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Lewis Co. Superior Court Cause No. 14-2-00917-6

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

DARCY L. JOHNSON, a single woman,

Plaintiff-Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LIQUOR
CONTROL BOARD,

Defendant-Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

A jury determined that the State of Washington Liquor Control Board (“WSLCB”) is liable for injuries suffered by Darcy L. Johnson (“Johnson”) when she fell in one of its stores. WSLCB does not challenge any of the instructions given to the jury, and the jury was properly instructed on the law. Notwithstanding the presumption that jurors follow the instructions, and the absence of any evidence suggesting to the contrary, WSLCB principally argues that the jury’s verdict is not supported by sufficient evidence, both with respect to liability and damages. In actuality, there is ample evidence to support the verdict, which has been strengthened by the superior court’s denial of WSLCB’s post-trial motions. This Court should affirm.

II. RESTATEMENT OF ISSUES

1. Has WSLCB waived the right to appeal the superior court’s denial of its motion for judgment as a matter of law at the conclusion of Johnson’s case in chief by presenting evidence in its own case in chief? (Assignments of Error 1 & 2.)
2. Has WSLCB preserved its ability to challenge the sufficiency of the evidence where it has not assigned error or provided argument regarding either the superior court’s denial of its post-trial motion or whether there is substantial evidence to support the jury’s verdict? (Assignments of Error 1 & 2.)

3. Does substantial evidence support the jury's verdict finding WSLCB negligent in light of the jury instructions governing its liability? (Assignments of Error 1 & 2.)
4. Did the superior court abuse its discretion in excluding evidence of asymptomatic preexisting conditions? (Assignments of Error 3 & 4.)
5. Did WSLCB waive its right to apportion fault to one of Johnson's health care providers by failing to plead apportionment of nonparty fault as an affirmative defense, contrary to the requirements of CR 12(i). (Assignments of Error 5 & 6.)
6. When one of the recognized risks of harm created by tortious conduct is the risk of malpractice by the victim's treating health care providers, is apportionment of fault to a treating health care provider compatible with the nature of the tortfeasor's duty? (Assignments of Error 5 & 6.)
7. Did the superior court abuse its discretion in denying WSLCB's motion for remittitur? (Assignment of Error 7.)
8. Did the superior court err in awarding post-verdict interest? (Assignment of Error 8.)

III. RAP 2.4(a) ASSIGNMENT OF ERROR

The following error should be addressed by this Court only in the event of reversal:

The superior court erred in granting WSLCB's motion in limine to exclude the testimony of Johnson's Human Factors engineer, Dan Johnson. CP 441.

IV. RESTATEMENT OF THE CASE

A. Jury instructions governing WSLCB's liability.

The superior court gave the following instructions to the jury regarding WSLCB's liability, all of which were either proposed or agreed-to by WSLCB. Instruction 5 defined negligence and ordinary care as follows:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

CP 512. This instruction was proposed by WSLCB. CP 459 (WSLCB's proposed Instruction 12). It is the same as the pattern jury instruction definitions of negligence and ordinary care. WPI 10.01 & 10.02.

Instruction 8 summarized Johnson's claim against WSLCB as follows:

The plaintiff claims that the defendant was negligent in failing to maintain in a reasonable, safe condition the area where Plaintiff Darcy Johnson fell.

The plaintiff claims that the Defendant's failing to maintain in a reasonably safe condition the area where Plaintiff Darcy

Johnson fell was a proximate cause of injuries and damage to plaintiff. The defendant denies this claim.

CP 515. This instruction was proposed by Johnson, CP 484 (Johnson's proposed Instruction 10), and not objected to by WSLCB.¹ It is an adaptation of the relevant pattern instruction. WPI 20.01.

Instruction 10 set forth the elements of Johnson's claim as follows:

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in the way claimed by the plaintiff Darcy Johnson, and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff Darcy Johnson was injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

CP 517. This instruction was proposed by Johnson. CP 485 (Johnson's proposed Instruction 11). It was agreed-to by WSLCB. RP 888:12-15. It is materially identical to the instruction proposed by WSLCB. CP 450 (WSLCB's proposed Instruction 3). It is also materially identical to the relevant pattern instruction. WPI 21.03.

¹ WSLCB objected to the omission of affirmative defenses of failure to mitigate and nonparty fault from the instruction, but not to the portion of the instruction quoted in the main text. RP 874:4-877:11.

The only difference is that the court's instruction specifically mentions Johnson by name.

Instruction 11 described the duty of a business to its customers as follows:

The operator of a business owes to a person who has an express or implied invitation to come upon the premises in connection with that business a duty to exercise ordinary care for her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that such person is expressly or impliedly invited to use or might reasonably be expected to use.

CP 518. This instruction was proposed by Johnson. CP 487 (Johnson's proposed Instruction 13). It was agreed-to by WSLCB. RP 896:21-22. It is the same as the relevant pattern instruction. WPI 120.06.01.²

Instruction 12 elaborated on the duty of a business to its customers as follows:

An owner of a store is liable for any injuries to its customers caused by a condition on the premises if the owner:

(a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such customers;

(b) should expect that the customers will not discover or realize the danger, or will fail to protect themselves against it; and

² WSLCB proposed an instruction based on WPI 120.06, which is phrased in terms of an owner or occupier of the premises rather than the operator of a business. CP 456 (WSLCB's proposed Instruction 9).

(c) fails to exercise ordinary care to protect them against the danger.

CP 519. This instruction was proposed by WSLCB. CP 457 (WSLCB's proposed Instruction 10). It is the same as the relevant pattern instruction. WPI 120.07.

Instruction 13 further elaborated on the duty of a business to its customers with respect to water on the floor:

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

CP 520. This instruction was proposed by WSLCB. CP 458 (WSLCB's proposed Instruction 11). The proposed instruction used the phrase "rain water" rather than "water," but WSLCB agreed to deletion of the word rain. RP 902:2-11. It is not based on a pattern instruction.³ The case was submitted to the jury under these instructions.

B. Evidence regarding WSLCB's negligence.

Darcy Johnson was injured at the WSLCB store on June 18, 2011. She and her then-boyfriend, now-husband, Steve Pallas

³ In its opening brief, WSLCB states "instruction 13 correctly stated the law." WSLCB Br., at 21.

(“Pallas”) stopped by the store to purchase a gift for a friend who had done a favor for Johnson’s father. It had been raining continuously ever since they got up that morning, between 6 and 7 a.m. RP 148:4, 178:12-20, 381:1-382:2 & 383:24-25. They arrived at the store between 11:30 and 11:45 a.m. RP 383:21-24. Pallas was walking in front of Johnson, and as soon as he stepped off a mat in the doorway, he slipped. RP 148:13-14 & 173:15-18. He turned around to warn Johnson to be careful, but before he could say anything she fell down. RP 148:14-16.

The WSLCB store manager, Jay Smiley, saw Johnson fall out of the corner of his eye. The store opened at 9 a.m., and Smiley arrived ½ hour before opening. RP 89:6-19. The store had been open for approximately 2 ½ hours before Johnson and Pallas came in. The store was busy because it was a Saturday. RP 91:8-11. Normally, the store had 700-800 customers on Saturdays. RP 95:8-10.

In his deposition, Smiley testified that it had started raining about 15 minutes before Johnson fell, but at trial he testified that he did not remember and acknowledged that it could have been raining when he arrived for work. RP 89:25-90:9. Smiley acknowledged that “[r]ainy days *always* bring muddy footprints.” RP 97:11 (brackets & emphasis added). It was common for customers to enter the store

with wet feet anytime it was wet outside. RP 105:24-106:3. Due to the lack of an awning on the outside of the building, customers' "feet get wet and it comes in the store." RP 108:7-12. "The water would come in with them." RP 109:15-16.

One of Smiley's job duties was to put out a highly visible yellow sign warning customers that the floor of the store is "slippery when wet" whenever it rains. Specifically, he testified that the sign is needed whenever it rains:

Q. [Counsel for Johnson] As part of your duties to—is to put out a very visible yellow sign that says, "slippery when wet"?

A. [Smiley] Yes.

Q. Right?

A. Yes.

Q. Is that your duty to do that?

A. Yes.

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

A. ***When it rains.***

RP 90:15-91:2 (brackets & emphasis added).

Q. [Counsel for Johnson] And the purpose of putting that sign out is to prevent people from falling; isn't that correct?

A. [Smiley] It's a warning sign, yes, sir.

Q. Okay. And it doesn't say, "wet floor." It says "floor slippery when wet"?

A. Correct.

Q. *And that is put out when you have a need, and that need is when it rains?*

A. *Yes, sir.*

RP 108:13-21 (brackets & emphasis added). The warning sign was needed "[j]ust as soon as it started raining." RP 110:7-10 (brackets added).

On the day Johnson was injured, Smiley acknowledged that he failed to put out the warning sign, even though it had been raining. RP 91:3-7 & 108:19-23. He did not take the time to do so because he was the only person in the store and he was busy helping other customers. RP 91:8-11 & 95:17-19. In light of this evidence, the jury determined that WSLCB was negligent. CP 527.

C. Evidence regarding Johnson's damages.

After she fell, Johnson began to experience pain. RP 387:22-25. She had difficulty getting in Pallas's truck to leave the store. RP 388:4-8. While sitting in the truck, Johnson was incontinent. RP 389:7. At that point, Pallas drove her to hospital. RP 389:15-21. A week later, Johnson had surgery on her back. RP 185:18-25. Her surgeon said the severity of Johnson's symptoms "led us to proceed

with the surgery earlier.” RP 185:18-25. After surgery, Johnson’s “pain was eight to nine out of ten most days, and she was still having difficulty with ambulation.” RP 188:21-23.

Johnson later began to experience pain in her left arm, for which she received treatment that “blocks sympathetic nerves which are believed to be involved in the pain that you get with complex regional pain syndrome[.]” RP 245:22-246:1-2. She was diagnosed with “chronic pain syndrome, failed back surgery, and radiculopathy, lumbar spine.” RP 238:25-239:1-5. “[I]t was becoming apparent ... that she was showing evidence of the development of a condition called complex regional pain syndrome in the left leg.” RP 239:41-22. Complex regional pain syndrome is “characterized by severe pain ... and you get severe swelling, sensitivity[.]” RP 240:1-18. Outbreaks in her pain syndrome caused something as simple as wearing clothes to be painful. RP 246:6-8. The condition was present on her arm and her left leg. RP 246:11, 13. Johnson describes it as “this new burning, on fire, achy sensation.” RP 405:19-24. Her pain required her to take pain medication that caused a variety of side effects, notably including early onset of menopause at the age of 33, which prevents her from having children. RP 409:3-15.

