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No. 71302-7-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

King County Case No. 11-2-39126-4 SEA

STATE FARM FIRE & CASUALTY, as subrogee for CAROLE
HAUSKINS; and CAROLE COE-HAUSKINS, a single woman,

Plaintiffs/Respondents,

v.

FORD MOTOR COMPANY, a foreign corporation,

Defendant/Petitioner.

APPELLANT FORD MOTOR COMPANY'S REPLY BRIEF

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I. INTRODUCTION

Plaintiffs' opposition brief fails to address in any meaningful way the most fundamental issues in this case. The product at issue here is a 1994 Town Car with a speed control deactivation switch ("SCDS") mounted at an angle on the proportioning valve and connected to a 2-amp fused jumper harness on the circuit powering the SCDS. No jury has ever determined that *this* product is defectively designed. Plaintiffs argue, in effect, that one jury's finding that a *different* product was defective under Minnesota law is sufficient to deny Ford its constitutionally-protected right to a jury trial on whether the product at issue here is defective under Washington law.

Plaintiffs' argument would be misguided even if this case involved nothing more than traditional, well-established principles of collateral estoppel because those principles require that the issue decided in the first case be *identical*—factually and legally—to the issue in the second case. But Plaintiffs' argument is even more inappropriate here because the Washington Supreme Court has never approved application of offensive nonmutual collateral estoppel in any case, let alone in a case involving the design of a mass-produced product. Such an application would condemn an entire product line based upon the vagaries of a single verdict, considered on an isolated record, controlled by the discretionary rulings of

an individual judge who excluded critical testing evidence, and under the law of a different jurisdiction.

Plaintiffs avoid addressing the fundamental issues surrounding this result by arguing evidentiary objections not previously made or preserved and suggesting disputed issues of fact that are not determinative of the legal issue before this Court. In addition, the analytical problems with Plaintiffs' argument are compounded by the fact that applying collateral estoppel in this case will not advance the goal of litigation efficiency. Plaintiffs made that impossible when they engaged in months-long discovery regarding their design defect claims—including discovery relating to testing that no jury had previously considered—and then waited until after the discovery cutoff, close to trial, to file their collateral estoppel motion. Further, the parties already tried this action once, resulting in a jury deadlocked on causation and a resultant mistrial. At this point, litigation efficiency would be best served by remanding for a jury determination of all issues of fact on all elements of Plaintiffs' Washington Product Liability Act ("WPLA") claim, including design defect.

II. AUTHORITY AND ARGUMENT

A. Washington Supreme Court Authority Mandates *De Novo* Review of an Order Granting Summary Judgment Based on Offensive Nonmutual Collateral Estoppel.

This Court reviews a summary judgment order *de novo*, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The same standard applies to review of a summary judgment order based upon collateral estoppel. “Whether collateral estoppel applies to bar relitigation of an issue is reviewed *de novo*.” *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305-06, 96 P.3d 957 (2004).

Plaintiffs argue, without precedent, that a “more lenient” abuse of discretion standard should apply to summary judgment orders based on offensive nonmutual collateral estoppel. Response Brief at 17-18. This argument is directly contrary to the Washington Supreme Court’s decision in *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001). In *Hadley*, the Court, without addressing whether Washington would recognize offensive nonmutual collateral estoppel, rejected application of the doctrine because it would work an injustice in the circumstances of that case. *Id.* at 312-15. In reaching this conclusion, the Court expressly held that “the question raised [application of offensive nonmutual collateral estoppel] flows naturally from the summary judgment order,” and that “[s]ummary

judgment decisions are reviewed *de novo* by appellate courts,” and, therefore, “we apply *de novo* review.” *Id.* at 310-11.

Further, a “lenient” abuse of discretion standard is inconsistent with *Parklane*, where the United States Supreme Court went to great lengths to explain the increased risk of injustice posed by the misapplication of offensive nonmutual collateral estoppel. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326–33, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). This risk of injustice requires a stringent standard of review, not a lenient one. Further, although the *Parklane* Court did not explicitly discuss the standard of review, the Court conducted a *de novo* review. *See id.* at 332–33 (assessing the propriety of applying collateral estoppel without deference to the trial court). Because Plaintiffs’ argument is directly contrary to Washington law and the analysis of the United States Supreme Court, *de novo* review is required.

