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Washington State
Court of Appeals
Division Two

November 16, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GERALDINE IVERSON, as personal representative of the estate of Bessie Ritter, Appellant, v. PRESTIGE CARE, INC. and NORTHWEST COUNTRY PLACE, INC., Respondents.	No. 54661-2-II UNPUBLISHED OPINION

PRICE, J. — Geraldine Iverson, as personal representative for Bessie Ritter, appeals the trial court's judgment in favor of the operators, Prestige Care and Northwest Country Place (collectively NCPI), of Ritter's nursing facility, Liberty Country Place. Iverson argues that the trial court erred by excluding evidence related to a Department of Social and Health Services (DSHS) investigation into the facility. She also argues that the trial court erred in instructing the jury on superseding cause. We affirm.

FACTS

I. BACKGROUND

On July 25, 2014, Bessie Ritter was admitted to Liberty Country Place, a nursing home owned and operated by NCPI. On August 19, Ritter went to the hospital at which time hospital

records show she had a small bowel obstruction. Ritter returned to Liberty Place on August 22. She did not have any bowel movements for a period of time after her return to Liberty Place.

On August 30, Ritter called her daughter Geraldine Iverson complaining of constipation and stating that she could not recall when she last had a bowel movement. On September 1, Ritter was admitted to the hospital after vomiting several times. On September 2, Ritter underwent emergency surgery revealing a cecal volvulus, which is a twisting of the colon. Ritter died on September 4, 2014. It is undisputed that Ritter died due to the cecal volvulus.

Iverson, as Ritter's personal representative, sued NCPI for medical negligence and violation of the "Abuse of Vulnerable Adults Act."[1] Iverson contended that NCPI's failure to properly monitor and treat Ritter's constipation caused Ritter to develop a cecal volvulus, resulting in the rupture of her colon and her eventual death.

II. MOTIONS IN LIMINE

A. FACTS RELATED TO THE DSHS INVESTIGATION

In October and November 2014, DSHS conducted a surprise "abbreviated survey" which is a "complaint investigation to determine compliance with state licensing requirements and [f]ederal requirements for nursing homes participating in the Medicare and/or Medicaid programs." Clerk's Papers (CP) Suppl. Ex., ID No. 9 at LPC 186. The survey included five NCPI residents, three current residents and two former residents, including Ritter. The survey found that NCPI "failed to consistently implement monitoring and treatment of constipation" for Ritter. Suppl. Ex., ID 9 at LPC 191. The DSHS investigator inquired why the bowel protocol was not

[1] Ch. 74.34 RCW.

followed. NCPI provided no explanation in response. The investigation indicated that Ritter did not have a bowel movement between August 23 and August 31, 2014.

The DSHS investigation found a violation of 42 C.F.R. § 483.25 which DSHS said required that

> [e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

Suppl. Ex., ID 9 at LPC 191. According to the DSHS investigation, the failure to meet the above regulation was evidenced by NCPI's "fail[ure] to consistently implement monitoring and treatment of constipation" for Ritter. Suppl. Ex., ID 9 at LPC 191. The investigation further concluded that NCPI failed to follow its house bowel protocol when providing care to Ritter.

DSHS Investigator Catherine Litsiba issued a "Nursing Home Survey Report" citing the facility for the regulatory violation. Suppl. Ex., ID 9 at LPC 195. No plan of correction was required for what was noted as "[p]ast noncompliance." Supple. Ex., ID 9 at LPC 191. On January 9, 2015, DSHS issued a letter to NCPI noting that "Because [DSHS] determined the facility had successfully implemented comprehensive corrective actions prior to the survey, no Plan of Correction is required." Suppl. Ex., ID 9 at LPC 186 (underscore omitted). Nonetheless, the letter noted that DSHS recommended "to the CMS Regional Office that they consider a federal CMP (Civil Monetary Penalty)." Suppl. Ex., ID 9 at LPC at 186 (underscore omitted). There is no evidence in the record that any penalty was actually imposed.

