

No. 68654-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALEXANDER MORANO, individually,

Respondent,

vs.

SKYWAY CUSTOM TRANSPORT, INC., a Washington
Corporation, and CHRIS T. MOSS, individually,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL HAYDEN

BRIEF OF APPELLANTS

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I. INTRODUCTION

Washington's CR 43(k) mandates that any questions from jurors to witnesses be submitted in writing and that counsel be given an opportunity to object to the questions outside the presence of the jury. Here, the trial court ignored the rule's clear directive, allowing the jury to directly question the defendants' expert witness – over objection and on subjects outside the scope of his examination by the parties – ultimately eliciting testimony that supported the plaintiff's theory of liability and resulting in a \$700,000 verdict. This court should reverse the judgment and should remand for a new trial in which the jury is prohibited from directly questioning witnesses.

II. ASSIGNMENT OF ERRORS

1. The trial court erred in permitting jurors to ask direct, oral questions of defense witness Jared Storer. (RP 211-20)
2. The trial court erred in entering judgment in favor of respondent Alexander Morano against appellants Skyway Custom Transport, Inc., and Chris Moss. (CP 491-96)

III. ISSUE

1. Does a trial court commit reversible error by permitting jurors to directly question a defendant's expert witness

on a subject that exceeds the scope of the parties' examination, where the expert's answers to jurors' questions support the plaintiff's theory of liability?

IV. STATEMENT OF THE CASE

A. In October 2008, Skyway And Its Employee Chris Moss Responded To A Request For Towing By Morano.

Appellant Skyway Custom Transport, Inc., provides towing services for tractor-trailer trucks based in Renton, Washington. (CP 5-6) On October 14, 2008, Respondent Alexander Morano asked Skyway for assistance because his tractor-trailer truck had become stuck in mud on the soft shoulder of a highway in Kent, Washington. (RP 79, 136; CP 2)

Skyway dispatched its employee Appellant Chris Moss to assist Morano. (RP 79, 136) Upon his arrival at the scene, Moss formulated a plan for extricating Morano's truck by attaching chains to lift the back end of the truck out of the mud and onto firmer ground. (RP 101-02, 293) The parties disputed how Moss attached the chains to the truck. Morano alleged that Moss attached the chains to aluminum rails along the side of the truck that could not bear the weight of the truck and its load. (CP 174-

77)¹ See also CP 2; CP 719 (schematic method 4.1)² Skyway asserted that Moss secured the chains to steel frame rails on the underside of the truck. (RP 90-91, 95, 295, 319; CP 719 (schematic method 4.3))

The parties also disputed the instructions Moss gave Morano. Morano alleged that Moss instructed him to pull the truck forward while Moss was lifting the back end. (RP 142; CP 179-80; see also CP 3) Moss testified that he did not instruct Morano to pull forward, but instructed him to start the engine, release the brakes, and set the brakes again on Moss's signal. (RP 102-03, 294)

As Moss lifted the truck, Morano placed the truck in gear and began to move the truck forward. (RP 102-03, 144) As the truck moved forward, the chains broke free from the truck, causing it to roll over. (RP 144-45, 229, 295) Morano injured his right shoulder when the truck rolled over. (RP 118, 245-46)

¹ This perpetuation testimony was played before the jury on March 20, 2012. (RP 189)

² Witnesses routinely referred to a demonstrative schematic depicting the alternative methods for attaching the chains to the trailer. (CP 719) Method 4.1 depicts how Morano alleged Moss attached the chains, 4.2 depicts how Morano alleged the chains should have been attached, and 4.3 depicts how Moss alleged he attached the chains.

B. At Trial On Morano's Negligence Claim, The Trial Court Allowed Jurors To Directly Question Skyway's Expert Witness On Subjects Outside The Scope Of The Parties' Examination.

Morano sued Skyway and Moss alleging that Moss negligently attached the chains to his truck, negligently instructed him to pull the truck forward while the chains were attached, and negligently attempted to move Morano's truck with insufficient equipment. (CP 1-4) The case was tried to a jury before King County Superior Court Judge Michael Hayden ("the trial court").

