

No. 44073-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BONNY M. BOLSON,
Appellant,

vs.

HAYDEN G. WILLIAMS and DONITA C. WILLIAMS, individually
and on behalf of the marital community composed of HAYDEN G. &
DONITA C. WILLIAMS; WILLIAMS & SCHLOER, CPA'S, P.S., a
Washington professional service corporation,
Respondents.

APPELLANT'S REPLY BRIEF

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Table of Contents

I.	INTRODUCTION.....	- 1 -
II.	ARGUMENT.....	- 2 -
A.	Motion to Strike Factual Assertions Not in the Record.....	- 2 -
B.	Defendants Fail to Prove that the Trial Court Granted Summary Judgment on the Basis of Collateral Estoppel.....	- 3 -
1.	<i>Motion to Strike Evidence Not Considered by the Trial Court and that should Not be Part of the Record on Review.</i>	- 3 -
2.	<i>Defendants' Failure to Cross-Appeal Precludes this Court's Consideration of the Admissibility of Plaintiff's L&I Records.</i>	- 5 -
3.	<i>Defendants Fail to Show that the Trial Court Erred in Not Considering Plaintiff's L&I File.</i>	- 8 -
4.	<i>Defendants Fail to Carry Their Burden of Proving the Estoppel Effect of the L&I Ruling.</i>	- 12 -
C.	Defendants Incorrectly Argue that Plaintiff is Required to Present Evidence of Causation with Greater Precision and Certainty than Established Law.....	- 17 -
D.	Defendants Fail to Show that the Element of Breach was Determined as a Matter of Law.....	- 22 -
E.	Defendants' Fail to Show that Their Conduct was Not Outrageous as a Matter of Law.....	- 23 -
III.	CONCLUSION.....	- 25 -

Table of Authorities

CASES

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000), 27 P.3d 608 (2001).....	- 6 -
<i>Bruns v. PACCAR, Inc.</i> , 77 Wn. App. 201, 890 P.2d 469 (1995).....	- 18 -, - 19 -
<i>Casco Co., et al. v. Pub. Util. Dist. No. 1 of Thurston Cnty.</i> , 37 Wn.2d 777, 226 P.2d 235 (1951)	- 4 -
<i>City of Bremerton v. Shreeve</i> , 55 Wn. App. 334, 777 P.2d 568 (1989).....	- 15 -
<i>Clark v. Baines</i> , 150 Wn.2d 905, 84 P.3d 245 (2004).....	- 13 -
<i>Coburn v. Seda</i> , 101 Wn.2d 270, 677 P.2d 173 (1984).....	- 10 -
<i>Dioxin/Organochlorine Ctr. v. Dep't of Ecology</i> , 119 Wn.2d 761, 837 P.2d 1007 (1992).....	- 4 -
<i>Evans v. Thompson</i> , 124 Wn.2d 435, 879 P.2d 938 (1994)	- 16 -
<i>Fischer-McReynolds v. Quasim</i> , 101 Wn. App. 801, 6 P.3d 30 (2000).....	- 7 -, - 8 -
<i>Folden v. Robinson</i> , 58 Wn.2d 760, 364 P.2d 924 (1961) - 9 -, - 10 -	- 9 -, - 10 -
<i>Grange Ins. Assoc. v. Ochoa</i> , 39 Wn. App. 90, 691 P.2d 248 (1984).....	- 4 -
<i>Guillen v. Pierce Cnty.</i> , 144 Wn.2d 696, 364 P.2d 924 (2002).....	- 10 -
<i>Hangman Ridge v. Safeco Title</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	- 9 -
<i>Herrington v. David D. Hawthorne, CPA, P.S.</i> , 111 Wn. App. 824, 47 P.3d 567 (2002)	- 7 -, - 8 -
<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290 (1998).....	- 10 -, - 14 -
<i>House v. Hess Furniture, Inc.</i> , 33 Wn. App. 857, 657 P.2d 813 (1983).....	- 4 -
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971 (2009).....	- 19 -
<i>In re Det. of Campbell</i> , 139 Wn.2d 341, 986 P.2d 771 (1999).....	- 19 -
<i>Jackson v. Peoples Fed. Credit Union</i> , 25 Wn. App. 81, 84, 604 P.2d 1025 (1979).....	- 24 -
<i>Johnson v. Rutherford</i> , 32 Wn.2d 194, 200 P.2d 977 (1949).....	- 9 -
<i>Lemond v. Dep't of Licensing</i> , 143 Wn. App. 797, 180 P.3d 829 (2008).....	- 14 -