B. RULINGS REGARDING DSHS EVIDENCE

In pretrial motions, NCPI asked the trial court to exclude documents and testimony related to the DSHS investigation conducted after Ritter's death. The specific evidence relevant to the

DSHS investigation that NCPI sought to exclude was the testimony from DSHS investigator Catherine Litsiba and the investigation report.

NCPI wrote in its motions in limine that a DSHS survey is largely based on hearsay. It argued that the DSHS investigation and civil suit were done "for different purposes" and would be unduly prejudicial. Verbatim Report of Proceedings (VRP) at 23, 25; Clerk's Papers (CP) at 32. NCPI also pointed to alleged deficiencies in the DSHS investigation, arguing that permitting the investigation report could lead to expanded testimony on collateral issues, including the accuracy of the report itself.

Iverson responded that the investigation evidence should be admitted as it was extremely probative, particularly when the DSHS investigator inquired of the assistant director of nurses as to an explanation for ten days with no bowel movement by Ritter and the director could provide no answer. After the records showing no bowel movements for ten days were shown to the investigator, she cited NCPI for violating the administrative regulations governing nursing homes. This, according to Iverson, is evidence of negligence.

The trial court determined not to admit evidence of the DSHS investigation, ruling,

> *The question of whether there was a survey deficiency is different than whether there was negligence here. The survey, the investigation, is for a different purpose.* The report reaches different conclusions. It is based on hearsay for purposes of this trial.
>
> So the report itself, I'm going to grant the motion in limine. That would not be admissible.

VRP at 25 (emphasis added).

The trial court also heard argument regarding the admission of testimony from the DSHS investigator, Catherine Litsiba. Iverson argued for admission of Litsiba's testimony contending

that the testimony "clearly contains admissible facts" and Litsiba's conclusion that NCPI "violated an administrative regulation constituting evidence of negligence is also admissible." VRP at 25. Iverson continued,

> Any deficiencies in [Litsiba's] investigation can be the subject of cross examination. And it will be the same witnesses. The people who were there at the facility were still there when she came out in November of 2014 and did her investigation. It is not hearsay. It's testimony.

VRP at 26.

NCPI again argued that Litsiba's testimony involved a "different proceeding, different standards, different purpose." VRP at 27. NCPI argued that Litsiba could not testify as to her conclusions or opinions and that her testimony would constitute inadmissible hearsay. The trial court excluded Litsiba's testimony, ruling,

> All right. Well, I agree, I don't think there's a lot of difference between the investigation and the report when I say that can't come in and then we get the theory being, well, she can testify that there was a violation. You know, they're really just two sides of the same coin.
>
> I'm going to grant this motion as well. We're not going to try that other investigation. We're trying this case. We're trying whether there was a problem with [Ritter's] care and it's going to be up to the jury to decide that.
>
> Now, I agree with Mr. Potter that if there is – if there's information that can come in through an exception to the hearsay rule, a statement of a party opponent or impeachment testimony, if she can testify regarding prior inconsistent statements that are made by a defense witness[], she would be able to do that. But the testimony regarding the investigation and report is excluded. I'm going to grant that motion.

VRP at 29. Iverson made no formal offer of proof regarding Litsiba's testimony.

After the trial court's ruling on the motions, Iverson obtained the deposition testimony of Litsiba on February 11, 2020. During trial, Iverson later sought to introduce the deposition

testimony asserting that the 17 minute video of Litsiba's deposition testimony contained both factual and expert testimony. The trial court stated that it had already excluded Litsiba's testimony.

NCPI also moved to exclude evidence of other DSHS surveys and related citations. The trial court denied the motion in part, allowing one investigation provided it was limited "to the issue of notice about the problems with the bowel protocols [and] that the facility was on notice that there was a problem, but we're not getting into all these other cases." VRP at 61-62. The previous investigation and citation from January 2014 were admitted at trial.

III. TRIAL TESTIMONY

A. TESTIMONY REGARDING RITTER'S CONSTIPATION

While at the hospital due to her small bowel obstruction, Ritter successfully had three bowel movements. NCPI's medical records showed that after Ritter returned to Liberty Place, between August 22 and September 1, a ten day period, Ritter had no subsequent bowel movements. Conflicting testimony, however, indicated that Ritter may have had a bowel movement on August 26.

