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No. 70767-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TWYLA KILL and TERRY KILL,

Appellants,

vs.

CITY OF SEATTLE,

Respondent.

REPLY BRIEF OF APPELLANTS

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I. OVERVIEW OF REPLY

The trial court erred in excluding Ms. Gill's opinions and granting the City's motion for summary judgment. The trial court misapprehended the evidence and misapplied the law. Instead of acting as a gatekeeper the trial court substituted its judgment of the evidence for the jury's.

The Court's review of the trial court's orders granting summary judgment, excluding Ms. Gill's testimony and denying a *Frye* hearing is de novo.

There's no dispute that the City owes a duty to maintain its sidewalks and in-sidewalk installations in a reasonably safe condition for pedestrians. That's virtually always a question of fact.

For at least the last 25 years the City's own standards and practices have required some form of slip-resistance treatment for utility covers and surrounding rims in a sidewalk. The City's CR 30(b)(6) representative Steven Read explained "[y]ou definitely want a nonskid surface" in a sidewalk and that diamond plate rims were available when the handhole was installed. The smooth rim Ms. Kill slipped on didn't have a slip-resistant treatment of any kind (but the cover did). The City's longstanding failure to comply with its own standards and practices is evidence the rim wasn't reasonably safe.

The City never tested the rim's slip resistance. The City's expert Mr. Flynn never testified the rim was adequately slip-resistant or reasonably safe.

The City argued below the 0.5 standard is not valid based on recent research and therefore a *Frye* hearing was necessary regarding Ms. Gill's testimony comparing her test results to the 0.5 standard. Ms. Gill testified the 0.5 standard was and remains generally accepted as a benchmark for reasonable safety. The trial court should have simply admitted Ms. Gill's testimony under ER 702 since there was an absence of evidence from the City conclusively establishing that the 0.5 standard was not generally accepted. At a minimum, the trial court should have held a *Frye* hearing to evaluate general acceptance of the 0.5 standard before excluding Ms. Gill's testimony on that basis.

The crux of the trial court's ER 702 analysis of Ms. Gill's testimony was whether her tribometer was calibrated. The evidence established beyond a doubt that Ms. Gill's tribometer was accurate and properly calibrated during each of her two field tests. The trial court agreed that using a tribometer to measure slip resistance is generally accepted and capable of producing reliable results. Because Ms. Gill's tribometer was calibrated and her methodology was reliable her opinions based on both tests should have been admitted under ER 702.

The City's arguments about Exel's testing and ASTM F2508 are just that. They would have had some force if Mr. Flynn had testified about those issues specifically, particularly about Exel's determination of the confidence interval applicable to the model of the English XL VIT Ms. Gill used in her testing. He didn't.

Similarly, the City offered no expert testimony from Mr. Flynn or another expert that it was appropriate to "clean" the rim in order to obtain a "baseline" coefficient of friction (COF) reading. Ms. Kill, Dr. Kill and Dr. Scher testified that's not generally accepted. The difference in Ms. Gill's test results based on surface contaminants (the rim always testing well below 0.5) don't make her testing unreliable. If there was any scientific criticism of this approach a *Frye* hearing should have been held.

Ms. Gill offered admissible opinions about the rim's safety beyond her slip-resistance testing which created an issue of fact.

ER 403—an "extraordinary remedy"—does not preclude Ms. Gill's testimony.

In sum: Ms. Gill's testimony should have been admitted under ER 702. At minimum before excluding Ms. Gill's testimony based on underlying scientific principles the trial court should have conducted a *Frye* hearing (as the City itself had requested) before proceeding to ER

702 and ER 403. There was a genuine issue of fact whether the rim was reasonably safe and the trial court erred in granting summary judgment.

The Court should reverse the trial court's orders.

II. ARGUMENT

A. In its De Novo Review the Appellate Court Considers All Evidence Before the Trial Court, Including Evidence Considered Upon Reconsideration

The City doesn't dispute that the standard of review of the trial court's rulings excluding Ms. Gill's testimony and granting summary judgment is de novo. The appellate court considers all of the evidence before the trial court, including evidence considered in a motion for reconsideration.

The City states that "issues first raised" in a motion for reconsideration after summary judgment are not generally considered on appeal.¹ Ms. Kill did not raise "new issues". The issues on reconsideration were the same as they were on summary judgment: whether there was a genuine issue of fact regarding the rim's safety and whether Ms. Gill's opinions were admissible.