<i>Luisi Truck Lines, Inc. v. Wash. Util. & Transp. Comm'n</i> , 72 Wn.2d 887, 435 P.2d 654 (1967)	- 14 -
<i>McCarthy v. Dep't of Soc. & Health Servs.</i> , 110 Wn.2d 812, 759 P.2d 351 (1988).....	- 15 -
<i>Mebust v. Mayco Mfg. Co.</i> , 8 Wn. App. 359, 560 P.2d 326 (1973).....	- 8 -, - 9 -, - 10 -, - 12 -
<i>Orcutt v. Spokane Cnty.</i> , 58 Wn.2d 846, 364 P.2d 1102 (1961).....	- 18 -
<i>Seaman v. Karr</i> , 114 Wn. App. 665, 59 P.3d 701 (2002).....	- 23 -
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	- 2 -
<i>Standlee v. Smith</i> , 83 Wn.2d 405, 518 P.2d 721 (1974).....	- 14 -
<i>State Farm Mut. Auto Ins. Co. v. Avery</i> , 114 Wn. App. 299, 57 P.3d 300 (2002).....	- 13 -
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992)	- 14 -
<i>State v. Sims</i> , 171 Wn.2d 436, 256 P.3d 285 (2011).....	- 5 -
<i>State v. Terry</i> , 10 Wn. App. 874, 520 P.2d 1397 (1974)	- 18 -
<i>Thompson v. Dep't of Licensing</i> , 138 Wn.2d 783, 982 P.2d 601 (1999).....	- 13 -
<i>West v. Thurston Cnty.</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	- 10 -
<i>Wilson v. Key Tronic Corp.</i> , 40 Wn. App. 802, 701 P.2d 518 (1985).....	- 19 -

STATUTES

RCW 50.12.110	- 9 -, - 11 -
RCW 51.08.140	- 15 -
RCW 51.28.070	- 8 -, - 9 -, - 11 -
RCW 51.32.180	- 15 -

RULES

ER 702.....	- 20 -
FED. R. APP. P. 32.1(a).....	- 11 -
GR 14.1(b).....	- 11 -
RAP 10.3(a)(5).....	- 2 -
RAP 10.3(a)(6).....	- 10 -, - 13 -
RAP 10.3(c)	- 13 -
RAP 10.4	- 10 -
RAP 10.7	- 11 -
RAP 18.9(a).....	- 11 -
RAP 2.4(a).....	- 5 -

TREATISES

16 WASH. PRAC., TORT LAW AND PRACTICE § 1.32 (3d ed.) - 22 -
Larson’s Workmen’s Compensation Law, § 72.91, Vol. 2A - 16 -
Tegland, 5B WASH. PRAC., EVIDENCE LAW AND PRACTICE §
702.50 (5th ed.)..... - 19 -
Tegland, 5D WASH. PRAC., HANDBOOK WASH. EVID. ER 702
(2012-13 ed.)..... - 17 -

I. INTRODUCTION

Defendants urge for affirmance of the trial court on collateral estoppel grounds. Yet, the trial court properly declined to consider plaintiff's L&I file and defendants failed to cross-appeal. As such, they cannot show collateral estoppel is an alternative basis to affirm the trial court's erroneous ruling. Even so, defendants fail to present any argument at all on the elements to determine issue preclusion.

Next, defendants argue plaintiff must show a heightened standard of testimonial evidence from an expert. Unfortunately, defendants fail to offer any legal support for this. They also argue that only a licensed medical doctor is qualified to provide expert opinion testimony where—as here—a plaintiff is injured due to a defendant's negligent actions. But, they fail to show how Dr. Thrasher does not satisfy the minimal requirements of ER 702.

Then, defendants argue there is no proof they breached any standard of care. Both parties articulated the standard of reasonable care defendants should have followed. Defendants should have taken specific steps as detailed by plaintiff's experts—an industrial hygienist and a toxicologist. Even without these steps, however, defendants' inaction—doing nothing—was not reasonable.

Finally, defendants suggest plaintiff's outrage claim was properly dismissed. They brush aside that the trial court failed to make any determination on plaintiff's outrage claim as evidenced by its absence in the report of proceedings. And, based on the facts viewed in plaintiff's favor, they cannot show this claim should have been determined as a matter of law.

This Court should reverse and remand this case for trial.

II. ARGUMENT

A. Motion to Strike Factual Assertions Not in the Record.

Plaintiff moves this Court to strike or otherwise not consider factual assertions in defendants' response brief not supported by the record. RAP 10.3(a)(5); *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 615, 160 P.3d 31 (2007).

The most flagrant of defendants' assertions is plaintiff's "treating physicians" have not opined as to a causal connection between her disease and work exposure.¹ Defendants' assertion is patently wrong because plaintiff never established a patient-physician relationship with those doctors. She went to them for purposes of her L&I claim—they were not her "treating physicians."