Historically, NCPI kept all medical records, including the tracking of bowel movements, on paper. In May 2014, the nursing home began implementing a new electronic medical records system. The parties disputed whether these electronic records included all evidence of bowel movements and vitals. Licensed practical nurse Harmony Edminster testified that not everyone used the electronic system to record bowel movements. Certified nursing assistant (CNA) Sabrina Hughes testified that all CNA charting was electronic by June 2014. CNA Julie Bair-Delaney testified that after the transition to the electronic system, CNAs continued to use paper forms although the electronic system was fully in place by 2014.

NCPI's bowel protocol required that after one day without a bowel movement, a resident received Fiber Rich, a high fiber apple juice, in their diet. If the Fiber Rich did not result in a bowel movement, the resident received Docusate, a stool softener, the next day. If neither the Fiber Rich nor the Docusate results in a bowel movement, after three days, the resident was given Milk of Magnesia, a medication for constipation. On the fourth day without a bowel movement, the resident received a Dulcolax suppository. If the resident persisted in not responding, NCPI staff should contact the resident's physician. After Ritter returned from the hospital, her doctor ordered that the house bowel protocol be followed.

On August 30, Ritter called Iverson complaining of constipation and stating that she could not recall when she last had a bowel movement. Iverson, in turn, alerted the nursing home and asked when her mother last had a bowel movement. She was informed that it had been four days since Ritter's last bowel movement and Ritter would be given something to assist her. On August 30, Ritter received Milk of Magnesia. The following day, she received a Dulcolax suppository because she did not respond to the Milk of Magnesia.

B. EXPERT TESTIMONY

Iverson presented expert testimony that NCPI's failure to properly treat Ritter's constipation caused her bowel to fill with stool, which in turn, resulted in a cecal volvulus that caused her death. Mary Shelkey, Ph.D., testified that NCPI violated the standard care when it failed to follow bowel protocol and the doctor's orders for treating Ritter's constipation. Teresa Brentnall, M.D., a board-certified gastroenterologist, testified that NCPI breached the standard of care by failing to follow the bowel protocol. She testified that Ritter's constipation more likely than not caused the cecal volvulus and Ritter's death.

NCPI's experts did not dispute that cecal volvulus was the cause of Ritter's death but disagreed that constipation resulted in the twisting of her colon. Michael Peters, M.D., a diagnostic radiologist, testified that in his experience, he has never heard of constipation associated with cecal volvulus. He also did not know of any literature that identified constipation as a cause of cecal volvulus. Brant Oelschlager, M.D., a general surgeon at the University of Washington School of Medicine and Chief of the Division of General Surgery, testified that he did not believe that the treatment of constipation would prevent cecal volvulus stating, "[T]here's no literature, experience to suggest that treating constipation with any sort of the regimen, carthartics, bowel — stool softener, or laxative will prevent cecal volvulus." VRP at 1359. He disagreed that constipation could cause cecal volvulus and opined that bowel movements were irrelevant to Ritter's development of cecal volvulus.

C. TESTIMONY OF STEPHEN SANCHEZ

Registered nurse Stephen Sanchez, who oversaw the wing in which Ritter resided at Liberty Country Place and also oversaw the facility's bowel program, testified that he was responsible for ensuring Ritter had regular bowel movements and that her doctor's orders were followed. Sanchez conducted an internal investigation into whether the facility's bowel protocol was followed, and this investigation did not result in any disciplinary actions.

> Q. Was anybody disciplined or counseled or given any warnings as a result of Ms. Ritter's care or the documentation of her bowel movements? Was there any discipline that was –
>
> A. No.
>
> Q. – handed out?
>
> A. No.

VRP at 926.

Following Sanchez's testimony, Iverson asked the trial court whether Sanchez's testimony opened the door to rebuttal evidence showing that NCPI was in fact disciplined regarding Ritter's care. NCPI argued that Sanchez's testimony referenced a lack of staff discipline and did not open the door to the submission of the DSHS investigation. The trial court agreed and determined that Sanchez's statements regarding the staff he supervised was not sufficiently broad enough to open the door to the DSHS investigation.

