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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHALISA HAYES, as the personal representative of THE ESTATE
OF BILLY RAY SHIRLEY III,

Respondents,

v.

BILL'S TOWING AND GARAGE, INC., a Washington corporation,
and THOMAS A. LOMIS and JANE DOE LOMIS, and the marital
community composed thereof,

Appellants,

and RICHARD E. WELCH and JANE DOE WELCH, and the marital
community composed thereof; and KOLLECTED SOULS SECURITY, a
Washington Sole Proprietorship owned by RICHARD WELCH,

Defendants.

REPLY BRIEF OF APPELLANTS BILL'S TOWING
AND GARAGE, INC. AND THOMAS A. LOMIS

Mary H. Spillane, WSBA #11981
Timothy L. Ashcraft, WSBA #26196
FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN
SPILLANE PLLC
Attorneys for Appellants Bill's Towing
and Garage, Inc. and Thomas A. Lomis

701 Fifth Avenue, Suite 4650
Seattle, WA 98104
(206) 749-0094

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II. INTRODUCTION

Appellants Bill's Towing and Garage, Inc. and Thomas A. Lomis (collectively "Bill's Towing") submit this reply to the Response Brief filed by respondent Shalisa Hayes, as personal representative of the Estate of Bill Ray Shirley III.

III. REPLY ARGUMENT

A. Bill's Towing Was Not Required to Renew Its CR 50 Motion or Move for New Trial Post-Verdict to Preserve the Issues It Has Raised on Appeal.

Relying on a portion of the Court of Appeals' decision in *Washburn v. City of Federal Way*, 169 Wn. App. 588, 612-14, 283 P.3d 567 (2012), that the Washington Supreme Court reversed in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 749-50, 310 P.3d 1275 (2013), Ms. Hayes incorrectly asserts, *Resp. Br. at 5-7*; *see also Resp. Br. at 1, 19*, that the issues raised in Bill's Towing's opening brief have not been preserved for appeal because Bill's Towing did not renew its CR 50(a) motion or move for a new trial under CR 59 after the jury returned its verdict. Under the Washington Supreme Court's decision in *Washburn*, 178 Wn.2d at 749-50, which Ms. Hayes fails to cite, Bill's Towing was not required to bring any such post-trial motion to preserve its appeal issues.

The Court of Appeals in *Washburn*, 169 Wn. App. at 612-14, relied on a series of federal cases interpreting Fed. R. Civ. P. 50 to con-

clude that it was not enough for a defendant to have moved for judgment as a matter of law under CR 50(a) at the close of plaintiff's case, but that the defendant post-verdict must also have renewed its motion for judgment as a matter of law under CR 50(b) or moved for new trial based on insufficiency of the evidence under CR 59 to preserve the issue for appeal. The Washington Supreme Court in *Washburn*, 178 Wn.2d at 750, disagreed, declining to follow the federal precedent, and holding that “[b]ecause the federal interpretation of Fed. R. Civ. P. 50 never took root in Washington, we reverse the Court of Appeals on this point.” Ms. Hayes’ claim that Bill’s Towing failed to preserve its appeal issues is without merit.

B. The Trial Court Erred in Granting Ms. Hayes’ Motion to Strike Bill’s Towing’s Contributory Fault Affirmative Defense and Not Allowing the Jury to Allocate Fault to Billy Ray Shirley.

Without responding directly to Bill’s Towing’s arguments that the trial court erred (1) in granting Ms. Hayes’ pre-trial motion to dismiss Bill’s Towing’s affirmative defense of Billy Ray Shirley’s comparative fault, *App. Br. at 17-25*,¹ and (2) in refusing to grant Bill’s Towing’s

¹ Ms. Hayes chastises Bill’s Towing, *Resp. Br. at 15-16*, for arguing that “the comparative fault ... issues should be analyzed under a CR 56 standard,” claiming that that is not correct. Yet, as Bill’s Towing correctly noted with respect to the trial court’s ruling on Ms. Hayes’ pre-trial motion to strike Bill’s Towing’s affirmative defense of comparative fault, *App. Br. at 17-18*, because the trial court considered matters outside the pleadings, *see, e.g.*, CP 328-67, the motion to strike the comparative fault affirmative defense is treated as a CR 56 motion for summary judgment for purposes of appellate review. *Stack v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 94 Wn.2d 155, 157, 615 P.2d 457 (1980). *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976),

motion to conform the pleadings to the proof of contributory fault that was nonetheless presented without objection at trial, *App. Br. at 25-28*, Ms. Hayes asserts, *Resp. Br. at 8-14*, that the trial court properly refused to instruct the jury on comparative fault, because: (a) Bill's Towing offered a jury instruction based on WPI 10.02 (ordinary care applicable to adults), rather than WPI 10.05 (ordinary care applicable to children); (b) this is an emergency doctrine case and therefore Billy Ray Shirley was not negligent; and (c) nothing Billy Ray allegedly did wrong was the legal cause of his death. Ms. Hayes is incorrect on all three counts.