B. The Trial Court’s Application of Offensive Nonmutual Collateral Estoppel to Find a Design Defect Under the WPLA Is Unprecedented Under Washington Law.

The Washington Supreme Court has never affirmed the application of offensive nonmutual collateral estoppel. Further, no Washington appellate court has ever addressed the propriety of offensive nonmutual collateral estoppel in the context of a WPLA action involving the design of a mass-produced product. Unable to rely on any Washington appellate

court decisions, Plaintiffs instead point to two federal district court decisions, *Seymour v. PPG Industries, Inc.*, 891 F. Supp. 2d 721 (W.D. Pa. 2012), and *Lange v. Heglund*, 391 F. Supp. 128 (W.D. Wa. 1974). The Pennsylvania district court in *Seymour* relied exclusively on the Washington Supreme Court's decision in *Hadley* to conclude that "Washington courts have endorsed the use of nonmutual offensive collateral estoppel." 891 F. Supp. 2d at 731. Perhaps unfamiliar with the entire body of relevant Washington case law, the Pennsylvania district court failed to recognize that *Hadley* is one of a handful of cases where Washington appellate courts have assumed, without deciding, that offensive nonmutual collateral estoppel would be recognized while rejecting specific requests for its application. *See* Opening Brief at 18–20 (discussing the evolution of collateral estoppel in Washington). In contrast, the Washington district court in *Lange* expressly recognized that there was no definitive guidance from the Washington appellate courts (although *Lange* was decided before *Hadley*). 391 F. Supp. at 130.

Even if *Hadley* can be read to endorse application of offensive nonmutual collateral estoppel in *some* cases, it does not follow that the Washington Supreme Court would endorse application of the doctrine in *all* cases, especially cases involving alleged design defects in mass-produced products. Indeed, the Washington federal district court in

Lange, while deciding to apply the doctrine in a dispute concerning the purchase of stock, recognized that it might be appropriate to reach a different conclusion in personal injury cases. *Id.*

This selective approach to applying the doctrine is precisely the approach taken by the Ohio Supreme Court in *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978 (Ohio 1983). In *Goodson*, the Court reaffirmed the general rule that mutuality was required. *Id.* at 987. At the same time, however, it recognized that it had departed from the requirement of mutuality in one of its recent decisions and that “there may well be other cases in which there are presented additional exceptions [to the mutuality requirement] which could be acceptable to this court upon the basis of serving justice within the framework of sound public policy.” *Id.* at 985, 987. Nevertheless, the court unequivocally held that product liability cases involving alleged design defects were not among the cases in which the court would depart from the mutuality rule:

Even though we currently entertain the thought of abandonment of the general principle requiring mutuality of parties, and within that broadened framework, we cannot accept the proposition that “offensive nonmutual collateral estoppel” be applied in actions involving issues of design negligence or defective design of mass-produced products particularly when the former adjudication of the issues arose out of a separate underlying incident.

* * *

In the overview, we hold that nonmutual collateral estoppel may not be used to preclude the relitigation of design issues

relating to mass-produced products when the injuries arise out of distinct underlying incidents.

Id. at 987, 988.

Plaintiffs dismiss *Goodson*, asserting that the Ohio Supreme Court merely “denied use of the [offensive nonmutual collateral estoppel] doctrine because operator error was a distinguishing factor between the two cases.” Response Brief at 22. But this interpretation of *Goodson* is incorrect; indeed, nowhere in the opinion is “operator error” even discussed (except by implication in the recitation of the facts). Moreover, the Syllabus of an Ohio Supreme Court decision states the law of the case. *Mominee v. Scherbarth*, 503 N.E.2d 717, 731 (Ohio 1986) (“A syllabus is the law of the case establishing principle and doctrine, binding alike on citizens and courts . . .”). Syllabus point 2 reads, quite simply: “In the absence of mutuality there may be no issue preclusion in the relitigation of design issues relating to a mass-produced product, especially when the former adjudication arose out of a separate underlying incident.” *Goodson*, 443 N.E.2d at 980. Thus, Plaintiffs incorrectly interpret *Goodson*, and its limitation on the application of offensive nonmutual collateral estoppel should be adopted by this Court.

