appellants' new argument on appeal (RAP 2.5(a)), but even if the Court reaches the merits of the issue, the argument is baseless. This Court should deny review.

3. The Court's Holding That There Was Sufficient Evidence to Support an Instruction of Comparative Fault Does Not Disproportionately Affect Spokane Residents.

Comparative fault is a doctrine that holds all parties responsible for their own actions. It is determined on a case-by-case basis, depending on whether sufficient evidence is presented that "supports reasonable inferences that each party was negligent." *See Sdorra v. Dickinson*, 80 Wash.App. 695, 703, 910 P.2d 1328 (1996). If a case supports reasonable inferences that each party was negligent, "it is an error if the trial court fails to give the jury a contributory negligence instruction." *Id.*

Appellants are taking a bold stance that the Court of Appeals' decision sets a standard that Spokane residents cannot pursue a slip-and-fall premises liability action. This is nonsensical. Nowhere in the Opinion does the Court state that

Spokane residents, upon observing ice, must not enter the premises and are negligent if they do so.[3]

Respondent again illustrates that the Court of Appeals' opinion did not rely upon one single factor in its decision. While weather conditions and related hazards can be a basis for evaluating whether someone exercised reasonable care, *see Cockle v. General Elec. Co.*, 70 Wash.2d 846, 849, 425 P.2d 665 (1967), the Court of Appeals did not hold Mrs. Swager was comparatively at fault *solely* because she is from Spokane. Instead, it was one of many reasonable inferences[4] from which the jury could determine Mrs. Swager was comparatively at fault for her own actions. Opinion, at p. 46-47. This is the correct

[3] Appellants again cite to page 20 of the Opinion for this proposition. As previously disclosed, page 20 is nothing more than quotes from the underlying trial.

[4] Such as observing "mounds and mounds" of ice, having an unobstructed view of the parking lot which she perceived as being "unplowed", seeing "large volumes of ice" up to 7 inches thick, changing her gait to walk across the lot, and her friend believing the condition was open and obvious. *See* RP at 470-475, 1151, 1161, 1181.

application of comparative fault within our state and is not contrary to any Washington opinion.

4. There was Substantial Evidence of Comparative Fault.

Appellants argue that Mr. Mankin's testimony was not substantial evidence of Mrs. Swager's comparative fault because "merely a slick floor and a fall are not evidence of negligence." Petition for Review, at p. 21. As previously discussed, Mr. Mankin's testimony was not the only evidence of Mrs. Swager's comparative fault, but was merely part of the Court of Appeals rationale for its decision that also discussed a multitude of other facts and evidence elicited at trial.

C. Denying an offset for Inland Lawn unjustly enriches the Appellants and forces Inland Lawn to pay more than its fair share of damages

The Court of Appeals concluded the parties were "bound by the prior jury award of $684,961.52," and the Respondent was entitled to an offset of $207,379.36, which represents the judgments rendered against TVI and CCM, which have been fully satisfied. Opinion, at 65-66. Appellants attempt to refute

this point by relying upon *Washburn v. Beatt Equipment Co.*, 120 Wash.2d 246, 840 P.2d 860 (1992), and claim they did not have an opportunity to brief this matter prior to the court rendering its decision. Both arguments are flawed, and this Court should deny review.

Washburn is distinct from this case and the Opinion does not contradict its holding. First, the plaintiff in *Washburn* was entirely *fault-free*, unlike here, where the jury found Mrs. Swager 70% contributorily negligent. Consequently, joint and several liability is unavailable. *See* RCW 4.22.070(1)(b). Under several liability, "a negligent party is liable for his own proportionate share of fault and no more." *Kottler v. State*, 136 Wash.2d 437, 446, 963 P.2d 834 (1998).

Second, the issue in *Washburn* was whether the Defendant was entitled to an offset for settlements paid by settling fault-free entities. *See* 120 Wash.2d 246, 291. In *Washburn*, the trial court reduced the verdict against Defendant Beatt Equipment Company (Beatt) by $730,000, an amount derived from pre-trial

settlements of three defendants who were ultimately found to be fault-free. 120 Wash.2d 246, 291. The court found that Defendant was not entitled to an offset as the settling defendants did not have a judgment entered against them. *Id.* at 294. Thus, Beatt was responsible for all its assigned damages because it was the only joint and severally liable defendant remaining. *See id.* at 294. As explained by the *Washburn* court "[h]ad there been more than one defendant against whom judgment was entered according to RCW 4.22.070(1), then, as among those defendants, there would have been joint and several liability." *Id.* at 298.