Johnson's persistent pain led her surgeon to refer Johnson for a spinal cord stimulator trial, which "is an implanted device that is laid on top of the surface of the lining tissue of the spinal cord. And then it has electrodes that are connected to a pulse generator underneath the skin." RP 197:6-14. After a successful trial, the spinal cord stimulator was implanted under her skin. RP 241:17. However, the spinal cord stimulator cannot eliminate all of Johnson's pain, and she still needs to take medication. RP 302:19-25-303:1-2. The device must be charged wirelessly, which requires her to often put herself in an uncomfortable position. RP 416:4-20. In order to manage her pain, she always has the device on, and must charge it "four to six hours" "every other day or every two days." RP 417:8-15. The battery has to be replaced surgically every "five to seven" years. RP 417:21-24.

Johnson has had significant medical expenses, RP 260:16-24; Ex. 3. In addition, "[s]he can't really live independently. She has her sisters, one primarily, but all the others and her husband help her do things around the house she is not able to go [sic] herself and she gets those supports. So she's not—she's not employable based on what the medical records tell us, including that physical capacities evaluation, but also even the expert reports from the defense in this case say that

she's had significant impairments and is not likely employable." RP 299:5-14. "As a matter of fact, they are getting a little bit worse in terms of her left arm. The number of hours that she is afforded for her care has been increased because her condition appears to be not getting any better." RP 300:8-12. Her limitations prevent her from working full time "even in a sedentary capacity ... [s]o from a vocational standpoint, when you look at that evaluation you are looking at an individual who's more probably than not unemployable." RP 301:16-23.

She has trouble sleeping due to discomfort and swelling in her left leg and arm due to her complex regional pain syndrome. RP 421:23-25-422:1-8. Temperatures in her left leg and arm vary, from burning hot on the inside to cold on the outside, and wearing clothes causes pain. RP 422:21-25-422:1-11. Due to her condition, showering can be painful. RP 426:6-14. Intimacy with her husband is "barely existent." RP 431:13. She puts pillows between herself and Pallas so that he does not accidentally touch her and cause pain in the night. RP 431:19-21. She still suffers incontinence due to lack of sensation. RP 432:25-433:1-4.

At the time of trial, Johnson was receiving 95 hours a month in in-home assistance. RP 305:18-21. Her sister, Kayleen Johnson,

became a certified health care aid in order to assist her. RP 307:4-5. She was providing approximately 95 hours of care a month for Johnson. RP 200:8-11. She arrives at Johnson's house early in the morning, sometimes helping her get out of bed, helping her get to the restroom, and helping her enter the shower if she has soiled herself. RP 122:23-25, 123:8 & 124:1-3. Johnson's persistent incontinence requires her to wear adult liners. RP 125:3. She assists with bathing and dressing. RP 124:5-25. Johnson cannot cook for herself. RP 126:13. Kayleen does most of the house chores, such as laundry, vacuuming, and cleaning the bathroom. RP 126:16-22. She also took Johnson to medical appointments since Johnson is incapable of doing so herself. RP 128:4. Johnson no longer participates in the social activities that she once did. RP 128:11-13.

In calculating the cost of nursing care for Johnson, her economist estimated that it would cost almost \$1 million conservatively. RP 312:6-11. The economist estimated her wage loss would be in the range between \$850,000 to \$1 million over her work-life expectancy. RP 313:11-18. Based on the foregoing evidence, the jury determined that Johnson suffered \$73,000 in past non-economic damages, \$600,000 in future non-economic damages,

\$432,000 in past economic damages, and \$1,200,000 in future economic damages. CP 527-28.

D. Procedural history.

1. The superior court granted Johnson's motion in limine to exclude evidence of asymptomatic preexisting conditions.

Johnson filed a motion in limine to exclude evidence of asymptomatic preexisting conditions. CP 323-26. The superior court granted the motion. RP 3:20-13:19 (argument and oral ruling); CP 443-44 (written order).

2. The superior court granted WSLCB's motion in limine to exclude testimony from Johnson's Human Factors expert, Dan Johnson.

Johnson retained a Human Factors expert, Dan Johnson, PhD (no relation), to testify regarding the circumstances of her injury. Dr. Johnson has his PhD in experimental psychology and is a Certified Professional Ergonomist. Ergonomics, also called Human Factors, relates knowledge of human capabilities, limitations and characteristics to design of tools, machines, and environments to ensure safe use. CP 350.

Dr. Johnson interviewed Johnson and reviewed video footage and photographs of the WSLCB store where she was injured. CP 351. He also reviewed medical records, CP 351, and the shoes Johnson

was wearing when she was injured, CP 360, and tested the slip resistance of the floor where she was injured, CP 362.

Dr. Johnson explained how water on the floor of the WSLCB store created a dangerous condition:

Water, acting as a lubricant between the shoe and the floor, can reduce the slip resistance of the surface (NSC, 1986). This is true even when the floors have polish films which may increase the slip resistance between a dry floor and a person's footwear. Braun and Roemer (1974, p. 70) state: "Moistened polish films exhibit a completely different behavior towards friction than dry ones, since water forms a lubricating film which leads to a different kind of mechanism." Templer reports that only selected combinations of wet shoes and surfaces result in a slip resistance value greater than 0.4 (Templer, 1992, V. 2, pp. 51-53). For example, while the slip resistance of carpet is high when dry (more than 0.75) it is lower when wet though still in what might be considered a safe range (0.4 up to 0.75). But, he reports, many other surfaces (e.g., linoleum, concrete, granolithic, clay tiles and terrazzo) which are slip resistant when dry lose slip resistance when wet and exhibit values between 0.2 to less than 0.4 (Ibid, Table 3.5, p. 52). In other words, a person stepping onto a surface covered with a layer of water may experience only half, or less, of the slip resistance that surface would have provided when dry.

CP 353-54. A wet linoleum floor violates applicable safety standards for the slip-resistance of walking surfaces, as confirmed by later testing. CP 354 & 362.

On the basis of his expertise and review of this case, Dr. Johnson concluded:

1) Ms. Johnson had no physical condition that contributed to her fall. She was properly dressed and was wearing footwear

the soles and heels of which are known to decrease the chance of a slip and fall. She was behaving in an expected and predictable manner.

2) If the floor had been slip resistant when wet, as required by Code, then, on a more probable than not basis, this fall would have been prevented.

3) If carpet mats had been arranged so that entering customers would have to walk on them after entering the store, and if any saturated mats had been replaced, then on a more probable than not basis this fall would have been averted.

4) If a warning had been placed so that entering customers could see them in time to alter their gait before stepping onto the wet floor, then, on a more probable than not basis, the chance of this fall occurring would have been reduced.

CP 357-58.

WSLCB filed a motion in limine to preclude Dr. Johnson from testifying. CP 294-97. The superior court granted the motion. RP 17:22-26:23 (argument and oral ruling); CP 439-40 (written order). The court justified its decision on grounds that Dr. Johnson's testing of the floor was performed too long after Johnson fell and the rest of his opinions were matters of common knowledge. RP 26:5-10 & 35:20-24.

3. The superior court denied WSLCB's motion for judgment as a matter of law after Johnson rested.

At the conclusion of Johnson's case in chief, WSLCB made a CR 50(a) motion for judgment as a matter of law, arguing that there

was insufficient evidence of constructive notice. RP 472:25-479:10.

The superior court denied the motion, stating:

I am denying the state's motion. When reviewing the facts in a light most favorable to the plaintiff, there is sufficient evidentiary basis for a reasonable jury to find the defendant liable. I understand that the state is arguing that Mr. Smiley was not put on notice because nobody knows whether or not there was water on the floor. However, there was some testimony from the plaintiff that her pants were wet. There could be a reasonable inference that there was water on the floor from the jury. And I think also the fact that Mr. Smiley did testify that when Mr. Mano asked him, when does the danger start? The danger starts when it rains. And so when it rains, he said that it's their -- not duty, but he said it was their policy and practice to put the sign out when it rains. He said he saw it raining. About 15 minutes later, he was helping customers, and he didn't have the opportunity to put it out. I think based on that testimony there could be a reasonable inference from the jury that Mr. Smiley knew or should have known of the dangers there.

RP 484:15-485:10.

4. The superior court denied WSLCB's request to apportion fault to one of Johnson's treating health care providers.

WSLCB did not allege an affirmative defense of nonparty fault in its answer to Johnson's complaint. CP 3-6. Nonetheless, WSLCB sought to apportion fault to one of Johnson's treating health care providers at the conclusion of trial. RP 877:14-880:25; CP 461-62 & 469-70. The superior court denied its request to instruct the jury on the issue. RP 885:8-10.

5. The superior court denied WSLCB's motion for remittitur.

After the jury rendered its verdict, WSLCB filed a CR 59 motion that included a request for the superior court judge to reduce the jury's determination of Johnson's damages. CP 560-62. The superior court denied the motion, stating:

The motion to reduce the jury's award of damages because it was outside the range of substantial evidence, when you read the case law, the jury's verdict is presumed to be correct. There is a very, very strong presumption that a jury's verdict is always correct. And in this case there was substantial evidence. There was sufficient evidence from economists, from the plaintiff herself about her economic loss, about her pain and suffering, and all the things that the jury heard. And the jury had the opportunity to weigh the experience, education, credibility of the economist experts in this case. They did that. And that was the verdict that they came up with. It's not a verdict that shocks the conscience of the court, but you know, it was the jury's decision. There was sufficient evidence to support their decision.

RP 1047:18-1048:9.

6. The superior court awarded Johnson post-verdict interest.

When the superior court entered judgment in favor of Johnson, the court ruled that "Interest Accrued to Date of Judgment" was "to be determined." CP 642. In context, this ruling related solely to post-verdict interest, not prejudgment interest. RP 1015:18-1018:22.

V. ARGUMENT

A. **WSLCB has waived the right to appeal the superior court's denial of its CR 50 motion after Johnson rested by presenting evidence in its own case in chief.**

WSLCB assigns error to the superior court's denial of its CR 50 motion for judgment as a matter of law after Johnson rested. WSLCB Br., at 3 (assignments of error 1 & 2); *id.* at 4 (issues 1 & 2); *id.* at 11-12 (discussing motion “[a]t the conclusion of Ms. Johnson’s case”; citing RP 472-85); RP 472:25-485:11 (argument and ruling on motion). However, WSLCB has waived the right to appeal this ruling by presenting evidence in its own case in chief. “Washington courts have consistently adhered to the rule that a challenge to the sufficiency of the evidence at the close of the plaintiff’s case is waived by a defendant who does not stand on his motion and proceeds to present evidence on his own behalf, after his motion to dismiss has been denied.” *Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC*, 183 Wn. App. 459, 474-75, 334 P.3d 63, 72 (2014) (collecting citations), *aff’d*, 184 Wn. 2d 176, 357 P.3d 650 (2015). Thereafter, the defendant is only entitled to appeal the sufficiency of the evidence to support the verdict.