C. Plaintiffs Failed to Prove that the Issue Decided in the Prior Actions Was “Identical In All Respects” to the Issue Here.

There are compelling reasons to anticipate that, when it decides the precise issue presented in *Goodson*, the Washington Supreme Court will adopt an approach similar to that of the Ohio Supreme Court. But this Court does not need to craft a new rule with far-reaching implications because this case can be decided on traditional collateral estoppel rules. Application of collateral estoppel—mutual or nonmutual, offensive or defensive—is *always* “limited to situations where the issue presented in the second proceeding is *identical in all respects* to an issue decided in the prior proceeding.” *Lopez-Vasquez v. Dep’t of Labor & Indus.*, 168 Wn. App. 341, 345-46, 276 P.3d 354 (2012) (quoting *LeMond v. Dep’t of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (quoting *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974))) (emphasis added). The recognized potential for injustice created by offensive nonmutual collateral estoppel requires that the identity standard be enforced even more rigorously in this case than in more traditional situations.

Moreover, the “identical in all respects” requirement necessarily arises out of the Washington Constitution, which provides that “the right of trial by jury shall remain inviolate.” Wash. Const. Art. I, § 21. Application of collateral estoppel is consistent with the right of trial by

jury only when the issues are truly identical because a litigant in a civil case is not entitled to a trial by jury ““unless and except so far as there are issues of fact to be determined,”” and ““once an issue has been resolved in a prior proceeding, there is no further fact finding function to be performed.”” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 268, 956 P.2d 312 (1998) (quoting *Parklane*, 439 U.S. at 336). But this rationale has no application if the issues are not ““identical in all respects”” because in such circumstances there are, by definition, additional issues that a jury has not yet determined. Ford’s right to have a jury determine those issues must remain inviolate.

1. The Factual Issue Here Is Not “Identical in All Respects” to the Factual Issue Decided in *Rausch*.

There can be no serious dispute that the issues in this case are not factually ““identical in all respects”” to those decided in *Duncan* or *Rausch*. Although their motion for summary judgment motion relied on *Duncan*, citing it dozens of times, Plaintiffs now concede that the *Duncan* verdict cannot serve as a basis for the trial court’s collateral estoppel determination. Response Brief at 25-26. Because the *Duncan* vehicle never had the recall fix—the 2-amp fused harness—installed, *Duncan* did not involve the same product as this case and the trial court’s reliance on the *Duncan* verdict was error.

Like *Duncan*, *Rausch* involved a materially different product than the product at issue here. The product at issue in *Rausch* was a 1999 F150 with a 2-amp fused jumper harness and an SCDS mounted vertically on the brake master cylinder that experienced a high level of vacuum pressure. CP 336; 665; 667-68; 679. In contrast, the product at issue here is a 1994 Town Car with a 2-amp fused jumper harness and an SCDS mounted at an angle on the proportioning valve where it experienced no vacuum pressure. CP 678; 699-701. In other words, the cases involve different vehicles, different model years, and different SCDS mounting locations and orientations. The analysis can and should stop here because the factual issues obviously are not identical in all respects.

