

FILED
Court of Appeals
Division II
State of Washington
1/18/2019 3:58 PM
NO. 51414-1

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

DARCY JOHNSON

Respondent,

v.

STATE OF WASHINGTON, LIQUOR AND CANNABIS BOARD,

Appellant.

APPELLANT'S REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

MICHAEL J. THROGMORTON
Assistant Attorney General
WSBA No. 44263

EARL M. SUTHERLAND
Assistant Attorney General
WSBA No. 23928

MICHAEL P. LYNCH
Senior Counsel
WSBA No. 10913

PO Box 40126
Olympia, WA 98504-0126
360-586-6300
OID No. 91023

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

A. In the Absence of Sufficient Evidence to Support Liability, this Court Should Reverse and Remand for Dismissal.....2

1. Ms. Johnson failed to offer evidence that the floor was dangerously slippery when wet2

a. The court erroneously denied the State’s CR 50 motion based on testimony that was never offered3

b. Testimony that a sign was “needed” when it rained does not establish dangerousness4

2. This Court should reject Ms. Johnson’s invitation to adopt the plurality opinion from *Iwai*.....5

3. The state has preserved review of its CR 50 challenge.....7

a. The State renewed its motion for judgment as a matter of law via a post-trial motion under CR 59.....7

b. Parties need not renew CR 50 motions post-trial to preserve them for appeal9

c. Parties do not waive review of the denial of a CR 50 motion by presenting their own evidence10

B. The Trial Court’s Erroneous Evidentiary Rulings Warrant Reversal and Remand for a New Trial.....11

1. The trial court’s erroneous exclusion of Ms. Johnson’s pre-existing conditions merits a new trial12

a.	Dr. Russo was prevented from offering any foundation for his opinion.....	13
b.	Dr. Dahmer-White was barred from supporting her opinion with Ms. Johnson’s medical history	16
2.	The trial court’s refusal to allow apportionment of fault under RCW 4.22.070 also merits reversal	18
a.	RCW 4.22.070 abrogated common law joint and several liability in favor of proportionate fault	18
b.	The Court refused to allow apportionment of fault based on evidence insufficiency, not waiver.....	20
c.	Since comparative fault was tried by consent of the parties, it has not been waived	20
C.	The Trial Court Properly Excluded Ms. Johnson’s Expert.....	21
1.	The trial court properly excluded Ms. Johnson’s expert’s opinion due to a lack of factual foundation	22
2.	This Court should decline Ms. Johnson’s request to review the trial court’s decision excluding her expert.....	23
III.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Afoa v. Port of Seattle</i> , 191 Wn.2d 110, 421 P.3d 903 (2018).....	19, 20
<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000)	23
<i>Amsbury v. Cowles Publ’g Co.</i> , 76 Wn.2d 733, 458 P.2d 882 (1969).....	9
<i>Bolson v. Williams</i> , 181 Wn. App. 1016 (2014)	23, 24
<i>Brant v. Market Basket Stores, Inc.</i> , 72 Wn.2d 446, 433 P.2d 863 (1967).....	2
<i>Charlton v. Toys R Us</i> , 158 Wn. App. 906, 246 P.3d 199 (2010).....	4
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	9
<i>Douglas v. Freeman</i> , 117 Wn.2d 242, 814 P.2d 1160 (1991).....	11
<i>Edgar v. City of Tacoma</i> , 129 Wn.2d 621, 919 P.2d 1236 (1996).....	20
<i>Fenton v. Contemporary Dev. Co.</i> , 12 Wn. App. 345, 529 P.2d 883 (1974).....	21
<i>Fredrickson v. Bertolino’s Tacoma, Inc.</i> , 131 Wn. App. 183, 127 P.3d 5 (2005).....	6
<i>Harris v. Drake</i> , 116 Wn. App. 261, 65 P.3d 350 (2003).....	11, 16

<i>Havens v. C & D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994)	22
<i>Henderson v. Tyrrell</i> , 80 Wn. App. 592, 910 P.2d 522 (1996).....	18, 19
<i>Hiner v. Bridgestone/Firestone, Inc.</i> , 138 Wn.2d 248, 978 P.2d 505 (1999).....	19
<i>In re Arbitration of Doyle</i> , 93 Wn. App. 120, 966 P.2d 1279 (1998).....	24
<i>In re Marriage of Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012)	22
<i>Iwai v. State Emp't Sec. Dep't</i> , 129 Wn.2d 84, 915 P.2d 1089 (1996)	5, 6, 7
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014)	22
<i>Jonson v. Sears, Roebuck & Co.</i> , 196 Wn. App. 1015 (2016) (unpublished).....	2
<i>Kalinowski v. Young Women's Christian Ass'n</i> , 17 Wn.2d 380, 135 P.2d 852 (1943)	5
<i>Kangley v. United States</i> , 788 F.2d 533 (9th Cir. 1986).....	4, 5, 6
<i>Kottler v. State</i> , 136 Wn.2d 437, 963 P.2d 834 (1998).....	19
<i>LaHue v. Keystone Invest. Co.</i> , 6 Wn. App. 765, 496 P.3d 343 (1972).....	21
<i>Lindquist v. Dengel</i> , 92 Wn.2d 257, 595 P.2d 934 (1979).....	18
<i>Mayer v. Sto Indus.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	11