¹ The City cites *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013). *Schreiner* held the appellant's entirely new legal theories (failure to cure and equitable estoppel) could not be considered because they were not raised in the initial summary judgment motion. *Id.*

B. The City is Not an Insurer of Pedestrian Safety—But it Owes Pedestrians a Duty to Keep Sidewalks Reasonably Safe

There's no disagreement between Ms. Kill and the City about the fundamentals of the applicable standard of care. An absolutely safe sidewalk isn't required. The City doesn't insure pedestrian safety. But sidewalks—and anything put in a sidewalk—has to be reasonably safe for pedestrians.

C. Falls Alone Don't Establish Negligence—But Whether a Sidewalk is Reasonably Safe is Generally an Issue of Fact

Whether a sidewalk is reasonably safe is generally a question of fact and the City cites no contrary authority. The *Smith* cases cited by Ms. Kill and referenced by the City confirm that general proposition as applied to utility covers specifically.² The key fact in those cases for the jury to decide was whether the utility covers were reasonably safe because they were smooth, not how they became smooth:

“If a walk is constructed of material so smooth and hard that travelers shod in the ordinary way are defeated or obstructed in their attempts to pass over it, by inability to get the hold upon it with their feet, which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk cannot be said, as matter of law, to be safe and convenient. And if in a sidewalk, the chief part of which is in proper condition for travel, a small part of the surface is constructed of material different from the remainder, and so smooth and slippery that a foot traveler, stepping suddenly upon it from the portion otherwise

² *Smith v. City of Spokane*, 103 Wn. 314, 174 P. 2 Wn. 1918 (1918); *Smith v. City of Tacoma*, 51 Wn. 101, 98 P. 91 (1908).

constructed, necessarily or probably slips and is likely to fall, it cannot be said, as matter of law, that such walk is not defective.” Within the above test it was for the jury to say whether this sidewalk was defective or not.³

D. The City’s Standards and Practices for Utility Covers—and its Failure to Follow Them—Are Admissible as Evidence of Negligence and Created a Genuine Issue of Fact

The City didn’t state in its discovery responses that it was known only that the handhole was installed prior to 1990. Instead, the City represented the handhole “was likely installed in 1989 (when the Bank Centre building was completed) or before.” The City went further, representing it was likely the cover “complied with any existing standard at the time of installation.”

The City’s 1986 standard for handholes—three years before the “likely” installation date of 1989—required a diamond-plate rim. And whether or not that standard was in effect when the handhole was installed, the City agreed that diamond plate rims (and covers) were available when the handhole was installed and that diamond plate met the definition of “nonskid” at the time.

The only reasonable inference from the City’s own standards and testimony is that the smooth rim of the handhole did not comply with

³ *Smith*, 51 Wn. at 104 (internal citations omitted; emphasis added).

standards existing at the time it was installed. No “speculation” is required.

The City’s assertion that the “flat metal rim” meets present industry standards is disingenuous. If the Court reads the source for that statement (Mr. Baker’s declaration), it will observe that Mr. Baker doesn’t say that a flat smooth metal rim without a nonskid treatment meets present industry standards.⁴

There’s no argument that the City was required to bring the handhole up to current standards (by, *e.g.*, installing a SlipNot Grade 3 coarse cover). But the City was required to make the handhole reasonably safe. Standards and practices in place after the handhole was installed are evidence of what is reasonably safe. The fact that the City has consistently required a nonskid surface on covers and rims suggests that a smooth metal rim is not reasonably safe.

E. Ms. Gill’s Testimony Should Have Been Admitted Under ER 702

Ms. Gill’s tribometer was calibrated. Her methods were reliable. Her opinions should have been admitted under ER 702.

⁴ CP 292-295 (Baker Decl., Sub No. 40).

1. *Frye* and ER 702

Ms. Kill doesn't disagree with the City's recitation of black letter law. If the underlying scientific principles are generally accepted and the expert adheres to reliable methodology the testimony should be admitted under ER 702. However, if expert opinion is to be excluded based on the lack of general acceptance of underlying scientific principles, a *Frye* determination about the general acceptance of those principles must be made before proceeding to ER 702.

2. *Ms. Gill's Testimony About the 0.5 Standard Satisfies ER 702—In the Alternative, a Frye Hearing About the 0.5 Standard was Required*

The City contends that Ms. Gill's testimony about the 0.5 standard is not admissible under ER 702—when in its summary judgment motion the City (which has adopted the 0.5 standard⁵) requested a *Frye* hearing on that very issue.

