

FILED
Court of Appeals
Division II
State of Washington
11/13/2018 2:38 PM

NO. 51414-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DARCY JOHNSON, a single woman,

Respondent,

v.

STATE OF WASHINGTON, LIQUOR AND CANNABIS BOARD,

Appellant.

APPELLANT'S AMENDED OPENING BRIEF

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I. INTRODUCTION

Notice is the cornerstone of Washington's wet floor jurisprudence. Under Washington law, a proprietor's knowledge that it is raining outside his or her store, without more, does not establish constructive notice of a hazardous condition inside the store.

On a rainy Saturday in June 2011, Darcy Johnson slipped and fell in the entryway of a liquor store in Chehalis. Since the store was owned by the Washington Liquor and Cannabis Board,¹ Ms. Johnson sued the State.

The trial court erred in denying the State's motion for judgment as a matter of law. In a wet floor slip-and-fall case, plaintiffs must establish that 1) the floor was wet, 2) the owner of the store knew, or should have known the floor was wet, 3) water makes the floor dangerously slippery, and 4) the store proprietor knew or should have known that the water would make the floor dangerously slippery. Other than the fact that it had been raining outside, Ms. Johnson offered no evidence the store had notice that the floor inside was wet, nor did she present any evidence that the floor was dangerously slippery when it was wet. No one had ever slipped and fallen in the store before. This Court should reverse the judgment below and remand with directions to enter judgment in favor of the State.

¹ Prior to the passage of Initiative 1183 in November 2011, which privatized the sale of liquor, the State of Washington owned and operated all liquor stores. *See* former RCW 66.16.010 (2005).

In addition, the court also committed a number of critical and prejudicial errors at trial. First, the jury was improperly led to believe that Ms. Johnson injured two discs in her back as the result of her fall. The State was precluded from offering evidence that imaging studies showed prior damage to the same two discs as a result of a previous injury. The State's expert would have testified that Ms. Johnson's back problems resulted from the natural progression of her pre-existing degenerative spinal condition, rather than her fall. This evidence was highly probative on the cause and extent of Ms. Johnson's injuries, and its exclusion greatly prejudiced the State's defense. The trial court also excluded expert testimony that Ms. Johnson's damages were caused, in substantial part, by a symptomatic, pre-existing somatoform disorder. Since the jury was prevented from considering this evidence, it erroneously attributed all of Ms. Johnson's damages to her fall, resulting in a \$2.3 million verdict.

Finally, the State presented evidence that the Seattle Pain Clinic's malpractice exacerbated Ms. Johnson's injuries. Nonetheless, the trial court erroneously concluded the State's evidence was insufficient to allow allocation of fault to the Seattle Pain Clinic. It also erroneously failed to give the State's proposed instructions 14 and 15, along with its special verdict form. As a result, the State was held 100 percent at fault, despite evidence showing the Seattle Pain Clinic caused Ms. Johnson's damages.

If this Court does not reverse and direct dismissal, it should order a new trial where a jury can consider all evidence relevant to the causes of Ms. Johnson's damages and apportion fault to the responsible parties.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the State's motion for judgment as a matter of law under Civil Rule (CR) 50 after the plaintiff rested, given the absence of any evidence that the store had notice of water on the floor.
2. The trial court erred in denying the State's motion for judgment as a matter of law under CR 50 after the plaintiff rested, given the absence of any evidence that the floor was dangerously slippery when wet.
3. The trial court erred in excluding evidence that Ms. Johnson's damages were not caused by her fall, but instead resulted from the natural progression of a pre-existing condition caused by a prior injury.
4. The trial court erred in excluding evidence that Ms. Johnson's damages were the result of a pre-existing somatoform² disorder that was symptomatic at the time she fell in the liquor store.
5. The trial court erred in dismissing the State's comparative fault defense as a matter of law when there was substantial evidence from

² Any group of psychological disorders (as body dysmorphic disorder or hypochondriasis) marked by physical complaints for which no organic or physiological explanation is found, and for which there is a strong likelihood that psychological factors are involved. <https://www.merriam-webster.com/medical/somatoform> (accessed June 27, 2018).

which the jury could have concluded that most of Ms. Johnson's damages were caused by the fault of the Seattle Pain Clinic and not the State.

6. The trial court erred in failing to give the State's proposed jury instructions 14 and 15 and proposed special verdict form, which would have enabled the jury to apportion fault to the Seattle Pain Clinic.

7. The trial court erred in denying the State's motion for remittitur of the \$2.3 million verdict caused by its improper exclusion of evidence and its refusal to allow the jury to apportion fault to the Seattle Pain Clinic.

8. The trial court erred in awarding pre-judgment interest.

III. STATEMENT OF ISSUES

1. Was the State's motion for judgment as a matter of law improperly denied where the plaintiff presented no evidence that the State had notice that the floor was wet, when case law requires such evidence to establish a prima facie case of negligence? [Assignment of Error No. 1]

2. Was the State's motion for judgment as a matter of law improperly denied where the plaintiff presented no evidence that the State had notice that the floor was dangerously slippery when wet, when case law requires such evidence to establish negligence? [Assignment of Error No. 2]

3. Testimony that the plaintiff's injuries were caused by the natural progression of an asymptomatic, pre-existing condition is relevant and admissible. Does the exclusion of evidence that the plaintiff's damages

resulted from the natural progression of two previously ruptured discs require reversal when the exclusion led the jury to erroneously believe that her damages were all the result of her fall? [Assignment of Error No. 3]

4. Testimony that the plaintiff's injuries were caused by a symptomatic pre-existing condition is relevant and admissible. Does the exclusion of evidence that the plaintiff's damages were caused by a symptomatic somatoform disorder require reversal when the exclusion of that evidence erroneously led the jury to believe that all of the plaintiff's damages were the result of her slip-and-fall? [Assignment of Error No. 4]

5. The State presented evidence that the Seattle Pain Clinic breached the standard of care in treating the plaintiff and that its negligence increased her damages and delayed her recovery. The court summarily dismissed the State's defense apportioning fault to the Seattle Pain Clinic. Was the evidence the State offered sufficient to allow it to seek apportionment of fault under RCW 4.22.070? [Assignment of Error No. 5]

6. The trial court rejected the State's proposed instructions 14 and 15, and refused to give its proposed verdict form apportioning fault, based on its erroneous conclusion that Dr. Schiesser's testimony was insufficient to establish fault. Did the court fail to view the evidence in the light most favorable to the State when it summarily dismissed the State's request to apportion fault under RCW 4.22.070? [Assignment of Error No. 6]

7. After the trial court excluded all evidence of Ms. Johnson's prior injuries, excluded evidence of her somatoform disorder, and refused to permit the jury to apportion fault, the jury was led to believe her damages resulted entirely from her fall. The court refused to remit the resulting \$2.3 million verdict. Should the court have remitted the verdict that resulted from its prejudicial exclusion of evidence? [Assignment of Error No. 7]

8. The Washington Supreme Court has held that the Legislature's waiver of the State's sovereign immunity did not include subjecting the State to pre-judgment interest. Did the trial court err in awarding pre-judgment interest against the State? [Assignment of Error No. 8]

IV. STATEMENT OF THE CASE

A. Factual Background

1. Ms. Johnson's feet were wet when she entered the store

Ms. Johnson fell in the entryway of a liquor store on a rainy Saturday in 2011. Clerk's Papers (CP) 1-2. Prior to arriving, she had been shopping at garage sales in the rain with Mr. Pallas. Report of Proceedings (RP) 441. They had been to eight to ten garage sales that morning. RP 170. As a result, their shoes were wet as they drove to the store. RP 172, 442. It was still raining when they arrived, and the ground was soaked as they parked and walked inside. RP 442-43. Ms. Johnson's shoes were wet as she entered the store a few steps behind Mr. Pallas. RP 444.

The entrance was narrow, requiring customers to walk in single-file. RP 173; Exs. 124, 125.³ Mr. Pallas entered first, two feet ahead of Ms. Johnson, who was looking at his back. RP 173, 444. They crossed two rubber mats, followed by two carpeted mats placed in the entry to absorb water. RP 104-05. They crossed five or six feet of carpet in addition to the rubber mats before reaching the linoleum floor. RP 105; Exs. 124, 125. Neither felt the mats being saturated or heard them squish. RP 173, 445.

Stepping off the mats and onto the linoleum, Mr. Pallas felt his foot slip and turned to warn Ms. Johnson. RP 148. Before he could do so, she stepped off the mat, slipped, and fell. RP 148. Mr. Pallas did not hear Ms. Johnson's shoes squeak or squeal as she fell. RP 174. At no point did he ever see any water on the floor. RP 174. Ms. Johnson remained down for a few seconds before getting up and continuing into the store where she and Mr. Pallas shopped for another seven to ten minutes. RP 99-100.

Between exiting her vehicle and entering the store, Ms. Johnson did not look at her feet and did not know if she stepped in any puddles. RP 444. Since she was looking at Mr. Pallas's back when she entered, she did not see any water on the floor before falling. RP 444-46. She had "no idea" if any water was there before she fell. RP 446. She admitted it was possible the water she slipped on "came in on her own shoes." RP 447-48.

³ Exhibits 124 and 125, which are photographs depicting the store's entryway that were admitted to the record at trial, are attached in the appendix.