<i>Meeker v. Howard</i> , 7 Wn. App. 169, 499 P.2d 53 (1972).....	21
<i>Merrick v. Sears, Roebuck & Co.</i> , 67 Wn.2d 426, 407 P.2d 960 (1965).....	2
<i>Millies v. LandAmerica Transnation</i> , 185 Wn.2d 302, 372 P.3d 111 (2016).....	6
<i>Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC</i> , 183 Wn. App. 459, 334 P.3d 63 (2014).....	10
<i>Phillips Building Co. v. An</i> , 81 Wn. App. 696, 915 P.2d 1146 (1996).....	24
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.2d 844 (2005)	2, 6
<i>Robinson v. Khan</i> , 89 Wn. App. 418, 948 P.2d 1347 (1998).....	24
<i>Shumaker v. Charada Inv. Co.</i> , 183 Wash. 521, 49 P.2d 44 (1935)	2
<i>Sing v. John L. Scott, Inc.</i> , 134 Wn.2d 24, 948 P.2d 816 (1997).....	20
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	16
<i>State v. Dixon</i> , 159 Wn.2d 65, 147 P.3d 991 (2006).....	16
<i>State v. Gould</i> , 58 Wn. App. 175, 791 P.2d 569 (1990).....	16
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998)	2, 6
<i>State v. Sims</i> , 171 Wn.2d 436, 256 P.3d 285 (2011)	23, 24

<i>Torno v. Hayek</i> , 133 Wn. App. 244, 135 P.3d 536 (2006).....	11, 15, 16
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	19
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	7, 9, 10
<i>Wiltse v. Albertson’s Inc.</i> , 116 Wn.2d 452, 805 P.2d 793 (1991)	5, 6
<i>Workman v. Chinchinian</i> , 807 F. Supp. 634 (E.D. Wash. 1992).....	18, 19

Statutes

RCW 4.22.070	11, 18, 25
RCW 4.22.070(1).....	19

Rules

CR 15(b).....	20
CR 41	10
CR 50	1, 7, 9, 10
CR 50(a).....	7, 9
CR 50(b).....	7, 8, 10
CR 51(f)	6
CR 59	1, 8
ER 403	16
ER 702.....	23

Fed. R. Civ. P. 50(b)	9
RAP 2.4(a).....	23, 24
RAP 2.4(b)	13

Treaties

<i>Restatement (Second) of Torts</i> § 343 (1965).....	5
--	---

I. INTRODUCTION

Ms. Johnson fails to cite any evidence establishing either (1) that the floor was wet, or (2) that it was dangerously slippery when wet. This is because there is no such evidence in the record. Instead, she argues the issue is not preserved, despite the fact that it was the subject of a CR 50 motion at the end of her case, as well as a post-trial CR 59 motion. Without this critical evidence, this Court should reverse and remand for dismissal.

If the Court gets past the lack of substantial evidence demonstrating the State knew the floor was wet or dangerously slippery, this case should be remanded for a new trial based on several evidentiary errors. First, the trial court improperly excluded the State's expert testimony showing that Ms. Johnson's problems were caused by pre-existing conditions and prior injuries. Second, the court also failed to view the evidence in the light most favorable to the State in granting Ms. Johnson's CR 50 motion, preventing the State from allocating fault to the Seattle Pain Clinic despite clear testimony that the clinic exacerbated her sleep apnea, thereby disrupting her ability to heal. The evidence also indicated Ms. Johnson's persistent exposure to high dose opioids at the clinic caused her to suffer from allodynia, an enhanced pain sensitivity, which resulted in her damages. Based on these reasons and the arguments set forth previously, the judgment should be reversed and remanded for dismissal or for a new trial.

II. ARGUMENT

A. In the Absence of Sufficient Evidence to Support Liability, this Court Should Reverse and Remand for Dismissal

1. Ms. Johnson failed to offer evidence that the floor was dangerously slippery when wet

Washington law requires slip-and-fall plaintiffs to prove not only that the floor was wet, but that water makes it dangerously slippery.¹ *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). Instruction 13 correctly stated the law:

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

CP 520; RP 921 (emphasis added). No one objected to this instruction, so it is the law of the case. *See Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.2d 844 (2005) (citing *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998)).

Ms. Johnson failed to meet her burden under this standard because she presented no evidence the floor was dangerously slippery when wet. She cites the clerk's testimony that "rainy days always bring muddy footprints" (Resp't

¹ Notice of a condition's dangerousness is analyzed separately from notice of its existence. *Jonson v. Sears, Roebuck & Co.*, 196 Wn. App. 1015 at *7 (2016) (unpublished).

Br. at 7 (citing RP 97)), but neither Mr. Smiley nor anyone else testified that muddy footprints or water made the floor dangerously slippery. *See* RP 97-98. No one else had ever fallen in the store before. RP 106. Ms. Johnson did not offer testimony from anybody establishing that the floor was dangerous. She therefore failed to meet her burden under instruction 13.

a. The court erroneously denied the State’s CR 50 motion based on testimony that was never offered

Despite this, the trial court denied the State’s motion for judgment as a matter of law at the conclusion of Ms. Johnson’s case, citing purported testimony from Mr. Smiley that “the danger starts when it rains.” RP 484-85. But Mr. Smiley never testified to a “danger” caused by rain. He never used the word “danger” at all. The passage the Court attempted to quote reads:

Q: As part of your duties to – is to put out a very visible yellow sign that says, “slippery when wet”?