This waiver analysis is consistent with the approach to judgment as a matter of law in the context of pretrial summary

judgment proceedings. “A motion for judgment as a matter of law is sometimes characterized as a delayed motion for summary judgment, in that both motions argue there is no genuine issue of fact that needs to be decided by the jury, and that the moving party is entitled to judgment on the basis of applicable substantive law.” 4 Wash. Prac., Rules Practice CR 50 (6th ed.); accord *Bratton v. Calkins*, 73 Wn. App. 492, 496, 870 P.2d 981, 984 (equating CR 50 and CR 56 standards), *rev. denied*, 124 Wn. 2d 1029 (1994). Denial of summary judgment based on the sufficiency of the evidence is not appealable. “When a trial court denies summary judgment due to factual disputes, as here, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment.” *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn. 2d 15, 35 n.9, 864 P.2d 921 (1993) (citing *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988)). The reason for the rule is that:

The final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting that final judgment can be reviewed at that time in light of the full record. This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weaknesses of the litigants at that earlier stage. Were we to hold otherwise, one who had sustained his position after a fair hearing of the

whole case might nevertheless lose, because he had failed to prove his case fully on an interlocutory motion.

Johnson, 52 Wn. App. at 306-07 (quotation omitted).

To deny a review seems to be unjust. But to grant it ... would be unjust to the party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised.

The greater injustice would be to the party which would be deprived of the jury verdict. Otherwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of evidence. This would defeat the fundamental purpose of judicial inquiry.

Id. at 307 (ellipses in original; quotation omitted). The same rule and rationales are applicable to review of CR 50 motions, and the Court should hold that WSLCB has waived the right to appeal the superior court's denial of its CR 50 motion after Johnson rested her case.

B. WSLCB has not preserved any error with respect to the superior court's denial of its post-trial motion for a new trial or the sufficiency of the evidence.

WSLCB did not renew its CR 50 motion for judgment as a matter of law at the close of all the evidence and before the case was submitted to the jury. *See* CR 50(b). Nor did WSLCB renew its CR 50 motion for judgment as a matter of law after the jury rendered its verdict. Instead, it filed a CR 59 motion for judgment

notwithstanding the verdict or new trial. CP 541-600.⁴ While this post-trial CR 59 motion included argument that the superior court erred by failing to grant judgment as a matter of law, WSLCB has not assigned error or argued that the superior court erred in denying its post-trial motion. WSLCB Br., at 3-4 (assignments of error 1-8).⁵ WSLCB also has not assigned error or argued that there is a lack of substantial evidence to support the verdict. *Id.*

The failure to assign error or argue that the superior court erred in denying its post-trial motion or that there is a lack of substantial evidence to support the verdict precludes review of these issues. An appellant's opening brief must contain "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4) (brackets added). The opening brief must also contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). "The appellate court will only review a claimed error which is included in an assignment of error or

⁴ The post-trial motion was expressly brought "[p]ursuant to CR 59." CP 541:22 (brackets added). It relied solely on CR 59 and did not cite CR 50. CP 544:22-6:2 (discussing "standard" for motion).

⁵ The only reference to the post-trial motion in WSLCB's briefing is for the purpose of establishing the timeliness of this appeal. WSLCB Br., at 16 (last paragraph).

clearly disclosed in the associated issue pertaining thereto.” RAP 10.3(g). Where an assignment of error is neither argued nor briefed, it is not preserved. *See Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn. 2d 182, 196 n.11, 421 P.3d 925 (2018).

WSLCB should not be allowed to argue that the superior court erred in denying its post-trial CR 59 motion for the first time in its reply brief. “A reply brief should ... be limited to a response to the issues in the brief to which the reply brief is directed.” RAP 10.3(c) (ellipses added). “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992). Johnson would be prejudiced because this brief has been tailored to address the issues as raised by WSLCB in its opening brief.

C. If the Court were to reach the merits of WSLCB’s challenge to the sufficiency of the evidence, review should be limited to whether there is substantial evidence to support the jury’s verdict based on the law of the case embodied in the unchallenged jury instructions.

WSLCB’s framing of the issues on appeal appears to be for strategic purposes. By limiting its appeal to the denial of its CR 50 motion, WSLCB focuses on its proposed synthesis of decisional law rather than the law of the case comprised of the jury instructions. “Judgment as a matter of law sought with a CR 50(a) motion is

governed by the applicable substantive law, not the trial court's instructions to the jury.” *Washburn v. City of Fed. Way*, 178 Wn. 2d 732, 749, 310 P.3d 1275, 1284 (2013). This makes sense because such motions are heard before the case is submitted to the jury, and typically before jury instructions have been finalized. *See* CR 50(a)(2). After the case is heard by the jury, however, review is limited to determining whether there is substantial evidence to support the verdict under the law of the case as embodied in the instructions. *See Millies v. LandAmerica Transnation*, 185 Wn. 2d 302, 321, 372 P.3d 111 (2016) (where CR 50 motion is not reviewable because it was untimely, sufficiency of the evidence is evaluated in light of the law of the case as reflected in the jury instructions); *Washburn v. City of Federal Way*, 169 Wn. App. 588, 606, 283 P.3d 567 (2012) (where CR 50 motion is not preserved, review is limited to whether there is sufficient evidence for a jury to find the defendant breached the duty stated in jury instructions), *rev'd in part & aff'd in part*, 178 Wn. 2d 732, 310 P.3d 1275 (2013).⁶

⁶ In *Washburn*, the Court of Appeals held that the CR 50 motion was not preserved because it was not renewed after the verdict. 169 Wn. App. at 614. The Supreme Court reversed and held that it was not necessary to renew the motion to preserve it. 178 Wn. 2d at 750. This aspect of *Washburn* does not apply here because the case involved a CR 50 motion based on the existence of a legal duty rather than the sufficiency of the evidence. Neither the Court of Appeals nor the Supreme Court addressed or altered the rule that a CR 50 motion based on the sufficiency of evidence is waived by a defendant who presents evidence in their case in chief.

In addition, WSLCB seeks the benefit of a de novo standard of review, rather than having to argue that the jury's verdict is not supported by substantial evidence. WSLCB Br., at 17 (citing *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 784, 358 P.3d 464 (2015), for the proposition that “[t]he trial court’s denial of a motion for judgment as a matter of law is reviewed de novo”). WSLCB is only partially correct, as a motion for judgment as a matter of law based on the sufficiency of the evidence is a mixed question of fact and law unless the facts are undisputed and the only issue concerns the legal significance or consequence of undisputed facts. In any event, where the law of the case has been established by the jury instructions, review is limited to whether substantial evidence supports the jury’s verdict in light of the instructions. *See Millies, supra*. If the Court were to overlook WSLCB’s failure to preserve its challenge to the sufficiency of the evidence, review should be limited to whether there is substantial evidence to support the jury’s verdict under the instructions.

D. Substantial evidence supports the jury’s verdict finding WSLCB negligent in light of the unchallenged instructions.

“Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Wilcox*

v. Basehore, 187 Wn. 2d 772, 782, 389 P.3d 531, 537 (2017) (quotation omitted). The evidence and all reasonable inferences must be viewed in the light most favorable to the verdict. *Id.*, 187 Wn. 2d at 782. If substantial evidence supports the verdict, an appellate court may not reweigh the evidence or substitute its judgment for the lower court, even if the appellate court would be inclined to reach a different result. *See Parkridge v. City of Seattle*, 89 Wn. 2d 454, 464, 573 P.2d 359, 365 (1978).

The “declared premise” that is the basis of substantial evidence review in this case consists of the jury instructions regarding liability. The instructions must be read together and viewed as a whole. *See State v. Wiebe*, 195 Wn. App. 252, 256, 377 P.3d 290, *rev. denied*, 186 Wn. 2d 1030 (2016). They are interpreted in accordance with the ordinary meaning of the words used. *See State v. Meneses*, 169 Wn. 2d 586, 592, 238 P.3d 495, 498 (2010) (“It is the jury instructions' ordinary meaning that matters”); *Tarabochia v. Johnson Line, Inc.*, 73 Wn. 2d 751, 758, 440 P.2d 187, 192 (1968) (“It will not be presumed that a jury ... accorded the instruction a meaning different from its plain language”; ellipses added)

WSLCB does not argue that there is insufficient evidence to support any instruction other than Instruction 13, which required

Johnson to “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 [she] slipped.” CP 520 (brackets added); WSLCB Br., at 21 (quoting CP 520). This instruction must be read in connection with the instructions requiring WSLCB to use ordinary care to maintain the premises in a reasonably safe condition, CP 518-19. In particular, the “should have known” (constructive knowledge) element of Instruction 13 must be read in conjunction with the instruction describing the duty “to exercise ordinary care to discover the condition.” CP 519.

Reasonable jurors could conclude that “water makes the floor dangerously slippery” and that WSLCB knew or should have known “that water would make the floor slippery” based on their common experience. The superior court made the exact same point when explaining the grounds for exclusion of Johnson’s expert witness. RP 26:5-10 & 35:20-24. In addition, WSLCB personnel placed a highly visible yellow warning sign out whenever it rained, stating that the floor where Johnson was injured is “slippery when wet.” RP 90:15-91:2 & 108:16-18. This is tantamount to an admission that water makes the floor slippery.

Reasonable jurors could also conclude that WSLCB knew or should have known that “there was water on the floor at the time [Johnson] slipped” based on: (1) the length of time it had been raining, i.e., at least 5 ½ hours; (2) the length of time the store had been open, i.e., approximately 2 ½ hours; (3) the fact that there were a lot of customers and the store was busy; and (4) the admissions by the store manager that: (a) “[r]ainy days **always** bring muddy footprints,” RP 97:11 (brackets & emphasis added); (b) customers track water into the store due to the lack of awnings outside, RP 105:24-106:3 & 108:7-12; and (c) the slippery-when-wet sign is **needed** whenever it rains, RP 90:15-91:2 & 108:19-21. This is sufficient evidence to support the jury’s verdict under the instructions.