1. Bill's Towing offered the proper "ordinary care" jury instruction applicable to Billy Ray's conduct.

Bill's Towing proposed at trial a jury instruction, based on WPI 10.02, defining ordinary care. CP 415. Ms. Hayes now asserts, *Resp. Br. at 8*, that Bill's Towing should have proposed WPI 10.05, defining ordinary care of a child, and that its failure to do so is somehow fatal to its claim that the trial court erred in striking its affirmative defense of Billy Ray's contributory fault. Ms. Hayes' assertions are incorrect.

cited by Ms. Hayes, albeit without clarity as to the proposition for which it is cited, *Resp. Br. at 15*, does not address the standard of review of a trial court's grant of a motion to strike an affirmative defense when matters outside the pleadings are considered. Ms. Hayes cites no authority that the standard of review applicable to the trial court's grant of such a motion changes if the defendant who lost such a motion seeks to have the trial court change its mind during trial whether by bringing a motion to conform the pleadings to the proof, or by proposing jury instructions on the issue and excepting to the failure to give them, or by moving for reconsideration, or otherwise.

Ultimately, the issue of how to define “ordinary care” as applied to Billy Ray was never reached because the trial court dismissed the comparative fault defense pretrial, refused to grant Bill’s Towing’s motion to conform the pleadings to the proof, and refused to allow the jury to allocate fault to him. But, even if the issue had been reached, because Billy Ray was 17 years old at the time in question, RP 148, CP 9, WPI 10.02 rather than WPI 10.05 was the appropriate and applicable ordinary care instruction. As the comment to WPI 10.05 makes clear:

A child under the age of six cannot be held negligent. As a matter of law no issue of the child’s negligence can be submitted to the jury. *Conversely, a 17 or 18 year old of normal capacity may be treated as an adult in all cases.* [Emphasis added.]

Contrary to Ms. Hayes’ assertions, Bill’s Towing properly proposed WPI 10.02, and the proposing of that instruction is not fatal to its claims that the trial court erred pre-trial in dismissing the affirmative defense of Billy Ray’s comparative fault and at trial in continuing to refuse to allow that issue to go to the jury. No matter what contributory fault instruction Bill’s Towing may have proposed, the trial court was not going to allow the jury to apportion fault to Billy Ray.

2. Even if this were an “emergency doctrine” case, which it is not, it does not as a matter of law absolve Billy Ray of contributory fault.

As she did in her pre-trial motion to dismiss the affirmative

defense of Billy Ray's comparative fault, CP 258-59, Ms. Hayes asserts, *Resp. Br. at 8-10*, that this is an emergency doctrine case in which Billy Ray acted instinctively and thus as a matter of law could not be found to have been negligent or comparatively at fault. Again, her assertions are incorrect. This is not an emergency doctrine case and, even if it were, it would not absolve Billy Ray of negligence as a matter of law, but would only warrant an emergency doctrine jury instruction. *See* WPI 12.02.

In support of her emergency doctrine argument, Ms. Hayes, *Resp. Br. at 9-10*, cites the Court of Appeals' decision in *Kappelman v. Lutz*, 141 Wn. App. 580, 170 P.3d 1189 (2007),² as an example of a case in which "the trial court was found to have properly invoked the emergency doctrine." But, what Ms. Hayes fails to tell this Court is that invocation of the emergency doctrine in *Kappelman* did not absolve the party who sought to invoke it of negligence as a matter of law, but rather presented a jury question such that the trial court did not err in giving an emergency instruction. *Id.* at 587-89; *see also Kappelman v. Lutz*, 167 Wn.2d 1, 10, 217 P.3d 286 (2009) (affirming the Court of Appeals on that issue).