A: Yes.

* * *

Q: Okay. And you told me, did you not, in your deposition that what – I asked you what triggers that responsibility, that need to put it out. And you told me what?

A: When it rains.

RP 90-91. This is consistent with Mr. Smiley’s testimony that the sign was used as a preventative measure any time it rained. RP 97-98. He had no knowledge the floor was wet or dangerous when wet. RP 98. He never testified to a “danger” caused by rain; the court simply misremembered his testimony. Appellant’s Opening Br. at 12 (citing RP 484-85).

b. Testimony that a sign was “needed” when it rained does not establish dangerousness

Absent evidence that water makes the floor dangerous, Ms. Johnson cites Mr. Smiley’s testimony that a warning sign was “needed” when it rained. Resp’t Br. at 9 (citing RP 108). This, she argues, distinguishes this case from those cited by the State and “is evidence of WSLCB’s recognition that water on the floor constitutes a dangerous condition.” Resp’t Br. at 31.

This argument likewise lacks merit. At the jury’s request, Mr. Smiley clarified that it was store practice to put out a sign whenever it rained, whether the floor was wet or not. RP 109. Such prophylactic measures are not an acknowledgement of dangerousness because they are not necessarily triggered by, and exist independently of, an actual danger. *See Charlton v. Toys R Us*, 158 Wn. App. 906, 911-15, 246 P.3d 199 (2010) (plaintiff failed to offer evidence of dangerousness despite the placement of two large yellow cones stating “Caution, Wet Floor”). Simply put, if neither the placement of safety measures inside a door nor the fact that it is wet outside are “enough to establish that an owner or occupier knows that the floor might be dangerous,” then neither is a practice of placing out such measures *because* it rains. *See Kangley v. United States*, 788 F.2d 533, 534-35 (9th Cir. 1986) (declining to place an “intolerable burden” on businesses by finding that a person who slips inside a door where a mat has been placed on a day when it is wet outside can

recover without showing anything more). Washington law imposes liability only for failing to respond to a known, specific danger. *See Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 459-60, 805 P.2d 793 (1991) (citing *Kangley*, 788 F.2d at 534-35). Failing to respond to prevailing weather conditions outside because they might create a dangerous condition inside is not enough.² *See Iwai v. State Emp't Sec. Dep't*, 129 Wn.2d 84, 97-98, 915 P.2d 1089 (1996) (rejecting the natural accumulation rule, but requiring plaintiffs to show actual or constructive notice of a dangerous condition).

Even if placing out a sign whenever it rained were enough to prove the floor was slippery, it still would not establish that the floor was *dangerously* slippery. *See Restatement (Second) of Torts* § 343 (1965). Not all slippery floors create liability; only floors that are “dangerously unfit to walk over” do. *See Kalinowski v. Young Women's Christian Ass'n*, 17 Wn.2d 380, 391, 135 P.2d 852 (1943). Ms. Johnson offered no evidence this was such a floor.

2. This Court should reject Ms. Johnson's invitation to adopt the plurality opinion from *Iwai*

Ms. Johnson argues she should not have to establish notice and urges the Court to adopt the reasoning of Justice Dolliver's plurality opinion in *Iwai*. Resp't Br. at 32-33. She argues doing so would “reflect a significant

² Ms. Johnson conceded as much before the trial court: “Now, I would agree with the defendant here that the law in the State of Washington is simply because it is raining outside that that doesn't automatically place a store owner on notice.” RP 22.

improvement in the state of the law,” but acknowledges that the Court “does not have complete freedom to follow the decision.” Resp’t Br. at 33.

This Court cannot adopt a position a majority of the Supreme Court has rejected. Five justices declined to dispense with the notice requirement in *Iwai*. See *Iwai*, 129 Wn.2d at 103 (Alexander, J., concurring) (finding the notice requirement “provide[s] adequate protection to invitees already”). This Court has also refused prior requests to jettison the notice requirement and impose liability whenever prevailing weather conditions make an injury “foreseeable.” See *Fredrickson v. Bertolino’s Tacoma, Inc.*, 131 Wn. App. 183, 192, 127 P.3d 5 (2005). Ms. Johnson admits this. Resp’t Br. at 33.

Ms. Johnson also has not preserved any argument regarding *Iwai*. She never objected to instruction 13, which set forth the notice requirement. See CR 51(f) (requiring parties objecting to an instruction to “state distinctly the matter to which [they] object and the grounds of [their] objection”). Nor did she propose an alternate instruction that the court refused to give. See *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310-11, 372 P.3d 111 (2016) (noting “an objection to a trial court's failure to give a competing instruction may preserve an objection to the instruction actually given”).

Instruction 13 is the law of the case. See, e.g., *Roberson*, 156 Wn.2d at 41; *Hickman*, 135 Wn.2d at 101-02. It correctly stated the law. See *Wiltse*, 116 Wn.2d at 459-60 (citing *Kangley*, 788 F.2d at 534-35). Ms. Johnson

never argued for a different standard, nor did the trial court consider adopting Justice Dolliver's plurality opinion from *Iwai*. This Court should decline Ms. Johnson's belated invitation to do so on appeal. Resp't Br. at 21-23.