⁵ The City concedes this but emphasizes the 2011 standard defining “non-skid” (section 1.07.1(3)) refers to an ASTM test method (C 1028) on a dry surface. First, the 2011 standard specifically applicable to handholes (section 9-34.6) calls for using “slip resistant steel plate” such as SlipNot Grade 3 coarse, which has a minimum COF of 0.8. Second, there was no testimony from the City that wet surfaces with a COF of less than 0.5 satisfy the 2011 standard. Third, the City's standard appears to refer only to the testing method (dry), not the dryness of the nonskid surface itself. (Ms. Gill testified that C 1028 isn't used for testing wet surfaces due to “stiction,” that ASTM now acknowledges C 1028 is inadequate for assessing slip safety and the standard is not going to be renewed by ASTM in 2014. CP 484-485 (Third Gill Decl., Sub No. 50, para. 3)). Finally, the conclusion to be drawn from the City's argument is nonsensical—why would a dry surface with a COF of less than 0.5 fail the official definition of “nonskid” but a wet surface of less than 0.5 would not? If a dry surface of less than 0.5 isn't adequately slip-resistant, isn't a wet surface of less than 0.5 also not adequately slip-resistant?

The validity of the 0.5 standard wasn't a basis for the trial court's summary judgment order. There the trial court expressly did not reach whether Ms. Gill's testimony about the 0.5 standard was admissible under ER 702, let alone whether the 0.5 standard is generally accepted. The 0.5 standard first appeared in the trial court's order denying reconsideration under the guise of ER 702 and 403 when it indicated "relative" tribometer results could not be compared to an "objective" standard like 0.5.

The 0.5 standard is not a novel scientific theory. Ms. Gill testified at length about the 0.5 standard, its history and general/widespread acceptance and the related scientific literature (extending well beyond Mr. English's publication). In any survey of appellate cases involving slip resistance testing reference to the 0.5 standard is legion.

The ASTM F2508 committee didn't vote that the 0.5 standard was rejected. ASTM F2508 does not speak to the 0.5 standard or for that matter reasonable safety.⁶

The City hasn't shown conclusively that it's generally accepted that 0.5 is no longer a benchmark for determining reasonable safety (based on testing with an ASTM F2508-calibrated tribometer). Mr. Flynn's own opinion (here Mr. Flynn does not speak for the ASTM F2508

⁶ Section 5.3.4 reads: "The validation and calibration procedure defined by this practice is not intended to establish a "safe threshold" value for any walkway surface." See Appx. A-4, p. 2.

committee)—that “current science” does not support that a COF measurement below 0.5 is unreasonably dangerous—is just that. He agreed that a calibrated tribometer’s results can be compared back to something (slip studies using the four reference surfaces). He testified that if Ms. Gill’s tribometer satisfied ASTM F2508 “we would have some basis for saying the tested surface is roughly equivalent to Vinyl Composition tile [VCT], or much more slip resistant than such tile.”⁷ (In the study referenced by Mr. Flynn 7 out of 20 test subjects slipped on wet VCT).⁸

The 0.5 standard—recognized by the City’s own standards and practices⁹—serves as a point of reference for tribometer test results because for decades it’s been recognized as a benchmark for reasonable safety.¹⁰ Just because a surface is less than 0.5 doesn’t mean someone will

⁷ CP 459 (Second Flynn Decl, para. 9).

⁸ Respondent’s brief at pp. 8-9.

⁹ Begging the question: Why does the City use the 0.5 standard at all if it no longer has meaning in determining if a walkway surface is reasonably safe?

¹⁰ The City intimates that Mr. English said the 0.5 standard for is a “myth”. Respondent’s brief at pp.5-6. In fact, this is what Mr. English said:

...It is not primarily the coefficient of friction of a floor surface that determines its safety for walking. It is usually a localized spot that is slipperier than the rest of the floor that causes the unsuspecting and unprepared pedestrian to slip and fall...if an unexpected slippery spot occurs on a floor with an overall COF of 0.5, a classic heel slip could be expected to occur.

This is not to criticize the 0.5 COF as a threshold of safety. There is little controversy over the safety of the .5 number. Most people can walk on most surfaces with a slip index of less than 0.3, and the .5 gives a margin of safety....

slip on it. But it's the point at which an unacceptable number of falls will occur.