Plaintiffs posit that these acknowledged differences can be disregarded because they are not significant, *i.e.*, that the test is “substantial similarity” and not “identical in all respects.” Even if Plaintiffs had legal support for this proposition (which they do not), Plaintiffs still had the burden of establishing that any difference (substantial or otherwise) was not material—a burden they have not met. *See, e.g., Luisi Truck Lines v. Wash. Utils. & Transp. Com.*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967) (“The party asserting collateral estoppel has the burden of showing that issues are identical” quoting 2 K. Davis, *Administrative Law Treatise* § 18.12 at 626 (1958)); *accord Dillon v.*

Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 65, 316 P.3d 1119 (2014) (“The party seeking the application of collateral estoppel has the burden of proof and ‘[f]ailure to establish any one element is fatal to the proponent’s claim.’” quoting *Lopez-Vasquez*, 168 Wn. App. at 345). Plaintiffs failed to produce any evidence to support their position that the acknowledged product differences were not material to the issue of factual identity.

In contrast, Ford presented uncontroverted evidence that mounting the SCDS at an angle on the proportioning valve (as it was installed in the *Hauskins* vehicle) instead of vertically on the brake master cylinder (as it was installed in the *Rausch* vehicle) significantly reduces the risk of fire. Even without the 2-amp fused jumper harness, an SCDS mounted at an angle on the proportioning valve (the *Hauskins* vehicle configuration) does not experience the high vacuum pressure that NHTSA determined led to seal failure and the resultant risk of fire. CP 667-68; 670; 679; 699-701. The difference in the risk of a fire is critical because the “likelihood of harm” is at the core of the WPLA risk-utility design defect analysis. *See, e.g.*, RCW 7.72.030(1)(a); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 330, 971 P.2d 500 (1999).

In an attempt to avoid addressing the material differences between the two product configurations, Plaintiffs instead argue that the different

mounting locations are irrelevant because Ford's recall notices allegedly "establish that the SCDS was defective regardless of the vehicle into which it was installed." Response Brief at 25. This assertion is factually and legally incorrect. The recall letters do not establish a product defect in the SCDS configuration in the *Hauskins* vehicle.¹ Ford has never recalled vehicles with an SCDS mounted at an angle on the proportioning valve and protected by a 2-amp fused jumper harness. Further, *no jury* has decided that "the SCDS was defective regardless of the vehicle into which it was installed." Plaintiffs resort to argument regarding *evidence* (the recall letters), not the *Rausch* verdict, in an attempt to circumvent the "identical in all respects" requirement under the collateral estoppel doctrine. Plaintiffs, in effect, are asking *this* Court to decide, based on the recall letters, that the SCDS is defective regardless of mounting location. But Article I, § 21 of the Washington Constitution unquestionably reserves that issue for the jury.

¹ Courts across the country hold that recall notices alone are insufficient *prima facie* evidence of a defect in a particular vehicle. *See, e.g., Glynn Plymouth v. Davis*, 120 Ga. App. 475, 477, 170 S.E.2d 848, 850 (1969), *aff'd* 175 S.E. 2nd 410 (1970); *Fields v. Volkswagen of Am., Inc.*, 1976 OK 106, 555 P.2d 48, 58 (Okla. 1976); *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 134 (6th Cir. 1984). Courts expressly hold that it is logically fallacious to use a recall notice to "make the transition from the general to the particular." *Vockie v. Gen. Motors Corp., Chevrolet Div.*, 66 F.R.D. 57, 61 (E.D. Pa. 1975); *Landry v. Adam*, 282 So. 2d 590, 596 (La. Ct. App. 1973); *Rose v. Figgie Int'l*, 229 Ga. App. 848, 854, 495 S.E.2d 77 (1997). Plaintiffs make this very error by arguing that the SCDS recall notices prove that the SCDS in Hauskins' Town Car was defective under the WPLA. Regardless of whether Plaintiffs' argument has any logical merit, that argument is for a jury, not this Court.

2. The Legal Issue Here Is Not “Identical In All Respects” to the Legal Issue in *Rausch*.

Responding to Ford’s argument that the Minnesota legal standard for design defect differs from the legal standard applicable in Washington—a proposition that they now concede, Response Brief at 29—Plaintiffs argue that it is enough if “the underlying analysis” is “‘substantially’ or largely the same.” Response Brief at 27. For this proposition, Plaintiffs cite *Friends of the Earth v. Hall*, 693 F. Supp. 904, 920 (W.D. Wash. 1988), *Cloud v. Summers*, 98 Wn. App. 724, 730, 991 P.2d 1169 (1999), and *LeMond*, 143 Wn. App. 797—all cases that expressly contradict Plaintiffs’ argument.

