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SUPREME COURT
STATE OF WASHINGTON

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No. 80922-4

(COA No. 34630-3-II)

SUPREME COURT

OF THE STATE OF WASHINGTON

JESSE MAGANA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY,

Respondents,

and

RICKY and ANGELA SMITH, husband and wife; et al.,

Defendants.

**RESPONDENTS' STATEMENT OF ADDITIONAL
AUTHORITIES**

Michael B. King

WSBA No. 14405

Gregory M. Miller

WSBA No. 14459

James E. Lobsenz

WSBA No. 8787

Attorneys for Respondents

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Under RAP 10.8, Respondents Hyundai Motor America and Hyundai Motor Company (collectively “Hyundai”) submit the following additional authorities.

1. Improperly Raised New Issue. Concerning whether citing cases in a Supplemental Brief not previously cited in support of an issue (e.g. due process) constitutes the impermissible raising of an issue (*see* Petitioner Magana’s Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers at 4-5), Hyundai submits the following authority:

Brutsche v. City of Kent, 164 Wn.2d 664, 671, n.3, 193 P.3d 110 (2008) (holding Court of Appeals erred in refusing to consider a case cited for the first time in an appellant’s reply brief) (“The court considered the case the equivalent of raising a new issue in a reply brief. . . . The refusal to consider the case on this basis was erroneous, however, because parties can clearly cite additional authority on appeal in support of issues they have already raised”)

2. Determining Relevance of OSI Evidence. Concerning the requirements that must be met to establish the relevance of so-called “other similar incidents” (“OSI”) evidence (*see, e.g.*, Petitioner Magana’s Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers at 10-16, discussing *inter alia* the relevance of the OSI discovery material produced by Hyundai), Hyundai submits the following additional authorities:

Ford Motor Co. v. Hall-Edwards, 971 So.2d 854, 859 (Fla. App. 2007), *rev. denied*, 984 So.2d 1250 (Fla. 2008) (reversing judgment on

\$60,000,000 jury verdict for plaintiffs in crashworthiness case) (holding trial court committed prejudicial error in admitting evidence of other accidents) (“failure to lay a sufficient predicate establishing *substantial* similarity between the accidents renders the evidence irrelevant as a matter of law” (citations omitted) (emphasis added)). *Accord, Colp v. Ford Motor Co.*, 279 Ga.App. 280, 630 S.E.2d 886, 889 (2006) (affirming decision of trial court to exclude proffered evidence of other accidents because substantial similarity had not been established).

3. Limitation on Use of OSIs by Expert Witness. Concerning whether Magana’s design defect expert could rely on the OSIs produced by Hyundai as a basis for his opinions if the OSIs were not admissible because they were not shown to be substantially similar to Magana’s accident (*see* Petitioner Magana’s Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers at 11), Hyundai submits the following additional authority:

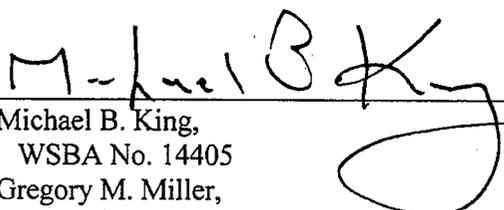
Smith v. Sturm, Ruger & Co., 39 Wn. App. 740, 750, 695 P.2d 600, *rev. denied*, 103 Wn.2d 1041 (1985) (affirming judgment on jury verdict in favor of manufacturer in products liability action) (“Otherwise inadmissible evidence may be the basis of expert testimony so long as it is the type reasonably relied upon by experts in the field”; holding that survey of product users reporting on other accidents could not properly have been the subject of testimony by plaintiff’s expert in relevant part because the survey did not qualify as of a type reasonably relied upon by those in the expert’s field).

Copies of the authorities are attached for the convenience of the Court.

RESPECTFULLY SUBMITTED this 14th day of January, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By:



Michael B. King,
WSBA No. 14405
Gregory M. Miller,
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H

Supreme Court of Washington, En Banc.
 Leo C. BRUTSCHE, Petitioner,

v.

CITY OF KENT, a Washington municipal corporation;
 and King County, a political subdivision of
 the State of Washington, Respondents.
 No. 79252-6.

Argued Jan. 17, 2008.

Decided Oct. 2, 2008.

Background: Property owner brought suit against city for damage done to property when law enforcement officers using a battering ram to gain entry caused physical damage to doors and door jambs. The Superior Court, King County, Brian D. Gain, J., granted summary judgment for city. Property owner appealed. The Court of Appeals, Becker, J., 134 Wash.App. 1002, 2006 WL 1980216, affirmed. Review was granted.

Holdings: The Supreme Court of Washington, Madsen, J., held that:

- (1) property owner's trespass claim was proper cause of action;
- (2) doctrine of trespass ab initio is no longer viable, abrogating *Hamilton v. King County*, 195 Wash. 84, 79 P.2d 697;
- (3) officers did not commit trespass in executing search warrant; and
- (4) destruction of property was not a taking and did not entitle property owner to compensation.

Affirmed.

Chambers, J., concurred in part, dissented in part, and filed opinion, joined by Debra J. Stephens, J.

Sanders, J., dissented, and filed opinion, joined by James M. Johnson, J.

West Headnotes

[1] Appeal and Error 30 ↪893(1)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate Court
 30k893(1) k. In General. Most Cited Cases
 Summary judgment is reviewed de novo.

[2] Judgment 228 ↪185(2)

228 Judgment
 228V On Motion or Summary Proceeding
 228k182 Motion or Other Application
 228k185 Evidence in General
 228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
 Evidence is construed in the light most favorable to the party opposing summary judgment.

[3] Municipal Corporations 268 ↪737

268 Municipal Corporations
 268XII Torts
 268XII(A) Exercise of Governmental and Corporate Powers in General
 268k737 k. Trespass. Most Cited Cases

Municipal Corporations 268 ↪739(1)

268 Municipal Corporations
 268XII Torts
 268XII(A) Exercise of Governmental and Corporate Powers in General
 268k739 Destruction of Property
 268k739(1) k. In General. Most Cited Cases
 Property owner did not have a negligence claim against city after law enforcement officers caused damage to property when they used battering ram to

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enter property, damaging doors and door jambs;
 any claim was for trespass.

[4] Searches and Seizures 349 ↩️141

349 Searches and Seizures

349III Execution and Return of Warrants

349k141 k. In General. Most Cited Cases

Law enforcement officers executing a search warrant have a duty to conduct a search in a reasonable manner and avoid unnecessary damage to property of innocent third parties.

[5] Appeal and Error 30 ↩️762

30 Appeal and Error

30XII Briefs

30k762 k. Reply Briefs. Most Cited Cases

Court of Appeals should have considered case that supported citizen's trespass claim raised on appeal, even though citizen cited case for first time in reply brief; citizen could cite additional authority in support of trespass issue he had earlier raised. Restatement (Second) of Torts § 214.

[6] Trespass 386 ↩️13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases
 If law enforcement officers executing a search warrant unnecessarily damage the property while conducting their search, that is, if they damage the property to a greater extent than is consistent with a thorough investigation, they exceed the privilege to be on the land, and liability in trespass can result. Restatement (Second) of Torts § 214.

[7] Trespass 386 ↩️10

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k10 k. In General. Most Cited Cases

A person is liable for trespass if he or she intentionally (1) enters or causes another person or a thing to enter land in the possession of another; or (2) remains on the land; or (3) fails to remove from the land a thing that he or she is under a duty to remove. Restatement (Second) of Torts § 158.

[8] Trespass 386 ↩️2

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k2 k. Intent. Most Cited Cases

The intent required to show liability for trespass is not limited to consequences that are desired; instead, if the actor knows that the consequences are certain or substantially certain to result and still goes ahead, he is deemed to have desired to produce the result. Restatement (Second) of Torts § 158.

[9] Trespass 386 ↩️13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases
 Liability for damage as trespasser may arise under Restatement section providing that one who has unreasonably exercised a privilege to enter land is subject to liability for any harm arising out of that unreasonable action. Restatement (Second) of Torts § 214(1).

[10] Trespass 386 ↩️13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases
 Restatement (Second) of Torts section on priv-

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ileged entries onto land applies to trespass claims involving execution of search warrants on private property. Restatement (Second) of Torts § 214.

[11] Trespass 386 ↪13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases

The type of conduct giving rise to liability under Restatement (Second) of Torts section on privileged entries onto land can be either intentional or negligent misconduct, but the action itself is a trespass action. Restatement (Second) of Torts § 214(1).

[12] Municipal Corporations 268 ↪737

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k737 k. Trespass. Most Cited Cases

Law enforcement officers' valid search warrant was not automatic bar to homeowner's trespass claim against city; officers used battering ram to enter home, damaging doors and door jambs, even though owner offered to unlock locks. Restatement (Second) of Torts § 214.

[13] Municipal Corporations 268 ↪737

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k737 k. Trespass. Most Cited Cases

Property owner's trespass claim against city after officers used a battering ram to gain entry, causing physical damage to home, was proper cause of action. Restatement (Second) of Torts § 214.

[14] Trespass 386 ↪13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases

The doctrine of trespass ab initio is no longer viable, and, thus, one who enters land under privilege and commits a tortious act is liable only for that tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct; abrogating *Hamilton v. King County*, 195 Wash. 84, 79 P.2d 697. Restatement (Second) of Torts § 214(2).

[15] Trespass 386 ↪13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases

An actor who unreasonably exercises the privilege to enter or remain on the land is subject to liability for trespass under Restatement section on privileged entries onto land, regardless of whether the initial entry onto the land is lawful. Restatement (Second) of Torts § 214(2).

[16] Trespass 386 ↪13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases

Law enforcement officers did not engage in unreasonable conduct in exercising their privilege to be on property, and, therefore, did not commit trespass when using battering ram to enter home, damaging doors and door jambs in executing search warrant, although property owner offered to use keys to allow officers to enter; search for evidence of methamphetamine manufacture was potentially

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dangerous, homeowners son, who was suspected of being involved in methamphetamine trade, barricaded himself in home, and there was danger that evidence would be destroyed before officers could search the premises. Restatement (Second) of Torts § 214.

[17] Eminent Domain 148 ↪ 2.35

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.35 k. Criminal Justice in General. Most Cited Cases

Destruction of property by law enforcement officers conducting lawful search pursuant to a warrant was not a "taking" and did not entitle property owner to compensation under eminent domain, although police did not seize any evidence and there was no resulting prosecution; there was no permanent physical occupation of property that occurred. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[18] Municipal Corporations 268 ↪ 189(1)

268 Municipal Corporations

268V Officers, Agents, and Employees

268V(B) Municipal Departments and Officers Thereof

268k179 Police

268k189 Rights, Duties, and Liabilities of Policemen

268k189(1) k. In General. Most Cited Cases

The gathering and preserving of evidence by police officers is a police power function, necessary for the safety and general welfare of society.

[19] Courts 106 ↪ 89

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k89 k. In General. Most Cited Cases
 A case should be overruled upon a clear showing that an established rule is incorrect and harmful.

[20] Trespass 386 ↪ 13

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k13 k. Wrongful Act After Rightful Entry and Trespass Ab Initio. Most Cited Cases

Liability in trespass may arise if law enforcement officers exceed the scope of their privilege to be on the land to execute a search warrant, by intentionally acting in a way that a reasonable person would not regard as necessary to execute the warrant, or by executing the warrant in a negligent manner, and thereby damage the property. Restatement (Second) of Torts § 214.

**112 John Roling Muenster, Muenster & Koenig, Jerald A. Klein, Attorney at Law, Seattle, WA, for Petitioner.

Chloethiel Woodard Deweese, Keller Rohrback LLP, Richard B. Jolley, Attorney at Law, Seattle, WA, for Respondents.

Sofia D'almeida Mabee, City of Yakima-Legal Dept., Yakima, WA, Daniel Brian Heid, City of Auburn, Auburn, WA, Amicus Curiae on behalf of Washington State Assoc. of Municipal Attorneys.

Jason C. Kinn, Danielson Harrigan Leyh & Tollefson, Nancy Lynn Talner, Attorney at Law, Sarah A. Dunne, ACLU, Seattle, WA, Amicus Curiae on behalf of American Civil Liberties.

William R. Maurer, Michael E. Bindas, Institute for Justice/WA State Chapter, Seattle, WA, Amicus Curiae on behalf of Institute for Justice Washington Chapter.

MADSEN, J.

*667 ¶ 1 In executing a search warrant for a suspected methamphetamine lab on premises **113

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owned by petitioner Leo C. Brutsche, law enforcement officers using a battering ram to gain entry caused physical damage to doors and door jambs. Mr. Brutsche brought suit against the city of Kent (the City), among others, arguing that the officers had a duty to conduct the search so as to avoid unnecessary damage and do the least damage to the property consistent with a thorough investigation, that they breached this duty, and that the City is liable for the damage. The trial court granted summary judgment in favor of the City and the Court of Appeals affirmed the decision. We hold that although a trespass claim may be asserted against a city alleging that law enforcement officers exceed the scope of their lawful authority to enter property to execute a search warrant, summary judgment in this case was proper because as a matter of law the officers did not commit trespass as Mr. Brutsche contends. We also hold that summary judgment was properly granted with respect to Mr. Brutsche's claim that the damage to his property constituted a taking of private property for which the City must pay just compensation and decline to overrule *Eggleston v. Pierce County*, 148 Wash.2d 760, 64 P.3d 618 (2003).

FACTS

¶ 2 On July 8, 2003, a King County District Court judge signed a search warrant authorizing the search of an *668 abandoned warehouse, several outbuildings, eight semitrailers, and a mobile home on property in Kent owned by Mr. Brutsche. The warrant also authorized police to search James F. Brutsche (Leo Brutsche's son), locked containers, and numerous abandoned or disabled vehicles within the fenced boundary of the property. It authorized the seizure of controlled substances, including methamphetamine, as well as paraphernalia and equipment used in connection with the manufacture and distribution of methamphetamine and other specified items.

¶ 3 On July 10, 2003, the Valley Special Response Team (SRT), a multi-jurisdictional group of law en-

forcement officers from several South King County law enforcement jurisdictions, executed the search warrant. The SRT was called on to execute the warrant because of its training for special situations, including serving high risk warrants. The search warrant for Mr. Brutsche's property was considered to be high risk because "it involved a search for the manufacture of methamphetamines and the apprehension of subjects in the methamphetamine trade." Clerk's Papers (CP) at 44 (Decl. of Darren Majack, a Kent patrol officer who was a member of the SRT executing the search warrant); see CP at 47 (Decl. of Mike Villa, a lieutenant with the Tukwila Police Department, who was commander of the SRT) (the SRT is used for executing warrants at high risk sites such as methamphetamine lab sites, which "are known to be dangerous and volatile and pose a significant risk to officer safety").

¶ 4 When the SRT arrived at the property in marked vehicles and wearing police uniforms, James Brutsche ran from an outdoor area into the mobile home and attempted to barricade himself and another suspect in the home by placing a dowel in the sliding glass door. He ran from the SRT "despite an announcement, repeated three times over the loud speaker from one of the vehicles, that the police had arrived and had a search warrant." CP at 44 (Decl. of Majack).

*669 ¶ 5 The SRT "almost immediately" breached the glass door of the mobile home with a battering ram. *Id.* Officer Majack stated that this tactic was necessary because SRT did not know if James Brutsche was arming himself or rallying unaccounted-for individuals in the mobile home to engage police in a fight, and to minimize the likelihood that evidence was being destroyed. CP at 44-45; see CP at 47, 48 (Decl. of Villa) (" [m]ethamphetamine users are typically paranoid, will act in an irrational fashion, and are often armed to protect themselves from other criminals"). James Brutsche was combative and resistant, and officers used a "taser" to subdue him. CP at 45 (Decl. of Majack); CP at 49 (Decl. of Villa).

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¶ 6 The SRT also decided it was necessary to enter other structures on the property immediately because they provided possible cover and concealment for unknown persons and to prevent possible destruction of evidence.**114 Lieutenant Villa said that while the doors of some structures were unlocked several were locked and thus it was necessary to breach these doors with the battering ram. CP at 49 (Decl. of Villa). He stated that although he did not see Leo Brutsche at the scene, as the SRT commander he would not have permitted Mr. Brutsche access to the property during the search because

[a]s a matter of standard operating procedure, the SRT does not allow access in or out of a potential crime scene until a search has been completed. This procedure not only maintains the integrity of the potential crime scene, but also ensures the safety of innocent bystanders in a potentially high risk environment.

Id. at 50.