At trial Skyway called Jared Storer as an expert witness. Storer testified on direct examination that he would have sent one truck and driver to conduct the recovery, that he would have involved the truck driver in the recovery, that he would have the engine on during recovery, and that he would not have advised the driver to step on the gas while the truck was hooked up to the chains. (RP 199-201) At the conclusion of counsel's examination of Storer, the trial court permitted the jurors to submit written questions pursuant to CR 43(k). (RP 206-10) After the trial court had asked all written questions, the trial court prompted the jury for further questions. (RP 211)

The jurors then directly asked Storer how he believed Moss attached the chains to the truck and asked that Storer be shown pictures (Ex. 8) of the damaged truck. (RP 215-17) Over Skyway's counsel's objection that the jurors' questions were "way beyond direct" and that she never discussed the issue with Storer (RP 213-15, 218), Storer reviewed the pictures of damage to the truck and testified that it was more probable that Moss attached the chains as depicted in method 4.1 than 4.3, *i.e.*, he wrapped the chains around the truck's aluminum siderails without wrapping them around the truck's frame. (RP 217 ("It does lead me to believe that it was hooked up like 4.1. . . . it looks more like 4.1, I suppose, where the sides are torn away -- if the entire load was being supported on that outside rail, and there was a significant shock load, it would have caused the rail to tear away"))

The jury returned a verdict of \$700,000 for Morano's shoulder injury. (CP 402-03) Skyway moved for a new trial. (CP 431-42) The trial court denied the motion. (CP 700-03) Skyway timely appealed. (CP 704-15)

V. ARGUMENT

The trial court failed to follow the procedures mandated by CR 43(k) by allowing jurors to directly question Storer. The trial court's error prejudiced Skyway by permitting juror questions on areas beyond the scope of Storer's previous testimony that ultimately produced testimony supporting Morano's theory of liability. This court should reverse and remand for a new trial in which jurors are not permitted to directly question witnesses.

A. **The Trial Court Failed To Follow The Strict Safeguards Imposed On Juror Questioning Of Witnesses By CR 43(k).**

The trial court erred in allowing direct juror questioning of Skyway's witness in contravention of the plain language of CR 43(k):

The court shall permit jurors to submit to the court written questions directed to witnesses. Counsel shall be given an opportunity to object to such questions in a manner that does not inform the jury that an objection was made. The court shall establish procedures for submitting, objecting to, and answering questions from jurors to witnesses. The court may rephrase or reword questions from jurors to witnesses. The court may refuse on its own motion to allow a particular question from a juror to a witness.

Until recently courts prohibited jurors from questioning witnesses. *Adoptions And Amendments Of Rules Of Court*, 147

Wn.2d 1101, 1247 (2002) (adopting CR 43(k)); **State v. Doleszny**, 176 Vt. 203, 844 A.2d 773, 779 (2004) (noting “significant recent trend towards endorsement of the practice”). Courts noted the inherent dangers associated with allowing jurors to question witnesses. **State v. Munoz**, 67 Wn. App. 533, 538, 837 P.2d 636 (1992) (noting “[p]otentially serious problems could arise from juror questions” and that improper juror questions could compromise “the adversarial procedure of a trial”), *rev. denied*, 120 Wn.2d 1024 (1993); **DeBenedetto by DeBenedetto v. Goodyear Tire & Rubber Co.**, 754 F.2d 512, 516 (4th Cir. 1985) (“the practice of juror questioning is fraught with dangers”).

Allowing jurors to question witnesses risks transforming the jury from a neutral arbiter tasked with hearing and evaluating evidence into an advocate responsible for the production of evidence. **State v. Monroe**, 65 Wn. App. 245, 253, 828 P.2d 24 (1992) (acknowledging “the risk of a subtle shift from the role of neutral fact-finder to that of advocate”)³, *rev. denied*, 119 Wn.2d

³ **Munoz** and **Monroe**, decided prior to the adoption of CR 43(k), both rejected an appellant’s objection to juror questions raised for the first time on appeal because they could not demonstrate prejudice from the questions. As explained in § V.B, the jury’s questions prejudiced Skyway because they exceeded the scope of the parties’ examination and generated answers beneficial to Morano’s theory of the case.

1019; *Day v. Kilgore*, 314 S.C. 365, 444 S.E.2d 515, 517 (1994) (“One of the most dangerous aspects of allowing juror questions is that a juror may lose his impartiality in the fact-finding process by active participation in the trial itself.”).