3. The state has preserved review of its CR 50 challenge

Lacking evidence to support liability, Ms. Johnson argues the State waived its right to challenge the denial of its Motion for Judgment as a Matter of Law. Resp't Br. at 19-21. She also alleges the State waived any challenge to the denial of its post-trial motion or to the sufficiency of the evidence, and she argues this Court cannot review the denial of the State's CR 50 motion because the State presented its own case-in-chief. Resp't Br. at 21-23. These arguments are inconsistent with CR 50 and run afoul of *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013).

a. The State renewed its motion for judgment as a matter of law via a post-trial motion under CR 59

Civil Rule 50(b) provides, in pertinent part:

If . . . the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment – and may alternatively request a new trial or join a motion for a new trial under rule 59.

That is exactly what the State did here. First, it sought judgment as a matter of law at the conclusion of Ms. Johnson's case under CR 50(a). RP 472-85.

Then, post-trial, the State moved for judgment notwithstanding the verdict under CR 59, citing as grounds for relief the trial court’s “failure to grant judgment as a matter of law,” and that “[t]here is no evidence or reasonable inference from the evidence to justify the verdict.” CP 541-42. The fact that the State’s post-trial motion was not captioned as a renewal of its CR 50 motion does not matter. The assertion that the trial court erred by failing to grant judgment as a matter of law preserved the issue. CR 50(b).

Ms. Johnson acknowledges that the State’s post-trial CR 59 motion “included argument that the superior court erred by failing to grant judgment as a matter of law,” but she nonetheless argues the State failed to preserve these issues for appeal. Resp’t Br. at 22. In doing so, she urges this Court to confine its review to the sufficiency of the evidence under the instructions given while simultaneously arguing that the State is foreclosed from challenging the sufficiency of the evidence under those instructions. Resp’t Br. at 22. Ms. Johnson cannot have it both ways.

Here, both the State’s post-trial motion and its opening brief gave Ms. Johnson notice that the State was challenging the trial court’s denial of its Motion for Judgment as a Matter of Law under the applicable substantive law as well as the sufficiency of the evidence under the instructions given. CP 541-62; Appellant’s Opening Br. at 3, Assignment of Error 1 (trial court’s denial of the State’s “motion for judgment as a matter of law under

Civil Rule 50”) and Assignment of Error 2 (trial court’s denial of the State’s “motion for judgment as a matter of law . . . given the absence of any evidence that the floor was dangerously slippery when wet”). Her claim that she will be prejudiced by the Court’s consideration of both is thus meritless.

b. Parties need not renew CR 50 motions post-trial to preserve them for appeal

Ms. Johnson also argues the State waived its challenge to the trial court’s denial of its CR 50 motion by failing to re-raise it post-trial. But even if the State had not re-raised its CR 50 motion post-trial, it still would not have waived appellate review. *See Washburn*, 178 Wn.2d at 751.

In *Washburn*, the Court of Appeals had held the City waived its right to seek review of the trial court’s denial of its CR 50(a) motion by failing to renew it post-verdict via a CR 50(b) motion. *Id.* at 750. The Supreme Court reversed. Distinguishing the federal cases interpreting Fed. R. Civ. P. 50(b) on which the Court of Appeals relied, the Supreme Court found “no reason to depart from long-followed state rules practice,” which had not required post-trial renewal of such motions to preserve them for appeal for over a half-century. *Id.* at 751 (citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 525, 70 P.3d 126 (2003), and *Amsbury v. Cowles Publ’g Co.*, 76 Wn.2d 733, 458 P.2d 882 (1969)). *Washburn*, *Davis*, and *Amsbury* remain the law today.

c. Parties do not waive review of the denial of a CR 50 motion by presenting their own evidence

Finally, Ms. Johnson argues the State waived review of the denial of its CR 50 motion by presenting its own case-in-chief. Resp't Br. at 19-21 (citing *Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC*, 183 Wn. App. 459, 474-75, 334 P.3d 63 (2014)).³ This argument confuses motions for judgment as a matter of law with motions for involuntary dismissal.

Nw. Wholesale involved a motion under CR 41, not a motion under CR 50. *Id.* at 474-75. Ms. Johnson argues “the same rule and rationales” apply because both challenge the sufficiency of the evidence. Resp't Br. at 21. But CR 41 motions only apply in bench trials, while CR 50 motions enable courts to take cases from juries when the evidence is legally insufficient. Moreover, unlike motions under CR 41, motions under CR 50 may be renewed after entry of judgment. CR 50(b). This enables courts to weigh the sufficiency of the evidence before *and* after the defendant's case.

Courts ruling on post-trial CR 50 motions must consider all of the evidence submitted. But judgment as a matter of law is governed by the applicable substantive law, not the jury instructions. *Washburn*, 178 Wn.2d at 749, n.5. Parties do not waive their right to challenge the sufficiency of the evidence based on applicable law by presenting their own evidence.

³ Ms. Johnson cites a number of other cases for this proposition. Resp't Br. at 20-21. All pre-date the comprehensive 2005 amendments to CR 50 and are thus inapposite.