2. The clerk was unaware of any water or foreign material on the floor before Ms. Johnson entered and fell

The clerk, Mr. Smiley, saw no water on the floor when he opened the store at 9:00 a.m. RP 96. It had been raining before Ms. Johnson entered, but no one had complained of water or any foreign matter on the floor. RP 96. While he was aware it was raining, Mr. Smiley was unaware of any water having been tracked in before Ms. Johnson entered. RP 97.

Immediately after Ms. Johnson fell, Mr. Smiley walked over to the spot to place out a caution sign. RP 98. When he did, he saw no water on the floor. RP 99. No witness testified to seeing water on the floor.⁴

There was no evidence that anyone had ever previously fallen in the store. RP 106. While it was Mr. Smiley's practice to place out a warning sign whenever it rained, he was unaware of any condition inside the store that necessitated placement of a sign prior to Ms. Johnson falling. RP 96-98. He was also unaware of any condition that would have made the floors especially slippery. RP 97-98. Jason Billings, who provided janitorial services to the store, testified he regularly maintained floors and that none of the products he applied made the floors slippery. RP 559, 565.

3. Ms. Johnson was initially diagnosed with a strain

Ms. Johnson was seen in the ER the day she fell. RP 388-89. She showed no sign of fracture or dislocation (*see* Ex. 114), and was diagnosed

⁴ Ms. Johnson testified her pants were wet, not the floor itself. RP 385, 484.

with a strain. Ex. 113 at 7. Her chart indicated she denied incontinence. Ex. 113 at 3. However, she testified the hospital staff must have made an error, because they helped her out of the trousers she had soiled. RP 390.

Ms. Johnson returned two days later complaining of numbness and tingling in her left leg. Ex. 115 at 3. The physician's assistant she saw that day reported no evidence of bowel or bladder dysfunction, nor of any neurological compromise. Ex. 115 at 5. She was sent for a lumbar CT scan, which showed only some mild disc bulging and one disc protrusion. Ex. 116. She was suspected of having a herniated disc (Ex. 115 at 5), though her chart indicated she reported previously rupturing two discs as a result of a back injury in 2007. RP 38-39 (colloquy between court and counsel regarding editing out reference in Ex. 115 at 3). She was given pain medication and referred to an orthopedist. Ex. 115 at 7. Since that day, she has never stopped taking prescription narcotics. RP 463.

4. Ms. Johnson's surgery failed, resulting in failed back syndrome

Less than a month after she fell, Ms. Johnson underwent spinal surgery with Dr. Barbara Lazio, who operated less than a week after the initial consultation. RP 200-01. Dr. Lazio agreed that operating on that timetable increased the risk of a risky procedure, but it was a risk she took because Ms. Johnson's report of incontinence gave her concern for cauda

equina syndrome.⁵ RP 204-05. Dr. Lazio later testified she never reviewed the initial chart note finding “no evidence of cauda equina syndrome,” “no evidence of bowel or bladder dysfunction,” and “no evidence of neurological deficit.” Exs. 113 at 3, 115 at 5. She admitted Ms. Johnson’s story about urinating on herself the day she fell conflicted with her hospital report that day, but she did not follow up to verify. RP 204-06.

The surgery failed, and Ms. Johnson developed “failed back syndrome,” a risk that occurs in about twenty percent of these particular surgeries. RP 202. Over the next six months, Ms. Johnson called Dr. Lazio’s clinic every month to obtain refills of her pain medication. Ex. 127; RP 211-12. Dr. Lazio testified Ms. Johnson would have to have taken the maximum dosage of her medication to run out so quickly each month. RP 219. Despite her clinic’s policy of not granting refills more than three months post-surgery, Dr. Lazio overrode the policy and refilled Ms. Johnson’s medications for another three months until finally she decided she could not allow Ms. Johnson to “keep abusing that.” RP 212-14. When she declined to refill Ms. Johnson’s prescription, Ms. Johnson severed her relationship with Dr. Lazio and went to the Seattle Pain Clinic. RP 214-15. Given the same circumstances and the prescription opioid

⁵ Cauda equina syndrome occurs when pressure from a disc rupture on the nerves exiting the bottom of the spinal cord causes neurological damage, resulting in loss of sensation in the lower extremities as well as bowel and bladder dysfunction. RP 521.

abuse epidemic in Washington, Dr. Lazio admitted that if Ms. Johnson were her patient today, she would not have continued to prescribe opioids to Ms. Johnson for more than six months postoperatively. RP 216-17.

5. The State offered evidence that Ms. Johnson's damages were the result of malpractice by the Seattle Pain Clinic

The Seattle Pain Clinic's misdeeds are well-documented. Dr. Laura Dahmer-White, a clinical neuropsychologist who was called as an expert on behalf of the State, testified that she based her opinions in part on her review of a July 15, 2016 Seattle Times article documenting no fewer than 18 deaths attributed to the Seattle Pain Clinic and its prescribing practices, including those of its principal, Dr. Frank Li, who prescribed narcotics to Ms. Johnson. VRP 855-56. Testimony was presented at trial that Ms. Johnson was a victim of the Seattle Pain Clinic's failure to observe the standard of care, and that the poor care she received rather than her fall was the cause of her damages. *See generally* RP 602-03, 624-25, 634-46.

B. Procedural History

1. The trial court denied the State's Motion for Judgment as a Matter of Law

At the conclusion of Ms. Johnson's case, the State moved for judgment as a matter of law, arguing she presented no evidence the store had prior notice that its floor was wet, nor that the floor was unreasonably dangerous even if it was wet. RP 472-79. Ms. Johnson responded that the

clerk's testimony that he normally put out a caution sign whenever it rained created an issue of fact because the clerk was aware that rain outside could potentially lead to a hazardous condition inside. RP 479-83.

Calling it a "very close call" and "not an easy decision," the trial court denied the motion. RP 484-85. Acknowledging that "nobody knows whether or not there was water on the floor," it found Ms. Johnson's testimony that her pants were wet could support an inference that there was water on the floor. RP 484-85. As to dangerousness, the court said:

And I think also the fact that Mr. Smiley did testify that. . . 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.⁶

RP 484-85. The trial court denied the motion, and the case went to verdict.

2. The trial court excluded all evidence regarding Ms. Johnson's prior medical history

Prior to her fall, Ms. Johnson had an extensive history of back problems going back to 2004 and had been treated for significant pre-existing damage. RP 503, 535-37. In 2007, she injured her back severely

⁶ Mr. Smiley did not testify he was aware the floor posed a danger when wet. RP 98. He did not use the word "danger" in his testimony at all. Rather, he testified it was part of his duties to put out a caution sign whenever it rained as a precautionary measure, and that he failed to do so on this occasion. RP 97-98. Mr. Smiley had been the clerk at the store since September 2008, about three years before Ms. Johnson's fall. RP 88-89.

when she tripped over a hat rack while working at a hospital in Maine. RP 257, 505. Following that injury, Ms. Johnson was diagnosed with the same condition – radicular pain resulting from herniation of two lumbar discs – for which she received the same treatment – epidural and transforaminal steroid injections – three years before she fell in the liquor store. RP 513-19, 529-31. Her imaging results following the 2007 injury confirmed the same two ruptured discs in her back that showed as damaged following her fall in the liquor store. RP 508-13. Ms. Johnson was even rated with, and received a workers’ compensation award for, permanent disability of her low back as a result of the prior injury to the same two discs. RP 529.

To rebut Ms. Johnson’s claims, the State called Dr. James Russo, a board-certified orthopedic surgeon, who was prepared to testify that based on a comparison between the imaging following Ms. Johnson’s 2007 injury and the imaging following her fall in the liquor store, Ms. Johnson’s damages were the result of the natural progression of her pre-existing injuries. RP 534-35. Dr. Russo was also prepared to opine that Dr. Lazio’s failure to consider Ms. Johnson’s complete medical chart before operating made a risky surgery even riskier. RP 520-23. Given Ms. Johnson’s complete medical history, it was Dr. Russo’s opinion that her back pain was caused by the natural progression of a pre-existing condition and that it did not proximately result from her fall in the liquor store. RP 534-35.

To prevent this, Ms. Johnson moved to exclude all evidence of her prior injuries, claiming she was asymptomatic at the time she fell. RP 4-6. She simply stated this as a verity. CP 325. The Court agreed and excluded all evidence of prior injuries or treatment. CP 443-45; RP 11-12. Without the ability to reference Ms. Johnson's prior medical records, it was impossible for Dr. Russo to support his opinion as to causation. RP 537.

Ms. Johnson also alleged she developed Complex Regional Pain Syndrome (CRPS) and that as a result, she was permanently disabled. RP 239-41. She called Dr. Russell Faria, who testified she developed CRPS as a result of her fall. RP 254-59. However, Dr. Faria also admitted that he did not rule out a somatoform disorder as required by the Diagnostic and Statistical Manual of Mental Health Disorders. RP 276-79. He testified that he failed to do so because he was not qualified to diagnose a somatoform disorder. *See* RP 277 ("I would defer that to a psychiatrist").

To rebut this testimony, the State called Dr. Laura Dahmer-White, a neuropsychologist. RP 588, 856. Dr. Dahmer-White was prepared to explain that Ms. Johnson did not meet the diagnostic criteria for CRPS, but instead had a somatoform disorder. RP 577-78. Based on her clinical testing and analysis of Ms. Johnson's records, Dr. Dahmer-White opined Ms. Johnson had a somatoform disorder and an anxiety disorder, both of which were symptomatic when she fell. RP 573-74, 588. Especially telling

was Ms. Johnson's use of Vicodin less than four months prior to falling, which demonstrated she was symptomatic. CP 333-34. She also filed a workers' compensation claim for "workplace stress" and was diagnosed with an anxiety disorder less than four months before she fell. CP 337. Based on Ms. Johnson's test results and medical records, Dr. Dahmer-White believed these conditions were pre-existing and unrelated to her fall. RP 577-78.