Juror questions also risk promoting deliberations among jurors prior to the submission of all the evidence. *DeBenedetto*, 754 F.2d at 517 (“To the extent that such juror questions reflect consideration of the evidence-and such questions inevitably must do so-then, at the least, the questioning juror has begun the deliberating process with his fellow jurors.”); *Day*, 444 S.E.2d at 517 (juror questions “encourage[] premature deliberations”). This is particularly true where a juror directly asks a question within the hearing of the other jurors. *DeBenedetto*, 754 F.2d at 517 (“stating the question and receiving the answer in the hearing of the remaining jurors begins the reasoning process in the minds of the jurors, stimulates further questions among the jurors, whether asked or not, and generally affects the deliberative process”).

Allowing jurors to directly question witnesses is also problematic because it presents counsel “the Hobson’s choice of risking offending a juror by an objection or allowing improper or

prejudicial testimony to be given,” **Munoz**, 67 Wn. App. at 536; **Day**, 444 S.E.2d at 517 (noting “the dilemma of whether to object and risk alienating the judge or jury, or remain silent and risk waiving the issue for appeal purposes”); **United States v. Hernandez**, 176 F.3d 719, 726 (3d Cir. 1999) (“the dangers of allowing jurors to ask questions orally far outweighs any perceived benefit of allowing juror questioning of witnesses”).

In order to alleviate these concerns, courts that allow juror questions require that the questions be submitted in writing and that counsel be given an opportunity to object to the questions outside the presence of the jury. **Monroe**, 65 Wn. App. at 253 (“many states require a procedure, similar to the one used by the court below, where counsel have an opportunity to object to the question out of the jury’s hearing”); **Day**, 444 S.E.2d at 519 (1994) (“Because of the inherent dangers in allowing jury questions, we hold that an abuse of discretion occurs when the procedures [requiring written submission of questions] are not strictly adhered to by the trial judge.”); **People v. Wilds**, 141 A.D.2d 395, 397, 529 N.Y.S.2d 325 (1988) (remanding for new trial where trial court allowed “jurors to spontaneously comment upon and propound

questions without the prior approval of the trial court”); **United States v. Rawlings**, 522 F.3d 403, 408 (D.C. Cir. 2008) (“the court . . . should require that all juror questions be submitted in writing, should review them with counsel out of the presence of the jury (evaluating objections, if any) and then, if it finds the question proper, should itself ask the question of the witness”).

Consistent with this authority, Washington’s CR 43(k) creates a carefully structured exception to the general prohibition on juror questions by requiring that all such questions be submitted in writing and that counsel be given an opportunity to object outside the presence of the jury. See also Washington State Jury Commission, *Report to the Board for Judicial Administration* (2000) (“Jury Commission Report”) at 60 (emphasizing that jury questions should be “subject to careful judicial supervision” and that “oral questions are not allowed”)⁴.

Here, the trial court allowed direct questioning of Skyway’s expert witness Jared Storer by jurors in violation of CR 43(k)’s mandate that the court “shall permit jurors to submit to the court *written questions*” and that “[c]ounsel shall be given an opportunity

⁴ (Available at [http://www.courts.wa.gov/committee/pdf/Jury Commission Report.pdf](http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf))

to object to such questions in *a manner that does not inform the jury that an objection was made*". (emphasis added) The word "shall" denotes a mandatory action. **Scannell v. City of Seattle**, 97 Wn.2d 701, 704, 648 P.2d 435 (1982), *amended*, 656 P.2d 1083 (1983). The trial court clearly violated CR 43(k) by allowing direct juror questions without requiring that they be submitted in writing and without giving counsel an opportunity to object outside the presence of the jury. This court should reverse and remand for a new trial in which the jury is prohibited from asking direct questions of the witnesses.

B. The Trial Court's Violation Of CR 43(k) Prejudiced Skyway By Allowing Direct Juror Questioning On Subjects That Went Far Beyond "Clarifying" Storer's Previous Testimony.

The trial court's violation of CR 43(k) prejudiced Skyway by allowing jurors to question Storer about how Moss attached the chains to Morano's truck – an area outside the scope of the parties' examination and an area that Storer had not prepared to testify regarding. The jury's unfettered questioning eventually produced testimony beneficial to Morano's theory of liability and prejudicial to Skyway. The trial court's error requires a remand for a new trial in

which jurors are prohibited from asking direct questions of witnesses.