B. The Trial Court’s Erroneous Evidentiary Rulings Warrant Reversal and Remand for a New Trial

Evidence may be excluded pre-trial only where it is “clearly inadmissible under the issues as drawn or which may develop during the trial, and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered.” *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991). The trial court prevented the State from referencing medical records documenting Ms. Johnson’s pre-existing conditions, relying on *Harris v. Drake*, 116 Wn. App. 261, 288-89, 65 P.3d 350 (2003), *affirmed* 152 Wn.2d 480, 99 P.3d 872 (2004). This was error. *See Torno v. Hayek*, 133 Wn. App. 244, 251, 135 P.3d 536 (2006) (holding that pre-existing injuries that mirror the alleged injuries from a subsequent accident are “highly relevant” to causation and “sufficiently probative to overcome any unfair prejudice”). Since *Harris* does not compel this result, the error was an abuse of discretion. *Mayer v. Sto Indus.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The trial court also erred in refusing to allow apportionment of fault. Since the State offered evidence that the Seattle Pain Clinic was at fault, and since RCW 4.22.070 requires apportionment of fault, the trial court also erred in granting judgment as a matter of law to Ms. Johnson on that issue.

1. The trial court's erroneous exclusion of Ms. Johnson's pre-existing conditions merits a new trial

Ms. Johnson incorrectly asserts the trial court did not reduce its exclusion of her pre-existing conditions to an order. Resp't Br. at 34. Instead, she claims the court "simply preclude[d] WSLCB from introducing evidence [of] asymptomatic preexisting conditions," but "did not prevent WSLCB from laying the proper foundation with Dr. Russo and introducing evidence of injuries or disabilities that would have resulted from the natural progression of a preexisting condition." Resp't Br. at 34.

Neither of those assertions are true. The trial court found "given that [Ms. Johnson] was not symptomatic at the time of the incident . . . I don't believe these medical records prior to the incident are relevant, and they are prejudicial to the plaintiff and therefore inadmissible." RP 11-12. Asked for clarification, the court said, "any medical record regarding the previous incident from 2007 is inadmissible." RP 12. The court's order, drafted by Ms. Johnson, precluded "any evidence or testimony, comments, argument, statements or questions by counsel, any witnesses, parties, directly, indirectly or by inference on . . . prior medical conditions not symptomatic immediately prior to the slip and fall . . ." CP 443-45.

At the conclusion of its offers of proof, the State asked the court to reconsider its exclusion of Ms. Johnson's pre-existing conditions. RP 642-

48. With the exception of Ms. Johnson’s diabetes, the court declined. RP 648. The State inquired whether Dr. Russo could offer his opinion that Ms. Johnson’s condition resulted from the natural progression of her pre-existing injuries “based solely on the record that’s post-injury,” but the court again refused, finding such testimony “encompassed within its ruling.” RP 648. Having preserved this issue, the State now seeks review. RAP 2.4(b).

a. Dr. Russo was prevented from offering any foundation for his opinion

Ms. Johnson argues Dr. Russo “did not testify that [her] ‘injuries or disabilities’ would have resulted from a natural progression of any preexisting condition” and that he “was not able to link differences on the two MRIs to [Ms.] Johnson’s symptoms.” Resp’t Br. at 35-36. This is unsurprising, since the trial court precluded him from doing so. CP 444.

In his offer of proof – where he was able to reference Ms. Johnson’s relevant history – Dr. Russo explained, “If a disk herniates, usually that produces back pain. And if it’s pressing on a nerve, it’s likely to produce leg pain as well.” RP 510. He went on to point out that Ms. Johnson’s MRI showed a herniation following her prior injury in 2007. RP 508. He further opined that her complaints of pain in her back and leg following that injury were significant because they were consistent with those findings, as well as the complaints she made immediately after her fall in the liquor store:

[T]he major significance is that these are problems back in 2007 that persisted in a well-documented manner for at least a year and three months that are essentially identical in terms of her left leg – her back and left leg is the one she complained of after this subject accident. There is also reference at least early in the course in Maine that she had problems in her left upper extremity, which also emerged as a complaint after the subject accident in . . . Washington. So it looks like there are striking similarities, both in the clinical reporting when she was in Maine as well as the imaging that I have to think there is potentially a relationship.

RP 535-36. Dr. Russo went on to explain that such a herniation can result solely from the degenerative aging process, a point Ms. Johnson's surgeon Dr. Lazio conceded. RP 509. Finally, Dr. Russo testified the inability to reference Ms. Johnson's full history would hamper his testimony:

Q: Without the benefit of these materials from Ms. Johnson's history, it will be far more difficult to support an opinion contesting causation in this matter, correct?

A: That's true, yes.

RP 537. Without the ability to reference Ms. Johnson's previous injury or treatment, Dr. Russo was unable to provide a link between the differences on her pre- and post-injury MRIs and her symptoms. As a result, the jury was misled into believing all of the damages Ms. Johnson alleged were caused by her fall. This resulted in a \$2.3 million verdict, the magnitude of which demonstrates the prejudice wrought by the trial court's ruling.

Ms. Johnson argues that given the lack of treatment records for two years prior to her injury and her testimony that her pain had resolved, "it

would have been an error [to allow evidence] that [her] symptoms were the natural progression of a preexisting condition.” Resp’t Br. at 37. This conflicts with *Torno*, 133 Wn. App. 244.