The Powers/USC studies referenced by Mr. Flynn and the City weren't about whether surfaces were unreasonably slippery, but traction demand involving a select population¹¹ and tribometer variability. The purpose of the studies was not to determine a standard for reasonable safety and Mr. Flynn never testified otherwise.¹²

The solution to the issue of tribometer variability was to develop a protocol for standardizing tribometers, not to conclude that tribometers "fail to work". ASTM F2508 was designed to control for tribometer "relativity" so their results could be meaningfully compared to something.

Ms. Gill explained tribometer results can be compared with the 0.5 standard. She didn't testify the 0.5 standard was an "absolute safety threshold," but that it's an indicator for when a surface is adequately slip resistant with a margin of safety. She testified the wet rim wasn't

...If a floor becomes dangerously slippery when wet...it must be treated to make it safer under the contaminated conditions.

(Emphasis added.). CP 401-403 (W. English article, Ex. 3 to Groshong Decl., Sub No. 45).

¹¹ The parameters/limitations of the studies are referenced in sections 5.3.1 through 5.3.3 of ASTM F2508, noting that "the study sample population of pedestrians and conditions is not representative of the larger general population of pedestrians," "[t]he shoe style and sole material is not representative of all combinations available in the marketplace" and "[t]he reference surfaces...are not representative of all walkway surfaces."

¹² The studies initially determined the point at which subjects actually slipped on four wet surfaces. Then in another study a variety of tribometers read the surfaces and the results were compared to actual slips.

reasonably safe not just because it was less than 0.5, but because (1) the rim tested so far below 0.5; (2) the surrounding concrete offered much greater traction and (3) it's generally recognized that wet smooth metal is dangerously slippery.

The Court should have admitted Ms. Gill's opinions under ER 702 without reaching the 0.5 standard. If this case was going to be a referendum on the 0.5 standard—*viz.*, whether it was generally accepted in light of ASTM F2508 and underlying studies—a *Frye* hearing should have been held first, just as the City originally requested.

3. *The Evidence Showed that Ms. Gill's Tribometer was Properly Calibrated*

i. *Ms. Gill's Tribometer was Calibrated During Her First Field Test*

Ms. Gill's tribometer was properly calibrated at the time of her first field test (before ASTM F2508 took effect).

Ms. Gill's tribometer was annually calibrated by Excel. Before testing Ms. Gill calibrated her tribometer using a reference surface with a known COF in accordance with the English XL VIT User's Guide. That's all that was required according to the generally accepted methodology at the time.

The trial court acknowledged ASTM F2508 didn't apply to Ms. Gil's first test. The trial court's only criticism of the first field test was

that there wasn't a record of Ms. Gill's reference testing results. As she explained, it's not usual practice to maintain such a record, nor is there a need to. If the tribometer fails calibration based on the reference testing, it's sent to the manufacture for recalibration. If it doesn't, the field test can proceed.

The trial court erred in excluding the results of Ms. Gill's first field test on the basis that her tribometer wasn't calibrated.

ii. *Ms. Gill's Tribometer was Calibrated During Her Second Field Test*

The trial court's analysis of Ms. Gill's test results compared to Excel's overlooked or disregarded the confidence interval established by Excel as the manufacturer of the English XL VIT (± 0.03 for surfaces with slip resistance values of less than 0.50 and ± 0.05 for surfaces with slip resistance values greater than 0.50).

The confidence interval is referenced in Excel's January 16, 2012 ASTM F2508 Validation Report for the English XL VIT model used by Ms. Gill in her second field test, issued a year and a half before these issues were litigated in this case (refuting the City's accusation that this was Mr. Widas' after-the-fact justification of a customer's tribometer):¹³

¹³ Appx. 5, p. 3 (CP 636) (Validation Report).

Note that the 95th percentile confidence interval for Peter Widas performing the testing was less than ± 0.006 for all reference surfaces, which is substantially more accurate than required for statistical differentiation of the reference surfaces, and/or substantially more accurate than required for ranking of the reference surfaces.

Based on the practical range of accuracy required for a walkway tribometer to meaningfully measure slip resistance to assess the relative risk for human slip and fall injury, and based on other testing and analyses, Excel Tribometers LLC, as the manufacturer and supplier of the XL VIT with sequencer-model, has established a 95th percentile confidence interval for the XL VIT with sequencer-model of ± 0.03 for slip resistance values equal to or less than 0.50, and ± 0.05 for slip resistance values greater than 0.50.