It remains Bill's Towing's position, *see App. Br. at 24-25*, that this is not an emergency doctrine case, because the emergency doctrine does

² Although Ms. Hayes does not so note, the Washington Supreme Court affirmed the Court of Appeals decision in *Kappelman v. Lutz*, 167 Wn.2d 1, 217 P.3d 286 (2009).

not apply unless the person as to whom it is sought to be invoked was “suddenly confronted by an emergency through no negligence of his or her own,” was “compelled to decide instantly how to avoid injury” and “ma[de] such a choice as a reasonably careful person placed in such a position might make.” WPI 12.02. Here, even if it could be said that Billy Ray was somehow “suddenly confronted” by an “emergency,” it was one to which he contributed through his own negligence by: (1) being on the property at all when he had been told by Mr. Welch on at least three prior occasions that he was not welcome there, RP 584-59; (2) getting into a fight in the building, RP 317, 319, 336; and (3) then, after safely leaving the building, and after gunfire erupted, making a conscious and deliberate choice to go back into the building, RP 317-19, 364-66, 371-72. There is no evidence that Billy Ray’s decision to go back into the building after he heard gunshots erupt was one he made under compulsion “to decide instantly how to avoid injury,” but rather it was one he consciously and deliberately made, purportedly to help his friend. RP 319. Nor can it be said as a matter of law that his decision to go back into the building was one “a reasonably careful person placed in such a position might make.”

Ms. Hayes’ assertions as to why this is “a sudden emergency case,” *Resp. Br. at 10*, are spun out of whole cloth, are unsupported by

citations to the record, and find no support in the record.³ Contrary to Ms. Hayes' assertions, after Billy Ray got into a fight in the building, he not only was able to, but in fact did, safely exit the building. RP 317-19, 366, 372. There is no evidence as to his movements or any instinctive reactions once he re-entered the building after gunshots erupted, much less of any "instinctive reaction to find safe harbor" that "lead to a boarded up dilapidated stairway." There is no evidence that his body was found near a boarded-up dilapidated stairway or some other blocked exit. Indeed, the evidence was that his body was found in the threshold of an open, unobstructed doorway where people were exiting. RP 335-36, 366-67.

Even if under the facts adduced in this case it could be said that the emergency doctrine applies, the emergency doctrine does not absolve Billy Ray of comparative fault as a matter of law or ameliorate the trial court's errors in dismissing Bill's Towing's comparative fault affirmative defense pre-trial and in refusing to allow the jury to apportion fault to Billy Ray based on the evidence that was presented at trial. At most, under the Court of Appeals' and the Supreme Court's decisions in

³ There are any number of places where Ms. Hayes makes factual assertions without any citation to the record, *see, e.g., Resp. Br. at 3, 4, 5, 10, 12, 13, 17, 18*, or where the citations to the record she provides do not fully support the factual assertions she makes, *see, e.g., Resp. Br. at 4, footnotes 9-15, 15, footnotes 19-21, and accompanying text*. It would unduly prolong this reply to catalogue them all. Suffice it to say that many of her factual assertions take license with, and/or are not borne out by, the record.

Kappelman, supra, if the court were to conclude that the record contains the kinds of facts to which the emergency doctrine applies, it would warrant a jury instruction on that doctrine, so that the jury could determine whether or not any fault should be apportioned to Billy Ray.

3. Bill's Towing's allegations as to Billy Ray's comparative fault are not lacking in either legal or proximate causation.

Ms. Hayes asserts, *Resp. Br. at 11-14*, that nothing that Bill's Towing alleges Billy Ray did wrong was the legal cause of his death, based on her claims that comparative fault is not applicable (a) when a duty of protection is owed; or (b) in the context of an intentional tort. Her assertions and claims are again incorrect.

a. *Christensen* is inapposite and does not stand for the proposition that comparative fault is unavailable.

Ms. Hayes cites *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) for the proposition that "comparative fault is inapplicable in situations wherein a duty of protection is owed." *Christensen* makes no such sweeping pronouncement and is inapposite. *Christensen* addressed the following certified question from the United States District Court for the Eastern District of Washington:

May a 13 year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the school district and her principal for failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the Washington Tort Reform Act for her participation in the relationship?

Id. at 64. The Washington Supreme Court answered “no” to that question, holding as a matter of law that a child under the age of 16 may not have contributory fault assessed against her for participation in a sexual relationship with a teacher, because she lacked the capacity to consent and because she is under no legal duty to protect herself from sexual abuse. *Id.* at 64-65, 70-72. The Court reasoned that a contrary holding would “frustrate the overarching goals of prevention and deterrence of child sexual abuse.” *Id.* at 72. The facts of *Christensen* bear no resemblance to the facts of this case and the Court’s reasoning in *Christensen* provides no guidance on the issues presented for review here.