¶ 7 Mr. Brutsche maintains the destruction of many of his doors and door jams was unnecessary. He stated, "At the time of the raid, I offered my keys to the officer in charge, Sergeant Jaime Sidell.^[FN1] I offered to escort the officers around my property and open all doors for them. Sergeant *670 Sidell rejected my offer saying '... we have our own way of getting in.' " CP at 89 (Certification of Leo C. Brutsche). Mr. Brutsche added that use of his keys would be quicker and quieter, making the entry safer for the officers, and would not damage the doors and door frames. *Id.* He said that he knew there were no illegal drugs or weapons on the property and offered to escort the officers at the time of the search because there were no genuine officer safety concerns or any illegal activities. Mr. Brutsche hired a carpenter to repair the doors and door jams damaged in the raid, at a cost of \$4,921.51. The SRT did not seize any evidence.

FN1. Sergeant Sidell was not, however, the officer in charge, as explained.

¶ 8 Mr. Brutsche brought this action against King County and the City, asserting several claims, among them claims of trespass, negligence, and a taking of property without just compensation.^{FN2} In November 2004, the matter was transferred to arbitration. The parties stipulated to dismissal of King County, which settled with Mr. Brutsche prior to the arbitration hearing. The arbitrator awarded \$2,400 to Mr. Brutsche, plus costs.

FN2. Mr. Brutsche and the Estate of James Brutsche filed an unsuccessful civil rights suit in federal court against the Port of Seattle, the cities of Auburn, Federal Way, Kent, Renton, and Tukwila, and individual law enforcement officers who participated in the raid and search of Mr. Brutsche's property.

¶ 9 Mr. Brutsche moved for a trial de novo in superior court. The City moved for dismissal under CR 12(b)(6). This motion was denied. On June 24, 2005, the City moved for summary judgment. A month later the court granted this motion. The City also moved for an award of \$27,124 in attorney fees under MAR 7.3 because Mr. Brutsche did not improve his position. On September 16, 2005, the court awarded the City attorney fees of \$4,050.

¶ 10 Mr. Brutsche appealed; the City cross-appealed the amount of attorney fees. The Court of Appeals affirmed the grant of summary judgment but remanded on the attorney fee issue for development of a record for review. The Court of Appeals awarded the City attorney fees on appeal under MAR 7.3 because Mr. Brutsche appealed and again failed to improve his position. *671 *Brutsche v. City of Kent*, noted at 134 Wash.App. 1002, 2006 WL 1980216, *review granted*, 160 Wash.2d 1017, 163 P.3d 793 (2007).

¶ 11 We limited review to Mr. Brutsche's common law negligence and trespass claims and his takings claims under the state and federal constitutions.

[1][2] ¶ 12 Summary judgment is reviewed de

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novo. *Osborn v. Mason County*, 157 Wash.2d 18, 22, 134 P.3d 197 (2006). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Evidence is construed in the light most favorable to the non-moving party. *Osborn*, 157 Wash.2d at 22, 134 P.3d 197.

ANALYSIS

[3][4][5] ¶ 13 Mr. Brutsche maintains that pursuant to this court's decision in **115*Goldsby v. Stewart*, 158 Wash. 39, 290 P. 422 (1930), the City is liable in negligence. In *Goldsby*, the court stated that law enforcement officers executing a search warrant have a duty to conduct a search in a reasonable manner and avoid unnecessary damage to property of innocent third parties. We agree that *Goldsby* is sound authority, but it is authority favoring Mr. Brutsche's trespass claim, not negligence.^{FN3}

FN3. The Court of Appeals refused to consider *Goldsby* on the ground that Mr. Brutsche did not cite it until his reply brief in that court and the City had not had an opportunity to address it. The court considered the case the equivalent of raising a new issue in a reply brief. *Brutsche*, 134 Wash.App. 1002, 2006 WL 1980216, at *4, *5. The refusal to consider the case on this basis was erroneous, however, because parties can clearly cite additional authority on appeal in support of issues they have already raised. While *Goldsby* is not authority supporting Mr. Brutsche's negligence claim, it is authority supporting his trespass claim.

¶ 14 Under *Goldsby*, which has never been overruled, and the *Restatement (Second) of Torts* (1965), a city may be liable in trespass for unnecessary damage to property caused by its law enforcement officers executing a search warrant, on the theory that unreasonable damage to the property ex-

ceeds the privilege to be present on the *672 property and search. In *Goldsby*, the plaintiffs owned a building and had rented the upper half to a tenant. *Goldsby*, 158 Wash. 39, 290 P. 422. Law enforcement personnel from Snohomish County and the city of Everett searched the upper level premises for alcoholic beverages pursuant to a valid search warrant. *Id.* In the course of the search, the officers allegedly damaged the building and removed an entrance door to the second floor. *Id.* at 40, 290 P. 422. The plaintiffs brought suit against the sheriff of Snohomish County and two deputies, the Everett commissioner of public safety, and the Everett chief of police seeking damages for injuries to the building. *Id.* at 39, 290 P. 422.

¶ 15 At the close of evidence, the court granted the defendants' motion for dismissal. *Id.* at 40, 290 P. 422. The plaintiffs appealed, arguing that the court invaded the province of the jury and decided the case itself on disputed facts. *Id.* This court agreed, holding that the trial court erred in ruling as a matter of law that the plaintiffs had failed to present a case for the jury, and reversed and remanded for a new trial. *Id.* at 42, 290 P. 422. The court stated the law as follows: "In executing a search warrant, officers of the law should do no unnecessary damage to the property to be examined, and should so conduct the search as to do the least damage to the property consistent with a thorough investigation." *Id.* at 41, 290 P. 422. The court said that "[i]t was for the jury to say whether or not [the officers] had, in searching appellants' property, unnecessarily damaged the same, and thereby rendered themselves liable to appellants." *Id.* at 41-42, 290 P. 422.

¶ 16 The only authorities cited in *Goldsby* for the rule of law concerning unnecessary damage are *Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L. Ed 581 (1849), *Buckley v. Beaulieu*, 104 Me. 56, 71 A. 70 (1908), and 24 Ruling Case Law § 11, at 708 (William M. McKinney & Burdette A. Rich eds., 1919). *Goldsby*, 158 Wash. at 41, 290 P. 422. Both of the cited cases involved actions of trespass quare

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clausum.^{FN4} An action in “trespass *673 quare clausum fregit” is “[a]t common law, an action to recover damages resulting from another’s unlawful entry on one’s land that is visibly enclosed.... Also termed *trespass to real property*; *trespass to land*.” BLACK’S **116 LAW DICTIONARY 1542 (8th ed.2004).^{FN5} The treatise cited in *Goldsby* in turn cites and quotes the same two cases that the court cited. There is no mention in *Goldsby* of negligence; it is a trespass case.^{FN6}

FN4. Like Mr. Brutsche, the American Civil Liberties Union treats *Goldsby* as a negligence case, and says that in *Buckley*, cited in *Goldsby*, the Supreme Court of Maine observed that an action could sound in negligence for an unreasonable search. *Amicus Curiae* Br. of Am. Civil Liberties Union of Wash. at 5. The opening sentence in *Buckley* is, however: “Action of trespass quare clausum for an alleged breaking and entering of the plaintiff’s dwelling house.” *Buckley*, 104 Me. 56, 71 A. 70. The case never mentions negligence, and concludes that “[u]pon the [] facts we think it clear that the manner and extent of the search in this case were unreasonable and in excess of the officers’ authority.” *Id.* at 60, 71 A. 70. The court’s reasoning that the trespass claim was permitted is like the law stated in the *Restatement (Second) of Torts* § 214(1), discussed below, recognizing liability for trespass when officers executing a search warrant engage in unreasonable acts beyond their privilege to enter property under a search warrant.

FN5. See also THE LAW DICTIONARY 394 (Anderson Publ’g 1997) (“trespass quare clausum fregit, *i.e.*, entry on another’s close (*q.v.*), or land without lawful authority”).

FN6. The parties’ briefs submitted in *Goldsby* do not mention negligence, either. The plaintiffs-appellants cited only the

same two cases that this court cited in its opinion, Appellants’ Opening Brief at 4-7, *Goldsby v. Stewart*, No. 22392 (Wash.Sup.Ct.), reprinted in 1 Brs. 158 Wash. (1930), and the defendants-respondents said they had no quarrel with the law stated in the appellants’ brief, Respondents’ Brief at 15-16, *Goldsby, supra*.

[6] ¶ 17 Therefore, under *Goldsby*, if officers executing a search warrant unnecessarily damage the property while conducting their search, that is, if they damage the property to a greater extent than is consistent with a thorough investigation, they exceed the privilege to be on the land and liability in trespass can result.

[7][8][9] ¶ 18 *Restatement (Second) of Torts* § 214 leads to the same result. A person is liable for trespass if he or she intentionally (1) enters or causes another person or a thing to enter land in the possession of another or (2) remains on the land or (3) fails to remove from the land a thing that he or she is under a duty to remove. See *674 *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash.2d 677, 681-84, 709 P.2d 782 (1985) (applying *Restatement (Second) of Torts* § 158).^{FN7} Liability for damage may arise under section 214(1), which provides that “[a]n actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct.” See *Fradkin v. Northshore Util. Dist.*, 96 Wash.App. 118, 123, 977 P.2d 1265 (1999) (quoting § 214(1) cmt. a).

FN7. Significantly, the intent required is used to mean “ ‘that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.’ ” *Bradley*, 104 Wash.2d at 682, 709 P.2d 782 (quoting *Restatement (Second) of Torts* § 8A (1965)). Intent is not limited to consequences that are desired. *Id.* Instead, if the actor knows that the consequences are

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certain or substantially certain to result and still goes ahead, he is deemed to have desired to produce the result. *Id.*

[10] ¶ 19 We adopt section 214 as an accurate statement of the law that applies to trespass claims involving execution of search warrants on private property.

¶ 20 Comment a to section 214(1), explains that

[a] privilege to enter land may be unreasonably exercised either by the intentional doing of an act which a reasonable man would not regard as necessary to effectuate the purposes for which the privilege is given, or by any negligence in the manner in which the privilege is exercised. Subsection (1), therefore, applies not only where the actor deliberately abuses his privilege by doing an act which he recognizes as unnecessary or deliberately does an act which a reasonable man would so recognize, but also where the actor does not use reasonable care to prevent the exercise of his privilege from involving an unreasonable risk of harm to the legally protected interests of others.

[11] ¶ 21 As the comment explains, the type of conduct giving rise to liability under section 214(1) can be either intentional or negligent misconduct, but the action itself is a trespass action. The City concedes that its conduct was intentional; it did not accidentally breach doors with the battering ram. We agree that the conduct giving rise to the injury to Mr. Brutsche's property was intentional because *675 the law enforcement officers intentionally and deliberately used battering rams to breach doors.

[12] ¶ 22 The City argues, however, that no trespass occurred because it had a valid, judicially issued warrant that authorized the police to open locked containers during the course of the search. As *Restatement (Second) of Torts* § 210 provides, the privilege to execute an order of a court to do any act on the land "carries with it the privilege to enter **117 the land for the purpose of executing the or-

der." Comment a to section 210 states, however: "As to the actor's liability for harm done by his unreasonable manner of exercising the privilege stated in this Section, see § 214(1)." Thus, under the *Restatement (Second) of Torts* § 210, section 214(1) applies even if the entry onto the property is initially lawful for purposes of a search pursuant to a valid warrant.^{FN8} The fact that a valid warrant exists is not an automatic bar to a trespass claim.

FN8. One court has stated that the presence of a valid search warrant is a complete defense to a suit for trespass. *Wright v. United States*, 963 F.Supp. 7, 19 (D.D.C.1997). But the authority cited in *Wright* for this proposition does not support the conclusion. The court relied on *Hammel v. Little*, 66 App. D.C. 356, 87 F.2d 907, 912 (D.C.Cir.1936). In *Hammel* property was seized for violation of the internal revenue laws, and upon acquittal of the owner, the property was returned. He brought a claim of trespass, claiming that probable cause is never justification for an illegal seizure. *Id.* at 908. The court rejected this argument, reasoning that the relevant question is whether the seizure was lawful and proper, and under civil rules of evidence this question had been resolved against the plaintiff even though he had been acquitted. *Id.* at 912. The court also said, however, that it has "never been the law that trespass will lie for an act of seizure unless it appears that the act was tortious or unauthorized." *Id.* Given this explanation, *Hammel* cannot be said to support a blanket defense because of the presence of a valid warrant.

[13] ¶ 23 Under *Restatement (Second) of Torts* § 214(1), and in light of *Goldsby*, Mr. Brutsche's trespass claim is a proper cause of action. See also 68 A.M.JUR.2d *Searches and Seizures* § 309 (2008) ("the victim of an unlawful search and seizure has available the remedy of trespass"), available at ht-

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tp:// web 2 westlaw. com; see, e.g., *Sovich v. State*, 92 Ind.App. 103, 167 N.E. 145, 146 (1929) (recognizing that officers executing a valid search warrant may be liable in damages for acts constituting a malicious trespass); *676 *Richardson v. Henderson*, 651 So.2d 501, 504-06 (La.Ct.App.1995) (relying on general principles in 68 AM.JUR.2d § 229 (1993), that execution of a search warrant must be carried out in an orderly manner and liability in trespass may result if the officers executing the warrant exceed their authority or wantonly destroy property in making their search; here, officers “thoroughly ‘trashed’ ” the plaintiffs' home, including spilling flour, splattering eggs on the floor, and tossing bags of chips and candy across the living room; judgment for plaintiffs affirmed an amount to clean the home and to compensate for emotional distress); *Onderdonk v. State*, 170 Misc.2d 155, 162-64, 648 N.Y.S.2d 214 (1996) (permitting recovery pursuant to a trespass claim of compensatory damages for damage to the plaintiff's property resulting from an unreasonably conducted search); *Moore v. Kilmer*, 185 Okla. 158, 90 P.2d 892, 893 (1939) (implicitly recognizing cause of action for trespass: an officer “ ‘is not liable as a trespasser for executing the [warrant] in an orderly manner’ ”; evidence did not support liability) (quoting *Knisley v. Ham*, 39 Okla. 623, 623, 136 P. 427 (syllabus), 39 Okla. 623, 136 P. 427 (1913)); *Jackson v. Harries*, 65 Utah 282, 236 P. 234, 236-37, 238 (1925) (damages sustained on basis of unlawful trespass); *Gillmor v. Salt Lake City*, 32 Utah 180, 89 P. 714 (1907) (action for damages for a trespass to property); but see *Wright v. United States*, 963 F.Supp. 7, 19 (D.D.C.1997) (presence of a valid search warrant is a complete defense to trespass).

[14] ¶ 24 However, we reject Mr. Brutsche's claim that the City is liable under the doctrine of trespass *ab initio*. This doctrine, which was accepted in the first restatement of torts, has been thoroughly repudiated in *Restatement (Second) of Torts*. “Trespass *ab initio*” is described as follows:

He who under *authority of law* enters upon another's land, and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance against the owner, is deemed to have entered originally without authority, and is therefore liable as a trespasser *ab initio* for the original entry itself, as well as for all damaging acts subsequently done by him thereunder. By the subsequent abuse, he forfeits the *677 protection which the law would otherwise give to the original entry. The abuse of the authority not only terminates it, but revokes it retrospectively, so that it is deemed never to have existed.

**118 But if one enters under an *authority in fact, given by the owner*, his subsequent abuse of that authority does not make him liable as a trespasser for the original entry. He is liable only for abuse or misconduct occurring after entry.

It has been said that the rule of trespass *ab initio* was “primarily one of procedure,” ... [b]ut the rule did not merely affect the form of action under the old procedure. It created a substantive liability which would not otherwise exist. And “its secondary effect upon the substantive law still remains, viz., that it enables the plaintiff to recover damages for the entire transaction, and not merely for the wrongful portion of it” (the abuse subsequent to the entry).

Jeremiah Smith, *Surviving Fictions*, 27 YALE L.J. 147, 164 (1917) (footnotes omitted) (some emphasis added) (quoting John W. Salmond, *The Law of Torts: A Treatise on English Law of Liability for Civil Injuries* 168 (1907)).

¶ 25 According to *Restatement (Second) of Torts* § 214(2) cmt. e, the doctrine is a “peculiar and anomalous fiction” having “its origin in the ancient law of distress of property” “in a time of strict rules of pleading, where much subsequent misconduct was not actionable in itself, and it served to afford a remedy where none was otherwise available.” Since about 1900, the doctrine has been rejected by the majority of courts. *Restatement (Second) of*

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Torts app. (reporter's notes). Section 214(2) also rejects the doctrine, providing instead that

[o]ne who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct.