E. The cases cited by WSLCB are not the law of the case, and they are distinguishable in any event.

WSLCB cites *Kangley v. United States*, 788 F.2d 533, 534 (9th Cir. 1986), for the proposition that “Washington law does not impose constructive notice of an unsafe condition based solely on the fact that it has been raining outside.” WSLCB Br., at 20. WSLCB also cites *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); and *Charlton v. Toys R Us*, 158 Wn. App. 906, 913-15, 246 P.3d 199 (2010), for the proposition that the existence of water on the floor does not establish that the floor was unsafe. See WSLCB Br., at 18 & 21-23. Lastly, WSLCB cites *Kalinowski v. YWCA*, 17 Wn. 2d 380, 135 P.2d 852 (1943), *Charlton*, and *Kangley*, and two New York cases for the proposition that “prophylactic measures” such as floor mats do not establish constructive notice of a dangerous condition. WSLCB Br., at 24-27. These cases do not control the analysis of whether there is substantial evidence to support the jury’s verdict under the instructions. In any event, the cases cited by WSLCB are distinguishable from the facts of this case.

None of the cases cited by WSLCB involve evidence comparable to the evidence before the jury, in particular the admissions made by its store manager in this case about the presence of water and need for the warning sign whenever it rains. In fact, none of the cases cited by WSLCB involve any evidence to support their claims, except the existence of a wet floor for an indeterminate amount of time. See *Brant*, 72 Wn. 2d at 451 (stating “[t]he plaintiff in this case has proven no more than that she slipped and fell on a wet floor and sustained certain injuries in consequence thereof”;

brackets added); *Merrick*, 67 Wn. 2d at 427-28 (only evidence was testimony by plaintiff that there was water on the floor, and testimony by a co-employee that there were “a few drops”); *Shumaker*, 183 Wash. at 524 (stating “[r]espondent knows little of the accident which resulted in injuries to her, save that she slipped and fell, and that ... she noticed that the spot where she fell was wet”; brackets & ellipses added); *Charlton*, 158 Wn. App. at 916 (noting the plaintiff “could present no evidence that [defendant] knew or should have known of an unsafe accumulation of water beyond the mats”; brackets added); *Kangley*, 788 F.2d at 535 (stating “our search of the record has not revealed any evidence that would support a finding that the [defendant] knew or should have known that the floor was wet”; brackets added).

The cases regarding floor mats and signs are similarly distinguishable because there was no testimony linking them to the defendants’ actual or constructive knowledge of the allegedly dangerous condition in question. *See Kalinowski*, 17 Wn. 2d at 384-85 (noting rubber mat was used to prevent corn meal from being tracked from dance floor to remainder of building, not to prevent falls); *Charlton*, 158 Wn. App. at 917 (plaintiff presented no evidence that mats or sign were placed in recognition of dangerous condition);

Kangley, 788 F.2d at 534 (noting mat was permanent part of floor). In this case, by way of contrast, WSLCB’s store manager admitted that the floors become wet and the slippery-when-wet warning sign is needed whenever it rains. RP 90:15-91:2, 97:11, 105:24-106:3, 108:7-12 & 108:19-21. This is evidence of WSLCB’s recognition that water on the floor constitutes a dangerous condition.⁷

There are aspects of the cases cited by WSLCB that actually support Johnson’s claims. In *Brant*, the Court stated that “[i]t could be inferred that the customers entering the store brought in on their clothes and footgear water that ultimately found its way onto the floor.” 72 Wn. 2d at 447 (brackets added). Similarly, in *Shumaker*, the Court stated “[o]n rainy days, doubtless the floor would be wet both from seepage and from water carried in by patrons.” 183 Wash. at 524. These statements support the inference that the WSLCB store manager knew there was water on the floor in this case. In sum, the cases cited by WSLCB do not require or permit the Court to overturn the jury’s verdict in this case.

⁷ The New York cases cited by WSLCB are distinguishable on the same grounds as the Washington cases. See *Seferagic v. Hannaford Bros. Co.*, 115 A.D.3d 1230, 1231, 982 N.Y.S.2d 289 (S. Ct. App. Div. 2014); *Beck v. Stewart’s Shops Corp.*, 156 A.D.3d 1040, 1042, 66 N.Y.S.3d 79 (S. Ct. App. Div. 2017). In addition, they are further distinguished because “wet floor” signs were placed as a safety precaution rather than a response to a specific need created by a dangerous condition. See *Seferagic*, 115 A.D.3d at 1231. *Beck*, 156 A.D.3d at 1041.

F. As an alternate ground to affirm, no showing of constructive notice should be required based on the plurality opinion in *Iwai*.

“A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a). In this case, the Court should follow the plurality opinion in *Iwai v. State, Employment Sec. Dep't*, 129 Wn. 2d 84, 101-02, 915 P.2d 1089, 1097 (1996) (Dolliver, J., lead opinion). The plurality urged that it is not necessary to establish actual or constructive notice of the specific dangerous condition in a premises liability case. Instead, the jury should be allowed to determine whether the risk of harm was foreseeable. This approach is consistent with the duty of businesses to use reasonable care to discover dangerous conditions. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn. 2d 127, 132, 606 P.2d 1214, 1218 (1980) (noting "affirmative duty to discover dangerous conditions"). It also eliminates the incentive for them to stick their head in the sand to avoid discovering and remedying such conditions. *See Iwai*, 129 Wn. 2d at 101 (stating “[a] strict application of the notice requirement would unfairly allow [defendant] to plead ignorance about [the dangerous condition], despite its general knowledge of the situation”; brackets added). This approach is also

consistent with tort law as applied outside the premises liability context.

Johnson acknowledges that the *Iwai* plurality opinion is not binding precedent because it failed to garner a 5-Justice majority, and that this Court does not have complete freedom to follow the decision. *See Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 192, 127 P.3d 5, 10 (2005), *rev. denied*, 157 Wn. 2d 1026 (2006). Nonetheless, for the reasons stated in the *Iwai* plurality, the Court should urge the Supreme Court to adopt it in the event of further review. It is not necessary to adopt the *Iwai* plurality to affirm the judgment in this case, but it would be sufficient to affirm, and it would also reflect a significant improvement in the state of the law.

G. The superior court did not abuse its discretion in granting Johnson's motion in limine to exclude evidence regarding asymptomatic preexisting conditions.

Exclusion of evidence is within the discretion of the superior court. *See Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 668, 230 P.3d 583, 585 (2010). The exercise of discretion must be based on the correct legal standard. *See Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 684, 132 P.3d 115, 118 (2006). The law requires exclusion of asymptomatic preexisting conditions. *See Harris v. Drake*, 152 Wn. 2d 480, 494, 99 P.3d 872, 878 (2004); *see also Hoskins v. Reich*, 142

Wn. App. 557, 566, 174 P.3d 1250, 1254 (holding trial court erred in admitting evidence of asymptomatic preexisting condition), *rev. denied*, 164 Wn. 2d 1014 (2008). The superior court would have abused its discretion if it had denied Johnson's motion in limine.

Notwithstanding the foregoing, WSLCB argues that the superior court abused its discretion in not allowing its retained orthopedist, James Russo, MD, to testify regarding an allegedly natural progression of a preexisting condition, and in not allowing its retained neuropsychologist, Laura Dahmer-White, PhD, to testify regarding an allegedly symptomatic somatoform disorder. *See* WSLCB Br., at 3 (Assignments of Error 3 & 4); *id.* at 15-16 (procedural history); *id.* at 32-36 (argument re: Dr. Russo); *id.* at 36-37 (argument re: Dr. Dahmer-White).

As an initial matter, however, there appears to be no appealable order. *See* RAP 3.1 (providing “[o]nly an aggrieved party may seek review”; brackets added). The court's order in limine simply precludes WSLCB from introducing evidence regarding asymptomatic preexisting conditions. CP 443. The order 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, nor

did the order prevent WSLCB from laying the proper foundation with Dr. Dahmer-White and introducing evidence of symptomatic conditions. In any event, there was no abuse of discretion because Dr. Russo could not lay the proper foundation to testify about natural progression of a preexisting condition, and, for her part, Dr. Dahmer-White was allowed to testify that Johnson suffered from an allegedly symptomatic somatoform disorder.

1. Dr. Russo did not lay the proper foundation to testify about natural progression of a preexisting injury.

The parties agree that “[t]here may be no recovery ... for any injuries or disabilities that would have resulted from natural progression of the preexisting condition even without this occurrence.” WPI 30.18 (brackets & ellipses added); *accord* WPI 30.18.01. However, Dr. Russo did not testify that Johnson’s “injuries or disabilities” would have resulted from a natural progression of any preexisting condition. Instead, he testified about certain findings on pre-injury and post-injury magnetic resonance imaging (MRI):

Q. [Counsel for WSLCB]: Doctor, looking at Ms. Johnson’s complete medical history, is it your opinion on a medically more probable than not basis that the imaging findings seen on her post injury MRI represent the natural progression of a preexisting condition?

A. [Dr. Russo] It is.

Q. On a medically more probable than not basis, would these findings still exist regardless of whether she had fallen in the liquor store on June 18, 2011.

A. Yes.

Q. Why do you think that?

A. The significant difference between the two MRIs was primarily the development of the narrowing of the nerve canal on the left side, that so-called neuroforaminal stenosis. That's a purely degenerative condition. And the disk bulges, once they start—as the disk bulges occur, the disk spaces between the two vertebral bodies gradually narrow down and the imprint on the thecal sack becomes more increased as that progresses.

RP 534:14-535:9; *accord* RP 511:23-25 (stating “there is nothing going on on the second MRI that cannot be explained by progression of the degenerative process is how I would put it”).

Dr. Russo was not able to link differences on the two MRIs to Johnson's symptoms. He admitted that degenerative disk disease affects 80-90 percent of the general population. RP 509:4-19. “It's a very common disorder.” RP 509:9-10. However, the degeneration cannot be equated with symptoms. RP 510:1-23. “[T]here has always been a fairly poor correlation between that finding and back pain[.]” RP 510:11-13 (brackets added). For those who do experience pain, “a large number,” i.e., “50 percent or more,” resolve with conservative

treatment in the form of physical therapy, medication, and the passage of time. RP 523:5-24.

Dr. Russo otherwise acknowledged the lack of records or symptoms for two years prior to Johnson's injury at the WSLCB store, RP 538:2-24, and admitted the possibility that Johnson's preexisting condition "went away entirely" during that time, RP 539:3-5. While he appeared to doubt that possibility, *see id.*, his belief was contrary to the undisputed evidence that Johnson was asymptomatic and represented an impermissible comment on the credibility of Johnson and her treating health care providers. *See* ER 608. Under these circumstances, it would have been error for the superior court to allow Dr. Russo to testify that Johnson's symptoms were the natural progression of a preexisting condition.