Ms. Hayes, trying to extrapolate something that cannot be extrapolated from *Christensen*, asserts, *Resp. Br. at 13*, that “[t]he act of simply patronizing a facility that the occupants are required to make safe is not comparative fault and certainly does not pass the proximate cause test in connection with Billy Ray having been shot and killed later that day.” That assertion is as flawed as most all of Ms. Hayes’ other assertions. First, it ignores the fact that Billy Ray, on at least three prior occasions, had been told by Mr. Welch, the lessee of the premises, that he was not welcome there. RP 584-89. A reasonable jury could find that Billy Ray was negligent in attempting to patronize a facility where he repeatedly had been told by the occupant that he did not belong there and

was not welcome. Second, a reasonable jury could also find that his other actions, including, after gunfire erupted, going back into a building that he had already safely exited, and, as a minor, being a out after curfew⁴ were negligent. Third, Ms. Hayes cites no authority supporting her claims that as a matter of law Billy Ray's actions did not constitute negligence or were not a legal or proximate cause of his death. Whether Billy Ray was comparatively negligent was a jury question, and the trial court erred in refusing to allow the jury to decide it.

b. This is not an intentional tort case.

Citing *Morgan v. Johnson*, 137 Wn.2d 887, 976 P.2d 619 (1999), and *Welch v. Southland*, 134 Wn.2d 629, 952 P.2d 162 (1998), Ms. Hayes argues, *Resp. Br. at 13*, that there can be no comparative fault in the context of an intentional tort. As discussed more fully in Bill's Towing's opening brief, *App. Br. at 20-21*, those cases, which Ms. Hayes also cited below, are inapposite because there were no intentional tort claims in this case and no one attempted to apportion fault to any intentional tortfeasor.

In *Morgan*, a formerly married couple fought and the ex-wife sued her ex-husband for injuries sustained. The issue on appeal was whether the intoxication defense was available to the ex-husband, when, before

⁴ See RP 362; Tacoma Municipal Code, Chapter 8.109 (providing that it is illegal for anyone under 18 to be "in any public place or on the premises of any establishment within the City during curfew hours [12:01 a.m. to 6 a.m.]").

trial, the ex-wife dropped all of her negligence claims and “restricted her case to the intentional torts of assault and battery.” *Morgan*, 137 Wn.2d at 890. The *Morgan* court concluded that the intoxication defense did not apply in the context of intentional torts. *Id.* at 896-97. Similarly, *Welch* dealt with the question of apportioning fault among intentional tortfeasors. The *Welch* court concluded that “[u]nder the current statutory definition of *fault*, a defendant is not entitled to apportion liability to an intentional tortfeasor.” *Welch*, 134 Wn.2d at 636-37.

Here, Ms. Hayes brought no intentional tort claims against any defendant. CP 9-13. All of her claims sounded in negligence. *Id.* Thus, nothing in the “intentional tort” holdings or reasoning of *Morgan* or *Welch* would preclude apportionment of fault to Billy Ray in this case.

Ms. Hayes, again trying to extrapolate something that cannot be extrapolated from the cases she cites, argues, *Resp. Br. at 13*, that “Billy Ray cannot, as a matter of law, be comparatively at fault for defending himself from being assaulted,” and that “Billy Ray having been placed into a position of having to defend himself from assaultive bikers does not pass the proximate cause test in connection with the lethal shooting.” Once again, Ms. Hayes provides no citations to the record to support her factual assertions. Nor could she, as no evidence was presented that Billy Ray and his friends were assaulted by a squad or “an armed and combative

group” of bikers, or were attempting to defend themselves, either after they had safely exited the building, or at the time Billy Ray, after gunfire erupted, re-entered the building and was shot by an unknown assailant.

Nor is there any evidence supporting the factual assertions that underlie Ms. Hayes’ claims, *Resp. Br. at 14*, that “it is hardly negligent to be placed in a position of deciding to run from stray bullets and electing to run one way over another” or that “[a] person is not negligent for not knowing which way to run from an armed and combative group of bikers.” There is no evidence that Billy Ray was running away from stray bullets, from an armed and combative group of bikers, or from anything else, when, after hearing gunfire erupt, he chose to re-enter a building he had already safely exited, or when he was shot after re-entering it.