Friends of the Earth holds that collateral estoppel did not apply because (among other things) the first case involved “different legal standards.” 693 F. Supp. at 904. Similarly, *Cloud* recognizes that the party seeking application of collateral estoppel has the burden of proving that “the issue decided in the prior adjudication is *identical* with the one presented in the second action,” and it refused to apply the doctrine of collateral estoppel “[b]ecause the issue decided by the federal court and the issue presented in the present action are not *identical*.” 98 Wn. App. at 730, 735 (emphasis added). Finally, *LeMond* directly contradicts Plaintiffs’ position:

- “[A]pplication of collateral estoppel is limited to situations where the issue presented in the second proceeding is *identical in all respects* to an issue decided in the prior proceeding, and ‘where the controlling facts and *applicable legal rules remain unchanged.*’” *LeMond*, 143 Wn. App. at 805 (emphases added) (citations omitted).
- “[I]t was incumbent upon LeMond . . . to prove by ‘competent evidence’ that the issue presented in the second proceeding was *identical in all respects* to the issue decided in the prior proceeding, *including the applicable legal rules.*” *Id.* at 806 (emphases added) (citations omitted).

Plaintiffs admit that the jury instruction defining design defect in *Rausch* is different from the relevant instruction in Washington. Response Brief at 29. With this concession, the analysis should stop here. But even if Plaintiffs were correct (a proposition Ford disputes) and proof of “substantial similarity” rather than identity is sufficient, Plaintiffs still fail to meet the requisite burden. Under the WPLA’s strict liability approach, the reasonableness of the manufacturer’s conduct at the time of design is irrelevant; the exclusive focus is on the product’s characteristics, the safety performance of the product had it utilized an alternative design, and any detriment to the product (*e.g.*, higher cost, less effective characteristics) by virtue of incorporation of the alternative design. RCW 7.72.030(1)(a); *Falk v. Keene Corp.*, 113 Wn. 2d 645, 646, 782 P.2d 974 (1989). Minnesota law is fundamentally different. As articulated in the Minnesota Pattern Jury Instructions, quoted by Plaintiffs, under Minnesota

law, “[a] manufacturer has a *duty to use reasonable care to design a product* that is not unreasonably dangerous” Response Brief at 29 (quoting 4A Minn. Prac. Jury Instr. Guides—Civil CIVJIG 75.20 (5th ed.)) (emphasis added). Highlighting the importance of evaluating the conduct of the manufacturer, under Minnesota law, “[a] manufacturer’s duty to design products must be judged according to the knowledge and advances that existed at the time the product was designed.” *Id.* The jury was instructed to apply both of these duties of care in *Rausch*. CP 822.

The substantive difference between the two tests is exemplified in the closing arguments in *Rausch*, where plaintiff’s counsel took advantage of a discretionary evidentiary ruling that prevented Ford from introducing certain testing evidence. Rausch’s counsel suggested in closing argument that Ford failed to act with reasonable care by not testing the design of its product. *See* CP 601-03. Thus, in obtaining his verdict against Ford, Rausch was able to leverage a specific theory of recovery that would not have been available to him in Washington under the WPLA.²

D. Applying Offensive Nonmutual Collateral Estoppel in this Action Is Likely to Result in a Miscarriage of Justice.

In addition to the requirement to establish that the prior action was “identical in all respects,” Plaintiffs also must prove that application of

² Plaintiffs’ argument that Washington and Minnesota apply the same or similar “consumer expectations” test is misleading. The *Rausch* jury did not receive any instructions on the consumer expectation test. *See* CP 822-23.

offensive nonmutual collateral estoppel will not be unjust to Ford. *Hadley*, 144 Wn.2d at 311-12. Plaintiffs, again, fail to meet their burden.