¹ Defs' Resp. Br. at 6, 7, 18, 20, 34.

In June 2010, plaintiff told defendant Hayden Williams she was going to the occupational illness doctors to assess whether her injuries may be covered in an L&I claim.² On September 9, 2010, plaintiff went to Harborview Medical Center and requested the L&I doctors submit the Report form.³ Nothing more occurred. The L&I doctors never treated plaintiff. There is no patient-physician relationship. The L&I doctors merely evaluated plaintiff for purposes of the industrial insurance claim. The L&I doctors are not plaintiff's "treating physicians" as defendants would have this Court believe.

B. Defendants Fail to Prove that the Trial Court Granted Summary Judgment on the Basis of Collateral Estoppel.

1. *Motion to Strike Evidence Not Considered by the Trial Court and that should Not be Part of the Record on Review.*

Plaintiff moves this Court to strike evidence, including references and citations to that evidence, not considered by the trial court and not properly part of the record on review. Specifically, the plaintiff's L&I file and records should be stricken.⁴ The trial court's order stated, as drafted by defendants' counsel, "However, the Labor and Industries files have not been considered"⁵

² CP 152.

³ CP 38, 152.

⁴ Documents that should be stricken include CP 16–17 (¶¶ 12–15); CP 21 (¶¶ 20–22); CP 24–25 (¶¶ 12–15); CP 26–43; CP 158–59.

⁵ CP 322.

This Court stated, “[w]e must have before us the precise record—no more and no less—**considered** by the trial court.” *House v. Hess Furniture, Inc.*, 33 Wn. App. 857, 858, 657 P.2d 813 (1983). Division 3, interpreting the same language, determined, “We, therefore, have confined our review to those documents which the court stated were **actually considered**.” *Grange Ins. Assoc. v. Ochoa*, 39 Wn. App. 90, 93, 691 P.2d 248 (1984). Our Supreme Court ruled a reviewing court “only **considers** on appeal evidence which was **admitted** in the trial court.” *Dioxin/Organochlorine Ctr. v. Dep’t of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992). The Court reasoned that “it would be very unfair to the trial judge to consider evidence in this court which was not before his when he entered his decision in the case.” *Casco Co., et al. v. Pub. Util. Dist. No. 1 of Thurston Cnty.*, 37 Wn.2d 777, 785, 226 P.2d 235 (1951).

While most of the above-cited cases deal with evidence not listed in a dispositive order as being considered by the trial court in making its decision, this is a distinction without a difference. Whether it was never considered at all or subsequently not considered or not admitted due to an exclusionary principle, the trial court simply did **not consider** plaintiff’s L&I records. Accordingly, neither can this Court.

2. Defendants' Failure to Cross-Appeal Precludes this Court's Consideration of the Admissibility of Plaintiff's L&I Records.

Without any supporting case law, defendants argue they may raise the issue of collateral estoppel as a basis to affirm the trial court's ruling. Unfortunately, all three grounds upon which they base their argument are meritless.

First, defendants are indeed seeking affirmative relief in that they urge this Court to partially modify the trial court's order. While RAP 2.4(a) does not limit the scope of defendants' argument, it qualifies any relief sought beyond affirmation of the trial court. "Notice of cross-review is essential if the respondent 'seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.'" *State v. Sims*, 171 Wn.2d 436, 442–43, 256 P.3d 285 (2011).

Defendants allege they do not seek to modify the trial court's order that states it did not consider records relating to plaintiff's L&I file. But they do—defendants argue the trial court erroneously excluded the L&I records and ask this Court to consider them for purposes of collateral estoppel and proximate cause.⁶ Defendants also contend they seek to affirm summary judgment on the *additional*

⁶ Defs' Br. at 17–21.

ground of collateral estoppel. But, they cannot do so without the L&I records—which the trial court did not consider. Thus, with any of defendants’ arguments, modification of the trial court’s decision to strike those records must necessarily occur. To be clear, defendants are seeking a partial reversal of the trial court’s order, not just advancing an alternative argument for affirming the trial court. Defendants are seeking affirmative relief.

Second, this Court is precluded from acting on defendants’ request to review the trial court’s alleged error in excluding the L&I records. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000), 27 P.3d 608 (2001) (failure to cross-appeal an issue precludes its review on appeal), is squarely on point. Again, defendants seek affirmative relief in a partial modification and reversal of the trial court’s order. Moreover, they urge this Court to affirm on collateral estoppel grounds. But, this cannot be done when the L&I records were not considered below and cannot be considered here.