IV. JURY INSTRUCTIONS

In her proposed jury instructions, Iverson included the definition of proximate cause:

> The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.
>
> There may be more than one proximate cause of an injury.

CP at 195; 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL: 15.01, at 193 (7th ed. 2019) (WPIC). The trial court rejected this proposed instruction and gave a different pattern jury instruction on proximate cause:

> A cause of an injury is a proximate cause if it is related to the injury in two ways: (1) the cause produced the injury in a direct sequence *unbroken by any superseding cause*, and (2) the injury would not have happened in the absence of the cause.
>
> There may be more than one proximate cause of an injury.

CP at 220 (emphasis added); VRP 1469; 6 WPIC 15.01.01, at 197.

Iverson objected to the inclusion of the phrase, "unbroken by any superseding cause," arguing that no evidence of a superseding cause existed. VRP at 1467. The trial court overruled the objection:

> Well, there's your argument that that's what it is. There's evidence both ways. There's evidence that the constipation did not cause it. And the defense should be entitled to argue their theory of the case.

VRP at 1469.

At the request of NCPI, the trial court also gave the jury an instruction defining "superseding cause."

> A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.
>
> If you find that defendant was negligent but that the sole proximate cause of the injury was a later independent intervening cause that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the injury. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening cause, then that cause does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the injury.
>
> It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which the defendant should reasonable have anticipated.

CP at 221; VRP 1469-70; 6 WPIC 15.05, at 206. Iverson objected to the instruction and its proposed language.

V. CLOSING ARGUMENT AND JURY VERDICT

In closing arguments, Iverson described the proximate causation chain as follows:

> Ten days without a bowel movement lead[ing] directly to the twisting of [Ritter's] intestines and her death, leading directly to agonizing pain caught on tape.
>
> None of this would have happened without disregarding the bowel protocol. Medicine after one, two, three days should have started on the 24th. The medicines work. She has a bowel movement when you give her medicine ordered by the doctor.

VRP at 1578.

The jury returned a verdict in favor of NCPI, finding that NCPI was not negligent. Although the jury was instructed to skip the issue of whether NCPI's negligence was the proximate cause of Ritter's death and harm if it found NCPI was not negligent, the jury answered "no" to the causation questions in addition to those regarding negligence. Based on the jury verdict, the trial court entered judgment in favor of NCPI.

Iverson appeals.

ANALYSIS

I. EXCLUSION OF EVIDENCE RELATED TO DSHS INVESTIGATION

Iverson argues that the trial court erred by excluding evidence related to the DSHS investigation. Specifically, Iverson argues that the trial court misunderstood the relevance of the evidence, and therefore, the trial court abused its discretion when it weighed the probative value of the evidence against the danger of unfair prejudice. We disagree.

A. LEGAL PRINCIPLES

"We review the trial court's decision not to admit evidence under a correctly interpreted evidentiary rule for abuse of discretion." *Hensrude v. Sloss*, 150 Wn. App. 853, 860, 209 P.3d 543 (2009). A trial court abuses its discretion when it makes its decision based on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). A decision based on an erroneous view of the law is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). We apply de novo review to a trial court's interpretation of an evidentiary rule. *Hensrude*, 150 Wn. App. at 860.

"All relevant evidence is admissible unless its admissibility is otherwise limited." *Salas*, 168 Wn.2d at 669. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. "Trial courts enjoy 'wide discretion in balancing the probative value of evidence against its potentially prejudicial impact.'" *Salas*, 168 Wn.2d at 671 (quoting *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997)).

RCW 5.40.050 provides,

> A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, *but may be considered by the trier of fact as evidence of negligence* . . . .

(Emphasis added). RCW 5.40.050 eliminated the doctrine of negligence per se, with certain exceptions not relevant here, and instead allows a weighing of a violation of a statute, ordinance, or administrative rule, along with other relevant factors, to determine liability. *Mathis v. Ammons*, 84 Wn. App. 411, 418-19, 928 P.2d 431 (1996). Even when a defendant breached a duty imposed by statute, the trier of fact must determine whether the defendant failed to exercise ordinary care. *Mathis*, 84 Wn. App. at 419. Where the facts show there was an alleged violation of an applicable statute or ordinance, we have held that while not negligence per se, the jury should be instructed on the applicable ordinance and it is then "for the jury to decide whether the code was violated, and if so, whether the violation was evidence of negligence." *Pettit v. Dwoskin*, 116 Wn. App. 466, 475, 68 P.3d 1088 (2003).