¶ 26 Mr. Brutsche acknowledges that section 214(2) rejects the doctrine, but maintains that it is still viable in *678 Washington state.^{FN9} As Mr. Brutsche correctly states, cases applying the doctrine have not been overruled.^{FN10}

FN9. The City argues that under *Restatement (Second) of Torts* §§ 204, 206, breach of the doors is permitted even if the doctrine of trespass ab initio is still viable. These sections are not relevant, however, because they pertain to forcible entry to arrest or apprehend a person and the circumstances under which one entering the land for these reasons may make a forcible entry of a dwelling.

FN10. For example, in *Hamilton v. King County*, 195 Wash. 84, 92-93, 79 P.2d 697 (1938), this court applied the doctrine of trespass ab initio when holding that a county was liable for loss of a property owner's season's mink crop when it entered the property without authority and constructed a drainage ditch, and the resulting disturbance in close proximity to the minks' mating pens led to a reduction in mink offspring.

[15] ¶ 27 Under the modern view set out in *Restatement (Second) of Torts* § 214, the trespass ab initio doctrine is not only abrogated, it is also unnecessary. An actor who unreasonably exercises the privilege to enter or remain on the land is subject to liability under section 214 regardless of whether the initial entry onto the land is lawful. We take this

opportunity to adopt section 214 in its entirety. Accordingly, a trespass action is appropriate under section 214.

[16] ¶ 28 Next, the City contends that summary judgment was proper because reasonable minds cannot differ on the evidence submitted and there was no trespass as a matter of law. We agree.

¶ 29 Mr. Brutsche contends that the officers exceeded the privilege to be on his land executing the search warrant. He points out that he offered his keys to the officers and offered to escort them around his property and open all doors. He maintains use of his keys would have been quicker and quieter, making entry safer for the officers while avoiding damage to the doors and frames. He states that he knew there were no illegal drugs or weapons on the property and that he offered to accompany the officers because there were no genuine concerns for officer safety.

¶ 30 However, the evidence submitted by the City establishes that the search was authorized for evidence of methamphetamine manufacture and that such searches are often dangerous. There was also the risk of harm to Mr. *679 Brutsche if he accompanied the officers, as well as the possibility that his **119 presence would hamper or limit the search. The declarations of SRT Commander Villa and Officer Majack, which are largely uncontroverted, show that it was necessary to breach the doors and that James Brutsche's (Mr. Brutsche's son's) actions dictated the need for the officers' actions. These declarations describe the high risk associated with search warrants for methamphetamine manufacture and the apprehension of individuals in the methamphetamine trade. They explain that James Brutsche was suspected of being involved in the methamphetamine trade, that he tried to barricade himself and another suspect in the mobile home by using a dowel to bar a sliding glass door, and that the officers did not know whether he was arming himself or attempting to rally unknown persons in the home to engage in a fight with police. Further, the declarations describe the danger that evidence

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would be destroyed before they could search the premises. Villa's declaration also explains that standard operating procedure is to bar access to search scenes during a search, in part to protect innocent bystanders.

¶ 31 Under these facts, reasonable minds could not differ. The officers did not engage in unreasonable conduct in exercising their privilege to be on the property. We hold that the trial court properly granted summary judgment on the trespass claim.

¶ 32 Mr. Brutsche also asserted a negligence claim, but in his petition for review and supplemental brief in this court he relies entirely on *Goldsby* as controlling precedent on his negligence claim. Because *Goldsby* is, as explained, a trespass case, and because the actions of the officers in breaching the doors on Brutsche's property were intentional, not accidental, we decline to address the negligence claim.

[17] ¶ 33 We next turn to Mr. Brutsche's takings claim. Mr. Brutsche argues that destruction of property of an innocent third party during execution of a search warrant where no evidence is seized constitutes a compensable *680 taking under article I, section 16 of the Washington State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals rejected this argument on the ground that under this court's reasoning in *Eggleston*, 148 Wash.2d 760, 64 P.3d 618, there is no compensable taking under the state constitution for seizure and preservation of evidence or for destruction of property by the police when executing a search warrant. Mr. Brutsche contends that *Eggleston* is distinguishable.

¶ 34 Article I, section 16 of the Washington State Constitution provides in part that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made."

¶ 35 Contrary to Mr. Brutsche's claim, *Eggleston* is not distinguishable and the Court of Appeals cor-

rectly held that no takings occurred given our holding in that case. In *Eggleston*, a property owner brought a claim alleging a taking under article I, section 16 after sheriff's deputies executed a search warrant for her home, uninhabited at the time, pertaining to a murder allegedly committed by her son, Brian. The officers collected evidence, including two walls, removal of which made the house unstable and uninhabitable. Brian was subsequently tried and convicted, but the walls were not used as evidence. The Court of Appeals reversed his conviction, and at the time this court decided *Eggleston*, an order preserving the scene at the house was still in effect and would remain in effect until vacated or modified, or until the criminal case was complete.

¶ 36 We held in *Eggleston* that the destruction of property by police activity other than collecting evidence pursuant to a warrant is not a takings under article I, section 16. *Eggleston*, 148 Wash.2d at 772-76, 64 P.3d 618.^{FN11} We noted there is a split *681 of authority **120 in other states as to whether damage of property during a search is a compensable taking, but found the analysis of courts in California and Iowa more compelling than those in Texas, Minnesota, and New Jersey.^{FN12} We observed that the California court's opinion is especially important because California's takings clause was a model for Washington's. *Id.* at 772 n. 8, 64 P.3d 618; see *Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 895 P.2d 900, 41 Cal.Rptr.2d 658 (1995).

FN11. The court reached the substantive takings claim, acknowledging that the parties had not presented a *Gunwall* analysis but noting that a satisfactory *Gunwall* analysis was presented by an amicus and also stating that "the threshold function *Gunwall* performs is less necessary when we have already established a state constitutional provision provides more protection than its federal counterpart." *Eggleston*, 148 Wash.2d at 767 n. 5, 64 P.3d 618; see

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State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986). We have held in other cases that article I, section 16 provides, in some ways, greater protection. *Eggleston*, 148 Wash.2d at 766, 64 P.3d 618 (citing *Mfr'd Hous. Cmty. of Wash. v. State*, 142 Wash.2d 347, 356 n. 7, 13 P.3d 183 (2000)). Because it is settled that article I, section 16 is to be given independent effect, it is unnecessary to engage in a *Gunwall* analysis.

FN12. In addition to the cases cited in *Eggleston*, courts in two other states have rejected takings claims arising out of destruction of or damage to an innocent property owner's property by police executing search warrants. *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 223-27 (Okla.1997) (also relying on distinction between police power and a takings; Oklahoma's constitution provides in part that "[p]rivate property shall not be taken or damaged for public use without just compensation," OKLA. CONST. art. 2, § 24); *Certain Interested Underwriters at Lloyd's London Subscribing to Certificate No. TP-CLDP217477 v. City of St. Petersburg*, 864 So.2d 1145 (Fla. Dist. Ct. App. 2003).

[18] ¶ 37 Our decision rested on the distinction between police power and the power of eminent domain: " '[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.' " *Eggleston*, 148 Wash.2d at 768, 64 P.3d 618 (quoting *Conger v. Pierce County*, 116 Wash. 27, 36, 198 P. 377 (1921)). "The gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of society." *Id.*

¶ 38 Mr. Brutsche contends that *Eggleston* is distinguishable because in his case the police did not

seize any evidence and there was no resulting prosecution. This difference is not a basis for distinguishing the case. Because the SRT searched for evidence pursuant to the warrant, *Eggleston's* analysis applies.

[19] *682 ¶ 39 Mr. Brutsche urges that *Eggleston* should be overruled. "A case should be overruled upon 'a clear showing that an established rule is incorrect and harmful.' " *State v. Bradshaw*, 152 Wash.2d 528, 542, 98 P.3d 1190 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970)). Mr. Brutsche does not make this showing. Rather, for the most part he simply reargues the same arguments that were thoroughly considered and decided in *Eggleston*.

¶ 40 One contention he makes, however, is that *Eggleston* was wrongly decided because it concludes that compensation cannot be sought and paid after a taking has occurred. He says the constitutional provision is not, however, limited to prior compensation, but requires compensation where it is found to be due after the taking is occurred. It is clear, he urges, that an action can be brought to seek compensation after the fact. Mr. Brutsche misunderstands the court's reasoning. The portion of *Eggleston* about which he complains involves an examination of the language of article I, section 16 as part of our inquiry into whether in 1889 when the state constitution was adopted it was intended to require compensation for damage to property during execution of a search warrant. *Eggleston*, 148 Wash.2d at 769, 64 P.3d 618. We said, "Article I, section 16 requires *prior* compensation. It would be administratively awkward (and constitutionally unlikely) to require prior compensation for the destruction of property by police while apprehending a suspect or executing a search warrant" *Id.* Stated a little differently, it would be highly problematic for a municipality to exercise eminent domain power and pay compensation in advance for destruction to follow during execution of a warrant. Because this is so, the language of article I, section 16 indicates, as the court reasoned, that compensation was not

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contemplated for damage occurring during execution of a warrant. We did not say that compensation cannot be sought after a taking has occurred.

¶ 41 Mr. Brutsche has failed to show that *Eggleston* was wrongly decided, and he has **121 not presented a persuasive *683 argument for overruling the case. Under *Eggleston*, no compensable taking occurred under article I, section 16.

¶ 42 Mr. Brutsche also maintains that a taking occurred under the Fifth and Fourteenth Amendments to the United States Constitution. He principally relies on *Wallace v. City of Atlantic City*, 257 N.J.Super. 404, 608 A.2d 480 (Law Div.1992), a New Jersey case considered by the court in *Eggleston*, and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-37, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). He also relies on "cases cited therein" in *Loretto* but does not discuss them or explain how they support his argument.

¶ 43 Initially, *Wallace* is a trial court decision, and therefore of little persuasive value. Under its analysis a search is conducted for a public purpose, with the intended beneficiary being society as a whole, and an innocent third party whose property is damaged should not bear the sole financial burden of the undertaking, and must be compensated for the damage. But this analysis is contradicted by *Hurtado v. United States*, 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973), in which material witnesses who were jailed to assure they appeared to testify brought a claim for compensation under the Fifth Amendment alleging that their time and liberty had been taken. The Court ruled that every person has a duty to provide evidence and the Fifth Amendment does not require that the government pay for the evidence. See *Eggleston*, 148 Wash.2d at 774-75, 64 P.3d 618 (citing *Hurtado*, 410 U.S. at 579, 589, 93 S.Ct. 1157). Contrary to the reasoning in *Wallace* the individual does, under *Hurtado*, bear the burden.^{FN13} *Wallace's* analysis, being inconsistent with *Hurtado's*, is not persuasive.

FN13. Although we did not decide any

Fifth Amendment issues in *Eggleston*, we did say that "it appears to us that [federal courts] would not find the injury to Mrs. Eggleston to be a takings." *Eggleston*, 148 Wash.2d at 774, 64 P.3d 618 (citing *Hurtado*).

¶ 44 Mr. Brutsche cites *Loretto* for the principle that a permanent physical invasion of property is a compensable taking under the federal constitution. *Loretto* involved installation of cable television facilities on a landlord's *684 building under a New York City law requiring a landlord to permit installation of such facilities. The Court held that this physical occupation of the plaintiff's rental property was a taking despite the fact the statute might be within the state's police power for the purpose of development of and penetration by a means of communication having educational and community aspects. *Loretto*, 458 U.S. at 425-26, 102 S.Ct. 3164. The Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426, 102 S.Ct. 3164.

¶ 45 The Court discussed a number of cases in *Loretto* involving permanent physical occupations, physical invasions short of an occupation, and regulations that restrict the use of property. At the heart of its analysis was the premise that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 432, 102 S.Ct. 3164. It "is a government intrusion of an unusually serious character." *Id.* at 433, 102 S.Ct. 3164. "In short," the Court said, "when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35, 102 S.Ct. 3164 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).

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¶ 46 Mr. Brutsche maintains that a permanent physical occupation of his property would have resulted had Mr. Brutsche not paid a carpenter to repair the property. But there simply is no permanent physical occupation of property that occurs when police officers damage property during execution of a search warrant, and the holding in *Loretto* does not apply. Mr. Brutsche has not established a taking under the federal constitution.

¶ 47 The Court of Appeals awarded attorney fees on appeal under MAR 7.3 and **122RAP 18.1. As the City's request for attorney fees in the Court of Appeals is a continuing *685 request in this court, RAP 18.1(b), we similarly award fees under MAR 7.3 and RAP 18.1. See *Pudmaroff v. Allen*, 138 Wash.2d 55, 69, 977 P.2d 574 (1999).

¶ 48 We hold that the trial court properly granted summary judgment to the City with regard to the takings claims and affirm the Court of Appeals on this issue.

CONCLUSION

[20] ¶ 49 We adopt *Restatement (Second) of Torts* § 214 and conclude that liability in trespass may arise if by intentionally doing an act that a reasonable person would not regard as necessary to execute the warrant and thereby damage the property, or by executing the warrant in a negligent manner and thereby damaging the property, law enforcement officers exceed the scope of their privilege to be on the land to execute a search warrant. Although a trespass action is a permissible cause of action, summary judgment was properly granted in this case because, as a matter of law, on the evidence submitted, the officers did not exceed the scope of their privilege to be on the property to execute the search warrant. We also conclude that Mr. Brutsche is not entitled to assert a takings claim and decline to overrule *Eggleston*. We award attorney fees to the City under MAR 7.3 and RAP 18.1. Finally, we decline to address Mr. Brutsche's negligence claim.

¶ 50 We affirm the Court of Appeals, under different reasoning, and affirm the trial court's grant of summary judgment.

WE CONCUR: Chief Justice GERRY L. ALEXANDER, Justice SUSAN OWENS, Justice CHARLES W. JOHNSON, and Justice MARY E. FAIRHURST-CHAMBERS, J. (concurring in part and dissenting in part).

¶ 51 I agree with the dissent that there were genuine disputed issues of material fact with respect to Leo Brutsche's claim that law enforcement officers caused unreasonable damage under *Restatement (Second) of Torts* § 214(1) (1965)*686 and *Goldsby v. Stewart*, 158 Wash. 39, 41, 290 P. 422 (1930). See *Ellis v. City of Seattle*, 142 Wash.2d 450, 458, 13 P.3d 1065 (2000). Therefore, it was error for the court to grant the government summary judgment on the trespass claim. I would also permit the common law negligence claim to go forward.

¶ 52 I write separately to stress that there is nothing more reprehensible to the law than an agent of the government causing unnecessary and unreasonable damage to the person or property of a person while performing-or purporting to perform-a government function. It is not necessary that the State and its agents choose the means that causes the least damage, so long as the means chosen is reasonable under all of the circumstances. There may be a legitimate basis for breaking down doors the owner stands ready and willing to unlock. But that use of force should be subject to scrutiny. The State must be prepared to show it was reasonable under all of the circumstances.

¶ 53 In my view, Brutsche has raised sufficient facts to survive summary judgment on these two claims. In all other respects I agree with the majority.

WE CONCUR: Justice DEBRA L. STEPHENS. SANDERS, J. (dissenting).

¶ 54 The issue here is whether the police can destroy property belonging to an innocent third party without incurring any liability for that destruction

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or, alternatively, be required to pay just compensation to the property owner who is disadvantaged for the public good. The majority, by affirming summary judgment of dismissal favoring the city, shields the government from liability for trespass as well as its constitutional responsibility to pay just compensation.

¶ 55 The majority correctly holds police cannot destroy private property in the search for evidence unless the destruction is absolutely necessary to conduct a complete search. Majority at 116. But then it immediately eliminates any protection given to the property owner by affirming*687 summary judgment for the city. Under these facts a **123 reasonable jury could certainly find using a battering ram to destroy doors rather than using an available key was unnecessary. Moreover the majority fails to recognize where the police destroy private property for a public purpose, it is a damaging requiring just compensation under article I, section 16 of the Washington Constitution.

Trespass

¶ 56 Under long established precedent police officers are liable in trespass where they do "unnecessary damage to the property to be examined" and fail to "conduct the search as to do the least damage to the property consistent with a thorough investigation." *Goldsby v. Stewart*, 158 Wash. 39, 41, 290 P. 422 (1930). Stated another way, a warrant immunizes the police from liability for trespass *but only* where the police do no more damage to the property than is absolutely necessary for a thorough search. The only question then is whether the damage done by the police officers during the search was *necessary* to complete the search. If the damage was *not necessary* to the search, the police are liable in trespass.