2. Dr. Dahmer-White was allowed to testify about an allegedly symptomatic somatoform disorder.

WSLCB repeatedly claims that the superior court excluded evidence of a preexisting somatoform disorder, WSLCB Br., at 2 (introduction, stating "the jury was prevented from considering" evidence of a preexisting somatoform disorder); *id.* at 3 (Assignment of Error 4); *id.* at 5-6 (Issues 4 & 7); *id.* at 31 (stating "the trial court refused to allow" evidence "that Ms. Johnson suffered from a

somatoform disorder”); *id.* at 36 (stating “[t]he trial court erroneously excluded expert testimony that Ms. Johnson had a symptomatic somatoform disorder that was the true cause of her alleged damages”; brackets added). These claims are simply not true. Dr. Dahmer-White was allowed to testify at length that Johnson suffered from a symptomatic preexisting somatoform disorder and a symptomatic anxiety disorder that were unrelated to her fall at the WSLCB store. RP 837:9:12, 839:20-2, 841:6-23, 846:1-3, 846:17-19, 847:7-848:4, 850:1-5, 851:9-11, 856:15-20, 857:3-12, 860:5-7 & 860:14-20. The error alleged by WSLCB did not occur.

H. WSLCB has waived its affirmative defense of nonparty fault by failing to allege it in answer to the complaint as required by CR 12(i).

WSLCB assigns error to the superior court’s denial of its request to instruct the jury regarding apportionment of fault to one of Johnson’s health care providers. WSLCB Br., at 3-4 (Assignments of Error 5 & 6); *id.* at 37-46 (argument). However, this affirmative defense has been waived by failing to plead it in answer to Johnson’s complaint. CR 3-7.

Washington’s fault-allocation scheme is not “self-executing.” *See Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn. 2d 15, 25, 864 P.2d 921, 928 (1993). Allocation of fault to nonparty is an

affirmative defense that must be pled and proved by the defendant. *See id.*, 123 Wn. 2d at 25; *accord accord Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 858, 313 P.3d 431, 445 (2013); WPI 21.10 (regarding burden of proof); CR 8(c) (identifying “fault of a nonparty” as an affirmative defense).

Because of the drastic consequences to a plaintiff resulting from an “empty chair,” CR 12(i) provides:

Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

Failure to raise the defense as required by this rule results in waiver. *See Henderson v. Tyrrell*, 80 Wn. App. 592, 622-25, 910 P.2d 522 (1996). Johnson relied on the fact that the defense was not pled in preparing for trial. RP 882:1-7. WSLCB mentioned amending its answer to conform to the evidence, but did not seek a ruling and has not assigned error to the superior court’s failure to rule on the issue. *See* RP 879:10-14 (stating “frankly, the judge does even need to make that ruling”). Under these circumstances, WSLCB should not be allowed to raise the issue of nonparty fault.

I. WSLCB cannot apportion fault to one of Johnson’s treating health care providers because malpractice by treating health care providers is one of the recognized risks of harm created by tortious conduct.

It is “a well-established principle of tort law” that the original tortfeasor is responsible for any exacerbation of the victim’s injuries caused by subsequent negligent medical treatment. *Lindquist v. Dengel*, 20 Wn. App. 630, 632, 581 P.2d 177, 179 (1978), *aff’d*, 92 Wn. 2d 257, 595 P.2d 934 (1979). “This rule has long been applied in this state.” *Lindquist v. Dengel*, 92 Wn. 2d 257, 262, 595 P.2d 934, 937 (1979); *accord Adams v. Allstate Ins. Co.*, 58 Wn. 2d 659, 669 & n.11, 364 P.2d 804 (1961) (referring to rule as “settled”). The reason for the rule is that subsequent negligent treatment “is within the scope of the risk created by the original negligent conduct.” *Lindquist*, 92 Wn. 2d at 262 (citing Restatement (Second) of Torts § 457, Cmt. b (1965)).

WSLCB argues that the foregoing rule has been abolished with the adoption of Washington’s fault-allocation scheme. However, nothing in the fault-allocation scheme purports to alter “the scope of the risk” created by a tortfeasor’s conduct, for which the tortfeasor is liable. In *Henderson*, the court indicated that the rule survives the adoption of Washington’s fault-allocation scheme. *See* 80 Wn. App. at 627 n.17; *see also Peters v. Ballard*, 58 Wn. App. 921, 931, 795 P.2d

1158, *rev. denied*, 115 Wn. 2d 1032 (1990) (recognizing *Lindquist* rule post-tort reform, but finding it distinguishable).

WSLCB cites a federal case denying a motion to exclude evidence of “alleged malpractice or inappropriate treatment by” treating health care providers, in part because “[n]othing in the legislative history of [the fault-allocation statute, RCW 4.20.070] indicates that this section was not intended to apply to medical malpractice actions. WSLCB Br., at 39 (citing *Workman v. Chinchinian*, 807 F. Supp. 634, 643 (E.D. Wash. 1992)). With due respect to the district court, its reasoning is non sequitur because the question of whether the fault-allocation statute applies to medical malpractice actions is unrelated to the question of whether it modifies the risk of harm engendered by the tortfeasor’s own conduct, for which the tortfeasor is liable. *Henderson* expressly disagreed with *Workman*. 80 Wn. App. at 620 n.17; *see also Sudre v. The Port of Seattle*, 2016 WL 7035062, at *15 (W.D. Wash. Dec. 2, 2016) (noting disagreement). Allocation of fault for a tort victim’s duty is a different question than the nature and scope of the tortfeasor’s duty. If this Court reaches the issue of apportionment of fault, it should hold that Washington’s fault-allocation scheme has not altered the nature and scope of a tortfeasor’s duty.

J. The superior court did not abuse its discretion in denying WSLCB's motion for remittitur.

WSLCB assigns error to the superior court's denial of its motion for remittitur. WSLCB Br., at 4 (Assignment of Error 8). As in the superior court, WSLCB asks this Court to reduce the jury's determination of Johnson's damages by almost a factor of four, from \$2,305,000 to \$600,000. WSLCB Br., at 48.

The jury has a constitutional right and responsibility to determine the plaintiff's damages. *See Washburn v. Beatt Equip. Co.*, 120 Wn. 2d 246, 269, 840 P.2d 860, 873 (1992) (citing *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989)). "The jury's role in determining noneconomic damages is perhaps even more essential," and is presumed to be correct. *Sofie*, 112 Wn. 2d at 646 & 654. "[C]ourts should be and are reluctant to interfere with the conclusion of the jury when fairly made." *Washburn*, 120 Wn. 2d at 268-69 (brackets added; quotation omitted). "[A]ppellate review is most narrow and constrained" and "the appellate court 'rarely exercises this power.'" *Id.* at 269 (brackets added; quotation omitted). "[D]eference and weight are given to the evaluation of the trial court's exercise of discretion in denying a new

trial on a claim of excessiveness.” *Id.* at 271 (brackets added). “The verdict is strengthened by denial of a new trial by the trial court.” *Id.*

The superior court’s denial of a motion for remittitur is reviewed only for an abuse of discretion. *See Bunch v. King Cty. Dep’t of Youth Servs.*, 155 Wn. 2d 165, 176, 116 P.3d 381 (2005). “An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” *Id.*, 155 Wn. 2d at 179 (quotation omitted). “The requirement of substantial evidence necessitates that the evidence be such that it would convince ‘an unprejudiced, thinking mind.’” *Id.* (quotation omitted). “The ‘shocks the conscience’ test asks if the award is ‘flagrantly outrageous and extravagant.’” *Id.* (quotation omitted). “Passion and prejudice must be ‘unmistakable’ before they affect the jury’s award.” *Id.*

In this case, there is ample evidence of Johnson’s past and future economic and noneconomic damages. The jury’s determination of her damages was well within the evidence, and the superior court did not abuse its discretion in denying WSLCB’s request for remittitur.

K. The superior court did not err in awarding post-verdict interest.

WSLCB assigns error to the superior court's award of what it describes as prejudgment interest. WSLCB Br., at 4 (Assignment of Error 8); *id.* at 49 (argument). However, the superior court did not award prejudgment interest. Instead, the court authorized post-verdict interest, albeit in an amount to be determined, given the prospect of appeal. RP 1015:18-1018:22. This is expressly authorized by the language of RCW 4.56.115, providing that "interest on the judgment ... shall relate back to and shall accrue from the date the verdict was rendered." (Ellipses added.) To the extent post-verdict interest is expressly authorized, there is no issue of limits on the waiver of sovereign immunity and the cases on which WSLCB are inapposite.

VI. RAP 2.5(a) ARGUMENT

A. The superior court abused its discretion in excluding the testimony of Johnson's Human Factors expert.

"The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent." RAP 2.4(a). In addition, if a motion for judgment of law is denied, "the party who prevailed on that motion may, as appellee, assert grounds

entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment.” CR 50(d). “If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.” *Id.* If this Court reverses the superior court, then it should review the lower court’s exclusion of Johnson’s Human Factors expert and remand for a new trial with instructions to admit the testimony.

Opinion testimony from a qualified witness that will “assist the trier of fact to understand the evidence or to determine a fact in issue” is admissible under ER 702. There is no question that Dr. Johnson is well qualified. He reviewed sufficient materials to render his opinions. He provided opinions that would be helpful to the jury in understanding the cause of Johnson’s injuries, including the dangerous nature of the condition created by the lubricating effect of water on the floor, the mechanics of injury, and applicable standards regarding slip resistance, floor mats, and warning signs.⁸

⁸ Dr. Johnson’s report, CP 349-60, a follow up letter regarding his testing of the slip resistance of the floor where Johnson was injured, CP 362, and an offer of proof regarding his testimony are reproduced in the Appendix. The offer of proof has been transmitted to the Court pursuant to a supplemental designation of Clerk’s Papers.

The superior court abused its discretion in excluding Dr. Johnson's testimony on grounds that too much time had elapsed between Johnson's injury and his testing of the floor where she was injured. Delay in testing does not render such evidence inadmissible "in the absence of proof that the subsequent condition does not truly reflect the actual circumstances obtaining at the time of the accident." *F.W. Woolworth Co. v. Seckinger*, 125 F.2d 97, 98 (5th Cir. 1942). The delay goes to the weight of the evidence rather than its admissibility. *Id.*; see also *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1284-85 (11th Cir. 2015) (finding abuse of discretion in excluding expert based on 520-day delay in testing slip resistance of surface where plaintiff fell; relying on *F.W. Woolworth*). Just as importantly, the superior court's reasoning is limited to Dr. Johnson's measurement of slip resistance and does not undercut the admissibility of his other opinions. If this Court reverses, Johnson should be entitled to a retrial with the benefit of her Human Factors expert's testimony.