The City argues this margin of error is an impermissible “fudge factor”. But its argument is just that. The City never offered any testimony from Mr. Flynn or any other evidence that the margin of error established by Excel to establish the confidence interval is inconsistent with ASTM F2508 or renders tribometer results inaccurate.

The trial court remarked and emphasized: “Critically, none of the calibration results produced by Ms. Gill fall within these intervals [of ± 0.006].” But as Excel’s Validation Report confirms, the measurements from which the confidence interval is defined are more precise than can be accurately read (the degree of precision for the English XL VIT in determining the upper and lower limits of the 95th percentile confidence interval was less than ± 0.006 for all reference surfaces).¹⁴ Excel explained the confidence interval was based on testing and the practical

¹⁴ This is “substantially more accurate than required for statistical differentiation of the reference surfaces, and/or substantially more accurate than required for ranking of the reference surfaces.” *Id.*

range of accuracy required.¹⁵ That's why Excel as the manufacturer established the confidence interval as it did and why not only Ms. Gill but Mr. Widas concluded her tribometer satisfied calibration.

The City argues this margin of error produces a "tenfold deviation" but offered no evidence that this "deviation" has any effect on evaluating a tribometer's accuracy in measuring reference or field surfaces.

The City acknowledges the lack of testimony from Mr. Flynn, instead relying on ASTM F2508's "plain language". ASTM F2508 (which defers to suppliers in establishing confidence intervals) is not a statute or a contract that's construed as a matter of law. It is a scientific method that three scientists (Mr. Widas, Ms. Gill and Dr. Gill) have determined is not inconsistent with a confidence interval producing values that are more precise than can accurately be read. While certainly the trial court and the City are capable of reading and understanding ASTM F2508, neither has the expertise or experience necessary to apply it to the English XL VIT. That is the province of expert testimony.

To someone trained in tribometry and who knows how the English XL VIT actually works, the margin of error/confidence interval as defined by Excel isn't "fudge". And if there was any indictment of Excel's

¹⁵ *Id.*

confidence interval as incompatible with ASTM F2508 this should have been determined in a *Frye* hearing.

The City next argues Mr. Widas’ testing of Ms. Gill’s tribometer shows Ms. Gill’s tribometer “has never been in calibration”. The City offered zero testimony from Mr. Flynn regarding these test results or how they were inconsistent with ASTM F2508.

The results of Mr. Widas’ testing were and remain uncontroverted:

(1) Same tiles (Excel’s), different tribometers:

Reference Surface	Mean Value (Excel Validation Report—Excel Tiles)	Mean Value (Excel Calibration Testing—Excel Tiles)	Difference in Mean Values
RS-A (granite)	0.08	0.07	-.01
RS-B (porcelain)	0.13	0.12	-.01
RS-C (vinyl)	0.18	0.17	-.01
RS-D (ceramic)	0.61	0.58	-0.03

This test showed both tribometers measured the same surfaces within the requisite confidence interval. Based on this test Excel concluded Ms. Gill’s tribometer was calibrated.

(2) Same tiles (Ms. Gill’s), same tribometer:

Reference Surface	Mean Value (Gill Validation Report—Gill Tiles)	Mean Value (Excel Testing—Gill Tiles)	Difference in Mean Values
RS-A (granite)	0.07	0.08	+.01
RS-B (porcelain)	0.10	0.10	.00
RS-C (vinyl)	0.17	0.15	-.02
RS-D (ceramic)	0.85	0.64	-0.21

(When Excel tested the southwest quadrant of the RS-D ceramic tile that Ms. Gill had tested (the center produced a mean of 0.64) it produced a mean value of 0.84, a 0.01 difference.)

This test confirmed that Ms. Gill’s tribometer had accurately measured her tiles the first time.

(3) Different tiles, different tribometers:

<i>Reference Surface</i>	<i>Mean Value (Excel Validation Report—Excel Tiles)</i>	<i>Mean Value (Excel Testing—Gill Tiles)</i>	<i>Difference in Mean Values</i>
RS-A (granite)	0.08	0.08	0.00
RS-B (porcelain)	0.13	0.10	-.03
RS-C (vinyl)	0.18	0.15	-.03
RS-D (ceramic)	0.61	0.64	+.03

This confirmed that the two different tribometers reached virtually the same results (and within the confidence interval) despite each testing different tiles.