The court's exclusion of all reference to Ms. Johnson's medical history prevented the State from offering this defense as well. RP 1-12. Because somatoform disorders exist at the crossroads of physiological and psychological health, and since diagnosing them relies heavily on medical history, Dr. Dahmer-White testified it would be difficult to support her diagnoses and causation determinations without referencing Ms. Johnson's medical history. RP 585-86. Nonetheless, the trial court refused to permit any such reference. The State made extensive offers of proof (RP 500-40, 570-88), but Dr. Russo and Dr. Dahmer-White were precluded from supporting their opinions with this critical evidence. RP 660-744, 832-62.

3. The trial court did not allow the jury to apportion fault to the Seattle Pain Clinic, denied the State's Motion for Judgment Notwithstanding the Verdict, and awarded pre-judgment interest to Ms. Johnson

The State asked for a verdict form enabling the jury to apportion fault to the Seattle Pain Clinic. RP 863. It did so based on the testimony of

Dr. Michael Schiesser, who testified the clinic's failure to provide treatment consistent with the standard of care for chronic opiate pain management caused or contributed to Ms. Johnson's condition and damages. RP 592-640. Specifically, Dr. Schiesser opined that the Seattle Pain Clinic's predatory prescribing practices, coupled with its failure to screen and treat Ms. Johnson for sleep apnea, resulted in her damages. RP 601-25. Dr. Schiesser testified he was personally acquainted with Ms. Johnson's treating physician, Dr. Frank Li, as well as his practice, and that he had treated a number of Dr. Li's patients after the Seattle Pain Clinic was shuttered. RP 607. Nonetheless, the trial court refused to give the instruction, finding Dr. Schiesser's testimony "did not reach the level required under the case law for proof." RP 885.

After approximately three hours of deliberation, the jury returned a verdict of over \$2.3 million in favor of Ms. Johnson, \$1.2 million of which was "future economic damages." CP 527-28. On Ms. Johnson's motion, the court set entry of judgment for October 6, 2017. RP 1008-09. After argument on Ms. Johnson's request for pre-judgment interest, which the court granted (CP 535-37), final judgment was entered on October 13, 2017. CP 539-40.

The State moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. CP 541-600. The trial court denied both motions. CP 636-67. This appeal timely followed. CP 638-46.

V. STANDARDS OF REVIEW

The trial court's denial of a motion for judgment as a matter of law is reviewed de novo. *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 784, 358 P.3d 464 (2015). This Court also reviews de novo the trial court's refusal to instruct the jury on non-party fault under RCW 4.22.070. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

By contrast, the denial of a motion for a new trial is reviewed for abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). A trial court abuses its discretion if it applies the wrong legal standard, bases its ruling on an erroneous view of the law, relies on unsupported facts, or takes a view of the facts that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). An abuse of discretion also occurs when a trial court makes a manifestly unreasonable decision on untenable grounds or based on untenable reasons. *Id.* The trial court's admission of evidence is likewise reviewed for abuse of discretion. *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250 (2008) (citing *Mayer*, 156 Wn.2d at 684).

Finally, "orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent." *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005).

VI. ARGUMENT

A. Absent Sufficient Evidence to Establish Liability, This Court Should Reverse and Remand with Instructions to Dismiss

Landowners are not liable to invitees for unsafe conditions on their property unless they “have actual or constructive notice of that unsafe condition.” *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983) (citing *Smith v. Manning’s, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)). Business owners are liable to invitees for unsafe conditions only if they are actually aware of such conditions or if the unsafe condition existed for a sufficient amount of time for the landowner to have had constructive notice of it. *Id.* Plaintiffs bear the burden of establishing such prior notice. *Id.* at 44-45 (citing *Morton v. Lee*, 75 Wn.2d 393, 450 P.2d 957 (1969)).

Slip-and-fall plaintiffs also bear the separate and additional burden of establishing that water makes the floor dangerously slippery. *See, e.g., Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448-49, 433 P.2d 863 (1967); *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 429-30, 407 P.2d 960 (1965); *Shumaker v. Charada Inv. Co.*, 183 Wash. 521, 530, 49 P.2d 44 (1935). Linoleum tile floors are not presumptively dangerous when wet. *Charlton v. Toys R Us*, 158 Wn. App. 906, 913-15, 246 P.3d 199 (2010).

Because Ms. Johnson failed to establish notice or an unsafe condition, the trial court erred by not granting judgment as a matter of law.

1. Without evidence of prior notice that the floor was wet, the State was entitled to judgment as a matter of law

a. Ms. Johnson presented no evidence the store had actual notice that the floor was wet

Ms. Johnson presented no evidence that the clerk had actual notice of water on the floor prior to her fall. Actual notice is “[n]otice given directly to, or received personally by, a party.” *Black’s Law Dictionary* 1164 (9th ed. 2009). Actual notice requires subjective awareness of a fact.

In this case, Mr. Smiley testified he saw no water on the floor in the entryway when he opened the store around 9:00 that morning. RP 95-96. Prior to Ms. Johnson’s fall, no one else had slipped in the store or complained of water or any other foreign substance on the floor. RP 96-97. After Ms. Johnson fell, Mr. Smiley saw no water on the floor when he went to the spot to place a caution sign. RP 98-99. Ms. Johnson had not been to the store earlier that day, and she presented no testimony from anyone who had. RP 447. No evidence was offered that could allow a jury to conclude, or even infer, that Mr. Smiley had actual notice of any water on the floor.

b. No evidence was offered from which the jury could infer constructive notice of a wet floor

Ms. Johnson likewise presented no evidence that Mr. Smiley had constructive notice of water on the floor. Constructive notice exists where a condition “has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a

proper inspection of the premises and to have removed the danger.” *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). Plaintiffs bear the burden of establishing facts sufficient to demonstrate constructive notice. *Kangley v. United States*, 788 F.2d 533, 534 (9th Cir. 1986).

Here, Ms. Johnson “had no idea” how long the water had been on the floor – or whether it was even there before she arrived. RP 446. Instead, she merely offered her own testimony, and the testimony of Mr. Pallas, that it had been raining all morning. RP 148, 442-43. She then invited the jury to speculate on the number of customers who entered the store before she did and asked the jury to infer, based on the rain and typical weekend customer traffic, that there was water on the floor before she fell. RP 929.

The trial court erroneously found that this was sufficient: that the jury was entitled to credit Ms. Johnson’s testimony as to how long it had been raining, and to draw from that testimony an inference that there was water on the floor and that it had been there long enough to have been discovered and removed. RP 484-85. But while the jury was entitled to credit Ms. Johnson’s testimony, Washington law does not impose constructive notice of an unsafe condition based solely on the fact that it has been raining outside. *See Kangley*, 788 F.2d at 535 (holding that neither the presence of a rug nor the fact that it is wet outside is sufficient to “support a finding that the government knew or should have known that the floor was wet”).

2. Ms. Johnson failed to produce any evidence that water made the floor dangerously slippery

By itself, water on the floor is not a presumptively unsafe condition under Washington law. *Brant*, 72 Wn.2d at 450 (quoting *Shumaker*, 183 Wash. at 530). Plaintiffs seeking recovery for slip-and-falls therefore bear the additional burden of establishing that water makes the floor dangerously slippery. *Id.* at 448-49. *See also Merrick*, 67 Wn.2d at 429-30.

A floor is dangerously slippery only if it is “dangerously unfit to walk over.” *Kalinowski v. Young Women’s Christian Ass’n*, 17 Wn.2d 380, 391, 135 P.2d 852 (1943). Jury instruction 13 correctly stated the law:

The presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner of the store.

The plaintiff must prove that water makes the floor dangerously slippery **and** that the defendant knew or should have known **both** that water would make the floor slippery **and** that there was water on the floor at the time the Darcy Johnson slipped.

CP 520; RP 921 (emphasis added). Here, Ms. Johnson offered no evidence that the floor was dangerously slippery in that it was unsafe to walk over, nor did she offer any evidence Mr. Smiley knew of its alleged “dangerousness:”

Q: Did you have any knowledge that there was anything unusual about the floors in this particular store that made them especially slippery when wet?

A: No.

Q: To your knowledge, was there anything special about the condition of the floors in this store as of June 18, 2011, that made them especially slippery when wet?

A: It was just another day.

Q: Nothing about the maintenance schedule or anything to put you on notice?

A: Not that I'm aware of, no.

RP 98. To the contrary, no one had ever fallen in the store before. RP 96-98.

See Anderson v. Seattle Park Co., 79 Wash. 575, 576-77, 140 P. 698 (1914)

(finding no notice of dangerousness absent prior falls in the same location).

Nor does Washington law impose a presumption of dangerousness based on the type of surface such as the one here. *Brant*, for example, involved a customer who slipped on water that had been tracked into the entryway of a store that had a cement floor. *Brant*, 72 Wn.2d at 449-50. Forty-three years later, this Court cited *Brant* with approval in denying recovery where the plaintiff slipped on a wet linoleum tile floor identical to the one at issue here. *Charlton*, 158 Wn. App. at 913.