Third, defendants’ excuses for failing to cross-appeal are disingenuous. Specifically, they argue they were not allowed to cross-appeal under the rules. Numerous other litigants before this Court have filed cross-appeals alleging that a trial court erred in

excluding evidence at summary judgment, even though they prevailed below. For example, in *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 806–07, 6 P.3d 30 (2000), DSHS moved for summary judgment on the employee’s disability discrimination claims. In support, it submitted declarations from two of the employee’s management team. *Id.* at 807. The employee moved to strike the declarations, which the trial court granted. *Id.* Nonetheless, the trial court granted DSHS’ summary judgment, and the employee appealed the trial court’s order. *Id.* And, “DSHS timely filed its cross-appeal, challenging the trial court’s exclusion of the . . . declarations.” *Id.* Because this Court affirmed, it did not need to reach DSHS’ cross-appeal. *Id.* at 814.

In another example, investors appealed the dismissal of their claims against Duke, one of the individual partners of an investment company. *Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn. App. 824, 828, 47 P.3d 567 (2002). At the trial court, Duke argued that certain evidence relating to the civil conspiracy claim was inadmissible hearsay. *Id.* at 840. Duke moved to strike the evidence; however, the trial court denied his motion. *Id.* Duke did not cross-appeal the ruling. *Id.* The appellate court held, “Thus, we will not address further the admissibility of this evidence.” *Id.*

The rules are clear regarding evidence not considered by a trial court at summary judgment. If a party files a timely cross-appeal, the appellate court will review that issue as it would have in *Fischer-McReynolds*. If a party does not file a cross-appeal, the appellate court will not review the admissibility of the evidence just as the court declined to do in *Herrington*. Defendants here did not file a cross-appeal regarding the trial court's non-consideration of plaintiff's L&I records. Like the court in *Herrington*, this Court should "not address further the admissibility of this evidence."

3. *Defendants Fail to Show that the Trial Court Erred in Not Considering Plaintiff's L&I File.*

"Our Supreme Court has said that the legislative enactment says that [the L&I file and records are] . . . discoverable, but not admissible at trial. I don't know if you had a chance to read it, but I sure did, and that's what it says to me."⁷ The trial court read *Mebust v. Mayco Mfg. Co.*, 8 Wn. App. 359, 560 P.2d 326 (1973), and clearly understood that RCW 51.28.070 creates a "rule of evidence" which renders a claimant's L&I file confidential and inadmissible. *Id.* at 362. Defendants fail to show any error regarding the trial court's plain reading of *Mebust*.

⁷ RP 20:6-12.

First, defendants argue that the trial court erred in its reading of *Mebust* because the statute allows an employer to “review a claim file” or “review any files of their own injured workers.” See RCW 51.28.070. Defendants’ position, however, is not inconsistent with *Mebust*. In fact, the *Mebust* court held that the “rule of evidence” was not a “privilege,” and thus the L&I file was subject to discovery. 8 Wn. App. at 362–63. That defendants were entitled to discovery of the L&I file does not mean that the file is admissible.

Second, defendants contend that the holding in *Mebust* is “pure dictum.”⁸ The “rule of evidence” has stood for 40 years. The legislature has not amended the language of the statute that creates the “rule of evidence”⁹ at any time since the *Mebust* court’s ruling.¹⁰ Additionally, recent cases cite to *Mebust* with approval and recognize its holding. For example, in *Coburn v. Seda*, 101 Wn.2d 270, 275–

⁸ Defs’ Br. at 19.

⁹ “Information contained in the claim files and records of injured workers, under the provisions of this title, **shall be deemed confidential and shall not be open to public inspection . . .**” RCW 51.28.070. This language under the Industrial Insurance Act is identical to language under the Employment Security Act, former RCW 50.12.110, where the Washington Supreme Court in *Folden v. Robinson*, 58 Wn.2d 760, 767–68, 364 P.2d 924 (1961), created a “rule of evidence” barring the admissibility of a claimant’s unemployment compensation records: “Information obtained from employing unit records under the provisions of this title or obtained from any individual pursuant to the administration of this title **shall be confidential and shall not be published or open to public inspection . . .**”

¹⁰ *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986) (Legislative inaction after a judicial interpretation of its enactments indicates legislative approval); *Johnson v. Rutherford*, 32 Wn.2d 194, 199, 200 P.2d 977 (1949) (legislature twice amended the statute without changing definition of a phrase; thus, legislature acquiesced in Supreme Court’s construction of the phrase).