There were genuine issues of material fact as to whether Billy Ray exercised the degree of care which a reasonably prudent man would have exercised for his own safety on the morning of his death. “[T]he issue of contributory negligence is a jury question unless the evidence is such that all reasonable minds would agree that the plaintiff had exercised the care which a reasonably prudent man would have exercised for his own safety under the circumstances.” *Lundberg v. All-Pure Chem. Co.*, 55 Wn. App. 181, 187, 777 P.2d 15, *review denied*, 113 Wn.2d 1030 (1989) (quoting *Stevens v. State*, 4 Wn. App. 814, 816, 484 P.2d 467 (1971) (citing *Poston*

v. *Mathers*, 77 Wn.2d 329, 462 P.2d 222 (1969)). The trial court erred in taking the issue of Billy Ray's comparative fault from the jury.

C. The Trial Court Erred in Refusing to Instruct the Jury on the Issue of Whether Billy Ray Shirley Was a Trespasser.

Citing *Singleton v. Jackson*, 85 Wn. App. 835, 935 P.2d 444 (1997), for the proposition that “[a]n owner or occupier is deemed to have consented to a stranger’s approach to the front entry of the facility absent an express communication otherwise,” *Resp. Br. at 14*, Ms. Hayes argues that the trial court did not err in refusing to submit a trespasser instruction to the jury. In *Singleton*, the appellate court held that the plaintiff, a Jehovah’s Witness who approached what appeared to be a residence with the purpose of engaging in religious solicitation and slipped and fell on the front porch, was a licensee, not a trespasser, in the absence of notice that consent to approach had been withdrawn. Here, however, Billy Ray, unlike the plaintiff in *Singleton*, had received an express communication of no permission to enter the premises at issue. Mr. Welch testified that he had expressly told Billy Ray Shirley multiple times that he was not welcome on the premises. RP 584-89.

Ms. Hayes, citing RP 363, nonetheless argues, *Resp. Br. at 14-15*, that Billy Ray was on the premises with permission the day he died. But, RP 363 says nothing about Billy Ray having permission to enter the

premises. At RP 363-64, Shawna Randall, Ricky Washington's mother, testifies only about Ricky's, not Billy Ray's, presence on the premises:

A. He [Ricky Washington] thought that it was funny that they let him in. But he came up there because he knew that I didn't have my vehicle and was – at the time he was my only son, and so he kind of would forget his role that he was my son and not my father, was kind of telling me, mom, I'm coming up there to get you, and I told him you need to leave and get out of here, and like, how did you get in, and he made a little joke saying, I got in like that, and that was my first encounter with him.

Q. And so did you want him to leave?

A. Yes.

Q. All right. Other than that, was anyone else challenging the fact that Ricky Washington was there in your observation?

A. No.

Q. How about Billy Ray?

A. I did not see Billy Ray.

The only evidence regarding permission as to Billy Ray came from Richard Welch, who testified that he had told Billy Ray on multiple occasions that he was not welcome on the premises. RP 584-89. Even Ms. Randall's testimony about her son Ricky's presence in the building does not indicate who it was that let Ricky in, which would be needed to determine if the person had authority to provide him with permission.⁵

⁵ Citing RP 363, Ms. Hayes asserts, *Resp. Br. at 14-15*, that a security guard for Global Grinders let Billy Ray "walk right in the front door," and that "Billy Ray was an invited patron of the Global Grinders," whom she claims was "a new subtenant" after Mr. Welch

Here, because the only evidence was that Billy Ray did not have permission to be on the property, Billy Ray was a trespasser under the definition of trespasser set forth in WPI 120.01. After failing to so hold as a matter of law, the trial court, at a minimum, should have submitted the issue to the jury. As Bill's Towing noted in its opening brief, *App. Br. at 30*, "when the facts [of a visitor's entry onto property] are disputed, the question is one for the jury to decide." *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188 (2002) (internal citations omitted); *see also* Note on Use to WPI 120.03 ("If the issue is whether or not there was permission to be on the premises, use WPI 120.01 and WPI 120.02 with this instruction, to submit the trespass issue."); Note on Use to WPI 120.05 ("If there are factual questions as to the status of the visitor as an invitee, licensee, social guest, or trespasser, the jury will need to be instructed on each relevant status and duty").⁶

had vacated the property. Nothing in Shawna Randall's testimony at RP 363 so states. And, as Bill's Towing noted in its opening brief, *App. Br. at 31-32*, Global Grinders, having no valid lease to the premises, RP 583-84, were themselves trespassers and thus had no authority to make Billy Ray anything but a fellow trespasser.