Since Ms. Gill’s tribometer was calibrated, we know (at a minimum) that the rim (measuring .21 at the second test) is slightly more slip-resistant than wet VCT (which about a third of test subjects actually slipped on) and much less slip resistant than wet ceramic. There was no evidence from the City that this result meant the rim was adequately slip-resistant.

In sum, Ms. Gill's tribometer was calibrated and therefore capable of taking accurate field measurements. Because (1) the trial court agreed ASTM F2508 is an appropriate methodology under *Frye*; (2) the trial court agreed that measurements from a calibrated tribometer at minimum would likely be admissible to prove the relative slipperiness of the rim; and (3) there was no evidence from the City that the rim's test results were indicative of adequate slip-resistance, her test results should have been admitted under ER 702.

4. *Tile Variability—A Largely Moot Issue*

The documented variability in the ASTM F2508 reference surface tiles is important for two reasons: (1) it explains why Ms. Gill's testing with her ceramic tile varied from Excel's ASTM F2508 validation testing with its ceramic tile—which concerned the trial court at the summary judgment hearing—and (2) tile variability appears to be a development which the ASTM F2508 committee didn't anticipate and which is now being actively discussed in the scientific community.

Again, Mr. Flynn—one of the architects of ASTM F2508—offered no testimony about tile variability or how it affected the analysis of Ms. Gill and Excel's testing.

In large part this issue has been rendered moot. Excel's testing fully addressed the trial court's concern about Ms. Gill's tile testing

“rougher” than Excel’s (because each tile was actually measured there is no need for Ms. Gill to show “what margin of error the variability of reference tiles adds to [her] calculation”). That said, if Ms. Gill’s test results are still going to be criticized as unreliable due to variations resulting from tile variability, it’s only fair to ask how ASTM F2508 can be reliably applied in practice (and be generally accepted) and serve as a basis for excluding her opinions if the standard itself doesn’t address that variability.

5. *Ms. Gill’s Testing Was Performed Under Substantially Similar Conditions—the Difference in Her Test Results Doesn’t Make Them Unreliable*

The rim when wet tested well below 0.5 in each of Ms. Gill’s field tests. The fact that there was a .14 difference in results does not mean that the tests were unreliable. It’s slipperier on some days than others. But the rim is always unreasonably slippery when wet.

As described in Ms. Kill’s opening brief, sufficient similarity between conditions—not identical conditions—is all that’s required for admissibility. Any variance goes to weight rather than admissibility.

Ms. Gill explained different surface contaminants likely explained the difference in results. She explained it was not generally accepted that the rim should be “cleaned” for a “baseline” reading because such a

reading isn't scientifically meaningful. (A pedestrian at 5th and Pike would never encounter a "clean" rim.)

The City never offered expert testimony from Mr. Flynn or any other witness that it was generally accepted that the surface should be "cleaned" before testing. It bears repeating that the City never tested the rim in any condition—wet, dry or "clean".

The City's citation to *Quinn v. McPherson*, 73 Wn.2d 194, 437 P.2d 393 (1968) is misplaced. There the appellate court explained the experiment at issue wasn't comparable in any way. *Id.* at 202. There the experiment involved pouring water down a drainpipe (vs. the rate of melting snow passing through a drainpipe) to illustrate the spread of water below the drainpipe. Conditions were so utterly dissimilar they prohibited comparison.

In this case, Ms. Gill tested the same rim, with the same smooth metal, with the same kind of known contaminant (water) having the most significant effect upon slip resistance. Conditions were sufficiently similar and comparable to determine the rim was unreasonably slippery when wet.

The problems with the expert testimony in the *Michaels v. Taco Bell* case weren't merely about accounting for potential or actual contaminants. There the expert didn't know what kind of tile was used

where the plaintiff's fall happened. He used soap solution in testing but didn't know if the floor was soapy at the time of the plaintiff's fall. His test results showed the damp floor was less slippery than the dry floor and he couldn't explain that counterintuitive outcome. The court concluded the sum of all errors made the testimony unreliable.

There was never any evidence that Ms. Gill's testing protocol was not generally accepted or unreliable. The jury should have been allowed to consider her test results. At trial the City would be free to explore the differences in conditions on cross-examination and through Mr. Flynn's testimony. The trial court substituted its own judgment for the process required by *Frye* and the jury's consideration of the evidence.