76, 677 P.2d 173 (1984), the Washington Supreme Court cites to *Mebust* as a case discussing grant of a full evidentiary privilege. More recently, in *Guillen v. Pierce Cnty.*, 144 Wn.2d 696, 715–16 n.9, 364 P.2d 924 (2002), the Supreme Court notes that “. . . *Mebust* recognized our holding in *Folden v. Robinson*, 58 Wn.2d 760, 364 P.2d 924 (1961), regarding inadmissibility” Thus, *Coburn* and *Guillen* make it clear that *Mebust* and *Folden* retain vitality despite the passage of time and defendants’ arguments.¹¹

Third, while it is accurate to say *Folden* does not govern this case, defendants apparently misunderstand its correlation with *Mebust*. The Supreme Court in *Folden* established a “rule of evidence” making Employment Security Department records confidential.¹² The statute in *Folden* contains identical language that is at issue in this case with respect to L&I files, also at issue in *Mebust*.¹³ The *Mebust* court, after reviewing the identical language of the two Acts and purposes behind them, held the following:

¹¹ Defendants also argue since they had access to plaintiff’s L&I file within the workers’ compensation claim, they are free to use the L&I file in this civil case. Defs’ Br. at 19. Defendants have provided no legal authority or citation to support this proposition. This Court should not consider conclusory arguments unsupported by citation to authority. See RAP 10.3(a)(6), 10.4. “Such ‘[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.’” *West v. Thurston Cnty.*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

¹² See fn.9 *supra*. See also CP 338–44.

¹³ *Id.*

We are bound, of course, to respect the ruling. And we agree that if RCW 50.12.110 establishes a “rule of evidence” which makes the personal injury plaintiff’s employment security file inadmissible at trial, RCW 51.28.070 likewise establishes a similar rule for personal injury plaintiff’s industrial insurance file.

8 Wn. App. at 362. Defendants’ argument lacks merit.

Fourth, defendants heavily rely upon a federal unpublished opinion that was filed on **November 8, 2006**, in violation of GR 14.1(b) and FED. R. APP. P. 32.1(a).¹⁴ RAP 18.9(a) provides: “The appellate court on its own initiative ... may order ... counsel ... who ... fails to comply with these rules ... to pay sanctions to the court.” RAP 10.7 also provides, “The appellate court will ordinarily impose sanctions on ... counsel for a party who files a brief that fails to comply with these rules.” Even if sanctions are not imposed, this Court should, at the very least, not consider this unpublished case and related arguments.

Fifth, defendants argue that plaintiff has waived her physician-patient privilege by filing a personal injury claim. Again, defendants were entitled to *discovery* of the L&I file, and it was made available to them—this does not equate to the file being admissible. In addition, plaintiff went to Dr. Lim solely for purposes of her workers’

¹⁴ Under these rules, only federal opinions “issued on or after January 1, 2007” may be cited.

compensation claim. Dr. Lim created the report solely to determine whether plaintiff's injury qualified as an "occupational disease" in order to receive benefits under the Industrial Insurance Act.¹⁵ While defendants urge Dr. Lim's report is relevant on a broader scale, even Dr. Lim acknowledges his limited role: "Thank you for the opportunity to assist with the evaluation of potential work related illness in Ms. Bolson."¹⁶ Dr. Lim evaluated and did not treat plaintiff.¹⁷ These factors are not inconsistent with plaintiff's waiver.

As a final attempt to persuade the trial court to admit plaintiff's L&I file, defendants allege that the L&I records could be filed under seal. The "rule of evidence" in *Mebust*, however, prohibits admission of the L&I file. Filing the L&I records under seal does not prevent the admission of the L&I file. Defendants' suggestion is nothing more than an attempted end run around the *Mebust* rule.

4. Defendants Fail to Carry Their Burden of Proving the Estoppel Effect of the L&I Ruling.

Ultimately, the trial court could not have decided summary judgment on collateral estoppel grounds because defendants simply failed to prove it.

¹⁵ This is discussed in further detail in the following section (§ II.B.4).

¹⁶ CP 38.

¹⁷ See plaintiff's Motion to Strike Factual Assertions Not in the Record at § II.A *supra*.

The party asserting collateral estoppel has the burden of proof. *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300 (2002). The proponent must show that (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999). Failure to establish any one element is fatal to the proponent's claim for collateral estoppel. *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245 (2004).

As an initial matter, this Court should decline to review this issue because defendants failed to set forth reasoned argument based on authority. RAP 10.3(a)(6). Under RAP 10.3(c), the appellant is tasked with replying to the issues raised in the responsive brief. The appellant must be given a clear, substantive argument to which to reply,¹⁸ and neither the appellant nor the reviewing court is a depository in which defendants may dump the

¹⁸ Indeed, the whole of their "argument" is but a single, conclusory sentence, reading: "[t]he summary judgment ruling on Bolson's negligence claims should be affirmed under the doctrine of collateral estoppel, because the DLI previously ruled against Bolson on the issue of medical causation." Defs' Br. at 13.

burden of argument and research. If defendants do not carry their burden by reasoned, cogent argument and useful citation, then they forfeit judicial review of the issue. *Holland*, 90 Wn. App. at 538; *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (appellate court will not review issue that is unsupported by relevant authority or persuasive argument).