⁶ Incomprehensibly, Ms. Hayes argues, *Resp. Br. at 16*, that "even in the absence of instructions on comparative fault under the trespasser issues," Bill's Towing "was still permitted to argue [that] Billy Ray should have been more cautious, and that he never even should have patronized the after-hours club," and thus thereby somehow "was afforded a fair trial and complete defense." It matters not what Bill's Towing may have argued in that regard. The trial court refused to permit the jury, and the jury was not permitted, to apportion fault to Billy Ray or to find that he was a trespasser to whom a lesser duty was owed. The trial court's refusals to submit those issues to the jury were prejudicial errors.

D. There Was No Evidence From Which a Reasonable Jury Could Find that Bill's Towing's Alleged Negligence Caused Billy Ray Shirley's Death.

In response to Bill's Towing's argument, *App. Br. at 32-35*, that the trial court erred in denying its motion for directed verdict on causation, Ms. Hayes argues that causation is generally a jury question. While that is true, it does not mean that causation is *always* a jury question. *See Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1004 (2011) (the court may decide the question of causation as a matter of law if "the causal connection is so speculative and indirect that reasonable minds could not differ"). "[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Id.* (citation omitted).

Ms. Hayes posits, *Resp. Br. at 17*, that if the stairway had been properly maintained, Billy Ray could have exited the building before the shooting ever started. This, of course, ignores that fact that Billy Ray *did make it out of the building safely*. RP 317-19, 364-666, 371-72. His death occurred when, after gunfire erupted, he voluntarily went back into the building. *Id.*

Ms. Hayes also posits, *Resp. Br. at 17*, that, if the building had

never been leased, Billy Ray would not have been killed. This is one of those “if you had never been born” type of arguments that, even if true, does not satisfy the mandates of legal causation.⁷ See, e.g., *People v. Zak*, 457 N.W.2d 59, 64 (Mich. Ct. App. 1990) (distinguishing between a condition for harm to occur and the cause of harm, such as arguing that the victim could not have been killed if he had never been born).

Citing *Derboven v. Stockton*,⁸ 490 S.W.2d 301 (Mo. Ct. App. 1972), by way of analogy, Ms. Hayes asserts, *Resp. Br. at 17-18*, that “[i]f the building had been configured with proper exits, even after the shooting started, Billy Ray would have made it out the door during the shooting rather than ending up dead in the doorway.” In *Derboven*, a Missouri wrongful death case in which the jury found for the plaintiff, the plaintiff’s decedent was one of several people who died in a bar fire. A person had walked through the front door of a bar, tossed gasoline against a wall and ignited it. All of the people who survived exited through the front door. Twelve people sitting near the rear of the tavern were killed. *Derboven*, 490 S.W.2d at 305. All of the deceased were found near the back door that, in violation of applicable building codes, was hinged in such a way

⁷ “Legal causation is one of the elements of proximate causation and is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend.” *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998).

⁸ Ms. Hayes incorrectly cites the case name as *DeBroven v. Stockton*.

that it was not possible to open it from the inside. *Id.* at 305-06. On appeal in *Derboven*, one issue was causation. The appellate court noted that it was not enough to prove building code violations; there must also be proof that those violations caused the death. Ultimately, the appellate court ruled that “the evidence indicates that the plaintiff’s decedent and others had gone to the door and were piled against the door. It is a reasonable inference that the failure of the door to open outward prevented escape.” *Id.* at 317.

As part of that analysis, the *Derboven* court cited *Davis v. Nox-All Shoe Co.*, 85 N.H. 327, 159 A. 126 (1932). In *Davis*, the plaintiff’s decedent died in a shoe factory fire and the plaintiff alleged that the cause of death was a door that did not swing outward. *Id.* at 327. Despite the defect in the door, the New Hampshire Supreme Court found no causation, as the decedent’s body was found 68 feet from the main entrance. The court ruled that it was impossible to know whether the door defect caused her death and thus a directed verdict should have been granted. *Id.* at 329.

As was the case with the plaintiff’s claim in *Davis*, here there is no foundation for the argument Ms. Hayes makes, *Resp. Br. at 17*, that a lack of proper exits was a cause of Billy Ray’s death. No evidence was

presented regarding the circumstances of Billy Ray's death.⁹ Billy Ray's body was not found near an obstructed exit, but rather was found in an open, unobstructed doorway through which other people were exiting. RP 317-18, 365-67. Ms. Hayes' insistence that Billy Ray was found dead in the doorway trying to escape the bullets or the building after the shooting started, *Resp. Br. at 18*, is unsupported by the record.

The jury here could only speculate as to whether any of the alleged building deficiencies caused or contributed to Billy Ray's death. The trial court erred in failing to grant Bill's Towing's motion for directed verdict on the issue of causation.