VII. CONCLUSION

Based on the foregoing, the Court should affirm the verdict of the jury and the judgment of the superior court in all respects. If, and only if, the Court reverses, the Court should grant Johnson a new

trial with instructions directing the superior court to allow her to present testimony from her Human Factors expert, Dr. Johnson.

Respectfully submitted this 21st day of November, 2018.

s/George M. Ahrend
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Co-Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

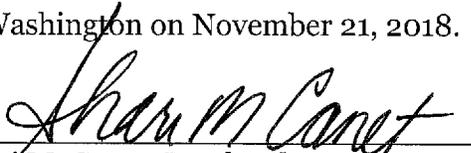
On the date set forth below, I served the document to which this is annexed by email and U.S Postal delivery, postage prepaid, as follows:

Robert W. Ferguson
Michael J. Throgmorton
Earl M. Sutherland
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and upon Respondent's co-counsel, Joseph M. Mano, Jr., via email pursuant to prior agreement for electronic service, as follows:

Joseph M. Mano, Jr., at josephm@chehalislaw.com

Signed at Moses Lake, Washington on November 21, 2018.



Shari M. Canet, Paralegal

APPENDIX

Human Factors Fall ReportA-1

July 20, 2016 letter from Daniel A. Johnson to Joe ManoA-13

Offer of Proof Re Daniel Johnson, PhD, CPE.....A-14

HUMAN FACTORS FALL REPORT

Name of Injured:
Ms. Darcy Johnson

Type of Fall:
Slip and Fall

Location of Fall:
Chehalis Liquor Store
1365 NW Louisiana Ave, Chehalis, WA

Date of Fall:
18 June 2011

Investigation Conducted by:
Daniel A. Johnson, PhD CPE CXLT

Report Requested by:
Joe Mano, Attorney at Law

Report Submitted:
11 September 2015

EXECUTIVE SUMMARY

At about 11:45 AM on 18 June 2011, 31-year-old Darcy Johnson was following an acquaintance into the Chehalis Liquor Store. Rain had been falling for about six hours. Ms. Johnson had no physical condition that would have contributed to a fall and she was wearing shoes that having tread shown to reduce slipping. She stepped onto a carpet mat that should have removed moisture from her shoes. When she took her first step off the last carpet mat her foot slipped forward and she fell, causing severe injury to her lower back. If the floor had been slip resistant when wet or dry, as required by Code, this fall would have been prevented. If the mats had been arranged so that entering customers would have to walk on them before stepping onto the hazardous slippery floor, the chance of this fall occurring would have been eliminated. A warning sign, which was out of sight to entering customers, was put on display only after her fall. If the warning had been in place before she fell, as recommended by a national safety standard, then the chance of this fall occurring would have been reduced.

QUALIFICATIONS

I am a Certified Professional Ergonomist. Ergonomics, also called human factors, is that body of knowledge of human limitations, capabilities and characteristics as it is related to design. Ergonomic design is the application of this body of knowledge to the design of tools, machines, jobs and the environment to ensure safe, comfortable and effective human use.

A Certified Professional Ergonomist is one who has extensive knowledge of available ergonomic information, a command of the methods used in applying that knowledge to the design of a product, system, job or environment; and who has applied this knowledge in the analysis, design, testing and evaluation of products, systems and environments.

The minimum qualifications to become a Certified Professional Ergonomist are: A masters degree or equivalent in ergonomics or a closely related field, such as anatomy, biomechanics, human factors, industrial engineering, industrial hygiene, medicine, physical anthropology, physiology or psychology; and three years of demonstrable experience in the practice of ergonomics. With a B.A., M.A. and a Ph.D. in psychology, and having worked in this field since 1967, I meet these qualifications.

I have worked as a forensic accident investigator since 1984. One of the areas in which I specialize involves pedestrian falls including trip and falls, slip and falls, and falls on stairs. I have worked on over 770 incidents involving falls, about 220 of which involved slips.

Tribometry is the measurement of slip resistance. I have been certified as a tribometrist on the English XL Tribometer (CXLT). When testing walking surfaces for slipperiness I normally use the English XL that is also referred to as the Variable Incident Tribometer (VIT). I did not use the VIT in this case due to the prolonged time (4 years) since the fall.

I retain the right to amend or edit this report based on any new information that might be provided.

BACKGROUND

I conducted an investigation at the request of Mr. Joe Mano, Attorney at Law. On 11 August 2015 I spoke with Darcy Johnson about the fall she experienced at the Chehalis Liquor Store on 18 June 2011 about 11:45 in the morning. Also present for the interview was her sister and caregiver, Kaelene Johnson. (Kaelene Johnson was not a witness to the fall.) This conversation took place at my home office in Olympia, Washington.

I also reviewed the following material: An in-store video (two camera positions) that had recorded plaintiff's fall. I also viewed several still photographs that had been taken inside the liquor store well after plaintiff's fall, and after significant changes to the layout of the store entrance and mat placement had taken place. I also reviewed three medical documents from Providence Centralia Hospital dated; 18 June 2011, 20 June 2011, and 24 June 2011.

The following report is based on the conversation I had with the plaintiff, my review of the relevant material, and on my own experience involving slipping incidents.

RESULTS OF INVESTIGATION

Plaintiff Characteristics

Age & Stature At the time of the fall Ms. Johnson was 31 years old, stood 64 inches in height and weighed about 180 pounds.

Vision She describes her corrected vision as being good. She wears corrective lenses and was wearing them when she fell.

Other Physical Conditions To her knowledge she does not have any physical condition that might have contributed to the fall. Her Type II diabetes was controlled.

Previous Falls and Injuries

In 2006 she tripped and fell over the base of a coat rack and incurred injury to her low back. According to her medical records she ruptured two discs in her lower back.

Shoes

The day of the subject fall Ms. Johnson was wearing men's size 8.5 "Georgia Giant[®]" (see Figure 1 near the end of the report.) The shoes appeared to be in good repair.

Environment

On the day she fell the weather was wet and the sky overcast. It had been raining since about 1:55 AM that morning (Weather Underground) (see Reference section for citations). Further, wet surfaces outside the store are visible in one of the in-store videos. The external ambient light was

more than adequate, since the fall occurred at about 11:45 AM, about 6.5 hours after the 5:17 AM sunrise.

Previous Experience on Walkway

Ms. Johnson said she had been inside the store about five to seven times before the subject incident, and had not experienced a previous misstep there.

Activities Before Fall

She and her friend, Steve Pallas, had parked in the lot outside the store and walked to the entrance. She was not carrying anything and Mr. Pallas was in front of her when they entered. She does not remember what she was looking at just before she fell but believes she was looking at Mr. Pallas who was in front of her. She was not talking to anyone and estimates her walking speed was, for her, normal.

Description of Fall

Before she and Mr. Pallas entered they would have stepped onto a rubber-faced mat that actuated door opening.

They walked over the threshold and took one or two more steps on a second rubber-faced mat just inside the store. There were two carpet entrance mats inside the store; one shorter than the other.

They then stepped onto a carpet entrance mat. This mat would likely have absorbed some of the water from their footwear. When she stepped off the carpet entrance mat her left foot slipped forward and she fell onto her left side. According to the 18 June 2011 medical records she apparently stated that she “slipped and did splits and land (sic) on buttocks.”

Injuries

She ruptured discs in her lower back (L3 – S1).

Heel Strike on Slippery Surface Causing a Slip and Fall

The four main phases of the walk cycle on a level surface are: Heel strike, stance phase, toe off, then the swing phase which ends as the heel once again strikes the surface (Di Pilla, 2010, p. 107).

A slip and fall-related injury, according to Gronqvist et al., tends to be a very rapid event, one that starts with the foot or shoe starting to slide until the person impacts the ground, usually with either an outstretched hand or the pelvis. The entire fall sequence lasts less than a second (Gronqvist et al., 2001, p. 1104).

At heel strike both horizontal and vertical forces are applied to the surface. In an uneventful walking cycle the forward foot lands on the surface and the person’s weight is pushed against the foot. It will stick and stop, thereby resisting the walker’s weight, and the foot and leg will support the walker. If, however, the heel lands on a surface where there is inadequate friction between the footwear and the surface, a slip will occur (Sacher, 1993). The foot can start to slip forward within the first 0.1 second following heel strike. According to Perkins (1977) this type

of slip can be the most dangerous due to the bodyweight being progressively transferred onto the slipping foot. The forward momentum of the body makes it difficult to remove the weight from this foot to regain balance. A continued slip is likely to result in a completely irrecoverable situation; if the slip exceeds 4 to 6 inches a fall is likely (Perkins, 1977).

When the heel strikes the surface and a slip occurs the body reflexively attempts to push the center of gravity (CG), located in the pelvic region, forward over the slipping foot; this increases the vertical force relative to the horizontal force being applied to that foot and can stop the foot from slipping. Support of the body would be maintained and the person would not fall. But this reflexive action of pushing the CG forward causes the body to straighten.

In some instances the person falls in a straight body position, landing flat on the back with the occipital region of the head striking the surface, often with great force. In other instances the person lands in a sitting position, striking the walking surface with one or both buttocks.

At the time of the slip the trailing foot, which had been supporting the body during the stance phase, will have moved into the swing phase. As the forward foot is slipping the toe of the foot that was in swing phase often touches the floor under the person (Cham et al., 2002; Liu & Lockhart, 2013). As the falling person strikes the ground this foot can still be under or behind the torso so that the person experiences the "splits" where one leg is in front and the other behind the torso, as reportedly occurred with Ms. Johnson.

When the forward foot slips it can no longer support the body weight on that side and the person tends to fall to that side; if the right foot slips then the person often falls to the right.

Based on Ms. Johnson's description of the fall, and her injuries, it appears that a slip and fall occurred on heel strike with her left foot; as she fell she impacted her left leg which was in swing phase and ended up behind her.

Floor Surface

The floor where Ms. Johnson fell appeared to be linoleum comprised of 12-inch squares of material.

Effect of Lubricants on Walking Surfaces

A foreign substance on a walking surface can increase the danger of walking on that surface by acting as a lubricant and decreasing the slip resistance between the shoe and the surface to an unsafe level.