Washburn is not analogous to this case as Appellants did not agree to a pre-trial settlement offer from any of the Defendants. Instead, the case was tried, and the jury concluded that CCM and TVI were liable for 30% of Mrs. Swager's damages. Accordingly, judgments were entered against both liable defendants and both judgments were satisfied, resulting in TVI and CCM being released from the case. Appellants' attempt to correlate pre-trial settlements specifically provided for in the

plain language of RCW 4.22.070(1) to satisfied jury verdicts that are not specifically provided for under that statute is absurd.

It is unjust to deny Inland Lawn an offset as doing so requires Inland Lawn to pay more than its fair share of the damages. In addition, and by ignoring the satisfied judgments of TVI and CCM, Appellants can "double dip" and recover more damages than established in the original verdict.

Further, it is disingenuous for Appellants to contend they did not have an opportunity to address the issue of offsets. Appellate courts have the authority to consider an issue not previously raised by the parties to decide a case. *See* RAP 12.1(b). In doing so, "the court *may* notify the parties and give them an opportunity to present written arguments on the issue raised by the court." *Id.* (emphasis added.) That is what happened here. After receiving initial briefing by the parties, the Court of Appeals provided five questions for supplemental briefing. All questions related to damages and liability, under the assumption that the case would be remanded on an evidentiary error, but Mrs.

Swager would still be contributorily at fault. Thus, the parties were placed on notice that offsets could be a potential issue on appeal considering all defendants except Inland Lawn have been dismissed from this matter[5].

Ultimately, the Court of Appeals correctly recognized the applicability of RCW 4.22.060(2) as both CCM and TVI paid their respective judgments and were released from the case. Opinion, at 65-66. Holding otherwise would entitle the Appellant to more damages than initially assigned by the jury and would be highly prejudicial to the Defendant. The court acted well within its discretion, and review should be denied.

D. A Conventional Slip-and-Fall Does Not Impact the Public Interest

In their final plea to this Court, Appellants contend that the Opinion disproportionately impacts females over the age of 60.

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[5] Furthermore, if Appellants truly felt that there was no basis for the Court of Appeals to apply RCW 4.22.060, they could have asked the court to reconsider its decision on that limited issue. Instead, they chose to challenge the entirety of the Opinion pursuant to RAP 13.4.

Appellants set out numerous citations to medical articles that have never before been raised and lack any semblance of foundation relative to the issues that were litigated below. The articles are purportedly to establish that older women are more susceptible to falling injuries, but this entire inquiry is irrelevant given Appellant failed to raise these issues at trial.

Comparative fault is not a gender- or age-based inquiry. It is a defense available where a plaintiff fails to exercise reasonable care for his/her own safety which a reasonable person would have used under the existing facts and circumstances. This defense is equally applicable to men and women of all ages. Changing the statutory scheme to carve out an exception for older women, as Appellants suggest, would result in a plain infringement upon the legislature's constitutionally-provided powers.

But beyond this strained argument, one arrives at the same point that has been emphasized throughout this brief: the Opinion **does not hold** that the mere act of falling on ice is sufficient

evidence of negligence. Comparative fault considers all facts and circumstances arising from a particular incident, and whether those facts support a reasonableness inquiry of the plaintiff being negligent. If so, the question becomes a factual one for the jury's consideration.

The Opinion does not change Washington's law regarding comparative fault or contributory negligence in any manner. Slip-and-fall cases will continue to be interpreted on a case-by-case basis as consistent with courts across the country. This is not a matter of public interest.

IV. CONCLUSION

Based on the foregoing, Inland Lawn again respectfully requests that the Court deny Appellants' Petition for Discretionary review.

I certify that the brief contains 4,325 words, excluding the parts of the brief exempted under RAP 18.17.

RESPECTFULLY SUBMITTED this 13th day of July, 2023.

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the foregoing electronically through the Washington Supreme Court's online Portal to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this day 13th of July, 2023, at Spokane, Washington.

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