“An error in the admission of evidence requires reversal when the error is prejudicial.” *In re Guardianship of Stamm v. Crowley*, 121 Wn. App. 830, 843-44, 91 P.3d 126 (2004). “An error is prejudicial if it has a substantial likelihood of affecting the outcome of the case.” 121 Wn. App. at 844. “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, ¶¶22, 230 P.3d 583 (2010) (internal quotation omitted).

Jurors’ questions that exceed the scope of the parties’ examination pose a substantial risk of prejudice. Jury Commission Report at 60 (trial court should instruct jurors prior to allowing questions that “[t]he sole purpose of jurors’ questions is to clarify the testimony” and “[j]urors are to remember that they are not advocates and must remain neutral fact finders”); *Day v. Kilgore*, 314 S.C. 365, 444 S.E.2d 515, 519 (1994) (remanding for new trial where jury questioned witness regarding unadmitted exhibit); *State v. Munoz*, 67 Wn. App. 533, 538, 837 P.2d 636 (1992) (juror

question did not prejudice defendant where question was “merely a clarification of the prior testimony”); **United States v. Groene**, 998 F.2d 604, 606 (8th Cir. 1993) (direct questions by jurors did not prejudice defendant because “they elicited only clarifications of previous testimony, cumulative evidence, or evidence that supported [defendant]’s theory of defense”), *cert. denied*, 510 U.S. 1072 (1994); **Albarran v. State**, 96 So.3d 131, 179 (Ala. Crim. App. 2011) (affirming because “[t]he majority of the [jury] questions dealt with matters that had already been addressed on direct examination or on cross-examination”), *cert. quashed*, 96 So.3d 216 (Ala. 2012).

The trial court’s violation of CR 43(k) prejudiced Skyway and requires a new trial. The trial court allowed the jury to ask questions that went far beyond “clarifying” questions and instead allowed the jury to broach subjects that Storer had not previously testified to. Skyway’s counsel objected to the jury’s questions of Storer regarding the method Moss used to attach the chains to Morano’s truck because they were “way beyond my direct” and because she had never discussed the issue with Storer. (RP 213-

14, 218) Skyway's counsel could not press this objection further without risking offending the jurors.

Over objection, the jury repeatedly asked Storer about how Moss attached the chains to the truck – a subject he did not testify to on direct or cross and on which he had not prepared to testify. (RP 211-17) At a juror's request, Storer reviewed an exhibit he had not reviewed during his examination by the parties. (RP 215-17) Referencing this exhibit, Storer testified that Moss likely attached the chains only to the aluminum siderails (Method 4.1), the method Morano argued supported his theory of liability. (RP 217) This testimony – from Skyway's expert called to defend its actions – prejudiced Skyway by undermining its assertion that Moss attached the chains to the frame of Morano's truck. Because this testimony posed a substantial risk of prejudicing Skyway and there is no way to know what value the jury placed on this testimony, a new trial is required. **Salas**, 168 Wn.2d at 673, ¶¶22.

The trial court committed reversible error in permitting the jury to question a witness about a subject that was beyond the scope of his direct testimony and which he had not prepared, using evidence he had previously received. Rather than subjecting the

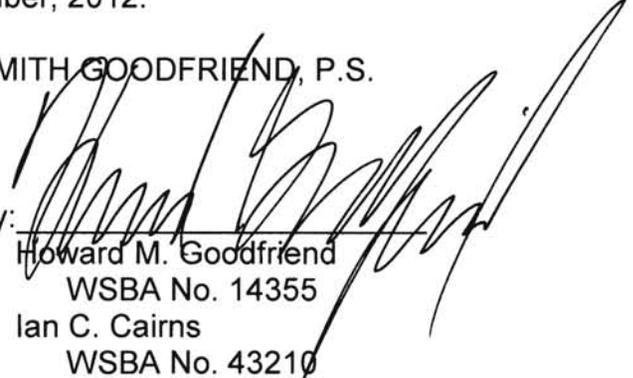
jurors' questions to "careful judicial supervision" the trial court allowed the jury to delve into a completely new area to the prejudice of Skyway. This court should reverse and remand for a new trial in which the jury is prohibited from asking questions directly of the witnesses.

VI. CONCLUSION

This court should vacate the jury's verdict and the judgment entered upon it, and should remand for a new trial.

Dated this 7th day of November, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 8, 2012, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 8th day of November, 2012.



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