Second, even if this Court was inclined to address the merits, defendants cannot show the “issues are identical and that they were determined on the merits in the first proceeding.” *Luisi Truck Lines, Inc. v. Wash. Util. & Transp. Comm’n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). This Court requires defendants to “specifically identify the issues and the underlying legal principles litigated in the prior proceeding.” *Lemond v. Dep’t of Licensing*, 143 Wn. App. 797, 180 P.3d 829 (2008). Courts also hold that the issue raised in the second case must “involve[] substantially the same bundle of legal principles that contributed to the rendering of the first judgment.” *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974).

Based on nothing more than their own conclusory opinion, defendants allege the fact that plaintiff’s workers’ compensation claim was rejected is identical to the issue of proximate cause in plaintiff’s negligence claim here. As this Court has already

previously determined, however, the issue of proximate cause within the context of workers' compensation and tort law are **not** identical and do **not** involve substantially the same bundle of legal principles. In *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 777 P.2d 568 (1989) (internal citation omitted), this Court determined:

“Proximate cause,” as used in this context, is not the equivalent of its counterpart in tort law. As pointed out by Dean Larson, the determination of legal causation in tort law has always involved two steps: first, causation in fact, and second, proximateness of cause. The first step can be settled by application of the “but for” test, while the second is usually tailored to “fault” conduct. On the other hand, in worker’s compensation cases, “fault” is immaterial, and work-connection in fact is the only issue. The “naturally” requirement of RCW 51.08.140 addresses the work-connection part of this equation, while the “proximately” requirement is addressed by the “but for” test set forth in *Simpson*.

This is exactly what plaintiff argued to the trial court in her briefing: that her claim for workers' compensation was rejected because her injury did not arise “naturally and proximately out of employment” in order to be a compensable occupational disease as defined by statute.¹⁹ RCW 51.32.180; RCW 51.08.140. As the Court in *McCarthy v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 812, 824, 759 P.2d 351 (1988) held, a case upon which defendants rely:

When determining the collateral estoppel effect of a Board’s ruling, a distinction must be drawn between **an**

¹⁹ CP 143–148.

occupational disease or injury that is not within the basic coverage of the Act and an occupational disease or injury that is within the basic coverage of the Act, but for which, under the facts of the particular case, no compensation is payable. **Under the former, since the disease or injury is not covered at all, the exclusive remedy provisions of the Act do not bar an employee's common law action.**

Third, the trial court could not have dismissed plaintiff's claims on collateral estoppel because defendants Hayden and Donita Williams were not parties or in privity with the parties to the workers' compensation claim. Defendants Williamses, in their individual and marital capacity, are the owners of the land and building rented to co-defendant Williams & Schloer, plaintiff's former employer.²⁰ Defendants do not argue and have never argued that defendants Williamses satisfied this element.²¹ This is consistent with the Supreme Court decision in *Evans v. Thompson*, 124 Wn.2d 435, 440, 879 P.2d 938 (1994), which held,

Pursuant to that doctrine, "(a)n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.' *Larson's Workmen's Compensation Law*, § 72.91, Vol. 2A."

²⁰ CP 1–2.

²¹ CP 100, 297. *But see* CP 143, 148 (plaintiff argued that there can be no collateral estoppel effect as to defendants Williamses).

Thus, an entity who is a landowner may be individually liable even if he is also a representative of plaintiff's employer.

Finally, application of collateral estoppel would result in an injustice to plaintiff. L&I determined plaintiff's injury was not an occupational disease as defined by statute and rejected her claim for workers' compensation benefits. There was no finding by L&I or the trial court that she was precluded from bringing her negligence claims. If this Court were to affirm the ruling below on this alternative ground as defendants urge, plaintiff will be essentially excluded from any access to any forum in which to bring her claims.

C. Defendants Incorrectly Argue that Plaintiff is Required to Present Evidence of Causation with Greater Precision and Certainty than Established Law.

Defendants argue Dr. Thrasher's opinion is not admissible because it is not relevant.²² They say the trial court viewed Dr. Thrasher's opinions given on a "more probable than not basis" as insufficient because his opinions are not "based on a reasonable degree of medical certainty."²³ There is no basis in the law for this

²² See Defs' Br. at 29–33. "The reason for the requirement of reasonable medical certainty is not based upon Rule 702 because, as mentioned, Rule 702 does not require any particular degree of certainty for admissibility. The reason is instead based upon the requirement of relevance. Medical testimony on causation is simply regarded as irrelevant if the medical expert cannot say, with reasonable medical certainty, what the cause of injury was." Tegland, 5D WASH. PRAC., HANDBOOK WASH. EVID. ER 702 (2012-13 ed.).