Water, acting as a lubricant between the shoe and the floor, can reduce the slip resistance of the surface (NSC, 1986). This is true even when the floors have polish films which may increase the slip resistance between a dry floor and a person's footwear. Braun and Roemer (1974, p. 70) state: "Moistened polish films exhibit a completely different behavior towards friction than dry ones, since water forms a lubricating film which leads to a different kind of mechanism." Templer reports that only selected combinations of wet shoes and surfaces result in a slip resistance value greater than 0.4 (Templer, 1992, V. 2, pp. 51-53). For example, while the slip resistance of carpet is high when dry (more than 0.75) it is lower when wet though still in what

might be considered a safe range (0.4 up to 0.75). But, he reports, many other surfaces (e.g., linoleum, concrete, granolithic, clay tiles and terrazzo) which are slip resistant when dry lose slip resistance when wet and exhibit values between 0.2 to less than 0.4 (Ibid, Table 3.5, p. 52). In other words, a person stepping onto a surface covered with a layer of water may experience only half, or less, of the slip resistance that surface would have provided when dry.

Standards The ASTM International document, Standard Practice for Safe Walking Surfaces (ASTM F 1637 – 07), is a national standard. It was not written for a special group of individuals (i.e., handicapped people) but for all people. In fact, it states that its provisions may not be adequate for those with handicaps. F1637-07 discusses walkway surfaces:

5.1 *General:*

5.1....

5.1.2 ...

5.1.3 Walkway surfaces shall be slip resistant under expected environmental conditions and use. ...

5.1.4 Interior walkways that are not slip resistant when wet shall be maintained dry during periods of pedestrian use.

Shoe Hardness

An investigation of whether the hardness of the sole or heel affects the probability of a slip and fall was conducted by Tsai & Powers (2006). They found in their laboratory study that young adults, 22 – 36 years, were not more likely to slip and fall when the soles of their shoes were hard as compared to when they were soft. They concluded that a person’s ability to recover from a slip event “is more related to one’s ability to generate an effective response strategy.”

Shoe Tread

The tread of the shoe Ms. Johnson was wearing (see Figure 1) was of a type that has been found to channel water away from the shoe/floor interface, thereby decreasing the chance of a slip and fall (Beschoner, K. & Singh, G. 2012; Li, Wu & Lin, 2006).

Floor Finish

The floor finish can also affect slip resistance. Finishes that increase the slip resistance of walking surfaces have been used to reduce slip and fall events on wet floors at several large retail outlets, such as Drug Emporium and Pier 1 (Kendzior, 2011).

Expectation that External Lobby Could Produce Slippery Surface

It is apparent that management of the Chehalis Liquor Store was aware that water produced a hazardous situation in the lobby where Ms. Johnson fell. Carpet mats had been placed inside the building near the entrance, in accordance with an ASTM International document, Standard Practice for Safe Walking Surfaces, which states:

Mats or runners should be provided at other wet or contaminated locations, particularly at known transitions from dry locations. Mats at building entrances also may be used to control the spread of precipitation onto floor surfaces, reducing the likelihood of the floors becoming slippery. (ASTM F 1637-07, Paragraph 5.4.3).

Mats shall be of sufficient design, area, and placement to control tracking of contaminants into buildings. Safe practice requires that mats be installed and maintained to avoid tracking water off the last mat onto floor surfaces. (ASTM F 1637-07, Paragraph 5.4.4).

According to Thorpe (2000) and Di Pilla (2003, p. 27) the effective length of the entrance flooring system should allow for a minimum of two footfalls for each foot. Since an average pace length is about 28 inches, the mat should cover an area of about 9.3 feet (28" x 4 paces) in any direction a person is likely to take once inside of the facility.

Mats, runners, and area rugs shall be provided with safe transition from adjacent surfaces and shall be fixed in place or provided with slip resistant backing. (ASTM F 1637-07, Paragraph 5.4.5).

Analysis of the in store video indicates that customers had to walk to their right after stepping off the rubber mat in order to access the product displays inside the liquor store and still stay on the carpeted mats. This created a hazardous situation.

ANALYSIS

Standards and Codes Related to Pedestrian Hazards

According to *The Injury Fact Book* "accidental falls are the second leading cause of unintentional death ... the second leading cause of both spinal cord and brain injury ... the most common cause of hospital admissions for trauma ... (and) the source of 87 percent of all fractures of the elderly. The total lifetime cost of fall injuries sustained in 1985 was about \$37 billion, an amount only slightly less than the cost of motor vehicle related injury" (Baker et al., 1992). In 2011 dollars the total lifetime cost of falls is over \$77 billion.

Federal Code

According to the ADA, "floor and ground surfaces shall be stable, firm and slip resistant."

Advisory #302.1, states: A **slip-resistant** surface provides sufficient frictional counterforce to the forces exerted in walking to permit safe ambulation. (Emphasis in original.)

It is apparent that when Ms. Johnson stepped off the carpeted mat and onto what appears to be linoleum squares there was inadequate friction to prevent one of her shoes from slipping forward, and her from falling.

State Code

The Washington State Building code in effect when plaintiff fell was the 2009 International Building Code (IBC), and 2009 IBC (Sec. 1101.2) incorporated the ICCANSI A117.1, which states

302.1 General. Floor surfaces shall be stable, firm, and slip resistant, ...

The floor at the Chehalis Liquor Store obviously did not have a slip resistant floor when it was wet.

Human Factors

In a human factors safety analysis of a system, if a hazard exists several alternatives should be considered. First, the hazard should be eliminated if possible. If it cannot be eliminated then a barrier should be erected to protect the unwary from the danger. If neither of these approaches is feasible then a warning needs to be provided.

Eliminate Hazard The hazard, water on a wet tile floor, could have been eliminated by providing a floor that had a high traction under both wet and dry conditions. If this had been done, the wet floor would not have been hazardous and this fall would not have occurred.

Alternatively, mats could have been laid out in such a manner that there would have been a safe walkway from the entrance into the store where customers intended to shop. Mats, which are typically composed of an absorbent material such as carpet, perform two functions when used on or near a hard-surfaced floor which might get wet. First, a mat would initially absorb moisture from the shoes of those entering from a wet environment so that people who had walked over a mat would have dryer shoes when stepping onto a hard surface than they would had they not first stepped onto the mat.

Second, the carpeted mat, even when wet, is likely to be more slip resistant than the hard-surfaced floor (see Templer, 1992, p. 52).

The National Safety Council (NSC) recommends that mats be used at entrances to minimize the slipping hazard and to help reduce the amount of moisture tracked in during inclement weather.

Ms. Johnson reported that there was water on the floor. This indicates that the mats, either their length or placement, were inadequate for the job of removing the water from the shoes of people entering. Alternatively, the mats may have become saturated and failed to remove water from the bottom of the customer's footwear. If this had occurred the saturated mats should have been replaced.

Barrier To Hazard There was no barrier to prevent the customer from coming into contact with the hazardous wet floor.

Warnings When warned humans adapt to slipperiness through postural changes during early stance and mid-stance (e.g., Moyer et al., 2002; Cham et al., 2002; Margiold & Patla, 2002). When warned the body's center of mass is moved forward closer to the base of support, knee flexion is increased facilitating a softer heel landing, and ankle plantarflexion is greater than during normal initial contact phase, thus reducing the heel contact angle with respect to the floor. Due to lower shear forces available in the shoe/floor interface, the ground reaction force profiles are altered for minimizing frictional utilization. These combined effects of force and postural changes reduce the vertical acceleration and forward velocity of the body. During safe locomotion, a dynamic interplay exists between the sensory systems that control posture, gait and balance, and the frictional surface phenomena between shoes and walkways.

An effective warning is one that provides a signal word (e.g., Danger, Warning, Caution); describes the hazard; and instructs on how to avoid it. On the day of the fall there were no warnings in the vicinity of the fall. In fact, the in-store video shows the cashier looking toward Ms. Johnson as she fell, then going over and putting a warning sign at the end of the mat that she had been walking on. To be effective a warning must be given *before* the person encounters a hazardous condition.

The ASTM document, Standard Practice for Safe Walking Surface, states that "(t)he use of visual cues such as warnings ... are recognized as effective controls in some applications. However, such cues or warnings do not necessarily negate the need for safe design construction" (ASTM F 1637-07, Paragraph 11.1).

Further, once a potential hazard has been eliminated the warning sign should be removed; failure to do so results in its effectiveness being significantly reduced (Thorpe & Lemon, p. 4-488, 2000). This means that a sign or cone kept by the door in all kinds of weather, warning that the floor is slippery when wet, will have little effectiveness when actually needed -- i.e., when the floor is actually wet and therefore, hazardous.

Had such a warning been provided it is quite likely Ms. Johnson would have adapted her gait and reduced the chance of a slip.

CONCLUSIONS And OPINIONS

Falls account for a leading cause of injury-related emergency department visits every year in the United States (U.S.), with over 10 million people injured from falls in 2010. Falls also are a leading cause of unintentional death in the U.S., resulting in more than 27,000 fatalities in 2010 (National Safety Council, 2014). Walkways, including ramps and stairs, should be constructed and maintained such that design-induced falls do not occur.

I base my conclusions and opinions on the assumption that there was foreign substance (water) on the floor that made it slippery. Ms. Johnson stepped on this wet floor and fell, thereby injuring herself.

- 1) Ms. Johnson had no physical condition that contributed to her fall. She was properly dressed and was wearing footwear the soles and heels of which are known to decrease the chance of a slip and fall. She was behaving in an expected and predictable manner.**
- 2) If the floor had been slip resistant when wet, as required by Code, then, on a more probable than not basis, this fall would have been prevented.**
- 3) If carpet mats had been arranged so that entering customers would have to walk on them after entering the store, and if any saturated mats had been replaced, then on a more probable than not basis this fall would have been averted.**

4) If a warning had been placed so that entering customers could see them in time to alter their gait before stepping onto the wet floor, then, on a more probable than not basis, the chance of this fall occurring would have been reduced.

Sincerely,

A handwritten signature in cursive script that reads "Daniel Johnson".

Daniel A. Johnson, PhD CPE CXLT
President

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- Weather Underground <http://www.wunderground.com/>



Figure 1. One of the shoes Ms. Johnson was wearing when she slipped. The grooves in the shoe are the type that have been found to reduce the incidence of slipping on wet surfaces.

20 July 2016

Joe Mano, Attorney at Law
Mano, McKerricher & Paroutaud
Chehalis, WA

Re: Darcy Johnson

Mr. Mano,

I have analyzed the data off of the two separate tiles I tested yesterday at the Chehalis Liquor Store. They were in the vicinity where Ms. Johnson was walking when she fell.

Generally, a COF of 0.5 or greater is considered safe. COFs less than 0.5 provide less underfoot-traction and are considered less safe. For example, dry asphalt has a COF of about 0.8 whereas smooth ice has a COF of about 0.2.

I found that the differences between the two tiles, when tested both DRY and WET, were not statistically significant. When Dry they had an average coefficient of friction of 0.83, and are "safe".

But, when tested WET, they had an average coefficient of friction of 0.27, which was too slippery, and therefore, unsafe.