In *Torno*, the plaintiff was involved in a pair of car accidents. *Id.* at 246. She sued both drivers and sought to exclude similar injury evidence and medical treatment from a prior accident seven years earlier. *Id.* at 247. Despite presenting a “convincing recollection of history as it related to being fixed and stable prior to the accident,” the trial court admitted the evidence. *Id.* Ms. Torno appealed, arguing the trial court “erred in allowing the defense to present pre-existing injury evidence.” *Id.* at 251. This Court affirmed, finding “Torno’s pre-existing injuries mirrored her alleged injuries from the accident.” *Id.* at 251. Given the similarities, the Court found “evidence of Ms. Torno’s pre-existing conditions was highly relevant to the defendants’ theories on causation,” since “they argued Ms. Torno’s injuries were caused by the [prior] accident.” *Id.* at 251.

Torno is indistinguishable from the case here. Like Ms. Torno, Ms. Johnson had a prior injury before she fell. RP 505-37. Her pain complaints following that injury mirrored the complaints she made after her fall. RP 535-36. Her MRI results also showed only degenerative changes resulting from aging. RP 535-36. This made her history “relevant and sufficiently

probative to overcome any unfair prejudice.”⁴ *Torno*, 133 Wn. App. at 251. Its exclusion also prevented the State from arguing it was liable for only the degree of worsening attributable to her fall. WPI 30.18.01. Even Ms. Johnson agrees that is the law. Resp’t Br. at 35.

Harris was an admitted liability case in which there was no evidence causally linking the plaintiff’s prior injury to her current symptoms. It did not require exclusion of Ms. Johnson’s pre-existing conditions in this case where Dr. Russo had, and was prepared to offer, such evidence. Excluding Ms. Johnson’s medical history based on *Harris* was an abuse of discretion. See *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006) (a reasonable decision based on an erroneous view of the law is an abuse of discretion).

b. Dr. Dahmer-White was barred from supporting her opinion with Ms. Johnson’s medical history

Finally, Ms. Johnson argues Dr. Dahmer-White testified “at length that [she] suffered from a symptomatic preexisting⁵ somatoform disorder

⁴ Notably, the trial court did not find that evidence of Ms. Johnson’s pre-existing conditions would be *unfairly* prejudicial. See *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990) (noting that all evidence is “prejudicial” in the sense that it is offered to persuade the trier of fact, but it is not “unfairly prejudicial” under ER 403 unless it is “unduly inflammatory” or “likely to prevent the jury from making a rational decision”). Nor did it find that the probative value of such evidence was *substantially* outweighed by its prejudicial effect. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Instead, the court merely found that such evidence would be “prejudicial to the plaintiff and therefore inadmissible.” RP 12. That is not the standard for admissibility under ER 403. *Id.*

⁵ Dr. Dahmer-White described only Ms. Johnson’s anxiety disorder as “pre-existing” before the jury. RP 842. She never used that word to describe Ms. Johnson’s somatic symptom disorder before the jury because “it’s almost impossible to be able to make that diagnosis without referencing [Ms. Johnson’s prior medical] records.” RP 578.

and a symptomatic anxiety disorder that were unrelated to her fall in the liquor store.” Resp’t Br. at 38 (citing RP 837-60).

Not one of the excerpts Ms. Johnson cites refers to an instance where Dr. Dahmer-White referenced excluded evidence. By contrast, in her offer of proof, where she was able to reference Ms. Johnson’s complete history, Dr. Dahmer-White testified Ms. Johnson’s somatic symptom and anxiety disorders pre-existed her fall based on her review of Ms. Johnson’s medical records. RP 577-78. Those records included drug-seeking behavior such as multiple trips to the emergency room in a “cluster” pattern (RP 582-85), a long history of seeking passive solutions to pain through opiates (RP 586-87), and an industrial injury report four months prior to her fall in which she complained of, and was diagnosed with, an anxiety disorder. RP 579-80.

Asked what in Ms. Johnson’s past records supported her diagnosis and causation opinion, Dr. Dahmer-White noted that somatoform disorders “exist at the crossroads of a person’s physiological and psychological health.” RP 586. Without the ability to reference Ms. Johnson’s medical record, it would be “difficult to support [her] conclusion that Ms. Johnson’s somatoform disorder not only existed but preexisted and was not related to [her] fall in the liquor store.” RP 586. With the benefit of Ms. Johnson’s medical history, Dr. Dahmer-White testified she was “one of the more clear-cut cases of a somatoform disorder [she had] seen in [her] career.” RP 588.

The jury did not hear this evidence due to the trial court’s exclusion of Ms. Johnson’s medical history. This resulted in an inflated verdict that the court erroneously refused to remit. Appellant’s Amended Opening Br. at 47-48. Ms. Johnson’s assertion that “the error alleged by WSLCB did not occur” is therefore baseless. *See* Resp’t Br. at 38.

2. The trial court’s refusal to allow apportionment of fault under RCW 4.22.070 also merits reversal

Ms. Johnson argues apportionment of fault to one of her medical providers would have been inappropriate because negligent treatment “is within the scope of the risk created by the original negligent conduct.” Resp’t Br. at 39-40 (citing *Lindquist v. Dengel*, 92 Wn.2d 257, 262, 595 P.2d 934 (1979)). She also argues the State waived its right to seek apportionment of fault under RCW 4.22.070. Neither argument has merit.

a. RCW 4.22.070 abrogated common law joint and several liability in favor of proportionate fault

Relying on dicta in a footnote in *Henderson v. Tyrrell*, 80 Wn. App. 592, 627, n.17, 910 P.2d 522 (1996), Ms. Johnson alleges “nothing in [RCW 4.22.070’s] fault-allocation scheme purports to alter ‘the scope of the risk’ created by a tortfeasor’s conduct, for which the tortfeasor is liable.” Resp’t Br. at 40. Dismissing the contrary ruling in *Workman v. Chinchinian*, 807 F. Supp. 634, 643 (E.D. Wash. 1992) as a “non sequitur,” she argues “[a]llocation of fault for a tort victim’s duty is a different question than the

nature and scope of the tortfeasor's duty" and urges the Court to "hold that Washington's fault-allocation scheme has not altered the nature and scope of a tortfeasor's duty." Resp't Br. at 41.