In *Charlton*, the plaintiff slipped and injured her knee within a few feet of the store's entrance after crossing two all-weather mats that had been placed in the entryway. *Id.* at 909. Toys R Us moved for summary judgment, citing the plaintiff's testimony that she "did not know how the water got on the floor of the entryway, [or] how long the water had been on the floor." *Id.* at 911. Ms. Charlton replied that "her own testimony, that the floor was wet and that she fell, contradicted the position of Toys R Us that it had mopped the area within the prior five minutes, thereby creating an issue of fact." *Id.*

at 912. She argued she was required to show no more, since “everyone knows that a floor of vinyl or tile is slippery when wet.” *Id.* at 912-13.

The trial court granted summary judgment, and the Court of Appeals affirmed, holding that the trial court properly rejected the plaintiff’s “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.” *Id.* at 915. The court noted that the plaintiff “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,” and “[f]or that reason alone, summary judgment was proper.” *Id.* (emphasis added).

Here, Ms. Johnson likewise failed to offer any evidence – other than her own fall – upon which the jury could reasonably conclude that the floor was unreasonably dangerous. But negligence cannot be inferred from her fall alone, “nor from mere dampness or wetness where it is to be expected in some degree under conditions showing the exercise of ordinary care in the design, construction and maintenance of the floor.” *Merrick*, 67 Wn.2d at 429 (citing *Knopp v. Kemp & Hebert*, 193 Wash. 160, 74 P.2d 924 (1938)).

3. A practice of putting up a warning sign when it is raining outside does not establish that the floor was wet or that it was unreasonably dangerous

Ms. Johnson distinguishes this case from the precedents cited above, arguing Mr. Smiley’s admission that he typically put out a warning sign

whenever it rained, coupled with his failure to do so, was sufficient to establish constructive notice. RP 481. Indeed, she even argued in closing that Mr. Smiley's practice of putting up a warning sign whenever it rained demonstrated that he knew the floor became slippery when wet (RP 998) and that it triggered a duty to put up the sign (RP 930, 991). But while such prophylactic measures are common, they do not establish notice. This has long been the law in Washington. *See Kalinowski*, 17 Wn.2d at 394-95.

The practice of putting up a warning sign when it is raining outside does not establish that a floor is wet inside. *Seferagic v. Hannaford Bros. Co.*, 115 A.D.3d 1230, 1231, 982 N.Y.S.2d 289 (2014) (holding “[t]he fact that it was raining during the morning of plaintiff’s fall and defendant’s employees placed wet floor warning cones near the entrance does not require a finding that the defendant had actual notice of the allegedly dangerous condition. Defendant demonstrated that the warning signs were put out as a safety precaution and not in response to complaints regarding the condition of the floor where plaintiff fell”)⁷ (internal quotes omitted).

More importantly, the placement of warning signs does not establish that water makes a floor dangerously slippery. *Shumaker*, 183 Wash. at 448-49. *Charlton* is again on point. There, in addition to the two

⁷ At trial, the jury asked: “For clarification, did the policy of putting out the sign take place only when it rained or only if the interior floor was wet?” RP 109. Mr. Smiley answered: “I don’t know any official state policy, but I do know that the practice at our store was to put it out whenever it was wet out, like when it rains.” RP 109, 868.

all-weather mats the plaintiff crossed before falling, Toys R Us had also put up two large yellow cones stating “Caution, Wet Floor.” *Charlton*, 158 Wn. App. at 911. Nonetheless, this Court affirmed summary dismissal because Ms. Charlton failed to present evidence that the floor presented an unreasonable risk of harm when wet. *Charlton*, 158 Wn. App. at 915. *See also Beck v. Stewart’s Shops Corp.*, 156 A.D.3d 1040, 1042, 66 N.Y.S.3d 79 (2017) (finding “no merit in plaintiff’s contention that defendant’s use of ‘wet floor’ signs raises a question of fact as to actual notice, as nothing in the record disputes the employee’s testimony that the warning signs were used as a prophylactic measure and not in response to any complaint [D]efendant’s use of the signs, taken together with the employee’s general awareness of the condition of the floor, fail to demonstrate that defendant knew or should have known of the specific hazardous condition alleged to have caused plaintiff’s injury”) (internal citations omitted).

Charlton relied heavily upon *Kangley*. In *Kangley*, the plaintiff fell on an indoor ramp. *Kangley*, 788 F.2d at 534. A mat had been affixed to the ramp, and there was snow and ice on the ground outside. *Id.* at 535. The court reversed the denial of summary judgment, holding: “[t]he existence of a rug inside a door alone is not enough to establish that an owner or occupier knows the floor might be dangerous The same is true of the fact that it is wet outside” (internal citation omitted). The court explained:

If we were to hold that a person who slips inside a door. . . . when it is wet outside may recover for injuries sustained without showing anything more, we would place an intolerable burden on businesses in areas like Tacoma where it is often wet outside. We are convinced that this is not the law in the state of Washington.

Id.

As *Charlton* and *Kangley* make clear, the use of prophylactics such as warning signs or floor mats does not establish actual or constructive notice that a floor is wet or dangerously slippery. *Charlton*, 158 Wn. App. at 915 (citing *Kangley*, 788 F.2d at 534-35). Nor was the closing argument of Ms. Johnson’s counsel evidence that the floor was wet or that it was unreasonably dangerous when wet. *See* jury instruction 1; CP 507; RP 914 (lawyers remarks, statements and arguments are not evidence).

The reasoning of *Charlton* and *Kangley* is the same whether the prophylactic measure at issue is a rug or a caution sign: constructive notice requires more knowledge than the fact that it is wet outside and that the floor can become dangerous if it gets wet. *Kangley*, 788 F.2d at 534. “To prove negligence, the plaintiff must prove that water makes the floor dangerously slippery *and* that the owner knew or should have known *both* that water would make the floor slippery *and* that there was water on the floor at the time the plaintiff slipped.” *Id.* (emphasis added). Anything less places an “intolerable burden” on businesses that the federal courts and this Court have

declined to embrace. *Id.* See also *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 459-60, 805 P.2d 793 (1991); *Charlton*, 158 Wn. App. at 914-15.

Here, no one testified that the floor inside the store was wet.⁸ As to dangerousness, Mr. Smiley testified no one had ever fallen in the store's entrance. RP 106. Absent evidence the floor was wet or unreasonably dangerous when wet, the judgment should be reversed and the case remanded with directions to dismiss. *Charlton*, 158 Wn. App. at 915-16.

4. Ms. Johnson's argument regarding constructive notice was rejected by the Supreme Court in *Iwai*

At trial, Ms. Johnson argued her fall was caused by water that had been tracked into the store's entryway. RP 990-91. She even admitted it was possible the water came in on her own shoes. RP 447-48. Nonetheless, she argued in closing, and in in opposition to the State's post-trial motion, that notice "can be inferred" from Mr. Smiley's testimony. RP 990-91; CP 612. In doing so, she argued for a standard our Supreme Court did not adopt in *Iwai v. State Emp't Sec. Dep't*, 129 Wn.2d 84, 97-98, 915 P.2d 1089 (1996).

In *Iwai*, a case involving a parking lot slip-and-fall, four members of the court favored eliminating the notice requirement, reasoning that its strict application "would unfairly allow [the defendant] to plead ignorance about

⁸ As the trial court noted, Ms. Johnson testified her *pants* were wet, not that the *floor* was. RP 484. Nonetheless, it found "there could be a reasonable inference [from that testimony] that there was water on the floor." RP 484. But Ms. Charlton also testified her pants were wet, and as this court found, "to prove negligence, the plaintiff must prove . . . that there was water on the *floor*" (emphasis added). *Charlton*, 158 Wn. App. at 911.

each patch of ice causing injury, despite its general knowledge of the situation.” *Id.* at 101. The plurality favored a rule imposing liability if prevailing conditions made the injury foreseeable. *Id.* (citing *Wiltse*, 116 Wn.2d at 461). That is precisely the position Ms. Johnson took in closing argument and in opposing the State’s motion for judgment notwithstanding the verdict: that general knowledge of the weather outside, coupled with the clerk’s knowledge that the floor could become wet, was enough to establish notice of a dangerous condition inside the store. RP 990-91; CP 611.

That is not the law. The *Iwai* plurality did not garner a majority. To the contrary, a majority rejected part two of the plurality opinion from which the above passage was taken, reasoning that to do otherwise would “mak[e] the landlord an insurer against unknown defects on his or her land.” *Iwai*, 129 Wn.2d at 102-05. *See also Charlton*, 158 Wn. App. at 917-18. Absent an injury in a self-service part of the store, and a nexus between the injury and that mode of operation, a majority of the court required plaintiffs to show prior notice. *Id.* at 103 (Alexander, J., concurring) (finding that the prior notice requirement “provide[s] adequate protection to invitees already”).

Here, there was no dispute that Ms. Johnson fell in the store’s entryway,⁹ an area that by law is not “self-service” in nature. *See Coleman v.*

⁹ Due to Washington’s extensive rainfall, absent prior notice of a dangerous condition, Washington law has allocated the risk of entryway slip-and-falls to patrons entering stores for over 80 years. *See Knopp*, 193 Wash. at 164.

Ernst Home Ctr., Inc., 70 Wn. App. 213, 219, 853 P.2d 473 (1993). Her fall was not caused by a broken bottle or a spill related to self-service operation. She was therefore required to establish prior notice, and her failure to do so requires reversal and remand for dismissal. *Charlton*, 158 Wn. App. at 918.