E. The Trial Court Erred in Entering Judgment Against Welch to Create Joint and Several Liability While Precluding Any Right of Contribution.

In response to Bill's Towing's argument, *App. Br. at 35-38*, that it was error for the trial court to enter judgment against Mr. Welch in order to create joint and several liability, when the bankruptcy court's order

⁹ As Bill's Towing referenced in its opening brief, *App. Br. at 34*, there was no evidence as to: (1) where in the building Billy Ray was shot (there was evidence that he was found in the doorway, but no evidence that he was in that spot when he was shot); (2) where on his body he was shot; (3) how many times he was shot; (4) whether he was stationary or moving when he was shot; (5) whether he was coming in, leaving or just standing there when he was shot; (6) where the shooter was; (7) how long Billy Ray had been in the building before he was shot; (8) whether he saw the shooter or the gun before he was shot; (9) whether he knew or suspected that he was going to be shot; (10) how many people, if any, were near him when he was shot; (11) whether he attempted to leave before he was shot; (12) whether, if he did attempt to leave before being shot, any person or thing impeded his ability to exit the building; (13) whether he was able to attempt to leave after he was shot; or (14) whether he actually attempted to leave after he was shot.

precluded any right of contribution against Mr. Welch, Ms. Hayes argues that Bills' Towing seeks to overturn Washington joint and several liability law. Quite the contrary, Bills' Towing seeks only to properly apply Washington's joint and several liability law, which provides for a right of contribution in the event of joint and several liability. RCW 4.22.040.

Ms. Hayes argues, *Resp. Br. at 19*, that "simply because Mr. Welch is insolvent" does not render entry of judgment against him in error. But, Bill's Towing's claim of error is not based on the fact that Mr. Welch is insolvent. It is based on the fact that the bankruptcy court's order that permitted entry of judgment against Mr. Welch in order to create joint and several liability, also precluded any contribution rights of Bill's Towing contrary to Washington law. RCW 4.22.040 expressly provides that a right of contribution exists between persons who are jointly and severally liable.

Ms. Hayes should not be allowed to hide behind the bankruptcy court's order. That order permitted, but did not require, entry of judgment against Welch. It was not the bankruptcy court's purview to alter Washington joint and several liability or contribution law. The trial court erred in entering judgment against Welch to create joint and several liability when the bankruptcy court's order precluded any right of contribution.

That error was then compounded by the trial court's refusal to

allow the jury to allocate fault to Billy Ray. Had the jury found Billy Ray negligent, it not only would have reduced any damage award, but also would have resulted in several-only liability on the part of Bill's Towing. See RCW 4.22.020 and RCW 4.22.070; see also *Ginocchio v. Hesston Corp.*, 46 Wn. App. 843, 847-48, 733 P.2d 551 (1987) (holding that comparative fault of the decedent reduces the award to the estate in a wrongful death action).

F. Any Re-Trial Should Be Limited to Liability (and Allocation of Fault) Issues Only.

In response to Bill's Towing's argument, *App. Br. at 38-40*, that any re-trial should be limited to liability and allocation of fault issues, and not damages, Ms. Hayes asserts, *Resp. Br. at 19-20*, that Bill's Towing has "stretched" the holdings of two of the cases it cited, *Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 710 P.2d 184 (1985) and *Bauman v. Crawford*, 104 Wn.2d 241, 704 P.2d 1181 (1985), arguing that neither case addressed allocation of fault.¹⁰ Plaintiff is incorrect.

In *Mina*, a motor vehicle collision case, the defendant was found negligent, but the plaintiff was found 85% comparatively negligent. *Mina*,

¹⁰ Ms. Hayes, rather incomprehensibly and without citation to any authority, also asserts, *Resp. Br. at 21*, that this issue is not properly before this Court, calling it a "novel bifurcation argument" that was not presented to the trial court. Bill's Towing is not claiming that the trial court should have bifurcated trial of the liability and damages issues. Contrary to Ms. Hayes' assertions, and as both *Mina* and *Bauman* indicate, it is well within the purview of the Court of Appeals to limit the scope of any retrial.

104 Wn.2d at 697. On appeal, the plaintiff argued that the giving of a jury instruction related to the plaintiff's conduct was inappropriate and the court agreed. *Id.* at 703-07. The court remanded the case for a new trial "limited to the issue of the parties' respective liabilities." *Id.* at 708. For the jury to assess the respective liabilities on remand, the jury necessarily would have to allocate fault, just as it did in the first trial.