B. EXCLUSION OF EVIDENCE OF DSHS INVESTIGATION

Here, the trial court did not prohibit Iverson from arguing that the facts showed that NCPI violated the federal statute. The trial court only excluded the specific DSHS report finding a violation and testimony regarding the report and investigation. The trial court recognized that the DSHS investigation and report was completed for a different purpose than determining whether negligence occurred. Because the survey report was completed for a different purpose, its admission would have been unfairly prejudicial by lending official weight to Iverson's allegation that NCPI failed to exercise ordinary care.

Furthermore, because the report was compiled as a survey report, NCPI argued it would be required to present evidence regarding the limitations of the report and the scope of the investigation. Litigating the investigation and the resulting report could confuse the jury into believing that the sufficiency and accuracy of the DSHS investigation were the focus of the trial—not whether NCPI exercised ordinary care. And the additional evidence could have created undue delay or waste of time.

Although Iverson asserts that the evidence of the DSHS report was highly probative, nothing prevented her from arguing that the facts established a violation of the federal regulation; however, she chose not to do so without being able to rely on the DSHS investigation. The trial court reasonably concluded that the DSHS investigation was unfairly prejudicial, risked confusing the jury, and could have created undue delay or waste of time. The trial court had tenable reasons for determining that the probative value of the evidence of the DSHS investigation was outweighed

by the danger of unfair prejudice, confusion of the issues, and the possibility of undue delay. Therefore, the trial court did not abuse its discretion by excluding the evidence.[2]

C. OPENING THE DOOR—SANCHEZ'S TESTIMONY

Alternatively, Iverson argues that if the trial court properly excluded the evidence of the DSHS investigation during motions in limine, NCPI opened the door to admitting the evidence through Sanchez's testimony. We disagree.

"[A] party may open the door" to inadmissible evidence. *Ang v. Martin*, 118 Wn. App. 553, 561, 76 P.3d 787 (2003). "The trial court has considerable discretion in administering this open-door rule." *Ang v. Martin*, 118 Wn. App. at 562. The open-door rule "aid[s] in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." *Ang v. Martin*, 118 Wn. App. at 562 (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Sanchez testified that nobody at NCPI was disciplined, counseled, or warned as a result of Ritter's care. Sanchez's testimony was not a half-truth that could be corrected by the evidence of the DSHS investigation because Sanchez's testimony was referring to individual employees being disciplined, not NCPI as a facility.

[2] In her reply brief, Iverson substantially reframes portions of her argument, such as distinguishing between the factual basis of Litsiba's testimony and the conclusions from the investigation. Iverson also argues that if we determine the trial court improperly excluded evidence of the DSHS investigation, we should also order the trial court to instruct the jury on a regulatory violation as evidence of negligence. Issues raised in a reply brief are too late to warrant consideration by this court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, we do not address these additional arguments raised by Iverson.

Further, the DSHS investigation did not impose any actual discipline on NCPI or its employees because, although it determined violations were committed, those violations were already remedied by the time of the survey report. And although DSHS recommended referral for a fine, there was no evidence that any fines were actually imposed. Because there was no evidence that NCPI was itself disciplined, counseled, or warned as a result of the DSHS investigation, the investigation would not have corrected misconceptions, if any, created by Sanchez's testimony.

The trial court did not abuse its discretion by ruling that Sanchez's testimony did not open the door to admission of the evidence of the DSHS investigation.

II. JURY INSTRUCTION ON "SUPERSEDING CAUSE"

Iverson also argues that the trial court erred in instructing the jury on superseding cause. Iverson argues that NCPI failed to present any evidence of an outside intervening force to support giving the instruction. We disagree.