¶ 57 Analyzing this question we must first recall this issue was presented in a motion for summary judgment. Summary judgment is appropriate "only when reasonable minds could reach but one conclu-

sion from" the facts, construing those facts and inferences in favor of the nonmoving party, Leo Brutsche. *Sherman v. State*, 128 Wash.2d 164, 184, 905 P.2d 355 (1995). Summary judgment must be denied if a reasonable person could find police battering down Brutsche's doors was *not necessary* for a complete search of Brutsche's property.

¶ 58 Construing the facts most favorably to the nonmoving party, a reasonable person could certainly determine battering down Brutsche's doors and destroying the door frames was not necessary to complete the search of his property. Brutsche offered to unlock all of the doors on *688 his property for the officers. He also offered the officers keys with which they could unlock all the doors themselves. The officers spurned Brutsche's offer to open the doors without damage. They chose instead to use a battering ram. Nonetheless the majority holds the officers' actions were necessary to the search *as a matter of law*. Majority at 116.

¶ 59 The majority asserts the officers' actions were necessary as a matter of law because of the asserted danger police officers might face when serving a warrant. Majority at 119. However even if serving warrants may sometimes be a dangerous task, that does not abrogate the officers' responsibility under *Goldsby* to serve warrants with no more damage to private property than is reasonably necessary.^{FN1} At the least whether the asserted (but nonexistent) danger allegedly faced by the officers required destruction of the door frames rather than simply unlocking the doors is a question of fact for a jury consistent with our constitutional requirement that the right to trial by jury remain "inviolable." Const. art. I, § 21; *LaMon v. Butler*, 112 Wash.2d 193, 199 n. 5, 770 P.2d 1027 (1989).

FN1. This is true whether Brutsche was barred from the search scene or evidence was in danger of being destroyed.

¶ 60 That the suspect barricaded himself in one building to possibly destroy evidence or arm himself may allow an inference that battering down the

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door to that particular building was necessary to effectuate the warrant. But that is not the only inference, as even that breach was arguably not strictly necessary as Brutsche offered the police a key to open that door as well. Moreover how a suspect barricading himself in one building justifies battering down doors to other outbuildings, especially after the barricaded suspect was arrested, is left to the imagination. There was simply no evidence, beyond the speculation of the officers, the other buildings contained individuals at all, much less those seeking to harm the officers or destroy evidence. Whether baseless suspicion justifies destruction of private property is at least a question of fact for the jury.

**689 Just compensation is required*

¶ 61 Not only does the majority err when it affirms summary judgment dismissing the **124 trespass claim, it also errs by rejecting Brutsche's alternative claim for just compensation for damaging his property. Article I, section 16 of the Washington Constitution provides in part, "No private property shall be taken or damaged for public or private use without just compensation having first been made." By this provision the framers gave us a simple, clear framework to determine when the State must compensate a property owner. Was this private property? Was it taken or damaged by the State? If the answers are yes, then the property owner must be compensated.

¶ 62 There was no claim these doors frames were a nuisance or otherwise harmful. A plain reading of article I, section 16 mandates Brutsche be justly compensated.^{FN2} I agree that "taking" or "damaging" does not occur in the constitutional sense where the damage is occasioned by a traditional use of the "police power," however this was not an exercise of the police power but rather an exercise of the power of eminent domain.

FN2. The court would do well to heed the warnings of Justice Holmes when he

wrote, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

¶ 63 The majority rejects Brutsche's takings claim based primarily on *Eggleston v. Pierce County*, 148 Wash.2d 760, 64 P.3d 618 (2003). In *Eggleston*, police seized a load bearing wall from Mrs. Eggleston's house as evidence for a murder trial involving her son. *Id.* at 763-65, 64 P.3d 618. *Eggleston* held collection of evidence is an exercise of the "police power," which does not require compensation, rather than eminent domain, which does. *Id.* at 775, 64 P.3d 618. The court asserted, "[t]he gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of *690 society." *Id.* at 768, 64 P.3d 618. For the reasons set forth in my dissent, *Eggleston* was wrongly decided, is harmful, and should now be overruled, not extended.^{FN3}

FN3. *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970).

¶ 64 That court failed to recognize the important distinction between the power of the police and the "police power." Appropriating or damaging property for the public good does not absolve the State from compensating the owner, precisely the opposite.^{FN4} That is what the takings clause is all about. We strongly rejected our new majority's opinion almost 90 years ago in *Conger v. Pierce County*, 116 Wash. 27, 33, 198 P. 377 (1921) (rejecting the argument Pierce County was not liable for damages to private property because "the private individual ... must suffer for the public good."). *Conger* held the county was not relieved from compensating the property owner "because [the county was] acting for the good of the public, or simply on the theory that the individual must suffer for the public good.

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To hold that [the county] would be relieved on any of these grounds would be entirely to disregard the express provisions of our constitution." *Id.* at 35, 198 P. 377. *Conger* strongly supported protecting private property rights from encroachment in the name of the public good as "[o]ne of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties against the demands and aggressions of the public." *Id.* at 33-34, 198 P. 377.

FN4. See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L.REVV. 553 (1972).

¶ 65 In essence *Conger* recognized, while *Eggleston* ignored or misperceived, "[t]he talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.'" *Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 964, 954 P.2d 250 (1998) (quoting *691 *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); accord *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)). *Eggleston* erroneously required Mrs. Eggleston to bear the entire cost of this public acquisition of her private property on her lonely shoulders, whereas **125 this burden in fairness and justice should be shared with the public as a whole. The same can be said of Mr. Brutsche, who the majority forces to uniquely shoulder the entire burden of police destruction of his property to gather evidence for the public good. This burden must be appropriately "borne by the public as a whole" FN5 to satisfy the constitutional mandate.

FN5. *Armstrong*, 364 U.S. at 49, 80 S.Ct. 1563.

¶ 66 When considering whether an exercise of the police power immunizes the State from compensating a property owner for damaging or taking his property, it is important to understand the tradition-

al meaning of "police power." It seems elementary the police power is *not* the power of the police, but rather the power *to* police (or protect) our rights.

The most important power surrendered to government is what Locke and others called "the executive power" and what is sometimes called the "police power." *This is the power to enforce or "police" one's rights when they have been violated by others.* Indeed, John Locke argued that it was the "inconvenience" of exercising the executive power in the state of nature that justified the creation of an "imperial magistrate"-that is, government.

RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 70-71 (2004) (emphasis added); see also CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 4-5 (1886); FN6 CATO HANDBOOK FOR CONGRESS: POLICY *692 RECOMMENDATIONS FOR THE 106TH CONGRESS 206 (Edward H. Crane & David Boaz eds., 1999) (the police power is "the power each of us has in the state of nature to secure his rights"). For example, if the police acquire land for a police station, which ultimately serves the ends of law enforcement, such is clearly an exercise of the power of eminent domain, requiring just compensation. If, however, government destroys property because that property is harmful, or used in a harmful way, that is not an acquisition (or damaging) for the public good but an abatement of a nuisance, requiring no compensation. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928).

FN6.

[T]he police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *sic utere tuo, ut alienum non laedas* Any law which goes beyond that principle, which under-

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takes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.

Tiedeman, *supra*, at 4-5. ["Use your property so as not to damage another's; so use your own as not to injure another's property." BLACK'S LAW DICTIONARY 1757 (8th ed.1999).]

¶ 67 Even if we accept, which I do not,^{FN7} that the police power of the State is limited only by the requirement it "reasonably tend to promote some interest of the State, and not violate any constitutional mandate,"^{FN8} this does not answer the question of whether this action falls under the "police power" rather than eminent domain.

FN7. As has been noted, "[t]his broad definition of the police power appears overinclusive" and has significantly expanded in scope since the adoption of the constitution. Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L.REVV. 495, 506 (2000).

FN8. *CLEAN v. State*, 130 Wash.2d 782, 805, 928 P.2d 1054 (1996).

¶ 68 "Police power" historically has allowed the government to physically destroy, take, or damage, private property "to avert an immediate danger" posed by the property itself.^{FN9} It is this power which allows the state, without compensation, to raze houses in an effort to contain a fire^{FN10} or destroy diseased cedar trees in an effort to prevent the *693 disease from spreading.^{FN11} But that is not **126 our present case. Here the doors and the

jams in and of themselves presented no danger to the community justifying their destruction.

FN9. John M. Groen & Richard M. Stephens, *Takings Law, Lucas and the Growth Management Act*, 16 U. PUGET SOUND L.REV. 1259, 1290 (1993).

FN10. *See, e.g., Bowditch v. City of Boston*, 101 U.S. (11 Otto) 16, 25 L.Ed. 980 (1879).

FN11. *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928).

¶ 69 The distinction between police power and eminent domain was specifically recognized in Washington nearly 90 years ago in *Conger*.^{FN12} There the court defined "police power" as the power of the State to prohibit the owner of property from using his property in ways harmful to others. It held "[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public." *Conger*, 116 Wash. at 36, 198 P. 377. Put another way the police power allows the State to "prevent all things harmful to the comfort, welfare and safety of society." *Id.* As *Conger* drew the distinction, the police power allows only the State to prohibit the property owner from using his property in ways harmful to others to avoid the just compensation constitutional mandate.

FN12. *Conger* is important for more than its longevity. Constitutional provisions should be interpreted as they were conceived at the time of adoption. *State v. Brunn*, 22 Wash.2d 120, 139, 154 P.2d 826 (1945). *Conger*, decided only 32 years after adoption of the constitution, is a good indicator of the understanding of the terms nearer the time of the constitution's adoption.

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¶ 70 The *Conger* distinction was supported by the Latin maxim *sic utere tuo ut alienum non lidas*^{FN13} and by several treatises published at the turn of the 20th Century, roughly contemporaneous with the state constitution. Since constitutional provisions should be interpreted as they were conceived at the time of adoption, sources such as these are invaluable to understanding our constitutional protections. *State v. Brunn*, 22 Wash.2d 120, 139, 154 P.2d 826 (1945). These treatises uniformly describe the police power as the ability of the State to restrict landowners from using their *694 property to harm the public. The landowner "is ... bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this ... duty which pertains to the police power of the State so far as the exercise of that power affects private property." 1 John Lewis, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 6, at 14-15 (2d ed.1900) (footnote omitted). "[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful..."^{FN14} Ernst Freund, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 511, at 546-47 (1904). As stated by Judge Dillon in 1890, "[t]his power to restrain a private injurious use of property, is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner..." John F. Dillon, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 141, at 212 (4th ed. 1890). As these treatises demonstrate, the "police power" was generally understood to be the power to prevent the use of property to harm others. However where the individual was deprived of the use of his harmless property (or it was damaged) for the public good, the State exercised its power of eminent domain.

FN13. See *Black's Law Dictionary*, *supra*, at 1757.

FN14. The Washington Constitution

broadens the traditional eminent domain protections to include property that is damaged, as well as taken, by the State. Const. art. I, § 16.

¶ 71 This distinction between the police power and the power of eminent domain, vital and vibrant as it was at the time the constitution was adopted, still remains today. Professor Stoebuck reflected this distinction in his influential work, William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L.REV.. 553, 569 (1972), clarifying when the State acquires property for the public good, it exercises its power of eminent domain and not its police power. Other experts continue to recognize this distinction as well, noting eminent domain is "the power to take property for public use upon payment of just compensation*695," whereas the police power is the "power to secure rights, through restraints or sanctions, not some general power to provide public goods." *CATO HANDBOOK FOR CONGRESS*, *supra*, at 206. Of importance, this court again recognized this distinction in **127 *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 15, 829 P.2d 765 (1992), where we held the police power was exceeded where the ordinance went "beyond preventing harm." Distinguishing police power (the State's ability to prevent harm to others) from eminent domain (the State's ability to take or damage property for the public good) is based on both historical and current sources and should be followed here.

¶ 72 Understanding this distinction allows the "police power" to be harmonized with the power of eminent domain, maintaining the integrity of each. Conceptually we must recognize property "as a legal term property denotes not material things but certain rights." Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-12 (1927-28). However those rights simply do not include the right to use property in a manner which harms the public. See *Mugler v. Kansas*, 123 U.S. 623, 662-63, 8 S.Ct. 273, 31 L.Ed. 205 (1887) ("Nor can it be said that government interferes with or impairs

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any one's constitutional rights ... of property, when it determines that the manufacture and sale of intoxicating drinks ... are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."); *see also* Conger, 116 Wash. at 36, 198 P. 377 (citing 1 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 6 (2d ed.1900)). As such, no property right is infringed when the State prohibits use of the property in a way that harms the public or creates a nuisance; therefore no property has been taken and hence no compensation is required. *See, e.g., Mugler*, 123 U.S. at 662-63, 8 S.Ct. 273. On the other hand, when government takes or damages an actual right on has in his property, compensation is mandatory. Const. art. I, § 16 ("No property *shall* be taken or damaged ... without just compensation having been first made."(emphasis added)).

*696 ¶ 73 The majority's analysis is also squarely at odds with the Texas Supreme Court's sensible outcome in *Steele v. City of Houston*, 603 S.W.2d 786 (Tex.1980). There the owners of a house sought compensation after their house was set ablaze by police officers in an effort to capture fugitives hiding in the house. *Id.* at 789. The Texas court properly rejected the assertion that destroying the property "for the safety of the public" was a proper exercise of the police power and mandated just compensation. *Id.* at 793. However our majority would apparently abandon this sensible outcome to reach the absurd conclusion that the property owner should bear the entire loss of their home, even though they were innocent of any wrongdoing and the house was burned for the public good of law enforcement. I agree with the Texas court when it held, "innocent third parties are entitled by the Constitution ^[FN15] to compensation for their property." *Id.* Once again, an innocent property owner should not be forced " 'to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Dolan*, 512 U.S. at 384, 114 S.Ct. 2309 (quoting *Armstrong*, 364 U.S. at 49, 80 S.Ct. 1563).

FN15. The case involved a provision of the Texas Constitution, which provides in relevant part, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made...."Tex. Const. art. I, § 17.

¶ 74 For these reasons Brutsche's constitutional taking or damaging claim falls squarely within article I, section 16, requiring the State to justly compensate Brutsche for the property destroyed during the search.

¶ 75 The trial court's summary judgment should be reversed to reinstate Brutsche's trespass claim. It is at least a question of fact whether the destruction of Brutsche's property was necessary to conduct a complete search. Otherwise, damage to Brutsche's property requires just compensation pursuant to article I, section 16. This burden *697 must in justice and fairness be borne by society as a whole because it is (allegedly) a necessary cost of law enforcement.

¶ 76 I dissent.

WE CONCUR: Justice JAMES M. JOHNSON.
 Wash.,2008.
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District Court of Appeal of Florida, Third District.
FORD MOTOR COMPANY, a foreign corporation,
Appellant,

v.

Joan HALL-EDWARDS, as Personal Representat-
ive of the Estate of Lance Crossman Hall, and
Lester Hall, survivor of Lance Crossman Hall, Ap-
pellees.

No. 3D06-1656.

Nov. 7, 2007.

Background: Passenger's mother, as personal rep-
resentative of passenger's estate, and passenger's
father brought products liability action against man-
ufacturer of sport utility vehicle (SUV), alleging
that design defects caused rollover accident in
which passenger was killed. Following jury trial,
the Circuit Court, Miami-DadeCounty, Roberto
Pineiro and David C. Miller, JJ., entered judgment
awarding \$30 million to each of passenger's par-
ents. Manufacturer appealed.

Holdings: The District Court of Appeal, Cortifias,
J., held that

- (1) evidence of other rollover accidents involving same model of SUV was not admissible to prove punitive damages without a showing of substantial similarity, and
- (2) improper admission of that evidence was revers-
ible error.

Reversed and remanded.

West Headnotes

[1] Evidence 157 ↪ 141

157 Evidence
157IV Admissibility in General
157IV(C) Similar Facts and Transactions
157k141 k. Other Injuries or Accidents
from Same or Similar Causes. Most Cited Cases

Evidence regarding other rollover accidents in-
volving the same model of sport utility vehicle
(SUV) was not admissible to prove punitive dam-
ages in products liability action against manufac-
turer arising from death of passenger in rollover ac-
cident, where trial court did not require a showing
of substantial similarity between the other accidents
and the one at issue. West's F.S.A. §§ 90.401, 90.403.

[2] Appeal and Error 30 ↪ 1050.4

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.4 k. Evidence Admitted
Without Preliminary Proof. Most Cited Cases
Improper admission of evidence relating to other
rollover accidents involving the same model of
sport utility vehicle (SUV) as accident at issue,
without required showing of substantial similarity
between the other accidents and the one at issue,
was reversible error in products liability action
against manufacturer arising from fatal rollover ac-
cident; numerous references to the other accidents
made the improper evidence a feature of the trial.
West's F.S.A. §§ 90.401, 90.403.