1. Two of the Four Non-exclusive “Indices of Unfairness” Identified in *Parklane* Are Present Here.

Addressing Ford’s argument that application of collateral estoppel would be unjust to Ford in this case, Plaintiffs make the unsupported assumption that the only factors to consider are four examples of “indices of unfairness” identified by the United States Supreme Court in *Parklane*. Response Brief at 18-21. The *Parklane* Court expressly indicated that the four factors were not exclusive. *See Parklane*, 439 U.S. at 331 (“[W]here, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”) (emphasis added). In any event, Plaintiffs incorrectly argue that none of the factors identified in *Parklane* are present here. Two of those factors are present, one by analogy and one directly.

a. There Is No Logical Reason To Distinguish Between Prior and Subsequent (Actual or Potential) Inconsistent Verdicts.

The *Parklane* Court recognized that collateral estoppel may be “unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.” 439 U.S. at 330. As an example, the Court cited

Brainerd Currie's article in which he hypothesized a case in which 50 passengers are injured in a railroad crash, the defendant wins the first 25 suits, and the plaintiff wins the 26th. *Id.* at 330 n.14 (citing Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 *Stan. L. Rev.* 281, 304 (1957)).

Recognition that *previous* inconsistent verdicts would make application of collateral estoppel unfair “demonstrates the Court’s concern about verdict variability.” Byron G. Stier, *Another Jackpot (In)justice: Verdict Variability and Issue Preclusion In Mass Torts*, 36 *Pepp. L. Rev.* 715, 719 (2009). But limiting this principle to previous inconsistent verdicts “makes fairness turn on the luck of which verdict comes first in time.” *Id.* If the plaintiff’s verdict occurs first, a defense verdict may never occur because issue preclusion would prevent subsequent juries from deciding the liability issue. Thus, giving preclusive effect to the first verdict, as Plaintiffs request here, does not eliminate or mitigate the unfairness recognized in *Parklane*; it merely conceals it from sight. See Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 *Tex. L. Rev.* 63, 74 n. 77 (1988) (“The repeated use of a single initial finding would conceal the problem. . . . Even though the result is no less anomalous, we would never have the anomaly demonstrated. The system would maintain an appearance—though a false one—of regularity.”);

Stier, 36 Pepp. L. Rev. at 739 (“Preserving the appearance of consistency, issue preclusion fastens on the first verdict, even when it may not in fact be representative of what most juries would do.”).

In short, if fairness is the issue—as it must be—it makes no logical sense to consider previous inconsistent verdicts but not subsequent inconsistent verdicts (actual or potential). In either case, it would be patently unjust for the decision of one jury, applying one state’s law, with evidence controlled by one trial court, to be treated as a perpetual, nationwide decree that a manufacturer’s product design is defective as a matter of law in all jurisdictions where other juries—if allowed—could reach the opposite conclusion. *See generally* Stier, 36 Pepp. L. Rev. at 742 (“Imposing such a potentially outlier verdict on all subsequent cases is not fair.”). As the Ohio Supreme Court observed:

Just as the risk of an erroneous determination is increased by the complex nature of design issues, the potential impact of such a decision would be unfairly broadened by the offensive application of nonmutual collateral estoppel. This could result in a single jury, sitting in review of certain limited facts, entering a verdict which would establish safety standards for a given product for the entire country. It would not be prudent to raise a decision made by one jury in the context of one set of facts to the standard under which all subsequent cases involving separate underlying factual circumstances are judged.

Goodson, 443 N.E.2d at 987. Plaintiffs fail to provide any principled rebuttal to this argument.

b. Procedural Opportunities Are Available Here That Were Unavailable in the First Case.

The Court in *Parklane* also recognized that it would be unfair to apply collateral estoppel where “the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.” 439 U.S. at 331. As Ford discussed in its Opening Brief, the trial court in *Rausch* excluded Ford’s in-house testing (referred to as “Building 4 testing”). That testing showed that a 2-amp fuse would blow before the current reached the level necessary to start a fire at the SCDS. Opening Brief at 7-8, 11, 29-30. Thus, this case affords Ford an important procedural opportunity that was not available in the first case—the admission of critical testing evidence excluded in *Rausch*.