If where Darcy Johnson had placed her feet was wet this would explain why she slipped and fell. This is true regardless of whether she had brought the water in on her shoes, or it was tracked in by others.

Sincerely,



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS**

DARCY L. JOHNSON, a
single woman,

Plaintiff,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF LIQUOR
CONTROL BOARD,

Defendant.

NO. 14-2-00917-6

**OFFER OF PROOF RE
DANIEL JOHNSON, PhD, CPE**

1) Education:

BA, MA and PhD in experimental psychology. As a Human Factors specialist and a Certified Professional Ergonomist, I conduct research on how people think and behave, especially as it affects safety.

2) Occupation: Starting in 1967 I worked at Douglas Aircraft Company, Long Beach, CA., for nearly 10 years. I left Douglas when I started my own company, Interaction Research Corp., Olympia WA, where we designed and tested safety information for airline passengers. I did this for over 25 years. Major emphasis was on the analysis of how people behave in hazardous situations and designing the equipment, environment, and the instructions to aircraft passengers so that the greatest number of people get out of the aircraft as quickly and safely as possible.

In 1984, I started to do forensic work and continue to so.

3) What are the major areas that you work in as an expert in human factors?

The majority of my forensic work has been with injuries. Of the approximately

OFFER OF PROOF RE
DANIEL JOHNSON, PhD, CPE

- Page 1

THE LAW OFFICES OF
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PAROUTAUD, INC. P.C.**
P.O. BOX 1123
CHEHALIS, WASHINGTON 98532
Phone: (360) 748-6641 Fax: (360) 748-6644

1 1100 cases I have worked on about 800 have involved falls. About a third of
2 those have involved falls from slips.

3 **4) Have you testified in court as an expert on falls?**

4 Yes. I have testified in 85 trials.

5 **5) Have you ever been disqualified as an expert with regard to falls?**

6 No.

7 **6) Have you published articles in peer-reviewed publications involving
8 falls? First, explain what peer reviews are.**

9 A peer-reviewed publication is one where a number of people who are your
10 peers as far as education and background are concerned, read the article that you
11 have submitted and either recommend that it be published or not. I have had
12 published 15 articles and book chapters dealing with human factors.

13 **7) What is your most recent peer-reviewed article on this topic?**

14 Nemire, K., Johnson, D.A., & Vidal, K. The science behind codes and standards
15 for safe walkways: Changes in level, stairways, stair handrails and slip
16 resistance. *Applied Ergonomics, Volume 52*, January 2016, pp. 309–316.

17 **8) Do you have other publications in the field of falls?**

18 Yes, I have a total of about 50 published articles and a book that concerns
19 human factors and safety, most of which were due to falls.

20 **9) Could you explain the area of human factors?**

21 Human factors, also called ergonomics, is that area of study concerned with how
22 we design and build things after taking into consideration the abilities and
23 limitations of people who will be using those things. One purpose of human
24 factors/ergonomics is to give information to designers and builders so they can
25 build and maintain things that people use comfortably, safely and efficiently.
Our work ends up in safety standards and building codes

The things studied in our area vary from things as small as computers and
telephones, to larger things such as submarines, highways, aircraft and even the
space shuttle. For 10 years I worked on the design of large commercial aircraft.
And recently I had a standard published for stairways on large passenger
carrying aircraft:

Johnson, D.A. (2014). *Aerospace Standard AS5671: Design and Performance
Criteria: Interior Passenger Stairways on Transport Category Airplanes*.
Warrendale, PA: SAE International.

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DANIEL JOHNSON, PhD, CPE
- Page 2

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10) If you are not an engineer how can you help in determining how accidents occur.

It is well known that accidents often occur because of how people think and behave. Engineering is the study of how materials behave. Psychology is the study of how people think and behave. About half of the 4000 professionals in the human factors field have backgrounds in psychology. We do not treat the mentally ill. We are not clinical psychologists.

Instead we conduct research on how things should be designed so that people can use them safely and efficiently. We look at how people behave in laboratory as well as in real world settings, and how different environmental or equipment designs, or different instructions and warnings given to the people, can increase their comfort, efficiency and safety.

We work with design engineers to help them understand what information users will need to operate a particular device or to work safely and efficiently in the expected environment. Occasionally, we analyze accidents, such as this one, to find out how and why an incident occurred.

11) Do you usually work on the side of those people who are injured in accidents, or those who are defending such cases?

90% of the cases I am involved with are on the side of people who are injured. In my experience, many people who are injured have done little or nothing wrong. Usually, they have behaved in an expected and predictable manner when they are injured.

Occasionally, I find that a person does do something that brought injury upon themselves and I will tell the attorney this. In such an instance, I refuse the case.

12) So, in most cases you work for the plaintiff rather than the defendant?

Yes

13) Have I ever asked you to work on a case before?

Yes, this is the 6th case I have consulted with you on since 1994.

14) You say that you refuse cases where you believe the client was wholly at fault and there was nothing a defendant could have done to prevent the accident. Why did you not refuse this case involving Ms. Johnson?

1 After analyzing the in-store video of her fall, reviewing the weather report for
2 that day, conducting an in-person interview with plaintiff, and taking
3 measurements of the wet and dry floor, I realized that most likely she fell
4 because she did not see or expect a dangerously slippery floor when she stepped
5 off the mat after entering the store.

6 And there was no warning posted prior to her fall, though the store clerk put one
7 out soon after her fall. He didn't issue an oral warning.

8 **15) What are your opinions in this case?**

9 Ms. Johnson fell because the floor that I examined at the Chehalis Liquor Store
10 was not slip resistant. It was not finished with a slip-resistant additive, nor was it
11 covered with a mat of appropriate length, or a mat correctly positioned. Further
12 she did not expect the floor to be slippery and she was not warned of the danger.

13 **16) How slippery was the floor where Ms. Johnson fell?**

14 Slipperiness is measured with a "slip meter" (which I have brought along). It's
15 called a tribometer. This model, used throughout the U.S., is the Variable
16 Incident Tribometer, or VIT.

17 Slip Resistance (SR), also referred to as the Coefficient of Friction (COF),
18 varies from 0 to 1.0. Safe walking surfaces provides a SR of 0.5 or more. Dry
19 concrete has a SR of about 0.8, whereas smooth ice has a SR of about 0.2.
20 Anything under about 0.5 can cause a slip and fall unless the person expects the
21 surface to be slippery, i.e., is warned. Where Ms. Johnson fell I measured the SR
22 of the wet floor to be 0.27

23 **16) Are slip-resistant surfaces readily available?**

24 Yes. There are several hard-surfaced floor tiles available, such as ceramic tiles,
25 that are slip resistant both wet and dry. They are said to be "ADA compliant",
meaning they have a COF of 0.6 or higher when wet. Two of them, both
available from Lowe's, are Carmen Brown Glazed Porcelain Floor Tiles and Del
Conca Roman Stone Porcelain Floor Tiles.

There are also resilient floor surfaces that are slip resistant when wet. One is a
resilient tile, provided by Tarkett, that testing in the polished condition exhibited
a wet slip resistance of 0.61 and 0.63, more than enough to prevent a slip.

**17) Are there floor finishes that increase the slip resistance of normally
slippery floor surfaces?**

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Yes, there are relatively inexpensive finishes¹ that can be applied to floor surfaces that increase their slip resistance when wet. If either H&C Sharkgrip® (Slip Resistant Additive), available from Lowe's, or Behr® (Non-Skid Floor Finish Additive), available from Home Depot, had been applied to the surface then the slip resistance of the floor would have been increased and the chance of this fall occurring, reduced.

18) Were the floor mats you saw appropriate for removing water from the soles of shoes of people entering the store?

No. The mats inside the entrance door on the day of my investigation were not sufficient in size or placement to prevent this type of fall. An entrance mat should extend at least 10 feet in any direction from the door a person is likely to take once inside of the facility.

19) Did the shoes Ms. Johnson was wearing contribute to her fall?

No. My examination of the soles of the shoe indicate that they should have reduced the chance of her slipping. There were adequate channels to let the water escape from under foot.

20) Would a warning have decreased the chance Ms. Johnson would have fallen?

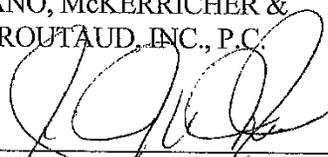
Yes, research has found that when a person expects a walking to be slippery she takes slower and shorter steps, actions which reduces the chance of the foot slipping.

The warning could have been provided by a posted sign or, more effectively, by an oral warning from the clerk.

I certify that the above colloquy would have been presented at trial had Dr. Johnson been allowed to testify.

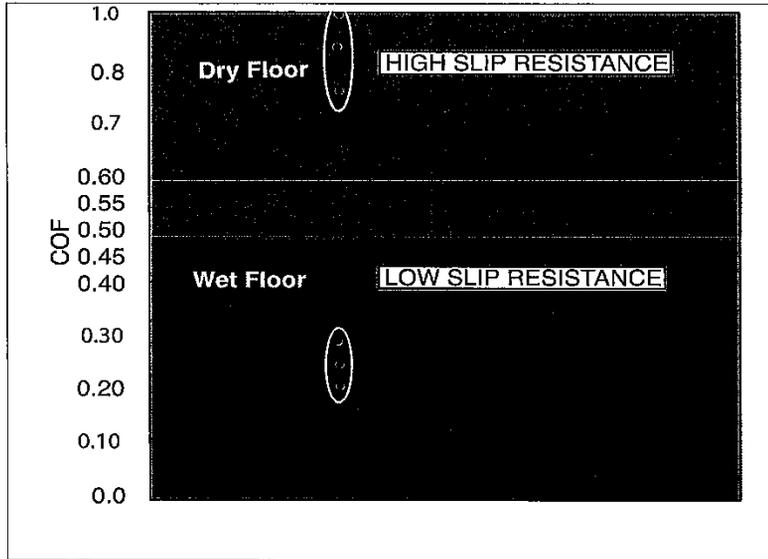
DATED: September 21, 2017

MANO, MCKERRICHER &
PAROUTAUD, INC., P.C.



Joseph M. Mano, Jr., WSBA #5728
Attorney for Plaintiff

¹ Less than \$20 for enough to make 5 gallons of finish.



Range of Slip Resistance Readings from 2 separate tiles obtained at Chehalis Liquor on July 19, 2016.

Black dots show the high, average and low readings of the 8 recorded on the dry tiles (top) and the 8 recorded on the wet tiles (bottom). Readings were taken in the general vicinity where plaintiff slipped and fell.

AHREND LAW FIRM PLLC

November 21, 2018 - 3:57 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

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