[3] Appeal and Error 30 ↪ 1050.1(10)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.1 Evidence in General
30k1050.1(8) Particular Types
of Evidence
30k1050.1(10) k. Admis-
sions, Declarations, and Hearsay. Most Cited Cases

Evidence 157 ↪ 219.30

157 Evidence

157VII Admissions

157VII(A) Nature, Form, and Incidents in General

157k219.10 Subsequent Remedial Measures

157k219.30 k. Strict Liability Cases. Most Cited Cases

Post-accident remedial measures taken by manufacturer of sport utility vehicle (SUV) were inadmissible in products liability action against the manufacturer arising from fatal rollover accident, and the improper admission of such evidence was reversible error.

[4] Evidence 157 ↪ 141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases

Negligence 272 ↪ 1635

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)4 Admissibility

272k1635 k. Similar Facts and Transactions; Other Accidents. Most Cited Cases

There are four required elements that must be satisfied prior to admitting similar accident evidence: (1) evidence may not be offered to prove negligence or culpability, but may be admissible to show the dangerous character of an instrumentality and to show defendant's knowledge; (2) similar accidents must pertain to the same type of appliance or equipment under substantially similar circumstances; (3) evidence must have a tendency to establish a dangerous condition at a specific place; and (4) prior accident must not be too remote in time to the accident at issue, thereby causing it to lack sufficient probative value.

[5] Evidence 157 ↪ 141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases
Burden of meeting test for admissibility of similar accident evidence and of laying a sufficient predicate to establish similarity between the two incidents falls on the party seeking admission of the prior accident evidence.

[6] Appeal and Error 30 ↪ 970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases

Evidence 157 ↪ 141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases
Admission of similar accident evidence is within the discretion of the trial court and will not be disturbed on appeal except for a showing of abuse of discretion.

[7] Evidence 157 ↪ 141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases
Judge cannot simply use his discretion to decide that despite a plain lack of substantial similarity in conditions he will, nevertheless, admit similar accident evidence.

[8] Evidence 157 ↪ 141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents

from Same or Similar Causes. Most Cited Cases
Failure to lay a sufficient predicate establishing substantial similarity between prior accident and the accident at issue renders the evidence about prior accident irrelevant as a matter of law.

*855 Carlton Fields and Wendy F. Lumish and Jeffrey A. Cohen and Alina Alonso, Miami; Cabaniss Smith Toole & Wiggins and F. Rand Wallis, Maitland; Salas Ede Peterson & Lage and Henry Salas, South Miami, for appellant.

Denney & Barrett and Richard L. Denney and Lydia JoAnn Barrett, Oklahoma; Kimberly L. Boldt, Boca Raton; Bruce Kaster, Ocala; Gustavo Gutierrez; Richard M. Mogerma, Plantation, for appellees.

Before GERSTEN, C.J., and CORTIÑAS, J., and SCHWARTZ, Senior Judge.

*856 CORTIÑAS, Judge.

Appellant, Ford Motor Company ("Ford"), seeks review of a \$60 million jury verdict awarded to the parents of Lance Crossman Hall ("Hall"), a passenger in a 1996 Ford Explorer involved in a rollover accident. Hall was ejected and killed after the driver of the Ford Explorer fell asleep and lost control of the vehicle. Plaintiff, Joan Hall-Edwards, as the personal representative of Hall's Estate, brought an action in the trial court against Ford alleging defects in the Explorer's handling and stability characteristics. The jury determined that Ford was liable for placing the Ford Explorer on the market with a defect relating to the design of the vehicle's stability and handling and that this was a legal cause of the accident. The jury awarded \$30 million to Hall's mother, Joan Hall-Edwards, and \$30 million to his father, Lester Hall.^{FN1}

FN1. The jury also awarded \$1.2 million for lost support and services, but the trial

court vacated this award.

[1][2][3] On appeal, Ford claims that the trial court committed reversible error by (1) allowing testimony and comment to the effect that Ford caused "hundreds" of injuries and deaths in other rollover accidents involving the Ford Explorer without requiring plaintiff to establish a substantial similarity between those accidents and the one involving Hall; (2) allowing testimony that Ford made subsequent design changes that, if made sooner, would have allegedly prevented Hall's death and "hundreds" of others; and (3) failing to issue a remittitur on the ground that the \$30 million award to each parent was excessive and unrelated to the evidence. We agree that the trial court committed reversible error in permitting testimony referencing other rollover accidents involving the Ford Explorer without requiring a showing of substantial similarity between those accidents and Hall's. As such, we will limit our review to this issue.^{FN2}

FN2. Nevertheless, under the facts of this case, the admission of post-accident remedial measures was also improper and constitutes reversible error.

After reviewing the trial record, it is apparent that references made to other incidents involving Ford were not isolated in nature and, in fact, became a feature of the case. For example, during opening statement, plaintiff's counsel mentioned "hundreds of deaths" caused by the Ford Explorer. After objection from Ford, the trial court opined that, "certainly none of this would be admissible on a main case or [if] punitive damages [were] not being tried at [this] point, but once it's been opened to punitive damages, he is entitled to talk about those deaths."

Additionally, during the trial, plaintiff's counsel sought to elicit testimony referencing other Ford Explorer accidents in an effort to establish notice as well as Ford's knowledge of a defect. The following exchanges took place in the examination of Mr. Gilbert, an expert for the plaintiff:

[PLAINTIFF'S COUNSEL]: And have you been involved in those cases that are substantially similar to this case where you have an untripped roll?

[DEFENSE COUNSEL]: Objection, Your Honor....

...

[PLAINTIFF'S COUNSEL]: Mr. Gilbert, on cross-examination, Mr. Wallis asked you about other Ford Explorer accidents you had investigated. You recall that, sir?

MR. GILBERT: Yes, sir.

[PLAINTIFF'S COUNSEL]: And you said, I think, many, something like that?

*857 MR. GILBERT: Right.

[PLAINTIFF'S COUNSEL]: Approximately, how many?

MR. GILBERT: Ford Explorer?

[PLAINTIFF'S COUNSEL]: Yes, sir.

MR. GILBERT: Sixty.

[PLAINTIFF'S COUNSEL]: Untripped roll?

MR. GILBERT: Untripped roll, maybe 45.

[DEFENSE COUNSEL]: Objection, it's speculation, move to strike.

THE COURT: Overruled

[DEFENSE COUNSEL]: Your Honor, also, I would object, failure to prove substantial similarity.

[PLAINTIFF'S COUNSEL]: I'll be glad to lay that. Were those substantially-let me ask you this; were those situations where there was a vehicle on a highway in which there was an untripped

roll while the vehicle was in a yaw?

[DEFENSE COUNSEL]: Objection, failure to show substantial similarity.

THE COURT: Overruled, that's why this question is being asked.

MR. GILBERT: Those-those were untripped rollovers, the 45 would be classified as untripped rollovers.

[PLAINTIFF'S COUNSEL]: On the highway?

MR. GILBERT: Not all of them were on the highway; some of them may have had a-a tire in the dirt or something, but the accident dynamics showed that those vehicles were untripped.

...

The following took place during the examination of Dr. Renfro, an expert for the plaintiff:

[PLAINTIFF'S COUNSEL]: Now, over the years, have you been involved in a number of other cases where the stability of the Explorer, and the handling problems of the Explorer, brought about an accident?

...

[PLAINTIFF'S COUNSEL]: Let's talk first about the rollover propensity of the vehicle, or its stability just from a rollover standpoint.... Over the years, have you been involved in cases where that was an issue, sir?

[DEFENSE COUNSEL]: Your Honor, I object and I have the same motion. This is now the sixth time that term was used.

THE COURT: Overruled. It's appropriate at this time regarding knowledge. I will allow it.

[PLAINTIFF'S COUNSEL]: Now, were there deaths and serious injuries in some of those

cases?

DR. RENFROE: Yes.

[PLAINTIFF'S COUNSEL]: And did Ford Motor Company receive from you reports, and take your deposition about those cases?

DR. RENFROE: Many times, yes.

[PLAINTIFF'S COUNSEL]: And did they include the UN46?

DR. RENFROE: Yes, they did.

[PLAINTIFF'S COUNSEL]: And the UPN105, the vehicle in question in this case?

DR. RENFROE: Yes.

[PLAINTIFF'S COUNSEL]: Were there a number of those cases?

DR. RENFROE: Yes, there were.

[PLAINTIFF'S COUNSEL]: Can you give the court an idea of how many times you have told Ford Motor Company about this problem, sir?

DR. RENFROE: I would say 150 times.

***858 [PLAINTIFF'S COUNSEL]:** And in each of those events when you told Ford Motor Company about it, were they there [sic] about a serious injury or death to an individual or individuals?

DR. RENFROE: Yes.

The following took place during the examination of Mr. Tandy, an expert for the defendant:

[PLAINTIFF'S COUNSEL]: Do you know in Explorer cases alone [involving] rollovers, injuries and deaths that you have been involved in well over a hundred?

MR. TANDY: Yes.

[PLAINTIFF'S COUNSEL]: You know of well over 200?

MR. TANDY: I can't say that I do. I have been involved in over a hundred.

During closing argument, plaintiff's counsel again mentioned that Ford "killed hundreds of people" and also discussed how Ford made \$285 million by selling vehicles after their engineers suggested they fix it. Counsel suggested that this was "blood money" and that Ford "shouldn't be [allowed] to keep that money."

Although there is not a specific provision in the Florida Evidence Code directly pertaining to the admissibility of similar accident evidence, sections 90.401^{FN3} and 90.403,^{FN4} Florida Statutes (1997), are applicable. Charles W. Ehrhardt, Florida Evidence § 411.2 (2007).

FN3. Section 90.401, Florida Statutes (1997), states:

Relevant evidence is evidence tending to prove or disprove a material fact.

FN4. Section 90.403, Florida Statutes (1997), states, in pertinent part:

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.

[4] There are four required elements that must be satisfied prior to admitting similar accident evidence.^{FN5} See *Perret v. Seaboard Coast Line R.R.*, 299 So.2d 590, 592-94 (Fla.1974).

FN5. The four criteria are applicable if the purpose of admitting the similar accident is to show notice or knowledge of a danger-

ous condition. Charles W. Ehrhardt, Florida Evidence § 411.2 (2007); *Warn Indus. v. Geist*, 343 So.2d 44, 46 (Fla. 3d DCA 1977).

(1) Evidence of similar accidents may not be offered to prove negligence or culpability, but may be admissible to show the dangerous character of an instrumentality and to show the defendant's knowledge.^{FN6}

FN6. Charles W. Ehrhardt, Florida Evidence § 411.2 (2007); *Jackson v. H.L. Bouton Co.*, 630 So.2d 1173, 1176 (Fla. 1st DCA 1994) (holding that no abuse of discretion occurred in admitting evidence regarding a lack of prior complaints to establish defendant's knowledge (or lack thereof) of a defect in the safety glasses that it produced or sold).

(2) The similar accidents must pertain to the same type of appliance or equipment under substantially similar circumstances.^{FN7}

FN7. *Jackson*, 630 So.2d at 1176; *Lasar Mfg. Co. v. Bachanov*, 436 So.2d 236, 238 (Fla. 3d DCA 1983) (holding that two prior complaints and the testimony from two witnesses who were injured by the same model meat grinder were admissible to rebut the notion that defendant had no notice of a defective condition of the grinder model at issue); *Ry. Express Agency v. Fulmer*, 227 So.2d 870, 873 (Fla. 1969) (holding that plaintiff failed to establish substantial similarity between the conveyor involved in the prior accident and the conveyor at issue in his accident). The other accidents do not have to occur at an identical place and time, but the conditions should be similar enough to provide the requisite probative value. Charles W. Ehrhardt, Florida Evidence § 411.2 (2007).

*859 (3) The similar accident evidence must have

a tendency to establish a dangerous condition at a specific place.

(4) The accident must not be too remote in time to the accident at issue, thereby causing it to lack sufficient probative value.

Id.; Charles W. Ehrhardt, Florida Evidence § 411.2 (2007).

[5][6][7][8] The burden of meeting this four-part test and laying a sufficient predicate to establish similarity between the two incidents falls on the party seeking admission of the prior accident evidence. See *Stephenson v. Cobb*, 763 So.2d 1195, 1196 (Fla. 4th DCA 2000). The admission of similar accident evidence is within the discretion of the trial court and will not be disturbed on appeal except for a showing of abuse of discretion. *Stephenson*, 763 So.2d at 1196; *Lasar*, 436 So.2d at 238. However, "[a] judge cannot simply 'use his discretion to decide that despite a plain lack of substantial similarity in conditions he will, nevertheless, admit the evidence.'" *Gen. Motors Corp. v. Porritt*, 891 So.2d 1056, 1058 (Fla. 2d DCA 2004) (quoting *State v. Arroyo*, 422 So.2d 50, 53 (Fla. 3d DCA 1982)) (discussing the admission of a videotaped experiment when the conditions under which the experiment was performed were not shown to be substantially similar to the circumstances of the case). Moreover, failure to lay a sufficient predicate establishing substantial similarity between the accidents renders the evidence irrelevant as a matter of law. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 640 (1993); *Stovall v. Daimler-Chrysler Motors Corp.*, 270 Ga.App. 791, 608 S.E.2d 245, 247 (2004); *Ray v. Ford Motor Co.*, 237 Ga.App. 316, 514 S.E.2d 227 (1999).

Here, the references to other accidents were not isolated. On the contrary, they were widespread throughout the trial and, at no time, did the plaintiff lay a sufficient foundation to establish substantial similarity between the evidence relating to other accidents and the accident at issue in this case. Plaintiff contends that the similar accident evidence

is admissible solely because Ford waived bifurcation of the trial, thereby permitting the issue of punitive damages to be tried along with the main case. In fact, the trial court justified the admission of other accidents on the basis of using them to prove Ford's liability for punitive damages.

The trial court relied on *Johns-Marville Sales Corp. v. Janssens*, 463 So.2d 242, 249 (Fla. 1st DCA 1984) and admitted evidence of other accidents in order to show that Ford, "intentionally took steps to cover the known danger in order to protect continued marketing of the product..." However, reliance on *Johns-Marville* fails because the requisite showing of substantial similarity is not reduced or eliminated when the issue of punitive damages is involved. *Johns-Marville* dealt with establishing a legal basis for punitive damages by showing a manufacturer's knowledge that its product was inherently dangerous along with the continued marketing of the product without making feasible modifications to eliminate the danger. *Id.* at 249. The case did not address the requirements of establishing substantial similarity. *Id.* at 242. Moreover, we are aware of no case which, absent a showing of substantial similarity, has allowed reference to "other cases" simply because punitive damages were at issue. See *Mack Trucks, Inc.*, 436 S.E.2d at 640 (admitting as relevant to the issues of notice and punitive damages evidence of frame cracks in other Mack tractor trailer trucks where the record indicated that the other cracks were substantially similar to the frame crack at issue, but not permitting the admission of frame cracks "caused by circumstances wholly different *860 from the one at issue"); see also *Stovall*, 608 S.E.2d at 247 (stating that evidence of substantially similar incidents is admissible in product liability cases and is relevant to the issues of notice of a defect and punitive damages); see also *Volkswagen of Am., Inc., v. Gentry*, 254 Ga.App. 888, 564 S.E.2d 733, 741 (2002).

In this case, the trial court did not require that plaintiff establish the predicate necessary to permit the admission of similar accident evidence. No pre-

cautions or measures were taken to ensure that the other accidents were not too remote in time or that the conditions of the accidents were similar. For example, the trial judge never inquired into the general characteristics of the other accidents. Based on the record before us, we are unable to determine whether the differences in condition were material or immaterial. See *Ry. Express Agency*, 227 So.2d at 873.

In *Volkswagen*, the Georgia Court of Appeals stated that, "evidence of other incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages, provided there is a showing of substantial similarity." *Volkswagen*, 564 S.E.2d at 741. The trial court devoted an entire day to hearing argument and testimony related to the other incidents. *Id.* The trial judge prohibited the admission of some of the proffered evidence because it was not sufficiently similar to the accident at issue. *Id.* For those accidents that were sufficiently similar, the trial judge permitted their use in limited circumstances and only on cross-examination. *Id.* Furthermore, the trial judge gave the jury a limiting instruction regarding the use of the similar accident evidence. *Id.*

Likewise, in *Ray*, the trial court determined that the plaintiff could not reference a number of prior incidents because she failed to lay the foundational requirements establishing substantial similarity. *Ray*, 514 S.E.2d at 231. The trial judge had not been provided with any documentation or verification of the referenced incidents and, therefore, could not properly determine if they were substantially similar to Ray's accident. *Id.* On appeal, the court affirmed the trial court's decision to exclude the similar accident evidence. *Id.*

Here, throughout the trial, numerous references were made to other cases without laying a foundation for substantial similarity. Moreover, this evidence improperly became a "feature of the trial." See *Peterson v. Morton F. Plant Hosp. Assoc.*, 656 So.2d 501, 502-03 (Fla. 2d DCA 1995) (remanding for a new trial because the trial court permitted de-

tails of a settlement agreement with a codefendant to become a feature of the trial). Because no foundation was laid establishing a substantial similarity between Hall's accident and other accidents referenced by plaintiff throughout the trial, the trial court abused its discretion in admitting this evidence and the verdict must be set aside and the matter remanded for a new trial involving both liability and compensatory damages.