5. Knowledge of rain outside a store does not establish notice of an unsafe condition inside a store

Finally, knowledge of a condition *outside* a store does not establish notice of an unsafe condition *inside* it. *See, e.g., Iwai*, 129 Wn.2d at 97-98 (“the sole fact that the temperature being around freezing at the time . . . does not sufficiently demonstrate [the defendant] ‘knew or should have known that a dangerous condition existed’”); *Kangley*, 788 F.2d at 535 (notice “that it is wet outside” is “not enough to establish that an owner or occupier knows the floor might be dangerous”); *Charlton*, 158 Wn. App. at 915 (same).

Even if the entryway inside the store had been wet, Ms. Johnson offered no evidence as to how long the water had been inside, nor was any corroborating evidence offered as to the amount of water. Neither Mr. Pallas nor Mr. Smiley testified they ever saw any water on the floor before or after Ms. Johnson fell. RP 97, 173-74. And Ms. Johnson herself only testified that her pants were wet, not that the floor was wet. RP 385, 484. Even under the *Iwai* plurality’s generous analysis, such evidence is insufficient to establish notice. *See Iwai*, 129 Wn.2d at 97-98 (citing *Brant*,

72 Wn.2d at 452). As the plurality recognized in *Iwai*, under the traditional rule, a plaintiff who fails to establish how long a specific dangerous condition existed is precluded from recovery. *Id.* (citing *Wiltse*, 116 Wn.2d at 458; *Brant*, 72 Wn.2d at 451-51; *Merrick*, 67 Wn.2d at 429).

In this case, the only evidence Ms. Johnson offered was that she slipped in the entryway of a store on a rainy day, and that the clerk was aware that it was raining. RP 97. Well-established case law recognizes that such evidence is insufficient as a matter of law to establish a prima facie case of negligence in Washington. *See, e.g., Knopp*, 193 Wash. at 164; *Iwai*, 129 Wn.2d at 97-98; *Kangley*, 788 F.2d. at 535; *Charlton*, 158 Wn. App. at 915.

There is no principled way to distinguish these cases that were summarily dismissed¹⁰ from the facts here. Consistent with these precedents, this Court should reverse and remand with directions to enter judgment in favor of the State.

If this Court remands this case for dismissal, then it need not address the remaining arguments that raise other serious errors committed by the trial court. At a minimum, however, these errors require remand for a new trial.

¹⁰ *Brant*, *Merrick*, and *Knopp* all affirmed directed verdicts for defendants. *Shumaker* reversed a denial of judgment notwithstanding a verdict in favor of a defendant. *Charlton* and *Ingersoll* affirmed summary judgments awarded to defendants. *Wiltse* affirmed a judgment for a defendant, and *Kangley* reversed a verdict entered in favor of a plaintiff. Appellants are unable to find a single reported case that has upheld a verdict entered in favor of a plaintiff in circumstances similar to those presented here.

B. The Trial Court Abused its Discretion by Excluding Evidence Related to Ms. Johnson's Pre-Existing Conditions

In addition, the trial court erroneously excluded all reference to Ms. Johnson's medical history prior to her fall. RP 1-12. Despite extensive offers of proof,¹¹ the State's experts were forced to testify without referencing this critical – and admissible – evidence. RP 660-744, 832-62.

Ms. Johnson had significant pre-existing injuries and treatment for her back. RP 535-37. She previously injured her low back in a workplace fall in Maine in 2007. RP 527. She was diagnosed with the same condition – radicular pain resulting from herniation of two lumbar discs – for which she received the same treatment – epidural steroid injections – three years before she fell in the store. RP 529-31. Ms. Johnson had even been rated with, and received a workers' compensation award for, permanent partial disability of her low back as a result of the prior injury. RP 529-34.

Dr. Russo was prepared to opine that the natural progression of Ms. Johnson's pre-existing spinal condition caused her damages. RP 534-35. Dr. Dahmer-White was prepared to rebut the testimony of Dr. Faria by explaining that Ms. Johnson suffered from a somatoform disorder that was symptomatic at the time she fell. RP 577-78. The State did not receive a fair trial because the trial court refused to allow this evidence. This Court should order a new trial at which this evidence is put before the factfinder.

¹¹ RP 500-40 (Dr. Russo); RP 570-88 (Dr. Dahmer-White).

1. Evidence regarding Ms. Johnson’s prior injuries was improperly excluded

Prior to trial, the trial court excluded all evidence, or any mention, of Ms. Johnson’s pre-existing medical conditions, including her two ruptured discs.¹² CP 443-45; RP 11-12. The court accepted Ms. Johnson’s argument that absent evidence these conditions were symptomatic at the time she fell, they were not a proximate cause of her subsequent disability under *Harris v. Drake*, 116 Wn. App. 261, 288-89, 65 P.3d 350 (2003), *aff’d* 152 Wn.2d 480, 99 P.3d 872 (2004). RP 11-12. This was clear error.

Harris involved a plaintiff who suffered back and shoulder injuries in an automobile accident. *Harris*, 116 Wn. App. at 266. The defendant admitted liability but disputed damages. *Id.* at 268. The trial court did not permit the defendant to present evidence that 14 months before the accident, the plaintiff had received chiropractic treatment, complaining of pain. *Id.*

At the conclusion of trial, the court directed a verdict for the plaintiff on the issue of causation. *Id.* The defendant appealed, arguing this was error because it offered evidence of a pre-existing condition that made causation debatable. *Id.* at 289. The Court of Appeals affirmed, noting the defendant had not called the plaintiff’s chiropractor to testify. *Id.* Instead, the defendant had attempted to rely solely on the plaintiff’s admission that he suffered mid

¹² Motions in limine should be granted only where the evidence is “*clearly inadmissible*” under the issues as drawn or which may develop during the trial” (emphasis added). *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991).

and low back pain, as well as on the testimony of a different doctor who relied on a note in the plaintiff's chiropractor's chart regarding the presence of shoulder pain and an MRI. *Id.* Noting that the physician the defendant called testified he "had no idea what that note meant," the court affirmed. *Id.*

Here, the State would not merely have introduced a pre-existing injury and asked the jury to speculate on its impact. Dr. Russo was prepared to point out that as the result of her 2007 injury, Ms. Johnson was diagnosed with the same condition – radicular pain resulting from herniation of the same two lumbar discs. RP 508-19, 529-31.¹³ He was further prepared to testify that Ms. Johnson's imaging findings were the result of her 2007 fall and that the radicular pain she complained of was not the result of her fall, but was caused by the natural progression of the two herniated discs she suffered in 2007. RP 511-12, 534-36. Washington law is clear that there may be no recovery for injuries or disabilities that would have resulted from the natural progression of pre-existing conditions even without injury. *Hoskins v. Reich*, 142 Wn. App. at 564 (quoting 6 *Washington Practice: Washington Pattern Jury Instructions: Civil* § 30.18, at 311 (2005) (WPI)). In this case, the State's expert was not permitted to offer his opinion that, based on Ms. Johnson's prior discogenic findings, her disability was the result of the natural progression of her pre-existing condition. RP 537.

¹³ The excerpts taken from RP 499-537 are from Dr. Russo's offer of proof, given outside the presence of the jury, to preserve the record for appeal.

The exclusion of this evidence prejudiced the State by preventing its expert from supporting his opinion on causation,¹⁴ and it allowed Ms. Johnson to recover twice for injury to the same body part. RP 529. The size of the verdict demonstrates the magnitude of prejudice. The jury did not hear evidence of the true condition of the person who made a claim for injuries. This Court should thus vacate the verdict and order a new trial.

Ms. Johnson argued in opposition to the State's motion for judgment notwithstanding the verdict that evidence regarding her pre-existing medical conditions was properly excluded as irrelevant under *Harris*, 116 Wn. App. at 288-89, because it was not symptomatic at the time of her injury. CP 614-16. But her prior injuries, even if not "symptomatic," mirrored her alleged injuries from the fall in the liquor store and were highly relevant to the State's theories on causation and damages. *See Torno v. Hayek*, 133 Wn. App. 244, 251, 135 P.3d 536 (2006). Evidence of pre-existing conditions that mirror Ms. Johnson's alleged injuries as a result of a later event are relevant to causation. *Id.*

Moreover, both Dr. Russo and Ms. Johnson's surgeon testified that the mere *existence* of the records documenting her pre-existing condition had independent significance. RP 204, 534. This was true because they bore on the propriety of the surgery Ms. Johnson underwent, as well as the timeline

¹⁴ Dr. Russo opined that Ms. Johnson's imaging findings were the result of injuries prior to her fall. RP 534-36. Nothing more is required to establish relevance.

with which that surgery was performed. RP 519-27. Unlike the expert in *Harris* who had “no idea” what the plaintiff’s prior medical records even meant, here there was *agreement* between Ms. Johnson’s and the State’s experts that the records of her prior injury and subsequent treatment were relevant, both to the issues of causation and damages. RP 202-04, 643.

Harris did not mandate exclusion of Ms. Johnson’s medical records. While the abuse of discretion standard applicable to evidentiary rulings allows for a range of choices on the part of the trial court, the standard is violated when a court makes a reasonable decision but bases its ruling on an erroneous view of the law. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Since nothing in *Harris* required exclusion of Ms. Johnson’s prior medical records, the trial court erred in misreading it as requiring exclusion. At the time of the pre-trial ruling, the trial court had no basis to conclude that the evidence was “clearly inadmissible.” See *Douglas*, 117 Wn.2d at 255.