²³ Defs' Br. at 33.

heightened standard for expert opinions—even those provided for medical opinions—and constitutes reversible error.

In *Orcutt v. Spokane Cnty.*, 58 Wn.2d 846, 364 P.2d 1102 (1961), the Court held that medical testimony to establish a causal connection between an injury and a subsequent condition must show the injury “probably” or “more likely than not” caused the condition rather than “might have,” “could have,” or “possibly did.” *Id.* at 853. From this, later cases interpreted “reasonable medical certainty” to mean “more likely than not.” See, e.g., *State v. Terry*, 10 Wn. App. 874, 884, 520 P.2d 1397 (1974) (pathologist who stated he could not give an opinion on the cause of death with “reasonable medical certainty” could testify that a particular cause of death was “more probable than not”, satisfying the standard). Thus, the necessary degree of certainty is established if the expert can testify that his or her opinion regarding causation is **more probable than not**. *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 215, 890 P.2d 469 (1995). That is all Dr. Thrasher was required to do—not some heightened degree of certainty as the trial court ruled and defendants suggest.

Defendants, as they did in summary judgment, spend much of their brief pointing out deficiencies in Dr. Thrasher’s opinions.²⁴ But,

²⁴ See Defs’ Br. at 33–38 (pointing out that Dr. Thrasher did not review certain materials, did not examine plaintiff, and other concerns).

this fails to recognize that plaintiff does not have to prove either harm or causation with precision. Once it is determined that the testimony is admissible, the thoroughness of the expert's testimony and opinions are a matter of weight for the jury. *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 815, 701 P.2d 518 (1985). She must prove her overall case only by a preponderance of the evidence, and Dr. Thrasher may express opinions on a more probable than not basis. See *In re Custody of C.C.M.*, 149 Wn. App. 184, 202, 202 P.3d 971 (2009) (preponderance standard applies in civil actions for damages); *Bruns*, 77 Wn. App. at 215 (more probable than not standard does not require absolute certainty). Any differences in opinion between experts go to the weight and not the admissibility of the testimony. *In re Det. of Campbell*, 139 Wn.2d 341, 358, 986 P.2d 771 (1999). As with any type of evidence, the trier of fact is not required to accept an expert's opinions; rather, it decides an issue based on its own fair judgment, assisted by the expert's testimony. Tegland, 5B WASH. PRAC., EVIDENCE LAW AND PRACTICE § 702.50 (5th ed.). This Court should reverse the ruling below that the law requires greater precision or scientific certainty than plaintiff has shown.

Defendants also argue that Dr. Thrasher was not a qualified expert and, as such, plaintiff could not prove causation. This is not

what the law dictates. The parties agree the admissibility of expert testimony in Washington is governed by the two-part ER 702 test. Neither the trial court nor the defendants challenged Dr. Thrasher's status as a toxicological expert under the first part of the ER 702 test. Thus, Dr. Thrasher is acknowledged to be an expert capable of recognizing and diagnosing symptoms caused by exposure to environmental contaminants and pollutants, including black water.

Despite his status and qualifications, presumably defendants allege that Dr. Thrasher's testimony would not help the trier-of-fact. But, his testimony would assist the trier of fact because he would explain the connection between plaintiff's symptoms and symptoms caused by black water contaminants—a subject matter beyond the common understanding of an ordinary juror. Dr. Thrasher then opined that plaintiff's exposure to the contaminated work environment directly caused or, at the very least, exacerbated her injuries.²⁵ As such, causation was proved by expert testimony.

Defendants allege that there is no evidence of causation without Dr. Thrasher's expert testimony. This is not so. Viewing the evidence and inferences in plaintiff's favor, the following undisputed facts were sufficient for the trial court to deny summary judgment:

²⁵ CP 267–68.

- Defendants knew that plaintiff had allergies since at least 2005;²⁶
- On January 20, 2008, medical imaging of plaintiff's lungs were normal and unremarkable;²⁷
- In early January 2009, defendants' premises became flooded with black water;²⁸
- Immediately after the flood and the repair work began, employees began experiencing flu-like symptoms, including plaintiff;²⁹
- On January 29, 2009, plaintiff presented to Dr. Lynda Stafford with subjective complaints of runny eyes, cough, and body pains in her back. Objectively, Dr. Stafford's diagnosis was that Ms. Bolson had "newly" developed allergies.³⁰
- On July 2, 2009, medical imaging revealed abnormal scars in plaintiff's chest and lungs.³¹

The evidence was sufficient to show that Dr. Stafford (a "medical" doctor) diagnosed plaintiff with new allergies that were different from the allergies she had suffered before. It is a reasonable inference to conclude that Dr. Stafford attributed these "new" allergies as a result of plaintiff's having worked in the contaminated building while defendants performed repairs.³² This was enough.