Ms. Johnson urges too fine a distinction. By her logic, physicians who render substandard care after an injury can never have fault allocated to them because such fault is "subsumed" as part of the risk undertaken by the tortfeasor. That is not consistent with Washington law, which requires allocation "of the *total* fault attributable to *every* entity which caused the claimant's damages." RCW 4.22.070(1) (emphasis added). This applies to "all actions involving fault of more than one entity" absent one of the enumerated exceptions. *Kottler v. State*, 136 Wn.2d 437, 442-45, 963 P.2d 834 (1998). Ms. Johnson points to no such exception here, and to the extent she invites the creation of a new one, this Court should decline. *Id.* at 445.

Since *Henderson*, both the federal courts and the Washington Supreme Court have rejected the footnoted dicta upon which Ms. Johnson relies. *See, e.g., Afoa v. Port of Seattle*, 191 Wn.2d 110, 119, 421 P.3d 903 (2018); *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 262, 978 P.2d 505 (1999); *Kottler*, 136 Wn.2d at 442-45; *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 292, 840 P.2d 860 (1992); *Workman*, 807 F. Supp at 643. This Court should do the same.

b. The Court refused to allow apportionment of fault based on evidence insufficiency, not waiver

Ms. Johnson implies the trial court rejected the State's request to apportion fault to Seattle Pain Clinic based on waiver. Resp't. Br. at 38- 39. That is incorrect. The court rejected the apportionment of fault defense on the merits, finding that Dr. Schiesser's testimony did not "reach the level required under the case law for proof." RP at 885. This was error. In deciding Ms. Johnson's Motion for Judgment as a Matter of Law on the apportionment of fault defense, the trial court was required to view the evidence in the light most favorable to the State as the non-moving party. *See Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Here, Dr. Schiesser provided sufficient testimony to submit the question to the jury. Appellant's Opening Br. at 42-45 (citing RP 600-633). "Allocation of fault is an 'inherently factual question' for the jury." *Afoa*, 191 Wn.2d at 120 (citing *Edgar v. City of Tacoma*, 129 Wn.2d 621, 627, 919 P.2d 1236 (1996)). Regardless, since Ms. Johnson did not assign error to or cross-appeal the rejection of her waiver argument, she cannot raise it here.

c. Since comparative fault was tried by consent of the parties, it has not been waived

Issues tried by the express or implied consent of the parties are "treated in all respects as if they had been raised in the pleadings." CR 15(b). Here, prior to trial, the State disclosed that it would present Dr. Schiesser,

that he would offer expert testimony that the Seattle Pain Clinic failed to provide treatment consistent with the standard of care, and that its failure to do so caused Ms. Johnson's damages. CP 597-98. Dr. Schiesser offered that testimony at trial, and Ms. Johnson did not object. RP 592-640. She does not dispute this, nor does she dispute that she asked Dr. Schiesser to elaborate on his opinion on cross-examination. RP 627-34. She cannot claim surprise or prejudice now and, consistent with CR 15(b), she has waived any argument that the State failed to raise the defense in its pleadings. *See, e.g., Fenton v. Contemporary Dev. Co.*, 12 Wn. App. 345, 349, 529 P.2d 883 (1974) (pleadings deemed amended to conform to evidence introduced without objection); *Meeker v. Howard*, 7 Wn. App. 169, 175, 499 P.2d 53 (1972) (same); *LaHue v. Keystone Invest. Co.*, 6 Wn. App. 765, 775, 496 P.3d 343 (1972) (formal motion not required to conform pleadings to the proof where evidence was offered without objection).

C. The Trial Court Properly Excluded Ms. Johnson's Expert

Recognizing Mr. Smiley's testimony cannot establish dangerousness, Ms. Johnson turns to her human factors expert. Resp't Br. at 14-16, 44-45. She recounts at length the testimony he would have provided, but as she acknowledges, his testimony was never offered. Resp't Br. at 16 (citing RP 17-35). The trial court excluded it due to a lack of foundation. RP 24-26. In doing so, the court did not abuse its discretion as Ms. Johnson now claims.

Any purported error regarding Ms. Johnson's expert is not before this Court as a basis for reversal, since Ms. Johnson failed to cross-appeal that issue. *See* Sec. C.2 below. Thus, the only issue is whether this Court should address and clarify what to do regarding the exclusion of Ms. Johnson's expert in the event it remands for a new trial. However, given the lack of foundation for her expert's opinion, the trial court was well within its discretion to exclude his testimony. To the extent Ms. Johnson asks for an advisory ruling on the admissibility of any other expert opinion, this Court should decline.

1. The trial court properly excluded Ms. Johnson's expert's opinion due to a lack of factual foundation

Expert testimony is admissible if it is based on generally accepted theories in the scientific community and is helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). "In applying this test, trial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." *Id.* (citing *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012)). Excluding evidence that has speculative probative value is not reversible error. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994).