6. *Ms. Gill's Remaining Opinions About the Rim's Safety Were Admissible*

Ms. Gill's expert opinions weren't confined to her two tests of the rim. In general wet smooth metal tests below 0.5. It's generally accepted smooth metal shouldn't be used in a sidewalk.¹⁶ Smooth metal is usually given a nonskid treatment. Slips are more likely when a pedestrian moves from a surface with adequate traction (like wet concrete on a sidewalk) to

¹⁶ The trial court remarked that it's common knowledge that wet smooth metal is slippery. If that's so, (1) why is expert testimony needed to defeat summary judgment and (2) shouldn't the jury decide if the smooth rim was reasonably safe? (In any event Ms. Gill explained why wet smooth metal in a sidewalk is dangerously slippery.)

a much more slippery surface (like wet smooth metal surrounding a handhole).

All of these opinions were admissible and created a genuine issue of fact whether the rim was reasonably safe.

7. *Other Cases Suggest Differences of Opinion About Slip Resistance Testing Should be Determined at Trial*

The two federal cases cited by Ms. Kill about ER 702 and slip-resistance testing confirm that questions about experts' competing methodologies and testing should be weighed by the trier of fact.¹⁷

Phelps and *Rosenfeld* don't involve ASTM F2508.¹⁸ That's not why they're on point. They show that criticisms of the sort leveled by the City and the trial court about slip resistance testing and expert opinion should be decided through the adversary process.

F. ER 403 Does Not Preclude Ms. Gill's Testimony

ER 403 is an extraordinary remedy and the burden for excluding evidence on that basis is high. The jury would not be misled by Ms. Gill's testimony about the 0.5 standard and how it applies to slip-resistance testing with tribometers.

¹⁷ Brief of Appellants at 25-26.

¹⁸ *Phelps v. Stein Mart, Inc.*, Not Reported in F. Supp.2d, 2011 WL 1337362 (W.D. La. 2011); *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1194 (11th Cir. 2011).

The City argues Ms. Gill's test results have no meaning at all because (1) her tribometer wasn't calibrated and (2) there is no 0.5 standard.

But the trial court's ER 403 reasoning didn't depend on whether Ms. Gill's tribometer was calibrated. Instead, the trial court assumed that even a properly calibrated tribometer's "relative" results couldn't be compared to the "objective" 0.5 standard. That false dichotomy aside, the trial court decided an issue under ER 403 that the City had requested a *Frye* hearing on. If there was a question about Ms. Gill comparing her test results to the 0.5 standard a *Frye* hearing should have been held.

G. The Trial Court Should Have Conducted a *Frye* Hearing

Ms. Gill's testimony should have been admitted under ER 702 without resorting to *Frye* because it was shown that her opinions were reliable and it was not established that she relied on novel theories or principles which were not generally accepted. But if there was any question about whether the underlying scientific principles were generally accepted as suggested by the City a *Frye* hearing should have been held.

Whether Excel's confidence interval is consistent with ASTM F2508 implicates *Frye*. Whether it's now generally accepted that 0.5 is not the standard for reasonable safety implicates *Frye*. Whether ASTM

F2508 accounts for tile variability implicates *Frye*. Whether field surfaces should be cleaned before testing implicates *Frye*.

A *Frye* hearing was particularly necessary when there was no testimony from Mr. Flynn which supported the trial court's reasoning based upon the underlying science.

Ms. Kill hasn't waived her arguments about the challenges in applying ASTM F2508 due to tile variability (which were qualitatively known but not quantitatively accounted for until after Excel's testing). At the time of the summary judgment hearing all that was known was that Ms. Gill's ceramic tile tested "rougher" and Mr. Widas confirmed the tiles were variable due to manufacturing tolerances. The variability has since been tested and accounted for. In any event, if there's any lingering argument that Ms. Gill's testing didn't comply with ASTM F2508 due to her ceramic tile's inherent variability, a *Frye* hearing should have been held.

III. CONCLUSION

The trial court exceeded its gatekeeping role in assessing expert testimony and failed to ensure Ms. Kill's right to trial was preserved if there were genuine issues of fact about the rim's safety. The jury should assess Ms. Gill's opinions and whether the rim was reasonably safe. The Court should reverse the trial court's orders excluding Ms. Gill's

testimony (or alternatively order a *Frye* hearing) and granting summary judgment.

DATED this 17th day of March, 2014.

Attorneys for Appellants Kill

A handwritten signature in black ink, appearing to read "M D Myers", written over a horizontal line.

By: _____
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