The State was prejudiced by the exclusion of these important facts and opinions. As Dr. Russo testified in his offer of proof, the exclusion of Ms. Johnson’s prior medical records made it impossible for him to support his opinions with respect to causation. RP 537. It also permitted Ms. Johnson to misrepresent herself to the jury as a wholly uninjured individual at the time she fell in the liquor store, thereby gutting the State’s ability to contest

the extent of her claimed damages. Nothing short of a new trial at which this evidence is presented to the jury will correct these errors.

2. The trial court erroneously excluded expert testimony that Ms. Johnson had a symptomatic somatoform disorder that was the true cause of her alleged damages

Evidence regarding Ms. Johnson's pre-existing mental health conditions should have been admitted. *Harris* only excluded evidence regarding pre-existing conditions that were *asymptomatic* at the time of injury. *Harris*, 116 Wn. App. at 288-89. Dr. Dahmer-White testified that Ms. Johnson had *symptomatic* somatoform and anxiety disorders at the time she fell. RP 588. The fact that Ms. Johnson filed a workers' compensation claim for "workplace stress" and was diagnosed with an anxiety disorder less than four months before she fell strongly supported both Dr. Dahmer-White's diagnosis of a pre-existing anxiety disorder and her conclusion that it was symptomatic as of the day Ms. Johnson fell. RP 579-80.

Against this testimony, Ms. Johnson presented no evidence regarding her mental health. No authority exists for the notion that a trial court may exclude evidence of *symptomatic* pre-existing conditions under *Harris*. Absent some evidence to the contrary, trial courts are not free to simply disagree with experts as to whether a condition exists or is symptomatic. Excluding all evidence of Ms. Johnson's pre-existing mental health conditions was an abuse of discretion.

Without the ability to offer evidence regarding Ms. Johnson's pre-existing mental health status, the State was denied an opportunity to present a plausible alternate theory for her symptom complex; a complex that not only impacted her ability to work, but was indicative of a somatoform disorder according to Dr. Dahmer-White. RP 575-78. This left the jury with no reasonable alternative but to accept the diagnosis of complex regional pain syndrome, despite the inaccuracy of that diagnosis as admitted by her expert. RP 275-79. Handcuffed by the trial court's ruling, Dr. Dahmer-White could neither credibly support her diagnoses, nor offer her opinion that Ms. Johnson's dependence on prescription narcotics pre-existed her fall in the liquor store. RP 585-86. This dealt a crucial blow, since it permitted Ms. Johnson to argue, as she did in closing, that no evidence was offered indicating she had ever used her prescriptions irresponsibly. RP 936. It also foreclosed any opportunity for the State to argue that her damages were caused in part by her pre-existing dependence on prescription narcotics. Again, no remedy short of vacating the verdict and ordering a new trial where the State is permitted to present this evidence will correct these errors.

C. The Trial Court Erred in Dismissing the State's Allocation of Fault Claim Against Seattle Pain Clinic

Prior to trial, the State disclosed that it would present expert testimony through Dr. Michael Schiesser that the Seattle Pain Clinic failed

to provide treatment consistent with the standard of care for chronic opiate pain management and that its failure to do so caused Ms. Johnson's damages. CP 597-98. At trial, Dr. Schiesser offered testimony consistent with this opinion. RP 592-640. Ms. Johnson did not object, and in fact, asked him to elaborate on his opinion on cross-examination. RP 627-34.

1. Washington law requires apportionment of fault

RCW 4.22.070(1) provides:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent (emphasis added).

Pursuant to this statute, the State proposed jury instructions 14 and 15 related to apportionment of fault (CP 582-83), and a special verdict form that listed the Seattle Pain Clinic as an at-fault non-party. CP 590-91.

Ms. Johnson argued that apportionment of fault to the Seattle Pain Clinic was improper because its negligence was foreseeable under *Lindquist v. Dengel*, 92 Wn.2d 257, 262, 595 P.2d 934 (1979). CP 617-18. The State responded that *Lindquist* predated the enactment of the Tort Reform Act of 1986,¹⁵ which adopted a system of proportionate liability under which negligent parties are liable only for their own proportionate

¹⁵ RCW 4.22.070.

fault. RP 632. Ms. Johnson replied that *Lindquist* was still good law, based on dicta in a post-Tort Reform Act case, *Henderson v. Tyrrell*, 80 Wn. App. 592, 627, 910 P.2d 522 (1996). RP 881. But *Henderson* held the defendant had waived any argument about apportioning fault to a non-party by its failure to disclose its intention to do so. *See Henderson*, 80 Wn. App. at 628. Thus, *Henderson* did not decide the issue on the merits.

Nonetheless, after *Henderson* concluded that the allocation of fault issue had been waived, it went on to indicate in a footnote that it disagreed with the federal court's conclusion in *Workman v. Chinchinian*, 807 F. Supp. 634 (E.D. Wash. 1992) that RCW 4.22.070 had abrogated the common law *Lindquist* rule. *See Henderson*, 80 Wn. App. at 627 n. 17. Ultimately, *Henderson* did not decide whether *Lindquist* and RCW 4.22.070's requirement to apportion fault would both be applicable. *See Sudre v. Port of Seattle*, No. 15-0928, 2016 WL 7035062, *15 (W.D. Wash. Dec. 2, 2016) (unpublished) (noting *Henderson* did not address whether the *Lindquist* rule and RCW 4.22.070's requirement to apportion fault may be both invoked regarding subsequent medical malpractice).

Since *Henderson* was decided, the Supreme Court has repeatedly emphasized that RCW 4.22.070 abolished joint and several liability under the common law in favor of proportionate liability. *See Kottler v. State*, 136 Wn.2d 437, 442-45, 963 P.2d 834 (1998) (citing *Washburn v. Beatt*

Equip. Co., 120 Wn.2d 246, 292, 840 P.2d 860 (1992)). Joint and several liability is retained only in several explicitly listed statutory exceptions. *Id.* See also *Tegman v. Accident & Med. Investigations Inc.*, 150 Wn.2d 102, 116-17, 75 P.3d 497 (2003) (under RCW 4.22.070(1), where damages result from both intentional acts and omissions and “fault,” *i.e.*, negligence, recklessness, and conduct subjecting the actor to strict liability, the damages resulting from intentional acts and omissions must be segregated from damages that are fault based).

Most recently, in *Afoa v. Port of Seattle*, 421 P.3d 903 (2018), the Supreme Court held that the liability of defendants owing a non-delegable duty with another entity is several only, and the fault of that entity was properly apportioned to those non-parties on an empty chair defense under RCW 4.22.070.

RCW 4.22.070(1)’s language is broad, applying to “*all* actions involving fault of more than one entity . . .” (emphasis added). In short, statutory modification of joint and several liability applies to *all* actions based on the broad definition of fault, whatever the theory of liability. *Hiner v. Bridgestone/Firestone Inc.*, 138 Wn.2d 248, 262 n.71, 978 P.2d 505 (1999) (quoting Gregory C. Sisk *Interpretation of the Statutory Modification of Joint and Several Liability; Resisting the Deconstruction of Tort Reform*, 16 U. of Puget Sound L. Rev. 1, 22 (1992)).

Both Idaho and California have addressed the issue of whether the common law rule of general foreseeability for subsequent medical negligence precludes a reduction of damages and apportionment of fault under those states' comparative fault statutes. The courts in both states have held that the comparative fault statutes require the jury to apportion fault to all liable actors, including liability that is the result of subsequent medical negligence. *See Cramer v. Slater*, 146 Idaho 868, 874, 204 P.3d 508 (2009) (holding any liability that results from subsequent medical negligence should be reduced by the assignment of a percentage of comparative fault that is the result of the subsequent medical negligence); *Henry v. Superior Court*, 160 Cal. App. 4th 440, 445, 72 Cal. Rptr. 3d 808 (2008) (application of statutory rule eliminating joint liability for non-economic damages in personal injury actions required allocation of fault to subsequent medical malpractice tortfeasors, even though the factfinder would be required to apportion fault on two different theories of liability).

While Ms. Johnson's primary argument against allocation of fault to the Seattle Pain Clinic was based on erroneous dicta in *Henderson*, that was not the basis upon which the trial court dismissed the State's apportionment of fault defense. Instead, it erroneously concluded that Dr. Schiesser's testimony was insufficient to establish Ms. Johnson had been harmed by the Seattle Pain Clinic's multiple violations of the

standard of care. RP 883, 885. That issue is addressed in the next section of this brief. The State made the foregoing argument in anticipation that Ms. Johnson will assert it as an alternative basis to affirm dismissal of its comparative fault affirmative defense under RCW 4.22.070.

2. The State presented sufficient evidence to enable the jury to apportion fault to the Seattle Pain Clinic

The trial court's conclusion that Dr. Schiesser's opinion did not reach the level required under the case law for proof of the Seattle Pain Clinic's negligence was error. RP 883-85. Ms. Johnson never challenged the foundation, admissibility, or competency of Dr. Schiesser's testimony or his opinions, which clearly established a sufficient basis upon which the jury could apportion fault to the Seattle Pain Clinic. RP 592-640.