Reversed and remanded.

Fla.App. 3 Dist., 2007.
Ford Motor Co. v. Hall-Edwards
971 So.2d 854, 32 Fla. L. Weekly D2642

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H

Court of Appeals of Georgia.
 COLP et al.

v.

FORD MOTOR COMPANY.
 No. A06A0816.

May 10, 2006.
 Certiorari Denied Sept. 18, 2006.

Background: Passenger, who was ejected from minivan during accident after sliding door fell off, and passenger's wife brought products liability action against manufacturer of minivan. After passenger's death, action was maintained by wife individually and as executor. Manufacturer filed motion in limine, seeking to exclude evidence of other incidents that allegedly were similar to passenger's accident. Following a hearing, the State Court, Cobb County, Darden, J., granted motion in limine. The Court of Appeals granted interlocutory appeal to wife.

Holdings: The Court of Appeals, Mikell, J., held that:

- (1) trial court was required to resolve factual disputes when deciding whether rule of substantial similarity barred admission of evidence of other accidents;
- (2) incidents concerning failure of sliding doors that had two-wedge design were not substantially similar to passenger's accident; and
- (3) incidents concerning failure of sliding doors when minivans rolled over were not substantially similar to passenger's accident.

Affirmed.

West Headnotes

[1] Evidence 157 ↪ 129(1)

157 Evidence
 157IV Admissibility in General

157IV(C) Similar Facts and Transactions
 157k129 Relation to Issues in General
 157k129(1) k. In General. Most Cited

Cases

Similar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time or place.

[2] Evidence 157 ↪ 141

157 Evidence
 157IV Admissibility in General
 157IV(C) Similar Facts and Transactions
 157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases
 Where the trial court in the exercise of its sound discretion determines that the other incidents proffered by the plaintiff do not share a substantially similar common design or common causation, such evidence is deemed irrelevant as a matter of law in a products liability action.

[3] Evidence 157 ↪ 141

157 Evidence
 157IV Admissibility in General
 157IV(C) Similar Facts and Transactions
 157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases
 Trial court was required to resolve factual disputes when deciding whether rule of substantial similarity barred admission of evidence of other accidents involving minivan's sliding doors in products liability action arising from sliding door opening during accident; court necessarily had to inquire into whether proffered incidents shared common design, common defect, and common causation with alleged design defect in action.

[4] Evidence 157 ↪ 141

157 Evidence
 157IV Admissibility in General
 157IV(C) Similar Facts and Transactions
 157k141 k. Other Injuries or Accidents

from Same or Similar Causes. Most Cited Cases
To satisfy itself that the rule of substantial similarity has been met in products liability action, the trial court must necessarily conduct a factual inquiry into whether the proponent's proffered incidents share a common design, common defect, and common causation with the alleged design defect at issue.

[5] Evidence 157 ↪99

157 Evidence

157IV Admissibility in General

157IV(A) Facts in Issue and Relevant to Issues

157k99 k. Relevancy in General. Most Cited Cases

Questions of relevance generally are within the domain of the trial court.

[6] Appeal and Error 30 ↪970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases

Absent a manifest abuse of discretion, a court's refusal to admit evidence on grounds of lack of relevance will not be disturbed on appeal.

[7] Evidence 157 ↪141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases
Incidents concerning failure of minivans' sliding doors that had two-wedge design were not substantially similar to accident in which passenger was ejected from minivan that had sliding door with wedge-and-pin design, and thus incidents were not admissible in products liability action; two-wedge design and wedge-and-pin design did not have

common design since wedge-and-pin design had more load capability than two-wedge design.

[8] Evidence 157 ↪141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other Injuries or Accidents from Same or Similar Causes. Most Cited Cases

Incidents concerning failure of minivans' sliding doors when minivans rolled over were not substantially similar to accident in which passenger was ejected from minivan during side-impact collision, and thus incidents were not admissible in products liability action; incidents did not arise from substantially similar cause since load forces on door were different in rollover accidents than in side-collision accidents.

**887 Doffermyre, Shields, Canfield, Knowles & Devine, Foy R. Devine, David S. Hagy, Atlanta, for appellants.

McKenna, Long & Aldridge, Charles K. Reed, Michael R. Boorman, Matthew S. Knoop, Atlanta, for appellee.

MIKELL, Judge.

*280 Nancy Colp ("Colp") and her since-deceased husband, Leonard Eugene Colp ("Leonard"), filed a products liability action in 1996^{FN1} alleging that Ford Motor Company ("Ford") defectively designed a sliding door on an Aerostar minivan. The door fell off during a crash and Leonard was ejected, suffering severe brain damage. We granted Colp's application for interlocutory appeal to determine whether the trial court erred in granting Ford's motion to exclude evidence of 37 other incidents allegedly similar to the crash in which Colp's husband was injured. Finding no abuse of discretion in the trial court's determination that the proffered incidents did not meet the test of substantial similarity as set out in *Cooper Tire & Rubber Co. v. Crosby*,^{FN2} we affirm. The relevant facts follow.

FN1. The record does not reflect the date of Leonard Colp's death. The action is now maintained by Nancy Colp individually and as executor of Leonard Colp's estate.

FN2. 273 Ga. 454, 543 S.E.2d 21 (2001).

The complaint shows that on April 18, 1995, Leonard was riding in the front passenger seat of a 1995 Ford Aerostar when it was struck on the right side by a vehicle driven by a third party. The van rotated 180 degrees, rolled over on the driver's side, and righted itself, but the sliding passenger door broke off and Leonard was ejected from the van.

[1] On October 25, 2004, Ford filed a motion in limine to exclude evidence of other similar incidents involving the failure of an Aerostar sliding door, arguing that the incidents did not meet the test of substantial similarity. In Georgia, "[s]imilar acts or omissions on other and different occasions are not generally admissible to prove *281 like acts or omissions at a different time or place." FN3 In *Cooper Tire*, FN4 our Supreme Court explained the rule of substantial similarity thusly:

FN3. (Punctuation and footnote omitted.)
Stovall v. DaimlerChrysler Motors Corp.,
270 Ga.App. 791, 792(1), 608 S.E.2d 245
(2004).

FN4. *Supra*.

In products liability cases, the "rule of substantial similarity" prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a "substantial similarity" between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarity must include a showing of similarity as to causation. Before admitting proffered evidence of other transactions in products liability cases, the trial court must satisfy itself that the rule of substantial similarity has been met. FN5

FN5. (Footnotes omitted.) *Id.* at 455(1),

543 S.E.2d 21. See also *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 544(3), 436 S.E.2d 635 (1993).

The Court further held that a party seeking to introduce similar incidents into evidence must show that the products (1) share a common design, (2) suffer from a common defect, and (3) "that any common defects shared the same causation." FN6 Further, as noted above, the Court specifically directed that it is the trial court's responsibility to decide whether the incidents proffered by the plaintiff satisfy the three-part test of substantial similarity. FN7 Finally, the Court

FN6. *Cooper Tire*, *supra* at 456(1), 543 S.E.2d 21.

FN7. *Id.* at 457(2), 543 S.E.2d 21. Accord *Cottrell, Inc. v. Williams*, 266 Ga.App. 357, 362(1), 596 S.E.2d 789 (2004).

made it quite clear that the admission of evidence is generally committed to the **888 sound discretion of the trial court, whose determination shall not be disturbed on appeal unless it amounts to an abuse of discretion.... Absent clear abuse, the trial courts' exercise of discretion in admitting or refusing to admit such evidence is entitled to deference, and should not be hamstrung by restrictive rulings. FN8

FN8. (Punctuation and footnote omitted.)
Cooper Tire, *supra* at 456-457(2), 543 S.E.2d 21.

Guided by these precepts, we briefly review the voluminous evidence and testimony presented over the course of the two-day hearing held in August 2005.

*282 Colp's expert, Andrew N. Gilberg, testified that the Aerostar was produced from 1986 to 1997, and had a "positive latch" at the rear of the sliding door, but not at the front, or "leading edge." Instead, on the leading edge, a "passive retention" system was used which, according to Gilberg,

would not keep the door closed in a crash. Before the 1995 model year, this system consisted of two wedges, an upper and lower wedge, about 18 inches apart, which would seat in wedge-shaped pockets on a structure called the "B-pillar" as the door closed.

Late in the 1994 model year, the design was changed to a wedge-and-pin design in which the lower wedge was replaced with a metal pin with a flanged end which would seat through a metal ring on the B-pillar. The Aerostar in which Leonard was riding was equipped with the wedge-and-pin design. Twenty-eight of the similar incidents that Colp sought to introduce into evidence involved 1990-1993 Aerostars with the two-wedge design, while two of the Aerostars had the wedge-and-pin design. As to causation, Gilberg testified that the sliding door came off in all 30 collisions because it failed to remain securely latched to the B-pillar due to the lack of a positive latch at the leading edge of the door. Those thirty incidents were tendered to show defect, and seven additional incidents were claims or complaints submitted to show that Ford had notice of problems with the door.

The defense expert, Edward Michael Paddock, an engineer who worked for Ford for 30 years before retiring in 1996, testified that he was involved in evaluating the design of the Aerostar and that he personally instigated the design change to the wedge-and-pin, which he termed the "catch-pin" design. According to Paddock, the catch-pin design was "totally different" from the earlier, two-wedge design; the two performed and responded differently. He explained that with the 1995 design, a "catch plate" replaced a cup receptacle at the bottom of the door; that a bracket holds the plate in place; and that the pin goes in behind the catch bracket. According to Paddock, testing showed that the catch-pin design created "an appreciable difference in performance" in its ability to retain the door.

After reviewing the testimony and documentary evidence submitted by the parties, the trial court

granted Ford's motion in limine.^{FN9} The court applied the three-part test of substantial similarity outlined in *Cooper Tire*, supra, and determined that Colp had not proved two of the three factors: common design or common causation. Specifically, based on the testimony of both experts, the court decided that Colp had not shown that the wedge-and-pin design was substantially similar to the two-wedge design, so that the twenty-eight *283 incidents involving the sliding door with the two-wedge design were not admissible. Moreover, the trial court found significant differences with respect to causation between the low speed collision in this case and the high speed single vehicle rollover represented by many of the other incidents, including the two involving the door with the wedge-and-pin design. Therefore, the court excluded all 30 incidents. The court certified its order for immediate review, and we granted an interlocutory appeal. Colp enumerates three errors.

FN9. The court's order is phrased as a denial of Colp's motion to admit the evidence. This is incorrect, as Colp filed no such motion, but the parties deem the error irrelevant.

1. Colp first argues that the trial court applied an improper legal standard in determining the admissibility of the proffered incidents. Colp contends that the trial court required that the other incidents be identical, as opposed to substantially similar. We disagree.**889 The term "identical" does not appear in the order. Rather, in finding no substantial similarity in the designs in question, the court recounted expert testimony that the designs operated differently in retaining the sliding door and performed differently on governmental safety tests.

[2] Colp next argues that the trial court failed to confine its analysis to relevant factors-i.e., the lack of a positive latch at the leading edge of the door. In this regard, Colp contends that the "substantial similarity" test "is simply a particularized application" of the relevance test, which provides: "the Georgia rule favors the admission of any relevant

evidence, no matter how slight its probative value; evidence of doubtful relevance or competency should be admitted and its weight left to the jury.”^{FN10} This argument ignores the case law regarding the “substantial similarity” test. The rule permitting admission of incidents ruled by the trial judge to be substantially similar to the one which is the subject of the plaintiff’s complaint has developed as an exception to the general rule prohibiting the introduction of “[s]imilar acts or omissions on other and different occasions ... to prove like acts or omissions at a different time or place.”^{FN11} Where, as here, the trial court in the exercise of its sound discretion determines that the other incidents proffered by the plaintiff do not share a substantially similar common design or common causation, such evidence is deemed irrelevant as a matter of law.^{FN12}

FN10. (Citation and punctuation omitted.) *Woodall v. Rivermont Apts., etc.*, 239 Ga.App. 36, 520 S.E.2d 741 (1999) (physical precedent only) (evidence of prior crimes in apartment complex admissible in negligence action against landlord). See *Mattox v. MARTA*, 200 Ga.App. 697, 700(8), 409 S.E.2d 267 (1991).

FN11. (Punctuation and footnote omitted.) *Stovall*, supra.

FN12. *Id.* See also *Cottrell*, supra; *Ray v. Ford Motor Co.*, 237 Ga.App. 316, 317(1), 514 S.E.2d 227 (1999); *Rose v. Figgie Int'l.*, 229 Ga.App. 848, 850(1)(a), 495 S.E.2d 77 (1997).

Finally, Colp contends that the trial court’s comment that “the hurdle for the admission of such evidence is a high one” shows that *284 the court applied the wrong standard. We believe that Colp has mischaracterized this comment, which was made at the end of a lengthy order in which the court repeatedly referred to the correct “substantial similarity” test. Therefore, we reject her argument.

[3][4] 2. In her second enumerated error, Colp argues that the court erred by undertaking to resolve disputed issues of fact relevant to the substantial similarity test. Colp also attacks the court’s decision as to the weight of the evidence presented at the hearing. Specifically, Colp contends that the overwhelming evidence supports a conclusion that the design change from the two-wedge to the wedge-and-pin did not affect the performance of the door, either in side-impact or rollover collisions. However, it is not the function of this Court to weigh the evidence; that function has been assigned to the trial judge. As stated in *Cooper Tire*, “[b]efore admitting proffered evidence of other transactions in products liability cases, the trial court must satisfy itself that the rule of substantial similarity has been met.”^{FN13} In order “to satisfy itself that the rule ... has been met,” the trial court must necessarily conduct a factual inquiry into whether the proponent’s proffered incidents share a common design, common defect, and common causation with the alleged design defect at issue. Therefore, we reject Colp’s argument that the trial court impermissibly engaged in resolving factual disputes.

FN13. (Footnote omitted.) *Cooper Tire*, supra at 455(1), 543 S.E.2d 21. Accord *Cottrell*, supra.

[5][6] 3. Finally, Colp contends that the trial court abused its discretion in excluding the proffered evidence of other incidents. We reiterate the general rule that “questions of relevance are within the domain of the trial court, and, absent a manifest abuse of discretion, a court’s refusal to admit evidence on grounds of lack of relevance will not be disturbed on appeal.”^{FN14}

FN14. (Citation omitted.) *Karoly v. Kawasaki Motors Corp.*, 259 Ga.App. 225, 227(3), 576 S.E.2d 625 (2003).

The reason underlying this rule was explained in *Cooper Tire*.

**890 [T]rial courts, unlike appellate courts, are familiar with a piece of litigation from its inception, hear first-hand the arguments of counsel, and consider disputed evidence within the context of an entire proceeding. Hence, it is only natural that an appellate court should defer to the trial court with regard to the admission of evidence, unless the lower court's decision is so flawed as to constitute an abuse of discretion.^{FN15}

FN15. (Footnote omitted.) *Cooper Tire*, supra at 457(2), 543 S.E.2d 21.

[7] (a) As to the thirty collisions to which her expert testified, Colp essentially maintains that the trial court should have credited the *285 testimony of her expert that there was no difference in the characteristics exhibited by the two-wedge and the wedge-and-pin designs in "real world" crashes. In addition, Colp argues that substantial similarity must be viewed from the perspective of the plaintiff's theory of defect, which, in this case, is the lack of a positive latch at the leading edge of the door. In other words, she argues that differences in the design or the type of accident may not be used to exclude evidence as insufficiently similar. Colp relies on federal cases in support of her argument, but those cases are inapposite because they do not apply Georgia law.^{FN16} Moreover, in the Eleventh Circuit, the admission of other incidents is generally governed by the federal substantial similarity doctrine, not state law.^{FN17}

FN16. *Clark v. Chrysler Corp.*, 310 F.3d 461, 472(III) (6th Cir.2002) (applying substantial similarity doctrine as established in *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102-103 (6th Cir.1989)); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1248(IV) (10th Cir.2000) (applying New Mexico law).