A. STANDARD OF REVIEW

As an initial matter, Iverson argues that we should apply de novo review to this jury instruction issue. We disagree.

We apply de novo review to a trial court's decision to give a jury instruction if based on a matter of law. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 767, 389 P.3d 517 (2017). However, when the decision is based on a factual determination, this court reviews the trial court's decision for an abuse of discretion. *Taylor*, 187 Wn.2d at 767. "To determine whether to give an instruction, the trial judge 'must merely decide whether the record contains the kind of facts to which the doctrine applies.'" *Taylor*, 187 Wn.2d at 767 (quoting *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)).

Here, Iverson is arguing that there was no evidence to support giving an instruction on superseding cause. Whether there is sufficient evidence to support a jury instruction is fundamentally a factual determination that this court reviews for an abuse of discretion. Accordingly, the appropriate standard of review is abuse of discretion.

B. EVIDENCE SUPPORTING JURY INSTRUCTION

"Instructions are not erroneous if they '(1) permit each party to argue [the] theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law.'" *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 521, 870 P.2d 999 (1994) (alternation in original) (internal quotation marks omitted) (quoting *Walker v. State*, 67 Wn. App. 611, 615, 837 P.2d 1023 (1992)). "If a party's case theory lacks substantial evidence, a trial court must not instruct the jury on it." *Fergen v. Sestero*, 174 Wn. App. 393, 397, 298 P.3d 782 (2013). Evidence is sufficient if sufficient evidence exists to persuade a rational person of the truth of the matter asserted. *Fergen*, 174 Wn. App. at 397. The supporting facts relied on by a party for a theory and instruction, "'must rise above speculation and conjecture.'" *Fergen*, 174 Wn. App. at 397 (quoting *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wash.2d 82, 86, 579 P.2d 346 (1978)).

When a defendant's actions are the proximate cause of the plaintiff's injury, he or she is liable for negligence. *Albertson v. State*, 191 Wn. App. 284, 296, 361 P.3d 808 (2015). "An act generally is a proximate cause of an injury if it produces the injury." *Albertson*, 191 Wn. App. at 296-97. "The trier of fact must determine if an intervening act has broken the causal chain between the conduct of the defendant and the injury of the plaintiff." *Maltman v.* Sauer, 84 Wn.2d 975,

982, 530 P.2d 254 (1975). An intervening act that rises to the level of a superseding cause relieves a defendant of liability. *State v. Meekins*, 125 Wn. App. 390, 397-98, 105 P.3d 420 (2005).

"'Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are *not* reasonably foreseeable are deemed superseding causes.'" *Cramer*, 73 Wn. App. at 520-21. "'The foreseeability of an intervening act, unlike the determination of legal cause in general, is ordinarily a question of fact for the jury." *Cramer*, 73 Wn. App. at 521 (quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 442, 739 P.2d 1177 (1987)).

Here, NCPI argued that the cecal volvulus was not caused by Ritter's constipation and presented expert testimony supporting that assertion. If the jury accepted NCPI's expert testimony, then cecal volvulus would not be a reasonably foreseeable consequence of constipation or failing to follow the bowel protocol. Because NCPI presented evidence that cecal volvulus was not reasonably foreseeable, the trial court did not abuse its discretion by giving an instruction on superseding cause.

Further, the instruction given by the trial court was a correct statement of the law and allowed both parties to argue their theories of the case. The trial court properly instructed the jury that a superseding cause can break the chain of proximate cause. The trial court also properly instructed the jury that a superseding cause is an independent cause that could not be reasonably anticipated. The instructions allowed Iverson to argue her theory of the case, which was that the cecal volvulus was caused by the constipation and, therefore, was directly in the chain of proximate cause from NCPI's failure to follow bowel protocol to Ritter's death. Because the trial court's

instructions were supported by sufficient evidence, correctly stated the law, and allowed both parties to argue their theory of the case, the trial court's jury instructions were proper. Accordingly, the trial court's decision to give the jury instructions on superseding cause was not error.

The trial court did not commit error when it excluded evidence and testimony related to the DSHS investigation and when it instructed the jury on superseding cause. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

CRUSER, P.J.

VELJACIC, J.