Ms. Johnson only argued lack of sufficiency of the evidence when prompted by the trial court, and even then she only argued the evidence was insufficient on causation. RP 882. But she conceded the sufficiency of the evidence on the issue of the breach of the standard of care:

Now, Dr. Schiesser was very candid about saying that he didn't think that [the Seattle Pain Clinic] did things according to the standard of care, but he never said, therefore, Darcy didn't get this or this happened to Darcy that kind of thing. There is no testimony of that at all.

RP 882.

This Court reviews de novo the trial court’s entry of judgment as a matter of law, viewing all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Keck v. Collins*, 184 Wn.2d 358, 370-371, 357 P.3d 1080 (2015) (holding that proof of fault of a doctor requires “an expert to say what a reasonable doctor would or would not have done, that the [doctor] failed to act in that manner, and that this failure caused her injuries”). Entry of judgment as a matter of law is only proper if there is no substantial evidence or reasonable inference that would sustain a verdict for the nonmoving party. *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 996 P.2d 1103 (2000).

a. There was sufficient evidence from which the jury could find the Seattle Pain Clinic breached the standard of care and that its breach proximately caused Ms. Johnson’s damages

Dr. Schiesser testified that screening for sleep apnea is the standard of care for diagnosing and treating the effects of prescribing opiates. RP 600-03. Left untreated, sleep apnea affects a patient’s ability to recover from surgery. RP 600-02. Prescribing opioids creates a “double whammy” because it increases sleep apnea, which lowers the level of oxygen in the blood and causes the heart to slow. RP 618-22. It disrupts wound healing and the endocrine system, and it causes diabetes and weight gain by throwing off hormones, causing depression, fatigue, and lethargy. RP 620-

21. Here, as Dr. Schiesser testified, Ms. Johnson's sleep apnea got precipitously worse with her use of opioids. RP 617. This delayed her recovery and resulted in a lost opportunity to get better. CP 627. Treatment for sleep apnea would have resulted in a much better recovery. RP 624. If the Seattle Pain Clinic had properly evaluated Ms. Johnson and identified her sleep apnea, it would have recognized that many of her symptoms were caused by sleep apnea. RP 624. "If that had occurred, then that would have been followed through on much earlier in her care . . . she would have done much better had that happened." RP 624.

A simple questionnaire would have identified the potential for sleep apnea, and the Seattle Pain Clinic's failure to utilize it was "a large deviation from the standard of care." RP 607. Anyone who answers "yes" to two or more questions has an 89 percent chance of having clinically significant sleep apnea. RP 634; Ex. 141. The treatment Ms. Johnson received put her life in danger and made her condition worse. RP 628.

Dr. Schiesser also opined that immediately after her surgery, Ms. Johnson should have started physical therapy, which is the standard for rehabilitation, not just start opioids. RP 609. The first time physical therapy was discussed with Ms. Johnson was two years post-surgery. RP 613-14. This can and should be done immediately after surgery. RP 607. Once Ms. Johnson was offered therapy, she participated. RP 631.

Dr. Schiesser also testified that on a more-probable-than-not basis, Ms. Johnson has allodynia, an enhanced pain sensitivity. RP 633. This is caused by persistent exposure to opiate medication when pain stimulators are seldom used because they provide little benefit. RP 615-16. Dr. Schiesser further testified that the Seattle Pain Clinic failed to look at enough options before focusing on installation of a spinal stimulator: “It’s sort of like a “Hail Mary pass.” You know, you lean into it when it’s all you’ve got left. But it isn’t . . . the first line therapy for sure.” RP 616-17.

Despite this, the trial court took the issue of non-party comparative fault from the jury by granting judgment as a matter of law on the defense. CP 883. In doing so, the court failed to view the evidence in the light most favorable to the State, and it ignored Dr. Schiesser’s testimony outlining how the Seattle Pain Clinic violated the standard of care and specifying the added damages it caused Ms. Johnson.

Ms. Johnson could have sued the Seattle Pain Clinic for breaching the standard of care and the damage it caused. Had she done so, she might have settled with the Seattle Pain Clinic, or it would have been on the verdict form. In any case, her decision not to sue the Seattle Pain Clinic does not preclude the State from apportioning fault to it. *See Mailloux v. State Farm Mut. Auto Ins.*, 76 Wn. App. 507, 514-16, 887 P.2d 449 (1995) (holding that if a defending party proves fault that proximately causes the

plaintiff's damages, that percentage of fault reduces the share of damages the plaintiff can recover from those against whom it has claimed).

While Ms. Johnson did not sue the Seattle Pain Clinic, she did elicit further testimony from Dr. Schiesser regarding its negligence and the damages she suffered as a result. RP 627-34. She did so in the erroneous belief that the State would be liable for the clinic's fault as well. RP 881.

b. The trial court erred in failing to give the State's proposed jury instructions 14 and 15 and special verdict form allowing the jury to apportion fault to the Seattle Pain Clinic

There was evidence in the record from which a reasonable jury could have found that the Seattle Pain Clinic breached the standard of care, and that its breach resulted in injury and damages to Ms. Johnson. Accordingly, the trial court erred in taking this issue from the jury and in refusing to give the State's proposed jury instructions 14 and 15 (CP 582-83) and verdict form (CP 590-91)¹⁶ requiring apportionment of fault under RCW 4.22.070.¹⁷ Based on this erroneous ruling, the State asks this Court to reverse and a remand for a new trial, where a jury can properly apportion fault to the Seattle Pain Clinic under RCW 4.22.070.

¹⁶ Pursuant to RAP 10.4(c), copies of the State's proposed jury instructions and special verdict form, as well as all statutes cited herein, are attached in the appendix.

¹⁷ Indeed, Ms. Johnson's counsel emphasized the absence of any instructions allowing the jury to hold the Seattle Pain Clinic responsible for its negligence in closing: "When you look at these instructions, the law as the judge gives it to you, there will be absolutely nothing in there that absolves the government because they sent her to negligent care, absolutely nothing." RP 988.

D. The Trial Court Erred in Refusing to Grant Remittitur

Finally, in the alternative, this Court may also consider whether to remit the amount of the damages to conform to the evidence offered at trial:

Appellate courts unquestionably have the authority to reduce jury damages awards . . . “[It is] at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur” (internal citations omitted).

Bunch, 155 Wn.2d at 171-72. See also RCW 4.76.030. Reduction is appropriate where (1) the award is outside the range of the evidence, (2) the jury was obviously motivated by passion or prejudice, or (3) the verdict shocks the court’s conscience. *Id.*; *Washburn*, 120 Wn.2d 246 at 268-69. Damages must not be “flagrantly outrageous and extravagant.” *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985).

Here, Ms. Johnson incorrectly argued that the State’s expert, Mr. Knowles, “admitted future economic damages in the amount of \$1,101,284.” CP 620. He did no such thing. That figure was the result of numbers offered by Ms. Johnson’s expert, who neither reduced them to present value¹⁸ nor provided any credible basis for his calculations. CP 313. None of the figures offered provide a basis for \$1.2 million in future

¹⁸ Ms. Johnson argued her failure to reduce her figures to present value was harmless, citing *Mendelsohn v. Anderson*, 26 Wn. App. 933, 940 & n.2, 614 P.2d 693 (1980). CP 620 n.4. *Mendelsohn* merely holds it is not error to fail to instruct a jury to discount future medical expenses and earning capacity to present value if no evidence is offered as to the proper interest rate or mathematical formula. *Id.* Both were offered here, so reduction to present value was required. Nonetheless, it is clear the jury did not do so.

economic damages, nor for the over \$2.3 million awarded overall. Such a figure shocks the conscience for a slip-and-fall. No evidentiary support exists in the record for the over \$1.6 million in past and future economic damages, and no credible evidence was offered to justify a non-economic damage award of \$673,000. No evidence was offered as to a value for future medical expenses. Even taking the figures in the light most favorable to Ms. Johnson, the highest present value for future economic loss damages presented was \$485,589 (Knowles total economic loss related to earnings, RP 770) plus \$466,646 (services, reduced by Knowles to present value based on Fountaine's numbers, *see* RP 788-91) which is less than the awarded \$1.2 million. These figures are exorbitant considering Mr. Fountaine had no basis for his calculations other than anecdotal evidence of dubious foundation.

The trial court's refusal to remit the verdict only compounded its erroneous exclusion of all evidence regarding Ms. Johnson's prior injuries, its exclusion of evidence regarding Ms. Johnson's pre-existing, symptomatic somatoform disorder, and its rejection of the State's request to apportion fault to the Seattle Pain Clinic. Collectively, these errors led the jury to incorrectly conclude Ms. Johnson's fall was the sole cause of her damages.

This Court can adjust the judgment as an alternative to a new trial. \$600,000 is a reasonable, defensible figure in light of the prejudice wrought by the trial court's erroneous rulings on evidence and non-party fault.

E. The Trial Court Erred in Awarding Pre-Judgment Interest

The State has the right to condition its waiver of sovereign immunity, and it has not waived its sovereign immunity under RCW 4.56.115 for pre-judgment interest in tort actions. *Norris v. State*, 46 Wn. App. 822, 824, 733 P.2d 231 (1987); *Foster v. State Dep't of Transp., Div. of Wash. State Ferries*, 128 Wn. App. 275, 280, 115 P.3d 1029 (2005).