A number of courts have concluded that the opportunity to introduce evidence not before the fact finder in the prior action precludes application of collateral estoppel. *See, e.g., Carpenter Co. v. BASF SE (In re Urethane Antitrust Litig.)*, 2013 U.S. Dist. LEXIS 179339, 46-47 (D. Kan. Dec. 16, 2013) (“[T]he Court concludes that this additional evidence that Dow may be able to use in these direct actions weigh against application of collateral estoppel in this case.”); *Rye v. United States Steel Mining Co.*, 856 F. Supp. 274, 279 (E.D. Va. 1994) (“Because the defendants were unable to or precluded from introducing evidence which

may have affected the Court's ruling [in the prior case] ... the Court does not believe it would be appropriate to preclude this issue from being litigated in [later] actions.”); *Strietmatter v. Procter & Gamble Co.*, 657 F. Supp. 548, 550 (D. N.M. 1983) (“While I do not know how I will rule when presented with this situation [whether to admit evidence with a limiting instruction not given in the first case], it may be that the trial in the present action will afford the Procter & Gamble companies a procedural opportunity which was not available to them in [the prior case] and which may cause a different result.”); *Herzog v. Lexington Township*, 167 Ill. 2d 288, 296, 657 N.E.2d 926, 930-31 (1995) (fact that prejudicial evidence admitted in the first case was not admissible in the second case was a “procedural opportunity” not available in the first case, making application of collateral estoppel unfair).

Plaintiffs at one point complain that the factual assertions made in Ford's brief concerning the “Building 4 testing” lack “proper foundation” because (for example) Ford's counsel did not refer to the testing as “Building 4” testing in his declaration. Response Brief at 11-13. At almost the same time, however, Plaintiffs admit that it is “true” that “Mr. Hoffman was not allowed to testify about ‘Building 4 testing,’ nor were the documentary results of such tests allowed into evidence.” Response Brief at 12 n. 1; *see also* Response Brief at 31-32 (“As for the ‘Building 4’

and ‘David Reiter’ testing Ford attempted to have the same admitted in that trial, but the Court denied admission.”).

Plaintiffs repeatedly assert that a Ford witness “conceded that the 2-amp fuse repair actually failed its design purpose and did not completely eliminate the risk of fire at the SCDS.” Response Brief at 17; *see also* Response Brief at 10, 31. These assertions, and the argument based on them, are both misguided and misleading. Plaintiffs’ only support for this supposed concession is Ford engineer Mark Hoffman’s answer to a generic question in *Rausch* asking if he had an opinion about whether a properly fused “electrical component” will work 100 percent of the time to prevent a fire. Response Brief at 10-11 (quoting CP 531-33).

Significantly, this general question did not address the configuration of the SCDS and use of a 2-amp fuse in this case (or any case for that matter) and it ignores Mr. Hoffman’s explicit testimony about the efficacy of the *Hauskins* product configuration in eliminating the risk of fire. CP 701. This answer is not inconsistent with his testimony in *Rausch*, where he refused to agree with an incredibly broad question that sought a single response for all fuses, all electrical devices, and all circumstances. *See* CP 531-33. By answering “no,” he fairly and reasonably answered that nothing in life or electricity is that certain.

Plaintiffs' exaggerated interpretation of Mr. Hoffman's testimony in *Rausch* is inapposite because manufacturers do not have a legal duty to design products that are 100 percent risk free. *See, e.g., Baumgardner v. Am. Motors Corp.*, 83 Wn.2d 751, 756, 522 P.2d 829 (1974) (“[A] manufacturer is not expected to produce an accident-free product, it is not an insurer of the users of its product and it need not adopt every possible safety device.”). Rather, as Plaintiffs concede, Response Brief at 28, the issue is whether the likelihood of harm outweighs the burden of taking further precautions and the disadvantages of these precautions. RCW 7.72.030. Thus, testing that shows a fire in a fuse-protected SCDS is highly unlikely is relevant even if a small residual risk of fire remained.