Similarly, in *Bauman*, a case involving a car/bicycle accident, the jury returned a verdict for the minor plaintiff bicycle rider, but found him 95% comparatively at fault. *Bauman*, 104 Wn.2d at 242-43. On appeal, the plaintiff argued that the jury should not have been instructed that the minor plaintiff's violation of a statute was negligence per se. *Id.* at 243. The court agreed, holding that, although evidence of a minor's violation of a statute is evidence of negligence a jury may consider, it is not negligence per se. *Id.* at 247-48. The court remanded the case for a new trial on liability only. *Id.* at 248-49. Because the jury on remand again would have to determine whether the minor plaintiff was negligent, the jury would necessarily have to determine what, if any, allocation of fault should be attributed to the minor plaintiff, as it had to do in the first trial.

Mina and *Bauman* are similar to the situation presented here and support limiting any retrial to liability and allocation of fault issues. Although Ms. Hayes argues, *Resp. Br. at 21*, that "there is potentially a

completely new set of facts to be presented” at a re-trial, she does not identify what that new set of facts is or how that would necessitate a re-trial of damages. And, although she argues, *Resp. Br. at 21*, that there would be “completely new parties at a new trial,” again she does not identify who those new parties would be, nor does she explain why adding new parties would necessitate a re-trial of damages.

Neither Bill’s Towing nor Ms. Hayes has made any claim of error that, if corrected on remand, would affect the jury’s determination of the amount of plaintiff’s damages. Although Ms. Hayes makes a passing assertion, *Resp. Br. at 21*, that the loss of future income presented by her expert exceeded the jury’s verdict,¹¹ she has not claimed that the jury’s determination of the amount of future income loss was the product of any error during trial. Nor has she cited any authority suggesting that the jury’s determination of the amount of damages was so low as to require a re-trial of that determination. That a new jury on retrial hypothetically might be persuaded to award more damages than the jury in the first trial awarded is not sufficient reason to mandate a re-trial of the amount of damages issue.

¹¹ The validity of her expert’s assumptions and calculations concerning lost wages was the subject of extensive cross-examination, which the jury was entitled to credit. *See CP 435-42, 444-58.*

IV. CONCLUSION

For the foregoing reasons and those set forth in Bill's Towing's opening brief, this Court should reverse the trial court's denial of Bill's Towing's motion for judgment as a matter of law on the issue of causation and remand for entry of judgment in Bill's Towing's favor. Alternatively, this Court should reverse and remand the case for a new trial on liability only with instructions to: (1) allow the jury to allocate comparative fault to Billy Ray Shirley; (2) allow the jury to find that Billy Ray was a trespasser; and (3) vacate the entry of judgment against Welch, and preclude joint and several liability for Welch's share of fault, in light of the strictures of the bankruptcy court's amended order.

RESPECTFULLY SUBMITTED this 18th day of June, 2015.

FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN SPILLANE
PLLC

By



Mary H. Spillane, WSBA # 11981

Timothy L. Ashcraft, WSBA #26196

Attorneys for Appellants Bill's Towing and
Garage, Inc. and Thomas A. Lomis

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 18th day of June 2015, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellants Bill's Towing and Garage, Inc. and Thomas A. Lomis," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondents:

Lincoln C. Beauregard, WSBA #32878
Connelly Law Offices
2301 N. 30th Street
Tacoma, WA 98403
Phone: 253-593-0377
Email: lincolnb@connelly-law.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondents:

Ashton K. Dennis, WSBA #44015
Washington Law Center, PLLC
15 Oregon Avenue, Suite 210
Tacoma, WA 98409
Phone: 253-476-2653
Email: ashton@washingtonlawcenter.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Personal Counsel for Thomas A. Lomis:

Brett Purtzer, WSBA #17283
Hester Law Group
1008 Yakima Avenue, Suite 302
Tacoma, WA 98405
Phone: 253-272-2157
Email: brett@hesterlawgroup.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Co-counsel for Defendants/Appellants Bill's
Towing and Garage, Inc. and Thomas A.

Lomis:

Dana A. Ferestien, WSBA #26460

WILLIAMS KASTNER

601 Union St., Suite 4100

Seattle, WA 98101

Phone: 206-628-6600

Email: dferestien@williamskastner.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Pro Se Defendant:

Richard Welch

417 E. 65th St.

Tacoma, WA 98404

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 18th day of June, 2015, at Seattle, Washington.



Carrie A. Custer, Legal Assistant