FN17. *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1395-1396(II)(B) (11th Cir.1997). See *Tran v. Toyota Motor*

Corp., 420 F.3d 1310, 1316(III) (11th Cir.2005) (applying doctrine of substantial similarity as set out in *Heath*).

[8] In the case at bar, we conclude that the trial court properly relied on *Cooper Tire* when it commented that proponents of other incident evidence "cannot define a design defect so broadly that all products which lack a certain design are by definition 'substantially similar.'" ^{FN18} Based on Paddock's testimony and exhibits of government tests indicating that the so-called "catch-pin" design had more "load capability" than the two-wedge design, meaning that it "added to the performance of the door," we cannot say that the trial court abused its discretion in ruling that Colp failed to satisfy the "common design" prong of the admissibility test with regard to the twenty-eight incidents involving Aerostars with the two-wedge design. The remaining two incidents, identified as "Navarro" and "Sweeney," involved the same design as the Aerostar in the instant case. However, the trial court ruled that neither these incidents, nor the other 28, arose from a substantially similar cause. In this regard, Gilberg testified that the "Navarro" and "Sweeney" incidents were rollover accidents. He also testified that the Colp incident was a side-impact collision and that the separation of the sliding door at the B-pillar occurred due to that impact. Paddock testified that load forces on the door are different in classic rollover accidents, and that in a rollover, the door often is ripped off the van by the road or off-road surface. Again, based on the evidence, we cannot say that the trial court *286 abused its discretion in ruling that Colp failed to show that "any common defects [here, the failure of the door] shared the same causation."^{FN19}

FN18. See *Cooper Tire*, supra at 456(2), 543 S.E.2d 21.

FN19. *Id.* at 456(1), 543 S.E.2d 21.

(b) Finally, Colp argues that the trial court abused its discretion in excluding evidence of other lawsuits on the issue of notice. She claims that such

evidence is admissible under the standard set forth in *Skil Corp. v. Lugsdin*.^{FN20} "All that is required is that the prior accident be sufficient to attract the owner's attention to the dangerous condition which resulted in the litigated accident." ^{FN21} However, as we previously held,

FN20. 168 Ga.App. 754, 309 S.E.2d 921 (1983).

FN21. (Citation and punctuation omitted.)
Id. at 755(1), 309 S.E.2d 921.

[t]he plaintiffs' reliance upon *Skil Corp.* is misplaced, as that case addressed the relevance**891 and permissible use of evidence of prior incidents, and not the foundational requirements for admission of that type of evidence. The similarity of the various incidents was conceded by *Skil Corp.* as is implicit in the opinion and nothing therein eliminates the requirements of a showing of similarity where such is in dispute.^{FN22}

FN22. *Gen. Motors Corp. v. Moseley*, 213 Ga.App. 875, 878(1), 447 S.E.2d 302 (1994), abrogated on other grounds, *Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998).

In the case at bar, the trial court did not abuse its discretion in excluding evidence of prior lawsuits involving the failure of sliding doors on 1986-1993 model year Aerostars, which have a different design than the 1995 model at issue.

Judgment affirmed.

BLACKBURN, P.J., and ADAMS, J., concur.
Ga.App., 2006.
Colp v. Ford Motor Co.
279 Ga.App. 280, 630 S.E.2d 886, 06 FCDR 1477

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Court of Appeals of Washington, Division 3,
 Panel Three.
 Wayne C. SMITH, Appellant,
 v.
 STURM, RUGER & CO., INC., Respondent.
 No. 5517-III-5.

Feb. 5, 1985.
 Rehearing Denied March 19, 1985.

Products liability action was brought against manufacturer of revolver for injuries incurred by plaintiff as a result of accidental discharge of revolver dropped by plaintiff. The Superior Court, Spokane County, Michael E. Donohue, J., dismissed plaintiff's claim under the Consumer Protection Act and entered judgment on jury verdict in favor of manufacturer as to plaintiff's products liability claim. Plaintiff appealed. The Court of Appeals, Munson, J., held that: (1) verdict form submitted to jury by trial court was proper; (2) special verdict form, which did not purport to list all of issues, was not required to list all elements of strict liability; (3) evidence was sufficient to allow jury to find that plaintiff's conduct was sole proximate cause of his injury; (4) plaintiff, who presented no evidence that manufacturer induced him to act or refrain from acting, was not entitled to recover under the Consumer Protection Act; and (5) although trial court erred in excluding testimony regarding survey of revolver owners as discovery sanction absent showing of intentional nondisclosure or other unconscionable conduct, survey was inadmissible on basis that there was no showing that survey was trustworthy, that it reported similar accidents, or that it was of a type reasonably relied upon by experts in field.

Affirmed.

West Headnotes

[1] Products Liability 313A ↩5**313A Products Liability**

313AI Scope in General

313AI(A) Products in General

313Ak5 k. Strict Liability. Most Cited

Cases

Washington law of strict liability focuses on buyer's expectation of product, not upon actions of seller or manufacturer; manufacturer's liability is measured solely by characteristics of product rather than manufacturer's behavior.

[2] Products Liability 313A ↩15**313A Products Liability**

313AI Scope in General

313AI(A) Products in General

313Ak15 k. Proximate Cause and Foreseeable Injury; Intended or Foreseeable Use. Most Cited Cases

Plaintiff in products liability case must prove claimed defect proximately caused alleged injuries.

[3] Products Liability 313A ↩15**313A Products Liability**

313AI Scope in General

313AI(A) Products in General

313Ak15 k. Proximate Cause and Foreseeable Injury; Intended or Foreseeable Use. Most Cited Cases

It is complete defense in products liability case if plaintiff's conduct was sole proximate cause of accident.

[4] Appeal and Error 30 ↩218.2(2)**30 Appeal and Error**

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k218 Verdict and Findings by Jury

30k218.2 Special Interrogatories and Findings

30k218.2(2) k. Nature of Error or

Defect. Most Cited Cases

Appeal and Error 30 ↪719(8)

30 Appeal and Error

30XI Assignment of Errors

30k719 Necessity

30k719(8) k. Verdict, Findings, or Judgment. Most Cited Cases

Plaintiff in products liability action, who failed to object or assign error to sequence of questions of verdict form, failed to raise claim that jury should not have been instructed to consider his conduct prior to reaching issue of manufacturer's liability, and thus, claim would not be considered on appeal. RAP 10.3(a)(3); CR 51(f).

[5] Products Liability 313A ↪15

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak15 k. Proximate Cause and Foreseeable Injury; Intended or Foreseeable Use. Most Cited Cases

"Misuse," as defense in products liability action, requires use in a manner neither intended nor reasonably foreseeable by manufacturer.

[6] Products Liability 313A ↪75.1

313A Products Liability

313AII Actions

313Ak75 Presumptions and Burden of Proof

313Ak75.1 k. In General. Most Cited Cases

(Formerly 313Ak75)

Defendant in products liability action has burden of proving misuse of product by plaintiff.

[7] Products Liability 313A ↪60.5

313A Products Liability

313AI Scope in General

313AI(B) Particular Products, Application to

313Ak60.5 k. Weapons. Most Cited Cases

(Formerly 406k18(1))

Plaintiff's action in dropping loaded gun was foreseeable by manufacturer as a matter of law, and thus, misuse was not an applicable defense to products liability action against manufacturer for injuries incurred when loaded gun discharged.

[8] Appeal and Error 30 ↪853

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k851 Theory and Grounds of Decision of Lower Court

30k853 k. Rulings as Law of Case.

Most Cited Cases

Although misuse was not an applicable defense in products liability action against manufacturer of revolver, plaintiff injected misuse into trial and it became law of case, and thus, verdict form containing a misuse instruction, which was not challenged, was proper.

[9] Products Liability 313A ↪96.1

313A Products Liability

313AII Actions

313Ak96 Instructions

313Ak96.1 k. In General. Most Cited Cases
(Formerly 406k18(2))

In products liability action brought by plaintiff against manufacturer of revolver, jury was not improperly required to determine issue of law as to what conduct by plaintiff would bar recovery, since jury was given instructions on misuse, proximate cause and manufacturer's duty to warn, which instructions allowed parties to argue their theories, and since, if jury believed injury occurred other than as sole conduct of plaintiff, it would have answered in the negative question on special verdict form as to whether plaintiff's own conduct was sole proximate cause.

[10] Products Liability 313A ↪71

313A Products Liability

313AII Actions

313Ak71 k. In General. Most Cited Cases
(Formerly 406k18(2))

Doctrines of assumption of risk and contributory negligence were not applicable to products liability action brought by plaintiff who incurred injuries when he dropped loaded revolver and it accidentally discharged, since manufacturer withdrew its defense of assumption of risk during trial, since no instructions were requested regarding such issues, and since issue in question was not damage reduction, but whether jury could properly find that plaintiff's conduct was sole proximate cause of his injury.

[11] Trial 388 ⇨228(1)

388 Trial

388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency

388k228 Form and Language

388k228(1) k. Form and Arrangement.

Most Cited Cases

Instruction which does not purport to summarize all issues is not held to same standard as a formula instruction.

[12] Trial 388 ⇨352.1(6)

388 Trial

388IX Verdict

388IX(B) Special Interrogatories and Findings

388k352 Preparation and Form of Interrogatories or Findings

388k352.1 In General

388k352.1(6) k. Personal Injuries in

General. Most Cited Cases

Special verdict form in products liability action, which form did not purport to list all issues, but was intended to be read in conjunction with other instructions, was not a formula instruction, and thus, was not required to list all elements of strict liability.

[13] Products Liability 313A ⇨86.5

313A Products Liability

313AII Actions

313Ak82 Weight and Sufficiency of Evidence

313Ak86.5 k. Weapons. Most Cited Cases

(Formerly 406k18(2))

Evidence that plaintiff was carrying revolver with its hammer down on a loaded chamber, that plaintiff accidentally dropped gun and gun discharged, resulting in injury to plaintiff's arm, that plaintiff had completed gun safety course, that every safety course includes some version of rule that handguns should be carried with hammer down on an empty chamber, and that plaintiff never read gun safety manuals except for ammunition information was sufficient to allow jury to properly find that plaintiff's conduct was sole proximate cause of his injury.

[14] Antitrust and Trade Regulation 29T ⇨138

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk138 k. Reliance; Causation; Injury, Loss, or Damage. Most Cited Cases

(Formerly 92Hk34, 92Hk32 Consumer Protection)

Antitrust and Trade Regulation 29T ⇨149

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk149 k. Number or Frequency of Transactions or Acts. Most Cited Cases

(Formerly 92Hk32 Consumer Protection)

In order to recover under the Consumer Protection Act, plaintiff must prove that defendant's conduct

induced plaintiff to act or refrain from acting, damaged plaintiff, and has potential for repetition. West's RCWA 19.86.090 et seq.

[15] Antitrust and Trade Regulation 29T ↪ 150

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk150 k. Completion of Transaction.
Most Cited Cases
(Formerly 92Hk5 Consumer Protection)

Antitrust and Trade Regulation 29T ↪ 162

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(B) Particular Practices
29Tk162 k. Omissions and Other Failures to Act in General; Disclosure. Most Cited Cases
(Formerly 92Hk5 Consumer Protection)
Consumer Protection Act may apply to a defendant's postsale activities or to a failure to disclose material facts. West's RCWA 19.86.090 et seq.

[16] Antitrust and Trade Regulation 29T ↪ 136

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk136 k. Fraud; Deceit; Knowledge and Intent. Most Cited Cases
(Formerly 92Hk34 Consumer Protection)
Intent to deceive on part of defendant is not required in order for plaintiff to recover under the Consumer Protection Act; capacity to deceive is sufficient. West's RCWA 19.86.090 et seq.

[17] Antitrust and Trade Regulation 29T ↪ 235

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations
29Tk232 Product Safety
29Tk235 k. Other Particular Products.

Most Cited Cases
(Formerly 92Hk39 Consumer Protection)
Plaintiff who was injured when he dropped loaded revolver and revolver discharged presented no evidence that manufacturer of revolver induced him to carry revolver with hammer down on loaded chamber, which resulted in gun accidentally discharging, and thus, was not entitled to recover from manufacturer under the Consumer Protection Act. West's RCWA 19.86.090 et seq.

[18] Antitrust and Trade Regulation 29T ↪ 135(2)

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk135 Practices Prohibited or Required

29Tk135(2) k. Source of Prohibition or Obligation; Lawfulness. Most Cited Cases
(Formerly 92Hk5 Consumer Protection)
Per se violation of the Consumer Protection Act must be based on a specific statutory declaration of public interest. West's RCWA 19.86.090 et seq.

[19] Antitrust and Trade Regulation 29T ↪ 235

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk232 Product Safety
29Tk235 k. Other Particular Products.
Most Cited Cases

(Formerly 92Hk11 Consumer Protection)
Section of Restatement of Torts (Second) dealing with strict liability did not provide necessary statement of public interest to warrant finding of per se violation of the Consumer Protection Act on part of manufacturer of revolver which accidentally discharged when dropped, injuring plaintiff, since Restatement is not a statute, and since jury did not find that manufacturer was strictly liable. West's RCWA 19.86.090 et seq.

[20] Antitrust and Trade Regulation 29T ↪ 235

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk232 Product Safety
29Tk235 k. Other Particular Products.
Most Cited Cases

(Formerly 92Hk11 Consumer Protection)
Statute dealing with registering of guns did not provide necessary statement of public interest for finding of per se violation of the Consumer Protection Act on part of manufacturer of revolver which accidentally discharged when dropped, injuring plaintiff, since statute does not deal with gun safety or manufacturers' warnings, since no violation of statute was alleged, and since statute does not contain declaration of public interest. West's RCWA 9.41.010 et seq., 19.86.090 et seq.

[21] Negligence 272 ↪ 1635

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)4 Admissibility
272k1635 k. Similar Facts and Transactions; Other Accidents. Most Cited Cases
(Formerly 272k125)
Whether evidence of prior accidents is admissible, based upon substantial similarity, is matter of trial court discretion.

[22] Evidence 157 ↪ 150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of Experiments. Most Cited Cases
In product liability action brought by plaintiff who was injured when revolver he dropped accidentally discharged, survey conducted by manufacturer's consultant consisting of interviews of people who responded to advertisements for conversion kit for revolver in question was inadmissible on grounds of bias and irrelevance, since survey was not a poll of people's opinions about manufacturer's products, but, rather, consisted of accounts of accidents involving use of revolver, since survey was not drawn from entire population of owners of similar revolvers, and since there was no showing that accidents reported were similar to plaintiff's.

[23] Pretrial Procedure 307A ↪ 45

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases
It is abuse of discretion to exclude testimony as discovery sanction absent any showing of intentional nondisclosure, willful violation of court order, or other unconscionable conduct. ER 703.

[24] Pretrial Procedure 307A ↪ 45

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases
In products liability action brought against manufacturer of revolver which accidentally discharged

when dropped by plaintiff, trial court erred in excluding testimony regarding survey of revolver owners as discovery sanction absent any showing of intentional nondisclosure or other unconscionable conduct.

[25] Evidence 157 ↪ 150

157 Evidence

157IV Admissibility in General

157IV(E) Competency

157k150 k. Results of Experiments. Most Cited Cases

Although trial court erred in excluding testimony regarding survey of revolver owners as discovery sanction, exclusion of survey would be upheld on alternate ground that it was inadmissible, in products liability action brought against manufacturer of revolver, on basis that there was no showing that survey was trustworthy, that it reported similar accidents, or that it was of a type reasonably relied upon by experts in field. ER 703.

*741 **602 Edward A. Dawson, Marcia Meade, Dawson & Meade, Spokane, for appellant. Frank H. Johnson, Steven Stocker, MacGillivray & Jones, Spokane, for respondent.

MUNSON, Judge.

Wayne C. Smith appeals a judgment on a jury verdict adverse to his products liability claim and the trial court's dismissal of his Consumer Protection Act (CPA) claim. He contends: (1) the special verdict form was improper; (2) his CPA claim should have gone to the jury; and (3) testimony by his expert regarding a survey taken by a consultant for Sturm, Ruger & Co., Inc., (Sturm) was admissible. We affirm.

On December 2, 1979,^{FN1} Smith sustained injuries from an accidental discharge of a Sturm, Ruger Super Blackhawk .44 magnum single-action revolver. The accident **603 occurred shortly after Smith returned from a day-long wood-cutting trip. He had taken the revolver and two rifles with him, *742 anticipating he might go deer hunting with his broth-

er. However, he did not hunt; he cut wood all day. Upon returning home, Smith started to carry several items upstairs from the garage. He carried in his right hand two unloaded hunting rifles; in his left hand was a folded plastic hunting vest, a map, and the fully loaded revolver which he was grasping by the barrel end of the holster. As he proceeded up the stairs, the holster slipped from his hand. The revolver struck a carpeted step, resulting in the discharge of a bullet which severely injured Smith's left arm. At the time of discharge, the gun was in the "full down" position, *i.e.*, the hammer was resting on a loaded cylinder.