Regardless, no portion of the damages claimed by Ms. Johnson were liquidated. No one is liable for pre-judgment interest on non-liquidated damages. *Fox v. Mahoney*, 106 Wn. App. 226, 230, 22 P.3d 839 (2001) (citing *Car Wash Enter., Inc., v. Kampanos*, 74 Wn. App. 537, 548, 874 P.2d 868 (1994)). The jury concluded Ms. Johnson's damages were related to her fall and exercised its discretion to determine their value. No portion of those damages were liquidated, and pre-judgment interest could not be awarded. *Id. See also Hansen v. Rothaus*, 107 Wn.2d 468, 477, 730 P.2d 662 (1986).

VII. CONCLUSION

While the State has raised several errors requiring a new trial, the fact is, this case never should have gone to verdict. Ms. Johnson presented no evidence that the floor was wet or that it was "dangerously slippery," nor did she present any evidence that the store had prior notice as to either of those things. Such evidence is required to establish a prima facie case in a premises liability action based on a slip-and-fall. Jury instruction 13, CP

520. Given the absence of such evidence, this Court should reverse and remand with directions to dismiss.

Alternatively, the Court should remand for a new trial at which evidence regarding Ms. Johnson's pre-existing conditions are presented on the issues of causation and damages. At the new trial, the jury should also consider the fault of the Seattle Pain Clinic, which caused or contributed to Ms. Johnson's damages. Finally, if the Court decides not to remand, it should substantially remit the judgment to a lesser amount to eliminate the prejudice caused by the improper exclusion of evidence and allocation of fault. At the very least, as a matter of law, the judgment must not include pre-judgment interest against the State, which is sovereignly immune from awards of such interest.

RESPECTFULLY SUBMITTED this 13th day of November, 2018.

ROBERT W. FERGUSON
Attorney General

s/Michael J. Throgmorton
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Liquor and Cannabis Board

Declaration Regarding Service

I declare that I initiated service of a copy of this document on all parties or their counsel of record on the date below via Electronic Mail by Agreement to Counsel.

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

DATED this 13th day of November, 2018.

s/Laurel DeForest
Laurel DeForest
Legal Assistant

APPENDIX

Trial Exhibit 124



Trial Exhibit 125



Defendant's
Instruction No. 14

DEFENDANT'S INSTRUCTION NO. 14

Before a percentage of negligence may be attributed to any entity that is not party to this action, the defendant has the burden of proving each of the following propositions:

First, that the entity was negligent; and

Second, that the entity's negligence was a proximate cause of the [injury] [damage] to the plaintiff.

WPI 21.10

"Burden of Proof— Entities Not Party to the Action."

Defendant's
Instruction No. 15

DEFENDANT'S INSTRUCTION NO. 15

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury or damage. [

Entities may include the defendant, the plaintiff and entities not party to this action.

The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

WPI 41.04
"Fault to Be Apportioned."

RCW 4.22.070

RCW 4.22.070

Percentage of fault—Determination—Exception—Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

NOTES:

Effective date—1993 c 496: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 496 § 3.]

Application—1993 c 496: "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [1993 c 496 § 4.]

Preamble—Report to legislature—Applicability—Severability—1986 c 305:
See notes following RCW 4.16.160.

RCW 4.56.115

RCW 4.56.115

Interest on judgments against state, political subdivisions or municipal corporations—Torts.

Judgments founded on the tortious conduct of the state of Washington or of the political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in their governmental or proprietary capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield (as published by the board of governors of the federal reserve system) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

[2004 c 185 § 1; 1983 c 147 § 2; 1975 c 26 § 1.]

NOTES:

Application—Interest accrual—2004 c 185: "The rate of interest required by sections 1 and 2(3), chapter 185, Laws of 2004 applies to the accrual of interest:

(1) As of the date of entry of judgment with respect to a judgment that is entered on or after June 10, 2004;

(2) As of June 10, 2004, with respect to a judgment that was entered before June 10, 2004, and that is still accruing interest on June 10, 2004." [2004 c 185 § 3.]

Application—1983 c 147: See note following RCW 4.56.110.

RCW 4.76.030

RCW 4.76.030

Increase or reduction of verdict as alternative to new trial.

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

[1971 c 81 § 19; 1933 c 138 § 2; RRS § 399-1.]

NOTES:

Severability—1933 c 138: "Adjudication of invalidity of any of the sections of this act, or any part of any section, shall not impair or otherwise affect the validity of any other of said sections or remaining part of any section." [1933 c 138 § 3.]

RCW 66.16.010

West's Revised Code of Washington Annotated Title 66. Alcoholic Beverage Control (Refs & Annos) Chapter 66.16. Liquor Purchase Records (Formerly: State Liquor Stores)
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This section has been updated. [Click here for the updated version.](#)

West's RCWA 66.16.010

66.16.010. Board may establish--Price standards--Prices in special instances

Effective: [See Text Amendments] to December 7, 2011

(1) There shall be established at such places throughout the state as the liquor control board, constituted under this title, shall deem advisable, stores to be known as "state liquor stores," for the sale of liquor in accordance with the provisions of this title and the regulations: PROVIDED, That the prices of all liquor shall be fixed by the board from time to time so that the net annual revenue received by the board therefrom shall not exceed thirty-five percent. Effective no later than July 1, 2005, the liquor control board shall add an equivalent surcharge of \$0.42 per liter on all retail sales of spirits, excluding licensee, military, and tribal sales. The intent of this surcharge is to raise revenue for the general fund-state for the 2003-2005 and 2005-2007 bienniums. The board shall remove the surcharge June 30, 2007.

(2) The liquor control board may, from time to time, fix the special price at which pure ethyl alcohol may be sold to physicians and dentists and institutions regularly conducted as hospitals, for use or consumption only in such hospitals; and may also fix the special price at which pure ethyl alcohol may be sold to schools, colleges and universities within the state for use for scientific purposes. Regularly conducted hospitals may have right to purchase pure ethyl alcohol on a federal permit.

(3) The liquor control board may also fix the special price at which pure ethyl alcohol may be sold to any department, branch or institution of the state of Washington, federal government, or to any person engaged in a manufacturing or industrial business or in scientific pursuits requiring alcohol for use therein.

(4) The liquor control board may also fix a special price at which pure ethyl alcohol may be sold to any private individual, and shall make regulations governing such sale of alcohol to private individuals as shall promote, as nearly as may be, the minimum purchase of such alcohol by such persons.

Credits

[2005 c 518 § 935, eff. May 17, 2005; 2003 1st sp.s. c 25 § 928, eff. June 26, 2003; 1939 c 172 § 10; 1937 c 62 § 1; 1933 ex.s. c 62 § 4; RRS § 7306-4. Formerly RCW 66.16.010 and 66.16.020.]

West's RCWA 66.16.010, WA ST 66.16.010

Current with all effective legislation from the 2018 Regular Session of the Washington Legislature.

**Defendant's
Proposed Special Verdict Form**

Judge Joley A. O'Rourke
Trial Date: September 18, 2017

STATE OF WASHINGTON
LEWIS COUNTY SUPERIOR COURT

DARCY L. JOHNSON, a single
woman,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LIQUOR
CONTROL BOARD,

Defendant.

NO. 14-2-00917-6

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the following negligent?

(Answer "yes" or "no" after the name of the defendant and the name of each entity not party to this action.)

ANSWER: (Write "yes" or "no")

Defendant _____
Non-Party () : _____

(INSTRUCTION: If you answered "no" to Question 1 as to the defendant, sign this verdict form. If you answered "yes" to Question 1 as to the defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury to the plaintiff?

(Answer "yes" or "no" after the name of the defendant and each non-party, if any, found negligent by you in Question 1.)

ANSWER: (Write "yes" or "no")

Defendant _____
Non-Party () : _____

(INSTRUCTION: If you answered "no" to Question 2 as to the defendant, sign this verdict form. If you answered "yes" to Question 2 as to the defendant, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer.

ANSWER:

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Was the plaintiff also negligent?

ANSWER: (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff negligence and what percentage of this 100% is attributable to the negligence of the defendant? Your total must equal 100%.

ANSWER:

To Plaintiff's negligence:	_____ %
To Defendant's negligence:	_____ %
To Non-Party's negligence:	_____ %
TOTAL	_____ 100%

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

Dated this _____ day of September, 2017

Presiding Juror

Modified WPI 45.23
"Special Verdict Form—Personal Injury/Wrongful Death—Single Defendant—Contributory
Negligence—'Empty Chairs'."

Merriam-Webster Medical
Dictionary Definition for
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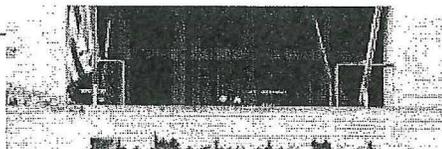
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somatoform disorder



noun so·ma·to·form disorder \ 'sō-mət-ə-, fōrm-, sə-'mat-ə- \

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- sequacious inadmissible oligarch, pejorative emolument troll
- SEE ALL

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What's Trending Now More Trending Words

1. sequacious 'intellectually servile'
2. inadmissible 'not capable of being allowed'
3. oligarch, pejorative 'a member a government in which a small group exercises control especially for corrupt and selfish purposes'
4. emolument 'the returns arising from office or employment usually in the form of compensation or perquisites'
5. troll 'to harass, criticize, or antagonize especially by disparaging or mocking public statements'

SEE ALL

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medical Definition of somatoform disorder

: any of a group of psychological disorders (as body dysmorphic disorder or hypochondriasis) marked by physical complaints for which no organic or physiological explanation is found and for which there is a strong likelihood that psychological factors are involved



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