2. The Jury Should Be Allowed to Assess All of Ford's Testing Evidence.

Of course, the Building 4 testing is not the only testing evidence available in this case that was not before the jury in *Rausch*. *See* Opening Brief at 7-8. Plaintiffs fail to provide a compelling reason why any such testing evidence should be kept from the jury in this case. Plaintiffs continue to rely on the standard governing CR 59(a)(4) (motion for new trial) to support their argument that a “due diligence” test applies in the context of collateral estoppel. Plaintiffs fail, however, to rebut Ford's analysis as to why the standard governing a motion for new trial should

not apply to the standard governing application of collateral estoppel. See Opening Brief at 37.

Rather than contend directly with the rationale supporting the “no due diligence” rule found in Comment j to the *Restatement (Second) of Judgments* § 29 (1982), Plaintiffs instead implore this Court to reject Comment j because *one* of the cases cited to support Comment j was overruled. *Continental Can Co. v. Hudson Foam Latex Prod., Inc.*, 123 N.J. Super. 364, 303 A.2d 97 (1973), *overruled*, 129 N.J. Super. 426, 324 A. 2d 60 (1974). Plaintiffs fail to note, however, that New Jersey courts continue to cite Comment j with approval. See, e.g., *Barker v. Brinegar*, 346 N.J. Super. 558, 788 A.2d 834, 840 (N.J. Super. Ct. App. Div. 2002); *Allen v. V & A Bros., Inc.*, 208 N.J. 114, 26 A.3d 430, 445 (2011). And, other courts follow Comment j as well. See, e.g., *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983 (1st Cir. 1995); *Rye v. United States Steel Mining Co.*, 856 F. Supp. 274, 278-79 (E.D. Va. 1994).

Finally, Plaintiffs argue that the Court should apply offensive nonmutual collateral estoppel in this case because Ford allegedly failed to lay a proper foundation for some of the testing evidence that it submitted in opposition to Plaintiffs’ summary judgment motion. Ford disagrees with Plaintiffs’ admissibility arguments; but, more importantly, Plaintiffs waived any objections to the admissibility of Ford’s testing evidence for

purposes of summary judgment and this appeal because they did not move to strike any of Ford's evidence. CP 794. Accordingly, all of the evidence that Plaintiffs challenge for the first time here was before the trial court on summary judgment and is part of the record on appeal. RAP 9.12; ER 103; *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 756, 162 P.3d 1153 (2007) (“[B]ecause the evidence proffered by SSB in conjunction with its first motion for reconsideration was considered by the trial court, and because the trial court made no ruling on the admissibility of this evidence to which any error has been assigned, the evidence constitutes part of the record before the trial court in ruling on the motion and is, consequently, properly before this court as well.”); *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (“The record before us, however, does not reveal any motion to strike the affidavit or any portion thereof prior to the trial court's action. Failure to make such a motion waives deficiency in the affidavit if any exists.”).

Plaintiffs' admissibility arguments are simply misplaced. Ford submitted its testing evidence in the context of the broader issue of whether it would be unjust for the trial court to apply offensive nonmutual collateral estoppel in this particular case. Ford did not offer the evidence to prove the substantive results of the testing as a matter of law. In other

words, the issue on summary judgment was not what Ford's testing actually demonstrates but whether testing evidence, in general, is available and was not before the jury in *Rausch*.

III. CONCLUSION

Ford respectfully requests that the Court reverse the Order Granting Plaintiffs' Motion for Partial Summary Judgment and the Order Denying Ford's Motion for Reconsideration and remand for trial on all elements of Plaintiffs' WPLA Claim.

RESPECTFULLY SUBMITTED this July 25, 2014.

MILLS MEYERS SWARTLING

A handwritten signature in black ink, appearing to read 'Raymond S. Weber', with a long horizontal flourish extending to the right.

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CERTIFICATE OF FILING AND SERVICE

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DATED this 28th day of July 2014.



Linda McIntosh Wheeler