FN1. The Products Liability Act, RCW 7.72, is therefore inapplicable. *See* RCW 4.22.920 (Act applies to claims arising on or after July 26, 1981).

Smith had owned approximately 35 different guns and had a long history of experience with firearms. Smith's gun safety knowledge was learned from his father and uncles, and from a safety course which emphasized .22 caliber rifles. He obtained this revolver in a used condition in 1975 or 1976 from an acquaintance, who did not give Smith the safety manual which accompanied the revolver when purchased new. Smith did not ask the acquaintance about such a manual or make any attempt to obtain one from Sturm or any local distributor.

Sturm manufactured this model from 1953 to 1972. It was adapted from the 1873 Colt single-action revolver, and has been termed "emblematic of the western guns". *Sturm, Ruger & Co., Inc. v. Bloyd*, 586 S.W.2d 19, 20 (Ky.1979). The hammer on this model has four notches (clicks): full down (hammer resting against firing pin), safety notch, loading notch, and full back. A witness for Sturm testified the four clicks are thought to symbolize the four letters C-O-L-T.

It is undisputed that, at the time of this accident, Smith's revolver was fully loaded and in the full down position. This was his habit. He had never heard of the safety notch or of the practice of load-

ing only five chambers and resting the firing pin on the empty chamber. There was no warning on the gun itself against carrying it in the full down position. See generally, Annot., *743 *Products Liability: Firearms, Ammunition, and Chemical Weapons*, 15 A.L.R. 4th 909 (1982).

Smith first contends the special verdict form was prejudicially erroneous. The jury answered "yes" to the first question on the form:

QUESTIONS NO. 1: Was Wayne Smith's own conduct the sole proximate cause of the injury or damage to the plaintiff?

ANSWER: _____ (Yes or No).

(If your answer is "No", proceed to Question No. 2. If your answer is "Yes", you need go no further. Date and sign this form and inform the bailiff your deliberations have ended.)

[1][2][3] The Washington law of strict liability focuses on the buyer's expectation of the product, not upon the actions of the seller or manufacturer. The manufacturer's liability is measured solely by the characteristics of the product rather than the manufacturer's behavior. *Lenhardt v. Ford Motor Co.*, 102 Wash.2d 208, 212-13, 683 P.2d 1097 (1984). Nevertheless, the plaintiff in a products liability case must prove the claimed defect proximately caused the alleged injuries. *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969); *Bich v. General Elec. Co.*, 27 Wash.App. 25, 614 P.2d 1323, 10 A.L.R. 4th 842 (1980). "Indeed, it has been stated that the heart of the theory of strict liability in tort is the requirement that plaintiff's injury must have been caused by some defect in the product." 63 Am.Jur.2d *Products Liability* § 558 at 791-92 (1984). Likewise, it is a complete defense in a products liability case if the plaintiff's conduct was the sole proximate cause of the accident. *Wood v. Stihl, Inc.*, 705 F.2d 1101, 1108 (9th Cir.1983) (applying Washington law); **604 *Teagle v. Fischer & Porter Co.*, 89 Wash.2d 149, 157, 570 P.2d 438 (1977); 63 Am.Jur.2d

Products Liability § 558 at 791-92, § 560 at 796 (1984).

[4] Without objection or assignment of error to the sequence of the questions on the verdict form, Smith argues the jury should not have been instructed to consider his conduct *744 prior to reaching the issue of Sturm's liability.^{FN2} We will not consider this argument. RAP 10.3(a)(3); CR 51(f).

FN2. A similar form was used in *Zahrte v. Sturm, Ruger & Co.*, 498 F.Supp. 389 (D.Mont.1980), *vacated on other grounds*, 709 F.2d 26 (9th Cir.), *cert. denied*, 464 U.S. 961, 104 S.Ct. 395, 78 L.Ed.2d 338 (1983), about which we make no comment other than to note the de- cision.

[5][6][7] Smith argues the jury should not have been allowed to consider unspecified "conduct", but rather should have received a verdict form using the term "misuse".^{FN3} Smith proposed both forms. "Misuse" means use in a manner neither intended nor reasonably foreseeable by the manufacturer. 63A Am.Jur.2d, *Products Liability* § 966 at 108 (1984); Restatement (Second) of Torts § 402A, Comment *h* at 351-52 (1965). The defendant has the burden of proving misuse. *Jackson v. Standard Oil Co.*, 8 Wash.App. 83, 505 P.2d 139 (1972). However, dropping a loaded gun is foreseeable as a matter of law. *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 42-43 n. 2 (Alaska 1979), *modified on other grounds*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981); *Cobb v. Insured Lloyds*, 387 So.2d 13, 15 A.L.R. 4th 896 (La.App.1980). Therefore misuse has no place in this case.

FN3. Plaintiff's proposed instruction 80 provided in part:

"QUESTION NO. 1: Did Wayne Smith "misuse" the product supplied by the defendant?"

ANSWER: _____ (Yes or No).

(If your answer is "No", proceed to Question No. 3. If your answer is "Yes", proceed to Question No. 2.)

QUESTION NO. 2: Was such "misuse" the sole proximate cause of the injury or damage to the plaintiff?

ANSWER: _____ (Yes or No).

(If your answer is "No", proceed to Question No. 3. If your answer is "Yes", you need go no further. Date and sign this form and inform the bailiff your deliberations have ended.)"

[8] Smith nevertheless injected misuse into the trial and it has become the law of the case. The jury received a misuse instruction which is not challenged. In the context in which this case was tried, we hold the verdict form was proper.

[9] Smith argues the jury was required to determine an issue *745 of law, *i.e.*, what conduct would bar recovery. The jury was given instructions on misuse, proximate cause, and the manufacturer's duty to warn. These instructions allowed the parties to argue their theories and are not challenged. See generally *Petersen v. State*, 100 Wash.2d 421, 435-36, 671 P.2d 230 (1983); *Connor v. Skagit Corp.*, 30 Wash.App. 725, 638 P.2d 115 (1981), *aff'd*, 99 Wash.2d 709, 664 P.2d 1208 (1983); *Bich v. General Elec. Co.*, *supra*; *Enslow v. Helmcke*, 26 Wash.App. 101, 611 P.2d 1338 (1980). If the jury believed the injury occurred other than as the sole conduct of Smith, then it would have answered question 1 of the special verdict form in the negative.

[10] Smith discusses assumption of risk and contributory negligence at unnecessary length. First, during trial Sturm withdrew its defense of assumption of risk. Second, the jury received no instruc-

tions on either of these concepts and none were requested. Third, the issue is not damage reduction, but liability, *i.e.*, whether the jury could properly find Smith's conduct was the sole proximate cause of his injury. *Teagle v. Fischer & Porter Co.*, *supra*; *Boeke v. International Paint Co.*, 27 Wash.App. 611, 614 n. 1, 620 P.2d 103 (1980), *review denied*, 95 Wash.2d 1004 (1981).

[11][12] Smith contends the special verdict form was erroneous because it did not list all the elements of strict liability, citing *State v. Emmanuel*, 42 Wash.2d 799, 259 P.2d 845 (1953). But an instruction which does not purport to summarize all the issues is not held to the same standard as a formula instruction. **605 *Ryder v. Kelly-Springfield Tire Co.*, 91 Wash.2d 111, 115, 587 P.2d 160, 16 A.L.R. 4th 129 (1978). The special verdict form clearly did not purport to list all the issues. Rather, it was intended to be read in conjunction with the other instructions.

[13] Smith also argues there was no evidence from which the jury could find he was using the gun in an unreasonable manner; therefore, it could not find his conduct was the sole proximate cause of his injury. Smith had completed a gun safety course. Sturm's expert testified that every safety course includes some version of the "Ten Commandments" *746 of gun safety, including carrying handguns with the hammer down on an empty chamber and never loading a gun until it is ready for use. The expert also testified a purchaser of a used gun has an obligation to himself and others to inquire about safety information from the manufacturer or a distributor. Smith admitted he never read gun safety manuals except for ammunition information. It is undisputed Smith was carrying two rifles, a map and a hunting vest when the fully loaded revolver slipped out of his hand. In the context of the issues presented to it, a jury could properly find Smith's conduct was the sole proximate cause of his injury.

Smith next contends the trial court erred in dismissing his CPA claim. The court dismissed the claim

before trial, but reserved ruling on Smith's motion for reconsideration until the close of his case. The motion was denied, and the court again ruled against Smith on his motion for a new trial or judgment notwithstanding the verdict. The court relied primarily upon the facts the "old model" revolver had not been manufactured for 10 years, Sturm had conducted an extensive advertising campaign, and the company was now offering free installation of transfer bar safeties.

In the 1970's, Sturm mounted an extensive advertising campaign regarding gun safety. James Thompson Ruger, marketing vice president for Sturm, estimated 50 million people had seen the advertisements over the first 10 years of running them. Ruger testified the advertisements ran 3 to 4 times per year in *Sports and Field*, *Field and Stream* and *Outdoor Life*, and 6 to 12 times per year in *Guns and Ammo*, *Hunting*, *Shooting Times*, and *Peterson Hunting* magazines. He further stated the advertising campaign began because the company was aware guns manufactured between 1953 and 1972 were going to the next generation of shooters, who may not have had the benefit of the original safety manuals or any safety training.

Sturm began manufacturing the so-called "new model" single-action revolver in 1973. This model has a transfer *747 bar safety feature which was not present in Smith's "old model". Ruger testified the old model was designed incorporating all the technology available at the time. Purchasers of new model revolvers receive safety instructions for the old model, and there is a place on the purchaser record card to indicate whether the purchaser also owns an old model. In 1982, Sturm began offering free installation of a "conversion kit" transfer bar safety in all old model revolvers. Ruger testified without contradiction that Sturm spent \$493,000 on "conversion kit" advertising in 1982, and had received 80,000 responses involving 150,000 guns. Sturm manufactured approximately 1.5 million old model revolvers. The same advertisements and conversion program were scheduled for 1983. Ruger

stated the conversion program did not begin sooner because Sturm's plant was not ready to receive the anticipated voluminous response. Ruling on the motion for new trial, the court stated Sturm "has done everything short of trying to track down all of the weapons and get their hands on them to remedy the situation, ..."

On the other hand, Smith's expert testified the safety advertisements were inadequate in that they did not convey the danger in carrying a loaded revolver in the full down position. Smith, himself, had never seen any of the advertisements, although he would leaf through shooting magazines at the grocery store and at friends' houses. Furthermore, Smith never read the safety **606 instructions for any of his guns except to look for ammunition information.

[14][15][16] In order to recover under the CPA, a plaintiff must prove the defendant's conduct induced the plaintiff to act or refrain from acting, damaged the plaintiff, and has the potential for repetition. *Anhold v. Daniels*, 94 Wash.2d 40, 614 P.2d 184 (1980). The CPA may apply to a defendant's post-sale activities. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash.2d 355, 581 P.2d 1349 (1978). It may also apply to a failure to disclose material facts. *McRae v. Bolstad*, 101 Wash.2d 161, 676 P.2d 496 (1984); *748 *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash.App. 39, 554 P.2d 349, 83 A.L.R.3d 680 (1976). Intent to deceive is not required; capacity to deceive is sufficient. *McRae v. Bolstad*, *supra*; *Haner v. Quincy Farm Chems., Inc.*, 97 Wash.2d 753, 649 P.2d 828 (1982).

[17] It has often been reiterated that a plaintiff must prove a defendant induced him or her to act or refrain from acting. *E.g.*, *Haner v. Quincy Farm Chems., Inc.*, *supra*; *Magney v. Lincoln Mut. Sav. Bank*, 34 Wash.App. 45, 659 P.2d 537 (1983). Smith presented no evidence to support a finding of inducement. We find no error.

[18][19][20] Smith also argues a per se CPA viola-

tion, contending the Restatement (Second) of Torts § 402A, Comment *c* at 349-50 (1965), and RCW 9.41 provide the necessary statements of public interest. A *per se* violation must be based on a specific statutory declaration of public interest. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wash.2d 599, 681 P.2d 242 (1984); *Sherwood v. Bellevue Dodge, Inc.*, 35 Wash.App. 741, 669 P.2d 1258 (1983). The Restatement of Torts (Second) § 402A, dealing with strict liability, is not a statute. Furthermore, the jury found no such liability. RCW 9.41, Firearms and Dangerous Weapons, deals with registering of guns, not gun safety or manufacturers' warnings. No violation of it is alleged, nor does it contain a declaration of public interest. The trial court correctly dismissed Smith's CPA claim.

Smith last contends the court erred in disallowing evidence of a certain survey conducted by a Sturm consultant named Rau. It consisted of interviews conducted in the summer of 1982 of a sample of those people who responded to the "conversion kit" advertisements. Smith wished to have his expert extrapolate from the sample the actual number of accidental discharges by "old model" revolvers. He argues the survey was a public opinion poll of the type held admissible in *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y.1963).

The trial court stated several grounds for excluding evidence of the survey. First, the sample was biased in that people responding to the conversion offer were more likely *749 to have had accidents than the general population of "old model" revolver owners. Then the court ruled that, even though the survey itself was inadmissible, Smith's expert, Dieter Jahns, could testify about it under ER 703 because it was evidence of the type reasonably relied upon by experts in the field. But then the court found Smith had failed to disclose the substance of Jahns' testimony under CR 26, and excluded the survey on that basis. Later, the court again rejected the survey, this time on the basis there was no showing of similarity between Smith's accident and those reported on the survey.

The survey at issue was not a poll of people's opinions about Sturm products. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir.1976); *Bank of Utah v. Commercial Sec. Bank*, 369 F.2d 19 (10th Cir.1966), *cert. denied*, 386 U.S. 1018, 87 S.Ct. 1374, 18 L.Ed.2d 456 (1967); *Zippo Mfg. Co. v. Rogers Imports, Inc.*, *supra*; 1-Pt. 2 Moore's Federal Practice ¶ 2.712 at 134-36 (2d ed. 1984). Rather, it consisted of accounts of accidents, which have consistently been held to be double hearsay. In *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir.1981), the court upheld exclusion of Consumer Product Safety Commission Reports on the ground **607 most of the data was mere paraphrasing of versions of accidents given by the victims themselves, who could not be regarded as disinterested observers. Likewise, a geologist's survey of 169 residents concerning structural damage to their homes was held to be inadmissible hearsay, in *Baumholser v. Amax Coal Co.*, 630 F.2d 550 (7th Cir.1980). *Accord, Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir.1978).

[21][22] Rau stated the survey was biased because it did not draw from the entire population of "old model" owners. As the court noted, Smith was attempting shaky extrapolations from a shaky basis. The court further ruled there was no showing the accidents reported were similar to Smith's. Whether evidence of prior accidents is admissible, based upon substantial similarity, is a matter of trial court discretion.*750 *Seay v. Chrysler Corp.*, 93 Wash.2d 319, 609 P.2d 1382, 9 A.L.R. 4th 625 (1980); *Blood v. Allied Stores Corp.*, 62 Wash.2d 187, 381 P.2d 742 (1963). The court correctly excluded evidence of the survey on the grounds of bias and irrelevance.

[23] Otherwise inadmissible evidence may be the basis of expert testimony so long as it is of the type reasonably relied upon by experts in the field. ER 703; *Baumholser v. Amax Coal Co.*, *supra*; *State v. Ecklund*, 30 Wash.App. 313, 633 P.2d 933 (1981). Although the trial court ruled the survey would be

admissible on this ground, there was no showing an admittedly biased survey would be relied upon by experts in the field.

[24][25] Regarding the alleged discovery violation, it is an abuse of discretion to exclude testimony as a sanction absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. *Lampard v. Roth*, 38 Wash.App. 198, 684 P.2d 1353 (1984); *Alpine Indus., Inc. v. Gohl*, 30 Wash.App. 750, 637 P.2d 998, 645 P.2d 737 (1981); *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 522 P.2d 1159 (1974). Here, there was no such showing, and it was error to exclude evidence of the survey on this ground.

However, the court correctly excluded the survey. While violation of the discovery rules would not be a valid basis for exclusion, there was no showing the survey was trustworthy, that it reported similar accidents, or that it was of a type reasonably relied upon by experts in the field. This court may uphold the exclusion on alternate grounds. *Thomas v. French*, 99 Wash.2d 95, 659 P.2d 1097 (1983).

The judgment is affirmed.

McINTURFF, A.C.J., and THOMPSON, J., concur.
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