²⁶ CP 45, 49, 249.

²⁷ CP 252.

²⁸ CP 3, 14–15, 19, 22–23, 54, 103, 178, 203–04, 221, 258.

²⁹ CP 12, 45, 48, 181, 205, 250–51.

³⁰ CP 238, 299–301.

³¹ CP 238–39, 252, 299–301.

³² CP 238.

D. Defendants Fail to Show that the Element of Breach was Determined as a Matter of Law.

There is no dispute, and defendants raise none, that defendants owed a duty to plaintiff. There is also no dispute that the defendants should have exercised reasonable care in their separate roles as landowners (premises liability) and employers (safe workplace). The trial court, as defendants argue, dismissed plaintiff's claims because she failed to further define the standard of "reasonable care" or provide an "industry standard" for landowners or employers.³³ This was error.

The issue of whether the defendants have used reasonable care is a question of fact for the jury. 16 WASH. PRAC., TORT LAW AND PRACTICE § 1.32 (3d ed.). This is because "reasonable care" is an external standard, based upon what society demands of defendants rather than upon the defendants' own notion of what is proper conduct. *Id.* In determining whether defendants have acted as a reasonably prudent person, it is appropriate to consider alternative courses of action open to that person. *Id.* In particular, the cost or inconvenience of the proposed course of conduct can be considered in determining whether the defendant's behavior was reasonable. *Id.* This is exactly what plaintiff did here—she proposed

³³ Defs' Br. at 40–43.

a course of conduct that defendants should have followed as testified by Dr. Thrasher and industrial hygienist Barbara Trenary.³⁴ Based on the evidence and any contradicting evidence (which defendants presented and argued), a jury is free to determine whether plaintiff's proposed standard of conduct was reasonable and whether defendants breached that standard.

Plaintiff also provided the trial court with evidence to alternatively show that defendants' actions were unreasonable—*i.e.*, doing nothing was not reasonable.³⁵ Defendants did not contest this evidence, or absence of any reasonable action on their part to protect plaintiff. Defendants are simply wrong or the trial court erred by determining this as a matter of law and usurping the jury's role.

E. Defendants' Fail to Show that Their Conduct was Not Outrageous as a Matter of Law.

Defendants argue that, based upon their own measure of morality, there is nothing in the record that could rise to the level of the tort of outrage. It is satisfying to know that the question of whether certain conduct is sufficiently outrageous is one for the jury—the correct scale of the conscience of the community. *Seaman v. Karr*, 114 Wn. App. 665, 59 P.3d 701 (2002).

³⁴ CP 254–68; 219–23.

³⁵ See Plf's Opening Br. at § IV.D.2 (pp. 39–40).

Defendants also argue the record confirms the trial court's dismissal of this claim. This, too, is incorrect. The trial court must make an initial determination as to whether the conduct may reasonably be regarded as so "extreme and outrageous" as to warrant a factual determination by the jury. *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979). The trial court failed to make any initial determination—this is reversible error. The report of proceedings contains nothing from the trial court on its obligation to make an initial determination.

Even if it had, however, and considered the "Hardwick" factors, the trial court should have found sufficient facts to warrant a determination by the jury. Defendants held a position of authority over plaintiff—they were her employers who were in a unique position to control the work environment. They forced employees to work in the flooded building, while repairs were performed, and without safeguarding the temporary work area. They knew about strong musty and moldy odors,³⁶ but did nothing. They knew employees had concerns, yet told them they were going to "wait and see" to conduct any tests to determine the safety of the workplace.³⁷

³⁶ CP 21, 23, 45, 48, 251.

³⁷ CP 21, 23–24, 45, 49, 180, 204, 251.

They knew employees fell ill working in the environment,³⁸ and took no action. They knew plaintiff was dealing with flu-like symptoms over a protracted period of time causing her severe emotional distress. All of this, defendants consciously disregarded. Measured against an objective standard of reasonableness, plaintiff produced sufficient evidence of her outrage claim.

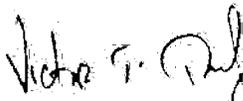
III. CONCLUSION

For the reasons set forth above, plaintiff Bonny Bolson asks this Court to reverse the decision below and remand for trial.

DATED this 30th day of August, 2013.

Respectfully submitted,

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³⁸ CP 12, 45, 48, 181, 205, 250–51.

CERTIFICATE OF SERVICE

I certify that on the 30th day of August, 2013, I caused to be delivered a copy of the document to which this Certificate is attached to the attorney(s) of record in the manner indicated below:

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DATED this 30th day of August, 2013.

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