Here, Ms. Johnson's expert was excluded because despite accepted tools and testing methods mandated by his profession, he formed his opinions

prior to any testing.⁶ CP 311-14. As he acknowledged, he formed his opinions based on nothing more than his interview of Ms. Johnson and his review of photos and video before he ever visited the store. CP 312-13. Such testimony, devoid of a legitimate factual basis, is not helpful to the trier of fact. ER 702.

2. This Court should decline Ms. Johnson’s request to review the trial court’s decision excluding her expert

Ms. Johnson also asks this Court to reverse the exclusion of her expert despite not having cross-appealed that issue. Resp’t Br. at 44-45 (citing RAP 2.4(a)). Asking this Court to reverse the trial court’s evidentiary ruling, however, seeks affirmative relief and therefore requires a cross-appeal. *Bolson v. Williams*, 181 Wn. App. 1016 at *10 (2014) (unpublished). This Court should decline to review evidentiary rulings Ms. Johnson has not appealed.

Prevailing parties need not cross-appeal to urge additional reasons in support of the judgment as long as no affirmative relief is sought on appeal. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000). “‘Affirmative relief’ normally means a change in the final result at trial.” *State v. Sims*, 171 Wn.2d 436, 442, 256 P.3d 285 (2011). However, “[w]hile RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of

⁶ Ms. Johnson argues her expert remedied those deficiencies by testing the floor *five years* after she fell, but she made the same argument at trial and it was properly rejected. RP 24-26. The court was within its discretion to exclude her expert’s testimony where the store had been sold and the floors and layout changed prior to his testing. CP 312-13; RP 24-26.

the lower court.” *Id.* (citing *In re Arbitration of Doyle*, 93 Wn. App. 120, 127, 966 P.2d 1279 (1998)). See also *Robinson v. Khan*, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998) (“notice of cross review is essential if the respondent ‘seeks affirmative relief as distinguished from the urging of additional grounds for affirmance’”) (quoting *Phillips Building Co. v. An*, 81 Wn. App. 696, 700, n.3, 915 P.2d 1146 (1996); RAP 2.4(a)).

Asking this Court to reverse the trial court’s exclusion of evidence does not just urge another ground for affirmance, it asks for affirmative relief. *Bolson*, 181 Wn. App. 1016 at *10 (refusing to reverse the trial court’s exclusion of L&I records absent a cross-appeal). Ms. Johnson’s request that the Court reverse the exclusion of her expert is therefore barred unless it is “demanded by the necessities of the case.” RAP 2.4(a). But she offers no explanation for why the necessities of this case require the Court to review the trial court’s evidentiary ruling, nor for her failure to cross-appeal.

If this Court decides to remand, nothing would stop Ms. Johnson from offering another expert at a new trial. If her expert is qualified and is able to offer testimony based on adequate foundation, the trial court can admit it. Until that occurs, however, this Court should decline Ms. Johnson’s invitation to render an advisory opinion on expert testimony not presently before the Court.

III. CONCLUSION

Some evidence of dangerousness is required to establish a prima facie case for liability in a slip-and-fall case. Ms. Johnson presented none. She also failed to present any evidence that the floor was wet. Therefore, this Court should reverse and remand for dismissal. It should decline Ms. Johnson's invitation to create an entirely new standard of fault based on "foreseeability," which she only seeks now for the first time on appeal.

Alternatively, the Court should remand for a new trial at which the jury is allowed to consider evidence regarding Ms. Johnson's pre-existing conditions, regardless of whether they were symptomatic when she fell. The jury should also be instructed and permitted to apportion fault to other non-parties under RCW 4.22.070. Only when all of the relevant evidence and the correct instructions are before the jury can it correctly determine causation and properly apportion fault for Ms. Johnson's condition.

RESPECTFULLY SUBMITTED this 18th day of January, 2019.

ROBERT W. FERGUSON
Attorney General

/s/Michael J. Throgmorton
Michael J. Throgmorton, WSBA #44263
Earl M. Sutherland, WSBA #23928
Michael P. Lynch, WSBA #10913
Assistant Attorneys General
OID #91023
Attorneys for Defendant Washington State
Liquor and Cannabis Board

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

January 18, 2019 - 3:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51414-1
Appellate Court Case Title: Darcy L. Johnson, Respondent v. State of WA, Liquor & Cannabis Board,
Appellant
Superior Court Case Number: 14-2-00917-6

The following documents have been uploaded:

- 514141_Briefs_20190118154913D2525620_2048.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was AppellantsReplyBrief.pdf

A copy of the uploaded files will be sent to:

- DebbieT1@agt.wa.gov
- KathrynL@atg.wa.gov
- Laureld@atg.wa.gov
- TOROlyEF@atg.wa.gov
- debbiem@chehalislaw.com
- gahrend@ahrendlaw.com
- jill@chehalislaw.com
- josephm@chehalislaw.com
- scanet@ahrendlaw.com

Comments:

Sender Name: Debbie Thomas - Email: DebbieT1@atg.wa.gov

Filing on Behalf of: Michael Joseph Throgmorton - Email: michaelt3@atg.wa.gov (Alternate Email:)

Address:
PO Box 40126
Olympia, WA, 98504-0126
Phone: (360) 586-6300

Note: The Filing Id is 20190118154913D2525620